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October 31, 2016

VIA EMAIL AND FACSIMILE

The Honorable Carol Fox Foelak
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 26049

Re: *In the Matter of Lynn Tilton,* et al. (*File No. 3-16462*)

Dear Judge Foelak:

I write regarding the Division's shocking revelation by letter sent to Your Honor late yesterday of yet another *Brady* violation involving a witness who already testified. At long last, it has come to this: The Division's failure to honor its constitutional and statutory obligations throughout this case has been simply egregious. Now the Division has disclosed yet one more episode of misconduct, and the Division has moved from serial rights violator into true "shock the conscience" territory. We therefore ask that Your Honor dismiss the charges brought here as the only appropriately severe sanction, or at a minimum temporarily halt the trial, hold an evidentiary hearing at which Division attorneys would be forced to answer questions under oath and permit the issuance of subpoenas to the Division and Anchin to get to the bottom of this scandalous turn of events.

Yesterday afternoon on a Sunday at 4:37 p.m., and more than three days after the conclusion of the testimony of Peter Berlant—the only fact witness outside Patriarch supposedly addressing the SEC's claim of alleged accounting fraud—the Division disclosed by letter (the "Partial Disclosure Letter") that Anchin, Block & Anchin ("Anchin"), the firm of which Mr. Berlant is a senior partner, has been engaged by the Division since May 2016 in connection with an unspecified enforcement action pending in the United States Court for the District of Connecticut, and that Mr. Berlant's firm is being paid $366,000 for that work (the "Connecticut Matter"). As explained more fully below, Mr. Heinke and Mr. Williams, the signatories to the Partial Disclosure Letter, are, in fact, the Division lawyers representing the SEC in that Connecticut Matter, and they disclosed Anchin's involvement to the defendant in the Connecticut Matter on October 4, 2016. However, the Division waited until October 30, 2016—*after* Mr. Berlant testified—to disclose to Respondents Anchin's involvement in the Connecticut Matter, carefully crafting the Partial Disclosure Letter to avoid providing any identifying information about the Connecticut Matter or disclosing that Mr. Heinke and Mr. Williams are the Division lawyers prosecuting that case. And of course, it was Mr. Williams

who questioned Mr. Berlant when he was called by the Division to testify in this case last week.

To date, the Division's multiple instances of misconduct have not only gone unpunished, they have gone unrecognized. In response to repeated instances of dereliction on the Division's part, Your Honor has commented that such misconduct should be referred to other "authorities"—apparently, meaning the SEC's Inspector General and the like—but that they are not "relevant" to the issues to be determined in this trial. To the contrary, they are not only relevant to the disposition of this case: they go to the fundamental fairness and integrity of these proceedings and wholly undermine them, as witness after witness takes the stand compromised by the Division's misconduct—including not only Mr. Berlant, but investor witnesses whose exculpatory statements or other highly relevant bias information were withheld until the last possible moment.

It should never have taken until this moment when the Division was caught with a smoking gun in its hand for Respondents to obtain relief for the Division's misconduct. But in any event, we now have a smoking gun. On the basis of that smoking gun, we believe that dismissal of this case is now warranted for prosecutorial misconduct. But in any event, at a minimum, it is simply essential—and Respondents respectfully request—that Your Honor now halt this trial so that the Court can hold a hearing exploring the following issues, among others, through testimony given under oath after document disclosure provided pursuant to subpoena (with an affidavit of compliance) directed to the Division and Anchin: (1) the details of the Anchin engagement in Connecticut; (2) details of any prior Anchin engagement for the Division; (3) the involvement of Mr. Heinke and Mr. Williams in retaining Anchin; (4) the knowledge of each member of the Division trial team here, including when each learned the information; (5) why the Division disclosed the engagement to the defendant in the Connecticut Matter on October 4, 2016, but waited more than three weeks until after Mr. Berlant testified to disclose the engagement to Respondents; and (6) why the Division produced only two Anchin emails to Respondents after Mr. Berlant testified that he provided many more than two emails in response to the Division subpoena (the "Subpoena") (RX 1275), and withheld nothing called for by the Subpoena.[1] With respect to the state of the Division's knowledge, we note specially that on September 28, 2016, Dugan Bliss certified under penalty of perjury the Division's compliance with its *Brady* and *Jencks* obligations.

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[1] *See United States v. Vastola*, 680 F. Supp. 709, 711 (D.N.J. 1988) (granting mid-trial evidentiary hearing to determine whether undisclosed *Brady* material existed because "judicial economy concerns are presently outweighed by the need to vindicate defendants' due process rights, as defined under *Brady v. Maryland*").

We have raised legitimate constitutional concerns over and over about the way the Division is proceeding. Every time the Division's lawyers have been indignant in response, claiming that it was "preposterous" for Respondents to have asserted *Brady* violations (Tr. 451:23-452:4), that Respondents were engaged in a "fishing expedition" and that the Division has "taken [its] obligations seriously." (Tr. 902:17-25) (all quotes from Mr. Williams).[2] Apparently not.

The Division's willful blindness to its *Brady, Giglio* and *Jencks* obligations is underscored by the grossly incomplete disclosure the Division has made in the Partial Disclosure Letter. The Division discloses only that "on or about May 23, 2016", "the [Commission] previously retained individuals in the Litigation, Forensic and Valuation Services group at Anchin to perform forensic accounting services in a separate unrelated district court case currently pending in the United States District Court for the District of Connecticut (the 'Connecticut Matter')", that "it is possible that Mr. Berlant may be generally aware that the Litigation, Forensic and Valuation Services group at Anchin was retained by the Commission", and that he "may indirectly" profit from the engagement. (Partial Disclosure Letter at 1, 2.)[3]

Stunningly, despite the fact that the Division does not rule out Mr. Berlant's knowledge and potential profit from the Connecticut Matter, the Division did not even identify the parties to that action, the docket number of the action, the date it was filed, or the subject matter of the litigation. Respondents had to dig that out for themselves late on a Sunday night.

Although Respondents have identified the Connecticut Matter and obtained confirmation that Anchin is indeed engaged by the SEC in that case, the Division itself has not even disclosed sufficient information about the Anchin engagement to permit Respondents to cross-examine Mr. Berlant effectively on the topic.

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[2] *See also* Letter of August 26, 2016 by Dugan Bliss ("Division has complied, and will continue to comply with its *Brady* obligations); Division's Opposition to Respondents' Motion to Compel Production of Brady Materials, dated September 8, 2016 (the Division is "keenly aware of its obligations under Brady"); Declaration of Dugan Bliss Regarding the Division of Enforcement's Search for Material Exculpatory Evidence, dated September 28, 2016 (Division "recognizes its ongoing obligations pursuant to *Brady*...and its progeny"); Division's Opposition to Respondents' Motion to Compel the Production of Brady Material and Jencks Act Witness Statements, dated October 18, 2016 (Division "is abiding by its obligations under *Brady*"); Tr. 301:7-8 (the Division has "complied with any" and "gone beyond any Brady obligations").

[3] The Litigation, Forensic and Valuation Services group at Anchin is comprised of just six individuals—including Mr. Berlant and the two other individuals currently working alongside Mr. Heinke and Mr. Williams—a convenient omission by the Division that puts the lie to its purported assurance that Mr. Berlant may only be "generally aware" of this large engagement by his department.

And one thing that became perfectly plain at this trial is that one needs details to cross-examine Mr. Berlant. He spent hours under oath prevaricating to a degree that, in other circumstances, could have warranted a federal judge in this courthouse making a referral to the United States Attorney's Office for further investigation. As Your Honor will recall, Mr. Berlant swore over and over—despite scores of contemporaneous documents to the contrary—that he performed merely clerical tasks for 14 years with respect to the Zohar financial statements (*E.g.*, Tr. 759:21; 762:9; 775:23), that he did not know the financial statements were sent to Zohar Noteholders (Tr. 937:22-24), that he could only speculate as to why the financial statements were generated at all (Tr. 936:16-23), that he never provided any advice on GAAP compliance and GAAP-related references in the financial statements (893:24-894:9), and many other naked lies. And of course, at the end of cross-examination, it was revealed that Mr. Berlant had never disclosed to the Division that he was Anchin's principal communicator with Ms. Tilton (Tr. 1034:14-20), that he had enjoyed a close working relationship with Ms. Tilton over many years (Tr. 1032:9-1043:2), that he was also close to Ms. Tilton's daughter, whose Trust he had advised on (Tr. 1036:18-24), that he had testified for Ms. Tilton as an expert witness in a malpractice action against her former accountant (Tr. 1033:14-20), that he had accompanied her to an IRS appeal hearing (Tr. 1035:4-16), that his advice to her included such gems as "Be gorgeous" (RX 1195), and that—to hear him tell it—his wife (now ex-wife) merely did not care for Ms. Tilton (as opposed to his wife accusing the two of them at dinner of having an affair they both denied) (Tr. 1052:18-25). Mr. Berlant testified that he had never told the Division any of these facts—and more—because the Division lawyers had never asked, which, of course, reflects astonishingly poorly on both Mr. Berlant and the Division lawyers, who apparently did not want to know the truth. But while Mr. Berlant is merely an unusually committed prevaricator, the Division lawyers have taken oaths to protect and defend the Constitution of the United States of America, something they manifestly are failing to do, much to the injury of Respondents.

The Partial Disclosure Letter is notable for another amazing sleight of hand by the Division. The Letter states that it was "only following Mr. Berlant's testimony" that the "undersigned counsel realized" a disclosure "may be warranted." The only "undersigned counsel" are Mr. Heinke and Mr. Williams. As noted, we believe that we have identified the Connecticut Matter—*SEC v. Ahmed*, 3:15-cv-00675-JBA, and that SEC counsel of record there are none other than Mr. Heinke and Mr. Williams. The Division disclosed Anchin's involvement to Mr. Ahmed more than three weeks ago, on October 4, 2016, in an Amended Witness Disclosure actually signed by Mr. Heinke, with Mr. Williams listed on the signature block. *See* Exhibit A (a true and correct copy of the SEC's Amended Rule 26(a) Disclosures in *SEC v. Ahmed*).

It is therefore a shocking disregard of elementary principles of candor that Mr. Heinke and Mr. Williams, the signatories to the Partial Disclosure Letter, now represent that it was "only following Mr. Berlant's testimony" that they realized a disclosure "may be warranted" when it is they who engaged Anchin in their Connecticut Matter, and that they disclosed to Mr. Ahmed's counsel the fact of Anchin's involvement *three weeks* before the start of Respondents' trial, but withheld those facts from Respondents until *after* Mr. Berlant testified. Such behavior more than justifies Respondents' request for dismissal of the charges or, at a minimum, a halt to the trial, document subpoenas to the Division, and testimony under oath for Mr. Heinke and Mr. Williams, as well as the three silent Division lawyers, who did not sign the Partial Disclosure Letter.

The Division's misconduct is amplified here by the fact that the Division has not disclosed either to Respondents or the Court the full story concerning the missing Anchin emails relating to Zohar. As Your Honor will recall, the Division served the Subpoena on Anchin on April 22, 2014. The Subpoena called for production of all relevant documents and communications concerning services rendered by Anchin in connection with the Zohar funds, including communications within Anchin, and between Anchin and Patriarch, between January 1, 2007 and "the present". Yet Anchin produced just two emails in response to the Subpoena. In his trial testimony, Mr. Berlant confirmed his investigative testimony about the Subpoena and his participation in the response to it on the following points: He reviewed the subpoena when it was served. He reviewed paper records and email in an effort to comply with the Subpoena. He did not withhold any responsive documents at all. (Tr. 924:25-925:15). At trial Mr. Berlant further testified that it "is likely, yes" that he provided more than two emails in response to the Subpoena. (Tr. 927:25-928:3)

On direct and, particularly tellingly, re-direct examination, the Division asked Mr. Berlant no questions whatsoever about Anchin's response to the Subpoena. Indeed, the Division's sole contribution to the discussion about the Subpoena was Mr. Williams' ludicrous objection to admission of the Subpoena as an exhibit on grounds that his Subpoena had not been authenticated, among others. (Tr. 920:13-922:16).

We also note again the necessity of obtaining the Division's notes of its "rehearsal" with Mr. Berlant the week prior to his testimony. Mr. Berlant testified that "all" the Division lawyers present took notes. (Tr. 901:12-21). He also testified that the "rehearsal" included the Division discussing questions and answers with him, and coaching him on cross-examination. (Tr. 899:17-900:25). Under the circumstances, it is imperative that the Division produce its notes of the "rehearsal."

In sum, the Division's misconduct recounted here is extraordinary and, indeed, continued in the Partial Disclosure Letter itself. And it is of a piece with the misconduct the Division has

committed throughout these proceedings.[4] As I have said before, the world is watching what is happening here. Public interest in this proceeding is intense, not only because of the controversial, hotly contested charges against Ms. Tilton, but also because of the related controversy about the forum in which they are being litigated that remains the subject of constitutional challenges throughout the country. Under all these circumstances, Respondents respectfully submit they are now entitled to dismissal of this case for prosecutorial misconduct[5] or, alternatively, a halt of the trial, subpoenas and an evidentiary

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[4] This pattern of prosecutorial misconduct includes not only the shocking details set out in this letter, but also an improper agreement with MBIA to permit its use in civil litigation of confidential, non-public information produced by our clients in the Division's investigation; belated disclosures of *Brady* and *Jencks* material based on the exculpatory statements of noteholder witnesses from SEI, Nord, and Varde; belated *Brady* disclosures of Division activities in connection with other entities whose employees were witnesses (the details of which we refrain from discussing given their confidential nature); the failure to disclose an expert's pre-OIP involvement in building the very charges on which he purportedly opined as a neutral third party; and questioning a witness on allegations outside the scope of the OIP.

[5] Under these circumstances, dismissal is the only sufficiently severe sanction warranted as a matter of fundamental fairness and due process. *See, e.g., United States v. Chapman*, 524 F.3d 1073, 1078-80, 1084 (9th Cir. 2008) (dismissing charges for prosecutorial misconduct where the government revealed, mid-trial, that it had not previously disclosed a testifying witness' prior conviction and had withheld documents from the defendant). *First*, Respondents have been subjected to a pattern of prosecutorial misconduct and belated disclosures of exculpatory information by the Division of Enforcement's attorneys that are a result, "at best, [of] its agents' sloppy investigative work or, at worst, [of] their knowing failure to meet constitutional duties," *United States v. Lyons*, 352 F. Supp. 2d 1231, 1252 (M.D. Fla. 2004) (dismissing charges). *Second*, there is no way to remedy the most recent misconduct: Respondents would suffer substantial prejudice if the government is permitted to recall Mr. Berlant, which—despite being presented in the Division's letter as an opportunity to remedy its *Brady* violation—is a transparent attempt by the Division to turn its misconduct to its advantage in order to reap the "benefit from a 'do over'" after its witness crashed and burned on the stand, *United States v. Aguilar*, 831 F. Supp. 2d 1180, 1210 (C.D. Cal. 2011) (dismissing charges); *see also Chapman*, 524 F.3d at 1080. *Third*, there is a glaring "weak[ness]"—indeed, sheer absence—of inculpatory evidence as we near the end of the government's case. *See Chapman*, 524 F.3d at 1080 (factoring same into the decision to dismiss). *Fourth*, if these proceedings are permitted to continue without severe sanction, the "public['s] confidence in the administrative process upon which [the SEC's] authority ultimately depends" will be severely "undermine[d]." *Clarke T. Blizzard*, Advisers Act Release No. 2032, 2002 WL 714444, at *2-3 (Apr. 24, 2002) (disqualifying counsel). Although Your Honor has commented in a prior case that you do not believe SEC Administrative Law Judges ("ALJs") have the authority to dismiss charges for prosecutorial misconduct—that only the Commission can do that—we believe that ALJs do have that authority, under their Rule 111(d) power to "regulat[e] the course of a proceeding and the conduct of the parties and their counsel." At a minimum, Your Honor could make a finding of misconduct, halt the trial, and allow Respondents time to go to the full Commission if that is the case. *See* Rule 161(b) (authorizing hearing officers to "adjourn any hearing" as "justice may require"). Moreover, ALJs have the authority to impose other sanctions such as striking Mr. Berlant's testimony in its entirety—which Respondents urge be done in any event.

hearing to fully investigate the facts surrounding this latest failure to disclose Anchin's involvement in the Connecticut Matter and related issues.

Respectfully,

Randy M. Mastro

cc: Susan Brune, Esq.
Dugan Bliss, Esq.
Nicholas Heinke, Esq.
Amy Sumner, Esq.
Mark Williams, Esq.

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. IFTIKAR AHMED, Defendant, and IFTIKAR ALI AHMED SOLE PROP; I-CUBED DOMAINS, LLC; SHALINI AHMED; SHALINI AHMED 2014 GRANTOR RETAINED ANNUNITY TRUST; DIYA HOLDINGS LLC; DIYA REAL HOLDINGS, LLC; I.I. 1, a minor child, by and through his next friends IFTIKAR and SHALINI AHMED, his parents; I.I. 2, a minor child, by and through his next friends IFTIKAR and SHALINI AHMED, his parents; and I.I. 3, a minor child, by and through his next friends IFTIKAR and SHALINI AHMED, his parents, Relief Defendants.	Civil Action No. 3:15cv675 (JBA)

I. PRELIMINARY MATTERS

Plaintiff, United States Securities and Exchange Commission ("SEC"), hereby amends its initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1) and Fed. R. Civ. P. 26(e)(1). The disclosures are based on information presently known to and available to the SEC. These disclosures are made without waiving the right to object on any ground including on the basis of privilege or work product protection. The SEC reserves the right to further amend or supplement these disclosures as permitted by the Federal Rules of Civil Procedure. If discovery reveals

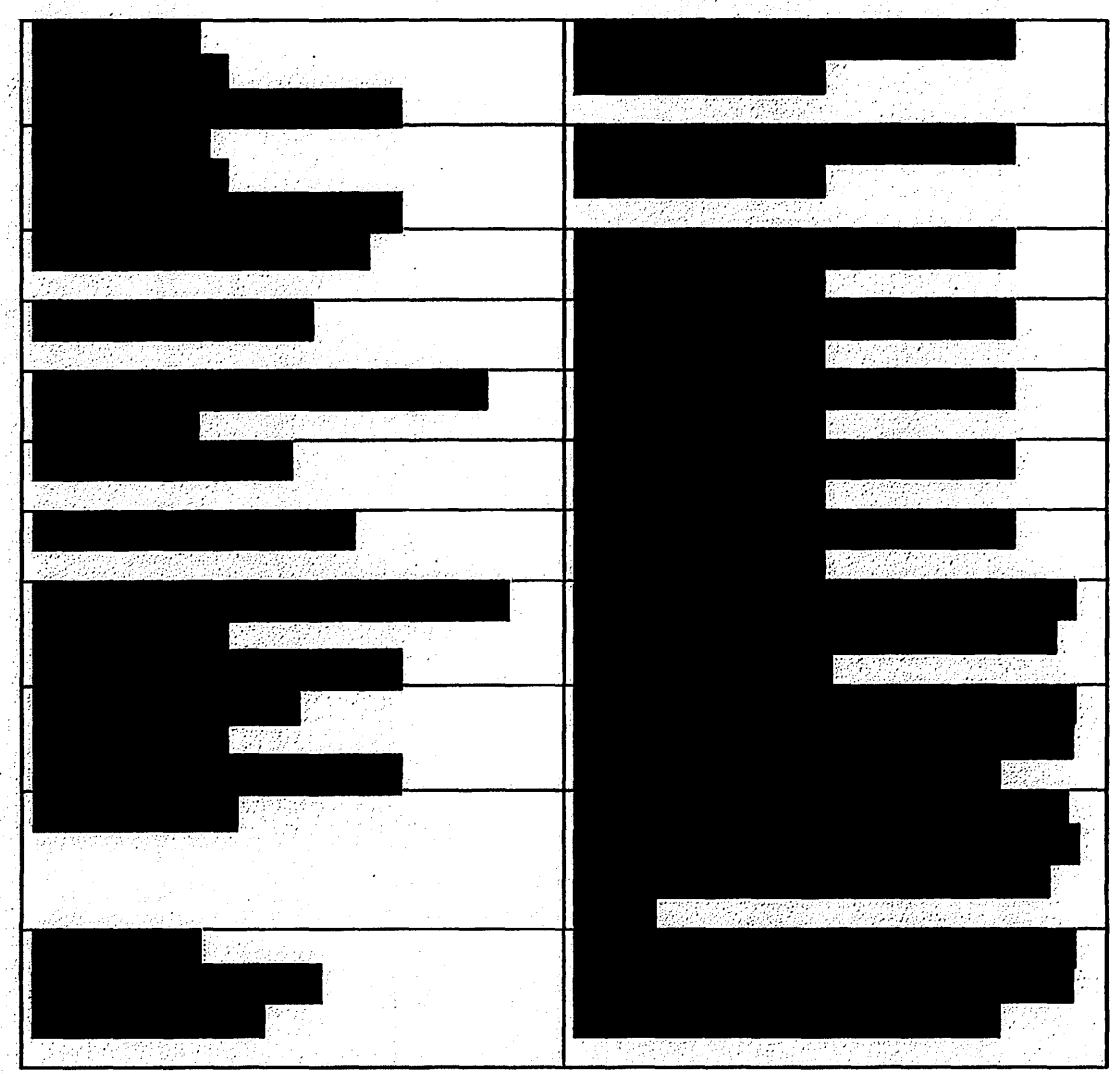
additional documents or witnesses, the SEC will supplement this disclosure, without waiving the right to object as set forth above.

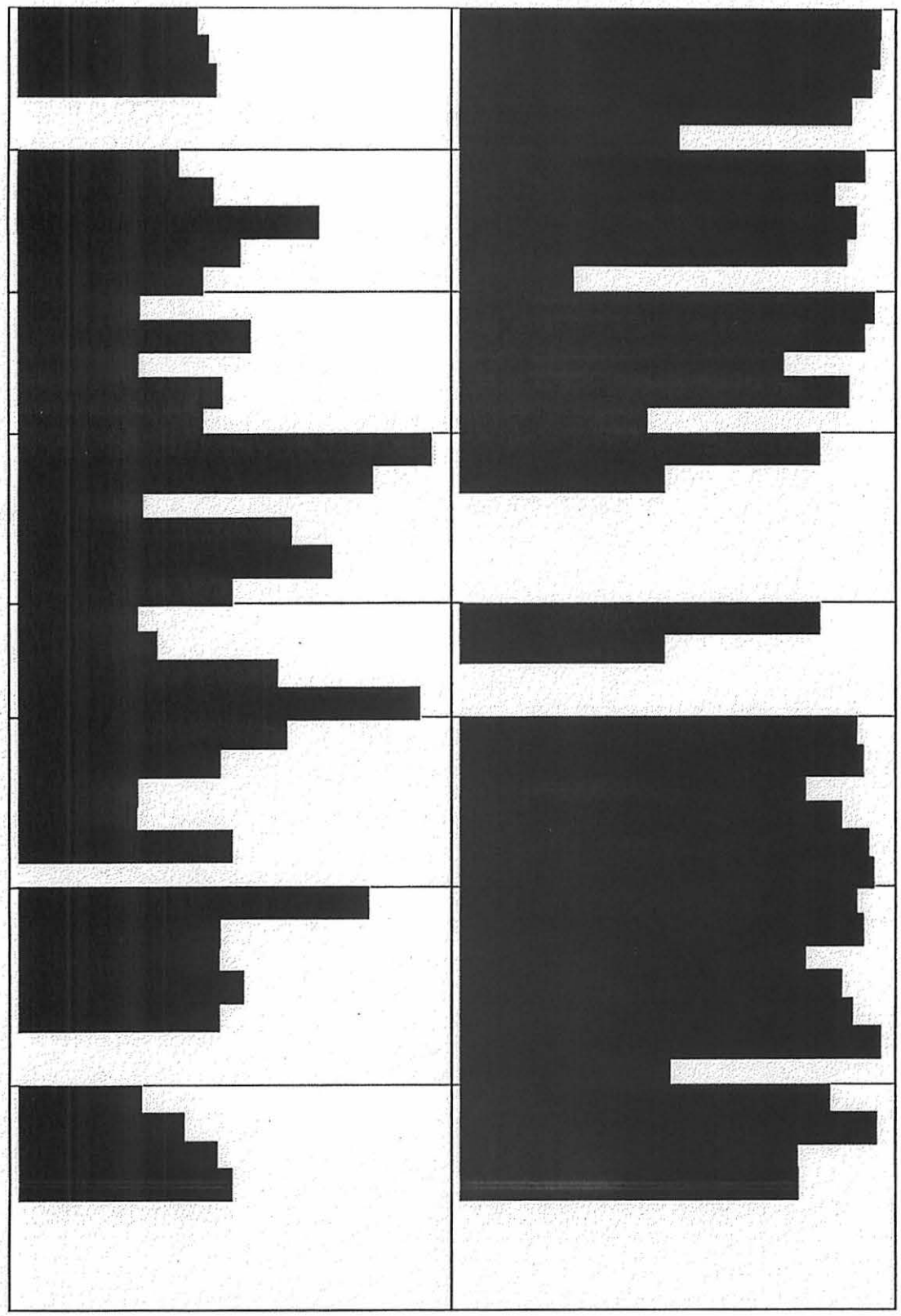
The SEC incorporates in this disclosure statement, by reference, all information disclosed by any Defendant or Relief Defendant pursuant to Fed. R. Civ. P. 26(a)(1).

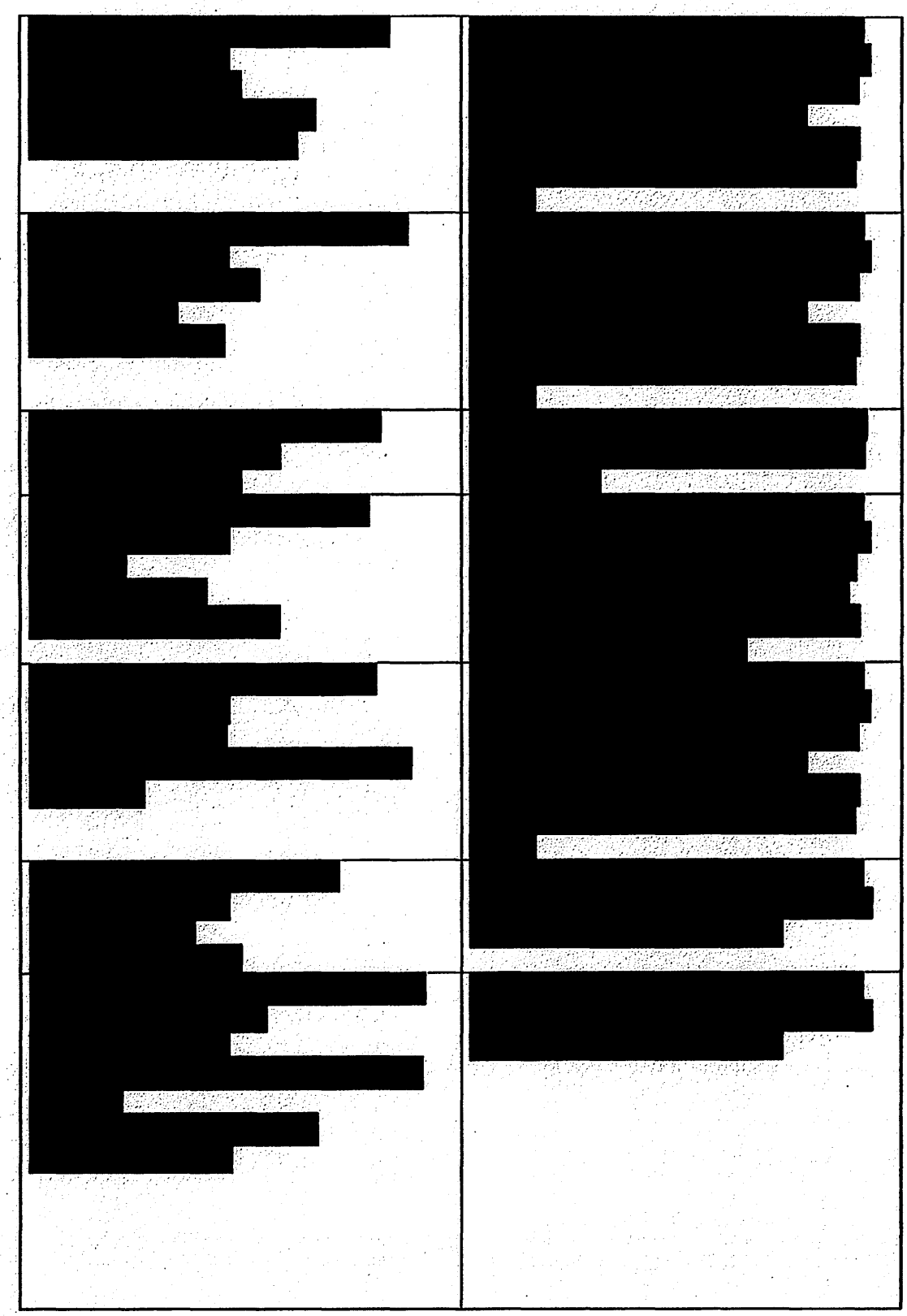
II. DISCLOSURES

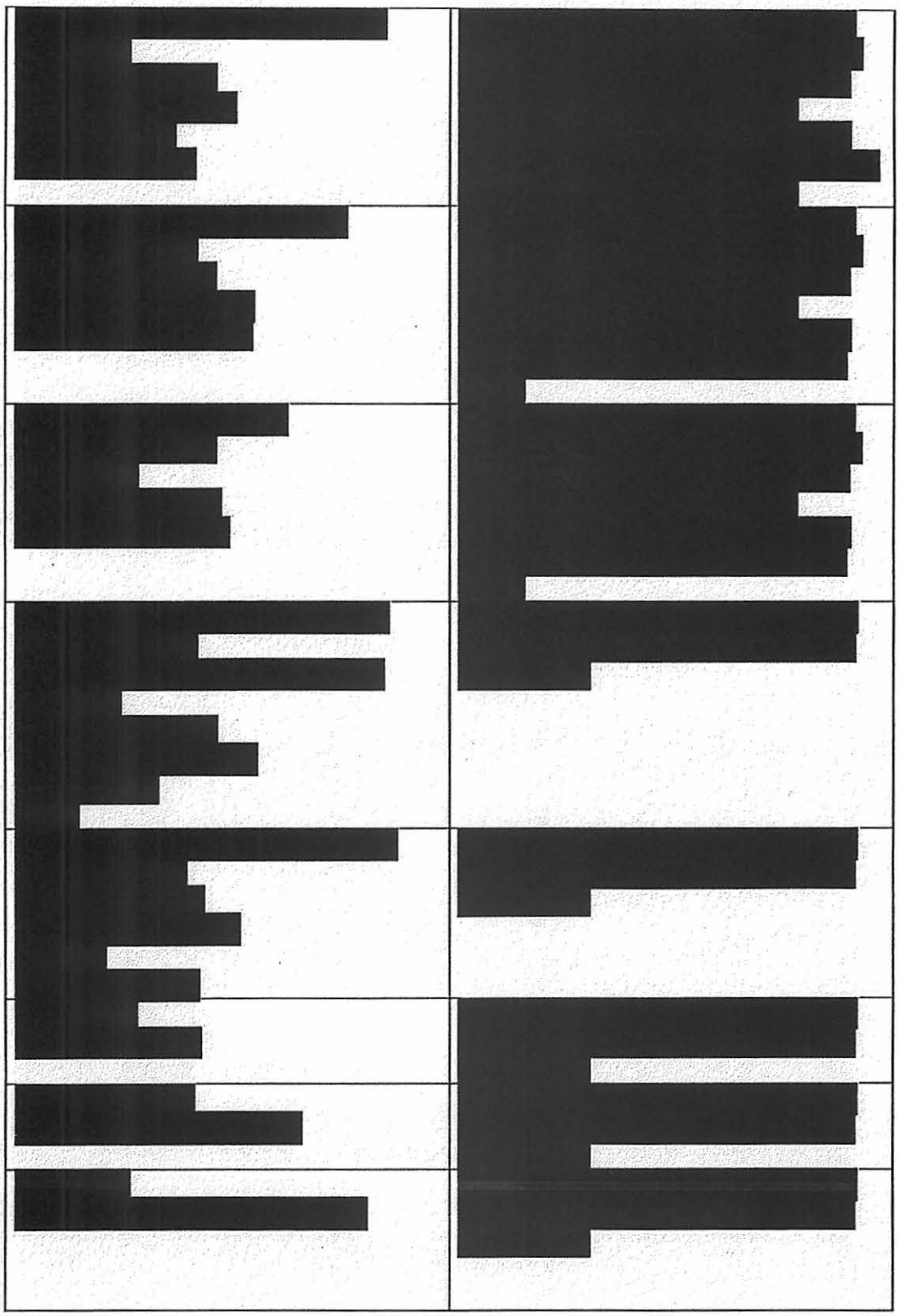
A. Rule 26(a)(1)(A)(i)

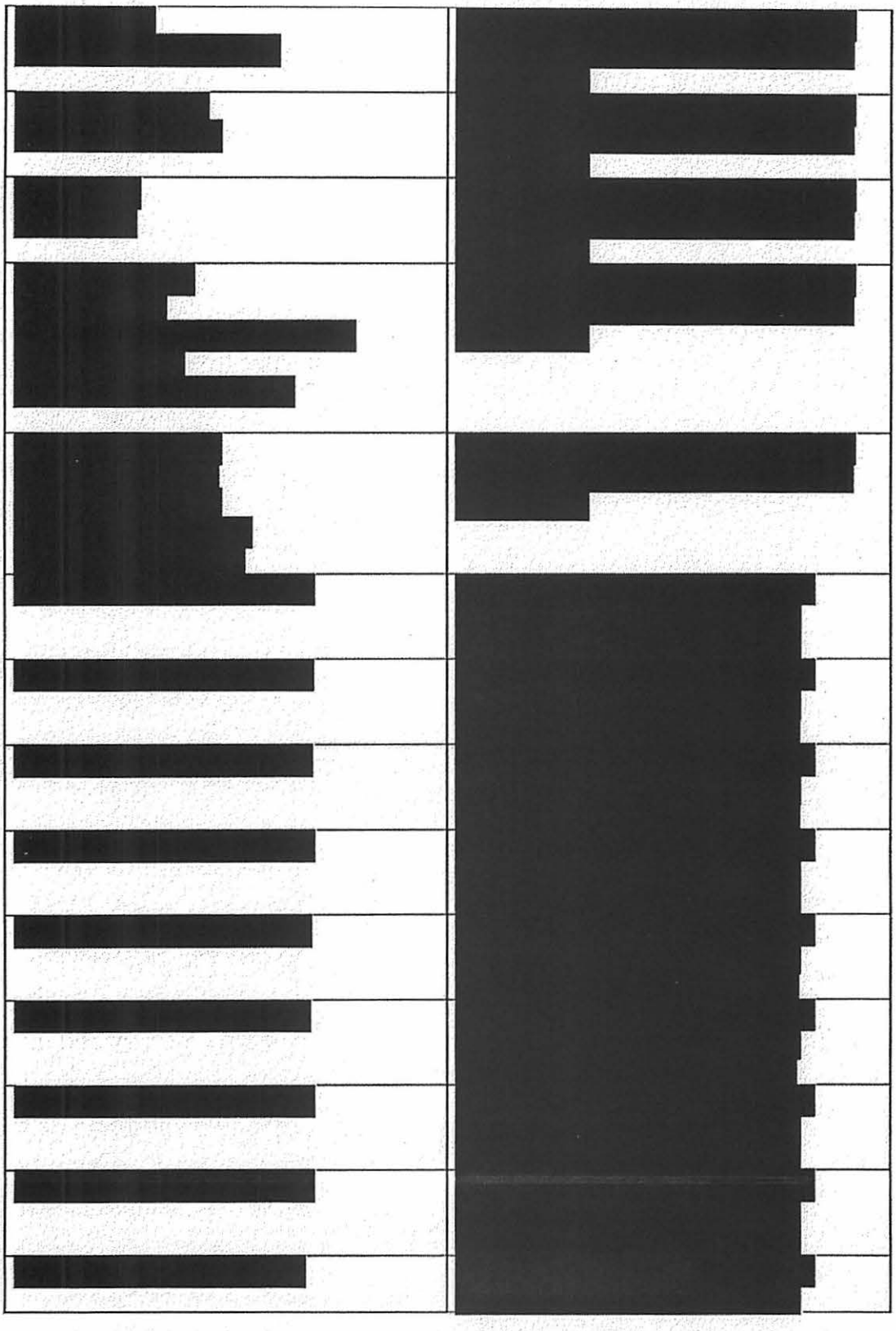
Pursuant to Fed. R. Civ. P. 26(a)(1)(A)(i), the following are the names and, if known, addresses and telephone numbers of individuals the SEC may use to support its claims.











[redacted]	[redacted]
David Beckman Anthony Bracco Or Other Representative Anchin, Block, and Anchin LLP c/o Nicholas Heinke or Mark Williams U.S. Securities and Exchange Commission 1961 Stout Street, Suite 1700 Denver, CO 80294 303.844.1000	Will summarize voluminous records relevant to this case, including bank and brokerage records showing the movement of funds that the Commission alleges were fraudulently obtained by Mr. Ahmed through various bank and brokerage accounts and into accounts in the name of Mr. Ahmed, relief defendants, or others. Will prepare numerous summary charts of relevant bank, brokerage and other voluminous records pursuant to Federal Rule of Evidence 1006, and will prepare and/or authenticate demonstrative exhibits showing the deposit, withdrawal, and transfer of funds alleged to be fraudulently obtained.
All additional witnesses identified through discovery	
All witnesses necessary for authentication of evidence	
All witnesses necessary for rebuttal	
All witnesses disclosed by any Defendant or Relief Defendant in their Rule 26(a)(1) disclosures	

B. Rule 26(a)(1)(A)(ii)

Attached as Exhibit A is an index of additional documents and electronically stored information that may be used to support Plaintiff's claims. These documents are in addition to the documents attached as Exhibit A to the SEC's initial disclosures made on March 28, 2016. Subject to the prior orders of the Court, including the Court's Order Denying Defendant's Motion for Full Access to the SEC's Investigative File [Doc. # 286], these documents are available for inspection at the offices of the U.S. Securities and Exchange Commission, 1961 Stout Street, Suite 1700, Denver, CO 80294-1961.

C. Rule 26(a)(1)(A)(iii)

The SEC is not seeking damages. The SEC is seeking, from the defendant, a permanent injunction against future violations of the federal securities laws charged in the Complaint. The SEC is also seeking disgorgement of ill-gotten gains relating to the alleged illegal conduct, plus prejudgment interest. The SEC is also seeking civil penalties pursuant to Securities Act Section 20(d) [15 U.S.C. § 77t(d)], Securities Exchange Act Section 21(d)(3) [15 U.S.C. § 78u-1], and Advisers Act Section 209(e) [15 U.S.C. § 80b-9(e)].

D. Rule 26(a)(1)(A)(iv)

Not applicable

Dated: October 4, 2016

Respectfully submitted,

s/ Nicholas P. Heinke
Nicholas P. Heinke (Colo. Bar No. 38738)
Connecticut Bar No. phv07374
Mark L. Williams (New York Bar. No. 4796611)
Connecticut Bar No. phv07375
United States Securities and Exchange Commission
1961 Stout St., Suite 1700, Denver, CO 80294
Phone: (303) 844-1000
(303) 844-1071 (Heinke)
(303) 844-1027 (Williams)
E-mail: HeinkeN@sec.gov
WilliamsML@sec.gov

Attorneys for Plaintiff United States Securities and Exchange Commission

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2016, the foregoing Amended Rule 26(A)(1) Initial Disclosures has been served upon the following via email:

Iftikar Ahmed
[redacted]

Jonathan Harris
Reid Skibell
David Deitch
S. Gabriel Hayes-Williams
Harris, St. Laurent & Chaudhry LLP
40 Wall Street
53rd Floor
New York, NY 10005
(Counsel for Relief Defendants)

s/ Nicholas P. Heinke
Nicholas P. Heinke

CERTIFICATE OF SERVICE

I hereby certify that I served true and correct copies of a letter from Randy Mastro with enclosure to Honorable Carol Fox Foelak, on this 31st day of October, 2016, in the manner indicated below:

United States Securities and Exchange Commission
Office of the Secretary
Attn: Secretary of the Commission Brent J. Fields
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
Fax: (202) 772-9324
(By Facsimile and original and three copies by Federal Express)

Hon. Judge Carol Fox Foelak
100 F Street, N.E.
Mail Stop 2557
Washington, D.C. 20549
(By Federal Express)

Dugan Bliss, Esq.
Nicholas Heinke, Esq.
Amy Sunmer, Esq.
Mark L. Williams, Esq.
Division of Enforcement
Securities and Exchange Commission
Denver Regional Office
1961 Stout Street, Ste. 1700
Denver, CO 80294
(By Email pursuant to parties' agreement)

Nilly Gezgin