UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	
RONALD S. BLOOMFIELD, ROBERT GORGIA, VICTOR LABI, JOHN EARL MARTIN, SR., and EUGENE MILLER,	**ADMINISTRATIVE PROCEEDING File No. 3-13871**
Respondents.	

PREHEARING BRIEF OF RESPONDENTS RONALD S. BLOOMFIELD AND JOHN EARL MARTIN SR.

Respondents Ronald S. Bloomfield and John E. Martin, by and through their counsel of record hereby submit the following Prehearing Brief.

I. THE RESPONDENTS

John E. Martin (Martin), age 68, is an equity trader and general securities representative duly registered with the Commission. He has more than 30 years in the business with no previous record of discipline other than one disputed termination report filed by a former employer as a pretext to evade a contractual obligation. Martin is a resident of South Pasadena, California.

Ronald S. Bloomfield (Bloomfield), age 62, is a general securities principal, general securities representative, and options principal duly registered with the Commission. He has more than 38 years in the business with no previous record of discipline other than one disputed termination report filed by a former employer as a pretext to evade a contractual obligation and a CFTC sanction for failure to supervise an employee. Bloomfield is a resident of Westlake Village, California

Martin and Bloomfield are both currently employed by AIS Financial, Inc. of Westlake Village, California, a broker dealer registered with the Commission.

During the 31-month period November 2004 through May 2007, Martin was registered with and employed by New York brokerage firm, Leeb Brokerage Services, Inc. (Leeb) at its satellite offices in Santa Monica, California, During the 22-month period August 2005 through May 2007, Bloomfield was registered with and employed by Leeb, during which time he was Martin's supervisor.

During the foregoing periods, Leeb was a broker-dealer incorporated under New York law, with a main office in New York. Leeb was registered with the Commission from March 1999 to July 20, 2007, when, according to the Commission, Leeb filed a Broker-Dealer Withdrawal form. Leeb is not a named party to this proceeding and the Commission alleges that Leeb is defunct.

During the period of his affiliation with Leeb, Martin was a trader and broker in a satellite office 3,000 miles from New York, operating under the supervision of Bloomfield. All securities sold by Martin during that period were sold in unsolicited brokers' transactions. In every case, Martin, and Bloomfield as his supervisor, conducted a reasonable inquiry into the origin and ownership of the stock prior to selling the stock to the market. In every case, Martin, and Bloomfield followed the written procedures set forth in the Leeb compliance manual. In every case, Bloomfield and Martin did nothing more than execute orders to sell the securities as agent for the person for whose account the securities were sold. In every case, Bloomfield and Martin executed orders for existing customers with whom they had established relationships and of whom they were familiar, Bloomfield and Martin received no more than the usual and customary broker's commission. At no time did Bloomfield or Martin have any reason to believe the securities sold were part of any distribution of any security, nor did the participate in any such distribution

In addition, Bloomfield and Martin were aware during this period of their obligations under the Bank Secrecy Act to file Suspicious Activity Reports concerning their customers' conduct. Bloomfield and Martin reasonably believed that the information on the transactions available to them was not suspicious. They further contend that the Commission has no evidence to show that any of the so-called "suspicious activity" that the Commission attempts to establish solely by innuendo was in fact activity that consisted of money laundering or any activity that such reports were

intended to identify.

II. THE PROCEEDING

The Securities and Exchange Commission (Commission) initiated this proceeding on April 27, 2010, pursuant to Section 8A of the Securities Act of 1933 (Securities Act) and Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act). The Order Instituting Proceedings (OIP) names Bloomfield and Martin among the respondents. Also named in the OIP were Robert Gorgia, Victor Labi and Eugene Miller, all former employees of Leeb in New York.

Although Rule 200(b)(3) of the Commission's Rules of Practice – and elemental principles of due process – require that the OIP contain "a short and plain statement of the matters of fact and law to be considered and determined," the OIP recites only "boilerplate" language that Bloomfield and Martin willfully violated Sections 5(a) and 5(c) of the Securities Act, Section 17(a) of the Exchange Act and Rule 17a-8 thereunder. But it neglects altogether to specify the issuers of the securities, the identities of the customers, or the specific transactions by which Bloomfield and Martin committed any such violations.

In response to this failure, Respondents Bloomfield and Martin, through their counsel, filed their motion herein for a more definite statement, to which the Division filed a response, which, although refusing to concede any deficiencies in the OIP, nevertheless provided a listing of eight different issuers, five different customers and a date range of the transactions involved. But still the Division equivocated, stating only that these groups might be "the specific instances that the Division reasonably anticipates at this point to present at trial." In response to counsel's argument that this was not specific enough, the motion for a more definite statement was denied and the actual specifics of the charges against Bloomfield and Marin have been left for presentation at the hearing itself.

III. THE COMMISSION'S BOGUS "EXPERT REPORT."

Faced with serious evidentiary problems in actually having to produce evidence at the hearing to prove exactly what wrongs were committed by Bloomfield and Martin, the

Division of Enforcements proffers as an "expert", Robert W. Lowry a former employee of the Commission for 23 years who apparently now makes his living telling hearing officers what the law is and how the cases before them should be decided. And, although the scope of Mr. Lowry's engagement was ostensibly to offer an opinion on whether Leeb's practices were consistent with the customs and practices of the securities industry, one looks in vain for any discussion of those customs and practices, or any explanation of the manner in which Leeb's practices were inconsistent with those industry practices. Instead, as discussed in more detail in the Motion in Limine of Bloomfield and Martin, and its accompanying Memorandum of Points and Authorities, Mr. Lowry offers only his opinion as to the applicable legal standards that he believes governed Leeb's conduct.

In short, a review of Mr. Lowry's expert report shows that, far from explaining or elucidating the evidence in this case in a way that would be otherwise inaccessible to the trier of fact, Mr. Lowry's expected testimony, as he explicitly writes in his report, would instead merely offer legal analysis and conclusions, impermissibly usurping the essential function of the hearing officer in this case. Such "expert" testimony, aimed precisely at instructing the hearing officer on how to understand and apply the securities law, invades the exclusive province of the hearing officer, and must be excluded.

It is also important to observe that Leeb is not a party to this proceeding, and no opinion is expressed by Mr. Lowry on any actions taken or not undertaken by the Bloomfield and Martin. Accordingly the expression of his "expert opinion" on whether Leeb in its activities was or was not in compliance with relevant provisions of the applicable securities laws is irrelevant to the case against Bloomfield and Martin, cannot assist the hearing officer in understanding the evidence or determining a disputed fact, and places upon Bloomfield and Martin the burden of responding to Mr. Lowry – who appears only in New York and is not even being made available for examination in California. The introduction of his report further backdoors into the record an analysis of the voluminous documents referenced in his report, the introduction into evidence of which is otherwise without proper foundation.

Bloomfield and Martin therefore reiterate in this Prehearing Brief what they have argued in their Motion in Limine, that Mr. Lowry's expected testimony, as set out in his expert report, is entirely improper and should be excluded in its entirety.

IV. THE LAW.

Securities Act Sections 5(a) and 5(c) make it unlawful to offer or sell a security in interstate commerce if a registration statement has not been filed as to that security, unless the transaction qualifies for an exemption. Section 4(1) exempts from registration "transactions by any person other than an issuer, underwriter, or dealer." Section 4(4) exempts "brokers' transactions" executed upon customers' orders on any exchange or in the over-the-counter market. Neither Section exempt transactions by an "underwriter."

An "underwriter" is defined in Securities Act Section 2(11) as follows:

> "The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer." [Emphasis added]

Rule 144 establishes several explicit safe harbors that qualify for the Section 4(1) exemption. If a transaction complies with the requirements of Rule 144, the parties involved are deemed not to fall within the statutory definition of underwriters for purposes of the transaction. In particular, when the transactions at issue took place, Rule 144(k) permitted a person to resell securities without restriction under certain circumstances if that person was not an "affiliate" of the issuer at the time of the sale or within the three months preceding the sale. *SEC v. Platforms Wireless Int'l Corp*, __F. 3rd ___ (9th Cir. July 27, 2010) "Affiliate" is defined as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common

control with, such issuer." Rule 144(a)(1).

Rule 144(g) also exempts a broker's transaction if the broker "[a]fter reasonable inquiry is not aware of circumstances indicating that the person for whose account the securities are sold is an underwriter with respect to the securities or that the transaction is a part of a distribution of securities of the issuer." Rule 144(g) further provides that the term "brokers' transactions" in section 4(4) of the Act shall be deemed to include transactions by a broker in which such broker:

> "1. Does no more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold; 2. Receives no more than the usual and customary broker's commission; [and] 3. Neither solicits nor arranges for the solicitation of customers' orders to buy the securities in anticipation of or in connection with the transaction."

The foregoing rules make clear that a respondent may be held primarily liable for a securities registration violation if – and only if – he was a "necessary participant" and a "substantial factor" in an unlawful transaction. *See, e.g. SEC v. Calvo*, 78 F.3d 1211, 1215 (11th Cir. 2004). Further it is time to remember, as the Commission seeks to sweep in everyone from the street, that it is also true that "[N]ot everyone involved in the chain of intermediaries between a seller of securities and the ultimate buyer is sufficiently involved in the process to make him responsible for an unlawful distribution.". *Kane v. SEC*, 48 S.E.C. 617, 620 (1986), *aff'd*, 842 F.2d 194 (8th Cir. 1988)."

V. SUMMARY OF THE CASE

Bloomfield and Martin were not issuers, underwriters, nor dealers with respect to any securities sold. Consequently, their transactions were exempt from registration under Section 4(1) of the Securities Act. Bloomfield and Martin further contend that the SEC cannot produce admissible evidence of the identity of <u>any</u> underwriter of such securities, the existence of which is a prerequisite to a finding that they were necessary participants in an unlawful transaction.

Bloomfield and Martin also contend that all securities sold by Martin that are the

subject of this proceeding were sold in unsolicited brokers' transactions subject to exemption from registration under Section 4(4) of the Securities Act. In each case, Martin, and Bloomfield as his supervisor, conducted a reasonable inquiry into the origin and ownership of the stock prior to selling the stock to the market. Bloomfield and Martin deny the existence of so-called "red flags" and invite the hearing officer to examine any such "red-flag" actually introduced into evidence to determine what if anything the "red flag" may have flagged.

Bloomfield and Martin emphasize that they did nothing more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold; received no more than the usual and customary broker's commission; and neither solicited nor arranged for the solicitation of customers' orders to buy the securities in anticipation of or in connection with the transaction." All such transactions were therefore "brokers' transactions" as defined in section 4(4) of the Act and Rule 144(g) thereunder, and therefore exempt from registration.

Finally, Bloomfield and Martin deny that they failed to address whether they fulfilled their obligations under the Bank Secrecy Act to file Suspicious Activity Reports concerning their customers' conduct. This is clearly a "throw-in argument" by the Commission in a weak attempt to bolster an otherwise weak case. Bloomfield and Martin deny that the information on the transactions available to them was suspicious and that they should have caused Leeb to file Suspicious Activity Reports. All the funds involved in the trades were processed through U.S. correspondent banks. There is no evidence to show that any of the so-called "suspicious activity" was in fact activity that consisted of money laundering or any activity that such reports were intended to identify.

VI. CONCLUSION

Bloomfield and Martin were ordinary brokers operating in an office 3,000 miles away from a now defunct New York securities firm that the Commission alleges to have been engaged in the distribution of unregistered securities. Bloomfield and Martin do not know if such allegations are true. What they do know is that they did what they were supposed to do prior to selling securities to the market in garden-variety broker transactions on the order of their known customers. If there was any distribution of

unregistered securities – and this is something the Commission will have to prove through the introduction of admissible evidence and not just conclusory allegations in pleadings and a so-called "expert report" – then Bloomfield and Martin are entitled to claim the exemptions set forth in Sections 4(1) and 4(4) of the Securities Act, Therefore, no remedial action is appropriate in the public interest against them, nor should they be ordered to cease and desist from conduct they never undertook.

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Respectfully submitted,

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