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APPENDIX

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SWAN ENERGY, INC., BRANDON DAVIS, JOHN SCHIFFNER, and CODY DAVIS Plaintiffs Below, Appellants, v. INVESTOR PROTECTION UNIT OF THE DELAWARE DEPARTMENT OF JUSTICE, Defendant Below, Appellee.	No. 331, 2025 Court Below: Superior Court of the State of Delaware C.A. No. N24C-03-071

Submitted: April 22, 2026
Decided: July 16, 2026

Before **TRAYNOR**, **LEGROW**, and **GRIFFITHS**, Justices.

Upon appeal from the Superior Court. **AFFIRMED**.

Travis J. Ferguson, Esquire, MCCARTER & ENGLISH, LLP, Wilmington, Delaware, Dean A. Elwell, Esquire, (*argued*), MCCARTER & ENGLISH, LLP, Boston, Massachusetts, *for Plaintiffs Below, Appellants*.

Ian R. Liston, Esquire, (*argued*), Lindsay Nasshorn, Esquire, DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware, *for Defendant Below, Appellee*.

TRAYNOR, Justice:

The Investor Protection Unit of the Delaware Department of Justice brought an administrative enforcement action against a corporation and four individuals, charging them with securities fraud and the unlawful sale of unregistered securities. After some procedural wrangling, four of the five respondents in the administrative action became the plaintiffs in this declaratory judgment action. They asked the Superior Court to declare that the administrative action and the statute under which it was brought violated their right to trial by jury as guaranteed by Article I, Section 4 of the Delaware Constitution. The plaintiffs also asked the court to declare that the process employed by the Investor Protection Unit and—in particular, the unit's "refusal to provide [them] access to past decisions"[1]—was violative of their due process rights under Sections 7, 8, and 9 of Article I of the Delaware Constitution.

The Superior Court dismissed the plaintiffs' complaint, concluding that the plaintiffs did not have a right to trial by jury in the administrative proceeding and that their due-process claim was not ripe for adjudication.[2] In this opinion, we explain why the trial court's decision was correct.

Our analysis of the plaintiffs' claim that they are entitled to a trial by jury is driven by our recent decision in *Blue Beach Bungalows DE, LLC. v. State of Delaware*.[3] In that case, we held that when, as here,

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[1] App. to Opening Br. at A26.

[2] *Swan Energy, Inc. v. Inv. Prot. Unit of the Delaware Dep't of Just.*, 341 A.3d 1036 (Del. Super. Ct. 2025).

[3] 351 A.3d 1007 (Del. 2025) [hereinafter *Blue Beach*].

a litigant claims a jury-trial right in an action based on a statute that does not itself provide for the right, trial by jury is available only if the cause of action is "sufficiently analogous to a cause of action to which the right to a jury at common law historically attached."[4] As we will explain, the Investor Protection Unit's administrative action against the plaintiffs does not have a sufficient analog at common law.

Nor do we find merit in the plaintiffs' due-process challenge. The plaintiffs acknowledge that, to the extent they are challenging the operation of the statute under the particular circumstances of this case—that is, an as-applied challenge—it is unripe for adjudication. They therefore characterize their objection to the statute as a facial challenge; they say that the statute cannot function in accordance with constitutional strictures under any set of circumstances. Viewed as such, their due-process claim is ripe, or so the plaintiffs contend, and the Superior Court erred by holding otherwise.

As we read the record, the plaintiffs framed their due-process challenge in the Superior Court as an as-applied challenge, and the court correctly dismissed it as unripe. But even if we were to accept that the plaintiffs mounted a facial challenge, their failure to demonstrate that the statute is unconstitutional in all its applications warrants dismissal of that claim. Consequently, we affirm the Superior Court's judgment.

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[4] *Id.* at 1034.

I

A

The Delaware Securities Act (the "Act"), which is found in Title 6 of the Delaware Code, was enacted in 1973.[5] The Act is a "Blue Sky Law" that "requires registration of securities offered or sold here, states that certain representations are unlawful, creates a registration procedure for broker-dealers and investment advisors, and provides for administration by the Attorney General or a designated Deputy."[6]

Section 73-201 of the Act provides, in pertinent part:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> (1) To employ any device, scheme or artifice to defraud;
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Section 73-202 of the Act prohibits the offer or sale of any security in Delaware unless (1) it is registered

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[5] 59 Del. Laws. ch. 208 (1973).

[6] *Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977), *overruled in part on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

under the Act, (2) the security or transaction is exempted under § 73-207 of the Act, or (3) it is a "federal covered security" for which a notice filing has been made under the provisions of § 73-208 of the Act.

In 1991, the General Assembly amended the Act to, among other things, state its purpose:

> The purpose of the Delaware Securities Act is to prevent the public from being victimized by unscrupulous or overreaching broker-dealers, investment advisers or agents in the context of selling securities or giving investment advice, as well as to remedy any harm caused by securities law violations. This prophylactic and remedial purpose shall be deemed of paramount importance in the interpretation of the provisions of this Act and particularly in any judicial review of sanctions or penalties imposed by the Securities Commission and of motions or requests by persons affected to stay such sanctions or penalties.[7]

Under the original version of the Act, the designated Deputy acted as Securities Commissioner and was the principal executive officer of a Division of Securities of the Department of Justice. The General Assembly revised this nomenclature in 2013.[8] Section 73-102 of the Act now provides:

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[7] 68 Del. Laws ch. 181, § 17(b) (1991) (previously codified at 6 *Del. C.* § 7301). In 2023, § 7301 was amended to reflect coverage of investment adviser representatives and the change of the former Securities Commissioner's title to Investment Protection Director. This section is now found at 6 *Del. C.* § 73-101(b).

[8] 79 Del. Laws ch. 182 (2013).

> (b) This chapter shall be administered by the Attorney General who may designate a Deputy Attorney General to act as Investor Protection Director to be the principal executive officer of an Investor Protection Unit of the Department of Justice to act for the Attorney General administering this chapter. The Investor Protection Director shall have the qualifications of and his or her salary shall be fixed as that of a Deputy Attorney General.

B

The Investor Protection Unit ("IPU") has the authority to prosecute administrative proceedings under the Act.[9] Section 73-601 of the Act provides that, in such proceedings, the Investor Protection Director ("Director") may issue orders providing for a host of remedies, including cease-and-desist orders, fines, assessment of costs, ordering restitution to investors, conditional or probationary registration orders, issuing censures or reprimands, and imposing special reporting requirements.[10] This list is not exhaustive as the Act explicitly confers upon the Director the authority to order "other remedies which the Director determines to be in the public interest."[11]

The Act and the IPU rules promulgated by the Director under § 73-102 (the "Rules") establish a detailed procedural framework to govern administrative proceedings under the Act. The following is a non-exhaustive description of that framework.

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[9] 6 *Del. C.* § 73-501.

[10] 6 *Del. C.* § 73-601(a).

[11] *Id.*

The Director may delegate her adjudicatory powers and authority to "an administrative hearing officer appointed by the Attorney General (or his or her designee)."[12] The person to whom such power and authority is delegated is referred to as a "Presiding Officer."[13] In the delegation process "[p]reference shall be given to Presiding Officers with experience practicing securities law, or those with an academic background in securities law."[14]

An administrative proceeding under the Act is commenced by the service and filing of a written complaint, which "shall specify in reasonable detail the conduct alleged to constitute the violative activity and the statutory provision, rule, order or other condition the respondent is alleged to be violating or to have violated."[15] A respondent is to file an answer in much the same manner as defendants do under our courts' civil rules of procedure.[16]

After the IPU files a complaint, it may request a hearing and, with the filing of the respondent's answer, the respondent too may request a hearing. The Rules direct the Presiding Officer to issue a notice—absent extraordinary circumstances, four weeks in advance—stating the date, time, and place of the hearing. No later than 20 days before the hearing date, the IPU must submit to the respondent and the Presiding Officer copies of all documentary evidence and the names of the witnesses who the IPU intends to

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[12] 6 *Del. C.* § 73-102(c).

[13] 6 Del. Admin. C. § 225(a).

[14] *Id.*

[15] 6 Del. Admin. C. § 221.

[16] 6 Del. Admin. C. § 224.

present in its case-in-chief at the hearing.[17] Under the Rules, all hearings, which are to be public,[18] are to be "conducted in a fair, impartial, expeditious and orderly manner."[19] Witnesses must testify under oath or affirmation.[20]

The Rules further direct the Presiding Officer to "receive relevant evidence" with leeway to "exclude all evidence that is irrelevant, immaterial or unduly repetitious."[21] In discharging this duty, the Presiding Officer may refer to and be guided by the Delaware Rules of Evidence. But "the Presiding Officer may admit any evidence that reasonable and prudent individuals would commonly accept in the conduct of their affairs, and give probative effect to that evidence. Evidence may not be excluded solely on the ground that it is hearsay."[22]

After the hearing, the Presiding Officer is required to issue a written decision—generally within 60 days of the hearing's conclusion or the filing of post-hearing submissions. The decision must include: a summary of the evidence, factual findings and the evidentiary bases therefor, conclusions of law, and the sanctions

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[17] 6 Del. Admin. C. § 243.

[18] 6 Del. Admin. C. § 241 ("All hearings, except hearings on ex parte applications for a summary order under the Act, shall be public unless otherwise ordered by the Presiding Officer on his or her own motion or the motion of a party. No hearing shall be nonpublic where all respondents request that the hearing be made public.").

[19] 6 Del. Admin. C. § 240.

[20] 6 Del. Admin. C. § 244.

[21] 6 Del. Admin. C. § 245.

[22] 6 Del. Admin. C. § 247.

or relief ordered, if any.[23] Final orders are appealable to the Court of Chancery.[24]

C

In November 2020, the IPU initiated an administrative proceeding against the plaintiffs by filing an administrative complaint.[25] In the operative version of the administrative complaint—the Second Amended Administrative Complaint filed in May 2023—the IPU alleged that the plaintiffs were "conducting a long-running scheme to induce investors, including investors in Delaware, to purchase risky, unregistered oil and gas and mining securities."[26] In furtherance of the scheme, according to the administrative complaint, certain of the plaintiffs committed securities fraud in violation of § 73-201 and all the plaintiffs offered and sold unregistered securities in violation of § 73-202. The IPU's complaint comprised 71 counts, each of which exposed the named respondents to a fine "not to exceed $10,000."[27] The IPU asked the Director to "enter an order providing restitution plus interest . . . an assessment of costs, fines in such amount as she deems appropriate, an order to cease and desist the offer and sale of unregistered securities in Delaware and to Delaware investors, and such other relief as she determines to be in the public interest."[28]

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[23] 6 Del. Admin. C. § 251.

[24] 6 *Del. C.* § 73-502.

[25] Our factual discussion is based on the facts alleged in the plaintiffs' first amended complaint ("FAC").

[26] App. to Opening Br. at A35.

[27] 6 *Del. C.* § 73-601(b).

[28] App. to Opening Br. at A84.

A procedural snarl in the proceedings before the Director ensued.

D

To a large extent, our review of that phase of this matter is constrained by the limited record of the administrative proceedings provided to the Superior Court. But because the plaintiffs' due-process claim is grounded in their allegations of procedural unfairness, we recite next our understanding of the relevant procedural facts that preceded the plaintiffs' commencement of judicial proceedings, beginning with the plaintiffs' efforts to secure documents they believe were relevant to their constitutional arguments.

In March 2021, the plaintiffs filed a Freedom of Information Act ("FOIA") request with the Department of Justice ("DOJ"). According to the complaint, the plaintiffs took this route because, under the Act, they lacked subpoena power in the IPU Action. The plaintiffs' First Amended Complaint ("FAC") in the Superior Court described the scope and defended the relevance of this FOIA request in the following terms:

> Plaintiffs . . . request[ed] public records regarding, inter alia, orders, decisions, and proposed decisions issued by the IPU. In particular, Plaintiffs requested, inter alia, information about how often a Presiding Officer resolved an administrative proceeding favorably to the IPU, how much money respondents were ordered to pay, and where those monetary payments went. These orders, decisions, and proposed decisions are matters of public record pursuant to 6 *Del. Admin. C.* § 206(a) and are necessary to meet

> the IPU's allegations against Plaintiffs, determine whether they are being treated disparately, and determine whether the IPU's Presiding Officer has the requisite impartiality.[29]

The plaintiffs alleged that "[t]he DOJ refused to comply with these aspects"[30] of the FOIA request.

The plaintiffs filed a second FOIA request, this one with the Delaware Office of Management and Budget, requesting "public records regarding, inter alia, monies received, expended, and awarded as a result of orders, decisions and proposed decisions issued by the IPU."[31] Like the DOJ, the Office of Management and Budget "refused to comply with these aspects"[32] of the plaintiffs' second FOIA request.

In the wake of their ill-fated FOIA request, the plaintiffs served more traditional requests for production on the IPU. The problem with this approach, the complaint points out, is that "[n]o statute, rule or regulation permits Plaintiffs to issue discovery requests . . . [and] [t]he only available discovery mechanism is a subpoena"[33] issued not by a respondent, but only by the IPU. Even so, the plaintiffs charged ahead, serving three requests for production on the IPU. The plaintiffs' first request for production sought, among other things, the documents identified in their first FOIA request quoted above. According to the FAC, this request was "intended to discover how the IPU

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[29] *Id.* at A16 (FAC ¶31).

[30] *Id.*

[31] *Id.* (FAC ¶32).

[32] *Id.* at A17 (FAC ¶32).

[33] *Id.* (FAC ¶34).

and its Presiding Officers had previously resolved legal issues relevant to the IPU Action and to discover the fines, penalties, costs, and charges imposed on other similarly situated respondents."[34] The plaintiffs alleged that the IPU, which had "repeatedly represented to Plaintiffs that they 'are not entitled to discovery in this administrative proceeding,'"[35] refused to comply with the renewed FOIA requests, contending that they represented "burdensome, disproportionate discovery to support a baseless constitutional challenge."[36] The IPU did, however, refer the plaintiffs to the IPU website, which contains, according to the FAC, "only a fraction of the IPU's orders, decisions, and proposed decisions[]," and most of those are "conclusory consent orders with no legal analysis."[37]

The plaintiffs later served a second request for production on the IPU with which the IPU "refused to comply."[38] The FAC does not disclose the substance of this request or the basis of the IPU's objections. A third request for production and a request to the Presiding Officer for the issuance of a subpoena duces tecum followed but, according to the FAC, they "were never resolved."[39] This wrangling over information rights figures prominently in the plaintiffs' constitutional claims. We turn next to how those claims were framed in the Superior Court.

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[34] *Id*. (FAC ¶36).

[35] *Id*. (FAC ¶35).

[36] *Id*. (FAC ¶36).

[37] *Id*. at A18 (FAC ¶37).

[38] *Id*. (FAC ¶38).

[39] *Id*. (FAC ¶39).

E

The FAC's description of how the plaintiffs first raised the constitutional issues that are now before us is murky. For instance, the FAC alleged that the plaintiffs "first raised constitutional issues with the IPU Action in their answers to the IPU's Administrative Complaint."[40] It does not describe the nature of those issues. The FAC then lists several dates when the plaintiffs "raised constitutional issues"[41] and refers to the Presiding Officer's recognition that the plaintiffs were raising "constitutional issues"[42] and "broad constitutional defenses."[43]

Notably, the FAC does not allege that the plaintiffs asserted their right to trial by jury or a claim that the administrative action infringed on their due process rights before the summer of 2023—nearly three years after the IPU filed its first administrative complaint. According to the FAC, in July 2023, "the Presiding Officer acknowledged the constitutional issues presented and set a deadline [of December 1, 2023] for Plaintiffs to move for summary disposition on them."[44] But well before the deadline arrived, the Presiding Officer issued an order *sua sponte* providing that she would not consider any constitutional issues and that

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[40] *Id.* (FAC ¶40).

[41] *Id.* (FAC ¶42).

[42] *Id.* at A19 (FAC ¶45).

[43] *Id.*

[44] *Id.* (FAC ¶43). There is an unexplained gap from mid-2022 to June 2023 in the procedural history of the administrative proceedings as outlined in the FAC. According to the IPU's opening brief in support of its motion to dismiss in the Superior Court, the proceedings were stayed for approximately one year while the parties engaged in settlement discussions.

"any such issues must be raised (if at all) in the judicial forum on or before December 1, 2023."[45]

In response, the plaintiffs filed a complaint in the Court of Chancery, requesting "(a) a declaration that the IPU Action and 6 *Del. C.* § 73-601 violate Plaintiffs' constitutional rights to trial by jury and due process and (b) an injunction enjoining the IPU Action from proceeding until Plaintiffs' declaratory judgment claims are fully and finally resolved, including any appeal to the Delaware Supreme Court."[46]

After the parties stipulated—and the Presiding Officer agreed—to a stay of the IPU Action, obviating the need for injunctive relief, the parties agreed to transfer the case to the Superior Court in accordance with 10 *Del. C.* § 1902.[47]

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[45] *Id.* (FAC ¶46).

[46] *Id.* at A20 (FAC ¶49). The complaint was filed on December 1, 2023, two days after the United States Supreme Court heard oral argument in *Sec. & Exch. Comm'n v. Jarkesy*, 603 U.S. 109 (2024). In *Jarkesy*, as we will discuss later, the Supreme Court held that when the SEC seeks penalties against a defendant for securities fraud, the Seventh Amendment to the United States Constitution entitles the defendant to a trial by jury. The timing of the plaintiffs' complaint in relation to *Jarkesy* is irrelevant to our analysis. We mention it merely as a possible explanation of the plaintiffs' apparent reluctance to describe the constitutional issues it had raised in the administrative proceedings. In this regard, in the IPU's opening brief below in support of its motion to dismiss, it asserts that the plaintiffs' answer to the IPU's administrative complaint did not raise the jury trial-right and due-process issues that are before us here.

[47] 10 *Del. C.* § 1902 permits the transfer of proceedings from a court lacking subject-matter jurisdiction to "an appropriate court."

F

As alleged under Count I of the FAC, the plaintiffs' claim that they are entitled to a jury trial, which we discuss in detail later, is straightforward. The FAC alleges that, because, at common law, fraud and securities regulations claims were triable by juries in courts of law, the IPU Action, in which no jury is available, violates their rights under Article I, § 4 of the Delaware Constitution. The plaintiffs' due-process claim, as alleged in Count II of the FAC, is more nuanced. As with the plaintiffs' trial-by-jury claim, we will delve deeper into their due-process claim later. For present purposes, it suffices to sketch its broad outlines.

Observing that the IPU sought to deprive them of their protected liberty and property interests, the plaintiffs alleged that their due-process rights under the Delaware Constitution were triggered by, then violated in, the IPU Action. The crux of the plaintiffs' due-process claim as alleged in the FAC was that their inability to secure the IPU's prior orders, decisions, and proposed orders implicated and violated their due-process rights in two ways. First, in the FAC's words "[w]ithout access to the IPU's record of past decisions, those who wish to assiduously comply with the Delaware Securities Act are forced to guess as to whether a given agreement, transaction, or course of action is proper or proscribed because they cannot know how the IPU has interpreted the Delaware Securities Act in the past."[48] This, by the plaintiffs' lights, impermissibly impaired the plaintiffs' due-process rights to notice and an opportunity to be heard.

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[48] App. to Opening Br. at A27 (FAC ¶72).

Second, the FAC alleged that the IPU's purported refusal to make its decisions publicly available made it impossible for the plaintiffs or the Superior Court to determine whether the Presiding Officer has "the requisite impartiality"[49] that due process demands. Visibility into the Presiding Officer's impartiality, the plaintiffs alleged, is particularly important in this context given (i) that "the Presiding Officer and the prosecutors are all Deputy Attorneys General reporting to the same Attorney General" and (ii) that how the IPU is funded gives rise to a suspicion that the Presiding Officer might have a pecuniary interest in the IPU Action's outcome.

Both due-process concerns—(i) notice and opportunity to be heard and (ii) inability to assess impartiality—were woven tightly with the plaintiffs' alleged lack of access to the IPU's prior decisions and orders and its funding mechanisms.

G

The IPU moved to dismiss the FAC, contending that the FAC failed to state a claim upon which relief could be granted. It argued that the plaintiffs waived any purported right to a jury trial but that, in any event, the right to trial by jury did not attach to a securities-fraud claim under the Act. The IPU sought dismissal of the plaintiffs' due-process claim on both procedural and substantive grounds. More specifically, the IPU argued that the due-process claim was unripe but that, even if it were ripe, the administrative procedures under the Act provide due process and

[49] *Id.* at A28 (FAC ¶74).

the plaintiffs had not pleaded facts that demonstrated otherwise.

In their opposition, the plaintiffs, though acknowledging that Article I, § 4 of the Delaware Constitution—and not the Seventh Amendment—governed their jury-trial claim, urged the court to hew to the United States Supreme Court's recent decision in *Securities and Exchange Commission v. Jarkesy*[50] and recognize that they had a right to a jury trial in the IPU Action. In response to the IPU's motion to dismiss their due-process claim, the plaintiffs maintained their position that their frustrated efforts to gain "access to the IPU's precedent"[51] and information about IPU's funding via monies received as a result of its orders and decisions rendered the process by which the IPU Action was being prosecuted constitutionally deficient.

As we will discuss more fully later on, the Superior Court rejected the plaintiffs arguments, dismissing the FAC and its requests for declaratory relief. The plaintiffs appealed.

On appeal, the plaintiffs press more or less the same arguments they made below. First, they contend that Article I, § 4 of the Delaware Constitution guarantees their right to a jury trial in the IPU's enforcement action for securities fraud and registration violations in which the IPU seeks to impose monetary penalties. Because § 73-605, which authorizes the Director to order monetary penalties, does not provide for the jury trials, it is, according to the plaintiffs, unconstitutional. Second, the plaintiffs maintain that

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[50] 603 U.S. 109 (2024).

[51] App. to Opening Br. at A395.

the Superior Court erred when it ruled that their due-process challenge was not ripe.

II

Questions of law, including claims challenging the constitutionality of statutes, are reviewed *de novo*.[52] We start, however, with the presumption that statutes enacted by the Delaware General Assembly are constitutional.[53] A party who asks us to invalidate a statute bears the burden of rebutting this presumption by clear and convincing evidence.[54] And our assessment of whether this burden has been carried should be tempered by "deference to legislative judgment in matters 'fairly debatable.'"[55]

III

The operative sentence of Article I, § 4 of the Delaware Constitution is concise: "Trial by jury shall be as heretofore." As Justice Holland observed in *Claudio v. State*,[56] "[t]his Court and the other courts of Delaware have always construed that provision in the Delaware Constitution as '*guaranteeing the right to trial by jury as it existed at common law*."[57]

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[52] *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 661 (Del. 2014).

[53] *Hoover v. State*, 958 A.2d 816, 821 (Del. 2008).

[54] *Albence v. Higgin*, 295 A.3d 1065, 1088 (Del. 2022); *Sierra v. Dep't of Servs. for Child., Youth & their Fams.*, 238 A.3d 142, 155-56 (Del. 2020).

[55] *Helman v. State*, 784 A.2d 1058, 1068 (Del. 2001) (quoting *Wilmington Med. Ctr., Inc. v. Bradford*, 382 A.2d 1338, 1342 (Del. 1978)).

[56] 585 A.2d 1278 (Del. 1991).

[57] *Id.* at 1297 (emphasis in original) (quoting *Fountain v. State*, 275 A.2d 251, 251(Del. 1971)).

We adhered to that construction in *Blue Beach*. There, we recognized a three-step framework for determining whether a cause of action created by statute that does not itself provide for a jury trial nevertheless triggers the right to a jury. The first step—actually assumed within the question to be answered—is determining whether the General Assembly provided for a right to trial by jury in the statute. If it did not, the second step is to determine "whether the new statutory cause of action is sufficiently analogous to a cause of action at common law."[58] If it is, then the third step determines whether, historically, the analogous cause of action was tried before a jury. If it was, the statutory cause of action carries with it a jury-trial right despite the General Assembly's silence.

The plaintiffs do not contest the applicability of *Blue Beach*'s three-step framework for analyzing whether Article I, § 4 jury-trial rights attach to a statutory cause of action; instead, they contend that the Superior Court's analysis is inconsistent with it. We disagree. Although we had not yet issued our decision in *Blue Beach* when the Superior Court decided this case, we are satisfied that the court's decision touches upon the two relevant steps in the *Blue Beach* test.

The court first observed that the General Assembly did not provide for jury trials in actions brought by the IPU under the Act. The court did not, as the plaintiffs appear to argue, conclude its analysis there.[59] The

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[58] *Blue Beach*, 351 A.3d at 1035.

[59] Appellant's Suppl. Br. at 8 ("The Superior Court reasoned that Appellants are not entitled to trial by jury because the General Assembly did not intend to provide a jury trial in securities fraud and regulation cases . . . . *Blue Beach* rejected

court also considered whether IPU enforcement actions for securities fraud and registration violations under the Act are sufficiently analogous to common law causes of action; the court concluded that they were not.[60] We address next why we agree with this conclusion, beginning with a comparison of securities fraud under the Act and common law fraud.

A

The Superior Court's conclusion that securities fraud under the Act was insufficiently analogous to common law fraud was grounded in the disparity between the pleading standards applicable to the two causes of action. Understanding the source of this disparity will be aided by a brief historical digression.

The elements of fraud at common law are:

1) a false representation, usually one of fact, made by the defendant;
2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
3) an intent to induce the plaintiff to act or to refrain from acting;
4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
5) damage to the plaintiff as a result of such reliance.[61]

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the Superior Court's approach. Whether the General Assembly provided a statutory right to trial by jury is just step one of the analysis.").

[60] This obviates the need to address *Blue Beach*'s third step.

[61] *Stephenson v. Capano Development Co.*, 462 A.2d 1069, 1074 (Del. 1983).

In 1993, in *Hubbard v. Hibbard Brown & Co.*,[62] this Court held that, in order to establish securities fraud under the Act,

> [i]t must be demonstrated that the defendant (1) made a misstatement or omission (2) of material fact (3) with scienter (4) in connection with a purchase or sale of a security (5) upon which the plaintiff (or another person if the action is brought by the Delaware Securities Division) relied and (6) that reliance proximately caused the plaintiff's (or other person's) injury.[63]

The Court supported this enumeration by citing an opinion of the Third Circuit Court of Appeals that concerned a stockholder class action—that is, a private cause of action—alleging Rule 10b-5 violations and not a government enforcement action.

It must be conceded that the securities-fraud elements enumerated in *Hubbard* are closely aligned with the common-law fraud elements as we set them forth above. In the 2013 amendments to the Act, however, the General Assembly added the following language to § 73-201:

> In interpreting this Section, courts will be guided by the interpretations given by the Federal Courts to similar language set forth in Section 17(a) of the Securities Act of 1933 and Rule 10b-5 promulgated under the Securities Exchange Act of 1934, to include, without limitation, *any difference in pleading requirements*

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[62] 633 A.2d 345 (Del. 1993).

[63] *Id.* at 349.

governing actions brought by securities regulators as opposed to private litigants.[64]

The IPU argued below, and the court agreed, that this provision "partially superseded" *Hubbard* and directs our courts to be guided by federal caselaw when identifying the requisite elements of securities fraud under the Act. Here, the Superior Court did just that and determined that, because the IPU brought fraud claims under §§ 73-201(2) and (3)—provisions based on §§ 17(a)(2) and (3) of the Securities Act of 1933—the IPU is not required to prove scienter.[65] The court further held that, in its enforcement actions, the IPU need not prove reliance, as federal courts have excused the SEC from establishing reliance, loss causation, and damages in civil enforcement actions.[66] The court also noted that causes of action for common-law fraud and enforcement actions for securities fraud serve different purposes, the former providing a remedy for an individual's injuries and the latter protecting the public. The court then concluded that, "[i]n light of the differences in the elements and purposes of common law fraud and securities fraud, plaintiffs have not shown, by clear and convincing evidence, that the right to a trial by jury applies to securities fraud actions brought by the government under the Delaware Securities Act."[67]

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[64] 79 Del. Laws ch. 182, § 4 (2013) (emphasis added) (amending § 73-201 of the Delaware Code).

[65] *Swan Energy*, 341 A.3d at 1053; *see Aaron v. SEC*, 446 U.S. 680, 701-02 (1980).

[66] *Swan Energy*, 341 A.3d at 1053; *see SEC v. Goble*, 682 F.3d 934, 943 (11th Cir. 2012).

[67] *Swan Energy*, 341 A.3d at 1054.

In this appeal, the plaintiffs do not contest the Superior Court's conclusion that the IPU need not prove reliance or scienter in civil enforcement actions under § 73-201. Instead, they enlist the 2013 amendment's instruction that we be guided by the federal courts' interpretations of analogous federal statutes in service of their argument that we are bound to adopt the United States Supreme Court's rationale in *Jarkesy*.[68]

As mentioned earlier, in *Jarkesy*, the Supreme Court held that the Seventh Amendment to the United States Constitution entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud.[69] Of course, as we pointed out in *Blue Beach*, *Jarkesy* was grounded in the Seventh Amendment, which has not been incorporated and applied to the states by the Fourteenth Amendment.[70] As such, it is not binding on us, and the plaintiffs concede as much here. Rather than insist that we follow *Jarkesy*'s Seventh Amendment analysis, the plaintiffs urge us to adopt—and, indeed, suggest that the 2013 amendments require us to adopt—the Supreme Court's view concerning the similarity of fraud under federal securities law and the common law. Specifically, the plaintiffs point to the *Jarkesy* majority's description of the "close relationship" between causes of action for fraud under federal securities laws and common-law fraud and the "enduring link" between the two.[71]

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[68] 603 U.S. 109 (2024).

[69] *Id.* at 120.

[70] *Blue Beach*, 351 A.3d at 1038.

[71] *Id.* at 125.

We are not persuaded that these statements undermine the trial court's conclusion that securities fraud is not so analogous to common-law fraud as to require a jury trial under the Delaware Constitution. In the first place, the 2013 amendment instructs our courts to be guided by the federal courts' "interpretations" of the anti-fraud provisions in federal securities laws. We do not view the Supreme Court's review of the relationship of the federal securities laws to common-law fraud as interpreting, as in ascertaining the meaning of, those laws. More than that, the Court's comparative exercise in *Jarkesy* was focused on determining whether the enforcement action at issue was "legal in nature," an inquiry that, as we explained in *Blue Beach*, is inapposite to our state constitutional analysis.[72]

The plaintiffs also fault the Superior Court for taking insufficient heed of the remedies available for the common-law antecedent of the Act. They contend that, the availability of a legal remedy—damages—in common law fraud actions weighs in favor of their claim that enforcement actions under the Act are triable before a jury. In support of this argument, the plaintiffs quote our observation in *Blue Beach* that "an inquiry into law or equity may be helpful in determining whether a matter receives a jury trial."[73]

A closer examination of *Blue Beach* and, in particular, the text that follows the passage quoted above exposes the flaw in the plaintiffs' argument. In full, we clarified:

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[72] *Id.* at 126.

[73] Appellants' Suppl. Br. at 17 (quoting *Blue Beach*, 351 A.3d at 1037).

> To be clear, we do not reject the notion that an inquiry into law or equity may be helpful in determining whether a matter receives a jury trial. Indeed, if the only analogy that can sufficiently be drawn is to . . . a historically equitable cause of action (as suggested by Cahill) then it is likely that the new statutory cause of action will not receive a jury trial. *But determining that an analogous historical cause of action was at equity and therefore did not receive a jury trial is more consistent with step three of the analysis we outline above. This does not change the fact that one must find a sufficient analogy in the first place*. Therefore, it is clear to us that when evaluating jury-related constitutional claims, Delaware courts do not focus solely on the claim's legal or equitable nature.[74]

Here, for the reasons given by the trial court with which we agree, the plaintiffs failed in their effort to provide a sufficiently analogous cause of action at common law that was triable before a jury.[75] They failed at step two, taking step three off the board. In sum, a jury trial is not available in IPU enforcement actions for securities fraud under the Act.

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[74] *Blue Beach*, 351 A.3d at 1037.

[75] This conclusion finds support in a pre-*Jarkesy* decision of the New Hampshire Supreme Court. See *Ridlon v. New Hampshire Bureau of Sec. Reg.*, 214 A.3d 1196, 1204 (N.H. 2019) ("[An] administrative proceeding . . . under the Securities Act is not analogous to common law fraud or deceit because it requires proof of significantly different elements and satisfaction of a different standard of proof.") (quotation marks and brackets omitted).

B

The plaintiffs contended in the Superior Court, as they do here, that because English statutes in the 17th and 18th centuries imposed registration and licensure requirements similar to those found in § 73-202, under which violations were punishable by civil penalties and triable by juries, Article I, § 4 commands that a jury be available for § 73-202 violations. For the plaintiffs, Article I, § 4's guarantee of jury-trial rights "as heretofore"—that is "as it existed at common law"—attaches to actions commenced under English statutes, extant at the founding, that conferred a right to a jury trial. The Superior Court rejected this expansive definition of the common law, and we agree.

In reaching this conclusion, we see no need to depart from the Superior Court's analysis. That the drafters of Delaware's first constitution in 1776 recognized a distinction between common law and the preexisting statutory law of England is evidenced by Article 25 of the 1776 Constitution. There, our forebears ensured that "[t]he common law of England, *as well as so much of the statute law as have been heretofore adopted in practice in this state*, shall remain in force, unless they shall be altered by a future law of the Legislature[.]"[76] And, as the Superior Court noted, that distinction between statutory and common law still prevails. Indeed, Black's Law Dictionary's first entry for "common law" is "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions."[77]

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[76] Del. Const. art. 25 (1776) (emphasis added).

[77] Common law, *Black's Law Dictionary* 345 (11th ed. 2019).

Reasonable minds might differ as to whether these distinctions and definitions fit seamlessly into our interpretation of Article I, § 4. It is well to keep in mind, however, that we presume the Act to be constitutional and that the plaintiffs bear the burden of rebutting that presumption by clear and convincing evidence; they have not done that here.

C

The plaintiffs contend that, because the IPU seeks civil penalties, they are entitled to trial by jury under Article I, § 4. In so arguing, the plaintiffs rely on *Jarkesy* and a host of cases whose concern is whether a particular cause of action is legal or equitable. This argument did not survive our opinion in *Blue Beach*, in which we held, as touched upon previously, that "the measure of a jury trial for Delaware is the common law, not the remedy sought."[78]

To summarize, the plaintiffs have not identified a common-law action triable before a jury that is sufficiently analogous to the IPU's allegations of securities fraud or its charging of registration violations. Nor does the IPU's pursuit of civil penalties trigger a right to trial by jury.[79] We therefore affirm the Superior Court's dismissal of Count I of the FAC. Whether the Superior Court erred when it dismissed Count II of the FAC—the plaintiffs' due-process claim—is the question to which we now turn.

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[78] *Blue Beach*, 351 A.2d at 1039 (emphasis omitted). In fairness to the plaintiffs, we note that the plaintiffs' argument on this point in both their opening and reply briefs were advanced before we issued our opinion in *Blue Beach*.

[79] *Id.* at 1045.

IV

A

It is undisputed that Sections 7 and 9 of Article I of the Delaware Constitution require that "[b]efore a party can be deprived of life, liberty, or property, it has the right to notice and a hearing in a meaningful time and meaningful manner."[80] And this Court has recognized that "in the exercise of quasi-judicial or adjudicatory administrative power, administrative hearings, like judicial proceedings, are governed by fundamental requirements of fairness which are the essence of due process . . . ."[81] And this, we point out, means that "[a]t a minimum, such proceedings require adequate notice to all concerned; a full opportunity to be heard by any person potentially aggrieved by the outcome; a decision which reflects the reasons underlying the result and, most importantly, an adherence to the statutory or decisional standards then controlling."[82]

Because the plaintiffs had not yet suffered any deprivation of their property or liberty as the result of the purportedly unfair administrative process, their claim, the Superior Court concluded, was unripe for adjudication. In so finding, it is clear that the court viewed the plaintiffs' due-process claim as an as-applied challenge. Conceding now that, if their claim is

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[80] *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083, 1089 (Del. 1986) (citing *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)).

[81] *Vincent v. E. Shore Markets*, 970 A.2d 160, 163-64 (Del. 2009) (quoting *Phillips v. Delhaize America, Inc.*, 2007 WL 2122139, at *2 (Del. Super. Ct. July 20, 2007)).

[82] *Cnty. Council of Sussex Cnty. v. Green*, 516 A.2d 480, 481 (Del. 1986)).

considered to be an as-applied challenge,[83] it is not ripe, the plaintiffs insist that they are—and always have been—mounting a facial challenge, a claim that is not subject to ripeness concerns. We disagree with the plaintiffs' characterization of their challenge as facial but, in the end, it does not matter. Even if we were to agree with the plaintiffs, their putatively facial challenge would fail.

To support our analysis of whether the plaintiffs' due-process claim is a facial challenge or an as-applied challenge, we draw upon the difference between the two that we observed in *Delaware Board of Medical Licensure and Discipline v. Grossinger*.[84] In that case, we noted that "[a] facial challenge alleges that a statute or regulation is not [constitutionally] valid under any set of circumstances; an as-applied challenge alleges that a statute or regulation is not valid in the particular circumstances of the case."[85] A review of the FAC and counsel's argument in the Superior

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[83] Oral Argument at 16:08-16:42, *Swan Energy, Inc. v. Inv. Prot. Unit of the Delaware Dep't of Just.* (No. 331, 2025), https://vimeo.com/1185541206?fl=pl&fe=vl. We reproduce the relevant exchange here:

> The Court: Would you agree that if we could isolate the as-applied challenge, that aspect is unripe?
>
> Plaintiffs' counsel: If this were an as-applied challenge, I believe that's correct. As a facial challenge, which this has always been—that's the only reasonable reading of our complaint at paragraphs 61 to 78. As a facial challenge, its ripe now because having to endure the in-house process is our injury under *Axon*, as the Superior Court correctly recognized.

Id.

[84] 224 A.3d 939 (Del. 2020).

[85] *Id.* at 956 (citing *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)).

Court persuades us that the plaintiffs' due-process challenge fits more comfortably within the latter definition than in the former.

The gravamen of the plaintiffs' due-process claim is that they were denied access to documents and information, most notably prior decisions of the IPU. Emblematic of this theme are the following allegations.

> [T]he IPU either improperly fails to make its orders, decisions, and proposed decisions accessible to the public or it mischaracterizes them and withholds them as nonpublic. Either way, *the IPU has wrongfully deprived Plaintiffs of their rights to inspect the IPU's orders, decisions, and proposed decisions*.[86]
>
> [W]hen Plaintiffs attempted to access the orders, decisions, and proposed decisions of Presiding Officers through FOIA Requests and three written discovery requests, the IPU rebuffed their attempts.[87]
>
> *[T]he IPU's refusal to make its decisions publicly available*—while simultaneously representing to Plaintiffs through 6 *Del. Admin. C.* § 206, its public website, and statements in the IPU Action that such decisions are readily available—*prevents Plaintiffs and this Court from determining whether the Presiding Officer* (who is saddled with a dual prosecutor-judge

[86] App. to Opening Br. at A25-26 (FAC ¶68) (emphasis added).

[87] *Id.* at A26 (FAC ¶70).

> role, appointed by the Director, and whose delegated powers may be unilaterally revoked by the Director) *has the requisite impartiality*.[88]
>
> [W]ithout access to the IPU's precedent, neither Plaintiffs nor this Court can assess the IPU's success rate in administrative proceedings, even though a perfect or abnormally high success rate would be powerful specific evidence of bias, whether on the part of a particular Presiding Officer or as an inevitable consequence of the IPU's structure.[89]

A thread running through these statements is the notion that, if only the plaintiffs could secure the documents and information they sought in their FOIA requests and requests for production, they could make the case that the Presiding Officer in this case was not impartial. If there was any question about this, the plaintiffs' counsel answered it at oral argument in the Superior Court. On that occasion, the plaintiffs' counsel addressed the "strong presumption" of impartiality this Court recognized in *Blinder, Robinson & Co., Inc. v. Bruton*,[90] a case that involved a due-process challenge to an administrative proceeding under the Act, predicated on the Commissioner's (now denominated "Director") commingling of the roles of prosecutor and adjudicator. In disposing of the challenge, this Court held that, in the absence of specific evidence of bias, "[t]he mere prosecution of a case by one Deputy Attorney General before another Deputy Attorney General, acting in an adjudicatory capacity, is not sufficient to

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[88] *Id.* at A28 (FAC ¶74) (emphasis added).

[89] *Id.* at A29-30 (FAC ¶75).

[90] 552 A.2d 466 (Del. 1989).

overcome the strong presumption [of honesty and integrity]"[91] that the United States Supreme Court recognized under similar circumstances in *Withrow v. Larkin*.[92] Here, the plaintiffs' counsel argued to the Superior Court:

> [T]here's a question about the role the discovery plays here, and particularly with regard to the due process challenge. . . . We're not running from *Blinder*.
>
> What *Blinder* creates . . . is a very strong presumption of the legitimacy of a proceeding that's operating under the aegis of the Attorney General, being presided over by a hearing officer, who is a Deputy Attorney General, and being prosecuted by another Deputy Attorney General. *But Blinder never says that is an irrebuttable presumption. We have to overcome a very strong presumption against bias*.
>
> The only way that can ever happen in civil litigation is through discovery.[93]

Reading this argument together with the FAC's allegations, we conclude that the Superior Court was justified in viewing the plaintiffs' due-process challenge as an as-applied challenge. The plaintiffs' embrace of *Blinder*, coupled with their insistence that their limited information rights *in this case* hindered their ability to challenge the Presiding Officer's impartiality, strongly suggests that the plaintiffs did not

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[91] *Id.* at 473.

[92] 421 U.S. 35, 47 (1975).

[93] App. to Ans. Br. at B91 (emphasis added).

intend to challenge the IPU process in all its applications. And, as mentioned, the plaintiffs have conceded that, to the extent that their challenge is an as-applied challenge, it is unripe.

B

The plaintiffs due-process claim fares no better if it is treated as a facial challenge. As previously discussed, at the heart of the plaintiffs' due-process claim is their concern that, because the presiding officer in IPU administrative enforcement actions is a Deputy Attorney General dependent on the Attorney General for compensation, assignments, and career advancement, the presiding officer's impartiality is compromised. To advance a facial challenge, this inherent partiality must exist in all cases. But the plaintiffs' underlying supposition collides with our decision in *Blinder*, discussed briefly above, which recognized a strong presumption that Deputy Attorneys General charged with adjudicating administrative enforcement actions do so with honesty and integrity.

As we understand it, the plaintiffs' work-around for *Blinder* is to claim that their inability to gain access to every single prior ruling in IPU administrative proceedings impairs their ability to rebut *Blinder*'s presumption.[94] If they could secure the prior rulings, they could assess—or so they assert—"whether the

[94] See Opening Br. at 36 ("In the absence of discovery and accessible reasoning, review for adjudicative neutrality and consistency is unfairly thwarted."); *see also id.* at 42. ("Without access to these rulings, neither Appellants nor a reviewing court can assess the IPU's in-house success rate, even though a perfect or abnormally high success rate would be powerful specific evidence of bias.").

IPU's prosecutorial success rate is unconstitutionally entangled with its funding structure."[95] Quoting § 73-703(b)(2), the FAC observes that "any moneys paid . . . in a securities action brought by the Attorney General or the Investor Protection Director . . . shall be credited to the Investor Protection Fund."[96] The FAC then notes that, under § 73-703 (e), "[t]he Attorney General is authorized to expend from the Investor Protection Fund such moneys as are necessary for the payment of costs, expenses, and charges [incurred] in connection with the activities of the Investor Protection Unit . . . ."[97]

Based in large part on these provisions, one of which is artfully edited,[98] the FAC alleges that the Act creates a risk that the Presiding Officer will have a pecuniary interest in the outcome of IPU proceedings, one that could avoid the application of *Blinder*. Count

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[95] App. to Opening Br. at A30 (FAC ¶76).

[96] *Id*. at A13-14 (FAC ¶22).

[97] *Id*. at A14 (FAC ¶22) (quoting 6 *Del. C.* § 73-703(e)).

[98] The plaintiffs' quotation elides the phrase "pursuant to a court order or judgment, including costs and attorney's fees . . ." drawn from §73-703(b)(2). The plaintiffs also chose to omit the subsections of §73-703 that would appear to be more relevant, though unhelpful, to their argument. Section 73-703(c) provides that "[a]ny fines, costs or other moneys (except those obtained as restitution or recission) received by the Director as a result of an administrative order (other than a consent order) *shall be credited to the General Fund*." (emphasis added). Section 73-703(d) provides that, "[i]f, at the end of any fiscal year, the balance in the Investor Protection Fund exceeds $750,000, the excess shall be withdrawn from the Investor Protection Fund and deposited in the General Fund." Reading §73-703 in its entirety, we understand that moneys received as the result of a Presiding Officer's order are not credited to the Investor Protection Fund.

II of the FAC—the plaintiffs' due-process count—reads, in part:

> Even *Blinder* recognized that there are "situations where experience teaches that there is too high a probability of bias on the part of a decision-maker to be constitutionally acceptable." *Id.* "That risk exists where the adjudicator 'has a pecuniary interest in the outcome . . . .'" *Id.* (quoting *Withrow*, 421 U.S. at 47). Precisely that concern is present here. Because all funds paid in an IPU administrative proceeding are credited to the Investor Protection Fund, and the Attorney General is authorized to spend those funds to pay for the operations of the IPU, Presiding Officers' decisions will have a material effect on the IPU's funding.[99]

But the plaintiffs do not allege that the IPUs funding structure is, on its face, unconstitutional. Instead, they point to their inability to secure "information about the monies received, expended, and awarded as a result of orders, decisions and proposed decisions issued by the IPU,"[100] despite their FOIA and document-production requests. Though the plaintiffs argue that, should they gain access to that information, they might then be in a position to mount a facial challenge to the Act, as pleaded here, the challenge is focused on the purported unfairness of the plaintiffs' in-

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[99] App. to Opening Br. at A30 (FAC ¶76).

[100] *Id.*

formation deficit in this case. The plaintiffs' information deficit—if it in fact exists[101]—is not a product of the Act or the IPU's regulations. To the contrary, the IPU Rules provide:

> Each order, decision, and proposed decision of a Presiding Officer shall be available for inspection by the public from the date of entry, unless the order or decision is nonpublic. A nonpublic order or decision shall be available for inspection by any person entitled to inspect it from the date of entry.[102]

If the IPU has not complied with this regulatory obligation—and, notably, the FAC does not explicitly allege such non-compliance—the plaintiffs or other aggrieved persons are not without a remedy. For instance, if the plaintiffs could demonstrate that they have a clear right to the performance of a non-discretionary duty imposed by law, they might compel the IPU's performance of that duty by seeking the issuance of a writ of mandamus. But the theoretical availability of a writ of mandamus does not justify the relief the plaintiffs seek here.

At the risk of redundancy, it bears emphasis that Count II of the FAC—the count in which the plaintiffs set forth their due-process claim—does not identify any provision of the Act or the IPU Rules that offends due process. Instead, it is the IPU Action, defined as

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[101] In its answering brief, the IPU asserts, and in their reply brief the plaintiffs do not contest, that records concerning IPU precedent are amply "available on the IPU website (245), Westlaw (433), and Lexis Nexis (448)." Answering Br. at 33.

[102] 6 Del. Admin. C. § 206.

the in-house administrative proceeding the IPU commenced in 2020 naming the plaintiffs as respondents, that, according to the FAC, does not meet the Delaware Constitution's due-process requirements. To be sure, the FAC is replete with allegations that the plaintiffs' inability to secure the IPU's prior orders and decisions hampered their ability to challenge the Presiding Officer's impartiality. But the plaintiffs do not identify any aspect of the statutory or regulatory procedure governing IPU actions generally that deprives respondents in all cases of the information that these particular plaintiffs believe is so vital to their defense. This failure defeats the plaintiffs' due-process claim to the extent it can be viewed as a facial challenge.

V

For the reasons set forth above, we affirm the judgment of the Superior Court.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SWAN ENERGY, INC., BRANDON DAVIS, JOHN SCHIFFNER, AND CODY DAVIS, Plaintiffs, v. INVESTOR PROTECTION UNIT OF THE DELAWARE DEPARTMENT OF JUSTICE Defendant.	C.A. No. N24C-03-071 MAA

Submitted: May 6, 2025
Decided: June 24, 2025

Defendant's Motion to Dismiss:

GRANTED.

OPINION

Steven P. Wood, Esquire (Argued), MCCARTER & ENGLISH, LLP, Wilmington, Delaware, Attorney for Plaintiffs.

Ian R. Liston, Esquire (Argued), and Evelyn H. Brantley, Esquire, Deputy Attorneys General, DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware, Attorneys for Defendant.

Adams, J.

INTRODUCTION

This action concerns the constitutionality of in-house administrative proceedings, brought by the Investor Protection Unit ("IPU") of the Delaware Department of Justice ("DOJ"), alleging violations of the Delaware Securities Act.[1] Plaintiffs,[2] who are defendants in an ongoing in-house IPU proceeding, contend the IPU's in-house proceeding violates the Delaware Constitution's provisions for trial by jury and due process of law.[3] The IPU moved to dismiss the Amended Complaint, arguing the Amended Complaint fails to state claims for which relief can be granted by this Court.[4] This Opinion resolves the IPU's Motion to Dismiss. For the reasons that follow, the IPU's Motion to Dismiss is GRANTED.

FACTS AND PROCEDURAL HISTORY

The IPU commenced an in-house administrative proceeding against Plaintiffs on November 2, 2020 (the "IPU Action").[5] The IPU Action's complaint alleges Plaintiffs sold securities without proper registration in violation of 6 *Del. C.* § 73-202 and committed securities fraud in violation of 6 *Del. C.* § 73-201.[6] The IPU Action seeks fines, restitution, and "an order to cease and desist the offer and sale of unregistered

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[1] 6 *Del. C.* § 73-101.

[2] Here, the Court collectively refers to Swan Energy, Inc.; Brandon Davis; John Schiffner; and Cody Davis as "Plaintiffs." Docket Item ["D.I."] 8 ["Am. Compl."] ¶¶ 6-9.

[3] Am. Compl. ¶¶ 1-2.

[4] D.I. 10.

[5] Am. Compl. ¶ 23.

[6] *Id.* ¶¶ 24-25.

securities in Delaware and to Delaware investors."[7] Plaintiffs have not yet been penalized for their alleged misconduct.

Plaintiffs participated in the IPU Action, first raising constitutional objections to the IPU Action's presiding officer (the "Presiding Officer") in December 2020.[8] On October 30, 2023, the Presiding Officer issued an order (the "October 30 Order"), explaining that Plaintiffs should raise their constitutional concerns in "a court of competent jurisdiction" and declaring the Presiding Officer would not hear constitutional challenges in the IPU Action.[9]

On December 1, 2023, Plaintiffs filed an action in the Court of Chancery seeking: (a) a declaration that the IPU Action and IPU in-house adjudication procedures violate Plaintiffs' constitutional rights to trial by jury and due process; and (b) an injunction preventing the IPU Action from proceeding until Plaintiffs' declaratory judgment claims are resolved.[10] On December 11, 2023, Plaintiffs and the IPU agreed to a stipulation, granted by the Court of Chancery, in which the parties agreed to stay the IPU Action pending adjudication of the constitutional questions.[11] With the injunction rendered moot, the case was transferred to this Court.[12] Plaintiffs seek a declaration that the IPU's in-house adjudication procedures

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[7] *Id.* ¶ 26.

[8] *Id.* ¶ 40.

[9] *Id.* ¶ 46.

[10] *Id.* ¶ 49.

[11] Am. Compl. ¶ 50.

[12] *Id.* ¶ 51.

and the IPU Action violate Plaintiffs' constitutional rights to a trial by jury and due process of law.[13]

The IPU moves to dismiss the Amended Complaint, arguing Plaintiffs' claims are unripe and fail to state a claim for which relief can be granted.[14] This Opinion resolves the Motion to Dismiss.

STANDARD OF REVIEW

The IPU moves to dismiss the Amended Complaint pursuant to Superior Court Rule 12(b)(6).[15] The "pleading standards governing the motion to dismiss stage . . . are minimal."[16] The court must "accept all well-pleaded factual allegations in the Complaint as true."[17] The court also must "read the complaint generously" and construe all such allegations "in a light most favorable to the plaintiff."[18] The court "credits even vague allegations, so long as they provide the opposing party notice of the claim; gives the non-movant the benefit of all reasonable factual inferences; and denies the motion if recovery on the claim is reasonably conceivable."[19] Dismissal is appropriate only where a complaint is so deficient that the plaintiff

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[13] *Id.* ¶ 52.

[14] D.Is. 10-11. Citations to the March 26, 2025, hearing addressing the Motion to Dismiss are in the form "Tr. #."

[15] D.I. 10.

[16] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011) (citing *Savor, Inc. v. FMR Corp.*, 812 A2d 894, 896-97 (Del. 2002)).

[17] *Id.*

[18] *Henry v. Middletown Farmers Mkt., LLC*, 2014 WL 4426311, at *2 (Del. Super. Sept. 8, 2014).

[19] *Agahi v. Kelly*, 2024 WL 1134048, at *7 (Del. Super. Mar. 15, 2024) (citation modified).

"could not recover under any reasonably conceivable set of circumstances susceptible of proof."[20]

The Supreme Court of Delaware has instructed that legislative enactments receive a "strong presumption" of constitutionality under Delaware law.[21] "Every presumption is in favor of the validity of a legislative act and all doubts are resolved in its favor."[22] The court defers to legislative judgment on matters which are "fairly debatable"[23] and "[a]ll reasonable doubts as to the validity of a law must be resolved in favor of the constitutionality of the legislation."[24] Constitutional prohibitions to legislative action must be shown by "clear and convincing evidence."[25] "One who challenges the constitutionality of a statute has the burden of overcoming the presumption of its validity."[26]

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[20] *Cent. Mortg.*, 27 A.3d at 536.

[21] *Op. of Justs.*, 425 A.2d 604, 605 (Del. 1981) ("Initially, we note the strong judicial tradition in Delaware in support of a presumption of the constitutionality of a legislative enactment.").

[22] *Justice v. Gatchell*, 325 A.2d 97, 102 (Del. 1974); *Wilm. Med. Ctr., Inc. v. Bradford*, 382 A.2d 1338, 1342 (Del. 1978).

[23] *Helman v. State*, 784 A.2d 1058, 1068 (Del. 2011) (citing *Bradford*, 382 A.2d at 1342).

[24] *Hoover v. State*, 958 A.2d 816, 821 (Del. 2008) (quoting *McDade v. State*, 693 A.2d 1062 (Del. 1997) (citation omitted)).

[25] *Albence v. Higgin*, 295 A.3d 1065, 1088-1089 (Del. 2022) (citation omitted).

[26] *Bradford*, 382 A.2d at 1342.

ANALYSIS

A. Plaintiffs' Due Process Claim Fails for Lack of a Deprivation of Life, Liberty, or Property.

The IPU argues Plaintiffs' procedural due process claim is unripe, as Plaintiffs have not yet suffered any injury.[27] The IPU contends a plaintiff must suffer deprivation of life, liberty, or property before said plaintiff can allege a procedural due process claim.[28] Plaintiffs offer no direct counterargument. Plaintiffs do not allege they have been deprived of life, liberty, or property. Plaintiffs instead assert the IPU "*seeks to* deprive" the Plaintiffs of property and liberty interests—the IPU seeks to deprive Plaintiffs of their money and the opportunity to sell securities in Delaware and to Delaware investors.[29] Plaintiffs might succeed in the IPU Action, avoiding any loss of property or liberty.

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[27] D.I. 11 ["MTD"] at 22-23.

[28] *Id*. (quoting Erwin Chemerinsky, *Procedural Due Process Claims*, 16 Touro L. Rev. 871, 871-72 (2015)) ("All procedural due process questions can be broken down into three sub-issues. First, is there a deprivation? Only if there is a deprivation does the court need to go any further in its procedural due process analysis.").

The IPU relies on federal constitutional jurisprudence. Count II of the Amended Complaint alleges violations of the Delaware Constitution. The Delaware Constitution's due process provision has "substantially the same meaning" as the due process provisions of the United States Constitution. *Op. of Justs.*, 246 A.2d 90, 92 (Del. 1968) (citation omitted). The elements of a due process claim are therefore identical under both Constitutions.

[29] Am. Compl. ¶ 64; D.I. 16 ["MTD Opp'n"] at 33 (emphasis added).

"Only after finding the deprivation of a protected interest does the Court look to see if the State's procedures comport with due process."[30] Plaintiffs' due process claim must be dismissed until Plaintiffs can demonstrate the IPU deprived Plaintiffs of property or liberty. The Court need not address the parties' other arguments regarding Count II.

B. Plaintiffs' Right to a Jury Trial Claim is Ripe.

The IPU contends Plaintiffs' right to a jury trial claim is not ripe for adjudication under the Declaratory Judgment Act.[31] The IPU argues Plaintiffs have yet to suffer any injury from the IPU proceeding.[32]

1. Plaintiffs show sufficient standing to bring a declaratory judgment claim alleging a violation of the right to trial by jury.

Unlike for the due process claim, the IPU does not argue that a litigant must allege deprivation of life, liberty, or property before asserting the right to trial by jury has been infringed. Plaintiffs have already been pulled into an IPU administrative proceeding with no opportunity to demand a jury trial. If Plain-

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[30] *Croda, Inc. v. New Castle Cty.*, 2021 WL 5027005 (Del. Ch. Oct. 28, 2021), *aff'd*, 282 A.3d 543 (Del. 2022) (citation modified); *See In re New Maurice J. Moyer Acad., Inc.*, 108 A.3d 294, 317-18 (Del. Ch. 2015) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999)) (same).

[31] 10 *Del. C.* § 6501.

[32] MTD at 6-8.

The parties agreed to stay the IPU proceeding while the Superior Court adjudicated the constitutional issues Plaintiffs raise. Am. Compl. ¶¶ 50-51. Now arguing the case is not ripe, the IPU apparently reversed its position.

tiffs have a right to a trial by jury on Delaware Securities Act claims, that right has already been infringed by the commencement of the IPU Action.[33]

A "[d]eclaratory judgment is intended to provide a remedy where no other remedy is available under circumstances where an impending injury has *not as yet occurred*. It establishes the legal rights of a party *before* the party is injured, although injury is anticipated."[34] The potential that Plaintiffs may imminently incur liability in a purportedly unconstitutional proceeding is sufficient for a claim under the Declaratory Judgment Act.

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[33] *See Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 192 (2023) (holding that the "here-and-now" injury of being subjected to an unconstitutional adjudicative process enables a litigant to raise a constitutional challenge before the close of an administrative proceeding).

The IPU invokes *Blankenship v. FINRA*. 2024 WL 4043442, at *2 (E.D. Pa. Sept. 4, 2024). In *Blankenship*, the court found it lacked subject matter jurisdiction to hear Seventh Amendment constitutional claims regarding an ongoing proceeding. *Id.* at *3. The court explained that the plaintiff would only be injured if the defendant "took certain allegedly unconstitutional steps to injure him." *Id*. at *2. The court noted, "if this case were a challenge to the very constitutionality of [the administrative act's] structure, the result might be different." *Id.* at *2 n.4. Such a facial challenge is presented here. The action taken by the IPU—a prosecution without jury trial—has already occurred.

[34] *First State Orthop., P.A. v. Liberty Mut. Ins. Co.*, 2020 WL 6875219, at *4 (Del. Super. Nov. 20, 2020) (citation modified) (emphasis added); *see also Schick Inc. v. Amalgamated Clothing and Textile Workers Union*, 533 A.2d 1235, 1237-38 (Del. Ch. 1987) (citations omitted) (explaining "the declaratory judgment action is designed to promote preventive justice.").

2. The Court will not apply the doctrine of exhaustion of administrative remedies.

The IPU argues the Court should apply the doctrine of exhaustion of administrative remedies and order the IPU proceeding be completed before this Court addresses Plaintiffs' alleged right to a trial by jury.[35] Under the doctrine of exhaustion of administrative remedies, Delaware courts require "that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will either review any action by the agency or provide an independent remedy."[36] The decision to apply the doctrine is "a matter of judicial discretion."[37] "It applies only where a claim must be initiated before an administrative agency which has exclusive jurisdiction over the matter and is able to provide an adequate remedy."[38]

The doctrine of exhaustion of administrative remedies will not apply if the presumption in favor of its application can be overcome by a showing of one of four conditions:

- That finishing the administrative proceeding would be futile;
- That public interest creates the need for a prompt resolution;
- That the issue is a question of law only, not a matter of administrative expertise; or

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[35] MTD at 7-8.

[36] *Levinson v. Del. Comp. Rating Bureau, Inc.,* 616 A.2d 1182, 1187 (Del. 1992) (citation omitted).

[37] *Id.* at 1189.

[38] *Id.* at 1187.

- That irreparable harm would result from the court's denial of relief.[39]

Three of the four conditions justifying refusal to apply the doctrine of exhaustion of administrative remedies are present. In the instant case, forcing the completion of the administrative proceeding would be futile, as the IPU will not determine whether there is a right to trial by jury in its administrative proceeding. In the October 30 Order, the Presiding Officer already declined to hear any constitutional questions during the IPU Action.[40] Waiting for the IPU Action's conclusion will not facilitate resolution of the constitutional question regarding the right to trial by jury presented in this action.

There is a strong public interest in favor of prompt resolution, as Plaintiffs raise constitutional concerns that may affect Delaware's entire administrative law system. Finally, the right to a jury trial is a question of law, and is not a matter in the IPU's expertise, which concerns securities law. For all of these reasons, Plaintiffs are not required to exhaust their administrative remedies before pursuing their claim regarding the right to trial by jury.

3. The claim alleging a violation of the right to trial by jury is ripe.

In determining whether a controversy is ripe, Delaware courts adopt a "common sense" approach.[41] The

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[39] *Eckeard v. NPC Int'l, Inc.,* 2012 WL 5355628, *at 3 (Del. Super. Oct. 17, 2012) (citing *Levinson*, 616 A.2d at 1190).

[40] Am. Compl. ¶ 46.

[41] *Viacom Inc. v. U.S. Specialty Ins. Co.*, 2023 WL 2034445, at *2 (Del. Super. Feb. 16, 2023).

court balances the interests of the party seeking immediate relief against the efficiency of refraining from addressing issues that are still developing.[42] A dispute is ripe if "litigation sooner or later appears to be unavoidable and where the material facts are static."[43]

Five factors are relevant in assessing ripeness: (1) a practical evaluation of the plaintiff's legitimate interests in a prompt resolution of the question presented; (2) the hardship threatened by further delay in resolving the question; (3) the possibility that future factual development might affect the resolution; (4) the need to conserve scarce judicial resources; and (5) respect for identifiable policies of law concerning the matter in dispute.[44] All five factors support a finding of ripeness for the right to trial by jury claim.

Plaintiffs face potential liability in what they argue is a facially unconstitutional administrative proceeding. Such a concern is legitimate. Should this Court determine the procedure is unconstitutional, Plaintiffs would no longer face liability in a defunct IPU proceeding. If, on the other hand, the Court refused to issue an opinion on the constitutionality of the IPU's procedures until after Plaintiffs lose the IPU Action, and ultimately appeal the IPU's decision, Plaintiffs would face hardship from the liability imposed by the IPU and the delay imposed by this Court. The first and second factors weigh in favor of ripeness.

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[42] *XL Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217 (Del. 2014).

[43] *Id.* at 1217 (quoting *Julian v. Julian*, 2009 WL 2937121, at *3 (Del. Ch. Sept. 9, 2009)).

[44] *Schick*, 533 A.2d at 1239.

No further factual development in the underlying IPU proceeding is necessary. The IPU's determination on Plaintiffs' liability for Delaware Securities Act violations has no bearing on whether the IPU's procedure is unconstitutional for failure to provide a jury. The third factor weighs in favor of ripeness.

By resolving Plaintiffs' claim now, this Court promptly addresses serious constitutional law issues, enabling the entire Delaware legal system to respond as necessary. The fourth factor weighs in favor of ripeness.

Plaintiffs and the IPU are engaged in an actual dispute over the parameters of the Delaware Constitution's right to trial by jury.

> [The fifth] factor requires the Court to consider the appropriateness of determining an issue at the time it is presented to the Court. Cases are only able to be decided by Delaware courts when the issue is fully and fairly presented as an actual controversy. In situations where a case is not an actual controversy, facts might not be fully developed and the parties might not dedicate the same amount of resources—thereby affecting the development of law.[45]

This dispute, a question of constitutional interpretation, can be resolved now. The fifth factor weighs in favor of ripeness. Plaintiffs' right to a trial by jury claim (Count I) is ripe.[46]

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[45] *Homeland Ins. Co. of New York v. Corvel Corp.*, 2011 WL 7122367, *6 (Del. Super. Nov. 30, 2011).

[46] The IPU, in its reply brief and at oral argument, invokes *Burris v. Cross* to argue that Plaintiffs' claims are overripe. 583

C. Plaintiffs Have No Right to a Trial by Jury in the DOJ Proceeding.

The IPU moves to dismiss Count I of Plaintiffs' Amended Complaint, arguing that the right to a trial by jury pursuant to Article I, Section 4 of the Delaware Constitution is inapplicable to the IPU's in-house adjudications.[47] Plaintiffs, relying heavily on the Supreme Court of the United States' Opinion in *Securities & Exchange Commission v. Jarkesy*,[48] counter

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A.2d 1364 (Del. Super. 1990); D.I. 18 ["MTDR"] at 4; Tr. 9:13-20. Argument concerning the overripeness factors in *Burris* should have been addressed in the IPU's opening brief. Even in its reply brief, the IPU does not articulate how the overripeness factors apply here. The Court deems any argument regarding overripeness waived. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) ("The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim"); *see also Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (citing *Murphy*, 632 A.2d at 1152) ("Issues not briefed are deemed waived.").

[47] MTD at 10. The IPU also argues Plaintiffs waived any right to trial by jury. *Id*. at 11-14. This argument is primarily premised on the application of the Delaware Superior Court Rules of Civil Procedure to the administrative proceeding. The Rules of Civil Procedure do not apply to the IPU Action. *Compare* Super. Ct. Civ. R. 1 ("These Rules shall govern the procedure in the Superior Court . . ."), *with* 6 *Del. Admin. C.* § 200(a) ("Part B of the Rules (Rule 200 through Rule 272) governs proceedings before Presiding Officers . . .."). The IPU argues Plaintiffs are estopped from raising constitutional objections this late in the proceeding but offers nothing in the rules of procedure for the administrative proceeding which required Plaintiffs to raise their objections sooner. MTD at 13-14. The IPU's waiver argument is unfounded.

[48] 603 U.S. 109 (2024).

that they are entitled to a trial by jury.[49] With no factual issues to resolve, the Court will determine the applicability of Article I, Section 4.[50]

1. The recent Supreme Court of the United States decision in Securities & Exchange Commission v. Jarkesy

In *Securities & Exchange Commission v. Jarkesy*, the Supreme Court of the United States considered whether the Seventh Amendment of the United States Constitution permits the SEC to adjudicate securities fraud claims before an administrative law judge rather than before a jury in federal court.[51] The Supreme Court determined that the Seventh Amendment prohibited the SEC from adjudicating securities fraud claims without a jury trial.[52] The Supreme Court focused on the remedy sought in the securities fraud claims, explaining that the SEC sought punitive damages for wrongdoing, and these damages were "a type of remedy at common law that could only be enforced in courts of law."[53] The Supreme Court analogized statutory securities fraud to common law fraud, explaining that the two causes of action share a "close

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[49] MTD Opp'n at 16.

[50] *See, e.g.*, *Mennella v. Albence*, 2024 WL 758606, at *1 (Del. Super. Feb. 23, 2024) (granting declaratory judgment on constitutionality of a Delaware statute at motion to dismiss stage), *rev'd on other grounds by Albence v. Mennella*, 320 A.3d 212 (Del. 2024).

[51] *Jarkesy*, 603 U.S. at 140.

[52] *Id.* at 139.

[53] *Id.* at 124 (citation omitted).

relationship,"[54] but acknowledging that they are not identical and that "securities fraud is narrower."[55]

Both *Jarkesy* and the instant case concern the validity of resolving securities fraud claims through administrative proceedings rather than jury trials.[56] Factual similarities between the cases do not necessarily command the same legal result under two different constitutions: the Delaware Constitution and the United States Constitution.

2. The Seventh Amendment analysis is inapplicable to the instant case.

The Seventh Amendment's guarantee of jury trials in civil proceedings is one of few provisions of the Bill of Rights that does not apply to the states through the Incorporation Doctrine of the Fourteenth Amendment of the United States Constitution.[57] When a provision of the Bill of Rights applies to the states, the applicable provision of the United States Constitution establishes "a minimum, the least protection that a State may provide to its citizens."[58] States are free to establish broader protections than said "minimum."[59] For those few provisions of the Bill of Rights that are not applicable to the states, like the Seventh Amendment,

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[54] *Id.*

[55] *Id.* at 126. The Court also refuted the application of the "public rights exception" to the Seventh Amendment.

[56] Am. Compl. ¶¶ 1-2.

[57] *McCool v. Gehret*, 657 A.2d 269, 281 (Del 1995). *See also Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) ("The States, so far as [the Seventh Amendment] is concerned, are left to regulate trials in their own courts in their own way.").

[58] *Sanders v. State*, 585 A.2d 117, 145 (Del. 1990).

[59] *Id.*

States need not adhere to the standards established by the United States Constitution.

As the Supreme Court of Delaware declared, "it is untenable to conclude that the right to trial by jury in the Delaware Constitution means exactly the same thing as that right in the United States Constitution."[60] Settled Delaware law reveals examples of deviation between the Delaware and Federal Constitutions' rights to trial by jury in civil cases. Delaware, maintaining separate courts of law and equity, vests its Court of Chancery with the power to resolve some legal claims without a trial by jury pursuant to the Cleanup Doctrine.[61] In federal courts, in cases in which legal and equitable issues commingle, litigants are entitled to a jury trial on the legal claim and any factual issues common to the legal and equitable claims.[62]

Because the Seventh Amendment does not apply to Delaware, this Court is not bound by the ruling in *Jarkesy*.[63] The Court must analyze Article I, Section 4 of the Delaware Constitution to determine whether

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[60] *Claudio v. State*, 585 A.2d 1278, 1298 (Del. 1991).

[61] *See*, *e.g.*, *FirstString Rsch., Inc. v. JSS Med. Rsch. Inc.*, 2021 WL 2182829, at *10 (Del. Ch. May 28, 2021) ("Delaware stayed stalwartly in the traditionalist camp, first bucking the mid-nineteenth century trend of merging courts of law and equity, and then maintaining the viability of the clean-up doctrine over a right to jury trial as to intertwined issues.")

[62] *Tull v. United States*, 481 U.S. 412, 425 (1987) (citation omitted).

[63] *See In re Investigation Pursuant to 30 V.S.A. Sec. 30 & 209*, 2024 VT 58, ¶ 31 (Vt. Aug. 30, 2024) (explaining "the Seventh Amendment is not applicable to state courts, and *Jarkesy* is therefore nonbinding on this Court").

Delaware Securities Act claims must be resolved through a trial by jury.

The provision for the right to a trial by jury in the Delaware Constitution is not verbose. Article I, Section 4 of the Delaware Constitution provides: "[t]rial by jury shall be as heretofore."[64] This language was first included in the Delaware Constitution of 1792.[65] The Supreme Court of Delaware explained this language "demonstrates an unambiguous intention to equate Delaware's constitutional right to trial by jury with the common law characteristics of that right."[66]

Under the Supreme Court of the United States' Seventh Amendment analysis, federal courts look to the remedy sought to determine if a claim must be heard by a jury in federal court.[67] Delaware, by contrast, looks to whether the cause of action received a trial by jury at common law.[68]

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[64] Del. Const. art. I § 4.

[65] *Claudio*, 585 A.2d at 1298.

[66] *Id.*

[67] *Tull*, 481 U.S. at 421 ("We reiterate our previously expressed view that characterizing the relief sought is '[m]ore important' than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial."); *See also Jarkesy*, 603 U.S. at 123. ("In this case, the remedy is all but dispositive.").

[68] *State v. Cahill*, 443 A.2d 497, 499 (Del. 1982) ("In examining a pure civil non-support enforcement action, it is clear that *such an action* did not exist in a non-statutory form at law.") (emphasis added); *McCool v. Gehret*, 657 A.2d 269, 282 (Del. 1995) ("A *sine qua non* of that common law jurisprudence is the principle that either party shall have the right to demand a jury trial upon an issue of fact in *an action at law*.") (emphasis added); *Bon Ayre Land LLC v. Bon Ayre Cmty. Assn.*, 2015 WL 893256, at *4 (Del. Super. Feb. 26, 2015) ("[A]bsent a newly created statutory right

In *State v. Cahill*, the Supreme Court of Delaware examined whether the right to a trial by jury applied to a civil non-support enforcement action in Delaware Family Court.[69] The Supreme Court concluded that the right to a trial by jury did not apply, explaining that "such an action did not exist in a non-statutory form at law."[70] The Supreme Court noted that actions brought for the support of a "legitimate child" were historically equitable, and that an action for the support of an "illegitimate child" did not exist at common law.[71] *Cahill* demonstrates that a "new statutory cause of action," unlike a common law cause of action, can be resolved without a trial by jury if the General Assembly intended for the statutory cause of action to be resolved without a jury.[72]

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to trial by jury, if the right for a particular cause of action did not exist at common law, then it does not exist today."), *rev'd on other grounds*, 133 A.3d 559 (Del. 2016).

Other jurisdictions, sharing similar state constitutional provisions for the right to a trial by jury, follow this same cause-of-action-oriented analysis. *See State v. Schweda*, 736 N.W.2d 59, 59 n.9 (Wis. 2007) ("We determine whether (1) the cause of action existed, was known, or was recognized at common law in 1848 and (2) whether the cause of action was regarded as at law in 1848."); *Wertz v. Chapman Twp.*, 741 A.2d 1272, 1278 (Pa. 1999) (stating "this court has eschewed a focus on the remedy sought and has embraced a view which looks to the cause of action in determining the right of a jury trial pursuant to Article I, Section 6 of our Constitution.").

[69] *State v. Cahill*, 443 A.2d 497, 499 (Del. 1982).

[70] *Id.*

[71] *Id.* at 499-500.

[72] *Id.* at 500. The Court also notes a footnote in *Cahill*, which characterizes the federal view of the federal constitutional right to a jury as "expansive." *Id.* at 499 n.5. The use of the adjective

3. Under the Delaware Constitution's analytical framework, there is no requirement for a trial by jury in securities fraud actions brought under the Delaware Securities Act.

Plaintiffs, pointing to the analysis in *Jarkesy*, argue the elements of securities fraud are analogous to those of common law fraud, so the right to a trial by jury must attach to securities fraud actions as it does to common law fraud actions.[73]

The analogy between common law fraud and securities fraud is imperfect. To succeed in bringing a common law fraud claim, a litigant must prove five elements:[74]

1. a false representation, usually one of fact, made by the defendant;
2. the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
3. an intent to induce the plaintiff to act or to refrain from acting;
4. the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
5. damage to the plaintiff as a result of such reliance.

"expansive" indicates the right to a jury under the Delaware Constitution may be more limited than that of the federal constitution.

[73] MTD Opp'n at 19.

[74] *Brady ex rel. v. Publishers Clearing House*, 787 A.2d 111, 116 (Del. Ch. 2001) (also noting the absence of a reliance or scienter element in a statutory fraud claim); *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954 (Del. 2005).

In *Hubbard v. Hibbard Brown & Co.*,[75] the Supreme Court of Delaware defined the elements for a securities fraud claim brought under the Delaware Securities Act:

1. the defendant made a misstatement or omission
2. of material fact
3. with scienter
4. in connection with a purchase or sale of a security
5. upon which the plaintiff (or another person if the action is brought by the Delaware Securities Division) relied and
6. that reliance proximately caused the plaintiff's (or other person's) injury.[76]

The Supreme Court of Delaware's decision relied upon a Third Circuit securities fraud case brought by a private litigant, not the Government.[77]

The IPU argues *Hubbard* incorrectly established the pleading standard for government-brought securities fraud claims as the Supreme Court defined identical elements for private and government-brought actions.[78] After *Hubbard*, the Delaware General Assembly passed a 2013 amendment to the Delaware Securities Act, adding the following language to Section 73-201:

> In interpreting this Section, courts will be guided by the interpretations given by Federal

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[75] 633 A.2d 345 (Del. 1993), *superseded*.

[76] *Id*. at 349 (citation modified).

[77] *Id*. (citing *In re Phillips Petroleum Sec. Litig.*, 881 F.2d 1236 (3d Cir. 1989)).

[78] D.I. 29 ["IPU Supp."] at 7.

> Courts to similar language set forth in Section 17(a) of the Securities Act of 1933 and Rule 10b-5 promulgated under the Securities Exchange Act of 1934, to include, without limitation, *any difference in pleading requirements governing actions brought by securities regulators as opposed to private litigants.*[79]

Partially superseding the ruling in *Hubbard*, this amendment clearly indicates that the legislature intended for a different pleading standard when the government brings a securities fraud claim, and that this Court should look to federal caselaw in identifying the appropriate elements for a government-brought securities fraud claim.[80]

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[79] 6 *Del. C.* § 73-201 (citation modified) (emphasis added).

[80] In 2023, the Court of Chancery employed the elements for securities fraud described in *Hubbard*, and was subsequently affirmed by the Supreme Court of Delaware. *Promise Easy Ltd. v. Moon*, 2023 WL 5152173, at *16 (Aug. 10, 2023), *judgment entered*, (Del. Ch. 2023), *aff'd*, 320 A.3d 194 (Del. 2024). *Promise Easy* is distinct from the instant case, as the securities fraud action in *Promise Easy* was brought by a private litigant, not the IPU.

Various federal caselaw indicates securities fraud claims, when brought by the government, do not require proof of reliance.[81] Accordingly, the IPU need not prove reliance in its action against Plaintiffs.[82]

The IPU brought securities fraud actions against Plaintiffs under 6 *Del. C.* § 73-201(2)-(3), provisions based on Sections 17(a)(2)-(3)[83] of the Federal Securities Act of 1933.[84] According to the Supreme Court of the United States—for actions brought under Sections 17(a)(2)-(3) of the 1933 Act—the government need not prove scienter.[85] It follows that the government need

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[81] *See*, *e.g*, *Sec. Exch. Comm'n v. Goble*, 682 F.3d 934, 943 (11th Cir. 2012) ("Because this is a civil enforcement action brought by the SEC, reliance, damages, and loss causation are not required elements."); *McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 931 (7th Cir. 2011) (stating "although the SEC doesn't have to prove reliance on a misrepresentation, a private party would have to, as otherwise he would have suffered no injury"); *Sec. Exch. Comm'n v. Tambone*, 597 F.3d 436, 447 n.9 (1st Cir. 2010) (noting the SEC need not prove reliance in a 10b-5 case); *Geman v. Sec. Exch. Comm'n*, 334 F.3d 1183, 1191 (10th Cir. 2003) ("The SEC is not required to prove reliance or injury in enforcement actions."); *United States v. Haddy*, 134 F.3d 542, 550 (3d Cir. 1998) ("Section 10(b)'s omission of reference to a particular victim is compelling evidence that investor reliance is not required for a securities fraud conviction.")

[82] *In re Swan Energy, Inc., Brandon Davis, John Schiffner, Cody Davis, and Dale Frank Phillips, Respondents*, 2022 WL 22672888, at *18 (Del. Div. Sec. Mar. 30, 2022).

[84] *Swan Energy*, 2022 WL 22672888, at *18; *See also* 6 *Del. C.* § 73-201 (stating "courts will be guided by the interpretations given by federal courts to similar language set forth in § 17(a) of the Securities Act of 1933").

[85] *Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680, 696-97 (1980).

not prove scienter when bringing an action under the Delaware Securities Act.[86]

Common law fraud and securities fraud serve different purposes. In IPU securities fraud claims, Delaware asserts its own right to protect its citizens—there is not a plaintiff seeking to remedy his/her own injuries.[87]

In light of the differences in the elements and purposes of common law fraud and securities fraud, plaintiffs have not shown, by clear and convincing evidence, that the right to a trial by jury applies to securities fraud actions brought by the government under the Delaware Securities Act.[88] The "strong presumption"[89] of the constitutionality of the Delaware Securities Act is not overcome by plaintiff's *Jarkesy*-inspired argument.

The Superior Court of Delaware previously addressed the right to trial by jury in a government-brought statutory fraud action, reaching the same conclusion as the Court in the instant case. In *Blue Beach Bungalows DE, LLC v. Delaware Department*

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[86] *Swan Energy*, 2022 WL 22672888, at *18.

Delaware securities fraud claims also have a longer statute of limitations period than common law fraud claims. Enforcement claims under the Delaware Securities Act must be brought within 5 years of a violation. *See* 6 *Del. C.* § 73-503. Common law fraud claims must be brought within 3 years of the injury. *Winklevoss Cap. Fund, LLC v. Shaw*, 2019 WL 994534, at *5 (Del. Ch. Mar. 1, 2019).

[87] *See* 6 *Del. C.* § 73-101(b) ("The purpose of the Delaware Securities Act is to prevent the public from being victimized").

[88] *Higgin*, 295 A.3d at 1088-1089 (citation omitted).

[89] *Op. of Justs*, 425 A.2d at 605 ("Initially, we note the strong judicial tradition in Delaware in support of a presumption of the constitutionality of a legislative enactment.").

of Justice Consumer Protection Unit, the Superior Court determined the right to a trial by jury did not apply to statutory fraud claims brought via an administrative proceeding under the Consumer Fraud Act ("CFA").[90] The court articulated the differences in elements between claims under the CFA and common law fraud.[91] The court concluded differences in the elements of the causes of action prevented a perfect analogy between claims under the CFA and common law fraud, and this "grey area" prevented a finding of unconstitutionality.[92]

Similarly, in *Ridlon v. New Hampshire Bureau of Securities Regulation*, the Supreme Court of New Hampshire declined to apply the state constitutional right to trial by jury to that state's securities fraud claims, reasoning "the administrative proceeding brought against Ridlon by the secretary under the Securities Act is not analogous to common law fraud or deceit because it require[s] proof of significantly different elements and satisfaction of a different standard of proof."[93]

That this Court's conclusion contrasts with *Jarkesy* is understandable. The test for determining the application of the Seventh Amendment right to trial by jury focuses on remedies.[94] Under the Seventh

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[90] 2024 WL 4977006, at *14 (Dec. 4, 2024), *amended*, 2024 WL 5088688 (Del. Super. Dec. 12, 2024).

[91] *Id.*

[92] *Id.*

[93] *Ridlon v. New Hampshire Bureau of Sec. Regulation*, 214 A.3d 1196, 1204 (N.H. 2019) (citation modified).

[94] *Tull*, 481 U.S. at 421 ("We reiterate our previously expressed view that characterizing the relief sought is '[m]ore important'

Amendment analysis, it is unnecessary to find a "close analogue to the modern cause of action at issue"[95] in the common law of the late eighteenth century, as "the fact that the subject matter of a modern statutory action and an eighteenth century English action are close equivalents is irrelevant for Seventh Amendment purposes, because that Amendment requires trial by jury in actions *unheard of at common law*."[96] The same is not true in Delaware, where the Delaware Constitution's provision enumerating the right to a trial by jury "demonstrates an unambiguous intention to *equate* Delaware's constitutional right to trial by

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than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial."); *See also Jarkesy*, 603 U.S. at 123. ("In this case, the remedy is all but dispositive.").

Citing to *Am. Appliance, Inc. v. State ex rel. Brady* and *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, Plaintiffs assert the remedy sought is dispositive in the instant case, comparing the IPU Action's desired civil penalties to a common law action of debt. MTD Opp'n at 27-29. 712 A.2d 1001 (Del. 1998); 385 A.2d 147 (Del. Ch. 1978), *aff'd*, 407 A.2d 533 (Del. 1979). Neither case articulates a remedies-oriented test for determining if the right to trial by jury applies to a cause of action. At most, these cases muddy the waters when analyzing the right to trial by jury, but still do not enable a finding, by clear and convincing evidence, that the Securities Act is unconstitutional. The Court relies on other Delaware caselaw which indicates the cause-of-action-focused test, rather than a remedies-focused test.

[95] *State v. Schweda*, 736 N.W.2d 59, 59 n.9 (Wis. 2007).

[96] *Tull*, 481 U.S. at 420 (citation modified) (emphasis added).

jury with the *common law characteristics* of that right."[97]

Government-brought securities fraud claims, such as those brought against Plaintiffs, are a "new statutory" cause of action to which the right to trial by jury was not intended to apply.[98] Plaintiffs have not demonstrated by clear and convincing evidence that government-brought securities fraud is sufficiently

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[97] *Claudio*, 585 A.2d at 1298 (emphasis added); *See also Cahill*, 443 A.2d at 500 (declining to apply the right to a trial by jury to a cause of action which did not exist at common law).

Plaintiffs direct the Court to *American Appliance*. 712 A.2d 1001. In *American Appliance*, the Supreme Court of Delaware found that the Superior Court had jurisdiction to hear an action for civil penalties. *Id*. at 1002. The Supreme Court reasoned that an action for civil penalties was "akin to a common law action to recover a debt." *Id*. at 1003. The Supreme Court, including the following quote from *Tull*: "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Id*. at 1003 n.10 (citing *Tull*, 481 U.S. at 422). Plaintiffs contend this evidences a remedies-focused analysis in Delaware's jurisprudence addressing the right to trial by jury. Tr. 57:12-59:9. The Court is not convinced. *American Appliance* addresses the Superior Court's subject matter jurisdiction, not the right to trial by jury. *Cahill* indicates that the focus should be directed towards identifying any closely analogous common law cause of action for the cause of action at issue. *Cahill*, 443 A.2d at 500; *see also Bon Ayre*, 2015 WL 893256, at *4 ("[A]bsent a newly created statutory right to trial by jury, if the right for a particular cause of action did not exist at common law, then it does not exist today.") (rev'd on other grounds). *Tull* indicates the opposite. 481 U.S. at 420 (explaining "the fact that the subject matter of a modern statutory action and an [eighteenth] century English action are close equivalents 'is irrelevant for Seventh Amendment purposes,' because 'that Amendment requires trial by jury in actions unheard of at common law.'").

[98] *See Cahill*, 443 A.2d at 500 (declining to apply the right to a trial by jury to a "new statutory" cause of action).

analogous to common law fraud to justify a finding of unconstitutionality.

4. *The right to a trial by jury does not apply to claims alleging violations of 6 Del. C. § 73-202.*[99]

Plaintiffs contend they have a right to trial by jury for the claims in which the IPU alleges Plaintiffs sold securities without proper registration in violation of 6 *Del. C.* § 73-202.[100] Plaintiffs cite 16th and 17th-century English caselaw, contending similar claims were brought before a jury, under English statutes, before the enactment of the Delaware Constitution.[101] Plaintiffs note the English statutes themselves explicitly provided for a right to trial by jury in such statutory actions.[102]

Delaware did not adopt all of the English statutes in effect at the time of independence.[103] As articulated in the Delaware Constitution of 1776, "the common law of England, *as-well as* so much of the statute law as has been heretofore adopted in practice in this

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[99] Plaintiffs contend the IPU waived argument regarding the differences in elements between 6 *Del. C.* § 73-202 and analogous common law causes of action by failing to address the subject in their supplemental brief. D.I. 29 at 2 n.1. The Court did not request briefing on that issue, instead requesting briefing regarding the elements of action brought under 6 *Del. C.* § 73-201(2)-(3). The IPU did not fail to brief the issue, as the IPU was not asked to do so. As explained in this section, there is no analogous common law cause of action for selling securities without registration.

[100] MTD Opp'n at 25.

[101] *Id.* at 25-26.

[102] *Id.*

[103] This is understandable, as the Declaration of Independence arose out of many objected-to English statutes.

State, shall remain in force, unless they shall be altered by a future law of the legislature."[104] The Delaware Constitution of 1776 thus treats statutes and common law as separate bodies. For an English statute on securities registration to remain effective post-independence, it must have been adopted in Delaware in 1776.

As discussed above, the Delaware Constitution's right to trial by jury preserves the right as it existed under the common law.[105] "Common law" is not defined in the Delaware Constitution of 1792. Black's Law Dictionary defines common law as "the body of law derived from judicial decisions*, rather than from statutes* or constitutions."[106]

Plaintiffs offer no evidence showing pre-1776 English securities registration statutes were adopted by Delaware by 1776. Even if any English securities registration statutes remained in effect after the Declaration of Independence, the right to trial by jury they provided was a product of those statutes, not of common law. Plaintiffs fail to identify a common law cause of action for selling unregistered securities which was tried by jury.

As in *Cahill*, actions brought for the sale of securities without registration, pursuant to 6 *Del. C.* § 73-

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[104] Del. Const. of 1776 art. 25 (emphasis added).

[105] *Claudio*, 585 A.2d at 1298.

[106] *Common Law*, Black's Law Dictionary (12th ed. 2024) (emphasis added). *See also* Karen Lynn Valihura, *Creating Common Law in the Corporate Context, Delaware Style*, 25 Univ. of Penn. J. of Bus. L. 1, 1 (2023) (citing the Black's Law Dictionary definition for "Common Law").

202, "did not exist in a non-statutory form" in Delaware's jurisprudential history.[107] Instead, these actions are "based on a new statutory cause of action intended by the General Assembly to be tried without a jury."[108]

The legislature did not require jury trials for actions brought by the IPU under 6 *Del. C.* § 73-202, and their determination receives a "strong presumption" of constitutionality.[109] Plaintiffs have failed to demonstrate 6 *Del. C.* § 73-202 is unconstitutional by clear and convincing evidence.[110] The right to a trial by jury under Article I, Section 4 of the Delaware Constitution does not apply to 6 *Del. C.* § 73-202.

CONCLUSION

For the reasons explained above, the IPU's Motion to Dismiss Counts I and II of Plaintiffs' Amended Complaint is **GRANTED**.

IT IS SO ORDERED.

/s/ Meghan A. Adams

Meghan A. Adams, Judge

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[107] *Cahill*, 443 A.2d at 499.

[108] *Id.* at 500.

[109] *Op. of the Justs*, 425 A.2d at 605 ("Initially, we note the strong judicial tradition in Delaware in support of a presumption of the constitutionality of a legislative enactment.").

[110] *Higgin*, 295 A.3d at 1088-1089 (citation omitted).

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SWAN ENERGY, INC., BRANDON DAVIS, JOHN SCHIFFNER, and CODY DAVIS v. INVESTOR PROTECTION UNIT OF THE DELAWARE DEPARTMENT OF JUSTICE	No. 331, 2025 Court Below: Superior Court of the State of Delaware C.A. No. N24C-03-071

The following docket entry has been efiled in the above cause.

August 3, 2026. Mandate to Clerk of Court below.
Case Closed.

cc: The Honorable Meghan A. Adams
Travis J. Ferguson, Esquire
Steve Wood, Esquire
Chelsea Botsch, Esquire
Ian R. Liston, Jr., Esquire
Evelyn H. Brantley, Esquire
T. Victor Clark, Esquire
Lindsay Nasshorn, Esquire
Kurt M. Heyman, Esquire
Elizabeth A. DeFelice, Esquire
Gillian L. Andrews, Esquire

Prothonotary
Received Above

By _____
Date _____

Date: August 3, 2026

/s/ Lisa A. Dolph
Clerk of Supreme Court

MANDATE

THE SUPREME COURT
OF THE STATE OF DELAWARE

TO: Superior Court of the State of Delaware in and for New Castle County:

GREETINGS:

WHEREAS, in the case of:

SWAN ENERGY, INC., BRANDON DAVIS, JOHN SCHIFFNER, AND CODY DAVIS

vs.

INVESTOR PROTECTION UNIT OF THE DELAWARE DEPARTMENT OF JUSTICE

C.A. No. N24C-03-071 MAA

a certain judgment or order was entered on the 24th day of June 2025, to which reference is hereby made; and **WHEREAS**, by appropriate proceedings the judgment or order was duly appealed to this Court, and after consideration has been finally determined, as appears from the Opinion decided **July 16, 2026**, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED

that the order or judgment be and is hereby **AFFIRMED**.

/s/ Lisa A. Dolph
Clerk of Supreme Court

Issued: August 3, 2026
Supreme Court No. 331, 2025

U.S. Const. amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Del. Const. art. I, § 4

§ 4. Trial by jury.

Trial by jury shall be as heretofore.

37 Del. Laws, c. 1 and 38 Del. Laws, Part II, c. 3; 64 Del. Laws, c. 404 and 65 Del. Laws, c. 186; 84 Del. Laws, c. 281 and 85 Del. Laws, c. 5;

6 Del. C. § 73-102(c)

§ 73-102(c). Administration of chapter.

(c) The Director may, by rule, regulation or order, delegate the Director's powers, duties and authority to issue orders, pursuant to §§ 73-501 through 73-601 of this title or otherwise in this chapter, to an administrative hearing officer appointed by the Attorney General (or his or her designee).

6 Del. C. § 73-201

§ 73-201. Employment of manipulative and deceptive devices.

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

(1) To employ any device, scheme or artifice to defraud;

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

In interpreting this section, courts will be guided by the interpretations given by federal courts to similar language set forth in § 17(a) of the Securities Act of 1933 [15 U.S.C. § 77q] and Rule 10b-5 [17 C.F.R. § 240.10b-5] promulgated under the Securities Exchange Act of 1934, to include, without limitation, any difference in pleading requirements governing actions brought by securities regulators as opposed to private litigants.

(6 Del. C. 1953, § 7303; 59 Del. Laws, c. 208, § 1; 68 Del. Laws, c. 181, § 16; 78 Del. Laws, c. 175, §§ 118, 122; 79 Del. Laws, c. 182, § 4; 84 Del. Laws, c. 230, § 4.)

6 Del. C. § 73-202

§ 73-202. Registration of and notice filing for securities.

It is unlawful for any person to offer or sell any security in this State unless:

(1) It is registered under this chapter;

(2) The security or transaction is exempted under § 73-207 of this title; or

(3) It is a federal covered security for which a notice filing has been made pursuant to the provisions of § 73-208 of this title.

(6 Del. C. 1953, § 7304; 59 Del. Laws, c. 208, § 1; 71 Del. Laws, c. 162, § 6; 78 Del. Laws, c. 175, §§ 6, 7, 88, 118.)

6 Del. C. § 73-502(b)

§ 73-502(b). Judicial review.

(b) When the record has been filed and certified by the Director, the Court of Chancery has exclusive jurisdiction to affirm, modify, enforce or set aside the order, in whole or in part. The findings of the Director as to the facts, if supported by material and substantial evidence, are conclusive. If, within 20 days of the filing of the record by the Director, either party applies to the Court for leave to adduce material evidence, and shows to the satisfaction of the Court that there were reasonable grounds for failure to adduce the evidence in the hearing before the Director, the Court may order the additional evidence to be taken before the Director and to be adduced upon the hearing in such manner and upon such conditions as the Court considers proper.

6 Del. C. § 73-601(a)-(b)

§ 73-601. Administrative remedies.

(a) In any administrative proceeding before the Director, the Director may issue orders providing for the following remedies: cease and desist; fine; assessment of costs; restitution to investors; conditional or probationary registration; suspension or bar from registration; censure or reprimand; special reporting requirements; freezing of accounts in which it is believed that fraud has occurred, may be occurring, or is likely to occur; or other remedies which the Director determines to be in the public interest.

(b) In addition to the remedies set forth in subsection (a) of this section, the Director may order the payment of fines and other monetary sanctions for any violation of any provision of this chapter or any rule or order hereunder in an amount not to exceed $10,000 for each and every violation, plus the costs of investigation and prosecution. Each independent violation of this chapter counts as a separate instance for purposes of calculating penalties.

6 Del. Admin. C. § 247

Evidence: Reference to Delaware Uniform Rules of Evidence

The Presiding Officer may make reference to and be guided by the Delaware Uniform Rules of Evidence in receiving relevant evidence under Rule 245 and ruling on objections under Rule 246. Notwithstanding those rules, the Presiding Officer may admit any evidence that reasonable and prudent individuals would commonly accept in the conduct of their affairs, and give probative effect to that evidence. Evidence may not be excluded solely on the ground that it is hearsay.

18 DE Reg. 394 (11/01/14)

BEFORE THE INVESTOR PROTECTION DIRECTOR OF THE STATE OF DELAWARE

IN THE MATTER OF: SWAN ENERGY, INC., BRANDON DAVIS, JOHN SCHIFFNER, CODY DAVIS, AND DALE FRANK PHILLIPS Respondents.	Investor Protection Case No. 18-0026

SECOND AMENDED ADMINISTRATIVE COMPLAINT

The Investor Protection Unit of the Delaware Department of Justice (the "IPU") hereby asserts the following complaint against Swan Energy, Inc., Brandon Davis, John Schiffner, Cody Davis, and Dale Frank Phillips pursuant to the Delaware Securities Act, 6 *Del. C.* § 73-101, *et seq.* (the "Act").

Summary of the Allegations

1. Respondents Swan Energy, Inc. ("Swan"), Brandon Davis ("Davis"), John Schiffner ("Schiffner"), Cody Davis,[1] and Dale Frank Phillips ("Phillips," and collectively with Swan, Davis, Schiffner, and Cody Davis, the "Respondents") are conducting a long-running scheme to induce investors, including investors in Delaware, to purchase risky, unregistered oil and gas and mining securities. Since 2011, Respondents have

[1] For the avoidance of doubt, Cody Davis will be referred to in this Complaint by his full name. Any references to "Davis" shall refer only to Brandon Davis.

raised over $800,000 from the sale of these securities in Delaware—and over $1,000,000 when considering the completion costs and other assessments Swan required to prevent dilution of their original investments.

2. With one exception, Respondents labelled all of their investments relevant to this Complaint as "joint ventures." Regardless of Swan's characterization of them, the investments were, and are, "securities" under the Act. Investors in each of these "joint ventures" made an investment of money, in a common enterprise, with an expectation of profits derived from the efforts of others.

3. Although Respondents disguise most of their investments as "joint ventures" that will be actively managed by investors, Respondents and their agents reserved for themselves control over all activity undertaken by the purported "joint ventures," including, but not limited to: (i) selecting (and modifying) the "joint venture's" business plan; (ii) securing all necessary permits; (iii) curating material to be reviewed by investors; and (iv) selecting oil and gas, financial, and business professionals to provide services to the "joint ventures." Because of their lack of oil and gas experience and their geographical distance from Swan's projects and one another, the investors were entirely dependent on the advice, representations and suggestions of the Respondents in making investment decisions.

4. Most of the "joint ventures" relevant to this Complaint were formed for the purpose of drilling, testing, and completing prospect oil and gas wells (the "Oil and Gas JVs"). As relevant here, in addition to the Oil and Gas JVs, Swan also formed (i) the Eureka I "joint

venture" to conduct gold mining operations in Baker County, Oregon and (ii) the Nject Disposal "joint venture" to hold class C "units" of Swan Nject, LLC ("Nject LLC"), a Texas limited liability company also formed by Swan to own and manage saltwater disposal wells in Oklahoma.

5. In addition to the "joint ventures," Respondents also offered and sold to at least one Delawarean Class D Units of Nject, LLC (the "Class D Securities") using an investment contract styled as an "Investment Letter." To induce existing Nject Disposal investors to purchase the Class D Securities, Davis led investors to believe that investments in the Class D Securities would be used to fund and operate an in-house trucking company to haul water to the saltwater disposal wells owned by Nject LLC. This was not true. Without consultation with or disclosure to investors, Swan and Davis caused the trucking company to deliver water to competing wells not owned by Nject LLC.

6. Each Respondent offered and sold unregistered securities to Delaware investors. In addition, Schiffner, who has never been licensed as an investment adviser in Delaware, also entered into an unwritten, years-long investment advisory relationship with an elderly Delawarean. During the course of this relationship, Schiffner advised the investor, among other things, as to the advisability of investing in Swan securities and recommended that he sell other securities to free up liquidity to purchase additional Swan securities. Schiffner's recommendations were plainly unsuitable for the investor based on, among other things, his age, liquidity profile, and self-described [RE-

DACTED] investment style. Moreover, for every security Schiffner sold, he received a large, undisclosed commission.

7. The counts set forth in this Complaint are summarized below:

Count(s)	**Respondent(s)**	**Nature of Allegation**
1-41	Swan and Schiffner	Offer of Unregistered Securities
42-49	Swan and Davis	Offer of Unregistered Securities
50-62	Swan, Davis, and Schiffner	Sale of Unregistered Securities
63-64	Swan, Cody Davis, and Schiffner	Sale of Unregistered Securities
65-66	Swan and Davis	Sale of Unregistered Securities
67	Swan and Phillips	Offer of Unregistered Securities
68	Swan, Davis, and Phillips	Sale of Unregistered Securities
69	Swan and Davis	Securities Fraud
70	Schiffner	Unwritten Investment Advisory Contract
71	Schiffner	Breach of Fiduciary Duty

Parties

8. Respondent Swan is a Delaware corporation with a principal place of business at 3200 Southwest Fwy., #1400, Phoenix Tower, Houston, TX, 77027.

9. Respondent Davis is an individual who at all relevant times was an agent, officer and/or director of Swan. Upon information and belief, Davis may be served at the following address: 3200 Southwest Fwy., #1400, Phoenix Tower, Houston, TX, 77027, or wherever he may be found.

10. Respondent Schiffner is an individual who at all relevant times was an agent, officer, and/or director of Swan. Schiffner is not, and has never been, registered as an investment adviser in the State of Delaware. Upon information and belief, Schiffner may be served at 3200 Southwest Fwy., #1400, Phoenix Tower, Houston, TX, 77027, 10 Papaya Street, Apartment 805, Clearwater Beach, FL 33767, or wherever he may be found.

11. Respondent Cody Davis is an individual who, upon information and belief, was an agent, officer, and or director of Swan during the period from January 1, 2016 through April 1, 2016. Upon information and belief, Cody Davis may be served at 9017 N. University Ave., Apartment 26209, Oklahoma City, OK 73114, or wherever he may be found.

12. Respondent Phillips is an individual who at all relevant times was an agent, officer, and/or director of Swan. Upon information and belief, Phillips may be served at 4710 Broken Elm Drive, Spring, TX 77388, or wherever he may be found.

13. The IPU is a unit within the Delaware Department of Justice directed by the Investor Protection Director (the "Director") under the Attorney General pursuant to the Act.

14. The Director is charged under 6 *Del. C.* § 73-102 with enforcement of the Act.

Statutory Authority

15. The purpose of the Act "is to prevent the public from being victimized by unscrupulous or overreaching broker-dealers, investment advisers or agents in the context of selling securities or giving investment advice, as well as to remedy any harm caused by securities law violations." 6 *Del. C.* § 73-101(b).

16. Section 73-103(a)(23) of the Act defines "security" as including an "investment contract" and a "certificate of interest of participation in an oil, gas or mining title or lease or in payments out of production under such title or lease."

17. Section 73-201 of the Act provides:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> (1) To employ any device, scheme or artifice to defraud;
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

18. Section 73-202 of the Act prohibits the offer or sale of any security in Delaware unless (1) it is registered under the Act, (2) the security or transaction is exempted under § 73-207 of the Act, or (3) it is a federal covered security for which a notice filing has been made pursuant to the provisions of § 73-208 of the Act.

19. Section 103(a)(10) of the Act defines an "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities."

20. Section 73-304(a)(7) of the Act prohibits investment advisers from engaging from dishonest or unethical practices.

21. Section 73-305(a)-(c) of the Act provides:

> (a) It is unlawful for an investment adviser, federal covered adviser or investment adviser representative, all as defined in this chapter, to employ any device, scheme or artifice to defraud another person, or to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon another person.
>
> (b) It is unlawful for an investment adviser, federal covered adviser or investment adviser representative, all as defined in this chapter, in connection with giving investment advice or otherwise acting as an investment adviser, federal covered adviser or investment adviser

representative to make any untrue statement of fact that a reasonable client or prospective client would deem material or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

(c) It is unlawful for any investment adviser or investment adviser representative to enter into, extend or renew any investment advisory contract unless it provides in writing:

(1) That the investment adviser or investment adviser representative shall not be compensated on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;

(2) That no assignment of a contract may be made by the investment adviser or investment adviser representative without the consent of the other party to the contract; and

(3) That the investment adviser or investment adviser representative, if a partnership, shall notify the other party to the contract of any change in the membership or the partnership within a reasonable time after the change.

22. Section 73-102(b) of the Act provides that the Director "may make, amend and rescind rules, regulations, forms and orders to carry out and define the provisions of [the Act]."

23. Rule 709(a) of the Rules Pursuant to the Delaware Securities Act provides:

> A person who is an investment adviser, a federal covered adviser, or an investment adviser representative is a fiduciary and has a duty to act primarily for the benefit of the client. While the extent and nature of this duty varies according to the nature of the relationship with the client and the circumstances of each case, no investment adviser, federal covered adviser or representative shall engage in any dishonest or unethical business practice. The provisions of this section apply to federal covered advisers only to the extent permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290). For purposes of Section 73-304(a)(7) of the Act, the term "dishonest or unethical practices" by an investment adviser, a federal covered adviser, or an investment adviser representative shall include but not be limited to the following:
>
> > (1) Recommending to a client, to whom investment supervisory, management or consulting services are provided, the purchase, sale, or exchange of any security, or other investment strategy, without reasonable grounds to believe that the recommendation is suitable for the client, in light of the client's investment profile, including but not limited to, age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information material

> to the investment, based on the information obtained through the reasonable diligence of the investment adviser or investment adviser representative to ascertain the client's investment profile along with such other information about the client's investment profile known to such investment adviser or investment adviser representative.
>
> * * *
>
> (12) Failing to disclose to clients, in writing, before any advice is rendered, any material conflict of interest relating to the adviser or any of its employees which could reasonably be expected to impair the rendering of unbiased and objective advice

24. The Act further states that the Director may issue administrative orders providing for the following remedies: "cease and desist; fine, assessment of costs; restitution to investors; conditional or probationary registration; censure or reprimand; special reporting requirements; or other remedies which the Director determines to be in the public interest." 6 *Del. C.* § 73-601(a).

Statement of Facts

I. The Delaware Investors

A. *Investor One*

25. [REDACTED] ([REDACTED] 1934-[REDACTED]/2020) ("Investor One") was a lifelong Delawarean and Wilmingtonian, having graduated from Salesianum School and then the University of Dela-

ware in 1958 with a bachelor's degree in business administration. Despite having general finance and stock investing experience, Investor One had no oil and gas experience when he originally invested with Swan in January 2011. Moreover, Investor One had only a basic proficiency of computers and e-mail technology. At all times relevant, Investor One was physically present in the State of Delaware. Swan contacted Investor One and sent materials to Investor One at his home address of [REDACTED]. Investor One is deceased. The IPU brings this matter in its own right for violations of the Act.

26. Investor One was initially contacted by Swan through its cold-calling efforts. Between 2011 and 2018, Investor One purchased over three-quarters of a million dollars' worth of securities disguised as "units" in nineteen (19) of Swan's "joint ventures," as well as Class D Securities The table below reflects the investments Respondents sold to Investor One and the consideration he paid for his securities, but does not reflect completion costs or other assessments Investor One paid in connection with such ownership:

Date (Approximate)	**Securities**	**Units**	**Consideration**
January 4, 2011	Three Tier	.25	$13,750
July 11, 2011	Golden Trend #7A	.5	$20,000
April 4, 2011	Golden Trend 12	.5	$70,000
November 17, 2011	Stars and Stripes	.25	$20,000
January 5, 2012	Black Dog	.5	$78,000

January 18, 2012	Three Kings	.25	$46,250
January 19, 2012	Black Dog	.25	$39,000
April 3, 2013	Ceran	.25	$20,000
December 3, 2015	Shallow Weld	.5	$50,000
December 28, 2015	Mustang	.5	$45,000
February 12, 2016	Tomahawk	.5	$50,000
March 14, 2016	Whitetail	.5	$50,000
April 19, 2016	Misener	.5	$42,500
June 29, 2016	Copper-head	.25	$25,000
August 31, 2016	Copper-head	.25	$21,250
September 9, 2016	Love Stack #1	.5	$31,875
January 12, 2017	Whitetail Sub Op	.5	$18,750
February 2, 2017	Love Stack #1 Sub Op	.25	$18,750
February 23, 2017	Misener	.5	$20,000
March 29, 2017	Stallion	.25	$62,500
August 3, 2017	Nject Dis-posal	.25	$45,000
September 22, 2017	Nject, LLC Class D	.25	$22,500

December 20, 2017	Matador	.25	$51,089
		Total	**$861,214**

27. When adding in these completion costs and other assessments to the purchase price of the securities, Investor One's total investment with Swan totals over **$1,000,000**.

B. ***Investor Two***

28. [REDACTED] ("Investor Two") (DOB: [REDACTED]/1961) holds a bachelor's degree in marketing and has experience in the investment and financial industries. However, at the time Swan reached out to him in July of 2015 through its cold calling efforts, Investor Two had no oil and gas experience. Investor Two does not know how Swan obtained his contact information, or why he was targeted. At all times relevant Investor Two was physically present in the State of Delaware. Swan contacted Investor Two and sent materials to Investor Two at his home addresses of [REDACTED] and [REDACTED]. The IPU brings this matter in its own right for violations of the Act.

29. Since 2015, Investor Two has purchased over $85,000 of securities disguised as "units" in three (3) of Swan's "joint ventures." The table below reflects the "joint ventures" in which Investor Two participated and the consideration he paid for his units:

Date (Approximate)	**Securities**	**Units**	**Consideration**
August 17, 2015	Texhoma	.25	$16,750
September 28, 2015	Eureka	.25	$62,500
February 10, 2016	Texhoma Sub-Op	.25	$6,250

Total:	**$85,500.00**

II. The "joint venture" interests offered and sold by Respondents are securities.

A. The Respondents found their investors through a national cold-calling campaign targeting wealthy individuals—without regard to such individuals' interest in, or knowledge of, the oil and gas industry.

30. At all relevant times, Swan aggressively solicited investors through a national cold calling campaign, without regard to whether a potential target had oil and gas experience or industry knowledge. Once targets were identified, one or more of the Respondents (or their agents) sent written offering materials to those they considered quality (*i.e.*, wealthy) prospects.

31. The offering materials for Swan's "joint ventures" were substantially the same, and those sent to the Delaware investors generally included a Confidential Information Memorandum ("CIM"), a "Joint Venture Agreement" with execution page; an "Investor Questionnaire," and an "Application Agreement." The offering materials were presented alongside marketing materials including colorful maps of the area where the proposed project was to occur, a "conversion table" optimistically describing various returns on investments depending on production and other factors, and information on the tax benefits of oil and gas investments. These materials uniformly touted Swan's success in the oil and gas arena generally, as well as its dominance in the specific region or field to be drilled. A true and accurate copy of the offering and

marketing materials for the Misener "joint venture" is attached hereto as **Exhibit A**.

32. Respondents' offering documents typically included only high-level, general information about the project, such as the number of wells to be drilled and the county or oilfield in which they were to be drilled. Respondents did not provide investors with a legal description of the land where the project was planned, a copy of the lease, or the joint operating agreement identifying the parties with interests in the project. Nor did Swan provide an itemized budget or timeline for the project.

33. In most cases, the offering materials were largely boilerplate, with only the name, description and number of wells, offering amount, and other similar details changed from one "joint venture" to the next. The offering materials, including the "Joint Venture Agreement," were presented to the investors on a "take or leave" basis.

34. When a target had money to invest but lacked industry experience, the Respondents would also include a "Primer of Oilwell Drilling," which presented a basic, high level overview of the mechanics and logistics of the oil and gas industry, but did not cover the business or financial aspects of oil and gas investments and was not specific to the project for which the target was being solicited.

35. Upon information and belief, at least as of October 2019, Swan sales representatives received a commission of at least 8% for every security sold, with additional bonuses possible for top performers. For example, on August 30, 2016, Swan sales representative Jeff Gostovich congratulated Schiffner on [RE-

DACTED] and observed that another sales representative had earned [REDACTED] during the same period. *See* **Exhibit B**. The respondents never disclosed their commissions Swan's Delaware investors.

36. As a result of Swan's solicitation methods, investors in a "joint venture" were strangers to one another and dispersed throughout the country. Many were elderly and/or retired. Although Swan made the names and phone numbers of co-investors available on its online portal for at least some of the relevant time period, upon information and belief, virtually all co-investor communication occurred during "joint venture" meetings, with one or more Swan representatives present.

B. Swan structured its business so that the "joint ventures" each held small pieces of larger asset shared with other (unidentified) "joint ventures" and/or Swan itself, which limited the power that any individual "joint venture" could exert over "joint venture" property.

37. Most of the "joint ventures" relevant to this Complaint were created by Swan for the purpose of drilling, testing, and/or completing oil and gas wells. The Respondents' offering documents for the "joint ventures" generally stated that the "joint venture" would purchase from Swan or a third-party a certain percentage of the "working interest," and corresponding "net revenue interest" in a certain number of prospect wells. The Respondents then offered and sold investors "units" in the "joint venture," with each unit entitling the investor to a certain percentage of the

working interest and corresponding net revenue interest from the wells in the offering. Each investor would share in the costs and revenues of the "joint venture" in proportion to the units that he or she owned.

38. Swan structured most if not all of the Oil and Gas JVs that no individual "joint venture" acquired 100% of the working interests or net revenue interests of any particular well. Instead, Swan created multiple "joint ventures" to each hold only a fraction of the interests in a particular well, as illustrated below:

Well Name	**API Number**	**"Joint Ventures" with interest in well**
AMC Matador 1-32	3508521275	Anadarko Basin Bighorn Cross County Matador Maysville Love Stack #1 Sub Op Prairie View Prairie View Sub Op Shallow Weld Stallion Tomahawk Whitetail Whitetail Sub Op
Armadillo 1-31	3508722035	Mustang Texhoma Sub Op Your Choice
Boss Hogg 1-23	3508521273	Cross County Love Stack #1 Love Stack #1 Sub Op Maysville Prairie View

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		Prairie View Sub Op Shallow Weld Stallion Tomahawk Whitetail Your Choice
Cardinal Farr #1	4232132395	Cardinal Prairie View Whitetail
Daisy Duke 1-15	3508521274	Anadarko Basin Cross County Love Stack #1 Sub Op Maysville Prairie View Shallow Weld Stallion Tomahawk Whitetail Whitetail Sub Op
Garfield 15N-35HZ	0512342576	Copperhead Misener
Garfield 37N-35HZ	0512342575	Copperhead Misener
Jaguar 14N-35HZX	0512342622	Copperhead Misener
JR Ranch 1-19	3508722047	Black River Tallgrass Texhoma Sub Op Whitetail Your Choice
May West 1-1	3504925070	Texhoma Cross County Five Star

Meese 16N-35HZ	0512342540	Copperhead Misener
Meese 37C-35HZ	0512342539	Copperhead Misener
Meese State 38C-35HZ	0512342538	Copperhead Misener
Meese State 38N-35HZ	0512342544	Copperhead Misener
New Gelbvieh 1-24	3504523616	Anadarko Basin Bighorn Whitetail

39. In addition, Swan also generally reserved for itself an unspecified percentage of ownership in the "joint venture's" assets.

40. By dividing assets among multiple "joint ventures," Swan positioned itself as the common denominator among various constituencies with interests in a common asset. While Respondents' offering documents purported that investors would be actively involved in managing *their own* "joint venture," those same documents also confirmed that investors would have absolutely *no* control over other "joint ventures" or Swan. Indeed, the CIM for the Oil and Gas JVs relevant to this Complaint each contained a statement or statements substantially similar to the following: "The Venture will be a separate entity, and the Venturers will not have, by virtue of their Joint Venture Interests, any rights or obligations with respect to the Managing Venturer or any other joint venture." The result of this arrangement was that Swan provided investors with the illusion of control over their own "joint venture" while also limiting the power that the

"joint venture" as a whole could exert over venture property.

41. To reduce the risk that two or more "joint ventures" would pool their interests and risk Swan's control over the "joint venture's" assets, Swan siloed the "joint ventures" from one another. Unless a particular investor happened to purchase "units" of two "joint ventures" holding interests in the same well, he or she would never know that the other "joint venture" also held interests in the same well, and would have no way of identifying the individual investors in those "joint ventures."

C. Respondents' offering documents described an 'active' investment, but delegated virtually all operational and decision-making authority to Swan.

i. The "joint venture" agreements named Swan as the "Managing Venturer" and gave Swan extensive—and exclusive—authority to manage the venture's affairs.

42. Swan drafted each "joint venture's" offering and governance documents to present the appearance of an active investment opportunity with shared management responsibilities while reserving for itself control over the strategic business decisions that would determine the venture's success and profitability.

43. Swan delegated to itself virtually all management and decision-making on behalf of the "joint venture" through each venture's "joint venture agreement" ("JVA"). The JVA for each "joint venture" named Swan as the initial "Managing Venturer," and

tasked that Managing Venturer with handling virtually all of the business, management and supervisory responsibilities. The specifically enumerated rights of the Managing Venturer varied slightly between projects. For Oil and Gas JVs, however, the Managing Venturer generally had "full and plenary power" to:

- Investigate and evaluate and present for acquisition investment opportunities for the "joint venture";
- Retain or act as operator(s) and to cause such operator(s) to Drill, Test and Complete, equip, rework, Operate, and if necessary, plug and abandon wells of the "joint venture";
- Conduct seismographic surveys and other geological operations and services;
- Execute and deliver any and all contracts and agreements, including purchase, joint venture, Farmout and operating agreements and turnkey contracts, binding the Joint Venture in furtherance of the business purposes of the Joint Venture;
- Execute and deliver, and receive or pay the consideration for, all deeds and assignments of properties or other interests transferred or acquired by the Joint Venture;
- Make all elections or decisions, and bind the Joint Venture thereby, that may be necessary or permissible in connection with any purchase, Joint Venture or Farmout agreement or other type of contract under which an interest in properties is to be acquired, Operated, sold or assigned (subject to Venturers' approval) by the Joint Venture;

- Maintain leases in full force and effect (including paying delay rentals);
- Execute and deliver all checks, drafts, or other orders for payment of funds belonging to the Joint Venture;
- Execute and deliver division orders, transfer orders, pooling orders, and assignments;
- Enter into and bind the Joint Venture in the execution of dry hole letters, bottom hole and acreage contribution agreements, and Farmouts, whether such agreements cover the assignment or transfer of properties or funds to or from the Joint Venture;
- Execute operating agreements whether or not the Joint Venture or the Managing Venturer may be designated as a party thereto;
- Execute powers of attorney, consents, waivers and other documents that may be necessary before any court, administrative board or agency of any governmental authority, affecting the properties owned by the Joint Venture;
- Take and hold title to property, execute evidences of indebtedness or other obligations or instruments in its name or the name of a nominee, all on behalf of the Joint Venture and with or without disclosing the true owner or party in interest thereto; and
- In general, execute all instruments of any kind or character that may be necessary or appropriate in connection with the business of the Joint Venture.

See, e.g., Matador JVA, pp. 12-13., attached hereto as **Exhibit C**.

44. Respondents' offering documents also provided that Swan would maintain the books and records of its "joint ventures" at its Texas headquarters. Investors could access these documents for "reasonable inspection," but only upon forty-eight (48) hours' notice and the provision of a satisfactory "proper purpose" to Swan. *See, e.g.*, **Ex. C**, p. 20.

45. Theoretically, investors could remove Swan as Managing Venturer of a "joint venture" with a vote of 51% of all interests. However, none of the "joint ventures" relevant to this Complaint ever attempted to remove Swan as Managing Venturer.

ii. Swan's "turnkey contracts" ensured that Swan would remain in control of the "joint venture" even if it removed Swan as Managing Venturer.

46. Immediately after forming most of its "joint ventures," but, upon information and belief, before any investors were subscribed, Swan, in its capacity as Managing Venturer, caused the newly-formed "joint venture" to enter into a "Turnkey Drilling and Completion Contract" or a similar turnkey agreement (each a "Turnkey Contract" and collectively the "Turnkey Contracts") with Swan in its individual capacity. Pursuant to the Turnkey Contract, Swan, in its own capacity, would serve as the contractor for the "joint venture." Swan drafted the Turnkey Contract and set its price (the "Turnkey Contract Price") as the total amount of initial capital contributions it would receive if all units were subscribed, subject to proportionate reduction if the project was not ultimately capitalized. Each Turnkey Contract was signed twice by Davis—once on behalf of Swan and once on behalf of the "joint

venture." A true and accurate copy of the Matador Turnkey Contract, as provided to the IPU by Swan, is attached hereto as **Exhibit D**.

47. The Respondents' offering materials generally provided that the Turnkey Contracts were not the subject of an arms-length negotiation and the prices Swan set for the Turnkey Contracts were "based in large part on subjective criteria determined by Swan Energy, including a provision for profit." The existence and general terms of the Turnkey Contract were disclosed in the offering materials for the "joint ventures," but the Turnkey Contract itself was only provided to the investor upon request.

48. According to Respondents' offering documents, all initial capital contributions Swan collected from the sale of securities in the "joint ventures" went directly to Swan as payment of the Turnkey Contract Price. For example, the offering materials from Swan's Matador "joint venture" provide:

Proceeds will be applied as set forth on the following table (assuming all Units are subscribed).

	INITIAL CAPITAL CONTRIBUTION
Turnkey Drilling and Completion Contract Price[1]	$3,232,000
Organizational Costs[2]	-0-
Managing Venturer's Management Fee[2]	-0-
TOTAL	$3,232,000

(1) The Turnkey Drilling and Completion Contract Price is subject to a proportionate reduction in the event less than all Units are subscribed at the close of the Capitalization Period. The Turnkey Drilling and Completion Contract Price will be subject to reduction to the extent Volume Discounts are provided.

(2) These amounts are included in the Turnkey Drilling and Completion Contract Price. *See* "COMPENSATION AND REIMBURSEMENT," below.

See Matador CIM, p. 28, attached hereto as **Exhibit E**.

49. Pursuant to the Respondents' offering documents, Swan was entitled to keep the difference between the Turnkey Contract Price and Swan's actual cost of performance under the contract as a "management fee." Respondents' offering documents disclose that, at the time it entered into the Turnkey Contracts, Swan estimated that its actual costs would be "significantly less" than the Turnkey Contract Price. Swan did not provide investors or potential investors with its estimated costs under the Turnkey Contract.

D. Swan's voting process was a sham designed to further the illusion of disbursed control among "joint venturers."

50. To maintain the façade that the "joint ventures" were actively managed by the investors, Swan purported to submit certain business decisions to a vote among investors. In reality, however, investor "votes" were orchestrated by Swan to give the impression of investor involvement while ensuring that the "joint venture" would remain under Swan's control and continue to operate as nothing more than a vehicle for funding Swan's projects.

i. Swan decided what business decisions would be subject to a "vote" by investors, scheduled calls to "discuss" those decisions, and determined what (and how much) information investors would receive before casting their vote.

51. Immediately after Swan accepted them, investors were provided with a one-page "housekeeping ballot" asking them to affirm Swan's business decisions already made on behalf of the "joint venture." These

decisions typically included (1) reaffirming Swan's business plan, (2) confirming Swan as the initial managing venture, and (3) ratifying Swan's engagement of accounting and legal firms for the "joint venture."

52. Investors were only provided with the names of the accounting and law firms Swan had engaged. They were not provided with the name of the specific attorney or accountant who had been hired, contact information for the firms, or a copy of the engagement letters Swan had signed on behalf of the "joint venture." Swan did not disclose the specific services that the firms were to provide, the rate for those services, or what qualified the firm to provide those services.

53. After this initial "housekeeping vote," Swan would schedule periodic conference calls with each "joint venture" (or, in some cases, multiple "joint ventures" with interests in a common asset). The calls were scheduled irregularly and entirely at Swan's discretion (*i.e.*, there was no standing call time), and Swan only provided investors with a few days' notice of the conference. Swan did not typically take a role call during the investor calls, and many investors skipped them altogether.

54. The purpose of many of these calls was to convince investors to rubber stamp Swan's proposed course of conduct (or, in some cases, to ratify Swan's decisions that had already been made). At the time Swan scheduled a call, it would provide investors with material prepared by Swan and/or its chosen experts that the investors were to review before the upcoming discussion. This material often included a ballot listing a proposal or set of proposals that Swan wanted the investors to approve, along with geological, seismographic and/or production reports. Regardless of

the importance or complexity of Swan's proposition, ballots were generally dated for the day of the scheduled call and due seven (7) days thereafter, thus preventing investors from hiring their own professionals to review Swan's recommendations.

55. The investor calls were always led by a Swan employee, often Davis, who would portray Swan's proposition as the best option for the investors. Davis and his employees would frequently cite their own confidence in the proposal as a basis for the investors to vote to accept, presenting themselves or one of Davis's professional contacts as an industry expert who was invariably supportive of the project. After Davis and/or Swan's experts were finished pitching the proposal(s) under consideration, Swan would open up the discussion to questions, which were generally answered with a slant towards procuring enough votes for the proposal to pass. Virtually every vote Swan presented to its investors passed.

56. When one investor complained during a call among investors in the Texhoma "joint venture"[2] that she did not understand what she was voting on, former Swan employee [REDACTED] who holds a masters degree in petroleum engineering, responded:

[REDACTED]

See **Ex. F**, p. 14.

57. While Swan drowned investors with complex technical data and asked them to make decisions based on information that they did not understand, it

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[2] A true and accurate copy of this call transcript, as provided by Swan, is attached hereto as **Exhibit F**. It is clear from the transcript that this was a Texhoma conference call; however, Swan did not provide the date that this call occurred to the IPU.

kept them largely out of the loop on the business and financial aspects of the "joint venture"—the two areas in which investors could have meaningfully contributed.

58. Indeed, Swan routinely hired and fired essential professionals such as geological consultants and other professionals for its "joint ventures" without ever seeking investor input. In other cases, Swan asked investors to vote to engage professionals it had already contracted with and who were already providing services to the "joint ventures."

59. For example, in 2018 Swan contracted with an outside firm, DRDA, PLLC ("DRDA") to handle its revenue processing and distribution for each "joint venture." Upon information and belief, and according to the Original Petition filed by Swan against DRDA in Harris County, Texas,[3] an engagement letter between Swan and DRDA provided, among other things, that DRDA would "provide bookkeeping services for JV entities" and "[p]repare annual federal and state tax returns for approximately 27 joint-venture entities." The "joint ventures" are not party to the lawsuit against DRDA and, upon information and belief, were not parties to the engagement letter with DRDA.

60. Despite the fact that DRDA would be providing essential services for the "joint ventures," upon information and belief, Swan never put the question of DRDA's engagement to a vote among any "joint ventures" relevant to this Complaint, [REDACTED].

61. Three days later, Swan informed investors in a memorandum that it had retained [REDACTED] to

[3] A true and accurate copy of the Original Petition is attached hereto as **Exhibit G**.

assist with tax preparations. Despite having already hired Calvetti, the memorandum requested that investors vote to ratify its decision.

ii. Many of the issues Swan placed to an investor "vote" were legally meaningless, presented investors with only one economically viable option, or asked investors to "vote" on whether they would like to purchase additional securities from Swan.

62. Most of the "joint ventures" relevant to this Complaint were formed for the purpose of drilling, testing, and completing oil wells. For these "joint ventures," Swan (or its chosen operators) would drill a well to a predetermined depth (as determined by Swan and its professionals) and test the area to determine if the well was capable of producing oil in quantities that would justify completion. If oil was present in such quantities, Swan (and/or the operator it hired) would recommend that the investors vote to complete the well and pay the "Completion Fee" set forth in the offering documents. If little or no oil was present, the drilled well would be deemed a "dry hole," and Swan (or the operator it hired) would recommend that the investors vote to plug and abandon it. Because every well Swan drilled could only result in one of these two outcomes (either the testing revealed the presence of oil, or it did not), votes on whether to complete ("Completion Votes") or to plug and abandon ("P&A Votes") were among the most common issues Swan presented to investors.

63. Neither vote served any purpose other than giving investors the impression that they were actively managing the "joint venture." Indeed, they were not.

64. First, few rational investors would ever vote "no" on a Completion Vote when Swan and its cadre of oil and gas professionals were confident that the well had production potential. Even if investors did not understand the geological data and engineering reports Swan prepared for them, virtually all could understand that no completion meant no production—and a guaranteed loss of their entire investment in the well. Thus, upon information and belief, all "Completion Votes" proposed by Swan to investors in the "joint ventures" relevant to this Complaint did indeed pass.

65. And in cases of a dry hole, an investor's P&A Vote is legally irrelevant, since Texas, Oklahoma, and Colorado all impose a statutory duty to plug abandoned wells. Although the primary obligation to plug a dry hole is on an operator, owners of a well can also be liable for the costs to the state of plugging an abandoned well. Regardless of whether investors voted "yes" or "no," the dry hole would still need to be plugged. Nevertheless, Swan regularly sought investor "approval" by the investors to fulfill their legal obligations.

66. Swan also regularly had investors "vote" on whether the existing "joint venture" should undertake a "subsequent operation"—the creation of a new "joint venture" that would only be open to investors in the initial "joint venture." The "sub op" entity was nothing more than a separate, standalone "joint venture" that Swan chose to open up to a particular group of investors. As such, Swan could have simply created the new "joint venture" and offered it to the existing

investors. Nevertheless, Swan claimed that it could only create the "sub op" with an affirmative vote of 51% of the units of the existing "joint venture" and placed the issue to a "vote." Existing investors were not required to participate in the "sub op," and their decision not to participate would not affect their existing investment.

III. Schiffner's Investment Advice

67. Upon information and belief, Schiffner was Swan's sales and marketing representative assigned to Investor One at all relevant times. Whenever Swan was soliciting investors for a project, Schiffner would mail Investor One a packet of offering materials and set up one or more phone calls with him to discuss Swan's latest investment opportunity. Schiffner was also responsible for extracting completion and other assessments as they became due, and for collecting completed ballots and other forms from Investor One.

68. When Schiffner was expecting a payment from Investor One or sensed he was close to a commitment for a new project, it was not uncommon for Schiffner to call Investor One daily—or even several times a day. At one point, Schiffner even bragged to Davis that he had called Investor One "12/14 days in a row."[4] According to Schiffner's call records, between October 2015 and February 2018, Schiffner initiated over 290 calls to Investor One.

69. During the course of their years-long relationship, Schiffner ingratiated himself into virtually every aspect Investor One's personal and financial life, col-

[4] *See* **Exhibit H**.

lecting detailed information on Investor One, his family, health, and other investments. During these calls, Schiffner presented Swan's investments as more lucrative than his other securities and encouraged Investor One to liquidate those other securities to free up cash to invest with Swan.

70. Below is a sampling of Schiffner's notes from his calls with Investor One:

[REDACTED]

71. Schiffner was an "investment adviser" as defined in the Act.

72. Upon information and belief, Schiffner never entered into a written investment advisory agreement with Investor One.

A. The Swan securities were not suitable for Investor One.

73. At all relevant times, Schiffner lacked *any* reasonable grounds to believe that Swan's securities were suitable for Investor One. First, upon information and belief, Schiffner recommended Swan securities, most of which were long-term investments, to Investor One without consideration of Investor One's age (over 80 years old) or investment time horizon.

74. Second, Schiffner recommended Swan securities to Investor One despite Investor One's risk tolerance, which he communicated to Schiffner on multiple occasions. Swan's CIMs generally contained a statement substantially similar to the following: "PARTICIPATION AS A JOINT VENTURER . . . INVOLVES A HIGH DEGREE OF RISK . . ." Investor One, however, told Schiffner on at least two occasions that he was a *conservative* investor. For example, on October

14, 2015, Schiffner recorded in his notes [REDACTED] Again on January 22, 2016, Schiffner observed that Investor One was [REDACTED] and quoted him as asking [REDACTED] Nevertheless, Schiffner continued recommending Swan securities to Investor One.

75. Third, Schiffner failed to consider Investor One's liquidity needs when recommending that he purchase Swan securities. On several occasions, Investor One bounced checks to Swan that were intended for the purchase of additional Swan securities. Schiffner's response to these events was not to discuss with Investor One whether he could or should continue to invest with Swan. Instead, he simply requested that Investor One provide replacement checks, and continued recommending Swan securities to Investor One.

76. By April of 2017, Investor One had invested over $900,000 with Swan and his liquidity had worsened to the point that he needed to take out a [REDACTED]. Schiffner's call notes confirm that he was aware of Investor One's [REDACTED]. Nevertheless, he continued to recommend and offer Swan securities to Investor One that specifically identified the liquidity risks of Swans' products. For example, the Matador CIM, dated July 17, 2017, provides:

- "Venturers should not expect to be able to readily liquidate their Interest in the Venture." (*See* **Ex. E**, p. 16).
- "The Units are suitable only for those prospective Venturers . . . (b) who can afford to bear the economic risk for an indefinite period and have no need for liquidity." (*See* **Ex. E**, p. 22).

77. Despite the fact that Swan's securities were not suitable for Investor One given, among other things, his age, investment horizon timeline, risk tolerance, and liquidity, Schiffner continued to recommend—and sell—Swan securities to Investor One.

IV. The Nject Securities

A. Swan forms the Nject Disposal "joint venture" to capitalize Nject LLC and hold passive, non-voting interests in Nject LLC.

78. In March 2017, Swan formed Nject LLC for the primary purpose of acquiring, owning, and managing saltwater disposal wells (each an "SWDW") in Oklahoma. Nject LLC initially had three (3) classes of membership units: Class A Units, Class B Units, and Class C Units.

79. The holder of the Class A Units was designated as the Manager of Nject LLC, and was given extensive, and exclusive managerial powers. Section 5.01 of the Company Agreement of Nject LLC, dated as of March 28, 2017 (the "Nject Agreement") provided:

> All business and affairs of the Company shall be managed by and through the Manager. The Manager shall have the authority to make and shall make all decisions and grant all approvals and/or consents on behalf of the Company. No approval or consent from any Member shall be necessary or required to approve or consent to any action or non-action taken or not taken by the Manager. The Manager shall be deemed a "manager" within the meaning of the Act.

Ex. I, Nject Agreement p. 11.

80. To capitalize Nject LLC, Swan began soliciting investors for its Nject Disposal Joint Venture ("Nject JV").[5] According to Respondents' offering documents, the primary business objectives of Nject JV were to: "(i) acquire Class C Units [of Nject LLC]; and (ii) provide cash distributions from operations."[6] Through this arrangement, investors in Nject JV would not have any direct ownership of the Class C Units, which would instead be held by the "joint venture." Title to the SWDWs would be held in the name of Nject LLC, and the Manager of Nject LLC had the "sole and exclusive" authority to determine the cash for distribution to Nject LLC's members, including to Nject JV, as the holder of the Class C Units.

81. Despite the fact that Nject JV's profitability was directly tied to the success of Nject LLC, the Nject JV offering documents did not identify the Manager of Nject LLC. "Manager" is defined in the Nject JV CIM as having "that meaning set forth in the Nject Agreement." The Nject Agreement, in turn, describes the Manager as "that person set forth in the Certificate of Formation." However, Nject LLC's certification of formation,[7] which was not included in Respondents' offering materials, does not identify the Manager.

82. Upon information and belief, Davis was the Manager of Nject LLC at all relevant times.

83. On or about August 3, 2017, Schiffner sold Investor One 0.25 units of Nject JV for $45,000.

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[5] A true and accurate copy of the Nject JV CIM, which includes the Nject Company Agreement, is attached hereto as **Exhibit I**.

[6] *See* **Ex. I**, p. 1.

[7] A true and accurate copy of the Nject LLC Certificate of Formation is attached hereto as **Exhibit J**.

B. Swan and Davis start a trucking division by selling Class D securities in Nject LLC.

84. The next week, Davis scheduled a conference call (the "August 11 Call")[8] with the Nject JV investors soliciting additional funds so that he could establish a trucking company to haul water to the SWDWs in which Nject JV had an interest. Davis informed investors that he was having difficulty finalizing contracts with trucking companies to bring water to the SWDWs, and that the best approach would be for Nject LLC to create a trucking division to bring water directly to the wells:

[REDACTED]

Ex. K, p. 3.

85. Davis and other Swan employees and agents present on the call presented the trucking opportunity to investors as a means to improve the return on their existing Nject JV investment. An individual Davis introduced only as [REDACTED] stated:

[REDACTED]

Ex. K, p. 9.

86. Also present on the call was [REDACTED] who Davis represented had extensive industry experience and was the [REDACTED] to run the trucking business he was proposing. During the call, Davis and Pinkney discussed the tangible benefit to investors' existing Nject JV interests by hauling more water to Nject LLC's SWDWs:

Davis: [REDACTED]

[REDACTED]

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[8] A true and accurate copy of the transcript of the August 11 Call is attached hereto as **Exhibit K**.

Davis: [REDACTED]

[REDACTED]

Ex. K, p. 5.

87. Indeed, [REDACTED] and Davis assured investors during the August 11 Call that Pinkney's work had already resulted in one finalized Master Services Agreement to haul water to Nject LLC's SWDWs, and that [REDACTED] was working on [REDACTED] before the trucks were even on the ground. At no point during the August 11 Call or any other time before Investor One invested in the trucking company did Davis, [REDACTED], or any other Swan employee or agent suggest that the trucking division would ever haul water to SWDWs other than those in which Nject JV had an interest.

88. Instead of creating a "joint venture" through which it could run its trucking operations, Swan offered and sold a new class of securities in Nject LLC (the Class D Securities) through an investment contract it titled an "Investment Letter." A copy of the "Investment Letter" is attached hereto as **Exhibit L**.

89. At the same time, Swan provided a ballot to all of Nject JV's investors (the "Nject Ballot") requesting that those investors vote their membership interests in Nject LLC to amend Nject LLC's Company Agreement to create the Class D interests. A copy of the Nject Ballot is attached hereto as **Exhibit M**.

90. Despite the fact that the Nject Ballot was legally irrelevant since individual investors in Nject JV did not actually own any interests in Nject LLC (only in Nject JV), Swan and Davis presented the vote to investors as though their vote mattered. Upon information and belief, other than the "housekeeping" vote

to ratify Swan's professionals and the inconsequential proposals on the Nject Ballot, Nject JV investors were never asked to take any active role in the "operations" of Nject JV.

91. Schiffner promptly started offering the Class D Securities to Investor One through the telephone and mail. Schiffner noted on August 14, 2017 [REDACTED]" Between August 14, 2017 and September 22, 2017 when he sold him the Class D Securities, Schiffner called Investor One no fewer than 18 times: August 22, 2017 (twice), August 23, 2017, August 24, 2017, August 25, 2017, August 31, 2017, September 1, 2017, September 6, 2017 (twice), September 8, 2017, September 12, 2017, September 14, 2017, September 15, 2017, September 18, 2017, September 19, 2017 (three times), and September 21, 2017. Upon information and belief, at least 8 of these phone calls were offers to purchase the Class D Securities.

C. Although Swan and Davis presented the Class D Securities to the Nject JV investors as an opportunity that would enhance their investment in Nject LLC's SWDWs, they in fact diverted business away from those wells and towards competing wells.

92. On October 24, 2017, Davis wrote Schiffner that things were "picking up" at the saltwater disposal wells, and that the trucking division was also extremely busy. Davis estimated that the gross billing for the trucking company would be [REDACTED] per day, with daily net revenues of [REDACTED] per day. *See* **Exhibit N**.

93. The success of the trucking business, however, was coming at the expense of the saltwater disposal division (i.e. the wells in which Nject JV—and its investors—had an interest). In response to Davis's October 24, 2017 e-mail, Schiffner wrote:

> How about why Nject is only moving [REDACTED] BBLS a day partners are asking if we have [REDACTED] trucks ? You mentioned we should have [REDACTED] more this past Sunday so are [REDACTED] running now and if so we are we now able to run them 24 hours to make [REDACTED] BBLS a day? On pace for [REDACTED] more by the end of this week like you were working on?

Ex. N.

94. Only then did Davis inform Schiffner, possibly for the first time, that the trucks were not exclusively hauling water to Nject LLC's SWDWs:

> Our trucks are taking he water to the closest place to dispose which may not be our disposal. This was something that I made a call on after being there to see how mind (sic) it took to get to our disposal we were only able to do [REDACTED] trips per shift and not being efficient with our new plan we are doing twice that [REDACTED] per shift which almost triples our profit. We need profit to buy more trucks and build more disposals for the d shares. The fire trucks we purchased are supposed to be ready today the guy fell behind on getting them ready.

Ex. N.

95. When Schiffner questioned how Davis's decision would impact the return for Nject JV investors, whose "joint venture" held Class C Units, Davis made it clear that his priority was to maximize revenue for the holders of the Class D Securities, contradicting what he told the Nject JV investors during the August 11 Call:

> We haul [REDACTED] loads per day per truck to them but for the d shares to work we have to make as much profit as possible to grow it. C shares only own the wells and they will get more water as we cut more deals and get more trucks but if we only haul to our disposal the trucking company breaks even and the disposal is still only getting a little More water. ***My obligation is to the d shares to make the trucking company as profitable as possible and grow it as fast as possible. I only have a year to get it to*** [REDACTED] ***trucks and*** [REDACTED] ***barrels per day so I cannot hamstring the trucking company to take water to our disposals only.*** Should all of the jv and b shares have participated in the d shares then we would be in a different place but with the way it was funded this is the only way its going to work (emphasis added)

Ex. N.

96. Swan and Davis's decision to deliver water to SWDWs not owned by Nject LLC and in which Nject JV had no interest was never put to a vote, nor was it discussed with or disclosed to potential investors, even though this material fact could have altered their decision to invest in the trucking company. Instead, Swan and Davis either (1) intentionally led potential

investors to believe that the trucks would be exclusively servicing the saltwater disposal wells in which Nject JV had an interest, even though they knew otherwise or (2) failed to correct investors' reasonable beliefs about the trucking company's business plan created as a result of the August 11 Call and Swan's subsequent marketing efforts for the Class D Securities.

V. Swan's black box Eureka sale

97. In September 2015, Swan began soliciting investors for its latest "joint venture," a mining project located near Sumpter, Oregon ("Eureka").[9] According to Swan's offering documents for Eureka and its Turnkey Contract with Swan, Swan would be responsible for, among other things:[10]

- Acquiring a 45% revenue interest in the mine, on behalf of the "joint venture";
- Acquiring equipment on behalf of the "joint venture" that would be sufficient for use in mining operations;
- Assisting the "joint venture" in locating and negotiating terms with an operator of the mine; and
- Securing necessary permits.

98. On or about September 15, 2015, Swan, Phillips, and Davis sold Investor Two 0.25 "units" of Eureka securities for $62,500.00.

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[9] A true and accurate copy of the Eureka CIM is attached hereto as **Exhibit O**.

[10] A true and accurate copy of the Eureka Turnkey Contract is attached hereto as **Exhibit P**.

99. Nearly a year after it began taking investor money, [REDACTED]. In an August 25, 2016 memorandum (the "August 25 Memo") to investors, Swan deflected attention away from its own mismanagement of the mining project, blaming the delay on state regulators, [REDACTED], and the need to acquire new equipment for onsite processing of the gold. Nevertheless, Swan assured investors that it had a path forward and that the mine was [REDACTED].

100. According to the August 25 Memo, Swan was in the process of creating a new operating company in Oregon to oversee the daily work at the mine because, as Davis explained to investors on September 22, 2016 (the "September 22 Call"), Swan's previous arrangement with a third-party operator [REDACTED] Despite having started the process to replace the operator in August, Swan did not present the issue to investors for a vote until September 22, 2016.

101. In addition to its operator problems, Davis also admitted to investors on the September 22 Call that Swan still had not acquired three permits necessary to commence operations: (1) a water well permit, which Davis claimed was being held up by "red tape"; (2) a mining permit, which, according to Davis, was delayed due to the death of the engineer's family member, and (3) an environmental permit, which Davis claimed would be received following a wetland survey within the week. These permits were necessary for the mine to become profitable, and squarely within the duties Swan had reserved for itself under the Eureka Turnkey Contract.

102. Despite these assurances from Davis, Swan did not procure the mining permit until June 2017 or the environmental permit until August 2017. During

a call with investors on August 30, 2017, Swan's chief operating officer continued to blame the delays on Oregon regulators and a mining manager (hired by Swan) who wasn't up for the task, all the while touting Swan's two-years of hard work to procure the permits:

[REDACTED]

103. At the same time Swan was [REDACTED] Davis had also been considering a potential sale of the mine since at least [REDACTED], when he informed investors that he had received a letter from [REDACTED] that claimed to have a potential purchaser for Eureka's assets. At the time of the call, Davis had already provided the firm with a map of the area and an engineering report, but assured investors that he would have them vote before providing any additional materials.

104. It is not clear how far Swan got with this potential purchaser, but Davis told investors in February 2018 that he was no longer marketing the mine, explaining [REDACTED].

105. But by September 2018, Davis had changed his mind again. During a September 27, 2018 investor call Davis told investors that Swan and/or Davis had bought out all other parties with interests in the mine, and a potential sale was back on the table. By the time he even asked investors if they were interested in selling, Davis had already talked to [REDACTED] different groups that want me to put together a 300 page deck." Davis did not identify these [REDACTED] interested groups, and the presentation, if it ever existed, was never provided to investors.

106. Since at least September 2018, Swan and Davis been marketing the Eureka mine and running the sale process with virtually no investor participation.

On May 22, 2019, Davis informed investors in a memorandum (the "May 22 Memorandum") that Swan had entered into a consulting agreement with an individual named [REDACTED] to "assist us with attracting potential buys, and to provide support and information to potential buyers of the property." Davis told investors that [REDACTED] had "knowledge and experience of mines in the area" and "strong buyer relationships," but did not provide any other details about [REDACTED] experience, qualifications, or fee arrangement. Nor did he provide contact information—or even a website—where investors could conduct their own research on [REDACTED] purported experience and qualifications. At the time Davis notified investors of [REDACTED] engagement, [REDACTED] had already begun work for the venture and was in communication with several potential buyers, none of which were identified to the investors.

107. The May 22 Memorandum also informed investors that Swan had entered into another agreement with a professional geologist named [REDACTED] of Although Swan provided investors with a copy of [REDACTED] resume and contact information, they were not given a copy of the contract with [REDACTED] or provided any information on [REDACTED] fees. To date, [REDACTED] has produced several reports on the mine's reserves and gold potential, all of which were addressed to Davis and Swan Mining Operations, LLC ("Swan Mining"), Swan's in-house operator for the mine.

108. On July 15, 2019, Davis conducted a call with Eureka investors updating them on Swan's efforts to sell the mine. During this call, investors were in-

formed that the venture was paying between [REDACTED] for [REDACTED] work and that its most recent report was being reviewed by "several interested parties." Investors were not told who these "interested parties" were, or the level of their interest. Davis also informed investors on the July 15 Call that [REDACTED] "initial numbers" placed the value of the mine anywhere from [REDACTED].

109. On August 15, 2019, Swan informed investors in a memorandum (the "August 15 Memorandum") that it had received its first offer for the mine, and provided investors with a copy of the [REDACTED] made by an individual offering [REDACTED]—far exceeding [REDACTED] initial estimate. The August 15 Memorandum also identified for the first time [REDACTED] of [REDACTED] as the broker responsible for the proposed transaction.

110. The [REDACTED] was dated August 5, 2019—ten days before it was shared with the investors—and was backed by a [REDACTED] dated August 7, 2019. It stated [REDACTED]. It is entitled to be, and shall constitute in everyway, a binding and legal agreement, thus may impose obligation or duty on either of both parties." Swan informed investors that it [REDACTED] and would update investors when more information became available. Despite their business experience, investors were not invited to assist Swan in assessing the offer.

111. On September 11, 2019, [REDACTED] presented Davis with a summary of the ongoing mining operations at the mine. In a memorandum sent two days later, Swan informed investors that the proposed transaction contemplated in the [REDACTED] was "likely dead." Investors were told only that the Swan

had been negotiating a letter of intent with the purchaser that required a [REDACTED], and that the purchaser was unable to proceed. Investors were not given any additional reason for the breakdown in communications, the specific terms of letter of intent, or how far along Swan had gotten when negotiations fell apart. Nor were they asked if they had any professional contacts who may be able to assist with locating a qualified purchaser.

112. On October 23, 2019, Swan updated investors in a memorandum that it had again been approached by "multiple potential buyers" who were interested in the mine pending results of [REDACTED] report on the amount and nature of the reserves in the mine. Again, Swan did not provide any information on these interested parties, or ask whether the investors had any other contacts that may be interested in purchasing the asset. Instead, Swan's goal was to have the mine sold by the end of the year, and it was confident that [REDACTED] forthcoming report, which it expected to receive by the end of the month, would trigger offers from the (unidentified) potential purchasers and generate additional interest in the mine

113. Ultimately, [REDACTED] reserve report was not sent to Swan until November 19, 2019 and was forwarded to the investors two days later. In a November 21, 2019 memorandum, Swan forwarded the highly-technical report to investors and stated that it would also be distributing it to "our brokers," who had buyers prepared to make offers upon receipt. Once more, neither the brokers, nor the buyers, were identified, and Swan did not enlist the investors' assistance in the marketing or sale efforts.

114. Despite Swan's confidence, [REDACTED] On December 30, 2019, Swan forwarded investors a [REDACTED] it had received from a potential purchaser [REDACTED] was sent by e-mail to Davis, care of Swan Mining, and, unlike the [REDACTED], did not include an amount for the proposed transaction.

115. In a December 30, 2019 memorandum, Swan informed investors that it had [REDACTED]. Again, Swan did not ask for the investors' assistance or input in vetting [REDACTED] or the offeror.

116. Four months later, Davis informed the investors that the [REDACTED]. Nevertheless, Davis informed investors yet again that Swan had "several other possible buyers" that may be interested in presenting offers—but only after the pandemic lockdown was lifted and they could tour the mine. Again, investors were not provided with any information on the identity or quality of these potential buyers Davis had identified, and neither Swan nor Davis solicited their assistance in selling the mine.

117. On June 19, 2020, Davis sent another memorandum to Eureka investors stating that Swan's broker had presented the mine to [REDACTED]. Not only did Swan draft the [REDACTED] without investor participation—it never even provided a copy to the investors. Again, Swan's "potential buyers" were not identified, and Swan did not seek investor input or assistance regarding the sale or marketing strategy.

118. As of October 18, 2020—[REDACTED]—the mine remains for sale. Indeed, Swan's black box marketing process over the last two years has yielded [REDACTED].

Interests in the Joint Ventures are Securities

119. The interests in the joint ventures offered and sold by Defendants are "securities" under the Act in that they are "investment contract(s)" or "certificate(s) of interest of participation in an oil, gas or mining title or lease or in payments out of production of such a title or lease," as defined in § 73-103(a)(23) of the Act.

120. Investor One and Investor Two were passive investors rather than true partners in the Swan investments, which remained under Respondents' control. The Joint Venture Agreements delegated management responsibilities to Respondents and/or their agents, and the Turnkey Contracts further bound the "joint ventures" to Swan. Investor One and Investor Two never had the opportunity to meet or elect a manager. Instead, they were instructed to ratify Swan's selection of a managing venture, made prior to the investors' investments, allowing Swan to retain control over the venture.

121. Investor One and Investor Two had no background or experience in the oil and gas industry that would provide any benefit to the investment; rather, their expectations of profit were entirely predicated on the expertise and managerial skill of Respondents and their agents. The investors' voting power was entirely illusory, as many votes were functionally meaningless and, in any event, Respondents were the sole source of information and operational knowledge provided to Investor One and Investor Two, who could not act in concert with other investors.

122. Investor One and Investor Two invested money by sending payment to Swan in exchange for an interest in a common enterprise, that is, the investment contract or certificate of interest of participation

in an oil, gas or mining title or lease or in payments out of production of such a title or lease. Investor [O]ne and Investor Two expected a return on their investment through the expertise and managerial efforts of Respondents and through no work of their own.

Substantive Counts

Counts 1 through 41

(Against Swan and Schiffner for Offer of Unregistered Securities in violation of § 73-202 of the Act)

123. The preceding paragraphs are fully incorporated herein by reference.

124. During the limitations period, Respondents Swan and Schiffner, and each of them, offered securities to Investor One in the form of investment contracts and/or certificates of interest of participation in an oil, gas or mining title or lease or in payments out of production of such a title or lease. The dates of such offers and the securities offered are listed below:

Date (Approximate)	**Swan Securities**
November 18, 2015	Shallow Weld
December 14, 2015	Mustang
January 20, 2016	Tomahawk
January 21, 2016	Tomahawk
February 23, 2016	Whitetail
February 23, 2016	Whitetail
February 24, 2016	Whitetail
April 5, 2016	Misener

April 6, 2016	Misener
May 10, 2016	Eureka II
May 10, 2016	Eureka II
June 20, 2016	Copperhead
June 21, 2016	Copperhead
June 22, 2016	Copperhead
August 18, 2016	Love Stack #1
August 18, 2016	Copperhead
August 19, 2016	Love Stack #1
October 3, 2016	Stallion
October 4, 2016	Stallion
March 27, 2017	Nject Disposal
April 7, 2017	Nject Disposal
April 8, 2017	Nject Disposal
May 16, 2017	Nject Disposal
May 17, 2017	Nject Disposal
July 17, 2017	Nject Disposal
July 18, 2017	Nject Disposal
August 14, 2017	Nject Class D
August 31, 2017	Nject Class D
September 1, 2017	Nject Class D
September 8, 2017	Nject Class D
September 12, 2017	Nject Class D
September 14, 2017	Nject Class D
September 15, 2017	Nject Class D

September 19, 2017	Nject Class D
September 21, 2017	Nject Class D
October 11, 2017	Matador
October 12, 2017	Matador
April 13, 2018	Shallow Weld Subsequent Operation
April 13, 2018	Copperhead Subsequent Operation
April 13, 2018	Misener Subsequent Operation
August 31, 2018	Silverstone

125. The securities that Respondents Swan and Schiffner, and each of them, sold to Investor One were not registered with the Director, were not exempt under the Act, and no notice filings regarding the securities were made with the Director.

126. Each offer of the securities identified in paragraph 124 constitutes a separate violation of § 73-202 of the Act.

Counts 42 through 49

(Against Swan and Davis for Offer of Unregistered Securities in violation of § 73-202 of the Act)

127. The preceding paragraphs are fully incorporated herein by reference.

128. During the applicable limitations period, Respondents Swan and Davis, and each of them, offered securities to Investor One in the form of investment

contracts and/or certificates of interest of participation in an oil, gas or mining title or lease or in payments out of production of such a title or lease. The dates of such offers and the securities offered are listed below:

Date (Approximate)	**Swan Securities**
November 8, 2016	Whitetail Sub Op
January 17, 2017	Love Stack #1 Sub Op
March 22, 2017	Nject Disposal
August 10, 2017	Nject Class D
August 11, 2017	Nject Class D
July 10, 2019	Nject Class D
July 12, 2019	Nject Class D
July 16, 2019	Nject Disposal

129. The securities that Respondents Swan and Davis, and each of them, offered to Investor One were not registered with the Director, were not exempt under the Act, and no notice filings regarding the securities were made with the Director.

130. Each offer of the securities identified in paragraph 128 constitutes a separate violation of § 73-202 of the Act.

Counts 50 through 62

(Against Swan, Davis, and Schiffner
for Sale of Unregistered Securities in
violation of § 73-202 of the Act)

131. The preceding paragraphs are fully incorporated herein by reference.

132. During the applicable limitations period, Respondents Swan, Davis, and Schiffner, and each of them, sold securities to Investor One in the form of investment contracts and/or certificates of interest of participation in an oil, gas or mining title or lease or in payments out of production of such a title or lease. The dates and amounts of such sales are listed below:

Date (Approximate)	**Swan Securities**	**Units**	**Consideration**
December 3, 2015	Shallow Weld	.5	$50,000
December 28, 2015	Mustang	.5	$45,000
April 19, 2016	Misener	.5	$42,500
June 29, 2016	Copperhead	.25	$25,000
August 31, 2016	Copperhead	.25	$21,250
September 9, 2016	Love Stack #1	.5	$31,875
January 12, 2017	Whitetail Sub Op	.5	$18,750
February 2, 2017	Love Stack #1 Sub Op	.25	$18,750
February 23, 2017	Misener	.5	$20,000
March 29, 2017	Stallion	.25	$62,500
August 3, 2017	Njject Disposal	.25	$45,000
September 22, 2017	Njject, LLC Class D Units	.25	$22,500
May 17, 2018	Matador	.75	$51,089

133. The securities that Respondents Swan, Davis, Schiffner, and each of them, sold to Investor One were not registered with the Director, were not exempt under the Act, and no notice filings regarding the securities were made with the Director.

134. Each sale of the securities identified in paragraph 132 constitutes a separate violation of § 73-202 of the Act.

Counts 63 and 64

(Against Swan, Cody Davis, and Schiffner for Sale of Unregistered Securities in violation of § 73-202 of the Act)

135. The preceding paragraphs are fully incorporated herein by reference.

136. During the applicable limitations period, Respondents Swan, Cody Davis, and Schiffner, and each of them, sold securities to Investor One in the form of investment contracts and/or certificates of interest of participation in an oil, gas or mining title or lease or in payments out of production of such a title or lease. The dates and amounts of such sales are listed below:

Date (Approximate)	Securities	Units	Consideration
February 12, 2016	Tomahawk	.5	$50,000
March 14, 2016	Whitetail	.5	$50,000

137. The securities that Respondents Swan, Cody Davis, and Schiffner, and each of them, sold to Investor One were not registered with the Director, were not exempt under the Act, and no notice filings regarding the securities were made with the Director.

138. Each sale of the securities identified in paragraph 136 constitutes a separate violation of § 73-202 of the Act.

Counts 65 and 66

(Against Swan and Davis for Sale of Unregistered Securities in violation of § 73-202 of the Act)

139. The preceding paragraphs are fully incorporated herein by reference.

140. During the applicable limitations period, Respondents Swan and Davis, and each of them, sold securities to Investor Two in the form of investment contracts and/or certificates of interest of participation in an oil, gas or mining title or lease or in payments out of production of such a title or lease. The dates and amounts of such sales are listed below:

Date (Approximate)	**Securities**	**Units**	**Consideration**
August 17, 2015	Texhoma	.25	$16,750
September 28, 2015	Eureka	.25	$62,500

141. The securities that Respondents Swan and Davis, and each of them, sold to Investor Two were not registered with the Director, were not exempt under the Act, and no notice filings regarding the securities were made with the Director.

142. Each sale of the securities identified in paragraph 140 constitutes a separate violation of § 73-202 of the Act.

Count 67

(Against Swan and Phillips for Offer of Unregistered Securities in violation of § 73-202 of the Act)

143. The preceding paragraphs are fully incorporated herein by reference.

144. On or about December 11, 2015, Respondents Swan and Phillips, and each of them, offered securities to Investor Two in the form of units in the Mustang Joint Venture.

145. The securities that Respondents Swan and Phillips, and each of them, offered to Investor Two were not registered with the Director, were not exempt under the Act, and no notice filings regarding the securities were made with the Director.

Count 68

(Against Swan, Davis, and Phillips for Sale of Unregistered Securities in violation of § 73-202 of the Act)

146. The preceding paragraphs are fully incorporated herein by reference.

147. On or about February 10, 2016, Respondents Swan, Davis, and Phillips, and each of them, sold securities to Investor Two in the form of 0.25 units in the Texhoma Subsequent Operations Joint Venture.

148. The securities that Respondents Swan, Davis, and Phillips, and each of them, sold to Investor Two were not registered with the Director, were not exempt under the Act, and no notice filings regarding the securities were made with the Director.

Count 69

(Against Swan and Davis for Securities Fraud in violation of § 73-201 of the Act)

149. The preceding paragraphs are fully incorporated herein by reference.

150. Swan and Davis, and each of them, in connection with the offer, sale and/or purchase of the Class D Securities, omitted 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. Specifically, Swan and Davis, and each of them, among other things:

- Conducted the August 11 Call with existing Nject JV investors urging them to invest in a trucking company that was to be formed by Davis and Swan to haul wastewater to saltwater disposal wells in which the Nject JV investors had an interest, repeatedly touting the benefit of this new investment on the investors' existing investment in the saltwater disposal wells owned by Nject LLC while omitting to disclose that the proposed trucking company would be hauling water to disposal wells that were in fact competing with the disposal wells in Nject JV had an interest;
- Informed Nject JV investors during the August 11 Call that they were having trouble finding existing trucking companies to bring water to the SWDWs in which Nject JV had an interest, and that the [REDACTED]—leading potential investors in the trucking company to reasonably believe that the trucking company was being formed to bring water to the Nject JV

SWDWs—and then failing to correct that incorrect impression;

- During the August 11 Call, projected massive increases in the number of barrels of wastewater that would be delivered to the existing SWDWs in which the Nject JV investors had an interest with the addition of the trucking division, further reinforcing potential investors' incorrect perception (created by Swan and Davis) that the trucking company would bolster revenues of the existing SWDWs owned by Nject LLC in which Nject JV had an interest;
- After the August 11 Call, continued to solicit Nject JV investors, including Investor One, by phone, mail, and electronic means by repeating that an investment in the trucking company would enhance the value of the existing SWDWs owned by Nject LLC without disclosing that Swan and/or Davis intended that the trucking company would haul water to disposal wells in which the Nject JV investors did not have an interest;
- Failed to inform potential investors during the August 11 Call, or at any other time prior to making their investment in the trucking company, that the Nject trucking company would haul water to saltwater disposal wells other than those in which Nject JV had an interest; and
- Failed to inform investors who had already invested in the Class D Securities, including Investor One, that the Nject trucking company would haul, or was already hauling, water to

saltwater disposal wells in which Nject JV did not have an interest.

151. Respondents Swan and Davis either failed to use reasonable care in that each failed to ascertain and disclose the material fact that the Nject trucking company would be hauling waste water to disposal wells other than those in which Nject JV had an interest, even though this fact was available to each of them, or they had actual knowledge of the omissions of this material fact as set forth herein.

152. Alternatively, in connection with the offer, sale and/or purchase of the Class D Securities, Swan and Davis, and each of them, engaged in an act, practice or course of business which operated as a fraud or deceit upon Investor One occurring during the period starting not later than the August 11 Call and ending not before Investor One purchased his Class D Securities.

Count 70

(Against Schiffner for failing to enter into a written investment advisory contract in violation of § 73-305(c) of the Act)

153. The preceding paragraphs are fully incorporated herein by reference.

154. Schiffner, for compensation, advised Investor One as to the value of securities and the advisability of investing in, purchasing or selling securities. Therefore, Schiffner was an "investment adviser" as defined in the Act and provided investment services to Investor One.

155. Schiffner was compensated for his investment advisory services through the commission he received for each completed sale of securities to Investor One.

156. Upon information and belief, Schiffner did not enter into a written investment advisory contract with Investor One as required by Section 73-305(c) of the Act.

Count 71

(Against Schiffner for breach of fiduciary duty in violation [of] §§ 73-304(a)(7), 73-305(a) and 73-305(b) of the Act and Rules 709(a)(1) and (12))

157. The preceding paragraphs are fully incorporated herein by reference.

158. Schiffner, for compensation advised Investor One as to the value of securities and the advisability of investing in, purchasing or selling securities. Therefore, Schiffner was an "investment adviser" as defined in the Act and provided investment services to Investor One.

159. Schiffner repeatedly recommended that Investor One purchase high-risk securities with no reasonable ground to believe that the securities were suitable for Investor One in light of Investor One's investment profile, including his age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, and/or risk tolerance.

160. Schiffner also failed to disclose to Investor One in writing, before any advice was rendered, a material conflict of interest which could reasonably be expected to impair the rendering of unbiased and objective advice. Specifically, Schiffner failed to disclose that he

was receiving a commission for each security he sold to Investor One.

161. Schiffner omitted a material fact necessary in order to make the statements he made to Investor One, in light of the circumstances in which they were made, not misleading in violation of Section 73-305(b) of the Act.

162. Schiffner's conduct constitutes a device, scheme or artifice to defraud another person, or to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon another person in violation of Section 73-305(a) of the Act.

163. Schiffner's conduct further constitutes a "Dishonest or Unethical Practice" as prohibited by Section 73-304(a)(12) of the Act and Rules 709(a)(1) and (12).

Request for Relief

WHEREFORE, the IPU, in order to protect the public's interest in avoiding the harm that may result from the kinds of misconduct above, respectfully requests that the Director, pursuant to 6 *Del. C.* § 73-102 and 6 *Del. C.* § 73-601, enter an order providing for restitution plus interest to Investor One and Investor Two, an assessment of costs, fines in such amount as she deems appropriate, an order to cease and desist the offer and sale of unregistered securities in Delaware and to Delaware investors, and such other relief as she determines to be in the public interest.

Respectfully submitted,

/s/ Evelyn H. Brantley
Evelyn H. Brantley (#3380)

Deputy Attorney General
Department of Justice
820 North French St.
Wilmington, DE 19801
(302) 577-8356

Dated: May 22, 2023

BEFORE THE INVESTOR PROTECTION DIRECTOR OF THE STATE OF DELAWARE

IN THE MATTER OF: SWAN ENERGY, INC., BRANDON DAVIS, JOHN SCHIFFNER, CODY DAVIS, AND DALE FRANK PHILLIPS Respondents.	Investor Protection Case No. 18-0026

RESPONDENT SWAN ENERGY, INC.'S RESPONSE TO SECOND AMENDED ADMINISTRATIVE COMPLAINT - *CONFIDENTIAL*

Respondent Swan Energy, Inc. ("Swan") files its Response to the Investor Protection Unit of the Delaware Department of Justice's ("IPU") Second Amended Administrative Complaint[1], as follows:

The allegations in the Second Amended Administrative Complaint ("Complaint") that appear prior to paragraph 1 do not require admitting or denying.

1. Swan denies the allegations in paragraph 1 of the Complaint.

2. Swan admits that the joint ventures mentioned in the Complaint were Texas general partnerships. Except as expressly admitted, Swan denies the allegations in paragraph 2 of the Complaint.

[1] In responding to the Complaint, Swan does not waive, and expressly reserves, all objections as to competency, relevancy, materiality, and admissibility of any documents referenced in this Response and/or the Amended Administrative Complaint

3. Swan admits that the joint ventures mentioned in the Complaint were Texas general partnerships. Swan admits that Swan provided certain materials to be reviewed by potential general partners of various joint ventures, who then had rights of management and control over the particular joint venture as general partners who joined that particular joint venture. Except as expressly admitted, Swan denies the allegations in paragraph 3 of the Complaint.

4. Swan admits that some of the joint ventures mentioned in the Complaint were formed for the purpose of drilling, testing, and completing prospect oil and gas wells, and as further described in their Confidential Information Memoranda. Swan admits that the Eureka Joint Venture was a Texas general partnership formed to participate in surface mining exploration and operations for recovery of free, nugget and other forms of gold, as well as secondary precious and base metals on a Mining Concession located in Baker County, Oregon, and as further described in the Confidential Information Memorandum. Swan admits that the Nject Disposal Joint Venture was a Texas general partnership formed to engage primarily in the business of owning Class C Units in Swan Nject, LLC, a Texas Limited Liability Company, and as further described in the Confidential Information Memorandum. Swan admits that Swan Nject, LLC was formed for the purpose of engaging in any business and/or activity for which limited liability companies may be formed under the Texas Limited Liability Company Act, including but not limited to (a) owning and managing one or more saltwater disposal wells; (b) owning an ownership interest in one or more entities which

own saltwater disposal wells; or (c) acting as an operator of one or more saltwater disposal wells. Except as expressly adm[itted], Swan denies the allegations in paragraph 4 of the Complaint.

5. Swan admits that joint venture general partners in the Nject Disposal Joint Venture were sent a packet of information that included a cover letter, Voting Ballot, Monthly Income Conversion Tables, Investment Letter, and an execution page of a proposed Second Amended and Restated Company Agreement of Swan Nject, LLC. Except as expressly admitted, Swan denies the allegations in paragraph 5 of the Complaint.

6. Swan admits that John Schiffner ("Schiffner") has never been licensed as an investment adviser in Delaware. Except as expressly admitted, Swan denies the allegations in paragraph 6 of the Complaint.

7. Swan denies the allegations in paragraph 7 of the Complaint and denies the IPU is entitled to any relief sought in the Counts listed in paragraph 7 of the Complaint.

8. Swan admits the allegations in paragraph 8 of the Complaint.

9. Swan admits that Brandon Davis ("Davis") is an individual who is currently the CEO for Swan, admits that Davis has been an officer or director of Swan at various times, and admits that he may be served at the address listed in the Complaint. Except as expressly admitted, Swan denies the allegations in paragraph 9 of the Complaint.

10. Swan admits that Schiffner is an individual who is currently a marketing representative for Swan and admits that Schiffner has been an employee of Swan at various times. Swan admits that Schiffner has

never been registered as an investment advisor in Delaware. Swan admits that Schiffner may be served at the addresses listed in the Complaint. Except as expressly admitted, Swan denies the allegations in paragraph 10 of the Complaint.

11. Swan admits that Cody Davis was the CEO of Swan from January 1, 2016 to March 31, 2016. Except as expressly admitted, Swan denies the allegations in paragraph 11 of the Complaint.

12. Swan admits that Dale Frank Phillips ("Phillips") is an individual who formerly worked for Swan. Swan does not have and is unable to obtain sufficient information to admit or deny the remaining allegations in paragraph 12 of the Complaint, and therefore such allegations are denied. Except as expressly admitted, Swan denies the allegations in paragraph 12 of the Complaint.

13. The allegations in paragraph 13 of the Complaint contain the IPU's legal conclusions to which no response is required and a reference to the Delaware Securities Act (the "Act"), which Act speaks for itself. Except as expressly admitted, Swan denies the allegations in paragraph 13 of the Complaint.

14. The allegations in paragraph 14 of the Complaint contain the IPU's legal conclusions to which no response is required and a reference to the Act, which Act speaks for itself. Except as expressly admitted, Swan denies the allegations in paragraph 14 of the Complaint.

15. The allegations in Paragraph 15 of the Complaint contain a partial quote to the Act, which Act speaks for itself. Except as expressly admitted, Swan denies the allegations in paragraph 15 of the Complaint.

16. The allegations in Paragraph 16 of the Complaint contain partial quotes to the Act, which Act speaks for itself, but Swan denies that the allegations in paragraph 16 of the Complaint accurately quote Section 73-103(a)(23) of the Act. Except as expressly admitted, Swan denies the allegations in paragraph 16 of the Complaint.

17. The allegations in Paragraph 17 of the Complaint contain a partial quote to the Act, which Act speaks for itself. Except as expressly admitted, Swan denies the allegations in paragraph 17 of the Complaint.

18. The allegations in paragraph 18 of the Complaint contain the IPU's legal conclusions to which no response is required and a reference to the Act, which Act speaks for itself. Except as expressly admitted, Swan denies the allegations in paragraph 18 of the Complaint.

19. The allegations in Paragraph 19 of the Complaint contain a partial quote to the Act, which Act speaks for itself. Except as expressly admitted, Swan denies the allegations in paragraph 19 of the Complaint.

20. The allegations in paragraph 20 of the Complaint contain the IPU's legal conclusions to which no response is required and a reference to the Act, which Act speaks for itself. Except as expressly admitted, Swan denies the allegations in paragraph 20 of the Complaint.

21. The allegations in Paragraph 21 of the Complaint contain a partial quote to the Act, which Act speaks for itself. Except as expressly admitted, Swan denies the allegations in paragraph 21 of the Complaint.

22. The allegations in Paragraph 22 of the Complaint contain a partial quote to the Act, which Act speaks for itself. Except as expressly admitted, Swan denies the allegations in paragraph 22 of the Complaint.

23. The allegations in Paragraph 23 of the Complaint contain a partial quote to the Act, which Act speaks for itself. Except as expressly admitted, Swan denies the allegations in paragraph 23 of the Complaint.

24. The allegations in Paragraph 24 of the Complaint contain a partial quote to the Act, which Act speaks for itself. Except as expressly admitted, Swan denies the allegations in paragraph 24 of the Complaint.

25. Swan admits that [REDACTED] ("General Partner One," referenced by the IPU as "Investor One") represented to Swan, among other things, that he attended the University of Delaware and had investing experience. With regard to various joint ventures, Swan admits that General Partner One swore under penalty of perjury that, among other things:

- "The undersigned understands . . . that participation in the Joint Venture is an active business venture requiring the exercise of experience and knowledge in business affairs while participating as a Venturer; and that participation in this Venture is not a passive investment or activity."
- "The undersigned warrants and represents that he or she possesses extensive experience and knowledge in business affairs such that he or she is capable of intelligently exercising his or her management powers as a Joint Venturer."

- "The undersigned warrants and represents that the undersigned is not relying on the unique entrepreneurial or managerial ability of Swan Energy for the success of the captioned Venture, and that his or her experience and knowledge in business affairs enable the undersigned to replace Swan Energy as Managing Venturer and operator and otherwise exercise meaningful Joint Venture powers. The undersigned understands and stipulates for all purposes that other drillers, operators, Joint Venture managers, and related oil and gas experts are readily available in all oil producing states, which are competent to perform Swan Energy's functions."
- "The undersigned is a person who has such knowledge and experience in financial and business matters so that he or she is capable of evaluating the merits and risks of participating in the Joint Venture, and exercising his or her management powers as a Joint Venturer."
- "The undersigned understands that the Units in the Joint Venture are not intended or considered by the Managing Venturer to be 'securities,' as that term is used in state and federal securities regulation."

With respect to various joint ventures, Swan also admits that General Partner One agreed, among other things:

- "The undersigned will rely solely upon the Confidential Information Memorandum and the independent investigations made by the undersigned or the undersigned's representative indicated in 4b(iv) above, in making the decision

to participate in the Joint Venture. The undersigned represents and warrants that the undersigned has read [sic] understands and is able to bear all of the risks set forth in Confidential Information Memorandum."

- "[The Application Agreement], along with the Memorandum (and exhibits attached thereto) and the Questionnaire, contains the entire agreement of the parties with respect to the matters contained herein, supersedes all oral agreements and representations, and may be changed, altered or amended only by a writing specifically referring to this Application Agreement and signed by the party against whom enforcement of the change, alteration or amendment is sought."
- "The undersigned acknowledges that he or she has received a copy of the Joint Venture Agreement and the Confidential Information Memorandum to which such Agreement is attached as an exhibit, and has read and understands same . . . ."

Moreover, Swan admits that General Partner One—even though he was not "the most computer savvy"—communicated using his computer/emails, exchanged multiple emails with Schiffner, and had 24 hour access, seven days a week to the information provided to general partners on Swan's confidential partner portal and knew how to access such information. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations regarding "oil and gas experience" because it is unclear what the IPU means by that term, and therefore such allegations are denied. Swan does not have and is unable to

obtain sufficient information to admit or deny that at all relevant times that General Partner One was physically present in the State of Delaware. Swan admits that General Partner One is now deceased. Except as expressly admitted, Swan denies the allegations in paragraph 25 of the Complaint.

26. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations that General Partner One "was initially contacted by Swan through its cold-calling efforts," and therefore such allegations are denied. Swan admits that between 2011 and 2018, General Partner One made contributions to become a general partner in various joint ventures. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations regarding "Date (Approximate)" because it is unclear what the IPU means by that term, and therefore such allegations are denied. For the entries in the table with a "Date (Approximate)" within 14 days of either the date the Application Document was received by Swan or the date the contribution was made, Swan admits the following entries in the table accurately list General Partner One's contributions and general partnership interest units held in those particular joint ventures: (1) Three Tier Joint Venture, .25 general partnership interest units, $13,750 contribution; Golden Trend #7A Joint Venture, .50 general partnership interest units, $20,000 contribution; Golden Trend 12 Joint Venture, .50 general partnership interest units, $70,000 contribution; Stars and Stripes Joint Venture, .25 general partnership interest units, $20,000 contribution; (5) Three Kings Joint Venture, .25 general partnership interest units, $46,250 contri-

bution; (6) Black Dog Joint Venture, .25 general partnership interest units, $39,000 contribution; (7) Shallow Weld Joint Venture, .50 general partnership interest units, $50,000 contribution; (8) Tomahawk Joint Venture, .50 general partnership interest units, $50,000 contribution; (9) Misener Joint Venture, .50 general partnership interest units, $42,500 contribution; (10) Copperhead Joint Venture, .25 general partnership interest units, $25,000 contribution; (11) Copperhead Joint Venture, .25 general partnership interest units, $21,250 contribution; (12) Love Stack #1 Sub-Op, .25 general partnership interest units, $18,750 contribution; and (13) Nject Disposal Joint Venture, .25 general partnership interest units, $45,000 contribution. Swan further admits the entries do not reflect all completion costs or other assessments made by General Partner One. Except as otherwise expressly admitted, Swan denies the allegations and the table (and its headings/references) in paragraph 26 of the Complaint.

27. Swan denies the allegations in paragraph 27 of the Complaint.

28. Swan admits that [REDACTED] ("General Partner Two," referenced by the IPU as "Investor Two") represented to Swan, among other things, that he had a bachelor's degree in marketing, had experience in investment banking and financial services, and had Series 7 and 63 licenses. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations that "Swan reached out to [General Partner Two] in July of 2015 through its cold calling efforts," and therefore such allegations are de-

nied. With regard to various joint ventures, Swan admits that General Partner Two swore under penalty of perjury that, among other things:

- "The undersigned understands . . . that participation in the Joint Venture is an active business venture requiring the exercise of experience and knowledge in business affairs while participating as a Venturer; and that participation in this Venture is not a passive investment or activity."
- "The undersigned warrants and represents that he or she possesses extensive experience and knowledge in business affairs such that he or she is capable of intelligently exercising his or her management powers as a Joint Venturer."
- "The undersigned warrants and represents that the undersigned is not relying on the unique entrepreneurial or managerial ability of Swan Energy for the success of the captioned Venture, and that his or her experience and knowledge in business affairs enable the undersigned to replace Swan Energy as Managing Venturer and operator and otherwise exercise meaningful Joint Venture powers. The undersigned understands and stipulates for all purposes that other drillers, operators, Joint Venture managers, and related oil and gas experts are readily available in all oil producing states, which are competent to perform Swan Energy's functions."
- "The undersigned is a person who has such knowledge and experience in financial and business matters so that he or she is capable of evaluating the merits and risks of participating

in the Joint Venture, and exercising his or her management powers as a Joint Venturer."

- "The undersigned understands that the Units in the Joint Venture are not intended or considered by the Managing Venturer to be 'securities,' as that term is used in state and federal securities regulation."

With respect to various joint ventures, Swan also admits that General Partner Two agreed, among other things:

- "The undersigned will rely solely upon the Confidential Information Memorandum and the independent investigations made by the undersigned or the undersigned's representative indicated in 4b(iv) above, in making the decision to participate in the Joint Venture. The undersigned represents and warrants that the undersigned has read understands and is able to bear all of the risks set forth in Confidential Information Memorandum."
- "[The Application Agreement], along with the Memorandum (and exhibits attached thereto) and the Questionnaire, contains the entire agreement of the parties with respect to the matters contained herein, supersedes all oral agreements and representations, and may be changed, altered or amended only by a writing specifically referring to this Application Agreement and signed by the party against whom enforcement of the change, alteration or amendment is sought."
- "The undersigned acknowledges that he or she has received a copy of the Joint Venture Agree-

> ment and the Confidential Information Memorandum to which such Agreement is attached as an exhibit, and has read and understands same . . ."

Swan does not have and is unable to obtain sufficient information to admit or deny the allegations regarding whether General Partner Two knew how Swan "obtained his contact information," and therefore such allegations are denied. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations regarding "oil and gas experience" because it is unclear what the IPU means by that term, and therefore such allegations are denied. Pursuant to the Cape Gazette, among other things "[General Partner Two] has been in the Financial Services industry for over 30 years, within private wealth management, institutional marketing and investment banking." On his LinkedIn page among other things, General Partner Two described himself as "Investment Banker to Mid-market companies seeking advisory work on Mergers & Acquisitions, or sponsorship from Private Equity firms." Swan does not have and is unable to obtain sufficient information to admit or deny that at all relevant times that General Partner Two was physically present in the State of Delaware. Except as expressly admitted, Swan denies the allegations in paragraph 28 of the Complaint.

29. Swan admits that between 2015 and 2016, General Partner Two made contributions to become a general partner in various joint ventures. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations regarding "Date (Approximate)" because it is unclear what the IPU means

by that term, and therefore such allegations are denied. For the entries in the table with a "Date (Approximate)" within 14 days of either the date the Application Document was received by Swan or the date the contribution was made, Swan admits the following entries in the table accurately list General Partner Two's contributions and general partnership interest units held in those particular joint ventures: (1) Texhoma Joint Venture, .25 general partnership interest units, $16,750 contribution; (2) Eureka Joint Venture, .25 general partnership interest units, $62,500 contribution; and (3) Tex[h]oma Sub-Op, .25 general partnership interest units, $6,250 contribution. Except as expressly admitted, Swan denies the allegations and the table (and its headings/references) in paragraph 29 of the Complaint.

30. Swan denies the allegations in paragraph 30 of the Complaint.

31. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations regarding "[t]he offering materials for Swan's 'joint ventures'" because it is unclear to which joint ventures paragraph 31 of the Complaint refers, and therefore such allegations are denied. Swan admits that, for various joint ventures, it sends potential joint venture general partners who indicate an interest to join the venture, certain materials that generally include a Confidential Information Memorandum, a Joint Venture Agreement that includes an execution page, a "Questionnaire," and an "Application Agreement." Swan admits that, with respect to various joint ventures, the materials sent included maps of the region where the drilling was anticipated. Swan admits that,

with respect to various joint ventures, potential general partners were sent Monthly Income Conversions Tables which state "[e]xploration for oil and gas is speculative by its very nature and involves a high degree of risk" and "[t]he values shown above are hypothetical and used to assist in the calculations relating to possible production levels," and include a separate page which lists numerous "Conversion Table Assumptions." Swan admits that, with respect to the Misener Joint Venture, attached to the Complaint as Exhibit A are correct copies of "Misener Joint Venture Application Document," Confidential Information Memorandum, Joint Venture Agreement, Application Agreement, Monthly Income Conversion Tables, letter from Brandon Guttery dated March 31, 2016, letter from John Harrison dated March 30, 2016, maps, a graph, and a document regarding certain potential tax advantages. Except as expressly admitted, Swan denies the allegations in paragraph 31 of the Complaint.

32. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations regarding Swan's "offering documents" because it is unclear to which offering documents or joint ventures paragraph 32 of the Complaint refers, and therefore such allegations are denied. Swan admits that legal descriptions of the land where projects were anticipated were included in certain materials provided to potential general partners. Swan admits that a breakdown of who has an ownership interest in a certain well is a matter of public record and that, in addition to the Confidential Information Memoranda, preview packages provide sufficient information for general partners (and potential general partners) of

the joint ventures to look up who owns working interests in the wells. Swan admits that, as further described in the Confidential Information Memoranda, various aspects of the joint venture were done pursuant to turnkey amounts approved by the general partners, and that the general partners had 24/7 access to Swan's confidential partner portal and other progress/status information. Swan admits that the breakdown of who owns an interest in the well, legal descriptions of the land where the projects were anticipated, leases, joint operating agreements, and AFEs (if any) is information that would have been provided to General Partner One and General Partner Two if requested. Except as expressly admitted, Swan denies the allegations in paragraph 32 of the Complaint.

33. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations regarding "offering materials" because it is unclear to which materials or joint ventures the allegations in paragraph 33 of the Complaint refers, and therefore such allegations are denied. Swan admits that General Partner One and General Partner Two could ask questions about and discuss changes to the joint venture agreements, questionnaires, and application agreements, and that neither one of them requested to negotiate the terms of those documents. Except as expressly admitted, Swan denies the allegations in paragraph 33 of the Complaint.

34. Swan admits that it sent General Partner One a book entitled "A Primer of Oilwell Drilling." Except as expressly admitted, Swan denies the allegations in paragraph 34 of the Complaint.

35. Swan admits that Exhibit B attached to the Complaint includes an email dated August 30, 2016

from Jeff Gostovich, provided by Swan to the IPU, that states his belief that [REDACTED] but denies the allegations purporting to interpret such statements. Swan admits the commission paid to Swan's marketing representatives is information that would be provided to General Partner One and General Partner Two if requested. Swan denies any commissions were paid to Davis or any marketing representatives with regard to the "Class D" units in Swan Nject, LLC. Except as expressly admitted, Swan denies the allegations in paragraph 35 of the Complaint.

36. Swan admits some general partners in various joint ventures were retired and some were over 65 years old. In that regard, Swan admits that [REDACTED] Swan admits that all joint venture general partners had access to the contact information of their other joint venture general partners, joint venture general partners communicated during conference calls, and joint venture partners could otherwise easily communicate by telephone, cellphone, video conferencing, FaceTime, emails, and texts. Except as expressly admitted, Swan denies the allegations in paragraph 36 of the Complaint.

37. Swan admits that some of the joint ventures mentioned in the Complaint were formed for the purpose of drilling, testing, and completing prospect oil and gas wells, and as further described in their Confidential Information Memoranda. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations regarding "offering documents" because it is unclear to which "offering documents" or joint ventures paragraph 37 of the Complaint refers, and therefore such allegations are denied. Swan admits that, for example, the Misener

Confidential Information Memorandum stated: "In the event of the sale of all thirty (30) Units offered hereby, The Venture intends to acquire up to an approximate aggregate 85% Working Interest (a 63.75% Net Revenue Interest) across two vertical oil and gas wells located in Garfield County, Oklahoma." Swan admits that, as general partners, the general partners in various joint ventures had access to the joint ventures' books and records, were jointly and severally liable, shared in the costs and revenues of the joint venture in proportion to the general partnership interest units that he or she owned, and as further described in their Joint Venture Agreement and Confidential Information Memorandum. Except as expressly admitted, Swan denies the allegations in paragraph 37 of the Complaint.

38. Swan admits that the joint ventures referenced in the Complaint did not own 100% of the working interests in a particular well, which is not uncommon in the industry, and as further described in those joint ventures' Confidential Information Memoranda. Swan also admits that a breakdown of who has an ownership interest in such a well is a matter of public record and that, in addition to the Confidential Information Memoranda, preview packages provide sufficient information for general partners (and potential general partners) of the joint ventures to look up who owns working interests in the wells. Swan also admits that the breakdown of who owns an interest in the well is information that would have been provided to General Partner One and General Partner Two if requested. With respect to the allegations in the table in paragraph 38 which has no specific time frame, Swan admits that as of November 2, 2020, the table

accurately reflects the API number for each well, and the following Joint Ventures had an interest in the following referenced well: (1) Bighorn Joint Venture and Stallion Joint Venture had an interest in AMC Matador 1-32; (2) Stallion Joint Venture had an interest in Boss Hogg 1-23; (3) Stallion Joint Venture had an interest in Daisy Duke 1-15; (4) Copperhead Joint Venture and Misener Joint Venture had an interest in Garfield 15N-35HZ; (5) Copperhead Joint Venture and Misener Joint Venture had an interest in Garfield 37N-35HZ; (6) Copperhead Joint Venture and Misener Joint Venture had an interest in Jaguar 14N-35HZX; (7) Your Choice Joint Venture and Whitetail Joint Venture had an interest in JR Ranch 1-19; (8) Copperhead Joint Venture and Misener Joint Venture had an interest in Meese 16N-35HZ; (9) Copperhead Joint Venture and Misener Joint Venture had an interest in Meese 37C-35HZ; (10) Copperhead Joint Venture and Misener Joint Venture had an interest in Meese State 38C-35HZ; and (11) Copperhead Joint Venture and Misener Joint Venture had an interest in Meese State 38N-35HZ. Except as expressly admitted, Swan denies the allegations and the table (and its headings/references) in paragraph 38 of the Complaint.

39. Swan denies the allegations in paragraph 39 of the Complaint.

40. Swan admits that for various joint ventures, the Confidential Information Memorandum contained the quote in paragraph 40 of the Complaint, but denies the IPU's allegations purporting to interpret this quote. Except as expressly admitted, Swan denies the allegations in paragraph 40 of the Complaint.

41. Swan denies the allegations in paragraph 41 of the Complaint.

42. Swan denies the allegations in paragraph 42 of the Complaint.

43. Swan admits that Joint Venture Agreements and Confidential Information Memorandum for various joint ventures mentioned in the Complaint named Swan as the initial "Managing Venturer," and as further provided in those Joint Venture Agreements, "a Vote of 51% in Interest of the Venturers shall have the right to remove the Managing Venturer with or without cause, and substitute a new Managing Venturer to carry on the day-to-day administration of the Joint Venture." Swan admits that various Joint Venture Agreements for various joint ventures mentioned in the Complaint stated: "[T]he Venturers expressly delegate management of the day-to-day administration of the Joint Venture to the Managing Venturer for the purpose of facilitating the orderly administration of the Venture's business," and provided the general partners with rights of management and control. With regard to the allegations as to the specifically "enumerated rights of the Managing Venturer," Swan does not have and is unable to obtain sufficient information to admit or deny if that "varied slightly between projects" because Swan does not know what the Complaint means by "varied slightly" and does not know to which "projects" and which "Oil and Gas JVs" these allegations in paragraph 43 of the Complaint refer, and therefore such allegations are denied. With regard to various joint ventures, Swan admits that General Partner One and General Partner Two swore under penalty of perjury that, among other things:

- "The undersigned understands . . . that participation in the Joint Venture is an active business venture requiring the exercise of experience and knowledge in business affairs while participating as a Venturer; and that participation in this Venture is not a passive investment or activity."
- "The undersigned warrants and represents that he or she possesses extensive experience and knowledge in business affairs such that he or she is capable of intelligently exercising his or her management powers as a Joint Venturer."
- "The undersigned warrants and represents that the undersigned is not relying on the unique entrepreneurial or managerial ability of Swan Energy for the success of the captioned Venture, and that his or her experience and knowledge in business affairs enable the undersigned to replace Swan Energy as Managing Venturer and operator and otherwise exercise meaningful Joint Venture powers. The undersigned understands and stipulates for all purposes that other drillers, operators, Joint Venture managers, and related oil and gas experts are readily available in all oil producing states, which are competent to perform Swan Energy's functions."
- "The undersigned is a person who has such knowledge and experience in financial and business matters so that he or she is capable of evaluating the merits and risks of participating in the Joint Venture, and exercising his or her management powers as a Joint Venturer."

- "The undersigned understands that the Units in the Joint Venture are not intended or considered by the Managing Venturer to be 'securities,' as that term is used in state and federal securities regulation."
- "The undersigned will rely solely upon the Confidential Information Memorandum and the independent investigations made by the undersigned or the undersigned's representative indicated in 4b(iv) above, in making the decision to participate in the Joint Venture. The undersigned represents and warrants that the undersigned has read [sic] understands and is able to bear all of the risks set forth in Confidential Information Memorandum."
- "[The Application Agreement], along with the Memorandum (and exhibits attached thereto) and the Questionnaire, contains the entire agreement of the parties with respect to the matters contained herein, supersedes all oral agreements and representations, and may be changed, altered or amended only by a writing specifically referring to this Application Agreement and signed by the party against whom enforcement of the change, alteration or amendment is sought."
- "The undersigned acknowledges that he or she has received a copy of the Joint Venture Agreement and the Confidential Information Memorandum to which such Agreement is attached as an exhibit, and has read and understands same . . . ."

And, although Swan admits that Exhibit C is a correct copy of the Matador Joint Venture Joint Venture

Agreement, which Swan provided to the IPU, it denies that Joint Venture Agreement states the "Managing Venturer generally had 'full and plenary power.'" Except as expressly admitted, Swan denies the allegations in paragraph 43 of the Complaint.

44. Swan admits that Swan, in its capacity as Managing Venturer for various joint ventures, maintained the books and records of those joint ventures, and the Joint Venture Agreements for those various joint ventures allowed for the general partners to inspect the joint venture's books and records on 48 hours' notice as provided in the Joint Venture Agreement. In addition, the Joint Venture Agreements for various joint ventures stated "The Managing Venturer may condition the disclosure of Venture books, records and reports upon a showing of a proper purpose and under such measures that the Managing Venturer reasonably believes are sufficient to maintain the confidential and proprietary nature of the information contained in such documents." Except as expressly admitted, Swan denies the allegations in paragraph 44 of the Complaint.

45. Swan admits that the general partners in various joint ventures mentioned in the Complaint, as further provided in their Joint Venture Agreements, by "a Vote of 51% in Interest of the Venturers shall have the right to remove the Managing Venturer with or without cause, and substitute a new Managing Venturer to carry on the day-to-day administration of the Joint Venture." Except as expressly admitted, Swan denies the allegations in paragraph 45 of the Complaint.

46. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations regarding "[i]mmediately after forming most of its 'joint ventures'" and "[e]ach Turnkey Contract" because Swan does not know to which joint ventures and turnkey contracts these allegations in paragraph 46 of the Complaint refer, and therefore such allegations are denied. With respect to the Matador Joint Venture, Swan admits that it entered into an agreement with the Matador Joint Venture whereby Swan undertook the responsibilities of "Contractor" for purposes of, among other things, furnishing the equipment, labor and services necessary to drill, test and complete the Prospect Wells to sufficient depths, for a fixed price, and as further described in the Matador Joint Venture Confidential Information Memorandum and Turnkey Agreement of Swan Energy, Inc. Matador Joint Venture. Swan admits that the Turnkey Agreement of Swan Energy, Inc. Matador Joint Venture had two signature lines, one for Swan Energy, Inc. as a Contractor with a signature line for Davis as Chief Executive Officer, and one for Swan Energy Inc. Matador Joint Venture as a Joint Venture with a signature line for Brandon Davis as CEO Swan Energy, Inc. as Swan Energy, Inc. Matador Joint Venture Managing Venturer. Swan admits that Exhibit D attached to the Complaint is a correct copy of the Turnkey Agreement of Swan Energy, Inc. Matador Joint Venture provided by Swan to the IPU. Except as expressly admitted, Swan denies the allegations in paragraph 46 of the Complaint.

47. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations regarding Swan's "offering materials" because Swan

does not know which "offering materials" or joint ventures the allegations in paragraph 47 of the Complaint are referring to, and therefore such allegations are denied. Swan admits that the Confidential Information Memorandum for Matador Joint Venture provides to potential partners, among other things, that "[n]either the Turnkey Drilling and Completion Contract nor the Turnkey Drilling and Completion Contract Price have been the subject of arm's-length negotiations, and are based in large part on subjective criteria determined by Swan Energy, including a provision for profit." Swan further admits that the Matador Confidential Information Memorandum provides:

- "When the Venture commences operations, the Venture will enter into a Turnkey Drilling and Completion Contract with Swan Energy, pursuant to which, the Venture will, among other things, initially pay for the Venture's share of the costs relating to the acquisition and the Drilling, Testing and Completion of the Prospect Wells."
- "[W]hile Swan Energy cannot accurately predict the actual amount constituting compensation under the Turnkey Drilling and Completion Contract to Swan Energy and its Affiliates, Swan Energy presently estimates that the costs to be incurred by Swan Energy for its obligations under the Turnkey Drilling and Completion Contract will be significantly less than the Turnkey Drilling and Completion Contract Price. As a result, Swan Energy presently anticipates that its compensation from the Turnkey Drilling and Completion Contract (the amount to Swan Energy in excess of the costs

to Swan Energy for its obligations under the Turnkey Drilling and Completion Contract), will be greater and could be significantly greater, than the total amount of the costs to Swan Energy for the services it is obligated to provide pursuant to the Turnkey Drilling and Completion Contract, and may equal or exceed the actual Drilling, Testing and Completion costs incurred by Swan Energy regarding the Prospect Wells."

- "Swan Energy anticipates that its profit from the Turnkey Drilling and Completion Contract will be sufficient to pay for part or all of such costs, thereby making its Working Interest a Carried Working Interest."
- "Swan Energy may use any funds it receives as profits from the Turnkey Drilling and Completion Contract, if any, for general operating and general and administrative expenses of Swan Energy, including, but not limited to, employee salaries, commissions, bonuses, consulting fees and office expenses of Swan Energy."

Swan admits that the general terms of the Turnkey Agreement of Swan Energy, Inc. Matador Joint Venture were provided in the Confidential Information Memorandum for the Matador Joint Venture. Swan admits that the Turnkey Agreement of Swan Energy, Inc. Matador Joint Venture would be provided to General Partner One if requested. Except as expressly admitted, Swan denies the allegations in paragraph 47 of the Complaint.

48. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations as to Swan's "offering documents" because Swan does not

know to which "offering documents" or joint venture these allegations in paragraph 48 of the Complaint refer, and therefore such allegations are denied. Swan admits that the screenshot of a table in paragraph 48 of the Complaint appears to be an accurate screenshot of a table contained in the Confidential Information Memorandum of the Matador Joint Venture, and refers the IPU to the remaining provisions of the Confidential Information Memorandum for the "anticipated applications of Venture funds, including capital contributions," which include the section titled "COMPENSATION AND REIMBURSEMENT." Swan further admits that the Matador Confidential Information Memorandum provides:

- "When the Venture commences operations, the Venture will enter into a Turnkey Drilling and Completion Contract with Swan Energy, pursuant to which, the Venture will, among other things, initially pay for the Venture's share of the costs relating to the acquisition and the Drilling, Testing and Completion of the Prospect Wells."
- "[W]hile Swan Energy cannot accurately predict the actual amount constituting compensation under the Turnkey Drilling and Completion Contract to Swan Energy and its Affiliates, Swan Energy presently estimates that the costs to be incurred by Swan Energy for its obligations under the Turnkey Drilling and Completion Contract will be significantly less than the Turnkey Drilling and Completion Contract Price. As a result, Swan Energy presently anticipates that its compensation from the Turnkey Drilling and Completion Contract (the

amount to Swan Energy in excess of the costs to Swan Energy for its obligations under the Turnkey Drilling and Completion Contract), will be greater and could be significantly greater, than the total amount of the costs to Swan Energy for the services it is obligated to provide pursuant to the Turnkey Drilling and Completion Contract, and may equal or exceed the actual Drilling, Testing and Completion costs incurred by Swan Energy regarding the Prospect Wells."

- "Swan Energy anticipates that its profit from the Turnkey Drilling and Completion Contract will be sufficient to pay for part or all of such costs, thereby making its Working Interest a Carried Working Interest."
- "Swan Energy may use any funds it receives as profits from the Turnkey Drilling and Completion Contract, if any, for general operating and general and administrative expenses of Swan Energy, including, but not limited to, employee salaries, commissions, bonuses, consulting fees and office expenses of Swan Energy."

Except as expressly admitted, Swan denies the allegations in paragraph 48 of the Complaint.

49. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations as to Swan's "offering documents" because Swan does not know to which "offering documents" or joint ventures these allegations in paragraph 49 of the Complaint are referring, and therefore such allegations are denied. Swan admits that the Joint Venture Agreement for the Matador Joint Venture provides to the general partners: "Management Fees. In consideration of the

supervision and management of the affairs of the Joint Venture during the Drilling, Testing and Completion period of the Initial Operations, the excess, if any, of the Turnkey Drilling and Completion Contract Price over the actual cost of its obligations pursuant to the Turnkey Drilling and Completion Contract (all as defined in the Memorandum) will be considered a management fee paid to the Managing Venturer." Swan admits that the Confidential Information Memorandum for the Matador Joint Venture provides: "In the event that a series of major difficulties are encountered, the costs to Swan Energy could equal or significantly exceed the Turnkey Drilling and Completion Contract Price, and Swan Energy would be individually responsible for such excess costs. However, while Swan Energy cannot accurately predict the actual amount constituting compensation under the Turnkey Drilling and Completion Contract to Swan Energy and its Affiliates, Swan Energy presently estimates that the costs to be incurred by Swan Energy for its obligations under the Turnkey Drilling and Completion Contract will be significantly less than the Turnkey Drilling and Completion Contract Price." Swan admits that the Confidential Information Memorandum for the Matador Joint Venture provides: "Swan Energy has been advised that actual Drilling, Testing and Completion costs of wells similar to the Prospect Wells have varied significantly and are not predictable with any degree of certainty" and that it did not provide general partners or potential general partners with "estimated costs under" the Matador Joint Venture Turnkey Contract, in that Turnkey Contract or in the Confidential Information Memorandum. Except as expressly admitted, Swan denies the allegations in paragraph 49 of the Complaint.

50. Swan denies the allegations in paragraph 50 of the Complaint.

51. With regard to the allegations pertaining to "housekeeping ballot," Swan does not have and is unable to obtain sufficient information to admit or deny the allegations in paragraph 51 [of] the Complaint because Swan does not know to which joint venture these allegations refer, and therefore such allegations are denied. Except as expressly admitted, Swan denies the allegations in paragraph 51 of the Complaint.

52. Swan admits that general partners in various joint ventures were provided the names of the specific attorney or accountant firms, and were not generally provided with copies of the engagement letters, the contact information, the services, and rates for the accountants and attorneys retained by the joint ventures, and admits that such documents would be provided to General Partner One and General Partner Two if requested. Moreover, Swan admits that general partners of various joint ventures had the right to access the joint ventures books and records. Except as expressly admitted, Swan denies the allegations in paragraph 52 of the Complaint.

53. With regard to the allegations pertaining to events that occurred "after this initial 'housekeeping vote,'" Swan does not have and is unable to obtain sufficient information to admit or deny the allegations in paragraph 53 [of] the Complaint because Swan does not know to which joint ventures these allegations refer, and therefore such allegations are denied. Swan admits that partner conference calls for various joint ventures were generally scheduled on weekdays. Swan admits that the urgency of the matters to be dis-

cussed on the conference call dictated how much notice was provided to the general partners of a scheduled conference call. Swan admits that it wanted as many general partners on the joint venture conference calls as possible, and therefore tried to provide sufficient notice of such calls. Swan admits the partners in the joint ventures decided themselves which calls they would attend. Swan admits that the Joint Venture Agreement for various joint ventures provided each general partner with the right to call meetings, for example, the Joint Venture Agreements provided that "meetings of the Venturers may be called by the Managing Venturer and shall be called by it upon the written request of any Venturer regardless of the number of Units owned by that Venturer." Except as expressly admitted, Swan denies the allegations in paragraph 53 of the Complaint.

54. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations pertaining to the conference calls, because it is unclear to which joint ventures the allegations in paragraph 54 of the Complaint refer, and therefore such allegations are denied. With regard to the allegations pertaining to "these calls," "a call," and "[t]his material" and "ballots," the details as to each conference call and the materials and/or ballots related to each conference call are sufficiently different such that Swan does not have and is unable to obtain sufficient information to admit or deny these allegations as stated, and therefore such allegations are denied. Swan admits that with respect to various joint ventures, materials provided to general partners in advance of certain conference calls sometimes included a ballot listing proposals for the general partners to

approve or not approve. Swan admits that certain ballots were dated the date of the conference call for various joint ventures and due seven days thereafter. Except as expressly admitted, Swan denies the allegations in paragraph 54 of the Complaint.

55. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations pertaining to the conference calls, because it is unclear to which or joint ventures the allegations in paragraph 55 of the Complaint refer, and therefore such allegations are denied. With respect to the allegations regarding the details as to each conference call and what was discussed, the calls are sufficiently different such that Swan does not have and is unable to obtain sufficient information to admit or deny these allegations as stated, and therefore such allegations are denied. Swan admits that some conference calls with partners in various joint ventures were led by a Swan employee and some were led by Davis, that sometimes they discussed their thoughts on some of these conference calls, and sometimes other persons (including general partners) spoke during conference calls. Swan admits that during conference calls, general partners were provided with an opportunity to discuss the topic, ask questions, and give their thoughts and comments. Except as expressly admitted, Swan denies the allegations in paragraph 55 of the Complaint.

56. Swan admits that a transcript of a conference call attached as Exhibit F is a correct copy of a transcript Swan provided the IPU for that conference call.[2]

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[2] The transcripts of the general partner conference calls for various joint ventures were prepared by a transcription service and did not include any certification as to the accuracy of such

Swan admits that [REDACTED] holds a master's degree in petroleum engineering and admits that he has performed services for the Texhoma Joint Venture. Except as expressly admitted, Swan denies the allegations in paragraph 56 of the Complaint.

57. Swan denies the allegations in paragraph 57 of the Complaint.

58. Swan denies the allegations in paragraph 58 of the Complaint.

59. Swan admits that Exhibit G is a correct copy of the Original Petition filed by Swan against DRDA in Harris County, Texas. Swan admits that in 2018, according to the Petition, it contracted with DRDA, PLLC to, among other things, handle the revenue processing and distribution for various joint ventures. Swan admits the Original Petition filed by Swan against DRDA states, among other things, that an engagement letter between Swan and DRDA provided that DRDA would "provide bookkeeping services for JV entities" and "[p]repare annual federal and state tax returns for approximately 27 joint-venture entities." Swan admits that the joint ventures were not named as parties to the lawsuit against DRDA, according to the Petition, and were not listed as parties to the aforementioned engagement letter. Swan admits that DRDA was also providing services for Swan. Except as expressly admitted, Swan denies the allegations in paragraph 59 of the Complaint.

60. Swan denies the allegations in paragraph 60 of the Complaint.

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transcription. Swan does not waive, and expressly reserves, all objections as to accuracy, competency, relevancy, materiality, and admissibility of any transcripts of any conference calls.

61. Swan denies the allegations in paragraph 61 of the Complaint.

62. With regard to the allegations regarding "[m]ost of the joint ventures," and "these joint ventures," Swan does not have and is unable to obtain sufficient information to admit or deny these allegations because it is unclear to which joint ventures paragraph 62 of the Complaint refers, and therefore such allegations are denied. Swan admits that some of the joint ventures mentioned in the Complaint were formed for the purpose of drilling, testing, and completing prospect oil and gas wells, and as further described in their Confidential Information Memoranda. Swan admits that with respect to certain wells, the operator of the well might drill a well to a predetermined depth and test the area to determine if the well was capable of producing oil in quantities that would justify completion and, if oil was present in such quantities, the operator may present options and may recommend that the well be completed, and the general partners of that joint venture would vote whether to complete the well or take other action and whether to pay any amount set forth within the ballot. Swan admits that with respect to certain wells, if the operator determined that a well was unlikely to produce sufficient quantities, the operator may present options and may recommend that the well be plugged and abandoned, and the general partners of that joint venture would receive a ballot to vote on whether they wanted to abandon the well or take other action. Except as expressly admitted, Swan denies the allegations in paragraph 62 of the Complaint.

63. Swan denies the allegations in paragraph 63 of the Complaint.

64. With regard to the allegations regarding "Completion Votes," Swan does not have and is unable to obtain sufficient information to admit or deny these allegations because it is unclear to which "Completion Votes" and 'Joint ventures" paragraph 64 of the Complaint refers, and therefore such allegation is denied. Except as expressly admitted, Swan denies the allegations in paragraph 64 of the Complaint.

65. Swan denies the allegations in paragraph 65 of the Complaint.

66. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations regarding the votes on subsequent operations because it is unclear to which joint ventures the allegations in paragraph 66 of the Complaint refer, and therefore such allegations are denied. Swan admits that the general partners in various joint ventures voted on whether they wanted to undertake a certain subsequent operation. ln that regard, Swan admits that the subsequent operation could proceed by an affirmative vote of at least 51% of the general partners of that joint venture. Swan admits that the general partners were not required to participate in the Sub-Op and admits that their decision not to participate in the Sub-Op did not affect their partnership interest in the joint venture. Except as expressly admitted, Swan denies the allegations in paragraph 66 of the Complaint.

67. Swan admits that Schiffner was a marketing representative at Swan and had the primary relationship of communicating with General Partner One regarding his partnership interests. Swan admits that Schiffner had certain materials sent to General Partner One and admits that Schiffner had one or more

phone calls with General Partner One to discuss various joint ventures and partnership matters. Swan admits that at certain times Schiffner facilitated communications with General Partner One regarding ballots, forms, and contributions for various joint ventures. Swan admits that it is the general partner's responsibility to consider and, in his or her discretion, send completed ballots, forms, and contributions for various joint ventures to the Managing Venturer. Except as expressly admitted, Swan denies the allegations in paragraph 67 of the Complaint.

68. Swan admits that Exhibit H is an email from John Schiffner to Davis, provided by Swan to the IPU, and states: "I've called him 12/14 days in a row waiting for him to get his funds in place." Swan admits that Schiffner had a number of telephone calls with General Partner One over the years, both initiated by Schiffner and when Schiffner was returning a call from General Partner One. Except as expressly admitted, Swan denies the allegations in paragraph 68 of the Complaint.

69. Swan admits that Schiffner was well-acquainted with General Partner One, including with respect to General Partner One's applications and contributions with various joint ventures referred to in the Complaint. Except as expressly admitted, Swan denies the allegations in paragraph 69 of the Complaint.

70. Swan admits the allegations in paragraph 70 of the Complaint accurately quote part of Schiffner's notes provided by Swan to the IPU, but denies the notes emphasized any specific words or include date and time stamps. Swan admits the notes indicate that [REDACTED]. Except as expressly admitted, Swan

denies the allegations in paragraph 70 of the Complaint.

71. Swan denies the allegations in paragraph 71 of the Complaint.

72. Swan admits the allegation in paragraph 72 of the Complaint.

73. Swan denies the allegations in paragraph 73 of the Complaint.

74. Swan admits that, with respect to the Confidential Information Memoranda for various joint ventures mentioned in the Complaint, they contain a statement, among a number of other disclosures, cautions, and warnings that generally state: "PARTICIATION AS A JOINT VENTURER HEREIN IS SPECULATIVE, INVOLVES A HIGH DEGREE OF RISK . . . "With regard to various joint ventures, Swan admits that General Partner One agreed, among other things:

- "The undersigned will rely solely upon the Confidential Information Memorandum and the independent investigations made by the undersigned or the undersigned's representative indicated in 4b(iv) above, in making the decision to participate in the Joint Venture. The undersigned represents and warrants that the undersigned has read [sic] understands and is able to bear all of the risks set forth in Confidential Information Memorandum."
- "[The Application Agreement], along with the Memorandum (and exhibits attached thereto) and the Questionnaire, contains the entire agreement of the parties with respect

to the matters contained herein, supersedes all oral agreements and representations, and may be changed, altered or amended only by a writing specifically referring to this Application Agreement and signed by the party against whom enforcement of the change, alteration or amendment is sought."

- "The undersigned acknowledges that he or she has received a copy of the Joint Venture Agreement and the Confidential Information Memorandum to which such Agreement is attached as an exhibit, and has read and understands same . . . ."

Swan admits that Schiffner's October 14, 2015 and January 22, 2016 notes provided by Swan to the IPU contain the statements quoted in paragraph 74 of the Complaint, but denies the allegations purporting to interpret such statements. Except as expressly admitted, Swan denies the allegations in paragraph 74 of the Complaint.

75. Swan denies the allegations in paragraph 75 of the Complaint.

76. Swan admits that Schiffner's notes provided by Swan to the IPU dated August 14, 2017, state [REDACTED] but denies the allegations purporting to interpret such statements. Swan admits that the Matador Confidential Information Memorandum dated July 17, 2017 includes, among other things, the statements quoted in paragraph 76 of the Complaint. Except as expressly admitted, Swan denies the allegations in paragraph 76 of the Complaint.

77. Swan denies the allegations in paragraph 77 of the Complaint.

78. Swan admits that Swan Nject, LLC was formed in March 2017 for the purpose of acquiring, owning, and managing one or more saltwater disposal wells ("SWDW") in Oklahoma. Swan admits that Swan Nject, LLC initially had three (3) classes of membership units: Class A Units, Class B Units and Class C Units. Except as expressly admitted, Swan denies the allegations in paragraph 78 of the Complaint.

79. Swan admits that the holder of the Class A Units was designated as the Manager of Swan Nject, LLC, and was given the managerial powers expressly set forth in the Company Agreement of Swan Nject, LLC, dated as of March 28, 2017 ("Swan Nject Agreement"). Swan admits that paragraph 79 accurately quotes Section 5.01 of the Swan Nject Agreement. Except as expressly admitted, Swan denies the allegations in paragraph 79 of the Complaint.

80. Swan admits the Confidential Information Memorandum for the Nject Disposal Joint Venture states "[t]he primary business objectives of the Venture will be to: (i) acquire Class C Units; and (ii) provide cash distributions from operations . . . ." Swan admits that the Nject Disposal Joint Venture held Class C Units in Swan Nject, LLC, and that generally title to the SWDWs would be held in the name of Swan Nject, LLC. Swan admits the Swan Nject Disposal Confidential Information Memorandum states the "Manager shall have the sole and exclusive authority to determine the amount of available cash to distribute (the 'Distributable Cash') to the Members" and refers the IPU to the Swan Nject Confidential Information Memorandum for additional information regarding Distributable Cash. Swan admits that Ex-

hibit I attached to the Complaint contains correct copies of the Confidential Information Memorandum for Nject Disposal Joint Venture and the Swan Nject Agreement provided by Swan to the IPU. Except as expressly admitted, Swan denies the allegations in paragraph 80 of the Complaint.

81. Swan admits the Certificate of Formation of Swan Nject, LLC does not list the Manager. Swan admits the Confidential Information Memorandum for the Nject Disposal Joint Venture and the Swan Nject Agreement describes the "Manager" but does not state its name. Swan admits Exhibit J attached to the Complaint appears to be the Certificate of Formation of Swan Nject, LLC filed with Secretary of State of Texas on March 28, 2017. Except as expressly admitted, Swan denies the allegations in paragraph 81 of the Complaint.

82. Swan denies the allegations in paragraph 82 of the Complaint.

83. Swan denies the allegations in paragraph 83 of the Complaint.

84. Swan admits that a conference call of the general partners of the Swan Nject Disposal Joint Venture was held on August 11, 2017 at 11:00 a.m. CT and Exhibit K attached to the Complaint is a correct copy of a transcript of that conference call Swan provided to the IPU. Swan admits that transcript reflects that Davis spoke with the general partners about issues with trucking companies, discussed establishing a trucking company to bring water to certain wells, and made the statement quoted in paragraph 84 of the Complaint, among other things. Except as expressly admitted, Swan denies the allegations in paragraph 84 of the Complaint.

85. Swan admits that a transcript of the August 11, 2017, 11:00 a.m. CT conference call with the general partners of Swan Nject Disposal Joint Venture provided by Swan to the IPU, attached as Exhibit K to the Complaint, reflects that Davis, [REDACTED] and others were present on the conference call and contains the statement quoted in paragraph 85 of the Complaint, among other things. Except as expressly admitted, Swan denies the allegations in paragraph 85 of the Complaint.

86. Swan admits that a transcript of the August 11, 2017, 11:00 a.m. CT conference call with the general partners of Swan Nject Disposal Joint Venture reflects that [REDACTED] was present on conference call and that [REDACTED] described [REDACTED] as [REDACTED] among other things. Swan admits that, among other things, Exhibit K attached to the Complaint is a transcript of an August 11, 2017, 11:00 a.m. CT conference call that Swan provided to the IPU, but denies the transcript is accurately quoted in paragraph 86 of the Complaint. Except as expressly admitted, Swan denies the allegations in paragraph 86 of the Complaint.

87. Swan admits that a transcript of the August 11, 2017, 11:00 a.m. CT conference call with the general partners of Swan Nject Disposal Joint Venture that Swan provided to the IPU reflects the general partners were told there was a finalized Ma[s]ter Services Agreement and others were in the works, among other things. Except as expressly admitted, Swan denies the allegations in paragraph 87 of the Complaint.

88. Swan admits that Exhibit L attached to the Complaint, provided by Swan to the IPU, is a copy of a document regarding the purchase of "Class D" units

in Swan Nject, LLC marked "NOT FOR DISTRIBUTION" and unsigned. Swan admits that no commissions were paid to Davis or any marketing representative with regard to the "Class D" units in Swan Nject, LLC. Except as expressly admitted, Swan denies the allegations in paragraph 88 of the Complaint.

89. Swan admits that Exhibit M attached to the Complaint is a copy of a Swan Nject, LLC Voting Ballot dated as of August 11, 2017, that Swan provided to the IPU, that included a proposition by which the members could vote to "amend the Amended and Restated Company Agreement for the Company dated July [*], 2017 . . . to create . . . new Class D Units." Except as expressly admitted, Swan denies the allegations in paragraph 89 of the Complaint.

90. Swan denies the allegations in paragraph 90 of the Complaint.

91. Swan admits that Schiffner's notes dated August 14, 2017, provided by Swan to the IPU, include the quote included in paragraph 91 of the Complaint, among other things. Swan admits that no commissions were paid to Davis or any marketing representative with regard to the "Class D" units in Swan Nject, LLC. Except as expressly admitted, Swan denies the allegations in paragraph 91 of the Complaint.

92. Swan admits that Exhibit N attached to the Complaint includes an email from Davis to Schiffner provided by Swan to the IPU, which stated, among other things, "Things are picking up at nject s disposals and our trucking company hasn t had a moment to breath since the last time I was in Oklahoma we are doing our first real round of billing this week I will keep you guys updated as I get info. Our gross billing should be around [REDACTED] per day" and "net . . .

[REDACTED] per day." Except as expressly admitted, Swan denies the allegations in paragraph 92 of the Complaint.

93. Swan admits that Exhibit N attached to the Complaint, provided by Swan to the IPU, includes an email from Schiffner to Davis which, among other things, contains the statements quoted in paragraph 93 of the Complaint, but denies the allegations purporting to interpret such statements. Except as expressly admitted, Swan denies the allegations in paragraph 93 of the Complaint.

94. Swan admits that Exhibit N attached to the Complaint, provided by Swan to the IPU, includes an email from Davis to Schiffner which, among other things, contains the statements quoted in paragraph 94 of the Complaint, but denies that the email contained "(sic)," and denies the allegations purporting to interpret such statements. Except as expressly admitted, Swan denies the allegations in paragraph 94 of the Complaint.

95. Swan admits that Exhibit N attached to the Complaint provided by Swan to the IPU, includes an email from Davis to Schiffner which, among other things, contains the statements quoted in paragraph 95, but denies the email had any words emphasized, and denies the allegations purporting to interpret such statements. Except as expressly admitted, Swan denies the allegations in paragraph 95 of the Complaint.

96. Swan admits Swan Nject, LLC was formed for the purpose of engaging in any business and/or activity for which limited liability companies may be formed under the Texas Limited Liability Company

Act, which includes increasing its business opportunities and making profits. Except as expressly admitted, Swan denies the allegations in paragraph 96 of the Complaint.

97. Swan admits that Exhibit O attached to the Complaint is a correct copy of the Confidential Information Memorandum for the Eureka Joint Venture, dated September 1, 2015, provided by Swan to the IPU. Swan admits that Exhibit P attached to the Complaint is a correct copy of the Eureka Joint Venture Turnkey Agreement dated September 1, 2015, provided by Swan to the IPU. Swan admits the Eureka Joint Venture involved a mining project located near Sumpter, Oregon. Swan admits that the Confidential Information Memorandum for the Eureka Joint Venture stated: "Swan will (among other things): (1) Acquire 45% Revenue Interest in the Eureka Mine, on behalf of the Venture; (2) pay the Venture's initial costs associated with the Eureka JV Interest and the Venture's participation in the Eureka JV; (3) pay for and acquire Equipment on behalf of the Venture, sufficient for use in mining operations on the Eureka mine; (4) Assist the Joint Venture in locating and negotiating terms with an Operator of the Eureka Mine; (5) pay all of the Organizational Costs of the Venture; (6) Secure Necessary Permits." Except as expressly admitted, Swan denies the allegations in paragraph 97 of the Complaint.

98. Swan denies the allegations in paragraph 98 of the Complaint.

99. Swan admits that [REDACTED] a risk which was disclosed to the partners in the Confidential Information Memorandum. In addition to other disclo-

sures, cautionary language, and warnings, that Confidential Information Memorandum stated: "[t]he surface mining activities on the Mine may not be commercially successful;" "[m]ineral prices may not support partnership profit;" and "[t]he mineral exploration and mining industry is highly competitive and there is no assurance that the Venture will be successful." (emphasis omitted) Swan admits that it provided Eureka Joint Venture general partners with a Memorandum from [REDACTED] dated August 25, 2016, provided by Swan to the IPU, which, among other things, explained delays, mentioned acquiring new equipment, and contained the statement quoted in paragraph 99 of the Complaint, but denies the allegations in paragraph 99 purporting to interpret the August 25, 2016 Memorandum. Except as expressly admitted, Swan denies the allegations in paragraph 99 of the Complaint.

100. Swan admits that it provided Eureka Joint Venture general partners with a Memorandum from [REDACTED] dated August 25, 2016, provided by Swan to the IPU, which explained that Swan was creating a new operating company in Oregon to oversee the mine. Swan admits a transcript of the September 22, 2016 conference call with the general partners in the Eureka Joint Venture, provided by Swan to the IPU, contains Davis's statement [REDACTED] quoted in paragraph 100 of the Complaint, among other things. Swan admits the ballot to change the operator of the Eureka mine was dated September 22, 2016. Except as expressly admitted, Swan denies the allegations in paragraph 100 of the Complaint.

101. Swan admits a transcript of the September 22, 2016 conference call with the general partners in the

Eureka Joint Venture, provided by Swan to the IPU, reflects that Davis discussed a water well permit, a mining permit, and an environmental permit, the reasons for permitting delays including "red tape" and the death of an engineer's family member, and stated the environmental permit was expected within the week, among other things. Swan admits that permits were necessary for the mine to operate. Swan admits that obtaining permits was part of its duties, as the "Contractor," in the Eureka Joint Venture - Turnkey Agreement. Except as expressly admitted, Swan denies the allegations in paragraph 101 of the Complaint.

102. Swan does not have and is unable to obtain sufficient information to admit or deny the allegations regarding the "mining permit" and the "environmental permit" because it is unclear what the IPU means by those terms, and therefore such allegations are denied. Swan admits that a conference call with Eureka Joint Venture general partners occurred on August 30, 2017, and a transcript of that conference call provided by Swan to the IPU, includes, among other things, the statements quoted in paragraph 102 of the Complaint, but denies the allegations purporting to interpret such statements. Except as expressly admitted, Swan denies the allegations in paragraph 102 of the Complaint.

103. Swan admits a transcript of a November 2016 conference call with Eureka Joint Venture general partners, provided by Swan to the IPU, reflects that, among other things, Davis stated that [REDACTED] had sent a letter indicating it was "actively looking for mining, assets, gold mining, etc., in the United States," that Davis thinks he sent a map of the area

and an engineering report, and that Davis discussed a vote that would be taken. Except as expressly admitted, Swan denies the allegations in paragraph 103 of the Complaint.

104. Swan admits a transcript of the February 1, 2018 conference call with the Eureka Joint Venture general partners, provided by Swan to the IPU, reflects Davis's statement quoted in paragraph 104 of the Complaint. Except as expressly admitted, Swan denies the allegations in paragraph 104 of the Complaint.

105. Swan admits a transcript of the September 27, 2018 conference call with the Eureka Joint Venture general partners provided by Swan to the IPU reflects that Davis told the general partners they (*i.e.* Swan Mining Operations Company, LLC) bought out the other owners in the mine, asked the general partners if they were interested in selling the mine, and made the statement quoted in paragraph 105 of the Complaint, among other things. Swan admits a transcript of the September 27, 2018 conference call with the Eureka Joint Venture general partners does not specifically identify the [REDACTED] interested groups. Swan admits the general partners could have asked the names of the [REDACTED] interested groups during the conference call, had the right to access the joint venture's books and records, and that the identity of the [REDACTED] interested groups is information that would be provided to General Partner Two if requested. Except as expressly admitted, Swan denies the allegations in paragraph 105 of the Complaint.

106. Swan admits that it provided Eureka Joint Venture general partners with a Memorandum dated

May 22, 2019 from Swan Mining Operations, LLC, provided by Swan to the IPU, which stated that Swan Mining Operations, LLC had "entered into a Consulting Agreement with [REDACTED] Swan admits this Memorandum, among other things, stated that [REDACTED] would assist Swan Mining Operations, LLC with attracting potential buyers, "provide support and information to potential buyers of the property," and that [REDACTED] had "knowledge and experience of mines in the area, and strong buyer relationships" and "has already opened communications with [REDACTED] parties that have expressed interest in the mine." Swan admits that [REDACTED] fee arrangement with Swan Mining Operations, LLC, his contact information, and the names of "[REDACTED] parties" are not listed in the Memorandum. Swan admits that [REDACTED] fee arrangement with Swan Mining Operations, LLC, his contact information, his experience and qualifications, and the names "[REDACTED] parties" is information that would be provided to General Partner Two if requested and that he had the right to access the joint venture's books and records. Except as expressly admitted, Swan denies the allegations in paragraph 106 of the Complaint.

107. Swan admits that the Memorandum dated May 22, 2019 from Swan Mining Operations, LLC, provided by Swan to the IPU, referenced, among other things, an agreement between Swan Mining Operations, LLC and [REDACTED], a Professional Geologist. Swan admits a copy of [REDACTED] resume and his contact information was attached to a Memorandum dated May 21, 2019 from Swan Mining Operations, LLC. Swan admits that a copy of any contract [REDACTED] had with Swan Mining Operations,

LLC was not attached to the May 22, 2019 Memorandum. Swan admits that [REDACTED] prepared reports regarding the Eureka mine which were addressed to Swan Mining Operations, LLC. Swan admits that any contract [REDACTED] had with Swan Mining Operations, LLC and the reports prepared by [REDACTED] regarding the Eureka mine is information that would be provided to General Partner Two if requested and that he had the right to access the joint venture's books and records. Except as expressly admitted, Swan denies the allegations in paragraph 107 of the Complaint.

108. Swan admits that a transcript of the July 15, 2019 conference call with Eureka Joint Venture general partners, provided by Swan to the IPU, reflects a discussion regarding the potential sale of the mine. Swan admits that during this conference call, Davis, among other things, stated: "[t]here are [REDACTED] interested parties looking at this report you have," and that [REDACTED] "initial numbers for mine value is [REDACTED]." Swan admits the transcript does identify the "interested parties." In addition, Swan admits the general partners could have asked the names of the interested parties during the conference call and admits that the names of the interested parties is information that would be provided to General Partner Two if requested and that he had the right to access the joint venture's books and records. Except as expressly admitted, Swan denies the allegations in paragraph 108 of the Complaint.

109. Swan admits that it provided Eureka Joint Venture general partners with a Memorandum dated August 15, 2019 from Swan Mining Operations, LLC, provided by Swan to the IPU. Swan admits that the

Memorandum, among other things, stated: "As you know, Swan Mining Operations, LLC, the operator of the Eureka Mine, has been working with a broker to sell the mine. [REDACTED] Swan admits that attached to the Memorandum was a document titled [REDACTED] addressed to [REDACTED] which, among other things, stated "I write to state my offer for the Gold Mine to the above broker and seller for [REDACTED]. Except as expressly admitted, Swan denies the allegations in paragraph 109 of the Complaint.

110. Swan admits that the document titled [REDACTED] provided by Swan to the IPU, is dated August 15, 2019, and the document included with the [REDACTED] is titled [REDACTED] is dated August 7, 2019, and states, among other things, it was issued by [REDACTED]. Swan admits [REDACTED]" included, among other things, the quote contained in paragraph 110 of the Complaint. Swan admits it provided the Memorandum dated August 15, 2019 from Swan Mining Operations, LLC with the attached [REDACTED] and [REDACTED] to the Eureka Joint Venture general partners for them to, among other things, review, consider, ask any questions, or provide any thought or comments. Except as expressly admitted, Swan denies the allegations in paragraph 110 of the Complaint.

111. Swan admits that [REDACTED] prepared a summary dated September 11, 2019 for Swan Mining Operations, LLC, provided by Swan to the IPU, regarding the ongoing activities regarding the Eureka mine. Swan admits that it provided to Eureka Joint Venture general partners a Memorandum from Swan Mining Operations, LLC dated September 13, 2019,

provided by Swan to the IPU. Swan admits that this Memorandum, among other things, stated that "We started negotiating a binding letter of intent, which included a [REDACTED] from the buyer in the sum of [REDACTED]. However, after much discussion between us and the broker, it is clear the prospective buyer is not ready to proceed at this time[,]" and stated that "we believe that offer is likely dead." Swan admits that it provided the Eureka Joint Venture general partners with the Memorandum to, among other things, review, consider, ask any questions, or provide any thoughts or comments. With respect to the allegations regarding what information is not contained in the Memorandum, Swan states the Memorandum speaks for itself. Swan admits that information regarding the communications and negotiations between Swan Mining Operations, LLC and the potential buyer, and the terms of the [REDACTED], is information that would be provided to General Partner Two if requested and that he had the right to access the joint venture's books and records. Except as expressly admitted, Swan denies the allegations in paragraph 111 of the Complaint.

112. Swan admits that it provided to Eureka Joint Venture general partners a Memorandum from Swan Mining Operations, LLC dated October 23, 2019, provided by Swan to the IPU, which discussed progress on the geological research and report, and stated "[w]e have already been approached by [REDACTED] potential buyers who have said that they will be ready to make an offer for the property once they have had a chance to review this report." Swan admits that the Memorandum, among other things, stated "[i]t is still

our goal to have a buyer for the property [REDACTED]. This report should cause many of the prospective buyers to make offers as well as generate additional interest in the property." Swan admits that the Memorandum does not identify the interested parties. Swan admits that the identity of the interested parties is information that would be provided to General Partner Two if requested and that he had the right to access the joint venture's books and records. Swan admits it provided the Memorandum dated October 23, 2019 from Swan Mining Operations, LLC to the Eureka Joint Venture general partners for them to, among other things, review, consider, ask any questions, or provide any thoughts or comments. Except as expressly admitted, Swan denies the allegations in paragraph 112 of the Complaint.

113. Swan admits that [REDACTED] prepared a report dated November 19, 2019 for Swan Mining Operations, LLC, provided by Swan to the IPU, and admits Swan Mining Operations, LLC provided the report to the Eureka Joint Venture general partners on November 21, 2019. Swan admits, among other things, the Memorandum states: "we will be distributing the document to our brokers who have interested buyers waiting to review the report before submitting any offers." Swan admits that the Memorandum did not identify the "brokers" or the "buyers." Swan admits that the identity of the brokers or the buyers is information that would be provided to General Partner Two if requested and that he had the right to access the joint venture's books and records. Swan admits it provided the Memorandum dated November 21, 2019 from Swan Mining Operations, LLC to the Eureka Joint Venture general partners for

them to, among other things, review, consider, ask any questions, or provide any thoughts or comments. Except as expressly admitted, Swan denies the allegations in paragraph 113 of the Complaint.

114. Swan admits that a December 30, 2019 Swan Mining Operations, LLC Memorandum provided to Eureka Joint Venture general partners, which was provided by Swan to the IPU, attached a document titled [REDACTED] Swan admits the [REDACTED] states, "via email only," is addressed to "Brandon Davis, Swan Mining Operations, LLC." Swan admits that the [REDACTED] does not include a proposed amount for the purchase of the mine. Swan admits that the proposed amount for the purchase of the mine is information that would be provided to General Partner Two if requested and that he had the right to access the joint venture's books and records. Except as expressly admitted, Swan denies the allegations in paragraph 114 of the Complaint.

115. Swan admits the December 30, 2019 Swan Mining Operations, LLC Memorandum, provided by Swan to the IPU, stated, among other things, that Swan Mining Operations, LLC had "followed up with the buyer and requested additional information to determine their initial offer, proof of funds, time required for due diligence, and an estimated date of closing." Swan admits it provided the Memorandum dated December 30, 2019 from Swan Mining Operations, LLC to the Eureka Joint Venture general partners for them to, among other things, review, consider, ask any questions, or provide any thoughts or comments. Except as expressly admitted, Swan denies the allegations in paragraph 115 of the Complaint.

116. Swan admits that it provided the Eureka Joint Venture general partners with a Memorandum dated April 29, 2020 from Swan Mining Operations, LLC, provided by Swan to the IPU, which stated, [REDACTED]. Swan admits the Memorandum, among other things, states: "We do have several other possible buyers, [REDACTED] that are all waiting until the lockdown orders are lifted to be able to visit the Mine site and then, hopeful, present offers." Swan admits the Memorandum did not include the "identity" or "quality" of the potential buyers. Swan admits that the identity or quality of the potential buyers is information that would be provided to General Partner Two if requested and that he had the right to access the joint venture's books and records. Swan admits it provided the Memorandum dated April 29, 2020 from Swan Mining Operations, LLC to the Eureka Joint Venture general partners for them to, among other things, review, consider, ask any questions, or provide any thoughts or comments. Except as otherwise admitted, Swan denies the allegations in paragraph 116 of the Complaint.

117. Swan admits that it provided Eureka Joint Venture general partners and the Eureka II Joint Venture general partners with a Memorandum from Swan Mining Operations, LLC dated June 19, 2020, which contained the quote in paragraph 117, among other things. Swan admits it did not provide the [REDACTED] to the partners with the June 19, 2020 Memorandum. Swan admits the June 19, 2020 Memorandum did not identify by name the potential buyers. Swan admits the identity of the potential buyers, and the [REDACTED] is information that would be provided to General Partner Two if requested and that

he had the right to access the joint venture's books and records. Except as expressly admitted, Swan denies the allegations in paragraph 117 of the Complaint.

118. Swan admits that as of October 18, 2020, the mine was potentially for sale and had been potentially for sale for more than two years. Except as expressly admitted, Swan denies the allegations in paragraph 118 of the Complaint.

119. Swan denies the allegations in paragraph 119 of the Complaint.

120. Swan denies the allegations in paragraph 120 of the Complaint.

121. Swan denies the allegations in paragraph 121 of the Complaint.

122. Swan denies the allegations in paragraph 122 of the Complaint.

123. Paragraph 123 of the Complaint does not require Swan to admit or deny any allegation, but to the extent a response is required, Swan incorporates by reference herein its responses in the preceding paragraphs.

124. Swan denies the allegations and the table (and its headings/references) in paragraph 124 of the Complaint.

125. Swan denies that any joint venture interests of General Partner One were "securities." Therefore, they were not registered (or required to be registered) with the Director and no "notice filings" regarding the joint venture interests were filed (or required to be filed) with the Director. Swan admits that the Investment Letter provides that the "Class D" units were "sold on the basis of exemptions from registration." Therefore, they were not registered (or required to be

registered) with the Director, and no "notice filings" regarding the "Class D" units were filed (or required to be filed) with the Director. Except as expressly admitted, Swan denies the allegations in paragraph 125 of the Complaint.

126. Swan denies the allegations in paragraph 126 of the Complaint.

127. Paragraph 127 of Complaint does not require Swan to admit or deny any allegation, but to the extent a response is required, Swan incorporates by reference herein its responses in the preceding paragraphs.

128. Swan denies the allegations and the table (and its headings/references) in paragraph 128 of the Complaint.

129. Swan denies that any joint venture interests offered to General Partner One were "securities." Therefore, they were not registered (or required to be registered) with the Director and no "notice filings" regarding the joint venture interests were filed (or required to be filed) with the Director. Swan admits that the Investment Letter provides that the "Class D" units were "sold on the basis of exemptions from registration." Therefore, they were not registered (or required to be registered) with the Director, and no "notice filings" regarding the "Class D" units were filed (or required to be filed) with the Director. Except as expressly admitted, Swan denies the allegations in paragraph 129 of the Complaint.

130. Swan denies the allegations in paragraph 130 of the Complaint.

131. Paragraph 131 of Complaint does not require Swan to admit or deny any allegation, but to the extent a response is required, Swan incorporates by reference herein its responses in the preceding paragraphs.

132. Swan denies the allegations and the table (and its headings/references) in paragraph 132 of the Complaint.

133. Swan denies that any joint venture interests of General Partner One were "securities." Therefore, they were not registered (or required to be registered) with the Director and no "notice filings" regarding the joint venture interests were filed (or required to be filed) with the Director. Swan admits that the Investment Letter provides that the "Class D" units were "sold on the basis of exemptions from registration." Therefore, they were not registered (or required to be registered) with the Director, and no "notice filings" regarding the "Class D" units were filed (or required to be filed) with the Director. Except as expressly admitted, Swan denies the allegations in paragraph 133 of the Complaint.

134. Swan denies the allegations in paragraph 134 of the Complaint.

135. Paragraph 135 of Complaint does not require Swan to admit or deny any allegation, but to the extent a response is required, Swan incorporates by reference herein its responses in the preceding paragraphs.

136. Swan denies the allegations and the table (and its headings/references) in paragraph 136 of the Complaint.

137. Swan denies that any joint venture interests of General Partner One were "securities." Therefore, they were not registered (or required to be registered) with the Director and no "notice filings" regarding the joint venture interests were filed (or required to be filed) with the Director. Except as expressly admitted, Swan denies the allegations in paragraph 137 of the Complaint.

138. Swan denies the allegations in paragraph 138 of the Complaint.

139. Paragraph 139 of Complaint does not require Swan to admit or deny any allegation, but to the extent a response is required, Swan incorporates by reference herein its responses in the preceding paragraphs.

140. Swan denies the allegations and the table (and its headings/references) in paragraph 140 of the Complaint.

141. Swan denies that any joint venture interests of General Partner Two were "securities." Therefore, they were not registered (or required to be registered) with the Director and no "notice filings" regarding the joint venture interests were filed (or required to be filed) with the Director. Except as expressly admitted, Swan denies the allegations in paragraph 141 of the Complaint.

142. Swan denies the allegations in paragraph 142 of the Complaint.

143. Paragraph 143 of Complaint does not require Swan to admit or deny any allegation, but to the extent a response is required, Swan incorporates by reference herein its responses in the preceding paragraphs.

144. Swan denies the allegations in paragraph 144 of the Complaint.

145. Swan denies that any joint venture interests of General Partner Two were "securities." Therefore, they were not registered (or required to be registered) with the Director and no "notice filings" regarding the joint venture interests were filed (or required to be filed) with the Director. Except as expressly admitted, Swan denies the allegations in paragraph 145 of the Complaint.

146. Paragraph 146 of Complaint does not require Swan to admit or deny any allegation, but to the extent a response is required, Swan incorporates by reference herein its responses in the preceding paragraphs.

147. Swan denies the allegations in paragraph 147 of the Complaint.

148. Swan denies that any joint venture interests of General Partner Two were "securities." Therefore, they were not registered (or required to be registered) with the Director and no "notice filings" regarding the joint venture interests were filed (or required to be filed) with the Director. Except as expressly admitted, Swan denies the allegations in paragraph 148 of the Complaint.

149. Paragraph 149 of Complaint does not require Swan to admit or deny any allegation, but to the extent a response is required, Swan incorporates by reference herein its responses in the preceding paragraphs.

150. Swan denies the allegations in paragraph 150 of the Complaint.

151. Swan denies the allegations in paragraph 151 of the Complaint.

152. Swan denies the allegations in paragraph 152 of the Complaint.

153. Paragraph 153 of Complaint does not require Swan to admit or deny any allegation, but to the extent a response is required, Swan incorporates by reference herein its responses in the preceding paragraphs.

154. Swan denies the allegations in paragraph 154 of the Complaint.

155. Swan denies the allegations in paragraph 155 of the Complaint.

156. Swan admits that Schiffner did not enter into a written investment advisory contract with General Partner One. Except as expressly admitted, Swan denies the allegations in paragraph 156 of the Complaint.

157. Paragraph 157 of Complaint does not require Swan to admit or deny any allegation, but to the extent a response is required, Swan incorporates by reference herein its responses in the preceding paragraphs.

158. Swan denies the allegations in paragraph 158 of the Complaint.

159. Swan denies the allegations in paragraph 159 of the Complaint.

160. Swan denies the allegations in paragraph 160 of the Complaint.

161. Swan denies the allegations in paragraph 161 of the Complaint.

162. Swan denies the allegations in paragraph 162 of the Complaint.

163. Swan denies the allegations in paragraph 163 of the Complaint.

PLEASE NOTE THAT, to the extent a response is required Swan denies the allegations in the headings, subheadings, and titles in the Complaint.

PLEASE NOTE THAT, to the extent a request is required, Swan denies the allegations contained in the Request for Relief, and denies that the IPU is entitled to any relief requested, if any, from Swan in this matter.

Defenses & Avoidances

1. Not only has the IPU failed to identify any actionable material misstatement or omission by Respondents, but the IPU's theories of recovery are also barred by applicable law, in whole or in part. Swan acted in good faith as, for example, exemplified in the pertinent documents received, understood, and/or signed by General Partner One and General Partner Two—including, without limitation, representations and promises signed by General Partner One and General Partner Two under penalty of perjury. Based on the IPU's Complaint, it is General Partner One and General Partner Two who made misrepresentations and otherwise breached their promises, warranties, and/or representations. Such bad faith and improper actions should bar the IPU from equitable remedies for restitution, any penalties, any interest, and any attorney's fees in this case, in whole or in part.

2. Subject to Swan's responses above, in addition and/or the alternative, and to the extent necessary, Swan asserts the following defenses and avoidances,

which are not intended to and do not alter the IPU's burden of proof with respect to any element/requirement of the claims and/or relief sought by the IPU:

3. In addition and/or the alternative, and to the extent necessary, Swan pleads that the Complaint fails to state a claim upon which relief can be granted.

4. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, because the interests described in the Complaint are not "securities" and/or are exempt under controlling law. Therefore, in whole or in part, there can be no securities violations.

5. In addition and/or the alternative, and to the extent necessary, Swan pleads that, because the interests described in the Complaint are not securities as defined under controlling law and/or are exempt, the IPU lacks the authority and/or jurisdiction, in whole or in part, to pursue its claims and any relief, and/or the Investor Protection Director lacks authority and/or jurisdiction, in whole or in part, including without limitation, the authority and/or jurisdiction to adjudicate the IPU's claims and/or grant any relief requested by the IPU, and/or the interests are not subject to regulation by the Investor Protection Director and/or the IPU.

6. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are preempted, in whole or in part, by exemptions under federal securities laws, including, without limitation, the National Securities Markets Improvement Act, 15 U.S.C. § 77r *et seq*.

7. In addition and/or the alternative, and to the extent necessary, Swan pleads that to the extent the interests at issue in the IPU's claims are securities (and they are not), the interests are exempt, in whole or in part, from the registration requirements under Title 6 of the Delaware Code and/or federal securities laws.

8. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, by the statute of limitations.

9. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, due to waiver, release, and/or laches.

10. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, due to equitable and/or contractual estoppel.

11. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, by the doctrine of unclean hands.

12. In addition and/or the alternative, and to the extent necessary, Swan pleads the Complaint fails to plead the essential elements of the fraud claim which, accordingly, must be dismissed.

13. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, because Swan made no material misrepresentation (whether by affirmative misrepresentation, intentional concealment, silence in the face of a duty to speak, or otherwise), Swan disclosed material facts

necessary to make any alleged statements or omissions not misleading, and/or was not the actual maker of the statement, with the ultimate authority over the statement, including its content and whether and how it was communicated, and because of lack of reliance.

14. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, because any allegedly untrue or misleading statement made by Swan was not material and/or would not significantly alter the total mix of information made available.

15. In addition and/or the alternative, and to the extent necessary, Swan pleads that any claims and/or relief sought in the Complaint for restitution, penalties, fines, interest, and/or any cease and desist order are barred, in whole or in part, because Swan did not act with the requisite scienter to justify or warrant any such claims and/or relief.

16. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, because Swan acted in good faith and/or reasonably relied in good faith on other parties, persons, or entities.

17. In addition and/or the alternative, and to the extent necessary, Swan pleads that the imposition of any amounts that are punitive in nature or constitute penalties would be fundamentally unfair and would violate the Constitution of the United States, the Constitution of the State of Delaware, and/or the Constitution of the State of Texas.

18. In addition and/or the alternative, and to the extent necessary, Swan pleads that any claim for relief by the IPU, including any claim for restitution, penalties, fines, interest, and/or any cease and desist order, to the extent it is punitive in nature and/or constitutes penalties, is barred, in whole or in part, by the statute of limitations.

19. In addition and/or the alternative, and to the extent necessary, Swan pleads that any amounts sought by the IPU are barred, in whole or in part, to the extent any relief sought by the IPU in the Complaint is not a reasonable approximation of net profits causally connected to a violation, and/or not tethered to an equitable remedy to each Respondent's net profits, and to the extent any amounts sought transform any equitable profits-focused remedy into a penalty. Swan further pleads that any attempt by the IPU to seek such amounts should be denied as well as it would constitute a penalty and/or be punitive in nature.

20. In addition and/or the alternative, and to the extent necessary, Swan pleads that any amount awarded to the IPU should be reduced/set off/offset by: (I) any income or value General Partner One and General Partner Two have received and/or continue to have or receive from their interests; (2) the amount of tax savings General Partner One and General Partner Two have realized and/or continue to realize, as a result of their interests; and/or (3) related costs, expenses, and/or risks incurred by any Respondent.

21. In addition and/or the alternative, and to the extent necessary, Swan pleads that the IPU may not recover the relief it seeks under the Delaware Securities Act, in whole or in part, because the IPU does not

account for any differing levels of culpability or receipt of different amounts of alleged profits.

22. In addition and/or the alternative, and to the extent necessary, Swan pleads that Swan is not liable, in whole or in part, in the capacity in which it has been sued. For example, Swan is not the issuer of the Swan Nject, LLC "Class D" units.

23. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole are in part, because the alleged improper actions, inactions, statements, and/or omissions were not the cause of injury.

24. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, due to the bespeaks caution doctrine and/or being nonactionable or protected "puffery," opinions, or forward-looking statements.

25. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, because the Confidential Information Memoranda, Joint Venture Agreements, Questionnaires, Application Agreements, Investment Letter, and other documents and statements relating to General Partner One's and/or General Partner Two's interests at issue in the Complaint contained sufficient cautionary language and/or disclosures such that any alleged omissions or misrepresentations were rendered immaterial and/or not actionable.

26. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or

in part, because any claims based on the interests of General Partner One are fundamentally unfair and unconstitutional on the grounds that such claims violate the Fourteenth and/or Sixth Amendments of the United States Constitution, Article 1, Sections 10 and/or 19 of the Constitution of the State of Texas, and/or Article 1, Sections 7 and/or 9 of the Constitution of the State of Delaware.

27. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, because Swan will be denied a fair hearing before an impartial tribunal in violation of the Fourteenth Amendment of the Constitution of the United States, Article 1, Sections 7 and/or 9 of the Constitution of the State of Delaware, and/or Article 1, Section 19 of the Constitution of the State of Texas. For example, the Deputy Attorney General adjudicating Swan's fate is a Deputy Attorney General with the same business address as the Deputy Attorney General prosecuting this case, both are employed by the Department of Justice, both work in the same office, under the same Attorney General, and both have a bias in favor of the IPU.

28. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, because the administrative proceeding itself, including without limitation, the appointment of the presiding officer, are unfair, unconstitutional, and violate the Fourteenth Amendment to the Constitution of the United States, Article 1, Sections 7 and/or 9 of the Constitution of the State of Delaware, and/or Article 1, Section 19 of the Constitution of the State of

Texas. Moreover, in addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, because the appointment of the presiding officer is in violation of Article 3 of the Delaware Constitution.

29. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, based on contractual limitations of liability.

30. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, based on the merger doctrine and/or disclaimer of reliance.

31. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole are in part, due to a failure in a condition precedent.

32. In addition and/or the alternative, and to the extent necessary, Swan pleads that the IPU's request for a cease and desist order is barred, in whole or in part, to the extent it amounts to an obey-the-law injunction because, for example, such an injunction is too vague to put the enjoined party on proper notice as to what is being enjoined and/or required.

33. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, because they, or the rules under which they are brought, are unconstitutional and/or unlawful, in whole or in part, including without limitation, under Article 2, Section 1 and/or Article 1, Sections 7 and/or

9 of the Constitution of the State of Delaware, Article I, Section 1 and/or the Fourteenth Amendment of the Constitution of the United States, and/or Article 3, Section 1 and/or Article I, Section 19 of the Constitution of the State of Texas. For example, the Delaware Constitution forbids administrative rulemaking that violates the due process, and/or the separation of powers doctrine, and/or the non-delegation doctrine. And, for example, 6 Del. C. § 73-102(b) does not and/or cannot give the Investor Protection Director the authority or power to usurp the power of the legislature branch, to broaden the scope of those who would be liable for the various offenses that the General Assembly promulgated elsewhere in the Delaware Securities Act, and/or to create new offenses.

34. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, because Schiffner is not an "investment advisor" and/or is exempt, in whole or part. The IPU cannot satisfy its burden of proof for its claims and/or any relief sought in the Complaint relating to any alleged violations of the investment adviser provisions under Title 6 of the Delaware Code and/or federal securities laws.

35. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, because Schiffner is not an "investment advisor" as that term is defined in § 73-103(a)(10) of the Delaware Securities Act, including, but not limited to, he is not engaged for compensation "in the busines[s] of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing or

selling securities," he does not issue or promulgate "analyses or reports concerning securities" as "a part of a regular business," and he "has not had more than 5 clients . . . who are residents of this State," and to the extent he was acting as "investment advisor" (he was not), he was acting outside the scope of his employment and/or without authority.

36. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, because Schiffner did not receive any compensation for any alleged security concerning General Partner One as alleged in Counts 70 and 71 of the Complaint.

37. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, because Swan, Davis and/or Cody Davis did not have actual control over, or did not induce or have culpable participation in, all aspects of the activity upon which primary violations are predicated by the IPU.

38. In addition and/or the alternative, and to the extent necessary, Swan pleads that the claims and/or relief sought in the Complaint are barred, in whole or in part, to the extent that they rely, in whole or in part, on Rules 202 or 225A of the Rules Pursuant to the Delaware Securities Act, which are invalid and/or *ultra vires* under the agency's enabling act.

39. In addition to the foregoing, Swan reserves the right to raise any additional defenses and/or avoidance not asserted herein of which Swan becomes aware through discovery or other investigation,

and/or as allowed under controlling law and/or dictates of fairness and equity.

Request for a Hearing

Pursuant to Title 6 Attorney General's Office Delaware Administrative Code Section 225(b), Swan requests a hearing of this administrative proceeding.

Prayer

Swan respectfully requests that Presiding Officer upon hearing enter an order denying all relief sought by the IPU in the Complaint, and granting Swan such other and further relief, at law or equity, to which it is justly entitled.

Dated: June 1, 2023

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SWAN ENERGY, INC., BRANDON DAVIS, JOHN SCHIFFNER, and CODY DAVIS, Plaintiffs, v. INVESTOR PROTECTION UNIT OF THE DELAWARE DEPARTMENT OF JUSTICE, Defendant.	C.A. No.: N24C-03-071 MAA

FIRST AMENDED COMPLAINT

Plaintiffs Swan Energy, Inc., Brandon Davis, John Schiffner, and Cody Davis (collectively, "Plaintiffs"), by and through their undersigned counsel, file this Verified Complaint against Defendant Investor Protection Unit (the "IPU") of the Delaware Department of Justice (the "DOJ"), and allege as follows:

NATURE OF THE ACTION

1. Pursuant to its authority under Title 6, Chapter 73 of the Delaware Code (the "Delaware Securities Act"), the IPU brought an in-house administrative proceeding against Plaintiffs captioned *In the Matter of: Swan Energy, Inc., Brandon Davis, John Schiffner, Cody Davis, and Dale Frank Phillips*, Investor Protection Case No. 18-0026 (the "IPU Action").

2. Plaintiffs seek a declaration that the IPU Action and certain provisions of the Delaware Securities Act violate their constitutional rights to trial by jury and due process.

3. Absent a declaration in Plaintiffs' favor, the IPU will subject Plaintiffs to an unjust and unconstitutional administrative proceeding that will adjudicate their potential liability and punishment under the Delaware Securities Act.

JURISDICTION AND VENUE

4. This Court has subject-matter jurisdiction under Article IV, § 7 of the Delaware Constitution and 10 *Del. C.* §§ 541 and 6501 *et seq.*

5. Personal jurisdiction and venue are proper in this Court because the IPU is a unit within the DOJ, a Delaware statewide agency. Thus, the State of Delaware has personal jurisdiction over the IPU.

PARTIES

6. Plaintiff Swan Energy, Inc. is a Delaware corporation with a principal place of business at 3200 Southwest Freeway, #1400, Phoenix Tower, Houston, Texas 77027. Founded in 1977, Swan works with companies and partnerships in the oil and gas, trucking, disposal, and mining industries. Swan forms joint ventures to raise capital from accredited investors who seek an active role in the management of oil and gas development, production, and related commercial activity.

7. Plaintiff Brandon Davis, an individual residing in Texas, is the Chief Executive Officer of Swan.

8. Plaintiff John Schiffner, an individual residing in Florida, was a marketing representative for Swan until January 2023.

9. Plaintiff Cody Davis, an individual residing in Texas, was an officer of Swan from January 1, 2016 to April 1, 2016.

10. Defendant IPU is a unit in the Fraud and Consumer Protection Division of the DOJ. The IPU is responsible for enforcing the provisions of the Delaware Securities Act, 6 *Del. C.* § 73-101 *et seq.*, and promulgating and enforcing the rules and regulations thereunder, 6 *Del. Admin. C.* § 100 *et seq.*

FACTUAL BACKGROUND

I. THE IPU'S IN-HOUSE ENFORCEMENT STRUCTURE

11. The Investor Protection Director (the "Director") is a Deputy Attorney General with the DOJ and the "principal executive officer" of the IPU. 6 *Del. C.* § 73-102(a). This is a dual role. On the one hand, the Director ***prosecutes*** administrative proceedings under the Delaware Securities Act. 6 *Del. C.* §§ 73-102(a), 501. On the other hand, the Director ***adjudicates*** administrative proceedings under the Delaware Securities Act. *See generally* 6 *Del. C.* § 73-601.

12. "The Director may make, amend and rescind rules, regulations, forms and orders to carry out and define the provisions of [the Delaware Securities Act]." 6 *Del. C.* § 73-102(b). The Delaware Securities Act does not otherwise restrict the Director's rulemaking authority or prescribe procedural safeguards that the Director must follow.

13. The Director may delegate her adjudicatory functions to an "administrative hearing officer," a "Presiding Officer." 6 *Del. C.* § 73-102(c). Presiding Officers are appointed on an ad-hoc basis, 6 *Del. Admin. C.* § 225A, and the Director may unilaterally revoke a delegation, 6 *Del. Admin. C.* § 202(d). The Presiding Officer in the IPU Action is also a Deputy Attorney General with the DOJ who, like the Director, is dually responsible for prosecuting administrative proceedings and adjudicating administrative proceedings. 6 *Del. Admin. C.* §§ 202, 225A.

14. In these administrative proceedings, pursuant to 6 *Del. C.* § 73-601(a), "the Director may issue orders providing for the following remedies: cease and desist; fine; assessment of costs; restitution to investors; conditional or probationary registration; suspension or bar from registration; censure or reprimand; special reporting requirements; freezing of accounts in which it is believed that fraud has occurred, may be occurring, or is likely to occur; or other remedies which the Director determines to be in the public interest."

15. "In addition to the remedies set forth in [6 *Del. C.* § 73-601(a)], the Director may order the payment of fines and other monetary sanctions for any violation of any provision of [the Delaware Securities Act] or any rule or order hereunder in an amount not to exceed $10,000 for each and every violation, plus the costs of investigation and prosecution." 6 *Del. C.* § 73-601(b). "Each independent violation of the Act counts as a separate instance for purposes of calculating penalties." *Id.*

16. When the IPU seeks an order for fines, it must commence an in-house administrative proceeding. The IPU has no authority to bring an action for fines

in a court established by Article IV of the Delaware Constitution. The IPU's authority to bring an action in the Court of Chancery is limited to applications for contempt orders, 6 *Del. C.* § 73-403, appeals from orders of the Director, 6 *Del. C.* § 73-502, and requests for injunctive and "other ancillary relief," 6 *Del. C.* § 73-602. The IPU's authority to bring an action in the Superior Court is limited to applications for contempt orders, 6 *Del. C.* § 73-601(c)(2), and criminal actions, 6 *Del. C.* § 73-604(d).

17. Accordingly, when the IPU seeks an order for fines, respondents have no ability to demand a jury trial, and the IPU has no ability to provide a jury trial, regardless of whether Article I, Section 4 of the Delaware Constitution guarantees one.

18. The IPU commences an administrative proceeding by filing a complaint with the Director and serving a copy on the respondents. 6 *Del. Admin. C.* § 220. The Director then notifies the Attorney General and requests that the Attorney General appoint a Presiding Officer. 6 *Del. Admin. C.* § 220. The appointment is episodic in that it expires automatically at the end of the administrative proceeding.

19. The respondents must then answer the IPU's complaint. 6 *Del. Admin. C.* § 224(a).

20. After the respondents answer the IPU's complaint, the Presiding Officer issues a scheduling order. *See* 6 *Del. Admin. C.* § 226. The scheduling order sets deadlines for discovery and motions for summary disposition. *See id.* The scheduling order also sets dates for a pre-hearing conference, an adjudicatory hearing, and post-hearing briefs. *See id.*

21. Following the adjudicatory hearing, the Director makes findings of fact and rulings of law on the

respondents' liability and then, when appropriate, issues orders providing for remedies. *See generally* 6 *Del. C.* § 73-601; *accord* 6 *Del. Admin. C.* § 251(a). Only a fraction of the IPU's orders, decisions, and proposed decisions are publicly available. Most of these orders, decisions, and proposed decisions are conclusory consent orders with no legal analysis. Respondents are thus denied the predictability and protections afforded by stare decisis.

22. "[A]ny moneys paid . . . in a securities action brought by the Attorney General or the Investor Protection Director . . . shall be credited to the Investor Protection Fund." 6 *Del. C.* § 73-703(b)(2). "The Attorney General is authorized to expend from the Investor Protection Fund such moneys as are necessary for the payment of costs, expenses, and charges [incurred] in connection with the activities of the Investor Protection Unit . . . ." *Id.* § 73-703(e).

II. THE IPU BRINGS AN ADMINISTRATIVE PROCEEDING AGAINST PLAINTIFFS

23. On November 2, 2020, the IPU commenced the IPU Action, an in-house administrative proceeding against Plaintiffs captioned *In the Matter of: Swan Energy, Inc., Brandon Davis, John Schiffner, Cody Davis, and Dale Frank Phillips*, Investor Protection Case No. 18-0026. The IPU has since amended its complaint twice, most recently on May 22, 2023. A redacted version of the IPU's most recent complaint (sans exhibits to the complaint) is attached hereto as Exhibit A.

24. In its complaint, the IPU alleges, *inter alia*, that Plaintiffs offered and sold unregistered securities in violation of 6 *Del. C.* § 73-202. Ex. A ¶¶ 1-148.

25. The IPU also alleges that Plaintiffs committed securities fraud in violation of 6 *Del. C.* § 73-201. Ex. A ¶¶ 149-152.

26. The IPU asks the Director to "enter an order providing for restitution plus interest . . . an assessment of costs, fines in such amount as she deems appropriate, an order to cease and desist the offer and sale of unregistered securities in Delaware and to Delaware investors, and such other relief as she determines to be in the public interest." Ex. A at 49. Potential fines alone could total as much as $710,000 "plus the costs of investigation and prosecution." *See* 6 *Del. C.* § 73-601(b).

27. In the Second Case Scheduling Order, a copy of which is attached hereto as Exhibit B, the Presiding Officer scheduled an adjudicatory hearing in the IPU Action for April 22, 2024. Ex. B § 10.

III. THE IPU DENIES PLAINTIFFS ACCESS TO PRIOR IPU DECISIONS

28. In the IPU Action, only "the Director, or any officer designated by the Director, may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records. . . ." 6 *Del. C.* § 73-402; 6 *Del. Admin. C.* § 304.

29. Plaintiffs have no such authority in the IPU Action. They may not issue subpoenas duces tecum or subpoenas ad testificandum. In fact, all "[i]nformation or documents obtained by the Unit in the course of any investigation or examination, unless made a matter of public record, shall be deemed nonpublic." 6 *Del. Admin. C.* § 302(a). "Unless otherwise

ordered by the Unit, all investigations are non-public and the reports thereon are for the Unit's use only." 6 *Del. Admin. C.* § 301(a). Plaintiffs are not among the many "persons" to whom "nonpublic information in the Unit's possession" may be disclosed. *See* 6 *Del. Admin. C.* § 302(b).

30. Because they lack subpoena power in the IPU Action, Plaintiffs were forced to issue requests pursuant to the Freedom of Information Act, 29 *Del. C.* § 10001 *et seq.* (each a "FOIA Request"). The Director is not exempt from FOIA Requests. *See* 6 *Del. Admin. C.* § 302(c)(2).

31. On March 11, 2021, counsel for Plaintiffs filed a FOIA Request with the DOJ requesting public records regarding, *inter alia*, orders, decisions, and proposed decisions issued by the IPU. In particular, Plaintiffs requested, *inter alia*, information about how often a Presiding Officer resolved an administrative proceeding favorably to the IPU, how much money respondents were ordered to pay, and where those monetary payments went. These orders, decisions, and proposed decisions are matters of public record pursuant to 6 *Del. Admin. C.* § 206(a) and are necessary to meet the IPU's allegations against Plaintiffs, determine whether they are being treated disparately, and determine whether the IPU's Presiding Officer has the requisite impartiality. The DOJ refused to comply with these aspects of Plaintiffs' March 11th FOIA Request.

32. On March 22, 2021, counsel for Plaintiffs filed a FOIA Request with the Delaware Office of Management and Budget requesting public records regarding, *inter alia*, monies received, expended, and awarded as a result of orders, decisions, and proposed decisions issued by the IPU. The Office of Management and

Budget refused to comply with these aspects of Plaintiffs' March 22nd FOIA Request.

33. Because they lack subpoena power and received no information responsive to these aspects of their FOIA Requests, Plaintiffs were forced to issue written discovery requests.

34. No statute, rule, or regulation permits Plaintiffs to issue written discovery requests in the IPU Action. The only available discovery mechanism is a subpoena, *see* 6 *Del. Admin. C.* § 306(a), but only the IPU can issue a subpoena, *see* 6 *Del. C.* § 73-402; 6 *Del. Admin. C.* § 304.

35. For this reason, the IPU repeatedly represented to Plaintiffs that they "are not entitled to discovery in this administrative proceeding."

36. Nevertheless, on September 7, 2021, Plaintiffs served and filed their First Set of Requests for Production. In it, Plaintiffs made 16 requests and reissued the requests included (but not answered) in Plaintiffs' March 11th FOIA Request. The IPU refused to comply with these renewed FOIA requests, attacking the endeavor as "burdensome, disproportionate discovery to support a baseless constitutional challenge." Plaintiffs' First Set of Requests for Production and FOIA Requests were intended to discover how the IPU and its Presiding Officers had previously resolved legal issues relevant to the IPU Action and to discover the fines, penalties, costs, and charges imposed on other similarly situated respondents.

37. In response, the IPU referred Plaintiffs to the IPU's website, https://attorneygeneral.delaware.gov/fraud/orders/. The IPU's website makes available only a fraction of the IPU's orders, decisions,

and proposed decisions. Most of these orders, decisions, and proposed decisions are conclusory consent orders with no legal analysis.

38. On September 20, 2021, Plaintiffs served and filed their Second Set of Requests for Production. In it, Plaintiffs made two requests. The IPU refused to comply with Plaintiffs' Second Set of Requests for Production.

39. On April 4, 2022, Plaintiffs served and filed their Third Set of Requests for Production alongside a request to the Presiding Officer for the issuance of a subpoena duces tecum. Plaintiffs' Third Set of Requests for Production and request for the issuance of a subpoena duces tecum were never resolved.

IV. PLAINTIFFS RAISE CONSTITUTIONAL ISSUES, BUT THE IPU ACTION CONTINUES

40. On December 30, 2020, Plaintiffs first raised constitutional issues with the IPU Action in their answers to the IPU's Administrative Complaint.

41. On April 2, 2021, Plaintiffs again raised constitutional issues with the IPU Action in their answers to the IPU's Amended Administrative Complaint.

42. On June 1, 2023, Plaintiffs yet again raised constitutional issues with the IPU Action in their answers to the IPU's Second Amended Administrative Complaint.

43. On July 20, 2023, the Presiding Officer acknowledged the constitutional issues presented and set a deadline for Plaintiffs to move for summary disposition on them. Ex. B § 4.

44. By the Presiding Officer's Second Order Modifying Deadline in Second Case Scheduling Order, this deadline was extended to December 1, 2023.

45. On October 30, 2023, the Presiding Officer sua sponte issued an Order Amending Second Order Modifying Deadline in Second Case Scheduling Order, attached hereto as Exhibit C (the "October 30th Order"), in which she again recognized "the broad constitutional defenses raised in the various Answers to the Second Amended Complaint, which question the constitutionality of the entirety of this administrative proceeding . . . ." Ex. C at 1.

46. The October 30th Order provided that the Presiding Officer would not hear any constitutional issues and that any such issues must be raised (if at all) in a judicial forum on or before December 1, 2023. Ex. C at 2. Specifically, the Presiding Officer ordered as follows:

> Respondents shall file all challenges to the constitutionality of this proceeding, the appointment of the Presiding Officer, the claims and charges raised in the Second Amended Complaint, and any other constitutional challenges raised in their Answers to the Second Amended Complaint, including claims and defenses under the Constitution of the United States, the Delaware State Constitution and the Texas State Constitution, in a court of competent jurisdiction (the "Constitutional Challenges"). The Presiding Officer of this proceeding will not hear any Constitutional Challenges in the course of this proceeding.

Id.

47. The October 30th Order further provided that Plaintiffs "may request that the relevant court or courts hearing the Constitutional Challenges order the Presiding Officer to stay this proceeding, pending the court or courts' determination of the merits of the Constitutional Challenges presented to it, and the Presiding Officer of this proceeding will abide by any such stay order." *Id*.

48. The IPU Action, however, "will proceed according to the Second Case Scheduling Order, absent either (i) a stay order issued by a court at any time, or (ii) a motion for stay filed in this proceeding by January 15, 2024." Ex. C at 3.

49. Accordingly, on December 1, 2023, Plaintiffs filed a Verified Complaint with the Court of Chancery seeking (a) a declaration that the IPU Action and 6 *Del. C.* § 73-601 violate Plaintiffs' constitutional rights to trial by jury and due process and (b) an injunction enjoining the IPU Action from proceeding until Plaintiffs' declaratory judgment claims are fully and finally resolved, including any appeal to the Delaware Supreme Court.

50. On December 11, 2023, Plaintiffs and the IPU entered into a stipulation, granted by the Court of Chancery on the same day, in which the parties agreed to stay the IPU Action.,

51. On February 14, 2024, the Presiding Officer entered an Order staying the IPU Action until Plaintiffs' "constitutional challenges are fully and finally resolved, including any appeal to the Delaware Supreme Court."

52. With Plaintiffs' request for an injunction moot, the parties agreed to transfer this case to the Superior Court pursuant to 10 *Del. C.* § 1902.

53. Plaintiffs now ask this Court to declare that the IPU Action and 6 *Del. C.* § 73-601 violate Plaintiffs' constitutional rights to trial by jury and due process as asserted herein.

COUNT I

Violation of Art. 1, § 4 of the Delaware Constitution Right to Trial by Jury (Declaratory Judgment)

54. Plaintiffs repeat and reallege the foregoing paragraphs as if set forth fully herein.

55. Under Article I, Section 4 of the Delaware Constitution, Plaintiffs are entitled to trial by jury on the claims brought and the civil penalty sought by the IPU in the IPU Action. Pursuant to 6 *Del. C.* § 73-601, however, the IPU Action does not permit a jury trial. Therefore, the IPU Action and 6 *Del. C.* § 73-601 violate Plaintiffs' constitutional rights to trial by jury.

56. Under Article I, Section 4 of the Delaware Constitution, "Trial by jury shall be as heretofore." "As heretofore," a phrase "which has remained unchanged in the Delaware Constitution since 1792, demonstrates an unambiguous intention to equate Delaware's constitutional right to trial by jury with the common law characteristics of that right." *McCoy v. State*, 112 A.3d 239, 256 (Del. 2015).

57. In the IPU Action, the IPU alleges, *inter alia*, that Plaintiffs offered and sold unregistered securities in violation of 6 *Del. C.* § 73-202 and committed securities fraud in violation of 6 *Del. C.* § 73-201. *See* Ex. A ¶¶ 1-152. The IPU asks the Director to "enter an order providing for," *inter alia*, "fines in such amount as she deems appropriate . . . ." Ex. A at 49.

58. At common law, fraud and securities regulation claims were triable by juries in courts of law. Therefore, Plaintiffs are entitled to trial by jury on the claims brought by the IPU in the IPU Action. But because 6 *Del. C.* § 73-601 does not permit Plaintiffs to demand trial by jury and does not permit the IPU to provide a jury trial, the IPU Action and 6 *Del. C.* § 73-601 violate Plaintiffs' rights to trial by jury as guaranteed by Article I, Section 4 of the Delaware Constitution.

59. Additionally, the IPU requests an order for fines, the quintessential legal remedy. Therefore, Plaintiffs are entitled to trial by jury on the IPU's request for an order for fines. But because 6 *Del. C.* § 73-601 does not permit Plaintiffs to demand trial by jury and does not permit the IPU to provide a jury trial, the IPU Action and 6 *Del. C.* § 73-601 violate Plaintiffs' rights to trial by jury as guaranteed by Article I, Section 4 of the Delaware Constitution.

60. Plaintiffs seek a declaratory judgment that the IPU Action and 6 *Del. C.* § 73-601 violate their constitutional rights to trial by jury. As such, an actual controversy exists among the parties about whether the IPU Action and 6 *Del. C.* § 73-601 violate Plaintiffs' rights under Article I, Section 4 of the Delaware Constitution.

COUNT II

Violation of Art. 1, §§ 7-9 of the Delaware Constitution Right to Due Process (Declaratory Judgment)

61. Plaintiffs repeat and reallege the foregoing paragraphs as if set forth fully herein.

62. Denying access to decisions of the IPU is not only inconsistent with the IPU's own rules, but it is also fundamentally unfair and violative of Plaintiffs' due process rights under Sections 7, 8, and 9 of Article I of the Delaware Constitution.

63. As a unit in the Fraud and Consumer Protection Division of the DOJ, the IPU acts pursuant to delegated state authority. The IPU therefore acts under color of state law in the IPU Action.

64. In the IPU Action, the IPU seeks to deprive Plaintiffs of their protected liberty and property interests. By way of example with respect to the former, the IPU seeks a cease-and-desist order prohibiting Plaintiffs from offering and selling unregistered securities in Delaware and to Delaware investors, Ex. A at 49, but Plaintiffs have a protected liberty interest in offering and selling ***exempt*** unregistered securities, which is legal and proper business. By way of example with respect to the latter, the IPU seeks an order for fines which could total $710,000, Ex. A at 49, but Plaintiffs have a protected property interest in their money. Therefore, Plaintiffs are entitled to due process in the IPU Action.

65. Sections 7, 8, and 9 of Article I of the Delaware Constitution dictate that "[b]efore a party can be deprived of life, liberty, or property, it has the right to notice and a hearing in a meaningful time and a meaningful manner." *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083, 1089 (Del. 1986). "In the exercise of quasijudicial or adjudicatory administrative power, administrative hearings, like judicial proceedings, are governed by fundamental requirements of fairness which are the essence of due process . . . ." *Vincent v. E. Shore Markets*, 970 A.2d 160, 163–64 (Del. 2009)

(quotations omitted). "A fair trial in a fair tribunal is a basic requirement of due process that applies to administrative agencies as well as to courts." *Sullivan v. Mayor of Elsmere*, 23 A.3d 128, 135 (Del. 2011) (quotations omitted).

66. Under Article I, Section 9 of the Delaware Constitution, "All courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense."

67. Plaintiffs have a "right to inspect and copy public records and documents, including judicial records and documents." *See Partner Invs., L.P. v. Theranos, Inc.*, 2018 WL 1906085, at *1 (Del. Ch. Apr. 23, 2018) (footnote and quotations omitted). Such "right of access to judicial records has been characterized as fundamental to a democratic state." *Id.* (footnote and quotations omitted). Indeed, "[t]he right of access enables the public to judge the product of the courts in a given case," which, "in turn, helps ensure quality, honesty and respect for our legal system." *Id.* (footnote and quotations omitted). "Consequently, all court proceedings are presumptively open to the public." *Id.* (footnote and quotations omitted).

68. Plaintiffs attempted to access the IPU's orders, decisions, and proposed decisions, but only a fraction of those are publicly available. Thus, the IPU either improperly fails to make its orders, decisions, and proposed decisions accessible to the public or it mischaracterizes them and withholds them as nonpublic. Either way, the IPU has wrongfully deprived Plaintiffs

of their rights to inspect the IPU's orders, decisions, and proposed decisions.

69. In this context, there is no tenable distinction between judicial records and administrative records. The IPU itself agrees (at least in principle) that "[e]ach order, decision, and proposed decision of a Presiding Officer shall be available for inspection by the public from the date of entry, unless the order or decision is nonpublic. A nonpublic order or decision shall be available for inspection by any person entitled to inspect it from the date of entry." 6 *Del. Admin. C.* § 206.

70. Yet when Plaintiffs attempted to access the orders, decisions, and proposed decisions of Presiding Officers through FOIA Requests and three written discovery requests, the IPU rebuffed their attempts.

71. The IPU's refusal to provide Plaintiffs access to past decisions is antithetical to stare decisis. Without a record of the IPU's past decisions, precedent—that foundational premise of our jurisprudence intended to promote the evenhanded, predictable, and consistent development of legal principles, foster reliance on decisions, and contribute to the actual and perceived integrity of the juridical process—plays no discernable role in the IPU's autocratic, in-house administrative proceedings. *See Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1278 (Del. 2021) (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019)) ("No doubt, the development of and adherence to precedent is an essential feature of common law systems . . . .").

72. Without access to the IPU's record of past decisions, those who wish to assiduously comply with the Delaware Securities Act are forced to guess as to whether a given agreement, transaction, or course of

action is proper or proscribed because they cannot know how the IPU has interpreted the Delaware Securities Act in the past. This poses a glaring due process problem. "At a minimum," due process in an administrative proceeding requires "adequate notice to all concerned; a full opportunity to be heard by any person potentially aggrieved by the outcome; a decision which reflects the reasons underlying the result ***and, most importantly, an adherence to the statutory or decisional standards then controlling***." *Cnty. Council of Sussex Cnty. v. Green*, 516 A.2d 480, 481 (Del. 1986) (emphasis added). Without access to the IPU's decisional standards, neither Plaintiffs nor this Court can hold the IPU to that "most important[]" requirement of due process. *See id.*

73. A few examples illustrate the point. ***First***, a fundamental tenet of due process is that "all persons similarly circumstanced shall be treated alike." *M. v. M.*, 321 A.2d 115, 117 (Del. 1974) (quotations omitted). The IPU's unconstitutional and unfair refusal to provide access to its precedent makes it impossible for Plaintiffs and this Court to know whether Plaintiffs have been subjected to disparate treatment, either during the administrative proceeding itself or, if Plaintiffs were ultimately found liable for one or more violations of the Delaware Securities Act, by the Presiding Officer's decision on the fines, penalties, and other costs to be imposed. In particular, without this information, neither Plaintiffs nor this Court can determine whether "there are other similarly-situated people who were treated differently," an element of a class-of-one equal protection claim. *See Smith v. Guest*, 16 A.3d 920, 932 (Del. 2011). This is especially troubling on two fundamental securities-law issues.

Without access to the IPU's precedent, Plaintiffs cannot determine whether the IPU has treated them differently with respect to their full-faith-and-credit arguments or their federal-preemption arguments, both of which are central to their defense. Nor can this Court ensure that the IPU is responding to similar arguments made by other respondents in a consistent fashion.

74. ***Second***, the IPU's refusal to make its decisions publicly available—while simultaneously representing to Plaintiffs through 6 *Del. Admin. C.* § 206, its public website, and statements in the IPU Action that such decisions are readily available—prevents Plaintiffs and this Court from determining whether the Presiding Officer (who is saddled with a dual prosecutor-judge role, appointed by the Director, and whose delegated powers may be unilaterally revoked by the Director) has the requisite impartiality. *See Home Paramount Pest Control v. Gibbs*, 953 A.2d 219, 222 (Del. 2008) (requiring neutrality and the appearance of neutrality from an administrative hearing officer as measured by the standard applied to judicial officers set forth in *Los v. Los*, 595 A.2d 381, 383-85 (Del. 1991)); *Quaker Hill Place v. Saville*, 523 A.2d 947, 967 (Del. 1987) ("In performing its duties under the Equal Rights to Housing Act, the [State Human Relations] Commission is statutorily compelled to act with fairness and due process for all parties concerned. It is axiomatic that this obligation derives from the due process mandates of the Delaware Constitution." (citations omitted)).

75. Said impartiality is particularly important here, where the Presiding Officer and the prosecutors are all Deputy Attorneys General reporting to the same

Attorney General, who is responsible for their compensation, assignments, and career advancement. Of course, *Blinder, Robinson & Co. v. Bruton* stated that "[t]he mere prosecution of a case by one Deputy Attorney General before another Deputy Attorney General, acting in an adjudicative capacity, is not sufficient" to support a due process claim, but that was only where there was "no claim of collusion or unauthorized communication"[1] and an "absence of specific evidence of bias." 552 A.2d 466, 473 (Del. 1989) (citing *Withrow v. Larkin*, 421 U.S. 35 (1975), which concerned tenured hearing officers, unlike the episodically appointed Presiding Officer here). Yet that is exactly the point: without access to the IPU's precedent, neither Plaintiffs nor this Court can assess the IPU's success rate in administrative proceedings, even though a perfect or abnormally high success rate would be powerful specific evidence of bias, whether on the part of a particular Presiding Officer or as an inevitable consequence of the IPU's structure.

76. Even *Blinder* recognized that there are "situations where experience teaches that there is too high a probability of bias on the part of a decision-maker to be constitutionally acceptable." *Id.* "That risk exists where the adjudicator 'has a pecuniary interest in the outcome . . . .'" *Id.* (quoting *Withrow*, 421 U.S. at 47). Precisely that concern is present here. Because all funds paid in an IPU administrative proceeding are credited to the Investor Protection Fund, and the Attorney General is authorized to spend those funds to pay for the operations of the IPU, Presiding Officers'

[1] The Presiding Officer and the Deputy Attorneys General prosecuting the IPU Action share access to the same servers and internal documents.

decisions will have a material effect on the IPU's funding. Again, Plaintiffs sought information about the monies received, expended, and awarded as a result of orders, decisions, and proposed decisions issued by the IPU, but they were denied access. This denial prevents Plaintiffs and this Court from assessing whether the IPU's prosecutorial success rate is unconstitutionally entangled with its funding structure.

77. Ultimately, "the test is whether the [Presiding Officer's] situation is one which would offer a possible temptation to the average man . . . which might lead him not to hold the balance nice, clear, and true between the state and the accused." *See Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57, 60 (1972) (quotations omitted); *see Blinder*, 552 A.2d at 472 ("The due process protection of the Delaware Constitution is considered to be coextensive with the due process protection of the United States Constitution."). If it were possible to apply this test (which it is not, given the IPU's withholding of its precedent), this Court would be called upon "to prevent even the probability of unfairness," *see Withrow*, 421 U.S. at 47 (quotations omitted), for due process "is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice," *see Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

78. Plaintiffs seek a declaratory judgment that the IPU Action violates their constitutional rights to due process. As such, an actual controversy exists among the parties about whether the IPU Action violates Plaintiffs' rights under Article I, Sections 7, 8, and 9 of the Delaware Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter the following:

a. A judgment in favor of Plaintiffs and against the IPU declaring the IPU Action unconstitutional, as described herein;

b. A judgment in favor of Plaintiffs and against the IPU declaring 6 *Del. C.* § 73-601 unconstitutional, as described herein;

c. An order awarding Plaintiffs their reasonable attorneys' fees, expenses, and costs; and

d. An order awarding any other relief the Court deems fair and equitable.

Dated: April 10, 2024

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