UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18061

In the Matter of

RETIREMENT SURETY LLC, CRESCENDO FINANCIAL LLC, THOMAS ROSE, DAVID LEEMAN, AND DAVID FEATHERSTONE,

Respondents.

RESPONDENTS THOMAS ROSE, DAVID LEEMAN, AND DAVID FEATHERSTONE'S RESPONSE TO THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18061

In the Matter of

RETIREMENT SURETY LLC, CRESCENDO FINANCIAL LLC, THOMAS ROSE, DAVID LEEMAN, AND DAVID FEATHERSTONE,

Respondents.

RESPONDENTS THOMAS ROSE, DAVID LEEMAN, AND DAVID FEATHERSTONE'S RESPONSE TO THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION

Respondents Thomas Rose ("Mr. Rose"), David Leeman ("Mr. Leeman"), and David Featherstone ("Mr. Featherstone") (collectively, "Respondents") respond to and file this Response to the Division of Enforcement's Motion for Summary Disposition as follows:

I. PRELIMINARY STATEMENT

The Securities and Exchange Commission ("the Commission") pursued non-fraud, non-scienter claims against Respondents, alleging strict-liability violations of Sections 5(a) and (c) of the Securities Act of 1933 ("Securities Act") and Section 15(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act"), for allegedly acting as unlicensed brokers for the sale of nine-month promissory notes issued by Verto Capital Management LLC. On November 14, 2017, the Commission entered into an agreed order with Respondents partially settling this proceeding. As

a result, the only issue remaining for this Court to determine, as applicable, are the measures of disgorgement and civil monetary penalties, if any, against Respondents.

As set forth below, factual issues remain that prohibit this Court for granting summary disposition. These material factual issues include: (1) Respondents' inability to pay; (2) the multiple factors relevant to an award of a civil monetary penalty; and (3) the amount of the disgorgement owed.

II.
PROCEDURAL HISTORY

On July 6, 2017, the Commission filed an Order Instituting Proceeding ("OIP") against Respondents seeking certain remedial measures, including a cease-and-desist order, disgorgement plus prejudgment interest, and civil monetary penalties for their alleged violations of Section 5 of the Securities Act and Section 15(a) of the Exchange Act. The OIP alleges that Respondents acted as unregistered brokers in the sale of nine-month notes issued by Verto Capital Management LLC (the "Verto Notes").

On November 14, 2017, the Commission entered into and issued a partial settled order. Pursuant to that settlement, Respondents, without admitting or denying the allegations of the OIP, consented to a Commission Order: (1) finding that Respondents violated Securities Act Sections 5(a) and (c) and Exchange Act Section 15(a); directing that Respondents cease-and-desist from committing or causing any violations and any future violations of the charged provisions; and (3) suspending Respondents for a period of one year. *Retirement Surety, LLC*, Securities Act Release No. 10436 (the "Order"). The Commission did not find any fraud-based or scienter-based securities violations against Respondents, nor were such allegations ever made against them. *Id.* Moreover, Respondents do not concede that commissions earned are the appropriate measure of disgorgement. *Id.*

Previously, on July 6, 2017, the Commission commenced Cease and Desist Proceedings (the "C&D Orders") against Randal Wallis ("Mr. Wallis") and Ron Wills ("Mr. Wills"), two other similarly situated brokers who also sold the Verto Notes through Crescendo. Pursuant to the C&D Orders, both Messrs. Wallis and Wills settled under the same non-scienter statutes as Respondents: Securities Act Section 5(a) and (c) and Exchange Act Section 15(a)(1). In addition to each paying disgorgement of under $25,000, Messrs. Wallis and Wills each received only a first-tier penalty of $7,500. *In re Randal Wallis,* File No. 3-18062 (Securities Act Release No. 10387) (Exchange Act Release No. 81088) (July 6, 2017); *In re Ronald Wills,* File No. 3-18063 (Securities Act Release No. 10388) (Exchange Act Release No. 81089) (July 6, 2017).

On April 18, 2018, Administrative Law Judge Elliot granted the Division's motion for summary disposition and issued an initial decision. However, on June 21, 2018, the Commission issued an order staying any pending administrative proceedings in light of the United States Supreme Court's decision in *Lucia v. SEC*, thereby vacating Judge Elliot's initial decision. This proceeding was subsequently assigned to Administrative Law Judge Foelak, and then reassigned by order dated March 4, 2019 to this Court.

Respondents request that the Court deny the Division's motion and order disgorgement, if at all, in an amount that is reasonably related to Respondents' current income and ability to repay, and levy no more than a first-tier penalty of $7,500 against each of them. Respondents are unable to pay the disgorgement and penalties sought by the Division, if they can at all, without selling their respective family homesteads and/or liquidating retirement savings. Doing so of course would put each at risk of financial ruin from which he would be unable to recover given his age, status, and limited employment opportunities. Such a result is certainly not in the public interest nor something that this Court, in fairness, should order. Further, because the Commission

did not find any fraud-based or scienter-based securities violations against Respondents and given the facts and circumstances surrounding Respondents' sale of Verto Notes, the third-tier penalty the Division seeks is inappropriate.

III.
SUMMARY DISPOSITION EVIDENCE

Respondents submit and incorporate by reference the following evidence in support of this Response:

- **App. 0001 - 0283**: Sworn Financials of Dave Leeman
- **App. 0284 - 0417**: Supplemental Financials of Dave Leeman
- **App. 0418 - 0419**: Sworn Statement of Dave Leeman
- **App. 0420 - 0792**: Sworn Financials of Tom Rose
- **App. 0793 - 1009**: Supplemental Financials of Tom Rose
- **App. 1010 - 1011**: Sworn Statement of Tom Rose
- **App. 1012 - 1424**: Sworn Financials of David Featherstone
- **App. 1425**: Sworn Statement of David Featherstone
- **App. 1426 - 1428**: Various Emails
- **App. 1429 - 1435**: Testimony Transcript of Dave Leeman
- **App. 1436 -1444**: Testimony Transcript of Tom Rose
- **App. 1445 - 1450**: Testimony Transcript of William R. Schantz III
- **App. 1451 - 1504**: Investor Declarations

IV.
LEGAL ARGUMENTS[1]

A. Summary Disposition Standard.

A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by him, by uncontested affidavits, or by facts officially noticed pursuant to SEC Rule of Practice 323. 17 C.F.R. § 201.323. The facts must be viewed in the light most favorable to the non-moving party. *See In the Matter of Jay T. Comeaux*, Exchange Act Release No. 72896, 2014 WL 4160054, at *2 (Aug. 21, 2014).

However, once the moving party has carried its burden of establishing that it is entitled to summary disposition on the factual record, the opposing party may not rely on bare allegations or denials, but instead must present specific facts showing a genuine and material dispute for resolution at a hearing. *See id.* Such facts may be established by "affidavits or other specific evidence." *In the Matter of China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *16 (Nov. 4, 2013).

B. A Factual Issue Remains as to Respondents' Inability to Pay.

The law provides that the hearing officer may, in his or her discretion, consider evidence concerning ability to pay in determining whether disgorgement, interest, or a civil monetary penalty is in the public interest. *See* 17 C.F.R. 201.630. The disgorgement and penalties sought by the Division against Respondents are not in the public interest. Accordingly, the Court should

[1] On November 30, 2017, the Commission directed reconsideration of the record by newly appointed Administrative Law Judges in all pending actions and lifted an earlier stay of all Commission enforcement actions subject to later appeal to the Tenth Circuit.

decline to order disgorgement, prejudgment interest, and monetary penalties as requested by the Commission. Instead, the Court should order them, if any, in amounts that are consistent with the nature of the conduct engaged in by the Respondents, consistent with similarly-situated parties such as Messrs. Wallis and Wills, and that take into account the respective financial conditions of each of the Respondents.

Indeed, Respondents each asserted the inability to pay in their respective Answers in this proceeding. As indicated in the attached sworn financials and statements, Respondents have presented a fact issue as to whether there is an inability to pay; therefore, summary disposition is inappropriate. Moreover, in *In the Matter of Thrasos Tommy Petrou*, AP File No. 3-16217 (Mar. 20, 2015) (Order), the respondent sought summary disposition and argued he had little to no ability to pay sanctions. *Id.* at 4. In support of this contention, he submitted extensive financial information. *See id.* This Court denied respondent's request, but in doing so, recognized that inability to pay may raise a factual issue precluding summary disposition. *Id.*

Similarly, Respondents have presented viable factual evidence of their inability to pay. Because their inability to pay bears a direct correlation in determining whether disgorgement, interest, or a penalty are in the public interest, summary disposition is improper. *See* 17 C.F.R. 201.630.

1. Dave Leeman has demonstrated that he lacks the inability to pay.

Mr. Leeman is a 69 year old self-employed insurance salesman. *See* Sworn Statement of Dave Leeman, App. 0418–19. Tragically, Mr. Leeman has been [redacted], [redacted] *Id.* [redacted] will [redacted] put further strain on his already [redacted] and, combined with his advanced age, significantly hinder [redacted] App. 0284–6.

The Order establishes that Mr. Leeman made $297,360 in commissions through the Verto Notes and Forbearance Agreements from 2013–2016. However, 2014 was the only full year that Mr. Leeman offered the Verto Notes to new customers, generating $131,127 in commissions from sales. App. 0418–19. During that same year, Mr. Leeman and his wife's combined gross income, as evident in his tax return, was [redacted]. *See* App. 105. Of this figure, his wife's salary accounted for approximately [redacted], meaning he generated approximately [redacted] in non-Verto related income during 2014. *Id.;* App. 0418–19.

Currently, Mr. Leeman's primary sources of income derived from the sale of a self-published book and insurance sales, which to date are minimal. The bulk of his family's current income derive from his wife's [redacted] per year job. And, as Mr. Leeman's current financials show, his household net income is approximately [redacted] per month. App. 0418–19. Given his advanced age, current financials and future medical needs, Mr. Leeman is without the ability to pay any disgorgement, much less the approximate disgorgement of $300,000 sought by the staff.

2. Tom Rose has demonstrated that he lacks the inability to pay.

Mr. Rose is a 63 year old self-employed insurance broker. *See* Sworn Statement of Tom Rose, App. 1010–11. Currently, Mr. Rose earns roughly [redacted] per month in gross commissions, but, after expenses, his monthly net profit is approximately [redacted]. App. 1010–11. In May 2017, Mr. Rose's wife was terminated from her [redacted] per month job and now makes roughly [redacted] per month. App. 0428–37, 1010–11. His current monthly net income (excluding his wife's salary) is approximately [redacted] per month. *Id.*

The year 2014 was the only full year that Mr. Rose offered the Verto Notes to new customers. In 2014, Mr. Rose generated $140,366 in commissions. App. 1010–11. During that same year, Mr. Rose and his wife's combined gross income, as evident in his tax returns was

[redacted]. App. 0839. Of this figure, his wife's salary accounted for approximately [redacted] meaning he generated approximately [redacted] in non-Verto related income during 2014. *Id.*; App. 1010–11. As the financial information clearly indicates, without the Verto Notes, the Rose family's current income derives primarily from Mrs. Rose.

3. David Featherstone has demonstrated that he lacks the inability to pay.

Mr. Featherstone is 72 years old and has an [redacted] for whom he and his wife provide and will continue to provide around-the-clock [redacted] for the rest of their life. *See* Sworn Statement of David Featherstone, App. 0425. Mr. Featherstone is a self-employed piano tuner/rebuilder, where he earns roughly [redacted] per year. *Id.* However, 2014 was the only full year that Mr. Featherstone offered the Verto Notes to new customers.

In 2014, Mr. Featherstone generated $84,493 in commissions related to sale of the Verto Notes. *Id.* During that same year, Mr. Featherstone's gross income, as evident in his tax returns, was [redacted] meaning his non-Verto income for that year was approximately [redacted] deriving primarily from his piano business. App. 1283. Mr. Featherstone currently depends on social security income, which he began taking in approximately 2015. Despite his advanced age, Mr. Featherstone is [redacted] because of his present and future [redacted].

C. Only First-Tier Penalties Should Be Levied Against Respondents.

The securities laws provide for three tiers of penalties to be determined by the court in light of the facts and circumstances:

- First Tier: $7,500 for an individual per violation;
- Second tier: $80,000 for an individual per violation that "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement"; or

- Third tier: $160,000 for an individual per violation that "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons."

See 15 U.S.C. § 78u-2.

In weighing whether a penalty is in the public's best interest, courts consider: (1) whether the act or omission involved fraud; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other matters as justice requires. *In re Middlebury Securities, LLC*, File Nos. 3-16227, 3-1622, March 1, 2017 (Initial Decision) (Judge Elliot).[2]

Simply because the Division could be justified in imposing a certain penalty does not establish that doing so is appropriate or in the public interest. *See In the Matter of J.S. Oliver Capital Mgmt., L.P.*, 2016 SEC LEXIS 2157, at *81-82 (noting that although the Commission "could be justified in finding a much larger number of acts or omissions [based on the number of transactions], ... this alone would not establish that a greater penalty was appropriate in the public interest"); *see, e.g., In the Matter of Christopher M. Gibson*, Exchange Act Release No. 1106, 2017 WL 371868 (January 25, 2017) (imposing a civil money penalty substantially less than the amount sought by the Division).

The Division seeks third-tier penalties against Respondents, which are inappropriate given the facts and circumstances surrounding Respondents' sale of the Verto Notes. Further, Respondents are entitled to similar treatment to Messrs. Wallis and Wills, who also sold Verto Notes and settled under the same provisions as Respondents, and yet received only first-tier penalties.

[2] Messrs. Wills and Wallis, who also sold the Verto Notes, received first-tier penalties of $7,500.

1. The factors for determining whether a penalty is in the public interest weigh in favor of imposing no more than a tier-one penalty.

As to the first factor, no fraud was alleged, charged, or found by the Commission against the Respondents. Indeed, the Commission did believe there was a fraud, but it was not perpetrated by the Respondents; rather, the staff concluded that the responsible party was Bill Schantz and the entity/product he created, Verto. *See* App. 1445–1450. Respondents, in actuality, believed so much in the Verto Notes that all of them personally invested in the product.

As such, the Commission did not charge Respondents with fraud, instead alleging only technical strict-liability violations—that they sold unregistered, non-exempt securities and were not licensed securities brokers. As the evidence describes below, Respondents performed due diligence to make reasonable assurances that the Verto Notes were not a security, thereby making a good faith, reasonable effort to comply with the regulations. Respondents are not accused of stealing money, creating the Verto Notes program, or engaging in any a fraudulent activity. Instead, they were recruited and misled by Schantz into selling his product, the Verto Notes, based on Schantz's claims that they were not securities.

Similarly, Respondents have no prior violations and have led law-abiding lives. Mr. Rose's career spans over thirty years in professional services and client relationship management. During his long career, he has no regulatory or disciplinary history whatsoever. Mr. Leeman worked a long time as a church music director before obtaining a license to sell insurance in Texas. Mr. Leeman also has no regulatory or disciplinary history whatsoever. Finally, Mr. Featherstone obtained a license to sell insurance in Texas in 2010. Like Mr. Rose and Mr. Leeman, he has had no regulatory or disciplinary history whatsoever.

A factual issue also remains as to the degree of harm suffered by investors. The architect of the Verto Notes, Bill Schantz, has been ordered to repay investors, with interest, through the

fair fund that was established as part of his settlement. As such, while payments to investors have been delayed through the SEC's payment procedures, investors may not realize a loss from their investments. Likewise, as the investor declarations attached indicate, many of these investors do not feel harmed and are in fact appreciative of the efforts undertaken by Respondents. *See* Investor Declarations, App. 1451–1504.

Furthermore, the Order has already had a significant deterrent effect on Respondents and the general public. The Order and press release are public and available for anyone to see. Similarly, Respondents not only are enjoined from committing future securities violations, but they have been suspended and, in all-likelihood, left unable to become securities brokers for the balance of their careers. The combined effect of this punishment has been pronounced on their respective abilities to earn a living. Indeed, Mr. Featherstone has left the industry all together, and Mr. Leeman's principal income is now derived from hymnal sales. Consequently, not only does the existing Order already provide a significant personal deterrent, but the collateral consequences and public nature of this proceeding represents a strong deterrent message to the general public as well.

In an attempt to establish second or third-tier penalties, the Commission contends that the Respondents showed reckless disregard for a regulatory requirement by selling unregistered securities because they were aware of the risk that the Verto Notes were securities. However, reckless conduct has been defined as a "highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.... [T]he danger of misleading buyers must be actually known or so obvious that any reasonable man would be

legally bound as knowing, and the omission must derive from something more egregious than even 'white heart/empty head' good faith." *SEC v. Platforms Wireless Intern. Corp.*, 617 F.3d 1072, 1093 (9th Cir. 2010).

Despite the Commission's contention, the overwhelming evidence shows the great lengths Respondents went to in order to gain reasonable assurances that they were acting in accordance with the various securities laws, i.e., not engaging in the sale of securities. Indeed, if there was reckless conduct, it would have been to not perform any due diligence, which Respondents did perform. Respondents acted prudently in requesting information from Mr. Schantz's securities attorney, John Pauciulo, a well-respected attorney at Eckert Seamons, on whether the Verto Note was a security. *See* App. 1426–28.

Specifically, on August 5, 2014, Tom Rose and Dave Leeman were forwarded an email from Eckert Seamons attorney John Pauciulo. Mr. Pauciulo's email stated that his firm "drafted the documents with the intent to meet the requirements of the 9 month note exemption. ***I think that a regulator or court should find that the notes are exempt***..." *See* App. 1426–28 (emphasis added). This email, at the very least, presents a genuine issue of material fact as to whether Respondents were reckless in their attempts to ensure that their activities were in regulatory compliance. And, as shown throughout the testimony of Bill Schantz, Schantz sought advice of counsel as to whether the Verto Notes were a security, and subsequently relayed this information to Respondents. *See* App. 1447–48 at 23:10-25:25. In reality, this email further corroborated Respondents' belief and their own due diligence that the Verto Notes were not a security.

After reading this email, any concerns the Respondents may have possessed were alleviated. This is confirmed by a reading of Tom Rose's email dated September 5, 2014. *See* App. 1426. In this email, Mr. Rose wants to discuss with Bill Schantz how to go about

explaining to other advisers what Mr. Schantz's lawyer told him – namely, that the Verto Notes are not a security. *Id.*

Additionally, as evidenced throughout the testimony of Mr. Rose and Mr. Leeman, Respondents also investigated whether the Verto Notes were a security because they wanted to ensure regulatory compliance—*i.e.,* that they could sell the Verto Notes without a securities license. Their initial investigation included researching a treatise on the nine-month notes, reading various securities laws, and talking to their own counsel. *See* App. 1432–33, 1437–41. This, in addition to the communications of Mr. Pauciulo, provided comfort to Respondents that they could sell the Verto Notes without a securities license. *See* App. 1430–33. Clearly, Respondents' state of mind was an honest and reasonable belief that the Verto Notes were not a security. Consequently, their conduct did not come close to rising to the level of an extreme departure from the standards of ordinary care. At the very least, this presents a factual issue as to whether summary disposition is appropriate.

And, assuming there was a reckless disregard of a regulatory requirement, which there was not, Respondents actions did not directly or indirectly result in substantial losses or create a significant risk of substantial losses to others, as required to impose a third-tier penalty. *See* 15 U.S.C. § 78u-2. It was not the fact that Respondents sold unregistered securities without a license that created the risk of loss; rather, it was the actions of Bill Schantz. According to the staff's now-settled allegations, Schantz, orchestrated a fraud—unbeknownst to Respondents—that misrepresented collateral and used investor funds for improper and undisclosed purposes. The Commission does not allege—nor can they—that the Respondents were co-conspirators in Schantz's alleged scheme. But it was this scheme that caused risk of harm to investors, not Respondents' lack of licenses.

Finally, as discussed above, Respondent's financial situation is not promising. The Verto Notes were their primary source of income. And, to make matters more dire, they are suspended from applying for a securities license, and as such, their means of earning income are limited. Therefore, as their attached financials show, Respondents' ability to pay a penalty, much less the maximum penalty sought by the staff, is bleak.

D. Respondents Should Be Ordered Disgorgement, if any, in Reasonable Relation to Their Income and Ability to Repay, and Should Be Given Credit for Taxes Paid and Forbearance Agreement Commissions.

"Disgorgement is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs." *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993). As the Supreme Court recently alluded to in *Kokesh*, the imposition of disgorgement does not return a defendant to the status quo if it fails to provide proper credits. *Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635, 1639, 2017 WL 2407471 (U.S. June 5, 2017). As a result, disgorgement without proper credits leaves the respondent in a worse position than the status quo, which is contrary to the intended concept and reasonable purpose of disgorgement. *Id.*

In *First Securities Transfer Systems, Inc.*, Exchange Act Release No. 36183, 52 S.E.C. 392, 397 (1995), the Commission stated:

> [The Commission is] cognizant of the inadvisability of assessing penalties so heavy that the persons against whom they are assessed are unable to pay them. Such a situation results in the expenditure of agency resources in unsuccessful attempts to collect penalties. Moreover, the imposition of a sanction that cannot be enforced may ultimately render the deterrent message intended to be communicated by the sanction less meaningful.

Instead, the court may opt to order disgorgement and penalties in an amount reasonably related to the violator's current income. *See, e.g. In the Matter of Middlebury Securities, LLC, and Gregory Osborn*, Exchange Act Release No. 1110, 2017 WL 782156, at *14 (March 1, 2017)

(ordering disgorgement equal to a portion of the wrongfully obtained earnings plus prejudgment interest owed, in reasonable relation to the violator's current income).

Courts routinely reduce disgorgement on a wrongdoer's showing of an inability to pay. *See, e.g., In the Matter of Middlebury Securities, LLC*, 2017 WL 782156, at *14. In *In the Matter of Michael W. Crow, et al.*, Exchange Act Release No. 953, 2016 WL 489352, at *81 (February 8, 2016), the court found disgorgement appropriate in the amount of $386,810.01, but reduced the amount to only $50,000.00 "[g]iven [the wrongdoer's] showing of an inability to pay, and his difficult financial [redacted]." The court explained:

> While [the wrongdoer's] conduct ... was somewhat egregious ... [t]here was no evidence that [he] lived lavishly or spent money recklessly. He appeared to be as a sincere individual who made regrettable decisions, in large part because he attempted to undertake endeavors that he was ill-equipped for. ... He appears to be a hard-working, generally good person.

Id.

Similar to the court in *Crow*, Respondents ask the Court to consider their respective conduct, lifestyles, and the fact that they are hard-working, good people who perhaps attempted to undertake endeavors they were ill-equipped for. If the Court finds that disgorgement is appropriate, Respondents request that the Court consider an amount reasonably related to their incomes, considering their ages, ability to work, and certain life hardships, including Mr. Leeman's stage four kidney disease and mounting medical expenses and Mr. Featherstone's lifetime obligations to his autistic daughter.

1. Respondents should be credited for taxes paid.

The objective of disgorgement—that the wrongdoer be returned to the status quo and not worse off as a result of its imposition—can only be achieved if the respondent is allotted a credit for their expenses—in this case, taxes paid on income. *Id.* The chart below illustrates the

percentage in taxes each Respondent paid compared to his total taxable income for the years 2013–2015, the primary years Respondents sold the Verto Notes, illustrating the average tax Respondents' paid for the commissions:[3]

Name	2013	2014	2015	Average Tax
Dave Leeman	21.8%	24.5%	28.6%	25.0%
Tom Rose	21.4%	23.8%	26.6%	23.9%
David Featherstone	27.1%	28.9%	26.2%	27.4%

As the landmark decision by the Supreme Court in *Kokesh* alluded, for an amount to be truly remedial and not punitive, the Court must consider the taxes Respondents paid, in order to fully place them back to the status quo. *Kokesh*, 137 S. Ct. at 1639. As such, this Court must credit Respondents with the taxes paid on disgorgement.

2. The Forbearance Agreements are not securities, and commissions derived therefrom should not be included in disgorgement.

A court may only order disgorgement if there is a violation of the securities laws. *SEC v. Sample*, Civ. No. 3:14-CV-1218-B, 2017 WL 5569873, at *1 (N.D. Tex. Nov. 20, 2017). While the Order establishes that the Verto Notes are securities, it is silent as to whether the Forbearance Agreements are securities. Order at ¶ 26. For the reasons listed below, the Forbearance Agreements have not been demonstrated to be securities, and commissions derived therein should not be considered for disgorgement.

[3] These tax returns are included in each Respondent's sworn financial statements which are included as App. 0001-0283, 0420–0792, 1012–1424 to this Response.

Section 2(a)(1) of the 1933 Act, 15 U.S.C. § 77b(a)(1), and § 3(a)(10) of the 1934 Act, 15 U.S.C. § 78c(a)(10), in slightly different formulations, define "security" to include "any note, stock, treasury stock, security future, bond, debenture, ... investment contract, ... [or any] instrument commonly known as a 'security.'" *SEC v. Edwards*, 540 U.S. 389, 393 (2004).

First, this Court, in its own Order, acknowledges the distinction between the Verto Notes and the Forbearance Agreements when it separated the commissions earned by Respondents by each of these categories. Order at ¶ 24.

Second, the Forbearance Agreement is not a "note," because it did not require the investor to add funds. Indeed, the Forbearance Agreement merely acted as an extension of the payout date of a pre-existing note; it is not a new note. Along those lines, the Forbearance Agreement is also not an investment contract as defined in *Howey*. *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). The test for whether a particular scheme is an investment contract is to look to "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Id.* at 301. Because there was no investment of money in connection with the Forbearance Agreement—the investment had already been made and completed through the original Verto Note—it cannot be held to be an investment contract.

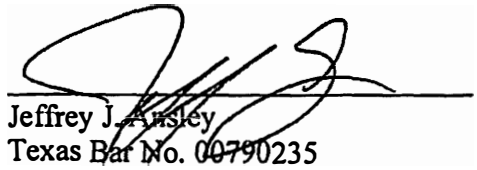
Accordingly, and in the alternative, if this Court did find Respondents' possessed an ability to pay, which they do not, each Respondent's share should be credited with taxes paid on such commissions and should not include any commissions earned from a Forbearance Agreement.

V.
CONCLUSION

Respondents request that the Commission's Motion for Summary Disposition be denied.

SIGNED this 3rd day of May, 2019.

Respectfully submitted,



Jeffrey J. Ansley
Texas Bar No. 00790235
Email: jansley@bellnunnally.com
Troy (T.J.) Hales
Texas Bar No. 24099011
Email: thales@bellnunnally.com
BELL | NUNNALLY LLP
2323 Ross Avenue, Suite 1900
Dallas, Texas 75201
(214) 740-1400 Telephone
(214) 740-1499 Facsimile

COUNSEL FOR RESPONDENTS DAVE LEEMAN, TOM ROSE, AND DAVID FEATHERSTONE

CERTIFICATE OF SERVICE

Pursuant to Rule 150 of the Commission's Rules of Practice, I hereby certify that on May 3, 2019, a true and correct copy of the foregoing was sent in the manner indicated below upon the following:

VIA ELECTRONIC MAIL
Honorable James E. Grimes
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557
Via e-mail to alj@sec.gov (courtesy copy)

VIA FEDERAL EXPRESS
Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

VIA ELECTRONIC MAIL
Jennifer Vakiener
Jack Kaufman
Steven Rawlings
New York Regional Office
Securities and Exchange Commission
200 Vesey Street, Rm. 400
New York, N.Y. 10281
vakienerj@sec.gov
kaufmanja@sec.gov
rawlingss@sec.gov

Jeffrey [illegible]

4476756_1.docx