UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceeding
File No.: 3-17849

In the Matter of
ANGEL OAK CAPITAL PARTNERS, LLC, PERAZA CAPITAL & INVESTMENT, LLC, SREENIWAS PRABHU, and DAVID WELLS

RESPONDENT PERAZA CAPITAL & INVESTMENT, LLC'S RULE 340 POST HEARING BRIEF AND INCORPORATED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dated: July 1, 2019

Respectfully submitted,

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Pursuant to Rule 340 of the Rules of Practice of the Securities and Exchange Commission (the "Commission"), Respondent Peraza Capital & Investment, LLC ("Peraza"), by and through its undersigned counsel, respectfully submits this Post Hearing Brief:

INTRODUCTION

On February 16, 2017, the Commission issued an Order Instituting Proceedings ("OIP"), wherein the Division of Enforcement (the "Division") found that Peraza facilitated Angel Oak Capital Partners, LLC's ("Angel Oak") violation of Section 15(a) of the Securities Exchange Act of 1934 (the "Exchange Act"). *See* Final Hearing Exhibit 1.[1] Peraza accepted the Division's findings without admitting or denying liability, but "agree[d] to additional proceedings in this [matter] to determine whether it is appropriate to order disgorgement, prejudgment interest and/or civil penalties pursuant to Sections 21B and Section 21C of the Exchange Act [of 1934], and if so, the amount of disgorgement and/or civil penalties." *Id.* at 9.

On November 19, 2018, the Division and Peraza submitted their respective Motions for Summary Disposition Pursuant to Rule 250 ("Motion(s)"), after which Administrative Law Judge James E. Grimes ("ALJ Grimes") entered orders denying both Peraza's Motion on December 19, 2018 ("Order Denying Peraza's Motion"), and the Division's Motion on February 1, 2019 ("Order Denying Division's Motion"). A final hearing was subsequently scheduled in the matter for May 29, 2019 ("Final Hearing"). As set forth in ALJ Grimes' Order Denying Division's Motion, the issues to be addressed during the Final Hearing were (1) whether Peraza should pay disgorgement, (2) reconciling the OIP disgorgement amount with the amount set forth in the Division's Motion, and (3) if disgorgement is awarded, whether Peraza is entitled to offset the disgorgement amount

[1] All admitted Final Hearing Exhibits shall be cited to as "Exhibit __."

by the marginal cost allocated to Angel Oak. *See generally* Order Denying Division's Motion. The Final Hearing in this matter was conducted on May 29-30, 2019.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. FINDINGS OF FACT

Background

1. The Commission found in the OIP that "[f]rom March 2010 to October 2014, Angel Oak violated the registration provisions of the Exchange Act by operating as an unregistered broker-dealer, primarily from an office located in Atlanta, Georgia." Exhibit 1 at ¶ 2.

2. The Commission found in the OIP that Peraza facilitated Angel Oak's violation by providing Angel Oak access to Peraza's trading platform where Angel Oak operated because Peraza knew, or should have known, that the owners of Angel Oak, "who were not all registered as broker-dealers or associated with a registered broker-dealer, were controlling the securities activities of the employees involved in the securities business." *Id.* at ¶¶ 7, 37.

3. The Commission found in the OIP that "[b]etween March 2010 and October 2014, [Angel Oak] employees ***who were registered representatives of Peraza Capital*** entered into more than 900 trades" and that "[Angel Oak] received approximately $3,054,288 in commissions as a result of its arrangement with Peraza Capital." Exhibit 1 at ¶¶ 23, 25 (emphasis added).

4. The evidence in the record does not establish that Peraza's conduct was willful or egregious. *See* Division's Motion at 11 ("While there is ***no finding that Peraza acted willfully***, Peraza's behavior was nonetheless a[n] [] infraction"); *see also generally* OIP.

5. Due to the holding set forth in *Kokesh v. SEC*, 198 L. Ed. 2d 86 (2017), the relevant time period at issue in this matter is 2012 through 2014. *See* Division's Motion at 7; *see also* Order

Denying Division's Motion at 4-5 ("[The Division] only seeks disgorgement for commissions received in 2012, 2013, and 2014.").

Evidence Presented at Final Hearing

6. The record established that the 900 trades entered by the Angel Oak employees that were registered representatives of Peraza were legal. *See* Order Denying Division's Motion at 8 ("The fact that trades were processed in a ***legal*** manner does not eliminate Peraza's liability") (emphasis added); Final Hearing Transcript ("Hearing Trans.") at 150:4-25; 151:9-25.

7. Angel Oak customers paid the same rate of commissions as any other customer of a Peraza branch office. *See id.* at 153:1-13 ("Q: So the commissions weren't any higher for Angel Oak customers? A: No, sir.").

8. The total amount of gross commissions that Peraza received between 2012 and 2014, as a result of the 900 trades, was $1,180,487.98. *See* Exhibit 3; *see also* Hearing Trans. at 67:16-25; 68:1-15.

9. Peraza allocated consultant fees for annual branch exams, legal fees, and trade/back-office support specifically related to Angel Oak as expenses directly associated with Angel Oak. *See* Hearing Trans. at 68:19-25; 72-77 ("Q: Right. Now, when you put together this spreadsheet, you also tried to identify expenses, did you not? A: I tried to identify expenses directly related to the Atlanta branch.").

10. The Financial Industry Regulatory Authority's ("FINRA") Letters of Acceptance, Waiver and Consent ("AWC(s)") submitted by the Division are related to Peraza's alleged technical violations. *See* Exhibits 13-15. Each AWC the Division submitted represents Peraza's technical violations based upon conduct that took place significant amounts of time (over ten (10) years ago, in two of the instances) for which FINRA assessed low fines. *See id.*

B. CONCLUSIONS OF LAW

Disgorgement

11. "Disgorgement merely requires the return of wrongfully obtained profits; it does not result in any actual economic penalty . . ." *See SEC v. Pitters*, No. 09-20957-CIV, 2010 WL 1413194, at *5 (S.D. Fla. Mar. 5, 2010) (quoting *SEC v. Lybrand*, 281 F.Supp.2d 726, 729-30 (S.D.N.Y.2003)). Disgorgement "is only triggered by a defendant's profit or gain or enrichment, and [] it is not a tool for punishing parties who have not profited from their wrongdoing." *See SEC v. Video Without Boundaries, Inc.*, No. 08–61517–cv, 2010 WL 5790684, at *5 (S.D. Fla. Dec. 8, 2010) (emphasis added); *see also Pitters*, 2010 WL 1413194, at *5; *SEC v. Merchant Capital, LLC*, No. 09-14890, 397 Fed. Appx. 593, 595, 2010 WL 3733878 (11th Cir. Sept. 27, 2010) ("[T]he chief purpose of disgorgement is to deprive the violators of their ill-gotten gains. [Disgorgement is tied to] the idea of unjust enrichment: the broad idea is that persons not profit from breaking the securities laws.").

12. The Division's burden of proof for a claim for disgorgement is well settled in the Eleventh Circuit and, in order to be entitled to disgorgement, the Division must provide a reasonable approximation of the defendant's ill-gotten gains. *See SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) (per curiam) (citation and internal quotation marks omitted). Once the Division provides a reasonable approximation of the defendant's unlawfully acquired assets, the burden shifts to the defendant to demonstrate that the Commission's estimate is not reasonable. *SEC v. Monterosso*, 756 F.3d 1326, 1337 (11th Cir. 2014) (citing *SEC v. Calvo,* 378 F.3d 1211, 1217 (11th Cir. 2004) (per curiam).

13. "A securities violator faced with disgorgement can . . . deduct expenses

incurred in a partially legitimate business." *SEC v. Aerokinetic Energy Corp.*, No. 8:08-CV-1409-T-27TGW, 2010 WL 5174514, at *4 (M.D. Fla. Sept. 10, 2010) (citing *SEC v. J.T. Wallenbrock & Assocs.*, 440 F.3d 1109, 1114 (9th Cir.2006)).

Civil Penalties

14. In any administrative action brought under Section 21B of the Exchange Act, 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." *See* Exchange Act Section 21B(a)(2)(b).

15. The Exchange Act provides three separate "tiers" of potential penalties, which increase depending upon the egregiousness of the violation. *See* 15 U.S.C. § 78u(d)(3); *see also* 17 C.F.R. § 201.1001. In the first tier, for non-scienter violations, the penalty cannot exceed (a) the greater of $7,500 (for a natural person)/$75,000 (for any other person), or (b) the gross amount of pecuniary gain to the defendant as a result of the violation. In the second tier, where the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," the penalty cannot exceed the greater of (a) $75,000 (for a natural person)/$375,000 (for any other person), or (b) the gross amount of pecuniary gain to the defendant as a result of the violation. The third tier, where the violation (i) "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and (ii) "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons," the penalty cannot exceed the greater of (a) $150,000 (for a natural person)/$725,000 (for any other person), or (b) the gross amount of pecuniary gain to the defendant as a result of the violation. *See* 15 U.S.C. § 78u(d)(3); 17 C.F.R. § 201.1001. In the instant matter, the Division seeks to impose the maximum first-tier civil penalty against Peraza.

16. In determining the appropriate amount of a civil penalty, courts in the Eleventh Circuit will consider, among other things, (1) the egregiousness of the defendant's violations, (2) the isolated or repeated nature of the violations, (3) the degree of scienter involved, (4) the deterrent effect of a particular penalty amount, taking into consideration the defendant's financial worth, (5) any other penalties arising from the conduct, and (6) the amount of unjust enrichment. *See SEC v. U.S. Pension Trust Corp.*, 2010 WL 3894082 at *25 (S.D. Fla. Sept. 30, 2010), aff'd, 444 F. App'x 435 (11th Cir. 2011)).

17. The evidence in the record establishes that the aforementioned facts do not favor the Division's request for a maximum first-tier civil penalty. Nothing in the record establishes that Peraza's violative conduct was willful or egregious. *See* Supra, ¶4. The conduct was isolated in that it only involved Peraza's Atlanta branch, and involved no degree of scienter. Due to Peraza's status, no penalty will serve any deterrent effect. As such, the Division's request for a maximum first-tier civil penalty is denied.

ARGUMENT

I. PERAZA IS ENTITLED TO AN OFFSET FOR EXPENSES RELATED TO LEGITIMATE BUSINESS

"Disgorgement merely requires the return of wrongfully obtained profits; it does not result in any actual economic penalty . . ." *See Pitters*, 2010 WL 1413194, at *5 (S.D. Fla. Mar. 5, 2010) (quoting *Lybrand*, 281 F.Supp.2d at 729-30). Disgorgement "is only triggered by a defendant's profit or gain or enrichment, and [] it is not a tool for punishing parties who have not profited from their wrongdoing." *See Video Without Boundaries, Inc.*, 2010 WL 5790684, at *5 (emphasis added); *see also Pitters*, 2010 WL 1413194, at *5; *Merchant Capital, LLC*, 397 Fed. Appx. 593, 595, 2010 WL 3733878 ("[T]he chief purpose of disgorgement is to deprive the violators of their ill-gotten gains. [Disgorgement is tied to] the idea of unjust enrichment: the broad idea is that

persons not profit from breaking the securities laws."). If the Administrative Law Judge imposes disgorgement against Peraza, he should offset the disgorgement amount the Division has requested by the legitimate business expenses Peraza incurred in connection with the revenues generated from the legitimate trades that took place through Peraza's registered representatives.

The Honorable Cecilia M. Altonaga ("Judge Altonaga") recently denied disgorgement against a defendant in its entirety because the Commission sought disgorgement for the full transaction amount instead of the *net* profits. *See SEC v. Hall*, No. 15-cv-234890-CIV, 2017 WL 1504025 (S.D. Fla. April 13, 2017). In *Hall,* the Commission asked the court to disregard the defendant's request for an offset of the millions in disgorgement because he was found liable for violating the federal securities laws. However, Judge Altonaga strongly disagreed with the Commission's position and found instead that:

> [T]he SEC cannot satisfy its burden to reasonably approximate a disgorgement amount merely by proving the violations and then simply stating the loans Defendant received from the transactions were all profits; [w]ithout proof, a court cannot speculate... Despite Hall having lied to Penson, the SEC has failed to meet its burden in reasonably approximating Hall's ill-gotten profits — ***it completely ignores the value Hall provided Penson during each transaction***. Where, as here, the SEC has not reasonably calculated Defendant's profits, disgorgement is inappropriate.

Id. (internal citations omitted) (emphasis added). In other words, seeking disgorgement for the total amount of compensation without taking into consideration any other factors would be tantamount to a punitive or compensatory remedy. Instead, as indicated by Judge Altonaga and other federal courts, an appropriate disgorgement calculation must offset any gains by the losses and ***expenses*** associated with them. *See Hall*, 2017 WL 1504025; *see also SEC v. Thomas James Assocs., Inc.*, 738 F. Supp. 88, 92 (W.D.N.Y. 1990). The unlawful conduct attributed to Peraza in

this matter was not related to the legal trades[2] entered by the Peraza registered representatives. Instead, the conduct attributed to Peraza was that it "facilitated" Angel Oak in operating as an unregistered broker-dealer by:

> Peraza Capital provided Angel Oak Capital Partners employees who were registered representatives of Peraza Capital access to its trading platform, through which trades were submitted for execution. Peraza Capital also provided access to its clearing firm arrangement as well as trade support services. Peraza Capital employees interacted with the clearing firm on behalf of Angel Oak Capital Partners. Peraza Capital also allowed employees of Angel Oak Capital Partners to register with Peraza as licensed securities representatives.

Exhibit 1 at ¶37. In exchange for providing these services, Peraza was entitled to 15% of the gross commission revenues. *See generally* OIP. As set forth in the record herein and during the Final Hearing, the 900 trades themselves did not violate any federal securities laws. *See* Order Denying Division's Motion at 8; *see also generally* Exhibit 1. Moreover, none of Peraza's other activities as a registered broker-dealer were at issue in this matter. As such, there was a portion of the activities at the Atlanta branch that were legal and the associated business expenses should be offset. *See J.T. Wallenbrock & Assocs.*, 440 F.3d at 1114 (It is appropriate to permit a defendant to offset against ill-gotten gains generated from "a partially legitimate company misdirecting or misappropriating revenues. For example, if an investor buys stock through a licensed broker who then skims off some or all of the profits generated by the stock, either through dividends or upon resale, the broker is enriched by the amount skimmed."); *see also SEC v. Gold Standard Mining Corp.*, No. CV 12-5662 JGB (CWX), 2016 WL 6892101, at *5 (C.D. Cal. May 26, 2016) ("[Respondent] is not alleged to be a company created for fraudulent and illegal purposes, and instead is at least a partially legitimate company. Accordingly, it is inappropriate to award

[2] "The fact that trades were processed in a ***legal*** manner does not eliminate Peraza's liability." *See* Order Denying Division's Motion at 8 (emphasis added).

disgorgement of the [] reimbursed travel expenses, which were incurred as business expenses in completing auditing work.") (internal quotations omitted). Peraza provided its back-office services to Angel Oak in an effort to conduct legal trading activities and, therefore, Peraza is entitled to an offset for the associated costs. *See Hall,* 2017 WL 1504025; *see also Thomas James Assocs., Inc.*, 738 F. Supp. at 92 (The Court held that "it is appropriate to offset [] gross profits [] with certain business expenses ***attributable*** thereto . . . These expenses include, for example, commissions, telephone charges, underwriting expenses and a proportionate share of overhead.") (emphasis added). Accordingly, Peraza should be entitled to an offset for its expenses in facilitating the lawful trades at its Atlanta branch office during the period between 2012-2014, including the following: (1) legal, professional, and consulting fees; (2) accounting fees; and (3) a proportionate equipment allocation, totaling $795,256.88. *See* Hearing Trans. at 68-77 ("Q: Right. Now, when you put together this spreadsheet, you also tried to identify expenses, did you not? A: I tried to identify expenses ***directly related to the Atlanta branch***.") (emphasis added); *see also* Exhibit 3.

II. A MAXIMUM FIRST-TIER PENALTY IS INAPPROPRIATE

A court typically imposes civil penalties as a means to punish the wrongdoer and deter the same from committing future securities law violations. *See SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 17 (D.D.C. 1998); *see also SEC v. Friendly Power Co.*, 49 F. Supp. 2d 1363, 1373 (S.D. Fla. 1999). The court determines any civil penalties "in light of the facts and circumstances" of the particular case. 15 U.S.C. § 77t(d)(2)(A); 15 U.S.C. § 78u(d)(3)(B)(I); *SEC v. Solow*, 554 F. Supp. 2d 1356, 1365-1366 (S.D. Fla. 2008). Further, this Court has full discretion in imposing civil penalties in this matter. *See SEC v. Gane*, 2005 WL 90154, *55 (S.D. Fla. Jan. 4, 2005). The Division has requested that ALJ Grimes impose a first-tier penalty against Peraza for $75,000.00

(the maximum amount for a first-tier penalty). *See* Order Denying Division's Motion at 10. For the reasons stated herein, ALJ Grimes should refrain from imposing a $75,000.00 civil penalty against Peraza, and should instead impose a lower civil penalty.

Courts in the Eleventh Circuit will consider, among other things, (1) the egregiousness of the defendant's violations, (2) the isolated or repeated nature of the violations, (3) the degree of scienter involved, (4) the deterrent effect of a particular penalty amount, taking into consideration the defendant's financial worth, (5) any other penalties arising from the conduct, and (6) the amount of unjust enrichment. *See SEC v. U.S. Pension Trust Corp.*, 2010 WL 3894082 at *25 (S.D. Fla. Sept. 30, 2010), aff'd, 444 F. App'x 435 (11th Cir. 2011)). Such factors do not support the Division's disgorgement request:

A. Egregiousness of Peraza's Violations

The Division's claim that the instant violation is so egregious as to warrant a maximum penalty under the first tier is without merit. Notwithstanding the prior FINRA AWCs the Division submitted during the Final Hearing, the Division has failed to establish the required factors required to establish egregiousness. *See* Exhibit 13-15; *see also Rapport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012) ("[T]he SEC must provide some meaningful explanation for imposing sanctions."). Each AWC the Division submitted represents Peraza's technical violations[3] based upon conduct that took place significant amounts of time (over ten (10) years ago, in two of the instances) for which FINRA assessed low fines. *See* Exhibits 13-15. Essentially, the evidence that the Division offered to support its allegation of Peraza's egregiousness has only served to undermine its contention, and clearly does not support a finding of egregiousness in this matter.

[3] The FINRA violations set forth in the AWCs relate to certain AML compliance, FOCUS Reports, Trade Reporting, and Compliance Engine violations. In each instance, FINRA assessed low fines of either $10,000 or $12,500. *See* Exhibits 13-15.

B. Isolated or Repeated Nature of the Violations

Moreover, although the conduct at issue occurred for multi-years, it was isolated in that it related to one branch of Peraza. The Commission has not alleged that Peraza engaged in any violative conduct at any other branch or in its headquarters. Accordingly, the violative conduct was isolated and impossible to repeat due to Peraza being out of business for several years. *See* Hearing Trans. at 125:8-25; 126:1-12. The isolated nature of the violative conduct does not support the Division's requested civil penalty.

C. The Degree of Scienter Involved

No dispute exists regarding the fact that Peraza's violative conduct included no degree of scienter. As such, this factor does not support the Division's requested civil penalty.

D. The Deterrent Effect of a Particular Penalty Amount

Peraza has been administratively dissolved and has not been an active broker-dealer or active limited liability company since 2017. *See* Hearing Trans. at 126:4-12. Accordingly, no civil penalty will have a deterrent effect on Peraza and this factor does not support the Division's requested civil penalty.

Based upon the application of the foregoing factors to the facts in this matter, the Division is not entitled to the imposition of the maximum amount of a third-tier penalty. *U.S. Pension Trust Corp.*, 2010 WL 3894082 at *25. The Administrative Law Judge should deny the Division's request for a civil penalty in its entirety, or – in the alternative – order a civil penalty in a decreased amount that reflects the application of the foregoing factors.

CONCLUSION

For the reasons stated herein, Peraza Capital & Investment, LLC hereby respectfully requests that the Administrative Law Judge limit the Division's claim for disgorgement to an amount less the expenses stated herein, as reflected in Peraza Capital & Investment, LLC's books and records. Additionally, Peraza Capital & Investment, LLC respectfully requests that the Administrative Law Judge enter a civil penalty in an amount lower than the maximum first-tier penalty as articulated herein.

Dated: July 1, 2019
Coral Gables, Florida

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2019, I filed the original and three copies of the foregoing with the Office of the Secretary, and served true copies by e-mail on the following:

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