UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15974

In the Matter of

JAMES E. COHEN and
JOSEPH A. CORAZZI,

Respondents.

DIVISION OF ENFORCEMENT'S POST-HEARING REPLY BRIEF

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INTRODUCTION

In his post-hearing brief, Respondent James Cohen ("Cohen") alternately ignores and obscures critical evidence adduced at the February 2015 hearing – evidence that definitively proved that Cohen functioned as a *de facto* officer of Natural Blue, and that he schemed with Respondent Joseph Corazzi[1] ("Corazzi") to conceal their roles and disciplinary backgrounds at Natural Blue. First, in arguing that he was not a *de facto* officer, Cohen bobs and weaves his way through the factual record, distorting and minimizing evidence that does not support his defense. Below, the Division explains how the Respondent's post-hearing brief mischaracterizes Anaya's[2] and other witnesses' testimony, fails to address clear evidence of Cohen's scienter, and attempts to whitewash Cohen's control over Natural Blue. As the Division noted at the hearing, this case is not a slippery slope, and it is not a close call. Cohen and Corazzi were *de facto* officers of Natural Blue, not by a "murky and unworkable standard," but under the well-established standard applied previously by numerous other courts in *de facto* officer cases, including *SEC v. Prince*, 942 F. Supp. 2d 108 (D.D.C. 2013).

Cohen's remaining legal arguments are unfounded. Cohen first argues that the mere presence of counsel (lawyers whose client was Natural Blue, a company that Cohen reminds us in the brief at least a dozen times that he "did not control") justifies the concealment of his role and disciplinary history from investors. The Court should reject Cohen's cynical effort to use Natural Blue's counsel as a shield for liability, as it is wholly inapposite to the facts and the law. Further, Cohen's *Janus* argument is a straw man, and in any event, it both misapprehends *Janus* and ignores the stark evidence of Cohen and Corazzi's conduct in furtherance of their scheme.

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[1] Since Corazzi did not file a post-hearing brief, the Division's reply does not further review the proof as to Corazzi.

[2] For example, Cohen asserts that "Anaya stated that he was testifying in accordance with [his] 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." *See* Cohen Br. at 6. That is not what Anaya said. Rather, Anaya testified that he ***was aware that if he "d[id]n't testify truthfully***, that [his] agreement with the SEC [would be] null and void." Tr. at 1147. In other words, Anaya testified that he had to tell the truth – not that his testimony needed to conform to the Division's expectations. This is a distortion that unfairly impugns Anaya's credibility.

ARGUMENT

I. The Evidence Proved that Cohen was a *De Facto* Officer of Natural Blue.

In his brief, Cohen vehemently denies having any policy-making function of Natural Blue, at any time during the company's history. *See* Respondent's Post-Hearing Brief at 1-3. ("Cohen Br."). Among other things, Cohen alleges that it was Anaya, not Cohen, who led the charge to found Natural Blue as a private company, and that it was Anaya and Pelosi who orchestrated its reverse merger into the public company Datameg, and who then independently led the company after it became public. *See* Cohen Br. at 4, 9-12. Moreover, while the record establishes that it was Corazzi who led the negotiations with Atlantic in January 2011, *see* Tr. 671-702, 1329-1341, Cohen persists in arguing against the clear weight of the evidence by insisting that Anaya had a substantial role in that transaction. *See* Cohen Br. at 23-24.

Notwithstanding these distortions, the Division proved by a preponderance of the evidence that Cohen fulfilled the core economic functions of an officer of a public company. Those core functions were clearly defined and described by Division expert witness Professor Robert Daines, without contravention by any evidence adduced by the Respondents. *See* Div. Ex. 301. Both before and after Natural Blue became public, Cohen managed senior executives, controlled and managed day-to-day operations, controlled strategic decisions, and had substantial responsibility for Natural Blue's financial operations, including custody of the books and records. *See* Division Post-Hearing Brief ("Div. Br.") at 16.

A. Cohen Exaggerates Anaya's Control, and Ignores or Conflates Key Evidence

As CEO of Natural Blue, Toney Anaya had impressive credentials as a long-time public servant, who was elected as Governor and Attorney General of New Mexico, participated in negotiations on NAFTA, and overseen the distribution of federal stimulus funding. Indeed, Anaya testified that, when he was recruited by Corazzi and Cohen to be CEO of Natural Blue,

Corazzi told him he was particularly well-suited for the job because of his executive experience, in particular as the governor of New Mexico. As Governor, Anaya "had several cabinet departments, as well as independent agencies and boards that reported directly to [him]," and his role as CEO of Natural Blue was to be similar with "departments reporting – divisions, separate companies, reporting to [him]." Tr. 1057-58. But, as the record reflects, Anaya did not have such departments, agencies and boards to advise him on corporate decisions and strategies at Natural Blue – only Cohen and Corazzi and board members who were chosen by them.

What Anaya also lacked in his role at CEO of Natural Blue, as Cohen steadfastly refuses to concede, is experience with or sophistication about public companies. Multiple witnesses for the Division[3] acknowledged Anaya's limited experience in this realm, including the fact that he had never served previously as an officer of a public company. *See* Tr. 404, 785, 1077-78; Cohen Ex. 22. Paul Vuksich testified that Anaya was not sophisticated about public companies, *see* Tr. 361-362 and was "surprised when ... working with [Anaya] that he didn't seem to have a good grasp of corporate formalities and how you put companies together." Tr. 458; *see also* 458-461 (Anaya was unfamiliar with the requirements of Rule 144). Similarly, defense witness Jeffrey Decker conceded that financial reporting "[was] obviously not in [Anaya's] wheelhouse." Tr. 1512. Anaya himself recognized that he did not have a firm grasp on certain aspects of public companies. *See* Tr. 1056 ("To the extent that I understood a reverse merger ... it made sense[.]"); *see also* Div. Ex. 95 (describing Corazzi and Cohen as "experts" on SEC filings).

The evidence amply demonstrated that – in sharp contrast to Anaya -- the requirements of

[3] Cohen complains about the absence of testimony of a "veritable phalanx of executives, account[ants], attorneys and board members." Cohen Br. at 1. Of course, Cohen himself chose not to testify at the hearing, and failed to call several members of the so-called "phalanx" who were on his witness list. *See* Respondent James Cohen's List of Proposed Witnesses for Hearing, filed in this matter on January 12, 2015, which states that Cohen intends to call as witnesses Steve Rountree, James Cohen Jr. and Daryl Kim, among others, in addition to Cohen and Corazzi. Yet, Cohen now asks for what is essentially a negative inference against the Division because those witnesses did not testify – despite the fact that they were equally available to Cohen. The Court should reject this entreaty.

public companies were firmly within Cohen's wheelhouse. Cohen, a former broker, was highly sophisticated about securities offerings and financial reporting. Accordingly, Natural Blue's management and counsel relied on Cohen for 10-Ks, 10-Qs, and other SEC filings. *See, e.g.*, Tr. 393-94 (Vuksich testimony about Cohen's assistance with SEC filings), 869, 910-12, 915, 960 (Anaya testimony about Cohen's work on SEC filings); Div. Ex. 69 (Vuksich bills reflecting assistance from Cohen on SEC filings, including 10-Ks, 10Qs, and Forms D).

The Division does not dispute, and the record reflects, that Anaya made certain decisions as Natural Blue's CEO – including a decision not to disclose Cohen and Corazzi's roles and disciplinary histories in public filings, for which he has taken responsibility. *See* Div. Ex. 286; Tr. 785-86. Nor is there any dispute that Cohen and Corazzi performed key management functions on their own initiative, as well as at the request of (or with the acquiescence of) Anaya. *See* Tr. 1088 (Cohen and Corazzi provided input on SEC filings); 1090 (Cohen and Corazzi raised money for Natural Blue); 1091 (Cohen involved in settling debts and potential claims). Indeed, Daines testified to the common sense proposition that there are often multiple officers making policy decisions, including chief operating officers, vice-presidents, and the like. The bare fact that Anaya made some decisions does not mean that Cohen was not a *de facto* officer. Rather, the record shows that Cohen and Corazzi had control akin to that of corporate officers over Natural Blue's policy-making functions, and in many instances, usurped Anaya's authority as CEO. *See, e.g.*, Hearing Tr. 961, 1027-29, Tr. 1136-37, 1145-46; Div Exs. 115, 116, 119.

Nonetheless, refusing to cede any ground on "control,"[4] Cohen claims that Anaya "ran

[4] Cohen implausibly suggests that his hearing loss created the misimpression that he sought to control Anaya and Natural Blue. *See* Cohen Br. at 3, n.1. The record speaks for itself on this point, but there is no shortage of evidence that Cohen was aggressive and bullying with Natural Blue's management. *See, e.g.*, Div. Ex. 53 (11/30/09 Murphy e-mail about Cohen's "camouflaging and bully tactics" and "throwing grenades" at management); Div. Ex. 69 at 41 (Vuksich bills referencing "heated discussion with Cohen"); Div. Ex. 80 (4/26/10 Pelosi e-mail, stating that Cohen "threaten[ed]" Pelosi and "said he was taking back [Pelosi's] shares in Natural Blue."); *see also* Div. Ex. 218 (audio recording of Cohen's post-board meeting discussions, including his assertion that Natural Blue "was my company.")

Natural Blue and retained authority" (Cohen Br. at 3), and in particular, lays the Datameg reverse merger at the feet of Anaya and the board. Cohen describes it as simply an "outgrowth of a business plan ... proposed by ... Anaya"[5] and that the deal structure was authorized and directed by the officers and directors, and in any event, "not controlled by Cohen." Cohen Br. at 9.

Here, Cohen really strains credulity. All of the witnesses involved in the Datameg reverse merger consistently testified that the transaction was initiated by Cohen, and both the contemporaneous communications and the legal bills prepared by Vuksich provide clear evidence that Cohen was deeply involved in the negotiations and the original deal structure. *See* Tr. 40-43, 53-56, 283-86, 798-800, 807, 1054, 1056; Div. Exs. 10, 69 at 16-17, 19, 22, 24-25. Tellingly, Cohen's 40-page brief also fails to even mention Blue Earth, the other public company involved in this transaction that was *also* controlled by Cohen, and references it only in the most oblique terms. *See* Cohen Br. at 30 (describing Pelosi's testimony about events "that led him to join 'another company's' board of directors.") Moreover, while Cohen relies heavily on the board minutes[6] in arguing that the directors and Anaya led this deal, the evidence shows that in reality, the Datameg negotiations were nearly over before the board enacted its "authorization." *See* Tr. 22-24, 53-56, 133-134, 286; Div. Ex. 69 at 24-25; *see also* Div. Br. at 9.

Throughout his brief, Cohen simply ignores or elides the evidence that is inconsistent with his defense. Among the most glaring omissions, Cohen is entirely silent on his ties to board

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[5] This Court should disregard the references in Cohen's brief (pp. 9-10) to purported communications between Corazzi and Cohen during February 2009 about a water project. Cohen improperly relies on testimony concerning an e-mail from Corazzi marked as Cohen Exhibit 430 – an exhibit which was excluded by this Court. *See* Tr. 1639.

[6] The Division submits that the board minutes, written with assistance from Cohen months after the fact, should be viewed with some skepticism. After being retained in April 2009, Vuksich found that the company lacked most of the necessary basic corporate records, as he testified. *See* Tr. 383-385. From May 20 to June 3, 2009, Vuksich, **in close consultation with Cohen**, created the missing records, including corporate bylaws, stock records, and minutes of board meetings that had occurred months earlier. *See* Div. Ex. 69 at 38-39 (Vuksich billing records); *see also* Div. Exs. 9, 10, 13, and 19 (Natural Blue board minutes for March 6, March 17, April 4, and April 14, 2009). It is also worth noting that the minutes reflect that Cohen was present at, and central to, each of the four Natural Blue (Nevada) board meetings in March and April 2009, although he was (by his choice) not a member of the board. *Id.*

members Samir Burshan and Daryl Kim, and similarly, fails to even acknowledge the fact that virtually all of the companies in which Natural Blue invested were tied to Cohen. Another example of the effort to whitewash Cohen's central role at Natural Blue is his description of Vuksich's retention as corporate counsel. In the brief, Cohen claims that Anaya "executed a fee agreement so that Vuksich could begin providing legal services for Natural Blue." Cohen Br. at 11, n.2. True, but Cohen neglects to mention that he had directed Vuksich be hired as Natural Blue's counsel, leading to Anaya signing the agreement. *See* Tr. 289-290; Div. Ex. 20 (April 28, 2009 letter from Vuksich stating, *inter alia*: "*As I have discussed with James Cohen, Sr.*, I have been asked to immediately begin providing ... legal services to Natural Blue Resources, Inc."[.]) (*Emphasis added.*) In other words, Vuksich's hiring as Natural Blue's counsel is a paradigmatic example of how Cohen controlled the company, notwithstanding Anaya's title.

Similarly, Cohen attempts to distance the Respondents from other hiring decisions at Natural Blue, such as the retention of Jehu Hand[7] as CEO and Steve Rountree as outside counsel. *See* Cohen Br. at 14-15. Again, Cohen misleads. In fact, Anaya testified that *Corazzi* was the one who recommended Rountree as legal counsel for Natural Blue, *see* Tr. 1125, and in turn,

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[7] To the extent the Court considers the dubious testimony of former Natural Blue CFO Jehu Hand, the Court should take careful note of Hand's claimed "memory problems" in denying his prior inconsistent statements to FINRA:

> Q: Didn't you tell FINRA that Cohen put the [Natural Blue/Atlantic] deal together?
> A: I may have. I can't remember now.
> Q: So it is your testimony that you may have told FINRA that Cohen put the deal together, but now you can't remember. Is that right?
> A: That's right. I do have memory problems and I'm honestly telling you.
> Q: What kind of memory problems do you have?
> A: Sometimes I forget, I have short and medium term memory [problems]. I just forget things.
> Q: Do you have any kind of diagnosis?
> A: No. ... It is just ever since I got knocked in the head in 2010, that's how it has been.
> Q: Did you have some kind of brain injury?
> A: It was a really bad concussion.
> Q: Did you talk with FINRA before or after 2010?
> A: That would be after.

Div. Ex. 303 at 92-93.

Rountree recommended Hand as CFO. Moreover, Hand had past ties to Corazzi, having previously served as legal counsel to Corazzi's company Las Vegas Entertainment Network, Inc. ("LVEN") during 1997-99 in connection with various SEC filings (File Nos. 333-72689 and 000-21278). Among other things, Hand's legal opinion is incorporated as Exhibit 5 in LVEN's Form S-8 registration statement filed on February 19, 1999, Hand signed a certification that is incorporated in LVEN's Form 10-KSB filed on February 17, 1998, and he is the contact person in LVEN's Form NT 10-K notice of late filing filed on October 31, 1997.

Despite Cohen's efforts to obfuscate the record, the evidence makes plain Cohen's central role both as and after Natural Blue became a public company. Cohen and Corazzi selected Anaya and Pelosi as the company's nominal officers, hand-picked the board of directors, identified the companies in which Natural Blue would invest, and performed other critical management tasks to enable Natural Blue to go public, with Cohen and Corazzi in control. And unlike the nominal officers and directors, Cohen and Corazzi were part of Natural Blue from beginning to end. As Natural Blue changed over time, in its mission and its leadership, Cohen and Corazzi's role as *de facto* officers at the company always stayed the same.

B. **The Division Proved by a Preponderance of Evidence that Cohen Controlled Natural Blue and Functioned as a *De Facto* Officer of Natural Blue.**

Cohen's heavy reliance on *SEC v. Prince*, 942 F. Supp. 2d 108 (D.D.C. 2013), is predicated on a revisionist account of his role at Natural Blue. He argues that the *de facto* officer "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." Cohen Br. at 31-32. But the largely uncontroverted record is clear: Cohen (as well as Corazzi) was no mere advisor whose ideas were freely rejected or accepted by Natural Blue's named officers. In *Prince*, the CEO (Chamberlain), CFO (Brown), and other officers functioned with authority commensurate

with their titles. Brown "was firmly in control of the accounting department and the financial statements [which] was also acknowledged by outside auditors . . . ." *SEC v. Prince*, 942 F. Supp. 2d 108, 120 (D.C. 2013). Chamberlain was uniformly regarded as a strong leader and deliberately set out to create a valuable role for Prince (the influential consultant) that would not rise to the level of executive -- for the very purpose of avoiding disclosure of Prince's felony conviction. *Id.* at 114, 120-22. To that end, Chamberlain and his other officers obtained legal advice about the ways in which to limit Prince's role so that he would not function as an officer; they also repeatedly obtained legal clearance for not disclosing Prince as an officer or his criminal history. *Id.* at 122, 126, 129-30, 139-41. After receiving this explicit legal advice, Chamberlain created a "series of 'carveouts' . . . to 'fence in' Prince's roles and duties." *Id.* at 115; see also *id.* at 122, 140-41. Among other things,

> Prince was not allowed to participate in accounting staff meetings and was not allowed to work on preparation of [the company's] financial statements. In general, he was also denied 'write' privileges to the network drives where the accounting numbers were stored, and at times he was denied 'read' access to the interim numbers.

Id.

The facts in *Prince* are a far cry from this case. Natural Blue's CEO struggled even to obtain basic information from Cohen about the company and frequently was bullied into acquiescing to Cohen and Corazzi's plans. He was in no position to *limit* Cohen's role so as to avoid having it cross over into that of an officer. Any notion that Cohen's access to Natural Blue's computer systems, financial information or any other aspect of the company would or could have been constrained is fantastical. Despite having been hired as Natural Blue's President (Cohen's decision, by the way), Pelosi admits never being in a position to fulfill his responsibilities for the day-to-day management of the public company. And no amount of straining can lead to the conclusion that Cruickshank, Natural Blue's CFO, "was firmly in

control of the accounting department." As many witnesses, including Cruickshank, acknowledged, he was overwhelmed by the job, needed substantial assistance, and communicated and took direction primarily from Cohen. In stark contrast to *Prince*, where the auditors affirmed Brown's competence and control as CFO, here Natural Blue's auditors actually resigned because of their discomfort with the degree of control that Cohen exhibited over the company and its accounting functions. Moreover, Cohen's attempt to discredit the auditor because the firm did not explicitly cite this concern in its resignation letter is feeble. The auditor credibly explained that the firm used a form letter and thought it unnecessary to embarrass Natural Blue by describing the reasons for their withdrawal, which including discovery of Cohen's disciplinary history.

In sum, the Division proved by a preponderance of the evidence that he and Corazzi were *de facto* officers under the well-established standard applied in *Prince* and other *de facto* officer cases, including *SEC v. Solucorp Industries, Ltd.*, 274 F. Supp. 2d 379, 382-87 (S.D.N.Y. 2003), *SEC v. Enterprises Solutions*, 142 F. Supp. 2d 561, 574 (S.D.N.Y. 2001) (discussed *infra*, as to advice of counsel defense), and *CRA Realty Corp. v. Crotty*, 878 F.2d 562, 563 (2d Cir. 1989).

II. The Court Should Reject Cohen's Back-Door Approach to Advice of Counsel, as Unfounded in Law and Inapposite to the Facts

Respondent Cohen, having waived an advice of counsel defense, now asks this Court to find him not liable because of the mere involvement of lawyers in SEC filings. This Court should not countenance Cohen's bad faith efforts to shield himself from liability with the presence of counsel. It is black letter law that defendants cannot evade liability under the securities laws simply because lawyers were present at meetings, or because lawyers may have seen or commented on disclosure language. *See SEC v. Tourre*, 950 F. Supp. 2d 666, 684 (S.D.N.Y. 2013) (precluding defendant from "placing undue focus on the fact of a lawyer's

presence at a meeting or that counsel reviewed disclosures" as "irrelevant, misleading or both" where he is "not pursuing a defense based on such a fact.") Here, the Court should reject Cohen's effort to persuade the Court that he reasonably relied on advice of counsel, as it has not only long ago been waived, but has no basis in either fact or law.

A. Cohen Explicitly Waived Any Advice of Counsel Defense Prior to the Hearing

The Division did not file a motion *in limine* regarding advice of counsel, because Cohen denied that he intended to assert the advice of counsel defense,[8] proffering that Decker would testify solely as a fact witness about the scope of Cohen and Corazzi's day-to-day involvement in the management at Natural Blue. *See Vicinanzo v. Brunschwig & Fils, Inc.*, 739 F. Supp. 891, 894 (S.D.N.Y. 1990) (noting the requirement that defendant seeking to rely on advice of counsel defense at trial requires that he make "a full disclosure during discovery; *failure to do so constitutes a waiver of the advice of counsel defense.*") (*Emphasis added.*) Nonetheless, Cohen signaled in his opening argument that he would rely on advice of counsel, arguing that "this precise issue, of the role and disclosure of the role of Mr. Cohen and Mr. Corazzi was considered within Natural Blue ... not just by Governor Anaya, but by not one but two different attorneys[.]" Tr. at 30-31. Having adduced what amounted to opinion testimony from both attorneys for Natural Blue, based on their incomplete knowledge of the facts, *see* Tr. at 453 and 1538, Cohen now claims that counsel "agreed with the disclosures" about Natural Blue's management, including Cohen and Corazzi's roles and disciplinary history. *See* Br. at 20-21.

Notwithstanding Cohen's doublespeak, these arguments amount to an advice of counsel defense, and it is a defense that he has long ago waived. There can be no dispute that Cohen was required to make a full disclosure if he sought to rely on an advice of counsel defense. *See*

[8] Of course, if Cohen were to have asserted the advice of counsel defense, he would have had little choice but to concede that he was a *de facto* officer of Natural Blue. Hence, Cohen takes a back-door approach to obtain the potential benefits of a defense that is unavailable to him, without meeting his burdens of disclosure and discovery.

Vicinanzo, 739 F. Supp. at 894. Cohen cannot use advice of counsel as the proverbial sword and shield without providing both the Division and the Court with the proper notice and discovery. Accordingly, the Court should reject Cohen's argument; however, as the Division explicates below, there is no factual or legal basis for Cohen's argument, even if waiver had not occurred.

B. Cohen Cannot Meet the Standard for Good Faith Reliance on Advice of Counsel.

In order to establish good faith reliance on the advice of counsel as a defense in a securities fraud case, the defendant must meet all four of the following elements:

(1) That he made a complete disclosure to counsel;
(2) That he requested counsel's advice as to the legality of the contemplated action;
(3) That he received advice that it was legal; and
(4) That he relied in good faith on that advice.

SEC. v. Goldfield Deep Mines Co. of Nevada, 758 F.2d 459, 467 (9th Cir. 1985)*; see also SEC v. Savoy Industries, Inc.*, 665 F.2d 1310, 1314 n. 28 (D.C.Cir.1981)).

Moreover, the reliance on counsel defense "does not mean that one can totally abdicate responsibility by consulting counsel." *SEC v. Scott*, 565 F. Supp. 1513, 1535 (S.D.N.Y. 1983); *see also SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972) ("While good faith reliance on advice of counsel may be a factor to consider ... [the] appellants' proven lack of good faith here precludes them from relying on this argument.") Rather, the reliance on counsel defense "is simply a means of demonstrating good faith and represents possible evidence of an absence of any intent to defraud." *US v. Peterson*, 101 F.3d 375, 381 (5th Cir. 1996).

A careful review of the factual record makes plain that it would be impossible for Cohen to assert advice of counsel, even if he had not waived such a defense. Cohen did not make a complete disclosure to counsel, and did not request counsel's advice as to the legality of the contemplated action, nor did he receive legal advice on which he relied in good faith. By contrast, in *Prince*, 942 F. Supp. 2d at 139, management and counsel "communicated as to "how

[they] could structure Prince's role so that [the company] would not have to disclose Prince's legal history in its public filings." *Id.* Moreover, the company discussed these issues internally; as the Court found, "there was never any effort to keep Prince's regulatory and criminal history or his actions, duties or responsibilities from anyone, inside or outside of [the company]." *Prince*, 942 F. Supp. 2d at 140. The findings in *Prince* thus highlight the weakness of Cohen's efforts to rely on the mere presence of counsel as his defense, as discussed further *infra*.

C. Natural Blue's Counsel Did Not "Agree[] With" Omitting Cohen and Corazzi as *De Facto* Officers and Their Disciplinary Histories From Public Filings.

Cohen claims that Natural Blue's counsel "agreed with" the disclosures about "management" with "full knowledge about the roles played by Cohen and Corazzi at Natural Blue. Cohen Br. at 20. Cohen is wrong, and his "factual" assertions in support of this advice of counsel argument deserve careful parsing. First, Cohen says that "at the time that *Natural Blue's attorneys* provided advice on the company's filings and the management therein, *they* were well aware of the roles Cohen and Corazzi were actually playing with the company." Cohen Br. at 20. Who are "they"? From reading Cohen's brief, it appears that "they" are Paul Vuksich and Jeffrey Decker, whose testimony is then quoted extensively in support of this factual assertion by Cohen. *Id.* This is counter-factual. As the record reflects, Vuksich and Decker represented Natural Blue at different times in its corporate history, and had very different (but incomplete) information about Cohen, Corazzi and the roles they played at Natural Blue.

There are, to be clear, certain commonalities between Vuksich and Decker – all of which undermine Cohen's purported defense. Neither Vuksich nor Decker was asked by Natural Blue's management for legal advice about Cohen and Corazzi's plan to adopt "consultant" titles as a way to avoid disclosure of their functional roles as officers. Neither Vuksich nor Decker was asked by Natural Blue's management for legal advice about disclosing Cohen's criminal

conviction. *See* Tr. 433-34, 1565. In addition, both attorneys spoke directly and frequently[9] to Cohen and Corazzi about key management issues at Natural Blue, without Anaya. *See* Div. Exs. 69 (Vuksich bills reflecting frequent contact with Cohen and Corazzi) and 78 (4/12/10 e-mail from Anaya, warning Cohen and Corazzi to be "judicious in how we utilize Jeff Decker[.]"); *see also* Tr. 872 (Anaya testimony that "almost all of the legal services that [Decker] was billing for were services that he provided to [Cohen and Corazzi] on various business transactions that they were working on[.]") And, while both Vuksich and Decker knew that Cohen had a criminal conviction, "they" did not disclose this fact to Natural Blue's CEO.10 *See* Tr. 433-34, 1569.

Cohen is highly misleading in blending the evidence about these lawyers together to support his assertion that counsel "agreed with" the disclosures about management, because it obscures the factual record. First, Vuksich *advised Cohen that he could serve openly as an officer or director of Natural Blue Resources*. *See* Div. Ex. 299; Tr. 324-25. Cohen chose not to serve, which this Court could reasonably infer was related to Vuksich's contemporaneous warning of the ease with which he located Cohen's criminal history and FINRA bar on the Internet. *See* Div. Ex. 299; Tr. 321-25. To the extent Cohen got advice of counsel from Vuksich, he chose not to follow it. Second, Vuksich had stopped working as corporate counsel[11] by the time the JEC Agreements were signed, and was never asked to opine on any disclosures concerning the JEC Corp. consulting agreements. Indeed, there is no evidence that Vuksich even knew that Cohen and Corazzi would opt not to serve as officers or directors or that they planned

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[9] Since Decker redacted his legal bills to remove any references to the identities of those with whom he spoke in connection with his service to Natural Blue, it is impossible to determine with accuracy how often and on what topics he spoke with Anaya, Cohen and/or Corazzi, among others. *See, e.g.*, Div. Ex. 64 (1/28/10 invoice).

[10] The fact that both attorneys failed to disclose Cohen's criminal conviction to the CEO of Natural Blue (their client) speaks volumes about Cohen's control and influence over the company, as compared to that of Anaya.

[11] Although Vuksich did not submit his resignation letter until late December 2009, Natural Blue retained Decker's firm in mid-October 2009. *See* Div. Ex. 36 (10/14/09 engagement letter from BakerHostetler to Natural Blue). Vuksich testified that his work for Natural Blue was fairly limited once Decker's firm was retained. *See* Tr. 452.

to use "consultant" titles as a way to avoid disclosure. And as noted above, Vuksich was unaware that Corazzi was barred as an officer or director of a public company. *See* Tr. 296. Accordingly, Cohen's assertion that Vuksich had "[no] issues with disclosures of management in filing" (Cohen Br. at 20) is highly misleading. Quite simply, Vuksich was never asked for his advice on the disclosures by Natural Blue, and to the extent he gave advice, Cohen ignored it.

As to Decker, it is undisputed that he knew about Cohen's prior criminal conviction. The analysis, of course, does not end there. Turning to the elements for the advice of counsel defense, had Cohen not already waived an advice of counsel defense by failing to disclose it prior to the hearing, he would be hard-pressed to even argue that he met the first element of "complete disclosure." Decker did not know the nature of Cohen's criminal conviction, did not know about Cohen's FINRA bar, and was not privy to the day-to-day management decisions by Cohen, Corazzi and the nominal officers of Natural Blue. *See, e.g., SEC v. Goldsworthy*, No. CIV.A. 06-10012-JGD, 2008 WL 8901272, at *5 (D. Mass. June 11, 2008) (advice of counsel defense unavailable "...where the defendant failed to apprise his [legal] advisor of all the material facts."); *see also SEC v. Yuen*, No. CV 03–4376(MRP)(PLAX), 2006 WL 1390828, at *40 (C.D.Cal. Mar.16, 2006) (claim of reliance on professionals is not available where defendant withheld material information); *SEC v. Scott*, 565 F.Supp. 1513, 1534 (S.D.N.Y.1983) (no good faith reliance where defendant failed to inform counsel of all material facts).

Moreover, even if Cohen were deemed to have "disclosed," he did nothing further – he did not seek advice as to the legality of the contemplated action, he was not advised that it was legal, and since he obtained no advice whatsoever, he could not have relied on advice in good faith. The case of *SEC v. Enterprises Solutions, Inc.* is illustrative. In *Enterprises Solutions*, the company failed to disclose in its registration statement that defendant-Solomon's former company went into bankruptcy while he was its CEO. *Enterprises Solutions*, 142 F. Supp. 2d

561, 575-76 (S.D.N.Y. 2001). Solomon claimed that he included information about the bankruptcy in the questionnaire responses he provided to corporate counsel. *Id.* at 576. The court held that simply providing the information to counsel was insufficient because Solomon "never sought specific advice from counsel with respect to disclosure of the bankruptcy, nor did he receive specific advice that [the company] was not required to disclose the bankruptcy." *Id.* The Court therefore found Solomon liable. *Id.* at 579. Accordingly, even if Cohen's "disclosure" was legally sufficient, he cannot meet his burden on the other elements– because, like the defendant in *Enterprises*, he failed to obtain, receive or rely on advice of counsel.

Decker's after-the-fact testimony that he "did not feel that the responsibilities that [Cohen or Corazzi] had ... made them executive officers" is thus both self-serving and beside the point. Of course, any corporate counsel is understandably loathe to testify that he or she may have given questionable legal advice regarding disclosures – particularly when said disclosures are at the heart of an SEC enforcement action. And more importantly, Decker was not asked for legal advice by Cohen or anyone else, in real time, with knowledge of the salient facts.

Moreover, Cohen grossly overreaches in implying that Decker provided advice of counsel about disclosures on the Natural Blue website. In his brief, Cohen claims that "the issue of disclosure of management was addressed . . . in relation to disclosures that appeared on the Natural Blue website." Cohen Br. at 19. Cohen then says that when issues regarding disclosures on the website regarding consultants arose, Anaya "advised Corazzi that he would confer with counsel and be guided by the overarching requirements of the securities laws." *Id.* Cohen then cites to Anaya's testimony about "communications with counsel Jeff Decker regarding disclosure of consultants and management" as authority for this factual assertion, and then concludes the discussion by noting that Anaya finalized the website disclosures on June 3, 2010. *Id.* This is all highly misleading, since by the time Natural Blue's website disclosures were

discussed internally in May and June of 2010, Decker was no longer serving as corporate counsel. *See* Div. Ex. 300 at ¶ 11; Tr. 1558 (Decker testimony that his firm stopped serving as counsel for Natural Blue Resources in late April or early May). A casual observer could read this passage and conclude that Decker and Anaya were speaking contemporaneously about the website disclosure issues. *But the factual record is clear that they did not*, because Decker had resigned as Natural Blue's counsel by, at the very latest, early May of 2010. *Id.*

In sum, Cohen "cannot rely on the silence of others to absolve [him] of responsibility when non-disclosure presented such an obvious danger of misleading investors." *Dolphin and Bradbury, Inc. v SEC*, 512 F.3d 634, 642 (D.C. Cir. 2008). It is not only false that Natural Blue's counsel "agreed with" the omission of Cohen and Corazzi from SEC filings, as discussed *supra*, but it elides the fact that Natural Blue's former CEO, Toney Anaya, entered into a settlement with the SEC to resolve the claim that he was negligent *in omitting critical information about Corazzi and Cohen from Natural Blue's public filings*. In other words, Anaya has taken responsibility for Natural Blue's decision to remain silent about Cohen and Corazzi's role and disciplinary histories – because this omission misled the investing public. Yet Cohen, who proclaims loudly that he never exerted control over Natural Blue, even now attempts to assert an advice of counsel defense on its behalf. The Court should reject this cynical ploy.

III. Cohen's Argument on Scheme Liability Wholly Misconstrues *Janus*

Cohen's argument that he cannot be held liable under *Janus* because "the SEC did not establish that he was the maker of any false statement" is a straw man. Cohen is correct that *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) limits liability under Exchange Act Section 10(b) and Rule 10b-5(b) to the "makers" of actionable statements. But the Division is not alleging that Cohen (or Corazzi) made any misstatements or omissions, and there are no Exchange Act claims pending against them.

The Division contends that Respondents employed a scheme to defraud and engaged in a course of business which operated as a fraud upon investors, thereby violating Securities Act Sections 17(a)(1) and 17(a)(3). *Janus* neither applies to Securities Act Section 17(a) nor to scheme liability under Section 17(a)(1) and (a)(3) or Rule 10b-5(a) and (c). *See In the Matter of John P. Flannery and James D. Hopkins*, A.P. File No. 3-14081 (Dec. 15, 2014) (overturning ALJ's initial decision that *Janus* applies to misstatements alleged under Securities Act Section 17(a)). The Supreme Court in *Janus* solely considered the scope of liability under Rule 10b-5(b)'s prohibition on the "making" of a false statement. Notwithstanding this focus, *Janus* is not applicable even to Section 17(a)(2), which explicitly provides for misstatement/omission liability and mirrors Rule 10b-5(b) in certain ways, because Section 17(a)(2) "covers a broader range of activity." *Id.* at 15. Section 17(a)(2) does not use the term "make" and is not contingent on whether one has made a false statement. *Id.* at 14. Section 17(a)(2) "liability instead turns on whether one has obtained money or property 'by means of' an untrue statement." *Id.*

The Commission and the large majority of courts to have considered the applicability of *Janus* to Securities Act Section 17(a)(2) have held that the decision does not apply -- "reasoning that *Janus's* holding 'may not be extended to statutes lacking the very language that *Janus* construed.'" *In the Matter of John P. Flannery and James D. Hopkins, Commission Opinion*, A.P. File No. 3-14081, p. 15 (Dec. 15, 2014) (overturning ALJ's initial decision that *Janus* applies to misstatements alleged under Securities Act Section 17(a)). *See also SEC v. Benger*, 931 F. Supp. 2d 904, 906-07 (N.D. Ill. 2013) (*Janus* does not apply to Section 17(a) claims); *SEC v. Sells*, 2012 WL 3242551, at *7 (N.D. Cal. Aug. 10, 2012) (*Janus* does not apply to Rule 10b-5(a) & (c) nor Sec. 17(a)(1) & (3)). *See also SEC v. Stoker*, 865 F. Supp. 2d 457, 465 (S.D.N.Y. 2012) (*Janus* inapplicable to Sec. 17(a)(2) and (3) of the '33 Act); *SEC v. Pentagon Capital Mgmt. PLC*, 844 F. Supp. 2d 377, 421 (S.D.N.Y. 2012) (*Janus* inapplicable to Rule 10b-

5 (a) & (c) and Sec. 17(a) of the '33 Act), *aff'd in part and rev'd in part on other grounds*, 725 F.3d 279 (2d Cir. 2013); *SEC v. Sentinel Mgmt. Grp., Inc.*, 2012 WL 1079961, *15 (N.D. Ill. March 30, 2012) (*Janus* inapplicable to Section 17(a) claims); *SEC v. Big Apple Consulting USA, Inc.*, No. 6:09-cv-1963-Orl-28GJK, at 14-15 (M.D. Fla. Dec. 29, 2011); *SEC v. Mercury Interactive, LLC*, 2011 WL 5871020, at *3 (N.D. Cal. Nov. 22, 2011) (*Janus* inapplicable to Rule 10b-5 (a) and (c)); *SEC v. Geswein*, 2011 WL 4565861, at *2 (N.D. Ohio Sept. 29, 2011) (*Janus* inapplicable to Rule 10b-5 (a) and (c) and Sec. 17(a)); *SEC v. Daifotis*, 2011 WL 3295139, at *5-6 (N.D. Cal. Aug. 1, 2011) (*Janus* inapplicable to Sec. 17(a) and 34(b) of the Investment Company Act); *see also SEC v. Radius Capital Corp.*, 2012 WL 695668, at *7 (M.D. Fla. Mar. 1, 2012) (implicitly holding that *Janus* does not apply to Section 17(a)(2) claim).[12]

The few contrary district court decisions are both flawed and inapposite. *See, e.g., SEC v. Kelly*, 817 F. Supp. 2d 340 (S.D.N.Y. 2011) ("because courts have routinely held that the elements of misstatement and scheme liability claims under Section 17(a) and Rule 10b-5 are the same" *Janus* applies to claims under Sec. 17(a)); *SEC v. Perry*, 2012 WL 1959566, at *8 (C.D. Cal. May 31, 2012) (applying *Janus* to the SEC's claims under Sec. 17(a)).[13] These decisions improperly limit liability to the "makers" of statements despite the absence of any such limitation in the language of Section 17(a). *See In the Matter of John P. Flannery and James D. Hopkins, Commission Opinion*, A.P. File No. 3-14081, p. 14-15. They also improperly constrain the "remedial purposes" of Section 17(a) by "eliminat[ing] even the possibility of liability under that provision for individuals who plainly use or employ, but are not themselves the 'makers' of, material misstatements that defraud investors." *Id.* at 16. These minority decisions also are

[12] If *Janus* does not apply to Section 17(a)(2), the provision most closely resembling Rule 10b-5(b), then it logically cannot apply to Section 17(a)(1) and (a)(3).

[13] *See also In the Matter of John P. Flannery & James D. Hopkins*, A.P. File No. 3-14081, 2011 WL 5130058, at *35 (Oct. 28, 2011) (Initial Decision), *rev'd by Commission* on December 15, 2014.

inapplicable because they construe Section 17(a)(2) -- the only subsection arguably analogous to Rule 10b-5(b) for purposes of *Janus* – and not Section 17(a)(1) or 17(a)(3). As noted above, the Division contends that Cohen and Corazzi engaged in a fraudulent scheme, not that they made misrepresentations or omissions. The applicability of *Janus* to Section 17(a)(2) thus is relevant.

Having knocked down his straw man, Cohen next suggests that the Division "has attempted to evade the Janus requirement by arguing that it is alleging a scheme rather than a false statement." Although courts have expressed concern that plaintiffs might attempt an end run around proving the elements of a false statement by cloaking their allegations in the language of scheme liability, that concern is misplaced here. As an initial matter, the Commission recently held that conduct does not have to "go beyond misrepresentations" in order to be actionable under Section 17(a)(1). The "use[] [of] a misstatement made by others to defraud investors" itself violates that provision. *In the Matter of John P. Flannery and James D. Hopkins, Commission Opinion*, A.P. File No. 3-14081, p. 24-25. Even so, Cohen and Corazzi's fraudulent scheme does go well beyond any misstatements or omissions alleged against the other parties to this litigation. Cohen and Corazzi wanted to operate and control a public company for their personal profit. They understood that investors very likely would balk if investors discovered that Cohen had been incarcerated after being convicted on felony charges for financial fraud. They also plainly understood that Corazzi -- whom the SEC has permanently barred from serving as a public company officer or director -- could not admit his role as a functional officer of Natural Blue. So Cohen and Corazzi instead turned to their scheme. They set out to run Natural Blue behind the title of "consultant," hoping that form over substance would carry the day and allow them to avoid discovery of their central roles at Natural Blue and disreputable histories. Cohen and Corazzi founded Natural Blue and decided to make it into a public company; they controlled and ran its operations; they conceived, oversaw, and implemented its strategic plans;

and they orchestrated numerous transactions and made a multitude of decisions that substantially impacted the direction, leadership, and ownership of the company. All of these actions manifested their fraud, none of which involved misrepresentations or omissions by them.

Natural Blue and Toney Anaya, however, have been found liable for misrepresentations and omissions in violation of Securities Act Section 17(a)(2), including for the failure to disclose Cohen and Corazzi's functional roles as officers and Cohen's criminal past. Both Natural Blue and Anaya are "makers" of the statements contained in those filings within the meaning of *Janus* (even though *Janus* does not apply to any Section 17(a) provision). Although their negligence in failing to disclose certainly contributed to the success of Cohen and Corazzi's scheme, the scheme itself consisted of Cohen and Corazzi's conduct over a period of years.

CONCLUSION

Accordingly, this Court should find both Cohen and Corazzi liable for the violations set forth in the Order Instituting Proceedings, and impose sanctions including a cease-and-desist order, disgorgement, civil penalties, and such other relief as the Court deems appropriate.

Respectfully submitted,

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