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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16937

In the Matter of

JAMES MICHAEL MURRAY,

Respondent.

DIVISION OF ENFORCEMENT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT JAMES MICHAEL MURRAY

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INTRODUCTION

Respondent James Michael Murray does not dispute that he was convicted of 23 counts of criminal misconduct. While acknowledging that he had a role in the purported accounting firm Jones, Moore & Associates, Ltd., he does not deny that the JMA audit reports – which he created – falsely showed positive performance for the fund, masking the fact that the fund had lost nearly all of its value. He admits that he lied to his investors about his qualifications. And he sweeps entirely under the rug his shenanigans that led to his conviction for contempt of court. Any of these facts, standing alone, are sufficient to support the requested industry bar against Respondent.

Instead, Respondent's opposition reads as though a jury did not consider any of these facts in returning a 23-count criminal verdict against him. In Murray's myopic version of events, the jury found him guilty only due to his failure to disclose his conflict of interest with the fund auditor and third-party administrator. The thrust of his opposition is an attempt to re-litigate the district court trial with the same arguments that the jury soundly rejected. As numerous Commission decisions and SEC administrative opinions have recognized, such collateral attacks on the underlying case are not appropriate in a follow-on proceeding such as this.

Indeed, Respondent's complete lack of remorse, his defiance, and his inability to appreciate the seriousness of his crimes all demonstrate that a full collateral bar is necessary to protect future would-be investors. There are no genuine issues of material fact here. The Commission's motion should be granted.

ARGUMENT

A. THERE IS NO CREDIBLE DISPUTE THAT RESPONDENT ACTED AS AN INVESTMENT ADVISER

The first factor in determining whether to impose an industry bar is whether at the time of the misconduct Murray was associated with an investment adviser. *David R. Wulf*, Initial Decision

Rel. No. 824, 2015 SEC LEXIS 2603, at *18-*19 (June 25, 2015) (Grimes, J.). Respondent appears to make three principal arguments as to why he was not an investment adviser: (1) he did not advise "others" but rather only himself as the sole member of Market Neutral Trading, LLC ("MNT"); (2) he did not receive compensation for such advice; and (3) in any event, he did not act as an investment adviser during the period of any misconduct. Opp. at 5-10. Respondent is wrong.

First, Respondent misconstrues the definition of "advice" under the Investment Advisers Act of 1940 ("Advisers Act") in claiming that because he was the sole member of MNT, he "by definition could not have been providing investment advice to others." Opp. at 5. Courts routinely hold that persons who exercise control over a fund provide the requisite "advice" to the *fund* and thus constitute investment advisers. *See Randal Kent Hansen*, Initial Decision No. 754, 2015 SEC LEXIS 1001, at *12 (Mar. 18, 2015) (Grimes, J.) (respondent was investment adviser where he controlled all operations and activities of funds and was responsible for researching, selecting and monitoring funds' investments); *Goldstein v. SEC*, 451 F.3d 873, 879-80 (D.C. Cir. 2006) (noting distinctions between investors, who invest assets in the fund, and the "fund manager – the adviser – [who] controls the disposition of the pool of capital in the fund"); *United States v. Elliott*, 62 F.3d 1304, 1310 (11th Cir. 1995) (defendants "clearly have provided investment advice to their customers" by controlling the investments underlying the investment vehicles); *Abrahamson v. Fleschner*, 568 F.2d 862, 871 (2d Cir. 1977) ("many investment advisers 'advise' their customers by exercising control over what purchases and sales are made with their clients' funds").

Here, Murray ignores the evidence showing that he was the investment manager of MNT, that he had 100 percent control over the fund, and that he alone had the authority to make trading decisions, enter orders, reconcile trades, and ensure compliance with the fund's disclosures. Div.

Ex. N at 14, 45; Div. Ex. C at 595:20-598:24.[1] He admits that he in fact placed trades on behalf of the fund, for the benefit of the underlying investors. Opp. at 3-4 ("The MNT funds were always located in the MNT titled brokerage and or bank accounts and invested as agreed"). There is no reasonable dispute that Murray provided investment advice as defined in the Advisers Act.

Second, Respondent's claim that the Division has failed to show he received compensation for providing investment advice is disingenuous at best and additional evidence of an ongoing intent to deceive at worst. MNT's Private Offering Memorandum distributed to investors clearly stated: "At the end of each calendar quarter, the Investment Manager, Mr. Murray, will be paid an Incentive Allocation equal to 25% for each member." Div. Ex. N. at 35; Div. Ex. I at 1552:14-19, 155:8-10. This is more than a reasonable inference that Respondent claimed such a performance fee. *See generally Kornman v. SEC*, 592 F.3d 173, 184 (D.C. Cir. 2010) (upholding Commission finding that defendant met investment adviser definition, noting that private offering memoranda required payment of quarterly and annual management fees).

But even more fundamentally, Murray's opposition does not deny that he was compensated, and the contemporaneous documents reflect that Murray did in fact receive the fee. MNT's "Monthly Performance Update," which purported to show the fund's performance, stated that performance reflected the "net asset value in Market Neutral Trading, LLC's interests, adjusted to account for unrealized gains and losses . . . *and deduction of the management fees and incentive fees paid to the General Partner.*" Div. Ex. Q at 5 (emphasis added). Murray cannot have it both ways: he cannot in 2010 claim that he was compensated, only to now argue (without any evidence to the contrary) that the Commission has not met its burden that he was paid.

[1] All references to "Div. Ex." herein refer to the exhibits attached to the Declaration of Jason M. Habermeyer in support of the Division's Opening Brief.

Respondent's protest that the fund's financial statements – which he pejoratively dismisses as showing "an 'incentive allocation' credits and then reversal debits in the same amounts" – do not show actual compensation misses the point. *See* Div. Ex. P at 1, 4-5, 9; Opp. at 6. Consistent with the above, these financial statements reflect that the fund was *accruing* an incentive fee to be paid to Murray as part of his ongoing role providing advice to the fund. In addition, his claim that the Due Diligence Questionnaire (Div. Ex. O), which also reflected both management and incentive fees, was merely a "rough draft" is a bald assertion without any evidence. Opp. at 6.[2]

In any event, Murray ignores the fact that he laundered $150,000 in proceeds from the Oppenheimer trade to a personal account and another Murray-controlled account. Div. Ex. G at 1219:17-22, 1223:5-1225:3, 1261:9-15, 1280:12-1284:4. The jury convicted Murray of wire fraud and money laundering as a result of this conduct. Div. Ex. K at 1812:7-1814:24; Div. Ex. Z. Separately, the evidence at trial also showed that Murray transferred another $150,000 from MNT accounts to a personal account in France. Div. Ex. G at 1261:9-15, 1276:4-1279:24. These amounts constitute compensation received for purposes of the statute. *See Elliott*, 62 F.3d at 1311 n.8 ("compensation element is satisfied by the receipt of *any economic benefit*, whether in the form of an advisory fee or some other fee relating to the total services rendered, commissions, or some combination of the foregoing") (citation omitted) (emphasis added).

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[2] The lone case cited by Respondent, *United States v. Regensberg*, 635 F. Supp. 2d 306 (S.D.N.Y. 2009), for the proposition that an incentive fee is not compensation under the Advisers Act is inapposite. In that criminal case, the government sought a sentencing enhancement to classify a defendant as an investment adviser, and the court found that "that there is no indication that he was compensated" for providing investment advice. *Id.* at 311. Here, as discussed above, fund documents show that Murray was to receive and received an incentive fee, which suffices for purposes of the statute. *See SEC v. Fife*, 311 F.3d 1, 11 (1st Cir. 2002) (affirming preliminary injunction and that defendant met statutory definition of investment adviser even where he had "not yet received compensation, [as] he understood that he would be compensated for his efforts by a commission based on a percentage of the profits from the investments, *if successful*, pursuant to a formula to be agreed upon at a later time") (emphasis in original).

Finally, Respondent's contention that the evidence does not establish that he was associated with an investment adviser during the requisite time period is nonsensical and erroneous. Opp. at 6-7. At all relevant periods, Respondent was the investment adviser to and sole member of MNT. In fact, Murray stated at trial that he is still the managing member of MNT. Div. Ex. I at 1468:6-9. Murray also testified that MNT was established as early as 2006, and the evidence showed that he continued to raise new investment into the fund as late as 2012. Div. Ex. C at 413:10-414:20, 431:8-20, 434:24-435:8; Div. Ex. R at 1; Div. Ex. G at 1261:9-22, 1273:14-1276:3; Div. Ex. I at 1468:6-11. In his opposition, Murray admits that he lied about his background and qualifications in documents provided to investors (Opp. at 2-3), and the evidence shows that this occurred during the relevant period. *See* Opening Brief ("Op. Br.") at 7-8. Murray also acknowledged that he failed to disclose his conflicts of interest with the fund auditor and third-party administrator (Opp. at 2, 22) that arose during the relevant period. Op. Br. at 6-7. Additional evidence shows that the other misconduct for which Respondent was convicted all occurred during the time that Murray was associated with an investment adviser, including:

- Creating false account statements that failed to disclose to investors the near-total losses in the fund in 2009 (*see* Op. Br. at 4-5);
- Creating false marketing materials to solicit new investors in the fund in 2010 that failed to disclose the 2009 losses and that falsely showed a positive rate of return (*see* Op. Br. at 5);
- Creating fake audit reports in 2010 and 2011 from a phony audit firm he created, which purported to show positive performance for the fund (*see* Op. Br. at 5-6);
- Engaging in a credit card swiping scheme in 2010 to steal hundreds of thousands of dollars from Chase Paymentech (*see* Op. Br. at 8-9);
- Misrepresenting the assets available for investment as part of a short sale trade in 2012 and laundering the proceeds of the trade (*see* Op. Br. at 9-11); and
- Violating the terms of his pretrial release, constituting contempt of court (*see* Op. Br. at 11-12).

In short, there is no genuine dispute as to whether, at the time of the misconduct, Murray was associated with an investment adviser.

B. MURRAY CONCEDES THAT HE WAS CONVICTED OF WIRE FRAUD

Respondent admits that he was convicted of 16 counts of wire fraud under Section 1343 of Title 18 of the United States Code. Opp. at 1. The second statutory factor, requiring a conviction within the past ten years of the offenses specified by Section 203(e)(2) of the Advisers Act, is therefore met. *See* 15 U.S.C. §§ 80b-3(e)(2)(A)-(D).

C. ALL OF THE *STEADMAN* FACTORS FAVOR A PERMANENT BAR

The Division's Opening Brief set forth under each of the so-called *Steadman* factors why a permanent and full collateral bar should be imposed to protect the public interest. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). Murray's opposition attempts to diffuse the overwhelming force of the evidence through two primary tactics: first, by dismissing or distorting the evidentiary record; and, second, by mounting a collateral attack on the jury verdict by re-litigating the issues at his criminal trial.

We address some of the instances of the former, below, but as to the latter, a long line of Commission opinions and SEC administrative decisions squarely hold that such collateral attacks are impermissible in follow-on proceedings. *See, e.g., Gregory Bartko*, Exchange Act Rel. No. 71666, 2014 SEC LEXIS 841, at * (Mar. 7, 2014) ("Estoppel is properly applied to a criminal verdict, whether general or specific, regarding the issues decided in the criminal case"); *David G. Ghysels*, Exchange Act Rel. No. 62937, 2010 SEC LEXIS 3079, at *13 (Sept. 20, 2010) (rejecting respondents' attempts to re-litigate issues that were considered and rejected at trial; "[w]e have long declined to 'revisit the factual basis for' or legal defenses to a conviction in follow-on proceedings"); *EagleEye Asset Mgmt., LLC*, Initial Decision Rel. No. 497, 2013 SEC LEXIS 2113, at *13 n.8 (July 24, 2013) ("Respondent's arguments are, in essence, attempts to re-litigate the

underlying case, which are not appropriate in a follow-on administrative action") (citation omitted).

As summarized below, Respondent's remaining arguments fail to show why a collateral bar should not imposed under the *Steadman* factors.

1. Murray's Conduct Was Egregious

Murray admits that he lied about his background in documents provided to investors, that he failed to disclose his conflicts of interest with the fund auditor and third-party administrator, and that he violated the terms of his pretrial release that led to his contempt of court conviction. Opp. at 2-3. These admissions alone demonstrate the egregiousness of his conduct and that a permanent bar is appropriate. *See Stephen L. Kirkland*, Initial Decision Rel. No. 875, 2015 SEC LEXIS 3583, at *16 (Sept. 2, 2015) (Grimes, J.) (investment adviser who perpetrated a fraud on fund investors "shows that [respondent]'s conduct is egregious and that he is not suited to remain in the securities industry") (citations omitted).

But Murray's objections to the tsunami of other evidence offer him no quarter. The evidence at trial demonstrated that Murray failed to inform investors that the MNT fund suffered near-total losses in 2009, solicited new investors without disclosing these losses, and distributed false reports that led investors to believe that his fund was actually profitable. Op. Br. at 4-5. Murray attempts to deflect this misconduct by suggesting that it cannot be determined whether the jury accepted this evidence in support of the conviction, and then proceeds to re-litigate the issue by positing various pieces of defense evidence (such as Murray's self-serving testimony) that purport to show that the reports were not in fact false.

The reasonable inference is that the jury did accept this evidence to support the wire fraud convictions. The jury was instructed that to find Murray guilty of wire fraud, he had to knowingly

participate in or devise a scheme to obtain money or property by means of false or fraudulent representations, which were material. Div. Ex. K at 1778:13-25. The government highlighted the fake reports and misrepresentations regarding performance in its closing argument. *Id.* at 1798:11-1799:5, 1805:7-1806:23. Murray's attempt to re-litigate the evidence in this proceeding is not appropriate.

Respondent then litters his opposition with a series of gross distortions of the record, including arguments that:

- There is no evidence to support the fact that he created the JMA audit reports that purported to show that the fund was being audited. Opp. at 11-12. In fact, the forensic evidence showed that Murray created the reports. Div. Ex. J at 1592:10-14, 1712:8-13, 1714:15-1729:4.

- While failing to disclose his conflicts of interest, he did not dupe any investors into believing that the fund was safe by representing that it had a third-party administrator and legal counsel. Opp. at 12. In fact, multiple investors testified that having independent service providers to the fund was critical to their decisions to invest in MNT. *See, e.g.*, Div. Ex. D at 739:18-741:25; Div. Ex. E at 825:8-24, 830:8-17.

- No JMA audits were sent to any investors on their investment. Opp. at 12. In fact, multiple investors testified that they received the reports and relied on JMA's ostensibly independent verification of such returns in deciding to invest in MNT. Div. Ex. D at 731:6-11, 747:13-754:22; Div. Ex. E at 831:2-832:15; *see also* Div. Ex. A at 193:7-194:2, 195:6-13.

- It is questionable whether Respondent's credit card swiping scheme was "a conclusion or even an issue before the jury." Opp. at 12. In fact, counts 1-4 of the wire fraud charges were all related to the credit card scheme where Chase Paymentech was the victim of Murray's fraud. Div. Ex. K at 1784:3-8, 1790:16-1795:3.

- There is no evidence that Respondent stole the identity of British citizen David Lowe to conduct his fraud. Opp. at 12. In fact, Lowe's United Kingdom-issued passport and various credit cards in Lowe's name used to execute the credit card scam were uncovered during a search of Murray's home, and Lowe testified he did not authorize Murray to use his passport for any purpose. Div. Ex. E at 891:4-10, 897:20-24; 922:23-925:22; Div. Ex. S; Div. Ex. T at 20:14-21:1.

Under any standard, Respondent's conduct was egregious and warrants a severe sanction. *See Daniel Imperato*, Exchange Act Rel. No. 74596, 2015 SEC LEXIS 1377, at *17 (Mar. 27, 2015) (criminal activity involving fraud "requires a severe sanction"); *John J. Bravata*, Initial Decision Rel. No. 737, 2015 WL 220986, at *6 (Jan. 16, 2015) ("The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business").

2. Murray's Misconduct Was Recurrent and Not Isolated

Respondent claims there is no evidence that his misconduct was recurrent, and that "we can't determine the periods and facts the jury accepted to various arguments." Opp. at 15. Not so. The evidence presented at trial established that Respondent's fraud began no later than December 2008, when he created a virtual office for the JMA accounting firm and forged his then-wife's signature and used her identity to set up the office. Div. Ex. A at 49:1-52:14; Div. Ex. B at 342:21-24, 357:10-365:8. The jury heard evidence of Respondent's fraud throughout the ensuing years, culminating in Murray's flagrant violation of his pretrial release conditions in 2013. *See* Op. Br. at 11-12. There can be no reasonable dispute that the wrongdoing was recurrent. *See Gordon Brent Pierce*, Securities Act Rel. No. 9555, 2014 SEC LEXIS 839, at *84 (Mar. 7, 2014) (misconduct that occurred over eight-month period deemed "recurrent and long-lasting"); *Richard P. Callipari*, Initial Decision Rel. No. 237, 2003 WL 22250402, at *5 (Sept. 30, 2003) (scheme of several weeks constituted recurring behavior).

Murray also challenges the recidivist nature of his crimes by mischaracterizing the Division's arguments. He first contends that the Division falsely accused him of being "convicted" of tax fraud. Opp. at 15. The Division actually stated that he committed tax fraud concerning his 2000 tax return, as a United States tax court judge found that Murray underreported his income and

did so while hiding account statements from his first wife, all of which is supported in the record. Div. Ex. J at 1690:13-1692:10. He also accuses the Division of alleging that his six-month New York Stock Exchange suspension was a "crime." The Division actually stated that Murray was previously suspended by the New York Stock Exchange and made no reference to it being a crime.

3. Murray Acted with a High Degree of Scienter

The Division's Opening Brief demonstrated that a criminal conviction for fraud by definition indicates a "high degree of scienter," that this factor is met where the jury necessarily found that the defendant acted with an intent to defraud, and that here the jury necessarily found that Respondent acted with the "intent to defraud" with respect to 22 counts and thus rejected any good faith defense to the charges. *See* Op. Br. at 18 (citing *Adam Harrington*, Initial Decision No. 484, 2013 WL 1655690, at *4 (Apr. 17, 2013); *David R. Wulf*, Initial Decision Rel. No. 824, 2015 SEC LEXIS 2603, at *26 (June 25, 2015) (Grimes, J.)).

Respondent does not dispute or cite any evidence purporting to show that he did not in fact act with a high degree of scienter. Nor does he dispute that the jury necessarily found that he acted with the intent to defraud. He instead argues that the jury instructions were permissive and did not require the jury to consider a good faith defense to the charges. Opp. at 15. In this bizarre scenario, Murray would have this Court believe that the jury may in fact have exonerated him if only they had considered such a defense . . . but declined and decided to forge ahead and convict him anyway. Suffice it to say there is no support for Respondent's argument.

4. Murray Continues To Fail to Appreciate the Wrongful Nature of His Misconduct.

Murray's 23-page opposition is proof alone that he has yet to accept any responsibility for his crimes. His brief distorts the evidentiary record, mischaracterizes the Division's arguments, and attempts to re-litigate issues already decided. He claims that the evidence contradicts that a

confrontational meeting with one of his friends (an investor in MNT) following his arrest, during which he was non-apologetic, defensive and patronizing, and made light of the situation, actually took place. Opp. at 16. Yet the evidence he cites in support does not address this meeting at all.

Most gallingly, Respondent claims that "no evidence exists [that] investors lost any money." Opp. at 16. Even viewing the evidence in the best possible light to Respondent, this hubris fails to acknowledge the unrefuted facts that: (1) Murray raised more than $4 million from investors (Div. Ex. R at 1; Div. Ex. G at 1261:9-22, 1273:14-1276:3), (2) approximately only $2 million of that was seized by the Government (*see* Div. Ex. F at 1038:16-19, 1039:20-23) and the balance has never been recovered, and (3) multiple investors testified that they lost their entire investments in the fund (*see* Op. Br. at 8).

5. There Is a Strong Likelihood of Future Violations

Respondent has been in the securities industry for over 20 years. Div. Ex. I at 1457:14-18. During that time, he does not dispute that the New York Stock Exchange suspended his securities license for six months. He does not deny that he was found by a United States tax court judge to have underreported his income and deceived his wife in doing so. He concedes that he violated *all* the terms of his pretrial release in direct defiance of a United States District Court order. And, of course, he was found guilty in this underlying case of 23 counts of criminal misconduct.

Despite all this, he now pleads for yet another chance. Opp. at 21. Respondent should not be rewarded with such an opportunity. He continues to protest his innocence despite his conviction and devotes the concluding pages of his brief to mischaracterizing the evidence and collaterally attacking the jury verdict. For example, Respondent again argues that the Division "falsely accuses him of failing to return money entrusted to him." Opp. at 16-17. As discussed above, Murray failed to return at least $2 million to investors, and multiple investors testified that they lost

their entire investment in MNT. He claims that the evidence does not support that Murray engaged in a credit card scam. Opp. at 17-18. In fact, the jury convicted Murray of four counts of wire fraud in connection with the credit card scheme on Chase Paymentech. *See* Div. Ex. K at 1784:3-8, 1790:16-1795:3; Div. Ex. Z. He laments that the Division "accuses" him of fraud relating to the Oppenheimer short sale trade, and proceeds to highlight purported evidence to the contrary. Opp. at 18-19. In fact, the jury convicted Murray of five counts of wire fraud, four counts of money laundering, and a count of aggravated identity theft associated with this trade. *See* Div. Ex. K at 1784:18-1785:14; Div. Ex. Z. His attempt to re-litigate the evidence is also improper. *See Eric S. Butler*, Exchange Act Rel. No. 65204, 2011 SEC LEXIS 3002, at *24 & n.34 (Aug. 26, 2011) (rejecting respondent's attempt to undertake separate assessment of evidentiary determinations at criminal trial where respondent had full and fair opportunity to litigate issues at trial).[3]

In short, the fact that Respondent denies almost all responsibility or involvement in the fraud, continues to plead his case even in the face of a 23-count guilty verdict, and accuse the Division of "numerous unsupported and false accusations" is grounds alone to impose the highest sanction possible in the form of a permanent and collateral bar. *See Randal Kent Hansen*, Initial Decision No. 754, 2015 SEC LEXIS 1001, at *17-*18 (Mar. 18, 2015) (Grimes, J.) ("Based on Hansen's refusal to accept responsibility and the fact of his long-running fraud, I infer that if he were given the opportunity, he would likely engage in similar conduct") (citation omitted). As one court stated:

> This last assertion indicates a persistence on respondent's part in a story which is palpably ludicrous on its face, was so rejected by the trial jury and one that is inconsistent with the conclusions to be fairly drawn from the facts developed. It is this sticking to so fanciful a story that indicates a lack of understanding on respondent's part of the seriousness of the acts he has committed, for which he was

[3] For the same reason, Respondent's attempts to revisit the evidence concerning the fake MNT reports and false JMA audit reports is also improper. Opp. at 19-21.

convicted by a jury after trial, and which requires the imposition of the severest sanction. (*David D. Carey*, 1987 SEC LEXIS 4050, at *17 (Aug. 4, 1987))

CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Court grant the Division's motion for summary disposition and issue an order permanently barring Murray from associating with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or any nationally recognized statistical rating organization.

Dated: March 25, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peggy Maguire, hereby certify that on March 25, 2016, an original and three copies of the foregoing:

- Division of Enforcement's Reply In Support Of Its Motion For Summary Disposition Against Respondent James Michael Murray

were sent by United Parcel Service for next day delivery for filing to the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Washington, D.C. 20549, with a copy transmitted by facsimile to (703) 813-9793 for filing, and that a true and correct copy of the foregoing has been served by United Parcel Service, marked for next day delivery, on the following persons entitled to notice:

The Honorable James E. Grimes
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

and by messenger service on the following person entitled to notice:

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