

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

**SECURITIES ACT OF 1933**  
**Release No. 10637 / May 3, 2019**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 85768 / May 3, 2019**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-19157**

**In the Matter of**  
  
**Thomas Gutierrez,**  
  
**Respondent.**

**ORDER INSTITUTING  
CEASE-AND-DESIST  
PROCEEDINGS PURSUANT TO  
SECTION 8A OF THE  
SECURITIES ACT OF 1933 AND  
SECTION 21C OF THE  
SECURITIES EXCHANGE ACT  
OF 1934, 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 8A of the Securities Act of 1933 (“Securities Act”) and Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against Thomas Gutierrez (“Gutierrez” 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 Respondent 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 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, 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<sup>1</sup> that:

#### Summary

1. This matter involves material misrepresentations on a second quarter 2014 earnings call by Thomas Gutierrez ("Gutierrez"), the former Chief Executive Officer of GT Advanced Technologies Inc. ("GT"), as well as reporting and books and records violations, in connection with a supply contract and debt agreement that GT entered into with Apple, Inc. ("Apple") in October 2013. The supply agreement required GT to manufacture large scale "sapphire glass" for use by Apple as cover screens for its next generation iPhone in a facility leased from Apple. The debt agreement required Apple to advance to GT \$578 million in four installments with each installment payment being contingent on GT meeting certain quality and quantity milestones. Further, GT was to repay the debt to Apple by delivering sapphire glass. The relationship with Apple was extremely high profile for the company, material to GT's revenue and reported liabilities and how its stock was valued, and was closely followed by analysts.

2. By April 25, 2014, Gutierrez was aware that GT failed to meet the required quantity, quality, and delivery standards, including a "fourth milestone" in the debt agreement, and that Apple had withheld its fourth installment payment of \$139 million due to that failure. By the second quarter GT's failure to meet the fourth milestone gave Apple the right to call back \$306 million in GT's debt from the prior installment payments, and would have required GT to change its debt classification from long-term to current. The "current" debt reclassification would have had an immediate, material impact on GT's liquidity and status as a going concern. As Gutierrez understood, prior to the second quarter filing, GT formed a position with its external auditor that Apple was in breach of a lease agreement covering a facility used to produce sapphire and, as a result of Apple's purported breach, GT was released from its performance and milestone obligations to Apple under the debt agreement. In the view of GT and Gutierrez, under these circumstances Apple could not call back the debt, allowing the company to continue to classify the debt as long-term.

3. During an August 5, 2014 earnings call in connection with GT's financial reporting for its second quarter, Gutierrez represented on the call that GT expected to hit performance targets and receive the fourth installment payment from Apple by October 2014. The statement was misleading and created a false impression regarding the

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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.

relationship between the parties and GT's performance under the contract. Gutierrez failed to disclose to investors that GT had taken the position that Apple breached the lease and considered itself excused from performing on the debt agreement. This position severely jeopardized any reasonable expectation by GT that Apple would make the fourth installment payment. In addition, neither Gutierrez nor the company publicly disclosed that GT had already missed the fourth milestone in April and continued in a state of failed performance in the months that had elapsed. Apple also had not agreed to pay GT the fourth installment payment.

4. In connection with GT's disclosure of sources of cash, liquidity, and ability to continue as a going concern analysis, Gutierrez internally provided unsupported sales projections for GT's sales of sapphire glass furnaces. The projections included future sales despite several indications to GT that these sales were unrealistic, including that Apple refused to authorize the sales and that GT's prospective customers were unable to commit to purchase orders.

5. Within eight weeks of the second quarter filing and earnings calls, GT filed voluntary petitions for reorganization under Chapter 11 bankruptcy, resulting in significant investor harm.

### **Respondent**

6. **Thomas Gutierrez ("Gutierrez")**, 70, of Raleigh, North Carolina, joined GT's predecessor company and served as GT's CEO and director from 2009 through 2015. As a member of GT's disclosure committee, Gutierrez reviewed and discussed drafts of GT's Forms 10-Q for the second quarter 2014. As CEO, Gutierrez certified, signed and approved the filing of GT's Forms 10-Q for the second quarter 2014.

### **Facts**

7. On October 31, 2013, GT entered into multiple agreements with Apple and parties related to Apple, including a Statement of Work ("supply agreement"), Prepayment Agreement ("debt agreement"), and Lease Agreement ("lease agreement"). Gutierrez, with other GT executives, negotiated the contracts.

8. The agreements required GT to operate 2,090 "Advanced Sapphire Furnaces" ("ASF furnaces") with capability to produce 262kg sapphire "boules," or a synthetic cylindrical mass of sapphire grown in a furnace, to supply a minimum of 56 million millimeters of sapphire in 2014. The contracts with Apple required production of an unprecedented amount of sapphire in boules that, per the negotiations with Apple, were over twice the size of boules GT had previously produced. Given the magnitude of the production obligations and high profile counter-party, the Apple contract was a game-changing event for GT.

9. To accommodate the scale of sapphire manufacturing, Apple leased a facility in Arizona, known as the “Mesa facility” to GT pursuant to a lease agreement.

10. The parties also signed a supply contract, which specified the amounts of sapphire GT was to produce, and the price Apple would pay for it. The supply agreement also contained an exclusivity provision that limited GT’s future ASF furnace sales to customers already in its backlog or customers that did not produce sapphire glass for consumer devices, who could be deemed Apple’s competitors.

11. The debt agreement required GT to achieve certain technical and quality metrics in order to receive each of four installments from Apple. Each milestone required GT to produce 262kg boules that contained increasing percentages of material suitable for use by Apple. In exchange, Apple agreed to pay GT \$578 million in four milestone installments, or “prepayments,” based upon GT reaching each of the four milestones. The debt agreement also required GT to: repay the prepayments through the delivery of sapphire beginning in 2015; use Apple’s prepayments to purchase 2,036 ASF furnaces to be used at an Arizona facility; and retrofit 54 ASF furnaces to be used in a facility that GT already maintained in Massachusetts.

12. Significantly, the debt agreement provided Apple the right to cancel future milestone prepayments and accelerate GT’s repayment obligations on the already-received amounts if GT failed to meet any technical quality milestone.

### **Apple’s Installment Payments to GT**

13. On November 15, 2013, Apple made the first milestone payment to GT, which was due fifteen days after contract signing and did not have any associated milestone requirements.

14. By December 2013, just weeks after execution of the debt agreement, GT could not meet the second milestone requirement, causing Apple to withhold its second prepayment that was due on December 30, 2013 until January 23, 2014.

15. As of that time, Apple had not completed, by the contractual deadline, the first phase of construction of the Mesa Arizona manufacturing facility, which impacted GT’s ability to achieve the second milestone requirements by the original deadline. The parties, however, agreed to amend the debt agreement to loosen some restrictions and provide GT a better chance of meeting its future milestone requirements, including by providing GT more time to meet the third milestone and leniency with regard to producing usable sapphire. GT never disclosed the amendment to the debt agreement, dated January 23, 2014, in a Form 8-K or in any periodic filing.

16. The successful growth of a sapphire boule required a constant supply of electrical power and a carefully regulated flow of cooling water at precise moments in the boule growth process. A failure in the supply of electrical power or cooling water could

destroy some or all of the sapphire boules then in the growth process. In the first two quarters of 2014, interruptions in the supply of power and water, referred to as “facilities events,” unexpectedly occurred on some occasions, which destroyed sapphire boules that were then in the growth process.

17. On April 3, 2014, Apple paid the third installment. As to the fourth installment of \$139 million, GT had until April 25, 2014 to meet the milestone requirements.

18. As the April 25<sup>th</sup> deadline approached and then passed, GT failed to meet the fourth milestone requirements.

19. Apple, in fact, never made the \$139 million payment or provided GT with a waiver of its obligation to meet the fourth milestone. Although the parties discussed the possibility of an amendment to the fourth milestone requirement, the terms for an amended agreement were never agreed upon, and the parties never executed a second amendment to the debt agreement.

#### **GT’s Failure to Meet Obligations Under the Contract**

20. From nearly the start of the contract, GT was unable to meet required delivery and quality standards under the contract. Among other problems, GT had difficulty scaling the sapphire “recipe” to produce 262 kg boules and experienced quality problems, including cracks, structural, and cosmetic defects that caused the material to fail to comport with Apple’s specifications. Gutierrez received regular reports concerning the sapphire project and received board materials detailing GT’s failure to scale the sapphire “recipe” to produce larger boules and maintain quality standards suitable for use by Apple. As reflected in a document presented to GT’s board on January 16, 2014, for example, Apple was “alarmed” that 75% of GT’s boules were cracked.

21. GT also experienced cooling water and power interruptions at the facility. On February 23, 2014 and March 8, 2014, process cooling water interruptions took place, damaging boules that were then in production. Power interruptions occurred on April 22, 2014, and July 22, 2014, which similarly damaged boules that were in production. Gutierrez was aware of the power and water interruptions.

22. In May 2014, an Apple supply executive warned Gutierrez that the low quantity of sapphire produced was a “major problem.” By June, the Apple supply executive emailed Gutierrez that he had “extremely limited confidence” that GT could produce even 33 million millimeters of sapphire in 2014 “based on GT’s inability to date to track factory performance” and that GT’s “de-commitments have to stop.”

23. Given the production difficulties, throughout 2014, GT continually revised its sapphire production projections downward. By June 3, 2014, as reflected in an internal supply review shared with Gutierrez, GT could not meet its contractual target to produce 56

million millimeters of sapphire in 2014. In July, Apple had expressly advised Gutierrez that Apple would likely not use sapphire glass for its iPhone 6 launch.

24. By July, as reflected in emails, GT's Chief Technology Officer informed Gutierrez that it would take at least six months from the summer of 2014 (January 2015 at the earliest) for GT to fix the known problems and produce over 200kg boules of acceptable quality in order to meet the fourth milestone requirements set forth in the January 2014 amendment to the debt agreement.

25. As a result, in the summer of 2014, GT experienced cash flow problems from its inability to achieve the milestones under the agreement.

26. At the end of July, Gutierrez requested that Apple make the fourth installment payment notwithstanding the performance problems, but Apple rejected the request.

27. Failing to meet the fourth milestone provided Apple with the ability to accelerate the debt repayment requiring GT to pay back to Apple the installment payments.

#### **GT's Position that Apple was in Breach and GT's Second Quarter Earnings Call**

28. On August 7, 2014, GT filed its second quarter 2014 Form 10-Q. In the filing, GT did not disclose that it had failed to meet supply and delivery obligations to Apple.

29. During the second quarter, but prior to the filing of the Form 10-Q, GT's external auditor was concerned that GT's failure to achieve the fourth milestone constituted a violation of the debt covenant and gave Apple the ability to call back GT's debt from the prepayments. As a result, GT's auditor looked at whether GT's continued classification of the debt as long term comported with GAAP. Had GT classified the prior Apple payments as current debt, this would have had an immediate, material impact on its liquidity and status as a going concern because Apple would have the right to call back \$306 million in debt from the prior prepayments that GT owed.

30. In determining whether GT had to classify the debt as current or continue to record it as long-term, GT's external auditor discussed GT approaching Apple for a waiver, and discussed the following language: "Apple waives all its rights under the Prepayment Agreement to require repayment of Milestone Payments previously paid to GT[AT] based on GT[AT] not meeting the Milestones as described in the January 17, 2014 Amendment to the Prepayment Agreement." Similarly, GT's then CFO requested Gutierrez to directly approach Apple and seek a waiver. However, in a June 18<sup>th</sup> email to Gutierrez, GT's then Chief Operating Officer advised him that "this is an issue of how we deal with [the external auditor] and [the CFO] learning how to keep him in a box."

31. On July 7, 2014, Gutierrez requested by email that Apple confirm that the parties were "postponing establishing revised criteria for the 4th milestone until Q4." Apple

responded the following day, stating: “Correct: we are postponing our discussions with respect to the 4th prepayment milestone.” GT sent this exchange to its external auditor. Gutierrez, however, did not send to Apple the language respecting waiver that GT’s CFO had proposed.

32. Without being able to provide evidence of a waiver from Apple, GT took the position that Apple was in breach of a lease agreement because, in GT’s view, Apple had not met certain power and water specifications in the lease, and, as a result, GT was released from its obligations to meet the performance milestones under the debt agreement and could not be deemed to have violated the debt covenant. On the basis of this position, GT continued to record the debt as long-term.

33. Gutierrez was aware of GT’s view that the company considered Apple to be in breach of the lease agreement. Gutierrez was also aware that GT did not disclose this view to GT’s investors.

34. On August 5, Gutierrez as the CEO held an analyst call, disclosing that GT expected Apple to pay the fourth installment by October 2014. Specifically, Gutierrez stated on the call that: “[t]he fourth prepayment from Apple is contingent upon the achievement of certain operational targets by GT. GT expects to hit these targets and receive the final \$139 million prepayment by the end of October 2014.” On August 13, Gutierrez held another analyst call where he similarly stated that “[w]e have indicated that we expect our final payment in the October time frame. I wouldn’t say that if I didn’t believe it and my conviction in terms of the long-term importance of the business to GT remains intact.”

35. In the days prior to the second quarter filing, Gutierrez sent Apple a draft of various proposed second quarter disclosures, including a proposed disclosure for GT’s second quarter earnings release, which stated “[t]he 4<sup>th</sup> and final prepayment from Apple, which is tied to achievement of certain operational targets, under GT’s control in Mesa, is now expected to be paid in the September/October timeframe.” In response, on August 1, 2014, Apple informed Gutierrez that the disclosure was “Not ok” and that the disclosure was “ambiguous about whether it is GT’s or Apple’s expectation to pay it in that time-frame.” Apple further requested that GT rephrase the disclosure “to something like ‘GT expects to [meet those targets] [receive the prepayment] in the September/October timeframe’ ... not ‘is now expected to be paid’.”

36. During this email exchange or any subsequent communication, Gutierrez did not raise with Apple the fact that GT took the position that Apple breached the lease agreement, which excused GT from performing under the contracts, including meeting the fourth milestone of the debt agreement.

37. Gutierrez’s statement on the earnings call was nonetheless misleading and false given that the public was unaware that GT took the position that Apple was in breach (and thus GT was released from its obligations) and painted a misleading picture of GT’s relationship with Apple and GT’s performance under the contract. This position severely

jeopardized any reasonable expectation by GT that Apple would make the fourth installment payment. In this regard, under the contract terms, Apple could refuse to pay GT if there were lease disputes. In addition, GT's expectation of receiving the fourth payment was undermined by its repeated failure to meet performance milestones. At a minimum, the breach position called into question whether either party had *any* ongoing obligations under the contract.

38. Apple was concerned that Gutierrez's statement on the earnings call was misleading and inconsistent with GT's deficient performance under the contract. For example, in an internal Apple exchange, the senior-most Apple executive overseeing the GT contract stated to his colleagues: "I feel like we got sold a bit of a story by Tom [Gutierrez]. It was all doom and gloom when he talked to us and how he needed our help to stay alive, then he ups his earnings guidance for the year on the call." The Apple supply executive responded "I am concerned about his earnings (the message was too positive)."

39. Gutierrez's statement on the earnings call concerning the fourth installment payment was material. Several analysts who covered GT's stock, for example, noted that GT's expectation that Apple would make the fourth installment payment as a positive development.

40. In addition, on the August 5<sup>th</sup> call, Gutierrez made statements that were unreasonable and unsupported. Specifically, he stated "I feel very confident, based on the progress that we're making, that we will achieve the milestone in that time frame. But as I indicated, with a projection of having close to \$400 million in the bank at the end of the year, it's not a world-ending event if it slides. Although, again, I don't anticipate that it will slide."

41. GT also disclosed in its accompanying Form 10-Q for its second quarter of 2014: "We have not received the fourth prepayment amount under the Prepayment Agreement and there can be no guarantee that we will satisfy the technical and performance metrics necessary to receive such prepayment amount in the near future, or at all."

42. Notwithstanding GT's disclosure, Gutierrez's statements were inconsistent with facts that had come to his attention by the time of the call. These include that: GT had already missed the April 25 milestone date and remained in a state of failed performance on production of sapphire glass by the time of the earnings call; GT's failures could not be rectified until January 2015 at the earliest; and the parties had not determined the terms of a future amendment or executed an amendment.

### **GT's Second Quarter Liquidity, Backlog, and 2014 EPS Estimate**

43. In connection with the second quarter Form 10-Q filing, GT's external auditor was concerned about GT's cash flow, and for the first time, requested a liquidity analysis. In addition, GT held debenture notes that included a covenant for default for inability to pay \$100 million in indebtedness.



44. In response, GT, provided the external auditor with a liquidity analysis that included inaccurate assumptions concerning its ability to sell: (1) \$275 million in ASF furnaces to non-Apple customers; and (2) 25 million millimeters of sapphire to Apple for \$232 million. These assumptions would result in GT ending the year with a cash balance of between \$267 million and \$424 million.

45. GT relied, in large part, on Gutierrez's internal projections that GT could achieve its 2014 ASF sales goals by selling in the second half of the year 450 ASFs either to two Apple suppliers or to a Taiwanese company. Based on the unsupported liquidity analysis, GT disclosed in its second quarter Form 10-Q that it had sufficient cash to satisfy its commitments and requirements for the next twelve months. Gutierrez's projected furnace sales also provided, in part, the basis for GT's non-GAAP EPS guidance estimate of \$0.12-\$0.18 as disclosed in its second quarter earnings release attached to Form 8-K.

46. Gutierrez's projections incorporated in GT's liquidity analysis were unsupported, unduly optimistic and without reasonable basis. GT relied on these projections to assess revenue of approximately \$236 million and to maintain its books and records.

47. As to the potential sales to the two Apple suppliers, Apple had offered on July 30, 2014, to "approach [two of its suppliers] with an offer to purchase 450 furnaces for their facilities" to be "exclusively used for Apple projects." Prior to the August 5, 2014 earnings call, Apple had given to Gutierrez the names of the sales contacts and informed him they had both been told that "Apple is interested in [the two suppliers] expanding their sapphire growth capacity to reduce parts pricing." At the time of the filing, GT representatives had not yet met with either of the two suppliers, and communications with the suppliers never advanced to the stage of completing non-disclosure agreements, a necessary first step for any negotiations.

48. As to the potential sale to the Taiwanese customer, Gutierrez made the representations despite the fact that these projected sales would violate the exclusivity provisions in the agreements with Apple, and GT did not have permission from Apple to close on these sales. As reflected in an August 3, 2014 email from Apple to Gutierrez, Apple specifically declined to give permission to GT to sell furnaces to a potentially new customer in Taiwan, stating "Tom, we are not going to waive the terms for the 983 [the total backlog] furnaces."

49. Gutierrez knew or should have known that the market for ASF furnaces was limited. Gutierrez received industry analysis reflecting that demand for ASF furnaces was based on Apple using GT's sapphire glass in its iPhone screens. By the time of the liquidity analysis, Gutierrez was aware that Apple would not announce an iPhone with a sapphire screen in 2014 and, thus, market participants would have little interest in new ASF furnace purchases.

50. Based on these unsupported assumptions, GT overstated sapphire equipment (ASF furnaces) backlog in its second quarter 2014 Form 10-Q and earnings release, attached

to Form 8-K. Most of the agreements in backlog were over 18 months old. Although GT had sales agreements with the backlog customers, it did not have an expectation of delivering furnaces to them in the second half of 2014. Although GT's second quarter 2014 Form 10-Q stated that "our order backlog as of any particular date should not be relied upon as indicative of our revenues for any future period," analysts typically regard it as an indication of the company's sales prospects. GT's backlog disclosure was material given that several analysts covering GT's stock specifically referenced the backlog disclosure as a positive factor.

51. In addition, as Gutierrez was aware, GT included in its cash analysis the assumption that GT would receive the fourth installment even though Apple never provided any assurance to GT that it would make that payment and the company was separately taking the position that Apple was in breach of the agreement. As a result of these inaccurate assumptions, in its second quarter 2014 Form 10-Q, GT inaccurately projected that "existing cash, customer deposits and prepayment installment proceeds will be sufficient to satisfy working capital requirements, commitments for capital expenditures and other cash requirements for at least the next twelve months," and "[GT] will have sufficient cash resources to fund operations for at least the next twelve months."

52. On October 6, 2014, two months after filing its second quarter 2014 Form 10-Q, GT filed voluntary petitions for reorganization under Chapter 11 and filed a Form 8-K in which the company stated that as of September 29, 2014 it had approximately \$85 million of cash compared to \$333 million of cash at June 28, 2014.

### **The Offer and Sale of Securities**

53. During the relevant time, GT offered and sold securities pursuant to a Form S-8 the Company filed on April 20, 2012. During fiscal year 2014, GT received payment from stock option exercises as a result of exercises and sales of stock by GT employees. GT's Form S-8 filed in 2012 incorporated by reference GT's subsequent periodic filings under the Exchange Act, including the quarterly and current filings during fiscal year 2014.

54. Gutierrez exercised options and sold 9,232 shares of GT stock into the open market on September 8, 2014 for gross proceeds of \$160,448.

### **Violations**

55. As a result of Gutierrez's statements on the earnings call regarding GT's expectation that it would receive from Apple the fourth prepayment by the end of October 2014, Gutierrez violated Sections 17(a)(2) and 17(a)(3) of the Securities Act, which makes it unlawful to obtain money or property through misstatements or omissions about material facts and proscribes any transaction or course of business that operates or would operate as a fraud or deceit upon a purchaser of securities.

56. As a result of the conduct described above, Gutierrez caused GT to violate Section 13(a) of the Exchange Act and Rules 13a-13 and 12b-20 thereunder, which requires issuers to file with the Commission accurate current reports, which include such further information as may be necessary to make the required statements not misleading.

57. As a result of the conduct described above, Gutierrez caused GT to violate Section 13(b)(2)(A) of the Exchange Act, which requires issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”

#### 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 8A of the Securities Act and Section 21C of the Exchange Act, Gutierrez cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act and Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, and 13a-13 thereunder.

B. Respondent shall pay disgorgement of \$15,510.00, prejudgment interest of \$2,993.91 and civil penalties of \$125,000 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 of disgorgement and prejudgment interest is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and if timely payment of a civil money penalty is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment shall be made in the following installments: \$43,503 within 10 days of entry of this Order; \$25,000 within 90 days of the entry of this Order; \$25,000 within 180 days of entry of this Order; \$25,000 within 270 days of entry of this Order; and final payment within 360 days of entry of this Order. Payments shall be applied first to post order interest, which accrues pursuant to SEC Rule of Practice 600 and 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.

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

- (1) Gutierrez may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Gutierrez 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) Gutierrez 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 Gutierrez 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 Anita B. Bandy, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-6561.

D. 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, he shall not argue that he is entitled to, nor shall he 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 he 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.

## 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, and further, any debt for disgorgement, prejudgment interest, civil

penalty or other amounts due by Respondent 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 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  
Acting Secretary