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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
GREGG C. LORENZO,	:	REQUESTED
FRANCIS V. LORENZO, and	:	
CHARLES VISTA, LLC	:	
	:	
Respondents.	:	
	:	

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW OF RESPONDENT FRANCIS V. LORENZO AND IN OPPOSITION TO THE DIVISION'S CROSS-APPEAL

Respondent Francis V. Lorenzo hereby submits this Brief in Support of his Petition for Review of the Administrative Law Judge's Initial Decision and in Opposition to the Division of Enforcement's Cross-Appeal (the "Petition"). The initial decision was issued on December 31, 2013 (the "Initial Decision") the Respondent's initial brief in support of his petition (the "Initial Brief") was filed on March 24, 2014 and the brief of the Division of Enforcement (the "Division") in Opposition to Respondent's Petition and in support of its cross-appeal was filed on April 21, 2014 (the "Opposition Brief").

I. The Opposition Brief Fails to Rebut the Respondent's Argument that the Holding in the Janus Capital Case Precludes a Finding of Liability Against Francis Lorenzo.

The Respondent's Initial Brief demonstrated that the Initial Decision in this matter contained findings of fact and conclusions of law that were contrary to the

holding by the US Supreme Court in *Janus Capital Group, Inc. v. First Derivative Traders, Inc.*, 131 S.Ct. 2296, 2299 (2011). The *Janus* Court held that only the "maker" of a false statement -- and not those who merely participate in creating or disseminating a 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 Initial Brief also demonstrated that under the *Janus* holding Francis Lorenzo could not be considered a maker of allegedly false statements that were contained in an October 14, 2009 email that was sent to two customers of Charles Vista, LLC, a registered 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. However, the Initial Decision found that the email in question was drafted by Gregg Lorenzo (Initial Decision "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.

In its Opposition Brief the Division argues unpersuasively that the Initial Decision is consistent with the *Janus* holding. First, the Division argues that the Initial Decision was wrong in it finding that Greg Lorenzo -- and not Francis Lorenzo – drafted the email in question. (Opp. Br. at 14). However, the Initial Decision's conclusion that Greg Lorenzo drafted the email in question is well supported by the record. The Administrative Law Judge found that "[o]n October 14, 2009, Gregg Lorenzo asked

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

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 Opposition Brief's citation to other parts of the record that tend to support The Division's argument only demonstrate that there was a factual issue that was in dispute and the Administrative Law Judge, after hearing the evidence of both sides and assessing the credibility of witnesses, found in favor of Respondent. The Commission should not disturb the ID's finding that Greg Lorenzo drafted the email because it is well supported by the record.

The Opposition Brief next argues, without any support, that Francis Lorenzo intended to attribute the statements that were made in the email to himself. On this point, the Opposition Brief relies primarily on the fact that the email in question appears above Francis Lorenzo's name. However, there is a fatal flaw in the Division's argument – namely that the email itself states that it is being sent at the request of Gregg Lorenzo. Moreover, at the hearing, Francis Lorenzo testified he cut and pasted the email into his email account. (Tr. at 346) These facts demonstrate that Francis Lorenzo did not meet the *Janus* Court's standard for who can qualify as a "maker" of the statements in Gregg Lorenzo's email.

The record demonstrated that 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.

In its attempt to argue that Francis Lorenzo can be deemed to be the maker of the statements in the email in question the Opposition Brief cites a number of cases that are simply inapplicable to the facts at issue in this proceeding. The cases cited in the Opposition Brief involve situations where corporate officers were held to be the maker of statements on behalf of a corporate entity (Opp. Br. at 15 fn 9). The cases cited by the Division are inapplicable for a number of reasons and, in particular, because a corporate entity cannot make statements on its own in the absence of a corporate officer. In contrast, in this matter, Gregg Lorenzo was an individual who was fully capable of making statements on his own behalf. Moreover, Francis Lorenzo was never a corporate officer of Charles Vista.

II. The Opposition Brief Fails to Address the Respondent's Argument that 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

The Initial Brief argued that the Initial Decision 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. The Initial Brief also argued that the Initial Decision does not 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.

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.

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.

Instead of addressing the Respondent's arguments the Division argues in its Opposition Brief that the record (in its view) supported the Administrative Law Judge's findings (Opp. Br. 16-19). However, the Division's argument misconstrues the Respondent's position. It is not enough for the Division to go back to the record and attempt to correct the deficiencies in the Initial Decision by giving its own recitation of the facts. As discussed above, it is critical for the Initial Decision itself to adequately consider and weigh the various pieces of evidence and then describe what evidence it accepted, what evidence was rejected and how the decision was arrived at. Unless the

Initial Decision does this there is no way that the Commission can perform an adequate review of its findings.

III. Third Tier Civil Penalties Are Not Warranted

Both the Opposition Brief and the Initial Brief set forth the legal standards for the imposition of a cease-and-desist order and an industry bar and those standards will not be repeated here. In addition, both the Division and the Respondent have already set forth their respective positions with regards to how to apply those legal standards to this matter. As noted in the Initial Brief the Initial Decision's imposition of an industry bar was not supported by the law or the record. It is also noteworthy that Francis Lorenzo is no longer employed in the securities industry, having resigned from his position on April 15, 2014. Therefore, the Division's arguments regarding Mr. Lorenzo's working in the securities industry are moot. (Opp. Br. at 24).

With regards to issue of whether a civil penalty should be imposed in this matter the Division's Opposition Brief fails to demonstrate that Francis Lorenzo's conduct qualifies for a Third Tier civil penalty because there is no evidence that the conduct "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." 15 U.S. Code § 78u–2(b)(3)(B). The Division has failed to show how the email in question – which was sent to only two people – resulted in substantial losses or created a significant risk of substantial losses. Of the two people who were sent the email there is no evidence that one of the investors ever read the email and there is no evidence that the second investor used it in making an investment decision. Both of the people who received the email had a registered representative that

advised them with respect to the W2E investment and there is likewise no evidence that the email in question ever came up in discussions the two investors had with their registered representative.

The Opposition Brief fails to make the required statutory connection between the email in question and any losses or risk of losses incurred by investors. In arguing that a significant civil penalty is warranted the Opposition Brief notes that one investor invested in W2E debentures and incurred losses but there is no evidence that the email in question had anything to do with this investor's losses. (Opp. Br. at 26-27). In addition, the Opposition Brief incorrectly argues that fees earned by Charles Vista can be used to justify a third tier civil penalty. This is clearly incorrect because one of the statutory requirements for the imposition of third tier civil penalties is that the conduct at issue "resulted in substantial pecuniary gain to the person who committed the act or omission." 15 U.S. Code § 78u–2(b)(3)(B)(emphasis added).

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.

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ORAL ARGUMENT REQUESTED

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

Dated: New York, New York
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Respectfully submitted,

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