

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21314

<p>In the Matter of</p> <p style="text-align:center">Alan J. Markowitz, CPA,</p> <p>Respondent.</p>

**RESPONDENT ALAN J. MARKOWITZ'S ANSWER
TO THE ORDER INSTITUTING PUBLIC ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS**

Pursuant to Rule 200 of the Securities and Exchange Commission's (the "Commission's") Rules of Practice, Respondent Alan J. Markowitz, CPA, respectfully submits this Answer to the Order Instituting Public Administrative and Cease-And-Desist Proceedings and Notice of Hearing (the "OIP"), dated February 28, 2023.

Since March 2023, the Division of Enforcement (the "Division") has produced over 2.7 million documents, which Mr. Markowitz feasibly could not complete reviewing before the deadline for this Answer. Mr. Markowitz reserves the right to withdraw, amend, or modify any responses and affirmative defenses in his Answer, subject to his further investigation of the allegations in the OIP and review of the Division's document production, or as other later circumstances may warrant, including, in the event the Commission assigns an Administrative Law Judge to this proceeding.

ANSWER

Section I of the OIP contains legal conclusions to which no response is required. To the extent a response is necessary, Mr. Markowitz denies that it is either appropriate or in the public interest for the Commission to institute these proceedings against him. Mr. Markowitz further denies that the Commission is entitled to institute these proceedings and reserves the right to file a federal court action to enjoin and declare them unconstitutional. By filing this Answer, Mr. Markowitz does not intend to waive, and does not waive, his rights to pursue a federal court action, and files the Answer without prejudice to and expressly preserves all claims that may be asserted in a federal court action. Mr. Markowitz denies any remaining allegations in Section I.

The OIP contains several headings. To the extent the headings contain allegations against Mr. Markowitz, he denies those allegations.

II.

A. SUMMARY

1. **Alan J. Markowitz, a certified public accountant (“CPA”), engaged in improper professional conduct, within the meaning of Section 4C of the Exchange Act and Rule 102(e) of the Commission’s Rules of Practice, during the audits of the 2016 and 2017 financial statements of FTE Networks, Inc. (“FTE”). FTE later restated these financial statements (the “Restatement”).**

ANSWER: Mr. Markowitz admits that he is a certified public accountant (“CPA”); admits, upon information and belief, that FTE Networks, Inc. (“FTE”) restated its consolidated financial statements for the years ended December 31, 2016 and 2017; and denies all remaining allegations in Paragraph 1.

2. For both audits, Markowitz served as the lead engagement partner for Marcum LLP (“Marcum”), the audit firm performing these audits, but repeatedly failed to conduct them in accordance with Public Company Accounting Oversight Board (“PCAOB”) auditing standards. Markowitz violated several PCAOB standards, including standards requiring Markowitz to act with due professional care, by improperly relying on FTE management’s false representations during the audits and failing to obtain sufficient audit evidence regarding the existence and valuation of unbilled receivables and revenue, miscellaneous receivables, notes payable and equity transactions. Despite contradictory evidence and significant red flags that signaled FTE’s underlying misconduct, Markowitz improperly relied on management representations and failed to perform procedures to substantiate or reconcile those representations with contradictory evidence.

ANSWER: Mr. Markowitz admits that Marcum LLP (“Marcum”) is the audit firm that performed the audits of FTE’s consolidated financial statements for the years ended December 31, 2016 and 2017 (the “2016 Audit” and the “2017 Audit,” respectively), and that he served as the lead engagement partner for Marcum for these audits. Mr. Markowitz denies all remaining allegations in Paragraph 2.

3. Markowitz also caused Marcum to violate Rule 2-02(b)(1) of Regulation S-X. In connection with the 2016 and 2017 audits, Marcum issued audit reports that stated that the audits were performed in accordance with PCAOB standards. Markowitz approved the issuance of Marcum’s audit reports that contained these unqualified opinions when he knew or should have known that Marcum’s representations were false because Marcum’s audits were not performed in accordance with PCAOB standards.

ANSWER: Mr. Markowitz admits that he authorized the issuance of Marcum’s audit reports for the 2016 and 2017 Audits; admits that these audit reports state that Marcum conducted the 2016 and 2017 Audits in accordance with PCAOB standards and refers to the reports for their contents; and denies all remaining allegations in Paragraph 3.

B. RESPONDENT

4. Markowitz, age 66, resides in Wayne, New Jersey, and is a CPA licensed in New York and New Jersey. Markowitz has been a partner at Marcum LLP since

2007. Markowitz was the lead engagement partner on Marcum's annual audits of FTE from 2014 through 2017. He has no known disciplinary history.

ANSWER: Mr. Markowitz admits the allegations in Paragraph 4.

C. OTHER RELEVANT ENTITIES

5. Marcum is a limited liability partnership headquartered in New York City with approximately 50 offices in the United States and other countries. It has more than 2,500 employees providing accounting, advisory, and consulting services. Marcum is a public accounting firm registered with the PCAOB.

ANSWER: Mr. Markowitz admits, upon information and belief, the allegations in Paragraph 5.

6. FTE is a Nevada corporation currently headquartered in New York, New York and previously headquartered in Naples, Florida. FTE's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the New York Stock Exchange under the ticker symbol FTNW from December 14, 2017 until December 17, 2019. Prior to that, FTE's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act and traded on OTC Pink as FTNW. From September 12, 2014 until May 16, 2015, the Commission revoked the registration of FTE's shares pursuant to Section 12(j) of the Exchange Act for failure to file periodic reports with the Commission for more than two years. Currently, FTE's common stock is not publicly traded on any exchange nor quoted on OTC Pink. However, its common stock remains registered pursuant to Section 12(g) of the Exchange Act.

ANSWER: Mr. Markowitz admits, upon information and belief, the allegations in the first four sentences of Paragraph 6, except states that he lacks knowledge or information sufficient to form a belief as to the truth or falsity of the specific dates referred to in the second sentence of the paragraph. Mr. Markowitz lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the last two sentences of Paragraph 6.

D. FACTS

FTE's Improper Accounting for Convertible Notes

7. From approximately January 2017 through January 2019, cash-strapped FTE issued approximately 71 convertible notes ("Notes") to lenders totaling approximately \$22.7 million in order to provide itself with much needed short-term funding. Each individual Note contained varying terms and features that required FTE to perform extensive and complex analyses under generally accepted accounting principles ("GAAP") to determine the proper accounting treatment and required financial statement disclosures related to each Note. These varying terms included such features as (1) the ability of the debt to be converted, at the option of the holder, to shares of FTE common stock at large discounts to market prices and (2) the contemporaneous issuance of attached warrants to purchase shares of FTE common stock. These varying terms will be referred to hereinafter as the "Convertible Features."

ANSWER: Mr. Markowitz avers that he rotated off the FTE audits at the close of the 2017 Audit, and was not involved in Marcum's 2018 quarterly reviews for FTE (the "2018 Quarterly Reviews") or the audit of FTE's consolidated financial statements for the year ended December 31, 2018 (the "2018 Audit"), and, therefore, lacks knowledge or information sufficient to form a belief as to the truth or falsity of allegations pertaining to notes issued after December 31, 2017. Mr. Markowitz admits that the audit evidence the engagement team obtained indicated that 30 notes, with an original principal amount of approximately \$6.9 million (some of which was taken on in 2016), were relevant to the 2017 Audit, including some that were convertible; admits, upon information and belief, that FTE issued notes at this time to raise short-term capital, and that FTE was "cash-strapped" to the extent that term means that FTE used external financing to meet its cash needs; and admits that in the last sentence of Paragraph 7, the Commission purports to define a term, "Convertible Features." Mr. Markowitz denies all remaining allegations in Paragraph 7.

8. **FTE improperly accounted for the Notes as conventional promissory notes and its financial statements did not contain certain required financial disclosures. Indeed, as part of FTE's Restatement for the years ended December 31, 2016 and 2017 and the quarterly periods ended March 31, June 30, and September 30 in 2017 and 2018, FTE's analyses confirmed that the Convertible Features of the Notes required separate accounting treatment as derivatives under GAAP. By failing properly to account for the Notes, FTE materially understated its reported net loss before taxes and current liabilities by 65% and 34%, respectively for the year ended December 31, 2017 and materially understated its reported current liabilities between 9% and 39% during the quarterly periods ended March 31, June 30, and September 30 in 2017 and 2018.**

ANSWER: Mr. Markowitz avers, upon information and belief, that FTE engaged in a collusive management fraud to conceal improper accounting in its financial statements for the years ended December 31, 2016 and 2017 and the quarterly periods ended March 31, June 30, and September 30 in 2017, and states that he lacks knowledge or information sufficient to form a belief as to the truth or falsity of allegations about such accounting. Mr. Markowitz further avers that he rotated off the FTE audits at the close of the 2017 Audit, and was not involved in the 2018 Quarterly Reviews or the 2018 Audit, and states that he lacks knowledge or information sufficient to form a belief as to the truth or falsity of allegations about the 2018 Audit, the 2018 Quarterly Reviews or the Restatement and any related FTE analyses, and refers to those workpapers and documents for their contents. Mr. Markowitz denies any remaining allegations in Paragraph 8.

FTE's Improper Revenue Recognition Practices

9. **From early 2016 through late 2018, FTE improperly recognized approximately \$12.5 million of revenue and related accounts receivable from purportedly completed construction projects that had not yet been billed and from contracts for projects that purportedly had been completed and billed but not yet paid. FTE management orchestrated FTE's improper accounting practices for these projects, most of which they attributed to FTE's largest customer ("Customer A").**

These practices involved FTE (1) recording wholly fictitious revenue and (2) recording revenue for which no evidence of an arrangement or contract with a customer existed.

ANSWER: Mr. Markowitz avers, upon information and belief, that FTE engaged in a collusive management fraud to conceal improper accounting in its financial statements for the years ended December 31, 2016 and 2017, and states that he lacks knowledge or information sufficient to form a belief as to the truth or falsity of allegations about that accounting. Mr. Markowitz further avers that he rotated off the FTE audits at the close of the 2017 Audit and was not involved in the 2018 Quarterly Reviews or the 2018 Audit, and states that he lacks knowledge or information sufficient to form a belief as to the truth or falsity of allegations about accounting relevant to those reviews and audit. Mr. Markowitz denies any remaining allegations in Paragraph 9.

10. According to the Restatement, these transactions materially overstated FTE's revenue by 108% for the year ended December 31, 2016, and overstated accounts receivable by 477% and 20% as of December 31, 2016 and December 31, 2017, respectively, and between 18% and 120% as of the quarterly periods ended March 31, June 30, and September 30, 2017 and 2018. Adjustments for these transactions were recorded in the Restatement.

ANSWER: Mr. Markowitz avers, upon information and belief, that FTE perpetrated a collusive management fraud to misstate its financial statements for the years ended December 31, 2016 and 2017, states that he lacks knowledge or information sufficient to form a belief as to the truth or falsity of the alleged overstatements and adjustments, and refers to the Restatement for its contents.

Markowitz Violated PCAOB Auditing Standards When Conducting the Audits of FTE's Annual Financial Statements

11. Markowitz was the engagement partner for the 2016 and 2017 annual audits ("Audits"). As the engagement partner, Markowitz was responsible for the

supervision and performance of the engagements in order “to obtain reasonable assurance about whether the financial statements [were] free of material misstatement whether caused by error or fraud.”³ For the Audits, Markowitz supervised engagement teams consisting of approximately five to six team members who managed and conducted the fieldwork.

ANSWER: Mr. Markowitz admits the allegations in the first and third sentences of Paragraph 11. The second sentence of Paragraph 11 (including footnote 3) states a legal conclusion and includes a citation to PCAOB auditing standards to which no response is required; to the extent a response is necessary, Mr. Markowitz refers to PCAOB Auditing Standard (“AS”) 1001, *Responsibilities and Functions of the Independent Auditor* and AS 1201 *Supervision of the Audit Engagement* for its contents and denies any violation of the standard.

12. In accordance with PCAOB Auditing Standard (“AS”) 2110, *Identifying and Assessing Risks of Material Misstatement*, Marcum developed Audit plans for FTE that identified several areas as having high risk of material misstatement due to fraud or related to a significant audit area (“Audit Risks”). The 2016 audit plan identified several Audit Risks, including: accounts receivable – assessed as both a significant risk and fraud risk for improper revenue recognition; notes payable and long-term debt – assessed as a significant audit area with a high risk of material misstatement for the completeness assertion because FTE might not record all outstanding notes; and equity – assessed as a significant risk due to complexity and potential accounting errors. The 2017 audit plan identified similar risks of material misstatement although notes payable and long-term debt was assessed as having a significant risk of material misstatement overall. As the engagement partner, Markowitz had an obligation to design and perform audit procedures commensurate with assessed risks.

3. See PCAOB Auditing Standard (“AS”) 1001, *Responsibilities and Functions of the Independent Auditor* and AS 1201 *Supervision of the Audit Engagement*.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 12, except admits that the engagement team developed plans for the 2016 and 2017 Audits and refers to those plans for their contents.

13. During the Audits, Markowitz improperly relied on management representations and did not obtain sufficient appropriate audit evidence related to the Audit Risks. Specifically, Markowitz performed no additional, substantive procedures (and, in certain instances, performed no substantive procedures) to appropriately respond to the assessed Audit Risks despite: (1) Marcum’s risk assessments noting that extended audit procedures were to be performed in certain areas; (2) having reviewed documents contradicting management representations; and (3) identifying that FTE had internal control weaknesses as reflected by, among other things, Marcum’s difficulties in obtaining audit documentation from FTE management.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 13.

14. Markowitz’s conduct demonstrated the following audit failures in violation of PCAOB standards: (1) failure to exercise due professional care; (2) failure to address assessed risks; (3) failure to obtain sufficient appropriate audit evidence; and (4) failure to evaluate audit results. As a result of these violations, Markowitz caused Marcum’s issuance of audit reports that inaccurately stated that the Audits were conducted in accordance with the standards of the PCAOB.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 14.

15. As a result of these violations, Markowitz engaged in improper professional conduct within the meaning of Section 4C of the Exchange Act and Rule 102(e) of the Commission’s Rules of Practice.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 15.

The 2016 Audit Failures

16. Markowitz violated multiple PCAOB standards when conducting the audit of FTE’s 2016 financial statements. These audit failures related to unbilled revenue (“Unbilled Revenue”) and unbilled receivables (“Unbilled Receivables”) – which related to FTE’s purportedly complete but unbilled construction projects – totaling \$5.8 million as of December 31, 2016. This represented 47% of FTE’s reported revenue and 83% of FTE’s reported accounts receivable, respectively. Marcum’s planning materials assessed accounts receivable and sales as a significant audit area susceptible to a significant risk of material misstatement due to fraud and concluded that extended audit procedures should be performed.

ANSWER: Mr. Markowitz states that the Commission's distinction, if any, between "Unbilled Revenue" and "Unbilled Receivables," as used in Paragraph 16 is unclear, and for purposes of responding to this paragraph he treats both terms to refer to the same amount. Subject to the foregoing, Mr. Markowitz denies the allegations in the first two sentences of Paragraph 16, except admits that Unbilled Receivables totaled \$5.8 million as of December 31, 2016, and admits the allegations in the last two sentences of Paragraph 16.

17. Markowitz primarily relied on substantive audit procedures to test Unbilled Receivables along with oral confirmations from the customer. For example, with respect to testing the support for Unbilled Receivables, Marcum sampled 31 transactions representing \$1.7 million (29%) of Unbilled Receivables. From this sample, the engagement team concluded that there was insufficient audit evidence to support approximately \$1.2 million (70%) of the sampled transactions. These testing exceptions included instances in which transactions were recorded in the wrong year and certain transactions where the engagement team concluded there was a "lack of support/documentation." Despite these testing exceptions, no additional test work was performed. Moreover, when Markowitz proposed an adjustment to the financial statements to remove at least \$708,000 of Unbilled Receivables that the audit team had concluded were improperly recorded, FTE refused to make the adjustment.

ANSWER: Mr. Markowitz states that the allegations in Paragraph 17 reflect a misunderstanding of the engagement team's audit procedures and are fundamentally incomplete. Subject to the foregoing, Mr. Markowitz denies the allegations in the paragraph, except admits that the engagement team relied on substantive audit procedures to test unbilled receivables; that one of those procedures was to obtain an oral confirmation from a representative of a customer, which confirmation the engagement team documented in the workpapers; that another procedure was to test a sample of 31 transactions representing \$1.7 million (29%) of unbilled receivables that

FTE had subsequently invoiced during the first quarter of 2017; that the engagement team noted that some of those 31 transactions represented work performed by FTE in 2017 and for some the engagement team noted they had “lack of support/documentation” because the support provided for the transactions did not meet all of the engagement team’s checklist for supporting documentation; that, as a result of the foregoing, the engagement team proposed a net approximately \$230,000 adjustment to the unbilled receivable; that FTE did not make this adjustment because it was deemed not material to the overall financial statements, but the engagement team proposed, and FTE recorded a separate, approximately \$2 million adjustment to reduce unbilled receivables as of December 31, 2016 to \$5.8 million, with a corresponding reduction in overall revenue.

18. In testing Unbilled Receivables, the engagement team also selected a sample of \$2.7 million of construction projects on which FTE had already begun work. However, substantive testing consisted of documenting oral confirmation of \$1.7 million of the projects with a representative for Customer A, and two emails forwarded to Marcum by FTE (“FTE Emails”) that purported to show customer approval for work on the project to begin. There was no written confirmation from Customer A or other written documentation to support the purported \$1.7 million. In fact, in an email Markowitz sent to FTE six days before the audit opinion was issued, Markowitz requested that FTE provide the engagement team with five types of evidentiary support for the FTE Emails. There is no written documentation that FTE ever provided the requested support for the \$1.7 million of Unbilled Receivables. Furthermore, Marcum did not perform any substantive testing on the remaining \$1 million in the sample.

ANSWER: Mr. Markowitz states that the allegations in Paragraph 18 reflect a misunderstanding of the engagement team’s audit procedures and are fundamentally incomplete. Subject to the foregoing, Mr. Markowitz denies the allegations in the paragraph, except admits that for the \$2.7 million of unbilled receivables that FTE had

not yet invoiced to customers, the engagement team performed testing on a sample of \$1.7 million of projects for Customer A; that, although the engagement team did not have written confirmation of these projects directly from Customer A, it obtained and documented in the workpapers an oral confirmation of the projects with a representative of Customer A and also obtained two emails from FTE forwarding Customer A's emails showing approval of work on those projects.

19. Markowitz's failure to perform additional procedures in the face of numerous testing exceptions along with his reliance on oral confirmations and insufficient documentation demonstrated his lack of due professional care and skepticism when evaluating the audit results. Based on the test work performed, Markowitz did not have sufficient audit evidence as required by AS 1105, *Audit Evidence* to conclude that FTE's 2016 financial statements were free of material misstatements. Markowitz caused Marcum's issuance of an audit report that inaccurately stated that the audit was performed in accordance with PCAOB standards. FTE filed Marcum's inaccurate audit report along with FTE's 2016 Form 10-K on May 11, 2017.

ANSWER: Mr. Markowitz denies all allegations in Paragraph 19, except admits that FTE filed its 2016 Form 10-K on May 11, 2017, and that the Form included Marcum's audit report.

20. The Unbilled Revenue and Unbilled Receivables materially overstated FTE's revenue and accounts receivable by 108% and 477%, respectively, for the year ended December 31, 2016. Adjustments for these transactions were recorded in the Restatement.

ANSWER: Mr. Markowitz avers, upon information and belief, that FTE perpetrated a collusive management fraud to misstate its financial statements for the year ended December 31, 2016; states that he lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations about overstatements and adjustments; and refers to the Restatement for its contents.

The 2017 Audit Failures

21. Like the 2016 audit, Markowitz violated multiple PCAOB standards when conducting the audit of FTE's 2017 financial statements. These audit failures spanned three audit areas – accounts receivable (specifically, Unbilled Receivables and miscellaneous receivables (“Miscellaneous Receivables”)), notes payable, and equity and stemmed from Markowitz's overreliance on management representations in the face of contradictory evidence. Moreover, Markowitz ignored numerous red flags regarding audit documentation. As such, the 2017 audit was not performed in accordance with PCAOB standards.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 21.

(a) Unbilled Receivables and Miscellaneous Receivables

22. As of December 31, 2017, FTE's financial statements showed that Unbilled Receivables increased from \$5.8 million as of December 31, 2016 to \$10 million (representing 16% of FTE's reported accounts receivable). In accordance with AS 2110, the engagement team identified accounts receivable as a significant audit area susceptible to a significant risk of material misstatement due to fraud and noted that extended audit procedures should be performed. Markowitz reviewed and approved the relevant work papers and relied on substantive audit procedures.

ANSWER: Mr. Markowitz admits the allegations in Paragraph 22.

23. Specifically, the engagement team selected for testing a sample of 21 Unbilled Receivables transactions representing \$4.3 million (43%) of the Unbilled Receivables balance. As set forth in AS 1105, *Audit Evidence*, when using information produced by the audit client as evidence, the auditor should evaluate whether the information is “sufficient and appropriate” for the audit procedure being performed. The testing performed on the 21 Unbilled Receivables solely relied on internal FTE documents as opposed to third-party documentation such as independent confirmation from the customer.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 23, except admits the allegations in the first sentence of the paragraph, and avers that the amount of unbilled receivables represented less than 5% of FTE's total revenue for the year ended 2017; refers to AS 1105, *Audit Evidence*, for its contents and denies any violation of that standard; and admits that, in the absence of returned confirms from FTE customers, the engagement team relied on FTE documents including, without limitation, purchase

orders and job completion notices, which purportedly had been signed by third-party construction managers in the field.

24. Also in 2017, FTE recorded Miscellaneous Receivables of approximately \$2.5 million. Markowitz concluded that the limited documentation provided by FTE did not provide sufficient support, and requested support for \$2.4 million of the Miscellaneous Receivables. FTE did not provide support for the \$2.4 million, so the engagement team proposed an adjustment to the financial statements to reverse the \$2.4 million. FTE did not make the adjusting entry, and Markowitz did not insist that FTE make the entry. The Miscellaneous Receivables remained on FTE's financial statements that were included in its 2017 Form 10-K and filed along with Marcum's inaccurate audit report.

ANSWER: Mr. Markowitz admits that, in 2017, FTE recorded a Miscellaneous Receivable of approximately \$2.5 million, which consisted of legacy billings; that he concluded that the receivable did not warrant a positive valuation, given its age, notwithstanding that Customer A acknowledged that there was approximately \$1.5 million of potential FTE billings waiting to be reviewed for approval; that the engagement team proposed an adjustment to the financial statements to reverse approximately \$2.4 million of the receivable; and that FTE did not make the adjusting entry because it was not material to the overall financial statements. Mr. Markowitz refers to FTE's 2017 Form 10-K for its contents. He denies all remaining allegations in Paragraph 24.

25. The Unbilled Receivables and Miscellaneous Receivables materially overstated FTE's accounts receivable by 20% for the year ended December 31, 2017. Adjustments for these transactions were recorded in the Restatement.

ANSWER: Mr. Markowitz avers, upon information and belief, that FTE perpetrated a collusive management fraud to misstate its financial statements for the year ended December 31, 2017; states that he lacks knowledge or information sufficient to form a

belief as to the truth or falsity of the allegations about overstatements; and refers to the Restatement for its contents.

(b) Notes Payable

26. During the 2017 quarterly reviews and audit, Markowitz was confronted with significant red flags and inconsistencies that contradicted management representations concerning the Notes. As of December 31, 2017, the Notes represented \$4.8 million (31%) of FTE's reported notes payable balance. The engagement team's planning materials assessed notes payable as a significant audit area susceptible to significant risk of material misstatement and concluded that extended audit procedures should be performed. Yet of 30 Notes FTE entered into in 2017, the engagement team obtained executed agreements for only three.

ANSWER: Mr. Markowitz denies the allegations in the first sentence of Paragraph 26.

Mr. Markowitz admits the allegations in the second sentence of the paragraph, and avers that the Notes represented \$4.8 million or 5.7% of FTE's total debt for 2017, which was \$83.6 million. Mr. Markowitz denies the allegations in the third sentence of Paragraph 26, except avers that the engagement team's planning materials assessed "Notes Payable and Long-Term Debt" as a significant audit area susceptible to significant risk of material misstatement and concluded that extended audit procedures should be performed on FTE's debt as a whole. Mr. Markowitz denies the remaining allegations in Paragraph 26, which are fundamentally incomplete, except admits that the engagement team obtained executed copies of certain notes and addenda for the 2017 Audit.

27. Markowitz ignored significant red flags regarding the Notes. During the first quarter review, Markowitz reviewed FTE's instructions to its transfer agent to reserve a certain number of shares of FTE common stock in the event the noteholder of a \$385,000 Note exercised its right to convert the Note into common stock. Markowitz knew the Notes, namely, the Convertible Features, required additional scrutiny and potentially had to be accounted for differently in FTE's financial statements. Markowitz requested a copy of the Note, but FTE never

provided one. Instead of following up with FTE, Markowitz accepted FTE management's representation that the Note was not convertible.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 27, except admits that he reviewed FTE's letter to its transfer agent regarding a note in the principal amount of \$385,000 and refers to the referenced letter for its contents; admits that the audit team requested a copy of the note and that FTE did not provide a copy of the note, and avers that obtaining the note was not necessary for the quarterly review, which, per AS 4105, *Reviews of Interim Financial Information*, was limited principally to performing analytical procedures and making inquiries of persons responsible for financial and accounting matters, and that, for the annual audit, Mr. Markowitz examined records showing that FTE had repaid in cash the note before year end.

28. During the third quarter, the engagement team obtained a board resolution that authorized the issuance of two convertible promissory notes. Despite ongoing difficulties in obtaining Notes and prior evidence from the first quarter that FTE had entered into Notes with Convertible Features, Markowitz never reviewed the resolution and the engagement team never raised it with him. During the third quarter, Marcum continued to ask FTE for all Notes. None were received.

ANSWER: Mr. Markowitz states that he lacks knowledge or information sufficient to form a belief as to the truth or falsity of allegations in Paragraph 28 about undefined "prior evidence" and a board resolution that the OIP alleges the engagement team did not raise with him and refers to the resolution for its contents; admits that during the third quarter of 2017, the engagement team asked FTE for copies of notes; refers to the workpapers and the engagement team's correspondence with FTE regarding the timing of when copies of notes were obtained by the engagement team, and avers that copies

of the notes were not necessary for the quarterly review; and denies all remaining allegations in Paragraph 28.

29. During the annual audit, Marcum's audit manager showed Markowitz FTE board meeting minutes authorizing the issuance of convertible debt and warrants to two lenders. Markowitz consulted with FTE's senior management, who told him that the debt had not been issued as authorized. Markowitz accepted their representation and did not conduct any further inquiry.

ANSWER: Mr. Markowitz admits the allegations in the first two sentences of Paragraph 29, except states that he was shown a copy of a Unanimous Consent in Lieu of a Special Meeting of Directors of FTE Networks Inc. Mr. Markowitz denies the remaining allegations in the paragraph, avers that the engagement team obtained a representation from FTE in the management representation letter that the company had not entered into the convertible debt agreement as authorized by the board, and also states that the allegations in Paragraph 29, in particular the last sentence, are fundamentally incomplete. Mr. Markowitz further avers that the engagement team obtained from FTE addenda to the notes at issue in this paragraph, which showed that the notes were convertible at the sole discretion of FTE, and for the annual audit, Mr. Markowitz examined records showing that by December 31, 2017, FTE had fully paid off these notes, either with cash or a reclass of equity.

30. Markowitz and the engagement team sent numerous emails throughout 2017 to FTE management requesting all debt agreements (that included Notes). In one email, Markowitz told FTE that the request had been pending for over two months, and further told FTE management that FTE's continued failure to provide the requested agreements or confirmation of the terms could result in a scope limitation (i.e., that Marcum could not opine on the financial statements as a whole). Although Markowitz and the engagement team only received three notes (out of 30), Markowitz did not conclude there was a scope limitation. In fact, 27 of the 30 Notes FTE issued were Convertible Notes that required different, more complex accounting treatment.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 30, except admits that, during 2017, he and the engagement team sent emails to FTE requesting copies of all debt agreements entered into in 2017; states that the second sentence of Paragraph 30 appears to refer to a March 25, 2018 email from him to Michael Palleschi (FTE's CEO), David Lethem (FTE's CFO) and Luisa Ingargiola (an FTE board member and audit committee chair), re "FTE discussion," and refers to that email for its contents; and admits that the engagement team obtained executed copies of certain notes and addenda to the notes, and that, by the time Marcum issued its audit report, dated April 17, 2018, he concluded a scope limitation was not warranted for the 2017 Audit.

(c) Equity Transactions

31. During the 2017 quarterly reviews and audit, Markowitz encountered difficulties with obtaining from FTE documentation related to equity transactions. The engagement team's planning materials assessed equity as a significant risk due to complexity and possible errors in accounting and concluded that extended audit procedures should be performed.

ANSWER: Mr. Markowitz admits the allegations in Paragraph 31, but avers that the engagement team obtained sufficient competent audit evidence reasonably to conclude that FTE's equity was reasonably stated as of December 31, 2017.

32. During 2017, FTE issued approximately 491,000 shares of FTE common stock, valued at approximately \$5.2 million, to "consultants" and "vendors" in lieu of payment. Although Markowitz and the engagement team requested that FTE provide the agreements or supporting documents related to the share issuances for each quarter, by the third quarter the requests remained outstanding. FTE never fully provided the outstanding documents. Additionally, although many of the "consultants" and "vendors" were Note holders, Markowitz failed to perform additional procedures in the face of these red flags and insufficient evidence. Nevertheless, Markowitz caused Marcum to release the 2017 audit opinion.

ANSWER: Mr. Markowitz admits the allegations in the first sentence of the paragraph. He admits that he and the engagement team requested FTE to provide agreements or supporting documents related to share issuances and obtained certain, but not all, of those materials, and avers that obtaining those materials was not necessary for the quarterly reviews, which, per AS 4105, *Reviews of Interim Financial Information*, was limited principally to performing analytical procedures and making inquiries of persons responsible for financial and accounting matters, and further that for the annual audit, the engagement team obtained sufficient competent audit evidence reasonably to conclude that FTE's equity was reasonably stated as of December 31, 2017. Mr. Markowitz admits that certain of the consultants and vendors were also lenders and that he authorized the release of the audit opinion report for the 2017 Audit. Mr. Markowitz denies all remaining allegations in Paragraph 32.

33. As part of the Restatement, FTE determined that certain of these share issuances were related to or executed contemporaneously with the issuance of the Notes, and thus required complex accounting analysis and material adjustments in FTE's Restatement. By failing properly to account for the Convertible Features of the Notes and equity transactions, FTE understated its 2017 net loss before tax and current liabilities by approximately \$60 million (65% and 34%, respectively).

ANSWER: Mr. Markowitz denies the allegations in Paragraph 33, except avers he rotated off the FTE audits at the close of the 2017 Audit, and was not involved in the 2018 Audit or the Restatement and lacks knowledge or information sufficient to form a belief as to the truth or falsity of allegations concerning the Restatement, and refers to the Restatement for its contents.

PCAOB Auditing Standards Markowitz Violated During the Audits

Failure to Exercise Due Professional Care

34. PCAOB AS 1015, *Due Professional Care in the Performance of Work* requires due professional care “to be exercised in the planning and performance of the audit and the preparation of the report.” It states that the “exercise of due professional care allows the auditor to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud, or whether any material weaknesses exist as of the date of management’s assessment.” It further provides that “[a]lthough not absolute assurance, reasonable assurance is a high level of assurance.” The standards require the auditor to:

- a. exercise professional skepticism, “an attitude that includes a questioning mind and a critical assessment of audit evidence” and the auditor must use “the knowledge, skill, and ability called for by the profession of public accounting to diligently perform, in good faith and with integrity, the gathering and objective evaluation of evidence;”
- b. “consider the competency and sufficiency of the [audit] evidence;”
- c. neither assume that management is dishonest nor assume “unquestioned honesty” and “the auditor should not be satisfied with less than persuasive evidence because of a belief that management is honest;” and
- d. adhere to the standard during the planning and throughout the audit process.

ANSWER: Mr. Markowitz avers that Paragraph 34 purports to set forth the requirements of PCAOB AS 1015, *Due Professional Care in the Performance of Work*, refers to the standard for its contents, and denies violating the standard.

35. PCAOB AS 2401, *Consideration of Fraud in a Financial Statement Audit* requires that the auditor exercise professional skepticism when considering the fraud risks and “conduct the engagement with a mindset that recognizes the possibility that a material misstatement due to fraud could be present, regardless of any past experience with the entity and regardless of the auditor’s belief about management’s honesty and integrity. Furthermore, professional skepticism requires an ongoing questioning of whether the information and evidence obtained suggests that a material misstatement due to fraud has occurred. In exercising professional skepticism in gathering and evaluating evidence, the auditor should not be satisfied with less-than-persuasive evidence because of a belief that management is honest.” It also states that “[i]f there is an identified fraud risk that involves improper revenue recognition, the auditor also may want to consider [c]onfirming with customers certain relevant contract terms and the absence of side agreements, because the appropriate accounting often is influenced by such terms or agreements.”

ANSWER: Mr. Markowitz avers that Paragraph 35 purports to set forth the requirements of PCAOB AS 2401, *Consideration of Fraud in a Financial Statement Audit*, refers to the standard for its contents, and denies violating the standard.

36. During the Audits of FTE, Markowitz knew or should have known that there was insufficient evidence or support for the Unbilled Receivables, Miscellaneous Receivables, notes payable, and equity. For example, in 2016 and 2017, Markowitz proposed that FTE make adjusting entries to the Unbilled Receivables and Miscellaneous Receivables. FTE did not make such entries, and Markowitz did not further insist upon the entries. In 2016, Markowitz was aware that there were testing exceptions within sampled items for Unbilled Receivables, but he failed to perform additional procedures or extrapolate the testing results to the entirety of the Unbilled Receivables.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 36, except admits that in 2016 and in 2017, he proposed that FTE make adjusting entries to the Unbilled Receivables and Miscellaneous Receivables.

37. Additionally, Markowitz was confronted with evidence that contradicted management representations regarding the existence of the Notes and equity transactions. For example, despite repeated and unanswered requests for the Notes, Markowitz failed to raise his level of professional skepticism and insist on obtaining copies of the Notes. Similarly, he repeatedly requested copies of third-party agreements, which FTE did not provide, in support of the issuance of FTE common stock to “consultants” and “vendors.” Instead, he improperly relied on management’s representations that the Notes did not contain Convertible Features and the share issuances were unrelated to the Notes.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 37, except admits that the engagement team had difficulty obtaining certain documentation from FTE, and avers that, for the 2016 and 2017 Audits, the engagement team ultimately obtained sufficient competent audit evidence reasonably to conclude that FTE’s financial statements were reasonably stated.

38. As a result, Markowitz failed to exercise due professional care, which was required by PCAOB standards, during the Audits of FTE’s financial statements.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 38.

Failure to Properly Address Assessed Risks

39. **PCAOB AS 2110, *Identifying and Assessing Risks of Material Misstatement*** states that “[w]hen the auditor obtains audit evidence during the course of the audit that contradicts the audit evidence on which the auditor originally based his or her risk assessment, the auditor should revise the risk assessment and modify planned audit procedures or perform additional procedures in response to the revised risk assessments.”

ANSWER: Mr. Markowitz avers that Paragraph 39 purports to set forth the requirements of PCAOB AS 2110, *Identifying and Assessing Risks of Material Misstatement*, refers to the standard for its contents, and denies violating the standard.

40. **PCAOB AS 1101 *Audit Risk*** provides that “[r]easonable assurance is obtained by reducing audit risk to an appropriately low level through applying due professional care, including obtaining sufficient appropriate audit evidence.

ANSWER: Mr. Markowitz avers that Paragraph 40 purports to set forth the requirements of PCAOB AS 1101 *Audit Risk*, refers to the standard for its contents, and denies violating the standard.

41. **During the Audits, Markowitz learned of red flags and contradictory evidence indicating that Unbilled Revenue and Receivables, Notes and equity transactions may not have been properly accounted for. Markowitz did not modify Marcum’s audit plans to respond to these red flags and contradictory evidence by, for example, expanding testing or obtaining third-party audit evidence to corroborate management representations. Accordingly, Markowitz failed to reduce audit risk to an appropriately low level.**

ANSWER: Mr. Markowitz denies the allegations in Paragraph 41.

Failure to Obtain Sufficient Appropriate Audit Evidence

42. **PCAOB AS 1105, *Audit Evidence*** provides that the auditor “must plan and perform audit procedures to obtain sufficient appropriate audit evidence to provide a reasonable basis for his or her opinion.” It states that “[t]o be appropriate, audit evidence must be both relevant and reliable in providing support for the conclusions on which the auditor’s opinion is based.” Relevance depends on “whether [the audit procedures] is designed to (1) test the assertion or control directly

and (2) test for understatement or overstatement” and the “timing of the audit procedure used to test the assertion or control.” Additionally, the “reliability of evidence depends on the nature and source of the evidence and the circumstances under which it is obtained ... Evidence obtained from a knowledgeable source that is independent of the company is more reliable than evidence obtained only from internal company sources.”

ANSWER: Mr. Markowitz avers that Paragraph 42 purports to set forth the requirements of PCAOB AS 1105, *Audit Evidence*, refers to the standard for its contents, and denies violating the standard.

43. Furthermore, when using information produced by the company as audit evidence, the standard requires the auditor to “[t]est the accuracy and completeness of the information, or test the controls over the accuracy and completeness of that information” and [e]valuate whether the information is sufficiently precise and detailed for purposes of the audit.” Furthermore, “the auditor should perform the audit procedures necessary to resolve the matter” when “audit evidence obtained from one source is inconsistent with that obtained from another, or if the auditor has doubts about the reliability of information to be used as audit evidence.”

ANSWER: Mr. Markowitz avers that Paragraph 43 purports to set forth the requirements of PCAOB AS 1105, *Audit Evidence*, refers to the standard for its contents, and denies violating the standard.

44. PCAOB AS 2301, *The Auditor's Responses to the Risks of Material Misstatement* states that “assessed risks of material misstatement, particularly fraud risks, should involve the application of professional skepticism in gathering and evaluating audit evidence[,]” which includes “(a) modifying the planned audit procedures to obtain more reliable evidence regarding relevant assertions and (b) obtaining sufficient appropriate evidence to corroborate management’s explanations or representations concerning important matters, such as through third-party confirmation, use of a specialist engaged or employed by the auditor, or examination of documentation from independent sources.” The standard also requires the auditor to:

- a. design the audit procedures performed to “[o]btain more persuasive audit evidence the higher the auditor’s assessment of risk [and] [t]ake into account the types of potential misstatements that could

result from the identified risks and the likelihood and magnitude of potential misstatement;”

b. “perform substantive procedures for each relevant assertion of each significant account and disclosure, regardless of the assessed level of control risk;” and

c. obtain more evidence from substantive procedures as “the assessed risk of material misstatement increases.” “Inquiry alone does not provide sufficient appropriate evidence to support a conclusion about a relevant assertion.”

ANSWER: Mr. Markowitz avers that Paragraph 44 purports to set forth the

requirements of PCAOB AS 2301, *The Auditor’s Responses to the Risks of Material*

Misstatement, refers to the standard for its contents, and denies violating the standard.

45. **PCAOB AS 2310, *The Confirmation Process*** explains that the purpose of confirmation is to “obtain evidence from third parties about financial statement assertions made by management.” It provides that “[o]ral confirmations should be documented in the workpapers [and] [i]f the information in the oral confirmations is significant, the auditor should request the parties involved to submit written confirmation of the specific information directly to the auditor.” Additionally, the auditor should apply “alternative procedures” to nonresponses to “positive confirmation requests” in order “to obtain the evidence necessary to reduce audit risk to an acceptably low level.”

ANSWER: Mr. Markowitz avers that Paragraph 45 purports to set forth the

requirements of PCAOB AS 2310, *The Confirmation Process*, refers to the standard for its

contents, and denies violating the standard.

46. Furthermore, it states that “[c]onfirmation of accounts receivable is a generally accepted auditing procedure [and] it is generally presumed that evidence obtained from third parties will provide the auditor with higher-quality audit evidence than is typically available from within the entity.” As such, “there is a presumption that the auditor will request the confirmation of accounts receivable during an audit unless “[a]ccounts receivable are immaterial to the financial statements[,] [t]he use of confirmations would be ineffective, [or] [t]he auditor’s combined assessed level of inherent and control risk is low, and the assessed level, in conjunction with the evidence expected to be provided by analytical procedures or other substantive tests of details, is sufficient to reduce audit risk to an acceptably low level for the applicable financial statement assertions.”

ANSWER: Mr. Markowitz avers that Paragraph 46 purports to set forth the requirements of PCAOB AS 2310, *The Confirmation Process*, refers to the standard for its contents, and denies violating the standard.

47. The standard explains that “[i]n many situations, both confirmation of accounts receivable and other substantive tests of details are necessary to reduce audit risk to an acceptably low level for the applicable financial statement assertions.” “An auditor who has not requested confirmations in the examination of accounts receivable should document how he or she overcame this presumption.”

ANSWER: Mr. Markowitz avers that Paragraph 47 purports to set forth the requirements of PCAOB AS 2310, *The Confirmation Process*, refers to the standard for its contents, and denies violating the standard.

48. PCAOB AS 2805, *Management Representations* states that representations from management “are not a substitute for the application of those auditing procedures necessary to afford a reasonable basis for an opinion regarding the financial statements under audit.” “If a representation made by management is contradicted by other audit evidence, the auditor should investigate the circumstances and consider the reliability of the representation made. Based on the circumstances, the auditor should consider whether his or her reliance on management’s representations relating to other aspects of the financial statements is appropriate and justified.”

ANSWER: Mr. Markowitz avers that Paragraph 48 purports to set forth the requirements of PCAOB AS 2805, *Management Representations*, refers to the standard for its contents, and denies violating the standard.

49. During the Audits, Markowitz learned of significant red flags and inconsistencies that necessitated him to exercise a heightened level of professional skepticism and expand the level and extent of audit procedures performed. Examples include:

- In 2017, the testing performed on Unbilled Receivables solely relied on internal FTE documents as opposed to third-party documentation such as independent confirmation from the customer.
- In 2016, Markowitz identified testing exceptions within sampled items of Unbilled Receivables and several instances where Unbilled Receivables

were unsupported. Further, in 2017, Markowitz identified that Miscellaneous Receivables were unsupported. Despite this, in each instance, Markowitz did not perform additional procedures in the face of insufficient audit evidence.

- In 2017, Markowitz's repeated requests to FTE for documentation to support the Notes and certain equity transactions went unanswered. Despite contradictory evidence, he relied on management representations that the Notes did not contain Convertible Features and that the equity transactions were unrelated. Moreover, he did not obtain any evidence to corroborate these representations.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 49.

50. As a result, Markowitz failed to obtain sufficient appropriate audit evidence, as required by PCAOB standards, during the Audits of FTE's financial statements.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 50.

Failure to Evaluate Audit Results

51. PCAOB AS 2810, *Evaluating Audit Results* provides that "the auditor should take into account all relevant audit evidence, regardless of whether it appears to corroborate or to contradict the assertions in the financial statements[,] when forming an opinion on whether the financial statements are presented fairly, in all material respects, in conformity with the applicable financial reporting framework. Additionally, "the auditor should evaluate whether the accumulated results of auditing procedures and other observations affect the assessment of the fraud risks made throughout the audit and whether the audit procedures need to be modified to respond to those risks." The auditor should consider the following factors when determining whether "sufficient appropriate audit evidence" has been obtained:

- a. "[t]he significance of uncorrected misstatements and the likelihood of their having a material effect, individually or in combination, on the financial statements;"
- b. "[t]he results of audit procedures performed in the audit of financial statements, including whether the evidence obtained supports or contradicts management's assertions and whether such audit procedures identified specific instances of fraud;"
- c. "[t]he auditor's risk assessments;" and
- d. "[t]he appropriateness (*i.e.*, the relevance and reliability) of the audit evidence obtained."

ANSWER: Mr. Markowitz avers that Paragraph 51 purports to set forth the requirements of PCAOB AS 2810, *Evaluating Audit Results*, refers to the standard for its contents, and denies violating the standard.

52. If the following matters are identified during the audit, the auditor should take into account “[c]onflicting or missing evidence, including: [m]issing documents” and “[p]roblematic or unusual relationships between the auditor and management,” including “[u]nusual delays by management in providing requested information.”

ANSWER: Mr. Markowitz states that the allegations in Paragraph 52 are ambiguous in that they do not define which “following matters” are referenced. Moreover, Paragraph 52 states a legal conclusion as to which no response is required. To the extent a response is necessary, Mr. Markowitz denies the allegations in Paragraph 52.

53. Markowitz failed properly to evaluate audit results. During the Audits, FTE repeatedly failed to provide copies of the Notes and support for certain equity transactions, as well as sufficient audit evidence to support the Unbilled Revenue and Unbilled Receivables. Throughout the Audits, Markowitz did not consider conflicting audit evidence when evaluating audit results. For example, despite written representations in board meeting minutes, board resolutions, and transfer agent instructions that FTE issued convertible notes, Markowitz accepted management representations that there were no such Notes, even when FTE did not produce copies of the Notes.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 53, except admits that FTE did not provide copies of all Notes, but avers that, for the 2016 and 2017 Audits, the engagement team obtained sufficient competent audit evidence reasonably to conclude that FTE’s financial statements were reasonably stated.

54. As a result, Markowitz failed properly to evaluate audit results, which was required by PCAOB standards, during the Audits of FTE’s financial statements.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 54.

Marcum's Inaccurate Audit Reports

55. Despite Markowitz's multiple departures from PCAOB auditing standards, as described above, Marcum, through Markowitz, issued audit reports that contained unqualified opinions on FTE's 2016 and 2017 financial statements. Those reports contained Marcum's opinion that FTE's financial statements presented fairly, in all material respects, the company's financial position and results of operations in conformity with GAAP, and Marcum's representation that its audits were conducted in accordance with PCAOB audit standards.

ANSWER: Mr. Markowitz denies the allegations in Paragraph 55 and refers to Marcum's audit reports filed with FTE's Forms 10-K for 2016 and 2017 for their contents.

56. As the lead engagement partner on the audits, Markowitz approved the issuance of these audit reports. Markowitz knew that FTE would file Marcum's audit reports with the Commission with FTE's Forms 10-K. Markowitz caused Marcum's audit reports to inaccurately state that the audits were conducted in accordance with PCAOB audit standards.

ANSWER: Mr. Markowitz admits the allegations in the first two sentences of Paragraph 56 and denies the remaining allegations in the paragraph.

E. VIOLATIONS

57. As a result of the conduct described above, Markowitz engaged in improper professional conduct within the meaning of Section 4C(a)(2) of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice. Section 4C(a)(2) and Rule 102(e)(1)(ii) provide, in pertinent part, that the Commission may censure or deny, temporarily or permanently, the privilege of appearing or practicing before the Commission to any person who is found by the Commission to have engaged in improper professional conduct. With respect to persons licensed to practice as accountants, "improper professional conduct" includes "[r]epeated instances of unreasonable conduct, each resulting in violations of applicable professional standards, that indicate a lack of competence to practice before the Commission." See Rule 102(e)(1)(iv)(B)(2). As discussed above, Markowitz engaged in repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards.

ANSWER: Mr. Markowitz denies the allegations in the first and last sentences of Paragraph 57. He avers that the remaining sentences in Paragraph 57 purport to set

forth the contents of Section 4C(a)(2) of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice, refers to them for their contents and denies violating them.

58. **Rule 2-02(b)(1) of Regulation S-X requires an accountant's report to state "the applicable professional standards under which the audit was conducted." 17 C.F.R. § 210.202(b)(1). For audits of fiscal years 2016 and 2017, Rule 2-02(b)(1) similarly mandated that an accountant's report "state whether the audit was made in accordance with accepted auditing standards..." An auditor violates Rule 2-02(b)(1) if it issues a report stating it has conducted its audit in accordance with the PCAOB standards when it has not. As a result of the conduct described above, Marcum violated and Markowitz caused Marcum's violations of Rule 2-02(b)(1) of Regulation S-X.**

ANSWER: Paragraph 58 states legal conclusions to which no response is required. To the extent a response is necessary, Mr. Markowitz denies the allegations in Paragraph 58, refers to Rule 2-02(b)(1) of Regulation S-X for its contents, and denies violating the rule.

To the extent that any allegation set forth in Section II of the OIP has not been explicitly addressed above, Mr. Markowitz denies each such allegation.

Mr. Markowitz avers that no response is deemed necessary to Sections III and IV of the OIP. To the extent a response is necessary, Mr. Markowitz denies violating any applicable rules and standards in the conduct of the 2016 and 2017 Audits.

AFFIRMATIVE DEFENSES

Mr. Markowitz asserts the following affirmative defenses to the OIP. In doing so, he does not assume the burden of proof with respect to any fact or proposition

necessary to that affirmative defense where that burden is properly imposed on the Division of Enforcement (the "Division").

1. The OIP fails to state a claim upon which relief may be granted.
2. This proceeding is not warranted by the facts and, in any event, is unsupported by substantial evidence.
3. The Commission's claims and relief sought are precluded, in whole or in part, by the statute of limitations.
4. Mr. Markowitz at all times exercised his professional skepticism, experienced judgment, acted in good faith, on an informed basis, and in reasonable reliance upon the work, opinions, information, representations, and advice of others upon which Mr. Markowitz was entitled to rely.
5. The alleged audit deficiencies asserted in the OIP are matters of professional judgment and not appropriately the subject of enforcement proceedings.
6. There is no basis for sanctioning Mr. Markowitz because Mr. Markowitz did not engage in any form of improper professional conduct and at no time acted with the requisite state of mind, and the facts alleged do not amount to a "single instance of highly unreasonable conduct," or "repeated instances of unreasonable conduct," as required under Rule 102(e)(1)(iv)(B)(1)-(2).
7. At all times relevant hereto, Mr. Markowitz acted in good faith and at no time acted either willfully, intentionally, knowingly, negligently, or recklessly with respect to any matter alleged in the OIP.

8. Mr. Markowitz was the victim of a collusive fraud by FTE's management, including its Chief Executive Officer ("CEO"), Chief Financial Officer ("CFO"), Chief Administrative Officer ("CAO") and Controller and others, that was designed, *inter alia*, to deceive him and the engagement team. FTE's fraud interfered with and acted to defeat audit procedures reasonably designed to afford Mr. Markowitz a reasonable basis for the Marcum audit opinions issued.

9. The Commission is estopped from finding that Mr. Markowitz engaged in improper professional conduct because the Commission itself has charged FTE's management, including its CEO, CFO, CAO and Controller, with fraud on the auditors concerning the very same accounting matters at issue here and has adopted positions contrary to those asserted in this proceeding. *See SEC v. Michale Palleschi and David Lethem*, 21-cv-00530 (M.D. Fl. 2022), *SEC v. Anthony Sirotko*, 22-cv-00348 (M.D. Fl. 2022), *SEC v. Daniel Moser*, 22-cv-00629 (M.D. Fl. 2022).

10. The Commission's authorization of these proceedings was arbitrary and capricious in that the allegations in the OIP lack support either in the record or in applicable rules and professional standards, and are contrary to allegations made by the Commission in related proceedings.

11. The Commission's claims with regard to the 2017 Audit are undermined by the PCAOB's "clean" inspection of the 2017 FTE audit workpapers.

12. The OIP fails to provide Mr. Markowitz with fair notice or due process under the Fifth Amendment to the U.S. Constitution and the Administrative Procedure

Act, because the OIP attempts to apply retroactively new interpretations of the plain language of applicable rules and professional standards.

13. The administrative proceeding, if successful, will deprive Mr. Markowitz of property without due process of law, in violation of Mr. Markowitz's Fifth Amendment and Fourteenth Amendment rights under the U.S. Constitution. The Commission seeks monetary penalties as well as further actions that could impede his ability to practice as an accountant and threaten his livelihood. Such penalties and actions will deprive Mr. Markowitz of property without the due process of law that is afforded to respondents facing proceedings in federal court, and withheld from respondents in administrative proceedings.

14. The OIP and this proceeding contravene Mr. Markowitz's right to due process under the Fifth Amendment to the U.S. Constitution because they seek to enforce vague and overbroad laws based on rules and professional standards, or interpretations thereof, that are unduly vague and subjective.

15. The penalties sought violate the Eighth Amendment of the U.S. Constitution because the standards for determining penalties are unduly vague and subjective, and permit arbitrary, capricious, excessive, and disproportionate punishment that serves no legitimate governmental interest.

16. The administrative proceeding violates Mr. Markowitz's right to equal protection under the U.S. Constitution. The administrative proceeding, devoid of the protections of the Federal Rules of Civil Procedure and Evidence, the right to a trial by jury, or adequate time to prepare a defense, deprives Mr. Markowitz of the rights

enjoyed by similarly situated individuals who are respondents in federal district court proceedings. As such, the Commission's arbitrary choice to commence the instant proceeding as an administrative proceeding, rather than file an action in federal district court, has denied Mr. Markowitz of his right to equal protection.

17. This administrative proceeding violates Mr. Markovitz's Seventh Amendment right to a jury trial.

18. This administrative proceeding violates the Appointments Clause of the U.S. Constitution.

19. The Commission's claims alleged in the OIP are barred, in whole or in part, because this administrative proceeding violates the doctrine of separation of powers.

20. This administrative proceeding involves an improper delegation of legislative power in violation of the Vesting Clause of the U.S. Constitution.

21. This administrative proceeding constitutes adjudication by inferior officers who are statutorily insulated from executive removal in violation of the Take Care Clause of the U.S. Constitution.

22. This administrative proceeding is otherwise unconstitutional on its face and as applied to the facts and circumstances of this matter.

23. The text of the OIP fails to honor the mandate set forth in Rule 200(b), 17 C.F.R. § 201.200(b), that an order initiating proceedings, where it directs an answer pursuant to § 201.220, must "set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto."


24. The proceeding is barred by laches or otherwise by the Board's failure to timely institute proceedings against Mr. Markowitz.

25. Mr. Markowitz has already suffered significant punitive consequences as a result of the Commission's investigation.

WHEREFORE, having fully answered the OIP, Mr. Markowitz denies that the Division is entitled to any of the relief it seeks against him in the OIP, and respectfully requests that the Commission enter an order dismissing the OIP with prejudice and grant such other and further relief as it may deem just and proper.

Dated: New York, New York
April 27, 2023

Respectfully submitted,
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Certificate of Service

Pursuant to Rule 150 of the Commission's Rules of Practice, I hereby certify that, on April 27, 2023, I filed the foregoing document using the eFAP system and also served a copy of it via email on the following persons:

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