UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 649/April 2, 2010

ADMINISTRATIVE PROCEEDING
File No. 3-13584

In the Matter of	:	ORDER DENYING DIVISION
	:	OF ENFORCEMENT'S MOTION
JAYCEE JAMES	:	FOR SUMMARY DISPOSITION
	:	AND DISMISSING PROCEEDING
		IN PART

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on August 18, 2009, pursuant to Section 21C of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that JayCee James (James) filed numerous reports with the Commission on Forms 3 and 4 and Schedules 13D between March and May 2009. The OIP asserts that, through these reports, James "claimed stock ownership" in more than two dozen public companies. According to the OIP, James is not a shareholder in any of the companies in which he claimed stock ownership. Because James filed these reports and because he is not a shareholder in any of the companies, the OIP contends that James violated Sections 13(d) and 16(a) of the Exchange Act and Exchange Act Rules 13d-1, 13d-2, and 16a-3, 17 C.F.R. §§ 240.13d-1, .13d-2, and .16a-3.

The Commission instituted this proceeding to determine whether the allegations are true, to afford James an opportunity to establish any defenses to the allegations, and to decide whether it should issue a cease-and-desist order. James received the OIP on August 26, 2009 (Postal Service Form 3811).

The Division of Enforcement (Division) promptly notified James of the opportunity to inspect and copy its investigative file (Division's letter to James, dated Aug. 25, 2009). James did not file an Answer within the time allowed. Accordingly, I ordered him to explain why he should not be held in default and why the factual allegations in the OIP should not be deemed to be true (Order to Show Cause, dated Sept. 18, 2009). Six days later (before the California-based parties had received the Order to Show Cause in the mail), the Division filed a motion to hold James in default.

On October 5, 2009, I received an unsigned letter which was captioned as a response to the Order to Show Cause. This document did little to clarify the facts in dispute and the legal arguments it presented were difficult to follow. The letter did not provide a telephone number at which James could be reached during business hours. It did not include a certificate of service, demonstrating that a copy had been delivered to counsel for the Division. Pursuant to Rule 180(b) of the Commission's Rules of Practice, I struck this document from the record, but gave James additional time to respond to the Order to Show Cause and to file and serve an Answer that complied with the Rules of Practice (Order dated Oct. 6, 2009).

I held a telephonic prehearing conference with the parties on October 15, 2009 (Oct. 15, 2009, PHC). At the conference, James promised to submit his response to the Order to Show Cause and his Answer to the OIP the next day. James admitted that he had filed the reports identified in Exhibit 1 to the OIP (Oct. 15, 2009, PHC at 7-8). He also explained that he was "working on acquiring all of the companies" and that "[t]here was no other . . . method to show the ownership in the companies . . . other than those forms" (Oct. 15, 2009, PHC at 9-10). James had previously told the Division that his filings included disclaimers of beneficial ownership (Exhibit 3 to First Declaration of DoHoang T. Duong, dated Sept. 24, 2009) (First Duong Decl.). James waived his statutory right to a hearing within sixty days after service of the OIP (Oct. 15, 2009, PHC at 10).

The promised submission did not arrive for another month. On November 16, 2009, James filed another communication. He characterized many of the companies identified in Exhibit 1 to the OIP as abandoned, revoked, or out of business. He also asserted that the law "may" recognize his efforts to take "constructive possession" of these defunct companies. James acknowledged that his theory of constructive possession did not apply to companies "with valid standings."

It was apparent to me that James did not intend to accept a default and wished to put the Division to its proof. In recognition of James's pro se status, I found that he had substantially complied with my Order to Show Cause and I treated his second communication as an untimely Answer to the OIP. I accepted the Answer and denied the Division's motion for the entry of a default. I also granted the parties leave to file cross-motions for summary disposition (Order dated Nov. 17, 2009).

The Division filed its Motion for Summary Disposition, with accompanying declarations and exhibits, and a Memorandum of Points & Authorities, on December 11, 2009. I held a second telephonic prehearing conference with the parties on December 17, 2009 (Dec. 17, 2009, PHC). Although James was well aware of the due date, he did not reply to the Division's Motion for Summary Disposition and he did not file a cross-motion for summary disposition. The time for doing so has expired.[1]

[1] Rule 155(a)(2) of the Commission's Rules of Practice permits, but does not require, an Administrative Law Judge to deem a party to be in default if the party fails to respond to a dispositive motion. In view of James's pro se status, I decline to hold him in default on that basis here. I will discuss the Division's Motion for Summary Disposition on its merits.

On January 13, 2010, I ordered the Division to show cause why I should not dismiss all allegations in the OIP relating to fourteen issuers that did not have a class of securities registered pursuant to Section 12 of the Exchange Act at the time of James's filings (Order Proposing to Take Official Notice). In the same Order, I also required the Division to show cause why I should not dismiss all allegations under Section 16(a) of the Exchange Act relating to the exempted securities of several foreign private issuers. See infra note 4. The Division filed a Supplemental Memorandum in Support of its Motion on January 26, 2010 (Div. Suppl. Mem.). James did not reply to the Division's Supplemental Memorandum.

The Standards for Summary Disposition

Rule 250(a) of the Commission's Rules of Practice provides that, after a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP with respect to that respondent. The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to Rule 323 of the Commission's Rules of Practice.

Rule 250(b) of the Commission's Rules of Practice requires the hearing officer promptly to grant or deny the motion, or to defer decision on the motion. The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law.

In assessing the summary disposition record, the facts, as well as the reasonable inferences that may be drawn from them, must be viewed in the light most favorable to the non-moving party. See Felix v. N.Y. City Transit Auth., 324 F.3d 102, 104 (2d Cir. 2003); O'Shea v. Yellow Tech. Svcs., Inc., 185 F.3d 1093, 1096 (10th Cir. 1999); Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999).

Rule 220(c) of the Commission's Rules of Practice provides that any allegation in an OIP that is not denied in an Answer "shall be deemed admitted." In federal court proceedings, a party whose responsive pleading fails to deny may be deemed to admit a plaintiff's well-pleaded allegations of fact. See Fed. R. Civ. Pro. 8(d). However, such a party is not deemed to admit conclusions of law or facts that are not well-pleaded. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009) ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions . . . we are not bound to accept as true a legal conclusion couched as a factual allegation"); Oxford Asset Mgmt. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002) (same); Ryan v. Homecomings Fin. Network, 253 F.3d 778, 780 (4th Cir. 2001) (same). Facts that are not well-pleaded include allegations that are contrary to facts of which a court may take judicial notice and facts that are contrary to the uncontroverted material in the file of the case. See Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 63 (2d Cir. 1971) (endorsing the district court's list of the narrow circumstances in which a complaint is not well-pleaded), rev'd on other grounds, 409 U.S. 363 (1973). See infra pp. 10-12.

The courts have recognized that the Commission modeled Rule of Practice 250 on Rule 56 of the Federal Rules of Civil Procedure. See, e.g., Kornman v. SEC, 592 F.3d 173, 182 (D.C. Cir. 2010). By analogy to Rule 56, a factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Once the moving party has carried its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine issue for a hearing and may not rest upon mere allegations or denials of its pleadings. At the summary disposition stage, the hearing officer's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing. See Anderson, 477 U.S. at 249. While Rule 56 does not govern the Commission's administrative proceedings, Jeffrey L. Gibson, 92 SEC Docket 2104, 2112 & n.26 (Feb. 4, 2008), aff'd, 561 F.3d 548 (6th Cir. 2009), it provides helpful guidance on issues not directly addressed by previous Commission opinions.

The Exchange Act's Beneficial Ownership Reporting Provisions and the Commission's Implementing Regulations

In relevant part, Section 13(d)(1) of the Exchange Act and Exchange Act Rule 13d-1 require any person who has acquired beneficial ownership of more than 5% of a voting class of equity securities registered under Section 12 of the Exchange Act to disclose the acquisition to the Commission within ten days.[2] The disclosure statement must contain the information required by Schedule 13D.[3] See Schedule 13D, 17 C.F.R. § 240.13d-101. Section 13(d)(2) of the Exchange Act and Exchange Act Rule 13d-2 require a filer to amend a Schedule 13D promptly as material changes occur in disclosures previously made. Reporting persons must file Schedules 13D electronically on the Commission's Electronic Data Gathering, Analysis and Retrieval (EDGAR) system. See Rule 101(a)(1)(iii) of Regulation S-T, 17 C.F.R. § 232.101(a)(1)(iii).

The Exchange Act does not define beneficial ownership. As a result, the scope of the term has been developed by administrative rulemaking and judicial interpretation. Exchange Act Rule 13d-3(a), 17 C.F.R. § 240.13d-3(a), defines beneficial ownership for purposes of Section 13(d). Under that rule, a "beneficial owner" of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares: (1) voting power which includes the power to vote, or to direct the voting of, such security; and/or (2) investment power which includes the power to dispose, or to direct the

[2] Section 13(d)(1) of the Exchange Act also applies to beneficial ownership reports concerning three other types of equity securities (those issued by insurance companies, closed-end investment companies, and Native Corporations). However, these other types of securities are not involved in this proceeding.

[3] Schedule 13D contains the following warning: "ATTENTION--Intentional misstatements or omissions of fact constitute Federal criminal violations (See 18 U.S.C. § 1001)."

disposition of, such security. "Acquisition" may be through purchase or otherwise. See Exchange Act Rule 13d-5(a), 17 C.F.R. § 240.13d-5(a).

Section 16(a) of the Exchange Act applies to every person who is the beneficial owner of more than 10% of any class of any equity security (other than an exempted security) registered under Section 12 of the Exchange Act and each officer and director of the issuer of such security.[4] It requires such persons to file initial reports with the Commission disclosing their beneficial ownership of all equity securities of the issuer. To keep this information current, Section 16(a) also requires such persons to report to the Commission changes in their ownership involving these equity securities. An initial statement of beneficial ownership must be filed on Form 3 and a statement of changes in beneficial ownership must be filed on Form 4.[5] See Exchange Act Rule 16a-3(a), 17 C.F.R. § 240.16a-3(a); Forms 3 and 4, 17 C.F.R. §§ 249.103-.104. Reporting persons must file Forms 3 and Forms 4 electronically on EDGAR. See Section 16(a)(4) of the Exchange Act; Rule 101(a)(1)(iii) of Regulation S-T.

From 1934 until 1991, the Commission never specifically defined beneficial ownership for purposes of Section 16(a). See, e.g., Interpretive Release on Rules Applicable to Insider Reporting and Trading, 23 SEC Docket 856, 862 (Sept. 24, 1981). Moreover, the Commission explicitly avoided applying to Section 16 the definition of beneficial ownership it had crafted in Rule 13d-3. See Filing and Disclosure Requirements Relating to Beneficial Ownership, 18 SEC Docket 1293, 1297 (Dec. 12, 1979) ("Because the purpose to be accomplished by [S]ection 16 is different from that under [S]ection[] 13(d) . . ., the Commission has not applied the standards for determining beneficial ownership set forth in Rule 13d-3 to reporting under [S]ection 16."). Beginning in 1991, the Commission has defined 10% holders under Section 16 as persons deemed 10% holders under Section 13(d) and Rule 13d-3. See Ownership Reports and Trading by Officers, Directors, and Principal Security Holders, 48 SEC Docket 234, 236, 257-58 (Feb. 8, 1991) (adopting current Exchange Act Rule 16a-1(a)(1), 17 C.F.R. § 240.16a-1(a)(1)).

A required report under Section 13(d) or Section 16(a) of the Exchange Act may contain a disclaimer of beneficial ownership by the person making the report. See Exchange Act Rules 13d-4 and 16a-1(a)(4), 17 C.F.R. §§ 240.13d-4, .16a-1(a)(4).

The Division is not required to demonstrate scienter to establish a violation of either Section 13(d) or Section 16(a) of the Exchange Act. See SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1167 (D.C. Cir. 1978) (Section 13(d)(1)); SEC v. Blackwell, 291 F. Supp. 2d 673, 694-95 (S.D. Ohio 2003) (Section 16(a)).

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[4] Section 3(a)(12)(A)(vii) of the Exchange Act authorizes the Commission to exempt securities from the operation of the Exchange Act by rule, if doing so is consistent with the public interest and the protection of investors. Exchange Act Rule 3a12-3(b), 17 C.F.R. § 240.3a12-3(b), provides that securities registered by a foreign private issuer, as defined in Exchange Act Rule 3b-4, 17 C.F.R. § 240.3b-4, are exempt from Section 16 of the Exchange Act.

[5] Forms 3 and 4 contain the following warning: "Intentional misstatements or omissions of facts constitute Federal Criminal Violations. See 18 U.S.C. § 1001 and 15 U.S.C. § 78ff(a)."

FINDINGS OF FACT

Based on the declarations and exhibits accompanying the Division's Motion for Entry of Default, the Division's Motion for Summary Disposition, the Division's Memorandum of Points & Authorities, James's late-filed Answer, the telephonic prehearing conference transcripts, the Division's Supplemental Memorandum, and matters that may be officially noticed under Rule 323 of the Commission's Rules of Practice,[6] the following material facts are undisputed.

James Makes Numerous EDGAR Filings

James is thirty-nine years of age and resides in Victorville, California (Answer). He is a high school graduate who is taking on-line college-level courses through Kaplan University (Dec. 17, 2009, PHC at 7-8). James held Series 7 and Series 63 securities licenses during the 1990s, but he has not been a registered professional in the securities industry for more than ten years (Dec. 17, 2009, PHC at 8).

Between March 6, 2009, and May 6, 2009, James filed eighty-two Forms 3, 3/A, 4, and 4/A and Schedules 13D and 13D/A on EDGAR.[7] In eighty of these filings, James reported beneficial ownership in twenty-eight different companies (Oct. 15, 2009, PHC at 7-8; Answer).[8] Many, but not all, of the filings contained language that disclaimed beneficial ownership, as

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[6] Pursuant to Rule 323, official notice may be taken of any matter in the public official records of the Commission, including EDGAR. See Phlo Corp., 90 SEC Docket 1089, 1094 n.19 (Mar. 30, 2007); cf. Ogayonne v. Mukasey, 530 F.3d 514, 520 (7th Cir. 2008) (holding that an Immigration Judge did not err in relying on documents he introduced into the record); Conforti v. United States, 74 F.3d 838, 840 (8th Cir. 1996) (holding that there was no error where a Judicial Officer took sua sponte official notice of proceedings in different courts).

If official notice is taken of a material fact not appearing in evidence in the record, the parties must be afforded an opportunity to establish the contrary. I have already given the parties one such opportunity (Order Proposing to Take Official Notice). If the parties wish to "establish the contrary" as to any other matters as to which official notice is taken in this Order, they may do so within fourteen days after service of the Order.

[7] Paragraph II.B.1 of the OIP alleges that James filed eighty-three such Forms and Schedules, involving twenty-nine distinct companies. Exhibit 1 to the OIP indeed lists eighty-three filings by James (Declaration of Cecile Peters ¶ 7) (Peters Decl.). However, one such filing (an April 28, 2009, letter involving Sports Media, Inc.) is a written communication ("SC TO-C"). Because this filing is not a Form 3, Form 4, or Schedule 13D, its content is beyond the scope of the OIP.

[8] The discrepancy as to the number of companies in Exhibit 1 to the OIP depends on whether APT Satellite Holdings Limited (CIK No. 1027229) and APT Satellite Holdings Limited\ADR (CIK No. 1027240) should be counted once or twice. I have counted it as one company. The Division has counted it as two companies.

permitted by Exchange Act Rules 13d-4 and 16a-1(a)(4).[9] See infra pp. 12-14. Two of James's filings reported no beneficial ownership of any shares of the companies in question.[10]

The Commission's Staff Disables James's EDGAR Filing Account and Starts to Delete His Filings

Four companies contacted the Commission's staff about James's filings (Second Duong Declaration, dated Dec. 9, 2009 (Second Duong Decl.), Exs. 8-10; Peters Decl. Ex. 1). A written complaint arrived on April 17, 2009, from SCOR Holding (Switzerland) Ltd. (SCOR Holding), a company that had deregistered its securities in 2008 (Peters Decl. ¶ 5, Ex. 1). The Division makes vague references to "others" who complained verbally, but, when pressed, it could not provide specifics (Dec. 17, 2009, PHC at 18).

On May 5, 2009, the Division sent James a request for the voluntary production of documents supporting the "claims" he had made in his EDGAR filings. The Division's May 5 request correlates closely with the May 6 cessation of James's postings to EDGAR. In the next three days, the Division did not receive any documents in response to its request.[11]

At some point thereafter, the Commission's Division of Corporation Finance (Corporation Finance) disabled James's EDGAR filing account (Div. Suppl. Mem. at 1-2).[12] Corporation Finance has also removed two of James's filings from EDGAR.[13]

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[9] The disclaimers are apparent on the faces of many of the filings, and I take official notice of them on that basis. James brought the disclaimers to the Division's attention no later than September 10, 2009 (First Duong Decl. Ex. 3). It is unknown if James also brought the disclaimers to the Division's attention during the investigation that preceded the OIP, because the text of James's May 13, 2009, "Wells submission" is not part of the record.

[10] James filed a Form 3/A on March 11, 2009, reporting that he owned no common or preferred shares of Admiralty Holding Co. He also filed a Form 3 on April 13, 2009, reporting that he owned no common or preferred shares of American Basketball Association, Inc. Assuming that the Division's theory of the case is correct, I decline to deem that James admitted that these two filings are false.

[11] There is no basis for inferring that the Division encouraged James to submit an expedited response, because the text of the Division's request is not part of the record. Peters and Duong had been investigating James's EDGAR filings since April 2009, possibly as early as April 17, 2009 (Peters Decl. ¶ 5; First Duong Decl. ¶ 3). In these circumstances, the abbreviated amount of time the Division afforded James to produce documents—three days—was not shown to be reasonable. I decline to draw an adverse inference that James "failed" to produce documents. The record does not show whether James offered an explanation without producing documents.

[12] After the Commission issued the OIP, James informed the Division that he was willing to rescind any filings he had made with respect to active companies (First Duong Decl. Ex. 3). However, the staff's decision to disable James's EDGAR filing account has eliminated that possibility. The Division nonetheless contends that a cease-and-desist order is necessary because

The Division's Prima Facie Case

The Division has presented a letter from an attorney representing SCOR Holding and sworn declarations from representatives of three other companies listed in Exhibit 1 to the OIP: CapitalSource Healthcare REIT (CapitalSource Healthcare), VOIP Talk, Inc. (VOIP Talk), and APT Satellite Holdings Limited (APT Satellite) (Peters Decl. Ex. 1; Second Duong Decl. Exs. 8-10). The letter from SCOR Holding and the sworn declarations from CapitalSource Healthcare and VOIP Talk cannot establish that James is liable under Sections 13(d) or 16(a) of the Exchange Act because the Division has not sustained its burden of proving that these issuers had a class of securities registered pursuant to Section 12 of the Exchange Act at the relevant times. See infra pp. 14-21.

The sworn declaration from a representative of APT Satellite is relevant only in part. This company was an issuer of securities registered pursuant to Section 12 of the Exchange Act when James made his filings. However, the Division's pleadings do not address the disclaimers of beneficial ownership that James included on his Forms 3 and 4 involving APT Satellite. See infra pp. 12-14. Nor has the Division shown good cause as to why I should not treat APT Satellite's securities as exempted securities for purposes of Section 16(a) of the Exchange Act. See infra p. 25.

APT Satellite

APT Satellite is a Bermuda corporation with its principal office in Hong Kong, China (APT Satellite Annual Report for the year ended Dec. 31, 2008, Form 20-F at 12) (Form 20-F) (official notice). As of December 31, 2008, APT Satellite had issued 413,265,000 ordinary shares (Form 20-F). APT Satellite's principal shareholders collectively own 214,200,000 of the company's outstanding ordinary shares (or 51.83% of the total) through APT Satellite International Company Limited (Declaration of Brian Lo ¶ 9) (Lo Decl.). APT Satellite maintains a listing for its ordinary shares on the Hong Kong Stock Exchange (Form 20-F at 59). That exchange is the primary trading market for its ordinary shares (Form 20-F at 59).

APT Satellite, a foreign private issuer, formerly had an American Depository Receipts (ADR) program that was traded on the New York Stock Exchange (Form 20-F; Lo Decl. ¶ 4). APT Satellite's ADRs were registered pursuant to Section 12(b) of the Exchange Act at the times relevant to this proceeding (APT Satellite's Notification of Removal from Listing and Registration, dated July 28, 2008) (Form 25) (official notice). Each ADR represented eight of

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James has not rescinded any of his filings (Div. Mem. P. & A. at 8) ("In the six months since James made the filings at issue, he has not taken any steps to withdraw or correct his inaccurate disclosures").

[13] James filed Forms 3 and 3/A with respect to SCOR Holding on April 10, 2009 (OIP Ex. 1). These filings, which prompted SCOR Holding's letter on April 17, 2009, no longer appear on EDGAR (official notice).

APT Satellite's ordinary shares (Form 20-F at iii, 60). The company voluntarily delisted its ADRs from the New York Stock Exchange in August 2008, citing the relatively low participation in the ADR program and the relatively high costs and administrative expenses associated with the listing (Form 25; Form 20-F at 60; Lo Decl. ¶ 4).

From August 2008 to September 2009, the only activity in APT Satellite's stock in the United States involved the surrender and cash settlement of the ADRs (Lo Decl. ¶ 7; Certification of Termination of Duty to File Reports (Form 15F) (official notice)). As of August 31, 2008, there were eighty-five registered holders of record of the company's ADRs (Form 20-F at 60). Collectively, these holders owned 4,244,016 ADRs (Form 20-F at 60).

While APT Satellite was winding down its ADR program in the United States, the company continued to comply with all the applicable reporting obligations under the Exchange Act (Lo Decl. ¶ 4). On September 16, 2009, (i.e., after the time period at issue in this proceeding), APT Satellite filed a Form 15F, voluntarily terminating its duty to file periodic reports with respect to its ADRs. See Exchange Act Rule 12h-6(a), 17 C.F.R. § 240.12h-6(a). APT Satellite reported that, as of September 10, 2009, there were no holders of its ADRs who are United States residents (Form 15F).

James filed several forms and schedules reporting a beneficial interest in the securities of APT Satellite (Lo Decl. ¶ 5). On March 24, 2009, he filed a Form 3, reporting beneficial ownership of 4,800,000 ordinary shares. On March 26, 2009, he filed a Form 3/A, reporting beneficial ownership of $480,000 worth of ordinary shares. On April 16, 2009, James filed a Form 3, reporting that he beneficially owned 305,000,000 shares of APT's "common stock." James made the April 16 filing under CIK No. 1027240 and identified the issuer as "APT Satellite Holdings Ltd\ADR." See supra note 8. James's filings of March 24, March 26, and April 16, 2009, disclaimed beneficial ownership. Typical language, taken from the March 26 filings, stated:

> Control may be deemed to exist[. A]s permitted under 13d-4 of SEC 34 I expressly declare that any such filings shall not be construed as an admission that such person is for the purposes of Sections 13(d) or 13(g) the beneficial owner of any securities covered by the schedule or a member of a group defined for these purposes other than as described in 13D.

On March 30, 2009, James filed a Form 4/A, reporting beneficial ownership of 413,000,000 ordinary shares of APT Satellite. James's March 30 filing attempted to disclaim beneficial ownership, but the disclaimer omitted the word "not" (i.e., "any such filings shall be construed as an admission").

James also filed four Schedules 13D and 13D/A on April 8, April 9 (two filings), and April 14, 2009, relating to APT Satellite (Answer; Lo Decl. ¶ 5). In each of these filings, James reported beneficial ownership of 413,000,000 shares of APT Satellite's "common stock" (official notice). These Schedules did not disclaim beneficial ownership, as permitted by Rule 13d-4. The beneficial ownership data James provided in his four Schedules 13D and 13D/A conflict with the Lo Declaration, which demonstrates that APT Satellite's principal shareholders in China

collectively owned 214,200,000 of the company's 413,265,000 ordinary shares at the relevant times.

DISCUSSION AND CONCLUSIONS

The "Deemed Admissions"

The Division has not presented declarations from representatives of twenty-four companies listed in Exhibit 1 to the OIP (Oct. 15, 2009, PHC at 18-19; Dec. 17, 2009, PHC at 10). To establish James's liability for the filings he made as to these twenty-four companies, the Division urges me to rely on James's Answer to the OIP, the transcript of the first prehearing conference, and certain matters that the Division believes must be "deemed admitted" pursuant to Rule 220(c) of the Commission's Rules of Practice.

The fact that James admitted to making the filings resolves very little. If a filer of Forms 3, Forms 4, or Schedules 13D lists shares as being beneficially owned by him, then that is some evidence that the filer does beneficially own the shares. However, in Section 16(b) proceedings for recovery of short-swing profits from insiders, it is not dispositive of the issues addressed in the Forms and Schedules. See Chem. Fund, Inc. v. Xerox Corp., 377 F.2d 107, 112 (2d Cir. 1967) (rejecting the argument that a corporation admitted the applicability of Section 16 when it filed Forms 3 and 4 without disclaimers of beneficial ownership; holding that the failure to file disclaimers did not dispose of the question of statutory interpretation presented); Levner v. Saud, 903 F. Supp. 452, 460-61 & n.14 (S.D.N.Y. 1994) (holding that it is irrelevant for purposes of Section 16(b) liability that the defendant filed a Schedule 13D representing that he was a significant beneficial owner); Schaffer v. Soros, 1994 U.S. Dist. LEXIS 9886, at *17 (S.D.N.Y. July 20, 1994) (in a Section 16(b) action, defendant's filing of a Schedule 13D is permissible evidence of his position, but it "cannot be deemed a conclusive admission which in itself settles the issue" of whether the defendant was a significant beneficial owner).

Except as already discussed, see supra note 11 and associated text, I specifically decline to deem that James admitted the allegations in Paragraphs II.B.4 and II.B.5 of the OIP. See supra note 1; cf. Whitsitt v. Vinotheque Wine Cellars, 2008 U.S. Dist. LEXIS 91181, at *10 (E.D. Cal. Nov. 10, 2008) (Mag. J.) (holding that a party "will not be deemed to have admitted the[] types of admissions which . . . mainly require [the party] to make conclusive legal admissions such that he basically concedes his case to [his opponent]").

The OIP alleges that, on May 8, 2009, the Division sent James a Wells notice, requesting that he provide documents supporting his stock ownership claims. This is not a well-pleaded factual allegation. A Wells notice is not a discovery tool. To the contrary, the Commission has explained that Wells submissions should generally avoid addressing contested factual issues.

> Where a disagreement exists between the staff and a prospective respondent or defendant as to factual matters, it is likely that this can be resolved in an orderly manner only through litigation. Moreover, the Commission is not in a position to, in effect, adjudicate issues of fact before the proceeding has been commenced and the evidence placed in the record. . . . Consequently, submissions by prospective defendants or respondents will normally prove most useful in connection with

> questions of policy, and on occasion, questions of law, bearing upon the question of whether a proceeding should be initiated. . .

Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations, 1972 SEC LEXIS 238, at *4-5 (Sept. 27, 1972); see 17 C.F.R. § 202.5(c).

What the OIP characterizes as a Wells notice appears to be a short-cut substitute for a subpoena duces tecum. By refraining from issuing an actual subpoena duces tecum, the Division foreclosed the prospect of a subpoena enforcement action under Section 21(c) of the Exchange Act. During any such action, James might have asserted defenses to a subpoena. Cf. SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118 (3d Cir. 1981) (en banc). To be sure, members of the Commission have expressed concern about delays in investigations involving subpoenas.[14] However, absent evidence that the Commission has changed its policy, the Division may not euchre the pro se target of an investigation into believing that short-notice document production is a mandatory component of a Wells submission.

The OIP further alleges that, on May 13, 2009, James made a Wells submission in which he admitted that he had not "traded" any shares in the subject companies. The significance of this allegation is unclear, inasmuch as Section 13(d)(1) of the Exchange Act deals with "acquiring . . . beneficial ownership" and Exchange Act Rule 13d-5(a) provides that "acquisition" may be made through purchase "or otherwise." Even if the "no trading" allegation were now to be deemed admitted, it would not resolve anything.

Finally, the OIP asserts that James's Wells submission "attempt[ed] to explain his interest in [eighteen] of the companies," but "did not include any stock certificates or other evidence to substantiate his stock ownership claims." The OIP concludes: "Therefore, . . . [James] is not a shareholder" in any of the companies listed in OIP Exhibit 1. This is not a well-pleaded factual allegation, either. It assumes that James bears the burden of proving that the information he provided in his Forms and Schedules is true. In fact, the Division bears the burden of proving that James lacked a factual basis for the representations he made in his filings. See IMS/CPAs & Assoc., 55 S.E.C. 436, 453 n.31 (2001) (holding that, as part of its prima facie case, the Division must establish that misstatements were made), pet. denied, 327 F.3d 851 (9th Cir. 2003); cf. BASF Corp. v. Old World Trading Co., 41 F.3d 1081, 1089 (7th Cir. 1994); United States v. Watts, 72 F. Supp. 2d 106, 113-14 (E.D.N.Y. 1999); In re Brown Co. Secs. Litig., 355 F. Supp. 574, 582-83 (S.D.N.Y. 1973). In addition, there is no way of knowing whether the eighteen companies that James discussed had a class of securities registered pursuant to Section 12 of the Exchange Act.

The Division's pleadings do not address James's disclaimers of beneficial ownership.

Because the Commission's definition of beneficial ownership is broad, the regulatory scheme expressly contemplates protective filings of Schedules 13D, Forms 3, and Forms 4,

[14] See, e.g., Address of Chairman Mary L. Schapiro to the Practising Law Institute's "SEC Speaks in 2009" Program (Feb. 6, 2009) ("In investigations that require use of subpoena power, time is always of the essence, and every additional day of delay can be costly.").

subject to disclaimers of beneficial ownership under Exchange Act Rules 13d-4 and 16a-1(a)(4). If persons file Schedules 13D or Forms 3 or 4 and disclaim beneficial ownership, then the courts have not deemed the filings to be admissions of beneficial ownership. See Morales v. Quintel Entm't, Inc., 249 F.3d 115, 129 (2d Cir. 2001); Calvary Holdings, Inc. v. Chandler, 948 F.2d 59, 64-65 (1st Cir. 1991).

More than half of James's filings contain such disclaimers of beneficial ownership. I take official notice of the disclaimers, which appear on the faces of many of the filings identified in Exhibit 1 to the OIP. Cf. In re Bristol Myers Squibb Secs. Litig., 312 F. Supp. 2d 549, 555 (S.D.N.Y. 2004) ("The court need not accept as true an allegation that is contradicted by documents on which the complaint relies."); Rapaport v. Asia Elecs., Inc., 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000) ("If the[] documents contradict the allegations of the . . . complaint, the documents control."). Although the disclaimers are material facts, the Division's pleadings do not address them.

James's disclaimers of beneficial ownership are not grammatically correct or properly punctuated. In some instances, his disclaimers invoke Rule 13d-4 when it would have been more appropriate to cite Rule 16a-1(a)(4). In other instances, he dropped the word "not." These flaws are not dispositive at this stage of the proceeding. The Office of the General Counsel has opined that disclaimers under Section 16(a) are appropriate "in case of doubt." Exchange Act Release No. 79, 1935 SEC LEXIS 31 (Jan. 13, 1935) (discussing former Exchange Act Rule NA3(d), a predecessor to current Rule 16a-1(a)(4)). Corporation Finance has explained that disclaimers under Section 16(a) are appropriate in cases of "genuine doubt" and that no special wording is required of filers making such disclaimers. See Interpretive Release, 23 SEC Docket at 874 (Q. 41) (discussing former Exchange Act Rule 16a-3, the immediate predecessor to current Exchange Act Rule 16a-1(a)(4)); Chittenden Corp., 1985 SEC No-Act. LEXIS 2613 (Oct. 18, 1985) ("the degree of elaboration on the circumstances believed to warrant a disclaimer of beneficial ownership is at the discretion of the individual or entity filing the Form 4.").[15]

In Portsmouth Square, Inc. v. Shareholders Protective Committee, 770 F.2d 866, 874 (9th Cir. 1985), the court of appeals held:

> Portsmouth Square suggests that the Committee has violated the securities laws by filing a "false and misleading" Schedule [13D], regardless of whether it was actually required to file one. Portsmouth Square provides no authority for this theory, and we reject it. The Committee filed a Schedule [13D] only under protest, at the insistence of the corporation. It did not expose itself to liability by doing so, except to the extent that it had a [S]ection 13(d) filing obligation. We hold that it had no such obligation.

[15] The views of the Commission's staff are not binding on the Commission itself. Nonetheless, the Commission has also shown flexibility towards the wording of a disclaimer, at least where the quantity of shares covered by the disclaimer was nominal. See Herbert Moskowitz, 55 S.E.C. 658, 667 n.28, 675 n.47 (2002).

In Calvary Holdings, 948 F.2d at 64-65 & n.8, the First Circuit refused even to consider an argument that a precautionary Schedule 13D was incomplete when there was no duty to file the Schedule in the first place:

> Calvary suggests that Chandler's Schedule 13D is incomplete. Because we find that Chandler did not have to file a Schedule 13D at all we do not have to reach that issue.

Accord Santa Fe Gaming Corp. v. Hudson Bay Partners, L.P., 49 F. Supp. 2d 1178, 1184 (D. Nev. 1999) (same).

The filers in Portsmouth Square, Calvary Holdings, and Santa Fe Gaming submitted Schedules 13D under pressure. In the present case, James stated his belief that he had to make beneficial ownership filings in connection with his campaign to take adverse possession of shell companies. The Division correctly notes that James has offered nothing in this proceeding to demonstrate that his adverse possession theory has a sound legal basis. However, that only demonstrates that James made a mistake of law. Cf. Levy v. Seaton, 358 F. Supp. 1, 4 (S.D.N.Y. 1973) (holding that the fact that a corporate officer filed a Form 4 was not dispositive of his liability under Section 16(b) if the filing "was an unnecessary act based on a mistake of law"). The Division's pleadings do not address the issue of whether James's disclaimers met the General Counsel's standard of "doubt" or Corporation Finance's standard of "genuine doubt."

For purposes of the Division's Motion for Summary Disposition, the facts must be viewed in the light most favorable to James as the non-moving party. At this stage of the proceeding, it is not necessary to find that James's disclaimers are truthful, or that his disclaimers should be given more weight than the information he provides elsewhere in his Schedules 13D and Forms 3 and 4. As to those filings that contain disclaimers of beneficial ownership, the Division cannot prevail by ignoring the disclaimers. The Division's Motion for Summary Disposition is denied to this extent.

The Division has not sustained its burden of proving that seventeen of the twenty-eight companies identified in OIP Exhibit 1 were issuers of a class of securities registered pursuant to Section 12 of the Exchange Act.

Registration of a class of securities under Section 12 of the Exchange Act is an essential element of a cause of action alleging that beneficial ownership reports violated Sections 13(d) and 16(a) of the Exchange Act. See Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 789 (S.D.N.Y. 1979) (holding that Section 13(d) does not apply to all securities, but only to equity securities registered pursuant to Section 12 and citing with favor an amicus curiae brief from the Commission); Steele v. Polymer Research Corp. of Am., No. 85 Civ. 5563, 1987 U.S. Dist. LEXIS 5270, at *3-6 (S.D.N.Y. June 18, 1987) (dismissing a counterclaim alleging violations of Section 13(d) because the security in question was not registered pursuant to Section 12; imposing sanctions under Fed. R. Civ. Pro. 11 against the attorney who filed the counterclaim); Interpretive Release, 23 SEC Docket at 860 n.9 ("Section 16, of course, does not apply to unregistered companies, including those which file periodic reports with the Commission pursuant to Section 15(d) of the Exchange Act. Section 16 becomes operative only after

registration under Section 12 has become effective."); Exchange Act Rule 12b-6, 17 C.F.R. § 240.12b-6 (same); Peter J. Romeo & Alan L. Dye, Section 16 Treatise and Reporting Guide § 6.02[11][b] (3d ed. 2008) ("[T]ransactions effected by a [10%] owner after termination of the issuer's registration under Section 12 are not subject to Section 16 under any circumstance.").

The Division elected to file its Motion for Summary Disposition without a supporting declaration from a knowledgeable individual, attesting to the fact that every one of the twenty-eight companies identified in OIP Exhibit 1 was a Section 12 registrant at the relevant times. Because of this rather gaping hole in the record, I reviewed EDGAR on my own motion and took official notice of its contents as to the Section 12 registration status of the twenty-eight companies. Based on this review, I conclude that at least seventeen companies identified in OIP Exhibit 1 did not have a class of securities registered pursuant to Section 12.

I have already afforded the Division an opportunity to address the Section 12 registration issue as to fourteen of these companies and to show cause why the allegations of the OIP should not be dismissed as to James's filings with respect to these companies (Order Proposing to Take Official Notice). In response, the Division conceded that Section 12 registration was imperative and that "several" entities listed in OIP Exhibit 1 were not Section 12 registrants when James made his filings (Div. Suppl. Mem. at 2). However, the Division attempted to minimize its gaffe by urging me to focus on those "entities that were then registered with the Commission, including but not limited to Fashion House Holdings, Inc., Sports Media, Inc., [and others]" (Div. Suppl. Mem. at 2-3) (emphasis in original).

This has proven to be easier said than done. At least five companies listed in OIP Exhibit 1 (Channel America Television Network, Inc., Admiralty Holding Co., Asia Electronics Holding Co., Inc., Visual Frontier, Inc., and TNX Television Holdings, Inc.) arguably had a class of securities registered pursuant to Section 12, but all of James's filings with respect to these companies contained disclaimers of beneficial ownership. To make matters worse, after closer examination of EDGAR, I have preliminarily determined that three more issuers (Fashion House Holdings, Inc., Sports Media, Inc., and VOIP Talk) are not Section 12 registrants, either. The circumstances are as follows:

Ten companies identified in OIP Exhibit 1 had a class of securities registered pursuant to Section 12 of the Exchange Act at one time, but filed Form 12g-4, Forms 15, or Forms 15F voluntarily terminating the registrations of their respective securities between 1983 and 2008 (Order Proposing to Take Official Notice; Div. Suppl. Mem. at 2).[16] These voluntary terminations of registration became effective well before James is alleged to have committed the reporting violations identified in the OIP.

Former Issuer	Filing Date of Termination Notice

[16] An issuer may file a Form 15 Certification and Notice of Termination of Registration under Section 12(g) of the Exchange Act under certain conditions. The termination becomes effective in ninety days, pursuant to Section 12(g)(4) of the Exchange Act and Exchange Act Rule 12g-4, 17 C.F.R. § 240.12g-4. The Commission adopted Form 15 to replace Form 12g-4 in 1984.

Capital Media Group Ltd.	Dec. 30, 2002 (Form 15)
Network Holdings International, Inc.	Jan. 15, 2002 (Form 15)
American Basketball Association, Inc.	Dec. 19, 2007 (Form 15)
Cinemastar Luxury Theaters, Inc.	Dec. 4, 2001 (Form 15)
Global Technologies, Ltd.	Mar. 12, 2002 (Form 15)
HydroFlo, Inc.	Nov. 8, 2006 (Form 15)
General Acceptance Corp. (Indiana)	Feb. 17, 1998 (Form 15)
Cornet Stores	June 16, 1983 (Form 12g-4)
TVSL S.A. in Liquidation	June 30, 2006 (Form 15F)
SCOR Holding	Jan. 7, 2008 (Form 15F)

In resolving the Sections 13(d) and 16(a) liability issues, no further consideration will be given to the filings that James made with respect to these ten companies.[17] Cf. TelcoBlue, Inc., 93 SEC Docket 7335 (June 30, 2008) (dismissing a proceeding instituted pursuant to Section 12(j) of the Exchange Act against a respondent that no longer had a class of securities registered pursuant to Section 12 of the Exchange Act); Enamelon, Inc., 86 SEC Docket 2944 (Dec. 15, 2005) (same).

The Division has not carried its burden of demonstrating that seven other companies identified in OIP Exhibit 1 had a class of securities registered pursuant to Section 12 of the Exchange Act at the relevant times:

Williams & Associates never applied to the Commission to register any equity securities pursuant to Section 12 of the Exchange Act. Because the Division elected to remain silent on this subject in its Supplemental Memorandum, it has waived its opportunity "to establish the contrary" under Rule of Practice 323. The allegations in the OIP relating to the securities of Williams & Associates will be dismissed.

Solar Night Industries, Inc. (Solar Night), filed a Form SB-2 on January 18, 2007, seeking to register a public offering of common stock under the Securities Act of 1933 (Securities Act). Solar Night then applied to withdraw its request for registration on May 3, 2007. Pursuant to Securities Act Rule 477, 17 C.F.R. § 230.477, an application to withdraw is deemed granted unless, within fifteen calendar days, the Commission notifies the applicant that it will not be granted. The Commission did not notify Solar Night that its application to withdraw would not be granted. EDGAR contains no evidence that Solar Night ever applied to register a class of securities under Section 12 of the Exchange Act. Because the Division elected to remain silent on this subject in its Supplemental Memorandum, it has waived its opportunity "to establish the contrary" under Rule of Practice 323. The allegations in the OIP relating to the securities of Solar Night will be dismissed.

[17] All allegations against James under Section 16(a) are dismissed as to his April 13, 2009, filing of a Form 3 involving American Basketball Association, Inc., for the additional reason that the Division has not shown that this Form 3 filing is false. See supra note 10.

VOIP Talk submitted the Declaration of Alex Brecher (Brecher), its president and chief executive officer, in support of the Division's Motion for Summary Disposition. In relevant part, Paragraph 4 of the Brecher Declaration states:

> In approximately March 2008, VOIP Talk registered 383,000 shares of common stock pursuant to Section 12 of the [Exchange Act] by filing a Form S-1 with the [Commission].

This statement is puzzling because Form S-1 is a Securities Act form, not an Exchange Act form. EDGAR shows that VOIP Talk filed a Form S-1 registration statement on March 13, 2008. The Form S-1, as later amended, sought to register a public offering of 383,000 shares of VOIP Talk's common stock under the Securities Act. VOIP Talk's registration under the Securities Act became effective on April 9, 2008 (official notice).

As a Securities Act registered company, VOIP Talk is required to file certain Exchange Act reports, such as periodic reports, pursuant to Section 15(d) of the Exchange Act and the rules thereunder. However, Section 15(d) issuers are not Section 12 registrants. EDGAR contains no evidence that VOIP Talk ever registered a class of securities pursuant to Section 12 of the Exchange Act (official notice).

Fashion House Holdings, Inc. (Fashion House), filed a Form SB-2 in late 2006, seeking to register a public offering of its common stock pursuant to the Securities Act (official notice). Registration of this public offering became effective on January 17, 2007 (official notice).

EDGAR contains no evidence that Fashion House registered a class of securities pursuant to Section 12 of the Exchange Act. In fact, there is evidence to the contrary. On the cover pages of its annual reports for the years ended December 31, 2006, and December 31, 2007, Fashion House specifically represented that it did not have a class of securities registered pursuant to Section 12(g) of the Exchange Act and that its shares were not listed on a national securities exchange (official notice). As a result, Fashion House is in precisely the same position as VOIP Talk: it is a Section 15(d) issuer, but not a Section 12 registrant.[18]

Sports Media, Inc. (Sports Media), registered its common stock with the Commission pursuant to Section 12(b) of the Exchange Act in July 1991 (official notice). Cf. Janice A. Jones, 59 SEC Docket 1768, 1770 (June 19, 1995) (settlement order). However, the Commission later entered an order striking Sports Media's common stock and warrants from listing on the Boston Stock Exchange and from registration under Exchange Act Section 12(b). See Exchange Act Release No. 37615, 62 SEC Docket 1970 (Aug. 28, 1996).

Under Exchange Act Rule 12g-2, 17 C.F.R. § 240.12g-2:

> [a]ny class of securities which would have been required to be registered pursuant to section 12(g)(1) of the [Exchange] Act except for the fact that it was exempt

[18] Furthermore, James's only filing with respect to Fashion House, a Form 3 filed on March 6, 2009, contains a disclaimer of beneficial ownership.

> from such registration by section 12(g)(2)(A) because it was listed and registered on a national securities exchange . . . shall upon the termination of the listing and registration of such class . . . and without the filing of an additional registration statement be deemed to be registered pursuant to said section 12(g)(1) if at the time of such termination . . . securities of the class are not exempt from such registration pursuant to section 12 or rules thereunder . . . and all securities of such class are held of record by 300 or more persons.

It is the Division's burden to show that Sports Media's securities were deemed registered pursuant to Section 12(g)(1) and were held of record by 300 or more persons on the date of termination of the listing and registration. Typically, in such circumstances, the Division contacts the transfer agent and obtains a sworn declaration. See FuelNation, Inc., 90 SEC Docket 2409 (June 5, 2007) (Order Dismissing Proceeding Based on Lack of Registration). Here, however, the Division elected not to contact any transfer agents, despite being alerted to the potential importance of doing so (Oct. 15, 2009, PHC at 18-19). Accordingly, the Division has not carried its burden of demonstrating that Sports Media had a class of securities registered pursuant to Section 12 at the relevant times.

CapitalSource Healthcare submitted the Declaration of Joseph Turlitz (Turlitz Decl.) in support of the Division's Motion for Summary Disposition. On August 6, 2008, CapitalSource Healthcare filed a Form S-11 to register a public offering of its common shares under the Securities Act (official notice). CapitalSource Healthcare amended its Form S-11 on September 29 and October 6, 2008 (official notice).

On October 10, 2008, CapitalSource Healthcare filed a concurrent Form 8-A to register a class of securities pursuant to Section 12(b) of the Exchange Act (official notice). On the cover page of its Form 8-A, CapitalSource Healthcare stated that registration pursuant to Section 12(b) of the Exchange Act would become "effective pursuant to General Instruction A.(c)" of Form 8-A.

General Instruction A.(c) of Form 8-A provides (emphasis added):

> If this form is used for the registration of a class of securities under Section 12(b), it shall become effective: . . . (2) If a class of securities is concurrently being registered under the Securities Act, upon the later of the filing of the Form 8-A with the Commission, receipt by the Commission of certification from the national securities exchange listed on this form[,] or [the] effectiveness of the Securities Act registration statement relating to the class of securities.

See also Exchange Act Form 8-A, 17 C.F.R. § 249.208a(c) (same).

The Commission received a certification from the New York Stock Exchange (NYSE) on October 9, 2008, advising that the NYSE had approved CapitalSource Healthcare for listing and registration (official notice).

Later in October 2008, CapitalSource Healthcare announced that it had temporarily decided to delay its plans to conduct an initial public offering due to market volatility (Turlitz Decl. ¶ 5). On February 5, 2010, CapitalSource Healthcare withdrew its registration application under the Securities Act (official notice). The Commission deems withdrawal of a Securities Act registration statement under Securities Act Rule 477 also a withdrawal of the corresponding Form 8-A. See Integration of Abandoned Offerings, 74 SEC Docket 666, 670 n.51 (Jan. 26, 2001).

The text of Section 12(d) of the Exchange Act, standing alone, could support an argument that Section 12 registration became effective no later than thirty days after October 9, 2008, the date the Commission received the NYSE's certification. In contrast, General Instruction A.(c)(2) to Form 8-A supports the conclusion that Section 12 registration never became effective because the corresponding Securities Act registration never became effective. The fact that CapitalSource Healthcare used Form 8-A, and not Form 10, also supports this latter conclusion.[19]

The Division needed to address these matters in its Supplemental Memorandum. Because the Division elected to remain silent on this subject, it has waived its opportunity "to establish the contrary" under Rule of Practice 323. The allegations in the OIP relating to the securities of CapitalSource Healthcare will be dismissed.

Asia Broadband, Inc. (Asia Broadband), is in a similar position to CapitalSource Healthcare because it, too, filed concurrent applications under the Securities Act and the Exchange Act. Asia Broadband filed a Form SB-2 on May 5, 2004, seeking to register a public offering of its common stock pursuant to the Securities Act (official notice). It amended its Securities Act application several times in 2004 and 2005.

Asia Broadband filed a concurrent Form 8-A on May 19, 2004, to register a class of securities pursuant to Section 12(g) of the Exchange Act (Div. Suppl. Mem. at 2 n.1). On the cover page of its Form 8-A, Asia Broadband stated that the registration pursuant to Section 12(g) of the Exchange Act would become "effective pursuant to General Instruction A.(d)" of Form 8-A (official notice).

General Instruction A.(d) of Form 8-A provides (emphasis added):

> If this form is used for the registration of a class of securities under Section 12(g), it shall become effective: . . . (2) If a class of securities is concurrently being registered under the Securities Act, upon the later of the filing of the Form 8-A

[19] Form 8-A requires an applicant to provide a limited amount of information, and most of that information can be incorporated by reference from the concurrently filed Form S-1 or S-11. Exchange Act Form 10 and former Form 10-SB, in contrast to Form 8-A, require more extensive information comparable to Forms S-1 and S-11 registration statements. It is highly likely that, if CapitalSource Healthcare intended to pursue Exchange Act registration of a class of securities without the concurrent registration of its public offering under the Securities Act, it would have utilized Form 10, not Form 8-A, to accomplish that goal.

> with the Commission or the effectiveness of the Securities Act registration statement relating to the class of securities.

See also Form 8-A, 17 C.F.R. § 249.208a(d) (same).

Corporation Finance provided comment letters to Asia Broadband, noting deficiencies in the company's proposal to register the public offering under the Securities Act. EDGAR contains no evidence that Asia Broadband replied to the last comment letter, dated May 19, 2005, or subsequently amended its Form SB-2. Although Asia Broadband did not pursue its Securities Act registration application, it did not withdraw its application, either. There is no evidence that the Commission declared Asia Broadband's registration statement effective. There is no evidence that the Commission declared the registration statement to be abandoned. See Securities Act Rule 479, 17 C.F.R. § 230.479.

The text of Section 12(g) of the Exchange Act, standing alone, could support the Division's argument that Section 12 registration became effective no later than sixty days after May 19, 2004. In contrast, General Instruction A.(d)(2) to Form 8-A supports the conclusion that Section 12 registration never became effective because the corresponding Securities Act registration never became effective. The fact that Asia Broadband used Form 8-A, and not Form 10 or former Form 10-SB, also supports this latter conclusion.

I have already offered the Division an opportunity to demonstrate why the allegations in the OIP should not be dismissed on the grounds that Asia Broadband did not have a class of securities registered pursuant to Section 12 at the relevant times. The Division needed to provide a sworn declaration from a knowledgeable individual, addressing the apparent discrepancy between the text of Section 12(g) of the Exchange Act, on the one hand, and General Instruction A.(d)(2) to Form 8-A, on the other hand, and then expressing the declarant's view as to whether Asia Broadband did or did not have a class of securities registered pursuant to Section 12 of the Exchange Act at the times relevant to this proceeding. Instead, the Division limited its Supplemental Memorandum to requesting that I take official notice of Asia Broadband's Section 12(g) filing. The Division has failed "to establish the contrary" pursuant to Rule of Practice 323. I therefore dismiss the allegations in the OIP relating to the securities of Asia Broadband. [20]

I conclude that the Division has failed to satisfy its burden of proving that seventeen of the twenty-eight companies listed in OIP Exhibit 1 were issuers of a class of securities registered pursuant to Section 12 of the Exchange Act between March and May 2009. The Division's Motion for Summary Disposition is denied to this extent.

The Division has not shown that it is entitled to summary disposition as a matter of law under Section 13(d) of the Exchange Act and Exchange Act Rules 13d-1 and 13d-2.

[20] In any event, James's only filing with respect to Asia Broadband, a Form 3 filed on March 11, 2009, contains a disclaimer of beneficial ownership.

There is no shortage of case law interpreting Section 13(d), but nearly all of it involves persons or groups who had a duty to file Schedules 13D and did not file, or who had a duty to file and filed late, or who had a duty to file and said they had no such duty. James is the opposite: a person who, according to the Division, did not have a duty to file, but filed anyhow, and whose filings contained false or misleading information.

The OIP does not allege that James violated a duty to file Schedules 13D, or even a duty to file truthful Schedules 13D. It only alleges that he filed Schedules 13D that were false. The difficulty is that this sort of conduct is already proscribed by Sections 10(b) and 18(a) of the Exchange Act. Under these two provisions, false or misleading filings are actionable whether or not there is a duty to file.[21]

The Division cites several judicial opinions emphasizing the importance of complete and accurate disclosure by filers of Schedules 13D. However, a close reading of the opinions shows that the duty to provide complete and accurate disclosure is implicit in the duty to file. The opinions do not address the question presented here: whether a person without a duty to file Schedules 13D nonetheless violates Section 13(d) if he files reports that the Division can show are not complete or accurate.

In GAF Corp. v. Milstein, 453 F.2d 709, 720 n.22 (2d Cir. 1978), the Second Circuit began its analysis by comparing the text of Sections 13(d) and 14(e) of the Exchange Act. The court of appeals acknowledged that Section 13(d), unlike Section 14(e), does not explicitly prohibit a false filing. Id. at 720 n.22. Nonetheless, the court rejected the argument that a false filing does not violate the section of the Exchange Act that requires the filing, i.e., Section 13(d). Id. In so ruling, the court followed the Supreme Court's admonition that "the securities laws should not be construed technically and restrictively, but 'flexibly to effectuate [their] remedial purposes.'" Id. at 720 (citing SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963)). The Second Circuit then reasoned:

> [W]e conclude that the obligation to file truthful statements is implicit in the obligation to file. . . We . . . find support for our conclusion in [S]ection 13(d)(2) [of the Exchange Act] which places a continuing obligation on the person filing to amend his statements "if any material change occurs in the facts set forth." Indeed, it is an argument not without force to urge that false statements

[21] Sections 10(b) and 18(a) contain a number of requirements that make them difficult to use. In the case of Section 10(b), these requirements include the need to prove scienter and to show that the false statement occurred "in connection with the purchase or sale" of a security. In the case of Section 18(a), a private right of action for damages incurred by purchasers or sellers of securities, the plaintiff must prove that he did not know that the filing was false or misleading and that he purchased or sold the security at a price which was affected by the false or misleading filing. Section 18(a) also allows the person making the filing to defend on the grounds that he acted in good faith and had no knowledge that his filing was false or misleading. Any policy argument for circumventing these requirements is more appropriately addressed to Congress.

> immediately place those required to file in violation of Rule 13d-2 which requires "prompt" amendment.

Id. at 720-21 (emphasis added). Accord United States v. Bilzerian, 926 F.2d 1285, 1298 (2d Cir. 1991) ("A duty to file under § 13(d) creates the duty to file truthfully and completely.") (emphasis added); Mason-Dixon Bancshares, Inc. v. Anthony Invs., Inc., 1997 U.S. Dist. LEXIS 23638, at *17 (D. Md. Mar. 3, 1997) ("While § 13(d) does not have a stated prohibition against false and misleading statements, courts have repeatedly read into Schedule 13D filing requirements the obligation to tell the truth.") (emphasis added).

Likewise, in Savoy Indus., 587 F.2d at 1165, the District of Columbia Circuit first found that appellant Zimmerman had a duty to file a Schedule 13D, and only then turned to the question of whether the Schedule 13D that had been filed was truthful:

> On the basis of the foregoing evidence, we must conclude that Zimmerman had effectively joined forces with the other group members and should have been included on the Schedule 13D.
>
> Section[] 13(d)(1) . . . and the rules promulgated thereunder undoubtedly create the duty to file truthfully and completely. To the extent that the violation of [S]ection[] 13(d)(1) . . . inheres in the Schedule 13D that was filed, it was this duty that was breached.

In contrast to Milstein, Bilzerian, Mason-Dixon, and Savoy Industries, the Division's theory of liability in the present proceeding depends on severing the link between Section 13(d)'s explicit language (the statutory duty of significant beneficial owners to file) and its judicially-created gloss (the implicit duty to file truthfully and completely). The Division argues that the duty to file should not be considered a necessary element of a violation of Section 13(d), at least where an individual files voluntarily. According to the Division:

> Even if James had no duty to make the disclosures in question, having done so, he was required to state the truth. . . . In light of the legislative intent behind the reporting statutes, it makes sense to impose liability where an individual has misled investors by filing forms which contain false claims of stock ownership, regardless of whether there was a duty to file such forms under the operative statutory provisions.

Div. Mem. P. & A. at 4 n.1; Oct. 15, 2009, PHC at 26-28. The Division's pleadings fail to discuss holdings to the contrary in Portsmouth Square, 770 F.2d at 874, and Calvary Holdings, 948 F.2d at 64-65 & n.8. See supra p. 13. These opinions reject the notion that the duty to make complete and accurate filings can be severed from the duty to file. They show that, absent a duty to file, the courts will not become involved in deciding whether filings are complete or accurate. They strongly suggest that the Division's approach to Section 13(d) lacks merit.[22]

[22] The additional cases cited by the Division are not persuasive. By invoking First Virginia Bankshares v. Benson, 559 F.2d 1307, 1313 (5th Cir. 1977), the Division attempts to "cherry

The Division's analytical task is further complicated by the fact that the Second Circuit already invoked the maxim that the securities laws should be interpreted flexibly when it concluded that the obligation to file truthful statements is implicit in Section 13(d)'s obligation to file. See Milstein, 453 F.2d at 720. The Division cannot play this same card a second time to eliminate the duty to file as an essential element of a Section 13(d) violation, so that all that is left of the statute is an implicit duty to file truthful statements.

I am mindful of the Second Circuit's admonition that "[i]n some instances, a false filing may be more detrimental to the informed operation of the securities markets than no filing at all." Milstein, 453 F.2d at 720. I also appreciate the Fourth Circuit's warning that "a court simply cannot turn a blind eye to a potentially inaccurate filing when it possesses the injunctive power to have that filing corrected before irreparable harm occurs to the investing public." Dan River, Inc. v. Unitex, Ltd., 624 F.2d 1216, 1227 (4th Cir. 1980). In Dan River, the court of appeals held that the plaintiff had offered sufficient information to show that the defendant's filing was not totally true or complete, and it concluded that the plaintiff was justified in seeking the additional discovery necessary for the ultimate determination of whether the Schedule 13D that the defendant filed was accurate. Id. at 1226-27.

Unfortunately, the present proceeding is unlike Dan River. First, the Division's investigation is closed and there will be no opportunity for additional discovery. Second, assuming arguendo that the Division could show that all thirteen of James's Schedule 13D filings were false or misleading, a cease-and-desist order under Section 13(d) would not even apply to most of them.[23] If the Division were to obtain the maximum possible relief in this proceeding, the resulting cease-and-desist order would do nothing to halt future false filings by James with respect to issuers whose securities are not registered pursuant to Section 12. Nor would a cease-and-desist order under Section 13(d) stop James from making future Schedule 13D filings as to other companies whose securities are not registered pursuant to Section 12. The Division does not acknowledge this significant limitation of the sanction it seeks.

I conclude that the Section 13(d) legal arguments the Division has advanced in support of its Motion for Summary Disposition are not persuasive. Accordingly, the Division is not entitled to summary disposition as a matter of law as to James's alleged violations of Section 13(d) and Rules 13d-1 and 13d-2.

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pick" the most helpful elements of Section 10(b) jurisprudence, while discarding its least helpful elements (the need to prove scienter and to show that the violation occurred in connection with the purchase or sale of a security). Valencia v. Merck & Co., 2009 U.S. Dist. LEXIS 103228, at *23-24 (E.D. Cal. Oct. 16, 2009), discusses California state law, not federal securities law.

[23] Any cease-and-desist order entered in this proceeding would not apply to the seven Schedules 13D and 13D/A that James filed with respect to VOIP Talk (April 6, 2009), Cornet Stores (two on April 6, 2009), General Acceptance Corp. (Indiana) (April 7, 2009), TVSL S.A. in Liquidation (two on April 10, 2009), and CapitalSource Healthcare (April 17, 2009). See supra pp. 14-21.

The Division has not shown that it is entitled to summary disposition as a matter of law under Section 16(a) of the Exchange Act and Exchange Act Rule 16a-3.

The Division's pleadings do not separately address the legal issues arising under Section 16(a) of the Exchange Act. Nor do they analyze the text of Section 16(a) or cite any judicial decisions interpreting Section 16(a).

The OIP does not allege that James violated a duty to file Forms 3 and 4 under Section 16(a), or even a duty to file truthful Forms 3 and 4. It only alleges that he filed Forms 3 and 4 that were false. As discussed above, this sort of conduct is already actionable under Sections 10(b) and 18(a) of the Exchange Act, whether or not there is a duty to file.

Of course, there is settled case law holding that a person with a duty to file Section 16(a) reports must make complete and accurate disclosure in the reports he does file. See SEC v. IMC Int'l, Inc., 384 F. Supp. 889, 893 (N.D. Tex.), aff'd, 505 F.2d 733 (5th Cir. 1974); SEC v. Shattuck Denn Mining Corp., 297 F. Supp. 470, 477 (S.D.N.Y. 1968). But these decisions do not address the question presented here: whether a person without a duty to file Section 16(a) reports nonetheless violates Section 16(a) if he files reports that the Division can show are not complete or accurate.

The text of Exchange Act Rule 16a-3 does not support the Division's position, because it is plainly addressed to persons who have a duty to file Section 16(a) reports. See, e.g., Rule 16a-3(a) ("Initial statements of beneficial ownership of equity securities required by section 16(a) of the [Exchange] Act shall be filed . . ."); Rule 16a-3(d) ("Any person required to file a statement with respect to securities . . . may file . . ."); Rule 16a-3(e) ("Any person required to file a statement under section 16(a) of the [Exchange] Act shall . . .") (emphasis added). Former Exchange Act Rule NA1, a predecessor to current Rule 16a-3, was equally clear on this point. See Exchange Act Release No. 101, 1935 SEC LEXIS 56 (Feb. 18, 1935) ("None of the reports provided for in Section 16(a) need be made except as provided in this rule.").

As a separate matter, I questioned whether James could be held liable for violating Section 16(a) of the Exchange Act if he filed Forms 3 and 4 involving the exempted securities of foreign private issuers (Order Proposing to Take Official Notice). See supra note 4. I also required the Division to show cause why the Section 16(a) allegations should not be dismissed insofar as they involved such exempted securities. In response, the Division offers a policy argument:

> Having undertaken to file reports where none were required, James was obligated to state the truth in those reports. . . . James should not be permitted to misrepresent his interest in these entities on Forms 3 and 4 just because they happen to be foreign private issuers.

Div. Suppl. Mem. at 3.

I am not aware of any judicial decisions discussing exempted securities in the context of an alleged Section 16(a) violation. However, judicial decisions addressing the analogous subject

of allegedly misleading proxy statements by foreign private issuers under Section 14(a) of the Exchange Act do not support the Division's position. See Schiller v. Tower Semiconductor Ltd., 449 F. 3d 286, 290-91 (2d Cir. 2006) (declining to reach the issue of whether a corporate proxy statement was materially misleading because the corporation was a foreign private issuer and thus exempt from the requirements of Section 14(a) by virtue of Exchange Act Rule 3a12-3); Batchelder v. Kawamoto, 147 F.3d 915, 922-23 (9th Cir. 1998) (rejecting claims that, having voluntarily distributed proxy materials, a company was required to make true and complete disclosures, because the company was a foreign private issuer with no obligations under Section 14(a)); In re Royal Dutch/Shell Transp. Secs. Litig., 380 F. Supp. 2d 509, 564 (D.N.J. 2005) (rejecting the argument that foreign private issuers waive any right to the exemption when they issue false proxy materials).

The Division also contends that the exemption in Section 16(a) excuses only the foreign private issuer (but not its officers, directors, or significant beneficial shareholders) from the reporting requirements of Section 16(a) (Div. Suppl. Mem. at 3). The Division cites no authority to support this position, and Commission precedent suggests the opposite. Cf. Multijurisdictional Disclosure, 44 SEC Docket 71, 90 (July 24, 1989) (proposing release) (stating that directors, officers, and 10% beneficial owners of the securities of foreign private issuers are not subject to Section 16 of the Exchange Act).

The Division's Supplemental Memorandum does not dispute that the companies identified in the Order Proposing to Take Official Notice should be treated as foreign private issuers. The Division has presented a declaration in support of its Motion for Summary Disposition from only one such issuer, APT Satellite. TVSL S.A. in Liquidation and SCOR Holding withdrew from Section 12 registration in 2006 and 2008, respectively. Asia Electronics Holding Co., Inc., has not withdrawn from Section 12 registration, but James's filings with respect to it disclaimed beneficial ownership. See supra p. 15.

If the Division were able to obtain the maximum possible sanction in this proceeding, the resulting cease-and-desist order would do nothing to correct or eliminate any false filings James made with respect to those issuers whose securities were not registered pursuant to Section 12. See supra pp. 14-21. At present, this is an entirely theoretical concern, because the Division presented a declaration from only one Section 12 registrant, APT Satellite, a foreign private issuer whose securities are exempted from Section 16.

I conclude that the Section 16(a) legal arguments the Division has advanced in its Motion for Summary Disposition are not persuasive. Accordingly, the Division is not entitled to summary disposition as a matter of law as to James's alleged violations of Section 16(a) and Rule 16a-3.

FURTHER PROCEEDINGS

For the reasons stated, I deny the Division's Motion for Summary Disposition. I also dismiss those aspects of the OIP alleging that James violated Sections 13(d) and 16(a) of the Exchange Act when he filed Forms and Schedules involving fourteen issuers that did not have a class of securities registered pursuant to Section 12 of the Exchange Act. In addition, I dismiss those aspects of the OIP alleging that James violated Section 16(a) of the Exchange Act when he filed Forms 3 and 4 involving the exempted securities of APT Satellite, a foreign private issuer.

The Division cannot claim that dismissing the proceeding in part at this juncture is procedurally improper. Under Federal Rule of Civil Procedure 56, a district court may grant summary judgment sua sponte "so long as the losing party was on notice that [it] had to come forward with all of [its] evidence." Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986); Gen. Universal Sys., Inc. v. Lee, 379 F.3d 131, 145 & n.29 (5th Cir. 2004). "Notice" means that the targeted party "had reason to believe the court might reach the issue and received a fair opportunity to put its best foot forward." Leyva v. On the Beach, Inc., 171 F.3d 717, 720 (1st Cir. 1999) (quoting Jardines Bacata, Ltd. v. Diaz-Marquez, 878 F.2d 1555, 1561 (1st Cir. 1989). There is no doubt in this case that the Division had the requisite notice. The January 13, 2010, Order Proposing to Take Official Notice specifically directed the Division to show cause why I should not dismiss all allegations relating to the securities of fourteen issuers that did not have securities registered pursuant to Section 12 of the Exchange Act. It also required the Division to show cause why I should not dismiss all allegations that James violated Section 16(a) of the Exchange Act by filing Forms 3 and 4 as to the exempted securities of foreign private issuers. As to the companies identified in the January 13, 2010, Order, the Division was not deprived of either its ability to ascertain facts or its opportunity to develop and present its case.

As discussed in this Order, I have preliminarily determined that three other issuers (VOIP Talk, Fashion House, and Sports Media) did not have a class of securities registered pursuant to Section 12 at the relevant times. The parties will be afforded fourteen days "to establish the contrary" pursuant to Rule of Practice 323. See supra note 6. If the parties file appropriate pleadings, I will address this subject in a subsequent Order.

The Division has not yet had an opportunity to address the other topics discussed in this Order: declining to treat certain matters as deemed admissions; denying summary disposition in situations where James disclaimed beneficial ownership; and concluding that the Division's legal arguments are not sufficient to show that it is entitled to summary disposition as a matter of law. Until now, the Division has not had the requisite notice that these aspects of its case are also in danger of dismissal. To this limited extent, the Division will be afforded "a second bite at the apple." It may take that bite through a second motion for summary disposition or during a hearing on the merits.

Under Federal Rule of Civil Procedure 56, a district court has wide discretion to permit or restrict successive motions for summary judgment. See Hoffman v. Tonnemacher, 593 F.3d 908, 910-11 (9th Cir. 2010) (collecting cases). I grant the Division permission to file a second motion for summary disposition, subject to the following conditions: (1) the Division must file its motion within twenty-one days after the date of this Order; (2) the Division must provide with its motion a spreadsheet updating (i.e., narrowing) OIP Exhibit 1 to identify only those companies and only those filings on which it will still rely to prove violations of Sections 13(d) and 16(a);

(3) for each of the companies on which the Division will still rely to prove violations of Sections 13(d) and 16(a), the Division must file a sworn declaration from a knowledgeable individual attesting that each such company had a class of securities registered pursuant to Section 12 of the Exchange Act at the relevant times; (4) the Division must file a memorandum of points and authorities discussing the legal issues and case law addressed in this Order; and (5) the Division must explicitly state that, with the filing of its second motion, it is resting its case-in-chief. Argument of counsel will not be an acceptable substitute for the sworn declaration proving Section 12 registration.

With respect to James's alleged Section 13(d) violations, the Division's second motion may elect to stand on the declaration already presented by APT Satellite. It need only state that this is what it is doing. The Division must also discuss the Section 13(d) legal issues addressed in this Order, and particularly the holdings of Portsmouth Square and Calvary Holdings.

With respect to James's alleged Section 16(a) violations, more will be required. Without the deemed admissions and the exempted securities of APT Satellite, this aspect of the Division's case lacks support in the present record. The Division's second motion must be supported by a sworn declaration concerning at least one issuer whose securities were registered pursuant to Section 12 and were not exempted securities under Section 16(a). The Division's second motion must also discuss the Section 16(a) legal issues addressed in this Order.

If the Division intends to gather materials from non-parties to support its second motion for summary disposition, it may not use investigative subpoenas, see Rule of Practice 230(g), nor may it use the Commission's staff to gather materials by invoking the staff's examination powers under Section 17(b) of the Exchange Act, see Next Fin. Group, Inc., Admin. Pro. No. 3-12738, Orders dated Jan. 28, 2008, at 1-4 and Feb. 11, 2008, at 1-2 (available at www.sec.gov/alj/aljordersarchive/aljarc2008.shtml). James could not use such tools, and it is necessary to maintain a level field for both parties.

If the Division elects to proceed to a hearing, declarations will not suffice. The Division should be prepared to bring its prospective witnesses, including its Section 12 registration specialist and any foreign based issuer witnesses, to the hearing site.[24] Within ten days after the date of this Order, the Division must notify this Office and James if it intends to proceed to a hearing on the merits.

ORDER

IT IS ORDERED THAT the Division of Enforcement's Motion for Summary Disposition is denied, without prejudice to the filing of a second motion for summary disposition within twenty-one days after the date of this Order. Any such motion shall be subject to the conditions imposed in this Order;

[24] The Division asserts that it has "not had an opportunity to take [James's] testimony" (Dec. 17, 2009, PHC at 11). It would be more accurate to state that the Division brought its investigation to a speedy conclusion, without taking investigative testimony from James.

IT IS FURTHER ORDERED THAT, within ten days after the date of this Order, the Division of Enforcement shall notify this Office and Respondent JayCee James if it intends to proceed to a hearing in lieu of filing a second motion for summary disposition;

IT IS FURTHER ORDERED THAT, within fourteen days after the date of this Order, the parties shall show cause why I should not dismiss the allegations in the OIP relating to filings James made with respect to the securities of VOIP Talk, Inc., Fashion House Holdings, Inc., and Sports Media, Inc., on the grounds that these issuers did not have a class of securities registered pursuant to Section 12 of the Exchange Act at the relevant times;

IT IS FURTHER ORDERED THAT all allegations in the Order Instituting Proceedings are dismissed as to filings James made with respect to the securities of Capital Media Group Ltd., Network Holdings International, Inc., American Basketball Association, Inc., Cinemastar Luxury Theatres, Inc., Global Technologies, Ltd., HydroFlo, Inc., General Acceptance Corp. (Indiana), Cornet Stores, TVSL, S.A. in Liquidation, SCOR Holding (Switzerland) Ltd., Williams & Associates, Solar Night Industries, Inc., CapitalSource Healthcare REIT, and Asia Broadband, Inc.; and

IT IS FURTHER ORDERED THAT the allegations in the Order Instituting Proceedings under Section 16(a) and Exchange Act Rule 16a-3 are dismissed, insofar as they involve filings James made with respect to the exempted securities of APT Satellite Holdings Ltd.

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James T. Kelly
Administrative Law Judge