UNITED STATES OF AMERICA
Before the
UNITED STATES SECURITIES & EXCHANGE COMMISSION

In the Matter of:	)	
	)	Administrative Proceeding
Craig Berkman, d/b/a Ventures	)	No. 3-15249
Trust LLC, et al.	)	
	)	

ANSWER OF JOHN B. KERN

COMES NOW the undersigned Respondent, John B. Kern, presenting this Answer to the March 19, 2013 Order Instituting Proceedings (OIP), incorporating both affirmative defenses and motions for relief. The Respondent thanks the Commission for the extension of time previously granted to respond, and respectfully states as follows:

ANSWER

1. Each and every allegation contained within the March 19, 2013 OIP which is not expressly admitted is hereby denied. The Respondent categorically denies any and all allegations contained within the OIP which relate to, allude to, or assert that the Respondent participated knowingly in any misconduct under the Securities laws of the United States.

2. The OIP is largely focused upon the wrongful conduct of Craig L. Berkman, who, on information and belief, the Respondent now believes acted as the Manager (including largely unilaterally) of various entities identified by the Commission in the OIP (the "Funds.")[1] Responding to the allegations which pertain to the Respondent, the undersigned will respond to each as the allegations are grouped and presented by the Commission.

3. The Respondent acted as the organizational attorney for some of the described entities (the "Funds") and was actively and deviously misled by Berkman about the conduct and activities of these Funds both in relation to investors and the investments which were represented as having been made.

[1] The undersigned is not familiar with and has no information on respondents identified by the names "Ventures Trust LLC," "Ventures Trust Asset Fund LLC," "Ventures Trust Asset Management LLC" or "Ventures Trust II Asset Management, LLC," and therefore denies based upon lack of information any allegation pertaining to any of these identified entities.

4. The Respondent had no responsibility for the management of Funds and represented the clients according to the authority afforded to him by the managers strictly on an hourly fee basis. At the time that the Respondent resigned from representing the Funds in February 2013, he was owed approximately $50,000 in attorneys' fees.

5. The Respondent was provided enough information about the legitimate conduct of the Funds and the misconduct of third parties in relation to the Funds to be led to believe that the Funds themselves were operating according to their operating agreements and in accordance with the US Securities laws and regulations.

Allegations Pertaining to a "Forged" Letter From Mintz Levin

6. With regard to the allegations contained in ¶ 45 of the OIP[2], the allegations are denied. The record will reflect that the undersigned learned of a 'forged' letter weeks after it had been created and circulated; and that immediately upon learning of its existence from Berkman, and being told by Berkman that its origin was unknown, the undersigned (1) immediately instructed the client that the letter's legitimacy must be disclaimed and that the allegations against the Fund managers should be challenged, and (2) openly, in writing and in a telephone conference call with the law firm of the alleged attorney author of the letter, disclaimed its authenticity and insisted that it should not be relied upon by anyone, including Ventures Trust which held "actual" investments in the other fund.

Allegations Pertaining to a Prospective SPV Transaction to be Funded by a Third Party

7. With respect to the allegations of ¶ 57, ¶ 58, ¶ 59 and ¶ 60 of the OIP[3], the allegations of misconduct pertaining to the Respondent are denied.

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[2] ¶ 45 states in pertinent part: "Berkman, the Manager, Kern and/or someone working with them later altered the letter.... The Letter falsely represented that the Actual Facebook Funds "ha[ve] allocated 497,625 shares of Facebook, Inc. in Ventures Trust II LLC['s] capital account."

[3] ¶ 57. Berkman's efforts to acquire Actual Facebook Fund 2 was perfunctory, at best. Berkman approached Actual Facebook Fund 2 about a proposal to purchase it, and Actual Facebook Fund 2's manager told Berkman in approximately April 2011 that it would cost at least $28 million. Because Berkman and his entities never had the money, a deal was never likely or imminent to prospective investors.

¶ 58. Yet Berkman and Kern falsely portrayed the Actual Facebook Fund 2 deal as imminent to prospective investors.

8. The record will reflect that the correspondence cited by the Commission was created with the plain-English purpose of defining the conditions upon which an investor in the Respondent's client Fund could indirectly (through the said Fund) acquire the ownership interests of a Special Purpose Vehicle (SPV) which, on information and belief, held Facebook stock.

9. The text of the letter described in ¶ 59 (addressed to the client's manager, Berkman) came about as a result of a series of communications following the inclusion of (1) the editorial comments of an individual who was represented to the undersigned to be the authorized representative of the prospective investor, and (2) the undersigned and the authorized representatives of the SPV. Indeed, the undersigned organized one or more three way telephone conference calls with the representative of the investor and the attorney representing the SPV to discuss the terms and conditions of such a prospective investment.

10. The undersigned never represented that his client was in a position to fund a $28 million acquisition of the SPV without the involvement of a qualified investor. This fact is underscored by the preparation of draft instruments for the investment and the organization of a three way conference call between the undersigned, and the representatives of the investor and the SPV.

11. There is no basis in fact or law to presume that the purpose of the letter was for another purpose or that this letter was inaccurate in any way. Instead, the Commission has singularly concocted the allegation that the purpose of the letter was otherwise – to falsely represent that the entity which was proposed for this transaction held, in hand, the resources to conclude the transaction. Respondent knows of no evidence in support of such an allegation, which appears to be incongruent with the very nature of a venture capital fund and the fundraising activities which are elsewhere in the OIP attributed to Mr. Berkman. This was not the case and the allegation of the same is strictly denied.

¶ 59. In a letter dated April 14, 2012, Kern sent Berkman a letter that described the status of negotiations between Face Off Acquisitions and Actual Facebook Fund 2 and falsely implied that Face Off Acquisitions' purchase of Actual Facebook Fund 2 was likely and imminent....

¶60. Berkman knew the letter was misleading. The seemingly urgent negotiations were a charade, because Berkman knew Face Off Acquisitions could not possibly pay $28 million (or any amount even close to $28 million) to purchase Actual Facebook Fund 2.

12. Moreover, the allegations referenced in ¶ 59 pertain only to presentment of a letter from an attorney to his client's manager and do not qualify as a "portrayal" to any recipient which could be attributable to any statement which is remotely false or fraudulent.

13. The April 14, 2012 letter described in ¶ 59 very precisely and accurately reflected the terms and conditions for a prospective investment to be made by an investor prior to the IPO of Facebook and very accurately described the procedures for concluding such a transaction in the future, as this information was related to the undersigned by the attorney of the SPV, as well as based upon the information acquired from the managing director of the SPV.

14. It is only when conjoined to the Commission's unsubstantiated premise for the letter which would impute any statement within the letter to be false or fraudulent.

15. To the best of the undersigned's knowledge, the transaction was not consummated and the entity proposed to be utilized never acquired any investment interest or the execution of an operating agreement or any other governance documents.

16. Respondent further moves for More Definite Statement of the alleged misconduct and further, for Summary Disposition by dismissal of these allegations as stated *infra*.

Allegations Concerning a Memorandum to Investors in the Funds

17. Responding to the allegations of paragraphs 84 through 90 of the OIP[4], the Respondent denies that he knowingly or recklessly stated made, or caused to be made, any misrepresentation and denies each and every such allegation.

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[4] ¶ 84. As the end of the lock up period for pre-IPO Facebook stock approached and investors began making requests for their distributions, the fraud began to unravel. In response, Berkman, Kern, and the Manager knowingly or recklessly made, or caused to be made, misrepresentations to investors to keep them from learning of the fraud and demanding the return of their funds.

¶ 85. For example, in August 2012, Kern wrote and signed a "Memorandum to Investors about Ventures Trust II LLC Efforts to Secure and Protect Interests with Our Trading Counterparties." Kern's memorandum stated that he was writing "to advise [investors] on the status of our efforts to address concerns that have been raised about the integrity of the funds.

¶ 86. Kern's memorandum represented that "Ventures Trust II has utilized two separate counterparties in securing the investments in privately held Facebook stock," and that "we are in the process of attempting to secure the transfer of these shares to our own trading account in order to avoid any complications arising out of the counterparty's trading practices.

¶ 87. Kern's memorandum represented that with respect to the first counterparty, "which involves approximately 20% of the investment capital of Ventures Trust II in Facebook stock," the counterparty "and its counsel have repeatedly affirmed that it has the requisite shares and reconfirmed to us that we have the securities interests to which we subscribed." The memorandum then suggested that the counter party may have "more-or-less fabricated" the price of the shares, creating a "collateral issue," but assured investors that Ventures II would "address this in due course on behalf of our investors," if necessary."

18. On the contrary, the Respondent states that he relied upon information provided to him by the managers of the Funds and conducted himself at all times and in all communications with impeccable forthrightness and truthfulness.

19. With respect to the allegation in ¶ 85, the Respondent did send to Mr. Paul Tabet a memorandum, but recalling that other documents were later changed by Tabet, states that he is not certain whether the memorandum referenced by the Commission throughout this section of the OIP is that which was prepared and delivered, and therefore denies the allegation as written.

20. Notwithstanding the foregoing, to the extent that the undersigned did correspond in Memorandum form as alleged, he states that the statements of fact were accurate and true when made, based upon information made available to him and upon which he reasonably relied. The managers of the funds, Mssrs Tabet and Berkman, who provided some of the information to Kern which may have been relied upon, reviewed and approved the terminology of the said communications, providing further assurance to the undersigned of its accuracy and reliability.

21. The August 12, 2012 memorandum referred to above was accurate and consistent with the information that had been presented to me by Berkman and Tabet and was also based on interaction that the undersigned had had with representatives of the counterparties.

22. With respect to the allegations in ¶ 85, 86 and 87, after learning of the circulation of the "forged letter", Respondent had direct contact with counsel for the "Actual Facebook

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¶ 88. Kern's memorandum further represented that the second counterparty "holds approximately 80% of our investments in Facebook."

¶ 89. The memorandum also stated that Ventures II "is subject to non-disclosure agreements with [both] counterparties which prevent us from disclosing the identity of these New York based groups at this time" and that Ventures II "is not a Ponzi scheme and absolutely and affirmatively rejects this assertion as false and malicious."

¶ 90. As Kern knew or at least recklessly disregarded, his statements were false. The Actual Facebook Funds were the first counterparty in Kern's memorandum. As set forth above, Kern had learned five months earlier that the Actual Facebook funds had terminated and liquidated Ventures II's interest in the Actual Facebook Funds based upon the forged letter and that Ventures II therefore held no Facebook shares based on its transaction with the Actual Facebook Funds. Kern therefore knew that his representations about the first counterparty were false. The Broker-Dealer was the second counterparty described in Kern's memorandum. The Broker-Dealer never received an investment from, or engaged in any transaction with, Ventures II or any other entity associated with Berkman. Had Kern contacted the Broker-Dealer or conducted even the most cursory inquiry, he would have known for certain that this representation was false. In fact, contrary to Kern's representations, no non-disclosure agreement existed between the Broker-Dealer and Ventures II (or any of the other Respondent entities.)

Funds" within the time frame allotted for discussion of the matter. Respondent demanded that the interests of his client be respected and maintained according to the status quo ante. The undersigned insisted that the "forged letter" not be relied upon by any party and offered to secure Affidavits from the managers of the fund attesting the same.

23. Contrary to the assertions of the Commission, counsel for the "Actual Facebook Funds" from the Mintz Levin Law Firm in New York proposed and agreed to recommend to their client that my client's interests remain intact and that the matter be put to rest. Counsel indicated that this would require their client's confirmation. This concession was confirmed in later email communications between myself and the attorney for the "Actual Facebook Funds" and is diametrically opposed to the assertion by the Commission in ¶ 90 that the undersigned had been advised that his client's interests in the funds had been liquidated.

24. Respondent states that the communications between the undersigned and the attorneys for the "Actual Facebook Funds" referenced the fact that the operating agreement of the "Actual Facebook Funds" prohibited the very action proposed to be taken by the fund managers, something which counsel for that fund acknowledged.

25. Respondent further states that within two days of the conversation which followed counsel's discussion of the maintenance of the interests of my client, the "Actual Facebook Funds" were sued by the SEC on issues related to the circumstances surrounding the original purchase and sale of interests (including the Ventures Trust client) in that entity. Almost immediately, counsel ceased all communications with me.

26. The undersigned formally requested and scheduled an inspection of the books and records of the "Actual Facebook Funds" but the attorneys for that fund refused all communication and efforts to determine any information about the funds.

27. A representative of FINRA advised me that my client had been a victim of the misconduct of the "Actual Facebook Funds" in terms of the procedures followed by the "Actual Facebook Funds" at the time of my client's purchase of interests in said funds – the circumstances described by the lawsuit brought by the SEC against the Actual Facebook Funds.

28. Subsequently, the undersigned reported the conduct of the Actual Facebook Funds to both FINRA and counsel for the SEC concerning counsel's refusal to provide an inspection of the books and records of the Actual Facebook Funds and their refusal to communicate further.

29. Thereafter, the Respondent received several written confirmations of my client's continuing, preserved interests in the fund, including a May 2012 offer from the manager of the

Actual Facebook Funds to purchase the LLC membership interests of my client. Respondent still maintain that the client (Ventures Trust II LLC) still has the right to recover the investment interests in these investments in the Actual Facebook Funds, presently valued in excess of $1.21 million and potentially considerably more.

30. With respect to the allegations referred to in ¶ 88, pertaining to the "Broker Dealer" (said to hold 80% of the investors' interests), it now appears that the information provided to me by Berkman concerning the concluded transactions was false. Nevertheless, the allegations concerning my knowing participation in this fact are denied.

31. With respect to the allegations of ¶ 89, the Respondent states that he had met the "Broker Dealer's" representative [said to be Mr. Paul McCabe] on numerous occasions, had attended the signing of a Confidentiality Agreement concerning what were to be the investments, and had been provided the documents issued by Facebook (and its original employees) relative to the opportunities which the undersigned was told at various times had been acted upon by Ventures Trust II LLC for Facebook interests and those in other pre-IPO securities.

32. After these other securities had gone public through their respective IPOs, the undersigned was told by Berkman and Tabet that the investors were recovering their proceeds from those earlier transactions, albeit much more slowly than anticipated.

33. Berkman reported that he had made several separate trips to New York to meet with the Broker Dealer, information which was believed to be true. Berkman also repeatedly informed me that he was assured that these matters concerning the distribution of these other securities interests were being rectified, information which Tabet confirmed. Berkman and Tabet advised that if we threatened legal action against the Broker Dealer on those other matters, that the consequences could be negative to the interests of my client and its investors.

34. The undersigned accepted this explanation for the time period of approximately April through August 2012. In August 2012, the Respondent was finally authorized to write to McCabe to demand the Broker Dealer's full performance. Berkman, who said that he was going to New York himself, stated his preference to hand deliver the letter to McCabe, citing its sensitivity. As stated above, the undersigned was misled, and duped into believing that the fund's interests were secured.

35. Further, as mentioned, the undersigned prepared and personally attended the execution of a Non Disclosure Agreement with the managers of both of the funds.

36. The undersigned did not have access to the banking account records of my clients; instead, the Respondent directly questioned and was advised by both managers of the fund – Berkman and Tabet – that all investment funds were being appropriately allocated to the investment targets and that the proceeds which were being returned to the investors were coming from the investment targets themselves, not later investors.

37. In the Spring of 2012, Berkman advised that he had received a late notice of an SEC subpoena issued to the Bank of America for the banking records of my client. Berkman did not appear to be bothered in the least that the Commission had acquired the records and even conducted a deposition of a Bank of America official concerning the handling of the funds.

38. Upon being told by Tabet that Berkman had told him that the investment funds were actually placed with another entity, the undersigned questioned Berkman as to why the undersigned had been authorized to write a demand letter to Mr. McCabe when, according to this information, McCabe was not connected with the actual counterparty on these other transactions.

39. Faced with this information, the Respondent immediately resigned from representing these clients on or about February 27, 2013. (See the allegations of ¶ 89 above.)

40. The Respondent denies the allegations of ¶ 97 of the OIP[5], which in fact constitute not allegation of fact but statements of law.

FOR A FIRST AFFIRMATIVE DEFENSE
(Reasonable Reliance and Truthful Communications)

41. The Respondent reiterates the foregoing and further states that he acted reasonably in fulfillment of his professional duties upon information gathered from his client through its managers and from third parties including other commercial parties, lawyers, FINRA and the SEC. All communications of the Respondent were factually accurate and truthful based upon information made available to him.

42. Respondent did not engage in any act, practice, or course of business which was fraudulent, deceptive, or manipulative, nor did he employ any device, scheme, or artifice to defraud any client or prospective client.

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[5] *¶ 97. Kern was a cause of, and willfully aided and abetted, violations committed by Berkman, Ventures Trust Management, and the Manager of §§206(1), 206(2) and 206(4) of the Advisors Act and Rule 206(4)-8, which prohibit certain fraudulent conduct by an investment advisor.*

FOR A SECOND AFFIRMATIVE DEFENSE
(Investment Advisor Act Exemption)

43. The Respondent is not liable for any conduct adjudged pursuant to the Investment Advisors Act of 1940. He is an attorney whose actions are purely incidental to the conduct of his profession and subject to the exemption afforded counsel in § 202(a)(11) of the Act.

44. Moreover, the relevant operating agreements and subscription agreements of the entities at issue in the allegations of the Commission provide that the investments undertaken are exempt from the application of the Investment Advisors Act of 1940.

FOR A THIRD AFFIRMATIVE DEFENSE
(Res Judicata)

45. On information and belief, the Commission has accepted and will accept the statements of admission of liability for the unilateral misconduct of Mr. Craig Berkman as the responsible party in misleading and misinforming the Respondent about the client Funds. Berkman has publicly stated and admitted, at the time of entering his plea of guilty to two separate criminal charges of fraud, that he misled many individuals who relied upon his truthfulness.

46. The Commission is anticipated to make findings of certain acts of misleading the Respondent within the scope of an anticipated settlement agreement between Berkman and the Commission.

47. To the extent that the Commission relies upon these findings in the maintenance of this administrative proceeding vis-à-vis the Respondent, the Respondent craves reference to the doctrine of Res Judicata to prohibit the Commission from making alternate findings in this proceeding.

FOR A FOURTH AFFIRMATIVE DEFENSE
(Client Confidentiality and Attorney-Client Privilege)

48. The Respondent is an attorney licensed in South Carolina. To the extent that the communications referenced in the OIP were privileged at the time when made, the Respondent asserts the same in reliance thereupon.

49. To the extent that the Respondent determined in or about February 2013 that the information provided by Berkman about the investment of capital by the clients was incongruent and therefore likely false, he immediately withdrew from representation of the client Funds. The Respondent did not represent Berkman.

50. Upon determining that Berkman had misled the undersigned (and likely the other manager of the Fund, Tabet), the Respondent was restrained by the attorney-client privilege from communicating with any individuals other than the managers about his decision to withdraw from representation. The Respondent reiterates that he knowingly made no false statements of any kind in the course of his representation of the client Funds or otherwise.

51. The Commission's allegations of ¶¶ 59 and 60 pertain only to third party statements attributed to Berkman and do not reference any third party communication by the Respondent.

52. The Commission's allegations at ¶¶ 84 to 90 pertain to communications between the attorney for a client and the members (owners) and/or managers of said client, not to third parties.

53. To the extent that the Commission alleges that the Respondent "should have" conducted communications with third parties about the activities of his clients without any notice of improper conduct by the manager(s) of the Funds, and without the authority of his client, the same would amount to an ad hoc rejection of the doctrines of confidentiality and attorney-client privilege established under both South Carolina law and the rules and regulations pertaining to practice before the Commission. The same would likewise impose a duty upon the Respondent which is not found in the jurisprudence of South Carolina or the United States Securities laws.

FOR A FIFTH AFFIRMATIVE DEFENSE
(Whistleblower Protections & Public Policy)

54. Respondent states that in or about early January 2012, he interviewed an attorney representative of FINRA about misconduct (pursuant to the Securities laws of the United States) of his client's counterparty in Facebook investments, characterized by the Commission in ¶ 57 et seq. as the so-called "Actual Facebook Funds."

55. Upon determining, based in part upon information provided by the attorney representative of FINRA that the "Actual Facebook Fund" had structured the purchase and sale of Facebook share interests in violation of law, had actually victimized his client by selling shares

within its own portfolio – not as represented to the client Fund managers at the time, and had refused to allow the undersigned to conduct an inspection of the books and records of the "Actual Facebook Fund," he contacted the SEC in New York and Washington to discuss and disclose the circumstances affiliated with the misconduct of this third party. Based upon information available to him, the Respondent believed at all times that his client held important and defensible rights in Facebook which were being threatened and wrongly undermined.

56. To the extent that the instant investigation hinged in any respect upon the information provided by the Respondent, believing that his client held rights in the "Actual Facebook Funds" and that his client had conducted itself appropriately, the Respondent states that he acted in a Whistleblower capacity concerning the instant investigation of the Commission.

57. The Respondent further states that in the period leading up to and including the month of February 2013, on more than one occasion, upon being consulted by Mr. Tabet about incongruent statements provided to him by Berkman, he counseled and advised Tabet to communicate with federal authorities (including but not limited to the FBI and the SEC) concerning the information that Tabet shared with the undersigned about the lack of integrity in the investment in the funds. This information concerned the suspicions that Tabet held about Berkman which Berkman covered up with lies and misrepresentations.

58. On information and belief, Tabet has been afforded protection from the Commissions actions pursuant to privileges associated with being a whistleblower and but for the advice of the Respondent he would not have been treated in this manner by the Commission. Therefore, the Commission cannot prevail because it is adverse to public policy of the United States to attempt to punish the Respondent, given the protections afforded under Sarbanes-Oxley and the Dodd Frank Wall Street Reform Act.

59. Respondent asserts that he is entitled to the same protections, having advised Tabet as a manager of the client to communicate with federal authorities, while the Respondent himself was bound to protect the confidentiality of information pursuant to the attorney-client privilege – information concerning which the undersigned withdrew from representation.

FOR A SIXTH AFFIRMATIVE DEFENSE
(Immateriality)

60. The Commission cannot prevail because the statements attributed to the Respondent lack materiality.

FOR A SEVENTH AFFIRMATIVE DEFENSE
(Statutory Exemption)

61. The Commission cannot prevail because the securities referenced in the allegations of the OIP were not registered at the time and were otherwise exempted from the application of the Investment Advisors Act.

MOTIONS

MOTION FOR SEVERENCE
(Rule 201(b))

62. The Respondent incorporates the foregoing and notwithstanding the application of the Res Judicata doctrine referenced above, further moves for a severance of the proceeding involving himself and any administrative proceeding aligned against the admitted criminally liable Mr. Craig Berkman, pursuant to Rule 201(b).

63. The Respondent Berkman has pled guilty to two separate charges of Securities Fraud and is awaiting sentencing in that criminal proceeding. He is, on information and belief, also in the process of negotiating a settlement agreement related to this administrative proceeding, in which he has been found in default. To the extent that no such agreement is reached and the Commission would attempt to conduct a hearing wherein the criminally liable Berkman is tried in any manner alongside the undersigned, the Respondent objects to the grouping together of these parties respondent.

64. The allegations contained in the OIP against Berkman are vastly different than those which are alleged against the Respondent.

65. Such a scenario would create a hostile atmosphere and would be prejudicial to the Respondent in violation of the right of procedural due process guaranteed by the U.S. Constitution.

MOTION FOR MORE DEFINITE STATEMENTS
Rule 220 (d)

66. The Respondent incorporates the foregoing responses and further states that in essence, the Commission has alleged violations of one more of four separate Securities regulations, without articulating the nature of any particular violation:

67. The Commission alleges:

a. "Berkman, the Manager, Kern and/or someone working with them later altered the letter.... The Letter falsely represented that the Actual Facebook Funds "ha[ve] allocated 497,625 shares of Facebook, Inc. in Ventures Trust II LLC['s] capital account" (¶45); and,

b. that the Respondent "falsely implied that [a] purchase ... was likely and imminent" (¶¶ 57 – 60)

68. The Commission has not identified with precision the factual basis for any such violation in the course of these two contentions, and has instead blithely attributed the conduct of other persons on an "and/or basis" to the Respondent.

69. Respondent therefore moves for an Order requiring the Commission to provide a more definite statement as to the specific acts of allegedly violative conduct involving fraud or intentional misrepresentation upon which it would rely. Respondent is entitled to a higher standard of fact pleading in the face of these allegations, and is entitled to receive particular notice of the conduct which is allegedly inappropriate, not blanket statements.

70. Respondent further states that the Commission should be required to indicate with precision which provision within each of the four referenced code sections is at issue in this matter and has been violated by the Respondent.

MOTIONS FOR SUMMARY DISPOSITION

FOR A FIRST MOTION
(Failure to State a Claim)

71. The Commission has alleged, based upon three separate factual scenarios presented in the OIP, (each of which has been addressed above and is categorically denied) that the Respondent has violated the Investment Advisors Act of 1940 (§ 206(1), (2) or (4)) and a single regulation promulgated thereunder (17 CFR 275.206(4)-8). (See ¶ 97 of the OIP.) The Commission has stated no other causes or claims against the Respondent.

72. Each of the foregoing rules pertains to Investment Advisors. Respondent has responded with the affirmative defense based upon the statute itself which provides that that

this statute and the regulation are inapplicable to him. Respondent is a lawyer and is exempted from the application of the Investment Advisor Act of 1940. He is by definition not an "Investment Advisor." See the Act, § 220 (a)(11).

73. Respondent was neither an owner, manager, director, marketing representative, salesman or acting in any other capacity in relation to the Funds. Respondent was not paid on any basis other than as an hourly attorney.

74. Therefore, the Respondent moves that the action be summarily dismissed based upon the Commissions failure to state a claim.

FOR A SECOND MOTION
(OIP ¶¶ 57 through 60: Allegations Pertaining to a Prospective but Unrealized Transaction)

75. The Respondent incorporates the foregoing responses to the OIP and further states that the Commission has alleged at paragraphs 57 through 60 of the OIP that the Respondent "falsely implied that [a] purchase ... was likely and imminent" as a basis for alleging misconduct pursuant to the Securities laws without identifying the basis for any such violation.

76. All of the allegations within this section of the OIP pertain to an event that was hoped to be created in the future, but to the knowledge of the Respondent, never transpired. There are no allegations pertaining to past events. All representations were absolutely factual and precisely and truthfully stated.

77. The client was represented to the undersigned to be in the business of identifying investment opportunities and then identifying qualified investors with the resources to effectuate the investment opportunity. In this case, the investment target was a Special Purpose Vehicle (SPV) which held Facebook stock.

78. The entity which is identified here as "Face Off Acquisitions LLC" was my client and was organized to act as the intermediary in such a transaction, securing value for both the investor and the manager(s) of the fund, according to the terms of the investment and the relevant investment documents which were to be organized with particular regard to the terms of the transaction.

79. The undersigned was advised that Berkman was attempting to secure an investor willing to fund the entire transaction amount (not a portion or any fractional interest of the required investment) within a limited period of time prior to the May 2012 IPO of Facebook Inc. The Respondent corresponded with at least two separate parties which were apparently

entertaining this opportunity, but to the best of his knowledge, the Respondent understood that the investment was never funded in any amount and was therefore unrealized.

80. Based upon information made available to me, Face Off Acquisitions LLC's organizational documents were prepared in draft form but never executed or acted upon.

81. The April 14, 2012 letter referred by the Commission very precisely described the requirements and terms required of the persons offering to sell the SPV and accurately reflected the undersigned's interaction with the fund manager and the fund's attorney over a period of several weeks.

82. The April 14, 2012 letter also included what the undersigned was advised were the edits and clarifications of others acting on behalf of an individual or entity which at the time was the prospective investor in the Face Off Acquisitions LLC.

83. Respondent further states that he arranged and participated in a telephone conference call between the prospective investor's representative(s) and the lawyer for the SPV to provide transparency to the terms and conditions of a potential transaction.

84. Consequently, even if the allegations of the Commission were true, there is no basis for a proceeding before this Commission and no violation of any Securities laws.

85. Respondent therefore moves for a dismissal and Summary Disposition of the allegations numbered paragraphs 57 through 60, and to the extent applicable, ¶ 97 of the OIP.

WHEREFORE the Respondent prays that this Commission dismiss the allegations concerning the Respondent, that in the alternative to the dispositive dismissal of the action the Commission provide the relief sought herein, invoking the affirmative defenses and Motion practice invoked by the Respondent, and that in the event that the matter is joined and brought to a hearing, that he be afforded the opportunity to present evidence and overcome the allegations of the Commission stated in the March 19, 2013 OIP, and that the Commission provide all other and further relief as is appropriate under its rules and procedures.

RESPECTFULLY SUBMITTED:

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