UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17849

In the Matter of

ANGEL OAK CAPITAL PARTNERS, LLC, PERAZA CAPITAL & INVESTMENT, LLC, SREENIWAS PRABHU, AND DAVID W. WELLS,

Respondents.

DIVISION OF ENFORCEMENT'S POST-HEARING MEMORANDUM OF LAW

The Division of Enforcement ("the Division") of the Securities and Exchange Commission ("the Commission" or "SEC"), respectfully submits this Post-Hearing Memorandum of Law following the Hearing in this matter on May 29 and May 30, 2019 in Miami, Florida (the "Hearing").[1]

REMAINING ISSUES FOR DECISION

The Order Instituting Proceedings in this case (the "OIP") deals with the operation of an unregistered, and therefore illegal, broker-dealer in the Atlanta, Georgia offices of Angel Oak Capital Partners, LLC ("Angel Oak Partners"). In the OIP, the Commission found that Angel Oak Partners

[1] The Division is not filing separate proposed Findings of Fact or Conclusions of Law because we believe the OIP and this Memorandum adequately, and concisely, present the relevant facts and law in clear form.

had operated an unregistered broker-dealer from March 2010 through October 2014 in violation of Section 15(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), and that Angel Oak Partners had violated Section 15(a) willfully. The OIP ordered Angel Oak Partners to cease and desist from committing or causing any violations or future violations of Section 15(a), and ordered Angel Oak Partners to pay $3,054,288 in disgorgement, $237,082 in prejudgment interest, and a civil money penalty of $375,000. (A copy of the OIP was admitted by agreement as Exhibit 1 for the Hearing.)

The Commission also found that the three other respondents caused Angel Oak Partner's violation of Section 15(a): Sreeniwas Prabhu ("Prabhu"), David W. Wells ("Wells"), and Peraza Capital & Investment LLC. ("Peraza"). The Commission ordered Prabhu to cease and desist from committing or causing any violations or future violations of Section 15(a), and ordered him to pay a civil money penalty of $40,000. The Commission ordered Wells to cease and desist from committing or causing any violations or future violations of Section 15(a), and to pay a civil money penalty of $40,000.

Finally, the Commission found that Peraza had also caused Angel Oak Partner's violations of Section 15(a), and ordered it to cease and desist from committing or causing any violations or future violations of Section 15(a). Unlike the other respondents, however, Peraza sought an opportunity to have its monetary sanctions determined through additional administrative proceedings. The OIP, in Section IV, clearly defines the scope of these additional proceedings:

> Pursuant to this Order, Peraza Capital agrees to additional proceedings in this proceeding to determine whether it is appropriate to order disgorgement, prejudgment interest and/or civil penalties pursuant to Sections 21B and 21C of the Exchange Act, and if so, the amount of disgorgement and/or civil penalties. If disgorgement is ordered, Respondent Peraza Capital shall pay prejudgment interest thereon, calculated from October 1, 2014, based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2). In connection with such additional proceedings, Peraza Capital agrees: (A) it will be precluded from arguing that it did not violate the federal securities laws described in this Order; (b) it may not challenge the validity of its Offer of Settlement and this Order; (c) solely for the purposes of such additional

> proceedings, the findings made in this Order shall be accepted as and deemed true by the hearing officer; and (d) the hearing officer may determine the issues raised in the additional proceedings on the basis of testimony, affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence.

Thus, the issues to be resolved following the Hearing are Peraza's disgorgement and Peraza's penalty. The approach taken by the Division to present its evidence on disgorgement at the Hearing followed the framework established in the Court's decision on February 1, 2019 denying the Division's Rule 250 motion (the "Rule 250 Decision"). That Decision did not reach the penalty issue.

EVIDENCE PRESENTED AT THE HEARING

The Division presented its evidence through three witnesses: Brian Palechek, an SEC forensic accountant ("Palechek"); Xiomara Perez, the former Chief Financial Officer and Financial and Operations Principal ("FINOP") for Peraza ("Perez"); and Sam Lewis, the former President and Chief Investment Officer of Peraza ("Lewis"). Palechek addressed only the disgorgement issue. Perez addressed primarily the disgorgement issue, and Lewis addressed primarily the penalty issue. The Respondent's counsel examined the same three witnesses, but called no others after the Division rested.

The parties prepared a Joint Exhibit List with 75 exhibits. Either by agreement, or by decision by the Court, all but two of the 75 exhibits were admitted. Exhibit 9, a letter from James Sallah, was withdrawn by the Division when Mr. Sallah did not testify. Exhibit 10, a long printout from the Angel Oak Partners general ledger, was not admitted either. The parties provided a Joint Post-Hearing Exhibit List that identified the transcript pages where decisions on contested evidentiary decisions involving the exhibits were made.

I. THE DIVISION'S DISGORGEMENT EVIDENCE MEETS ITS BURDEN.

Under well-settled law, the Division has the burden to provide a "reasonable approximation" of the Respondent's ill-gotten gains. The Division clearly met that burden with the evidence presented at the Hearing.

At the Hearing, the Division presented evidence explaining how the commission revenue generated from the arrangement between Angel Oak Partners and Peraza was distributed. Peraza earned $1,521,705.87 during the period from 2010-2014, of which the Division now seeks $1,180.487.98 in disgorgement as a result of the Supreme Court's *Kokesh* decision. The Division presented evidence, relying on Peraza's own books and records and the testimony of its FINOP, to establish the basis for the amount now sought in disgorgement (see Part A below). Angel Oak Partners, in turn, earned $3,054,288 in net commission revenue, which the Commission sought as disgorgement as a result of its settlement with that entity (Exhibit 1, the OIP, para. 25). The Division independently verified this amount through the testimony of Palechek, who analyzed Angel Oak Partners' own financial records to arrive at a figure virtually identical to the commission revenue specified in the OIP (see Part B below). The remaining balance of the commission revenue was paid to Angel Oak Partners' employees who were registered representatives of Peraza, including David Wells (Exhibit 1, the OIP, para 24). As detailed further below, the Division has clearly met its burden to present a "reasonable approximation" of the commission revenue that Peraza earned as a result of its arrangement with Angel Oak Partners.

A. The Division Has Provided a More Than Reasonable Disgorgement Number.

There is no dispute about the "top-line" starting point for the analysis of Peraza's disgorgement. Exhibit 3 at the Hearing was a spreadsheet that Perez had created to identify the amount that Peraza had received from the Atlanta trading at Angel Oak Partners. The total for the

period from 2010 through 2014 was $1,521,705.87. In the Rule 250 Decision, this Court acknowledged that Peraza had conceded that this number "'represents the revenues received from the trading,'" while noting that Peraza disputed that this amount was the appropriate measure of disgorgement. (Rule 250 Decision, at 5.)

At the Hearing, and also in her deposition testimony, Perez identified herself as the person who calculated the amounts in the Exhibit 3 spreadsheet, and described the derivation of the $1,521,705.81. (Hearing Transcript at pages 63-68; Exhibit 2, the Deposition Transcript of Xiomara Perez, May 17, 2017, at pages 43-47.) Perez affirmed that the spreadsheet was derived from the books and records of Peraza. She further affirmed that the amount of revenue that Peraza Capital received from the Atlanta operation from 2010 through 2014 was $1,521,705.87. Finally, Perez identified the funds received by Peraza for each full or partial year between 2010 and 2014. (*Id.*)

The Division has truncated the period for which it seeks disgorgement from Peraza in light of the Supreme Court's decision in *Kokesh v. SEC*, 198 L. Ed. 2d 86 (2017). Using the years for 2012-2014 only, the Division reduced its disgorgement request to $1,180,487.98. At the Hearing, Perez subtracted the 2010 and 2011 Peraza revenues from the $1,521,705.87 number (without using the cents), and calculated the top-line revenue number for the 2012-2014 period to be $1,180,488. (Hearing Transcript pages 67-68.) This was within 2 cents of the Division's requested disgorgement. At the Hearing, Peraza made no attempt to challenge either the initial five-year revenue figure or the three-year calculation undertaken by Perez at the Hearing. Thus, it is now beyond dispute that Peraza received $1,180,487.98 in revenue from the Angel Oak Partners' illegal trading in its Atlanta office during the 2012-2014 period.

B. Reconciling the Numbers in the OIP.

In their opposition to the Division's Rule 250 motion, Peraza asserted that there was a potential inconsistency between the disgorgement number sought by the Division from Peraza and the numbers in the OIP. The Rule 250 Decision acknowledged that argument, and ruled that the Division would have to show how the disgorgement received from Angel Oak Partners, $3,054,288, and the disgorgement sought from Peraza, $1,180,487.98, fit together. (Rule 250 Decision, at pages 4-7.)

To accomplish this goal, the Division presented the testimony of Palechek. Palechek did a forensic accounting analysis of the issues identified in the Rule 250 Decision using the books and records of Angel Oak Partners from 2011 through 2014. The only other documents that Palechek reviewed were the OIP, the Division's Rule 250 motion papers, and the Rule 250 Decision. (Hearing Transcript at 18-19.)

Palechek was able to identify the source of the Angel Oak Partners disgorgement number of $3,050,288. The final disgorgement figure for Angel Oak Capital Partners was for the period between August of 2011 and the end of 2014, identified in the OIP as the period in which the payments from Peraza began to pass through Wells on their way to Angel Oak Partners. (Exhibit 1, the OIP, at paragraphs 23-25.) That period included part of 2011, but none of 2010.

For the period beginning in August of 2011, Palechek was able to identify a single line item in the Angel Oak Partners' general ledger that reflected the net profit that Angel Oak Partners received from the illegal trading that Peraza caused. That item was identified as "expense reimbursement." But this was not a true expense, as Palechek explained, because it showed up in an expense account as a negative number. (Hearing Transcript at 24-26.) Palechek showed that the "expense reimbursement" line item was always a negative expense number, and therefore a net

profit to Angel Oak Partners. He also testified that the general ledger identified this "negative expense" as a return for broker-dealer activity. (Hearing Transcript at 25-26.) Palechek then demonstrated that the sum of the "expense reimbursements" or net profits for the August 2011 through 2014 period was $3,054,290.69. (Exhibit 11, and Hearing Transcript at pages 31-32.) He then compared this number, which came directly from the general ledger of Angel Oak Partners, to the amount paid by Angel Oak Partners in disgorgement, as identified by the OIP. (Hearing Testimony at 32-33, Exhibit 1, the OIP, and Exhibit 11.) There was less than a three dollar difference between the two numbers. Given the three plus years of numbers that could have involved different approaches to rounding for many different periods, the mere three dollar difference is remarkable. The actual difference between the numbers is .00001%. In truth, the numbers are spot-on with each other.

This exercise showed the origin of the Angel Oak Partners' disgorgement number. But, by itself, it did not completely explain the origin of the negative "expense reimbursements," or the positive "net profits" number, that showed up in Angel Oak Partners' general ledger for its broker-dealer activity beginning in August of 2011.

As the OIP found, Angel Oak Partners received that money from Wells, **after** Wells had paid the individual Atlanta based broker-dealers (including himself) their commissions. (Exhibit 1, the OIP, at paragraphs 23-25; 33.) Palechek was able to confirm these numbers because he had access to Angel Oak Partners' books and records for the first seven months of 2011, which preceded the disgorgement period for which Peraza paid the money directly to Wells. During that seven month period of 2011, Angel Oak Partners received gross commission revenues directly from Peraza, and paid commissions directly to the individual broker-dealers who were doing the actual trading in Atlanta. The Angel Oak Partners' general ledger thus contained a line item in a

revenue account for broker-dealer commissions received, and a line item in an expense account for broker-dealer commissions paid out to individuals. Using that information, Palechek identified the percentage of the gross revenue that went to the individual broker-dealers for their commissions. For the pre-disgorgement period of January to July of 2011, Angel Oak Partners paid the individual broker-dealers roughly 63% of the gross revenues received from Peraza. (Hearing Transcript, at 27-31, Exhibit 12.) Palechek testified that he made no other adjustments for overhead or other expenses. (Hearing Transcript, at 25-26.) Employing those numbers, Palechek calculated an average profit margin on the illegal trades for Angel Oak Partners of roughly 37%. (Hearing Transcript, at 27-31, Exhibit 12.)

Palechek then applied the 37% profit margin to the Angel Oak Partners' disgorgement amount to estimate the gross commission proceeds paid by Peraza to Wells after July of 2011. The path of the money during this period (the Angel Oak Partners' disgorgement period) was:

(1) Peraza took its share;

(2) the balance went to Wells, after Peraza deducted trade ticket expenses, and other expenses directly related to the Atlanta trading;

(3) Wells then paid himself and the other individual broker-dealers their commissions; and

(4) the remainder went to Angel Oak Partners.

Knowing what the net to Angel Oak Partners was ($3,054,790.69), and estimating that this amount would be approximately 37% of the gross commissions, Palechek derived the gross revenues received by Angel Oak Partners during its disgorgement period in Exhibit 11 -- $8,327,647.20. To make this complete for the entire 2011-2014 period, Palechek added the gross commission revenue numbers in the Angel Oak Partners' general ledger from January to July, 2011. Exhibit 12 showed that the numbers for these seven months totaled $835,133.34. This makes the Palechek

estimate for the gross commission revenue received by Angel Oak Partners from Peraza during the 2011-2014 period to be -- $9,162,780.54.

A remarkable convergence appears by comparing the Palechek estimate to the numbers in the Perez spreadsheet, Exhibit 2. The starting point for reconciliation is the number $9,984,328.41, identified by Perez as the amount she sent to Angel Oak Partners over the 2010-2014 period. (Exhibit 3.) This number excluded Peraza's share, and whatever ticket charges and clearing fees that came with each trade, and whatever expenses that Perez deemed "directly" related to the Atlanta operation. (See below at 15-16.) Subtracting the number included in the Perez spreadsheet for 2010, $753,323.37, from the starting number, $9,984,328.41, yields $9,231,005.04.

Palechek's estimate ($9,162,780.54) is just under 1.5% less than the number calculated by Perez from the books and records of Peraza ($9,231,005.04). Because the Palechek number starts with the disgorgement number, his slight underestimate of gross commission revenue means that Angel Oak Partners in all likelihood slightly **overpaid** in disgorgement.

Putting the mathematical details to the side, the question left open in the Rule 250 Decision was how to account for the difference between the $9,984,328.41 gross commission revenues going to Angel Oak Partners in the Perez spreadsheet (Exhibit 2), and the $3,054,290.69 in the OIP for Angel Oak Partners' disgorgement. The Division has shown that these numbers can be reconciled in four steps. First, you must use the first seven months of 2011 from the Angel Oak Partners' general ledger to calculate the percentage of the proceeds that Atlanta received that went to pay individual broker-dealers. Second, you must convert that cost percentage into a profit margin (100% minus the % of costs). Third, you must use that profit margin to estimate the total proceeds that went to Wells at the Atlanta office from August of 2011 through 2014. Fourth, you

must adjust the numbers in the Palechek estimate and the Perez spreadsheet so that they both cover the same 2011–2014 time period.

The results of this exercise produces two numbers for the 2011-2014 period, one from the Peraza general ledger, the other from the Angel Oak Partners' general ledger. These two numbers should measure the same thing, and they turn out to be remarkably close ($9,231,005.04 and $9,162,780.54). In sum, through the Palechek testimony and exhibits, and through the Perez testimony and exhibits, the Division has provided a more than reasonable reconciliation of these details.

C. The Division Has Met Its Burden of Proof on Disgorgement.

The relevant law on the Division's burden of proof for disgorgement is settled:

> In order to be entitled to disgorgement, the SEC needs to produce only a reasonable approximation of the defendant's ill-gotten gains, and "[e]xactitude is not a requirement." *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) (per curiam) (citation and internal quotation marks omitted). Once the SEC has produced a reasonable approximation of the defendant's unlawfully acquired assets, the burden shifts to the defendant to demonstrate the SEC's estimate is not reasonable. *SEC v. Calvo,* 378 F.3d 1211, 1217 (11th Cir. 2004) (*per curiam*).

S.E.C. v. Monterosso, 756 F.3d 1326, 1337 (11th Cir. 2014).

> "The SEC is entitled to disgorgement upon producing a reasonable approximation of a defendant's ill-gotten gains." *S.E.C. v. Calvo,* 378 F.3d 1211, 1217 (11th Cir.2004) (citations omitted). Once the SEC produces a reasonable approximation the burden shifts to the defendants to demonstrate that the SEC's estimate is not a reasonable one. *See id.* Significantly, exactitude is not required. *See id.* As long as the SEC's estimate is reasonable, any risk of error falls on the wrongdoer whose illegal conduct created the uncertainty. *See id.*

SEC v. Merch. Capital, LLC, 486 F. App'x 93, 96 (11th Cir. 2012).

There can be no question that the Division satisfies this burden here. The disgorgement number proposed by the Division is not just a reasonable approximation, it is an exact number that comes straight from Peraza's books and records. Nothing that came into evidence at the Hearing changes the basic measure of what is due. Peraza's disgorgement is $1,180,487.98.

II. PERAZA FAILED TO MEET ITS BURDEN OF PROOF TO CHALLENGE THE DIVISION'S REASONABLE APPROXIMATION OF DISGORGEMENT.

Based on these facts, the burden of proof for reducing the Division's disgorgement number – by any argument or evidentiary presentation – shifts to Peraza. At the Hearing, Peraza failed to meet its burden across the board.

A. Peraza Failed to Establish a Justification for Departing from the OIP's Causing Determination.

Causation is clearly an element of proof for disgorgement.[2] In this case, however, there are several findings in the OIP establishing that Peraza caused the illegal trading of Angel Oak Partners. (Exhibit 1, the OIP, at paragraphs 9-10; 33-38; 40.)

Nonetheless, Peraza tried to argue in its opposition to the Division's Rule 250 motion that it did not cause the illegal brokerage operation, because the trades in question were somehow otherwise legal, and therefore not illegal for purposes of this action. The Rule 250 Decision invited Peraza to try to establish a basis for rejecting the Commission's determination in the OIP that Peraza caused the violations for purposes of establishing disgorgement. (Rule 250 Decision, at 8.)

The basis for analysis here has to be the established legal framework. An unregistered broker-dealer is not created overnight. The elements traditionally used to establish the operation of an illegal brokerage require a series of activities over an extended time period.

> Section 15(a) makes it unlawful for any "broker or dealer" to make use of any means of interstate commerce and "to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security" without registering as a broker with the Commission. 15 U.S.C. § 78o(a)(1). The Exchange Act broadly defines "broker" as one who "engaged in

[2] *See e.g. S.E.C. v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995); *SEC v. Bilzerian*, 29 F.3d 689, 697 (D.C.Cir.1994); *S.E.C. v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("the court may exercise its equitable power only over property causally related to the wrongdoing.'); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978).

> the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). In determining whether a particular individual or entity falls within this definition, courts consider whether the individual may be "characterized by 'a certain regularity of participation in securities transactions at key points in the chain of distribution.' " *SEC v. Hansen,* No. 83 Civ. 3692, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984) (quoting *Massachusetts Fin. Services, Inc. v. Securities Investor Protection Corp.,* 411 F.Supp. 411, 415 (D.Mass.) *aff'd,* 545 F.2d 754 (1st Cir.1976)).

SEC v. Martino, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003). *See also SEC v. Margolin*, 1992 WL 279735 at *5 (S.D.N.Y. September 30, 1992)("the Commission can demonstrate 'regularity of business activity' which supports the statutory definition of broker or dealer.")(citations omitted). *Accord, S.E.C. v. Benger*, 697 F. Supp. 2d 932, 944 (N.D. Ill. 2010)("courts consider whether the individual may be characterized by 'a certain regularity of participation in securities transactions at key points in the chain of distribution.'")(*quoting Martino* and *Hansen*); *In the Matter of Juliann Palmer Martin*, Exch. Act Release No. 751, 20165 WL 1004876, at *16 (March 9, 2015)(same).

Thus, an entity found to have violated the broker registration requirement must have had a business involving a consistent pattern of transactions, basically being in the regular process of providing brokerage services without the required registration. It is thus unnecessary to establish that any individual trade was itself a violation of the broker registration law. The violation involves a "regularity" of business activity. Once that fact is found, or admitted as in this case, all trades undertaken by that unregistered broker-dealer are illegal.

Case law on the award of disgorgement for unregistered broker-dealer violations confirms that the proper measure of disgorgement for a participant in an unregistered broker-dealer case is: (1) the amount of money received by the participant due to its involvement in the illegal operations; (2) based on the entire period the participant was involved in the illegal operations. In other words, the time period for assessing disgorgement is the period of the operation of the illegal brokerage, and the measurement of the amount of disgorgement is what the participant made as a

result of the illegal brokerage operation during that period. These cases award disgorgement to cover all of the fee or commission income received by a participant as a result of the illegal brokerage activity. *See e.g. SEC v. Baccam*, 2017 WL 5952168 (C.D. Cal., June 14, 2017); *SEC v. Gibraltar Global* Securities, 2016 WL 153090 (S.D.N.Y., January 1, 2016); *SEC v. Rockwell Energy of Texas, LLC*, 2012 (S.D. Tx., February 1, 2012); *SEC v. Integrity Financial AZ, LLC*, 2102 WL 176228, at*6 (N.D. Ohio, January 20, 2012)(disgorgement of all commission appropriate for violations of "strict-liability provisions" such as Section 15 of the Exchange Act); *SEC v. Randy*, 38 F. Supp. 2d 657 (N.D. Ill. 1999); *In the Matter of Curtis A. Peterson*, S.E.C. Release No. 1124, April 19, 2017, 2017 WL 1397544; *In the Matter of Ireeco, LLC and Ireeco Limited*, S.E.C. Release No. 986, March 24, 2016, 2016 WL 1168570; *In the Matter of Michael W. Crow, et al.*, S.E.C. Release No. 953, February 8, 2016, 2016 WL 489352; *In the Matter of David B. Havanich, Jr. et al.*, S.E.C. Release No. 935, January 4, 2016, 2016 WL 25746; *In the Matter of Spring Hill Capital markets, LLC, et al.*, S.E.C. Release No. 919, November 30, 2015, 2015 WL 7730856; *In the Matter of Juliann Palmer Martin*, S.E.C. Release No. 751, March 9, 2015, 2015 WL 1004876.

The entire presentation of Peraza's evidence at the Hearing failed to distinguish this case law, let alone the OIP. Indeed, the closest that Peraza came to even approaching the issue was when Lewis was asked by Peraza's counsel:

> Q If Peraza's relationship with Angel Oak didn't exist, would the customers of the Atlanta branch who executed those trades still have paid commissions?
>
> A Yes.
>
> Q The same commissions?
>
> A Yes.
>
> Q So the commissions weren't any higher for Angel Oak customers?

A No, sir.

Q And they weren't any lower for Angel Oak customers?

A No, sir.

(Hearing Transcript at 153.) It is not clear exactly what this proves, but upon re-direct of Lewis the matter was sealed. The "causing" found in the OIP related to Peraza using its status as a registered broker-dealer to register the Angel Oak Partners employees as Peraza representatives. Without that, they could not have engaged in any trades. At the Hearing, Lewis admitted that without those registered representatives, no Atlanta trades would have occurred.

Q But the trade is worked by the folks in the Atlanta office?

A Yes.

Q Okay. And so if those folks in the Atlanta office aren't there, this trade doesn't happen, correct?

A In that limited context that would be true.

(Hearing Transcript at 160.)

Given the findings in the OIP, and this candid admission, it is hard to see how there can be any doubt that Peraza caused all of the illegal trades of Angel Oak Partners during the relevant period, and is liable for disgorgement thereon. Peraza'a attempt to create a "causing" issue has simply failed.

Moreover, Peraza's attempt to re-open the causation issue at this late date is fundamentally unfair, and Peraza should be estopped from doing so. The OIP (with respect to Peraza) resulted from an Offer that Peraza made to the Commission. (Exhibit 75.) If Peraza had wanted to preserve an argument that it did not "cause" the illegal trades, or seek a finding that the trades were "otherwise legal" (an oxymoron in the context of the OIP), the time to raise this issue was before the OIP was entered. Peraza never expressed any objection to the finding that they "caused" the

illegal operation of the unregistered broker-dealer when it would have made a legitimate difference. To the contrary, they admitted the fact in their Offer.

Finally, there is no support for the "otherwise legal" argument anywhere in the case law, or any explanation as to how it would affect the remedies issues. Peraza has simply failed to meet its burden of proof on this issue.

B. Peraza Failed to Justify Deducting Overhead Expenses from Disgorgement.

The Rule 250 Decision acknowledged that the "general rule, as the Division notes, is that a respondent cannot offset disgorgement with expenses." (Rule 250 Decision, at 8, citations omitted.) Nonetheless, the Decision left open the possibility that Peraza might be able to establish either that it incurred some as yet unidentified marginal costs for their participation in the trading, or find some law that expanded allowable expense offsets in cases that did not involve fraud. (Rule 250 Decision, at 9, citations omitted.)

Based on the Hearing, Peraza has failed at both tasks. As to the nature of the costs allegedly incurred by Peraza, Perez acknowledged, as she had done in her prior testimony, that the expenses she had identified were overhead expenses. (Hearing Transcript, at 75-76, Exhibit 2, the Deposition Transcript of Xiomara Perez, May 17, 2017, at pages 48-53.) There was no attempt at the Hearing to introduce any new reservations or limits on the nature of these expenditures. Indeed, Perez effectively confirmed her admission when she testified concerning the monthly statements that she sent Wells to confirm the right amount of money to send to him.

> **Q Okay. Now, we've seen a number of expenses, Mr. Sallah's invoice, the CRD, this one, which were charged directly to Angel Oak before you sent them the money; is that right?**
>
> A Some expenses were charged directly because they're related to things that were directly for the branch as it is registrations. And that invoice for Mr. Sallah, it was related to a presentation for David Wells for one specific FINRA-related LDR.

Q Okay. Now, do you take time to try and figure out which expense were directly related to the Atlanta branch?

A On a monthly basis before -- when preparing this calculation, yes. I have to know which expenses needed to be deducted at that point.

(Hearing Transcript, at 80-81.) So when expenses were legitimately attributable to the Atlanta operation, Peraza **contemporaneously** charged those expenses to Wells/Angel Oak Partners before remitting the 85% (+ or -) share to Atlanta. The expenses Peraza seeks to deduct from its disgorgement now are not just general business overhead, but they are "expenses" that Peraza previously determined were not "directly" related to the Atlanta operations. They are, in fact, expenses only identified and "allocated" in response to the SEC's investigation.

Q And I believe you testified that the numbers down here concerning starting with finders fees to Bill Baer and these other numbers, are numbers that you constructed as allocations?

A Not constructed. Those numbers are a percentage of the total.

Q Okay. And you determine what the percentage was?

A Correct.

Q And as I understand it, you -- these were not prepared contemporaneously?

A They were not.

Q These were prepared in response to you knowing that the SEC was considering enforcement action against Peraza?

A They were prepared based on a request at the time.

Q But you knew Peraza was under investigation?

A Yes.

Q And these were your allocations in response to this request during the investigation?

A This was my educated allocation, yes.

Q Right. And they are not in QuickBooks anywhere?

A An allocation would not be in QuickBooks, sir, no.

(Hearing Transcript, at 104-105.)

Moreover, Perez admitted that she had no specialized training in doing her "allocations" of these expenses. (Hearing Transcript, at 107.) She also acknowledged that the analysis done by Palechek did not reduce the Angel Oak Partners' disgorgement by any allocation of overhead expenses. (Hearing Transcript, at 109.)

It is inescapable that the proposed deductions from the Division's disgorgement number all fall under the category of general business expenses, and the law clearly says such expenses are not proper deductions from disgorgement in Commission cases.[3]

As for the possibility that Peraza might find law that allows for a reduction in disgorgement in non-fraud situations, that is unavailing. The case law is clear that the type of securities law violation does not alter the measure of disgorgement:

> Disgorgement is not dependent on scienter, but is tied instead to the idea of unjust enrichment: the broad idea is that persons not profit from breaking the securities laws.

---

[3] "[T]he overwhelming weight of authority holds that securities law violators may not offset their disgorgement liability with business expenses." *SEC v. Brown*, 658 F.3d 858, 861 (8th Cir. 2011) (holding that a disgorgement award should not be reduced for expenses) (quoting *SEC v. United Energy Partners, Inc.*, 88 Fed. Appx. 744, 746 (5th Cir. 2004). *Accord SEC v. Merchant Capital LLC et al.*, 486 Fed. Appx. 93, **3 (11th Cir. 2012) (quoting *Brown*); *SEC v. Aerokinetic Energy Corp.*, 444 Fed. Appx. 382 (11th Cir. 2011); *SEC v. Warren*, 534, F. 3d 1368, 1370 (11th Cir. 2008); *SEC v. Bernath*, 2017 WL 527662, *2 (3:15CV485 W.D.N.C. Feb. 8, 2017); *SEC v. Schooler et al.*, 106 F.Supp. 3d 1157, [add pinpoint] (S.D. Cal 2015); *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1087 (D.N.J. 1996) ("the overwhelming weight of authority holds that securities law violators may not offset their disgorgement liability with business expenses."), *aff'd* 124 F.3d 449 (3d Cir. 1997). While some courts have allowed the deduction of costs related to specific transactions, which the Division accepts in this case, the attempt to offset illegal gains by allocating general overhead and business expenses is never allowed.

SEC v. Merch. Capital, LLC, 397 F. App'x 593, 595 (11th Cir. 2010).[4]

> Disgorgement is appropriate not only in cases of fraud, but also for any violation of the securities laws. *SEC v. Rockwell Energy of Texas, LLC,* No. H–09–4080, 2012 WL 360191, at *6 (S.D.Tex. Feb. 1, 2012) (ordering disgorgement against a defendant who violated only the securities registration provisions of the federal securities laws); *see, e.g., In re Skyway Comm. Holding Corp.,* No. 8:05–bk–11953–PMG, 2011 WL 1380068, at *2 (Bankr. M.D.Fla. Apr. 6, 2011)(awarding disgorgement against an unregistered broker for violations of the registration provisions of federal securities laws); *SEC v. Martino,* 255 F.Supp.2d 268 (S.D.N.Y.2003) (same).

SEC. v. Life Partners Holdings, Inc., 71 F. Supp. 3d 615, 621 (W.D. Tex. 2014), *aff'd in part, vacated in part, rev'd in part sub nom. SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765 (5th Cir. 2017). *Accord, In the Matter of Curtis A. Peterson*, S.E.C. Release No. 1124, April 19, 2017, 2017 WL 1397544, at *4; *In the Matter of Ireeco , LLC, and Ireeco Limited*, S.E.C. Release 986, March 24, 2016, 2016 WL 1168570.

Absent proof that they incurred marginal costs for the trades at issue, and there is none, or a significant change in the law as to what constitutes disgorgement, Peraza has no basis for seeking a reduction in its disgorgement amount. Put simply, it has failed to meet its burden of proof on this issue.

---

[4] *Accord, SEC v. Merch. Capital, LLC*, 486 F. App'x 93, 96 (11th Cir. 2012)("The purpose of disgorgement is to deprive the wrongdoer of his ill-gotten gain."). *See also SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997); *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991); *SEC. v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987) *cert. denied*, 486 U.S. 1014, 108 S.Ct. 1751, 100 L.Ed.2d 213 (1988)(" The paramount purpose of ... ordering disgorgement is to make sure that wrongdoers will not profit from their wrongdoing."); *SEC v. Jankovic*, 2018 WL 301160, at *4 (S.D.N.Y. Jan. 4, 2018)("The primary purpose of disgorgement is not punitive; instead, it is to deprive wrongdoers of any unjust enrichment and to deter similar conduct."); *SEC v. Spongetech Delivery Sys., Inc.*, 2015 WL 5793303, at *2 (E.D.N.Y. Sept. 30, 2015), *aff'd sub nom. SEC v. Metter*, 706 F. App'x 699 (2d Cir. 2017)("The fundamental purpose of disgorgement is to remedy securities law violations by depriving malefactors of the fruits of their illegal conduct.")

II. THE OIP REQUIRES PREJUDGMENT INTEREST

The OIP requires that prejudgment interest for the total amount of disgorgement run from October 1, 2014. (Exhibit 1, the OIP, at page 9, Section IV.) Attached as Appendix 1 to this Memorandum is a calculation for prejudgment interest on the disgorgement amount using the calculator on the SEC's EnforceNet webpage. The prejudgment interest number is $245,322.60.

III. A FIRST-TIER MAXIMUM CORPORATE PENALTY IS APPROPRIATE.

A penalty is appropriate against Peraza. Peraza facilitated the illegal securities trading by Angel Oak Partners over a four-year period, made a substantial amount of money by doing so, and has a regulatory record showing distain for its obligations as a broker-dealer. Compared to similar cases, the Division's request for a First Tier maximum penalty of $75,000 is appropriate for Peraza on these facts. (Section 21B(b)(1).)

A. The Standard for Civil Penalties in a Cease and Desist Action.

In any administrative action brought under Section 21C of the Exchange Act for cease and desist proceedings (15 U.S.C. § 78u–3), the Commission may impose a civil penalty against any person that "was a cause of the violation of any provision of this title, or any rule or regulation issued under this title." (Section 21B(a)(2)(B), 15 U.S.C. § 78u–2(a)(2)(B).) The Commission has already found that Peraza caused a violation of the Exchange Act, so a penalty may be assessed.

Assessing a penalty is discretionary. Under the statute governing the assessment of penalties in SEC Administrative Proceedings, the discretion is governed by both the tier system of penalties based on the objective nature of the offenses (15 U.S.C. § 78u–2(b)), and a public interest determination (15 U.S.C. § 78u–2(a)(1)). The factors governing the public interest determination are also statutory.

> In considering under this section whether a penalty is in the public interest, the Commission or the appropriate regulatory agency may consider—
>
> (1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;
>
> (2) the harm to other persons resulting either directly or indirectly from such act or omission;
>
> (3) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;
>
> (4) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in section 78o(b)(4)(B) of this title:
>
> (5) the need to deter such person and other persons from committing such acts or omissions; and
>
> (6) such other matters as justice may require.

(15 U.S.C. § 78u–2(c)(1-6).) These statutory provisions are often joined in consideration by the *Steadman* factors. *Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds,* 450 U.S. 91 (1981).

> the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.

In the Matter of David R. Wulf, Release No. 4356 (Mar. 21, 2016). *Accord In the Matter of Wayne L. Palmer*, Release No. 1025 (June 13, 2016). *See also In the Matter of Savings2Retire, LLC. and Marian P. Young*, Release No. 1195 (October 19, 2017); *In the Matter of Select Fidelity Transfer Services, Ltd.*, Release No. 718 (December 15, 2014).

B. Peraza's Violations Involved Serious Misconduct.

A violation of the registration requirements for a broker-dealer is a serious matter.

> Section 15(a)'s registration requirement is "of the utmost importance in effecting the purposes of the Act" because it enables the SEC "to exercise discipline over those who may engage in the securities business and it establishes necessary standards with respect to training, experience, and records." *Celsion Corp. v. Stearns Mgmt. Corp.*, 157 F.Supp. 2d 942, 947 (N.D.Ill. 2001) (citing *Regional Props. v. Financial & Real Estate Consulting, Co.*, 678 F.2d 552, 562 (5th Cir.1982)).

SEC v. Benger, 697 F. Supp. 2d 932, 944 (N.D. Ill. 2010). *Accord In the Matter of Allen M. Perres*, Release No. 10287 (Jan. 23, 2017).

While there is no finding that Peraza acted willfully, Peraza's behavior was nonetheless a very serious infraction. It turned its back on what was going on in Atlanta, while achieving a substantial pecuniary gain from its behavior over a period that lasted more than four years. Moreover, the Commission has assessed a serious penalty ($310,000) for a failure to supervise a registered representative, a non-fraud charge, without any finding beyond the supervisory matter, and the penalty was upheld by the Court of Appeals. *SEC v. Collins*, 736 F.3d 521 (D.C. Cir. 2013).

C. Three Factors Support A First-Tier Penalty Against Peraza.

Three factors from the applicable standards set forth above support assessing a first-tier penalty against Peraza. First of all, the illegal behavior took place over a substantial period of time – from March of 2010 through the end of 2014. This is surely "recurrent" behavior. This four-year period is more than the periods cited in several other cases finding that the length of time for the infraction merited a penalty. *See e.g. SEC v. Afriyie*, 2018 WL 6991097 at *6 (S.D.N.Y. Nov. 26, 2018)(insider trading over two months determined to be "recurrent" factor in awarding SEC penalty); *SEC v. Madsen*, 2018 WL 5023945 at *4 (S.D.N.Y. Oct. 17, 2018)(failed pump and dump efforts that took place over less than two years deemed to be recurrent); *SEC v. Baccam*,

[illegible] (C.D. Cal., June 8, 2017)(sale of unregistered securities over a less than four-year period).

Second, Peraza received over $1.5 million in total unjust enrichment from this activity, almost $400,000 of which cannot be recovered in disgorgement because of *Kokesh*. This amount is greater than many other cases in which unjust enrichment was cited as a factor in assessing a penalty. *See e.g. SEC v. CMKM Diamonds, Inc.*, 635 F. Supp.2d 1185, 1193, 1196 (D. Nev. 2009)(defendant with unjust enrichment of $648,500 ordered to pay penalty of same amount, citing size of unjust enrichment as one of factors); *SEC v. Yun*,148 F. Supp 2d 1287, 1297 (M.D. Fla. 2001)(disgorgement of $269,000 cited as justification for $100,000 penalty).

Third, Peraza is a recidivist. The Division entered three prior determinations by the NASD and FINRA showing prior regulatory problems at Peraza. (Exhibits 13, 14, and 15.) The Division also entered Peraza's CRD report. (Exhibit 5.) Both Exhibit 14 (at page 4) and Exhibit 15 (at page 3) state that:

> "this AWC will become part of Peraza's permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against it."

Testimony at the hearing by Lewis highlighted the egregious nature of the violation found in Exhibit 14, which dealt with net capital violations and attempts to hide them through failed reporting. The AWC found that Peraza was net capital deficient by $1,531,597, $1,013,695, and $721,108 for each of three consecutive months in 2008. This was extraordinary. Lewis testified at the Hearing about Peraza's net capital requirement at the time of this violation:

> **Q What were the net capital requirement rules?**
>
> A That their minimum standard is based on activity, scope of business that require certain amount of capital. We were filed I believe at that time as a 5 K broker-dealer. It might have been -- it might have been required as a $50,000 or $100,000 broker dealer, but that higher number was as a result of some of the trading activity that they found that made that capital requirement go up.

Q Okay.

A I'm not exactly sure of all the details. But I think we were a $100,000 BD at that time.

Q Okay. But FINRA found that you were net capital deficient -- by you, I don't mean you personally, but I mean Peraza Capital was net capital deficient on three occasions, twice by numbers over a million dollars and once you were over by 721,000?

A That's what it says, yes.

Q Okay. And those net capital rules are rules that are designed to protect Peraza's clients, right?

A That is true.

(Hearing Transcript at 141.)

Recidivism is frequently cited as a factor in awarding penalties. *See e.g. Geiger v SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004); *SEC v. Custable,* 132 F.3d 36 (7th Cir. 1997); *SEC v. Boock*, 2014 WL 7641789, *3 (S.D.N.Y. September 24, 2014); *SEC v. Art Intellect, Inc.*, 2013 WL 840048, *24 (D. Utah Mar. 6, 2013); *SEC v. Tecumseh Holdings Corp.*, 2011 WL 2076466, *3 (S.D.N.Y. May 24, 2011); *SEC v. Rosen*, 2002 WL 34414715, *13 ff (S.D. Fla. April 24, 2002).

Peraza has avoided accountability for too long. A penalty is surely justified.

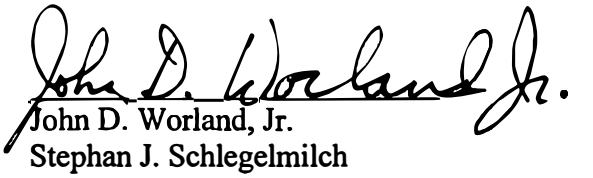
For all of these reasons, the Division could seek a penalty equal to the total amount of Peraza's disgorgement. Instead, the Division seeks only a first-tier statutory penalty of $75,000. The Division has made a sufficient showing to support this award.

CONCLUSION

For all the above reasons, the Division requests that Peraza be ordered to pay disgorgement of $1,180,487.98, prejudgment interest on that amount of $245,322,60, and a first-tier penalty of $75,000, for a total of $!,500,810.58.

Dated: July 1, 2019

Respectfully submitted,



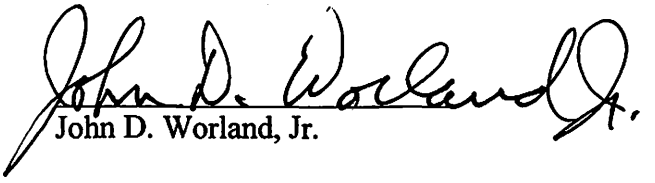
John D. Worland, Jr.
Stephan J. Schlegelmilch
Fuad Rana
Christina Adams

COUNSEL FOR
DIVISION OF ENFORCEMENT

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

CERTIFICATE OF WORD COUNT

I hereby certify that the above Memorandum has fewer than 14,000 words.



John D. Worland, Jr.

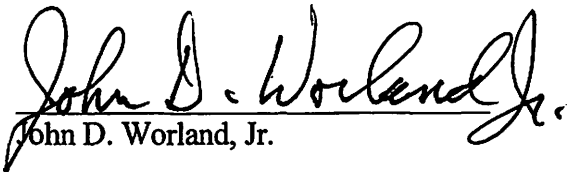
CERTIFICATE OF SERVICE

I hereby certify that I served true copies of the Division of Enforcement's Memorandum of Law by e-mail on the following on this 1st day of July, 2019, and filed the original and three copies with the Secretary's Office:

The Honorable James E. Grimes
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549-2557
ALJ@sec.gov

Mark David Hunter , Esquire
Florida Bar No. I 2995
Jenny D. Johnson-Sardella , Esquire
Florida Bar No. 67372
Robert C. Harris, Esquire
Florida Bar No. 26205
255 University Drive
Coral Gables, Florida 33134
Tel: (305) 629-8816
Fax: (305) 629-8877
Email:mhunter@htflawyers.com
jsardella@htflawyers.com,
rharris@htflawyers.com

Counsel for Respondent Peraza Capital & Investment, LLC



John D. Worland, Jr.

APPENDIX 1

U.S. Securities and Exchange Commission
Prejudgment Interest Report

Peraza Pre-Judgment Interest

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				**$1,180,487.98**
11/01/2014-12/31/2014	3.00%	0.5%	$5,918.61	$1,186,406.59
01/01/2015-03/31/2015	3.00%	0.74%	$8,776.16	$1,195,182.75
04/01/2015-06/30/2015	3.00%	0.75%	$8,939.31	$1,204,122.06
07/01/2015-09/30/2015	3.00%	0.76%	$9,105.14	$1,213,227.20
10/01/2015-12/31/2015	3.00%	0.76%	$9,173.99	$1,222,401.19
01/01/2016-03/31/2016	3.00%	0.75%	$9,117.91	$1,231,519.10
04/01/2016-06/30/2016	4.00%	0.99%	$12,247.89	$1,243,766.99
07/01/2016-09/30/2016	4.00%	1.01%	$12,505.64	$1,256,272.63
10/01/2016-12/31/2016	4.00%	1.01%	$12,631.38	$1,268,904.01
01/01/2017-03/31/2017	4.00%	0.99%	$12,515.22	$1,281,419.23
04/01/2017-06/30/2017	4.00%	1%	$12,779.08	$1,294,198.31
07/01/2017-09/30/2017	4.00%	1.01%	$13,048.36	$1,307,246.67
10/01/2017-12/31/2017	4.00%	1.01%	$13,179.91	$1,320,426.58
01/01/2018-03/31/2018	4.00%	0.99%	$13,023.39	$1,333,449.97
04/01/2018-06/30/2018	5.00%	1.25%	$16,622.46	$1,350,072.43
07/01/2018-09/30/2018	5.00%	1.26%	$17,014.61	$1,367,087.04
10/01/2018-12/31/2018	5.00%	1.26%	$17,229.04	$1,384,316.08
01/01/2019-03/31/2019	6.00%	1.48%	$20,480.29	$1,404,796.37
04/01/2019-06/30/2019	6.00%	1.5%	$21,014.21	$1,425,810.58

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
11/01/2014-06/30/2019	$245,322.60	$1,425,810.58