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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: _____
DEPUTY

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'08 CV 0621 DMS LSP

12
13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**

15
16 **SECURITIES AND EXCHANGE**
COMMISSION,
17 **Plaintiff,**
18 **vs.**
19 **MICHAEL T. UBERUAGA, EDWARD P.**
RYAN, PATRICIA FRAZIER, TERESA A.
20 **WEBSTER, and MARY E. VATTIMO,**
21 **Defendants.**

Case No.
COMPLAINT FOR
VIOLATIONS OF THE
FEDERAL SECURITIES
LAWS

22
23 Plaintiff Securities and Exchange Commission ("Commission") alleges as
24 follows:

25 **JURISDICTION AND VENUE**

26 1. This Court has jurisdiction over this action pursuant to Sections 20(b),
27 20(d)(1) and 22(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C.
28 §§ 77t(b), 77t(d)(1) & 77v(a), and Sections 21(d)(1), 21(d)(3)(A), 21(e) and 27 of

1 the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. §§ 78(u)(d)(1),
2 78u(d)(3)(A), 78u(e) & 78aa. Defendants have, directly or indirectly, made use of
3 the means or instrumentalities of interstate commerce, of the mails, or of the
4 facilities of a national securities exchange in connection with the transactions, acts,
5 practices and courses of business alleged in this Complaint.

6 2. Venue is proper in this district pursuant to Section 22(a) of the
7 Securities Act, 15 U.S.C. § 77v(a), and Section 27 of the Exchange Act, 15 U.S.C.
8 § 78aa, because certain of the transactions, acts, practices and courses of conduct
9 constituting violations of the federal securities laws occurred within this district,
10 and four of the Defendants reside and/or are located in this district.

11 SUMMARY

12 3. This case involves false and misleading statements by five former
13 officials of the City of San Diego (the “City”) during 2002 and 2003 in connection
14 with the City’s municipal securities offerings that raised over \$260 million,
15 continuing bond disclosures, and 2003 rating agency presentations. These officials
16 were: Defendants Michael T. Uberuaga (“Uberuaga”), the former City Manager;
17 Edward P. Ryan (“Ryan”), the former City Auditor and Comptroller; Patricia
18 Frazier (“Frazier”), the former Deputy City Manager for Finance; Teresa A.
19 Webster (“Webster”), the former Assistant City Auditor and Comptroller; and
20 Mary E. Vattimo (“Vattimo”), the former City Treasurer.

21 4. During 2002 and 2003, the five Defendants knew, among other things,
22 that the City faced severe difficulty funding its future pension and retiree health
23 care obligations unless new revenues were obtained, pension and health care
24 benefits were reduced, or City services were cut. They also knew that the City’s
25 looming financial crisis resulted from (1) the City’s intentional under-funding of its
26 pension plan since fiscal year 1997; (2) the City’s granting of additional retroactive
27 pension benefits since fiscal year 1980; and (3) the City’s use of the pension fund’s
28 assets to pay for the additional pension and retiree health care benefits since fiscal

1 year 1980.

2 5. Nevertheless, Uberuaga, Ryan, Frazier, Webster, and Vattimo acted
3 recklessly in failing to disclose these and other material facts to investors and to
4 rating agencies.

5 **DEFENDANTS**

6 6. Michael T. Uberuaga is a resident of Meridian, Idaho. Uberuaga was
7 the City's Manager from November 1997 until April 2004.

8 7. Edward P. Ryan is a resident of El Cajon, California. Ryan was the
9 City's Auditor and Comptroller from 1982 until February 2004. He is a licensed
10 Certified Public Accountant in California.

11 8. Patricia Frazier is a resident of San Diego, California. Frazier was the
12 City's Deputy City Manager for Finance from 1997 until 2005.

13 9. Teresa A. Webster is a resident of San Diego, California. Webster
14 was the City's Assistant Auditor and Comptroller from December 1994 to
15 February 2004 and the acting Auditor and Comptroller from February 2004 to
16 March 2005. Webster was also a trustee of the City's pension plan from 1995 until
17 March 2005. She is also a Certified Public Accountant in California.

18 10. Mary E. Vattimo is a resident of San Diego, California. Vattimo was
19 the City's Treasurer from June 2001 until January 2005. Vattimo was also a
20 trustee of the City's pension plan from 2001 until March 2005.

21 **RELATED PARTIES**

22 11. The City of San Diego, California, is a California municipal
23 corporation with all municipal powers authorized by the California Constitution
24 and laws, including the power to issue debt. The City is the seventh most populous
25 city in the country, with approximately 1.3 million residents.

26 12. San Diego City Employees' Retirement System ("CERS") is a
27 multiple-employer, defined benefit plan established by the City to provide
28 retirement benefits to its members, *i.e.*, City employees and their beneficiaries.

1 **THE CITY'S PENSION AND RETIREE HEALTH CARE CRISIS**

2 **A. The City's Pension Plan**

3 13. The City provides a defined benefit pension plan and retiree health
4 care benefits to its employees through CERS. The actuary retained by CERS
5 determines each year the value of the plan's assets and liabilities and the required
6 pension contributions. The City and the employees each pay a portion of the
7 required contributions.

8 14. In the disclosure to investors of the City's pension obligations and
9 funding of those obligations, at least three concepts were material:

10 (a) CERS's funded ratio, *i.e.*, the ratio of its assets to liabilities;

11 (b) The City's unfunded liability to CERS, *i.e.*, the dollar shortfall
12 between CERS's assets and liabilities; and

13 (c) The City's net pension obligation, also called the NPO, *i.e.*, the
14 cumulative difference between what the City actually contributed to CERS and the
15 amount that the City would have contributed had it conformed to a funding method
16 recognized by the Government Accounting Standards Board ("GASB"). GASB is
17 the organization that establishes standards of state and local governmental
18 accounting and financial reporting.

19 15. In 2001 and 2002, as shown on the chart below, as calculated by the
20 CERS actuary, CERS's funded ratio fell substantially, and the City's unfunded
21 liability and net pension obligation increased dramatically. In addition, in
22 February 2003, as also shown on the chart below, the actuary projected that
23 CERS's funded ratio would continue to fall and the City's unfunded liability and
24 net pension obligation would continue to increase substantially:

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Fiscal Year ending	Funded Ratio	Unfunded Liability	Net Pension Obligation
6/30/00	97.3%	\$69 million	\$23.05 million
6/30/01	89.9%	\$284 million	\$30.98 million
6/30/02	77.3%	\$720 million	\$39.23 million
6/30/09 projected	65.6%	\$2 billion	\$446 million

16. The City conducted its own analysis in mid-2003, which yielded similar projections.

17. This fall in CERS's funded ratio and the increase in the City's unfunded liability and net pension obligation was the result of many factors, including:

(a) CERS twice agreed to permit the city to underfund its annual contributions to CERS, as further alleged below;

(b) The City used so-called surplus earnings to pay additional pension and other non-pension benefits on behalf of CERS's members, as further alleged below (surplus earnings are earnings above CERS's actuarially projected 8% return rate, which pension plans typically retain to support the plan's financial soundness and to make up for years in which earnings fall short of the assumed return rate); and

(c) CERS suffered substantial investment losses in fiscal years 2001 and 2002 - \$193.2 million in fiscal year 2001 and \$364.8 million in fiscal year 2002.

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2 **1. CERS Agrees To Two Proposals By The City Permitting The**
3 **City To Underfund Its Annual CERS Contributions**

4 a. **CERS Agrees To The City's Proposal In 1997 To**
5 **Underfund Its Pension Obligations - "Manager's**
6 **Proposal 1"**

7 18. In fiscal year 1996, the City agreed to increase significantly and
8 retroactively all employees' pension benefits. Because the City could not afford to
9 fund the cost of the benefit increases, it made them contingent on CERS's
10 agreement to the City's underfunding of its annual contribution to CERS.

11 19. In fiscal year 1997, the City and CERS entered into an agreement,
12 referred to as Manager's Proposal 1, that allowed the City to intentionally
13 underfund its annual liability to CERS in fiscal years 1997 through 2006. This
14 funding method was not approved by GASB. Manager's Proposal 1 also required
15 that if CERS's funded ratio fell below 82.3%, the City would have to increase its
16 CERS contribution.

17 20. As part of Manager's Proposal 1, CERS, at the City's request,
18 recorded \$39.2 million from the surplus earnings as a net pension obligation
19 "reserve" or "NPO Reserve." The amount represented the difference between what
20 the City would have contributed under a GASB-accepted funding rate and what the
21 City actually contributed under Managers Proposal 1. The NPO Reserve, despite
22 its name, was not a true reserve because its creation and funding had no effect on
23 CERS's funded ratio or the City's unfunded liability to CERS.

24 b. **CERS Agrees To The City's Proposal In 2002 To Extend**
25 **The Time It Would Underfund Its Pension Obligations -**
26 **"Manager's Proposal 2"**

27 21. In the second half of fiscal year 2002, the City agreed again to
28 increase pension benefits for fiscal year 2003. From as early as October 2001,

1 however, the City was aware that CERS's funded ratio would likely fall below the
2 82.3% floor established by Manager's Proposal 1, which would require the City to
3 increase its annual fiscal year 2004 contribution to CERS by at least \$25 million.
4 CERS's annual actuarial report as of June 30, 2001, which was issued on February
5 12, 2002, also confirmed this downward trend in the funded ratio.

6 22. Concerned about likely having to pay the additional amount, the City
7 conditioned the pension benefit increases on the City's obtaining from CERS relief
8 from the floor of Manager's Proposal 1. Those additional pension benefits
9 included increasing the general members' retirement multiplier from 2.25% to
10 2.5%. Significantly, this increase raised the Defendants' pensions by thousands of
11 dollars each year. In November 2002, the City and CERS (including Webster in
12 her role as a CERS Board member) agreed to Manager's Proposal 2, which
13 provided that once CERS's funded ratio fell below the 82.3% required by
14 Manager's Proposal 1, the City would have five years to increase its CERS
15 contributions to reach a GASB-accepted funding rate. Manager's Proposal 2 thus
16 effectively allowed the City an additional five years to underfund its annual CERS
17 contribution.

18 **2. The City Uses Surplus Earnings For Non-Pension Purposes**

19 23. For the purpose of the annual actuarial calculations, the CERS actuary
20 assumed a projected 8% rate of return. Any actual earnings above 8% were
21 considered to be surplus earnings to offset years in which the earnings fell below
22 the assumed return rate.

23 24. Since the early 1980s, the City used CERS's surplus earnings to fund
24 an ever-increasing amount of additional pension and non-pension benefits for
25 CERS members including, but not limited to, making an extra monthly pension
26 payment each year known as the "thirteenth check," paying retiree health care
27 benefits, and funding certain portions of the employee pension contributions.
28 In total, the City used surplus earnings of \$150 million as of the end of fiscal year

1 2001 and an additional \$25 million as of the end of fiscal year 2002 primarily to
2 fund non-pension benefits for CERS members. From fiscal years 1997 through
3 2003, this use by the City of surplus earnings accounted for 17% of the increase in
4 the City's unfunded liability to CERS.

5 **B. Retiree Health Care Benefits**

6 25. As of February 2003, the present value of the City's liability for future
7 health care was in excess of \$1.1 billion. The City was paying retiree health care
8 benefits out of CERS's surplus earnings.

9
10 **THE DEFENDANTS' INVOLVEMENT IN THE FALSE AND**
11 **MISLEADING DISCLOSURES**

12 **A. The City's 2002 and 2003 Municipal Securities Offerings and**
13 **Continuing Disclosures**

14 26. In 2002 and 2003, the City conducted five municipal securities
15 offerings totaling \$261,850,000. These offerings were entitled:

- 16 • \$25,070,000 Public Facilities Financing Authority of the City of San
17 Diego Lease Revenue Bonds, Series 2002B (Fire and Safety Project)
(June 2002);
- 18 • \$93,200,000 City of San Diego, 2002-03 Tax Anticipation Notes
19 Series A (July 2002);
- 20 • \$15,255,000 City of San Diego/Metropolitan Transit Development
21 Board Authority 2003 Lease Revenue Refunding Bonds (San Diego
22 Old Town Light Rail Transit Extension Refunding (April 2003);
- 23 • \$17,425,000 City of San Diego 2003 Certificates of Participation
24 (1993 Balboa Park/Mission Bay Park Refunding) (May 2003); and
- 25 • \$110,900,000 City of San Diego 2003-04 Tax Anticipation Notes
26 Series A (July 2003).

27 27. For each of the offerings, the City issued offering documents that
28 purported to disclose the material information regarding the offering and the City

1 in appendix A, prepared and updated by City officials in the Financing Services
2 Department. The 2002 offering documents included the City's fiscal year 2001
3 audited financial statements as appendix B, prepared by the Auditor's office and
4 the City's outside auditor. The 2003 offering documents included the City's fiscal
5 year 2002 audited financial statements as appendix B, prepared by the Auditor's
6 office and the City's outside auditor. Information regarding the City's pension and
7 retiree health care obligations was provided in both appendices A and B in each of
8 the offerings.

9 28. During 2002 to 2003, pursuant to its contractual obligation, the City
10 also filed annual disclosures (otherwise called continuing disclosures) relating to
11 its \$2.29 billion in outstanding bonds for the purpose of updating investors on the
12 state of the City's finances. City officials in the Financing Services Department
13 coordinated, reviewed, and filed the 2003 continuing disclosures. Most of these
14 continuing disclosures included the same appendices A and B that were contained
15 in the City's bond offering documents.

16 **B. Rating Agency Presentations**

17 29. The City made presentations to the rating agencies on a yearly basis,
18 both in connection with specific bond offerings and to update the rating agencies
19 on the City's general credit. In 2003, upon the rating agencies' request, the City
20 included information about its pension liabilities in these presentations.

21 **C. The City's False And Misleading Disclosures**

22 30. The City's bond offering documents, continuing disclosures and
23 rating agency presentations included certain information about the City's then
24 current unfunded liability and funded ratio. However, these disclosures omitted
25 other material information.

26 31. Specifically, the disclosures in appendix A of the City's bond offering
27 documents and continuing disclosures were false and misleading because:
28

1 (a) There was no disclosure of the City's looming financial crisis
2 or that it resulted from (i) the City's intentional under-funding of its pension plan
3 since fiscal year 1997; (ii) the City's granting of additional retroactive pension
4 benefits since fiscal year 1980; and (iii) the City's use of the pension fund's assets
5 to pay for the additional pension, non-pension, and retiree health care benefits
6 since fiscal year 1980;

7 (b) There was no disclosure that certain sums relating to a lawsuit
8 settlement were excluded from the calculation of the unfunded liability, which, if
9 included, would have substantially increased such unfunded liability;

10 (c) There was no disclosure in 2003 that the City's unfunded
11 liability to CERS was expected to dramatically increase, from \$720 million at the
12 beginning of fiscal year 2003 to an estimated \$2 billion at the beginning of fiscal
13 year 2009 and its estimated annual pension contribution would grow from \$51
14 million in 2002 to \$248 million in 2009;

15 (d) There was no disclosure that Manager's Proposal 1 and
16 Manager's Proposal 2 were significant contributors to the projected increases in the
17 City's unfunded liability and annual pension contribution to CERS, nor was there
18 any disclosure that Webster voted to approve Manager's Proposal 2 in her capacity
19 as a CERS Board member knowing that its enactment would continue the City's
20 underfunding of CERS while increasing her pension; and

21 (e) There was no disclosure that (i) the estimated present value of
22 the City's liability for retiree health care was \$1.1 billion; (ii) the retiree health care
23 expense was being paid with surplus earnings from CERS; (iii) this surplus
24 earnings reserve was running out of money; and (iv) the City would have to begin
25 paying this substantial expense out of its own budget.

26 32. Disclosures in appendix B of the City's bond offering documents and
27 continuing disclosures were false and misleading because:
28

1 (a) It stated that the City's NPO was funded in a reserve, when, in
2 fact, it was not;

3 (b) The City's 2002 financial statements reported that the City's
4 NPO was \$39.2 million as of the end of fiscal year 2001, but failed to disclose that
5 at the time of the 2003 offerings, the City had already calculated that its NPO for
6 fiscal year 2003 would be \$51.9 million;

7 (c) The 2002 financial statement footnotes falsely stated that the
8 City's method for funding CERS included "a provision to assure the funding level
9 of [CERS] would not drop below a level [CERS's actuary] deem[ed] reasonable to
10 protect the financial integrity of [CERS]." In fact, this statement was false and
11 misleading in that CERS's funded ratio at the end of fiscal year 2002 was 77.3%,
12 which was less than the 82.3% that the CERS actuary deemed reasonable. Further,
13 the footnote failed to disclose that (i) Manager's Proposal 1 had established a
14 trigger level of 82.3% for the funded ratio; (ii) by the latter half of fiscal year 2002,
15 the City was aware that CERS funded ratio would likely fall below this trigger
16 level; and (iii) if Manager's Proposal 2 were not approved, the City would have
17 had to make a large additional payment to CERS;

18 (d) The 2002 financial statement footnotes also falsely stated that
19 CERS's actuary believed that the City's funding method was an excellent method
20 for the City and was superior to certain GASB-accepted funding methods. In fact,
21 this statement was false and misleading in that the actuary ceased to have this view
22 once CERS's funded ratio fell below 82.3%;

23 (e) There was no disclosure in the 2002 financial statement
24 footnotes that Manager's Proposal 2 was a significant contributor to the projected
25 increases in the City's unfunded liability and annual pension contribution to CERS,
26 nor was there any disclosure that Webster voted to approve Manager's Proposal 2
27 in her capacity as a CERS Board member knowing that its enactment would
28 continue the City's underfunding of CERS while increasing her pension;

1 (f) The 2001 financial statement footnotes also falsely stated that
2 the CERS's actuary "is in the process of requesting the GASB to adopt the [City's]
3 funding method as an approved expending method which would eliminate any
4 reported NPO." In fact, although the CERS actuary had initiated communication
5 with GASB, GASB had never responded; and

6 (g) The footnote disclosures for the City's financial statements
7 regarding the City's retiree health care obligations, which stated that the City
8 provided such benefits to certain retirees at a cost of \$7.2 million in fiscal year
9 2001 and \$8.9 million in fiscal year 2002 and that "expenses for [such retiree
10 health care benefits] are recognized as they are paid." This statement was
11 misleading because there was no disclosure that the retiree health care expense was
12 being paid with surplus earnings from CERS; that this surplus earnings reserve was
13 running out of money; and that the City would have to begin paying this
14 substantial expense out of its own budget.

15 33. In the 2003 rating agency presentations, the City failed to disclose,
16 among other things, the material facts identified in paragraph 31.

17 **D. Uberuaga, Ryan, Frazier, Webster, and Vattimo Were Reckless In**
18 **Making the False and Misleading Disclosures**

19 34. Uberuaga, Ryan, Frazier, Webster, and Vattimo had substantial
20 knowledge of the City's pension and retiree health care obligations. Uberuaga,
21 Ryan, Frazier, Webster, and Vattimo were all aware that Manager's Proposal 2
22 would allow the City to continue to underfund CERS while at the same time
23 increase their pensions. Additionally, they were all aware of (a) the findings of a
24 blue ribbon committee in April 2002 that raised concerns about the City's pension
25 and retiree health care liabilities; and (b) CERS's response to the blue ribbon
26 committee report in February 2003, which highlighted the true reasons for the
27 pension underfunding and further included other relevant information pertaining to
28 the projected NPO. The CERS response also stated that the City was not making

1 any contributions to CERS to pay for its retiree health care liability, that CERS had
2 been paying for this liability with money in a reserve funded with CERS's surplus
3 earnings from prior years, that the reserve would be depleted by FY 2006, and that
4 in FY 2006, the City would have to pay an estimated \$15 million for retiree health
5 care.

6 35. Additionally, Vattimo and Webster were CERS trustees from 2001 to
7 2005 and 1995 to 2005, respectively. In that role, both Vattimo and Webster
8 received CERS's actuarial reports and hence were very familiar with the pension
9 underfunding issue, reasons for approving Managers Proposals 1 and 2, and the
10 reasons for the underfunding. Vattimo and Webster were advised in March 2003
11 by CERS's counsel to nullify Managers Proposal 2 due to its questionable legality.

12 36. Despite this knowledge, Uberuaga advised the City Council on the
13 issuance of the municipal securities. The City Council delegated the preparation of
14 the final official statement to Uberuaga as the City Manager. Uberuaga recklessly
15 certified in writing that appendix A in the May 2003 Balboa Park/Mission Bay
16 Park Refunding bond offering documents did not contain any false or misleading
17 statements. Uberuaga knew or was reckless in not knowing that this certification
18 was false.

19 37. Ryan signed the City's FY 2001 and FY 2002 Comprehensive Annual
20 Financial Reports, representing that "[a]ll disclosures necessary to enable the
21 reader to gain an understanding of the City's, and its related agencies', financial
22 activities have been included." Ryan was also one of the signatories to the
23 management representation letters to the outside auditor in FYs 2001 and 2002, in
24 which he confirmed that he was responsible for the City's financial statements and
25 that the financial statements fairly presented the City's financial position. Ryan
26 was reckless in failing to ensure that these representations were true.

27 38. Frazier oversaw the preparation of the City's appendix A, which
28 contained some of the misleading disclosures, and participated in the City's rating

1 agency presentations. Accordingly, she knew or was reckless in not knowing that
2 the disclosures in the bond offerings, continuing disclosures and rating agency
3 presentations were misleading. Nevertheless, she recklessly certified that appendix
4 A included in the 2002 Fire and Safety bond offering and the 2003 Balboa Park
5 offering did not contain any false or misleading statements. She was also reckless
6 in signing five continuing disclosures in FY 2003 in which appendix A was
7 included, and in reviewing and making presentations to the rating agencies.

8 39. Webster recklessly participated in making false and misleading
9 statements in the City's disclosures and in the rating agency presentations. Webster
10 reviewed the relevant disclosures in appendix B, including the pension footnotes in
11 the City's financial statements. She knew or was reckless in not knowing that the
12 statements contained in appendix B were false and misleading. Nevertheless, she
13 failed to correct the misstatements. Additionally, Webster made oral presentations
14 on the pension plan before the rating agencies in 2003 and fielded numerous
15 questions on that topic.

16 40. Vattimo recklessly participated in making false and misleading
17 disclosures to investors and rating agencies. Vattimo was a member of the
18 transactional financing team that prepared the City's offering documents. The
19 team, consisting of City officials and outside retained consultants, met several
20 times to review, discuss, and ultimately finalize the offering documents at "page-
21 turner meetings." Vattimo also reviewed and edited appendix A as it was updated
22 periodically within the Financing Services Department. Vattimo signed closing
23 letters for two bond offerings in FYs 2002 and 2003 (specifically, the 2002 and
24 2003 Tax Anticipation Notes) representing that appendix A did not contain any
25 false or misleading statements, when, in fact, it did. She also signed continuing
26 disclosures for six prior bond offerings in FY 2003, which contained appendices A
27 and B. Finally, Vattimo edited the 2003 presentation to the rating agencies relating
28 to the City's pension obligations and participated in other parts of the presentation.

1 **E. The City's Voluntary Disclosure Results In The Lowering Of The**
2 **Ratings On The City's Bonds**

3 41. The City eventually filed a Voluntary Report of Information on
4 January 27, 2004, which disclosed information regarding CERS's current and
5 estimated future funded status, the City's current and estimated future liabilities to
6 CERS; the reasons for the substantial decrease in CERS's funded ratio and
7 increase in the City's liability to CERS; and the City's previous use of CERS funds
8 to pay for retiree health care and the City's estimated future liabilities for retiree
9 health care.

10 42. Shortly after the disclosures in the Voluntary Report, the rating
11 agencies lowered their ratings on the City's bonds.

12
13 **FIRST CLAIM FOR RELIEF**
14 **Violations Of Section 17(a) Of The Securities Act**
15 **Against Defendants Uberuaga, Ryan, Frazier, Webster and Vattimo**

16 43. The Commission realleges and incorporates by reference paragraphs 1
17 through 42 above.

18 44. Defendants Uberuaga, Ryan, Frazier, Webster, and Vattimo, and each
19 of them, by engaging in the conduct described above, in the offer or sale of
20 securities by the use of means or instruments of transportation or communication
21 in interstate commerce or by use of the mails directly or indirectly:

- 22 a. with scienter, employed devices, schemes, or artifices to
23 defraud;
24 b. obtained money or property by means of untrue statements of a
25 material fact or by omitting to state a material fact necessary in
26 order to make the statements made, in light of the
27 circumstances under which they were made, not misleading; or
28 c. engaged in transactions, practices, or courses of business which
operated or would operate as a fraud or deceit upon the

1 purchaser.

2 45. By engaging in the conduct described above, Defendants Uberuaga,
3 Ryan, Frazier, Webster, and Vattimo violated, and unless restrained and enjoined
4 will continue to violate, Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a).

5 **SECOND CLAIM FOR RELIEF**

6 **Violations Of Section 10(b) Of The Exchange Act And Rule 10b-5 Thereunder**
7 **Against Defendants Uberuaga, Ryan, Frazier, Webster and Vattimo**

8 46. The Commission realleges and incorporates by reference paragraphs 1
9 through 42 above.

10 47. Defendants Uberuaga, Ryan, Frazier, Webster, and Vattimo, and each
11 of them, by engaging in the conduct described above, directly or indirectly, in
12 connection with the purchase or sale of a security, by the use of means or
13 instrumentalities of interstate commerce, of the mails, or of the facilities of a
14 national securities exchange, with scienter:

- 15 a. employed devices, schemes, or artifices to defraud;
- 16 b. made untrue statements of a material fact or omitted to state a
17 material fact necessary in order to make the statements made,
18 in the light of the circumstances under which they were made,
19 not misleading; or
- 20 c. engaged in acts, practices, or courses of business which
21 operated or would operate as a fraud or deceit upon other
22 persons.

23 48. By engaging in the conduct described above, Defendants Uberuaga,
24 Ryan, Frazier, Webster, and Vattimo violated, and unless restrained and enjoined
25 will continue to violate, Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b),
26 and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

27 ///

28 ///

V.

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

DATED: April 7, 2008



DAVID J. VAN HAVERMAAT
Attorney for Plaintiff
Securities and Exchange Commission

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