

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

EAMMA SAFI and ZHI GE a/k/a JOSH GE,

Defendants.

**Civil Action No. 25-cv-**

**JURY TRIAL DEMANDED**

**COMPLAINT**

Plaintiff United States Securities and Exchange Commission (“the Commission”) alleges as follows against Defendants Eamma Safi (“Safi”) and Zhi Ge a/k/a Josh Ge (“Ge”):

**SUMMARY OF THE ACTION**

1. From in or about 2017 through in or about 2024, Safi and Ge willfully participated in an international insider trading scheme that netted them millions in illicit profits from trading in advance of market-moving announcements. The scheme (the “Tipping Scheme”) involved tips that originated from persons known to Safi or his close associates.

2. In the Tipping Scheme, Safi directly or indirectly obtained from insiders (including one or more sources at publicly traded companies) material nonpublic information about impending corporate transactions or other confidential information that could move the market, such as earnings announcements. Safi then tipped Ge as well as another individual (“Trader A”) recruited by Ge, and all three traded profitably on the tips of inside information. Safi and/or Ge demanded and received kickbacks of trading profits from Trader A in exchange for such information.

3. Using the illegal tips, Safi and Ge – along with Trader A – generated millions in

illicit profits trading the securities of numerous companies, both through their individual trading accounts and through brokerage accounts in the names of other people and entities that were controlled by Safi, Ge, and/or Trader A.

4. Safi and Ge knew or were reckless in not knowing they were trading while aware of and on the basis of material nonpublic information obtained from insiders at public companies and/or other sources owing a similar duty to maintain the confidentiality of such information.

5. By knowingly or recklessly engaging in the conduct described in this Complaint, Defendants Safi and Ge violated, and unless restrained and enjoined will continue to violate, Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

#### **NATURE OF PROCEEDING AND RELIEF SOUGHT**

6. The Commission brings this action under Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)]. The Commission seeks permanent injunctions against the Defendants, to enjoin them from engaging in the transactions, acts, practices, and courses of business alleged in this Complaint; disgorgement of profits realized from the unlawful trading set forth herein, along with prejudgment interest; and civil monetary penalties pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1], and for such other relief as the Court may deem just and appropriate.

#### **JURISDICTION AND VENUE**

7. This Court has jurisdiction over this action under Sections 21(d), 21(e), 21A, and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), 78u-1, and 78aa]. Certain of the acts, practices, transactions, and courses of business constituting the violations made use of a means or instrumentality of interstate commerce, or of the mails, and/or of the facilities of national securities exchanges.

8. Venue in this District is proper under Section 27 of the Exchange Act [15 U.S.C. § 78aa], because certain of the acts, practices, transactions, and courses of business constituting the violations alleged in this Complaint occurred in the District of Massachusetts. Among other things, certain of the options trades executed by Safi, Ge, and/or Trader A in connection with this scheme, including in Medidata Solutions, Inc. and Cytokinetics, Inc., were conducted through the BOX Options Exchange (BOX), located in Boston, Massachusetts.

### THE DEFENDANTS

9. **Safi**, age 37, has resided in the United Arab Emirates and is a German citizen. Safi is the owner of Emallates.com FZE, and purportedly works in the information technology industry.

10. **Ge**, age 34, is a Singapore citizen. Ge is the owner of Belleby Holdings Pte Ltd., which purportedly manages restaurants and real estate.

### OTHER RELEVANT INDIVIDUALS

11. **Trader A** is a U.S.-based securities trader who obtained material nonpublic information from Safi and/or Ge, and, as described in greater detail herein, traded on that inside information.

12. **Safi's Associate** resides in France, previously worked in investment banking, and owned and operated a Paris restaurant in which Safi shared partial ownership (the "Paris restaurant").

13. **Insider 1** resides in France and at times relevant to this Complaint worked in the M&A group of Atos S.E. ("Atos") and then Worldline S.A. ("Worldline"), publicly traded companies based in France which previously were affiliated. Insider 1 was an investor in the Paris restaurant and previously worked with Safi's Associate at a large investment bank.

## **TYPES OF SECURITIES TRADED**

14. In connection with the Tipping Scheme, Safi and Ge, along with Trader A and other tippees, established “long” positions in companies that were targeted for acquisition by purchasing shares of common stock, call options (a type of security that is typically purchased if the buyer believes the company’s stock price will increase),<sup>1</sup> American depositary receipts, and/or contracts-for-difference.

15. An American depositary receipt (“ADR”) is a certificate issued by a U.S. bank that represents a specified number of shares of a foreign company traded on a foreign exchange and held by the bank overseas. ADRs are priced and traded in U.S. dollars on U.S. stock exchanges comparable to shares of stock in domestic companies. ADRs allow investors to functionally trade foreign equities on U.S. exchanges.

16. A contract-for-difference (“CFD”) is an agreement between two parties to exchange the difference in value of an underlying stock between the time the contract is opened and the time at which it is closed. If the share price of the underlying stock increases, the seller pays the difference to the buyer; however, if the share price declines, the buyer must pay the seller. A CFD related to a U.S.-listed company thus mirrors the movement and pricing of the underlying stock on a dollar-for-dollar basis. A CFD provider ordinarily hedges its exposure against a CFD buyer’s long position by purchasing (directly or indirectly) a corresponding number of shares of the underlying U.S. company on a U.S. exchange through domestic brokerage firms.

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<sup>1</sup> A buyer who purchases a call option for a stock has the opportunity, but not the obligation, to buy that stock for a specific price known as the “strike price” for a predetermined period ending on the “expiration date.”

## FACTUAL ALLEGATIONS

17. Beginning in or about mid-2017, Trader A began receiving tips of material nonpublic information from Safi and/or Ge regarding public companies. Safi and/or Ge provided specific information, obtained directly or indirectly from corporate insiders and/or investment bankers, about upcoming announcements, including about earnings releases, acquisition offers, and/or other market-moving events expected to impact the share price of a publicly traded company. Safi and/or Ge further provided guidance about exactly when to buy securities of a given company, and, on occasion, directed Trader A to exit his investment if an anticipated announcement was no longer going to take place as expected.

18. In furtherance of the Tipping Scheme, Safi directly or indirectly leaked material nonpublic information to journalists and news outlets, so that Safi and other scheme participants could profitably trade around the market reaction to the publication of such information, rather than waiting to potentially profit from a corporate press release. Trader A understood from Safi that he had connections with persons writing articles about upcoming deals; on one or more occasions Safi previewed for Trader A that news related to a deal was coming out and later identified which news agency would publish it.

19. As described below, Safi and/or Ge provided material nonpublic information about U.S.-based public companies, as well as foreign public companies traded on foreign exchanges with ADRs that traded on U.S. exchanges.

**A. Safi and Ge Recruit Trader A and Provide “Sample” Insider Trading Tip**

20. Safi and Ge have known each other since at least 2016.

21. By at least November 2016, Safi began recruiting Ge into the Tipping Scheme, and, to that end, invited Ge to visit Safi and Safi’s Associate in Paris.

22. On November 17, 2016, Safi messaged Ge (via Facebook Messenger) that “[Safi’s Associate] wants to see you this Friday,” adding that “Plan would be lunch and in the evening drinks.” When Ge made remarks about the short notice for this trip to Paris, given the need for flight and hotel arrangements, Safi noted “We are doing business.” After messaging further about Ge’s travel plans, Safi wrote to Ge: “Friday you will be welcomed to our world of business.”

23. On or about November 19, 2016, Ge messaged Safi, asking “When do I meet [Safi’s Associate] today,” then adding “Can’t wait to get started.” After some more back and forth, with Safi indicating he needed to check the time of the meeting, Safi wrote: “So you will be 5:30 at the restaurant.” Later that day, Ge sent a message to Safi confirming his arrival: “I’m at [name of the Paris Restaurant] already.”

24. Also in November 2016, after the meeting at the Paris restaurant, Safi and Ge exchanged messages about recruiting more investors into the Tipping Scheme. Ge remarked to Safi that “this shit is easier than I thought... Everyone knows what’s up lol ... I thought peeps are gonna be more apprehensive.”

25. Safi and Ge began using code words to communicate about the Tipping Scheme. For example, “socks” and “shoes” were code for disposable (or “burner”) cell phones and SIM cards, while “greens” was code for money, and “games” and/or “races” were code words for forthcoming corporate announcements which were not yet public.

26. On November 21, 2016, Ge told Safi that Ge was recruiting his mother’s friend into the Tipping Scheme, and they began discussing getting new “shoes” and “socks,” *i.e.*, obtaining burner phones and new SIM cards to mask communications related to the scheme. Safi told Ge: “[N]ew socks and shoes is a must bro.” In messaging Ge about the need for both “socks” and “shoes,” Safi warned Ge that not changing burner cell phones and SIM cards was

the “major mistake people do.” After being reminded by Safi to frequently change “shoes” and “socks,” Ge messaged Safi: “[I]’ll change after every game, okay?”

27. On November 24, 2016, Safi and Ge continued to message about recruiting investors, and Safi alerted Ge that a “race” was on the way, meaning that he was in possession of nonpublic information about an upcoming corporate deal. Safi touted to Ge how much money they would make, telling Ge: “Millions are like 12 to 15 months away worst case... hundreds of K [meaning, thousands] ... Just [a] few months.” Ge replied to Safi: “[L]et’s do it.”

28. In or about December 2016, Safi traveled to Hong Kong and to Singapore so that he and Ge could recruit traders into the Tipping Scheme and provided some potential traders with a “sample” tip about an upcoming deal in a non-U.S. company.

29. On January 8, 2017, Ge exchanged several messages with Safi and advised Safi that Ge was planning a trip to Los Angeles to “network ... and exp[a]nd our business,” meaning the Tipping Scheme.

30. In or around February 2017, Ge met Trader A at a social event in California and they struck up a friendship.

31. On March 10, 2017, Ge sent Safi an electronic message explaining that he had become close to Trader A.

32. Shortly thereafter, Ge shared what he described as a “free sample” tip with Trader A regarding a potential acquisition of Kindred Healthcare, Inc. (“Kindred”), which at that time was a U.S. company headquartered in Louisville, Kentucky. Kindred shares traded on the New York Stock Exchange under the ticker symbol KND.

33. Based on Ge’s tip, Trader A purchased Kindred call options, but lost money on his investment because the call options that he purchased had too high of a “strike price.” Although the price of Kindred stock rose in response to the announcement of the acquisition, the

stock price never reached the options' strike price and thus expired worthless. Nevertheless, Trader A expressed interest in the Tipping Scheme.

34. On or about June 17, 2017, Ge informed Trader A that he would arrange for Trader A to meet "his partners" and "dine at their restaurant" in Paris.

35. On June 23, 2017, Ge messaged Safi to ask if he was in Paris because Trader A wished to visit and "he's down for racing."

36. Over the next several days, Ge corresponded separately with Trader A and Safi about the arrangements for the meeting.

37. On or about June 29, 2017, Safi and Trader A met as planned at the Paris restaurant. Safi's Associate also attended. After dining together, Safi asked Trader A to discuss trading with him. As part of this discussion, Safi referenced having various sources of confidential information. Trader A agreed to join Safi's trading group and to share 50% of his trading profits.

38. On June 29, 2017, Ge messaged Trader A inquiring about the outcome of his meeting with Safi. Trader A responded the next day, stating that the meeting was great and thanking Ge for making the introduction. As part of this same message thread that day, Trader A asked Ge what the percentage is for "you guys" and Ge responded "50. I told you haha...Promoters take 50% profit off the door sales;" Trader A responded, "...it works." Ge cautioned Trader A that "if he [meaning, Safi] told you something else there [meaning, in Paris] ... [t]hat one would be the next one and it'll be charged." Trader A responded: "Got it."

39. After Trader A joined the group, Safi encouraged him to "find insiders," such as on Wall Street in New York City, and to refer other traders with resources to Safi. Ge likewise sought to recruit additional traders and insiders, once telling an associate that he "was looking for investment bankers in big banks working in M&A specifically."



**B. Safi, Ge, and Trader A Establish Secret Communication Protocols**

40. When Ge and Trader A first exchanged electronic communications, they used Facebook Messenger to send messages back and forth. But before tipping Trader A about Kindred (the “free sample” tip), Ge asked Trader A to download Signal to communicate. Signal is a secure messaging application that uses end-to-end encryption, which allows communications to remain private as between senders and recipients. Ge introduced Trader A to Signal, and Trader A understood that its purpose was to keep communications confidential.

41. After Trader A met Safi in Paris in June 2017 and agreed to participate in the Tipping Scheme, Safi provided further instructions to Trader A about how to communicate to ensure that any communications would remain private. Safi explained that all electronic messaging about the group’s trading should take place through disappearing messages on Telegram, a cloud-based application that stores user data in encrypted form and permits users to set messages or photographs to disappear within a period as short as minutes or seconds. Safi told Trader A to obtain a “burner” (or, disposable) phone, use it to activate Telegram, and then extract the SIM card from the burner phone and throw it in the trash.

42. Safi also provided instructions to Trader A about how to communicate in code about their trading on material nonpublic information: all communications regarding public issuers would be disguised as conversations about women and/or girlfriends, and the issuers would be given female code names with a first letter that corresponded to the first letter of the company. For example, “Kindred” was coded as “Kelly” in the chats.

43. As with Ge, Safi used code words with Trader A in communications about trading on material nonpublic information. In addition to “shoes,” “socks,” “greens,” and “races,” Safi, Ge, and Trader A also used the term “sniper” to refer to inside information that they considered especially strong and reliable, and thus likely to generate substantial trading profits.

44. After they began trading together, Safi also directed Trader A to delete any message threads that mentioned his name. Trader A complied with this directive.

**C. Safi and Ge Require Kickbacks from Trader A in Exchange for Tips**

45. After an initial grace period in which Trader A received tips and accumulated trading profits, Safi addressed with Trader A the need for Trader A to make a payment, with Safi explaining he would “pass on the gift,” meaning Safi needed to pay his sources for the inside information tipped to Trader A.

46. In or about August 2018, Safi specifically instructed Trader A to pay Safi 100,000 Euros as partial payment for their trading activity since June 2017. When Trader A expressed concern to Safi over the size of the withdrawal, Safi directed Trader A that if he was questioned by bank personnel, Trader A should lie and tell them that he needed the money for an art deal or for gambling.

47. In or about September 2018, Safi instructed Trader A to meet him in Vienna, Austria to make the payment. Trader A traveled from the Czech Republic to Vienna and met Safi at a café, giving him the money in a plastic bag.

48. In March 2020, Safi requested another payment from Trader A – this time for \$300,000. Ge also began communicating with Trader A to tell him to make the payment. Ge directed Trader A to wire the funds to a bank in Hong Kong in the name of an associate of Safi and Ge, so that the funds were not traceable to Safi or Ge. As a cover story for the payment, Ge told Trader A to say it was a payment to an antique watch dealer that only accepted cash.

49. On or about April 1, 2020, Trader A made the \$300,000 payment as directed by Safi and Ge. Around this same time, Ge sent a DHL box containing a toy to Trader A’s home to make it look like Trader A had in fact ordered something from overseas.

**D. Safi, Ge, and Trader A, on Multiple Occasions, Trade Together on Material Nonpublic Information from Insider 1**

50. Safi, Ge, and Trader A generated substantial profits purchasing the securities of companies (including U.S.-traded companies) that were being targeted for acquisition, and/or for which Safi and Ge had other confidential information that was likely to cause the stock price to move, in advance of such information being disclosed to the public. This coordinated pattern of insider trading specifically included, on information and belief, trading on material nonpublic information obtained from Insider 1, who had timely, advance knowledge of the information in the Atos and Worldline corporate announcements addressed below, while owing a duty to keep such information confidential.

**December 2017 Atos Offer to Acquire Gemalto**

51. For example, in or about November 2017, Safi directly or indirectly tipped material nonpublic information to Ge and Trader A in advance of the December 11, 2017 announcement by Atos that it had made an all-cash offer to acquire Gemalto, N.V. (“Gemalto”). Gemalto was a cybersecurity company headquartered in the Netherlands that traded on the Amsterdam Stock Exchange, with ADRs that traded over-the-counter in the United States under the ticker symbol GTOMY. By November 1, 2017 (or earlier), Insider 1 had knowledge of the contemplated Atos-Gemalto transaction.

52. In tipping Trader A, Safi described the material nonpublic information regarding the still-secret plan for Atos to make an all-cash offer to acquire Gemalto as a “sniper” deal, meaning that Safi had a high level of confidence the information was accurate and the expected announcement would result in substantial trading profits for Safi, Ge, and Trader A.

53. On or about November 24, 2017, Safi began purchasing shares of Gemalto.

54. On or about November 28, 2017, Trader A began purchasing U.S.-traded ADRs of Gemalto, and then expanded his trading in Gemalto to include shares and foreign options between November 29, 2017 and December 8, 2017.

55. On December 8, 2017 (a Friday), Trader A messaged a family member to whom he had been passing along tips from Safi: “[L]ast chance to buy GTOMY before it takes off.”

56. On Monday, December 11, 2017, Atos announced a bid to acquire Gemalto, and the price of Gemalto shares increased by 35%.

57. The same day, Trader A removed Safi as a “friend” on Facebook to conceal their association.

58. As a result of his trading Gemalto securities based on inside information, Safi realized approximately \$225,000 in illicit trading profits from trading in equities.

59. As a result of his trading Gemalto securities based on inside information, Trader A generated approximately \$130,000 in illicit trading profits, comprised of approximately \$15,000 from trading Gemalto ADRs and \$115,000 from trading in Gemalto shares and options. Trader A also generated approximately \$400,000 in illicit profits trading in Gemalto and GTOMY through his spouse’s trading accounts, which he controlled.

60. On December 26, 2017, Ge sent a Facebook Messenger communication to Trader A, saying: “Hope you’re good and hope you’re satisfied with the gift from [Safi] and I! 😊” Trader A responded: “[H]ey yeah bro, Merry Christmas... [M]ore to say but I won’t say it here ... but thank you, thank you, thank you.”

#### **July 2018 Atos Offer to Acquire Syntel**

61. Safi also directly or indirectly tipped material nonpublic information to Trader A in advance of the July 22, 2018 announcement that Atos had agreed to acquire Syntel, Inc. (“Syntel”), a U.S.-based IT services company traded on NASDAQ under the ticker symbol

“SYNT.” Insider 1 had access to material nonpublic information concerning the transaction, including, without limitation, in January, June, and July 2018.

62. On or about June 4, 2018, Trader A began buying Syntel call options through an account in the name of his spouse.

63. On or about June 29, 2018, Trader began buying Syntel call options in his own account(s) and purchased additional Syntel securities in or about early July 2018.

64. As a result of his trading Syntel securities based on inside information, Trader A generated approximately \$200,000 in illicit trading profits from trading in Syntel shares and options. Trader A also generated approximately \$210,000 in illicit profits trading in Syntel shares and options through his spouse’s trading accounts, which he controlled.

**October 2018 Atos Negative Earnings Announcement**

65. In or about October 2018, Safi again directly or indirectly tipped Trader A with material nonpublic information concerning the French company Atos – this time, that Atos would soon announce lower-than-expected revenue growth and a reduced profit forecast for the year.

66. In tipping Trader A, Safi described the negative earnings announcement from Atos and told Trader A that it was a “sniper” – meaning that the nonpublic information about Atos was highly likely to be accurate and Trader A could trade with confidence on the tip.

67. On October 22, 2018, Trader A used foreign accounts held in his spouse’s name to purchase CFDs and options, anticipating that Atos’s stock price would decline.

68. On October 23, 2018, Atos issued negative earnings guidance. In the wake of the announcement, the company’s stock price declined 22% by the end of the trading day.

69. In total, Trader A realized approximately \$110,000 in illicit profits from trading around the Atos negative news, which was comprised of approximately \$16,000 in CFD trading profits and \$94,000 in options trading profits in his spouse's account.

**January 2019 Atos Spinoff of Worldline Shares**

70. In or about December 2018, Atos began discussions with Worldline to distribute approximately half of Atos's 50% ownership stake in Worldline to Atos shareholders through a share distribution.

71. On or about December 12, 2018, Safi began buying Atos call options, and Trader A began buying U.S.-traded Atos ADRs in an account in his mother's name.

72. On December 13, 2018, Insider 1 received official notice that he was considered an insider on the potential Atos/Worldline transaction.

73. On December 17, 2018, Trader A began purchasing Atos call options through an account in his spouse's name.

74. On January 9, 2019, Ge communicated with Trader A, advising Trader A that Ge would write to Trader A "on other," meaning Signal or Telegram.

75. On or about January 9, 2019, Ge began buying Atos call options, and on the following day, January 10, 2019, Trader A bought Atos CFDs through an account in his spouse's name.

76. On January 14, 2019, Safi purchased Atos call options. On the same day, Ge added to his own options position in Atos and messaged another scheme participant, ordering him to contact Ge as soon as possible and noting that "the business we are doing is very serious." This individual began purchasing call options in Atos on or about that same day.

77. On January 28, 2019, Trader A purchased U.S.-traded Atos ADRs (ticker symbol AEXAY).

78. Two days later, on January 30, 2019, Atos announced a plan to distribute a portion of the share capital of Worldline to Atos investors, and that pursuant to this plan, “Atos’ shareholders [we]re expected to receive 2 Worldline shares for 5 Atos shares held.” Following the announcement, the price of Atos shares closed about 5% higher than the prior trading day.

79. Also on January 30, 2019, Ge again messaged with the other scheme participant referenced in paragraph 76 above, telling him not to make any independent moves (“[I]’ll instruct you what to do”) and the next day ordered him to “start transferring the profits on my share to your bank.” On February 1, 2019, Ge messaged this individual again to check on the status of the profit transfer, stating: “I gotta collect from you asap gotta pay some peeps.”

80. As a result of his illicit trading of Atos securities based on inside information, Ge generated approximately \$240,000 in trading profits.

81. As a result of his illicit trading of Atos securities based on inside information, Trader A generated approximately \$40,000 in trading profits in accounts in his own name and in his spouse’s name.

82. Safi did not generate profits from his above-described options trading in advance of this announcement because those options positions were closed before January 30, 2019.

### **February 2020 Worldline Offer to Acquire Ingenico**

83. In or about October 2019, Safi directly or indirectly tipped material nonpublic information to Trader A in advance of the February 3, 2020 announcement that Worldline had agreed to acquire French rival Ingenico Group SA (“Ingenico”), which traded on the Paris Stock Exchange, with ADRs that traded over-the-counter in the United States under the ticker symbol INGIY. Insider 1 had knowledge of the transaction by at least mid-October 2019.

84. On or about October 14, 2019, Trader A began buying U.S.-traded Ingenico ADRs in his account and Ingenico options through his spouse's trading accounts, which he controlled, and continued to trade Ingenico securities for several months.

85. As a result of his trading Ingenico securities based on inside information, Trader A generated approximately \$120,000 in illicit trading profits comprised of approximately \$40,000 from trading Ingenico ADRs and \$80,000 from trading Ingenico shares. Trader A also generated approximately \$460,000 in illicit profits trading in Ingenico through his spouse's trading accounts, which he controlled.

**E. Safi, Ge, and Trader A Trade on Material Nonpublic Information from Other Inside Source(s)**

86. In addition to the above-described Atos and Worldline corporate announcements, Safi and/or Ge traded on and/or covertly tipped material nonpublic information to Trader A in advance of other corporate news and announcements, including but not limited to acquisition offers for Medidata Solutions, Inc. ("Medidata"), Tiffany & Co. ("Tiffany"), and Wright Medical Group N.V. ("Wright Medical").

**April 2019 Dassault Acquisition of Medidata Solutions**

87. On November 22, 2018, Paris-based Dassault Systèmes SE ("Dassault") entered into a confidentiality agreement with Medidata related to a potential acquisition transaction. At that time, Medidata was a technology company headquartered in New York and shares of Medidata traded on NASDAQ (ticker symbol MDSO).

88. On February 15, 2019, after numerous board meetings, Dassault confirmed to Medidata via a telephone call that it was interested in acquiring Medidata.



89. On February 19, 2019, Trader A began buying shares of Medidata via accounts in his name, his wife's name, and the name of an entity held in his wife's name. Then, two days later, Trader A purchased shares of Medidata in his parents' account.

90. In early April 2019, Ge reached out to his cousin to ask for money, telling him that Ge was short on cash and that the "play" was happening soon.

91. On April 21, 2019, Bloomberg News published an article about a possible purchase of Medidata by Dassault, and Medidata's stock price increased by approximately 14%.

92. On or about May 1, 2019, Ge began buying Medidata call options. The following week, Ge messaged another trader and instructed him to "get ready"; the trader then began purchasing Medidata as Ge directed.

93. On May 14, 2019, Ge sent a message to Trader A asking how things were going. Trader A responded that he was stressed but hoped "Maria" (code for Medidata) would "help take a little stress off next week."

94. On June 12, 2019, Dassault formally announced that it had made an offer for Medidata at a 17% premium over the share price before the acquisition rumors began in mid-April 2019. Medidata's share price did not change significantly upon this announcement.

95. In total, Trader A generated approximately \$110,000 in profits from illicit trading in Medidata, including options trading in his own account and options and equity trading in his wife's account. Certain of these options trades were conducted on the BOX. Ge generated approximately \$40,000 in illicit profits from trading in Medidata options.

**October 2019 LVMH Offer to Acquire Tiffany**

96. On October 15, 2019, luxury goods conglomerate Louis Vuitton Moët Hennessy (LVMH), headquartered in Paris, France, approached U.S. jewelry company Tiffany,

headquartered in New York, New York and traded on the New York Stock Exchange under ticker symbol TIF, with an unsolicited offer to acquire the company for \$120 per share.

97. Trader A was in Ibiza in October 2019 when he was contacted via Telegram by Safi, who urged him to look up TIF.

98. On or about October 22, 2019, Ge tried to call Trader A, but Trader A missed the call. When Trader A reached out to Ge after missing the call, Ge wrote: “Let’s talk on other” (meaning, on Signal or Telegram).

99. On or about October 24, 2019, Trader A sent a message to a friend saying: “URGENT. Buy Tiffany Co. symbol is TIF. Load the fuckin’ truck up.”

100. On or about October 24, 2019, Ge, Safi, and Trader A began buying TIF.

101. On or about October 27, 2019 (a Sunday), news of the LVMH offer leaked to the press and both Tiffany and LVMH subsequently confirmed that preliminary discussions had taken place between the two companies regarding a possible transaction. On Monday, October 28, 2019, Tiffany’s stock price closed at around \$129 per share, an increase of approximately 32% from the closing price on Friday, October 25, 2019.

102. In total, Trader A generated approximately \$2,260,000 in illicit profits from equity and options trading in Tiffany in his own account, and an additional \$1,280,000 from equity and options trading Tiffany in his wife’s accounts. Ge generated approximately \$1,660,000 in illicit profits from trading Tiffany CFDs and options. Safi generated approximately \$3,090,000 in illicit profits from trading in Tiffany options.

**November 2019 Acquisition by Stryker of Wright Medical Group**

103. Safi also tipped material nonpublic information to Trader A ahead of news that medical technology company Stryker, headquartered in Kalamazoo, Michigan, would acquire

Wright Medical, a medical device company based at the time in Amsterdam, Netherlands, with shares publicly traded on NASDAQ (ticker symbol WMGI).

104. On or about November 1, 2019, Safi, Ge, and Trader A all began buying Wright Medical securities, including buying by Trader A in his wife's account. The same day, Trader A sent a message to his sibling, saying: "I loaded you up today on Wright Medical. \$1m position. It is up another 10% now in after-hours trading 📈📈📈📈📈/News out after market close that Wright Medical is exploring a sale. Lucky timing on my bet 😊."

105. On November 1, 2019, post-market close, Bloomberg News published an unconfirmed report regarding Wright Medical's exploration of a potential sale.

106. On November 4, 2019, pre-market open, Stryker announced a definitive agreement to acquire all of the issued and outstanding shares of Wright Medical for \$30.75 per share. Upon news of the acquisition, Wright Medical's stock price increased \$7.03 or 32%, closing that day at \$29.04 per share.

107. On or about the same day, Ge messaged Trader A "Yo bro" and Trader A responded "yo yo yo, it's Christmas time (:)" and Ge replied "Yeah bro."

108. In total, Trader A generated approximately \$1,070,000 in illicit profits from trading in Wright Medical, and his wife's accounts generated approximately \$150,000. Ge generated approximately \$1,100,000 and Safi generated approximately \$565,000 in illicit profits from trading in Wright Medical.

#### **Late 2023/Early 2024: Trading Around Potential Novartis Acquisition of Cytokinetics**

109. On or before September 25, 2023, the Swiss pharmaceutical company Novartis AG ("Novartis") expressed interest in acquiring Cytokinetics, Inc. ("Cytokinetics"), a San Francisco-based biopharmaceutical company traded on NASDAQ (ticker symbol CYTK).

110. On or about September 29, 2023, Ge began buying Cytokinetics call options, and, by October 5, 2023, Safi had also begun trading Cytokinetics call options.

111. On or about October 12, 2023, Ge and Safi exchanged messages via Telegram about one of Ge's recruits (the "Recruit"), with Safi stating: "Cytok | Tell him upside from here 120% | At least 40% | We wanna exit at least ... | And revisit the deal with options." On or about the same day, the Recruit purchased Cytokinetics shares.

112. On the morning of October 31, 2023, Bloomberg News published an article regarding takeover interest in Cytokinetics, and by the end of the day, the share price for CYTK had increased by 9% from the prior day's close.

113. On or about October 31, 2023, Safi and Ge sold nearly all of their Cytokinetics call options for a profit, after the Bloomberg article was published.

114. On or about December 28, 2023, as part of continued merger discussions between the companies, Novartis sent Cytokinetics a non-binding offer letter.

115. On or about January 6, 2024 (a Friday), Ge dispatched a Telegram message to the Recruit, conveying material nonpublic information from Safi about the nature and timing of anticipated Cytokinetics news: "Monday pre market | Tell him a strategic sell process | Has very firm timelines ... And owners of Cytok are not amateurs is [Safi names investment firm]." The Recruit messaged Ge later that same day, asking "Hi bro guess nothing to do tonight? | Still on track for Mon?" Ge responded by relaying additional information from Safi: "Bro tell [Recruit] | We waiting if nova | Gies *[sic]* higher with bid | Because if leak comes | And we know that lets say nova wins at 124 | And leak take it to 140 | We sell | Or if it takes it to 120 | We well *[sic]* the short leg of the 125 call | Calls."

116. On January 8, 2024, the Wall Street Journal reported that Novartis was in talks to acquire Cytokinetics, and Cytokinetics shares increased by 15%, but two days later, the Journal reported that Novartis was backing away from the Cytokinetics deal.

117. Safi and Ge made at least approximately \$275,000 from trading Cytokinetics securities based on material nonpublic information in or about January 2024.

118. Both Safi and Ge purchased Cytokinetics call options over the BOX Options Exchange.

**February 2024 Novartis Acquisition of MorphoSys**

119. In December 2023, Novartis began exploring the possibility of acquiring MorphoSys AG (“MorphoSys”), a German biotechnology company traded on the Frankfurt Stock Exchange with ADRs traded on NASDAQ.

120. By January 3, 2024, Novartis had sent MorphoSys a non-binding acquisition proposal, and, on January 15, 2024, Novartis sent MorphoSys a binding acquisition proposal to purchase 100% of its stock for a 121% premium over its January 12, 2024 closing price.

121. On or about the following day, January 16, 2024, Ge and two of his associates began buying MorphoSys call options and continued to do so over the course of the next two days. A third associate of Ge began buying NASDAQ-traded MorphoSys ADRs on January 30, 2024.

122. On February 5, 2024, Novartis announced the acquisition of MorphoSys, and MorphoSys’s stock price rose by approximately 50% over the next two days.

123. In total, Ge made approximately \$3.8 million in illicit profits from trading in MorphoSys options in advance of the Novartis acquisition announcement.

## CLAIM FOR RELIEF

### *Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder*

124. The Commission re-alleges and incorporates by reference Paragraphs 1 through 123 above as if they were fully set forth herein.

125. Safi and Ge traded, and/or tipped other individuals to trade, securities while aware, and on the basis, of material nonpublic information. Safi and Ge knew or recklessly disregarded that such information was material and nonpublic. Safi and Ge also knew, recklessly disregarded, should have known, or consciously avoided knowing that such material nonpublic information had been conveyed and/or obtained in breach of a duty or obligation arising from a similar relationship of trust or confidence.

126. By engaging in the conduct described above, Safi and Ge, directly or indirectly, in connection with the purchase or sale of securities, by the use of means or instrumentalities of interstate commerce, or of the mails, with scienter:

- (a) employed devices, schemes, or artifices to defraud;
- (b) made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and
- (c) engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons, including purchasers and sellers of securities.

127. By reason of the actions alleged herein, Safi and Ge violated and, unless restrained and enjoined, will continue to violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

**PRAYER FOR RELIEF**

WHEREFORE, the Commission respectfully requests that this Court enter a judgment:

I.

Finding that Defendants Safi and Ge each violated Section 10(b) of the Exchange Act [15 U.S.C. §§ 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5];

II.

Permanently restraining and enjoining Defendants from violating Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5] by committing or engaging in specified actions or activities relevant to insider trading;

III.

Ordering each Defendant to disgorge, with prejudgment interest, all ill-gotten gains or unjust enrichment derived from all actions alleged herein;

IV.

Ordering Defendants to pay civil monetary penalties pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1];

V.

Retaining jurisdiction over this action to implement and carry out the terms of all orders and decrees that may be entered; and

VI.

Granting such other and further relief as this Court may determine to be just and appropriate.

Dated: March 4, 2025

By: Rua M. Kelly  
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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

**SECURITIES AND EXCHANGE  
COMMISSION,**

**Plaintiff,**

**-against-**

**GLEN LEIBOWITZ,**

**Defendant.**

**COMPLAINT**

**25 Civ. 2155**

**JURY TRIAL DEMANDED**

Plaintiff Securities and Exchange Commission (“Commission”), for its Complaint against Defendant Glen Leibowitz (“Leibowitz” or “Defendant”), alleges as follows:

**SUMMARY**

1. This action involves federal securities law violations committed by Leibowitz, while serving as the Chief Financial Officer (“CFO”) of a publicly traded company in the cannabis industry, Acreage Holdings, Inc. (“Acreage”). As alleged herein, from December 2019 to May 2020, Leibowitz falsified Acreage’s accounting records and lied to Acreage’s auditor about a sham round-trip transaction designed to artificially inflate Acreage’s cash balance for the fiscal year ended December 31, 2019 (“FY 2019”).

2. With Leibowitz's knowledge and active participation, Acreage caused an affiliated but unconsolidated entity ("Entity A") to transfer approximately \$4.2 million to Acreage on December 26, 2019 with the express understanding that Acreage would return the exact same amount at the beginning of the new year—which it did on January 3, 2020. Leibowitz knew that the round-trip transfer had no economic substance or legitimate business purpose and was intended to bolster Acreage's publicly reported year-end cash balance.

3. The receipt of the money from Entity A increased Acreage's existing cash balance as of December 31, 2019 by over 15%, from approximately \$26.5 million to approximately \$30.7 million. Leibowitz's conduct contributed to Acreage's accounting staff's creation of journal entries that mischaracterized the round-trip transaction and concealed its true purpose.

4. After certain employees' concerns about the transaction were escalated to a member of Acreage's board of directors and the director ("Director A") began making inquiries, Leibowitz directed Acreage's accounting staff to record an additional journal entry that effectively reversed the round-trip transaction by making it falsely appear as if Acreage had returned the funds in December 2019 rather than January 2020. As a result, the money that Acreage received from Entity A was ultimately not included in Acreage's publicly reported financial statements for FY 2019.

5. Although the fraud had been aborted, Leibowitz proceeded to lie about the transaction on multiple occasions to Acreage's outside auditor ("Audit Firm A") during its audit of Acreage's FY 2019 financial statements in order to cover up his participation in the planned scheme.

6. Initially, Leibowitz falsely told Audit Firm A that Entity A had sent the money to Acreage of its own accord, as repayment of an outstanding debt, and that Acreage returned the money only because Acreage learned in January 2020 that Entity A's board of directors had not approved the payment. Then, in a later email to Audit Firm A in May 2020, Leibowitz described Entity A's transfer of the funds in December 2019 as an "incorrect cash payment made at the

[Entity A] level” and claimed that Acreage sent the money back in January 2020 once the “error” was identified.

7. These statements were materially false and misleading because, as Leibowitz knew but never disclosed to Audit Firm A, Acreage had directed Entity A to send the money before year-end and planned from the outset to return the money to Entity A immediately after year-end. Nor did Leibowitz disclose his own knowledge about the true nature of and his participation in the transaction, the involvement of other members of senior management in arranging the round-trip transfers, or that the purpose of the transfers was to inflate Acreage’s FY 2019 cash balance.

8. In May 2020, Leibowitz also signed Acreage’s management representation letter to Audit Firm A, which was false and misleading because it incorporated by reference his May 2020 email discussed above.

### **VIOLATIONS**

9. By virtue of the foregoing conduct and as alleged further herein, Leibowitz has violated Section 13(b)(5) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. § 78m(b)(5)], and Rules 13b2-1 and 13b2-2 [17 C.F.R. §§ 240.13b2-1 and 240.13b2-2]; and aided and abetted Acreage’s violations of Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)].

10. Unless Defendant is restrained and enjoined, he will engage in the acts, practices, transactions, and courses of business set forth in this Complaint or in acts, practices, transactions, and courses of business of similar type and object.

### **NATURE OF THE PROCEEDINGS AND RELIEF SOUGHT**

11. The Commission brings this action pursuant to the authority conferred upon it by Exchange Act Section 21(d) [15 U.S.C. § 78u(d)].

12. The Commission seeks a final judgment: (a) permanently enjoining Defendant from violating Section 13(b)(5) of the Exchange Act and Rules 13b2-1 and 13b2-2, and from aiding and

abetting violations of Section 13(b)(2)(A) of the Exchange Act; (b) prohibiting Defendant from acting in an accounting or financial reporting role at a public company in connection with the preparation of financial statements filed with the Commission, providing substantial assistance to a public company in the preparation of financial statements filed with the Commission, or acting as an auditor on a public company audit; (c) ordering Defendant to pay civil money penalties pursuant to Exchange Act Section 21(d)(3) [15 U.S.C. § 78u(d)(3)]; and (d) ordering any other and further relief the Court may deem just and proper.

### **JURISDICTION AND VENUE**

13. This Court has jurisdiction over this action pursuant to Exchange Act Section 27 [15 U.S.C. § 78aa].

14. Defendant, directly and indirectly, has made use of the means or instrumentalities of interstate commerce or of the mails in connection with the transactions, acts, practices, and courses of business alleged herein.

15. Venue lies in this District under Exchange Act Section 27 [15 U.S.C. § 78aa]. Defendant may be found in, is an inhabitant of, or transacts business in the Southern District of New York, and certain of the acts, practices, transactions, and courses of business alleged in this Complaint occurred within this District. For example, Leibowitz and other Acreage employees worked at Acreage's offices in New York, New York, and communicated with other Acreage employees and Audit Firm A about the round-trip transfers while located within this District.

### **DEFENDANT**

16. **Leibowitz**, age 55, resides in New York, New York, and was Acreage's CFO from March 2018 to April 2021. Leibowitz is a certified public accountant and has been licensed in New York since 1996. After leaving Acreage, he was the CFO at another publicly traded company, from November 2022 until his resignation on November 15, 2024.

## **OTHER RELEVANT INDIVIDUALS AND ENTITIES**

17. **Acreage** is a company in the cannabis industry and is headquartered in New York, New York and incorporated in British Columbia, Canada. At the time of the events described herein, Acreage had a class of securities registered pursuant to Section 12(g) of the Exchange Act; its subordinate voting shares were listed on the Canadian Securities Exchange and quoted in the United States on the OTCQX; and Acreage was a reporting company pursuant to Section 13(a) of the Exchange Act.

18. **Entity A** is a nonprofit corporation that operates therapeutic cannabis dispensaries in multiple locations and online. During the time of the events described herein, Entity A was affiliated with Acreage through certain contractual relationships.

## **FACTS**

### **I. Background**

#### **A. Acreage's Relationship with Entity A**

19. Acreage operates its cannabis business through subsidiaries in several states. Acreage also had relationships in certain states with entities that were not subsidiaries, including Entity A.

20. As a separate entity that was not owned by Acreage, Entity A's financial results were not consolidated with Acreage's financial results. Accordingly, cash and other assets held by Entity A were not included in Acreage's financial statements.

21. Acreage, through one of its subsidiaries, had contractual arrangements with Entity A. Those arrangements included a Management Consulting and Service Agreement ("Services Agreement"), pursuant to which Acreage provided certain services to Entity A in exchange for fees from Entity A, as well as a line of credit pursuant to which Acreage lent money to Entity A.

22. The services that Acreage contracted to provide to Entity A included billing, day-to-day operational support, employee training, and financial oversight, controls, planning, and access to

capital.

23. Between approximately 2016 and 2019, Acreage generally did not require Entity A to make payments for the management fees owed pursuant to the Services Agreement or to repay amounts owed pursuant to the line of credit. Instead, Acreage allowed those amounts to accrue over time.

**B. Acreage's Cash Shortfall in Late 2019**

24. In late 2019, as the end of FY 2019 approached, Acreage's senior management became increasingly concerned about Acreage's cash balance.

25. On November 26, 2019, an Acreage senior officer ("Officer A") emailed Leibowitz with the subject line "Cash Flow" and wrote: "Let's discuss tomorrow. All of our competitors are showing [cash flow] positive. Why are we so far off?"

26. During this period, industry analysts were focused on the cash balances at companies in the cannabis industry, including Acreage. Cash was an important metric for investors in the cannabis industry due to the relative unavailability of more traditional sources of financing such as bank loans.

27. As Leibowitz and other members of senior management knew, Acreage's cash balance was separately reported in Acreage's financial statements, including in financial statements that Acreage was required to file with the Commission with Acreage's annual report on Form 10-K for FY 2019, which would reflect the cash balance as of December 31, 2019.

28. As a result of Acreage's looming cash shortfall, Acreage's senior management considered potential ways to increase Acreage's cash balance in late 2019.

**C. Entity A's Bona Fide Debt Repayment Proposal**

29. Among other options, members of Acreage's senior management explored the possibility of having Entity A repay some of the amounts it owed to Acreage.

30. As of December 2019, pursuant to a line of credit, Entity A had borrowed approximately \$4.5 million from Acreage and owed Acreage over \$1.5 million in accrued interest.

31. Around that same time, discussions ensued between Acreage and Entity A about a proposed repayment of a portion of this debt.

32. On December 5, 2019, Leibowitz received an email from an Acreage employee (“Employee A”) whose role included providing accounting services for Entity A. The email was in response to a request for information from Leibowitz and a senior member of Acreage’s accounting department (“Employee B”).

33. Employee A’s email summarized the status of Entity A’s proposed debt repayment.

34. Specifically, Employee A’s email stated that Entity A had a “sizeable cash balance that can be used to make a proposed \$1.5 [million] lump sum interest payment and then pay the remaining outstanding interest over the subsequent 12 months.” The email noted that while Entity A had significantly more than \$1.5 million in cash on hand, \$2 million of those funds were earmarked for specific capital expenditures in 2020, including the opening of a second dispensary that Acreage had previously approved. The email also stated that Entity A’s board of directors was reviewing the proposed repayment plan; had given a “soft approval” for the \$1.5 million lump sum payment; and was expected to formally approve the plan at the next board meeting in late January or early February 2020.

## **II. The Fraudulent Round-Trip Cash Transfer At Year-End 2019**

35. However, Acreage’s senior management subsequently embarked on a different, and fraudulent, plan to increase Acreage’s cash balance.

36. In late December 2019, Acreage’s senior management decided to have Entity A temporarily transfer virtually all of its available cash (over \$4 million) to Acreage before the end of 2019, with an unconditional assurance that Acreage would send the full amount right back to Entity

A in early January 2020.

37. Leibowitz knew that the purpose of this plan was to artificially increase Acreage's reported cash balance at the end of FY 2019 and participated in arranging the transfers.

**A. Leibowitz Actively Participated in the Round-Trip Scheme With Knowledge of Its Improper Purpose**

38. On December 22, 2019, Leibowitz had several calls with Officer A or another Acreage senior officer ("Officer B").

39. During those calls with Officer A and Officer B, Leibowitz learned about the details of a plan to have Entity A transfer over \$4 million to Acreage in late December 2019 and for Acreage to send the funds right back to Entity A in early January 2020.

40. That same afternoon, Officer B also called Employee A and left a voicemail.

41. In his voicemail to Employee A, Officer B stated as follows: "Just giving you a call to let you know [Entity A's Chief Executive Officer ("CEO") is] going to be calling you. They're gonna wire approximately \$4.5 million to the Acreage account just to show cash in our account, then we're gonna put it back, but he needs to know what are [sic] outstanding as far as payables so we leave sufficient funds in there so no checks bounce."

42. Almost immediately thereafter, Leibowitz spoke again with Officer B.

43. Moments after Leibowitz finished speaking with Officer B, Leibowitz texted the following to Employee A: "When you have a chance can you please call me and I can explain what we are doing [with Entity A]?"

44. Leibowitz and Employee A spoke on the phone twice later that day.

45. On those calls, Leibowitz conveyed to Employee A that Entity A was going to help Acreage bolster its balance sheet at year-end by temporarily transferring approximately \$4.5 million to Acreage before December 31, 2019, and that Acreage would return the money to Entity A shortly after December 31, 2019, through what Leibowitz falsely characterized as a "capital call."



46. At Acreage, the term “capital call” referred to a process by which Acreage subsidiaries or affiliates could request funding for specified projects or other capital expenditure needs, after which Acreage would assess the request and determine whether or not to fund it.

47. Contrary to Leibowitz’s statements to Employee A, no such “capital call” process occurred or was contemplated by Acreage in connection with the planned round-trip transfer.

48. Nor at any time did Acreage and Entity A discuss a “capital call” process with respect to the planned round-trip transfer, wherein Entity A would have to justify the amount it requested based on its upcoming capital spending needs for specific projects and Acreage would then assess those needs and decide, in its sole discretion, whether to approve sending the requested funds.

49. To the contrary, as Leibowitz knew from his conversations with Officer A and Officer B, Acreage planned from the outset to return the money to Entity A right after the end of FY 2019 without any such “capital call” process occurring.

50. Employee A understood from his December 22, 2019 calls with Leibowitz that Leibowitz was asking him to have Entity A send all of its available cash—less a small amount to cover Entity A’s immediate expenses—to Acreage.

51. On their December 22, 2019 calls, Leibowitz also instructed Employee A on how to record the transfers on Acreage’s accounting records.

52. One option proposed by Leibowitz to Employee A was to record the incoming transfer as a short-term bridge loan from Entity A to Acreage—even though there was no documentation for such a loan or any information available concerning the terms of any purported loan, such as the principal amount of the loan, the rate of interest, or the due date for repayment of the principal.

53. Another option proposed by Leibowitz, which was inconsistent with the prior

option, was to treat the transfer from Entity A as a repayment of debt that Entity A owed to Acreage.

54. Leibowitz told Employee A, in substance, that he needed to “bury” the incoming transfer from Entity A somewhere in Acreage’s books.

55. Employee A understood that Leibowitz was instructing him to account for the cash transfer from Entity A in a way that would not attract scrutiny from Acreage’s outside auditors.

56. Employee A was alarmed by what Leibowitz told him and expressed his concerns to Leibowitz about the propriety of what Leibowitz had directed him to do.

57. Employee A did not carry out Leibowitz’s instructions.

58. On December 22, 2019, Leibowitz also exchanged text messages with Officer A shortly after Leibowitz’s second conversation with Employee A ended.

59. In one of those text messages, Officer A asked Leibowitz to “add in the \$4.5 million dollars from [Entity A]” to a slide deck being prepared for potential investors in Acreage. Leibowitz responded: “I had it already in the Q4 19 balance. You just made it reality. So now it will be in the financial statements.”

60. Leibowitz then continued to execute the round-trip scheme.

61. On December 23, 2019, Leibowitz sent a follow-up email to Employee A instructing Employee A to transfer \$4.5m from Entity A to Acreage.

62. Leibowitz stated in his email, which also copied Employee B (a senior accounting employee), that the transfer would be “accounted for as short term financing” and that Acreage would send the money “back on January 2,” pursuant to what Leibowitz again falsely characterized as a “capital call.”

63. Employee A responded to Leibowitz by raising a number of issues with the request, including the fact that he did not have the ability to send wires from Entity A, and that “there is only

\$4.3m through all of [Entity A's] bank accounts and [Entity A's] outstanding payables"—a reference to Entity A's immediate expense obligations—"currently account for \$150k," thereby leaving only approximately \$4.15 million available to be transferred.

64. Leibowitz replied: "Understand, [Officer A] has discussed the transfer with the [Entity A] contact . . . \$4.3m will be sent. Just note the accounting."

65. At around this time, Officer A, Officer B, and an additional senior officer of Acreage ("Officer C") spoke by telephone with Entity A's CEO to implement the plan.

66. During that call, Officer A directed Entity A's CEO to send all of Entity A's cash to Acreage, except for what was needed to cover Entity A's immediate short-term expenses.

67. During that call, Officer A also unconditionally assured Entity A's CEO that Acreage would return the money to Entity A at the beginning of January 2020. There was no discussion of Entity A making a "capital call" to Acreage as a necessary predicate for Acreage to return the money to Entity A after year-end.

68. Entity A's CEO initially objected to the direction from Officer A, but ultimately acquiesced.

69. Entity A's CEO asked that Acreage put in writing the unconditional assurance that Acreage would return the money to Entity A at the beginning of January 2020.

70. On December 24, 2019, Acreage provided that written assurance in an email sent by Officer B to Entity A's CEO. Leibowitz was copied on that email.

71. In that email, Officer B wrote that:

- a. "[W]e have requested that you wire all available funds (not including those needed to cover outstanding liabilities) to the Acreage corporate account" and reiterated the unconditional assurance that "[t]he funds that will be wired into the Acreage account will be returned in whole on January 2nd";

- b. Acreage's request for Entity A's money was being made "in an effort to clarify our revenues and cash on-hand for potential investors"; and
- c. "Glen [Leibowitz] will follow-up with the Acreage wire information and confirmation of your outstanding liabilities."

72. Leibowitz responded to Officer B's December 24, 2019 email the same day, writing in an email to Entity A's CEO that "Per my discussion with [Employee A] there is approximately \$200,000 of outstanding liabilities for [Entity A]"—again a reference to Entity A's immediate expense obligations. In that email, Leibowitz provided Entity A's CEO with instructions for wiring the funds to Acreage.

73. After this email, Leibowitz continued to be in close communication with Officer A and Officer B and was aware of the relevant details concerning the plans for the round-trip cash transfer.

74. For example, Leibowitz spoke with Officer A by phone approximately ten minutes after Leibowitz sent the wire instructions to Entity A's CEO in the email quoted above. In the next hour and a half after that call, Leibowitz spoke two more times with Officer A and once with Officer B.

75. Entity A's CEO initiated a wire transfer request later in the day on December 24, 2019, instructing Entity A's bank to wire \$4,164,458.06 to Acreage's bank account.

76. After Entity A's wire transfer was initiated, an Entity A employee received an alert from Entity A's bank about the transfer. After receiving that alert, the Entity A employee wrote to Entity A's CEO, asking "Do you know what this is for?"

77. Entity A's CEO responded as follows: "I received a request from Acreage this week to transfer funds from the [Entity A] account to their account and the funds will be transferred back on January 2<sup>nd</sup>. . . . Enough funds have been left in the payroll and operating account to cover the

next pay period on Thursday the 2<sup>nd</sup> and for any outgoing payments, ~\$200k in total.”

78. The \$4,164,458.06 that was wired from Entity A’s bank account arrived in Acreage’s bank account on December 26, 2019 and remained there until January 3, 2020.

79. Entity A’s cash transfer to Acreage was neither a bona fide repayment of debt that Entity A owed Acreage nor a bona fide short term financing, as Entity A’s CEO and Acreage’s senior management, including Leibowitz, understood from the outset that the money would be temporarily parked in Acreage’s bank account for just a few days at the end of December 2019 before Acreage returned that money to Entity A in early January 2020.

80. The receipt of this money from Entity A increased Acreage’s existing cash balance as of December 31, 2019 by over 15%, from approximately \$26.5 million to approximately \$30.7 million.

81. On December 27, 2019, Leibowitz sent a text message to Officer A and Officer B, stating “4.164m received from [Entity A][.]” Officer B responded, “Good news[,]” and Officer A added “Amen. Thank you[.]”

82. On December 31, 2019, Officer C spoke with Leibowitz by phone.

83. During their phone conversation, Officer C relayed to Leibowitz what he had heard on the earlier group call with Entity A’s CEO, including the fact that Officer A had unconditionally assured Entity A’s CEO that Acreage would return the money in early January 2020.

84. Officer C expressed concerns to Leibowitz that the cash transfers did not make any legitimate business sense.

85. Officer C also expressed particular concern to Leibowitz that Acreage, a public company, was receiving the funds from Entity A so close to the end of its fiscal year with the express understanding that Acreage would send the money right back to Entity A shortly after the end of the fiscal year.

86. In response, Leibowitz told Officer C that he would look into the transaction and get back to him, but Leibowitz failed to tell Officer C that Leibowitz was already aware of the transaction and its round-trip nature and was involved in carrying out the scheme.

87. In fact, following his call with Officer C, Leibowitz continued to take steps to carry out the round-trip transaction.

88. On January 2, 2020, Entity A's CEO sent an email to Leibowitz following up on the December 24, 2019 email chain and requesting reconfirmation that, as agreed, Acreage would now be returning the money.

89. Entity A's CEO wrote as follows: "Glen [Leibowitz], Happy New Year! Confirming that the wire will be coming back to the [Entity A] account today or tomorrow. Please let me know when you can and if you need wire instructions, I can provide."

90. Within an hour and a half after that email was sent, Employee B (a senior accounting employee) emailed Entity A's CEO asking for wire instructions for Entity A. Entity A's CEO provided the wire instructions, and Employee B circulated a wire transfer request form to Leibowitz and Officer B.

91. In response, Leibowitz wrote "Great, approved!" Officer B also responded, "Approved."

92. On January 3, 2020, Acreage wired \$4,164,458.06—the exact same amount that Entity A had wired to Acreage just one week earlier on December 26, 2019—back to Entity A.

#### **B. Acreage's False Journal Entries Recording the Round-Trip Transfers**

93. Acreage's accounting staff made journal entries that falsified Acreage's accounting records by mischaracterizing the transfer from Entity A—first as a repayment of debt by Entity A to Acreage and then as a short-term financing (*i.e.* a loan) from Entity A to Acreage.

94. Specifically, on January 3, 2020, Acreage accounting staff made a journal entry that

recorded Acreage's receipt of the funds from Entity A on December 26, 2019 as a debit to Acreage's bank account, an asset account, and a credit to "Investments – Consolidated: Investment in [Entity A]," also an asset account.

95. The effect of this journal entry was to increase the amount of cash in Acreage's bank account balance, and to decrease the amount that Entity A owed to Acreage under the line of credit, in the amount of the transfer.

96. In other words, the journal entry treated the December 26, 2019 cash transfer from Entity A to Acreage as a bona fide repayment of debt that Entity A owed to Acreage under the line of credit.

97. The January 3, 2020 journal entry was false because the December 26, 2019 cash transfer from Entity A to Acreage was not a bona fide repayment of debt from Entity A to Acreage.

98. Prior to the January 3, 2020 journal entry, Leibowitz withheld full and accurate information about the transaction from Acreage's accounting staff—including the fact that Acreage assured Entity A at the outset that the December 26, 2019 cash transfer would be returned immediately after year-end.

99. Following the January 3, 2020 journal entry, Leibowitz had discussions with senior accounting personnel at Acreage about the need to change the accounting treatment for the transfers, while continuing to conceal the pre-planned nature of the return transfer.

100. Following those discussions, on January 7, 2020, Acreage accounting staff revised the January 3, 2020 journal entry recording the receipt of the money from Entity A on December 26, 2019, changing the account for the credit entry from the asset account "Investments - Consolidated: Investment in [Entity A]" to "Other Current Liabilities," a liability account.

101. The effect of this journal entry was to reverse the reduction in the amount that Entity A owed to Acreage under the line of credit reflected in the prior journal entry, and to instead

increase Acreage's unspecified short-term indebtedness by the amount of the transfer. The prior debit to the bank account balance (*i.e.* increase) remained unchanged.

102. This entry was false because the December 26, 2019 cash transfer from Entity A to Acreage was not bona fide short-term financing provided by Entity A to Acreage.

103. Leibowitz caused the January 3, 2020 and January 7, 2020 journal entries to be falsified because, among other reasons, he participated in arranging the underlying sham round-trip transaction and withheld full and accurate information about the transaction from Acreage's accounting staff.

104. As a result of both the January 3, 2020 and January 7, 2020 journal entries, the general ledger balance for Acreage's bank (*i.e.* cash) account as of December 31, 2019 was overstated by approximately \$4.2 million (*i.e.* the amount of the cash transfer from Entity A).

105. During January 2020, multiple Acreage employees raised questions and concerns about the propriety of the year-end cash transfers between Entity A and Acreage.

106. On January 11, 2020, an Acreage employee sent an email to Officer C outlining a number of concerns with Acreage's management, including that Acreage was "[e]ngaging in what appears to me as potentially Accounting Fraud w four mm from [Entity A] . . . coming onto a public company balance sheet just days before the end of a reporting period, without public announcement. . . . [and] leaving the corporate balance back to [Entity A] just days after the quarter and year end."

107. On January 12, 2020, this same Acreage employee forwarded this email to a member of Acreage's board of directors ("Director A").

108. Director A was alarmed by the email and immediately reached out to another director to discuss its allegations.

109. On January 14 and January 15, 2020, Director A contacted Leibowitz with questions



and concerns regarding the propriety of the cash transfers between Entity A and Acreage and confronted Leibowitz about whether those transfers were part of a planned round-trip transaction.

110. In response, Leibowitz lied to Director A.

111. Rather than disclose the true facts about the transfers with Entity A—including the fact that, as Leibowitz knew, Acreage had expressly assured Entity A at the outset that Acreage would return the money in early January 2020—he falsely told Director A that the December 26, 2019 cash transfer from Entity A was a repayment of amounts owed to Acreage under the line of credit and that Acreage returned the money to Entity A in January 2020 only because Acreage later learned that Entity A had lacked board approval to transfer the money to Acreage.

112. A few days after Leibowitz’s communications with Director A, Leibowitz caused a new journal entry to be recorded that once again changed the manner in which Acreage accounted for the cash transfers.

113. Specifically, on January 17, 2020, Acreage accounting staff, at Leibowitz’s direction, recorded a journal entry dated December 31, 2019 that showed Acreage returning the money to Entity A on December 31, 2019, three days before the return wire actually occurred.

114. This journal entry consisted of a debit to “Other Current Liabilities” (*i.e.* a decrease) in the amount of the transfer and a credit to Acreage’s bank account balance (also a decrease) in the same amount, both occurring as of December 31, 2019.

115. The effect of this journal entry was to decrease the amount of cash in Acreage’s bank account balance, and to decrease Acreage’s unspecified short-term indebtedness, by the amount of the return transfer as of December 31, 2019.

116. This journal entry effectively reversed the December 26, 2019 cash transfer from Entity A to Acreage from an accounting perspective, essentially treating the cash transfers as if they had both occurred in December 2019 and cancelled each other out.

117. As a result, the money that Acreage received from Entity A in December 2019 was not included in Acreage's cash balance in the FY 2019 financial statements that Acreage provided to Audit Firm A or that Acreage included in its annual report on Form 10-K filed with the Commission on May 29, 2020.

118. Although the January 17, 2020 journal entry negated the impact of Entity A's cash transfer on Acreage's publicly reported financial statements for FY 2019, that journal entry was only made after Director A intervened and confronted Leibowitz about the round-trip transaction.

119. The January 17, 2020 journal entry was false because, as noted above, it reflected Acreage returning the money to Entity A on December 31, 2019, three days before the return wire actually occurred.

### **III. Leibowitz's Materially False and Misleading Statements To Audit Firm A**

120. During the course of Audit Firm A's audit of Acreage's financial statements for FY 2019, Leibowitz communicated with accountants from Audit Firm A on multiple occasions, both orally and in writing, including about instances or allegations of fraud at Acreage.

121. As detailed below, Leibowitz lied to Audit Firm A about the round-trip cash transfer with Entity A to cover up the true facts about the transaction and his own role in implementing the scheme to artificially inflate Acreage's FY 2019 cash balance.

122. On January 21, 2020, an Acreage employee submitted an anonymous complaint through Acreage's compliance hotline service ("Anonymous Complaint").

123. That Anonymous Complaint stated that "[t]here was a size-able cash movement between Acreage and one of its affiliated entities near the end of the calendar year that seemed to lack a business purpose." The complaint also stated that "[m]anagement of Acreage and an affiliated entity" were involved.

124. On February 11, 2020, accountants from Audit Firm A spoke with Leibowitz in

connection with its audit of Acreage's FY 2019 financial statements and inquired, among other things, whether he was aware of any instances or allegations of fraud at Acreage during the period relevant to the FY 2019 audit.

125. Leibowitz told the accountants from Audit Firm A about the Anonymous Complaint and referenced the transfers of funds between Entity A and Acreage in late December 2019 and early January 2020.

126. Leibowitz also told the accountants that the Anonymous Complaint raised the concern that Acreage was trying to show higher cash balances at year end in order to make Acreage's financial situation look better.

127. However, Leibowitz then proceeded to make materially false and misleading statements to the accountants about the transaction.

128. Just as he falsely represented to Director A, Leibowitz falsely represented to Audit Firm A's accountants during the February 11, 2020 meeting that Entity A had transferred the funds to Acreage in late December 2019 to repay Entity A's outstanding debt to Acreage, and that Acreage immediately returned those funds only because it learned from Entity A in early January 2020 that Entity A's board of directors had not approved the payment.

129. Leibowitz's statements to Audit Firm A on February 11, 2020 were false and misleading because the true facts, as Leibowitz knew but failed to disclose, were that:

- a. Entity A transferred the funds to Acreage in December 2019 because Acreage senior management directed Entity A to do so and assured Entity A that Acreage would return those funds in early January 2020 as part of a round-trip payment, and not because Entity A was repaying an outstanding debt to Acreage;
- b. Acreage senior management returned the funds in early January 2020 because

it planned to do so from the outset, not because Acreage was informed by Entity A that it lacked board approval for the payment;

- c. Acreage's senior management, including Leibowitz, participated in directing the cash transfers between Entity A and Acreage; and
- d. The purpose of the round-trip transfer was to inflate Acreage's cash balance at the end of FY 2019.

130. Approximately three months later, Leibowitz again gave a knowingly false explanation to Audit Firm A for the transaction in connection with Audit Firm A's audit of Acreage's FY 2019 financial statements, this time in writing.

131. On May 28, 2020, Leibowitz sent an email ("May 28, 2020 email") to Audit Firm A in which he again referenced the Anonymous Complaint.

132. Leibowitz sent his May 28, 2020 email after reviewing a draft of Acreage's management representation letter for the FY 2019 audit that Audit Firm A had circulated, which did not include a reference to the Anonymous Complaint.

133. In the May 28, 2020 email, Leibowitz described the Anonymous Complaint as "indicating that [Acreage] had erroneously reported [its] cash balance at year end 2019 as a result of cash erroneously received from [Entity A]."

134. Leibowitz wrote that the cash transfer that Acreage received from Entity A in late December 2019 was "for repayments of an outstanding loan and management fee," but that the transfer was "determined to be an incorrect cash payment made at the [Entity A] level" and that the "money was returned to [Entity A] on January 2, 2020 once the error was identified."

135. Leibowitz's statements to Audit Firm A in the May 28, 2020 email were false and misleading because the true facts, as Leibowitz knew but failed to disclose, were that:

- a. Entity A transferred the funds to Acreage in December 2019 because

Acreage senior management directed Entity A to do so and assured Entity A that Acreage would return those funds in early January 2020 as part of a round-trip payment, and not as part of bona fide repayments by Entity A “of an outstanding loan and management fee” owed to Acreage;

- b. Acreage senior management returned the funds in early January 2020 because it planned to do so from the outset, not because Acreage later “determined [it] to be an incorrect cash payment made at the [Entity A] level” or returned the money in early January 2020 “once the error was identified”;
- c. Acreage senior management, including Leibowitz, participated in directing the cash transfers between Entity A and Acreage; and
- d. The purpose of the round-trip transfer was to inflate Acreage’s cash balance at the end of FY 2019.

136. On May 29, 2020, Acreage provided Audit Firm A with its management representation letter for the FY 2019 audit, which Leibowitz signed.

137. The management representation letter incorporated by reference Leibowitz’s May 28, 2020 email, as follows: “Except as discussed in a memo provided to you on May 28, 2020, we have not received any communications, nor do we have knowledge of any fraud, allegations of fraud or suspected fraud affecting Acreage involving” management, employees who have a significant role in internal control, or others.

138. Because it incorporated Leibowitz’s false and misleading May 28, 2020 email, the management representation letter, as Leibowitz knew or recklessly disregarded, was false and misleading.

139. In addition, the management representation letter was false and misleading also because Leibowitz had knowledge of the following undisclosed facts relating to fraud, allegations of

fraud or suspected fraud affecting Acreage involving management, employees who have a significant role in internal control, or others:

- a. Entity A transferred the funds to Acreage in December 2019 because Acreage senior management directed Entity A to do so and assured Entity A that Acreage would return those funds in early January 2020 as part of a round-trip payment, and not as part of bona fide repayments by Entity A “of an outstanding loan and management fee” owed to Acreage;
- b. Acreage senior management returned the funds in early January 2020 because it planned to do so from the outset, not because Acreage later “determined [it] to be an incorrect cash payment made at the [Entity A] level” or returned the money in early January 2020 “once the error was identified”;
- c. Acreage senior management, including Leibowitz, participated in directing the cash transfers between Entity A and Acreage; and
- d. The purpose of the round-trip transfer was to inflate Acreage’s cash balance at the end of FY 2019.

140. The undisclosed facts described in paragraphs 129, 135, and 139 would have been important to a reasonable auditor because, among other reasons, they would have impacted the auditor’s assessment of management integrity and other risk assessments and caused the auditor to consider whether additional audit procedures were necessary.

141. The undisclosed facts described in paragraphs 129, 135, and 139 would have been important to Audit Firm A because they would have impacted Audit Firm A’s: (i) assessment of management integrity; (ii) assessment of audit risk and consideration of whether to escalate concerns to Audit Firm A’s senior leadership; (iii) consideration of whether to conduct additional audit procedures; and (iv) assessment of Acreage’s accounting and disclosures relating to the cash

transfers with Entity A.

#### **IV. Leibowitz Agreed to Tolling Any Applicable Statute of Limitations**

142. On October 11, 2024, Leibowitz entered into a tolling agreement with the Commission. The tolling agreement specifies a period of time (a “tolling period”) in which the “running of any statute of limitations applicable to any action or proceeding against Leibowitz authorized, instituted, or brought by . . . the Commission . . . arising out of the [Commission’s investigation of Leibowitz’s conduct], including any sanctions or relief that may be imposed therein, is tolled and suspended[.]” The tolling agreement further provides that Leibowitz and any of his agents or attorneys “shall not include the tolling period in the calculation of the running of any statute of limitations or for any other time-related defense applicable to any proceeding, including any sanctions or relief that may be imposed therein, in asserting or relying upon any such time-related defense.”

143. The tolling agreement tolled the running of any limitations period or any other time-related defenses to the allegations in this Complaint for a period of 90 days, beginning on October 15, 2024 and ending on January 13, 2025.

#### **FIRST CLAIM FOR RELIEF Violations of Exchange Act Rule 13b2-2**

144. The Commission realleges and incorporates by reference here the allegations in paragraphs 1 through 143.

145. Leibowitz, directly or indirectly, made or caused to be made materially false or misleading statements to an accountant in connection with audits, reviews, or examinations of Acreage’s financial statements or in the preparation or filing of Acreage’s documents or reports required to be filed with the SEC; or omitted to state, or caused another person to omit to state, material facts necessary in order to make statements made, in light of the circumstances under which such statement were made, not misleading, to an accountant in connection with audits, reviews, or

examinations of Acreage's financial statements or in the preparation or filing of Acreage's documents or reports required to be filed with the SEC.

146. By reason of the foregoing, Leibowitz violated and, unless enjoined, will again violate, Rule 13b2-2 under the Exchange Act [17 C.F.R. § 240.13b2-2].

**SECOND CLAIM FOR RELIEF**  
**Violations of Exchange Act Rule 13b2-1**

147. The Commission realleges and incorporates by reference here the allegations in paragraphs 1 through 143.

148. By reason of the conduct alleged above, Leibowitz, directly or indirectly, falsified or caused to be falsified books, records, or accounts of Acreage subject to Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)].

149. By reason of the foregoing, Leibowitz violated and, unless enjoined, will again violate, Rule 13b2-1 under the Exchange Act [17 C.F.R. § 240.13b2-1].

**THIRD CLAIM FOR RELIEF**  
**Violations of Exchange Act Section 13(b)(5)**

150. The Commission realleges and incorporates by reference here the allegations in paragraphs 1 through 143.

151. By engaging in the conduct described above, Leibowitz knowingly falsified Acreage's books and records.

152. By reason of the foregoing, Leibowitz violated and, unless enjoined, will again violate, Exchange Act Section 13(b)(5) [15 U.S.C. § 78m(b)(5)].

**FOURTH CLAIM FOR RELIEF**  
**Aiding and Abetting Acreage's**  
**Violations of Exchange Act Section 13(b)(2)(A)**

153. The Commission realleges and incorporates by reference here the allegations in paragraphs 1 through 143.



154. By reason of the foregoing, Acreage was an issuer with a class of securities registered pursuant to Exchange Act Section 12 and failed to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflected Acreage's transactions and dispositions of its assets.

155. Leibowitz knowingly or recklessly provided substantial assistance to Acreage with respect to its violations of Exchange Act Section 13(b)(2)(A) [15 U.S.C. § 78m(b)(2)(A)].

156. By reason of the foregoing, Leibowitz is liable pursuant to Exchange Act Section 20(e) [15 U.S.C. § 78t(e)] for aiding and abetting Acreage's violations of Exchange Act Section 13(b)(2)(A) [15 U.S.C. § 78m(b)(2)(A)], and, unless enjoined, will again aid and abet such violations.

### **PRAYER FOR RELIEF**

WHEREFORE, the Commission respectfully requests that the Court enter a Final Judgment:

#### **I.**

Permanently enjoining Leibowitz and his agents, servants, employees and attorneys and all persons in active concert or participation with any of them from violating, directly or indirectly, Exchange Act Section 13(b)(5) [15 U.S.C. § 78m(b)(5)] and Rules 13b2-1 and 13b2-2 [17 C.F.R. §§ 240.13b2-1 and 240.13b2-2], and from aiding and abetting any violations of Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)].

#### **II.**

Permanently prohibiting Leibowitz from acting in an accounting or financial reporting role at a public company in connection with the preparation of financial statements filed with the Commission, providing substantial assistance to a public company in the preparation of financial statements filed with the Commission, or acting as an auditor on a public company audit. For purposes of this paragraph: (1) "Accounting or financial reporting role" means participating in the

preparation of financial statements; decisions about financial reporting; the creation or implementation of accounting policies; or decisions about accounting treatment, and (2) “Public company” means a company, foreign or domestic, that files financial statements with the Commission.

**III.**

Ordering Leibowitz to pay civil monetary penalties under Exchange Act Section 21(d)(3) [15 U.S.C. § 78u(d)(3)].

**IV.**

Granting any other and further relief this Court may deem just and proper.

**JURY DEMAND**

The Commission demands a trial by jury.

Dated: New York, New York  
March 14, 2025

/s/ Russell J. Feldman

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**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

**SECURITIES AND EXCHANGE COMMISSION,**

**Plaintiff,**

**v.**

**ALBERT GOLUSIN,  
PETER JACOBS,  
JOHN SCUDERI,**

**Defendants.**

**Civil No. 25-2379**

**Jury Trial Demanded**

**COMPLAINT**

Plaintiff Securities and Exchange Commission (“SEC”) alleges:

**SUMMARY**

1. This is a civil securities fraud enforcement action. From approximately January 1, 2017 through at least mid-2022 (the “Relevant Period”), Albert Golusin, Peter Jacobs, and John Scuderi (collectively “Defendants”) schemed to fraudulently sell the stock of American Green, Inc. (“American Green,” the “Company,” and the “Issuer”) to investors in the public United States securities markets.

2. Jacobs and Golusin, individually or through nominee entities under their control, lent money to American Green in exchange for secured convertible debentures, pursuant to which they received millions of American Green shares at a steep discount to the market price. Jacobs and Golusin then misrepresented their control of American Green to American Green's transfer agent, their broker-dealers, and the investing public. They falsely asserted that Jacobs, Golusin, and their nominee entities were not affiliates of American Green in order to remove any trading restrictions and distribute the stock to the public in unregistered, resale transactions.

3. Jacobs and Scuderi, whom Jacobs hired, concurrently generated interest in American Green stock through manipulative trading, promotional campaigns, and false statements to the investing public for the purpose of driving up the stock's price. The Defendants' deceptive promotional campaigns enabled them to artificially generate demand for American Green stock while concealing from prospective purchasers that the shares were being sold, in bulk, by people who controlled the company.

4. The Defendants' pump and dump scheme generated more than \$21 million in net trading proceeds, while retail investors who invested their savings were left with catastrophic losses.

### **DEFENDANTS**

5. Albert Golusin ("Golusin"), age 70, resides in Phoenix, Arizona. From approximately January 2003 through December 2005, Golusin was the chief financial officer ("CFO") of SunnComm Technologies, Inc. and SunnComm International, Inc., predecessor entities of American Green. During the Relevant Period, Golusin continued to serve as the *de facto* CFO of American Green and controlled American Green's finances. Golusin is an active Certified Public Accountant ("CPA") in the State of Arizona.

6. Peter Jacobs (“Jacobs”), age 76, resides in Phoenix, Arizona. From approximately 2000 until he purportedly resigned his positions on February 14, 2011, Jacobs was the President, CEO, and Director of American Green’s predecessor entities: SunnComm, Inc., SunnComm Technologies, Inc., SunnComm International Inc., and The Amergence Group, Inc. As described below, he continued to exercise undisclosed control of American Green during the Relevant Period.

7. John Scuderi (“Scuderi”), age 60, resides in Scottsdale, Arizona. From 2005 to 2009, Scuderi was associated with two different registered broker-dealers and/or investment advisers as a registered representative and senior vice president. He previously held Series 7 and 63 securities licenses. From approximately November 2018 to 2022, Scuderi assisted Jacobs and American Green with, among other things, investor relations and marketing of American Green stock, and held the title of Vice President of Business Development at American Green from approximately November 2018 until at least June 2021.

### **ISSUER**

8. American Green is – and was during the Relevant Period – a non-SEC reporting, microcap public company based in Phoenix, Arizona, and incorporated in Nevada in 1998. American Green has undergone several name changes and changes to its business lines since its inception. In 2014, the company’s name was changed to American Green, Inc., and it changed its domicile from Nevada to Wyoming in 2016. American Green now offers “retailing, branding, and commercial cultivating strategies in conjunction with its ongoing business with various licensed medical marijuana medical and retail dispensaries.” American Green’s common

stock is traded in the United States on OTC Link, whose parent company is OTC Markets Group, Inc. (“OTC Markets”), under ticker symbol ERBB.

9. During the Relevant Period, American Green’s common stock qualified as a penny stock because they did not meet any of the exceptions from the definition of a “penny stock,” pursuant to Section 3(a)(51) of the Exchange Act [15 U.S.C. § 78c(a)(51)] and Rule 3a51-1 thereunder [17 C.F.R. § 240.3a51-1]. Among other things, American Green’s common stock were equity securities: (1) that were not an “NMS [national market system] stock,” as defined in 17 C.F.R. § 242.600(b)(65); (2) traded below five dollars per share during the relevant period; (3) whose issuer had net tangible assets and average revenue below the thresholds of Exchange Act Rule 3a51-1(g) [17 C.F.R. § 240.3a51-1(g)]; and (4) did not meet any of the other exceptions from the definition of “penny stock” contained in Rule 3a51-1 under the Exchange Act [17 C.F.R. § 240.3a51-1].

#### **RELATED ENTITIES**

10. 10th Planet Partners Limited Partnership (“10th Planet”) is an Arizona limited partnership formed in 2004. Jacobs exercised control over 10th Planet’s bank and brokerage accounts during the Relevant Period.

11. Information Investments, LLC (“Information Investments”) is an Arizona limited liability company formed in 2010. Golusin exercised control over Information Investments’ bank and brokerage accounts during the Relevant Period.

12. Libra AGI, LLC (“Libra AGI”) was a Wyoming entity incorporated in 2018. Golusin exercised control over Libra AGI’s bank and brokerage accounts during the Relevant Period. Libra AGI was administratively dissolved by Wyoming in June 2019.

13. Libra PJI (“Libra PJI”), LLC was a Wyoming entity incorporated in 2018. Jacobs was the beneficial owner of Libra PJI during the Relevant Period. Libra PJI was administratively dissolved by Wyoming in June 2020.

14. PanPacific International, Inc. (“PanPacific”) was a Nevada entity incorporated by Jacobs in 2010. Jacobs served as its President. Nevada dissolved PanPacific in 2016, but during the Relevant Period, Jacobs continued operating in its name, including by continuing to use a bank account under his control and signatory authority. PanPacific retained and paid stock promoters on behalf of Jacobs and American Green.

15. Sunrise Communications, LLC (“Sunrise Communications”) is an Oregon entity incorporated in 1998. Jacobs exercised control over Sunrise Communications’ bank and brokerage accounts during the Relevant Period.

16. X Finance Limited Partnership (“X Finance”) is an Arizona limited partnership formed in 2001. Golusin exercised control over X Finance’s bank and brokerage accounts during the Relevant Period.

### **JURISDICTION AND VENUE**

17. This Court has jurisdiction over this action pursuant to Sections 20(d) and 22(a) of the Securities Act [15 U.S.C. §§ 77t(d) and 77v(a)] and Sections 21(d) and 27 of the Exchange Act [15 U.S.C. §§ 78u(d) and 78aa].

18. This court has personal jurisdiction over Defendants, and venue is proper in this district, because certain of the acts, practices, transactions and course of business alleged in this Complaint occurred within the Eastern District of New York, and were effected, directly or indirectly, by making use of means or instrumentalities of transportation or communication in interstate commerce, or the mails. For example, during the Relevant Period, certain individuals who reside in the Eastern District of New York purchased shares of American Green.

19. In connection with the conduct alleged in this complaint, specifically the sale of unregistered securities, the making and dissemination of fraudulent statements, and the undertaking of fraudulent acts and practices, Defendants, directly and indirectly, singly or in concert with others, made use of the means or instrumentalities of interstate commerce, the means or instruments of transportation or communication in interstate commerce, such as through e-mail and telephone.

### **BACKGROUND**

20. Persons who control companies that have stock that is sold to the public are subject to a variety of legal and regulatory requirements. Such registration requirements, sale restrictions, and disclosure obligations are safeguards designed to regulate how corporate insiders or control persons are transacting in that stock.

21. “Restricted stock” is stock of a company whose shares are traded publicly (also known as an “issuer”) that has been acquired from an issuer, or an affiliate of an issuer, in a private transaction that is not registered with the Commission. *See* Securities Act Rule 144(a)(3). Absent an exemption under the federal securities laws and rules, restricted stock cannot legally be offered or sold to the public unless a securities registration statement has been filed with the Commission (for an offer) or is in effect (for a sale). A registration statement contains important information about an issuer’s business operations, financial condition, results of operations, risk factors, management, and major shareholders. *See* Section 7 of the Securities Act [15 U.S.C. § 77g].

22. “Unrestricted stock” is stock that may legally be offered and sold in the public securities marketplace, including by having previously been subject to a registration statement. Registration statements are transaction specific, however, and apply to each separate offer and sale as detailed in the registration statement. Registration, therefore, does not attach to the



security itself, and registration at one stage for one party does not necessarily suffice to register subsequent offers and sales by the same or different parties. Thus, when a control person buys publicly-traded or otherwise unrestricted shares in a company s/he controls, those shares automatically become subject to the legal restrictions on sales by an affiliate, which strictly limit the quantity of shares that may be sold to the public at any one time absent registration.

Affiliates holding stock quoted on the over-the-counter market cannot sell more than one percent of the issuer's outstanding stock in a three-month period. *See* Securities Act Rule 144(e) [17 C.F.R. § 230.144(e)].

23. An “affiliate” of an issuer is a person or entity that, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, such issuer (i.e., a control person). *See* Securities Act Rule 144(a)(1) [17 C.F.R. § 230.144(a)(1)]. “Control” means the power to direct management and policies of the company in question. *See* Securities Act Rule 405 [17 C.F.R. § 230.405]. Affiliates include officers, directors and controlling shareholders, as well as any person who is under “common control” with or has common control of the issuer.

24. A “transfer agent” is a company that, among other things, issues and cancels certificates of a company's stock to reflect changes in ownership. Many companies that have publicly traded securities use transfer agents to keep track of the individuals and entities that own their stock. Transfer agents routinely keep track of whether shares are restricted from resale.

25. OTC Markets is a stock quotation service that facilitates public trading of shares in public companies that are not otherwise listed on national securities exchanges (like NASDAQ or the New York Stock Exchange). Public companies that do not have an obligation to file reports with the Commission may choose to file public reports (such as quarterly and

annual statements) on the OTC Markets website for investors to review and consider when making investment decisions. Posting reports on OTC Markets helps enable common stock to be publicly quoted and traded and unrestricted shares to be issued and deposited into brokerage accounts. *See* Exchange Act Rule 15c2-11 [17 C.F.R. § 240.15c2-11].

26. The Financial Regulatory Authority (“FINRA”) is a self-regulatory organization that, among other things, monitors trading on stock markets and regulates brokerage firms doing business with the public. FINRA investigates potential securities violations and, when appropriate, brings formal disciplinary actions against brokerage firms and their associated persons. FINRA’s investigations may also result in referrals to other state or federal agencies.

27. The practice of promoting a stock without disclosing a present or immediate intent to sell the stock violates the antifraud provisions of the securities laws.

28. “Painting the tape” is a deceptive trading technique employed by submitting multiple buy offers on the same day, often at gradually increasing prices and within a short period of time, for the purpose of artificially inflating the share price and creating the appearance of active trading.

29. “Marking the close” is a form of market manipulation that involves attempting to influence the closing price of a security by executing purchase or sale orders at or near the close of normal trading hours. Such activity can artificially inflate or depress the closing price for the security.

## **FACTS**

### **I. Jacobs and Golusin Exercised Undisclosed Control of American Green**

30. Jacobs and Golusin exercised broad control over American Green. Though American Green’s CEO approved and reviewed some decisions, internal communications show

that American Green's key decisions were frequently made following direction from Jacobs and Golusin, and in some cases without the input of the CEO. While they did not hold official titles at American Green during the Relevant Period, Jacobs and Golusin influenced and exerted significant control over American Green's finances, investor relations, corporate actions, share issuances, and hiring decisions, among other operational issues. Jacobs' and Golusin's involvement permeated all aspects of American Green's business.

31. For example, Jacobs: (i) reviewed, revised, and orchestrated the timing of American Green press releases; (ii) made hiring decisions and controlled which individuals had access to American Green e-mail domain names; (iii) ensured that timely payments were made to OTC Markets so that American Green could continue to disseminate information to investors through the OTC Markets website; (iv) instructed American Green on how to expend funds; (v) drafted and revised American Green's corporate disclosures posted on OTC Markets; and (vi) determined who had access to American Green's marijuana grow facility.

32. As for Golusin, he: (i) was a signatory on the American Green bank account until October 2018; (ii) drafted a misleading response to a surveillance inquiry from FINRA on behalf of American Green, *see* Paragraph 48 below; (iii) drafted and revised American Green's corporate disclosures posted on OTC Markets; (iv) facilitated the issuance of ERBB shares, including by instructing the transfer agent and submitting documentation falsely claiming that Jacobs, Golusin, and their associated entities were not affiliates of American Green; and (v) made decisions regarding American Green's business acquisitions.

33. Jacobs played a pivotal role in restructuring American Green's corporate stock. On August 2, 2019, Jacobs wrote to Golusin, Scuderi, American Green's CEO, and others that "[i]t is essential that ERBB files its 500 to 1 restructure as soon as possible...[f]iling soon will

bring the share value into the acceptable range for trading at many brokerage firms....” On September 23, 2019, American Green underwent a 1:500 reverse stock split.

34. Jacobs had access to the CEO’s e-mail account, which he used to e-mail American Green shareholders and others, as well as to review e-mails that the CEO had written. On July 1, 2018, Jacobs scolded the CEO for providing “wrong” information to an investor when the CEO “answered one out of 75 inquiries we got last week” and asked the CEO to “check with me on Confide [an encrypted messaging app] for updates [about the Company].”

35. In a January 23, 2020 e-mail originating from the CEO’s e-mail address but signed by “Peter,” Jacobs sent to an American Green accountant a contract involving “American Green’s most famous employee/consultant in the cannabis sector...we’ll need to get her the first \$1,000 by tomorrow. Sorry for the short notice....”

36. On May 12, 2020, Scuderi wrote to an American Green employee and Jacobs that a press release needed to be posted on American Green’s Twitter account because “peter [Jacobs] spent a lot of money on this.” Jacobs responded, using the CEO’s e-mail address, attaching an additional press release for dissemination on the Twitter account.

37. Jacobs and Golusin routinely made financial decisions and effectuated transactions on behalf of American Green. For example, on November 8, 2018, Jacobs wrote to Golusin that Jacobs would be “out of shares today and need that new issue to help pay for the administrative charges coming up.”

38. On February 12, 2021, Scuderi asked Jacobs if 5 billion shares were added to American Green’s outstanding share number, and Jacobs responded that “Al [Golusin] did add shares lately.”

39. On January 31, 2022, Scuderi sent Jacobs a press release regarding increased revenues for “AI [Golusin] review.” And on May 12, 2022, Golusin wrote to Jacobs that American Green needed approximately \$700,000 from Jacobs’ nominee entity to close on a real estate purchase. After Jacobs wired the funds, Jacobs wrote to an American Green accountant that “AI [Golusin] will let you know when to send funds to the escrow company. Please check with him before sending.”

40. In addition, Golusin and Jacobs exercised control over American Green’s finances and stock trading activity through their extensive lending and stock ownership in American Green. Jacobs frequently referred to himself as American Green’s largest lender and in one e-mail asked Golusin why the company was not generating more cash flow from its grow operations to offset the “amount the company needs from you and I to pay its bills.”

41. In another e-mail on which Golusin was copied, Jacobs remarked that he was “under constant pressure to create a new stock trading market for” American Green. At times, Golusin and Jacobs appear to have coordinated the sale of American Green shares, such as in April 2017 when Jacobs wrote to Golusin “per your suggestion I have refrained from buying any ERBB shares for about 45 days,” and in October 2021 when Jacobs messaged Golusin on two separate occasions “no sales please” and “no sales today please.”

42. Golusin and Jacobs also frequently drafted, reviewed, and/or uploaded American Green’s corporate disclosures filed on OTC Markets’ website for review by the investing public. Though the CEO reviewed the final disclosures, e-mail correspondence between Golusin and Jacobs show their involvement in drafting and revising the disclosures. For example, in May 2021, November 2021, February 2022, and May 2022, Golusin sent Jacobs American Green’s draft annual and quarterly reports and asked him to revise or add what he thought was

appropriate. Golusin had previously written to Jacobs that the OTC Markets filings were “critical to us depositing more stock because of the disclosures (increased in authorized, debentures outstanding, etc.).” Jacobs also uploaded the reports to OTC Markets on several occasions.

## **II. The Defendants Misrepresented Jacobs’ and Golusin’s Control Over American Green**

43. Despite this extensive control, the Defendants took multiple, affirmative steps to hide Jacobs’ and Golusin’s affiliations with the issuer.

44. OTC Markets required American Green to disclose its “Officers, Directors, and Control Persons” every quarter. The purpose of the disclosure, as explained by the OTC Market Pink Basic Disclosure Guidelines, is to “provide an investor with a clear understanding of the identity of all the persons or entities that are involved in managing, controlling or advising the operations, business development and disclosure of the issuer, as well as the identity of any significant or beneficial shareholders.”

45. Beginning in the reporting period ending December 31, 2017, in contravention of this disclosure requirement, American Green’s OTC Markets filings failed to disclose that Jacobs, Golusin, or any of their nominee entities were control persons of American Green. Golusin and Jacobs frequently drafted and/or reviewed these filings including in May 2021, November 2021, February 2022, and May 2022. The filings misleadingly disclosed that American Green’s officers, directors, and control persons were limited to the CEO and one other individual.

46. On the microcap message board Investorshub.com, investors posted comments with their suspicions that Jacobs was an American Green insider and that he or other Company insiders were using American Green as a vehicle to dump shares. Scuderi, using the pseudonym

“100%,” repeatedly posted messages from 2020 to 2022 in response, in which he denied that Jacobs had any involvement with the Company, despite knowing or being reckless in not knowing that his statements were false.

47. Scuderi’s false posting included the following:

- On December 29, 2020, Scuderi wrote: “Peter Jacobs is Just an investor in ERBB. It is PLAIN AND SIMPLE...Does Peter Jacobs have any say in what ERBB does as an investor, HELL NO!” Four days earlier, Scuderi and Jacobs had worked together to edit a script for an American Green promotional video.
- On August 16, 2021, in response to an investor that wrote “PETER JACOBS IS RUNNING THIS SCAM!,” Scuderi responded: “ZERO PROOF...[Jacobs] is the old president of a company that’s it.” Three days earlier, Scuderi and Jacobs had worked together on an American Green press release, after which Jacobs had told Scuderi to “delete this email and empty your trash after doing that.”
- On January 25, 2022, Scuderi wrote: “JACOBS OLD CEO... COME ON! JACOBS IS AT MOST AN INVESTOR SINCE HE WAS INVOLVED WITH THE OLD COMPANY.” Five days earlier, Scuderi had written to Jacobs that he was working with promoters to boost the stock price, including with a promoter that had told Jacobs he could get the stock price up. Jacobs asked Scuderi to delete the e-mail chain. “Then, go to your trash and delete it again from there.” In November 2021, Jacobs forwarded Scuderi e-mail correspondence with a stock promoter noting that “Peter Jacobs, the president of PanPacific International, handles American Green’s awareness programs.”

48. In 2017, FINRA sought information about Jacobs’ and Golusin’s nominee entities and their relationship to American Green, in connection with an inquiry regarding American Green’s purported purchase of the town of Nipton, California. Jacobs and Golusin drafted a false response, which an American Green employee submitted to FINRA on September 14, 2017.

49. The response falsely stated that 10th Planet Partners – Jacobs’ nominee entity – had not provided any funding for American Green’s purchase of Nipton and that a third party had provided all of the funding. In fact, 10th Planet had provided \$1.25 million of the \$2 million

in funding. Jacobs and Golusin knew, or were reckless in not knowing, that their statement denying Jacobs' involvement in funding American Green's municipal purchase was false.

50. Jacobs and Golusin schemed to disguise the fact that they exercised control over American Green because, as they knew, control persons are required to: (a) register stock sales with the SEC pursuant to Section 5 of the Securities Act [15 U.S.C. § 77e]; (b) sell stock pursuant to an applicable exemption from registration; or (c) sell stock pursuant to the conditions set forth in SEC Rule 144 [17 C.F.R. § 240.144], including limitations on the amount of stock a person can legally sell.

51. Such registration requirements and sale restrictions are critical safeguards designed regulate how corporate insiders or control persons are transacting in a company's stock. In addition, the repeated issuance of shares to insiders would have been important information for investors and other market participants to consider when evaluating whether Jacobs and Golusin were engaging in an unregistered distribution of ERBB shares and whether the company was being used as a vehicle to enrich the company's insiders.

### **III. Jacobs' and Golusin's Scheme to Sell Unregistered American Green Stock**

52. Jacobs and Golusin, individually or through nominee entities under their control, lent money to American Green in exchange for secured convertible debentures, which typically paid 10% per year in interest. If the holder of the debenture – Jacobs, Golusin, or a nominee entity – was not repaid within 365 days, the note became convertible into American Green shares. American Green neither repaid the loans nor paid interest on the loans, so Jacobs and Golusin converted the debentures in satisfaction of the debt and accrued interest and received American Green shares.



53. The conversion formula allowed Jacobs and Golusin to acquire American Green shares at a significant discount to the market price: the debenture holder, at his option, could “convert, and sell on the same day,” any part of the unpaid principal amount of the debenture, plus accrued interest, into shares of American Green’s stock at a price per share equal to fifty percent of the lowest closing bid price of the Company’s stock within the one-year immediately preceding the conversion date. Jacobs described this feature of the convertible debentures as a “double your money guarantee.”

54. During the Relevant Period, Jacobs – through his nominee entities 10th Planet, Libra PJI, and Sunrise Communications – loaned American Green over \$2.5 million, and converted the debentures into more than 7 billion shares of American Green stock. Golusin – individually and through his nominee entities Information Investments, Libra AGI, and X Finance – also loaned American Green over \$2.5 million, and converted the debentures into more than 7 billion shares of American Green stock. Jacobs and Golusin, in brokerage accounts in their name and the names of their nominee entities, then resold these shares of American Green stock to the public in unregistered transactions.

55. The Defendants’ scheme generated more than \$21 million in net trading proceeds. Specifically, Jacobs and his nominee entities realized trading profits of over \$11 million, while Golusin and his nominee entities realized trading profits of over \$10 million.

**A. Jacobs’ and Golusin’s Extensive Unregistered Resales**

56. The shares acquired through the convertible debentures were not registered under the Securities Act and thus could only be deemed unrestricted and sold to the public if they qualified for an exemption under the Securities Act. In addition, as the Defendants knew, affiliates of American Green would be subject to limitations on the volume of stock that they

could sell in any given period. In May 2020, Scuderi wrote to Jacobs that the “SEC definition of affiliate is broad,” and Jacobs acknowledged that affiliates are subject to volume limitations on the amount of stock that they can sell during any three-month period.

57. The number of shares that Jacobs and Golusin sold in unregistered resale transactions constituted significant percentages of American Green’s total outstanding shares.

58. As discussed further below, their resales repeatedly exceeded Securities Act Rule 144’s limitation that an affiliate shall not sell more than one percent of the Company’s outstanding shares during any 90-day period.

**B. Jacobs and Golusin Misrepresented Their Affiliate Status**

59. Whenever Jacobs and Golusin converted the debentures, American Green was required to submit to its transfer agent documentation with instructions regarding the issuance of shares to Jacobs and Golusin. Golusin typically controlled American Green’s correspondence with the transfer agent, and repeatedly instructed the transfer agent, on behalf of American Green and with the awareness of Jacobs, to issue unrestricted shares to Jacobs and Golusin.

60. With these instructions, Golusin repeatedly submitted attorney opinion letters to American Green’s transfer agent that contained false information supplied by Golusin asserting that Jacobs, Golusin, and their nominee entities were not affiliates of American Green. Based upon Golusin’s submission of the attorney opinion letters containing the false representations, as well as Jacobs’ submission of a false attorney opinion letter on at least one occasion, the transfer agent issued the unrestricted shares.

61. After the shares were issued, Golusin and Jacobs typically deposited the shares into brokerage accounts. The broker-dealers’ procedures for depositing the shares required the submission of stock deposit forms regarding the shares’ origination, including disclosure by

Golusin and Jacobs as to whether either was an “affiliate/control person” of American Green. On more than a dozen occasions, Golusin and Jacobs each falsely responded “no.” In connection with the deposits, Golusin and Jacobs also submitted “144 Seller’s Letters” in which they signed letters falsely affirming that they were not affiliates of the Company.

62. For example, on July 29, 2020, Golusin provided Jacobs with the documents necessary to deposit 68,750,000 ERBB shares into a brokerage account at Broker-Dealer A in the name of Sunrise Communications. Golusin wrote: “PJ: Sign the SDR [securities deposit request form] and 144 letter and send [the B-D] the signed docs.” The request form falsely stated that Sunrise, controlled by Jacobs, was not involved in promoting American Green and that Jacobs was not an affiliate of American Green. After Jacobs signed and submitted the securities deposit request, the broker-dealer accepted the deposit of shares on July 30. Jacobs messaged Golusin on July 31st: “Congratulations! You did it again...Deposit with no questions asked.”

**C. The Defendants Engaged in Additional Deceptive Acts to Generate Interest in American Green Stock Before Dumping Their Shares**

63. Once the shares were deposited, the Defendants primed the market by generating public interest in the stock while unloading Golusin’s and Jacobs’ shares. The Defendants generated investor demand in several ways, including through: (a) internet promotions, disseminating American Green press releases, and posting favorable information on a popular stock message board; and (b) manipulative trading. Golusin and/or Jacobs then sold their stock into the investor demand without disclosing their financing of the promotions.

**1. The Promotional Campaigns and Related Misrepresentations**

64. During the Relevant Period, Jacobs, with the knowledge and assistance of Golusin and Scuderi, worked to promote American Green stock and orchestrated numerous promotional campaigns while Golusin and Jacobs were selling shares.

65. In March 2022, for example, Jacobs, through his nominee entity PanPacific, entered into an agreement with a stock promoter, whereby the promoter agreed to generate \$175,000 of liquidity in American Green stock in exchange for \$25,000. Jacobs and Scuderi reviewed the agreement, and Scuderi signed it on behalf of PanPacific.

66. In total, during the Relevant Period, Jacobs, through his nominee entity PanPacific, paid stock promoters at least \$400,000. American Green directly paid at least \$75,000 towards promotional campaigns orchestrated by Jacobs.

67. Jacobs repeatedly forwarded stock promoter invoices to Golusin, in some cases asking to discuss the invoices with him. For example, a March 25, 2020 e-mail from Jacobs to Golusin stated “Contestant #1 for review” and attached a stock promoter’s description of services and pricing. In another e-mail exchange, Jacobs sent stock promoter invoices, totaling \$40,000, to Golusin and asked him to “Please calculate your participation and send your percentage through AG [American Green] to me to PanPacif[i]c when the funds are available.”

68. The aim of these promotional efforts was to generate buying interest in American Green stock so that Jacobs and Golusin could unload their shares at a high profit. For instance, in one January 21, 2022 e-mail exchange, Scuderi wrote to Jacobs that he was working with promoters to boost the stock price, including with a promoter that had told Jacobs he could get the stock price up; in response, Jacobs told Scuderi to delete the e-mail chain and “[t]hen, go to your trash and delete it again from there.”

69. Jacobs communicated with stock promoters and kept Golusin informed about the promotional campaigns and the timing of stock sales. Scuderi occasionally helped Jacobs with promoting the stock. In some cases, Jacobs acknowledged he was seeking to avoid regulatory scrutiny and encouraged others to delete evidence of communications about stock promotions.

70. For example:

- On March 15, 2018, Jacobs wrote to a stock promoter that the “company is extremely loyal to [stock promoter] entities that can be effective without doing anything to attract regulatory attention.”
- On January 6 and January 7, 2020, Jacobs wrote to Golusin and others regarding a stock promoter that had been engaged for a “30 day full-on” plan. After sending the e-mails, Jacobs wrote to one of the recipients: “ps empty your trash.”
- On August 13, 2021, Scuderi wrote to Jacobs that he and Jacobs had put a lot of work into the upcoming American Green press release, with assistance from a promoter. Jacobs asked Scuderi to “delete this email and empty your trash after doing that.”

71. In many cases, the promotional campaigns were timed with Jacobs’ and Golusin’s stock sales.

72. For example, on October 24, 2017, Jacobs wrote to Golusin and others that a stock promoter would be doing a report on American Green. On October 26, 2017, Jacobs, through PanPacific, transferred \$2,500 to the promoter. From October 2017 until March 2018, Jacobs corresponded with the promoter about the report, including by making edits to the report and circulating it to Golusin and others. On March 14, 2018, Jacobs asked the promoter to release the report the next day, and the promoter confirmed that he released it on March 15, 2018 on a penny stock promotion website.

73. The report stated, among other things, that American Green was “well-positioned to benefit from the Green Rush” but failed to disclose that the report was paid for by Jacobs or that Jacobs was selling American Green stock. Jacobs later referred to the report facetiously as an “outside report” (quotation marks in original). After publication of the paid promotional report, from March 15, 2018 until March 29, 2018, an entity controlled by Golusin sold 184 million ERBB shares for gross proceeds of over \$195,000, and an entity controlled by Jacobs sold over 192 million shares of American Green for gross proceeds of over \$206,175.

74. These sales were not exempt from registration under Securities Act Rule 144 because, as affiliates, Golusin and Jacobs could sell no more than 1% of the company's outstanding shares during any three-month period. As reflected in the chart below, Golusin's and Jacobs' sales from January through March 2018 comprised significantly more than 1% of the company's outstanding shares and in fact comprised 3.91% and 4.24%, respectively, of American's Green's outstanding shares:

<b>Selling Party</b>	<b>Dates</b>	<b>Total Shares Sold</b>	<b>Shares Outstanding Per OTC Markets Filing</b>	<b>Total Shares Sold in 90 Day Period vs. Outstanding</b>
Albert Golusin	1/5/2018 to 3/29/2018	747,049,091	19,121,569,077	3.91%
Sunrise Communications (Peter Jacobs' entity)	1/5/2018 to 3/29/2018	811,235,121	19,121,569,077	4.24%

75. The sales also did not qualify for any other applicable exemption from registration.

76. On September 20, 2019, an entity Jacobs controlled hired a stock promoter "to get the word out on ERBB next week," concurrent with the announcement of the 1:500 reverse stock split that Jacobs had advocated to Golusin and the CEO. The promotion included newsletters, SMS blasts, and website traffic generation. According to Jacobs, the goal of the promotion, combined with the reverse split, was to return American Green to the "5 cent + range after the week is up." Jacobs informed Golusin of the upcoming promotion, noting that it would run at the same time that the company issued a news release.

77. The promotional materials disseminated by the promoter from approximately September 23, 2019 until October 2, 2019, made claims that American Green had been “oversold and could be ready for a major bounce higher” that it had “900% upside potential,” and that it was a “potential gem” to look at “before recent events matriculate to a larger audience.” The promotional materials contained materially incomplete or inaccurate disclosures, including that the promotional materials were paid for by a “non-affiliated third party” and that the third party “*may* hold free-trading shares of the company.”

78. From September 23, 2019 until the end of October 2019, an associate of Jacobs sold over 3.8 million shares of American Green for gross proceeds of over \$230,000. In October 2019, the associate wired \$154,794 to Jacobs’ nominee entity 10th Planet Partners pursuant to an agreement to kick back most of the trading profits to Jacobs.

79. On January 27, 2020, Jacobs wrote to a stock promoter: “Good talk, we are now on the same page, this is the marketing we need. Running 2/3 – 2/7.” Jacobs forwarded the e-mail to Golusin and wrote: “This is a big one. Talk to me on the phone about this.” Jacobs attached an invoice directed to American Green for \$22,500, which included “Newsletter and SMS blast” promotions.

80. Beginning on February 3, 2020, the newsletter blasts were disseminated, generating enthusiasm in ERBB by making claims such as that “ERBB is a unique and overlooked opportunity that could experience increased growth potential.” On February 4, 2020, a separate stock promoter sent Jacobs an invoice for “bid support, some offer support,” and “marketing.” Jacobs wrote to the promoter that he used an encrypted app to communicate. Also on February 4, 2020, American Green issued a press release that had been edited and reviewed in advance by Jacobs and Scuderi.

81. On February 4, 5, and 7, 2020, brokerage accounts in the name of and controlled by Jacobs and Scuderi placed buy orders for small quantities of American Green stock in the last ten minutes of the trading day. Jacobs and Scuderi logged into the brokerage accounts on February 4 and February 5, 2020, from the same IP address.

82. In February 2020, Jacobs and Golusin generated tens of thousands of dollars in trading profits by selling into the demand created by the stock promotions. Jacobs' entity 10th Planet Partners sold over 13 million shares of ERBB for proceeds of over \$60,000. Golusin's entity X Finance sold over 16 million shares of ERBB for proceeds of over \$71,000.

83. These sales were not exempt from registration under Securities Act Rule 144 because, as affiliates, Golusin and Jacobs could sell no more than 1% of the company's outstanding shares during any three-month period. As reflected in the chart below, Golusin's and Jacobs' sales from January through March 2020 comprised significantly more than 1% of the company's outstanding shares and in fact comprised 40.1% and 27.1%, respectively, of American Green's outstanding shares:

<b>Selling Party</b>	<b>Dates</b>	<b>Total Shares Sold</b>	<b>Shares Outstanding Per OTC Markets Filing</b>	<b>Total Shares Sold in 90 Day Period vs. Outstanding</b>
X Finance Limited Partnership (Golusin's entity)	1/2/2020 to 3/31/2020	54,049,723	134,744,610	40.1%
Sunrise Communications (Jacobs' entity)	2/3/2020 to 3/30/2020	37,297,744	134,744,610	27.1%

84. Golusin and Jacobs exceeded Rule 144's 1% threshold for the 90-day period following the majority of the Company's disclosed outstanding share amounts posted on OTC



Markets' from December 31, 2016 until June 30, 2022. The sales did not qualify for any other applicable exemption from registration.

85. In addition, the stock promotions orchestrated by Jacobs, Golusin, and Scuderi contained misleading or inaccurate disclosures that concealed that Jacobs and Golusin were responsible for the promotions.

86. For example, on June 29, 2021, a promoter sent Jacobs a report that the promoter said he could disseminate the next Monday. The report falsely claimed that the promoter had “no association with anyone, or any group, with any plan to acquire, purchase, sell, trade or transfer these shares.” It also falsely stated that the “party responsible for the production of this report owns no common stock and/or warrants in subject Company in any way, shape, or form.” On July 7, 2021, the promoter disseminated the report. Jacobs knew or was reckless in not knowing that the report falsely disavowed any association with him. On July 7 and 8, 2021, Golusin and an entity that was trading in American Green and sharing the majority of its profits with Jacobs sold over 6 million shares of American Green for gross proceeds of over \$29,000.

87. On May 4, 2022, Scuderi posted a link on a popular stock message board to a supposed report by a “third-party research firm.” The report claimed that it “expect[s] strong growth prospects for American Green” and that the “management team has a strong history of commitment to shareholder value.” The report disclosed that the report’s publisher had been compensated \$2,500 by a “third party” and that the “party responsible for the production of this report owns no common stock and/or warrants in the subject Company in any way, shape or form.” Nowhere did the report disclose that Jacobs paid for the report and that, in fact, Jacobs and Golusin were liquidating shares in April and May 2022, at the same time that the report claimed strong growth prospects for American Green. Scuderi himself had been involved in

editing and approving the report and knew or was reckless in not knowing that the report's claim about the party responsible for the report owning no stock was false.

88. On May 30, 2022, Jacobs sent Scuderi an e-mail showing 10th Planet's sales of ERBB for the month of May 2022. He also wrote that he would be moving to an encrypted app "almost exclusively for confidential stuff." In response, Scuderi advised Jacobs to remember to "set each individual person to disappearing messages."

89. On numerous occasions, Jacobs concealed his involvement in promotional campaigns through false and misleading statements to broker-dealers. For example,

- On December 25, 2019, Jacobs wrote to Broker-Dealer A that he was not "currently engaged in public relations, fund raising, or stock promotion for any OTCBB/Pink Sheet Company." Jacobs knew or was reckless in not knowing that this statement was false given that Jacobs was involved heavily in orchestrating promotional campaigns for American Green throughout December 2019 and January 2020.
- On March 3, 2020, Jacobs signed a deposit representation form in connection with 10th Planet Partners depositing shares of ERBB with Broker-Dealer A. In response to the question whether he was "currently promoting...or plan[ning] to promote or engage a third party to promote" the issuer's securities, Jacobs falsely answered "no." However, just the previous day, Jacobs had been corresponding with a stock promoter who had told him "We stay under the radar. Not stock promotion flags etc." Similarly, on March 26, 2020, Jacobs submitted another deposit representation form to Broker-Dealer A in connection with Sunrise Communications, again falsely stating he was not planning to engage a third party to promote the issuer's securities. However, just the previous day, on March 25, 2020, Jacobs through PanPacific wired the promoter \$10,000 in exchange for stock promotion services.
- On January 26, 2021, Jacobs wrote to a stock promoter regarding an outstanding invoice that "PanPacific is hired by 10th Planet to do awareness." On February 15, 2021, Jacobs submitted a stock deposit representation form falsely stating that he was not involved in promoting or engaging a third party to promote American Green's securities in order to deposit shares into a brokerage account in the name of 10th Planet. Jacobs continued to orchestrate promotional activity throughout February 2021.

90. Jacobs knew or was reckless in not knowing that his statements to broker-dealers were false given his involvement in stock promotional campaigns.

91. Scuderi, again using the pseudonym “100%”, disseminated statements on an investor message board to generate additional interest in American Green stock. For example:

- On March 28, 2018, Scuderi wrote, “If I was unhappy with ERBB, I would sell it. But, I love it. I load up at these low levels.”
- On January 16, 2019, Scuderi wrote, “MADE A TON OF MONEY BUYING AND SELLING ERBB.”
- On June 11, 2020, Scuderi wrote, “Basically no risk in a company with massive upside.”
- July 19, 2021, Scuderi wrote on an investor message board that “ERBB has never paid for a promo...erbb does not pay for articles and never will.”
- On July 31, 2022, Scuderi wrote on an investor message board that “AMERICAN GREEN DOES NOT AND NEVER HAS PAID FOR A PROMO.”

92. Scuderi knew or was reckless in not knowing that his statements about his own trading and about American Green never paying for a stock promotion were false because of his involvement in his own trading and in American Green stock promotions.

93. Golusin and Jacobs also concealed American Green’s involvement in orchestrating stock promotion campaigns in the filings made with OTC Markets that Golusin and Jacobs drafted and reviewed. Each of American Green’s periodic filings on OTC Markets listed “none” when asked to disclose an investor relations consultant. Yet both Golusin and Jacobs were aware that statement was false because American Green was retaining service providers to assist with investor relations.

94. For example, on February 4, 2020, Jacobs wrote to Golusin that he had paid two invoices to a stock promoter, the first “in full through AG [American Green] but the second from PanPacific.” He attached the invoices addressed to American Green, totaling \$40,000, which billed for a “marketing program” and “SMS blasts,” among other things. On May 4, 2020, Golusin sent the American Green “quarterly reports ready to be uploaded unless there are some corrections or comments” to Jacobs and the CEO. On or around May 4, 2020, the quarterly

report covering the period from January 1, 2020 through March 31, 2020 was uploaded to the OTC Markets website, and falsely listed “none” in response to whether American Green had retained any investor relations consultants.

## **2. Jacobs’ and Scuderi’s Manipulative Trading**

95. To aid Jacobs’ and Golusin’s sales, Jacobs and Scuderi engaged in numerous instances of manipulative trading activity by “painting-the-tape” and “marking-the-close.”

96. Beginning in 2017, Jacobs began using accounts at Broker-Dealers B, C, and D to place successive buy limit orders in American Green. For example, as reflected in the chart below, on September 29, 2017, Jacobs placed five successive buy limit orders at Broker-Dealer B, gradually increasing the price of the limit order from \$.0016 to \$.0017 over the course of the five orders.

<b>Order Date</b>	<b>Order Time</b>	<b>Ticker</b>	<b>Quantity</b>	<b>Buy Limit Price</b>
9/29/2017	3:55:34 p.m.	ERBB	2,000,000	\$.0016
9/29/2017	3:57:21 p.m.	ERBB	1,000,000	\$.0016
9/29/2017	3:58:01 p.m.	ERBB	1,000,000	\$.0016
9/29/2017	3:58:39 p.m.	ERBB	1,000,000	\$.0017
9/29/2017	3:59:13 p.m.	ERBB	500,000	\$.0017

97. Also on September 29, 2017, Jacobs through Sunrise Communications sold 7,000,000 shares of ERBB through an account at Broker-Dealer A for total proceeds of \$10,500.

98. On October 16, 2017, Broker-Dealer B informed Jacobs that it was exercising its discretion to end its relationship with Jacobs.

99. Beginning in December 2017, Jacobs also began placing successive buy limit orders at the end of the trading day at Broker-Dealer C. For example, Jacobs placed such orders on December 7, 13, 14, and 15, 2017.

100. Broker-Dealer C detected Jacobs' activity and informed him by letter on December 19, 2017, to cease submitting orders which have the appearance of attempting to manipulate the price of a stock. The letter included the following chart of such trades:

Trade Date	Execution Time	Execution Quantity	Symbol	Market / Limit	Limit Price	Prior Trade	Executed Price(s)
12/15/2017	15:59:30	100,000	ERBB	Limit	\$0.0013	\$0.0013	\$0.0013
12/15/2017	15:59:02	50,000	ERBB	Limit	\$0.0013	\$0.0012	\$0.0012
12/14/2017	15:58:58	50,000	ERBB	Limit	\$0.0013	\$0.0012	\$0.0013
12/14/2017	15:57:45	50,000	ERBB	Limit	\$0.0013	\$0.0012	\$0.0013
12/13/2017	15:58:45	100,000	ERBB	Limit	\$0.0013	\$0.0013	\$0.0013
12/13/2017	15:56:31	100,000	ERBB	Limit	\$0.0013	\$0.0012	\$0.0013
12/07/2017	15:55:50	250,000	ERBB	Limit	\$0.0013	\$0.0011	\$0.0013
12/07/2017	15:55:14	500,000	ERBB	Limit	\$0.0013	\$0.0011	\$0.0013
12/07/2017	15:53:50	240,000	ERBB	Limit	\$0.0012	\$0.0012	\$0.0012
12/07/2017	15:53:43	10,000	ERBB	Limit	\$0.0012	\$0.0012	\$0.0012
12/07/2017	15:53:04	500,000	ERBB	Limit	\$0.0012	\$0.0012	\$0.0012
12/07/2017	15:52:23	490,000	ERBB	Limit	\$0.0012	\$0.0012	\$0.0012
12/07/2017	15:52:19	10,000	ERBB	Limit	\$0.0012	\$0.0012	\$0.0012
12/07/2017	15:51:28	250,000	ERBB	Limit	\$0.0012	\$0.0012	\$0.0012
12/07/2017	15:50:34	250,000	ERBB	Limit	\$0.0012	\$0.0012	\$0.0012
12/07/2017	15:49:57	250,000	ERBB	Limit	\$0.0012	\$0.0011	\$0.0012

101. During the same time period that Jacobs placed successive buy orders at the end of the trading day at Broker-Dealer C, he also sold millions of ERBB shares out of a brokerage account at Broker-Dealer A. From December 7, 2017, through December 15, 2017, Jacobs through Sunrise Communications sold 129,000,000 ERBB shares for gross proceeds of \$129,800.

102. On January 8, 2018, Broker-Dealer C informed Jacobs that it was closing his account. On February 7, 2018, Jacobs asked Broker-Dealer C for reconsideration in an e-mail, stating that “My dad, who taught me to trade, told me that the best price for a stock during the day often comes at the end of the trading day.”

103. Jacobs also used an account at Broker-Dealer D to place successive buy orders at the end of the trading day beginning in February 2017. Jacobs had previously opened the account at Broker-Dealer D in July 2016.

104. By August 13, 2018, Broker-Dealer D detected Jacobs’ activity and requested an explanation for his May, June, and July 2018 trades. The letter included a chart of the trading that raised concerns about “marking the close.”

Exchange	Account ID	Account Title	Trade Date	Symbol	TRADE TIME	EXECUTION QUANTITY	EXECUTION PRICE	CLOSING PRICE OF STOCK
CITDLPNK	U1846354	Peter H Jacobs	20180726	ERBB	155953	100000	0.0009	0.0009
CITDLPNK	U1846354	Peter H Jacobs	20180725	ERBB	155952	100000	0.0009	0.0009
CITDLPNK	U1846354	Peter H Jacobs	20180720	ERBB	155951	100000	0.001	0.0009
CITDLPNK	U1846354	Peter H Jacobs	20180718	ERBB	155949	100000	0.001	0.001
CITDLPNK	U1846354	Peter H Jacobs	20180716	ERBB	155954	100000	0.001	0.001
CITDLPNK	U1846354	Peter H Jacobs	20180713	ERBB	155952	100000	0.001	0.001
CITDLPNK	U1846354	Peter H Jacobs	20180712	ERBB	155949	100000	0.001	0.001
CITDLPNK	U1846354	Peter H Jacobs	20180710	ERBB	155954	100000	0.001	0.001
ARCAEDGE	U1846354	Peter H Jacobs	20180706	ERBB	155952	100000	0.001	0.001
CITDLPNK	U1846354	Peter H Jacobs	20180705	ERBB	155952	100000	0.001	0.001
CITDLPNK	U1846354	Peter H Jacobs	20180702	ERBB	155922	100000	0.001	0.001
CITDLPNK	U1846354	Peter H Jacobs	20180627	ERBB	155946	100	0.00095	0.00095
CITDLPNK	U1846354	Peter H Jacobs	20180606	ERBB	155956	100000	0.0011	0.0011
CITDLPNK	U1846354	Peter H Jacobs	20180605	ERBB	155956	100000	0.0011	0.0011
CITDLPNK	U1846354	Peter H Jacobs	20180530	ERBB	155957	100000	0.0011	0.0011
CITDLPNK	U1846354	Peter H Jacobs	20180529	ERBB	155955	100000	0.0011	0.0011
CITDLPNK	U1846354	Peter H Jacobs	20180518	ERBB	155956	100000	0.0012	0.0012
CITDLPNK	U1846354	Peter H Jacobs	20180515	ERBB	155955	100000	0.0012	0.0012
CITDLPNK	U1846354	Peter H Jacobs	20180514	ERBB	155956	100000	0.0012	0.0012
CITDLPNK	U1846354	Peter H Jacobs	20180509	ERBB	155955	100000	0.0012	0.0012



105. Jacobs responded that he had no intention of marking the close and that he trades at the “beginning or end of the day because [his] Dad told [him] that’s when [he] can get the best price for the day.” Broker-Dealer D did not close Jacobs’ account in part because it had “trouble finding direct connections between Mr. Jacobs and ERBB.” Unbeknownst to Broker-Dealer D, however, around this same period, in August 2018 Jacobs, in fact, reviewed and edited American Green promotional materials, controlled access to the American Green e-mail address domains, and corresponded about American Green invoices and payments.

106. In May, June, and July 2018, while Jacobs was marking the close in an account at Broker-Dealer D, simultaneously Jacobs, through Libra PJI, sold 234,675,000 ERBB shares for total proceeds of \$220,305.49 at Broker-Dealer F.

107. In March 2018, Jacobs opened an account at Broker-Dealer E. He began using the account to trade in ERBB in September 2019, including by placing successive buy limit orders. Jacobs gave Scuderi access to his trading account at Broker-Dealer E and allowed Scuderi to place manipulative trades in the account.

108. For example, on January 20, 2022, Scuderi wrote to Jacobs that “No one came through for us and I am not happy. I reached out to the [stock promoters] and ... told [them] that I could not buy more stock and help him today I already bought 500 worth. And of course you told me he said he could get to 41 42.” Upon receiving the e-mail, Jacobs asked Scuderi to “delete this response, along with your email. Then, go to your trash and delete it again from there.” That same day, an individual believed to be Scuderi used Jacobs’ account at Broker-Dealer D to purchase ERBB shares in the amount of \$487.50, using three successive limit orders. The stock was trading at “39” ten thousandths of a cent at the time of the purchases.

109. On May 16, 17, and 18, 2022, Jacobs' account at Broker-Dealer E placed successive buy orders at the very end of the trading day.

<b>Date</b>	<b>Time</b>	<b>Order Quantity</b>	<b>Buy Limit Order Share Price</b>
5/16/2022	3:58:55 p.m.	25000	\$0.0031
5/16/2022	3:59:53 p.m.	30000	\$0.0032
5/17/2022	3:56:43 p.m.	50000	\$0.0031
5/17/2022	3:57:58 p.m.	50000	\$0.0031
5/18/2022	3:53:47 p.m.	20000	\$0.003
5/18/2022	3:54:39 p.m.	10000	\$0.0029

110. On May 18, 2022, Scuderi wrote to another individual that the “promo guy has asked for more posts than normal today. We r not getting buy volume we expected yet.” He later wrote that it was a “rock fight regarding stock price today.” Later that week, on May 20, 2022, Scuderi wrote to a stock promoter regarding clicks on a press release and assistance “fighting the bashers” on an investor message board. Scuderi also wrote: “Wish we had a better week, We pulled out all the stops and could not do it. Really one of the few times we could not get movement. We will get them next time. Thanks for the effort.”

111. Scuderi also used trading accounts in his own name to place manipulative trades in ERBB. In August 2018, Scuderi opened an account at Broker-Dealer B. Scuderi concealed his employment with American Green on his account application, despite Jacobs having named Scuderi in an e-mail as “American Green’s product manager” in May 2018 and Scuderi’s assisting American Green with its CBD and hemp oil products from at least May through August 2018. Scuderi used this account at Broker-Dealer B, including by logging into the account from an IP address registered to PanPacific, to mark-the-close in ERBB from August 2018 through



December 2019.

112. Scuderi again concealed his employment with American Green on November 19, 2019, when he told Broker-Dealer B on a recorded phone call that he had “no employer right now.” That same day, Scuderi, in his capacity as “Vice President of Business Development” for American Green, using a “john@americangreen.com” e-mail address, corresponded with Jacobs and a counterparty in preparation for an American Green press release to be issued the following week.

113. On October 3, 2018, Scuderi opened a brokerage account at Broker-Dealer D. Scuderi again concealed his employment at American Green in his account opening paperwork.

114. On April 13, 2020, Broker-Dealer D warned Scuderi about trading activity in his account that appeared to constitute marking the close.

115. On May 29, 2020, Scuderi placed 11 orders in the last 30 minutes of the trading day in his account at Broker-Dealer D, raising the trading price by a fraction of a penny just before closing.

116. On July 28, 2020, Broker-Dealer D again warned Scuderi about trading activity in his account that appeared to constitute marking the close.

117. Despite Broker-Dealer D’s two previous warnings, on December 14, 2020, Scuderi placed four orders within the last ten minutes of the trading day in his account at Broker-Dealer D. For three of his trades, Scuderi paid \$0.0038 per share even though the stock traded at a bid of \$0.0036 just prior to the trades. Scuderi’s last trade of the day set the closing price.

118. On February 4, 2021, and March 2, 2021, Broker-Dealer D again warned Scuderi about marking the close.

119. In March 2021, Broker-Dealer D closed Scuderi’s account.

**FIRST CLAIM FOR RELIEF**

**Violations of Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder  
(All Defendants)**

120. Paragraphs 1 through 119 above are re-alleged and incorporated by reference as if fully set forth herein.

121. By engaging in the conduct described above, Defendants Golusin, Jacobs, and Scuderi, directly or indirectly, in connection with the purchase or sale of securities, by use of means or instrumentalities of interstate commerce, or of the mails:

- a. Employed devices, schemes, or artifices to defraud;
- b. Made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and
- c. Engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons, including purchasers of securities.

122. By reason of the foregoing, Defendants Golusin, Jacobs, and Scuderi violated, and unless restrained and enjoined will continue to violate, Section 10(b) of the Exchange act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

**SECOND CLAIM FOR RELIEF**

**Violations of Section 17(a) of the Securities Act  
(All Defendants)**

123. Paragraphs 1 through 119 above are re-alleged and incorporated by reference as if fully set forth herein.

124. By engaging in the conduct described above, Defendants Golusin, Jacobs, and Scuderi, directly or indirectly, in the offer or sale of securities, by use of the means or instruments of transportation or communication in interstate commerce or by the use of the mails:

- a. employed devices, schemes, or artifices to defraud;
- b. obtained money or property by means of untrue statements of material fact or by omitting 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; and
- c. engaged in transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon purchasers.

125. By reason of the foregoing, Defendants Golusin, Jacobs, and Scuderi violated, and unless restrained and enjoined will continue to violate, Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)].

### **THIRD CLAIM FOR RELIEF**

#### **Violations of Sections 5(a) and 5(c) of the Securities Act (Golusin and Jacobs)**

126. Paragraphs 1 through 119 above are re-alleged and incorporated by reference as if fully set forth herein.

127. By reason of the conduct described above, Golusin and Jacobs, directly or indirectly: (a) made use of the means or instruments of transportation or communication in interstate commerce or of the mails to sell, through the use or medium of a prospectus or otherwise, American Green securities as to which no registration statement has been in effect and

for which no exemption from registration has been available; and/or (b) made use of the means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, through the use or medium of a prospectus or otherwise, American Green securities as to which no registration statement has been filed and for which no exemption from registration has been available.

128. As a result, Golusin and Jacobs violated Securities Act Sections 5(a) and 5(c) [15 U.S.C. §§ 77e(a) and (c)] and will continue to violate those sections unless enjoined.

### **PRAYER FOR RELIEF**

Wherefore, the SEC respectfully requests that the Court:

#### **I.**

Issue findings of fact and conclusions of law that Defendants committed the alleged violations.

#### **II.**

Issue judgments, in forms consistent with Rule 65(d) of the Federal Rules of Civil Procedure, permanently enjoining Defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with any of them, who receive actual notice of the judgment by personal service or otherwise, and each of them, from violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

#### **III.**

Issue judgments, in forms consistent with Rule 65(d) of the Federal Rules of Civil Procedure, permanently enjoining Defendants Golusin and Jacobs, as well as their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with

them who receive actual notice of the injunction by personal service or otherwise, and each of them, from violating Section 5(a) and 5(c) of the Securities Act [15 U.S.C. § 77e(a) and (c)];

**IV.**

Order Defendants to disgorge all funds received from their illegal conduct, together with prejudgment interest thereon, pursuant to Section 21(d)(3), (5), and (7) of the Exchange Act [15 U.S.C. § 78u(d)(3), (5) and (7)].

**V.**

Order Defendants to pay civil penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)].

**VI.**

Enter an order barring Defendants from participating in any offering of a penny stock, pursuant to Section 20(g) of the Securities Act [15 U.S.C. § 77t(g)] and Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)].

**VII.**

Enter an order barring Defendants Jacobs and Golusin from serving as an officer or director of a public company pursuant to Section 20(e) of the Securities Act [15 U.S.C. § 77t(e)] and 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)].

**VIII.**

Enter an order permanently restraining and enjoining Defendants Golusin, Jacobs, and Scuderi, pursuant to Section 20(b) of the Securities Act [15 U.S.C. § 77t(b)] and/or Sections 21(d)(1) and (5) of the Exchange Act [15 U.S.C. §§ 78u(d)(1) and (5)], from directly or indirectly, including, but not limited to, through any entity owned or controlled by each of them, participating in the issuance, purchase, offer, or sale of any security, provided however, that such

injunction shall not prevent each of them from purchasing or selling securities for each of their own personal accounts;

**IX.**

Retain jurisdiction of this action in accordance with the principles of equity and the Federal Rules of Civil Procedure in order to implement and carry out the terms of all orders and decrees that may be entered, or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court; and

**X.**

Grant such other and further relief as this Court may determine to be just and necessary.

**JURY DEMAND**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands that this case be tried to a jury.

DATED: April 29, 2025

Respectfully submitted,

/s/ P. Davis Oliver  
P. Davis Oliver  
James Carlson

Attorneys for the Plaintiff

SECURITIES AND EXCHANGE COMMISSION  
100 F. Street, NE  
Washington, D.C. 20549  
Telephone: (202) 551-8920

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

## I. (a) PLAINTIFFS

## SECURITIES AND EXCHANGE COMMISSION

(b) County of Residence of First Listed Plaintiff \_\_\_\_\_  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

P. Davis Oliver and James Carlson, SEC, 100 F. St. NE  
Washington, DC 20549 (202) 551-8920 (Oliver); (202)  
551-3711 (Carlson)

## DEFENDANTS

Albert Golusin, Peter Jacobs, John Scuderi

County of Residence of First Listed Defendant Maricopa County  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF  
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

For Golusin: Milena Dolukhanyan, Gartenberg, Gelfand,  
Dolukhanyan LLP, 15303 Ventura Blvd, Suite 900,  
Sherman Oaks, CA 91403

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☒ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |                                         | PTF                        | DEF                        |                                                               | PTF                        | DEF                        |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation                                                | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice <b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>INTELLECTUAL PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input checked="" type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education <b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

## V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
Securities Act of 1933; Securities Act of 1934

Brief description of cause:

SEC enforcement action alleging violations of the anti-fraud and registration provisions of the federal securities laws.

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

04/29/25

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

**CERTIFICATION OF ARBITRATION ELIGIBILITY**

Local Arbitration Rule 83.7 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

Case is Eligible for Arbitration ☐

I, **P. Davis Oliver**, counsel for **SEC**, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- ☒ monetary damages sought are in excess of \$150,000.00 exclusive of interest and costs,
- ☒ the complaint seeks injunctive relief, or
- ☐ the matter is otherwise ineligible for the following reason:

**DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1**

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks. Add an additional page if needed.

None

**RELATED CASE STATEMENT (Section VIII on the Front of this Form)**

Please list all cases that are arguably related pursuant to Division of Business Rule 3 in Section VIII on the front of this form. Rule 3(a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 3(a) provides that "A civil case shall not be deemed "related" to another civil case merely because the civil case involves identical legal issues, or the same parties." Rule 3 further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (b), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

None

**NEW YORK EASTERN DISTRICT DIVISION OF BUSINESS RULE 1(d)(3)**

*If you answer "Yes" to any of the questions below, this case will be designated as a Central Islip case and you must select Office Code 2.*

1. Is the action being removed from a state court that is located in Nassau or Suffolk County? ☐ Yes ☒ No
2. Is the action—not involving real property—being brought against United States, its officers or its employees AND the majority of the plaintiffs reside in Nassau or Suffolk County? ☐ Yes ☒ No
3. If you answered "No" to all parts of Questions 1 and 2:
  - a. Did a substantial part of the events or omissions giving rise to claim or claims occur in Nassau or Suffolk County? ☐ Yes ☒ No
  - b. Do the majority of defendants reside in Nassau or Suffolk County? ☐ Yes ☒ No
  - c. Is a substantial amount of any property at issue located in Nassau or Suffolk County? ☐ Yes ☒ No
4. If this is a Fair Debt Collection Practice Act case, was the offending communication received in either Nassau or Suffolk County? ☐ Yes ☒ No

*(Note, a natural person is considered to reside in the county in which that person is domiciled; an entity is considered a resident of the county that is either its principal place of business or headquarters, of if there is no such county in the Eastern District, the county within the District with which it has the most significant contacts).*

**BAR ADMISSION**

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

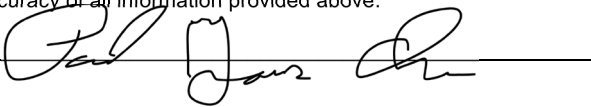
☒ Yes ☐ No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

☐ Yes (If yes, please explain) ☒ No

I certify the accuracy of all information provided above.

Signature: \_\_\_\_\_





**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 6860 / March 7, 2025**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-22460**

**In the Matter of**

**MOMENTUM ADVISORS,  
LLC AND ALLAN J.  
BOOMER,**

**Respondents.**

**ORDER INSTITUTING ADMINISTRATIVE  
AND CEASE-AND-DESIST PROCEEDINGS,  
PURSUANT TO SECTIONS 203(e), 203(f),  
AND 203(k) OF THE INVESTMENT  
ADVISERS ACT OF 1940, MAKING  
FINDINGS, AND IMPOSING REMEDIAL  
SANCTIONS AND A CEASE-AND-DESIST  
ORDER**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Momentum Advisors, LLC (“Momentum Advisors”) and Allan J. Boomer (“Boomer”) (collectively, “Respondents”).

**II.**

In anticipation of the institution of these proceedings, Respondents have each submitted an Offer of Settlement (the “Offers”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V below, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

### III.

On the basis of this Order and Respondents' Offers, the Commission finds<sup>1</sup> that:

#### **Summary**

These proceedings arise out of two distinct breaches of fiduciary duty by associated persons of Momentum Advisors in connection with a private fund that Momentum Advisors advises, as well as custody rule violations by Momentum Advisors.

Momentum Advisors, a registered investment adviser, provides investment advisory services to a private fund, Franklin Morgan Fund 1 LLC (the "Fund"), which was formed to purchase and develop franchise businesses, including dry cleaner businesses. Boomer is a partner of Momentum Advisors and a member of the general partner of the Fund. Boomer also held other roles at Momentum Advisors prior to March 2024, including managing partner and chief compliance officer. Boomer was the direct supervisor of Tiffany Hawkins ("Hawkins"), who was Momentum Advisors' chief operating officer and also a member of the general partner of the Fund.

First, from at least August 2021 through February 2024, Hawkins misappropriated approximately \$223,000 from portfolio companies in which the Fund had invested. Specifically, Hawkins misused the portfolio company debit cards in more than 100 transactions to pay for personal purchases, clothing, and vacations for herself and caused herself to be paid compensation in excess of her authorized salary. Momentum Advisors failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act arising from Hawkins' misappropriation. Boomer failed reasonably to supervise Hawkins, with a view of preventing violations of the federal securities laws within the meaning of Section 203(e)(6) of the Advisers Act.

Second, in 2020, in connection with the Fund's purchase of two franchise businesses jointly owned by a third party and by a limited liability company controlled by Boomer and Hawkins, Boomer caused the Fund to pay a business debt that should have been paid by the entity controlled by Boomer and Hawkins. Specifically, in connection with buying the third party's ownership interest in the businesses, Boomer caused the Fund to satisfy the entire outstanding obligation on two loans provided to the businesses. Because the entity controlled by Boomer and Hawkins owned 45% of the businesses, it should have contributed on a pro rata basis to satisfy the outstanding loans, but it did not, resulting in an unearned benefit of \$346,904.

Finally, Momentum Advisors violated Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder, commonly referred to as the "custody rule," by failing to obtain and timely distribute annual audited financial statements prepared in accordance with Generally Accepted Accounting Principles ("GAAP") to investors in the Fund, which it advised.

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<sup>1</sup> The findings herein are made pursuant to Respondents' Offers and are not binding on any other person or entity in this or any other proceedings.

## **Respondents**

1. **Momentum Advisors** is a New York limited liability company with its principal place of business in New York, New York. Momentum Advisors is registered with the Commission as an investment adviser. Momentum Advisors has approximately \$353 million in regulatory assets under management in about 300 accounts as of March 29, 2024.

2. **Boomer**, age 48, is a resident of New Jersey. Boomer is a partner of Momentum Advisors and a member of Franklin Morgan Partners, LLC, the manager of the Fund. Until March 2024, Boomer was the managing partner and chief compliance officer of Momentum Advisors.

## **Other Relevant Entities and Individuals**

3. **Hawkins, also known as Tiffany Taylor-Watson**, age 42, is a resident of Washington, D.C. Until March 2024, Hawkins was the chief operating officer of Momentum Advisors. Hawkins is a member of Franklin Morgan Partners, LLC.

4. **The Fund** is a private fund formed as a Delaware limited liability company. At all relevant times, an affiliate under common control with Momentum Advisors was the managing member of the Fund. Momentum Advisors has been the investment adviser to the Fund since at least 2020.

5. **Franklin Morgan Partners, LLC (“Franklin Morgan Partners”)** is the general partner of the Fund. Franklin Morgan Partners is a New Jersey limited liability company. Boomer and Hawkins are managing members of Franklin Morgan Partners.

6. **Ledgerity LLC (“Ledgerity”)** is a New Jersey limited liability company that owns an interest in two of the portfolio companies in which the Fund invested. Boomer and Hawkins are managing members of Ledgerity.

## **Facts**

### **Formation of the Fund and Operation of the Portfolio Companies**

7. In November 2020, Boomer and Hawkins formed the Fund for the purpose of raising money from investors to purchase and develop franchise businesses, such as dry cleaners. The Fund raised approximately \$5 million from advisory clients of Momentum Advisors. Momentum Advisors provides investment advisory services to the Fund. Franklin Morgan Partners serves as the general partner of the Fund.

8. Boomer and Hawkins represented in the Fund’s offering materials that they would operate the Fund in such a manner as to generate distributable cash from the operations of the Portfolio Companies, which would then be distributed to Fund investors. In total, the Fund invested in nine dry cleaners and the Fund distributed returns to Fund investors based on the Portfolio Companies’ profitability and cash on hand.

9. Until March 2024, the Portfolio Companies were managed on a day-to-day basis by employees of the Portfolio Companies and Hawkins. Hawkins, along with Boomer, opened business checking accounts for several of the Portfolio Companies and Hawkins held a debit card linked to those business accounts to use for the Portfolio Companies' business expenses.

### **The Fund Buys Out the Former Business Partner**

10. Prior to the Fund's investments in the Portfolio Companies, Ledgerity, which was controlled by Boomer and Hawkins, owned 45% of two of the Portfolio Companies, and a third party (the "Former Business Partner") owned the remaining 55% of the two Portfolio Companies.

11. In or about December 2020, in a transaction negotiated by Boomer, the Fund agreed to purchase the Former Business Partner's interest in two of the Portfolio Companies. Specifically, the Fund agreed to acquire the Former Business Partner's 55% share of the two Portfolio Companies for a purchase price of \$1,450,000, plus the satisfaction of two outstanding loans totaling approximately \$1,145,000 that a trust associated with the Former Business Partner had made to the two Portfolio Companies. Given that Ledgerity owned 45% of the two Portfolio Companies, it should have contributed on a pro rata basis to satisfy the outstanding balance of the loans. Boomer, however, failed to consider Ledgerity's share of the loan obligations and caused the Fund to satisfy the entire amount of the outstanding loans. After accounting for partially offsetting payments made by the two Portfolio Companies in connection with the transaction, Ledgerity received an unearned benefit of \$346,904 through the Fund's satisfaction of the outstanding loans.

12. After the completion of the Commission staff's examination, and just after their investigation had begun, Momentum Advisors and Boomer initiated an investigation that discovered this issue, and they subsequently disclosed the Fund's overpayments to Commission staff. Boomer promptly signed a promissory note on behalf of Ledgerity, pursuant to which the Fund has been reimbursed for the unearned benefit, plus interest.

### **Hawkins Misappropriated Portfolio Company Funds**

13. From at least August 2021 through February 2024, Hawkins misappropriated a total of approximately \$223,000 from the Portfolio Companies. Hawkins used Portfolio Company debit cards in more than 100 transactions to pay for personal vacations, clothing, and other personal expenses. From November 2022 through February 2024, Hawkins also caused one of the Portfolio Companies to pay her compensation totaling more than \$24,000 above her authorized salary.

14. Hawkins concealed this misappropriation from Boomer, Momentum Advisors, the Portfolio Companies' bookkeeper, and Commission staff. In documents produced to Commission staff by Momentum Advisors, Hawkins falsely represented that tens of thousands of dollars of expenses paid for by the Portfolio Companies relating to her personal vacations were legitimate business travel expenses. Hawkins also falsely represented that certain of the Portfolio Companies' purchases of designer clothing were legitimate business expenses in which the

Portfolio Companies had replaced customer garments that had been damaged by the dry cleaners. In fact, these purchases were made by Hawkins for her own personal use.

15. In August 2023, Hawkins informed Boomer that several Portfolio Company transactions that she had previously represented were legitimate business travel expenses were personal expenses for which she had mistakenly used the Portfolio Company debit cards, and Hawkins reimbursed approximately \$18,000 to the Portfolio Companies. This amount, however, was not the full scope of her misappropriation. Neither Boomer nor Momentum Advisors took any steps to impose additional controls or policies, limit Hawkins' access to Portfolio Company funds, or investigate Hawkins' use of Portfolio Company funds until after November 2023, when they learned that the misappropriation was more extensive.

16. In approximately March 2024, Hawkins resigned from Momentum Advisors and Hawkins and Momentum Advisors have since reimbursed the Portfolio Companies for Hawkins' misappropriation, plus interest.

### **Momentum Advisors' Compliance Failures and Boomer's Supervision Failures**

17. Registered investment advisers are required to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules adopted by the Commission under the Act.

18. Momentum Advisors' written compliance policies and procedures did not address the operation of the Fund or Portfolio Companies. Therefore, there were no policies in place, for example, regarding travel and other business expenses or the review of expenses charged to the Portfolio Companies. As a result of Momentum Advisors' failure to adopt policies and procedures concerning the operation of the Fund and Portfolio Companies and its failure to implement existing relevant policies and procedures, Hawkins was able to misuse Portfolio Company debit cards without any review or approval process and pay herself in excess of her authorized salary.

19. Boomer was Hawkins' direct supervisor throughout the period of August 2021 through October 2023 and was responsible for overseeing Hawkins. Momentum Advisors' compliance manual provided that "[e]very person in a supervisory role is also responsible for those individuals under his/her supervision" and that Boomer, as chief compliance officer, had "overall responsibility for monitoring and testing compliance with the Firm's policies and procedures." At Franklin Morgan Partners, Hawkins and Boomer were partners, but Hawkins was responsible for the day-to-day operations of the Portfolio Companies, which Boomer oversaw.

20. Boomer was aware of facts that should have constituted red flags of potential misappropriation by Hawkins, but he failed to reasonably supervise Hawkins. For example: (i) beginning in 2022, Boomer noticed significantly increased expenses purportedly relating to replacements of customers' garments by Hawkins in the Portfolio Companies' monthly profit and loss reports; (ii) by mid-2022, Boomer knew that Hawkins had failed to pay personal income

taxes and that she was concerned that tax authorities might place a lien on her personal checking account; (iii) in November 2022, Boomer urged Hawkins to limit travel expenses because the excessive expenses were impacting investment returns, but Boomer failed to investigate why the travel expenses had increased and failed to take any further steps to ensure that Hawkins reduced the travel expenses; and (iv) Boomer implemented no additional controls or oversight after Hawkins stated in August 2023 that she had mistakenly used the Portfolio Company debit cards to pay for approximately \$18,000 in personal vacations, allowing Hawkins to continue to misappropriate funds for an additional two months.

### **Momentum Advisors Violated the Custody Rule**

21. The custody rule requires that registered investment advisers who have custody of client funds or securities implement an enumerated set of requirements to prevent the loss, misuse, or misappropriation of those assets.

22. A registered investment adviser has custody of client assets if it holds, directly or indirectly, client funds or securities, or if it has the authority to obtain possession of them. *See* Advisers Act Rule 206(4)-2(d)(2). Custody includes, among other things, “[a]ny capacity (such as . . . trustee of a trust) that gives you or your supervised person legal ownership of or access to client funds or securities.” *Id.*

23. A related person of Momentum Advisors served as the managing member or general partner of the Fund at all relevant times, and had the authority to make decisions for, and act on behalf of, the Fund. Momentum Advisors was therefore deemed to have custody of the Fund’s assets as defined in Advisers Act Rule 206(4)-2.

24. Momentum Advisors also had custody of client assets because, contrary to the compliance policies of Momentum Advisors, employees of Momentum Advisors possessed several clients’ bank account log-in credentials, which could have allowed Momentum Advisors personnel to withdraw or transfer client funds from those bank accounts.

25. An investment adviser with custody of client assets must, among other things: (i) ensure that a qualified custodian maintains the client assets; (ii) notify the client in writing of accounts opened by the adviser at a qualified custodian on the client’s behalf; (iii) have a reasonable basis for believing that the qualified custodian sends account statements at least quarterly to clients for which it maintains funds or securities, except if the client is a limited partnership or is a limited liability company for which the adviser or a related person is a general partner or managing member, the account statements must be sent to each limited partner (or member or other beneficial owner); and (iv) ensure that client funds and securities are verified by actual examination at least once each year by an independent public accountant at a time chosen by the accountant without prior notice or announcement to the adviser. *See* Advisers Act Rule 206(4)-2(a)(1)-(5).

26. The custody rule provides an alternative to complying with the requirements of Advisers Act Rule 206(4)-2(a)(2), (3) and (4) for investment advisers to limited partnerships,

limited liability companies, or other types of pooled investment vehicles. The custody rule provides that such an investment adviser “shall be deemed to have complied with” the independent verification requirement and is not required to satisfy the notification and account statements delivery requirements with respect to a fund if the fund is subject to audit (as defined in Rule 1-02(d) of Regulation S-X (17 CFR 210.1-02(d)) at least annually and “distributes [the fund’s] audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners . . . within 120 days of the end of [the fund’s] fiscal year” (“Audited Financials Alternative”). *See* Advisers Act Rule 206(4)-2(b)(4). The accountant performing the audit must be an independent public accountant that is registered with, and subject to regular inspection by, the Public Company Accounting Oversight Board. *See* Advisers Act Rule 206(4)-2(b)(4)(ii). An investment adviser to a limited partnership, limited liability company or other pooled investment vehicle that fails to meet the requirements of the Audited Financials Alternative to timely distribute audited financial statements prepared in accordance with Generally Accepted Accounting Principles would need to satisfy all of the requirements of Rule 206(4)-2(a)(2)-(4) in order to avoid violating the custody rule.

27. With respect to its custody of the Fund’s assets, Momentum Advisors purported to rely on the Audited Financials Alternative in order to comply with the custody rule and did retain independent public accountants, but the audits were never completed and Momentum Advisors failed to timely deliver the audited financial statements to investors in the Fund, as set forth in the table below:

<b>End of Fiscal Year</b>	<b>Date Distribution Required</b>	<b>Date Distributed</b>	<b>Number of Days Late</b>
12/31/2020	4/30/2021	10/3/2024	1,253
12/31/2021	4/30/2022	10/3/2024	888
12/31/2022	4/30/2023	10/3/2024	523
12/31/2023	4/30/2024	In progress	

28. Because Momentum Advisors did not satisfy the requirements of the Audited Financials Alternative with respect to its custody of the Fund’s assets, Momentum Advisors was required to comply with each of the provisions of Rule 206(4)-2(a)(2), (3), and (4), which it failed to do. Momentum Advisors also did not comply with each of the provisions of Rule 206(4)-2(a)(2), (3), and (4) with respect to the client accounts for which its personnel had the ability to access funds through their possession of bank log-in credentials. For example, Momentum Advisors did not ensure that client funds and securities were verified by actual examination each year by an independent public accountant at a time chosen by the accountant without prior notice or announcement to the adviser, in accordance with Rule 206(4)-2(a)(4).

## **Violations**

29. As a result of the conduct described above, Momentum Advisors willfully<sup>2</sup> violated Section 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-2 thereunder.

30. As a result of the conduct described above, Boomer willfully violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, and Boomer failed reasonably to supervise within the meaning of Section 203(e)(6) of the Advisers Act.

## **Remedial Efforts and Cooperation by Momentum Advisors and Boomer**

31. In determining to accept the Offers, the Commission considered remedial acts undertaken by Respondents and cooperation afforded the Commission staff. Following the commencement of the staff's investigation, Momentum Advisors initiated a review of Portfolio Company transactions and voluntarily reported Hawkins' misappropriation to Commission staff and Boomer disclosed the Fund's overpayment in satisfying the two Portfolio Companies' loans. Momentum Advisors and Boomer then promptly took steps to make Fund investors whole for Hawkins' misappropriation and the Fund's overpayment in connection with the loan. Momentum Advisors has replaced Boomer as managing partner and chief compliance officer, retained a new chief financial officer, and hired a compliance consultant, and the Fund has implemented improved policies regarding business expenses.

## **Undertaking**

32. Boomer has undertaken to provide to the Commission, within 30 days after the end of the twelve-month limitation period described in paragraph IV.E below, an affidavit that he has fully complied with the sanctions described in IV.E below. The certification shall be submitted to Steven G. Rawlings, with a copy to the Office of Chief Counsel of the Enforcement Division.

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<sup>2</sup> "Willfully," for purposes of imposing relief under Sections 203(e) and 203(f) of the Advisers Act, "means no more than that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). The decision in *The Robare Group, Ltd. v. SEC*, which construed the term "willfully" for purposes of a differently structured statutory provision, does not alter that standard. 922 F.3d 468, 478-79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has "willfully omit[ted]" material information from a required disclosure in violation of Section 207 of the Advisers Act).



#### **IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 203(e), 203(f), and 203(k) of the Advisers Act, it is hereby ORDERED that:

#### **Momentum Advisors**

A. Momentum Advisors cease and desist from committing or causing any violations and any future violations of Section 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-2 promulgated thereunder.

B. Momentum Advisors is censured.

C. Momentum Advisors shall pay a civil monetary penalty in the amount of \$235,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). Payment shall be made in the following installments:

- \$25,000 within 30 days of the entry of this Order;
- \$62,500 within 120 days of the entry of this Order;
- \$62,500 within 240 days of the entry of this Order; and
- \$85,000 within 360 days of the entry of this Order.

Payments shall be applied first to post-order interest, which accrues pursuant to 31 U.S.C. § 3717. Prior to making the final payment set forth herein, Respondent shall contact the staff of the Commission for the amount due. If Respondent fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.

#### **Boomer**

D. Boomer cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder.

E. Pursuant to Section 203(f) of the Advisers Act, Boomer shall be, and hereby is, subject to the following limitations on his activities for a period of twelve months from the entry of this Order:

Boomer shall not act in a supervisory capacity with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization for the time period specified above.

F. Boomer shall pay a civil monetary penalty of \$80,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). Payment shall be made in the following installments:

- \$20,000 within 30 days of the entry of this Order;
- \$20,000 within 120 days of the entry of this Order;
- \$20,000 within 240 days of the entry of this Order; and
- \$20,000 within 360 days of the entry of this Order.

Payments shall be applied first to post-order interest, which accrues pursuant to 31 U.S.C. § 3717. Prior to making the final payment set forth herein, Respondent shall contact the staff of the Commission for the amount due. If Respondent fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.

G. Boomer shall comply with the undertaking enumerated in Section III, paragraph 32, above.

### **Payment**

I. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center  
Accounts Receivable Branch  
HQ Bldg., Room 181, AMZ-341  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Momentum Advisors or Boomer as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Thomas P.

Smith, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 100 Pearl Street, Suite 20-100, New York, New York, 10004-2616.

J. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against one or both of the Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in this Order entered by the Commission in these proceedings.

## V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the findings in this Order are true and admitted by Respondent Boomer, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent Boomer under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent Boomer of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

By the Commission.

Vanessa A. Countryman  
Secretary

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

THOMAS JOSEPH POWELL;  
BARRY D. ROMERIL;  
CHRISTOPHER A. NOVINGER;  
RAYMOND J. LUCIA;  
MARGUERITE CASSANDRA  
TOROIAN; GARY PRYOR;  
JOSEPH COLLINS; REX SCATES;  
MICHELLE SILVERSTEIN;  
REASON FOUNDATION; CAPE  
GAZETTE; NEW CIVIL  
LIBERTIES ALLIANCE,

*Petitioners,*

v.

UNITED STATES SECURITIES  
AND EXCHANGE COMMISSION,

*Respondent.*

No. 24-1899

OPINION

On Petition for Review of an Order of the  
Securities and Exchange Commission

Argued and Submitted February 13, 2025  
Honolulu, Hawaii

Filed August 6, 2025

Before: Sidney R. Thomas, Daniel A. Bress, and Ana de Alba, Circuit Judges.

Opinion by Judge Bress

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## **SUMMARY\***

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### **Securities and Exchange Commission**

The panel denied a petition for review of the Securities and Exchange Commission's denial of a request to amend SEC Rule 202.5(e), which reflects SEC policy that the agency will not settle a civil enforcement action unless the defendant agrees not to publicly deny the allegations against him.

The panel rejected petitioners' facial-type challenge to Rule 202.5(e) under the First Amendment. The panel clarified that petitioners' challenge before the court is that it violates the First Amendment for civil enforcement defendants to agree on a voluntary basis not to deny the allegations against them in return for the SEC agreeing to settle its securities law charges, with the limited remedy that, if the defendant does later publicly deny the allegations, the SEC may return to court.

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\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Applying the Supreme Court’s framework in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), for evaluating a voluntary relinquishment of First Amendment rights, the panel concluded that Rule 202.5(e) is not facially invalid under the First Amendment, even though legitimate First Amendment concerns could well arise in a more particularized, as-applied type of challenge. Accordingly, the panel upheld Rule 202.5(e) against the instant facial-type First Amendment challenge, without prejudice to future challenges on more particularized records.

Finally, the panel rejected petitioners’ contention that the SEC’s adoption of Rule 202.5(e) violated the Administrative Procedure Act. The panel held that the SEC had statutory authority to enact Rule 202.5(e), notice-and-comment rulemaking was not required, and the SEC provided a rational explanation for its determination not to amend Rule 202.5(e).

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## COUNSEL

Margaret A. Little (argued), Kara M. Rollins, Markham S. Chenoweth, and Kaitlyn D. Schiraldi, New Civil Liberties Alliance, Arlington, Virginia, for Petitioners.

Archith Ramkumar (argued), Appellate Counsel; Jeffrey A. Berger, Assistant General Counsel; Michael A. Conley, Solicitor; Megan Barbero, General Counsel; Securities & Exchange Commission, Washington, D.C.; for Respondent.

Michael D. Pepson and Cynthia F. Crawford, Americans for Prosperity Foundation, Arlington, Virginia; Joshua A. House, Foundation for Individual Rights and Expression,

Washington, D.C.; for Amici Curiae Americans for Prosperity Foundation, the Foundation for Individual Rights and Expression, and Freedom of the Press Foundation.

Nathan J. Ristuccia, Institute for Free Speech, Washington, D.C., for Amicus Curiae Institute for Free Speech.

Lawrence S. Ebner and Hannah S. Marcley, Atlantic Legal Foundation, Washington, D.C., for Amicus Curiae Atlantic Legal Foundation.

Adam E. Schulman, Hamilton Lincoln Law Institute, Washington, D.C.; Ilya Shapiro and Tim Rosenberger, Manhattan Institute, New York, New York; for Amici Curiae Hamilton Lincoln Law Institute and Manhattan Institute.

Thomas A. Berry, Brent Skorup, and Christopher D. Barnewolt, Cato Institute, Washington, D.C., for Amicus Curiae the Cato Institute.

Donald M. Falk and Eugene Volokh, Schaerr Jaffe LLP, San Francisco, California; Gene C. Schaerr, Cristina M. Squiers, and Aaron Gordon, Schaerr Jaffe LLP, Washington, D.C.; Tyler S. Badgley and Mariel A. Brookins, United States Chamber Litigation Center, Washington, D.C.; for Amicus Curiae The Chamber of Commerce of the United States of America.

Nicolas Morgan, Investor Choice Advocates Network, Los Angeles, California; Devin Watkins, David McFadden, and Dan Greenberg, Competitive Enterprise Institute, Washington, D.C.; for Amicus Curiae Competitive Enterprise Institute.

Reilly Stephens, Liberty Justice Center, Austin, Texas, for Amicus Curiae Liberty Justice Center.

Joel S. Nolette and Michael J. Showalter, Wiley Rein LLP, Washington, D.C.; David C. Tryon and Alex M. Certo, The Buckeye Institute, Columbus, Ohio; for Amicus Curiae The Buckeye Institute.

Angela L. Brown and Chris Davis, Gray Reed & McGraw LLP, Dallas, Texas, for Amici Curiae Texas Blockchain Council and AI Innovation Association.

Thomas Brejcha and B. Tyler Brooks, Thomas More Society, Chicago, Illinois, for Amicus Curiae Thomas More Society.

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## OPINION

BRESS, Circuit Judge:

This is a petition for review of the Security and Exchange Commission's denial of a request to amend SEC Rule 202.5(e). *See* 17 C.F.R. § 202.5(e). That Rule reflects SEC policy, in place since 1972, that the agency will not settle a civil enforcement action with a defendant unless the defendant agrees not to publicly deny the allegations against him. If a defendant violates this provision of the settlement agreement, the SEC's remedy is to go back to the court that entered the consent judgment and ask for the case to be reopened. The petitioners claim Rule 202.5(e) violates the First Amendment.

We reject petitioners' challenge, although we do so on necessarily narrow grounds. This petition for review amounts to a facial-type challenge to Rule 202.5(e), and given longstanding precedent permitting the voluntary waiver of constitutional rights, including First Amendment



rights, Rule 202.5(e) on its face is not per se unconstitutional. Petitioners do validly argue that in application, Rule 202.5(e) could impermissibly intrude on First Amendment rights, especially if it prevents civil enforcement defendants from criticizing the SEC. We do not minimize petitioners' concerns. But these concerns are properly addressed in as-applied challenges with defined records, whether during court approval of settlements, in a pre-enforcement posture, or in response to the SEC seeking to reopen a closed enforcement proceeding for an alleged breach of a settlement agreement.

## I

The SEC investigates violations of the securities laws and may bring enforcement actions in federal court. 15 U.S.C. § 78u(d)(1). Sometimes, the SEC insists that defendants admit the allegations against them as a condition of settlement. *See, e.g.*, Press Release, SEC, JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay \$125 Million Penalty to Resolve SEC Charges (Dec. 17, 2021), <https://www.sec.gov/newsroom/press-releases/2021-262>; Grubir S. Grewal, Director, SEC Div. of Enf't, Remarks at SEC Speaks 2021 (Oct. 13, 2021), <https://tinyurl.run/KderJu>; Dina ElBoghdady, *SEC to Require Admissions of Guilt in Some Settlements*, WASH. POST, (June 18, 2013), <https://tinyurl.run/E1As8b>. In 1972, the SEC announced that it would not settle civil enforcement actions unless defendants, at minimum, agree not to publicly deny the Commission's allegations. Consent Decrees in Judicial or Administrative Proceedings, 37 Fed. Reg. 25,224

(Nov. 29, 1972). Codified at 17 C.F.R. § 202.5(e), the SEC's settlement policy is as follows:

The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

The SEC refers to this as the “no-deny provision” or the “no-admit, no-deny policy.” The petitioners call it the “gag rule.” We will refer to it as Rule 202.5(e), or “the Rule.”

Neither the SEC nor Rule 202.5(e) mandate settlement. But in practice, the vast majority of civil enforcement defendants choose to settle with the SEC. If a defendant wishes to settle, he must acknowledge that his settlement is voluntary and agree to abide by Rule 202.5(e). Once a settlement is negotiated, the defendant signs a consent provision which typically says, among other things, that “Defendant understands and agrees to comply with the terms

of 17 C.F.R. § 202.5(e).” Where the SEC has filed an action in federal court, the settlement is incorporated into a final consent judgment, entered by the court. Compliance with Rule 202.5(e) does not prevent defendants from denying the allegations in other legal proceedings, such as separate civil litigation.

When settling with the SEC, defendants agree to waive various rights. Many consent judgments provide, consistent with Rule 202.5(e), that the defendant neither admits nor denies the SEC’s allegations. If a defendant breaches the Rule 202.5(e) component of the consent judgment, the SEC’s remedy is to petition the issuing court to vacate the final judgment and restore the case to its active docket. But the court may also deny this requested relief.

On October 30, 2018, the New Civil Liberties Alliance (NCLA) filed a petition requesting that the SEC amend Rule 202.5(e). Citing First Amendment concerns, the NCLA suggested that the SEC eliminate the language preventing a defendant from denying the SEC’s allegations against him. This proposed change, as the SEC later described it, would “allow defendants to consent to a judgment while denying the allegations[,] with no recourse for the Commission to return to active litigation.”

The SEC did not respond to the petition to amend for over five years. On December 20, 2023, the NCLA filed a renewed petition, adding various individuals as petitioners. On January 30, 2024, the SEC denied the petition to amend, providing a six-page letter ruling explaining why it was maintaining its policy. According to the SEC, Rule 202.5(e) “preserves its ability to seek findings of fact and conclusions of law if a defendant, after agreeing to a settlement, chooses to publicly deny the allegations.” In the SEC’s view, and

because it “does not try its cases through press releases,” the agency is “not required to choose a path whereby it waives its right to try a case while the defendant is free to publicly deny the allegations without any real ability for the Commission to respond in court.” The SEC further rejected petitioners’ First Amendment objections, explaining that “[t]here is a large body of precedent confirming that a defendant can waive constitutional rights as part of a civil settlement, just as a criminal defendant can waive constitutional rights as part of a plea bargain.”

SEC Commissioner Hester Peirce dissented from the Commission’s denial of the petition to amend Rule 202.5(e). She concluded that “[t]he policy of denying defendants the right to criticize publicly a settlement after it is signed is unnecessary, undermines regulatory integrity, and raises First Amendment concerns.” In Commissioner Peirce’s view, there is “scant factual basis” for the SEC needing Rule 202.5(e), and if the SEC has concerns about defendants speaking out, this policy is “not the right way to protect the Commission’s reputation.”

After the SEC denied the petition to amend, twelve petitioners challenged the SEC’s denial by filing a petition for review in this court. Nine of the petitioners are individuals, eight of whom entered settlements containing the Rule 202.5(e) obligation. The remaining three petitioners are organizations and entities. Petitioners challenge the Rule on its face, claiming that it violates the First Amendment. They also contend that the Rule was adopted in violation of the Administrative Procedure Act (APA).

We have jurisdiction under 15 U.S.C. § 78y(a)(1), which permits “[a] person aggrieved by a final order of the

Commission . . . [to] obtain review of the order in the United States Court of Appeals for the circuit in which he resides” or the D.C. Circuit. Although the SEC claims that many of the petitioners lack standing or fail to meet the jurisdictional prerequisites of § 78y(a)(1), the agency agrees that one petitioner, Raymond Lucia, can maintain this petition. Our independent review confirms the same.

The SEC charged Lucia with securities law violations in 2012, and he agreed to a settlement that requires him to abide by Rule 202.5(e). Lucia resides in the Ninth Circuit, and he joined the NCLA when it renewed its petition to amend. Under all these circumstances, Lucia was “aggrieved by” the SEC’s denial of the request to amend Rule 202.5(e). 15 U.S.C. § 78y(a)(1). Because “[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review,” *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007), and Lucia fits that bill, we proceed to the merits. *Cf. Nat’l Family Farm Coal. v. EPA*, 966 F.3d 893, 907 n.2 (9th Cir. 2020) (“[R]egardless whether venue is improper as to three of the six . . . Petitioners, we can address the merits of the . . . petition.”).

## II

SEC Rule 202.5(e) has been in place for over five decades, much of that time seemingly without great fanfare. The record gives no indication that the SEC regularly returns to court to reopen judgments for claimed violations of Rule 202.5(e). The SEC also represented at oral argument that it is unaware of a court ever finding a defendant in contempt for violating a Rule 202.5(e) provision in a settlement agreement. Even so, in more recent years, Rule 202.5(e) has been the subject of criticism. The criticism is not necessarily uniform.

Some have suggested that Rule 202.5(e) goes too easy on civil enforcement defendants, in that it allows defendants to neither admit nor deny the SEC's allegations. Civil enforcement defendants presumably prefer "neither admit nor deny" over "admit," to prevent their settlements with the SEC from creating admissions that could later be used against them in private securities litigation. Yet some critics of Rule 202.5(e) would prefer the SEC to more frequently require admissions of wrongdoing as a condition of settlement, in the interest of greater securities law enforcement and public accountability. *See, e.g., SEC v. Citigroup Glob. Markets Inc.*, 827 F. Supp. 2d 328, 332–35 (S.D.N.Y. 2011) (concluding that a consent decree that did not require the defendant to admit the SEC's allegations was "neither fair, nor reasonable, nor adequate, nor in the public interest"), *vacated and remanded*, 752 F.3d 285 (2d Cir. 2014); James B. Stewart, *S.E.C. Has a Message for Firms Not Used to Admitting Guilt*, N.Y. TIMES, (June 21, 2013), <https://tinyurl.run/3p3JHF>; Grewal, *Remarks at SEC Speaks 2021*.

Coming at it from the other direction are those who believe that SEC Rule 202.5(e) is too heavy-handed. Motivated by concerns about administrative agency power generally, and the SEC's enforcement powers more specifically, these critics have argued that by preventing civil enforcement defendants from publicly denying the allegations against them as a condition of settlement, Rule 202.5(e) contradicts First Amendment values. *See, e.g.,* Rodney A. Smolla, *Why the SEC Gag Rule Silencing Those Who Settle SEC Investigations Violates the First Amendment*, 29 WIDENER L. REV. 1 (2023); Aaron Gordon, *Imposing Silence Through Settlement: A First-Amendment Case Study of the New York Attorney General*, 84 ALB. L.

REV. 335 (2021); James Valvo, Notice & Comment, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, YALE J. ON REG. (Dec. 4, 2017); *see also SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring); *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011, at \*3–5 (S.D.N.Y. Oct. 28, 2022). The petitioners in this case, supported by various amici, take up this First Amendment mantle.

But as is often true when a problem of many dimensions is presented to a court, we are hemmed in by certain constraints inherent in judicial decision-making, including those arising from the type of challenge brought before us. It is not our role to second-guess the SEC’s policy decisions or enforcement priorities. SEC Commissioner Peirce and others have challenged the wisdom of Rule 202.5(e), but the wisdom of regulatory policy lies outside our authority. Nor is it within our authority to decide what rules would most promote public confidence in the SEC.

Deciding whether an agency action violates the First Amendment is, of course, very much within our authority. But the challenge before us is a petition for review of the SEC’s denial of a request to amend Rule 202.5(e). The petition does not seek relief as to any one civil enforcement defendant based on his or her facts and circumstances, the language of any particular consent judgment, or the threatened actions of the SEC as to that defendant. The petition for review instead maintains that Rule 202.5(e) is per se unconstitutional, that is, unconstitutional across the board. In this sense, the petition is properly analyzed as a facial challenge. For facial challenges in the First Amendment context, we ask “whether ‘a substantial number of [the Rule’s] applications are unconstitutional, judged in relation to the [Rule’s] plainly legitimate sweep.’” *Moody*

*v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (quoting *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021)); *see also, e.g., NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1115 (9th Cir. 2024).

Petitioners rightly point out that we should be concerned about any effort *by* the government to limit criticism *of* the government, including criticism offered by those whom the SEC claims violated the law. Those that the SEC has charged with securities law violations may have a particularly valuable perspective on government enforcement efforts, or at least one that is entitled to be considered in the marketplace of ideas. If the SEC utilized Rule 202.5(e) to prevent criticism of the agency, its officers, or its enforcement programs, the Rule would likely raise substantial First Amendment concerns in application. But what we have before us is a more discrete and stylized challenge, namely, that it assertedly violates the First Amendment for civil enforcement defendants to agree on a voluntary basis not to deny the allegations against them in return for the SEC agreeing to settle its securities law charges, with the limited remedy that, if the defendant does later publicly deny the allegations, the SEC may return to court with no guarantee that a court will reopen the case.

The law has long regarded the voluntary relinquishment of constitutional rights as permissible, so long as appropriate safeguards are attached. And when we apply the Supreme Court's and our court's framework for the voluntary waiver of rights, we conclude that Rule 202.5(e) is not facially invalid under the First Amendment, even though legitimate First Amendment concerns could well arise in a more particularized type of challenge.



## III

## A

The starting point for our analysis is that Rule 202.5(e) cannot be abstracted from the circumstances that bring the Rule into effect, namely, a defendant's voluntary decision to settle with the SEC and his voluntary agreement to abide by the Rule's requirements. Rule 202.5(e) is not simply a speech-restricting rule, but a rule that defendants voluntarily accede to in return for substantial benefits.

In proper circumstances, rights, including constitutional rights, can be waived. There is a "background presumption that legal rights generally . . . are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S. 196, 203 (1995). Indeed, "'in the context of a broad array of constitutional and statutory provisions,'" the Supreme Court has "articulated a general rule that presumes the availability of waiver." *New York v. Hill*, 528 U.S. 110, 114 (2000) (quoting *Mezzanatto*, 513 U.S. at 201). And when a party by agreement has "waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

We frequently see these waivers of rights in the criminal context, especially for guilty pleas. A defendant "may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution," including the right to a jury trial, the right to confront one's accusers, and so on. *Mezzanatto*, 513 U.S. at 201 (citing *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938)). Criminal suspects may likewise

waive their right to remain silent and their right to counsel, so long as they have been properly informed of those rights. *See, e.g., Davis v. United States*, 512 U.S. 452, 458, 460 (1994). As the Supreme Court has explained, “[a]lthough a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.” *Corbitt v. New Jersey*, 439 U.S. 212, 218 n.8 (1978) (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)).

Although there are limitations on the waiver of First Amendment rights—just as there are limitations and protections associated with the waiver of other rights—First Amendment rights can be waived. “The Supreme Court has held that First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary[,] and intelligent.” *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993) (citing *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 187 (1972)); *see also, e.g., SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021) (“[P]arties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings.”); *Lake James Cmty. Volunteer Fire Dep’t v. Burke Cnty., N.C.*, 149 F.3d 277, 280 (4th Cir. 1998); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1099 (3d Cir. 1988) (“[W]e know of no doctrine . . . providing a *per se* rule that constitutional claims, even [F]irst [A]mendment claims, may not be waived.”); *Kausal v. George F. Nord Bldg. Corp. (In re George F. Nord Bldg. Corp.)*, 129 F.2d 173, 176 (7th Cir. 1942).

Although we do not typically think of it in these terms, a guilty plea effects a certain inevitable infringement of First

Amendment rights, in that a criminal defendant agrees to say something about his guilt in return for a substantial benefit. Guilty pleas can also include provisions precluding the right to appeal—a form of First Amendment petitioning activity. *See, e.g., United States v. Wells*, 29 F.4th 580, 585 (9th Cir. 2022). And pleading guilty to a crime can result in even further First Amendment infringements, considering that a guilty plea can lead to imprisonment, and in prison First Amendment rights are reduced. *See, e.g., Shaw v. Murphy*, 532 U.S. 223, 229 (2001); *Turner v. Safley*, 482 U.S. 78, 89–91 (1987).

We encounter waivers of the right to speak outside of the criminal context, as well. Government employees can agree to restrictions on their First Amendment rights as a condition of employment. *See, e.g., Snepp v. United States*, 444 U.S. 507, 509 & n.3 (1980) (per curiam) (explaining that although “Snepp relies primarily on the claim that his agreement is unenforceable as a prior restraint on protected speech,” “[w]hen Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review”). Judicially enforceable non-disclosure and non-disparagement agreements are commonplace. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 665, 672 (1991); *Wright v. Eugene & Agnes E. Meyer Found.*, 68 F.4th 612, 621–22 (D.C. Cir. 2023); *Infogroup, Inc. v. DatabaseLLC*, 956 F.3d 1063, 1068 (8th Cir. 2020). And public sector employees who are not union members can agree to pay fees to a public sector union, thereby “waiving their First Amendment rights.” *Janus v. American Fed’n of State, Cnty., & Mun. Emps. Council 31*, 585 U.S. 878, 930 (2018). No doubt there are other examples.

Our court and other circuits have held that a waiver of First Amendment rights should be analyzed under the Supreme Court's decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987). See *Leonard*, 12 F.3d at 890; *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396–97 (9th Cir. 1991); *Lake James*, 149 F.3d at 280; *Erie Telecomms.*, 853 F.2d at 1099.

In *Rumery*, the Supreme Court upheld an agreement in which a defendant released his right to bring a civil rights action under 42 U.S.C. § 1983 in exchange for the prosecutor dismissing pending criminal charges against him. 480 U.S. at 389, 398. Observing that “it is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights,” *Rumery* declined to establish “a *per se* rule of invalidity” for all waiver agreements. *Id.* at 393, 395. In “many cases,” the Supreme Court explained, a defendant’s “choice to enter” into a waiver agreement “will reflect a highly rational judgment that the certain benefits” of ending the litigation exceed the benefits of what he is giving up. *Id.* at 394. And that a waiver of rights could be “coercive” in some cases did not “justify invalidating *all* such agreements.” *Id.* at 393; see also *id.* (“We see no reason to believe that release-dismissal agreements pose a more coercive choice than other situations we have accepted.”).

Accordingly, *Rumery* held that in this context, “a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.” *Id.* at 392; see also *id.* at 392 n.2 (“The threshold question is whether compelling a defendant to decide whether to waive constitutional rights impairs to an appreciable extent any of the policies behind the rights involved.”) (brackets omitted) (quoting

*McGautha*, 402 U.S. at 213). In *Rumery*'s case, he "voluntarily entered the agreement," and "enforcement of this agreement would not adversely affect the relevant public interests." *Id.* at 398. The Supreme Court thus recognized that the waiver of rights can be permissible, even when they force parties to make "difficult choices." *Id.* at 393.

We have applied *Rumery* in two key First Amendment cases: *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993), and *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390 (9th Cir. 1991). In *Leonard*, we upheld a provision in a collective bargaining agreement, referred to as Article V, that required a public employee union to bear the costs of any new economic or benefit improvement endorsed or sponsored by the Union that caused "increased payroll costs" to the municipality. 12 F.3d at 886. The contractual language was originally proposed by the Union and then included in successive collective bargaining agreements. *Id.*

We first determined that the Union's waiver of "the full and unrestricted exercise of its First Amendment rights" in the collective bargaining agreement was "knowing, voluntary[,] and intelligent." *Id.* at 889–90. Although the Union informed the city during contract negotiations that Article V was unconstitutional, this objection did not make "the Union's execution of the agreement any less voluntary." *Id.* at 890. Indeed, we explained, "[i]f the Union felt that First Amendment rights were burdened by Article V, it should not have bargained them away and signed the agreement." *Id.*

Because *Rumery* nominally involved the waiver of a "statutory remedy," *Davies*, discussed below, had earlier left open the possibility that "a stricter rule" may be appropriate in cases involving waivers of constitutional

rights, 930 F.2d at 1397 (emphasis omitted). But *Leonard* applied the *Rumery* framework and expressly “decline[d] to adopt a stricter standard” in the constitutional context. 12 F.3d at 891 n.8. Under a *Rumery* analysis, we identified in *Leonard* two policies supporting enforcement of the waiver at issue: the “public interest in the stability and finality of collective bargaining agreements,” and the “public interest in the finality of a compensation package between a city and a group of its employees.” *Id.* at 891. But we also recognized the “public interest in the Union’s unfettered ability to present its views to the state legislature.” *Id.*

In upholding the waiver of presumed First Amendment rights, we found it significant that Article V of the collective bargaining agreement did “not ban *all* Union speech” and was “narrowly tailored to achieve the City’s goal of budgetary predictability.” *Id.* There was also a sufficient nexus between the “dispute resolved in the” collective bargaining agreement and the restriction placed on the Union’s First Amendment rights. *Id.* at 891 n.10. And “[e]ven in those areas affected by Article V,” the Union could “endorse benefit-increasing legislation if it fe[lt] that the benefits to be gained by passage of the bill [we]re more valuable than the salary foregone.” *Id.* at 892. Accordingly, “[b]ecause Article V [wa]s a relatively narrow limitation on the Union’s political speech,” we could not “find that the public policy in favor of the Union’s completely unfettered freedom of expression outweigh[ed] the public interests in the finality of collective bargaining and the predictability of municipal budgets.” *Id.* The Union’s constitutional arguments were relevant to our analysis, but they could not by themselves invalidate the waiver, because “[i]f constitutional arguments always outweighed ones grounded in other sources of law, then we could never enforce

individuals’ waivers of their constitutional rights, an outcome that would fly in the face of a long line of Supreme Court precedent.” *Id.* at 892 n.12.

We applied the same *Rumery* methodology in *Davies*, although there we concluded that the waiver was invalid. 930 F.2d at 1392. Davies and his spouse, a teacher, sued the school district over a dispute relating to the spouse’s employment. The parties settled. In exchange for monetary compensation, Davies and his spouse agreed not to seek employment or office within the district. *Id.* Davies later won an election for a seat on the district’s board, and the district sought to enforce the settlement agreement, which would result in Davies’s removal from public office. *Id.* at 1392–93. The district court granted the school district’s motion to enforce the settlement and ordered Davies to resign his office immediately. *Id.* at 1393.

Applying the *Rumery* framework, we held that “the public policy favoring enforcement” of the contractual provision preventing Davies from running for office was “outweighed by the public policy served by its non-enforcement.” *Id.* at 1392. The interest in non-enforcement was “of the highest order,” “involv[ing] the most important political right in a democratic system of government: the right of the people to elect representatives of their own choosing to public office.” *Id.* at 1397. This interest was “of critical importance” because the contractual provision not only prevented Davies from running for office but also “result[ed] in a limitation on the fundamental right to vote of every resident” in the district. *Id.* at 1398. The school district’s interests in enforcement of the provision, meanwhile, were insufficient. Besides the general interest in settling litigation that would be present in every case, the district claimed that Davies’s presence on the board would

be detrimental to the district, a “startling” and “pernicious” rationale that reflected “a serious abuse of the power of incumbency.” *Id.* at 1398–99.

The contractual provision preventing Davies from running for office was further impermissible because it lacked a sufficient connection to the underlying employment dispute that was the subject of the earlier settlement. We explained that “[b]efore the government can require a citizen to surrender a constitutional right as part of a settlement or other contract, it must have a legitimate reason for including the waiver in the particular agreement.” *Id.* at 1399. And “[a] legitimate reason will almost always include a close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived.” *Id.* In Davies’s case, “the nexus between the individual right waived and the dispute that was resolved by the settlement agreement [was] not a close one” because “[t]he underlying dispute had little connection with Dr. Davies’ potential future service on the Board.” *Id.*

Cases from other circuits have also relied on *Rumery* when analyzing waivers of First Amendment rights. In *SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021), *cert. denied sub nom. Romeril v. SEC*, 142 S. Ct. 2836 (2022), the Second Circuit cited *Rumery* in rejecting a challenge to the same SEC Rule at issue here. In *Romeril*, one of the same petitioners in this case sought relief from his consent decree under Federal Rule of Civil Procedure 60(b)(4). *Id.* at 170. The Second Circuit held that Romeril’s consent judgment “[d]id not violate the First Amendment because Romeril waived his right to publicly deny the allegations of the complaint.” *Id.* at 172. Observing that “parties can waive their First Amendment rights in consent decrees and other



settlements of judicial proceedings,” the Second Circuit saw no issue with Romeril’s agreement: “A defendant who is insistent on retaining the right to publicly deny the allegations against him has the right to litigate and defend against the charges. Romeril elected not to litigate.” *Id.*

Because SEC Rule 202.5(e) involves the waiver of rights by agreement, *Rumery* and the above precedents provide the proper legal framework for evaluating this petition for review. For that reason, we disagree with petitioners that Rule 202.5(e) should be analyzed as a traditional prior restraint or content-based restriction on speech, because every waiver of First Amendment rights can in some sense be described as a content-based prior restraint. We likewise disagree with petitioners that we can apply other First Amendment doctrines, like the compelled speech doctrine, without regard to the fact that the speech restriction here arises from a voluntary agreement. Although the nature of the agreed-upon speech restriction is central to the *Rumery* analysis, precedent directs that the *Rumery* framework is the proper one for evaluating a voluntary relinquishment of First Amendment rights.

## B

Under the *Rumery* framework and our precedents, the specific challenge before us fails, although as we noted above, our decision is necessarily limited in nature.

To the extent the petitioners claim that *Rumery* cannot apply because defendants do not voluntarily agree to Rule 202.5(e), we disagree, at least as to the facial-type challenge presented to us. There is no basis to conclude that as to all or a substantial number of SEC defendants, their agreement to abide by Rule 202.5(e) is not “voluntary, knowing[,] and intelligent.” *Davies*, 930 F.2d at 1394. Though the plaintiffs

assert that the SEC possesses outsized power, frequently settles its cases, and makes defendants' agreement to Rule 202.5(e) non-negotiable, the record also reflects that defendants in SEC enforcement actions are often sophisticated players who are represented by counsel. And ultimately, the defendants in these cases chose to settle with the SEC rather than litigate further. *See Leonard*, 12 F.3d at 890 ("If the Union felt that First Amendment rights were burdened by Article V, it should not have bargained them away and signed the agreement.").

We do not foreclose an individual defendant in any particular case from later claiming that his agreement to the terms of Rule 202.5(e) was involuntary or unknowing. But we also cannot say that generalized concerns about the SEC's powers or enforcement tactics justify a blanket conclusion that these agreements are always or very often improperly coercive. *See Rumery*, 480 U.S. at 393 (concluding that the "possibility" that "some release-dismissal agreements may not be the product of an informed and voluntary decision" given the "risk, publicity, and expense of a criminal trial" did not "justify invalidating *all* such agreements").

Nor is Rule 202.5(e) facially invalid under the *Rumery* framework. Per Rule 202.5(e), a defendant who settles with the SEC may not publicly deny the SEC's allegations, and, if he does, the SEC may seek to reopen his case in order to proceed to litigation. The Rule in its purest form allows the SEC to return things to how they were before the settlement, potentially allowing the SEC to pursue its claims in court. It is as if the civil enforcement action remains subject to reopening at the defendant's election. Rule 202.5(e) essentially tells defendants that if they come to disagree with their original decision not to publicly deny the SEC's

allegations, they may later have to defend against them. In this sense, there is a “close nexus” between “the specific interest the government seeks to advance in the dispute underlying the litigation involved”—proving the allegations supporting its enforcement actions—and “the specific right waived”—the defendant agreeing not to deny those same allegations. *Davies*, 930 F.2d at 1399. This is a far cry from a case like *Davies*, in which the restriction on Davies’s ability to run for public office “had little connection” to the underlying settlement agreement. *Id.*

Indeed, the situation in the case before us is not so dissimilar from *Rumery* itself. In *Rumery*, “the criminal charges that had been filed against Rumery and Rumery’s civil suit against the prosecutor involved the same incident.” *Id.* (italics omitted). “In fact,” as we later described it, “they were opposite sides of the coin.” *Id.* “The two actions reflected the opposing parties’ differing versions of what actually occurred,” and “a full compromise of the dispute between the parties necessitated resolving both matters.” *Id.*

Analogous in this respect to *Rumery*, any defendant who wishes to publicly deny the SEC’s allegations wants to tell a different version of the story than the one reflected in his voluntarily entered settlement agreement. But instead of restricting an offsetting suit, as in *Rumery*, Rule 202.5(e) uses a different mechanism. It gives the defendant a choice: agree to “a full compromise of the dispute,” *id.*, by declining to deny the SEC’s version of what occurred, or speak out against the SEC’s allegations and permit the SEC to attempt to litigate the facts in the same (reopened) case. This further confirms the closeness of the nexus between the government’s interest and the right waived.

We also cannot say that the SEC's interest in Rule 202.5(e) is wholly illegitimate, to the point that the Rule should be struck down entirely on a petition for review. The SEC's interests are not so much weaker than the asserted interests we found sufficient in *Leonard*. See 12 F.3d at 891. And they do not compare to the "utterly unpersuasive" and "pernicious" anti-democratic justifications that we rejected in *Davies*. See 930 F.2d at 1398. The SEC explains that if it is to forego its decision to present evidence in court, the agency should have the opportunity to pursue that path if a defendant later decides to deny the SEC's allegations publicly. Accordingly, and because it does not "try its cases through press releases," the SEC maintains that its policy "preserves its ability to seek findings of fact and conclusions of law if a defendant, after agreeing to a settlement, chooses to publicly deny the allegations."

The SEC has some interest in determining how to try its cases and prove its allegations, and in deciding upon settlement terms that are most consistent with its preferred enforcement strategy. The SEC also has a related interest in offering defendants different options for addressing the SEC's allegations. The absence of a policy like Rule 202.5(e) could lead the SEC to requiring more outright admissions or settling fewer cases, which may not necessarily be in the interest of civil enforcement defendants. See *Rumery*, 480 U.S. at 394 (explaining that defendants' choice to waive rights in a settlement agreement can "reflect a highly rational judgment" about the benefits of avoiding prosecution); *Romeril*, 15 F.4th at 172. Provided that any limitation on speech remains within proper bounds, and given the background ability to waive First Amendment rights at least to some extent, the SEC has an interest in

giving defendants the option to agree to a speech restriction as part of a broader settlement agreement.

However, to the extent the SEC's letter addressing NCLA's request to amend Rule 202.5(e) advances the broader rationale that it is necessary to silence defendants in order to promote public confidence in the SEC's work, this rationale would be improper. "[W]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement' that it was adopted in part to 'protect the free discussion of governmental affairs.'" *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 478 (2022) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). A defendant who denies the SEC's allegations may well undermine confidence in the SEC's enforcement programs. But undermining confidence in the government is an inevitable result of our robust First Amendment protections for speech critical of the government. The SEC's valid interest in Rule 202.5(e) is thus more mechanical: that if a defendant wants to deny the allegations, the SEC wants to be able to prove those allegations in a particular forum, i.e., in court, with the benefits and protections of the judicial process.

At the same time, the SEC's interests are not so compelling that they would justify a broad restriction on speech, either. In this case, and critical to our *Rumery* analysis, is the fact that, on its face, SEC Rule 202.5(e) "is a relatively narrow limitation" on defendants' speech. *Leonard*, 12 F.3d at 891. By its terms, Rule 202.5(e) creates consequences for defendants only when they publicly deny the SEC's allegations. The Rule on its face sweeps no further than speech denying the allegations. And, critically, the consequence for violating the Rule is not speech suppression or the automatic undoing of the settlement

agreement, but only that the SEC may seek to reopen the civil enforcement proceedings—which would in turn require a court to agree to that request, including over and above any First Amendment objections that the defendant could interpose at that time. *See Rumery*, 480 U.S. at 401 (O’Connor, J., concurring in part and concurring in the judgment) (noting that “judicial supervision” creates “an important check against abuse” of voluntary agreements to waive rights). “Even in those areas affected by” Rule 202.5(e), defendants can later decide to deny the allegations against them “if [they] feel[] that the benefits to be gained . . . are more valuable than the [settlement] foregone,” or, that is, potentially foregone, because a court must still agree to the SEC’s request to reopen. *Leonard*, 12 F.3d at 892.

Although the SEC’s asserted interest in Rule 202.5(e) is limited, the face of the Rule only imposes a limited speech restriction. And the remedy for a violation of Rule 202.5(e) is also limited, requiring court sign-off that, if granted, merely puts the parties back in the position they were in before the settlement. The result is that a defendant who agrees to a Rule 202.5(e) settlement faces the prospect of reopened proceedings, but he may conclude that agreeing to the SEC’s allegations or litigating instead of settling are inferior options. We do not think the First Amendment forecloses the SEC from giving defendants the optionality reflected in Rule 202.5(e). On this basis, we narrowly reject petitioners’ facial-type challenge.

We caution, however, that further restrictions on defendants’ speech would require a different analysis under *Rumery*. The SEC assures us in its briefing that “[d]efendants who enter into settlements with the Commission remain free to speak about the Commission, enforcement actions, and a host of other topics so long as

they do not publicly deny the Commission’s allegations.” Defendants who have settled with the SEC should therefore understand that they have full latitude in this regard, including when it comes to criticizing the SEC. At the same time, we question how easy the SEC’s line will be to police in practice, should the SEC ever seek to enforce Rule 202.5(e). Our decision today resolves only whether an agreement allowing the SEC to seek to reopen proceedings upon a defendant’s bare denial of allegations violates the First Amendment. And on that understanding of Rule 202.5(e), the Rule is not unconstitutionally vague, either. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (explaining that laws “must give fair notice of conduct that is forbidden or required”). But any broader rule would present different issues.

In this regard, we note evidence in the record of settlement agreements that could be read to sweep more broadly than Rule 202.5(e) itself. For example, we are informed that defendants agree not to make “any public statement denying, *directly or indirectly*, any allegation in the complaint or *creating the impression* that the complaint is without factual basis.” (Emphasis added). Defendants also agree not to “permit” such statements to be made, an obligation that could be understood to extend to the speech of others.

No specific settlement agreement is before us in this petition for review. But insofar as the SEC’s settlement agreements impose greater obligations than the face of Rule 202.5(e) itself, today’s decision—which concerns the denial of a petition to amend Rule 202.5(e) itself—does not resolve whether such a settlement agreement could survive a *Rumery* or vagueness challenge. Courts considering such settlements may take up these questions in appropriate cases,

whether when entering consent judgments or entertaining requests for relief from them. If defendants raise such challenges, courts should carefully consider them, mindful of the important values associated with permitting criticism of the government. Nor do we decide if it would be constitutional for the facial restrictions in Rule 202.5(e) to apply in perpetuity. It stands to reason that under a *Rumery* analysis, the government's interest may wane as time passes. Issues such as this will need to be addressed in individual cases.

For these reasons, we uphold Rule 202.5(e) against the instant facial-type First Amendment challenge, without prejudice to future challenges on more particularized records.

#### IV

We lastly consider petitioners' contention that the SEC's adoption of Rule 202.5(e) violates the APA. An agency's denial of a petition to amend a rule may be vacated if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *O'Keeffe's, Inc. v. U.S. Consumer Prod. Safety Comm'n*, 92 F.3d 940, 942 (9th Cir. 1996). Petitioners raise three arguments on this score. Each is unpersuasive.

*First*, we reject petitioners' argument that the SEC lacked statutory authority to enact Rule 202.5(e). Petitioners claim that the SEC's initial claimed sources of authority—"section 19 of the Securities Act of 1933, section 23(a) of the Securities Exchange Act of 1934, section 20 of the [now-repealed] Public Utility Holding Company Act of 1935, section 38 of the Investment Company Act of 1940 and section 211 of the Investment Adviser's Act of 1940," 37 Fed. Reg. 25,224 (Nov. 29, 1972)—only empower the



agency to make internal housekeeping rules. According to petitioners, these statutes provide no authority for a rule that binds third parties that come before the agency.

But there is no dispute that the SEC has “discretionary authority to settle on a particular set of terms” with defendants, *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 295 (2d Cir. 2014), and the Commission could have informed each defendant individually about the settlement terms the agency would be willing to accept. Petitioners do not cite any authority suggesting that the SEC cannot publicly announce its policy more formally, and, in fact, petitioners’ request to the SEC was premised on the idea that the SEC can have rules regarding settlements, with petitioners urging the SEC to amend its rule.

In addition, when denying the petition, the SEC explained that Rule 202.5(e) “implements and aids in the execution of the Commission’s enforcement powers under [15 U.S.C. § 78u] and other enforcement-related provisions.” In other words, the SEC premises its ability to request certain terms of settlement on its powers to enforce the securities laws through enforcement actions. We understand the SEC’s latest explanation of the basis for the Rule as simply a further elaboration of its original grounds from 1972. And the SEC’s enforcement powers provide sufficient authority for the Rule. *See* 15 U.S.C. § 78w(a) (authorizing the SEC “to make such rules and regulations as may be necessary or appropriate . . . for the execution of the functions vested in them” under the Securities Exchange Act of 1934).

*Second*, petitioners argue that Rule 202.5(e) fails because it was not adopted through notice-and-comment rulemaking. But under the APA, notice-and-comment

rulemaking is not required for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. § 553(b)(A). Rule 202.5(e) simply announces the Commission’s settlement policy, and it is only enforced if a defendant signs a consent agreement that contains a no-deny provision. The Rule is best viewed as one of policy, procedure, or practice, which is exempt from the notice-and-comment requirements.

*Finally*, petitioners argue that the SEC failed to provide a rational explanation for its determination not to amend Rule 202.5(e). But judicial review of an agency’s “refus[al] to exercise its discretion to promulgate proposed regulations” is “‘extremely limited’ and ‘highly deferential.’” *Compassion Over Killing v. FDA*, 849 F.3d 849, 854 (9th Cir. 2017) (quoting *Massachusetts*, 549 U.S. at 527–28). In this case, the SEC’s explanation for not amending its Rule survives our deferential review. Although petitioners disagree with it, the SEC’s six-page letter adequately explains the SEC’s reasoning.

\* \* \*

For the foregoing reasons, the petition for review is  
**DENIED.**

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 6901 / August 1, 2025**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-22500**

**In the Matter of**  
  
**Munakata Associates LLC**  
  
**Respondent.**

**ORDER INSTITUTING CEASE-AND-  
DESIST PROCEEDINGS, PURSUANT TO  
SECTION 203(k) OF THE INVESTMENT  
ADVISERS ACT OF 1940, MAKING  
FINDINGS, AND IMPOSING A CEASE-  
AND-DESIST ORDER**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Munakata Associates LLC (“Munakata” or “Respondent”).

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

**III.**

On the basis of this Order and Respondent’s Offer, the Commission finds that:

## **Summary**

1. This proceeding arises out of the failure of registered investment adviser Munakata to comply with the independent verification requirement for client funds and securities over which it had custody from 2018 through 2024, in violation of Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder, commonly referred to as the “Custody Rule.”

## **Respondent**

2. Munakata is a New York limited liability company with its principal office and place of business in Rye, New York. Munakata has been registered with the Commission as an investment adviser since March 26, 2018. The firm holds over \$64 million in regulatory assets under management from 11 clients as of its February 21, 2025, Form ADV.

## **Background**

3. The Custody Rule is designed to protect investment advisory clients from, among other things, the loss, misuse, or misappropriation of their funds and securities. The Custody Rule provides that “it is a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the [Advisers] Act . . . for [a registered investment adviser] to have custody of client funds or securities unless” the adviser implements an enumerated set of requirements to prevent loss, misuse, or misappropriation of those funds and securities. *See* Rule 206(4)-2(a).

4. An investment adviser has custody if it holds, directly or indirectly, client funds or securities, or if it has the ability to obtain possession of those funds and securities. *See* Rule 206(4)-2(d)(2). Custody includes, among other things, “[a]ny arrangement . . . under which [the adviser is] authorized or permitted to withdraw client funds or securities maintained with a custodian upon [its] instruction to the custodian” and “[a]ny capacity (such as . . . trustee of a trust) that gives [the adviser or its] supervised person legal ownership of or access to client funds or securities.” *Id.* A “related person” is defined as any person, directly or indirectly, controlling or controlled by the adviser, and any person that is under common control with the adviser. *See* Rule 206(4)-2(d)(7).

5. Under the Custody Rule, an investment adviser who has custody of client funds and securities must, among other things: (i) ensure that a qualified custodian maintains the client funds and securities; (ii) notify the client in writing of accounts opened by the adviser at a qualified custodian on the client’s behalf; (iii) have a reasonable basis for believing that the qualified custodian sends account statements at least quarterly to clients; and (iv) ensure that client funds and securities are verified by actual examination each year by an independent public accountant pursuant to a written agreement at a time chosen by the accountant without prior notice or announcement to the adviser (i.e., the “surprise examination” requirement). *See* Rule 206(4)-2(a)(1) – (4). The written agreement with the accountant must provide for the first examination to occur within six months of becoming subject to the requirement and require, among other things, that the accountant file a Form ADV-E with the Commission within 120 days of the date chosen by the accountant to perform the examination, which states that the accountant has examined the client

funds and securities and describes the nature and extent of the examination. See Rule 206(4)-2(a)(4).

### **Munakata Violated the Custody Rule**

6. From at least 2018 to 2024 (the “Relevant Period”), Munakata’s President, who is the firm’s sole principal and also serves as the firm’s chief compliance officer (“Munakata’s President”), served as a co-trustee of two trusts that were Munakata’s advisory clients. The trust agreements granted each co-trustee “broad investment and other powers under the trust agreement and applicable law to enter into transactions and to trade, buy, sell, sell short or otherwise acquire, receive, deliver, assign, endorse for transfer, hold or dispose of all manner of securities, futures, currencies and commodities . . .” as well as “broad powers under the trust agreements and applicable law to engage in borrowing and other loan and credit transactions . . .” The agreements further stated that each co-trustee may act independently. Thereby, Respondent had access to and/or the ability to obtain possession of trust funds and securities without the consent of the respective co-trustees.

7. During the Relevant Period, Munakata’s President also had signatory authority on four clients’ accounts opened between 2017 and 2019 whereby he had the same ability to instruct the broker as to delivery of the accounts’ funds and securities as did the beneficial owner of the account. Thereby, Respondent had access to and/or the ability to obtain possession of client funds and securities.

8. During the Relevant Period, Munakata’s President acted as an authorized agent with power of attorney on five clients’ accounts opened between 2017 and 2022 whereby he had “the power to place orders in an account, request disbursements and make inquiries concerning the account such as obtaining account balances” as well as the power “to make gifts or other transfers of . . . money or other property from [the client’s] account during [the client’s] lifetime, without restriction, to any one or more persons, *including the agent himself or herself.*” (emphasis in original). Thereby, Respondent had access to and/or the ability to obtain possession of client funds and securities.

9. As a result, during the Relevant Period, Respondent had custody of client funds and securities under the Custody Rule. Accordingly, Respondent was required to obtain surprise examinations in accordance with Rule 206(4)-2(a)(4) during the Relevant Period. At no time during the Relevant Period, however, did Respondent arrange for the required surprise examinations for the client accounts.

### **Violations**

10. As a result of the conduct described above, from at least 2018 to 2024, Respondent violated Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder.

## **IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 203(k) of the Advisers Act, Respondent cease and desist from committing or causing any violations and any future violations of Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder.

B. Respondent shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of \$50,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center  
Accounts Receivable Branch  
HQ Bldg., Room 181, AMZ-341  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Munakata Associates LLC as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Sheldon L. Pollock, Associate Regional Director, New York Regional Office, Securities and Exchange Commission, 100 Pearl Street, Suite 20-100, New York, NY 10004.

C. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the

Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a “Related Investor Action” means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman  
Secretary

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**

**Release No. 6908 / August 15, 2025**

**ADMINISTRATIVE PROCEEDING**

**File No. 3-22511**

**In the Matter of**

**TZP MANAGEMENT  
ASSOCIATES, LLC,**

**Respondent.**

**ORDER INSTITUTING  
ADMINISTRATIVE AND CEASE-AND-  
DESIST PROCEEDINGS, PURSUANT TO  
SECTIONS 203(e) AND 203(k) OF THE  
INVESTMENT ADVISERS ACT OF 1940,  
MAKING FINDINGS, AND IMPOSING  
REMEDIAL SANCTIONS AND A  
CEASE-AND-DESIST ORDER**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against TZP Management Associates, LLC (“TZP” or “Respondent”).

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.



### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### Summary

1. These proceedings arise out of breaches of fiduciary duty by TZP, a registered investment adviser, regarding management fee calculation practices for its private fund clients related to compensation TZP received from portfolio companies. TZP advises private funds that focus on investing in lower-middle market companies that provide technology services, business services, and consumer products in the United States and Canada, including the nine funds at issue here (each, a "Fund," and collectively, the "Funds").

2. Under each Fund's limited partnership agreement (each, an "LPA," and collectively, the "LPAs"), TZP is entitled to management fees. Each LPA states that TZP also may receive "Transaction Fees"—defined to include all transaction fees, advisory fees, and monitoring fees, among other fees—from portfolio companies, but requires that TZP credit back to each Fund a portion of the Transaction Fees to reduce or offset the management fees the Fund owes to TZP ("fee offset").

3. From October 2018 through November 2023 ("Relevant Period"), TZP engaged in two fee offset calculation practices related to its receipt of Transaction Fees that created conflicts of interest that were not adequately disclosed to the Funds or their limited partners ("LPs") and were inconsistent with the relevant LPAs.

4. *First*, pursuant to management services agreements between TZP and portfolio companies, the payment of Transaction Fees could be deferred either at TZP's sole discretion or because applicable loan covenants prohibited payment. For five portfolio company investments, TZP collected interest on such deferred Transaction Fees but did not include such interest in the corresponding fee offsets. These determinations by TZP resulted in the Funds receiving lower fee offsets than they were otherwise entitled to receive. TZP failed to adequately disclose these arrangements and the resulting conflicts of interest.

5. *Second*, for at least one portfolio company in which multiple Funds invested, when calculating the fee offsets, TZP started with a reduced allocation of Transaction Fees to each Fund. This resulted in lower fee offsets than the Funds were entitled to receive and increasing the management fees retained by TZP.

6. As a result of this conduct, TZP charged the Funds more than \$500,000 in excess management fees and violated Section 206(2) of the Advisers Act.

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

## **Respondent**

7. **TZP** is a Delaware limited liability company with its principal office and place of business in New York, New York. TZP has been registered with the Commission as an investment adviser since March 30, 2012. TZP, together with its affiliated relying advisers, provides investment advisory services to private equity funds, including the Funds. On its Form ADV filed in June 2025, TZP reported that it had regulatory assets under management of approximately \$2.4 billion.

## **Other Relevant Entities**

8. The Funds are **TZP Capital Partners II, LP; TZP Capital Partners II-A (Blocker), LP; TZP Capital Partners III, LP; TZP Capital Partners III-A (Blocker), LP; TZP Small Cap Partners I, LP; TZP Small Cap Partners I-A (Blocker), LP; TZP Small Cap Partners II, LP; TZP Small Cap Partners II-A (Blocker), LP; and TZP Group Investments, LP**. None of the Funds were or are registered with the Commission in any capacity.

## **Facts**

### **A. Background**

9. TZP provides investment advisory services to the Funds both directly and through various relying advisers. TZP and its relying advisers operate as a single advisory business and generally share common owners, officers, partners, and employees. The LPs in the Funds include pension funds, university endowments, a registered investment company, other institutional investors, and high net worth individuals.

10. Each Fund is governed by an LPA setting forth the rights and obligations of LPs. The LPAs contain the operative language for calculating, among other things, the management fees that TZP can charge the Funds. Generally, the LPAs permit TZP to charge each Fund an annual management fee equal to between 1% and 2% of the LPs' total committed capital during the commitment period and between 1% and 2% of invested capital for the remainder of the respective Fund's term, paid quarterly in advance.

11. The LPAs generally provide that TZP "shall have the right to contract for and receive Transaction Fees" and other fees from portfolio companies. The LPAs define Transaction Fees as "all transaction fees, advisory fees, monitoring fees or other similar fees received by [TZP] . . . in respect of services provided to any Portfolio Company, purchaser or seller of any Portfolio Investment as a result of a proposed transaction or investment by the Partnership (net of any unreimbursed Expenses incurred in generating such fees)."

12. The LPAs further provide for a fee offset of the management fees owed by the Funds for 100% of the Transaction Fees received by TZP and its affiliates, subject to certain specific listed exclusions.

13. During the Relevant Period, TZP charged the Funds excess management fees totaling \$502,041 as a result of two fee offset calculation practices that were not adequately disclosed to the Funds and their respective LPs and were inconsistent with the LPAs.

**B. TZP Failed to Adequately Disclose Its Practices Regarding the Receipt of Interest on Deferred Transaction Fees and the Resulting Conflicts of Interest.**

14. During the Relevant Period, TZP entered into management services agreements directly with many of the Funds' portfolio companies. These management services agreements obligated the portfolio companies to pay Transaction Fees to TZP for certain services that TZP provided. The management services agreements also typically provided that payment of the Transaction Fees would be deferred if: (i) TZP, in its sole discretion, elected to defer payment of the fees; or (ii) loan covenants applicable to the portfolio company required deferral of the fees. The management services agreements also typically permitted TZP to charge interest on Transaction Fees during the deferral period at an annual rate of 8%.

15. Certain LPs that were also co-investors in portfolio companies received copies of certain of these management services agreements.

16. On multiple occasions during the Relevant Period, to increase the cash flow at portfolio companies, payment of Transaction Fees was deferred, either at TZP's discretion or because the applicable loan covenants required it. TZP did not adequately disclose that it could collect interest on those deferred Transaction Fees. TZP also did not adequately disclose that this discretion created a conflict of interest.

17. When the payment of Transaction Fees was deferred, the management fees TZP received during the deferral period were higher because those fees were not offset by the deferred Transaction Fees.

18. Pursuant to the management services agreements, which were entered into by TZP and the portfolio companies and to which the Funds were not parties, TZP could charge interest to portfolio companies on deferred Transaction Fees during the deferral period.

19. When, in certain cases, TZP later received the deferred Transaction Fees and interest payments, it included the Transaction Fees but not the interest payments in the relevant Funds' fee offsets. Because the Funds were required to pay management fees to TZP during these deferral periods with no fee offset increase for the interest payments TZP later collected, this effectively resulted in interest-free loans from the Funds to TZP.

20. During the Relevant Period, TZP collected interest on deferred Transaction Fees for five portfolio company investments. TZP did not adequately disclose this practice or the resulting conflict of interest. For example, TZP did not disclose to LPs either that it collected this interest or that it did not include this interest in the corresponding fee offsets. TZP also did not seek to mitigate this conflict of interest by including the interest payments it received in the relevant Funds' fee offsets.

21. The LPAs do contain provisions that describe what types of compensation or revenue TZP may exclude from the fee offset, but interest on deferred Transaction Fees is not listed among the exclusions.

22. During the Relevant Period, TZP collected \$701,522 in interest on deferred Transaction Fees for five portfolio company investments, of which \$423,065 should have been allocated to increase the relevant Funds' fee offsets under the LPAs.

**C. TZP Improperly Duplicated Transaction Fee Reductions When Calculating Certain Fee Offsets.**

23. When more than one Fund invested in the same portfolio company, the LPAs governed how Transaction Fees were to be allocated among the Funds for purposes of calculating the Funds' respective fee offsets.

24. The LPAs provided that each Fund's fee offset would be calculated based on all Transaction Fees that TZP received from a portfolio company. Specifically, the LPAs defined Transaction Fees to include "all transaction fees, advisory fees, monitoring fees or other similar fees **received by the Investment Manager, the General Partner or their respective Affiliates** or any officer, director, employee, manager, member, partner or shareholder of any of the foregoing" (emphasis added).

25. The LPAs further provided that each Fund's allocation of these Transaction Fees would be reduced to account for other Funds' and co-investors' fully diluted equity ownership of the portfolio company.

26. For at least one portfolio company in which multiple Funds invested, TZP initially allocated to each Fund a portion of the Transaction Fees received based on each Fund's pro rata share of the total amount of capital the Funds had invested, instead of allocating "all" Transaction Fees received by TZP. TZP then reduced each Fund's allocation *a second time* based on each Fund's fully diluted equity ownership of the portfolio company.

27. This calculation was inconsistent with the LPAs, amounted to improper double counting, and had the effect of lowering each Fund's fee offset.

28. As a result of this Transaction Fee allocation practice, TZP received \$78,976 in excess management fees. TZP did not disclose this allocation practice or the conflicts of interest it created to the relevant Funds or their respective LPs.

**Violation**

29. As a result of the conduct described above, TZP willfully<sup>2</sup> violated Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging in any transaction,

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<sup>2</sup> "Willfully," for purposes of imposing relief under Section 203(e) of the Advisers Act, "means no more than that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000)

practice or course of business that operates as a fraud or deceit upon a client or prospective client. Scienter is not required to establish a violation of Section 206(2), which may rest on a finding of negligence. *SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194-95 (1963)).

### **Disgorgement and Civil Penalties**

30. The disgorgement and prejudgment interest ordered in Paragraph IV.C. is consistent with equitable principles and does not exceed TZP's net profits from its violations and will be distributed to harmed investors to the extent feasible. Upon approval of the distribution final accounting by the Commission, any amounts remaining that are infeasible to return to investors may be transferred to the general fund of the U.S. Treasury, subject to Section 21F(g)(3) of the Securities Exchange Act of 1934 ("Exchange Act").

### **IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent TZP's Offer.

Accordingly, pursuant to Sections 203(e) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondent TZP cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Advisers Act.

B. Respondent TZP is censured.

C. Respondent TZP shall pay disgorgement, prejudgment interest, and a civil monetary penalty totaling \$683,877, as follows:

(i) Respondent TZP shall pay disgorgement of \$502,041, and prejudgment interest of \$6,836, consistent with the provisions of this Subsection C.

(ii) Respondent TZP shall pay a civil penalty of \$175,000, consistent with the provisions of this Subsection C.

(iii) Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the penalties, disgorgement, and prejudgment interest described above for distribution to those current and former investors in the Funds that were financially harmed by the practices detailed in Section III during the Relevant Period ("Affected Investors"). Amounts ordered to be paid as civil money penalties pursuant to this Order shall

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(quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). The decision in *The Robare Group, Ltd. v. SEC*, which construed the term "willfully" for purposes of a differently structured statutory provision, does not alter that standard. 922 F.3d 468, 478-79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has "willfully omit[ted]" material information from a required disclosure in violation of Section 207 of the Advisers Act).

be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

(iv) Within ten (10) days of the issuance of this Order, Respondent shall deposit \$683,877 (the "Fair Fund") into an escrow account at a financial institution not unacceptable to the Commission staff and Respondent shall provide evidence of such deposit in a form acceptable to the Commission staff. The account holding the assets of the Fair Fund shall bear the name and the taxpayer identification number of the Fair Fund. If timely payment into the escrow account is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 [17 C.F.R. § 201.600] and/or 31 U.S.C. § 3717.

(v) Respondent shall be responsible for administering the Fair Fund and may hire a professional at its own cost to assist it in the administration of the distribution. The costs and expenses of administering the Fair Fund, including any such professional services, shall be borne by Respondent and shall not be paid out of the Fair Fund.

(vi) Respondent shall distribute from the Fair Fund to Affected Investors an amount representing the excess management fees it charged to the relevant Funds during the Relevant Period as a result of the practices described above and, from the remaining funds, reasonable interest paid at the Federal short term rate plus three percentage points, compounded quarterly from the year-end of each excess management fee payment through the expected distribution date, pursuant to a disbursement calculation (the "Calculation") that will be submitted to, reviewed, and approved by the Commission staff in accordance with this Subsection C. The Calculation shall be subject to a *de minimis* threshold. No portion of the Fair Fund shall be paid to any Affected Investor account in which Respondent, or any of its current or former officers or directors, has a financial interest.

(vii) Respondent shall, within ninety (90) days from the date of this Order, submit the Calculation to the Commission staff for review and approval. At or around the time of submission of the proposed Calculation to the staff, Respondent shall make itself available, and shall require any third-parties or professionals retained by Respondent to assist in formulating the methodology for its Calculation and/or administration of the distribution to be available, for a conference call with the Commission staff to explain the methodology used in preparing the proposed Calculation and its implementation, and to provide the staff with an opportunity to ask questions. Respondent also shall provide the Commission staff such

additional information and supporting documentation as the Commission staff may request for the purpose of its review. In the event of one or more objections by the Commission staff to Respondent's proposed Calculation or any of its information or supporting documentation, Respondent shall submit a revised Calculation for the review and approval of the Commission staff or additional information or supporting documentation within ten (10) days of the date that the Commission staff notifies Respondent of the objection. The revised Calculation shall be subject to all of the provisions of this Subsection C.

(viii) Respondent shall, within thirty (30) days of the written approval of the Calculation by the Commission staff, submit a payment file (the "Payment File") for review and acceptance by the Commission staff demonstrating the application of the methodology to each Affected Investor. The Payment File should identify, at a minimum, (1) the name of each Affected Investor; (2) the net amount of the payment to be made, less any tax withholding; (3) the amount of any *de minimis* threshold to be applied; and (4) the amount of reasonable interest paid. Respondent shall exclude from the payee file all payments to payees that appear on the U.S. Treasury Department Specially Designated Nationals List.

(ix) Respondent shall disburse all amounts payable to Affected Investors within ninety (90) days of the date the Commission staff accepts the Payment File, unless such time period is extended as provided in Paragraph (xiii) of this Subsection C. Respondent shall notify the Commission staff of the date and the amount paid in the initial distribution.

(x) If Respondent is unable to distribute or return any portion of the Fair Fund for any reason, including an inability to locate an Affected Investor or a beneficial owner of an Affected Investor or any other factors beyond Respondent's control, Respondent shall transfer any such undistributed funds to the Commission for transmittal to the United States Treasury in accordance with Exchange Act Section 21F(g)(3) once the distribution of funds is complete and before the final accounting provided for in Paragraph (xii) of this Subsection C is submitted to the Commission staff. Payment must be made in one of the following ways:

- a. Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- b. Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- c. Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center  
Accounts Receivable Branch  
HQ Bldg., Room 181, AMZ-341  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying TZIP as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Lee A. Greenwood, Assistant Director, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, 100 Pearl Street, Suite 20-100, New York, NY 10004 or such other person or address as the Commission staff may provide.

(xi) A Fair Fund is a Qualified Settlement Fund (“QSF”) under Section 468B(g) of the Internal Revenue Code, 26 U.S.C. §§ 1.468B.1- 1.468B.5. Respondent agrees to be responsible for all tax compliance responsibilities associated with the Fair Fund’s status as a QSF. These responsibilities involve reporting and paying requirements of the Fair Fund, including but not limited to: (1) tax returns for the Fair Fund; (2) information return reporting regarding the payments to Affected Investors, as required by applicable codes and regulations; and (3) obligations resulting from compliance with the Foreign Account Tax Compliance Act. Respondent may retain any professional services necessary. The costs and expenses of tax compliance, including any such professional services, shall be borne by Respondent and shall not be paid out of the Fair Fund.

(xii) Within one hundred fifty (150) days after Respondent completes the disbursement of all amounts payable to Affected Investors, Respondent shall return all undisbursed funds to the Commission pursuant to the instructions set forth in this Subsection C. Respondent shall then submit to the Commission staff a final accounting and certification of the disposition of the Fair Fund for Commission approval, which final accounting and certification shall include, but not be limited to: (1) the amount paid to each payee, with the reasonable interest amount, if any, reported separately; (2) the date of each payment; (3) the check number or other identifier of the money transferred; (4) the amount of any returned payment and the date received; (5) a description of the efforts to locate a prospective payee whose payment was returned or to whom payment was not made for any reason; (6) the total amount, if any, to be forwarded to the Commission for transfer to the United States Treasury; and (7) an affirmation that Respondent has made payments from the Fair Fund to Affected Investors in accordance with the Calculation approved by the Commission staff. The final accounting and certification shall be submitted under a cover letter that identifies Respondent and the file number of these proceedings to Lee A. Greenwood, Assistant Director, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, 100 Pearl Street, Suite 20-100, New York, NY, 10004, or such other person or address as the Commission staff may provide. Respondent shall provide any and all supporting documentation for the accounting and certification to the Commission staff upon its request and shall cooperate with any additional requests by the Commission staff in connection with the accounting and certification.



(xiii) The Commission staff may extend any of the procedural dates set forth in this Subsection C for good cause shown. Deadlines for dates relating to the Fair Fund shall be counted in calendar days, except if the last day falls on a weekend or federal holiday, the next business day shall be considered the last day.

By the Commission.

Vanessa A. Countryman  
Secretary

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

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**SECURITIES AND EXCHANGE  
COMMISSION**

**Plaintiff,**

**ROUZBEH HAGHIGHAT,  
BEHROUZ HAGHIGHAT,  
KIRSTYN PEARL,  
SEYEDFARBOD SABZEVARI, and  
JAMES ROBERGE**

**Defendants.**

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**COMPLAINT**

**Civil Action No.**

**JURY TRIAL DEMANDED**

**COMPLAINT**

Plaintiff Securities and Exchange Commission (the “Commission”), 33 Arch Street, 24th Floor, Boston, MA 02110, alleges as follows against the Defendants, whose names and last known addresses are set forth below:

- a. Rouzbeh Haghighat a/k/a “Ross” Haghighat  
10 Coffin Street  
West Newbury, Massachusetts 01985
- b. Behrouz Haghighat a/k/a “Bruce” Haghighat  
14 O Hill Ridge  
Laguna Nigel, California 92677
- c. Kirstyn Pearl  
900 Calle Emilio Gonzalez, A 103  
Isabela, Puerto Rico 00662
- d. Seyedfarbod Sabzevari a/k/a “Fabio” Sabzevari  
5115 Lankershim Blvd.  
Apt. 619  
North Hollywood, California 91601

- e. James Roberge  
1 Links Road  
Westford, Massachusetts 01886

**PRELIMINARY STATEMENT**

1. This case involves illegal insider tipping and trading in the securities of Chinook Therapeutics, Inc. (“Chinook”) in the days leading up to the public announcement on June 12, 2023 that the company would be acquired by Novartis AG (“Novartis”). On the day of the announcement, Chinook common stock closed at \$37.98 per share, an increase of \$13.99 per share, or approximately 58% from the prior day’s closing price.

2. The announcement of Chinook’s acquisition was preceded by weeks of confidential negotiations between Chinook and Novartis. These negotiations were led by Chinook’s management and its board of directors. Defendant Ross Haghighat was a member of Chinook’s board of directors during these negotiations and owed the company and its shareholders a duty to protect the confidentiality of the information he learned in this position.

3. Defendant Ross Haghighat breached this duty by providing material, non-public information (“MNPI”) concerning the acquisition of Chinook to his family and friends, specifically, his brother, Bruce Haghighat, his step-daughter, Kirstyn Pearl (“Pearl”), and his friends Fabio Sabzevari (“Sabzevari”) and James Roberge (“Roberge”)—each of whom knew, consciously avoided knowing, or was reckless in not knowing that (i) Ross Haghighat was a member of Chinook’s board of directors or otherwise affiliated with Chinook, and (ii) he conveyed this information in breach of his duty.

4. After receiving this MNPI from Ross Haghighat, Defendants Bruce Haghighat, Pearl, Sabzevari, and Roberge traded on it by purchasing Chinook securities in advance of the public announcement of the company’s acquisition. In addition, Ross Haghighat purchased

Chinook stock in a custodial account he managed for a minor stepchild in advance of the public announcement of the company's acquisition. In this way, all five Defendants—Ross Haghighat, Bruce Haghighat, Pearl, Sabzevari, and Roberge—reaped the unfair advantage of buying Chinook securities based on MNPI prior to the acquisition's announcement to the general public and the resultant price increase.

5. The acquisition of Chinook by Novartis was announced before market open on June 12, 2023. As a result of the announcement, the price of Chinook's stock rose dramatically that day and closed at \$37.98 per share. Based on their illegal purchases of Chinook securities prior to the announcement, Defendants Ross Haghighat, Bruce Haghighat, Pearl, Sabzevari, and Roberge collectively gained over \$500,000 for themselves or others.

6. By knowingly or recklessly engaging in the conduct described in this Complaint, Defendants Ross Haghighat, Bruce Haghighat, Pearl, Sabzevari, and Roberge violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder.

7. The Commission seeks against each Defendant an injunction against future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by engaging in the transactions, acts, practices, and courses of business of the type alleged in this Complaint, disgorgement of illicit profits, prejudgment interest thereon, and a civil penalty.

8. The Commission further seeks entry of an order barring Ross Haghighat from serving as an officer or director of a public company.

### **JURISDICTION AND VENUE**

9. The Commission brings this action pursuant to Sections 21(d) and 21A of the Exchange Act [15 U.S.C. §§ 78u(d), 78u-1].

10. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, and Sections 21(d), 21(e), 21A, and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), 78u-1, and 78aa]. The Defendants have, directly or indirectly, made use of the means or instrumentalities of interstate commerce, or of the mails, or the facilities of a national securities exchange in connection with the acts, practices, transactions, and courses of business alleged in this Complaint.

11. Venue in this district is proper under 28 U.S.C. § 1391(b) and Section 27 of the Exchange Act [15 U.S.C. § 78aa] because certain of the acts, practices, transactions and courses of business constituting the alleged securities law violations occurred within this district. The Defendants' trades in Chinook's securities were executed on stock market computer servers installed in various locations in New Jersey.

### **DEFENDANTS**

12. Ross Haghighat, age 62, is a businessman, investor, and corporate executive with years of experience serving as a director on the boards of public and private companies. At the time of negotiations between Chinook and Novartis between May and June 2023, Ross Haghighat was a member of Chinook's board of directors, and he was also on the board's audit committee. When his term on the board expired on or around June 9, 2023, Ross Haghighat entered into a consulting agreement with Chinook during which he was paid the remainder of his "2023 Board Compensation." He has also previously served as a director and officer of other companies whose securities have been registered with the Commission, and he recently served as Chairman, Chief Executive Officer ("CEO"), and director of Company A, a private engineering product research and development company located in Chelmsford, Massachusetts.

13. Bruce Haghighat, age 60, is Ross Haghighat's brother. Bruce Haghighat serves as trustee of a trust established by Ross Haghighat for the benefit of Ross Haghighat's children.

14. Kirstyn Pearl, age 36, is Ross Haghighat's stepdaughter.

15. Fabio Sabzevari, age 31, is Ross Haghighat's friend and, until October 2023, was also his employee at Company A.

16. James Roberge, age 70, is Ross Haghighat's friend.

### **RELEVANT ENTITIES**

17. Chinook was a Seattle-based biopharmaceutical company focused on the discovery, development, and commercialization of precision medicines for kidney diseases. Prior to being acquired by Novartis, Chinook stock was registered with the Commission and traded on the NASDAQ stock market ("NASDAQ") under the symbol KDNY.

18. Novartis is a Swiss holding company that, directly or indirectly, owns a multinational group of operating companies specializing in the research, development, manufacturing and marketing of a broad range of pharmaceuticals and medicines. Novartis' shares are listed in Switzerland on the SIX Swiss Exchange. Novartis makes its stock available in United States markets through the American Depositary Receipts ("ADR") Program. Novartis ADRs are listed on the New York Stock Exchange and trade under the symbol NVS. Novartis's United States operations are based in or around East Hanover, New Jersey.

### **FACTUAL ALLEGATIONS**

#### **A. Timeline of Novartis's Acquisition of Chinook**

19. On May 4, 2023, the CEO of Novartis contacted the CEO of Chinook and made a verbal proposal for Novartis to acquire Chinook at an all-cash purchase price of \$32 per share of Chinook common stock. That same day, Novartis followed this verbal offer with a formal written non-binding preliminary proposal communicating the same terms ("May 4 Proposal"), indicating

that the price represented a 67% premium to Chinook stock's closing price from the previous day.

20. On May 4, 2023, Chinook's CEO informed the company's board of directors, which included Ross Haghighat, about the unsolicited offer, and planned a board meeting for the following day, May 5, 2023.

21. On May 5 and 6, 2023, Chinook's board, including Ross Haghighat, met to discuss the May 4 Proposal. The board directed company management to communicate to Novartis that the bid was too low and to offer to make a presentation to encourage Novartis to make a higher bid.

22. Between May 8 and May 15, 2023, Chinook's management communicated the board's message to Novartis, entered into a confidentiality agreement with Novartis, and presented information to Novartis about Chinook's product development programs and market opportunities.

23. On May 22, 2023, Novartis communicated to Chinook management that it would increase its purchase price offer to \$36 per share of Chinook common stock ("May 22 Proposal").

24. Later that same day, Chinook's board, including Ross Haghighat, met with Chinook's senior management and its financial advisers to discuss the May 22 Proposal. Following the discussion, the Chinook board determined to make a counteroffer to Novartis. The board directed one of Chinook's financial advisers to inform Novartis that Chinook would be willing to proceed with the proposed transaction at a price of \$40 per share plus a contingent value right that would pay an additional \$4 per share upon the submission to the U.S. Food and

Drug Administration (“FDA”) of a New Drug Application (“NDA”) for a particular drug product candidate (the “drug product candidate”) being developed by Chinook.

25. On May 23, 2023, one of Chinook’s financial advisers communicated the counteroffer to Novartis.

26. On May 26, 2023, Novartis informed one of Chinook’s financial advisers that Novartis was willing to increase its proposed purchase price to \$40 per share and a contingent value right of an additional \$4 per share based upon FDA approval of the drug product candidate (“May 26 Proposal”). As part of the May 26 Proposal, Novartis requested that Chinook negotiate with Novartis on an exclusive basis.

27. Later that same day, Chinook’s board, including Ross Haghighat, met with senior management and its financial advisers to discuss the May 26 Proposal. Following the discussion, the Chinook board determined to make a counteroffer to Novartis. The board directed one of its financial advisers to inform Novartis that Chinook would be willing to proceed with the proposed transaction at a price of \$40 per share plus a contingent value right to (i) an additional payment of \$2 per share upon FDA approval of an NDA for the drug product candidate for a particular indication for use and (ii) an additional \$2 per share upon FDA approval of an NDA for the same drug product candidate for a second indication for use (“May 26 Counteroffer Proposal”). The Chinook board directed one of its financial advisers to communicate the counteroffer to Novartis as well as Chinook’s willingness to negotiate exclusively until at least June 12, 2023, if Novartis determined the counteroffer to be acceptable. Chinook’s financial adviser communicated this message to Novartis on May 26, 2023.

28. On May 27, 2023, Novartis advised Chinook’s financial adviser that it would proceed based on Chinook’s May 26 Counteroffer Proposal with certain modifications to the



contingent value right provisions. Novartis stated that this was its best and final offer. Later that same day, Chinook's CEO informed the board, including Ross Haghighat, of this modified offer. The board, including Ross Haghighat, directed Chinook management to proceed with Novartis' proposed acquisition, on an exclusive basis, based on this best and final offer. And Novartis was advised of the board's determination to proceed on the basis of this best and final offer.

29. Between May 27 and June 10, 2023, Chinook provided Novartis with expanded, customary due diligence materials, and the parties circulated and negotiated draft written agreements.

30. On June 11, 2023, the Chinook board, senior management, and its financial advisers held a meeting, which Ross Haghighat attended. The board reviewed and discussed the negotiated terms of the merger agreement and contingent value rights agreement, and the board approved the merger agreement and proposed transaction. Thereafter, Chinook and Novartis executed the merger agreement.

31. On the following day, June 12, 2023, prior to the opening of the U.S. stock markets, the merger parties issued a joint press release publicly announcing the transaction. By the end of that trading day, Chinook's common stock price had risen to close at \$37.98 per share, an increase of 58.3% over the prior trading day's closing price of \$23.99 per share. This price increase was accompanied by a spike in the volume of trading activity in Chinook shares. On June 12, 2023, over 22 million Chinook shares were traded. By comparison, the average daily volume of trading in Chinook shares during the two weeks prior to the public announcement was 729,232 shares.

**B. Chinook's Protection of Confidential, Material Non-Public Information**

32. Chinook maintained an Insider Trading Policy (“Policy”) protecting its confidential MNPI. The Policy was in effect during the relevant period between May 4 and June 12, 2023 (the “Relevant Period”).

33. The Policy applied to all company employees and directors, as well as to their immediate family members sharing their households or those financially dependent upon them or subject to their influence or control.

34. The Policy defined “material information” as “information about our company, positive or negative, that a reasonable stockholder would consider useful when buying or selling our stock.” The definition included, as an example of MNPI, not-yet-announced “mergers or acquisitions.”

35. According to the Policy, its “primary purpose” was “to prevent people who are in possession of MNPI from profiting from that MNPI before it is made publicly available, thus allowing all of our stockholders to benefit from the information at the same time.” The Policy further stated that “federal securities laws prohibit a person from using MNPI to make decisions about trading our stock, including tipping off someone else with that information so that they can trade our stock.”

36. The Policy specifically warned covered persons thinking of trading Chinook stock: “1. Never buy or sell our stock when in possession of MNPI” and “2. Keep all MNPI confidential, including from your family and friends.”

37. Chinook also maintained a Code of Business Conduct and Ethics (“Code”) that applied to all directors, officers and employees. With regard to insider trading, the Code stated, “The bottom line is that we never buy or sell securities based on inside information, nor do we tip-off others to do so. It doesn’t matter how we learned the information – using material

nonpublic information to make a trade is never acceptable. Doing so violates the law and the trust we've built with our fellow employees, and with our suppliers, vendors, collaborators and investors, and others.”

38. As a member of the Chinook board when it adopted both the Policy and Code, Ross Haghighat was aware of Chinook's prohibitions against insider trading and tipping during the Relevant Period.

**C. Ross Haghighat Obtained MNPI at Confidential Chinook Board Meetings.**

39. On May 4, 2023, Ross Haghighat was informed of the Novartis offer to purchase Chinook. As a Chinook board member, the company provided Ross Haghighat with MNPI concerning Novartis' offers to purchase Chinook and the competitive bidding process that resulted in a sale of the company.

40. Ross Haghighat knew or was reckless in not knowing that the information he received about the proposed acquisition was material and non-public.

41. Ross Haghighat knew or was reckless in not knowing that, as a board member, he had a duty to Chinook and its shareholders to keep this MNPI in confidence.

**D. Ross Haghighat Tipped His Brother Bruce Haghighat Who Traded on Chinook's MNPI.**

42. In or about May 2023, Ross Haghighat tipped his brother Bruce Haghighat with MNPI concerning the potential acquisition of Chinook. In making this tip, Ross Haghighat expected to benefit from Bruce Haghighat using the MNPI to place profitable trades in a trust that Ross Haghighat had set up for the benefit of Ross's children.

43. Bruce Haghighat knew, consciously avoided knowing, or was reckless in not knowing that Ross Haghighat was a member of the Chinook board of directors or otherwise affiliated with Chinook.

44. At the time Bruce Haghighat received this tip, he further knew, consciously avoided knowing, or was reckless in not knowing that the information provided to him was both material and non-public.

45. Accordingly, Bruce Haghighat knew, consciously avoided knowing, or was reckless in not knowing that Ross Haghighat breached his duty to Chinook by tipping him so that Bruce Haghighat could place profitable trades for the benefit of Ross Haghighat and his children.

46. The circumstances of Ross Haghighat's tip and Bruce Haghighat's illicit stock purchase include the following facts.

47. Bruce Haghighat served as trustee for a trust for which Ross Haghighat was the grantor and Ross Haghighat's children were the beneficiaries (the "Trust").

48. On May 25, 2023, three days after Ross Haghighat learned about the May 22 Proposal, Bruce Haghighat emailed his broker, stating: "I have a short window of opportunity for a transaction. Is the [Trust brokerage] account set up in a way that I can trade options?" The broker responded: "Unfortunately, that account is not set up for options trading. Would you like to add that capability to the account?" Bruce Haghighat replied: "Yes, Pls add this option to this account ASAP. I will have a transaction for you as early as Friday, or next Tuesday. Pls let me know when this feature has been added."

49. That same day, the broker responded to Bruce Haghighat: "Because of the complexity of options trading and our compliance process, I think it would be in your best interest to place any options trading directly with ... another broker..." Bruce Haghighat replied: "Well time is of the essence. I have an opportunity transaction next week."

50. On May 26, 2023, the same day Chinook's board met with senior management and its financial advisers to discuss Novartis's May 26 Proposal, Bruce Haghighat and Ross Haghighat spoke on the phone and texted each other multiple times. In these texts, they had the following exchange:

- **Bruce:** What is the stick [sic] symbol?
- **Ross:** Kdny
- **Bruce:** [The broker] called me and he needs 3 days to set up for options. I am just going to buy it direct. If you change your mind, let me know in the next hour.

51. Following this text exchange, Ross Haghighat called Bruce Haghighat and they spoke for over a minute. Bruce Haghighat then spoke with his broker who managed a brokerage account in the name of the Trust, and almost immediately afterward, Bruce Haghighat texted Ross Haghighat: "Done. Let me know the exit." Ross Haghighat replied: "OK we can talk." On May 26, 2023, Bruce Haghighat bought 2,000 Chinook shares at \$22.66 per share through the brokerage account in the name of the Trust.

52. On June 12, 2023, the day that the merger of Chinook and Novartis was announced, Ross Haghighat and Bruce Haghighat exchanged the following texts:

- **Bruce:** Let me know when u want to sell the stock
- **Ross:** Oh right. Let's all [sic] it for \$39 anytime
- **Ross:** Bruce Ali, on second thought, hold on to it. The deal is \$40 +2+2 or \$42/sh. The deal should close in August. Stock is at \$38. Seems it has another 5-8% gain to go. So let's leave it alone. Thnx.

53. Approximately one month later, on July 7, 2023, Bruce Haghighat sold 2,000 Chinook shares at \$39 per share from the Trust-held brokerage account, generating unjust gains in the amount of \$30,640.

54. On July 10, 2023, Bruce Haghighat texted Ross Haghighat: “The stuff sold. All in cash now. If u r not moving it, we should put it into a MM fund. Will pay about 4-5% ...”

55. On July 24, 2023, the illicit trading profits of \$30,640, along with other funds in the account, were wired from the Trust-held brokerage account to another financial account held in the name of the Trust.

**E. Ross Haghighat Tipped His Stepdaughter Kirstyn Pearl Who Traded on Chinook’s MNPI.**

56. In or about May 2023, Ross Haghighat tipped Pearl with MNPI concerning the potential acquisition of Chinook. In making this tip, Ross Haghighat provided Pearl with an illicit gift of confidential MNPI that Pearl could profit upon by purchasing Chinook securities in advance of the public announcement of the contemplated acquisition. Pearl then shared her illicit profits with Ross Haghighat.

57. At the time Pearl received this tip, Pearl knew, consciously avoided knowing, or was reckless in not knowing that Ross Haghighat was a member of the Chinook board of directors or otherwise affiliated with Chinook.

58. She further knew, consciously avoided knowing, or was reckless in not knowing that the information provided to her was both material and non-public.

59. Pearl knew, consciously avoided knowing, or was reckless in not knowing that Ross Haghighat was breaching his duty to Chinook by tipping her. Pearl further knew, consciously avoided knowing, or was reckless in not knowing that Ross Haghighat provided her the tip of MNPI concerning Chinook’s imminent acquisition as an illicit gift to profit upon.

60. The circumstances of Ross Haghighat’s tip and Pearl’s securities purchases include the following facts.

61. On May 22, 2023, the day Chinook's board met with senior management and its financial advisers to discuss Novartis's May 22 Proposal, Ross Haghighat texted Pearl:

- I just finished Board call. Going for a bite.
- Looking forward to our drive back on Wednesday

62. Two days later, on May 24, 2023, Ross Haghighat drove Pearl from New York City to Ross Haghighat's home in West Newbury, Massachusetts, and, within hours of their arrival, Pearl visited a website for an options profit calculator. An options profit calculator is a tool used to estimate the potential profit on a hypothetical options trade.

63. Between May 24, 2023, and May 26, 2023, Pearl made a series of electronic fund transfers into her brokerage account totaling \$2,050.

64. On May 26, 2023, Pearl made a \$5,000 cash deposit into her bank account at an ATM located in or around Newburyport, Massachusetts, not far from Ross Haghighat's home, which she subsequently transferred into her brokerage account. On that same day, Pearl entered orders to purchase Chinook call options in her brokerage account, but her orders were rejected because her recently deposited funds were still on hold. Four days later, on May 30, 2023, Pearl again entered orders to purchase Chinook call options in her brokerage account, but her orders were again rejected because the funds she deposited were still on hold.

65. An option is, in substance, a contract that gives the option's owner the right to buy or sell shares of the underlying stock at a set price per share, known as the option's "strike price." Options to buy shares are known as "call" options. An option's expiration date is the last day the options holder has the right to buy or sell the underlying asset at the strike price.

66. On June 5, 2023, Pearl purchased 153 Chinook call options with a strike price of \$30 and an expiration date of June 16, 2023.

67. On the day Pearl bought the Chinook call options, the company's stock was trading at prices ranging from \$24.32 to \$25.47, and the options that Pearl purchased were "out-of-the-money." When a call option's strike price is greater than the market price of the underlying stock, the option is "out-of-the-money" because the exercise of the option and sale of the stock into the market would result in a trading loss. If the underlying stock later trades at a price above the option's strike price, the option is considered to be "in-the-money" because the option owner can exercise the call option and buy the stock at the strike price and then sell the stock into the market for a profit.

68. Pearl's purchase of call options with a \$30 strike price and a June 16, 2023 expiration date meant she was anticipating that the price of Chinook's common stock would rise above \$30 per share in less than two weeks. At the time of Pearl's option purchases, Chinook's common stock had never traded at a price above \$30 per share.

69. In the early morning of June 12, 2023, within hours after the acquisition had been publicly announced, Pearl sent the following texts to Ross Haghighat about premarket trading in Chinook's securities:

- 4 am on the dot \$35k order in from someone at \$39/share
- Passing out - night!

70. Later that day, Ross Haghighat texted Pearl:

- Did u get it done?

71. Within minutes of the text, Pearl sold some of her Chinook call options and then sent Ross Haghighat the following text:

- Chunks/game plan finalized – excited to show u when you get home. going to [a social club] in Boston with a friend later, helping mom now with the yard work



72. Between June 12, 2023, and June 14, 2023, Pearl sold all of her remaining Chinook call options in small batches (or “chunks”) via multiple trades. In total, Pearl’s options trading generated total illegal gains of approximately \$115,949.

73. On Thursday, July 6, 2023, Pearl and Ross Haghighat exchanged the following text messages, discussing what to do with the money made from the illegal insider trading of Chinook securities:

- **Pearl:** Tuesday for \$ in my bank, scheduled to clear monday (just called)
- **Ross:** Oh nice. Life is good. Decide how much of it you plan to save. Move it and forget it. Saving is done at the beginning, never at the end. I’m glad this worked out honey
- **Pearl:** Unfortunately not much to save after I pay off all school loans/debt - \$58k total for every last penny I owe. BUT what a friggin blessing to be debt free at this stage of my life. So glad it worked out as well – very very very grateful

74. A few weeks later, on August 2, 2023, Pearl and Ross Haghighat exchanged the following text messages discussing how to transfer some of the illicit profits to Ross:

- **Ross:** Kirst, I’d like to close the loop on fund transfer this week. Easiest is to write out a check or transfer to me and I’ll redirect into individual accounts. Let’s discuss logistics tonight. Thnx.
- **Pearl:** No prob – it’s sitting in my [brokerage] account as cash, I’ll transfer it to my bank now so it goes in in next 48 hrs
- **Pearl:** Was gonna do it last week but got sidetracked with the nyc stuff, everything here, sorry
- **Pearl:** But yes no prob to get a cashiers check over to you when ready

75. Two days later, on August 4, 2023, Pearl transferred approximately \$62,757 from her brokerage account to her bank account.

76. On or about August 7, 2023, Pearl caused a cashier’s check in the amount of \$55,000 to be drawn from her bank account for the benefit of Ross Haghighat.

77. Between August 9 and August 11, 2023, Pearl and Ross Haghighat exchanged a series of texts indicating that Pearl gave the cashier's check to Ross Haghighat who then lost the check. In these texts, Pearl and Ross Haghighat discussed that it could take 90 days to cancel and replace the cashier's check, and Pearl noted that she had lied to the bank manager about the purpose of the payment in order to expedite it.

78. On or about November 6, 2023, after the funds for the initial cashier's check had been credited back to her account, Pearl caused a cashier's check in the amount of \$55,000 to be drawn from her bank account for the benefit of Ross Haghighat. This check was deposited into Ross Haghighat's bank account on or about November 13, 2023.

79. Several months later, on April 24, 2024, Pearl and her mother, who is married to Ross Haghighat, exchanged the following texts about the lost check incident:

- **Pearl:** I just totally had a brain popping realization – you know how SOMEHOW a \$60k check went missing on Ross's desk – it was intentional – since it was an illegal insider trading move by him, if he had a random big deposit immediately after the sale of the company/the stock was going up, it'd be suspicious if he was ever looked into – so he made us all think we were crazy searching around the house for that [expletive] when he prob ripped it up
- **Pearl:** He always thinks he's so friggin slick and then gets busted – I swear on my life that's what happened.
- **Pearl's Mother:** No I found it after
- **Pearl:** Did u????! lol that's hilarious
- **Pearl:** Man I was like that [expletive] sneak – made too much sense
- **Pearl's Mother:** That's what happens makes u doubt everything else
- **Pearl:** Delete these lol
- **Pearl's Mother:** Am
- **Pearl:** Yep

**F. Ross Haghighat Tipped His Friend and Former Employee Fabio Sabzevari Who Traded on Chinook's MNPI.**

80. In or about May 2023, Ross Haghighat tipped Sabzevari with MNPI concerning the potential acquisition of Chinook. In making this tip, Ross Haghighat provided Sabzevari with an illicit gift of confidential MNPI that Sabzevari could profit upon by purchasing Chinook securities in advance of the public announcement of the contemplated acquisition.

81. At the time Sabzevari received this tip, he knew, consciously avoided knowing, or was reckless in not knowing that Ross Haghighat was a member of the Chinook board of directors or otherwise affiliated with Chinook.

82. Sabzevari further knew, consciously avoided knowing, or was reckless in not knowing that the information provided to him was both material and non-public.

83. Sabzevari also knew, consciously avoided knowing, or was reckless in not knowing that Ross Haghighat was breaching his duty to Chinook by tipping him. Sabzevari also knew, consciously avoided knowing, or was reckless in not knowing that Ross Haghighat provided him the tip of MNPI concerning Chinook's imminent merger for the purpose of allowing Sabzevari to make an illegal purchase of Chinook stock.

84. The circumstances of Ross Haghighat's tip and Sabzevari's illicit stock purchase include the following facts.

85. Sabzevari worked for Ross Haghighat as an employee of Company A, where his job included scheduling Chinook board meetings for Ross Haghighat. Sabzevari considered Ross Haghighat to be a father figure and his mentor.

86. Sabzevari felt that he had been mistreated at Company A and had been promised a raise that he never received.

87. Sabzevari knew that Ross Haghighat was affiliated with Chinook. For example, Sabzevari admitted to federal agents that he (i) managed Ross Haghighat's LinkedIn account, which included information about Ross Haghighat's affiliation with Chinook and (ii) sent emails back and forth to Chinook to schedule board meetings for Ross Haghighat

88. On May 25, 2023, three days after Novartis's May 22 Proposal, Ross Haghighat and Sabzevari texted each other multiple times over the course of the day.

89. On May 26, 2023, Sabzevari called his broker to inquire about how to get additional funds into his brokerage account that he could use to trade that day. During this call, Sabzevari asked: "Can I put like \$10,000 cash into an ATM and deposit it into the checking account?" After the brokerage firm representative outlined deposit limits, Sabzevari commented: "I was just curious how much money I could shove into the ATM."

90. Sabzevari then asked: "If I wanted to do options trading, and let's just say, for example, I just sold some [Company B] stock, do I have to wait til that money is settled before I can do options trading?" As the representative was checking, Sabzevari commented: "Cuz I literally just sold it." Sabzevari's brokerage records confirm he sold recently acquired shares of [Company B] for proceeds of approximately \$7,800.

91. Less than one hour later, after initiating a wire of funds into his brokerage account, Sabzevari called his broker again to "double check to see if [broker] had received it" and to see when the funds would be available to trade. During this conversation, Sabzevari stated that it was his "first time making a wire."

92. That same day, Sabzevari sold, at a loss, shares of another recently purchased security for proceeds of approximately \$35,000.

93. From May 26, 2023, through June 6, 2023, Sabzevari purchased in his brokerage account 316 out-of-the money Chinook call options set to expire in July 2023 with strike prices ranging from \$25 to \$30.

94. Sabzevari's purchase of these short-term out-of-the money call options meant that he was anticipating that the price of the underlying Chinook stock would increase quickly.

95. On June 9, 2023, Sabzevari and Ross Haghighat exchanged text messages in the mid-afternoon. Shortly thereafter, Sabzevari purchased 620 shares of Chinook common stock.

96. At 3:34 AM on June 12, 2023, approximately two and a half hours after the Novartis/Chinook acquisition was announced, Sabzevari telephoned his broker seeking advice about how to sell his Chinook call options. Sabzevari told his broker, "I just don't know anything really about options."

97. Later on June 12, 2023, Sabzevari sold all his Chinook call options and common shares, reaping illegal gains of approximately \$283,826.

98. Sabzevari admitted to federal agents that Ross Haghighat told him to buy Chinook's securities prior to making his purchases.

**G. Ross Haghighat Tipped His Friend James Roberge Who Traded on Chinook's MNPI.**

99. In or about May 2023, Ross Haghighat tipped Roberge with MNPI concerning the potential acquisition of Chinook. In making this tip, Ross Haghighat provided Roberge with an illicit gift of confidential MNPI that Roberge could profit upon by purchasing Chinook securities in advance of the public announcement of the contemplated acquisition.

100. At the time Roberge received this tip, he knew, consciously avoided knowing, or was reckless in not knowing that Ross Haghighat was a member of the Chinook board of directors or otherwise affiliated with Chinook.

101. Roberge also knew, consciously avoided knowing, or was reckless in not knowing that the information provided to him was both material and non-public.

102. Roberge also knew, consciously avoided knowing, or was reckless in not knowing that Ross Haghighat was breaching his duty to Chinook by tipping him. Roberge also knew, consciously avoided knowing, or was reckless in not knowing that Ross Haghighat provided him the tip of MNPI concerning Chinook's imminent merger for the purpose of allowing Roberge to make an illegal purchase of Chinook stock.

103. The circumstances of Ross Haghighat's tip and Roberge's illicit stock purchase include the following facts.

104. Roberge and Ross Haghighat are close friends who bike together, meet for dinner and drinks, and communicate regularly.

105. Roberge admitted to federal agents that he knew that Ross Haghighat was affiliated with Chinook.

106. On Sunday, May 7, 2023, three days after Novartis's May 4 Proposal, Ross Haghighat went to Roberge's house around 3:30 PM.

107. Less than two hours later, at 5:20 PM, Roberge placed an order to buy 500 Chinook shares in one of his brokerage accounts, which executed the next morning. Prior to this purchase, Roberge's last trading in Chinook occurred in July 2021, when he sold the 120 shares of Chinook stock he held at that time.

108. Minutes later, at 5:26 PM on May 7, 2023, Roberge initiated a \$60,000 transfer from his bank to his brokerage account, which he later used to buy additional Chinook shares.

109. Early the next morning, on May 8, 2023, Roberge bookmarked a NASDAQ webpage for pre-market trading in Chinook's stock. Then, later that morning, he purchased a total of 6,000 shares of Chinook stock in two of his brokerage accounts.

110. Around noon on May 8, 2023, Roberge called one of his brokers to ask why his purchases were on margin when he had transferred funds from his bank. During this call, Roberge said to his broker, "I don't touch these [brokerage] accounts very often."

111. Between May 9, 2023, and June 7, 2023, Roberge and Ross Haghighat exchanged multiple text messages about getting together and also spoke on the phone. During this time period, Roberge purchased a net total of 3,400 additional Chinook shares.

112. By purchasing Chinook stock based on the MNPI Ross Haghighat provided him, Roberge generated illegal profits of approximately \$153,886 as of the close of regular market trading on June 12, 2023, the day of the merger announcement.

113. On or around August 14, 2023, Roberge spoke with his broker to discuss selling his Chinook shares. During the call, Roberge told his broker: "Yeah, he kinda told me, um, Novartis was buying out, um, buying out, um, this Chinook. I think it was ... actually, it was at \$38 a share, but they had several contingent value conditions associated with it. That increased value of it ... So several things that could bump the stock up to as much as \$44 a share."

**H. Ross Haghighat Purchased Chinook Stock Based On MNPI.**

114. On June 8, 2023, just four days prior to the public announcement of Novartis's acquisition of Chinook, Ross Haghighat purchased 40 shares of Chinook stock in a custodial brokerage account, which he managed, in the name of a minor stepchild.

115. Ross Haghighat made this purchase while aware that Novartis was negotiating to acquire Chinook.

116. Ross Haghighat also knew, or was reckless in not knowing, that the information that Novartis was negotiating to acquire Chinook was both material and non-public.

117. In making this purchase, Ross Haghighat breached his duty to Chinook to refrain from using the company's MNPI to purchase securities for his or anyone else's benefit.

118. At the time of this purchase, Ross Haghighat knew or was reckless in not knowing that he was breaching his duty to Chinook to refrain from using the company's MNPI to purchase securities for his or anyone else's benefit.

**CLAIM FOR RELIEF**  
**(Violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder)**

119. The Commission repeats and incorporates by reference the allegations in paragraphs 1 through 118 above.

120. By engaging in the conduct described above, Defendants directly or indirectly, acting knowingly or recklessly, in connection with the purchase or sale of securities, by the use of means and instrumentalities of interstate commerce, or of the mails, or of a national securities exchange: (a) employed devices, schemes or artifices to defraud; (b) made untrue statements of material facts or omitted to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading; and/or (c) engaged in acts, practices or courses of business which operated or would operate as a fraud or deceit upon certain persons.

121. As a result, Defendants violated and, unless enjoined, will continue to violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].



**PRAYER FOR RELIEF**

WHEREFORE, the Commission requests that this Court:

- A. Enter a permanent injunction restraining Defendants and each of their agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, from directly or indirectly violating Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5];
- B. Require Defendants to disgorge ill-gotten gains, plus prejudgment interest;
- C. Order Defendants to pay a civil monetary penalty pursuant to Section 21A of the Exchange Act [15 U.S.C. §78u-1];
- D. Enter an order, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. §78u(d)(2)], barring Ross Haghighat from serving as an officer or director of any issuer required to register securities with the Commission pursuant to Sections 12(b) or 12(g) [15 U.S.C. §78l(b), 78l(g)], or to file reports with Commission pursuant to Section 15(d) [15 U.S.C. §78o(d)], of the Exchange Act;
- E. Retain jurisdiction over this action to implement and carry out the terms of all orders and decrees that may be entered; and
- F. Award such other and further relief as the Court deems just and proper.

Dated: August 22, 2025  
Boston, Massachusetts

/s/ David H. London

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#### **LOCAL CIVIL RULE 11.2 CERTIFICATION**

Pursuant to Local Civil Rule 11.2, I certify that the matter in controversy alleged against the Defendants in the foregoing Complaint is not the subject of any other civil action pending in any court, or of any pending arbitration or administrative proceeding.

/s/ David H. London

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**DESIGNATION OF AGENT FOR SERVICE  
UNDER LOCAL CIVIL RULE 101.1(f)**

In accordance with Local Civil Rule 101.1(f), the undersigned hereby makes the following designation for the receipt of service of all notices or papers in this action at the following address:

United States Attorney's Office  
District of New Jersey  
Attention: Alex Silagi  
Assistant U.S. Attorney  
970 Broad Street, Suite 700  
Newark, NJ 17102

/s/ David H. London

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10 Securities and Exchange Commission

11 Division of Enforcement

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13 Washington, DC 20549

14 *Counsel for Plaintiff*

15 *Securities and Exchange Commission*

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION**

SECURITIES AND EXCHANGE  
COMMISSION,

*Plaintiff,*

v.

RYAN N. COLE,

*Defendant.*

**Case No. 25-cv-1038**

**COMPLAINT JURY**

**DEMAND**

1 Plaintiff Securities and Exchange Commission (the “SEC”) files this  
2 Complaint against Defendant Ryan N. Cole (“Cole”) and alleges as follows:

3 **SUMMARY OF THE ACTION**

4 1. While working as a trader for a financial firm (the “Firm”), Defendant  
5 Cole perpetrated a manipulative trading scheme known as spoofing. Cole placed  
6 fake—or spoof—orders to manipulate the prices of thinly traded options, and then  
7 he executed different orders at the resulting manipulated prices. By repeatedly  
8 engaging in this fraudulent conduct, Cole obtained approximately \$234,000 in ill-  
9 gotten gains from this scheme.

10 2. Cole’s spoofing scheme worked like this: he first placed orders for  
11 options that were thinly traded and had a large spread between the National Best  
12 Bid and the National Best Offer. Cole’s spoof orders were visible to the market,  
13 were priced either significantly lower than the current best offer or significantly  
14 higher than the current best bid. He sometimes placed spoof orders across  
15 neighboring options series referencing the same underlying security. By narrowing  
16 the spread between the National Best Bid and Offer across options series, Cole  
17 attracted the attention of other market participants to these thinly traded options.  
18 Cole’s spoof orders, however, were non-bona fide orders that he did not intend to  
19 execute—instead, they were designed to induce other market participants to trade  
20 these securities at manipulated prices, and Cole cancelled most of his spoof orders  
21 relatively quickly.

22 3. After these spoof orders shifted the market by narrowing the National  
23 Best Bid and Offer spread across neighboring option series, Cole placed coordinated  
24 immediate-or-cancel orders on the opposite side of the market within the newly  
25 established price range across options series, usually on a different exchange, some  
26 of which, due to the market attention drawn by his spoof orders, were executed. To  
27 facilitate desired executions across the neighboring options series in which he had  
28 placed spoof orders, Cole used the complex order book to place multi-leg immediate-

1 or-cancel orders. After his immediate-or-cancel orders were executed, Cole then  
2 cancelled his spoof orders, which had the effect of returning the National Best Bid  
3 and Offer spread to true market levels.

4 4. To close out his position, Cole then repeated these same steps on the  
5 opposite side of the market—first using a publicly viewable spoof order to set a new  
6 National Best Bid or National Best Offer and then submitting immediate-or-cancel  
7 orders to lock in his ill-gotten gains.

8 5. Through this scheme, Cole used spoof option orders—option orders  
9 that he never had any intention of executing—to artificially deflate or inflate the  
10 price of thinly traded options. He then profited by buying and selling those same  
11 options at artificial prices. This practice has long been recognized as an illegal,  
12 fraudulent scheme and a form of market manipulation.

13 6. Cole knew or was reckless in not knowing that this type of trading was  
14 illegal. As part of his job as a trader, he attended annual compliance trainings led  
15 by the Firm’s Chief Compliance Officer, including training on improper strategies  
16 such as spoofing.

17 7. Cole also took steps to conceal his spoofing from the Firm. When Firm  
18 senior management, including the Chief Compliance Officer, asked Cole about his  
19 daily trading activity, Cole provided false and misleading responses.

20 8. In early February 2022, the Firm’s Chief Compliance Officer asked  
21 Cole a series of questions about his trading that appeared to reflect spoofing activity  
22 and requested that Cole provide responses “with very specific detail.” Cole’s  
23 answers were short, non-responsive, and failed to address the indicia of spoofing  
24 that the Chief Compliance Officer raised.

25 9. Dissatisfied with Cole’s responses, the Firm terminated Cole’s  
26 employment.

27 10. By perpetrating the spoofing scheme and as alleged further in this  
28 Complaint, Cole violated, and unless enjoined will continue to violate, Sections

17(a)(1) and (3) of the Securities Act of 1933 (“Securities Act”) [15 U.S.C. §§ 77q(a)(1) and (3)], and Sections 9(a)(2) and 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. §§ 78i(a)(2) and 78j(b)], and Rules 10b-5(a) and (c) thereunder [17 C.F.R. §§ 240.10b-5(a), (c)].

## JURISDICTION AND VENUE

11. The SEC brings this action, and this Court has subject matter jurisdiction over this action, pursuant to Sections 20(b), 20(d), and 22(a) of the Securities Act [15 U.S.C. §§ 77t(b), 77t(d), and 77v(a)], and Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78aa]. Cole, directly or indirectly, made use of the mails, or the means and instrumentalities of interstate commerce, or the facilities of national securities exchanges, in connection with the transactions, acts, practices, and courses of business alleged in this complaint.

12. Venue is proper under Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)] and Section 27 of the Exchange Act [15 U.S.C. § 78aa] because the Defendant can be found within the Eastern District of California. He currently splits his time between Nevada and a residence in Folsom, California.

## DEFENDANT

13. **Ryan N. Cole**, age 39, is a former day trader and has never held any securities licenses. Cole worked at the Firm from May 2018 through February 2022.

## TERMS USED IN THIS COMPLAINT

14. *Options* are a contract that gives the owner the right, but not the obligation, to buy or sell a specific quantity of an asset at a specific price (“strike price”) on or before a specific date (“expiration”). Options for securities are frequently sold as one contract representing 100 shares of a stock.

15. *Option series* refers to the same type of options (e.g., a put or a call) for an underlying security with the same strike price and expiration.

16. *Spoofing* refers to a type of market manipulation scheme where a trader enters non-bona fide orders to create a false appearance of new or increased

1 trading interest in a security. Spoofers induce others to place orders priced at or  
2 better than the spoofer's non-bona fide orders. Spoofing creates artificial market  
3 conditions that benefit the spoofer's interests while harming other market  
4 participants.

5 17. *National Best Bid* is the highest reported price a buyer is willing to pay  
6 to buy a security.

7 18. *National Best Offer* is the lowest reported price that a seller is willing  
8 to accept to sell a security.

9 19. *NBBO*. The spread between the National Best Bid and National Best  
10 Offer is referred to as the "NBBO." The NBBO is publicly reported to the market  
11 and represents the tightest bid-ask spread for a particular security.

12 20. *Thinly traded securities* are securities that have low trading volume.  
13 As compared to more actively traded securities with greater trading volume, thinly  
14 traded securities often have fewer interested buyers and sellers and larger NBBO  
15 spreads. Thus, a small number of orders or trades can substantially impact the  
16 market prices of thinly traded securities, rendering them more susceptible to  
17 manipulation than securities that are more actively traded.

18 21. *Limit orders* can only be executed if the market price reaches the limit  
19 price. A buy limit order can only be executed at the limit price or lower, and a sell  
20 limit order can only be executed at the limit price or higher. While limit orders do  
21 not guarantee execution, they help ensure that an investor does not pay more than  
22 a pre-determined price.

23 22. *Day-limit orders* are limit orders to buy or sell a security at a specific  
24 price or better and which are automatically canceled if they remain unexecuted by  
25 the end of the trading day. While day-limit orders are open, they are publicly visible  
26 and can affect the NBBO.

27 23. *Immediate-or-cancel orders* are a type of limit order that must be  
28 executed immediately upon their placement. Any portion of an immediate-or-cancel



1 order that cannot be filled immediately will be cancelled. Given the nature of an  
2 immediate-or-cancel order, it does not affect the NBBO and is not publicly visible  
3 unless and until it is executed.

4 24. *Multi-leg orders* are a type of complex order for two or more different  
5 options series (“legs”).

6 25. *Complex Order Book* enables market participants to place multi-leg  
7 options orders.

## 8 **FACTS**

### 9 **I. The Firm Hired Cole and Warned Him Not to Spoof.**

10 26. In May 2018, the Firm hired Cole to trade an account funded by the  
11 Firm. Cole was paid an annual salary and was eligible for a performance-based  
12 bonus.

13 27. Starting in January 2019, and annually thereafter, Cole received  
14 training from the Firm’s Chief Compliance Officer on disruptive trading practices  
15 and improper order behavior. The Chief Compliance Officer explained that Cole and  
16 other employees were prohibited from spoofing, which the training materials  
17 described as entering orders without any intention of executing those orders for the  
18 purpose of driving the market price of a security up or down.

19 28. The Firm also explained to Cole that it monitored its traders’ activity  
20 for manipulative order behavior by reviewing, among other things, a trader’s  
21 cancellation ratio, pattern and practice of order placement, and a trader’s overall  
22 volume as a percentage of the market.

23 29. The Firm told Cole that engaging in improper order behavior could  
24 result in termination of his employment, legal action, and an industry bar.

### 25 **II. Cole Engaged in Manipulative Trading.**

26 30. Despite the Firm’s training, Cole engaged in spoofing on an almost  
27 daily basis from September 2020 through February 2022. Using accounts and assets  
28 belonging to the Firm, Cole entered options orders that he did not intend to execute

1 which allowed him to buy options at artificially low prices and sell at artificially  
2 high prices.

3 31. Cole generally spoofed thinly traded options with a large NBBO  
4 spread—a large difference between the National Best Bid and the National Best  
5 Offer. He first placed visible, day-limit orders on one side of the market, at a price  
6 near the middle of the NBBO. Cole entered similar orders simultaneously across  
7 different options series for the same stock. These limit orders shifted and narrowed  
8 the NBBOs across options series, creating a false appearance of new or increased  
9 trading interest in those options.

10 32. Cole then placed a flurry of immediate-or-cancel orders on the opposite  
11 side of the market within the new, narrower NBBO spreads. Unlike his day-limit  
12 orders, Cole's immediate-or-cancel orders did not impact the National Best Bid or  
13 the National Best Offer and those orders were not visible to the market unless and  
14 until they were executed. Cole repeatedly submitted immediate-or-cancel orders  
15 across related options series, hoping to buy at artificially lower prices or sell at  
16 artificially higher prices.

17 33. Once Cole's immediate-or-cancel orders were no longer being executed,  
18 he cancelled his non-bona fide day-limit orders. This usually triggered an  
19 immediate decrease in the National Best Bid (or increase in the National Best  
20 Offer) and a return to the true market NBBO.

21 34. Cole then repeated the same spoofing scheme on the other side of the  
22 market to lock in his profits.

23 35. Here is an example of how Cole's scheme worked. On February 1, 2022,  
24 Cole spoofed call options for the common stock of a company with a strike price of  
25 \$430 and an expiration date of March 4, 2022. Before Cole's manipulative trading,  
26 the National Best Bid for these options was \$0.50 and the National Best Offer was  
27 \$5.30. These options were thinly-traded, far out-of-the-money (the underlying  
28

1 security was trading around \$343 per share) and long-dated (set to expire in more  
2 than a month).

3 36. At 9:40:12 a.m., Cole placed a day-limit order to sell 11 contracts for  
4 these call options at a price of \$1.80, which was posted on a national exchange that  
5 Cole selected. This order was visible to the market, and it generated a new National  
6 Best Offer of \$1.80—down from \$5.30 before Cole’s spoof order.

7 37. Once the new NBBO range was set and reported, Cole then submitted  
8 immediate-or-cancel orders to buy one call option contract on an exchange that was  
9 different from the exchanges he had selected for his day-limit sell order.

10 38. At 9:42:11 a.m., one of Cole’s immediate-or-cancel buy orders executed  
11 at the price of \$1.40. He then placed immediate-or-cancel orders to buy 20 contracts  
12 of the same options. One of those 20-contract orders was executed at the price of  
13 \$1.50. Cole submitted more immediate-or-cancel buy orders for 20 contracts each,  
14 but no more orders were executed.

15 39. At 9:50:41 a.m., Cole cancelled his spoof day-limit sell order, and  
16 within seconds the National Best Offer rose from \$1.80 to \$4.80.

17 40. At this point, Cole had spent \$3,140 to purchase 21 contracts for these  
18 options.

19 41. To lock in his profits from this manipulation, Cole repeated the same  
20 spoofing scheme on the other side of the market. At 9:51:59 a.m., Cole placed a day-  
21 limit order to buy 11 of the same call option contracts at a price of \$1.60, which was  
22 posted on a national exchange that Cole selected. This order was visible to the  
23 market and increased the National Best Bid from \$0.10 to \$1.60.

24 42. At 9:53:13 a.m., Cole began to submit immediate-or-cancel orders to  
25 sell one call option contract on an exchange different from the one selected for his  
26 day-limit buy order. As soon as an order executed at a price of \$2.21, Cole submitted  
27 multiple immediate-or-cancel orders, each offering to sell 20 contracts. One order for  
28 20 contracts was ultimately executed at a price of \$2.12.

43. After entering four more immediate-or-cancel sell orders for 20 contracts each, without receiving an execution, Cole canceled his spoof day-limit buy order at 9:55:01 a.m. Approximately two seconds later, the National Best Bid for those options fell from \$1.60 to \$0.50.

44. In summary, between around 9:40 and 9:55 a.m. on February 1, 2022, Cole bought 21 contracts for these options at \$3,140 and then sold the 21 contracts for \$4,461—locking in an illicit profit of \$1,321 in around 15 minutes. Note that Cole’s profit for this window was actually higher because while Cole was engaging in spoofing on the March 4, 2022 \$430 call option series, he was placing related spoofing orders on the \$435 and \$440 call options series for the same underlying stock, manipulating those prices, and reaping additional illicit profits of around \$4,600.

### **III. Cole Tried to Conceal His Scheme and Was Terminated.**

45. The Firm required Cole to submit daily reports of his trading activity via firm-wide emails. In those reports, Cole identified his successful trades and described strategies he was purportedly executing. However, Cole did not disclose his spoofing strategy or any part of that strategy, including (i) the placement of opposite-side trades on different exchanges, (ii) the extremely high cancellation rates of his visible day-limit orders, (iii) the low execution rates of his visible day-limit orders, (iv) the impact on the NBBO from placing and canceling visible day-limit orders, and (v) the single-contract, immediate-or-cancel orders followed by higher contract-volume orders (as in the example above, where single-contract orders were followed by 20-contract orders).

46. On at least two separate occasions, members of the Firm’s senior management, including the Firm’s Chief Compliance Officer, questioned Cole directly about his “methodology” and the trading “strategies” he was employing. In response, Cole supplied false and misleading statements.

1           47. On November 8, 2021, for example, the Firm's Chief Compliance  
2 Officer told Cole that the Firm sought "a better understanding of the strategy," and  
3 asked for "a description of the selection process, specific strategy, along with the  
4 intended outcome" for each of Cole's "current positions." The Chief Compliance  
5 Officer explained that this information was being requested "to confirm  
6 compliance." Cole submitted a list of strategies he was purportedly using, including  
7 trading based on such themes as COVID-19 and Bitcoin, trading based on  
8 information obtained from news services, and price-based "momentum" trading.  
9 However, nowhere in his response did Cole disclose his spoofing strategy nor any  
10 key components of that strategy.

11           48. On February 2, 2022, the Chief Compliance Officer reviewed Cole's  
12 trading activity and told him that his "order placement, cancellations and  
13 executions [we]re extremely concerning" and that Cole's approach was "not  
14 consistent" with the strategies that Cole had earlier described to the Chief  
15 Compliance Officer.

16           49. The Chief Compliance Officer then asked Cole to provide written  
17 answers to a series of trading questions "with very specific detail."

18           50. The Chief Compliance Officer's questions reflected concerns of  
19 potential spoofing activity, including (i) whether or not Cole believed his trading  
20 was "impacting the market," (ii) why Cole was "loading up on a term structure and  
21 canceling," and (iii) whether Cole's orders were "entered with the intent to be  
22 executed," given that his "execution ratio" for certain orders reflected "little to no  
23 likelihood" of execution.

24           51. Despite the Chief Compliance Officer's stated concerns and requests  
25 for very specific detail, Cole's answers were short and non-responsive. For example,  
26 in response to a question on the market impact of his orders, Cole responded that  
27 "all activity in the market has some way of impacting price."  
28

52. Dissatisfied with Cole's responses, the Firm's Chief Compliance Officer recommended that the Firm terminate Cole.

53. A week later, on February 9, 2022, the Firm terminated Cole's employment.

### FIRST CLAIM FOR RELIEF

#### Fraud in Violation of Sections 17(a)(1) and (3) of the Securities Act

54. The SEC realleges and incorporates by reference each and every allegation in paragraphs 1 through 53, inclusive, as if they were fully set forth herein.

55. As set forth above, Defendant Cole engaged in a scheme to fraudulently manipulate the prices of thinly traded options by placing spoof orders that he had no intention of executing. Cole then profited from his scheme by executing orders at the resulting manipulated prices. He knew, or was reckless or negligent in not knowing, that this type of trading was illegal because, among other things, he attended annual compliance trainings that warned him against spoofing. Cole acted with *scienter* and took steps to conceal his spoofing from the Firm.

56. By virtue of the foregoing, Cole, directly or indirectly, in the offer or sale of securities, and by the use of the means of instruments of transportation or communication in interstate commerce or the mails:

- a) Knowingly or recklessly employed one or more devices, schemes or artifices to defraud; and
- b) Knowingly, recklessly, or negligently engaged in one or more transactions, practices or courses of business which operated or would operate as a fraud or deceit upon the purchaser.

57. By virtue of the foregoing, Cole violated and, unless restrained and enjoined, will again violate, Sections 17(a)(1) and (3) of the Securities Act [15 U.S.C. §§ 77q(a)(1) and (3)].

**SECOND CLAIM FOR RELIEF**

**Fraud in Violation of Section 10(b) of the Exchange Act and  
Rules 10b-5(a) and (c) thereunder**

58. The SEC realleges and incorporates by reference each and every allegation in paragraphs 1 through 53, inclusive, as if they were fully set forth herein.

59. As set forth above, Defendant Cole engaged in a scheme to fraudulently manipulate the prices of thinly traded options by placing spoof orders that he had no intention of executing. Cole then profited from his scheme by executing orders at the resulting manipulated prices. He knew, or was reckless in not knowing, that this type of trading was illegal because, among other things, he attended annual compliance trainings that warned him against spoofing. Cole acted with *scienter* and took steps to conceal his spoofing from the Firm.

60. By virtue of the foregoing, Cole directly or indirectly, in connection with the purchase or sale of a security, by use of the means or instruments of interstate commerce, or of the mails, or the facilities of a national securities exchange, knowingly or recklessly:

- a) Employed one or more devices, schemes, or artifices to defraud; and
- b) Engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon others.

61. By virtue of the foregoing, Cole violated and, unless restrained and enjoined, will again violate, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rules 10b-5(a) and (c) [17 C.F.R. §§ 240.10b-5(a), (c)] thereunder.

**THIRD CLAIM FOR RELIEF**

**Violation of Section 9(a)(2) of the Exchange Act**

62. The SEC realleges and incorporates by reference each and every allegation in paragraphs 1 through 53, inclusive, as if they were fully set forth herein.

63. As set forth above, Defendant Cole engaged in a scheme to fraudulently manipulate the prices of thinly traded options by placing spoof orders that he had no intention of executing. Cole then profited from his scheme by executing orders at the resulting manipulated prices. He knew, or was reckless in now knowing, that this type of trading was illegal because, among other things, he attended annual compliance trainings that warned him against spoofing. Cole acted with *scienter* and took steps to conceal his spoofing from the Firm.

64. By virtue of the foregoing, Cole, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, effected, alone or with one or more other persons, a series of transactions in a security creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

65. By reason of the foregoing, Cole violated and, unless enjoined, will again violate Exchange Act Section 9(a)(2) [15 U.S.C. § 78i(a)(2)].

#### **PRAYER FOR RELIEF**

**WHEREFORE**, the SEC respectfully requests that this Court enter a Final Judgment that:

- a) Finds that Cole violated federal securities laws as alleged in this Complaint;
- b) Orders Cole to disgorge, with prejudgment interest, all illicit trading profits or other ill-gotten gains received, directly or indirectly, as a result of the conduct alleged in this Complaint;
- c) Orders Cole to pay a civil monetary penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)]; and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)];
- d) Permanently restrains and enjoins Cole from violating, directly or indirectly, Section 9(a)(2) of the Securities Exchange Act of 1934



(the “Exchange Act”) [15 U.S.C. § 78i(a)(2)], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security to effect a series of transactions in any security registered on a national securities exchange, any security not so registered, or in connection with any security-based swap or security-based swap agreement with respect to such security creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others;

e) Permanently restrains and enjoins Cole from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) [15 U.S.C. § 78j(b)] and Rule 10b-5(a) and (c) promulgated thereunder [17 C.F.R. § 240.10b-5(a) and (c)], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security; to employ any device, scheme, or artifice to defraud, or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

f) Permanently restrains and enjoins Cole from violating Sections 17(a)(1) and (3) of the Securities Act of 1933 (the “Securities Act”) [15 U.S.C. § 77q(a)(1) and (3)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly; to employ any device, scheme, or artifice to defraud or to engage in any transaction, practice, or course of

business which operates or would operate as a fraud or deceit upon the purchaser;

- g) Enjoins Cole, for a period of five years, from, directly or indirectly, opening, maintaining or trading in any brokerage account(s) in his name, the names of any immediate family members, the names of any company over which he has any control or the names of any third party individual(s), without providing the relevant broker-dealer(s) a copy of the complaint and final judgment entered against him in this action, pursuant to Section 20(b) of the Securities Act [15 U.S.C. § 77t(b)] and Section 21(d)(5) of the Exchange Act [15 U.S.C. §§ 78u(d)(5)]; and
- h) Grants such other and further relief as the Court may deem just and proper.

### **JURY DEMAND**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands that this case be tried before a jury.

DATE: August 11, 2025

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

-against-

RYAN R. WEAR, WATER STATION  
MANAGEMENT LLC, and CREATIVE  
TECHNOLOGIES, INC.,

Defendants,

-and-

REFRESHING USA, LLC, and IDEAL  
PROPERTY INVESTMENTS LLC,

Relief Defendants.

COMPLAINT

25 Civ. 6713 ( )

**JURY TRIAL DEMANDED**

Plaintiff Securities and Exchange Commission (“Commission”), for its Complaint against Defendants Ryan R. Wear (“Wear”), Water Station Management LLC (“Water Station”) and Creative Technologies, Inc. (“Creative”) (collectively, “Defendants”) and Relief Defendants Refreshing USA, LLC (“Refreshing”) and Ideal Property Investments LLC (“Ideal”) (together, “Relief Defendants”), alleges as follows:

## SUMMARY

1. From at least September 2016 through February 2024 (the “Relevant Period”), Defendants raised at least \$275 million through the fraudulent offering and sale of securities backed by water vending machines (“water machines”). Wear founded and controlled the companies that purportedly manufactured and serviced the machines: Creative and Water Station, respectively.

2. Wear effected his fraud by orchestrating two inter-related Ponzi-like schemes, through which Defendants misappropriated or otherwise diverted tens of millions of dollars in investment proceeds to pay distributions to earlier investors and to fund Wear’s unrelated business ventures.

3. Beginning by at least September 2016, Defendants’ first scheme (the “Retail Scheme”) involved offering and selling investment contracts primarily to retail investors including veterans. As part of this scheme, Defendants solicited investors to purchase specifically identified water machines from Creative, documented in a purchase order. Water Station agreed to service the investors’ machines pursuant to an agreement executed at the same time as the purchase order. Defendants lured investors by touting the prospect and, in some cases, the supposed guarantee, of lucrative returns, typically ranging between at least 12% and 20% annually. These returns were ostensibly generated from the water machines’ vending revenues, as derived from Water Station’s placement and maintenance of the machines in various retail locations. From approximately September 2016 to September 2023, the Retail Scheme raised in excess of \$165 million through the putative sale of more than 15,000 water machines to approximately 250 investors.

4. But in reality, most of the more-than 15,000 water machines Defendants purported to sell to investors either did not exist or were previously pledged to other investors. Defendants’ representations to investors that they would earn steady returns from the revenues their machines generated were also false. Instead, Wear misappropriated his victims’ investments to fund unrelated

businesses, including Refreshing and Ideal, and diverted them to make payments to earlier investors in a Ponzi-like manner.

5. In approximately April 2022, as Defendants struggled to raise new investor money to sustain the Retail Scheme, Defendants commenced their second scheme (the “Note Scheme”), which targeted institutional investors. Pursuant to the Note Scheme, Water Station raised more than \$110 million between April 2022 and February 2024 through the issuance of notes purportedly secured by Defendants’ water machines (“Notes”). Water Station procured these investments based on Wear’s false representation that Water Station would use proceeds of the Notes exclusively to purchase new water machines from Creative and existing water machines from Retail Scheme investors, which would generate revenues to pay the Note Scheme investors their promised interest.

6. As with the Retail Scheme, most of the water machines Water Station purported to pledge as collateral for the Notes did not exist or were not owned by Water Station. In furtherance of the Note Scheme, Wear directed the submission of fabricated invoices, purchase orders, and other financial reports to the trustee bank for the Notes to support the illusion that Water Station was acquiring or had acquired more than 10,000 water machines to secure the Notes, and to deceive the trustee bank into releasing the Notes proceeds to fund those purchases. In fact, Defendants misappropriated or otherwise diverted approximately \$60 million from the Notes proceeds for unauthorized purposes, including to fund Refreshing and Ideal, to make payments to Retail Scheme investors, and even to pay Note Scheme investors their required interest payments with their own money.

7. In approximately mid-2023, Defendants’ scam began to come to light when a financial firm tasked with independently monitoring the performance of the water machines purportedly backing the Notes identified significant discrepancies between the water machines Wear claimed were securing the Notes and the water machines actually generating revenues in the field.

Wear was unable to explain these discrepancies, leading one Water Station insider (and early Retail Scheme investor) to conclude that Wear was running “the largest franchise fraud in the history of the United States.”

8. By mid-2024, Defendants had run out of money to sustain their fraud, and, in August 2024, Water Station and Creative were placed into receivership and involuntary bankruptcy proceedings, resulting in Wear’s removal from his position as managing partner at both companies. To date, most Retail Scheme and Note Scheme investor victims have not recovered their investments.

### **VIOLATIONS**

9. By virtue of the foregoing conduct and as alleged further herein: (a) Defendants Wear, Water Station, and Creative violated Section 17(a) of the Securities Act of 1933 (“Securities Act”) [15 U.S.C. § 77q(a)] and Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]; and (b) Defendant Wear, as a control person of Water Station and Creative under Exchange Act Section 20(a) [15 U.S.C. § 78t(a)], is liable for Water Station’s and Creative’s violations of Exchange Act Section 10(b) and Rule 10b-5 thereunder.

10. Unless Defendants are restrained and enjoined, they will engage in the acts, practices, transactions, and courses of business set forth in this Complaint or in acts, practices, transactions, and courses of business of similar type and object.

### **NATURE OF THE PROCEEDINGS AND RELIEF SOUGHT**

11. The Commission brings this action pursuant to the authority conferred upon it by Securities Act Sections 20(b) and 20(d) [15 U.S.C. §§ 77t(b) and 77t(d)] and Exchange Act Section 21(d) [15 U.S.C. § 78u(d)].

12. The Commission seeks a final judgment: (a) permanently enjoining Defendants from violating the federal securities laws and rules this Complaint alleges they have violated; (b) ordering Defendants to disgorge all ill-gotten gains they received as a result of the violations alleged here and to pay prejudgment interest thereon, pursuant to Exchange Act Sections 21(d)(3), 21(d)(5), and 21(d)(7) [15 U.S.C. §§ 78u(d)(3), 78u(d)(5), and 78u(d)(7)]; (c) ordering Defendants to pay civil money penalties pursuant to Securities Act Section 20(d) [15 U.S.C. § 77t(d)] and Exchange Act Section 21(d)(3) [15 U.S.C. § 78u(d)(3)]; (d) ordering Relief Defendants to disgorge, with prejudgment interest, all ill-gotten gains by which they were unjustly enriched, pursuant to Exchange Act Sections 21(d)(3), 21(d)(5), and 21(d)(7) [15 U.S.C. §§ 78u(d)(3), 78u(d)(5), and 78u(d)(7)]; (e) permanently prohibiting Wear from serving as an officer or director of any company that has a class of securities registered under Exchange Act Section 12 [15 U.S.C. § 78l] or that is required to file reports under Exchange Act Section 15(d) [15 U.S.C. § 78o(d)], pursuant to Securities Act Section 20(e) [15 U.S.C. § 77t(e)] and Exchange Act Section 21(d)(2) [15 U.S.C. § 78u(d)(2)]; (f) permanently enjoining Wear from, directly or indirectly (including, but not limited to, through any entity owned or controlled by Wear) participating in the issuance, purchase, offer, or sale of any security, provided, however, that such injunction shall not prevent Wear from purchasing or selling securities for his own personal account; and (g) ordering any other and further relief the Court may deem just and proper.

### **JURISDICTION AND VENUE**

13. This Court has jurisdiction over this action pursuant to Securities Act Section 22(a) [15 U.S.C. § 77v(a)] and Exchange Act Section 27 [15 U.S.C. § 78aa].

14. Defendants, directly and indirectly, have made use of the means or instrumentalities of interstate commerce or of the mails in connection with the transactions, acts, practices, and courses of business alleged herein.

15. Venue lies in this District under Securities Act Section 22(a) [15 U.S.C. § 77v(a)] and Exchange Act Section 27 [15 U.S.C. § 78aa]. Certain of the acts, practices, transactions, and courses of business alleged in this Complaint occurred within this District. Among other things, Defendants offered and sold securities purportedly backed by water machines to Note Scheme investors whose principal place of business was in New York County, and who executed the relevant transaction documents to acquire the Water Station Notes in this District.

### DEFENDANTS

16. **Wear**, age 49, is a resident of Marysville, Washington. Wear is the founder and owner and, until August 2024, was the managing partner of Water Station, Creative, Refreshing, and Ideal. Wear also owns and controls dozens of other limited liability companies.

17. **Water Station** is a Washington limited liability company formed by Wear in 2016 and wholly-owned and controlled by him throughout the Relevant Period. Water Station placed, installed, operated, and serviced water machines, which were generally manufactured or sourced by Creative. In August 2024, Water Station was put into receivership through a private litigation in Washington state court, captioned *First Fed Bank v. Creative Technologies, LLC*, Case No. 24-2-10753-3 SEA (Wa. Super. Ct.) (filed May 14, 2024) (the “Receivership Action”). Later that month, a creditor of Water Station filed an involuntary Chapter 11 bankruptcy petition against it, captioned *Water Station Management LLC*, No. 24-bk-1864 (Bankr. E.D. Wa.) (filed Aug. 27, 2024) (transferred from Bankr. S.D. Tex.). Water Station is now managed by an independent chief restructuring officer, who also manages Creative and Refreshing.

18. **Creative** is a Washington limited liability company formed by Wear in 2013. Throughout the Relevant Period, Creative was controlled and majority-owned by Wear. Creative manufactured, sourced, and sold water machines that Water Station placed and serviced around the country. In May 2024, Creative was put into receivership through the Receivership Action. In



August 2024, a creditor filed an involuntary Chapter 11 bankruptcy petition against Creative, captioned *Creative Technologies, LLC*, No. 24-bk-1866 (Bankr. E.D. Wa.) (filed Aug. 27, 2024) (transferred from Bankr. S. D. Tex.). Creative is now managed by an independent chief restructuring officer.

### RELIEF DEFENDANTS

19. **Refreshing** is a Washington limited liability company formed by Wear in 2020. Throughout the Relevant Period, Refreshing was controlled and majority-owned by Wear. Refreshing, through its subsidiaries, operated retail vending machines that sold refreshments and snacks. Refreshing was put into receivership through the Receivership Action in August 2024. Later the same month, a creditor filed an involuntary Chapter 11 bankruptcy against Refreshing, captioned *Refreshing USA, LLC*, No. 24-bk-1863 (Bankr. E.D. Wash.) (filed Aug. 27, 2024) (transferred from Bankr. S.D. Tex.). Refreshing is now managed by an independent chief restructuring officer.

20. **Ideal** is a Washington limited liability company formed by Wear in 2019. Throughout the Relevant Period, Ideal was majority-owned and controlled by Wear. Ideal owned commercial and residential real estate across the United States, including warehouses in which water machines and vending machines were purportedly stored. In the spring of 2024, Ideal was put into receivership through a private litigation in *First Fed Bank v. Ideal Property Investments*, No. 24-2-08418-5 (Wa. Super Ct.) (filed Apr. 14, 2024). In September 2024, Ideal commenced Chapter 11 bankruptcy proceedings captioned *Ideal Property Investments LLC*, No. 24-bk-1421 (Bankr. E.D. Wa.) (filed Sept. 5, 2024). Ideal is now managed by an independent chief restructuring officer.

## FACTS

### I. WEAR FORMS CREATIVE AND WATER STATION TO DEVELOP AND MONETIZE WATER MACHINES.

#### A. Background on Wear's Water Machine Business Model

21. Wear formed Creative in 2013 to develop, manufacture, and sell water machines.

Creative's water machines filtered water from a local source, allowing customers to purchase gallon-size containers of filtered water using cash or a credit card.

22. Wear formed Water Station in 2016 to place, install, service, and operate Creative's water machines. Water Station identified and facilitated the placement of Creative's water machines at available retail locations around the United States. Water Station was also responsible for installing and servicing the water machines, including the periodic replacement of the machines' water filters and the collection of cash and other payments from the machines.

23. Water Station contracted with retailers for the right to install Creative-manufactured water machines in their stores.

24. In exchange, Water Station paid the retailer a percentage of the water machines' revenues as a commission.

25. Wear negotiated these contracts with retailers, including determining the locations for the water machines' placement and the retailers' commission levels, which generally ranged from 40% to 55% of the machines' gross profits.

26. Wear signed the contracts with retailers on Water Station's behalf.

27. Retailers that agreed to place water machines on Water Station's behalf included national convenience and grocery store chains, fitness centers, gas stations, and discount retailers. These retailers agreed to place Water Station water machines at locations across the United States.

28. Each water machine purportedly had a unique serial number and modem number. The modem number would report the amount of credit card revenue generated by the machine, which was processed by a third-party vendor and sent to bank accounts belonging to Water Station.

29. Wear had signatory authority for all Water Station and Creative bank accounts at all times throughout the Relevant Period.

## **II. THE RETAIL SCHEME**

### **A. Defendants Offered and Sold Investment Contracts.**

30. By at least 2016, Wear began raising money for Water Station and Creative from retail investors through the issuance of investment contracts tied to Creative's water machines.

31. Under these investment contracts—the precise terms of which, as described below, evolved over time—investors paid a fixed price, typically \$8,500 per machine though sometimes as much as \$10,000, purportedly to purchase water machines.

32. In addition, investors paid service fees to Water Station to place, install, manage, and service the water machines. Water Station deducted these service fees from the machines' purported monthly revenues that it paid to the investors.

33. Investors also agreed to pay certain other expenses associated with the placement and service of the water machines in retail locations out of their machines' purported monthly revenues, including a share of the commissions Water Station paid to retailers for hosting their machines and the cost of replacing water filters for their machines.

34. Under the investment contracts, investors were supposed to receive monthly payments from Water Station that came from the net profits of their water machines, after fees and expenses.

35. These profits were to be derived from Water Station's efforts to place, service, and manage the water machines in locations across its retailer network.

**1. Defendants Marketed the Water Machine Investments as Securities.**

36. Water Station and Creative, through Wear, retained in-house salespeople on commission to solicit investments in their water machine investment opportunities.

37. Beginning at least in 2019, Wear also engaged third-party marketing firms to solicit investments in Water Station's and Creative's water machines, generally agreeing to pay these firms a commission of 10% of every dollar they raised for Water Station and Creative.

38. Defendants pitched their water machine investment opportunities as a purely passive investment, offering steady income derived solely from Water Station's servicing and management efforts. According to Defendants' marketing materials, investors would own the machines and collect regular streams of income as Water Station placed and serviced the machines, purportedly in highly-trafficked retail locations, and collected payments from water sales.

39. In brochures and other marketing materials provided to potential investors, Defendants described the water machine investment as a "truly passive, turnkey investment" that was "ideal for the passive investor," offering potential investors the opportunity to "maintain current activities without the responsibilities to carry out the day-to-day operations of the business."

40. Defendants' marketing materials also touted the water machine investment as tax advantageous, permitting for immediate deductions and depreciation of the machines that supposedly enhanced the return on the investment.

41. In some cases, the marketing materials provided to prospective investors guaranteed that Water Station would buy back the water machines from investors at or near their purchase price upon the election of the investor, offering investors additional protection against the investment's downside risks.

42. When soliciting potential investors, Defendants specifically targeted the veteran community, coordinating with veterans' business advocacy groups to publicize the opportunity.

43. Defendants offered veterans preferred terms of investment, including lower minimum investments and down payments, higher guaranteed returns, and exclusive financing options, such as low or no-interest loans provided by Creative repayable over ten years.

44. Defendants also encouraged prospective investors to finance their investments through debt. Wear applied for and obtained a listing with the Small Business Administration's ("SBA") Franchise Directory, a listing of all franchises and other brands eligible for SBA financial assistance. This listing publicly confirmed the eligibility of investments in Water Station and Creative's water machines for SBA loans.

45. To assist investors in accessing SBA financing, Wear offered investors the option of executing a "franchise agreement" with a Water Station affiliate, WST Franchise Systems LLC ("WST"), under which WST licensed its business model and trademark to investors for a fee.

46. A franchise agreement was not required for an investment in Defendants' water machines, and not all Retail Scheme investors signed one. Investors who executed franchise agreements typically did so to obtain eligibility for an SBA loan to finance the investment, as the provisions governing SBA loans available to finance Water Station investments generally prohibited loans for securities purchases, but allowed loans for "franchise" opportunities.

47. At least 127 investors obtained approximately \$102 million in SBA loans to finance their investments in the Retail Scheme.

48. Regardless of whether investors executed a franchise agreement, the substance of their investment in the Retail Scheme was the same: investors purchased water machines from Creative in bulk and delegated placement and management of them to Water Station in exchange for a return based on a share of the machines' profits

**2. The “Partnership Model” (2016 – 2021)**

49. From 2016 through late 2021, Water Station and Creative raised money from Retail Scheme investors using a “joint venture,” or “franchise” model (together, the “partnership model”), through which investors executed: (a) a purchase order; (b) a service agreement; and, for franchise investors, (c) a franchise agreement.

50. **The Purchase Order:** Pursuant to the purchase order, investors agreed to pay Creative a fixed price (usually \$8,500 per machine, though sometimes as much as \$10,000) to become the “sole owner and titleholder” of specific machines identified in the purchase order by their unique serial numbers.

51. The purchase orders did not give investors discretion over the locations of their water machines, which was generally left to Water Station’s discretion.

52. Wear signed all purchase orders on behalf of Creative.

53. **The Service Agreement:** Investors executed a service and management agreement (“service agreement”) with Water Station at the same time they entered into an order to purchase water machines from Creative. Pursuant to the service agreements, Water Station agreed to place and install investors’ machines at retail locations, to collect cash and credit card payments from the machines, and to manage “all day-to-day decisions” concerning the purchased machines in return for a servicing fee typically equal to 20% of the applicable machines’ monthly profits.

54. Until approximately mid-2019, the service agreements provided that investors and Water Station would split the net profits generated by the investors’ water machines equally, after Water Station collected its 20% servicing fee and paid out other expenses (which included certain commissions paid to retailers to place the machines).

55. Beginning in or around mid-2019, Water Station amended the terms of its service agreements to eliminate the profit-splitting structure for new, and for many existing, Retail Scheme

investors. Instead, Water Station guaranteed investors fixed annual returns, which generally ranged from 12% to 20% of their investment.

56. Water Station also generally promised investors in these service agreements a share (typically 30%) of any advertising revenues the company received from placing advertisements on the investors' water machines.

57. Although early versions of the service agreement provided for payments to investors based on the profits of their particular machines, all versions of the service agreement informed investors that Water Station would not segregate water machine revenues by machine, but rather would commingle machine revenues with the revenues generated by other investors' machines.

58. Additionally, although the service agreements stated that Water Station was "not required to maintain separate bank accounts [for] or to otherwise segregate" the water machine owners' gross and net machine profits, the service agreements represented that Water Station would maintain all books and records relating to the water machines and, at least annually, provide investors with a report showing their particular machines' gross and net profits, associated costs, as well as the total distributions Water Station paid them.

59. The service agreements additionally gave Water Station the option (and, in some cases, the obligation, at the investor's election) to buy the water machines back from investors at 85% of the cost of the machines within the first three years of the investment, and at 100% of the cost of the machines thereafter.

60. Wear signed all service agreements on behalf of Water Station.

61. **The Franchise Agreement:** Certain investors—*i.e.* those who financed their water machine investments through an SBA loan—also executed a franchise agreement with WST, under which WST licensed its business model and trademark to investors for a fee. Investors who did not need or want an SBA loan to finance their investment generally did not execute the franchise

agreement or pay the franchise fee, but instead invested in water machines by executing the purchase order and service agreement only.

62. Wear signed all franchise agreements on behalf of WST.

63. At or after the time investors executed the purchase order and service agreement, either Creative or Water Station, through Wear, provided them with lists of the machines that they purchased and owned, identifying each machine by its unique serial number and confirming the location at which each machine was installed (“Machine Lists”). Wear and Creative typically appended Machine Lists to investors’ purchase orders, although Water Station (through Wear) would sometimes send investors Machine Lists after execution of the purchase orders to update investors on the placement of their machines.

### **3. The Private Placement Model (Late 2021 – 2023)**

64. In or around August 2021, Wear concluded that the purchase orders and service agreements, collectively, constituted an investment contract and therefore fell within the definition of “securities” under the federal securities laws.

65. Defendants accordingly began selling the water machine investments pursuant to a private placement memorandum (“PPM”) that purported to rely on exemptions from registration under Regulation D (the “private placement model”).

66. Beginning in at least January 2022, Defendants, as well as a registered broker-dealer they later retained to market the investments, distributed the PPM to prospective investors along with marketing materials and the purchase orders and service agreements.

67. The PPM described the “security” being sold as an “Investment Contract” comprised of the purchase order and service agreement, the terms of which remained materially the same as those used previously under the partnership model with Retail Scheme investors.



68. The PPM represented that investors would receive a monthly fee based on a fixed annual rate of return specified in the service agreement (generally between 12% and 15% of the investment) plus a percentage (generally 30%) of any advertising revenue generated by the investors' water machines.

69. The PPM stated that "return[s] on the purchase of an Investment Contract will depend solely on the sales of water from each water [machine] the Investor purchases, and on the net advertising revenue attributable to each machine."

70. The PPM also stated that the offering proceeds would be used to finance the manufacture of the water machines sold under the investment contract, to pay broker fees if applicable, and to provide a return to Creative's owners.

71. Wear reviewed and approved the PPM on behalf of Water Station and authorized its use with potential investors.

72. Investors in the private placement model subscribed by executing a subscription agreement, in addition to signing the purchase order and service agreement.

73. Apart from the PPM's acknowledgment that the purchase order and service agreement constituted a security and the requirement that investors sign a subscription agreement, investing in water machines under the private placement model was functionally the same as under the partnership model.

74. As with investors under the partnership model, investors under the private placement model (a) purchased water machines from Creative, (b) delegated the machines' placement and maintenance to Water Station, (c) received Machine Lists from Water Station and Wear identifying the serial number and location for each machine they supposedly purchased, and (d) received monthly fees purportedly derived from the management efforts of Water Station.

75. Wear signed all subscription agreements (as well as purchase orders and service agreements) on behalf of Water Station and Creative under the private placement model.

76. From 2016 through April 2022, Defendants raised over \$135 million from approximately 250 Retail Scheme investors under either the partnership model or the private placement model.<sup>1</sup>

77. In so doing, Defendants purported to sell more than 15,000 water machines to investors. Defendants represented in purchase orders and Machine Lists that they had placed these machines at locations in Defendants' retailer network on these investors' behalf.

**B. Defendants Defrauded Investors in the Retail Scheme.**

78. In fact, Defendants neither produced nor installed anywhere near 15,000 water machines. The vast majority of the water machines Defendants purported to sell and manage did not exist at all or were not owned by Creative because they had already been sold to other investors.

79. Indeed, during the Relevant Period, Water Station placed, at most, approximately 2,600 machines at retail locations nationwide, only a fraction of the more than 15,000 water machines Defendants represented to investors that they had installed and placed in falsified purchase orders and Machine Lists.

80. Defendants stored approximately 3,000 additional water machines in warehouses, but many of these machines were only partially built or otherwise inoperable—and, in any event, virtually none of these warehoused machines were either (a) located where Defendants represented them in purchase orders and/or Machine Lists to be, or (b) capable of producing revenues to generate investor distributions as promised.

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<sup>1</sup> Defendants raised the nearly the entirety of those investments through the partnership model. As of April 2022, only three investors signed subscription agreements, and Water station raised only approximately \$3 million of funds from investors through the private placement model.

81. Accordingly, Wear's and Creative's representations in the purchase orders that investors would be the sole owners of actual, physical machines placed in the field were, in at least most cases, false and misleading.

82. In addition to falsely overstating the number of water machines they sold, Defendants misrepresented the machines' locations. For example, according to Machine Lists that Defendants sent to investors during the Relevant Period, Defendants represented that Water Station had placed more than 3,800 investor water machines at nationwide locations of Retailer A, a national discount retail chain.

83. These representations were false because, in fact, Retailer A hosted no more than 120 of Defendants' water machines during the Relevant Period.

84. Defendants also routinely sold the same water machines to multiple investors. For example, Water Station (through Wear) provided a Machine List to an investor ("Investor A") in April 2022 identifying by serial number the 71 machines this investor purportedly owned under a purchase order executed in December 2021. All but one of the serial numbers on Investor A's Machine List also appeared on the Machine List that Defendants sent to a different investor ("Investor B"), who purportedly purchased these water machines months earlier, in April 2021, and who never sold or otherwise relinquished title to them.

85. Accordingly, the representations in Investor A's purchase order that Investor A would have sole title to the purchased water machines were false.

86. In total, during the Relevant Period, Defendants sold at least 650 water machines bearing a unique serial number to more than one investor. Dozens of machine serial numbers were assigned to at least four investors at once.

87. As the founder, owner, and managing partner of Water Station and Creative, Wear (a) signed the purchase order and service agreement through which each Retail Scheme investor

invested in Defendants' water machines; (b) had access to these entities' vending management systems, which showed the number of machines actually placed and installed; (c) negotiated the placement of machines (and commission rates) with retail locations hosting Defendants' machines; and (d) generated, reviewed, and/or disseminated (or facilitated the dissemination of) the Machine Lists for each investor.

88. Accordingly, Wear knew or recklessly disregarded that Creative was falsely promising Retail Scheme investors exclusive ownership of water machines that, in reality, were either non-existent or were already owned by others (or both), and which were not placed at the locations Defendants represented them to be.

89. After inducing investments through the false representation of ownership of actual, physical water machines, Wear misappropriated the investment proceeds, including to fund the operations of his unrelated ventures—diverting tens of millions of dollars' worth of investor funds to Refreshing, Ideal, as well as other businesses Wear founded and managed in other industries.

90. Wear also used approximately \$800,000 in investor funds to purchase a personal residence on Camino Island in Washington in July 2020.

91. At least partly because Defendants promised returns on more water machines than they actually placed, Water Station was unable to generate enough machine revenues to cover Water Station's guaranteed monthly distributions to investors.

92. To cover these shortfalls—and to foster the pretense that investors possessed real, physical, and profitable water machines when they did not—Wear made putative distribution payments to Water Station's investors using other sources, including using new investor money to make payments to existing investors in a Ponzi-like fashion. For example:

- a. In July 2020, three investors wired approximately \$300,000 in new investments to a Creative bank account. At Wear's direction, almost a third of that money was transferred to pay outstanding investor distributions the same day.
- b. Between August 21 and August 24, 2020, Wear directed the transfer of new investor funds received over that period to pay over \$90,000 in investor distributions.
- c. In January 2022, Wear caused approximately \$1 million in putative distributions to be paid to Retail Scheme investors using the proceeds of a loan obtained by Creative.
- d. On March 3, 2022, Creative received \$340,000 in new investor money. Wear routed that money to existing Retail Scheme investors to pay distributions and to fund Wear's unrelated businesses within two days of receiving it.

93. Wear directed these (and other) transfers to make payments to investors, and he therefore knew or recklessly disregarded that he was using new investor money and other sources to make payments to investors, and not money generated from water machine profits as represented.

94. Even after it became clear, by at least the middle of 2020, that water machine profits were insufficient to cover investor distributions, and after he had resorted to covering shortfalls through other means, Wear continued to represent to later investors in service agreements and the PPM that their distributions would be paid using machine profits.

### **III. THE NOTE SCHEME**

#### **A. Defendants Offered and Sold Water Station Notes to Institutional Investors.**

95. By April 2022, Defendants faced significant cash flow shortages, lacking funds from either new investors or other sources to satisfy their distribution obligations to Retail Scheme investors.

96. To prolong his scheme, Wear arranged for Water Station to issue Notes to institutional investors.

97. On April 29, 2022, at Wear’s direction, Water Station issued Class A Notes in the aggregate principal amount of \$56.25 million and Class B Notes in the aggregate principal amount of \$15 million under an indenture (“Indenture”), raising a total of approximately \$71.25 million.

98. A financial services company focused on community banking (“Institutional Investor A”) purchased the Class A Notes for \$55.7 million.

99. The Class B Notes were purchased by two affiliates of the Jefferies Financial Group (“Jefferies”), including the 3|5|2 Capital ABS Master Fund, LP (“352 Fund”), a private investment fund.

100. Jordan Chirico (“Chirico”), the portfolio manager for the 352 Fund, directed the purchases of the Class B Notes, with the 352 Fund paying approximately \$8.9 million, and another Jefferies affiliate buying the remainder for approximately \$6.1 million.

101. Wear signed the Indenture on behalf of Water Station.

102. In exchange for the Notes proceeds, Water Station pledged 2,794 water machines as collateral (“Initial Collateral”). Water Station, at Wear’s direction, provided a list of the 2,794 water machines pledged as Initial Collateral to a bank appointed to serve as trustee (the “Trustee”) under the Indenture, identifying each machine by serial number and location (the “Initial Collateral List”).

103. Going forward, Water Station also agreed under the Indenture to pledge “Eligible Assets,” defined as newly manufactured water machines or existing machines less than five years old, to be purchased with the proceeds of the Notes. These Eligible Assets then became part of the collateral pool securing the Notes.

104. Wear represented in the Indenture that Water Station “ha[d] good and marketable title” to the Initial Collateral and Eligible Assets pledged under the Indenture, and that when transferred to the noteholders, the collateral would be “free and clear of any Encumbrances.”

105. Pursuant to the Indenture, Water Station granted a first priority security interest in the Initial Collateral and all Eligible Assets to the Trustee for the benefit of noteholders.

**1. The Indenture's Restrictions on Defendants' Use of Notes Proceeds**

106. The Indenture placed strict controls over the use of proceeds from the Water Station Notes offerings and water machine revenues.

107. Under the Indenture, Notes proceeds were to be remitted into a segregated account with the Trustee (the "Acquisition Account").

108. With limited exceptions applicable to the initial funding, Water Station was prohibited from withdrawing funds from the Acquisition Account for any purpose other than to acquire water machines defined as Eligible Assets.<sup>2</sup>

109. To assure that Water Station was using Notes proceeds only for their approved uses, before Water Station could make a withdrawal from the Acquisition Account, it was required to submit certain required documentation to the Trustee.

110. The required documentation included:

- a. An **invoice** from Creative evidencing the purchase of new water machines identified by serial number;
- b. A **purchase and sale agreement** between Water Station and Creative (signed by Wear on behalf of both parties) in which Creative represented it had title to the water machines subject to the sale free and clear of any encumbrances and/or transfer restrictions and that the water machines sold were in good operating condition and repair. Bills of sale attached to the purchase and sale agreement

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<sup>2</sup> As part of the initial funding, Water Station was authorized to use a portion of the Notes proceeds to pay certain offering-related expenses, to buy back machines from certain retail investors to contribute to the Initial Collateral, and to make certain one-time lease payments on warehouses leased from Ideal that were purportedly used to store water machines. After payment of these expenses, the remainder (approximately \$38 million) was remitted into the Acquisition Account for the acquisition of Eligible Assets.

identified the machines sold to Water Station by serial number and placement location; and

- c. A **withdrawal request** from Water Station (also typically signed by Wear) in which Water Station certified that it would use the Notes proceeds “solely to fund the purchase of Eligible Assets” pursuant to the terms of the Indenture and related purchase and sale agreements.

111. These documents were subject to review by the “Collateral Manager,” an independent financial institution appointed under an agreement that was executed contemporaneously with the Indenture and signed by Wear on behalf of Water Station.

112. The Collateral Manager was required to review and approve each proposed acquisition of Eligible Assets by Water Station before the Trustee could release funds from the Acquisition Account.

113. The Indenture imposed additional reporting obligations on Water Station, requiring it to provide the Collateral Manager and Trustee with monthly sales data for all water machines securing the Notes, quarterly performance reports, and periodic financial statements.

## **2. The Indenture’s Restrictions on the Use of Water Machine Revenues**

114. The Indenture required that revenues from the water machines pledged to the Notes as Initial Collateral or Eligible Assets be remitted to a separate segregated account at the Trustee (the “Collection Account”).

115. The Indenture authorized Water Station to withdraw funds monthly from the Collection Account to pay commissions to retailers, which typically ranged from 40% to 55% of the revenues generated by the water machines purportedly placed at their stores.



116. Each month, Water Station was required to submit to the Collateral Manager a report detailing the revenues earned by the water machines serving as collateral for the Notes and the commissions Water Station owed to the retailers where those machines were placed.

117. Upon review and approval of this report, the Collateral Manager would, per the Indenture, instruct the Trustee to transfer the amounts owed as commissions from the Collection Account to a Water Station bank account from which Water Station was to then distribute the commissions it owed to retailers.

118. Under the Indenture, balances from the Collection Account, net of retailer commission payments, were used to compensate the Trustee and Collateral Manager and to make interest and principal payments to noteholders.

**B. Defendants Defrauded Investors in the Note Scheme.**

**1. Defendants Fraudulently Misappropriated and Diverted Notes Proceeds from the Acquisition Account.**

119. Defendants induced investments in the Notes on fraudulent pretenses and misappropriated millions of dollars of Notes proceeds through numerous deceptions and false representations.

120. The Initial Collateral List identifying the water machines that Wear, on behalf of Water Station purported to have pledged to secure the Notes contained hundreds of machines that did not exist, that were already owned by Retail Scheme investors, and/or were not in the locations identified.

121. Water Station's representation in the Indenture that Water Station had "good and marketable title" to the water machines included on the Initial Collateral List—and that such assets were "free and clear" of any encumbrances—was therefore false.

122. Wear's and Water Station's representation in the Indenture that they would use Notes proceeds exclusively to acquire Eligible Assets—that is, water machines—was also false.

123. For example, on May 19, 2022, just three weeks after the first Notes offering closed, Wear submitted Water Station's very first withdrawal request to the Trustee, seeking approximately \$480,000 from the Acquisition Account.

124. Wear represented to the Trustee in the request that "the funds so withdrawn will be used solely to fund the purchase of Eligible Assets," and attached an invoice and purchase and sale agreement that supposedly identified by serial number the 58 new water machines to be acquired with the requested funds.

125. This representation was false.

126. As Wear acknowledged in an email to Water Station's financial controller on May 20, 2022, Water Station needed "all of the bond draw for partner payments." In other words, Water Station needed all of the Notes proceeds he was withdrawing for payments to Retail Scheme investors.

127. Consistent with this email, and contrary to his representation to the Trustee, Wear used the approximately \$480,000 from the Acquisition Account to pay distributions to investors in the Retail Scheme and not to purchase new water machines as required.

128. Additionally, the invoice and purchase and sale agreement attached to Wear's May 19, 2022, withdrawal request were fabricated, representing water machine sales that never, in fact, occurred.

129. Wear's subsequent requests to withdraw funds from the Acquisition Account followed a similar pattern.

130. From May 2022 through November 2022, Water Station, through Wear, submitted nineteen withdrawal notices to the Trustee, each representing that the funds withdrawn would be used "solely" to fund the purchase of Eligible Assets. In aggregate, these requests, and their supporting invoices and purchase and sale agreements, purported to evidence that Water Station had

used the Notes proceeds to acquire more than 4,000 new water machines from Creative, and to buy back more than 750 machines from investors in the Retail Scheme, which Water Station then pledged to the Trustee as collateral for the Notes.

131. By the end of November 2022, Water Station had fully drawn down the approximately \$38 million initial funding of the Acquisition Account under the Indenture.

132. On January 23, 2023, Water Station issued approximately \$25 million of additional Class A and B Notes under a supplemental Indenture (the “First Supplemental Indenture”), bringing the total amounts raised through the Notes offering to nearly \$100 million.

133. The Notes issued under the First Supplemental Indenture were subject to the same restrictions and reporting requirements the initial Indenture placed upon Water Station’s withdrawals of both the Notes proceeds from the Acquisition Account and retail commission payments from the Collection Account. As with the initial Indenture, Water Station could only use Notes proceeds to purchase Eligible Assets, and Water Station represented that it had “good and marketable title” to any Eligible Assets it pledged under the Indenture and that when transferred to the noteholders, such collateral would be “free and clear of any Encumbrances.”

134. Between February 2 and April 25, 2023, Water Station, through Wear, submitted six withdrawal notices to the Trustee, each representing that the funds withdrawn would be used “solely” to fund the purchase of Eligible Assets. These notices and their supporting documentation purported to evidence that Water Station had used the Notes proceeds to acquire an additional approximately 2,850 new water machines from Creative as Eligible Assets that Water Station then pledged to the Trustee.

135. By April 2023, Water Station had fully withdrawn the Notes proceeds raised under the First Supplemental Indenture.

136. In total, by April 2023, under the Indenture and First Supplemental Indenture, Water Station withdrew approximately \$63.6 million in Notes proceeds from the Acquisition Account, and purported to pledge 10,464 water machines (including the Initial Collateral) to the Trustee as collateral to secure the Notes.

137. The 10,464 water machines that Water Station supposedly acquired and installed at retailers and to have pledged as security for the Notes exceeded the number of machines that Creative had ever manufactured, much less placed in the field.

138. In actuality, most of the water machines Wear and Water Station claimed to have purchased with Notes proceeds either did not exist or had already been sold to Retail Scheme investors (and were not repurchased using these Notes proceeds).

139. Wear's representations in the withdrawal requests described in paragraphs 130 and 134 that the withdrawn funds would be used solely to fund the purchase of Eligible Assets were, accordingly, false.

140. At Wear's direction, Water Station fabricated the invoices and purchase and sale agreements that it submitted with these withdrawal requests to reflect sales from Creative to Water Station of fictitious water machines and/or water machines that Creative did not own.

141. Wear and Water Station also routinely generated and submitted falsified financial reports, including sales and performance reports, to the Collateral Manager and the Trustee.

142. These reports falsely vouched for the existence of non-existent water machines, falsified the locations at which these machines were purportedly installed and placed, and fabricated the revenues that these machines generated.

143. For example, at Wear's direction, Water Station represented to the Collateral Manager in withdrawal requests and in sales and performance reports that, as of April 2023, Water Station had placed 3,367 of the 10,464 water machines supposedly securing the Notes with Retailer

A, a retailer that (as detailed above) had in fact hosted no more than 120 machines across its stores during the Relevant Period.

144. Water Station also represented in these reports that, as of April 2023, Water Station had placed an additional 4,099 machines across three other retailers (Retailers B, C, and D), none of which hosted a single Water Station water machine at any location during the Relevant Period.

145. In total, Wear reported in invoices, purchase sales and sales agreements, and other sales data and performance reports, that Water Station had placed at least 70% of the water machines purportedly securing the Notes with retailers that, in actuality, had no (or only nominal) business with Water Station, as reflected in the below chart:

<b>Retailer</b>	<b>Eligible Assets Reportedly Placed at Retailer</b>	<b>Eligible Assets Actually Placed at Retailer</b>
Retailer A	3,367	112
Retailer B	442	0
Retailer C	718	0
Retailer D	2,939	0
<b>Total</b>	<b>7,466 (out of 10,464 machines)</b>	<b>112</b>

146. Contrary to Wear and Water Station's representations that Water Station would use funds withdrawn from the Acquisition Account solely to buy water machines, Wear and Water Station then misappropriated and diverted these funds unauthorized purposes.

147. Of the \$63.6 million Water Station withdrew from the Acquisition Account between May 2022 and April 2023, Defendants misappropriated and siphoned more than \$59 million for purposes other than purchasing water machines—including using (a) more than \$15 million to pay distributions to Retail Scheme investors; (b) more than \$10 million to fund the operations of Wear's other businesses, including Refreshing and Ideal; and (c) approximately \$5 million to fund the Collection Account in order to cover interest payments due to the same holders of the Notes whose investments had funded the Acquisition Account.

**2. Defendants Fraudulently Misappropriated and Diverted Notes Proceeds from the Collection Account.**

148. At Wear's direction, Water Station routinely provided revenue reports to the Collateral Manager that materially overstated the amount of revenues generated by the water machines Water Station had actually placed at retail locations.

149. In turn, because retailer commissions were based on a percentage of this reported revenue, these inflated revenue figures had the effect of falsely inflating the amount of commissions Wear reported being required to pay to retailers.

150. Providing inflated revenue and commission figures to the Collateral Manager and Trustee allowed Wear to access funds from the Collection Account that, based on the actual, lower commission totals, he would not have been able to access.

151. For example, Wear approved the submission of sales reports and other data to the Collateral Manager representing that, between May 2022 and December 2023, the more-than 3,200 machines purportedly placed at Retailer A had generated approximately \$6.5 million in customer revenues over the period, resulting in corresponding commission payments due to Retailer A of about \$3.15 million.

152. Upon review and approval of the Collateral Manager, the Trustee disbursed this \$3.15 million from the Collection Account to a Water Station bank account to allow Water Station to make its claimed commission payments to Retailer A.

153. But, as reflected in Water Station's internal sales and commission reports, over the May 2022 to December 2023 period, Water Station only actually placed about 112 water machines at Retailer A stores, and those machines generated only about \$150,000 in customer revenues.

154. The commissions Water Station actually paid to Retailer A between May 2022 and December 2023 totaled only about \$60,000.

155. Wear misappropriated and diverted the difference between the \$3.15 million in commission amounts he falsely told the Collateral Manager and Trustee he paid Retailer A and the \$60,000 he actually paid Retailer A in commissions.

156. By similarly overstating the purported commissions paid to other retailers, Defendants were able to misappropriate or otherwise divert a total of at least \$5 million from the Collection Account during the Relevant Period.

**3. Defendants Made Deposits into the Collection Account to Conceal Their Fraud.**

157. Had Defendants deposited only actual water machine revenues into the Collection Account, the resulting deficit would have exposed the falsity of the invoices, purchase and sale agreements and collateral reports Defendants had been submitting to the Collateral Manager and Trustee.

158. To avoid detection of their fraud and to maintain the illusion that the thousands of fictitious water machines Defendants claimed to have placed were real, Wear directed funds into the Collection Account from other sources to create the appearance that these fictitious machines were generating revenue.

159. For example, Wear directed funds into the Collection Account from: (a) new investments in the Retail Scheme (including Investor C, described below at paragraphs 161 to 172), (b) revenues from other types of vending machines (*i.e.*, not water machines) owned by Refreshing; and (c) funds that Wear misappropriated from the Acquisition Account.

160. In sales reports provided to the Collateral Manager, Wear falsely classified these other sources of funds as water machine revenues, bolstering the fiction that the Notes were collateralized with thousands of revenue-generating water machines in the field when, in reality, both the number of the machines and the revenues they generated were substantially overstated.

**IV. DEFENDANTS FRAUDULENTLY INDUCED AN INVESTMENT FROM INVESTOR C.**

161. Defendants' successful closing of the first Notes offering in April 2022 allowed Wear to present Water Station and Creative as well-capitalized and positioned for growth, enabling Wear to generate additional demand from investors and to recruit new victims for the Retail Scheme.

162. In November 2022, between Water Station's first and second Notes issuances, Defendants secured its largest ever investment in the Retail Scheme by inducing Investor C, a private company focused on investing in water-related businesses, to enter into a purchase and sale agreement for water machines to be serviced and managed by Water Station.

163. Pursuant to a November 2022 master purchase agreement, and several supplemental purchase and sale agreements executed through January 2023, Investor C invested \$32.2 million in Water Station.

164. In exchange for that investment, Water Station purported to sell Investor C 3,427 water machines, which Water Station allegedly had acquired from existing investors in the Retail Scheme who purportedly had agreed to sell their water machines back to Water Station.

165. Under a corresponding service agreement, Water Station agreed to place, manage, and service Investor C's water machines. The service agreement promised Investor C a fixed annualized return of 12%.

166. Wear signed each of the purchase and sale agreements and the service agreements related to the sales of water machines to Investor C.

167. In these agreements, Wear identified by serial number and location each of the water machines Water Station purportedly purchased from investors in the Retail Scheme on Investor C's behalf.



168. Wear also represented in these agreements that the water machines Water Station purchased on Investor C's behalf were in good and operable condition, and that Investor C would have exclusive title to them.

169. These representations were false.

170. Wear did not, as represented, enter into agreements to buy back over 3,000 water machines from existing investors in the Retail Scheme on Water Station's behalf for resale to Investor C. Rather, at Wear's direction, Water Station provided Investor C a list of water machines that did not exist and/or were pledged or sold to other investors.

171. As Wear knew or recklessly disregarded by virtue of his role as signatory to the Indenture, Indenture supplements, and withdrawal requests pledging water machines as collateral to the Trustee, at least 2,000 of the water machines that Defendants purported to sell to Investor C had already been pledged as collateral to the Note Scheme, including approximately 600 machines that were purportedly placed at Retailer A but did not actually exist.

172. Rather than use Investor C's \$32.2 million to acquire water machines from existing investors as promised, Wear directed that at least \$13.7 million of the investment be routed to bank accounts belonging to Defendants to (a) pay outstanding distributions to earlier investors in the Retail Scheme; (b) fund the Collection Account to create the false appearance that the Eligible Assets were generating revenue in-line with what Defendants' fabricated collateral reports had represented; and (c) make payments on commercial loans related to Wear's other, unrelated business interests.

**V. RELIEF DEFENDANTS WERE UNJUSTLY ENRICHED.**

173. During the Relevant Period and throughout the period in which their fraudulent Retail and Note Schemes were ongoing, Defendants paid more than \$47 million to Refreshing (\$41.5 million) and Ideal (\$6.2 million).

174. Refreshing did not provide consideration justifying its receipt of this \$41.5 million.

175. Ideal did not provide consideration justifying its receipt of this \$6.2 million.

**VI. DEFENDANTS' FRAUDULENT SCHEMES UNRAVEL.**

176. By April 2023, with no new investments coming in, and having completely exhausted both the initial proceeds from the Note Scheme and the funding from Investor C, Defendants stopped making guaranteed monthly distributions to investors in the Retail Scheme.

177. Over the summer of 2023, the Collateral Manager began to question the accuracy of the data reported by Water Station in its invoices, purchase and sale agreements, and sales and performance reports.

178. In or around August 2023, the Collateral Manager commissioned a third-party to perform spot checks of locations that Water Station had represented to have placed water machines that were supposedly collateralizing the Notes.

179. This third-party firm reported to the Collateral Manager that 163 of the 164 locations it visited had no Water Station water machines on site.

180. The Collateral Manager, in turn, relayed this finding to Wear by email on August 11, 2023 and sought an explanation for the discrepancy.

181. On August 16, 2023, the Collateral Manager informed Wear by email that Water Station had 90 days (a "Cure Period") per the terms of the Indenture to provide information

verifying the existence and the location of “3000+ machines” ostensibly securing the Notes that the Collateral Manager determined were “actually missing.”<sup>3</sup>

182. The Cure Period expired in November 2023 without Wear providing sufficient information to substantiate the existence of the machines the Collateral Manager identified. During this period, Wear also cut off the Collateral Manager’s access to Water Station’s vending management system, preventing the Collateral Manager from viewing real-time evidence of Water Station’s purported water machine operations and performance.

183. In December 2023, the 352 Fund (and a Jefferies affiliate) bought out the Class A Notes held by Institutional Investor A at a discount, leaving the 352 Fund as the primary holder of all classes of the Notes.

184. Also in December 2023, after months of not receiving its guaranteed distribution payments, Investor C filed an arbitration claim against Defendants and other Wear entities, alleging, among other things, that the water machines Investor C purportedly purchased were not free and clear of prior liens and claims, were not present at the locations they had represented them to be, and may not have existed at all.

185. Over the course of the end of 2023 and into 2024, numerous other victims of the Retail Scheme initiated lawsuits against Defendants due to their failure to make promised distribution payments, with many of these suits accusing Wear of operating a Ponzi scheme.

186. In January 2024, Chirico requested that Water Station’s director of equipment services provide him directly with a report from Water Station’s vending management system listing all operable water machines placed in retailer locations. The report showed that Water Station had

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<sup>3</sup> Under the Indenture, if any water machines securing the Notes were discovered to require maintenance or repairs (*i.e.* were non-operational), Water Station had 90 days to demonstrate that it had performed all necessary repairs, or else would be required to refund to the Collections Account all cash used to purchase such machines.

only 2,342 machines placed in the field at retailer locations, far less than the more than 10,000 machines purportedly securing the Notes that Water Station had reported through its Initial Collateral List, invoices, and purchase and sale agreements.

187. On January 29, 2024, Wear participated in a recorded call with Chirico and Individual A, a mutual friend of Chirico and Wear's who had extensive business dealings with Wear and Water Station, including as one of Water Station's earliest partnership model investors.

188. During the call, Chirico asked Wear if a substantial portion of the collateral for the Notes were actually vending machines, rather than water machines. Individual A raised the possibility that a large portion of the water machines did not exist at all.

189. Wear did not deny the allegations and provided no explanation as to the existence or the whereabouts of the missing water machines. Wear acknowledged that he did not know where the relevant water machines were and suggested instead that he would look for alternative funding sources to repay Water Station's investors.

190. On the call, Individual A accused Wear of running "the largest franchise fraud in the history of the United States."

191. The 352 Fund and Water Station entered into another supplemental Indenture on February 2, 2024, under which Water Station sold the 352 Fund an additional approximately \$16.7 million worth of Notes, bringing the total raised through Water Station's note offering to approximately \$111 million.

192. In May and June, 2024, the Trustee issued notices of default to Water Station under the Indenture.

193. In May 2024, Creative was placed into receivership through the Receivership Action.

194. In August 2024, the order appointing the receiver in the Receivership Action was amended to place Water Station (as well as Refreshing) into the receivership, at which time Wear

was removed from his role as managing partner of Water Station and Creative and divested of any management authority with respect to them.

195. In August 2024, creditors filed involuntary Chapter 11 bankruptcy proceedings against Water Station and Creative.

196. In April 2025, counsel for the estates of Water Station and Creative in their pending bankruptcy proceeding filed a preliminary accounting listing water machines placed in retail locations as of October 2024, the last date for which Water Station's and Creative's vending management system had data.

197. That list reported that only 2,107 water machines had been placed in retail locations as of October 2024. Many of the machines included on the list were claimed by multiple creditors because Defendants frequently sold the same machine to more than one investor.

198. Counsel to Creative's and Water Station's estate in bankruptcy additionally identified approximately 2,700 water machines inventoried in warehouses across various states—many of which were only partially built or otherwise inoperable, and many of which likewise were claimed by multiple creditors.

**FIRST CLAIM FOR RELIEF**  
**Violations of Securities Act Section 17(a)**  
**(All Defendants)**

199. The Commission re-alleges and incorporates by reference here the allegations in paragraphs 1 through 198.

200. Defendants, directly or indirectly, singly or in concert, in the offer or sale of securities and by the use of the means or instruments of transportation or communication in interstate commerce or the mails, (1) knowingly or recklessly have employed one or more devices, schemes or artifices to defraud, (2) knowingly, recklessly, or negligently have obtained money or property by means of one or more untrue statements of a material fact or omissions of a material

fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and/or (3) knowingly, recklessly, or negligently have engaged in one or more transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchaser.

201. By reason of the foregoing, Defendants, directly or indirectly, singly or in concert, have violated and, unless enjoined, will again violate Securities Act Section 17(a) [15 U.S.C. § 77q(a)].

**SECOND CLAIM FOR RELIEF**  
**Violations of Exchange Act Section 10(b) and Rule 10b-5 Thereunder**  
**(All Defendants)**

202. The Commission re-alleges and incorporates by reference here the allegations in paragraphs 1 through 198.

203. Defendants, directly or indirectly, singly or in concert, in connection with the purchase or sale of securities and by the use of means or instrumentalities of interstate commerce, or the mails, or the facilities of a national securities exchange, knowingly or recklessly have (i) employed one or more devices, schemes, or artifices to defraud, (ii) made one or more untrue statements of a material fact or omitted to state one or more material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and/or (iii) engaged in one or more acts, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons.

204. By reason of the foregoing, Defendants, directly or indirectly, singly or in concert, have violated and, unless enjoined, will again violate Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

**THIRD CLAIM FOR RELIEF**  
**Control Person Liability for Violations of Exchange Act Section 10(b) and Rule 10b-5**  
**(Wear)**

205. The Commission re-alleges and incorporates by reference here the allegations in paragraphs 1 through 198.

206. As alleged above, Water Station and Creative violated Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

207. At all relevant times, Wear controlled Water Station and Creative and was a culpable participant in Water Station and Creative's violations of Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

208. By reason of the foregoing, Wear is liable as a controlling person pursuant to Exchange Act Section 20(a) [15 U.S.C. § 78t(a)] for Water Station's and Creative's violations of Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

**FOURTH CLAIM FOR RELIEF**  
**Unjust Enrichment**  
**(Relief Defendants)**

209. The Commission re-alleges and incorporates by reference here the allegations in paragraphs 1 through 198.

210. As described above in Paragraphs 173 to 175, Refreshing and Ideal received approximately \$41.5 million and \$6.2 million, respectively, in investor proceeds raised through the Retail and Note Schemes.

211. Relief Defendants have no legitimate claim to these ill-gotten gains.

212. Relief Defendants obtained the funds under circumstances in which it is not just, equitable, or conscionable for her to retain the funds.

213. Relief Defendants have therefore been unjustly enriched.

### **PRAYER FOR RELIEF**

WHEREFORE, the Commission respectfully requests that the Court enter a Final Judgment:

#### **I.**

Permanently enjoining Defendants and their agents, servants, employees and attorneys and all persons in active concert or participation with any of them from violating, directly or indirectly, Securities Act Section 17(a) [15 U.S.C. § 77q(a)] and Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5(b)].

#### **II.**

Ordering Defendants to disgorge all ill-gotten gains they received directly or indirectly, with pre-judgment interest thereon, as a result of the alleged violations, pursuant to Exchange Act Sections 21(d)(3), 21(d)(5), and 21(d)(7) [15 U.S.C. §§ 78u(d)(3), 78u(d)(5), and 78u(d)(7)];

#### **III.**

Ordering Defendants to pay civil monetary penalties under Securities Act Section 20(d) [15 U.S.C. § 77t(d)] and Exchange Act Section 21(d)(3) [15 U.S.C. § 78u(d)(3)];

#### **IV.**

Ordering Relief Defendants to disgorge, with prejudgment interest, all ill-gotten gains by which they were unjustly enriched, pursuant to Exchange Act Sections 21(d)(3), 21(d)(5), and 21(d)(7) [15 U.S.C. §§ 78u(d)(3), 78u(d)(5), and 78u(d)(7)];

#### **V.**

Permanently prohibiting Wear from serving as an officer or director of any company that has a class of securities registered under Exchange Act Section 12 [15 U.S.C. § 78l] or that is required to file reports under Exchange Act Section 15(d) [15 U.S.C. § 78o(d)], pursuant to



Securities Act Section 20(e) [15 U.S.C. § 77t(e)] and Exchange Act Section 21(d)(2) [15 U.S.C. § 78u(d)(2)];

**VI.**

Permanently enjoining Wear from, directly or indirectly (including, but not limited to, through any entity owned or controlled by Wear) participating in the issuance, purchase, offer or sale of any security, provided, however, that such injunction shall not prevent Wear from purchasing or selling securities for his own personal account; and

**VII.**

Granting any other and further relief this Court may deem just and proper.

**JURY DEMAND**

The Commission demands a trial by jury.

Dated: New York, New York  
August 14, 2025

/s/ David Zetlin-Jones  
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