

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 U.S. SECURITIES AND EXCHANGE)
5 COMMISSION,)

6 v.)
7)

8 Plaintiff,)

9 JOHN J. BRAVATA, RICHARD J.)
10 TRABULSY, ANTONIO BRAVATA,)
11 BBC EQUITIES, LLC AND)
12 BRAVATA FINANCIAL GROUP,)
13 LLC)

CIVIL ACTION NO.: 2:09-cv-12950-
DML-VMM

14 Defendants,)

15 and)

16 SHARI A. BRAVATA,)

17 Relief Defendant.)
18)
19)

20 **BRAVATA DEFENDANTS’ PROPOSED FINDINGS OF**
21 **FACT AND PROPOSED CONCLUSIONS OF LAW IN**
22 **OPPOSITION TO THE PLAINTIFF’S MOTION FOR A**
23 **CONTINUATION OF PRELIMINARY INJUNCTIVE RELIEF**¹

24 **I. Bravata Defendants’ Proposed Conclusions of Law**²

25
26 ¹ Glossary of Terms: “BBC” and “BFG” refer to BBC Equities, LLC and Bravata Financial Group, LLC,
27 respectively. “Bravata” refers to John J. Bravata. “Bravata Defendants” refers to all three individual
28 Bravata Defendants. “OFIR” refers to Office of Financial and Insurance Regulation – State of Michigan.
29 Some references to witnesses that testified at the evidentiary hearing (“Hearing”) may be referred to by
30 surname only for ease of review, with no disrespect intended.

31 ² Citations to the certified record of the evidentiary hearings conducted in this case are referred to as H.
32 Tr.:____:____, which refers to the hearing transcript, page number and line numbers supporting the

1 requirements or exceptions from registration, in her capacity as an accountant with the
2 SEC. (H. Tr.: 219:24-25 and 220:1-2).

3 9. Mrs. Aguilar's role or assignment in this case for the SEC was to review
4 documents, make summaries, review bank records and participate in interviews. (H.
5 Tr.: 220:8-13 and 156:10-15).

6 10. Aguilar testified only that her source of documents to review for her
7 examination of BBC came from SEC files, banks, BBC files, attorneys, OFIR, car
8 dealerships, and jewelry stores. (H. Tr.: 220:14-23).

9 11. Aguilar indicated that BBC went out of its way to cooperate with the SEC,
10 even arranging a meeting with the SEC enforcement staff, flying to Chicago, Illinois and
11 participating in meetings with the SEC--providing the Staff with all information
12 requested by the Staff on a timely cooperative spirit. (H. Tr.: 244:21-25 and 245:1-7).

13 12. Aguilar attended meetings in Chicago, Illinois between lawyers from
14 Butzel Long, LLP, legal counsel for BBC and SEC staff attorneys, Hanauer and Polish.
15 Aguilar recalls receiving a power point presentation prepared by and provided by
16 Butzel Long during the Chicago, Illinois meeting. (H. Tr.: 242:25; 243:1-2; Hearing
17 Exhibit 107).

18 13. Aguilar had access to "virtually the entire universe of documents"
19 accumulated in the SEC investigation. (H. Tr.: 220:24-25; 221:1-2; 156:16-24). In that
20 regard, Aguilar admitted to reviewing over 16 boxes of information. (H. Tr.: 157:18-25).

21 14. Aguilar, who referred to BBC as a Ponzi Scheme during her testimony was
22 asked if she knew what a rescission offer was and she had no idea. (H. Tr.: 221:14-15).

23 15. Aguilar admitted to constructing all of the financial spread sheets and
24 documents used by the SEC in the exhibits filed with the Court in support of the SEC's
25 request for ex-parte relief and for the SEC at the hearing. (H. Tr.: 221:16-18. She also
26 admitted that the sole source of the data from which her financial summaries and
27 exhibits were prepared came from her review of monthly bank statements only. (H. Tr.:
28 221:19-23).

29 16. Aguilar, when asked if she ever reviewed the Financial Quick books of
30 BBC prior to her testimony responded, "No." (H. Tr.: 222:7-11).

1 17. So, in fact Aguilar of the SEC reached all of her conclusions without ever
2 looking at the financial books and records of the Company. (H. Tr.: 222:18-20).

3 18. As a senior accountant for the SEC, working on over 50 different cases,
4 many of which included allegations arising from Ponzi Schemes, Mrs. Aguilar was
5 unfamiliar with and never used Quick Books. (H. Tr.: 222:21-22).

6 19. Aguilar has reviewed all of Defendants' bank records on a month-by-
7 month basis and prepared summary spread sheets in Excel. (H. Tr.:159:2-19 and Exhibit
8 14). Exhibit 14 reflects no analysis other than a summary of Defendants monthly bank
9 transactions on Excel spread sheets. (H. Tr.:159:2-19).

10 20. Upon inquiry as to what her favorite accounting program was, Aguilar
11 stated that it was "Excel spread sheets. That's all I work with. I'm sorry." (H. Tr.:
12 222:25 and 223:1-2).

13 21. Aguilar participated in conversations with OFIR the State of Michigan
14 regulator and directly with Elizabeth Borden of OFIR concerning the status of the OFIR
15 inquiry of BBC. (H. Tr.: 223:7-19). But, Aguilar stated that she never became aware of
16 any settlement offer being negotiated between BBC and OFIR that would have resolved
17 the complaint brought by OFIR against BBC before the SEC's Complaint was filed. (H.
18 Tr.: 223:24-25; 224:1).

19 22. Aguilar did not interview any employees of BBC or ex-employees that she
20 could remember the names of but when asked about specific names, Aguilar could only
21 name a "Friend" as a person she interviewed. (H. Tr.: 225:7-10). However, she also
22 testified that it was her practice to make notes of meetings on the phone or of interviews
23 she participated in. (H. Tr.: 225:11-13).

24 23. Aguilar never interviewed or questioned the chief financial officer of BBC,
25 Melissa Traver before the SEC filed its Complaint or before she gave her Affidavit in
26 support of the SEC's request for ex-pare relief on July 26, 2009. (H. Tr.: 225:20-22).

27 24. Aguilar said that it would not have been helpful to her if in fact she did
28 interview the chief financial officer of BBC before coming to her conclusions. (H. Tr.:
29 226:4-7).

30 25. When asked why, Aguilar admitted to being told to just assimilate bank
31 records and prepare summary sheets in fact not telling the whole story. (H. Tr.:226:7-13)

1
2 26. Aguilar never requested any financial information in the course of her
3 SEC review to clarify anything in preparation of her exhibits that were referred to in her
4 Affidavit or her testimony. (H. Tr.: 225:23-25 and 226:1-2).

5 27. Traver's job responsibility was anything to do with the flow of money in
6 and out of the companies. Traver handled deposits, real-estate, investor funds,
7 disbursements and liquidations payroll, coordinating with outside CPA firms to finish
8 tax returns, financial statements, K-1 filings, anything to do with finance. (H.Tr.:395:5-
15).

9 28. Traver was involved in top management meetings and executive
10 meetings. BBC used an executive board structure which consisted of heads of each
11 department which would meet weekly to discuss financial and all matters relating to
12 the operation of all companies' divisions. (H. Tr.: 396:18-25 and 397:1-6).

13 29. When Aguilar prepared her summary sheets for her testimony, she
14 admitted in her testimony that there were no other internal financial reports or financial
15 statements regarding BBC operations that she used. (H. Tr.: 226:14-22). She testified
16 that she came to her conclusions of a Ponzi Scheme by her review of the bank records
17 only. (H. Tr.: 403:1-6).

18 30. It is clear that Traver was never interviewed by the Aguilar or any
19 member of the SEC Enforcement Staff before the SEC's Complaint was filed –
20 notwithstanding the SEC had investigated the Defendants for almost six months.
21 Aguilar therefore never had the benefit of the entire set of financial records maintained
22 by Traver for all operations of BBC and BFG before the SEC sought emergency, ex-parte
23 relief from the Court. (H. Tr.: 402:11-14).

24 31. The only financial analysis conducted by Aguilar was to assimilate bank
25 records, organize them, prepare summary spread sheets depicting in summary fashion
26 thousand of transaction in one or more accounts. (H. Tr.: 226:8-13).

27 32. Traver established that she has been trained as a public accountant,
28 trained in accounting practices and software programs generally used by business of
29 the size of BBC and BFG; she stated that it is impossible to examine a company's
30 operations merely from examining monthly banking records. Traver established that a
31 lot of internal transactions occur that are never seen coming and going through bank
32 accounts. (H. Tr.: 403:7-11).

1 33. Aguilar testified that her job was to review the offering materials that
2 were published by BBC (H. Tr.: 237:5-9), but when asked if she reviewed the February
3 2007 and April 2008 private placement memoranda for BBC ("PPM"), she said that she
4 did not review them very much (H. Tr.: 237:19-21, although she admits having them
5 available for her review (H. Tr.: 237:22-23).

6 34. Aguilar was asked if the PPM's contained important disclosures for the
7 uses of the proceeds in which BBC could use with its offering and she admitted that
8 they did include such disclosures. (H. Tr.: 237:24-25) and (H. Tr.: 238:1-3). When asked if
9 she was familiar with the sections of the PPM that pertained to disclosures to the
10 investors on the use of proceeds, Aguilar said, "NO." (H. Tr.: 238:4-5).

11 35. Aguilar admitted that she did not review the PPMs for disclosures on the
12 use of proceeds, she did not review the PPMs for the disclosure of risk factors and she
13 didn't review the PPMs for any information on salaries to be paid to BBC management.
14 (H. Tr.: 238:1-10). When Aguilar was asked if she reviewed disclosures made in the
15 PPMs that made it clear that offering proceeds could be used to pay distributions to
16 earlier investors she testified "No." (H. Tr.: 238:12-15).

17 36. Aguilar was asked on cross-examination, "What did you review" and she
18 responded, "I just glanced at it" [referring to the PPMs] (H. Tr.: 238:16-19. She admitted
19 having only a passing familiarity with the PPMs and nothing more than that. (H. Tr.:
20 238:20-24).

21 37. When Aguilar was asked on cross-examination if the offering of BBC was
22 limited to accredited investors, Aguilar replied, "I—I don't have an answer to that. I
23 don't know." (H. Tr.: 262:10-12). Aguilar also admitted that in the context of an offering
24 of securities being exempt from registration, that is an important piece of information
25 she should know. (H. Tr.: 262:20-23).

26 38. Aguilar testified that it was BBC's legal counsel that produced the
27 information to the SEC during their investigation prior to the SEC filing suit and
28 requesting ex-parte orders to shut down the companies. (H. Tr.: 201:23-25).

29 39. The documents and other information that OFIR obtained in its 9-month
30 investigation of BBC was information that was shared and turned over to the SEC,
31 which establishes that the SEC had actual knowledge and information that was
32 purposefully not disclosed to the Court when the SEC sought ex-parte orders from the
Court on July 26-27, 2009. (H. Tr.: 201:17-25).

The Securities Regulation Law Firm

3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

1 40. Aguilar testified that it was her understanding that the SEC requested "all
2 documents that had been produced by BBC," by OFIR, be turned over to the SEC. (H.
3 Tr.:204:19-22) and that OFIR did in fact produce all of the documents in their possession
4 to the SEC prior to the SEC filing this action and seeking ex-parte orders from the
5 Court. (H. Tr.: 204:23-25).

6 41. Melissa Traver, chief financial officer of BBC and BFG was never
7 interviewed prior to the SEC filings its Complaint or seeking ex-parte orders from the
8 Court. (H. Tr.: 453:18-19).

9 42. In contrast to the testimony of Mrs. Aguilar, Mrs. Traver, was asked in
10 here capacity as a certified public accountant, if she was familiar with the phrase "Ponzi
11 Scheme" and she indicated that she was. (H. Tr.: 414:22-25). She testified that there was
12 in fact a real business being run and built and that in her capacity as chief financial
13 officer she saw the company grow and expand. (H. Tr.: 417:15-24).

14 43. Traver said that new proceeds that were derived from new investors were
15 in fact used to help pay distributions to older investors as well as to run and maintain
16 the infrastructure of the company. (H. Tr.: 418:1-4). Traver testified that the PPMs
17 allowed for and disclosed that payments would be used in this manner as the company
18 grew from a startup company to a profitable entity. (H. Tr.: 417:8-11).

19 44. Traver pointed out in her testimony that the legal disclosures and her
20 understanding of the PPM allowed the payment of distributions to prior investors and
21 the PPMs included disclosures of the allowable use of proceeds. (H. Tr.: 418:8-11).
22 Traver also stated that in maintaining the corporate books of BBC and BFG, no money
23 was ever spent that was not allowed by the PPM or legal counsel for the companies.

24 45. Upon inquiry from the Court, where the Court asked Traver "From your
25 reading of the private placement memorandum, did the private placement
26 memorandum authorize the company to pay initial investors from the proceeds
27 received from subsequent investors," Travers responded, "Yes it did." (H. Tr.: 418:24-25
28 and 419:1-3).

29 46. This case involves the question of whether it is lawful to use investors'
30 funds from newer investors to make distributions to earlier investors if that use of funds
31 is fully disclosed in the PPM, assuming the company is conducting a real operating
32 business. (H. Tr.: 419:6-17).

1 47. The PPMs do disclose in the “use of proceeds,” that there is the possibility
2 that new investors may in fact help pay distributions to old investors, it says it will, and
3 has. (Exhibit 38, Pg. 18 ¶1).

4 48. BBC disclosed to its investors that given the early stage of the company’s
5 development and the nature of many of its real estate investment to date, the Company
6 has not derived sufficient income from its investments for such quarterly distribution
7 payments, and all quarterly payments of the preferred distribution have been paid from
8 the proceeds received from other investors. (Exhibit 38, Pg. 24 – “4.18 No Assurance of
Distributions.”)

9 49. BBC disclosed to investors that there was a risk that earlier investors will
10 have received distributions from proceeds of sales of BBC shares to later investors and
11 that the later investors may not receive distributions. (Exhibit 38, Pg. 24 – “4.18 No
12 Assurance of Distributions.”)

13 50. BBC disclosed to its investors that there was no guaranty that the
14 “Preferred Distribution” or any redemption amounts will be paid when due. (Exhibit
15 38, Pg. 25).

16 51. BBC disclosed to its investors that “given the early stage of the Company’s
17 development, the start-up and operating expenses incurred and other factors, the
18 Company would have insufficient resources to fully redeem all currently outstanding
19 shares” in the case of liquidation. (Exhibit 38, Pg. 25).

20 52. BBC disclosed to its investors, “[T]o the extent the Company lacks
21 sufficient income from its real estate investments, proceeds of this offering will be used
22 to pay some or all of the Preferred Distribution of not only the Class D shares but the
23 earlier investors of Class C shares. (Exhibit 38, Pg. 10 – “Use of Proceeds”).

24 53. BBC disclosed to its investors that no assurances can be given that
25 acquisitions of real estate or real estate related investments made with the proceeds of
26 its offering would produce a return on investment or generate any operating cash flow.
(Exhibit 38, Pg.17--4.3 “Blind Pool”).

27 54. BBC disclosed to its investors that the Company would utilize investor
28 funds from the “this” offering to pay the Preferred Distributions or redemption
29 amounts to the holders of interests until the Company showed a profit from its
30 operations. (Exhibit 38, Pg. 17--4.3 “Blind Pool”).

1 55. BBC disclosed to its investors that “there is a significant likelihood that
2 investors may experience an indeterminate delay in realizing any return on their
3 investments or that proceeds of this offering will be used to pay some or all of the
4 Preferred Distributions or redemption amounts to purchasers of interests until the
5 Company realizes sufficient income from investments. (Exhibit 38, Pg. 17--4.3 “Blind
6 Pool”).

7 56. BBC disclosed to its investors that, “There can be no assurances that the
8 Mangers will succeed in indentifying real estate investment opportunities which they
9 believe are suitable for the Company, that the Company will be successful in
10 negotiating the purchase of real estate so identified, that the Company will be successful
11 in obtaining purchase money financing on favorable terms or that the real estate, once
12 acquired, will prove profitable or successful. (Exhibit 38, Pg. 19--4.3 “Blind Pool”).

13 57. BBC disclosed to its investors that the Managers may elect to pay all or a
14 portion of Preferred Distributions and/or redemption amounts out of the Company’s
15 available assets, which may include the proceeds of “this” offering. (Exhibit 38, Pg. 19--
16 4.7 “Risks of Ancillary Investments”).

17 58. BBC disclosed to its investors that “To date, proceeds of the initial private
18 placements of shares have been used to pay all Preferred Distributions to the investors.
19 (Exhibit 38, Pg. 19--4.7 “Risks of Ancillary Investments”).

20 59. BBC disclosed to its investors that until the Company properties
21 generated sufficient cash flow that investor funds could be used to pay distributions.
22 (Exhibit 38, Pg. 19--4.7 “Risks of Ancillary Investments”).

23 60. BBC disclosed to its investors that given the early stage of the Company,
24 the Company had not derived sufficient income from its investments to make quarterly
25 payments or distribution to its investors, that in fact all quarterly payments from new
26 investors were in fact paying the distributions to earlier share classes. (Exhibit 38, Pg.
27 24-- 4.18 “No Assurance of Distributions”).

28 61. BBC disclosed to its investors that the Company had a limited operating
29 history. (Exhibit 38, Pg. 16--4.1 “Operating History”).

30 62. BBC disclosed to its investors that as an early stage company there was a
31 lack of information to assess the investment and since the start of the Company the

1 Company in fact has not yet realized a profit from operations. (Exhibit 38, Pg.16-17--4.1
2 "Operating History").

3 63. K-1 IRS forms were properly prepared and distributed to BBC investors
4 annually. A K-1 form is a document for tax purposes disclosing to each BBC investor
5 any loss or profit on his or her investment on an annual basis. (H. Tr.:452:22-24 and 453:
6 1-6). BBC's Forms K-1 were prepared by its outside accounting firm and mailed to
7 investors (H. Tr.:453:1-5).

8 64. Aguilar testified that there is no mandated accounting protocol or policy
9 that requires an analysis of a bank account to assume that the funds deposited and
10 withdrawn from the account are calculated under a FIFO accounting practice, even
11 though the SEC has used solely a FIFO method of analysis in relation to money
12 deposited in and out of Defendants' bank accounts (H. Tr.:258:2-14.)

13 65. Aguilar admits that the SEC presumes that a FIFO analysis of bank
14 account transactions is the correct methodology to use. (H. Tr.:258:20-23). Aguilar
15 testified when asked about the proper use of the FIFO method of accounting, "[T]hat
16 every time I do an analysis like this, that's the rule that I apply." (H. Tr.:184:5-13).

17 66. The SEC issued a press release on July 29, 2009 praising the joint
18 cooperation of the SEC and OFIR in the BBC investigation (Exhibit 108), but never
19 bothered to disclose the status of the OFIR settlement agreement to the Court when the
20 SEC pleaded for ex-parte, emergency relief from the Court on July 27, 2009.

21 67. Aguilar testified that approximately \$12,516,749 that had been received in
22 BBC offerings was returned to investors in the form of interest payments and for
23 surrenders of principle dollars through liquidations back to investors. (H. Tr.:165:2-21
24 and Exhibit 14-15).

25 68. The SEC's compiled summary of purchases of automobiles, jewelry,
26 vacations, art work and other non-business expenditures shows that the Bravata
27 Defendants paid for their automobiles, jewelry, vacations and art work from personal
28 bank accounts at Comerica Bank and Charles Schwab. (H. Tr.:187:13-25 and Exhibit
29 26).

30 69. Other exhibits created by Aguilar consist of nothing more than summaries
31 of all income the Bravata Defendants received from various entities derived from bank
32 account statements reviewed by Aguilar. Aguilar's analysis fails to establish that

1 income from sources that are not defendants in this lawsuit or from the Receivership
2 Entities named as defendants is tainted by wrongdoing or fraud. (H. Tr.:178:4-16 and
3 Exhibit 26).

4 **Compensation Received by John J. Bravata**
5 **Fails to Establish Anything Other**
6 **Than he is a High Energy Entrepreneur**

7 70. The SEC disregarded Mr. Bravata's substantial outside income sources in
8 drawing its conclusions that he "plundered" BBC and defrauded investors. Aguilar
9 testified that Bravata did receive income from New York Life and other outside sources
10 during the time the BBC offerings were in place. (H. Tr.:251:12-17 and Exhibit 22).

11 71. Aguilar failed to include on her spread sheet income from Bravata's
12 insurance sales on Exhibit 22. (H. Tr.:251:25; 252:1-6 and Exhibit 22). Aguilar testified
13 that while compiling her Excel spread sheets used as exhibits during the Hearing, she
14 did not compile information on outside income generated by Bravata. (H. Tr.:253:10-
15 12). Bravata's bank accounts were the only information she considered. (H. Tr.:253:3-5).

16 72. Aguilar did not consider it to be material to determine and document
17 Bravata's income generated from sources other than BBC and that she was not trying to
18 determine any income, but was only showing deposits and withdrawals from the
19 Bravata accounts. (H. Tr.:253:13-21).

20 73. Aguilar was only doing what she was told, just assimilate information,
21 create spread sheets from bank records only, her job was not to disclose the whole truth
22 in regards to financial records. (H. Tr.:226:7-13).

23 74. Aguilar testified that she was in fact instructed to focus her summaries
24 such that the data that she made her summary only came from the source of bank
25 statements and other related bank records, only showing the court what they wanted,
26 not the true picture of the facts. Aguilar's response was, "Yes." (H. Tr.:253:22-25)

27 75. Aguilar said she was instructed to focus her exhibits and summaries from
28 data shown on Bravata's bank statements and other related bank records. Aguilar
29 indicated that this sort of analysis only showed what the SEC wanted and not the true
30 picture of all sources of income for Bravata. (H. Tr.:253:22-25 and 254:1).

31 76. The SEC requested and received financial information showing all of
32 Bravata's sources of income, which was available to the SEC prior to the filing of its

1 request for emergency, ex-parte relief and failed to disclose this material information to
2 the Court. (H. Tr.:254:2-9). The SEC Enforcement Staff received all financial information
3 reflecting Bravata's income sources yet failed to provide a full and complete picture of
4 Bravata's income to the Court when seeking emergency, ex-parte relief that including a
5 complete freeze on all of Bravata's assets and sources of income. (H. Tr.:254:9-14).

6 77. The SEC failed to disclose all important and material information to the
7 Court regarding Bravata's sources of income when it sought an emergency, ex-parte
8 asset freeze from the Court, the results of which were to shut down BBC and BFG. (H.
9 Tr.:254:9-14). Bravata did make hundreds of thousands of dollars in insurance sales and
10 outside sources not related to BBC Equities, yet the SEC failed to provide this
11 information in their exhibit summaries and to disclose the information to this Court. (H.
12 Tr.:254:10-14).

13 78. Aguilar saw documentation indicating outside sources of income for
14 Bravata, but it wasn't used to put into the spread sheets provided as evidence to the
15 Court. (H. Tr.:254:15-18). Aguilar testified, "And there were more deposits than this
16 \$60,000 New York Life." (H. Tr.:254:20-21).

17 79. Aguilar testified that Bravata was paid \$348,315 in commissions from
18 New York Life alone. (H. Tr.:255:22-25 and Exhibit 26).

19 80. Aguilar testified that above the \$348, 315 earned by Bravata from New
20 York Life there was another \$205,000 that did not appear to be monies from investors
21 and not from BBC that Bravata earned. (H. Tr.:256:3-9).

22 81. Aguilar testified and agreed that Bravata had in excess of \$687,000 dollars
23 of earned income from outside sources. (H. Tr.:256:13-17, 23-25 and Exhibit 26).

24 82. Traver established in her testimony that BBC never had any employees
25 (H. Tr.:456:10-18; 456:10-11 and that BBC never paid Bravata a salary. (H. Tr.:457:1-5).).
26 Traver also established that BBC Management, Inc., an affiliated company of BBC and
27 BFG, paid Bravata a salary only from January 2008 through February 2009. (H.
28 Tr.:457:6-9).

29 83. BBC never had a payroll. (H. Tr.:457:10-14). Bravata never receiver a salary
30 from BBC until January of 2008 through February of 2009, 12 months out of three years.
31 (H. Tr.:426:21-25).

32 84. BBC's PPM disclosed to investors that commencing January 1, 2008,
Bravata began receiving a salary from BBC Management, Inc.. (Exhibit 38, Pg. 35--11.2

1 “Compensation”). The PPM discloses that salaries and income were being paid to the
2 managers of BBC. (Exhibit 38, Pg. 10 – “Use of Proceeds”).

3 85. BBC disclosed to the investors that that the issuer and its affiliates
4 intended to enter into various agreements and arrangements with Bravata and entities
5 he owned or controlled in exchange for payment of fees. (Exhibit 38, Page 21--4.14
6 “Conflicts of Interest”).

7 86. BBC disclosed to its investors that such fees in exchange for services, in
8 the absence such arrangements, that it was likely that BBC would never the less be
9 required to retain unaffiliated companies to provide the same or similar services for
10 comparable fees. (Exhibit 38, Pg. 22).

11 87. BBC disclosed to its investors that it would pay “finder’s fees” to its
12 managers and other that introduced investors who were interested in purchased BBC
13 shares. (Exhibit 38, Pg. 26--4.22 “Possible Fees or Commissions”).

14 88. BBC disclosed to its investors that offering proceeds would be used to
15 reimburse Bravata (and others) from any expenses incurred on BBC’s behalf. (Exhibit
16 38, Pg.35--11.2 “Compensation”).

17 89. BBC disclosed to its investors that in June 27, 2007, BBC entered into a
18 Management Agreement with BBC Management, Inc. allowing the payment to all
19 employees, including Bravata. (Exhibit 38, Pg. 36 – “Management Agreement”).

20 90. BBC disclosed to its investors that, “[T]he Company agreed to pay and
21 reimburse all wages, salaries, benefits and other compensation approved by
22 management. (Exhibit 38, Pg. 37). BBC disclosed to its investors that, “John Bravata and
23 Richard Trabulsky are officers, directors, and employees of BBC Management, Inc. and
24 each of them receives a salary and other benefits. (Exhibit 38, Pg. 37).

25 91. Contrary to testimony provided by Aguilar, Traver testified that Bravata
26 stopped taking salary from all companies in February of 2009. (H. Tr.:427:7-13).

27 92. Traver testified that it would not make sense for Bravata to voluntarily
28 stop taking salary from BBC Management, Inc. if he was orchestrating a Ponzi Scheme.
29 (H. Tr.:427:7-13).

30 93. Bravata did not take any other salaries from either BBC BFG or BBC
31 Management, Inc. for the remainder of the year 2009. (H. Tr.:427:14-16).

1 94. Traver verified that Bravata made considerable amount of money from
2 other outside companies and compensation paid to him. (H. Tr.:427:17-25. These other
3 companies which generated compensation to Bravata were not affiliated with BBC or
4 BFG. (H. Tr.:426:1-3).

5 95. Traver also established Bravata did not handle money of any of the
6 companies. All checks and money flowed through to the financial department headed
7 by Traver. (H. Tr.:428:25 and 420:1-2). Bravata never initiated any wires or any other
8 kind of electronic transfer of funds from the companies. (H. Tr.:429:3-6) and never wrote
9 himself a check or borrowed money from BBC. (H. Tr.:429:7-10).

10 96. Bravata did not receive any income from any BBC affiliated company
11 except for the month of January in 2009 to the day the SEC filed its Complaint on July
12 26, 2009. (H. Tr.:530:20-25).

13 97. Traver testified that Aguilar erred in her summary exhibits presented to
14 the Court by including all mortgage payments that were paid while BBC held title to
15 the Florida home, as income paid to Bravata. (H. Tr.:531:1-23).

16 98. Bravata did not run the daily operations of BBC, rather a chief executive
17 officer was hired to run the day-to-day operations. (H. Tr.:429:10-21). This officer was
18 hired in April of 2008 turning over the daily operation of BBC to the new chief executive
19 officer. (H. Tr.:429:22-25 and 430:1-4).

20 99. In September 2008, a highly qualified fund manager was hired to run the
21 real estate portfolio. This fund manager was in fact a current/fund manager for the
22 world's largest industrial REIT. He maintained and ran a multi/billion dollar REIT.
23 (H. Tr.:430:8-16). The real estate manager earned \$720,000 per year salary to start and
24 the new chief executive officer for BBC starting salary was around \$300,000 per year.
25 (H. Tr.:430:15-19).

26 100. BBC retained top quality inside legal counsel to maintain compliance for
27 the company. (H. Tr.:430:22-25).

28 101. BBC hired three in house lawyers to grow and maintain the compliance of
29 the operations, along with two legal assistances. (H. Tr.:431:2-8).

30 102. These in-house lawyers also handled most of the real estate related legal
31 work needed in building the real estate portfolio of BBC. The companies expanded their
32 IT Department, Trust Department, and created a real estate advisory team. (H. Tr.:431:9-
13).

1 103. Anticipating the need to address broker dealer and investment advisory
2 compliance, BFG hired a senior compliance officer. (H. Tr.:432:9-10).

3 104. BBC and BBC Management, Inc. would have no reason to register with
4 the SEC, as BBC had no sales agents, and BBC Management, Inc. functioned as an
5 employee leasing company. (H. Tr.:455:5-9).

6 105. Bravata did not unilaterally make the decisions on what property BBC
7 was to buy or not. An advisory board of 6 persons voted unanimously on each
8 proposed real estate investment project. (H. Tr.:431:17-21).

9 **The OFIR Cease and Desist Order**

10
11 106. BBC received a "Cease and Desist Order" from the OFIR department of
12 the State Of Michigan on April 1, 2009. (H. Tr.:434:7-8 and Exhibit 52). The Cease and
13 Desist Order followed from an inquiry conducted of BBC by OFIR that commenced in
14 November, 2008.

15 107. The SEC Enforcement Staff received copies of the Cease and Desist Order
16 and it was produced to Aguilar by OFIR. (H. Tr.:206:16-21 and Exhibit 52). Aguilar
17 identified Exhibit 15 as a list of investors who purchased BBC investments before April
18 1, 2009. (H. Tr.:164:20-23 and Exhibit 15).

19 108. Aguilar indicated in her testimony that she was aware of investors whom
20 invested after the Cease and Desist Order was served on BBC, leaving the faulty
21 impression that somehow non-Michigan based sales constituted a violation of the Cease
22 and Desist Order issued against BBC prohibiting sales of BBC securities within the State
23 of Michigan. (H. Tr.:164:24-25 and 165:1-2).

24 109. Without distinguishing what the Cease and Desist Order actually
25 prohibited, the SEC sought to establish that BBC violated the Cease and Desist Order
26 accepting subscriptions from BBC investors after the April 1, 2009 Cease and Desist
27 Order was served. (H. Tr.:196:13-15 and Exhibit 31).

28 110. Although Aguilar testified that \$4,255,343 was received by BBC after the
29 April 1, 2009 Cease and Desist Order was received. (H. Tr.:196:23-25 and 197:1-2 and
30 Exhibit 31), neither the SEC nor Aguilar made the distinction that only subscriptions
31 tendered by non-Michigan investors were accepted by BBC after April 1, 2009 nor did
32 they make the distinction that the Cease and Desist Order applied only to prospective
investors in the State of Michigan. (H. Tr.:434:15-25).

1 111. The SEC failed to establish that BBC violated the Cease and Desist Order
2 in any way. (H. Tr.:434:11-14).

3 112. In fact, testimony established that Bravata personally instructed all staff of
4 BBC and BFG not to conduct any further offerings. (H. Tr.:439:13-17).

5 113. Upon inquiry by OFIR, no violation of the Cease and Desist Order was
6 apparent since OFIR actively engaged BBC in settlement negotiations that led up to the
7 exchange of settlement letters between OFIR and Butzel Long, LLP (Exhibits 110 and
8 111).

9 114. BBC utilized two independently run trust departments at Pensco Trust
10 and Equity Trust as third party administrators for all BBC qualified investments. (H.
11 Tr.:435:2-7. Aguilar validated the trust arrangement for qualified BBC investments in
12 her testimony as well. (H. Tr.:196:16-22).

13 115. Traver testified that on June 1, 2009, Bravata instructed the companies to
14 cease all offering activities of BBC on a national level even though there was no request
15 to do so by OFIR or the SEC. (H. Tr.:439:13-17).

16 116. Although BBC received a letter from OFIR on July 9, 2009 questioning
17 possible violations of the OFIR Cease and Desist Order, BBC and BFG provided OFIR
18 with evidence that no violations of the Cease and Desist Order had knowingly
19 occurred. (H. Tr.:439:22-25).

20 117. Traver explained that any investor funds received after April 1, 2009 were
21 due to subscription agreements that were already filled out, signed and accepted and if
22 subscriptions were from qualified funds, the transfer was already in process and funds
23 transferred from Pensco or Equity Trust to time to flow through the system. (H.
24 Tr.:501:4-13).

25 118. The SEC claimed otherwise, but Exhibit 79 reflects that BBC received
26 \$517,000 on April 29, 2009, after the OFIR Cease and Desist Order issued from an
27 investor in Michigan. (H. Tr.:502:15-23).

28 119. Traver's testimony, supported by exhibits, reflects that the investor that
29 invested \$517,000 (David Bochniak), signed all subscription documents and made his
30 investment decision before BBC's receipt of the OFIR Cease and Desist Order and that
31 Mr. Bochniak's funds were not received until April 29, 2009. (Exhibit 79-80).

1 120. Aguilar claimed in her testimony that BBC raised money in violation of
2 the OFIR Cease and Desist Order by the State of Michigan, but did not know where the
3 investor, Mr. Salo, lived. (H. Tr.:231:22-25).

4 121. It was established, however, that Mr. Salo was a resident of Ohio, which
5 was no effected by the OFIR Cease and Desist Order. (H. Tr.:232:1-5 and Exhibit 70).

6 122. Aguilar identified Exhibits 67 and 69, which is the investor application
7 and Equity Trust documentation for Mr. Salo, a BBC investor. (H. Tr.:209:2-9 and
8 Exhibit 67; (H. Tr.:210:6-10). Aguilar testified that Mr. Salo invested in June, 2009. (H.
9 Tr.:211:8-10).

10 123. Aguilar was not correct in her assumptions concerning the scope and
11 effect of the OFIR Cease and Desist Order outside of Michigan. (H. Tr.:232:13-25 and
12 235:1). For example, Aguilar examined Exhibit 52 (the Cease and Desist Order) and
13 could not identify where in the order that sales by BBC were unlawful outside of
14 Michigan (H. Tr.:233:1-9 and 233:20-23).

15 124. When questioned on cross-examination, Aguilar admitted that, "Yes, No, I
16 don't know if it prohibits from selling anywhere else." (H. Tr.:234:2-16).

17 125. In mid-June, 2009, Bravata conducted a telephone conference call with
18 over 200 BBC investors fully disclosing to them the investigations being conducted by
19 OFIR and the SEC and the rescission offer which BBC investors would be receiving.
20 This was almost six weeks before the SEC filed suit and shut down the companies. (H.
21 Tr.:574:3-8, Exhibit 143).

22 126. On July 10, 2009 OFIR produced a draft settlement agreement that was
23 intended to resolve all pending matters being investigated by OFIR. (Exhibit 137 and
24 111). After a nine month investigation by OFIR, the proposed settlement agreement did
25 not contain any mention of a Ponzi Scheme and no references to violations of any anti-
26 fraud provisions of the securities laws. (H. Tr.:442:12-14 and Exhibit 137). Integral to the
27 settlement negotiated between OFIR and BBC was the requirement that BBC initiate a
28 rescission offer to certain BBC investors. (H. Tr.:440:6-10).

29 127. BBC's rescission offer was to allow BBC investors to liquidate their BBC
30 investments, or re-affirm their investment in BBC, or elect to convert their BBC
31 investment to a new managed fund called Phoenix Venture Capital, LLC. (H.
32 Tr.:440:10-13). The rescission offer was structured by BBC and Phoenix's outside
securities counsel, Butzel Long, LLP. (H. Tr.:440:6-18 and Exhibit 137-138).

1 128. BBC's rescission offer was to be part and parcel of the terms of the
2 settlement agreement negotiated with OFIR. (H. Tr.:440:20-22).

3 129. OFIR allowed BBC until July 31, 2009 to fund the escrow account that was
4 required by the terms of the proposed settlement agreement. (H. Tr.:441:22-25 and
5 Exhibit 137-138).

6 130. On July 23, 2009 Bravata had completed discussions and negotiations with
7 a Chicago-based broker-dealer firm that agreed to pledge \$40.0 million dollars of life
8 insurance policy assets to BBC as collateral for a letter of credit in that same amount. (H.
9 Tr.:441:8-13). These arrangements were negotiated to purchase a substantial interest in
10 the Chicago-based broker-dealer, fund the rescission offer expected by OFIR and give
the companies working capital to move forward. (H. Tr.:441:8-18).

11 131. In addition, BBC was negotiating a closing on the \$40.0 million dollar
12 letter of credit and a purchase with Huntington Bank of a separate \$75.0 million dollar
13 letter of credit for BBC before the SEC filed its Complaint and sought emergency, ex-
14 parte relief that closed both companies. (H. Tr.:443:3-11).

15 132. It is undisputed that the SEC and OFIR had all of this information at the
16 time it filed its Complaint on July 26, 2009. (H. Tr.:441:19-20).

17 133. The SEC was fully aware of the impending settlement agreement
18 negotiated with OFIR. (H. Tr.:440:22-25; 441:1-3).

19 134. Even though the SEC had all of the information relative to the OFIR
20 investigation, the proposed settlement agreement with OFIR and the rescission offer
21 that was made a part of the OFIR settlement agreement, the SEC filed suit on July 26,
22 2009 and requested the Court to grant emergency, ex-parte relief that including shutting
23 down both companies and appointing a receiver from Chicago to take control of over
100 real estate properties in Southeast Michigan. (H. Tr.:442:2-5).

24 135. Traver, an experienced certified public accountant, was shocked by
25 allegation by the SEC that BBC was operated as a Ponzi Scheme and only heard for the
26 first time of such allegations when she became aware of the emergency orders entered
27 by the Court on July 27, 2009. (H. Tr.:442:22-24).

28 136. The only emergency that necessitated ex-parte relief from the Court was
29 created by the SEC. (H. Tr.:442:25 and 443:1-2).

1 BBC offering. The deposits referred to by Aguilar into Bravata's personal account came
2 from Kuzma. (H. Tr.:234:21-25 and 235:1-4).

3 146. Aguilar also testified that the first wire transfer from Kuzma was wired
4 into Bravata's personal account, not any BBC bank account and this was on May 22,
5 2006. (H. Tr.:250:6-10 and Exhibit 22).

6 147. Aguilar participated on a phone call by the SEC Enforcement Staff with
7 Kuzma prior to the filing of the SEC Complaint. Aguilar recalled in her testimony that
8 when Kuzma was asked about the deposit to Bravata, he indicated that his funds were
9 for real estate investments rather than related to BBC. (H. Tr.:235:16-17).

10 148. Kuzma told the SEC Enforcement Staff during its interview with him by
11 telephone that deposits he made to Bravata's personal account in May 2006 were not for
12 any BBC investment, but for his investment in real estate with Bravata. (H. Tr.:235:16-
13 18).

14 149. Aguilar's testimony concerning her belief of when the BBC offering
15 commenced was solely based on her statement that she relied on "...just the bank
16 records reflecting the deposit from Kuzma." (H. Tr.:250:11-16).

17 150. Aguilar admitted that the deposit by Kuzma on May 26, 2009 does not
18 indicate why the deposit was made. (H. Tr.:250:17-19).

19 151. Aguilar testified similarly as to the wire transfer made by Kuzma to
20 Bravata's personal account on June 6, 2006. (H. Tr.:250:20-24).

21 152. As to another deposit made from Kuzma for \$230,000 to Bravata's
22 personal account, Augilar admitted that she only could testify to the transfer not to the
23 purpose of the transfer. (H. Tr.:251:8-11 and Exhibit 22).

24 153. Kuzma testified that the money was never intended to BBC, BBC did not
25 exist at the time, his intentions were not to have the money invested in BBC. (H.
26 Tr.:279:23-25 and 280:1-5).

27 154. The SEC has not produced adequate, reliable evidence suggesting that
28 Kuzma's deposits to Bravata's personal account commenced the BBC offering in May,
29 2006. (H. Tr.:398:3-7).

30 155. Traver stated clearly that the BBC offering did not begin until September
31 19, of 2006. (H. Tr.:398:3-15).

1 156. In fact, Traver recalled specifically that the first bank account was opened
2 for BBC with a \$200.00 opening deposit from Bravata in September of 2006 (H.
3 Tr.:398:20-25.

4 157. The formation by name change of ""BBC"" occurred on September 18, 2009
5 (Exhibit 117-118). The company name of BBC was formally changed by filing with the
6 State of Michigan on September 18, 2006. (Exhibit 117-118). Exhibit 3 (Page 6),
7 consisting of the financial statements of BBC as prepared by BBC outside accounting
8 firm, Doren Mayhew, verifies that Bravata Holdings X, LLC actually formally amended
9 its Articles of Organization on February 16, 2007 so that the various classes of limited
10 liability units with different rights, preferences and privileges were thereafter validly
11 issuable.

12 158. The SEC requested BBC to provide information commencing May 1, 2006,
13 which resulted in the preparation by Traver of a pie chart exhibit commencing May 1,
14 2006. (H. Tr.:481:9-13 and Exhibit 78).

15 159. BBC received approximately \$50,000,000 in offering proceeds from its
16 investors (H. Tr.:482:1-3).

17 160. BBC used approximately \$20.7 million on real estate purchases to acquire
18 71 real estate investments valued at over \$150.0 million dollars evidencing a rule
19 business. (H. Tr.:482:6-9).

20 161. As permitted by disclosures in the BBC PPMs, approximately \$5.75
21 million dollars of investor's funds along with all rents and revenues were used to pay
22 distributions to the investors. (H. Tr.:483:8-13).

23 162. The SEC has not established that BBC's use of proceeds received from its
24 investors was not a permitted use as disclosed in the BBC PPMs. (Exhibits 37 and 38, Pg.
25 1-2, 10-11,21-22 and 26; ¶ 4.22, Pgs. 35-37, "Disclosures," Pg. 2-5and 13; "Blind Pool,"
26 Pgs. 25 and 34; "Allowing Investor Proceeds to Pay Investors" Pg. 10, 17, 19, 24 and 46;
27 "Conflicts of Interest" Pg. 21; 4.14 "Results of Operations" Pg. 34; 10.0 "Economic
28 Conditions" Pg. 27).

29 163. Aguilar testified that \$55.0 million of investor funds were received by BBC
30 between May 22, 2006 and June 30, 2009. (H. Tr.:163:7-10 and Exhibit 14). Aguilar's
31 calculations included in Exhibit 14 are not accurate considering the weight of the
32 testimony establishes that the BBC offering did not commence until late September,
2006.

1 164. Aguilar admitted in her testimony that a deposit of \$120,000 by
2 Defendant, Richard Trabulsy's grandmother was in fact not deposited to BBC but was
3 deposited to BFG, which sister company was not engaged in any activities with respect
4 to BBC's offering until September of 2006. (H. Tr.:181:5-14 and Exhibit 23).

5 **Roman Kuzma Has Been Used by the SEC**
6 **To Peg the Commencement Date of the**
7 **BBC Offering – That Effort has Failed**

8 165. Kuzma was called as a witness for the Bravata Defendants in rebuttal to
9 many of the conclusions drawn by the SEC that he was one of the initial BBC investors;
10 that his funds provided to Bravata were used inappropriately for the purchase of
11 Bravata's Ferrari and that the BBC offering actually commenced on or about May 1,
12 2009. Traver testified that she saw Kuzma quite often in the office, at least a couple
13 times per month. (H. Tr.: 399:6-14).

14 166. Traver testified that Kuzma was a main investor, who helped maintain
15 some of the properties in the portfolio before they were transferred to BBC. Kuzma
16 mainly took care of the property of which he had prior ownership, specifically the
17 Ferndale Parking Lot and construction of the Ferndale Building Loft Project. (H. Tr.:
18 400:1-14).

19 167. Kuzma testified that he has known John Bravata since 2005. (H. Tr.:
20 273:24-25).

21 168. His testimony, un-rebutted by the SEC's evidence, is that he did not invest
22 in BBC in 2006. Rather, he said that in 2006 he bought into a partnership arrangement
23 with Bravata to acquire two projects outside of BBC long before BBC was organized and
24 commenced its offering activities. (H. Tr.: 275:6-13).

25 169. Kuzma appeared to the Court to be a knowledgeable 82 year-old man
26 with years of experience in real estate investing. (H. Tr.: 275:8-19).

27 170. Kuzma affirmed that he funded Bravata on some real estate purchases
28 prior the formation of BBC and that he participated in weekly decision-making
29 meetings with Bravata on those discreet properties. (H. Tr.: 277:1-9).

30 171. The Court finds that Kuzma's relationship with and co-venturing
31 arrangement with Bravata preceded the BBC offering. For example Exhibit 102

1 establishes that Kuzma loaned or advanced funds to Bravata as early as March 2, 2005.
2 Some of these loans were placed with Bravata's affiliated limited liability companies,
3 but none with BBC. (H. Tr.: 278:6-13 and Exhibit 102).

4 172. Clearly the facts establish that funds advanced to Bravata from Kuzma
5 were sent to and received by Bravata personally or to one of his controlled special
6 purpose limited liability companies used for real estate investment – not BBC. (H. Tr.:
7 278:6-13 and Exhibit 102).

8 173. Kuzma's relationship with Bravata was not just a one-time arrangement.
9 For example he testified that he made a personal loan to Bravata in the amount of
10 \$50,000, which Bravata paid back in February of 2007. (H. Tr.: 278:17-23).

11 174. Kuzma also validated Bravata's testimony that money loaned to Bravata
12 was to be used by Bravata for personal reasons and not to be invested in BBC. (H. Tr.:
13 279:9-25).

14 175. Kuzma disputed the SEC's contentions that his capital funding to Bravata
15 was really the first investments into BBC. Kuzma rightfully pointed out that BBC,
16 "didn't exist. Didn't even hear about it." (H. Tr.: 279:23-25 and 280:1-3).

17 176. The Court is satisfied that Kuzma's intention in loaning or transferring
18 funds to Bravata was not for the purpose of investing into BBC. (H. Tr.: 280:3-5).

19 177. It is clear that Kuzma actively participated in managing the co-venture in
20 real estate investments he undertook with Bravata. He assisted with the construction,
21 architectural contracts and the bills incurred in developing the properties he and
22 Bravata purchased. (H. Tr.: 280:9-25 and Exhibit 105).

23 178. In January, 2006, letters, invoices and related contracts and
24 correspondence associated with the real estate purchased in the co-venture were
25 addressed to Kuzma or to the holding company, not BBC. The Court finds that Kuzma's
26 testimony and the referenced exhibits establish that he and Bravata co-ventured in real
27 estate projects before the commencement of the BBC offering in September, 2006. (H.
28 Tr.: 281:13-16 and Exhibit 105).

29 179. Once BBC was established in September of 2006, Bravata provided
30 Kuzma with his choice of either continuing ownership of the co-ventured properties, or
31 transferring them to the new, bigger projects being acquired by BBC. (H. Tr.: 283:13-16).

32 *The Securities Regulation Law Firm*

3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

1
2 180. The Court received an email authored by Kuzma dated November 2, 2006
3 that summarized all the loans Kuzma made to Bravata personally. (H. Tr.: 286:7-11 and
4 Exhibit 106). This summary reflects loans by Kuzma to Bravata of approximately
5 \$990,000.

6 181. Kuzma testified that after having several conversations with Bravata, he
7 decided to roll his existing co-ventured real estate investments with Bravata into BBC.
8 (H. Tr.: 288:9-18).

9 182. Kuzma thereafter consented to the assignment of the real estate to the
10 newly formed BBC. (H. Tr.: 288:23-25).

11 183. Prior to filing of the SEC Complaint and the seeking of the Asset Freeze
12 entered in this case, the SEC had conversations Benjamin Hanauer, of the SEC
13 Enforcement Staff., Kuzma specifically explained to Mr. Hanauer the facts upon which
14 he testified at the Hearing. Apparently, the SEC chose to disregard those facts in its
15 request for emergency, ex-parte relief including the scope of the requested Asset Freeze
16 approved by the Court. (H. Tr.: 290:1-5).

17 184. Kuzma explained to Mr. Hanauer that that the funds provided to Bravata
18 were for business purposes, specifically as to purchasing real estate properties and that
19 his contributions did not relate to BBC. (H. Tr.: 290:24-25 and 290:19-21).

20 185. Aguilar testified that she interviewed Kuzma as well, but Kuzma testified
21 that he never talked with Aguilar and did not know she was on the phone listening to
22 his conversation with Mr. Hanauer. (H. Tr.: 291:17-18).

23 186. Kuzma contradicted Aguilar's testimony and opined rather strongly that
24 Aguilar's recall of what he said during the phone conversation with Mr. Hanauer was
25 simply not true. (H. Tr.: 291:1-14).

26 187. Kuzma said in his testimony that the subject of Bravata's Ferrari did come
27 up during the phone call with Benjamin Hanauer, of the SEC. (H. Tr.: 291:22-24).

28 188. The Court heard Kuzma testify that after attempting to explain to Mr.
29 Hanauer that a startup company could not be immediately profitable with a "J-Curve,"
30 and that the SEC was acting like the Soviet Union, Mr. Hanauer hung up the phone on

1 Kuzma. This is of concern to the Court as the SEC's role is not to make the evidence, but
2 merely to collect it. (H. Tr.: 292:8-15).

3 189. Equally obvious to the Court is that the SEC has never requested an
4 affidavit Kuzma, although it had financial information from BBC, proof of purchase of
5 Bravata's Ferrari, the dates and records of the wire transfers from Kuzma to Bravata
6 and a substantive conversation with Kuzma, the very person who gave Bravata the
7 funds. In the face of this scenario, the SEC continued its assertions that Bravata
8 inappropriately used Kuzma's money to purchase his Ferrari and failed to enlighten the
9 Court when seeking its emergency, ex-parte orders. (H. Tr.: 291:19-21).

10 190. Kuzma gave an affidavit which was attached to prior filings in this case
11 when the parties were contesting whether the Asset Freeze covered the Ferrari. (H. Tr.:
12 296:16-19 and Exhibit 74).

13 191. Kuzma's affidavit, which was offered by the SEC as an exhibit states, "It is
14 important to note that all monies paid to John Bravata went to John Bravata personally
15 or to a Bravata, LLC." (H. Tr.: 298:4-8 and Exhibit 74).

16 192. The Kuzma's affidavit goes on to state, "It is my understanding and
17 consent that when I gave John Bravata the loans that the money was his for his using as
18 he saw fit." (H. Tr.: 298:10-14 and 300:4-8 and 306:10-13 and Exhibit 74).

19 193. Kuzma testified that \$540,000 of the money he provided to Bravata was
20 considered by him to be "seed money" and that an additional \$340,000 were loans to
21 Bravata. (H. Tr.: 299:3-8 and Exhibit 106).

22 194. Kuzma testified on cross-examination by Mr. Polish that there were
23 several different short-term loans made to Bravata, which did not appear on the records
24 because they were repaid in a matter of days. (H. Tr.: 299:13-22).

25 195. Kuzma explained that he agreed to sign a settlement agreement, which
26 memorialized his interest in BBC in exchange for the transfer of ownership of his real
27 estate properties acquired with Bravata. (H. Tr.: 302:2-19 and Exhibit 75).

28 196. The Court has reviewed Exhibit 75 and finds that it states, "In March 2007,
29 Kuzma asserted that he was entitled to receive three million shares of Class A
30 membership interests in BBC as a result of his advances aggregating \$890,000 in

1 connection with real estate interests acquired by BBC.” (H. Tr.: 303:20-25 and 304:1 and
2 Exhibit 75).

3 197. Legal counsel on review of the arrangement with Kuzma came to the
4 conclusion that the money from Kuzma was a loan to Bravata, and that Bravata
5 transferred the real estate to BBC and that the three million shares of stock would be
6 deducted from Bravata’s own BBC shares. (H. Tr.: 305:15-21 and 306:1-4 and Exhibit 75).

7 198. Exhibit 75 is clear with respect to Kuzma’s loans advanced to Bravata. The
8 Court is satisfied that the Kuzma loans were not advances to BBC or investments into
9 BBC and should not be treated as such. (H. Tr.: 305:15-21 and 306:1-4 and Exhibit 75).

10 199. Also telling is the fact that the settlement agreement with Kuzma, was
11 signed many months after he agreed to transfer his ownership in other real estate to
12 BBC. In fact it is dated August 4, 2008. (H. Tr.: 307:10-13 and 307:18-21 and Exhibit 75).

13 **The SEC Has Not Adduced Credible**
14 **Evidence Reflecting that Credit Card Usage by**
15 **The Bravata Defendants was Inappropriate**

16 200. Aguilar testified that the Bravata Defendants used an American Express
17 Corporate credit card(s) (“AMEX Account”) for personal use. (H. Tr.:261:1-2).

18 201. Aguilar was unable to determine from her review of bank account records
19 only whether or not the Bravata Defendants reimbursed any personal charges placed on
20 the AMEX Account by any of the Bravata Defendants. (H. Tr.:261:22-25).

21 202. Aguilar testified clearly that she only looked at bank account records of
22 the Defendants in support of her testimony. (H. Tr.:261:1-10).

23 203. She did not ask for or have access to the Defendants’ QuickBooks financial
24 records maintained by Traver or the accounting firms that preceded Traver. (H.
25 Tr.:262:11-13).

26 204. Aguilar was not even aware that there were whole files maintained by
27 BBC reflecting the running credit and debit balance on the AMEX Account. (H. Tr.:2:14-
28 16).

1 205. The SEC's sole financial and main witness was asked if she felt it would
2 have been useful to know that the AMEX Account expenses had been tracked and
3 reimbursements made as recorded in QuickBooks and Aguilar's response was, "It
4 would have been useful,.." (H. Tr.:262:17-22).

5 206. Aguilar mistakenly testified, however, that there were no reimbursements
6 made by the Bravata Defendants to the AMEX Account. (H. Tr.:262:23-24).

7 207. Her testimony relied solely on the Defendants' bank account records. (H.
8 Tr.:263:1-3).

9 208. The SEC failed to disclose in its emergency, ex-parte request for relief as
10 well as failed to establish at the Hearing that the AMEX account was in reality not a
11 BBC credit card obligation, but was obtained by the individual Defendants through the
12 use of their individual credit. (H. Tr.:404:23-25 and 405:1-2).

13 209. Traver monitored the usage and reporting on a monthly basis of the
14 business and personal expenditures on the AMEX Account. (H. Tr.:405:3-6).

15 210. Traver testified that all expenditures were accounted for, documented,
16 and most importantly paid for by the Bravata Defendants' personal funds on a monthly
17 basis. (H. Tr.:405:7-22 and 410: 3-10).

18 211. The Bravata Defendants were not the only personnel within BBC or BFG
19 that were allowed to use the AMEX Account. Traver maintained records for all
20 personnel in order to track and account for BBC business expenses and personal
21 expenses. (H. Tr.:405:23-25 and 406:1-17).

22 212. Emblematic of the SEC's failure to present complete disclosures to the
23 Court and fairly present the contents of exhibits reflecting usage of the AMEX Account
24 is found in Exhibit 13. This exhibit reflects that certain missing pages produced to the
25 SEC show clearly that Traver's records evidence the month-to-month tracking and
26 reimbursement of personal expenses of the Bravata Defendants placed on the AMEX
Account. (H. Tr.:407:9-19 and Exhibit 13).

27 213. The SEC did not have an adequate explanation on why Exhibit 13 was not
28 offered in its complete form as apparently produced by the Defendants during the
29 course of the SEC investigation. (H. Tr.:407:24-25; 408: 1-5 and 408:6-20).

1 214. The SEC Enforcement Staff admitted during the Hearing that the SEC had
2 received the entire exhibit reflecting notations that evidence the manner that Traver
3 testified the AMEX Account was maintained. (H. Tr.:408:21-23).

4 215. The Court finds that Exhibit 13-A is the complete record of the data
5 reflected on Exhibit 13 and admitted the complete exhibit under Federal Rule of
6 Evidence 706. (H. Tr.:409:4-9; Exhibit 13-A and 263:1-3).

7 216. The Court is also satisfied that Traver routinely documented each and
8 every month in her QuickBooks database the same type of reimbursement notations in
9 Exhibit 13-A that evidences the reimbursement by the individual Defendants of
10 personal expenses billed to the AMEX Account. (H. Tr.:411:9-14).

11 217. Traver testified Relief Defendant, Shari Bravata, used the AMEX Account
12 from time-to-time, which purchases were reimbursed to BBC by Bravata in the ledger
13 account Traver maintained on a monthly basis or paid personally. (H. Tr.:412:9-16).

14 218. The SEC made efforts to establish that Relief Defendant, Shari Bravata was
15 the legal owner of the Mazzeratti purchased for her by her husband. However, the
16 SEC's proofs are lacking in this regard as it appears to the Court that legal title to the
17 Mazzeratti was never in the name of Shari Bravata but was always her husband's name.
18 (H. Tr.:89:13-14, 23-25 and 90:20-21). The Court has found little in the way of proofs that
19 justify the continuation of Shari Bravata as a Relief Defendant in this case.

20 219. The SEC's evidence suggesting that Bravata committed some unlawful
21 violation of the securities laws when he purchased a \$19,680 Rolex watch for his wife
22 falls short in establishing why Bravata would not be allowed or able to purchase a gift
23 for his wife considering that Bravata's outside sources of income unrelated to BBC or
24 BFG was approximately \$750,000 per year. (Exhibit 12 and (H. Tr.:91:14-18).

25 220. The Court even remarked during this testimony that, "Mrs. Bravata
26 testified that her husband gave her jewelry, they were gifts. It would be rather
27 surprising to me if she actually knew the purchase price." (H. Tr.:95:2-5).

28 221. Aguilar on the other hand testified that "No expenses that were charged
29 on the company credit card were reimbursed," which testimony is refuted by the more
30 detailed testimony of Traver, the person charged with the responsibility to track
31 business and personal expenses in the Amex Account. (H. Tr.:415:7-12).

32 *The Securities Regulation Law Firm*

3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

1 222. Pursuant to Traver's testimony, she recalls that when the SEC shut down
2 both BBC and BFG, Bravata was owed over \$200,000 in personal loans that he had
3 advanced to BBC. (H. Tr.:414:5-11).

4 223. Traver testified that, "When the company was short cash, John and RJ
5 would write the company a check or wire funds that would go into their account to
6 help the company." (H. Tr.:496:23-25 and 497:1).

7 224. Defendants, Bravata and Trabulsy actually wrote personal checks to
8 reimburse personal expenditures charged by them on the AMEX Account. (H.
9 Tr.:490:16-22).

10 225. When Bravata did not actually write a personal check at the end of a given
11 month, the personal expenses were credited to the loan ledger that Bravata maintained
12 with BBC. (H. Tr.:491:1-8).

13 226. The Court heard un-rebutted testimony that Traver, when asked by the
14 SEC if Bravata actually paid the AMEX Account by check, she quoted, "Oh, yes he did."
15 (H. Tr.:491:24-25 and 492:1-2).

16 227. Aguilar's testimony to the effect that Bravata never paid his personal
17 expenses back is at odds with Traver's testimony, who was in the better position to
18 know of what funds were collected and documented as coming from Bravata. Traver's
19 testimony on the issue of expense reimbursements for the AMEX Account is credible
20 and reliable. (H. Tr.:492:4-14).

21 228. It appears to the Court that it is probable that when BBC was shut down
22 by the Court's Temporary Restraining Order, Bravata had a credit balance in the loan
23 ledger maintained on his behalf by Traver of over \$200,000. (H. Tr.:495:10-16 and
24 Exhibit 78).

25 229. The SEC admits that aggregating all entities that Bravata was owed
26 money by BBC and carried a credit balance in his loan ledger. (H. Tr.:496:5-10).

27 230. BBC never charged interest to the officers who carried loan ledgers with
28 the company and the officers never charged interest to BBC. (H. Tr.:496:15-19).

29 231. So far as the Relief Defendant, Shari Bravata was concerned, she
30 understood that her husband paid all personal expenditures that she charged on the
31 AMEX Account. (H. Tr.:97:5-9).

1 232. Relief Defendant, Shari Bravata, did use the AMEX Account to purchase
2 Broadway show tickets, book a Disney cruise, and for airline flights for travel for her
3 and her children to use the concierge service. (H. Tr.:100:4-24).

4 233. BBC Management, Inc. was the employee management company used by
5 BBC and BFG to pay employees and to manage the real estate properties of BBC. (H.
6 Tr.:499:11-21).

7 234. The Court heard testimony that the companies retained reputable outside
8 law firms and accounting firms to assist in the legal and accounting functions of the
9 companies. (H. Tr.:50:5-7).

10 235. Aguilar's testimony wherein she concluded that the Bravata Defendants
11 did not ever reimburse personal charges on the AMEX Account is not consistent with
12 much of the other testimony adduced in this case. (H. Tr.:191:14-16).

13 236. Aguilar believes that the Bravata Defendants paid for houses, cars, boats,
14 jewelry and other items, "From monies that they received from BBC Equities or the
15 related entities." (H. Tr.:191:19-23). The Court finds that Aguilar's testimony in that
16 regard is not a complete picture of the manner that the Defendants used the AMEX
17 Account and documented payment for their personal expenditures.

18 237. Bravata's outside sources of income unrelated to BBC or BFG was
19 approximately \$750,000 per year, his ability to pay for houses, cars, boats, jewelry and
20 life insurance policies on his family was substantial and real, not relying on BBC
21 income. (Exhibit 12 and (H. Tr.:91:14-18).

22 Disclosures to Investors/PPM's

23 238. BBC maintained a PPM distribution log which documented the
24 distribution of the PPMs to prospective investors. ." (H. Tr.:264:1-4 and Exhibit 39).

25 239. Aguilar testified that the SEC Enforcement Staff mailed out voluntary
26 document requests to many BBC investors in this case. ." (H. Tr.:270:3-5). This included
27 requests by the SEC for BBC investors to provide BBC offering materials to the SEC
28 Enforcement Staff. (H. Tr.:270:8-10).

29 240. Aguilar confirmed that some of the BBC investors did send to the SEC
30 copies of the PPMs they received from BBC. ." (H. Tr.:270:11-13).

1 241. Aguilar admits to having a list of investors provided to them by BBC of
2 all investors who received PPMs. (H. Tr.:200:12-22 and Exhibit 39).

3 242. Aguilar did not know why a small group of early BBC investors were not
4 included on the PPM distribution list. (H. Tr.:220:20-25; 201:1-5 and Exhibit 29, Pg.12).

5 243. The Court has heard extensive testimony and has seen various exhibits
6 that reflect that the Defendants were mindful of their obligations of disclosure to BBC
7 prospective investors and even after investors invested with BBC. For example, Bravata
8 conducted a phone conference with over 200 investors disclosing to them the
9 investigations by OFIR and the SEC as well as the coming rescission offer which
investors would be receiving. (H. Tr.:574:3-8 and Exhibit 143).

10 244. Standard offering practice was followed by BBC in the manner that it
11 maintained distribution logs and tracked the delivery of offering materials to
12 prospective investors. Joseph Bravata, who testified that he was hired as director of
13 trust operations for BBC indicated that he assisted in preparing the PPM distribution
14 logs that were provided to the SEC. (H. Tr.:577:16-24).

15 245. In October 2008 Joseph Bravata was approached by Defendant, Trabulsky
16 to take a position with BBC as the director of operations for the BBC Trust Department.
(H. Tr.:555:20-22).

17 246. Joseph Bravata transitioned with the Trust Department in the months of
18 November-December 2008. (H. Tr.:556:1-3).77:16-24). He thereafter took over the Trust
19 Department of BBC as of January 1, 2009. (H. Tr.:556:6-8).

20 247. Joseph Bravata also testified that when he came to work for BBC and BFG,
21 he assisted the previous head of the BBC Trust Department covering the time period
22 from the commencement of the offering through January 1, 2009 when he assumed the
23 supervision of that department and was responsible for PPM distribution records. (H.
24 Tr.:578:1-4).

25 248. Joseph Bravata was also hired to take charge of building out the "IT"
26 department, human resources, disaster recovery systems and back up computer
27 systems that did not exist prior to him joining the companies. (H. Tr.:557:18-21).

28 249. Joseph Bravata affirmed in his testimony that records in the Trust
29 Department were missing a block of PPM delivery logs and that was due principally to
30 the BBC Trust Department being overwhelmed with requests for documents by the SEC

1 during the course of its inquiry. Joseph Bravata also said that prior to his arrival at BBC,
2 the department was not very organized and that he could not locate one of the spread
3 sheets that contained the same number of investors the SEC claims were missing on the
4 distribution logs. He said all others were provided to the SEC. (H. Tr.:578:10-20).

5 250. It is evident in the record that BBC did provide to the SEC a complete
6 PPM distribution log covering every BBC investor except for the small block of
7 sequentially-numbered PPMs that records were unavailable for. (H. Tr.:578:25 and
8 579:1-4).

9 251. Joseph Bravata's role with BBC was to interface with the BBC legal and
10 other compliance personnel to set up procedures to document PPM deliveries to
11 investors and to manage the BBC Trust Department. He was not responsible to assure
12 physical delivery of a PPM to every BBC investors. (H. Tr.:584:21-25.)

13 252. It appears to the Court that even before Joseph Bravata was hired by the
14 Defendants, after which he assumed responsibility for tracking PPM distributions and
15 developing systems BBC equities always had someone doing the same job, and also had
16 outside custodians maintaining the flow of money and applications. (H. Tr.:584:8-14).

17 253. Joseph Bravata also testified that he was requested by BBC's legal counsel
18 with a request that BBC's May 18, 2009 PPM Supplement be provided to prospective
19 investors with every new PPM being distributed. (H. Tr.:586:1-10).

20 254. Joseph Bravata testified that he never heard in his presence that investors
21 were told that the principle of their BBC investments were guaranteed. (H. Tr.:590:1-3
22 and 590:6-11).

23 255. Joseph Bravata testified that all investors who invested in BBC during the
24 time he was handling PPM distribution did in fact receive a PPM. (H. Tr.:594:19-24).

25 256. When asked if investors were told that fees would be paid on their
26 investments, Joseph Bravata responded, "Everything was disclosed in the PPM." (H.
27 Tr.:594:25 and 595:1-2).

28 257. The PPM disclosed to investors that, "Given the early stage of the
29 Company, its acquisition of interests in investment and development properties which
30 do not yet produce income, the "start up" and overhead costs incurred to date and
31 other factors, the Company has operated at a loss during its first year of operations.

1 (Exhibit 38, Pg. 34--10.0 "Results of Operations"). Disclosures were also made to
2 investors that an investment in BBC involved a high degree of risk. (Exhibit 38, Pg. 2--
3 10.0 "Disclaimers").

4 258. Investors were advised by the PPM that no sales person, or other person
5 was authorized to give any information or make representations other than those
6 contained in the PPM and information to make an investment decision must ONLY be
7 relied upon from disclosures in the PPM. (Exhibit 38, Pg. 4).

8 259. Joseph Bravata created systems that included new filing requirements,
9 tracking of all funds in and out of BBC, date stamping of investor applications, tracking
10 PM distributions, etc. (H. Tr.:559:19-25 and 559:1-3).

11 260. BBC utilized two reputable, outside custodial trust companies to act as
12 custodian for qualified investment funds received by BBC from some of its investors.
13 (H. Tr.:560:12-14).

14 261. The Court believes that the evidence shows that BBC had many internal
15 controls in place to assure compliance and integrity throughout its operations as they
16 related to offering and investment activities of BBC. (H. Tr.:561:16-20).

17 262. Joseph Bravata testified, and the SEC has not disputed, that at no time was
18 he ever an officer or director of BBC BFG. (H. Tr.:548:19-21).

19 263. He also testified that at no time was he ever an officer or director of any
20 other affiliates of either BBC or BFG. (H. Tr.:548:22-24).

21 264. Joseph Bravata worked with BBC Equities in-house legal counsel, BBC
22 outside legal counsel as well as Equity Trust's legal counsel and compliance to make all
23 applications and disclosure documents in order for an investor to invest in BBC. (H.
24 Tr.:560:22-25, 561:1-15, Exhibit 140).

25 265. BBC had many internal controls in place to assure compliance and
26 integrity though out their operation. (H. Tr.:561:16-20).

27 266. Joe Bravata testified all forms had to be approved by outside custodians or
28 they would not except the documents from BBC. (H. Tr.: 561:19-22).

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30
31 *The Securities Regulation Law Firm*

32 3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

The SEC Called 1 of 440 BBC Investors as a Witness

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3 267. Robert DeFaw, a BBC investor (“DeFaw”), admitted attending a seminar
4 in August of 2006 at the Ritz Carlton Hotel. (H. Tr.: 121:18-20). He invested \$50,000
5 dollars into BBC on September 22, 2006. (H. Tr.: 121:14-20).

6 268. DeFaw testified that after the real estate workshop he attended, he
7 requested further information on investment opportunities. (H. Tr.: 125:8-18). So,
8 DeFaw had further meetings with BBC and received further documentation about BBC
9 before his decision to invest.

10 269. DeFaw recalled viewing a powerpoint presentation. (Exhibit 2-A). The
11 SEC apparently contends that the start of the presentation read “Bravata Real Estate
12 Empire” and underneath that title it read “Grand Poobah”. (H. Tr.: 126:17-22).
13 However, DeFaw was asked if he recalled the words, Grand Poobah, and he stated, “I
14 can’t say for certain.” (H. Tr.: 126:23).

15 270. The Court finds that it is unclear whether DeFaw specifically recalls
16 viewing the “Grand Poobah” version of the presentation or the more complete, final
17 version that the Bravata Defendants contend was actually distributed to workshop
18 participants. (H. Tr.: 126:23-25).

19 271. On the issue of what DeFaw did and did not receive from BFG at the
20 workshop, the testimony is simply unclear and not compelling. He was asked if, “The
21 only information you recall was actually seen at the presentation in the form of slides in
22 a powerpoint presentation.” DeFaw testified that the actual document that the SEC is
23 alleging was used as a powerpoint presentation at one of the early workshops
24 conducted by BFG he had never seen until it was provided by the SEC several months
25 ago to him. (H. Tr.: 138:3-16).

26 272. DeFaw admitted in his testimony that the presentation did not include
27 any mention of BBC and that it was an educational real-estate workshop. He recalled
28 no solicitation of BBC investors. (H. Tr.: 127:10-11 and 127:13-16 and Exhibit 101).
29 DeFaw also testified that the seminar and form he filled out at the seminar had no
30 connection to BBC Equities. (H. Tr.: 128:2-4).

31 273. DeFaw also stated that there were no materials handed out to anyone in
32 attendance of the real estate workshop. It appears then to the Court that the only
information that was given to DeFaw must have come from his subsequent meetings

1 with BBC personnel where he testified that he did receive documentation and signed
2 documentation. (H. Tr.: 130:10-13).

3 274. The evidence as to DeFaw's investment suggests that he had one or more
4 follow-up meetings after the workshop at the Ritz Carlton, during which he recalls
5 receipt of a BBC subscription agreement and other materials. (H. Tr.: 128:12-18). DeFaw
6 signed these documents, although his testimony indicated that it was his practice not to
7 read such materials carefully, but usually skimmed such documents. (H. Tr.: 129:2-5).
8 When asked if DeFaw reviewed the BBC PPM, his response was that, "I did not read it
9 in detail." (Pg. 134 Line1-7).

10 275. The Court believes that DeFaw is not sure one way or the other what
11 documentation he received from BBC and when. Perhaps more compelling is the clear
12 impression left by DeFaw's testimony that his practice is not to read legal documents
13 carefully and has no specific recall of what he received and when. He did not seek any
14 outside advice from an attorney, a CPA or financial advisor before investing. (H. Tr.:
15 133:22-24).

16 276. On cross-examination, when asked if DeFaw read the disclosures that
17 were made about how the money that was being raised by BBC was to be used, his
18 response was, "no." When asked if DeFaw reviewed the PPM. The response was, "I
19 did not read it in detail." (H. Tr.: 134:1-7 and 134:8-11). DeFaw did not read the PPM
20 disclosures on risks of investing in BBC. (H. Tr.: 134:12-15). DeFaw did not read the
21 disclosures on BBC compensation to its managers. (H. Tr.: 134:15-16).

22 277. In fact, DeFaw generally testified that he did not read any section of the
23 PPM that was concerning, interesting or that he found informative. (H. Tr.: 135:2-6).

24 278. In rebuttal of the SEC's sole investor witness, the Bravata Defendants
25 called Jim Deakin, a BBC investor as a witness.

26 279. The Bravata Defendants called another investor, Jim Deakin ("Deakin"),
27 as a witness who testified that he attended the same workshop at the Ritz Carlton in late
28 2006 that DeFaw attended. (H. Tr.: 311:3-5).

29 280. Deakin recalled seeing Exhibit 101 at the workshop and stated that he was
30 asked to fill out the form only if he wanted to learn more about investment
31 opportunities. (H. Tr.: 311:18-25). When Deakin was presented with Exhibit 2-A, which
32 is the powerpoint presentation DeFaw said was used at the workshop, Deakin recalled

1 only that he recognized some of the pages, and that some of the pages, that are in
2 Exhibit 2-A, were not presented at the workshop. (H. Tr.: 312:16-25 and 313:1-5). Deakin
3 also repeated this testimony on his cross-examination. (H. Tr.: 316:9-22).

4 281. When specifically asked on examination, Deakin stated that the pages
5 contained in the presentation that address "guarantees of investment returns" were not
6 part of the presentation he saw at the workshop. Deakin stated that Bravata did not
7 guarantee anybody's investments at the workshop presentation he attended. He also
8 validated that the workshop was informational on real estate, not on BBC specifically.
(H. Tr.: 313:6-10 and 313:17-25).

9 282. When asked at the subsequent meeting if Deakin received a PPM he
10 responded, "Yes, I did." (H. Tr.: 315:2-5). He recalled that his follow up meeting
11 occurred a month or month and a half after the workshop. (H. Tr.: 314:16-21).

12 283. Deakin was asked if Bravata used the terminology "angel investor,"
13 during the workshop to which Deakin stated, "Yes, to the best of my recollection, about
14 providing monies to start up companies or entities--seed money." (H. Tr.: 315:5-12).

15 284. When asked if Deakin ever believed that his investments in BBC were
16 guaranteed, he responded, "No." Deakin said he has invested over \$4,000,000 with BBC
17 between himself and family.

18 285. When asked by the SEC on cross-examination if he recalled a single
19 comment about BBC during the workshop, Deakin stated that he did not recall any such
20 comments. Deakin did say he remembered the powerpoint presentation, but clearly
21 stated it was not the presentation that the SEC was attempting to use. (H. Tr.: 317:2-23)

22 286. When asked about the "guaranteed" slide, Deakin stated there was no
23 mention to attendees at that workshop on "guarantees". (H. Tr.: 319:2-5).

24 287. Finally, after posing virtually the same question on several occasions on
25 cross-examination, the SEC asked Deakin whether he had any general recollection of
26 BBC being discussed and the workshop and Deakin responding, "That is correct." (Pg.
27 320 Line 5-10). Deakin also stated in response to questions related to management
28 salaries for BBC, Deakin responded, "Not at that time, not at that presentation, no." (H.
29 Tr.: 320:10-16)

**The SEC Over-emphasizes and "Hypes" the
Scope and Use of Seminars by BBC**

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3 288. BBC as the issuer, never organized or conducted seminars. (H. Tr.:420:13-
4 19).

5 289. The seminars that were testified to were conducted either by independent
6 agents or agents of BFG. (H. Tr.:420:20-21).

7 290. The seminars were not productive; too expensive; and did not bring new
8 clients to BFG or BBC. And did not bring new clients to either Bravata Financial Group.
9 (H.Tr.:422:21-25 and 423:1-10).

10 291. Traver testified that Bravata did speak at a few seminars as a guest
11 speaker but clearly not all. (H.Tr.:423:1-10, 18-22).

12 292. BFG did hire seminar speakers or presenters to present a compliant
13 approved presentation for many of its educational seminars. (H.Tr.:422:21-25 and 423:1-
14 10) ; 423:23-25 and 424:1-6).

15 293. BFG agents were never employees of BBC. BBC never had a staff of
16 people or employees delivering or running seminars. (H.Tr.:426:5-8).

17 294. Joseph Bravata testified that he was at some, but not all of the seminars.
18 When asked by the SEC at the Hearing if while at the seminars if Bravata told investors
19 that the returns on their investment was guaranteed, Joseph Bravata responded, "He
20 never said that at the seminars I attended." (H.Tr.:600:6-9).

21 295. In addition, the SEC asked Joseph Bravata at the Hearing if he ever heard
22 Bravata tell investors that their investments were guaranteed by certificates of deposits,
23 and his response was, "not at all." (H.Tr.:591:14-17).

24 296. Joseph Bravata testified that the seminars in which he participated were
25 estate planning, long term care seminars with no mention of BBC (H.Tr.:591:16-22).
26 Joseph Bravata verified that BBC never conducted any public seminars, only BFG
27 conducted educational or investment seminars. (H.Tr.:594:11-13). The seminars that
28 Joseph Bravata attended did not even discuss BBC. (H.Tr.:594:14-18).

29 297. Seminars that were run by Bravata Financial Group ceased in September
30 of 2008 prior to the SEC claiming an emergency. (H. Tr.:422:21-25, 423:1-10)

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**Defendants Retained Competent Securities and
Corporate Counsel and Ultimately Hired In-House Counsel**

298. John Sellers testified during the Hearing ("Sellers"). Sellers was a former equity partner at the Detroit-based law firm of Hyman Lippitt, focusing his practice on securities and real estate law from 1992 to October 2007. (H.Tr.:328:9-15, 22-25 and 329:1-4).

299. Sellers left Hyman Lippitt to join BBC as in-house legal counsel for the companies. (H.Tr.:328:14-15 and 338:10-13).

300. Sellers is an experienced lawyer that regularly represented issuers of securities in transactions exempt from registration and well as various public companies. (H.Tr.:329:5-13).

301. Sellers also testified that he is experienced in the regulation of broker-dealers and registered investment advisors. (H.Tr.:329:14-16 and 329:17-24).

302. Bravata had initially retained Hyman Lippitt to conduct the legal work on Bravata Holdings X LLC, a privately-held company, in May 2006. (H.Tr.:332:15-23). Bravata Holdings X LLC's name was later changed to BBC in September 2006 and thereafter functioned under the assumed name of BBC Equities until it formally amended its Articles of Organization on February 16, 2007. (H.Tr.:332:19-20, Exhibit 117 and ¶ 157 hereof).

303. Sellers prepared the Articles of Amendment for Bravata Holdings X LLC in order to change the name of the company to BBC. (H.Tr.:333:6-9).

304. Sellers testified that the reasons for amending the Articles of Organization were multifold: (i) to allow the Articles to provide for management by managers; (ii) to change the name; and (iii) to authorize different classes of securities and the relative rights and preferences of the classes of securities. (H.Tr.:333:13-19).

305. Sellers verified that the first BBC PPM was completed by Hyman Lippitt in February 2007. (H.Tr.:334:6-7 and Exhibit 37). This was the initial PPM used for the BBC offering. (H.Tr.:328:14-19).

1 306. Hyman Lippitt also prepared the customary ancillary legal documents to
2 support the BBC offering such as subscription agreements, investor and suitability
3 questionnaires. (H.Tr.:339:3-8).

4 307. These documents were used by BBC to determine if prospective investors
5 qualified as accredited investors. (H.Tr.:339:9-15).

6 308. Hyman Lippett was also relied upon by the Defendants to prepare the
7 legal documents needed to convey Bravata and Trabulsky's interests in real estate from
8 their personal ownership BBC, which occurred in February 2007. (H.Tr.:344:12-16).

9 309. As disclosed in the PPMs, all real estate properties that were previously
10 owned personally by Bravata or his solely-owned limited liability companies, was
11 properly documented in both the February 2007 and April 2008 PPMs. (H.Tr.:344:20-24
12 and Exhibits 37-38).

13 310. As part of the growth of BBC and BFG, an in-house legal team was put
14 together that not only included Sellers, but two additional real estate lawyers and two
15 legal assistance. (H.Tr.:345:15-23).

16 311. This in-house legal staff also took over the role of reviewing the PPM for
17 any needed updates or amendments. (H.Tr.:346:5-10).

18 312. BBC used the services of Hyman Lippitt, as well as in house counsel, to
19 prepare the second PPM dated April 2008. (H.Tr.:347:1-6 and Exhibit 38).

20 313. Both BBC PPMs fully disclose the permissible uses of proceeds received
21 by BBC from subscribers. (H.Tr.:347:19-21).

22 314. Hyman Lippett and in-house counsel for BBC both were aware of the
23 disclosures in the PPMs that offering proceeds received from later investors could be
24 used to pay distributions to earlier investors. (H.Tr.:347:24-25 and 348:1, 13-18).

25 315. Sellers testified for example that Section 4.8, page 19 of Exhibit 38, which
26 is one of the PPMs, under the title of "Liquidity Risk" is one area in which there was full
27 disclosure to prospective investors that the proceeds of the offering could be used to
28 pay distributions and redemptions to other earlier investors. (H.Tr.:349:4-10).

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30
31 *The Securities Regulation Law Firm*

32 3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

1 316. Sellers affirmed that the PPMs disclose that “the company may be
2 required to use investor funds to pay redemption amounts or it may need to sell some
3 or all of its assets prematurely to pay such amounts, which may result in the company
4 realizing a loss on its investment in those assets.” (H.Tr.:349:16-21 and 350:1). The Court
5 is aware that this disclosure is repeated in various places in the PPMs. (H.Tr.:351:4-7).

6 317. Sellers also testified that he included several disclosures in the PPMs as to
7 how management would be paid. (H.Tr.:351:8-12).

8 318. As BBC’s in-house legal counsel, he participated in both the OFIR and the
9 SEC investigation. (H.Tr.:351:24-25 and 352:1-6).

10 319. He participated in the negotiations with OFIR and helped craft the
11 preliminary OFIR settlement agreement, along with Butzel Long, LLP, BBC’s outside
12 counsel.

13 320. It is clear that Exhibit 111 evidences a proposed settlement agreement
14 made by OFIR to BBC on July 10, 2009. (Exhibit 111). This settlement letter represented
15 the start of negotiations to resolve OFIR’s complaint and its investigation of BBC that
16 commenced in November, 2008. Following Exhibit 111, Butzel Long, LLP then
17 produced the final settlement proposal letter dated July 22, 2009, none of which was
18 ever given to the court prior to the SEC seeking their Emergency *Ex-parte* Order (Exhibit
19 110; (H.Tr.:360:11-15).

20 321. Sellers testified that it was these two exhibits (Exhibits 110 and 111) that
21 constituted the discussions with OFIR that gave rise to the rescission offer that BBC
22 agreed to as a condition of settlement with OFIR. (H.Tr.:360:11-15 and Exhibits 110-111).

23 322. Sellers participated in the drafting and structuring of the BBC rescission
24 offer that was included as part of the preliminary settlement with OFIR, along with
25 Butzel Long, LLP. (H.Tr.:352:7-21). However, the counter-offers made back to OFIR
26 were primarily made by Butzel Long, LLP. (H.Tr.:352:22-23). Exhibit 110 reflects the
27 final version of the preliminary settlement agreement negotiated between BBC and
28 OFIR. (Exhibit 110).

29 323. The Butzel Long, LLP final form of settlement agreement with OFIR was
30 provided to the SEC before the SEC filed its Complaint and claimed that emergency, *ex-*
31 *parte* relief was necessary to stop a Ponzi Scheme. (H.Tr.:346:4-13).

1 324. During the entire SEC investigation of BBC, it is apparent that the
2 Defendants and personnel from BBC and BFG were responsive, cooperative and fully
3 aware of their responsibility to promptly provide information and documents requested
4 by the SEC. Sellers was integrally involved in this process on behalf of both companies.
(H.Tr.:361:17-21).

5
6 325. Sellers also validated the policy followed by the Defendants that any
7 documents or materials that would have been used by the companies outside of the
8 PPMs were first by BBC's legal counsel. (H.Tr.:362:10-20).

9
10 326. BBC's legal counsel did review and approve a specific version of "Fund
11 Facts" (a summary term sheet) was approved for distribution to some BBC investors.
(H.Tr.:362:16-20).

12
13 327. Seller's believed that he had full and complete access to company
14 information he used in preparing the PPMs. Sellers testified that the information was
15 available for him to assure accuracy in drafting the PPMs because he had full access to
16 management or other personnel to acquire needed information for drafting purposes
17 and Sellers was a member of the BBC executive board as well. (H.Tr.:381:19-25 and
18 382:1).

19
20 328. Sellers opined that he had adequate information to draft the PPMs
21 accurately. (H.Tr.:382:19-23).

22
23 329. Sellers also assisted the companies in other legal needs. He edited the
24 PPMs for accuracy and completeness, he circulated drafts to various personnel for
25 comments and revisions and he also assisted BFG and its affiliate to register with the
26 SEC as a registered investment advisor. people inside BBC for comments and changes.
27 (H.Tr.:384:4-6).

28
29 330. Sellers was never interviewed by the SEC Enforcement Staff before the
30 filing of the SEC Complaint

31
32
**The SEC Has Purposely Mischaracterized
The Florida Home as Bravata's "Vacation Home"**

33
34 331. The SEC questioned Joseph Bravata if he had disclosed to potential
35 investors, that his brother, Bravata, was using their money to pay for a \$6.0 million

1 dollar vacation home. He testified that, "I didn't mention something that was not true."
2 (H. Tr.: 590:12-16).

3 332. Based on the evidence presented, it is not disputed that this property,
4 located at 26868 Hickory Boulevard, Bonita Springs, Florida, was acquired by BBC. (H.
5 Tr.: 447:4-6).

6 333. The property after being acquired by BBC, was listed for sale and rent
7 under BBC's ownership. (H. Tr.: 447:20-24).

8 334. Testimony reflects that there were actually three comparable home-
9 investments by BBC on the same street. (H. Tr.: 448:2-7).

10 335. The residence in question was used by Bravata and his family for 37 days
11 out of the three years of BBC ownership; the residence was also used by over 64 other
12 investors, charities, and as the site of numerous business meetings. (H. Tr.: 448:11-15).

13 336. It is also not disputed that Bravata, purchased the home from BBC in
14 January 2009. (H. Tr.: 508:17-25).

15 337. The evidence reflects that this residence was not treated as Bravata's
16 personal vacation home until he purchased it in January 1, 2009.

17 338. The SEC's witness, Aguilar, represented the property as the "Bravata
18 vacation home," but that testimony appears to the Court to be the witnesses own
19 personal judgment unsupported by any detail.

20 339. Other BBC residential properties such as condominiums located in South
21 Carolina and Florida were not deemed to be "Bravata Vacation Homes." (H. Tr.: 448:2-
22 7).

23 340. Testimony shows that Bravata took over financial responsibility for the
24 Bonita Springs home in January of 2009 after his purchase. (H. Tr.:508:24-25 and 509:1
25 and Exhibit 107). Apparently, Bravata took over the house payments to help alleviate
26 the expense to BBC and also because he wanted the home. (H. Tr.:509:2-14). Bravata was
27 cross-examined by the SEC on why took over the payments and Bravata established
28 that it was because the cost was expensive and he wanted to alleviate the cost on BBC.
29 (Pg. 509 Line2-14).

30
31 *The Securities Regulation Law Firm*

32 3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

1 341. Even though the SEC characterizes this BBC property as Bravata's
2 vacation home, Aguilar, testified that she did not know how many days the Bravata
3 Defendants used the property during the three year time period BBC owned the
4 property. (H. Tr.:260:6-8).

5 342. The Court is also curious on why the SEC apparently had the proper
6 documentation on Bravata's purchase of the property as early as May of 2009 validating
7 that the home was being paid for by Bravata and that the balance of the payments were
8 being credited to his loan account with BBC against money he had lent to BBC. (H.
9 Tr.:509:15-25). The Court finds that this information was in the hands of the SEC long
10 before its Complaint was filed, but the SEC still chose to characterize the home as
11 "Bravata's Vacation Home. (Pg. 509 Lines 15-25).

12 343. The Court believes that the SEC has not established to the Court's
13 satisfaction that all costs and expenditures of this home should be added to the sums or
14 payments received by Bravata from BBC or BFG, prior to January of 2009. (H. Tr.:510:1-
15 25). The analysis by Aguilar, which places all such costs and expenditures by BBC of
16 this home, which was not Bravata's home until January of 2009, into the column of
17 Bravata funds received from BBC or BFG is not a correct analysis. (Pg. 510 Line 1-25).

18 344. The Court cannot agree that Bravata's use of the Bonita Springs property
19 for 37 days out of a three year time span constitutes an inappropriate use of BBC assets
20 without disclosure to BBC investors or in any manner unlawful with respect to BBC or
21 its investors.

22 345. Aguilar's testimony also established that BBC, not Bravata, entered into a
23 lease with an option to purchase the home on December 2, 2006. (H. Tr.:189:17-23 and
24 Exhibit 27).

25 346. BBC thereafter exercised its option to purchase the Bonita Springs
26 property on January 18, 2007, 46 days after entering into the agreement. (H. Tr.:189:24-
27 25 and 190:1-2).

28 347. Although Aguilar did testify that BBC did not rent out the Bonita Springs
29 home to increase income when she said, "No, they didn't use it as an income
30 production company - or property, sorry." (H. Tr.:190:6-9), the Court concludes that
31 Aguilar was not completely familiar with the uses made of the property by BBC.
32

The Securities Regulation Law Firm

3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

1 348. The Court is satisfied that Exhibit 21 illustrates that nothing was paid in
2 excess of what was owed on the Bonita Springs property since inception of ownership
3 in December of 2006. (H. Tr.:190:10-24 and Exhibit 21).

4 349. Exhibit 21 shows nothing more than what should have been paid on a
5 property such as the Bonita Springs home that BBC owned and controlled. (Pg. 190
6 Line 10-24 Exhibit 21).

7 350. The Court does not see adequate proof or support for the SEC's attempt to
8 place ownership of the Bonita Springs property under Bravata's name from December
9 2006 to January 2009, during which time the property was clearly shown to have been
10 under BBC's.

11 351. Concomitantly, the Court sees no logic in ascribing all costs to BBC
12 associated with the Bonita Springs home Bravata, since it is only the moniker of
13 "Bravata's Vacation Home" that the SEC relies upon.

14 352. In June, 2009, the Bonita Springs home was leased out to a third-party.
15 (Exhibit 65).

16 353. Traver testified on the other hand that Bonita Springs property was
17 acquired by BBC and the cost of that project was paid for by BBC. (H. Tr.:528:13-16).
18 Traver also testified that BBC made timely, direct payments to the land contract holder
19 of the property. (H. Tr.:529:2-6). Beginning in January, 2009, Traver verified Bravata's
20 testimony that Bravata thereafter personally paid for the Florida property. (H.
21 Tr.:529:16-25 and 530:1-13).

22 354. The Court gives due consideration and agrees with Traver's testimony
23 that she felt that Aguilar incorrectly recited in her summaries prepared as SEC exhibits
24 that all of the mortgage payments paid while BBC owned the Bonita Springs home
25 should be added as income paid to Bravata. (H. Tr.:531:1-23).

26 355. Traver did testify that it was inappropriate in her opinion to count
27 payments made by BBC towards a BBC-owned property as income or compensation to
28 Bravata, and was not right to portray that income or compensation on exhibits used in
29 support of the SEC's allegations. (H. Tr.:531:24-25 and 532:1)

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**John J. Bravata May be Flamboyant
and an Energetic Entrepreneur, but
That is not the Definition of a Ponzi Schemer**

356. Bravata told investors that he had two principal rules of money. You must not risk your principle dollars and you must earn as high of interest on my money without violating rule number one. (H. Tr.:18:8-21). The SEC adduced no evidence at the Hearing to cast Bravata's money-making rules as anything other than general investment philosophy – unconnected to the BBC offering.

357. On cross-examination, Bravata was asked if he ever told investors that their principle dollars were secured by BBC, but the SEC failed to bring even one witness or proffer one affidavit from almost 500 BBC investors establish that he did. Instead, the SEC will likely rely on adverse inferences that can be reached within the Court's discretion as to questions, like this one, where Bravata claimed his 5th Amendment Constitutional Right against self-incrimination ("5th Amendment") (H. Tr.:19:3-5).

358. The SEC confronted Bravata with what it claims was a damaging, self-aggrandizing power point presentation, which the SEC claimed was used by Bravata at an investors' workshop. (Exhibit 2). According to Bravata's testimony, Exhibit 2 is NOT a version of the presentation approved for distribution – rather it was an internal draft with some comic relief on the cover. No credible SEC witnesses contradicted Bravata's testimony on the use of Exhibit 2. (H. Tr.:19:9-12 and Exhibit 2).

359. Bravata stated that the front cover which read, "Bravata real estate empire, John Bravata Grand Poobah," was in fact not used in front of any public or at any workshop, but was only an internal working draft. (H. Tr.:20:7-8).

360. As to the ultimate use of Exhibit 2, the Court finds that it is likely a power point presentation in draft form not used in workshops conducted by the Defendants, but many of the same pages contained in the body of the presentation were likely pages used in the version shown to prospective real estate investors. (H. Tr.:20:20-23).

361. Bravata did not create, review or approve of Exhibit 2. (H. Tr.:21:1-8). Bravata indicated in testimony he thought Exhibit 2 may or may not be anything more than one of hundreds of documents that were created, then changes made before a final copy was approved for investor use.

1 362. Although the SEC has raised the specter in its proofs that Bravata
2 routinely advised prospective investors that a return on their BBC investment was
3 “guaranteed,” the Court is not convinced that premise has been established. (H.
4 Tr.:21:21-24).

5 363. The Court cannot overlook the disclosures made to investors in the PPMs,
6 which clearly do not lead the investor to believe there was any guaranty of their BBC
7 investment. (Exhibits 37 and 38).

8 364. It is established in this case that the Defendants relied upon outside
9 accounting firms to handle much of their accounting functions other than what Traver
10 managed as the chief financial officer of both companies. (H. Tr.:22:15-18 and 23:23-25
11 and Exhibit 3).

12 365. BBC prospective investors likely were not mislead by statements made
13 during seminars by any of the Defendants on the financial condition, the balance sheet
14 position of BBC or other financial data, as prospective investors could not invest at
15 seminars, rather they could only invest after having an individual meeting with BBC or
16 BFG personnel, completing the requisite subscription materials and establishing that
17 they were accredited investors. (Exhibit 3).

18 366. Investors are held to using a reasonable amount of care in reading and
19 understanding offering materials delivered to them by a company seeking their
20 investments. Here, the Court is satisfied that the PPMs clearly advise investors that
21 statements outside of the PPMs should be disregarded and that only the contents of the
22 information provided in the PPMs could be relied upon to make investment decisions.
23 (Exhibit 38 Pg. 4 Paragraph 4).

24 367. The Bravata Defendants have stated during the Hearing that the SEC’s
25 claims that material misstatements were made concerning statements allegedly
26 attributed to Bravata that BBC backed up all investor funds dollar for dollar with
27 Certificates of Deposit held by BBC – was never presented in that fashion and is a
28 mischaracterization. Bravata has testified that the only mention of CD’s owned by BBC
29 was done so to let the investors know that the ownership of CD’s was only one option
30 available to BBC – not its exclusive investment policy, and no proofs have been
31 admitted to show at the time of the statements in fact it was not correct. (H. Tr.:26:3-5).

32 368. The Court also finds that the SEC’s focus on Bravata’s mantra that, “If you
don’t make money, I don’t make money,” is somewhat misplaced. Bravata explained

1 what he means by that phrase, which is simply that since the PPMs disclose that the
2 BBC managers receive 90% of all profits with 10% distributed to investors, Bravata's
3 usage of that phrase was explained to relate to a split of profit, if any is earned. Exhibit
4 38 Pg. 8 Class D interest Paragraph 3).

5 369. Bravata and Trabulsy were entitled to receive compensation as disclosed
6 in the PPMs. On the other hand, earning a larger percentage of the "profits" of the
7 company is separate and distinct from managements' right to receive salaries if they are
8 disclosed. (Exhibit 38 Pg. 1-2, 10-11,21-22,35-37,26 4.22)

9 370. To complicate the SEC's claims, it acknowledges that Bravata never
10 received a salary from BBC. (H. Tr.:27:5-8).

11 371. The fact that money went to BBC Management, Inc. to pay salaries was
12 fully disclosed and set up by outside legal counsel as well as the outside accounting
13 firms as disclosed to investors in their investment packets and the PPMs. (Exhibit 38 Pg.
14 35:11.2 'compensation).

15 372. Even though Bravata had a right to receive a salary based on disclosures
16 of that fact in the PPMs, Bravata testified that he did receive a salary from BBC
17 Management, Inc. on and off starting in January 2008 through February 2009, at which
18 time no further salary was received by Bravata. (H. Tr.:29:24 and 30:1).

19 373. It seems obvious to the Court that the PPMs are filled with pages of
20 disclosures on the salaries and compensation payable to managers, including Bravata.
(Exhibit 38, Pg.1-2, 10-11, 21-22, 26 – Section 4.22, Pg. 35-37).

21 374. Unlike ordinary tactics of Ponzi Schemers, Bravata only took a salary from
22 BBC Management, Inc. for one month in 2009 then stopped taking a salary to help the
23 companies with cash flow. (H. Tr.:30:16-19).

24 375. Bravata, as well as many other of the Defendants' witness, has convinced
25 the Court that in preparing information for the SEC prior to the filing of the SEC
26 complaint, virtually all personnel affiliated with BBC or BFG, including Bravata and
27 Trabulsy, gathered approximately 16,000 pages of written material requested by the
28 SEC and that all required information was initially supplied to outside counsel, Butzel
29 Long, LLP and thereafter provided to the SEC. A strong level of cooperation is evident
30 in the record. (H. Tr.:36:15-22).

1 376. Although it may be evident to the Court that the SEC disagrees with the
2 manner that BBC used the proceeds of its offerings, the Court does not believe the SEC
3 adduced any credible evidence that investors proceeds were used contrary to the legal
4 documents outlined in the PPMs which do disclose the permitted use of funds. (H.
Tr.:37:17-25 and 38:1-2).

5 377. Bravata testified in cross-examination that as of June 10, 2009, before the
6 SEC Complaint was filed, BBC had a cash on hand of \$1,480,877, but he also opined that
7 did not take into consideration the transactions BFG was close to finalizing with Brewer
8 Capital in Chicago, Illinois and Huntington Bank with respect to letters of credit. (H.
9 Tr.:47:19 and Exhibit 5).

10 378. The Court agrees that merely focusing on BBC's profit and loss statement
11 (Exhibit 6), which the SEC chose to use (one month out of three years) in order to
12 support the SEC's assertion that BBC was in "dire straits," is not a reliable means of
13 establishing the financial condition of an investment fund like BBC – which adopted a
14 business model where investor funds are used early on in the development cycle to
15 build infrastructure, hire qualified personnel and being the investment phase of the
operation . (H. Tr.:50:9-17 and Exhibit 6).

16 379. Bravata testified that the analysis by Aguilar that focused on the profit
17 and loss analysis of BBC was misleading, considering the developmental stage of the
18 company's investment cycle. For example, Bravata made the point that, "we had
19 properties that we were paying cash to do construction work," which would
20 dramatically effect profit and loss analysis and would true picture of the company. (H.
Tr.:53:1-3).

21 380. Bravata also testified that the Aguilar profit and loss approach was not
22 reflective of the true financial picture of BBC since it did not take into consideration
23 cash flow from part of the largest piece of the BBC portfolio which was the
24 "Timberstone" acquisition. (H. Tr.:51:4-10 and Exhibit 6).

25 381. The Court finds Bravata's points about the stage of BBC's development to
26 be informative. A profit and loss analysis shows the cost of building out a business and
27 infrastructure cost, but as Bravata testified, you will always have expenditures in the
28 early years of a company exceed that far exceed cash flow especially, in real estate
29 acquisition plans. Returns and profitability may not be seen until assets are rented or
30 sold. (H. Tr.:53:1-9).

31 *The Securities Regulation Law Firm*

32 3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

1 382. Contrary to the implication by the SEC that no real operating business was
2 functioning within BBC, the facts belie that assertion. For example, the Receiver
3 appointed in this case has reported to the Court that with the proceeds of
4 approximately \$20,000,000, BBC acquired over 71 different pieces of real estate.

5 383. The Court is concerned that what the SEC accomplished in this case is to
6 shut down a company in its early stage of development and failed to provide the
7 opportunity for BBC investors to stay with the company or exercise their coming right
8 to rescission required by the OFIR settlement terms. (H. Tr.:57:6-11).

9 384. BBC was endeavoring to ride out a real estate market that was going
10 through some of the greatest drops in value in our country's history for residential and
11 commercial properties; banks were and still are collapsing; financial institutions that no
12 one would ever worry about failing – in fact have failed. (H. Tr.:58:5-1).

13 385. Bravata pointed out in his testimony that value of real estate needs to
14 include intrinsic value as well as actual value. Bravata testified that nowhere in the
15 valuation analysis were elements such as tax abatements, the brown stone, or “cap
16 rates” included by the Receiver in his initial reports. Bravata pointed out that even
17 though a shopping center may have a mortgage that exceeds its value, it could be cash
18 flowing nonetheless. (H. Tr.:59:1-5).

19 **Bravata Financial Group, LLC**

20 386. Aguilar testified that BBC transferred \$7.6 million dollars to BFG as shown
21 by her financial analysis. (H. Tr.:173:22-25; 174:1-2 and Exhibit 17).

22 387. The Court finds, however, that a valid, written management agreement
23 was put in place between BBC and BFG that contemplated and provided for
24 management services to be provided to BBC by BFG with fees payable to BFG in
25 exchange for these services. (H. Tr.:174:7-13 and Exhibit 18).

26 388. Aguilar testified that there did in fact exist a legal document that
27 memorializes the arrangement by which BBC Equities would in fact reimburse Bravata
28 Financial Group for its selling cost. (H. Tr.:174:7-13, Exhibit 18)

29 389. The PPMs disclose that the use of proceeds from the BBC offering would
30 be used to pay finder's fee and to reimburse sales agents. The PPMS specifically
31 disclosed to prospective investors that BBC, “Intends to utilize the services of brokers,

1 finders and/or sales agents, who may or may not be affiliated with the Company's
2 Managers. (Exhibit 38, Pg. 1 (2) bottom of page and top of pg. 2).

3 390. BBC did adequately disclose in its PPMs that "the Company would pay
4 finder's fees of 8% to finders or others who brought investors who actually invested in
5 the shares of this offering." (Exhibit 38, Pg. 2).

6 391. The PPMs adequately disclose in the "Conflicts of Interest," section that
7 "The Company has entered into various agreements and arrangements with the
8 Managers and their entities to perform various services on behalf of the Company in
9 exchange for the payment of fees." (Exhibit 37, Pg. 21).

10 392. In fact, the Court finds that disclosures made in the PPMs to the effect
11 "that \$16,200,000 of the proceeds of this offering would be used in costs associated with
12 finder's fees, attorneys, CPAs, broker's fees and for reimbursing individuals for certain
13 expenses they incur" is a comprehensive disclosure to BBC investors – not an effort to
14 mislead investors on the allowable uses of offering proceeds. (Exhibit 38, Pg. 10 – "Use
15 of Proceeds").

16 393. It is also undisputed by the SEC that BFG marketed other insurance
17 products besides investments in BBC. (H. Tr.:175:14-22).

18 *Advice to Purchase of a Broker Dealer*

19 394. BFG was advised by its securities counsel to either become registered as a
20 broker-dealer or to acquire a broker-dealer. This recommendation was given by legal
21 counsel even before the OFIR investigation began and certainly before the SEC inquiry
22 commenced. Testimony at the Hearing revealed that in order to begin the process of
23 doing so, BFG purchased a shell broker-dealer with the assistance of National Financial
24 Services ("NFS"), a division of Fidelity Investments, prior to the investigations. (H.
25 Tr.:433:1-7).

26 395. Further to this plan, the Court heard credible testimony that BFG entered
27 into a purchase agreement to acquire a company called "Vantage," a shell broker-
28 dealer, which was arranged under the guidance of NFS. (H. Tr.:563:11-20).

29 396. The Court also heard testimony from Traver that plans were underway
30 for BFG to purchase an up and running broker-dealer out of Chicago, Illinois, Brewer
31 Financial. (H. Tr.:433:3-7).

1
2 397. The Court also finds that it is undisputed that an affiliate of BFG, BFG
3 Asset Management, LLC, d/b/a BFG Institutional Consulting Group, was approved by
4 the SEC as an investment advisory firm on April 27, 2009. The Court finds this odd in
5 that the SEC filed its Complaint on July 26, 2009, sought emergency, ex-parte relief
6 which the Court granted in part – yet never mentioned or disclosed that an affiliate of
7 BFG had applied for and was approved as an investment advisor. (H. Tr.:433:11-22 and
8 Exhibits 32-36, inclusive).³

9 398. The Court finds that the PPMs disclose that BBC's "managers presently
10 contemplate organizing a securities broker-dealer which would assist the Company in
11 selling Shares in this offering." (Exhibit 38, Pg. 1 (2) bottom of pg. and top of pg. 2).

12 399. In fact, the Court finds that disclosures made in the PPMs to the effect
13 "that \$16,200,000 of the proceeds of this offering would be used in costs associated with
14 finder's fees, attorneys, CPAs, broker's fees and for reimbursing individuals for certain
15 expenses they incur" is a comprehensive disclosure to BBC investors – not an effort to
16 mislead investors on the allowable uses of offering proceeds. (Exhibit 38, Pg. 10 – "Use
17 of Proceeds").

18 400. Exhibit 32 establishes that Bravata did hold FINRA licenses in life and
19 health products, his Series 6, 63, 7, and Series 24 FINRA registrations, but Bravata was
20 not at the time of the BBC offerings duly affiliated with a registered broker-dealer.
21 However, Bravata testified that he was relying on exemptions from broker-dealer
22 registration afforded by Rule 3a-4 of the Securities Exchange Act of 1934. (Exhibit 32
23 and § 240.3a4-1 "Associated Persons of an Issuer Deemed Not to be Brokers").

24 401. Aguilar was asked if she was familiar with the Associated Person Rule,
25 she responded, "No". (H. Tr.:242:1-3)

26 402. As to finder's fees, the testimony shows that the SEC believes
27 compensation paid to finder's of BBC was unlawful and violated federal securities laws
28 as alleged in its Complaint. However, Aguilar (an SEC senior accountant and employee)
29 was asked on cross-examination if paying finders fee's was unlawful? The Court finds
30 that she responded, "no." (H. Tr.:239:17-25 and 240:1).

31
32 ³ The name of the applicant for registration under the Investment Advisors Act of 1940 was
subsequently changed to "Strategic Institutional Consulting Group, LLC."

1 403. Aguilar then was asked on cross-examination whether she was familiar
2 with the "Associated Person Rule," and she responded, "no." (H. Tr.:242:1-3 and
3 § 240.3a4-1 "Associated Persons of an Issuer Deemed Not to be Brokers").

4 404. The Court also heard testimony from Joseph Bravata that although BFG
5 was ever registered, he testified that in July 2009 BFG commenced the transfer process
6 of its agents to the broker-dealer that was under consideration for purchase and was in
7 the process of registering the agents' Forms U-4s, but again this information was not
8 given to this court prior to the seeking of the Emergency Ex-parte order. (H. Tr.:588:18-
25; 589:1-2 and Exhibit 171).

9 405. Joseph Bravata worked with the new broker-dealer and the compliance
10 office of the broker-dealer as they worked out the details of the transfer of funds and
11 operations. (H. Tr.:566:8-12).

12 406. Some BFG sales agents actually moved and turned in fingerprint cards to
13 join the new broker-dealer. (H. Tr.:566:4-18 and Exhibit 171).

14 407. Bruce Coleman, BFG's chief compliance officer was actually transferred to
15 Brewer Financial July 14, 2009 and thereafter removed on July 30, 2009-- just 4 days after
16 the SEC filed its Complaint and sought emergency, ex-parte relief. (H. Tr.:567:18-25 ;
17 568:1-3 and Exhibit 171).

18 *The SEC Was Aware of the Impending Opportunities Available to BFG and its*
19 *Affiliated Investment Advisory Firm*

20 408. The SEC was advised by the Defendants of the business plan and
21 investment opportunities available to BFG's Strategic Institutional Consulting Group,
22 LLC, which included upwards of \$6.0 billion dollars under management that was in the
23 process of joining BFG's new investment advisory firm. The SEC's actions of shutting
24 down the Defendants' operations scuttled that opportunity for BBC's investors. (H.
25 Tr.:438:3-5).

26 409. Joseph Bravata did testify that BFG's registered investment advisory firm
27 had arranged the hiring of a group of registered investment advisors which were
28 bringing in a total of approximately \$6.0 billion dollars under management. (H.
29 Tr.:564:18-22).

1 410. Even though BFG expected far more capital coming under the
2 management of its investment advisory firm, its *pro forma* evaluation was premised on
3 only \$1.6 billion dollars of assets – which *pro forma* was provided to the SEC prior to the
4 filing in court for the Emergency *Ex-parte* Order. (H. Tr.:437:1-6).

5 **Phoenix Venture Capital, LLC**
6 **Represented Defendants' Implementation**
7 **of the OFIR Settlement Agreement**

8 411. Phoenix Venture Capital, LLC (“Phoenix”) was a new company, with
9 either ties, nor financial connections to BBC or BFG. (H. Tr.: 444:6-8).

10 412. Phoenix prepared its own PPM, disclosures, and related offering
11 documents. (Exhibit 64).

12 413. Phoenix created an acknowledgement letter in which prospective
13 investors reviewed and signed fully disclosing the OFIR and SEC investigations and
14 documenting the investors election to transfer their BBC investment to the new
15 opportunity with Phoenix. (Exhibits 140 and 141).

16 414. Aguilar apparently did not even review the Phoenix materials (H. Tr.:
17 266:16-19).

18 415. The SEC made no assessment or evaluation of Phoenix, similar to that
19 conducted for BBC. (H. Tr.: 266:20-22).

20 416. Aguilar did testify that she received the PPM Phoenix. (H. Tr.: 207:8-12).

21 417. Aguilar that the Phoenix PPM was prepared by and supplied by Butzel
22 Long, LLP, Defendants' outside legal counsel. (H. Tr.: 207:8-12 and Exhibit 64) .
23

24 418. The Court also heard testimony from Aguilar that she was not aware of
25 any documents relating to Phoenix produced by any of the defendants in this case,
26 including BBC, to the SEC. (H. Tr.: 207:13-16).

27 419. The SEC was also given a power point presentation, in Chicago, during
28 the meeting held between Butzel Long, LLP and the SEC Enforcement Staff, which
29 contained information regarding Phoenix. (Exhibit 107).
30

1 420. Aguilar, on cross examination, testified in relation to receiving
2 documentation regarding Phoenix said, "I saw it, but I didn't review it again. I didn't
3 review it in detail." (H. Tr.: 266:16-19).

4 421. Exhibit 141 is the subscription agreement for Phoenix. (H. Tr.: 571:14-17).

5
6 422. All new investors in Phoenix were required to fill out new paperwork,
7 separate from those for BBC (H. Tr.: 571:20-24).

8 423. The Court finds that the new offer planned by Phoenix was discussed
9 with both regulators from OFIR and the SEC, prior to the SEC's Complaint being filed
10 and prior to the exchange of settlement letters in July, 2009 between BBC and OFIR, and
11 no violations have been mentioned on the new fund. (H. Tr.: 571:25 and 572:1-2).

12 424. Joseph Bravata established during his testimony that he, along with legal
13 counsel for BBC, along with the approved custodians used by BBC and Phoenix for
14 qualified retirement accounts, created the documents and disclosures used for new
15 Phoenix investors. (H. Tr.: 572:9-25 and 573:1-4 and Exhibit 142).

16 425. Consistent with his testimony regarding BBC, Joseph Bravata, along with
17 in-house counsel, created a distribution log assigning all new PPMs with numbers to
18 any person who were qualified to invest into Phoenix. (Pg.576 line 21-25, Pg. 577 line 3-
19 5).

20 426. Joseph Bravata participated in the mass conference call conducted by
21 Bravata in June, 2009, with all interested BBC investors explaining the OFIR
22 investigation, the SEC formal investigation, and the new Phoenix offering. (H. Tr.:
23 Exhibit 143).

24 427. This call included over 200 BBC investors and included a disclosure of the
25 details of the rescission offer that BBC was implementing as part of the OFIR settlement.
26 (H. Tr. 5743-8 and Exhibit 143).

27 428. Traver testified that there were no funds ever transferred or comingled
28 with Phoenix Venture Capital from BBC or BFG. (H. Tr.:444:6-8)

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**Anthony Bravata Has No Business
Being Named as a Defendant in this Case**

429. The SEC appears to have an interest in claiming, without sufficient factual support, that Anthony Bravata is somehow involved in a management level with BBC or BFG. The testimony establishes otherwise. (H. Tr.: 72:15-20). Antonio Bravata never attended any management meetings for either of the companies.

430. Antonio Bravata is not an owner of BBC Equities. (H. Tr.: 63:7-11).

431. Antonio Bravata is not an owner of Bravata Financial Group. (H. Tr.: 63:7-11).

432. Antonio Bravata has never held ownership in any of the companies. Antonio Bravata has never held a position of authority with either of the companies. (H. Tr.: 63:7-11).

433. Instead, the evidence shows that Antonio Bravata was an agent, hired by BFG, who performed the exact same functions as any other BFG employee and was paid the same as every other agent around the country. (H. Tr.: 445:13-15)

434. Antonio Bravata was paid a salary to work for BFG – nothing more. (H. Tr.: 426:16-17)

435. All agents (just like Antonio Bravata) of BFG were paid a fixed level of compensation. (H. Tr.: 426:9-13).

436. Antonio Bravata never received any loans from BFG or BBC. (H. Tr.: 445:10-12)

437. Antonio Bravata testified he was never an employee of BBC. (H. Tr.: 63:9-11).

438. Although the SEC asserts that Antonio Bravata conducted “free lunch seminars” for BBC, Antonio Bravata was never employed or contracted by BBC to provide any services for BBC. (H. Tr.: 63:9-11).

1 439. As an independent agent for BFG, Antonio Bravata received a finder's fee
2 for individuals whom ultimately decided to invest in BBC, but he was at no time
3 employed by BBC (H. Tr.: 68:12-15).

4 440. Finder's fees were paid and disclosed to any individual who acted as a
5 finder and brought potential investors to BBC. These fees were fully disclosed in both
6 PPMs. (H. Tr.: Exhibit 37 and Exhibit 38).

7 441. Investors themselves received finder's fees from BBC if they introduced
8 new or potential investors to BBC. (H. Tr.: Exhibit 8).

9 442. Finder's fees paid to Antonio Bravata, or any other of the listed finders,
10 does not establish that the payee of a finder's fee was employed by BBC. (H. Tr.: Exhibit
11 37 and Exhibit 38, "Use of Proceeds").

12 443. Antonio Bravata received finder's fees from BBC before becoming an
13 employee of BFG, after which time his compensation became a fixed salary. (H. Tr.:
14 Exhibit 8).

15 444. Aguilar testified that she did not know if the QuickBooks accounting
16 records maintained by the Defendants contained a list of all finders, numbering around
17 40 people, who received fees from BBC. (H. Tr.: 239:4-6 and 239:11-12 and 241:9-12).

18 445. Aguilar testified that it was her belief that persons that received finder's
19 fees from BBC were employees of BBC, which the Court finds not to be a correct
20 assumption derived from the facts in to evidence. (H. Tr.: 241:18-20).

21 446. Traver on the other hand, the person responsible for maintaining all
22 payroll records for BBC and BFG, testified that Antonio Bravata was never an employee
23 of BBC Equities. Aguilar testified in support of her conclusion that Anthony Bravata
24 was an employee based simply on her understanding that Antonio Bravata was an
25 employee of BBC. (H. Tr.: 241:21-25).

26 447. SEC Exhibit 28, which is a summary of checks received by Anthony
27 Bravata does not establish that his role with either BFG or BBC was in violation of
28 federal securities laws. (H. Tr.: 192:6-14 and Exhibit 28).

29 448. SEC Exhibit 29 has little probative value in showing that Anthony Bravata
30 violated federal securities laws. That exhibit merely shows the details of the

1 automobiles and real estate that Antonio Bravata purchased over the years using the
2 compensation he earned from his various sources of income; Exhibit 29 does not show
3 any wrong doing or unlawful conduct by Anthony Bravata in owning vehicles or
4 homes that he worked for. (H. Tr.: 193:3-90).

5 449. When asked on cross-examination how Antonio Bravata paid for his cars
6 and homes, Aguilar admitted that not all of the money he used to pay for those items
7 came from BBC and in fact some of his funds came from loans made to him by his
8 father. Aguilar's testimony also established that Antonio Bravata earned at least
9 \$127,000 from his outside insurance sales. (H. Tr.: 193:10-16).

10 450. The SEC states Antonio Bravata put on Free lunch Seminars for BBC
11 Equities, but the fact is Antonio Bravata was never employed or contracted with BBC
12 Equities. (H. Tr.:63:9-11).

13 451. Antonio Bravata testified that, "I don't know anything that goes on inside
14 BBC Management". (H.TR.:72:1-18).

15 452. Antonio Bravata testified he did not know anything that went on inside of
16 BBC Equities. (H. Tr.:72:19-20).

17 453. Aguilar testified that in fact it was not dollars and cents, it was just her
18 understanding that Antonio Bravata was an employee of BBC Equities. (H. Tr.:241:21-
19 25).

20 454. Exhibit 28 of the Government is nothing more than once again a summary
21 of checks Antonio Bravata received from either BBC as finder's fees, or from BFG as
22 dictated by the legal of either company. (H. Tr.:192: 6-14, Exhibit 28).

23 455. Exhibit 29 of the Government shows the accuracy of the automobiles, and
24 real estate that Antonio Bravata purchased over the years, but fails to show or prove
25 any wrong doing with owning vehicles, or homes, or in fact how they were purchased.
26 (H. Tr.:193:3-90).

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31 *The Securities Regulation Law Firm*

32 3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

1 **PREAMBLE**

2 **II. Bravata Defendants' Proposed Conclusions of Law**

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4 The Plaintiff, United States Securities and Exchange Commission ("SEC")
5 brought this civil enforcement action against the named Defendants on July 26, 2009
6 [Doc. No. 1]. The Complaint was filed after the SEC Enforcement Staff conducted an
7 exhaustive inquiry of the Defendants in concert with the OFIR. In the first few
8 paragraphs of the SEC Complaint, the SEC summarizes its core allegations against the
9 Defendants. Those core allegations were stated by the SEC as follows:
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13 "The Commission brings this action to shut down an ongoing offering fraud and
14 Ponzi scheme involving \$50 million and at least 440 investors. The fraud is being
15 perpetrated by Defendants John J. Bravata ("John Bravata"), Richard J. Trabulsky
16 ("Trabulsky"), two of their companies - Defendants BBC Equities, LLC ("BBC
17 Equities") and Bravata Financial Group, LLC ("Bravata Financial") - assisted by
18 Defendant Antonio M. Bravata ("Antonio Bravata"). (John Bravata, Trabulsky,
19 BBC Equities, and Bravata Financial are collectively referred to herein as the
20 "Fraud Defendants." The Fraud Defendants and Antonio Bravata are collectively
21 referred to as "Defendants").

22 The Fraud Defendants have lied to prospective investors about the use of
23 investor funds; the risks to them and others; and the true financial condition of
24 BBC Equities.

25 To keep their scheme afloat, the Fraud Defendants have spent an additional \$11.3
26 million of investor funds perpetrating a Ponzi scheme. They have used new
27 investment proceeds to make the quarterly payments to earlier investors, among
28 other payments. They have also spent \$14 million of investment proceeds
29 soliciting and raising money from new investors to fuel the scheme." [Doc. No. 1,
30 ¶¶ 1, 2-3].

31 The SEC assumes the burden of proof in this civil action. One day following the
32 filing of the SEC Complaint, the SEC Enforcement Staff, knowing full well that a full

1 settlement and resolution of any alleged securities violations by BBC and BFG was
2 being resolved through a rescission offer substantively agreed to by OFIR; knowing full
3 well that BBC and BFG had ceased all offering activities upon the receipt of the OFIR
4 cease and desist order on April 1, 2009; knowing full well that BBC and BFG had
5 implemented a number of substantial remedies intended to address compliance issues
6 identified by OFIR in the offering process; and knowing full well that BBC and BFG
7 were at the time and had been all during its investigation, represented by George
8 Donnini, Esq. of Butzel Long, LLP – swept into Detroit, Michigan to convince this Court
9 that 440 investors who had contributed upwards of \$50.0 million dollars into BBC
10 would be better protected by entering a number of *ex-parte* orders rather than making
11 sure the SEC could prove its allegations by testing the facts alleged in the Complaint. As
12 discussed in a number of filings made by the Bravata Defendants early on in this case,
13 the SEC accomplished its intended result by failing to comply with Fed. R. Civ. Pro. 65
14 and by failing to candidly disclosure to the Court other salient facts that the Court
15 should have been privy to in ruling on the SEC’s Emergency Motion for Temporary
16 Restraining Order, Asset Freeze, and Other Ancillary Relief (hereafter, “Emergency, *Ex-*
17 *Parte* Motion” and “Order.” [Doc. No. 4].

18
19 The filing of this case as it was filed by the SEC was unnecessary. That is not to
20 say that there are not violators of the securities laws that engage in conduct that must be
21 dealt with by the SEC. The problem with this case and the SEC is that in the current

1 post-Bernard Madoff environment the SEC is functioning in, the agency simply is
2 unable to distinguish between entrepreneurs that are developing and growing a
3 legitimate business operation from those promoters who are not. This case represents a
4 classic specimen of how the Government can use its very formidable power and
5 resources, having knowledge of facts the Government elects NOT to disclose to the
6 judiciary, to destroy a promising venture without just cause and without following the
7 legal requirements in place to protect those accused of wrongdoing. We believe that,
8 but for the SEC's failure to unbiasedly investigate BBC and BFG, its failure to understand
9 the developmental business cycle of a "blind pool" real estate-managed fund and its
10 failure to be able to distinguish between those who are intentionally or recklessly
11 violating federal securities laws in using other peoples' money to grow a business,
12 contrasted with those who are struggling through bad economic times or unexpected
13 "hypergrowth" of a business – the injustice done to investors in this case was done by
14 their own Government, i.e. the SEC.

22 PROPOSED CONCLUSIONS OF LAW

24 I.

25 In determining whether a temporary restraining order should issue, the Court
26 considers the same factors as it would when considering a motion for a preliminary
27 injunction. *Summit County Dem. Cent. & Executive Comm. v. Blackwell*, 388 F.3d 547, 550
28 (6th Cir. 2004). These factors are: (1) whether the movant has a "strong" likelihood of
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1 success on the merits; (2) whether the movant would otherwise suffer irreparable
2 injury; (3) whether issuance of a preliminary injunction would cause substantial harm
3 to others; and (4) whether the public interest would be served by issuance of a
4 preliminary injunction. *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453,
5 459 (6th Cir.1997) (*en banc*). "These four considerations are 'factors to be balanced, not
6 prerequisites that must be met.'" *Certified Restoration Dry Cleaning Network, L.L.C. v.*
7 *Tenke Corp.*, 511 F.3d 535, 542 (6th Cir.2007) (quoting *Jones v. City of Monroe*, 341 F.3d 474,
8 476 (6th Cir. 2003)). The Court should find that the SEC has failed to meet its burden of
9 proof on these necessary elements and that the SEC has further failed to establish the
10 essential elements of the claims stated in its Complaint. Upon such a finding, the Court
11 should then either dissolve the preliminary injunctive order now in place in this case, or
12 short of that, should find that the assets described in Appendix "A" attached hereto are
13 not assets that should be further restrained by the Court's Asset Freeze.

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21 Section 15(a) (1) of the Exchange Act, 15 U.S.C. § 78o(a)(1) makes it "unlawful for
22 any broker or dealer ... to make use of the mails or any means or instrumentality of
23 interstate commerce to effect any transactions in, or to induce or attempt to induce the
24 purchase or sale of, any security ... unless such broker or dealer is registered [with the
25 Commission]." *See S.E.C. v. George*, 426 F.3d 786, 793 (6th Cir. 2005). A broker is defined
26 in section 3(a)(4) of the Act as "any person engaged in the business of effectuating
27 transactions in securities for the accounts of others." 15 U.S.C. § 78c(a)(4)(A). The Court
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1 should consider several factors to determine whether a person or entity qualifies as a
2 broker for the purposes of section 15(a)(1), including “regular participation in securities
3 transactions, employment with the issuer of the securities, payment by commission as
4 opposed to salary, history of selling the securities of other issuers, involvement in
5 advice to investors and active recruitment of investors.” *George*, 426 F.3d at 797
6 (citations omitted); *see also S.E.C. v. Martino*, 255 F.Supp.2d 268, 283 (S.D.N.Y.2003)
7 (listing as the relevant factors (1) whether an employee is the issuer; (2) whether he is
8 reimbursed on a commission-basis rather than a salary; (3) whether he is selling or
9 previously has sold the securities of other issuers; (4) whether he is involved in the
10 negotiations between the issuer and the investor; (5) whether he opines on the merits of
11 the investment or gives advice; and (6) whether he is an active finder of investors);
12 *Salamon v. Teleplus Enterprises, Inc.*, No. 05-2058, 2008 WL 2277094, at *8 (D.N.J. June 2,
13 2008) (stating that even a finder will be subject to the registration requirement of the
14 Securities Exchange Act if his activities include “analyzing the financial needs of an
15 issuer, recommending or designing financing methods, involvement in negotiations,
16 discussion of details of securities transactions, making investment recommendations,
17 and prior involvement in the sale of securities”). “Cases and SEC No-Action letters
18 interpreting the phrase [‘engaged in the business of effecting transactions in securities ’]
19 have indicated that regularity of participation is the primary indicia [*sic*] of being
20 ‘engaged in the business.’ ” *S.E. C. v. Kenton Capital, Ltd.*, 69 F.Supp.2d 1, 12
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The Securities Regulation Law Firm

3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

1 (D.D.C.1998) (internal citations omitted). The most important factor in determining
2 whether an individual or entity is a broker or dealer is whether that individual or entity
3 may be “characterized by a certain regularity of participation in securities transactions
4 at key points in the chain of distribution.” *Martino*, 255 F.Supp.2d at 283 (internal
5 quotation marks and citations omitted).
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9 Based on the allegations in the Complaint contrasted with the proofs adduced
10 during the Hearing, the Court should find that that none of the Bravata Defendants
11 should be found to have engaged in the regularity and scope of activities that compel a
12 finding that they acted as unregistered broker dealers. In addition, based on the filings
13 of record, the Court should find that the SEC has failed to present a *prima facie* showing
14 that Bravata Defendants have engaged in acts, practices, and transactions that constitute
15 violations of sections 5(a) and 5(c) of the Securities Act of 1933 (“Securities Act”), 15
16 U.S.C. §§ 77e(a) and (c); sections 17(a)(1), 17(a)(2) and 17(a) (3) of the Securities Act, 15
17 U.S.C. § 77q(a)(1), (a)(2), (a)(3); section 10(b) of the Securities Exchange Act of 1934, 15
18 U.S.C. § 78j(b), Rule 10b-5 promulgated there under, 17 C.F.R. 240.10b-5; and section
19 15(a) of the Exchange Act, 15 U.S.C. § 77o(a).
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25 The SEC has also failed to present any evidence that could be the basis for a
26 finding that the Bravata Defendants are likely to continue to violate these provisions of
27 the federal securities laws unless restrained from doing so.
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29 II.

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31 *The Securities Regulation Law Firm*
32 3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092
Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

1 The most glaring flaw in the SEC's efforts to tarnish the Bravata Defendants as
2 fraudsters and Ponzi Schemers is that the SEC has failed to establish that BBC or BFG
3 was in fact or law a Ponzi Scheme operation. For this singular reason, the Court must
4 deny the continuation of the effects of the preliminary injunction entered in this case, or
5 should radically adjust the nature and scope of the Asset Freeze and frankly, should just
6 dismiss the SEC's claims outright. The Court should find that the use of investor funds
7 from new BBC investors to pay earlier BBC investors has been disclosed by the
8 Defendants *ad naseum* and therefore, the most significant element of a Ponzi Scheme---
9 the desire to conceal the fact that investor funds from new investors are used to pay
10 earlier investors--is missing and the Defendants' actions in the manner that BBC was
11 functioning does not even constitute a Ponzi Scheme at all.

12 The Court should find that the Bravata Defendants did not engage in a Ponzi
13 Scheme at all. To prove the existence of a Ponzi Scheme, the SEC must show that there
14 was a lack of a significant business enterprise and an intent to hide the lack of such
15 business enterprise by granting returns to earlier investors misrepresented as profits in
16 order to get more investors. See *Wyle v. C.H. Rider & Family (In re United Energy Corp.)*,
17 944 F.2d 589, 590 n. 1 (9th Cir.1991) (Proceeds are funneled "from new investors to
18 previous investors in the guise of profits from the alleged business venture, thereby
19 cultivating an illusion that a legitimate profit-making business opportunity exists and
20 inducing further investment"). The argument for the existence of a Ponzi Scheme clearly

1 fails in this case because: (i) the companies purchased \$20 million in real estate
2 investments, valued in excess of \$150,000,000 according to some sources, so there was a
3 legitimate business enterprise; and (ii) since the PPMs disclosed all of the activity, it
4 cannot be said that the Bravata Defendants engaged in a phony investment plan to
5 deceive investors about the real source of the money in order to induce them to invest
6 more money. *See In re Bonham*, 229 F.3d 750, 759, n. 1 (9th Cir.2000). *See also Cunningham*
7 *v. Brown*, 265 U.S. 1, 44 S. Ct. 424, 68 L. Ed. 873 (1924) ("Generically, a Ponzi scheme is a
8 phony investment plan in which monies paid by later investors are used to pay
9 artificially high returns to the initial investors, with the goal of attracting more
10 investors").
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16 "The securities laws were not enacted to protect sophisticated businessmen [and
17 women] from their own errors of judgment. Such investors must . . . investigate the
18 information available to them with the care and prudence expected from people blessed
19 with full access to information." *Hirsch v. du Pont*, 553 F.2d 750, 763 (2d Cir.1977); see
20 also *Royal American Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011 (2d Cir.1989).
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23 The majority view recognizes that knowledge and information disclosed by an
24 issuer is imputed even to investors who do not read the PPM, *see, e.g., Zobrist v. Coal-X*
25 *Inc.*, 708 F. 2d 1511, 1517 (10th Cir. 1983). The court in *Zobrist, id.*, emphasized that the
26 investors signed subscription agreements acknowledging that they did read the PPM.
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28 Thus, the "accredited investors in *Zobrist* undisputedly knew the risk of investing in
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1 hedge funds, contrary to the view of the Staff" *See id.* ("We observe, however, that had
2 Phil Rasmussen read the Private Placement Memorandum, he undeniably would have
3 been notified of the risks of the investment."); *Grossman v. Novell, Inc.*, 120 F.3d 1112,
4 1122, n.10 (10 Cir. 1997) ("this court has previously held that an [accredited] investor
5 may *not* rely on oral misstatements when the risks of an investment are adequately
6 disclosed in an accompanying private placement memorandum") (emphasis added).
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10 Although the number of cases involving alleged Ponzi Schemes far outweigh the
11 number of Ponzi Scheme allegations rejected by courts, close analysis of several judicial
12 decisions supports the Bravata Defendants' strong opposition to the assertion that BBC
13 was a Ponzi Scheme.
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16 In *Adler v. Berg Harmon Associates*, 790 F. Supp. 1222 (S.D.N.Y., 1992), plaintiffs
17 alleged that defendants engaged in an elaborate Ponzi Scheme. According to plaintiffs,
18 defendants engaged in an elaborate "Ponzi" or pyramid scheme whereby defendants
19 utilized a portion of the fees and profits earned to "prop up" earlier partnerships so that
20 the illusion of successful past performance would allow the promoters to continue in
21 the syndication of new partnerships. The court determined that full disclosure results in
22 no fraud.
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26 The court emphasized that the goal of the anti-fraud provisions of the securities
27 laws is full disclosure, not substantive review of the underlying transaction by the
28 courts. *Antonoff v. Bushell*, 1991 WL 95433, at *3 (S.D.N.Y.1991). Where the seller of
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1 securities makes full and objective disclosure of the material factual matters respecting
2 the transaction, the seller need not characterize its terms as unreasonable or
3 unwarranted. *Id.* In the *Adler* case, the terms of the wraparound mortgages and the
4 purchase price of the properties were fully disclosed in the PPMs. *Id.* at 1232.
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7 Whether the terms complained of were unreasonable or unwarranted was for
8 plaintiffs themselves to decide — the securities laws were not enacted to protect
9 sophisticated investors from their own errors of judgment. *Haggerty v. Comstock Cold*
10 *Co.*, 765 F.Supp. 111, 115 (S.D.N.Y.1991) (citations omitted). The *Adler* court dismissed
11 this set of allegations pursuant to Rule 12(b)(6) for failure to allege the misrepresent-
12 ation element of a Section 10(b) claim. *Id.*
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16 *Adler* should be carefully scrutinized by this Court as there are many factual
17 similarities to the case at bar. In *Adler*, plaintiffs' allegation that defendants failed to
18 disclose the payment of certain commissions and fees to accountants and other financial
19 advisors was deemed meritless. Fees to accountants, financial advisors, and others
20 were fully disclosed in the PPMs. The section of the PPM entitled Fees, Profits and
21 Compensation of the General Partner and Affiliates included a summary of the types
22 and amounts of compensation, fees or other distributions, including fees for financial
23 consulting and tax advice and various services rendered by the placement agent, to the
24 General Partner and affiliates. Allegations that the fees received by defendants in
25 connection with the partnership transactions were excessive or unwarranted also failed
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1 to state a claim under Section 10(b) since the fees paid to defendants and others were
2 fully disclosed in the PPMs.
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4 The *Adler* court then addressed *scienter* vis-à-vis full disclosure. The court found
5 that "The Complaint is further deficient in its allegation of the *scienter* element. For
6 liability to attach under Section 10(b), plaintiffs must plead and prove *scienter* on the
7 part of each of the defendants. As noted above, plaintiffs' allegations regarding *scienter*
8 are plainly insufficient to charge each of the defendants with intentional fraudulent
9 conduct — it is not enough to argue that all of the defendants are insiders who earned
10 substantial sums from the syndications." *Id.* The Second Circuit recently warned that
11 Luce and DiVittorio "must not be mistaken for license to base claims of fraud on
12 speculation and conclusory allegations." *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172
13 (2d Cir.1990). "[A] complaint must adduce specific facts supporting a strong inference of
14 fraud or it will not satisfy even a relaxed pleading standard." *Id.* at 1233.
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20 The *Adler* Court stated that although the complaint did allege that "[t]he
21 principle architects of the fraudulent scheme were Harmon and Berg" and that
22 "Harmon, Berg and entities formed and controlled by them decided to utilize devices
23 which amounted to an elaborate 'Ponzi' or pyramid scheme," such allegations were
24 wholly conclusory in nature. Moreover, while Berg's status as president and chairman
25 of the board of two entities which participated as joint venturers in entities which were
26 general partners of certain Berg-Harmon partnerships may suffice to tie him to
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1 misrepresentations in offering materials, it is not clear whether there remain any
2 actionable misrepresentations or omissions for which Berg is alleged to be responsible.

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4 *Id.* at 1235.

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6 *In re Southern Indus. Banking Corp.*, 159 B.R. 224 (Bankr. E.D. Tenn., 1993) is a case
7 with other comparisons to the one now before the Court. The bankruptcy trustee for the
8 debtor in this bankruptcy case filed suit contending that the business of SBIC was
9 conducted as a Ponzi Scheme. The Court evaluated the SBIC business and investment
10 model and concluded that there was no Ponzi Scheme and in so doing held:

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13 “Every business that is balance-sheet insolvent is not a Ponzi scheme. The
14 outcome may be the same – earlier debts paid and later debts not paid – but
15 that does not make an insolvent business a Ponzi scheme.” *Id.* at 228. In a Ponzi
16 scheme the crooks may set up a regularly operating business, but its purpose is
17 to lure investors into the scheme; the crooks know the business will not make
18 enough money to repay the investors. *Henderson v. Buchanan* (In re Western
19 World Funding, Inc.), 52 B.R. 743 (Bankr. D.Nev.1985) aff'd in part, rev'd in part,
20 *Buchanan v. Henderson*, 131 B.R. 859 (D.Nev.1990), rev'd, *Henderson v.*
21 *Buchanan*, 985 F.2d 1021 (9th Cir.1993). Other Ponzi schemes go down the scale
22 from a few transactions to no legitimate business. See *Wootton v. Barge* (In re
23 Cohen), 875 F.2d 508, 19 Bankr.Ct.Dec. 883, 21 Collier Bankr.Cas.2d 554 (5th Cir.
24 1989); *Merrill v. Abbott* (In re Independent Clearing House Co.), 41 B.R. 985, 12
25 Bankr.Ct.Dec. 44, 11 Collier Bankr.Cas.2d 196 (Bankr.D.Utah 1984), aff'd in part,
26 rev'd in part, 77 B.R. 843 (D.Utah 1987) (en banc); *Rafoth v. Bailey* (In re Baker &
27 Getty Fin'l Serv., Inc.), 88 B.R. 792 (Bankr.N.D.Ohio 1988).”

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29 In the above decision, the court remarked that the mortgage company run by
30 SBIC was not set up to be and did not become a scheme for the operators to steal money
31 from the business or its customers. The business was not soliciting new customers just

1 to get money to pay old customers. "The mortgage company was a legitimate business
2 that went awry because of financial problems." *Id.* The court concluded that the
3 undisputed facts distinguish SIBC from a Ponzi scheme.
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6 In *Benzon v. Morgan Stanley Distributors, Inc.*, 420 F.3d 598 (Fed. 6th Cir., 2005), the
7 Sixth Circuit found that the issuer had in fact accomplished full disclosure and there
8 was no fraud where the plaintiff had alleged that defendants mislead investors into
9 believing that it may be a rational strategy to invest amounts up to \$100,000 in B shares,
10 when it is a "mathematical fact" that Class A shares will yield higher net returns on
11 investments over \$50,000 than Class B shares. The Sixth Circuit agreed with the district
12 court in granting defendants' motion to dismiss and opined that defendants had satisfied
13 the disclosure requirements and no fraud was afoot. Interestingly, the court in *Benzon*
14 found 'materiality as the key to its finding that no fraud had been shown by the
15 plaintiffs. The *Benzon* court summarizes its decision with the following analysis that
16 carries over to the case now before this Court:
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22 "Given that all of the information necessary to compare the different class shares
23 was in the prospectuses, the alleged omissions in this case are not material.
24 "Materiality depends on the significance the reasonable investor would place on
25 the withheld. . . information." *Id.* at 609 quoting *Helwig v. Vencor, Inc.*, 251 F.3d
26 540, 555 (6th Cir.2001) (en banc). While statements of the type proposed by
27 Plaintiffs might have facilitated an investor's task in comparing the share classes,
28 the critical question is whether they would have "significantly altered the `total
29 mix' of information made available." *Id.* quoting *Helwig* at 563 (quoting *Basic*, 485
30 U.S. at 231-32, 108 S. Ct. 978). With regard to materiality, the court held that the
31 disclosures the plaintiffs proposed were merely interpretations drawn from the
32 facts presented in the prospectuses, and did not actually provide new

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1 information, they would not have "significantly altered the `total mix'" of the
2 information already presented in the prospectuses.

3
4 With respect to the disclosures made in the BBC PPMs, the Court is confronted
5 with much the same issue confronted by the *Benzon* court, which is whether or not the
6 alleged misrepresentations pleaded by the SEC in its Complaint have been shown
7 during the Hearing to be "material." Materiality must be juxtaposed against the entire
8 contents of the BBC disclosures in its two PPMs. The Bravata Defendants submit that
9 considering the "totality of the total mix of information" made available to the BBC
10 investors, any assertions made by the SEC that the Bravata Defendants propagated
11 material misrepresentations in the offer and sale of securities has not been established
12 and will never be established, taking into consideration the extensive nature of the
13 disclosures by BBC in the PPMs.
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18 III.

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20 The SEC's Complaint asserts violations by the Bravata Defendants of 17 C.F.R. §
21 240.10b-5. To establish violations of these anti-fraud provisions, the SEC must show that
22 the Bravata Defendants engaged in (1) misrepresentations or omissions of material facts
23 (2) made in connection with the offer, sale or purchase of securities (3) with *scienter* on
24 the part of the Bravata Defendants. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S. Ct.
25 1375, 47 L.Ed.2d 668 (1976). A fact is material if a substantial likelihood exists that (1) a
26 reasonable shareholder would consider the fact important in making his investment
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1 decision and (2) a reasonable shareholder would view the information as having
2 significantly altered the total mix of information. *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-
3 32, 108 S. Ct. 978, 99 L.Ed.2d 194 (1988). *Scienter* may be established by proof of
4 recklessness – "highly unreasonable conduct which is an extreme departure from the
5 standards of ordinary care." *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1025 (6th
6 Cir.1979).

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10 In this case, the Court should find that the SEC has fallen substantially short in
11 establishing that any of the Bravata Defendants acted with the requisite *scienter*. Not
12 only has the SEC not produced any direct evidence from which the Court might
13 conclude that the Bravata Defendants conducted BBC's operations and its offering with
14 an intention "to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S.
15 185, 194, and n. 12, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976), the SEC has failed to adduce any
16 meaningful evidence in this case which "shows either a conscious intent to defraud or 'a
17 high degree of recklessness.'" *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st
18 Cir.2008) (quoting *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 82 (1st Cir.2002)).
19 "Recklessness is 'a highly unreasonable omission, involving not merely simple, or even
20 inexcusable negligence, but an extreme departure from the standards of ordinary care,
21 and which presents a danger of misleading buyers or sellers that is either known to the
22 defendant or is so obvious the actor must have been aware of it.'" *SEC v. Fife*, 311 F.3d
23 at 9-10 (quoting *Greebel v. FTP Software*, 194 F.3d 185, 198 (1st Cir.1999)).
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31 *The Securities Regulation Law Firm*

32 3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

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1 Testimony at the Hearing established that the Bravata Defendants were mindful
2
3 of their obligations to seek out and retain competent legal counsel at virtually every
4 step of BBC's development. There is no indication in the Hearing record that the
5 Bravata Defendants recklessly disregarded BBC's obligation to make adequate and
6 accurate disclosures to its investors. In fact, the Court should find after review of both
7 PPMs used in the BBC offerings, that the PPMs include disclosures as to many if not all
8 of the customary areas of material facts that one typically includes in offering materials
9 distributed to prospective private placement investors. The Hearing record includes
10 indicia of vigilance by the Bravata Defendants rather than ignorance. *See SEC v.*
11 *Jakubowski*, 150 F.3d 675, 682 (7th Cir.1998) ("Deliberate ignorance . . . can be a form of
12 knowledge."); *In re Kidder Peabody Sec. Litig.*, 10 F.Supp.2d 398, 415 (S.D.N.Y.1998)
13 ("[R]eckless disregard of the truth satisfies the *scienter* requirements of [the anti-fraud
14 provisions] when the defendant deliberately failed to acquire the information that
15 would have indicated to her that her statements were false or misleading."). The
16 Bravata Defendants have also vigorously denied inappropriate use or expenditure of
17 investor funds on personal expenditures, a fact that at times can itself establish the
18 requisite state of mind for committing securities fraud. *See Lowry v. SEC*, 340 F.3d 501,
19 506 (8th Cir.2003); *SEC v. Infinity Group Co.*, 212 F.3d 180, 192 (3d Cir.2000). Most courts
20 have held that "recklessness is 'a highly unreasonable omission, involving not merely
21 simple, or even inexcusable[] negligence, but an extreme departure from the standards
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31 3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

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1 of ordinary care, and which presents a danger of misleading buyers or sellers that is
2 either known to the defendant or is so obvious the actor must have been aware of it.' ”
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4 *SEC v. Fife*, 311 F.3d at 9-10 (quoting *Greebel v. FTP Software*, 194 F.3d 185, 198 (1st
5 Cir.1999)).
6

7 The Court should find that the record does not support a finding that the Bravata
8 Defendants were intentionally or highly reckless in their business dealings with BBC or
9 BFG.
10

11 III.

12
13 The SEC's reliance on any adverse inference that the Court will be asked to draw
14 stemming from a claim of their Fifth Amendment rights by Bravata and Anthony
15 Bravata is not sufficient in this case to fill the gaps in the proofs the SEC has failed to
16 introduce.
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19 In *SEC v. Collelo*, 139 F.3d 674, Fed. Sec. L. Rep. P 90,166 (9th Cir. 1998), the court
20 reviewed the various options available to a trial court in the context of an SEC civil
21 enforcement action and the defendants claim of his Fifth Amendment right against self-
22 incrimination.
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25 As espoused in *Collelo, id.*, parties are free to invoke the Fifth Amendment in civil
26 cases, but the court is equally free to draw adverse inferences from their failure of proof.
27
28 *See Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 1557-58, 47 L.Ed.2d 810 (1976);
29 *United States v. Solano-Godines*, 120 F.3d 957, 962(9th Cir.1997) (“In civil proceedings,
30

1 however, the Fifth Amendment does not forbid fact finders from drawing adverse
2 inferences against a party who refuses to testify"). Moreover, a district court has
3 discretion in its response to a party's invocation of the Fifth. *See Wehling v. Columbia*
4 *Broadcasting System*, 608 F.2d 1084, 1089 (5th Cir.1979) (If invocation of privilege
5 prejudiced the other party, the district court "would be free to fashion whatever remedy
6 is required to prevent unfairness."); *United States v. \$506,641.00 in U.S. Currency*, 1996
7 WL 78364, *3 (N.D.Ill.1996) ("[A] court has discretion in determining the appropriate
8 means of dealing with a claimant's invocation of the privilege.").

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13 At the Hearing, Bravata and Anthony Bravata were both called as witnesses by
14 the SEC on cross-examination and they testified quite extensively on a number of issues
15 the SEC questioned them about. Bravata did refuse to answer select questions when he
16 felt his response could be incriminating to him, as did his son, Anthony Bravata.
17
18 However, this case does not present the sort of more typical scenario where a civil
19 defendant makes a blanket claim of his privilege against self-incrimination. The SEC has
20 not been prejudiced in any manner as a result of either of the Bravatas refusing to
21 answer certain of their questions. For example, when asked if Bravata ever told
22 investors at workshops or seminars conducted by BFG that their return on investment
23 would be "guaranteed" or "secured," Bravata refused to answer claiming his Fifth
24 Amendment right. The SEC on the other hand was free to present testimony or
25 documentary evidence establishing what it believes were statements made by Bravata
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1 guaranteeing returns to investors. As a result, the SEC was not then and there
2 prejudiced in any fashion by Bravata's claim of privilege.
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4 If one looks at virtually all of the questions posed by the SEC to Bravata that he
5 refused to answer based on his Fifth Amendment privilege – the SEC is unable to cry
6 prejudice in any manner. Bravata was rightfully concerned about making any
7 incriminating statements to the SEC which would be immediately spoon fed to other
8 Government agencies with criminal prosecutorial jurisdiction. With the sheer vigor that
9 the SEC has pursued Bravata in this case, a reasonable person would conclude that the
10 SEC Enforcement Staff has a direct pipeline to other such agencies. It is clear that
11 Bravata wanted to testify at the Hearing. It is clear he was frustrated during his
12 testimony by having to refuse to answer questions that he seemed to have ready
13 answers for, but which could tend to incriminate himself in other proceedings.
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19 The bottom line is that Bravata expects the SEC to essentially claim that their case
20 is fully proved up merely by the act of Bravata claiming his Fifth Amendment privilege.
21 However, that is not the law. The Court should conduct a balancing of interests
22 between Bravata's right to invoke his Fifth Amendment rights against self-incrimination
23 against the SEC's right to cross-examine Bravata on salient aspects of its case. One
24 comes away from the several days of Hearing in this case with the impression that the
25 SEC would not have fared better in any aspect of Bravata's testimony even if he had
26 fully answered each question posed to him.
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1 In a decision just handed down this week by the U.S. District Court – Southern
2 District of New York in *S.E.C. v. Cohmad Securities Corp.*, Slip Copy, 2010 WL 363844,
3 S.D.N.Y., February 02, 2010 (NO. 09 CIV. 5680 (LLS)), the SEC’s initial complaint was
4 dismissed on dual motions brought under Fed. R. Civ. Pro. 12(b)(6) and 9(b). During the
5 investigatory stage of the SEC’s inquiry of *Cohmad Securities Corp.*, one of the principals
6 of the firm refused to provide sworn testimony to the SEC claiming his Fifth
7 Amendment right against self-incrimination. Justifying the dismissal of the SEC’s
8 complaint, the court in *Cohmad* remarked:

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13 “The SEC argues that Jaffe’s assertion of his Fifth Amendment privilege during
14 his SEC investigative testimony “provides a sufficient and independent reason
15 for denying his motion to dismiss in its entirety.” Pl.’s Opp. to Jaffe Mot. 23.
16 The adverse inference that may be drawn from Jaffe’s invocation of his Fifth
17 Amendment privilege is weak. Given the numerous criminal investigations
18 arising from Madoff’s fraud, there is a justifiable concern for anyone who did
19 business with BMIS’s investment advisory unit, as did Jaffe, that he or she will be
20 hauled into the criminal probe.” (Footnote 2)

21 *S.E.C. v. Brown*, 579 F.Supp.2d 1228 (D. Minn., 2008) is a recent decision in a
22 similar SEC civil enforcement action where in the court summarized the majority view
23 on the impact of a claim against self-incrimination in the context of an SEC proceeding.

24 Parties are free to invoke the Fifth Amendment in civil cases, but the court is
25 equally free to draw adverse inferences from their failure to bring forward evidence in
26 their defense. *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976);
27 *S.E.C v. Colello*, 139 F.3d 674, 677 (9th Cir.1998). But the Court may not punish a party
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1 for invoking the Fifth Amendment, see *S.E.C v. Merrill Scott & Assocs., Ltd.*, 505
2 F.Supp.2d 1193, 1208 (D. Utah 2007), and a direct inference of guilt or liability from a
3 party's silence is forbidden. *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 390 (7th Cir.
4 1995). However, a district court has discretion to fashion a response to a party's
5 invocation of the Fifth that is no more harsh than necessary to prevent unfair and
6 unnecessary prejudice to the other side. See *Colello*, 139 F.3d at 677; *Merrill Scott &*
7 *Assocs., Ltd.*, 505 F.Supp.2d at 1209. Courts elsewhere have shifted the burden to the
8 defendant to demonstrate an entitlement to disputed funds, *id.*; stricken a counterclaim
9 and an affirmative defense in their entirety, *United States v. One Parcel of Real Prop.*, 780
10 F. Supp. 715, 722 (D.Or.1991); and prevented a defendant from offering evidence in
11 support of positions on which he had invoked the Fifth Amendment. See *S.E.C v.*
12 *Benson*, 657 F. Supp. 1122, 1129 (S.D.N.Y.1987).

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19 In *Brown, supra*, the court agreed that it would be inappropriate to allow *Brown*
20 to rely on interrogatory responses in opposing summary judgment sought by the SEC.
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22 As the Magistrate Judge there noted, *Brown's* invocation of the Fifth Amendment
23 prevented the SEC from exploring and clarifying his responses in a deposition. The
24 Magistrate Judge felt the significance of that limitation was apparent in light of the
25 content of *Brown's* interrogatory responses. *Brown's* discovery responses were precisely
26 the sort of general answer on a critical issue that would have been explored in great
27 detail in a deposition by the SEC. The court felt that allowing *Brown* to rely on his Fifth
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1 Amendment right not to testify would in effect allow him to manipulate the discovery
2 process so that his unquestioned, conclusory assertions were the only version of his
3 testimony in the record. *In re Edmond*, 93,4 F.2d 1304 (4th Cir.1991) (approving the
4 striking of a self-serving affidavit where a party had invoked the Fifth Amendment to
5 prevent a deposition); *United States v. Baker*, 721 F.2d 647, 650 (8th Cir.1983)
6 (disregarding direct testimony after a defendant invoked the Fifth Amendment to
7 prevent cross-examination). The Court did not consider *Brown's* interrogatory response
8 in the context of the SEC summary judgment motion.
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13 None of these considerations are evident in the Hearing record before the Court.
14 Bravata testified at some length. He was subject to vigorous questioning by the SEC.
15 The Court should not find that any aspect of the Fifth Amendment claims raised in this
16 case have unduly prejudiced the SEC in any fashion – resulting in the same result that
17 obtained in *S.E.C. v. Cohmad Securities Corp.*, *supra*, i.e. “any adverse inference that may
18 be drawn from Bravata’s invocation of his Fifth Amendment privilege is weak.”
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22 IV.

23 At the conclusion of the Hearing, the Court allowed the record to remain open
24 with respect to the SEC’s request to admit proposed Exhibit 1 and the continuing
25 objections to same by the Bravata Defendants. Exhibit 1 has been represented by the
26 SEC to consist of “segments” or snippets of video recordings of educational workshops
27 or seminars conducted by BFG with the participation of Bravata and Anthony Bravata.
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1 The Bravata Defendants continue their objection to the Court's admission of
2 Exhibit 1 and continue their objection to the Court's consideration of the snippets of
3 video recordings apparently created by the SEC. The objection remains that the SEC has
4 wholly failed to lay a proper foundation for the admission of Exhibit 1. During the
5 initial hearing in this case on October 21, 2009, the SEC moved for admission of Exhibit
6 1. The Court stated "No, You can submit it, lay a foundation for it. If it's received as an
7 exhibit, I'll take a look at it myself at a time other than during the hearing. I don't want
8 to use valuable court time to watch a movie." (H. Tr.:14-15).

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13 No foundation was laid at the Hearing for the admission of Exhibit 1 – even
14 though the SEC had between October 21, 2009 and January 14, 2010 to do so. Now, at
15 the eleventh hour, the SEC asks to supplement the record by affidavit to lay a
16 foundation. Doing so is prejudicial to the Bravata Defendants in that there is no means
17 of determining whether the foundation is adequate or flawed. The only alternative
18 available to the Bravata Defendants is to continue our objections to the exhibit. The
19 contents of Exhibit 1 quite clearly reflect as to Anthony Bravata that there is no
20 indication of who recorded the video, when, where or whether the segment shown in
21 the video is complete or incomplete. The same foundation defects carry over to the
22 segment showing Bravata conducting an educational seminar in January 2008. The only
23 foundational fact seen on the video is the date of the seminar and the undisputed fact
24 that the video depicts Bravata. Without adequate foundation for admission of Exhibit 1,
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1 consideration of the contents of the video would be error – prejudicial to the Bravata
2 Defendants. Even if the SEC were to lay a proper foundation for the exhibit, under FRE
3 403, the Court should deem the contents of the video to be inadmissible. However, the
4 Bravata Defendants contend Exhibit 1 remains inadmissible under FRE 901.
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7 V.

8 *The SEC Improperly Sought An Ex-Parte Temporary Restraining Order*

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10 The Court should find that this case has significantly changed since July 27, 2009
11 when the Court had before it ONLY those facts the SEC selected for its own purposes.
12 Even though the Bravata Defendants fully understand that the Asset Freeze granted on
13 July 27, 2009 has in fact remained intact since that date, they also contend that it is
14 significant that the SEC obtained the Emergency, *Ex-Parte* Order in our view –
15 inappropriately. This is a finding we believe the Court should make and such a finding
16 should have an impact in the Court’s global determinations following the submissions
17 by the parties.
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22 There is no doubt in the undersigned counsel’s mind that if a private plaintiff
23 had filed the pleadings filed by the SEC with this Court on July 26-27, 2009 and sought
24 emergency, *ex-parte* relief as did the SEC – the Court may have not been as comfortable
25 in granting the same relief obtained by the SEC. However, as evidenced by certain of
26 the aspects of this case, Government agencies are no more or less reliable than non-
27 governmental parties. Perhaps one would argue that private litigants are more reliable.
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1 The SEC's request for the Emergency, *Ex- parte* Order was unwarranted in this
2 case and the SEC should not now be rewarded by continuing the effect of same in its
3 present configuration. In filing its application *ex parte*, the SEC put the Court in a
4 difficult position. The SEC gave the Court the impression that there was a high profile
5 emergency that required extraordinary action to protect investors. Now that the
6 Hearing is concluded, it is patently clear that was not true. In fact, there was no basis at
7 all for the SEC to proceed *ex parte*. Fed. R. Civ. Pro. 65 allows for the issuance of a
8 "TRO" without written or oral notice to the adverse party or its attorney in only one
9 limited circumstance. Such an order may be issued "only if specific facts in an affidavit
10 or a verified complaint clearly show that immediate and irreparable injury, loss, or
11 damage will result to the movant before the adverse party can be heard in opposition,
12 and the movant's attorney certifies in writing any efforts made to give notice and the
13 reasons why it should not be required." Fed. R. Civ. Proc. 65(b)(1) (emphasis added).
14 The papers filed by the SEC on July 26, 2009 do not include, nor do they satisfy the
15 requirement to certify any efforts made to give notice and the reasons why notice
16 should not be required – after spending weeks, if not months, working with Butzel
17 Long, LLP during the formal inquiry stage of the SEC's investigation. Why didn't the
18 SEC certify in writing their efforts to notify Defendants' counsel of the impending *ex-*
19 *parte* request for the temporary restraining order and why didn't the SEC certify in
20 writing why such notice was not required? These are glaring deficiencies in the
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1 granting of the Emergency, *Ex-parte* Order which still enables the SEC to refuse to
2 unfreeze assets of the Bravata Defendants that have not been shown to be in any
3 manner causally connected to the BBC and BFG allegations.
4

5
6 ***The SEC Made No Showing of Immediate and Irreparable Injury***

7 The SEC offered no specific facts – or even any facts – in an affidavit nor in a
8 verified complaint that *clearly show* immediate and irreparable injury, loss, or damage,
9 as required by the Federal Rules. The SEC simply stated, in conclusory fashion, that *ex*
10 *parte* proceedings were appropriate because “the Defendants have been operating a
11 “ponzi scheme,” are currently holding investor funds, and own assets purchased with
12 investor funds.” The Bravata Defendants have established that there is no Ponzi Scheme
13 and never was. On this basis alone, the Court should find that the relief sought by the
14 SEC should not continue. The SEC also included other inflammatory factual references,
15 such as the ownership and use by the Bravata Defendants of luxury cars (the Ferrari),
16 luxury boats, houses and glitzy hunting trips to Russia and elsewhere. The SEC knows
17 that using such language in its Complaints and *ex-parte* papers results in obtaining such
18 relief as a *fait accompli*.⁴ It has been shown at the Hearing that BBC relied on qualified
19 unaffiliated trust companies, holding custody of clients’ assets, which assets were
20 already frozen; information disregarded by the SEC. The SEC presented no evidence
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28 ⁴ Having seen a number of SEC Complaints, coupled with motions for emergency, *ex-parte*
29 relief, it is remarkable how similar the facts of the SEC’s cases appear to be. Many such
30 complaints include the same “buzz phrases” that are designed to place a U.S. District Court in a
31 position whereby he or she is unable to refuse an *ex-parte* request for relief.

1 demonstrating that BBC or BFG was dissipating assets – on the contrary the assets at
2 issue are illiquid and cannot be sold quickly, i.e. they comprise almost exclusively real
3 estate assets. The Receiver appointed in this case will no doubt attest to the difficulty he
4 has encountered in “liquidating” BBC assets. Prior to the issuance of the Asset Freeze,
5 the SEC presented no credible evidence that BBC or BFG was actively raising money
6 from anyone, and in fact, counsel for BBC advised the SEC and OFIR that as of April 1,
7 2009, BBC was accepting no new subscription agreements for BBC units within
8 Michigan and as of June 1, 2009 (on a voluntary basis), no new subscriptions were
9 accepted by BBC outside of Michigan. The SEC presented no evidence demon-strating
10 that any bank or investor had complained. The only investor complaints arrived after
11 the SEC made its spurious allegations of a Ponzi Scheme public.
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17 The SEC failed to point out or allege in any of its papers that BBC and BFG were
18 preparing formal rescission documents for the purpose of remedying the registration
19 violations found by OIFR, which was one of the conditions of settlement being
20 negotiated between BBC and OIFR. The SEC also failed to inform the Court of BBC’s
21 attempt to secure a forty million dollar line of credit it was seeking to take out investors
22 two days prior to the SEC’s filing and release alleging the existence of a Ponzi Scheme.
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27 Based upon the testimony of Kuzma, the most salacious allegations in the SEC’s
28 Complaint are simply unsupported by the facts. The facts known to the SEC before it
29 filed its *ex-parte* papers also demonstrate a complete absence of any need to proceed in
30

1 secret. The SEC knew from BBC and BFG's counsel, Butzel Long, LLP that there was a
2 long history of voluntarily cooperation between the SEC and BBC and its managing-
3 members. Yet, without even the slightest showing – indeed not a single shred of
4 evidence – the SEC proceeded to this Court without notice to Butzel Long, LLP or
5 without even advising the Court of the prior relationship and dealings between the SEC
6 and Butzel Long, LLP and requested that the Court take the extraordinary step of
7 freezing all assets of anyone connected with the business, requesting the *ex-parte*
8 appointment of a Chicago-based receiver.
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13 The SEC's *ex-parte* moving papers are simply devoid of any compliance with Fed.
14 R. Civ. Pro. 65(b)(1). Yet Rule 65 requires the SEC to show when moving for a TRO
15 without notice that giving notice "will result" in immediate and irreparable damage –
16 not that there is merely an opportunity for assets to be moved or sold. Under the SEC's
17 reasoning, every case it files would warrant *ex parte* proceedings because there will
18 always be "an opportunity" for assets to be sold or moved before a case is concluded.
19 Yet that is not the law.
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24 ***The SEC Did Not Establish the Extraordinary Circumstances Necessary to***
25 ***Justify an Ex-Parte Proceeding***

26 "Circumstances justifying the issuance of an *ex parte* temporary restraining order
27 are extremely limited because 'our entire jurisprudence runs counter to the notion of
28 court action taken before reasonable notice and an opportunity to be heard has been
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1 granted to both sides of a dispute.” *MRC Golf, Inc., v. Hippo Golf Company, Inc.*, No. 09-
2 CV 327-L 2009 U.S. Dist. LEXIS 15625, at *7 (S.D. Cal. Feb. 26, 2009) (quoting *Reno Air*
3 *Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006) (citations omitted).
4 “Where it is possible to find and serve the adverse party, courts have recognized ‘a very
5 narrow band of cases in which *ex parte* orders are proper because notice to the
6 defendant would render fruitless the further prosecution of the action.” *Id.* at * 8
7 (quoting *Reno Air Racing*, 452 F.3d at 1131). The courts have cautioned strongly against
8 the use of *ex parte* applications. Then-District Judge Rymer noted that “*ex parte*
9 proceedings pose a threat to the adversary system,” and thus a threat to “accuracy,
10 fairness, and consistency.” *In re Intermagnetics Am.*, 101 B.R. 191 (C.D. Cal. 1989). *Ex*
11 *parte* applications “contravene the structure and spirit of the Federal Rules of Civil
12 Procedure and the local rules of [the Central District],” both of which contemplate
13 noticed motions should be the rule rather than the exception. *Id.* They impose “an
14 unnecessary administrative burden on the court and an unnecessary adversarial burden
15 on opposing counsel who are required to make a hurried response under pressure,
16 usually for no good reason.” *Id.* (emphasis added). They “put the applicant ‘ahead of
17 the pack,’ without cause or justification.” *Id.* This is precisely what occurred to the
18 Bravata Defendants in this case and what they have sought to overturn the extended
19 Hearing before this Court. The Bravata Defendants have struggled to obtain means to
20 retain securities counsel for their defense as well as maintain their living accom-
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1 modations and daily needs. Mr. Bravata’s businesses and all of his personal assets are
2 taken, and the SEC even wants to prevent him from using his own money and his own
3 assets hire a lawyer.⁵ Because the SEC failed to justify its *ex parte* action, this case has
4 been commenced with a dramatic advantage to the SEC – an advantage that has to date
5 existed and frankly is baffling to the SEC according to certain unnamed sources. It is
6 time for the Court to balances out the opportunities of the Bravata Defendants to either
7 dissolve the Emergency, Ex-parte Order now or allow assets that have remained frozen
8 since July 27, 2009 to be released and accessed. Even without dissolution of the Court’s
9 Emergency, Ex-Parte Order, the current asset freeze should be released and adjusted in
10 accordance with the following requests.

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16 **ASSETS NOW FROZEN THAT THE BRAVATA DEFENDANTS**
17 **REQUEST BE RELEASED FROM THE ASSET FREEZE**

18 *Applicable Legal Standard for Issuance of Asset Freezes*

19
20 The Court’s Order of July 26, 2009, and as continued in its Order of August 4,
21 2009, imposes an asset freeze on all of BBC’s, BFG’s and the individual Bravata
22 Defendants named in this case. The freeze on the personal assets of the Bravata
23 Defendants is unnecessary and dramatically overbroad as well as unjustified
24 considering the SEC’s lack of credible proofs established at the Hearing. If the Court
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28 ⁵ Once again, the SEC’s breadth in its request prevents Mr. Bravata from utilizing funds
29 received from employment outside the scope of the SEC’s allegations for even his own legal
30 defense. In fact, Mr. Bravata ceased taking payments from BBC and BFG and February of 2009
31 to help the company prosper; in direct contrast to the SEC allegations that he is “dissipating
32 assets”.

1 decides not to dissolve the current preliminary injunctive orders, the freeze on the
2 assets described herein should be substantially modified for the legal and factual
3 reasons advanced below.⁶

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6 Courts have wide discretion to modify asset freezes. *SEC v. McMillan*, No. CV-
7 06-0951 2006 U.S. Dist. LEXIS 89150, at *1-2 (D. Ariz. Dec. 7, 2006). In *FSLIC v. Sahni*, 868
8 F.2d 1096, 1097 (9th Cir. 1989), the Ninth Circuit held that “the proper standard for the
9 district court to apply in deciding whether to issue a freeze is whether [the government]
10 has shown a likelihood of success on the merits and a possibility of dissipation.” *Sahni*,
11 868 F.2d at 1097. The Court has now admitted as exhibits the BBC PPMs prepared by
12 BBC’s in-house securities counsel and reviewed with approval by its outside securities
13 firm. In light of what the Court now knows contrasted with the one-sided presentation
14 received from the SEC on July 26-27, 2009, there is no longer any doubt that the SEC
15 has been unable to show either a possibility of success on the merits or of dissipation of
16 assets. The Asset Freeze in effect is also dramatically overbroad. The primary purpose
17 of an asset freeze is to facilitate compensation of allegedly defrauded investors in the
18 event a securities violation is established at trial. *SEC v. Gonzalez de Castilla*, 170
19 F.Supp.2d 427, 429 (S.D.N.Y. 2001). An asset freeze is used to “preserve sufficient funds
20 for the payment of a disgorgement award.” *SEC v. Lauer*, 445 F. Supp. 2d 1362, 1367
21 (S.D. Fla. 2006); *see also SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734-35 (11th Cir. 2005)
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30 ⁶ See Appendix “A” hereto.

1 (finding that an asset freeze was supported by the record because the frozen assets were
2 less than the potential disgorgement). Frozen assets should be equal to or less than the
3 potential disgorgement. The amount of assets frozen is determined by a reasonable
4 approximation of the amount the defendant was allegedly unjustly enriched. *Lauer*, 445
5 F.Supp.2d at 1370 (citing *ETS Payphones, Inc.*, 408 F.3d at 735-36). The Third Circuit has
6 held that “the court must make some attempt reasonably to relate the value of the assets
7 encumbered to the likely value of the expected judgment.” *Hoxworth v. Blinder, Robinson*
8 & *Co.*, 903 F.2d 186, 198 (3rd Cir. 1990) (unfreezing assets because of the overly broad
9 scope of the freeze).

14 Subsequent to the Hearing, the Court should find that the SEC’s allegations of
15 BBC perpetrating a massive Ponzi Scheme simply do not hold water. On this basis
16 alone, no further relief is justified *pendent lite*. It is patently obvious in this case that the
17 SEC has only one objective on its mind, which is that all the assets be frozen, and
18 that all assets anywhere in the world be forever out of the reach of the Bravata
19 Defendants – no matter when and how they were acquired. The *Hoxworth* court
20 explained that the purpose of a freeze is to protect a likely judgment, so a freeze that
21 involves funds that are not part of the possible final decree harms a defendant more
22 than is necessary. *Hoxworth*, 903 F.2d at 198 (citing *DeBeers Consol. Mines, Ltd. v. United*
23 *States*, 325 U.S. 212, 220 (1945)). Due to the SEC’s lack of meaningful proofs at the
24 Hearing, substantial doubt exists whether the SEC will ever prevail in this case. Courts

1 have also regularly granted modifications of asset freezes to permit defendants to retain
2 counsel on their behalf. *See, e.g., SEC v. Grossman*, No. 87 Civ. 1031 2003 U.S. Dist. LEXIS
3 317, at *16 (S.D.N.Y. 2003) (noting that the asset freeze was modified to permit the
4 payment of attorneys' fees); *SEC v. Int'l Loan Network, Inc.*, 770 F. Supp. 678, 680 (D.D.C.
5 1991) (noting that it had granted a modification of the freeze to permit defendants to
6 retain counsel). In *Gonzalez de Castilla*, the district court found it was appropriate to
7 modify the asset freeze to permit the payment of legal fees because the defendants had
8 a legitimate challenge to the SEC's evidence. *Gonzalez de Castilla*, 170 F. Supp. 2d at 430.
9 Even when the frozen assets are substantially smaller than the potential disgorgement,
10 courts have allowed a defendant access to his funds in order to pay for attorneys' fees.
11 *See, e.g., FTC v. World Wide Factors*, 882 F.2d 344, 348 (9th Cir. 1989) (limiting attorneys'
12 fees "out of concern for preserving funds for ultimate distribution"). In the case at bar,
13 the SEC has impeded the Bravata Defendants from paying their legal counsel in this
14 action. The SEC has a strong interest in placing the Bravata Defendants in a position
15 where they have no legal advocate on their behalf.

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24 ***The Ferrari Should not be Subject to the Asset Freeze.***

25 In large measure, the current and earlier requests for carve outs by the
26 Defendants are a direct result of the entry of the Emergency, *Ex-parte* Order. Some of the
27 sworn statements made in support of the SEC's Motion for *Ex-Parte* Temporary
28 Restraining Order have not held up under the scrutiny of the Hearing. For example, the
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1 SEC Complaint asserts that the Bravata, purchased a Ferrari luxury vehicle in June 2006
2 using investor proceeds from one of the early subscribers to the BBC offering. This
3 factual assertion is untrue and the facts upon which this Court should rely strongly
4 point to the SEC's assertions concerning the Ferrari as being untrue. The SEC knew or
5 should have know this assertion was factual incorrect. Kuzma testified as to what he
6 told the SEC Enforcement Staff who had called to interview him prior to filing suit.
7
8 According to Kuzma when he did not provide the right answers to the SEC's inquiry –
9 the phone call was terminated by SEC counsel hanging up the phone.⁷ Contrary to the
10 inflammatory allegations in the Complaint that Bravata inappropriately converted
11 Kuzma's investment to his own use and purchased the Ferrari with offering proceeds –
12 that assertion is false and has been debunked during the Hearing. Salacious allegations
13 by the Government about fast luxury cars, vacation homes, hunting trips and luxury
14 yachts all sound good when requesting emergency relief from the Court, but the
15 allegations have simply not held up under the scrutiny of the hearing. Kuzma did not
16 subscribe to BBC units offered and sold by BBC in June 2006. The Court has found that
17 Kuzma entered into a separate business relationship with the Bravata at that time, to
18 purchase, rehabilitate and possibly resell two office properties in the Detroit area, as
19 well as build out the financial business. No BBC investment was made by Kuzma until
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28 ⁷ Such conduct further evidence the SEC's selective use of evidential support; such as the use of
29 evidence from employees terminated for cause and "forced affidavits". In fact, Defendants
30 have been provided with information the SEC staff coerced an elderly client, who refused to
31 provide an affidavit, under threat of subpoena.

1 much later in 2007 when Kuzma elected to convert his loan advanced to the Bravata, to
2 voting limited liability membership units in parity with those units held by Messrs.
3 Bravata and Trabulsy. The reality is that Bravata purchased the Ferrari with his own
4 money before BBC actively accepted any subscriptions for and paid for the Ferrari
5 using a large commission check he received from New York Life for commissions
6 earned totally unrelated and before BBC was formed. It is impossible for those
7 commissions or any other outside income received by Bravata to be considered “ill-
8 gotten gains” or the product of any securities law violations. The proofs at Hearing
9 established that Bravata placed a \$5,000 down payment on the vehicle on June 2, 2006
10 and paid the balance of the \$85,268.40 purchase price by his personal check that cleared
11 his joint personal account on June 16, 2008. . Exhibits offered at the Hearing establish
12 that three wire transfers sent from Mr. Kuzma to the Bravata Comerica joint account
13 totaled \$398,965, which deposits were to be used by Bravata for the purchase and build
14 out of the commercial properties that had been identified as a distressed asset
15 opportunities as well as let Bravata build out the financial practice. Kuzma agreed to
16 participate in this investment as a partner solely with Bravata. In June 2006, Bravata
17 received one or more large sales commission checks from his employer, New York Life.
18 The Bravata’s joint bank account statement for June 2006 reflects other deposits,
19 including a deposit of \$119,000 on June 9, 2006, which Bravata testified were New York
20 Life commissions from which he purchased the Ferrari. Although it sounds good in the
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3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

1 SEC Complaint, the Ferrari belongs to Bravata, he paid for it using his income received
2 from life insurance commissions received from New York Life and, notwithstanding
3 those facts, Kuzma understands that funds he lent permitted discretionary use of the
4 funds he delivered to Mr. Bravata in June 2006, which is diametrically opposed to the
5 proofs adduced during the Hearing. The Ferrari should not be subject to any asset
6 freeze and must be released.
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10 ***One Additional Vehicle Owned or Used by the Bravata Defendants Is Not an***
11 ***Asset, But an Obligation***

12 Bravata leases a 2005 Cadillac STS. There is no logical reason for the Cadillac
13 vehicle, that are now subject to the Court's asset freeze, to continue to be subject to the
14 freeze if the fair market value of the "asset" far exceeds the debt associated with the
15 vehicle. Accordingly, the Cadillac STS should be released from the current asset freeze.
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18 ***Insurance Policies on Mr. Bravata's Life and Other Family Life Policies Have***
19 ***Been Surrendered, Abandoned or Have Lapsed***

20 It has steadfastly been the position of the Bravata Defendants that life insurance
21 cash value and policies that existed before the commencement of offering activity by
22 BBC is Bravata's sole and separate estate, they should not have been impacted by the
23 current asset freeze. These family policies have created substantial controversies in this
24 case that the Court has dealt with separately as issues have arisen.
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28 As of the current date, all Bravata family life policies have lapsed for non-
29 payment. The Court's orders address certain rights available to Bravata with respect to
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1 these policies, whether to reinstate them or pay over to the Receiver the cash surrender
2 value in the case of Bravata's own life policy. The Court, to the extent that it has not
3 already made provision for a given life policy, should permit the Bravata life policies to
4 remain in the full control of Bravata without further rights to any of the policies or
5 value that may remain in any given policy. Accordingly, all of the Bravata life policies
6 should be carved out of the effect of any further asset freeze even assuming the Court
7 continues the asset freeze in any form *pendent lite*.

11 ***The Balance of the Retainer Paid by Mr. Bravata to his Bankruptcy Counsel
12 Should be Released from the Asset Freeze With Direction to Transfer the Balance
13 of the Retainer to Counsel for the Bravata Defendants***

14 Another issue presented to the Court and which could not be effectively ruled
15 upon until the conclusion of the Hearing relates to the disposition of the remainder of a
16 \$25,000 retainer paid to Charles Bullock, Esq., a bankruptcy lawyer consulted early on
17 in this case by Bravata. There apparently is a \$20,000 balance of that retainer which Mr.
18 Bullock has advised the undersigned he is ready and willing to transfer for the benefit
19 of Bravata's, subject to approval by this Court.

22 The SEC has wholly failed to introduce any testimony, exhibits or other form of
23 evidence to connect Bravata's payment of the Bullock retainer to what it contends are
24 ill-gotten gains received by Bravata. Accordingly, the Court should release that as an
25 asset that was previously subject to the Court's asset freeze. Finally, if the Court finds
26 that some aspect of the Asset Freeze should continue *pendent lite* in this case, the
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1 remaining assets described in Appendix "A" have wholly failed to be connected by the
2 SEC to any violations of the securities laws asserted against the Bravata Defendants and
3 they should be released from the freeze.
4

5 Dated this 6th day of February, 2010.
6

7 Respectfully Submitted,
8

9 By: /s/ Gregory Bartko
10 **Law Office of Gregory Bartko, LLC**
11 Gregory Bartko, Esq.
12 Michigan Bar No. P30052
13 *Counsel for Bravata Defendants*
14 3475 Lenox Road, Suite 400
15 Atlanta, GA 30326
16 Telephone: (404) 238-0550
17 Facsimile: (866) 342-4092
18 gbartko@securitieslawcounsel.com
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APPENDIX "A"
Assets to be Released

Description of Asset(s)	Current Owner	Rationale for Release
Two Jet Skis	John J. Bravata	Gifts. No SEC proofs established that these assets were acquired using proceeds from alleged unlawful activities.
2005 Cadillac STS	John J. Bravata	This is a lease vehicle used by Mr. and Mrs. Bravata. It has no net value and no SEC proofs established that these assets were acquired using proceeds from alleged unlawful activities.
1995 Ferrari	John J. Bravata	Testimony is compelling that this vehicle was not acquired using offering proceeds.
1996 Ferrari "car kit"	John J. Bravata	No SEC proofs established that this asset were acquired using proceeds from alleged unlawful activities.
2007 Masserati	John J. Bravata	This car is titled to Mr. Bravata but was a gift to Mrs. Bravata. No SEC proofs established that this vehicle was acquired using proceeds from alleged unlawful activities.
Bravata family life insurance policies	Various owners	With the exception of the life policy on the life of

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		Joanne P. Bravata, which is owned by BBC, there have been no SEC proofs established that any other life insurance policies owned by the Bravata family were acquired using proceeds from alleged unlawful activities. Moreover, except for the life policy on Joanne P. Bravata – all other policies have lapsed.
“Robolo Boat”	John J. Bravata	Purchased with Mr. Bravata’s own funds from his own bank account. No SEC proofs established that this asset was acquired using proceeds from alleged unlawful activities. In fact, the SEC has never mentioned this asset.
Bravata family furniture, oriental rugs, art work and all other personal belongings of the Bravata family (mostly in storage).	John J. and Shari Bravata	Purchased with the Bravata’s own funds from their own bank account. No SEC proofs established that these assets were acquired using proceeds from alleged unlawful activities.
All ownership interest in Phoenix Venture Capital, LLC	John J. Bravata	No evidence adduced by the SEC establishes that this entity failed to comply with any federal securities laws, nor do the SEC proofs establish that

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Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

		Phoenix used any proceeds from alleged unlawful activities.
Safe deposit box with contents	James Joseph Bravata	The bank where Joseph Bravata banks provides a personal safe deposit box in his name. Mr. Bravata has no rights to access the contents in the box as a result of the Asset Freeze. This asset should be released since no SEC proofs established that the box or contents were acquired using proceeds from alleged unlawful activities.
Checking account for Dylite Adams, Anthony Bravata's grandmother	Dylite Adams	This account is completely uninvolved with any violations alleged in the SEC Complaint. This account should be released since no SEC proofs established that the funds in the account derive from proceeds of alleged unlawful activities.
Vehicles, personal property, bank accounts and interests in any remaining real property held by Anthony Bravata	Anthony Bravata	All assets of Anthony Bravata should be released from the effects of the Asset Freeze since no SEC proofs established that he acquired any such assets with funds derived from proceeds of alleged unlawful activities.

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3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092

Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

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<p>All personal property, jewelry, bank accounts and interests in any remaining personal property held by Shari Bravata, Relief Defendant. All rights Mrs. Bravata had prior to the Asset Freeze to use her personal credit cards for ongoing personal needs and living expenses.</p>	<p>Shari Bravata</p>	<p>All assets of Shari Bravata should be released from the effects of the Asset Freeze since no SEC proofs established that she has in her possession or ownership any assets with funds derived from proceeds of alleged unlawful activities.</p>
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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 U.S. SECURITIES AND EXCHANGE)
5 COMMISSION,)

6 v.)

7 Plaintiff,)

8)
9 JOHN J. BRAVATA, RICHARD J.)
10 TRABULSY, ANTONIO BRAVATA,)
11 BBC EQUITIES, LLC AND)
12 BRAVATA FINANCIAL GROUP,)
13 LLC)

CIVIL ACTION NO.: 2:09-cv-12950-
DML-VMM

14 Defendants,)

15 and)

16 SHARI A. BRAVATA,)

17 Relief Defendant.)
18

19 CERTIFICATE OF SERVICE

20 I hereby certify that a true and correct copy of the foregoing BRAVATA
21 DEFENDANTS' PROPOSED FINDINGS OF FACT AND PROPOSED CONCLUSIONS
22 OF LAW IN OPPOSITION TO THE PLAINTIFF'S MOTION FOR A CONTINUATION
23 OF PRELIMINARY INJUNCTIVE RELIEF was filed electronically this 6th day of
24 February, 2010 with the Clerk of the Court using CM/ECF. I also certify that the
25 foregoing document is being served this day on all counsel of record via transmission of
26 Notices of Electronic Filing generated by CM/ECF or via U.S. mail to those parties that
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29
30

31 *The Securities Regulation Law Firm*
32 3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092
Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

1 have formally appeared of record but are who are not authorized to receive electronic
2 Notices of Electronic Filing.
3

4 Respectfully Submitted,
5

6 By: /s/ Gregory Bartko
7 **Law Office of Gregory Bartko, LLC**
8 Gregory Bartko, Esq.
9 *Counsel for Defendants*
10 3475 Lenox Road, Suite 400
11 Atlanta, GA 30326
12 Telephone: (404) 238-0550
13
14
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