PETRILLO KLEIN & BOXER LLP

655 Third Avenue
22nd Floor
New York, NY 10017
Telephone: (212) 370-0330
www.pkbllp.com

Guy Petrillo
Direct Dial: (212) 370-0331
Cell: (646) 385-1479
gpetrillo@pkbllp.com

January 3, 2017

BY ELECTRONIC MAIL

Hon. James Grimes
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549
Email: alj@sec.gov

Re: *In the Matter of Barbara Duka*, File No. 3-16349

Dear Judge Grimes:

We respectfully submit this letter in support of the Court's ruling, absent authority to the contrary, barring the Division's offer of the testimony of Kurt Pollem in a Division rebuttal case. (Rough Tr. 148:15-149:7).[1] As explained below, the Court's ruling is correct and should remain undisturbed.

Mr. Pollem should be precluded from testifying as a rebuttal witness for two independent reasons. First, the testimony that the Division asserts is proper rebuttal was, in fact, offered by the Division when it introduced, and the Court accepted into evidence, the transcript of Ms. Duka's investigative testimony, Division Exhibit 338 (Tr. 1185:15-25). Ms. Duka gave the same testimony during the investigation that the Division cited as support for calling Mr. Pollem in rebuttal. A party cannot rebut testimony that it offered. Second, the hearing testimony that the Division relies on to characterize Mr. Pollem as a rebuttal witness was elicited during the Division's case-in-chief and before the Division rested its case.

I. Applicable Law

Rebuttal evidence is allowed "to permit a litigant to counter new, unforseen facts brought out in the other side's case." *Faigin v. Kelly,* 184 F.3d 67, 85 (1st Cir.1999); *see* Charles Alan Wright and Victor James Gold, 28 Federal Practice and Procedure § 6164 (1993) (rebuttal evidence "may not merely support the case-in-chief of the prosecution or plaintiff"). "Rebuttal

[1] Respondent understands the Court to have ruled that Mr. Pollem cannot properly rebut testimony offered by Brian Snow, and therefore, this letter only addresses whether Mr. Pollem can be called by the Division to rebut Ms. Duka's testimony. (Rough T. 154:12-23).

evidence is admissible only where the need for it could not have been foreseen at the time the plaintiff presented its case-in-chief." *Daly v. Far E. Shipping Co. PLC.*, 238 F. Supp. 2d 1231, 1238 (W.D. Wash. 2003), *aff'd sub nom. Daly v. Fesco Agencies NA Inc.*, 108 F. App'x 476 (9th Cir. 2004) (citing Charles Alan Wright and Victor James Gold, 28 Federal Practice and Procedure § 6164 (1993)). "When a party knows that a contested matter is in the case, yet fails to address it in a timely fashion, he scarcely can be heard to complain that the trial court refused to give him a second nibble at the cherry." *Id.*

"To determine whether evidence is 'rebuttal' evidence, a court must ask whether the rebuttal evidence is proffered to counter evidence that the defendant has offered, or whether it is simply a continuation of the plaintiffs case in-chief . . . If the adverse party has not raised an issue to which such evidence is responsive, it is not 'rebuttal' evidence." *In re Puda Coal Sec. Inc., Litig.*, 30 F. Supp. 3d 230, 252 (S.D.N.Y. 2014), *aff'd sub nom. Querub v. Hong Kong*, 649 F. App'x 55 (2d Cir. 2016); *see also United States v. Levy*, 904 F.2d 1026, 1031 (6th Cir.1990) ("The proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party.") (internal quotation marks and citation omitted). "Evidence or theories offered by the defendant are 'new' for rebuttal purposes 'if, under all the facts and circumstances, . . . the evidence was not fairly and adequately presented to the trier of fact before the defendant's case-in-chief." *Toth v. Grand Trunk Railroad*, 306 F.3d 335, 345 (6th Cir. 2002) (citations omitted).

II. Relevant Facts

In Respondent's cross examination of Ms. Duka during the Division's case, Respondent offered Respondent's Exhibit 387 into evidence, and the Court admitted the Exhibit without objection by the Division. (Tr. 1392:8-24). Respondent's Exhibit 387, attached hereto as Ex. 1, is the same document as Division Exhibit 234, which is attached hereto as Ex. 2, and is the same document as Investigative Exhibit 234, which is attached hereto as Ex. 3.

Respondent's Exhibit 387 stated in relevant part "In determining a loan's DSC, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based upon property type as further detailed in our conduit/fusion criteria." Ms. Duka testified as relevant here as follows:

Q: Okay. And were you comfortable with the draft that Mr. Pollem sent along?

A: Yes.

Q: And why is that? What was your intention in approving -- I take it you approved this disclosure, correct?

A: I did.

Q: What was your intention in approving it?

A: To alert the reader of the manner in which we calculated debt service coverage had changed and was no longer solely focused on Table 1 constants.

(Tr. 1393:12-22.).

During Mr. Pollem's investigative testimony on February 27, 2014, the Staff showed Mr. Pollem Investigative Exhibit 234 – the same document – and elicited testimony concerning an alleged conversation Mr. Pollem had with Ms. Duka regarding the underlined language. Mr. Pollem was identified on the Division's Witness List. But the Division determined not to call Mr. Pollem before it rested on December 21, 2016. (Tr. 1926:9-10).

III. The Division Cannot Rebut Evidence That it Offered in its Case-in-Chief

We are aware of no court that has endorsed the offer of rebuttal testimony to counter evidence offered by the proponent of the rebuttal testimony in the proponent's case in chief. Here, *before* Ms. Duka was examined by her counsel in the Division's case, the Division offered her investigative testimony and it contained the very testimony the Division has argued it now wishes to rebut. Specifically, in its examination of Ms. Duka, the Division offered Division Exhibit 338, the investigative testimony of Ms. Duka, and the Court admitted the testimony (1185:15-25).

As the transcript confirms, Ms. Duka was questioned as follows and provided the following responses:

MR. LEIDENHEIMER: Could you just walk me through your thought process back in 2011 of why you thought this was sufficient disclosure?

THE WITNESS: I'm not -- I'm not sure that I remember a specific thought process. I was disclosing -- I felt I was disclosing it in the section that described what differences we had with the published criteria.

MR. LEIDENHEIMER: I'm sorry. What section is that?

THE WITNESS: Conduit/fusion methodology.

MR. LEIDENHEIMER: That starts on page 19.

THE WITNESS: Yes. So that relates to the conduit/fusion criteria, briefly explains it and then talks about some of the ways we -- some of the exceptions in this particular deal, so I think my thought process initially was that was -- that that was disclosure.

MR. LEIDENHEIMER: And specifically, you're referring to the sentence at the end of the second paragraph under conduit/fusion methodology "in determining a loan's DSC, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our conduit/fusion criteria."

THE WITNESS: Correct.

. . .

MR. LEIDENHEIMER: This sentence ends with the phrase, as further detailed in our conduit/fusion criteria. The conduit/fusion criteria were marked as Exhibit 15. Can you just show me where in there or what it is in there that you're referring to in that sentence?

THE WITNESS: Page 6, table 1 in the archetypical conduit/fusion pool. The loan constants by property type. Top left.

MR. LEIDENHEIMER: That doesn't say anything about a blend between the actual and the criteria constant, right?

THE WITNESS: It doesn't talk about a blend. It talks about what the stressed constant is.

MR. LEIDENHEIMER: It doesn't mention the actual constant at all, right?

THE WITNESS: No. But I'm -- that's why I'm saying, I'm doing something different. I'm using the constants in our criteria, but I'm also looking at the actual constant.

. . .

MR. LEIDENHEIMER: **And so by mentioning the actual debt constant, you're alerting – or attempting to alert the reader to the fact that you're doing something different than what the published criteria would say**.

THE WITNESS: **Correct**.

Division Exhibit 338, 610:7-613:2 (bold added); *see also* Division Exhibit 338, 914:4-12 ("Well, my presale reports contained a section that specifically talked about exceptions to criteria, and that's the section that I published that I was looking at two constants, thus **highlighting the fact that I was in fact looking at something different than the published criteria** and that I was actually highlighting it by putting into a section that would call that out if, you know, anybody was reading the presale.") (bold added).

This is the very testimony that the Division now purportedly wishes to rebut.

Specifically, at hearing, Ms. Duka provided the same substantive answers.

Q: What was your intention in approving [the underlined language in Respondent's Exhibit 386]?

A: To alert the reader of the manner in which we calculated debt service coverage had changed and was no longer solely focused on Table 1 constants.

A comparison chart is supplied for clarity:

Division Exhibit 338 (Investigative Transcript)	**Hearing Transcript**
612:22-613:2 MR. LEIDENHEIMER: And so by mentioning the actual debt constant [in the underlined language in Respondent's Exhibit 386], you're alerting – or attempting to alert the reader to the fact that you're doing something different than what the published criteria would say. THE WITNESS: Correct.	1393:19-22 Q: What was your intention in approving [the underlined language in Respondent's Exhibit 386]? A: To alert the reader of the manner in which we calculated debt service coverage had changed and was no longer solely focused on Table 1 constants.

We have found no decision permitting the kind of gamesmanship attempted here by the Division. *The Division offered* this testimony in its direct examination of Ms. Duka. If it wished to, it could have called other witnesses including Mr. Pollem in its direct case. It cannot call such witnesses now in rebuttal. *See Daly v. Far E. Shipping Co. PLC.*, 238 F. Supp. 2d 1231, 1238 (W.D. Wash. 2003) ("At trial, plaintiff spent a substantial portion of his case-in-chief attacking the ONI investigation, and plaintiff himself testified that he believed the ONI had engaged in a coverup of the alleged laser attack. Senator Smith's testimony that he thought the ONI 'stonewalled' would have constituted a similar attack on the investigation and should have been presented along with the other testimony to this effect in plaintiff's case-in-chief. Senator Smith's proposed testimony was not proper rebuttal."); *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1225-26 (10th Cir. 2000) ("When an attorney conducting cross-examination affirmatively draws out specific testimony, as occurred here, the district court does not abuse its discretion by disallowing rebuttal to that testimony.").

Moreover, Ms. Duka's testimony regarding her approval of the proposed sentence in the Methodology section of the presale reports can hardly be characterized as "new" or "unforeseen." *See* authorities cited supra. Division Exhibit 318, Respondent's *Wells* Submission dated December 3, 2014, stated as follows concerning the sentence in the Methodology section: "As she testified, she believed at the time that use of this phrase to describe the change highlighted the change in approach for the reader." Further, Respondent's Prehearing Brief stated as follows concerning the sentence in the Methodology section of the presale:

> As noted above, Duka reasonably believed that the Methodology disclosure concerning both Table 1 and Actual Constants was appropriate because the "considering both" formulation - "In determining a loan's DSC, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our conduit/fusion criteria" - informed the reader that the Actual Constants

> figured into the analysis and also captured the treatment of all loans in the respective 2011 CF Transactions, including those whose actual constant was higher than Table 1, and partial-interest only loans. Duka also intended to alert the reader through this disclosure that New Issuance was employing a different approach from one that merely drew on Table 1.

Respondent's Prehearing Brief at 39-40. And, notably, the Division's Prehearing Brief twice referred to Duka's approval of the sentence in the Methodology. Division's Prehearing Brief at 4, 11.

Accordingly, the Division's claim that Ms. Duka's hearing testimony introduced evidence that requires a rebuttal witness is not credible, especially absent any explanation as to why Mr. Pollem, who was available, was not called during the Division's case. *See Skogen v. Dow Chem. Co.*, 375 F.2d 692, 706 (8th Cir. 1967) ("The issues were known to plaintiffs when they presented their case in chief. In fact, proof that the Skogen boys suffered from insect poisoning was a necessary element in their prima facie case. Likewise, the defense that the Skogen boys did not suffer from insect poisoning was certainly anticipated by plaintiffs. They did not demonstrate to the trial court's satisfaction, nor have they to ours, why Dr. Quinby was not called in plaintiffs' case in chief. It is altogether possible that plaintiffs kept Dr. Quinby in reserve, hoping to achieve some tactical advantage by a dramatic final statement on the issue.").

IV. The Division Cannot Rebut Evidence Elicited in the Division's Case Before the Division Rested

The testimony that the Division claims requires rebuttal was elicited during its case, before the Division rested, and was entirely within the scope of the Division's examination of Ms. Duka. Because the Division failed to call Mr. Pollem before it rested, it has waived its right to call Mr. Pollem in rebuttal. *See Olsen v. United States*, 521 F. Supp. 59, 69 (E.D. Pa. 1981) ("While it is true, as plaintiffs contend, that it is not improper to admit evidence in rebuttal which also supports plaintiffs' case-in-chief, **it would be improper to admit evidence in rebuttal which supports plaintiffs' case-in-chief but does not contradict evidence admitted in defendant's case-in-chief**. To hold otherwise would be to permit a plaintiff to withhold part of plaintiff's case-in-chief and deprive the defendant of a fair opportunity to meet that evidence in defendant's case-in-chief. In addition, the resulting volleys of evidence back and forth between plaintiff and defendant would undoubtedly confuse even the most conscientious jury.") (bold added).

The cases cited by the Division in court today do not rule or even suggest otherwise. In *United States v. Barrow*, 400 F.3d 109 (2005), the defendant specifically declined to make the argument that Ms. Duka makes here, namely, that evidence should be precluded because it was not appropriate rebuttal evidence. *See id.* at 117 ("Nor does [Barrow] complain because his proffer statements were admitted in the government's case-in-chief rather than in its rebuttal case."). Instead, *Barrow* addressed the wholly distinct question of whether a defendant's statements made during proffer sessions could properly be introduced at trial pursuant to a

waiver agreement as a result of defense counsel's "factual assertions in his opening statement and cross-examination." *Id.* at 123.[2]

And, *United States v. Tejada*, 956 F.2d 1256 (2d Cir. 1992) is inapposite because, there, the court permitted the government to call a witness to rebut testimony offered by a defense witness *after* the government rested. Specifically, a private investigator hired by the defendant testified in the defense case "that Detective O'Flaherty could not have seen the entrance to 2800 Jerome Avenue from his surveillance point on the date of arrest," to which the government offered rebuttal testimony by way of "Agent Dongelli," who testified that "from his surveillance position he had seen Cabrera enter 2800 Jerome Avenue empty-handed and return carrying a box." *Tejada*, 956 F.2d at 1266.

V. Conclusion

As we explained today, Respondent has made decisions regarding how to present Respondent's defense based on the Division's failure to identify or call Mr. Pollem as a witness in its case-in-chief, including but not limited to decisions regarding (1) the witnesses Respondent no longer needed to consider calling, and (2) whether to examine Respondent during the Division's case. It would unfairly undermine Respondent's opportunity to present her case in the manner counsel determined to be in her interests were the Division to be permitted, at the last minute, to elicit on rebuttal testimony from Mr. Pollem that it has known about for almost three years and was entirely free to elicit in its direct case. The Court's ruling is entirely appropriate and should not be disturbed.

Respectfully submitted,

Guy Petrillo
Daniel Goldman
Theresa Gue

Encs.

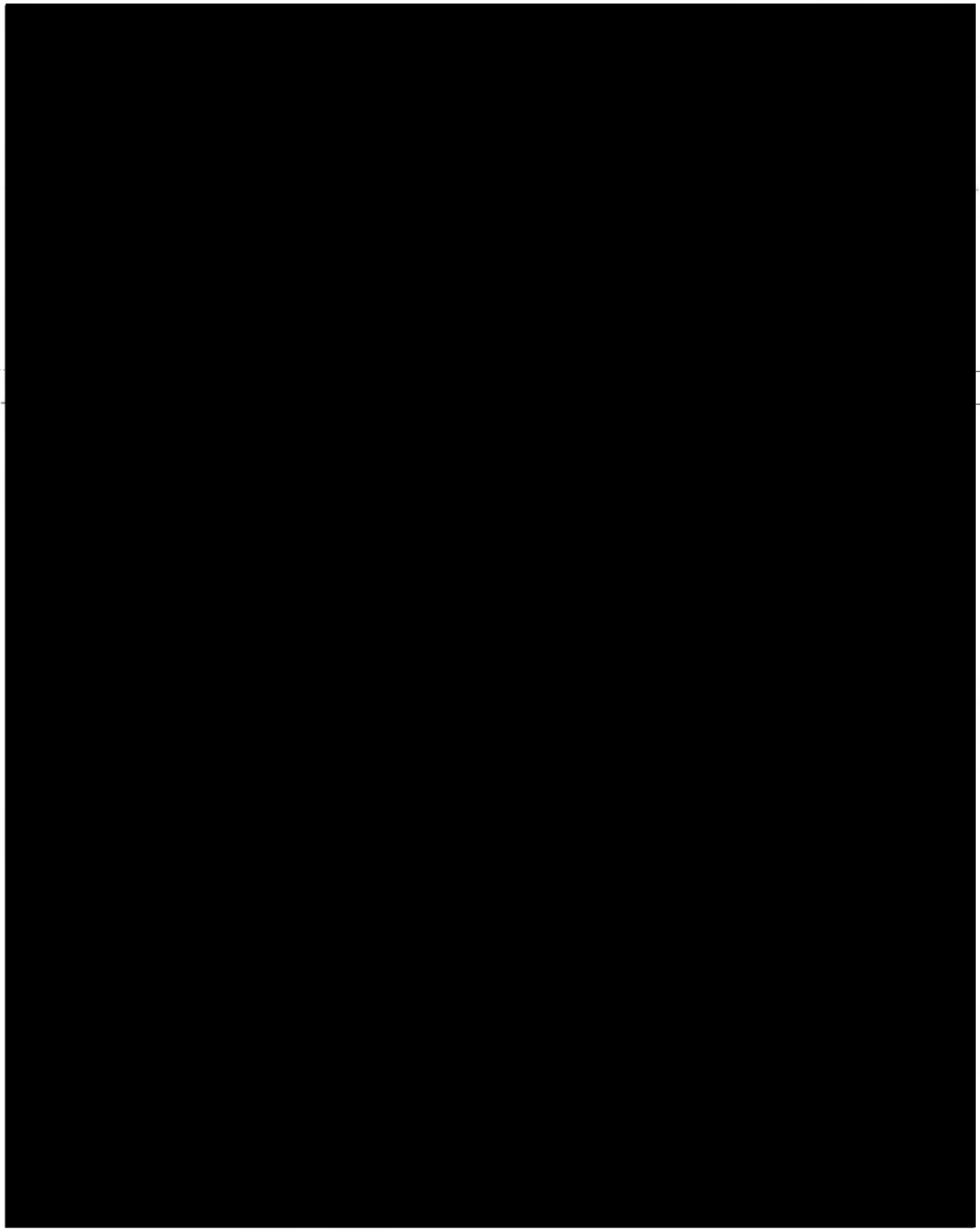
cc: Stephen McKenna, Esq. (by electronic mail)
Alfred Day, Esq. (by electronic mail)
Rua Kelly, Esq. (by electronic mail)

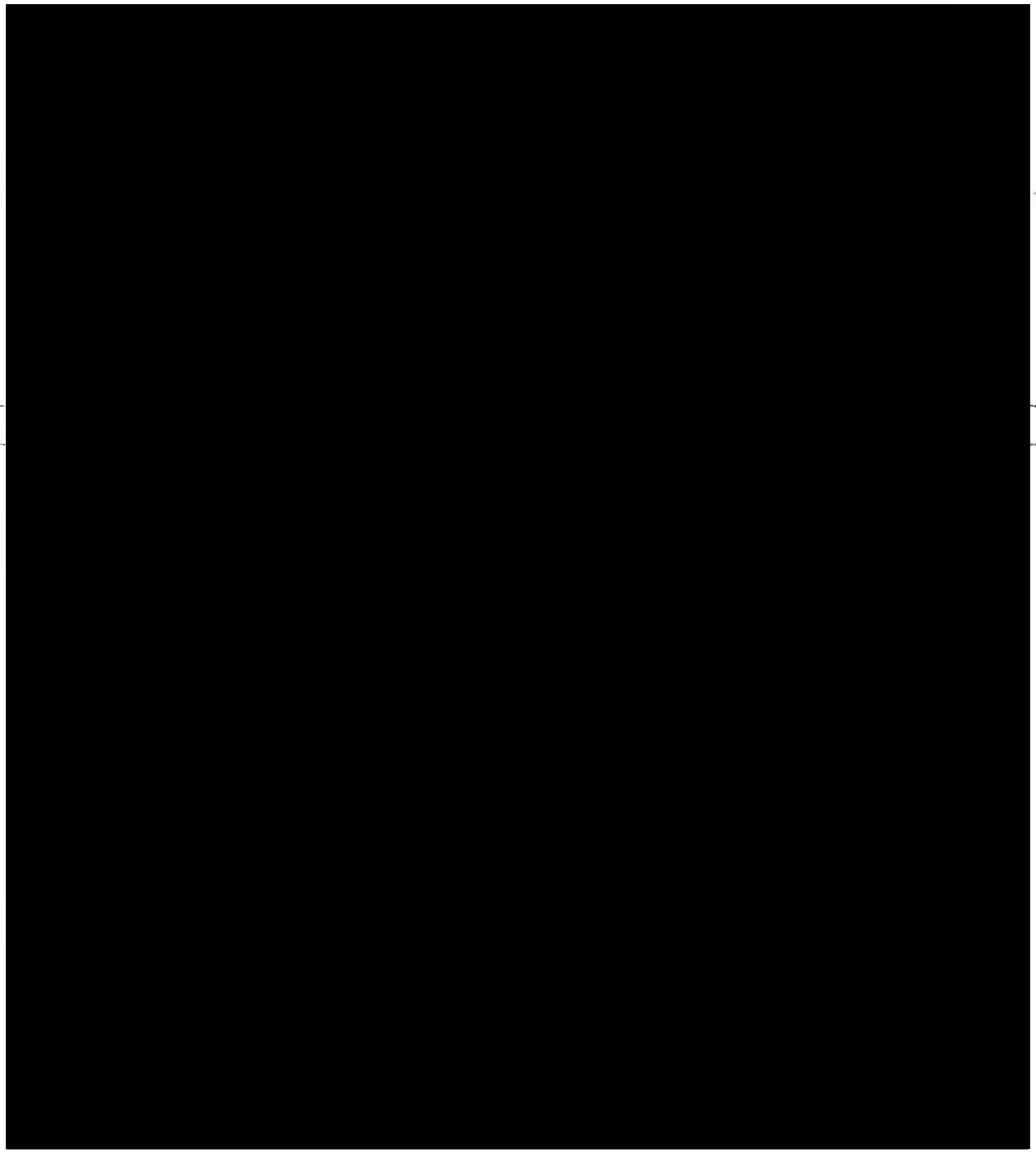
---

[2] Indeed, *Barrow* included a footnote that supports Ms. Duka's argument that evidence elicited during cross-examination during the government's case-in-chief needs to be addressed during the government's direct case, and not on rebuttal. *Id.* at 117, n. 7 ("We are not convinced that the admission of proffer statements in the government's case-in-chief necessarily constitutes error. As the Seventh Circuit observed in *United States v. Krilich*, 159 F.3d at 1025, a defendant can open the door to introduction of proffer statements as easily on the government's case-in-chief—for example, through cross examination of a prosecution witness—as on his own case. In the former circumstance, and where the defendant rests without presenting direct evidence, the only opportunity the government will have to rebut the evidence elicited on cross-examination *will be on its direct case*.") (emphasis added). Had the Respondent declined to call any witnesses in her defense case, it cannot be the case that the Division would have an opportunity to present a rebuttal case.

Exhibit 1

[redacted]

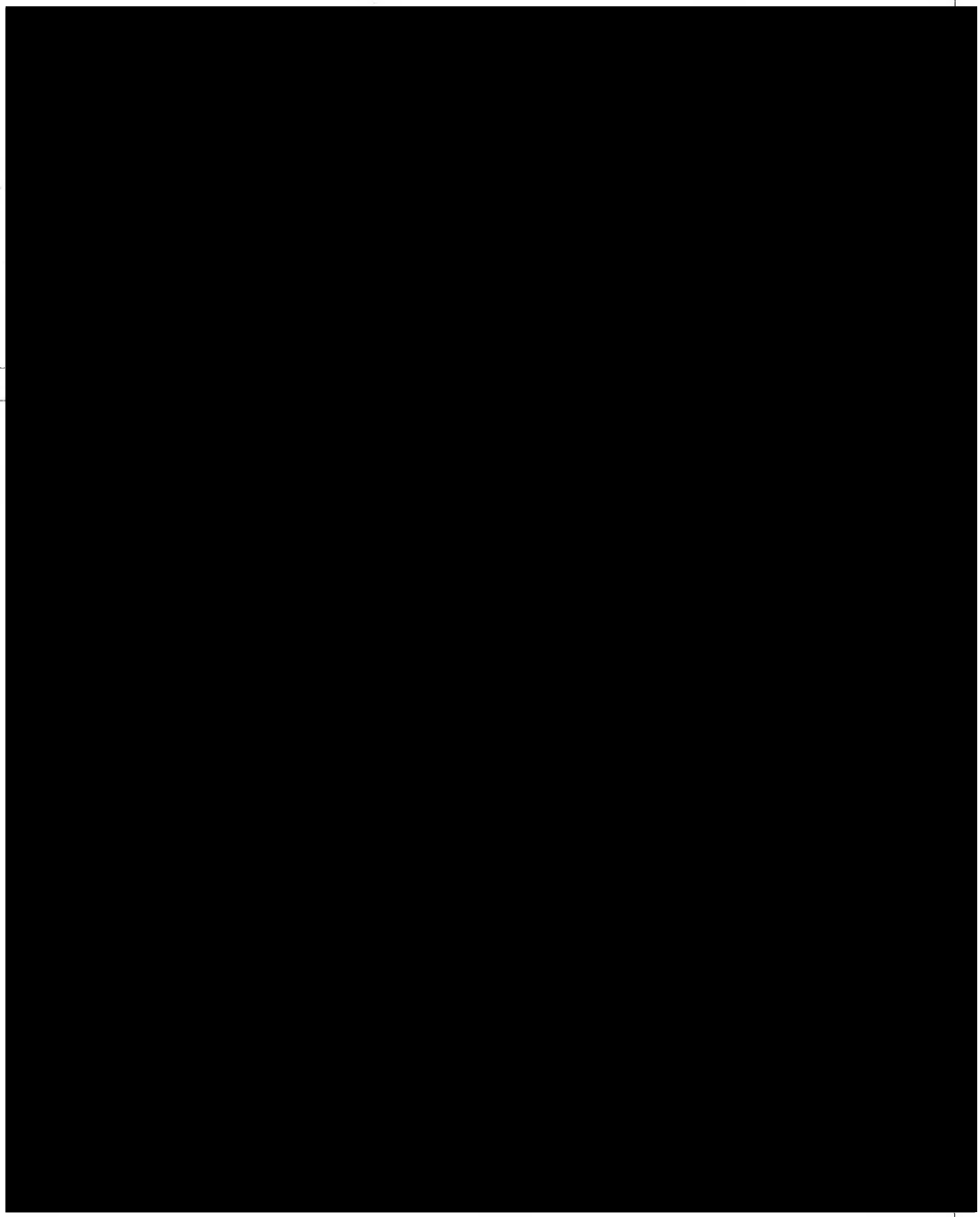




[redacted]

Exhibit 2

[redacted]



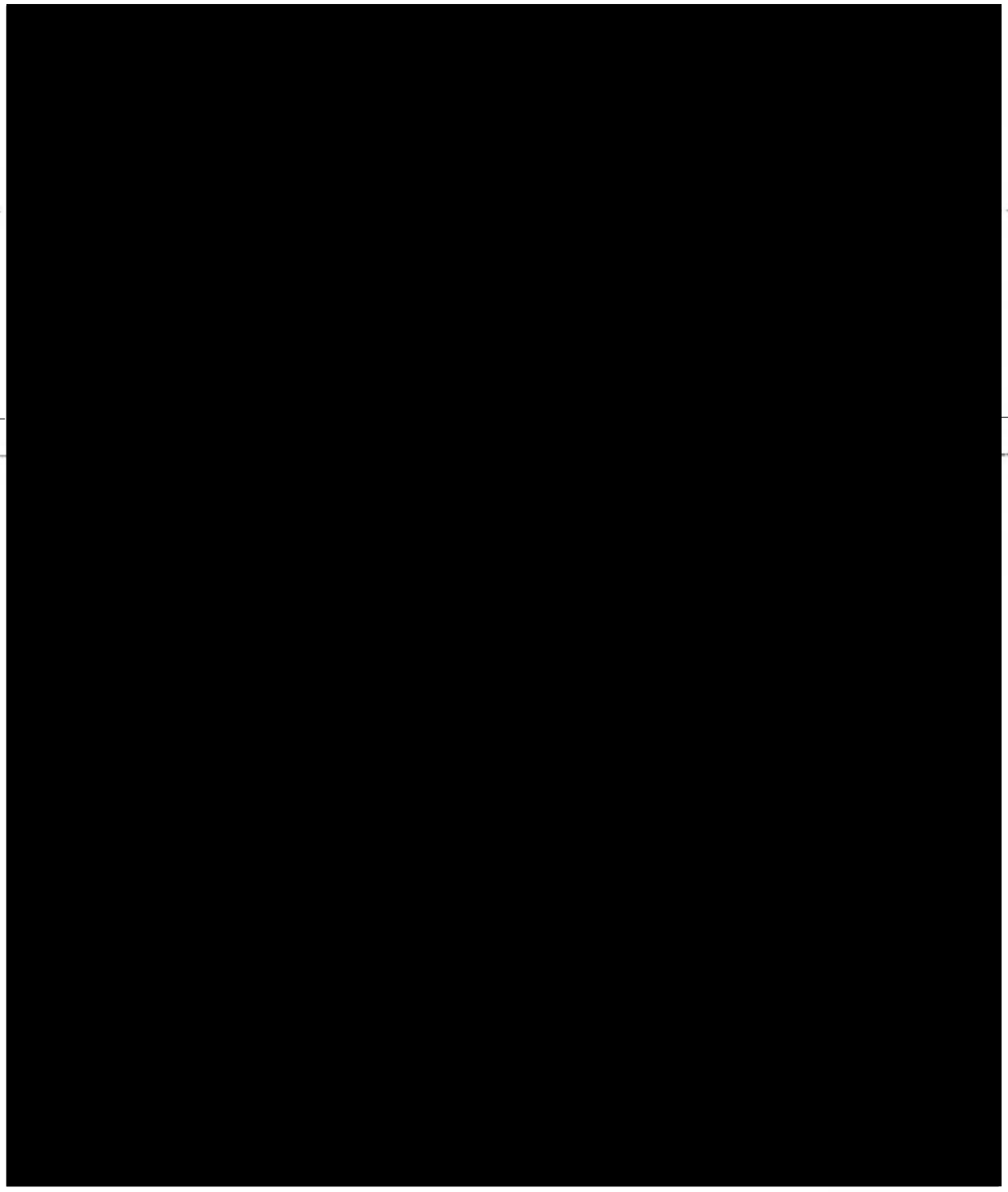
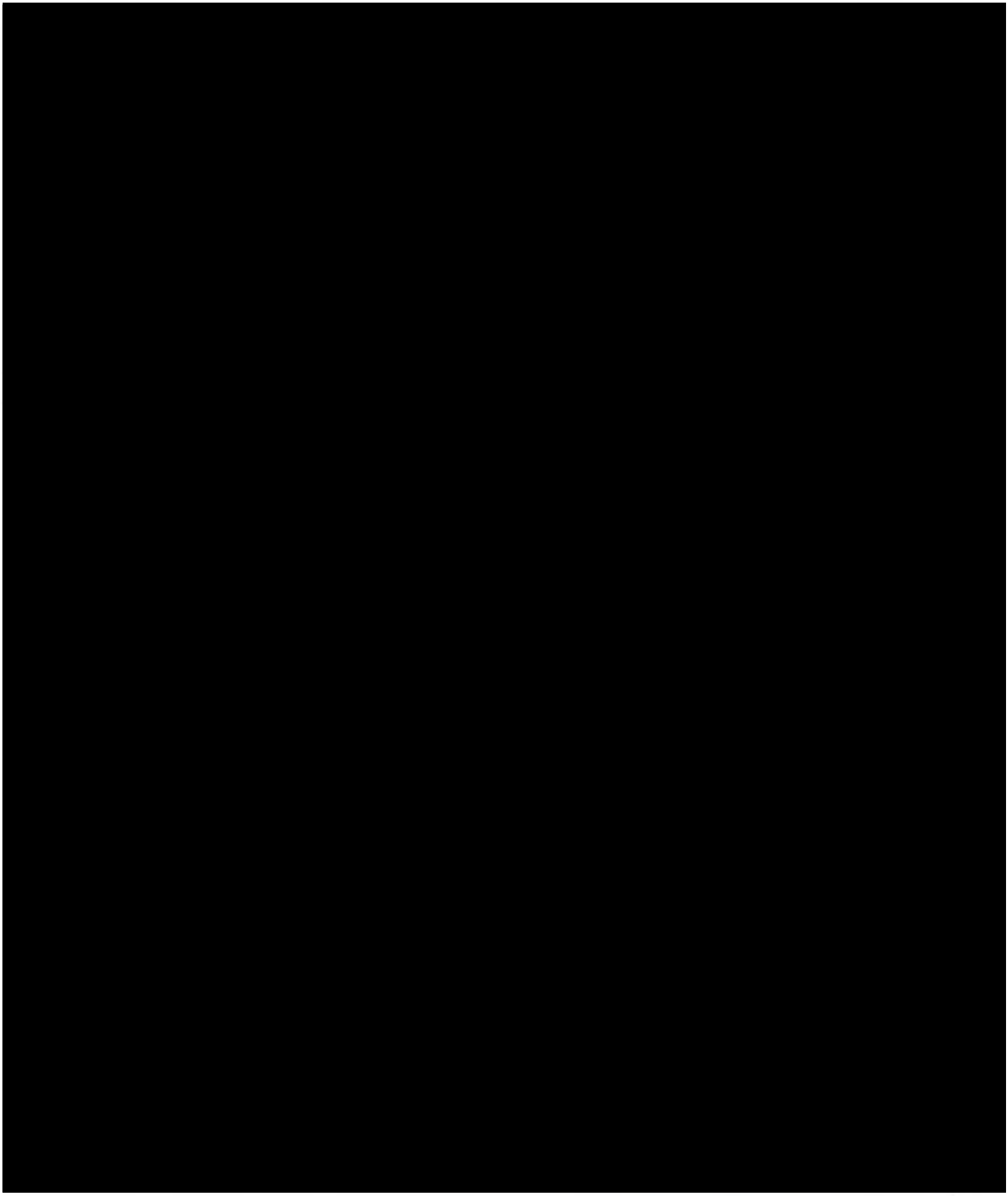
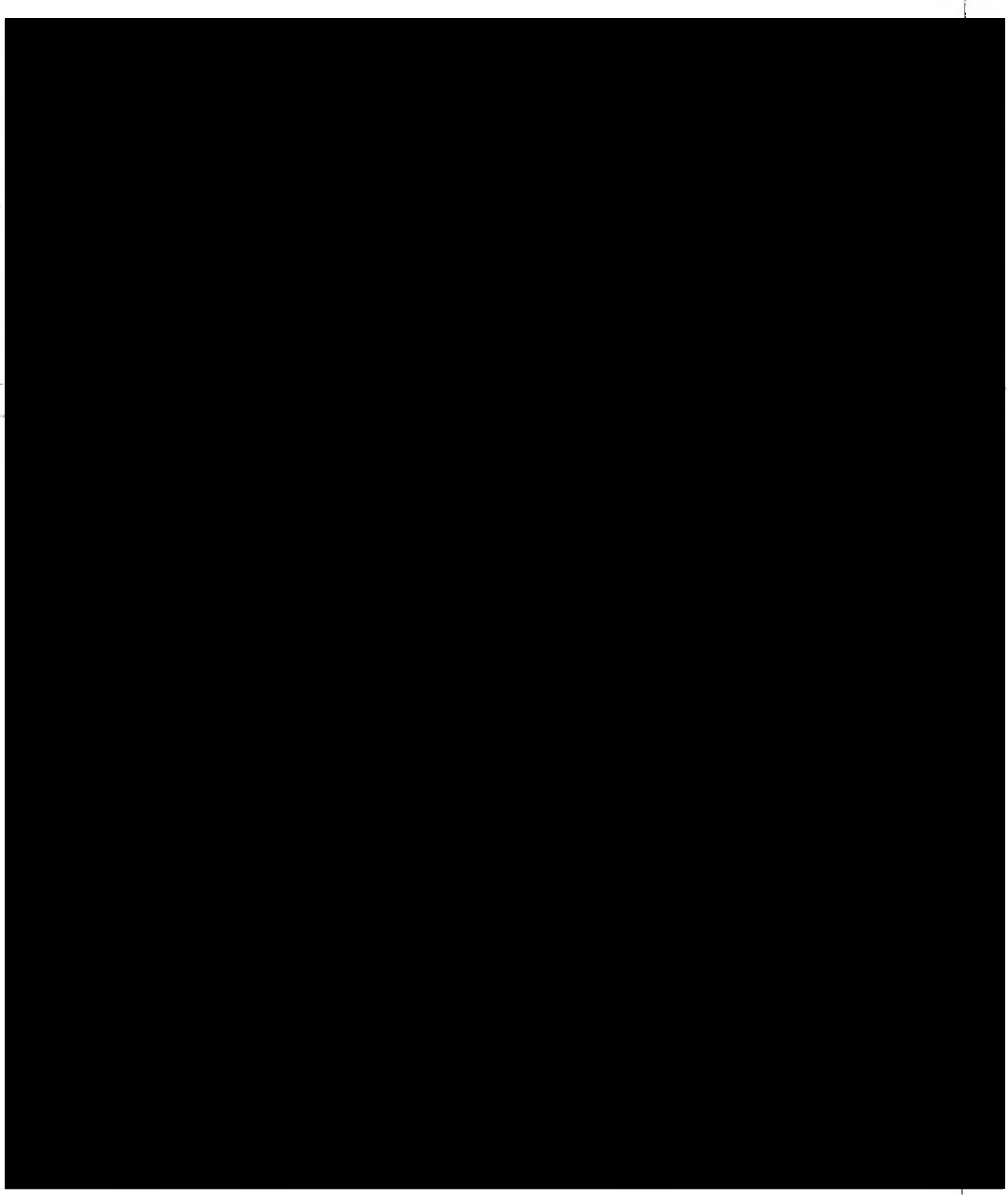
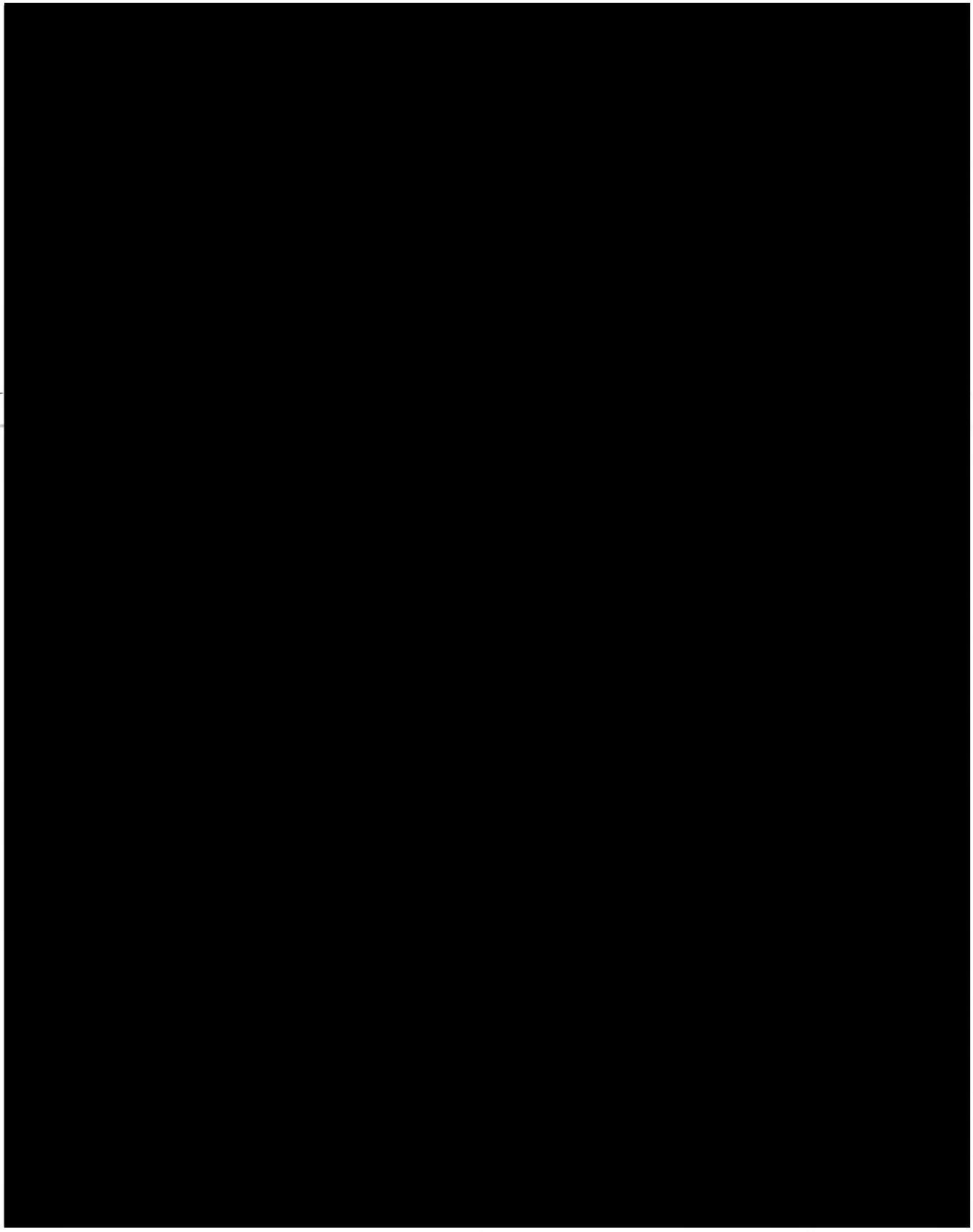


Exhibit 3







UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16349

In the Matter of	
BARBARA DUKA	
Respondent.	

CERTIFICATE OF SERVICE

On January 3, 2017, Respondent Barbara Duka's letter in support of the Court's ruling barring the Division's offer of the testimony of Kurt Pollem and related exhibits were sent to the following parties and other persons entitled to notice as follows:

Brent Fields, Secretary
Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549
Phone: 202-551-5400
Fax: 703-813-9793
(Original by Federal Express; one copy by facsimile)

Hon. James Grimes
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549
Email: alj@sec.gov
(by electronic mail)

Stephen C. McKenna
Trial Attorney
U.S. Securities and Exchange Commission
Denver Regional Office
1961 Stout St., Suite 1700

Denver CO 80294
Email: McKennaS@sec.gov
(by electronic mail)

Alfred Day
Trial Attorney
U.S. Securities and Exchange Commission
Boston Regional Office
33 Arch Street, 23rd Floor
Boston, MA 02110-1424
(by electronic mail)

Rua Kelly
Trial Attorney
U.S. Securities and Exchange Commission
Boston Regional Office
33 Arch Street, 23rd Floor
Boston, MA 02110-1424
(by electronic mail)

By: _____

Theresa H. Gue
(tgue@pkbllp.com)

Petrillo Klein & Boxer LLP
655 Third Avenue, 22nd Floor
New York, New York 10017
Telephone: (212) 370-0330
Facsimile: (212) 370-0391