RECORD NO. 19-4356

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

DARYL BANK,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT NORFOLK

JOINT APPENDIX

James O. Broccoletti
ZOBY & BROCCOLETTI, PC
6663 Stoney Point South
Norfolk, VA 23502
(757) 466-0750
James @zobybroccoletti.com

Counsel for Appellant

Andrew C. Bosse
Elizabther M. Yusi
Assistant U.S. Attorneys
OFFICE OF THE
U.S. ATTORNEY
Suite 8000
101 West Main Street
Norfolk, VA 23510-1624
(757) 441-6331
andrew.bosse@usdoj.gov
elizabeth.yusi@usdoj.gov

Counsel for Appellee

Daniel T. Young
Assistant U.S. Attorney
OFFICE OF THE
U.S. ATTORNEY
2100 Jamieson Avenue
Alexandria, VA 22314-5194
(703) 299-3700
daniel.young@usdoj.gov

Counsel for Appellee

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

TABLE OF CONTENTS

APPEAL

U.S. District Court
Eastern District of Virginia - (Norfolk)
CRIMINAL DOCKET FOR CASE #: 2:17-cr-00126-MSD-LRL-1

Case title: USA v. Bank et al Date Filed: 08/23/2017

Assigned to: District Judge Mark S. Davis
Referred to: Magistrate Judge Lawrence R. Leonard

Appeals court case number: 19-4356 4CCA - Case Number Joy Hargett Moore

Defendant (1)

Daryl G. Bank represented by **James Orlando Broccoletti**
Zoby & Broccoletti
6663 Stoney Point S
Norfolk, VA 23502
(757) 466-0750
Fax: 757-466-5026
Email: james@zobybroccoletti.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Jason M. Wandner
Law Office of Jason M. Wandner P.A. (FL-NA)
100 N. Biscayne Blvd.
Suite 160
Miami, FL 33132
NA
(305) 868-1655
Fax: (305) 508-7480
Email: jason@wandnerlaw.com
TERMINATED: 05/03/2018
PRO HAC VICE
Designation: Retained

Pending Counts **Disposition**

T.18:1343, 1349, and 1341 -

Conspiracy to Commit Mail and Wire Fraud / T.18:982(a)(1); T.18:981(a)(1)(C); T.28:2461(c) and T.21:853(p) - Criminal Forfeiture
(1ss)

T.18:1341 and 2 - Mail Fraud
(2ss-6ss)

T.18:1343 and 2 - Wire Fraud
(7ss-12ss)

T.18:371; T.15:77e, 77q, and 77x - Conspiracy to Sell Unregistered Securities and to Commit Securities Fraud
(13ss)

T.15:77e and 77x and T.18:2 - Sale of Unregistered Securities
(14ss-18ss)

T.15:77q(a), 77x and 18:2 - Securities Fraud
(19ss-22ss)

T.18:1957 and T.18:1956(h) - Conspiracy to Launder Monetary Instruments
(23ss)

T.18:1957 and 2 - Unlawful Monetary Transactions
(24ss-28ss)

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
Title 18, United States Code, Sections 1349,1341,1343 - Conspiracy to Commit Mail and Wire Fraud / Criminal Forfeiture - Title 18, United States Code, Section 982(a)(1); Title 18, United States Code, Section 981(a)(1)(C), as incorporated by Title 28, United States Code, Section 2461(c); and Title 21, United States Code, Section 853(p) (1)	Superseding Indictment, Dismissed - Second Superseding Indictment filed on 5/25/2018
T.18:1349, 1341, & 1343 - Conspiracy	

to Commit Mail and Wire Fraud / T:18:982(a)(1); T.18:981(a)(1)(C); T.28:2461(c); and T.21:853(p) - Criminal Forfeiture (1s)	Superseding Indictment, Dismissed - Second Superseding Indictment filed on 5/25/2018
Title 18, United States Code, Sections 1341 and 2 - Mail Fraud (2-4)	Superseding Indictment, Dismissed - Second Superseding Indictment filed on 5/25/2018
T.18:1956(h) - Conspiracy to Launder Monetary Instruments (2s)	Superseding Indictment, Dismissed - Second Superseding Indictment filed on 5/25/2018
T.18:1341 and 2 - Mail Fraud (3s-7s)	Superseding Indictment, Dismissed - Second Superseding Indictment filed on 5/25/2018
Title 18, United States Code, Sections 1343 and 2 - Wire Fraud (5-11)	Superseding Indictment, Dismissed - Second Superseding Indictment filed on 5/25/2018
T.18:1343 and 2 - Wire Fraud (8s-14s)	Superseding Indictment, Dismissed - Second Superseding Indictment filed on 5/25/2018
Title 18, United States Code, Sections 1957 and 2 - Unlawful Monetary Transactions (12-14)	Superseding Indictment, Dismissed - Second Superseding Indictment filed on 5/25/2018
T.18:1957 and 2 - Engaging in an Unlawful Monetary Transaction (15s-19s)	Superseding Indictment, Dismissed - Second Superseding Indictment filed on 5/25/2018

Highest Offense Level (Terminated)

Felony

Complaints	**Disposition**
None	

Interested Party

Melissa Conner represented by **Melissa Ann Conner**
Park Sensenig LLC
2310 West Main Street
Richmond, VA 23220
804-417-4673
Email:
melissa.conner@parksensenig.com

LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Waived or Self (Pro Se)

Interested Party

Timothy Stephen Baird represented by **Timothy Stephen Baird**
Kutak Rock LLP
901 East Byrd Street
Suite 1000
Richmond, VA 23219-4071
(804) 644-1700
Fax: (804) 783-6192
Email: tim.baird@kutakrock.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Waived or Self (Pro Se)

Interested Party

David Alcorn represented by **Richard Yarrow**
821 W. 21st Street
Suite 208
Norfolk, VA 23517
757-337-3963
Fax: 757-686-0180
Email: RichardYarow@gmail.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Plaintiff

USA represented by **Melissa E O'Boyle**
United States Attorney Office - Norfolk (NA)
101 W Main St
Suite 8000
Norfolk, VA 23510
NA
(757) 441-6331
Fax: (757) 441-6689
Email: melissa.oboyle@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: US Attorney

Andrew C. Bosse
U.S. Attorney's Office
101 W Main St
Suite 8000
Norfolk, VA 23510
NA
(757) 441-6331
Email: andrew.bosse@usdoj.gov
ATTORNEY TO BE NOTICED

Elizabeth M. Yusi
United States Attorney's Office - Norfolk
101 W Main St
Suite 8000
Norfolk, VA 23510
(757) 441-6331
Fax: (757) 441-6689
Email: elizabeth.yusi@usdoj.gov
ATTORNEY TO BE NOTICED
Designation: US Attorney

Date Filed	#	Docket Text
08/23/2017	1	MOTION to Seal Indictment by USA as to Daryl G. Bank, Raeann Gibson. (tbro) (Entered: 08/23/2017)
08/23/2017	2	Memorandum in Support by USA as to Daryl G. Bank, Raeann Gibson re 1 MOTION to Seal Indictment. (tbro) (Entered: 08/23/2017)
08/23/2017	3	ORDER granting 1 Motion to Seal Indictment by USA as to Daryl G. Bank (1), Raeann Gibson (2). Signed by Magistrate Judge Douglas E. Miller and filed on 8/23/17. (tbro) (Entered: 08/23/2017)
08/23/2017	4	CRIMINAL INDICTMENT, returned and filed in open court 8/23/17, and directing warrants to be issued as to Daryl G. Bank (1) count(s) 1, 2-4, 5-11, 12-14, Raeann Gibson (2) count(s) 1, 2-4, 5-11, 13, 15. (Attachments: # 1 Defendant Information Sheet - Bank, # 2 Defendant Information Sheet - Gibson) (tbro) (Entered: 08/23/2017)
08/23/2017	8	Arrest Warrant Issued and delivered to the USM in case as to Daryl G. Bank. (tbro) (Entered: 08/23/2017)
08/24/2017		Case as to Daryl G. Bank, Raeann Gibson Reassigned to Magistrate Judge Lawrence R. Leonard. Magistrate Judge Robert J. Krask no longer assigned to the case. (afar) (Entered: 08/24/2017)
09/01/2017		Arrest of Daryl G. Bank, and Raeann Gibson in Florida Southern District Court (Fort Pierce Division). (ldab,) (Entered: 09/01/2017)

09/01/2017	11	Partial Rule 5(c)(3) Documents Received from Southern District of Florida as to Daryl G. Bank, and Raeann Gibson. (ldab,) (Entered: 09/01/2017)
09/01/2017		Case unsealed as to Daryl G. Bank, Raeann Gibson (ldab,) (Entered: 09/01/2017)
09/07/2017		Arrest of Daryl G. Bank in Southern District of Florida. (ldab,) (Entered: 09/07/2017)
09/07/2017	14	Rule 5(c)(3) Documents Received from Southern District of Florida as to Daryl G. Bank (Attachments: # 1 Appendix Part 1, # 2 Appendix Part 2, # 3 Appendix Part 3)(ldab,) (Entered: 09/07/2017)
10/27/2017	21	MOTION for Special Appearance by Daryl G. Bank. (Broccoletti, James) (Entered: 10/27/2017)
10/27/2017	22	Memorandum in Support by Daryl G. Bank re 21 MOTION for Special Appearance (Broccoletti, James) (Entered: 10/27/2017)
10/27/2017		Set/Reset Deadlines/Hearings as to Daryl G. Bank: Initial Appearance set for 10/27/2017 at 02:30 PM in Norfolk Mag Courtroom 2 before Magistrate Judge Robert J. Krask. (afor) (Entered: 10/27/2017)
10/27/2017		Arrest of Daryl G. Bank (ldab,) (Entered: 10/27/2017)
10/27/2017	23	Minute Entry for proceedings held before Magistrate Judge Lawrence R. Leonard:Initial Appearance as to Daryl G. Bank held on 10/27/2017, Defendant to retain James Broccoletti who was entered in for special limited appearance until retained. Arraignment set for 11/15/2017 at 02:30 PM in Norfolk Mag Courtroom 2 before Magistrate Judge Lawrence R. Leonard. **Appearances**: AUSA Melissa O'Boyle for the Government, Retained attorney Randall Lehman for defendant. Defendant present and remanded to custody of USM. (Court Reporter FTR.)(ldab,) (Entered: 10/27/2017)
10/27/2017	24	Arrest Warrant Returned Executed on 8/24/17 in case as to Daryl G. Bank. (ldab,) (Entered: 10/27/2017)
10/30/2017	25	ORDER Granting 21 Motion for Special Appearance as to Daryl G. Bank (1). Signed by Magistrate Judge Lawrence R. Leonard and filed on 10/30/17. Copies distributed to all parties 10/30/17. (ldab,) (Entered: 10/30/2017)
11/01/2017	26	Motion to appear Pro Hac Vice by Jason M. Wandner and Certification of Local Counsel James O. Broccoletti (Filing fee $ 75 receipt number 0422-5789918.) by Daryl G. Bank. (Broccoletti, James) (Entered: 11/01/2017)
11/03/2017	27	ORDER granting 26 Motion for Pro hac vice for Jason M. Wandner as to Daryl G. Bank. Signed by District Judge Mark S. Davis on 11/3/17. (bpet,) (Entered: 11/03/2017)
11/15/2017	29	Minute Entry for Arraignment as to Daryl G. Bank held on 11/15/2017 before Magistrate Judge Lawrence R. Leonard. Defendant present, in custody. Defendant waived formal arraignment, entered plea of not guilty, wishes to

		appear at preliminary hearings and demands trial by jury. By agreement of the parties, speedy trial is waived. Preliminary motions deadline 12/20/17. Jury Trial set for 4/24/2018 at 10:00 AM in Norfolk Courtroom 5 before District Judge Mark S. Davis. The Court authorizes Mr. Leeman to sign the discovery order. Agreed Discovery Order filed in open court. Defendant remanded. **Appearances**: AUSA Melissa O'Boyle for the Government, retained attorney Randall Leeman, Jason Wandner for defendant. (Court Reporter FTR.)(lwoo) (Entered: 11/16/2017)
11/15/2017	30	Agreed Discovery Order as to Daryl G. Bank. Signed by Magistrate Judge Lawrence R. Leonard and filed in open court on 11/15/17. (lwoo) (Entered: 11/16/2017)
12/06/2017	31	MOTION for Leave to Address Conditions of Bond by Daryl G. Bank. (Broccoletti, James) (Entered: 12/06/2017)
12/07/2017	32	RESPONSE to Motion by USA as to Daryl G. Bank re 31 MOTION Leave to Address Conditions of Bond (O'Boyle, Melissa) (Entered: 12/07/2017)
12/13/2017	33	ORDER Denying 31 Motion for Leave to Address Conditions of Bond as to Daryl G. Bank (1).. Signed by Magistrate Judge Lawrence R. Leonard and filed on 12/13/17. Copies distributed to United States Attorney, and to all counsel of record for Defendants 12/13/17. (ldab,) (Entered: 12/13/2017)
12/14/2017	34	NOTICE OF ATTORNEY APPEARANCE: James Orlando Broccoletti appearing for Daryl G. Bank (Broccoletti, James) (Entered: 12/14/2017)
12/14/2017	35	MOTION for Amendment of Bond by Daryl G. Bank. (Broccoletti, James) (Entered: 12/14/2017)
12/14/2017	36	Exhibit by Daryl G. Bank re: 35 Motion for Bond (Broccoletti, James) (Entered: 12/14/2017)
12/27/2017	37	RESPONSE in Opposition by USA as to Daryl G. Bank re 35 MOTION for Bond (Attachments: # 1 Exhibit 1 SDFL Transcript, # 2 Exhibit 2 McPherson Bank Account, # 3 Exhibit 3 FINRA Order, # 4 Exhibit 4 Spectrum 100 Inv. Offering, # 5 Exhibit 5 Bayport Accounts, # 6 Exhibit 6 SEC Complaint, # 7 Exhibit 7 SCC Motion for Temp. Inj., # 8 Exhibit 8 SEC Judgment, # 9 Exhibit 9 Oculina Report)(O'Boyle, Melissa) (Entered: 12/27/2017)
01/03/2018	38	REPLY TO 37 Response in Opposition by USA as to Daryl G. Bank (Attachments: # 1 Exhibit)(Broccoletti, James) (Entered: 01/03/2018)
01/03/2018		Notice of Correction re 38 Reply to Response. Attorney notified that leave of Court is required in order to file the Reply. (bpet) (Entered: 01/03/2018)
01/03/2018	39	MOTION for Leave to File by Daryl G. Bank. (Attachments: # 1 Exhibit) (Broccoletti, James) (Entered: 01/03/2018)
01/08/2018	40	MOTION for Return of Property/PreTrial by Daryl G. Bank. (Broccoletti, James) (Entered: 01/08/2018)

01/09/2018	41	ORDER granting 39 Motion for Leave to File as to Daryl G. Bank (1). Signed by Magistrate Judge Lawrence R. Leonard on 1/9/2018. (Leonard, Lawrence) (Entered: 01/09/2018)
01/11/2018	42	MOTION in Limine by Daryl G. Bank. (Broccoletti, James) (Entered: 01/11/2018)
01/12/2018	43	MOTION for Extension *of Pretrial Motions* by Daryl G. Bank. (Broccoletti, James) (Entered: 01/12/2018)
01/17/2018	45	25 Blank Subpoenas issued (ldab,) (Entered: 01/18/2018)
01/18/2018	44	ORDER Denying 35 MOTION for Amendment of Bond as to Daryl G. Bank (1). Signed by District Judge Mark S. Davis and filed on 1/18/18. Copies distributed to all parties 1/18/18. (ldab,) (Entered: 01/18/2018)
01/22/2018	46	RESPONSE in Opposition by USA as to Daryl G. Bank re 40 MOTION for Return of Property/PreTrial (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Hudson, Kevin) (Entered: 01/22/2018)
01/25/2018	47	RESPONSE in Opposition by USA as to Daryl G. Bank re 42 MOTION in Limine (O'Boyle, Melissa) (Entered: 01/25/2018)
01/26/2018	48	RESPONSE to Motion by USA as to Daryl G. Bank re 43 MOTION for Extension *of Pretrial Motions* (O'Boyle, Melissa) (Entered: 01/26/2018)
01/30/2018	49	ORDER granting 43 Motion to Extend Time for Filing Any Pre-Trial Motions as to Daryl G. Bank (1). Signed by District Judge Mark S. Davis on 01/30/2018. (Davis, Mark) (Entered: 01/30/2018)
01/31/2018	50	1 Subpoena Returned as to Daryl G. Bank. (ldab,) (Entered: 02/01/2018)
02/13/2018		Terminate Jury Trial as to Daryl G. Bank: See Order entered 2/13/18 (afar) (Entered: 02/13/2018)
02/20/2018		Jury Trial reset as to Daryl G. Bank, Raeann Gibson: for 9/18/2018 at 10:00 AM in Norfolk Courtroom 5 before District Judge Mark S. Davis. (vwar) (Entered: 02/20/2018)
02/20/2018	54	MOTION for Reconsideration *Bond* by Daryl G. Bank. (Attachments: # 1 Exhibit)(Broccoletti, James) (Entered: 02/20/2018)
02/28/2018	55	MOTION Motion to Modify Bond-Permit Sale of Home by Daryl G. Bank. (Attachments: # 1 Exhibit)(Broccoletti, James) (Entered: 02/28/2018)
03/06/2018	56	RESPONSE in Opposition by USA as to Daryl G. Bank re 54 MOTION for Reconsideration *Bond* (Attachments: # 1 Exhibit A Nevada Certificate)(Yusi, Elizabeth) (Entered: 03/06/2018)
03/14/2018	59	RESPONSE in Opposition by USA as to Daryl G. Bank re 55 MOTION Motion to Modify Bond-Permit Sale of Home (Attachments: # 1 Exhibit 1) (Hudson, Kevin) (Entered: 03/14/2018)
03/15/2018		Motion Hearing as to Daryl G. Bank re 40 MOTION for Return of

		Property/PreTrial and 42 MOTION in Limine set for 3/22/2018 at 11:30 AM in Norfolk Courtroom 5 before District Judge Mark S. Davis. (lbax,) (Entered: 03/15/2018)
03/15/2018	60	Reply by Daryl G. Bank re 59 Response in Opposition *to Government's Response* (Broccoletti, James) (Entered: 03/15/2018)
03/22/2018	61	Motion Hearing held before District Judge Mark S. Davis: Paul McManus, OCR. Melissa OBoyle, Elizabeth Yusi, and Kevin Hudson, present on behalf of the Government. James Broccoletti and Jason Wandner, present on behalf of the Defendant. Defendant present in custody. Matter came on for a hearing on 40 Motion for Return of Property/Pretrial and 42 Motion in Limine. Motion Hearing as to Daryl G. Bank held on 3/22/2018 re 42 MOTION in Limine, 40 MOTION for Return of Property/PreTrial. Comments of the Court. Argument of counsel heard. Court made certain findings on the record. For reasons stated on the record, the Court DENIED 40 Motion for Return of Property/ Pretrial and the Court GRANTED in part, and DENIED in part 42 Motion in Limine. Defendant remanded to custody of USM. Court adjourned. (vwar) (Entered: 03/23/2018)
04/19/2018		Case sealed as to Daryl G. Bank, Raeann Gibson (jrin) (Entered: 04/19/2018)
04/19/2018	65	SEALED FIRST SUPERSEDING INDICTMENT as to Daryl G. Bank (1) count(s) 1s, 2s, 3s-7s, 8s-14s, 15s-19s, Raeann Gibson (2) count(s) 1s, 2s, 3s-7s, 8s-14s, 15s-19s, Billy J. Seabolt (3) count(s) 1, 3-7, 8-14, 15-19. On motion of the Government, the Court directed a warrant to be issued as to Billy Seabolt. Motion to Seal Indictment - Order entered and filed in open Court. Arraignment to be set for 5/2/2018 at 2:30 pm as to Daryl Bank (in custody) and Raeann Gibson (on bond). (Attachments: # 1 Def Information Sheet, # 2 Def Information Sheet, # 3 Def Information Sheet) (jrin) (Entered: 04/19/2018)
04/19/2018	66	MOTION to Seal First Superseding Indictmentby USA as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt. (jrin) (Entered: 04/19/2018)
04/19/2018	67	ORDER granting 66 Motion to Seal as to Daryl G. Bank (1), Raeann Gibson (2), Billy J. Seabolt (3). Signed by Magistrate Judge Lawrence R. Leonard on 4/19/2018. (jrin) (Entered: 04/19/2018)
04/19/2018		Arraignment set as to Daryl G. Bank and Raeann Gibson for 5/2/2018 at 02:30 PM in Norfolk Mag Courtroom 1 before Magistrate Judge Lawrence R. Leonard. (jrin) (Entered: 04/19/2018)
04/20/2018	75	ORDER: Parties are ORDERED to file all desired pretrial motions that may be filed under Local Criminal Rule 12 of the Federal Rules of Criminal Procedure within fourteen (14) days from the date of arraignment. Signed by District Judge Mark S. Davis on 4/20/2018. (jrin) (Entered: 04/20/2018)
04/26/2018	78	OPINION AND ORDER denying 54 Motion for Reconsideration dismissing 55 Motion to Modify Bond to Permit the Sale of Family Home as to Daryl G. Bank (1). Signed by District Judge Mark S. Davis on 4/26/2018. (jrin)

		(Entered: 04/26/2018)
05/01/2018	79	MOTION to Withdraw as Attorney by Jason Wandner. by Daryl G. Bank. (Broccoletti, James) (Entered: 05/01/2018)
05/01/2018		Notice of Correction re 79 MOTION to Withdraw as Attorney by Jason Wandner does not include a SIGNED Certificate of Service. Please file the signed Certificate of Service as a separate document. Use the Certificate of Service event (under notices) and link the Certificate of Service to the document it was omitted from. Additionally, document number 79 did not include a Proposed Order. (jrin) (Entered: 05/01/2018)
05/02/2018	80	Minute Entry for arraignment on superseding indictment held 5/2/18 before Magistrate Judge Lawrence R. Leonard. Defendant present, in custody. Defendant objects to new trial setting beyond Sept. Govt opposes Bench Trial. Defendant waived formal arraignment, entered plea of not guilty, waives trial by jury, waiver executed and filed in open court, and defendant wishes to appear at preliminary hearings. Speedy trial previously waived. Preliminary motions deadline 5/16/18. The Court sets the matter for a jury trial for reasons stated on the record. Jury Trial set for 11/27/2018 at 10:00 AM in Norfolk Courtroom 5 before District Judge Mark S. Davis. Defendant remanded. **Appearances**: AUSA Elizabeth Yusi for the Government, retained attorney James Broccoletti for defendant (Court Reporter FTR.)(lwoo) Modified on 5/2/2018 to include speedy trial language (lwoo). (Entered: 05/02/2018)
05/02/2018	81	WAIVER of Trial by Jury by Daryl G. Bank filed in open court 5/2/18. (lwoo) (Entered: 05/02/2018)
05/03/2018	87	ORDER granting 79 Motion to Withdraw as Attorney. Jason M. Wandner withdrawn from case as to Daryl G. Bank (1). Signed by District Judge Mark S. Davis on 05/03/2018. (Davis, Mark) (Entered: 05/03/2018)
05/07/2018		Jury Trial reset as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt for 1/15/2019 at 10:00 AM in Norfolk Courtroom 5 before District Judge Mark S. Davis. (vwar) (Entered: 05/07/2018)
05/08/2018	90	MOTION for Bond by Daryl G. Bank. (Broccoletti, James) (Entered: 05/08/2018)
05/09/2018	91	MOTION for Exculpatory Evidence by Daryl G. Bank. (Broccoletti, James) (Entered: 05/09/2018)
05/10/2018	92	MOTION in Limine with brief in support by Daryl G. Bank. (Broccoletti, James) Modified text on 5/10/2018 (jrin). (Entered: 05/10/2018)
05/14/2018	93	MOTION in Limine *to Exclude Evidence* by Raeann Gibson as to Raeann Gibson (Renninger, Nicholas) Modified defendant association on 5/15/2018 (jrin). (Entered: 05/14/2018)
05/15/2018		Notice of Correction: When you filed Document number 93 Motion in Limine to Exclude Evidence, you selected all defendants instead of just your

		defendant, Raeann Gibson. The Clerk's Office has corrected this mistake, however, in the future please select just the defendant you represent. (jrin) (Entered: 05/15/2018)
05/17/2018	96	Consent MOTION for Extension of Time to File Response/Reply as to 92 MOTION in Limine by USA as to Daryl G. Bank. (Yusi, Elizabeth) (Entered: 05/17/2018)
05/18/2018	98	ORDER granting 96 Motion for Extension of Time to File Response to Defendant's Motion in Limine. Signed by District Judge Mark S. Davis on 05/18/2018. (Davis, Mark) (Entered: 05/18/2018)
05/22/2018	99	RESPONSE to Motion by USA as to Daryl G. Bank re 90 MOTION for Bond (O'Boyle, Melissa) (Entered: 05/22/2018)
05/23/2018	101	RESPONSE to Motion by USA as to Daryl G. Bank re 91 MOTION for Exculpatory Evidence (O'Boyle, Melissa) (Entered: 05/23/2018)
05/23/2018	102	REPLY TO RESPONSE by Daryl G. Bank re 99 Response to Motion for Bond (Broccoletti, James) Modified document linkage on 5/24/2018 (jrin). (Entered: 05/23/2018)
05/24/2018		Notice of Correction re 102 Reply to Response was incorrectly linked to document 101 Response to Motion re 91 Motion for Exculpatory Evidence. The Clerk's Office has corrected to linkage to reflect document 102 as a reply to 99 Response to the Motion for Bond. No further action is required at this time. (jrin) (Entered: 05/24/2018)
05/25/2018	103	TRANSCRIPT of Proceedings held on 3/22/2018, before Judge Mark S. Davis. Court reporter/transcriber Paul McManus, Telephone number 757-222-7077. **NOTICE RE REDACTION OF TRANSCRIPTS:The parties have thirty(30) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.vaed.uscourts.gov Transcript may be viewed at the court public terminal or purchased through the court reporter/transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 6/25/2018. Redacted Transcript Deadline set for 7/25/2018. Release of Transcript Restriction set for 8/23/2018.(mcmanus, paul) (Entered: 05/25/2018)**
05/25/2018	104	ORDER granting 90 Motion to Reduce Surety Bond as to Daryl G. Bank (1) and ORDERS that the Corporate Surety Bond be reduced from $250,000 to $100,000. The amount of the $300,000 Personal Surety Bond remains unchanged and shall be co-signed by Defendant's father as agreed. Additional and special conditions are placed on defendant prior to his release as outlined in the Order and the defendant shall appear in this court to execute his bonds after the outlined conditions of release are met. Signed by District Judge Mark S. Davis on 5/25/2018. Copies distributed as directed. (jrin) (Entered: 05/25/2018)

05/25/2018	105	SECOND SUPERSEDING INDICTMENT as to Daryl G. Bank (1) count(s) 1ss, 2ss-6ss, 7ss-12ss, 13ss, 14ss-18ss, 19ss-22ss, 23ss, 24ss-28ss, Raeann Gibson (2) count(s) 1ss, 2ss-6ss, 7ss-12ss, 13ss, 14ss-18ss, 19ss-22ss, 23ss, 24ss-28ss, Billy J. Seabolt (3) count(s) 1s, 2s-6s, 7s-12s, 13s, 14s-18s, 19s-22s, 24s-28s. On motion of the Government, the Court directed Defendant in custody - Arraignment to be set for 6/6/2018 at 2:30 pm. (Attachments: # 1 Def. Info Sheet - Seabolt, # 2 Def. Info Sheet - Gibson, # 3 Def. Info Sheet - Bank) (jrin) (Entered: 05/29/2018)
05/29/2018		DISMISSAL OF COUNTS on Government Motion as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt. Second Superseding Indictment filed on 5/25/2018 (jrin) (Entered: 05/29/2018)
05/29/2018		Arraignment set for 6/6/2018 at 02:30 PM in Norfolk Mag Courtroom 2 before Magistrate Judge Robert J. Krask as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt (jrin) (Entered: 05/29/2018)
05/30/2018	108	RESPONSE in Opposition by USA as to Daryl G. Bank re 92 MOTION in Limine (O'Boyle, Melissa) (Entered: 05/30/2018)
05/31/2018	109	MOTION to Modify Conditions of Release *concerning personal surety bond* by Daryl G. Bank. (Broccoletti, James) (Entered: 05/31/2018)
06/01/2018	110	ORDER granting 109 Motion to Amend Terms of Bond as to Daryl G. Bank and ORDERS that the double-equity requirement for Defendant's $300,000 Personal Surety Bond be waived. All other requirements set out in the Court's Order entered on May 25, 2018, remain unchanged. Signed by District Judge Mark S. Davis on 6/1/2018. (jrin) (Entered: 06/01/2018)
06/04/2018		Reset Hearings as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt: Arraignment reset for 6/6/2018 at 02:30 PM in Norfolk Mag Courtroom 1 before Magistrate Judge Douglas E. Miller. (lwoo) (Entered: 06/04/2018)
06/04/2018	111	Having carefully considered the parties briefs regarding Defendants Motion for Disclosure of Exculpatory Evidence, the Court DENIES Defendants motion. The Government has expressly stated that it has complied with the discovery order by promptly turning over exculpatory evidence, and Defendant has failed to identify any specific piece of evidence that he believes has been wrongfully withheld. In the absence of any evidence that the Government is not complying with the agreed discovery order, the Court agrees with the Government that Defendants request for an additional order is duplicative and thus should be denied.. Signed by District Judge Mark S. Davis on 06/04/2018. (Davis, Mark) (Entered: 06/04/2018)
06/06/2018	114	Minute Entry for proceedings held before Magistrate Judge Douglas E. Miller:Arraignment as to Daryl G. Bank (1) Count 1ss,2ss-6ss,7ss-12ss,13ss,14ss-18ss,19ss-22ss,23ss,24ss-28ss held on 6/6/2018. **Appearances**: AUSA Beth Yusi for the Government, retained attorney Randall Leeman for defendant. Defendant is present and in custody. Defendant waived formal arraignment, entered a plea of not guilty, wishes to

		waive jury trial and wishes to be present for pretrial motions. The government objects to the waiver. The waiver is LODGED. Preliminary motions deadline set for one month (7/6/18). Findings re: waiver of speedy trial made on the record and were previously made. Set Hearings as to Daryl G. Bank: Jury Trial set for 1/15/2019 at 10:00 AM in Norfolk Courtroom 5 before District Judge Mark S. Davis. Defendant remanded to USM custody. (Tape #FTR.) (cdod,) (Entered: 06/07/2018)
06/08/2018	117	Corporate Surety Bond in the amount of $100,000 and Personal Surety Bond in the amount of $300,000 executed by Daryl G. Bank.(jrin) (Entered: 06/08/2018)
06/08/2018	118	ORDER Setting Conditions of Release as to Daryl G. Bank. Signed by District Judge Mark S. Davis on 6/8/2018. (jrin) (Entered: 06/08/2018)
06/11/2018	119	Having carefully considered the parties briefs regarding Defendants Motion in Limine to Prohibit the Government from Introducing Evidence Defendant Violated Securities Regulations, the Court agrees with the Government that Defendant's motion should be denied. As the Government points out, the instant evidence is now relevant because Defendant is charged in the Second Superseding Indictment with multiple violations of securities statutes, and this evidence goes to the issue of Defendants allegedly willful and knowing intent. With regards to Defendants contention that the evidence is irrelevant because the investments were not securities and that he was not a broker or dealer of securities, these are contested issues for the jury to decide based on the evidence presented at trial. Because Defendant has not shown that the instant evidence is clearly inadmissible on all potential grounds, Defendants Motion in Limine is DENIED. Signed by District Judge Mark S. Davis on 06/11/2018. (Davis, Mark) (Entered: 06/11/2018)
07/13/2018	121	100 Blank Subpoenas issued (Attachments: # 1 Letter)(jrin) (Entered: 07/13/2018)
09/19/2018	126	MOTION to Modify Conditions of Release by Daryl G. Bank. (Broccoletti, James) (Entered: 09/19/2018)
09/21/2018	127	ORDER granting 126 Unopposed Motion to Modify Conditions of Release to allow Defendant to travel to Port St. Lucie, Florida for a two week period starting September 27, 2018 and returning October 12, 2018 as to Daryl G. Bank (1). Signed by District Judge Mark S. Davis on 09/21/2018. (Davis, Mark) (Entered: 09/21/2018)
11/05/2018	129	MOTION to Continue *Trial* by Daryl G. Bank. (Broccoletti, James) (Entered: 11/05/2018)
11/14/2018	130	MOTION to Modify Conditions of Release by Daryl G. Bank. (Broccoletti, James) (Additional attachment(s) added on 11/14/2018: # 1 Exhibit) (jrin). (Entered: 11/14/2018)
11/14/2018		Notice of Correction re 130 MOTION to Modify Conditions of Release . Document number 130 contained and exhibit in support of a document. These

		types of documents should be submitted as separate attachments to the main document, rather than contained in the main document. The Clerk's Office has corrected this error, no action is required at this time. (jrin) (Entered: 11/14/2018)
11/15/2018	131	ORDER granting 130 Unopposed Motion to Modify Conditions of Release to allow Defendant, Daryl G. Bank, to travel to Port St. Lucie, Florida starting on November 16, 2018 and returning on November 26, 2018. Signed by District Judge Mark S. Davis on 11/15/2018. (Davis, Mark) (Entered: 11/15/2018)
11/19/2018	132	RESPONSE to Motion by USA as to Daryl G. Bank, Raeann Gibson re 129 MOTION to Continue *Trial* (O'Boyle, Melissa) (Entered: 11/19/2018)
11/20/2018	134	MOTION *to Permit Defense to Use Transcripts* by Daryl G. Bank. (Broccoletti, James) (Entered: 11/20/2018)
11/20/2018	135	Memorandum in Support by Daryl G. Bank re 134 MOTION *to Permit Defense to Use Transcripts* (Broccoletti, James) (Entered: 11/20/2018)
11/20/2018		Notice of Correction re 135 Memorandum in Support of Motion, 134 MOTION *to Permit Defense to Use Transcripts*. Documents number 134 and 135 do not include a signed Certificate of Service. Please file the signed Certificate of Service as a separate document. (jrin) (Entered: 11/20/2018)
11/20/2018	136	CERTIFICATE of Service re 134 MOTION *to Permit Defense to Use Transcripts* (Broccoletti, James) (Entered: 11/20/2018)
11/20/2018	137	CERTIFICATE of Service re 135 Memorandum in Support of Motion (Broccoletti, James) (Entered: 11/20/2018)
11/21/2018	138	NOTICE OF ATTORNEY APPEARANCE Andrew C. Bosse appearing for USA. (Bosse, Andrew) (Entered: 11/21/2018)
11/27/2018	139	MOTION to Dismiss by Daryl G. Bank. (Broccoletti, James) (Entered: 11/27/2018)
11/27/2018	140	Memorandum in Support by Daryl G. Bank re 139 MOTION to Dismiss (Broccoletti, James) (Entered: 11/27/2018)
11/29/2018	142	RESPONSE to Motion by USA as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt re 141 MOTION to Continue , 129 MOTION to Continue *Trial* (O'Boyle, Melissa) (Entered: 11/29/2018)
11/29/2018	143	ORDER granting 129 Joint Motion to Continue based upon the non-Lorenzo based arguments presented by defendants, and with the consent of the Government. Signed by District Judge Mark S. Davis on 11/29/2018. (Davis, Mark) (Entered: 11/29/2018)
12/04/2018	144	RESPONSE in Opposition by USA as to Daryl G. Bank re 134 MOTION *to Permit Defense to Use Transcripts* (Bosse, Andrew) (Entered: 12/04/2018)
12/10/2018		Jury Trial reset as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt for 6/25/2019 at 10:00 AM in Norfolk Courtroom 5 before Chief District Judge

		Mark S. Davis. (vwar) (Entered: 12/10/2018)
12/11/2018	145	MOTION to Modify Conditions of Release by Raeann Gibson as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt. (Attachments: # 1 Order Modifying Bond Conditions)(Renninger, Nicholas) (Entered: 12/11/2018)
12/11/2018	147	RESPONSE in Opposition by USA as to Daryl G. Bank re 139 MOTION to Dismiss *on Double Jeopardy Grounds* (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Bosse, Andrew) (Entered: 12/11/2018)
12/12/2018	148	MOTION to Modify Conditions of Release by Daryl G. Bank. (Broccoletti, James) (Entered: 12/12/2018)
12/14/2018	149	RESPONSE to Motion by USA as to Daryl G. Bank re 148 MOTION to Modify Conditions of Release (Yusi, Elizabeth) (Entered: 12/14/2018)
12/18/2018	150	ORDER granting 148 Motion to Modify Conditions of Release as to Daryl G. Bank (1). However, the Court urges Defendant to make the most of his trip from a medical standpoint as his repeated requests are eating away at the reasonable conditions of bond previously requested. Signed by Chief District Judge Mark S. Davis on 12/18/2018. (Davis, Mark) (Entered: 12/18/2018)
12/19/2018	151	REPLY TO RESPONSE to by Daryl G. Bank re 144 Response in Opposition (Broccoletti, James) (Entered: 12/19/2018)
12/19/2018		Notice of Correction re 151 Reply to Response. Unfortunately, when you filed document number 151, you needed leave of court to file the document. The proposed document should have been an attachment to the motion. Please file a Motion for Leave of Court with supporting memorandum, a proposed order, and thee proposed document as an attachment. (jrin) (Entered: 12/19/2018)
12/20/2018	152	MOTION for Leave to File by Daryl G. Bank. (Attachments: # 1 Proposed Order)(Broccoletti, James) (Entered: 12/20/2018)
12/20/2018	153	REPLY TO RESPONSE to by Daryl G. Bank re 152 MOTION for Leave to File (Broccoletti, James) (Entered: 12/20/2018)
12/20/2018	154	MOTION for Leave to File by Daryl G. Bank. (Attachments: # 1 Proposed Order)(Broccoletti, James) (Entered: 12/20/2018)
12/20/2018	155	REPLY TO RESPONSE to by Daryl G. Bank re 154 MOTION for Leave to File (Broccoletti, James) (Entered: 12/20/2018)
12/21/2018		Notice of Correction re 155 Reply to Response, 153 Reply to Response. Unfortunately, when you filed document number 153 and 155, you needed leave of court. Document 153 and 155 should have been attached as proposed documents to the Motions for Leave. (jrin) (Entered: 12/21/2018)
12/21/2018	156	ORDER. It is ordered that the defendant is granted leave to file a reply to government's response, document number, 144. Signed by Chief District Judge Mark S. Davis on 12/21/2018. (jrin) (Entered: 12/21/2018)
12/21/2018	157	ORDER. It is ordered that the defendant is granted leave to filea reply to

		government's response, document number, 147. Signed by Chief District Judge Mark S. Davis on 12/21/2018. (jrin) (Entered: 12/21/2018)
01/04/2019	159	100 Blank Subpoenas issued (Attachments: # 1 Letter)(jrin) (Entered: 01/04/2019)
01/15/2019	160	Consent to Modify Conditions of Release. Signed by Magistrate Judge Lawrence R. Leonard on 1/15/2019. (jrin) (Entered: 01/15/2019)
01/30/2019	164	MOTION to Quash *Subpoenas* by USA as to Daryl G. Bank. (Bosse, Andrew) (Entered: 01/30/2019)
03/07/2019	166	RESPONSE to Motion by Daryl G. Bank re 164 MOTION to Quash *Subpoenas* (Attachments: # 1 Proposed Order, # 2 Proposed Order) (Broccoletti, James) (Entered: 03/07/2019)
03/07/2019		Notice of Correction re 166 Response to Motion. Unfortunately, when you filed document number 166, Response to Motion, you needed leave of court. The proposed response should have been an attachment to a motion for leave. Please file a Motion for Leave of Court with the proposed document as an attachment to the motion. (jrin) (Entered: 03/07/2019)
03/13/2019	167	MOTION for Leave to File *Untimely Pleading* by Daryl G. Bank. (Attachments: # 1 Proposed Order)(Broccoletti, James) (Additional attachment(s) added on 3/13/2019: # 2 Proposed Response) (jrin). (Entered: 03/13/2019)
03/15/2019	168	ORDER. UPON motion of the defendant, Daryl Bank, by counsel, pursuant to local Rule 47 (f) (1), it is ordered that the defendant is granted leave to file a reply to the government's response, document number 164. Signed by Chief District Judge Mark S. Davis on 3/14/2019. (jrin) (Entered: 03/15/2019)
03/19/2019	169	MOTION to Modify Conditions of Release by Daryl G. Bank. (Broccoletti, James) (Entered: 03/19/2019)
04/01/2019	170	RESPONSE to Motion by USA as to Daryl G. Bank re 169 MOTION to Modify Conditions of Release (Yusi, Elizabeth) (Entered: 04/01/2019)
04/02/2019	171	ORDER granting 169 Motion to Modify Conditions of Release as to Daryl G. Bank (1). The Court notes that the motion was unopposed by U.S. Probation and the Government. Signed by Chief District Judge Mark S. Davis on 04/02/2019. (Davis, Mark) (Entered: 04/02/2019)
04/05/2019	173	MEMORANDUM OPINION. The Defendant's motions for issuance of subpoenas are DENIED (ECF no. 161, 162) and the Government's motion to quash isDISSMISSED AS MOOT (ECF no. 164). Signed by Chief District Judge Mark S. Davis on 4/5/2019. (jrin) (Entered: 04/05/2019)
04/29/2019	176	Consent MOTION to Take Deposition *Pursuant to Fed. R. Crim. P. 15* by USA as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt. (Attachments: # 1 Proposed Order)(Yusi, Elizabeth) (Entered: 04/29/2019)
05/01/2019	177	ORDER granting 176 Motion to Take Deposition as to Daryl G. Bank (1),

		Raeann Gibson (2), Billy J. Seabolt (3) See Order for details. Signed by Chief District Judge Mark S. Davis on 4/30/2019. (jrin) (Entered: 05/01/2019)
05/08/2019	180	OPINION AND ORDER. The Defendant's motion to dismiss (ECF no. 139) is DENIED. Signed by Chief District Judge Mark S. Davis on 5/8/2019. (jrin) (Entered: 05/08/2019)
05/10/2019	182	Joint MOTION for Joinder by Daryl G. Bank as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt. (Broccoletti, James) (Entered: 05/10/2019)
05/10/2019	183	Memorandum in Support by Daryl G. Bank as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt re 182 Joint MOTION for Joinder (Broccoletti, James) (Entered: 05/10/2019)
05/21/2019	184	NOTICE OF APPEAL (Interlocutory) by Daryl G. Bank re 180 Order. Filing fee $505, receipt number 0422-6650365. (Broccoletti, James) (Entered: 05/21/2019)
05/22/2019		Notice of Correction re 184 Notice of Appeal - Interlocutory. Document number 184 contains more than one pleading or motion for relief. Please refile the Motion to Stay as a separate docket entry. (jrin) (Entered: 05/22/2019)
05/22/2019	185	Transmission of Notice of Appeal to 4CCA as to Daryl G. Bank to US Court of Appeals re 184 Notice of Appeal - Interlocutory (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (Attachments: # 1 Notice of Appeal)(jrin) (Entered: 05/22/2019)
05/22/2019	186	MOTION to Stay . (Attachments: # 1 Proposed Order)(Broccoletti, James) (Entered: 05/22/2019)
05/22/2019	187	ORDER. The Government and Bank's co-defendants are instructed to file any responsive briefs to the Motion to Stay (ECF no. 186) no later than May 30, 2019, at noon. Bank shall file a reply brief, if so inclined, no later than June 4, 2019, at noon. Signed by Chief District Judge Mark S. Davis on 5/22/2019. (jrin) (Entered: 05/22/2019)
05/23/2019	188	USCA Case Number 19-4356 4CCA - Case Number Joy Hargett Moore for 184 Notice of Appeal - Interlocutory filed by Daryl G. Bank. (clou) (Entered: 05/24/2019)
05/24/2019	189	RESPONSE in Opposition by USA as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt re 182 Joint MOTION for Joinder (O'Boyle, Melissa) (Entered: 05/24/2019)
05/29/2019	195	Fifty (50) Blank Subpoenas issued. (Attachments: # 1 Memorandum) (bpet,) (Entered: 05/29/2019)
05/30/2019	203	RESPONSE in Opposition by USA as to Daryl G. Bank re 186 MOTION to Stay (Bosse, Andrew) (Entered: 05/30/2019)
05/30/2019	204	Response to Motion by Billy J. Seabolt as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt re 186 MOTION to Stay (Munn, Emily) (Entered: 05/30/2019)

05/30/2019	205	Reply by Daryl G. Bank, Billy J. Seabolt as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt re 189 Response in Opposition (Broccoletti, James) (Entered: 05/30/2019)
05/31/2019	206	MOTION for Additional Peremptory Strikes by Daryl G. Bank, Billy Seabolt as to Daryl G. Bank, Billy J. Seabolt. (Broccoletti, James) Modified text on 5/31/2019 (tamarm). (Entered: 05/31/2019)
05/31/2019	207	Memorandum in Support by Daryl G. Bank, Billie Seabolt as to Daryl G. Bank, Billy J. Seabolt re 206 MOTION for Additional Peremptory Strikes (Broccoletti, James) Modified text on 5/31/2019 (tamarm). (Entered: 05/31/2019)
05/31/2019		Notice of Correction re 206 MOTION, 207 Memorandum in Support of Motion. Incorrect parties were selected as filers. The text has been modified to reflect the correct filers of the documents. The text has also been modified to reflect the correct title of the document. (tamarm) (Entered: 05/31/2019)
06/03/2019	208	MOTION to Quash *Witness Subpoena* by Timothy Stephen Baird as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt. (Baird, Timothy) (Entered: 06/03/2019)
06/03/2019	209	Memorandum in Support by Timothy Stephen Baird as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt re 208 MOTION to Quash *Witness Subpoena* (Baird, Timothy) (Additional attachment(s) added on 6/3/2019: # 1 Exhibit) (jrin). (Entered: 06/03/2019)
06/03/2019	210	Reply by Daryl G. Bank re 186 Motion to Stay (Broccoletti, James) Modified document linkage on 6/3/2019 (jrin). (Entered: 06/03/2019)
06/04/2019		Notice of Correction re 211 Reply. Document number 211 was filed using the wrong docket event. The "Reply" event was incorrectly filed as a "Motion to Quash." The clerk's office staff corrected this error. No further action is required at this time. (jrin) (Entered: 06/04/2019)
06/04/2019	212	MEMORANDUM ORDER. The Court GRANTS Bank's Motion to Stay proceedings in this case pending interlocutory appeal (ECF no. 186). Signed by Chief District Judge Mark S. Davis on 6/4/2019. (jrin) (Entered: 06/04/2019)
06/04/2019	213	MOTION to Quash Subpoena by David Alcorn as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt. (Attachments: # 1 Letter)(jrin) (Entered: 06/04/2019)
06/07/2019	214	Supplemental Memorandum by USA as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt re 182 Joint MOTION for Joinder (O'Boyle, Melissa) (Entered: 06/07/2019)
06/13/2019	215	RESPONSE in Opposition by USA as to Daryl G. Bank, Billy J. Seabolt re 206 MOTION *for Additional Peremptory Strikes* (Bosse, Andrew) (Entered: 06/13/2019)
06/18/2019		Terminate Deadlines and Hearings as to Daryl G. Bank, Raeann Gibson, Billy J. Seabolt (Jury trial terminated will be rescheduled after stay is lifted). (vwar)

		(Entered: 06/19/2019)

PACER Service Center			
Transaction Receipt			
06/19/2019 15:25:23			
PACER Login:	lantagne92:2586058:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	2:17-cr-00126-MSD-LRL
Billable Pages:	13	**Cost:**	1.30

Sam S. Puathasnanon
Cal. Bar No. 198430
Email: puathasnanons@sec.gov
Sana Muttalib
Cal Bar. No. 267005
Email: muttalibs@sec.gov

Attorneys for Plaintiff
Securities and Exchange Commission
Michele Wein Layne, Regional Director
Lorraine B. Echavarria, Associate Regional Director
John W. Berry, Regional Trial Counsel
444 S. Flower Street, Suite 900
Los Angeles, California 90071
Telephone: (323) 965-3998
Facsimile: (213) 443-1904

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Securities and Exchange Commission, Plaintiff, vs. Janus Spectrum LLC; David Alcorn; Kent Maerki; Dominion Private Client Group, LLC; Janus Spectrum Group, LLC; Spectrum Management, LLC; Spectrum 100, LLC; Spectrum 100 Management, LLC; Prime Spectrum, LLC; Prime Spectrum Management, LLC; Daryl G. Bank; Premier Spectrum Group, PMA; Bobby D. Jones; Innovative Group, PMA; Premier Group, PMA; Prosperity Group, PMA; Terry W. Johnson; and Raymon G. Chadwick, Jr., Defendants.	Case No. **COMPLAINT**

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

SUMMARY

1. This matter involves a securities offering fraud orchestrated by Defendants David Alcorn and Kent Maerki, through the company they founded and managed, Defendant Janus Spectrum LLC ("Janus Spectrum"). Janus Spectrum held itself out as a company that prepares applications for Federal Communications Commission ("FCC") cellular spectrum licenses on behalf of third party fundraising entities. Alcorn and Maerki organized the business so that the fundraising entities, owned and managed by Defendants Daryl Bank, Bobby Jones, Terry Johnson, and Raymon Chadwick, offered and sold securities purporting to raise funds to apply for FCC licenses. In these offerings, Defendants misled investors by promising that their investments would yield substantial returns through the sale or lease of the FCC licenses to major wireless carriers, when in fact, Defendants knew or were reckless or negligent in not knowing that the FCC licenses, if obtained, could never be sold or leased by any major wireless carriers. Defendants further concealed the actual costs associated with obtaining these FCC licenses, and pocketed substantial sums of investor moneys for their own, undisclosed, uses.

2. In all, the fundraising entities controlled by Bank, Jones, Johnson, and Chadwick raised over $12.4 million from investors from May 2012 through October 2014. After collecting and pooling these investor funds, the fundraising entities funneled a significant percentage of the funds to Janus Spectrum, Alcorn, and Maerki, with only a small portion of these funds used to prepare applications for FCC licenses. Alcorn and Maerki kept the remainder of the investor funds for personal use. In all, Janus Spectrum received at least $6,834,700 from the fundraising entities. Of that amount, Alcorn received at least $514,996, and Maerki received at least $867,665 of investor funds. Bank paid himself and his other businesses approximately $4,494,900 out of investor funds. Jones received approximately $622,700 from investor funds and referral fees from Janus Spectrum. Chadwick and

Johnson received approximately $456,483 from investor funds and referral fees from Janus Spectrum.

3. By conducting this fraudulent scheme and lying to investors, Defendants violated the securities registration provisions of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), the antifraud provisions of Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder, and the broker-dealer registration provisions of Section 15(a)(1) of the Exchange Act.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to Sections 20(b), 20(d)(1) and 22(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77t(b), 77t(d)(1) & 77v(a)], and Sections 21(d)(1), 21(d)(3)(A), 21(e) and 27 of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78u(d)(1), 78u(d)(3)(A), 78u(e) & 78aa].

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

6. Venue is proper in this district pursuant to Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)] and Section 27 of the Exchange Act [15 U.S.C. § 78aa] because certain of the transactions, acts, practices and courses of conduct constituting violations of the federal securities laws occurred within this district. In addition, venue is proper in this district because Janus Spectrum's principal place of business is in this district and Alcorn and Maerki reside in this district.

DEFENDANTS

A. The Janus Spectrum Defendants

7. **Janus Spectrum** is a New Mexico limited liability company, formed in October 2011, with its principal place of business in Glendale, Arizona. Janus

Spectrum holds itself out to be an FCC license application services company. Janus Spectrum has not registered any offerings of securities under the Securities Act, nor has it registered a class of any securities under the Exchange Act.

8. **David Alcorn**, age 70, of Scottsdale, Arizona is a founder and managing director of Janus Spectrum. Alcorn is the president of David Alcorn Professional Corporation, which became the sole owner of Janus Spectrum as of January 2014. Prior to January 2014, David Alcorn Professional Corporation held a 55% ownership interest in Janus Spectrum.

9. **Kent Maerki**, age 72, of Scottsdale, Arizona is a founder and former owner of Janus Spectrum. Until January 2014, Maerki held a 45% ownership interest in Janus Spectrum. Maerki is currently a consultant to Janus Spectrum.

B. The Fundraising Entity Defendants

10. The top fundraising entities for Janus Spectrum and their respective principals were: (1) Dominion Private Client Group, LLC ("Dominion Private Client Group"), Janus Spectrum Group, LLC ("Janus Spectrum Group"), Spectrum Management, LLC ("Spectrum Management"), Spectrum 100, LLC ("Spectrum 100"), Spectrum 100 Management, LLC ("Spectrum 100 Management"), Prime Spectrum, LLC ("Prime Spectrum"), and Prime Spectrum Management, LLC ("Prime Spectrum Management")—Daryl Bank; (2) Premier Spectrum Group, PMA ("Premier Spectrum Group")—Bobby Jones; and (3) Innovative Group, PMA ("Innovative Group"), Premier Group, PMA ("Premier Group"), and Prosperity Group, PMA ("Prosperity Group")—Terry Johnson and Raymon Chadwick (collectively, the "Fundraising Entities").

1. The Bank Defendants

11. **Daryl G. Bank**, age 44, of Port St. Lucie, Florida is the managing member of Dominion Private Client Group. Bank is the managing member of Janus Spectrum Group, Spectrum 100, and Prime Spectrum through his entities Spectrum Management, Spectrum 100 Management, and Prime Spectrum Management

respectively (collectively with Bank and Dominion Private Group, the "Bank Defendants").

12. **Dominion Private Client Group** is a Virginia limited liability company with its principal place of business in Virginia Beach, Virginia. Dominion Private Client Group offered and sold securities in connection with acquiring and monetizing FCC licenses for 800 MHz spectrum. Dominion Private Client Group has not registered any offerings of securities under the Securities Act, nor has it registered a class of securities under the Exchange Act.

13. **Janus Spectrum Group** is a Virginia limited liability company with its principal place of business in Virginia Beach, Virginia. Janus Spectrum Group offered and sold securities in connection with acquiring and monetizing FCC licenses for 800 MHz spectrum. Janus Spectrum Group has not registered any offerings of securities under the Securities Act, nor has it registered a class of securities under the Exchange Act.

14. **Spectrum Management** is a Virginia limited liability company with its principal place of business in Virginia Beach, Virginia. Spectrum Management is the managing member of Janus Spectrum Group. Spectrum Management has not registered any offerings of securities under the Securities Act, nor has it registered a class of securities under the Exchange Act.

15. **Spectrum 100** is a Virginia limited liability company with its principal place of business in Virginia Beach, Virginia. Spectrum 100 offered and sold securities in connection with acquiring and monetizing FCC licenses for 800 MHz spectrum. Spectrum 100 has not registered any offerings of securities under the Securities Act, nor has it registered a class of securities under the Exchange Act.

16. **Spectrum 100 Management** is a Virginia limited liability company with its principal place of business in Virginia Beach, Virginia. Spectrum 100 Management is the managing member of Spectrum 100. Spectrum 100 Management has not registered any offerings of securities under the Securities Act, nor has it

registered a class of securities under the Exchange Act.

17. **Prime Spectrum** is a Virginia limited liability company with its principal place of business in Virginia Beach, Virginia. Prime Spectrum offered and sold securities in connection with acquiring and monetizing FCC licenses for 800 MHz spectrum. Prime Spectrum has not registered any offerings of securities under the Securities Act, nor has it registered a class of securities under the Exchange Act.

18. **Prime Spectrum Management** is a Virginia limited liability company with its principal place of business in Virginia Beach, Virginia. Prime Spectrum Management is the managing member of Prime Spectrum. Prime Spectrum Management has not registered any offerings of securities under the Securities Act, nor has it registered a class of securities under the Exchange Act.

2. The Jones Defendants

19. **Bobby D. Jones**, age 68, of Phoenix, Arizona, is the founder and trustee of Premier Spectrum Group (collectively with Jones, the "Jones Defendants").

20. **Premier Spectrum Group** is a Texas private membership association with its principal place of business in Phoenix, Arizona. Premier Spectrum Group offered and sold securities in connection with acquiring and monetizing FCC licenses for 800 MHz spectrum. Premier Spectrum Group has not registered any offerings of securities under the Securities Act, nor has it registered a class of securities under the Exchange Act.

3. The Johnson/Chadwick Defendants

21. **Terry W. Johnson**, age 57, of Heath, Texas, is co-founder of Innovative Group, Premier Group, and Prosperity Group. In addition, Johnson is a principal trustee and managing member of Premier Group, and is the principal trustee and managing member of Prosperity Group.

22. **Raymon G. Chadwick, Jr.**, of Grand Prairie, Texas, age 60, is co-founder of Innovative Group, Premier Group, and Prosperity Group (together with Johnson and Chadwick, the "Johnson/Chadwick Defendants"). In addition,

Chadwick is the principal trustee and managing member of Innovative Group, and is a principal trustee and managing member of Premier Group.

23. **Innovative Group** is a Texas private membership association with its principal place of business in Grand Prairie, Texas. Innovative Group offered and sold securities in connection with acquiring and monetizing FCC licenses for 800 MHz spectrum. Innovative Group has not registered any offerings of securities under the Securities Act, nor has it registered a class of securities under the Exchange Act.

24. **Premier Group** is a Texas private membership association with its principal place of business in Grand Prairie, Texas. Premier Group offered and sold securities in connection with acquiring and monetizing FCC licenses for 800 MHz spectrum. Premier Group has not registered any offerings of securities under the Securities Act, nor has it registered a class of securities under the Exchange Act.

25. **Prosperity Group** is a Texas private membership association with its principal place of business in Heath, Texas. Prosperity Group offered and sold securities in connection with acquiring and monetizing FCC licenses for 800 MHz spectrum. Prosperity Group has not registered any offerings of securities under the Securities Act, nor has it registered a class of securities under the Exchange Act.

STATEMENT OF FACTS

A. The 800 MHz Wireless Spectrum

26. Among other things, the FCC regulates wireless communications. It does so in part through its oversight of the various frequencies that comprise the country's available wireless capacity, or spectrum. The FCC issues licenses to use the various frequencies throughout the country. The most common licenses involve transmitting radio, television, and cellular telephone signals on certain frequencies.

27. In 2004, the FCC adopted a plan to reconfigure the 800 MHz portion, or band, of the wireless spectrum. This plan was designed to address increasing interference problems with the operation of public safety communication systems using the 800 MHz band caused by the operation of closely situated high-density

commercial wireless systems.

28. The plan separated the frequencies on which public safety systems operate from the frequencies on which commercial wireless carriers operate by moving public safety operations to the lower portion of the 800 MHz band and moving commercial wireless systems to the higher portion of the band.

29. As part of its plan, the FCC established the Expansion Band and Guard Band to provide public safety licensees with a buffer from the cellular portion of the band. The Expansion Band and Guard Band each provide one MHz of separation from the cellular portion of the band.

30. The FCC's rules specify that a licensee using an Expansion Band or Guard Band channel is only authorized to use a maximum bandwidth of 20 kilohertz (20 thousand Hertz).

31. Major wireless carriers such as Sprint currently use technology for cellular voice and data services that require a minimum bandwidth of 1.25 megahertz (1.25 million Hertz) to 1.4 megahertz (1.4 million Hertz). Thus, the FCC would not permit major wireless carriers to operate their cellular services on the 800 MHz Expansion Band or Guard Band because those services would not fit within the FCC's authorized maximum bandwidth of 20 kilohertz. This remains true regardless of whether these major wireless carriers buy or lease the licenses from others.

B. The Investment Scheme

32. Janus Spectrum, Alcorn, and Maerki orchestrated an investment scheme involving them, the Bank Defendants, the Jones Defendants, and the Johnson/Chadwick Defendants, disguised as a business seeking to obtain and monetize FCC licenses in the Expansion Band and Guard Band.

1. Role of the Janus Spectrum Defendants in the scheme

33. Janus Spectrum's business had two parts, each of which played a part in the investment scheme.

34. The first part of Janus Spectrum's business involved offering and

providing FCC license application services to over 20 fundraising entities, including all of the Fundraising Entity Defendants, which Janus Spectrum called "clients." These application services included working with third parties, such as engineers and attorneys, to prepare and file spectrum applications with the FCC.

35. Janus Spectrum prepared applications for 800 MHz spectrum in the Expansion Band and Guard Band. These bands represented the only spectrum that non-public safety entities could apply for in the 800 MHz band from January 2013 through the present. As the FCC began releasing blocks of licenses, Janus Spectrum submitted a number of applications, and as a result, some of the Fundraising Entities received licenses.

36. The second part of Janus Spectrum's business involved encouraging investment in the Fundraising Entities. From the inception of Janus Spectrum, Alcorn and Maerki created a layered investment scheme that structured the business, relationships, and written agreements with the Fundraising Entities to avoid the appearance that Janus Spectrum was offering securities. Alcorn and Maerki relied on the Fundraising Entities to overtly offer securities, hoping to shield themselves from the registration requirements and potential liability associated with offering securities.

37. Although the membership interests were offered and sold by the Fundraising Entities, Alcorn and Maerki were intimately involved in their offer and sale.

38. Alcorn and Maerki each referred potential investors to the Fundraising Entities. They participated in conference calls with potential investors. They made presentations to potential investors regarding the investments in the Fundraising Entities. They promised investors potential returns on the investment during in-person meetings or via email and telephone. Alcorn and Maerki frequently encouraged the Fundraising Entities to use them to close sales. Alcorn also answered investors' questions regarding the possible uses of the 800 MHz spectrum.

39. Janus Spectrum, Alcorn, and Maerki also furthered the scheme through

numerous deceptive acts. Alcorn and Maerki, among other things, encouraged and facilitated the setup and use of the Fundraising Entities. They used the layered structure in an attempt to evade the securities laws, including the registration requirements.

40. They also used the layered structure to funnel investor funds from the Fundraising Entities to Janus Spectrum and themselves. From May 2012 to October 2014, the Fundraising Entities paid at least $6,834,700 to Janus Spectrum. Of that amount, Alcorn received at least $514,996, and Maerki received at least $867,665 of investor funds, concealing from investors that the FCC license application costs were substantially less than the amount they were charging per application. Alcorn and Maerki controlled how much of these funds they paid to themselves and as referral fees to Jones, Johnson, and Chadwick. Defendants did not disclose to investors how much of their investment went to Alcorn, Maerki, Bank, Jones, Johnson, Chadwick or their entities instead of toward the costs of obtaining FCC license applications.

41. In furtherance of their scheme, Alcorn and Maerki also made investor referrals to the Fundraising Entities. They provided misleading videos entitled "Money from Thin Air" and "Educational Preview About Airwaves Presentation" to the Fundraising Entities for use in soliciting and deceiving investors. They also provided sample offering documents to Bank which were virtually identical to the offering documents used by Jones. All of these materials misrepresented the anticipated use and value of the 800 MHz spectrum licenses by promising that they could be sold or leased to major wireless carriers. Further, these materials concealed the use of investor funds for referral fees, commissions, and payments to Alcorn, Maerki, Bank, Jones, Johnson and Chadwick.

42. Alcorn and Maerki knew, or were reckless or negligent in not knowing, that they committed deceptive acts in furtherance of the fraudulent scheme. Alcorn and Maerki knowingly supported the solicitation and sales efforts of the Fundraising Entities and controlled Janus Spectrum's bank accounts into which the Fundraising

Entities funneled investor funds.

43. During the relevant time period, Alcorn and Maerki were owners and managers of Janus Spectrum; thus, their knowledge that they committed deceptive acts in furtherance of the fraudulent scheme is imputed to Janus Spectrum.

2. The Janus Spectrum Defendants' material misrepresentations

44. Janus Spectrum, Alcorn, and Maerki misrepresented the potential use of the spectrum in the 800 MHz Expansion Band and Guard Band, the only type of spectrum for which Janus Spectrum prepared applications. Specifically, Alcorn and Maerki represented to the Fundraising Entities and investors that the licenses Janus Spectrum applied for could be used by major wireless carriers, such as Sprint, to operate their cellular systems.

45. Nonetheless, Alcorn falsely represented to investors that 800 MHz spectrum in the Expansion Band and Guard Band could be used by major wireless carriers like Sprint. At least one potential investor asked which entities would want to lease the spectrum being applied for by Janus Spectrum, and Alcorn responded "The most likely user will be Sprint but the market is very deep."

46. Maerki made the same misrepresentation to potential investors in two video presentations. In the first video, entitled "Money from Thin Air," Maerki repeatedly touted the potential of the 800 MHz spectrum and misrepresented the use of this spectrum by major wireless carriers. Specifically, Maerki represented "Sprint is going to need this [the 800 MHz spectrum] …But if they don't take it, AT&T needs it, and so does Verizon. More importantly T-Mobile really needs it. So do the other ones."

47. Maerki emailed this video to the Fundraising Entities for their use and directly to potential investors. Maerki knew that the Fundraising Entities would use the video to solicit investors when he sent the video. For example, Jones sent Maerki an email in which Jones clearly stated that he planned to use the video during a webinar with potential investors.

48. In the second video, entitled "Educational Preview About Airwaves Presentation" and also referred to as the "10-Minute Spectrum Preview," Maerki again repeatedly touted the potential of the 800 MHz spectrum. For example, Maerki represented that: "Obviously, Sprint will be the very apparent candidate for us to lease the 800 megahertz spectrum within [sic] interruption immediately after having relinquished it to the FCC." He also represented: "According to recent analytical models, by owning an 800 megahertz license, one may achieve an annual income up to 300 percent or more while sharing the license with a major wireless carrier."

49. Maerki emailed this video to potential investors and, at Alcorn's request, Maerki sent the video to Fundraising Entities to use to solicit investors.

50. Alcorn and Maerki also attended a live presentation for potential investors in Premier Spectrum Group hosted by Jones at which Maerki misrepresented that the 800 MHz Expansion Band and Guard Band could be used by Sprint. At that presentation, Maerki stated "We have two of our licenses. We will have more and ultimately we will have all 25. Everybody will have their licenses....If you hire us, we will go talk to Sprint and make a deal. That's what we can guarantee. We can't guarantee anything else."

51. In 2012, Alcorn and Maerki received questions from potential investors, indicating that the 800 MHz spectrum in the Expansion Band and Guard Band may not be able to be used by major wireless carriers. Some of these potential investors raised questions regarding the feasibility of leasing or selling the spectrum to major wireless carriers after speaking with FCC representatives. Despite these questions, Alcorn and Maerki did not follow up on these questions and never spoke to anyone at the FCC about whether major wireless carriers could use the Expansion Band and Guard Band of the 800 MHz spectrum. They simply continued to market the spectrum licenses as tremendously valuable to major wireless carriers.

52. Alcorn and Maerki made these misrepresentations even though they knew, or were reckless or negligent in not knowing, that the statements were false.

Both knew, or were reckless or negligent in not knowing, that major wireless carriers cannot use this particular spectrum to operate their cellular systems. Instead, this spectrum is most typically used for small scale push-to-talk services, such as those used by local law enforcement or small businesses such as pizza delivery companies.

53. In 2010, two years before the first securities offering, a Sprint representative told Alcorn that Sprint would not be able to use the spectrum for which Janus Spectrum was applying because of FCC restrictions. Alcorn was again advised of this important limitation in 2011, a year before the first securities offering, when Janus Spectrum's primary engineer told Alcorn that he did "not see Sprint being a customer for a long time."

54. Both Alcorn and Maerki received questions from potential investors indicating that the 800 MHz spectrum in the Expansion Band and Guard Band may not be able to be used by major wireless carriers. Nevertheless, they failed to follow up on this information and continued to market the spectrum licenses as tremendously valuable to major wireless carriers.

55. During the relevant time period, Alcorn and Maerki were owners and managers of Janus Spectrum; thus, their knowledge of the falsity of their representations is imputed to Janus Spectrum.

56. Alcorn's and Maerki's misrepresentations and omissions were material. Investors considered the ability to lease or sell the 800 MHz spectrum obtained by Janus Spectrum to major wireless carriers important to their decision to invest in the scheme. Knowing that the 800 MHz spectrum in the Expansion Band and Guard Band could not be used by major wireless carriers, such as Sprint, affected investors' likelihood and ability of obtaining a return on their investments. The technical limitations of the Expansion Band and Guard Band meant they could not be used by major wireless carriers, but instead only by small businesses, greatly diminishing the value of the licenses.

///

3. The Role of the Fundraising Entity Defendants in the scheme

57. With Janus Spectrum's support, the Fundraising Entities offered investors the opportunity to become members in a limited liability company, or "LLC," or in a private membership association, or "PMA," by purchasing membership interests. The Fundraising Entities pooled investor funds received from the sale of these membership interests.

58. A significant portion of the investor funds raised by the Fundraising Entities was funneled to Janus Spectrum. From May 2012 to October 2014, Janus Spectrum received at least $6,834,700 from the Fundraising Entities.

59. The Fundraising Entities used a portion of the funds to purchase license preparation and submission services from Janus Spectrum for applications in specific geographic areas.

60. The Fundraising Entities represented to investors that Janus Spectrum would handle all aspects of the application process and that Janus Spectrum and the Fundraising Entities would manage the FCC licenses and negotiate deals on their behalf.

a. The Bank Defendants' securities offerings

61. From September 2012 through October 2014, Bank's three Dominion Private Client Group offerings—Janus Spectrum Group, Spectrum 100, and Prime Spectrum—raised a total of approximately $8,194,600 from 111 investors nationwide.

62. The structure of all three offerings was nearly identical. Dominion Private Client Group and the respective issuer LLCs, Janus Spectrum Group, Spectrum 100, and Prime Spectrum, each offered LLC membership interests. Spectrum Management, Spectrum 100 Management, and Prime Spectrum Management managed the offerings as the managing member. Pursuant to the issuers' operating agreements, Spectrum Management, Spectrum 100 Management, and Prime Spectrum Management had "complete power and authority for the

management and operation of the [issuer's] assets and business…"

63. Dominion Private Client Group, the three issuer LLCs, and Bank solicited investors nationwide both directly and through salespeople.

64. Potential investors received offering-specific documents for the three Dominion Private Client Group spectrum offerings managed through Dominion Private Client Group, Spectrum Management, Spectrum 100 Management, and Prime Spectrum Management. The offering documents represented that the three issuer LLCs would apply for and obtain FCC spectrum licenses using Janus Spectrum's application services. Bank was the primary preparer of the offering documents and, as principal and managing member of his respective Fundraising Entities, Bank had ultimate authority over the offering documents' content and whether and how to communicate that content to potential investors.

65. Bank also hosted a radio show, aired on public radio stations and available on YouTube, during which he spoke about the spectrum investment opportunity in general and interviewed Alcorn and Maerki.

66. In addition, Bank recorded a video presentation about the spectrum opportunity, which was also uploaded to YouTube. Bank appeared in the video presentation and, after giving an introduction in which he stated that "[t]here is an opportunity, which is what Kent is going to talk about today, where . . . we can actually invest in those airwaves," he then played the "Money from Thin Air" video which misrepresented the potential of 800 MHz spectrum in the Expansion Band and Guard Band and misled investors regarding the use of this spectrum by major wireless carriers.

67. Many of the investors in the three Dominion Private Client Group spectrum offerings were unsophisticated, did not have a technical background or understanding of spectrum, and did not have any substantial role in preparing the applications or involvement in the entities in which they bought membership interests. Investors were entirely dependent on the information and efforts of Janus

Spectrum and Bank's respective Fundraising Entities.

68. Bank, Dominion Private Client Group, and the three issuer LLCs, Janus Spectrum Group, Spectrum 100, and Prime Spectrum, and the three managing member LLCs, Spectrum Management, Spectrum 100 Management, and Prime Spectrum Management, engaged in multiple deceptive acts that furthered the fraudulent investment scheme. In addition to disseminating misleading information to investors, Bank transferred almost $4.5 million in investor funds raised through the three entities to his personal and other business accounts, and concealed this information from investors. Of this amount at least $1,339,681 went to Bank personally, and approximately $3,040,904 was sent to Dominion Private Client Group. Bank also funneled almost $3.7 million of investor funds to Janus Spectrum.

69. Bank knew, or was reckless or negligent in not knowing, that he committed deceptive acts in furtherance of the fraudulent scheme. Bank controlled the bank accounts into which he funneled investor funds and from which he paid himself substantial amounts.

70. During the relevant time period, Bank was the managing member of Janus Spectrum Group, Spectrum 100, and Prime Spectrum through his entities Spectrum Management, Spectrum 100 Management, and Prime Spectrum Management; thus, his knowledge that he committed deceptive acts in furtherance of the fraudulent scheme is imputed to his respective Fundraising Entities.

b. Jones' Premier Spectrum Group offering

71. From January 2013 to October 2013, Jones' Premier Spectrum Group offering raised approximately $407,050 from 13 investors nationwide.

72. Premier Spectrum Group, Jones, and his salesperson directly solicited investors nationwide through the company's website (which was not password protected), webinars, live presentations and email.

73. Premier Spectrum Group and Jones held webinars in which he appeared and, after giving an introduction in which he stated "Kent [Maerki] will share with

you this evening his past and bring you up to speed on the present," he then played the "Money from Thin Air" video which misrepresented the potential of 800 MHz spectrum in the Expansion Band and Guard Band and misled investors regarding the use of this spectrum by major wireless carriers. Potential investors learned about these webinars through emails that Jones sent them. Following the webinar, Jones sent emails to potential investors reiterating his prior misrepresentations regarding the purported 800 MHz spectrum opportunity.

74. In addition, Jones hosted at least one live presentation to solicit investors. Alcorn and Maerki attended the presentation and Maerki was the main presenter. Jones also solicited potential investors by sending a standard email describing the spectrum opportunity to a list of people with whom he had no prior relationship.

75. Potential investors received an offering document for the Premier Spectrum Group offering. Jones was the primary preparer of the offering document and, as founder and trustee of Premier Spectrum Group, Jones had ultimate authority over the offering document's content and whether and how to communicate that content to potential investors.

76. Investors purchased membership units in Premier Spectrum Group, a private membership association. Upon purchasing membership units, an investor became a member in the association. Investors were told that the private membership association would apply for and obtain FCC spectrum licenses through Janus Spectrum.

77. Many of the investors in Jones' offering were unsophisticated and thereby dependent on Janus Spectrum and Premier Spectrum Group's information and efforts to monetize the spectrum opportunity presented by Jones, Premier Spectrum Group, and Janus Spectrum.

78. Jones and Premier Spectrum Group engaged in multiple deceptive acts that furthered the fraudulent investment scheme. In addition to disseminating

misleading information to investors, Jones transferred at least $55,000 in investor funds raised through Premier Spectrum Group to accounts he controlled, and concealed this information from investors. Jones paid himself approximately $47,160 in commissions and paid a salesperson approximately $8,400 in commissions. Jones also sent approximately $350,000 in investor funds to Janus Spectrum. Jones received undisclosed referral fees totaling $567,140 from Janus Spectrum for introducing other potential fundraising entities and persons, namely Daryl Bank, to the spectrum opportunity and to Janus Spectrum's services. These referral fees further incentivized him to raise money and funnel investor funds to Janus Spectrum.

79. Jones knew, or was reckless or negligent in not knowing, that he committed deceptive acts in furtherance of the fraudulent scheme. Jones controlled the bank accounts into which he funneled investor funds and from which he paid himself substantial amounts.

80. During the relevant time period, Jones was the founder and trustee of Premier Spectrum Group; thus, his knowledge that he committed deceptive acts in furtherance of the fraudulent scheme is imputed to Premier Spectrum Group.

c. The Johnson/Chadwick Defendants' securities offerings

81. From December 2012 to October 2013, Johnson and Chadwick raised approximately $3,859,600 through at least three spectrum offerings of membership interests issued by Innovative Group, Premier Group, and Prosperity Group from 201 investors nationwide.

82. Johnson and Chadwick solicited potential investors by email and word of mouth. Johnson and Chadwick also held conference calls and hosted live presentations and in-person meetings with potential investors, some of which were attended by Alcorn and Maerki. The email invitations for these conference calls and presentations were sent to prior investors, but the emails encouraged the recipients to invite "anyone who might be interested." Jones, who was acquainted with Johnson and Chadwick, also solicited potential investors for Innovative Group.

83. Investors purchased membership interests in Innovative Group, Premier Group, or Prosperity Group, all private membership associations. Upon purchasing membership interests, an investor became a member in the association and would have a percentage ownership in the applications.

84. Similar to the investors in the other offerings, many of the investors in Johnson and Chadwick's offerings were unsophisticated and also dependent on Janus Spectrum and Innovative Group, Premier Group, and Prosperity Group's information and efforts.

85. Johnson, Chadwick, Innovative Group, Premier Group, and Prosperity Group engaged in multiple deceptive acts that furthered the fraudulent investment scheme. In addition to disseminating misleading information to investors, the Johnson/Chadwick Defendants transferred at least $103,459 and $93,024, respectively, to accounts they controlled, concealing those transfers from investors. Johnson and Chadwick also funneled approximately $2,785,000 in investor funds to Janus Spectrum. Johnson and Chadwick also received at least $260,000 in referral fees from Janus Spectrum for referring clients to Janus Spectrum, which further incentivized them to raise money and send investor funds to Janus Spectrum.

86. Johnson and Chadwick knew, or were reckless or negligent in not knowing, that they committed deceptive acts in furtherance of the fraudulent scheme. Johnson and Chadwick controlled the bank accounts into which they funneled investor funds and from which they paid themselves substantial amounts.

87. During the relevant time period, Johnson and Chadwick were the co-founders of Innovative Group, Premier Group, and Prosperity Group; thus, their knowledge that they committed deceptive acts in furtherance of the fraudulent scheme is imputed to their respective Fundraising Entities.

///

///

///

4. The Fundraising Entity Defendants' material misrepresentations and omissions

a. The Bank and Jones offering materials

88. Bank and Jones made misrepresentations and omitted material facts in Dominion Private Client Group's offering documents for the Janus Spectrum Group, Spectrum 100, and Prime Spectrum offerings and in Premier Spectrum Group's offering documents.

89. These entities did not use standard private placement memoranda. Instead, each offering had a short, approximately 20-page, offering document generally describing the investment opportunity.

90. Bank's entities, Dominion Private Client Group, Janus Spectrum Group, Spectrum 100, and Prime Spectrum, used offering documents explaining that Dominion Private Client Group "has partnered with Janus Spectrum and its team" to apply for FCC spectrum licenses.

91. These offering documents falsely stated that "[t]oday this targeted 800 MHz Spectrum is among the most coveted Spectrum to wireless carriers....We anticipate ownership of this valuable, lower band spectrum will provide [Janus Spectrum Group, Spectrum 100, Prime Spectrum,] with opportunities for capital appreciation—as the value of spectrum rises over time; and, attractive income opportunities through a lease or joint-venture arrangement with one or more wireless service provider."

92. The offering documents that Jones used for the Premier Spectrum Group offering made a virtually identical misrepresentation.

93. Both Bank and Jones' offering documents, however, failed to disclose that Janus Spectrum was only applying for spectrum in the 800 MHz Expansion Band and Guard Band, which could not be used by major wireless carriers for their cellular systems.

94. Bank knew, or was reckless or negligent in not knowing, that the

representations regarding the use of the 800 MHz spectrum were false and material information had been omitted, rendering the representations misleading. Bank developed suspicions and concerns about the investment based on Maerki's mismanagement of other offerings, lack of communication, and unwillingness to provide updates or answer questions. Bank had no basis upon which to represent that the 800 MHz spectrum was "coveted" by wireless carriers aside from Maerki's and Alcorn's representations. But Bank did not address his concerns and suspicions, choosing to continue marketing the spectrum licenses as profitable and to repeat misrepresentations in order to solicit investors.

95. Jones also knew, or was reckless or negligent in not knowing, that the representations regarding the use of the 800 MHz spectrum were false and material information had been omitted, rendering the representations misleading. Jones received a number of questions from potential investors' asking about FCC rules limiting the ability of major wireless carriers to use 800 MHz spectrum in the Expansion Band and Guard Band. But he never conducted any follow-up research even though he realized such restrictions would be cause for concern and would "make a difference in the applications." Instead, he chose to continue soliciting investors with promises that the 800 MHz spectrum in the Expansion Band and Guard Band would be profitable because of its value to major wireless carriers. Jones even went so far as to promise investors "double-digit returns" based on the value of the 800 MHz spectrum in the Expansion Band and Guard Band.

96. Bank's and Jones' misrepresentations and omissions were material because investors considered the representation that major wireless carriers would lease or purchase the 800 MHz licenses from Janus Spectrum important in deciding whether to invest.

97. The offering documents of Bank, Jones and their respective entities also misrepresented how investor funds would be used.

98. Bank's offering documents falsely stated that the investor funds raised

would be used for "the application and acquisition of the [FCC] applications and licenses." This representation was misleading because it failed to disclose that Bank kept a substantial portion of investor funds for his personal use. Specifically, he commingled investor funds with funds from his numerous other business ventures and used investor funds to pay himself and his salespeople undisclosed sales commissions ranging from twelve to sixteen percent.

99. Jones' offering documents falsely represented that "[e]ach membership unit includes the application, acquisition, and management of the FCC licenses," and Jones made a similar representation in his webinars. These representations were misleading because they failed to disclose that Jones used a portion of the investor funds raised to pay himself and his salesperson undisclosed commissions ranging from twelve to fourteen percent.

100. Bank and Jones knew, or were reckless or negligent in not knowing, that the representations and omissions regarding the use of investor proceeds were false and misleading because they controlled the bank accounts into which their respective investor funds were deposited and thus knew that they kept a substantial portion of investor funds for personal use.

101. Bank's and Jones' misrepresentations and omissions regarding the use of investor proceeds were material because it was important to investors, when deciding whether to enter into an investment, to know that Bank and Jones kept a portion of investor funds and used them for purposes other than FCC license applications.

102. During the relevant time period, Bank was the owner and manager of Dominion Private Client Group, Janus Spectrum Group, Spectrum Management, Spectrum 100, Spectrum 100 Management, Prime Spectrum, and Prime Spectrum Management, and Jones was the owner and manager of Premier Spectrum Group; thus, Bank's and Jones' knowledge of the falsity of their representations is imputed to their respective entities.

///

b. Use of the "Money from Thin Air" video

103. Bank, Jones, Johnson, and Chadwick all used the materially false and misleading "Money from Thin Air" video to solicit investors.

104. Bank included the "Money from Thin Air" video as part of his video presentation on YouTube.

105. Jones sent links to the "Money from Thin Air" video in solicitation emails to investors, and he played the video during a webinar he conducted.

106. Johnson and Chadwick sent the "Money from Thin Air" video to potential investors.

107. Jones, Johnson, and Chadwick each knew, or were reckless or negligent in not knowing, that the representations in the video concerning the use of the 800 MHz license by major wireless carriers were false. Each of them ignored red flags created by questions from investors and potential investors regarding the ability of major wireless carriers to use the 800 MHz spectrum.

108. Bank also knew, or was reckless or negligent in not knowing, that the representations in the video concerning the use of the 800 MHz license by major wireless carriers were false. Although Bank had developed suspicions and concerns about the investment based on Maerki's mismanagement of other offerings, lack of communication, and unwillingness to provide updates or answer questions, Bank did not address his concerns and suspicions and continued to market the spectrum licenses as profitable.

109. Bank's, Jones', Johnson's, Chadwick's and knowledge of the falsity of the representations in the video are imputed to their respective entities.

c. Solicitation emails sent by Jones, Johnson, and Chadwick

110. Jones, Johnson, and Chadwick also sent solicitation emails to investors which contained misrepresentations.

111. Jones solicited potential investors through emails that falsely claimed

"[t]his particular opportunity has [a] **double-digit** return on Membership projected monthly within the next 24 months." (emphasis in original). The representation regarding "double-digit return" was false because the 800 MHz spectrum for which Janus Spectrum was applying could not be used by major wireless carriers to operate their cellular systems.

112. Johnson and Chadwick made misrepresentations and omitted material facts in emails to investors. In a solicitation email that went to potential investors in the Innovative Group offering, Johnson and Chadwick falsely stated "[a] little more detail on the 800mhz spectrum that is being released to the public via 02-55 here....Once re-banding is complete and the public notices go out and we receive our licenses, our plan is to go back to Sprint and negotiate a lease back to them." In this email, Johnson and Chadwick failed to disclose that 800 MHz spectrum in the Expansion Band and Guard Band could not be used by major wireless carriers for their cellular systems.

113. In addition, in a recent email sent to an Innovative Group investor on November 14, 2014, Johnson and Chadwick falsely blame the lack of interest from major wireless carriers on the limited number of licenses received, stating, "[w]e are not getting interest from cell phone companies with only two markets. It is apparent that we need more licenses to get their attention. . . . Until then we have to manage and monetize them [as] best as possible as we acquire them."

114. Jones, Johnson, and Chadwick each knew, or were reckless or negligent in not knowing, that their representations and omissions were false. None of them investigated or researched the questions they received from investors and potential investors regarding the ability of major wireless carriers to use the 800 MHz spectrum. Yet, they all continued to solicit investors by claiming that the licenses would be leased or purchased by major wireless carriers.

115. Jones's, Johnson's, and Chadwick's knowledge of the falsity of their email representations are imputed to their respective entities.

C. Lack Of Securities Registration And Broker-Dealer Registration

116. During all relevant times, all of the offerings by the Fundraising Entities required the investment of money by investors who received a membership interest or membership unit upon investing.

117. Each of the Fundraising Entities then pooled investor money and investors shared ownership in an LLC or private membership association.

118. Many investors were unsophisticated and uninvolved in the FCC license application process. Janus Spectrum and the Fundraising Entities represented to investors that they would apply for the licenses and work to negotiate deals to monetize the licenses on behalf of investors. Moreover, the FCC license application process and the profitability of the licenses were dependent on the actions of the Defendants. Accordingly, investors were completely reliant on Janus Spectrum and the Fundraising Entities for the investment's overall success.

119. During all relevant times, all of the Fundraising Entities' offerings each made use of the means or instrumentalities of interstate commerce or of the mails in connection with the transactions, acts, practices and courses of business alleged in this complaint.

120. Bank and his respective Fundraising Entities solicited investors through, among other things, a radio show that was aired on public radio stations and YouTube and a video presentation that was uploaded to YouTube.

121. Jones and Premier Spectrum Group solicited investors through, among other things, the entity's website (which was not password protected), webinars, and email.

122. Johnson, Chadwick and their respective Fundraising Entities solicited investors through, among other things, emails and conference calls.

123. During all relevant times, the Fundraising Entities' securities offerings were required to be registered under the securities laws. None of the Fundraising Entities' securities offerings had a registration statement in effect or on file; thus,

these offerings were not registered.

124. All of the Fundraising Entities' securities offerings solicited investors nationwide. Many of the investors in each of the Fundraising Entities' offerings were unsophisticated and there were at least several unaccredited investors in each offering. The Bank Defendants, the Jones Defendants, and the Johnson/Chadwick Defendants took no steps to verify that investors were accredited.

125. Bank had common control over all of the issuers, Dominion Private Client Group, Janus Spectrum Group, Spectrum 100, and Prime Spectrum. Each issuer was engaged in the same type of business, offering membership interests and then using investor funds to try to obtain FCC spectrum licenses, and Bank disregarded entity form by using Dominion Private Client Group's name on each offering document. In addition, all of the offerings were a part of a single plan of financing and for the same general purpose, which was to apply for FCC spectrum licenses through Janus Spectrum, they all sold the same type of securities, membership interests; the offerings overlapped for a period of time in 2013 and 2014; and all three received cash as consideration.

126. Johnson and Chadwick controlled Innovative Group, Premier Group, and Prosperity Group; each issuer was engaged in the same type of business, offering membership interests and then using investor funds to try to obtain FCC spectrum licenses; and Johnson and Chadwick disregarded entity form by commingling investor money. In addition, all three offerings sold the same type of securities, membership interests; the offerings occurred about the same time, overlapping in 2012 and 2013; and the same consideration, cash, was received from investors.

127. Janus Spectrum, Alcorn, Maerki, Bank, Jones, Johnson, and Chadwick were not registered as broker-dealers as required by the federal securities laws.

128. Janus Spectrum, Alcorn, Maerki, Bank, Jones, Johnson, and Chadwick acted as brokers because they actively solicited investors to purchase membership interests or units through one-on-one meetings, live presentations, video

presentations, a radio show, conference calls, or email. They described the merits of investing in spectrum to potential investors or answered investor questions.

129. Alcorn, Maerki, Bank, Jones, Johnson, and Chadwick each received compensation from investor funds. Bank and Jones each personally received a percentage of assets invested; Bank received $1,339,681 or approximately sixteen percent, and Jones received $47,160 or approximately fourteen percent. Alcorn, Maerki, Johnson and Chadwick did not receive a fixed percentage of assets invested, but simply took investor funds for personal use. Each received at least the following: $514,996 - Alcorn; $867,665 - Maerki; $103,459 - Johnson; $93,024 - Chadwick. In addition, Jones received a $567,140 referral fee from Janus Spectrum that was based, at least in part, upon his referral of Bank to Janus Spectrum.

FIRST CLAIM FOR RELIEF

Violations of Sections 17(a) of the Securities Act

(Against All Defendants)

130. The SEC realleges and incorporates by reference paragraphs 1 through 129 above.

131. Defendants, by engaging in the conduct described above, in the offer or sale of securities by the use of means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) employed devices, schemes, or artifices to defraud;

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

(c) engaged in transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchaser.

132. By engaging in the conduct described above, Defendants violated, and unless restrained and enjoined will continue to violate, Sections 17(a)(1), 17(a)(2)

and 17(a)(3) of the Securities Act [15 U.S.C. § 77q(a)].

SECOND CLAIM FOR RELIEF

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

(Against All Defendants)

133. The SEC realleges and incorporates by reference paragraphs 1 through 129 above.

134. Defendants, by engaging in the conduct described above, directly or indirectly, in connection with the purchase or sale of a security, by the use of means or instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities exchange, with scienter:

(a) employed devices, schemes, or artifices to defraud;

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

(c) engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons.

135. By engaging in the conduct described above, Defendants violated, and unless restrained and enjoined will continue to violate, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Rule 10b-5(a-c) thereunder [17 C.F.R. § 240.10b-5].

THIRD CLAIM FOR RELIEF

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

(Against All Defendants)

136. The SEC realleges and incorporates by reference paragraphs 1 through 129 above.

137. Defendants, by engaging in the conduct described above, directly or indirectly, made use of means or instruments of transportation or communication in interstate commerce or of the mails, to offer to sell or to sell securities, or to carry or cause such securities to be carried through the mails or in interstate commerce for the

purpose of sale or for delivery after sale.

138. No registration statement has been filed with the SEC or has been in effect with respect to any of the offerings alleged herein.

139. By engaging in the conduct described above, Defendants violated, and unless restrained and enjoined will continue to violate, Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)].

FOURTH CLAIM FOR RELIEF

Violations of Section 15(a)(1) of the Exchange Act

(Against Janus Spectrum, Alcorn, Maerki, Bank, Jones, Johnson, and Chadwick)

140. The SEC realleges and incorporates by reference paragraphs 1 through 129 above.

141. Defendants Janus Spectrum, Alcorn, Maerki, Bank, Jones, Johnson, and Chadwick, by engaging in the conduct described above, made use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security.

142. During the relevant time period, Defendants Janus Spectrum, Alcorn, Maerki, Bank, Jones, Johnson, and Chadwick were not registered as a broker or dealer.

143. By engaging in the conduct described above, Defendants violated, and unless restrained and enjoined will continue to violate, Section 15(a)(1) of the Exchange Act [15 U.S.C. §§ 78o(a)(1)].

PRAYER FOR RELIEF

WHEREFORE, the SEC respectfully requests that the Court:

I.

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

II.

Issue judgments, in forms consistent with Rule 65(d) of the Federal Rules of

Civil Procedure, permanently enjoining Defendants, and their agents, servants, employees, and attorneys, and those persons in active concert or participation with any of them, who receive actual notice of the judgment by personal service or otherwise, and each of them, from violating Sections 5(a), 5(c), and 17(a) of the Securities Act [15 U.S.C. §§ 77e(a), 77e(c), 77q(a)], and Section 10(b) of the Exchange Act [15 U.S.C. §§ 78j(b) and 78t(a)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

III.

Issue judgments, in forms consistent with Rule 65(d) of the Federal Rules of Civil Procedure, permanently enjoining Defendants Janus Spectrum, Alcorn, Maerki, Bank, Jones, Johnson, and Chadwick, and their agents, servants, employees, and attorneys, and those persons in active concert or participation with any of them, who receive actual notice of the judgment by personal service or otherwise, and each of them, from violating Section 15(a)(1) of the Exchange Act [15 U.S.C. §§ 78o(a)(1)].

IV.

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

VI.

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

VII.

Retain jurisdiction of this action in accordance with the principles of equity and the Federal Rules of Civil Procedure in order to implement and carry out the terms of

///

///

///

///

all orders and decrees that may be entered, or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

VIII.

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

Dated this 6th day of April, 2015.

Respectfully submitted,

/s/ Sam S. Puathasnanon
Sam. S. Puathasnanon
Sana Muttalib
Attorneys for Plaintiff
Securities and Exchange Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 2:17cr126
	)	
DARYL G. BANK, (Counts 1-28)	)	18 U.S.C. § 1349 Conspiracy to Commit Mail and Wire Fraud (Count 1)
	)	
RAEANN GIBSON, (Counts 1-28)	)	18 U.S.C. §§ 1341 and 2 Mail Fraud (Counts 2-6)
and	)	
	)	18 U.S.C. §§ 1343 and 2
BILLY J. SEABOLT (Counts 1-22, 28)	)	Wire Fraud (Counts 7-12)
Defendants.	)	
	)	18 U.S.C. § 371 Conspiracy to Sell Unregistered Securities and to Commit Securities Fraud (Count 13)
	)	
	)	15 U.S.C. §§ 77e, 77x and 18 U.S.C. § 2 Sale of Unregistered Securities (Counts 14-18)
	)	
	)	15 U.S.C. §§ 77q, 77x and 18 U.S.C. § 2 Securities Fraud (Counts 19-22)
	)	
	)	18 U.S.C. § 1956(h) Conspiracy to Launder Monetary Instruments (Count 23)
	)	
	)	18 U.S.C. §§ 1957 and 2 Unlawful Monetary Transactions (Counts 24-28)
	)	
	)	18 U.S.C. §§ 981(a)(1)(C) and 982(a)(1) 28 U.S.C. § 2461 Criminal Forfeiture

SECOND SUPERSEDING INDICTMENT

May 2018 Term – at Norfolk, Virginia

THE GRAND JURY CHARGES THAT:

At all times relevant to this Second Superseding Indictment, unless otherwise stated:

GENERAL ALLEGATIONS

1. DARYL G. BANK ("BANK") created, owned, and operated Dominion Investment Group, LLC ("DIG"). DIG was a Virginia limited liability company with offices operating from 4301 Commuter Drive, Virginia Beach, Virginia, 1391 NW St. Lucie West Boulevard, Port St. Lucie, Florida, and 1100 SW St. Lucie West Boulevard, Port St. Lucie, Florida. BANK was the managing member of DIG with approximately an 85% ownership interest in the company.

2. RAEANN GIBSON ("GIBSON") was the Director of Operations of DIG. GIBSON ran the day-to-day operations of DIG. GIBSON owned an estimated 10% interest in DIG.

3. BILLY J. SEABOLT ("SEABOLT") was an attorney licensed in the Commonwealth of Virginia. SEABOLT owned and operated his own law firm called the Family Wealth Law Group, P.C. SEABOLT's offices were located in Williamsburg and Lynchburg, Virginia. SEABOLT specialized in wills, estates, trusts and elder law. However, with regard to DIG and affiliated offerings, SEABOLT reviewed investment offerings, negotiated funding agreements, served as the registered agent for limited liability companies, provided estate

services for BANK's clients, and assisted in concealing the failure of investment offerings and lulling victims.

4. BayPort Credit Union was a federally-insured credit union that operated in the Eastern District of Virginia.

5. Oculina Bank was a federally-insured bank that operated in Florida.

6. BANK created, owned, and operated Dominion Private Client Group, LLC ("DPCG"). DPCG was a Virginia limited liability company with its principal place of business initially in Virginia Beach, Virginia. BANK was the managing member of DPCG. BANK, GIBSON, SEABOLT, and others used DPCG to offer various Investment Offerings to potential investors. Many of the investors were retirees with limited assets.

7. The Financial Industry Regulatory Authority, Inc. ("FINRA") is a private organization authorized by Congress to protect investors by making sure the broker-dealer industry operates in a fair and honest manner. On February 5, 2010, after an investigation, FINRA issued a final order concluding that BANK had, among other things, misappropriated funds, provided false information during FINRA interviews, and created inaccurate books and records. As a result, FINRA issued an order permanently barring BANK from professionally associating with any FINRA member in any capacity. For all practical purposes, the FINRA ban prevented BANK from associating with any FINRA-licensed broker/dealer authorized to sell securities.

8. Despite the FINRA ban, BANK, GIBSON, SEABOLT, and others created, promoted, and sold fraudulent "private equity" investment opportunities. These investment opportunities were unregistered, securities. BANK, GIBSON, SEABOLT, and others made

material misrepresentations and omissions to sell the illiquid, high risk securities to investors in the Eastern District of Virginia and across the country. BANK, GIBSON, SEABOLT, and others failed to disclose that FINRA had banned BANK for fraudulent activities, that BANK and GIBSON funneled investment funds through entities that BANK controlled, and that BANK and GIBSON almost immediately misappropriated substantial portions of investment funds for undisclosed personal and business purposes.

DENTAL SUPPORT PLUS "FRANCHISES" AND DSPF GROUP

9. Starting in or about December 2011, BANK and others pitched an investment offering from DIG and Dominion Franchise, LLC to his clients and sales force. The advertisement offered an "absentee-owned fully-managed dental support franchise with a 5-year track record producing annual profits up to 40% or more." The investors would "own" a Dental Support Plus "franchise" that they would not have to manage. The franchise would refer patients to dentists and, in turn, investors would receive 16.5% of patient collections with "profits taken BEFORE expenses, not AFTER expenses." The advertisement stated that a franchise unit cost $25,000 and that the franchise would be "fully operational" within 180 days. Conspirator #1 was the founder and President of Dental Support Plus. In truth and in fact, these "franchises" were unregistered securities.

10. BANK represented, and caused to be represented, to investors that the Dental Support Plus "franchises" would provide regular income – at least $200 a month – per "franchise unit." BANK falsely represented to his client, TW, that if the franchise did not produce revenue within six months, then TW would be paid $200 per month per franchise from Dental Support. Relying on these and other material misrepresentations and omissions, investors purchased

"franchise units." In some instances, clients at and near retirement age with no background in dentistry and no ability to run a franchise purchased multiple "franchise units" each costing $25,000.

11. According to the Franchise Disclosure Document, the Virginia State Corporation Commission's Division of Securities and Retail Franchising required Dominion Franchise to defer payments of the initial franchise fee owed by franchisees until the franchisor had completed its pre-opening obligations. Despite this limitation, BANK, GIBSON, and others, took investors' funds prior to Dental Support Plus engaging in required actions.

12. At BANK's and GIBSON's suggestion, many investors held the investment in newly created limited liability companies that BANK and GIBSON controlled. At investor expense, BANK and GIBSON created over 40 limited liability companies in investors' names in Virginia all with the principal place of business at 4301 Commuter Drive, Virginia Beach, Virginia.

13. From in or about April 2012 through April 2013, BANK and GIBSON opened over 30 bank accounts at BayPort Credit Union on behalf of the investors' limited liability companies. The investors were not signatories on these bank accounts; instead, BANK and GIBSON held signatory authority on investor accounts.

14. Despite representations that the "franchise units" would earn at least $200 a month starting within 180 days of investment, Dental Support Plus deposited little, if any, funds into investors' bank accounts at BayPort Credit Union. Despite knowing that Dental Support Plus was not fulfilling the promised returns and that the alleged "franchises" were not actually operating, BANK and GIBSON continued to sell the "franchise units" to investors.

15. In or about April 2013, a representative from BayPort Credit Union contacted GIBSON to inquire about the lack of funds in the investor bank accounts. The representative told GIBSON that bank accounts go dormant after one year with no activity and inquired as to why the investors were not receiving the "minimum" guarantee. GIBSON ignored the question about the "minimum guarantee" and justified the lack of funds by stating that there was a problem with a "vendor." Despite knowing that this was a failed investment, BANK and GIBSON continued to sell the "franchise units."

16. In addition, BANK and GIBSON created a new method for investors to fund "franchises." In late 2012, BANK and GIBSON created, managed, and controlled DSPF Group LLC ("DSPF Group") – an entity aimed at "pooling" investor funds to purchase Dental Support Plus "franchise units." In reality, BANK and GIBSON used DSPF Group to defraud new investors to pay off previous investors in the failed "franchises." BANK and GIBSON also controlled DSPF Management, LLC – an entity purportedly organized to "manage" the investors' funds.

17. In late 2012, BANK, Conspirator #2 and others prepared an Investment Offering for DSPF Group. Conspirator #2 was the Chief Investment Officer at DPCG. Despite knowing that Dental Support Plus "franchises" were failing, the Investment Offering for DSPF Group claimed that "[f]or some time Dental Support Plus has been offering franchise opportunities to investors in its proven strategy," that "Dental Support Plus Franchise owners … receive 9.97% of all new patient revenue produced from every patient provided by the Dental Support Plus Franchise," and "[t]he Dental Support Plus Franchise model is designed to achieve annual profits up to 30% or more after one or two years in operation." The Investment Offering also falsely

represented that "Dental Support Plus offers dentists a turnkey patient delivery system using a proprietary 'direct to consumer' approach within the dentists' communities." The Investment Offering further claimed that "[a]n investment into the Investment Group incurs no fees to the investor. 100% of the investment participates directly in 100% of the pool of franchisees in the Group." This was false as BANK and GIBSON consistently stole approximately 31% of investor funds by transferring investor funds immediately to BANK's companies. Finally, the Investment Offering did not disclose BANK's role in the investment or his FINRA ban. In truth and in fact, this offering was for unregistered securities.

18. Starting in or about January 2013, BANK pitched DSPF Group to his clients and encouraged his sales representatives across the country to pitch it to their clients. In or about January 2013, knowing that the Dental Support Plus "franchise units" were failing, BANK pitched DSPF Group to DB, a woman from Chesapeake, Virginia. BANK advised DB to invest in DSPF Group claiming that it was a good investment and that the money would be pooled with others to invest in franchises. BANK did not tell DB that the investment was failing or that her funds would be used to pay off previous investors.

19. On or about January 25, 2013, based on material misrepresentations and omissions and at BANK's direction, DB invested $40,500 (approximately 50% of DB's 401k savings) into DSPF Group.

20. On or about January 29, 2013, approximately four days after DB's investment, GIBSON siphoned approximately $12,000 (approximately 31%) of DB's investment by transferring the funds to limited liability companies controlled by BANK for his use.

21. Two months later, GIBSON misappropriated the remainder of DB's money – approximately $35,000 – to pay off a previous investor in the failed franchise units.

22. In March 2013, BANK and GIBSON learned that the Idaho Department of Finance was contacting investors in Dental Support Plus "franchises" to investigate potential security violations. Conspirator #3 – who worked for DIG – told BANK that she would contact investors, tell them that it was "just a routine letter," and that, if the investors elected to respond, "all they should say is that DSP is a franchise, not an investment."

23. On or about May 13, 2013, a potential salesman notified a DIG representative about various misrepresentations in the investment offering materials. He also complained that Conspirator #1 had previously declared bankruptcy and had regulatory problems in the past. The DIG representative notified BANK about these issues. BANK and GIBSON did not disassociate from Conspirator #1 and continued to sell the fraudulent "franchises" as well as other investments related to Conspirator #1.

24. In early 2013, GIBSON and BANK continued to sell and process DSPF Group investments to repay certain previous investors – a group that included GIBSON's family member – for their failed investments in Dental Support Plus "franchises."

25. On or about May 17, 2013, RK invested $150,000 into DSPF Group. BANK caused material misstatements and omissions to be made to the investor. RK was told that the "franchises" were successful and was not told that his funds would be used to pay off previous, disgruntled investors. Upon receipt of RK's investment funds, GIBSON immediately siphoned approximately $47,499 (31% of his investment) by transferring RK's funds to limited liability

companies controlled by BANK for his use. GIBSON also misappropriated a portion of RK's funds to repay disgruntled, previous investors – including her family member.

26. On or about June 3, 2013, GIBSON prepared and signed a $25,000 check from the DSPF Group bank account – an account funded entirely with investor funds – to IRA Services for the benefit of her family member. This family member previously had invested $40,000 to purchase two "franchise units" and had not received the promised return on investment. GIBSON's family member was one of very few investors to receive a full refund (plus an alleged $5,000 "increase" in value) for an alleged "franchise unit." GIBSON's family member withdrew the $25,000 repayment in two installments on June 14, 2013, and July 17, 2013 from the IRA Services account.

27. From in or about January 2013 through January 2014, BANK, GIBSON, and others represented, and caused to be represented, numerous material misrepresentations and omissions to induce clients to invest in DSPF Group. Based on these material misrepresentations and omissions, over 20 investors invested approximately $892,500 into DSPF Group. Despite telling investors that an investment would incur "no fees to the investor," BANK and GIBSON siphoned approximately $310,000 to limited liability companies controlled by BANK. BANK used these monies for his own purposes.

28. BANK and GIBSON also used approximately $315,000 of new DSPF Group investor funds to repay previous investors without disclosing this purpose to the new investors.

29. On or about August 8, 2014, Conspirator #1 informed all "franchise" owners that Dental Support Plus had "run out of money and funding." Therefore, Conspirator #1 "had no choice but to 'shelve' DSPF." All investors – in Virginia and elsewhere – who had invested in

Dental Support "franchises" and DSPF Group lost the entirety of their invested funds. BANK's and GIBSON's investors lost over $3,000,000 in this investment.

30. Despite this massive failure, BANK and GIBSON continued to associate and promote investments with Conspirator #1.

THE SPECTRUM INVESTMENTS

31. From in or about August 2012 through in or about August 2015, BANK and GIBSON pitched three investment opportunities involving 800MHz Spectrum: Janus Spectrum, Spectrum 100, and Prime Spectrum. In truth and in fact, these offerings were for unregistered securities. BANK learned about this investment from Conspirator #1.

32. BANK, Conspirator #2, and others prepared the offering documents for these three investment opportunities. The Investment Offerings falsely represented that only "Summit Trust will receive an asset management fee of two percent (2%) of the gross assets for managing and custodian [sic] of the separately managed account." In fact, BANK and GIBSON misappropriated approximately 47%-70% from each investor's funds. Finally, the Investment Offering did not disclose BANK's role in the investment and his FINRA ban.

33. In early 2013, through material misrepresentations and omissions, BANK convinced WB to invest in Janus Spectrum Group LLC ("Janus Spectrum") and Spectrum 100 LLC ("Spectrum 100"). BANK concealed that he was raising funds for companies that he controlled and that he intended to misappropriate approximately half of WB's retirement funds immediately upon receipt.

34. On or about March 29, 2013, WB invested $39,500 in Janus Spectrum – a company controlled by BANK. That same day, GIBSON siphoned approximately $18,762.50

(47.5%) of the investment by transferring the money to two companies that BANK owned and controlled. To conceal that they had misappropriated approximately 47.5% of WB's funds, BANK and GIBSON knowingly and intentionally caused WB to receive Summit Trust statements via the mail reflecting that WB's funds were whole and had retained full market value.

35. On or about April 10, 2013, based on BANK's material misrepresentations and omissions, WB invested $110,000 in Spectrum 100 – another company controlled by BANK. At the time of WB's investment, Spectrum 100's bank account balance was $5.00. Five days after receiving WB's funds, GIBSON siphoned approximately $59,180 (53.8%) of the investment by transferring the funds to three companies that BANK owned and controlled. To conceal that they had misappropriated approximately 53.8% of the investment funds, BANK and GIBSON caused WB to receive Summit Trust statements via the mail reflecting that WB's invested funds were whole and had retained full market value.

36. In addition to selling directly to clients, BANK and GIBSON caused sales representatives across the country to sell these investments to their clients. BANK developed a nationwide network of sales representatives with the help of Conspirator #1. BANK also located sales representatives by putting online ads on Craigslist.

37. In March 2014, BANK caused numerous material misrepresentations and omissions to be made to RC and BC as well as MB and BB in connection with an investment into Prime Spectrum LLC ("Prime Spectrum"). BC was blind and was in his late 70s at the time he invested $20,000 of his retirement funds in Prime Spectrum. MB and BB were in their late 60s when they invested $25,000 in Prime Spectrum. Upon receipt, BANK and GIBSON

siphoned approximately 70% of the invested funds by transferring the funds to two companies that BANK controlled and to the salesman. No one ever disclosed to RC, BC, MB or BB that BANK and GIBSON would siphon 70% of their investment funds within weeks of receipt for purposes other than the stated investment.

38. In or about late April 2014, the Securities and Exchange Commission ("SEC") subpoenaed BANK to appear for a deposition in connection with a federal securities investigation into Janus Spectrum. Despite knowledge of the ongoing SEC investigation, BANK, GIBSON, and others continued to sell the spectrum investments and did not disclose the existence of the investigation to current and potential investors.

39. On or about April 6, 2015, the SEC filed a civil complaint against, among others, BANK, Janus Spectrum Group, Spectrum 100 and Prime Spectrum accusing the parties of running a multi-million dollar scheme to defraud investors arising from the sale of unregistered securities. The complaint outlined the misrepresentations contained in, among others, the offering documents related to the spectrum investments.

40. In or about April 2015, JL met with BANK by video conference call. At that time, BANK falsely represented that the Spectrum 100 investment was doing well and that investors were earning 12% interest. BANK falsely represented to JL that DIG had vetted the investment and that it was secure. BANK did not inform JL about the SEC's investigation and lawsuit in connection with this investment.

41. In or about July 2015, based on material misrepresentations and omissions and without knowledge of the SEC lawsuit, JL invested $50,000 into Spectrum 100. Almost immediately, GIBSON siphoned approximately $29,400 (58.8%) of the investment by

transferring the funds to three companies that BANK owned and controlled. To conceal that they had misappropriated approximately 58.8% of JL's funds, BANK and GIBSON caused Summit Trust to send quarterly statements to JL via the United States mail that falsely represented that JL's investment into Spectrum 100 was whole and had retained full market value.

42. After the SEC filed its civil complaint alleging fraudulent sale of unregistered securities, BANK, GIBSON, and others continued to sell the Spectrum investments through three separate investment vehicles that they created: (1) Spectrum 100; (2) Venture Capital; and (3) Xcel Bandwith. At no time did BANK, GIBSON, and others disclose to prospective investors the existence of the SEC's fraud lawsuit nor that they intended to use a portion of their Spectrum-invested funds to pay attorneys to defend them against that lawsuit.

43. From in or about September 2012 through in or about July 2014, BANK, GIBSON, and others represented, and caused to be represented, numerous material misrepresentations and omissions to investors to obtain investments into Janus Spectrum Group. Based on these material misrepresentations and omissions, over 25 investors invested approximately $2,515,000 into Janus Spectrum Group. BANK and GIBSON almost immediately misappropriated approximately $1,199,095 of the investment funds.

44. From in or about April 2013 through July 2017, BANK, GIBSON, and others represented, and caused to be represented, numerous material misrepresentations and omissions to investors to obtain investments into Spectrum 100. Based on these material misrepresentations and omissions, over 100 investors invested approximately $7,500,000 into

Spectrum 100. BANK and GIBSON misappropriated approximately $4,300,000 of the investment funds.

45. From in or about December 9, 2013 through March 2014, BANK, GIBSON, and others represented, and caused to be represented, numerous material misrepresentations and omissions to investors to obtain investments into Prime Spectrum. Based on these material misrepresentations and omissions, approximately five (5) investors invested $130,000 into Prime Spectrum. BANK and GIBSON almost immediately misappropriated $74,000, including payments to DPCG, Spectrum Management LLC, Prime Spectrum Management LLC, and MR Diamonds Group c/o Wonder Jewelry.

46. From in or about August 2015 through in or about July 2017, BANK, GIBSON, and others represented, and caused to be represented, numerous material misrepresentations and omissions to investors to obtain investments into Xcel Bandwidth investments. Based on these material misrepresentations and omissions, over 70 investors invested approximately $5,191,856.82 into Xcel Bandwidth. BANK and GIBSON misappropriated approximately $2,876,495.93.

47. In or about July 2017, BANK, and others at his direction, held conference calls with investors aimed at concealing the misappropriation of funds and attempting to lull investors into believing that their Spectrum investments continued to have value.

VENTURE CAPITAL I

48. Starting in or about December 2014 through in or about November 2015, BANK, GIBSON, and others represented, and caused to be represented, numerous material representations and omissions to investors to obtain investments into Venture Capital I. In truth

and in fact, this offering was for unregistered securities. BANK and GIBSON created, managed and controlled this investment through which, yet again, the conspirators misappropriated substantial portions of investor funds.

49. In or about November 2015, BANK and GIBSON caused fraudulent misrepresentations to be made to BS to invest in this alleged diversified mutual-fund type investment.

50. On or about November 13, 2015, based on material misrepresentations and omissions, BS invested $300,000 of his retirement funds into Venture Capital I. Approximately one month after receiving BS's funds, BANK and GIBSON transferred $150,000 of his retirement funds to pay for expenses related to the operation of McPherson Trailer Park in North Carolina. At no time did BANK, GIBSON, and any other individual disclose to BS that his funds would be used and were in fact used to support a trailer park. In truth and in fact, BS specifically had rejected the opportunity to invest in the McPherson Trailer park.

WEMONITOR GROUP

51. In late 2012, BANK and GIBSON organized, created and controlled weMonitor Group LLC ("weMonitor Group") and weMonitor Management LLC ("weMonitor Management"). weMonitor, Inc. is a company located in California that BANK did not control.

52. Starting in or about December 2012, BANK, GIBSON, and others worked on an investment offering related weMonitor Group, Inc. weMonitor Group, Inc. was a company that was in the process of developing a home monitoring system that claimed to be able to reduce utility bills by $150 a month. Through DPCG, BANK endeavored to raise funds for weMonitor

Group, Inc. SEABOLT was involved in drafting a "funding agreement" with weMonitor Group, Inc. In truth and in fact, this offering was for unregistered securities.

53. On or about February 6, 2013, SEABOLT and BANK received an email regarding the weMonitor Group investment noting that the monitoring device was not yet developed and that there "isn't even an Alpha model, yet a Beta or First customer model."

54. On or about February 19, 2013, BANK sent SEABOLT the Investment Offering document that he drafted to mislead investors to believe that weMonitor had a fully functioning device, and concealed the fact that BANK controlled all of the relevant investment entities. The Investment Offering also falsely represented that "Summit Trust will receive an asset management fee of two percent (2%) of the gross assets for managing and custodian [sic] the separately managed account." In fact, BANK and GIBSON misappropriated at least 26% from each investor's funds. Finally, the Investment Offering did not disclose BANK's FINRA ban.

55. On or about February 22, 2013, SEABOLT sent an email to BANK and others defending his version of the "funding agreement" as appropriate because weMonitor, Inc. would get "close to $4 million net without personal guarantees, with little collateral, an incomplete monitoring device, no working business model, no working franchise model, decent salaries and benefits and the possibility of becoming millionaires all the while keeping control of the company and the other side hopes and prays they can do it." SEABOLT was well aware that such pertinent, material information was not contained in DPCG's Investment Offering.

56. On or about February 27, 2013, BANK sent an e-mail to SEABOLT and another individual instructing him to get the funding agreement signed because: "1-we are getting paid

handsomely 2-the firm picks up 4% plus 3-Billy captured extra territory 4-The commission is strong."

57. On or about March 5, 2013, the parties executed the funding agreement.

58. From in or about February 2013 through in or about August 2015, BANK, GIBSON, SEABOLT, and others represented, and caused to be represented, numerous material misrepresentations and omissions to investors to obtain investments into weMonitor Group. Based on these material misrepresentations and omissions, over 60 investors invested approximately $4,100,000 into weMonitor Group. Upon receipt of the funds, BANK and GIBSON immediately siphoned over $1,000,000 (26%) of the investment by transferring the funds to companies under BANK's control.

59. On or about March 24, 2013, SEABOLT sent BANK an email requesting a written agreement regarding his payouts stating that he did not spend that much "time and effort (and future time and effort) to get 'a little piece.'" GIBSON and BANK paid SEABOLT 1% of all investor funds raised for weMonitor.

60. This investment required weMonitor, Inc. to make quarterly interest payments to investors. Instead of seeking payment from weMonitor, Inc., BANK and GIBSON intermingled funds from other investments to make quarterly interest payments to weMonitor Group investors.

61. GIBSON used weMonitor Group investor funds to repay her family member who invested in two failed Dental Support Plus "franchises." On or about April 16, 2014, GIBSON cut a $17,500 check from weMonitor Group's bank account to IRA Services for the benefit of her family member. GIBSON's family member had never invested in weMonitor Group.

62. GIBSON's family member retained the funds in the IRA Services account for approximately one month. On or about May 30, 2014, GIBSON directed that all the funds in the IRA Services account, including the proceeds of the weMonitor Group check, be wired to Summit Trust. Four days later, on or about June 3, 2014, GIBSON caused the $17,500 in funds to be wired back to weMonitor Group so that her family member would be considered an investor in weMonitor Group.

63. In or about April 2015, weMonitor, Inc. did not have the financial means through which to make its scheduled investor interest payments. To conceal the failing health of weMonitor, Inc., BANK and GIBSON used new investor funds to make interest payments to previous investors.

64. On or about July 10, 2015, weMonitor Management sent a letter via the United States mail to all weMonitor Group investors falsely stating that "[d]ue to taxes, efficiency, and the desire to keep costs down, we have decided to move the location of weMonitor Group LLC from Virginia to Florida." The letter failed to disclose that, in truth and fact, as all conspirators were aware almost two weeks earlier, the Virginia State Corporation Commission ("SCC") had filed a motion for a temporary injunction against BANK, GIBSON, and all of BANK's affiliated companies to enjoin them from the fraudulent sale of unregistered securities.

65. More than a year later, in July 2016, BANK, GIBSON, and others finally disclosed to investors that weMonitor, Inc. had failed. On July 25, 2016, Conspirator #2 sent a letter via interstate mail to weMonitor investors stating that he was "a partner at FAS Partners, LLC in Florida" and "an officer of BlueDot Corporation, a newly created entity that was

incorporated to hold the assets of weMonitor, Inc." Conspirator #2 did not disclose his past affiliation with BANK and that he was one of the architects of the Investment Offering.

66. In this letter, Conspirator #2 falsely represented that "a gross total of $4,551,050 was funded to weMonitor, Inc." In reality, BANK and GIBSON had siphoned over $1,000,000 of those investor funds for other purposes. Conspirator #2 further claimed that "weMonitor made interest payments on the promissory notes as required up to the first quarter of 2016," but concealed that BANK and GIBSON had been using new investor funds to make interest payments to previous investors since the inception of the investment.

67. On or about May 5, 2017, Conspirator #2 sent another letter to weMonitor investors informing them he was resigning as an officer of BlueDot Corporation, effective July 10, 2017, and placing the burden on the investors to nominate suitable candidates to act as officers of the corporation.

PLI GROUP LLC

68. Starting in or about October 2012, BANK, Conspirator #2 and others prepared the offering document for Project Lifesaver ("PLI Group investment"). According to the Investment Offering, "PLI Group is a LLC formed to license, market, retail and distribute the new SARTrack bracelets and associated technologies and provide related product training, certification, and support to law enforcement and other public safety organizations and community groups." In truth and in fact, this offering was for unregistered securities. The Investment Offering sought a $500,000 capital raise from investors. BANK, Conspirator #2, and others created the Investment Offering to conceal the multiple roles BANK played in this investment offering:

- BANK controlled DPCG – the company presenting the Investment Offering and soliciting the investment funds;
- BANK created and controlled PLI Group LLC ("PLI Group") – the company that received all investment funds;
- BANK created and controlled PLI Management LLC – the company formed to manage and guarantee the investor funds; and
- BANK created and controlled SARTrack Group LLC ("SARTrack Group") – the company formed to acquire the licensing agreement for the SARTrack bracelet and that also guaranteed the investor funds.

69. To address fees, the offering only represented that "Summit Trust will receive an asset management fee of two percent (2%) of the gross assets for managing and custodian [sic] of the separately managed account." In fact, BANK and GIBSON ultimately misappropriated a substantial portion of all investor funds. Finally, the Investment Offering did not disclose BANK's role in the investment and his FINRA ban.

70. On or about May 28, 2013, the PLI Group investment was fully funded with $500,000 from at least 18 investors investing various amounts.

71. By late 2013, the company developing the SARtrack bracelet had encountered substantial problems during the development phase and had reported those problems to BANK. By that point, BANK only had provided $100,000 of investor funds to the company to develop the bracelet. On or about November 1, 2013, BANK sent an email copying SEABOLT demanding that the company return the $100,000 noting that: "There is not a device. Reasonably there will NOT be a device, that you committed to, ever delivered." The company did not return the funds, and BANK severed the relationship with the company.

72. Instead of disclosing the failure of the investment and transferring any remaining funds back to investors, on or about November 26, 2013 and December 5, 2013, BANK,

GIBSON, and SEABOLT caused the remaining PLI Group investor funds to be transferred into the weMonitor Group account.

73. On or about December 16, 2013, to conceal that they had transferred the investment funds from PLI Group investment, BANK and GIBSON transferred $4,166.69 from the weMonitor Group account back into the PLI Group account to cut checks for the December PLI Group interest payments. As a result, PLI Group investors continued to believe that their funds were fully invested in a successful business venture.

74. SEABOLT did not prepare any documents regarding the transfer of funds at the time. BANK did not notify the PLI Group investors that he had transferred their monies into an entirely different investment. Indeed, BANK and GIBSON caused Summit Trust to send statements to these investors that falsely represented that the value of their original investments were intact and remained fully vested in PLI Group.

75. On or about January 1, 2014, the PLI Group bank account balance was $3,657.50. Despite the fact that: (1) the PLI Group investment had been fully funded since May 2013; (2) in November 2013, the conspirators recognized that the investment was a failure; and (3) all remaining investor funds had been transferred to weMonitor Group, BANK caused yet another investor, MG, to invest $25,000 into the PLI Group investment.

76. On or about January 10, 2014, based on numerous material misrepresentations and omissions, MG invested in PLI Group. BANK and GIBSON used MG's $25,000 to repay a previous investor in PLI Group. MG was never told that the investment had failed and that her money would be used to repay an earlier investor.

77. Despite the fact that the PLI Group investment had failed (and all remaining monies moved out of the investment) prior to MG's investment, BANK and GIBSON caused Summit Trust to send statements to MG via the mail that reflected that her $25,000 investment was whole and fully vested in PLI Group.

78. To conceal that the investment had failed, BANK and GIBSON laundered funds from other investments into the PLI Group account to make quarterly interest payments.

79. In or about June 2014, BANK again contacted SEABOLT about the PLI Group investment and the transfer of PLI Group funds. At this time, SEABOLT became aware that BANK still had not disclosed to the PLI Group investors that the project had failed nor that he had transferred their monies to another investment.

80. In or about July 2014, SEABOLT created documents in an attempt to fix the "screwy deal" and sent them to BANK and GIBSON. SEABOLT continued to assist BANK and GIBSON cover-up the transaction despite his knowledge that the investors falsely believed that their funds continued to be fully vested in PLI Group.

81. In or about January 2015, SEABOLT again assisted BANK in developing documents to justify the transfer of PLI Group investor funds following the execution of a federal search warrant at DIG.

82. On or about February 11, 2015, SEABOLT lashed out at BANK and another employee about participating in a cover-up of the fraudulent transfer of funds (which investors still did not know about). SEABOLT stated, among other things:

> 3) Despite what you may believe or other people may say, these are not simple agreements that we can just throw together and get back to the other side and wrap it up. These agreements concern people's money. These agreements are

being looked at by the FBI, the SCC, two or three state Attorney Generals, possibly the FCC, the Post Office (due to solicitation by mail), and others. These things that you guys sign might involve years in jail and hundreds of thousands of dollars in fines for you guys if perceived to be fraudulent. They need to be well thought through and done right.

4) All the funding agreements are out of the usual and the original PLI Group agreement was just weird to begin with ($500,000 raised, $400,000 that Sartrack is Responsible for, $100,000 that PLI is responsible for, Fees from licenses but never a stock exchange for PLI a non-profit and the whole thing was a bet on unprovable technology) and now complicated because some of the money is gone with no real value to account for it and a Canadian Company that may have ripped PLI off. The PLI Group money was given to weMonitor (a for profit company for another adventure unrelated to the first) with no agreement in place (which can be perceived as playing around with client money by the various States and the Feds). Now we have to hammer some kind of agreement that will make sense for: 1) PLI, 2) PLI Group investors, weMonitor, weMonitor Group investors, SarTrack, etc.

5) After a couple of requests, I still do not have an accurate account of where $500,000 went that was raised for PLI Group.

Despite the reservations outlined in this email, SEABOLT prepared the requested documents. Moreover, throughout this entire series of events, SEABOLT, GIBSON, and BANK were well aware that PLI Group investors falsely believed that their funds remained fully vested (and had retained their full value) in PLI Group.

83. On or about July 10, 2015, almost two years after BANK had transferred all remaining funds to a different investment, PLI Management sent a letter via the United States mail to all PLI Group investments, including those located in the Eastern District of Virginia, announcing that "[d]ue to taxes, efficiency, and the desire to keep costs down, we have decided to move the location of PLI Group, LLC from Virginia to Florida." The letter neglected to mention that the investment had already failed, that BANK and GIBSON had transferred all

funds to a separate investment, and that the SCC had filed for a temporary restraining order against BANK and GIBSON.

84. In or about July 2016, GIBSON and Conspirator #2 contacted the PLI Group investors and stated that they now had an interest in BlueDot Corporation (the entity purportedly organized to sell the "assets" of weMonitor, Inc.).

85. On May 5, 2017, Conspirator #2 sent another letter to PLI Group investors informing them he was resigning as an officer of BlueDot Corporation, effective July 10, 2017, and placing the burden on the investors to nominate suitable candidates to act as officers of BlueDot.

86. BANK, GIBSON, and SEABOLT created and sold numerous other purported "private equity" investments using the same and similar fraudulent methods.

87. BANK and GIBSON regularly caused interstate wirings of investor funds to BANK and others for their personal use. For example, in 2014, GIBSON transferred via interstate wires over $1,000,000 in siphoned investor funds to BANK's personal bank account.

88. Throughout this time, GIBSON also transferred investor funds from bank accounts associated with the various companies that BANK controlled to BANK's personal bank account for his use.

89. GIBSON also used investor funds to pay herself from bank accounts associated with Spectrum Management, Spectrum 100 Management, DIG, DPCG, and Dominion Franchise Group.

90. GIBSON also used investor funds to pay SEABOLT and SEABOLT knowingly received a percentage of investor funds as payment for his contributions to this conspiracy.

91. In or about July 2017, Oculina Bank served notice on BANK and GIBSON that they needed to close all Oculina bank accounts within two weeks. On or about July 14, 2017, BANK and GIBSON moved all accounts to MidFlorida Credit Union. Approximately three weeks later, on or about August 8, 2017, BANK and GIBSON closed these accounts and moved funds to Centerstate Bank of Florida and Generations Federal Credit Union in San Antonio, Texas.

COUNT ONE
(Conspiracy to Commit Mail and Wire Fraud)

1. The allegations contained in paragraphs 1 through 91 of the General Allegations section of the Second Superseding Indictment are realleged and incorporated as if set forth fully herein.

2. From in or about January 2012 through in or about July 2017, in the Eastern District of Virginia and elsewhere, defendants DARYL G. BANK, RAEANN GIBSON, BILLY J. SEABOLT, and others known and unknown, knowingly and intentionally combined, conspired, confederated and agreed to commit the following offenses against the United States:

(a) Mail Fraud: defendants, and others known and unknown, having devised a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, did knowingly place and caused to be placed in any post office and authorized depository for mail, any matter and thing whatever to be sent and delivered by the Postal Service; did deposit and caused to be deposited any matter and thing whatever to be sent and delivered by any private and commercial interstate carrier; and caused to be delivered by mail and such carrier any matter and thing whatever according to the direction thereon, in violation of Title 18, United States Code, Section 1341; and

(b) Wire Fraud: defendants, and others known and unknown, having devised a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, did transmit and cause to be transmitted by means of wire communication in interstate commerce writings, signs, signals, pictures, and

sounds for the purpose of execution of such scheme and artifice, in violation of Title 18, United States Code, Section 1343.

THE PURPOSE OF THE CONSPIRACY

3. The purpose of the conspiracy was for DARYL G. BANK, RAEANN GIBSON, BILLY J. SEABOLT, and others to profit personally by misleading investors in material ways about the use of investment funds, who controlled the investment funds, the nature of the investment, and the status of invested funds.

THE WAYS, MANNER, AND MEANS OF CONSPIRACY

The ways, manner and means by which BANK, GIBSON, SEABOLT, and others sought to accomplish this conspiracy included, but were not limited to, the following:

4. BANK and GIBSON, operating through DIG, DPCG and related entities Dominion Franchise Group LLC and Dominion Diversified Strategies LLC, offered various investment opportunities to potential investors.

5. BANK, SEABOLT, Conspirator #2, and others prepared materially false and misleading investment offering documents that intentionally misled investors about the use of their investment funds, who controlled the investment funds, and the nature of the investment.

6. BANK, GIBSON, SEABOLT, and others, made and caused to be made, material misrepresentations, deceitful statements and omissions to potential investors about these investments during sales pitches, live presentations, radio shows, social security maximization seminars, and other communications. The purpose of these fraudulent actions was to create a false impression, mislead and to otherwise deceive investors about the use of the investment funds, the identity of who controlled the investment funds, and the nature of the investment.

7. BANK, GIBSON, and others, recruited sales agents across the country (principally insurance sales agents unregistered to sell securities) to sell DIG's and DPCG's false, misleading, and deceptive investment offerings to unsuspecting and unsophisticated investors. BANK and other conspirators regularly participated in weekly sales calls to encourage the sales agents to sell the fraudulent investment offerings.

8. BANK, GIBSON, SEABOLT, and others principally targeted investors at and near retirement age from across the country to invest in fraudulent investment offerings.

9. BANK, GIBSON, SEABOLT, and others created and utilized a complex web of limited liability companies to conceal the misappropriation of investor funds. The conspirators did not invest any personal capital into these companies; instead, the companies functioned solely on investor funds. BANK, GIBSON, SEABOLT, and others concealed from investors that BANK wholly controlled the companies sponsoring the private equity offering, the companies controlling the investment funds, and the companies purportedly "managing" the investment funds.

10. BANK, GIBSON, and others directed investors to withdraw funds from various sources – including legitimate 401(k) and other retirement accounts – and transfer the funds to self-directed Individual Retirement Accounts at trust companies. Thereafter, GIBSON and others completed paperwork directing the trust companies to wire funds to accounts that she and BANK controlled. Often times, GIBSON only provided the signature pages to investors instructing them to authorize the transfer of funds to accounts that she and BANK controlled. The victims had no knowledge that they were authorizing the trust company to send retirement funds to accounts controlled solely by BANK and GIBSON.

11. BANK, GIBSON, and others concealed that, upon immediate receipt of investment funds, the conspirators directly siphoned substantial portions of the investment funds by transferring the funds to separate bank accounts under their control.

12. BANK, GIBSON, and others used investments from new investors to make payments to previous investors – including one of GIBSON's family members – without first disclosing such a purpose to the new investors.

13. BANK and GIBSON intermingled funds between investments without disclosing such activities to the investors.

14. In furtherance of this conspiracy, BANK, GIBSON, SEABOLT, and others routinely caused interstate wirings of investment funds into and out of bank accounts they controlled at BayPort Credit Union located in the Eastern District of Virginia and Oculina Bank located in Florida.

15. BANK, GIBSON, and others knowingly and intentionally used investor funds for private purposes including, but not limited to, supporting BANK's lavish lifestyle.

16. In furtherance of this conspiracy, BANK, GIBSON, SEABOLT, and others knowingly and intentionally concealed, misled, and deceived investors as to the status of their investment funds by causing trust companies to send, via the United States mail, fraudulent quarterly statements to the investors. The account statements gave the false impression that the investors' funds were whole, fully invested, and, in some instances, increasing in value. Many of these mailings came to addresses within the Eastern District of Virginia.

17. BANK, GIBSON, SEABOLT, and others concealed from investors the existence of regulatory investigations into DPCG's investment offerings.

18. BANK, GIBSON, SEABOLT, and others caused letters to be sent to investors aimed at misleading and deceiving investors regarding the status of the investments, and at concealing that they had misappropriated substantial portions of investor funds.

19. BANK and others held conference calls with investors aimed at misleading and deceiving investors regarding the status of the investments, and at concealing that he and his conspirators had misappropriated substantial portions of investor funds.

20. As a result of this conspiracy, at least 375 investors in the Eastern District of Virginia and elsewhere have suffered losses exceeding $25 million.

(In violation of Title 18, United States Code, Sections 1349, 1341, 1343).

COUNTS TWO – SIX
(Mail Fraud)

1. The allegations contained in paragraphs 1 through 91 of the General Allegations section and paragraphs 1 through 20 related to Count One of this Second Superseding Indictment are realleged and incorporated as if set forth fully herein.

2. On or about the dates set forth below, in the Eastern District of Virginia and elsewhere, for the purpose of executing the above-described scheme and artifice to defraud and for obtaining money and property by means of materially false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants DARYL G. BANK, RAEANN GIBSON, and BILLY J. SEABOLT knowingly caused to be delivered by U.S. mail and any private and commercial interstate carrier any matter and thing whatever according to the direction thereon, and at the place at which it was directed to be delivered by the person to whom it was addressed, the following matters:

Count	In or About Date	Item Mailed
2	March 2015	Federal Express mailing of DR's Summit Trust documents.
3	August 2015	Mailing of Summit Trust statement to PS in Virginia Beach, Virginia.
4	July 2015	Mailing of PLI Management statement about the company's relocation to MG in Chesapeake, Virginia
5	July 2015	Mailing of weMonitor Management statement about the company's relocation to BS in Chesapeake, Virginia
6	May 2017	BlueDot Corporation mailing to TW in Chesapeake, Virginia.

(In violation of Title 18, United States Code, Sections 1341 and 2).

COUNTS SEVEN – TWELVE
(Wire Fraud)

1. The allegations contained in paragraphs 1 through 91 of the General Allegations section and paragraphs 1 through 20 related to Count One of this Second Superseding Indictment are realleged and incorporated as if set forth fully herein.

2. On or about the dates set forth below, in the Eastern District of Virginia and elsewhere, for the purpose of executing the above-described scheme and artifice to defraud and for obtaining money and property by means of materially false and fraudulent pretenses, representations and promises, the defendants DARYL G. BANK, RAEANN GIBSON, and BILLY J. SEABOLT knowingly transmitted and caused to be transmitted by means of a wire communication in interstate commerce certain writings, signs, signals, pictures and sounds, as follows:

Count	On Or About Date of Wire	Item Wired
7	December 19, 2013	Interstate wire transfer of $50,000.00 belonging to LZ from a Wells Fargo bank account to DSPF Group LLC's bank account (account number ending in 9219) at BayPort Credit Union located in the Eastern District of Virginia.
8	May 29, 2013	Interstate wire transfer of $61,000.00 belonging to AM from a Wells Fargo bank account to DSPF Group LLC's bank account (account number ending in 9219) at BayPort Credit Union located in the Eastern District of Virginia.
9	January 10, 2014	Interstate wire transfer of $25,000.00 belonging to MG from a Wells Fargo to PLI Group LLC's bank account (account number ending in 8817) at Bay Port Credit Union located in the Eastern District of Virginia.
10	March 3, 2014	Interstate wire transfer of $45,000.00 belonging to BC, RC, MB, and BB from a Wells Fargo bank account to Prime Spectrum LLC's bank account (account number

Count	On Or About Date of Wire	Item Wired
		ending in 5296) at BayPort Credit Union located in the Eastern District of Virginia.
11	June 3, 2014	Interstate wire transfer of $17,500.00 from a Wells Fargo bank account to WeMonitor Group LLC's bank account (account number ending in 3724) at BayPort Credit Union located in the Eastern District of Virginia.
12	December 16, 2013	Interstate wire transfer of $78,000.00 from Dominion Private Client Group's bank account (account ending in 8622) at BayPort Credit Union located in the Eastern District of Virginia to a Wells Fargo Bank account.

(In violation of Title 18, United States Code, Sections 1343 and 2).

COUNT THIRTEEN

(Conspiracy to Sell Unregistered Securities and to Commit Securities Fraud)

1. The allegations contained in paragraphs 1 through 91 of the General Allegations section of this Second Superseding Indictment are realleged and incorporated as if set forth fully herein.

2. From in or about January 2012 through in or about August 2017, in the Eastern District of Virginia and elsewhere, defendants DARYL G. BANK, RAEANN GIBSON, BILLY J. SEABOLT and others known and unknown, knowingly and intentionally combined, conspired, confederated and agreed to commit the following offenses against the United States:

(a) Unlawful Sale of Unregistered Securities: defendants, and others known and unknown, willfully offered and sold, and caused the offer and sale of, securities to the individuals when no registration statement was filed with the United States Securities and Exchange Commission and in effect as to the securities, and used the means and instruments of transportation and communication in interstate commerce and the mails in connection with the offer and sale of securities in violation of Title 15, United States Code, Sections 77e and 77x; and

(b) Securities Fraud: defendants, and others known and unknown, willfully and knowingly, in the offer and sale of securities by the use of the means and instruments of transportation and communication in interstate commerce and by the use of the mails, directly and indirectly: (a) employed a device, scheme, and artifice to defraud; (b) obtained money by means of untrue statements of material fact and omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made,

not misleading; and (c) engaged in transactions, practices, and courses of business which operated and would have operated as a fraud and deceit upon the purchasers, in violation of Title 15, United States Code, Sections 77q(a) and 77x.

THE PURPOSE OF THE CONSPIRACY

3. The purpose of the conspiracy was for the defendants to enrich themselves through the fraudulent sale of unregistered securities.

THE WAYS, MANNER, AND MEANS OF CONSPIRACY

The ways, manner and means by which BANK, GIBSON, SEABOLT and others sought to accomplish this conspiracy included, but were not limited to, the following:

4. BANK and GIBSON, operating through DIG, DPCG and related entities Dominion Franchise Group LLC and Dominion Diversified Strategies LLC, offered various investment opportunities to potential investors.

5. BANK, SEABOLT, Conspirator #2, and others prepared materially false and misleading investment offering documents that intentionally misled investors about the use of their investment funds, who controlled the investment funds, and the nature of the investment.

6. BANK, SEABOLT, GIBSON and Conspirator #2 did not register these securities with appropriate federal and state agencies.

7. BANK, GIBSON, SEABOLT, and others, made and caused to be made, material misrepresentations, deceitful statements and omissions to potential investors about these investments during sales pitches, live presentations, radio shows, social security maximization seminars, and other communications. The purpose of these fraudulent actions was to create a

false impression, mislead and to otherwise deceive investors about the use of the investment funds, the identity of who controlled the investment funds, and the nature of the investment.

8. In furtherance of this conspiracy, BANK often pitched the securities to victims via video teleconference and on the telephone.

9. In furtherance of this conspiracy, BANK, GIBSON and others mailed false and misleading solicitations labeled "Opportunity Alert" to advertise the securities.

10. BANK, GIBSON, SEABOLT, and others created and utilized a complex web of limited liability companies to conceal the misappropriation of investor funds. The conspirators did not invest any personal capital into these companies; instead, the companies functioned solely on investor funds.

11. BANK and GIBSON pooled all investors for a specific investment into a limited liability company over which BANK maintained complete control.

12. In furtherance of this conspiracy, BANK, GIBSON, SEABOLT, and others routinely caused interstate wirings of investment funds into and out of bank accounts they controlled at BayPort Credit Union located in the Eastern District of Virginia and Oculina Bank located in Florida.

13. In furtherance of the conspiracy, BANK, GIBSON, SEABOLT and others continued to sell securities after becoming aware that federal and state regulatory agencies were investigating the investment offerings as being unregistered and fraudulent.

OVERT ACTS IN FURTHERANCE OF THE CONSPIRACY

In furtherance of the conspiracy and to effect the purpose thereof, the following overt acts, among others, were committed in the Eastern District of Virginia and elsewhere:

14. The government incorporates by reference the acts described in the General Allegations section of this Second Superseding Indictment as overt acts in furtherance of this conspiracy.

15. On or about January 8, 2014, GIBSON sent an email to a conspirator attaching the "signature pages" of the Operating Agreements for victim MG to sign.

16. On or about April 11, 2013, BANK made fraudulent misrepresentations and omissions to victim AR about numerous securities.

17. On or about July 2, 2013, the conspirators caused victim KG to wire $25,000 to purchase an interest in the security weMonitor Group, LLC.

18. On or about December 19, 2013, the conspirators caused victim LZ to wire $50,000 to purchase an interest in the security DSPF Group, LLC.

19. On or about November 14, 2014, SEABOLT wrote a letter to the Virginia SCC claiming that his "client has not been selling securities at all."

20. On or about December 12, 2014, the conspirators caused victim GC to wire $160,000 to purchase an interest in the security Venture Capital I.

21. On or about June 17, 2015, the conspirators caused victim GB to wire $100,000 to purchase an interest in the security Venture Capital I.

22. On or about June 23, 2015, the conspirators caused victims NC and GC to wire $32,000 to purchase an interest in the security Spectrum 100, LLC.

(In violation of 18 U.S.C. § 371, 15 U.S.C. §§ 77e, 77q and 77x).

COUNTS FOURTEEN - EIGHTEEN
(Unlawful Sale of Unregistered Securities)

1. The allegations contained in paragraphs 1 through 91 of the General Allegations section and paragraphs 1 through 22 of Count Thirteen of this Second Superseding Indictment are realleged and incorporated as if set forth fully herein.

2. On or about the dates set forth below, in the Eastern District of Virginia, and elsewhere, defendants DARYL G. BANK, RAEANN GIBSON, BILLY J. SEABOLT, and others known and unknown, willfully offered and sold, and caused the offer and sale of, securities to the individuals identified below when no registration statement was filed with the United States Securities and Exchange Commission and in effect as to the securities, and used the means and instruments of transportation and communication in interstate commerce and the mails in connection with the offer and sale of securities:

Count	On or About Date	Victim(s)	Amount
14	December 12, 2014	GC	$160,000
15	June 17, 2015	GB	$100,000
16	December 19, 2013	LZ	$ 50,000
17	July 2, 2013	KG	$ 25,000
18	June 23, 2015	NC & GC	$ 32,000

(In violation of Title 15, United States Code, Sections 77e and 77x and Title 18, United States Code, Section 2).

COUNTS NINETEEN – TWENTY-TWO
(Securities Fraud)

1. The allegations contained in paragraphs 1 through 91 of the General Allegations section and paragraphs 1 through 22 related to Count Thirteen of this Second Superseding Indictment are realleged and incorporated as if set forth fully herein.

2. On or about the dates set forth below, in the Eastern District of Virginia, and elsewhere, defendants DARYL G. BANK, RAEANN GIBSON, BILLY J. SEABOLT, and others known and unknown, willfully and knowingly, in the offer and sale of securities by the use of the means and instruments of transportation and communication in interstate commerce and by the use of the mails, directly and indirectly: (a) employed a device, scheme, and artifice to defraud; (b) obtained money by means of untrue statements of material fact and omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (c) engaged in transactions, practices, and courses of business which operated or would have operated as a fraud and deceit upon investors:

Count	In or About Date	Security
19	January 2013 through in or about January 2014	Interests In DSPF Group LLC
20	April 2013 through in or about July 2017	Interests In Spectrum 100 LLC
21	February 2013 through in or about August 2015	Interests In weMonitor Group LLC
22	October 2012 through in or about January 2014	Interests In PLI Group LLC

(In violation of 15 U.S.C. §§ 77q(a), 77x and 18 U.S.C. § 2).

COUNT TWENTY-THREE
(Conspiracy to Launder Monetary Instructions)

1. The allegations contained in paragraphs 1 through 91 of the General Allegations section and paragraphs 1 through 20 related to Count One of the Second Superseding Indictment are realleged and incorporated as if set forth fully herein.

2. From in or about January 2012 through in or about August 2017, in the Eastern District of Virginia and elsewhere, defendants DARYL G. BANK and RAEANN GIBSON, and others known and unknown, knowingly and intentionally combined, conspired, confederated and agreed to commit the following offenses against the United States:

(a) Laundering of monetary instruments, that is, to knowingly conduct and attempt to conduct financial transactions affecting interstate and foreign commerce, which transactions involved the proceeds of specified unlawful activity, that is, mail and wire fraud, knowing that the transactions were designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of specified unlawful activity, and that while conducting and attempting to conduct such financial transactions, knew that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i); and

(b) Laundering of monetary instruments, that is, to knowingly engage and attempt to engage, in monetary transactions by, through, and to a financial institution, affecting interstate and foreign commerce, in criminally derived property of a value greater than $10,000, that is deposit, withdrawal, and transfer of monetary instruments, such property having been derived

from a specified unlawful activity, that is, mail and wire fraud, in violation of Title 18, United States Code, Section 1957.

THE WAYS, MANNER, AND MEANS OF CONSPIRACY

The ways, manner and means by which BANK, GIBSON, and others sought to accomplish this conspiracy included, but were not limited to, the following:

3. BANK and GIBSON concealed the original and true source of fraudulently obtained funds by transferring and laundering those monies through multiple financial accounts.

4. BANK and GIBSON laundered funds to conceal those monies from law enforcement.

5. BANK and GIBSON transferred and laundered funds through multiple financial accounts in order to avoid paying federal taxes on such funds.

6. BANK and GIBSON transferred and laundered funds through financial accounts to avoid disclosing the failure of investment offerings to victims.

7. BANK and GIBSON transferred and laundered funds exceeding $10,000 to support BANK's lavish lifestyle.

8. In addition, the ways, manner, and means that defendants BANK and GIBSON used to accomplish the objectives of the conspiracy included, but were not limited to, the following acts and transactions all originally derived from investor funds:

DATE (on or about)	MONETARY/FINANCIAL TRANSACTION (approximately)
2/29/2012	$13,000 transfer from Dominion Franchise Group's BayPort Credit Union Account #xx9806 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.

DATE (on or about)	MONETARY/FINANCIAL TRANSACTION (approximately)
3/29/2012	$7,000 transfer from Dominion Franchise Group's BayPort Credit Union Account #xx9806 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
5/30/2012	$44,000 transfer from Dominion Franchise Group's BayPort Credit Union Account #xx9806 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
6/1/2012	$43,495 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for jewelry repair, Neiman Marcus, Cartier, Saks Fifth Avenue, etc.
6/28/2012	$20,000 transfer from Dominion Franchise Group's BayPort Credit Union Account #xx9806 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
7/31/2012	$32,000 transfer from Dominion Franchise Group's BayPort Credit Union Account #xx9806 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
8/31/2012	$21,000 transfer from Dominion Franchise Group's BayPort Credit Union Account #xx9806 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
10/17/2012	$42,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
11/20/2012	$41,260 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Louis Vuitton, Cartier, Thomas Pink, Liljenquist & Beckstead, Mattress Firm, Capetown Diamond, etc.
1/22/2013	$35,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
1/22/2013	$31,420 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Louis Vuitton, Saks Fifth Avenue, Chanel, Hamilton Jewelers, Trafalgar, Loft, etc.
2/19/2013	$55,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
2/22/2013	$52,712 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Thomas Pink, Saks Fifth Avenue, Tory Burch, Neiman Marcus, jewelry, Hermes, Gucci, Swarovski, J Crew, West Elm, etc.

DATE (on or about)	MONETARY/FINANCIAL TRANSACTION (approximately)
3/21/2013	$50,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
4/19/2013	$40,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
5/15/2013	$42,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
6/17/2013	$66,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
6/20/2013	$25,000 transfer from Dominion Franchise Group's BayPort Credit Union Account #xx9806 to BANK's BayPort Credit Union Account #xx8157
6/21/2013	$56,329 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Restoration Hardware, Saks Fifth Avenue, Thomas Pink, Neiman Marcus, Bloomingdale's, J Crew, Massage Envy, entertainment tickets, etc.
7/9/2013	$10,000 transfer from DSP Management's BayPort Credit Union Account #xx8157 to BANK's BayPort Credit Union Account #xx8157
7/9/2013	$10,000 transfer from weMonitor Management's BayPort Credit Union Account #xx3730 to BANK's BayPort Credit Union Account #xx8157
7/12/2013	$30,000 transfer from Dominion Diversified Strategy's BayPort Credit Union Account #xx5984 to BANK's BayPort Credit Union Account #xx8157
7/12/2013	$70,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
7/12/2013	$58,650 transfer from BANK's Bayport Credit Union Account #xx8157 to M.R. Diamonds USA c/o Wonder Jewelers for personal jewelry
8/15/2013	$55,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
8/25/2013	$41,254 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Hamilton Jewelers, Boot Star, Neiman Marcus, Gucci, Mezlan, Massage Envy, J Crew, Bealls, Nordstrom, etc.

DATE (on or about)	MONETARY/FINANCIAL TRANSACTION (approximately)
9/18/2013	$74,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
9/22/2013	$57,529 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Tumi, Hermes, Gucci, J Crew, etc.
10/16/2013	$50,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
11/8/2013	$15,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's BayPort Credit Union Account #xx8157
11/20/2013	$75,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
12/16/2013	$4,166.69 transfer from weMonitor Group's Bayport Credit Union Account #xx3724 to PLI Group's Bayport Credit Union Account #xx8817
12/16/2013	$78,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
1/13/2014	$5,000 transfer from Warped Cigar Management's BayPort Credit Union Account #xx5031 to BANK's BayPort Credit Union Account #xx8157
1/13/2014	$5,000 transfer from PLI Management's BayPort Credit Union Account #xx8821 to BANK's BayPort Credit Union Account #xx8157
1/22/2014	$110,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
1/23/2014	$98,120 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Tourneau, Thomas Pink, Gray and Sons, Massage Envy, Cartier, Gucci, BCBG, etc.
2/21/2014	$76,900 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
2/25/2014	$14,000 transfer from Spectrum Management's BayPort Credit Union Account #xx8618 to BANK's BayPort Credit Union Account #xx8157
3/11/2014	$16,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.

DATE (on or about)	MONETARY/FINANCIAL TRANSACTION (approximately)
3/25/2014	$65,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
4/22/2014	$30,071 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
4/25/2014	$110,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
4/25/2014	$89,241 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Bloomingdales, Joan of Art, Neiman Marcus Last Call, Gilt Groupe, Berluti, J Crew, S.Y.L.K., Brushing on Bisque, Tea Collection, Seaworld, etc.
5/21/2014	$65,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
6/18/2014	$25,000 transfer from Spectrum 100 Management's Bayport Credit Union Account #xx5690 to Buckley Sandler LLP
6/24/2014	$65,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
7/25/2014	$75,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
8/27/2014	$100,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
8/27/2014	$94,808 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for ILori, Stubbs & Wotton, Neiman Marcus, Art Brokerage Inc., Celebrity Press, Cartier, Thomas Pink, La Martina, Hermes, J Crew, Massage Envy, etc.
9/26/2014	$82,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
9/26/2014	$81,627 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Hermes, Swatch, Celebrity Press, Thomas Pink, Louis Vuitton, Saks Fifth Avenue, Ulta, Saks Off Fifth, Castro's Interiors, Pbteen, Guitar Center, J Crew, etc.

DATE (on or about)	MONETARY/FINANCIAL TRANSACTION (approximately)
10/28/2014	$103,854 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Barney's New York, KentWang.com, Celebrity Press, Palm Beach Opera, Hermes, Agent Provocateur, J Crew, Saks Fifth Avenue, Tory Burch, etc.
10/28/2014	$118,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
11/26/2014	$87,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
12/1/2014	$87,402 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Gucci, Celebrity Awards, Celebrity Press, Thomas Pink, Saks Fifth Avenue, Omega, Gilt Groupe, J Crew, Off Fifth, H&M, etc.
12/24/2014	$92,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
12/25/2014	$74,736.05 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Cartier, Celebrity Press, Nordstrom, Massage Envy, etc.
1/14/2015	$150,000 transfer from Spectrum 100 Management's BayPort Credit Union Account #xx5690 to BANK's BayPort Credit Union Account #xx8157
1/30/2015	$100,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
1/31/2015	$81,108 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Beecroft & Bull, Grace's Tailor Shop, Celebrity Press, Nordstrom, KentWang.com, Saks Fifth Avenue, Watch U Want, Gucci, Robert Graham, Thomas Pink, Charles Tyrwhitt, etc.
2/27/2015	$99,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
3/1/2015	$92,499 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Lacoste, Neiman Marcus Last Call, Celebrity Press, Omega, Neiman Marcus, BCBG, etc.

DATE (on or about)	MONETARY/FINANCIAL TRANSACTION (approximately)
3/25/2015	$27,695 transfer from Dominion Investment Group's Bayport Credit Union Account #xx9056 to Buckley Sandler LLP
3/31/2015	$70,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
3/31/2015	$16,000 transfer from BANK's Bayport Credit Union Account #xx8157 to Wolcott River Gates
3/31/2015	$56,940 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Thomas Pink, Celebrity Press, Chanel, Barney's New York, Garnet Hill, One Kings Lane, J Crew, Zara, etc.
4/2/2015	$74,000 transfer from BANK's Bayport Credit Union Account #xx8157 Account to Singer Legal Group, LLC
4/24/2015	$100,000 transfer from Spectrum 100, LLC's Bayport Credit Union Account #xx5687 to Buckley Sandler LLP
4/30/2015	$95,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
5/1/2015	$82,659 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Gucci, Celebrity Press, Celebrity Awards, Tumi, Total Wine, Thomas Pink, Land's End, Massage Envy, BCBG, J Crew, Tory Burch, etc.
5/28/2015	$77,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
6/25/2015	$55,000 transfer from Dominion Private Client Group's BayPort Credit Union Account #xx8622 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
6/26/2015	$20,000 transfer from Prime Spectrum's Bayport Credit Union Account #xx5296 to Buckley Sandler LLP
7/29/2015	$78,000 transfer from Dominion Private Client Group's Oculina Bank Account #xx3011 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
8/6/2015	$5,000 transfer from Dominion Investment Group's BayPort Credit Union Account #xx9056 to BANK's BayPort Credit Union Account #xx8157

DATE (on or about)	MONETARY/FINANCIAL TRANSACTION (approximately)
8/31/2015	$85,000 transfer from Dominion Private Client Group's Oculina Bank Account #xx3011 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
9/2/2015	$68,010 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Vault, Celebrity Press, J Crew, Hermes, Law Offices of Joshua Deckard, West Elm, Ulta, Stella & Dot, Madewell, One Kings Lane, Just in Case Bail Bonds, Seaworld, etc.
9/24/2015	$15,700 transfer from Dominion Financial DBA Dominion Investment Group's Oculina Bank Account #xx3348 to Norris & St. Clair, P.C.
10/1/2015	$120,000 transfer from Dominion Private Client Group's Oculina Bank Account #xx3011 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
10/3/2015	$111,457 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Scotts Police K9, Orvis Company, Brooks Brothers, Orin Swift Cellars, Victoria's Secret, Petco, JP Boden, J Crew, West Elm, Ticketmaster, etc.
10/29/2015	$62,000 transfer from Dominion Private Client Group's Oculina Bank Account #xx3011 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
10/29/2015	$46,850 transfer from BANK's Wachovia/Wells Fargo Bank Account #xx7355 to American Express for charges for Louis Vuitton, Hermes, Tory Burch, Homegoods, Dior, etc.
11/24/2015	$50,000 transfer from Dominion Private Client Group's Oculina Bank Account #xx3011 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
12/24/2015	$48,000 transfer from Dominion Private Client Group's Oculina Bank Account #xx3011 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
1/5/2016	$40,656 transfer from Dominion Financial DBA Dominion Investment Group's Oculina Bank Account #xx3348 to Buckley Sandler LLP
1/20/2016	$20,000 transfer from Dominion Financial DBA Dominion Investment Group's Oculina Bank Account #xx3348 to Norris & St. Clair, P.C.
1/27/2016	$17,943 transfer from Dominion Financial DBA Dominion Investment Group's Oculina Bank Account #xx3348 to Norris & St. Clair, P.C.
1/29/2016	$76,000 transfer from Dominion Private Client Group's Oculina Bank Account #xx3011 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.

DATE (on or about)	MONETARY/FINANCIAL TRANSACTION (approximately)
3/3/2016	$75,000 transfer from Dominion Private Client Group's Oculina Bank Account #xx3011 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
3/14/2016	$55,000 transfer from Dominion Private Client Group's Oculina Bank Account #xx3011 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
4/15/2016	$10,000 transfer from Sovereign Asset Group's Oculina Bank Account #xx4808 to BANK's Wachovia/Wells Fargo Bank Account #xx7355.
6/21/2016	$10,000 transfer from Dominion Financial DBA Dominion Investment Group's Oculina Bank Account #xx3348 to Buckley Sandler LLP
6/21/2016	$10,000 transfer from Dominion Financial DBA Dominion Investment Group's Oculina Bank Account #xx3348 to Norris & St. Clair, P.C.
8/4/2016	$10,000 transfer from Dominion Financial DBA Dominion Investment Group's Oculina Bank Account #xx3348 to Norris & St. Clair, P.C.
11/29/2016	$10,000 transfer from Dominion Financial DBA Dominion Investment Group's Oculina Bank Account #xx3348 to Buckley Sandler LLP
6/23/2017	$60,000 transfer from Xcel Bandwidth's Oculina Bank Account #xx7718 to Norris & St. Clair, P.C.
6/23/2017	$60,000 transfer from Xcel Bandwidth's Oculina Bank Account #xx7718 to Singer Legal Group
8/8/2017	$143,137.28 cashier's check number 999494 from Xcel Bandwidth's MidFlorida Credit Union Account #xx1973 and deposited into Centerstate Bank of Florida
8/16/2017	$200,000 cashier's check number 999489 from Xcel Bandwidth's MidFlorida Credit Union Account #xx1973 and deposited into Generations Federal Credit Union in Texas

(All in violation of Title 18, United States Code, Section 1956(h)).

COUNTS TWENTY-FOUR – TWENTY-EIGHT
(Engaging in an Unlawful Monetary Transaction)

1. The allegations contained in paragraphs 1 through 91 of the General Allegations section and paragraphs 1 through 20 related to Count One of this Second Superseding Indictment are realleged and incorporated as if set forth fully herein.

2. On or about the following dates and in the manner described below, in the Eastern District of Virginia and elsewhere, defendants DARYL G. BANK, RAEANN GIBSON, and BILLY J. SEABOLT knowingly engaged and attempted to engage in the following monetary transactions by, through, and to a financial institution, affecting interstate and foreign commerce, in criminally derived property of a value greater than $10,000, that is, money deposits which represented fraudulently obtained funds from investors, such property having been derived from a specified unlawful activity, that is, wire fraud in violation of Title 18, United States Code, Section 1343:

Count	Defendants	On or About Date	Financial Transaction
24	BANK and GIBSON	December 23, 2013	Payment of $55,493.50 for Daryl Bank's personal American Express card.
25	BANK and GIBSON	July 12, 2013	Wire of $58,650.00 to M.R. Diamonds USA c/o Wonder Jewelers.
26	BANK and GIBSON	October 5, 2015	Payment of $111,458.46 for Daryl Bank's personal American Express card.
27	BANK and GIBSON	August 26, 2014	Check for $29,715.00 written to and negotiated by The Gibson Irrevocable Trust.
28	BANK, GIBSON, and SEABOLT	April 22, 2014	Check for $25,000 written to and negotiated by Billy J. Seabolt.

(In violation of Title 18, United States Code, Sections 1957 and 2).

FORFEITURE

THE GRAND JURY FURTHER ALLEGES AND FINDS PROBABLE CAUSE THAT:

1. Defendants DARYL G. BANK, RAEANN GIBSON, and BILLY J. SEABOLT, if convicted of one or more of the violations alleged in Counts One through Twenty-two of the Second Superseding Indictment, shall forfeit to the United States, as part of the sentencing pursuant to Federal Rule of Criminal Procedure 32.2, any property, real or personal, which constitutes or is derived from proceeds traceable to the violation.

2. Defendants DARYL G. BANK, RAEANN GIBSON, and BILLY J. SEABOLT if convicted of one or more of the violations alleged in counts Twenty-three through Twenty-Eight of the Second Superseding Indictment, shall forfeit to the United States, as part of the sentencing pursuant to Federal Rule of Criminal Procedure 32.2, any property, real or personal, involved the violation, and any property traceable to such property.

3. If any property that is subject to forfeiture above, as a result of any act or omission of the defendant, (a) cannot be located upon the exercise of due diligence, (b) has been transferred to, sold to, or deposited with a third party, (c) has been placed beyond the jurisdiction of the Court, (d) has been substantially diminished in value, or (e) has been commingled with other property that cannot be divided without difficulty, it is the intention of the United States to seek forfeiture of any other property of the defendant, as subject to forfeiture under Title 21, United States Code, Section 853(p).

4. The property subject to forfeiture includes, but is not limited to, the following property:

a. A sum of money of at least $4,706,425.83, representing the proceeds DARYL G. BANK obtained from the offenses charged in counts one through twelve;

b. A sum of money of at least $483,645.15, representing the proceeds RAEANN GIBSON obtained from the offenses charged in counts one through twelve;

c. A sum of money of at least $137,851.65, representing the proceeds BILLY J. SEABOLT obtained from the offenses charged in counts one through twelve;

d. $75,812.39 in U.S. currency seized from 814 SW St. Julien Court, Port St. Lucie, Florida on August 24, 2017;

e. $1,565 in U.S. currency seized from Daryl Bank at the time of his arrest;

f. Real property and improvements located at 814 SW St. Julien Court, Port St. Lucie, Florida 34986;

g. Real property and improvements located at 9686 SW Flowermound Circle, Port St. Lucie, Florida 34987;

h. Real property and improvements located at 1140 Northside Road, Elizabeth City, North Carolina 27906, also known as McPherson's Mobile Home Park;

i. 2011 Land Rover LR4 with VIN # SALAG2D41BA554792;

j. 2012 BMW 535i with VIN # WBAFR7C58CC815577;

k. $143,558.26 seized on August 29, 2017 from Centerstate Bank account 20437174;

l. Generations Credit Union account #1556709;

m. Generations Credit Union account #1556674;

n. One diamond ring 5.01K VS2 GIA #2151479679 and band;

o. All diamonds purchased by DARYL G. BANK from M.R. Diamonds between January 2015 and February 2016;

p. Approximately $325,840.00 on M.R. Diamonds' open book account for Dominion Investment Group;

q. One lot of jewelry seized from 814 SW Julien Court, Port St. Lucie, Florida on August 24, 2017;

r. One lot of jewelry seized from Daryl Bank at the time of his arrest;

s. One lot of watches seized from seized from 814 SW Julien Court, Port St. Lucie, Florida on August 24, 2017;

t. One lot of artwork seized from 814 SW Julien Court, Port St. Lucie, Florida on August 24, 2017;

u. One lot of sculptures seized from 814 SW Julien Court, Port St. Lucie, Florida on August 24, 2017;

v. One lot of collectable coins/currency seized from 814 SW Julien Court, Port St. Lucie, Florida on August 24, 2017;

w. One lot of antique clocks and trunks seized from 814 SW Julien Court, Port St. Lucie, Florida on August 24, 2017;

x. One lot of handbags, scarves, belts, sunglasses, and clothing accessories seized from 814 SW Julien Court, Port St. Lucie, Florida on August 24, 2017;

y. One Hermes belt seized from Daryl Bank at the time of his arrest;

z. One Visconti Dragon Pen seized from Daryl Bank at the time of his arrest; and

aa. One lot of prepaid credit cards seized from 814 SW Julien Court, Port St. Lucie, Florida on August 24, 2017;

bb. The following firearms:

- One Benelli Model M4 Shotgun
- One Sig Sauer 5.56 NATO Model M400 Rifle
- One Glock Model 17 "Third Generation" Pistol With Laser Max Laser Site Model 5A01247
- One Silver Taurus Model 445 Revolver
- One Interarms/Star Model PD 45 Cal Pistol
- One Davis Industries Model D25 "D-Series" Silver Derringer Handgun
- One Bersa Model 383A Silver Semi-Automatic Handgun With Wood Grips
- One Astra Model A100 Pistol
- One Glock Model 30 Pistol
- One Rohm GMBH Model RG17 Derringer
- One Sig Sauer Model P226 Pistol
- One Smith & Wesson Model 36 Revolver
- One Romarm/Cugir WASR-10 .762 Caliber Rifle
- One Colt Model CSR15 Rifle With Bump Stock
- One FN Herstal Model Scar 17S Rifle
- One Maverick Arms Model 88 12 GA. Shotgun
- One Tikka Beretta Bolt Model T3 Rifle

- One ATN Model X-Sight HD Wi-Fi GPS HDMI Scope (From Beretta Bolt)
- One Browning / Abercrombie & Fitch Over/Under Shotgun
- One Bushmaster AR-15/Carbon 15 Rifle (With Scope Model 1X30ST S/N 81350268)
- One New Haven/Mossberg Model 283B Bolt Rifle (Black/Wood) With Screw Choke
- One Sears Roebuck & Co. Model: Ted Williams Black/Wood Rifle
- One Weaver Scope (From Sears Rifle)

(All in accordance with Title 18, United States Code, Section 982(a)(1); Title 18, United States Code, Section 981(a)(1)(C), as incorporated by Title 28, United States Code, Section 2461(c); and Title 21, United States Code, Section 853(p).)

United States v. Daryl G. Bank et. al
Criminal No. 2:17cr126

Pursuant to the E-Government Act, the original of this page has been filed under seal in the Clerk's Office

A TRUE BILL:

_____
FOREPERSON

G. Zachary Terwilliger
United States Attorney

By: Melissa E. O'Boyle

Melissa E. O'Boyle
Assistant United States Attorney
Attorney for the United States
United States Attorney's Office
8000 World Trade Center
101 West Main Street
Norfolk, VA 23510
Phone: (757) 441-6331
Fax: (757) 441-6689
E-Mail: melissa.oboyle@usdoj.gov

By: _____

Elizabeth M. Yusi
Assistant United States Attorney
Attorney for the United States
United States Attorney's Office
8000 World Trade Center
101 West Main Street
Norfolk, VA 23510
Phone: (757) 441-6331
Fax: (757) 441-6689
E-Mail: elizabeth.yusi@usdoj.gov

UNITED STATES OF AMERICA
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES

V. **CASE NO.: 2:17CR126**

DARYL G. BANK

MOTION TO DISMISS FOR DOUBLE JEOPARDYVIOLATION

Now Comes the Defendant, Daryl G. Bank, and pursuant to the Double Jeopardy Clause of the Fifth Amendment and Kokesh v. S.E.C., 137 S.Ct. 1635 (2017), and moves the Court to dismiss the indictment now pending against him.

WHEREFORE, Mr. Bank respectfully requests the Court to grant this Motion.

Respectfully submitted,

DARYL G. BANK
By Counsel
_____/s/_____
James O. Broccoletti, Esquire
VSB# 17869
Counsel for DARYL G. BANK
ZOBY, BROCCOLETTI & NORMILE, P.C.
6663 Stoney Point South
Norfolk, VA 23502
(757) 466-0750
(757) 466-5026
james@zobybroccoletti.com

CERTIFICATE OF SERVICE

I hereby certify that on the _27th___ day of November, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Melissa O'Boyle, Esquire
United States Attorney's Office
101 W Main Street, STE 8000
Norfolk, VA 23510
757-441-6331

_____/s/_____
James O. Broccoletti, Esquire
VSB# 17869
Counsel for DARYL G. BANK
ZOBY, BROCCOLETTI & NORMILE, P.C.
6663 Stoney Point South
Norfolk, VA 23502
(757) 466-0750
(757) 466-5026
james@zobybroccoletti.com

UNITED STATES OF AMERICA
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES

V. **CASE NO.: 2:17CR126**

DARYL G. BANK

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR DOUBLE JEOPARDY VIOLATION

Now Comes the Defendant, Daryl G. Bank, and in support of his filed Motion to Dismiss, states in support as follows:

The Defendant is charged with the following counts:

18 U.S.C. §1349, Conspiracy to Commit Mail and Wire Fraud (Count 1)

18 U.S.C. §§1341 and 2, Mail Fraud (Count 2-6)

18 U.S.C. §§1343 and 2, Wire Fraud (Counts 7-12)

18 U.S.C. §371, Conspiracy to sell Unregistered Securities and to Commit Securities Fraud (Count 13)

15 U.S.C. §§77e, 77x and 18 U.S.C. 2 Securities Fraud (Counts 14-18)

15 U.S.C. §§77q, 77x and 18 U.S.C. 2 Securities Fraud (Counts 19-22)

18 U.S.C. §1956(h), Conspiracy to Launder Monetary Instruments (Count 23)

18 U.S.C. §§1957 and 2, Unlawful Monetary Transactions

(Counts 24-28)

18 U.S.C. §§981(a)(1)(C) and 982(a)(1) 28 U.S.C. ξ2461

Criminal Forfeiture

These counts stem from an alleged violation of Federal Securities laws with corollary counts alleging mail and wire fraud for material statements and omissions in a willful scheme or artifice to defraud.

The same conduct, allegations and proof were part of an action by The Securities and Exchange Commission in the United States District Court, District of Arizona, CV-15-0609-PHX-SMM. By final judgment in that case filed on February 8, 2018, the District Court entered judgment against the Defendant which included a disgorgement of $4,494,900.00, representing profits gained as a result of conduct alleged in the Complaint, together with pre-judgment interest in the amount of $802,553.00, and a civil penalty in the amount of $4,494,900.00, pursuant to Section 20 (d) of the Securities Act, 15 U.S.C. 77t (d) and Section 21 (d)(3) of the Exchange Act, 15 U.S.C. 78u(d)(3). The Defendant contends that the Order disgorging him of $4,494,900.00, constitutes a criminal sanction under the reasoning of Kokesh v. S.E.C., 137 S.Ct. 1635 (2017), which prohibits his prosecution in this matter as this prosecution is barred by the Double Jeopardy Clause of the Fifth Amendment as the Defendant has already been punished for the same offense.

The Double Jeopardy Clause states; "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limits." U.S. Constitution Amendment V. Criminal defendants are thus protected from multiple punishments for the same offense. North Carolina v. Pearce, 395 US. 711, 717, 89 S.CT. 2072, 73 L. Ed. 2d. 656 (1969). The Defendant contends

that the penalty of disgorgement imposed by the District Court of Arizona is a punishment for the same conduct and thus bars his prosecution.

The United States Supreme Court in Kokesh v. S.E.C., 137 S.Ct. 1635 (2017), was faced with the issue of whether 28 U.S.C. §2462, which applies to any action, suit or preceding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, also applies.

The Double Jeopardy Clause protects against both successive prosecution and successive punishments. United States v. Ursey, 518 US 267, 273 (1966). The protection against successive punishment prohibits the Government from punishing twice, or attempting a second time to punish criminally for the same offense. Witte v. United States, 515 US 389, 396.

In Kokesh the Defendant was the owner of two (2) investment-advisor firms and provided investment advice to companies interested in business development. *Id.* at 1641. The SEC filed an action against the Defendant in 2009 alleging that between 1995 and 2000, the Defendant, through his investment firm, misappropriated $34.9 million from several of the companies to which he was providing advice. *Id.* The SEC further alleged that the Defendant filed false and misleading SEC reports and proxy statements. The SEC sought disgorgement among other remedies. *Id.*

The Defendant was found liable for violations of the Investment Company Act of 1940, the Investment Advisors Act of 1940, and the Securities and Exchange Act of 1934. *Id.* The District Court held that the SEC could not collect civil monetary penalties for any actions occurring prior to October 27, 2004, which was the date the SEC filed its Complaint, as those were barred by the applicable Statute of Limitations. *Id.* However, the District Court also held

that disgorgement was not a penalty within the meaning of 28 U.S.C. §2462 and ordered the Defendant to pay $34.9 million plus an additional $18.1 million in pre judgment interest. Id. The Supreme Court reversed and Justice Sotomayor, writing for a unanimous court couldn't have been clearer:

> A penalty is a punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offense(s) against its laws. This definition gives rise to two principles. First, whether a sanction represents a penalty turns in part on whether the wrong sought to be addressed is a wrong to the public or a wrong to the individual.

Id. at 1642.

> ...SEC disgorgement constitutes a penalty within the meaning of §2642. First, SEC disgorgement is imposed by the courts as a consequence for violating...public laws. The violation for which the remedy is sought is committed against the United States rather than an aggrieved individual — this is why, for example, a securities enforcement action may proceed even if victims do not support or are not parties to the prosecution. As the Government concedes, when the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties.
>
> Second, SEC disgorgement is imposed for punitive purposes. In *Texas Gulf*— one of the first cases requiring disgorgement in SEC proceedings — the court emphasized the need to deprive the defendants of their profits in order to...protect the investing public by providing an effective deterrent for future violations, 312 F. Supp. at 92. In the years since, it has become clear that deterrence is not simply an incidental effect of disgorgement. Rather, courts have consistently held that the primary purpose of disgorgement orders is to deter violations of their ill-gotten gains.

Id.

> Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because deterrence [is] not [a] legitimate non-punitive governmental objective.

Id.

> Finally, in many cases, SEC disgorgement is not compensatory. As courts and the Government have employed the remedy, disgorged profits are paid to the district court, and it is within the court's discretion to determine how and to whom the money will be distributed. Courts have required disgorgement regardless of whether the disgorged funds will be paid to such investors as restitution. Some disgorged funds are paid to victims; other funds are dispersed to the United States Treasury. Even though district courts may distribute the funds to the victims, they have not identified any statutory command that they do so. When an individual is made to pay a non-compensatory sanction to the Government as a consequence of a legal violation the payment operates as a penalty.

Id. at 1644.

In making its unanimous decision, the Supreme Court specifically rejected the Government's position that SEC disgorgement is not punitive, but remedial in that it lessens the effects of a violation by restoring the *status quo:*

> As an initial matter, it is not clear that disgorgement, as courts have applied it in the SEC enforcement context, simply return the defendant to the place he would have occupied had he not broken the law. SEC disgorgement sometimes exceeds the profits gained as a result of the violation.
>
> And, as demonstrated by this case, SEC disgorgement sometimes is ordered without consideration of a defendant's expenses that reduced the amount of illegal profit.

Id.

> In such cases, disgorgement does not simply restore the *status quo;* it leaves the defendant worse off. The justification for this practice given by the court below demonstrates that disgorgement in this context is a punitive, rather than a remedial sanction."

Id. at 1645.

> A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also servicing either retributive or deterrent

purposes, is punishment, as we have come to understand the term.

In Hudson v. United States, 522 U.S. 93 (1997), the Supreme Court reaffirmed the relevant guideposts for determining whether a civil remedy actually operates as a criminal punishment for double jeopardy purposes:

> (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment -- retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Id. at 99-100 (citing and quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). Here, several factors point toward the conclusion that the SEC disgorgement rises to the level of criminal punishment for double jeopardy purposes.

Most obviously (and unlike the exclusively civil provisions at issue in Hudson), Congress did not limit the enforcement of 15 U.S.C. §§ 77(a), 78j(b), and SEC Rule 10b-5 to civil injunction actions by the SEC. Rather, Congress authorized the government to criminally prosecute individuals for violating these provisions, providing a statutory penalty of up to five years' in prison. 15 U.S.C. § 77x; *see, e.g.*, Bogy v. United States, 96 F.2d 734 (6th Cir. 1938). Disgorgement in SEC actions is not a statutory remedy, but one that courts began to order as part of their equitable power in the 1970s, many years after Congress first enacted the crime of securities fraud under § 77q. See Kokesh, 137 S. Ct. at 1640. Meanwhile, courts routinely use disgorgement as a measure for determining criminal sanctions. *See* United States v. Nacchio, 573

F.3d 1062, 1086 (10th Cir. 2009) (using disgorgement as a guidepost for determining loss in an insider trading case); *see also* United States v. McLaughlin, 565 F. App'x 470, 473 (6th Cir. 2014) (disgorgement is the measure of the punitive sanction of forfeiture). The criminal connotations of disgorgement are manifest.

Further, as Kokesh now tells us, disgorgement is a penalty whose "operation will promote the traditional aims of punishment - retribution and deterrence." Hudson, 522 U.S. at 99; Kokesh, 137 S. Ct. at 1643-44. While civil disgorgement for a violation of § 77q and § 78j(b) is not the "infamous punishment of imprisonment," Hudson, 522 at 99, the sanction for violating § 77q(a)(1) and 78j(b) and Rule 10b-5 can come into play "only on a finding of *scienter." Id.; see* SEC v. George, 426 F.3d 786, 792 (6th Cir. 2005) (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)); *see* Aaron v. SEC, 446 U.S. 680, 697 (1980) ("the language of [§ 77q(a)] requires *scienter* under [§ 77q(a)(1)]). *See also* SEC Complaint at 15, 17-18 (Counts I and III). This is not the case where the only factor is the "mere presence of a deterrent purpose." Hudson, 522 U.S. at 105.

The only Appellate decision, post Kokesh, counsel can locate is the recent decision by the Sixth Circuit in United States v. Dyer, No. 17 -6174/6177, (6th Circuit, Nov. 13, 2018).

That Court specifically addressed the question and concluded that an action by the S.E.C. resulting is disgorgement is not a "penalty" for Double Jeopardy purposes. However, that case is clearly distinguishable from the case at bar.

First, it dealt with a sentencing issue after Dyer had already been convicted. The question was the 18 level enhancement included in the sentencing guidelines computations based upon

the conduct alleged in the S.E.C. complaint.

Secondly, the Court notes that it would have affirmed for two separate reasons that are not present in our case. The Court notes that in the criminal case, the offense alleged was a conspiracy, different from the allegations in the S.E.C. enforcement action. Therefore the elements were different, under Blockburger v. United States, 284 U.S. 299 (1972).

Also, the Court held that consideration of relevant conduct under the guidelines is not punishment for Double Jeopardy purposes. Neither of these justifications are applicable in this Defendant's case.

Finally, Dyer holds that because the Supreme Court in Kokesh did not address the issue of a criminal penalty, that Court did not intend to extend its analysis in this arena. That rational misses the point. The Supreme Court only determines "the case at hand", Hein v. Freedom From Religion Foundation, Inc., 551 US 587 (2007). The Court's "standard practice is to refrain from addressing constitutional questions except when necessary to rule on particular claims before us". Citizens United v. F.E.C., 558 US 310 (2010) (Roberts, C.J. confirming). Kokesh dealt with whether a disgorgement order is a "penalty" under the statute of limitations. The issue of Double Jeopardy was not before it. But clearly Kokesh, unanimously, held that a disgorgement order is a penalty.

Therefore, for all of the above reasons, Defendant Bank moves to dismiss the indictment against him.

Respectfully submitted,
DARYL G. BANK
By Counsel

_____/s/_____

James O. Broccoletti, Esquire
VSB# 17869
Counsel for DARYL G. BANK
ZOBY, BROCCOLETTI & NORMILE, P.C.
6663 Stoney Point South
Norfolk, VA 23502
(757) 466-0750
(757) 466-5026
james@zobybroccoletti.com

CERTIFICATE OF SERVICE

I hereby certify that on the _27th_ day of November, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Melissa O'Boyle, Esquire
United States Attorney's Office
101 W Main Street, STE 8000
Norfolk, VA 23510
757-441-6331

_____/s/_____
James O. Broccoletti, Esquire
VSB# 17869
Counsel for DARYL G. BANK
ZOBY, BROCCOLETTI & NORMILE, P.C.
6663 Stoney Point South
Norfolk, VA 23502
(757) 466-0750
(757) 466-5026
james@zobybroccoletti.com

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 2:17cr126
	)	
DARYL G. BANK,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE IN OPPOSITION TO
DEFENDANT BANK'S MOTION TO DISMISS FOR DOUBLE JEOPARDY VIOLATION

The United States of America, through its undersigned counsel, respectfully files this response in opposition to defendant Bank's "Motion to Dismiss For Double Jeopardy Violation" (the "Motion"), ECF Nos. 139–140.

The Motion must be denied because Bank, as part of his settlement of the SEC's enforcement action against him, explicitly waived his right to make a Double Jeopardy allegation based on the disgorgement and other remedies ordered in that case. Additionally, the defendant's Double Jeopardy argument, premised on the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), is incorrect. Every appellate court that has analyzed the same argument, both before and after *Kokesh*, has held that disgorgement does not qualify as a Double Jeopardy predicate. Defendant's argument is that, in interpreting a *civil* statute of limitations provision, the Supreme Court also—but without saying so—unanimously overturned decades of securities law precedent, including the ability of the government to conduct parallel civil and criminal securities actions. The Supreme Court did no such thing in *Kokesh* or any other case, and so the Motion must be denied if this Court reaches its merits. Finally, even if the Court were to hold that the disgorgement creates a potential jeopardy issue, defendant has not attempted to

show which of the charges against him actually place him "twice … in jeopardy of life or limb." U.S. Const., Amdt. 5. In fact, only a handful of the counts against Bank, at best, are premised on the same allegations in the SEC enforcement action. For each of those independent reasons, the Motion should be denied.

Factual Background

A. The SEC's Civil Enforcement Action.

On April 6, 2015, the Securities and Exchange Commission ("SEC") filed a civil enforcement action against Bank, multiple Bank-controlled entities, and other individuals and entities involved with Bank's investment operations related to purported spectrum investments. *SEC v. Janus Spectrum LLC et al.*, Case No. 2:15-cv-609 (D. Ariz.), ECF No. 1 (Complaint).

After the SEC moved for summary judgment against Bank, *id.*, ECF Nos. 136, 165, Bank, on January 13, 2017, "[w]ithout admitting or denying the allegations of the complaint," consented to the entry of a judgment against him that permanently restrained him from violating various provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, *id.*, ECF No. 194, Consent, at 1 ¶ 2 (Exhibit 1). Bank further agreed that the Court would order the disgorgement of his ill-gotten gains. Ex. 1 at 1 ¶ 3. In the signed and notarized Consent, Bank specifically "waive[d] any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy or civil penalty herein." Ex. 1 at 3 ¶ 11.

Pursuant to the Consent, the district court entered judgment against Bank under Federal Rule of Civil Procedure 54(b) on April 25, 2017. *Id.*, ECF No. 228. The court's judgment incorporated the Consent in full. *Id.*, ECF No. 228 at 5.

On October 27, 2017, the SEC moved for entry of a final judgment setting the amount of disgorgement against Bank and entities he controlled. *Id.*, ECF Nos. 243, 243-1. The district

court entered its orders setting disgorgement amounts and granting final judgment as to Bank and those entities on February 8, 2018. *Id.*, ECF Nos. 248, 256. In its final judgment order against Bank, filed after the institution of this criminal case, the district court again incorporated the Consent in full: "IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent of Defendant Daryl G. Bank is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant shall comply with all of the undertakings and agreements set forth therein." *Id.*, ECF No. 256, at 7 (Exhibit 2). Bank was held liable for disgorgement of $4,494,900, "representing profits gained as a result of the conduct alleged in the Complaint," plus prejudgment interest and a civil penalty, also in the amount of $4,494,900. Ex. 2 at 5.

B. The Timing of the Criminal Investigation, the Motions Deadline, and the Filing.

Bank has known he was under criminal investigation since at least January 21, 2015, when the FBI executed search warrants at his business offices in Virginia Beach and Florida. He was indicted on August 23, 2017—more than two months after the Supreme Court's decision in *Kokesh*, on which the Motion is premised. ECF No. 4. At Bank's arraignment, the Court set a motions deadline of December 20, 2017—which was almost a year after Bank agreed that civil disgorgement would be part of the resolution of the SEC enforcement action then pending against him, as described above. ECF No. 29. The second superseding indictment was returned on May 25, 2018, ECF No. 105, and at Bank's arraignment, the Court set a motions deadline of July 18, 2018. ECF No. 112. Bank filed the Motion more than four months after that deadline expired, on November 27, 2018. ECF No. 139.

Analysis

A. The Court Should Consider the Timing of the Motion in Weighing its Merits.

Defendant filed the Motion long after the pretrial motions deadline, long after the Supreme Court decision on which it is premised, and long after Bank agreed to pay the disgorgement he now claims creates a Double Jeopardy issue.

While the Motion, because it raises a former jeopardy argument, arguably does not fall within the strictures of Federal Rule of Criminal Procedure 12(b)(3) and so may not be subject to dismissal on timeliness grounds alone, the Court should consider the lateness of the filing in weighing the merits of defendant's argument.[1] The Court set a deadline for pretrial motions precisely to avoid the unnecessarily late filing of such claims—the "basis" of which was "reasonably available" to defendant even before he was indicted—in the run-up to trial. Fed. R. Crim. Pro. 12(b)(3). Bank waited more than a year and a half after the *Kokesh* decision, the purported basis for his claim, to suggest the government's charges against him must be dismissed on former jeopardy grounds. Had there been a true former jeopardy defect in the indictment, Bank certainly would have raised it long ago.

[1] The advisory note to the 1944 adoption of Rule 12 states that the defense of former jeopardy may be raised before or at the time of trial, suggesting that such claims fall in the middle ground between allegations of jurisdictional defect, which may be raised any time under Rule 12(b)(2), and the class of motions that must be made before trial or before a court-ordered motions cutoff, listed in Rule 12(b)(3). In *United States v. Jarvis*, the Fourth Circuit stated that claims of former jeopardy fall within the category of defenses "which may, but need not necessarily," be raised before trial. 7 F.3d 404, 409 (4th Cir. 1993). For those reasons, the government does not ask the Court to deny the Motion solely on timeliness grounds. It does not thereby waive its right to object to any other Rule 12(b)(3)-type motion filed after the motions cutoff.

B. Bank Explicitly Waived Any Double Jeopardy Argument as Part of His Settlement with the SEC.

Bank filed this Motion in direct contravention of the judgment entered in the SEC civil action, in which he resolved the SEC case against him "[w]ithout admitting or denying the allegations." Ex. 1 at 1 ¶ 2; Ex. 2 at 7 (incorporating the Consent). As part of that "no admit/no deny" resolution, Bank explicitly agreed that he "waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy or civil penalty herein." Ex. 1 at 3 ¶ 11. That blanket waiver covers the argument presented here. Bank cannot argue that the remedy of disgorgement falls outside the waiver or that he did not know the court would order disgorgement, as the same document states that "Defendant agrees that the Court shall order disgorgement of ill-gotten gains." *Id.* at 1 ¶ 3. He further agreed that the Consent "resolves only the claims asserted against the Defendant in this civil proceeding," and that "no promise or representation has been made by the SEC … with regard to any criminal liability that may have arisen or may arise from the facts underlying [the SEC civil] action." *Id.* at 3 ¶ 11. The reason the SEC bargained for that language in the consent resolution to its civil enforcement action is obvious: SEC civil actions are often followed by criminal charges, and all parties were aware that Bank faced potential criminal liability along with the civil remedies the SEC sought. Indeed, at the time Bank signed the Consent, he had known for two years he was under criminal investigation by the FBI. And by the time the final disgorgement order was entered—again incorporating the entire Consent, including the waiver—this criminal prosecution had begun. *See* Ex. 2 (filed February 8, 2018).

The disgorgement ordered in the SEC civil proceeding—*i.e.*, the "remedy or civil penalty" imposed in that action—is the purported former jeopardy on which Bank premises the Motion. In other words, the claimed former jeopardy event is the very thing as to which Bank

waived any Double Jeopardy claim. He made that waiver as part of a bargained-for resolution that allowed him to avoid a civil trial against the SEC and avoid admitting wrongdoing.

The Motion must be denied on that ground alone. Double Jeopardy claims, like a "broad array of constitutional and statutory provisions," may be waived. *United States v. Mezzanatto*, 513 U.S. 196, 200–201 (1995) (citing *Ricketts v. Adamson*, 481 U.S. 1, 10 (1987)). Here, defendant signed the waiver and had it notarized. It was then incorporated into the final disgorgement judgment entered against him in the SEC enforcement action, which was filed on February 8, 2018—after the institution of this prosecution. Thus, unlike in *United States v. Van Waeyenberghe*, where the Seventh Circuit declined to reject the defendant's Double Jeopardy claim based on a similar waiver in light of an argument that it did not specifically bar jeopardy claims in *future* criminal proceedings, Bank's waiver was made part of the civil judgment against him *while this criminal case was pending*. 481 F.3d 951, 957–58 (7th Cir. 2007). Bank is bound to his waiver and must be held estopped from bringing the waived claim before this Court.

C. Civil Disgorgement Does Not Implicate the Double Jeopardy Clause.

The Double Jeopardy clause provides that "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amdt. 5. There are two components of the clause: "[t]he first provides protections against the imposition of cumulative punishments for the same offense in a single criminal trial; the second against being subject to successive prosecutions for the same offense, without regard to the actual imposition of punishment." *United States v. Ragins*, 840 F.2d 1184, 1187 (4th Cir. 1988) (internal quotations omitted).

As the Supreme Court explained in *Hudson v. United States*, it "has long recognized that the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that

could, in common parlance, be described as punishment." 522 U.S. 93, 98–99 (1997) (quotation omitted). Rather, "[t]he Clause protects only against the imposition of multiple *criminal* punishments for the same offense." *Id.* at 99; *see also Breed v. Jones*, 421 U.S. 519, 528 (1975) ("In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution."). Thus, while the Clause has been construed to cover more than literal "life or limb," the Court has "held that the risk to which the Clause refers is not present in proceedings that are not essentially criminal." *Breed*, 421 U.S. at 528 (quotation omitted).

Defendant argues that the language the Supreme Court used to describe the remedy of disgorgement in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)—in which the Court held that such disgorgement is subject to 28 U.S.C. § 2462's five-year statute of limitations—necessarily means that disgorgement qualifies as a former jeopardy event and requires dismissal of the indictment. Even assuming he had not waived that argument in settling the enforcement action, it fails for multiple reasons.

The first and most fundamental is that the question before the Court in *Kokesh* had nothing to do with the Double Jeopardy clause and indeed nothing to do with the criminal law; the only reference to "crime" in the entire opinion is in the Court's quotation of an 1892 decision for its definition of "penalty." *Kokesh*, 137 S Ct. at 1642 (quoting *Huntington v. Attrill*, 146 U.S. 657, 667 (1892)). The Court could not have been more clear about the narrowness of the issue before it or the limited breadth of its holding: "The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to" § 2462, which defines the statute of limitations "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." *Id.* at 1642 n.3; 28 U.S.C. § 2462. Section 2462 is itself concerned with civil, not criminal, matters, and so the Court's holding that disgorgement should be classed

as a "penalty" for purposes of that statutory definition does not imply disgorgement is a criminal penalty. *See Gabelli v. SEC*, 568 U.S. 442, 444 (2013) (describing § 2462 as the "general statute of limitations for *civil* penalty actions" (emphasis added)). Nowhere in *Kokesh* did the Court suggest that disgorgement is anything other than a civil penalty available in a civil proceeding.

If Bank were correct about the meaning of *Kokesh*, the Supreme Court unanimously, unilaterally, and *sub silentio* overturned decades of practice in the field of securities regulation and prosecution. Since the 1970s, the SEC regularly has used disgorgement as a remedy in civil enforcement proceedings. *Kokesh*, 137 S. Ct. at 1640; *see also SEC v. Contorinis*, 743 F.3d 296, 306–07 (2d Cir. 2014) (contrasting disgorgement, "an equitable remedy that prevents unjust enrichment," and criminal forfeiture, "a statutory legal penalty imposed as a punishment").[2] And SEC civil enforcement proceedings are often initiated parallel to, or are followed by, federal criminal prosecution. *See, e.g.*, *SEC v. First Fin. Grp. of Tx., Inc.*, 659 F.2d 660, 666–67 (5th Cir. 1981) (noting that "[p]arallel civil and criminal proceedings instituted by different federal agencies are not uncommon occurrences," that "[t]he simultaneous prosecution of civil and criminal actions is generally unobjectionable," and that "[t]his principle is fully applicable when the SEC and Justice Department each seek to enforce the federal securities laws through separate civil and criminal actions").

Bank's interpretation of *Kokesh* would at least partly immunize individuals and entities subjected to disgorgement in civil enforcement actions from ensuing criminal liability for securities fraud—despite the fact that the '33 Act and '34 Act both explicitly anticipate the possibility of both criminal and civil liability for violators. *See, e.g.*, 15 U.S.C. § 77t(b)

[2] In 2017, the SEC brought 754 enforcement actions "and obtained judgments and orders totaling more than $3.7 billion in disgorgement and penalties." SEC Division of Enforcement, Annual Report FY 2017, *available at* https://www.sec.gov/files/enforcement-annual-report-2017.pdf

(allowing SEC to bring an injunction action *and* provide evidence "to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter"). Practically speaking, if Bank were correct, the SEC would be loath to pursue the long-standing remedy of disgorgement in any action, knowing that doing so could be used as a shield to subsequent criminal prosecution. If the Supreme Court intended fundamentally to change the way the securities laws were enforced in this country, it would not have done so *by implication* in a decision on a civil statute of limitations question.

To the government's knowledge, every appellate court that has considered the issue has held that SEC disgorgement is not a criminal penalty for Double Jeopardy purposes. *United States v. Dyer*, Nos. 17-6174/6177, 2018 WL 5916096, --- F.3d ---- (6th Cir. Nov. 13, 2018); *United States v. Van Waeyenberghe*, 481 F.3d 951, 958–59 (7th Cir. 2007); *United States v. Perry*, 152 F.3d 900, 903–04 (8th Cir. 1998); *United States v. Palmisano*, 135 F.3d 860, 865–66 (2d Cir. 1998); *United States v. Gartner*, 93 F.3d 633, 635 (9th Cir. 1996); *SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994); *see also United States v. Rogers*, 960 F.2d 1501, 1506–07 (10th Cir. 1992) (rejecting argument that follow-on prosecution after SEC enforcement action violated Double Jeopardy clause); *cf. United States v. Glymph*, 96 F.3d 722, 724–25 (4th Cir. 1996) ("[C]ivil forfeiture is not punitive for Double Jeopardy purposes.") (citing *United States v. Ursery*, 518 U.S. 267, 274 (1996)).

The most recent of those decisions, the Sixth Circuit's opinion in *Dyer*, is on point and rejected the precise argument defendant makes here. The court began its analysis by noting that the defendants' Double Jeopardy argument would require it to "read between the lines in the *Kokesh* opinion" and further require it to hold that every penalty is a "punishment" and that every punishment "necessarily implicates the Double Jeopardy Clause." 2018 WL 5916096,

at *3. Explaining that, per *Hudson*, "only multiple *criminal* punishments are prohibited," the court stated that "nothing in *Kokesh* suggests that the Court considered SEC disgorgement to be a criminal punishment." *Id.*; *see also United States v. Reed*, 908 F.3d 102, 125–26 (5th Cir. 2018) (rejecting the argument that *Kokesh* requires the application of 28 U.S.C. § 2462's five-year statute of limitations to criminal forfeiture because, "[b]y its terms, § 2462 governs *civil* forfeitures").

The *Dyer* court then went on to apply the two-part test for determining whether a given penalty is criminal in nature such that it implicates the Double Jeopardy clause, as set out in *Hudson* and *Ward v. United States*, 448 U.S. 242 (1980). The first question is whether the legislature "'indicated either expressly or impliedly a preference'" for the punishment to be classified as civil or criminal. *Dyer*, 2018 WL 5916096, at *4 (quoting *Hudson*, 522 U.S. at 99). Assuming Congress indicated a preference for a civil penalty, the second question asks whether the statutory scheme is "so punitive either in purpose or effect" as to negate that intention and "'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'" *Id.* (quoting *Hudson*, 522 U.S. at 99).

Looking to the first question, the court explained that "Congress expressly established a preference for disgorgement to be a civil remedy," noting that "[w]hen Congress juxtaposes civil and criminal penalties within the same statute," as it did in the '33 Securities Act and the '34 Exchange Act, "the distinction gives 'added significance' to Congress's choice of the 'civil penalty' label." *Id.* (citing *Ward*, 448 U.S. at 249.) In reaching that conclusion, the *Dyer* court looked to the terms of the civil settlement in the SEC enforcement action that was the basis of the defendants' former jeopardy claims. There, as here, disgorgement was ordered pursuant to 15 U.S.C. § 78u(d)(3) (Section 21(d)(3) of the Exchange Act) and 15 U.S.C. § 77t(d) (Section 20(d)

of the Securities Act). *Id.*; *see* Ex. 2 at 5. As the court explained, those provisions authorizing civil remedies sit side-by-side in the statutory scheme with provisions allowing for criminal penalties, suggesting Congress intended the equitable disgorgement remedy to be civil in nature. *Id.*

Likewise, the Second Circuit, in *SEC v. Palmisano*, explained that the same remedies provisions in the '33 Act and '34 Act are referred to as civil penalties. 135 F.3d 860, 865 (2d Cir. 1998). The *Palmisano* court went on to explain that while disgorgement is not specifically provided for in the securities statutes, "Congress has expressly authorized" the sanction, "which has long been upheld as within the general equity powers granted to the district court by § 22(a) of the Securities Act … and § 27 of the Exchange Act" and "has not been considered a criminal sanction." *Id.* at 865–66 (citing H.R.Rep. No. 101-616, at 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1379, 1380).

The second step of the *Hudson* analysis asks "whether the statutory scheme was so punitive either in purpose or effect" that it negated Congress's expressed intent and "transfor[med] what was clearly intended as a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 99. A court cannot override Congress's expressed intent to create a civil remedy—as we have here—without the "clearest proof" that the penalty actually is criminal in nature. *Id.* at 100. *Hudson* listed seven non-exclusive and non-dispositive factors to consider in making the determination:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter* "; (4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is

> assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

522 U.S. at 99–100 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)).

In running through that multi-factored analysis, the *Dyer* court followed the Second Circuit's identical analysis in *SEC v. Palmisano*, 135 F.3d 860, 865–66 (2d Cir. 1998)—as did the Eighth Circuit in *United States v. Perry*, which likewise found the *Palmisano* analysis persuasive. 152 F.3d at 904. As those courts explained, disgorgement, while it may apply to conduct that also can be prosecuted criminally, is not an affirmative disability or restraint (like prison); has not been historically regarded as a criminal punishment; and serves non-punitive goals (including assuring that defendants do not profit from illegal securities schemes and promoting the stability of the securities industry). *Dyer*, 2018 WL 5916096, at *5; *Palmisano*, 135 F.3d at 856–66; *Perry*, 152 F.3d at 903–04. As the *Dyer* court further explained, *Kokesh* does not change the analysis; the "'mere presence of [a deterrent] purpose' does not make a sanction criminal for Double Jeopardy purposes." 2018 WL 5916096, at *5 (quoting *Hudson*, 522 U.S. at 105).

The reasoning of those appellate courts—both before and after *Kokesh*—is persuasive; no other court, to the government's knowledge, has found otherwise or come close to finding otherwise in analyzing the same issue. Indeed, "[i]f anything, *Kokesh* reinforces the long-held understanding that SEC disgorgement is civil in nature." *Dyer*, 2018 WL 5916096, at *5. Defendant's Motion fails on the same reasoning.

In sum, Bank bargained with the SEC to settle the enforcement action against him without admitting wrongdoing. Part of that settlement was the disgorgement of "profits gained as a result of the conduct alleged in the Complaint"—again, conduct Bank did not then admit. It would be bizarre to hold that a *civil* remedy Bank paid as part of a settlement in which he

avoided any admission of wrongdoing should be considered a *criminal* punishment that bars the government from seeking to hold Bank accountable for his crimes. The Court should deny the Motion.

D. Even if the Disgorgement Implicated Double Jeopardy, Defendant Has Not Shown Which Counts, If Any, Could Be Affected.

The relief Bank seeks in the Motion appears to be dismissal of the entire indictment against him. Even assuming the civil disgorgement brings the Double Jeopardy clause into play, which for the reasons outlined above it does not, defendant has not explained how the SEC's 2015 enforcement action alleging four securities violations based on the spectrum investment scheme would bar the numerous charges in the indictment premised on other schemes the defendant created.

To put it in the bluntest terms, if someone is convicted of robbing John Doe, he cannot be charged again with the identical robbery of Mr. Doe—but there is no bar to charges he robbed other people at other times. To determine whether a later prosecution is barred by Double Jeopardy, "the first step is to decide whether the government used the evidence that established the first offense to obtain a conviction on the second offense as well." *United States v. Jarvis*, 7 F.3d 404, 410 (4th Cir. 1993). Even if Double Jeopardy were a potential issue, the government would be able to prove many of the crimes charged in the indictment with different evidence than that used to secure the disgorgement related to the spectrum investments.

For example, both the civil enforcement action and the indictment allege securities violations under Title 15 of the United States Code. But even among the Title 15 charges, only Counts 18 and 20 relate to the spectrum investments. And the indictment includes numerous other charges under Title 18 of the United States Code, among them three conspiracy charges and numerous other counts alleging other crimes committed against other individuals separate

and apart from the spectrum scheme. Defendant has not made any showing that those charges would be barred by Double Jeopardy under *Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). As to the conspiracy charges, for example, because "a conspiracy is a distinct crime from the overt acts that support it," "prosecution of a defendant for conspiracy, where certain of the overt acts … are based on substantive offenses for which the defendant has been previously convicted, does not violate the Double Jeopardy Clause." *United States v. Ambers*, 85 F.3d 173, 177–78 (4th Cir. 1996) (internal quotations and citations omitted).

Moreover, defendant cannot credibly maintain that jeopardy precludes the prosecution of crimes that he continued to commit even after he agreed to a consent judgment in the SEC enforcement action, in January 2017, and after the district court entered judgment under Rule 54(b), in April 2017. As alleged in the indictment, as late as July 2017 defendant was still arranging and participating in conference calls with the spectrum investors. At no time during those calls did he inform the victims that he had stolen large portions of their investment funds or that he had just agreed to a consent judgment in federal court to resolve civil claims by the SEC related to their investments. In other words, defendant continued to lull his victims, including the spectrum victims, after settling the SEC claims against him. His argument that the Court should dismiss, on Double Jeopardy grounds, ongoing crimes that he continued to commit after entry of the consent judgment is absurd. Under defendant's strained interpretation of the law, an SEC consent judgment that did not stop him from continuing his illegal conduct is also a shield

to prosecution, immunizing him from facing the criminal consequences of his actions. That is simply not the law.

There is no need for the Court to reach the more technical questions about which counts even potentially are susceptible to a Double Jeopardy challenge in light of Bank's explicit waiver and the failure of his argument that disgorgement is a criminal penalty for jeopardy purposes. They are noted here because they show that, even if defendant had a well-founded jeopardy argument, he has incorrectly assumed the entire indictment would be dismissed rather than engage in a count-by-count analysis. Such an analysis is unnecessary for the reasons stated above. If the Court holds that the Double Jeopardy clause is implicated, however, additional briefing may be necessary.

Conclusion

For the reasons above, the Court should deny the Motion.

Respectfully submitted,

G. Zachary Terwilliger
United States Attorney

By: /s/

Andrew Bosse
Melissa E. O'Boyle
Virginia State Bar No. 47449
Elizabeth M. Yusi
Virginia State Bar No. 91982
Attorneys for the United States
United States Attorney's Office
101 West Main Street, Suite 8000
Norfolk, VA 23510
Office Number – 757-441-6331
Facsimile Number – 757-441-6689
E-Mail Address – andrew.bosse@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 11, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

James O. Broccoletti
Zoby & Broccoletti, P.C.
6663 Stoney Point South
Norfolk, Virginia 23502
james@zobybroccoletti.com

Nicholas D. Renninger
Kozak, Davis, Renninger & Belote, P.C.
355 Crawford Street, Suite 700
Portsmouth, Virginia 23704
nrenninger@kozakfirm.com

Emily M. Munn
Bischoff Martingayle, PC
208 E. Plume Street
Suite 247
Norfolk, Virginia 23510
emily@bishoffmartingayle.com

By: /s/
Andrew Bosse
Assistant United States Attorney
Attorney for the United States
United States Attorney's Office
101 West Main Street, Suite 8000
Norfolk, VA 23510
Office Number – 757-441-6331
Facsimile Number – 757-441-6689
E-Mail Address – andrew.bosse@usdoj.gov

Donald W. Searles, Cal. Bar No. 135705
Email: searlesd@sec.gov
David J. VanHavermaat, Cal. Bar No. 175761
Email: vanhavermaatd@sec.gov
Sana Muttalib, Cal Bar. No. 267005
Email: muttalibs@sec.gov

Attorneys for Plaintiff
Securities and Exchange Commission
Michele Wein Layne, Regional Director
John W. Berry, Regional Trial Counsel
444 S. Flower Street, Suite 900
Los Angeles, California 90071
Telephone: (323) 965-3998
Facsimile: (213) 443-1904

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Securities and Exchange Commission,

Plaintiff,

vs.

Janus Spectrum LLC; David Alcorn; Kent Maerki; Dominion Private Client Group, LLC; Janus Spectrum Group, LLC; Spectrum Management, LLC; Spectrum 100, LLC; Spectrum 100 Management, LLC; Prime Spectrum, LLC; Prime Spectrum Management, LLC; Daryl G. Bank; Premier Spectrum Group, PMA; Bobby D. Jones; Innovative Group, PMA; Premier Group, PMA; Prosperity Group, PMA; Terry W. Johnson; and Raymon G. Chadwick, Jr.,

Defendants.

Case No. 2:15-cv-0609- SMM

CONSENT OF DEFENDANT DARYL G. BANK

Exhibit 1

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

2. Without admitting or denying the allegations of the complaint (except as provided herein and except as to personal and subject matter jurisdiction, which Defendant admits), Defendant hereby consents to the entry of the Judgment in the form attached hereto (the "Judgment") and incorporated by reference herein, which, among other things, permanently restrains and enjoins Defendant from violation of Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)], Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder [15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5], Section 5 of the Securities Act [15 U.S.C. § 77e], and Section 15(a) of the Exchange Act [15 U.S.C. § 78o(a)].

3. Defendant agrees that the Court shall order disgorgement of ill-gotten gains, prejudgment interest thereon, and a civil penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]. Defendant further agrees that the amounts of the disgorgement and civil penalty shall be determined by the Court upon motion of the Securities and Exchange Commission ("SEC"), and that prejudgment interest shall be calculated from September 1, 2012, based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2). Defendant further agrees that in connection with the SEC's motion for disgorgement and civil penalties, and at any hearing held on such a motion: (a) Defendant will be precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint; (b) Defendant may not challenge the validity of this Consent or the Judgment; (c) solely for the purposes of such motion, the allegations of the Complaint shall be accepted as and deemed true by the Court; and (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations,

excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure. In connection with the SEC's motion for disgorgement and/or civil penalties, the parties may take discovery, including discovery from appropriate non-parties.

4. Defendant agrees that he shall not seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made pursuant to any insurance policy, with regard to any civil penalty amounts that Defendant pays pursuant to the Judgment or any final judgment in this action, regardless of whether such penalty amounts or any part thereof are added to a distribution fund or otherwise used for the benefit of investors. Defendant further agrees that he shall not claim, assert, or apply for a tax deduction or tax credit with regard to any federal, state, or local tax for any penalty amounts that Defendant pays pursuant to the Judgment or any final judgment in this action, regardless of whether such penalty amounts or any part thereof are added to a distribution fund or otherwise used for the benefit of investors.

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

6. Defendant waives the right, if any, to a jury trial and to appeal from the entry of the Judgment.

7. Defendant enters into this Consent voluntarily and represents that no threats, offers, promises, or inducements of any kind have been made by the SEC or any member, officer, employee, agent, or representative of the SEC to induce Defendant to enter into this Consent.

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

9. Defendant will not oppose the enforcement of the Judgment or any final

judgment in this action on the ground, if any exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waives any objection based thereon.

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

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

12. Defendant understands and agrees to comply with the terms of 17 C.F.R. § 202.5(e), which provides in part that it is the SEC's policy "not to permit a

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

13. Defendant hereby waives any rights under the Equal Access to Justice Act, the Small Business Regulatory Enforcement Fairness Act of 1996, or any other provision of law to seek from the United States, or any agency, or any official of the

United States acting in his or her official capacity, directly or indirectly, reimbursement of attorney's fees or other fees, expenses, or costs expended by Defendant to defend against this action. For these purposes, Defendant agrees that Defendant is not the prevailing party in this action since the parties have reached a good faith settlement.

14. In connection with this action and any related judicial or administrative proceeding or investigation commenced by the SEC or to which the SEC is a party, Defendant: (i) agrees to appear and be interviewed by SEC staff at such times and places as the staff requests upon reasonable notice; (ii) will accept service by mail or facsimile transmission of notices or subpoenas issued by the SEC for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by SEC staff; (iii) appoints Defendant's undersigned attorney as agent to receive service of such notices and subpoenas; (iv) with respect to such notices and subpoenas, waives the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Defendant's travel, lodging, and subsistence expenses at the then-prevailing U.S. Government per diem rates; and (v) consents to personal jurisdiction over Defendant in any United States District Court for purposes of enforcing any such subpoena.

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

///

///

///

///

///

///

///

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

Dated: 1-6-17

Daryl G. Bank

On Jan 1st, 2016, Daryl Bank, a person known to me, personally appeared before me and acknowledged executing the foregoing Consent.

Notary Public
Commission expires: May 17, 2018

MYRTLE NORRIS
Notary Public, State of Florida
Commission# FF 109998
My comm. expires May 17, 2018

Approved as to form:

Thomas A. Sporkin
Buckley Sandler LLP
1250 24th Street NW, Suite 700
Washington, DC 20037
Attorney for Defendant Daryl G. Bank

PROOF OF SERVICE

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

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

On January 13, 2017, I caused to be served the document entitled on all the parties to this action addressed as stated on the attached service list: **CONSENT OF DEFENDANT DARYL G. BANK**

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

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

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

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

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

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

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

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

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

Date: January 13, 2017

/s/ Donald W. Searles
Donald W. Searles

Exhibit 1

SEC v. Janus Spectrum LLC, et al.
United States District Court – District of Arizona
Case No. 2:15-CV-00609-SMM
(LA-4280)

SERVICE LIST

Thomas E. Littler, Esq. ***(served via CM/ECF and electronic mail)***
341 W Secretariat Drive
Tempe, AZ 85284
Email: telittler@gmail.com
Attorney for Defendants Janus Spectrum LLC, David Alcorn and David Alcorn Professional Corporation

Kent Maerki ***(served via electronic mail and U.S. mail)***
10632 N. Scottsdale Road
Suite B479
Scottsdale, AZ 85254
Email: kentmaerki@gmail.com
Defendant Pro Per

Keith Beauchamp, Esq. ***(served via CM/ECF and electronic mail)***
Coppersmith Brockelman PLC
2800 North Central Avenue, Suite 1200
Phoenix, AZ 85004
Email: kbeauchamp@cblawyers.com
Attorneys for Defendants Daryl G. Bank and the Dominion Entities

Thomas A. Sporkin, Esq. ***(served via CM/ECF and electronic mail)***
Timothy J. Coley, Esq. ***(served via CM/ECF and electronic mail)***
BuckleySandler LLP
1250 24th Street NW, Suite 700
Washington, DC 20037
Email: tsporkin@buckleysandler.com
Email: tcoley@buckleysandler.com
Attorneys for Defendants Daryl G. Bank and the Dominion Entities

James M. McGee, Esq. ***(served via CM/ECF and electronic mail)***
Dennis L Roossien, Jr., Esq. ***(served via CM/ECF and electronic mail)***
Phillip C. Appenzeller, Esq. ***(served via CM/ECF and electronic mail)***
Munsch Hardt Kopf & Harr, PC
500 N. Akard Street, Suite 3800
Dallas, TX 75201-6659
Email: jmcgee@munsch.com
Email: droossien@munsch.com
Email: pappenzeller@munsch.com
Attorneys for Defendants Terry W. Johnson; Raymon G. Chadwick, Jr.; Innovative Group, PMA; Premier Group, PMA; and Prosperity Group, PMA

Bobby D. Jones ***(served via electronic mail and U.S. mail)***
15920 NE 15th Street
Bellevue, WA 98008
Email: jobbybones@me.com
Defendant Pro Per

Exhibit 1

Premier Spectrum Group, PMA *(served via electronic mail only)*
c/o Bobby D. Jones
15920 NE 15th Street
Bellevue, WA 98008
Email: jobbybones@me.com
Defendant Pro Per

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Securities and Exchange Commission, Plaintiff, vs. Janus Spectrum LLC; David Alcorn; Kent Maerki; Dominion Private Client Group, LLC; Janus Spectrum Group, LLC; Spectrum Management, LLC; Spectrum 100, LLC; Spectrum 100 Management, LLC; Prime Spectrum, LLC; Prime Spectrum Management, LLC; Daryl G. Bank; Premier Spectrum Group, PMA; Bobby D. Jones; Innovative Group, PMA; Premier Group, PMA; Prosperity Group, PMA; Terry W. Johnson; and Raymon G. Chadwick, Jr., Defendants.	CV-15-0609-PHX-SMM **FINAL JUDGMENT AS TO DEFENDANT DARYL G. BANK**

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

evidence and arguments presented by the parties with regard to the motion by Plaintiff Securities and Exchange Commission for a Final Judgment setting the amounts of disgorgement, prejudgment interest, and civil penalties against Defendant:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating Section 5 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77e, by, directly or indirectly, in the absence of any applicable exemption:

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

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

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

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

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

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

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

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

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

III.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

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

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

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

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

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or

indirectly, Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a), which makes it unlawful for any broker or dealer which is either a person other than a natural person or a natural person, to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with Section 15(b) of the Exchange Act, 15 U.S.C. § 78o(b).

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

V.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is liable for disgorgement of $4,494,900, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $802,553, and a civil penalty in the amount of $4,494,900 pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3). Defendant's disgorgement and prejudgment interest obligation includes Defendant's joint and several liability with Defendants Dominion Private Client Group, LLC, Spectrum Management, LLC, Spectrum 100 Management, LLC, and Prime Spectrum Management, LLC for any amounts they are ordered to pay as disgorgement and prejudgment interest in this action. Defendant shall satisfy this obligation by paying $9,792,353 to the Securities and Exchange Commission within 14 days after entry of this Final Judgment.

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

Enterprise Services Center

Accounts Receivable Branch

6500 South MacArthur Boulevard

Oklahoma City, OK 73169

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

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

The Commission shall hold the funds (collectively, the "Fund") and may propose a plan to distribute the Fund subject to the Court's approval. The Court shall retain jurisdiction over the administration of any distribution of the Fund. If the Commission staff determines that the Fund will not be distributed, the Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

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

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent of Defendant Daryl G. Bank is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant shall comply with all of the undertakings and agreements set forth therein.

VII.

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

VIII.

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

IX.

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

Dated this 7th day of February, 2018.

Honorable Stephen M. McNamee
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

UNITED STATES OF AMERICA

v. **Criminal No. 2:17cr126**

DARYL G. BANK,

Defendant.

DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR DOUBLE JEOPARDY VIOLATION

COMES NOW, the Defendant Daryl G. Bank, by counsel, and states as follows in reply to the government's opposition to his previously-filed motion to dismiss on Double Jeopardy grounds (Doc. No. 147):

1. The government correctly acknowledges that a Double Jeopardy violation may be raised at any time prior to or during trial. Furthermore, trial of this matter is currently more than six months away so there is more than ample time to litigate this matter. Accordingly, this Court should address Mr. Bank's claim on its merits.

2. Contrary to the government's assertions, Mr. Bank has not waived his right to assert this claim. It is true that Mr. Bank executed a waiver in which he agreed to waive any claim of Double Jeopardy based upon the imposition of any remedy or civil penalty imposed in the SEC case. He did not, however, waive the claim he presently asserts because that claim did not exist at the time Mr. Bank executed the waiver.

3. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938).

4. "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights . . . ." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938)(internal quotation omitted). There is no question that the Double Jeopardy Clause is a fundamental constitutional right. See *Bartkus v. Illinois*, 359 U.S. 121, 155, 79 S. Ct. 676, 697 (1959) (Black, J, dissenting) (noting that "few principles have been more deeply "rooted in the traditions and conscience of our people" than the prohibition on multiple punishments and trial for the same offense").

5. Under these principles, Mr. Bank cannot be held to have waived his right to assert this claim.

6. Mr. Bank executed his waiver in January, 2017. The Supreme Court did not issue its opinion in *Kokesh* until June, 2017. Mr. Bank could not knowingly and intentionally waive his claim that the disgorgement imposed in the SEC cases operates a punishment sufficient to implicate the Fifth Amendment's Double Jeopardy Clause because such a claim did not exist in any meaningful sense until the Supreme Court created it in *Kokesh*.

7. The government's argument on the merits of Mr. Bank's claim is also incorrect. Notwithstanding the government's many assertions to the contrary, *Kokesh* does stand for the proposition that civil disgorgement implicates the Double Jeopardy Clause.

8. The Court in *Kokesh* held in no uncertain terms that disgorgement is a penalty designed to punish and not merely a civil sanction. '"A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be

explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.'" *Kokesh v. SEC*, 137 S.Ct. 1635, 1645 (2017) (*quoting Austin v. United States*, 509 U.S. 602, 610, 113 S. Ct. 2801 (1993)).

9. There is no question that the Double Jeopardy Clause "protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076 (1969) ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.") (*quoting Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873)). To impose the disgorgement in one proceeding and a conviction and sentence in another is a clear violation of these principles and Mr. Bank's motion must be granted on this basis.

10. As to the government's final assertion that Mr. Bank's claim does not bar prosecution of all of the charged offenses, Mr. Bank concedes that the Double Jeopardy bar would only prohibit prosecution of those offenses related to the Spectrum Investment activities that constituted the SEC action in which the disgorgement was imposed.

WHEREFORE, for the reasons set forth above, the Defendant, Daryl G. Bank, respectfully requests that this Honorable Court grant his motion to dismiss.

Respectfully submitted,

/s/

James O. Broccoletti, Esquire
VSB# 17869
ZOBY, BROCCOLETTI & NORMILE P.C.
6663 Stoney Point South
Norfolk, VA 23502

(757) 466-0750
(757) 466-5026
james@zobybroccoletti.com

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Elizabeth M. Yusi, Esquire
Assistant U. S. Attorney
Office of the U. S. Attorney
World Trade Center, Suite 8000
101 W. Main Street
Norfolk, VA 23510
Elizabeth.yusi@usdoj.gov

Melissa E. O'Boyle, Esquire
Assistant U. S. Attorney
Office of the U. S. Attorney
World Trade Center, Suite 8000
101 W. Main Street
Norfolk, VA 23510
Melissa.oboyle@usdoj.gov

Andrew Bosse
Assistant U. S. Attorney
Office of the U. S. Attorney
World Trade Center, Suite 8000
101 W. Main Street
Norfolk, VA 23510
Andrew.bosse@usdoj.gov

JAMES O. BROCCOLETTI

By: _____/s/ _____
James O. Broccoletti, Esquire
Attorney for the Defendant
VSB: 17869
6663 Stoney Point S.
Norfolk, VA 23502

Telephone: (757) 466-0750
Fax: (757) 466-5026
james@zobybroccoletti.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA,

v. **Criminal No. 2:17cr126**

DARYL G. BANK,

Defendant.

OPINION AND ORDER

This matter is before the Court on Defendant Daryl G. Bank's ("Defendant" or "Bank") Motion to Dismiss for Double Jeopardy Violation. Def.'s Mot., ECF No. 139. Defendant moves to dismiss the pending indictment against him in light of the United States Supreme Court's decision in Kokesh v. SEC, 137 S. Ct. 1635 (2017). Id. For the reasons explained below, Defendant's motion to dismiss is **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the second superseding indictment issued by a Grand Jury of this Court on May 25, 2018, Bank was charged with the following counts:

- Conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1349 (Count 1);
- Mail fraud, in violation of 18 U.S.C. §§ 2, 1341 (Counts 2-6);

- Wire fraud, in violation of 18 U.S.C. §§ 2, 1343 (Counts 7-12);
- Conspiracy to sell unregistered securities and to commit securities fraud, in violation of 18 U.S.C. § 371 (Count 13);
- Unlawful sale of unregistered securities, in violation of 15 U.S.C. §§ 77e, 77x and 18 U.S.C. § 2 (Counts 14-18);
- Securities fraud, in violation of 15 U.S.C. §§ 77q, 77x and 18 U.S.C. § 2 (Counts 19-22);
- Conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 1956(h) (Count 23);
- Engaging in unlawful monetary transaction, in violation of 18 U.S.C. §§ 2, 1957 (Counts 24-28).

Second Superseding Indictment, ECF No. 105. These charges arise from allegations that Bank and others executed a scheme to defraud investors. Id. at 30.

A separate prior civil enforcement action was initiated on April 6, 2015 by the United States Securities and Exchange Commission ("SEC") in the United States District Court for the District of Arizona against Bank and others for several investment activities, some of which form the basis of the securities offenses in the second superseding indictment now before this Court. Gov't Resp. 2, ECF No. 147 (citing SEC v. Janus Spectrum LLC, No. CV-15-609 (D. Ariz.)). On February 8, 2018, the District of Arizona

entered a final judgment against Bank in the civil enforcement action, holding Bank civilly liable for a disgorgement of $4,494,900, pre-judgment interest in the amount of $802,553, and a civil penalty of $4,494,900 pursuant to 15 U.S.C. §§ 77t(d), 78u(d)(3). SEC v. Janus Spectrum LLC, No. CV-15-609, 2018 U.S. Dist. LEXIS 21709, at *2, *8 (D. Ariz. Feb. 8, 2018); Gov't Ex. 2 at 5, ECF No. 147-2.

Defendant filed the instant motion on November 27, 2018. Def.'s Mot., ECF No. 139. Defendant claims that the 2017 Supreme Court decision in Kokesh, which declared SEC disgorgement a penalty, bars pursuit of the instant criminal action under the Double Jeopardy Clause of the Fifth Amendment because Defendant has already been punished for some of the activity with which he is charged. Def.'s Br. 2, ECF No. 140. The Government replied on December 11, 2018, arguing (1) that Defendant unfairly delayed filing the instant motion, (2) that he waived his right to pursue a Double Jeopardy claim, (3) that he cannot claim Double Jeopardy because he only received a civil punishment, and (4) that, even if Double Jeopardy applied, it would only apply to the pending criminal charges associated with the specific investment activities involved in the civil action. Gov't Resp., ECF No. 147. Defendant filed a reply on December 20, 2018, contesting most of the Government's assertions, but conceding that Double Jeopardy would only bar some of the charges in the indictment

because only a portion of the criminal allegations are related to the investment activities punished by the civil action.[1] Def.'s Reply, ECF No. 155. Accordingly, Defendant is pursuing a partial dismissal of the pending criminal charges based on the conduct that was punished by the Janus Spectrum case. Having been fully briefed, this matter is now ripe for disposition.

II. LEGAL STANDARD

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution states that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. This guarantee protects criminal defendants from both multiple punishments and successive prosecutions for the same offense. United States v. Dixon, 509 U.S. 688, 696 (1993); United States v. Ragins, 840 F.2d 1184, 1187 (4th Cir. 1988).

In explaining the parameters of a restriction on multiple punishments, as is relevant in this case, the Supreme Court has "long recognized that the Double Jeopardy Clause does not prohibit the imposition of any additional sanction that could, 'in common parlance,' be described as punishment." Hudson v. United States, 522 U.S. 93, 98-99 (1997) (quoting United States ex rel. Marcus v.

[1] Because Defendant concedes that his motion only applies to certain investment activities and not the entirety of the criminal charges against him, the Court does not address the Government's argument on this issue in the analysis section below.

Hess, 317 U.S. 537, 549 (1943)). Rather, "[t]he Clause protects only against the imposition of multiple criminal punishments for the same offense." Id. at 99. To determine whether a punishment is civil or criminal, the Supreme Court has held that "[a] court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.'" Id. (quoting United States v. Ward, 448 U.S. 242, 248 (1980)). In doing so, courts are required to "begin with reference to [the statute's] text and legislative history." Seling v. Young, 531 U.S. 250, 262 (2001). If Congress "'has indicated an intention to establish a civil penalty,'" a court must then consider the following seven factors, with respect to "the statute on its face," to determine if the civil penalty is transformed into a criminal penalty for the purposes of Double Jeopardy:

> (1)"whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"'; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment -- retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Hudson, 522 U.S. at 99-100 (first quoting Ward, 448 U.S. at 248-49, then quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-

69 (1963)); accord United States v. Dyer, 908 F.3d 995, 1002 (6th Cir. 2018), cert. denied, 587 U.S. __ (Apr. 22, 2019) (No. 18-8436); Brewer v. Kimel, 256 F.3d 222, 226 (4th Cir. 2001); United States v. Trogden, 476 F. Supp. 2d 564, 569-72 (E.D. Va. 2007). "'[O]nly the clearest proof' will suffice to override legislative intent and transform . . . a civil remedy into a criminal penalty." Hudson, 522 U.S. at 100.

III. ANALYSIS

A. Timely Filing

In response to Defendant's motion, the Government first argues that Defendant unfairly delayed filing the motion. While the Court recognizes that Defendant could have filed this motion much earlier, he was not required to file it within the pretrial motions deadline, let alone prior to trial. United States v. Jarvis, 7 F.3d 404, 409 (4th Cir. 1993) (stating that a Double Jeopardy claim "may, but need not," be raised prior to trial); see Fed. R. Crim. P. 12(b)(3). Additionally, Defendant's delay in filing is not necessarily indicative of the strength of his claim. It is equally likely that he focused his efforts on first filing motions that were time restricted, before devoting time to the present motion. Therefore, the Court declines to consider the timing of the motion in weighing its merits.

B. Waiver

The Government next argues that, in the Janus Spectrum consent judgment, Defendant waived his right to pursue a Double Jeopardy claim. Defendants are permitted to waive their constitutional right to assert a Double Jeopardy claim. See Menna v. New York, 423 U.S. 61, 62 n.2 (1975); see also United States v. Van Waeyenberghe, 481 F.3d 951, 957 (7th Cir. 2007). However, the Supreme Court has explained that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege," and has cautioned against presuming that a waiver of fundamental constitutional rights was knowing and voluntary. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). "In examining a purported waiver of the double jeopardy right, we must draw all reasonable presumptions against the loss of such a right." United States v. Morgan, 51 F.3d 1105, 1110-11 (2d Cir. 1995).

1. Intentional and Knowing

Here, the consent judgment between Defendant and the SEC in the Janus Spectrum case contains the waiver provision at issue. Such provision states: "Defendant waives any claim of Double Jeopardy based on the settlement of this proceeding, including the imposition of any remedy or civil penalty herein." Gov't Ex. 1 at 3, ECF No. 147-1. Although Defendant argues that his waiver could not have been meaningfully knowing and intentional prior to the change of law in Kokesh, which was decided six months after his

waiver, there is no indication that Defendant's waiver was not knowing and voluntary based on the law at the time of the waiver, and he does not request to withdraw his waiver based on the new law. See Def.'s Reply ¶ 6. Rather, Defendant argues that Kokesh altered the Double Jeopardy analysis by declaring disgorgement to be punitive (a key factor in the Double Jeopardy analysis), thus creating a viable Double Jeopardy claim that did not exist at the time of his waiver and that may have caused him not to waive his right had it existed. Id. While the language of his waiver is broad and covers "any claim," Gov't Ex. 1 at 3 (emphasis added), there is some merit to the argument that Defendant did not waive a Double Jeopardy claim because, before Kokesh, such a claim was not viable under existing case law finding disgorgement remedial rather than punitive, and thus, rejecting similar Double Jeopardy claims. See, e.g., SEC v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994) ("Accordingly, we conclude that the disgorgement order is remedial in nature and does not constitute punishment within the meaning of double jeopardy."). Having considered the case law and the specific waiver language at issue here, and "drawing all reasonable presumptions against the loss of such a right," Morgan, 51 F.3d at 1110-11, the Court finds that the evidence currently before the Court is insufficient to show Defendant intentionally relinquished a known right. Zerbst, 304 U.S. at 464. Therefore, the Court looks to the language of the waiver.

2. Scope of Language

The Government argues that the scope of the language of Defendant's waiver in the consent judgment is sufficient for the Court to deny the instant Double Jeopardy motion. The language of Defendant's waiver provision is broader than that of the one deemed insufficient in Hudson, which did not expressly mention Double Jeopardy. Hudson, 522 U.S. at 97 n.2. However, although the language at issue broadly waives the right to make a Double Jeopardy claim, it does so without specific reference to criminal proceedings. In this respect, it is, therefore, almost identical to the language of the pre-Kokesh waiver that the United States Court of Appeals for the Seventh Circuit deemed an insufficient basis alone for denying a later Double Jeopardy claim. Van Waeyenberghe, 481 F.3d at 957. Therefore, having considered the case law and specific waiver language at issue here, the Court finds that the language of Defendant's waiver of his right to later assert a Double Jeopardy claim is insufficient alone to bar further consideration of his current Double Jeopardy claim. Thus, the Court declines to deny the motion to dismiss based on just the purported waiver. See id. at 957-98.

C. Criminal Versus Civil Punishment

The Double Jeopardy Clause is meant to protect against successive punishments. See Dixon, 509 U.S. at 696. However, as noted above, not just any punishment triggers Double Jeopardy; the

punishment must be criminal. Hudson, 522 U.S. at 99. The issue before the Court is whether the disgorgement that was imposed on Defendant for violations of securities laws was civil or criminal in nature.[2]

Under Hudson, whether a penalty is civil or criminal in nature depends on a two-step analysis: (1) "whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other,'" and (2) if the legislative preference is civil, whether the "clearest proof," based on seven non-dispositive and non-exhaustive factors, exists to "transform . . . a civil remedy into a criminal penalty." Hudson, 522 U.S. at 98-100 (quoting Ward, 448 U.S. at 248). Defendant argues that the decision in Kokesh is sufficient to establish the clearest proof necessary to transform the civil penalty of disgorgement into a criminal penalty for Double Jeopardy purposes.

Kokesh did not specifically address whether SEC disgorgement is civil or criminal in nature for Double Jeopardy purposes. Rather, the Supreme Court addressed the question of whether disgorgement constitutes a "penalty," as that term is used in 28 U.S.C. § 2462, the statute of limitations provision for enforcing

[2] Although civil monetary penalties were also imposed on Defendant pursuant to 15 U.S.C. § 77t(d) and 15 U.S.C. § 78u(d)(3), Defendant only contends that the disgorgement constitutes criminal punishment for Double Jeopardy purposes. Def.'s Br. 2.

a civil "penalty." Kokesh, 137 S. Ct. at 1643. The Court held that "SEC disgorgement constitutes a penalty within the meaning of [the statute of limitations in 28 U.S.C.] § 2462" because (1) disgorgement is meant to protect the public interest by remedying a harm to the public, (2) "SEC disgorgement is imposed for punitive purposes" and serves as a deterrent, and (3) disgorgement is not compensatory because the funds are paid to the court, not the victims. Id. at 1643-44. Because Kokesh did not expressly address whether disgorgement is civil or criminal in nature, the Court must now determine how the Supreme Court's holding impacts the analysis of the Hudson Double Jeopardy analysis. Each of Hudson's two steps are discussed below.

1. Legislative Preference

Under the first step, the Court must determine whether the legislature intended to create a civil or criminal penalty, asking if the legislature "'indicated either expressly or impliedly a preference for one label or the other.'" Hudson, 522 U.S. at 99 (quoting Ward, 448 U.S. at 248).[3] To answer such question, the Court "must begin with reference to [the statute's] text and legislative history." Seling, 531 U.S. at 262.

[3] By only conducting an analysis of the seven factors in the second step of the Hudson analysis, Defendant implicitly concedes that "the legislature. . . . 'indicated an intention to establish a civil penalty.'" Hudson, 522 U.S. at 99 (quoting Ward, 448 U.S. at 248-49); Def.'s Br. 6, ECF No. 140. Despite the implied concession, the Court conducts a complete analysis of the first step for clarity.

a. Statutory Construction

1. Statutory Text

There is some disagreement about which statutory provision actually authorizes disgorgement. Some courts suggest the authority comes from the provisions granting general equity jurisdiction in securities law violation cases (15 U.S.C. § 77v(a) and 15 U.S.C. § 78aa). See, e.g., SEC v. Palmisano, 135 F.3d 860, 865-66 (2d Cir. 1998); SEC v. Desai, 145 F. Supp. 3d 329, 337-38 (D.N.J. 2015) ("Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a), and § 27 of the Exchange Act, 15 U.S.C. § 78aa, allow for disgorgement of all profits derived from violating the securities laws."). Other courts suggest disgorgement is an ancillary equitable power available to courts under the statutory provisions that grant courts the authority to issue injunctions in securities law violation cases (15 U.S.C. § 77t(b) and 15 U.S.C. 78u(d)(1)). See, e.g., SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989) ("Disgorgement, then, is available simply because the relevant provisions of the Securities Exchange Act of 1934, sections 21(d) and (e), 15 U.S.C. §§ 78u(d) and (e), vest jurisdiction in the federal courts."); SEC v. Materia, 745 F.2d 197, 200-01 (2d Cir. 1984). Which statute actually authorizes disgorgement does not impact the Court's analysis on the issue of whether Congress intended disgorgement to be civil or criminal

because, as explained below, the language of each statute impliedly indicates a preference for the civil label.[4]

First, the language of sections 77v(a) and 78aa authorizes district courts to exercise jurisdiction over suits in equity in securities litigation. 15 U.S.C. § 77v(a) ("The district courts of the United States . . . shall have jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.") (emphasis added); 15 U.S.C. § 78aa ("The district courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.") (emphasis

[4] Kokesh has sparked a debate about whether district courts have the authority at all to impose disgorgement because the Supreme Court appeared to question such authority. See Kokesh, 137 S. Ct. at 1642 n.3 (stating that the court offered "[n]o opinion on whether courts possess authority to order disgorgement in SEC proceedings"); Donna M. Nagy, The Statutory Authority for Court-Ordered Disgorgement in SEC Enforcement Actions, 71 S.M.U. L. Rev. 896, 898 (2018) (explaining how, at oral argument for Kokesh, the Justices questioned the authority to order disgorgement and invited challenges to it by disclaiming, in a footnote of the opinion, that it was not deciding the issue). Those arguing there is no authority for disgorgement suggest that, now that disgorgement has been declared a penalty, it can no longer be within a district court's equitable authority because a court cannot impose penalties when acting in equity. See, e.g., Stephen M. Bainbridge, INSIDER TRADING: Kokesh Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases, 56 Wash. U. J.L. & Pol'y 17, 21-22 (2018). Those arguing that there is authority posit that just because disgorgement is a penalty for one purpose does not mean it is a penalty for all purposes, and that Congress has expressly recognized a court's power to order disgorgement. See, e.g., Nagy, supra, at 901-903. In March of 2019, a bill was introduced in the Senate that would resolve this debate by amending 15 U.S.C. § 78u(d) to expressly grant district courts the authority to order disgorgement. Securities Fraud Enforcement and Investor Compensation Act of 2019, S.799, 116th Cong. (2019).

That said, a district court's authority to order disgorgement is not at issue here. Accordingly, the Court assumes, for the purposes of this motion only, that district courts necessarily have the authority to order disgorgement under the equitable authority granted to them by one of the statutes discussed above. See 15 U.S.C. §§ 77t(b), 77v(a), 78aa, 78u(d)(1).

added). Though the language of these statutes does not expressly label such jurisdiction as "civil," the Federal Rules of Civil Procedure have made it clear that suits in equity are considered civil actions. Fed. R. Civ. P. 2 advisory committee's note to 1937 amendment ("Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules."). Because suits in equity are treated as civil actions, the references to suits in equity in sections 77v(a) and 78aa, impliedly indicate a preference for the civil label.

Second, sections 77t(b) and 78u(d)(1) both state that, where someone is engaged in or about to engage in conduct that violates the securities laws, the SEC "may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices." 15 U.S.C. §§ 77t(b), 78u(d)(1). Both statutes also authorize the SEC to "transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings." 15 U.S.C. §§ 77t(b), 78u(d)(1). Though the statutory language authorizing injunctions does not expressly label such authority as "civil," the reference to criminal proceedings as a distinct process controlled by the Attorney General suggests that injunction proceedings are not criminal. This distinction, along with the fact that injunctions are

equitable remedies available in suits in equity (which this Court just noted are civil actions), impliedly indicates a preference for the civil label in sections 77t(b) and 78u(d)(1).

This Court finds that the language of these statutes (15 U.S.C. §§ 77t(b), 77v(a), 78aa, 78u(d)(1)) indicates that Congress preferred the civil label. Because the disgorgement ordered in Janus Spectrum was necessarily authorized by at least one of these statutes, it logically follows that, despite the lack of express statutory authority for disgorgement, in each of these statutes Congress impliedly indicated a preference that disgorgement be civil in nature. As the United States Court of Appeals for the Second Circuit noted, "[t]he disgorgement remedy, which has long been upheld as within the general equity powers granted to the district court, . . . has not been considered a criminal sanction." Palmisano, 135 F.3d at 865-66 (internal citations omitted).

2. Statutory Framework

Defendant was ordered, pursuant to the district court's equitable authority in civil enforcement actions, to disgorge profits.[5] The civil basis upon which Defendant was ordered to make such disgorgement, and the statutory framework which separates

[5] Although the consent judgment in Janus Spectrum does not specifically identify the statutes that authorized disgorgement, the authority to order disgorgement necessarily comes from one of two places: either the statutes granting general equitable authority in SEC enforcement actions (15 U.S.C. § 77v(a) and 15 U.S.C. § 78aa) or the statutes granting courts the authority order injunctions in SEC enforcement actions ((15 U.S.C. § 77t(b) and 15 U.S.C. 78u(d)(1)).

civil and criminal penalties in the securities statutes, also suggest Congress intended SEC disgorgement to be civil in nature. For example, the civil equitable power of district courts can be contrasted with the courts' power to impose criminal sanctions for securities law violations, as expressly authorized by 15 U.S.C § 77x, upon which this criminal indictment rests, and 15 U.S.C. § 78ff, upon which criminal charges under 15 U.S.C. § 78a et seq. may be based. See Ward, 448 U.S. at 249. Though not as closely juxtaposed as the criminal and civil references of the statute in Ward, which authorized a criminal penalty in one paragraph and a civil penalty in the subsequent paragraph of the same section, the criminal penalties in sections 77x and 78ff are still in the same titles and chapters as the equitable authority granted to courts in civil enforcement actions. This juxtaposition between civil enforcement and criminal enforcement provides "added significance" to the fact that disgorgement has been recognized as an equitable remedy within the Court's civil enforcement power. Dyer, 908 F.3d at 1002. Therefore, this Court finds that "the separation of civil and criminal penalties indicate that Congress intended SEC disgorgement to be civil in nature." Dyer, 908 F.3d at 1002.

b. Legislative History

Disgorgement was recognized by courts in the 1970s, prior to the existence of civil monetary penalties, as an equitable remedy in civil enforcement actions. See Kokesh, 137 S. Ct. at 1640

(citing SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77, 91 (S.D.N.Y. 1970)). Though the general equitable power granted to courts by statute (on which courts have relied to authorize disgorgement) does not specifically refer to disgorgement, and hence there is no legislative history on that issue, Congress has recognized, albeit in a separate statutory framework, that disgorgement is a remedy in civil enforcement actions. H.R. Rep. No. 101-616, at 13, 22, 31 (1990) (committee report noting that the Remedies Act authorized "federal courts to order the payment of civil monetary penalties, in addition to disgorgement"); S. Rep. No. 101-337, at 3-4, 8-12, 16, 8 n.7 (1990) (committee report noting that "courts in civil proceedings currently may order disgorgement under their equitable powers") (emphasis added). It was against this backdrop that, twelve years after that, when it enacted the Sarbanes-Oxley Act in 2002, Congress enacted statutory language recognizing that courts order disgorgement. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 308, 116 Stat. 745, 784-85 (2002). That Act, in relevant part, authorized the SEC to create a fund for victims out of court ordered disgorgement and civil penalties and expanded the equitable power of district courts in civil enforcement actions. 15 U.S.C. § 7246(a) (authorizing civil penalties to "become part of a disgorgement fund"); see 15 U.S.C. § 78u(d)(5) ("In any action or proceeding brought or instituted by the Commission under any provision of the securities

laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors."). While the Court has already observed that the four statutes, that could have been relied on for the Janus Spectrum disgorgement, do not expressly authorize disgorgement as a method for a court to exercise its equitable power, Congress has recognized, in enacting other statutes, that courts have the power to order disgorgement in civil enforcement actions.

c. Conclusion for Step One

Step one of the Hudson analysis requires this Court to decide whether the legislature "'indicated either expressly or impliedly a preference for'" the civil or criminal label. Hudson, 522 U.S. at 99 (quoting Ward, 448 U.S. at 248). For the reasons stated above, this Court finds that, with respect to each of the four statutes upon which the Janus Spectrum court could have relied in ordering disgorgement, Congress has impliedly "indicated . . . a preference" for the civil label. Id. (citation and internal quotation marks omitted). Thus, this Court must move to the second step of the Hudson analysis to decide if the "'statutory scheme [is] so punitive either in purpose or effect'" as to 'transform what was clearly intended as a civil remedy into a criminal penalty.'" Hudson, 522 U.S. at 99 (first quoting Ward, 448 U.S. at 248, then quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)) (internal citations omitted).

2. Clearest Proof for Transformation

Below, in the second step, the Court applies the seven factors enumerated in Hudson, as well as other considerations, to determine if the "clearest proof" has been established to transform the civil disgorgement penalty into a criminal penalty that triggers Double Jeopardy. Hudson, 522 U.S. at 100. These factors are "'neither exhaustive nor dispositive.'" Dyer, 908 F.3d at 1002 (quoting Ward, 448 U.S. at 249); see Trogden, 476 F. Supp. 2d at 567 (stating that the test "is not exhaustive and should be applied flexibly"). Only the "clearest proof" will sufficiently "override legislative intent and transform what has been denominated as a civil remedy into a criminal penalty." Hudson, 522 U.S. at 100 (quoting Ward, 448 U.S. at 249) (internal quotation marks omitted).

a. Affirmative Disability or Restraint

First, the Court looks to "whether the sanction involves an affirmative disability or restraint." Id. at 99 (internal quotation marks omitted). The focus of this factor is whether the penalty approaches "the infamous punishment of imprisonment." Id. at 104 (internal quotations omitted). Monetary penalties, such as the disgorgement imposed on Defendant in Janus Spectrum, do not typically constitute an affirmative disability or restraint. Hudson, 522 U.S. at 104; Simpson v. Bouker, 249 F.3d 1204, 1213 (10th Cir. 2001). Although this Court recognizes that there can be some substantial restrictions on an individual's life when their

financial means are reduced (especially in a case like this where the sum of money is large), disgorgement is intended to be limited because it is only meant "to force the defendant into giving up unjust enrichment he received as a result of his illegal activities." SEC v. Gotchey, No. 91-1855, 1992 U.S. App. LEXIS 33647, at *7 (4th Cir. Dec. 28, 1992). Accordingly, evaluation of this factor weighs in favor of the Government because disgorgement does not amount to a sufficient "affirmative disability or restraint" so as to transform an otherwise civil disgorgement penalty into a criminal punishment.

b. Historically Regarded as Punishment

Second, the Court considers whether disgorgement has, historically, been viewed as a criminal punishment. Monetary penalties have not, historically, been viewed as criminal punishment, as "'the payment of fixed or variable sums of money [is a] sanction which has been recognized as enforceable by civil proceedings since the original revenue law of 1789.'" Hudson, 522 U.S. at 104 (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938)) (alteration in original) (emphasis added). Prior to Kokesh, courts in multiple circuits specifically held that disgorgement was not a criminal punishment for Double Jeopardy purposes. See, e.g., United States v. Melvin, 918 F.3d 1296, 1301 (11th Cir. 2017); Van Waeyenberghe, 481 F.3d at 958-59; United States v. Perry, 152 F.3d 900, 904 (8th Cir. 1998); Palmisano, 135

F.3d at 865-66; United States v. Gartner, 93 F.3d 633, 635 (9th Cir. 1996); Bilzerian, 29 F.3d at 696; SEC v. Resnick, 604 F. Supp. 2d 773, 784 (D. Md. 2009). Moreover, in 1998, the Department of Justice issued an opinion, analyzing such case law and concluding that imposing SEC disgorgement and criminal punishment for the same conduct did not violate the Double Jeopardy Clause. Application of the Double Jeopardy Clause to Disgorgement Orders under the Federal Trade Commission Act, 22 Op. O.L.C. 56, 59-60 (1998). Following Kokesh, only a few courts have mentioned disgorgement in the Double Jeopardy context, and, as of the date of this Opinion and Order, the United States Court of Appeals for the Sixth Circuit appears to be the only court to have analyzed in depth whether disgorgement is now a criminal punishment. Dyer, 908 F.3d at 1003-04.[6] In its well-reasoned opinion, the Sixth Circuit found that Kokesh did not modify the years of precedent finding that disgorgement is not a criminal punishment. Id.

Like the defendant in Dyer, the Defendant here argues that Kokesh changes the historical view because disgorgement was found to be a punishment, and therefore a "penalty," for purposes of the use of that word in the statute of limitations at issue. Id. While Defendant is correct that disgorgement may now be regarded

[6] Dyer filed a petition for writ of certiorari with the Supreme Court of the United States, but the Supreme Court denied certiorari on April 22, 2019. Dyer, 908 F.3d 995, cert. denied, 587 U.S. __ (April 22, 2019) (No. 18-8436) (order list available at https://www.supremecourt.gov/orders/courtorders/042219zor_9o1b.pdf)

as a type of punishment, for at least certain purposes, Kokesh did not make disgorgement a criminal punishment. Kokesh, 137 S. Ct. at 1643-44. The Supreme Court expressly limited its holding in Kokesh when it stated that "[t]he sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period." Id. at 1642 n.3 (emphasis added). Defendant's motion asks this Court to reach beyond the express limitations of Kokesh and hold that it overturned years of case law declaring that disgorgement is not a punishment for criminal Double Jeopardy purposes. Accordingly, because Kokesh was expressly limited to the application of 28 U.S.C. § 2462, it did not change the historical view of disgorgement and declare disgorgement to be a criminal punishment. Thus, this factor weighs more in favor of the Government.

c. Scienter

Third, this Court must decide whether disgorgement only applies upon a finding of scienter; such a finding would make it more likely that the penalty is criminal in nature. Defendant argues that the scienter element is satisfied because the substantive offenses underlying the civil penalties required a finding of scienter.

Although there is no express statutory authority for disgorgement, the authority to order disgorgement necessarily comes from one of two places: either the statutes granting general

equitable authority in SEC enforcement actions (15 U.S.C. § 77v(a) and 15 U.S.C. § 78aa) or the statutes granting courts the authority to order injunctions in SEC enforcement actions ((15 U.S.C. § 77t(b) and 15 U.S.C. 78u(d)(1)). Therefore, the Court looks to whether these statutes that authorize disgorgement as an equitable remedy require scienter. See 15 U.S.C. §§ 77t(b), 77v(a), 78aa, 78u(d)(1). The Supreme Court has found that "nothing on the face of [sections 77t(b) and 78u(d)(1)] purports to impose an independent requirement of scienter. And there is nothing in the legislative history of either provision to suggest a contrary legislative intent." Aaron v. SEC, 446 U.S. 680, 701 (1980). Similarly, nothing on the face of sections 77v(a) and 78aa requires a finding of scienter for the Court to exercise its equitable authority. 15 U.S.C. §§ 77v(a), 78aa.

As the statutes do not require a finding of scienter on their face, courts look to whether the substantive statutes and regulations, that formed the basis for the violations, require a finding of scienter. Aaron, 446 U.S. at 689; Dyer, 908 F.3d at 1003; Palmisano, 135 F.3d at 866. This makes sense because, if a penalty can only be imposed upon a violation of a separate substantive provision and that substantive provision requires scienter, then it logically follows that the penalty only applies on a finding of scienter. Dyer, 908 F.3d at 1003; Palmisano, 135 F.3d at 866.

Here, the amended complaint in Janus Spectrum alleged that Defendant violated the following substantive provisions: 15 U.S.C. §§ 77q(a), 77e(a), 77e(c), 78j(a), 78o(a)(1) and 17 C.F.R. § 240.10b-5.[7] Amended Complaint, Janus Spectrum, 2018 U.S. Dist. LEXIS 21709 (No. CV-15-609). Only some of these substantive provisions require a finding of scienter. Aaron, 446 U.S. at 697 (finding that § 77q(a)(1) required scienter but §§ 77q(a)(2) and 77q(a)(3) did not); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 187 (1976) (holding that § 78j(b) and 17 C.F.R. § 240.10b-5 required a finding of scienter). The other substantive provisions do not require scienter to find a violation. Sec. & Exch. Com. v. Nat'l Exec. Planners, Ltd., 503 F. Supp. 1066, 1072 (M.D.N.C. 1980) (finding that scienter was not required to find violations under §§ 77e and 78o(a)(1)); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976) (holding that scienter is not a necessary element to find a violation of 78o(a)(1)). Because it appears from the Janus Spectrum consent judgment that disgorgement was imposed on Defendant for violations of the substantive provisions that require scienter as well as those that do not, the Court

[7] It appears that Defendant's disgorgement was imposed for violations of all of the statutes named in the amended complaint. Amended Complaint, Janus Spectrum, 2018 U.S. Dist. LEXIS 21709 (No. CV-15-609). Defendant did not admit or deny such alleged violations, but he agreed that the allegations may be accepted as true for the limited purposes of the civil consent judgment in the Janus Spectrum case and the resulting penalties only. Id.; cf. SEC v. Metter, 706 F. App'x 699, 702 (2d Cir. 2017) (explaining how a defendant who entered into a consent judgment with the SEC, which was similar to the one Defendant agreed to in the case before this Court, surrendered his right to contest factual allegations in the complaint on a subsequent motion).

cannot find that the disgorgement judgment at issues applies only on a finding of scienter. Cf. Melvin, 918 F.3d at 1300 (holding that "none of the penalties 'comes into play only on a finding of scienter'" because "[t]he SEC may impose a monetary penalty against a person whom the SEC determines has merely 'violated' the Exchange Act" thus making the disgorgement more likely civil in nature). Therefore, the Court finds that this factor favors the Government because it is less likely that disgorgement may be viewed as criminally punitive without a requirement of scienter.

d. Traditional Aims of Punishment

Fourth, the Court considers whether the disgorgement ordered in the prior civil enforcement proceeding "promote[s] the traditional aims of punishment - retribution and deterrence." Hudson, 522 U.S. at 99. To argue that this factor now weighs in his favor, Defendant relies on the Supreme Court's recent ruling in Kokesh, which held that "SEC disgorgement is imposed for punitive purposes" because its "'primary purpose . . . is to deter violations of securities laws by depriving violators of their ill-gotten gains." Kokesh, 137 S. Ct. at 1643 (emphasis added). According to the Supreme Court, disgorgement is not imposed to compensate anyone, but "is imposed as a consequence of violating a public law and . . . is intended to deter." Id. at 1644 (emphasis added). Thus, Defendant is correct that disgorgement does serve

the "traditional aims of punishment" and that this factor weighs in his favor.

However, Kokesh does not completely alter the prior Double Jeopardy analysis of this factor because, before Kokesh, multiple courts recognized that disgorgement served some deterrent purpose yet still found that disgorgement was not a criminal punishment. See, e.g., Palmisano, 135 F.3d at 866; Gartner, 93 F.3d at 635. Nevertheless, unlike the Double Jeopardy cases just referenced, Kokesh declared that deterrence is the primary purpose of disgorgement. Kokesh, 137 S. Ct. at 1643. Therefore, Defendant is correct in asserting that Kokesh somewhat altered the analysis of this factor because Kokesh held that disgorgement primarily serves to promote deterrence. In light of this recognition in Kokesh, the Court finds that this factor now weighs more in Defendant's favor than it did under the case law decided prior to Kokesh.

e. Applies to Criminal Conduct

Fifth, the Court looks to whether the conduct for which the civil penalties were imposed may also be punished criminally because, if it can, it makes it more likely that the civil penalty is intended to punish the criminal conduct. Although the fact that Congress can create both criminal and civil penalties for the same conduct alone is insufficient to transform civil monetary penalties into criminal penalties, if the same conduct can justify the imposition of both a criminal penalty and a civil penalty, the

penalty denominated civil must be looked at more closely to determine if it is intended as criminal. See Hudson, 522 U.S. at 105 (citing United States v. Ursery, 518 U.S. 267, 292 (1996)). Here, disgorgement was imposed for violations of the substantive offenses under 15 U.S.C. §§ 77q(a), 77e(a), 77e(c), 78j(a), 78o(a)(1) and 17 C.F.R. § 240.10b-5, which are also punishable criminally under § 77x (for violations of 15 U.S.C. § 77a et seq.) or § 78ff (for violations under 15 U.S.C. § 78a et seq.).[8] When combined with other Hudson factors, the fact that the securities law violations, for which the Janus Spectrum court ordered disgorgement, may also be punished criminally can show that disgorgement is intended as a criminal punishment as well. Hudson, 522 U.S. at 105. Therefore, this factor slightly favors Defendant because it makes it more likely that the prior penalties imposed on him are criminal.

f. Alternative Purposes

Sixth, the Court asks whether there are alternative purposes for disgorgement in order to determine whether "the remedies have a clear rational purpose other than punishment." Palmisano, 135 F.3d at 866. If there are no purposes for disgorgement other than punishment, it is more likely the punishment is "so punitive in . . . purpose" that it qualifies as a criminal punishment. Hudson,

[8] The only securities violations alleged in the instant criminal action are violations of 15 U.S.C. §§ 77e and 77q and 18 U.S.C. § 371, all of which are punishable under § 77x.

522 U.S. at 99. If disgorgement may be ordered to serve purposes other than punishment, then it is less likely that the disgorgement was only ordered as a criminal punishment. While Kokesh explained that the primary purpose of disgorgement is punishment, it also acknowledged that there are other purposes for disgorgement. Kokesh, 137 S. Ct. at 1643, 1645 (recognizing that disgorgement can be both remedial and punitive). As the Dyer court recognized, "there are 'clear rational purpose[s]' for disgorgement other than punishment." Dyer, 908 F.3d at 1003 (quoting Palmisano, 135 F.3d at 866) (alterations in original). These non-punitive purposes include "ensuring that defendants do not profit from their illegal acts, 'encouraging investor confidence, increasing the efficiency of financial markets, and promoting stability of the securities industry.'" Id. (quoting Palmisano, 135 F.3d at 866); accord Gotchey, 1992 U.S. App. LEXIS 33647, at *7. Therefore, because disgorgement can be imposed for purposes other than punishment, it is more likely that the disgorgement imposed on Defendant is not so punitive that it was meant to punish him criminally. See Palmisano, 135 F.3d at 866. Accordingly, this factor favors the Government.

g. Excessive in Relation to Alternative Purposes

Seventh, the Court evaluates whether disgorgement is excessive in relation to the alternative purposes noted in the previous factor because disproportionate penalties are more

punitive and, thus, more likely criminal in nature. Disgorgement is meant to be limited to the amount of illegal profits gained by a defendant. See Gotchey, 1992 U.S. App. LEXIS 33647, at *7. Such limitation makes it less likely that disgorgement "will be excessive in relation to Congress's nonpunitive goals." Palmisano, 135 F.3d at 866. Therefore, this factor favors the Government.

h. Additional Considerations

The purpose of analyzing the factors above is to determine whether they generate the "clearest proof" that disgorgement is "'so punitive either in purpose or effect' as to 'transform what was clearly intended as a civil remedy into a criminal penalty.'" Hudson, 522 U.S. at 99 (first quoting Ward, 448 U.S. at 248, then quoting Rex Trailer Co., 350 U.S. at 154) (internal citations omitted) (emphasis added). Based on the conclusions reached above regarding the seven factors in subsections (a) through (g), this case presents a closer call than it would have before Kokesh.[9] However, these factors are not exhaustive. Dyer, 908 F.3d at 1002 (quoting Ward, 448 U.S. at 249); Trogden, 476 F. Supp. 2d at 567.

[9] There are two factors in favor of Defendant ((1) disgorgement serves the traditional aims of punishment and (2) disgorgement applies to criminal conduct), and there are five factors in favor of the Government ((1) there is not an affirmative disability or restraint, (2) disgorgement has not historically been regarded as criminal punishment, (3) disgorgement does not only apply on a finding of scienter, (4) there are alternative purposes to disgorgement, and (5) disgorgement is proportionate to the alternative purposes).

Therefore, the Court takes into account the three additional considerations below to determine whether the "clearest proof" exists to transform disgorgement from civil to criminal.

1. Punitive Nature

Kokesh clearly impacted the analysis of the Hudson factors. Most notably, it shifted the "traditional aims of punishment" factor in Defendant's favor. See supra Part III.C.2.d. However, Defendant's argument asks this Court to find that Kokesh did more than just shift one factor in his favor; Defendant asks the Court to find that Kokesh impacted the Hudson analysis to an extent that it made disgorgement so punitive in nature that disgorgement now qualifies as criminal punishment. The question of whether disgorgement is a criminal punishment for Double Jeopardy purposes, as Defendant asks this Court to decide, "is distinct from (although overlapping with) the question of whether [disgorgement] is a penalty rather than a remedy," as the Kokesh Court decided. Saad v. SEC, 873 F.3d 297, 305 (D.C. Cir. 2017) (Kavanaugh, J. concurring) (emphasis added). There is overlap in these questions because both the issue in Kokesh and the issue presented to this Court depend on the punitive nature of disgorgement. See Kokesh, 137 S. Ct. at 1643-44. However, they are distinct issues because they deal with different types of punishments. Kokesh only analyzed whether disgorgement was punitive enough to qualify as a civil penalty for purposes of the

statute of limitations provision at issue there, but the Double Jeopardy analysis asks whether disgorgement is punitive enough to be a criminal punishment.

That distinction is important to the analysis here. There are numerous civil penalties that are punitive but not criminal for Double Jeopardy purposes. See, e.g., Hudson, 522 U.S. at 102 (recognizing that, "even though all civil penalties have some deterrent effect," the punitive nature does not make them criminal punishment); Traficanti v. United States, 227 F.3d 170, 174, 177 (4th Cir. 2000) (finding that a punishment for violating the Food Stamp Act did not constitute a "criminal sanction"); Trogden, 476 F. Supp. 2d at 571 (holding that nonjudicial punishment by the United States Navy did not amount to criminal punishment); Hough v. Mozingo, No. 1:04CV609, 2005 U.S. Dist. LEXIS 42430, at *30-31 (M.D.N.C. Apr. 29, 2005), report and recommendation adopted by Hough v. Monzingo, No. 1:04CV609, 2005 U.S. Dist. LEXIS 42431 (M.D.N.C. Sept. 12, 2005) (holding that a tax imposed on individuals who possessed illegal substances was punitive because it was intended to deter possession, but it did not qualify as criminal punishment). Such is the case with disgorgement as well. While disgorgement may now be considered civilly punitive in nature after the Kokesh decision, the analysis of the Hudson factors above reveals that Kokesh did not render disgorgement so punitive that it became a criminal punishment. Even after Kokesh, the weight of

the factors still favors a finding that disgorgement is not criminally punitive. See Dyer, 908 F.3d at 1003.

2. Limited Holding of Kokesh

Also crucial to this Court's decision is the explicitly limited nature of Kokesh,[10] which declared disgorgement a penalty only for the purposes of the statute of limitations in 28 U.S.C. § 2462, and explicitly refers to the penalty as civil. Kokesh, 137 S. Ct. at 1639, 1642 n.3. As the Sixth Circuit explained in its detailed analysis in Dyer:

> It is important to recognize what the Court did not say in Kokesh. The Court did not say that SEC civil disgorgement is a criminal punishment. Nor did it say anything about Double Jeopardy. Defendants ask us to read between the lines in the Kokesh opinion. They assert it should be read broadly to mean that every "penalty" is a "punishment," and in turn that every "punishment" necessarily implicates the Double Jeopardy Clause. This is based on the general language from Kokesh defining "penalty" as a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its

[10] The Court notes that the briefing, and oral argument transcript, from Kokesh show that the issue of Double Jeopardy was not expressly before the Court, nor was it something that the Justices addressed during oral argument. See generally, Transcript of Oral Argument, Kokesh, 137 S. Ct. (No. 16-529); Brief of Petitioner, Kokesh, 137 S. Ct. 1635 (No. 16-529); Brief for the Respondent, Kokesh, 137 S. Ct. 1635 (No. 16-529). Additionally, any Double Jeopardy concerns were downplayed by both an amicus brief and comments by counsel early on in oral argument. First, in support of the Petitioner, Kokesh, the Chamber of Commerce of the United States of America filed a brief stating that "civil penalties - the penalties covered by § 2462 - are distinguished from criminal penalties by the fact that they are not 'so punitive' as to be criminal in nature." Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 5, Kokesh, 137 S. Ct. 1635 (No. 16-529) (emphasis added). Second, during oral argument Kokesh's counsel said that "clearly Section 2462 . . . only applies to civil remedies. The word 'civil' is right there in the statute." Transcript of Oral Argument at 24, Kokesh, 137 S. Ct. (No. 16-529). These statements address the issue of whether disgorgement is civil or criminal, effectively eliminating any concerns the Justices may have had about how the outcome of Kokesh would impact Double Jeopardy.

> laws." Id. at 1642 (alteration in original) (quoting Huntington v. Attrill, 146 U.S. 657, 667 (1892)). But even if a civil penalty is a punishment, the Double Jeopardy Clause still allows the successive imposition of some "sanctions that could . . . be described as punishment." Hudson v. United States, 522 U.S. 93, 98-99 (1997) (citation omitted). Rather, only multiple criminal punishments are prohibited. Id. And apart from a single mention of the word "crime," nothing in Kokesh suggests that the Court considered SEC disgorgement to be a criminal punishment. Kokesh, 137 S. Ct. at 1642 (quoting Huntington, 146 U.S. at 667). Therefore, Defendants' broad reading seems improper, especially considering that just four years earlier the Supreme Court analyzed the exact same statute of limitations at issue in Kokesh—28 U.S.C. § 2462—as the "general statute of limitations for civil penalty actions." Gabelli v. SEC, 568 U.S. 442, 444 (2013).

Dyer, 908 F.3d at 1003.

For these reasons, this Court declines to extend the reach of the limited holding in Kokesh to overturn years of case law expressly declaring that disgorgement is civil and, thus, does not trigger Double Jeopardy. See, e.g., Dyer, 908 F.3d at 1003-04; Van Waeyenberghe, 481 F.3d at 958-59; Perry, 152 F.3d at 904; Palmisano, 135 F.3d at 865-66; cf. Application of the Double Jeopardy Clause to Disgorgement Orders under the Federal Trade Commission Act, 22 Op. O.L.C. 56, 59-60 (1998).

3. Waiver

Although the Court declined to deny the motion to dismiss for Double Jeopardy on the basis of the waiver in the consent judgment alone, the Court now factors the waiver into its analysis here because the seven factors from Hudson are not exhaustive. Trogden,

476 F. Supp. 2d at 567. Defendant does not contest that he made his waiver knowingly and voluntarily based on the law at the time that he signed the consent judgment in Janus Spectrum. This suggests that Defendant recognized he did not have a viable claim for Double Jeopardy at the time because criminal punishments and SEC disgorgement were often both imposed for the same conduct without violating Double Jeopardy. Because this Court now finds that Kokesh did not substantially alter the law in existence at the time of Defendant's waiver, his argument that such a claim did not exist at the time is weak because his rights did not substantially change with the Kokesh decision. Therefore, though the waiver is not the only basis for the Court's decision to deny the motion to dismiss, it is a factor that the Court finds to weigh against Defendant. Cf. Van Waeyenberghe, 481 F.3d at 958.

i. Conclusion for Step Two

In step two of the Hudson analysis, the Court must determine whether the civil penalty is actually criminal in nature. Hudson, 522 U.S. at 100. Only the "clearest proof" will sufficiently "override legislative intent and transform what has been denominated as a civil remedy into a criminal penalty." Id. (quoting Ward, 448 U.S. at 249) (internal quotation marks omitted). The seven Hudson factors provide guidance to determine if the "clearest proof" has been established, however they are "'neither exhaustive nor dispositive,'" Dyer, 908 F.3d at 1002 (quoting Ward,

448 U.S. at 249), and they "should be applied flexibly," Trogden, 476 F. Supp. 2d at 567. Synthesizing the factors and additional considerations above, this Court finds that, while Kokesh declared disgorgement a punishment for certain purposes, it did not sufficiently alter the Court's analysis as to whether there exists the clearest proof necessary to "override legislative intent" and transform the civil penalty of disgorgement into a criminal punishment that triggers Double Jeopardy. Hudson, 522 U.S. at 100.

IV. CONCLUSION

For all the reasons stated, the Court finds that the civil penalty imposed in the Janus Spectrum case does not bar pursuit of the instant criminal action against Defendant. Defendant's motion to dismiss is, therefore, **DENIED**. The Clerk is **DIRECTED** to send a copy of this Opinion and Order to all counsel of record.

/s/ MSD
Mark S. Davis
CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
May 8, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA

vs. DOCKET NO. 2:17CR126

DARYL BANK, *et al*

Defendants

NOTICE OF APPEAL

TO: Melissa O'Boyle, Esquire
Assistant U. S. Attorney
Office of the U. S. Attorney
101 W. Main Street, STE 8000
Norfolk, VA 23510

NOTICE IS HEREBY GIVEN that Daryl Bank, Defendant above named, and pursuant to Abney v. United States, 431 U.S. 651 (1977), hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order entered in this action on the 8th day of May, 2019 denying his motion to dismiss for a double jeopardy violation. Defendant also moves the Court to stay the pending criminal trial now set for June 25, 2019 to allow him to prosecute his appeal.

Respectfully submitted,

DARYL BANK
By Counsel

_____/s/_____
James O. Broccoletti, Esquire
VSB# 17869
Counsel for DARYL BANK
ZOBY & BROCCOLETTI, P.C.
6663 Stoney Point South
Norfolk, VA 23502

(757) 466-0750
(757) 466-5026
james@zobybroccoletti.com

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2019, I electronically filed the foregoing Notice Of Appeal with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Elizabeth M. Yusi, Esquire
Assistant U. S. Attorney
Office of the U. S. Attorney
World Trade Center, Suite 8000
101 W. Main Street
Norfolk, VA 23510
Elizabeth.yusi@usdoj.gov

Melissa E. O'Boyle, Esquire
Assistant U. S. Attorney
Office of the U. S. Attorney
World Trade Center, Suite 8000
101 W. Main Street
Norfolk, VA 23510
Melissa.oboyle@usdoj.gov

Andrew Bosse
Assistant U. S. Attorney
Office of the U. S. Attorney
World Trade Center, Suite 8000
101 W. Main Street
Norfolk, VA 23510
Andrew.bosse@usdoj.gov

_____/s/_____
James O. Broccoletti, Esquire
VSB# 17869
Counsel for DARYL BANK
ZOBY & BROCCOLETTI, P.C.
6663 Stoney Point South
Norfolk, VA 23502
(757) 466-0750
(757) 466-5026

james@zobybroccoletti.com