UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15974

In the Matter of

NATURAL BLUE
RESOURCES, INC.
JAMES E. COHEN, and
JOSEPH A. CORAZZI,

Respondents.

POST-HEARING SUBMISSION ON BEHALF OF RESPONDENT JAMES E. COHEN

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PRELIMINARY STATEMENT

After years of investigation and seven days of testimony, it is clear that the Division has failed to establish a factual or legal predicate for the imposition of liability against James Cohen under Sections 10(b) or 17(a) with respect to his involvement with the company Natural Blue Resources, Inc. ("NBR" or the "Company"). The Division has not applied the correct standard set forth in SEC regulations and adopted by the case law for whether an individual must be disclosed as an officer: to constitute a *de facto* officer, one must occupy a policy-making role within a company, and not merely advise those who possess that authority. And the Division has failed adequately to address the issue under Janus that is fatal to their case: that Cohen was not the "maker" of the purportedly false statements.

Further, the evidence presented during the hearing only supported the Respondents' contention that they acted as consultants, advisors and shareholders, but did not possess the level of decision-making authority that would have rendered the company's filings false. Notably, there was a veritable phalanx of executives, accounting professionals, attorneys and board members associated with and knowledgeable about the workings of the Company. The Division called only a few of those – including Paul Vuksich, Paul Pelosi, and former Governor Toney Anaya – and even then their testimony depicted a Company steeped in the requisite corporate processes for consideration, review and authorization of corporate activity. The Division declined to call the many other participants in that corporate process, creating a further failure of proof in their presentation. That lack of evidence was then more than countered by the evidence presented by the Respondents, including CFO Walter Cruickshank, attorney Jeffrey Decker and CFO Jehu Hand. From those who did testify – including even the witnesses that the Division did put forth – the evidence was clear and consistent: those professionals who dealt extensively with Cohen, who held decision making authority, and who understood the Company's disclosure

obligations did not consider the company's filings to be false, and certainly did not scheme to conceal Cohen's involvement with the company. Taken as a whole, the evidence demonstrated the utter deficiency of the Division's contentions: in each of the company's critical areas of operations, Natural Blue was managed by its executives, guided by its counsel, overseen by its board, subject to appropriate levels of corporate formalities, and in compliance with regulatory and disclosure requirements – all contrary to the Division's contentions.

To find Cohen liable on this record would allow the Division to create from whole cloth a murky and unworkable standard that could be employed to find filings false whenever chief executives receive and follow advice by consultants or even take heed of the entirely appropriate efforts of shareholders to influence the course of management. Fortunately, the standard is not so malleable that a company's public filings become false because a consultant is responsible for even a significant aspect of the company's business, so long as its decisions are made by its executives and its board. Neither an activist shareholder nor a "forceful" consultant mutates into an officer – and renders all public filings false – unless he, and*not* the named officers, sets company policy and has authority over its actions.

The Division will undoubtedly select a handful of communications to argue that Cohen and/or Corazzi were the ones who "ran the company." It will point to emails regarding approvals of disbursements or claims that Anaya was not the primary negotiator of Natural Blue's reverse merger with Datameg Corporation or the 2011 Atlantic transaction. Those contentions are inconsistent with the clear evidence of Governor Anaya's continuous oversight and control of corporate activities. Those claims utterly fail to demonstrate that Cohen or Corazzi ran the company or supplanted its executives or board, and are plainly insufficient under the analysis of SEC v. Prince, 942 F. Supp. 2d 108 (D.D.C. 2013).

Rather, the evidence demonstrates that Governor Anaya, assisted by experienced professionals, and in conjunction with other members of the Board of Directors, ran Natural Blue and retained authority over all relevant decisions, corporate actions, and required filings. The record shows that while Cohen was certainly vocal, and made any number of recommendations, they were just that: recommendations that Anaya could – and oftentimes did – reject. Anaya and the Board did oversee and control Natural Blue, retained via Board decision Cohen and his consulting firm, JEC, to advise regarding acquisitions, and then proceeded to make business decisions with respect to each of the proposed transactions and contracts. Equally clear is that Cohen did not "control" those officers and directors; he did remain involved with the company not only as a consultant but also as a significant shareholder who held, and invariably shared, strong opinions regarding the Company, but he did not control or set policy for the Company[1].

STATEMENT OF FACTS

I. Individuals Involved in Natural Blue

A. Governor Toney Anaya

Governor Toney Anaya served as the initial Chairman of the Board and Chief Executive Officer of Natural Blue Resources, Inc. (Nevada). Div. Ex. 300. He subsequently served as Chairman of the Board and Chief Executive Officer of Natural Blue Resources, Inc. (Delaware) through January 27, 2011. Div. Ex. 300.

Anaya received a B.A. from the Georgetown University School of Foreign Service and a J.D. from American University School of Law. Anaya Tr. 783:10-15; Div. Ex. 269. Anaya has

[1] It should be noted that the Division's predicate for its claim against Cohen – that he was such a forceful consultant that Anaya "deferred" to him to some inappropriate extent – was not even asserted at the hearing with respect to Joseph Corazzi. Although Governor Anaya complained that he felt Cohen was "disrespectful," he confirmed that Corazzi was more respectful of Governor Anaya's role as the company's chief executive. Anaya Tr. 960:8-21. It is also apparent that Anaya's issues with Cohen may derive from a misunderstanding regarding Cohen's method of communication: Anaya reported that Cohen "would call and shout" at him (Anaya Tr. 1153:18-25), but the evidence shows that Cohen in fact tends "to talk loud" because he has significant hearing issues and is partially deaf (Div. Ex. 218 at 34:19-22).

a wealth of high-level and executive public and private sector experience. In the public sector, he served as an assistant district attorney, chief of staff for a New Mexico governor, was elected as New Mexico's attorney general, where he had responsibility for investigating and prosecuting fraud related to securities matters, and then was elected as New Mexico's governor in 1982 and served from 1983 to 1986. Anaya Tr. 783:22-784:6, 1002:9-1004:22; Div. Ex. 269. Through his government service, Anaya participated in service on "many" boards, including chairing the New Mexico Board of Finance, which had authority over the investment of billions of dollars. Anaya Tr. 999:19-1000:23, 1005:1-1007:16; Cohen Exs. 429, 433. He later participated in negotiations and passage of the North American Free Trade Agreement as one of three representatives authorized to speak on behalf of the Mexican president and government. Anaya Tr. 1001:8-1002:1; Div. Ex. 269. More recently, Anaya was appointed by then-Governor Bill Richardson of New Mexico to oversee the implementation of federal stimulus funding in New Mexico, and oversaw approximately $6 billion in stimulus funding earmarked for New Mexico. Anaya Tr. 784:17-25.

In the private sector, Anaya has been a licensed attorney for over 37 years, and has private law practice experience specializing in business and corporate law. Anaya Tr. 785:1-5; 992:14-21. Anaya also has executive level experience and board service with a variety of corporations, including Valor Telecom, a private company that Anaya helped form (Anaya Tr. 993:3-997-25; Div. Ex. 269), Burger King, where he served on an Advisory Board (Anaya Tr. 998:24-999:18; Div. Ex. 269); and NuAmerica Bank, a chartered bank that Anaya helped found (Anaya Tr. 998:1-8; Div. Ex. 269).

Through his private and public sector roles, Anaya gained experience in managing large organizations. He served as the chief executive of the entire State of New Mexico, responsible

for preparing and signing off on budgets, delegating authority as he saw appropriate, but retaining final authority to approve or disapprove decisions. Anaya Tr. 1011:4-1012:14. He developed a "management style" of "surrounding [him]self with competent people with the expertise and relying on their advice." Anaya Tr. 1077:11-18.

Accordingly, when he joined Natural Blue, Anaya understood the obligations and responsibilities incumbent upon him as Chairman and CEO. Anaya Tr. 1012:15-25 (Anaya understood his responsibility was to make "the material decisions with respect to the activities of the corporation"), 1025:4-16 ("The buck stops with me."), 1138:16-19, 1152:16-1153:14; Cohen Ex. 60. Anaya testified that he understood that his leadership role at Natural Blue "would be similar to that as when I served as governor . . . I had several cabinet departments, as well as independent agencies and boards that reported directly to me as governor." Anaya Tr. 1058:2-4. And he was well aware, as he wrote to fellow board members in September 2009, of their shared obligation "to defend the company and advance the company's interests and image for the benefit of all," and to "carry out our corporate responsibilities to the company while fulfilling our obligations to investors." Anaya Tr. 1152:16-1153:14; Cohen Ex. 60.

The experienced professionals that worked closely with Anaya gave positive assessments on his capacity to serve as an executive. Paul Vuksich, Natural Blue's attorney from July 2009 through December 2009, testified that Anaya reviewed material carefully and responded in great detail with respect to important documents, and exercised diligence as befit his experience as a former governor and attorney general and practicing attorney. Vuksich Tr. 396:14-397:19, 406:16-407:3; Cohen Exs. 21, 24. Vuksich also noted that Anaya was an experienced executive, practiced in working with a large staff and then making "an informed decision . . . what he is supposed to do." Vuksich Tr. 415:12-416:7. Jeff Decker, who served as Natural Blue's attorney

from October 2009 to May 2010, stated that he thought Anaya "was capable of serving as CEO or an executive role. There were things that were obviously not in his wheelhouse such as the financial reporting and that kind of thing, but I clearly had the impression that he could serve as the chief executive of this company." Decker Tr. 1512:1-15.

Anaya entered into a cooperation agreement with the SEC in April 2014, and a consent agreement with the SEC in July 2014. Anaya Tr. 1134:7-17; Div. Exs. 286, 295. During his testimony, Anaya stated that he was testifying in accordance with that cooperation agreement and that, if it led to a dispute with the Division, his testimony could render his consent "agreement with the SEC . . . null and void" and subject him to further and harsher penalties. Anaya Tr. 1147:1-7; 785:19-786:23.

B. Paul Pelosi, Jr.

Paul Pelosi, Jr. served as president and on the board of Natural Blue Resources, Inc. (Nevada) and then Natural Blue Resources, Inc. (Delaware).

Pelosi graduated from Georgetown University with a B.A., and also received a law degree from the Georgetown University Law Center. Pelosi Tr. 473:1-5. He subsequently passed the bar exam. Pelosi Tr. 519:10-11. Pelosi worked in the financial services and securities industries, and served on the boards of several publicly traded companies. Pelosi Tr. 473:1-16. He twice passed the Series 7 examination for registered representatives, in 1996 and 2009, and gained investment banking experience. Pelosi Tr. 519:12-520:12. He served as a board member for the companies Blue Earth, Looksmart, Targeted Medical, Cereplast, Vodis Pharmaceutical, Tree Top, and Verde Science. Pelosi Tr. 521:4-23.

Pelosi also had experience in the environmental and technological spheres: he had served as President of the City of San Francisco's Commission on the Environment, on Cisco's Connected Urban Development Initiative, and as an advisor to the administrator at the NASA

Ames Research base. Pelosi Tr. 522:22-524:24, 541:4-25; Div. Ex. 22. Through these experiences, Pelosi had developed experience and expertise in the energy efficiency and water and environmental industries, and formed relationships with people that had access to technologies that could lead to producing clean drinking water. Pelosi Tr. 528:1-529:13.

C. James Murphy

James Murphy served as Chief Executive Officer of Natural Blue from July 23, 2009 to August 24, 2009, and remained on the board through January 26, 2010.

Murphy testified to a lengthy business career prior to joining Natural Blue. He "owned a carpet business, sporting good stores, [and] was a partner in a chain in New England called Building 19" which is "an off-price retail chain" that "did about 100 million a year at that time." Murphy Tr. 35:20-36:6. Murphy was a Datameg investor, and later became its Chief Executive Officer in 2005, staying on through Datameg's merger with Natural Blue Resources, Inc. (Nevada) in 2009. Murphy Tr. 36:10-37:11.

As Datameg's CEO, Murphy was responsible for signing Datameg's public filings, and understood the obligations of a public company CEO to ensure the accuracy of financial reports. Murphy Tr. 102:12-18; 103:22-19.

D. Walter Cruickshank

Walter Cruickshank served as the Chief Financial Officer of Natural Blue from August 2009 through August 2010. Div. Ex. 300.

Cruickshank graduated from Rutgers University with a B.S. and became a Certified Public Accountant by the State of New Jersey. Cruickshank Tr. 1586:21-1587:4. He worked for Coopers & Lybrand and then served as the controller and/or CFO of other non-public companies. Cruickshank Tr. 1587:10-17. Cruickshank has also worked for a number of public companies, performing accounting work and financial reporting, including the preparation and filing of 10-

K's, 10-Q's, S-1's, and 8-K's, for companies including Lloyds Electronics, Manhattan Bagel, and Blasius Industries. Cruickshank Tr. 1587:18-1588:10.

E. Paul Vuksich

Paul Vuksich provided legal services to Natural Blue from July 2009 through December 2009. Div. Ex. 300. Vuksich had previously served as counsel for Datameg, dating back to January 2006. Vuksich Tr. 274:15-25, 373:20-25.

Vuksich is a West Point graduate; he spent five years in the military after West Point, then went on to law school at the University of San Francisco, where he received a J.D. in 1980. Vuksich Tr. 273:10-15. Since 1980, Vuksich has been in private practice, specializing in providing corporate legal services to startup companies. Vuksich Tr. 273:16-274:2.

F. Jeffrey Decker

Jeffrey Decker and the law firm of BakerHostetler provided legal services to Natural Blue from October 2009 through May 2010. Div. Ex. 300.

Decker attended the University of Miami and received both an undergraduate degree and a J.D. from that institution. Decker Tr. 1508:10-15. Decker has specialties in securities work (since 1984) and corporate legal services (since 1989), and represents public and private companies in their securities offerings, compliance matters, mergers and acquisitions and general transactional work. Decker Tr. 1509:16-1509:2.

G. Jehu Hand

Jehu Hand served as Chief Financial Officer of Natural Blue from September 2010 through June 2011. Div. Ex. 300.

Hand graduated from Brigham Young University in 1981 with a degree in Latin American studies and subsequently attended law school at New York University School of Law, where he received a J.D. degree in 1984. Cohen Ex. 434 at 20:14-22. Hand is a member of the

State Bar of California, and previously held Series 7, 24 and 63 licenses until filing a withdrawal in 2010. Id. at 20:3-10. Hand's experience includes the practice of law and accounting, and his public company experience includes serving as a director of Worldwide Energy and Manufacturing USA, president of Las Vegas Airlines, and secretary for a number of other public companies. Id. at 21:2-22:12.

II. Cohen Did Not Control Natural Blue

The evidence demonstrates that throughout the relevant period, in episode after episode and across Natural Blue's operations, Cohen did not occupy a policy-making role. The following instances, discussed below, demonstrate this fact: the reverse merger transaction with Datameg, board and officer appointments, selection and control over Natural Blue's attorneys, accountants and auditors, SEC filings and other disclosures, financial records and disbursements, and the transaction with Atlantic.

A. Cohen Did Not Control Natural Blue's Reverse Merger with Datameg

The corporate transaction that resulted in a reverse merger between Natural Blue Resources, Inc. (Nevada) and Datameg Corporation, and the creation of the public company Natural Blue Resources, Inc. (Delaware), was an outgrowth of a business plan that had been proposed by Governor Anaya, and its structure was authorized and directed by the boards of directors and officers of *both* predecessor companies, not controlled by Cohen.

Prior to the founding of Natural Blue, Governor Anaya had been involved, as of February 2009, in discussions with a number of business people regarding various water and environmental proposals. Anaya Tr. 1045:12-1046:5. Indeed, Anaya had been "interested in activities and businesses relating to water purification . . . for over 30 years." Anaya Tr. 1054:10-13. Anaya also communicated with Corazzi and Cohen during February 2009 regarding his interest in developing and participating in a water-related project. Anaya Tr. 1048:9-

1049:12, 1053:4-18. Through these conversations, Anaya told Cohen and Corazzi that he would be interested in leading "a green-related company." Anaya Tr. 1053:13-1058:19.

Following these conversations, Natural Blue was formed, and at a March 6, 2009 meeting, Toney Anaya and Paul Pelosi accepted appointment to the Natural Blue's Board of Directors, Anaya was elected by the Board to be the first Chairman of the Board, Anaya was elected as CEO, and Pelosi was elected as President. Div. Ex. 9; Cohen Ex. 420. At the meeting, the new Board resolved "that James Cohen, Sr.,***investigate and report alternatives to the board*** for the Corporation concerning funding and becoming a reporting public company." Div. Ex. 9 (emphasis added); Cohen Ex. 420;*see also* Anaya Tr. 818:8-21, 1056:14-25 ("To the extent that I understood a reverse merger, I thought it made sense because it would bring Natural Blue in as a publicly-traded company. And I understood what that meant"), 1064:25-1065:13; Pelosi Tr. 537:18-538:5 (agreeing "that from the time that [Pelosi] founded Natural Blue, Nevada ***the plan of the Board Members of the company was to become a public company***").

At a March 17, 2009 Board of Directors meeting, Cohen reported back on "several discussions . . . with James Murphy, the CEO of Datameg Corporation," and stated that he and Murphy had agreed to "***recommend*** entry into a nonbinding term sheet" for a reverse merger transaction, "***subject to the approval of each company's board***" Div. Ex. 10 (emphasis added); Pelosi Tr. 539:1-8. The Natural Blue Board "discussed the credentials of Datameg Corporation and considered Cohen's report" and then "deemed [it] desirable and in the best interest of the Corporations and its shareholders" to "***authorize[] and direct[] Cohen*** to proceed with the negotiation and drafting of a nonbinding term sheet with Datameg." Div. Ex. 10 (emphasis added); Pelosi Tr. 539:1-8. At a March 31, 2009 Board of Directors meeting, Cohen presented to the Natural Blue Board a proposed nonbinding term sheet with Datameg. Anaya Tr. 821:11-14;

Cohen Ex. 1. Anaya subsequently signed a transaction term sheet dated April 1, 2009, which documented his sign off on the terms of the transaction. Anaya Tr. 1069:10-20; Cohen Ex. 2.

After the term sheet was signed but before the final deal closed, Pelosi performed due diligence on the deal. Pelosi Tr. 552:21-553:12. This diligence included an on-site visit to Paul Vuksich's office by Pelosi; Pelosi reviewed Datameg's financial information, and determined that "everything looked in order."[2] Pelosi Tr. 552:21-553:12; *see also* Murphy Tr. 116:1-117:6; Vuksich Tr. 345:7-23, 365:11-366:5. Based on this review, and even though he recognized the "challenges" that Datameg faced, Pelosi believed that the deal between Natural Blue and Datameg should go forward. Pelosi Tr. 483:8-19. The Natural Blue board also took action by Unanimous Written Consent to enter into a Share Exchange Agreement with Datameg and issued to Datameg stock in Natural Blue. Cohen Ex. 37.

On the Datameg side, the reverse merger transaction received similar proper authorization by the Datameg board, with input from counsel, and was approved by the company's shareholders. On or about April 20, 2009, Datameg filed a form 8-K reporting that it had, on April 14, 2009, entered into a Share Exchange Agreement with Natural Blue, with the transaction "***subject to the consent of a majority of Datameg's shareholders and to the consent of each of NBR's shareholders***." Cohen Ex. 7; Murphy Tr. 122:15-123:4. A press release filed with the SEC regarding the proposed transaction stated that Natural Blue was "led by Toney Anaya, the company's chairman and CEO" (Cohen Ex. 415), and Murphy testified that he had spoken with Anaya and Pelosi during the lead-up to the transaction (Murphy Tr. 57:20-58:4), and understood Natural Blue to be led by Anaya and Pelosi (Murphy Tr. 124:2-11).

[2] Vuksich had been the attorney for Datameg since January 2006. Vuksich Tr. 274:15-25. On May 5, 2009, Anaya executed a fee agreement so that Vuksich could begin providing legal services for Natural Blue. Cohen Exs. 12-13.

After the announcement of the proposed deal, Datameg requested and received approval from its shareholders, in a process guided by Paul Vuksich as legal counsel. Murphy Tr. 126:16-127:4, 134:11-14, 147:7-148:13, 161:13-162:7;[3] Vuksich Tr. 409:3-413:21. Datameg first filed a preliminary proxy with the SEC, received requests by the SEC for changes, and then resubmitted a proposed proxy. Id; *see also* Cohen Exs. 8, 14, 17, 417. The proxy detailed the reasons that Datameg Board had explored a reverse stock split, summarized the transaction term sheet, and disclosed the business plan and leadership—Anaya and Pelosi—of Natural Blue. Ex. 417. The proxy closed with a recommendation from Datameg's Board to its shareholders to vote in favor of the transaction. Murphy Tr. 135:14-136:15; Cohen Ex. 417 at 7 ("Our Board of Directors believes that the Reverse Stock Split is imperative. . . . With the American Marketing loans exhausted, the Company and the Board need the flexibility that the Reverse Stock Split provides."). The company's shareholders then voted in favor of the transaction. Murphy Tr. 149:18-23; Cohen Ex. 29. The transaction closed on July 24, 2009. Cohen Exs. 44, 412-414; Murphy Tr. 164:11-165:10; 166:18-167:6.

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[3] Q Well, I think you stated that it automatically happens. And what I am referring to is a corporate action.
A I'm sure it is a formality that Paul, you know, explained that we had to go through.
Q Okay. So Mr. Vuksich was involved in helping the formalities along?
A **We wouldn't do anything without Paul.**
Q Okay. And do you recall Paul being involved in assisting the corporate formalities with respect to the transaction?
A **He was involved in all transactions**
Q In all transactions.
A **We didn't do anything without him**
Q Okay. And you don't remember, for example, that he wasn't involved in this transaction?
A No, I bet lots of money he was, so I wouldn't do anything without an in-depth discussion with Paul.

B. Cohen Did Not Control Board and Officer Appointments

The evidence shows that Cohen did not control who became officers and directors of Natural Blue, but rather that board members were properly elected by the shareholders or appointed by Anaya, and that officers were appointed by the Board and/or Anaya.

Following the close of the reverse merger, the shareholders of the company, now called Natural Blue, elected a new Board of Directors via consent in lieu of meeting. Cohen Ex. 55; Anaya Tr. 1117:22-1118:4; Murphy Tr. 168:11-169:8; Pelosi Tr. 553:24-554:23; Vuksich Tr. 326:1-9, 427:12-428:23 (confirming that Vuksich as counsel participated in this process). The Board included the following initial directors: Anaya, Pelosi, Murphy[4], Samir Burshan and Daryl Kim. Cohen Ex. 55. These directors then, at a meeting on August 1, 2009 in Orlando, Florida, appointed Anaya as Chairman of the Board and named the following as officers of the company: Anaya (CEO), Pelosi (President), Vuksich (Secretary and General Counsel), and Walter Cruickshank (Treasurer and CFO). Anaya Tr. 1119:16-1120:3, 1120:19-1121:21 (confirming that Anaya agreed to the board appointments of Murphy, Burshan and Kim); Murphy Tr. 69:24-70:5, 172:24-174:9, 175:3-10 (testifying that Cohen did not direct Murphy's vote for officers, and confirming that Murphy decided on how to vote his own shares); Div. Ex. 24.

At later periods, Anaya continued to seek recommendations for individuals to serve on the Board, review their qualifications, and then appoint them based on his review. Anaya Tr. 1121:22-1124:3. With respect to Paul Whitford, a board member from May 2010-January 2011 (Div. Ex. 300), Anaya spoke with Whitford, learned that he was a licensed attorney and a licensed CPA, and determined to appoint him to the Board (Anaya Tr. 1122:2-1123:4, 1128:6-

[4] Murphy testified that he decided to stay on the board of Natural Blue post-merger because he "believed the prior shareholders needed a voice, and I felt I would be the best voice of that." Murphy Tr. 73:21-25. He further stated that Cohen did not control Murphy's shares or direct Murphy to vote them a certain way for the purposes of electing board members. Murphy Tr. 171:10-172:1.

1129:5); Anaya later stated that he had "great respect" for Whitford, who "proved to be a good Board member" (Anaya Tr. 1122:21-1123:4). Before appointing John McCall to the Board, Anaya spoke with McCall, learned his background as a banker and his interest in bringing investors to Natural Blue, and gained comfort with McCall; McCall served on the Board from May 2010 to November 2010. Anaya Tr. 1123:5-19, 1128:6-1129:5; Div. Ex. 300; Cohen Ex. 186. Anaya also mined his own contacts regarding potential Board service. Anaya Tr. 1123:20-1124:3, 1125:4-9, 1127:13-1128:5; Cohen Ex. 179.

C. Cohen Did Not Control Selection of Natural Blue's Attorneys, Accountants or Auditors, Nor did he Control the Services they Provided

From August 2009 through January 2011, Natural Blue retained a number of professionals to provide legal, accounting and auditing services. Div. Ex. 300. Anaya consistently testified that these professionals were hired at*his* direction. Anaya Tr. 832:5-8 (confirming that he "accepted the recommendation" to hire an auditing firm), 1183:3-1184:6 (Anaya was familiar with BakerHostetler, Jeffrey Decker's "well-respected firm," and interviewed Decker to determine he was "an attorney of substance" before hiring him; Decker had no prior relationship with Cohen or Corazzi) (*see also* Decker Tr. 1510:6-1511:1); Anaya Tr. 838:15-18 (Anaya retained attorney Michelle Henry on behalf of Natural Blue), 942:9-13 (Anaya decided to hire Jehu Hand "as a virtual CFO" and "bring in a bookkeeper that had been doing bookkeeping for me") (*see also* Cohen Ex. 434 at 34 (Hand testified that neither Cohen nor Corazzi had anything to do with his retention and that "Cohen didn't have any power or control over the company at all")), Anaya Tr. 1020:11-1021:6 (Anaya decided to hire Paul Vuksich as counsel, signed the retainer agreement, and termed the services Vuksich provided to the company to be "excellent"), 1107:5-1108:5 (agreeing that Vuksich had no preexisting relationship with Cohen or Corazzi and that Anaya signed a waiver of conflicts letter for the

services Vuksich provided pre-merger), 1125:10-1126:7 (Anaya interviewed Steve Rountree to provide legal services for Natural Blue and then retained him); 1265:2-1265:1 (Anaya hired the Silberstein firm to be Natural Blue's auditors).

Anaya's efforts in seeking to hire a new auditing firm in mid-2010 are instructive: following the resignation of the firm of Cross, Fernandez & Riley LLP, Anaya sought recommendations from a number of sources, including Decker, Rountree, and fellow board member Paul Whitford. Anaya Tr. 1259:2-1265:1; Cohen Exs. 149, 166, 197, 191. Only after none of the recommendations provided by others panned out did Anaya then seek recommendations from Cohen and Corazzi. Anaya Tr. 1264:8-1265:1.

These professionals provided real services and guidance to Natural Blue and Anaya, and always under the direction of Anaya. Vuksich helped organize the initial meeting of the Natural Blue board and prepared meeting minutes as well as other organizational documents. Anaya Tr. 847:11-18; Vuksich Tr. 427:12-428:23; Vuksich Tr. 1070:6-19. Vuksich also provided extensive material to Anaya and other board members regarding their obligations and duties, with particular reference to required public filings, and advice on matters including proper recordkeeping. Anaya Tr. 867:25-868:25, 1013:1-1014:6, Anaya 1077:6-10; Vuksich 398:5-399:14, 401:4-13, 417:9-418:19 and Cohen Ex. 31 (Vuksich recommended accountant to Anaya), 435:14-438:3; Cohen Exs. 22-23. Anaya engaged in extensive direct communication with and oversight of Vuksich on these topics. Anaya Tr. 1072:22-1073:15, 1075:1-22, 1076:6-1077:1; Vuksich 446:5-10, 450:10-451:19 Cohen Exs. 65-66 (Anaya provided direction relating to litigation); Cohen Ex. 22. Vuksich looked to *Anaya*, not others, to approve all legal documents. Anaya Tr. 1114:9-15; Vuksich 389:14-390:5, 393:18-394:7, 468:17-25 (Vuksich

took direction from Anaya "[b]ecause by law and by contract, I have one person to report to in the corporation, and that's the CEO").

Decker communicated frequently with Anaya, was responsive to Anaya, and consulted him on important business or to get direction. Anaya Tr. 870:15-21, 1188:25-1189:3; Decker 1514:1-18. Decker also interacted with the Board as a whole on occasion. Decker Tr. 1519:23-1520:16. Decker and his firm handled SEC filings for Natural Blue and also performed corporate and transactional work. Decker Tr. 1512:4-22, 1517:11-1518:8. Decker recommended that Natural Blue hire a financial consultant, Nancy Hennessey to assist in financial matters, and Anaya looked to Decker for recommendations for an auditing firm. Anaya Tr. 1259:2-1260:7; Cohen Ex. 149; Decker Tr. 1525:1526:24. When Anaya determined that Decker's legal bills were too high, *Anaya directed Cohen and Corazzi* that they should withhold from incurring additional legal expenses. Anaya Tr. 1188:1-1189:25, 1190:6-14; Cohen Ex. 148.

Rountree provided Anaya with all relevant documents and looked to Anaya for approvals. Anaya Tr. 1187:25-1188:5. As had Decker, Rountree also provided Anaya with recommendations for an auditing firm. Anaya Tr. 1261:11-1262:15.

Anaya directed Hand explicitly that "only I, of course, can authorize any such filings or disclosures." Anaya Tr. 1318:13-17; Cohen Ex. 363. Hand understood that Anaya made all business decisions for the company and its subsidiaries. Cohen Ex. 434 at 35.

As discussed in detail *infra*, attorneys and other professionals also played extensive roles in preparing, reviewing and submitting required filings to the SEC.

Even parties negotiating with Natural Blue regarding potential transactions were aware that the company and Anaya were receiving legal advice, including during the negotiations over the Atlantic deal. Ross Tr. 733:14-734:2, 734:24-735:10.

D. Cohen Did Not Control Natural Blue's SEC Filings or Disclosures of Management

The testimony from Anaya and the professionals who provided legal and professional services to Natural Blue demonstrated that they, not Cohen, were responsible for Natural Blue's SEC filings, and contemporaneously determined that the descriptions of management and Cohen's role as a consultant (not an officer) in those filings and other disclosures was accurate.

1. Anaya Participated in the Preparation of SEC Filings as Natural Blue's CEO, Received Advice from Counsel, and Approved the Filings

As Anaya prepared to take office as Natural Blue's CEO, he received from Vuksich information regarding his responsibilities to ensure proper and accurate filings on behalf of the company, and Anaya "understood" these responsibilities. Anaya Tr. 867:25-868:25, 1013:1-1014-6 and Cohen Ex. 23, Anaya Tr. 1015:2-8 (Anaya was familiar with the Sarbanes-Oxley CEO certification); Vuksich Tr. 418:13-420:6 and Cohen Ex. 31. And over the rest of his term as Natural Blue's CEO, Anaya at all times required review by Natural Blue's counsel prior to authorizing a filing. Anaya Tr. 869:23-870:1 ("[I]f [the filing] had not already been sent to our general counsel, I would forward it to the general counsel for his review as well."), 1214:12-23 (confirming that Anaya worked with Decker to review draft filings); Decker Tr. 1527:17-1528:20 (Decker and his colleagues from BakerHostetler conducted review and diligence over several months to prepare the 2009 10-K), 1536:9-1537:8; Cohen Exs. 139, 440. Anaya also relied on his respective Chief Financial Officers, Walter Cruickshank and Jehu Hand, as well as the outside consultant Nancy Hennessey, to participate in preparing the filings. Anaya Tr. 869:19-21; 910:7-911:11, 1254:21-1255:8; 1257:4-1258:2; Cruickshank Tr. 1589:1-21 (Cruickshank prepared filings by calculating data, taking input from officers and attorneys, compiling information, and submitting drafts to "the rest of the Board members and officers for review and filing"); Cohen Exs. 116, 434 at 43 (Hand testified that he was "the principal in

preparing [a 10-Q] with Toney Anaya[,] with constant talking to him about that with Steve Rountree").

Anaya used the input and review "of the CFO . . . the independent auditor, the legal counsel, and whatever review I could provide on my own based on . . . what was presented to me" to achieve a sufficient level of comfort to sign and submit the filings. Anaya Tr. 1015:9-1016:16.[5] And no filing was submitted to the SEC that Anaya had not reviewed and approved. Anaya Tr. 1109:7-1110:6 (Vuksich was "vigilant" in forwarding draft filings to Anaya, "seeking [Anaya's] comments, getting [Anaya's] comments, and getting [Anaya's] approval"), Anaya Tr. 1127:9-12 (confirming that Hand "always ensure[d] that [Anaya] received and commented on and approved any of the public filings that he worked on"); Anaya Tr. 1318:13-17 and Cohen Ex. 363 (Anaya directed Hand explicitly that "only I, of course, can authorize any such filings or disclosures"); Anaya Tr. 1187:25-1188:5 (Rountree ensured that he provided Anaya all relevant documents and obtained all relevant approvals); Anaya Tr. 1254:21-1255:8 (Anaya reviewed draft filings, asked questions of Cruickshank, and when "questions were answered and satisfied, [Anaya] would then approve the filing"); Anaya Tr. 1256:4-1258:2 (Anaya reviewed 2009 10-K prior to filing and communicated with Decker, Nancy Hennessy, Cruickshank, and outside auditing firm); Anaya Tr. 1265:2-1266:13; Cruickshank Tr. 1592:25-1593:24 (approval for filings came from "individual Board members and the governor . . . and the attorney"); Cohen Exs. 116, 139, 222.

In contrast to the roles Anaya and Natural Blue's counsel played with respect to approving filings, Jeff Decker testified that he did not "recall having a lot of discussions or any

[5] Anaya testified that Cohen and Corazzi participated in drafting and reviewing the filings, but did not testify that they controlled or had authority over the filings. Id To the contrary, *Anaya requested* that Cohen or Corazzi would review and offer input on draft filings. Id 1088:14-25.

discussions with Jim [Cohen] on the totality of the 10-K under any circumstances." Decker Tr. 1541:3-5.

The issue of disclosure of management was addressed not only in the context of the 10-Ks and 10-Qs but also in relation to disclosures that appeared on the Natural Blue website. Disclosures regarding the Company's consultants were a specific item of discussion, with Governor Anaya repeatedly emphasizing that he needed to ensure that the public disclosures of personnel accurately reflected those who did – and did not – participate in management. Anaya Tr. 1291:12-1293:10; Cohen Ex. 227 (describing "discussion about making sure the web site wasn't misleading investors . . . [by] suggesting that those [consultants] may have a larger role in NTUR than they really do"). Leaving no doubt who made the final decision as to the content of the Company's public disclosures, Governor Anaya advised Corazzi that he would confer with counsel and be guided by the overarching requirements of the securities laws. Anaya Tr. 1295:14-1296:24 (recounting communications with counsel Jeff Decker regarding disclosure of consultants and management), 1302:7:16 ("I would not let Jeff Decker be the final say on that, because I already had a very strong opinion . . . ."), 1303:13-1305:5; Cohen Exs. 153, 227, 228 (Anaya reporting that he was checking with "SEC counsel to make sure that whatever we do, we are in compliance with SEC"), 230 (Anaya describes to Corazzi communications with counsel, and summarizing the "need to specifically meet SEC rules, regs, laws and not mislead as to who is – or, who is not – involved in management of the various divisions or of the company"). And Governor Anaya then made that decision: by email dated June 3, 2010, he conveyed to those involved in the web site the final list of those who would be identified as "officers for Natural Blue Steel, Inc." Anaya Tr. 1305:1-5; Cohen Ex. 233.

2. Legal Counsel, Knowledgeable About the Roles Played by Cohen and Corazzi, Agreed with the Disclosures About Management

Further, at the time that Natural Blue's attorneys provided advice on the company's filings and the disclosures of management therein, they were well aware of the roles Cohen and Corazzi were actually playing with the company. Anaya Tr. 1212:13-25 (Decker worked closely with Cohen and Corazzi and understood that they played an active role in the business of Natural Blue); Decker Tr. 1537:13-25. This knowledge did not lead *any* of the company's counsel to suggest that Cohen or Corazzi should be disclosed as officers, nor did counsel testify as to participation in any related scheme to conceal their true roles. Vuksich Tr. 410:20-411:10 (Vuksich did not have any issues with disclosures of management in filing or have a belief that he was concealing Cohen's role), 452:24-453:18 (Vuksich stated that "the filings when made are not false"); Anaya Tr. 1214:12-1215:3 (Decker reviewed the language in the 10-K regarding management), 1287:13-1289:3, 1292:23-1293:10 (disclosure of roles of Cohen and Corazzi discussed with Decker, Rountree and Hand), 1303:13-1305:5, 1307:16-19 (Anaya did not enter into any scheme to conceal the role Cohen or Corazzi played from investors); Decker Tr. 1538:1-18 (with reference to 10-K that disclosed the consulting agreement Natural Blue had entered into with JEC Consulting, Div. Ex. 75, Decker did not "feel that the responsibilities that [Cohen or Corazzi] had for the company made them executive officers at all much less to be disclosed in the 10-K under the disclosure rules"); Decker Tr. 1541:12-15 (Decker never communicated with Cohen or Corazzi regarding concealing their roles from investors); Decker Tr. 1568:7-21 (Cohen told Decker about his criminal history at the beginning of Decker's engagement); Cohen Exs. 228, 230.

Other board members and officers testified similarly. Murphy Tr. 179:2-5 (regarding Cohen and Corazzi's roles, Murphy stated "we wouldn't conceal anything"), 206:3-11 (same);

Anaya Tr. 1307:16-19 ("Q: Did you, during this period of time, enter into any scheme with Mr. Cohen and Mr. Corazzi to conceal their role from investors. A: Of course not.").

E. Cohen Did Not Control Natural Blue's Financial Records

Natural Blue's financial records were kept and controlled by the company's Chief Financial Officers, Walter Cruickshank and then Jehu Hand.

Cruickshank's term as Chief Financial Officer covered August 2009 through August 2010. Div. Ex. 300. At an August 1, 2009 Board of Directors meeting, Cruickshank was elected as Chief Financial Officer (Div. Ex. 24), and Anaya subsequently directed Cruickshank to keep corporate records (Anaya Tr. 1077:2-5, 1143:4-1144:3). As mandated by Anaya, Cruickshank did then "keep[] the books of original entry, which is a general ledger" (Cruickshank Tr. 1589:1-6), and he kept the "general ledger [on a] reporting system we had" (Cruickshank Tr. 1593:6-11). Cohen did not have access to the general ledger. Cruickshank Tr. 1610:8-24.

At the conclusion of Cruickshank's term, he transferred to Jehu Hand, his successor as CFO, "copies of [the] internal ledger and any detail that he asked for." Cruickshank Tr. 1598:5-11. Cruickshank recalled that he sent the relevant material first as a single file, then learned that Hand's system "wouldn't accept it," and so instead "had to break it up into three pieces until his system could accept that size file." Cruickshank Tr. 1598:16-1599:1. Cruickshank testified that through this process, Hand received "[t]he general ledger, which is the activity, the electronic version of the general ledger . . . [w]hich [Hand] could take and plug into a QuickBooks system." Cruickshank Tr. 1599:2-14. Cruickshank also confirmed that Cohen never directed him not to provide financial records to Hand. Cruickshank Tr. 1599:16-18

Hand was hired by Anaya and became CFO of Natural Blue in September 2010. Div. Ex. 300; Anaya Tr. 942:9-13 (Anaya decided to hire Jehu Hand "as a virtual CFO"); Cohen Ex. 434 at 32-34 (Hand testified that neither Cohen nor Corazzi had anything to do with his retention).

Hand testified that, upon assuming his responsibilities, he did receive "one download of documents" from Cruickshank. Cohen Ex. 434 at 35:17-18. As to additional information he sought, Hand recalled that Anaya and other company personnel were able to provide him with what he required. Id. at 37:14-38:1. Hand utilized the "Peachtree Complete Accounting" system to "recreate the general ledger." Id at 38:20-39:17. As a result of this process, Hand substantially recreated the relevant accounting records to enable the filing of a 10-Q for the period ending September 30, 2010 that he considered accurate and not misleading (id at 40:5-16), and Anaya did in fact certify and sign that filing (Anaya Tr. 1273:25-1275:17, 1280:19-81:1; Div. Ex. 134). Hand also confirmed that Cohen did not control Natural Blue's financial records, and indeed stated that "Cohen didn't have any power or control over the company at all." Id. at 34:24-25.

F. Cohen Did Not Control Disbursement of Funds

According to the Natural Blue bylaws and in fact, Anaya controlled the disbursement of funds.

Anaya testified that he was responsible for approving payment of invoices for major payments. Anaya Tr. 1100:17-21; Cohen Ex. 56 at 5. Anaya would request input from Cohen or Corazzi if they were in a position to know about the legitimacy of a given obligation. Anaya Tr. 1099:18-100:21. Cruickshank, too, testified that "Governor Anaya had the control of all the bank accounts and he would do the payments" (Cruickshank Tr. 1590:14-19), and also had sole authority over wire transfers (id 1591:10-13). Anaya had "ultimate approval" when a bill came in as to whether to pay it. Cruickshank Tr. 1592:5-24. Cruickshank reflected that from an "internal control" perspective, this arrange was "better" as it separated the functions of disbursement (Anaya's responsibility) and recordkeeping (Cruickshank's responsibility). Id 1590:22-1591:5.

G. Cohen Did Not Control Natural Blue's Transaction with Atlantic

Anaya maintained control over Natural Blue's transaction with Atlantic Acquisitions and Atlantic Dismantling (collectively, "Atlantic"), reviewed and altered the material deal terms and the legal agreements, and retained and provided final approval over the deal.

Anaya confirmed that he discussed the proposed transaction with Corazzi, reviewed drafts of contracts, participated in "in-depth discussion" of the deal, and met telephonically with the management of Atlantic. Anaya Tr. 969:25-971:4;*see also* Montalto Tr. 1328:18-1329:2 (recounting conversation with Anaya prior to the deal being finalized). Anaya asked that his fellow Board Member Paul Whitford receive copies of relevant financial records, and testified that both he and Whitford had familiarity and expertise in reviewing such records. Anaya Tr. 972:22-973:21. Anaya did diligence on Atlantic's management, involved Whitford and Rountree in the diligence, and concluded that there were "three or four points that I found attractive for Natural Blue." Anaya Tr. 975:23-977:25, 1309:10-15; Cohen Ex. 332. Anaya authorized Hand to deal directly with Corazzi with respect to receipt and review of key deal documents. Anaya Tr. 1311:14-18; Cohen Ex. 341. In reviewing the draft contracts, Anaya requested that changes be made; these changes were accepted because otherwise, Anaya "wasn't going to sign" the agreement. Anaya Tr. 984:9-985:11, 1312:12-1313:5, 1316:14-23; Cohen Exs. 351 (providing comments on eight different aspects of the draft agreement), 360. After satisfying himself with respect to this process and the deal, and following a Board meeting to discuss it, Anaya signed the final agreement. Anaya Tr. 985:12-14, 1318:18-25; Cohen Ex. 365.

Even from the perspective of the others that Natural Blue was negotiating with regarding the deal, it was clear that Anaya maintained communications with his negotiating agents and retained final approval over the deal. Ross Tr. 729:11-21, 730:5-10, 730:21-731:5 (Ross testified his "understanding was that as the CEO, Toney Anaya would have to sign the documents"),

733:1-8; Cohen Ex. 160. Eric Ross was also aware that the terms of the deal and the legal documentation were subject to review by counsel. Ross Tr. 733:14-734:2, 734:24-735:2.

H. Anaya and other Natural Blue Directors and Officers Exercised Control Over Cohen

Anaya consistently exercised authority over Cohen with regard to Natural Blue's affairs, and retained final policy-making control in a variety of areas.

Anaya testified that he, not Cohen, had the authority on behalf of Natural Blue to enter into contracts, and to hire or fire legal counsel. Anaya Tr. 1019:13-1020:7, 1033:24-1034:13.[6] Indeed, Anaya testified that Cohen made a recommendation to hire Vuksich as counsel, but the final decision remained Anaya's. Anaya Tr. 1020:11:1021:6. Anaya restricted Cohen's ability to interact directly with outside counsel. Anaya Tr. 1188:25-1189:25, 1190:6-23, Cohen Ex. 148. Anaya provided explicit direction for Cohen to perform specific tasks, such as developing a website, responding to shareholder questions, seeking to resolve outstanding litigation, and pursuing fundraising and acquisitions. Anaya Tr. 1085:4-1086:1, 1235:25-1236:20, 1238:2-4, 1240:15-18, 1242:25-1243:24; Cohen Ex. 119, 419. As Anaya testified, even if Cohen told Anaya to simply sign a contract, Anaya "would not have signed it without taking it to the Board . . . he could tell us that, but it may or may not happen." Anaya Tr. 1025:4-16;*see also* 1147:18-1148:12 (testifying that "those items that required corporate action, Board action, they would come to me and I would bring them to the Board"). Anaya, not Cohen, had the authority to approve and finalize legal documents and filings. Anaya Tr. 1114:9-15. And at no point did Cohen control Anaya's stock. Anaya Tr. 1116:6-12.

[6] Anaya asserted that Cohen "exercised" authority to hire or fire lawyers, id, but provided no examples of Cohen actually having done so.

As discussed above, when it came to the Atlantic deal, Anaya demanded that Corazzi and Cohen accept his required changes to the deal documents, stating that "they had to because I'm the one that had – if I didn't agree, I wasn't going to sign it." Anaya Tr. 985:4-11; 1021:12-18. Indeed, Anaya confirmed that he "rejected" the initial structure of the Atlantic steel deal that Cohen and Corazzi presented to him. Anaya Tr. 1169:7-25.

Anaya's course of conduct with respect to the JEC Consulting agreement illustrates this dynamic, as Anaya "made the decisions, even the ones that relate to Cohen's relationship with the company and the extent to which he was going to receive compensation." Anaya Tr. 1022:1-10. As documented at trial, prior to entry into an agreement with JEC, the Natural Blue Board went through a multi-week deliberative process consisting of multiple Board discussions and the review and amendment of draft agreements. Anaya Tr. 1171:10-21, 1172:10-15, 1173:5-15, 1176:15-1177:23; Div. Ex. 41. After extensive deliberation, "ultimately the Board unanimously, all five Board members, approved the contracts." Anaya Tr. 859:15-17, 864:10-17. And later on, after Anaya grew dissatisfied with Cohen's performance, Anaya "put [Cohen] back in his place" and suspended Cohen's consulting agreement; Anaya was able to do that because Anaya, not Cohen, was the chief executive officer and Chairman of the Board, and Anaya had the support of the Board against Cohen. Anaya Tr. 1029:18-1031:9; Anaya Tr. 1166:13-19 (Anaya recounted that "I did suspend [Cohen]").

III. The Division Has Not Adduced the Evidence it Anticipated

A. Order Instituting Administrative Proceedings

The SEC's OIP recites its overarching claim against Cohen: "Cohen and Corazzi" created and "controlled" Natural Blue "while failing to disclose their roles as *de facto* officers." (OIP ¶ 47).

It also includes a series of allegations that reflect that Governor Anaya and Erik Perry occupied the executive positions and possessed and exercised the authority associated with their positions. Even the SEC's OIP appears to acknowledge that those executives ran the Company but claims that, in so doing, they were too "influenced" in their decisions. According to the SEC, Anaya, Perry and others improperly "deferred" to "Cohen and Corazzi," and by "deferring" to them, allowed the "consultants to dictate the company's affairs." OIP ¶ 23. For example, according to the OIP, "Cohen and Corazzi recommended virtually all of the officers and directors" of Natural Blue, and those recommendations were allegedly accepted by the Chairman and Chief Executive Officer. OIP ¶¶ 11, 13. "Cohen and Corazzi" allegedly "exercised significant influence over the company." OIP ¶ 12. "Cohen and Corazzi" supposedly "pressured the board" and executives who then "approved" consulting agreements. OIP ¶ 12.

Throughout the OIP, the SEC effectively acknowledges that the company was controlled by its executives but asserts that the Company's filings were false because those executives acceded to the recommendations that were made by "Cohen and Corazzi."

B. The Evidence Runs Counter to Unsubstantiated Claims in the Division's Pre-Hearing Brief

The Division's Pre-Hearing Brief, filed January 26, 2015, made a series of unsubstantiated claims that found no support in the evidence developed at hearing. These claims, and the contradictory evidence, include the following:

- Reverse Merger Transaction: The Division claimed that Anaya "was informed by Cohen before coming on board that Natural Blue would eventually become public through a reverse merger." *In fact*, Cohen was directed by the Natural Blue Board to explore ways in which Natural Blue might become a public company, and the Board oversaw his efforts on that front. *Supra* pp. 9-12

- Natural Blue's Transition Away From the Water Purification Business: The Division claimed that Natural Blue "moved away from the water purification project . . . at the direction of Cohen and Corazzi." *In fact*, the company moved away from the water purification business because that business model was not successful. Pelosi Tr. 488:13-490:1 (noting that "[t]he water business, it was clear it was challenging. The land Toney [Anaya] delivered was not sufficient."), 555:3-9 ("[T]he water business was going sideways."), 558:25-559:2 ("The problem is we just didn't have any land or any projects. We couldn't get a contract.")

- Appointment of Cruickshank as CFO: The Division claimed that "Cohen dictated that Walter Cruickshank, the CFO of Blue Earth, be made the CFO of Natural Blue." *In fact*, the full Board of Natural Blue named Cruickshank as CFO at a board meeting on August 1, 2009. *Supra* p. 13.

- Hiring of Decker as counsel: The Division claimed that Natural Blue hired Decker "at Cohen's direction." *In fact*, Anaya testified that he was responsible for hiring Decker, and that Cohen had no prior relationship with Decker before Anaya hired him. *Supra* p. 14.

- Approval of invoices: The Division claimed that "Anaya was required to submit all invoices to Cohen and Pelosi for approval." *In fact*, Anaya testified that it was his responsibility to make "the material decisions with respect to the activities of the corporation," and "[t]he buck stops with me." *Supra* p. 5.

- JEC agreement: The Division claimed that Cohen and Corazzi "insisted that Natural Blue enter into consulting agreements" and "threatened to cancel and/or delay a fundraising trip" if the agreements "were not immediately approved by the board." *In fact*, the Board undertook a multi-week deliberative process through which the Board had the opportunity

to discuss the agreements, propose revisions, and vote whether the company should enter into the agreements. *Supra* p. 25.

- Pelosi resignation: The Division claimed that Cohen and Corazzi "forced" Pelosi off the board. *In fact*, Pelosi resigned from the Board; he was not removed by the shareholders. Cohen Ex. 107. In any event, as the Division's own expert testified, for a shareholder to vote "people on or off the board" is hardly surprising but rather a form of "a governance mechanism." Daines Tr. 1442:6-13.

- Anaya proposal for his daughter to perform bookkeeping for Natural Blue: The Division claimed that Cohen "refused" to accede to Anaya's desire "to move the company's books and records to his city of residence." *In fact*, Anaya proposed assigning bookkeeping responsibilities to his daughter, during the same period in which she was enmeshed in legal issues, having been arrested in January 2009 in connection with allegations of improper relations with a minor, and having pleaded no contest to a felony charge in or about August 2009. Anaya Tr. 1192:20-1193:20; Cohen Ex. 442.

- Atlantic deal: The Division claimed that "the Natural Blue/Atlantic transaction was orchestrated by Cohen and Corazzi, with virtually no input from Natural Blue's management," and "the Atlantic principals believed that Cohen and Corazzi were the people who ran Natural Blue." *In fact*, Anaya participated in "in-depth discussion" of the deal, discussed the deal directly with the management of Atlantic, and made substantive changes to critical deal documents; the other parties to the deal understood that Anaya retained final authority over the deal. *Supra* p. 23-24.

- Horowitz Testimony: The Division claimed that Natural Blue's auditors "resigned in 2010 because they were concerned about the high level of control that Cohen

exercised over the company and had learned that Cohen had a disciplinary history with NASD." *In fact*, the resignation letter the auditors sent to Natural Blue made no mention of this purported rationale, and stated instead that "[t]his decision was based on our assessment of our internal resources and the expected future service needs of the company." Cohen Ex. 425; Horowitz Tr. 615:17-616:3, 588:14-25 (excluding Div. Ex. 252).

- Removal of Perry: The Division claimed that "Cohen directed Perry's ouster because a plan being proposed by Perry would have significantly decreased Cohen's and Corazzi's influence over Natural Blue and their ownership interest." *In fact*, Perry was removed because, as Board Member Joseph Montalto testified, Perry "wouldn't listen to anybody or take anybody else's advice under consideration. He was pursuing contracts that we knew could never be fulfilled or we knew that they weren't real," and "the company was going to spiral out of control." Montalto Tr. 1358:4-24; *see also* Div. Ex. 287 (SEC Order Instituting Administrative and Cease-and-Desist Proceedings against Perry and imposing sanctions based on material misrepresentations made by Perry and Natural Blue while Perry served as CEO).

- Hussein Testimony: The Division claimed that Division staff accountant Sofia Hussein would demonstrate that Cohen and Corazzi were paid a majority "of all of the compensation paid by Natural Blue." *In fact*, Hussein testified that she was asked by the Division "litigators on this case" to include Cohen and Corazzi "in the compensation category" even though the two were not employees and did not receive payroll checks. Hussein Tr. 1412:24-1413:24. Hussein further testified that she was not able to distinguish expense reimbursements from other types of payments made to Cohen and Corazzi. Hussein Tr. 1417:3-1418:7.

- Daines Testimony: The Division claimed that their expert, Professor Robert Daines, would testify that Cohen and Corazzi's conduct, "as alleged by the Division, fulfilled the core conduct of senior executives and directors of a public company." *In fact*, Daines conceded on cross-examination that he had not considered for the purposes of his testimony the SEC rules relating to the disclosure of management (Daines Tr. 1460:25-1462:4, 1468:19-24), had not evaluated whether the Respondents had done any of the things alleged by the Division (id 1472:14-1473:10), and that certain of the actions alleged by the Division did not rise to officer-level acts (id. 1474:19-1475:6).

C. Multiple Witnesses Described Instances of Shareholders Taking Active Roles in Other Microcap Companies

A number of witnesses testified that, in their experience with companies other than Natural Blue, they were familiar with investors in microcap companies taking active roles in company activities, participating in money-raising, seeking to place representatives on the company's board, and influencing company management.

Vuksich testified that his role as counsel for Datameg arose out of the actions taken by one of the company's investors. Vuksich Tr. 367:13-369:3. The investor, who was not an officer or director of the company, also took steps to assist the company in money raising. Id Vuksich judged these activities not unusual. Id He stated that for "a penny stock company, . . . there is a very limited amount of funds to actually have worker bees doing things," and that he was aware of "active" shareholders engaging in activities such as communicating with management with business and personnel recommendations. Vuksich Tr. 372:4-373:19.

Pelosi testified that the events that led him to join another company's board of directors were spurred by one of the company's investors. Pelosi Tr. 525:4-21. He stated the investors

pushed for him to join the board because they felt that "because of [Pelosi's] record that [he] would bring relationships and [he] could bring some deals to the table." Id 526:10-15.

Eric Ross agreed that "activist investors" often seek to impact management, company structure, and who will serve as management. Ross Tr. 739:15-740:1.

And notably, the Division's own expert witness, Prof. Robert Daines of Stanford, testified extensively that one of the principal "aims of corporate governance [is] to make sure that control [of the corporations] is exercised in shareholders' interests" (Daines Tr. 1438:6-13), and that if active shareholders can exert "some influence over the board, it's more likely that managers might attend to shareholders' wishes" (Daines Tr. 1443:10-22). Daines agreed that shareholders *acting as shareholders* "are entitled to seek their interests," "can often change company strategy," "influence and change company management," and "accomplish this through private discussions with members of management as opposed to formal shareholder meetings." Daines Tr. 1450:20-1451:25; *see also* Daines Tr. 1452:19-1453:17 (stating that "shareholders are entitled to press for their rights, including if they want to change the course of the firm or even its management").

DISCUSSION

From a legal perspective, the claims of the SEC appear to ignore both existing authority regarding alleged *de facto* officers, and the plain teachings of Janus. First, relevant authority demonstrates that one cannot be found to be a *de facto* officer – undisclosed in public filings that are thereby rendered false – unless he occupies a policy making function. It is not enough that he provides services to a corporation, or that he is an active critic or advisor to the company. If that were the case, countless companies and their executives would be in violation of the securities laws. There has to be, and there is, a standard by which such issues are judged, and that standard cannot be so nebulous that a consultant's rendering of advice, or an executive's

acceptance of that advice, transforms the advisor into a *de facto* officer. As discussed below, to constitute a *de facto* officer, an individual has to actually set and control policy.

Here, the evidence bears out that neither the executives nor the accounting professionals nor the board nor the Company's counsel were "controlled" by Cohen or Corazzi. The public filings that described them as consultants were reviewed and approved, time and again, by that combination of professionals, all of whom were fully aware that Cohen and Corazzi were consultants and were active in assisting in the Company's affairs but were also aware that it was the executives and the Board who made the final decisions and accepted, or rejected, the consultant's advice.

Even assuming that Cohen was acting as an undisclosed officer, the allegedly false statements to investors were made by those who issued the public filings – not by Cohen. Under the language and reasoning of the Janus decision, those "makers" of the allegedly false statements would be liable for the public filings. Any effort to circumvent the holding of Janus through a "scheme" theory would also fail, since courts have repeatedly held that a scheme theory cannot be deployed to charge fraudulent statements where the charges would otherwise fail under Janus.

I. The SEC Did Not Establish That Cohen was a *De Facto* Officer

Only a small handful of decisions have been located that address the definition of a *de facto* officer in this context.[7] Both of the decisions illustrate that Cohen falls well outside the scope of those who can be characterized as officers for purposes of a finding that all of the Company's public filings were false.

[7] In SEC v. Prince, 09 cv 01423-GK, in its Post-Trial Submission on this issue, the SEC commented that there is a "dearth of decisional law on the issue of what functions are sufficient to bring an employee, regardless of title, within the definition of officer as that term is defined by the federal securities laws." [Doc. 149 at 11 of 59.] The SEC went on to cite what was then, before the Prince decision, the only applicable ruling on the issue: SEC v. Solucorp Indust. Ltd., 274 F. Supp. 2d 379 (S.D.N.Y. 2003).

The most fulsome discussion of the issue appears in SEC v. Prince, 942 F. Supp. 2d 108 (D.D.C. 2013). That case involved the same basic claims at issue here: the SEC alleged that Gary Prince was an undisclosed *de facto* officer of Integral, and that he and others were therefore liable for false statements in the public filings that described him as a consultant. There, as here, Prince was responsible for, among other things, "investigat[ing] possible acquisitions of other companies" and reporting those to Chamberlain, the Chief Executive Officer. But Prince was also responsible for a range of other corporate responsibilities including "overseeing the operations of the subsidiaries" and supervising their activities and employees. Id. at 115-130. Further, he was a member of a small group of advisors who were consulted by the Chief Executive Officer in relation to the creation of policy. Id. at 116.

> Generally, Prince would advise and make recommendations to Chamberlain, who would then accept or reject them. Once Chamberlain made a decision, Prince or the relevant Group head would then implement it.

Id. at 117.

Notably, the Chief Executive Officer was fully aware that Prince had a legal history, and deliberately created a "position for Prince that would not require Integral to disclose" that background. Id. at 113. Integral's counsel was fully aware of the substantial role occupied by Prince and confirmed to management that Prince's biographical information need not be disclosed in the company's public filings. Id. at 121-24.

In a lengthy decision concluding that the SEC had failed to establish that Prince was a *de facto* officer, the court set forth the requisite elements for the SEC's allegation that Prince was part of a scheme to conceal his role as a *de facto* officer and his legal history. The SEC must begin, the court stated, by proving "that Prince was a de facto officer" and must also prove by a preponderance of the evidence that (1) Prince did not make certain disclosures "in order to perpetuate a 'scheme to defraud' that had the principal purpose of not disclosing his history of

securities fraud violations to the public; (2) his legal history was a material fact; (3) the scheme was made in connection with the purchase or sale of securities; and (4) Prince had the requisite scienter." Id. at 131.

On the threshold issue of Prince's alleged status as a *de facto* officer, the Court looked to Rule 3b-7 under the Exchange Act, which defines "executive officer" as "any officer who performs a *policy making function* or any other person who performs similar policy making functions." Id. at 132 (citing 17 C.F.R. § 240.3b-7) (emphasis added). The court then turned to consideration of the facts and readily concluded that it was the Chief Executive Officer – not Prince – who "was the only person who had authority to make company policy for Integral." Id. at 134. The court considered each of the roles that Prince occupied: as an "influential" advisor, as the director of the Mergers and Acquisitions program, and as the supervisor of the Contracts Department. Notwithstanding those substantial functions, the evidence confirmed that "the ultimate decision" on each significant issue "remained with Chamberlain," the Chief Executive Officer:

> The record is clear that, while Prince exercised significant influence at Integral and was very close to Chamberlain, he did not have the authority to make or implement any policy decisions. Such authority lay with Chamberlain and the heads of the various groups. ***To decide that the Regulations reach individuals involved in discussing company strategy and policy, but who do not have the authority to actually implement such policy would expand the scope of de facto officer status far beyond what any court has to date recognized as policy making authority.***

Id. at 136 (emphasis added).

The court also considered "the few cases that have found an employee to be a de facto officer because of their ability to make policy." Id. at 134. Those cases, the court found, "involved alleged 'consultants' who were actually in total control of a company" and so none of those cases involved factual situations similar to Integral, where there was management in place and making the "ultimate decisions."

The SEC endorsed a similar analysis, and came to a similar conclusion, in the Douglas W. Powell matter. A.P. File No. 3-11086, Initial Dec. No. 255, 2004 SEC LEXIS 1796 (Aug. 17, 2004) *and* Securities Exchange Act of 1934 Release No. 50423, 2004 SEC LEXIS 2171 (Sep. 22, 2004) (notice that initial decision has become final). The case involved, among other issues, a claim by the Division of Enforcement that two individuals enacted "a plan to surreptitiously hide their de facto control of [a broker-dealer] in violation of Section 15(b)(6)(B)(i) of the Exchange Act." 2004 SEC LEXIS 1796, 33. As evidence, the Division pointed to the existence of a Services Agreement through which the individuals would provide certain management and consulting services, id at 10, and that the individuals participated in interviewing and hiring staff of the company, and attempting to resolve broker-related problems. Id. at 33-34.

The court rejected the Division's claim, finding that the individuals' conduct "was consistent with the Services Agreement" that governed the relationship between the individuals and the company, and was also consistent with a disclosure made to the SEC. Id. at 40. Accordingly, the court found that the individuals were not "in de facto control" of the company. Id.; *cf.* Robert G. Weeks, A.P. File No. 3-9952, Securities Act of 1933 Release No. 8313, 56 S.E.C. 1297, 1315-16 (Oct. 23, 2003) (concluding that Respondent "served in a control capacity as a de facto 'executive officer' and 'director'" only after determining that other "putative officers and directors" were mere "figureheads acting at his (and others') direction" and that these "figureheads . . . exercised neither authority nor influence in the management and operations of [the company]").

The role occupied by Cohen in this case was certainly far less substantial than that of Prince, and the same result should hold. In every material aspect of Natural Blue's operations, as

described *supra*, the testimonial and documentary record evidenced that Cohen's role was controlled and circumscribed by Anaya. Cohen did not make Natural Blue policy or hold authority over Board and officer appointments, the hiring of legal counsel, corporate actions and transactions, public filings, disbursements or the company's financial records. In all of these areas, and others, he answered to Anaya. And Anaya maintained direct control over Cohen's actions, even suspending Cohen's consulting contract.

The dealings between Cohen and Natural Blue are susceptible of only one logical and consistent explanation, in contrast to the Division's rather unlikely tale of a conspiracy among a cast of changing and disparate characters. The public filings for the period of the transactions at issue – the fall of 2009 through 2011 – are signed by Governor Anaya, Walter Cruickshank, Erik Perry and others, and with the review and advice of counsel Paul Vuksich, Jeffrey Decker, Steve Rountree, and Jehu Hand. According to those filings, the management of the Company is comprised of its officers and directors, who make business decisions regarding the Company's activities based on input from many sources but, ultimately, their own business judgment. The contemporaneous documents and email communications demonstrate that Governor Anaya was actively involved in the business and fully capable of making his own decisions. The SEC has not established that Cohen occupied any role that, under the reasoning of SEC v. Prince, could lead to a conclusion that he should be considered a *de facto* officer.[8]

[8] Solucorp, and SEC v. Enterprises Solutions, 142 F. Supp. 2d 561 (S.D.N.Y. 2001), relied upon heavily by the Division, are both distinguishable. In both cases, the courts determined that the relevant individuals had acted as de facto officers after evidence that they were in substantial control of the respective companies. *See* Solucorp, 274 F. Supp. 2d at 385-386 (individual held himself out as company's CEO and chief operating officer, and was addressed by third parties "as the CEO and/or chairman of the Company"); Enterprises Solutions, 142 F. Supp. 2d at 568-570 (consultant in functional control while company had no chief executive or board; subsequently, consultant, not board, hired new CEO).

II. The SEC Did Not Establish that Cohen was the Maker of any False Statement

The assertion that Cohen served as an undisclosed officer is, analytically, a claim that the officers and directors of the company each knowingly lied in public filings. That theory not only requires the factual proof of a sweeping conspiracy but also implicates the substantial authorities relating both to the identity of the "maker" of the statement and the extent to which omissions are actionable. Unlike statements, omissions are actionable only if the defendant had a duty to disclose the omitted information." Genesee Cnty. Emps' Ret. Sys. v. Thornburg Mortg. Sec. Trust, 825 F. Supp. 2d 1082, 1127 (D.N.M. 2011). Here, an omission or "concealment" would require evidence not only of Cohen's actual control but also that he and others knew that his role required disclosure. In this case, the level of Cohen's involvement was plain to officers, directors and counsel, but was not perceived to be at odds with management's the board's own description of its role. Under these circumstances, the SEC has not established that all of these various individuals had a duty to disclose further information regarding Cohen, understood that obligation, but deliberately failed to comply with their duty.

This claim of a misrepresentation or failure of disclosure also squarely implicates the decision of the Supreme Court in Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011). There, the Supreme Court rejected an interpretation of Rule 10b-5 that would impose liability for misstatements on those who supposedly enable or "create" the statements. Id. at 2303. The court held, in language that established the new standard for § 10(b), that liability for an allegedly false statements lies with the person or entity who*made* it, and defined the maker as the one with "ultimate authority" over the issuance and content of the statement. As plainly stated in Janus, "the maker of a statement is the entity with authority over the content of the statement and whether and how to communicate it." Id. at 2303.

Applying that new standard, the Janus Court held that an investment adviser and administrator who were "significantly involved in preparing" the allegedly false statements could *not* be liable for those misstatements and omissions under § 10(b) and Rule 10b-5(b). Id. at 2299, 2305. The Supreme Court held that only the company which issued the prospectus could be liable for misstatements and omissions, because any assistance the investment advisor provided was subject to the company's "ultimate control." Id. at 2304-05.

The Supreme Court also stated that its holding in Janus was "supported by our recent decision in Stoneridge," in which the Supreme Court found that entities that agreed to arrangements which allowed another company to mislead its auditor and investors could not be liable for the false statements, because "'nothing [the defendants] did made it necessary or inevitable for [the company] to record the transactions as it did.'" Id. at 2303 (citing Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 152-53 (2008)).

Janus and related decisions establish that Cohen cannot be charged in relation to the statements that were made – or not made – by the Company and its representatives because Cohen did not "make" the statements at issue.*See* SEC v. Kelly, 817 F. Supp. 2d 340 (S.D.N.Y. 2011) (SEC conceded that the new Janus standard precluded a claim for false statements against those who participated in the reported underlying event). The proposed claim does not satisfy this first and fundamental component of liability: the utterance – or "making" – of a false statement by Cohen.

In some instances, the SEC has attempted to evade the Janus requirement by arguing that it is alleging a scheme rather than a false statement. As noted in SEC v. Kelly, however, "courts have routinely rejected the SEC's attempt to bypass the elements necessary to impose

'misstatement' liability under subsection (b) by labelling the alleged misconduct a scheme rather than a 'misstatement.'" Kelly, 817 F. Supp. 2d at 343 (citing cases).

> Courts have not allowed subsection (a) and (c) of Rule 10b-5 to be used as a "backdoor into liability for those who help others make a false statement or omission in violation of subsection (b) of Rule 10b-5." In re Parmalat Sec. Litig., 376 F. Supp. 2d 472, 503 (S.D.N.Y. 2005). As the Court explained in PIMCO, to permit scheme liability "to attach to individuals who did no more than facilitate preparation of material misrepresentations or omissions actually communicated by others . . . would swallow" the bright line test between primary and secondary liability. 341 F. Supp. 2d at 467.

Id.

The courts in this and other jurisdictions have consistently held that "scheme liability must be based on conduct beyond misrepresentations or omissions actionable under Rule 10b-5(b)." Pub. Pension Fund Grp. v. KV Pharma, Co., 679 F.3d 972, 987 (8th Cir. 2012) (courts in the Second Circuit have held that "scheme liability must be based on conduct beyond misrepresentations or omissions actionable under Rule 10b-5(b)."); Stoneridge Inv. Partners, 128 S. Ct. at 770. The SEC may not construct a § 10(b) claim against a third party – who is not the "maker" of the alleged false statement – simply by asserting that they were involved in a transaction or "scheme" that was the underpinning for a false statement; the SEC can proceed against that third party only if it can identify separate conduct that, in and of itself, constitutes a deceptive or fraudulent act.

In the Kelly case, for example, the court was confronted with claims regarding AOL's arrangements with third parties which supposedly enabled AOL to overstate advertising revenue. The court noted that the underlying conduct was not deceptive in and of itself, but allegedly involved deception because it resulted in an overstatement of revenue in a public filing. The Kelly court rejected the SEC's attempt to pursue that claim. The court found that "[t]o impose liability on the third party under those circumstances would circumvent the holding in Janus;"

the contracting parties did not "make" the allegedly false statement concerning revenue in the public filing, and the SEC's claim was dismissed.

Here too, a scheme theory fails. There is no evidence that the consulting agreements were part of a "scheme," and certainly neither the Company nor its officers and directors testified that they participated in such a scheme – to the contrary, they disclaimed any such scheme. In addition, the particular disclosures relating to Cohen were specifically reviewed and approved by counsel. Finally, the alleged "concealment" and the "scheme" are essentially one and the same, and so the holding of Janus governs.

CONCLUSION

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