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Defendant in Pro Se

IN THE UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

IN THE MATTER OF JOSEPH L. PITTERA, ESQ.	ADMINISTRATIVE PROCEEDING File No. 3-17507
Respondent,	**RESPONDENT'S PETITION FOR LIFT OF TEMPORARY SUSPENSION PURSUANT TO SEC RULE OF PRACTICE 102(e)(3)(ii)**

Comes now defendant Joseph L. Pittera ("Defendants"), who files a Petition for a Lift of the Temporary Suspension of the answers the August 26, 2016 Order for Temporary Suspension by Petitioner Securities and Exchange Commission ("Petitioner").

I.

RELEVANT FACTS

Respondent was misled by his client and by the Company known as MusclePharm in the securities work that both the client and the Company retained him for. Specifically Respondent did not have the experience and requisite knowledge in writing the ten opinion letters for his client's company OTC Capital Partners, LLC and its proprietor Adi M. Elfenbein. Management

for MusclePharm provided all of the documents that were used in the issuance of the opinion letters and Respondent relied on the documents to prepare the opinion letters. Respondent was not an experienced securities attorney and did not at the time have the requisite knowledge of the securities laws to issue the opinions that were issued. Respondent legitimately believed that invoices could be converted into securities which could then be sold by entities purchasing said debt. Respondent failed to understand that the invoices had to be converted into convertible notes which would then have to be held for one year before they could be sold into the public securities markets. Respondent has not prior to and since then issued any similar type opinion letters based on invoices. As Respondent will advocate in the civil case on the merits, these opinions were carried out with only negligence, and without the not requisite intent or "extreme recklessness" required by Petitioner's own regulations and the case law progeny. Respondent will further set forth that good cause exists for Petitioner's Office of General Counsel ("OCG") should lift the Temporary Suspension of Respondent.

A Civil Complaint filed by Petitioner was served on Respondent in February, 2016. Since that point, Respondent had been seeking out legal counsel for this matter, and the assistance of a friend and attorney Al West. Al West had contacted Petitioner's counsel, Zachary Carlyle, Esq., via telephone numerous times to request an extension of time to respond to the Complaint, but Petitioner's counsel failed to respond at all. Respondent did not contemplate that Petitioner's counsel's failure to respond was part of a plan to request a default and file for a default judgment. On April 11, 2016, the default was entered, and subsequently a default judgment was entered against Respondent.

Respondent attaches a copy of the proposed Motion to Vacate pursuant to Fed.R.Civ.P. 60(b)(1), which is based on attorney neglect and inadvertence, but also on the improper conduct of Petitioner's counsel in failing to respond to Respondent's request for more time to file an answer. (See Exhibit A", Motion to Vacate Default Judgment)

Respondent sets forth that good cause exists to grant Respondent a lift from the Temporary Stay of Suspension by Petitioner.

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II.

GOOD CAUSE EXISTS TO LIFT PETITIONER'S TEMPORARY SUSPENSION

Respondent sets forth that good cause exists to lift the temporary suspension of Respondents for securities matters before Petitioner. As Respondent will set forth in the civil action on the merits, the Petitioner cannot meet the regulatory requirement of intent for the violations alleged, constituting good cause for the present Petition for a Lift of Suspension. "'Good cause' means a fair and honest cause or reason regulated by good faith…" *Marcy v. Delta Airlines*, 166 F.3d 1279, 1284 (9th Cir. 1999). "Good cause means, at a minimum, excusable neglect." *Boudette v. Barnette*, 923 F.2d 754, 755-56 (9th Cir.1991).

1. Petitioner Will Not be Able to Establish "Extreme Recklessness" or "Intent" in the Civil Proceeding

Petitioner is alleging that Respondent aided and abetted in the alleged securities fraud claims. The elements of aiding and abetting securities law violations, required for Securities and Exchange Commission (SEC) to pursue injunctive action, are: existence of independent primary violation; actual knowledge by alleged aider and abettor of primary violation and of his or her own role in furthering it; and substantial assistance in commission of the primary violation. See *S.E.C. v. Fehn*, 97 F.3d 1276, 1288 (9th Cir. 1994). "Awareness of wrongdoing," as required by the Securities and Exchange Commission (SEC) for a finding of aiding and abetting securities laws violations in a disciplinary case, means knowledge of wrongdoing. Securities Exchange Act of 1934, §§ 15(b)(4)(E), (b)(6)(A), 21B(a)(2), as amended, 15 U.S.C. §§ 78o(b)(4)(E), (b)(6)(A), 78u-2(a)(2). See *Howard v. S.E.C.*, 376 F.3d 1136, 1142 (D.D.C., 2004). " 'Extreme recklessness' - or as many courts of appeals put it, 'severe recklessness' - may be found if the alleged aider and abettor encountered 'red flags,' or "suspicious events creating reasons for doubt" that should have alerted him to the improper conduct of the primary violator. . .or if there was 'a danger ... so obvious that the actor must have been aware of 'the danger.' It is not enough that the accused aider and abettor's action or omission is "derived from inexcusable neglect." *Sundstrand*, 553 F.2d at 1047. "Extreme recklessness" is neither ordinary negligence nor 'merely a heightened form of ordinary negligence.' To put the matter in terms of § 21C, aiding and

abetting liability cannot rest on the proposition that the person should have known' he was assisting violations of the securities laws." *Id.* at 1143.

Nothing in the Complaint shows that Petitioner possesses any evidence to support "extreme recklessness" or intent of Respondent. Respondent was an inexperienced securities attorney who failed to understand primarily that invoices could not be converted into securities by themselves without "securitizing" them, i.e by converting the invoices into convertible notes and then holding the notes for a one-year period prior to converting them into tradable securities. Respondent did not prepare any of the underlying documents that were used in the preparation of the legal opinions and legitimately believed that an invoice could be a security by itself and therefore convertible into tradable common shares.

2. Petitioner Has Previously Not Prosecuted Such Weak Cases

Respondent believes not only that Petitioner will not be able to satisfy these legal requirements of extreme recklessness or intent on the violations alleged in the civil case, but also that this case presents an example of government lawyers seeking to merely put "notches" on the wall of their employer for insignificant and de minimis violations; all for which OGC has previously decided were unworthy of taking action.

In enacting Rule 102(e), the commission intended to "protect the integrity and quality of its system of securities regulations and, by extension, the interests of the investing public. See Amendment to Rule 102(e) of Commissions Rule of Practice, 63 Fed.Reg. 57, 164 (Oct. 26, 1998), *Touche Ross & Co. v. S.E.C.*, 609 Fed.2d 579 (2nd Cir. 1979). The Commission's public interest factors are instructive on whether a sanction is appropriate under Rule 102(c): 1) egregiousness of Respondent's actions; 2) the isolated and recurrent nature of the infraction; 3) the degree of scientor involved; 4) the sincerity of respondent's assurances against future violations; 5) the respondent's recognition of the wrongful nature of his conduct; and 6) the likelihood of future violations. See *Streadman v. S.EC.*, 603 F.2d 1126, 1140 (5th Cir. 1979). No one factor is controlling. See *S.E.C. v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996). Here, Respondent's negligent acts were not egregious; this is an isolated occurrence' he has taken his own practice procedures to ensure that reoccurrence does not happen; he recognizes that he

negligently failed to conduct research of what his client was telling him; and there is very little chance of reoccurrence.

That general approach of the OGC was previously set forth in *In re William R. Carter & Charles J. Johnson, Jr.*, 22 S.E.C. Docket 292, Rel. No. 17597 (Feb. 28, 1981). Traditionally, OCG has not brought disciplinary proceedings absent an underlying securities law violation. In particular, the OGC has long observed the policy that it would not bring a Rule 102(e) proceeding against attorneys who provided reasonable legal advice that in hindsight was incorrect, "if a securities lawyer is to bring his best independent judgment to bear on a disclosure problem, he must have the freedom to make innocent – or even, in certain cases, careless – mistakes without fear of legal liability or loss of the ability to practice before the Commission." *Id.* at 25. Petitioner has furthered this position of not holding attorneys accountable for that which was discoverable with hindsight in *In re Scott G. Monson*. 93 S.E.C. Docket 1989, Re. No. 28323, 2008 WL 2574441 (June 30, 2008), stating that "[t]he intent requirement…is crucial to an allegation of wrongdoing by a lawyer because it 'provides the basis for distinguishing between those professionals who may be appropriately considered as subjects of professional discipline and those who, acting in good faith, have merely made errors of judgment or have been careless.'"

Suspension under Rule 102(c) should only be imposed for remedial purposes, and in the absence of a strong showing of a necessity to prevent future violations, the sanction is considered to be punitive. See *McCarthy v. S.E.*C., 406 F.3d 179, 188 (2nd Cir. 2005). Here, the OCG here should lift the Temporary Suspension of Respondent, pending the outcome of Respondent's Motion to Vacate the Default Judgment.

DATED: September 21, 2016

Law Offices of Joseph L. Pittera

By: _____
Joseph L. Pittera
Respondent in Pro Se

DECLARATION OF JOSEPH L. PITTERA IN SUPPORT OF RESPONSE

I, Joseph L. Pittera, declare as follows:

1. I am an attorney licensed in the State of California and admitted to the Central District of California. I have personal knowledge of the events and facts of this case, and to the matters sworn to below. If called to testify in person, I could do so completely and fully.

2. I did not willfully or intentionally violate Sections 5(a) and 5(c) of the Securities Act of 1933 and I did not aid and abet or cause a violation of Sections 5(a) and 5(c) of the Securities Act of 1933.

3. The only civil malfeasance on my part could have been my own confusion regarding the issues surrounding whether invoices can be deemed securities or whether they in fact have to be securitized prior to the writing of an opinion letter seeking an exemption from the registration requirements. I have been practicing law since 1994 and for most of that period of time I practiced Business Law, Bankruptcy Law, and Corporate Law not involving Securities Law.

4. I have never been disciplined by the State Bar of California nor by the Securities and Exchange Commission for any violations surrounding my practice of law. I like to think of myself as an honest and ethical attorney and it pains me to be accused of having violated any aspect of the Securities Laws. I am hoping that by explaining myself herein that I can convince the Commission that I am not a willful or intentional violator of any of the Securities Laws, and that the malfeasance was only an innocent mistake, and that as a result I do not merit being suspended by the Commission.

5. [redacted] able to practice Securities Law this will cause untold suffering to not only myself but also my wife and children, four of whom are in college and one of whom is now attending Law School.

6. Since the lawsuit filed by the Commission against me I have changed my entire practice away from Securities Law. I am currently working mostly on Family Law, Criminal, and Civil matters.

7. When I was practicing Securities Law I was involved with the preparation and filing of Registration Statements on Form S-1 for a number of clients. The most recent S-1 that I worked on was approved prior to the entry of judgment against me. With respect to the entry of judgment against me I am filing a Motion to Set Aside the Judgment concurrently with this submission.

8. I have been successful in the past at submitting SB-2 Registration Statements for a number of companies and then S-1 Registration Statements for some clients. I do not do any other opinion letters for clients since the default judgment was entered against me.

9. I have not done opinion letters involving invoices prior to and since the MusclePharm situation. When I have written debt opinions I have written them after doing extensive due diligence specifically focusing on the legitimateness of the debt, whether the debt is properly convertible, whether consideration was paid in one form or another, whether the Company that issued the debt is a shell or not, and whether there exists an appropriate exemption from the Registration Requirements of the Securities Act. I have learned about using the exemptions found in Section 3(a)(9) of the Securities Act, Section 3(a)(10) of the Securities Act, and of course Rule 144.

10. At no time was I the corporate counsel for MusclePharm. Adi Elfenbein of OTC Capital Partners, LLC contacted me and asked if I could do some legal opinions based on debt conversion. The Company prepared all of the documents that were used and also sent me a sample opinion letter which I used for the template for my opinion letters. I believed at the time that invoices could be removed from a Company balance sheet by converting it to stock. I did not know better at the time that the invoices had to be securitized.

11. I never created any of the documents that were attached to each legal opinion that I produced to the Commission pursuant to the Subpoena. All of the documents were prepared by someone at MusclePharm and they were all signed by Brad Pyatt. It was MusclePharm and Brad Pyatt who created all of the documents and convinced OTC Capital Partners, LLC to participate in each transaction.

12. I rendered a total of 10 opinions between February 02, 2011 and June 13, 2011. Each and every opinion involved the issuance of stock of MusclePharm to OTC Capital Partners, LLC based upon the purchase of debt by OTC Capital Partners, LLC from third party creditors of MusclePharm. The debt purchased by OTC Capital Partners, LLC was based on invoices submitted by the third party creditors to MusclePharm for which MusclePharm claimed at the time to not have the funds necessary to pay the invoices. MusclePharm therefore arranged to have the debt sold by the third party creditor to OTC Capital Partners, LLC, and then MusclePharm agreed to issue common stock to OTC Capital Partners, LLC so that it could be sold in the public marketplace thereby paying off the debt and removing that debt from the

balance sheet of MusclePharm. All documents associated with the sale and purchase of the debt to OTC Capital Partners, LLC, as I mentioned previously, were prepared by MusclePharm.

13. I incorrectly interpreted that an invoice could in turn become a security and therefore believed that it would be exempt from the Registration Requirements. However converting debt into equity is an established practice that companies use to control their balance sheet. Had the debts sold to OTC Capital Partners been convertible debts then I believe my opinion would have been correct.

14. I did not willfully violate Section 5. I believed that the securities issued pursuant to the debt transaction were exempted from being registered. I reviewed the MusclePharm documents, which I did not prepare myself, and they looked comprehensive and detailed enough that I truly believed that the invoices being converted into securities was a legitimate way to issue securities exempt from the registration requirements of the Act.

15. I have since learned that the Company should have turned the invoices into Convertible Notes in cooperation with the creditors and then sold the Convertible Notes to OTC Capital Partners who would then be able to convert portions of the debt into securities. I did not willfully seek to violate the Securities Laws.

16. My misunderstanding was merely nothing more than my lack of knowledge with respect to whether such an invoice can be a security and whether a company such as MusclePharm can then turn around and via resolution convert the debt into securities, sell the debt to a third party who would convert the debt into securities to be sold in the public marketplace, thereby aiding the Company in removing the debt from its balance sheet.

17. I realize now that the misunderstanding of these transactions, but at the time I always made sure that the legal opinions that I wrote were well grounded in law. I now comprehend the inaccuracies of my interpretation. Clearly it is up to the Commission to determine whether to proceed with an enforcement and an administrative action. I would ask however that the Commission take into account some personal factors in mine and my family's life that might mitigate or change the Commission's mind with respect to whether to proceed with an action against me or not.

18. To begin with my wife and I are not in [redacted] and this matter has severely strained the both of us. [redacted]

[redacted] since 2013 [redacted] This [redacted]

19. [redacted] occasionally [redacted] Both my wife and I have very [redacted]

20. In addition to [redacted] my wife and I have five (5) children. I have four young adult children who are 20 years old now as well as a 24 year old daughter who is in her first year of law school. Financially my wife and I are under constant strain with supporting not only ourselves but our young adult children who are in college and law school. I work for myself and [redacted]. In addition my wife and I do not own a home but rent instead. Because [redacted] at this juncture and do not have the funds to pay them.

21. My financial difficulties are compounded by the fact that I continue to have pretty severe tax problems which began in 1998 and continue until today. The bottom line is that I have no savings and do not own a home, am responsible for our five children as well as my wife, have some pretty major tax problems, and in addition my wife and I have some [redacted].

22. I can tell you that I have not done anything since the MusclePharm incident that would merit the Commission finding me responsible for violating the securities laws. I believe that the work I have done since the MusclePharm matter is good work and have not received any complaints from clients or from the Commission with regard to it. In fact I take pride in that I'm a legitimate and honest businessman and am selective in the work I do.

23. I did not conspire, aid, or abet with anyone in violating the provisions of Section 5(a) and 5(c) of the Securities Act of 1933. I believed the information I received from MusclePharm was correct and at the time I misunderstood, and should have made sure that an invoice be converted into a security. In hindsight I know that I wasn't thorough as I could have been with

regard to this situation and as a result I rendered an inaccurate opinion, but I did not understand these relevant securities laws then as I understand them now. I would never again do a transaction of this nature in any event and believe that I have learned my lesson.

24. I understand that the Commission has a duty to protect the public from transactions that violate the securities laws, and that the laws as they exist were drafted to make sure that securities markets function in a transparent and orderly manner. All I can say is that I acknowledge my misunderstanding, but I did not do it deliberately or with a view towards violating any securities laws. I am a more experienced attorney now than I was back in 2011 when the MusclePharm transaction was being put together and I believe that what I did happened more out of ignorance of the law than a desire to find a way to circumvent the securities laws.

25. With respect to the judgment against me in favor of the Commission, my attorney Al West has claimed that he attempted numerous times prior to the entry of default to contact the attorney for the SEC, Zachary Carlyle, and obtain a two week extension for filing the answer to the complaint. Mr. Carlyle claims he never received any telephone calls from Mr. West and the result was that a default and then default judgment was entered against me. I did not "agree" to the factual allegations in the complaint by letting the matter go to a default. I hired counsel to represent me and things did not turn out as I expected they would. I am filing a Motion to Vacate the Default and Default Judgment and this is attached as Exhibit A to this document.

I declare under the penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Dated this 21st day of September 2016

Joseph L. Pittera, Declarant

PROOF OF SERVICE BY OVERNIGHT MAIL

Joseph Pittera certifies and declares as follows:

I am over the age of 18 years, and not a party to the cause; my business address is 1308 Sartori Avenue, Suite 109, Torrance, California 90501; I am employed in the county where the mailing took place.

I deposited in the overnight mail at TORRANCE, CALIFORNIA on September 21, 2016, a copy of the following document(s): **RESPONDENT'S PETITION FOR LIFT OF TEMPORARY SUSPENSION PURSUANT TO SEC RULE OF PRACTICE 102(e)(3)(ii)** in a sealed envelope with postage fully prepaid thereon, addressed to:

Matthew S. Ferguson, Esq.
Office of the General Counsel
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-9612

I certify and declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed September 21, 2016, at TORRANCE, CALIFORNIA.

JOSEPH PITTERA

Ex.

A

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Defendant in Pro Se

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. OTC CAPITAL PARTNERS, LLC; ADI M. ELFENBEIN; AND JOSEPH L. PITTERA, Defendants.	Case No. 16-20270-CIV-SCOLA **NOTICE OF MOTION AND MOTION TO VACATE DEFAULT JUDGMENT PURSUANT TO FED.R.CIV.PROC. 60(b)(1); DECLARATION OF JOSEPH L. PITTERA AND AL WEST** Date: Time and Date Set by Court Time: Time and Date Set By Court Room: 12-3 Honorable Richard N. Scola, District Court Judge

TO THE ABOVE-ENTITLED COURT AND ALL INTERESTED PARTIES HEREIN, PLEASE TAKE NOTICE THAT on October __, 2016 at ___, or as soon thereafter as the matter may be heard, in Room 12-3 of the above-entitled Court, located at 400 North Miami Avenue, Miami, Florida. 33128, Defendant Joseph L. Pittera ("Defendant") will and hereby does move to vacate the default judgment entered by Plaintiff Securities and Exchange Commission.

This motion is based upon the grounds that:

1. Good cause exists to vacate the default judgment entered against Defendant based upon attorney neglect and inadvertence, and reliance upon the professional courtesy of opposing counsel.

2. Defendant has a complete defense to the allegations of Plaintiff.

This motion will be made pursuant to Fed.R.Civ.P. 60(b)(1) and this court's inherent authority. This motion is based upon this notice, the accompanying memorandum of points and authorities, all pleadings and papers on file in the above-captioned action, the declarations of Joseph L. Pittera and Al West, and other evidence that may be presented by Defendant at the hearing on this motion.

DATED: September 21, 2016 Law Offices of Joseph L. Pittera

By: _____
Joseph L. Pittera
Defendant in Pro Se

I.

RELEVANT FACTS

Defendant was misled by his client and by the Company known as MusclePharm in the securities work that both the client and the Company retained him for. Specifically Defendant did not have the experience and requisite knowledge in writing the ten opinion letters for his client's company OTC Capital Partners, LLC and its proprietor Adi M. Elfenbein. Management for MusclePharm provided all of the documents that were used in the issuance of the opinion letters and Defendant relied on the documents to prepare the opinion letters. Defendant was not an experienced securities attorney and did not at the time have the requisite knowledge of the securities laws to issue the opinions that were issued. Defendant legitimately believed that invoices could be converted into securities which could then be sold by entities purchasing said debt. Defendant failed to understand that the invoices had to be converted into convertible notes which would then have to be held for one year before they could be sold into the public securities markets. Defendant has not prior to and since then issued any similar type opinion letters based on invoices. As Defendant will advocate in the civil case on the merits, these opinions were carried out with only negligence, and without the not requisite intent or "extreme recklessness" required by Plaintiff's own regulations and the case law progeny.

The Civil Complaint filed by Plaintiff was served on Defendant in February, 2016. Since that point, Respondent had been seeking out legal counsel for this matter, and the assistance of a friend and attorney Al West. Al West had contacted Plaintiff's counsel via phone numerous times to request an extension of time to respond to the Complaint, but Plaintiff's counsel failed to respond at all. Defendant did not contemplate that Plaintiff's counsel's failure to respond was carried out to effectuate a request a default and file for a default judgment.

On April 11, 2016, the default was entered, and subsequently a default judgment against Defendant. Defendant now moves to vacate the default judgment.

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II.

POINTS AND AUTHORITIES/ARGUMENT

A.

STANDARDS ON A MOTION TO VACATE DEFAULT JUDGMENT PURSUANT TO FED.R.CIV.P. 60(b)

"Rule 60(b) allows a district judge to provide relief from a final judgment if the moving party can show (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . ., misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. Fed.R.Civ.P. 60(b)." *United Nat.Ins.Co. v. Spectrum Worldwide*, 555 F.3d 772, 780 (9th Cir. 2009). The equitable power embodied in Rule 60(b) is the power "to vacate judgments whenever such action is appropriate to accomplish justice." *Gonzalez v. Crosby*, 545 U.S. 524, 542 (2005).

B.

THE DEFAULT JUDGMENT ENTERED AGAINST DEFENDANT SHOULD BE VACATED PURSUANT TO FED.R.CIV.P. 60 (b)(1) AS EXCUSABLE NEGLECT AND JUSTIFIABLE RELIANCE UPON OPPOSING COUNSEL'S PROMISES RESULTED IN THE UNDESIRED DISPOSITION

Defendant here had a default judgment entered against him because of his own inadvertence and the reliance of the expected professional courtesy of opposing counsel. Good cause exists here to vacate the default judgment against Defendant.

"'Good cause' means a fair and honest cause or reason regulated by good faith…" *Marcy v. Delta Airlines*, 166 F.3d 1279, 1284 (9th Cir. 1999). "Good cause means, at a minimum, excusable neglect." *Boudette v. Barnette*, 923 F.2d 754, 755-56 (9th Cir.1991). A defaulting defendant is not "culpable" where they offer "a credible, good faith explanation negating any

intention to take advantage of the opposing party, interfere with judicial decision making, or otherwise manipulate the legal process." *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 697 (9th Cir.2001).

"Excusable neglect," as may support grant of relief from final judgment or order, covers cases of negligence, carelessness, and inadvertent mistake. See *Bateman v. United States Postal Serv.*, 231 F.3d 1220, 1223-24 (9th Cir.2000). "[T]he Supreme Court held in *Pioneer* that "excusable neglect" covers negligence on the part of counsel." *Id.* at 1223. "[W]e noted that *Pioneer* changed our law on excusable neglect. After Pioneer, however, we recognized that the term covers cases of negligence, carelessness and inadvertent mistake." *Id.* at 1224. "Excusable neglect" is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 394 (1993). "In determining whether neglect is excusable a court considers (1) prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay, including whether it was in the reasonable control of the moving party; and (4) the good faith of the moving party." *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380, 395 (1993). *In re. Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 973 (9th Cir., 2007), accord, *Bateman v. United States Postal Serv.*, 231 F.3d 1220, 1223-24 (9th Cir., 2000). "[T]he determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer*, 507 U.S. at 395. However, it is an "elastic concept" not limited to omission caused by circumstances beyond the movant's control. *Id.* at 392.

Excusable neglect under Rule 60(b)(1) " 'encompass[es] situations in which the failure to comply with a ... deadline is attributable to negligence,' and includes 'omissions caused by carelessness.' " *Lemoge v. United States*, 587 F.3d 1188, 1192 (9th Cir.2009). These factors are disjunctive, and the court is free to deny the motion to vacate a default judgment if any of the three factors is true. See *American Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1108 (9th Cir.2000). "*Pioneer* sets forth an equitable 'framework' for determining the question of excusable neglect in particular cases, and we will ordinarily examine all of the circumstances

involved rather than holding that any single circumstance in isolation compels a particular result regardless of the other factors." *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 382 n. 2 (9th Cir.1997).

If the default judgment is obtained because of a mistaken understanding of the facts concerning the duty to respond, relief may be granted. See *999 v. Cox & Co.*, 574 F.Supp. 1026, 1029 (ED Mo. 1983). Relief may also be granted where a defendant who has been served with process is reasonably mistaken as to his or her duty to respond to the complaint. See *Newhouse v. Probert*, 608 F.Supp. 978, 985 (WD Mi. 1985).

Here, the Default Judgement was obtained through a combination of the neglect of Defendant and his advisory counsel, and also justifiable reliance on Plaintiff's counsel to respond to phone requests made by Defendant's counsel for an extension of time to respond to the complaint. Attorney Al West made several calls to Plaintiff's counsel requesting an extension of time to respond, none of which were returned. (See Declaration of Al West, ¶ 2). Al West also relied on the professional courtesy of Plaintiff's counsel to both respond to him and to afford Defendant an extension of time to respond to the Complaint. (Id. at ¶ 3). Defendant also relied upon both advisory counsel Mr. West and the professionalism of Plaintiff's counsel to respond and afford additional time to respond to the Complaint. (Declaration of Joseph L. Pittera, ¶¶ 2-3)

Defendant and his advisory counsel's inadvertence and neglect, and their reliance on the expected professional courtesy of Plaintiff's counsel that never came. (See Declaration of Al West, ¶ 3, Declaration of Joseph L. Pittera, ¶ 3)

Together, this establishes good cause to vacate the default judgment entered against Defendant.

Under clear authority, good cause exists to vacate the default judgment.

C.

RELIEF IS PROPER BECAUSE DEFENDANT HAS A MERITORIOUS DEFENSE TO THE CASE, HE IS NOT CULPABLE, AND PLAINTIFF WILL SUFFER NO LEGAL PREJUDICE BY HAVING THE DEFAULT JUDGMENT VACATED

A default judgment is properly maintained only if: "(1) the plaintiff would be prejudiced if the judgment is set aside, (2) defendant has no meritorious defense, or (3) the defendant's culpable conduct led to the default. This tripartite test is disjunctive." *Hammer v. Drago (In re Hammer)*, 940 F.2d 524, 525–26 (9th Cir.1991)). "Meritorious defense" component of test in determining whether there is good cause to set aside default does not go so far as to require that movant demonstrate likelihood of success on merits; rather, movant's averments need only plausibly suggest existence of facts which, if proven at trial, would be cognizable defense. See *Coon v. Grenier*, 867 F.2d 73, 77 (1st Cir. 1989). In order to make a sufficient showing of a meritorious defense in connection with a motion to vacate a default judgment, the defendant need not establish his defense conclusively, but he must present evidence of facts that, if proven at trial, would constitute a complete defense. See *Hartford Fire Ins. Co. v. The Evergreen Organization, Inc.*, 410 F.Supp.2d 180, 186 (S.D.N.Y. 2006). A party seeking to set aside a default need not prove his defense by a preponderance of the evidence; rather, that party only carries burden of producing competent evidence that establishes a factual or legal basis for tendered defense. See *Operating Co. v. Utility Workers Union of America*, 491 F.2d 245, 252 n. 8 (4th Cir. 1974).

Plaintiff is alleging that Defendant aided and abetted in the alleged securities fraud claims. The elements of aiding and abetting securities law violations, required for Securities and Exchange Commission (SEC) to pursue injunctive action, are: existence of independent primary violation; actual knowledge by alleged aider and abettor of primary violation and of his or her own role in furthering it; and substantial assistance in commission of the primary violation. See *S.E.C. v. Fehn*, 97 F.3d 1276, 1288 (9th Cir. 1994). "Awareness of wrongdoing," as required by the Securities and Exchange Commission (SEC) for a finding of aiding and abetting securities laws violations in a disciplinary case, means knowledge of wrongdoing. Securities Exchange Act of 1934, §§ 15(b)(4)(E), (b)(6)(A), 21B(a)(2), as amended, 15 U.S.C.A. §§ 78o(b)(4)(E), (b)(6)(A), 78u-2(a)(2). See *Howard v. S.E.C.*, 376 F.3d 1136, 1142 (D.D.C., 2004). "'Extreme recklessness' - or as many courts of appeals put it, 'severe recklessness' - may be found if the alleged aider and abettor encountered 'red flags,' or "suspicious events creating reasons for doubt" that should have alerted

him to the improper conduct of the primary violator. . .or if there was 'a danger ... so obvious that the actor must have been aware of 'the danger.' It is not enough that the accused aider and abettor's action or omission is "derived from inexcusable neglect." *Sundstrand*, 553 F.2d at 1047. "Extreme recklessness" is neither ordinary negligence nor 'merely a heightened form of ordinary negligence.' To put the matter in terms of § 21C, aiding and abetting liability cannot rest on the proposition that the person should have known' he was assisting violations of the securities laws." *Id.* at 1143.

Defendant here has a complete defense based upon the requisite standard of proof by Plaintiff of a showing of "extreme recklessness" or "intent"; standards that they will not be able to meet.

Defendant attaches the proposed Answer to the Complaint as Exhibit "A" to the Declaration of Joseph L. Pittera, and ¶ 4).

III.

CONCLUSION

Based upon the foregoing, this court should vacate the default judgment against defendant and order the proposed answer to be filed.

DATED: September 21, 2016 Law Offices of Joseph L. Pittera

By: _____
Joseph L. Pittera
Defendant in Pro Se

DECLARATION OF JOSEPH L. PITTERA

I, Joseph L. Pittera do declare:

1. I am an attorney licensed in the State of California and admitted to the Central District of California. I have personal knowledge of the events and facts of this case, and to the matters sworn to below. If called to testify in person, I could do so completely and fully.

2. I negligently relied upon the advice of Al West as we attempted to obtain an extension of time to respond to the complaint. I did not expect that Plaintiff's counsel was going to file for and obtain a default judgment.

3. I also relied upon the professional courtesy of Plaintiff's counsel to afford me additional time to respond to the Complaint.

4. Attached as Exhibit "A" is a true and correct copy of the proposed Answer to the Complaint.

I declare under the penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Dated this 22nd day of September 2016

Joseph L. Pittera, Declarant

DECLARATION OF AL WEST

I, Al West, do declare:

1. I am an attorney licensed in the State of California and admitted to the Central District of California and the 9th Circuit Court of Appeals. I acted in an advisory capacity to Joseph L. Pittera. I have personal knowledge of the events and facts of this case, and to the matters sworn to below. If called to testify in person, I could do so completely and fully.

2. I made several phone calls in late March 2016 and early April 2016 to Plaintiff's counsel requesting that he afford Defendant Joseph L. Pittera an extension of time to respond to the Complaint.

3. I myself relied on the professional courtesy expected of government attorney's to grant an extension of time that never came.

I declare under the penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Dated this 22nd day of September 2016

/s/ Al West
Al West, Declarant

PROOF OF SERVICE BY OVERNIGHT MAIL

Joseph Pittera certifies and declares as follows:

I am over the age of 18 years, and not a party to the cause; my business address is 1308 Sartori Avenue, Suite 109, Torrance, California 90501; I am employed in the county where the mailing took place.

I deposited in the overnight mail at TORRANCE, CALIFORNIA on September 21, 2016, a copy of the following document(s): **NOTICE OF MOTION AND MOTION TO VACATE DEFAULT JUDGMENT PURSUANT TO FED.R.CIV.PROC. 60(b)(1); DECLARATION OF JOSEPH L. PITTERA AND AL WEST** in a sealed envelope with postage fully prepaid thereon, addressed to:

Zachary T. Carlyle, Esq.
U.S. Securities and Exchange Commission
1961Stout Street
Suite 1700
Denver, Colorado 80294-1961

I certify and declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed September 21, 2016, at TORRANCE, CALIFORNIA.

JOSEPH PITTERA

EXHIBIT A

Joseph L. Pittera, SBN 170660
Law Offices of Joseph L. Pittera
1308 Sartori, Suite 109
Torrance, CA 90501
Tel. (310) 328-3588
Fax (310) 328-3063
[redacted]
Defendant in Pro Se

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. OTC CAPITAL PARTNERS, LLC; ADI M. ELFENBEIN; JOSEPH L. PITTERA, Defendants.	Case No. 1:16-cv-20270 **DEFENDANT JOSEPH L. PITTERA'S ANSWER TO THE COMPLAINT** **DEMAND FOR JURY TRIAL** Complaint Filed: January 22, 2016

1. Comes now defendant Joseph L. Pittera ("Pittera"), who answers the complaint filed by plaintiff Securities and Exchange Commission ("Plaintiffs") pursuant to Fed.R.Civ.P. 12 (a)(1)(A) and (b), and admits or denies each statement in the complaint as follows, contention by contention pursuant to Fed.R.Civ.P. 8 (b). Defendant further sets forth affirmative defenses pursuant to Fed.R.Civ.P. 8 (c).

I.

SPECIFIC ADMISSIONS OR DENIALS PURSUANT TO FED.R.CIV.P. 8 (b)

2. Answering Paragraph 1, Pittera admits the sentence no. 1, but denies sentence no. 2.

3. Answering Paragraph 2, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

4. Answering Paragraph 3, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

5. Answering Paragraph 4, Pittera denies the allegations.

6. Answering Paragraph 5, Pittera denies the allegations.

7. Answering Paragraph 6, Pittera denies the allegations.

8. Answering Paragraph 7, Pittera denies sentence no. 1, but admits sentence no. 2.

9. Answering Paragraph 8, Pittera denies the allegations.

10. Answering Paragraph 9, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

11. Answering Paragraph 10, Pittera admits that Plaintiff has authority to act in this case.

12. Answering Paragraph 11, Pittera admits that Plaintiff has proper jurisdiction over this case.

13. Answering Paragraph 12, Pittera denies the allegations.

14. Answering Paragraph 13, Pittera only admits that venue is correct.

15. Answering Paragraph 14, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

16. Answering Paragraph 15, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

17. Answering Paragraph 16, Pittera admits the first sentence, but denies sentence no. 2.

18. Answering Paragraph 17, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

19. Answering Paragraph 18, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

20. Answering Paragraph 19, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

21. Answering Paragraph 20, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

22. Answering Paragraph 21, Pittera denies the allegations.

23. Answering Paragraph 22, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

24. Answering Paragraph 23, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

25. Answering Paragraph 24, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

26. Answering Paragraph 25, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

27. Answering Paragraph 26, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

28. Answering Paragraph 27, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

29. Answering Paragraph 28, Pittera admits the allegations.

30. Answering Paragraph 29, Pittera admits the allegations.

31. Answering Paragraph 30, Pittera denies the allegations.

32. Answering Paragraph 31, Pittera denies the allegations.

33. Answering Paragraph 32, Pittera denies the allegations.

34. Answering Paragraph 33, Pittera denies the allegations.

35. Answering Paragraph 34, Pittera denies the allegations.

36. Answering Paragraph 35, Pittera denies the allegations.

37. Answering Paragraph 36, Pittera denies the allegations.

38. Answering Paragraph 37, Pittera admits the first sentence, but denies sentence nos. 2-3.

39. Answering Paragraph 38, Pittera admits the allegations.

40. Answering Paragraph 39, Pittera denies the allegations.

41. Answering Paragraph 40, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

42. Answering Paragraph 41, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

43. Answering Paragraph 42, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

44. Answering Paragraph 43, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

45. Answering Paragraph 44, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

46. Answering Paragraph 45, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

47. Answering Paragraph 46, Pittera denies the allegations.

48. Answering Paragraph 47, Pittera lacks sufficient knowledge or information to admit or deny these allegations of the complaint.

49. Answering Paragraph 48, Pittera denies the allegations.

50. Answering Paragraph 49, Pittera denies the second sentence of the allegations.

51. Answering Paragraph 50, Pittera realleges and incorporates by reference their admissions and denials in Paragraphs 1-50, inclusive.

FIRST CLAIM TO RELIEF

52. Answering Paragraph 51, Pittera denies the allegations.

53. Answering Paragraph 52, Pittera denies the allegations.

54. Answering Paragraph 53, Pittera denies the allegations.

II.

AFFIRMATIVE DEFENSES PURSUANT TO FED.R.CIV.P. 8(c)

FAILURE TO STATE A CAUSE OF ACTION

55. As a first separate and distinct affirmative defense, Pittera alleges that the Complaint, and each claim set forth therein, fails to state a claim against Pittera upon which relief can be granted.

LACK OF CAUSATION

56. As a second separate and distinct affirmative defense, Pittera alleges that the Complaint, and each claim set forth therein, is barred, in whole or in part by the Pittera's lack of causation.

EQUITABLE ESTOPPEL

57. As a third separate and distinct affirmative defense, Pittera alleges that the Complaint, and each claim set forth therein, is barred, in whole or in part by the doctrine of equitable estoppel.

WAIVER

58. As a fourth separate and distinct affirmative defense, Pittera alleges that the Complaint, and each claim set forth therein, is barred, in whole or in part by the doctrine of waiver.

STATUTE OF LIMITATIONS

60. As a fifth separate and distinct affirmative defense, Pittera alleges that the Complaint, and each claim set forth therein, is barred, in whole or in part by the applicable statute of limitations.

LACHES

61. As a sixth separate and distinct affirmative defense, Pittera alleges that the Complaint, and each claim set forth therein, is barred, in whole or in part by the Plaintiff(s)' claims are barred by the doctrine of laches. Specifically, Plaintiff(s), to the extent they suffered any harm, did not act promptly to notify Pittera of the harm and by sitting on their rights allowed further harm to occur.

FAULT OF OTHER PERSONS

62. As a seventh separate and distinct affirmative defense, Pittera alleges provisionally and conditionally that if anyone suffered any damages, such damages were proximately or legally caused by the misconduct, neglect and fault of other parties other than Pittera.

EQUITABLE OFFSET

63. As an eighth separate and distinct affirmative defense, Pittera alleges that the Complaint, and each claim set forth therein, is barred, in whole or in part by an equitable offset.

DUE CARE, REASONABLENESS AND GOOD FAITH

64. As a ninth separate and distinct affirmative defense, Pittera alleges that the Complaint, and each claim set forth therein, is barred, in whole or in part by his acting reasonably and in good faith at all times material herein, based on all relevant facts and circumstances known by Defendant at the time it so acted, and has at all times exercised due care in its dealings with Plaintiffs related to the events alleged in the Complaint. Accordingly, Plaintiffs are estopped from asserting any cause of action against Defendant.

UNINTENTIONAL VIOLATION

65. As a tenth separate and distinct affirmative defense, Pittera alleges that the Complaint, and each claim set forth therein, is barred, in whole or in part because such violation, if any, was unintentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error.

LACK OF JUSTIFIABLE RELIANCE

66. As an eleventh separate and distinct affirmative defense, Pittera alleges that the fraud claim set forth therein, is barred, in whole or in part by a lack of justifiable reliance by the alleged victims.

LACK OF SCIENTOR

67. As a twelfth separate and distinct affirmative defense, Pittera alleges that the fraud claim set forth therein, is barred, in whole or in part by a lack of any scientor by Pittera.

INTERVENING ACT BY OTHER DEFENDANTS AS SUPERSEDING

68. As a thirteenth separate and distinct affirmative defense, Pittera alleges that the Complaint, and each claim set forth therein is barred due to defendants Adi M. Elfenbeim and other members of the OTC Capital Partners, LLC's own intervening acts supersede any alleged acts by Pittera.

RIGHT TO ASSERT ADDITIONAL DEFENSES

69. Pittera reserves the right to assert additional affirmative defenses as discovery continues.

RIGHT TO ASSERT ADDITIONAL DEFENSES

70. Pittera reserves the right to assert additional affirmative defenses as discovery continues.

PRAYER

71. WHEREFORE, Pittera prays that Plaintiff take nothing by reason of the Complaint, that their claims be dismissed with prejudice, that judgment be entered in favor of Pittera as to all of Plaintiff's claims, and that Pittera be awarded its costs and attorney's fees in the matter and such other and further relief as the court deems proper.

III.

DEMAND FOR JURY TRIAL

72. Pursuant to Fed.R.Civ.P. 38 (b), Pittera hereby demands a jury trial on any and all issues qualified for a jury trial to which there is an entitlement to a jury trial under the United States Constitution.

Dated this 22nd day of September, 2016

Joseph Pittera, Esq.
Defendant in Pro Se