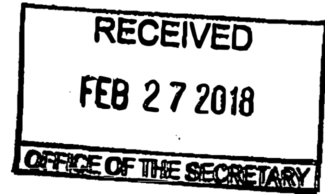

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15211

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In the Matter of :
:
Francis V. Lorenzo, :
:
Respondent. :
:
---X

RESPONDENT FRANCIS V. LORENZO'S REPLY BRIEF REGARDING SANCTIONS

Pursuant to the Commission's Order dated December 12, 2017 Respondent Francis V. Lorenzo ("Lorenzo") respectfully submits this Reply Brief Regarding Sanctions.

I. The Division of Enforcement's Opposition Brief Fails to Rebut Lorenzo's Argument that No Sanctions are Warranted Against Lorenzo.

In Lorenzo's Opening Brief Regarding Sanctions Lorenzo demonstrated that no sanctions should be imposed against him because, among other things, the imposition of sanctions against Lorenzo would not be consistent with Commission precedent in similar cases. Moreover, in *Lorenzo v. SEC*, 872 F.3d 578 (DC Cir. 2017) the DC Circuit held that Lorenzo was not the maker of the misstatements at issue in this proceeding under the standards set forth in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011). Not only did Lorenzo not make the statements but he never met, spoke to or otherwise interacted with either of the recipients of the two emails and the emails were not material to anyone's investment decision.

The DC Circuit's decision remanding this matter back to the Commission specifically stated that sanctions in this case could be reviewed for consistency with sanctions in other cases. *Lorenzo v. SEC*, 872 F.3d 578 (DC Cir. 2017). The DC Circuit stated "we have never declined

to compare past-and-present Commission sanctions in the context of an arbitrary-and-capricious challenge. In fact, our decision in *Collins* clarified that such a challenge may be brought to review the propriety of the Commission's choice of sanction in a given case as compared with sanctions in comparable situations. *See* 736 F.3d at 526." 872 F.3d at 596. In *Collins v. SEC,* the DC Circuit held that the Court may assess "whether the sanction is out of line with the agency's decisions in other cases" involving comparable misconduct—which, as we have observed, is one consideration informing review of penalties for arbitrariness and capriciousness." *Collins v. SEC*, 736 F.3d 521, 526 (D.C. Cir. 2013)

This case involves two emails that were drafted by Lorenzo's boss that were sent to two individuals seconds apart. There is no evidence that either individual was harmed in any way from receiving the emails and there is no evidence either individual relied on the statements in the emails in deciding to purchase the securities of Waste2Energy Holdings Inc. While reliance is not a formal element that the Commission must prove to establish a violation of the federal securities laws, it is an element the Commission considers when determining whether anyone was harmed by the conduct at issue. The total financial gain to Lorenzo was a negligible $150.

Moreover, Lorenzo never had the opportunity to contest the scheme liability allegations under Rule 10b5(a) and (c) and 17(a)(1) of the Securities Act of 1933 that now form the basis of the sanctions the Division of Enforcement (the "Division") seeks to impose. After the hearing in this matter the Administrative Law Judge found that "[t]he record shows that Frank Lorenzo violated the antifraud provisions by making material misstatements and omissions in the emails. (Initial Decision issued by the SEC Administrative Law Judge dated December 31, 2013 at 9) Nowhere in the decision does the Administrative Law Judge find that Lorenzo's conduct amounted to a fraudulent scheme. The first time that Lorenzo is alleged to have engaged in a

fraudulent scheme occurs when the Commission inserted it into its holding on the petition for review. "We also find that Lorenzo employed a "device, scheme, or artifice to defraud," in violation of Section 17(a)(1) and Rule 10b-5(a); that he engaged in an "act" that would operate as a fraud in violation of Rule 10b-5(c); and that his conduct was deceptive, as required by Section 10(b)." (Commission Opinion dated April 29, 2015 at 16) This finding was made without the Commission hearing from any witnesses or introducing any new evidence into the record or giving any notice to Lorenzo that the Commission would also consider scheme liability in its deliberations on the petition for review.

The Commission's disregard of the findings of the Administrative Law Judge was sharply criticized in Judge Kavanaugh's dissent when he said "[w]ithout hearing from Lorenzo or any other witnesses, the Commission simply swept the judge's factual and credibility findings under the rug." 872 F.3d at 598. This finding by the Commission regarding Lorenzo's liability for scheme liability without notice to Lorenzo and without calling any new witnesses contravenes basic fairness and Lorenzo's due process rights.

II. The Only Two Cases the Division Cites in Support of Imposing Sanctions On Lorenzo Involve Conduct that Is Much More Egregious than Lorenzo's

In support of its argument that a cease and desist order, a permanent lifetime bar and a $15,000 civil penalty are consistent with other similar cases the Division of Enforcement shockingly only cites to two cases – both of which involved conduct that was far more egregious than Lorenzo's conduct.

The first case that the Division argues is comparable to this matter is *Korman v. SEC*, 592 F.3d 173. But the *Korman* case is not comparable because it involved a defendant who was indicted on two counts of securities fraud involving insider trading, one count of providing false statements to the Commission, and one count of obstruction of justice. As the *Korman* Court

explained, Korman entered a plea to one count of making a false statement in violation of 18 U.S.C. § 1001, for which he could have been sentenced to five years' imprisonment, followed by three years' supervised release, and ordered to pay a $250,000 fine, to make restitution, and to pay any costs of incarceration and supervision. As part of his plea agreement Korman stipulated in a Factual Resume that during a telephone conversation with Commission investigators on October 29, 2003, he falsely stated that he did not know who possessed trading authority over the brokerage account for a hedge fund through which he conducted trading activity in publicly traded stock. He further stipulated that he ''knew that he personally possessed [that] authority.'' His stipulation continued: ''In addition, the defendant made the statement intentionally, knowing that it was false. Further, the statement was material. Finally, the defendant made the false statement for the purpose of misleading the Securities and Exchange Commission in its investigation into his trading activity.'' Korman was also unjustly enriched by over $143,000 as a result of his misconduct. The egregious criminal misconduct of the defendant in the *Korman* case, along with his unjust enrichment of over $143,000, makes the *Korman* case wholly different from the conduct at issue in this proceeding, which involved no criminal conduct and no unjust enrichment. In addition, Korman was the maker of the misstatements at issue in his matter in contrast to Lorenzo who was found not to have made the misstatements at issue.

The second and last case cited in the Division's Opposition Brief as being comparable with Lorenzo's conduct is *In the Matter of Siming Yang,* 2015WL 2088468. In that matter Yang was enjoined against violations of the antifraud and reporting provisions of the federal securities laws. The court also imposed second-tier civil penalties totaling $150,000 on Yang. These sanctions were imposed after a jury trial in which Yang was found to have engaged in front-running and to have been responsible for a false disclosure in a Commission filing in violation of

Sections 10(b) and 13(d) of the Exchange Act and Rules 10b-5 and 13d-1 thereunder and of Sections 206(1) and 206(2) of the Advisers Act.

When discussing the *Yang* case in their Opposition Brief the Division fails to mention key facts that make Yang's conduct far more egregious than Lorenzo's conduct including the fact that Yang violated an asset freeze order, which made it impossible to collect any money judgment that might be ordered by the court. In addition, while the litigation with the SEC was underway Yang engaged in further trading through an undisclosed account that also violated the stipulated asset freeze order. Moreover, Yang's conduct extended over a one week period, in contrast to Lorenzo who sent the two emails only seconds apart.

The Division's failure to cite to any precedent that is remotely comparable to Lorenzo's conduct demonstrates that the sanctions the Commission imposed on Lorenzo are not comparable with its precedent and are arbitrary and capricious. The lack of any comparable sanctions precedent should lead the Commission to adopt the position advocated in Judge Kavanaugh's dissent and end this case without imposing any sanctions. Judge Kavanaugh stated:

> I hope that the SEC on remand pays attention, comes to its senses, and (at a minimum) dramatically scales back the sanctions in this case. Indeed, notwithstanding the majority opinion, I hope that the SEC, on its own motion, goes further than that: **The SEC should vacate the order against Lorenzo in its entirety and either end this case altogether.**"
> (J. Kavanaugh dissenting at 12)(emphasis added)

CONCLUSION

For the reasons set forth above we respectfully request that the Commission adopt Judge Kavanaugh's conclusions, not impose any sanctions on Lorenzo and dismiss the case in its entirety.

Dated: New York, New York
February 26, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert G. Heim, certify that on the 26th day of February 2018, I caused true and correct copies of Respondent Francis V. Lorenzo's Reply Brief Regarding Sanctions to be filed and served on the following by the methods indicated below:

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