

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re

ZYMERGEN INC.,<sup>1</sup>

Liquidating Debtor.

Chapter 11

Case No. 23-11661 (KBO)

**Re: D.I. 512**

**NOTICE OF FILING OF ADDITIONAL DOCUMENTS PURSUANT TO ORDER  
APPROVING THE STIPULATION BETWEEN THE ZYM LIQUIDATING TRUST  
AND U.S. SECURITIES AND EXCHANGE COMMISSION (D.I. 512)**

**PLEASE TAKE NOTICE** that Neal Goldman, solely in his capacity as liquidating trustee (the “Liquidating Trustee”) of the ZYM Liquidating Trust (the “Liquidating Trust”), the successor in interest to the above-captioned debtor, by and through his undersigned counsel, hereby files this notice pursuant to the *Order Approving the Stipulation Between the ZYM Liquidating Trust and U.S. Securities and Exchange Commission (D.I. 512)* (the “Stipulation Approval Order”).

**PLEASE TAKE FURTHER NOTICE** that attached hereto as **Exhibit A** are the Additional Documents, including the *Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order* issued by the SEC on September 13, 2024.<sup>2</sup>

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<sup>1</sup> This chapter 11 case is now being administered by the ZYM Liquidating Trust, pursuant to the terms of the Liquidating Debtors’ *First Amended Joint Chapter 11 Plan of Liquidation* [D.I. 372-1]. The ZYM Liquidating Trust’s mailing address is 500 East Broward Boulevard, Ste 1700, Fort Lauderdale, FL 33394.

<sup>2</sup> Undefined terms used herein shall have the meaning ascribed to them in the *Motion of ZYM Liquidating Trust for Entry of an Order Approving Stipulation Between the ZYM Liquidating Trust and U.S. Securities and Exchange Commission (D.I. 500)*.

**PLEASE TAKE FURTHER NOTICE** that, pursuant to the Stipulation Approval Order, parties may object to the Additional Documents (other than the amount of the SEC Claim if such claim is no greater than \$30 million) by filing such objection with the Clerk of Court, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801 and serving it upon the Liquidating Trust, on or before **October 1, 2024 at 4:00 p.m. (Prevailing Eastern Time)** (the “Response Deadline”).

**PLEASE TAKE FURTHER NOTICE** that if an objection is timely filed and properly served and not withdrawn or resolved, the Liquidating Trust shall schedule a hearing on such objection on at least seven (7) days’ notice to such objecting party.

**PLEASE TAKE FURTHER NOTICE** that to the extent an objection is filed, the Liquidating Trustee reserves all rights to object or otherwise respond on any or all grounds as may be applicable.

**IF NO OBJECTIONS TO THE ADDITIONAL DOCUMENTS ARE TIMELY FILED, SERVED AND RECEIVED IN ACCORDANCE WITH THIS NOTICE, THE ADDITIONAL DOCUMENTS SHALL BE DEEMED APPROVED WITHOUT FURTHER NOTICE OR ORDER OF THE COURT.**

*[Signature Page to Follow]*

Dated: September 17, 2024  
Wilmington, Delaware

**MORRIS, NICHOLS, ARSHT & TUNNELL LLP**

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**Exhibit A**

**Additional Documents**

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES ACT OF 1933**  
**Release No. 11303 / September 13, 2024**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-22112**

**In the Matter of**

**ZYMERGEN INC.**

**Respondent.**

**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) against Zymergen Inc. (“Zymergen” or “Respondent”).

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### Summary

1. These proceedings arise from Zymergen's misrepresentations and omissions during and after its initial public offering ("IPO") in April 2021. Zymergen was a biotechnology company focused on the manufacture of novel materials, including optical films used in electronic screens. From at least March to August 2021, Zymergen misled investors about its lone developed product's market opportunity, revenue prospects, and customer pipeline.

2. Leading up to and continuing after Zymergen's IPO, which raised about \$530 million from investors, Zymergen misleadingly touted a large market opportunity for its sole commercially available product, an electronics film called Hyaline. Zymergen estimated that Hyaline had a \$1 billion display market in 2020, the year before the IPO. Its finance team calculated this market opportunity by making certain assumptions about the size of Hyaline's possible markets as well as the pricing that customers would be willing to pay. These assumptions were inconsistent with analysis conducted by Zymergen's sales team responsible for marketing and selling Hyaline. However, even after the sales team provided its separate analysis, Zymergen failed to reassess the market opportunity it described to investors.

3. Zymergen also misled investors about its overall revenue potential. Leading up to the IPO, Zymergen distributed revenue projections to research analysts so those analysts could create their own financial models that would be communicated to investors. Zymergen described its revenue projections as conservative when, in reality, the projections lacked a reasonable basis and were materially higher than the high-confidence projections initially prepared by Zymergen's own sales team.

4. Finally, Zymergen misled investors about the strength of Hyaline's customer pipeline and future sales during the company's first post-IPO earnings call held on May 24, 2021. During the call, research analysts asked for an update on the status of the customers who were evaluating Hyaline. Zymergen responded that the progress of customer testing of Hyaline and customer feedback were positive and in line with expectations. These statements omitted adverse facts known to Hyaline's sales team indicating that the late-stage customer pipeline experienced significant technical and commercial challenges over the first half of 2021, and that multiple significant customers were either delayed in their qualification process, had dropped out of the pipeline, or indicated that they were likely to do so. Nor did these comments reflect the rising concern within the company over the weeks and days preceding the earnings call about whether any of Hyaline's late-stage customers would purchase significant amounts of Hyaline in 2021.

5. Through the above conduct and material misstatements, Zymergen violated Sections 17(a)(2) and 17(a)(3) of the Securities Act.

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

### **Respondent**

6. **Zymergen Inc.** was incorporated in Delaware with its principal place of business in Emeryville, California. Zymergen was a biotechnology company focused on the manufacture of novel materials for use in the subsequent manufacturing of other products. Zymergen's common stock was previously registered with the Commission under Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and traded on the NASDAQ Global Select Market under the symbol "ZY" from April 22, 2021 until October 19, 2022. At all relevant times, Zymergen was required to file periodic reports with the Commission pursuant to Section 13(a) of the Exchange Act. On October 3, 2023, Zymergen filed a voluntary petition for relief under Chapter 11 of the U.S. Bankruptcy Code. After the U.S. Bankruptcy Court for the District of Delaware confirmed Zymergen's Plan of Liquidation in February 2024, Zymergen's assets and liabilities were transferred to a Liquidating Trust.

### **Background**

7. Zymergen was founded in 2013 for the purpose of replacing petroleum-based products with biobased products, chemicals, and materials. Zymergen required hundreds of millions of dollars in capital to finance the development and manufacturing of its products. From 2013 through the fall of 2020, Zymergen raised over \$800 million through private offerings. At the time of its IPO, Zymergen had developed one commercially available product called Hyaline, a film designed for electronics companies to use for display touch sensors in personal devices and other applications.

8. After the conclusion of its Series D private offering in the fall of 2020, Zymergen was rapidly burning through cash. At that time, Zymergen planned to raise at least one more private round of fundraising before going public. It initially planned to conduct an IPO after Hyaline generated substantial revenue. But in late 2020 and early 2021, when Zymergen needed capital and even though Hyaline had not yet produced any revenue for the company, Zymergen decided to pursue an IPO on an expedited basis because it viewed the capital markets as favorable.

9. On March 23, 2021, Zymergen filed a registration statement and prospectus on Form S-1 to register its common stock. An amended version of the Form S-1 was declared effective on April 21, 2021. Zymergen's IPO closed on April 26, 2021 and raised approximately \$530 million in proceeds.

10. On April 23, 2021, Zymergen filed a registration statement and prospectus on Form S-8 to register certain of its common stock and stock options issued or to be issued to certain of its directors, officers, and employees under incentive compensation plans.

11. Zymergen's misleading conduct and statements related to Hyaline's market opportunity, revenue prospects, and customer pipeline occurred and were made at the time securities were being offered and sold pursuant to Zymergen's Forms S-1 and S-8 registration statements.

**Misrepresentations Concerning Hyaline's Market Opportunity**

12. In its Form S-1, Zymergen made representations regarding the market opportunity and risks for Hyaline. Specifically, Zymergen represented that although Hyaline had not yet generated sales, “we estimate that the display market alone for Hyaline was over \$1 billion in 2020 . . . .” Because Hyaline was the first commercially available product created by Zymergen’s biofacturing platform, this estimate provided investors with an important datapoint to assess the potential scale of Zymergen’s revenues.

13. Zymergen knew or should have known its statements concerning the \$1 billion display market opportunity were materially misleading and lacked a reasonable basis. Zymergen’s finance team developed the \$1 billion figure in early January 2021 by estimating the size of Hyaline’s display market opportunities and the prices at which those products would sell. Then they multiplied the estimated market sizes by the estimated pricing to calculate the total Hyaline display market opportunity. Although these finance employees consulted with Hyaline’s sales team, the finance team had no role in the marketing or sales of Hyaline and had no firsthand knowledge or expertise about Hyaline’s markets or appropriate pricing.

14. Hyaline was an optical film specifically designed for the flexible electronic device market, including foldable devices with touch screens. The \$1 billion figure was misleading because it included product markets that the sales team was not targeting and/or that were poor fits for Hyaline’s technical characteristics. Specifically, the estimate included the rigid-touch-sensors market and fingerprint-on-display market, which together comprised over 99 percent of the \$1 billion market opportunity figure provided in the Form S-1. No member of Zymergen’s sales team reviewed this assumption, nor did the information provided by the sales team support the inclusion of these markets. In fact, the sales team knew that past attempts to sell Hyaline in these markets had already failed after customers found Hyaline was either too expensive, unnecessary, or both. Thus, Hyaline’s customer pipeline maintained by the sales team did not list any customer that was testing the product for either the rigid-touch-sensors market or the fingerprint-on-display market as of the end of 2020. Despite this information, Zymergen included these markets in the \$1 billion figure provided to investors.

15. The \$1 billion figure was also misleading because it relied on product pricing assumptions that were unreasonable and at odds with the company’s own internal sales analyses. When developing the \$1 billion display market opportunity figure included in the Form S-1, Zymergen’s finance team assumed pricing that was three to five times higher than the pricing for similar products at that time. For example, the finance team assumed that Hyaline could be sold at a price of \$100 per square meter in the two aforementioned markets—rigid-touch-sensors and fingerprint-on-display—even though the sales team knew that in those markets the dominant films were priced at approximately \$20 per square meter. The price assumed by the finance team was a premium price that the sales team believed customers might pay for Hyaline in smaller specialty markets, such as the flexible and foldable films markets where there were not low-priced, strong incumbent films.

16. Beginning in mid-January and through mid-February 2021, the sales team separately prepared internal analyses that calculated the display market opportunity for Hyaline. These analyses used product prices that reflected actual pricing realities and excluded the two markets (rigid-touch-sensor and fingerprint-on-display) that were deemed not likely to be a good

fit for Hyaline. According to the sales team's analyses, the total display market opportunity for Hyaline in 2021 was approximately \$42 million to \$100 million—or approximately 5 to 10 percent of the \$1 billion market opportunity for 2020 presented in the Form S-1.

17. Despite the material differences between the finance and sales teams' market opportunity analyses, Zymergen failed to implement a reasonable process to reconcile the two figures. Likewise, between the time Zymergen initially developed its estimates in early January 2021 and the publication of the Form S-1 in March 2021, Zymergen failed to assess whether the \$1 billion market opportunity estimate remained accurate.

### **Misleading Revenue Projections**

18. In February 2021, Zymergen held meetings with research analysts who regularly published reports to investors on publicly-traded companies. Zymergen's goal in these meetings was to educate the analysts on Zymergen's business. Zymergen expected the analysts would report on Zymergen after the IPO and that they would also speak with and provide information to investors during Zymergen's roadshow.

19. Zymergen's financial model and its projections for revenue, profits, and cash flow for 2022 and 2023 were important benchmarks that investors used to value Zymergen's stock.

20. To enable the analysts to build their own models, Zymergen provided them with an internal financial model that included revenue projections for Zymergen's products for 2021 through 2025. Zymergen also met with analysts to describe the model, provide context for the projections, and answer questions. Because Zymergen was a pre-revenue company, its internal financial estimates were important to analysts in building their own models. When analysts subsequently shared their models with investors, those investors knew that the analysts' models were built using information that Zymergen provided to the analysts but could not provide to investors directly.

21. To create Zymergen's internal financial model, Zymergen's finance team requested that the sales team provide its highest-confidence revenue projections based on a detailed, customer-by-customer analysis and assessment of potential market share. In response, the sales team provided projections indicating that revenues for 2021, 2022, and 2023 were approximately 60–70% lower than management's prior projections in September 2020.

22. In response to the sales team's projections, Zymergen's finance team reduced by approximately half the 2021 estimate provided but requested that the sales team target revenue projections that were significantly higher than the highest-confidence projections by the sales team for 2022 and 2023. These revised figures were more in-line with the prior projections from the fall of 2020. After receiving these targets, the sales team complied with the finance team's request and significantly increased (in some instances, more than doubled) its previous highest-confidence projections for 2022 through 2025, increasing total revenues for those years by approximately \$740 million. The finance team subsequently increased these figures even further before providing the final numbers to analysts.

23. Zymergen described these projections as "conservative" to analysts and suggested in the meetings that it had with the analysts that there were multiple ways the company could

exceed the projections. Zymergen did not disclose to analysts that the revenue projections for 2022 through 2025 were materially higher (sometimes double or more) than the highest-confidence projections originally provided by the sales team. Analysts subsequently published and provided models to investors that substantially mirrored the higher projections provided by the company. In light of the unreasonable process used to develop these projections, Zymergen knew or should have known that the financial model and revenue numbers that it provided to analysts and characterized as “conservative” were misleading.

### **Misrepresentations During Zymergen’s First Quarter 2021 Earnings Call**

24. On May 24, 2021, Zymergen held its first earnings call as a public company. During the call, research analysts asked about the current status of Zymergen’s customer pipeline and requested an “update on the number of customers evaluating” Hyaline and “where your customers are in evaluation process.” Among other things, the company responded by noting that “customer market feedback during the product qualification process has been positive,” and customer qualification was “progressing in line with expectations.” Zymergen also stated that it “continue[d] to strengthen the pipeline” of customers.

25. These statements were materially misleading. Leading up to the earnings call, the company’s internal reports and communications reflected growing concern and materially adverse information regarding the sales pipeline, customer qualification process, and overall revenue prospects and market for Hyaline. For example, internal documents prior to the earnings call indicated that several of the company’s key customers were delaying purchases of Hyaline and/or dropping out of the pipeline altogether due to technical issues that arose in the qualification process. At least three major customers dropped out of the short-term revenue pipeline due to technical issues and delays in qualification, and another large customer indicated that it was purchasing a competitor’s product instead of Hyaline. Additionally, the company’s internal customer tracking documents indicated that the then-current display market for Hyaline was very small and that the company’s projections for Hyaline revenue continued to decline significantly.

26. Zymergen’s disclosure review process leading up to the earnings call did not reasonably reflect or address this adverse information available to the company. Nor did the company’s public statements appropriately reflect the steady stream of negative information. As a result, the company’s statements during the May 24, 2021 earnings call misled investors and created a misleading, positive impression of the state of Hyaline’s customer pipeline and overall prospects.

### **Subsequent Developments**

27. On August 3, 2021, Zymergen issued a press release and Form 8-K disclosing adverse facts concerning Hyaline’s deteriorating pipeline and technical issues with the product. The disclosures noted that “the Company no longer expects product revenue in 2021, and expects product revenue to be immaterial in 2022.” Zymergen also announced that its former CEO had separated from the company and resigned from the Board of Directors. On this news, Zymergen’s stock price declined approximately 76%.

28. On November 3, 2021, Zymergen announced the discontinuation of all but one of its products, including Hyaline.

29. On July 24, 2022, Zymergen signed an agreement to be acquired by a competing biotechnology company at terms that valued Zymergen at approximately \$300 million, which was about 10 percent of the company's valuation at the time of the IPO. That acquisition was completed on October 19, 2022.

30. On October 3, 2023, Zymergen filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware, Case No. 23-11661 (Bankr. D. Del.) (the "Delaware Bankruptcy").

### **Violations**

31. As a result of the conduct described above, Zymergen violated Section 17(a)(2) of the Securities Act, which proscribes, in the offer or sale of a security, obtaining "money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." In addition, Zymergen also violated Section 17(a)(3) of the Securities Act, which proscribes, in the offer or sale of a security, engaging "in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." A violation of these provisions does not require scienter and may rest on a finding of negligence. *See Aaron v. SEC*, 446 U.S. 680, 685 & 701-02 (1980).

### **Zymergen's Cooperation**

32. In determining to accept the Offer, the Commission considered cooperation afforded the Commission staff by Respondent.

### **Undertakings**

33. Zymergen (including its post-bankruptcy successor or representative, officers, directors, and employees, and third-party consultants within Zymergen's control, provided that the Liquidating Trustee of the ZYM Liquidating Trust shall have no personal liability for the Undertakings set forth in this Order, including with respect to the undertakings set forth in this paragraph 33), shall, until the termination of the ZYM Liquidating Trust, subject to the availability of funds in the ZYM Liquidating Trust to do so, continue to cooperate fully with the Commission with respect to this action and to any related judicial proceeding, administrative proceeding, or investigation commenced by the Commission or to which the Commission is a party, subject to compliance with applicable law. Zymergen agrees that such cooperation shall include, but is not limited to:

- a. **Production of Information:** at the Commission's request, upon reasonable notice, and without subpoena, Zymergen shall truthfully and completely disclose all information in its possession reasonably requested by the Commission staff in connection with this action or any related investigation, litigation, or other proceeding commenced by the Commission or to which the Commission is a party.

b. Production of Documents: at the Commission's request, upon reasonable notice, and without subpoena, Zymergen shall provide any document, record or other tangible evidence in its possession reasonably requested by the Commission staff in connection with this action or any related investigation, litigation, or other proceeding commenced by the Commission or to which the Commission is a party.

c. Production of Cooperative Personnel: at the Commission's request, upon reasonable notice, and without subpoena, Zymergen shall secure the attendance and truthful statements, deposition, or testimony of any Zymergen officer, director, or employee or third-party consultant within Zymergen's control, excluding any person who is a party to any related litigated judicial or administrative proceeding, at any meeting, interview, testimony, deposition, trial, or other legal proceeding commenced by the Commission or to which the Commission is a party. At the Commission's request, Zymergen shall also use its best efforts to secure the attendance and truthful statements, deposition, or testimony of any former Zymergen officer, director, or employee, excluding any person who is a party to any related litigated judicial or administrative proceeding, at any meeting, interview, testimony, deposition, trial, or other legal proceeding commenced by the Commission or to which the Commission is a party.

The foregoing obligations are subject to Zymergen's reservation of rights: (i) to claim that documents or information requested is subject to attorney-client privilege, attorney work-product protection, or other applicable protection; and (ii) to seek entry of a confidentiality order as to: sensitive business documents or information; sensitive personnel documents or information; or confidential information pertaining to parties other than Zymergen; and

d. Service and Personal Jurisdiction Consents: Zymergen further agrees that, with respect to this action and any related judicial proceeding, administrative proceeding, or investigation commenced by the Commission or to which the Commission is a party, it will: (i) accept service by email, mail, or facsimile transmission of notices, requests, or subpoenas issued by the Commission for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by the Commission staff ("Commission Service"); (ii) appoint Zymergen's counsel as agent to receive Commission Service; (iii) with respect to Commission Service, waive the territorial limits upon service contained in Rule 45 for the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Zymergen's travel, lodging, and subsistence expenses at the then-prevailing U.S. Government per diem rates; and (iv) consent to personal jurisdiction over Zymergen in any United States District Court for purposes of enforcing any Commission Service.

In determining whether to accept the Offer, the Commission has considered these undertakings.

#### IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Zymergen's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act, Respondent Zymergen cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

B. Respondent shall comply with the undertakings enumerated in Section III above.

C. Respondent shall pay a civil money penalty of \$30,000,000 to the Securities and Exchange Commission, which amount shall be allowed as a Class 3 General Unsecured Claim under Respondent's First Amended Joint Chapter 11 Plan of Liquidation dated February 1, 2024 (the "Plan") and treated as set forth in the Order Approving the Stipulation Between the ZYM Liquidating Trust and U.S. Securities and Exchange Commission issued by the U.S. Bankruptcy Court for the District of Delaware and dated June 10, 2024 (D.I. 512-1) (the "Stipulation"). Payment shall be made in the following installments: Respondent, through the ZYM Liquidating Trust (the "Liquidating Trust"), shall pay \$5,000,000 to the Commission promptly upon Bankruptcy Court approval of the Offer, as set forth in the Stipulation; and the Liquidating Trust shall also make subsequent distributions under the Plan to the Commission as set forth in the Stipulation up to \$30,000,000. Upon the termination of the Liquidating Trust and following the distribution of the remaining Liquidating Trust Assets in accordance with Section 10.2 of the Liquidating Trust Agreement, the Commission will forgo any further distributions on unpaid penalties and the Commission Claim (as defined in the Stipulation).

D. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

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

Payments by check or money order must be accompanied by a cover letter identifying Zymergen as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Jason H. Lee, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, Suite 2800, San Francisco, CA 94104.

E. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund is created for the penalties referenced in paragraphs C–D above. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent’s payment of a civil penalty in this action (“Penalty Offset”). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission’s counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a “Related Investor Action” means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman  
Secretary