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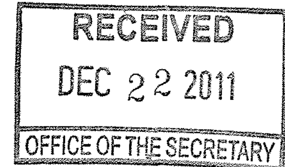
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: JOHN P. FLANNERY and JAMES D. HOPKINS	ADMINISTRATIVE PROCEEDING FILE NO. 3-14081



REPLY MEMORANDUM IN SUPPORT OF JOHN PATRICK ("SEAN") FLANNERY'S MOTION FOR SUMMARY AFFIRMANCE

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I. INTRODUCTION

Pursuant to Rule 411(e) and Rule 154(b) of the Securities and Exchange Commission's ("Commission") Rules of Practice, Respondent John Patrick ("Sean") Flannery ("Flannery") submits this Reply to the Division of Enforcement's (the "Division") Opposition to Flannery's Motion for Summary Affirmance ("Flannery's Motion").

After a full and fair opportunity to present its claims over the course of more than two weeks before the Commission's Chief Judge in the Division's chosen forum, the Division, dissatisfied with the result, asks the Commission to disregard every single aspect of the 58-page Initial Decision, which found that Flannery did nothing wrong. Indeed, the overwhelming weight of the evidence demonstrated that Flannery did all that he could to ensure that the letters at issue were accurate, and, in fact, they were accurate. The Division simply did not prove its case, and now apparently asks the Commission to disregard the fact that a hearing even occurred.

The Division's Opposition sets forth a fictional account of the events of the Summer of 2007 that is completely at odds with the voluminous hearing record. To compensate for the lack of evidence supporting its fiction, the Division resorts to inflammatory and at times ugly rhetoric, baselessly accusing Flannery of having "pillaged" the Limited Duration Bond Fund ("LDBF") and defrauding investors through three letters State Street Global Advisors ("SSgA") sent to them in July and August (the July 26, August 2, and August 14 letters). Div. Opposition 12-13. The Division also relies heavily on its characterizations of Flannery's purported "authority" and "his longstanding position and influence in SSgA and his role in acting as a final approver of the communications at issue" (Div. Opposition 5-6) that are contradicted by the evidence; this is not a control person case, and the evidence clearly proved that Flannery, who had no responsibility for investor communications, was not the "final approver" of the letters — SSgA's well-informed legal team was. Initial Decision 25-26, 30-31, 53; Flannery's Motion 6, 13, 17-18.

Further, the Division fails to meaningfully deal with the fact that the Initial Decision rests on numerous independent grounds — including Chief Judge Murray's findings that there were no misstatements or omissions in the letters and that Flannery lacked any culpable state of mind — each of which was well-reasoned and supported by the evidence, and each of which exonerated Flannery. Perhaps most egregious is the Division's suggestion that Chief Judge Murray's credibility determinations are effectively meaningless and entitled to no weight (Div. Opposition 4-5), notwithstanding her observation of Flannery during his three days of testifying, as well the unanimous testimony of other witnesses who knew him. Initial Decision 3. The Division's request for a "do-over" should be denied. The Initial Decision should be summarily affirmed.[1]

II. LEGAL CONCLUSIONS REGARDING *JANUS* AND INVESTOR SOPHISTICATION HAVE NO BEARING ON THE MANY OTHER GROUNDS SUPPORTING FLANNERY'S TOTAL EXONERATION.

As set forth in Flannery's Motion, the Commission can affirm the Initial Decision, even if it were to agree with the Division regarding the scope of *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011). Chief Judge Murray's findings that Flannery lacked the requisite state of mind and that there were no misstatements or omissions in any of the letters at issue were independent of her determinations regarding whether or not he "made a statement" in those letters. The same is true for Chief Judge Murray's analysis of investor sophistication principles, which similarly had no bearing on her findings that the letters were accurate and that Flannery did not act negligently, recklessly or with any intent to deceive.[2]

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[1] The Division does not dispute that its Rule 10b-5(b) claim is not longer viable (Flannery's Motion 6-7), and the Commission must therefore summarily affirm the Initial Decision on that claim.

[2] Flannery disagrees with the Division regarding the scope of *Janus* and the role of investor sophistication (the only grounds for review articulated by the Division in its Petition for Review). The Initial Decision is correct in all respects, including with regard to those points of law. But if the Commission were to agree with the Division, it can nonetheless affirm the result in light of the other, independent grounds supporting the Initial Decision, and except those legal issues from its Order. Flannery also notes that the Division correctly points out that Flannery's Motion

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The Division asserts that Chief Judge Murray's application of *Janus* resulted in her failure to adequately analyze the Division's purported "scheme and course of business claims" (Div. Opposition 1), but this simply is not the case. She properly found that because this is a case about alleged misstatements and omissions, and because there were none, there could be no fraudulent scheme or course of conduct. *See, e.g.*, Initial Decision 43 ("This case involves allegations of materially false or misleading statements or omissions"), 57 ("Because I find there were no materially false or misleading statements or omissions, there can also be no fraudulent 'course of conduct' or 'scheme liability.'"). The law is well-settled that cases that are wholly premised on alleged misstatements or omissions, like this case, cannot give rise to scheme liability or course of conduct claims. *See, e.g.*, *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 177 (2d Cir. 2005) (scheme claims failed where sole basis for such claims were alleged misrepresentations or omissions) (citing *Schnell v. Conseco, Inc.*, 43 F. Supp. 2d 438, 447-48 (S.D.N.Y. 1999)); *SEC v. Kelly*, 2011 U.S. Dist. LEXIS 108805, at *8 (S.D.N.Y. Sept. 22, 2011) ("[C]ourts have routinely rejected the SEC's attempt to bypass the elements necessary to impose 'misstatement' liability under subsection (b) by labeling the alleged misconduct a 'scheme' rather than a 'misstatement'"); *SEC v. Brown*, 740 F. Supp. 2d 148, 172 (D.D.C. 2010) ("[T]he alleged conduct must be more than a reiteration of the misrepresentations underlying the Rule 10b-5(b) misstatement claim."); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 475 (S.D.N.Y. 2005); *see also United States v. Naftalin*, 441 U.S. 768, 774 (1979) ("each subsection [of § 17(a)] proscribes a distinct category of misconduct").[3]

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misquoted a portion of Rule 411, and that the correct standard under Subsection (b)(2)(ii)(B) of that rule is "erroneous" rather than "clearly erroneous." This was inadvertent and the result of a typographical error.

[3] *VanCook v. SEC*, 653 F.3d 130 (2d Cir. 2011), cited in the Division's Opposition to Respondent James D. Hopkins' Motion for Summary Affirmance (p. 3), is inapposite. That case involved allegations that the defendant orchestrated a scheme that allowed certain customers to engage in late trading, which itself violates the

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Where a case concerns allegedly deceptive communications to investors, and where the communications are true, there can be no fraudulent scheme or course of conduct. Initial Decision 57. Chief Judge Murray's application of *Janus* had nothing to do with her determination of this issue, and there is nothing that prevents the Commission from summarily affirming the result while excepting the *Janus* analysis contained in the Initial Decision from its Order (in the event the Commission were to agree with the Division on *Janus*).[4]

The Division also opaquely argues that Chief Judge Murray's analysis of "the relevance of investor sophistication and reliance concepts also infected [her] analysis of both the full factual record and the context in which Flannery's deceptive scheme took place." Div. Opposition 2. It is unclear what, exactly, the Division is arguing in the quoted sentence, but what is clear is that it does not impact Chief Judge Murray's well-reasoned findings that Flannery lacked scienter and was not negligent, and that the letters at issue were true and not misleading. Incredibly, the Division goes on to contend:

> While several of the documents that contributed to LDBF investors' ignorance of the fund's subprime concentration were not Flannery's responsibility . . ., the distorted picture of LDBF created by these documents was a key part of understanding how Flannery was able to further defraud LDBF investors in July and August 2007.

Id. The Division's newfound theory that unidentified documents for which it admits Flannery was not responsible contributed to investors' purported ignorance is baffling, and bears no

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Commission's rules. *VanCook*, 653 F.3d at 133 (citing 17 C.F.R. § 270.22c-1). It was not a case, like this one, involving nothing more than alleged misstatements and omissions to investors.

[4] Again, the Initial Decision correctly applied *Janus*. *See Kelly*, 2011 U.S. Dist. LEXIS 108805, at *11-15 (holding that where the Division's scheme liability theories are premised on alleged misstatements and omissions, the *Janus* standard for making a statement applies to claims under Rule 10b-5(a) & (c) and Section 17(a)). The Division warns that the Initial Decision will be cited by the defense bar regarding the scope of *Janus* until the Commission takes action (Div. Opposition 3-4), but (1) this concern is eliminated if the Commission expressly carves out an exception in its Order concerning *Janus*; and (2) the claimed, future actions of the defense bar are simply not a reason to prolong a case against a man who has lived under a cloud of investigation for years, and who has been fully and fairly exonerated after an extensive hearing before the Commission's Chief Judge.

relationship to any of the allegations brought against him. Moreover, after a three-year investigation, the Division did not — because it could not — call one investor to testify that they were "ignorant" of the LDBF's subprime concentration. LDBF's investment in subprime mortgages was well known (including by the contemporaneous financial press), and the unrebutted evidence shows that SSgA had a robust process for communicating with LDBF investors; a process for which Flannery was not responsible. Initial Decision 9, 30; Flannery Motion 9, 19. The Division's theory (and it was always just a theory) that LDBF's investors were somehow ignorant of what was in the fund was laid to rest by the record evidence.

The Commission can and should summarily affirm the result exonerating Flannery, whether or not it agrees with the Division regarding the scope of *Janus* and investor sophistication principles, as those issues have no bearing on the outcome.

III. CHIEF JUDGE MURRAY'S FACTUAL FINDINGS ARE FULLY SUPPORTED BY THE HEARING RECORD. THE DIVISION'S THEORIES ARE NOT.

As is fully set forth in Flannery's Motion, the evidence presented at the hearing demonstrated, consistent with the findings in the Initial Decision, that Flannery did not defraud anybody, and instead at all times sought to act in investors' best interests. Flannery responds below to particular evidentiary misrepresentations made in the Division's Opposition.

A. Flannery Was Not the "Gatekeeper" for or "Final Approver" of the Letters.

The Division's theory that Flannery was the senior person at SSgA with the authority to edit and approve the letters (Div. Opposition 5-6, 14) is plainly wrong. Setting aside the fact that the letters were accurate, the record shows that Flannery did not have responsibility for communications with clients, that he was just one of a number of senior persons at SSgA involved in drafting the letters (playing a very minimal role in the July 26 and August 2 letters), and, most significantly, that he ensured that experienced in-house and outside counsel, who had

knowledge of all of the facts, reviewed and approved the letters. Initial Decision 26-28, 30-31, 53, 56-57; Flannery's Motion 5-6, 11-13, 17-18. The Division ***simply ignores this crucial fact.*** Illustrative of the weakness of the Division's case is the fact that Flannery was charged for language in the August 14 letter that was drafted and inserted by SSgA's Deputy General Counsel, who was so involved in the review and editing process that he wrote Flannery, "how many times do we have to sign off???" Flannery Ex. 207, at SS-SEC 118389.

B. There Is No Evidence That Flannery Sought to Keep Investors in LDBF.

The Division's theory that Flannery orchestrated a scheme to keep investors in LDBF also lacks any support in the record. The Division's oft-repeated assertion that Flannery was motivated to keep investors in LDBF and to prevent a "run on the fund" (Div. Opposition 5) is wrong. Relatedly, there is literally no evidence supporting the Division's claim that Flannery "knew [the crisis of the summer of 2007] had the potential to affect his own future, and the active funds' prospects to remain viable competitors beyond the summer of 2007" (Div. Opposition 2-3), much less that Flannery engaged in conduct based on such purported knowledge. If preventing a run on the fund had been Flannery's goal, he could have advocated that LDBF be frozen to redemptions (a decision that was not his to make), something he did not advocate because a core principle of LDBF was the availability of daily liquidity. Tr. 1287-89; Flannery Post-Hearing Mem. 30; Div. Ex. 132. SSgA did not freeze LDBF. *Id.* Instead, LDBF II — an optional, alternative fund that would not allow for daily liquidity but would allow investors to remain exposed to the LDBF strategy without being impacted by redemptions of others — was created and offered to investors in early August 2007, and it was championed by Flannery notwithstanding the fact that, as one of the Division's own experts testified, it could harm his reputation. Flannery's Motion 11-12. Throughout this case, the Division has either misunderstood, or worse, refused to acknowledge the existence of, LDBF II. If Flannery had

been so worried about his future and his reputation as the Division contends, he would not have been an advocate of a measure such as LDBF II.

C. The Division Continues to Advance a Fictionalized Account of the Investment Committee Meeting.

The Division's interpretation of what occurred at the July 25 Investment Committee meeting, as set forth in its Opposition, is contradicted by the witnesses. The Division continues to beat the same broken drum, asserting that Flannery "implement[ed] the July 25th Investment Committee's decision to sell LDBF's highest-rated and most liquid assets to fund the cash redemption requests of internally-advised investors" (Div. Opposition 3), but no matter how many times the Division says it, the record evidence does not bear out the Division's claims. The Division's allegations, first articulated in its post-hearing briefs, boil down to this: Flannery and the SSgA Investment Committee decided to sell LDBF's highest-rated assets to satisfy immediate redemption needs of internal funds, leaving later redeemers with less liquidity, and Flannery sought to conceal this from investors when he edited the letters. Div. Opposition 5, 12-13. However, not a single witness supported the Division's theory about the meeting, and witnesses instead supported Flannery. Indeed, Division witness Robert Pickett, LDBF's Portfolio Manager who was present at the meeting and responsible for implementing the Investment Committee's instructions, testified that the Committee's goal was to treat all investors equally. Tr. 1751-52; Flannery's Motion 20-22; *see also* Initial Decision 15-16 (discussing Investment Committee meeting); Flannery's Post-Hearing Mem. 27-32 (same); Flannery's Post-Hearing Reply Mem. 57-65 (same).[5]

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[5] With respect to the Division's continued contention that certain SSgA funds received targeted information allowing them to redeem earlier than others (Div. Opposition 13), the Division offered no proof that any of these funds redeemed on the basis of superior information, and the evidence is to the contrary. Flannery's Motion 9-10. As for OFA's decision to attend the July 25 Investment Committee meeting, the evidence is clear that this was not

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The Division takes aim at Flannery because of the purported "authority he wielded" (Div. Opposition 5), but it is unrebutted that he was just one of many members of the Investment Committee and while he had a right to vote, his vote carried no more weight than any other member. Tr. 864-65, 1269. It is also unrebutted that the decision made at the meeting was unanimous. Tr. 1003-04, 1283. This is *not* a case against SSgA for SSgA's investment decisions. It also is *not* a control person case. The question presented in this case is whether Flannery intentionally, recklessly or negligently deceived investors, and the facts clearly demonstrate that he did not. And, again, not one investor was called to testify that their purported "desire to redeem" was "quell[ed]" (Div. Opposition 12) by anything Flannery did.

D. The Evidence That The Transactions Described In The July 26 and August 2 Letters Reduced Risk, and That Flannery Believed They Reduced Risk (As The Division Concedes), Remains Unrebutted.

The Division's argument that the July 26 and August 2 letters were misleading because SSgA did not take steps to reduce risk was completely debunked at the hearing. As discussed below, Respondents' expert Ezra Zask's testimony that these transactions reduced risk has not been rebutted, notwithstanding the Division's misleading claim to the contrary. Most troubling is that the Division continues to promote two theories that are factually untrue: that all of the cash from the July 26 AAA bond sale was used to pay redemptions, and that SSgA's internal funds redeemed from the fund to the disadvantage of other investors. Div. Opposition 7, 9-10. The Division's arguments are belied by the actual record of the hearing, which shows that LDBF had almost $200 million in cash as of August 2, and that SSgA funds redeemed in-kind, such that

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Flannery's decision or responsibility. Initial Decision 15-16; Tr. 995-98, 2005-10, 2365-66, 2396-97. The evidence is also clear that OFA's redemption recommendation had nothing to do with anything allegedly learned during that meeting, but instead was based on LDBF's performance. Initial Decision 17; Flannery's Motion 9-10. Notably, the Division failed to call the OFA representative who attended the meeting to testify.

their redemptions had no impact on the cash available for other investors. Flannery's Motion 8, 10, 14; *see* Div. Ex. 230; Flannery Ex. 288; *see also* Flannery Post-Hearing Reply Mem. 7-9.

The Division also inexplicably ignores the fact that the July 26 AAA bond sale reduced LDBF's leverage substantially, thus reducing risk, something which both expert and fact witnesses corroborated. Tr. 1743-45 (Pickett, LDBF's Portfolio Manager), 2206-07 (Armstrong, Head of Risk Management), 2356-57 (Respondents' expert Zask); Flannery's Motion 8; Initial Decision 16, 37. Furthermore, ***the Division has already conceded that Flannery believed that the AAA sale (and the other transactions at issue) reduced risk.*** Div. Proposed Findings of Fact ¶ 368 ("When he edited Kohler's draft [of the August 2 letter], Flannery did not change the sentence concerning risk reduction because ***he believed that risk had been reduced*** when leverage was reduced as a result of some AAA swaps rolling off and the reduction of reverse repurchase financing on LDBF's AAA-rated bonds.") (emphasis added).

Consistent with Flannery's belief, Respondents' expert Zask opined that the July 26 AAA bond sale, as well as reduction of exposure to ABX Index swaps in mid-July and the rolling off of total return swaps ("TRS") at the end of July (transactions referenced in the letters at issue but which the Division simply ignores), reduced risk by, among other things, reducing LDBF's exposure to an increasingly volatile market. Flannery Ex. 299, at 10-18 (Zask); Tr. 2357 ("Each of the transactions reduced the portfolio's exposure to the subprime housing market, which was identified clearly as the source of risk. To me I guess I can't overstress how self-evident it seems to me. You've got a risk in the housing market, and you take three steps to reduce that exposure. It's like where do you go from there?"). Indeed, the transactions "reduced the fund's market and credit risk by (1) decreasing exposure to the subprime residential market; (2)

reducing the portfolio leverage; and (3) increasing liquidity by converting securities into cash and cash equivalents." Flannery Ex. 299, at 10.

While not a single witness controverted Zasks's testimony about the effect of the transactions on risk, the Division, which did not present any expert risk analysis of its own, takes issue with Zask's analysis in connection with a risk measure known as Conditional Value at Risk (or "CVaR"). Div. Opposition 10-11. But the Division misinterprets and/or mischaracterizes Zask's opinion regarding CvaR, which was not dependent on whether or how long the cash proceeds from the July 26 AAA bond sale remained in the fund. The purpose of Zask's CVaR analysis was to show the impact of the transactions referenced in the letters on the CVaR of the LDBF portfolio. Flannery Ex. 299, at 10-18. Each of the transactions reduced CVaR, and this was not rebutted. *Id.* The fact that the overall CVaR of the portfolio may have continued to increase as the unprecedented market conditions worsened (a fact likely true of any fund with subprime exposure during this time period) is irrelevant; as witnesses explained, a fund's CVaR can increase notwithstanding risk reducing transactions, due to external market events. Tr. 1754 (Pickett), 1960-61 (Peter Lindner, North American Head of Investment Risk Management). Stated differently, due to the volatility in the market, LDBF's CVaR would have *further increased* in the absence of the risk reducing transactions. No witness disputed this fact.[6]

In short, the right question is this: did the AAA sale, the reduction of exposure to ABX swaps in mid-July, and the rolling off of TRS at month end, reduce risk in LDBF? The answer

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[6] Moreover, with respect to Flannery's alleged presentation to the Board about the reduction in CVaR in October 2007 (Div. Opposition 11), the document the Division cites contains a graph showing the unremarkable proposition that LDBF's CVaR increased during the volatile market conditions of the Summer of 2007. Div. Ex. 185, at SS 009157104. It does not discuss whether the transactions described in the letters reduced risk, and it does not change the fact that without the transactions, LDBF would have been riskier. Moreover, the document is dated October 18, 2007, more than two months after the July 26 and August 2 letters containing the risk reduction statements. As the Division concedes, at the time he provided suggested edits to these letters, Flannery believed the truth of their risk reduction statements. The Board presentation is irrelevant.

to that question is yes, and it ***has not been rebutted by any evidence at all.*** Accordingly, as the Initial Decision appropriately concluded, the statements about risk reduction in the July 26 and August 2 letters were true, and (as the Division concedes) Flannery believed they were true.

E. The Division Virtually Ignores Chief Judge Murray's Findings That Flannery Lacked Any Culpable State of Mind.

Other than offering a single, conclusory paragraph in which it asserts that Chief Judge Murray's determination that Flannery did not act negligently or with scienter was "erroneous" (Div. Opposition 14), the Division fails to identify any specific findings regarding Flannery's state of mind that it believes were erroneous. That is because there were none. Whether this is treated as a case about alleged misstatements or omissions as it should be (*see* p. 3, *supra*), or as a purported "scheme/course of conduct" case, the Division had to prove that Flannery acted with the requisite mental state in order to prevail. The Division failed. The evidence is clear that Flannery lacked scienter and was not reckless or negligent. Flannery Motion 10-12, 15-16, 20.

IV. THE COMMISSION SHOULD DECLINE THE DIVISION'S INVITATION TO IGNORE CHIEF JUDGE MURRAY'S CREDIBILITY DETERMINATIONS.

The Division cavalierly asks the Commission to completely disregard Chief Judge Murray's findings regarding Flannery's credibility, but the Commission should decline to do so. Chief Judge Murray observed Flannery's demeanor during his three days of testimony, and issued detailed findings regarding his credibility and truthfulness. Initial Decision 3. She also found that witnesses were unanimous in their testaments to his honesty and integrity. *Id.*; *see also id.* at 6. Nonetheless, in the Division's view, Chief Judge Murray's observations are irrelevant. The Division contends that "of course Flannery would claim a pure heart," evidently attempting to make a sinister suggestion to the contrary, and further that:

> What matters is not what a Flannery character witness thinks of him, or what his biased colleagues who also participated in the collapse of LDBF and the other active funds thought of him, but what the evidence shows he did — mislead

> investors. The claims against Flannery do not present a case where credibility matters in the sense that there are diametrically opposed versions of conversations, or meaningful factual disputes about whether an event took place.

Div. Opposition 4-5. The Division's arguments about when credibility matters are simply wrong. In any case involving state of mind, the factfinder's determinations of credibility are central to determining the outcome. *See, e.g.*, *Metzger By and Through Metzger v. Osbeck*, 841 F.2d 518, 521 (3d Cir. 1988) ("[W]hen resolution of the dispositive issue requires a determination of state of mind . . . much depends upon the credibility of witnesses testifying as to their own states of mind, and assessing credibility is a delicate matter best left to the factfinder.") (citations and internal quotation marks omitted); *cf. Kimm v. Dep't of the Treas.*, 61 F.3d 888, 892 (Fed. Cir. 1995) (reversing board judgment which had reversed administrative judge's ("AJ") decision exonerating employee, holding: "When, as with a determination concerning a witness's state of mind, the AJ's finding is explicitly or implicitly based on the demeanor of a witness, the board may not simply disagree with the AJ's assessment of credibility."). The Division's suggestion that credibility only matters in a "he said, she said" situation is not supported by the law (and the Division cites to none) and, in any event, the Division's purported version of events ***is*** in many instances "diametrically opposed" to Flannery's and other witnesses' (accurate) description of what occurred. The Investment Committee meeting is a perfect example — while the Division maintains, despite the evidence, that the meeting was part of scheme to raise cash for so-called "early redeemers," Flannery and every other witness who was asked testified, consistent with the Initial Decision, that the purpose of the meeting was to attempt to treat all investors equally. Flannery's Motion 20-22.

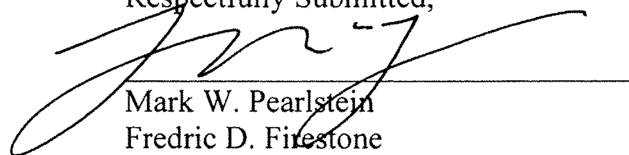
The record is unequivocal that Flannery is an honest and ethical person, with an impeccable nearly 30-year career in the industry and a well-deserved reputation for integrity.

Chief Judge Murray, an experienced and respected judge who has overseen numerous hearings, is in the best position to determine credibility. She saw, and described in detail, what everybody but the Division saw: Sean Flannery is a good and honest man who sought to do the right thing during an unprecedented period in our financial markets. Though inconsistent with the Division's theory of its case, these are the true facts. The Commission should show deference to Chief Judge Murray's credibility findings, and give them significant weight.

V. CONCLUSION

While the Division chooses to proceed as if the hearing in this case — which lasted for 11 days and generated 3,145 pages of transcript and approximately 500 exhibits — never took place, the Commission should not do so. The evidence exculpating Flannery was overwhelming: not only did the Division fall far short of its burden of proof, each and every one of its claims was affirmatively refuted on multiple grounds, as set forth in Chief Judge Murray's thoughtful and well-reasoned Initial Decision. Accordingly, the Commission should summarily affirm the Initial Decision. At a minimum, the Commission should summarily affirm the result as to Flannery, excepting from its Order the Initial Decision's findings regarding the legal issues of *Janus* and investor sophistication raised in the Division's Petition for Review.

Respectfully Submitted,



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