

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 98034 / August 1, 2023

INVESTMENT ADVISERS ACT OF 1940
Release No. 6362 / August 1, 2023

INVESTMENT COMPANY ACT OF 1940
Release No. 34979 / August 1, 2023

ADMINISTRATIVE PROCEEDING
File No. 3-21542

In the Matter of

**EXCHANGE TRADED
MANAGERS GROUP LLC,**

ETF MANAGERS GROUP LLC,

and

SAMUEL R. MASUCCI,

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-
AND-DESIST PROCEEDINGS,
PURSUANT TO SECTION 15(b) OF
THE SECURITIES EXCHANGE
ACT OF 1934, SECTIONS 203(e),
203(f) AND 203(k) OF THE
INVESTMENT ADVISERS ACT OF
1940, AND SECTIONS 9(b) AND 9(f)
OF THE INVESTMENT COMPANY
ACT OF 1940, MAKING FINDINGS,
AND IMPOSING REMEDIAL
SANCTIONS AND A CEASE-AND-
DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”), Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 (“Investment Company Act”) against Samuel Masucci, Exchange Traded Managers Group LLC, and ETF Managers Group LLC (each a “Respondent” and collectively “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement (the “Offer”) which the Commission has determined to

accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over him and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V as to Respondent Masucci, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondents’ Offers, the Commission finds¹ that:

SUMMARY

1. These proceedings arise out of a prohibited joint transaction that investment advisers Samuel Masucci (“Masucci”) and ETF Managers Group LLC (“Adviser”), and Adviser’s parent company Exchange Traded Managers Group LLC (“Parent”) (collectively, “Respondents”), entered into, to the detriment of Adviser’s client the ETFMG Alternative Harvest ETF (“MJ”). In connection with this prohibited transaction, Masucci and Adviser—which Masucci founded, majority-owned and controlled—violated their duty of loyalty to MJ by knowingly providing advice that favored their own interests over their client MJ and failing to fully disclose to MJ’s Independent Trustees their financial conflicts of interest. Masucci and Adviser also breached their duty of care by failing to act in the best interest of their client MJ.

2. Beginning in the second half of 2019, Respondents urgently needed tens of millions of dollars to settle private litigation, without which they risked bankruptcy and the loss of Adviser’s advisory contracts with MJ and its other ETF clients. So Respondents used MJ’s lucrative securities lending revenue stream in negotiating \$20 million in financing on favorable terms, and free investment banking services to raise additional financing, from Company A—MJ’s then-custodian and securities lender, and the only entity willing to provide the rescue financing Respondents needed. In exchange, Masucci agreed to keep MJ’s securities lending business at Company A, despite offers from other securities lenders with better fee splits that Masucci and Adviser understood could have provided millions more in revenue and other benefits to MJ. Masucci then omitted this joint arrangement between Respondents, Company A, and MJ in communications with MJ’s Independent Trustees, inaccurately telling them that MJ had no viable option besides Company A as a securities lender.

¹ The findings herein are made pursuant to Respondents’ Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

Respondents

3. **ETF Managers Group LLC (“Adviser”)**, a Delaware limited liability company with its principal place of business in New Jersey, is an investment adviser registered with the Commission since January 2016. Adviser is the investment adviser to a family of SEC-registered exchange traded funds (each an “ETF”) that are part of the Exchange Traded Managers Trust (the “Trust”), a trust incorporated in 2009. According to its Form ADV, dated February 7, 2023, Adviser managed \$3.72 billion in regulatory assets under management.

4. **Exchange Traded Managers Group LLC (“Parent”)** is a New Jersey limited liability company that wholly owns and controls Adviser and other subsidiaries, including an SEC-registered broker-dealer and a CFTC-registered Commodity Pool Operator.

5. **Samuel R. Masucci (“Masucci”)**, age 61, is a U.S. citizen and resident of Florida. Masucci co-founded Adviser and Parent, and at all pertinent times was: (i) the majority owner and control person of Parent, owning 75% until May 2020 and 51% thereafter; (ii) the Chief Executive Officer of Adviser; (iii) the lone interested trustee on the three-member board of the Trust; and (iv) a portfolio manager of MJ.

Other Relevant Entities

6. **ETFMG Alternative Harvest ETF (“MJ”)**, a registered investment company, is an ETF listed in the U.S. managed by Adviser. MJ tracks an index of companies involved in the business of growing, marketing and selling cannabis products for medical and recreational use. As of April 2023, MJ had net assets of approximately \$232 million.

7. **Company A** is a California corporation registered with FINRA and the Commission as a broker-dealer, and with the Commission as an investment adviser.

Facts

A. Adviser in 2018 Custodied MJ at Company A as a Last Resort

8. In late 2017, Adviser converted one of its ETFs into MJ, an ETF that tracked a cannabis index. Around that time, the full-service bank custodian and securities lending (“sec lending”) agent for the dozen or so other ETFs that Adviser managed (“Bank B”) decided to cease servicing MJ because Bank B had not yet accepted the reputational and legal risk then associated with cannabis. Bank B required the MJ Trustees to commit to liquidate MJ if Adviser was unable to find a new custodian by September 2018. After months of searching for a replacement custodian, in September 2018, Adviser and MJ’s trustees determined they had no option but to move MJ’s custody and sec lending to Company A, a broker-dealer, or close the fund. Adviser agreed to a 60/40 “split” of MJ’s sec lending revenue, with Company A receiving 40%. Although significantly less favorable for MJ than Bank B’s 80/20 split with Adviser’s

other ETFs still custodied there, Adviser had no viable alternative to Company A at the time.

B. Adviser in 2019 Began Seeking Alternative Sec Lenders for MJ at the Independent Trustees' Direction

9. By early 2019, the number of willing service providers for cannabis funds had increased. In consultation with MJ's independent trustees, Adviser and Masucci assessed MJ's alternatives to Company A and the 60/40 split. In spring and summer 2019, Masucci and Adviser obtained estimates from more than a half-dozen willing alternatives.

10. Adviser's Chief Investment Officer compared some of these estimates for Masucci—concluding that, assuming utilization remained constant, MJ stood to earn additional revenue of tens of millions of dollars annually by switching custodians or improving its sec lending split with Company A to more favorable splits of 70/30 or 80/20—which were more typical of registered fund sec lending arrangements at the time. Some of the competing proposals also could have enhanced MJ's lending revenue through loaning MJ's valuable foreign securities that Company A could not loan.

C. May 2019: Adviser and Parent Lost A Multimillion Dollar Trial in the Midst of Their Search for a New Sec Lender

11. While Adviser's search for a more favorable securities lending arrangement for MJ already was underway, Respondents learned on May 31, 2019 that Adviser and Parent had lost a trial for breach of contract claims brought against them concerning certain other ETFs that Adviser managed. Although the court would not quantify the amount they would owe until December 2019 (when it ordered \$78 million in damages), Masucci told the Independent Trustees that Adviser and Parent faced a liability of tens of millions of dollars but had only \$2 million. The trial loss thus threatened Adviser and Parent with insolvency and the loss of its advisory contracts. The case also exposed Masucci to collateral liability in a separate, parallel lawsuit brought against Parent, Adviser, and him personally by another financial institution (these lawsuits are referred to collectively herein as the "Litigation").

D. Respondents Used MJ's Sec Lending Revenues to Secure Rescue Financing

12. By early June 2019, Masucci began soliciting financing from various financial institutions needed to settle the Litigation. He found only one willing entity, Company A. As Masucci knew, Company A since September 2018 had earned more than \$10 million from its 40% share of MJ's sec lending revenue. He also was informed that the lending revenue made MJ a "top 5 client" of Company A in prime brokerage and sec lending and a growing source of Company A's revenue. They began negotiating the structure and terms of rescue financing, and by August 2019, Masucci had made a \$34 million offer to settle the Litigation, which amount was guaranteed by Company A.

13. By August 2019, and as Masucci negotiated financing with Company A, Adviser and Masucci had received multiple written proposals for MJ's sec lending and

custody business from bank custodians and broker-dealers. These proposals offered (i) more favorable splits (of 70/30 or 80/20 for instance) than MJ's 60/40 arrangement with Company A; (ii) to split earnings on MJ's cash collateral (whereas Company A shared none); and, in some cases, (iii) other favorable terms compared to Company A (such as a higher cash collateral cushion and indemnification against certain borrower defaults).

14. Of the competing proposals he received for MJ, Bank B was Masucci's preference, including because Adviser's other ETFs still were custodied there (with an 80/20 sec lending split). Masucci, other Adviser officers, and MJ's Independent Trustees also preferred traditional full-service bank custodians like Bank B because they provided transfer agent, accounting, administration, and index receipt agent services, none of which could be provided by Company A or other broker-dealers interested in servicing MJ. By August 7, 2019, Masucci had signed a letter of intent ("LOI") with Bank B for MJ to rejoin Adviser's other ETFs at a full-service bank custodian.

15. Before making a final decision about whether to recommend moving MJ's sec lending business, Masucci tried to leverage MJ's sec lending revenues to obtain the Litigation settlement financing Respondents needed from Bank B and two other firms competing for MJ's sec lending business. When each one rejected or would not agree to provide the financing, Masucci and Adviser abandoned discussions about their proposals to service MJ. Instead, Masucci maintained MJ's securities lending business on existing terms with Company A—the only willing funding provider—in exchange for providing settlement financing to Respondents on favorable terms.

16. As reflected in signed, non-binding letters of intent between Parent and Company A, dated November 21, 2019 and February 4, 2020, and in drafts of a note exchanged as late as January 31, 2020, Company A would pay \$20 million toward the Litigation settlement on Respondents' behalf, structured as: (a) a \$10 million preferred equity investment in Parent for a 20% ownership stake; and (b) a \$10 million, three-year loan to Parent at 3% interest for 4.99% in additional ownership (the "Note"). In exchange, these LOIs and drafts of the Note contained a provision that required Adviser to keep MJ's sec lending business at Company A—despite the competing proposals discussed above offering more favorable fee splits and other benefits to MJ. Under that provision, Adviser's transfer of MJ's sec lending business away from Company A would constitute an event of default, requiring Parent to fully repay the three-year loan in just three months (vs. three years) and increase the interest rate from 3% to 10%. This provision requiring Adviser to keep MJ's sec lending business at Company A eventually was removed from the Note only days before Masucci signed it on February 4, 2020, based on counsel's suggestion.

17. Per a separate signed investment banking agreement, and to help raise additional funds to settle the Litigation, Company A also agreed to provide to Parent free investment banking services the parties estimated could be worth \$4 million if MJ's business remained at Company A for a three-year period and if there were a successful transaction. Company A's services did not result in an investment banking transaction. The provisions in these financing and investment banking documents, conditioning favorable terms on MJ's sec lending business staying at Company A, are referred to

herein as the “MJ Condition.” The provision stated that retaining Company A as MJ’s sec lender was “not within the control” of the Adviser.

18. To protect the financing he was negotiating from Company A, Masucci in mid-October 2019 ordered an executive of Adviser—who had encouraged Masucci to move MJ’s business away from Company A for MJ’s best interest—to stop his search for a Company A replacement: “I have changed my mind about meeting with [another bank custodian offering to service MJ] based on end of the week accomplishments [*i.e.*, in negotiations with Company A]. I now have funding in place and a suitable custody solution. Do not try and source new custody relationships or cultivate existing conversations . . . ***There is no further value in dangling \$50M in projected sec lending revenue to attract new custody/lending relationships.***” (Emphasis added.) Masucci then cut off communications with Bank B and other firms competing for MJ’s sec lending business and did not respond to their requests to proceed with their proposals to service MJ.

19. The MJ Condition pitted Respondents’ interests against MJ’s, as Masucci understood. In November 2019, a Company A banker negotiating with Masucci wrote to senior Company A executives that Masucci accepted the MJ Condition in the investment banking agreement, despite having initially “pushed back on [it] given the potential conflicts this may create for them.”

20. On February 4, 2020, Masucci signed an agreement with plaintiffs and Company A to settle the Litigation with approximately \$17 million to be provided by Company A. That same day, Company A and Masucci signed their Note. By early May 2020, Masucci and Company A finalized and executed their other financing documentation (without the MJ Condition) to close on a total \$20 million in funding for Parent.

E. Masucci and Adviser Misled MJ’s Independent Trustees and Favored Their Own Interests Over MJ’s Best Interest

21. Masucci informed MJ’s Independent Trustees about the terms in the final Company A financing documentation. But he never told MJ’s Independent Trustees about the MJ Condition, or otherwise how the financing arrangements with Company A were being conditioned on it keeping MJ’s sec lending business. The failure to fully and fairly disclose these arrangements occurred across regular updates that Masucci gave to the Independent Trustees about his efforts to negotiate and finance a settlement of the Litigation—which Masucci knew the Independent Trustees were closely monitoring in case they needed to protect the Trust and its funds from an insolvent Adviser. MJ’s Independent Trustees would have wanted to know about the link between the MJ’s Fund’s sec lending business and the Company A financing as a conflict of interest between Masucci’s and Adviser’s need for financing on one hand, and the best interest of MJ on the other, because it was their duty as trustees to protect MJ by managing such conflicts.

22. Masucci also never disclosed to MJ’s Independent Trustees his August LOI with Bank B, the written proposals from other candidates, or the improved splits, estimated higher sec lending revenue, or other improved terms in these available alternatives—even

though he advised MJ's Independent Trustees at quarterly board meetings in July and September 2019 that other candidates had expressed interest in MJ's business. Instead, although he had promised Bank B and at least two other firms that he would discuss their proposals at upcoming board meetings, Masucci at these meetings misrepresented to the Independent Trustees that Company A remained MJ's only viable option because other interested firms had lingering reluctance towards risks associated with servicing a cannabis fund. MJ's Independent Trustees would have wanted to know about these other proposals for MJ's business, including their better sec lending splits compared to Company A.

23. An investment adviser's fiduciary duty includes both a duty of loyalty and a duty of care. To fulfill these obligations, an adviser, among other things, must make full and fair disclosure to a client of conflicts of interest, and must provide investment advice in the best interest of its client based on the client's objectives. By terminating negotiations for MJ's sec lending business with competing financial institutions, keeping MJ's sec lending business at Company A, and agreeing to continue to do so in order to secure settlement financing for Respondents, Masucci and Adviser breached their duty of care to MJ. By failing to inform MJ's Independent Trustees about the certain key provisions of the arrangement and the conflicts of interest it created, Masucci and Adviser breached their duty of loyalty to MJ.

Violations

24. As a result of the conduct described above, Masucci and ETF Managers Group LLC willfully violated Sections 206(1) and 206(2) of the Advisers Act, which make it unlawful for any investment adviser directly or indirectly "to employ any device, scheme, or artifice to defraud any client or prospective client" or "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Sections 206(1) and (2) impose on an investment adviser fiduciary duties of loyalty and care to its client. Section 206(1) requires a showing of scienter, whereas negligence is sufficient for Section 206(2).

25. As a result of the conduct described above, ETF Managers Group LLC, and Exchange Traded Managers Group LLC, and Masucci willfully violated Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder, which generally prohibit any affiliated person of a registered investment company (or any affiliated person of such affiliated person), acting as principal, from effecting any transaction in which such registered investment company is a joint or a joint and several participant with such affiliated person on a basis different from or less advantageous than that of such other participant unless an exemptive order has been issued by the Commission.

F. Undertakings

26. Respondents Masucci and ETF Managers Group LLC have undertaken to:
- a. Resignation and limitation on activities. Not later than July 15, 2023, Masucci will resign as an interested Trustee of any and all investment companies managed by Adviser (the "Funds"), including but not limited to MJ, and will resign from

his role as CEO of Adviser and any of its affiliates (each an “ETFMG Entity” and collectively the “ETFMG Entities”), including but not limited to Parent and Parent’s affiliated broker-dealer and affiliated commodity pool operator. Masucci shall not attempt to influence or exercise voting control of his shares of Parent concerning the operations of any ETFMG Entity, or communicate directly or indirectly with any employees of any ETFMG Entity concerning the operation of any ETFMG Entity, except as necessary to effectuate one or more transactions to sell the corporate assets and wind down the business of Parent and its subsidiaries (which do not include the Trust, the funds held by the Trust, or the holdings of those funds), and to terminate his affiliated person status with respect to the ETFMG Entities.

b. Notice. Within thirty (30) days of the entry of this Order, Respondent Adviser shall (A) post for one year a copy of this Order prominently on its Website in a place not unacceptable to the Commission’s staff, and (B) provide a copy of this Order to: (i) the Trustees of the Trust; (ii) the Board of Managers of Parent; and (iii) all current investors in the Funds via SEC filing.

c. Certification. Respondents Masucci and Adviser shall certify, in writing, compliance with the undertakings set forth in Paragraphs 26.a.-26.b. above. The certification shall identify the undertaking(s), provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondents agree to provide such evidence. The certification and supporting material shall be submitted to David Becker, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

d. Recordkeeping. Respondents shall preserve, for a period of not less than six (6) years from the end of the fiscal year last used, the first two (2) years in an easily accessible place, any record of compliance with these undertakings.

e. Deadlines. For good cause shown, the Commission staff may in its discretion extend any of the procedural dates relating to the undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered to be the last day.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents’ Offers of Settlement.

Accordingly, pursuant to Sections 15(b) of the Exchange Act, Sections 203(e), Sections 203(f), and 203(k) of the Advisers Act, and Section 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondents Masucci and ETF Managers Group LLC cease and desist from committing or causing any violations and any future violations of Sections 206(1) and

206(2) of the Advisers Act.

B. Respondents Masucci, ETF Managers Group LLC, and Exchange Traded Managers Group LLC cease and desist from committing or causing any violations and any future violations of Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder.

C. Respondents ETF Managers Group LLC and Exchange Traded Managers Group LLC are censured.

D. Respondent Masucci shall be and hereby is:

a. barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

b. prohibited from serving or acting as an employee, officer, director, of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter;

with the right to apply for reentry after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission; **provided however**, that Masucci may, until March 31, 2024: (i) continue to hold and exercise control over Exchange Traded Managers Group LLC through his ownership of Exchange Traded Managers Group LLC stock, so long as he does not (A) attempt to influence or exercise voting control of his Exchange Traded Managers Group LLC stock concerning the operations of ETF Managers Group LLC, Exchange Traded Managers Trust, or ETFMG Financial LLC; or (B) communicate directly or indirectly with any employee of ETF Managers Group LLC, Exchange Traded Managers Trust, or ETFMG Financial LLC to influence or exercise control over the operations of ETF Managers Group LLC, Exchange Traded Managers Trust, or ETFMG Financial LLC, in each case except as necessary in connection with the activities contemplated by clause (ii) below; and (ii) perform tasks or functions relating to ETF Managers Group LLC, Exchange Traded Managers Trust, or ETFMG Financial LLC to the extent necessary to effectuate a transaction for the sale of ETF Managers Group LLC's assets to a third party, which must include the termination of Masucci's affiliated person status with respect to ETF Managers Group LLC, Exchange Traded Managers Trust, and ETFMG Financial LLC. For the avoidance of doubt, at such time as Masucci terminates his affiliated person status with respect to ETF Managers Group LLC, Exchange Traded Managers Trust, or ETFMG Financial LLC, the proviso to the preceding sentence beginning with the words "provided however" shall cease to be operative with respect to such entity.

E. Any reapplication for association by Respondent Masucci will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, compliance with the Commission's order and the satisfaction of any or all of the following: (a) Respondents'

undertakings above in Paragraphs 26a.-26.d; (b) the penalties ordered below in Paragraphs IV.F. and IV.G.; (c) any disgorgement or civil penalties ordered by a Court against Masucci in any action brought by the Commission; (d) any disgorgement ordered against Masucci, whether or not the Commission has fully or partially waived payment of such disgorgement; (e) any arbitration award related to the conduct that served as the basis for the Commission order; (f) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (g) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

F. Masucci shall, within 15 days of the entry of this Order, pay a civil money penalty in the amount of \$400,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

G. ETF Managers Group and Exchange Traded Managers Group, jointly and severally, shall pay civil money penalties in the amount of \$4,000,000 to the Securities and Exchange Commission. Payment shall be made in the following installments: \$200,000 must be paid within 30 days of the entry of this Order, and the remaining balance must be paid on or before March 31, 2024. Payments shall be applied first to post-order interest, which accrues pursuant to 31 U.S.C. § 3717. Prior to making the final payment set forth herein, Respondent shall contact the staff of the Commission for the amount due. If Respondent fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.

H. With respect to the Respondents' payment of penalty amounts set forth above in Paragraphs IV.F. and IV.G. above, payments must be made in one of the following ways:

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

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

Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Masucci, ETF Managers Group, and/or Exchange Traded Managers Group as Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Corey Schuster, Co-chief of the Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

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

J. Respondents Masucci and ETF Managers Group shall comply with their undertakings as enumerated in Section III., Paragraphs 26.a - 26.d above.

V.

It is further ORDERED that, for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent Masucci, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Masucci under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Masucci of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Vanessa A. Countryman
Secretary