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.

RESPONSE ON BEHALF OF RESPONDENT JAMES E. COHEN TO DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF

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PRELIMINARY STATEMENT

Now that the evidence has been presented, and the briefing completed, the key and dispositive failures of the Division's claims are stark. First, and as a matter of law, the Division failed to demonstrate that these Respondents are liable for the alleged misrepresentations because (1) this case presents a clear instance of allegedly false statements that were "made" by individuals other than the Respondents, and (2) those same allegedly false statements cannot be used to try to impose "back door" scheme liability under Section 17(a).

Second, even if this case could be pursued under a Section 17(a) "scheme" theory, the Division's claims are entirely premised on a standard that does not – and should not – apply to a company's disclosures about management. All in an effort to impose liability on Respondents, the Division ignored the applicable SEC guidelines regarding disclosure of management, brought in an expert to put forth a novel and inapposite "economic function" theory with respect to the role of officers, and then used that theory to argue that the Respondents were *de facto* officers who should have been included in the disclosures of management. Because the Division failed even to apply the correct standard, much less establish any violation of those provisions, the Court should find that Respondents are not liable for the Company's alleged failure to include them in the management disclosures. Under the actual standard defined by the SEC rules and adopted by the courts, Cohen does *not* qualify as a *de facto* officer because "while [he] exercised significant influence . . . and was very close to [the CEO], ***he did not have the authority to make or implement any policy decisions***. Such authority lay with [others]." SEC v. Prince, 942 F. Supp. 2d 108, 136 (D.D.C. 2013) (defining officer status with reference to Rule 3b-7 under the Exchange Act).

Based on either of those overarching flaws in the Division's claims, the Court can and should conclude that Respondent is not liable for the public filings that were prepared and reviewed by its attorneys and accountants, and issued and certified by its executives.

If the Court declines to decide this case based on either of those issues, and reaches the issue of whether the Division proved by a preponderance of the evidence that the Respondents were *de facto* officers, consideration of that evidence leads ineluctably to the same result. Application of the proper standards to the evidence clearly shows that Cohen did not serve as a *de facto* officer for Natural Blue because he did not control or set policy for the company. Respondent Cohen's opening brief reviewed exhaustively the evidence of Governor Anaya's actual control over Natural Blue; in responding to the Division's brief, we will – again – provide clear examples of unchallenged elements of the record that demonstrate that fact (contrary to the Division's claims). This includes the sequence of events that led to the founding of Natural Blue (and Anaya's participation in those events), the manner in which Board Members were appointed (and, in the case of Pelosi, the manner in which they left the board), and Governor Anaya's continuing control over Natural Blue through the Atlantic transaction. We further address, and dispose of, the Division's arguments regarding control over Natural Blue's financial records, the "Hoover building" transaction, and payments received by Cohen.

Natural Blue was led by an accomplished and capable chief executive officer who had no reason to agree to abrogate his responsibilities and serve as some kind of "puppet" for Respondents. He understood his obligations and he ensured that it was he who ultimately directed and/or approved all significant corporate action. Natural Blue further had an active and functioning Board, with assistance from experienced legal counsel, professional auditors, and other accounting professionals. And those critical witnesses flatly denied at trial that there was

any scheme to conceal or misstate the involvement or role of Respondent. The Division's claim that the Company's adherence to corporate process was a "fiction" – that so many professionals participated in a sham, all pretending to direct the Company but actually ignoring their obligations – is so strained and at odds with the evidence that it can only be viewed as a concession by the Division that the Company's consistent corporate processes are directly counter to the Division's claim.

In summary, the Division has not shown that liability is appropriate in these circumstances.

DISCUSSION

I. The Division Has Failed to Account for the Impact the Supreme Court's *Janus* Decision Has on their Legal Theory

The Division has failed to establish any basis for liability under Section 17(a) of the Securities Act. Rather, the Division's case against Cohen rests on purported misrepresentations and omissions in the public filings of Natural Blue, and thus remains subject to the decision of the Supreme Court in Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011). That decision, and extensive testimony as to the *lack* of a scheme among Natural Blue's officers, directors, and professionals, are fatal to the Division's contentions.

The Division's claim is that Natural Blue's public filings failed to disclose the role and background of Cohen and Corazzi, whose disclosure was supposedly required because they were "*de facto*" officers.[1] OIP Paras. 22-28. The OIP also asserted claims against Cohen and Corazzi not only under Section 17(a) but also under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Id. Para. 47. Based on the Division's brief, it has clearly determined that it will no

[1] In fact, only a single filing, the Form 10-K for 2009 filed in April 2010, included disclosures regarding management. Div. Ex. 75. The Division's argument as to the other filings relies on purported omissions, but there can be no liability for omissions without a corresponding duty to disclose; here, no such duty existed. Genesee Cnty. Emps' Ret. Sys. v. Thornburg Mortg. Sec. Trust, 825 F. Supp. 2d 1082, 1127 (D.N.M. 2011).

longer pursue the Section 10(b) claims, but still argues that Respondent is liable under Section 17(a) for those same statements contained in Natural Blue's public filings.

Under Janus, where liability can only attach to those who "make" the statements at issue, Cohen cannot be found liable. Janus, 131 S. Ct. at 2303. Here, there is no dispute that the alleged misrepresentations were contained in the filings that were prepared and reviewed by accountants and lawyers, circulated to the Board, and certified by Governor Anaya. Cohen Br. 17-19. Equally clear was that Governor Anaya addressed and ultimately decided the issues associated with disclosures regarding the identity of management. Id.; Anaya Tr. 1305:1-5; Cohen Ex. 233 (Anaya conveyed via email dated June 3, 2010 a list of persons to be identified as officers for Natural Blue Steel, Inc.). In comparison, while Cohen and Corazzi may have *reviewed* some of the filings, they certainly did not control them such that they qualify as "makers" of the statements. Cohen Br. 17-19. Indeed, even the Division asserts only that Cohen had some "involvement" in the filings. Division of Enforcement Post-Hearing Brief ("Div. Br.") 16.

Because Respondents cannot be viewed as the "maker" of the statements contained in the filings, the Division has had to resort to the claim that the alleged misrepresentations in the Company's filings are actionable as a "scheme." But cases make clear that "scheme" liability does not exist where it rests on allegedly false statements made by others. The Kelly decision from the Southern District of New York, discussed in Respondent Cohen's opening brief at 38-39, is chief among these. SEC v. Kelly, 817 F. Supp. 2d 340 (S.D.N.Y. 2011). In Kelly, the court cautioned that "[c]ourts have not allowed subsection (a) and (c) of Rule 10b-5 to be used 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." Id. at 343 (quotation omitted). Indeed, 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] Because the Division is attempting to use the same alleged false statements as a basis for "scheme" liability against Respondents – without evidence of an actual scheme that extends beyond the alleged concealment – it has failed to establish a sufficient basis for such liability under section 17(a).

II. The Evidence Shows that None of Natural Blue's Executives or Professionals Participated in any Fraudulent Scheme

Even assuming that Section 17(a)(1) and (3) and a "scheme" liability theory were applicable in this case, the Division still falls short of meeting its burden of proof. To the contrary, witness after witness rejected the existence of anything approaching a scheme to conceal Cohen's and Corazzi's roles with Natural Blue. This includes the following witnesses:

- Paul Vuksich, counsel for Natural Blue, who testified that "the filings when made are not false" and that he did not have a belief that he was concealing Cohen's role (Vuksich Tr. 410:20-411:10, 452:24-453:18)

[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.

- Jeff Decker, counsel for Natural Blue, who stated that he never communicated with Cohen or Corazzi regarding concealing their roles from investors; to the contrary, he reviewed contemporaneously disclosures regarding management, 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," and found accurate the language in the 2009 10-K concerning disclosure of management (Anaya Tr. 1214:12-1215:3; Decker Tr. 1538:1-18, 1541:12-15, 1568:7-21)[3]
- Governor Anaya, who testified that he did not enter into any scheme to conceal the roles played by Cohen or Corazzi (Anaya Tr. 1307:16-19)
- James Murphy, a Natural Blue board member, who testified that, regarding Cohen and Corazzi's roles, "we wouldn't conceal anything" (Murphy Tr. 179:2-5, 206:3-11)

This testimony compares favorably with the evidence that the Court reviewed in Prince in rejecting the SEC's request to apply scheme liability in violation of Section 10(b) of the Exchange Act. SEC v. Prince, 942 F. Supp. 2d 108, 144 (D.D.C. 2013). As here, the case involved charges that a *de facto* officer had not been disclosed to the SEC. Id. The court rejected that claim, in part because

> there was no indication that [Prince] . . . or anyone else decided he should not file such reports in order to defraud the public or the SEC. Thus, even if Prince was extremely reckless in relying on counsel's advice that he did not need to file Section 16(a) reports, the Court finds there was no "scheme to defraud" at Integral.

[3] Decker's factual testimony also demonstrates Respondents' good faith. While Respondent has not asserted an advice of counsel defense, good faith demonstrates a lack of scienter, which the Division must show to maintain its claims. *See* Markowski v. SEC, 34 F.3d 99, 105 (2d Cir. 1994); SEC v. Savoy Indus., Inc., 665 F.2d 1310, 1315 n.28 (D.C. Cir. 1981).

Id. So, too, here, where the evidence demonstrates that no "scheme to defraud" existed at Natural Blue.

III. The Division Bases its Definition of "*De Facto*" Officers on the Inapposite Testimony of its Expert Witness

The Division's argument that Respondent is a *de facto* officer of Natural Blue is literally based on the invention and application of a standard that does not exist – for good reason. This supposed standard comes from the testimony of Robert M. Daines, put forth as an expert witness. His testimony suffers from serious deficiencies, and several portions should be disregarded.[4]

Most critically, and as even the Division has recognized, SEC rules define the standard for when an individual should be disclosed as a member of management. These rules require that a company disclose its *officers*, and then defines that term. Indeed, the Division's own brief recognizes that standard:

> Regulations promulgated under the Exchange Act define the "officer" title . . . . Exchange Act Rule 3b-7 defines an "executive officer" as a company's president, any vice president . . . in charge of a principal business unit, division or function . . ., any other officer who performs a policy making function or **any other person who performs similar policy making functions for the registrant**. 17 C.F.R. § 240.3b-7.

Div. Br. 39. Nor is this the first time that the Division has acknowledged that applicable standard in a case involving allegations of whether an individual served as a *de facto* officer. In SEC v. Prince, discussed in Respondent Cohen's opening brief, the Division submitted a lengthy post-trial memorandum. No. 1:09-CV-01423-GK (D.D.C. Feb. 8, 2013), ECF No. 149. That memorandum too asserts that the relevant standard comes from Rule 3b-7, and acknowledges that "[m]ost courts that have considered the question acknowledge that policy-making is an important characteristic of an officer." Id. at 4.

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[4] The Court denied Respondent Cohen's motion *in limine* two exclude certain of the direct testimony of Robert M. Daines. *Natural Blue Resources, Inc.*, Release No. 2284/Feb. 4, 2015 (A.P. File No. 15974).

Here, however, the Division has sought to have this Court apply a new and entirely different "economic function" analysis. Daines *never even considered 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 further 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. The Division then goes further, seeking to expand on the use of Daines's testimony and utilize the "economic function" standard in place of that set by law. Div. Br. 34-35 (claiming that "Cohen and Corazzi served all of the core officer functions described by Professor Daines").

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. In the Prince matter, the Division never even employed the phrase "economic function" in its post-trial brief, focusing instead on the "policy making" issue. No. 1:09-CV-01423-GK, ECF No. 149. 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.[5] Nor is Daines's standard even

[5] 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

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. 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.

Using the proper standard set by rule and by law establishes that Cohen did not occupy a policy-making function. Indeed, 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

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one or more than one of those functions. Such a standard might require every corporation to employ someone of Daines's expertise.

forecasts, assessing [the company'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). In sum, engaging in extensive activities for a company as a consultant or even an employee does not render that individual an officer where *others* set policy.[6] Id. at 136.

[6] Two of the cases cited by the Division on this topic, SEC v. Solucorp Indust. Ltd., 274 F. Supp. 2d 379 (S.D.N.Y. 2003) and SEC v. Enterprises Solutions, 142 F. Supp. 2d 561 (S.D.N.Y. 2001), were distinguished in Respondent's opening brief. Cohen Br. 36 n.8. 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.").

IV. The Division Ignores the Evidence that Anaya and Pelosi Participated in the Formation of Natural Blue and Directed its Initial Operations

The Division seeks to categorize as "fiction" (Div. Br. 9) the documentary record demonstrating not only that Natural Blue (Nevada) was formed collectively by *all* of Anaya, Pelosi, Cohen and Corazzi, but also that that Cohen's work in identifying a reverse merger target and pursuing that opportunity were in fact directed and authorized by Anaya and Pelosi. The Division cannot escape, though, the testimony of its own witnesses that reinforces that documentary record.

A. Founding of Natural Blue (Nevada)

Governor Anaya's Testimony: Governor Anaya testified that, prior to the founding of Natural Blue, he had in fact been "interested in activities and businesses relating to water purification . . . for over 30 years." Anaya Tr. 1054:10-13. Indeed, in the time period directly leading up to Natural Blue's incorporation, in February 2009, Governor Anaya had in fact had a series of discussions with a number of business people regarding various water and environmental proposals. Anaya Tr. 1045:12-1046:5. He then shared his interest in developing and participating in a water-related project with Cohen and Corazzi, and told them that he would be interested in leading "a green-related company." Anaya Tr. 1048:9-1049:12, 1053:4-1058:19.

Subsequent to these conversations, a meeting among Governor Anaya, Pelosi, and Cohen was held on March 6, 2009; that meeting is documented by minutes that were *signed by both Governor Anaya and Pelosi.* Div. Ex. 9; Cohen Ex. 420. The minutes attest to the following corporate acts:

- The appointment of Governor Anaya and Pelosi to Natural Blue's Board, with Anaya elected as Chairman and CEO and Pelosi as President
- That organizational shares of the corporation be issued as follows:

- Toney Anaya – 24%
- Paul Pelosi, Jr. – 21%
- James Cohen, Sr. or designees – 20%
- Other organizational shares – 35%

- That Cohen "investigate and report alternatives to the board for the Corporation concerning funding and becoming a reporting public company."

Div. Ex. 9; Cohen Ex. 420.[7]

Moreover, Governor Anaya testified extensively regarding the initial meetings held by the Natural Blue Board of Directors. Far from repudiating the minutes – that he signed – of those meetings, his testimony supported the account that the minutes provided: that he and Pelosi participated in the founding of Natural Blue, and directed Cohen to explore ways in which it could transition into becoming a public company. Thus, Anaya testified that:

- Natural Blue was not presented to him "as a fait accompli" but grew out of a series of discussions. Anaya Tr. 1054:14-1056:15.
- He recalled attending and participating in the March 6, 2009 meeting. Anaya Tr. 818:6-24.
- He recalled that the Board resolved at the meeting to direct Cohen to investigate and report alternatives for Natural Blue to become a public company. Anaya Tr. 818:8-21, 1065:25-13 (confirming "that's the job that the Board agreed to"). Indeed, Governor Anaya stated that he thought a reverse merger "made sense because it would bring Natural Blue in as a publicly-traded company. And I understood what that meant." Anaya Tr. 1064:25-1065:13.

[7] The Natural Blue Board received subsequent reports from Cohen on the progress of talks with Datameg over the following weeks, culminating in Anaya signing a transaction term sheet. Cohen Br. 10-11.

Even if, as the Division asserts, Cohen may have had some discussions with Datameg prior to March 6, 2009, they were just that – discussions – and involved a separate aspect of Datameg's business. Those discussions did not rise to the level of a corporate act until Cohen received authorization from Governor Anaya and the Natural Blue Board.

Paul Pelosi's Testimony: Pelosi testified that Natural Blue was formed through the participation of *each* of himself, Anaya, Cohen and Corazzi:

> Q Okay. How did you first become familiar with Natural Blue?
> A Well, I got together with, over the phone with Jim Cohen, Joe Corazzi, and Toney Anaya, and we founded the company.
> Q The four of you?
> A Yes.

Pelosi Tr. 476:13-19. Pelosi too testified that he attended the March 6, 2009 meeting of the Natural Blue Board of Directors. Pelosi Tr. 533:21-534:9. He testified that he accepted appointment to the Board and signed the minutes of the meeting reflecting the election of officers and directors and Cohen's assignment by the Board to explore a reverse merger. Id. 536:9-16. Overall, Pelosi testified that the minutes accurately depicted the officers of the company and the intent of the Board members to explore going public. Id. 537:8-538:5.

Paul Vuksich's Testimony: Vuksich, the experienced counsel that Natural Blue retained, testified that he was intimately involved in documenting the corporate acts of Natural Blue (Nevada). Vuksich Tr. 386:8-24.

B. Initial Operations of Natural Blue (Nevada)

Moreover, after their appointment as officers and directors, Anaya and Pelosi did indeed direct the operations of Natural Blue, as reflected in contemporaneous documents and their testimony. For example, on May 1, 2009, Anaya sent an email to Pelosi and Cohen that included a summary of "recent activities that [he had] been handling." Cohen Ex. 11. Anaya testified that

the email accurately listed various types of work that he had been doing on the company's behalf, including the following:

- Accounting Activities, including posting and making deposits and paying invoices
- Secretarial Activities, including documenting receipt of subscription agreements

Anaya Tr. 1097:16-1098:25; Cohen Ex. 11.

Pelosi as well testified to a range of activities that he and Anaya engaged in during that period:

> We met in New Mexico. We discussed – we met with lawyers. We met with geologists. We discussed the technologies. And we explored the process of acquiring land or rights to land to extract water and then clean.

Pelosi Tr. 485:15-24. Contemporaneous business correspondence also reflects these activities, including an email Pelosi sent on May 3, 2009 noting that the group "had [a] good week of getting organized and setting up the business" and outlining various business objectives. Div. Ex. 22; Pelosi Tr. 539:9-541:3; *see also* Pelosi Tr. 545:18-547:5 (confirming that Cohen Ex. 16, email correspondence between Pelosi and Anaya dated May 16, 2009, reflects Pelosi "and Governor Anaya as officers and directors of the company working through the business plan").

V. The Division Ignores the Evidence that Anaya and the Board Controlled Natural Blue's Operations

The Division attempts to create from whole cloth an alternate reality that ignores the roles that Governor Anaya and the Board had in setting policy for Natural Blue and directing its operations. *See* Div. Br. 14-25. Yet throughout the period from August 2009 through January 2011, the period in which Anaya served as the company's Chairman and CEO, he and the Board set policy, as reflected in the evidentiary record.

A. Director and Officer Appointments

The Division ignores the record of how the shareholders of Natural Blue determined the individuals that would serve as the initial members of Natural Blue's Board, claiming that the board members were "hand-picked" by Cohen and Corazzi. Div. Br. 11. In fact, the *shareholders* of Natural Blue, including Governor Anaya, *elected* the initial Board of Directors. Cohen Ex. 55. No less than *four* of the Division's witnesses testified that the shareholders and *not* Cohen and Corazzi in fact controlled these Board appointments:

- Governor Anaya confirmed that he "sign[ed] off on the shareholder consent with respect to selection of the Board of Directors" and "voted [his] shares in favor of that." Anaya Tr. 1117:22-1118:4.
- Pelosi confirmed that "by virtue of [his] signature" on the consent, he "voted as a shareholder for the individuals listed to be the Board of Directors of Natural Blue effective August 20." Pelosi Tr. 553:24-554:23.
- James Murphy, another Board Member, testified that he "consent[ed] to the election" of the initial board as listed in Cohen Ex. 55. Murphy Tr. 168:11-169:8.
- And Paul Vuksich, the company's experienced counsel, testified that he drafted the consent to document the election of the Board *by the shareholders*. Vuksich Tr. 427:12-428:23.

Subsequent Board Member appointments through January 2011 were authorized by one person alone: Governor Anaya, who retained and exercised that authority. *See* Post-Hearing Submission on behalf of Respondent James E. Cohen ("Cohen Br.") 13-14.

Nor do the circumstances surrounding Natural Blue's transaction with EcoWave, and the appointment of Samir Burshan and Daryl Kim to Natural Blue's Board, demonstrate otherwise.

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).

The appointment of Walter Cruickshank as Natural Blue's Chief Financial Officer, a corporate act that the Division argues demonstrates Cohen's control (Div. Br. 17), in fact represents another instance of the Natural Blue Board setting policy and directing Cruickshank's hiring. 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").

B. Pelosi Was Not Removed, He Resigned

The Division misstates the evidence as to Pelosi's departure from the Board, asserting that Cohen and Corazzi "force[d] Pelosi off of the board." Div. Br. 22. In fact, as Pelosi testified, his 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.

The Division points to correspondence regarding a draft shareholder consent to remove Pelosi from the Board (Div. Br. 22), but ignores two critical facts. First, the Division never presented any evidence that the shareholder consent was in fact signed. 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.

Second, the record demonstrates that, 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* "opened up" regarding removing Pelosi. Div. Ex. 264.

C. The Division Has Not Shown That Cohen Controlled the Company's Public Filings

On a number of key examples of corporate activity, the Division cannot show that Cohen exerted control. So, for instance, the Division asserts lamely that Cohen and Corazzi had "*involvement* in drafting SEC filings for Natural Blue" and otherwise had additional direct communications with the company's lawyers and auditors, not that they controlled the filings or the company's attorneys. Div. Br. 16. In fact, as demonstrated in Respondent Cohen's opening brief, Anaya controlled selection of the company's attorneys and the services they provided (Cohen Br. 14-16), and Anaya and the professionals he controlled were responsible for the company's filings (Cohen Br. 17-19).

D. The Division's Other Examples of Cohen Asserting Control Fall Flat

Respondent Cohen's opening brief addressed a number of the episodes the Division focused on at trial to demonstrate that Cohen did not exert control or set policy for Natural Blue. Additional instances put forward in the Division's brief, including the "Hoover" deal and control over the company's books and records, do not show otherwise.[8]

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

The Division focuses on Governor Anaya's complaints about access to the company's financial records (Div. Br. 15, 23), but they are just that – unsubstantiated complaints. In fact,

[8] Indeed, the Division quotes Anaya as complaining about Cohen's "meddling" in the company's affairs. Div. Br. 19; Anaya Tr. 843. Yet Anaya's word choice – "meddling" – implies that Cohen was perceived as an outsider, hardly an officer of the company.

those complaints were never borne out by a shred of evidence that Cohen ever controlled those records or sought to keep them from Anaya in any way.[9] To the contrary, the record shows the following:

- 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)

2. The "Hoover building" Deal Does Not Evidence Control of Natural Blue by Cohen

Another of Governor Anaya's complaints, and the Division's focus, revolved around the "Hoover building" deal. Div. Br. 24. The incident, however, does not demonstrate control over Natural Blue by Cohen. To start with, 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.

[9] Anaya also proposed that the company give bookkeeping 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.

Indeed, 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, 1166:13-19 (Anaya recounted that "I did suspend [Cohen]").

3. The Division Manipulated the Testimony of Sofia Hussain

The Division relies heavily on analysis by SEC accountant Sofia Hussain in attempting to misstate the relative payments to Cohen and Corazzi from Natural Blue, and their share ownership. However, Hussain's testimony was so severely predicated on skewed slivers of information, based on direction from Division attorneys, as to render her evidence unavailing to the Division.

This dynamic impacted Hussain's analysis of payments. Hussain analyzed the funds that employees on payroll and non-employee retained professionals received from Natural Blue. Div. Ex. 253. However, after being directed by the Division "litigators on this case," she listed payments to Cohen and Corazzi "in the compensation category" along with employees of the firm even though, as she recognized, neither was an employee and neither received payroll checks from the company. Hussain Tr. 1412:24-1413:24. Including Cohen and Corazzi in the "compensation" category is an entirely artificial construct, and renders meaningless significant portions of Hussain's analysis, including Div. Ex. 253 p. 2. By contrast, moving payments received by Cohen and Corazzi into the "Payments for Professional Business Services" category, id. p. 5, would allow for a more representative comparison.

Hussain's inability to distinguish professional services payments from expense reimbursements further compromises, critically, her analysis. Hussain Tr. 1417:3-1418:7. Indeed, the Division can only argue – in a footnote – that the company appears to have paid directly for certain expenses. Div. Br. 33 n.21. However, neither Hussain nor the Division has

affirmatively identified *any* single payment to Cohen as actually being for professional services versus a reimbursement. The Division has fallen far short of its burden on this point.

Hussain's analysis of share ownership contains similar flaws. Again, Hussain testified that "[t]he litigators in this case" provided her with an instruction to *combine* in her chart share ownership by Cohen and Corazzi despite the utter lack of evidence as to any control by one over shares owned or controlled by the other. Hussain Tr. 1401:5-15; Div. Ex. 254. She further admitted that Division attorneys directed her *not* to include share ownership of new management that took over leadership of Natural Blue following the Atlantic deal, even though that would have demonstrated that new management had more shares than did Cohen or Corazzi. Id. 1403:10-24, 1411:11-20.

In the end, her testimony proved only what Respondents contended: majority ownership by Anaya and Pelosi, no control by Respondents, and disbursements to accountants, attorneys and executives to conduct the business of Natural Blue. In light of these deficiencies, Hussain's testimony should not be credited.

VI. The Division Ignores the Evidence that Anaya Directed Entry into the Atlantic Deal and Remained Closely Involved in Negotiations

The account the Division provides of the circumstances that resulted in Natural Blue entering into an agreement with Atlantic suffers from a number of deficiencies: much of it is irrelevant, tangential and not probative as to Cohen's role with Natural Blue, and it ignores critical documentary and testimonial evidence demonstrating Governor Anaya's work to direct, monitor, and authorize the transaction.

To start with, the Division's own brief makes clear that the genesis of the transaction came not from the efforts of either Cohen or Corazzi but the interest and conversations of Eric Ross of the venture firm Watch Harbor Asset Management and Erik Perry of Atlantic. Div. Br.

26-27. These two conducted a series of communications, involved others at Atlantic, including Sal Tecce and Joseph Montalto, and only then reached out to involve Natural Blue. Id. Cohen and Corazzi were not part of these precipitating conversations.

Along the same lines, the Division's own brief details a series of misrepresentations made by Perry in February 2011 once he assumed leadership of Natural Blue. Div. Br. 31-32. Neither Cohen or Corazzi have been accused of participating in or directing these 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.

Most critically, the Division largely ignores evidence of Anaya's role in directing, monitoring, and authorizing the transaction. As presented in Respondent Cohen's brief, Anaya discussed the transactions with his authorized agent, Corazzi, reviewed all relevant agreements and provided comments where necessary, involved counsel, professionals, and fellow Board members, and demanded that any proposed changes be made before he would commit to the deal. Cohen Br. 23-24. This record shows that Anaya was intimately involved in and knowledgeable about the transaction. Id. Moreover, the Division also ignores the evidence as to Anaya's motive to push for a transaction: Anaya 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").

In summary, the evidence shows that Anaya retained control of Natural Blue, and Cohen and Corazzi, through the close of the Atlantic transaction.

The Division also discusses at some length the events surrounding Perry's dismissal from the Natural Blue Board in June 2011. Div. Br. 32-33. This discussion chiefly is notable for the degree to which it ignores the valid reasons that the Board as a whole determined that Perry was no longer capable of operating in the company's best interests. Montalto Tr. 1358:4-24 (testifying 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, as the Division recognizes, Perry's actions and misrepresentation were so far out of bounds that he incurred sanction by the SEC. Div. Ex. 287. These dynamics compelled his removal.

Moreover, the transcript of the conversation from June 2011 that the Division argues shows Cohen "claimed ownership over the company" is in fact subject to multiple interpretations. Based on the history of the company's development, and previous corporate actions including Datameg's 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.

CONCLUSION

For the foregoing reasons, the Division has not established that Cohen acted as a *de facto* officer of Natural Blue, engaged in any scheme to defraud, or in any way violated Section 17(a) of the Securities Act, or any other provision, by a preponderance of the evidence. Accordingly, we respectfully submit that this Court should find Cohen not liable and decline to impose sanctions.

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Respectfully Submitted,

/s/

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