UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CRAIG R. JALBERT, IN HIS CAPACITY AS TRUSTEE OF THE F2 LIQUIDATING TRUST, on behalf of himself and all others similarly situated, Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION, Defendant.	**CLASS ACTION COMPLAINT** **Case No.:** **JURY TRIAL DEMANDED ON ALL ISSUES SO TRIABLE**

Plaintiff Craig R. Jalbert in his capacity as trustee of the F2 Liquidating Trust (the "Trust"), on behalf of himself and all other similarly situated parties, by and through undersigned counsel, files this class action complaint against the Securities and Exchange Commission (the "SEC") and alleges the following:

PRELIMINARY STATEMENT

1. This is an action to recover, on behalf of the plaintiff and all other similarly situated parties, money collected from them by the SEC as "disgorgement" without statutory authority or in excess of statutory authority. For decades, including the six-year limitations period applicable to this Complaint, the SEC has been obtaining from hundreds of individuals and entities billions of dollars, including approximately but not less than $14.9 billion over the last six years, in purported "disgorgement" and has been paying the vast majority of these purported "disgorgement" proceeds to the U.S. Treasury. Its theory for doing so was that "disgorgement" was not a penalty but served only a remedial purpose. Indeed, the SEC claimed that "disgorgement" was remedial and consistent with law, even though the SEC did not, and had

no intent to, return the purported "disgorgement" proceeds to the alleged victims. Moreover, the SEC obtained "disgorgement" payments in addition to, and often well in excess of, the monetary penalties the SEC obtained in the same actions under the explicit statutory fines provisions of the relevant federal securities laws, all of which have statutory monetary penalty maximums.

2. The Supreme Court in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), recently analyzed the SEC's historical use of purported "disgorgement" and found that "disgorgement" in SEC actions operated as a penalty because the SEC sought and obtained "disgorgement" for punitive, law-enforcement reasons, and because, as the Supreme Court observed, in many SEC enforcement cases "disgorgement" was not compensatory but paid to the U.S. Treasury. Because SEC "disgorgement" is not remedial and constitutes a penalty, in each case in which the SEC obtained "disgorgement" and handed the proceeds over to the U.S. Treasury, it did so without proper statutory authority. Put differently, there is no statutory authority for the SEC to collect a penalty labeled as "disgorgement" separate from, and often in addition to, a civil penalty.

3. F-Squared Investment Management, LLC (together with its subsidiaries, "F-Squared") is one of the entities that paid substantial sums (in F-Squared's case, $30 million) to the U.S. Treasury as purported "disgorgement," when in reality the payment was nothing more than an unauthorized fine in excess of properly-authorized, statutory fines and in violation of statutory and regulatory procedures governing true "disgorgement" orders.

4. The Trust brings this action under the Administrative Procedure Act, on behalf of itself (as successor to the interests of the now-failed F-Squared for these purposes) and all other individuals and entities similarly situated, to undo the SEC's actions that contravene and exceed its statutory, regulatory, and constitutional authority, and to obtain equitable restitution of funds collected without authority.

5. The Trust is representative of the putative class because F-Squared paid $30 million to the SEC as purported "disgorgement" in a cease-and-desist proceeding the SEC commenced against F-Squared in 2014.

6. In particular, the Trust seeks a declaration that the SEC assessed an illegal penalty on each of the Proposed Class (as defined herein) members (including $30 million from F-Squared) as purported "disgorgement" and did not comply with the procedures required by the federal securities laws, as set forth in Section 8A(e) of the Securities Act of 1933 (codified at 15 U.S.C. § 77h-1(e)), Sections 21B(e) and 21C(e) of the Securities Exchange Act of 1934 (codified at 15 U.S.C. §§ 78u-2(e), 78u-3(e)), Sections 9(e) and 9(f)(5) of the Investment Company Act of 1940 (codified at 15 U.S.C. §§ 80a-9(e), 80a-9(f)(5)), and Sections 203(j) and 203(k)(5) of the Investment Advisers Act of 1940 (codified at 15 U.S.C. §§ 80b-3(j), 80b-3(k)(5)), in issuing or obtaining from federal district courts orders requiring "disgorgement" (including the Order (as defined below)).

7. Because the SEC acted beyond its legal authority and capacity, the order directing F-Squared to pay $30 million in purported "disgorgement" is void, as are all orders issued by the SEC or in favor of the SEC in which a person or entity was ordered to pay as "disgorgement" sums that were without statutory authority or that exceeded statutory authority.

8. The Trust has standing to sue under 5 U.S.C. §§ 702, 704, and 706 because it and its beneficiaries, as well as all others who are similarly situated, have been adversely affected by, and suffered legal wrong as a result of, final SEC actions. Further, this Complaint does not encroach upon sovereign immunity because the Trust seeks relief other than money damages. *See* 5 U.S.C. § 702.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702.

10. Venue is proper in this Court pursuant to 5 U.S.C. § 703 and 28 U.S.C. § 1391(e)(1).

PARTIES

11. The F2 Liquidating Trust is a liquidating trust established under the laws of Delaware, Internal Revenue Code Sections 671-677, and U.S. Treasury Regulations Section 301.7701-4(d), in connection with confirmation of the *Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code Proposed by the Debtors and the Official Committee of Unsecured Creditors*, in chapter 11 proceedings referred to as *In re F-Squared Investment Management, LLC*, No. 15-11469 (LSS) (Bankr. D. Del. Dec. 7, 2015) [Docket No. 417] (the "Bankruptcy Case"), pending in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") [Docket No. 486]. The F2 Liquidating Trust is a Delaware entity. The beneficiaries of the F2 Liquidating Trust are the creditors of F-Squared determined by the Bankruptcy Court to have valid claims, and F2 Liquidating Trust is the successor-in-interest to F-Squared for purposes of effecting recoveries in its name. Craig R. Jalbert of Verdolino & Lowey, P.C., is the trustee of the F2 Liquidating Trust. The Trust has a usual place of business in Foxboro, Massachusetts.

12. The SEC is an agency of the United States government, headquartered in Washington, D.C.

ALLEGATIONS

I. The SEC Improperly Obtains Disgorgement in Civil Actions in Federal Court and in Administrative Proceedings.

13. Since the 1970s, the SEC has sought and obtained "disgorgement" from defendants in both federal court actions and administrative proceedings in excess of its delegated statutory authority.

14. The SEC has long claimed that disgorgement is an "equitable" remedy that is available to the SEC as a means of depriving a defendant of the fruits of his or her misconduct. With varying reasoning, the SEC has exceeded its statutory authority and sought and obtained monetary payments as purported "disgorgement" both in federal courts and in administrative proceedings.

A. Improper "Disgorgement" in Federal Court.

15. In lower federal courts, since the 1970s, the SEC has sought and obtained monetary relief labeled as "restitution" or "disgorgement" outside of its statutory authority and the established meaning of those terms.

16. After the 1929 stock market crash and the Great Depression, Congress enacted a series of laws to regulate the securities industry: the Securities Act of 1933 (codified at 15 U.S.C. § 77a *et seq.*), the Securities Exchange Act of 1934 (codified at 15 U.S.C. § 78a *et seq.*), the Investment Company Act of 1940 (codified at 15 U.S.C. § 80a-1 *et seq.*), and the Investment Advisers Act of 1940 (codified at 15 U.S.C. § 80b-1 *et seq.*). *See Kokesh*, 137 S. Ct. at 1639-40. The Securities Exchange Act created the SEC and enabled the SEC to conduct investigations and initiate actions in federal court to enforce the federal securities laws. *See id.* at 1640.

17. "Initially, the only statutory remedy available to the SEC in an enforcement action was an injunction barring future violations of the securities laws. In the absence of statutory

authorization for monetary remedies, the Commission urged courts to order disgorgement as an exercise of their 'inherent equity power to grant relief ancillary to an injunction.'" *Id.* (citations omitted). At that time, lower courts accepted the SEC's arguments and reasoned that disgorgement was "a form of '[r]estitution measured by the defendant's wrongful gain'" which required a "defendant [to] give up 'those gains . . . properly attributable to the defendant's interference with the claimant's legally protected rights.'" *Id.* (citation omitted).

18. Thus, beginning in the 1970s, lower courts ordered monetary payments to the SEC under the statutory authority for injunctive relief.

19. Then, in 1990, Congress authorized the SEC to seek monetary civil penalties in federal court under the Securities Enforcement Remedies and Penny Stock Reform Act (the "<u>Penny Stock Reform Act</u>"). *See id*. The four major securities laws were amended to incorporate this authorization. *See* Securities Enforcement Remedies and Penny Stock Reform Act § 201 (codified at 15 U.S.C. § 77t(d) (Securities Act of 1933); 15 U.S.C. § 78u(d)(3) (Securities Exchange Act 1934); 15 U.S.C. § 78u-1(a) (Securities Exchange Act of 1934); 15 U.S.C. § 80a-41(e) (Investment Company Act of 1940); 15 U.S.C. § 80b-9(e) (Investment Advisers Act of 1940)). In 1984, Congress authorized the SEC to obtain monetary relief in the form of a "civil penalty" in federal court for *only* insider trading violations. *See* Insider Trading Sanctions Act of 1984 § 2 (current version at 15 U.S.C. § 78u-1).

20. "The [Penny Stock Reform] Act left the Commission with a full panoply of enforcement tools: It may promulgate rules, investigate violations of those rules and the securities laws generally, and seek monetary penalties and injunctive relief for those violations. In the years since the [Penny Stock Reform] Act, however, the Commission has continued its practice of seeking disgorgement in enforcement proceedings." *Kokesh*, 137 S. Ct. at 1640.

21. In other words, the SEC kept arguing for implied remedies, while also using its statutorily authorized enforcement tools. As a result, the SEC sought and obtained double recovery exceeding statutory limits and without statutory authority.

22. In 2002, Congress also authorized the SEC to seek "equitable relief" for the "benefit of investors," removing any need, and supplanting its authority, to rely on the courts' inherent equitable powers to grant disgorgement. *See* Sarbanes-Oxley Act of 2002 § 305 (codified at 15 U.S.C. § 78u(d)(5) (Securities Exchange Act of 1934)).

23. Under these statutory provisions, the SEC lacks any explicit authority to seek disgorgement in federal court. Its sole authority to obtain monetary remedies aside from statutory fines is cabined by a provision that authorizes only "equitable relief" and only for the benefit of victims. *See* 15 U.S.C. § 78u(d)(5) (Securities Exchange Act of 1934). In order to qualify as true equitable relief under long-standing Supreme Court precedent, *see Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), disgorgement must seek recovery of specifically traced funds of the victim and, under the securities laws, those funds must be returned to the victim. "Disgorgement" of other, non-traced funds owned by the wrongdoer is a legal, rather than an equitable, remedy.

24. Because the SEC incorrectly classified "disgorgement" as a purported "equitable" remedy, the SEC considered it separate and distinct from a "penalty" and, therefore, obtained both "disgorgement" and civil penalties from defendants while subjecting only the civil penalties to separate, statutory limitations for determining their amounts and application. Thus, the SEC routinely double-dipped by obtaining "disgorgement" amounts in addition to any fines.

25. In addition, as was the case with Mr. Kokesh, the SEC has obtained other

purported "disgorgement" payments that related to conduct that was more than five years old. In fact, as some observers noted, the SEC was increasingly reliant on "disgorgement" following the Supreme Court's ruling in *Gabelli v. SEC*, 568 U.S. 442 (2013) that its statutory penalty actions were subject to a five-year statute of limitations.

B. Improper "Disgorgement" in Administrative Actions.

26. In administrative actions, the SEC has also sought and obtained purported "disgorgement" by disregarding its own authorizing legislation. As a parallel to enforcement actions in federal court, for decades, the SEC has instituted and conducted in-house, administrative hearings before administrative law judges.

27. In 1990, in the Penny Stock Reform Act, Congress also authorized the SEC to obtain in administrative proceedings the statutory remedy of an "accounting and disgorgement" pursuant to its adoption of "rules, regulations, and orders concerning *payments to investors*, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection." Penny Stock Reform Act §§ 102, 202, 301, 401 (codified at 15 U.S.C. § 77h-1(e) (Securities Act of 1933); 15 U.S.C. § 78u-2(e) (Securities Exchange Act of 1934); 15 U.S.C. § 78u-3(e) (Securities Exchange Act of 1934); 15 U.S.C. § 80b-3(j) (Investment Adviser Act of 1940); 15 U.S.C. § 80b-3(k)(5) (Investment Company Act of 1940); 15 U.S.C. § 80a-9(f)(5) (Investment Company Act of 1940)) (emphasis added). At the same time, in the Penny Stock Reform Act, Congress first granted the SEC limited authority to levy civil penalties on registered individuals or persons associated with such registered entities in administrative proceedings. *See* 15 U.S.C. § 77h-1 (Securities Act of 1933), 15 U.S.C. § 78u-2(a) (Securities Exchange Act of 1934), 15 U.S.C. § 80a-9(d)(1) (Investment Company Act), 15 U.S.C. § 80b-3(i)(1) (Investment Advisers Act of 1940).

28. After the financial crisis in 2008, admitting that its statutory authority only

permitted recovery of penalties in administrative proceedings in a limited category of cases, the SEC requested that Congress grant it expanded authority to obtain civil penalties against non-registered persons in those proceedings as well as in federal court. Congress granted this request by passing the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, which, in part, extended the SEC's civil penalty authority to non-registered individuals and entities in administrative proceedings, and increased the amount of civil penalties available in administrative hearings. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 929P(a) (codified at 15 U.S.C. § 77h-1(g) (Securities Act of 1933); 15 U.S.C. § 78j-1(d) (Securities Exchange Act of 1934); 15 U.S.C. § 78u-2(a) (Securities Exchange Act of 1934); 15 U.S.C. § 80a-9(d) (Investment Company Act of 1940); 15 U.S.C. § 80b-3(i) (Investment Advisers Act of 1940)).

29. Taking the provisions of the securities laws together, they thus mean that in administrative proceedings:

- An order of disgorgement requires an accounting;
- Disgorgement can be ordered only if paid to investors; and
- When not paid to investors, disgorgement is a monetary penalty that is subject to the limitations imposed by the penalty provisions, and, in any event, when not compensatory, disgorgement may not be ordered as an additional, non-statutory fine.

* * *

30. In summary, based on statutes adopted by Congress from 1990 through the present, the SEC is statutorily authorized to obtain only the following types of monetary relief:

Federal Court Actions	Administrative Proceedings
• Civil penalties subject to statutory maximums • "Equitable relief that may be appropriate or necessary for the benefit of investors"	• Civil penalties subject to statutory maximums • "Accounting and disgorgement" obtained pursuant to "rules, regulations, and orders concerning payments to investors"

31. Every time the SEC sought and obtained "disgorgement" in civil enforcement actions under the guise of equitable relief, without tracing assets or returning the funds to victims, it did so without a statutory basis, and in contravention of statutory limits on its powers. Likewise, every time the SEC has obtained purported "disgorgement" in administrative proceedings without conducting an accounting or returning funds to investor victims, it imposed an unauthorized monetary penalty. Where the disgorgement is in excess of, or not otherwise in correlation to, losses suffered by investors, disgorgement is improper. Finally, in each instance in which the SEC obtained a penalty and also "disgorgement" without returning the proceeds of the "disgorgement" to investor victims, it did so without statutory authority.

II. *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

32. According to longstanding Supreme Court precedent, *see Commissioner v. Acker*, 361 U.S. 87, 91 (1959), penalties cannot be assessed in the absence of explicit statutory authority.

33. On June 5, 2017, in *Kokesh*, the Supreme Court unanimously held that disgorgement as used historically by the SEC was not remedial, but constituted a penalty because the SEC has obtained purported "disgorgement" for violations of public laws and, *inter alia*, for retribution and deterrence, *i.e.*, penal purposes. And, because "disgorgement in the securities-enforcement context is a 'penalty,'" it is "within the meaning of [28 U.S.C. § 2462], and so disgorgement actions must be commenced within five years of the date the claim accrues."

Kokesh, 137 S. Ct. at 1639 (citations omitted).

34. The reason the statute of limitations was at issue in *Kokesh* was because the defendant there faced an enforcement action for conduct spanning a long period of time, and he argued that any disgorgement order could not reach back more than five years. As the Supreme Court described it:

> The [district] court ordered Kokesh to pay a civil penalty of $2,354,593, which represented "the amount of funds that [Kokesh] himself received during the limitations period." Regarding the Commission's request for a $34.9 million disgorgement judgment—$29.9 million of which resulted from violations outside the limitations period—the [district] court agreed with the Commission that because disgorgement is not a "penalty" within the meaning of § 2462, no limitations period applied.

Id. at 1641 (citation omitted).

35. In reaching the decision that the SEC's disgorgement orders constituted penalties subject to the five-year statute of limitations, the Supreme Court identified two guiding principles that determine whether a pecuniary sanction is a "penalty": (i) "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual"; and (ii) whether the pecuniary sanction "is sought 'for the purpose of punishment, and to deter others from offending in like manner'—as opposed to compensating a victim for his loss." *See id* at 1642.

36. Applying these principles and relying on earlier precedent, the Supreme Court held that disgorgement—as used by the SEC in securities-enforcement actions—functions as a penalty for three reasons:

a. *First*, "SEC disgorgement is imposed by the courts as a consequence for violating . . . public laws. The violation for which the remedy is sought is committed against the United States rather than an aggrieved individual—this is why, for example, a securities-enforcement action may proceed even if victims

do not support or are not parties to the prosecution." *Id.* at 1643.

b. *Second*, "SEC disgorgement is imposed for punitive purposes." *Id.* The Supreme Court observed that since the early 1970s, the SEC has used disgorgement for the purpose of deterrence. "[I]t has become clear that deterrence is not simply an incidental effect of disgorgement. Rather, courts have consistently held that '[t]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains.'" *Id.* And, thus, "[s]anctions imposed for the purpose of deterring infractions of public laws are inherently punitive because 'deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e].'" *Id.* (alternation in original).

c. *Third*, "SEC disgorgement is not compensatory" because the disgorged profits are not paid directly and entirely to the victim investors. The Supreme Court noted that "disgorged profits are paid to the district court, and it is 'within the court's discretion to determine how and to whom the money will be distributed.' . . . Some disgorged funds are paid to victims; other funds are dispersed to the United States Treasury." *Id.* at 1644 (citation omitted). The Court stated that "[w]hen an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty." *Id.*

37. The Supreme Court also stressed that the SEC's use of disgorgement is not remedial for yet another reason: "it is not clear that disgorgement, as courts have applied it in the SEC enforcement context, simply returns the defendant to the place he would have occupied had he not broken the law" because disgorgement often exceeds the profits obtained by the defendant as a result of the alleged violation and is ordered without considering the amount of the

"defendant's expenses that reduced the amount of illegal profit." *Id.* at 1644. In other words, rather than restoring the *status quo ante*, as the SEC argued disgorgement does, the way that disgorgement has been used by the SEC often "leaves the defendant worse off." *Id.* at 1645.

38. Additionally, the fact that the SEC's use of disgorgement sometimes compensates victim investors does not eliminate its punitive nature. "A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.*

39. Accordingly, the Supreme Court determined that the way that the SEC has used disgorgement in securities enforcement actions for nearly 50 years has been punitive, and thus a penalty. For Mr. Kokesh, this meant that the case was remanded to the lower courts to recalculate the monetary relief ordered against him to comply with the Supreme Court's holding, including by applying the five-year statute of limitations provided by 28 U.S.C. § 2462. *Id.* at 1639.

40. For F-Squared and the members of the Proposed Class, this means that the SEC's collection of purported "disgorgement" from class members was without legal authority and must be undone. This conclusion follows inexorably from the established principles that penalties cannot be imposed without statutory authority or in excess of statutory limits, and can only be imposed according to legal procedures.

ADMINISTRATIVE PROCEDURE ACT ALLEGATIONS

41. Because the SEC's collection of "disgorgement" was without legal authority, exceeded legal limits, or did not comply with legal procedures, they are subject to challenge under the Administrative Procedure Act.

42. Orders in administrative proceedings involving class members, and SEC orders

and actions seeking disgorgement in federal court actions involving class members, are final agency actions under the Administrative Procedure Act. *See* 5 U.S.C. § 704.

43. Each member of the Proposed Class (as defined below) was adversely affected by the SEC's actions. The Trust, on behalf of itself and all members of the Proposed Class, seeks the return of specific property collected without authorization or otherwise in contravention of legal limits and procedures, and therefore is not seeking money damages. Thus, this Court can order this relief, and find the relevant SEC orders and actions to be void, pursuant to the Administrative Procedure Act. *See* 5 U.S.C. §§ 702, 706(2).

CLASS ALLEGATIONS

44. The Trust brings this lawsuit on behalf of the Trust and the proposed Class members pursuant to Federal Rule of Civil Procedure 23.

45. The proposed Class (the "Proposed Class") consists of: all persons or entities from whom the SEC has collected, during the period from October 26, 2011 to the present, purported "disgorgement," where the funds so collected:

a) exceed, either on their own or in combination with any penalties collected, the statutory maximum penalty amount,

b) are collected in addition to a civil penalty assessment,

c) were paid to the U.S. Treasury, rather than an identified victim or victims for identified victim losses,

d) were based on purported ill-gotten gains received by the defendant outside the statute of limitations provided by 28 U.S.C. § 2462,

e) in administrative proceedings, were imposed without any statutorily required accounting,

f) related to non-traced funds, such as funds not received by the defendant ordered to "disgorge" them, or funds owned by the defendant separate from any funds traced to wrongdoing, or

g) were collected without adequate proof that there were any victims or any losses caused by wrongdoing.

46. The Trust reserves the right to amend the definition of the Proposed Class if

discovery or further investigation reveals that the Proposed Class should be expanded or otherwise modified.

47. **Numerosity:** Members of the Proposed Class are so numerous that joinder of all members is impracticable. The Trust does not know the exact size of the Proposed Class, but believes that there are at least hundreds of putative members of the Proposed Class geographically dispersed throughout the United States and elsewhere.

48. **Typicality:** The Trust's claims are typical of the claims of the members of the Proposed Class. The Trust and all members of the Proposed Class were damaged by the same improper conduct of the SEC. Specifically, the SEC collected penalties under the guise of purported "disgorgement" or otherwise from the members of the Proposed Class, without the authority to do so.

49. **Adequacy of Representation:** The Trust will fairly and adequately protect and represent the interests of the Proposed Class. The interests of the Trust are coincident with, and not antagonistic to, those of the members of the Proposed Class. Accordingly, by proving its own claims, the Trust will prove other Proposed Class members' claims as well.

50. **Adequacy of Legal Representation:** The Trust is represented by counsel that are experienced and competent in the prosecution of class action litigation and actions involving the SEC. The Trust and its counsel have the necessary financial resources to adequately and vigorously litigate this class action. The Trust can and will fairly and adequately represent the interests of the Proposed Class and have no interests that are adverse to, conflict with, or are antagonistic to the interests of the Proposed Class.

51. **Commonality and Predominance:** Common questions of law and fact exist as to all members of the Proposed Class, including, but not limited, to the following:

a. Whether the purported "disgorgement" in both federal court actions and administrative proceedings obtained by the SEC has operated as an unauthorized penalty;

b. Whether penalty amounts collected exceed statutory limits;

c. Whether the SEC's actions in obtaining "disgorgement" or exceeding penalty limits were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law";

d. Whether the SEC's actions in obtaining "disgorgement" or exceeding penalty limits were "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; and

e. Whether the SEC's actions in obtaining "disgorgement" or exceeding penalty limits were "without observance of procedure required by law."

52. **Predominance:** Questions of law and fact common to the members of the Proposed Class predominate over questions that may affect only individual members of the Proposed Class because the SEC has acted on grounds generally applicable to the entire Proposed Class, thereby making a common methodology for determining class damages.

53. **Superiority:** Class action treatment is a superior method for the fair and efficient adjudication of the controversy. Such treatment will permit a large number of similarly situated, geographically dispersed persons or entities to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, or expense that numerous individual actions would engender. The benefits of proceeding through

the class mechanism, including providing injured persons or entities a method for obtaining redress on claims that could not practicably be pursued individually, substantially outweighs potential difficulties in management of this class action. The Proposed Class has a high degree of cohesion, and prosecution of the action through representation would be unobjectionable.

54. **Ascertainability:** The members of the Proposed Class are ascertainable by applying objective criteria to public records and records maintained by the SEC and Proposed Class members.

55. The Trust knows of no special difficulty to be encountered in the maintenance of this action that would preclude its maintenance as a class action.

56. Unless a class is certified, the SEC will improperly retain monies received as a result of its misreading of its authority and the statutory limits on penalties, including penalties imposed as purported "disgorgement," from the Trust and members of the Proposed Class.

ALLEGATIONS SPECIFIC TO THE TRUST

57. F-Squared was an investment management firm headquartered in Massachusetts serving clients in the advisor, institutional, retail, and retirement markets.

58. On December 22, 2014, F-Squared agreed to resolve the SEC enforcement proceedings against it by means of a settled administrative cease-and-desist proceeding brought by the SEC pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act and Sections 9(b) and 9(f) of the Investment Company Act. Under the terms of the order enacting this settlement (the "Order", attached hereto as **Exhibit A**), the SEC charged, and F-Squared agreed to admit, that F-Squared's performance track record for the period between April 2001 and September 2008 was materially inflated, hypothetical and back-tested. The Order required F-Squared to pay $30 million in purported "disgorgement" to the SEC (the "$30 million

payment"), as well as a $5 million fine (the "Fine").

59. Pursuant to the Order, F-Squared transferred $35 million directly to the U.S. Treasury. No part of this was paid to F-Squared's clients (collectively, "Clients").

60. Less than eight months later, on July 8, 2015, F-Squared filed the Bankruptcy Case.

61. The $30 million payment collected from F-Squared was a penalty not authorized by law, because it was not calculated based on funds traceable and causally connected to the alleged wrongdoing, and was not returned to the Clients.

62. The SEC charged, and F-Squared admitted, that F-Squared misrepresented its performance track record for the period between April 2001 and September 2008 by claiming that it was based on live trading when, in fact, it was merely back-tested and hypothetical. However, even though F-Squared's early track record was alleged and admitted to be merely back-tested, when used for actual, live investing by F-Squared's Clients on the basis of trading signals issued by F-Squared, the back-tested model outperformed the market. Indeed, F-Squared's Clients continued to trade more and more of their own clients' securities on the basis of F-Squared's trading signals over time due to the actual returns generated by use of the F-Squared model.

63. Reflecting that reality, the $30 million payment was not paid back to anyone purportedly harmed by F-Squared's wrongdoing or calculated in such a way as to reflect any purported harm to F-Squared's Clients.

64. Accordingly, the $30 million payment was not representative of the purported harm to F-Squared's Clients and was not paid to F-Squared's Clients in violation of the statutory provisions.

65. As stated herein, although the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940 authorize the SEC to obtain accounting and disgorgement in administrative proceedings, any such disgorgement may not function as an additional fine that circumvents explicit statutory fines or exceeds the statutory maximums for such fines.

66. With respect to F-Squared, the SEC determined that the appropriate statutory monetary penalty was $5 million. The SEC then extracted more money on top of that penalty by labelling the additional $30 million "disgorgement." As a result, the total monetary penalty paid by F-Squared to the SEC exceeded what the SEC itself determined to be an appropriate monetary penalty here by at least $30 million. Upon information and belief, this has been the SEC's practice for decades and it has taken the same approach to obtaining "disgorgement" from other similarly situated members of the Proposed Class.

67. In addition, the collection of the $30 million payment also violates Section 8A(e) of the Securities Act of 1933, Sections 21B(e) and 21C(e) of the Securities Exchange Act of 1934, Section 9(e) and 9(f)(5) of the Investment Company Act of 1940, and Sections 203(j) and 203(k)(5) of the Investment Advisers Act of 1940, which grant the SEC the power to order disgorgement but only for the benefit of investors who suffered losses as a result of violative conduct. Upon information and belief, in addition to the $30 million payment from F-Squared, the SEC has been obtaining purported "disgorgement" for decades, the amount of which is not correlated to the losses suffered by investors. As a result, the SEC did not have the power to order the $30 million payment, or "disgorgement" from similarly situated parties, and such orders of "disgorgement" is void.

68. The Order became "final" when issued on December 22, 2014 in accordance with SEC Rule of Practice 249(c)(7).

69. As F-Squared's successor-in-interest for these purposes, the Trust was injured in fact in the amount of at least $30 million.

70. Absent the unlawful Order, F-Squared would not have paid the $30 million payment that the SEC had no authority to obtain.

71. The Trust seeks a declaratory judgment invalidating the relevant portion of the SEC's Order, and restitution and recovery of the $30 million in unlawful "disgorgement" transferred to the U.S. Treasury.

72. The issuance of the Order was a final agency action under the Administrative Procedure Act. *See* 5 U.S.C. § 704. Because it was in violation of the Investment Company Act of 1940 and the Investment Advisers Act of 1940 and because it was not authorized by law, the SEC's actions were unlawful and subject to challenge under the Administrative Procedure Act.

73. F-Squared was adversely affected by the SEC's action. As described below, the Trust is seeking a determination that the Order is void in relevant part and seeks the return of the $30 million "disgorgement" paid to the SEC pursuant to the Order, and is not seeking money damages. Thus, this Court can hold the Order to be unlawful in relevant part and set aside its relevant portion, and the Trust has the standing to ask it to do so. *See* 5 U.S.C. §§ 702, 706(2).

COUNT I

Administrative Procedure Act (5 U.S.C. § 702, 5 U.S.C. § 706)
On Behalf of the Trust Individually and the Proposed Class

74. The Trust incorporates paragraphs 1 through 73 as if fully re-alleged herein.

75. The SEC exceeded its statutory authority by seeking and obtaining disgorgement from F-Squared and the similarly situated members of the Proposed Class as a separate monetary

penalty or otherwise beyond statutory authorization.

76. Under 5 U.S.C. § 706(2)(A), a reviewing court shall hold unlawful and set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

77. Under 5 U.S.C. § 706(2)(C), a reviewing court shall hold unlawful and set aside agency action found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

78. Pursuant to securities laws, including the Securities Act of 1933, Securities Exchange Act of 1934, Investment Company Act of 1940, and Investment Advisers Act of 1940, in administrative proceedings, the SEC is authorized to obtain "civil penalties" and "an accounting and disgorgement" if it serves the remedial function of making victims whole.

79. Similarly, pursuant to the securities laws, in federal court actions, the SEC is authorized to obtain "civil penalties" subject to statutory limits and "equitable relief" only if such "equitable relief" has the true character of equitable relief, and only if it is collected for the benefit of investors.

80. For decades, the SEC has been obtaining purported "disgorgement" for purposes other than making victims whole, and has required or caused such "disgorgement" to be paid to the U.S. Treasury, not the purported victims.

81. In *Kokesh*, the Supreme Court determined that this historical use of "disgorgement" by the SEC is, in reality, the imposition of a penalty.

82. As a result, the SEC has been improperly obtaining duplicate collections, in violation of its statutory authority of (i) "fines" which are permitted "civil penalties" and (ii) "disgorgement" orders, which the Supreme Court has now determined operate as penalties.

83. Thus, in both administrative proceedings and federal court actions, the SEC exceeded its statutory authority by obtaining "disgorgement" from F-Squared and the similarly situated members of the Proposed Class.

84. Accordingly, all SEC orders of disgorgement and all other SEC orders and actions seeking or collecting disgorgement within the six-year statute of limitations applicable to Administrative Procedure Act cases must be held to be unlawful and set aside pursuant to 5 U.S.C. §§ 706(2)(A) and (C) as actions in excess of the SEC's statutory authority, and the relief set forth below in the Prayer for Relief should be granted.

COUNT II

Administrative Procedure Act (5 U.S.C. § 702, 5 U.S.C. § 706)
On Behalf of the Trust Individually and the Proposed Class

85. The Trust incorporates paragraphs 1 through 84 as if fully re-alleged herein.

86. Under 5 U.S.C. § 706(2)(D), a reviewing court shall hold unlawful and set aside agency action found to be "without observance of procedure required by law."

87. The SEC failed to observe the procedural requirements of the securities laws, including the Securities Act of 1933, Securities Exchange Act of 1934, Investment Company Act of 1940, and Investment Advisers Act of 1940, by requiring "disgorgement" from F-Squared and similarly situated Proposed Class members without obtaining an accounting of the profits that F-Squared or the Proposed Class members allegedly acquired as a result of wrongdoing or tracing the purported investor losses to the profits acquired as a result of the wrongdoing, and then tailoring the order of "disgorgement" accordingly. *See* Section 8A(e) of the Securities Act of 1933 (codified at 15 U.S.C. § 77h-1(e)), Sections 21B(e) and 21C(e) of the Securities Exchange Act of 1934 (codified at 15 U.S.C. §§ 78u-2(e), 78u-3(e)), Sections 9(e) and 9(f)(5) of the Investment Company Act of 1940 (codified at 15 U.S.C. §§ 80a-9(e), 80a-9(f)(5)), and Sections

203(j) and 203(k)(5) of the Investment Advisers Act of 1940 (codified at 15 U.S.C. §§ 80b-3(j), 80b-3(k)(5)).

88. Accordingly, the SEC orders of disgorgement against F-Squared and the members of the Proposed Class within the six-year statute of limitations applicable to Administrative Procedure Act cases must be held unlawful and set aside as an agency action that fails to observe procedural requirements, and the relief set forth below in the Prayer for Relief should be granted. 5 U.S.C. § 706(2)(D).

PRAYER FOR RELIEF

WHEREFORE, the Trust, on behalf of itself and members of the Proposed Class, prays for relief as follows:

Certification of the Proposed Class under Federal Rule of Civil Procedure 23 and appointment of the Trust as the representative of the Proposed Class and its counsel as Class counsel.

On Count I, entry of a judgment against the SEC by this Court, (a) declaring that the SEC's collection of purported "disgorgement," pursuant to the Order, and from the members of the Proposed Class is unlawful pursuant to 5 U.S.C. §§ 706(2)(A) and (C); (b) setting aside the purported "disgorgement" from members of the Proposed Class, including the $30 million purported "disgorgement" paid to the U.S. Treasury by F-Squared under the Order; (c) ordering the refund to the members of the Proposed Class of the purported "disgorgement" paid to the U.S. Treasury, including the $30 million purported "disgorgement" paid to the U.S. Treasury by F-Squared under the Order; and (d) providing such other relief as the Court deems just and proper.

On Count II, entry of a judgment against the SEC by this Court, (a) declaring that the collection of purported "disgorgement" by the SEC is unlawful pursuant to 5 U.S.C.

§ 706(2)(D); (b) setting aside the orders of purported "disgorgement," including the Order; (c) ordering the refund to the members of the Proposed Class of the purported "disgorgement" paid to the U.S. Treasury, including the $30 million purported "disgorgement" paid to the U.S. Treasury by F-Squared under the Order; and (d) providing such other relief as the Court deems just and proper.

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Dated: October 26, 2017
Boston, Massachusetts

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EXHIBIT A

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Investment Advisers Act of 1940
Release No. 3988 / December 22, 2014

Investment Company Act of 1940
Release No. 31393 / December 22, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-16325

In the Matter of **F-SQUARED INVESTMENTS, INC.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTIONS 9(b) AND 9(f) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against F-Squared Investments, Inc. ("Respondent" or "F-Squared").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Respondent admits the facts set forth in Appendix A attached hereto, and acknowledges that its conduct as set forth in Appendix A violated the federal securities laws, admits the Commission's jurisdiction over it and the subject matter of these proceedings, and consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

A. Summary

1. This matter arises from a registered investment adviser's advertising of a materially inflated, and hypothetical and back-tested, performance track record for the period of April 2001 to September 2008 in connection with an exchange-traded fund ("ETF") sector rotation strategy. In September 2008, F-Squared and its co-founder and former CEO Howard Present created an investment strategy they called "AlphaSector" and used data they were at least reckless in not knowing was back-tested to create hypothetical performance of AlphaSector. From September 2008 to September 2013, F-Squared advertised the hypothetical historical performance as "not backtested" and based on an actual strategy that had been used to manage live assets from April 2001 to September 2008.

2. In addition, F-Squared incorrectly applied ETF trend data – which were detecting price momentum – that dictated whether an ETF was in or out of the AlphaSector portfolio (the "in/out signals"). In creating its back-tested track record, F-Squared systematically applied the in/out signals one week before the ETF price changes that caused changes in signals (*i.e.*, a change from invested in the ETF to out of the ETF or vice-versa). As a result, the advertised historical performance of the AlphaSector strategy from April 2001 to September 2008 was based on implementing signals to sell before price drops and to buy before price increases that had occurred a week earlier. F-Squared at least recklessly compiled the historical data to implement a hypothetical trade (that F-Squared advertised as an actual trade) one week before the trade could have occurred.

3. The inaccurate compilation of historical data substantially improved the AlphaSector strategy's advertised hypothetical and back-tested historical performance. If an investor made a hypothetical investment of $100,000 on April 1, 2001 (assuming a reinvestment of dividends and no further contributions or withdrawals), the investment would have been worth approximately $128,000 on August 24, 2008 if invested in the S&P 500 Index. With accurately timed (but still hypothetical and back-tested) signal implementation, the same investment in F-Squared's hypothetical ETF sector rotation strategy would have been worth $138,000. However, by implementing the hypothetical and back-tested signals one week early, F-Squared advertised the investment as worth $235,000 – an increase of approximately 350% more than if F-Squared had applied the signals accurately.

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[1] The findings herein are made pursuant to Respondent's Offer and are not binding on any other person or entity in this or any other proceeding.

4. As described below, virtually all of F-Squared's claimed outperformance relative to the S&P 500 Index for the period before October 2008 is attributable to its data compilation error. By 2014, F-Squared's ETF strategy was the largest in the market, with approximately $28.5 billion in assets following the strategy.

B. Respondent

5. **F-Squared Investments, Inc.** (SEC File No. 801-69937) is an investment adviser registered with the Commission since March 2009 and is headquartered in Wellesley, Massachusetts. In October 2008, F-Squared launched its first AlphaSector index. Today, F-Squared sub-licenses its approximately 75 AlphaSector indexes to unaffiliated third parties who manage assets pursuant to these indexes. As of June 30, 2014, there were approximately $28.5 billion invested pursuant to AlphaSector indexes including $13 billion in mutual fund assets sub-advised by F-Squared.[2] Since June 2010, F-Squared Investments, Inc. has been a wholly-owned subsidiary of F-Squared Investment Management, LLC.

C. Other Relevant Person

6. **Howard Brian Present** ("Present"), age 53, resides in Wellesley, Massachusetts. In 2006, Present co-founded F-Squared. Present was the President and CEO of F-Squared until his separation in 2014. Present owns approximately 22% of F-Squared Investment Management, LLC.

D. Facts

AlphaSector Background

7. From October 2008 to September 2013, F-Squared marketed an ETF sector rotation strategy called AlphaSector that was based on an algorithm that yields a "signal" indicating whether to buy or sell nine industry ETFs.[3] As of June 30, 2014, there was approximately $28.5 billion

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[2] In August 2010, F-Squared Institutional Advisors, LLC (SEC File No. 801-71753), a registered investment adviser and an affiliate of F-Squared Investments, Inc., was created and became the sub-adviser of the registered mutual funds.

[3] F-Squared has created several AlphaSector strategies and sub-licenses approximately 75 AlphaSector indexes. The AlphaSector indexes that are the subject of this matter, including the AlphaSector Premium Index and the AlphaSector Rotation Index, are based on investments in U.S. Equity ETFs. As with all indexes, the performance of the AlphaSector Premium and AlphaSector Rotation indexes are inherently hypothetical in the sense that the index does not purport to reflect the performance of any particular client or account. However, as described below, F-Squared advertised that the AlphaSector Premium Index and AlphaSector Rotation Index were based on a strategy that had been in place since 2001 and therefore the performance of these indexes was "not backtested" when in fact the performance *was* backtested.

invested pursuant to the AlphaSector indexes. The bulk of these assets are invested through registered mutual funds or other funds or through separately managed accounts managed by advisers or brokers who implement the strategy based on information they receive periodically from F-Squared. Today, AlphaSector is the largest active ETF strategy in the market.

8. F-Squared and Present began advertising the AlphaSector strategy via an index in September 2008. From inception, F-Squared stated in advertisements that AlphaSector is an ETF sector rotation strategy that (i) invests in as many as nine U.S. equities industry ETFs, with an algorithm or quantitative engine determining whether, based on ETF sector trends and volatility, the portfolio would invest in none, some, or all of the nine ETFs; (ii) holds equal ownership of any of the nine ETFs with a positive trend and no ownership of any of the nine ETFs with a negative or neutral trend; (iii) rebalances periodically, either weekly or monthly, and only when at least one of the nine ETFs show a change in trend; and (iv) applies a 25% cap per ETF (*i.e.*, no ETF would hold more than 25% of the total assets in the strategy) at the time of rebalancing, with the remainder of the portfolio invested in a short-term treasury ETF (representing cash).

9. Present created and was responsible for all of F-Squared's AlphaSector advertisements, which included PowerPoint presentations describing the strategy and its past performance, including for the period April 2001 to September 2008. The relevant slides from F-Squared's August 2013 standard presentation for the AlphaSector Premium Index, which was available on F-Squared's public website until the end of September 2013, are attached as Exhibit 1. F-Squared posted the presentations and other AlphaSector performance advertisements and marketing materials on its public website and sent them to numerous prospective and current clients from September 2008 to September 2013.

10. From AlphaSector's inception in October 2008 through September 2013, F-Squared advertised AlphaSector's past performance as index performance. Even though F-Squared did not create AlphaSector until late 2008, F-Squared made two materially false claims in its AlphaSector advertisements and Forms ADV, namely that:

- the in/out ETF signals that formed the basis of the AlphaSector index returns had been used to manage client assets from April 2001 to September 2008; and

- the in/out ETF signals resulted in a track record that significantly outperformed the S&P 500 Index from April 2001 to September 2008.

F-Squared was at least reckless in advertising both of these statements.

<u>F-Squared and Present Used Back-Tested Data to Create a Seven-Year Track Record</u>

11. According to Present, in early 2008, Present and a proprietor of a private wealth advisory firm (hereinafter, "Private Wealth Advisor") discussed a sector rotation investment strategy using ETFs. According to Present, in the context of these discussions, the Private Wealth Advisor

claimed to have used a sector rotation strategy to manage client assets. Present never saw records showing that the Private Wealth Advisor had invested advisory clients in a sector rotation strategy. Present was encouraged to get such documentation – for instance, in mid-2008, F-Squared's co-founder and former Vice Chairman reports that he told Present to get account records to confirm the historical performance of the Private Wealth Advisor's sector rotation strategy.

12. Present also understood that the Private Wealth Advisor had a college intern who was developing an algorithm to use in conjunction with the sector rotation strategy. The algorithm could generate a momentum-based signal that could be used to determine whether to invest or not invest in a particular sector ETF. As discussions between Present and the Private Wealth Advisor moved forward in summer 2008, the Private Wealth Advisor decided to co-found a signal provider company (the "Data Provider") with his intern. The Data Provider would send data with in/out signals to F-Squared that F-Squared would then use to determine whether AlphaSector would own or not own an ETF.

13. In late August and early September 2008, as F-Squared and the Data Provider were finalizing a contract for signal delivery to F-Squared, the Private Wealth Advisor's intern sent Present three sets of hypothetical, back-tested weekly trends for each of the ETFs. A positive trend was a signal to be "in" (buy or own) the ETF, and a negative trend was a signal to be "out" (sell or do not own) of the ETF. The first two data sets of trends were based on whether the simple moving average of each ETF had increased or decreased from the previous week. One of the two sets of trends was based on a 41-week simple moving average and the other set was based on a 61-week simple moving average.[4] The intern's third set of signals were from his own algorithm.

14. After he received the three sets of signals from the Private Wealth Advisor's intern, Present instructed an F-Squared employee to divide the three sets of weekly ETF trend or signal data among three different time periods, which, according to Present, corresponded to the periods the Private Wealth Advisor had claimed each set of signals had been used to manage his clients' assets, and then calculate AlphaSector's back-tested and hypothetical historical performance for the period April 2001 to September 2008. The 61-week simple moving average trends were used for the period April 2001 to June 2006, the 41-week simple moving average trends were used for the period July 2006 to June 2008, and the signals from the intern's algorithm were used for the period July 2008 to September 2008.

15. To convert the in/out ETF signals into an index "track record," F-Squared and Present tested the performance of various portfolio construction methodologies – which convert the ETF

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[4] In this instance, the simple moving average is the sum of the weekly closing prices of an ETF for either 41 or 61 weeks divided by either 41 or 61. The trends the intern sent Present showed each ETF's simple moving average at the end of each week for the period 2001-2008. A positive ETF trend, for example, meant that week's simple moving average for the particular ETF was higher than the prior week's simple moving average.

signals into performance – and ultimately Present created the rules, described in paragraph 8, that are central to the AlphaSector strategy.

16. F-Squared's AlphaSector advertisements emphasized algorithmic-based models that purportedly supported both the hypothetical and actual track record beginning in July 2008, but in reality the AlphaSector track record for the period April 2001 to June 2008 was based on changes in 41-week and 61-week simple moving averages. An example of the model description underlying AlphaSector is at page 14 of Exhibit 1.

17. The Private Wealth Advisor never used a sector rotation strategy. His client and customer trades were ad hoc, client-by-client, non-discretionary, and were not uniform across clients. Before mid-2008, the Private Wealth Advisor and his business partner traded the ETFs that form the basis of AlphaSector only infrequently, and they did not trade some of the ETFs at all. To the extent that the Private Wealth Advisor ever attempted to use moving average data to make trades, the trades were not consistent with the trend data F-Squared and Present used to create AlphaSector's performance.

F-Squared and Present Ignored a Material Performance Calculation Error

18. F-Squared created the pre-October 2008 "historical track record" incorrectly by implementing all the purchases and sales dictated by the ETF trend signals one week before they should have been implemented. Because the signals were detecting price momentum, F-Squared's incorrectly implementing the signals one week early meant that AlphaSector's "historical track record" was based on its selling before price drops that had already occurred and buying before price increases that had already occurred. As described below, virtually all of AlphaSector's claimed outperformance relative to the S&P 500 Index for the pre-October 2008 period is attributable to this erroneous calculation.

19. The now former F-Squared employee who constructed the AlphaSector track record realized the error by late September 2008, shortly after F-Squared started advertising the strategy, and alerted Present. Nevertheless, F-Squared and Present continued to advertise the inflated track record until September 2013.

20. The inaccurate compilation of historical data substantially improved the AlphaSector's strategy's advertised back-tested and hypothetical historical performance for the pre-October 2008 period. If an investor made a hypothetical investment of $100,000 on April 1, 2001 (assuming a reinvestment of dividends and no further contributions or withdrawals), the investment would have been worth approximately $128,000 on August 24, 2008 if invested in the S&P 500 Index. With accurately timed (but still hypothetical and back-tested) signal implementation, the same investment in F-Squared's hypothetical ETF sector rotation strategy would have been worth $138,000. However, by implementing the hypothetical and back-tested signals one week early, F-Squared advertised the investment as worth $235,000.

After 2008, Present and F-Squared Continued to Advertise AlphaSector's Hypothetical and Back-Tested and Substantially Improved Track Record

21. On multiple occasions after September 2008, Present requested back-up documentation from the Private Wealth Advisor to support AlphaSector's track record. Present never received back-up from the Private Wealth Advisor. Despite the lack of documentation of live assets supporting AlphaSector's performance for the period prior to September 2008, F-Squared and Present continued to advertise the false track record until September 2013.

22. In January 2009, Present contacted the Private Wealth Advisor and his business partner to obtain an audited track record for the Private Wealth Advisor's accounts that had supposedly tracked the AlphaSector methodology. Present did not receive one. During these discussions, the Private Wealth Advisor told Present that the Private Wealth Advisor did not have a specific track record because he considered the sector rotation strategy to be a client-by-client trading strategy and not a specific product.

23. In October 2009, F-Squared began sub-advising mutual funds using the AlphaSector strategies. In connection with that effort, Present assured the mutual fund adviser that AlphaSector's performance was constructed based on "actual investment philosophy, trading patterns and portfolio strategy that was employed for the client assets." Present stated that the portfolio construction rules used to create AlphaSector were all "consistent elements of the AlphaSector Strategy during its entire existence, and critical to its performance returns." Present also stated that the AlphaSector Index was "based on investment decisions that were generated on a live basis since 2001" and "the Index therefore explicitly does not reflect backtested data, but instead represents live, historical data." The mutual fund adviser, working with Present, amended the funds' prospectus to include the inflated historical performance of the AlphaSector indexes from April 2001 to September 2008.

24. In June 2012, F-Squared retained an outside attorney to perform a mock audit. One of the recommendations from the mock audit was that F-Squared "should ensure that it has books and records to support its performance disclosed for years prior to the year 2006." Present sent several communications in June and July 2012 to the Private Wealth Advisor and officers of the Data Provider co-founded by the Private Wealth Advisor in 2008, seeking the required records. F-Squared's then-CCO also prepared a document by which the Data Provider and/or the Private Wealth Advisor would certify that they had records to support the advertised historical performance. These efforts proved unsuccessful. Present's effort to elicit information from the Data Provider also prompted the Data Provider's CEO and COO to tell Present that: (i) the Private Wealth Advisor's former intern (now the Chief Technology Officer (CTO) of the Data Provider) was only 14 years old in 2001; and (ii) the data the former intern sent Present would have been back-tested for the period before either 2007 or 2008, when the former intern started working on the algorithm.

25. In October 2012, Present received a copy of a September 2008 email from a then F-Squared employee to a then employee of the Private Wealth Advisor concerning the implementation of historical signals. That email concerned the dating convention associated with the Data Provider's

signals and should have called into question whether F-Squared implemented the signals one week early in creating AlphaSector's pre-October 2008 track record. Nonetheless, Present and F-Squared continued to advertise that inflated track record.

26. By May 2013, F-Squared had decided to replace the Data Provider's ETF signals with signals generated by its own proprietary model. During this process, the Data Provider's CEO and CTO told Present that the Private Wealth Advisor was not responsible for F-Squared's pre-October 2008 track record. In addition, on July 1, 2013, the Data Provider's CEO and CTO told Present that they could not replicate AlphaSector's pre-October 2008 advertised performance when they used the signals they understood were the basis of the AlphaSector track record. In September 2013, F-Squared removed all performance track records and advertising materials for the time period April 2001 to September 2008 from its website.

F-Squared's Inaccurate Advertisements

27. F-Squared's advertisements stated that the inception date of the AlphaSector indices "is based on an active strategy with an inception date of April 2001. Inception date is defined as the date as of which investor assets began tracking the strategy." This disclosure is located in Exhibit 1 at page 18.

28. Starting in late 2009, F-Squared's AlphaSector advertisements also explicitly claimed that the track record for the period April 2001 to September 2008 was not back-tested. For example, even as of September 2013, F-Squared's advertisements stated: "The process of converting the active strategy to an index implies that the returns presented, while not backtested, reflect theoretical performance an investor would have obtained had it invested in the manner shown and does not represent returns that an investor actually attained, as investors cannot invest directly in an index." This disclosure is located in Exhibit 1 at page 18.

29. From September 2008 to September 2013, F-Squared advertised that AlphaSector indices had outperformed the S&P 500 Index, particularly for the period from April 2001 to September 2008. Attached at pages 10 and 11 of Exhibit 1 are examples of AlphaSector performance advertisements.

30. F-Squared also claimed that it was responsible for AlphaSector's buy and sell decisions for the pre-October 2008 period. For example, in September 2013, F-Squared's public website featured news articles with statements such as:

- "Back in mid-2007, well before the financial debacle that began with the collapse of the investment bank Bear Stearns, Howard Present, co-founder, president and CEO of F-Squared Investments in Boston, had a strategy that determined that financial stocks were becoming too risky. But they didn't just sell down the financial holdings, which at the time represented one-ninth of his strategy's investments. He sold *all* his financial holdings."

- "We eventually dropped the tech sector in 2001," says Present.
- "Financials in 2006, [Present] notes, had moved from a historic average of about 15% of the S&P to 28%, or nearly double, which was another sign of a bubble that F-Squared was able to avoid. . . And when [Financials] started to show signs of decline, F-Squared dropped its entire financials allocation like a hot potato."

F-Squared's Inaccurate Forms ADV

31. F-Squared's various Forms ADV filed during the period October 2008 to September 2013 inaccurately claimed that the investment models underlying the index had been used to manage actual client assets between April 2001 and September 2008.

F-Squared's Policies and Procedures Were Inadequately Designed and Implemented

32. During the October 2008 to October 2013 time period, F-Squared failed to adopt and implement policies reasonably designed to prevent violations of the Advisers Act and its rules. For example, F-Squared did not have policies reasonably designed to prevent the use of performance advertising materials that were false or misleading. Furthermore, F-Squared published performance advertisements without back-up for the performance, even after the issue was identified in a mock audit in 2012.

E. Violations

33. Based on the conduct described above, Respondent willfully[5] violated Section 206(1) of the Advisers Act, which prohibits any investment adviser from employing any device, scheme, or artifice to defraud any client or prospective client.

34. Based on the conduct described above, Respondent willfully violated Section 206(2) of the Advisers Act, which prohibits any investment adviser from engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

35. Based on the conduct described above, Respondent willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder, which makes it a fraudulent, deceptive, or

[5] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "'also be aware that he is violating one of the Rules or Acts.'" Id. (quoting Gearhart & Otis, Inc. v. SEC, 348 F.2d 798, 803 (D.C. Cir. 1965)).

manipulative act, practice, or course of business within the meaning of Section 206(4) of the Advisers Act to, among other things, directly or indirectly publish, circulate, or distribute an advertisement which contains any untrue statement of material fact, or which is otherwise false or misleading.

36. Based on the conduct described above, Respondent willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which, among other things, makes it a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of Section 206(4) of the Advisers Act to fail to adopt and implement such written policies or procedures reasonably designed to prevent violation of the Advisers Act and the rules promulgated thereunder.

37. Based on the conduct described above, Respondent willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, which makes it a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of Section 206(4) of the Advisers Act for any investment adviser to a pooled vehicle to make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle, or to other wise engage in any act, practice, or course of business that is fraudulent, deceptive or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

38. Based on the conduct described above, Respondent willfully violated Section 207 of the Advisers Act which makes it unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission, or willfully to omit to state in any such application or report any material fact which is required to be stated therein.

39. Based on the conduct described above, Respondent willfully violated Section 204 of the Advisers Act and Rule 204-2(a)(16) thereunder. Section 204 of the Advisers Act requires investment advisers to make and keep certain records as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 204-2 under the Advisers Act requires investment advisers registered or required to be registered to make and keep true, accurate and current various books and records relating to their investment advisory business, including all accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of any or all managed accounts or securities recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication that the investment adviser circulates or distributes, directly or indirectly, to 10 or more persons.

40. Based on the conduct described above, Respondent willfully aided and abetted and caused certain mutual funds sub-advised by F-Squared to violate Section 34(b) of the Investment Company Act which, among other things, makes it unlawful for any person to make any untrue or misleading statement of material fact in any registration statement, application, report, account, record, or other document filed with the Commission under the Investment Company Act.

F. Respondent's Remedial Efforts and Cooperation

41. In determining to accept Respondent's Offer, the Commission considered the remedial acts undertaken by Respondent and Respondent's cooperation with the Commission staff in its investigation of this matter. Among other things, F-Squared hired an Independent Compliance Consultant in January 2014, and separated its Chief Executive Officer (Howard Present) in 2014. The Independent Compliance Consultant has already undertaken and completed a review of F-Squared's compliance policies and procedures and submitted a report (the "Initial Report") to F-Squared and the Commission staff.

G. Undertakings

42. Independent Compliance Consultant. F-Squared retained the services of an Independent Compliance Consultant in January 2014, and the Independent Compliance Consultant submitted an Initial Report to the Commission staff in September 2014. F-Squared undertakes to maintain the engagement of the Independent Compliance Consultant as follows:

a. Within 30 days of the date of the issuance of this Order, F-Squared shall retain the services of the Independent Compliance Consultant who submitted the Initial Report. The Independent Compliance Consultant's compensation and expenses shall be borne exclusively by F-Squared. F-Squared shall require the Independent Compliance Consultant to conduct a second review of the F-Squared compliance policies and procedures that the Independent Compliance Consultant deems relevant with respect to the creation, publication, circulation, or distribution of performance advertisements or other marketing material;

b. At the end of the review, which in no event shall be more than three months after the date of the issuance of this Order, F-Squared shall require the Independent Compliance Consultant to submit a Second Report to F-Squared and to the Commission staff. The Second Report shall describe the review performed, the conclusions reached, and shall include any recommendations deemed necessary to make the policies and procedures adequate. F-Squared may suggest an alternative procedure designed to achieve the same objective or purpose as that of the recommendation of the Independent Compliance Consultant. The Independent Compliance Consultant shall evaluate any alternative procedure proposed by F-Squared. However, F-Squared shall abide by the Independent Compliance Consultant's final recommendation;

c. Within six months after the date of issuance of this Order, F-Squared shall, in writing, advise the Independent Compliance Consultant and the Commission staff of the recommendations it is adopting;

d. Within nine months after the date of issuance of this Order, F-Squared shall require the Independent Compliance Consultant to complete its review and submit a written final report to Commission staff. The Final Report shall describe the review made of F-Squared's compliance policies and procedures relating to the publication, circulation, or distribution of

performance advertisements or other marketing material containing historical (hypothetical or actual) performance information; set forth the conclusions reached and the recommendations made by the Independent Compliance Consultant, as well as any proposals made by F-Squared; and describe how F-Squared is implementing the Independent Compliance Consultant's final recommendations;

e. F-Squared shall take all necessary and appropriate steps to adopt and implement all recommendations contained in the Independent Compliance Consultant's Final Report;

f. For good cause shown and upon timely application by the Independent Compliance Consultant or F-Squared, the Commission's staff may extend any of the deadlines set forth in these undertakings;

g. F-Squared shall require the Independent Compliance Consultant to enter into an agreement providing that for the period of the engagement and for a period of two years from completion of the engagement, the Independent Compliance Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with F-Squared, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. The agreement will also provide that the Independent Compliance Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Compliance Consultant in the performance of his or her duties under this Order shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with F-Squared, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

43. F-Squared shall certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission's staff may make reasonable requests for further evidence of compliance, and F-Squared agrees to provide such evidence. The certification and supporting material shall be submitted to Kevin M. Kelcourse, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, Suite 2300, Boston, MA 02110, with a copy to the Office of the Chief Counsel of the Enforcement Division, no later than sixty days from the date of completion of the undertakings.

44. Respondent shall cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in the Order. In connection with such cooperation, Respondent shall: (i) produce, without service of a notice or subpoena, any and all non-privileged documents and other information requested by the Commission staff subject to any restrictions under the law of any foreign jurisdiction; (ii) use its best efforts to cause their officers, employees, and directors to be interviewed by the Commission staff at such time as the staff reasonably may direct; and (iii) use its best efforts to cause their officers, employees, and directors to appear and testify without service of a notice or subpoena in such investigations, depositions, hearings or trials as may be requested by the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Sections 203(e) and 203(k) of the Advisers Act and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent shall cease and desist from committing or causing any violations and any future violations of Sections 204(a), 206(1), 206(2), 206(4), 207 of the Advisers Act and Rules 204-2(a)(16), 206(4)-1, 206(4)-7, and 206(4)-8 thereunder and Section 34(b) of the Investment Company Act.

B. F-Squared Investments, Inc. is censured.

C. F-Squared Investments, Inc. shall, within 10 days of the entry of this Order, pay disgorgement of $30 million ($30,000,000.00) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways:

(1) F-Squared Investments, Inc. may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) F-Squared Investments, Inc. may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) F-Squared Investments, Inc. may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169 17

Payments by check or money order must be accompanied by a cover letter identifying F-Squared Investments, Inc. as the Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Kevin M. Kelcourse, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, Suite 2300, Boston, MA 02110.

D. F-Squared Investments, Inc. shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $5 million ($5,000,000.00) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) F-Squared Investments, Inc. may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) F-Squared Investments, Inc. may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) F-Squared Investments, Inc. may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169 17

Payments by check or money order must be accompanied by a cover letter identifying F-Squared Investments, Inc. as the Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Kevin M. Kelcourse, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, Suite 2300, Boston, MA 02110.

E. Respondent F-Squared Investments, Inc. shall comply with the undertakings enumerated in Section III.G. above.

By the Commission.

Brent J. Fields
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16325

In the Matter of **F-SQUARED INVESTMENTS, INC.** **Respondent.**	**APPENDIX A TO ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTIONS 9(b) AND 9(f) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

APPENDIX A

Respondent F-Squared Investments, Inc., admits the facts set forth below (the "Admissions") and acknowledges that its conduct violated the federal securities laws:

AlphaSector Background

1. From October 2008 to September 2013, F-Squared marketed an ETF sector rotation strategy called AlphaSector that was based on an algorithm that yields a "signal" indicating whether to buy or sell nine industry ETFs. As of June 30, 2014, there was approximately $28.5 billion invested pursuant to the AlphaSector indexes. The bulk of these assets are invested through registered mutual funds or other funds or through separately managed accounts managed by advisers or brokers who implement the strategy based on information they receive periodically from F-Squared. Today, AlphaSector is the largest active ETF strategy in the market.

2. F-Squared and Present began advertising the AlphaSector strategy via an index in September 2008. From inception, F-Squared stated in advertisements that AlphaSector is an ETF sector rotation strategy that (i) invests in as many as nine U.S. equities industry ETFs, with an algorithm or quantitative engine determining whether, based on ETF sector trends and volatility, the portfolio would invest in none, some, or all of the nine ETFs; (ii) holds equal ownership of any of the nine ETFs with a positive trend and no ownership of any of the nine ETFs with a negative or neutral trend; (iii) rebalances periodically, either weekly or monthly, and only when at least one of the nine ETFs show a change in trend; and (iv) applies a 25% cap per ETF (*i.e.*, no ETF would hold more than 25% of the total assets in the strategy) at the time of rebalancing, with the remainder of the portfolio

invested in a short-term treasury ETF (representing cash).

3. Present created and was responsible for all of F-Squared's AlphaSector advertisements, which included PowerPoint presentations describing the strategy and its past performance, including for the period April 2001 to September 2008. The relevant slides from F-Squared's August 2013 standard presentation for the AlphaSector Premium Index, which was available on F-Squared's public website until the end of September 2013, are attached as Exhibit 1. F-Squared posted the presentations and other AlphaSector performance advertisements and marketing materials on its public website and sent them to numerous prospective and current clients from September 2008 to September 2013.

4. From AlphaSector's inception in October 2008 through September 2013, F-Squared advertised AlphaSector's past performance as index performance. Even though F-Squared did not create AlphaSector until late 2008, F-Squared made two materially false claims in its AlphaSector advertisements and Forms ADV, namely that:

- the in/out ETF signals that formed the basis of the AlphaSector index returns had been used to manage client assets from April 2001 to September 2008; and

- the in/out ETF signals resulted in a track record that significantly outperformed the S&P 500 Index from April 2001 to September 2008.

F-Squared was at least reckless in advertising both of these statements.

<u>F-Squared and Present Used Back-Tested Data to Create a Seven-Year Track Record</u>

5. According to Present, in early 2008, Present and a proprietor of a private wealth advisory firm (hereinafter, "Private Wealth Advisor") discussed a sector rotation investment strategy using ETFs. According to Present, in the context of these discussions, the Private Wealth Advisor claimed to have used a sector rotation strategy to manage client assets. Present never saw records showing that the Private Wealth Advisor had invested advisory clients in a sector rotation strategy.

6. Present also understood that the Private Wealth Advisor had a college intern who was developing an algorithm to use in conjunction with the sector rotation strategy. The algorithm could generate a momentum-based signal that could be used to determine whether to invest or not invest in a particular sector ETF. As discussions between Present and the Private Wealth Advisor moved forward in summer 2008, the Private Wealth Advisor decided to co-found a signal provider company (the "Data Provider") with his intern. The Data Provider would send data with in/out signals to F-Squared that F-Squared would then use to determine whether AlphaSector would own or not own an ETF.

7. In late August and early September 2008, as F-Squared and the Data Provider were finalizing a contract for signal delivery to F-Squared, the Private Wealth Advisor's intern sent Present three sets of hypothetical, back-tested weekly trends for each of the ETFs. A positive trend was a signal to be "in" (buy or own) the ETF, and a negative trend was a signal to be "out" (sell or do not own) of the ETF. The first two data sets of trends were based on whether the simple moving average of each ETF had increased or decreased from the previous week. One of the two sets of trends was based on a 41-week simple moving average and the other set was based on a 61-week simple moving average.[6] The intern's third set of signals were from his own algorithm.

8. After he received the three sets of signals from the Private Wealth Advisor's intern, Present instructed an F-Squared employee to divide the three sets of weekly ETF trend or signal data among three different time periods, which, according to Present, corresponded to the periods the Private Wealth Advisor had claimed each set of signals had been used to manage his clients' assets, and then calculate AlphaSector's back-tested and hypothetical historical performance for the period April 2001 to September 2008. The 61-week simple moving average trends were used for the period April 2001 to June 2006, the 41-week simple moving average trends were used for the period July 2006 to June 2008, and the signals from the intern's algorithm were used for the period July 2008 to September 2008.

9. To convert the in/out ETF signals into an index "track record," F-Squared and Present tested the performance of various portfolio construction methodologies – which convert the ETF signals into performance – and ultimately Present created the rules, described in paragraph 2, that are central to the AlphaSector strategy.

10. F-Squared's AlphaSector advertisements emphasized algorithmic-based models that purportedly supported both the hypothetical and actual track record beginning in July 2008, but in reality the AlphaSector track record for the period April 2001 to June 2008 was based only on changes in 41-week and 61-week simple moving averages. An example of the model description underlying AlphaSector is at page 14 of Exhibit 1.

11. The Private Wealth Advisor never used a sector rotation strategy. His client and customer trades were ad hoc, client-by-client, non-discretionary, and were not uniform across clients. Before mid-2008, the Private Wealth Advisor and his business partner traded the ETFs that form the basis of AlphaSector only infrequently, and they did not trade some of the ETFs at all. To the extent that the Private Wealth Advisor ever attempted to use moving average data to make trades, the trades were not consistent with the trend data F-Squared and Present used to create AlphaSector's performance.

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[1] In this instance, the simple moving average is the sum of the weekly closing prices of an ETF for either 41 or 61 weeks divided by either 41 or 61. The trends the intern sent Present showed each ETF's simple moving average at the end of each week for the period 2001-2008. A positive ETF trend, for example, meant that week's simple moving average for the particular ETF was higher than the prior week's simple moving average.

The Track Record Contained a Substantial Performance Calculation Error

12. F-Squared created the pre-October 2008 "historical track record" incorrectly by implementing all the purchases and sales dictated by the ETF trend signals one week before they should have been implemented. Because the signals were detecting price momentum, F-Squared's incorrectly implementing the signals one week early meant that AlphaSector's "historical track record" was based on its selling before price drops that had already occurred and buying before price increases that had already occurred. As described below, virtually all of AlphaSector's claimed outperformance relative to the S&P 500 Index for the pre-October 2008 period is attributable to this erroneous calculation.

13. The inaccurate compilation of historical data substantially improved the AlphaSector's strategy's advertised back-tested and hypothetical historical performance for the pre-October 2008 period. If an investor made a hypothetical investment of $100,000 on April 1, 2001 (assuming a reinvestment of dividends and no further contributions or withdrawals), the investment would have been worth approximately $128,000 on August 24, 2008 if invested in the S&P 500 Index. With accurately timed (but still hypothetical and back-tested) signal implementation, the same investment in F-Squared's hypothetical ETF sector rotation strategy would have been worth $138,000. However, by implementing the hypothetical and back-tested signals one week early, F-Squared advertised the investment as worth $235,000.

After 2008, Present and F-Squared Continued to Advertise AlphaSector's Hypothetical and Back-Tested and Substantially Improved Track Record

14. On multiple occasions after September 2008, Present requested back-up documentation from the Private Wealth Advisor to support AlphaSector's track record. Present never received back-up from the Private Wealth Advisor. Despite the lack of documentation of live assets supporting AlphaSector's performance for the period prior to September 2008, F-Squared and Present continued to advertise the false track record until September 2013.

15. In January 2009, Present contacted the Private Wealth Advisor and his business partner to obtain an audited track record for the Private Wealth Advisor's accounts that had supposedly tracked the AlphaSector methodology. Present did not receive one. During these discussions, the Private Wealth Advisor told Present that the Private Wealth Advisor did not have a specific track record because he considered the sector rotation strategy to be a client-by-client trading strategy and not a specific product.

16. In October 2009, F-Squared began sub-advising mutual funds using the AlphaSector strategies. In connection with that effort, Present assured the mutual fund adviser that AlphaSector's performance was constructed based on "actual investment philosophy, trading patterns and portfolio strategy that was employed for the client assets." Present stated that the portfolio construction rules used to create AlphaSector were all "consistent elements of the AlphaSector Strategy during its entire existence, and critical to its performance returns." Present also stated that the AlphaSector Index was

"based on investment decisions that were generated on a live basis since 2001" and "the Index therefore explicitly does not reflect backtested data, but instead represents live, historical data." The mutual fund adviser, working with Present, amended the funds' prospectus to include the inflated historical performance of the AlphaSector indexes from April 2001 to September 2008.

17. In June 2012, F-Squared retained an outside attorney to perform a mock audit. One of the recommendations from the mock audit was that F-Squared "should ensure that it has books and records to support its performance disclosed for years prior to the year 2006." Present sent several communications in June and July 2012 to the Private Wealth Advisor and officers of the Data Provider co-founded by the Private Wealth Advisor in 2008, seeking the required records. F-Squared's then-CCO also prepared a document by which the Data Provider and/or the Private Wealth Advisor would certify that they had records to support the advertised historical performance. These efforts proved unsuccessful. Present's effort to elicit information from the Data Provider also prompted the Data Provider's CEO and COO to tell Present that: (i) the Private Wealth Advisor's former intern (now the Chief Technology Officer (CTO) of the Data Provider) was only 14 years old in 2001; and (ii) the data the former intern sent Present would have been back-tested for the period before either 2007 or 2008, when the former intern started working on the algorithm.

18. In October 2012, Present received a copy of a September 2008 email from a then F-Squared employee to a then employee of the Private Wealth Advisor concerning the implementation of historical signals. That email concerned the dating convention associated with the Data Provider's signals and should have called into question whether F-Squared implemented the signals one week early in creating AlphaSector's pre-October 2008 track record. Nonetheless, Present and F-Squared continued to advertise that inflated track record.

19. By May 2013, F-Squared had decided to replace the signal provider company's ETF signals with signals generated by its own proprietary model. On July 1, 2013, Data Provider's CEO and CTO told Present that they could not replicate AlphaSector's pre-October 2008 advertised performance when they used the signals they understood were the basis of the AlphaSector track record. In September 2013, F-Squared removed all performance track records and advertising materials for the time period April 2001 to September 2008 from its website.

<u>F-Squared's Inaccurate Advertisements</u>

20. F-Squared's advertisements stated that the inception date of the AlphaSector indices "is based on an active strategy with an inception date of April 2001. Inception date is defined as the date as of which investor assets began tracking the strategy." This disclosure is located in Exhibit 1 at page 18.

21. Starting in late 2009, F-Squared's AlphaSector advertisements also explicitly claimed that the track record for the period April 2001 to September 2008 was not back-tested. For example, even as of September 2013, F-Squared's advertisements stated: "The process of converting the active strategy to an index implies that the returns presented, while not backtested, reflect theoretical performance an investor would have obtained had it invested in the manner shown and does not

represent returns that an investor actually attained, as investors cannot invest directly in an index." This disclosure is located in Exhibit 1 at page 18.

22. From September 2008 to September 2013, F-Squared advertised that AlphaSector indices had outperformed the S&P 500 Index, particularly for the period from April 2001 to September 2008. Attached at pages 10 and 11 of Exhibit 1 are examples of AlphaSector performance advertisements.

23. F-Squared also claimed that it was responsible for AlphaSector's buy and sell decisions for the pre-October 2008 period. For example, in September 2013, F-Squared's public website featured news articles with statements such as:

- "Back in mid-2007, well before the financial debacle that began with the collapse of the investment bank Bear Stearns, Howard Present, co-founder, president and CEO of F-Squared Investments in Boston, had a strategy that determined that financial stocks were becoming too risky. But they didn't just sell down the financial holdings, which at the time represented one-ninth of his strategy's investments. He sold *all* his financial holdings."

- "We eventually dropped the tech sector in 2001," says Present.

- "Financials in 2006, [Present] notes, had moved from a historic average of about 15% of the S&P to 28%, or nearly double, which was another sign of a bubble that F-Squared was able to avoid. . . And when [Financials] started to show signs of decline, F-Squared dropped its entire financials allocation like a hot potato."

<u>F-Squared's Inaccurate Forms ADV</u>

24. F-Squared's various Forms ADV filed during the period October 2008 to September 2013 inaccurately claimed that the investment models underlying the index had been used to manage actual client assets between April 2001 and September 2008.

<u>F-Squared's Policies and Procedures Were Inadequately Designed and Implemented</u>

25. During the October 2008 to October 2013 time period, F-Squared failed to adopt and implement policies reasonably designed to prevent violations of the Advisers Act and its rules. For example, F-Squared did not have policies reasonably designed to prevent the use of performance advertising materials were false or misleading. Furthermore, F-Squared published performance advertisements without back-up for the performance, even after the issue was identified in a mock audit in 2012.

Conclusion

26. In connection with the violations described in the foregoing Admissions, F-Squared Investment, Inc.'s actions were, at a minimum, reckless.

EXHIBIT 1

Strategies Tracking the AlphaSector® Series of Indices:

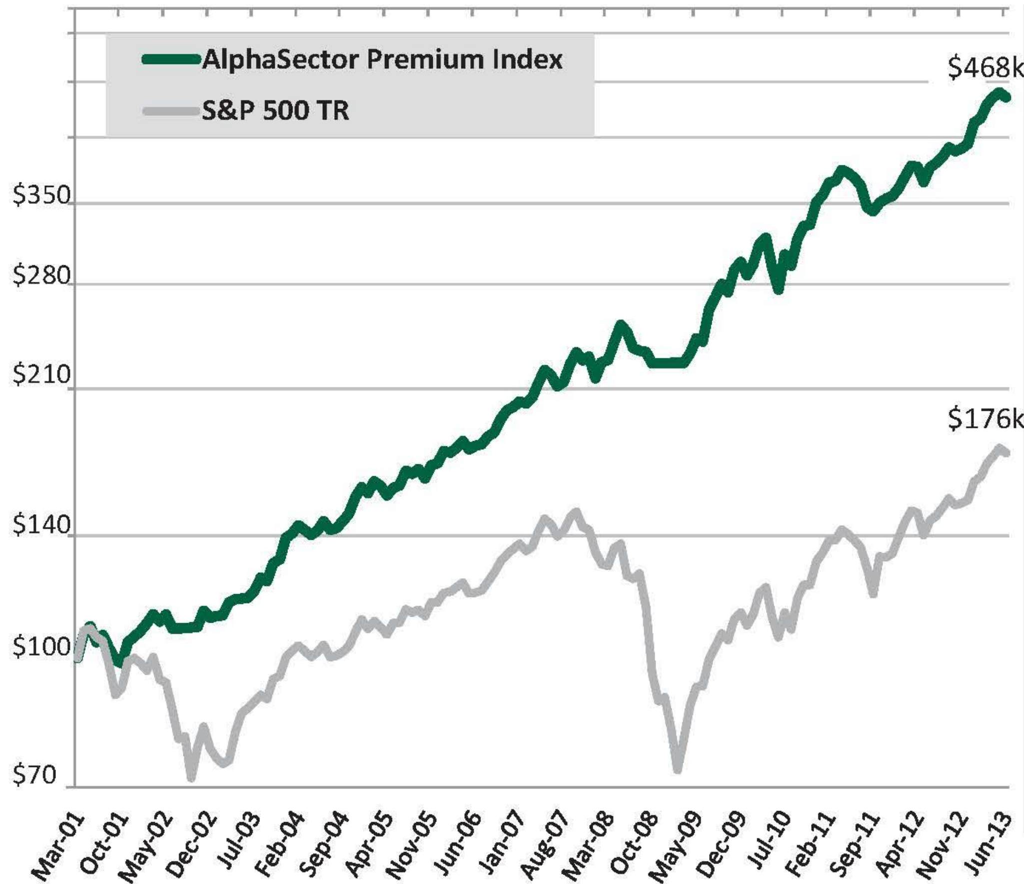
AlphaSector Premium Index

AUGUST 2013

AlphaSector was designed to meet the real needs of investors: risk controls for down markets, participation in up markets[1]

- **Powerful but simple story, and uses NO derivatives, leverage, or shorting**

Growth of $100k: Comparison vs. S&P 500 TR



Source: Morningstar, F-Squared Investments. [1]April 2001– June 2013

Data as of June 30, 2013

	AlphaSector Premium Index	S&P 500
Cumulative Return	368.2%	76.0%
1 Year Return	21.3%	20.6%
3 Yr Return (Annualized)	19.3%	18.5%
5 Yr Return (Annualized)	13.8%	7.0%
10 Yr Return (Annualized)	14.8%	7.3%
Standard Deviation	10.4%	15.5%
Annual Excess Return	8.7%	N/A
R-Squared	53.0%	N/A
Maximum Drawdown	-13.4%	-51.0%
*Asymmetry Ratio**	**70%**	**0%**
Up Capture Ratio(Bull)	85%	0%
Down Capture Ratio (Bear)	15%	0%

** See final pages for definition of Asymmetry Ratio*

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AlphaSector™
An F-Squared Solution

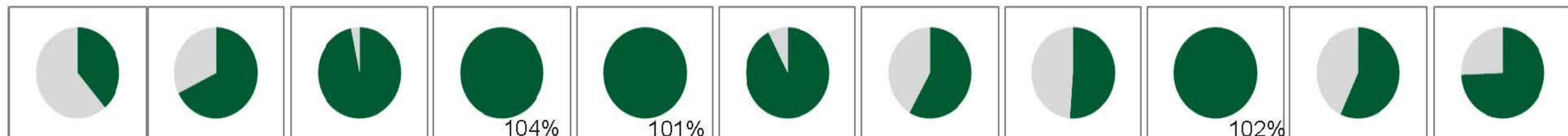
AlphaSector Premium Index has historically delivered consistent returns across multiple market cycles[1]

Annual Returns by Calendar Year

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
S&P 500 TR	-22.1%	28.7%	10.9%	4.9%	15.8%	5.5%	-37.0%	26.5%	15.1%	2.1%	16.0%
AlphaSector Premium Index	5.3%	24.8%	14.9%	6.9%	16.7%	15.0%	-1.9%	32.3%	17.7%	1.7%	15.5%

Y-axis: 40%, 30%, 20%, 10%, 0%, -10%, -20%, -30%, -40%

Relative Volatility (Green = API Standard Deviation versus S&P 500 Standard Deviation)



Source: Morningstar, F-Squared Investments. [1]*April 2001– December 2012*

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AlphaSector™
An F-Squared Solution

AlphaSector Premium: Construction methodology

- **Investments include:**
  - Nine exchange traded funds (ETFs) reflecting the primary sectors of the U.S. economy
  - Short-term Treasuries ETF, used for downside protection

- **Index is re-evaluated weekly**
- **Sector ETFs are traded using a binary model – either IN or OUT of the portfolio**
  - Sectors forecasted for positive return are left in; sectors forecasted to lose money are removed entirely
  - Decisions are based on a proprietary quantitative model in operation and development since 2001
- **All sectors remaining IN the index are <u>equal weighted</u> at the time of rebalancing**
  - There is a maximum cap of 25% for any sector ETF at time of rebalance
- **When 6 or more sectors are OUT, the model reduces exposure to equities**
  - Begin to build "cash" position using Short-term Treasury ETF:
    3 sectors IN = 25% cash; 2 sectors IN = 50% cash; 1 sector IN = 75% cash
  - Can go to 100% in S-T Treasuries if all 9 sectors are eliminated

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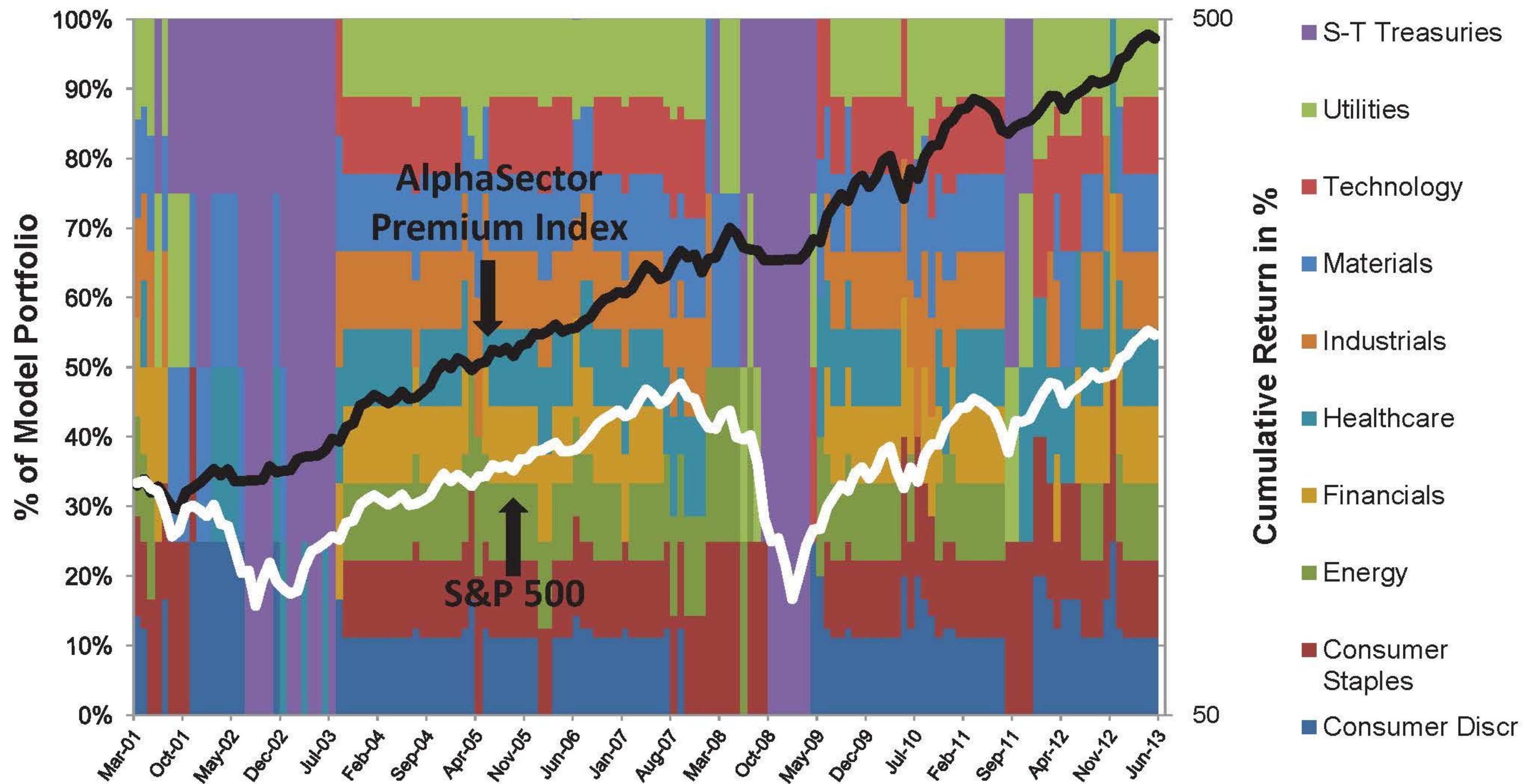
AlphaSector™
An F-Squared® Solution

AlphaSector Indices periodically decide to either eliminate or include a sector from the Index (binary option)[1]



Source: Morningstar, F-Squared Investments. [1]*April 2001– June 2013*

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AlphaSector
An F-Squared Solution

AlphaSector Premium: Model description

- **Model objective**
  - Makes a probabilistic determination of the risk of loss for each component ETF
- **Primary factors**
  - Volatility
    - Volatility trends
    - Rate of change
  - Price momentum
- **Key aspects**
  - Price momentum modified by volatility through use of a "Dynamic Volatility Window"
  - Utilizes intra-day volatility
  - Proprietary volatility measure featuring "True Volatility"
    - Volatility transformed into step function versus traditional rolling measure

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AlphaSector™
An F-Squared® Solution

Important Information

Past performance is no guarantee of future results.

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Investment products that may be based on AlphaSector Indexes may not be sponsored by F-Squared, and F-Squared does not make any representation regarding the advisability of investing in them. F-Squared serves as the model provider to various investment advisers. There is no guarantee that an investor's account will achieve its objectives or avoid losses. Inclusion of a mutual fund or an exchange traded fund in an index does not in any way reflect an opinion of F-Squared regarding the investment merits of such a fund, nor should it be interpreted as an offer of such a fund's securities. None of the mutual funds or exchange traded funds included in an index has given any real or implied endorsement or support to F-Squared or to this index. One cannot invest directly in an index.

All AlphaSector Indexes represented in this material do not reflect the actual trading of any client account. No representation is being made that any client will or is likely to achieve results similar to those presented herein.

Most AlphaSector Indexes are evaluated for rebalancing on both a monthly basis ("Rotation") or evaluated for rebalancing on a weekly basis ("Premium"). The following is a summary of the core AlphaSector strategies:

The *AlphaSector U.S. Equity Index* is based on an active strategy with an inception date of April 2001. Inception date is defined as the date as of which investor assets began tracking the strategy. Returns provided prior to 2008 were generated from data received under a third party licensing agreement and are provided on an as is basis. The process of converting the active strategy to an index implies that the returns presented, while not backtested, reflect theoretical performance an investor would have obtained had it invested in the manner shown and does not represent returns that an investor actually attained, as investors cannot invest directly in an index.

The *AlphaSector International Index* returns provided herein were restated in August 2013 and therefore returns presented may differ from previously published returns.

The *AlphaSector Global Index* is a blend of two Indexes, AlphaSector U.S. Equity Index and AlphaSector International Index. Both are based on active strategies, with the AlphaSector U.S. Equity Index having an inception date of April 2001 and the AlphaSector International Index having an inception date of May 2009. Any returns shown in the AlphaSector Global Index prior to May 2009 reflect partially backtested, simulated data.

The *AlphaSector Allocator Index* is a blend of four Indexes: AlphaSector U.S. Equity Index ("U.S. Equity"), AlphaSector International Index ("International"), AlphaSector INFInity Index ("Fixed Income"), and AlphaSector Alternatives Index ("Alternatives"). All are based on active strategies, with the U.S. Equity Index having an inception date of April 2001, the International Index having an inception date of May 2009, and the Fixed Income and Alternative Indexes having an inception date of December 2009. Any returns in the AlphaSector Allocator Index shown prior to December 2009 reflect partially backtested, simulated data.

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Jalbert, Craig R. in his Capacity as Trustee for F2 Liquidating Trust, on behalf of himself and all others similarly situated

(b) County of Residence of First Listed Plaintiff: Norfolk County

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

(see attached)

DEFENDANTS

Securities and Exchange Commission

County of Residence of First Listed Defendant: ______

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

Unknown.

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District *(specify)*
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing **(Do not cite jurisdictional statutes unless diversity)**:

5 U.S.C. §§ 701 et seq.

Brief description of cause:

Agency action in excess of statutory authority

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $ Equitable relief

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE N/A DOCKET NUMBER N/A

DATE: 10/26/2017

SIGNATURE OF ATTORNEY OF RECORD: /s/ William R. Baldiga

FOR OFFICE USE ONLY

RECEIPT # ______ AMOUNT ______ APPLYING IFP ______ JUDGE ______ MAG. JUDGE ______

Attachment to Civil Cover Sheet

I. (c) Plaintiff's Attorneys:

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Counsel for the Trust

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. **Title of case (name of first party on each side only)** Craig R. Jalbert, in his Capacity as Trustee for F2 Liquidating Trust v. Securities and Exchange Commission

2. **Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).**

   ☐ **I.** **410, 441, 470, 535, 830*, 835*, 891, 893, 895, R.23, REGARDLESS OF NATURE OF SUIT.**

   ☐ **II.** **110, 130, 140, 160, 190, 196, 230, 240, 290,320,362, 370, 371, 380, 430, 440, 442, 443, 445, 446, 448, 710, 720, 740, 790, 820*, 840*, 850, 870, 871.**

   ☑ **III.** **120, 150, 151, 152, 153, 195, 210, 220, 245, 310, 315, 330, 340, 345, 350, 355, 360, 365, 367, 368, 375, 376, 385, 400, 422, 423, 450, 460, 462, 463, 465, 480, 490, 510, 530, 540, 550, 555, 625, 690, 751, 791, 861-865, 890, 896, 899, 950.**

   ***Also complete AO 120 or AO 121. for patent, trademark or copyright cases.**

3. **Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.**

   N/A

4. **Has a prior action between the same parties and based on the same claim ever been filed in this court?**

   YES ☐ **NO** ☑

5. **Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)**

   YES ☐ **NO** ☑

   If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?

   YES ☐ **NO** ☐

6. **Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?**

   YES ☐ **NO** ☑

7. **Do all of the parties in this action, excluding governmental agencies of the United States and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).**

   YES ☑ **NO** ☐

   A. **If yes, in which division do all of the non-governmental parties reside?**

   Eastern Division ☑ **Central Division** ☐ **Western Division** ☐

   B. **If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?**

   Eastern Division ☐ **Central Division** ☐ **Western Division** ☐

8. **If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)**

   YES ☐ **NO** ☐

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME William R. Baldiga; Alex Lipman

ADDRESS Brown Rudnick LLP, One Financial Center, Boston, MA 02111; Brown Rudnick LLP, Seven Times Square, NY, NY 10036

TELEPHONE NO. (617) 856-8200; (212) 209-4800

(CategoryForm6-2017.wpd)

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: Class Action Lawsuit Claims SEC ‘Disgorgement’ Falls Outside Agency’s Authority