UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19515

In the Matter of **PATRICK S. CARTER,** **Respondent.**	**DECLARATION OF DOUGLAS M. MILLER IN SUPPORT OF DIVISION OF ENFORCEMENT'S MOTION FOR ENTRY OF DEFAULT AND SANCTIONS**

DECLARATION OF DOUGLAS M. MILLER

I, Douglas M. Miller, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am employed as Senior Trial Counsel for the Los Angeles Regional Office of the U.S. Securities and Exchange Commission ("Commission"), 444 S. Flower Street, Suite 900, Los Angeles, California 90071, Telephone: (323) 965-3837.

2. I am the trial attorney handling the litigation of this matter on behalf of the Division of Enforcement ("Division"). I have personal knowledge of the facts set forth in this Declaration, and, if called and sworn as a witness, could and would competently testify thereto.

3. Attached as Exhibit 1 is a true and correct copy of the Judgment as to Defendant Patrick S. Carter ("Carter") entered on November 21, 2018, in the Commission's civil action against Carter filed in the United States District Court for the Central District of California entitled *SEC v. Patrick S. Carter, et al.*, case number 8:16-cv-02070-JVS-DFM ("Civil Action").

4. Attached as Exhibit 2 is a true and correct copy of the Complaint filed in the Civil Action on November 17, 2016.

5. Attached as Exhibit 3 is a true and correct copy of the Consent of Defendant Patrick S. Carter to Entry of Judgment filed on November 20, 2018, filed in the Civil Action.

6. Attached as Exhibit 4 is a true and correct copy of the August 27, 2021 Civil Minutes regarding the Commission's renewed motion for monetary remedies in the Civil Action.

7. Attached as Exhibit 5 is a true and correct copy of the Plea Agreement issued in the criminal action brought by the United States Attorney's Office against Carter in the United States District Court for the Central District of California entitled *USA v. Patrick S. Carter*, case number 8:17-cr-00164-JLS.

8. Attached as Exhibit 6 is a true and correct copy of Carter's Opposition to SEC's Renewed Motion for Monetary Remedies filed on June 16, 2021, in the Civil Action.

9. Attached as Exhibit 7 is a true and correct copy of the Final Judgment as to Defendant Patrick S. Carter entered on September 20, 2021, in the Civil Action.

10. Carter has not served me with his answer to the OIP and the Division has no record of him filing one or a response to the Order to Show Cause issued on August 23, 2021.

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

Executed this 30th day of September 2021 in Los Angeles, California.

/s/ Douglas M. Miller
DOUGLAS M. MILLER

In the Matter of Patrick S. Carter
Administrative Proceeding File No. 3-19515
SERVICE LIST

Pursuant to Commission Rule of Practice 151 (17 C.F.R. §201.151), I certify that the attached:

DECLARATION OF DOUGLAS M. MILLER IN SUPPORT OF DIVISION OF ENFORCEMENT'S MOTION FOR ENTRY OF DEFAULT AND SANCTIONS

was served on September 30, 2021, upon the following parties as follows:

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 1090
Washington, DC 20549-1090

(By eFAP only)

Patrick S. Carter
[redacted]
Respondent

(By UPS and U.S. Mail)

Dated: September 30, 2021

/s/ Douglas M. Miller
DOUGLAS M. MILLER

OS Received 09/30/2021

EXHIBIT 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Southern Division

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

PATRICK S. CARTER, 808 RENEWABLE ENERGY CORPORATION, 808 INVESTMENTS, LLC, MARTIN J. KINCHLOE, PETER J. KIRKBRIDE, WEST COAST COMMODITIES, LLC, THOMAS A. FLOWERS, and T.A. FLOWERS LLC,

Defendants.

Case No. 8:16-CV-02070-JVS-DFM

JUDGMENT AS TO DEFENDANT PATRICK S. CARTER

The Securities and Exchange Commission having filed a Complaint and defendant Patrick S. Carter ("Carter" or "Defendant") having entered a general appearance and consented to the Court's jurisdiction over Defendant and the subject matter of this action, consented to entry of this Judgment without admitting or denying the allegations of the Complaint (except as to jurisdiction and except as otherwise provided herein in paragraph X), waived findings of fact and conclusions of law; and waived any right to appeal from this Judgment (except that Defendant has not waived his right to appeal the Court's determination of the amounts of disgorgement and prejudgment interest that Defendant shall be ordered to pay pursuant to paragraph VIII below):

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and

(b) other persons in active concert or participation with Defendant or with anyone described in (a).

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to employ any device, scheme, or artifice to defraud;

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 5 of the Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of any applicable exemption:

(a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in

interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;

(b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or

(c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the SEC as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act [15 U.S.C. § 77h].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

IV.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 15(a) of the Exchange Act [15 U.S.C. § 78o(a)] by, directly or indirectly, in the absence of any applicable exemption, making use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless registered in accordance

with Section 15(b) of the Exchange Act [15 U.S.C. § 78o(b)].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from soliciting, accepting, or depositing any monies from actual or prospective investors in connection with any offering of securities, provided, however, that such injunction shall not prevent Defendant from purchasing or selling securities listed on a national securities exchange for Defendant's own personal accounts.

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)] and Section 20(e) of the Securities Act [15 U.S.C. § 77t(e)], Defendant is prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

VII.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently barred from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock. A penny stock is any equity security that has a price of less than five dollars, except as provided in Rule 3a51-1 under the Exchange Act [17 C.F.R. 240.3a51-1].

VIII.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant shall pay disgorgement of ill-gotten gains plus prejudgment interest thereon. The Court shall determine the amount of disgorgement at a hearing upon motion of the SEC. Prejudgment interest shall be calculated from December 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 the SEC's motion for disgorgement, and at any hearing held on such a motion: (a) Defendant will be precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint; (b) Defendant may not challenge the validity of the Consent or this Judgment; (c) solely for the purposes of such motion, the allegations of the Complaint shall be accepted as and deemed true by the Court; and (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure. In connection with the SEC's motion for disgorgement, the parties may take discovery, including discovery from appropriate non-parties.

IX.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent of Defendant Patrick S. Carter to Entry of Judgment is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant shall comply with all of the undertakings and agreements set forth therein.

X.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the allegations in the complaint are true and admitted by Defendant, and further, any debt for disgorgement, prejudgment interest, civil penalty or other

amounts due by Defendant under this Judgment or any other judgment, order, consent order, decree, or settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

XI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Judgment.

XII.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Judgment forthwith and without further notice.

Dated: November 21, 2018

HON. JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. PATRICK S. CARTER, 808 RENEWABLE ENERGY CORPORATION, 808 INVESTMENTS, LLC, MARTIN J. KINCHLOE, PETER J. KIRKBRIDE, WEST COAST COMMODITIES, LLC, THOMAS A. FLOWERS, and T.A. FLOWERS LLC, Defendants.	Case No. **COMPLAINT**

Plaintiff Securities and Exchange Commission ("SEC") alleges:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to Sections 20(b), 20(d)(1), and 22(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77t(b), 77t(d)(1) & 77v(a), and Sections 21(d)(1), 21(d)(3)(A), 21(e), and 27(a) of the

Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78u(d)(1), 78u(d)(3)(A), 78u(e) & 78aa(a).

2. Defendants have, directly or indirectly, made use of the means or instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities exchange in connection with the transactions, acts, practices and courses of business alleged in this complaint.

3. Venue is proper in this district pursuant to Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a), and Section 27(a) of the Exchange Act, 15 U.S.C. § 78aa(a), because certain of the transactions, acts, practices and courses of conduct constituting violations of the federal securities laws occurred within this district. In addition, venue is proper in this district because defendants 808 Renewable Energy Corporation, 808 Investments, LLC, West Coast Commodities, LLC, and T.A. Flowers LLC each have their principal place of business in this district and because defendants Patrick S. Carter, Martin J. Kinchloe, Peter J. Kirkbride, and Thomas A. Flowers reside in this district.

SUMMARY

4. This matter involves the fraudulent and unregistered offer and sale of securities by Patrick Carter ("Carter") through a company he founded and managed, 808 Renewable Energy Corporation ("808 Renewable"). Peter Kirkbride ("Kirkbride"), 808 Renewable's chief operating officer, and two sales representatives for 808 Renewable, Martin Kinchloe ("Kinchloe") and Thomas Flowers ("Flowers"), also perpetrated the fraud and carried out the illegal securities offerings.

5. 808 Renewable owns cogeneration equipment that produces electricity and energy on-site at customers' facilities, and which is supposed to generate revenue from the sale of the electricity and energy produced by the company's cogeneration systems. From 2009 through 2014, the defendants engaged in a scheme where they offered and sold securities in 808 Renewable, raising over $30 million from over 500 investors nationwide in fraudulent and unregistered offerings.

6. When selling shares of 808 Renewable, the defendants represented to investors and prospective investors that the company was engaged in the renewable and efficient energy business. As part of their campaign to raise capital, the defendants circulated private placement memoranda, or "PPMs," and made oral statements representing that investor funds would be used to acquire new equipment, to expand 808 Renewable's business, and for other business-related expenditures. The defendants also represented that if any commissions were paid in connection with the sale of 808 Renewable securities, they would not exceed 10% and would be paid only to registered brokers. In addition, some of the defendants represented that 808 Renewable was generating positive cash flow that would be used to pay monthly or quarterly dividends to investors. Carter also told prospective investors that the company's shares had been pre-approved by the New York Stock Exchange ("NYSE") for listing on the American Stock Exchange ("AMEX").

7. Contrary to these representations, Carter misappropriated about half of the money raised from investors to support his lavish lifestyle and to pay substantial sales commissions of up to 25% to the sales agents who helped Carter perpetrate the fraud. Carter and Kirkbride personally authorized these misuses of company funds. Carter and Kirkbride also authorized the use of investor funds for other undisclosed and improper purposes, including the payment of Ponzi-like "dividends" to existing investors with funds invested by new investors. In addition, contrary to Carter's representations to investors, 808 Renewable had never been approved or pre-approved for listing on AMEX.

8. By lying to investors and perpetrating their fraudulent scheme, all of the defendants violated the antifraud provisions of Sections 17(a) of the Securities Act, and violated and/or aided and abetted violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. In addition, each of the defendants, except for Kirkbride, violated the securities registration provisions of Section 5 of the Securities Act. Carter, Kinchloe, Flowers, and the limited liability companies that they controlled

also violated the broker-dealer registration provisions of Section 15(a)(1) of the Exchange Act.

THE DEFENDANTS

9. **Patrick S. Carter**, age 45, resides in Newport Beach, California. Carter was registered as an investment adviser with the SEC from October 2006 through August 2007, and was associated with a FINRA-registered broker-dealer from September 2006 through July 2007. On December 3, 2009, the Texas State Securities Board issued a cease-and-desist order finding that Carter and other parties had made materially misleading and deceptive statements in connection with the offer and sale of securities while not registered as dealers or agents in that state. On January 20, 2010, the California Department of Corporations issued a desist-and-refrain order against Carter and others finding that Carter had failed to disclose the Texas order to prospective investors in California and that, from 2005 through 2009, Carter offered and sold securities in California by means of "communications which omitted to state material facts necessary to make the statements made [] not misleading."

10. **808 Renewable Energy Corporation** is a Nevada corporation with its principal place of business in Orange County, California. 808 Renewable was formed by Carter in May 2009, purportedly to acquire, develop, and manage renewable energy projects. The company's stock is quoted over-the-counter and is presently quoted at $0.002 with average daily trading volume of less than 4,000 shares. 808 Renewable is required to file periodic reports, including Forms 10-K and 10-Q, with the SEC, but it is delinquent and has not submitted any reports since it filed its Form 10-K for the fiscal year ended December 31, 2015 on April 22, 2016.

11. **808 Investments, LLC ("808 Investments")** is a California limited liability company solely owned and controlled by Carter. 808 Investments' corporate status has been suspended by the California Franchise Tax Board. 808 Investments is not and has never been registered with the SEC in any capacity.

12. **Peter J. Kirkbride**, age 53, resides in Laguna Niguel, California. From

2009 through 2010, Kirkbride was also engaged as a sales representative for 808 Renewable and, in that role, solicited investors and was paid commissions. Kirkbride was registered as an investment adviser with the SEC from January 2005 through April 2010, and was associated with a FINRA-registered broker-dealer from October 2004 through August 2009.

13. **Martin J. Kinchloe**, age 41, resides in Garden Grove, California. From 2009 through at least 2014 Kinchloe served as a sales representative for 808 Renewable and he was paid approximately $1.8 million in commissions for soliciting investors. Kinchloe is not and has never been associated with a broker or dealer registered with the SEC.

14. **West Coast Commodities, LLC ("WCC")**, is a California limited liability company solely owned and controlled by Kinchloe. Kinchloe used WCC to collect some of the commission payments he received in connection with the sale of 808 Renewable securities. WCC is not and has never been registered with the SEC in any capacity.

15. **Thomas A. Flowers,** age 49, resides in Mission Viejo, California. From 2009 through at least 2014 Flowers worked as a sales representative for 808 Renewable and he was paid approximately $1.3 million in commissions for soliciting investors. Flowers is not and has never been associated with a broker or dealer registered with the SEC.

16. **T.A. Flowers LLC ("TAF")**, is a limited liability company that is solely owned and controlled by Flowers. Flowers used TAF to collect some of the commission payments he received in connection with the sale of 808 Renewable securities. TAF is not and has never been registered with the SEC in any capacity.

THE ALLEGATIONS

A. 808 Renewable and Its Officers and Sales Agents

17. Since its formation in 2009, 808 Renewable has claimed to "manage[] combined heat and power… renewable energy projects" for public entities and

industrial firms with the "goal [] to help America focus on renewable and green energy solutions in order to reduce [] dependence on foreign oil." 808 Renewable owns and operates cogeneration equipment that is installed on customer sites to generate revenues from the sale of electricity generated by those systems. 808 Renewable has never been profitable and by 2015 the company had only four operational systems installed at customer sites. 808 Renewable became a public company on January 24, 2014.

18. By August 2010, 808 Renewable owned all membership interests of two subsidiaries purportedly formed to acquire combined heat and power plants: 808 Energy 2, LLC and 808 Energy 3, LLC. These subsidiaries were dissolved on April 23, 2012.

19. Carter and Kirkbride were the key officers and directors of 808 Renewable. Carter founded the company and has served as its president, secretary, treasurer, and director since the company's inception. Carter also served as the company's chief executive officer from 2009 through September 2010, and from November 2011 through the present. Kirkbride has been 808 Renewable's chief operating officer since 2010.

20. Kinchloe and Flowers were sales agents for 808 Renewable. From 2009 through at least 2014, Kinchloe was a sales representative for 808 Renewable and he was paid approximately $1.8 million in commissions for soliciting investors. Flowers was a sales representative from 2009 through at least 2014, and was paid approximately $1.3 million in commissions for soliciting investors. Kinchloe served as a director of 808 Renewable and a member of the audit committee for 808 Renewable's board from August 2012 through October 2012.

B. The Unregistered Fraudulent Offerings

21. From at least 2009 through 2014, the defendants raised over $30 million from over 500 investors nationwide by offering and selling five different types of securities in 808 Renewable.

22. As alleged in more detail below, the offer and sale of units in 808 Energy 3, LLC, which were converted to 808 Renewable common stock, and the offer and sale of 808 Renewable common and series B stock, constituted a single offering. These securities were offered and sold pursuant to one of three PPMs. At least one investor who purchased shares in 808 Renewable was given the PPM for 808 Energy 3, LLC in connection with her purchase of 808 Renewable stock.

23. When the offering pursuant to the PPMs was carried out, Carter had common control over both 808 Renewable and 808 Energy 3, LLC. While offering these securities, each issuer was engaged in the same type of business, raising investor capital that purportedly would be used to acquire and maintain cogeneration systems that would generate energy that the issuers would, in turn, sell to its customers. Both issuers shared office space, management, employees, and sales representatives.

24. The offering of securities of 808 Renewable and 808 Energy 3, LLC was also a part of a single plan of financing and purportedly for the same general purpose, namely to raise funds for 808 Renewable's operations. All of the sales raised cash as consideration. Because the 808 Energy 3, LLC units were converted to 808 Renewable stock by 2010, they all involved stock in one issuer, 808 Renewable. During September 2010, the offering of units overlapped with the offering of 808 Renewable common stock and, from January 2011 through February 2012, the offering of common stock overlapped with the offering of 808 Renewable series B shares.

1. Units in 808 Energy 3, LLC, Converted to 808 Renewable Stock

25. From 2009 through at least September 2010, the defendants distributed a PPM dated August 12, 2009 for units in 808 Energy 3, LLC ("August 2009 PPM"). Under the direction of Carter and 808 Renewable, Kirkbride, Kinchloe, Flowers, and other sales representatives distributed the August 2009 PPM to prospective investors.

26. The defendants raised approximately $7.5 million from about 200

investors in connection with the offering of 808 Energy 3, LLC units.

27. By September 2010, all units in 808 Energy 3, LLC were exchanged for common stock in 808 Renewable. In 2012, 808 Energy 3, LLC, which was by then a wholly-owned subsidiary of 808 Renewable, dissolved.

2. Common Stock in 808 Renewable

28. From at least 2010 through at least October 2012, the defendants distributed a PPM dated October 11, 2010 for common stock in 808 Renewable ("October 2010 PPM"). Under the direction of Carter and 808 Renewable, Kinchloe, Flowers, and other sales representatives distributed the October 2010 PPM to prospective investors.

29. The defendants raised approximately $4.5 million from about 150 investors in connection with the offering of 808 Renewable common stock.

3. Series B Stock in 808 Renewable

30. From at least January 2011 through approximately February 2012, the defendants distributed a PPM dated January 28, 2011 for series B preferred stock in 808 Renewable ("January 2011 PPM"). Under the direction of Carter and 808 Renewable, Kinchloe, Flowers, and other sales representatives distributed the January 2011 PPM to prospective investors.

31. The defendants raised approximately $3.5 million from over 60 investors in connection with the offering of 808 Renewable series B stock.

4. Carter's Founder Shares (Common Stock in 808 Renewable)

32. From about October 2011 through approximately July 2014, Carter offered and sold his "founder shares" in 808 Renewable, representing that he was selling only a "limited" amount of his shares at a discount to avoid taking a salary.

33. During prerecorded shareholder conference calls, for which links were emailed to investors, Carter encouraged existing investors to invest in his founder shares and to refer the offering to their friends and family. Kinchloe, Flowers, and other sales representatives also pitched the founder shares to investors and

prospective investors whom they initially contacted in connection with the offering made pursuant to the PPMs.

34. Carter pitched the offer and sale of founder shares as beneficial to the company and investors. He claimed that he would continue providing services as CEO while waiving his salary, and that investors who purchased his discounted founder shares at $0.75 (a purported discount from the $1.00 per share company shares) would allegedly have greater profit margins when the company became publicly listed.

35. Carter sold the majority of his founder shares, raising approximately $14 million.

36. Carter engaged Kinchloe, Flowers, and other sales representatives to offer and sell his founder shares, and he paid them commissions of up to 25% for these sales. From 2011 through at least 2012, the sales representatives were simultaneously offering and selling Carter's founder shares and shares in 808 Renewable pursuant to one of the PPMs.

37. Carter used unregistered brokers to solicit investors and sell his founder shares. In at least two instances, he failed to limit the shares he sold in any three month period to no more than 1% of the common shares outstanding for 808 Renewable.

38. Carter did not file a Form 144 in connection with his sale of founder shares.

39. Carter sold founder shares to over 100 investors nationwide and generally solicited some of the sales. Many of the individuals were unsophisticated investors and some were also unaccredited. Existing investors were urged to solicit family members to purchase founder shares, without regard to the sophistication of those referred.

5. Series D Stock in 808 Renewable

40. In or about October 2014, 808 Renewable offered and sold series D

preferred stock.

41. This offering was announced in an October 17, 2014 press release issued by 808 Renewable. At the direction of Carter and 808 Renewable, Kinchloe and Flowers circulated emails to investors promoting the offering.

42. 808 Renewable raised approximately $5.5 million from at least two investors in connection with the offering of 808 Renewable series D stock.

C. The Defendants' Solicitation Efforts

43. To sell the 808 Renewable securities, Carter and 808 Renewable hired sales representatives to solicit investors and paid them a percentage of each of their sales as commission.

44. Investors were generally solicited through cold calls, mass emails, or a televised advertisement.

45. The offerings of 808 Renewable securities other than the series D preferred stock were made to investors in multiple states. Nationwide, over 500 investors purchased 808 Renewable securities.

46. Over $15 million in 808 Renewable securities was offered and sold in these offerings.

47. None of the defendants made any meaningful effort to determine whether the investors were or accredited or sophisticated. Some investors were unaccredited. Indeed, some of the investors had no experience trading in securities prior to their investment in 808 Renewable.

48. The investors were not provided with any audited financial statements. The defendants did not provide the kind of information that an adequate registration statement would reveal.

49. Carter and his sales representatives told prospective investors that 808 Renewable was engaged in the renewable energy industry, and the PPMs that the defendants distributed to prospective investors similarly represented that the company was formed "for the purpose of acquiring, developing, owning and managing

renewable and efficient energy projects throughout the United States."

50. Carter reviewed and approved the content of all of the PPMs distributed to investors for the offer and sale of the units in 808 Energy 3, LLC, and of the common and series B stock of 808 Renewable (namely, the August 2009 PPM, the October 2010 PPM, and the January 2011 PPM).

51. Carter also participated in and spoke during the prerecorded conference calls in November 2013 and other telephone calls with investors when his founder shares were offered.

52. Carter also drafted the language of the October 17, 2014 press release and emails announcing and promoting the offer and sale of 808 Renewable's series D stock.

53. As part of their investor solicitation efforts, the defendants engaged in several forms of general solicitations.

54. At the direction of Carter and 808 Renewable, sales representatives, including Kinchloe and Flowers, made cold calls to potential investors nationwide using lead lists. The sales representatives, including Kinchloe and Flowers, used high pressure sales tactics and misleading sales scripts to promote investments in 808 Renewable.

55. In 2010, 808 Renewable advertised its "investment opportunity" on the television show *Today in America*. Carter and Kirkbride both appeared in this advertisement and, as part of their 2010 and 2011 sales efforts, Flowers, Kinchloe and other sales representatives mass emailed a link to this televised advertisement to prospective investors.

56. On October 15, 2012, 808 Renewable filed a registration statement with the SEC and, at Carter's direction, sales representatives circulated this registration statement to attract investors to purchase shares.

57. Carter, Kinchloe, and Flowers personally met with some investors to persuade them to purchase 808 Renewable securities.

58. The defendants provided subscription agreements to investors who agreed to purchase shares of 808 Renewable. The subscription agreements included a clause under which the investors self-certified that they were accredited. Even though the offerings were supposed to be limited to accredited investors, the defendants took no steps to verify that investors were accredited and that the self-certifications were accurate.

59. In fact, some investors were not accredited or had no prior experience investing in stock. Further, some of these investors made clear to the 808 Renewable sales representatives who solicited them that they had had little to no experience investing in securities.

60. Some investors used their retirement funds to invest in 808 Renewable. Kinchloe provided instructions to some investors regarding rolling over their retirement funds to self-directed IRAs so that investors could use their retirement money to invest in 808 Renewable.

61. Once an investor made an initial purchase, Carter, Kinchloe, Flowers, and other sales representatives urged the investor to invest more funds before the allegedly imminent initial public offering. 808 Renewable's sales representatives referred to this practice of persuading investors to increase their investment as "reloading."

62. Flowers and Kinchloe offered to pay some investors referral fees and commissions to convince them to reload and to refer their friends and family.

D. The Defendants' Misrepresentations and Omissions of Material Fact

63. In connection with the offerings of 808 Renewable securities, the defendants misrepresented information, made misleading statements, and omitted material facts. These misrepresentations and omissions related to, among other things, (i) the payment of commissions to 808 Renewable's sales agents, (ii) how investor funds would be used, (iii) investors purportedly earning cash flow and receiving monthly or quarterly dividend payments, and (iv) representations that 808

Renewable had been preapproved by the NYSE for listing on AMEX.

1. Misrepresentations Regarding the Payment of Commissions

64. 808 Renewable, Carter, and Kinchloe, as well as their companies (808 Investments and WCC), made materially false statements regarding the payment of commissions to sales representatives.

65. Each of the defendants circulated PPMs to investors and prospective investors in connection with the offer or sale of 808 Renewable securities (specifically, the 808 Energy 3, LLC units, and the 808 Renewable common stock and series B preferred stock). All of these PPMs falsely represented that only "up to 10%" of the proceeds of the offerings could be paid in commissions to "broker-dealers."

66. The August 2009 PPM for the sale of units in 808 Energy 3, LLC represented that, if commissions were paid, FINRA registered brokers would be engaged. Specifically, the August 2009 PPM stated "We have not entered into any agreements or commitments to pay any commission. However, we may pay up to 10% of the proceeds of the offering to broker dealers registered with the Financial Industry Regulatory Authority ('FINRA')."

67. Also in connection with the offering of 808 Energy 3, LLC units, Carter, as president of the company, executed and filed a Notice of Exempt Offering of Securities ("Form D") with the SEC on February 2, 2010, where he represented that "No Agreements with FINRA registered Broker dealers have been signed, but the Company may pay commissions up to [$1 million of the $10 million total offering amount] if such broker dealers are engaged."

68. The October 2010 and January 2011 PPMs for the offer and sale of 808 Renewable's common and series B stock also misleadingly implied that commissions would not be paid. The October 2010 PPM for the sale of common stock stated "We are acting as our own agent with respect to the Shares being offered pursuant to this Memorandum. To the extent shares are sold directly by us, no commissions will be

paid, and the proceeds allocated for commissions will be used by us as additional working capital. We reserve the right to enter into agreements with one or more broker-dealers to sell the shares, with such broker-dealers receiving commissions of up to 10% of the price of the Shares in the form of cash or Shares in connection with this offering."

69. The January 2011 PPM for the sale of series B shares contained identical representations regarding commissions as the defendants made in the October 2010 PPM.

70. In a Form D that 808 Renewable filed with the SEC on July 26, 2011 in connection with the series B share offering, 808 Renewable represented that the amounts of sales commissions and finders fees expenses in connection with the sale of 808 Renewable's series B shares were "$0."

71. On July 7, 2012, Carter, in his capacity as president of 808 Renewable, executed and filed a Form D with the SEC in connection with 808 Renewable's common stock offering. In this July 7, 2012 Form D, Carter and 808 Renewable represented that the amounts of sales commissions and finders' fees expenses in connection with the offering of 808 Renewable common stock were "$0."

72. In the conference calls and telephone calls in which Carter's founder shares were offered, and in the October 17, 2014 press release and emails announcing and promoting the offer and sale of 808 Renewable's series D stock, it was never disclosed that up to 25% of the investments would be paid in commissions, including to non-FINRA registered brokers, as well as commissions to Carter.

73. Kinchloe falsely told at least one investor that he was only receiving commissions in shares of the company, rather than in cash, because Kinchloe allegedly was waiting for the company to become publicly listed in order to get a large payout from his shares.

74. The defendants' representations regarding commissions were false because 808 Renewable always paid commissions either to 808 Investments, which

then paid the sales representatives, or directly to the sales agents. Also, those commissions exceeded 10% and generally were as high as 25%, the commissions were not paid only to FINRA registered brokers, and the commissions were paid to people affiliated with 808 Renewable including Carter, Kinchloe, and Flowers.

75. Carter used his company, 808 Investments, to collect commissions from 808 Renewable at rates of up to 25% of the investor capital that was raised. Carter sometimes referred to these commissions as "consulting fees." Carter sometimes used these fees to pay commissions to the sales representatives according to the rates to which the sales representatives had agreed with Carter.

76. For example, when Flowers first joined 808 Renewable, he was paid 15% of the funds raised from investors he successfully solicited. Carter's company, 808 Investments, collected a commission of 25% of the investments Flowers solicited, and Carter passed on 15% to Flowers, and kept 10% for himself.

77. Kinchloe generally earned a 25% commission on amounts that he raised. When Kinchloe and Flowers worked together to solicit an investment, they would split a 25% commission on funds they raised as a team.

78. After each sale, Kinchloe, Flowers, and other sales representatives filled out forms seeking payment of commissions for their sales. These forms showed that sales representatives collected commissions as high as 25% for each sale.

79. 808 Renewable's bookkeeper prepared reports that showed that 808 Renewable would pay 808 Investments, which was Carter's LLC, purported consulting fees in an amount as high as 25% of funds raised from investors. Carter and Kirkbride reviewed and approved these reports, and authorized the payments to 808 Investments.

80. In connection with a July 31, 2013 audit confirmation letter, Carter signed the letter acknowledging that, from January 2012 through September 2012, 808 Investments had been paid 25% of the proceeds from the sales of 808 Renewable stock as purported "finders' fees."

81. Investors were never told, and did not know, that sales representatives received commissions as high as a quarter of the capital they were investing in 808 Renewable.

82. Investors were never told, and did not know, that Carter himself was collecting commissions or consulting fees for raising capital for 808 Renewable.

83. Investors were never told, and did not know, that 808 Renewable paid commissions to brokers who were not registered with FINRA.

84. Carter's, 808 Renewable's, 808 Investments', Kinchloe's, and WCC's misrepresentations and omissions regarding commissions were material because reasonable investors would have considered it important to know that up to 25% of their investment would be paid in commissions, including to non-FINRA registered brokers, as well as commissions to Carter, the CEO and president of the company, in deciding whether to invest in 808 Renewable.

2. Misrepresentations and Omissions Regarding the Use of Offering Proceeds

85. 808 Renewable, Carter, and his company, 808 Investments, made materially false statements regarding the use of offering proceeds.

86. Carter, 808 Renewable, and 808 Investments misrepresented that investor funds would be used for legitimate business purposes. Instead, Carter, with the help of Kirkbride, used substantial amounts of investor funds for improper and undisclosed purposes, including to support his lavish lifestyle.

87. Carter and his sales representatives represented orally to investors that their capital would be used to acquire new cogeneration equipment, maintain current assets, and to expand 808 Renewable's business. The PPMs that the defendants distributed to investors and prospective investors similarly stated that 808 Renewable would use investor funds for business-related expenditures, including the acquisition and development of energy generation facilities and working capital.

88. The August 2009 PPM for units in Energy 3, LLC specifically stated

"We intend to use the proceeds from this offering for investing in, acquiring or developing, and operating, energy generation facilities and projects; procurement of equipment and technology; hiring additional personnel; and general corporate purposes. . . . Pending any of these uses, we plan to invest the proceeds of this offering in bank certificates of deposit or short-term, investment-grade, interest bearing securities." The August 2009 PPM further specified that 30.75% of the proceeds would be used to acquire cogeneration assets, 16% would be used for maintenance and operating reserves, 45% would be paid to 808 Renewable in connection with the purchase of cogeneration assets and plants, 8.75% would be used for working capital, and 0.5% would be used for offering expenses.

89. Both the October 2010 and January 2011 PPMs provided that 70% of the offering proceeds would be used for "Investments in and Acquisitions and Development of Energy Generation Facilities and Projects) and 19.8% would be used for working capital.

90. In the conference calls and telephone calls in which Carter's founder shares were offered, and in the October 17, 2014 press release and emails announcing and promoting the offer and sale of 808 Renewable's series D stock, it was never disclosed that investor funds were being used for improper and undisclosed purposes.

91. Contrary to the representations to investors, only about half of the capital raised from investors was used for legitimate business expenses. From 2009 through early 2015, 808 Renewable generated approximately $5 million from business operations and raised approximately $21 million from investors who purchased shares directly from the company (as opposed to those who purchased Carter's founder shares). Approximately half of these funds went directly to Carter or 808 Investments: approximately $10 million (or about 38% of the $26 million) was transferred from 808 Renewable to Carter and 808 Investments, approximately $2.7 million (or about 10%) of investor funds was deposited directly with 808 Investments, and approximately $12.7 million (or about 48%) was spent on business

expenses.

92. Carter used the funds he misappropriated from 808 Renewable to support his lifestyle and to pay commissions to the sales representatives who helped him defraud investors.

93. For example, in 2009, 808 Investments paid over $220,000 for boats and cars for Carter, $246,000 to pay Carter's personal credit card bills, and over $40,000 to cover additional personal expenses of Carter's, including trips, jewelry, art, and gambling. Carter's 2009 personal expenses were largely paid by funds traced to 808 Renewable investors.

94. In 2014, 808 Renewable remained unprofitable and its independent auditor issued a "going concern" qualification when it completed the company's most recent audit. Despite this, Carter continued to misappropriate funds from the company, using over $3 million of 808 Renewable's funds for his benefit: $2.2 million was used to redeem Carter's series A shares, approximately $600,000 was used to repay a purported loan made by Carter to 808 Renewable Energy, and $360,000 was used to pay Carter's 2014 salary.

95. In early 2015, when company funds were largely depleted and no additional investor funds were being raised, 808 Renewable paid Carter a bonus of $360,000 and a salary of $125,000. In 2015, Kirkbride also was paid a bonus of $150,000 in addition to his $139,000 salary. Carter and Kirkbride approved each other's 2015 bonuses.

96. Carter and Kirkbride both reviewed bookkeeping reports that were generated during this period reflecting the improper use of 808 Renewable funds, and both approved these improper uses.

97. Carter's, 808 Renewable's, and 808 Investments' misrepresentations and omissions regarding the use of investor funds were material because reasonable investors would have considered it important to know that substantial portions of their investments were being funneled to Carter or an entity that he controlled in

deciding whether to invest in 808 Renewable.

3. Misrepresentations and Omissions Regarding 808 Renewable Generating Cash Flow to Pay Dividends

98. 808 Renewable, Carter, and his company, 808 Investments, made materially false statements regarding 808 Renewable purportedly generating cash flow to pay dividends or distribution to investors.

99. In order to induce investors to buy 808 Renewable securities, Carter, 808 Renewable, and 808 Investments misrepresented that 808 Renewable was generating a cash flow that enabled it to pay a 12% annual return in the form of dividends or distributions until the company went public.

100. In the February 2010 *Today in America* broadcast, Carter stated "we are currently looking for the right investors that [sic] are interested in hard assets that produce cash flow." In this same broadcast, investors were told that each investor "buys a part of the company as such they own shares and receive dividends…."

101. In a September 7, 2010 email, Carter wrote to an investor "You will get the 10 percent within 60 days…Also the cash flow will be over 20 percent annually. This is your chance….We should be public in 90 days."

102. Sales representatives working under Carter's direction also told prospective investors that they would receive monthly dividends if they invested in 808 Renewable. For example, a solicitation script that Kirkbride reviewed and revised for a sales representative in 2011 stated "we have an offering that helps to mitigates [sic] risk, provides steady monthly cash flow…this is a 'Turn Key' operation that allows your money to be invested in energy producing hard assets, providing you stable Income of 12% annually paid monthly, Short & Long-term Growth and the Stability of a utility."

103. In the October 17, 2014 press release and emails announcing and promoting the offer and sale of 808 Renewable's series D stock, Carter represented that the series D stock offered "an annual return of twelve percent (12%) that is paid

quarterly."

104. At the direction of Carter, sales representatives circulated marketing material to prospective investors that stated one of the benefits of investing in 808 Renewable was the "monthly cash flow."

105. Investors did not know that 808 Renewable was cash-strapped and that Carter was depleting the company's funds.

106. Because 808 Renewable was facing financial challenges, new investor capital was used to pay dividends and distributions to existing investors. The use of new investor capital to pay dividends and distributions to existing investors was never disclosed to investors.

107. From 2011 through 2012, at least $250,000 of new investor funds was used to pay purported dividends or distributions to existing investors.

108. Carter and Kirkbride authorized the use of new investor funds to make the Ponzi-like dividend payments to existing investors.

109. By late 2011 and early 2012, the Ponzi-like dividend structure began to collapse when the company was unable to pay outstanding vendor invoices for the legitimate part of its business, and new investor funds were insufficient to continue to support the Ponzi-like payments.

110. Rather than disclose its poor financial condition to investors, on June 15, 2012, Carter informed investors about a "brand new dividend reinvestment program" that would provide dividends in the form of additional stock instead of cash. Carter further explained that this program would allow the company to "use the cash not distributed to grow business" and would be a "benefit to you the investor" because "you get additional stock at a reduced amount." This representation, which was false because the company did not have cash to distribute or to grow the business, was used to lull investors.

111. Carter's, 808 Renewable's, and 808 Investments' misrepresentations and omissions regarding 808 Renewable's purported cash flow and dividend payments,

which Kirkbride aided and abetted, were material because reasonable investors would have considered it important to know that the company was not generating sufficient cash flow to pay dividends to investors, but rather the defendants were using new investor capital to pay dividends to existing investors.

4. Misrepresentations Regarding 808 Renewable's Pre-Approval by the NYSE for Listing On AMEX

112. 808 Renewable, Carter, and his company, 808 Investments, made materially false statements regarding 808 Renewable's purported pre-approval by the NYSE for listing on AMEX.

113. Throughout 2009 to 2012, Carter told prospective investors that 808 Renewable was well-positioned to be listed on NASDAQ or on the NYSE.

114. On November 13, 2013, Kinchloe and Flowers emailed investors regarding a "Pre-Approval" by the "NYSE (AMEX)." The email linked to a prerecorded conference call during which Carter announced that the company had been "given preliminary approval" by representatives from the NYSE for listing on AMEX. In this recording, Carter also encouraged investors to refer the "investment opportunity" to friends and family and to purchase his founders shares before the company's IPO.

115. In the recorded conference call that was linked in emails that Kinchloe and Flowers disseminated to investors, Carter also represented that "the minimum to list on the AMEX is $4 per share."

116. Contrary to Carter's representations to investors, 808 Renewable was never approved or preliminarily approved for listing on AMEX.

117. Carter made over $3 million from the sale of founder shares from November 14, 2013 (after his false announcement regarding AMEX pre-approval) through April 2014 (before it was disclosed to investors that 808 Renewable would be an OTCQX-listed company (*i.e.*, that its securities would trade over-the-counter and not on AMEX)).

118. Carter's misrepresentations and omissions regarding the purported AMEX pre-approval were material because a reasonable investor would have considered it important to know that 808 Renewable was never pre-approved by the NYSE for listing on the AMEX in making an investment decision, particularly in light of Carter's representation that an AMEX listing required a minimum stock price of $4 per share.

119. 808 Renewable's stock is currently quoted over-the-counter at $0.002 per share, with its total trading volume averaging less than $8 per day.

E. Kirkbride, Kinchloe, Flowers, and Their Companies Aided and Abetted The Misrepresentations and Omissions

120. Kirkbride, Flowers, Kinchloe, and their companies (Flower's TAF and Kinchloe's WCC) substantially assisted the making of the materially false statements and omissions by Carter, 808 Renewable, and 808 Investments regarding the payment of commissions to sales representatives.

121. Kirkbride reviewed the PPMs that contained these false statements, and distributed those PPMs to prospective investors. Kirkbride also approved the cash flow reports that provided detailed information regarding the commission payments, and he, along with Carter, authorized those large commission payments to Carter's company, 808 Investments.

122. Kinchloe and Flowers, and their companies, also distributed the PPMs to prospective investors and received commissions of as high as 25% on amounts raised from investors.

123. Kirkbride also provided substantial assistance to the making of the materially false statements regarding the use of offering proceeds and the alleged generation of cash flow to pay dividends to investors.

124. Kirkbride authorized the transfer of funds from 808 Renewable to 808 Investments to pay purported consulting fees. The cash flow reports that Kirkbride authorized also detailed the payment of the Ponzi-like payments to investors and

provided detailed information about the transfers of funds to 808 Investments. Kirkbride also revised a sales pitch used by a sales representative to solicit investors that stated that 808 Renewable offered the opportunity to receive a "stable income of 12% paid monthly."

F. The Defendants Obtained Money By Means of the Fraud

125. Each of the defendants received money by means of the materially untrue statements and omissions alleged above in the offer or sale of the 808 Renewable securities.

126. 808 Renewable received money from investors through the sales of its securities.

127. Carter and 808 Investments obtained money through the receipt of commissions and the payments of salary and bonuses to Carter, payment for Carter's purported loans and consulting fees, and other substantial sums transferred from 808 Renewable to Carter. Carter also obtained money from his sale of founder shares.

128. Kirkbride obtained money in the form of salary and bonuses that 808 Renewable paid him from the funds raised from investors.

129. Kinchloe, WCC, Flowers, and TAF obtained money in the form of the substantial commissions paid to them from the funds raised from investors.

G. The Defendants Engaged in a Fraudulent Scheme

130. Each of the defendants engaged in a fraudulent scheme to convince investors to continue to invest in 808 Renewable securities so that each of them could profit financially.

131. In conference calls and marketing materials to investors and prospective investors, Carter encouraged investors to "take advantage of the opportunity" to receive cash flow while they waited for a "significant increase" in their investments. While encouraging investors to invest, Carter caused substantial funds to be diverted to him and to 808 Investments for Carter's personal use and to make commission payments to Carter and to the sales representatives.

132. Carter and Kirkbride caused 808 Renewable to make the Ponzi-like dividend payments to investors. From 2011 through 2012, at least $250,000 of new investor funds was used to pay purported dividends or distributions to existing investors.

133. When 808 Renewable was no longer raising sufficient investor funds to allow it to continue making the Ponzi-like dividend payments, Carter further extended the scheme by telling investors that their dividends would be reinvested into the company to grow the business.

134. Carter also began offering his founder shares at a purported discount, representing that only a limited amount of founder shares would be available for a brief time. While selling his founder shares, Carter made nearly $14 million through the sales of his founder shares while 808 Renewable was losing money.

135. The cash flow reports that Carter and Kirkbride reviewed and approved identified the Ponzi-like payments, and Kirkbride also reviewed bookkeeping reports that showed that 808 Renewable's revenues were insufficient to support its operations. Kirkbride also reviewed and revised at least one sales script used to solicit investors, which represented that an investment in 808 Renewable would "provide a steady monthly cash flow."

136. Kinchloe, Flowers, and their LLCs furthered the scheme by distributing PPMs to investors that provided false information about the amounts of commissions being paid, even while they were receiving commission rates higher than represented in the PPMs.

H. The Defendants' Roles in the Fraud

1. Carter, 808 Renewable and Carter's Company (808 Investments)

137. From 2009 through 2014, Carter, 808 Renewable, and 808 Investments raised over $30 million from investors as part of their fraudulent offerings. Because 808 Renewable and 808 Investments are entities controlled by Carter, and the latter is his alter-ego, Carter's actions and mental state are imputed to both 808 Renewable

and 808 Investments.

138. Carter was responsible for the misrepresentations in the PPMs regarding the payment of commissions and the use of investor proceeds because Carter personally reviewed and approved the PPMs, provided the very first draft PPM to counsel as the template for the offering document, and had ultimate authority over the substance of the offering material circulated to investors and prospective investors.

139. Carter also orally made misleading statements to investors that investor funds would be used for 808 Renewable's business purposes.

140. Carter served as a signatory to bank accounts into which investor money was deposited. Carter directed 808 Renewable to transfer funds to 808 Investments to pay Carter and his sales representatives commissions as high as 25% of the funds raised. Carter also directed that investor funds be used to repay Carter for loans he purportedly made to the company and to make the Ponzi-like dividend payments to investors.

141. Carter sold his founder shares without disclosing that investor funds that had been raised pursuant to one of the PPMs had largely been depleted by him or used for other improper purposes.

142. Carter knew or was reckless in not knowing that, contrary to the representations he and his sales representatives made to investors, Carter was personally misappropriating substantial amounts of investor funds for his personal use, to pay undisclosed commissions, and for other improper and undisclosed purposes.

143. Carter knew, or was reckless or negligent in not knowing, that the dividend payments made to existing investors were being paid from new investor funds.

144. Carter knew or was reckless or negligent in not knowing that 808 Renewable had not been pre-approved for listing on AMEX. Carter sold a significant amount of his founder shares after making this false announcement.

145. At all relevant times, Carter, 808 Renewable, and 808 Investments knowingly or recklessly, or by acting negligently, perpetrated their fraudulent scheme, and knew or acted recklessly or negligently in not knowing that their misrepresentations and omissions were false and misleading when made.

2. Kirkbride

146. Kirkbride engaged in a scheme to continue to convince individuals to invest in 808 Renewable's failing business so that that he could financially profit. For his role in the scheme, from 2010 through 2015, Kirkbride earned a total salary of approximately $670,000 and an additional $190,000 in bonuses. Further, on August 2014, Carter paid Kirkbride an additional $125,000.

147. In furtherance of the fraudulent scheme, Kirkbride reviewed and approved financial reports that specified that investor funds would be used to make Ponzi-like dividend payments to existing investors, to pay interest on purported loans Carter had obtained for 808 Renewable, to repay Carter for loans purportedly made to the company, to pay a 25% commission to 808 Investments for capital raised from investors, and for other undisclosed and improper purposes.

148. Kirkbride served as a signatory to the bank accounts into which investor money was deposited. Kirkbride authorized the use of investor funds for undisclosed and improper purposes, including to pay money to 808 Investments that was used to pay commissions to Carter and to the sales representatives, and to pay dividends to existing investors with new investors' funds. Kirkbride also authorized the transfer of company funds to Carter and to 808 Investments.

149. Kirkbride revised at least one PPM, and reviewed and distributed PPMs to potential investors, knowing that the PPMs contained representations about the commissions paid and use of proceeds that were inconsistent with the financial reports he reviewed and approved.

150. Kirkbride provided marketing materials for sales representatives to use with prospective investors, reviewed and revised at least one sales script, and

provided guidance to sales representatives regarding how to respond when investors asked about the returns on their investments.

151. Kirkbride provided substantial assistance to Carter, 808 Renewable, and 808 Investments in connection with misrepresentations they made.

152. At all relevant times, Kirkbride knowingly, recklessly, or negligently perpetrated the fraudulent scheme, and knew or acted recklessly or negligently in not knowing that his misrepresentations and omissions were false and misleading when made to investors.

3. Kinchloe, Flowers, and Their Companies (WCC and TAF)

153. In furtherance of the scheme to continue to convince individuals to invest in 808 Renewable's failing business, Kinchloe, Flowers, WCC, and TAF generally solicited and encouraged investors to invest in 808 Renewable. Kinchloe, Flowers, and their entities solicited investors and distributed offering materials, including the PPMs.

154. Kinchloe, Flowers, WCC, and TAF distributed PPMs that falsely stated that sales commissions would be limited to 10% and only paid to registered brokers, while they knew or were reckless in not knowing that they were generating commissions as high as 25% and were receiving these commissions despite not being registered brokers.

155. Kinchloe, Flowers, WCC, and TAF offered commissions or referral fees to some investors in order to convince them to reload or to refer their friends and family.

156. Kinchloe also knowingly misrepresented to at least one investor that he was paid commissions in only shares of 808 Renewable stock, and not in cash.

157. From 2009 through 2014, Kinchloe and WCC earned approximately $1.8 million in commissions.

158. From 2009 through 2014, Flowers and TAF earned approximately $1.3 million in commissions.

159. At all relevant times, Kinchloe, WCC, Flowers, and TAF knew, or acted recklessly or negligently, in perpetrating the fraudulent scheme, and knew or acted recklessly or negligently in not knowing that their misrepresentations and omissions were false and misleading when made.

I. Registration Violations

160. The offer and sale of 808 Renewable common stock, and the offer and sale of the units in 808 Energy 3, LLC that were converted to that stock, have never been registered with the SEC.

161. The offer and sale of 808 Renewable series B and series D stock have never been registered with the SEC.

162. The offer and sale of Carter's founder shares of 808 Renewable has never been registered with the SEC.

163. 808 Investments, WCC, and TAF have never been registered with the SEC as brokers or dealers.

164. During the period of the offer and sale of 808 Renewable securities, Carter was not associated with a registered broker or dealer and was not registered as a broker-dealer with the SEC.

165. Kinchloe and Flowers have never been associated with registered brokers or dealers, and have never registered as brokers or dealers.

166. Carter, 808 Investments, Kinchloe, WCC, Flowers, and TAF each effected or induced the sale of securities while not registered with the SEC as a broker or dealer or affiliated with a broker-dealer registered with the SEC.

167. Carter oversaw the sales efforts of Kinchloe, Flowers, and other sales representatives. Through his company, 808 Investments, Carter collected transaction-based compensation based on a percentage of the investor funds raised through the sales efforts. Carter also used 808 Investments to pay commissions to himself and to his sales representatives.

168. Kinchloe and Flowers were actively engaged in promoting and selling

808 Renewable securities to investors by calling and emailing potential investors. Kinchloe and Flowers advised investors to purchase the 808 Renewable securities.

169. Kinchloe and Flowers were paid transaction-based compensation in the form of commissions for selling 808 Renewable securities.

FIRST CLAIM FOR RELIEF

Fraud in the Connection with the Purchase and Sale of Securities

Violations of Section 10(b) of the Exchange Act

and Rules 10b-5(a) and 10b-5(c) Thereunder

(Against All Defendants)

170. The SEC realleges and incorporates by reference paragraphs 1 through 169 above.

171. As alleged above in paragraphs 130 through 159, among other allegations, each of the defendants participated in activities with the principal purpose and effect of creating a false appearance regarding 808 Renewable's financial condition, including the making of Ponzi-like payments to investors, in order to, among other things, convince investors to continue to invest in 808 Renewable so that the defendants could misappropriate investor funds.

172. By engaging in the conduct described above, each of the defendants, directly or indirectly, in connection with the purchase or sale of a security, by the use of means or instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities exchange, with scienter: (a) employed devices, schemes, or artifices to defraud; and (b) engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons.

173. By engaging in the conduct described above, each of the defendants violated, and unless enjoined will continue to violate, Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rules 10b-5(a) and 10b-5(c) thereunder, 17 C.F.R. §§ 240.10b-5(a) & 240.10b-5(c).

SECOND CLAIM FOR RELIEF

Fraud in Connection with the Purchase or Sale of Securities

Violations of and Aiding and Abetting Violations of

Section 10(b) of the Exchange Act and Rule 10b-5(b)

(Against All Defendants)

174. The SEC realleges and incorporates by reference paragraphs 1 through 169 above.

175. As alleged above in paragraphs 63 through 84 and 137 through 159, among other allegations, Defendants Carter, 808 Renewable, 808 Investments, Kinchloe, and WCC made material misrepresentations and omissions to investors and prospective investors regarding, among other things, the payment of commissions to the sales representatives who offered and sold 808 Renewable's securities.

176. As alleged above in paragraphs 85 through 119 and 137 through 145, among other allegations, Defendants Carter, 808 Renewable, and 808 Investments also made material misrepresentations and omissions to investors and prospective investors regarding the use of the proceeds from 808 Renewable's securities offerings, the existence of cash flow from 808 Renewable's business activities sufficient to enable it to pay dividends to investors, and the purported pre-approval of 808 Renewable for listing on the AMEX stock exchange.

177. By engaging in the conduct described above, Defendants Carter, 808 Renewable, 808 Investments, Kinchloe, and WCC, and each of them, directly or indirectly, in connection with the purchase or sale of a security, and by the use of means or instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities exchange, with scienter, made untrue statements of a material fact or omitted to state a fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

178. By engaging in the conduct described above, Defendants Carter, 808 Renewable, 808 Investments, Kinchloe, and WCC violated, and unless enjoined will

continue to violate, Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5(b) thereunder, 17 C.F.R. § 240.10b-5(b).

179. In the alternative, as alleged above in paragraphs 120 through 122 and 153 through 159, among other allegations, Defendants Kinchloe and WCC knowingly provided substantial assistance to Carter, 808 Renewable, and 808 Investments in their violations of Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder in connection with 808 Renewable's securities offerings.

180. By engaging in the conduct described above, Defendants Kinchloe and WCC aided and abetted, and unless enjoined will continue to aid and abet violations of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5(b) thereunder, 17 C.F.R. § 240.10b-5(b).

181. As alleged above in paragraphs 120 through 124 and 146 through 159, among other allegations, Defendants Kirkbride, Flowers, and TAF knowingly provided substantial assistance to 808 Renewable in its violation of Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder in connection with 808 Renewable's securities offerings.

182. By engaging in the conduct described above, and pursuant to Section 20(e) of the Exchange Act, 15 U.S.C. § 78t(e), Defendants Kirkbride, Flowers, and TAF aided and abetted, and unless enjoined will continue to aid and abet violations of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5(b) thereunder, 17 C.F.R. § 240.10b-5(b).

THIRD CLAIM FOR RELIEF

Fraud in the Offer or Sale of Securities

Violations of Section 17(a)(1) and 17(a)(3) of the Securities Act

(Against All Defendants)

183. The SEC realleges and incorporates by reference paragraphs 1 through 169 above.

184. As alleged above in paragraphs 130 through 159, among other

allegations, each of the defendants participated in a scheme to defraud purchasers of 808 Renewable's securities, and their scheme included the making of Ponzi-like payments to investors to, among other things, convince investors to continue to invest in 808 Renewable so that the defendants could misappropriate investor funds.

185. By engaging in the conduct described above, each of the defendants, directly or indirectly, in the offer or sale of securities, and by the use of means or instruments of transportation or communication in interstate commerce or by use of the mails directly or indirectly: (a) with scienter, employed devices, schemes, or artifices to defraud; and (c) with scienter or negligently, engaged in transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchaser.

186. By engaging in the conduct described above, each of the defendants violated, and unless enjoined will continue to violate, Sections 17(a)(1) and 17(a)(3) of the Securities Act, 15 U.S.C. §§ 77q(a)(1) & 77q(a)(3).

FOURTH CLAIM FOR RELIEF

Fraud in the Offer or Sale of Securities

Violations of Section 17(a)(2) of the Securities Act

(Against All Defendants)

187. The SEC realleges and incorporates by reference paragraphs 1 through 169 above.

188. As alleged above in paragraphs 63 through 119, 125 through 129, and 137 through 159, among other allegations, each of the defendants received money by means of untrue statements and omissions regarding the payment of commissions to the sales representatives who offered and sold 808 Renewable's securities. Defendants Carter, 808 Renewable, 808 Investments, and Kirkbride also received money by means of untrue statements and omissions regarding the use of proceeds from 808 Renewable's securities offerings and the existence of cash flow from 808 Renewable's business activities sufficient to enable it to pay dividends to investors.

Defendants Carter, 808 Renewable, and 808 Investments also received money by means of untrue statements and omissions regarding the purported pre-approval of 808 Renewable for listing on the AMEX stock exchange.

189. By engaging in the conduct described above, each of the defendants, directly or indirectly, in the offer or sale of securities, and by the use of means or instruments of transportation or communication in interstate commerce or by use of the mails directly or indirectly, with scienter or negligently, obtained money or property by means of untrue statements of a material fact or by omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

190. By engaging in the conduct described above, each of the defendants violated, and unless enjoined will continue to violate, Section 17(a)(2) of the Securities Act, 15 U.S.C. § 77q(a)(2).

FIFTH CLAIM FOR RELIEF

Unregistered Offer and Sale of Securities

Violations of Sections 5(a) and 5(c) of the Securities Act

(Against Defendants Carter, 808 Renewable, 808 Investments, Kinchloe, WCC, Flowers, and TAF)

191. The SEC realleges and incorporates by reference paragraphs 1 through 169 above.

192. As alleged above in paragraphs 21 through 62 and 160 through 162, among other allegations, Defendants Carter, 808 Renewable, 808 Investments, Kinchloe, WCC, Flowers, and TAF directly or indirectly offered and sold securities of 808 Renewable in an offering or offerings that were not registered with the SEC.

193. By engaging in the conduct described above, Defendants Carter, 808 Renewable, 808 Investments, Kinchloe, WCC, Flowers, and TAF, and each of them, directly or indirectly, singly and in concert with others, have made use of the means or instruments of transportation or communication in interstate commerce, or of the

mails, to offer to sell or to sell securities, or carried or caused to be carried through the mails or in interstate commerce, by means or instruments of transportation, securities for the purpose of sale or for delivery after sale, when no registration statement had been filed or was in effect as to such securities, and when no exemption from registration was applicable.

194. By engaging in the conduct described above, Defendants Carter, 808 Renewable, 808 Investments, Kinchloe, WCC, Flowers, and TAF have violated, and unless enjoined will continue to violate, Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) & 77e(c).

SIXTH CLAIM FOR RELIEF

Unregistered Broker-Dealer

Violation of Section 15(a) of the Exchange Act

(Against Defendants Carter, 808 Investments, Kinchloe, WCC, Flowers, and TAF)

195. The SEC realleges and incorporates by reference paragraphs 1 through 169 above.

196. As alleged above in paragraphs 21 through 62 and 163 through 169, among other allegations, Defendants Carter, 808 Investments, Kinchloe, WCC, Flowers, and TAF acted as unregistered broker-dealers by, among other things, soliciting investors and effectuating transactions in 808 Renewable securities for transaction-based compensation.

197. By engaging in the conduct described above, Defendants Carter, 808 Investments, Kinchloe, WCC, Flowers, and TAF, and each of them, made use of the mails and means or instrumentalities of interstate commerce to effect transactions in, and induced and attempted to induce the purchase or sale of, securities (other than exempted securities or commercial paper, bankers' acceptances, or commercial bills) without being registered with the SEC in accordance with Section 15(b) of the Exchange Act, 15 U.S.C. § 78o(b), and without complying with any exemptions

promulgated pursuant to Section 15(a)(2) of the Exchange Act, 15 U.S.C. § 78o(a)(2).

198. By engaging in the conduct described above, Defendants Carter, 808 Investments, Kinchloe, WCC, Flowers, and TAF have violated, and unless restrained and enjoined, are reasonably likely to continue to violate, Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a).

PRAYER FOR RELIEF

WHEREFORE, the SEC respectfully requests that the Court:

I.

Issue findings of fact and conclusions of law that the defendants committed the alleged violations.

II.

Issue judgments, in forms consistent with Rule 65(d) of the Federal Rules of Civil Procedure, permanently enjoining Defendants Carter, 808 Renewable, 808 Investments, Kirkbride, Kinchloe, WCC, Flowers, and TAF, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with any of them, who receive actual notice of the judgment by personal service or otherwise, and each of them, from violating Section 17(a) of the Securities Act [15 U.S.C. §77q(a)], and Section 10(b) of the Exchange Act [15 U.S.C. §§ 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

III.

Issue judgments, in forms consistent with Rule 65(d) of the Federal Rules of Civil Procedure, permanently enjoining defendants Carter, 808 Renewable, 808 Investments, Kinchloe, WCC, Flowers, and TAF, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with any of them, who receive actual notice of the judgment by personal service or otherwise, and each of them, from violating Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a), 77e(c)].

IV.

Issue judgments, in forms consistent with Rule 65(d) of the Federal Rules of Civil Procedure, permanently enjoining defendants Carter, 808 Investments, Kinchloe, WCC, Flowers, TAF, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with any of them, who receive actual notice of the judgment by personal service or otherwise, and each of them, from violating Section 15(a) of the Exchange Act [15 U.S.C. §§ 78o(a)].

V.

Issue judgments, in forms consistent with Rule 65(d) of the Federal Rules of Civil Procedure, permanently enjoining defendants Carter, 808 Renewable, 808 Investments, Kirkbride, Kinchloe, WCC, Flowers, TAF, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with any of them, who receive actual notice of the judgment by personal service or otherwise, and each of them, from soliciting, accepting, or depositing any monies from actual or prospective investors in connection with any offering of securities, provided, however, that such injunction shall not prevent the defendants from purchasing or selling securities listed on a national securities exchange for their own personal account.

VI.

Order Defendants to disgorge all funds received from their illegal conduct, together with prejudgment interest thereon.

VII.

Order Defendants to pay civil penalties under Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)].

VIII.

Pursuant to Section 20(g) of the Securities Act [15 U.S.C. § 77t(g)] and Section 21(d)(6) of the Exchange Act [15 U.S.C. § 78u(d)(6)], bar Defendants Carter, 808

Renewable, 808 Investments, Kirkbride, Kinchloe, WCC, Flowers, and TAF from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock.

IX.

Pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], and Section 20(e) of the Securities Act [15 U.S.C. § 77t(e)], bar Defendants Carter and Kirkbride from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l], or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

X.

Retain jurisdiction of this action in accordance with the principles of equity and the Federal Rules of Civil Procedure in order to implement and carry out the terms of all orders and decrees that may be entered, or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

XI.

Grant such other and further relief as this Court may determine to be just and necessary.

Dated: November 17, 2016

/s/ David Van Havermaat

David Van Havermaat
Yolanda Ochoa
Attorney for Plaintiff
Securities and Exchange Commission

EXHIBIT 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Southern Division

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

PATRICK S. CARTER, 808 RENEWABLE ENERGY CORPORATION, 808 INVESTMENTS, LLC, MARTIN J. KINCHLOE, PETER J. KIRKBRIDE, WEST COAST COMMODITIES, LLC, THOMAS A. FLOWERS, and T.A. FLOWERS LLC,

Defendants.

Case No. 8:16-CV-02070-JVS-DFM

CONSENT OF DEFENDANT PATRICK S. CARTER TO ENTRY OF JUDGMENT

1. Defendant Patrick S. Carter ("Carter" or "Defendant") acknowledges having been served with the complaint in this action, enters a general appearance, and admits the Court's jurisdiction over Defendant and over the subject matter of this action.

2. Defendant has entered into a written agreement to plead guilty to criminal conduct relating to certain matters alleged in the complaint in this action. Specifically, in *United States v. Patrick S. Carter*, Case No. SACR17-00164-JLS (C.D. Cal.), Defendant agreed to plead guilty to a one count of wire fraud, in violation of 18 U.S.C. § 1343. This Consent shall remain in full force and effect regardless of the existence or outcome of any further proceedings in *United States v. Patrick S. Carter*.

3. Without admitting or denying the allegations of the complaint (except as provided above and in paragraph 12, and except as to personal and subject matter jurisdiction, which Defendant admits), Defendant hereby consents to the entry of the Judgment in the form attached hereto (the "Judgment") and incorporated by reference herein, which, among other things:

(a) permanently restrains and enjoins Defendant from violations of Section 10(b) and 15(a) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) and 78o(a)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], and Sections 5 and 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77e and 77q(a)];

(b) permanently restrains and enjoins Defendant from soliciting, accepting, or depositing any monies from actual or prospective investors in connection with any offering of securities;

(c) prohibits Defendant from acting as an officer or director of any public company;

(d) permanently bars Defendant from participating in an offering of penny stock; and

(e) orders Defendant to pay disgorgement and prejudgment interest thereon in amounts to be determined by the Court upon motion of plaintiff Securities and Exchange Commission ("SEC").

4. Defendant agrees that the Court shall order disgorgement of ill-gotten gains and prejudgment interest thereon against Defendant. Defendant further agrees that the amount of disgorgement shall be determined by the Court at a hearing upon motion of the SEC, and that prejudgment interest shall be calculated from December 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). Defendants further agrees that in connection with the SEC's motion for disgorgement, and at any hearing held on such a motion: (a) Defendant will be precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint; (b) Defendant may not challenge the validity of this Consent or the Judgment; (c) solely for the purposes of such motion, the allegations of the Complaint shall be accepted as and deemed true by the Court; and (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure. In connection with the SEC's motion for disgorgement, the parties may take discovery, including discovery from appropriate non-parties.

5. Defendant waives the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

6. Defendant waives the right, if any, to a jury trial and to appeal from the entry of the Judgment (except that Defendant does not waive his right to appeal the Court's determination of the amounts of disgorgement and prejudgment interest that Defendant shall be ordered to pay pursuant to the process described in paragraph 4 above).

7. Defendant enters into this Consent voluntarily and represents that no

threats, offers, promises, or inducements of any kind have been made by the SEC or any member, officer, employee, agent, or representative of the SEC to induce Defendant to enter into this Consent.

8. Defendant agrees that this Consent shall be incorporated into the Judgment with the same force and effect as if fully set forth therein.

9. Defendant will not oppose the enforcement of the Judgment on the ground, if any exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waives any objection based thereon.

10. Defendant waives service of the Judgment and agrees that entry of the Judgment by the Court and filing with the Clerk of the Court will constitute notice to Defendant of its terms and conditions. Defendant further agrees to provide counsel for the SEC, within thirty days after the Judgment is filed with the Clerk of the Court, with an affidavit or declaration stating that Defendant has received and read a copy of the Judgment.

11. Consistent with 17 C.F.R. 202.5(f), this Consent resolves only the claims asserted against Defendant in this civil proceeding. Defendant acknowledges that no promise or representation has been made by the SEC or any member, officer, employee, agent, or representative of the SEC with regard to any criminal liability that may have arisen or may arise from the facts underlying this action or immunity from any such criminal liability. Defendant waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy or civil penalty herein. Defendant further acknowledges that the Court's entry of a permanent injunction may have collateral consequences under federal or state law and the rules and regulations of self-regulatory organizations, licensing boards, and other regulatory organizations. Such collateral consequences include, but are not limited to, a statutory disqualification with respect to membership or participation in, or association with a member of, a self-regulatory organization. This statutory disqualification has consequences that are separate from any sanction imposed in an

administrative proceeding. In addition, in any disciplinary proceeding before the SEC based on the entry of the injunction in this action, Defendant understands that he shall not be permitted to contest the factual allegations of the complaint in this action.

12. Defendant understands and agrees to comply with the terms of 17 C.F.R. § 202.5(e), which provides in part that it is the SEC's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings," and "a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations." As part of Defendant's agreement to comply with the terms of Section 202.5(e), Defendant acknowledges the guilty plea for related conduct described in paragraph 2 above, and Defendant: (i) will not take any action or make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis; (ii) will not make or permit to be made any public statement to the effect that Defendant does not admit the allegations of the complaint, or that this Consent contains no admission of the allegations, without also stating that Defendant does not deny the allegations; (iii) upon the filing of this Consent, Defendant hereby withdraws any papers filed in this action to the extent that they deny any allegation in the complaint; and (iv) stipulates for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, that the allegations in the complaint are true, and further, that any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Defendant under the Judgment or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19). If Defendant breaches this agreement, the SEC may petition the Court to vacate the Judgment and restore this action to its active docket. Nothing in this

paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the SEC is not a party.

13. Defendant hereby waives any rights under the Equal Access to Justice Act, the Small Business Regulatory Enforcement Fairness Act of 1996, or any other provision of law to seek from the United States, or any agency, or any official of the United States acting in his or her official capacity, directly or indirectly, reimbursement of attorney's fees or other fees, expenses, or costs expended by Defendant to defend against this action. For these purposes, Defendant agrees that Defendant is not the prevailing party in this action since the parties have reached a good faith settlement.

14. Defendant agrees that the SEC may present the Judgment to the Court for signature and entry without further notice.

15. Defendant agrees that this Court shall retain jurisdiction over this matter for the purpose of enforcing the terms of the Judgment.

Dated: 10/29/18

Patrick S. Carter

PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

U.S. SECURITIES AND EXCHANGE COMMISSION,
444 S. Flower Street, Suite 900, Los Angeles, California 90071
Telephone No. (323) 965-3998; Facsimile No. (213) 443-1904.

On November 20, 2018, I caused to be served the document entitled **CONSENT OF DEFENDANT PATRICK S. CARTER TO ENTRY OF JUDGMENT** on all the parties to this action addressed as stated on the attached service list:

☐ **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

☐ **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

☐ **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

☐ **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

☐ **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

☐ **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

☒ **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

☐ **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: November 20, 2018

/s/ David J. Van Havermaat
David J. Van Havermaat

SEC v. Patrick S. Carter, et al.
United States District Court—Central District of California
Case No. 8:16-cv-02070-JVS-DFM

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Southern Division

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

PATRICK S. CARTER, 808 RENEWABLE ENERGY CORPORATION, 808 INVESTMENTS, LLC, MARTIN J. KINCHLOE, PETER J. KIRKBRIDE, WEST COAST COMMODITIES, LLC, THOMAS A. FLOWERS, and T.A. FLOWERS LLC,

Defendants.

Case No. 8:16-CV-02070-JVS-DFM

[PROPOSED] JUDGMENT AS TO DEFENDANT PATRICK S. CARTER

The Securities and Exchange Commission having filed a Complaint and defendant Patrick S. Carter ("Carter" or "Defendant") having entered a general appearance and consented to the Court's jurisdiction over Defendant and the subject matter of this action, consented to entry of this Judgment without admitting or denying the allegations of the Complaint (except as to jurisdiction and except as otherwise provided herein in paragraph X), waived findings of fact and conclusions of law; and waived any right to appeal from this Judgment (except that Defendant has not waived his right to appeal the Court's determination of the amounts of disgorgement and prejudgment interest that Defendant shall be ordered to pay pursuant to paragraph VIII below):

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and

(b) other persons in active concert or participation with Defendant or with anyone described in (a).

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to employ any device, scheme, or artifice to defraud;

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 5 of the Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of any applicable exemption:

(a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in

interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;

(b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or

(c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the SEC as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act [15 U.S.C. § 77h].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

IV.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 15(a) of the Exchange Act [15 U.S.C. § 78o(a)] by, directly or indirectly, in the absence of any applicable exemption, making use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless registered in accordance

with Section 15(b) of the Exchange Act [15 U.S.C. § 78o(b)].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from soliciting, accepting, or depositing any monies from actual or prospective investors in connection with any offering of securities, provided, however, that such injunction shall not prevent Defendant from purchasing or selling securities listed on a national securities exchange for Defendant's own personal accounts.

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)] and Section 20(e) of the Securities Act [15 U.S.C. § 77t(e)], Defendant is prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

VII.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently barred from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock. A penny stock is any equity security that has a price of less than five dollars, except as provided in Rule 3a51-1 under the Exchange Act [17 C.F.R. 240.3a51-1].

VIII.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant shall pay disgorgement of ill-gotten gains plus prejudgment interest thereon. The Court shall determine the amount of disgorgement at a hearing upon motion of the SEC. Prejudgment interest shall be calculated from December 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 the SEC's motion for disgorgement, and at any hearing held on such a motion: (a) Defendant will be precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint; (b) Defendant may not challenge the validity of the Consent or this Judgment; (c) solely for the purposes of such motion, the allegations of the Complaint shall be accepted as and deemed true by the Court; and (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure. In connection with the SEC's motion for disgorgement, the parties may take discovery, including discovery from appropriate non-parties.

IX.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent of Defendant Patrick S. Carter to Entry of Judgment is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant shall comply with all of the undertakings and agreements set forth therein.

X.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the allegations in the complaint are true and admitted by Defendant, and further, any debt for disgorgement, prejudgment interest, civil penalty or other

amounts due by Defendant under this Judgment or any other judgment, order, consent order, decree, or settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

XI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Judgment.

XII.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Judgment forthwith and without further notice.

Dated: _____, 2018

_____
HON. JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

Stipulation

8:16-cv-02070-JVS-DFM U.S. Securities and Exchange Commission v. Patrick S. Carter et al

ACCO, (DFMx),DISCOVERY,MANADR

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Van Havermaat, David on 11/20/2018 at 12:00 PM PST and filed on 11/20/2018

Case Name: U.S. Securities and Exchange Commission v. Patrick S. Carter et al
Case Number: 8:16-cv-02070-JVS-DFM
Filer: U.S. Securities and Exchange Commission
Document Number: 69

Docket Text:
STIPULATION for Judgment as to Defendant Patrick S. Carter filed by Plaintiff U.S. Securities and Exchange Commission. (Attachments: # (1) [Proposed] Judgment)(Van Havermaat, David)

8:16-cv-02070-JVS-DFM Notice has been electronically mailed to:

David J Van Havermaat vanhavermaatd@sec.gov, irwinma@sec.gov, kassabguir@sec.gov, LAROFiling@sec.gov, longoa@sec.gov, mitchells@sec.gov, ochoay@sec.gov, wardra@sec.gov

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8:16-cv-02070-JVS-DFM Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :

The following document(s) are associated with this transaction:

OS Received 09/30/2021

Document description: Main Document
Original filename:J:\ENF\LA-04491\LITIGATION FILES\DRAFTS\COURT PAPER DRAFTS\808 Renewable - Carter Consent to Bifurcated Judgment FINAL 11.20.18.pdf
Electronic document Stamp:
[STAMP cacdStamp_ID=1020290914 [Date=11/20/2018] [FileNumber=26640948-0] [a1d1b1461f246265dff76534a7675511cb59c8928872080c2d19457795fcd9e4d5 2c0f4cf75cec78c62a9d9bce4d3a23dc5e60fbe9ced130f7c377c345b3a85b]]
Document description: [Proposed] Judgment
Original filename:J:\ENF\LA-04491\LITIGATION FILES\DRAFTS\COURT PAPER DRAFTS\808 Renewable - Carter Proposed Bifurcated Judgment FINAL 11.20.18.pdf
Electronic document Stamp:
[STAMP cacdStamp_ID=1020290914 [Date=11/20/2018] [FileNumber=26640948-1] [740bf21cf13881f1e2569fe633090dec8c29f3dea42cbf07cb767e7ff06c341840 60ebc52d7874bfa8006dbd8ff66628c2513c9c0923775fe7bca14c3e91f515]]

EXHIBIT 4

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 16-2070 JVS (DFMx)	Date	August 27, 2021
Title	United States Securities and Exchange Commission v. Patrick S. Carter et al.		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**

Lisa Bredahl	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **[IN CHAMBERS] Order Regarding Renewed Motion for Monetary Remedies**

Before the Court is Plaintiff United States Securities and Exchange Commission's (the "SEC") renewed motion for monetary remedies against Defendant Patrick S. Carter ("Carter"). Mot., ECF No. 108. Carter filed an opposition. Opp'n, ECF No. 113. The SEC filed a response. Reply, ECF No. 114.

Carter filed a request for hearing. ECF No. 117. The SEC filed an opposition to the request for a hearing that responded fully to all of Carter's arguments. ECF No. 118. The Court reviewed the parties arguments, but finds that oral argument would not be helpful in this matter.

For the following reasons, the Court **GRANTS** the motion.

I. BACKGROUND

On November 21, 2018, judgment was entered in this case as to Carter. Judgment, ECF No. 70. As part of that judgment, it was ordered that for this motion for monetary remedies "the allegations of the Complaint shall be accepted as and deemed true by the Court." Id. at 5. The following summary of the case is therefore derived from the Complaint, ECF No. 1, and is accepted as true.

Carter conducted a fraudulent and unregistered offer and sale of securities through co-defendant 808 Renewable Energy Corporation ("808 Renewable"), a company that he founded and managed. Compl. ¶ 4. Specifically, from 2009 to 2014, Carter engaged in a scheme that raised over $30 million from over 500 investors nationwide in fraudulent and

unregistered offerings. Id. ¶ 5.

Through the use of private placement memoranda ("PPMs") and oral statements, Carter made four key misrepresentations as part of his campaign to raise capital. Id. ¶ 6. Carter represented that investor funds would be used to acquire new equipment and expand 808 Renewable's business, that commissions paid in connection with the sale of 808 Renewable securities would not exceed 10% and go only to registered brokers, that 808 Renewable was generating positive cash flow that would be used to pay monthly or quarterly dividends, and that the company's shares had been pre-approved by the New York Stock Exchange for listing on the American Stock Exchange. Id. In fact, Carter used investor money to support a lavish lifestyle, pay sales commissions of up to 25%, and pay out Ponzi-like "dividends" to previous investors. Id. ¶ 7. 808 Renewable was also never pre-approved for listing on the American Stock Exchange. Id.

On November 17, 2016, the SEC filed the complaint. See generally id. Carter also entered into a plea agreement with the United States Attorney's Office for the Central District of California ("USAO") on March 7, 2018. See United States v. Patrick S. Carter, CR 17-0164 JLS, ECF No. 3. The SEC filed their original motion for monetary damages on December 19, 2019. Mot., ECF No. 94. After multiple continuances, the SEC filed an amended motion for monetary damages on December 18, 2020. Mot., ECF No. 101. On February 24, 2021, the Court denied the motion without prejudice. Order, ECF No. 104.

II. LEGAL STANDARD

"In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5). "[A] disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief under § 78u(d)(5)." Liu v. SEC, 140 S. Ct. 1936, 1940 (2020).

"Disgorgement need be 'only a reasonable approximation of profits causally connected to the violation.'" SEC v. Platforms Wireless International Corp., 617 F.3d 1072, 1096 (9th Cir. 2010) (quoting SEC v. First Pacific Bancorp, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998)). "The SEC bears the ultimate burden of persuasion that its disgorgement figure reasonably approximates the amount of unjust enrichment." Id. at

1096 (internal quotation marks omitted). "Once the SEC establishes a reasonable approximation of defendants' actual profits, however, . . . the burden shifts to the defendants to demonstrate that the disgorgement figure was not a reasonable approximation." Id. (internal quotation marks omitted).

III. DISCUSSION

The SEC seeks an order directing Carter to disgorge $15,946,228.91. Mot. at 13. The SEC's accountant derived this number by adding together the following figures after a review of the relevant accounts:

Founder Shares Proceeds	$13,440,690.65
Money Paid to Carter	$4,415,209.49
Non-Business Money Use	$68,101.07
Money Deposited by Carter	-$1,184,384.58
Money Paid to Martine Kinchloe and West Coast Commodities LLC	-$1,011,483.51
Money Paid to Thomas Flowers and T.A. Flower LLC	-$1,099,365.25
Prejudgment Interest	$1,317,461.04
Total	**$15,946,228.91**

Conte Declaration, ECF No. 109, ¶¶ 17-26. The Court begins by examining the support for the SEC estimate before turning to Carter's arguments in response.

A. Reasonable Approximation of Profits

The SEC has the burden of establishing that the amount of disgorgement "reasonably approximates the amount of unjust enrichment." Platforms Wireless, 617 F.3d at 1096 (internal quotation omitted). On behalf of the SEC, Conte reviewed the underlying bank records and documents of Carter and his companies. Conte Decl. ¶¶ 7-12. Conte then created summaries and performed calculations to determine how much

money was raised from investors, how much money went to Carter and his affiliates, and the appropriate offsets for money that was returned or used for legitimate business expenses. Id. ¶¶ 13-16. Conte represents that preparation of those summaries and calculations did not require any scientific, technical, or specialized knowledge. Id. ¶ 13.

Conte determined that Carter received $13,440,690.65 from the sale of Founder Shares to investors based on "review of financial and business records, including examining agreements, emails, and notations on checks deposited into these accounts." Id. ¶ 17. In addition to the sale of Founder Shares, Conte determined that Carter received an additional $4,415,209.49 from 808 Renewable. Id. ¶ 18. The true and correct copies of the relevant withdrawal slips, checks, and statements are included in Exhibits 2 through 46, and summarized in Exhibit 1. Id. ¶ 19. Conte reviewed the bank records of 808 Renewable and determined that Carter misappropriated $68,101.07 of investor funds with no legitimate business purpose related to 808 Renewable. Id. ¶ 20. The true and correct copies of the relevant cashier's checks, checks, and statements are included as Exhibits 47 through 77, and summarized in Exhibit 1. Id. ¶ 20.

The SEC also identified legitimate business expenses and deducted them from the requested disgorgement amount. Based on the review of 808 Renewable's bank records, Conte determined that Carter deposited $1,184,384.58 into 808 Renewable's accounts and deducted that amount. Id. ¶ 21. Based on the review of bank records, Conte determined that Martin Kinchloe and West Coast Commodities were paid $1,011,483.51 as commission payments and deducted that amount. Id. ¶ 22. Based on the review of bank records, Conte determined that Thomas Flowers and T. A. Flower LLC were paid $1,099,365.25 as commission payments and deducted that amount. Id. ¶ 23.

In opposition to the SEC's original Amended Monetary Relief Motion, Carter disputed the accuracy of $726,698.10 of the disgorgement award. Opp'n, Dkt. No. 102, at 20; Carter Decl., Dkt. No. 102-1, ¶ 10. As part of the current motion, Conte reviewed Carter's earlier objections and provided a detailed response explaining his determination that the $726,698.10 is properly included. Conte Decl. ¶ 24. Carter declined to renew those objections in his opposition. Conte also did not deduct the $2,976,023.15 in loss that Carter admitted to causing as part of his criminal case because no criminal restitution order has been imposed at this time. Id. ¶ 25.

As shown in the table above, adding and subtracting the relevant sums results in a

total of $14,628,767.87 as the requested disgorgement amount. Id. ¶ 26. The Court finds that the SEC has carried its burden in establishing that the proposed disgorgement of $14,628,767.87 is a reasonable approximation of Carter's net profits from wrongdoing.

Finally, the SEC seeks an order of $1,317,461.04 in prejudgment interest. Mot., at 12. The judgment states that prejudgment interest shall be calculated "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)." Judgment, Dkt. No. 70, at VIII. The Ninth Circuit has upheld the SEC's use of the rate provided in 26 U.S.C. § 6621(a)(2) for calculation of prejudgment interest in disgorgement proceedings. Platforms Wireless, 617 F.3d at 1099. Based on that rate, Conte calculated that $1,317,461.04 is owed in prejudgment interest. Conte Decl., ¶ 28. Conte explained his methodology in reaching that number, and provided the prejudgment interest report. Id. ¶ 27-28. The Court finds that the SEC has also carried its burden of supporting the prejudgment interest request of $1,317,461.04.

B. Carter's Evidentiary Objections

Carter raises a number of evidentiary objections arguing that the documentation provided by Conte is inadmissible and therefore insufficient for the SEC to carry its burden. First, Carter contends that the Conte declaration is hearsay because it is based on underlying documents instead of personal knowledge. Opp'n at 6-7, 8-13. Next, Carter asserts that some portions rely on absent documents in violation of the Best Evidence Rule, while other portions rely on documents that are not properly authenticated. Id. at 7-8. Additionally, Carter argues that there is a lack of support for the alleged $13,440,690.65 in profits from the sale of Founder Shares in violation of the Best Evidence Rule. Id. at 13-14. Finally, Carter claims that the Conte Declaration is impermissible lay witness opinion not founded on personal knowledge. Id. at 14-16.

In response, the SEC points to the judgment entered in this case as to Carter. Judgment, Dkt. No. 70. The judgment states that for the purposes of determining the amount of disgorgement "the allegations of the Complaint shall be accepted as and deemed true by the Court." Id. at VIII. The judgment also states that for the purposes of a disgorgement motion "the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn depositions or investigative testimony, and documentary evidence, without regard to the standards for summary judgement contained in Rule 56(c)." Id. Under similar agreements, courts routinely accept

summaries of financial documents to determine an appropriate amount of disgorgement. See SEC v. Slowinski, No. 19-cv-3552, 2020 WL 7027639, at *3 (N.D. Ill. Nov. 29, 2020) (relying on SEC accountant declaration summarizing review of bank records to establish a reasonable approximation of profits); SEC v. Mizrahi, No. CV 19-2284, 2020 WL 6114913, at *2 (C.D. Cal. Oct. 5, 2020) (same); SEC v. Rinfret, No. 19-cv-6037, 2020 WL 6559411, at *5 (S.D.N.Y. Nov. 9, 2020) (same); SEC v. Smith, No. 20-cv-1056-PA, 2020 WL 6712257, at *3 (C.D. Cal. Oct. 19, 2020) (same); SEC v. Fujinaga, No. 13-cv-1658-JCM, 2015 WL 356291, at *3 (D. Nev. Jan. 27, 2015) (same).

Here, the SEC reviewed business records, offering documents, bank records, and the underlying details. Conte Decl. ¶ 7. The SEC also provided true and correct copies of the certification of business records for all of the bank records relied upon. Conte Reply Decl., Dkt. No. 114-2, at ¶ 4 (referencing attached Exhibits 1 through 6). As discussed above, Conte then relied on that information to calculate a reasonable approximation of net profits. Under the terms of the judgment, that is sufficient documentation to support the requested disgorgement. Carter has not indicated that any specific documents are inaccurate and cannot be relied upon.

Mere speculation that some of the documents Conte relied upon may have another provenance is insufficient to overcome the SEC's thorough documentation in support of their calculation.

C. Carter's Substantive Objections

Turning to the merits, Carter argues that the only amount of disgorgement that is properly supported is the $2,976,023.15 from the plea agreement in the criminal case. Opp'n at 24. With respect to the other amounts, Carter raises a series of hypothetical questions to suggest that the Conte declaration is insufficient to meet the SEC's burden of persuasion. Opp'n at 16. Carter also cites to several exhibits to assert that Conte lacks sufficient personal knowledge to draw conclusions based on the contents of those documents. Opp'n at 16-20. However, Carter offers no evidence to rebut any specific amounts. This is insufficient to contradict the reasonable approximation of net profits that the SEC provided. See Mizrahi, 2020 WL 6114913, at *3 (denying requested deductions from disgorgement where no evidence is offered in support); Slowinski, 2020 WL 7027639, at *3 (finding insufficient evidence to rebut SEC calculation where no contradictory evidence is provided). Once the SEC met their burden of persuasion in this

case, it falls to Carter "to demonstrate that the disgorgement figure was not a reasonable approximation." Platforms Wireless, 617 F.3d at 1096.

Carter also takes issue with the support for the SEC determination that Carter received $13,440,690.65 from the sale of Founder Shares. Opp'n at 13-14. The crux of his argument is that the renewed Conte declaration contains a paragraph that is identical to a paragraph from the initial Conte declaration. Request at 4-5 (comparing Conte Decl., Dkt. No. 101-2 ¶ 13 with Conte Decl., Dkt. No. 109-2 ¶ 17). While literally true, this selective focus ignores the new detail provided in the renewed declaration that elaborates on Conte's methodology. See Conte Decl., Dkt. No. 109-2 ¶¶ 13-16. A declaration attached to the SEC Reply also describes the voluminous bank records reviewed, how the records were obtained, and contains exhibits certifying that the records are true and correct copies. Conte Decl., Dkt. No. 114-2. Taken together, these additional details provide the necessary context for the renewed motion to meet the SEC's burden of persuasion. Again, Carter has failed to offer any specific contradictory evidence. See Mizrahi, 2020 WL 6114913, at *3; Slowinski, 2020 WL 7027639, at *3. Once the SEC met their burden of persuasion, Carter must "demonstrate that the disgorgement figure was not a reasonable approximation." Platforms Wireless, 617 F.3d at 1096.

The Court concludes that Carter has failed to meet his burden of demonstrating that the SEC's disgorgement figure was not a reasonable approximation of net profits.

D. Use of Disgorged Funds for the Benefit of Investors

Finally, Carter argues that the SEC has failed to show that disgorgement will be "for the benefit of investors" as required by § 78u(d)(5). Opp'n at 20. The Ninth Circuit requires an explicit finding that it the disgorgement award is for the benefit of investors. See SEC v. Yang, 824 Fed. Appx. 445, 447 (9th Cir. 2020); SEC v. Janus Spectrum LLC, 811 Fed. Appx. 432, 434 (9th Cir. 2020). However, this Court has previously concluded that the SEC expression of intent to distribute funds to harmed investors was sufficient to satisfy the § 78u(d)(5) requirement. Order, Dkt. No. 104, at 4. Courts routinely rely on similar representations. See SEC v. Blockvest, LLC, 2020 WL 7295837, at *3 (S.D. Cal. Dec. 10, 2020); SEC v. Smith, 2020 WL 6712257, at *3 (C.D. Cal. Oct. 20, 2020); SEC v. Curative Biosciences, 2020 WL 7345681, at *6; SEC v. Rinfret, 2020 WL 6559411, at *6 (S.D.N.Y. Nov. 9, 2020); SEC v. Yang, 2021 WL 1234886, at *6 (C.D. Cal. Feb. 16, 2021). Carter presents no evidence to call the SEC's representation into question.

The Court therefore concludes that the proposed disgorgement would be "for the benefit of investors" and satisfies the requirements of § 78u(d)(5).

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the SEC's Renewed Motion for Monetary Relief. The Court imposes a disgorgement amount of $14,628,767.87 with prejudgment interest of $1,317,461.04. The Court will enter a Judgment consistent with this Order.

IT IS SO ORDERED.

EXHIBIT 5

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Attorneys for Plaintiff
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

PATRICK S. CARTER,

Defendant.

SACR17-00164 JLS

NO. SA CR

PLEA AGREEMENT FOR DEFENDANT PATRICK S. CARTER

1. This constitutes the plea agreement between Patrick S. Carter ("defendant") and the United States Attorney's Office for the Central District of California (the "USAO") in the above-captioned case. This agreement is limited to the USAO and cannot bind any other federal, state, local, or foreign prosecuting, enforcement, administrative, or regulatory authorities.

DEFENDANT'S OBLIGATIONS

2. Defendant agrees to:

a) Give up the right to indictment by a grand jury and, at the earliest opportunity requested by the USAO and provided by the Court, appear and plead guilty to a one-count information in the

form attached to this agreement as Exhibit A or a substantially similar form, which charges defendant with wire fraud, a violation of Title 18, United States Code, Section 1343.

b) Not contest facts agreed to in this agreement.

c) Abide by all agreements regarding sentencing contained in this agreement.

d) Appear for all court appearances, surrender as ordered for service of sentence, obey all conditions of any bond, and obey any other ongoing court order in this matter.

e) Not commit any crime; however, offenses that would be excluded for sentencing purposes under United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") § 4A1.2(c) are not within the scope of this agreement.

f) Be truthful at all times with Pretrial Services, the United States Probation Office, and the Court.

g) Pay the applicable special assessment at or before the time of sentencing unless defendant lacks the ability to pay and prior to sentencing submits a completed financial statement on a form to be provided by the USAO.

3. Defendant further agrees to cooperate fully with the USAO, the Federal Bureau of Investigation ("FBI"), and, as directed by the USAO, any other federal, state, local, or foreign prosecuting, enforcement, administrative, or regulatory authority. This cooperation requires defendant to:

a) Respond truthfully and completely to all questions that may be put to defendant, whether in interviews, before a grand jury, or at any trial or other court proceeding.

b) Attend all meetings, grand jury sessions, trials or other proceedings at which defendant's presence is requested by the USAO or compelled by subpoena or court order.

c) Produce voluntarily all documents, records, or other tangible evidence relating to matters about which the USAO, or its designee, inquires.

4. For purposes of this agreement: (1) "Cooperation Information" shall mean any statements made, or documents, records, tangible evidence, or other information provided, by defendant pursuant to defendant's cooperation under this agreement; and (2) "Plea Information" shall mean any statements made by defendant, under oath, at the guilty plea hearing and the agreed to factual basis statement in this agreement.

THE USAO'S OBLIGATIONS

5. The USAO agrees to:

a) Not contest facts agreed to in this agreement.

b) Abide by all agreements regarding sentencing contained in this agreement.

c) At the time of sentencing, provided that defendant demonstrates an acceptance of responsibility for the offense up to and including the time of sentencing, recommend a two-level reduction in the applicable Sentencing Guidelines offense level, pursuant to U.S.S.G. § 3E1.1, and recommend and, if necessary, move for an additional one-level reduction if available under that section.

d) Recommend that defendant be sentenced to a term of imprisonment no higher than the low end of the applicable Sentencing Guidelines range, provided that the offense level used by the Court

is 24 or higher and provided that the Court does not depart downward in offense level or criminal history category. For purposes of this agreement, the low end of the Sentencing Guidelines range is that defined by the Sentencing Table in U.S.S.G. Chapter 5, Part A, without regard to reductions in the term of imprisonment that may be permissible through the substitution of community confinement or home detention as a result of the offense level falling within Zone B or Zone C of the Sentencing Table.

6. The USAO further agrees:

a) Not to offer as evidence in its case-in-chief in the above-captioned case or any other criminal prosecution that may be brought against defendant by the USAO, or in connection with any sentencing proceeding in any criminal case that may be brought against defendant by the USAO, any Cooperation Information. Defendant agrees, however, that the USAO may use both Cooperation Information and Plea Information: (1) to obtain and pursue leads to other evidence, which evidence may be used for any purpose, including any criminal prosecution of defendant; (2) to cross-examine defendant should defendant testify, or to rebut any evidence offered, or argument or representation made, by defendant, defendant's counsel, or a witness called by defendant in any trial, sentencing hearing, or other court proceeding; and (3) in any criminal prosecution of defendant for false statement, obstruction of justice, or perjury.

b) Not to use Cooperation Information against defendant at sentencing for the purpose of determining the applicable guideline range, including the appropriateness of an upward departure, or the sentence to be imposed, and to recommend to the

Court that Cooperation Information not be used in determining the applicable guideline range or the sentence to be imposed. Defendant understands, however, that Cooperation Information will be disclosed to the probation office and the Court, and that the Court may use Cooperation Information for the purposes set forth in U.S.S.G § 1B1.8(b) and for determining the sentence to be imposed.

c) In connection with defendant's sentencing, to bring to the Court's attention the nature and extent of defendant's cooperation.

d) If the USAO determines, in its exclusive judgment, that defendant has both complied with defendant's obligations under paragraphs 2 and 3 above and provided substantial assistance to law enforcement in the prosecution or investigation of another ("substantial assistance"), to move the Court pursuant to U.S.S.G. § 5K1.1 to fix an offense level and corresponding guideline range below that otherwise dictated by the sentencing guidelines, and to recommend a term of imprisonment within this reduced range.

DEFENDANT'S UNDERSTANDINGS REGARDING COOPERATION

7. Defendant understands the following:

a) Any knowingly false or misleading statement by defendant will subject defendant to prosecution for false statement, obstruction of justice, and perjury and will constitute a breach by defendant of this agreement.

b) Nothing in this agreement requires the USAO or any other prosecuting, enforcement, administrative, or regulatory authority to accept any cooperation or assistance that defendant may offer, or to use it in any particular way.

c) Defendant cannot withdraw defendant's guilty plea if the USAO does not make a motion pursuant to U.S.S.G. § 5K1.1 for a reduced guideline range or if the USAO makes such a motion and the Court does not grant it or if the Court grants such a USAO motion but elects to sentence above the reduced range.

d) At this time the USAO makes no agreement or representation as to whether any cooperation that defendant has provided or intends to provide constitutes or will constitute substantial assistance. The decision whether defendant has provided substantial assistance will rest solely within the exclusive judgment of the USAO.

e) The USAO's determination whether defendant has provided substantial assistance will not depend in any way on whether the government prevails at any trial or court hearing in which defendant testifies or in which the government otherwise presents information resulting from defendant's cooperation.

NATURE OF THE OFFENSE

8. Defendant understands that for defendant to be guilty of wire fraud, in violation of Title 18, United States Code, Section 1343, the following must be true: (1) defendant knowingly participated in a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises; (2) the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property; (3) defendant acted with the intent to defraud; that is, the intent to deceive or cheat; and

(4) defendant used, or caused to be used, an interstate wire to carry out or attempt to carry out an essential part of the scheme.

PENALTIES AND RESTITUTION

9. Defendant understands that the statutory maximum sentence that the Court can impose for a violation of Title 18, United States Code, Section 1343 is: 20 years of imprisonment; a three-year period of supervised release; a fine of $250,000 or twice the gross gain or gross loss associated with the offense, whichever is greatest; and a mandatory special assessment of $100.

10. Defendant understands that supervised release is a period of time following imprisonment during which defendant will be subject to various restrictions and requirements. Defendant understands that if defendant violates one or more of the conditions of any supervised release imposed, defendant may be returned to prison for all or part of the term of supervised release authorized by statute for the offense that resulted in the term of supervised release, which could result in defendant serving a total term of imprisonment greater than the statutory maximum stated above.

11. Defendant understands that defendant will be required to pay full restitution to the victims of the offense to which defendant is pleading guilty. Defendant agrees that, in return for the USAO's compliance with its obligations under this agreement, the Court may order restitution to persons other than the victims of the offenses to which defendant is pleading guilty and in amounts greater than those alleged in the count to which defendant is pleading guilty. In particular, defendant agrees that the Court may order restitution to any victim of any of the following for any losses suffered by that victim as a result of any relevant conduct,

as defined in U.S.S.G. § 1B1.3, in connection with the offense to which defendant is pleading guilty.

12. Defendant understands that the conviction in this case may also subject defendant to various other collateral consequences, including but not limited to revocation of probation, parole, or supervised release in another case and suspension or revocation of a professional license. Defendant understands that unanticipated collateral consequences will not serve as grounds to withdraw defendant's guilty plea.

13. Defendant understands that, if defendant is not a United States citizen, the felony conviction in this case may subject defendant to: removal, also known as deportation, which may, under some circumstances, be mandatory; denial of citizenship; and denial of admission to the United States in the future. The court cannot, and defendant's attorney also may not be able to, advise defendant fully regarding the immigration consequences of the felony conviction in this case. Defendant understands that unexpected immigration consequences will not serve as grounds to withdraw defendant's guilty plea.

FACTUAL BASIS

14. Defendant admits that defendant is, in fact, guilty of the offense to which defendant is agreeing to plead guilty. Defendant and the USAO agree to the statement of facts provided below and agree that this statement of facts is sufficient to support a plea of guilty to the charge described in this agreement and to establish the Sentencing Guidelines factors set forth in paragraph 16 below but is not meant to be a complete recitation of all facts relevant

to the underlying criminal conduct or all facts known to either party that relate to that conduct.

Defendant operated 808 Renewable Energy Corporation ("808 Renewable") located in Garden Grove, California. 808 Renewable was engaged in the renewable and efficient energy business. 808 Renewable generated some revenue from the sale of electricity and energy produced by the company's cogeneration systems. Defendant offered and sold securities in 808 Renewable to investors throughout the United States.

Defendant, with the intent to defraud, executed and participated in a scheme to defraud and to obtain money by means of materially false and fraudulent pretenses, representations, and promises, and the non-disclosure and concealment of material facts from investors in connection with the sales of defendant's founder shares in 808 Renewable.

From approximately November 2013 to April 2014, defendant offered and sold his founder shares in 808 Renewable to prospective investors, representing that he was selling only a "limited" amount of his shares at a discounted price to avoid taking a salary. In order to sell his founder shares, defendant told prospective investors that 808 Renewable was "given preliminary approval" by representatives of the NYSE for listing on the NYSE. Defendant, with the intent to defraud, offered his founder shares to prospective investors for 75¢ per share, promising that when 808 Renewable lists on the NYSE, the shares would open at least $4 a share, the minimum price to list on the NYSE.

Contrary to defendant's representations, 808 Renewable was never approved or preliminarily approved for listing on the NYSE. In fact, 808 Renewable shares are worth substantially less than what defendant claimed.

From the sale of his founder shares, defendant caused over 10 investors to lose $2,976,023.15.

In furtherance of the above scheme, on or about January 29, 2014, defendant caused investor F.S. to wire $25,000 from his account at Sterling Savings Bank in Bandon, Oregon to Patrick and Parvaneh Carter's Chase Bank account in Newport Beach, California for the purchase of defendant's founder shares.

15. Defendant understands that in determining defendant's sentence the Court is required to calculate the applicable Sentencing Guidelines range and to consider that range, possible departures under the Sentencing Guidelines, and the other sentencing factors set forth in 18 U.S.C. § 3553(a). Defendant understands that the Sentencing Guidelines are advisory only, that defendant cannot have any expectation of receiving a sentence within the calculated Sentencing Guidelines range, and that after considering the Sentencing Guidelines and the other § 3553(a) factors, the Court will be free to exercise its discretion to impose any sentence it finds appropriate up to the maximum set by statute for the crime of conviction.

16. Defendant and the USAO agree to the following applicable Sentencing Guidelines:

Base Offense Level: 7 [U.S.S.G. § 2B1.1(a)(1)]

Loss more than $1,500,000 but less than $3,500,000: +16 [U.S.S.G. § 2B1.1(b)(1)(I)]

More than 10 victims: +2 [U.S.S.G. § 2B1.1(b)(2)(A)(i)]

17. Defendant and the USAO reserve the right to argue that additional specific offense characteristics, adjustments, and departures under the Sentencing Guidelines are appropriate.

18. Defendant understands that there is no agreement as to defendant's criminal history or criminal history category.

19. Defendant reserves the right to argue for a sentence outside the sentencing range established by the Sentencing Guidelines based on the factors set forth in 18 U.S.C. § 3553(a)(1), (a)(2), (a)(3), (a)(6), and (a)(7).

WAIVER OF CONSTITUTIONAL RIGHTS

20. Defendant understands that by pleading guilty, defendant gives up the following rights:

a) The right to persist in a plea of not guilty.

b) The right to a speedy and public trial by jury.

c) The right to be represented by counsel - and if necessary have the court appoint counsel - at trial. Defendant understands, however, that, defendant retains the right to be

d) represented by counsel - and if necessary have the court appoint counsel - at every other stage of the proceeding.

e) The right to be presumed innocent and to have the burden of proof placed on the government to prove defendant guilty beyond a reasonable doubt.

f) The right to confront and cross-examine witnesses against defendant.

g) The right to testify and to present evidence in opposition to the charges, including the right to compel the attendance of witnesses to testify.

h) The right not to be compelled to testify, and, if defendant chose not to testify or present evidence, to have that choice not be used against defendant.

i) Any and all rights to pursue any affirmative defenses, Fourth Amendment or Fifth Amendment claims, and other pretrial motions that have been filed or could be filed.

WAIVER OF APPEAL OF CONVICTION

21. Defendant understands that, with the exception of an appeal based on a claim that defendant's guilty plea was involuntary, by pleading guilty defendant is waiving and giving up any right to appeal defendant's conviction on the offense to which defendant is pleading guilty.

LIMITED MUTUAL WAIVER OF APPEAL OF SENTENCE

22. Defendant agrees that, provided the Court imposes a term of imprisonment within or below the range corresponding to an offense level of 22 and the criminal history category calculated by the Court, defendant gives up the right to appeal all of the following: (a) the procedures and calculations used to determine and impose any portion of the sentence, with the exception of the Court's calculation of defendant's criminal history category; (b) the term of imprisonment imposed by the Court, except to the extent it depends on the Court's calculation of defendant's criminal history category; (c) the fine imposed by the court, provided it is within the statutory maximum; (d) the term of probation or supervised release imposed by the Court, provided it is within the

statutory maximum; (e) the amount and terms of any restitution order; and (f) any of the following conditions of probation or supervised release imposed by the Court: the conditions set forth in General Orders 318, 01-05, and/or 05-02 of this Court; the drug testing conditions mandated by 18 U.S.C. §§ 3563(a)(5) and 3583(d); and the alcohol and drug use conditions authorized by 18 U.S.C. § 3563(b)(7).

23. The USAO agrees that, provided (a) all portions of the sentence are at or below the statutory maximum specified above and (b) the Court imposes a term of imprisonment within or above the range corresponding to an offense level of 22 and the criminal history category calculated by the Court, the USAO gives up its right to appeal any portion of the sentence.

RESULT OF WITHDRAWAL OF GUILTY PLEA

24. Defendant agrees that if, after entering a guilty plea pursuant to this agreement, defendant seeks to withdraw and succeeds in withdrawing defendant's guilty plea on any basis other than a claim and finding that entry into this plea agreement was involuntary, then (a) the USAO will be relieved of all of its obligations under this agreement; and (b) should the USAO choose to pursue any charge that not filed as a result of this agreement, then (i) any applicable statute of limitations will be tolled between the date of defendant's signing of this agreement and the filing commencing any such action; and (ii) defendant waives and gives up all defenses based on the statute of limitations, any claim of pre-indictment delay, or any speedy trial claim with respect to any such action, except to the extent that such defenses existed as of the date of defendant's signing this agreement.

EFFECTIVE DATE OF AGREEMENT

25. This agreement is effective upon signature and execution of all required certifications by defendant, defendant's counsel, and an Assistant United States Attorney.

BREACH OF AGREEMENT

26. Defendant agrees that if defendant, at any time after the signature of this agreement and execution of all required certifications by defendant, defendant's counsel, and an Assistant United States Attorney, knowingly violates or fails to perform any of defendant's obligations under this agreement ("a breach"), the USAO may declare this agreement breached. All of defendant's obligations are material, a single breach of this agreement is sufficient for the USAO to declare a breach, and defendant shall not be deemed to have cured a breach without the express agreement of the USAO in writing. If the USAO declares this agreement breached, and the Court finds such a breach to have occurred, then: (a) if defendant has previously entered a guilty plea pursuant to this agreement, defendant will not be able to withdraw the guilty plea, and (b) the USAO will be relieved of all its obligations under this agreement.

27. Following the Court's finding of a knowing breach of this agreement by defendant, should the USAO choose to pursue any charge that was not filed as a result of this agreement, then:

a) Defendant agrees that any applicable statute of limitations is tolled between the date of defendant's signing of this agreement and the filing commencing any such action.

b) Defendant waives and gives up all defenses based on the statute of limitations, any claim of pre-indictment delay, or

any speedy trial claim with respect to any such action, except to the extent that such defenses existed as of the date of defendant's signing this agreement.

c) Defendant agrees that: (i) any statements made by defendant, under oath, at the guilty plea hearing (if such a hearing occurred prior to the breach); (ii) the agreed to factual basis statement in this agreement; and (iii) any evidence derived from such statements, shall be admissible against defendant in any such action against defendant, and defendant waives and gives up any claim under the United States Constitution, any statute, Rule 410 of the Federal Rules of Evidence, Rule 11(f) of the Federal Rules of Criminal Procedure, or any other federal rule, that the statements or any evidence derived from the statements should be suppressed or are inadmissible.

COURT AND PROBATION OFFICE NOT PARTIES

28. Defendant understands that the Court and the United States Probation Office are not parties to this agreement and need not accept any of the USAO's sentencing recommendations or the parties' agreements to facts or sentencing factors.

29. Defendant understands that both defendant and the USAO are free to: (a) supplement the facts by supplying relevant information to the United States Probation Office and the Court, (b) correct any and all factual misstatements relating to the Court's Sentencing Guidelines calculations and determination of sentence, and (c) argue on appeal and collateral review that the Court's Sentencing Guidelines calculations and the sentence it chooses to impose are not error, although each party agrees to maintain its view that the calculations in paragraph 16 are consistent with the facts of this

case. While this paragraph permits both the USAO and defendant to submit full and complete factual information to the United States Probation Office and the Court, even if that factual information may be viewed as inconsistent with the facts agreed to in this agreement, this paragraph does not affect defendant's and the USAO's obligations not to contest the facts agreed to in this agreement.

30. Defendant understands that even if the Court ignores any sentencing recommendation, finds facts or reaches conclusions different from those agreed to, and/or imposes any sentence up to the maximum established by statute, defendant cannot, for that reason, withdraw defendant's guilty plea, and defendant will remain bound to fulfill all defendant's obligations under this agreement. Defendant understands that no one -- not the prosecutor, defendant's attorney, or the Court -- can make a binding prediction or promise regarding the sentence defendant will receive, except that it will be within the statutory maximum.

NO ADDITIONAL AGREEMENTS

31. Defendant understands that, except as set forth herein, there are no promises, understandings, or agreements between the USAO and defendant or defendant's attorney, and that no additional promise, understanding, or agreement may be entered into unless in a writing signed by all parties or on the record in court.

PLEA AGREEMENT PART OF THE GUILTY PLEA HEARING

32. The parties agree that this agreement will be considered part of the record of defendant's guilty plea hearing as if the entire agreement had been read into the record of the proceeding.

AGREED AND ACCEPTED

UNITED STATES ATTORNEY'S OFFICE
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SANDRA R. BROWN
Acting United States Attorney

JENNIFER L. WAIER
Assistant United States Attorney — Date 11/15/17

PATRICK S. CARTER
Defendant — Date 11-9-17

DYKE HUISH
Attorney for
Defendant PATRICK S. CARTER — Date 11-9-17

CERTIFICATION OF DEFENDANT

I have read this agreement in its entirety. I have had enough time to review and consider this agreement, and I have carefully and thoroughly discussed every part of it with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms. I have discussed the evidence with my attorney, and my attorney has advised me of my rights, of possible pretrial motions that might be filed, of possible defenses that might be asserted either prior to or at trial, of the sentencing factors set forth in 18 U.S.C. § 3553(a), of relevant Sentencing Guidelines provisions, and of the consequences of entering into this agreement. No promises, inducements, or representations of any kind have been made to me other than those contained in this agreement. No one has threatened or forced me in any way to enter into this agreement. I am satisfied with the representation of my attorney in this matter, and I am pleading guilty because I am guilty of the charge and wish to take advantage of the promises set forth in this agreement, and not for any other reason.

PATRICK S. CARTER
Defendant

11-9-17
Date

CERTIFICATION OF DEFENDANT'S ATTORNEY

I am PATRICK S. CARTER's attorney. I have carefully and thoroughly discussed every part of this agreement with my client. Further, I have fully advised my client of his rights, of possible pretrial motions that might be filed, of possible defenses that might be asserted either prior to or at trial, of the sentencing factors set forth in 18 U.S.C. § 3553(a), of relevant Sentencing Guidelines provisions, and of the consequences of entering into this agreement. To my knowledge: no promises, inducements, or representations of any kind have been made to my client other than those contained in this agreement; no one has threatened or forced my client in any way to enter into this agreement; my client's decision to enter into this agreement is an informed and voluntary one; and the factual basis set forth in this agreement is sufficient to support my client's entry of a guilty plea pursuant to this agreement.

11-9-17

DYKE HUISH
Attorney for
Defendant PATRICK S. CARTER

Date

EXHIBIT 6

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Attorneys for Defendant
PATRICK CARTER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

PATRICK S. CARTER, 808 RENEWABLE ENERGY CORPORATION, 808 INVESTMENTS, LLC, MARTIN J. KINCHLOE, PETER J. KIRKBRIDE, WEST COAST COMMODITIES, LLC, THOMAS A. FLOWERS, AND T.A. FLOWERS LLC,

Defendants.

CASE NO. 8:16-cv-02070-JVS-DFM

DEFENDANT PATRICK CARTER'S OPPOSITION TO SEC'S RENEWED MOTION FOR MONETARY REMEDIES

Date: August 23, 2021
Time: 1:30 p.m.
Courtroom: Santa Ana Court, 10C
Judge: Hon. James v. Selna

Complaint Filed: November 17, 2016
Trial Date: Vacated

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I. INTRODUCTION

This is the Securities and Exchange Commission's ("SEC") second attempt to obtain disgorgement award against defendant Patrick Carter. The first motion, which relied exclusively on the declaration of SEC accountant Christopher Conte, was denied by order dated February 24, 2021 (Dkt. #104) due to the SEC's failure to carry its burden of persuasion. The SEC's renewed motion fares no better.

Despite the benefit of specific guidance from the Court regarding the evidentiary deficiencies of the prior motion, the SEC has again failed to support its request for an eight-figure disgorgement award with admissible, competent evidence, opting instead for hearsay and lay opinion entirely untethered to their only witness's personal knowledge. In fact, the SEC's evidence in support of their claim for disgorgement of $13,440,690.65 for Mr. Carter's sale of founder shares – by far the largest single claim – is unchanged from the prior motion and no new evidence has been submitted.

This Court's prior ruling more than gently suggested that the subject matter of Mr. Conte's testimony was best presented by an expert witness pursuant to Fed. R. Evid. 702. The SEC's renewed motion rejects that suggestion and, without reservation, declares Mr. Conte a lay witness pursuant to Fed. R. Evid. 701. As this is the SEC's chosen route, Mr. Conte's testimony is limited to that based on his personal knowledge and any opinion he provides must be both "rationally based on [his] perception" and "not based on scientific, technical, or other specialized knowledge." Fed. R. Evid. 701(a) and (c).

As explained by this Court:

> The SEC may have believed that the Court would be justified in relying in Conte's calculations because of his experience as a certified public accountant. See Reply at 3 (noting that Conte arrived at his figure based on "the extensive experience he has in making these sorts of calculations"). But such a justification for Conte's calculations runs into Carter's arguments as to whether Conte is providing expert testimony. Under Federal Rule of Evidence 701, a witness can only provide opinion testimony without complying with the strictures of Rule 702 if that testimony is "not based on scientific, technical, or

> other specialized knowledge." "[A]ny part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702." Fed. R. Evid. 701 Advisory Committee Notes. Even if a witness's specialized knowledge is gained in the course of that witness's job, the witness still must comply with Rule 702. Rodriguez v. General Dynamics Armament and Technical Products, 510 Fed. Appx. 675, 676 (9th Cir. 2013).
>
> While the lack of documentary evidence makes it impossible for the Court to determine whether Conte indeed relied on specialized knowledge in coming to his conclusion, several of Conte's statements suggest that he may have. For example, Conte states that he made his calculations in part "based … on [his] extensive accounting experience, including [his] experience as a certified public accountant and [his] experience in the public and private sectors doing forensic and investigative accounting." Conte Decl., ¶ 15. Conte reviewed relevant documents and bank records "pursuant to [his] course of [his] duties with the SEC are of the type reasonably relied upon by accountants in forming opinions and inferences about, among other things, the purchases and sales of securities." *Id.* ¶ 4. Therefore, to the extent that the Court is supposed to rely on Conte's declaration because of his experience, the Court is still left uncertain as to whether Conte's declaration should be properly considered expert testimony for which the SEC would need to show the use of sufficient facts or data and reliable methods. See Fed. R. Evid. 702.
>
> The evidence that the SEC submitted with its motion was therefore insufficient for the SEC to carry its burden of persuasion. There is neither adequate documentary evidence for the SEC's calculations nor sufficient disclosures made to ensure that the Court can properly rely on Conte's calculations without falling afoul of Rule 702. The Court therefore **DENIES** the SEC's motion.

Order at pp.5-6.

Mr. Conte's declaration – which is the only evidence submitted by the SEC in support of its motion – ignores the critical distinctions between expert and lay witness testimony. While an expert may provide an opinion based on material of which he has been "made aware" and is the type reasonably relied upon by those in his field, regardless of admissibility, a lay witness may not. Fed. R. Evid. 703. An opinion from a qualified expert based on inadmissible materials he or she reviews in the course of litigation is admissible. An opinion from a lay witness based on those same records is hearsay, violates Fed. R. Evid. 602's requirement for personal knowledge, violates Fed. R. Evid. 901's requirement for authentication, ignores the best evidence rule in Fed. R. Evid. 1002, and disregards Fed. R. Evid.

701's limitation on lay witness testimony.

Due to the SEC's failure to submit competent evidence, it has again fallen short of its "ultimate burden of persuasion that its disgorgement figure is a reasonable approximation of profits causally connected to the violation." *SEC v. Schooler*, 106 F.Supp.3d 1157, 1161-62 (S.D. Cal. 2015). Accordingly, the burden never shifted to Mr. Carter to show the SEC's disgorgement figure is not reasonable.[1]

Alternatively, if the Court finds the SEC has met its burden, then disgorgement is nevertheless improper because the SEC has failed to establish that the disgorgement order sought – requiring only payment to the government with no indication that the funds will or can be distributed to investors - complies with the United States Supreme Court's opinion in *Liu v. SEC*, 140 S.Ct. 1936 (2020) requiring disgorgement be for the benefit of investors and "something more than depriving a wrongdoer of his net profits." *Id.* at 1948. Finally, if the Court is nevertheless inclined to award disgorgement, the award should be limited only to the amount supported by admissible evidence - $2,976,012.15 – which is the amount of loss Mr. Carter has admitted causing in his plea agreement in *USA v. Patrick S. Carter*, case number SACR17-00164-JLS.

Mr. Carter does not dispute this $2,976,012.15 debt is owing. His dispute with the SEC has always been over money beyond this amount. Nothing in this brief should be interpreted as minimizing or ignoring Mr. Carter's criminal and civil liability for the $2,976,012.15 that he owes to those investors which are the

[1] Due to the evidentiary failures in Mr. Conte's declaration, Mr. Carter determined that deposing Mr. Conte, a 701 witness, was neither justified nor required to respond to the SEC's showing. Any argument from the SEC that Mr. Carter's position is somehow diminished because he elected not to depose Mr. Conte should be rejected. Mr. Carter has no obligation to bolster the SEC's haphazard evidentiary presentation by spending time and money fixing an adverse party's incompetent evidence, especially an adversary with the resources of the United States Securities and Exchange Commission.

subject of his criminal conviction.[2]

II. ARGUMENT

A. Mr. Conte is Unambiguously Offered as a Lay Witness.

The February 24 order advised the SEC that, in the event it re-filed its motion for disgorgement, it must meet its burden of persuasion by either: (1) competent documentary evidence; or (2) properly qualifying Mr. Conte as an expert pursuant to Fed. R. Evid. 702. The SEC leaves no doubt that it chose the former:

> …Conte's declaration and all of the exhibits attached to it demonstrate that the SEC's disgorgement calculation is not based on any scientific, technical, or other specialized knowledge and should not fall under the strictures of Rule 702. … Not only does Conte's latest declaration include over 70 exhibits and explain in detail how Conte arrived at his disgorgement calculation, it also makes clear that he did not rely on any unique accounting expertise to do so.

SEC's Renewed Memorandum of Points and Authorities in Support of its Motion for Monetary Remedies ("Renewed Motion"), Dkt. # 108-1, p.9, l.21-p.10, l.1.

By electing to rely on Mr. Conte's lay witness testimony and no other evidence, the SEC has failed to lay even the most rudimentary foundation for its evidentiary presentation and, thus, again failed to carry its "ultimate burden of persuasion that its disgorgement figure is a reasonable approximation of profits causally connected to the violation." *SEC v. Schooler*, *supra*, 106 F.Supp.3d at 1161-62.

As explained below, Mr. Conte's declaration runs afoul of the rules of evidence in three critical respects, each sufficiently serious to independently justify rejecting his testimony:

1) Mr. Conte admits his testimony is based on documents, only some of which are attached as exhibits to his declaration, those that are attached are not

[2] Mr. Carter submits that the Court may reasonably order the $2,976,012.15 to be paid in this case or defer it to the criminal proceeding, where it has already been admitted and established and will be ordered to be paid in restitution in case No. SACR17-00164-JLS.

properly authenticated and are offered for the truth of their content, therefore, they and his testimony are hearsay;

2) The Best Evidence Rule, Fed. R. Evid. 1001, precludes Mr. Conte from offering testimony regarding the content of documents not attached to his declaration, which includes the entirety of the SEC's claimed $13,440,690.65 for disgorgement of proceeds of the sale of founder shares; and

3) As a lay witness with no claimed personal knowledge of the operations of 808 Renewable Energy Corp., Fed. R. Evid. 701 precludes Mr. Conte from offering opinions regarding which, if any funds paid to Mr. Carter are causally connection to violation of securities laws or opinion that certain expenses of 808 Renewable were not for legitimate business purposes.

B. <u>The SEC Has Failed To Meet Its Burden Of Persuasion To Establish A Reasonable Approximation Of The Amount To Be Disgorged Because The Evidence In Support Of The Motion Is Inadmissible.</u>

Mr. Conte's is not designated as an expert, as such, he may only testify from his own personal knowledge and any opinions he offers must be constrained to those which are rationally based on his own perception. Fed. R. Evid. 602 and 701. Moreover, as a lay witness, Mr. Conte cannot rely on inadmissible material to form opinions. Fed. R. Evid. 703. He "cannot simply take the stand and repeat what he was told by witnesses or read in documents. Such testimony would be hearsay…." *United States v. O'Brien*, 2014 U.S. Dist. LEXIS 14703, at *40-41 (D. Mass. Feb. 6, 2014), *see also United States v. Flores-de-Jesus*, 569 F.3d. 8, 26 (1st Cir. 2009) ("[A]ll of Toro's testimony about the role of the defendants in the conspiracy that was based on information gathered from police reports, other documents not introduced into evidence, and interviews with CI Espada, cooperating co-conspirator Medina Torres, or other individuals, was hearsay and inappropriate overview testimony.").

1. Mr. Conte's Declaration Is Hearsay.

a. The Entirety Of Mr. Conte's Testimony Relies On Documents And Not His Personal Knowledge.

Mr. Conte's declaration leaves no doubt that his testimony is based on records and not his own personal knowledge:

> During the course of the SEC's investigation into this matter, and pursuant to my duties as an accountant with the SEC, I reviewed offering documents, business records, and bank records (including underlying detail, such as account statements, account opening documents, signature cards, wire transfers, deposit slips and copies of items deposited, checks, withdrawal slips and bank account transfers).

Conte Declaration, p.2, ll.14-18.

> Based on my review of the bank records and other documents noted above, I created several summaries, like spreadsheets, tables, and charts, that contain simple mathematical calculations, which I used to make reasonable approximations regarding how much money in these bank accounts came from investors, how much money went to Carter and the other individuals or entities affiliated with him, how much money they put back into 808 Renewable and 808 Energy, and how much money was used for legitimate business expenses of 808 Renewable and 808 Energy. I used these calculations to arrive at a reasonable approximation of the disgorgement amount in this case.

(Conte Declaration, p.3, l.23-p.4, l.3

> One of the first steps I took in arriving at a reasonable approximation of the disgorgement amount in this case was to determine how much money Carter and the other defendants raised from investors as part of the offering frauds alleged in the SEC's complaint. To do this, I primarily reviewed what appeared to be investor folders maintained by 808 Renewable. In these folders, 808 Renewable kept information about the investors, including their names, their method of payment when investing, and the amount of shares they received. I compared the information in these investor folders to the bank records listed above in order to confirm, to a reasonable extent, the amount of the investment, the date of the investment, and the name of the investor. In addition, I reviewed what appeared to be commission payout sheets, which also tended to list the names of investors and how much they invested, but also the commission that the defendants received in connection with that investment. Finally, I occasionally reviewed emails and notations on checks deposited into these accounts.

(Conte Declaration, p.4, ll.6-19).

> Based on my review of the bank records for 808 Renewable and Carter between November 2011 and November 16, 2016, I determined that Carter received $13,440,690.65 from the sale of his Founder Shares. The payments for his Founder Shares were made by wire, cashier's check, check, money order, and cash. Based on my review of financial and business records, including examining agreements, emails, and notations on checks deposited into these accounts, I determined that the $13,440,690.65 Carter received from the sale of his Founder Shares came from investors.

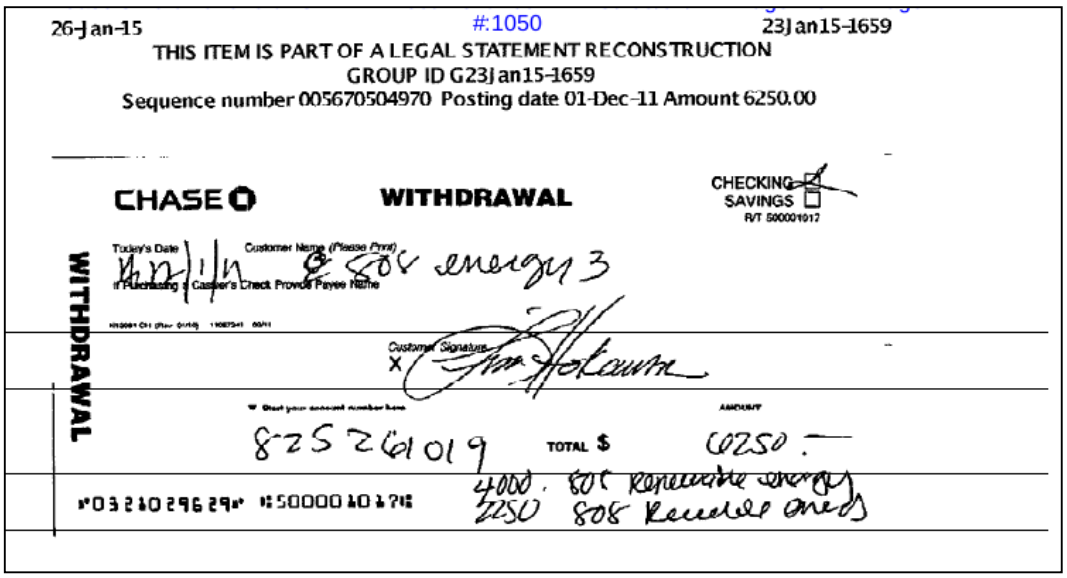
(Conte Declaration, p.5, ll.11-18).

b. The Best Evidence Rule And The Requirement For Authentication Prohibit Mr. Conte From Offering Testimony Of The Content Of The Documents On Which His Conclusions Are Based.

The documents which form the basis for Mr. Conte's testimony are either wholly absent (*e.g.*, the "offering documents," "business records," account opening documents," "signature cards," "investor folders," and "emails") or are attached as exhibits to Mr. Conte's declaration without proper authentication. As to the former category (absent documents), Fed. R. Evid. 1002, the "Best Evidence Rule," prohibits Mr. Conte from testifying regarding their content without introducing the documents themselves. As to the latter category of documents (*e.g.*, those appended to the declaration as Exhibits 2-77, they – and any testimony derived from them – are inadmissible because the SEC has not appropriately authenticated the documents, nor has it even attempted to establish the bases for the business records exception to the hearsay rule. This is insufficient, as satisfying a burden of persuasion requires competent evidence, not merely *ipse dixit* decrees.

The requirement for authentication under Fed. R. Evid. 901 is said to fall within the category of relevancy dependent upon fulfillment of a condition of fact governed by Fed. R. Evid. 104(b). *In re James E. Long Constr. Co.*, 557 F.2d 1039, 1040 (4th Cir. 1977). In simpler terms, the party seeking to admit a writing "must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a).

While Mr. Conte attempts to authenticate Exhibits 2-77 to his Declaration by stating they are "true and correct copies of" "withdrawals slips, checks, and statements" and "cashier's checks, checks, and statements," Mr. Conte does not explain how he has personal knowledge of the documents' authenticity and the documents themselves reveal that Mr. Conte cannot have such knowledge. Conte Declaration, p.6, ll.5-6 and ll.26-28. By way of example, consider Exhibit 2 to Mr. Conte's declaration (reproduced below):


26-Jan-15 #:1050 23Jan15-1659
THIS ITEM IS PART OF A LEGAL STATEMENT RECONSTRUCTION
GROUP ID G23Jan15-1659
Sequence number 005670504970 Posting date 01-Dec-11 Amount 6250.00
CHASE
WITHDRAWAL
CHECKING
SAVINGS
WITHDRAWAL
TOTAL $ 6250.

The document appears to be a withdrawal slip from an account at Chase Bank. Mr. Conte offers no testimony regarding how he can truthfully testify it is a true and correct copy of that which it purports to be or that it accurately reflects a transaction which ever occurred.

c. Even If The Documents On Which Mr. Conte's Conclusions Are Based Were Properly Authenticated, They – And Mr. Conte's Testimony Based Thereon – Are Still Hearsay.

Even if Mr. Conte had sufficient personal knowledge to testify that the exhibits attached to his declaration (other than Exhibits 1 and 78) are true and correct copies of what they purport to be, the documents – and Mr. Conte's

testimony derived from them – are nevertheless inadmissible hearsay. As noted by the Advisory Committee's notes to Fed. R. Evid. 901: "It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain." *Ibid.*

Hearsay is defined as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Exhibits 2-77 to Mr. Conte's declaration fall squarely within this definition. Without exception, they purport to be financial records which Mr. Conte offers as proof of his conclusions that funds were deposited to, withdrawn from, or transferred between bank accounts. Mr. Conte does not claim – and cannot credibly claim - that he has personal knowledge of the transactions which these exhibits purport to document.

Fed. R. Evid. 602 creates a bright-line rule that non-expert testimony must be based on the witness's personal knowledge. This rule precludes testimony based on or which merely repeats out-of-court statements from third parties:

> A witness's testimony must be based on personal knowledge. *United States v. $92,203.00 in U.S. Currency*, 537 F.3d 504, 508 (5th Cir. 2008); *see* Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.") The personal knowledge requirement and the hearsay rule "are cut at least in part from the same cloth," as Rule 602 prevents a witness from testifying about a hearsay statement upon which has no personal knowledge. *United States v. Quezada*, 754 F.2d 1190, 1195 (5th Cir. 1985). It is axiomatic that a witness may not merely repeat the subject matter of a hearsay statement, nor may he rely on inadmissible hearsay as a substitute for his own knowledge.

United States v. El-Mezain, 664 F.3d 467, 495 (5th Cir. 2011).

While financial account records *can* fall within an exception to the rule against hearsay under Fed. R. Evid. 803(6), the SEC has not even attempted to show that the elements of the business records exception have been satisfied.

More particularly, Rule 803(6) creates an exception to the rule against hearsay for:

> A record of an act, event, condition, opinion, or diagnosis if:
>
> (A) the record was made **at or near the time** by – or from information transmitted by – someone with knowledge;
>
> (B) the record was kept in the course of **a regularly conducted activity** of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a **regular practice** of that activity;
>
> (D) **all these conditions are shown by the testimony of the custodian or other qualified witness**, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> (E) the opponent does not show that the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6) (bold added).

First, and most importantly, element D is wholly absent. There are no custodial declarations establishing elements A-C nor are there any certifications from the custodians of the records. Without testimony or certification from a custodian with personal knowledge of the records, Exhibits 2-77 remain hearsay and Mr. Conte may not simply adopt them as his testimony.

Even were this not the case, several of the exhibits to Mr. Conte's declaration show on their face that they are not records made "at or near the time" of the acts they purport to depict, are not records of a "regularly conducted activity" and are not made in the "regular practice" of the institution. Turning back to Exhibit 2 as an example, the document recites "This item is part of a legal statement reconstruction." *Ibid.*

After-the-fact "reconstructions" are not admissible as business records. In *Bethlehem Steel Corp. v. Avondale Shipyards*, 1004 U.S. Dist. LEXIS 1066 (E.D. La, Feb. 3, 2004), the Court was asked to award damages based upon a reconstruction of costs allegedly stemming from breach of contract for repairs to a dredge vessel. The District Court for the Eastern District of Louisiana found the

reconstruction to be inadmissible as a business record, holding:

> Based on the Government's evidence or lack thereof, the Court concludes that PNS was not set up to segregate the cost of the port tail shaft replacement from the cost of the other unrelated work being performed at the same time, and the Corps' claim is based on an attempted after-the-fact reconstruction of costs by James Walker, a now retired PNS boilermaker/administrator/accountant, based on parameters set by the Corps itself.
>
> ***
>
> USA-7 was not made near the time of the casualty, but five years after the fact and three months prior to trial. USA-7 was not a regularly produced business document of PNS and there was no testimony that this exhibit was kept in the course of a regularly conducted business activity of PNS. In fact, Mr. Walker was retired from PNS when this exhibit was generated.

Id. at *9-13.

The SEC cites to *SEC v. Fujinaga*, a case from the District of Nevada, as support for its proposition that lay witness testimony in the form of a declaration from an SEC accountant is sufficient evidentiary support for a disgorgement award. *Fujinaga* was a Ponzi scheme case where the SEC's motion for judgment was filed after the court granted a motion for summary judgment in which the SEC authenticated its evidence. *See* Exhibits A, B, and C to the accompanying declaration of Dyke E. Huish ("Huish Decl."). As foundation for the exhibits had previously been laid, the SEC accountant's testimony was, in that case and under those specific circumstances, truly limited to addition and subtraction.

Moreover, *Fujinaga* is distinguishable from the case at hand because there the defendant only objected to the SEC accountant's declaration on the basis that it was improper expert testimony. Exhibit D to the Huish Decl. It is axiomatic that, in the absence of any objections to the witness's foundation, authentication or hearsay, the District Court did not rule that an accountant employed by the SEC may disregard the Federal Rules of Evidence.

Instead, the case of *Richards v. Now, LLC,* 2019 U.S. Dist. LEXIS 77979 (C.D. Cal. May 8, 2019) is on point and instructive with regard to the appropriate

treatment of a lay witness declaration made without sufficient personal knowledge of the records on which it is based. At issue in *Richards* was a motion to remand a putative wage and hour class action. In resisting remand, the defendants submitted a declaration from Lihua Lu, a staff accountant employed by Now, LLC, which purported to establish that certain requirements of the Class Action Fairness Act had been met. The Court excluded Ms. Lu's declaration, finding:

> Here, unlike the declarant in *Davis*, who was an executive at the company, Lu is merely a "Staff Accountant" at The Now and has not established that she has personal knowledge regarding employment records generally. Lu's position does not naturally correlate to one requiring comprehensive knowledge and familiarity with all of The Now's employment records, let alone the accuracy of those records. Moreover, Lu has not even stated in her declaration how long she has worked for The Now, meaning that Lu does not have any basis to confirm the accuracy of any employment records she reviewed.
>
> Lu's only personal knowledge is based on her review of the vague employment records, including personnel files, compensation records, schedule records, payroll records, and "documents compiling data from these records," Lu Decl. ¶1, prior to submitting her declaration about what those records contain. But the pertinent content of Lu's declaration – discussing the content of these employment records – is inadmissible hearsay predicated upon unauthenticated business records. For hearsay to be admissible under the business records exception, the party offering records must establish, inter alia, that (A) the record was made contemporaneously by someone with knowledge as to the content of the record, (B) the record was kept in the ordinary course of business, (C) making the record was a regular practice of business, and most importantly, (D) the record is introduced by a custodian or other qualified witness. *See* Fed. R. Evid. 803(6). Lu has not established a foundation that she has personal knowledge that the information contained in the records she reviewed was made contemporaneously. Nor has Lu offered competent evidence that the records she reviewed were produced and maintained as part of The Now's regular business practices; Lu's conclusory statement that these records were "created, kept, and maintained in the ordinary course of business," Lu Decl. ¶1, comes without a shred of supporting evidence or foundation as to Lu's personal knowledge about such a claim.

Id. at *22-24.

In the instant case, Mr. Conte, himself an accountant employed by one of the parties, is on equal footing with Ms. Lu. His declaration is based on a review of records, but those records are unauthenticated and neither he nor the SEC even attempt to show that the requirements of the business records exception to the rule

against hearsay have been met. Accordingly, the Court should exclude Mr. Conte's declaration as hearsay, just as Judge Wilson excluded Ms. Lu's declaration in *Richards*.

2. The Best Evidence Rule Precludes Disgorgement Of Claimed Profits From Founder Shares.

The portions of Mr. Conte's declaration addressing disgorgement of sums Mr. Carter allegedly received from 808 Renewable Energy Corp. ("808 Renewable") and alleged improper business expenses are allegedly based on documents, but these documents are conspicuously absent. In omitting these documents from Mr. Conte's declaration, the SEC obscures the basis for its request for a $13,440,690.65 disgorgement order for Mr. Carter's alleged profits from the sale of founder shares. Mr. Carter is, again, being left to take shots in the dark as to the SEC's arguments. Mr. Conte cannot simply offer testimony regarding the content of these missing documents without violating the letter of the best evidence rule and its fundamental purpose "to protect against error in reporting details about a document." *United States v. Iverson,* 808 F.3d 1015, 1024 (10th Cir. 2016)

The entirety of Mr. Conte's testimony in support of the SEC's request for disgorgement of alleged founder share profits is as follows:

> Based on my review of the bank records for 808 Renewable and Carter between November 2011 and November 16, 2016, I determined that Carter received $13,440.690.65 from the sale of his Founder Shares. The payments for his Founder Shares were made by wire, cashier's check, check, money order, and cash. Based on my review of financial and business records, including examining agreements, emails, and notations on checks deposited into these accounts, I determined that het $13,440,690.65 Carter received from the sale of his Founder Shares came from investors.

Conte Declaration, p.5, ll.11-18.

Fed. R. Evid. 1002 precludes a lay witness from offering testimony regarding the content of a document – or, in this case, documents – without introducing the original or a copy thereof into evidence. *Ibid.* and Fed. R. Evid. 1003. The SEC cannot simply rely on Mr. Conte's statement that he reviewed

unspecified, absent documents of unknown origin as support for a financially crippling disgorgement order. In fact, the above-quoted portion of Mr. Conte's declaration – which is the only evidence submitted by the SEC with respect to disgorgement of profits from founder shares – is identical to Mr. Conte's prior declaration, which the Court found did not meet the SEC's burden of persuasion.

The fundamental failure of the SEC's evidentiary showing becomes instantly apparent if one were to substitute any private plaintiff in its position here. For purposes of illustration, assume that this is action is a collection action by American Express against Mr. Carter. If liability had been established and American Express filed a motion to set damages supported only by a declaration of one of its staff accountants stating that he had reviewed documents (but did not attach them as exhibits) and that American Express was entitled to a judgment of $13,440,690.65, it would be rejected out-of-hand. The result here should be no different. "Research has revealed no authority for the proposition that a district judge must rely on a representation, made by the government or any other litigant for that matter. Instead, in making a determination, a trial court must rely on the evidence before it." *Mora v. United States*, 955 F.2d 156, 158 (2d. Cir. 1992). "The government, no less than any other litigant, is required to ensure that evidence it intends to offer is admissible, to anticipate objections from opposing parties, and to comply with the Federal Rules of Evidence." *United States v. Weiland*, 420 F.3d 1062, 1072 at fn.7 (9th Cir. 2005).

3. Despite The SEC's Representations To The Contrary, Mr. Conte's Disgorgement Conclusion Is Impermissible Lay Witness Opinion Not Founded On Personal Knowledge.

Except for expert witness testimony offered under Fed. R. Evid. 703, "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. Further, while lay witnesses are permitted to offer opinion testimony, such

testimony is limited to opinions which are "rationally based on the witness's perception…." Fed. R. Evid. 701(a). This limitation on lay witness opinion is described by the Advisory Committee's notes as "the familiar requirement of firsthand knowledge or observation." *Ibid.*

If Mr. Conte's testimony was solely constrained to math, it would be admissible, as such is within his own personal knowledge and not based on any scientific, technical, or other specialized knowledge. Mr. Conte's declaration, especially when considering the SEC's burden of persuasion on a disgorgement motion, is not and cannot be so narrow. In drawing conclusions from the hearsay documents he reviewed, Mr. Conte necessarily offers opinions which are not supported by his own personal knowledge. *Stagman v. Ryan*, 176 F.3d 986, 996 (7th Cir. 1999) (defining opinion as an inference or conclusion drawn by the witness.).

It is well-established that, "[w]hen moving for disgorgement, the SEC bears the ultimate burden of persuasion that its disgorgement figure is a reasonable approximation of profits **causally connected to the violation**." *SEC v. Schooler*, *supra*, 106 F.Supp.3d at 1161-62 (bold added). The burden of persuasion is defined as follows:

> When one must *prove* a given fact or issue, that person carries the *burden of persuasion* on that issue. We think to prove her case meant to prove the material allegations of her complaint, or each and every allegation in her complaint necessary to recover a judgment. To prove means to establish or make certain; to establish a fact or hypothesis as true by satisfactory and sufficient evidence.

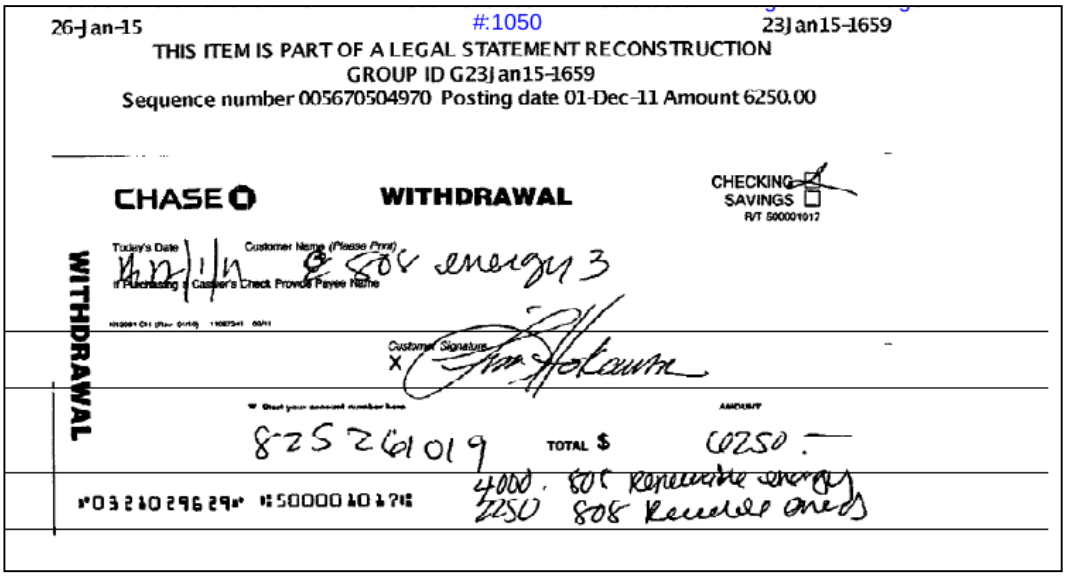
Greenwich Collieries v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor, 990 F.2d 730, 374-75 (3d. Cir. 1993), internal quotations and citations omitted, emphasis in original. The burden of persuasion necessarily includes an evidentiary showing: "The same party who has the burden of persuasion also starts out with the burden of producing evidence." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (citing 21B Fed. Practice §5122,

at 401). Another way to describe the burden of persuasion in more utilitarian terms is "which party loses if the evidence is closely balanced." *Schaffer v. Weast*, 546 U.S. 49, 56 (2005).

Even assuming, for argument's sake, that Mr. Conte's declaration is otherwise admissible, it still fails to satisfy the SEC's burden of persuasion because, as a lay witness, Mr. Conte has no basis to offer an opinion that any of the financial records discussed in his declaration or attached as exhibits thereto are "causally connected to the violation" of securities laws.

Even the most cursory review of the documents appended to Mr. Conte's declaration raises serious questions. Where did they come from? How are they related to Mr. Carter? How are they related to violation of securities laws? Why did Mr. Conte select these documents and not others? Why does Mr. Conte conclude that some figures represent improper gains but not others on the same page? Why does Mr. Conte conclude that certain transactions represent improper gains to Mr. Charter when Mr. Carter's name doesn't even appear on the documents?

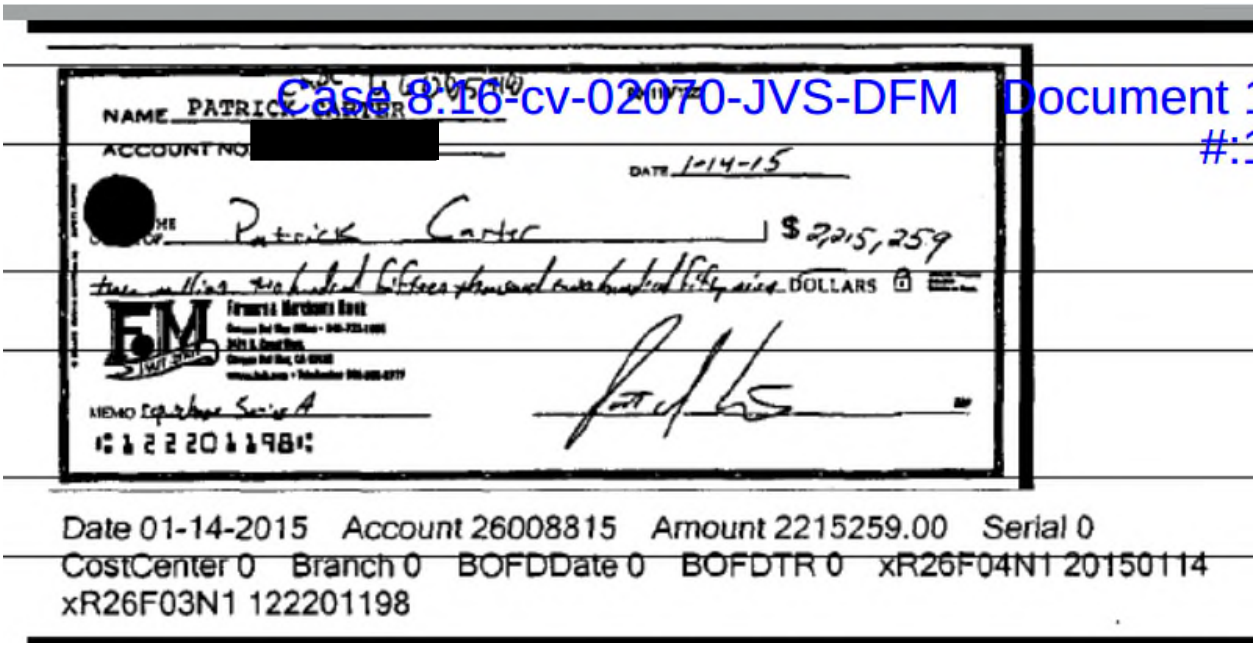
As an example, we return again to Exhibit 2:


26-Jan-15 #:1050 23Jan15-1659
THIS ITEM IS PART OF A LEGAL STATEMENT RECONSTRUCTION
GROUP ID G23Jan15-1659
Sequence number 005670504970 Posting date 01-Dec-11 Amount 6250.00
CHASE
WITHDRAWAL
CHECKING
SAVINGS
R/T 500001017
WITHDRAWAL
Today's Date
Customer Name (Please Print)
If Purchasing a Cashier's Check, Provide Payee Name
Customer Signature
X
TOTAL $
6250.
4000. 80% Renewable energy
2250 80% Renewable energy

Assuming proper authentication and evidence sufficient to satisfy the business records hearsay exception, Exhibit 2, without explanation or

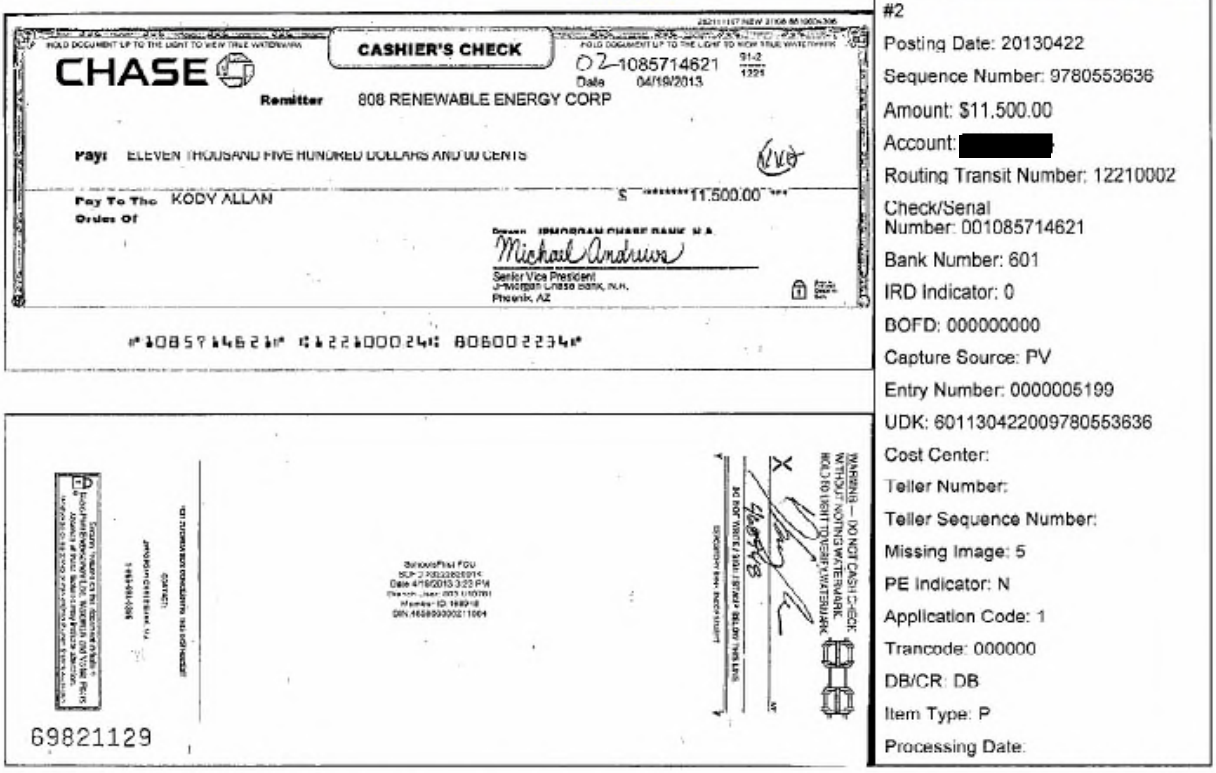
extrapolation, does not demonstrate the withdrawal it purports to document was either causally connected to violations of securities laws or that the funds withdrawn were paid to Mr. Carter. Mr. Conte cannot bridge this gap without making his own assumptions and conclusions but, as a lay witness, those conclusions and assumptions must be "rationally based on [his] perception" and he provides no evidence even suggesting this is the case. Fed. R. Evid 701. Instead, Mr. Conte's conclusion seems to be nothing more than pure speculation.

Mr. Conte's conclusions concerning Exhibit 45 further illustrate that his declaration is often speculation masquerading as lay witness opinion:



Ignoring for the moment that this document is unauthenticated and hearsay, it purports to be a check from Patrick Carter to Patrick Carter for $2,215,259. Without offering any foundation for his personal knowledge or first-hand observation about the source of these funds, Mr. Conte simply concludes that this check, purporting to be one from Mr. Carter to himself, is related to profits resulting from a violation of securities laws. *SEC v. Schooler*, *supra*, 106 F.Supp.3d at 1161-62.

Exhibit 62 is another example of sheer speculation. According to Mr. Conte's declaration, this document is evidence of a payment Mr. Conte concluded


CASHIER'S CHECK

CHASE

Remitter 808 RENEWABLE ENERGY CORP

Pay: ELEVEN THOUSAND FIVE HUNDRED DOLLARS AND 00 CENTS

Pay To The Order Of KODY ALLAN

$ 11,500.00

Michael Andrews
Senior Vice President

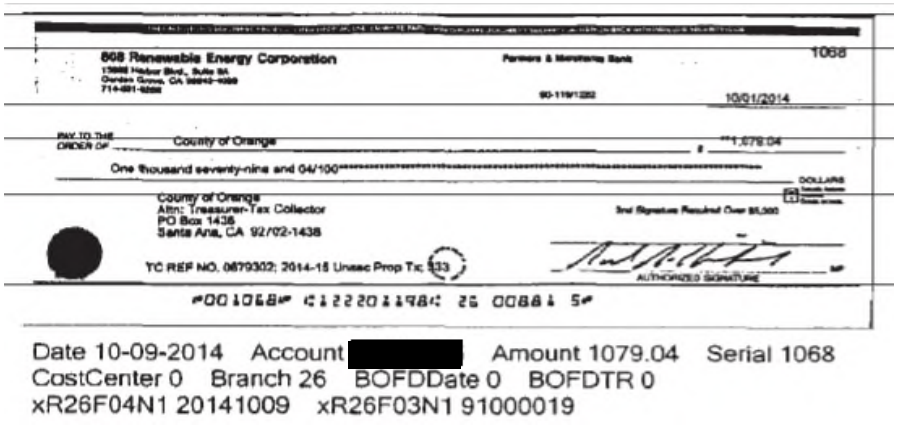
69821129

#2
Posting Date: 20130422
Sequence Number: 9780553636
Amount: $11,500.00
Account: [redacted]
Routing Transit Number: 12210002
Check/Serial Number: 001085714621
Bank Number: 601
IRD Indicator: 0
BOFD: 000000000
Capture Source: PV
Entry Number: 0000005199
UDK: 601130422009780553636
Cost Center:
Teller Number:
Teller Sequence Number:
Missing Image: 5
PE Indicator: N
Application Code: 1
Trancode: 000000
DB/CR: DB
Item Type: P
Processing Date:

had "no legitimate business purpose related to 808 Renewable":

Again, ignoring that this document is unauthenticated hearsay, it purports to be a cashier's check for $11,5000 drawn on an account in the name of 808 Renewable and made payable to Kody Allan. Mr. Conte's declaration does not once mention Kody Allan or why a payment from 808 Renewable to Kody Allan is fairly chargeable against Mr. Carter. Without laying a foundation for personal knowledge of the identity of Kody Allan and his or her connection to Mr. Carter, Mr. Conte's lay opinion testimony is inadmissible speculation.

Exhibit 75 is another example of overreaching and erroneous opinion testimony:



808 Renewable Energy Corporation
1068
10/01/2014
PAY TO THE ORDER OF County of Orange
One thousand seventy-nine and 04/100
DOLLARS
County of Orange
Attn: Treasurer-Tax Collector
PO Box 1438
Santa Ana, CA 92702-1438
TC REF NO. 0879302; 2014-15 Unsec Prop Tax 533
AUTHORIZED SIGNATURE

Date 10-09-2014 Account [redacted] Amount 1079.04 Serial 1068
CostCenter 0 Branch 26 BOFDDate 0 BOFDTR 0
xR26F04N1 20141009 xR26F03N1 91000019

This document purports to be a check from 808 Renewable to the County of Orange and directed to the "Treasurer/Tax Collector." Mr. Conte offers nothing to explain or justify how a check for taxes to the County of Orange written by a company headquartered in Orange County is fairly chargeable against Mr. Carter.

Finally, turning to Exhibit 66 to Mr. Conte's declaration, this unauthenticated hearsay document purports to be part of a statement showing charges against a debit card linked to a Chase Bank deposit account:

ATM & DEBIT CARD WITHDRAWALS

DATE	DESCRIPTION		AMOUNT
08/01	Card Purchase	07/30 Center Auto Machine Sho Oakland CA Card 2907	$320.00
08/02	Card Purchase	08/01 International Fire I San Francisco CA Card 2907	90.00
08/05	Card Purchase	08/02 Super 8 Motel San Mate 650-3423273 CA Card 2907	1,008.20
08/05	Card Purchase	08/03 Staples6823628950000 800-3333330 CA Card 2907	76.93
08/05	Card Purchase	08/04 Ringcentral, Inc 650-4724100 CA Card 2907	18.19
08/05	Card Purchase	08/05 ADT*Security Services 800-238-2455 FL Card 2907	1,694.97
08/06	Card Purchase	08/06 Att*Bill Payment 800-288-2020 TX Card 2907	100.00
08/07	Card Purchase	08/05 Worldwide Express 662-598-4855 CA Card 2907	447.23
08/07	Card Purchase	08/06 Waukesha-Pearce Housto 713-7231050 TX Card 2907	4,041.58
08/07	Card Purchase	08/06 Power Solutions Inc 630-757-5322 IL Card 2907	187.46
08/07	Recurring Card Purchase	08/06 Intuit *Qb Online 800-286-6800 CA Card 2907	39.95
08/08	Card Purchase	08/06 Super 8 Motel San Mate 650-3423273 CA Card 2907	739.32
08/08	Card Purchase	08/07 Waukesha Pearce-Ontari 909-6380003 CA Card 2907	2,177.50
08/09	Card Purchase	08/08 Waukesha Pearce-Ontari 909-6380003 CA Card 2907	927.01
08/09	Card Purchase	08/08 Power Solutions Inc 630-757-5322 IL Card 2907	3,772.61
08/12	Recurring Card Purchase	08/09 Intuit *Qb Online 800-286-6800 CA Card 2907	35.95
08/12	Recurring Card Purchase	08/11 Stamps.Com 888-434-0055 CA Card 2899	15.99
08/14	Card Purchase	08/12 7693 Royal Santa Ana CA Card 2907	172.37
08/15	Recurring Card Purchase	08/14 Dun & Bradstreet Cred 800-8922980 CA Card 2907	69.00
08/15	Recurring Card Purchase	08/14 Intuit *Qb Online 800-286-6800 CA Card 2907	39.95
08/16	Card Purchase	08/15 Power Solutions Inc 630-757-5322 IL Card 2907	123.00
08/16	Card Purchase	08/15 Power Solutions Inc 630-757-5322 IL Card 2907	118.42
08/16	Card Purchase	08/16 Amazon.Com Amzn.Com/Bill WA Card 2907	97.38
08/19	Card Purchase	08/17 Amazon.Com Amzn.Com/Bill WA Card 2907	15.11
08/19	Card Purchase	08/16 Power Solutions Inc 6307575322 IL Card 2907	491.06
08/19	Card Purchase	08/17 Craigslist.Org 415-566-6394 CA Card 2907	25.00
08/19	Card Purchase	08/17 Craigslist.Org 415-566-6394 CA Card 2907	75.00
08/21	Card Purchase	08/21 Hns*Hughesnet.Com 866-347-3292 MD Card 2907	108.54
08/22	Card Purchase	08/22 Att*Bill Payment 800-288-2020 TX Card 2907	85.00
08/23	Card Purchase	08/21 Bel Mateo Motel Belmont CA Card 2907	120.00
08/26	Card Purchase	08/23 Waukesha Pearce-Ontari 909-6380003 CA Card 2907	603.32

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Mr. Conte's declaration states that the highlighted charges, including a budget motel, small purchases from Amazon, and $100 paid to Craigslist (a job posting board) represent charges with "no legitimate business purpose related to 808 Renewable." Again, Mr. Conte provides no indication that he has personal knowledge regarding the purposes of these charges and, therefore, no valid basis to offer opinion under Fed. R. Evid. 701 that any charges personally benefitted Mr. Carter. His conclusions are nothing more than speculation and should be rejected.

Moreover, Mr. Conte's opinion that certain expenses paid by 808 Renewable were not related to its business operations is of no import without tying those expenses to securities violations, which he fails to do. Abuse of corporate funds is fair game for a shareholder derivative action but, without a link to securities violations, is not an appropriate basis for an SEC enforcement action.

C. No Disgorgement Award Should Issue Because The SEC Has Not Shown That Disgorged Funds Can Or Will be Used For The Benefit Of Investors.

In *Liu v. SEC*, 140 S.Ct. 1936 (2020), the United States Supreme Court was asked to resolve, among other issues, whether the authority granted to the SEC by Congress in 15 U.S.C. §78u(d)(5) to pursue "equitable relief that may be appropriate or necessary for the benefit of investors" permits a disgorgement award payable to the government without an obligation to return disgorged funds to aggrieved investors. The Supreme Court directed the question be considered on remand:

> The Government additionally suggests that the SEC's practice of depositing disgorgement funds with the Treasury may be justified where it is infeasible to distribute the collected funds to investors. It is an open question whether, and to what extent, that practice nevertheless satisfies the SEC's obligation to award relief "for the benefit of investors" and is consistent with the limitation of §78u(d)(5). The parties have not identified authorities revealing what traditional equitable principles govern when, for instance, the wrongdoer's profits cannot practically be disbursed to the victims. But we need not address the issue here. The parties do not identify a specific order in this case directing any proceeds to the Treasury. If

> one is entered on remand, the lower courts may evaluate in the first instance whether that order would indeed be for the benefit of investors as required by §78u(d)(5) and consistent with equitable principles.

Liu, supra, 140 S. Ct. 1936 at 1948-49, internal citations omitted.

Although *Liu* has yet to reach a conclusion on the above issue, Mr. Carter submits that a disgorgement award payable to the government does not constitute equitable relief or the benefit of investors" so long as the SEC is under no obligation to actually disburse the funds to investors. To hold to the contrary would violate the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Liu, supra,* 140 S. Ct. at 1948.

Nothing about the judgment sought by the SEC will benefit the persons who purchased securities in 808 Renewable. If the proposed judgment is entered, all recovery will go to the United States, without any obligation to even attempt to return funds to individual investors. Indeed, the net result of the disgorgement award requested by the SEC is that funds from aggrieved investors will become the property of the United States Treasury, unjustly enriching the United States to the detriment of the investors which the SEC is charged to protect.

In the SEC's prior motion for monetary relief, it argued and the Court agreed that "the SEC's representations that it intends to so distribute the disgorged funds is sufficient o satisfy § 78(u)(d)(5)'s requirement." Order (Dkt. #104), p.4. In support of this ruling, the Court's order cites to *SEC v. Blockvest, LLC*, *SEC v. Smith*, *SEC v. Curative Biosciences*, and *SEC v. Rinfret.*

SEC v. Blockvest, LLC, 2020 U.S. Dist. LEXIS 235474 (S.D. Cal. Dec. 10, 2020) did not resolve any challenge to whether the SEC could obtain a disgorgement award payable to the Government in light of the Supreme Court's concerns in *Liu*. As such, it is of no useful guidance here. Similarly, *SEC v. Smith*, 2020 U.S. Dist. LEXIS 194614 (C.D. Cal. Oct. 19, 2020) is an order granting an application for a default judgment. It did not address whether a disgorgement

award payable to the government, without further instruction, satisfies §78(u)(d)(5).

In *SEC v. Rinfret*, 2020 U.S. Dist. LEXIS 209278 (S.D. NY Nov. 9, 2020), also an application for a default judgment, the Southern District of New York held that a disgorgement award was "consistent with equitable principles, as it was fraudulently obtained from investors and the SEC has represented that it will use almost the entirety of these funds to compensate those same investors." *Id.* at *18.

SEC v. Curative Biosciences, 2020 U.S. Dist. LEXIS 246382 (C.D. Cal. Oct. 22, 2020) did resolve a challenge as to whether the disgorgement award sought by the SEC was truly "for the benefit of investors" as required by §78(u)(d)(5). There Hon. Judge Wilson held "The Court finds the disgorgement requested by the SEC is consistent with the equitable principles identified in *Liu*. First, the SEC asserts that it 'intends to distribute the funds to investors harmed by the Alversons' sale of unregistered securities.'" *Id.* at *15-16 (internal citations omitted).

The Ninth Circuit, however, took exception to a disgorgement award payable to the government in *United States SEC v. Yang*, 824 Fed.Appx. 445 (9th Cir. 2020). In *Yang*, just as in the present case, the SEC sought a disgorgement award payable to the SEC. Huish Decl., Exhibit E (final judgment in Yang). On appeal, the thee-judge panel unanimously held that it was "unclear that the disgorgement amounts ordered are 'appropriate and necessary for the benefit of investors'" and remanded the case back to Judge Wilson for consideration of the question. *Id.* at 447. On remand, Judge Wilson again found that disgorgement was appropriate for the benefit of investors based on the SEC's representation "that it intends to distribute the disgorged funds to the defrauded investors." *SEC v. Yang*, 2021 U.S. Dist. LEXIS 64413 at *14 (C.D. Cal. Feb. 16, 2021). Yang filed a notice of appeal, which is pending with the Ninth Circuit.

Similarly, in *United States SEC v. Janus Spectrum LLC*, 811 Fed. Appx. 432 (9th Cir. 2020), the Ninth Circuit expressed concern over whether a disgorgement

award would be for the benefit of investors under *Liu* and remanded the case back to the District of Arizona to resolve the question. *Id.*at 434. On remand, the District Court held a status conference at which the SEC represented it had identified aggrieved investors and developed a mechanism to distribute the disgorgement award accordingly. Based on that representation, the District Court entered an order mandating "that the disgorgement award shall be provided for the benefit of investors pursuant to Liu, 140 S. Ct. at 1947-49." Huish Decl., Exhibit F at p.1, ll.26-27.

Yang and *Janus Spectrum LLC* are the only two instances in which the Ninth Circuit has addressed whether a disgorgement award payable to the government satisfies §78(u)(d)(5)'s requirement that disgorgement be issued for the benefit of investors. Neither opinion held that the SEC's naked representation that it intends disgorged funds to be used for the benefit of investors is sufficient, nor should this be the case: "Research has revealed no authority for the proposition that a district judge must rely on a representation, made by the government or any other litigant for that matter. Instead, in making a determination, a trial court must rely on the evidence before it." *Mora v. United States, supra*, 955 F.2d at 158.

On both instances in which it has faced concerns regarding the use of disgorged funds post-*Liu*, the Ninth Circuit remanded the matter back to the District Court for further proceedings to determine whether the disgorgement award is truly for the benefit of investors. Accordingly, Mr. Carter submits that the disgorgement award sought by the SEC in the instant case, consisting of only a payment obligation to the government with no showing that the funds to be disgorged will or even can be paid back to investors, is not permitted post-*Liu*, which held "the phrase 'appropriate or necessary for the benefit of investors' must mean something more than depriving a wrongdoer of his net profits alone, else the Court would violate the 'cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute.'" *Liu, supra*, 140 S. Ct. at

1948.

D. If a Disgorgement Award Is To Issue, The Only Figure Supported By Evidence is $2,976,023.15.

For the reasons discussed above, the SEC has offered no admissible evidence to meet its burden of persuasion. That said, if the Court is nevertheless inclined to issue a disgorgement award, the only amount supported by admissible evidence – Mr. Carter's own plea agreement in his criminal case – is $2,976,023.15: "From the sale of his founder shares, defendant caused over 10 investors to lose $2,976,023.15." Huish Decl., Exhibit G, p.10, ll5-6.

III. CONCLUSION

Because Mr. Conte's declaration is inadmissible, the SEC has not met its "ultimate burden of persuasion that its disgorgement figure is a reasonable approximation of profits causally connected to the violation." *SEC v. Schooler*, supra, 106 F.Supp.3d at 1161-62. Accordingly, the burden never shifted to Mr. Carter to show that the SEC's approximation is unreasonable nor did Mr. Carter have any obligation to depose Mr. Conte to shore up the SEC's evidentiary shortcomings. For this reason, no disgorgement award should issue and the SEC's motion should be denied, with prejudice. Alternatively, if the Court finds the SEC has met its burden, no disgorgement award should issue because the SEC has not shown that the disgorged funds will be used "for the benefit of investors." Finally, if the Court is inclined to award disgorgement, it should limit the amount to $2,976,023.15, which is the only amount supported by competent evidence.

Dated: June 16, 2021

LAW OFFICE OF DYKE E. HUISH

/s/Dyke E. Huish
Dyke E. Huish
Attorneys for Defendant Patrick Carter

EXHIBIT 7

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Southern Division

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

PATRICK S. CARTER, 808 RENEWABLE ENERGY CORPORATION, 808 INVESTMENTS, LLC, MARTIN J. KINCHLOE, PETER J. KIRKBRIDE, WEST COAST COMMODITIES, LLC, THOMAS A. FLOWERS, and T.A. FLOWERS LLC,

Defendants.

Case No. 8:16-cv-2070-JVS-DFM

FINAL JUDGMENT AS TO DEFENDANT PATRICK S. CARTER

OS Received 09/30/2021

The Securities and Exchange Commission ("SEC" or "Commission") having filed a Complaint and Defendant Patrick S. Carter ("Defendant" or "Carter") having entered a general appearance; consented to the Court's jurisdiction over Defendant and the subject matter of this action; consented to entry of this Final Judgment without admitting or denying the allegations of the Complaint (except as to jurisdiction and except as otherwise provided herein in paragraph X); waived findings of fact and conclusions of law; and waived any right to appeal from this Final Judgment:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

///

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to employ any device, scheme, or artifice to defraud;

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 5 of the Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of any applicable exemption:

(a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;

(b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or

(c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the SEC as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act [15 U.S.C. § 77h].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

IV.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 15(a) of the Exchange Act [15 U.S.C. § 78o(a)] by, directly or indirectly, in the absence of any applicable exemption, making use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless registered in accordance with Section 15(b) of the Exchange Act [15 U.S.C. § 78o(b)].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as

provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from soliciting, accepting, or depositing any monies from actual or prospective investors in connection with any offering of securities, provided, however, that such injunction shall not prevent Defendant from purchasing or selling securities listed on a national securities exchange for Defendant's own personal accounts.

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)] and Section 20(e) of the Securities Act [15 U.S.C. § 77t(e)], Defendant is prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

VII.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently barred from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock. A penny stock is any equity security that has a price of less than five dollars, except as provided in Rule 3a51-1 under the Exchange Act [17 C.F.R. 240.3a51-1].

VIII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant

is liable for disgorgement of $$14,628,767.87, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $1,317,461.04. Defendant shall satisfy this obligation by paying $15,946,228.91, to the Securities and Exchange Commission within 14 days after the entry of this Final Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable
Branch 6500 South
MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Patrick S. Carter as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 14 days following entry of this Final Judgment. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

IX.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent of Defendant Patrick S. Carter to Entry of Judgment is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant shall comply with all of the undertakings and agreements set forth therein.

X.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the allegations in the complaint are true and admitted by Defendant, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Defendant under this Judgment or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

XI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Judgment.

XII.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Judgment forthwith and without further notice.

Dated: September 20, 2021

HON. JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

OS Received 09/30/2021