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28IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIASECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

KIMON P. DAIFOTIS and  
RANDALL MERK,Defendants.  
\_\_\_\_\_ /

No. C 11-00137 WHA

**ORDER RE REQUEST FOR  
SECTION 1292(B) CERTIFICATION**

The two issues are controlling questions of law as to important theaters of contention in this case. Although this Court rejected the defense arguments based upon *Janus*, it agrees that there are substantial grounds for difference of opinion. Given the volume of securities litigation in our district courts across the United States, conflicts will inevitably arise, probably even among district judges in our circuit. It is a fair question whether *Janus* should be extended to narrow the Investment Company Act of 1940 and the Securities Act of 1933. All of the foregoing would support an appeal now.

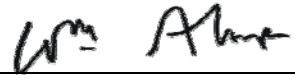
Would an interlocutory appeal “materially advance” the termination of the litigation? Without doubt, an interlocutory appeal, if accepted by the court of appeals, would require a substantial postponement of the trial, now set for July 9, 2012. Moreover, even a ruling by the court of appeals in favor of defendants on the issues in question would *not* terminate the litigation, for there are several other claims asserted by the Commission on which a trial would be

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necessary in all events. Given this, it cannot be said that an interlocutory appeal would materially advance the ultimate termination of the litigation, although it could possibly simplify the issues for decision by the jury. On balance, the Court is of the view that the potential benefit from an appeal will be outweighed by its inherent delay. If it turns out that defendants are found guilty by the jury for violating the Investment Company Act and Section 17(a)(2) of the 1933 Act, then those discrete findings, along with all other findings, will be appealable and benefit from a full evidentiary record. Therefore, the request for certification of Section 1292(b) is **DENIED**.

**IT IS SO ORDERED.**

Dated: October 12, 2011.

  
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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE