

Case No. 09-14890-F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant

v.

MERCHANT CAPITAL, LLC, STEVEN C. WYER and
KURT V. BEASLEY,

Defendants-Appellees.

On Appeal from the United States District Court—
Northern District of Georgia

BRIEF OF MERCHANT CAPITAL, LLC, STEVEN C. WYER
and KURT V. BEASLEY
APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-1(b), counsel for the Appellees, Merchant Capital, LLC, Steven W. Wyer and Kurt V. Beasley certify that the following persons and entities have or may have an interest in the outcome of this case:

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10. New Vision Financial, LLC
11. Alex Rue, Esq.
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15. Steven C. Wyer
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1 **I. STATEMENT OF THE ISSUES PRESENTED¹**
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3 The issues presented on this third appeal are summarized to include: (i) the
4 extent to which the district court carefully followed the mandate of this Court after
5 the second appeal; (ii) the latitude and deference that this Court should ascribe to
6 the district court in making its supplemental findings on the level of culpability of
7 the district court in making its supplemental findings on the level of culpability of
8 the Defendants, if any, that the Appellant, Securities and Exchange Commission
9 (“SEC”) established or failed to establish at trial; and (iii) the scope of the district
10 court’s discretion in determining the equitable remedies sought by the SEC against
11 the Defendants, including disgorgement, civil monetary penalties and permanent
12 injunctive relief.
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17 This Court has addressed this case twice previously, when it initially heard
18 the SEC’s appeal from the district court’s order denying the SEC’s requests for a
19 permanent injunction, disgorgement and imposition of civil penalties and entered
20 judgment in favor of the Defendants; *SEC v Merchant Capital, LLC*, 483 F.3d 747
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29 _____
30 ¹ Consistent with the references to the record below contained in the SEC’s Opening Brief,
31 “R_-D_:_” refers to volume number, document number, and page(s) of a document in the district
32 court record. “Ex._:_” refers to exhibit number and page(s).

1 (11th Cir. 2007) (hereinafter referred to as “*Merchant I*”). On appeal, this Court
2 reversed the district court’s holding that the RLLP interests which had been offered
3 and sold by Merchant Capital, LLC (“Merchant”) as alleged in the SEC’s
4 Complaint were securities as defined in § 2(11) of the Securities Act of 1933
5 (“Securities Act”). This Court also reversed the district court on its holding that the
6 Defendants made no material misrepresentations to RLLP prospective partners in
7 Merchant’s offering materials. Rather than reverse the district court on its other
8 findings after six days of hearings, this Court remanded for reconsideration of
9 whether Defendants acted in a manner sufficiently culpable such that Defendants
10 acted with *scienter* or failed to use ordinary care in the offer and sale of the
11 Merchant RLLP interests.
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19 On remand and after reconsideration, the district court entered further
20 findings of fact and conclusions of law dated June 10, 2008 (R7-131). The SEC
21 then disagreed with the supplemental factual findings made by the district court,
22 contending in yet a second appeal that the district court’s June 10, 2008 findings
23 after remand and reconsideration were “clearly erroneous and as to its decisions on
24 remedies, constituted an abuse of discretion.” The SEC now makes the same
25 contentions in this third appeal.
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1 This Court heard the SEC's second appeal, *SEC v. Merchant Capital, LLC*,
2 311 Fed. Appx. 250 (11th Cir.) (hereinafter referred to as "*Merchant II*") and
3 reversed and remanded this case back to the district court with far more narrowly
4 defined instructions on remand. Those instructions specifically delegated discretion
5 to the district court to make supplemental findings on whether the SEC had
6 sustained its burden at trial to show that the Defendants acted with *scienter* or
7 merely were negligent. This Court also specifically delegated discretion to the
8 district court to determine the extent to which the equitable remedies sought by the
9 SEC should be granted. The district court did exactly what this Court allowed and
10 instructed. (*emphasis added*). Still disappointed with the district court's findings
11 after the second remand with instructions, the SEC continues its efforts to make up
12 on appeal for its lack of evidentiary support adduced at the trial of this civil
13 enforcement action.

14 Perhaps the real issue in this case is why the SEC refuses to accept the
15 factual conclusions repeatedly reached by the district court.

16 **STATEMENT OF THE CASE**

17 ***A. Nature of the Case and Prior Proceedings***

18 On November 4, 2002, following an approximately six month investigation,
19 the SEC brought this civil enforcement action against Defendants for selling what
20

1 the SEC contended were “securities” without registration and without qualifying
2 the offering as exempt from registration. Throughout the investigation “Defendants
3 cooperated fully with the SEC.” (R7-D27: 62-63) Over the course of the six month
4 investigation, Defendants produced voluminous documents and both Wyer and
5 Beasley submitted to repeated interviews and depositions. Not once did the SEC
6 feel the need to issue an investigative subpoena on the Defendants, due ostensibly
7 to their unprecedented level of cooperation. *SEC v. Merchant Capital, LLC*, 400 F.
8 Supp 2d 1336, 1372 (N.D. Ga. 2005).

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14 In its Complaint, the SEC alleged that Appellees, Steven C. Wyer (“Wyer”),
15 Kurt V. Beasley (“Beasley”), and Merchant Capital, LLC (“Merchant”)
16 (collectively “Defendants”), violated securities registration, anti-fraud and broker-
17 dealer registration provisions of the federal securities laws. (R1-D1). The SEC
18 sought preliminary and permanent injunctive relief and disgorgement of more than
19 \$7,000,000 million in what the SEC contended were ill-gotten gains from the
20 formation, funding and management of Merchant, in addition to the imposition of
21 draconian civil penalties. The SEC sought permanent injunctive relief alleging that
22 Defendants should be restrained from further violations of the federal securities
23 laws based upon its assertion that Defendants were likely to violate federal
24 securities laws in the future.

1 In the district court, when the Complaint was filed, the SEC sought *ex-parte*
2 temporary emergency relief and preliminary orders freezing the assets of
3 Defendants pending the final determination of the SEC's claims at trial. The
4 district court scheduled a hearing on the SEC's motion for a temporary restraining
5 order on November 7, 2002, which resulted in a consent order being entered on
6 that date with a full hearing on the SEC's request for a preliminary injunction
7 against the principals of Merchant, Wyer and Beasley, to preliminarily enjoin them
8 from federal securities law violations; and from aiding and abetting Merchant's
9 alleged violations of the federal securities law. (R1-D8) One of the bases of the
10 SEC's argument below that temporary and preliminary injunctive relief was
11 necessary was its contention that the RLLP interests in the 28 RLLPs formed by
12 Merchant should be deemed to be securities and regulated as such.
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20 By order entered May 2, 2003, as amended by order entered June 22, 2003,
21 the district court denied the SEC's application for a preliminary injunction and
22 directed the parties to complete discovery on certain issues which the SEC
23 contended were critical to the presentation of its case. (R2-D28) The May 2, 2003
24 order followed a three-day evidentiary hearing on January 13-15, 2003 with
25 respect to the SEC's motion for a preliminary hearing. (R7-D27). At the
26 conclusion of the evidentiary hearing the district court stated on the record that in
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1 reference to the Defendants' credibility that the district court had "heard some
2 probably 5,000 witnesses over the last 20-odd years, and I would conclude at this
3 point that there was no fraud involved." In the Court's May 2, 2003 order, it
4 denied the SEC's request for a preliminary injunction, ordered the case dismissed
5 and ordered a final judgment for the Defendants, stating that the "defendants acted
6 in good faith at all times without the requisite *scienter*." (R7-D27); *SEC v.*
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11 *Merchant Capital, LLC*, (No. 1:02-CV-2984-MHS) (N.D. Ga. May 2, 2003). The
12 May 2, 2003 order was subsequently amended on June 22, 2003.

14 Following the completion of discovery, the parties appeared before the Court
15 for a non-jury trial beginning on January 18, 2005 and concluding on January 21,
16 2005. On November 10, 2005, after considering the testimony and evidence
17 presented to the district court during the trial and during the preliminary injunction
18 hearing, and considering the arguments and briefs of counsel, the district court
19 denied the SEC's application for injunctive relief, disgorgement and civil penalties,
20 and entered judgment in favor of Defendants as to all counts of the SEC's
21 Complaint. The November 10, 2005 ruling consists of a 111-page opinion by U.S.
22 District Judge Marvin Shoob, methodically identifying the reasons and findings
23 supporting his rationale for dismissing this case *in toto*. (R6-D105).
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1 In its previous orders the district court cited numerous reasons in support of
2 its findings that Defendants lacked *scienter*. For example, the district court found
3 it significant the lengths to which the Wyer and Beasley went to ensure that the
4 RLLP interests would not be considered securities. For example, Defendants
5 acquired legal opinions from four different prominent law firms around the
6 country.² *Merchant Capital, LLC*, 400 F.Supp. 2d at 1340-1341, 1372. Beasley, a
7 practicing attorney, conducted vast legal research for several months before
8 beginning the venture. *Id.* at 1372. Defendants acquired and considered a “no
9 action” letter from the Texas State Securities Board essentially finding that the
10 RLLP interests were not securities. *Id.* at 1341.

11 Beasley testified that he had numerous discussions with two large companies
12 that are still to this day believed to employ the RLLP structure. It is noteworthy
13 that the SEC did not proceed against these two large companies employing the
14 RLLP structure, instead choosing to pursue alleged violations against Defendants
15 only.³ The extent to which the Defendants went to ensure compliance with the law

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27 ² The SEC has asserted in prior proceedings in this case that these legal opinions were not based
28 on full disclosure to the law firms rendering the opinions. The SEC is again attempting to raise
29 issues that are not properly before this Court on appeal, nor is it in any way true, as found by the
30 district court.

31 ³ A reasonable implication arises that the SEC elects to file civil enforcement actions against
32 respondents whom are less financially able to contest charges made against them compared to

1 is material proof that Defendants exercised all reasonable diligence and as a result
2 lacked *scienter*.⁴
3

4 The district court also initially found the extent to which Defendants
5 cooperated with the SEC as evidence of Defendants' good faith and lack of
6 *scienter*, stating that Defendants had exercised an "undisputed high level of
7 cooperation with the SEC. Beasley voluntarily drove from Nashville, Tennessee to
8 Atlanta, Georgia to meet with counsel for the SEC after receiving the SEC's initial
9 call, at his own initiative. Defendants produced voluminous documentation and
10 each of the principals agreed to be repeatedly interviewed and deposed, despite the
11 fact that no subpoenas were ever issued prior to the filing of the action."(R7-D27:
12 62-63); See also, *Merchant Capital, LLC*, 400 F.Supp. 2d at 1371. The district
13 court also found it "significant that the Defendants made the voluntary decision "to
14 stop soliciting new RLLP partners upon the filing of the SEC Complaint and
15 informed the SEC of this decision." *Merchant Capital, LLC*, 400 F.Supp. 2d at
16 1371. The extent to which the Defendants went to proactively and voluntarily
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25 better financed respondents that may have engaged in the same conduct that attracted SEC
26 scrutiny to the less financially able respondent.
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28 ⁴ This finding by District Judge Shoob is really the core of the disagreement that appears evident
29 between the prior rulings of this Court compared to the prior rulings of the district court. Based
30 upon the most recent findings by Judge Shoob in his Order dated July 28, 2009 (R7-152) and his
31 Order that preceded his July 28, 2009 Order on April 16, 2009, the district court found that
32 Defendants' actions were no more than negligent rather than severely reckless. In short, the
district court has found that Defendants did not act with *scienter*.

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1 cooperate with the SEC is irrefutable, un rebutted and convincing evidence of
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3 Defendants' good faith and lack of *scienter*. The district court's analysis went
4 further than making a mere finding of good faith by the Defendants. In its Order of
5
6 July 28, 2009 (R7-152), the district court pointed to specific evidence which
7
8 precluded a finding that Defendants had acted with severe recklessness. (R7-
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10 D152:11-15) In this Court's most recent opinion on February 9, 2009, *SEC v.*
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12 *Merchant Capital, LLC*, 311 Fed. Appx. 250 (11th Cir. 2009), this Court expressed
13
14 no disagreement with the district court's analysis in that regard. The SEC now
15
16 appeals the district court's July 28, 2009 Order due to what is clear to the
17
18 Defendants to be the inability of the SEC to accept rationally-based findings of fact
19
20 made by the district court on the issue of lack of *scienter* and remedies.⁵

19 ***B. Statement of Facts Relevant to This Third Appeal***

20 **1. Merchant Capital, LLC and the RLLP Interests**

21
22 The law of this case is that Merchant's RLLP interests were securities to be
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24 regulated as such. (See *Merchant I*) The SEC now asserts that the alleged manner
25
26 that Wyer and Beasley formed Merchant, developed Merchant's business and

27 ⁵ This Court's February 9, 2009 ruling expressly remanded this case to the district court for
28 further findings on whether Defendants acted with *scienter* or mere negligence. At the time of
29 this reversal and remand, this Court purposely authorized the district court to make additional
30 findings on these issues, including appropriate remedies. It was at this point in the lengthy
31 proceedings in this case that the Court notably did not dictate to the district court what findings
32 should be entered, but reposed discretion to the district court to do so as the trier of fact.
(*emphasis added*).

1 revenue model and marketed the RLLP interests are indicative that the SEC
2 established that the Defendants' acted with *scienter*. It is a distortion of the factual
3 record below for the SEC to assert on appeal that Defendants formed Merchant
4 knowing they might be illegally selling unregistered securities. In fact, this
5 contention, espoused in the SEC's Opening Brief at 8, is not supported by any
6 factual findings in any of the previous proceedings of this case. The SEC's
7 Opening Brief, which includes unsupported statements of fact asserting that
8 Defendants knowingly sold unregistered securities, knowingly made material
9 misrepresentations to Merchant's limited partners and knowingly sought to hide
10 their violations from regulatory scrutiny—are conclusory statements made by the
11 SEC that have no basis in fact in the record below.

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19 Beginning in October 2001, Merchant served as the organizing general
20 partner and the elected managing general partner of 28 Colorado registered limited
21 liability partnerships (“RLLPs”). The RLLPs were referred to as “Evergreen High
22 Yield RLLPs” and were formed for the purpose of purchasing, collecting, and
23 reselling consumer debt charged-off by financial institutions. Wyer was the Chief
24 Manager of Merchant. Beasley was the Secretary. Wyer owned 75% of Merchant
25 through another limited liability company, while Beasley owned the remaining
26 25% through another limited liability company.

1 Wyer and Beasley initially learned about the business of buying charged-off
2
3 consumer credit card debt through Wyer’s personal research. Prior to that time,
4
5 neither Wyer nor Beasley had any debt collection experience, but both had
6
7 substantial business and professional experience.

8 To conduct additional research, in the spring of 2001, Wyer met Fred
9
10 Howard (“Howard”), the principal owner of New Vision Financial, LLC (“New
11
12 Vision”), a relief defendant in the original action filed by the SEC. Howard
13
14 introduced Wyer to New Vision’s business and to the industry generally. He told
15
16 Wyer about the structure of the Colorado RLLPs, how New Vision’s business
17
18 operated, and how New Vision’s RLLPs were funded. At the time Wyer initially
19
20 spoke with Howard, New Vision had already organized and managed more than 50
21
22 such RLLPs.

23 Shortly after meeting Wyer, Howard supplied him with audited financial
24
25 statements of New Vision’s RLLPs that reflected their historical financial
26
27 performance. Howard also supplied Wyer with a spreadsheet that showed New
28
29 Vision’s “break even” business model (referred to in the district court proceedings
30
31 and here on appeal as the “RLLP Model”). The RLLP Model constructed by New
32
Vision and Howard reflected the monthly target performance goals necessary for
an RLLP to return 100% of the partners’ capital contributions at the conclusion of

1 the 36-month anticipated life of an RLLP, along with projected partnership
2 distributions. Howard told Wyer that the New Vision RLLPs that repurchased debt
3 with proceeds from the sale of existing debt (the same RLLP Model ultimately
4 chosen by Merchant) were performing consistent with Howard's performance
5 models.
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9 After Beasley first discussed this new business opportunity with Wyer, he
10 also did extensive research regarding RLLPs. Beasley learned that both New
11 Vision and another business in the industry, Collect America, used the RLLP
12 structure. Beasley visited the offices of New Vision and met with Howard and
13 New Vision's legal counsel. He requested and received copies of various legal
14 opinions from New Vision's counsel and spoke at length with New Vision's
15 counsel regarding the structure of the RLLP, as well as the actual historical
16 performance of the New Vision RLLPs.
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22 Beasley spent the next several months educating himself about the RLLPs.
23 He retained the Nashville, Tennessee law firm of Baker, Donelson, Bearman &
24 Caldwell and requested that firm's independent evaluation of the RLLP entity and
25 the proposed structure of Merchant's business. He specifically requested an
26 analysis from the law firm regarding whether a Merchant RLLP partnership
27 interest should be considered a security as defined under federal securities laws.
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1 Merchant thereafter received a formal legal opinion letter from Baker, Donelson,
2 Bearman & Caldwell stating that the RLLP partnership interest “should not be
3 viewed as a security.”
4

5
6 Merchant also reviewed and relied upon several other legal opinions that
7 were provided to Merchant by New Vision’s counsel. One of those opinion letters
8 had previously been issued at the request of Collect America and similarly opined
9 that RLLPs were not subject to the federal securities laws. A third opinion letter
10 reviewed by Merchant dated May 25, 2001, from a Florida law firm further
11 confirmed the consensus opinion that an RLLP was not subject to the federal
12 securities laws.
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17 New Vision’s counsel also provided Merchant with an opinion letter from
18 the Houston office of the law firm of Chamberlain, Hrdlicka, White, Williams &
19 Martin. That opinion letter, dated May 31, 2001, recited that RLLP partnership
20 interests “are not securities under the Texas Securities Act.”
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22

23 Finally, New Vision provided Merchant with a “no-action” letter from the
24 State of Texas, in which the staff of the Texas State Securities Board took a “no-
25 action” position on the issuance of partnership interests in a general partnership
26 entity formed to buy and collect receivables of small businesses, thereby
27 concluding that the partnership interests were not securities. Even though the SEC
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1 on appeal contends that Wyer and Beasley's due diligence efforts and reliance on
2 outside legal opinions was indicative of their severe recklessness in conducting
3 Merchant's business, it strains credulity to draw that conclusion. How many times
4 have promoters of a business venture gone to the lengths that Wyer and Beasley
5 went to in formulating their decisions and strategies? It is obvious that Wyer and
6 Beasley thirsted for as much information as they could obtain in order to structure
7 the RLLPs in a manner that was as compliant with all relevant laws and legal
8 requirements as possible. This sort of due diligence is consistent with acting in
9 good faith at all times and is also consistent with the findings made by the district
10 court that the SEC failed to establish that Defendants' violated federal securities
11 laws with *scienter*. (R7-D152).

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19 **(i) Returns Anticipated to be Generated by the Merchant RLLPs**

20 Each Merchant RLLP was limited to no more than 20 partners. The
21 minimum capital contribution permitted from a partner in an RLLP was \$25,000.
22 The maximum capital contribution permitted from a partnership was \$3,000,000.
23

24 Each Merchant RLLP contemplated a 36-month life of the business, with the
25 partners having the option of a projected 3.6% quarterly return or, alternatively, a
26 projected deferred annual return of 16.5%, which was to be paid upon the
27 termination of the partnership at month 37. The RLLP, as designed, contemplated
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1 the potential return of all of the partners' capital contributions at the conclusion of
2
3 the 36-month period, in addition to the quarterly or deferred annual return.

4 These high returns, 14.4% in the case of quarterly returns or 16.5% in the
5
6 case of a deferred annual return, reflect the level of risk that is inherent in the credit
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8 card debt collection business. Merchant never guaranteed these rates of return, or
9
10 any rates of return, to any of the prospective partners and the district court made
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12 specific findings to that effect.

13 To the contrary, Merchant specifically advised the prospective partners that
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15 these rates of return might not be achieved. In the partnership application,
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17 Merchant expressly advised prospective partners of the risks associated with the
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19 credit card debt collection business and the fact that the businesses might not
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21 perform as anticipated. Although the SEC contends on appeal that Merchant
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23 "buried risk disclosures on page 10 of 50 of the partnership application," (SEC
24
25 Opening Brief, 21), one must evaluate the totality of the risk disclosures made to
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27 prospective partners by Merchant as opposed to segmenting out a discreet
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29 statement and implying there was a nefarious intention to hide or minimize the risk
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31 disclosures by Merchant. This Court on appeal recognized the importance of the
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33 bolded section of Defendants' offering materials entitled "Risk Factors," which
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35 warned prospective partners that this investment was "only appropriate for those

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1 persons capable of withstanding the risk of losing their entire capital contribution.”
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3 *Merchant Capital, LLC*, 483 F. 3d at 768 (quoting offering documents). This
4 meaningful cautionary language contained in the original offering documents is
5
6 further indicia of the Defendants’ good faith.

7 8 **2. Structure and Characteristics of the RLLPs**

9 10 **(i) Merchant’s Role as Organizing General Partner**

11 As emphasized earlier, this case no longer includes any dispute on whether
12 the RLLP interests were securities. However, as included in its prior appeals to this
13 Court, the SEC’s Opening Brief includes substantial legal arguments addressing
14 the formation of the RLLPs by Wyer and Beasley in an effort to bootstrap
15 violations of § 5 of the Securities Act into securities fraud. Prior to the election of a
16 managing general partner by each RLLP, Merchant served as the organizing
17 general partner for each RLLP. This fact was disclosed to the prospective partners
18 in the partnership application. Since § 5 violations of the Securities Act in this
19 case are deemed to be “strict liability” violations, it serves no useful purpose for
20 the SEC to advocate on appeal that the registration violations covering the
21 Merchant RLLP interests somehow get the SEC closer to making up for its
22 deficient proofs at trial on the issue of *scienter*. As emphasized in the Defendants’
23 arguments, the SEC has for seven years sought to embolden its lack of proofs
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1 adduced at trial by continuing to disagree with findings made by the district court,
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3 only to appeal those findings *argumentum ad nauseum*.⁶

4 **(ii) Role of the Limited Partners**

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6 The SEC's Opening Brief continues to endeavor to boot strap findings made
7 by this Court on the registration issue in earlier appeals into "evidence" that was
8 never adduced at trial with respect to *scienter*. The clear import of this effort is to
9 obfuscate the district court's rationale in support of its most recent Order of July
10 28, 2009. Under the theory of leaving no stone unturned, Defendants must again
11 factually address the SEC's recitation of the "facts."
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15 Section 7.2 of the RLLP partnership agreement defines the role of
16 Merchant's partners. Each of the partners made a specific representation that he or
17 she understood the need to actively participate in the business affairs of the RLLP
18 and agreed to do so.
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22 Although the partnerships contracted with Merchant to have some of the
23 day-to-day management functions performed by Merchant and by persons with
24 whom Merchant contracted, the partnership agreement is clear that Merchant did
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28 ⁶ "*Ad nauseam*" arguments are logical fallacies relying on the repetition of a single argument to
29 the exclusion of all else. This tactic employs intentional obfuscation, in which other logic and
30 rationality is intentionally ignored in favor of preconceived (and ultimately subjective) modes of
31 reasoning and rationality. (http://en.wikipedia.org/wiki/Ad_nauseam#References).

1 not have the authority to control or manage the partnership. The partnership
2 agreement makes it clear that only the partners had the authority to control and
3 manage the business, and with respect to the primary partnership decision, the
4 purchase and sale of debt, Merchant was expressly prohibited from acting without
5 the approval of two-thirds of the general partners in each partnership.
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9 The partnership agreement expressly reserved to the partners the following
10 powers: (i) the ability to call meetings for any purpose and to hold regular
11 quarterly meetings; (ii) the ability to control the managing general partners by
12 requiring a two-thirds vote of the interests in the partnership to permit the
13 managing general partner to enter into any obligation in excess of \$5,000 or incur
14 any expenses in excess of \$5,000 per month; (iii) the ability to participate in one or
15 more committees; (iv) the ability to elect a managing general partner and to
16 remove the managing general partner by a two-thirds vote of the interests if the
17 managing general partner materially failed to carry out its duties; (v) the ability to
18 inspect all of the books and records of the general partnership; (vi) the ability to
19 approve additional funding after the initial closing of the partnership by a two-
20 thirds vote of the interests of the partnership; and (vii) the ability to amend the
21 partnership agreement by either a two-thirds or unanimous vote depending on the
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1 type of amendment. The partners also had the ability to dissolve the partnership
2 prior to the original stated term.
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4 The actual degree of each partner's involvement in the business of the
5 RLLPs varied greatly, depending on the extent to which the partner chose to
6 exercise the managerial powers reserved to the partners in the partnership
7 agreement. Some of the partners were extremely active, while others had minimal
8 participation.
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11 Each RLLP had quarterly meetings in which the partners were invited to
12 participate. The partners had all of the information necessary to perform the same
13 analysis that Merchant performed in evaluating the potential purchase or sale of
14 debt. The monthly statements that the partners received, coupled with the ballots
15 that were sent to the partners, provided the partners with the name of every pool of
16 debt in which they owned an interest, the date that the interest was purchased, the
17 length of time that the RLLP had held the interest, and both the historical gross and
18 net collections from the debt. There can be no serious debate that the district court
19 found that the partners were capable of affording and understanding the risks
20 associated with the business of the RLLPs and of participating as partners.
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1 had the requisite ability. Indeed, Merchant was approached by others who had
2 expressed an interest in serving as a managing general partner for an RLLP.
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4 The SEC sought to establish at trial that the control and participation of the
5 RLLP partners was illusory or a sham, thus tending to establish one of the factors
6 emphasized by the court in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100
7 (1946). At the end of the day, however, this Court determined on appeal that the
8 RLLP interests were investment contracts and to be regulated as securities under
9 federal securities laws. See *SEC v. Merchant Capital, LLC*, 483 F.3d 747 (11th Cir.
10 2007).
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15 **3. Material Misrepresentations or Omissions**

16 At the core of this latest SEC appeal is the degree to which the district court
17 made supplemental findings of fact upon remand from this Court's latest ruling.
18
19 *SEC v. Merchant Capital, LLC*, 311 Fed. Appx. 250 (11th Cir. 2009). The SEC has
20 endeavored now for more than seven years to establish that Merchant and its
21 principals, Wyer and Beasley, made material misrepresentations and omissions to
22 prospective partners and that they did so with *scienter*, thus violating the anti-
23 fraud statutes and rules governing such conduct. Noticeably deficient, the SEC
24 Complaint in this case (R1-D1) does not even allege any facts associated with two
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1 of the three material omissions heretofore identified by this Court on its previous
2 reviews of this case.⁷
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4 The bottom line on appeal here is that the district court has logically and
5 rationally found that the SEC has continually failed to establish any facts which
6 support a finding by either the district court or this Court that any of the three
7 material omissions by Merchant, Wyer or Beasley establish that Defendants
8 conducted their activities in forming, operating, managing or marketing Merchant
9 with *scienter*, or alternatively, with severe recklessness.
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14 **SUMMARY OF DEFENDANTS' ARGUMENTS**

15 Through the series of appeals to this Court taken by the SEC, it seeks to
16 transform an appellate court into a trial court. It is clear the SEC disagrees with
17 most of the findings made by the district court after failing to convince the district
18 court on three distinct occasions that Defendants violated the anti-fraud provisions
19 of the federal securities laws, being § 17(a) of the Securities Act, 15 U.S.C. §§
20 77e(a), 77e(c) and 77q(a); § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and
21 Rule 10b-5 promulgated there under, 17 C.F.R. 240.10b-5 with *scienter*.
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27 Defendants acknowledge that the law of this case post-appeal, is that the limited
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30 ⁷ The SEC Complaint (R1-D1) consisting of 80 allegations covering 27 pages, does not mention
31 any alleged material omission attributable to the Defendants relating to a failure to disclose the
32 California Cease and Desist Order or failing to disclose the personal bankruptcy filing of Wyer.

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1 partnership interests which were offered and sold as RLLP interests were sub-
2
3 sequently determined by this Court to fall within the family of securities known
4 generically as “investment contracts.” However, as found by the district court on
5 remand and reconsideration, any violation of §§ 5(a), 5(c) of the Securities Act of
6 1933 was premised upon Defendants acting in good faith, without any indicia of
7
8 *scienter*, with the district court specifically articulating its rationale for concluding
9 that Wyer and Beasley conducted the original formation, pre-offering due diligence
10 and management of the 28 RLLPs formed by the Defendants acting at all times in
11 good faith, and with neither the intent to deceive nor with severe recklessness (R6-
12 D131: 22). Instead of recognizing at the trial of this case and even later on appeal,
13 that the SEC failed to carry its burden of proof, it appears to Defendants that the
14 SEC has elected to continue its quest *ad infinitum* until it gets the result that it
15 wants.⁸

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22 However, the facts of this case will never change. The district court trial
23 record will never change. An examination of the record of testimony admitted
24 before the district court results in glaring insufficiencies in the SEC’s own proofs;

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28 ⁸ This strategy is one uniquely available to the Government and not available to private litigants.
29 Compared to the Defendants, the SEC has unlimited financial resources, unlimited enforcement
30 staff and an unlimited period of time to achieve the result that it pursues in this case on appeal.
31 Defendants have none of those advantages. At some point, the judiciary must check the
32 executive branch of Government, for if it remains otherwise, there would be no point in opposing
the SEC in any of its regulatory and enforcement efforts. “Might does not make it right.”

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1 insufficiencies that the district court pointed out in its June 10, 2008 Order (R6-
2 D131) holding for the third time that the SEC has not satisfied its burden of proof
3 in establishing that Defendants acted with either *scienter* or negligence. Upon
4 remand by this Court on February 9, 2009 with instructions to the district court to
5 determine whether Defendants' material omissions made to RLLP investors
6 constituted actions with *scienter* or negligence, the district court abided by this
7 Court's mandate. (R7-152:10). Specifically, the district court found that "in
8 reversing that Order [June 10, 2008], the court of appeals found that the omissions
9 "were committed either with the requisite *scienter* or negligently and instructed
10 this Court to resolve that issue." The district court goes on to point out that
11 "[N]othing in the court of appeal's opinion calls into question this Court's previous
12 analysis, which concluded that the evidence did not support a finding that
13 defendants' omissions rose to the level of severe recklessness." (R7-152:10). An
14 example of the glaring distinction between how the SEC viewed the evidence at
15 trial compared to its actual proofs, counsel for the SEC at trial in his opening
16 statement remarked that "they [Wyer and Beasley] ran this business the way a
17 crooked stockbroker churns an account: It operated only for Merchant; the more
18 they bought, the more Merchant made, the more the investors lost." (R9-11-
19 D98:16). Even now in its Opening Brief, the SEC tags Wyer as a "liar." In its
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1 request for reconsideration after remand from *Merchant II*, the SEC argued that
2 Defendants told “outright lies” to investors regarding the performance of their
3 partnerships. (R7-D148:15 and R7-D152:11). These vituperative references
4 unsupported by the very evidentiary record the SEC failed to develop at trial are
5 beyond mere appellate advocacy. It implies rather clearly that the SEC now resorts
6 to wild, unsupported statements in hopes that the district court’s analysis will be
7 deemed to be “clearly erroneous” yet at the same time, the trial court record never
8 changes.
9

10
11 For example, the SEC’s own lead expert witness at trial, a forensic fraud
12 examiner retained by the SEC to evaluate all of the Defendants’ books and records
13 as well as disclosures made to the RLLP partners, found that he saw no fraud or
14 fraudulent activities during the entirety of his 310 hours of examination of the
15 Defendants’ records (R9-11-D98:58-60). The SEC has never disputed this
16 testimony in any manner, nor could it. Defendants wish to emphasize that the
17 SEC’s own retained expert could only point out after his thorough and exhausting
18 review of the Defendants’ books and records, that he found two minor fee
19 assessments that were imposed by Merchant on the RLLPs through what he termed
20 as oversights rather than purposeful and that on a combined basis, the dollar
21 amount of these two overcharges totaled approximately \$120,000 compared with
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1 \$8.4 million in fees earned by Merchant. This was characterized by the SEC's
2 expert witness as lacking in materiality. (R9-11-D98:54-56).
3

4 There can be no dispute what the standard of review is in this appeal. Factual
5 findings made by the district court are reviewed under a clearly erroneous standard.
6 *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 731 (11th Cir. 2005). Denial of remedies
7 sought by the SEC is reviewed under an abuse of discretion standard. *SEC v.*
8 *Calvo*, 378 F.3d 1211, 1216-1217 (11th Cir. 2004). However, none of these
9 decisions stand for the proposition that this Court may substitute its discretion for
10 that of the trial court. The SEC has not asserted that the district court applied any
11 incorrect legal standards in rendering its July 28, 2009 Order after remand from
12 this Court. The sole contention that is posited by the SEC on appeal is that the
13 district court's findings on lack of *scienter* and the nature of remedies granted
14 against the Defendants are both "clearly erroneous." *SEC v. Ginsburg*, 362, F.3d
15 1292, 1304 (11th Cir. 2004).
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23 This Court must review a district court's findings of fact following a bench
24 trial under a "clearly erroneous" standard of review. See Fed. R. Civ. P. 52(a)(6)
25 ("Findings of fact, whether based on oral or other evidence, must not be set aside
26 unless clearly erroneous, and the reviewing court must give due regard to the trial
27 court's opportunity to judge the witnesses' credibility."); *Ceraso v. Motiva Enters.*,
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1 326 F.3d 303, 316 (2d Cir. 2003) ("The weight of the evidence is not a ground for
2 reversal on appeal, and the fact that there may have been evidence to support an
3 inference contrary to that drawn by the trial court does not mean that the findings
4 are clearly erroneous." (citations omitted)). A district court's application of law to
5 the facts is reviewed *de novo*. See *Henry v. Champlain Enters.*, 445 F.3d 610, 617-
6 18 (2d Cir. 2006). Injunctions against future violations of securities laws and other
7 equitable relief for violations of federal securities laws are reviewed for abuse of
8 discretion. See *SEC v. Posner*, 16 F.3d 520, 521-22 (2d Cir. 1994); cf. *Sims v. Blot*,
9 534 F.3d 117, 132 (2d Cir. 2008) ("A district court has abused its discretion if it
10 based its ruling on an erroneous view of the law or on a clearly erroneous
11 assessment of the evidence, or rendered a decision that cannot be located within
12 the range of permissible decisions." (citations and internal quotation marks
13 omitted)).

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22 In addressing the issues presented by this appeal, Defendants submit the
23 following:
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26 **A. *The District Court's Findings After Remand from Merchant II Are Not***
27 ***Clearly Erroneous***

28 Mixed questions of law and fact, such as questions of materiality and
29 *scienter*, "involve assessments peculiarly within the province of the trier of fact
30 and hence are reviewable under the clearly erroneous rule." *Lucas v. Florida*

1 *Power & Light Co.*, 765 F.2d 1039, 1040-1041 (11th Cir. 1985) (citing *Arrington v.*
2
3 *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 651 F.2d 615 (9th Cir. 1981)). “A
4 finding is clearly erroneous only when, although there is evidence to support it, the
5 reviewing court on the entire evidence is left with a definite and firm conviction
6 that a mistake has been committed.” *Arrington*, 651 F.2d at 619; *United States v.*
7
8 *U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *SEC*
9
10 *v. Merchant Capital, LLC*, *supra*.

11
12 What the SEC fails to accept at the district court level is that as plaintiff
13 below, the SEC failed to carry its burden of proof on the element of *scienter*, with
14 respect to § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5
15 promulgated there under, 17 C.F.R. 240.10b-5. It is acknowledged by the
16
17 Defendants that after the most recent remand by this Court, the district court has
18
19 found that Defendants’ actions were negligent with respect to §§ 17(a)(2) and (3)
20 of the Securities Act, 15 U.S.C. §§ 77e(a), 77e(c) and 77q(a). The district court has
21 specifically made findings, after evaluating the credibility of the witnesses that
22 included extensive testimony by Wyer and Beasley, that their conduct and actions
23 in the formation and management of Merchant and the RLLP entities themselves,
24 was conducted in “good faith.” The district court’s findings of good faith in
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1 Defendants' actions are inconsistent with the notion that Defendants acted with
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3 *scienter* or severe recklessness.

4 The SEC also continues to misconstrue the testimony at trial by Wyer and
5
6 Beasley which established their good faith reliance on the advice of counsel (SEC
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8 Opening Brief, 40-41). Reliance on counsel, trained and knowledgeable in
9
10 securities law matters "need not be raised as a formal defense; it is simply evidence
11
12 of good faith, a relevant consideration in evaluating a defendant's *scienter*."

13 *Howard v. S.E.C.*, 376 F.3d 1136 (D.C. Cir. 2004); See *Bisno v. United States*, 299
14
15 F.2d 711, 719 (9th Cir. 1961). As a former SEC commissioner put it, the "reliance
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17 defense ... is not really a defense at all but simply some evidence tending to
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19 support a defense based on due care or good faith." Bevis Longstreth, *Reliance on*
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21 *Advice of Counsel as a Defense to Securities Law Violations*, 37 Bus. Law. 1185,
22
23 1187 (1982).⁹ Contrary to the SEC's assertion on appeal that even if Defendants

23 ⁹ *Howard v. S.E.C.*, *supra*, note 20—"An essential means by which securities professionals
24
25 comply with the law is through the guidance of counsel. See Hawes & Sherrard, *supra* note 19, at
26
27 36 (securities laws are "complex and often uncertain"; "the layman [i.e., a non-lawyer] has no
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29 real choice but to rely on counsel"). Legal counsel plays a critical role in the functioning of
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31 securities transactions. "Significant public benefits flow from the effective performance of the
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33 securities lawyer's role. The exercise of independent, careful and informed legal judgment on
34
35 difficult issues is critical to the flow of material information to the securities markets." Carter v.
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37 Johnson, 47 S.E.C. 471, 504, 1981 WL 314179 (1981); SEC v. Spectrum, Ltd., 489 F.2d 535,
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39 541-42 (2d Cir.1973) ("The legal profession plays a unique and pivotal role in the effective
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41 implementation of the securities laws. Questions of compliance with the intricate provisions of
42
43 these statutes are ever present and the smooth functioning of the securities markets will be
44
45 seriously disturbed if the public cannot rely on the expertise proffered by an attorney when he
46
47 renders an opinion on such matters.")

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1 relied in good faith on advice of counsel in structuring and offering the RLLP
2 interests, that should not be pertinent to whether Defendants acted with *scienter* in
3 making the three material misrepresentations identified by this Court in *Merchant*
4 *I*, that proposition does not square with findings by the district court that
5 Defendants acted in good faith, nor does it square with *Howard v. S.E.C, supra*.
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9 The SEC has continued to attempt to hold Defendants, who in good faith
10 followed established practices and in most instances exceeded established
11 practices, liable for securities law violations perpetrated with *scienter*. The
12 problem with this strategy is that the district court made specific, rational factual
13 findings, supported by the evidence admitted at trial that Wyer and Beasley did not
14 conduct any of their affairs with Merchant in a severely reckless manner. The
15 record at trial is totally devoid of any evidentiary support for that “non-finding.”
16 Requiring some proof of severe recklessness in support of the SEC’s Complaint
17 was necessary at trial. Otherwise, there would be no guarantee of due process to
18 the Defendants or others in their situation and all violations of the federal securities
19 laws would simply be based upon strict liability, which of course is not the case.
20 Before a person can be sanctioned or penalized, he must be able to discern from
21 existing law whether an activity is legal or not. As noted by the Second Circuit in
22 another SEC enforcement action:
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1 “Due process requires that 'laws give the person of ordinary intelligence a reasonable
2 opportunity to know what is prohibited.' Although the Commission's construction of its
3 own regulations is entitled to 'substantial deference,' we cannot defer to the Commission's
4 interpretation of its rules if doing so would penalize an individual who has not received
5 fair notice of a regulatory violation. . . . The Commission may not sanction [a respondent]
6 pursuant to a substantial change in its enforcement policy that was not reasonably
7 communicated to the public.” *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996).

8 **B. The District Court Again Properly Considered Instructions On** 9 **Remand**

10 *“The Remand Considerations”*

11 Since this case had been to this Court on appeal previously, its February 9,
12 2009 opinion narrowly defined the parameters on remand which the district court
13 was to follow in making further findings on the issues of *scienter* or negligence
14 and remedies. The specific direction given to the district court was:
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16
17 “Given that the existence of *scienter* or negligence is a question of fact that
18 is within the province of the district court in the first instance, we find it
19 necessary to remand this case again for a resolution of these questions.
20 Given our prior opinion in this case, the district court is not at liberty to find
21 that the omissions were made neither with *scienter* nor negligently.
22 Additionally, the district court must order the appropriate remedies in light
23 of its determination of whether the defendants acted with *scienter* or only
24 negligently as the availability of remedies differs with reference to each
25 culpable mental state. The district court is instructed to order the appropriate
26 disgorgement and appropriate civil penalties for violations of the anti-fraud
27 statutes. Although based on the record before us, we would be inclined to
28 order the district court to issue a permanent injunction, we find that the
29 issuance of an injunction involves questions of fact of whether *scienter* or
30 negligence was involved as well as the other factors mandated by this circuit
31 in *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1322 (11th Cir. 1982), and *SEC*
32 *v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 2004). The district court is directed
to assess these questions of fact and determine whether the SEC is entitled to

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1 the issuance of a permanent injunction.” *SEC v. Merchant Capital, LLC*, 311
2 Fed. Appx. 250 (11th Cir. 2009), pages 4-5.

3
4 In its most recent effort to usurp the district court’s discretion on findings of
5 fact derived from the deficient evidentiary trial record, the SEC essentially
6
7 rehashes the same factual arguments made in *Merchant I* and *Merchant II*. The
8
9 futility of this approach is that the SEC has failed now three times after remands
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11 from appeal to convince the district court to materially alter its key factual findings
12
13 on the issue of the culpability of the Defendants’ conduct and the nature and
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15 reasonableness of remedies flowing from that conduct. Seizing on the three
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17 material omissions this Court found to constitute misrepresentations in *Merchant I*,
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19 the SEC contends again that the trial record requires a finding of *scienter* rather
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21 than a finding of negligence. The SEC fails to identify any aspect of the district
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23 court’s July 28, 2009 Order that is “clearly erroneous.” Instead, the Opening Brief
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25 merely compounds the SEC’s warn out argument that it disagrees with the district
26
27 court’s findings. However, on appeal, the SEC’s efforts must again be re-addressed
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29 by Defendants.

26 **C. Merchant’s Alleged Failure to Disclose Known Poor** 27 **Performance**

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29 The SEC begins its arguments by contending that the district court failed to
30
31 “meaningfully consider factors identified in *Merchant I* and *Merchant II*.”
32

1 *Merchant I* is history in this case and cannot be the basis for further claims that the
2
3 district court's July 28, 2009 Order contains findings that are clearly erroneous. As
4 instructed by this Court in *Merchant II*, the district court readdressed the Court's
5
6 concerns that there was a material omission by Defendants due to their failure to
7
8 disclose poor performance of existing RLLPs from June to November, 2002.

9 Setting aside for a moment the SEC's conclusions that the district court failed to
10
11 consider this as a material omission, the district court did effectively address it
12
13 (R6-D, 131:11-12). The district court found that un-rebutted evidence submitted by
14
15 the Defendants, when viewed as a whole, supported the finding that the RLLPs
16
17 performed at an average of 82.14% of the model target through November 2002.

18 The district court further found un-rebutted testimony showed that if an RLLP
19
20 collected approximately 83% of its model target, the partners would receive all of
21
22 their capital back, if not the quarterly distributions too. The district court
23
24 considered the fact that as of November 30, 2002, the average age of a Merchant
25
26 RLLP was only a little over six months, out of a projected three-year term,
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28 resulting in the district court's finding after remand that "Defendants failure to
29
30 disclose between June and November 2002 that some of the partnerships were
31
32 performing below the RLLP Model did not amount to a "highly unreasonable
omission" and an "extreme departure from the standards of ordinary care." (R6-

1 D:131, 11-12). Although the SEC argues now on appeal that since Wyer and
2
3 Beasley knew that some of the RLLPs were not performing to the RLLP model
4 that proves they acted with *scienter*. What the SEC continues to ignore is the
5
6 testimony at trial of its own expert witness, David H. Crumpton.

7
8 The SEC's expert witness, Mr. Crumpton testified at trial that, based upon
9
10 his review of the books and records of Merchant, it was apparent to him that
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12 Merchant continuously undertook to make modifications to the New Vision
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14 performance model, in an attempt to make the model a more accurate predictor of
15
16 actual performance. Mr. Crumpton also testified that he conducted his own
17
18 extensive analysis, review and projection of the actual performance of the
19
20 Merchant RLLPs and compared that actual performance with the performance that
21
22 had been projected internally by Merchant using the New Vision model. Mr.
23
24 Crumpton concluded that upon the anticipated dissolution of the RLLPs, the
25
26 average rate of return for the general partners would be 68.1% of the general
27
28 partners' original capital contributions. (R9-D99:45). After remand, the district
29
30 court revisited the testimony offered at trial in support of the SEC's claims that
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32 Defendants' conduct in failing to disclose poor performance of some of the RLLPs
was indicative of "highly unreasonable" or an "extreme departure from the
standards of ordinary care" amounting to "severe recklessness."

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1 The district court found the absence of convincing testimony on this issue
2 compelling. It pointed out that both of the SEC's expert witnesses at trial, Mr.
3 Crumpton and Ms. Epstein, acknowledged that the partners were clearly advised of
4 the potential risks associated with the RLLPs prior to the time that they made their
5 initial capital contributions. (R10-11-D98-99:78, 222). The fact that it appeared,
6 according to the testimony of the SEC's own expert witness, Mr. Crumpton, that
7 the partners will receive, on average, approximately 68.1% of their original capital
8 contributions back from a business venture that was plainly disclosed as being
9 speculative and risky, is, if anything, a fact that tends to support Defendants' good
10 faith conduct as the managing general partner of the RLLPs. The district court
11 commented further that Lawrence J. Warfield, the receiver for One Vision
12 Children's Foundation, who was the only witness to testify unfavorably regarding
13 his business experience with Defendants, did not dispute the fact that, given the
14 fully disclosed significant risks involved with the RLLPs, the anticipated return
15 was within an accept able range. The district court found that the fact that the SEC
16 was unable to present the testimony of a single RLLP partner other than Mr.
17 Warfield who was dissatisfied with the performance of the Merchant RLLPs is
18 further evidence that Defendants' conduct regarding the RLLPs was at all times
19 appropriate, legal, ethical and forthright. (R6-D105, 79-80). Although the SEC in
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1 its Opening Brief labors to paint every decision and action by the Defendants as
2 evidence of *scienter*, the problem with that approach is that the trial record below
3 does not support those conclusions and the district court made that clear not once,
4 but four times. As submitted earlier, the facts presented to the district court by the
5 parties have never changed nor will they. The district court's observations and
6 findings below should not change simply due to the SEC's "spin" on what those
7 facts reveal. Spin coupled with the SEC's unlimited resources should not convert
8 findings made by the district court into findings that are "clearly erroneous." "The
9 weight of the evidence is not a ground for reversal on appeal, and the fact that there
10 may have been evidence to support an inference contrary to that drawn by the trial
11 court does not mean that the findings are clearly erroneous." *Ceraso v. Motiva*
12 *Enters.*, 326 F.3d 303, 316 (2d Cir. 2003) (internal citations omitted)).

21 **D. Non-Disclosure of Wyer's Bankruptcy**

22 In the first appeal of this case, this Court concluded that, "under the facts in
23 the record, a reasonable investor would have been interested in Wyer's previous
24 personal bankruptcy, and that it was thus materially misleading to omit the
25 information." *S.E.C. v. Merchant Capital, LLC*, 483 F.3d 747 (11th Cir. 2007).

26 Although this finding is the law of this case, on appeal after reconsideration, it is
27 important to emphasize that the SEC's Complaint filed in this case never mentions
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1 any material misrepresentation by the Defendants in their failure to disclose
2
3 Wyer's personal bankruptcy filing. It is again worth noting that, like the California
4 Cease and Desist Order discussed below, Wyer's bankruptcy was not raised at
5 trial. The SEC had every opportunity to develop this issue on the record before the
6 district court and chose not to. The SEC elected to raise the issue on appeal despite
7 the incomplete record. It appears that Wyer's bankruptcy filing was not material
8 enough to include the omission of that disclosure in the Complaint. (R1-D1). Now,
9 on appeal again, this omission from disclosure is cast as indicia of *scienter*.
10
11 Essentially, the facts are what the SEC says they are—notwithstanding hundreds of
12 pages of factual findings in the district court record that runs contra to that
13 conclusion.

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19 Again, the SEC confuses what was determined by this Court to be a
20 material omission in Merchant's offering documents with failing to disclose a
21 material aspect of one's business history equating to an intention to deceive
22 prospective investors. The issue of Mr. Wyer's bankruptcy filing was minimally
23 mentioned by the SEC at trial. It was not until the SEC formulated its appellate
24 strategy did it seize upon the relevancy or materiality of the bankruptcy to the
25 disclosures made to Merchant RLLP investors. In fact, in the district court's 111-

1 page opinion dated November 10, 2005, the bankruptcy is mentioned but once
2
3 during the district court's background summary.

4 After two remands by this Court, the Wyer bankruptcy filing has taken on
5
6 much more importance than the SEC ascribed to it during the hearing on the
7
8 SEC's motion for preliminary injunctive relief and then, at trial. Frankly, it appears
9
10 that the SEC did not consider the fact of Mr. Wyer's bankruptcy to be "material"
11
12 either, until appeal and until this Court deemed the bankruptcy to be one of three
13
14 material omissions to Merchant investors. As with all three material omissions that
15
16 this Court found on appeal in *Merchant I*, the district court on remand was
17
18 specifically given instructions and latitude to determine whether any of those three
19
20 material omissions were made negligently or with severe recklessness. The district
21
22 court has done exactly that.

23 As in this case, *S.E.C. v. Phan*, 500 F.3d 895 (9th Cir. 2007) is an instructive
24
25 decision where the appellate court reversed the trial court's finding that *Phan*
26
27 violated the anti-fraud provisions of the federal securities laws and also reversed
28
29 the trial court's imposition of disgorgement and penalties. *In S.E.C. v. Phan, id.*,
30
31 the court held that "The antifraud provisions' materiality element is satisfied only if
32
there is "a substantial likelihood that the disclosure of the omitted fact would have
been viewed by the reasonable investor as having significantly altered the `total

1 mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32,
2 108 S. Ct. 978, 99 L.Ed.2d 194 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*,
3 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L.Ed.2d 757 (1976)) (internal quotation
4 mark omitted) (applying test to claims under § 10(b) and Rule 10b-5); *SEC v.*
5
6 *Rogers*, 790 F.2d 1450, 1458 (9th Cir.1986) (applying a "reasonable investor" test
7 to § 17), overruled on other grounds by *Pinter v. Dahl*, 486 U.S. 622, 108 S. Ct.
8 2063, 100 L.Ed.2d 658 (1988).”

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11
12 “Determining materiality in securities fraud cases "should ordinarily be left to
13 the trier of fact." *In re Apple Computer Secs. Litig.*, 886 F.2d 1109, 1113 (9th
14 Cir.1989). The determination [of materiality] requires delicate assessments of the
15 inferences a "reasonable shareholder" would draw from a given set of facts and the
16 significance of those inferences to him, and these assessments are peculiarly ones
17 for the trier of fact. Only if the established omissions are "so obviously important
18 to an investor, that reasonable minds cannot differ on the question of materiality" is
19 the ultimate issue of materiality appropriately resolved "as a matter of law by
20 summary judgment." *S.E.C. v. Phan, id.*

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27 After remand from *Merchant I*, the district court made further findings of
28 fact on the bankruptcy issue as instructed by this Court (R6-D131:12-13). The
29 additional findings point out that considering the totality of the disclosures made to
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1 prospective investors, including clear and unmistakable disclosures of the risks of
2 investment in the RLLPs, that no rates of return were guaranteed and that investors
3 were told they must be capable and willing to withstand the risk of losing their
4 investment, the district court held that the failure to disclose the Wyer bankruptcy
5 was not an indicia of “severe recklessness.” This Court’s February 9, 2009 ruling
6 does not evidence any disagreement with these findings. *SEC v. Merchant Capital,*
7
8
9
10
11 *LLC*, 311 Fed. Appx. 250 (11th Cir.).

12 **E. Failure to Disclose the California Cease and Desist Order**

13
14 As with the non-disclosure of the Wyer bankruptcy issue, the failure of the
15 Defendants to make a disclosure of the California Cease and Desist Order was not
16 even alleged in the SEC’s Complaint (R1-D1). Defendants’ nondisclosure of a
17 September 30, 2002 Cease and Desist Order from the California Department of
18 Corporations does not evidence *scienter*. Nonetheless, this Court on appeal found
19 that non-disclosure of the Cease and Desist Order was a material omission
20 attributable to the Defendants. This Court was unaware of a number of important
21 and material facts surrounding the Cease and Desist Order primarily because the
22 SEC did not develop the record below. For example, immediately upon
23 notification of the order in October, 2002, Beasley flew to Sacramento, California
24 to meet with representatives of the California Department of Corporations
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1 (“Department”). As Defendants did with the SEC’s investigation, Defendants fully
2
3 cooperated with the Department’s investigation and at all times maintained a
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5 positive relationship with its representatives. A year later, in November, 2003 after
6
7 numerous discussions, correspondence, and documents exchanged, by agreement
8
9 the original Cease and Desist Order was dissolved and a new Consent Order
10
11 executed. Again, the extent to which the Defendants went to proactively and
12
13 voluntarily cooperate with the Department is irrefutable and material evidence of
14
15 Defendants’ good faith and lack of *scienter* in their actions and conduct. One of the
16
17 reasons that factual information is not found in the district court record is because
18
19 not only is there no allegation of such in the SEC Complaint, but it is worth noting
20
21 that at trial the issue of the Cease and Desist Order was not even raised. It was not
22
23 admitted into evidence and the only testimony in the record regarding it is the fact
24
25 that Defendants received it. No one testified about the conclusions in the Cease
26
27 and Desist Order and the only record of it is the SEC’s argument for the admission
28
29 of the exhibit. (R7-D29:268-271). As specifically noted by the district court, the
30
31 findings in the Cease and Desist Order have no application to the instant case. (R7-
32
D29:268-271). Moreover, the cited testimony absolutely does not indicate that
Defendants failed to disclose the Cease and Desist Order to potential partners.
(R7-D29:268-271). The testimony merely indicates that Defendants did not

1 provide formal notification of the Cease and Desist Order to existing partners, and
2 does not confirm nor deny whether Defendants disclosed the Cease and Desist
3 Order to partners who purchased from September through November 2002. (R7-
4 D29:268-271). Also important is that even if the Cease and Desist Order had been
5 disclosed, it could have only affected one of the 28 RLLPs, because as of the date
6 of the Order the other 27 RLLPs had already been fully formed and partners
7 admitted.
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12 In the face of the above, the SEC continues a third time on appeal to
13 establish that the district court's findings after remand from *Merchant II* are clearly
14 erroneous relates to its assertion that the SEC established *scienter* in the district
15 court by establishing that Merchant did not disclose the issuance of the Cease and
16 Desist Order received by Merchant on October 4, 2002. As with other "*post hoc*
17 non-disclosures," the SEC believes that Merchant's non-disclosure of the issuance
18 of the Cease and Desist Order somehow *per se* is indicia of *scienter*. The SEC on
19 appeal does not, however, explain how the occurrence of a material event such as
20 the issuance of a Cease and Desist Order, 30 days before the SEC's Complaint was
21 filed in this action, during which 30 days, Merchant was earnestly trying to
22 respond to the Cease and Desist Order with materials and facts relevant to the
23 order was improvidently entered, supports its contention on appeal that the district
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1 court's finding of negligence is clearly erroneous. After all, at the time of the
2
3 Cease and Desist Order, Merchant had laboriously structured the RLLP
4
5 opportunities consistent with several legal opinions that comforted Merchant that
6
7 the RLLP interests were most likely not securities or investment contracts; and that
8
9 only one additional RLLP closed after Merchant's receipt of the Cease and Desist
10
11 Order. In fact, if one carefully analyzes the timeline of when the Merchant RLLPs
12
13 formally were determined to be securities, it was on April 7, 2007 at which time
14
15 this Court issued its decision reversing the district court on the core issue of
16
17 whether or not the Merchant RLLP interests were securities. See *Merchant I*.
18
19 Almost four and a half years after the issuance of the California Cease and Desist
20
21 Order is the first time a court of competent jurisdiction found the RLLP interests to
22
23 be securities. Prior to that time, no judicial declaration had been rendered on that
24
25 issue and in fact, as of November 10, 2005, the district court had concluded that
26
27 the RLLP interests were not securities. As with the other two material omissions
28
29 found by this Court on remand, the failure to disclose the Cease and Desist Order
30
31 30 days before all efforts at marketing any additional RLLP interests ceased, does
32
not *per se* require a determination by this appellate court that the district court's
findings in its July 28, 2009 Order are clearly erroneous on the issue of *scienter*.

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1 I. THERE IS NO ABUSE OF DISCRETION BELOW BY DENYING
2 REMEDIES TO THE SEC

3 A fair reading of the SEC's Opening Brief leaves one with the overriding
4 sense that the SEC approaches virtually every formation of a business venture as
5 one that creates an investment contract and hence, a security. The presumption
6 seems to be rather strong that anytime a promoter creates a new business
7 opportunity that involves "other peoples' money," that underlying business
8 arrangement creates a security. Even more troubling is the penchant of the SEC to
9 presume that every such business venture that may not be successful was doomed
10 by securities fraud. That is not the law. See *SEC v. W.J. Howey Co.*, 328 U.S. 293,
11 66 S. Ct. 1100 (1946) and its progeny.
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18 The Merchant RLLP interests have been deemed to be securities. The
19 district court has methodically parsed through the evidence presented at trial and
20 has drawn factual and legal conclusions that are clearly supported by the law and
21 facts; findings that are based upon the SEC's failure at trial to carry its burden of
22 proof on salient elements such as the Defendants' "state of mind" during the many
23 phases of Merchant's development. On appeal, Defendants re-emphasize two key
24 findings by the district court, which were correct then and are still correct now
25 after remand. They are that: (i) "parties [such as the Defendants] acting in good
26 faith may fail in their efforts to create a business structure that is not subject to the
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1 federal securities laws. Such failure alone is not sufficient to establish that the
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3 persons were acting with an intent to deceive or with severe recklessness;” and (ii)
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5 “it is clear that Defendants were attempting to structure their enterprise so that the
6
7 partnership interests would not be deemed securities. The SEC has pointed to no
8
9 authority that such efforts, assuming they are successful, somehow violate the
10
11 federal securities laws.” As the district court has opined after remand of *Merchant*
12
13 *I*, “Even if unsuccessful, as the Court of Appeals has determined they were here,
14
15 such efforts are not necessarily indicative of the *scienter* required for establishing
16
17 securities fraud.” (R6-D131:16).

18
19 After trial, the district court found that even if the RLLP interests structured
20
21 by Merchant were found to be securities, no relief as prayed for in the SEC’s
22
23 Complaint was justified. When this Court heard the first appeal of this case in
24
25 *Merchant I*, it was clear that the district court felt that no relief in favor of the SEC
26
27 would be justified due to the district court’s findings that Defendants acted in good
28
29 faith in virtually all of their dealings with the Merchant RLLPs. This Court’s ruling
30
31 on April 7, 2007, remanded on remedies in light of this Court’s reversal on the
32
33 unregistered securities claims and in light of this Court’s determination that there

1 were three material omissions by Merchant in its offering materials given to
2
3 prospective partners of the RLLPs.¹⁰

4 On remand after *Merchant I* and *II*, the district court did reconsider the issue
5
6 of remedies (R6-D13:20 and R7-D151:21-29). It is again notable that this Court
7
8 did not instruct the district court after *Merchant II* on what latitude it had with
9
10 regard to remedies, meaning that the district court retained all of its equitable
11
12 remedial discretion it had with any matter that comes before it. After the second
13
14 remand, the district court expressly revisited certain key aspects of the analysis of
15
16 to what extent remedies should be imposed for violations of the federal securities
17
18 laws. At trial, the district court felt strongly that Wyer and Beasley’s credibility
19
20 was unassailable and that they exhibited nothing but good faith in their conduct
21
22 and actions in forming and managing the Merchant RLLPs. The district court
23
24 remains convinced that the Merchant RLLPs were formed as truly viable business
25
26 enterprises and that in doing so, Defendants had no intent to deceive nor did they
27
28 act with severe recklessness. Rather, as instructed by this Court, the district court
29
30 has found that Defendants’ conduct violated the ordinary standards of care and that
31
32 they were merely negligent. Under such circumstances, a district court has wide
latitude in crafting remedies, if any.

¹⁰ Two of which were not even included in the SEC Complaint.

1 The SEC also wholly failed to demonstrate at trial that there is was a
2
3 likelihood of future violations of the federal securities laws by Wyer or Beasley.
4
5 With respect to the SEC's claims pursuant to § 17(a) of the Securities Act and/or §
6
7 10(b) of the Exchange Act and Rule 10b-5 promulgated there under, the SEC
8
9 failed to present a prima facie case that there had been any past violations by
10
11 Defendants and also failed to demonstrate the likelihood of any future violations.
12
13 Under § 20(b) of the Securities Act, 15 U.S.C. § 77t(b), and § 21(d) of the
14
15 Exchange Act, 15 U.S .C . § 78u(d), the district court has authority to enter an
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17 injunction only when the SEC establishes the following: (1) a prima face case of
18
19 previous violations of federal securities laws; and (2) a reasonable likelihood that
20
21 the wrong will be repeated. *SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195,
22
23 1199 n .2 (11th Cir. 1999).

24 After trial, the district court found that, “the SEC has failed to offer positive
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26 proof' that defendants have the "propensity" to violate the federal securities laws.
27
28 After remand from *Merchant II*, the district court found that, “Quite simply, after
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30 what has happened in this case, Defendants would have to be crazy to risk
31
32 incurring the wrath of the SEC again. There is simply no reason to believe that
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34 defendants will ever again engage in conduct that could conceivably be found to
35
36 violate the securities laws.” (R7-D151:24) In fact, the district court went one step

1 further and found that “the Court finds the conduct of the SEC in this matter much
2 more egregious than the conduct of defendants.” (R7-D151:24) See also *SEC v.*
3 *Blatt*, 583 F.2d 1325 (5th Cir. 1978); *SEC v. Bangor Punta Corp.*, 331 F. Supp.
4 1154, 1163 (S .D .N.Y. 1971). Although the SEC need not prove *scienter* with
5 respect to its claims under § 17(a)(2) and § 17(a)(3), *scienter* is relevant to whether
6 the district court should have enjoined Defendants from future violations of these
7 provisions. As the Supreme Court noted in *Aaron v. S.E.C.*, 100 S.Ct. 1945, 446
8 U.S. 680, 64 L.Ed.2d 611, Fed. Sec. L. Rep. P97,51:

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14 “An important factor in this regard is the degree of intentional wrongdoing
15 evident in a defendant's past conduct. Moreover, as the Commission
16 recognizes, a district court may consider *scienter* or lack of it as one of the
17 aggravating or mitigating factors to be taken into account in exercising its
18 equitable discretion in deciding whether or not to grant injunctive relief. And
19 the proper exercise of equitable discretion is necessary to ensure a "nice
20 adjustment and reconciliation between the public interest and private needs."
21 *Aaron*, 446 U.S. at 701 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329
(1944)).

22 The district court has broad equitable powers to fashion appropriate
23 remedies in SEC civil enforcement actions where it is shown that violations of the
24 federal securities laws have occurred, including ordering culpable defendants to
25 disgorge any ill-gotten gains generated from their violations. *S.E.C. v. Lorin*, 76
26 F.2d 458, 461-62 (2nd Cir. 1996). The primary purpose of disgorgement as a
27 remedy for violation of the securities laws is to deprive violators of their ill-gotten
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1 gains. *SEC v. Wang*, 944 F.2d 80, 85 (2nd Cir. 1991). District courts have broad
2 discretion, however, in determining both whether to order disgorgement and the
3 amount to be disgorged, if any. *S.E.C. v. First Jersey Securities, Inc.*, 101 F.3d
4 1450, 1474-75 (2nd Cir. 1996). As the district court emphasized below in this
5 action, district courts enjoy so much latitude in these matters that a decision not to
6 order disgorgement should not be disturbed by an appellate court unless it is
7 established that the district court abused its discretion. See, e.g., *S.E.C. v. First*
8 *Jersey Securities*, 101 F.3d at 1475; *S.E.C. v. Posner*, 16 F.3d 520, 522 (2nd Cir.
9 1994).

10
11 It is also not without precedent that a district court rejects the SEC's request
12 for relief in civil enforcement cases, depending on the facts of a given case. In
13 *S.E.C. v. Pasternak*, 561 F.Supp.2d 459 (D.N.J., 2008), the trial court found that
14 "Throughout the trial, although given ample opportunity, the SEC failed to solidify
15 its theory of the case, or present sufficient evidence to establish any element
16 required by the various statutes it invokes in its Amended Complaint. The Court,
17 therefore, finds in favor of Defendants and against the SEC." *S.E.C. v. Pasternak*,
18 *Id.*

19
20 *S.E.C. v. Slocum, Gordon & Co.*, 334 F.Supp.2d 144 (D.R.I., 2004) is a case
21 where the court determined, although there were technical, non-deliberate

1 violations of the federal securities laws, little if any remedies as prayed for by the
2 SEC were warranted.
3

4 In *Slocum*, the Court found a violation of §§ 206(2) and 206(4) of the
5 Advisers Act and Rule 206(4)-2(a)(2) issued there under. The SEC requested a
6 permanent injunction enjoining defendants from engaging in further violations of
7 federal securities laws. The legal standard applied to determine whether injunctive
8 relief was warranted was whether there was a reasonable likelihood that the
9 defendants would engage in future violations of the law. In order for a court to
10 issue a permanent injunction "[t]here must be `some cognizable danger of recurrent
11 violation, something more than the mere possibility which serves to keep the case
12 alive.'" *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed.
13 1303 (1953)). Relevant factors to consider when assessing whether a future
14 violation is likely are (1) whether the defendant's violation was part of a pattern or
15 an isolated incident; (2) whether a violation was deliberate or merely technical in
16 nature; and (3) whether the defendant's business will present opportunities for
17 future violations of the law. *Id.* (citing *SEC v. First City Fin. Corp.*, 890 F.2d 1215,
18 1228 (D.C.Cir.1989)). In *Slocum*, the court evaluated these factors and found that
19 a permanent injunction against defendants was unnecessary. Like here, the court in
20 *Slocum* found the only securities violations were non-*scienter* based, technical
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1 violations. The SEC was unable to demonstrate that defendants were aware of their
2 violations and that when they were informed of a potential violation, the
3 defendants took every step possible to rectify the situation as quickly as possible.
4 Finally, in terms of remedies, the court in *Slocum* found that “In light of the
5 evidence presented, the Court imposes a civil penalty of \$1,000 against SG & C for
6 each respective violation. Although one course of conduct resulted in Defendants’
7 violation of both §§ 206(4) and Rule 206(4)-2(a)(2), this writer considers each
8 provision violated, and imposes separate civil penalties. Thus, in light of the three
9 independent violations by SG & C, the Court imposes a \$3,000 civil penalty on the
10 firm for its infractions. Because Defendants’ violations were not willful, and as no
11 actual loss to clients resulted, the court finds that this nominal penalty is
12 appropriate.” *S.E.C. v. Slocum, Gordon & Co, Id.* at 169-170.

13
14 Here, the SEC is clearly aggrieved by the district court’s determinations on
15 remedies. However, there are many situations not unlike the case at bar, where trial
16 courts have determined that disgorgement is not appropriate, monetary penalties
17 should be nominal and where no permanent injunctive relief is warranted. This is
18 such a case. Recently in *SEC v. Smath*, 277 F. Supp. 2d 186 (E.D.N.Y. 2003), the
19 district court determined “that trial courts have broad discretion not only in
20 determining whether or not to order disgorgement but also in calculating the

1 amount to be disgorged." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474-75
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3 (2d Cir. 1996) (citing *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 1996) (per curiam));
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5 see also *SEC v. Patel*, 61 F.3d 137, 140 (2d Cir. 1995) (holding "district courts
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7 must be given wide latitude" in deciding the amount of disgorgement). Further-
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9 more, the district court has discretion whether or not to impose a civil penalty "in
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11 light of the facts and circumstances" of the case at bar. 15 U.S.C. § 78u-1(a)(2); see
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13 also *SEC v. Moran*, 944 F. Supp. 286, 296-297 (S.D.N.Y. 1996) ("Considering the
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15 discretionary nature of the civil penalty framework, prior decisions and consent
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17 decrees are of little comparative value for any individual matter."). The district
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19 court in *Smath, id.* ruled that "[T]hus, this Court has discretion to determine
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21 whether or not to award disgorgement and civil penalties and the amount to award
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23 for each. In this case, enough is enough. Similarly as in *Smath*, enough is enough
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25 in this case as well. See also, *SEC v. Gann*, No. 3:05-CV-0063-L, 2008 WL
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27 857633, at *12 (N.D. Tex. Mar. 31, 2008) (denying the SEC's request for a
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29 maximum third-tier penalty based on evidentiary findings during trial, finding a
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31 lower penalty "adequate and consistent with the evidence adduced at trial and with
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the purpose of the statute"); *SEC v. Snyder*, No. H-03-04658, 2006 U.S. Dist.
LEXIS 81830, at *33-37 (S.D. Tex. Aug. 22, 2006) (denying SEC request for civil
penalties based upon failure of the Commission to assert facts satisfying

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1 discretionary factors utilized by district courts) (citing *SEC v. Lybrand*, 281 F.
2 Supp. 2d 726, 730 (S.D.N.Y. 2003)¹¹; cf. *SEC v. Slocum, Gordon & Co.*, 334 F.
3 Supp. 2d 144, 186 (D.R.I. 2004) (denying SEC's request for maximum civil
4 penalties where statutory burden not met under § 209(e) of the Investment
5 Advisers Act of Act of 1940).
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9 CONCLUSION

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11 At trial, the district court considered all of the SEC's evidence presented in
12 support of its request for remedies, including disgorgement. The witnesses
13 included extensive testimony by Wyer and Beasley, the two principals of
14 Merchant. After six days of testimony, including many hours of deposition
15 testimony tendered by the SEC, the district court reached a firm conclusion, which
16 it has never wavered from, that there was insufficient evidence to suggest that
17 Defendants' conduct, and the results of the securities violations, warrant
18 disgorgement of any ill-gotten gains or the need for permanent injunctive relief.
19 After trial, the district court made it quite clear that even if securities violations
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26 ¹¹ In *Lybrand, supra*, the court articulated many of the factors ordinarily considered by trial
27 courts in fashioning equitable remedies in cases where defendants are found to have violated
28 federal securities laws. "In evaluating the facts and circumstances of the case, courts weigh
29 factors including: (1) the egregiousness of the violations at issue, (2) [the degree of] defendants'
30 *scienter*, (3) the repeated nature of the violations, (4) defendants' failure to admit to their
31 wrongdoing; (5) whether defendants' conduct created substantial losses or the risk of substantial
32 losses to other persons; (6) defendants' lack of cooperation and honesty with authorities, if any;
and (7) whether the penalty that would otherwise be appropriate should be reduced due to
defendants' demonstrated current and future financial condition.

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1 were found in this case, the district court would nevertheless exercise its discretion
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3 under the facts presented and deny the SEC's request for such relief.

4 It is clear that a decision to impose a penalty, and the amount of any such
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6 penalty, lies within the discretion of the district court. See 15 U.S.C. § 78u(d)(3); 1
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8 5 U.S.C. §77t(d)(1). District courts are not required to impose such penalties and
9
10 no minimum penalty is mandated by the statute. The Securities Act and
11
12 Exchange Act simply provide tiered categories establishing limitations which
13
14 the penalties may not exceed. 15 U.S.C. § 78u(d)(3)(B); 15 U.S.C. §77t(d)(2).
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16 These limitations, and ultimately the determination of whether to impose penalties
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18 at all, are guided by the district court's analysis of the underlying facts and
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20 circumstances. The intent of the Defendants strongly influences, if not controls,
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22 such determinations. 15 U.S.C. § 78u(d)(3)(B); 15 U.S.C. §77t(d)(2).

23 Even after remand of *Merchant I* and *II*, the district court has specifically
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25 found that Defendants' conduct did not evidence the requisite fraud, deceit,
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27 manipulation, or deliberate or reckless disregard of regulatory requirements to
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29 support imposition of any significant monetary penalties. Nor have the factual
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31 findings below sufficiently shown that disgorgement as requested by the SEC in
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the amount of approximately \$7.5 million dollars is warranted or even equitable.
No compelling showing has been made to justify the imposition of money

1 penalties beyond those included in the district court's post-remand Order of July
2 28, 2009. The basis of these rulings by the district court is the clear, unmistakable
3 factual findings repeatedly made by the district court throughout this entire
4 proceeding, which is that the evidence presented at trial shows that Defendants
5 were acting at all times in good faith and with neither the intent to deceive nor
6 severe recklessness.
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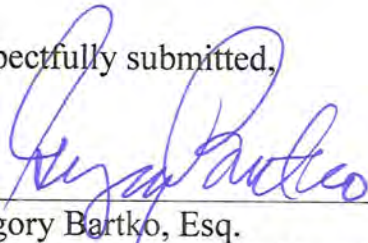
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11 Defendants encourage this Court to keep certain basic principals in mind on
12 this third appeal. The SEC as plaintiff in this civil enforcement action carries the
13 burden of proof on its claims. This case was well tried below; there was a full and
14 fair opportunity for the SEC to bring forward sufficient, reliable evidence in
15 support of the entirety of its claims. The district court, having sifted through the
16 evidence, listened to the witnesses called by the parties, determined the credibility
17 of those witnesses, has been steadfast in its opinions that the Defendants' conduct
18 at all times with regard to Merchant and the RLLPs, was in good faith and without
19 *scienter*,
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25 The SEC has had its day in court and has failed to establish all elements
26 needed to show that Defendants violated the anti-fraud provisions of the federal
27 securities laws with *scienter* and that, with regard to the violations of § 5 of the
28 Securities Act, remedies as prayed for by the SEC in its Complaint are warranted.
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1 It is important to accept the established fact that the RLLP interests marketed by
2
3 Merchant, Wyer and Beasley were never found to be “securities” by any court of
4
5 competent jurisdiction, until this Court reversed and remanded the district court’s
6 findings in *Merchant I*, some three years after the alleged § 5 violations.

7
8 Dated this 21st day of December, 2009.

9
10 Respectfully submitted,

11
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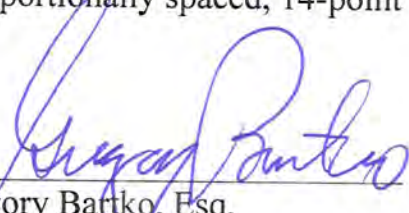
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b); it contains 13,880 words, including all parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. Rule 32-4. I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word Times New Roman Font in a proportionally spaced, 14-point typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2009, I caused the requisite number of copies of the foregoing brief of the Appellees, Merchant Capital, LLC, Steve C. Wyer and Kurt V. Beasley to be filed with the Clerk of the Court and also caused two copies of the brief to be served by Federal Express on counsel for the Appellant, United States Securities and Exchange Commission, addressed as follows:

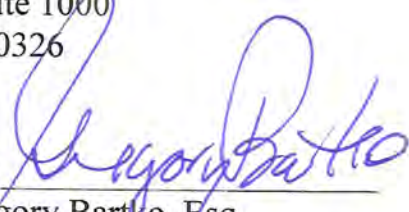
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