Paul Leon White II, [redacted]
[redacted]
P.O. [redacted]
Dannemora, NY [redacted]

Honorable James E. Grimes
U.S. S.E.C.
100 F. Street, N.E.
Washington, DC 20549-2557

Re: File No. 17210
Respondent's Partial Answer to Plaintiff's
Order Instituting Procedures ("OIP")

October 4, 2016

Dear Judge Grimes,

Enclosed please find a copy of the Respondent's Partial Answer to Plaintiff's Order Instituting Procedures ("OIP"), Pursuant to Rule 220(a) & (b), and Motion for Extension of Time, Pursuant to Rule 161, to File Complete Answer. You will discover from the information contained herein as well as information that I previously sent you, I have continuously been constructively prevented from submitting a complete adequate and effective Answer to the OIP due to a number of reasons such as:

1. [redacted] - Annex ([redacted]) extremely limits my time in the Law Library.

2. CCF takes about one(1) month to process Authorized Advance Requests in order for an indigent prisoner to make photocopies.

3. CCF commenced and continues to deny prisoners from obtaining plain white paper in order to prepare legal documents.

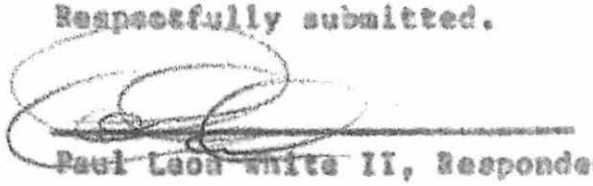
4. Plaintiff continues to refrain from providing Respondent with all the relevant material requested in Respondent's Discovery Motion, pursuant to Rule 230, in order for Respondent to adequately and effectively Answer the Plaintiff's OIP.

5. The Court continues to refrain from executing the Judicial Subpoenas Duces Tecum ("SUBPOENAS"), to provide Respondent with the relevant material requested in the SUBPOENAS, in order for Respondent to adequately and effectively Answer the Plaintiff's OIP.

In addition, indigent Respondent could only afford to make three(3) incomplete copies of the EXHIBITS submitted with the Respondent's Partial Answer to Plaintiff's OIP, based on the afore-mentioned impediments. Due to the fact that Respondent has provided Plaintiff with most of the EXHIBITS, pursuant to Plaintiff's Subpoena Duces Tecum issued in or about 2009, referred to in the Respondent's Partial Answer submitted herewith, Plaintiff will not be prejudiced in any way and has the ability to provide the Court with any missing EXHIBITS that the Court may so request.

Dated: October 4, 2016
Dannemora,NY

Respectfully submitted.



Paul Leon White II, Respondent

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
FILE NO.: 3-17210
HEARING OFFICER: James E. Grimes
DATE: October 4, 2016

----------X

In the Matter of .

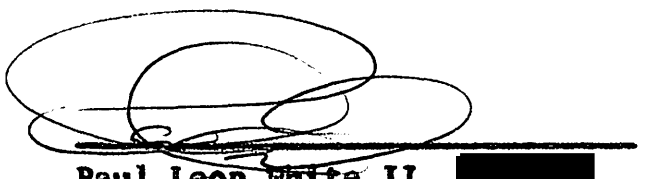
PAUL LEON WHITE II,

Respondent.

RESPONDENT'S
PARTIAL ANSWER TO OIP
PURSUANT TO RULE 220(a),(b)
AND MOTION FOR
EXTENSION OF TIME
PURSUANT TO RULE 161
TO FILE COMPLETE ANSWER

----------X

Dated: October 4, 2016
Dannemora, NY



Paul Leon White II, [redacted]
Respondent, Pro Se
[redacted]
P.O Box 2002
Dannemora, NY [redacted]

RESPONDENT'S ANSWERS TO PLAINTIFF'S ALLEGATIONS IN ORDER INSTITUTING PROCEEDINGS ("OIP") PURSUANT TO RULE 161

ANSWERS TO PARAGRAPH 1

Plaintiff has no jurisdiction over Respondent who relinquished his securities licenses in 2009 and the underlying case does not involve a security under Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act) and Section 203(f) of the Investment Advisors Act of 1940 ("Advisors Act"), grounded upon the reasons stated in detail herein.

ANSWERS TO PARAGRAPH II(A)(1)

1. Answer to allegation contained in sentence #1: False

2. Answer to allegation contained in sentence #2: Respondent cannot state an answer to this allegation because Plaintiff has failed to furnish and the Administrative Law Judge ("ALJ") has not executed the Juddicial Subpoenas Duces Tecum to provide Respondent with the relevant material Respondent requested in the Discovery process, constructively preventing Respondent from submitting an adequate and effective defense to Plaintiff's allegations.

3. Answer to allegation contained in sentence #3: False

4. Answer to allegation contained in sentence #4: True

ANSWERS TO PARAGRAPH II(B)(2)

5. Answer to allegation contained in sentence #1: True

6. Answer to allegation contained in sentence #2: True

6. Answer to allegation contained in sentence #3: False

7. Answer to allegation contained in sentence #4: False

ANSWER TO PARAGRAPH II(B)(3)

8. Answer to allegation contained in sentence #1: Respondent's conviction was obtained in violation of both the Constitution of the United States of America and the New York States Constitution, as described in detail herein.

ANSWER TO PARAGRAPH II(B)(4)

9. Answer to allegation contained in sentence #1: Respondent's sentence and restitution were issued in violation of both the Constitution of the United States of America and the New York States Constitution, as described in detail herein.

RESPONDENT'S FIRST DEFENSE

PLAINTIFF LACKS AUTHORITY TO PROSECUTE RESPONDENT

The Securities Act of 1933 ("SECURITIES ACT") and the Securities Exchange Act of 1934 ("EXCHANGE ACT"), created a need for the Securities and Exchange Commission, which was enacted by Congress as discussed henceforth. In the case at bar, the Respondent voluntarily relinquished his securities licenses, due to the fact that Respondent no longer desired to be associated with an unethical and immoral organization, the Financial Industry Regulatory Authority ("FINRA").

Grounded upon the fact that in or about 2009, Respondent relinquished his securities licenses, coupled with the fact that the underlying issue of the Respondent's conviction was obtained in violation of Respondent's Federal and New York State Constitutional rights, as discussed in detail herein, coupled with the fact that the underlying issue, resulting in Respondent's unjust conviction did not involve a security, the Securities Exchange Commission lacks authority to prosecute Respondent, pursuant to Title 17 of the Code of Federal Regulations.

HISTORY AND CONGRESSIONAL INTENT
ENACTING THE SECURITIES ACTS OF 1933 AND 1934

The primary reason why Congress enacted the Securities Acts of 1933 and 1934, was to protect investors, who lacked the skill to manage and further, lacked control over their investment, thereby, relying solely on the investment company's expertise and integrity. The Securities Act of 1933 and the Securities Exchange Act of 1934 arose by the need to regulate financial information for the protection of investors in order to curb excessive speculation, market manipulation, and the like. While "form" has been disregarded for "substance" in relation to the ACTS, for the purpose of extending coverage, there is substantial authority supporting that weight should be given to "substance" rather than "form", governing implementation of the ACTS, even if it restricts their coverage (Forman v. Community Services, 500 F.2d 1246 (U.S.C.A. 2 Cir. [NY] 1974; Securities Act of 1933, §1 et seq.; 15 U.S.C. §78a et seq.).

In Forman v. Community Services, 366 F.Supp. 1117 (U.S.D.C. S.D. [NY] 1973), the Court held:

"Although the securities laws do not extend to the purchase of real estate, this is so because the transaction does not meet the full test developed to identify a stock or an investment contract, not because the underlying property is real rather than personal".

A "security"is defined in Section 3(a)(10) of the 1934 Act, 15 U.S.C. §78c(a)(10), provides in relevant part:

"(a) when used in this title, unless the context otherwise requires

(10) The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation, if any, profit-sharing agreement or in any ... mineral [oil, natural gas, gold etc.] royalty or lease, any collateral-trust, ... subscription, transferable share, 'investment contract', voting-trust certificate, certificate of deposit, for a security ..."

In United Sportfishers v. Buffo, 597 F.2d 658 (U.S.C.A. 9 cir. [CA] 1978) the Court opined:

"Notwithstanding the generality of the language, the Supreme Court has concluded that 'the context' underlying Security Regulation under the 1934 Act indicates that 'security' should be limited to investments and not other commercial dealings [real estate]"

It is important for the Honorable Court to carefully examine the specific wording in the 1934 Act in which Congress specifically included "mineral royalty or lease" and "profit-sharing agreement" to be considered an "investment contract". The primary reason why Congress specifically included "mineral royalty or lease" in the 1934 Act was to allow oil and natural gas companies to access private funding on a national, rather than regional (state), basis because oil and natural gas production id vital to our nation's economy and the general public's well being. Contarily, Congress specifically omitted real estate from the wording contained in the 1934 Act because it deemed real property should not be government controlled but, rather, regulated by the individual state in which the property is located.

However, Congress did interceed in real estate by enacting the Interstate Land Sales Full disclosure ("ILSFD") Act in 1968, in response to the perceived abuses detailed in hearings held before the Senate, regarding the unscrupulous marketing and sale of undeveloped subdivided land, often sight-unseen, to investors from far away states (Pub. L. 90-448, 82 Stat. 476 (1968)). The original bill, introduced by Senator Harrison A. Williams, Jr., in 1965, required full disclosure to buyers of subdivided land. William's bill "to the amusement of some and the chagrin of others, was simply a truncated version of the Securities Act of 1933, adapted for application to the sale of real estate lots" (Sec. 111 Cong. Rec. 27, 310, 27, 312, (1965)).

In 1979, Congress amended the ILSFD Act because the House Committee on Banking, Finance and Urban Affairs fund that "small businessman [similar to Respondent] and persons who occassionally sell lots from a larger inventory of land have been subjected to extensive regulatory requirements". In response, the Committee suggested amendments designed to "to balance the consumer's need for adequate protections and remedies with the small businessman's concern with over-regulation". In addition, to providing "improved remedies to assist defrauded customers", the Committee proposed to add "several exemptions and a state certification procedure".

Notably, the Committee proposed to exempt, from securities regulation, subdivisions smaller than 100 lots from registration and disclosure provisions of the ILSFD Act. On December 21, 1979, Congress passed a slightly altered version of the House Committee's recommended amendments, inclusing the exemption of subdivisions less than 100 lots (See Housing and Community Development Amendments of 1979, Pub. L. 96-153, 93 Stat. 1101 1979). The ISLFD Act has changed little since 1979.

In 2002, the United States Internal Revenue Service issued Rev. Proc. 2002-22, which included Tenant-In-Common ("TIC") properties having 35 or less owners to be exempt (i.e. Safe-harbor) under 26 U.S.C. §1031, more commonly known as tax deferred "1031 EXCHANGE". Respondent submits to the Honorable Court that if Congress intentionally exempted "subdivisions less than 100 lots [owners]" from regulation under Federal Securities Laws and Regulations, it is logical that Congress would also exempt real estate ownership [TIC] having 35 or less owners as present in the case at bar.

As the Honorable Court may be aware, Respondent is regarded by his peers to be one of the leading experts and authority on Tenant-In-Common ("TIC") property ownership and 1031 EXCHANGES. In fact, over the past 39 years, Respondent has successfully, without incident, other than the case at bar, implemented countless TIC/1031 EXCHANGE property ownership transactions involving many hundreds of millions of dollars worth of real estate for himself and clients. Respondent first obtained his professional real estate license in the early 1980's and was licensed by New York State to teach real estate and tax law to professionals such as attorneys, Certified Public Accountants ("CPA"), accountants, real estate brokers and agents. Respondent has spoken at numerous real estate conventions and seminars throughout the U.S. as well as educated well over 10,000 investment property real estate owners. Furthermore, Respondent has published a plethora of papers on the subject matter (i.e. TIC/1031 EXCHANGES) that law schools throughout the U.S. utilize the teach their law students.

In 2002, Respondent invented the "White Rule", that numerous real estate and securities professionals utilize to determine if property is a "security" or "non-security". To date, the "White Rule" has never failed. The "White Rule" states:

"If a property conforms to 26 U.S.C. §1031 and, thereby, tax deferred exchangeable, the property itself is not a security. However, the means by which a property is acquired and/or the form of ownership may constitute an 'investment contract', pursuant to the Securities Act of 1934".

For example, co-operative or condominium real estate, itself, is not a security but the "means by which the property is acquired (i.e. Ownership of stock in real estate corporation) of the form (i.e. Non-fee simple deeded ownership interest) may constitute an 'investment contract'"in accord with the White Rule (see S.E.C. v. C.M. Joiner, 320 U.S. 344 (U.S. [TX] 19430; Forman v. Community, 500 F.2d 1246 (U.S.C.A. 2 cir. [NY] 1974); Bender v. Continental Towers, 632 F.Supp. 497 (U.S.D.C. S.D. [NY] 1986); Davis v. Rio Rancho, 401 F.Supp. 1045 (U.S.D.C. S.D. [NY] 1975); Kaplan v. Shapiro, 655 F.Supp. 336 (U.S.D.C. S.D. [NY] 1987); Slevin v. Pedersen, 540 F.Supp. 437 (U.S.D.C. S.D. [NY] 1982); Horowitz v. AGS Columbia, 700 F.Supp. 712 (U.S.D.C. S.D. [NY] 1988); Clemente Global v.Pickens, 729 F.Supp. 1439 (U.S.D.C. S.D. [NY] 1990); Fargo v. Dain, 540 F.2d 912 (U.S.C.A. 9 cir. [ND] 1976), 405 F.Supp. 739 (U.S.D.C. S.D. [ND] 1975); Romney v. Richard Prows, 289 F.supp. 313 (U.S.D.C. [UT] 1968); Goldberg v. 401 North Wabush, 904 F.Supp. 2d 820 (U.S.D.C. N.D. [IL] 2012).

RESPONDENT'S SECOND DEFENSE

PLAINTIFF LACKS AUTHORITY TO PROSECUTE RESPONDENT GROUNDED UPON FACT THAT THE REAL ESTATE TRANSACTION IN QUESTION IS NOT A SECURITY

FACTS OF THE REAL ESTATE TRANSACTION

Commencing in 2008, numerous clients and prospective clients contacted Respondent to purchase real estate, to be utilized as the Replacement Property ("RPP") for their implementation of tax deferred exchanges, pursuant to 28 C.F.R. §1031, more commonly known as a "1031 EXCHANGE", because they sold their Relinquished Property ("RLP") and were required to purchase another equally or greater priced property, within one hundred eighty (180) days from closing. Respondent showed his clients numerous RLPs, including real estate located on Delight Road, Lawndale, NC, which consists of a 374 acre parcel owned by Nancy and Gilbert Stamey ("STAMEYS") and a 26 acre parcel owned by Gray and Susan Kimmel ("KIMMELS"), who purchased same from the STAMEYS in 2007. The STAMEY PROPERTY and KIMMEL PROPERTY are hereinafter referred to as the PROPERTY. Respondent created a company, John Cline Reservoir LLC ("JCR LLC"), which is owned by the Paul White Family Limited Partnership ("WHITE FLP"), to purchase the PROPERTY from the STAMEYS and KIMMELS. Respondent is the managing member of JCR LLC and selected the following persons, from his numerous clients and prospective clients, to purchase the PROPERTY, based upon JCR LLC's intent was to develop the property, which required expertise, knowledge and experience to do so because Respondent, WHITE, lacked same. Respondent selected the following clients, hereinafter referred to as "BUYERS", to purchase the PROPERTY:

1. Albert Abney ("ABNEY")

2. Teodocia Santos ("T.SANTOS")

3. Edilberto Santos ("E.SANTOS")

4. Sandra Schmidt ("SCHMIDT")

5. Dean DelPrete ("DELPRETE")

6. Afzal Sheikh ("SHEIKH")

7. Maryann Chernovsky ("CHERNOVSKY")

8. Saverio (Sal) Saverino ("SAVERINO")

9. Patrick Mitchell ("MITCHELL")

10. Preston Treiber (TREIBER")

All BUYERS, except CHERNOVSKY, hereinafter referred to as "1031 EXCHANGERS", utilized the PROPERTY as their Replacement Property ("RPP") in their individual 1031 EXCHANGES. Each BUYER executed a Purchase Agreement ("PA": EXHIBIT A) with JCR LLC to buy the PROPERTY as well as personally, or on behalf of their company, as well as STAMEYS, executed a Power of Attorney ("POA": EXHIBIT B) and Dual Representation Agreement ("DRA": EXHIBIT C), authorizing Cathleen Quinn-Nolan Esq. ("NOLAN") to represent them as their attorney-in-fact in the PROPERTY purchase. Pursuant to the PA (EXHIBIT A), the BUYERS agreed to NOLAN'S representation and acquire title of the PROPERTY in their personally or corporately owned Limited Liability Company, which NOLAN formed on their behalf (EXHIBIT D). At closing, NOLAN, representing STAMEYS, and WHITE, acting as managing member of JCR LLC, executed deeds on the SELLER'S behalf, transferring ownership of the PROPERTY to the BUYERS. Thereafter, STAMEYS personally executed subsequent deeds on the STAMEY PROPERTY (EXHIBIT E).

In 2012, the Suffolk County District Attorney ("SCDA") commenced both a Civil Case Index NO. 29681-2012 ("CIVIL CASE") and a Criminal Case Indictment No. 2710-2012 ("CRIMINAL CASE"). Respondent, representing himself Pro Se, litigated the CIVIL CASE, wherein Honorable Supreme Court Justice Elizabeth H. Emerson, thoroughly examined both the CIVIL CASE and CRIMINAL CASE issuing a Decision and Order (EXHIBIT F), in Respondent's favor, wherein Honorable Justice Emerson stated that there was "no criminality" involved in the real estate transaction, involving the PROPERTY, hereinafter referred to as the JCR LLC DEAL (See EXHIBIT F). Based upon a plethora of violations of Respondent's Constitutional rights, the SCDA obtained a criminal conviction of Respondent, that should be reversed shortly, based on the reasons presented henceforth.

1031 EXCHANGE: HISTORY AND FACTS

In 1918, Congress enacted legislation to collect income tax from U.S. residents and domestically domiciled corporations. Today, the United states of America is the largest voluntary, YES voluntary, taxation system in the world (NOTE: There is no federal law mandating payment of income tax).

In 1021, Congress enacted legislation to enable farmers to sell their appreciated nutrient depleted land and buy new nutrient rich land upon which to grow crops, without paying tax on the gain. This pre-cursor "exchange" legislation was not utilized until 1935 when the first "land exchange" occurred. To date, there have been five(5) major revisions to the law regarding "like kind property exchanges".

In 1991, the most significant revision occurred, which permitted taxpayers to "delay" their property exchange for up to 180 days ("180 DAY RULE"), commencing from the sale date of the taxpayer's Relinquished Property and purchasing a Replacement Property within the 180 DAYS. A second mandate was that an "Exchanger" must identify the Replacement Property(ies) within 45 days ("45 DAY RULE") from the time of the sale of the Relinquished Property. This "Delayed Exchange" was enacted after a taxpayer, Stalker, successfully litigated against the U.S. Internal Revenue Service. 1031 Exchange professionals refer to the modern day property exchange as the "STALKER EXCHANGE", named after the taxpayer who successfully challenged the IRS. A taxpayer who implements a "like kind property exchange" is commonly known as a 1031 EXCHANGER and the transaction is referred to as a "1031 EXCHANGE".

Respondent has been successfully implementing 1031 EXCHANGES, pursuant to 26 U.S.C. §1031, for approximately 40 years. When Respondent commenced his real estate career, he and other real estate professionals rarely utilized 1031 EXCHANGES because a taxpayer was forced to sell his/her investment property (i.e. Relinquished Porperty) and purchase a Replacement Property at the same closing on the same day which is the primary reason why the majority of 1031 EXCHANGES failed prior to 1991. However, with the

advent of the STALKER EXCHANGE that permitted a taxpayer to delay purchasing the Replacement Proeprty for up to 180 DAYS, real estate professionals embraced the concept and, presently, approximately $100 Billion of real estate is 1031 EXCHANGED in the U.S. per annum. The Honorable Court should realize the 26 U.S.C. §1031 pertains to any real property, such as vehicles, equipment, jewlery, art etc. not solely to real estate.

As previously discussed herein, the "White Rule" states that if real property in question is "1031 EXCHANGEABLE" it cannot be considered a "security".

In the case at bar, nine(9) of the ten(10) BUYERS and ten(10) of the eleven(11) OWNERS of the PROPERTY implemented 1031 EXCHANGES was CHERNOVSKY because she utilized corporate funds to purchase the PROPERTY, rather than selling a Relinquished Property. The above described nine(9) BUYERS (i.e. All BUYERS except CHERNOVSKY), who implemented tax deferred exchanges, pursuant to 26 U.S.C. §1031, are hereinafter referred to as 1031 EXCHANGERS. In accord with the laws, rules and regulations governing 1031 EXCHANGES, a 1031 EXCHANGER must utilize 100% of the money he/she receives ("SALES FUNDS") from the sale of his/her Relinquished Property to purchase another "like kind" real estate to be held for investment purposes. Any amount of SALES FUNDS not utilized or held on behalf of the 1031 EXCHANGER (i.e. Remains their property) is taxable and must be reflected on the 1031 EXCHANGER'S federal (i.e. 8824 Form and Schedule D) and state tax returns as well as, concurrently, the 1031 EXCHANGER must pay both federal and state taxes thereon.

In the unlikely and unfortunate event that a 1031 EXCHANGER fails to consummate his/her 1031 EXCHANGE, by not receieving a valid deeded ownership interest in the Replacement Property within the 180 DAYS, commencing on the sale date of the Relinquished Property, the 1031 EXCHANGER must pay federal and state taxes, penalty and interest on that failed 1031 EXCHANGE. In the scenarion that the 1031 EXCHANGER did not amend their personal and/or corporate federal and state tax returns, reflecting theif failed 1031 EXCHANGE, the 1031 EXCHANGERS

have commited both federal and state fraud and criminal tax evasion in both the state that they reside (i.e. New York, Virginia, Nevada, or Indiana) and the state in which the PROPERTY is located. North Carolina. In addition, the 1031 EXCHANGERS would be subject to both federal and state criminal perjury for filing a false tax return. Furthermore, the 1031 EXCHANGERS would be subject to both federal and state civil penalties in a cumualtive amount exceeding $4 Million in Respondent's professional opinion, based upon his numerous years being licensed by New York State Departments of Real Estate and Accountancy to teach tax attorneys, attorneys, Certified Public Accountants ("CPA"), accountants, real estate brokers and agents.

In summary, if the BUYERS who are 1031 EXCHANGERS did not receive a valid deeded (EXHIBITS D, and E) ownership interest in the PROPERTY, they are both federally and state criminally as well as civilly liable. If any third party, including any Governmental and/or Municipal Official or employee had knowledge of the 1031 EXCHANGER'S fraud, tax evasion and/or perjury by failing to amend their federal and/or state tax returns, he/she is also criminally liable for aiding and abetting commission of a known crime. A very serious career ending offense.

FACTS OF THE REAL ESTATE TRANSACTION

1. In 2008, Respondent established John Cline reservoir LLC ("JCR LLC"), a Delaware Limited liability Company, of which Respondent is a managing member.

2. In 2008, JCR LLC entered into contracts of sale with Nancy and Gilbert Stamey ("STAMEYS") to purchase approximately 274 acres of farm land, located on Delight Road, Lawndale, NC, including an immobile home, two(2) mobile homes, chicken rearing facilities, farm equipment and cattle.

3. In 2008, JCR LLC entered into a verbal contract of sale with Gray and Susan Kimmel ("KIMMELS") to purchase approximately 26 acres of land, located on the corner of Delight and Casar Roads, Lawndale, NC, including a historic cotton gin thereon.

4. During the years 2008 and 2009, JCR LLC executed Purchase Agreements ("PA"; EXHIBIT A)with ten(10) Buyers ("BUYERS") namely:

   i) Albert Abney ("ABNEY")
  ii) Teodocia Santos ("T. SANTOS")
 iii) Edilberto Santos ("E. SANTOS")
  iv) Sandra Schmidt ("SCHMIDT")
   v) Dean DelPrete D/B/A 114 Parkway Drive Associates LLC ("DELPRETE")
  vi) Afzal Sheikh D/B/A S&G Properties Inc. ("SHEIKH")
 vii) Maryann Chernovsky D/B/A Little Shelter Animal Adoption ("CHERNOVSKY")
viii) Saverio (Sal) Saverino B/B/A Homeport Inc. ("SAVERINO")
  ix) Patrick Mitchell ("MITCHELL")
   x) Preston Treiber D/B/A Treiber Realty Corp. ("TREIBER")

All BUYERS,with the exception of CHERNOVSKY, implemented tax deferred exchanges, pursuant to 26 U.S.C. §1031, more commonly known as "1031 EXCHANGE" and are hereinafter referred to as "1031 EXCHANGERS". The PA executed between JCR LLC and BUYERS included all the afore-described real estate (i.e. "STAMEY PROPERTY") and "KIMMEL PROPERTY") and chatels but specifically excluded the farm equipment and cattle that were to be retained by JCR LLC.

5. Each BUYER personally, or on behalf of their corporataion, executed a Purchase Agreement ("PA"; EXHIBIT A); Tenant-In-Common Agreement ("TICA"); Power of Attorney ("POA"; EXHIBIT B); and Dual Representation Agreement ("DRA"; EXHIBIT C), hereinafter referred to as the "DOCUMENTS", in Respondent's presence, with the exception of SCHMIDT, who Respondent personally mailed original DOCUMENTS thereto for her signature and personally received original signed DOCUMENTS back from SCHMIDT, who resides in the State of Indiana (EXHIBITS A, B, and C). The relevant points agreed upon by the parties in the PA are as follows:

   A. BUYER agreed to a purchase price of the PROPERTY in 2008 of $5,700,000 and $11,000,000 in 2009 (EXHIBIT A: page 1, paragraph 1).

   B. BUYER agreed to purchase the PROPERTY as Tenant-In-Common ("TIC") ownership proportionate (i.e. Percentage) to the amount of funds BUYER utilized to purchase the PROPERTY (EXHIBIT A: page 1, paragraph 1.1). For example, in 2008, if a BUYER utilized $570,000 to purchase a deeded TIC ownership interest, he/she would receive 10% (i.e. $570,000 / $5,700,000 = 10%) ownership in the PROPERTY.

   C. BUYER granted Seller (i.e. JCR LLC) an option to repurchase the PROPERTY ("REPURCHASE OPTION") at anytime within 5 years from the PA execution date by both parties (EXHIBIT A: page 1, paragraph D) by JCR LLC paying BUYER 7% REPURCHASE OPTION fee and 5% premium ("REPURCHASE PREMIUM") per annum if JCR LLC exercises the REPURCHASE OPTION within the 5 year time period (EXHIBIT : page 12, paragraphs 9.1, 9.2, 10.1 and 10.1.1)

   D. During the time period commencing 2008 through 2010, JCR LLC paid BUYERS approximately $500,000 in REPURCHASE OPTION payments but was forced to cease due to the fact that SAVERINO and CHERNOVSKY filed false charges against Respondent resulting in his arrest on July 11, 2011.

E. In 2008 or 2009, the BUYERS each received deeded TIC ownership interests (EXHIBIT A) in the PROPERTY via their individually or corporately owned Limited Liability Company (i.e. John Cline Reservoir I-X LLC) that was established on their behalf by their attorney, Cathleen Quinn-Nolan Esq. ("NOLAN"), who utiled their executed POA (EXHIBIT B) and DRA (EXHIBIT C) to represent the BUYERS at closing, whereat NOLAN, STAMEYS, KIMMEL and/or JCR LLC executed deeds (EXHIBIT E)

F. The 1031 EXCHANGERS utilized the PROPERTY as their Replacement Property in their 1031 EXCHANGES in order to legally defer state and federal tax on the the sale of their Relinquished Property. Each 1031 EXCHANGER listed the PROPERTY on their federal tax return (i.e. Schedule D and 8824 form) as well as their state tax returns in the year the 1031 EXCHANGER implemented the 1031 EXCHANGE (2008 or 2009). Based upon [illegible] information, Respondent believes that 1031 EXCHANGERS did not amend their personal and/or corporate federal or state tax returns to reflect non-ownership of the PROPERTY and, concurrently, paid the taxes, penalty and interest in the sale of their Relinquished Property as a result of their 1031 EXCHANGE failing due to not receiving a deeded ownership interest in the PROPERTY, which the 1031 EXCHANGERS utilized as their Replacement Property in their 1031 EXCHANGE. It is crucially important that the Honorable Court realize that if the 1031 EXCHANGERS did not receive a valid deeded ownership interest in the PROPERTY and did not amend their federal and state tax returns and, concurrently, pay the taxes, penalties and interest, estimated to exceed $4,000,000, the 1031 EXCHANGERS would have commited both federal and state criminal tax evasion, fraud, and perjury as well as be liable for civil penalties cumulatively exceeding $4,000,000 associated with failure to pay the taxes due on the sale of their Relinquished Properties.

G. During the time period, 2008 through 2011, BUYERS, now OWNERS of deeded (EXHIBIT A) TIC ownership interests in the PROPERTY, helped Respondent develop the PROPERTY, by utilizing individual talents, expertise, skill, knowledge and experience. In fact, Respondent has absolutely no expertise, skill, knowledge or experience in property development, which is the primary reason why Respondent each BUYER to purchase a TIC ownership interest in the PROPERTY based upon their individual talents, expertise, skills, knowledge and experience as follows:

i) Albert Abney ("ABNEY") was the former Commissioner of the New York City Planning Department and possesses the requisite talent, expertise, skill, knowledge and experience necessary to help Respondent plan both the residential and commercial development projects palnned for the PROPERTY. ABNEY personally visited the PROPERTY on numerous occasions and utilized the immobile home, located thereon, to stay. In addition, ABNEY personally met with governmental officials including, but not limited to, former North Carolina State Senator Debbie Clary ("CLARY"), Cleveland County Supervisor David Deer ("DEER") and Cleveland County Tax Accessor as well as Registar of Deeds. Furthermore, ABNEY attended a plethora of meetings at Art of Form architect's office located in Babylon, NY to help plan the Continuing Care Retirement Community ("CCRC") building and residences, attended meetings with Clyde (Butch) Smith who was the Commissioner of the Clevland County Water Authority ("CCWA") to help plan the proposed John Cline Reservoir that is to located adjacent to the PROPERTY, attended a focus group meeting presented by CLARY for the purpose of obtaining crucial consumer information for the amenities for the CCRC, and attended meetings at TGS Engineering firm, located in Shelby, NC for the purpose of planning the subdivision of the PROPERTY as well as the proposed CCRC, marinal, homes, game farm, and diner/gas station to be built on the PROPERTY. In essence, ABNEY was one of the crucial OWNERS to help develop the PROPERTY. ABNEY not only visted the PROPERTY and used the home located thereon but also desired to own one of the proposed homes planned for the sub-division as well as avail himself of the CCRC in his advancing years.

ii) Teodocia Santos ("T.SANTOS") is a retired nurse, Edilberto Santos ("E.SANTOS") is a retired physician and Afzal Sheikh ("SHEIKH") is a medical doctor, who all worked together and with Respondent diligently helping design and develop the CCRC. In fact, T.SANTOS, E.SANTOS and SHEIKH were such a crucial and critical component of the PROPERT development, that JCR LLC paid each of them for their dedicated work over and above the money JCR LLC paid the BUYERS (i.e. OWNERS) for the REPURCHASE OPTION. In addition, T.SANTOS, E.SANTOS and SHEIKH attended numerous meetings at Art of Form architectural firm to help design the CCRC, marina and diner/gas station that is proposed to be developed on the PROPERTY. Furthermore, SHEIKH travelled to North Carolina, with his wife, and met with Governmental officials, CLARY and SMITH, as well as attended focus group meetings held by CLARY for the purposes of obtaining information, such as what type of amenities, from prospective customers, who are interested in purchasing a retirement home and/or joining the CCRC which is proposed to be developed on the PROPERTY. SHEIHK also attended at least one meeting at TGS Engineering firm to plan the subdivision, CCRC, marina and diner/gas station as well as at least one meeting with SMITH to discuss Cleveland County Water Authority's construction of the proposed John Cline Reservoir that is to be placed adjacent to the PROPERTY, creating approximately 1.9 miles of extremely valuable waterfront real estate on the PROPERTY, at the proposed 485 foot RESERVOIR water level. Due to the fact that Respondent lacks the skill, expertise, knowledge and experiance necessary to successfully design and develop the CCRC, that requires extensive medical information, knowledge and experience, Respondent carefully selected T.SANTOS, E.SANTOS and SHEIKH from his hundreds of clients and thousands of prospective clients to fulfill the required void (i.e. Medical field skill and expertise) that the CCRC despirately needs to become a successful development.

iii) Saverio (Sal) Saverino ("SAVERINO") and Patrick Mitchell ("MITCHELL") are professional real estate developers, remodlers and builders, who specialize in construction. SAVERINO and MITCHELL were integral persons carefully selected from the thousands of Respondent's prospective clients because they both possessed the necessary skill, expertise, knowledge and experience in the construction field, that Respondent lacked, in order to successfully develop the PROPERTY. SAVERINO and MITCHELL attended numerous meetings at Art of Form architectural firm for the purpose of helping design the construction of the CCRC, marina and diner/gas station that is proposed to be constructed on the PROPERTY. In addition, SAVERINO personally visited the PROPERTY and stayed in his home located thereon. While in North Carolina, SAVERINO attended several meetings with Governmental officials: CLARY, SMITH, DEER and GREEN. Furthermore, SAVERINO attended at least one meeting at TGS Engineering firm to help in the layout of the subdivision and development of the CCRC, marina and diner/gas station, that are proposed to be built on the PROPERTY as well as worked diligently to obtain crucial information, at Focus Group meetings, from prospective customers interested in purchasing a retirement home in the retirement community and/or joining the CCRC.

iv) Dean DelPrete is a brilliant businessman with an acute innate unique talent and expertise lacking by almost all other inhabitants in the United States, including the Respondent. DELPRETE possesses the talent, skill, expertise, knowledge and experience to convert raw land, such as the PROPERTY, into a successful income producting business by establishing a paintball enterprise and associated events thereon. Over the past ten(10) years, Respondent has personally obeserved DELPRETE successfully create and finacially exploit this type of business on Long Island, upstate New York and in various other states throughout the U.S.. Respondent, who lacks the necessary skill and expertise required to "convert dirt" into an income generating enterprise on the PROPERTY, carefully selected DELPRETE from his thousands of prospective clients for the purpose of DELPRETE'S unique skills and talent.

v) Sandra Schmidt ("SCHMIDT") is a professional farmer, who resides in the State of Indiana. She and her family have been farmers for multi-generations. Due to the fact that Respondent, lacks any knowledge and experience in farming or other means by which farmland, such as the PROPERTY, can generate income, Respondent carefully selected SCHMIDT from his thousands of prospective clients to purchase the PROPERTY. Commencing in 2008, Respondent had extensive communications with SCHMIDT and her husband, Orville, regarding what type of crops to grow on the PROPERTY, how to lease the property for farming purposes, gathered a tremendous information about cattle rearing etc. which was utilized to generate income from the PROPERTY for the purpose of the OWNERS paying the PROPERTY expenses such as real estate taxes, insurance, maintenance etc.

vi) Maryann Chernovsky ("CHERNOVSKY") was carefully selected from the thousands of Respondent's prospective clients because she possesses a very unique talent and skill that Respondent lacks. CHERNOVSKY is a skilled, experienced and knwoeldgeable investment property owner, having accumulated approximately $5 million in net personal and corporate real estate assets during her lifetime. CHERNOVSKY'S unique talent and skills are concentrated in the specialized field of animal husbandry. As previously briefly discussed herein, one of the businesses planned to be established utilizing some of the 400 acres of PROPERTY is a "Game Farm", that comprises dichotomous disciplines of sport hunting and animal preservation, the two components utilized in the same sencence seem to be an oxymoran.

Commencing in 2008, Respondent and CHERNOVSKY had extensive conversations during numerous personal meetings concerning the Game Farm. CHERNOVSKY sought to build a "cat house", with felines not prostitutes, on the PROPERTY in order to generate income and provide a place to house her company's overflow of cats because CHERNOVSKY'S Animal Shelter cannot physically handle the total amount of cats on an annual basis due to limited space available to house the felines. CHERNOVSKY also suggested that a portion of the PROPERTY be utilized as a "Horse Haven" that functions to provide an environment where

retired horses form Long Island and other localities can spend the remainder of the the twighlight years of their life before they go to "Horse Heaven". The PROPERTY has approximately 300+ acres of pasture that retired horses would surely make them "Horse Happy".

In addition, CHERNOVSKY also provided valuable information for the sport hunting aspect of the Game farm regarding the humane rearing of game birds, such as: quail, pheasant, grouse, partridge, ducks etc. utilizing the pre-existing chicken rearing facilities located on the PROPERTY as well as, oxymoronically, information on how to "humanly" hunt reared game birds for sport. Hence, CHERNOVSKY'S use for her company's feline overflow and suggested building of a "cat house" to accomplish same as well as her desire to establish a "Horse Haven" to generate substantial income similar to CHERNOVSKY'S Animal Shelter company that generates over $2 million in annual revenues, coupled with her unique expertise and skills concerning "humanly" rearing and sport hunting PROPERTY reared game birds, are the primary reasons why Respondent selected CHERNOVSKY from his thousands of potential potential clients to help develop the PROPERTY because RESPONDENT laks the talent, expertise, skill, knowledge and experience in this extremely specialized field of animal husbandry.

vii) Preston Treiber ("TREIBER") has been a successful businessman and investment property owner for over 50 years. His business acumen is uncanny as well as his talent and skill to organize and manage a large scale operation such as the planned development on the PROPERTY, unlike, Respondent that lacks same. Not only has TREIBER created, managed and financially exploited successful businesses during the 78 years of his life but also has an inalienable passion for sport hunting game birds, which he routinely does on an annual basis throughout the U.S.. TREIBER has personally attended a plethora of meetings with Governmental officials: CLARY, SMITH, DEER and GREEN as well as North Carolina State Senators Michael Hager ("HAGER") and Tim Moore ("MOORE"), regarding the development project on the PROPERTY and CCWA'S construction of the John Cline Reservoir, that has been continuously planned since 1999. TREIBER also

attended numerous meetings at Art of Form architectural firm and TGS engineering firm, diligently working to devlop all aspects of the PROPERTY, including but not limited to: subdivision of the retirement community plots; retirement home design and offerings; Continuing Care Retirement Community ("CCRC") facility's main building; marina including a restaurant, retail store and dockage. In addition to TREIBER'S passion for sport hunting, he is also an avid boater. TREIBER also helped design and develop the business models concerning the diner/gas station and Game Farm. In fact, since 2008, TREIBER has travelled to the PROPERTY and stayed at the OWNER'S house located thereon, to participate in sport hunting on the PROPERTY, several times per year, the latest being April 2016. TREIBER continues to this date to work on the development project planned for the PROPERTY, even in the absence of Respondent, due to his unjust incarceration, and the other OWNERS, who falsely accused Respondent of crimes that he absolutely did not commit.

SUMMARY

THE BUYERS/OWNERS DID NOT RELY ON RESPONDENT'S UNIQUE TALENT OR SPECIALIZED EXPERTISE, KNOWLEDGE OR EXPERIENCE

In the real estate transaction underlying the case at bar, the BUYERS of the PROPERTY were carefully selected by Respondent, from thousands of his prospective clients, due to the BUYER'S unique talents and/or specialized skills, knowledge and experience as described herein, which Respondent lacked. In fact, Respondent relied solely on BUYER'S/OWNER'S unique talents and specialized skills for the purpose of successfully developing the PROPERTY. Indisputably, when BUYERS/OWNERS, such as SAVERINO and CHERNOVSKY decided to cease using their unique talents and specialized skills to develop the PROPERTY, coupled with the unfortunate untimely deaths of E.SANTOS and MITCHELL, the development project of the PROPERTY came to a grining halt providing unquestionable proof that it was the unique talents and specialized skills of the BUYERS/OWNERS not the Respondent that the success of the development project of the PROPERTY was grounded thereon.

As a sequella of the OWNERS no longer involved in the development of the PROPERTY, JCR LLC was forced to discontinue its REPURCHASE OPTION payments and, thereby, the OWNERS retained the PROPERTY contractually barring JCR LLC from repurchasing same, even after JCR expended over $1 million in expenses related to the PROPERTY including approximately $500,000 in REPURCHASE OPTION payments made to the PROPERTY owners. In essence, the OWNERS have been unjustly enriched by their deliberate and intentional failure to continue with utilizing their unique talents and specialized skills, which Respondent lacked, in order to successfully develop the PROPERTY for the financial benefit of Respondent since there does not exist any profit sharing arrangement between PROPERTY OWNERS and JCR LLC. As previously described herein and in accord with the contractual obligation of the Purchase Agreements (EXHIBIT C) between OWNERS and JCR LLC, the OWNER'S "profit" was limited to solely 7% REPURCHASE OPTION payement plus 5% REPURCHASE PREMIUM, if and only if, JCR LLC exercised its contractual right to repurchase the PROPERTY from the OWNERS, whereas, JCR LLC'S profit potential was approximately $56 million less cost of PROPERTY and its development, according to a detailed appraisal performed by TGS engineering firm.

TENANT-IN-COMMON ("TIC") PROPERTY OWNERSHIP

Tenant-In-Common ("TIC") property ownership is one of the oldest known forms of real estate ownership, dating back to the 1400's, when Great Brittian permitted citizens to own land. Due to the high cost of property, several Serf farmers were forced to pool their monies together to purchase a single piece of real estate, in which, each buyer received a deeded percentage ownership interest therein, based upon the amount of money invested in relationship to the purchase price of the entire property. In fact, virtually all multi-owner real estate in the United States is owned as a TIC, although, in New York State, a husband and wife's home that is jointly owned is referred to as "Tenants-By-The-Entirety", which means that if one spouse dies, the other automatically inherits their home and, thus, avoiding the legal entanglement associated with probating a decedent's estate.

There are three(3) major categories of TIC property ownership as follows:

1. TIC ownership with self-management or hiring a third party management company, not owner controlled or operated, without a Master Lease ("MASTERLEASE") which is defined as an agreement between property owners and the third party management company, whereby, the management company contractually obligates itself to paying the owners a set percentage or income on a monthly or annual basis and the management company generates income from the excess money the property produces, over and above the contractual obligation. In addition, the MASTERLEASE serves the purpose of creating a scenario to facilitate leasing the property to multiple tenants when the property iteself is owned by multi-persons or entities. Obviously, it would be impractical for a multi-owned property having numerous tenants to be able to have each owner sign a lease or, renewal thereof, for each tenant in a timely fashion. Using a MASTERLEASE, the tenant's lease is between the third party management company, a single entity, and the tenant and, thereby, only two signatures are required on each lease, the third party management company and the tenant. Furthermore, day-to-day management and moderate property expenditures can be facilitated in a timely manner by using a MASTERLEASE.

2. TIC ownership in which property owners agree to hire, and have the control to also fire, a non-owner controlled or operated management company as well as establishes a MASTERLEASE therebetween. This type of TIC ownership is the most commonly utilized in non-securitized and "securitized" TIC property ownership.

3. TIC ownership in which owners establish their own management company which owners have 100% ownership interest and control. A MASTERLEASE is employed to facilitate the execution of tenant leases, or renewal thereof, as well as day-to-day management and moderate property expenditures. This business concept was invented by Respondent, who named it Fractional Deeded Ownership ("FDO") in order to distinguish it from the two afore-described TIC property ownerships. The FDO solves all of the inherent problems that multi-owner TIC properties encounter when the owners reside in various states, having limited contact with eachother or the third party non-owner controlled management company, that was experienced over the past 15 years since the inception of the "securitized" TIC industry emerged and failed miserably. The real estate transaction related to the case at bar is Fractional Deeded Ownership and the other two(2) types of TIC property ownership will intentionally not be discussed in detail herein because Respondent believes that it is in the public's best interest that the illusion of TIC property ownership's relationship to a "security" remain entact at the present time.

It is in Respondent's professional opinion, that is supported by a plethora of federal case law, presented herein, that all three afore-described types of TIC ownership are not securities nor investment contracts. As previously stated above, Respondent is restricting the detailed discussion herein to only concern the PROPERTY that is the subject of the case at bar and Fractional Deeded Ownership as well as specifically excluding the TIC property ownership having third party non-owner controlled management company with MASTERLEASE associated therewith. If the Honorable Court so desires, it may seek to glean the relevant information concerning TIC property ownership with non-owner controlled third party management company and MASTERLEASE. Respondent respectfully requests that the Honorable Court refrain on any decision or comments relating thereto.

THE HOWEY/FORMAN/5-PRONG TEST TO
DETERMINE WHETHER AN INVESTMENT CONSTITUTES
AN "INVESTMENT CONTRACT" AND, THEREBY, A "SECURITY"

In Revak v. SEC Realty, 18 F.3d 81 (U.S.C.A. 2 cir. [NY] 1991), United States Supreme Court Chief Judge Telesca opined:

> "The Supreme Court long ago defined the term 'investment contract' to include any 'contract', transaction or scheme whereby a person invests money in a common enterprise and is lead to expect profits solely from the efforts of the promoter or a third party'. (SEC v. Howey, 328 U.S. 293, 298-299 (U.S. 1946)."

In Bender v. Continental Towers, 632 F.Supp. 497 (U.S.D.C. S.D. [NY] 1986), the United States District Court, Southern District Judge Griesa opined:

> "The investors in Howey bought parcels of land in a citrus grove. The land was offered together with a service contract under which the seller would jointly cultivate the groves and market the produce, and would remit the profits to investors based upon the acreage they owned. The Court [United States Supreme Court] held that the transaction [not the real estate itself] was an 'investment contract', emphasizing that the seller was offering 'something more than fee simple interests in land, something different from a farm or orchard coupled with management services'. (Howey supra at 299, 66 S.Ct. at 1103)."
>
> NOTE: In the JCR LLC-BUYER case at bar, the BUYERS did not have any service contract or joint sharing of profits that will be discussed in great detail herein.
>
> "The 'something more' was the opportunity to join a 'common enterprise'; the investors would contribute money and ... share in the profits of large citrus fruit enterprise managed and partly owned' by the seller."
>
> NOTE: in the JCR LLC-BUYER case at bar, there was no "common enterprise" or sharing of profits between the parties as depicted in Howey, which is discussed in detail herein.
>
> "on these facts, the purchasers of the land contracts were 'attracted solely by the prospects of a return on their investment. (SEC v. Howey, 328 U.S. 293, 300, 66 S.Ct. 1100, 1103, 90 L.Ed. 1244. 1247 (U.S. 1946))."
>
> NOTE: In the JCR LLC-BUYER case at bar, there was no "management contract" and "investors"(BUYERS) were not "attracted solely by the return on their investment as described in detail herein.

"The three elements [prongs] of the Howey test must all be present for a land sale to constitute a security:

(i) an investment of money;

(ii) in a common enterprise; and

(iii) with profits solely derived from the efforts of others."

NOTE: In the JCR LLC-BUYER case at bar, only possibly one(1) of the three(3) prongs of the HOWEY Test is met as discussed in detail herein.

"The meaning of the term 'investment contract' was considered again by the Court [U.S. Supreme Court] in United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621 (U.S. 1975) [overturning U.S. District Court, second Department decision]. The case involved an offering of stock in a cooperative apartment corporation. The purchase of stock of the cooperative corporation was a prerequisite to leasing an apartment in the cooperative. The [Supreme] Court [in Forman] held that that the cooperative's stock was not 'stock' within the meanings of the federal securities laws because it bore none of the traditional indicia of stock. The mere labelling of the shares of the cooperative as 'stock' did not bring the ambit of the federal securities laws. Forman supra at 848-851, 95 S.Ct. at 2058-2060. The Court [in Forman] went on to consider whether the shares constituted investment contracts. The Court [in Forman] stated that 'when a purchase is motivated by a desire to use or consume the item purchased ... the securities laws do not apply. Forman supra at 853, 955 S.Ct. at 2061. Finding that the cooperative shares were purchased not with an eye toward profit, but to acquire a place to live, the Court [in Forman] held that the shares did not constitute 'investment contracts.'"

NOTE: The JCR LLC-BUYER case at bar, is similar to Forman supra because the BUYERS purchased the PROPERTY "not with an eye toward profit but to acquire a place to live [retire]", which is explained in detail herein.

In Forman v. Community Services, Inc., 366 F.Supp. 1117 (U.S.D.C. S.D. [NY] 1973), Honorable Southern District Court Judge Pierce of New York, opined:

"Although the securities laws do not extend to the purchase of real estate, this is because the transaction does not meet the full test [Howey/Forman Test] developed to identify a stock or an investment contract, not because the underlying property is real rather than personal."

In Forman supra, the Supreme Court reversed a decision by the United States Court of Appeals, Second Circuit for taking an excessively literal approach to the problem of defining securities. the approach taken by the Second Circuit in Forman, although termed "literal", form would be disregarded in favor of substance and the emphasis would be on economic realities (Forman supra at 848, 95 S.Ct. at 2051). In the course of its opinion, the Supreme Court observed:

The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.

By contrast, when a purchaser is motivated by a desire to use or consume the item purchased "to occupy the land or to develop it themselves" ... the securities laws do <u>not</u> apply.

NOTE: In the JCR LLC-BUYER case at bar, indisputably the BUYERS were more "motivated by the desire to use or consume ["occupy the land": buy retirement home or become member of CCRC] the item [PROPERTY] purchased as well as develop it [PROPERTY] themselves since it was the unique talents and expertise of the BUYERS, not JCR LLC (i.e. Respondent), because he lacked same, which was required and utilized to develop the PROPERTY.

In Elson v. Geiger, 506 F.Supp. 238 (U.S.D.C. E.D. [MI] 1980), Honorable District Court Judge Julian Able Cook Jr. opined:

> "Although the Howey Test has been unaltered since 1946, United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 851-852, 95 S.Ct. 2051, 2060, 44 L.Ed.2d 621 (U.S. 1975) added a caveat that 'the substance of the economic realties of the transaction rather than the names that may have been employed by the party' controls.
>
> Thus, in determining whether the transactions complained of involved 'securities', the Court must now determine whether Plaintiff's invested money which was 'premised on a reasonable extrepreneurial or managerial efforts of others' United Housing Foundation, Inc. v. Forman, 427 U.S. at 847-848, 95 S.Ct. at 2057-2058."

In Rodriguez v. Banco, 777 F.Supp. 1943 (U.S.D.C. [PR] 1991), brilliant and insightful Honorable District Court Judge Fuste opined:

> "In determining whether land sales contract is a security for purposes of federal securities law, collateral agreement on which developer or third party's managerial or entrepreneurial obligations are set out must have some degree of 'horizontal commonality', meaning that the fates of investors are intertwined through pooling of common funds to be used for common development to benefit all [investor and promoter]; 'vertical commonality', defined as developer's promise to purchaser to make improvements is not enough".
>
> NOTE: In the JCR LLC BUYER real estate transaction at bar, BUYERS ["investors"] not only did not pool their funds as required in "horizontal commonality" but JCR LLC made no contractual promise to develop the PROPERTY and its managing member, Respondent, lacked the unique talents, expertise, knowledge and experience possessed by the BUYERS, who were the critical component in developing the PROPERTY as described in detail herein.
>
> "The inducement to the land purchaser is not the intrinsic value of the land per se, but rather the expected profits from the efforts of the seller of the land. In Howey, for instance, the Court found an investment contract where the seller of citrus groves also sold along with the land, a service contract for the cultivation and marketing of the fruit, along with an agreement that a portion of the profits from the sales would inure to the buyer of the property.

In S.E.C. v. C.M. Joiner Leasing Corp., 320 U.S. 344, 63 S.Ct. 120, 88 L.Ed. 88 (U.S. 1943), the Supreme Court found a security to exist in the sale of plots of land where the sales were effectuated to provide the financing necessary to enable the sellers to drill a test oil well on the land sold. '[T]he undertaking to drill a well runs through the whole transaction as the thread on which everybody's beads are strung' Joiner supra at 348, 64 S.Ct. at 122."

NOTE: It is important to realize that unlike "real estate", oil and gas leases and other related rights were specifically included in the Securities Act of 1934 to enable companies to raise money on a national, not just local (i.e. state) wide basis since oil and gas production is in the "public's interest."

"Real estate sales of residential space have been more problematic for courts, since the issue of whether the purchaser is 'investing' or merely 'consuming' can be very murky."

"In United Housing Foundation, Inc. v. Forman ... the Court found no investment contract in sales of apartment ownership shares ... if owner wished to sell, the Cooperative had the right to purchase the apartment back ... the Court wrote that '[w]hat distinguishes a security transaction - and what is absent here - is an investment where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases the commodity for personal consumption or living quarters for personal use. Forman at 858, 95 S.Ct. at 2063."

NOTE: The JCR LLC-BUYER real estate transaction is quite similar to Forman grounded upon the fact that the BUYERS sought to not only purchase the property by also have ownership in the retirement community after it was developed utilizing the unique talents, expertise, knowledge and experience of the BUYERS, which was lacking in JCR LLC or Respondent.

"While the Supreme Court has delineated the two ends of the land sale spectrum, with Howey's pure 'profit-from-efforts-of-another' driven investment on one side and Forman's pure personal consumption on the other, lower courts have had to develop a conceptual framework to parse the mixed motive situations that litter the middle of the continuum."

The combined Howey and Forman Tests are often referred to as the "5-Prong Test" because there are five(5) separate and distinct elements that all must be met for a Court to make a proper determination regarding whether a particular investment constitutes an "investment contract" and, thereby, a "security", governed under federal law, pursuant to the Securities Acts of 1933 and 1934. The 5-Prong test consists of the following:

PRONG #1: An investment of money;

PRONG #2: In a common enterprise;

PRONG #3: With expectation of profits;

PRONG #4: Solely from the efforts of the promoter or a third party; and

PRONG #5: Risks loss.

(See Marine Bank v. Weaver, 455 U.S. 551, 557-559 (U.S. 1982); Revak v. SEC Realty, 18 F.3d 81, 87 (U.S.C.A. 2 cir. [NY] 1994); Gary Plastic v. Merrill Lynch, 756 F.2d 230, 239 (U.S.C.A. 2 cir. [GA] 1995); GBJ v. Sequa, 804 F.Supp. 564, 567 (U.S.D.C. S.D. [NY] 1992); Perez-Rubio v. Wycoff, 718 F.Supp. 217, 233 (U.S.D.C. S.D. [NY] 1989); Dept. of Economic Development v. Arthur Anderson, 681 F.Supp. 1463 (U.S.D.C. S.D. [NY] 1988); Marini v. Adamo, 812 F.Supp.2d 243, 255 (U.S.D.C. S.D. [NY] 2011); Connors v. Lexington, 666 F.Supp. 434 (U.S.D.C. E.D. [NY] 1987); United States v. Leonard, 529 F.3d 83, 88 (U.S.C.A. 2 cir. [NY] 2008))

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PRONG #1

"AN INVESTMENT OF MONEY" - DEFINED

Respondent concededs that BUYERS invested money to purchase deeded (EXHIBITS D and E) in the PROPERTY. In Fact, nine(9) of the ten(10) BUYERS implemented 1031 EXCHANGES, pursuant to 26 U.S.C. §1031 which states:

> "(1) In general. - No gain or loss shall be recognized on the exchange of property [100% of sales funds from Relinquished Property] held for productive use in a trade or business or for investment if such property is exchanged [100% of sales funds used to purchase Replacement Property] solely for property of like kind which is to be held either for productive use or in a trade or business or for investment purposes".

In disputably, the BUYERS in any real estate transaction, including the PROPRTY transaction in the 1031 EXCHANGE at bar, invest funds in order to receive deeded (EXHIBITS D and E) ownership interests in order to satisfy the second leg of the 1031 EXCHANGE transaction, receiving title to the Replacement property. The "leg one" of a 1031 EXCHANGE tarnsaction is consummated when the taxpayer sells his/her investment property (i.e. Relinquished Property) and authorizes the sales funds to be held, on his/her behalf, by a Qualified Intermediary, prior to the taxpayer purchasing his/her Replacement property.

PRONG #2

"COMMON ENTERPRISE" - DEFINED

In Revak v. SEC Realty, 18 F.3d 81 (U.S.C.A. 2 cir. [NY] 1994), Honorable Chief Judge Telesca, of the United States Court of Appeals, Second Circuit, opined:

> "'Common enterprise' within the meaning of Howey can be established by a showing of 'horizontal commonality': tying of each individual investor's fortunes to the fortunes of the other investors by 'pooling of assets', usually combined with the pro-rata description of profits. See Hart v. Pulte Homes of Michigan, 735 F.2d 1001, 1004 (U.S.C.A. 6 circ. [MI] 1984); Salcer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 682 F.2d 459, 460 (U.S.C.A. 3 cir. [NJ] 1982) (investment must be 'part of a pooled group of funds'); Milnarik v. M-S- Commodities, Inc., 457 F.2d 274, 276 (U.S.C.A. 5 cir. [IL] 1972) (success or failure of other contracts must have a 'direct impact' on the profitability of plaintiffs' contract'), cert. denied, 409 U.S. 887, 93 S.Ct. 113, 34 L.Ed.2d 144 (U.S. 1972). In a common enterprise marked by horizontal commonality, the fortunes of each investor depend upon the profitability of the enterprise as a whole:
>
> Horizontal commonality ties the fortunes of each investor in a 'pool of investors' to the success of the overall venture. In fact, the finding of 'horizontal commonality' requires a sharing or pooling of funds".
>
> "Common enterprise within the meaning of the 5-Prong Test for a land sale contract and, thus, security under federal securities law mau not be established by mere showing of 'broad vertical commonality' which requires fortunes of investors to be linked to efforts of the promoter".

In Heine v. Colton, 789 F.Supp. 360(U.S.D.C. S.D. [NY] 1992), Honorable Judge Leisure of the United States District Court, Southern District, opined:

> "The Courts of the Southern District of New york have consistantly held that a litigant must establish either hirizontal or vertical commonality to demonstrate a 'common enterprise' for the purpose of an 'investment contract'. See, e.g. Donner v. NMI Ltd., 725 F.Supp. 153, 158 (U.S.D.C. S.D. [NY] 1989); Perez-Rubio v. Wycoff, 718 F. supp. 217, 234 (U.S.D.C. S.D. [NY[1989)".
>
> "The horizontal commonality theory 'requires plaintiff to show a pooling of the investors' interests in order to establish a common enterprise'. Kaplan v. Shapiro, 655 F.Supp. 336, 339-340 (U.S.D.C. S.D. [NY] 1897); accord Perez-Rubio supra at 234 ('The funds must be pooled')".

In Dooner v. NMI, 725 F.Supp. 135 (U.S.D.C. S.D. [NY] 1989). the Honorable District Court Judge Robert J. ward, of the Southern District of New york opined:

> "Courts in this circuit have held that the commonality requirement is met by either horizontal commonality, where investors' funds are pooled, or by narrow vertical commonality, where the fortunes of the investor and the investment company are interdependent. Perez-Rubio v. Wycoff supra at 234; Department of Economic Development v. Arthur Anderson & Co., 683 F.Supp. 1465, 1473 (U.S.D.C. S.D. [NY] 1988); In re Gas Reclamation, Inc. Securities Litigation, 659 F.Supp. 493, 500-501 (U.S.D.C. S.D. [NY] 1987); Accord 2 L. Loss & Seligman, Securities Regulation, 930, 956-963 (3d ed. 1989); M. Steinberg & W. Kaulbach, The Supreme Court and Definition of 'security': The 'Context' Clause, "Investment Contract" Analysis, and Their Ramifications, 40 Vand.L.Rev. 489, 524 (1987)".

In Michigian v. Art Capital, 612 F.Supp. 1421 (U.S.D.C. S.D. [NY] 1985), Honorable Judge Kevin Thomas Duffy, of the Southern District of New York, opined:

> "When determining whether an investment has satisfied the 'common enterprise' element of the Howey Test, courts are divided on which of two basic approaches apply:
>
> 'horizontal commonality' or 'vertical commonality', require plaintiff to show a pooling of the investor's interests in order to establish a 'common enterprise'. See Salcer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 682 F.2d 459, 460 (U.S.C.A. 3 cir. [NJ] 1982); Curran v. Merrill Lynch, Pierce, Fenner & Smith Inc., 622 F.2d 216, 222 (U.S.C.A. 6 cir. [MI] 1980), aff'd on other grounds, 456 U.S. 353, 102 S.ct. 1825, 72 L.Ed.2d 96 (U.S. [MI] 1982); Hirk v. Agri-Research Council, 561 F.2d 96, 100-101 (U.S.C.A. 7 cir. [IL] 1977)".

In Savino v. E.F. Hutton & Co., Inc., 507 F.Supp. 1225 (U.S.D.C. S.D. [NY] 1981, Honorable Judge Robert J. Ward, of the Southern District Court opined:

"The Courts have generally agreed there is a 'common enterprise' within the meaning of Howey where the financial arrangement involves 'horizontal commonality', that is, a relationship amoung investors whereby their monies or investment proceeds are pooled. see, e.g., Curran v. Merrill Lynch, Pierce, Fenner & smith, Inc., supra note 7, 622 F.Supp. at 222 (U.S.C.A. 6 cir. [MI] 1980); Milnarik v. M-S Commodities, Inc., 457 F.2d 274, 276-277 (U.S.C.A. 7 cir. [IL] 1972), cert. denied, 409 U.S. 887, 93 S.Ct. 113, 34 L.Ed.2d 144 (U.S. [IL] 1972). See also Darrell v. Goodson supra, note 7, (1979-1980) Fed.Sec.L.rep. at 97,325; Troyer v. Karcagi, supra, 476 F.Supp. at 1147".

"Thus, an example of horizontal commonality ... in which funds are placed in a single account and transactions are executed on behalf of the entire account rather than being attributed to any particular subsiduary account".

"The profit or loss shown by the account as a whole is ultimately allocated to each investor according to the relative size of his or her contribution to the fund. Each investor's rate of return is thus entirely a function of the rate of return shown by the entire account. See Meredith v. Conticommodity Services, Inc. (1980) Fed.Sec.L.Rep. (CCH) P 97, 701 at 98, 672 (D.D.C. 1980)".

In Marini v. Adamo, 812 F.Supp.2d 243 (U.S.D.C. E.D. [NY] 2011), Honorable District Court Judge Joseph F. Bianco, of the Eastern District of New York opined:

"The horizontal commonality teat, for purposes of determining whether a common enterprise exists, as required to qualify as investment contract security under §10(b), involves the tying of each individual investor's fortune to the fortunes of the the individual investor's fortunes to the fortunes of the other investors by pooling of assets, usually combined with the pro-rata distribution of profits".

"Courts have applied several different tests to determine whether a common enterprise exists, namely; the horizontal commonality test, the broad vertical commonality test, and the narrow or strict vertical commonality test. Revak supra at 87-88: Horizontal commonality involves 'tying of each individual investor's fortunes to the fortunes of the other investors by pooling of assets, usually combined with the pro-rata distribution of profits".

In Rodriguez v. Banco Cent., 777 F.Supp. 1043 (U.S.D.C. [PR] 1991), Honorable District Court Judge Fuste, a brilliant articulate communicator, opined:

"In determining whether land sales contract is a security for purposes of federal securities law, collateral agreement on which developer or third party's managerial or entrepenurial obligations are set out must have some degree of 'horizontal commonality', meaning that fates of investors are interwined through pooling of common funds to be used for common development to benefit all; 'vertical commonality' defined as developer's individual promise to purchaser to make improvements, is not enough".

In Dewit v. Firstar, 904 F.Supp. 1476 (U.S.D.C. N.D. [IA] 1995), the Honorable District Court Judge Bennett opined:

"Trial court had not disregarded eariler precedent in determining that 'horizontal commonality', sharing of common interests among investors, was requirement for a particular investment to be a 'security' for purposes of federal securities laws; case constituting prior authority had simply recognized 'vertical commonality', sharing of interest between investor and promoter, as factor in determining whether 'security' existsed, and did not discuss horizontal element".

In Pliskin v. Bruno, 838 F.Supp. 658 (U.S.D.C. [ME] 1993), Honorable District Court Chief Judge Gene Carter opined:

"As pointed out in Lavery, neither the Court of Appeals for the First Circuit nor the United States Supreme Court have clarified what elements to look for in finding a 'common enterprise' under Howey. District Courts in the First Circuit and elsewhere have applied both the narrow vertical commonality and the horizontal commonality analysis for determining whether various transactions satisfy the definition of an investment contract".

"Narrow vertical commonality 'finds a common enterprise when the investment manager's fortunes rise and fall with those of the investors'. Lavery, 792 F.Supp. at 851 (quoting Savino v. E.F. Hutton & Co., 507 F.Supp. at 1225, 1237 (U.S.D.C. S.D. [NY] 1981). Horizontal commonality on the other hand, focuses on whether the assets from two or more investors are pooled into a single fund; usually accompanied by a pro rata sharing of profits from a joint enterprise. Hocking v. Dubbis, 839 F.2d 560, 566 (U.S.C.A. 9 Cir. 1988, approved en banc, 885 F.2d 1449, 1459 (U.S.C.A. 9 Cir. 1989)".

In Kaplan v. Shapiro, 655 F.Supp. 336 (U.S.C.A. S.D. [NY] 1987), Honorable Southern District Court Judge Kram of New York, opined:

> "'Horizontal commonality' approach to common enterprise element of the definition of security under federal securities law requires that fortunes of each investor in a pool of investors be tied to success of overall adventure".
>
> "Courts are divided on which of two basis approaches to apply, or to apply both, in determining whether an instrument satisfies the common enterprise prong of the Howey Test, some courts have applied 'horizontal commonality', others have adopted 'vertical commonality', and some use both approaches".
>
> "Courts espousing a theory of horizontal commonality require plaintiff to show a pooling of investor's interest in order to establish a common enterprise. See, e.g. Salcer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 682 F.2d 459, 460 (3rd Cir. 1982); Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 222 (6th Cir. 1980), aff'd on other grounds, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 274 (7th Cir.), Cert. denied, 409 U.S. 887, 93 S.Ct. 113, 34 L.Ed.2d 144 (1972). In other words, the horizontal commonality approach requires that the fortunes of each investor in a pool of investors be tied to the success of the overall venture, i.e. a sharing or pooling of funds. In re Energy Systems Equipment Leasing Securities Litigation, 642 F.Supp. 718, 735 (E.D.N.Y. 1986)"
>
> "Some courts view the horizontal and vertical approaches as mutually exclusive, e.g., Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d at 222 ('By adopting [horizontal commonality] we necessarily reject the vertical commonality'), while others do not, e.g. Savino v. E.F. Hutton & Co., Inc., 507 F.Supp. at 1238 n. 12 ("Under the interpretation that the Court here gives to vertical commonality, no such necessary exclusivity exists')".

In Deckenbach v. La Vida Charters, Inc., 666 F. Supp. 1049 (U.S.D.C. S.D. [OH] 1987), Honorable District Court Judge Carl B. Rubin opined:

> "Horizontal commonality ties the fortune of each investor in a pool of investors to the success of the overall venture. In fact, a finding of horizontal commonality requires a sharing or pooling of funds. Union Planters National Bank v. Commercial Credit Business Loans, Inc., 651 F.2d 1174, 1183 (6th Cir.), cert. denied, 454 U.S. 1124, 102 S.Ct. 972, 71 L.Ed.2d 111 (1981). See also Hart v. Pulte Homes of Michigan corp., 735 F.2d 1001 (6th Cir. 1984)".

In Hart v. Pulte Homes of Michigan Corp., 735 F.2d 1001 (U.S.C.A 6 cir. [MI] 1984), Honorable Senior Circuit Judge Bailey Brown of the United States Court of Appeals opined:

> "Relying on Union Planters National Bank v. Commercial Credit Business Loans, Inc., 651 F.2d 1174 (6th Cir. 1981), cert. denied, 454 U.S. 1124, 102 S.Ct. 972, 71 L.Ed.2d 111 (1981), the district court held that commonality requires a pooling of funds among investors, i.e., 'horizontal' as distinquished from 'vertical commonality'. The district court found that the defendants nowhere promised to plaintiffs that defendants would develop the subdivisions successfully".
>
> "The mere fact that an assurance of development to each investor may have come from the same seller does not satisfy the requirement of horizontal commonality. In Milnarik v. M-S Commodities, Inc., 457 F.2d 274 (7th Cir.), cert. denied, 409 U.S. 887, 93 S.Ct. 113, 34 L.Ed.2d 144 (1972), quoted in Curran v.Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980), aff'd on other grounds, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982), the Seventh Circuit held that a discretionary trading account in commodity futures is not a security, even though the broker had other such accounts with the customers, because of the absence of a common enterprise".

In American Bank v. Wallace, 529 F.Supp. 258 (U.S.D.C. E.D. [KY[1981), Honorable District Court Judge Scott Reed opined:

> "This Circuit explained its approach in Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980), cert. granted, 101 S.Ct. 1971 (1981). In Curran, the Court adopted the horizontal commonality. Id. at 222, Horizontal commonality, the Court noted, 'best comports the language of Howey, because in a common enterprise all investors must share a common fortune'. Union Planters National Bank, supra at 1183. See also Curran, supra at 222. A horizontal relationship are those between an individual investor and the pool of other investors".

PRONG #3
EXPECTATION OF PROFITS

In Hart v. Pulte Homes, 735 F.2d 1001 (U.S.C.A. 6 cir. [MI] 1984), Honorable Senior Circuit Judge Bailey Brown of the Court of Appeals opined:

> "This circuit has interpreted the Howey Test as requiring a showing of horizontal commoanlity.
>
> Horizontal commonality ties the fortunes of each investor in a pool of investors to the success of the overall venture. [citation omitted] In fact, a finding of horizontal commonality requires a sharing or pooling of funds. Union Planters National Bank, 651 F2d at 1183."

> "The seminal decision of SEC v. Joiner Leasing Corp., 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88 (1943), illustrates the degree of commonality required when investors expect profits from in the form of property appreciation brought about through the entrepeneurial efforts of a developer. In Joiner, the defendant offered investors leasehold interests with the promise to drill an oil well 'so located as to test the oil-producing possibilities of the offered leaseholde". The Court held that the transactions were securities. The Court found that the investors were all linked together in the common venture to drill a test well. '[T]he undertaking to drill a well runs through the whole transaction as the thread on which everybody's beads were strung". Id. at 348, 64 S.Ct. at 122. Without the drilling enterprise, 'no one's leases had any value'. Id. at 349, 64 S.Ct. at 122".

In Milnarik v. M-S Commodities, 457 F.2d 274 (U.S.C.A. 7 cir. [IL] 1972), Honorable Judge Stevens of the Court of Appeals, opined:

> "An investor who grants discretionary authority to his broker does not thereby join broker's other customers in the kind of common enterprise that would convert the agency relationship into a statutory security".

In Seagrave v. Vista Resources, 534 F.Supp. 378 (U.S.D.C. S.D. [NY] 1982), Honorable Southern District Court Judge Sweet of New York, opined:

> "Of critical significance, in determining whether an acquisition is a 'security' within the meaning of federal securities laws, is whether investor has been attracted solely by prospects of return on his investment or whther a purpose has been motivated by desire to use or consume the item purchased".

In American Bank v. Wallace, 529 F.Supp. 258 (U.S.D.C. [KY] 1981), Honorable District Court Judge Scott Reed opined:

> "Profits, as defined within the context pf the Howey-Forman Test, focuses on the expectation of appreciation resulting from the development of the initial investment. See Forman, supra at 852-853, 95 S.Ct. at 2060-2061. the Ninth Circuit cases of United California Bank, supra, and AMFAC Mortgage Corp., supra, both involved promissary notes which carried an interest rate slightly above prime. Both cases held that the repayment of the principal plus a fixed rate of interest [similar to JCR-BUYER'S real estate tarnsaction in case at bar] was more 'indicative of commercial lending situation than an investment of risk capital'. AMFAC Mortgage Corp., supra at 434, Further, in Union Planters National Bank, the court stated that the repayment of principalplus a fixed rate of interest was <u>not</u> a synonymous with a reasonable expectation of profits. Plaintiff cannot validly argue that it had a reasonable expectation of profits from the payment of principal and a fixed rate of interest [similar to the JCR LLC - BUYER real estate transaction in the case at bar]"

In Rodriguez v. Banco, 777 F.Supp. 1043 (U.S.D.C. [PR] 1991), the brilliant Honorable District Court Judge Fuste opined:

> "In determining whether real estate contracts qualify as securities under federal securities law, expectation of profits from general appreciation in value of land <u>must</u> be disregarded for purposes of identifying security".

In Pliskin v. Bruno, 838 F.Supp. 658 (U.S.D.C. [ME] 1993), Honorable District Court Judge Gene Carter opined:

"To establish that transaction is 'investment contract' to which state and federal securities law apply, plaintiff's must show investment in common enterprise with profits generated solely from efforts of third party"

"Narrow vertical commonality analysis for determining whether parties have invested in a 'common enterprise' establishing that transaction is 'investment manager's fortunes rise and fall with those of investor".

""Horizontal commonality analysis for determining whether parties have invested in 'common enterprise' establishing that transaction is 'investment contract', to which state and securities laws apply, focuses on whether assets from two or more investors are pooled into a single fund, usually accompanied by pro rata sharing of profits from joint enterprise".

In Elson v. Geiger, 506 F.Supp. 238 (U.S.D.C. E.D. [MI] 1980), Honorable District Court Judge Julian Able Cook Jr. opined:

"Thus, in determining whether the transactions complained of involve 'securities', the Court must now determine whether Plaintiffs invested money which was 'premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others". United Housing Foundation, Inc., v. forman, 421 U.S. at 847-848, 95 S.Ct. at 2057-2058, or whether they were loaning money with the hope that the borrower would remain solvent in order to repay the principal with interest".

"The commercial loan/investment dichotomy: is explained in C.N.S. Enterprises Inc. v. G & G Enterprises, Inc., 508 F.2d 1354 (7th Cir.), cert. denied, 423 U.S. 825, 96 S.Ct. 38, 46 L.Ed.2d 40 (1975), where the Court noted that every money lender places his money at risk in anticipation of a 'profit' through interest payments; hoever, inorder to come under the aegis of the Federal Securities Act, it must be shown that the instant lender is distinguishable from 'every lender' and warrants the special protection which is offered by the Acts".

"With regard to the three land purchases and subsequent leasebacks the Court must ask again whether Plaintiffs were buying land or buying a reasonable expectation of profits from entrepreneurial efforts of others".

In Driscoll v. Schuttler, 697 F.Supp. 1195 (U.S.D.C. N.D. [GA] 1988), Honorable District Court Judge Robert H. Hall opined:

> "Test for security is presence of an investment in a common venture, premised on reasonable espectation of profits which are derived from entrepreneurial or managerial efforts of others".

ANALYSIS OF THE CASE AT BAR IN REFERENCE TO
EXPECTATION OF PROFITS

In the case at bar, the BUYERS intention for purchasing the PROPERTY was primarily to use the PROPERTY, purchase a home in the retirement community or become a member of the the CCRC and/or hold the real estate for investment purposes of compliance to 26 U.S.C. §1031. If JCR LLC defaulted in paying its contractually obligated REPURCHASE OPTION payments or failed to exercise its right to buy back the PROPERTY, within the 5 year time limitation, as occured in the case at bar, the BUYERS/OWNERS became unjustly enriched by JCR LLC'S payments of the REPURCHASE OPTION fees, in the approximate amount of $500,000 plus obtained the additional benefit of PROPERTY appreciation due to all the development work performed thereon by OWNERS. In contract, JCR LLC, assumed losses in the approximate amount of $1 Million as a result of the REPURCHASE OPTION payments made to OWNERS as well as other expenses associated with the PROPERTY development and/or expenses. Furthermore, JCR LLC was unjustly deprived of the estimated $56 Million value of the PROPERTY development according to the detailed appraisal performed by TGS Engineering, which the SEC has a copy thereof, obtained pursuant to the Subpoena Duces Tecum issued to JCR LLC and Respondent.

In the case at bar, it is indisputable, as previously described in detail herein, that all BUYERS/OWNERS utilized their unique talents and specialized skills to help develop the PROPERTY and did not rely on any specialized qualities or entrepreneurial efforts or managerial efforts by JCR LLC and/or Respondent. The Honorable Court should also note that the OWNERS have always managed the PROPERTY and continue to do so in Respondent's absence due to his unfortunate situation of being incarcerated for a crime that he absolutely did not commit. Unquestionably, the profits of OWNERS (i.e. Investors) and JCR LLC (i.e. Promoter) are not inseparably interwoven and interdependent. In fact, the opposite is true. If JCR LLC was able to continue paying the REPURCHASE OPTION fee (i.e. 7% APR) and exercised its contractually obligated right, it would have financially benefited approximately $56 Million dollars, whereas, the OWNERS would only benefit 12% APR.

PRONG #4

SOLELY FROM THE EFFORTS OF PROMOTER

In Endico v. Fonte, 485 F.Supp.2d 411 (U.S.D.C. S.D. [NY] 2007), Honorable Southern District Court Judge Lewis A. Kaplan of New York, opined:

> "The mere choice of an investor to remain passive in a common enterprise transaction is not sufficient to create a security interest as an investment contract, within the meaning of securities law, rather, whether the investor was expected at the time of the transaction to remain passive, with profits to come solely from efforts of others, is the controlling standard."
>
> "While contractual language receiving the right of an investor to exercise control in a common enterprise may not alone be enough to conclude that there is no investment contract, within the meaning of securities law, it nevertheless can be probative of the parties' reasonable expectation of control."
>
> "As courts have held, 'the mere choice to remain passive is not sufficient to create a security."

In Nelson v. Stahl, 173 F.Supp.2d 153 (U.S.D.C. S.D. [NY] 2001). Honorable District Court Judge Swain opined:

> "Because the LLC agreements grant their members direct authority over management of the entities [similar to the case at bar, BUYERS/OWNERS owned their own LLC in which there were the sole owner and managing member having complete control thereover], their structure precluded satisfaction of the third element of the Howey Test - that the expectations of profit is 'to come solely from the efforts of others"
>
> "An LLC membership interest can be considered a security 'when the partners [no other partners in BUYER'S/OWNER'S LLC in case at bar] are so dependent on a particular manager that they cannot replace him or otherwise exercise ultimate control'. Williamson v. Tucker, 645 F.2d 404, 424 (5th Cir. 1981). Yet, '[t]he delegation of rights and duties standing alone does not give rise to the sort of dependence on others which underlies the third prong of the Howey Test'. Id. at 423. So long as the member 'retains ultimate control, he has the power over the investment and the access to information about it which is necessary to protect against any unwilling dependence on the manager'. Id. Furthermore, 'the mere choice by a [member] to remain passive is not sufficient to create a security interest.' Rivanna Trawlers Unlimited v. Thompson Trawlers, 840 F.2d 236, 240-241 (4th Circ. 1988).

> Given the Supreme Court's instruction 'to consider investment schemes in light of their economic realties', this Circuit [United States Court of Appeals, Second Circuit] has found that the scheme that was primarily 'a means whereby participants could pool their own activity, their money and the promoter's contribution in a meaningful way' [BUYERS/OWNERS did not pool their money and promoter, JCR LLC, did not contribute any meaningful efforts in case at bar] was not an investment contract. SEC v. Aqua-Sonic Products Corp., 687 F.2d 577, 582 (2d Cir. 1982). The delegation of membership responsibilities responsibilities, or the failure to exercise membership owners does not 'diminish the investor's legal right to a voice in partnership matters.' Hirsch v. duPont, 396 F.Supp. 1214, 1220 (S.D.N.Y. 1975); see also Keith v. Black Diamond Advisors, Inc., 48 F.Supp.2d 326, 334 (S.D.N.Y. 1999). Indeed, if an investment scheme gives rise to a 'reasonable expectation ... of significant investor control, a reasonable purchaser could be expected to make his own investigation of the new business he planned to under take and protection of the [Exchange act] would be unnecessary.' Aqua-Sonic Products Corp., 687 F.2d at 585."
>
> "Keith v. Black Diamond Advisors, Inc., plaintiff brought a Section of 10b-5 action in connection with his purchase of an interest in a New York limited liability company. The defendants moved to dismiss under Rule 12(b)(6) on the ground that plaintiff's interest in the LLC did not constitute a security under the Exchange Act. The court applied the test set forth in Howey and noted, that under the terms of that limited liability company's operating agreement, the plaintiff had rights: to manage the company along with the other members; to participate in a detailed cash flow distribution structure; and to call meetings. Keith, 48 F.Supp.2d at 333. The court held that such rights were 'antithetical to the notion of member passivity' implicit in the Howey analysis. Id. Moreover, the court concluded that if, at the time of the investment, plaintiff 'did not intend to be a passive investor' [similar to the BUYERS/OWNERS in the case at bar]. Id. The Keith court held that the plaintiff's interest in the LLC was not a security under the Exchange Act."

In Hirsch v. duPont, 396 F.Supp. 1214 (U.S.D.C. S.D. [NY] 1975), Honorable Southern District Court Judge Robert L. Carter of New York, opined:

> "In other words, an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.' 328 U.S. at 298-99, 66 S.Ct. at 1103. (Emphasis added)"

"One element of this definition has caused considerable controversy. That element is the requirement that the investor rely for profit 'solely' on the efforts of others. Some subsequent cases have found this apparently narrow, inflexible requirement to be inconsistent with the Howey opinion's own admonition, 328 U.S. at 299, 66 S.Ct. at 1103, that is definition 'embodies a flexible rather than a static principle, one that is capable of adaptation top meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.' See S.E.C. v. Glenn W. Turner Enterprises, Inc., 348 F.Supp. 766, 774 (D.Or. 1972), aff'd, 474 F.2d 476 (9th Cir. 1973). Other courts have noted that in some of the state law cases relied on by Howey, e.g., State v. Gopher Tire & Rubber Co., 146 Minn 52, 177 N.W. 937 (1920), the investors contributed nominal efforts to the enterprise, and these courts have interpreted Howey not where the investor is required to perform nominal services or physical labor. S.E.C. v. Koscot Interplanetary, Inc., 497 F.2d 473, 480 (5th Cir. 1974); J. Long, Partnership, Limited Partnerships, and Joint Venture Interests as Securities. 37 Mo.L.Rev. 581, 599 n. 73 (1972). The primary concern in this regard has been that if the Howey requirement is interpreted literally, see, e.g., Gallion v. Alabama Market Centers, Inc., 282 Ala. 679, 213 So.2d 841 (1968); Georgia Market Centers, Inc., v. Fortson, 225 Ga. 854, 171 S.E.2d 620 (1969) (requirement that investors hand out 'purchase authority' cards to potential customers in order to earn commissions precluded finding of security), the test could easily be evaded by requiring the investor to contribute a modicum of effort. Lino v. City Investing Co., 487 F.2d 689, 692-93 (3d Cir. 1973); S.E.C. v. Glenn W. Turner Enterprises, Inc., supra, 474 F.2d at 482; see Scholarship Counselors, Inc. v. Waddle, 507 S.W.2d 138 (Ct.App.Ky. 1974); State of Utah v. Dare to Be Great, Inc., 3 CCH Blue Sky L.Rep. P71,096 (Dist.Ct.Utah 1972) (questioning whether Howey would have been decided differently if the contract had required the investor 'to appear once a year to pull weeds along a row of trees.')"

"Finally, some courts have stated that the reason Howey excluded the investor who participates in the enterprise from protection of the disclosure and fraud provisions of the securites laws is that an investor does not need such protection where he obtains a degree of managerial control which affords access to information about the issuer. Polikoff v. Levy, 55 Ill.App.2d 229, 204 N.E.2d 807, cert. denied, 382 U.S. 903, 86 S.ct. 237, 15 L.Ed.2d 156 (1965); In the Matter of Continental Marketing Associates, Inc., 3 CCH Blue Sky L.Rep. P71,016 (Ind.sec.Comm'n 1969)."

In Keith v. Black Diamond, 48 F.Supp.2d 326 (U.S.D.C. S.D. [NY] 1999), Honorable Southern District Court Judge Scheindlin of New York, opined:

> "However, following the Supreme Court's 'repeated directions to consider investment schemes in light of their economic realities', this Circuit [United States Court of Appeals, Second Circuit] has found that a scheme that was primarily 'a means whereby participants could pool their own activities, their money and the promoter's contribution in a meaningful way' [BUYERS/OWNERS did not pool their money and promoter had no meaningful efforts in the case at bar] was not an investment contract. SEC v. Aqua-sonic Products Corp., 687 F.2d 577, 582 (2d Cir. 1982). Indeed, if an investment scheme gives rise to a 'reasonable expectation ... of significant investor control [BUYER/OWNER total control as present in the case at bar], a reasonable purchaser could be expected to make his own investigation of the new business he planned to undertake and the protection of the [Exchange Act] would be unnecessary.' Id. at 585."
>
> "Furthermore, 'the mere choice by a partner to remain passive is not sufficient to create a security interest.' Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc., 840 F.2d 236, 240-41 (4th Cir. 1988). To make this determination, the Rivanna court found that the critical inquiry is 'whether the powers possessed by the [LLC members] under the [operating agreement] were so significant that, regardless of the degree at which such powers were exercised, the investments could not have been premised on a reasonable expectation of profits derived from the management efforts of others.' Id. at 241 (quoting Tucker, 645 F.2d at 419)."
>
> "In Hirsch v. duPont, 396 F.Supp. 1214 (S.D.N.Y. 1975), a pre-Rivanna case, this court [United States District Court, Southern Division of New York] found that the determination whether a partnership interest was a security 'does not and should not hinge on the particular degree of responsibility [a partner] assumes within the firm', 'nor does the delegation of membership responsibilities, or the failure to exercise membership powers, 'diminish the investor's legal right to a voice in partnership [or company] matters.' Id. at 1220 (quoting New york Stock Exchange Inc. v. Sloan, 394 F. Supp. 1303, 1314 (S.D.N.Y. 1975))."

In Weibolt v. Metz, 355 F.Supp. 255 (U.S.D.C. S.D. [NY] 1973), Honorable Southern District Court Judge Lasker of New York, opined:

> "[A]greement contemplated for profits, if any, would be derived primarily from efforts of the franchisee [investor or BUYER/OWNER in the case at bar], franchisee [investor or BUYER/OWNER in the case at bar] was not an 'investment contract' and its offer and sale were not covered by the Securities Acts."

In Hart v. Pulte Homes, 735 F.2d 1001 (U.S.C.A. 6 cir. [MI] 1984), United States Court of Appeals Circuit Judge Bailey Brown opined:

> "The seminal decision of SEC v. Joiner Leasing Corp., 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88 (1943), illustrates the degree of commonality required when investors expect profits in the form of property appreciation brought about through the entrepreneurial efforts of a developer. In Joiner, the defendant offered investors leasehold interests with the promise to drill an oil well 'so located as to test the oil-producing possibilities of the offered leaseholds.' The Court held that the transactions were securities. The Court found that the investors were all linked together in a common venture to drill a test well. '[T]he undertaking to drill a well runs through the whole transaction as the tread on which everybody's beads were strung.' Id. at 348, 64 S.Ct. at 122. Without the drilling enterprise, 'no one's lease had any value.' Id. 13 349, 64 S.Ct. at 122. [unlike the case at bar wherein the BUYER/OWNERS have a deeded interest in the valuable real estate]"

In Fargo Partners v. Dain, 540 F.2d 912 (U.S.C.A. 8 cir. [ND] 1976), Honorable United States Court of Appeals Circuit Judge Ross opined:

> "Essential prerequisite for existance of investment contract as 'security' under federal securities laws is substantial reliance on efforts of seller or third parties for return on investment."

In United Sportfishers v. Buffo, 597 F.2d 658 (U.S.C.A. 9 cir. [CA] 1978), The United States Court of Appeals Circuit Judge Choy opined:

> "The Court concluded:
>
> What distinguishes a security transaction and what is absent here [also absent in the case at bar] is an investment where one parts with his money in a hope or receiving profits of others ...
>
> United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 858 95 S.Ct. 2051, 2063, 44 L.Ed.2d 621 (1975). See SEC v. W.J. Howey Co., 328 U.S. 293, 298-99, 66 S.Ct. 1100, 90 L.Ed. 1244 (1944); United California Bank v. THC Financial Corp., 557 F.2d 1351, 1356-59 (9th Cir. 1977); SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 480-83 (9th Cir.), cert. denied, 414 U.S. 821, 94 S.Ct. 117, 38 L.Ed.2d 53 (1973)."

In Rodriguez v. Banco, 777 F.Supp. 1043 (U.S.D.C. [PR] 1991), insightful Honorable District Court Judge Fuste opined:

> "To show that real estate sales contract is a security for purposes of federal securities law, purchasers must show that they purchased at least in substantial part in reliance on collateral agreement in which developer or third party's managerial or entrepreneurial obligations are set out."
>
> "In examining real estate sales contracts to determine whether they can qualify as investment contracts, and therefore securities, '[T]he touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.' United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 852, 95 S.Ct. 2051, 2060, 44 L.Ed.2d 621 (1975) (emphasis added). In the classic land investment contract', the sale of the land by the promoter is merely incidental to the primary reason for the sale, which is to open the way for the operation of a commercial enterprise on the land financed through the sales but carried out by the developer or third party [both commercial enterprise and land financing lacking in the case at bar]."
>
> "The inducement to the land purchaser is <u>not</u> the intrinsic value of the land per se [as present in the case at bar due to the fact BUYERS/OWNERS were implementing 1031 EXCHANGES], but rather the expected profits from the efforts of the seller of the land."

"Real estate sales of residential space have been more problematic for courts, since the issue of whether the purchaser is 'investing' or merely 'consuming' [as present in the case at bar where the OWNER/BUYERS sought to use the PROPERTY for their own purposes] can be very murky. In United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975), the Court found no investment contract in the sale of apartment ownership shares in a low-income cooperative. The shares were sold to persons on the basis of their income and enabled them to become the owners of the apartment which they could then occupy [similar to the case at bar where the BUYERS/OWNERS use the PROPERTY and some sought to buy a residential home in the retirement community or become a member of the CCRC]. The tenant owner could not rent out the space to another, if the tenant/owner wished to sell and move out, the Cooperative had the right to purchase the apartment back at the original purchase price, thereby precluding the possibility of profit realization for the tenant [similar to the case at bar wherein the BUYER/OWNERS had all executed a Tenant-In-Common Agreement between themselves wherein they had to offer the sale of the PROPERTY to the other owners prior to selling it to an unknown third party], the Court wrote that '[w]hat distinguishes a security transaction - and what is absent here - is an investment where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use [similar to the case at bar wherein the BUYERS/OWNERS sought to use and or ultimately own a retirement home or become a member of the CCRC when the development was completed by the BUYER'S/OWNER'S, not JCR LLC'S, efforts).' United Housing Foundation, 421 U.S. at 858, 95 S.Ct. at 2063."

"While the Supreme Court delineated the two ends of the land sale spectrum, with Howey's pure 'profit-from-efforts-of-another' driven investment on the one side and United Housing's pure personal consumption on the other, lower courts have had to develop a conceptual framework to parse the mixed motive situations that litter the middle of the continuum. several leitmotiffs have surfaced which help guide the inquiry. First, ;where those who purchase something with the primary desire to use or consume it, the security laws do not apply.' Rice v. Branigar Organization, Inc., 922 F.2d 788 (11th Cir. 1991) (Powell, Associate Justice [retired], United States Supreme Court, sitting by designation; Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1040 (10th Cir. 1980); Fogel v. Sellamerica, Ltd., 445 F.Supp. 1269, 1277 (S.D.N.Y. 1978). Second, expectation of profit from the general appreciation in the value of land must be disregarded for purposes of identifying a 'security' McCown v. Heidler, 527 F.2d 204, 208 (10th Cir. 1975); Aldrich, 627 F.2d at 1039, n. 1 ("[c]apital appreciation through development should be distinguished from general increase in land values concurrent with neighborhood growth and improvements"). Third, the purchasers must show that they purchased at least in substantial part in reliance on a collateral agreement in which the developer or third party's managerial or entrepreneurial obligations are set out.

Dumbarton Condominium Assoc. v. 3120 R Street Associates Ltd. Partnership, 657 F.Supp. 226 (D.C. 1987). Fourth, the collateral agreement must have some degree of "horizontal commonality", meaning that the fates of the investors are interwined through the pooling of common funds to be used for the common development to benefit all (indisputably lacking in the case at bar]. The fate of each investor must rise and fall together [unquestionably, the BUYER'S/OWNER'S and JCR LLC'S profits and losses are inversely correlated to eachother in the case at bar]. Vertical commonality, defined as a developer's individual promise to a purchaser to make improvements [completely lacking in the case at bar], is not enough. Hart v. Pulte Homes of Michigan Corp., 735 F.2d 1001 (6th Circ. 1984)."

"In Woodward v. Terracor, 574 F.2d 1023 (10th Cir. 1978), the Tenth Circuit faced a factual scenario very similar to the one in the case at bar. The Defendants sold lots in what was promoted as a planned residential community. 'included in the plans were shopping centers, health and cultural facilities, transportation facilities, and abundant recreational opportunity, including a golf course and a lake.' [in the case at bar, JCR LLC did not promote a planned retirement community, the BUYERS/OWNERS used their unique talents, expertises and skills to help design and develop the retirement community]. Woodward, 574 F.2d at 1025. Most of the plaintiffs purchased the lots with the intention of building on them, although several did not intend to build and bought the land as an investment. A land sales contract was entered into which provided for the sale of the lost along with some rudimentary developments such as underground sewage, water, and a curb. The court found that the planned community facilities which were part of the promotional materials [completely lacking in the case at bar] did not turn an ordinary land sales contract into a security. The court looked to the actual obligations of the developer [completely lacking in the case at bar due to the fact that JCR LLC had absolutely no contractual obligation what-so-ever to develop the PROPERTY] vis-a-vis the group of purchasers as a whole, and found that a collateral agreement to engage in wide scale development through the use of common funds that would the generate a return on investment to the purchasers was missing [identical to the case at bar]."

"[The developer] itself was involved in the business venture [identical to the case at bar]. [The developer] was developing a new residential community [identical to the case at bar where JCR LLC was utilizing the unique talents, specialized skills and expertise of the BUYER/OWNERS not vice-versa] As part of the venture [the developer] sold lots to persons who either intended to build a house thereon, or intended to resell to others who would so build. But the mere fact that the plaintiffs bought lots from [the

developer] does not mean that by such acquisition they were thereafter engaged in a common venture or enterprise with [the developer]. The only contractual agreement between plaintiffs and [the developer] was a Uniform Real Estate Contract [similar to the Purchase Agreement between JCR LLC and the BUYER/OWNERS in the case at bar]. [The developer] was under no contractual obligation to the plaintiffs other than to deliver title once purchase terms were met [identical to the case at bar wherein JCR LLC transferred deeded ownership interests to the BUYER/OWNERS at closing]. Unlike Howey, [the developer] was not under any collateral management contract with the purchases of its land [identical to the case at bar wherein JCR LLC was also not under any management contract with BUYERS/OWNERS]."

"Woodward, 574 F.2d at 1025. In De Luz Ranchos Inv. v Coldwell Banker & Co., 608 F.2d 1297 (9th Cir. 1979), the Ninth Circuit applied the same reasoning to find that the sale of subdivided, undeveloped land could not be considered an investment contract despite promotional material speaking generally about the developer's plans for further development of the common facilities within the project where the contract obligated the seller to do no more than transfer title to the property. As stated succinctly by the court in Hart, 735 F.2d at 1004, "[t]he mere fact that an assurance of development to each investor may have come from the same seller does not satisfy the requirement of horizontal commonality."

In Happy v. Lakewood Properties, 396 F.Supp. 175 (U.S.D.C. N.D. [CA] 1975), Honorable Chief district Court Judge Oliver J. Carter opined:

"Buying land with expectations of profit does not make the transaction a purchase of a security subject to federal securities laws; rather, the land must be developed or operated by others [in the case at bar, the BUYERS/OWNERS themselves developed and managed the PROPERTY]."

"Test of whether land sale amounted to purchase of an investment contract subject to the federal securities laws, under requirement that essential managerial efforts be made or offered by the vendors, is not fulfilled when there are promises of a general nature but no actual commitment to perform actual services that affect purchasers' control and management of the land [identical to the BUYER/OWNER - JCR LLC real estate transaction in the case at bar wherein the BUYERS/OWNERS control and managed the PROPERTY]."

"The word 'solely' has been somewhat diluted in this Circuit by the Court of Appeals' decision in SEC v. Glenn Turner Ent., Inc. 474 F.2d 476 (9th Cir. 1973). In the case, the Ninth Circuit held that the word 'solely' must be realistically defined; the investor should not be thrown out of court because he has made a 'modicum of effort'.

'Rather we adopt a more realistic test, whether the efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.' [indisputably, the BUYERS/OWNERS have always and continue to manage and were their essential efforts, not JCR LLC'S efforts, that affected the failure or success of the PROPERTY development] Glenn Turner, supra, at 482."

"The value of the plaintiff's land may increase, but that alone is not enough to make the land a security; the land must be developed or operated by others [completely lacking in the case at bar wherein the BUYERS/OWNERS developed and continue to manage the PROPERTY]. Loss, Securities Regulation, 492. Buying land with expectation of profit does not make the transaction a security. Contact Buyers League v. F & F Investment, 300 F.Supp. 210 (N.D.Ill. 1969); Huberman v. Denny's Restaurants, Inc., supra."

In Timmreck v. Munn, 433 F.Supp. 396 (U.S.D.C. N.D. [IL] 1977), Honorable District Court Judge Decker opined:

"Land as such is not a 'security' and land purchase contract, simply because the purchaser expects or hopes that the value of the land purchased will increase, does not fall automatically within the confines of the Securities Acts"

"Not every promise or even minor improvement with respect to undeveloped lots suffices to create an investment property so as to render real estate contracts 'investment contracts' within the Securities Acts' minimal managerial services are not enough, nor will mere inclusion of roads supplied by the developer transmute a run-of-the-mill real estate sale, ; court must distinguish between mere puffery, generalizations, and other talk designated to create an 'illusion' of extensive development plans from cases where the real burden of development is not placed on the purchasers [in the case at bar, the burden of development of the PROPERTY was squarely placed on the BUYERS/OWNERS due to the fact that they possessed the unique talents, skills and expertise required that JCR LLC lacked"

"[T]he decision of Judge McMillen in Bublua, et al. v. The Grand Bahama Development Co., Ltd., No. 73 C 3131 (N.D. Ill. 6/27/74), for the proposition that '(a)lleged oral misrepresentation cannot transform a document into a security to bring it within the

jurisdiction of this court if the document itself does not satisfy the definition of the statute and the case law."

"In Bubula, it seems that the plaintiffs asserted that the real estate purchases were securities upon the basis of a clause providing for a small 'service' charge for maintenance and other minor improvements, and other oral and written representations 'about the nature and value of the land.' The court apparently viewed the former as insufficient to establish a common enterprise with profits solely from the efforts of the defendents. And while Judge McMillen did give some emphasis to the fact that the latter representations were specifically excluded from the purchase agreement, it is clear that mere generalizations about the 'nature and value' of the property could not suffice to transform a routine real estate transaction into an investment."

"Land as such is not a security and that a land purchase contract, simply because the purchaser expects or hopes that the value of the land puchased will increase, does not fall automatically within the confines of the Securities Acts. McCown v. Heidler, supra, 527 F.2d at 208."

"As noted, there is an investment aspect in every land transaction arising from the hope of increased property values. But, as the Supreme Court recently stressed, there is frequently also a strong motivation to purchase real estate for purposes of 'consumption', that is to occupy the land or develop it by one's own effort [As present in the case at bar wherein the BUYERS/OWNERS utilized their own unique talents, skills and expertise that JCR LLC lacked in order to develop the PROPERTY. Forman, 421 U.S. at 853, 95 S.Ct. 2051."

"Several of the opinions [agreed upon by the Court] relied upon by the defendants cite 1 Loss, Securities Regulation, pp. 491-92 (2d ed. 1961):

'No 'investment contract' is involved when a person invests in real estate, with the hope perhaps of earning a profit as the result of a general increase in values concurrent with the development of the neighborhood"

"Of couse not every promise or even minor improvement suffices to create an investment property. Minimal managerial services are not enough. Bubula, supra; Rio Rancho, supra, Nor will the mere inclusion of roads supplied by the developer transmutate a run-of-the-mill real estate sale. Rio Rancho, supra. A court must distinguish between mere puffery, generalizations, and other talk designed to create an 'illusion' of extensive development plans, from cases where the real burden of development is not placed upon the purchasers [as depicted in the case at bar wherein the BUYERS/OWNERS had the requisite unique talents, skill, expertise and knowledge, not JCR LLC, to develop the PROPERTY]. Happy Investment, supra."

"Ninth Circuit had previous ruled in S.E.C. v. Glenn W. Turner Ent., Inc., 474 F.2d 476 (9th Cir. 1973), that 'the word 'solely' should not be read as a strict limitation on the definition of an investment contract'. Instead, the Ninth Circuit chose to adopt the more realistic test of looking to see 'whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise [in the case at bar, indisputably, the development of the PROPERTY depended on the unique talents, skills, expertise, knowledge and experience that JCR LLC lacked in order for the PROPERTY development project to be successful]. 474 F2d at 482."

PRONG #5

RISKS / LOSS

In Keith v. Black Diamond, 48 F.Supp.2d 326 (U.S.D.C. S.D. [NY] 1999), Honorable Southern District Court Judge Scheindlin of New York, opined:

> "However, following the Supreme Court's 'repeated directions to consider investment schemes in light of their economic realities', this Circuit has found that a scheme that was primarily 'a means whereby participants could pool their own activities, their money and promoter's contribution in a meaningful way' was not an investment contract. SEC v. Aqua-sonic Products Corp., 687 F.2d 577, 582 (2d Cir. 1982). Indeed, if an investment scheme gives rise to a 'reasonable expectation ... of significant investor control, a reasonable purchaser could be expected to make his own investigation of the new business he planned to undertake and the protection of the [Exchange Act] would be unnecessary'. Id. at 585."
>
> "Furthermore, 'the mere choice of a partner to remain passive is not sufficient to create a security interest.' Rivanna Trawlers Unlimited v. thompson Trawlers, Inc., 840 F. 2d 236, 240-241 (4th Cir. 1988). To male this determination, the Rivanna court found that the critical inquiry is "whether the powers possessed by the [LLC members] under the [operating agreement] were so significant that, regardless of the degree to which such powers were exercised, the investments could not have been premised on a reasonable expectation of profits derived from the management efforts of others.' Id. at 241 (quoting Tucker, 654 F.2d at 419)."
>
> "In Hirsch v. duPont, 396 F.Supp. 1214 (U.S.D.C. S.D. [NY] 1975), a pre-Rivanna case, this court found that the determination whether a partnership interest was a security 'does not and should not hinge on a particular degree of responsibility [a partner] assumes within the firm,' nor does the delegation of membership responsibilities, or the failure to exercise membership powers, 'diminish the investor's legal right to a voice in partnership [or company] matters." Id. at 1220 (quoting New York Stock Exchange Inc., v. Sloan, 394 F.Supp. 1303, 1314 (S.D.N.Y. 1975)."

In Hirsch v. duPont, 396 F.Supp. 1214 (U.S.D.C. S.D. [NY] 1975), Honorable Southern District Court Judge Robert L. Carter of New York, opined:

> "In other words, an investment contract for the purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. 328 U.S. at 298-99, 66 S.Ct. at 1103. (Emphasis added)"

"One element of this definition has caused considerable controversy. That element is the requirement that the investor rely on profit 'solely' on the efforts of others. Some subsequent cases have found this apparently narrow, inflexible requirement to be inconsistent with the Howey opinion's own admonition, 328 U.S. at 299, 66 S.Ct. at 1103, that its definition 'embodies a flexible rather than a static principle ... See S.E.C. v. Glenn W. Turner Enterprises, Inc., 348 F.Supp. 766, 774 (D.Or. 1972), aff'd, 474 F.2d 476 (9th Cir. 1973). Other courts have noted that in some of the state law cases relied on by Howey, e.g., State v. Gopher Tire & Rubber Co., 146 Minn. 52, 177 N.W. 937 (1920), the investors contributed nominal services or physical labor. SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 480 (5th Cir. 1974); J. Long, Partnership, Limited Partnership, and Joint Venture Interests as Securities, 37 Mo.L.Rev. 581, 599 n. 73 (1972). The primary concern in this regard has been that if Howey requirement is interpreted literally, see e.g., Gallion v. Fortson, 225 Ga. 854, 171 S.E.2d 620 (1969) (requirement that investors hand out 'purchase authority' cards to potential customers in order to earn commissions precluded finding a security), the test could easily be evaded by requiring the investor to contribute a modicum of effort. Limo v. City Investing Co., 487 F.2d 689, 692-693 (3d Cir. 1973)' S.E.C. v. Glenn W. Turner Enterprises, Inc., supra, 474 F.2d at 482; see Scholarship Counselors, Inc. v. Waddle, 507 S.W.2d 138 (Ct.App.Ky. 1974); State of Utah v. Dare to be Great, Inc., 3 CCH Blue Sky L.Rep. P71,096 (Dist.Ct.Utah 1972) (questioning whether Howey would have been decided differently if the contract had required the investor to appear once a year to pull weeds along his row of trees.')"

"Finally, some courts have stated that the reason Howey excluded the investor who participates in the enterprise from the protection of the disclosure and fraud provisions of the securities laws is that an investor does not need such protection where he obtains a degree of managerial control which affords access to inform about the issuer. Polikoff v. Levy, 55 Ill.App.2d 229, 204 N.E.2d 807, cert. denied, 382 U.S. 903, 86 S.Ct. 237, 15 L.Ed.2d 156 (1965); In the Matter of Continental Marketing Associates, Inc., 3 CCH Blue sky L.Rep. P71,016 (Ind.Sec.Comm'n 1969)"

"'In theory' general partners have equal rights to participate in management. CRANE & BROMBERG ON PARTNERSHIP 374-375 (1968). This would seem to preclude one from relying solely on another for profits, and thus to rule out an investment contract. But the theoretical principle may be varied by the agreement of the partners, which may lodge all control in designated partners.' 1 A. Bromberg, securities Law, Fraud, Sec. 4.6(331)(1973); Jennings and Marsh, supra, at 308."

"Certain state courts have rejected the Howey Test altogether, and, following Silver Hills Country Club v. Sobieski, 55 Cal.2d 811, 13 Cal.Rptr. 186, 361 P.2d 906 (1961), have held that an investor's interest is a security of the investor places his capital at the risk of the enterprise and receives some benefit in exchange. Accord, In the Matter of the State of Alaska department of Commerce v. Spa Athletic Club, Inc., 3 CCH Blue sky L.Rep.)71, 136 (Alaska Department of Commerce 1974); Linquist v. American Campground Memberships, Inc., 3 CCH Blue Sky L.Rep. P71,196 (Wash.Super. 1973); People v. Witzerman, 29 Cal.App.3d 169, 105 Cal.Rptr. 284 (1972); contra, Brown v. Computer Credit System, Inc., 128 Ga.App. 429, 197 S.E.2d 165 (1973); see Long, Partnership Interests as Securities, supra, at 603-04. In Sobieski, Justice Traynor of the California Supreme Court stated the rationale of the 'risk capital' test as follows:

'Since the (California) act does not make profit to the supplier of a captital test of what is a security, it seems that its objective is to afford those who risk their capital at least a fair chance of realizing their objectives in legitimate ventures whether or not they expect a return on their capital in one form or another 13 Cal.Rptr. at 188, 361 P.2d at 908-909."

"Under this test, virtually every conceivable investment, including the general partnership interests, would qualify as securities. However, no federal court has adopted the 'risk' capital test."

"Certain state and federal decisions have, however, combined the 'risk capital' test with a modified version of the Howey definition. In State v. Hawaii Market Center Inc., 485 P.2d 105 (Hawaii 1971), the court held that an investment contract is created where four requirements are satisfied:

(1) an offeree furnishes initial value to an offeror, and

(2) a portion of its initial value is subjected to the risks of capital enterprise, and

(3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and

(4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise. 485 P.2d at 109.

See S.E.C. v. Glenn W. turner Enterprises, Inc., supra, 348 F.Supp. at 374-75; Venture Investments Co. v. Schaefer, 3 CCH Blue Sky L.Rep. P71,031 (D.Colo. 1972) (Colorado Uniform Securities Act); State ex. rel. Park v. Glenn Turner Enterprises, Inc., 3 CCH Blue Sky L.Rep. P71,023 (Idaho Dist.Ct. 1972); State ex rel. Fisher v. World Market Centers, Inc., 3 CCH Blue Sky L.Rep P71,034 (Okla.Dist.Ct. 1972).

The first three requirements are easily met, and attention has focused on the fourth requirement, the absence of 'the right to exercise practical and actual control over the managerial decisions of the enterprise.' (Emphasis added)."

"Indeed after the Hawaii Market Center decision, the federal courts in several circuits adopted this fourth requirement, the absence of managerial control, as the single test of an investment contract. S.E.C. v. Koscot Interplanetary, Inc., supra, 474 F.2d at 483 (5th Cir. 1974); Nash & Associates, Inc. v. Lum's of Ohio, Inc., 484 F.2d 392, 395 (6th Cir. 1973); see also In the Matter of Continental Marketing Associates, Inc., supra; Shaul v. Consumer Companies of America, Inc., 3 CCH Blue Sky L.Rep. (071,022 (Ohio C.P. 1972). the leading case of S.E.C. v. Glenn W. Turner Enterprises, Inc., stated the new test as follows:

"'Rather we adopt a more realistic test, whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.' 474 F.2d at 482. (Emphasis added)"

"The SEC has also adopted the position that an interest is a security only where there is 'no active participation in the management and operation of the scheme on the part of the investor.' Sec.Act.Rel. 4877, CCH Fed.Sec.L.Rep. P77,462 (1967) (emphasis added). In Sec.Act.Rel. 5211, CCH fed.Sec.L.Rep. 78,446, the Commission stated, with specific reference to pyramiding schemes:

'The term 'security' must be defined in a manner adequate to serve the purpose of protecting investors. The existence of a security must depend in significant measure upon the degree of managerial authority over the investor's funds retained or given, and performance by an investor of duties related to the enterprise, even if financially significant and plainly contributing to the success of the venture, may be irrelevant to the existence of a security if the investor does not control the use of his funds to a significant degree. the 'efforts of others' referred to in Howey are limited, therefore, to those types of essential managerial efforts but for which the anticipated return could not be produced.' (Emphasis added)"

"Adoption of this liberal version of the Howey Test may be justified by language in the Howey opinion itself which suggests that the 'efforts' to which the Court referred were managerial efforts. Long, Partnership Interests as Securities, supra, at 601-02. This test reduces the possibility of evasion by inclusion of a provision requiring the investor to contribute nominal efforts. Moreover, it is consistent with the above-mentioned view that where the investor obtains managerial control and thereby gains access to information about the issuer, he has less need of the protection of the fraud and disclosure provisions of the securities laws."

In Weibolt v. Metz, 355 F.Supp. 255 (U.S.D.C. S.D. [NY] 1973), Honorable southern District Court Judge Lasker of New York, opined:

"Broadly speaking according to the 'risk capital' approach, a franchise is a security if the franchisee's monetary contribution to the enterprise constitutes part of its initial capitalization, while his personal participation in the activities does not give him any effective control over it. The theory behind the test is that, under those circumstances, the profit-making potential of his investment is essentially realized by the franchisor and the Howey test and that 'profits [are] to come solely from the efforts of others' (328 U.S. at 301, 66 S.Ct. at 1104)"

In Milnarik v. M-S Commodities, 457 F.2d 274 (U.S.C.A. 7 cir. [IL] 1972), Honorable Court of Appeals Circuit Judge Stevens, opined:

"[I]nvestment contract whereby plaintiff's deposited a certain sum with defendant broker on understanding that he could use those funds at his descretion to trade commodity futures for benefit of plaintiffs, that all trades were to be made by defendant at sole risk of plaintiffs, and that defendant's sole compensation would be derived from commissions generated by his trading was <u>not</u> a security and was <u>not</u> subject to registration requirements of Securities Act"

ANALYSIS OF RELEVANT CASE LAW

In SEC v. Howey, 328 U.S. 293, 298-299 (U.S. 1946), the Supreme Court held that an "investment contract" includes any "contract", transaction or scheme consisting of all the following elements (i.e. Prongs):

PRONG #1: An investment of money;

PRONG #2: In a common enterprise;

PRONG #3: With the expectation of profits; and

PRONG #4: Solely from the efforts of the promoter or a third party.

The investors in Howey bought parcels of land in a citrus grove which was offered together with a service contract under which the seller (i.e. Promoter) would jointly cultivate Howey's citrus trees along with (i.e. Pooled) other owners citrus trees and market the "pooled" produce splitting the profit between Howey (i.e. Promoter) and owners (i.e. Investors), based upon the percentage of acreage owned by each investor. The Supreme Court held that the transaction was an "investment contract", emphasizing that the seller (i.e. Promoter) was offering "something more than fee simple interests in land, something different than a farm [PROPERTY in case at bar] or orchard coupled with management services. Id. at 299. The "something more" was the opportunity to join a "common enterprise" where investors would "contribute money and ... share in the profits of large citrus fruit enterprise managed and partly owned" by the seller (i.e. Promoter).

The Howey case is distinguished from the John Cline Reservoir LLC ("JCR LLC") real estate transaction with the BUYERS/OWNERS in the case at bar, hereinafter referred to as the JCR LLC DEAL. The BUYERS in the JCR LLC DEAL, were all extremely experienced real estate investment property owners, each having accumulated multi-millions of dollars in net value real estate assets during many decades of ownership thereof, also possessed extremely unique talents, skills, knowledge and experience, that JCR LLC (i.e. Respondent) lacked, which were necessary in order to develop the PROPERTY. In fact, the JCR DEAL is diametrically opposite to HOWEY, wherein the investors relied on Howey for their expertise and skills, but JCR LLC specifically selected each BUYER, based upon the unique talent, expertise, knowledge and experience which JCR LLC required to develop the PROPERTY as described in detail herein and JCR LLC relied on the BUYERS/OWNERS to make the PROPERTY development project a success.

In fact, commencing in 2010 through about January, 2011, most of the BUYERS/OWNERS ceased working on the PROPERTY development, which abruptly came to a grinding halt, causing JCR LLC to default on its contractual obligations (EXHIBIT C) to repurchase the PROPERTY back from BUYERS/OWNERS by paying 7% APR option payment ("REPURCHASE OPTION") and if the option was exercise by JCR LLC, within 5 years, JCR LLC was obligated to pay an additional 7% premium fee ("REPURCHASE PREMIUM") over and above the original purchase price paid by the BUYERS/OWNERS. In summary, the BUYER/OWNERS were limited to buying the PROPERTY and receiving deeded ownership interest therein as Tenant-In-Common ("TIC") ownership plus a maximum of 12% APR (i.e. 7% REPURCHASE OPTION fee plus 5% REPURCHASE PREMIUM), if JCR LLC exercised its REPURCHASE OPTION to buy back the PROPERTY from the BUYERS/OWNERS. Most of the BUYERS/OWNERS also sought to utilize the PROPERTY for their own personal or corporate desires (i.e. Personal use) as well as purchase (i.e. Consume) a retirement home or become a member of the Continuing Care Retirement Community ("CCRC") that the BUYERS/OWNERS were developing, on the PROPERTY, for the benefit of JCR LLC. Inversely correlated, JCR LLC sought to acquire gross sales of approximately $56,000,000 from the PROPERTY development (EXHIBIT I).

Dissimilar to Howey, the JCR LLC DEAL did not have any management contract associated with the BUYER'S purchase of the PROPERTY (See EXHIBIT A), although, JCR LLC (i.e. Respondent) proposed that if income was generated from the PROPERTY, prior to exercise of the REPURCHASE OPTION or in the event that JCR LLC failed to exercise the REPURCHASE OPTION, which is what occurred, the BUYERS/OWNERS could create a self-owned and self-operated management company, John Cline Reservoir Management Company Inc., that was proportionately owned, in similar percentages to the deeded (EXHIBITS D and E) TIC ownership interests. Thereby, the JCR LLC DEAL fails to meet at least 3 of the 4 Prongs of the Howey Test:

PRONG #1: Conceded by Respondent as being satisfied in the JCR LLC DEAL.

PRONG #2. The JCR LLC DEAL is not a "common enterprise" because there was no "pooling" of investor funds to purchase the PROPERTY and each BUYER received a deeded (EXHIBIT C) ownership interest therein that was separate and distinct from the other investors.

PRONG #3: The BUYERS/OWNERS in the JCR LLC DEAL did not seek the purchasing the PROPERTY for profit but for investment purposes to satisfy their federal and state obligation to conform to 28 C.F.R. §1031 ("1031 EXCHANGE") as well as use and consume the PROPERTY for personal and/or corporate purposes.

PRONG #4: The "profit", which did not exist as previously described herein, would have indisputably been derived from the efforts of the BUYERS/OWNERS who had the unique talents, expertise, knowledge and experience that JCR LLC (i.e. Respondent) lacked.

Since all four(4) elements (i.e. PRONGS) of the Howey Test must be satisfied and three(3) PRONGS are not satisfied, the JCR LLC DEAL is not an "investment contract" and, thereby, not a security.

The meaning of "investment contract" was considered again by the United States Supreme Court in United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (U.S. 1975). This case involved an offering of stock in a New York cooperative apartment corporation. The purchase of the stock of the cooperative corporation was prerequisite to leasing an apartment in the cooperative. The Supreme Court held that the cooperative's stock was not "stock" within the meanings of the federal securities laws because it has none of the traditional indicia of stock. The Supreme Court then reconsidered what constituted an "investment contract" which it stated:

"when a purchase if motivated by a desire to use or consume the item purchased ... the securities laws do not apply."
(Forma supra at 853)

This 5th PRONG, "Risks Loss" was added to the 4 elements established in the Howey Test, thereby creating the Howey/Forman Test which is also known as the 5-Prong Test.

FORMAN COMPARED TO THE JCR DEAL

In the JCR LLC DEAL, it is indisputable that the BUYERS/OWNERS purchased the PROPERTY for their personal or corporate purposes (i.e."Use") as well as most of the BUYERS/OWNERS sought to purchase a home in the retirement community and/or become a member of the CCRC (i.e. "Consume") which is the main reason why most of the BUYERS/OWNERS worked so diligently on the PROPERTY development project as described in detail herein. In addition, in the JCR LLC DEAL, the BUYERS not only sought to "use" and "consume" the PROPERTY but they also did not share in the "Risks Loss" which is evident by the upside potential of the JCR LLC DEAL for the BUYERS/OWNERS is solely 12% (7% REOPTION PURCHASE payments and 5% REPURCHASE PREMIUM) maximum plus the afore-described "use" and "consume" of the PROPERTY, whereas, the

upside potential for JCR LLC was an estimated $56,000,000 in gross sales (EXHIBIT F). Furthermore, the downside risk to the BUYERS/OWNERS is negligent because if JCR LLC fails to pay the REPURCHASE OPTION fee and/or repurchase the PROPERTY back from the OWNERS, the OWNERS still own a deeded (EXHIBITS D and E) in the PROPERTY plus and REPURCHASE OPTION payments (i.e. Approximately $500,000; EXHIBIT E) paid to OWNERS, whereas, JCR LLC lost approximately $500,000 in REPURCHASE OPTION payments paid to OWNERS, plus approximately $1,000,000 JCR LLC expended in development of the PROPERTY and related expenses (EXHIBIT B). Therefore, the JCR LLC DEAL fails to satisfy the 5th PRONG of the HOWEY/FORMAN/5-PRONG Test and only satisfies the 1st PRONG "An investment of money" as conceded by the Respondent.

In Revak v. SEC Realty, 18 F.3d 81 (U.S.C.A. 2 cir. [NY] 1994), Honorable United States Court of Appeals, Second Circuit Chief Judge Telesca of New York, held:

"condominium transactions were <u>not</u> investment contracts and, therefore, were <u>not</u> securities for purposes of securities law"

"The three elements of the Howey Test must <u>all</u> be present for a land sale contract to constitute a security: (i) an investment of money; (ii) in a common enterprise; (iii) with profits to be derived <u>solely</u> from the efforts of others. Cameron v. Outdoor Resorts of America, Inc., 608 F.2d 187, 192 (5th Cir. 1979)."

"A common enterprise within the meaning of HOWEY can be established by a showing of "horizontal commonality", the tying of each individual investor's fortunes to the fortunes of the other investors by the <u>pooling</u> of assets, usually combined with a pro-rata distribution of profits. See Hart v. Pulte Homes of Michigan Corp., 735 F.2d 1001, 1004 (6th Cir. 1984); Salcer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 682 F.2d 459, 460 (3d Cir. 1982) (investment must be "part of a <u>pooled</u> group of funds"); Milnarik v. M-S Commodities, Inc., 457 F.2d 274, 276

(7th Cir.) (success or failure of other contracts must mave a "direct impact on the profitability of plaintiff's contract"), cert. denied, 409 U.S. 887, 93 S.Ct. 113, 34 L.Ed.2d 144 (1972)."

"In a common enterprise marked by horizontal commonality, the fortunes of each investor must depend on the profitability of the enterprise as a whole:

"Horizontal commonality ties the fortunes of each investor in a pool of investors to the success of the overall venture. In fact, the finding of horizontal commonality requires a sharing or pooling of funds. Hart, 735 F.2d at 1004."

"Some circuits hold that a common enterprise can also exist by virtue of "vertical commonality", which focuses on the relationship between the promoter and the the body of investors. See SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 479 (5th Cir. 1974) ("requisite commonality is evidenced by the fact that the fortunes of all investors are inextricably tied to the efficacy: of the promoter); SEC v. Glenn W. turner Enterprises, Inc., 474 F.2d 476, 482 n. 7 (9th Cir.), cert. denied, 414 U.S. 821, 94 S.Ct. 117, 38 L.Ed.2d 53 (1973); Villeneuve v. Advanced Business Concepts Corp.,698 F.2d 1121, 1124 (11th Cir. 1983), aff'd en banc, 730 F.2d 1403 (1984)."

"Two distinct kinds of vertical commonality have been indentified: "broad vertical commonality" and "strict vertical commonality". To establish "broad vertical commonality", the fortunes of the investors need be linked only to the efforts of the promoter. See Long v. Shultz Cattle Co., Inc., 881 F.2d 129, 140-141 (5th Cir. 1989). "Strict vertical commonality" requires that the fortunes of investors be tied to the fortunes of the promoter. See Brodt v. Bache & Co., Inc., 595 F.2d 459, 461 (9th Cir. 1978)."

"There is nothing on record to indicate that the fortunes of the Lake Park purchasers were interwoven with the promoter's fortunes [similar to JCR DEAL] so as to support a finding of strict vertical commonality."

"There is nothing on record to indicate that the fortunes of the Lake Park purchasers were interwoven with the promoter's fortunes [similar to JCR DEAL] so as to support a finding of strict vertical commonality."

"If a common enterprise can be established by the mere showing that the fortunes of investors are tied to the efforts of the promoter, two separate questions posed by Howey - whether a common enterprise exists and whether the investor;s profits are derived solely from the efforts of the others - are effectively merged into a single inquiry' "whether the fortuity of the investments colectively is essentially dependent upon the promoter enterprise." SEC v. Continental Commodities Corp., 497 F.2d 516, 522 (5th Cir. 1974). See Savino v. E.F. Hutton & Co., Inc., 507 F.Supp. 1225, 1237-1238 n. 11 (S.D.N.Y. 1981) (in dicta, broad vertical; commonality is inconsistent with Howey); Berman v. Bache, Halsey, Stuart, Shields, Inc., 467 F.Supp. 311, 319 (S.D.OHIO 1979) ("a finding of a common enterprise based solely upon the fact of entrustment by a single principal of money to an agent effectively excises the common enterprise requirement of Howey")."

"Plaintiffs owned individual units, and could make profits or sustain losses independent of the fortunes of the other purchasers [identical to the JCR LLC DEAL]. There are simply no indicia of horizontal commonality. ... Accordingly, the Lake Park venture does not constitute a common enterprise within the meaning of Howey and the sale of the Lake Park condominium units cannot be considered the sale of securities for purposes of the federal securities laws."

"Our [United states Court of Appeals, Second Circuit] analysis is consistent with the approach adopted by the Securities and Exchange Commission (the "SEC") in applying the principals of Howey to condominium offers. The SEC recognizes that the sale of a condominium, without more, does not constitute a security transaction. SEC Release No. 33-5347, 38 Fed.Reg. 1735 (Jan. 18, 1973) (listed in 17 C.F.R. §231.5347); see also Dumbarton Condominium Ass'n v. 3120 R St. Associates, 657 F.Supp. 226, 230 (D.D.C. 1987); Bender v. Continental Towers Ltd. Partnership, 632 F.Supp. 497, 500 (S.D.N.Y.); Mosher v. Southridge Associates, Inc., 552 F.Supp. 1231, 1232 (W.D.Pa. 1982). A condominium offer is an investment contract only if it is accompanied by one or more of the following collateral agreements: (i) a rental arrangement coupled with a sales promotion emphasizing the economic benefits to be derived from renting out the condominium through the offices of the condominium management or its agents; (ii) a rental pool arrangement; or (iii) material restrictions on the owner's occupancy or rental of the unit, such as requiring that the unit be available for rental for part of the year, or that the owner use an exclusive rental agent. 38 Fed.Reg. at 1736. No such agreements were collateral to the Lake Park investments [identical to the JCR LLC DEAL]."

"First, although many of the Lake Park investors were seeking rental income [dissimilar to the JCR LLC DEAL], there was no rental arrangement within the contemplation of the SEC Release [No. 33-5347], ... some plaintiffs contracted to have Harvey Freeman & Sons, Inc. serve as their rental agent, but that indicates only that they "bought their units purely as an investment [identical to 1031 EXCHANGERS/BUYERS in the JCR LLC DEAL], that is not to live in [BUYERS/OWNERS in JCR LLC DEAL sought to both "use" and "consume" the PROPERTY by purchasing a retirement home and/or becomming a member of the CCRC, that the BUYERS/OWNERS were utilizing their own unique talents and

expertise to develop the PROPERTY], but to rent out [BUYERS/OWNERS in the JCR LLC DEAL sought apprectation of the PROPERTY as an investment pursuant to their 1031 EXCHANGE]. Johnson v. Nationswide Industries, Inc., 450 F.Supp. 948, 953 (N.D.Ill. 1978) (no security even though some purchasers bought units as passive investments)."

"Second, as discussed earlier, there is no showing of a rental pool arrangement [identical to the JCR LLC DEAL where there were no rentals because PROPERTY is farmland]."

"Third SEC Realty placed no limitations on plaintiff's use of their units; nor were the plaintiffs, in the event they chose to rent their units [identical to JCR LLC DEAL with the 1031 EXCHANGE caveat] bound to use an exclusive rental agent [there was no rental or rental agent in JCR LLC DEAL]. In short, there was no collateral agreement of the kind envisioned in the SEC release, no common enterprise within the meaning of Howey, and no investment contract [identical to JCR LLC DEAL]."

"[T]he sale of Lake Park units did not constitute the sale of 'securities' for purposes of the federal securities laws"

REVAK COMPARED TO THE JCR LLC DEAL

In the JCR LLC DEAL, the indisputable facts are as follows:

A. The BUYERS/OWNERS did not "pool" their money together to buy the PROPERTY and each individual BUYER purchased and received a deeded (EXHIBITS F and G) Tenant-In-Common ("TIC") ownership interest (i.e. Identical to Revak's condominium units), via their individually owned Limited Liability Companies (EXHIBIT H), in the PROPERTY.

B. There was absolutely no rental income and, thereby, no "pooled" rental income generated from the PROPERTY as well as no pro-rata distribution of profits and, therefore, no "horizontal commonality" exists in the JCR LLC DEAL.

C. The "fortune" of each BUYER/OWNER was not interwoven with the "fortune" of any other BUYER/OWNER because each OWNER could sell, trade, and/or encumber their own deeded (EXHIBITS F and G) TIC ownership interest independent of any other owner and, therefore, no "horizontal commonality" exists in the JCR LLC DEAL.

D. The "fortunes" of the BUYERS/OWNERS were not "linked" or "tied" to the fortunes of JCR LLC (i.e. Promoter). In fact, JCR LLC relied on the BUYERS/OWNERS unique talents, expertises, knowledge and experience that JCR LLC (i.e. Respondent) lacked, not vice-versa and, thereby, the JCR LLC fails to meet the required elements of either "broad vertical commonality" or "strict (narrow) vertical commonality".

E. BUYERS/OWNERS owned individual deeded (EXHIBITS F and G) TIC ownership interests in the JCR LLC DEAL, that are identical in principal and ownership to the "condmimium units" as described in Revak and, thereby, there is no investment contract and no security in the JCR LLC DEAL identical to Revak.

F. The BUYERS/OWNERS sought to purchase the PROPERTY for investment purposes that is an indisputable fact in order to conform to their "1031 EXCHANGES" as well as further sought to "use" the PROPERTY for personal and/or corporate purposes as well as "consume" the PROPERTY by purchasing a retirement home and/or becoming a member of the Continuing Care Retirement Community ("CCRC") that the BUYERS/OWNERS were utilizing their own individual unique talents, expertise, knowledge and experience to develop on the PROPERTY.

In conclusion, based on the afore-described reasons, the JCR LLC DEAL does not satisfy the required elements of "horizontal commonality", "broad vertical commonality" or "strict (narrow) vertical commonality" and, thereby, is not and "investment contract" nor a "security" governed by federal securities law.

In Marini v. Adamo, 812 F.Supp.2d 243 (U.S.D.C. E.D. [NY] 2011), Honorable District Court Judge Joseph F. Bianco of New York, held:

"Seller's ownership of same type or similar rare coins [similar to OWNER'S deeded TIC interests in the JCR LLC DEAL] as he sold to buyer was insufficient to establish the existence of strict vertical commonality, as required to show existence of investment contract, for purpose of buyer's §10(b) securities fraud claim against seller, where buyer and seller maintained separate coin [real estate in JCR LLC DEAL] portfolios, their portfolios were not identical [similar to BUYERS/OWNERS different deeded TIC percentage ownership interests in the JCR LLC DEAL], and seller was under no obligation to sell his coins at same time that buyer sold his coins [identical to JCR LLC DEAL wherein BUYER/OWNERS can independently sell their TIC ownership interests at anytime]."

"The Second Circuit has interpreted Howey to mean that '[a] common enterprise within the meaning of Howeye can be established by a showing of 'horizontal commonality': the tying of each individual investors by the pooling of assets, usually combined with the pro-rata distribution of profits.' Revak, 18 F.3d at 87. Here in contrast, Adamo was not offering Marini the opportunity to contribute funds and share in the profits of a coin portfolio that would be managed by Adamo [similar to the JCR LLC'S offer of the deeded TIC ownership interests to the BUYERS]. In indeed, it is undisputed that horizontal commonality is not present in this case [nor is horizontal commonality present in the JCR LLC DEAL for the same reasons]."

MARINI v.ADAMO COMPARED TO THE JCR LLC DEAL

Similar to ADAMO, JCR LLC'S ownership of deeded (EXHIBIT E) TIC ownership interests in the same KIMMEL PROPERTY not STAMEY PROPERTY (EXHIBIT E; NOTE: In ADAMO it was coins not real estate) is insufficient to establish the existence of "strict (narrow) vertical commonality" as required to show existence of "investment contract", for purposes of federal securities law since BUYERS/OWNERS maintained separate deeded (EXHIBIT E) TIC ownership interests in the KIMMEL PROPERTY (EXHIBIT E) not STAMEY PROPERTY (EXHIBIT E) that were not identical and BUYERS/OWNERS were under absolutely no obligation to sell their deeded (EXHIBITS A and E) ownership interests in the PROPERTY at the same time that JCR LLC sold its deeded (EXHIBIT E) TIC ownership interests in the KIMMELL PROPERTY. Furthermore, ADAMO, similar to REVAK as previously discussed herein, the BUYERS/OWNERS "fortunes" were not inseparably interwoven to rise and fall with JCR LLC'S "fortune" and, in fact, inversely correlated, whereby, if the BUYERS/OWNERS "fortunes" increased by JCR LLC'S REPURCHASE OPTION payments (approximately $500,000 in the JCR LLC DEAL; EXHIBIT E) and appreciation of the value of the PROPERTY due to JCR LLC expending approximately $1,000,000 in development of the PROPERTY of which the BUYERS/OWNERS ultimately received the financial benefit therefrom as a result of JCR LLC'S failure to exercise its REPURCHASE OPTION rights, and thereby, assuming a loss in excess of $1,500,000 (i.e. $500,000 REPURCHASE OPTION payments plus $1,000,000+ in PROPERTY development fees and expenses) coupled with the loss of the contractual right to repurchase the PROPERTY. In summary,. the BUYERS/OWNERS financially benefited while, conversely, JCR LLC assumed financial losses in excess of $1,500,000 as well as loss of right to repurchase the PROPERTY. In conclusion, the JCR LLC DEAL is not an "investment contract" and is not a "security" governed by the federal securities laws.

In Endico v. Fonte, 485 F. Supp. 411 (U.S.D.C. S.D. [NY] 2007), Honorable Southern District Court Judge Lewis A. Kaplan of New York, held:

"While contractual language reserving the right of an investor to exercise control in a common enterprise may not alone be enough to conclude that there is no investment contract, within the meaning of securities law, it nevertheless can be probative of the parties' reasonable expectations of control."

"Operating Agreement of 9 South (the "Operating Company") raises even more questions as to Endico's claim of passitivity. While it designed the Fontes as Managing Members with power and authority to manage the business, it went on to limit that authority by providing that no one member could act for or obligate the company and by requiring the unanimous consent of the members -and thus of Endico - to sell or mortgage company property [almost identical to the Tenant-In-Common Agreement: EXHIBIT J executed by all BUYERS/OWNERS]."

"Whether Endico was passive in fact is quite a different matter of the question whether he was expected at the time of the transaction to remain passive, which is the controlling standard. S.E.C. v. Aqua-Sonic Prods. Corp., 687 F.2d 577, 584 (2d Cir. 1982); see S.E.C. v. Merch. Capital, LLC, 483 F.3d 747, 760 (11th Cir. 2007) (court is "limited to assessing the expectations of control at the inception of the investment" but post-investment actions may indicate what those expectations were) (citing Williamson v. Tucker, 645 F.2d 404, 424 n. 14 (5th Cir. 1981). As courts have held, "the mere choice ... to remain passive is <u>not</u> sufficient to create a security interest.") Nelson, 173 F.Supp.2d at 165 (S.D.N.Y. 2001) (quoting Rivanna Trawlers Unlimited v. Thompson Trawlers, 840 F.2d 236, 240 (4th Cir. 1988))."

"Membership interests in apartment building sold by plaintiff were not "investment contracts" involving common enterprise by passive investors with profits to come solely from efforts of others, and thus were not "securities" as required to support plaintiff's security fraud claims arising out of sale, since buyers were to have participated in rehabilitation construction and management of apartment building project, and plaintiff retained financial control by signature power over checking account for apartment building and by veto power sale or encumbrance of its assets."

ENDICO COMPARED TO THE JCR LLC DEAL

In the JCR LLC DEAL, all BUYERS/OWNERS personally executed the Purchase Agreement (EXHIBIT A), Power of Attorney ("POA": EXHIBIT B), and Dual Representation Agreement ("DRA": EXHIBIT C) and Tenant-In-Common Agreement ("TICA": EXHIBIT J), hereinafter referred to as the "DOCUMENTS", in the presence of Respondent, a New York State licensed Notary at the time, except for Sandra Schmidt ("SCHMIDT"), who Respondent mailed an original copy of the DOCUMENTS thereto, which SCHMIDT personally executed and delivered back to Respondent. In fact, at least one of the DOCUMENTS SCHMIDT signed was in the presence of a Notary in the State of Indiana. In the TICA, all BUYERS/OWNERS agreed to assume "full Control" over the PROPERTY in conformity to IRS Revenue Proclamation ("Rev. Proc.") 2002-22, requiring unimous vote by all BUYERS/OWNERS to hire/fire a third party manager or management company (NOTE: JCR LLC DEAL had neither) or encumber (i.e. Mortgage, loans etc.) the PROPERTY. In fact, not only was there no third party manager or management company in the JCR LLC DEAL, the OWNERS themselves, have and still continue to manage the PROPERTY and pay expenses thereon, even in Respondents absence, due to his unfortunate unjust incarceration. Pursuant to the PA (EXHIBIT A) and TICA (EXHIBIT J), all BUYERS/OWNERS agreed to establish a self-owned management company, John Cline

Reservoir Management LLC as well as execute a "Property and Asset Management Agreement" with their own JCR Management LLC in the event that the PROPERTY commenced to generate income, which never occurred to date. The afore-described TICA and "Property and Asset Managment Agreement are similar to Endico's "Operating Agreement" because they also are designed to invoke the "power and authority to manage the business" and :limit the authority by providing that no one member could act for or obligate the company [PROPERTY] and by requiring the unanimous consent of the members ... to sell or mortgage the company property [PROPERTY]." Even though a few (SCHMIDT and CHERNOVSKY) of the BUYERS/OWNERS remained relatively "passive" rather than the overwhelming majority [STAMEYS, ABNEY, E. SANTOS, T. SANTOS, SAVERINO, DELPRETE, SHEIKH, MITCHELL and TREIBER] were extremely active in utilizing their unique talents, expertise, knowledge and experience to develop the PROPERTY as previously described in detail herein. Both SCHMIDT and CHERNOVSKY utilized their unique talents, expertise, knowledge, and experience in generating income from farmland and animal husbandry, respectively, to help the development of the PROPERTY, as previously described in detail herein.

Based upon the same reasoning that Honorable Southern district Court Judge Lewis A. Kaplan held in Endico, the JCR LLC DEAL deeded (EXHIBITS D and E) TIC ownership interests, like the "membership interests in apartment building sold by plaintiff [ENDICO] were <u>not</u> 'investment contracts' involving common enterprise by passive investors with profits to come solely from the efforts of others, and thus were <u>not</u> 'securities', as required to suport plaintiff's security fraid claims arising out of the sale, since buyers [BUYERS/OWNERS] were to have participated in rehabilitation construction and management of apartment building [PROPERTY] project, and plaintiff [BUYERS/OWNERS] retained financial control ... for apartment building [PROPERTY] and by veto power over sale of encumbrance of its assets [BUYERS/OWNERS required unanimous vote in TICA]."

In Caiola v. Citibank, 137 F.Supp.2d 362 (U.S.D.C. S.D. [NY] 2001), Honorable Southern District Court Judge Cote of New York, held:

"In order to have standing under [Securities Law] Rule 10b-5, a plaintiff must be a purchaser or seller of a securies. Gurary v. Winehouse, 190 F.3d 37, 46 n. 9 (2d Cir. 1999); Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 170 (2d Cir. 1999)."

"An option contract 'entitles a purchaser to buy or sell a commodity by some specified date at a fixed price, known as the 'strike' price, determined by the market value of the commodity at the time the option is purchased.' United States v. Bein, 728, F.2d 107, 111 (2d Cir. 1984). The synthetic transactions between Caiola and Citibank were not options on securities since 'they did not give either couterparty the right to exercise an option or take possession of any security [identical to JCR LLC DEAL]. Procter and Gamble v. Bankers Trust Co., 925 F.Supp.1270, 1282 (S.D. Ohio 1996)."

CIOLA v. CITIBANK COMPARED TO THE JCR LLC DEAL

In the JCR LLC DEAL, the BUYERS/OWNERS had a one-way (i.e. No "put" feature) contractual obligation (EXHIBIT A) to sell the PROPERTY back to JCR LLC within 5 years, commencing from the date both parties executed the PA (EXHIBIT A), if JCR LLC paid BUYERS/OWNERS 7% APR REPURCHASE OPTION fee plus 5% REPURCHASE PREMIUM. Similar to CIAOLA, the BUYERS had no right to retain the PROPERTY or "put" (i.e. Force JCR LLC to buy) the PROPERTY upon JCR LLC, in the event JCR LLC fails to either pay the REPURCHASE OPTION fee and/or exercise the REPURCHASE OPTION and, thereby, "they [REPURCHASE OPTION] did not give either counterpart the right to exercise an option or take possession of any security" identical in nature to Southern District Court Judge Cote holding: "arrangement was not investment contract."

In Nelson v. Stahl, 173 F.Supp.2d 153 (U.S.D.C. S.D. [NY] 2001), Honorable Southern District Court Judge Swain of New York, held:

"A plaintiff must be a purchaser or seller of securities to have standing to sue for damages under the Securities Exchange Act of 1934."

"The delegation of rights and duties standing alone does not give rise to the sort of dependence on others which underlies part of the test [Howey Test] for determining whether an interest in an entity is a 'security', so long as the member retains ultimate control [BUYERS/OWNERS retained ultimate control in JCR LLC DEAL], he has the power over the investment and the access to information about it which is necessary to protect against any unwilling dependence on the manager."

"The mere choice by a member of a limited liability company (LLC) to remain passive is not sufficient to render a LLC membership interest a 'security' within meaning of the Securities Act and the Securities Exchange Act."

"In determining whether membership interests in a limited Liability company (LLC) is a 'security', the delegation of membership responsibilities, or the failure to exercise membership powers does not diminish the investor's legal right to a voice in partnership matters; indeed, if an investment scheme gives rise to a reasonable expectation of significant investor control, a reasonable purchaser could be expected to make his own investigation of the new business he planned to undertake and the protection of the securities Exchange Act would be unnecessary."

"Shareholders' membership interest in limited liability company (LLCs) was not a security within the meaning of the Securities Act and the Securities Exchange Act"

NELSON v. STAHL COMPARED TO THE JCR LLC DEAL

In the JCR LLC DEAL, each BUYER personally or on behalf of their corporate entity executed a Purchase Agreement ("PA": EXHIBIT A) and Power of Attorney ("POA": EXHIBIT B) authorizing their attorney, Catherine Quinn-Nolan Esq. ("NOLAN") to represent them to purchase the PROPERTY. NOLAN on behalf of the BUYERS/OWNERS created separate Limited Liability Companies ("LLC": EXHIBIT B) for each BUYER/OWNER in which to hold the deeded (EXHIBITS D and E) interest therein for the purpose of encapsulating liability in a corporate entity rather than personally. The BUYERS/OWNERS had 100% control over their individual LLC as well as 100% control over the PROPERTY because of the following reasons:

1. OWNERS managed and continue to manage the PROPERTY.

2. The PROPERTY cannot be sold without unanimous (100%) vote by all OWNERS (See Tenant-In-Common Agreement: "TICA": EXHIBIT I).

3. The PROPERTY cannot be encumbered (i.e. Mortgage, loan etc.) without unanimous (100%) vote by all OWNERS (See Tenent-In-Common Agreement: "TICA": EXHIBIT I).

4. The PROPERTY cannot be developed (i.e. Subdivided, building permits, sewer, water, utilities etc.) without unanimous (100%) vote by all OWNERS (See Tenent-In-Common Agreement: "TICA": EXHIBIT I).

Therefore, identical to Nelson supra., the OWNERS of the PROPERTY do not have any "dependence on others" nor "dependence on a manager" and "retain ultimate control" and, thereby, similar to Southern District Court Judge Swain holding in Nelson supra, the JCR LLC DEAL "is not as 'security' within the meaning of the Securities Act and Securities Exchange Act."

In Keith v. Black Diamond, 48 F.Supp.2d 326 (U.S.D.C. S.D. [NY] 1999), Honorable Southern District Court Judge Scheindlin of New York, held:

"If an investment scheme gives rise to a 'reasonable expectation ... of significant investor control, a reasonable purchaser could could be expected to make his [her] own investigation of the new business he [she] planned to undertake and the protection of the [Exchange Act] would be unnecessary."

"Futhermore, the mere choice of a partner to remain passive is not sufficient to create a security interest. Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc., 840 F.2d 236, 240-241 (4th Cir. 1988)."

"Therefore, if at the time of his investment in Pace, Keith did not intend to be passive investor, as he clearly did not, the Pace interests could not be securities. Furthermore, although the degree of control he actually exercised was less than he expected to exercise, that fact does not convert his interests into securities."

KIETH v. BLACK DIAMON COMPARED TO THE JCR LLC DEAL

As previously described in detail in Nelson v. Stahl supra. above, the OWNERS had "ultimate 100% control" of the PROPERTY and management thereof and still do, which is indisputable because Respondent has been unjustly incarcerated for over 2½ years and obviously has not been managing the PROPERTY and, therefore, the OWNERS themselves have always and continue to manage the PROPERTY. Furthermore, the BUYERS all represented that they made "his [her] own investigation of the new business [PROPERTY] he [she] planned to undertake and the protection of the [Securities Exchange Act] would be unnecessary." (See EXHIBIT Â: page 5, paragraph 7.2 and page 6, paragraphs 7.5.1 and 7.5.5). Similar to Keith v. Black Diamond supra., the JCR LLC DEAL "does not convert his [her] interests into securities."

In GBJ v. Sequa, 804 F.Supp. 564 (U.S.D.C. S.D. [NY] 1992), Honorable Southern District Court Judge Haight of New York, Held:

"[A]s Judge Conner of this Court [United States District Court, Southern District] said in Niderhoffer [Neiderhoffer v. Telstat Systems, 436 F.Supp. 180, 184 (U.S.D.C. S.D. [NY] 1977], 'the judicial eye must remain focused upon the congressional concerns ... in the determination of the issue of a plaintiff's standing to sue [under federal securities law].' 436 F.Supp. at 183. A determination that a particular transaction may fall within the literal language of the securities statutes only begins the analysis, it does not end it. In United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 849, 95 S.Ct. 2051, 2059, 44 L.Ed.2d 621 (1975), the Court said:

'The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. ... the exchanges of which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors. Because securities transactions are economic in character, Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto. Thus in construing these Acts against the background of their purpose, we are guided by a traditional Canon of satisfactory construction:

[A] thing may be within the letter of the statute and yet not within the statute [itself], because not within the spirit, nor within the intention of its makers. Church of the Holy Trinity v. United States, 143 U.S. 457, 459 [12 S.Ct. 511, 512, 36 L.Ed. 226] (1892)."

"Consistant with that analysis, the Supreme Court has 'emphasized the importance of ascertaining the congressional purposes underlying the statute as a means of defining the scope of the implied private right of action. Niederhoffer at 183. Thus, in Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 477, 97 S.Ct. 1292, 1303, 51 L.Ed.2d 480 (1977), the Court dealt generally with the circumstances justifying an implied cause of action under the 1934 Act:

Congress did not expressly provide a private cause of action for violations of [the federal securities laws]. Although we have recognized an implied cause of action ... in some circumstances. Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6, 13, 92 S.Ct. 165, 169, 30 L.Ed.2d 128 (1971), we have also recognized that a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purpose' in adopting the Act. Piper v. Chris-Craft Industries, ante, [430 U.S. 1] at 41 [97 S.Ct. 926 at 949, 51 L.Ed.2d 124 (1977)]. Case Co. v. Borak, 3777L.Ed.2d 426, 431-433 [84 S.Ct.1555, 1559-1560, 12 L.Ed.2d 423 (1964)."

"THe Court must ask in each case if Congress intended to bring within the ambit of federal securities antifraud laws the particular transaction described and grievance asserted in the plaintiff's complaint."

Consulting agreement under which consultant was to arrange financing for acquisition of equipment and for third-party leases of that equipment did not give rise to investment contract or other form of 'security' within meaning of the Securities Exchange Act."

GBJ v. SEQUA COMPARED TO THE JCR LLC DEAL

Similar to GBJ and Neiderhoffer, "the judicial eye must remain on cogresstional concerns" and Congress' intent when it enacted the Securities Laws of 1933 and 1934. In fact, in the Securities Exchange Act of 1934, Congress expressly included "securities" to include leasing and royalty of real estate related mineral rights (i.e. oil and gas) but specifically excluded real estate itself as Congress also did in the Securities Act of 1933. Congress' intention to include mineral rights, specifically oil and gas, in the 1934 Act was to allow small to medium size companies located in remote areas within the United States to access national financing which the companies would be precluded from doing, due to their geographically remote or population limited investor pool to fund their exploration and exploitation of their oil and/or gas business, producing a product(s) which are indisputably in the "public's best interest" as well as can affect national security. However, Congress specifically excluded real estate from the Securities Acts of 1933 and 1934 for the exact same reason, which was to prevent small regionally located real estate companies from accessing national pools of investor funding. In fact, commencing in about the year 2000, a cunningly clever tax attorney working for the law firm of Luce Forward located in San Diego, California, devised the "bright" idea, on behalf of his client, Tony Thompson, who was one of the owners (I.e. Bill Passco was the other owner) and operator of TNP Properties Inc., to submit to the SEC, a "No Action Letter", duping the SEC into making an Administrative Decision that classic Tenant-In-Common owned real estate was a "security", not real estate, which the SEC, unknowing of the true motive behind same, affirmed. History has proven, the SEC's uniformed and unknowing condolence of TIC property ownership should be considered a security, under federal laws, rather than real estate, regulated under state law, caused the worst financial disaster, related to real estate, in the history of the United States and, thereby, TIC real estate being regarded as a

"security", cannot be in the "public's best interest". See WHY TENANT-IN-COMMON REAL ESTATE SHOULD NOT BE CONSIDERED A SECURITY argument presented herein for more detailed explanation.

Respondent admits that, although he did not have the unique talents, expertise, knowledge and experience that the BUYERS/OWNERS posses, regarding development and generation of income from the PROPERTY, he tried to help to the best of his limited ability. However, as Honorable Southern District Court Judge Haight held in GBJ supra., "consulting agreement [no formal agreement is present in JCR LLC DEAL] did not give rise to 'investment contract' or other form of 'security' within meaning of Securities Exchange Act". Therefore, similar to GBJ, the JCR LLC DEAL is not an "investment contract" and is not a "security".

In Cohen v. Merrill Lynch, 722 F.Supp. 24 (U.S.D.C. S.D. [NY] 1989), Honorable Southern District Court Judge Lowe of New York, held:

"The term "commodity futures" refers to a standardized contract for purchase and sale of a fixed quantity of a particular commodity, for delivery in a specified future month, at a price agreed upon when the contract is made. Mallen v. Merrill Lynch, Pierce, Fenner & Smith, 605 F.Supp. 1105 (N.D. Georgia 1985). It is well settled that commodities futures are not securities, and never have been, within the meaning of [the Securities Acts of 1933 and 1934]. Mallen, 605 F.Supp. at 1107; Scheer v. Merrill Lynch, Pierce, Fenner & Smith, CCH Fed.Sec.L.Rep. [1974-75 Transfer Binder] ¶ 95,086, 1975 WL 390 (S.D.N.Y. 1974); Berman v. Orimex Trading, Inc., 291 F.Supp. 701, 702 (S.D.N.Y. 1968); Sniva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 253 F.Supp. 359 (S.D.N.Y. 1966)."

"The legislative history of the 1974 amendments further reflects Congress' intent to preclude application of the federal securities laws to commodities accounts. See Commodities Futures Trading Commission Act of 1974: Hearings on S.2485, S.2578, S.2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry, 93 Cong., 2d Sess. 541 (1974) (cited in Raisler, Discretionary Commodity Accounts: Why They are Not governed by the federal Securities Laws, 42 Wash. & Lee.L.Rev. 752 (1985)). Federal courts have adhered to this intent to have recognized that the provisions of the federal securities laws are not applicable to commodity futures trading accounts. Saxe v. E.F. Hutton & Co., Inc., 789 F.2d 105 (2d Cir. 1986) (affirming dismissal of suit on the grounds that any remedy from grievance related to a discretionary commodities account lies within the exclusive jurisdiction of the CEA, not the Exchange act); Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 221-224, (6th Cir. 1980), affirmed, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982); Gonzalez v. Paine Weber, Jackson & Curtis [1982 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 98,867 at 95,514, 1982 WL 1348 (S.D.N.Y. 1982) ("the persuasive regulatory scheme established under the Commodity Exchange Act has preempted the field insofar as futures regulation is concerned").

COHEN v. MERRILL LYNCH COMPARED TO JCR LLC DEAL

According to the Purchase Agreement ("PA": EXHIBIT A) that all BUYERS/OWNERS signed in Respondent's presence, with the exception of SCHMIDT as previously described herein), JCR LLC had a REPURCHASE OPTION to buy back the PROPERTY from the OWNERS, within 5 years from date both parties signed the PA, by paying 7% APR REPURCHASE OPTION FEE plus 5% REPURCHASE PREMIUM. This type "option" is very common in the real estate industry and range from rental tenants having the "option" to purchase the real estate from the owner for a specific price within a specific time period, all the way to the other end of the spectrum, where a seller (i.e. JCR LLC) can repurchase the real estate (i.e. PROPERTY) from the buyers/owners (i.e. BUYERS/OWNERS) by paying an option payment fee(s), within a specific time frame or date,

at a set price or market value at the time of purchase (i.e. The JCR LLC DEAL). There is one element that is common to all real estate "options", which is the "optioner" (i.e. BUYERS/OWNERS in the JCR LLC DEAL) always lack "put" element of the option to mandate the purchase of the real estate. In simplistic terms, real estate "options" have "call" element but lack a "put" element found in both security and commodity trading. In the JCR LLC DEAL, the Respondent, being one of the leading 1031 EXCHANGE experts in the U.S., according to his peers, as previously described in detail herein, specifically omitted the "put", due to the fact that, if a "put" is present in a 1031 EXCHANGE real estate transaction, regarding the Replacement Property (i.e. PROPERTY), the OWNERS'S 1031 EXCHANGE is invalid, according to Judicial Law that has interpreted 28 U.S.C. §1031 over the past several decades. Even if the SEC seeks to argue that the REPURCHASE OPTION constitutes something other than a normal and customary real estate repurchase option, the SEC lacks jurisdiction, pursuant to the CFTC Act.

In conclusion, according to Southern District Court Judge Lowe's holding in Cohen, the JCR LLC DEAL "option ... was not an 'investment contract' within the meaning of the Exchange Act".

In Horowitz v. AGS Columbia, 700 F.Supp. 712 (U.S.D.C. S.D. [NY] 1988), Honorable Southern District Court Judge William C. Conner of New York, held:

"Limited Partnership Units in entity to purchase and manage apartment complex itself was not a 'security' ... complex vendor's [promoter's] role in transaction was fully disclosed [similar to PA in JCR LLC DEAL], and investors were completely dependent on general partners' management efforts [unlike JCR LLC DEAL where OWNERS continue to manage the PROPERTY]."

"The complaint alleges that '[t]he limited partnership units were and are 'securities' within the meaning of the 1933 Act and the 1935 Act."

"An interest in real estate is considered a 'security' where ordinary investors pay, not only for the land, but for the promoter's promise that the real estate will be managed in a way that may yield profits that can be distributed to the investors." (See Forman suprs. at 852-853, 95 S.Ct. at 2060-2061)

"Lower courts applying the Howey Test to real estate transactions have reached the same conclusion [as described in above paragraph]. Simple land sales are outside the scope of the securities laws. Woodward v. Terracor, 574 F.2d 1023, 1025 (10th Cir. 1978) (purchase of subdivision lots in residential community did <u>not</u> constitute "investment contract" where sellers only obligation was to deliver title). Indeed, as long as the investors retain full control over management [OWNERS have complete control in JCR LLC DEAL by managing the PROPERTY themselves], their interest will <u>not</u> be deemed a security. Perry v. Gammon, 583 F.Supp. 1230, 1232-1233 (N.D. Ga. 1984) (limited partnership interests in real estate syndicate held <u>not</u> securities where investors retained control over management of apartment complexes); Davis v. Rio Rancho Estates, Inc., 401 F.Supp. 1045 (S.D.N.Y. 1975) (Brieant, J) (where seller of residential lots, through not obligated to manage the residential complex, constructed roads and other improvements, investment in lots was <u>not</u> a security)."

"This distinction [whether investors derive profits from the entrepreneurial efforts of the promoter or third party) is clearly described in Professor Loss's comprehensive treatise:

The line is drawn ... where neither the element of a common enterprise nor the element of reliance of the efforts of another is present. For example, no 'investment contract' is involved when a person invests in real estate, with the hope perhaps of earning a profit as the result of a general increase in values concurrent with the development of the neighborhood, as long as he does not do so as part of an enterprise whereby it is expressly or impliedly understood that the property will be developed by others. 1 L. Loss, Securities Regulation 491-492 (2d ed. 1961)."

"Thus, although the real estate that Columbia [AGS] sold was not itself a 'Security', the limited partnership units which Berkley sold were 'securities' [in conformity to the White Rule described herein]. ... Under the terms of the transaction, the limited partners completely depend on the general partners' management efforts."

HOROWITZ v. AGS COMPARED TO THE JCR LLC DEAL

Respondent agrees with Honorable Southern District Court Judge William C. Connor's holding that "the limited partnership units were 'securities', although the apartment complex itself was not a 'security'. The AGS case is easily distinguishable from the JCR LLC DEAL, based upon the fact that the OWNERS have complete control and manage the PROPERTY themselves. Furthermore, in conformity to the White Rule, while the real estate itself is 1031 EXCHANGEABLE, the AGS real estate transaction does not conform to the Judiciary Laws that have interpreted 28 U.S.C. §1031 and, hence, the AGS is a security and non-conforming to a 1031 EXCHANGE. Therefore, the White Rule, once again, is proven correct.

In Bender v. Continental Towers, 632 F.Supp. 497 (U.S.D.C. S.D. [NY] 1986), Honorable Southern District Court Judge Griesa of New York, held:

"Piece of real estate, such as condominium, has inherent worth, worth not solely dependent on the efforts of promoter, and, for this reason, real estate transactions are not in an of themselves governed by federal securities laws."

"Condominium conversion involved only transfer of title to real estate [similar to JCR LLC DEAL], not transfer of any securities, and therefore, federal securities law was inapplicable."

"Neither contracts to purchase condominiums nor alleged options to buy condominiums constituted investment contracts, though tenants challenging conversion alleged that investors purchased condominiums and tenants purchased options with intention of reselling at higher prices, where profits were not expected solely from efforts of the promoter or third party but also from appreciation in value"

BENDER v. CONTINENTAL TOWERS COMPARED TO THE JCR LLC DEAL

The JCR LLC DEAL is extremely similar to Bender because both involve improving or developing the real estate. In Bender, the investors (i.e. BUYERS) not the promoter (i.e. JCR LLC), as in the JCR LLC DEAL, had the option right to sell (i.e. "put") the real estate at a higher price and the promoter in Bender exerted the efforts and possessed the unique talents and skills concerning condominium conversion, unlike the JCR LLC DEAL, wherein, the efforts concerning the development of the PROPERTY resided solely on the unique talents, expertise, knowledge and experience of the BUYERS/OWNERS because JCR LLC (i.e. Respondent) lacked these essential attributes to develop the PROPERTY successfully.

Therefore, the JCR LLC DEAL "did not involve the transfer of securities and was not subject to federal securities regulation" similar to Honorable Southern District Court Judge Greisa holding in Bender relating to the similar "condominium conversion plan" which resembles in all essence the PROPERTY development plan in the JCR LLC DEAL.

In Silverstein v. Merrill Lynch, 618 F.Supp. 436 (U.S.D.C. S.D. [NY] 1985), Honorable Southern District Court Judge Whitman Knapp of New York, held:

"Without attempting a detailed analysis of the opinions in those cases, it seems to us [Southern District Court] that no interpretation of the facts in the instant action would meet the Howey criterion that plaintiff be engaged in a 'common enterprise'. An essential element of any common enterprise is that the fortunes of its members [i.e. Investors] be to some degree related to each other. Here however, it would be perfectly possible, on one hand for the defendants to have suggested a few lucky (or wise) investments that would have brought great profit to the plaintiff and practically no revenue to the defendants, and on the other hand, as plaintiff claims here to be the case, defendants to have so poorly managed the account that plaintiff suffered great losses while defendant earned huge commissions. See e.g., Brodt v. Bache, supra (where defendant brokerage firm earned commissions based not on profitability of transactions, but simply by their frequency, no common enterprise existed)."

"Such coincidental investments would not transform plaintiff's account into an investment contract, for 'the success or failure of those other contracts would have had no direct impact on the profitability of plaintiff's contract. Milnarik v. M.S. Commodities, 457 F.2d 274, 276 (7th Cir.). Instead, all investors' expectations of profits would derive 'from their individual trading accounts independently of all others.' Hirk v. Agri-Research, 561 F.2d 96, 100 (7th Cir. 1977)."

SILVERSTEIN v. MERRILL LYNCH

As previously described herein, the JCR LLC DEAL REPURCHSE OPTION does not convert the real estate transaction into either an "investment contract" or "security" similar to Honorable Southern District Court Judge Whitman Knapp's holding in Silverstein in which he stated: that "futures [options] account was not a security for purposes of securities laws", the JCR LLC DEAL lacked the essential elements to constitute a "common enterprise" and the "profits" or "fortunes" of the BUYERS/OWNERS and JCR LLC were not correlated, depending on each other. In fact, the "fortunes" of each party were inversely correlated, whereby, if the BUYERS/OWNERS "fortunes" increased by JCR LLC'S defaulting on the REPURCHASE OPTION PAYMENTS and REPURCHASE PREMIUM plus having been paid almost $500,000 in REPURCHASE OPTION payments (EXHIBIT B) plus JCR LLC expended approximately $1,000,000 in expenses related to the PROPERTY development and expenses (EXHIBIT B) plus BUYERS/OWNERS ultimately received ownership in the PROPERTY without JCR LLC'S contractual right to repurchase the PROPERTY. Conversely, JCR LLC'S "fortune" was adversely financially effected by the afore-described expenditures plus loss of the right to repurse the PROPERTY. Therefore, similar to Silverstein, the JCR LLC DEAL is not an "investment contract" and is not a "security".

In Mechigian v. Art Capital Corp., 612 F.Supp. 1421 (U.S.D.C. S.D. 1985), Honorable Southern District Court Judge Kevin Thomas Duffy of New York, held:

"'Horizontal commonality' clearly does not exist under the present set of facts. Nowhere does the plaintiff allege that any of his funds were pooled with the other investor's funds [identical to JCR LLC DEAL]. Rather, plaintiff urges that this court adopt the second, more expansive definition of "common enterprise" and hold that "vertical commonality" is sufficient to

satisfy the second prong of the Howey Test. See Mordaunt v. Incomco, 686 U.S. 1115, 105 S.Ct. 801, 83 L.Ed.2d 482 n. 7 (9th Cir.), cert. denied, 414 U.S. 821, 94 S.Ct. 147, 38 L.Ed.2d 53 (1973)."

"Thus, at best, plaintiff may only be able to satisfy the broad definition of 'vertical commonality' espoused by the Fifth Circuit which merely requires the fortunes of the investor to be inextricably tied to the promoter's efforts, Given that I [Honorable Judge Duff] reject this broad version of 'vertical commonality', plaintiff cannot be considered the purchaser of a security."

"In sum, as plaintiff has not met either the 'horizontal commonality' test or the narrow definition of 'vertical commonality', he has not satisfied the 'common enterprise' prong of the Howey test for investment contracts."

"Buyer of an original artwork in the form of a lithographic plate did not satisfy the common enterprise prong of the test [Howey Test] for investment contracts so as to be able to maintain action under the securities laws on the grounds that sellers, who were entrusted with marketing of prints made from the original, utilized nonrecourse financing based on allegedly artificially inflated purchase price."

MECHIGIAN v. ART CAPITAL COMPARED TO THE JCR LLC DEAL

Similar to Mechigian, the JCR LLC DEAL does not satisfy "horizontal cmmonality" because the BUYERS money was not "pooled" together to buy the PROPERTY and further does not satisfy either "broad" or "narrow" definitions of "vertical commonality" because the "fortunes" of the BUYERS/OWNERS are not "inestricably tied" to the "fortunes" of JCR LLC. In fact, the "fortunes" of the BUYERS/OWNERS and JCR LLC are inversely correlated, whereas, when

the BUYERS/OWNERS financially benefit, JCR LLC suffers financial adversity and vice-versa as previously described in detail herein.

Therefore, based upon the same reasoning by Honorable Southern District Court Judge Kevin Thomas Duffy in Mechigian, the JCR LLC DEAL does "not satisfy the 'common enterprise' prong of the test [Howey Test] for investment contracts subject to securities laws."

In Slevin v. Pedersen, 540 F.Supp. 437 (U.S.D.C. S.D. [NY] 1982), Honorable Southern District Court Judge Kevin Thomas Duffy of New York, held:

"joint venture for development of prefabricated homes on island off coast of Venezuela was type of partnership and not a 'security' subject to federal securities laws, even though it may not have been forseen at time of parties' agreement that engineer would contribute to management of scheme, where his subsequent assistance was accepted as one would accept help of a friend and business partner, no stock was issued, and there was no writing recording intent of parties at time engineer made his investment."

"The parties agree that the first two elements of the Howey Test have been met. The final element, whether Mr. Slevin [investor] expected his profits to be derived solely from the efforts of Pedersen and Tagoni [promoters], provides the crux of the instant motions:

The resolution of this controversy would normally depend on whether 'solely' is interpreted literally (i.e., did plaintiff contribute in any manner to the project) or liberally (i.e., did the plaintiff provide only ministerial, non-managerial help). I [Honorable Judge Duffy] prefer an approach which goes beyond an

interpretation of the word "solely" and takes into account the 'economic reality' of the contract in issue. Tcherepnin, Knight, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967). The recent decision of the Second Circuit in Golden v. Garofalo, supra [678 F.2d 1139, (2nd Cir. 1982), does not militate against consideration of the contract's economic reality. It may be argued that Golden has reduced the applicability of the securities law to a simplistic examination of the form or name given to the transction device and that since this transaction is referred to as an investment contract, the instant action is cognizable under securities laws. This argument misreads the Golden decision. A lizard with a sign around its neck reading 'dog' does not change the lizard into a Labrador Retriever."

"The general partners of a partnership are not passive investors who place money in an enterprise with the expectation of deriving profits solely from the efforts of others. rather, they expect to reap profits through their own active participation in the control and management of the business."

"But a 'contract to invest' [Purchase Agreements: EXHIBIT A] are not necessarily an 'investment contract' within the meaning of the securities laws."

"The securities laws protect the integrity of financial interests that unsuspecting investors are incapable of investing for themselves. The free assignability of most securities has buttressed the need for this statutory protection. The assignment of an interest increases the liklihood that an investor will be further removed from the "horse race". It does not appear that the parties here contemplated assignment of their joint venture or partnership interest to any third party. The spirit of the investment contract definition as enunciated in Howey was not meant to encompass an oral agreement between friends or pioneer a market and closely follow the progress of the project. The lack of Slevin's remoteness from the tangible product of his capital

investment renders it unnecessary to extend the protection of the securities laws to this situation."

"The reality of the situation presented by the instant case is that plaintiff made an investment in a joint venture with individual defendant. The joint venture in which the plaintiff invested was a type of partnership and was not a security."

"Common sense indicates that when an interest which is not freely assignable is purchased under the conditions herein, the securities laws will not apply."

SLEVIN v. PEDERSEN COMPARED TO THE JCR LLC DEAL

In several ways, the Slevin case is similar to the JCR LLC DEAL because they both involved building a retirement community and the investors in Slevin, similar to the BUYERS/OWNERS in the JCR LLC DEAL, took an active role in development of the PROPERTY with the promoter (i.e. JCR LLC) in a sort of financial symbiotic commensalistic joint venture relationship because the BUYERS/OWNERS utilized their unique talents, expertise, skills, knowledge and experience that JCR LLC (i.e. Respondent) lacked, for the benefit of the development of the PROPERTY which both parties would disproportionately benefit therefrom. Similar to the investor(s) in Slevin, the BUYERS were not passive in the JCR LLC DEAL and did not expect profits being derived from the "efforts of others", due to the fact that all of the BUYERS/OWNERS contributed their own unique talents, expertise, skill, knowledge and experience to either generate income from the PROPERTY and/or help develop the PROPERTY by gathering potential customer information at focus group meetings and working with the architect designing the buildings: CCRC, marina and diner/gas station as well as working with the engineering firm, governmental officials etc. to develop the sub-division of the PROPERTY. In addition, the BUYERS/OWNERS intent when

contemplating purchasing the PROPERTY was not to assign their deeded (EXHIBITS D and E) TIC ownership interests therein but to hold the PROPERTY for investment purposes which is evident from the BUYERS/OWNERS implementing 1031 EXCHANGES (EXHIBITS A and A) and executing the Tenant-In-Common Agreement ("TICA": EXHIBIT J) that mandated the OWNER offer their TIC interest to the other OWNERS prior to selling it to a third party. Furthermore, one of the OWNERS, Preston Treiber ("TREIBER") testified at a hearing in the civil case that he would have bought all the interests of the other JCR LLC DEAL OWNERS, if they would have offered them to him, but the other OWNERS never offered their TIC ownership interests to TREIBER (EXHIBIT A).

In conclusion, grounded upon the same reasoning Honorable Southern District Court Judge Kevin Thomas Duffy utilized in Slevin, "the joint venture in which the engineer [BUYERS/OWNERS] invested was a type of partnership and not a 'security' subject to federal securities laws."

In Kaplan v. Shapiro, 655 F.Supp. 336 (U.S.D.C. S.D. [NY] 1987), Honorable Southern District Court Judge Kram of New York, held:

"Under restrictive [narrow, strict] 'vertical commonality' approach to common enterprise requirement for investment to be 'security', 'common enterprise' may be held to exist where there is one-to-one relationship between investor and investment manager and profits and losses of two parties are somehow interdependent."

"Although profits of investors were directly tied to those of investment managers, in that investors were to receive 5% of any profits received by investment managers, no interdependence of losses existed, so that there could be no 'vertical commonality'. and thus, investment did not satisfy 'common enterprise' requirement of definition of 'security' under the Securities Act of 1933 and Securities Exchange Act of 1934, where investors

explicitly claimed that they were not liable for losses incurred, so that investment managers would necessarily be liable for any losses."

"Horizontal commonality clearly does not exist under the present set of facts because horizontal commonality requires multiple investors whose investments are pooled. See Savino v. E.F. Hutton & Co., Inc., 507 F.Supp. at 1236-1237. Plaintiff do not allege that any of their funds were pooled with funds of other like investors, nor could they where, as here, plaintiffs are the sole purchasers of a 5% share of their friends' 33 1/3 to 50% shares of four real estate investments."

"The Kaplans [plaintiff, investors] explicitly claim no liability for losses incurred. Because the Kaplans claim that the terms of their arrangement with the Shapiros [defendant, promoter] precluded the loss of any of their $150,000 investment, it necessary follows that the Shapiros [promoter] could lose money on their investment but the Kaplans [investor], who claim the right to the return of their initial investment in any event, could not. Therefore, there is no interdependence of losses, and there can be no vertical commonality as a result. See Meyer v. Thomas & McKinnon Auchincloss Kohlmeyer, Inc., 686 F.2d 818,819 (9th Cir. 1982) (No vertical commonality in situations where "the promoter continued to profit through commissions even as the account lost money [or where,] had the account been successful, the promoter would not necessarily have shared the benefits because [the investor] could elect to withdraw profits as they accrued"), cert. denied, 460 U.S. 1023, 103 S.Ct. 1275, 75 L.Ed.2d 495 (1983)."

"Investors, who were sole purchasers of 5% share of friends' interest in four real estate investments [Tenant-In-Common], but whose funds were not pooled with funds of other like investors [BUYERS funds in JCR LLC DEAL not pooled], did not satisfy 'horizontal commonality' approach in determining whether 'common enterprise' requirement of definition of 'security' was

satisfied, and thus, investors could not maintain suit against investment managers under Securities Act of 1933 or Securities Exchange Act of 1934."

KAPLAN v. SHAPIRO COMPARED TO THE JCR LLC DEAL

The JCR LLC DEAL is extremely similar to Kaplan because each real estate deal involved Tenant-In-Common ("TIC") ownership interests which are not "pooled with funds of other like investors" and, thereby, is analogous to Honorable Southern District Court Judge Kram's holding in Kaplan which he states: "did not satisfy "horizontal commonality" and was not a "security". In addition, in both the JCR LLC DEAL and Kaplan, "vertical commonality" is also not satisfied because the "profits and losses of the two parties" are not "interdependent". In fact, the profits and losses of JCR LLC and the OWNERS ate inversely correlated, whereas, if JCR LLC "profits" (i.e. pays all REPURCHASE OPTION fees and exercises its contractual right to repurchase the PROPERTY and $56M gross sales: EXHIBIT [illegible]), the OWNERS "profit" is limited to only JCR LLC'S payment of the REPURCHASE OPTION fees (7% APR) and REPURCHASE PREMIUM (5% APR) as well as return of their original funds utilized to purchase the PROPERTY. Conversely, if JCR LLC defaults on the REPURCHASE OPTION and/or fails to exercise its contractual right to buy back the PROPERTY, JCR LLC assumes a financial loss of the REPURCHASE OPTION fees paid to OWNERS (i.e. approximately $500,000: EXHIBIT B) and expenditures associated with development of the PROPERTY (i.e. approximately $1M: EXHIBIT [illegible]) as well as the gross sales of approximately $56,000,000 from the sale of the developed PROPERTY, whereas, the OWNERS financially directly benefit from same. Hence, JCR LLC'S and OWNER'S "fortunes" are not "inextricably tied" to each other and both "narrow (i.e. strict) vertical commonality" and "broad commonality" do not exist nor can the JCR LLC DEAL be considered an "investment contract" or "security".

In Reprosystem v. SCM Corp., 522 F.Supp. 1257 (U.S.D.C. S.D. [NY] 1981), Honorable Southern District Court Judge Sweet of New York, held:

"As in Fredricksen, the 'economic reality' of this transaction was that Keller [plaintiff] intended to manage and operate the business and had no intention to rely on the present and future efforts of SCM to produce profits. Thus, the securities law claim fails for the reason that the contemplated transaction did not involve an investment of money in a common enterprise from which the profits were expected 'to come solely from the efforts of others. Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551, 559 n.11, 99 S.Ct. 790, 795, 58 L.Ed.2d 808, (1979), quoting Forman, supra, 421 U.S. at 851, 95 S.Ct. at 2060; SEC v. W.J. Howey Co., 328 U.S. 293, 301, 66 S.Ct. 1100, 1104, 90 L.Ed. 1244 (5th Cir. 1980); Glen-Arden Commodities, Inc. v. Costantino, 493 F.2d 1027 (2d Cir. 1974); Rocky v. Vachi, 503 F.Supp. 952 (N.D. Ill. 1981); Hirsch v. Metz, 355 F.Supp. 255 (S.D.N.Y. 1973)."

"Here, there is no sale or purchase of securities involved in alleged agreement for purchase and sale of business so as to be [illegible] under Federal securities law."

REPROSYSTEMS v. SCM COMPARED TO JCR LLC DEAL

Similar to Reprosystems, the BUYER/OWNERS also "had no intention to rely on the present and future efforts of JCR LLC (i.e. promoter/sponsor) to produce profits. In addition, there was no "common enterprise from which profits were expected to 'come solely from the efforts of others'", grounded on the fact, that the BUYER/OWNERS in the JCR LLC DEAL all utilized their unique talents, skills, knowledge and experience to develop the PROPERTY, because JCR LLC (i.e. Respondent) lacked these same abilities.

In S.E.C. v. Energy Group, 459 F.Supp. 1234 (U.S.D.C. S.D. [NY] 1978), Honorable Southern District Court Judge Stewart of New York, held:

"A reasonable expectation of profits from entrepreneurial or managerial efforts of others is an essential feature of an investment contract."

"[C]onsidering the services as a whole, there is no common ownership of any enterprise and no entrusting of the enterprise to the managerial efforts of others. The economic risk of any buyer customer and, more important, of EGA. Thus, we find no [illegible] common enterprise in the form of pooling."

"Under the circumstances, EGA's role in the success of the enterprise, limited as it is to recommending parcels on which to bid, with the cost left to chance, can hardly be said to be essential managerial or entrepreneurial efforts."

"The SEC argues that a critical ingredient in EGA's package is the offer to purchase any recommended lease that is not, thereby guaranteeing liquidity, citing Glen-Arden Commodities, Inc. v. Costantino, supra, 493 F.2d at 1035. There investors purchased small quantities of Scotch whisky, in the form of warehouse receipts, relying on Glen-Arden's expertise in selecting profits and pooling the Scotch. The Court, in finding that this was an investment contract based upon a common enterprise, and in distinguishing one from the other, noted the importance of customer of Glen-Arden's offer to purchase the Scotch from the customer if it should prove impossible to find another buyer. ... the buy-back arrangement was 'crucial to any customer's hope to liquidate his investment'. Id. That is not the case here. While it may be difficult for a person in the oil and gas business to sell or lease on his or her own, and while it may be an important incentive to the customer that EGA offers to buy any recommended lease that is not, there never the less is a market for the lease and an opportunity to liquidate the 'investment contract' set forth in Howey.'

"In summary, all of the cases cited to us by the SEC and all of the cases discovered in our own research dealing with types of investment contracts can be categorized either as cases where investors contributed capital to an enterprise expecting a participation in earnings resulting from the use of their funds, or as cases where tangible or intangible property was purchased by the investor in the expectation that it would appreciate in value, either because of the promoter's expertise ... or because of the promoter's managerial or entrepreneurial efforts subsequent to the purchase of the property. See United Housing Foundation, Inc. v. Forman, supra, 421 U.S. at 852, 95 S.Ct. at 2060. The facts of this case fit <u>neither</u> of these categories."

"[D]efendant corporation which solicited customers, through advertising and direct mailing, to utilize its services in connection with oil and gas lease lotteries ... was <u>not</u> engaged in offering for sale nor selling a 'security' within meaning of securities laws. Defendant corporation's scheme failed to meet test of an 'investment contract.'"

<u>S.E.C. v. ENERGY GROUP COMPARED TO JCR LLC DEAL</u>

The Energy Group case is similar, in some aspects, to the JCR LLC DEAL because the "expectation or profits" was <u>not</u> "derived from the entrepreneurial or managerial efforts of others" which is "an essential feature of an investment contract" due to the fact that in the JCR LLC DEAL [illegible] always [illegible] to [illegible] the PROPERTY [illegible]. In addition, it was the "entrepreneurial" unique expertise, skills, knowledge, and experience of the BUYERS/OWNERS, which JCR LLC (i.e. Respondent) lacked, that was the crucial component to [illegible] success in the development of the PROPERTY. In addition, similar to Energy Group, there was <u>no</u> "common [illegible]". Furthermore, [illegible] Honorable Court [illegible] Judge [illegible] [illegible]. Furthermore, although JCR LLC [illegible]

to buy back the PROPERTY, REPURCHASE OPTION, from the OWNERS, similar to Energy Group, there was and still is a broad market available for the OWNERS to sell the PROPERTY, "an opportunity to liquidate", at any time each OWNER individually, or collectively wishes to do so. In fact, since JCR LLC expended approximately $1,000,000 (EXHIBIT B) to develop the PROPERTY and other expenses related thereto, the OWNERS not JCR LLC, now have the financial benefits therefrom, probably at a much higher price than the OWNERS initially paid to purchase the PROPERTY.

In Fogel v. Sellamerica, 445 F.Supp. 1269 (U.S.D.C. S.D. [NY] 1978), Honorable Southern District Court Judge Gagliardi of New York, held:

"If residential lots represented an asset to be developed or occupied by purchasers rather than an investment to be managed by efforts of others, real estate transaction did not constitute an 'investment contract' and thus a 'security' within meaning of securities laws for purpose of antifraud provision of securities laws."

"To determine whether real estate transaction was an 'investment contract' and thus a 'security' within the meaning of securities laws for the purpose of determining whether transaction violated antifraud provision of securities laws, court had to consider motivation of purchasers as well as promotional emphasis of developers."

"If the residential lots here in issue represented an asset to be developed or occupied by the purchaser rather than an investment to be managed by the efforts of others, the real estate transaction would not constitute an investment contract. United Housing Foundation Inc., v. Forman, supra, 421 U.S. at 852-853, 95 S.Ct. 1100. To determine this issue, the Court must consider the motivation of the purchaser, Forman, supra, 421 U.S. at 852-853,

95 S.Ct. 2051, Howey, supra, 328 U.S. at 300, 66 S.Ct. 1100, as well as the promotional emphasis of the developer. SEC v. Joiner Corp., 320 U.S. 344, 348-349, 352-353, 64 S.Ct. 120, 88 L.Ed. 88 (1943); Timmreck v. Munn, supra, 433 F.Supp. at 402; Davis v. Rio Rancho Estates, Inc., supra, 401 F.Supp. at 1049-1050. (court found that "defendants promotional materials, fairly read, place more emphasis on development of a residential community than on purchase as an investment." Id. at 1049)."

"Davis v. Rio Rancho Estates, supra, 401 F.Supp. at 1050 ("Defendant's did not promise to run the development and distribute the profits to the plaintiff ... There was no management contract between plaintiffs and defendants, nor were defendants obligated by the Purchase Agreement to perform any such services [identical to the JCR LLC DEAL] ... In the absence of a 'common enterprise' between the parties, the expectation of a profit on resale is insufficient to transform what is essentially a sale of real property into the sale of an 'investment contract.' Id., at 1050)."

"[T]he developers did represent that a variety of residential services and recreational facilities would be developed so as to increase the value of plaintiffs' property along with all of the lots in the development."

FOGEL v. SELLAMERICA COMPARED TO THE JCR LLC DEAL

In many respects, the JCR LLC DEAL is similar to both Fogel and Davis, because all three cases involve the development of real estate, lacked management contract with seller (i.e. JCR LLC), promotional materials utilized to solicit buyers emphasized "development of a residential community" rather than "investment" as well as not only did the JCR LLC DEAL BUYERS/OWNERS expect "profit" from the resale, they also sought to use and reside in the retirement community after the PROPERTY development was complete and, thereby, no "investment contract" existed, similar to Fogel and Davis.

In Davis v. Rio Rancho, 401 F.Supp. 1045 (U.S.D.C. S.D. [NY] 1975), Honorable Southern District Court Judge Brieant of New York, held:

"Upon the execution of a contract for the sale of real property, equitable title vests immediately in the purchaser, and the vendor retains legal title only as security for the remainder of the purchase price."

"These contractual rights and obligations were fixed when Rio Rancho signed and returned a copy of the [Purchase] Agreement to plaintiff, and the [Purchase] Agreement became binding and enforceable upon both parties at that time. Any fraud was complete and actionable on that date, or as soon thereafter as plaintiff knew or should have known she had been defrauded."

"Even if purchaser of property never intended to use the property as a residence [dissimilar to JCR LLC DEAL] and purchased property purely for the profit which she expected to make on resale [identical to JCR LLC DEAL], purchase agreement covering the property, which was one-half-acre parcel of unimproved land in a subdivision developed by the vendor, was not an 'investment contract' for purposes of federal securities laws."

"Even if vendor was intending to build roads and other improvements in the subdivision where land was located [identical to JCR LLC DEAL], that activity was not the type of managerial service provided to the purchaser which would turn the contract into an investment contract for the purposes of federal securities laws."

"There is no doubt that purchasers in this housing cooperative sought to obtain a decent home at an attractive price [similar to most BUYERS/OWNERS in JCR LLC DEAL]. But that type of economic interest characterizes every form of commercial dealing. What distinguishes a security transaction and what is absent here [also

absent in the JCR LLC DEAL] is an investment where one parts with his money in a hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use [similar to the BUYERS/OWNERS in the JCR LLC DEAL who sought to purchase a retirement residence and/or become a member of the CCRC that is proposed to be developed on the PROPERTY]."

"Even if plaintiff, unlike the plaintiffs in United Housing, supra, never intended to use the property as a residence and did purchase her property purely for the profit she expected on resale, the Purchase Agreement never the less is not an 'investment contract' as defined in that case or in Howey, supra."

"If defendants [JCR LLC] in fact built roads and other improvements, this is not the type or managerial service contemplated in Howey, supra, or United Housing, supra. Defendants did not promise to run the development and distribute profits to the plaintiff [similar to JCR LLC], as did the operators of the orange groves in Howey. There is no management contract between plaintiff and defendants, nor were defendants obligated by the Purchase Agreement or perform any such services [identical to the JCR LLC DEAL]. Defendants' attempts to induce purchasers to build or their efforts, if any, to enhance living conditions in the development were unrelated to plaintiff. Their interest was in recouping their investment, making a profit and moving on. Any benefit to plaintiff would be purely incidental."

"In the absence of a 'common enterprise' between the parties [identical to the JCR LLC DEAL], the expectation of a profit on resale is insufficient to transform what is essentially a sale of real property into a sale of an investment contract."

"Plaintiff's effort to shoe-horn their land speculation into a definition of the Securities Acts [similar to the SEC v. Paul Leon White II case at bar] in our [United States District Court Southern District] opinion fails. Bubula v. The Grand Bahama Development Co., (N.D. Ill. June 7, 1974, unreported decision, pp. 4-5)"

"The plaintiffs in Bubula alleged that written contracts for the purchase of undeveloped land on Grand Bahama Island were investment contracts. The Court disagreed and dismissed the complaint. Contracts for the purchase of the undeveloped lots in the recreational subdivisions in California were held not to be investment contracts in Happy Investment Group v. Lakeworld Properties, Inc., 396 F.Supp. 175 (N.D. Cal. 1975). See also Contract Buyers League v. F&F Investment, 300 F.Supp. 210 (N.D. Ill. 1969) and I Loss, Securities Regulation, pp. 491-2 (2d ed. 1961)"

"The line is drawn, however, where neither the element of common enterprise nor the element of reliance on the efforts of another is present [identical to the JCR LLC DEAL]. For example, no 'investment contract' is involved when a person invests in real estate, with the hope perhaps of earning a profit as the result of a general increase in values concurrent with the development of the neighborhood, as long as he does not do so as part of an enterprise whereby it is expressly or impliedly understood that the property will be developed or operated by others."

"The plaintiff claims that she was granted a 'fractional undivided interest in oil, gas, or other mineral rights' as defined in the Securities Act of 1933 (15 U.S.C. §77b(1)) and a 'certificate of interest or participation in any profit sharing agreement or any oil, gas, or other mineral royalty or lease' as defined in the Securities exchange act of 1934."

"Clearly, defendant's are not in the mining or oil business, nor did they represent to plaintiff that they intended to commence such explorations, as was the case in SEC v. Joiner Corp., 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88 (1943). The 'economic realty' of this transaction is the simple installment sale of a parcel of real property. The mere possibility of future discovery of minerals or oil is too speculative, and too insubstantial, to bring this transaction within the securities laws."

"The sale of land did not constitute an 'investment contract' for purpose of the Securities Exchange Act"

DAVIS v. RIO RANCHO COMPARED TO THE JCR LLC DEAL

The Davis case has many similarities to the JCR LLC DEAL because the buyers in both intended to use the real estate for their own personal and/or company's purposes (i.e. purchase a retirement or residential home in which to reside), sellers (i.e. JCR LLC or Rio Rancho) "did not promise to run the development or distribute profits to the OWNERS and there lacked any management contract what-so-ever (OWNERS have always and continue to manage the PROPERTY to date) "nor were [sellers] (i.e. JCR LLC or Rio Rancho) obligated by the Purchase Agreement with buyers (i.e. BUYERS) to perform such services." In addition, both the JCR LLC DEAL and Rio Rancho lacked a "'common enterprise' between the parties" as well as lacked "the element of reliance on the efforts of another" because in the JCR LLC DEAL, it was the BUYERS/OWNERS who had the unique talents, expertise, knowledge and experience to sucessfully develop the PROPERTY, not JCR LLC (i.e. Respondent), who lacked same. As Honorable Southern District Court Judge Brieant held in DAVIS: "The 'economic reality' of this transaction is the simple sale of a parcel of real property. The mere possibility of [development] is too speculative, and too insubstantial, to bring this transaction within the securities laws" and "the sale of land did not constitute an 'investment contract' for purposes of the Securities Exchange Act".

In Hirsch v. duPont, 396 F.Supp. 1214 (U.S.D.C. S.D. [NY] 1975), Honorable Southern District Court Judge Robert L. Carter of New York, held:

"General partnership interests purchased by plaintiffs [BUYERS/OWNERS] were not 'securities' ... where ... agreement [PA: EXHIBIT C and TICA: EXHIBIT J] provided that general partners were to have complete managerial control ... where plaintiffs [BUYERS/OWNERS] had right to participate actively ... and exercised that right [identical to JCR LLC DEAL]."

"In our view, however, the determination whether the partnership interest ... is a 'security' does not and should not hinge on the particular degree of responsibility he assumes ... The fact that a partner may chose to delegate his day-to-day managerial responsibilities ... does not diminish in the least his legal right to a voice in partnership matters ... these factors critically distinguish the status of a general partner from that of the purchaser of an 'investment contract' who in law as well as in fact a 'passive' investor. (New York Stock Exchange, Inc. v. Sloan, 394 F.Supp. 1301, 1314 (S.D.N.Y. 1975))."

"The general partners had the power to appoint and remove the managing director [similar to the BUYERS/OWNERS in the JCR LLC DEAL] ... substantial legal right(s) to a voice in partnership matters [TIC PROPERTY ownership matters] ... were not securities, irrespective of the degree to which Kohns and Mundheim [BUYERS/OWNERS] actually chose to exercise their rights."

"I [Honorable Southern District Court Judge Robert L. Carter] hold that Kohns and Mundheim's interests were not 'securities' ... by virtue of their managerial powers and express rights ... and through their efforts to promote its success [similar to BUYERS/OWNERS in JCR LLC DEAL in which PROPERTY DEVELOPMENT depended on the BUYER'S/OWNER'S efforts, not Respondent's]."

"Indeed, after the Hawaii Market Center decision, the federal courts in several circuits adopted this fourth requirement, the absence of managerial control, as the single test of an investment contract. S.E.C. v. Glenn W. Turner Enterprises, Inc., supra, 474 F.2d at 482 (9th Cir. (1973); S.E.C. v. Koscot Interplanetary, Inc., supra, 474 F.2d at 483 (5th Cir. 1974); Nash & Associates, Inc. v. Lum's of Ohio, Inc., 484 F.2d 392, 395 (6th Cir. 1973); In the Matter of Continental Marketing Associates, Inc., 3 CCH Blue Sky L.Rep. P71,022 (Ohio, C.P. 1972).

The leading case of S.E.C. v. Glenn W. Turner Enterprises, Inc. stated this new test as follows:

'Rather we adopt a more realistic test, whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."

"The SEC also adopted the position that an interest is a 'security' only where there is 'no active participation in the management and operation of the the scheme in the part of the investor.' Sec.Act.Rel.4877, CCH Fed.Sec.L.Rep.P77,462 (1967) (emphasis added)."

"In Sec.Act.Rel. 5211, CCH Fed.Sec.L.Rep. 78,446, the Commission stated, with specific reference to schemes:

'The term 'security' must be defined in a manner adequate to serve the purpose of protecting investors. The existence of a 'security' must depend in significant measure upon the degree of managerial authority over the investor's funds retained or given; and performance by an investor of duties related to the enterprise, even if financially significant and plainly contributing to the success of the venture, may be irrelevant to the existence of a security if the investor does not control the use of his funds to a significant degree. The 'efforts of others' referred to in Howey are limited, therefore, to those types of essential managerial efforts but for which the anticipated return could not be produced."

HIRSCH v. DUPONT COMPARED TO THE JCR LLC DEAL

The Hirsch case is analogous to the JCR LLC DEAL because the Honorable Southern District Court's reasoning why neither an "investment contract" or "security" existed is based on the same logical reasoning being: investors (i.e. BUYERS/OWNERS) had control over the investment (i.e. PROPERTY) and authority to make all the decisions thereon as well as the investors (i.e. BUYERS/OWNERS) did not rely on the "essential managerial efforts" of others and the investors (i.e. BUYERS/OWNERS) were "active participants" in the management as well as development of the PROPERTY. In addition, Respondent and Honorable Southern District Court Judge Robert L. Carter agree with the SEC (i.e. Plaintiff in the Respondent's case at bar) which adopted the position that:

"an interest is a 'security' only where there is 'no active participation in the management and operation ... on the part of the investor [BUYERS/OWNERS]" (Sec.Act.Rel. 4877, CCH Fed.Sec.L.Rep. P77,462 (1967)."

The SEC further defined a 'security' in Sec.Act.Rel. 5211, CCH Fed.Sec.L.Rep. 78,446 by stating:

"The existance of a 'security' must depend in significant measure upon the degree of managerial authority ... and performance by an investor of duties related to the enterprise, even if financially significant and plainly contributed to the success of the venture"

In the JCR LLC DEAL at bar, it is indisputable that the OWNERS had and still have 100% full control over the PROPERTY as well as continue to manage the PROPERTY themselves. Undeniably, the BUYERS/OWNERS utilized their unique talents, skills, knowledge and experience to develop the PROPERTY, due to the fact that JCR LLC (i.e. Respondent) lacked these essential characteristics. In fact, when the OWNERS ceased helping develop the PROPERTY, the project came to a grinding halt and continues to [illegible] to present. Therefore, grounded upon the above-described deduction, the JCR LLC DEAL is not an 'investment contract' or "security".

In Forman v. Community Services, Inc., 366 F. Supp. 1117 (U.S.D.C. S.D. [NY] 1973), Honorable Southern District Court Judge Pierce of New York, held:

"Fact that shareholder was severely limited in his dealings with his shares or that he must first offer them back to the cooperative corporation was not dispositive on issue of whether the shares were 'securities' within meaning of antifraud provisions of federal securities laws."

"Although the securities laws do not extend to the classic purchase of real estate, this is because the transaction does not meet the full test developed to identify a stock or an investment contract, not because the underlying property is real rather than personal."

"'Share' of state-financed and supervised, nonprofit cooperative housing corporation was not 'investment contract' and was not within antifraud provisions of the federal securities laws."

"'Share' of a ... cooperative housing corporation was not a 'security' within the meaning of federal securities laws."

FORMAN v. COMMUNITY SERVICES COMPARED TO THE JCR LLC DEAL

"Shares" in a cooperative housing unit wherein "Many are husbands and wives who own jointly their interest in a single apartment unit. Thus, altogether, there are occupants of 30 apartments named as plaintiffs" is analogous to the deeded (EXHIBIT C) Tenant-In-Common ("TIC") ownership interests of the BUYERS/OWNERS in the JCR LLC DEAL. Although the "shareholder [OWNER] was severely limited in his dealings with the shares [deeded TIC ownership interests] or that he must first offer them

ownership interests to the other co-owners prior to selling to a third party] was not dispositive ... the shares [deeded TIC ownership interests] were 'securities' within the meaning of ... federal securities laws". Therefore, Respondent agrees with Honorable Southern District Court Judge Pierce's reasoning that the "'shares' of ... housing ... was not a 'security' within the meaning of federal securities laws".

In Wiebolt v. Metz, 355 F.Supp. 255 (U.S.D.C. S.D. [NY] 1973), Honorable Southern District Court Judge Lasker of New York, held:

"[M]aster franchise agreement contemplated that profits, if any, would be derived primarily from the efforts of the franchisee [BUYERS/OWNERS], franchise [PROPERTY development] was not an 'investment contract' and its offer and sale were not covered by Securities Acts."

"[P]laintiff franchisee's [BUYERS/OWNERS] given role was not ministerial but truly active and discretionary [similar to the OWNERS in the JCR LLC DEAL] and as to his franchise area agreement gave him virtually unfettered control [similar to the PA: EXHIBIT C and TICA: EXHIBIT J in the JCR LLC DEAL], franchise would not be an 'investment contract' within the 'risk capital' test and its offer and sale would not be covered by Securities Acts on that ground."

"The essential nature of the agreement and the language of the contract demonstrate plainly that both SBS [defendant] and the franchisee [plaintiff] are intended to have an active role in carrying out its terms [similar to the BUYERS/OWNERS in the JCR LLC DEAL]. This fact distinguishes the master franchise from other arrangements which have been found to be investment contracts for purposes of the securities laws."

"Unlike Joiner and Howey, the situation here does not involve numerous, scattered, ignorant investors. ... Although no prior experience was required of them, the contract anticipated that they [plaintiffs - investors] would receive, at the hands of SBS [defendant], the training necessary to conduct the business [dissimilar to the JCR LLC DEAL wherein the BUYERS/OWNERS possessed the unique talents, skills, knowledge and experience that JCR LLC (i.e. Respondent) lacked regarding development of the PROPERTY."

WIEBOLT v. METZ COMPARED TO THE JCR LLC DEAL

Similar to Wiebolt, the BUYERS/OWNERS (i.e. franchisees) has total cotrol over the PROPERTY and any "profits" (i.e. 5% APR REPURCHASE PREMIUM) that could have been achieved would have been derived solely from efforts of the BUYERS/OWNERS, who possessed the unique talents, skills, knowledge and experience that JCR LLC (i.e. Respondent) lacked. In fact, several BUYERS/OWNERS, Edilberto and Teodocia Santos ("SANTOS") and Afzal Skeikh ("SHEIKH"), possess such specialized talents and skills in the field of medicine, which JCR LLC critically required to successfully design the main building in the Continuing Care Retirement Community ("CCRC"), that in addition to the 5% APR REPURCHASE OPTION fees, JCR LLC paid the afore-described BUYERS/OWNERS extra money to design the main building in the Continuing Care Retirement Community ("CCRC"). Therefore, grounded upon the same legal reasoning employed by Honorable Southern District Court Judge Lasker' holding in Weibolt, the JCR LLC DEAL "was not an "investment contract and its offer and sale were not covered by the securities laws".

SUMMARY OF ANALYSIS OF RELEVANT CASE LAW

In the JCR LLC DEAL, the JCR LLC DEAL is not an "investment contract", and thereby, is not a security, based upon the fact that three(3) of the four(4) prongs of the Howey/Forman Test are not satisfied as follows:

1. PRONG #1: Respondent concedes that Prong #1 is satisfied in the JCR DEAL.

2. PRONG #2: The JCR LLC DEAL is not a "common enterprise" because there was no "pooling" of investment funds to purchase the PROPERTY and each BUYER received a deeded (EXHIBIT E) ownership interest therein, that was separate and distinct from the other BUYERS.

PRONG #3: The BUYERS/OWNERS in the JCR LLC DEAL did not seek purchasing the PROPERTY for profit but, rather, bought the PROPERTY for investment purpose in order to satisfy their Federal and State obligation in conformance with 28 C.F.R. §1031 ("1031 EXCHANGE") as well as use and consume the PROPERTY for personal and/or corporate purpose.

PRONG #4: The "profit", which did not exist is thoroughly discussed herein, would have indisputably been derived from the efforts of the BUYERS/OWNERS, who had the unique talents, expertise, knowledge and experience that Respondent (i.e. JCR LLC) lacked to develop the PROPERTY.

Since all four elements (i.e. PRONGS) of the Howey/Forman Test must be satisfied and three(3) of the four(4) PRONGS are not satisfied, the JCR LLC DEAL is not an "investment contract" (i.e. Security), and thereby, the SEC lacks authority to prosecute Respondent, accordingly.

In Reprosystem v. SCM Corp., 522 F.Supp. 1257 (U.S.D.C. S.D. [NY] 1981), Honorable Southern District Court Judge Sweet of New York, held:

"As in Fredricksen, the 'economic realty' of this transaction was that Muller [plaintiff] intended to manage and operate the business and had no intention to rely on the present and future efforts of SCM to produce profits. Thus, the securities law claim fails for the reason that the contemplated transaction did not involve an investment of money in a common enterprise from which the profits were expected "to come solely from the efforts of others. Int'l Brhd. of Teamsters v. Daniel, 439 U.S. 551, 558 & n.11, 99 S.Ct. 790, 815, 58 L.Ed.2d 808, (1979), quoting Forman, supra, 521 U.S. at 851, 95 S.Ct. at 2060; SEC v. W.J. Howey Co., 328 U.S. 293, 301, 66 S.Ct. 1100, 1104, 90 L.Ed. 592-601 (5th Cir. 1980); Glen-Arden Commodities, Inc. v. Costantino, 493 F.2d 1027 (2d Cor. 1974); Barsy v. Verin, 508 F.Supp. 952 (N.D. Ill. 1981); Wiebolt v. Metz, 355 F.Supp. 255 (S.D.N.Y. 1973)."

"there was <u>no</u> sale or purchase of securities involved in alleged agreement for purchase and sale of business so as to bring action under federal securities law."

REPROSYSTEMS v. SCM COMPARED TO JCR LLC DEAL

Similar to Reprosystems, the BUYER/OWNERS also "had <u>no</u> intention to rely on the present and future efforts of JCR LLC (i.e. promoter/sponsor) to produce profits. In addition, there was <u>no</u> "common enterprise from which profits were expected to 'come solely from the efforts of others'", grounded on the fact, that the BUYER/OWNERS in the JCR LLC DEAL all utilized their unique talents, skills, knowledge and experience to develop the PROPERTY, because JCR LLC (i.e. Respondent) lacked these same abilities.

In S.E.C. v. Energy Group, 459 F.Supp. 1234 (U.S.D.C. S.D. [NY] 1978), Honorable Southern District Court Judge Stewart of New York, held:

"A reasonable expectation of profits from entrepreneurial or managerial efforts of others is an essential feature of an investment contract."

"[C]onsidering the services as a whole, there is no common ownership of any enterprise and no entrusting of the enterprise to the management efforts of others. The economic fate of any other customer and, more important, of EGA. Thus, we fail to see any common enterprise in the facts of this case."

"Under the circumstances, EGA's role in the success of the enterprise, limited as it is to recommending parcels on which to bid, with the rest left to chance, can hardly be said to be essential managerial or entrepreneurial efforts."

"The SEC argues that a critical ingredient in EGA's package is the offer to purchase any recommended lease that is won, thereby guaranteeing liquidity, citing Glen-Arden Commodities, Inc. v. Costantino, supra, 493 F.2d at 1035. There investors purchased small quantities of Scotch whiskey, in the form of warehouse receipts, relying on Glen-Arden's expertise in selecting storing and aging the Scotch. The Court, in finding that this was an investment contract rather than a purchase of a commodities future, and in distinguishing one from the other, noted the importance of customer of Glen-Arden's offer to purchase the Scotch from the customer if it should prove impossible to find another buyer. ... the buy-back arrangement was 'crucial to any customer's hope to liquidate his investment'. Id. That is not the case here. While it may be difficult for a person in the oil and gas business to sell or lease on his or her own, and while it may be an important incentive to the customer that EGA offers to buy any recommended lease that is won, there never the less is a market for the lease and an opportunity to liquidate the 'investment contract' set forth in Howey."

"In summary, all of the cases cited to us by the SEC and all of the cases discovered in our own research dealing with types of investment contracts can be categorized either as cases where investors contributed capital to an enterprise expecting a participation in earnings resulting from the use of their funds, or as cases where tangible or intangible property was purchased by the investor in the expectation that it would appreciate in value, either because of the promoter's expertise ... or because of the promoter's managerial or entrepreneurial efforts subsequent to the purchase of the property. See United Housing Foundation, Inc. v. Forman, supra, 421 U.S. at 852, 95 S.Ct. at 2060. The facts of this case fit neither of these categories.",

"[D]efendant corporation which solicited customers, through advertising and direct mailing, to utilize its services in connection with oil and gas lease lotteries ... was not engaged in offering for sale nor selling a 'security' within meaning of securities laws. Defendant corporation's scheme failed to meet test of an 'investment contract.'"

S.E.C. v. ENERGY GROUP COMPARED TO JCR LLC DEAL

The Energy Group case is similar, in some aspects, to the JCR LLC DEAL because the "expectation or profits" was not "derived from the entrepreneurial or managerial efforts of others" which is "an essential feature of an investment contract" due to the fact that in the JCR LLC DEAL, the OWNERS always managed and continue to manage the PROPERTY to the present time. In addition, it was the "entrepreneurial" unique experise, skills, knowledge and experience of the BUYERS/OWNERS, which JCR LLC (i.e. Respondent) lacked, that was the crucial component to achieve success in the development of the PROPERTY. In addition, similar to Energy Group, there was no "common ownership of any enterprise". Respondent agrees with Honorable Southern District Court Judge Stewart who stated: "we fail to see any common enterprise in the facts of this case". Furthermore, although JCR LLC possessed a contractual right

to buy back the PROPERTY, REPURCHASE OPTION, from the OWNERS, similar to Energy Group, there was and still is a broad market available for the OWNERS to sell the PROPERTY, "an opportunity to liquidate", at any time each OWNER individually, or collectively wishes to do so. In fact, since JCR LLC expended approximately $1,000,000 (EXHIBIT B) to develop the PROPERTY and other expenses related thereto, the OWNERS not JCR LLC, now have the financial benefits therefrom, probably at a much higher price than the OWNERS initially paid to purchase the PROPERTY.

In Fogel v. Sellamerica, 445 F.Supp. 1269 (U.S.D.C. S.D. [NY] 1978), Honorable Southern District Court Judge Gagliardi of New York, held:

"If residential lots represented an asset to be developed or occupied by purchasers rather than an investment to be managed by efforts of others, real estate transaction did not constitute an 'investment contract' and thus a 'security' within meaning of securities laws for purpose of antifraud provision of securities laws."

"To determine whether real estate transaction was an 'investment contract' and thus a 'security' within the meaning of securities laws for the purpose of determining whether transaction violated antifraud provision of securities laws, court had to consider motivation of purchasers as well as promotional emphasis of developers."

"If the residential lots here in issue represented an asset to be developed or occupied by the purchaser rather than an investment to be managed by the efforts of others, the real estate transaction would not constitute an investment contract. United Housing Foundation Inc., v. Forman, supra, 421 U.S. at 852-853, 95 S.Ct. 1100. To determine this issue, the Court must consider the motivation of the purchaser, Forman, supra, 421 U.S. at 852-853,

95 S.Ct. 2051, Howey, supra, 328 U.S. at 300, 66 S.Ct. 1100, as well as the promotional emphasis of the developer. SEC v. Joiner Corp., 320 U.S. 344, 348-349, 352-353, 64 S.Ct. 120, 88 L.Ed. 88 (1943); Timmreck v. Munn, supra, 433 F.Supp. at 402; Davis v. Rio Rancho Estates, Inc., supra, 401 F.Supp. at 1049-1050. (court found that "defendants promotional materials, fairly read, place more emphasis on development of a residential community than on purchase as an investment." Id. at 1049)."

"Davis v. Rio Rancho Estates, supra, 401 F.Supp. at 1050 ("Defendant's did not promise to run the development and distribute the profits to the plaintiff ... There was no management contract between plaintiffs and defendants, nor were defendants obligated by the Purchase Agreement to perform any such services [identical to the JCR LLC DEAL] ... In the absence of a 'common enterprise' between the parties, the expectation of a profit on resale is insufficient to transform what is essentially a sale of real property into the sale of an 'investment contract.' Id., at 1050)."

"[T]he developers did represent that a variety of residential services and recreational facilities would be developed so as to increase the value of plaintiffs' property along with all of the lots in the development."

FOGEL v. SELLAMERICA COMPARED TO THE JCR LLC DEAL

In many respects, the JCR LLC DEAL is similar to both Fogel and Davis, because all three cases involve the development of real estate, lacked management contract with seller (i.e. JCR LLC), promotional materials utilized to solicit buyers emphasized "development of a residential community" rather than "investment" as well as not only did the JCR LLC DEAL BUYERS/OWNERS expect "profit" from the resale, they also sought to use and reside in the retirement community after the PROPERTY development was complete and, thereby, no "investment contract" existed, similar to Fogel and Davis.

In Davis v. Rio Rancho, 401 F.Supp. 1045 (U.S.D.C. S.D. [NY] 1975), Honorable Southern District Court Judge Brieant of New York, held:

"Upon the execution of a contract for the sale of real property, equitable title vests immediately in the purchaser, and the vendor retains legal title only as security for the remainder of the purchase price."

"These contractual rights and obligations were fixed when Rio Rancho signed and returned a copy of the [Purchase] Agreement to plaintiff, and the [Purchase] Agreement became binding and enforceable upon both parties at that time. Any fraud was complete and actionable on that date, or as soon thereafter as plaintiff knew or should have known she had been defrauded."

"Even if purchaser of property never intended to use the property as a residence [dissimilar to JCR LLC DEAL] and purchased property purely for the profit which she expected to make on resale [identical to JCR LLC DEAL], purchase agreement covering the property, which was one-half-acre parcel of unimproved land in a subdivision developed by the vendor, was not an 'investment contract' for purposes of federal securities laws."

"Even if vendor was intending to build roads and other improvements in the subdivision where land was located [identical to JCR LLC DEAL], that activity was not the type of managerial service provided to the purchaser which would turn the contract into an investment contract for the purposes of federal securities laws."

"There is no doubt that purchasers in this housing cooperative sought to obtain a decent home at an attractive price [similar to most BUYERS/OWNERS in JCR LLC DEAL]. But that type of economic interest characterizes every form of commercial dealing. What distinguishes a security transaction and what is absent here [also

absent in the JCR LLC DEAL] is an investment where one parts with his money in a hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use [similar to the BUYERS/OWNERS in the JCR LLC DEAL who sought to purchase a retirement residence and/or become a member of the CCRC that is proposed to be developed on the PROPERTY]."

"Even if plaintiff, unlike the plaintiffs in United Housing, supra, never intended to use the property as a residence and did purchase her property purely for the profit she expected on resale, the Purchase Agreement never the less is not an 'investment contract' as defined in that case or in Howey, supra."

"If defendants [JCR LLC] in fact built roads and other improvements, this is not the type or managerial service contemplated in Howey, supra, or United Housing, supra. Defendants did not promise to run the development and distribute profits to the plaintiff [similar to JCR LLC], as did the operators of the orange groves in Howey. There is no management contract between plaintiff and defendants, nor were defendants obligated by the Purchase Agreement or perform any such services [identical to the JCR LLC DEAL]. Defendants' attempts to induce purchasers to build or their efforts, if any, to enhance living conditions in the development were unrelated to plaintiff. Their interest was in recouping their investment, making a profit and moving on. Any benefit to plaintiff would be purely incidental."

"In the absence of a 'common enterprise' between the parties [identical to the JCR LLC DEAL], the expectation of a profit on resale is insufficient to transform what is essentially a sale of real property into a sale of an investment contract."

"Plaintiff's effort to shoe-horn their land speculation into a definition of the Securities Acts [similar to the SEC v. Paul Leon White II case at bar] in our [United States District Court Southern District] opinion fails. Bubula v. The Grand Bahama Devenopment Co., (N.D. Ill. June 7, 1974, unreported decision, pp. 4-5)"

"The plaintiffs in Bubula alleged that written contracts for the purchase of undeveloped land on Grand Bahama Island were investment contracts. The Court disagreed and dismissed the complaint. Contracts for the purchase of the undeveloped lots in the recreational subdivisions in California were held not to be investment contracts in Happy Investment Group v. Lakeworld Properties, Inc., 396 F.Supp. 175 (N.D. Cal. 1975). See also Contract Buyers League v. F&F Investment, 300 F.Supp. 210 (N.D. Ill. 1969) and I Loss, Securities Regulation, pp. 491-2 (2d ed. 1961)"

"The line is drawn, however, where neither the element of common enterprise nor the element of reliance on the efforts of another is present [identical to the JCR LLC DEAL]. For example, no 'investment contract' is involved when a person invests in real estate, with the hope perhaps of earning a profit as the result of a general increase in values concurrent with the development of the neighborhood, as long as he does not do so as part of an enterprise whereby it is expressly or impliedly understood that the property will be developed or operated by others."

"The plaintiff claims that she was granted a 'fractional undivided interest in oil, gas, or other mineral rights' as defined in the Securities Act of 1933 (15 U.S.C. §77b(1)) and a 'certificate of interest or participation in any profit sharing agreement or any oil, gas, or other mineral royalty or lease' as defined in the Securities exchange act of 1934."

"Clearly, defendant's are not in the mining or oil business, nor did they represent to plaintiff that they intended to commence such explorations, as was the case in SEC v. Joiner Corp., 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88 (1943). The 'economic realty' of this transaction is the simple installment sale of a parcel of real property. The mere possibility of future discovery of minerals or oil is too speculative, and too insubstantial, to bring this transaction within the securities laws."

"The sale of land did not constitute an 'investment contract' for purpose of the Securities Exchange Act"

DAVIS v. RIO RANCHO COMPARED TO THE JCR LLC DEAL

The Davis case has many similarities to the JCR LLC DEAL because the buyers in both intended to use the real estate for their own personal and/or company's purposes (i.e. purchase a retirement or residential home in which to reside), sellers (i.e. JCR LLC or Rio Rancho) "did not promise to run the development or distribute profits to the OWNERS and there lacked any management contract what-so-ever (OWNERS have always and continue to manage the PROPERTY to date) "nor were [sellers] (i.e. JCR LLC or Rio Rancho) obligated by the Purchase Agreement with buyers (i.e. BUYERS) to perform such services." In addition, both the JCR LLC DEAL and Rio Rancho lacked a "'common enterprise' between the parties" as well as lacked "the element of reliance on the efforts of another" because in the JCR LLC DEAL, it was the BUYERS/OWNERS who had the unique talents, expertise, knowledge and experience to sucessfully develop the PROPERTY, not JCR LLC (i.e. Respondent), who lacked same. As Honorable Southern District Court Judge Brieant held in DAVIS: "The 'economic reality' of this transaction is the simple sale of a parcel of real property. The mere possibility of [development] is too speculative, and too insubstantial, to bring this transaction within the securities laws" and "the sale of land did not constitute an 'investment contract' for purposes of the Securities Exchange Act".

In Hirsch v. duPont, 396 F.Supp. 1214 (U.S.D.C. S.D. [NY] 1975), Honorable Southern District Court Judge Robert L. Carter of New York, held:

"General partnership interests purchased by plaintiffs [BUYERS/OWNERS] were not 'securities' ... where ... agreement [PA: EXHIBIT C and TICA: EXHIBIT J] provided that general partners were to have complete managerial control ... where plaintiffs [BUYERS/OWNERS] had right to participate actively ... and exercised that right [identical to JCR LLC DEAL]."

"In our view, however, the determination whether the partnership interest ... is a 'security' does not and should not hinge on the particular degree of responsibility he assumes ... The fact that a partner may chose to delegate his day-to-day managerial responsibilities ... does not diminish in the least his legal right to a voice in partnership matters ... these factors critically distinguish the status of a general partner from that of the purchaser of an 'investment contract' who in law as well as in fact a 'passive' investor. (New York Stock Exchange, Inc. v. Sloan, 394 F.Supp. 1301, 1314 (S.D.N.Y. 1975))."

"The general partners had the power to appoint and remove the managing director [similar to the BUYERS/OWNERS in the JCR LLC DEAL] ... substantial legal right(s) to a voice in partnership matters [TIC PROPERTY ownership matters] ... were not securities, irrespective of the degree to which Kohns and Mundheim [BUYERS/OWNERS] actually chose to exercise their rights."

"I [Honorable Southern District Court Judge Robert L. Carter] hold that Kohns and Mundheim's interests were not 'securities' ... by virtue of their managerial powers and express rights ... and through their efforts to promote its success [similar to BUYERS/OWNERS in JCR LLC DEAL in which PROPERTY DEVELOPMENT depended on the BUYER'S/OWNER'S efforts, not Respondent's]."

"Indeed, after the Hawaii Market Center decision, the federal courts in several circuits adopted this fourth requirement, the absence of managerial control, as the single test of an investment contract. S.E.C. v. Glenn W. Turner Enterprises, Inc., supra, 474 F.2d at 482 (9th Cir. (1973); S.E.C. v. Koscot Interplanetary, Inc., supra, 474 F.2d at 483 (5th Cir. 1974); Nash & Associates, Inc. v. Lum's of Ohio, Inc., 484 F.2d 392, 395 (6th Cir. 1973); In the Matter of Continental Marketing Associates, Inc., 3 CCH Blue Sky L.Rep. P71,022 (Ohio, C.P. 1972).

The leading case of S.E.C. v. Glenn W. Turner Enterprises, Inc. stated this new test as follows:

'Rather we adopt a more realistic test, whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."

"The SEC also adopted the position that an interest is a 'security' only where there is 'no active participation in the management and operation of the the scheme in the part of the investor.' Sec.Act.Rel.4877, CCH Fed.Sec.L.Rep.P77,462 (1967) (emphasis added)."

"In Sec.Act.Rel. 5211, CCH Fed.Sec.L.Rep. 78,446, the Commission stated, with specific reference to schemes:

'The term 'security' must be defined in a manner adequate to serve the purpose of protecting investors. The existence of a 'security' must depend in significant measure upon the degree of managerial authority over the investor's funds retained or given; and performance by an investor of duties related to the enterprise, even if financially significant and plainly contributing to the success of the venture, may be irrelevant to the existence of a security if the investor does not control the use of his funds to a significant degree. The 'efforts of others' referred to in Howey are limited, therefore, to those types of essential managerial efforts but for which the anticipated return could not be produced."

HIRSCH v. DUPONT COMPARED TO THE JCR LLC DEAL

The Hirsch case is analogous to the JCR LLC DEAL because the Honorable Southern District Court's reasoning why neither an "investment contract" or "security" existed is based on the same logical reasoning being: investors (i.e. BUYERS/OWNERS) had control over the investment (i.e. PROPERTY) and authority to make all the decisions thereon as well as the investors (i.e. BUYERS/OWNERS) did not rely on the "essential managerial efforts" of others and the investors (i.e. BUYERS/OWNERS) were "active participants" in the management as well as development of the PROPERTY. In addition, Respondent and Honorable Southern District Court Judge Robert L. Carter agree with the SEC (i.e. Plaintiff in the Respondent's case at bar) which adopted the position that:

"an interest is a 'security' only where there is 'no active participation in the management and operation ... on the part of the investor [BUYERS/OWNERS]" (Sec.Act.Rel. 4877, CCH Fed.Sec.L.Rep. P77,462 (1967)."

The SEC further defined a 'security' in Sec.Act.Rel. 5211, CCH Fed.Sec.L.Rep. 78,446 by stating:

"The existance of a 'security' must depend in significant measure upon the degree of managerial authority ... and performance by an investor of duties related to the enterprise, even if financially significant and plainly contributed to the success of the venture"

In the JCR LLC DEAL at bar, it is indisputable that the OWNERS had and still have 100% full control over the PROPERTY as well as continue to manage the PROPERTY themselves. Undeniably, the BUYERS/OWNERS utilized their unique talents, skills, knowledge and experience to develop the PROPERTY, due to the fact that JCR LLC (i.e. Respondent) lacked these essential characteristics. In fact, when the OWNERS ceased helping develop the PROPERTY, the project came to a grinding halt and continues in that state to present. Therefore, grounded upon the afore-described reasoning, the JCR LLC DEAL is not an 'investment contract' or "security".

In Forman v. Community Services, Inc., 366 F. Supp. 1117 (U.S.D.C. S.D. [NY] 1973), Honorable Southern District Court Judge Pierce of New York, held:

"Fact that shareholder was severely limited in his dealings with his shares or that he must first offer them back to the cooperative corporation was not dispositive on issue of whether the shares were 'securities' within meaning of antifraud provisions of federal securities laws."

"Although the securities laws do not extend to the classic purchase of real estate, this is because the transaction does not meet the full test developed to identify a stock or an investment contract, not because the underlying property is real rather than personal."

"'Share' of state-financed and supervised, nonprofit cooperative housing corporation was not 'investment contract' and was not within antifraud provisions of the federal securities laws."

"'Share' of a ... cooperative housing corporation was not a 'security' within the meaning of federal securities laws."

FORMAN v. COMMUNITY SERVICES COMPARED TO THE JCR LLC DEAL

"Shares" in a cooperative housing unit wherein "Many are husbands and wives who own jointly their interest in a single apartment unit. Thus, altogether, there are occupants of 30 apartments named as plaintiffs" is analogous to the deeded (EXHIBIT C) Tenant-In-Common ("TIC") ownership interests of the BUYERS/OWNERS in the JCR LLC DEAL. Although the "shareholder [OWNER] was severely limited in his dealings with the shares [deeded TIC ownership interests] or that he must first offer them back to the cooperative corporation [the OWNERS all agreed, in the TICA: EXHIBIT J, that OWNERS must first offer their deeded TIC

back to the cooperative corporation [the OWNERS all agreed, in the TICA: EXHIBIT J, that OWNERS must first offer their deeded TIC ownership interests to the other co-owners prior to selling to a third party] was not dispositive ... the shares [deeded TIC ownership interests] were 'securities' within the meaning of ... federal securities laws". Therefore, Respondent agrees with Honorable Southern District Court Judge Pierce's reasoning that the "'shares' of ... housing ... was not a 'security' within the meaning of federal securities laws".

In Wiebolt v. Metz, 355 F.Supp. 255 (U.S.D.C. S.D. [NY] 1973), Honorable Southern District Court Judge Lasker of New York, held:

"[M]aster franchise agreement contemplated that profits, if any, would be derived primarily from the efforts of the franchisee [BUYERS/OWNERS], franchise [PROPERTY development] was not an 'investment contract' and its offer and sale were not covered by Securities Acts."

"[P]laintiff franchisee's [BUYERS/OWNERS] given role was not ministerial but truly active and discretionary [similar to the OWNERS in the JCR LLC DEAL] and as to his franchise area agreement gave him virtually unfettered control [similar to the PA: EXHIBIT C and TICA: EXHIBIT J in the JCR LLC DEAL], franchise would not be an 'investment contract' within the 'risk capital' test and its offer and sale would not be covered by Securities Acts on that ground."

"The essential nature of the agreement and the language of the contract demonstrate plainly that both SBS [defendant] and the franchisee [plaintiff] are intended to have an active role in carrying out its terms [similar to the BUYERS/OWNERS in the JCR LLC DEAL]. This fact distinguishes the master franchise from other arrangements which have been found to be investment contracts for purposes of the securities laws."

"Unlike Joiner and Howey, the situation here does not involve numerous, scattered, ignorant investors. ... Although no prior experience was required of them, the contract anticipated that they [plaintiffs - investors] would receive, at the hands of SBS [defendant], the training necessary to conduct the business [dissimilar to the JCR LLC DEAL wherein the BUYERS/OWNERS possessed the unique talents, skills, knowledge and experience that JCR LLC (i.e. Respondent) lacked regarding development of the PROPERTY."

WIEBOLT v. METZ COMPARED TO THE JCR LLC DEAL

Similar to Wiebolt, the BUYERS/OWNERS (i.e. franchisees) has total cotrol over the PROPERTY and any "profits" (i.e. 5% APR REPURCHASE PREMIUM) that could have been achieved would have been derived solely from efforts of the BUYERS/OWNERS, who possessed the unique talents, skills, knowledge and experience that JCR LLC (i.e. Respondent) lacked. In fact, several BUYERS/OWNERS, Edilberto and Teodocia Santos ("SANTOS") and Afzal Skeikh ("SHEIKH"), possess such specialized talents and skills in the field of medicine, which JCR LLC critically required to successfully design the main building in the Continuing Care Retirement Community ("CCRC"), that in addition to the 5% APR REPURCHASE OPTION fees, JCR LLC paid the afore-described BUYERS/OWNERS extra money to design the main building in the Continuing Care Retirement Community ("CCRC"). Therefore, grounded upon the same legal reasoning employed by Honorable Southern District Court Judge Lasker' holding in Weibolt, the JCR LLC DEAL "was not an "investment contract and its offer and sale were not covered by the securities laws".

SUMMARY OF ANALYSIS OF RELEVANT CASE LAW

In the JCR LLC DEAL, the JCR LLC DEAL is not an "investment contract", and thereby, is not a security, based upon the fact that three(3) of the four(4) prongs of the Howey/Forman Test are not satisfied as follows:

1. PRONG #1: Respondent concedes that Prong #1 is satisfied in the JCR DEAL.

2. PRONG #2: The JCR LLC DEAL is not a "common enterprise" because there was no "pooling" of investment funds to purchase the PROPERTY and each BUYER received a deeded (EXHIBIT E) ownership interest therein, that was separate and distinct from the other BUYERS.

PRONG #3: The BUYERS/OWNERS in the JCR LLC DEAL did not seek purchasing the PROPERTY for profit but, rather, bought the PROPERTY for investment purpose in order to satisfy their Federal and State obligation in conformance with 26 C.F.R. §1031 ("1031 EXCHANGE") as well as use and consume the PROPERTY for personal and/or corporate purpose.

PRONG #4: The "profit", which did not exist is thoroughly discussed herein, would have indisputably been derived from the efforts of the BUYERS/OWNERS, who had the unique talents, expertise, knowledge and experience that Respondent (i.e. JCR LLC) lacked to develop the PROPERTY.

Since all four elements (i.e. PRONGS) of the Howey/Forman Test must be satisfied and three(3) of the four(4) PRONGS are not satisfied, the JCR LLC DEAL is not an "investment contract" (i.e. Security), and thereby, the SEC lacks authority to prosecute Respondent, accordingly.

VERTICAL COMMONALITY

In Revak v. SEC Realty, 18 F.3d 81 (U.S.C.A. 2 cir. [NY] 1994), Honorable Second Circuit Judge Jacobs of the United States Court of Appeals, opined:

> "Some circuits hold that a common enterprise can also exist by virtue of 'vertical commonality', which focuses on the relationship between the promoter and the body of investors. See SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 479 (5th Cir. 1974) ("requisite commonality is evidenced by the fact that the fortunes of all investors are inextricably tied to the efficacy" of the promoter); SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 482 n. 7 (9th Cir.), cert. denied, 414 U.S. 821, 94 S.Ct. 117, 38 L.Ed.2d 53 (1973); Villeneuve v. Advanced Business Concepts Corp., 698 F.2d 1121, 1124 (11th Cir. 1983), aff'd en banc, 730 F.2d 1403 (1984). In an enterprise marked by vertical commonality, the investors' fortunes need to rise and fall together; a pro-rata sharing of profits is required. Two distinct kinds of vertical commonality have been identified: "broad vertical commonality" and "strict vertical commonality". To establish "broad vertical commonality", the fortunes of the investors need to be linked to the efforts of the promoter. See Long v. Shultz Cattle Co., Inc. 881 F.2d 129, 140-141 (5th Cir. 1989). "Strict vertical commonality" requires that the fortunes of investors be tied to the fortunes of the promoter. See Brodt v. Bache & Co., Inc., 595 F.2d 459, 461 (9th Cir. 1978)".

In Dooner v. NMI, 725 F.Supp. 153 (U.S.D.C. S.D. [NY] 1989), Honorable District Court Judge Robert J. Ward opined:

> "While horizontal commonality requires a number of investors, narrow vertical commonality can exist based on a transaction solely between a promoter and a single investor. E.g. Department of Economic Development v. Arthur Anderson & Co., supra, 683 F.Supp. at 1473."

In Marini v. Adamo, 812 F.Supp.2d 243 (U.S.D.C. E.D. [NY] 2011), Honorable District Court Judge Joseph F. Bianco of the Eastern District of New York, opined:

> "The vertical commonality test, for purposes of determining whether a common enterprise exists, as required to qualify as an investment contract security under §10(b), focuses on the relationship between the promoter and the body of investors rather than on the sharing of pooling of funds among investors".

"Under the broad vertical commonality test, for the purpose of determining whether a common enterprise exists, as required to qualify as investment contract security under §10(b), the fortunes of the investors need to be linked to the efforts of the promoter, while strict vertical commonality requires that the fortunes of investors be tied to the fortunes of the promoter".

"To support a finding of strict vertical commonality, for purpose of determining whether a common enterprise exists, as required to qualify as investment contract security under §10(b), a plaintiff must establish that the fortunes of plaintiff and defendants are linked so that they rise and fall together".

"Strict vertical commonality exists, as will show that a common enterprise exists, as required to qualify as investment contract security under §10(b), where there is a one-to-one relationship between the investor and investment manager such that there is an interdependence of both profits and losses of the investment".

"Vertical commonality in contrast [to horizontal commonality], 'focuses on the relationship between the promoter and the body of investors', rather than on the sharing or pooling of funds among investors. Id. Under the broad vertical commonality test, 'the fortunes of the investors need be linked only to the efforts of the promoter", while '[s]trict vertical commonality requires that the fortunes of investors be tied to the fortunes of the promoter".

"To support the finding of strict vertical commonality, a plaintiff must establish that 'the fortunes of plaintiff and defendants are linked so that they rise and fall together'. Jordan (Bermuda) Inv. Co., Ltd. v. Hunter Green Invs. Ltd., 205 F.Supp.2d 243, 249 (S.D.N.Y. 2002) (quoting Dooner v. NMI Ltd., 725 F.Supp. 153, 159 (S.D.N.Y. 1989)); accord In re J.P. Jeanneret Associates Inc., 769 F.Supp.2d 340, 360 (S.D.N.Y. 2011) (where investment manager was to be paid, in part, through a performance fee equal to 20% of the profits in the investment account, defendant's compensation was "dependent on the successful performance of the investment account" and strict vertical commonality accordingly existed because "[i]f profits were not generated in a calendar year, or if the profits did not receive a performance fee" and therefore "financial compensation was linked to the fortunes of the investors"); Walther v. Maricopa Intern. Inv. Corp., No. 97-cv-4916, 1998 WL 186736, at 7 (S.D.N.Y. Apr. 17, 1998) (finding that "success of [plaintiff's] investments were directly tied to the fortunes of the defendant" and strict vertical commonality therefore existed where defendants were to be paid only if [plaintiff's] funds were substantial gains", and "[c]onsequently, if [plaintiff's] funds appreciated in value, the defendants were financially compensated", whereas "if [plaintiff's] investment did not perform well, the defendants were not paid"

"Stated otherwise, strict vertical commonality exists where there is a 'one-to-one relationship between the investor and investment manager' such that there is 'an interdependence of both profits and losses of the investment". Kaplan v. Shapiro, 655 F.Supp. 336, 341 (S.D.N.Y. 1987) (emphasis on original); see also Lowenbraun v. L.F. Rothchild, Uterberg, Towbin, 685 F.Supp. 336, 341 (S.D.N.Y. 1988) (noting that "vertical commonality is present when there is interdependence between broker and client for both profits and losses of the investment" and holding that plaintiff had not established vertical commonality because "profits and losses were not interdependent since the broker allegedly profited from the commissions while plaintiff's suffered losses"); Savino v. E.F. Hutton & Co., Inc., 507 F.Supp. 1225, 1238 (S.D.N.Y. 1981) ("it is plain enough that a vertical relationship, that a vertical relationship, that is, a one-to-one relationship between the investor and the investment manager, is capable of being structured so that the profits and the losses of the two parties are somehow interdependent. In the Court opinion, such a structure is all that vertical commonality means under [SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir. 1973)] and Brodt [v. Bache & Co., 595 F.2d 459, 461 (9th Cir. 1978)]. and is all that Howey requires. Accordingly, the Court concludes that a common enterprise should be found where there is vertical commonality such as is described above".)"

"The Court notes that, in Revak, the Second Circuit declined to reach the issue of whether the existence of strict vertical commonality alone "gives rise to a common enterprise". 18 F.3d at 88. However, a number of district courts in this Circuit, as well as the Ninth Circuit Court of Appeals, have found a showing of strict vertical commoanality to be sufficient to establish a common enterprise. see In re J.P. Jeanneret Assocs., Inc., 769 F.Supp.2d 340, 360 (S.D.N.Y. 2011) (collecting cases); accord Brodt v. Bache & Co., 595 F.2d 459, 461)9th Cir. 1978)."

"The Second Circuit on revak rejected the broad vertical commonality test, which requires that the 'fortunes of the investors ... be linked only to the efforts of the promoter". 18 F.3d at 88 (emphasis in original). Accordingly, to the extent that the holding in Glen-Arden implies that a common enterprise may be established solely through the showing that a plaintiff's fortunes are linked to the work and efforts of an investment manager, the Second Circuit has explicitly rejected such reasoning in Revak."

In Heine v. Colton, 786 F.Supp. 360 (U.S.D.C. S.D. [NY] 1992), Honorable Southern District Court Judge Leisure of New York, opined:

"To establish vertical commonality, and thus to demonstrate a common enterprise for purposes of an investment contract, investor must establish that his fortunes are interdependent, with the fortunes of investment manager".

"The courts of the Southern District of New York have consistantly held that a litigant must establish either horizontal or narrow vertical commonality to demonstrate a 'common enterprise' for the purposes of an 'investment contract". See, e.g. Dooner v. NMI Ltd., 725 F.Supp. 153, 158 (S.D.N.Y. 1989); Perez-Rubio v. Wycoff, 718 F.Supp. 217, 234 (S.D.N.Y. 1989). The horizontal commonality theory 'require[s[plaintiff to show a pooling of invetors' interests in order to show establish a common enterprise". Kaplan v. Shapiro, 655 F.Supp. 336, 339-340 (S.D.N.Y. 1987); accord Prez-Rubio, supra, 718 F.Supp. at 234 ("The funds must actually be pooled".). To establish narrow vertical commonality, the investor must establish that his fortunes are interdependent with the fortunes of the investment manager. Dooner, supra, 725 F.Supp. at 158; Perez-Rubio, supra, 718 F.Supp. at 234 ("an investor must establish not only that his or her fortunes would rise with the promotor's fortunes, but also that their fortunes would fall togehter".)."

In Lowenbraun v. L.F. Rothchild, 685 F.Supp. 336 (U.S.D.C. S.D. [NY] 1988), Hororable Southern District Court Judge Kram opined:

"Vertical commonality between a broker and a client, a prerequisite to showing of common enterprise invested in by plaintiff alleging securities fraud, is present when there is interdependence between broker and client for both profits and losses of investment".

In Kaplan v. Shapiro, 655 F.Supp. 336 (U.S.D.C. S.D. [NY] 1987), Honorable Southern District Court Judge Kram of New York, opined:

"Vertical commonality approach to common enterprise requirement for security under federal las is not satisfied merely by showing link between fortunes of investors and efforts of promoters; rejecting S.E.C. v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir.)".

"Although profits from investors were directly tied to those of investment managers, in that investors were to receive 5% of any profits received by investment managers, no interdependence of losses existed [similar to JCR LLC-BUYER case at bar], so that there could be no 'vertical commonality', and thus, requirement of definition of 'security' under the Securities Act of 1933 and Securities Exchange Act of 1934, where investors explicitly claimed they were not liable for losses [identical to JCR-BUYER case at bar], so that investment managers [no manager in JCR LLC-BUYER case at bar] would necessarily be liable for any losses".

"There is a split among those courts that have applied the vertical commonality approach. The more restrictive approach, which is first enunciated by the Ninth Circuit, holds that vertical commonality exists where 'fortunes of the investor are interwoven and dependent upon the efforts and success of those seeking the investment of third parties". SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 482 n. 7 (9th Cir.), cert. denied, 414 U.S. 821, 94 S.Ct. 117, 38 L.Ed 2d 53 (1973). The Ninth Circuit requires merely that there be a 'direct relation between the success or failure of the promoter and that of his investors". Mordaunt v. Incomco, 686 F.2d 815, 817 (9th Cir. 1982) (emphasis added), cert. denied, 469 U.S. 1115, 105 S.Ct. 801, 83 L.Ed.2d 793 (1985). However, absent such a direct relationship, vertical commonality will not be held to exist. Mechigian v. Art Capital Corp., 612 F.Supp. 1421, 1426 (S.D.N.Y. 1985)".

In Mechigian v. Art Capital, 612 F.Supp. 1421 (U.S.D.C. S.D. [NY] 1985, Honorable Southern District Court Judge Kevin Thomas Duffy or New York, opined:

"With respect to the 'common enterprise' element necessary to finding of an 'investment contract' implicating the securities laws, the broad definition of 'vertical commonality', whereby the requisite commonality is evidenced by the fact that the fortunes of all investors are inextricably tied to the efficacy of the promoter's efforts, is untenable; declining to follow Securities and Exchange Commission v. Continental Commodities, 497 F.2d 516; and Securities and Exchange Commission v. Koscot Interplanary, Inc., 497 F.2d 473".

"When determining whether an investment has satisfied the 'common enterprise' element of the Howey test, courts are divided on which of two basic approaches to apply: 'horizontal commonality' or 'vertical commonality', require plaintiff to show a pooling of the investors' interests in order to establish a 'common enterprise'. See Salcer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 682 F.Supp. 459,460 (3d Cir. 1982), Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 222 (6th Cir. 1980), aff'd on other grounds, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982); Hirk v. Agri-Research Counsel, Inc., 561 F.2d 96, 100-101 (7th Cir. 1977)."

"There is a split in the courts that have applied the 'vertical commonality' approach regarding prcisely what is necessary to satisfy this standard. The courts applying the more restrictive definition state that 'vertical commonality' exists where the 'fortunes of the investor are interwoven with the dependent upon the efforts and success of those seeking the investment or third parties'. Securities and Exchange Commission v. Glenn W. Turner Enterprises, Inc., 474 F.2d at 482 n. 7 (9th Cir.), cert. denied, 414 U.S. 821, 94 S.Ct. 117, 38 L.Ed2d 53 (1973). Thus, the Ninith Circuit appears to acquire merely that there be a 'direct relation between the success or failure of the promoter and that of his investors'. Mordaunt v. Incomoco, 686 F.2d at 817

(9th Cir. 1982), cert. denied, 469 U.S. 1115, 105 S.Ct. 801, 83 L.Ed.2d 793 (1985). However, absent such direct relation, the Ninith Circuit will not find 'vertical commonality'. See Meyer v. Thomas & McKinnon Anchincloss Kohlmeyer, Inc., 868 F.2d 818, 819 (9th Cir. 1982) (No "vertical commonality" in situations where "the promoter continued to profit through commissions even as the account lost money ... [and], had the account been successful, the promoter would not necessarily have shared the benefits because [the investor] could elect to withdraw profits as they accrued".), cert. denied, 460 U.S. 1023, 103 S.Ct. 1275, 75 L.Ed2d 595 (1983); Brodt v. Bache & Co., 595 F.2d 459, 461 (9th Cir. 1978) ("Vertical commonality" does not exist where the brokerage house for a discretionary commodities trading account "could reap large commissions for itself and be characterized as successful, while the individual accounts could be wiped out".)"

"A broader definition of 'vertical commonality' seems to have been articulated by the Fifth Circuit which has held that the 'requisite commonality is evidenced by the fact that the fortunes of all investors are inextricably tied to the efficacy of the [promoter's efforts]'. Securities and Exchange Commission v. Continental Commodities, 497 F.2d 516, 522 (5th Cir. 1974) (quoting Securities and Exchange Commission v. Koscot Interplanetary, Inc., 497 F.2d 473, 479 (5th Cir. 1974). Thus, rather than requiring a tie between the fortunes of investors and the fortunes of the promotersm as is necessitated under the restricted definition of 'vertical commonality', the broader definition merely requires a link between the fortunes of the investors and the efforts of the promoters. Judge Robert J. Ward of this Court [U.S.D.C. S.D. (NY)] has noted that the application of this broader definition of 'vertical commonality' essentially eliminates the 'common enterprise' prong of the Howey Test because the only inquiry required is whether the success or failure of the investment is dependent upon the promoter's efforts - i.e. the third prong of the Howey Test. Savino v. E.F. Hutton & Co., Inc., 507 F.Supp. 1225, 1237-1238 n. 11 (S.D.N.Y. 1981). Because, as a practical matter, the broad definition of 'vertical commonality' renders the second element of the Howey Test meaningless, I must reject it as untenable. I fully concur with Judge Judge ward's observation that '[a]ssuming that the courts have been correct on fastening onto Howey's 'common enterprise' language as an independent component of the Test for the existance of an investment contract, the Court has little doubt that the broad version of vertical commonality is inconsistant with Howey".

"The cases with have addressed this issue in the Southern District are divided on whether 'horizontal commonality' or 'vertical commonality' is required, compare Darrell v. Goodson [1979-80] Fed.Sec.L.Rep. (CCH) 97,349 at 97.325 (S.D.N.Y. 1980) ("horizontal commonality" or a "pooling of the monies of various investors ... [is] necessary to the existence of a 'common enterprise'") with Savino v. E.F. Hutton & Co., Inc., 507 F.Supp. at 1238 ("a common enterprise should be found to exist within the meaning of Howey where

> is vertical commonality ..."); additionally, those courts which have approved of the 'vertical commonality' approach are split as to whether narrow or broad definition should be applied, compare Savino v. E.F. Hutton & Co., Inc., 507 F.Supp. at 1238 n. 11 ("the Court has little doubt that the broad version of vertical commonality is inconsistant with Howey") with Troyer v. Karcagi, 476 F.supp. 1142, 1147-1148 (S.D.N.Y. 1979) (discretionary securities trading accounts which satisfy only the broad definition of vertical commonality held "sufficient to satisfy the common enterprise compoenent of the Howey Test".)"

In Silverstein v. Merrill Lynch, 618 F.Supp. 436 (U.S.D.C. S.D. [NY] 1985), Honorable Southern District Court Judge Whitman of New York, opined:

> "A second approach toward finding a common enterprise focusses on the relationship between the investor and the broker. This perspective has been dubbed 'vertical commonality' and has been interpreted both broadly and narrowly."
>
> "A variety of cases, including some from our own district, have applied a 'broad' vertical commonality test to facts not too dissimilar from those before us and have concluded that a common enterprise could be found. See, e.g., S.E.C. v. Continental Commodities Corp. (5th Cir. 1974) 497 F.2d 516; Troyer v. Karcagi, (S.D.N.Y. 1979) 479 F.Supp. 1142 (discretionary trading account is investment contract); Johnson v. Arthur, Espey, Shearson, Hammill & Co. (S.D.N.Y. 1972) 341 F.Supp. 764; Berman v. Orimex Trading, Inc. (S.D.N.Y. 1968) 291 F.Supp. 701 (test satisfied by promoter's statement that it would make all investment decisions and could earn profit for investor); Matheu v. Renolds & Co. (S.D.N.Y. 1967) 282 F.Supp. 423 (discretionary account is investment contract). Other courts, applying a 'narrow' standard, have rejected a finding of common enterprise on facts similar to those before us. See, e.g., Mordaunt v. Insomco (9th Cir. 1982) 686 F.2d 815, cert. denied (1985) 469 U.S. 1115, 105 S.Ct. 801, 83 L.Ed.2d 793; Kelsaw v. Union Pacific Railroad Co. (9th Cir. 1982) 686 F.2d 819; Brodt v. Bache (9th Cir. 1979) 595 F.2d 459; see also Savino v. E.F. Hutton (S.D.N.Y. 1981) 507 F.Supp. 1225 (rejecting "broad" approach); Mechigian v. Art Capitol Corp. (S.D.N.Y. 1985) 612 F.Supp. 1421 (rejecting "broad" approach)."

In Kaplan v. Shapiro, 655 F.Supp. 336 (U.S.D.C. S.D. [NY] 1987), Honorable Southern District Court Judge Kram of New York, opined:

> "There is a split among those courts that have applied the vertical commonality approach. The more restrictive approach, which was first enunciated by the Ninth Circuit, holds that vertical commonality exists where 'the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or third parties.' SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 482 n. 7 (9th Cir.), cert. denied, 414 U.s. 821, 94 S.Ct. 117, 38 L.Ed.2d 53 (1973). The Ninth Circuit requires merely that there be a 'direct relation between the success or failure of the promoter and that of his investors.' Mordaunt v. Incomco, 686 F.2d 815, 817 (9th Cir. 1982) (emphasis added), cert. denied, 469 U.S. 1115, 105 S.Ct. 801, 83 L.Ed.2d 793 (1985). However, absent such direct relationship, vertical commonality will not be held to exist. Mechigian v. Art Capital Corp., 612 F.Supp. 1421, 1426 (S.D.N.Y. 1985)."
>
> "The Fifth Circuit has articulated a broader interpretation of the vertical commonality approach and held that 'the requisite commonality is evidenced by the fact that the fortunes of all investors are inextricably tied to the efficacy of the [promoter's efforts].' SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 479 (5th Cir. 1974). Rather than requiring tie between the fortunes of the investors and the fortunes of the promoters, as is necessitated under the restrictive approach to vertical commonality, the broader definition merely requires a link between the fortunes of the investors and the efforts of the promoters. Mechigian v. Art Capital Corp., 612 F.Supp. at 1426. Application of the Fifth Circuit's broader definition of vertical commonality essentially eliminates the 'common enterprise' prong of the Howey Test because the only inquiry required becomes whether the success or failure of the investment is dependent upon the promoter's efforts, which is also the third prong of the Howey Test. Savino v. E.F. Hutton & Co., Inc., 507 F.Supp. 1225, 1237-38 n. 11 (S.D.N.Y. 1981)."
>
> "At least two different District Courts in this Circuit have rejected the broad definition of vertical commonality espoused by the Fifth Circuit on the ground that, if the common enterprise component is indeed a full fledged prong of the Howey Test, it must be given some content distinct from Howey's third prong. See Mechigian v. Art Capital Corp., 612 F.Supp. at 1426; Savino v. E,F. Hutton & Co., Inc., 507 F.Supp. at 1237-1238 n. 11 (dictum). This Court [U.S.D.C. S.D. (NY)] agrees and rejects the broad definition of vertical commonality because it negates one of the three prongs of the Howey test."

"The Second Circuit has not decided which approach to whether both approaches - should be employed by courts within its Circuit. And, District Court cases confronting the issue within this Circuit have reached varied results. Compare, e.g., Troyer v. Karcagi, 476 F.Supp. 1142 (S.D.N.Y. 1981) (broad vertical commonality), Savino v. E.F. Hutton & Co., Inc., 507 F.Supp. 1225 (S.D.N.Y. 1981) (restrictive vertical commonality) and Darrell v. Goodson, [1979-1980] Fed.Sec.L.Rep. (CCH) 97,349 (S.D.N.Y. 1980) (horizontal commonality)."

"Under the Ninth Circuit's restrictive vertical commonality approach, however, a common enterprise may be held to exist within the meaning of Howey where there is a one-to-one relationship between the investor and the investment manager and the profits and losses of the two parties are somehow interdependent. Savino v. E.F. Hutton & Co., Inc., 507 F.Supp. at 1238; Brodt v. Bache & Co., 595 F.2d 459, 461 (9th Cir. 1978) (vertical commonality held not to exist where "the success or failure of [the investment manager] does not correlate with individual investor profit or loss"); SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d at 482 n. 7 (vertical commonality held to exist where the financial arrangement if "one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment")."

"It is important consideration that this one-to-one vertical investment relationship must involve an interdependence of both profits and losses of the investment. See Mechigian v. Art Capital Corp., 612 F.Supp. at 1426. This issue typically arises within the context of a broker who can still reap the benefits of commissions and be characterized as successful while the individual accounts are wiped out by losses. In that situation, vertical commonality does not exist because there is no interdependence of both profits and losses. Mardaunt v. Incomco, 686 F.2d at 817; Brodt v. Bache & Co., 595 F.2d 459, 461 (9th Cir. 1978)."

In Hart v. Pulte Homes, 735 F.2d 1001 (U.S.C.A. 6 cir. [MI] 1984), Honorable Senior Circuit Judge Bailey Brown of the United States Court of Appeals, Sixth Circuit, opined:

"Relying on Union Planters National Bank v. Commercial Credit Business Loans, Inc., 651 F.2d 1174 (6th Cir. 1981), cert. denied, 454 U.S. 1124, 102 S.Ct. 972, 71 L.Ed.2d 111 (1981), the district court held that commonality requires a pooling of funds among investors, i.e. 'horizontal' as distinguished from 'vertical' commonality. The district court found nothing in the pleadings supporting the plaintiff's claim that such as common enterprise existed. The court found that the "defendant's nowhere promised to plaintiffs that the defendants would develop these subdivisions successfully [identical to JCR LLC - BUYER/OWNER real estate transaction in case at bar]."

In Dewit v. Firstar, 904 F.Supp. 1476 (U.S.D.C. [IA] 1995), Honorable District Court Judge Bennett, opined:

> "Broad vertical commonality for purposes of determining whether financial arrangement involves 'security' for purposes of federal securities laws, arises when fortunes of investors are linked to effort of promoter, and 'strict vertical commonality' is involved when fortunes of investors are tied to fortunes of promoters."

In Pliskin v. Bruno, 838 F.Supp. 658 (U.S.D.C. [ME] 1993), Honorable District Court Chief Judge Gene Carter opined:

> "To establish a transaction is 'investment contract' to which state and federal securities laws apply, plaintiff's must show investment in common enterprise with profits generated solely from efforts of third party ."
>
> "Narrow vertical commonality analysis for determining whether parties have invested in 'common enterprise' establishing that transaction is 'investment contract', to which state and federal securities laws apply, finds 'common enterprise' when investment manager's fortunes rise and fall with those of investor."

In Lavery v. Kearns, 792 F.Supp. 847 (U.S.D.C. [ME] 1992), Honorable District Court Judge Gene Carter opined:

> "Two tests for vertical commonality in determining whether an investment is an investment contract are 'broad vertical commonality' in which plaintiff must show a link between investor's fortunes and the promoter's efforts and 'narrow vertical commonality' which finds a common enterprise when the investment manager's fortunes fall and rise with those of the investor."
>
> "The second prong of the Howey Test is more difficult to apply, in part because the circuit courts of appeal are not in agreement concerning what is meant by the term 'common enterprise'. Some courts require 'horizonlal commonality', i.e., the pooling of assets from two or more investors into a single investment fund, usually combined with a pro rata sharing of the profits. Hockling v. Dubois, 839 F.2d 560, 566 (9th Cir. 1988), approved en banc, 885 F.2d 1449, 1459 (9th Cir. 1989). Other courts require that there be 'vertical commonality', which focuses not on whether there is an enterprise common to the aggregate of investors, but rather on whether there is a venture common to the dyad of the promoter and the investor."

"The are two tests for vertical commonality, however. To establish so-called 'broad vertical commonality', a plaintiff must show merely a link between the investor's fortunes and the promoter's efforts. SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974). Another test for 'narrow commonality', which is a compromise approach between requiring horizontal commonality and broad vertical commonality, finds a common enterprise when the investment manager's fortunes rise and fall with those of the investor. Savino v. E.F. Hutton & Co., 507 F.Supp. 1225, 1237 (S.D.N.Y. 1981); SEC v. Glenn Turner Enterprises, Inc., 474 F.2d 476 (9th Cir. 1973)."

"In Xaphes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.Supp. 213, 216 (D.Me 1984), this Court, agreeing with a number of other district courts in this circuit, noted that the test for broad vertical commonality was the functional equivalent of the third Howey test, that the investor is led to expect profits solely from the efforts of the promoter. See, id.' Holtzman v. Proctor, Cook & Co., 528 F.Supp. 9, 16, (D.Mass. 1981) (McNaught, J.). Therefore, this Court as well as the others rejected the broader view of vertical commonality since it is essentially eliminates the common enterprise element of the Howey Test."

"The court of Appeals for the First Circuit, like the United States Supreme Court, has not yet spoken on what the appropriate test for a common enterprise under Howey should be. Most of the District Courts in this circuit have required narrow vertical commonality for a finding of common enterprise. See Sampson v. Invest America, Inc., 754 F.Supp. 928, 933 (D.Mass. 1990). The most recent case addressing the horizontal commonality requirement in the context of a land sales and development project, without extensive discussion of the other standards. Rodriguez v. Banco Central, 777 F.Supp. 1043, 1057 (D.P.R. 1991)."

"The agency-like sales agreement does <u>not</u> give rise to a vertical common enterprise any more than does the commission sales relationship of a stockbroker with his client. See Xaphes, 597 F.Supp. at 216. Plainly the person or company receiving the commission can make a profit while the person for whom he is making the transactions incurs a loss."

THE COURT SHOULD DISMISS THE ORDER INSTITUTING PROCEEDINGS ("OIP") GROUNDED UPON THE DOCTRINE OF "UNCLEAN HANDS"

The Doctrine of "unclean hands" is ingrained in the American legal system, which "rightfully closes the doors of a court to one tainted with bad faith relative to the matter it seeks relief". In the case at bar, Respondent, respectfully submits to the Court that "members of the Commission" and Respondent's clients ("CLIENTS"), have "unclean hands", grounded upon aiding, abetting and committing fraud, tax evasion and perjury against the People of the United States of America as well as violations of 17 C.F.R. §200.54 and §200.55. In fact, upon personal information and belief, the United States Department of Justice is allegedly investigating SPILLANE, JANGHORBANI, THOMPSON, STAVRIDES and KWON as well as the United States Internal Revenue Service, New York State and Indiana State Departments of Taxation, are allegedly investigating Respondent's CLIENTS for fraud, tax evasion, and perjury (i.e. signing a false tax return).

FACTS OF THE CASE AT BAR

In 2009, the SEC commenced an investigation of Respondent, by issuing and serving a Subpoena Duces Tecum ("SUBPOENA") demanding that the Respondent produce copies of all business records, commencing from 2003, when he entered the securities industry. The SUBPOENA, Respondent believes was issued by and/or with the knowledge of Margaret Spillane ("SPILLANE"), was in bad faith and overly burdensome to Respondent, forcing him to produce "approximately 90,000 pages of documents (or approximately 30 banker's boxes)" as stated by the SEC's Division of Enforcement ("DOE") Senior Trial Counsel, Alexander Janghorbani ("JANGHORBANI") in his May 19, 2016 letter, which the Court has a copy thereof.

Based upon information, Respondent believes, the SEC (i.e. SPILLANE and/or another SEC employee) and the United States Department of Justice ("DOJ"), performed a thorough investigation and communicated with a number of Respondent's CLIENTS: Albert and/or Ella Abney ("ABNEY"), Teodocia and/or Edilberto Santos ("SANTOS"), Sandra and/or Orville Schmidt ("SCHMIDT"), Dean DelPrete ("DELPRETE"), Afzal Sheikh ("SHEIKH"), Saverio Saverino ("SAVERINO"), Maryann Chernovsky ("CHERNOVSKY"), Patrick and/or Bridgette and/or Patrick Jr. Mitchell ("MITCHELL"), Preston Treiber ("TREIBER"), and Nancy and/or Gilbert Stamey ("STAMEY"). After extensive investigations of Respondent, by both the SEC and DOJ, and neither Department of the United States of America found any wrongdoing by Respondent.

In addition, upon information, Respondent believes, that at least one(1) "member of the Commission [employee(s)]" of the DOE also communicated with at least one employee of the United States Department of Justice ("DOJ") and at least one employee of the Financial Industry Regulatory Authority ("FINRA"), who Respondent believes is Craig Thompson ("THOMPSON") and at least one employee of the Suffolk County District Attorney's Office, who Respondent believes is Thalia Stravides ("STRAVIDES") and/or Lucia Kwon ("KWON").

Upon information provided to Respondent, he believes the following:

1. SPILLANE and JANGHORBANI have full knowledge that the CLIENTS, with the exception of CHERNOVSKY, hereinafter referred to as "1031 EXCHANGERS", each sold at least one(1) piece of real estate ("Relinquished Property: "RLP") and deferred both federal and state taxes by implementing 28 C.F.R. §1031, more commonly known as a "1031 EXCHANGE".

2. SPILLANE and JANGHORBANI have full knowledge that the CLIENTS individually signed their respective Purchase Agreement ("PA": EXHIBIT C), Tenant-In-Common Agreement ("TICA": EXHIBIT J), Power of Attorney ("POA": EXHIBIT D), and Dual Representation Agreement ("DRA": EXHIBIT E) in Respondent's presence (i.e. except Sandra Schmidt, "SCHMIDT", who signed in presence on an Indiana Notary), in CLIENT'S personal or corporate capacity to buy the PROPERTY from John Cline Reservoir LLC ("JCR LLC").

3. SPILLANE and JANGHORBANI have full knowledge that Catherine Quinn-Nolan Esq. ("NOLAN") represented the CLIENTS and STAMEYS (i.e. Nancy and Gilbert Stamey") at the real estate closing, based upon the authority bestowed upon NOLAN by the POAs and DRAs, whereat, NOLAN executed deeds (EXHIBITS F and G) transferring title (i.e. ownership) from the STAMEYS to the CLIENTS, via their individual Limited Liability Companies ("LLC": EXHIBIT H), that were established by NOLAN on CLIENT'S behalf, for the purpose of encapsulating liability therein (EXHIBIT B).

4. SPILLANE and JANGHORBANI have full knowledge that the CLIENTS filed both federal and state tax returns, stating thereon, that the CLIENTS own the real estate located on Delight Road, Lawndale, NC ("PROPERTY").

5. SPILLANE and JANGHORBANI have full knowledge that the CLIENTS, excluding CHERNOVSKY, hereinafter referred to as "1031 EXCHANGERS", implemented tax deferred exchanges, pursuant to 28 C.F.R. §1031 ("1031 EXCHANGE") for the purpose of deferring both Federal and State tax on the sale of their individual Relinquished Properties ("RLP").

6. SPILLANE and JANGHORBANI have full knowledge that the 1031 EXCHANGERS authorized their respective attorney's at the closing (i.e. sale) of their RLP to send the funds ("RLP FUNDS") to a Qualified Intermediary ("QI"), in conformance of 28 C.F.R. §1031.

7. SPILLANE and JANGHORBANI have full knowledge that the QI utilized by ABNEY, SANTOS, SCHMIDT, DELPRETE, SHEIKH, SAVERINO and MITCHELL was First National Qualified Intermediary Corp. ("FNQI CLIENTS")

8. SPILLANE and JANGHORBANI have full knowledge that FNQI was solely owned and solely operated by Donna White, Respondent's high school sweetheart and wife.

9. SPILLANE and JANGHORBANI have full knowledge that 1031 EXCHANGERS, each executed documents such as: 45 Day Notice and Replacement Property ("RPP") Agreement, with FNQI or another QI (i.e. TREIBER) listing the PROPERTY as the 1031 EXCHANGER'S RPP in conformity of 28 C.F.R. §1031.

10. SPILLANE and JANGHORBANI have full knowledge that the 1031 EXCHANGERS granted authorization to transfer their RLP FUNDS, held by FNQI or QI, to NOLAN to be utilized at closing to purchase the PROPERTY.

11. SPILLANE and JANGHORBANI have full knowledge that CHERNOVSKY, personally wrote and signed four(4) checks from her company, that were held by NOLAN, to be distributed at closing when CHERNOVSKY received a deeded (EXHIBITS F and G) ownership interest in the PROPERTY, via her company's owned LLC (EXHIBIT H).

12. SPILLANE and JANGHORBANI have full knowledge that real estate commissions paid to Respondent's company(ies) were paid by <u>seller(s) not CLIENTS</u> and after closing, at which CLIENTS received deeded (EXHIBITS F and G) to their respective LLC (EXHIBIT H), the RLP FUNDS <u>no</u> longer belonged to the CLIENTS (EXHIBIT B).

13. SPILLANE and JANGHORBANI have full knowledge that Respondent did <u>not</u> utilize any of the RLP FUNDS before or <u>after</u> closing for his personal use, as evidenced by sworn statements in affidavits and during the criminal trial testimony, by Christine Lusak, the <u>prosecutor's</u> witness (EXHIBIT B).

14. SPILLANE and JANGHORBANI have full knowledge that the 1031 EXCHANGERS, filed both federal and state tax returns in numerous sequential years, commencing in 2008, stating thereon (Schedules C and D as well as Form 8824) under the penalty of perjury, that the CLIENTS own the real estate located on Delight Road, Lawndale, NC (i.e. PROPERTY).

15. SPILLANE and JANGHORBANI have full knowledge that CHERNOVSKY executed numerous sequential Federal and New York State tax returns, commencing in 2008, under the penalty of perjury, listing the PROPERTY owned by CHERNOVSKY'S company.

16. SPILLANE and JANGHORBANI have full knowledge that the 1031 EXCHANGERS utilized the PROPERTY as their Replacement Property ("RPP") for their individual 1031 EXCHANGES.

17. SPILLANE and JANGHORBANI have full knowledge, bestowed upon them by STAVRIDES and/or KWON, that the deeds relating to the PROPERTY, that were prepared, executed (i.e. Power of Attorney), and filed by CLIENT'S attorney, Catherine Quinn-Nolan Esq. ("NOLAN"), are allegedly invalid, pursuant to STAVRIDES' and KWON'S theory of Respondent's Grand Larceny and Scheme to Defraud ("THEORY"), and thereby, the 1031 EXCHANGER'S 1031 EXCHANGES are allegedly, concurrently, invalid in accord with the THEORY.

18. SPILLANE and JANGHORBANI have full knowledge that if Respondent is truly guilty of Grand Larceny and Scheme to Defraud, the deeds must be invalid.

19. SPILLANE and JANGHORBANI have full knowledge that if the deeds of the PROPERTY are invalid, the 1031 EXCHANGERS are required to file amended federal and state tax returns as well as pay, taxes, penalties and interest on the sale of their RLP, accordingly.

20. SPILLANE and JANGHORBANI have full knowledge that CLIENTS, including 1031 EXCHANGERS, did not amend their federal and/or state tax returns, to date, in accord with invalid PROPERTY deeds, and therefore, CLIENTS either own the PROPERTY (i.e. no tax amended returns, taxes, penalties and interest required) or CLIENTS knowingly, willfully and intentionally committed both federal and state fraud, tax evasion and perjury.

21.SPILLANE and JANGHORBANI have full knowledge that Respondent was licensed by the New York State Departments of Real Estate and Accountancy, to teach federal and state tax law as well as real estate law to professionals such as tax attorneys, Certified Public Accountants (CPA"), accountants, real estate professionals, and New York licensed real estate brokers and agents.

22. SPILLANE and JANGHORBANI have full knowledge that Respondent is regarded by his peers as being one of the leading experts in the United States on the subject matters of 1031 EXCHANGES and Tenant-In-Common ("TIC") property ownership because respondent has spoken at hundreds of real estate conventions and seminars as well as published numerous papers on the subject matters, of which, numerous law schools utilize some of Respondent's published papers to teach their law students about the subject matters.

23. SPILLANE and JANGHORBANI have full knowledge that Respondent's has stated on numerous pleadings, that in Respondent's professional opinion, based upon, full knowledge of 1031 EXCHANGER'S cost basis of their RLP and sales price of their RLP related to their individual 1031 EXCHANGES, the CLIENTS would owe in excess of $4,000,000 in combined federal and state taxes, penalties and interest as well as subject to both federal and state criminal charges, based upon fraud, tax evasion and perjury.

24. SPILLANE and JANGHORBANI have personal knowledge that SAVERINO intentionally, knowingly and willfully fraudulently listed, on his company's (i.e. Homeport Inc.) the purchase price of the PROPERTY as $900,000 rather than $150,000 to deceive the United States Internal Revenue Service and the New York State Department of Taxation.

25. SPILLANE and JANGHORBANI have full knowledge that STAMEY purchased DELPRETE'S Tenant-In-Common ("TIC") ownership interest in "Summit" property sold by Sponsor, American Investment Exchange ("AIE"), located in Charlotte, NC, in 2009 and SUMMIT property was sold in or about 2013, however, DELPRETE took the money from AIE from the sale of the SUMMIT depriving STAMEY therefrom, thereby, DELPRETE committed Grand Larceny in the approximate amount of $200,000.

26. SPILLANE and JANGHORBANI have full knowledge that, based upon their personal knowledge of the fore-described CLIENT'S fraud, tax evasion and perjury, as well as DELPRETE'S Grand Larceny, and <u>not</u> furnishing this information to the proper authorities, SPILLANE and JANGHORBANI, acting as "members of Commission", have aided and abetted the CLIENT'S crimes as well as violated 17 C.F.R. §200.54 and §200.55.

28. Respondent submits to the Court that the OIP should be dismissed pursuant to the doctrine of "unclean hands" grounded upon bad faith, improper behavior, fraud, deceit and unconscionably by SPILLANE, JANGHORBANI, SAVERINO and DELPRETE.

CLAIMANTS ARE BARRED FROM BENEFITING BY A JUDGMENT OF FORFEITURE AGAINST RESPONDENT GROUNDED UPON THE DOCTRINE OF "UNCLEAN HANDS"

1. In 2010, Saverio Saverino ("SAVERINO") and Maryann Chernovsky ("CHERNOVSKY"), whose associated companies were Buyers of real estate located on Delight Road, Lavadelo, NC ("PROPERTY"), sought to sell their deeded (EXHIBITS F and G) Tenant-In-Common ("TIC") ownership interests in the PROPERTY back to Seller, John Cline Reservoir LLC ("JCR LLC"), a Delaware Limited Liability Company, that Respondent, Paul White ("WHITE"), is managing member.

2. Commencing in 2011, Suffolk County Police Department ("SCPD") Detective Kenneth Ripp ("RIPP"), who works in the identity crimes division of the SCPD and knows little about real estate, other than being personally foreclosed upon for a property RIPP purchased on Greenlawn Road, Huntington, NY, communicated with a relative of SAVERINO, who is a law enforcement professional, and RIPP commenced an investigation of WHITE and his associated companies.

3. Commencing in 2011, RIPP personally met with SAVERINO and Maryann Chernovsky ("CHERNOVSKY"), President of Little Shelter Animal Adoption Center Inc..

4. RIPP coerced SAVERINO and CHERNOVSKY, by making false promises to force WHITE (i.e. JCR LLC) to repurchasing the PROPERTY back from them, into furnishing untrue statements (EXHIBIT U), for the sole purpose of having WHITE arrested on July 11, 2011 (EXHIBIT V), for a crime that WHITE did <u>not</u> commit.

5. Thereafter, at least one employee of the Suffolk County District Attorney's Office ("SCDA") contacted WHITE's attorney, Randy Zelin Esq. ("ZELIN") and coercively offered to drop the criminal charges and not seek a Grand Jury indictment against WHITE, if JCR LLC repurchased the PROPERTY back from SAVERINO and CHERNOVSKY.

6. RIPP utilized SAVERINO's and CHERNOVSKY's unsworn untrue statements (EXHIBIT U) to illegally obtain a search warrant by a Suffolk County Judge ("JUDGE").

7. Upon an intensive investigation of the JUDGE, WHITE discovered that the JUDGE was not present in his court, at the time the search warrant was executed, and the JUDGE did not receive a copy of the search warrant application, affidavit in support, or exhibits before the JUDGE's law clerk, stamped the JUDGE's signature on the search warrant, in the JUDGE's absence.

8. Upon intensive investigation, information and belief, the JUDGE never personally reviewed the search warrant, affidavit in support or exhibits attached thereto before the JUDGE's law clerk stamped the JUDGE's signature on the search warrant.

9. Upon extensive investigation, information and belief, the JUDGE is a personal acquaintance of RIPP, having known each other socially during their concomitant "hanging out" at the local fire house near their residence.

10. Upon intensive investigation, information and belief, the JUDGE is estranged from his wife, residing in the lower portion of their house, and frequently "hangs out" at the local fire house with RIPP and others.

11. Commencing in 2011 through 2014, RIPP and at least one other employee of the SCDA, including, but not limited to, Thalia Stavrides ("STAVRIDES") met with SAVERINO, CHERNOVSKY, Albert and/or Ella Abney ("ABNEY"), Afsal Sheikh ("SHEIKH"), Dean DelPrete ("DELPRETE"), Sandra Schmidt A/K/A Sandra K. Schmidt A/K/A Sandra Kroger Schmidt (SCHMIDT"), Teodosia and Edilberto Santos ("SANTOS"), and Patrick Mitchell Sr. and/or Brigtette Mitchell and/or Patrick Mitchell Jr. ("MITCHELL"), hereinafter referred to as the "CLAIMAINTS", coerced and coached CLAIMANTS into not being truthful and candid, during their testimony at the criminal case Grand Jury and subsequent trial, by stating that the CLAIMANTS "did not remember" and/or "did not recall" signing their respective Purchase Agreement ("PA": EXHIBIT C), Tenant-In-Common Agreement ("TICA": EXHIBIT K), Power of Attorney ("POA": EXHIBIT D), and Dual Representation Agreement "DRA": EXHIBIT E), hereinafter referred to as the "DOCUMENTS", for the purpose of falsely alluding, that the CLAIMANTS did not own the PROPERTY.

12. In fact, WHITE states herein, being duly sworn, under the penalty of perjury, that WHITE personally witnessed all CLAIMANTS sign the DOCUMENTS, in his presence, other than SCHMIDT.

13. At the time, the CLAIMANTS signed the DOCUMENTS, WHITE was a licensed New York State Notary, and personally notarized the CLAIMANTS signatures on at least one of the DOCUMENTS and signed other DOCUMENTS, on behalf of JCR LLC, as managing member, with the exception of SCHMIDT, whom WHITE mailed an original set of the DOCUMENTS thereto, SCHMIDT signed same and mailed back the original signed DOCUMENTS to WHITE, as well as SCHMIDT communicated and presented proof to Donna White ("D.WHITE"), owner of First National Qualified Intermediary Corporation ("FNQI"), who notarized SCHMIDT's signature, on at least one paper associated with SCHMIDT's purchase of the PROPERTY.

14. In addition, each CLAIMANT signed, under the penalty of perjury and filed their personal and/or company Federal and State tax returns ("TAX RETURNS"; EXHIBIT J), stating that each CLAIMANT owned the PROPERTY.

15. The CLAIMANTS' statements and testimony furnished to RIPP, STAVRIDES, Grand Jury and at WHITE'S trial in his criminal case, Indictment Number 2710-2012 ("CRIMINAL CASE"), were knowingly false, resulting in WHITE's arrest (EXHIBIT V) and unjust conviction for a crime that he truly did not commit.

16. On or about September, 2012, STAVRIDES and assistant SCDA Lucie Kwon ("KWON"), who works in the same office building as STAVRIDES, co-conspired in a pre-meditated plot, to constructively prevent WHITE from exercising his right to testify before the Grand Jury, by unethically and immorally, performing the following acts:

A. KWON commenced a civil action Index Number 29681-2012 ("CIVIL CASE") and concurrently mislead Honorable Supreme Court Justice Elizabeth H. Emerson into executing an Attachment Order, on September 25, 2012 ("ATTACHMENT ORDER"; EXHIBIT V), seizing all of WHITE's and other defendant's assets and funds, for the primary purpose of crippling WHITE'S defense in the CRIMINAL CASE that was commenced on July 11, 2011 (EXHIBIT V).

B. After KWON cunningly duped Hon. Justice Emerson into signing the ATTACHMENT ORDER (EXHIBIT V) on September 25, 2012, KWON again cleaverly deceived Honorable Supreme Court Justice Emily Pines, after "judge shopping" the prior day and being refused by Judge Denise F. Molia, rather than Hon. Justice Emerson, who was originally assigned and continues to be assigned to the CIVIL CASE, into ordering a hearing for the ATTACHMENT ORDER, in Riverhead, NY, on October 22, 2012 (EXHIBIT Z).

C. Simultaneously, KWON's co-conspirator, STAVRIDES, who works in the same office with KWON, scheduled WHITE'S appearance to testify at the Grand Jury, located in Hauppague, NY, also on October 22, 2012.

17. Prior to Hon. Justice Emerson executing the ATTACHMENT ORDER, KWON, on behalf of Plaintiff, executed and served a plethora of Subpoenas Duces Tecum ("SUBPOENAS") in violation of Article 13 of the New York Civil Procedure Law and Rules ("CPLR"), which states that the SUBPOENAS must be judicially ordered (CPLR §1311-a).

18. The SUBPOENAS KWON executed and served, were directed to one or more of the following persons and/or entities, comprising the group: Debbie Clary D/B/A Millennium Marketing ("CLARY"), Leonard Fletcher D/B/A TGS Engineering ("FLETCHER"), Bradford Tiernan Esq. ("TIERNAN"), Catherine Quinn-Nolan Esq. ("NOLAN"), Alan Lichtenstein ("LICHTENSTEIN"), Hudson City Savings Bank ("HUDSON CITY"), TD Bank ("TD BANK"), Bank of America ("BOA"), Internal Revenue Service ("IRS"), and the New York State Department of Taxation and Finance ("NYDOT").

19. Furthermore, KWON illegally utilized her "subpoena powers" as an officer of the Court, issuing at least one SUBPOENA to persons and/or entities that are located outside of the State of New York, hereinafter referred to as "FOREIGN DOMICILE".

20. The FOREIGN DOMICILES comprise a group consisting of: CLARY, FLETCHER, HUDSON CITY, IRS, TD BANK and BOA.

21. Commencing about 2012, STAVRIDES and/or KWON commenced an unethical and immoral legal strategy in violation of the New York State Code of Professional Conduct and New York State Penal Law §215.10, regarding tampering with Defendant's witnesses, by intimidating and/or threatening them, such that they would not testify on WHITE's behalf at the trial in his CRIMINAL CASE.

22. Prior to Preston Treiber ("TREIBER"), Barbara Fiegas ("FIEGAS"), Louis Rogers ("ROGERS"), Alan Lichtenstein ("LICHTENSTEIN") and Catherine Quinn-Nolan Esq. ("NOLAN"), testifying at the Grand Jury in the CRIMINAL CASE, STAVRIDES, communicated and/or personally met with each, and utilizing

coercive intimidating tactics and/or threats, successfully constructively prevented WHITE's WITNESSES from testifying, on behalf of WHITE, at the Grand Jury and/or trial in the CRIMINAL CASE.

23. STAVRIDES improperly acted in the following ways, regarding the WITNESSES:

A. STAVRIDES intercepted TREIBER and FIEGAS, prior to their testimony, on behalf of WHITE, at the Grand Jury, forcing them to meet with STAVRIDES in her office, trying to intimidate them from testifying at the Grand Jury, on behalf of WHITE, and successfully intimidating them from testifying at the trial in the CRIMINAL CASE (EXHIBIT W).

B. STAVRIDES furnished ROGERS with extremely short notice to testify, before the Grand Jury, on behalf of WHITE, creating a scheduling conflict with ROGERS, who owns and operates an extremely large company, valued in the hundreds of millions of dollars. STAVRIDES refused to reschedule ROGERS appearance at the Grand Jury, even though the Grand Jury was sitting for almost two(2) weeks after ROGERS was scheduled to first appear (EXHIBIT X).

C. STAVRIDES threatened LICHTENSTEIN, that if he did not testify against WHITE, at the Grand Jury, STAVRIDES would indict him for Grand Larceny and Scheme to Defraud, for selling the PROPERTY to SHEIKH.

D. STAVRIDES threatened NOLAN, that if she did not falsely testify against WHITE at the Grand Jury and at trial in the CRIMINAL CASE, STAVRIDES would indict her in the CRIMINAL CASE and have NOLAN disbarred from practicing law because she performed a real estate closing on the PROPERTY, located in North Carolina, for the CLAIMANTS and NOLAN is not licensed to practice Law in the State of North Carolina.

24. In addition, STAVRIDES and/or KWON also intimidated and/or threatened and/or constructively prevented the following persons from testifying on WHITE's behalf at the CRIMINAL CASE TRIAL:

A. STAVRIDES arrested, on false charges, and threatened Donna White ("D.WHITE"), that if she testified on behalf of WHITE, she would be prosecuted for approximately eight(8) C Felonies, carrying a maximum cumulative sentence of 40 to 120 years in prison, for a crime that she did not commit. STAVRIDES, allowed D.WHITE to plea from the afore-mentioned eight(8) C Felonies to a violation and sealed her record, if she agreed not to testify on WHITE's behalf. KWON also threatened D.WHITE, via attorney Christopher Cassar Esq., ("CASSAR"), that KWON was going to forfeit her home if D.WHITE did not sign a stipulation and pay the SCDA approximately $16,000, in extortion money (EXHIBIT AA). Both D.WHITE and CASSAR, personally made the afore-described statements to WHITE, regarding the threats and intimidation of D.WHITE. The Honorable Court has previously determined (EXHIBIT B), after thorough review of all the evidence, that Defendants, such as D.WHITE, did not misappropriate any of CLAIMANT's funds and, therefore, the $16,000 demanded by KWON is illegal extortion money. The Honorable Court should recommend that KWON be charged criminally and investigated by the Grievance Committee for KWON's illegal, unethical and immoral act.

B. STAVRIDES intimidated Nancy and Gilbert Stamey ("STAMEYS") not to testify on WHITE's behalf at the CRIMINAL CASE trial. STAVRIDES continues to try to intimidate the STAMEYS (See EXHIBIT AB).

C. STAVRIDES intimidated Raymond Caliendo, prior to his testimony at the Grand Jury, such that he felt uncomfortable testifying on WHITE's behalf at the CRIMINAL CASE trial.

D. STAVRIDES intimidated former North Carolina Senator, Debbie Clary ("CLARY"), from testifying on behalf of WHITE at the CRIMINAL CASE trial.

E. Upon information and belief, STAVRIDES intimidated Bradford Tiernan Esq. ("TIERNAN"), by threatening to have TIERNAN indicted by the Grand Jury as well as lose his Law license, if he testifed on behalf of WHITE at the CRIMINAL CASE trial.

F. Upon information and belief, STAVRIDES intimidated Leonard Fletcher ("FLETCHER") such that he would not testify on behalf of WHITE at the CRIMINAL CASE trial.

G. Upon information and belief, STAVRIDES intimidated Todd Condiff ("CONDIFF") such that he would not testify on behalf of WHITE at the CRIMINAL CASE trial.

H. Recently, KWON again went "judge shopping", in a desperate last ditch effort to keep the Defendant's assets and funds under seizure in the CIVIL CASE, even after Honorable Justice Emerson released same in the Court's May 1, 2016 Order and Decision (EXHIBIT B) and the Supreme Court Appellate Division, Second Department, entered a Vacatur Order on May 27, 2016 (See Spota v. White et al., Slip.Op. 2016 N.Y. Slip op 74909(U) (5/27/2016). KWON cunningly deceived a newly appointed acting Supreme Court Justice into signing a second Attachment Order (EXHIBIT AC), on June 7, 20160 ("SECOND ATTACHMENT ORDER"), rather than procedurally correctly bringing the SECOND ATTACHMENT ORDER to Honorable Justice Emerson, the Supreme Court Justice, who was originally assigned and remains presiding over the CIVIL CASE. KWON's continued course of misconduct, regarding "judge shopping" is procedurally flawed and violates the Code of Professional Conduct, grounded upon KWON's unethical and immoral act.

I. Upon information and belief, between in 2012 through 2014, STAVRIDES personally met and interviewed Raymond Caliendo ("CALIENDO") and LICHTENSTEIN, at least one time, prior to their Grand Jury testimony. CALIENDO and LICHTENSTEIN provided the following exonerating evidence for WHITE, which STAVRIDES surpressed at the Grand Jury proceeding and intentionally concealed, during discovery in the CRIMINAL CASE, a Constitutional "Brady Violation". The exonerating evidence is as follows:

A. Upon information and belief, CALIENDO stated to STAVRIDES, prior to his Grand Jury testimony, that the following CLAIMANTS: ARNEY, SAVERINO, DELPRETE, SANTOS, SHEIKH, and MITCHELL, worked on the PROPERTY development project in CALIENDO's office, on numerous occasions. CALIENDO is the owner of Art of Form, an architectural firm located in Babylon, NY, that JCR LLC hired to do all of the building design work for the PROPERTY development. CALIENDO's statement to the Grand Jury or at WHITE's criminal trial, would have revealed to the Grand Jury, that the CLAIMANTS, not only had full knowledge of ownership of the PROPERTY, which the CLAIMANTS were coached by STAVRIDES to falsely state otherwise, during their testimony at the Grand Jury and trial. This newly discovered evidence, by WHITE, would have displayed exonerating evidence to the Grand Jury not to indict WHITE and, further, exhibited to the trial jury in the CRIMINAL case not to unjustly convict WHITE for a crime that he truly did not commit.

B. Upon information and belief, LICHTENSTEIN stated to STAVRIDES, that he had personal knowledge of the PROPERTY sale to SHEIKH and was paid a commission, via his company, AllDeb Marketing LLC, for the sale. LICHTENSTEIN further stated to STAVRIDES that he was personally present when SHEIKH signed the Purchase Agreement (EXHIBIT C), Tenant-In-Common Agreement (EXHIBIT H), Power of Attorney (EXHIBIT D), and Dual Representation Agreement (EXHIBIT E). STAVRIDES, knowlingly, willfully and intentionally supressed this exonerating evidence for WHITE, during the Grand Jury proceeding as well as failed to provide same to WHITE for his defense in the CRIMINAL CASE, a Constitutional "Brady Violation".

25. On July 11, 2011, WHITE was arrested on the false charges and personally appeared before the Court in the CRIMINAL CASE approximately twenty-six(26) times prior to October 4, 2013. On or about August 26, 2013, WHITE's attorney, Randy Zelin Esq. ("ZELIN") submitted an application to the Court, withdrawing from representing WHITE in the CRIMINAL CASE, because WHITE could no longer afford to pay his legal services because KWON unfairly

seized all of the Defendant's assets and funds, utilizing false information and pretenses, in the ATTACHMENT ORDER (EXHIBIT Y). Prior to August 26, 2013, WHITE had made reservations to travel from New York to North Carolina with his client, John Clemenza ("CLEMENZA") in order to meet with North Carolina Senators, governmental officials and other persons such as FLETCHER, regarding the PROPERTY development. WHITE, proceeding Pro Se in the CRIMINAL CASE, personally called the Judge's law clerk who told WHITE to write a letter to the judge in the CRIMINAL CASE, requesting the Judge adjorn the next appearance, which was scheduled for October 1, 2013. WHITE wrote the letter, faxed and mailed it to the CRIMINAL CASE Judge and also sent him a copy of the round trip plane ticket, flying from New York to North Carolina, returning October 4, 2013. Unfortunately, due to a mere oversight, WHITE sent a copy of CLEMENZA's plane ticket to the Court, rather than WHITE's own plane ticket, which was identical. STAVRIDES subpoenaed the airline records and had copies of both WHITE's and CLEMENZA's round trip plane tickets. STAVRIDES intentionally, knowingly and willfully was not candid and truthful with the Honorable Court, concealing from the Court, that STAVRIDES had a copy of both WHITE's and CLEMENZA's round trip airline plane ticket reservations, that revealed both WHITE's and CLEMENZA's identical reservations. STAVRIDES appeared in Court, on October 1, 2013, before Honorable Judge Camacho and untruthfully stated to the Court, that WHITE tried to mislead the Court by submitting CLEMENZA's round trip reservation, rather than WHITE's own plane ticket. STAVRIDES intentionally, knowingly and willfully withheld the information, that WHITE's and CLEMENZA's airline reservations were identical. STAVRIDES' cunning untruthfulness, resulted in the Court issuing a fugitive arrest warrant for WHITE, who was arrested on Friday, October 4, 2013 on the PROPERTY, leading the car to travel to the airport to return back home to New York, using the round trip plane ticket. Upon information and belief, several days later, while WHITE was incarcerated in a North Carolina Jail, STAVRIDES personally spoke with the District Attorney ("DA") in Shelby, NC and told him a plethora of untruths,

convincing the DA to recommend to the local judge to hold WHITE on $1,000,000 cash bail, the highest in the county's history, in over 100 years of existence. Thereafter, the SCDA, told the Suffolk County Judge in the CRIMINAL CASE, another plethora of untruths, resulting in the Suffolk County Judge setting an unreasonable unattainable bail of $3,000,000 on WHITE, in violation of his Eighth Amendment right protected by the Constitution of the United States of America.

26. Lastly, the most egregious "unclean hands" exhibited by STAVRIDES and KWON, adversely affected their own clients, the COMPLAINANTS. Both KWON and STAVRIDES, allegedly attended and graduated law school and were taught 1031 EXCHANGES as well as the Code of Professional Responsibility, that became the New York Code of Professional Conduct in 2009. KWON and STAVRIDES have full knowledge that if their theory of invalid PROPERTY deeds was proven correct, the CLAIMANTS would concurrently, be liable for both Federal and State criminality, based on fraud, tax evasion and perjury as well as civilly liable for unpaid taxes, penalties and interest in the approximate amount exceeding $4,000,000 increasing daily. Factually, if the PROPERTY deeds were improperly prepared and/or filed by CLAIMANT's attorney, NOLAN, the PROPERTY deeds could have easily been corrected for a nominal sum of approximately $20.00, by requesting the PROPERTY Seller to re-file corrected PROPERTY deed(s), but instead, STAVRIDES and KWON decided to selfishly sacrificing their own clients, the CLAIMANTS, by continuing WHITE's criminal prosecution attempting to prove that the deeds were invalid, which they are <u>not</u> (EXHIBIT N), rather than protecting their own clients, the CLAIMANTS.

27. Upon personal information and belief, the CLAIMANTS are presently being investigated by the United States Internal Revenue Service and the New York State and Indiana Departments of Taxation. As previously stated herein, if the PROPERTY deeds are invalid, the CLAIMANTS are Federally and State criminally liable for fraud, tax evasion and perjury as well as civilly liable in excess of $4,000,000, grounded upon unpaid taxes, penalties and interest.

In summary, the afore-described illegal, immoral and unethical acts by STAVRIDES and KWOK, in violation of the Code of Professional Conduct, indisputably, constitutes "unclean hands". Thereby, Defendant respectfully requests the Honorable Court to hold the Plaintiff accountable, by "barring its doors" to any relief requested by the Plaintiff.

HISTORY OF "CLEAN HANDS" DOCTRINE

The public policy of the "clean hands" doctrine has its roots grounded in the English Crown's original delegation of its prerogative power of grace to the Chancellor, who was required to exercise the power to enforce the dictates of conscience, fairness and tainted claim. He was refused the aid of equity and relegated to his action at law (See, generally 1 Pomeroy. op. cit., §50). Thus, even in those days, the public policy consideration were not forceful enough to deprive the offensive plaintiff of his legal remedy. Although the differences in form between actions at law and suits in equity have been long abolished in New York State. The rules governing the distinct bodies of common law and equity jurisprudence have survived intact. Indeed, the public policy and good morals, force a Honorable Court to invoke the "clean hands" doctrine, similar to the Chancellor's discretion to reject an equity claim, he regards as tainted. Alologously, the Defendant respectfully requests the Honorable court to reject Plaintiff's requested relief.

CASE LAW IN SUPPORT OF DFEFENDANT'S AGRUMENT THAT PLAINTIFF'S REQUESTED RELIEF SHOULD BE DENIED PURSUANT TO THE DOCTRINE OF "UNCLEAN HANDS"

A complainant, such as Plaintiff, in the case at bar, cannot be permitted to take advantage of its own wrong doing [FN 1]. This maxim is deeply ingrained in the American Justice System's principles of equity [FN 2]. In other words, a Plaintiff should not be permitted to base any claim against WHITE, upon Plaintiff's own inequity [FN 3]. The centuries old doctrine of "unclean hands" ("DOCTRINE") is grounded upon the principle that a litigant cannot be advantaged by its own wrong doing or base a claim upon another's wrong doing. In the CIVIL CASE, based upon indisputable afore-described facts, the Plaintiff, and its clients, CLAIMANTS, have "unclean hands" as follows:

1. CLAIMANTS SAVERINO and CHERNOVSKY made untrue statements (EXHIBIT U) leading to WHITE's unlawful arrest on July 11, 2011 (EXHIBIT V) as well as issuance of an illegally obtained search warrant, in violation of WHITE's Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights, protected by the Constitution of the United States of America as well as Article I of the New York State ("NYS") Constitution.

2. RIPP, an agent of Plaintiff, and STAVRIDES, coerced CLAIMANTS into making false statements to the Grand Jury and in trial of the CRIMINAL CASE, resulting in WHITE's indictment on baseless false charges and unjust conviction.

3. STAVRIDES and KWON, co-conspired, constructively preventing WHITE from testifying on his own behalf, at the Grand Jury, in violation of New York Criminal Procedure Law ("CPL") Section 190 as well as violation of WHITE's Due Process rights, protected by both the Federal and NYS Constitutions.

4. KWON cunningly mislead, using false information, Honorable Supreme Court Justice Elizabeth Emerson into signing a First Attachment Order ("FIRST ATTACHMENT ORDER": EXHIBIT Y), seizing all of WHITE's and other defendant's, in the CIVIL CASE, funds and assets. KWON cunningly located an unaware Judge, into scheduling the Confirmation hearing for the FIRST ATTACHMENT ORDER on the exact same day that KWON's co-conspirator, STAVRIDES, scheduled WHITE's appearance to testify before the Grand Jury, thus, constructively preventing WHITE from either appearing at the Grand Jury or having his and other defendant's funds assets remain seized, in violation of WHITE's Federal and NYS Constitutional rights.

5. KWON purposefully, unethically and immorally, commenced the CIVIL CASE against WHITE for the sole purpose of seizing WHITE's funds and assets to compromise his ability to defend himself, in both the CIVIL CASE and CRIMINAL CASE, as well as apply undue pressure, attempting to coerce WHITE into a guilty plea for a crime that he did <u>not</u> commit.

6. KWON illegally issued Subpoenas Duces Tecum to to obtain evidence in the CIVIL CASE, in violation of Article 13 of the New York Civil Practice Rules and Law ("CPLR"), CPLR §1311-a, that requires all SUBOPOENAS to be judicially ordered.

7. KWON illegally utilized her "subpoena powers", as an Officer of the Court, to obtain information from person(s) and/or company(ies) outside of New York State.

8. STAVRIDES and/or at least one other agent or employee of the Suffolk County District Attorney's Office ("SCDA") and/or the Suffolk Police Department ("SCPD"), unduly influenced and intimidated WHITE's witnesses, in violation of Federal Law and New York Penal Law ("PL") Section 215.10, regarding "Witness Tampering", that is also a violation of WHITE's Due Process rights, pursuant to both the Federal and State Constitutions.

9. STAVRIDES illegally, immorally and unethically communicated with WHITE's witnesses, TREIBER, FIEGAS and ROGERS, attempting to intemidate them from testifying on WHITE's behalf at the Grand Jury as well as constructively prevented ROGERS from testifying therein.

10. STAVRIDES constructively prevented WHITE's key witnesses, D.WHITE, LICHTENSTEIN, NOLAN, TREIBER, FIEGAS, TIERNAN, CONDIFF, CLARY, FLETCHER, STAMEYS, CALIENDO, and A.ABNEY.

11. STAVRIDES made false statements to the Cleveland County, North Carolina District Attorney to set an unreasonably high excessive bail on WHITE in violation of his Eighth Amendment right.

12. STAVRIDES and/or another Assistant SCDA made false statements to at least two(2) Suffolk County Judges, resulting in no bail set and, thereafter, setting an unreasonably high excessive bail on WHITE in violation of his Eighth Amendment right.

13. Recently, KUON, again, cunningly duped a newly appointed judge into signing a second Attachment Order ("SECOND ATTACHMENT ORDER": EXHIBIT AC), after Honorable Supreme Court Justice Emerson (EXHIBIT B) and the Supreme Court, Appellate Division, Second Department, Ordered WHITE's and other defendant's assets and funds released in the CIVIL CASE.

Pursuant to the DOCTRINE of "unclean hands", an Honorable Court will <u>not</u> lend itself to a perpetration of a wrong [FN 4]. Based upon this principle, Plaintiff should be denied, by the Court, from maintaining an action, by the Plaintiff's own misconduct [FN 7]. In order to come into Court with "clean hands", Plaintiff's own conduct must <u>not</u> have been characterized by want of good faith or by a violation of the principles of equity in righteous dealing, as Plaintiff has exhibited in both the CIVIL CASE and CRIMINAL CASE [FN 7]. The "clean hands" maxim applies to

unconscionable, immoral, inequitable, or unconscientious contact, that Plaintiff unquestionably exhibited in both the CIVIL CASE and CRIMINAL CASE [FN 8]. Where a Plaintiff acts in a manner that is offensive to good conscience and justice, it will be completely without recourse in the Court of equity, regardless of what its rights may be [FN 9]. The Court's enforcement of the DOCTRINE, shuts the Court's doors against the Plaintiff, seeking to set the judicial machinery in motion to obtain any remedy, such as forfeiture against Defendants or criminal conviction against WHITE, because Plaintiff violated conscience or good faith, or equitable principles, in prior conduct, regarding the subject matter upon which the action is based [FN 10]. Applying the principle of "unclean hands", equity will <u>not</u> lend its aid to a litigant, such as Plaintiff, that is guilty of any reprehensible conduct related to the subject matter of the case at bar [FN 11]. The primary purpose of the DOCTRINE, that one (i.e. Plaintiff) who comes into equity <u>must</u> come with "clean hands" is for the Honorable Court to deny to the suitor who is <u>not</u> of good moral character [FN 12]. Plaintiffs malicious inequitable bad faith conduct, in violation of the DOCTRINE, caused irreparable harm to WHITE, who is incarcerated for a crime that he <u>truly</u> did <u>not</u> commit, WHITE is unfairly burdened with a $2,975,000 restitution order, and WHITE has had his assets and funds seized since September 25, 2012 (EXHIBIT Y). In other words, Plaintiff "profited" by its "unclean hands" by unconstitutionally obtaining a seizure of WHITE's and other defendant's funds and assets, as well as unjust conviction of WHITE.

A Court may exercise a wide range of discretion in refusing to aid a litigant coming into Court with "unclean hands" [FN 13]. Courts of equity, are <u>not</u> restrained in applying the DOCTRINE by any limitation that tends to trammel the free and just exercise of discretion [FN 14]. Justification, for the Court's induction of the DOCTRINE, is established, when the Plaintiff exhibits an act or conduct, alleged by the complainant (i.e. WHITE), was done in its own self-interest [FN 15] or for its own gain [FN 16], gain or

advantage [FN 17], or in the interest of another, such as CLAIMANTS [FN 19], which is indisputably proven by the facts WHITE presented herein. On an application for relief by the Plaintiff, the Court must take into consideration whether the Plaintiff has come before it with "clean hands" [FN 19] and must deny the relief requested, where the Plaintiff is not acting in good faith or has "unclean hands" (FN 20]. Wrongful behavior by the Plaintiff, in connection with the case at bar, must preclude relief sought [FN 21], and thus, a Plaintiff's knowledge of or active participation in the improper conduct (i.e. Plaintiff has both), serves as the basis for the Court's denial of Plaintiff's request [FN 22]. Indeed, a Plaintiff that acts in bad faith and resorted to trickery and deception, such as Plaintiff, or is guilty of injustice or unfairness, regarding the subject matter of the case at bar, must be denied its requested relief, even if the Plaintiff has not violated the law, since the misconduct, barring the requested relief, need not be of such nature as to be punishable as a crime or to constitute the basis of a legal action [FN 23]. Where it appears that the Plaintiff requesting relief, violated the DOCTRINE, with her "eyes wide open", the Court must not rush to the Plaintiff's aid, even though the Plaintiff's situation is hapless [FN 23].

In summary, the DOCTRINE is applicable when the complainant (i.e. WHITE) shows that the plaintiff was guilty of immoral or unconscionable conduct [FN 24], which is related to the subject matter in litigation [FN 25] and the complainant (i.e. WHITE) was injured by the Plaintiff's misconduct [FN 26]. The test that the Court should rely upon, regarding the DOCTRINE, is whether the Plaintiff's conduct, relating to the subject matter of the litigation, is against the public interest, from the standpoint of public morality, which WHITE has proven by indisputable facts herein [FN 27]. The compass, by which the Plaintiff's questioned conduct is measured, is a moral one, and the Plaintiff's acts WHITE complained of, need not be criminal nor actionable at law but merely be willful and unconscionable or be of such nature,

that an honest fair-minded person would denounce such Plaintiff's actions as being morally and ethically wrong [FN 28]. The Honorable Court's review of the indisputable facts and evidence, presented by WHITE, regarding the Plaintiff's immoral, unethical and unconscionable acts, were willfully, knowingly and intentionally committed by Plaintiff, would surely be deemed, by any ordinary person, to be against the public interest and violation of public morality [FN 27]. Therefore, the Honorable Court should dismiss the CIVIL CASE, or alternatively deny Plaintiff's request for forfeiture against WHITE and other defendants in the CIVIL CASE. The Honorable Court should <u>not</u> favor Plaintiff, who acts in a manner that is shocking to the Court's conscience, and neither should the Court permit equity to be available to one who acts in a manner that is oppressive or unjust or whose conduct is sufficiently egregious so as to prohibit PLAINTIFF from asserting its legal rights against WHITE [FN 29]. Thus, where Plaintiff has committed breaches of fiduciary duties owed to WHITE, the doctrine of "unclean hands" applies to bar the plaintiff from seeking relief requested [FN 30]. The Plaintiff's misconduct that WHITE complains thereof herein, should bar Plaintiff's requested relief by the Honorable Court.

CONCLUSION

In conclusion, Respondent has presented indisputable facts), proving Plaintiff's reliance on CRIMINAL CASE prosecutor's "unclean hands", beyond a reasonably doubt. Although, there are a plethora of immoral, unethical and illegal acts committed by CRIMINAL CASE prosecutor, the most egregious was to utilize the Honorable Court in the CIVIL CASE to constructively prevent WHITE from exercising his right to testify before the Grand Jury on October 22, 2012, by KWON and STAVRIDES, co-conspiring with one another, to schedule WHITES appearance in Hauppague, NY to testify before the Grand Jury (EXHIBIT AD) and KWON's "judge shopped" FIRST ATTACHMENT ORDER (EXHIBIT Y) confirmation hearing date, also, on October 22, 2012 (EXHIBIT Z) in Hivernead, NY, approximately forty-five(45) minutes to one(1) hour away from Hauppague. KWON's knowledge and STAVRIDES' coercively coaching the CLAIMANTS to falsely testify, in unison, by stating, at the Grand Jury and trial in the CRIMINAL CASE, that the CLAIMANTS "did not remember" signing the DOCUMENTS (EXHIBITS C, D, E and K), regarding the purchase of PROPERTY, knowing that the CLAIMANTS listed the PROPERTY on their personal and/or corporate, Federal and State tax returns (EXHIBIT J). STAVRIDES unethically, immorally and illegally intimidated and constructively prevented WHITE's witnesses from testifying on his behalf, at the Grand Jury proceeding and at trial in the CRIMINAL CASE, in violation of both the Federal and New York State Constitutions as well as violation of New York State Penal Law Section 215.10. STAVRIDES made false statements to the Cleveland County District Attorney, Judge Camacho and Judge Jones, causing them to either unconstitutionally fail to set bail or set excessive bail in violation of both the Federal and New York State Constitutions. KWON's continues her course of unethical and immoral conduct, regarding "judge shopping" (EXHIBITS Y and AC) to futilely maintain defendant's assets and funds in the CIVIL CASE, under seizure. Lastly, both KWON'S and STAVRIDES' selfish, self-centered, immoral, unethical and self-serving sacrifice of their own clients, the CLAIMANTS,

subjecting them to both Federal and State criminal liability for fraud, tax evasion and perjury as well as further subjecting the CLAIMANTS to combined Federal and State civil liability, in excess of $4,000,000, for unpaid taxes, penalties and interest, because KWON's and STAVRIDES' insatiable desire to convict WHITE, at all costs, rather than correcting the PROPERTY deed for a mere $20.00, if their invalid deed theory was correct, which it is not (EXHIBIT H). KWON's and STAVRIDES' misbehavior, as Officers of the Court, should be severely punished by by the Honorable Court, denying Plaintiff's requested relief and recommending the Grievance Committee, in the 10th Judicial Department, to investigate KWON's and STAVRIDES' unethical and immoral violations of the Code of Professional Conduct. Failure by the Honorable Court to punish the Plaintiff, pursuant to the doctrine of "unclean hands", will undermine the integrity of the entire legal profession, by condoling a litigant's misconduct, that "she who lies and cheats the best wins". Respondent respectfully requests that the Honorable Court not condone Plaintiff's egregious behavior in the public's best interest.

"UNCLEAN HANDS" #1

SPILLANE, JANGHORBANI AND RESPONDENT'S CLIENTS HAVE "UNCLEAN HANDS" BASED UPON THE FACTS THAT CLIENTS COMMITTED FRAUD, TAX EVASION AND PERJURY AGAINST THE UNITED STATES OF AMERICA AND THE STATES OF NEW YORK AND INDIANA SPILLANE AND JANGHORBANI HAVING FULL KNOWLEDGE OF THE CRIMINAL ACTS, AND, THEREBY, AIDED AND ABETTED THE CLIENTS' COMMISSION AND PERPETUATION OF THE FEDERAL AND STATE CRIMES BY NOT DISCLOSING SAME TO THE PROPER AUTHORITIES

In 2009 or 2010, Respondent furnished the SEC (i.e. SPILLANE) all information ("DOCUMENTS") regarding the JCR LLC DEAL, pursuant to a Subpoena Duces Tecum, issued by the Division of Enforcement ("DOE"). Contained within the DOCUMENTS, Respondent furnished the DOE (i.e. SPILLANE), was all Respondent's Clients' ("CLIENTS") information regarding the JCR LLC DEAL, including, but not limited to, information that all the CLIENTS, with the exception of CHERNOVSKY (i.e. 1031 EXCHANGERS) availed themselves of tax deferment, pursuant to 28. U.S.C. §1031. Concurrently with the SEC investigation, the United States Department of Justice ("DOJ") and United States Postal Service ("USPS") also conduced intensive investigations of Respondent. The DOJ also issued a Subpoena Duces Tecum, similar to the SEC, requiring Respondent to provide copies of all business records from 2003 to date. The Financial Industry Regulatory Authority ("FINRA") aslso demanded Respondent produce copies of all docuemnst involving the CLIENTS. The DOJ and FINRA, were both supplied with the same information as the SEC, involving the CLIENTS, including the DOCUMENTS. In addition, the DOJ, USPS and FINRA interviewed most, if not all, of the CLIENTS during their investigations.

1. Based upon information, Respondent believes, the DOE (i.e. SPILLANE and JANGHORBANI) acquired a copy of the DOJ's, USPS's and FINRA's investigative reports ("IR"), which contains relevant material being exhonorating evidence, concerning Respondent and CLIENTS.

2. Indisputably, the DOE (i.e. SEC) intentionally and knowingly, did not furnish the Respondent with the IR, pursuant to the discovery demand Motions under Rules 220(d), 230 and 232, that were properly served upon the DOE.

3. Upon Information, Respondent believes, the DOE (i.e. SPILLANE and/or JANGHORBANI) communicated and continue to communicate with at least one employee of the Suffolk County District Attorney's Office.

4. Based upon information, Respondent believes that the at least one employee is Thalia Stavrides ("STAVRIDES") and/or Lucie KWON ("KWON").

5. Grounded upon information, Respondent believes that STAVRIDES and/or KWON have furnished the DOE (i.e. SPILLANE and/or JANGHORBANI) information regarding the 1031 EXCHANGERS, relating their 1031 EXCHANGES and personal and/or corporate tax returns which lack any amendments and payments of Federal and/or State of New York and/or Indiana taxes, penalties and interest estimated to be approximately $4,000,000, resulting from their "failed" 1031 EXCHANGE, related to the Respondent's "Grand Larceny" conviction, grounded upon alleged "invalid" PROPERTY deeds that were prepared, executed and filed by CLIENT'S attorney, NOLAN.

6. Indisputable facts exists that SPILLANE and JANGHORBANI had and have full knowledge that the CLIENTS committed fraud, tax evasion and perjury (i.e. filing a false tax return) against the "public" of the United States of America as well as the "people" of the States of New York and Indiana and, thereby, SPILLANE and

JANGHORBANI, acting in concert with each other, as accessories to the commission of both Federal and State crimes with CLIENTS, by aiding and abetting CLIENTS commission and perpetuation of the Federal and State crimes of fraud, tax evasion and perjury. Undeniably SPILLANE and JANGHOBANI have "unclean hands" grounded upon the fact that they had and continue to have full knowledge of commissions of crimes related to matters in the case at bar.

Therefore, grounded upon SPILLANE's and JANGHORBANI's being accessories to the CLIENTS Federal and State crimes, and CLAIMANT'S commission thereof, the SEC's Order Instituting Proceedings ("OIP") should be dismissed by the Court, pursuant to the Doctrine of "Unclean Hands", whereby, "He [she] who comes into court must come with 'clean hands' and their hands must remain 'clean'" (See Precision Instrument v. Automotive Maintenance, 324 U.S. 806, 65 S.Ct. 993, 89 L.Ed. 1381, 65 U.S.P.Q. 133 (U.S. [IL] 1945); Keystone Drilling Co. v. General Excavator Co., 290 U.S. 245, 246, 54 S.Ct. 147, 148, 78 L.Ed. 293 (U.S. [OH] 1933); Yuille v. American Home Mortg., 483 Fed.Appx. 132 (U.S.C.A. 6 Cir. [MI] 2012); Samsung v. Ranbus, 523 F.3d 1374, 86 U.S.P.Q.2d 1604 (U.S.C.A. Fed.Cir. [VA] 2008); Tempo Music v. Myers, 407 F.2d 503, 160 U.S.P.Q. 707 (U.S.C.A. 4 Cir. [NC] 1969); Salesmograpgh v. Offshore Raydist, 263 F.2d 5, 119 U.S.P.Q. 146 (U.S.C.A. 5 Cir. [LA] 1958); Strey v. Devine's, 217 F.2d 187, 103 U.S.P.Q. 289 (U.S.C.A. 7 Cir. [IL] 1954); In Estate of Lennon v. Screen Creations, 939 F.Supp. 287 (U.S.D.C. S.D. [NY] 1996); Federal Folding v. National folding, 340 F.Supp. 141, 172 U.S.P.Q. 221 (U.S.D.C. S.D. [NY] 1971); Hershey Creamery v. Hershey Chocolate, 269 F.Supp. 45, 11 Fed.R.Serv.2d 1440, 153 U.S.P.Q. 794 (U.S.D.C. S.D. [NY] 1967); Patsy's Italian Restaurant v. Banas, 575 F.Supp.2d 427 (U.S.D.C. E.D. [NY] 2008); International Union v. Local Union No. 589, 693 F.2d 666, 111 R.R.M.(BNA) 3106, 95 Lab. Cas. 13, 879 (U.S.C.A. 7 Cir. 1982); Borden v. Occidental Petroleum, 381 F.Supp. 1178, 182 U.S.P.Q. 471 (U.S.D.C. S.D. [TX] 1974); Jack Winter v. Koratron, 375 F.Supp. 1, 181 U.S.P.Q. 353 (U.S.D.C. N.D. [CA] 1974); Hall v. Wright, 125 F.Supp. 269, 103 U.S.P.Q. 16 (U.S.D.C. S.D. [CA] 1954).

ARGUMENT #1

CLAIMANTS RECEIVED "WHAT THEY BARGAINED FOR" AND THEREBY, PLAINTIFF IS NOT ENTITLED TO LIFETIME BAR FROM SECURITIES INDUSTRY AGAINST RESPONDENT BASED UPON LACK OF WRONGDOING BY RESPONDENT AND, FURTHER, GROUNDED UPON THE DOCTRINE OF "UNJUST ENRICHMENT"

The quintessential elements of the case at bar, that the Honorable Court must decide, are the following:

1. Did Claimants (i.e. Respondent's Clients) receive valid deeded Tenant-In-Common ("TIC") ownership interests in real estate located on Delight Road, Lawndale, NC 28090, hereinafter referred to as the "PROPERTY"?

2. If the Claimants did not receive valid deeded TIC ownership interests in the PROPERTY, is Respondent or a third party responsible?

3. If the Claimants did not receive valid deeded TIC ownership interests in the PROPERTY, did Respondent or a third party financially benefit therefrom?

4. If the Claimant's did received valid deeded TIC ownership interests in the PROPERTY, who paid the commission to the Respondent - Seller(s) or Buyers (i.e. Claimants)?

5. Did Respondent misappropriate any of Claimant's funds in the real estate transaction, hereinafter referred to as the "JCR LLC DEAL", in which Buyers, including Claimants, purchased valid deeded TIC ownership interests in the PROPERTY?

QUESTION #1

DID CLAIMANTS RECEIVE A VALID DEEDED TENANT-IN-COMMON ("TIC") OWNERSHIP INTEREST IN REAL ESTATE LOCATED ON DELIGHT ROAD, LAWNDALE, NC 28090 ("PROPERTY")?

1. Indisputably, the Plaintiff's case at bar, must prove by a preponderance of the evidence, that Respondent, not a third party, had Mens Rea (i.e. mental culpability) as well as was personally responsible for any wrongful taking of Claimant's (i.e. BUYER'S) property, which consists of the funds that BUYERS utilized to purchase the PROPERTY.

2. Unquestionably, the "wrongful taking", in the case at bar, is solely grounded upon whether the Claimants (i.e. BUYERS) received a valid deeded TIC ownership interest in the PROPERTY.

3. Logically, if the PROPERY deeds are valid, the BUYERS (i.e. Claimants) received "What they bargained for" and there was no wrongful taking of Claimant's (i.e. BUYER'S) property (i.e. Funds).

4. Conversely, if the Claimants (i.e. BUYERS) did not receive valid TIC ownership interests in the PROPERTY, the Honorable Court must decide the question, is Respondent and/or a third party responsible for the event, Actus Reas (i.e. prohibited act) as well as did Respondent and/or third party financially benefit from the "wrongful taking"?

5. There are essentially two(2) parcels of real estate that constitute the PROPERTY.

6. The first is a twenty-six (26) acre parcel of real estate, that Nancy and Gilbert Stamey ("STAMEYS") sold to Grey and Susan Kimmel ("KIMMELS"), for the approximate sum of one hundred and eight-four thousand dollars ($184,000) in 2007, hereinafter referred to as the "KIMMEL PROPERTY".

7. John Cline Reservoir LLC ("JCR LLC") purchased the KIMMEL PROPERTY from the KIMMELS in 2008, for the sum of two hundred and ten thousand dollars ($210,000).

8. The second real estate area consists of three (3) geographically distinct parcels: approximately fifty-five (55) acres, fifty-six (56) acres and one hundred sixty-three (163) acres, cumulatively totalling approximately two hundred seventy-four (274) acres, hereinafter referred to as the "STAMEY PROPERTY".

9. In 2008, JCR LLC entered into a contract of sale ("SALES CONTRACT") with the STAMEYS to purchase the STAMEY PROPERTY for approximately three million five-hundred thousand dollars ($3,500,000).

10. In 2008, JCR LLC entered into multiple contracts of sale, hereinafter referred to as "PURCHASE AGREEMENTS" or "PA", with first BUYERS (i.e. Claimants), at a sales price of five million seven hundred thousand dollars ($5,700,000), for the PROPERTY.

11. All BUYERS also personally, or on behalf of their corporation, executed their respective Power of Attorney ("POA": EXHIBIT D), Dual Representation Agreement ("DRA": EXHIBIT E) and Tenant-In-Common Agreement ("TICA": EXHIBIT K), hereinafter referred to as the "DOCUMENTS".

12. Each BUYER personally, or on behalf of their corporation, executed their respective DOCUMENTS in the presence of Respondent, with the exception of Sandra Schmidt A/K/A Sandra Kroger Schmidt A/K/A Sandra K. Schmidt ("SCHMIDT"), to whom Respondent personally sent an original set of the DOCUMENTS thereto and Respondent personally received executed original DOCUMENTS, sent to Respondent by SCHMIDT.

13. The POA (EXHIBIT D) and DRA (EXHIBIT E) that each BUYER (i.e. Claimant) executed granted attorney Cathleen Quinn-Nolan ("NOLAN") the authority to represent each BUYER in the real estate transaction, wherein the BUYERS received deeded TIC ownership interests in the PROPERTY, hereinafter referred to as the JCR "LLC DEAL".

14. The STAMEYS also each executed a Power of Attorney ("POA") and Dual Representation Agreement ("DRA"), authorizing NOLAN to represent them at closing in the JCR LLC DEAL.

15. In fact, NOLAN admits, under oath, representing STAMEYS at closing, in the JCR LLC DEAL, and executing deeds to the STAMEY PROPERTY on their behalf (EXHIBIT Q), transferring ownership from the STAMEYS to the BUYERS.

16. NOLAN also admits, under oath (EXHIBIT Q), that she represented JCR LLC, at the closings, when NOLAN transferred ownership from the STAMEYS to the BUYERS. NOLAN only represented JCR LLC for a "split second", during closings in the JCR LLC DEAL. JCR LLC, which was, simultaneously, the Buyer of the STAMEY PROPERTY, pursuant to the SALES CONTRACT and also Seller of the STAMEY PROPERTY, pursuant to the PURCHASE AGREEMENTS (EXHIBIT C) at the closings in the JCR LLC DEAL, and thus, JCR LLC briefly, for a "split second", owned transient title to the STAMEY PROPERTY at the closings. This common type of real estate transaction is commonly known as a "Simultaneous Closing", whereat a first buyer (JCR LLC) purchases real estate from a first seller (STAMEYS) and, briefly thereafter, first buyer (JCR LLC) acts as second seller, transferring ownership of the real estate to a second buyer (BUYERS/Claimants). This normal and customary "Simultaneous Closing" functions to eliminate any confusion, concerning improperly filing sequential deeds as well as eliminates double payment of any fees, taxes and other expenses associated with buying, selling and/or recording real estate ownership (i.e. deed).

HENRY MITCHELL, A SELF-PROFESSED "TITLE EXPERT"
FALSELY TESTIFIED, UNDER OATH, BY CONTRADICTING HIMSELF

17. Henry Mitchell ("MITCHELL"), Plaintiff's self-professed "title expert" testifies, under oath, to the following:

"ADA Thalia Stravides ("STRAVIDES"): Mr. Mitchell, where is your office located, which county?

MITCHELL: In Wake County.

STRAVIDES: And where is Wake County in relation to Cleveland County?

MITCHELL: Two-and-a-half hours east of Cleveland County.

STRAVIDES: In the course of your profession as a real estate attorney, approximately how many times have you conducted title searches that involve real property located in Cleveland County?

MITCHELL: I would say hundreds of times, I personally have conducted title searches in that county.

STAVRIDES: When you [personally] conduct those title searches, in what way does it involve reviewing the deeds that were recorded in Cleveland County?

MITCHELL: For those searches, I would [personally] review deeds in Cleveland County."
(EXHIBIT R: page 1749, lines 4-23)

"STAVRIDES: My question is, what, if any, types of documents does the search include that are recorded with the Cleveland County register of deeds?

MITCHELL: We would review [in person] a number of documents. There are documents on record in the register of deeds office in Cleveland County that include ... We also look at [in person] the records at the clerk of court's office who's the repository for records relating to civil actions ... We would look at [in person] tax records from the municipality or county. We would look at [in person] zoning, building permits ... those types of matters." (EXHIBIT R: page 1751, line 20 through page 1752, line 18)

18. Thereafter, MITCHELL admits that he falsely testified, by stating:

"Chirstopher Cassar ("CASSAR"): Did you personally appear at Cleveland County Register's office in this case?

MITCHELL: No.

CASSAR: Did you speak to any person at the Cleveland County register's office in connection with this case?

MITCHELL: No."
(EXHIBIT R: page 1846, line 21 through page 1847, line 2)

"CASSAR: What is the address for that register of deeds in Cleveland County?

MITCHELL: I have no idea.

CASSAR: And you just said that you never went there, correct?

MITCHELL: Correct."
(EXHIBIT R: page 1850, lines 16-21)

19. Defendant submits to the Honorable Court that MITCHELL'S contradictory untrue statements, under oath, exhibit his lack of credibility and, therefore, the Court should not believe any of his testimony, accordingly.

MITCHELL TESTIFIED, UNDER OATH, THAT DEEDS RECORDED BY CLEVELAND COUNTY REGISTER OF DEEDS ARE PROPERLY PREPARED

20. MITCHELL further testifies, under oath, to the following:

"CASSAR: The register of deeds in Cleveland County is an elected official, correct?

MITCHELL: Correct.

CASSAR: The register of deeds, after determining that all of the statutory prerequisites for recording of the deed, must immediately file and record the deed, correct?

MITCHELL: Correct." (EXHIBIT R: page 1851, lines 10-24)

"CASSAR: What is the definition of a statutory prerequisite under the law, under 161.12 of the general statute law of North Carolina?

MITCHELL: It is a general law that published in books in North Carolina.

CASSAR: What is the phrase, statutory prerequisite for recording a deed"

MITCHELL: It means that the form [notary acknowledgment, attestation, power of attorney etc.] of the deed -- not the substance -- is in recordable form so it can be registered with the register of deeds office.

CASSAR: An the form of the deed would include the notary, correct?

MITCHELL: Yes.

CASSAR: Yes.

MITCHELL: Yes."
(EXHIBIT R: page 1853, lines 11-25)

"CASSAR: The form of the deed would include the acknowledgment on the deed, correct?

MITCHELL: Yes..

CASSAR: And the acknowledgement, the assistant DA [STARAVIDES] was using the attestation clause, correct?

MITCHELL: Yes.

CASSAR: But in North Carolina, they use the phrase acknowledgment, correct?

MITCHELL: Correct.

CASSAR: And under North Carolina law, the register of deeds, after determining that all the statutory prerequisites for the recording of the deeds have been met, must immediately record the deeds, correct?

MITCHELL: That's correct.

CASSAR: These deeds were all recorded by the Cleveland County register of deeds, correct?

MITCHELL: Correct.

CASSAR: In fact, if the register of deeds in Cleveland County fails to execute their duty, that's a crime, correct?

MITCHELL: Correct."
(EXHIBIT R: page 1854, lines 1-24)

"CASSAR: You testified on direct examination that the book and page number indicates that the document [deed] was accepted by the register of deeds, correct?

MITCHELL: Correct.

CASSAR: Can the excise tax be paid after the deeds are filed?

MITCHELL: It can be.

CASSAR: In fact, the excise taxes were paid in this case after the deeds were filed, correct?

MITCHELL: In have no information about this.

CASSAR: You don't do the research on that [excise tax being paid]?

MITCHELL: I know it is on the public record.

CASSAR: And you didn't check that, correct?

MITCHELL: No, I checked it.

CASSAR: You did. You said you had no infromation if they were in fact paid [excise tax] after the deeds were filed, correct?

MITCHELL: Correct."
(EXHIBIT R: page 1871, line 13 through page 1872, line 5)

21. In the above testimony, under oath, MITCHELL states in essence that the deeds on the PROPERTY, were reviewed by the Cleveland County Register of Deeds ("REGISTER"), who recorded them after inspection thereof, thus, proving that the PROPERTY deeds are "satisfactory", including the acknowledgement (i.e. attestation), that NOLAN executed, pursuant to the STAMEYS' Power of Attorney. Hence, the deeds to the PROPERTY are properly prepared and recorded by the REGISTER.

MATTHEW A. SCHWEITZER, "TITLE EXPERT" IN NORTH CAROLINA STATES UNDER OATH THAT THE PROPERTY DEEDS ARE VALID

22. In Matthew A. Schweitzer's ("SCHWEITZER") Affidavit (EXHIBIT N), sworn under the penalty of perjury, SCHWEITZER states:

"TRACT 1: (320.85 acre parcel)

The final deed [EXHIBIT G] appearing in the chain was recorded on July 19, 2010, in Book 1599, Page 1532, Cleveland County Registry. The deed is properly executed by the Grantors. The deed is effective [valid] and does convey an interest [deeded ownership] in the property to every entity listed as a Grantee except for John Cline Reservoir X, LLC [because it was formed thereafter].

The deed [EXHIBIT G] conveys [grants deeded ownership] an interest in the 320.85 acres to Nancy Stamey Irrevocable Living Trust, Gilbert Stamey Irrevocable Living Trust, John Cline Reservoir I, LLC, John Cline Reservoir II, LLC, John Cline Reservoir III, LLC, John Cline Reservoir IV, LLC, John Cline Reservoir V, LLC, John Cline Reservoir VI, LLC, John Cline Reservoir VII, LLC, John Cline Reservoir VIII, LLC, and John Cline Reservoir IX, LLC."

"TRACK 1 (47.91 acres parcel)

The analysis of this Tract is identical to that of Tract 1. There were four deeds recorded purporting to convey property contained in Tract 2. ... The final deed [EXHIBIT G] appearing in the chain which is recorded on July 19, 2010, in Book 1599, Page 1548, Cleveland County Registry conveys an interest [ownership] in the property to every entity listed as a Grantee except for John Cline Reservoir X, LLC [because it was not formed prior to recordation of deed].

The deed [EXHIBIT G] conveys [transfers ownership] an interest in the 47.91 acres to Nancy Stamey Irrevocable Living Trust, Gilbert Stamey Irrevocable Living Trust, John Cline Reservoir I, LLC, John Cline Reservoir II, LLC, John Cline Reservoir III, LLC, John Cline Reservoir IV, LLC, John Cline Reservoir V, LLC, John Cline Reservoir VI, LLC, John Cline Reservoir VII, LLC, John Cline Reservoir VIII, LLC, and John Cline Reservoir IX, LLC."

"Based upon the foregoing, I have sufficient information upon which to form a conclusion.

Effective July 19, 2010, Tract 1 and Tract 2 were vested in the following: Nancy Stamey Irrevocable Living Trust, Gilbert Stamey Irrevocable Living Trust, John Cline Reservoir I, LLC, John Cline Reservoir II, LLC, John Cline Reservoir III, LLC, John Cline Reservoir IV, LLC, John Cline Reservoir V, LLC, John Cline Reservoir VI, LLC, John Cline Reservoir VII, LLC, John Cline Reservoir VIII, LLC, and John Cline Reservoir IX, LLC.
(EXHIBIT N)

23. Based upon SCHWEIZER's expert testimony in his Affidavit (EXHIBIT N), the deeds (EXHIBIT G) on the STAMEY PROPERTY <u>are valid</u>, since at least July 10, 2010, prior to Defendant being falsely accused of wrongdoing in the CIVIL CASE and unjustly convicted of a crime, in the CRIMINAL CASE, that he <u>truly</u> did <u>not</u>

commit. Therefore, Defendant respectfully requests that the Honorable Court deny Plaintiff's request for forfeiture and/or enforcement of the Restitution Order, erroneously issued, without a hearing, violating Defendant's due process rights afforded in both the Constitutions of the United States and the State of New York, in the CRIMINAL CASE.

24. In the CRIMINAL CASE, there was never a question that the deeds (EXHIBIT F), concerning the validity of the KIMMEL PROPERTY deeds (EXHIBIT F) because Defendant, not NOLAN, executed same on behalf of the Seller (i.e. John Cline Reservoir LLC - "JCR LLC").

ALL THE PROPERTY DEEDS ARE VALID, EVEN THE ONES THAT WERE EXECUTED AND RECORDED BY THE CLEVELAND COUNTY REGISTER OF DEEDS PRIOR TO THE BUYER'S CORPORATE ENTITY FORMATION GROUNDED UPON THE DOCTRINE OF "DE FACTO CORPORATION"

25. SCHWEITZER states in his Affidavit (EXHIBIT N), the following:

"The deed [EXHIBIT G] fails to convey any interest [ownership] to John Cline Reservoir X, LLC as that particular entity was not created until several months following recordation of the deed [EXHIBIT F]. Therefore, the 4.55% interest that was designated to go to John Cline Reservoir X, LLC, remains with the Grantor [STAMEYS]. The conveyance [deeded TIC ownership interests] is effective as to all of the remaining limited liability companies listed as Grantees in the deed as those entities were formed and in existence prior to the execution and recordation of the deed [EXHIBIT F]."

26. Grounded upon a plethora of North Carolina Case Law, presented herein, Defendant disagrees with SCHWEITZER's theory, that the first filed deeds in the STAMEY PROPERTY were invalid, because the BUYERS' (i.e. Claimants') Limited Liability Companies (EXHIBIT H) were executed, by NOLAN, before NOLAN executed and filed the deeds

on the STAMEY PROPERTY, but created in the State of Delaware thereafter. Defendant presents indisputable evidence herein, that the prior filed deeds are in fact valid, pursuant to the "DeFacto Corporation" doctrine, that is thoroughly discussed in section: "BUYER'S LIMITED LIABILITY COMPANIES DID NOT HAVE TO BE IN EXISTENCE BEFORE THE DEEDS WERE EXECUTED AND FILED PURSUANT TO THE NORTH CAROLINA 'DE FACTO CORPORATION' DOCTRINE" herein, supported by the following North Carolina case law: LeOceanfront v. Lands End, 768 S.E.2d 15 (COA [NC] 2014); Best Cartage v. Stonewall Packaging, 219 N.C.App. 429, 727 S.E.2d 291 (COA [NC] 2012); Williams v. Hammer, 2015 WL 4764125 (S.C. [NC] 2015); Pocahontas Fuel v. Tarboro Cotton Factory, 174 N.C. 245, 93 S.E. 790 (S.C. [NC] 1917); College v. Riddle, 165 N.C. 211, 81 S.E. 283 (S.C. [NC] 1914); and Board of Education v. Berry, 59 S.E. 169 Am.St.Rep. 975, 62 W.Va 433 (COA 1907).

27. Therefore, Defendant respectfully requests that the Honorable Court make a determination that the PROPERTY deeds are valid.

QUESTION #2

IF BUYERS/CLAIMANTS DID NOT RECEIVE VALID DEEDED TIC OWNERSHIP INTERESTS IN THE PROPERTY NOLAN MADE THE MISTAKE AND SHOULD BE LIABLE, NOT DEFENDANT

28. NOLAN admits, under oath, during testimony (EXHIBIT S), that she executed and filed the PROPERTY deeds (via an agent), on behalf of the STAMEYS.

29. If in fact, there are any problems with the PROPERTY deeds, it was NOLAN, who personally made the mistake(s), as an attorney representing both BUYERS (i.e. Claimants) and Seller (i.e. STAMEYS), by authority granted to NOLAN by individually executed Powers of Attorney (EXHIBIT D) and Dual Representation Agreement (EXHIBIT E) and, thereby, Defendant, who is not an attorney, had absolutely nothing to do with NOLAN's mistake(s), if any, regarding whether the deeds were executed and/or filed properly.

30. Therefore, Respondent respectfully requests that if the Honorable Court does not declare that the PROPERTY deeds are valid, the Court places the blame on NOLAN and dismisses any liability from defendants.

QUESTION #3

DID SELLERS (i.e. STAMEYS and/or JCR LLC) OR BUYERS (i.e. Claimants) PAY THE COMMISSIONS TO RESPONDENTS?

31. The question of whether Sellers (i.e. STAMEYS or JCR LLC) or BUYERS (i.e. Claimants) paid the commissions to defendants, has been thoroughly discussed in previous pleadings which Plaintiff in the CRIMINAL CASE conceded, by non-response thereto, that the Sellers, not the BUYERS (i.e. Claimants, paid the commissions to defendants based upon the fact, that if the later paid the commissions, they would have received less deeded (EXHIBITS F and G) TIC ownership in the PROPERTY (See EXHIBIT T for detailed analysis).

32. In addition, Honorable Supreme Court Justice Emerson has previously addressed the issue in the Court's May 1, 2014 Decision and Order (EXHIBIT B), wherein, the Court states:

"The record reflects that the defendant, John Cline Reservoir, LLC, purchased a 400-acre parcel of real property with the investor's money [figurative not literal], and the claiming authority has failed to meet its burden of establishing that investor's money was used to pay White's personal expenses. Moreover, once the investors closed on their interests in the property, the money [commissions paid] was no longer their property, but belonged to the defendant John Cline Reservoir, LLC (see, People v. Headley, 37 Misc.3d 815, 824, citing People v. Kirk, 62 Misc.2d 1078)."

33. Therefore, Respondent respectfully requests that the Honorable Court make a determination that the Sellers, not the BUYERS (i.e. Claimants), paid the commissions to the defendants.

QUESTION #3-4

DID RESPONDENT MISAPPROPRIATE ANY OF CLAIMANT'S FUNDS IN THE JCR LLC DEAL, IN WHICH CLAIMANTS' PURCHASED VALID DEEDED TIC OWNERSHIP INTERESTS IN THE PROPERTY?

34. The above question has been thoroughly discussed which plaintiff conceded, by non-response thereto, as well as specifically addressed by Honorable Supreme Court Justice Emerson in the Court's May 1, 2014 Decision and Order (EXHIBIT B), stating:

"The claiming authority [Plaintiff in the CRIMINAL CASE] contends that White [Respondent] used investor's money to pay personal expenses. However, in an affidavit dated November 15, 2012, Senior Investigative Auditor [Christine] Lusak, acknowledged that her review of bank records for the accounts of the defendant John Cline Reservoir, LLC, revealed that the majority of the payments from those accounts were for expenses related to the property in North Carolina [PROPERTY] and there did not appear to be any significant personal expenses paid out of these accounts."
(See EXHIBIT B)

"CASSAR: Your [LUSAK's] review and examination of the TD Bank records for John Cline Reservoir, LLC account ending in 0784 reveals that no significant personal expenses were paid out of the John Cline Reservoir, LLC bank account ending in 0784, correct?

LUSAK: In 0784 there are no checks issued [no misappropriation of funds].

THE COURT: Can that [CASSAR's question above] be answered yes or no?

LUSAK: I would say yes, that's correct [Respondent did not pay any significant personal expenses from JCR LLC account]."
(EXHIBIT P: page 30, lines 4-23)

"CASSAR: Your [LUSAK's] review and examination of the TD bank records for the John Cline Reservoir, LLC bank account ending in 7439 reveals no significant personal expenses were paid out of the John Cline Reservoir, LLC bank account ending in 7439, correct?

LUSAK: No [No personal expenses paid out of account]."
(EXHIBIT P, page 30, line 24 through page 51, line 4)

"CASSAR: Your [LUSAK's] review and examination of the TD Bank records for the Professional Real Estate Advisors, Inc. bank account ending in 7017 reveals that no significant personal expenses were paid out of the Professional Real Estate Advisors, Inc., bank account ending in 7017, correct?

LUSAK: No [No personal expenses paid out of account]."
(EXHIBIT P: page 31, lines 11-16)

"CASSAR: Did you [LUSAK] put in that affidavit [November 15, 2012 Affidavit], page 3, paragraph 6, that upon your review of the John Cline Reservoir, LLC bank accounts, 'nowhere in my [LUSAK's] review does there appear to be any significant personal expenses paid out of the John Cline Reservoir accounts' did you [LUSAK] put that [statement] in your affidavit in November [15] of 2012?

LUSAK: Yes."
(EXHIBIT P: page 32, lines 8-14)

35. Therefore, grounded upon the Plaintiff's expert witness, in the CRIMINAL CASE and CIVIL CASE, LUSAK's, repeated statements in her November 15, 2012 Affidavit (EXHIBIT O) and LUSAK's sworn testimony on November 24, 2014 (EXHIBIT P), during Respondent's CRIMINAL CASE trial, defendants did not misappropriate any of BUYERS' (i.e. Claimant's) funds.

36. Therefore, Respondent respectfully requests that the Honorable Court reaffirm its determination stated in the Court's May 1, 2014 Decision and Order (EXHIBIT B) that Respondent (i.e. defendants) has/have not misappropriated any Claimant's (ie.e. BUYER's) funds.

CASE LAW IN SUPPORT OF DISMISSAL OF PLAINTIFF'S ORDER INSTITUTING PROCEEDINGS ("OIP") GROUNDED UPON THE DOCTRINE OF "UNCLEAN HANDS"

In Precision Instrument v. Automotive Maintenance, 324 U.S. 806, 65 S.Ct. 993, 89 L.Ed. 1381, 65 U.S.P.Q. 133 (U.S. [IL] 1945), Honorable Justice Murphy delivered the opinion of the United States Supreme Court holding:

"A equity court may exercise wide range of discretion in refusing to aid litigant coming into court with 'unclean hands'."

"Misconduct justifying equity court in refusing relief because of 'unclean hands' need not necessarily be of such nature as to be punishable as a crime or as to justify legal proceedings, but any willful act concerning cause of action which rightfully can be said to transgress equitable standards of conduct is satisfied cause for refusing relief."

"Wherein information indicating perjury ... denial of relief to plaintiff ... on ground of 'unclean hands'."

"This maxim necessarily gives wide range to the equity court's use of discretion in refusing at aid the 'unclean' litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion'. Keystone Drilling Co. v. General Excavator Co., 290 U.S. 245, 246, 54 S.Ct. 147, 148, 78 L.Ed. 293 (U.S. [OH] 1933)."

"The equity court's discretion in refusing to aid the 'unclean' litigant. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 54 S.Ct. 146, 78 L.Ed. 293 (1933)."

In Yuille v. American Home Mortg., 483 Fed.Appx. 132, 2012 WL1914056 (U.S.C.A. 6 Cir. [MI] 2012), Honorable United States Court of Appeals Magistrate Judge Donald A. Scheer held:

"Doctrine of 'unclean hands' precluded mortgagor's quiet title claim"

"The District Court fould that Yuille [plaintiff] was foreclosed from equitable relief under the 'unclean hands' doctrine. That doctrine applies to quiet-title actions, See McFerren v. B&B, 253 Mich.App. 517, 655 N.W.2d 779, 783 (U.S.C.A. [MI] 2002) and 'closes the doors of equity to one tainted with inequitableness or bad faith relative to the matter in which he or she seeks relief, regardless of improper behavior of the defendant.' Richard v. Tibaldi, 272 Mich.App. 522, 726 N.W.2d 770, 779 (C.A. [MI] 2006)."

In Samsung v. Rambus, 523 F.3d 1374, 86 U.S.P.Q.2d 1604 (U.S.C.A. Fed.Cir. [VA] 2008), Honorable United States Court of Appeals Circuit Court Judge Robert E. Payne wrote the opinion of the Court holding:

"Patents were unenforceable by virtue of doctrines of 'unclean hands'"

In Tempo Music v. Myers, 407 F.2d 503, 160 U.S.P.Q. 707 (U.S.C.A. 4th Cir. [NC] 1969), Circuit Court Judge Craven wrote the opinion of the Court holding:

"[Plaintiff] ... estopped ... under doctrine of 'unclean hands', from asserting infringement and asking for damages and counsel fees" (See Wihtol v. Crow, 199 F.Supp. 682 (D.Iowa 1961); Gaye v. Gillis, 167 F.Supp. 416 (D.Mass. 1958); Humble Oil v. Standard Oil, 229 F.Supp. 586; Folmer Graflex v. Graphic Photo, 41 F.Supp. 319 (D.Mass. 1941); Leo Feist v. Young, 138 F.2d 972 (7th Cir. 1943)."

In Seismograph v. Offshore Raydist, 263 F.2d 5, 119 U.S.P.Q 146 (U.S.C.A. 5 Cir. [LA] 1958), Honorable Circuit Court Judge Rives wrote the opinion of the Court holding:

"Prevailing party was entitled to an award of court costs and reasonable attorney fees against losing party who was denied relief on ground of 'unclean hands'."

In Strey v. Devine's, 217 F.2d 187, 103 U.S.P.Q. 289 U.S.C.A. 7 Cir. [IL] 1954), Honorable Chief Circuit Court Judge Duffy wrote the opinion of the Court holding:

"[J]ustified denial [plaintiff's complaint] for, pursuant to 'unclean hands' doctrine, of relief sought by him."

"One of the reasons that the District Court denied relief was that he [plaintiff] came into court with 'unclean hands'"

In Estate of Lennon v. Screen Creations, 939 F.Supp. 287 (U.S.D.C. S.D. [NY] 1996), Southern District Court Judge Baer of New York, held:

"[D]octrine of 'unclean hands' barred grant of injunction"

"[Plaintiff's claims] Were barred under doctrine of 'unclean hands' from obtaining equitable remedy of preliminary injunction"

"Court may deny relief based on defense of 'unclean hands' where party applying for such relief is guilty of Conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue. Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1383 (6 Cir. 1995); Novus Franchising, Inc. v. Taylor, 795 F.Supp. 122, 126 (M.D. Pa. 1992); Saxon v. Blann, 968 F.2d 676, 680 (8th Cir. 1992); Fuddruckers, Inc. v. Docs' B.R. Others, Inc., 826 F.2d 837. 847 (9th Cir. 1987)."

In Federal Folding v. National Folding, 340 F.Supp. 141, 172 U.S.P.Q. 221 (U.S.D.C. S.D. [NY] 1971), Honorable Southern District Court Judge Palmieri of New York, held:

"[P]laintiff came into court with 'unclean hands', and its complaint would be dismissed"

In Hershey Creamery v. Hershey Chocolate, 269 F. Supp. 45, 11 Fed.R.Serv.2d 1440, 153 U.S.P.Q. 794 (U.S.D.C. S.D. [NY] 1967), Honorable Southern District Court Judge Motley of New York, held:

"[P]laintiff must overcome by testimony the allegations of fraud, with factual statements to support them, which are here made in particularity. If these allegations are here made in particularity. If these allegations prove true, the court might well, in the existance of its its discretion, bar plaintiff's action on the grounds as dictated by the doctrine of 'unclean hands'. Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 65 S.Ct. 993, 89 L.Ed. 1381 (1945); Jacobs v. Beecham, 221 U.S. 263, 31 S.Ct. 555, 55 L.Ed. 729 (1911), Manhattan Medicine Co. v. Wood, 108 U.S. 218, 25 Ct. 436, 27 L.Ed. 706 (1883)."

In Patsy's Italian Restaurant v. Banas, 575 F.Supp.2d 427 (U.S.D.C. E.D. [NY] 2008), Honorable Eastern District Court Judge of New York, held:

"Much like latches, the defenses of 'unclean hands' and bad faith involve a balancing of equities; thus, a finding of a [plaintiff's] bad faith would likely also foreclose its 'unclean hands' and bad faith defenses."

"The doctrine of 'unclean hands' requires a balancing of equities and the relative extent of each party's wrong upon the other and upon the public should be taken upon the other and upon the public should be taken into account, and an equitable balance struck."

"Defendant's equitable defenses of latches, 'unclean hands', and bad faith are issues of law and would, thus, be decided post-verdict by the Court."

"Thus finding of a [plaintiff's] bad faith would likely also foreclose its 'unclean hands' and bad faith [claims]. (Precision Instrument Mfg. Co. v. Auto. Main. Co., 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945) (noting the "guiding doctrine ... is the equitable maxim that 'he who comes into equity must come with clean hands'"; 6 MCCARTHY §32:52 ("Plaintiff's alleged 'unclean hands' cannot be considered in a vacuum, apart from the nature of [defendant's] conduct which gave rise to the litigation. ... where defendant raises the alleged misrepresentations of plaintiff as a defense, the respective interests of both parties must be weighed ...")."

"Indeed, the oft-quoted maxim that one who comes into equity must come with 'clean hands' is 'far more than a mere banality' but rather a 'self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the bahavoir of the defendant. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814, 65 S.Ct. 993, 89 ,/Ed. 1381 (1945). [W]hile equity does not demand that its suitors shall have led blameless lives, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy at issue. Dunlop-McCullen v. Local 1-S, AFL-CIO-CLC, 149 F.3d 85, 90 (2d Cir. 1958) (quoting Precision supra at 814-815)"

In International Union v. Local Union No. 589, 693 F.2d 666, 111 R.R.M.(BNA) 3106, 95 Lab. Cas.) 13, 879 (U.S.C.A. 7 Cir. 1982), Honorable United States Court of Appeals Circuit Judge Eschbach wrote the opinion of the Court holding:

"The International Union is chargeable with 'unclean hands' in two regards:

... regional representative [analogous to members of the Commission: SPILLANE and JANGHORBANI] with knowledge [of wrong doing] ...

... and in spite od [a third party, analogous to Respondent] bringing attention to wrongdoing [fraud, tax evasion and perjury in the JCR LLC DEAL] appointing [approving] the same individual [wrongdoer: analogous to the BUYERS/OWNERS]"

"Moreover, in a case such as this one, which touches on 'public interest as well as the private interest of the litigants [the clean hands] doctrine assumes even wider and more significant proportions. Precision Instrument, supra, 324 U.S. at 815, 65 S.Ct. at 957. By its very nature, the relationship between International Union [BUYERS/OWNERS] and its local affiliate [SPILLANE and JANGHORBANI] is affected with 'public interest', and public policy against bad faith dealings in this context warrants denial of all relief plaintiffs seek in the case ... this Court concludes that all of plaintiff's claims are precluded by the 'clean hands' doctrine."

"Although the 'unclean hands' finding is sufficient of itself to preclude plaintiffs from obtaining any of the relief they seek, a consideration of the evidence pertaining top their financial reporting and tax claims <u>is warranted</u> in order to reveal the full extent of plaintiffs' equitable conduct."

In Borden v. Occidental Petroleum, 381 F.Supp. 1178, 182 U.S.P.Q. 471 (U.S.D.C. S.D. [TX] 19740, Honorable District Court Judge Carl O. Bue Jr. held:

"The applicant [plaintiff] was guilty of 'unclean hands' and practiced fraud."

In Jack Winter v. Koratron, 375 F.Supp. 1, 181 U.S.P.Q. 353 (U.S.D.C. N.D. [CA] 1974, Honorable District Court Judge Renfrew held:

"The Court ... should refuse to enforce a patent if it can be shown that [plaintiff] came into court with 'unclean hands'."

In Hall v. Wright, 125 F.Supp. 269., 103 U.S.P.Q. 16, (U.S.D.C. S.D. [CA] 1954), Honorable District Court Judge Mathes held:

"The rule is well established by Judge Soper in Roof Refining Co. v. Universal Oil Products Co.: 'No principle is better settled than the maxim that he who comes into equity must come with 'clean hands' and keep them clean throughout the course of the litigation, and that if he violates the rule, he must be denied all relief what-so-ever may have been the merits of his claim. 3 Cir., 169 F.2d 514, 534-535. certiorari denied; Universal Oil Products v. William Whitman Co., 1948, 335 U.S. 912, 69 S.Ct. 481, 93 L.Ed. 444' Precision Instrument Mfg. Co. v. Automotive Co., 1945, 324 U.S. 806, 65 S.Ct. 993, 89 L.Ed. 1381; Hazel-Atlas Glass Co. v. Hartford Empire Co., 1944, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250; Morton Salt Co. v. G.S. Suppiger Co., supra, 314 U.S. at pages 492-494, 62 S.Ct. 406; Keystone Driller Co. v. General Excavator Co., 1933, 290 U.S. 240, 245, 54 S.Ct. 146, 78 L.Ed. 293, Mas v. Coca-cola Co., 4 Cir. 1947, 163 F.2d 505, 508; American Ins. Co. v. Scheufler, 8 Cir. 129 F.2d 143, 148, certiorari denied, 1942, 317 U.S. 687, 63 S.Ct. 257, 87 L.Ed. 551; Rollman Mfg. Co. v. Universal Hdw. Works, 3 cir., 1916, 238 F. 568, 570."

PLAINTIFF AND COMPLAINANTS/CLAIMANTS ARE BARRED FROM BENEFITTING GROUNDED UPON THE DOCTRINE OF "UNCLEAN HANDS"

Commencing in or about 2009, Plaintiff (i.e. SEC) commenced an investigation of Respondent by utilizing its unbridled subpoena powers, issuing Subpoenas Duces Tecum ("SUBPOENAS") to Respondent and the companies of which he was affiliated. The SUBPOENAS legally forced Respondent to provide, as admitted by the Plaintiff, SEC, in its May 19, 2016 letter (EXHIBIT G), with the following:

1. "90,000 pages of documents (or approximately 30 banker's boxes). ... estimated cost of printing to be approximately $6,800."

2. "approximately 8.45 million pages at an approximate cost of $507,000."

3. "approximately 63.4 million pages at an approximate cost of $3.8 million."

In total, the SEC, utilizing its subpoena powers, legally forced Respondent to produce approximately 71,940,000 pages of documents, for discovery purposes, at an estimated cost of $4,313,000, as admitted by the Plaintiff (See EXHIBIT G). Unquestionably, the Plaintiff's SUBPOENAS were unreasonable, oppressive, excessive in scope and unduly burdensome. Commencing in or about May 2016, Respondent submitted discovery requests to the Plaintiff as well as several Judicial Subpoenas Duces Tecum "JUDICIAL SUBPOENAS"), to provide relevant material to Respondent for use in his defense, to the Court for execution, since Respondent, a non-attorney, lacks subpoena powers. To date, the Plaintiff has failed to provide Respondent with all the requested relevant material and the Court has <u>not</u> executed the JUDICIAL SUBPOENAS, thereby, denying Respondent his Constitutionally protected Due Process rights.

As previously stated, commencing in or about 2009, the Plaintiff, SEC, commenced their thorough investigation of Respondent, finding absolutely no violations of Federal or State Securities Law or other laws as well as determining that the real estate transaction in the JCR LLC DEAL was not an "investment contract" and, thereby, not a security. This fact is evidenced by the Plaintiff, SEC, failing to deny Respondent's No Action Letter, regarding the subject matter, submitted to the SEC, in or about 2009, by Respondent's attorney, Bradford Tiernan Esq. ("TIERNAN"), copy of this relevant exonerating material, was respectfully requested by Respondent in his discovery demands to the Plaintiff and JUDICIAL SUBPOENAS. This purposefully undisclosed relevant exonerating material, proves beyond a preponderance of evidence, that the real estate transaction in question, that is the focal point of the Plaintiff's case at bar, is not an "investment contract" and, thereby, not a security. Therefore, the Plaintiff, SEC, lacks authorization to prosecute Respondent, accordingly. The Plaintiff's and Court's denial to provide exonerating evidence to Respondent to use in his defense of the Plaintiff's allegations contained in the OIP, proves that the parties have "unclean hands" and, hence, the Honorable Court should dismiss the Administrative Proceeding ("AP"), accordingly, based on the doctrine of "unclean hands".

PLAINTIFF HAS FULL KNOWLEDGE THAT CLAIMANTS/COMPLAINANTS ARE GUILTY OF FEDERAL AND STATE CRIMES OF FRAUD, TAX EVASION AND PERJURY AND THEREFORE PLAINTIFF IS BARRED FROM OBTAINING RELIEF DUE TO THE DOCTRINE OF "UNCLEAN HANDS" BASED UPON THE FACT THAT THEY ARE ACCESSORIES TO THE CRIMES

Unquestionably, Plaintiff has full knowledge that all Complainants in Criminal Case indictment No. 2710-2012 ("CRIMINAL CASE") and Claimants in Civil Case Index No. 29681-2012 ("CIVIL CASE"), implemented tax deferred real estate exchanges, pursuant to 28 C.F.R. §1031, more commonly known as a "1031 EXCHANGE".

Plaintiff's knowledge, which was obtained during the SEC's investigation, which was provided by Respondant, Financial Industry Regulatory Authority ("FINRA"), Suffolk County District Attorney ("SCDA"), United States Department of Justice ("DOJ"), United States Federal Bureau of Investigation ("FBI"), United States Postal Service ("USPS"), and United States Internal Revenue Service ("IRS") as well as State Departments of Taxation and Finance, reveal that all Complainants/Claimants filed their personal and/or corporate 2008 or 2009 Federal and State tax returns, disclosing ownership of the real estate, located on Delight Road, Lawndale, NC ("PROPERTY"), as their Replacement Property ("RPP"), in conformance of laws, rules and regulations, regarding 1031 EXCHANGES. Plaintiff's attorneys, Alexander Janghorbani Esq. (JANGHORBANI") and Margaret Spillane Esq. ("SPILLANE"), attended law school, at which, they were taught that if a taxpayer (i.e. Complainants/Claimants) attempt to implement a 1031 EXCHANGE, but it fails because he/she cannot receive deeded ownership interest in a RPP within 180 days, commencing on the date the taxpayer sold his/her Relinquished Property ("RLP"), the taxpayer must amend both their Federal and State tax returns as well as pay unpaid taxes, penalties and interest on the sale of his/her RLP. Furthermore, JANGHORBANI and SPILLANE have personal knowledge that JCR LLC paid the Complainants/Claimants approximately $500,000 in option payments (See EXHIBIT F) of which the Complainants/Claimants knowingly, willingly and intentionally did not amend their Federal and/or State tax returns and, concurrently, pay the unpaid taxes, penalties and interest estimated to exceed $4,000,000, increasing daily. The fact that JANGHORBANI and SPILLANE had full knowledge that the SCDA's alleged theory of alleged invalid PROPERTY deeds, upon which Respondent was convicted in the CRIMINAL CASE, coupled with the Claimants/Complainants <u>not</u> amending their personal and corporate tax returns, thereby, committing Federal and State crimes of fraud, tax evasion and perjury, implicate JANGHORBANI and SPILLANE are accessories the crimes.

Therefore, Respondent respectfully requests that the Honorable Court dismiss the Administrative Proceeding ("AP") grounded upon the doctrine of "unclean hands", preventing the Plaintiff's from benefiting from their own immoral and unethical acts in violation of the American Bar Association's Code of Professional Responsibility as well as the New York State Code of Professional conduct.

RESPONDENT HAS A SUBSTANTIVE DUE PROCESS RIGHT TO BE PROVIDED THE RELEVANT MATERIAL RESPECTFULLY REQUESTED PURSUANT TO RULE 230 AND JUDICIAL SUBPOENAS DUCES TECUM

Respondent has a Constitutional right to obtain evidence which bears upon the determination of either guilt or innocence (California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (U.S.S.C. 1984) (Due process abuse of Forth Amendment requires prosecution to turn over exculpatory evidence) (citing Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (U.S.S.C. 1963); United Stores v. Aqurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 2401-2402, 49 L.Ed.2d 342 (U.S.S.C. 1976)), and a Sixth Amendment right to due process. A defendant has both the right to obtain the evidence and to require its production (See U.S. v. Beckford, 964 F.Supp. 1010, 1018-1019 (E.D. [VA] 1997) (citing In re Martin Marietta Corp., 856 F.2d 619, 621 (U.S.C.A. 4th Circ. 1988).

In Smith v. City of Pittsburgh, 585 F.Supp. 941 (U.S.D.C. [PA] W.D. 1984), the Honorable United States District Court held:

"Notice and hearing are quintessence of proceedural due process ... [Respondent] was entitled to ... a reasonable time to respond."

In Hall v. State of Maryland, 433 F.Supp. 756 (U.S.D.C. [MD] 1977), the Honorable United States District Court held:

"The inmate will be given reasonable time to respond"

"The First Amendment provides in part:'Congress shall make no law [against] ... the right of the People ... to petition the Government for redress of grievances'. Additionally, that right is guaranteed as an element of due process and may be asserted by a person held in confinement. In Cruz v. Beto, 405 U.S. 319, 321, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (U.S.S.C. 1972), the Supreme Court, in a per curiam opinion, has cautioned and also stressed:

'Federal Courts sit ... to enforce the Constitutional rights of all persons, including prisoners. Persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes access of prisoners to the courts (Johnson v. Avery, 393 U.S. 483, 485, 89 S.Ct. 747, 21 L.Ed.2d 718; Ex parte Hull, 312 U.S. 546, 549, 61 S.Ct. 640, 641, 85 L.Ed. 1034; Younger v. Gilmore, 404 U.S. 15, 92 S.Ct. 250, 30 L.Ed.2d 142; Gilmore v. Lynch, 319 F.Supp. 105 (U.S.D.C. [CA] N.D.); Bounds v. Smith, (U.S.S.C. [NC] 1977)."

In the case at bar, the Respondent respectfully requested to be provided relevant material, by submitting a demand, pursuant to Rule 230, as well as submitted several Judicial Subpoenas Duces Tecum ("SUBPOENAS") to the Court for execution, due to the fact that Respondent, unlike Plaintiff, lacks subpoena powers. The relevant material requested by Respondent will enable him to adequately and effectively respond to Plaintiff's false allegations in its Order Instituting Proceedings ("OIP") and fortify his defense. Denial of the Court to execute the SUBPOENAS on behalf of Respondent. who lacks subpoena powers to issue same himself, constructively violated respondents Cosntitutional right of Due process.

RESPONDENT'S THIRD DEFENSE

PLAINTIFF HAS AN FIDUCIARY OBLIGATION

PURSUANT TO 17 C.F.R. §200.54 and §200.55

TO DETERMINE WHETHER RESPONDENT'S CONVICTION

WAS OBTAINED IN VIOLATION OF FEDERAL AND NEW YORK STATE CONSTITUTIONS

Unquestionably, Plaintiff's case against Respondent is based upon Respondent's conviction in the CRIMINAL CASE, which was obtained in violation of both the Constitution of the United States of America and the New York State Constitution. Title 17 of the Code of Federal Regulations, Sections 200.54 and 200.55 mandate, that "members of the commission [SEC]" such as JANGHOBANI, SPILLANE and SEC employee, Administrative Law Judge, James E. Grimes, "carefully guard against any infringement of the constitutional rights, privileges, or immunities of those [Respondent] who are subject to regulation by the Commission [SEC]".

In fact, 17 C.F.R. §200.55 specifically states:

"In administering the law [Administrative Proceeding] members of this Commission [SEC] should vigorously enforce compliance with the [Constitutional] law by all persons [SCDA] affected thereby [Respondent]."

"In the exercise of their [SEC members] judicial functions, members shall honestly, fairly and impartially determine the [Constitutional] rights of all persons under the [Constitutional] law."

Respondent's criminal conviction was undeniably obtained upon the following violations of his Federal and New York State Constitutional rights:

REPONDENT WAS HELD WITHOUT BAIL AND THEREAFTER, EXCESSIVE BAIL, IN VIOLATION OF RESPONDENT'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Even though Respondent appeared approximately 26 times before the court, since being first arrested on July 11, 2011, when Respondent was re-arrested on October 4, 2013, based on Prosecutor's false statements and appeared before Justice Fernand Camacho, he was held without bail and thereafter, an excessive $3,000,000 bail was set by Justice J.J. Jones, depriving Respondent of his liberty, in violation of Article I, Section 6 of the New York State Constitution and the Fifth, Eighth and Fourteenth Amendments of the Constitution of the United States of America.

The Fifth Amendment states:

"No person shall be ... deprived of ... liberty ... without due process of law"

The Eighth Amendment states:

"Excessive bail shall not be required"

The Fourteenth Amendment states:

"No state shall ... deprive any person of ... liberty ... without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

PROSECUTOR EMPLOYED AND UTILIZED ILLEGAL SEARCH AND SEIZURE IN VIOLATION OF RESPONDENT'S FOURTH AMENDMENT RIGHTS

On or about June 20, 2011, the Suffolk County Police Department ("SCPD") executed an illegally obtained search warrant, that was not supported by "oath or affirmation" or reviewed by or signed by a judge, prior to SCPD's execution thereof, searching Respondent's residence and seizing computers, hard drives, and a plethora of other documents, that were utilized against Respondent in the CRIMINAL CASE, in violation of Article I, Section 6 of the New York Constitution and the Fourth Amendment of the Federal Constitution, which states:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no [Search] Warrants shall issue but upon probable cause, supported by Oath or affirmation"

THE RESPONDENT'S INDICTMENT WAS DEFECTIVE IN VIOLATION OF RESPONDENT'S FIFTH AMENDMENT RIGHTS

The Respondent's Indictment in the CRIMINAL CASE is defective, grounded upon the fact that the Foreman of the Grand Jury and the District Attorney of Suffolk County did not sign same, pursuant to Criminal Procedure Law ("CPL") Sections 200.50(8) and (9).

The Fifth Amendment states:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on ... indictment by a Grand Jury"

RESPONDENT WAS DEPRIVED OF HIS PROPERTY IN VIOLATION OF RESPONDENT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS

After Respondent was convicted of a crime),hat he did not commit, which was obtained in violation of Respondent's Constitutional rights, as described herein, the trial court judge, deprived Respondent of his property, by issuing an Order commanding Respondent to pay $2,975,000, without Due Process, failing to conduct a hearing to determine the proper restitution amonnt, if any, which is the $2,975,000 is erroneous, pursuant to Supreme Court Justice Emerson's May 1, 2014 Decision and Order (EXHIBIT F).

RESPONDENT WAS DENIED A SPEEDY TRIAL IN VIOLATION OF THE SIXTH AMENDMENT AND CPL §30.30

Respondent was arrested on July 11, 2011, indicted on November 2, 2012 and commenced trial on October 8, 2014. The Sixth Amendment states:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy trial"

New York Criminal Procedure Law ("CPL") Section 30.30, further defines the Sixth Amendment, mandating that an accused person must be brought to trial within one hundred eighty (180) days from arrest. In the CRIMINAL CASE, commencing on July 11, 2011 and commencing trial on October 8, 2014, approximately 2,085 days lapsed, well in excess of the 180 day time limit, therefore, Respondent was denied his speedy trial rights.

RESPONDENT WAS NEVER INFORMED THE NATURE OF THE ACCUSATION IN VIOLATION OF RESPONDENTS SIXTH AMENDMENT RIGHTS

Respondent was erroneously indicted, as previously discussed herein, on November 2, 2012. However, the indictment lacked specificity to permit Respondent to adequately and effectively defend the Prosecutor's allegations. Respondent's attorney served the Prosecutor a Bill of Particulars, in order to further clarify and amplify the charged contained within the Indictment, but the Prosecutor refused to furnish Defendant with this essential information. The Prosecutor surprised Respondent at trial, with her theory that the PROPERTY deeds (EXHIBIT E) were allegedly invalid, such that Respondent did not have sufficient time to locate a title expert in the State of North Carolina, where the PROPERTY is located, to testify that the deeds were in fact valid. Recently, Respondent has received exonerating evidence (EXHIBIT H), that the PROPERTY deeds are, in fact, valid, by an skilled, knowledgeable and experienced title expert in North Carolina and, thereby, Respondent is actually innocent of the charges of which he was convicted. Respondent will be submitting a motion, shortly, pursuant to actual innocence, to hopefully, God willing, be released from prison by Christmas.

The Sixth Amendment states:

"In all criminal prosecutions, the accused shall be ... informed of the nature and the cause of the accusation"

By the SCDA Prosecutor intentionally failing to provide Respondent with the afore-described relevant information, such that the Respondent could not adequately and effectively provide a defense to the Prosecutor's allegations, Grand Larceny and Scheme to Defraud, against him, in the CRIMINAL CASE, based on the allegation, that the deeds are invalid, which could have been easily corrected by refiling a correction deed, if necessary, with a $20.00 filing fee. Due to the fact the Respondent was never provided sufficient information, that the Respondent's crime was grounded upon invalid deeds, in which to form an adequate and effective defense, in the CRIMINAL CASE. Prosecutor violated Respondent's Sixth Amendment rights.

Factually, Respondent never received any of the funds associated with the BUYER'S (i.e. Claimants/Complainants) purchase of the PROPERTY, until <u>after</u> the real estate closing, which was conducted by Sellers' STAMEYS and BUYER'S attorney, Cathleen Quinn-Nolan ("NOLAN"). The Honorable Court should fully understand that if the PROPERTY deeds were invalid, the origional Sellers, STAMEYS and KIMMELS would have been both paid for the purchase of the PROPERTY as well as still own the PROPERTY. Thereby, the Respondent would <u>not</u> have financially benefited from the crime of Grand Larceny because he would <u>not</u> have ownership of the PROPERTY. In essence, the entire CRIMINAL CASE does <u>not</u> make logical sense for Respondent to risk violating the law without receiving any financial benefit. Throughout the 56 years of Respondent's life, he has been accused of many things, and unjustly convicted in the CRIMINA CASE, but Respondent has <u>never</u> been accused of being stupid, which would be obvious, if he actually committed the crimes for the financial benefit of another, <u>not</u> himself.

PROSECUTOR CONSTRUCTIVELY PREVENTED RESPONDENT FROM CONFRONTING THE COMPLAINANTS AS WELL AS HAVING WITNESSES TESTIFY ON HIS BEHALF IN VIOLATION OF THE SIXTH AMENDMENT

The SCDA Prosecutor constructively prevented Respondent's key witness, Donna White ("D.WHITE") from testifying on his behalf and presenting exonerating evidence. The Prosecutor, intimidated her, in violation of New York Penal Law ("PL") Section 215.10, that if she testified on Respondent's behalf, the Prosecutor threatened to continue prosecuting her on false charges, which Prosecutor has full knowledge that the criminal charges were both false and D.WHITE could not be held liable for the crime accused, pursuant to PL §187.01. The Prosecutor and other Prosecution witnesses, referred to D.WHITE and/or her company First National Qualified Intermediary Corporation ("FNQI"), approximately one hundred (100) times during the criminal trial. D.WHITE was John Cline Reservoir LLC's, the company Respondent is managing member, bookkeeper and office manager. D.WHITE had intimate knowledge, that the BUYERS (i.e. Complainants/Claimants), not only agreed in writing (i.e. EXHIBITS A, B and C) to purchase the PROPERTY but also personally and/or on behalf of his/her company, executed numerous other documents with D.WHITE'S company, FNQI in order to purchase the PROPERTY. In addition, D.WHITE was personally present when some of the BUYERS signed the afore-described documents as well as filed all originals of said documents.

The Sixth Amendment states:

"In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with witnesses against him; to have a compulsory process for obtaining witnesses in his favor"

In addition to the Prosecutor constructively preventing D.WHITE from testifying on behalf of Respondent at trial in the CRIMINAL CASE, the Prosecutor also threatened and/or intimidated numerous other witnesses, including but not limited to: STAMEYS, Debbie Clary, Bradford Tiernan, Preston Trieber, Barbara Fiegas, Raymond Caliendo, Alan Lichtenstein, and several others. The SCDA Prosecutor's egregious acts are not only in violation of Penal Law §215.10, but also, violated Respondent's Sixth Amendment right to call witnesses to testify on his behalf.

Furthermore, two of the alleged Complaints in the Indictment in the CRIMINAL CASE, Albert Abney and Patrick Mitchell, never testified at the Grand Jury, prior to Respondent's Indictment nor testified at the trial. Hence, Respondent was deprived of his Constitutional rights, pursuant to the "Confrontation Clause" contained in the Sixth Amendment of the Federal Constitution.

RESPONDENT WAS DEPRIVED OF LEGAL COUNSEL OF HIS CHOICE AND RESPONDENT'S COURT ASSIGNED LEGAL COUNSEL WAS INEFFECTIVE AND INADEQUATE IN VIOLATION OF THE SIXTH AMENDMENT

On September 25, 2012, SCDA seized all of Respondent's and other defendant's assets and funds in the CIVIL CASE. This caused Respondent's legal counsel, Randy Zelin Esq. ("ZELIN") to submit a motion to withdraw from legally representating Respondent, who was assigned a public defender, pursuant to Municipal Law §722, which statutory mandates a maximum capitation rate of $2,400 for legal representation. Respondent's CRIMINAL CASE is the most complicated litigated real estate in the history of the United States and the trial took over 7½ weeks. An attorney would have had to spend at least 100 hours familiarizing himself with the case, 50-100 hours preparing for trial and over 200 hours of trial time (i.e. 7½ weeks), cumulatively totalling approximately 350 to 400 hours in total time spent on the CRIMINAL CASE.

Therefore, if the Respondent's legal counsel spent the required time to be effective and adequate, he would have only earned about $6.86 per hour, which is below minimum wage, rather than CASSAR'S normal and customary rate of $250.00 per hour. Hence, CASSAR could only spend less than 10 hours on the CRIMINAL CASE, billing at his normal and customary rate (i.e. $2,400/$250 = 9.6 hours). Therefore, the Respondent's legal counsel, Christopher Cassar Esq. ("CASSAR"), could not adequately and effectively represent Respondent in the CRIMINAL CASE, in violation of the Sixth Amendment, which protects a criminal defendant by mandating that he be represented by adequate and effective legal counsel. In summary, New York State Municipal Law §722, which places an unrealistic capitation rate of $2,400, on legal representation of a criminal defendant, violates the Federal Constitution's mandate of adequate and effective "assistance of counsel for his defense".

RESPONDENT WAS IMPOSED EXCESSIVE FINES IN VIOLATION OF THE SIXTH AND EIGHTH AMENDMENT

The Eighth Amendment states:

"Excessive bail shall not be required, nor excessive fines imposed"

On January 29, 2015, the trial court in the CRIMINAL CASE imposed $2,975,000 in restitution, without a hearing, in violation of Respondent's Sixth Amendment right of Due Process and Eighth Amendment, excessive fines, of the Constitution of the United States of America. In fact, Respondent was ordered to cumulatively pay restitution in the amount of $750,000 for two(2) Complainants, Albert Abney and Edilberto Santos, who both refused to testify against Respondent at the Grand Jury and trial in the CRIMINAL CASE. In addition, John Cline Reservoir LC ("JCR LLC") paid Complainants/Claimants approximately $500,000 in option payments

(EXHIBIT F), that were not credited toward the amount in restitution amount. Furthermore, Supreme Court Justice Elizabeth H. Emerson, thoroughly analyzed the evidence in both the CRIMINAL CASE and CIVIL CASE and determined that the Claimants (i.e. Complainants) "received what they bargained for" (EXHIBIT F), deeded (EXHIBITS D and E) ownership interests in the PROPERTY. The validity of the deeds were confirmed by expert, Matthew Schweizer (EXHIBIT H), and thereby, the Complainants in the CRIMINAL CASE did not realize any financial loss what-so-ever. In fact, the Complainants (i.e. BUYERS) received approximately $2,250,000 more than the amount of funds that they utilized to purchase the PROPERTY. In fact, the BUYERS received approximately $1,750,000 in financial benefits from their 1031 EXCHANGES as well as an additional $500,000 in option payments paid by JCR LLC to Claimants (i.e. BUYERS) (See EXHIBIT F).

SUMMARY

In summary, "members" of the SEC, such as JANGHORBANI, SPILLANE and Administrative Law Judge, James E. Grimes, are legally obligated, pursuant to Title 17 of the Code of Federal Regulations Sections 200.54 and 200.55 to "carefully guard against any infringement of the constitutional rights, privleges, or immunities of those [Respondent] who are subject to regulation by the Commission [SEC]" and "in administering the law [Administrative Proceeding] members of this Commission [SEC] should vigorously enforce compliance with the [Constitutional] law by all persons [SCDA] affected thereby [Respondent]" as well as "in the exercise of their [SEC members] judicial functions, members shall honestly, fairly and impartially determine the [Constitutional] rights of all persons under the [Constitutional] law". Therefore, the Court has a legal obligation, pursuant to 17 C.F.R. §200.54 and §200.55 to "guard against any infringement of constitutional rights" of Respondent and fully adjudicate Respondent's afore-described allegations of Constitutional infringement by the SCDA and others, resulting in Respondent's unjust conviction in the CRIMINAL CASE, which is the basis of Plaintiff's allegations in this Administrative Proceeding.

THEIR WOULD BE A GRAVE MANIFEST OF INJUSTICE IF THE COURT OVERLOOKED THE PLAINTIFF'S ABUSE OF DISCRETION AND ACQUIESCED TO THE MOST DRASTIC SANCTION AVAILABLE RESPONDENT'S LIFETIME BAN FROM THE SECURITIES INDUSTRY

There is a plethora of Federal case law which states that the Plaintiff, SEC, has a duty to articulate carefully the grounds of its reasoning it seeks the most drastic sanction against Respondent as well as why a lesser sanction will not suffice. In fact, the Honorable United States Court of Appeals Judge Tjoflat wrote the Court's opinion in Steadman v. SEC, 603 F.2d 1126, 1140 (U.S.C.A. 5th Cir. 1979) that the SEC must prove by "clear and convincing evidence" why it is in the "public's best interest" that the Respondent should receive such a severe sanction of a lifetime ban from the Securities Industry. The Honorable Court in Steadman supra., created a six(6) part test, more commonly known as the Steadman Multifactor Test, that the Plaintiff must consider and prove, beyond a preponderance of evidence, each and every element prior to a sanction being imposed on a Respondent. The factors are as follows:

FACTOR #1: How egregious was the Respondent's actions?

FACTOR #2: Was the nature of the infraction an isolated event or recurrent in nature?

FACTOR #3: What was the degree of Scienter involved?

FACTOR #4: What is the degree of Respondent's assurances against future violations?

FACTOR #5: What is the Respondent's recognition of the wrongful nature of the violation?

FACTOR #6: What is the likelihood that the Respondent's occupation will present opportunities for future violations?

STEADMAN TEST FACTOR #1

HOW EGREGIOUS WAS THE RESPONDENT'S ACTIONS?

The question of "How egregious was Respondent's Actions?" is easily answered by the proof and facts presented herein. Indisputably, the Complainants in the CRIMINAL CASE, personally or on behalf of their company, executed numerous documents (EXHIBITS A, B and C; FNQI documents, Federal and State tax returns implementing 1031 EXCHANGES etc.) with the intent to purchase the PROPERTY and receive deeded (EXHIBITS D and E) Tenant-In-Common ("TIC") ownership interests therein. During the trial in the CRIMINAL CASE, the SCDA Prosecutor surprised the respondent and his legal counsel, with a previously undisclosed theory alleging, that the PROPERTY deeds were invalid, resulting in Respondent's criminal conviction. The PROPERTY deeds (EXHIBITS D and E) have recently been proven to be valid and, thereby, no egregious act was committed by Respondent. Hence, the first Factor of the Steadman Test is not satisfied.

STEADMAN TEST FACTOR #2

WAS THE NATURE OF THE INFRACTION AN ISOLATED INCIDENT OF RECURRENT?

Respondent was licensed to practice in the Securities Industry for approximately ten(10) years and was a licensed real estate professional for over thirty five(35) years, prior to the event of the real estate transaction involving the PROPERTY. During Respondent's tenure, he made thousands of recommendations to clients, representing hundreds of millions of dollars in assets. To date, Respondent never received one client complaint while licensed in the real estate industry for approximately thirty five(35) years. Even though, Respondent received several client complaints to the Financial Industry Regulatory Authority ("FINRA"), not one complaint proved, beyond a preponderance of evidence that Respondent committed any wrong doing.

In fact, FINRA violated Respondent's Due Process rights, by illegally obtaining default judgments against Respondent, without furnishing Respondent with prior notice of a complaint and/or notice of a hearing, to enable Respondent to defend himself. Furthe-more, in or about 2007, two(2) or three(3) persons, out of the hundreds of Respondent's clients, submitted complaints against Respondent and FINRA notified Respondent of same. Respondent vigorously and successfully defended the complaints and FINRA found no wrongdoing by Respondent. However, in FINRA's continued course of misconduct, FINRA continues to publish the complaints as "pending", rather than Respondent was found to not guilty of any wrongdoing, after approximately ten(10) years from the conclusions of the investigations concerning the complaints.

In order to be provided the relevant material, for Respondent to adequately and effectively prepare a defense against Plaintiff's false allegations, Respondent submitted a Judicial Subpoena Duces Tecum ("SUBPOENA") to the Hearing Officer, James E. Grimes, respectfully requesting FINRA to provide the afore-described relevant material. To date, the Court has failed to execute the SUBPOENA, thereby, denying Respondent's Constitutionally protected Due Process rights.

FACTOR #3

WHAT IS THE DEGREE OF RESPONDENT'S SCIENTER INVOLVED?

Black's Law Dictionary defines "scienter" as:

"A degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act having been done knowingly as a ground for civil damages or criminal punishment (i.e. "Mens Rea").

A mental state consisting of an intent to deceive, manipulate or defraud."

The United States Supreme Court held in Ernest & Ernest v. Hochfelder, 425 U.S. 185, 96 S.Ct. 1375 (U.S.S.C 1976), that to establish a claim under securities law, a Plaintiff must prove, beyond a preponderance of evidence, that the Respondent must have acted with scienter (i.e. Knowledge and intent).

Grounded upon the indisputable evidence presented herein, the Complainants (i.e. BUYERS) in the CRIMINAL CASE, as well as the STAMEYS, each executed a Power of Attorney (POA: EXHIBIT B) and a Dual Representation Agreement (DRA: EXHIBIT C), authorizing Cathleen Quinn-Nolan Esq. ("NOLAN") to represent them at closing in order to purchase the PROPERTY. NOLAN, exercising her authority, pursuant to the POA and DRA, representing the STAMEYS, executed deeds on their behalf, transferring ownership from the STAMEYS to the Limited Liability Companies, John Cline Reservoir (I - X) LLCs, that NOLAN formed on the BUYER'S (i.e. Complainant's) behalf. Thereafter, NOLAN, filed the PROPERTY deeds, via an agent, with the Register of Deeds, in Cleveland County, NC, who, in compliance of her Public Officer duties, accepted the PROPERTY deeds as conforming to all applicable North Carolina State and Cleveland County Laws regarding same, prior to recording the PROPERTY deeds.

Even in the scenario that the SCDA Prosecutor's theory was correct, that the PROPERTY deeds were invalid, which has been proven to be false (EXHIBIT H), Respondent had no knowledge of same nor did Respondent have any intent to deceive, manipulate or defraud BUYERS (i.e. Complainants), mandatory elements of scienter, because Respondent could not benefit from invalid PROPERTY deeds, based on the fact that the original owners, the STAMEYS, would remain in title (i.e. Ownership) of the PROPERTY not Respondent. Therefore, Respondent lacked the necessary element of scienter and the FACTOR #2 of the Steadman Multifactor Test is not satisfied.

STEADMAN TEST FACTOR #4

WHAT IS THE DEGREE OF RESPONDENT'S ASSURANCES AGAINST FUTURE VIOLATIONS?

Respondent is fifty-eight(58) years young and had absolutely no prior criminal record, before the CRIMINAL CASE. Due to the fact that Respondent spent over a half century not committing any crimes or deceiving, manipulating or defrauding his clients, it is unlikely he would commit scienter in the future. Respondent has always believed that unethical and immoral persons working in any profession, such as the Securities Industry or Law, have a fiduciary responsibility, not only uphold the law, but adhere to a much higher standard of ethics and morals, in order promote the professionalism of their occupation. For this reason, Respondent's allegations against JANGHORBANI'S and SPILLANE'S aiding and abetting the Complainat's commissions of both Federal and State crimes of fraud, tax evasion and perjury, by failing to notify the proper authorities, is egregious and, thereby, the Plaintiff enters Court with "unclean hands". Based on the Respondent's clean record and fulfillment of his professional obligation to the BUYERS (i.e. Complainants), to consummate the purchase of the PROPERTY, receiving valid deeded (EXHIBITS D, E and H) ownership interests therein, FACTOR #4 of the Steadman Test is not satisfied.

STEADMAN TEST FACTOR #5

WHAT IS THE RESPONDENT'S RECOGNITION OF THE WRONGFUL NATURE OF THE VIOLATION?

The Respondent fully recognizes, that if NOLAN intentionally, knowingly and willfully deceived, manipulated or defrauded her clients, the BUYERS (i.e. Complainants) into believing that they acquired valid deeded Tenant-In-Common ("TIC") ownership interests

in the PROPERTY, whereas NOLAN purposefully committed the wrongful act such that her clients, the STAMEYS, have received both payment for the PROPERTY as well as retained the ownership thereof, scienter is present. However, it is NOLAN'S scienter, not Respondent's, since he did not receive any financial benefit from the PROPERTY deeds, if they were invalid, which they are not (EXHIBIT H). Therefore, Respondent fully recognizes, as the Court should also, that if scienter is present in the afore-described real estate transaction ("JCR LLC DEAL"), it was NOLAN who committed it, not, Respondent. Therefore, FACTOR #5 of the Steadman Test is not satisfied.

STEADMAN FACTOR #6

WHAT IS THE LIKELIHOOD THAT THE RESPONDENT'S OCCUPATION WILL PRESENT OPPORTUNITIES FOR FUTURE VIOLATIONS?

Since Respondent voluntarily relinquished his securities licenses in or about 2009, Respondent has continued to work as a professional in the real estate business which he has done successfully, without one single customer complaint, for over thirty-five(35) years. Due to the fact that Respondent is no longer involved in the Securities Industry, it is unlikely that Respondent's occupation will present opportunities for future violations concerning the Securities Industry, especially, due to the facts presented herein, that Tenant-In-Common ("TIC") property ownership is not an investment contract and, thereby, not a security under the jurisdiction of the Plaintiff, SEC. Therefore, FACTOR #6 of the Steadman Test is not satisfied.

CASE LAW IN SUPPORT OF RESPONDENT'S ARGUMENT

In Steadman v. SEC, 603 F.2d 1126, 1140 (U.S.C.A. 5th Circ. 1979), the United States Court of Appeals held that the Plaintiff must prove by "clear and convincing evidence", that the Respondent should receive the most severe sanction, a lifetime bar from the Securities Industry, is in the Public's interest.

In Steadman supra., Honorable United States Court of Appeals Justice Tjoflat wrote the opinion of the Court, holding:

"In our view, however, permanent exclusion from the [Securities] industry is 'without justification in fact' unless the Commission [SEC] specifically articulates compelling reasons for such a [severe] sanction."

"To say that past misconduct gives rise to an inference of future misconduct is not enough. What is required is a specific enumeration of the factors in Steadman's [Respondent's] case that merit permanent exclusion."

"When the Commission [SEC] imposes the most drastic sanction at its disposal [lifetime ban], it has a duty to articulate carefully the grounds for its decision, including an explanation of why lesser sanctions will not suffice."
(See Aaron v. Securities and Exchange Commission, 446 U.S. 680, 100 S.ct. 1945, 64 L.Ed.2d 611 (U.S.S.C. 1980) ([1]"Scienter is an element of a violation of the Securties Exchange act of 1934 and (2) scienter is an element of a violation of the Securities Act of 1933")

In McCarthy v. SEC, 406 F.3d 179 (U.S.C.A. 2nd Circ. [NY] 2005), Honorable United States Court of Appeals Justice Cardamone wrote the opinion of the Court, holding:

"SEC's decision affirming sanction was deficient for failure to provide reasoned basis from which Court of Appeals could conclude that it was not arbitrary."

In Monetta Financial v. SEC, 390 F.3d 952 (U.S.C.A. 7th Circ. 2004), Honorable United States Court of Appeals Justice Williams wrote the opinion of the Court, holding:

"SEC sanctions [lifetime ban] were excessive"

"Court of Appeals will reverse Securities and Exchange Commission [SEC] order prescribing sanctions upon finding that the SEC abused its discretion (See Mister Disc. Stockbrokers v. SEC, 768 F.2d 875, 879 (U.S.C.A. 7th Circ. 1985); WHX Corp. v. SEC, 362 F.3d 854, 859 (U.S.C.A. D.C. Circ. 2004))"

"In assessing the appropriate sanctions, the Commissions must consider 'the egregiousness of a respondent's actions, the isolated or recurrent nature of the violation, the degree of scienter, the sincerity of a respondent's assurances against future violations, the respondent's recognition that the violation was wrongful, and the likelihood of recurring violations (Monetta Financial Services, 2003 WL 21310330 at 9 (2003))"
(See also Decker v. SEC, 631 F.2d 1380 (10th Circ. 1980); Healey v. Catalyst Recovery, 616 F.2d 641 (U.S.C.A. 3rd Circ. 1980))

In the case at bar, the Plaintiff provides absolutely no evidence, other than Respondent's unconstitutionally obtained conviction in the CRIMINAL CASE, that Respondent's lifetime ban would be in the Public's interest, especially, due to the fact that Respondent made successful investment recommendations, regarding hundreds of millions of dollars of client's assets, as well as recommending to his clients 100% divestiture from the stock market prior to the most recent crash in the mid 2000's, unlike virtually all other similarly licensed securities representatives.

IN SUMMARY

The Plaintiff has failed to satisfy any of the required elements of the Steadman Multifactor Test warranting Respondent's lifetime ban from the Securities Industry in the Public's interest. In fact, Respondent has provided facts, that he made thaousands of recommendations to clients, relating to hundreds of millions of dollars in assets, including completely divesting all of client's assets from the stock market, prior to its crash in the mid-2000's, commencing the "Great Recession", which is proof that the Respondent's presence in the Securties Industry, rather than his absence, is in the Public's interest. The Courts acquiessence of Plaintiff's request of a lifetime ban against respondent would grossly manifest injustice because the SEC is grossly abusing its descretion under the guise of protecting the Public's interest.

CONCLUSION

Respondent has proven, by a preponderance of evidence presented herein, the following:

1. Respondent cannot adequately and effectively Answer the Plaintiff's allegations against Respondent, in the Order Instituting Proceedings ("OIP"), upon which this Administrative Proceeding ("AP") is grounded, without the Plaintiff providing the requested relevant discovery material, that Respondent respectfully requested, pursuant to Rule 230, as well as the Court executing the Judicial Subpoenas Duces tecum ("SUBPOENAS") for additional relevant material in order for Respondent to present an adequate and effective defense. In fact, all EXHIBITS (I through AD) referred to herein could not be provided by Respondent because he was not provided the relevant material, based on the afore-described reasons, and/or the indigent Respondent, could not afford to make photocopies of same, due to the fact that and an "Authorized Advance 'Request" historically takes approximately thirty (3) days or more to be approved at Clinton Correctional Facility - Annex ("CCF") in order for Respondent to be provided photocopies.

2. Respondent was constructively prevented from submitting the Answer fortifying his defense to the Plaintiff's allegations because CCF refuses to provide Respondent with sufficient quantities of plain white paper, in violation of Federal Law that was Judicially mandated in Bounds supra. as well as in violation of the New York State Department of Corrections and Community Services ("DOCCS") Directive #4483, and therefeore, the Court should grant Respondent an Extension of Time, pursuant to Rule 161, until such time as he receives the afore-described relevant material derived from the Plaintiff and the SUBPOENAS and CCF provides Respondent with suffieient quantities of white paper to prepare legal pleadings.

3. Plaintiff lacks authority, pursuant to Title 17 of the Code of Federal Regulations, to prosecute Respondent, due to the fact that Respondent relinquished his securities license in or about 2009, over six(6) years from Plaintiff's commencement of this action and, thus, this action is statutorily time barred.

4. Plaintiff lacks authority, pursuant to Title 17 of the Code of Federal Regulations, to prosecute Respondent, due to the fact that the underlying causation, upon which the Plaintiff grounds its allegations, the Claimants purchase of real estate, is not an "investment contract" and, thereby, not a security.

5. The Plaintiff, by virtue of their employee agents, Alexander Janghobani ("JANGHOBANI") and Margaret Spillane ("SPILLANE") as well as the Complainants, are barred from seeking any equitable relief, based on the doctrine of "unclean hands".

6. Plaintiff is barred from its relief requested grounded upon Respondent's conviction in the CRIMINAL CASE was obtained in violation of the Constitution of the United states of America.

7. Plaintiff is barred from obtaining any relief against Respondent due to the fact that the Claimants "received what they bargained for", valid deeded Tenant-In-Common ("TIC") ownership interests in the PROPERTY as well as received approximately $2,250,000 in financial benefits more than the funds that the Claimants utilized to purchase the PROPERTY and, thus, Claimants would be "unjustly enriched", if the Court grants Plaintiff's requested relief.

RELIEF REQUESTED

Respondent respectfully requests that the Honorable Court grant the following relief:

A. Dismiss the Administrative Proceeding, with prejudice, in favor of Respondent, grounded on the afore-described reasons.

B. In the event that the Court decides not to dismiss the AP, the Respondent respectfully requests that the Court mandate the Plaintiff to provide all of the discovery material Respondent requested, pursuant to Rule 230 as well as the Court execute the Judicial Subpoenas Duces Tecum, that have repeatedly been submitted to the Court, such that Respondent can adequately and effectively prepare a defense to Plaintiff's allegations contained in the Order Instituting Proceedings ("OIP") and further grant Respondent a fourteen (14) day Extension of Time, pursuant to Rule 161, commencing from the time the requested relevant material is provided to Respondent.

C. the Court to provide the time and means to investigate and adjudicate Respondent's allegations that his conviction was obtained in violation of the Federal Constitution.

D. Dismiss the the AP on the grounds, that the Plaintiff is exercising a "gross abuse of discretion", pursuant to the Steadman Multifactor Test, under the guise of "protecting the Public's Interest", requesting Respondent to be banned from the Securities Industry for life, to cover up Plaintiff's aiding and abetting Complaint's commissions of Federal and State crimes of fraud, tax evasion and perjury (i.e. Signing false tax returns), grounded upon the fact that the Complaints failed to amend their Federal and State tax returns as well as pay the associated taxes, penalties and interest, based upon their "failed" 1031 EXCHANGES, in an estimated amount exceeding $4,000,000, increasing daily.

Dated: October 4, 2016

Paul Leon White II, Respondent