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.

RESPONDENT JAMES COHEN'S RESPONSE TO DIVISION OF ENFORCEMENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent James Cohen (the "Respondent") submits the following specific responses to referenced numbered paragraphs of the Division of Enforcement's Proposed Findings of Fact and Conclusions of Law. Additional responses generally are contained in Respondent's Response to the Division of Enforcement's Post-Hearing Brief, and are incorporated herein.

PROCEDURAL HISTORY

4. The Commission's Order instituting settled public administrative and cease-and-desist proceedings against Governor Toney Anaya did not include any finding that Anaya violated Section 17(a)(1) or 17(a)(3) of the Securities Act, relating to fraudulent schemes. Div. Ex. 287.

6. The Initial Decision in this matter as to Natural Blue Resources, Inc. included no findings of fact relating to any public filings or statements made prior to February 2011. Initial Decision Release No. 710 (File No. 3-15974) (Nov. 26, 2014).

FINDINGS OF FACT

18. Natural Blue's Form 10-K for the year ended December 31, 2009 included as exhibits both the Management Agreement and the Advisory Agreement that the company entered into with JEC Corp. Div. Ex. 75 at Exs. 10.1 (36 of 50), 10.2 (39 of 50). Each of the two agreements makes clear Respondent's involvement in JEC Corp., listing Cohen as the "Chairman & CEO" of JEC Corp. and the signatory to both agreements. Id. And as the Division recognizes, Cohen's background is "readily discoverable through easy internet searches." Div. Conclusions of Law ¶ 20.

21. Natural Blue was founded by four people: Governor Anaya, Paul Pelosi, Cohen, and Corazzi. Div. Ex. 9; Cohen Ex. 420; Anaya Tr. 818:6-24, 1054:14-1056:15; Pelosi Tr. 476:13-19. Cohen was assigned by Natural Blue's Board to explore ways in which Natural Blue could become a public company, and the Board and Anaya approved of entry into the transaction. Div. Exs. 9-10; Cohen Exs. 2, 420; Anaya Tr. 818:8-21, 1064:25-13; Pelosi Tr. 536:9-16, 537:8-538:5, 539:1-8. Following the merger, Cohen and Corazzi did not set corporate policy but remained subject to the control of Governor Anaya and the Board. Anaya Tr. 1019:13-1020:7, 1020:11:1021:6, 1025:4-16, 1033:24-1034:13, 1114:9-15, 1116:6-12, 1147:18-1148:12, 1188:25-1189:25, 1190:6-23, 1085:4-1086:1, 1235:25-1236:20, 1238:2-4, 1240:15-18, 1242:25-1243:24; Cohen Exs. 119, 419. The negotiation of the Atlantic deal was also subject to Anaya's oversight and control. Anaya Tr. 985:4-11; 1021:12-18, 1169:7-25.

22. The "core economic function" theory of Division expert witness does not reflect the standard for when a company must disclose its officers, which is set by Exchange Act Rule 3b-7, 17 C.F.R. § 240.3b-7. Moreover, Cohen and Corazzi did not control Natural Blue's operations. Cohen did not have authority over the company's bank accountants, and could not access the company's general ledger. Cruickshank Tr. 1589:1-6, 1593:6-11, 1610:8-24. Cohen did not have a significant role in drafting SEC filings for Natural Blue – that process was controlled by Governor Anaya and supported by counsel and other professionals. Anaya Tr. 869:19-870:1, 1109:7-1110:6, 1127:9-12, 1187:25-1188:5, 1214:12-23, 1256:4-1258:2, Anaya Tr. 1265:2-1266:13, 869:19-21; 910:7-911:11, 1254:21-1255:8; 1257:4-1258:2.

23. The JEC consulting agreements were not in furtherance of any scheme. 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. Further, when a dispute thereafter arose, executives and the Board suspended or terminated those contracts. Anaya Tr. 1029:18-1031:9; Anaya Tr. 1166:13-19 (Anaya recounted that "I did suspend [Cohen]").

26. The transactions between Datameg and Blue Earth, and Datameg and Natural Blue Nevada, were negotiated separately and approved separately. Vuksich Tr. 377:11-378:23; Cohen Exs. 126, 417.

27, 29, 37-40. Cohen's investigation of a transaction with Datameg was subject to the direction and control of Natural Blue, whose Board had 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").

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." 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.

30-35. 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. Natural Blue was not presented to Anaya "as a fait accompli" but grew out of a series of discussions. Anaya Tr. 1054:14-1056:15. Ultimately, all four of Anaya, Pelosi, Cohen and Corazzi "got together . . . over the phone . . . and . . . founded the company." Pelosi Tr. 476:13-19. Natural Blue's initial business plan, to locate, purify, and sell water recovered from underground aquifers in New Mexico, was an idea formulated by, among others, Anaya. Div. Ex. 300 ¶ 1.

36. Cohen and Corazzi did not engage in a scheme to defraud. The investors that the Division called testified that their investments were driven by factors other than representations by Cohen and Corazzi. Flaherty Tr. 765:7-19 (Leonard Tocci talked to Elizabeth Flaherty concerning her investment in Natural Blue); Cohen Exs. 428 (Flaherty signature as to status as accredited investor for purposes of private placement registration), 443 (notes of Sandy Robinson's independent research into Natural Blue).

41. The initial Board of Directors of Natural Blue (Delaware), including Samir Burshan and Daryl Kim, were elected by the shareholders of the company. 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).

42. The Natural Blue Board retained control over setting corporate policy and often rejected proposed business ventures, up to "90 percent" of such proposals. Pelosi Tr. 499:25-500:7; *see also* Anaya Tr. 1169:22-25.

44. None of the referenced citations reflects any involvement by Cohen in the referenced loan. The testimony by CFO Walter Cruickshank cited by the Division reflects that Cruickshank did not recall definitively any discussions with Cohen concerning the loan. Cruickshank Tr. 1613.

45. Anaya was responsible for approving payment of invoices for major payments. Anaya Tr. 1100:17-21; *see also* Cruickshank Tr. 1590:14-19 ("Governor Anaya had the control of all the bank accounts and he would do the payments"), 1591:10-13 (Anaya had sole authority over wire transfers); 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. Anaya's assertion as to Cohen's ability to control Natural Blue's shareholders is unfounded, and contradicted by the identity of the shareholders. *See* Cohen Ex. 55.

53. A Form 8-K filed with the SEC on or about August 19, 2009 and signed by then-CEO James Murphy documents the multi-stage transaction that resulted in the EcoWave purchase. Cohen Ex. 52. Notably, the 8-K identifies Samir Burshan and Daryl Kim as part-owners of the entity that sold EcoWave to Natural Blue. Id. This association with EcoWave led to the appointment of Burshan and Kim as directors of Natural Blue, and appointment *approved by the Natural Blue shareholders*. Cohen Ex. 55. Moreover, Governor Anaya and Pelosi testified that they supported the EcoWave transaction and the appointment of Burshan and Kim as directors. Anaya Tr. 1120:25-1121:2 (Anaya agreed that Burshan and Kim should serve on the Board), 1129:9-11 (Anaya testified that "Ecowave was a technology that [he] felt very positive about"); Pelosi Tr. 555:3-19 (testifying that he was "in favor of the EcoWave transaction" and that through the transaction, "[w]e brought two Board members in that seemed to know what they were doing with proven technology from Seoul" that "could be a valuable business opportunity"), 555:20-558:6 (describing advantages of the EcoWave technology).

54. Anaya's proposal was that the company move the bookkeeping function to New Mexico in order to give work to his daughter, Kristina Bibb. Anaya Tr. 1192:20-1193:20. That idea naturally found resistance due first to concerns about nepotism and conflicts of interest, and later as a result of Bibb's legal issues. Cohen Ex. 442.

55. The invented, untested and never adopted "economic function" theory advanced by the Division and Professor Robert M. Daines should be disregarded. Response to Conclusions of Law ¶¶ 9-10. Cohen did not occupy a policy-making role for Natural Blue. Cohen Br. 9-25.

56. Cruickshank was appointed CFO by the entire Board of Directors of Natural Blue. . Cohen Ex. 55; Anaya Tr. 1143:4-1144:3 (testifying that Cruickshank "was performing services for Natural Blue consistent with [Anaya's] direction"). Moreover, both Governor Anaya and Pelosi spoke favorably of Cruickshank's work. Anaya Tr. 1143:4-16 (Anaya did not have a problem with Cruickshank's services); Pelosi Tr. 542:11-543:22 (testifying that Cruickshank was

"an accountant with experience" and that "if we had someone like Walter [Cruickshank] taking care of the books, that's a good thing").

57. Cruickshank only had "a couple" of interactions with Corazzi, and only had a firm memory of a single conversation with Corazzi. Cruickshank Tr. 1615-1616.

58. Vuksich 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. 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." Vuksich Tr. 468:17-25. Vuksich was "vigilant" in forwarding draft filings to Anaya, "seeking [Anaya's] comments, getting [Anaya's] comments, and getting [Anaya's] approval." Anaya Tr. 1109:7-1110:6.

59-60. During the same period that Anaya purportedly threatened to resign, he remained engaged in leading Natural Blue, and trumpeted its successes. Cohen Ex. 60 (Email from Anaya dated Sept. 3, 2009 noting that "the management team has officially been on board for only a few days but are already having some measurable successes, with more to come" and "[w]e are collectively doing a good job"); *see also* Cohen Exs. 61-78 (sample of emails by Anaya relating to management of Natural Blue from September 2009).

63-65. 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.

66, 68. Pelosi's departure from the Board came as a consequence of a series of events. First, the original business model of the company had not met with success but had gone "sideways." Pelosi Tr. 507:4-5. Pelosi's expertise was "in the water business, the technologies, the legal aspects . . . the land issues, the technology issues," but that business was "not working out." Id. 507:6-10. Second, Pelosi decided to take a new job in the securities industry at WR Hambrecht. Id. 509:22-510:6. Third, Pelosi and Anaya had issues working together, reflected in the fact that Pelosi had difficulties in reaching Anaya by telephone. See Id. 509:9-12.

Regarding the supposed shareholder votes, there is no evidence that the shareholder consent was ever executed. To the contrary, Pelosi resigned of his own volition as President, in connection with the factors discussed above, as documented in correspondence and public filings. On January 7, 2010, Pelosi sent an email stating that

> In order to move Natural Blue Resources, Inc. forward, it is logical to have a President with experience in daily operations of an energy efficiency company and knowledge in areas involving commodities and energy transactions. To attract the best talent in a timely fashion, I will initiate a conversation with Toney regarding a new President, and my immediate resignation . . .

Cohen Ex. 106. Governor Anaya then signed a Form 8-K filed with the SEC on or about January 15, 2010 stating that Pelosi had "resigned" as a Board Member and as President, not that he had been removed. Cohen Ex. 107.

To the extent there was pressure on Pelosi to depart from the Board, it came from Anaya, not Cohen. Anaya testified that, following the vote on the JEC Consulting Agreement, he "was very upset with Mr. Pelosi" because Pelosi "had voted for the contracts" and then later sought to renege on his vote. Anaya Tr. 865:22-867:10. Indeed, on December 30, 2009, Board Member James Murphy emailed Anaya with reference to a conversation that *Anaya*, not Cohen, "opened up" regarding removing Pelosi. Div. Ex. 264.

68-69. Cohen did not control Natural Blue's financial records, and Anaya's complaints that he was unable to gain access to those records are not supported by the testimony of the company's financial officers. Anaya directed that Cruickshank keep the company's corporate records. Anaya Tr. 1077:2-5, 1143:4-1144:3. Cruickshank did in fact "keep[] the books of original entry, which is a general ledger" (Cruickshank Tr. 1589:1-6), storing the "general ledger [on a] reporting system we had" (Cruickshank Tr. 1593:6-11). Cruickshank testified that Cohen *never had access* to the general ledger (Cruickshank Tr. 1610:8-24). At the conclusion of Cruickshank's term, Cruickshank 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), in a form that Hand "could take and plug into a QuickBooks system" (Cruickshank Tr. 1599:2-14). Cohen never directed Cruickshank not to provide financial records to Hand. Cruickshank Tr. 1599:16-18. Hand testified that he did receive the information required to make accurate public filings. Cohen Ex. 434 at 40:5-16.

71. Anaya established his control over access by Cohen and Corazzi to professional staff such as Decker. 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.

72. The Hoover building transaction did not involve Natural Blue; therefore, this transaction, by definition cannot show that Cohen controlled Natural Blue. Indeed, even Governor Anaya recognized that there were valid reasons why Natural Blue should not have entered into a transaction to purchase the Hoover building. Anaya Tr. 1157:19-23 (Corazzi told Anaya that the

building was "full of asbestos"), 1160:21-25. The episode mainly demonstrates that when Governor Anaya became upset with Cohen and Corazzi as a result of his impressions of the Hoover deal, he had the authority to suspend their consulting agreement and he and the Board exercised that authority. Anaya Tr. 1029:18-1031:9; Anaya Tr. 1166:13-19 (Anaya recounted that "I did suspend [Cohen]").

73. The resignation letter the auditing firm Cross, Fernandez & Riley sent to Natural Blue made no mention of Cohen or Corazzi at all, and stated instead that the decision to resign "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).

74. 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.[1] 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.

75, 80-89. 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

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

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.

Anaya also revealed his motive to push for a transaction: he was desperate for funds in the wake of his daughter's legal troubles (*see, e.g.* Cohen Ex. 297 (Oct. 26, 2010 email in which Anaya writes of his "inability to help family members when then [*sic*] needed me the most because the anticipation of results by the company did not materialize as I was led to believe they would. . . . Too much suffering by innocent family depending upon me for me to ever forgive myself for screwing up their lives")), and saw the Atlantic transaction and change in control of Natural Blue as a way for him to cash out and begin liquidating his shares in the company (*see* Div. Ex. 159 (Jan. 21, 2011 email from Anaya noting that even if the Atlantic "deal does not close, I will be stepping down").

90-92. Neither Cohen or Corazzi have been accused of participating in or directing the referenced misrepresentations, and the SEC has already sanctioned Perry as a result of these misrepresentations. Div. Ex. 287. The Division's inclusion of a discussion of these misrepresentations in the proceeding against Cohen and Corazzi verges on prejudicial and should be discounted as irrelevant in any event.

93-94. The Board as a whole removed Perry – with good reason – after determining that he was no longer capable of operating in the company's best interests. Montalto Tr. 1358:4-24 (testimony that 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"). Indeed, Perry's actions and misrepresentation were so far out of bounds that he incurred sanction by the SEC. Div. Ex. 287.

Moreover, the transcript of the conversation from June 2011 is subject to multiple interpretations. Based on the history of the company's development, and previous corporate actions including the sale of the American Marketing division to Blue Earth Solutions, it is likely that Cohen's statement "this was my company" is a past tense statement that actually refers to the contemplated Datameg shell after American Marketing had been spun-off, not to Natural Blue (either the Delaware or Nevada entities). Div. Ex. 218 at 25.

95, 97-98. The Division "litigators on this case" manipulated the presentation of payments to Cohen and Corazzi to be listed "in the compensation category" along with employees of the firm

even though, neither was an employee and neither received payroll checks from the company. Hussain Tr. 1412:24-1413:24. In fact, a number of professional service providers received substantial payments from natural Blue. Div. Ex. 253 p. 5. Further, the Division could not distinguish professional services payments from expense reimbursements, and could not definitively identify *any* single payment to Cohen as actually being for professional services versus a reimbursement. Hussain Tr. 1417:3-1418:7.

CONCLUSIONS OF LAW

1. Cohen and Corazzi did not engage in any fraudulent scheme, and are not liable under Sections 17(a)(1) and 17(a)(3) of the Securities Act.

2. The government may not use a scheme liability theory as a "back door into liability for those who help others make a false statement or omission in violation of subsection (b) of Rule 10b-5." SEC v. Kelly, 817 F. Supp. 2d 340, 343 (S.D.N.Y. 2011). Where "the core misconduct alleged is in fact a misstatement, it would be improper to impose primary liability . . . by designating the alleged fraud a 'manipulative device' rather than a 'misstatement.'" SEC v. KPMG LLP, 412 F. Supp. 2d 349, 377-378 (S.D.N.Y. 2006) (declining to hold defendant liable under Rule 10b-5 subsections (a) and (c)); *see also* SEC v. PIMCO Advisors Fund Mgmt. LLC, 341 F. Supp. 2d 454, 467 (S.D.N.Y. 2004) (rejecting scheme liability where conduct involved "misleading statements issued by others").[2]

Further, where the core allegations rest on purported misrepresentations and omissions in public filings, liability can only attach to those who "make" the statements at issue. Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2303 (2011).

3. Cohen and Corazzi did not engage in any scheme or fraudulent course of business to create and operate Natural Blue as a vehicle for them to control and profit from the company. They did not serve as *de facto* officers of Natural Blue, nor did they mislead investors.

4. Cohen and Corazzi did not act with scienter with respect to any alleged deceptive acts.

5-6. In both Solucorp, and SEC v. Enterprises Solutions, 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;

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[2] All of the cases the Division cites to argue that the alleged scheme "went beyond misrepresentations and omissions" involve deceptive acts that go far beyond any of Cohen's conduct. In SEC v. Kovzan, the court permitted the SEC's scheme allegations to survive summary judgment only after determining that such allegations could not be predicated on misrepresentations and omissions alone, but required "a separate deceptive act." 2013 U.S. Dist. LEXIS 147947, at *21 (D. Kan. Oct. 15, 2013) (allegations included allowing personal expenses to be paid "as proper business expenses"). In SEC v. Alternative Green Tech., Inc., the deceptive acts underlying the scheme allegations included "fabrication and backdating" of corporate records. 2012 U.S. Dist. LEXIS 142154, 17 (S.D.N.Y. Sept. 24, 2012). And SEC v. Brown involved allegations regarding some degree of manipulation of "internal records of the company and email communications." 878 F. Supp. 2d 109, 117 (D.D.C. 2012). Cohen did not engage in any actions akin to those that the courts found constituted deceptive acts in these cases.

subsequently, consultant, not board, hired new CEO). The additional cases the Division cites in discussing the *de facto* officer standard are similarly distinguishable and even undercut the Division's argument. *See* C.R.A. Realty Corp. v. Crotty, 878 F.2d 562, 564 (2d Cir. 1989) (defendant was a named vice president and had "complete and autonomous control" of a division but still not deemed an officer for § 16(b) purposes); U.S. Diagnostic Inc., S.E.C. Release No. 7928, 2000 WL 1920604 (Dec. 20, 2000) ("Greenberg operated as an officer, was represented as an officer in certain documents disseminated to the press and investors, and held himself out as an officer.").

8. Cohen did not function as a *de facto* officer of Natural Blue. In every material aspect of Natural Blue's operations, 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.

Cohen's actions in connection with Natural Blue fall far short of the activities in Prince that the court determined did *not* qualify the defendant as a *de facto* officer:

- Performing financial analyses
- Evaluating companies for purposes of acquisition and/or merger and the development of a mergers and acquisitions program
- "[O]verseeing the operations of subsidiaries" and supervising their activities, and serving as Board Chairman and/or a Director for corporations created to acquire various subsidiaries
- Drafting the Management Discussion and Analysis section of a Form S-1 registration statement
- Extensive involvement with the company's accounting department, including "commenting on payroll analyses, discussing incentives, comparing results to forecasts, assessing Integral's core profitability, analyzing general and administrative costs, reviewing Defense Contract Audit Agency submissions, evaluating legal costs, investigating how capital losses had been booked, creating a software development amortization plan, assessing how the company should adopt new financial accounting standards, proposing and evaluating segment reporting structure, and assessing whether any particular operating group was spending in an unusual or inappropriate fashion"
- Drafting press releases
- Offering bonus suggestions for members of executive management
- Helping to prepare, review, and comment on drafts of public filings

- Acting as a general advisor to the company's CEO and management, and participating in a group that discussed "companywide policies on a variety of issues, including human resource decisions, benefits, personnel, and mergers and acquisitions"

- Regularly attending Board meetings and making presentations to the Board

- Receiving payments that made him "one of the five highest paid individuals" at the company

942 F. Supp. 2d 108, 114-120 (D.D.C. 2013).

9-10. Professor Robert M. Daines invented and applied a standard that does not exist, and his testimony should be disregarded for that reason. As the Division has recognized (Conclusions of Law ¶ 7), Exchange Act Rule 3b-7 has been used by the courts to determine whether an individual has acted as a *de facto* officer. In contrast, Daines *never even considered the applicable SEC rules* for the purposes of his testimony. Daines Tr. 1460:25-1462:4, 1468:19-24. Instead, Daines performed a separate analysis using a standard that he derived from economic theory: "looking at the economic function of an officer or a director." Id. 1461:9-15. Daines's direct testimony as offered by the Division includes a statement that "a person that [engaged in the alleged activities] would be fulfilling the economic function of a corporate officer or director." Div. Ex. 301, No. 41. Daines offers this conclusion despite his concession that he never investigated whether the Respondents had done any of the things alleged by the Division, and therefore could not conclude that they actually performed any "functions" of officers. Daines Tr. 1472:14-1473:10.

Daines's terminology, "the economic function of an officer or a director" can be found nowhere in the standard established by SEC Rule, nor has the Division pointed to any instance of a court adopting that standard. There is good reason that no court has adopted this standard: it is far too ambiguous and vague, and would leave consultants, advisers, and other professionals everywhere trying to apply an "economic function" analysis to every corporate act to determine disclosure obligations and liability consequences.[3] Nor is Daines's standard even internally workable – Daines conceded that some of the actions that he identified as being within the "economic function" of an officer, including serving as the primary contact for a company's investors or dealing with the website, do not alone rise to officer-level status (Daines Tr. 1474:19-1475:6), while others, such as capital raising, would be appropriate for consultants or other non-officers (id. 1473:11-15, 1488:19-1489:3).

Even were Daines using the correct standard, expert witnesses may not reach legal conclusions by "apply[ing] corporate governance concepts to the case's specific facts." United States v. Brooks, 2010 U.S. Dist. LEXIS 2277, *11-12 (E.D.N.Y. Jan. 11, 2010); *see also* United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991); Floyd v. Hefner, 556 F. Supp. 2d 617, 640 (S.D.

[3] It is difficult to imagine corporate executives and their counsel trying to understand the concept of the "economic function" of an officer and then trying to apply it to determine if an employee, shareholder or consultant has filled one or more than one of those functions. Such a standard might require every corporation to employ someone of Daines's expertise.

Tex. 2008); Pereira v. Cogan, 281 B.R. 194, 198 (S.D.N.Y. 2002). As a whole, this testimony sheds no light on the matter in dispute and should be disregarded.

11-14. Cohen did not serve as a *de facto* officer of 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, cited above and in the briefs submitted in support of Cohen, 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.

17-19. The Natural Blue Form 10-K for 2009 and subsequent filings need not have disclosed Cohen as an officer, as he did not meet the standard for disclosure. Further, Cohen did not make the filings; they were controlled by Anaya, with assistance of counsel. Cohen Br. 17-19. Given that Cohen did not make the disclosures in the filings, he cannot be held liable for them. Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2303 (2011).

22-23, 26-27, 30-32, 37, 39. Cohen did not act with scienter with respect to the alleged deceptive acts. He did not function as a *de facto* officer because he did not occupy a policy making role for Natural Blue. Further, the investors the Division called testified relied on factors other than information about Cohen and Corazzi in making their investments. Response to Proposed Finding of Fact ¶ 36. The Division did not show that Cohen and Corazzi reaped the vast majority of the compensation paid out by the company; to the contrary, the Division could not distinguish professional services payments from expense reimbursements, and could not definitively identify *any* single payment to Cohen as actually being for professional services versus a reimbursement. Id. ¶¶ 95, 97-98.

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Respectfully submitted,

/s/

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