UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of mPHASE TECHNOLOGIES, INC. For Review of Action taken by FINRA	ADMINISTRATIVE PROCEEDING File No. 3-15130

BRIEF IN SUPPORT OF APPLICATION OF
mPHASE TECHNOLOGIES, INC.
FOR REVIEW OF ACTION TAKEN BY FINRA

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INTRODUCTION

This matter involves an appeal from a final determination by the Financial Industry Regulatory Authority ("FINRA"). On July 6, 2012, Respondent, mPhase Technologies, Inc. ("mPhase"), submitted an application to FINRA to conduct a reverse stock split, pursuant to FINRA Rule 6490. FINRA determined the application was deficient on October 2, 2012. Respondent appealed, but a FINRA review committee affirmed on November 20, 2012.

FINRA Rule 6490 establishes procedures for the submission, review, and approval of requests, by issuers to FINRA, to process certain corporate actions, including dividends, distributions, and stock splits. Rule 6490 is an extension of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and SEC Rule 10b-17, promulgated thereunder, and it grants FINRA the authority to deny an issuer's request if the request is incomplete. Additionally, FINRA may deny an issuer's request if there are other "indicators of potential fraud," such as failure to disclose that the issuer was previously found liable of securities fraud, or settled a securities fraud investigation, where FINRA has "actual knowledge" otherwise. Here, mPhase disclosed all material information requested by the application and disclosed that certain of its officers and directors consented to a cease-and-desist order more than five years ago. In fact, Respondent attached a copy of the cease-and-desist order to its application, ensuring that FINRA would see it. FINRA's denial is therefore punishment for past conduct, improper, and should be reversed.

STATEMENT OF FACTS

I. Procedural Posture

A. Respondent's Application and FINRA's Initial Denial

Respondent mPhase is a New Jersey corporation that specializes in microfluidics, microelectromechanical systems, and nanotechnology. (*See generally* FINRA 00082, Letter by

M. Smiley to E. Topolosky) The company develops, among other things, reserve batteries with both commercial and military applications. (*Id.*) Respondent is publicly traded on the OTC Bulletin Board ("OTCBB") under ticker symbol XDSL.[1] Since its inception in 1998, Ronald Durando ("Durando") has served as mPhase's Chief Executive Officer and Gustave Dotoli ("Dotoli") has served as its Chief Operating Officer. Both Durando and Dotoli are also Directors on Respondents' Board of Directors. (FINRA 000140, Proxy Statement)

On July 6, 2012, mPhase submitted a notice to FINRA's Department of Operations ("DOP") requesting that DOP process documentation which would allow Respondent to conduct a reverse stock split. (FINRA 000401, The UPCC Subcommittee's Findings and Conclusions, p.1). Respondent's notice was made pursuant to FINRA Rule 6490. In filing its notice and in during subsequent correspondence with FINRA, mPhase complied with all of Rule 6490's requirements and submitted all required documentation. (*See* FINRA 000050-54, Issuer Company-Related Action Notification Form & *see* Record *generally*). Among other things, mPhase sent FINRA a copy of SEC Litigation Release No. 20339, dated October 18, 2007, explaining that Durando and Dotoli consented to a cease-and-desist order. (FINRA 0075-0076)

As the actual cease-and-desist order sets forth, Durando and Dotoli consented to findings that they failed to adhere to Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act, both of which are strict liability provisions that do not require a finding of willful misconduct or scienter. (FINRA 000023, Cease-and-Desist Order) As that order also sets forth, these violations were based on activity that occurred in 1999 in connection with two other, separate companies, PacketPort.com., Inc. ("PacketPort.com") and Microphase Corp.

[1] Respondent currently has approximately 23,000 shareholders, 6 billion shares of authorized stock and approximately 4.4 billion shares of common stock outstanding. (FINRA 000328, Appeal From DOP Deficiency Determination, p.1)

("Microphase").[2] (*Id.*) The cease-and-desist order does not contain findings that Durando or Dotoli violated the anti-fraud provisions of the Securities Act, the Exchange Act, or any other federal or state law. (*See id.*)

The DOP made no finding that the documentation mPhase submitted was in any way deficient. (FINRA 000323, Deficiency Notice) Yet on October 2, 2012, DOP refused mPhase's application by providing mPhase with a deficiency notice. (*Id.*) In refusing to grant mPhase's application, DOP stated its denial was based on DOP's "actual knowledge" that Durando and Dotoli were the subject of a "settled federal regulatory action related to fraud or securities law violation." (*Id.*) As stated above, however, the fact that Durando and Dotoli consented to a cease-and-desist order was fully and accurately disclosed to FINRA in the notice asking to conduct a reverse stock split and subsequent correspondence with FINRA.

B. Respondent's Appeal and FINRA's Final Decision

On October 8, 2012, mPhase filed an appeal of DOP's deficiency determination. (FINRA 000328, Notice of Appeal of Deficiency Notice) On November 20, 2012, a subcommittee of FINRA's Uniform Practice Code Committee ("UPCC Subcommittee") affirmed DOP's deficiency determination. In affirming DOP's refusal, the UPCC Subcommittee listed three factors. (FINRA 000401, UPCC Subcommittee's Findings and Conclusions) First, the UPCC Subcommittee noted the roles of Durando and Dotoli within mPhase. (*Id.*) Second, the UPCC Subcommittee considered the factual allegations contained in the cease-and-desist proceedings that Respondent disclosed in its initial application. [3] (*Id.*) In its discussion of the

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[2] PacketPort.com and Microphase will be discussed in more detail below. *See* Statement of Facts, Section II.B., *infra.*

[3] After a review of FINRA's record for this appeal, it appears that the UPCC Subcommittee also considered the allegations contained in a lawsuit, *SEC v. PacketPort.com, Inc., et al.*, filed by the SEC's Division of Enforcement ("Division") in 2005. (*See* FINRA 00007, Complaint) As the Commission will see, the record in this matter shows that FINRA reviewed – and in fact *highlighted* – factual allegations of the Division's complaint in that

facts of the cease-and-desist proceedings, however, the UPCC failed to address the portion of the cease-and-desist order that states "the findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding." (*See* FINRA 0000324, Cease-and-Desist Order p.2, n.1) Third, the UPCC Subcommittee noted that Durando is an executive of mPhase, PacketPort.com, as well as Microphase, and that all three companies list the same address in Norwalk, Connecticut. (FINRA 000401, UPCC Subcommittee's Findings and Conclusions)

FINRA Rule 6490 states that its guiding principles are to prevent fraudulent activities in connection with the securities markets and to protect investors and the public interest. Yet nowhere in the UPCC Subcommittee's Findings and Conclusions does the UPCC Subcommittee state or explain how the aforementioned three factors implicate Durando, Dotoli, or mPhase with any fraudulent activities in connection with the securities markets.[4] (*See id.*) Nor does the UPCC Subcommittee set forth an explanation as to how its decision protects investors and the public interest. (*See id.*)

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matter. (*See id.*) The Division's complaint alleged that six individuals, including Durando, Dotoli, and their outside counsel at the time, Robert H. Jaffe ("Jaffee"), violated the anti-fraud provisions of the federal securities laws. (*Id.*) The complaint also included related counts against four companies, including PacketPort.com, Inc. and Microphase Corp. (*Id.*) In sum, the complaint alleged a scheme to pump and dump the stock of PacketPort.com. (*Id.*) However, on March 21, 2007, the Division's lawsuit was dismissed with prejudice by the United States District Court for the District of Connecticut for failure to prosecute. *See SEC v. Packetport.com, et al.*, 2007 WL 911900, at *7 (D. Conn. March 21, 2007). Not only was the UPCC Subcommittee's consideration of the enforcement action improper, *see* Argument, Section II.C, *infra*, the UPCC Subcommittee failed to mention that it took the enforcement action into consideration at all. (*See* FINRA 000401, UPCC Subcommittee's Findings and Conclusions)

[4] As discussed in greater detail below, historically, FINRA's role in the corporate action process has been ministerial with limited jurisdiction to impose informational or other requirements, and no power to reject requested changes. Rule 6490 altered that role slightly. As the proposal release to Rule 6490 states, there was concern that certain parties were using FINRA to assist in specific fraudulent activities, such as usurping the corporate identity of publicly traded entities by either reinstating an entity with no authority or creating new entities with the same name as the public entity. SEC Release No. 34-62434, 75 FED.REG. 39603, at 39604 & n.9 (July 10, 2010) ("Proposal Release") (*citing* Commission Order and cases). Not only does the UPCC Subcommittee's Findings and Conclusions fail to state how Durando and Dotoli are currently engaged in fraudulent activity, the Findings and Conclusion fail to state how its decision prevents the types of fraud that Rule 6490 envisioned FINRA as detecting and ferretting out. *See* Argument, Section II.A, *infra.*

Further, Respondent noted in its appeal to the UPCC that Durando and Dotoli, during their tenure as Officers of mPhase, have completed all regulatory filings in connection with their involvement with mPhase, including Forms 3, 4, 13D and those required by Section 16 of the Exchange Act. (FINRA 000328, Appeal From Deficiency Determination, p.4) Respondents also noted that, neither Durando nor Dotoli, in their capacity as mPhase Officers, have ever violated the federal securities laws, including Section 5 of the Securities Act. (*Id.*) Respondents also noted that Durando and Dotoli have not sold their shares of mPhase stock in the past 12 years, (*id.*), and Respondent has never, since its inception in 1998, asked FINRA – or its predecessor, NASD – to conduct a reverse stock split. (*Id.*, p. 3) The UPCC Subcommittee made no mention of these facts in their Findings and Conclusions. (*See* FINRA 000401, UPCC Subcommittee's Findings and Conclusions)

II. The Cease-and-Desist Order and Underlying Allegations

A. The Cease-and-Desist Order

Durando and Dotoli consented to the entry of an Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of The Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934 (the aforementioned "cease-and-desist order") on October 18, 2007. As part of the cease-and-desist order, Durando and Dotoli consented to pay monetary sums representing penalties in the amounts of $150,000 and $100,000, respectively, for violations of Section 5 of the Securities Act and Section 13(d) and 16(a) of the Exchange Act. (FINRA 000024, Cease-and-Desist Order p. 6)

When Durando and Dotoli consented to the cease-and-desist order, they neither admitted nor denied any of the factual allegations therein. (*See id.*) Further, as part of the settlement process with the Division – which included consent to the aforementioned monetary

sums representing penalties – the Division agreed that the cease-and-desist order would not be binding on any other person or entity, including mPhase. (*See id.*, p.2 n.1) Because FINRA purported to rely on the facts alleged in the cease-and-desist order when making its initial deficiency determination, we recite the facts below.

B. Allegations of the Cease-and-Desist Order

According to the cease-and-desist order, Linkon was an internet telephone company whose common stock was registered with the SEC pursuant to Exchange Act Section 12(g) and traded over the OTC Bulletin Board. Sometime in the latter half of the 1990's, Linkon encountered financial problems. (*Id.*, p.3) Linkon became insolvent in 1999. (*Id.*, p.3)

According to the cease-and-desist order, Durando and Dotoli, through a company called PacketPort, Inc. ("PacketPort), sought to acquire shares of Linkon common stock in November 1999. The cease-and-desist order states that Durando – through Packetport – ultimately acquired 1.48 million Linkon shares from a certain Linkon shareholder ("Former Linkon Shareholder"). (*Id.*, p.4) The cease-and-desist order states that, in doing so, PacketPort obtained a controlling position in Linkon. (*Id.*, p.3) During the acquisition process, Durando did not timely file a Schedule 13D prior to or within ten days of PacketPort's acquisition of the Linkon common stock. (*Id.*, p.5)

Soon thereafter, Durando and Dotoli were elected to Linkon's Board of Directors, but did not timely file Form 3 Reports of beneficial ownership of securities within ten days of becoming Linkon Directors. (*Id.*, p.5) Eventually, PacketPort changed Linkon's name to PacketPort.com, Inc. (*Id.*, p.3) At the time, Robert H. Jaffee ("Jaffee") served as outside counsel for PacketPort.[5] On or about December 10, 1999, Jaffee instructed the company's transfer agent

[5] Jaffee is no longer affiliated with mPhase.

to change Linkon shares to Packetport.com shares and reissue them to Packetport and its assignees. (*Id.*, p.4) The cease-and-desist order states that Jaffee believed they were subject to Form S-8 registration when, in fact, the shares were subject to Form S-2A registration, which did not cover any resale of the underlying shares except by Former Linkon Shareholder. (*Id.*, pp.4-5) According to the cease-and-desist order, the shares were reissued as PacketPort.com shares and were received by Packetport's assignees on or about December 13, 1999. (*Id.*, p. 4.)

The cease-and-desist order does not allege that Durando or Dotoli had any actual or constructive knowledge of the fact that these shares did not qualify for an exemption from the registration requirements of Section 5 of the Securities Act. (*See id.*) Rather, all of the facts that support a failure to register shares under Section 5 relate to and implicate Jaffee, PacketPort's outside counsel, who Durando or Dotoli relied on for legal advice. (*See id.*)

The cease-and-desist order further states that PacketPort also obtained warrants for 1,000,000 Linkon shares. According to the cease-and-desist order, Jaffee – as with the prior transaction – instructed the transfer agent to issue stock certificates for the shares acquired by the exercise of the warrants, believing that they were subject to the Form S-8 registration statement referenced above. (*Id.*, pp.4-5) In January 2000, PacketPort's assignees ultimately exercised the warrants and later sold the underlying shares. (*Id.*, p.5)

The cease-and-desist order does not allege that PacketPort, Durando, Dotoli, or its assignees had actual knowledge that shares issued pursuant to the exercise of Former Linkon Shareholder's warrants were acquired from the issuer in an unregistered transaction and were thus restricted. (*See id.*) Likewise, the cease-and-desist order does not allege that PacketPort, Durando, Dotoli, or its assignees had any actual knowledge that there was no registration statement covering the sale acquired from Former Linkon Shareholder or obtained through the

exercise of Former Linkon Shareholder's warrants. (*See id.*) Lastly, the cease-and-desist order states that Durando and Dotoli consented to a finding that they failed to adhere to Section 5 of the Securities Act and Section 13(d) and 16(a) of the Exchange Act, (*see id.*), which are strict liability provisions that do not require a finding of willful misconduct or scienter. Lastly, the cease-and-desist order does not involve any of the anti-fraud provisions of the Securities Act, the Exchange Act, or any other federal or state law. (*See id.*)

SUMMARY OF ARGUMENT

FINRA Rule 6490 is a ministerial rule. Enacted in September 2010, it sets forth procedures for the submission, review, and determination of the sufficiency of requests made to FINRA by issuers to process certain corporate actions, including dividends, distributions, and stock splits. Rule 6490 is an extension of Section 10(b) of the Exchange Act and Rule 10b-17, promulgated thereunder, and gives FINRA authority to deny an issuer's request if that request is incomplete or if there are other "indicators of potential fraud." Proposal Release, at 39604. The plain language of the Rule and the Rule's history demonstrate that these latter two occurrences that trigger FINRA's ability to deny requests are interrelated. Specifically, FINRA can deny a request if the issuer fails to include information that is "material," under the federal securities laws. In addition, FINRA can deny a request if the issuer was previously found liable or guilty of securities fraud or settled a securities fraud investigation or action, but failed to disclose that fact in its application, *and* FINRA has "actual knowledge" otherwise. In other words, all Rule 6490 gives to FINRA is the power to detect and ferret out fraud in the application.

Yet here, Respondent disclosed in its application to perform a reverse stock split that two of its Officers and Directors – Durando and Dotoli – consented to a cease-and-desist order in 2007. Importantly, as set forth in the cease-and-desist order, Durando and Dotoli consented to technical violations of the federal securities laws that are not based on findings of

willfulness or scienter. More importantly, the conduct upon which the order was based took place almost thirteen years. In addition, Respondents disclosed all other material information necessary to complete the application. FINRA does not assert otherwise. FINRA nevertheless denied Respondents' application, citing Rule 6490, and expressly based its denial on the fact that Respondents consented to the cease-and-desist order.

Simply put, because Respondent disclosed the cease-and-desist order and disclosed all other necessary information, FINRA's denial exceeded the scope of its authority under Rule 6490 and was improper. Moreover, FINRA's denial – and the SEC's affirmation of that denial – would amount to punishment of past conduct that neither FINRA nor the SEC have the power or ability to seek now. Affirming FINRA's denial would improperly expand FINRA's powers, and it would allow the Commission a backdoor to a remedy it chose not to seek more than five years ago. Accordingly, FINRA's denial of Respondent's application to conduct a reverse stock split should be reversed.

ARGUMENT

I. FINRA's Denial of Respondent's Application Should Be Reversed Because The Denial Exceeded the Authority Granted To FINRA Under Exchange Act Section 10(b), SEC Rule 10b-17, and FINRA Rule 6490.

As noted in the proposal to adopt Rule 6490, FINRA has no jurisdiction over issuers and does not impose listing standards. Proposal Release, at 39604. Therefore, it may not make substantive judgments about matters of corporate governance for a corporation, such as whether the officers and directors of that corporation are fit to serve. Rather, the only power granted to FINRA under Rule 6490 by Section 10(b) of the Exchange Act and SEC Rule 10b-17 – the enabling statute and SEC Rule – is to require the filing of an appropriate notice, which it may refuse to file if the notice is deficient in some way. But, here there was no deficiency in Respondent's notice because mPhase disclosed the cease-and-desist order. In fact, Respondent

gave FINRA notice of the cease-and-desist order as part of its application, ensuring that FINRA would see it. Accordingly, FINRA's denial of mPhase's application based on the past actions of Durando and Dotoli – facts that were fully disclosed in the application – exceeded the authority granted to FINRA under Rule 6490 and should be reversed.

Two provisions of the Exchange Act define FINRA's quasi-governmental authority to adjudicate actions against members who are accused of unethical or illegal securities practices and the Commission's oversight of that authority: Sections 15A and 19 of the Exchange Act. *National Ass'n of Secs. Dealers. Inc. v. SEC*, 431 F.3d 803, 804 (D.C. Cir. 2005), *rehearing en banc denied* (2006) ("*NASD v. SEC*"). Section 15A of the Exchange Act, 15 U.S.C. § 78o-3, lays out FINRA's specific duties, including disciplinary functions. Section 19, 15 U.S.C. § 78s, sets out the SEC's supervisory duties over FINRA. A close look at Section 19 shows that FINRA's rule-making authority should be strictly limited by parameters set forth by the Commission and, by extension, Congress. *See* 15 U.S.C. § 78s (b)(1) ("Each self-regulatory organization shall file with the Commission, *in accordance with such rules as the Commission may prescribe*, copies of any proposed rule or any proposed change ... No proposed rule change shall take effect *unless approved by the Commission*) (emphasis added); *see also Fiero v. FINRA*, 600 F.3d 569, 574-79 (2d Cir. 2011) (analyzing whether FINRA's actions in that case conformed to the authority granted under the Exchange Act and any corresponding SEC and/or SRO rule).

Here, the statute guiding the Commission's supervision over FINRA is Section 10(b) of the Exchange Act, which was written by Congress to prohibit conduct involving fraud or manipulation in connection with the purchase or sale of securities. *Santa Fe v. Green*, 430 U.S. 462, 473, 97 S.Ct. 1292 (1977); *see also SEC v. Zandford*, 535 U.S. 813, 819, 122 S.Ct.

1899 (2002) (discussing how Section 10(b) and the Exchange Act, in general, were written to promote a philosophy of full disclosure surrounding the purchase or sale of securities on national exchanges). To further the goals of Section 10(b), the Commission promulgated, *inter alia*, Rule 10b-17, entitled "Untimely Announcements of Record Dates." 17 C.F.R. § 240.10b-17. According to its plain text, Rule 10b-17 was enacted to prevent the failure to give notice by an issuer with respect to certain corporate actions, such as payment to shareholders of dividends, distributions, stock splits, or rights offerings. *Id.* Accordingly, the Commission requires that issuers give notice to FINRA not later than ten days prior to the record date of such corporate action. *Id.* This is a ministerial function. Indeed, FINRA has limited jurisdictional reach over public companies. FINRA does not impose listing standards for securities and maintains no formal relationship with, or direct jurisdiction over, issuers. Proposal Release, at 39604.

Thus, the overarching purpose of the Rule is to ensure that the investing public is not misled by the failure of issuers to disclose information that would be considered material under the federal securities laws. For example, subsection (d)(3) of Rule 6490 itself recognizes in that subsection's title – "Deficiency Determination" – that FINRA's sole function in the application process is ministerial. That subsection states that:

> [W]here an SEA Rule 10b-17 Action or Other Company-Related Action is deemed deficient, the Department may determine ... that documentation ... will not be processed ... [W]here the Department makes such a deficiency determination, the request to process documentation ... will be closed ... The Department shall make such deficiency determinations solely on the basis of one or more of the following factors: (1) FINRA staff reasonably believes the forms and all supporting documentation, in whole or in part, may not be complete, accurate or with proper authority; (2) the issuer is not current in its reporting requirements, if applicable, to the SEC or other regulatory authority; (3) FINRA has *actual knowledge* that the issuer ... officers, [or] directors ... are the subject of a pending, adjudicated or settled regulatory action or investigation by a federal, state or foreign regulatory agency, or a

> self-regulatory organization; or a civil or criminal action related to fraud or securities laws violations; [and] (4) a state, federal or foreign authority or self-regulatory organization has provided information to FINRA, or FINRA *otherwise has actual knowledge* indicating that the issuer ... officers, [or] directors... may be potentially involved in fraudulent activities related to the securities markets and/or pose a threat to public investors...

FINRA Rule 6490(d)(3) (emphasis added); *see also* Proposal Release, at 39606 ("Accordingly, the Commission believes that the proposal is designed to encourage issuers and their agents to provide complete, accurate and timely information to FINRA concerning Company-Related Actions involving OTC Securities, *and thereby* to prevent fraudulent and manipulative acts and practices with respect to these securities") (emphasis added).

Thus, under the plain text of subsections (d)(1) and (d)(2) of Rule 6490, FINRA can deny a request if the issuer fails to include information that is material under the federal securities laws. Under subsection (d)(3), FINRA can deny a request if the issuer was previously found liable or guilty of securities fraud, or settled a securities fraud investigation or action, but failed to disclose that fact in its application, *and* FINRA has "actual knowledge" of that fact. FINRA can deny a request under subsection (d)(4) of Rule 6490 if the issuer is involved in a securities fraud investigation or action, but fails to disclose that fact in its application, *and* FINRA is told by an authority or otherwise obtains "actual knowledge" of that securities fraud investigation or action.

Here, subsections (d)(1), (d)(2), and (d)(4) are inapposite. The only subsection that could apply is (d)(3). The record, however, shows that the cease-and-desist proceeding was fully disclosed to FINRA as part of its Rule 6490 application, as well as to the public in Respondent's Exchange Act filings. (*See* FINRA 0075-0076, FINRA 000299) Therefore, there can be no "deficiency determination." This is the only logical reading of Rule 6490(d)(3). That is why the rule refers to FINRA having "actual knowledge" of an "investigation" or

"adjudication."[6] If the rule were intended to preclude an issuer from engaging in a Rule 10b-17 corporate action merely by virtue that one or more of its officers or directors consented to a cease-and-desist proceeding, the rule would state that FINRA will not process any documentation for a company, where an officer or director has ever been involved in a regulatory proceeding. Instead, the Rule states that FINRA may not process documentation where it possesses "actual knowledge" of such a proceeding. In other words, where an issuer has filed documentation, which fails to disclose all material information, *and then* FINRA comes into possession of such information, it need not process the documentation further.[7]

As a final note, subsection (d)(5) of Rule 6490 also allows FINRA to determine that an application is deficient if there is "significant uncertainty" in the settlement and clearance process for the issuer's securities. FINRA Rule 6490(d)(5). This is a technical exception that makes sense when one considers the object of Rule 6490 is to perform actions that will impact trading in the issuer's securities. In addition, as the Proposal Release makes clear, this exception was the *main* reason Rule 6490 increased FINRA's role in the application process – namely, there was concern that fraudsters were taking advantage of FINRA's limited powers vis-à-vis corporate actions to assist in certain and specific schemes, such as usurping the corporate identity of publicly traded entities by either reinstating an entity with no authority or creating new entities

[6] The term "actual knowledge" is not defined in the federal securities laws. Under other areas of the law, however, one cannot have "actual knowledge" where one does not become aware of the circumstances contemporaneously with the occurrence of some other event. *See e.g.*, UNIFORM COMMERCIAL CODE (U.C.C.), § 1-201 (25) ("'Discover' or 'learn' or a word or phrase of similar import refers to knowledge rather than to reason to know").

[7] Moreover, any other reading would violate due process. In this country one is presumed innocent or not liable of any wrongdoing until convicted or found liable. Yet, FINRA's interpretation of this Rule would allow it to prejudge a person or entity of guilt or liability by virtue of the *mere existence* of an investigation. FINRA's interpretation of this Rule would also allow it to effectively impose penalties on persons and entities where there has been a determination or finding that the persons and entities did not violate the law. Thus, to avoid these absurd results, the rule should be read as allowing FINRA to make a deficiency determination only when there was an action or investigation against the applicant, that fact was not disclosed, and FINRA obtains "actual knowledge" of that fact independently.

with the same name as the public entity. *See* Proposal Release, at 39604 & n.9 (*citing* Commission Order and cases). In other words, the only additional power that Rule 6490 gives to FINRA is the power to detect and ferret out *this* type of fraud in the application.

Yet not only does the UPCC Subcommittee's Findings and Conclusions fail to state how Durando and Dotoli are currently engaged in fraudulent activity, the Findings and Conclusion make no attempt whatsoever to base its decision on the actual language of the rule, in context, or this important history. Thus, any argument by FINRA *now* that its decision is supported by Rule 6490 is a semantic argument that relies on certain broad language from subsection (d)(3), taken out of context. In sum, FINRA's denial exceeded the scope of its authority under Rule 6490 and was improper. Accordingly, FINRA's denial of Respondent's application to conduct a reverse stock split should be reversed.

II. Even If FINRA's Interpretation Of The Rule Is Correct, FINRA's Denial of Respondent's Application Was Based On Improper Consideration of Evidence, And The Denial Should Be Reversed On That Basis.

Assuming *arguendo* that the Commission finds that FINRA did not exceed the authority granted to it under Exchange Act Section 10(b) and SEC Rule 10b-17, which Respondent does not concede, the Commission should nevertheless find that FINRA improperly considered evidence. First, FINRA – through the UPCC Subcommittee's Findings and Conclusions – improperly considered facts contained the cease-and-desist order, even though the order states that it may not be used in any other proceeding against Durando, Dotoli, or any other entity. Further, the only other source of information that FINRA relied on to make its deficiency determination – besides Respondent's disclosure and the cease-and-desist order – appears to be a complaint filed by the Division of Enforcement in 2005, based on facts that are also contained in the cease-and-desist order. That action and complaint, however, were dismissed with prejudice. In other words, the SEC lost and may not relitigate the facts alleged or

causes of action again. Thus, FINRA's deficiency determination is built on an improper foundation, and the Commission should reverse FINRA's denial on that basis.

A. The UPCC Subcommittee impermissibly considered the findings of the cease-and-desist order.

As noted above, in affirming DOP's deficiency finding, the UPCC Subcommittee explicitly considered the substantive allegations of the cease-and-desist proceedings. (FINRA 000401, The UPCC Subcommittee's Findings and Conclusions) The cease-and-desist order, however, explicitly states that its findings are "made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding." (FINRA 000023-24; Cease-and-Desist Order p. 2, footnote 1) In other words, as part of the settlement process between Durando, Dotoli, and the Division – which included consent to monetary sums representing disgorgement – the Division agreed that the cease-and-desist order would not be binding on any other person or entity, including mPhase. Yet throughout its Findings and Conclusions, the UPCC Subcommittee failed to state how it was permissible for them to consider the allegations contained in an agreement whose findings are "not binding on any other person or entity in this or any other proceeding."

A cease-and-desist order is a command from the Commission to refrain from violating the securities laws. Andrew M. Smith, *SEC Cease-and-Desist Orders*, 51 ADMIN. L. REV. 1197, 1218 (1999). If violated, the Commission can seek an injunction requiring compliance with the order. *Id.* In addition, the Commission can bring an action in a federal court for a civil money penalty. *Id.* In practice, cease-and-desist orders are often times the result of a negotiated settlement, and contain mutual, bilateral promises. In addition to the promise by the regulated entity and/or persons not to violate the securities laws, the Commission allows the regulated entity and/or persons to neither admit nor deny the allegations. In addition, the

Commission promises that the findings contained therein will not be used against that regulated entity or persons in any other proceeding.

Meanwhile, FINRA's authority "to discipline its members for violations of federal securities law is entirely derivative." *See NASD v. SEC*, 431 F.3d at 806. "The authority it exercises ultimately belongs to the SEC." *Id.* Because FINRA derives its disciplinary powers from the Commission, FINRA should be bound to the same promise that the Commission made to Durando and Dotoli in the cease-and-desist order, and FINRA should have been prohibited from considering the facts contained therein.[8] In sum, because the UPCC subcommittee improperly considered the facts contained in the cease-and-desist order, FINRA's denial of Respondent's request to conduct a reverse stock split should be reversed.

B. The UPCC Subcommittee improperly considered the complaint in the Division's Enforcement Action, but that complaint was dismissed with prejudice.

Based on evidence contained in FINRA's record for this appeal, the only other source of information that FINRA relied on to make its deficiency determination – besides Respondent's self-disclosure and the cease-and-desist order, which could not be considered – is a complaint filed by the Division of Enforcement on November 15, 2005. The complaint, filed in the action, *SEC v. Packetport.com, Inc., et al.*, was based on facts that are also contained in the cease-and-desist order. On its face, not only does the record suggest the FINRA viewed the complaint, but they considered the substantive allegations of the complaint by highlighting provisions that it deemed noteworthy. (*See* FINRA 00007-00012, Complaint) That action and complaint, however, were dismissed with prejudice. *Packetport.com,* 2007 WL 911900, at *7.

[8] Furthermore, as a practical matter, if the Commission affirms the deficiency determination in this case, such a decision would lead to the conclusion that FINRA has been given the general authority to undo an SEC consent decree in cease-and-desist proceedings. If that happens, the Division could find it much more difficult to settle cases since, regulated persons and entities will not want to run the risk of a counter-measure from FINRA under Rule 6490.

Because the action and complaint were dismissed with prejudice, FINRA should not be able to use the complaint as a basis of "actual knowledge" that Durando and Dotoli were the subject of a securities enforcement investigation or action. The term "dismissed with prejudice" is defined as the instance when a case has been "removed from the court's docket in such a way that the *plaintiff is foreclosed from filing the suit again on the same claim or claims*." BLACK'S LAW DICTIONARY 482 (7th ed. 1999) (emphasis added). Further, because the statements within the complaint are wholly unsubstantiated and unverified, to place any weight on them at all would be entirely misplaced.

Even more troubling, one of the provisions which FINRA highlighted included the fact that Durando invoked his constitutional right when he "invoked his Fifth Amendment privilege against self-incrimination and refused to testify and to provide documents in response to a Commission investigative subpoena." (FINRA 00009) Yet not even a motion for summary judgment can be granted on an adverse inference. "[R]ather, the inference must be weighed with other evidence in the matter in determining whether genuine issues of fact exist." *US v. Suman*, 684 F.Supp.2d 378, 386 (S.D.N.Y.2010*); see also, Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n. 5, 97 S.Ct. 2132 (1977); *SEC v. Druffner*, 517 F.Supp.2d 502, 510 (D.Mass.2007). "Because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 191 (3d Cir.1994). In sum, because the UPCC subcommittee improperly considered the facts contained in the complaint filed in the 2005 enforcement action, FINRA's denial of Respondent's request to conduct a reverse stock split should be reversed.

III. The SEC's Enforcement of FINRA's Denial Would Be Improper Because It Would Amount To A De Facto Officer And Director Bar, A Remedy The SEC Is Estopped From Seeking Now.

As demonstrated above, FINRA's decision went beyond detecting fraud in the application – because Durando and Dotoli disclosed they consented to the cease-and-desist order – and is essentially a punishment for past conduct. If the Commission affirms FINRA's deficiency determination, the Commission will effectively bar Durando and Dotoli from serving as officers and directors of mPhase, as well as any other publicly traded company, an outcome that the Commission is collaterally estopped from seeking.

Corporate actions, such as dividends, distributions, and stock splits are necessary in the life cycle of all corporate entities. By preventing mPhase from engaging in these actions now, because Durando and Dotoli are officers and directors of mPhase, FINRA has effectively barred Durando and Dotoli from serving as officers and directors at mPhase in the future. Furthermore, given FINRA's sparse analysis in its deficiency determination, any company on which Durando and Dotoli serve as officers and directors will suffer the same fate. Therefore, the Commission's enforcement of the instant deficiency determination would amount to an officer and director bar. The Commission, however, should be collaterally estopped from affecting such a bar against respondents now.

The doctrine of collateral estoppel is appropriate in any proceeding where the same facts and issues that were previously adjudicated are being used against the same party to impose a new punishment or new liability. *See Montana v. United States*, 440 U.S. 147, 153-54, 99 S.Ct. 970 (1979); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 27, comment c. ("[I]f the party against whom preclusion is sought did in fact litigate an issue of ultimate fact and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact.... similarly if the issue was one of law, new

arguments may not be presented to obtain a different determination of that issue"). Further, "collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645 (1979).

In addition, the Commission may bar a defendant in an injunctive action from serving as officers and directors under Section 20(b) of the Securities Act or Section 21(d)(2) of the Exchange Act only if that person violates either Section 17(a)(1) of the Securities Act or Section 10(b) of the Exchange Act, and the defendant's "conduct demonstrates unfitness to serve as an officer or director." 15 U.S.C.S. §§ 77t(e), 78u(d)(2). The Commission may also bar persons in a cease-and-desist proceeding from serving as officers and directors under Section 8A(f) of the Securities Act or Section 21C(f) of the Exchange Act, but only if that person is found to have violated either Section 17(a)(1) of the Securities Act or Section 10(b) of the Exchange Act, and that person's "conduct demonstrates unfitness to serve as an officer or director." 15 U.S.C.S. §§ 77h-1(f), 78u-3(f). None of the aforementioned provisions allow the Commission to bar persons from serving as an officer or director for violations of Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act.

Here, the Division filed an enforcement action against Durando, Dotoli, and Packetport.com on November 15, 2005. That action included counts against the defendants for violations of Section 10(b) of the Exchange Act and Rule 10b-5. Despite the fact that the enforcement action sought injunctive relief, the Division did not seek to bar Durando and Dotoli from serving as officers and directors under Section 20(b) of the Securities Act or Section 21(d)(2) of the Exchange Act. Subsequent to the dismissal of the Division's enforcement action

in *Packetport.com*, 2007 WL 911900, at *7, the Division entered into a stipulation of dismissal with Durando and Dotoli. Under the terms of that stipulation, the Division "agree[d] that the ... district court action shall be dismissed against all defendants, with prejudice as to all future actions based on the allegations of the complaint, *except for* the cease-and-desist proceedings." (Stipulation, p.2) [9] In those cease-and-desist proceedings, Durando and Dotoli consented to findings that they failed to adhere to Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act, both of which are strict liability provisions that do not require a finding of willful misconduct or scienter. [10]

Thus, the Commission was not only precluded from seeking to bar Durando and Dotoli from serving as an officer and director when the 2005 enforcement action was dismissed with prejudice, the Commission knowingly waived the ability to seek an officer and director bar against Durando and Dotoli when it consented to the cease-and-desist order. In any event, as demonstrated above, the Commission's enforcement of FINRA's denial would amount to a de facto officer and director bar. The Commission, however, should be collaterally estopped from imposing such a bar on defendants now.

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[9] The stipulation is part of the record of the Division's enforcement action and available on the Federal Pacer Court Docket. The Commission may therefore take judicial notice of it. F.R.E. 201(b). We attach a copy of the stipulation for the convenience of the Commission.

[10] Respondent notes that Section 20(b) of the Securities Act or Section 21(d)(2) of the Exchange Act initially came into law as part of the Remedies Act. As leading commentators have noted, however, "the officer and director bar remedy was in fact one of the more controversial aspect of the Remedies Act, in part because it called into question the interplay between the federal and securities laws and state corporate law." Donna M. M. Nagy, Richard W. Painter, & Margaret V. Sachs, SECURITIES LITIGATION AND ENFORCEMENT, ch. 9, p. 694 (2007 ed.) (*citing* Congressional testimony of former Chairperson Richard Breeden in support of the Remedies Act). Because determinations of fitness to serve as officers and directors of a corporation are matters of state and corporate law, the Remedies Act required a finding that a person be found liable of scienter-based fraud. This concern is also reflected in the language of Section 8A(7) of the Securities Act and Section 21C(7) of the Exchange Act. Thus, in addition to the argument that the Commission's affirmation of FINRA's deficiency determination would amount to a de facto officer and director bar, Respondent also notes that FINRA's initial determination and the Commission's affirmation of that determination would also violate principles of federalism. Notably, mPhase shareholders voted by Proxy in 2008 to reelect Durando and Dotoli as directors. If Congress intended for FINRA to have the authority to preempt these state law procedures and effectively disenfranchise those voters, they would have specifically said so.

As a final note, yet more to the point, if the Commission were to enforce FINRA's deficiency finding – thereby barring Durando and Dotoli as officers and directors of mPhase as well as any other publicly-traded company – not only would it violate the well-established principals of collateral estoppel, but it would do so in a way that is void of the procedural requirements dictated by the federal securities laws. For example, even if the Commission were able to pursue a follow-on action under any of the aforementioned provisions, a jury, a district court judge, or administrative law judge would be required to engage in an extensive balancing and weighing of facts in order to determine whether Durando and Dotoli are " unfit" to hold such positions.[11] None of the procedural safeguards, such as the rules of evidence or right to confront and cross-examine witnesses, are present in the sparse analysis of either the DOP or UPCC. Further, without a more extensive record before the Commission that contains evidence – for example, examined evidence about the state of mind of Durando and Dotoli during the Linkon transactions, and cross-examined testimony by others involved in those transactions, like Jaffe – the Commission cannot ensure those safeguards are met now.

[11] As the Commission is well aware, in resolving the issue of unfitness, a court would have to consider the following: (1) the egregiousness of the violation; (2) whether the defendant was a recidivist; (3) the defendant's position when he engaged in the fraud; (4) the degree of scienter; (5) the defendant's economic gain from the violation; and (6) the likelihood that the defendant would repeat the misconduct. *SEC v. Patel*, 61 F.3d 137, 141 (2d Cir. 1995); *see also SEC v. Levine*, 517 F.Supp.2d 121, 145 (D.D.C. 2007) (listing alternative factors, but agreeing about the importance of the sixth *Patel* factor). More to this point, Respondent noted in its appeal to the UPCC that Durando and Dotoli, during their tenure as Officers of mPhase, have completed all regulatory filings in connection with their involvement with mPhase, including Forms 3, 4, 13D and those required by Section 16 of the Exchange Act. (FINRA 000328, Appeal From Deficiency Determination, p.4) Respondents also noted that neither Durando nor Dotoli, in their capacity as mPhase Officers, have ever violated the federal securities laws, including Section 5 of the Securities Act. (*Id.*) Respondents also noted that Durando and Dotoli have not sold their shares of mPhase stock in the past 12 years, (*id.*), and Respondent has never, since its inception in 1998, asked FINRA – or its predecessor, NASD – to conduct a reverse stock split. (*Id.*, p. 3) The UPCC Subcommittee made no mention of these facts in their Findings and Conclusions. (*See* FINRA 000401, UPCC Subcommittee's Findings and Conclusions). Given the consequences that their deficiency determinations will have on Durando and Dotoli – i.e., that it amounts to a de facto officer and director bar – the failure to consider these factors should constitute another reason why the decisions of the DOP and UPCC Subcommittee should be reversed.

In sum, given the reasons set forth by the DOP and UPCC Subcommittee in their determinations – which were sparse – the Commission's enforcement of FINRA's denial would effectively bar Durando and Dotoli from serving as officers and directors of mPhase, as well as any other publicly traded company. The Commission attempted to, but ultimately did not, pursue an injunctive action against Durando and Dotoli. By extension, the Commission could have, but ultimately chose not to pursue an officer and director bar against Durando and Dotoli. The Commission should therefore refrain from affirming FINRA's denial of Respondent's application to conduct a reverse stock split on this basis.

IV. The SEC's Enforcement of FINRA's Denial Would Be Improper Because It Violates The Five Year Statute Of Limitations.

Lastly, as demonstrated above, FINRA's deficiency determination and the Commission's affirmation of FINRA's deficiency determination would amount to punishing mPhase for the past conduct of its officers and directors, Durando and Dotoli. Accordingly, the FINRA proceedings below as well as this appeal should constitute "an action, suit or proceeding" for the enforcement of a "penalty," and the Commission should be time-barred from affirming FINRA's denial by the general statute of limitations contained in 28 U.S.C. § 2462.

As an initial matter, the five year limitations period has clearly passed. In the Supreme Court's recent decision in *Gabelli v. SEC.*, _ U.S. _, _ S.Ct. _ (2013), the Supreme Court held that the five-year statute of limitations period in Section 2462 begins to run at the time the actions at issue are "complete" rather than when they are discovered. The Court rejected the SEC's arguments that the discovery rule should apply to Section 2462. Here, the conduct at issue occurred in 1999 through 2000. Further, the Division filed its complaint against Dotoli, Durando and Packetport.com on November 15, 2005. Under the rule in *Gabelli*, the statute began to run as late as 2000. Even under the discovery rule, however, the clock began to

tick when the Division filed its complaint for injunctive relief – that is, once it first became possible to seek an officer and director bar.

Second, preventing mPhase from conducting a reverse stock split for the past conduct of its officers and directors, Durando and Dotoli, is a "penalty" within the meaning of section 2462. In *Johnson v. SEC*, the D.C. Circuit Court of Appeals ruled that a sanction rendered by the Commission is a "penalty" within the meaning of section 2462 if it (1) has "collateral consequences" beyond merely remedying the instant misconduct, and (2) is based mostly on a person's past misconduct. 87 F.3d 484, 488 (D.C. Cir. 1996). Here, the misconduct at issue took place in 1999 and 2000, and was remedied by Durando and Dotoli's consent to a cease-and-desist order, which included the payment of monetary sums. However, FINRA's deficiency determination and the Commission's affirmation of FINRA's deficiency determination, based on the cease-and-desist order, would have the collateral consequence of preventing mPhase from conducting future corporate actions should Durando and Dotoli continue to serve as officers and directors. The determination and affirmation would have the additional collateral consequence of effectively barring Durando and Dotoli from serving as officers and directors of any other publicly traded company.

Although there is case law from other Circuits that is contrary to Respondent's position,[12] Respondents urge the Commission to look at a recent decision coming out of the Fifth Circuit in *SEC v. Bartek*, as being instructive here. 484 Fed. Appx. 949, 2012 LEXIS 16399 (5th Cir. 2012). In that case, the court held that although permanent injunctions and officer director bars are equitable in nature, their collateral consequences were sufficiently "penal" to make the

[12] *SEC v. Berry*, 580 F. Supp.2d 911, 918 (N.D. Cal. 2008) (holding that under Ninth Circuit law, claims seeking a permanent injunction, disgorgement, or an officer and director bar were not "penalties" within the meaning of section 2462 because they were "equitable" in nature).

Division's enforcement action subject to Section 2462's five year statute of limitations. *Id.* at *22-23. The Court thus barred the Division from bringing stock option backdating charges against two former executives more than five years after their alleged misconduct.

Lastly, the Commission should recognize that FINRA's deficiency determination and the Commission's affirmation of FINRA's deficiency determination constitute an "action, suit or proceeding." Section 2462's five year limitation applies to the entire federal government in all civil penalty cases, unless Congress specifically provides otherwise. *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994). It is well-established that this statute applies to the SEC. *See Johnson*, 87 F.3d at 488; *SEC v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007).

That said, Respondent concedes that the Commission, in reviewing disciplinary sanctions imposed by the NASD twice held that the Section 2462 five-year period of limitations is not applicable to a self-regulatory organization, taking the position that proceedings initiated by a self-regulatory organization are not government agency proceedings. *In the Matter of the Application of Henry James Faragelli*, Exch. Act Release No. 37,991, 1996 SEC LEXIS 3263 (Nov. 26, 1996); *In the Matter of the Application of Larry Ira Klein*, Exch. Act Release No. 37,835, 1996 SEC LEXIS 2922 (Oct. 17, 1996). What those decisions failed to address, however, is that the rules that self-regulatory organizations write and enforce are direct extensions of rules written by the SEC, under Congressional order. *NASD v. SEC*, 431 F.3d at 804 (*citing* Sections 15A and 19 of the Exchange Act); *Fiero*, 600 F.3d at 574-79.

Here, Rule 6490 is an extension of Section 10(b) of the Exchange Act and Rule 10b-17, promulgated thereunder. Under the statute and rules, FINRA denied Respondent's application based on the past conduct of its officers and directors, and did so in a way that constitutes a present and future punishment. Thus, any argument that FINRA can punish

misconduct that took place more than five years ago because it is not a government agency would be improperly and unfairly placing form over substance. In any event, because FINRA derives its disciplinary powers from the SEC, as set forth above, in Argument Section II.A., this five year limitation should also apply to FINRA.

CONCLUSION

For all of the foregoing reasons, we respectfully request that the Commission reverse the decision of the DOP, UPCC Subcommittee, and FINRA in favor of Respondents.

Dated: March 4, 2013

Respectfully submitted,

By: Frank C. Razzano by Min Choi

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Attachment – Stipulation of Dismissal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. PACKETPORT.COM, INC., RONALD DURANDO, PACKETPORT, INC., MICROPHASE CORP., ROBERT H. JAFFE, GUSTAVE DOTOLI, IP EQUITY, INC., M. CHRISTOPHER AGARWAL, THEODORE KUNZOG, and WILLIAM COONS III, Defendants.	3:05 CV 1747 (PCD)

STIPULATION OF DISMISSAL

This Stipulation of Dismissal is entered into between the Securities and Exchange Commission (the "Commission") and defendants M. Christopher Agarwal, William Coons III, Gustave Dotoli, Ronald Durando, Robert H. Jaffe, Theodore Kunzog, IP Equity, Inc., Microphase Corporation, PacketPort, Inc. and PacketPort.com, Inc., by and through the undersigned, in connection with the above-captioned case.

WHEREAS, the Commission filed a complaint against the defendants on November 15, 2005;

WHEREAS, to avoid further litigation in connection with the complaint, the parties seek and desire, by means of entering into this Stipulation of Dismissal, to hereby consensually resolve this action upon the terms as set forth in the paragraphs below; and

WHEREAS, the parties agree that upon execution of this Stipulation of Dismissal, the terms and obligations of this Stipulation become effective immediately and shall be binding upon the Commission and the defendants, and their respective successors and assigns.

NOW, THEREFORE, THE PARTIES HERETO AGREE AND IT IS HEREBY ORDERED AS FOLLOWS:

1. The Commission agrees that the above-captioned district court action shall be dismissed against all defendants, with prejudice as to all future actions based on the allegations of the complaint, except for the cease-and-desist proceedings described in the paragraph below.

2. Certain of the defendants have submitted to the Commission written offers of settlement agreeing to the institution of cease-and-desist proceedings against them pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, which proceedings they have agreed to settle on a neither admit nor deny basis. These defendants agree to abide by these offers of settlement and consent to the Commission's issuance of an administrative cease-and-desist order as described in their offers of settlement.

3. The signatories hereto hereby confirm and acknowledge that they have full authority to execute this Stipulation of Dismissal on behalf of the respective parties and to bind them to all of the terms hereof.

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*The SEC did not receive an executed offer of settlement from defendant Microphase so the action against Microphase remains pending.

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SO ORDERED on August , 2007:

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United States District Court
For the District of Connecticut