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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15211

In the Matter of	:	**ORAL ARGUMENT REQUESTED**
GREGG C. LORENZO, FRANCIS V. LORENZO, and CHARLES VISTA, LLC	:	
Respondents.	:	

BRIEF IN SUPPORT OF PETITION FOR REVIEW OF RESPONDENT FRANCIS V. LORENZO

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Francis V. Lorenzo

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Respondent Francis V. Lorenzo hereby submits this Brief in Support of his Petition for Review of the Administrative Law Judge's Initial Decision (the "Petition"). The initial decision was issued on December 31, 2013 (the "Initial Decision").

I. INTRODUCTION

This Petition is brought because the Initial Decision in this matter, which imposed draconian sanctions on the Respondent including a permanent bar from association with a broker-dealer or investment advisor and a $15,000 civil penalty, suffers from fatal flaws in its findings of fact and conclusions of law and must be reversed. This matter involves an October 14, 2009 email that was sent to two customers of Charles Vista, LLC, a broker-dealer. The email contained information related to an offering of debentures being made by Waste2Energy Holdings, Inc. ("W2E"), one of Charles Vista's investment banking clients. The Initial Decision found that the email contained misstatements of fact related to the financial condition of W2E.

The Initial Decision further found that the email was drafted by Gregg Lorenzo (ID p. 5), the owner and principal control person of Charles Vista. Francis Lorenzo, one of the firm's employees, sent the email that Gregg Lorenzo drafted from his own email account -- all at the direction of Gregg Lorenzo. The email itself indicated that it was being sent to the two customers at the request of Gregg Lorenzo.

The Initial Decision Must Be Reversed Because it is Contrary to the Supreme Court's Holding in the *Janus Capital* Case

The Initial Decision found that the email contained misstatements of fact and improperly held that Francis Lorenzo had violated the antifraud provisions of the federal securities laws by sending the email that Gregg Lorenzo drafted to two customers of Charles Vista. The Initial Decision's finding that Francis Lorenzo violated the antifraud provisions of the federal securities laws by sending an email that was drafted by Gregg Lorenzo is contrary to holding by the US Supreme Court in *Janus Capital Group, Inc. v. First Derivative Traders, Inc.*, 131 S.Ct. 2296, 2299 (2011) stating that only the "maker" of the false statement -- and not those who merely participate in creating or disseminating the false statement - can be held liable as a primary violated of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder.[1]

The *Janus* case established a bright-line test to determine whether a person can be held primarily liable for false statements under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The *Janus* decision ruled that only the "maker" of the

[1] As discussed herein other federal courts have subsequently applied the *Janus* holding to Section 17(a) of the Securities Act of 1933.

statement, but not a person who substantially participates in the creation of the statement, can be held primarily liable under Section 10(b) and Rule 10b-5.

The Initial Decision's finding that Francis Lorenzo violated Section 10(b), Rule 10b-5 and Section 17(a) is counter to the Supreme Court's holding in *Janus* and its progeny because Francis Lorenzo did not "make" any of the allegedly false statements contained in the email. The *Janus* case clearly indicates that those who merely disseminate but do not make a false statement cannot be held primarily liable for violations of the antifraud provisions of the federal securities laws. The Janus Court held that "[o]ne who prepares or publishes a statement on behalf of another is not its maker. And in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed."

The Initial Decision is Deficient Because it Does Not Make Any Findings as to Which of Three Allegedly False Statements in the Email Were False

Not only does the Initial Decision run counter to the *Janus* decision but it also is deficient because it fails to make any findings as to which of the three allegedly false statements in the email drafted by Gregg Lorenzo was false. Nor does the Initial Decision set forth what evidence the Administrative Law Judge relied on in arriving at the determination that one or more of the three statements was false. These are critical deficiencies in the Initial Decision because the three allegedly false statements are separate and distinct and must be separately analyzed to determine: (i) whether the statement was false; (ii) what evidence supports the holding that the statement was false; (iii) whether each statement was made with the required degree of scienter or negligence; and (iv) what evidence the Initial Decision relies on to determine whether each statement was made with scienter or negligence.

The lack of findings by the Initial Decision on these points also makes it impossible for the Commission to adequately consider the level of egregiousness of the alleged violations and whether the sanctions that were imposed by the administrative law judge were proper, proportional to the offense and consistent with the statutory framework.

The Initial Decision also must be reversed because it incorrectly held that the statements in the email were made with scienter, when in fact the record demonstrates that Francis Lorenzo acted in good faith and did not have any intent to deceive the two customers that received the email. Finally, the Initial Decision also improperly imposed sanctions on Francis Lorenzo in that the permanent lifetime bar is far out of proportion to the level of egregiousness of the alleged violations and because a third tier civil penalty was imposed even though the conduct at issue did not meet the statutory requirement of resulting in substantial losses or creating a significant risk of substantial losses to other persons nor did it result in substantial pecuniary gain to Francis Lorenzo.

II. THE RESPONDENT AND OTHER RELEVANT PARTIES

A. Respondent

1. **Francis Lorenzo.** Francis Lorenzo has worked in the securities industry for over 25 years and prior to this matter has never had a regulatory issue. Francis Lorenzo was associated with Charles Vista where he worked on investment banking transactions. Francis Lorenzo did not maintain any retail customer accounts at Charles Vista.

B. Other Relevant Entities

Gregg Lorenzo. Gregg Lorenzo (no relation to Francis) was formerly the owner and control person of the broker-dealer Charles Vista.

Charles Vista. Charles Vista was formerly a broker-dealer registered with the Commission and was W2E's investment banking firm.

W2E. W2E was a renewable energy company that was founded in 2007 and became publicly traded in early 2009. In September 2009 W2E was preparing to offer up to $15 million in 12% debentures and Charles Vista was acting as the placement agent for the debentures.

III. ARGUMENT

A. The Initial Decision Found that Gregg Lorenzo -- Not Francis Lorenzo - Drafted the Email in Question.

On October 14, 2009 Francis Lorenzo sent an email from his account to two customers of Charles Vista. The email was drafted by Gregg Lorenzo, the owner of Charles Vista and was sent at Gregg Lorenzo's direction (ID at 5). The email in question discussed an offering of debentures that was being made by W2E, an investment banking client of Charles Vista. The Administrative Law Judge found that Gregg Lorenzo drafted the email and stated in the Initial Decision "[o]n October 14, 2009, Gregg Lorenzo asked Frank Lorenzo to send an email that Gregg Lorenzo had drafted relating to the debenture offering to two Charles Vista clients..." (ID at 5, emphasis added). The email to one customer stated in the beginning that it was being sent "[a]t the request of Adam Spero and Gregg Lorenzo" while the second email stated it was being sent "at the request of Gregg Lorenzo" (ID at 5, fn 8). At the hearing, Francis Lorenzo testified he cut and pasted the email into his email account. (Tr. at 346)

The US Supreme Court in *Janus Capital Group, Inc. v. First Derivative Traders, Inc.*, 131 S.Ct. 2296, 2299 (2011), established a bright-line test to determine whether a person can be held primarily liable for false statements under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. In *Janus*, investors in the Janus Investment Fund (the "Fund") brought suit under Section 10(b) of the Exchange Act and Rule 10b-5 against the Fund's adviser and administrator, Janus Capital Management (JCM) alleging that false statements were made in the Fund's prospectuses. JCM was alleged to have helped prepare the prospectuses at issue and disseminated them to investors through JCG's website. The Supreme Court dismissed the case against JCM on the ground that only the Fund -- and not JCM -- "made" the allegedly improper statements:

The *Janus* decision ruled that only the "maker" of the statement, but not a person who substantially participates in the creation of the statement, can be held primarily liable under Section 10(b) and Rule 10b-5. The Janus Court held

> For purposes of Rule 10b–5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker. And in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed. (131 S. Ct. 2296 (2011))

Other federal courts have extended the Janus Court's holding to claims under Section 17(a) of the Securities Act. *See SEC v. Kelly*, 817 F. Supp. 2d 340, 344 (S.D.N.Y. 2011); *SEC v. Perry*, 11 Civ. 1309 (MLR), 2012 WL 1959566, at *8 (C.D. Cal. May 31, 2012).

In this case the Initial Decision found that it was Gregg Lorenzo and not Frank Lorenzo that drafted the October 14, 2009 email containing three allegedly false

statements (ID at 5). In fact, not only did Gregg Lorenzo draft the three allegedly false statements, the three statements were specifically attributed to him in the email to both customers. It was Gregg Lorenzo, the owner of Charles Vista, that had the "ultimate authority" over the statements contained in the emails. Francis Lorenzo merely helped to distribute the statements by sending the email that Gregg Lorenzo drafted to two customers of Charles Vista. Francis Lorenzo did not "make" the allegedly false statements and therefore cannot be held liable as a primary violator of the antifraud provisions of the federal securities laws.

Notably, the Initial Decision does not reference the *Janus* decision or attempt to distinguish its holding from the *Janus* decision. In fact, the only case law cited in the Initial Decision in support of its conclusion that Francis Lorenzo violated the antifraud provisions of the federal securities laws were decided well before the Supreme Court's decision in *Janus*. Accordingly, the Initial Decision should be reversed because Francis Lorenzo did not make the statements at issue and cannot be held to be a primary violator of the antifraud provisions of the federal securities laws.

B. The Initial Decision Does Not Specify Which of the 3 Statements at Issue Were False, Why They Were False or What the Basis Was For Finding That Francis Lorenzo Acted With Scienter

The Order Instituting Proceedings alleges that three statements in the October 14, 2009 email authored by Gregg Lorenzo relating to W2E were false and misleading. These three statements were: (i) the Company has over $10 mm in confirmed assets; (ii) the Company has purchase orders and LOI's [letters of intent] for over $43 mm in orders; and (iii) Charles Vista has agreed to raise additional monies to repay these Debenture holders (if necessary). (OIP at 11)

Each statement is a separate and distinct statement the truth or falsity of which must be determined on a statement by statement basis - something the Initial Decision fails to do. Moreover, to find a violation of the federal securities laws it is not enough for the Division of Enforcement to show that the statements were untrue, they also must prove that the false statements were made with scienter or, in the case of Section 17(a)(2) and (a)(3), with negligence.

1. The Statement Concerning W2E's Asset Value

The first statement at issue says that W2E has over $10 million in confirmed assets. This statement was taken from W2E's SEC filings, specifically the financial statements dated as of December 31, 2008 which were the latest financial statements available to Charles Vista. While the Division of Enforcement made much of the fact that the December 31, 2008 financial statement was unaudited, the financial statement was filed with the Commission by W2E and W2E would be subject to substantial penalties for filing false statements with the SEC if the financial statements were not accurate. It was entirely reasonable to rely on the asset values listed by W2E in its financial statements filed with the SEC whether or not they were audited. The Division of Enforcement has cited no legal authority for the questionable proposition that investment bankers and investors should not rely on the unaudited financial statements that are filed with the SEC by publicly traded companies In fact, even the SEC's own witness at the hearing testified that the fact that W2E's financial statements were unaudited was of no effect:

Q. And is there any significance to the fact it was unaudited?

A. No. It is not uncommon to file

> unaudited statements in these type of filings. (Tr. at 56, testimony of Craig Brown former CFO of W2E)

At the hearing the Division faulted Francis Lorenzo for not picking up that W2E filed new financial statements with the Commission on October 1, 2009 in which substantially reduced the value of W2E's assets making the $10 million figure in Gregg Lorenzo's October 14, 2009 email inaccurate. However, there was a contractual requirement for W2E to notify Charles Vista of any proposed material changes in its financial condition (Tr. at 134) and W2E did not fulfill this requirement in that Charles Vista was never appropriately notified by W2E of the write down of its assets (Tr. at 369).

In fact, testimony at the hearing demonstrated that W2E's management was having discussions about the write down of its assets as early as July 2009 (Tr. at 140) yet the company never notified Charles Vista of these discussions. Instead of notifying Charles Vista, W2E buried the disclosure of the write down of its assets in a very lengthy Form 8K filing with the SEC and in a cursory email (Tr. 246). Francis Lorenzo testified at the hearing that he skimmed W2E's lengthy October 1, 2009 SEC filings but did not notice that the Company had written down the value of its assets (Tr. at 364). [2]Once W2E became aware that it was going to write off a large portion of its assets it should have called an emergency meeting with Charles Vista and emphasized these developments (Tr. at 369). W2E should have also amended its September 9, 2009 private placement memo to disclose that beginning in July 2009 the company was

[2] It is important to note that Francis Lorenzo also forwarded W2E's October 1, 2009 filings to all of the brokers at Charles Vista the same day they were filed with the SEC (Tr. 233, 241-42), which demonstrates he had no intent to misrepresent or hide W2E's financial condition.

considering writing off a substantial part of its assets but it did not do so even though W2E took in hundreds of thousands of dollars from investors in July, August and September 2009 (Tr. 369-70).

There is absolutely no evidence that anyone at Charles Vista acted with any intent to deceive investors or that Charles Vista personnel were reckless in not catching the write down of assets buried in W2E's lengthy October 1, 2009 filing with the SEC. In fact, as soon as W2E filed its SEC filings on October 1, 2009 (which were the filings that contained the write down of W2E's assets), Francis Lorenzo sent the filings to all of the brokers at Charles Vista by email – something that he would not have done had he intended to deceive customers of Charles Vista (Tr. 233, 241-243) Prior to October 1, 2009 W2E likewise took no steps to update either the July 27, 2009 private placement memorandum (Div Ex. 72) or the September 9, 2009 version of its private placement memorandum to indicate the company was considering writing off a substantial part of the asset value that is listed in their publicly filed financial statements. The Division of Enforcement did not offer any expert testimony at the hearing which would establish the standard of care that investment bankers must meet in conducting a placement of debentures and no testimony or expert evidence was presented that would establish Charles Vista personnel acted recklessly or negligently in not catching W2E's write down of its asset value.[3]

[3] In addition, Michael Molinaro the Chief Compliance Officer of Charles Vista sent an email to all of Charles Vista's broker s on October 14, 2009 that contained a W2E research report prepared by Waterville Research showing W2E assets far exceeding the $10mm. (Div. Ex. 77). The fact that the Chief Compliance Officer also missed the asset write down buried in W2E's lengthy SEC filing on October 1, 2009 is some evidence that Mr. Lorenzo was not acting recklessly or negligently when he missed it.

2. The Statement Concerning W2E's Letter of Intent

The second statement that the Division took issue with is the statement that the W2E had purchase orders and letters of intent (LOI's) of over $43 million. The Initial Decision cites to no evidence that this statement was inaccurate. There, was in fact, a letter of intent from a potential W2E customer in St. Martin (Tr. 273, 276). There was also evidence that demonstrated that Peter Bohan, the CEO of W2E, believed in the validity of this LOI at that it would convert into customer orders (Tr. at 270). Merely because Francis Lorenzo was unsure whether sales would result from the LOI is not a sufficient basis for saying the statement in Gregg Lorenzo's email was false or misleading particularly given the assurances from W2E's CEO.

3. The Statement Concerning Charles Vista's Agreement to Raise Additional Funds if Needed

Finally, the Division of Enforcement takes issue with the statement that Charles Vista had agreed to raise additional funds for W2E to repay the debentures if it was necessary to do so. The Division of Enforcement argues that the statement was false because Charles Vista did not have a written agreement in place with W2E regarding raising additional funds. However, the statement does not indicate the agreement was written and Gregg Lorenzo as the owner and principal of Charles Vista was in a position to make that agreement and that representation on behalf of Charles Vista. In addition, this was not an unreasonable statement because Gregg Lorenzo had on a number of prior occasions raised money to pay back debenture holders. In fact, there was testimony that there were often heated discussions between Gregg Lorenzo and the CEO of W2E because Gregg Lorenzo wanted the proceeds from the sale of new debentures to be used to pay back the holders of earlier debentures and the CEO of W2E wanted more of the

proceeds to be used to fund W2E's business (Tr. 383-84). Also, there was evidence that Gregg Lorenzo was meeting with other broker-dealers in connection with raising additional funds for W2E. (Tr. at 293). There is no evidence that this statement is false or that it was made with scienter.

IV. SANCTIONS

A. The Initial Decision Improperly Imposed a Cease and Desist Order

The Initial Decision sets forth the standards for the imposition of a cease and desist order and that discussion is not repeated here. In general, the Commission has found the following factors relevant for determining whether a cease-and-desist order is appropriate:

> the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the respondent's opportunity to commit future violations, . . . whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings. *KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1192 (2001).

It is important to note that none of the alleged violations by the Respondent in this matter are recent. Importantly there is no evidence to show that Francis Lorenzo is likely to violate the securities laws in the future because (i) his sending of the email was an isolated incident and there is no pattern of misconduct[4]; (ii) Francis Lorenzo is currently working at a firm that focuses on institutional investors; and (iii) he has indicated that he regrets the email being sent out.

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[4] The Initial Decision's characterization of the conduct as "repeated" (ID at 11) is disingenuous. It is undisputed that the conduct involved sending an almost identical email to two separate customers minutes apart. In fact, the Initial Decision itself in another part states that it considers the conduct part of one course of action (ID at 12)

Moreover, the Initial Decision completely ignores the evidence that after leaving Charles Vista Francis Lorenzo spent a substantial amount of time and effort assisting investors who purchased W2E debentures in organizing and filing claims. All of this was done without any compensation to Francis Lorenzo. The isolated nature of the 2 emails that were sent out and the efforts made by Francis Lorenzo on behalf of W2E investors demonstrate that he does not present any risk

B. The Initial Decision Improperly Imposed a Bar on Francis Lorenzo

The public interest considerations for a sanction pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act are:

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see also Joseph J. Barbato*, 53 S.E.C. 1259, 1282 n.31 (1999); *Donald T. Sheldon*, 51 S.E.C. 59, 86 (1992), *aff'd*, 45 F.3d 1515 (11th Cir. 1995). Deterrence is also a factor to be considered. *See Berko v. SEC*, 316 F.2d 137, 141 (2d Cir. 1963.)

In this matter, the evidence demonstrated that Francis Lorenzo did not act with the intent to defraud any investors. There is also no evidence that either of the two customers that were sent the emails in question took any actions or made any investment decisions as the result of the statements in the email. The two customers had their own brokers, neither customer spoke with Francis Lorenzo and Francis Lorenzo made no efforts to follow up on the email. One customer that received the email did not invest in

W2E (Tr. at 177) and the second customer who received the email invested $15,000 at least two months after the October 14, 2009 email and there is absolutely no evidence that the October 14, 2009 email played any role in the customer's investment decision particularly given that he had a separate broker and had access to W2E's SEC filings and other materials including the SEC filings showing the write down of W2E's asset value.[5] In fact, the Division of Enforcement did not even call the investor who purchased the W2E debentures as a witness at the hearing and there is no evidence the customer even read the email.

1. There is no evidence that Respondent's Occupation Will Present Opportunities for Future Violations.

Francis Lorenzo's sending of an email to two retail customers was a unique occurrence that was outside the scope of his investment banking responsibilities – both at Charles Vista and at his current firm. At Charles Vista Francis Lorenzo did not have any customer accounts and did not communicate with customers outside of the two customers that received the October 14, 2009 email. At his current firm Francis Lorenzo does not service customer accounts and works on investment transactions for companies that are in good financial health (Tr. 400).

2. The Permanent Lifetime Bar is Grossly Disproportionate to the Alleged Offense.

The permanent lifetime bar imposed on Francis Lorenzo by the Initial Decision - for simply sending an email drafted by Gregg Lorenzo to two customers -- is simply grossly disproportionate to the offense at issue, particularly given Mr., Lorenzo's long unblemished career in the securities industry. Not only is the bar inconsistent with the

[5] While reliance is not an element the Division has to prove the lack of any harm from a respondent's alleged misconduct is highly relevant in determining sanctions.

Steadman factors it also is so excessive as to violate the Eighth Amendment's prohibition against excessive punishment. See *Kennedy vs Louisiana* 554 U.S. 407 (2008) and *Jackson v. Bishop*, 404 F. 2d 571 (8th Cir. 1968) "The scope of the Amendment is not static....[D]isproportion, both among punishments and between punishment and crime, is a factor to be considered...."; (See also *In the Matter of FXC Investors Corp.*, Admin Pro. File No. 3-10625 (December 9, 2002) applying the Eighth Amendment to sanctions imposed in SEC Administrative Proceedings)

C. Civil Money Penalties Are Not Appropriate in this Matter

The imposition of a third tier civil penalty of $15,000 against Francis Lorenzo is unwarranted. In considering whether to impose civil penalties the Commission considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation and the combination of sanctions against the respondent. *See Marshall E. Melton*, 56 S.E.C. 695, 698 (2003), *KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1192 (2001). *See also WHX Corp. v. SEC*, 362 F.3d 854, 859-860 (D.C. Cir. 2004). Whether there is a reasonable likelihood of such violations in the future must also be considered. *KPMG*, 54 S.E.C. at 1185, which in this case there is not. The amount of a sanction depends on the facts of each case and the value of the sanction in preventing a recurrence. *See Berko v. SEC*, 316 F.2d 137, 141 (2d Cir. 1963); *see also Leo Glassman*, 46 S.E.C. 209, 211-12 (1975).

Consideration of the facts in this case demonstrates that civil penalties are not warranted -- much less the third tier civil penalties of $15,000 that were imposed by the Initial Decision. *In In Re Steven E. Muth*, 2004 WL 2270299, SEC Rel. No. 262 (Oct. 8, 2004) the Commission stated that the Commission may consider the following six

factors in deciding whether to impose a civil penalty: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) need for deterrence; and (6) such other matters as justice may require, in considering whether a civil penalty is in the public interest. The *Muth* decision also holds that a third-tier penalty is permissible where an act or omission involved not only fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, but also must have had "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission."

Fist, it is undisputed that the amount of the improper gain to Francis Lorenzo was a minimal amount of $150. The evidence also fails to show that the alleged misconduct by Francis Lorenzo resulted in substantial losses -- or even created a significant risk of substantial losses – a statutory prerequisite for imposing a third tier civil penalty. The other factors cited above governing the imposition of civil penalties weigh against the imposition of any civil penalty for the reasons set forth in this Petition.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Commission should find that the Initial Decision is fatally flawed and that the Division has failed to meet its burden of proving by a preponderance of the evidence that the Respondent has violated any of the statutes, rules or regulations set forth in the OIP and thereby reverse the Initial Decision.

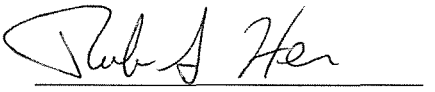
ORAL ARGUMENT REQUESTED

Respondent also requests oral argument before the Commission in this matter.

Dated: New York, New York
March 24. 2014

Respectfully submitted,

MEYERS & HEIM LLP

By: 

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