UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17674

In the Matter of

ALEXANDER KON,

Respondent.

RESPONDENT'S PREHEARING SUBMISSION UNDER RULE 222(a)

The Respondent expressly denies any wrongdoing. Particularly, the Division of Enforcement has no evidence of an improper disclosure under Section 17(b) of the Securities Act of 1933 ("Securities Act"). The Division will offer only unsubstantiated suppositions and conjecture to deliver its case. The Respondent will use fact based, documentary evidence to show that his disclosure was thorough, fulsome, and completely accurate. The Respondent should not be subject to this proceeding, much less, any further penalty, cease-and desist order, industry bar, or financial harm of any kind.

1. The Facts

From March 2013 through March 8, 2014, Casey Cummings ("Cummings") as part of an illegal pump and dump scheme, converted a contrived note into millions of free-trading Cannabusiness Group ("CBGI") shares and he sold them into the market. No registration statement was filed as to any of the shares Cummings sold into the public market, and no

exemption from registration was applicable to the transactions. Cummings settled with the SEC for various charges related to the scheme on November 14, 2016, the same day this OIP was instituted.

It appears Cummings asked his father to reach out and speak with the Respondent; this has no effect on the fact that Casey Cummings was the verifiable, true source of the consideration. The undisputed fact; Cummings was selling his illegal shares into the market, confirms Cummings as the source of consideration the Respondent received. In fact, in a recorded conversation with the deceased father, Michael Cummings clearly and distinctly requests the invoice be sent to his non-affiliate son Casey Cumming's, CEO at Free Bird Capital. The wire transmission and every banking document associated with these transactions will confirm; Casey Cummings, CEO of Freebird, was the true source of the properly disclosed consideration.

The Respondent had no financial gain, motive or any other incentive to misidentify the source of consideration. Indeed, as Casey Cummings was the true seller of the shares into the promotional activity he paid for; it is logical for the Respondent to disclose Casey Cummings as the source of consideration. The Division wrongly asks the Law Judge to look beyond the evidence, beyond the grave even, to find a wink and a nod, a sham, that simply does not exist.

2. Legal Theories Upon Which the Respondent Will Rely

"[I]n order to violate Section 17(b), a person must (1) publish or otherwise circulate (using a means of interstate commerce), (2) a notice or type of communication (which describes a security), (3) for consideration received (past, currently, or prospectively, directly or

indirectly), (4) without full disclosure of the consideration received and the amount." SEC v. Gorsek, 222 F. Supp. 2d 1099, 1105 (C.D. Ill. 2001).

Here, The Respondent, clearly and accurately described the amount of consideration he received and the source of the consideration. Any investor reading the disclosure is made fully aware, the Respondent's communication was "bought and paid for." Casey Cummings, the securities law violator, the seller of millions of illegal shares of the underlying CBGI, was the source of the consideration.

The Division will attempt to support its argument for a violation of section 17(b) by arguing, the Respondent communicated solely with Casey Cummings father, by this logic, although no evidence supports the Issuer as the source of consideration; the Issuer should be disclosed as the source of consideration. This theory works an illogical and unconstitutional result. The Division's theory in this case would lead to a post-hoc fraud analysis being applied to a non-scienter based statute. Thereby, blurring the distinction between the crystal clear, non scienter based 17(b) disclosure requirements, and the fraud based, scienter based 17(a).

The Division's theory in this case requires the Commission to disregard the most basic principle of statutory interpretation giving words in a statute their common, ordinary meaning. *Williams v. Taylor*, 529 U.S. 420, 431, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). Here Section 17(b) calls for the disclosure of the receipt of compensation and the amount *SEC v. Gorsek*, 222 F. Supp. 2d 1099 - Dist. Court, CD Illinois 2002.

Although disclosure requirements are not without constitutional implications, such provisions are permissible. In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), the Supreme Court held that "unjustified or unduly

burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech," but "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." Under this standard, Section 17(b) has been upheld against constitutional challenges. See *SEC v. Wall St. Publ'g Inst., Inc.*, 851 F.2d 365, 374 (D.C. Cir. 1988) (finding that magazine's "failure to disclose consideration received in return for publication is then, in principle, constitutionally proscribable"); *Huttoe,* 1998 U.S. Dist. LEXIS 23211, at *40-41 ("Regulations which turn solely on whether consideration was paid for publication of an article, and not the content of the article, are constitutionally permissible.") "Under the commercial speech doctrine, a court judging whether a particular regulation affecting speech is constitutional must determine, among other issues, "whether the asserted governmental interest is substantial." *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2350.

"A publicist's failure to disclose consideration received in return for publication is then, in principle, constitutionally proscribable. Nonetheless, we think we are obliged to consider — no matter how the speech is categorized — whether the government's interpretation of consideration poses the danger that "speech deserving of greater constitutional protection [will] be inadvertently suppressed." *Central Hudson*, 447 U.S. at 564-65, 100 S.Ct. at 2350-51;

"Content-based regulations are objectionable because they put the government into the unneutral position of approving some while disapproving other speech, on the basis of the viewpoints expressed. If this problem is not precisely present here, it is certainly analogous. "*Boos v. Barry*, ___ U.S. ___, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). "The disclosure requirement must necessarily turn solely on whether consideration was paid to the magazine for publication of the article." *SEC v. Wall Street Pub. Institute, Inc.*, 851 F. 2d 365

"Conditioning regulation on the extent to which text is used, however, would result in both SEC and court interference with the "crucial process" of editorial control, interference that the Supreme Court has decried as particularly repugnant to core First Amendment concerns." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257-58, 94 S.Ct. 2831, 2839-40, 41 L.Ed.2d 730 (1974).

"The substantial interest of the investing public in knowing whether an apparently objective statement in the press concerning a security is motivated by promise of payment is obvious. We see no significant abridgement of freedom of the press in requiring disclosure of a promise of payment if there has been one. *United States v. Amick*, 439 F. 2d 351 - Court of Appeals, 7th Circuit 1971

Simple, amount and type of consideration, that is all that can reasonably be required under Section 17(b). Requiring a publicist to engage in an in-depth source analysis and disclosure would unduly burden Section 17(b). The requirement would create an unconstitutional "content based" regulation. Therefore, regulation into material misstatements and omissions is left to the Anti-Fraud Provisions of our securities rules.

The Respondent will fully demonstrate that the investing public was properly made aware, his communications were "bought and paid for". The Respondent was forthright and diligent in his appreciation for the rules and even took extra steps to confirm the source and provenance of his consideration before disclosing it.

This case should be immediately dismissed with prejudice. Although no violation of law has been described in the OIP or any of the Division's pleadings. Any industry bar or penalties the Division is seeking in this case would be inappropriate based on the alleged infractions when

compared with the standards for imposition of a Penny Stock Bar. The Respondent will address remedies further in his post hearing brief.

3. Lists and Documents.

The Respondent has filed separately a list of exhibits to be introduced at the hearing.

4. Witnesses

A copy of the witness list has been filed.

Respectfully Submitted,
By and through Counsel,

March 23, 2017

/s/ *Todd S. Feinstein*

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CERTIFICATE OF SERVICE

I hereby certify that an original and three copies of the foregoing document was filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Washington, D.C. 20549-9303, and that a true and correct copy of the foregoing has been served by U.S. Mail and email, on this 23th day of March, 2017, on the following persons entitled to notice:

Honorable Cameron Elliot
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/s/ Todd S. Feinstein
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