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.

DIVISION OF ENFORCEMENT'S SUPPLEMENTAL REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

The Division of Enforcement ("Division") respectfully submits this Supplemental Reply Memorandum of Law in support of its motion for summary disposition against Respondents Thomas Rose ("Rose"), David Leeman ("Leeman"), and David Featherstone ("Featherstone") (collectively "Respondents"). The Division incorporates and adopts all of its arguments set forth in its memoranda of law in support of its motion for summary disposition dated April 19 and May 10, 2019.

ARGUMENT

In their opposition to the Division's motion, Respondents argue that (1) they did not recklessly disregard regulatory requirements in acting as unregistered brokers; (2) their conduct did not create a substantial risk of losses to investors; and (3) Respondents are unable to pay any monetary remedies due to their allegedly poor financial conditions. These arguments are unavailing.

First, Respondents recklessly disregarded the regulatory requirement of a broker's license to sell securities. It is undisputed that: (1) Respondents knew they needed a license to sell securities; (2) they knew that at least one attorney had opined that the Verto Notes were securities; and (3) throughout the time period that Respondents sold the Verto Notes, they continued to harbor concerns that the notes were securities. *Second*, Respondents' actions created a substantial risk of loss to investors. Despite being unlicensed, Respondents held themselves out as financial advisors and made claims regarding the safety and collateral of the Verto Notes. Indeed, thirty-two investors whom Respondents solicited lost money they had invested. *Finally*, Respondents' financial conditions do not warrant a reduction of disgorgement. They each either possess positive net monthly income or assets sufficient to pay full disgorgement and penalties and, contrary to their claims, no evidence exists that Respondents will need to sell their family homesteads or liquidate retirement assets to do so.

I. Respondents Recklessly Disregarded Regulatory Requirements

Respondents argue that second or third-tier penalties are inappropriate, claiming thate their conduct does not constitute reckless disregard of the regulatory requirement at issue (that they act only as licensed securities brokers). The undisputed facts establish, however, that Respondents' conduct was reckless. Respondents admit that they knew that selling securities without a license was a regulatory violation.[1] Furthermore, Respondents cannot contest that they harbored "concerns" that the Verto Notes were securities when they began selling them in November 2013. (November 14, 2017 Order ("Order") ¶ III.C.27.) Indeed, as early as November 2013, Respondent Leeman indisputably knew that another broker's attorney had

[1] *See* Respondents' Response Memo at 13 (stating Respondents "investigated whether the Verto Notes were a security because they wanted to ensure regulatory compliance – that they could sell the Verto Notes without a securities license").

opined that the Verto Notes *were* securities and that, for this very reason, that attorney had counseled his own client (another potential Verto Notes-broker) *not* to sell the Verto Notes. That attorney's opinion plainly put Leeman on notice of the very real risk that his activities would violate the securities laws. (*Id.*; Respondents' uncontestable settled Order states that "Respondent Leeman stated on November 15, 2013 that he received a call from another broker who 'called to let [Leeman] know that the attorney [the broker] asked to do his due diligence has recommended that he not participate' and '[t]he issue appears to be his opinion that our notes is a security.'") Leeman's response to learning of this opinion evinces his disdain for SEC regulatory requirements and that his focus was on making money: "Sure hope it's all OK because I wrote up $75,000 today!" (Vakiener April 19, 2019 Declaration ("Vakiener Decl.") Exs. F & G.)

Respondents argue that any such concerns that the Verto Notes were securities were alleviated by an August 2014 email from Verto attorney John Pauciulo, forwarded to Respondents by Verto's CEO. (Respondents Response Memo at 12, citing App. 1426-28.) That August 2014 email, however, cannot fairly be read to alleviate such concerns. To begin with, Verto's attorney, hardly a disinterested party, stated in his email that "providing a formal legal opinion on this point would not be feasible." Moreover and in any event, Respondents received attorney Pauciulo's email nine months *after* they began selling the Verto Notes – all the while harboring concerns that to do so might be illegal. Thus, they cannot claim to have relied upon it.

To the extent Respondents claim they "consult[ed] with attorneys" regarding the sale of nine-month notes prior to selling them in the fall of 2013, they have not asserted reliance of counsel; they have not waived privilege as to communications with their attorney David Shelmire (*see* Division Reply Memo at 4-5); and they have not contended that they communicated with Verto counsel Pauciulo on this topic (Respondents contend only that

Respondent Rose confirmed with Pauciulo that his firm prepared the Verto Notes information booklet, *see* Respondents Supplemental Response at 9).

Thus, by August 2014 – when Respondents again prompted Schantz to obtain a formal attorney opinion and received Pauciulo's email response – the most Respondents can claim is that they had learned (from another broker's attorney) that the Verto notes *were* securities, and that selling them without a brokerage license would be illegal. These undisputed facts amply establish that Respondents recklessly disregarded their regulatory obligation not to broker securities sales without a license.

To the extent Leeman asserts that his Kaplan Training Course provided information on a short-term notes exemption (*see* Respondents Supplemental Memo at 8), the excerpt of the training materials he cites related to the Uniform Securities Act, a state regulatory scheme, not the federal securities laws. Furthermore, Leeman stated that he took the course in the spring of 2014, months after he began selling the notes (in the fall of 2013). Finally, after this training (in August 2014), Leeman requested that Schantz provide a formal opinion letter from Pauciulo. (Vakiener Decl. Ex. I; August 5, 2014 email from Schantz stating that "[t]his is counsel's response to the email that Dave [Leeman] sent and I forwarded to them".) Leeman's post-training conduct thus belies any claim that he believed this training was sufficient to conclude that the Verto Notes were not securities.

II. Respondents' Violations Created a Substantial Risk of Loss to Investors

Respondents further assert (erroneously) that third-tier penalties are inappropriate because their illegal actions allegedly did not create a substantial risk of loss to investors. Respondents assert that (1) Verto note investors might not ultimately realize any loss because, under the consent judgment in *SEC v. William R. Schantz III and Verto Capital Mgmt. LLC,* No. 17-cv-03115 (D.N.J.), Verto's CEO "has been ordered to repay investors, with interest throughe

the fair fund that was established as part of his settlement" (Respondents Response Memo at 11); and (2) Respondents were not aware of Verto's fraudulent conduct (*id.* at 10). These arguments miss the mark. Regardless of whether Respondents knew of Verto's fraud, or will recover through the Commission's settlement, Respondents' actions put Verto investors at risk. As discussed in our opening brief (at p. 20), Respondents solicited Verto note investors by advertising the notes as "low risk"; highlighted that the notes were "200% collateralized" (Order ¶¶ III.C.18-19); and held themselves out as "financial advisors" (*id.* ¶ III.C.25) – all without qualifying as registered securities brokers (*id.* at ¶ III.C.29). Those regulatory licensing obligations are intended precisely to hold brokers to a due diligence standard that protects investors from risk. (Division Opening Memo at 20-21.) Respondents nonetheless marketed themselves as having the financial qualifications and certifications to recommend the investment when, in fact, the Respondents were not licensed to sell securities and make investment recommendations. Thus, Respondents put potential investors at risk regardless of whether any underlying fraud existed.

Additionally, Respondents do not respond to the Division's point that they accepted new commissions under the Forbearance Agreements even after learning of the Division's investigation into their conduct related to the Verto Notes (Division Reply Memo at 9). Respondents thus continued earning profits derivative of the Verto Notes despite the clear and present risk that the Division (and Commission) viewed that conduct as violating the Federal securities laws, actions that also further evince Respondents' recklessness.

Moreover, the investors solicited by Respondents were harmed. Respondents brokered sales of Verto Notes to thirty-two of the thirty-six investors who lost money on their Verto Notes. (Division Opening Memo at 22-23, citing Vakiener Decl. ¶ 13.) Defendants Schantz and Verto Capital Management LLC are more than $1.5 million delinquent on their obligations

under the SEC's settled judgment. (*Id.*) Indeed, for this reason, the Division will seek to add any monetary remedies recovered through this proceeding to the Fair Fund for distribution to these harmed investors, as the SEC did under its settlements with Respondents Randal Wallis and Ronald Wills. (*Id.*, citing Vakiener Decl. Exs. K & L.)

III. The Court Should Award Disgorgement, Interest, and Civil Penalties

Respondents further assert that monetary remedies are inappropriate because (1) they are unable to pay any, or only an unspecified portion of, the disgorgement, interest, and penalties the Division seeks; and (2) the requested relief is disproportionate to the amounts ordered in the related settled administrative proceeding against Respondents Wallis and Wills. (Opp. Mem. at 6-9.)e

Respondents' own affidavits of their financial condition establish that Respondents possess assets sufficient to warrant the monetary sanctions the Division seeks. Importantly, each Respondent reports substantial current monthly gross household income. (Division Opening Memo at 10-11, 15-16.) In addition, Rose and Leeman assert that they each have current positive net monthly household income (net of their monthly expenses). (Respondents Opp. Mem. at 7.) Furthermore, though Featherstone does not provide a monthly expense figure, his overall net worth (assets minus liabilities) is very substantial. (Division Opening Memo at 11, citing Resp. App. at 1013.) In any event, even where this Court has found that a particular respondent will have difficulty paying sanctions, it nonetheless has been "reluctant to relieve [a respondent] entirely of his [disgorgement] obligation." *In re Middlebury Securities LLC, et al.*, AP File Nos. 3-16227, 3-16229, 2017 WL 782156, *14 (ALJ Mar. 1, 2017). Here, Respondents have not explained why they cannot reasonably pay disgorgement, given that they have positive net monthly income, particularly where the Court may order Respondents to make payments through an installment plan. (*See id.*) And Respondents have provided no support for the

assertion that they would have to "sell their respective family homesteads and/or liquidate scarce retirement savings" (Respondents' Supplemental Response Memo at 2) to pay monetary remedies over time, where each has monthly income and/or sufficient assets to do so.

Respondents' comparisons to the $7,500 each in penalties that the Division obtained in settled proceedings against Wallis and Wills (Respondents Response Memo at 8 n. 2) is also unavailing. The Commission and Respondents Wallis and Wills arrived at the penalty figures through a negotiated settlement, whereas Respondents here have chosen instead to litigate these issues. Moreover, Wallis and Wills each paid disgorgement of under $25,000 because each received less than $25,000 in commissions. (Vakiener Decl. Ex. K – Wallis's settled $23,829 disgorgement figure equaled the full commissions he received; and Ex. L – Wills settled to $10,000 in disgorgement, having received only $13,240 in commissions). Thus, Respondents' reliance is misplaced. (*See* Division Reply Memo at 7-8, collecting cases.) To the contrary, rewarding Respondents here with pre-litigation settlements would provide a perverse incentive for all respondents to litigate rather than resolve claims more amicably with the Commission.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Division's memoranda filed on April 19, 2019 and May 10, 2019, the Division respectfully requests that the relief requested in its motion for summary disposition be granted in its entirety.

Respectfully submitted,

Dated: September 4, 2019

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CERTIFICATE OF SERVICE

Pursuant to Rules 150-52 of the Commission's Rules of Practice, I hereby certify that on September 4, 2019, a true and correct copy of the foregoing was sent in the manner indicated below upon the following:

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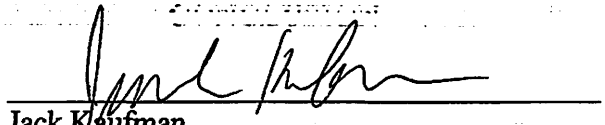

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