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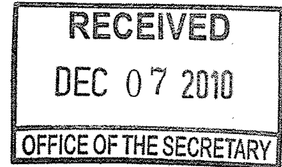
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
FILE NO. 3-13871

In the Matter of	:	
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RONALD S. BLOOMFIELD	:	CHIEF JUDGE
ROBERT GORGIA	:	BRENDA P. MURRAY
VICTOR LABI	:	
JOHN EARL MARTIN, SR., and	:	
EUGENE MILLER	:	

POST-HEARING REPLY BRIEF OF DIVISION OF ENFORCEMENT

December 6, 2010

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The Division of Enforcement respectfully submits this reply brief in response to the post-hearing submissions of Respondents John Martin, Ronald Bloomfield and Robert Gorgia. (Respondent Victor Labi failed to make any post-hearing submission.)

PRELIMINARY STATEMENT

Overwhelming evidence proves that customers of Martin and Bloomfield routinely deposited into their Leeb accounts millions of shares of thinly traded penny stocks, which were then quickly sold, and that no exemption from registration applied. Bloomfield and Martin do not dispute these basic facts showing the *prima facie* violations of Section 5 of the Securities Act of 1933. Instead, their defense rests squarely on their claim that they performed a "reasonable inquiry" into the source of the penny stocks that flooded into their customers' accounts, and are therefore entitled to the "broker's exemption."

The broker's exemption, however, cannot apply to excuse the conduct of Boomfield and Martin, who completely disregarded their duty to inquire into the source of the shares that were flowing through their customers' accounts. Had they performed their duty, Bloomfield and Martin would have known that these shares were obtained by their customers directly from issuers or through affiliates of the issuer; that no exemption from registration applied; that the issuers had scant operating history; and that the market price of the issuers stock fluctuated wildly depending on the sales activity from the Leeb accounts.

The evidence of these penny stock offerings – how the shares were transferred from the issuers to the customers and then into the Leeb customer accounts – cannot be disputed. In every case, the Leeb customers transferred blocks of affiliate or restricted

shares into Leeb accounts. Bloomfield and Martin could have easily discovered the facts had they bothered to ask. They did not do so, or failed to act on the information that they did possess, because they wanted to continue their lucrative penny stock business.

Bloomfield and Martin present themselves as paragons of diligence who in every case performed a rigorous inquiry into the sources of millions of shares that were deposited into their customers' accounts. Among other things, they claim that Martin examined the trading activity, asked customers if they were affiliates, where they got the securities, how long the securities were held, and the price paid. Bloomfield then undertook "a second screening process," and "checked Martin's work," by again asking the customers "where they got the shares." Bloomfield/Martin. Br. at 13-15.

None of this is supported by the evidence. Indeed, apart from their own testimony at the hearing, there is no evidence that Bloomfield and Martin did any inquiry at all. They both admit that they never once asked any customer for contracts of sale or documentation. Div. Findings of Fact ("FOF") ¶¶ 49, 52-56. Those admissions alone should defeat any claim that a reasonable inquiry was done. Martin's testimony, in particular, should be rejected as not credible in view of his prior statements that investigating the source of his customer's shares was not his "purview" or "area of expertise." Div. FOF ¶ 278.

Robert Gorgia, who had supervisory authority over Bloomfield and Martin, failed to take any remedial steps despite receiving a continuous stream of inquiries and concerns from clearing agents and law enforcement. Indeed, Gorgia admits in his brief that he "was acutely aware of Bloomfield and Martin's activities," Gorgia Br. at 6, however, there is no evidence ever did anything to stop their conduct.

office for the final approval on whether or not the stock got deposited."

Bloomfield/Martin FOF ¶ 28.

In fact, the record shows that the only inquiry Bloomfield and Martin did was to look at whether a certificate had a legend; any certificate without a legend was treated as unrestricted stock that could safely be sold. See Div. FOF ¶¶ 49, 52-53, 56. Bloomfield and Martin (and Labi) all testified that they believed they were shielded from liability as long as the certificate did not have a restricted legend. *Id.*

Bloomfield and Martin also claim that they bear no burden to put forward evidence concerning the nature of the underlying customer transactions in which they participated; and they analogize the Section 5 inquiry to an aiding-and-abetting. Bloomfield and Martin, though, are not charged with aiding and abetting a Section 5 violation. They are charged with being participants in—and thus directly liable for—the unregistered sales of securities to the public, and the legal framework for analyzing such claims is straightforward. The Division bears the burden of putting forward a *prima facie* case showing that the Respondents participated in the selling of stock without a registration statement being in effect, and that the interstate commerce jurisdictional prerequisite is satisfied. Once the Division shows a *prima facie* violation, the participants in the unregistered sales must establish that they are entitled to an exemption from registration. This is not changed in cases where the participants are brokers. See Matter of Carley, Exchange Act Rel. No. 57246, 2008 SEC LEXIS 222 (Commission Op. Jan. 31, 2008) (applying standard "prima facie" framework to case including registered representatives, and discussing argument by those respondents that underlying transactions satisfied 4(1) exemption); Matter of Newbridge Securities Corp., Initial

Decision Rel. No. 380, 2009 SEC LEXIS 2058 at *126-131 (June 9, 2009). As the Administrative Law Judge said in the Newbridge case, after summarizing the Division's prima facie case, "Respondents [a registered representative and his supervisors] might still argue that the resale transactions were exempt from registration, but they must sustain their burden of showing that Bojadzijev [the brokerage firm's customer] was a person other than an issuer, an underwriter, or a dealer." Newbridge at *129.

Bloomfield and Martin, therefore, could have escaped Section 5 liability by showing either: (1) that the underlying unregistered sales in which they participated were entitled to an exemption because the customers were not underwriters or issuers; or (2) that they, as registered representatives, were entitled to an exemption under Section 4(4) of the Securities Act because they participated in the offering after having conducted a reasonable inquiry. Bloomfield and Martin, however, made no real attempt to prove that their customers were not issuers or underwriters; instead, they argue only that they are entitled to the broker's exemption under Section 4(4).

It is hardly surprising that Bloomfield and Martin make only a token argument that their customers did not act as underwriters or issuers. Even though it is the Respondents' burden, the Division offered extensive evidence showing that Leeb's customers were engaging in non-exempt distributions. Bloomfield and Martin largely ignore this evidence, except for the EQSE offerings, where they accuse the Division of "leap[ing] to the conclusion" that EQSE indirectly issued stock to OTC Services "with no testimony by any witness whatsoever" regarding the contract in which OTC Services agreed to cause a third-party to issue shares to OTC Services. Bloomfield/Martin Br. at 21.

The evidence regarding the EGSE offering, however, was extensive, and includes a contract between EQSE and OTC Services, plainly showing that EQSE indirectly issued stock to OTC Services, a Leeb customer. Div. FOF ¶¶ 69-79. Not only is EQSE's indirect issuance apparent from the face of the contract itself, but the person who negotiated the contract on EQSE's behalf, and then provided the shares to OTC Services, Carlos Pichardo, testified that EQSE's contractual obligation was fulfilled when Gold Coast Capital, Inc., provided the shares to OTC Services for no compensation. Tr. 569:9-570:5.[1]

Furthermore, Gold Coast is an affiliate under the fact-specific test for whether an entity is an affiliate. See, e.g., SEC v. Lybrand, 200 F. Supp.2d 384, 395 (S.D.N.Y. 2002). In any event, the fact that the issuer EQSE directed the transfer from Gold Coast to OTC Services independently means that the stock was also restricted stock—regardless of whether the stock would not have otherwise been restricted. This was a new issuance, albeit a purposely indirect one. See, e.g., SEC v. Stanwood Oil Corp., 516 F. Supp. 1181, 1184 (W.D. Pa. 1981).[2]

Beyond EQSE, the Division has put in a wealth of documentary evidence showing that the other specific unregistered securities offerings could not come within any registration exemption. See Div. FOF 93-155. Even Bloomfield and Martin concede that this evidence "might be interpreted on their face as raising some questions about how

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1 Bloomfield and Martin characterize the Division as engaging in "speculations," suggesting that it "propose[d]" that the shareholder was Gold Coast based on three documents that do not mention OTC Services: Div. Ex. 209, 210, and 211). However, the document that confirms Mr. Pichardo's testimony is Div. Ex. 201.

2 Given that the restricted status of shares provided in a direct issuance to OTC Services would have been obvious (see Rule 144(a)(3); Rule 701(g)), the most appropriate inference from the evidence is that this was an attempt to evade registration requirements to assist the Useltons in the immediate resale of stock to the public.

the securities were issued in the first place." Bloomfield/Martin Br. at 22. Their inability to suggest any alternate answers to those questions is telling, and confirms that Bloomfield and Martin failed to meet their burden of proving any exemptions because the underlying transactional evidence does not support any.[3]

B. Bloomfield and Martin's Claims to Have Conducted a Reasonable Inquiry Are Without Merit

Aware that the evidence so overwhelmingly establishes their failure to conduct any inquiry into the source of their customers' shares, Bloomfield and Martin try to narrow the legal standard to accommodate their conduct. This strained effort to minimize their responsibilities by arguing that they do not have to do an "audit" or "certification" or provide a "guaranty" thoroughly misses the point. In fact, what Bloomfield and Martin were supposed to do is clearly established. See Kane v. SEC, 842 F.2d 194, 200 (8th Cir. 1988) (circumstances made it unreasonable to rely on self-serving answers from client); A.G. Becker Paribas Inc., 48 S.E.C. 118, 121 (1985) ("If a broker relies on others to make the inquiry called for in any particular circumstances, it does so at its peril."). See also Distribution by Broker-Dealers of Unregistered Securities, Securities Act Rel. No. 33-4445, 1962 SEC LEXIS 74 at *3 (Feb. 2, 1962) ("[A] dealer who offers to sell, or is asked to sell a substantial amount of securities must take

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3 Rather than directly addressing the evidence concerning any specific Section 5 examples other than one of the EQSE transactions, Bloomfield and Martin suggest that the Division's entire case is left with a "gaping hole" because their customers have not been sued with Section 5 violations. Bloomfield/Martin Br. at 20. However, the weight of the evidence in the record stands on its own, regardless of whether issuers or customers are, have been, or will ever be sued for Section 5 violations with respect to any of the sales with which Martin and Bloomfield are charged. That the Useltons were ultimately sued for scalping and manipulation—activity that Bloomfield and Martin should have suspected at Leeb—does not advance Respondents' defense.

whatever steps are necessary to be sure that this is a transaction not involving an issuer, person in a control relationship with an issuer or an underwriter.").

A reasonable inquiry must examine not only whether a customer may be a "control" person (Bloomfield and Martin Br. at 16), but whether the stock is restricted (as Bloomfield and Martin appear to recognize on page 12 of their brief).[4] And the general formulation of reasonable inquiry does not say that a broker may proceed "with considerable confidence" when a customer is "well known to the broker" (Bloomfield/Martin Br. at 9), but rather when a customer "whose lack of relationship to the issuer is well known to him." Id., quoting from Wonsover.

Given everything that Bloomfield and Martin admittedly knew about their customers and the stocks that were delivered in, they were required to engage in a constant state of "searching inquiry" on that latter point alone: the Useltons' very business involved relationships with issuers, and a reasonable broker would have questioned how Thimble managed to repeatedly privately obtain blocks of stock in issuers such as Golden Apple, China Gold, Goldmark, and LOM Logistics.

Bloomfield and Martin's lack of a meaningful searching inquiry is obvious from the record. Any inquiry done by Bloomfield and Martin was far from sufficient in view of their failure to learn the facts behind the lack of trading and/or current issuer information in stocks such as EQSE, China Gold, Golden Apple, Goldmark, and LOM Logistics, or the delivery history and trading activity in Viyya Technologies. If they had actually done what they now claim they did, Bloomfield and Martin would have

4 In this proceeding, the applicable safe harbor provisions for selling affiliate or restricted stock without being deemed to have engaged in a distribution are set forth in the version of Rule 144 that existed prior to amendments that took effect February 15, 2008.

discovered that their these customers were acting as underwriters, or as intermediaries in an unlawful chain of distribution.

In addition, Bloomfield and Martin tout their completion of Low Priced Security Questionnaires as evidence of their inquiry. But if the LOM Logistics questionnaire from February 2007 is any indication, "completed" does not mean thorough, let alone bona fide. (Div. FOF ¶ 118).

Last, Bloomfield and Martin's brief demonstrates, as their trial testimony did, an unreasonable reliance on third parties—including the very customers delivering in the stocks—in lieu of their fulfillment of their own inquiry obligations. See Bloomfield/ Martin Br. at 15-16.[5]

The "reasonable inquiry" standard that applies to Bloomfield and Martin is the same standard that has applied to brokers for more than forty years. It is not a recent innovation but rather an important part of every broker's responsibilities. Bloomfield and Martin, even in the face of all the evidence before the Court, continue to deny this elementary fact, as they ominously argue that holding them to account for their securities law violations "would bring [the] markets to their knees and eviscerate the exemption." Bloomfield/Martin Br. at 23. It is apparent from this record, however, that the threat to the markets comes not from the application of longstanding precedent but rather from brokers like Bloomfield and Martin, who ignore their responsibilities as brokers for

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[5] Relying on Thimble's other brokers to have performed a reasonable inquiry, Bloomfield and Martin claim that Thimble only "occasionally" introduced other securities into its account after the account was initially opened in September 2005. The Lowry report describes a general pattern of activity by Thimble, and if Respondents wanted to contest that, it would have behooved them to put into evidence documents showing Thimble's account activity. The Division did not burden the record with an entire run of monthly account statements, but Div. Ex. 160 is a Thimble account statement for February 2006 showing the delivery in of 9 stocks in that month alone.

financial gain. In cases when the customers and securities fit the profile of the Uselton and Thimble accounts, it is securities professionals such as Bloomfield and Martin who are supposed to protect the markets.

II. GORGIA FAILED REASONABLY TO SUPERVISE TO PREVENT SECTION 5 VIOLATIONS

In opposition to the charge that Gorgia failed to supervise and prevent Section 5 violations by Leeb's registered representatives, Gorgia's primary argument is that "the acts of his superiors denied him the authority necessary to execute his functions." (Gorgia Br. at 22). However, there is no evidence in the record that Gorgia ever sought to implement any improvement in either the firm's written procedures, or the implementation of those procedures, to address the continuing failure of registered representatives to conduct a reasonable inquiry into the securities being delivered in to customer accounts. Correspondingly, there is no evidence that he was ever prevented from curing "reasonable inquiry"-related failures.

Gorgia's attempt to paint himself as someone who cared deeply about "reasonable inquiry," but was stymied in his attempts to whip the firm's low-priced security procedures into shape, is belied by his own testimony that he had "very little involvement" with ensuring that customers were asked about their stock and that he "wasn't sure" whether in fact the registered representatives were conducting an inquiry into the stocks. (Div. FOF at ¶ 203).[6] How credible are Gorgia's claims to have attempted action on this front if he had not even recognized the problem? Indeed, such a claim is logically inconsistent with his contention that "reasonable inquiry" procedures

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[6] Because of a typographical error, Finding 203 provides a Transcript cite to 800:13-801:6, whereas the correct citation including the phrase quoted in that Finding should instead be 800:13-802:6.

were in place and that "there were representations made to Gorgia by Miller, Bloomfield and Martin that they were complying with the procedures." (Gorgia Br. at 33).

Thus, the most reasonable explanation for the lack of documentation from someone who describes himself as "I'm somewhat anal, I try to document everything" (Div. FOF at ¶ 209) is that Gorgia never undertook any bona fide efforts to fix Leeb's "reasonable inquiry" failures. And it is not just the implementation of procedures that was lacking, but the procedures themselves.

Gorgia attempts to rebut the lack of written procedures by citing to a host of provisions, none of which sets forth "reasonable inquiry" guidelines or procedures to be followed when stock is delivered in by customers. Citing to page 165 of the firm's WSP (Div. Ex. 17), Gorgia quotes from a sentence requiring that Leeb obtain and review offering materials, but the quoted sentence pertains only to situations in which Leeb "will act as placement agent" in "private placements." (Div Ex. 17 at 163). Similarly, Gorgia points to another sentence within the "Investment Banking" part of the manual that simply says that the Compliance Department (which was Gorgia) should be consulted if any doubt exists about whether a transaction should be registered as a public offering. (Div. Ex. 17 at 156).[7]

In the end, Gorgia cites to the Gutfreund case in support of his argument that he did all that he could do at Leeb. But Gorgia's behavior does not satisfy the expectations laid out in the key portion of that opinion:

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[7] The frequency of review for these Investment Banking-related procedures is "Project Based," and neither the conducting of nor documentation of the review mentions customer receipt or trading of shares, but rather "documents and filings" and "compensation arrangements" (for Leeb). (Div. Ex. 17 at 155).

> It is not sufficient for one in such a position to be a mere bystander to the events that occurred.
>
> Once a person in Feuerstein's position becomes involved in formulating management's response to the problem, he or she is obligated to take affirmative steps to ensure that appropriate action is taken to address the misconduct. For example, such a person could direct or monitor an investigation of the conduct at issue, make appropriate recommendations for limiting the activities of the employee or for the institution of appropriate procedures, reasonably designed to prevent and detect future misconduct, and verify that his or her recommendations, or acceptable alternatives, are implemented. If such a person takes appropriate steps but management fails to act and that person knows or has reason to know of that failure, he or she should consider what additional steps are appropriate to address the matter. These steps may include disclosure of the matter to the entity's board of directors, resignation from the firm, or disclosure to regulatory authorities.

Gutfreund, 51 S.E.C. 93, 113-14 (Dec. 3, 1992).

For one thing, there is no evidence that Gorgia ever took any of the crucial initial steps, such as directing or monitoring an investigation, or making appropriate recommendations for limiting activities or instituting procedures. Without taking any such steps (let alone documenting them in writing), it is difficult to see how one could hold management solely accountable for failing to act, such that the appropriate next steps would even be reached. If Gorgia truly wanted to effect change, why didn't he put a detailed factual record before management, in order to force a response?

Nonetheless, with initial actions missing, Gorgia claims to have taken two of the three next steps suggested by Gutfreund—disclosing the matter to the Board, and resigning from the firm. (Gorgia Br. at 36). However, there is no evidence of Gorgia bringing to the attention of the Board that there were potential Section 5 violations that he attempted to address but was blocked from doing so. The only written communication

between Gorgia and the Board (Gorgia Ex. 1-14) does not come close to supporting Gorgia's claim.[8]

As for Gorgia's June 2006 departure from Leeb, the record contradicts Gorgia's claim that he "had no choice but to leave the firm as it became apparent that none of his demands or suggestions would be implemented[.]" Gorgia Br. at 5. On the contrary, Eugene Miller testified without contradiction that Gorgia resigned after Miller discovered that Gorgia had improperly put himself on the health care plan. Tr. at 443-448, 510-511. There is no evidence that Gorgia left Leeb because he had been thwarted in his attempts to rein in illegal penny stock sales by Bloomfield, Martin, and Labi.

In sum, and as outlined in the Division's Proposed Findings of Fact, Gorgia did not fulfill his supervisory responsibilities and failed to prevent Bloomfield, Martin, and Labi from selling stock without conducting a reasonable inquiry.[9]

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8 Gorgia's inactions present a contrast to a recent decision in which a broker-dealer's general counsel was found to have supervised reasonably. Theodore W. Urban, 2010 SEC LEXIS 2941 (Sept. 8, 2010). In Urban, the ALJ found that a respondent who took numerous actions in response to concerns over a registered representative's activity should not be held accountable for failing to take other alternative measures that would have been futile. But in that case, the respondent had taken a number of significant steps, including documenting specific concerns in writing, writing a memorandum recommending termination of the registered representative, and accepting, as an alternative to his recommendation, a special supervision agreement between the individual and a high level manager (who was also Vice Chairman of the firm). The special supervision agreement enumerated thirteen restrictions and came with the Vice Chairman's representation that he would ensure that sufficient attention be paid to the individual's activity.

9 Gorgia's supervisory responsibilities are established by his titles, by the 2005 WSP and AML Program, and by the various correspondence with FINRA and Pershing, and are not dependent on the June 2006 WSP completed right as he was resigning from the firm (because Gorgia had failed to do so earlier). Though Gorgia describes the June 2006 WSP as falsified, the manual at the very least corroborates his responsibility for auditing the OSJ (though it provides for annual audits, rather than the quarterly audits that Gorgia had promised to FINRA).

their own employees, so long as such internal violations are reported to the SEC or an SRO.[10] Thus, suspected federal securities laws violations by customers *do* need to be reported (as do internal violations that are not reported to the SEC or an SRO), and that obvious implication is confirmed by the rule's adopting release, which notes that commenters had "suggested that the exception should be broadened to cover securities law violations by a customer of the broker-dealer." (67 Fed. Reg. 44048, 44051 (July 1, 2002)). As explained in the release, the exception was not expanded because "the suspicious activity reporting regime established by the final rule implicates a broad array of law enforcement concerns." (Id.).

The customers of Bloomfield and Martin had to have understood as much, given (a) the plain wording of the industry SAR form (Div. Ex. 10, fourth form attached), with check boxes covering a number of "ordinary" securities law violations, such as market manipulation and securities fraud; (b) the fact that Leeb's AML program listed penny stock transactions as a red flag because they have been utilized "in connection with fraudulent schemes and money laundering activity" (Div. Ex. 10 at 17); (c) correspondence from Legent Clearing explicitly described as related to "AML oversight," and questioning the transactions engaged in by the Uselton accounts (Div. Ex. 105); and (d) the wealth of communications between Leeb and Pershing's AML officer concerning penny stock activity at the firm (see Div. FOF ¶¶ 185-192, 198).

As reflected by the actions of Leeb's own clearing firm back in 2005, the activity that is at the heart of this case falls well within the type of activity that triggers SAR

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[10] The subsection also exempts brokers from reporting burglaries, or stolen securities—also activity that opposing counsel would apparently not consider to fall within his narrow concept of "money laundering."

filing obligations. Indeed, there is significant evidence indicating that accounts at Leeb were used to convert securities to cash through illegal stock sales, and additional indicia of suspicious activity (such as the use of multiple entity accounts and the wiring of funds to a tax haven) were also present.[11]

B. BLOOMFIELD, MARTIN AND GORGIA ALL HAD THE REQUISITE SCIENTER FOR "AIDING AND ABETTING" LIABILITY

The direct obligation to file SARs rested with Leeb, which should have filed SARs because it knew, suspected, or had reason to suspect that unlawful transactions (as described above) had occurred. The respondents, in turn, have been charged with aiding and abetting Leeb's repeated failure to file SARs. They are the very ones who, on behalf of Leeb, knew, suspected, or had reason to suspect that unlawful transactions were occurring, but took no steps to have Leeb file any SARs. In the face of not just the underlying transactional activity, but the repeated warnings from clearing firms, and inquiries from regulators, the only reasonable conclusion is that the respondents knowingly, or at the very least recklessly, disregarded their obligations.

Bloomfield and Martin's attack on this conclusion is based on implausible denials: they "dispute the existence of any red flags," Bloomfield/Martin Br. at 27, and they claim that it is "clear from the evidence" that neither of them "had any idea that they might be required to file an SAR if they detected any potential registration violations or market manipulation." (Id.). The evidentiary record, however, amply demonstrates that numerous indicia of wrongdoing were indeed repeatedly laid before Bloomfield and

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[11] To the extent that Counsel also appears to be minimizing the AML significance of registration violations, as opposed to market manipulation, the law provides no such distinction. Moreover, the evidence in this case illustrates the potential connection between registration violations and pump-and-dump schemes that defraud the public.

Martin. For example, could Bloomfield and Martin truly not have understood that the pattern of dormant stock, delivery in of shares, "liquidity"-related purchases, price spikes, dumping of shares, and price declines, was not indicative of unlawful activity? Or could they truly believe that there is no legal significance to Thimble's having sent money to Liechtenstein because the money was first routed (as all wires are) through a U.S. correspondent bank?[12]

In the face of the obvious, and in the face of the repeated queries from those around them, Bloomfield and Martin's denial of the existence of red flags serves to further call their credibility into question. Bloomfield and Martin also argue that they had no idea that the activity they were facilitating required the filing of SARs. Contrary to their brief, however, it is not "clear from the evidence" that they failed to understand that securities violations could trigger filing obligations. In fact, Bloomfield and Martin never testified that they observed wrongdoing but did not believe such conduct should be reported in a SAR. But even if they had, such testimony would have demonstrated—to use the legal phrase relied on by opposing counsel—"an extreme departure from the standards of ordinary care." Nor, could such a position be credited, would a lack of knowledge of the law, protect them from aiding and abetting liability. In the Matter of vFinance Investments, Inc., 2010 SEC LEXIS 2216 at *41 and n.32 (July 2, 2010).[13]

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12 Without citing to any documentary evidence, Counsel describes Thimble's wire activity as "from time to time," or "occasional" (Bloomfield and Martin Br. at 27, 32). The schedule of wires on Div. Ex. 355 show otherwise.

13 The evidence supports a finding that respondents knowingly aided and abetted Leeb's failure to file SARs, but should a finding instead be based on "recklessness," the Division submits that the distinction claimed between the Commission's standard of "recklessness" and the wording of the test they put forward ("an extreme departure from the standards of ordinary care") is likely a distinction without a difference. Whatever

Georgia's attempt to dispute scienter rests on two contradictory points: that he was not "present" when the suspicious activity took place because of his part-time status, and that he was an "estopped" CCO because whenever he discovered violations he was prevented from acting upon them. (Gorgia Br. at 7, 39-40). Wherever Gorgia physically happened to be when individual suspicious transactions occurred, there is no denying that he was aware of the pattern of suspicious conduct set forth in the evidentiary record, and that he failed to take steps to have Leeb report it. Whether or not he felt overridden by Miller (whom he describes as passive) on any issues that were significant to him at Leeb, the record shows that Gorgia had sufficient power to effect compliance-related changes such as terminating registered representatives (Gorgia Ex. 1-1 at 1) and (after Pershing brought an unfavorable news article to his attention) closing David Stocker's account (Div. Ex. 37). There is also no evidence that Gorgia attempted to report suspicious activity but was stopped from doing so. Such a claim would run directly counter to the contemporaneous reports generated by two separate independent AML audits that Gorgia authorized and assisted. (Div. Ex. 38, 96).[14]

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adjectives may ultimately be used to describe respondents' conduct here, an extreme departure from ordinary care would fit the bill.

[14] Gorgia relies heavily on the report prepared by the Commission's examination staff, but the cited language in the report is obviously based on his own statements to them (including, apparently, his claim not to have noticed red flags), and ultimately boils down to his claim that he tried to reign in Bloomfield but was not able to—for which the only supporting documentary evidence is an email exchange in April 2006, regarding a fact situation that Gorgia might have misunderstood, but including the threat "I will shut you down." Gorgia testified that at the time he sent that email in April 2006, he believed that he had the power to shut Bloomfield down. (Tr. 874:23-875:18). Even assuming he had tried before then to shut down the OSJ for compliance reasons, and even assuming that he had not acquiesced in any overriding of compliance considerations, it is odd that there is no evidence of any attempts by Gorgia to improve compliance at the OSJ, let alone to take steps to report the activity that was going on there. The silence on that point matches Gorgia's silence in reporting the "dirty" business being engaged in by Labi.

Accordingly, the evidence supports a finding of scienter on aiding and abetting liability for all respondents.[15]

IV. THE COURT SHOULD IMPOSE MEANINGFUL SANCTIONS AND OTHER REMEDIES AGAINST RESPONDENTS

The evidence, as summarized by the Lowry Report (Div. Ex. 1), establishes a pattern of conduct in the Uselton and Thimble accounts that involved the sale to the public of dozens of securities, yielding tens of millions of dollars for the account holders. The pattern existed over an extended period of time, and Bloomfield and Martin's failure to take steps to have Leeb file SARs with respect to this conduct helped enable the accounts to stay open and profitable. It is on that basis that the Division appropriately seeks disgorgement of the significant commissions that Bloomfield and Martin earned by their protective handling of the accounts. Moreover, the appropriate percentages of gross commissions that each retained is accurately reflected by the calculations shown in Div. Ex. 361, which was based on documentation provided by Bloomfield and Martin's attorney (Div. Ex. 348), and it is those percentages, rather than the ones in the respondents' brief, that should be applied.

From the broad pattern described by Lowry (who also scheduled out some specific illustrative examples), the Division proffered detailed evidence with respect to ten specific securities sold by Bloomfield and Martin's clients. That evidence served two purposes: to provide concrete examples of the pattern of suspicious activity occurring within the suspect accounts, and to provide individual examples of the Section 5 violations caused by respondents' customary failure to engage in a reasonable inquiry.

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[15] The Division's reply brief does not address its alternative argument that the Respondents "caused" Leeb's failure to file SARs.

But full disgorgement of commissions on the AML-related claim, for the time period reflected in Div. Ex. 361, are warranted. To put the disgorgement claim into perspective, during that same period Thimble wired $42.3 million in sales proceeds overseas.

With respect to Gorgia's disclosure of assets and liabilities, one of the issues raised by the Division concerns Gorgia's scheduling of liabilities which, as learned during testimony, relate to the payments made by Gorgia on behalf of three income-earning adult family members (his wife, his third son, and that son's wife). Gorgia provided the court with no information concerning the assets of these adults (including his wife, with whom he jointly files tax returns and co-owns a house), and no information concerning the income of his son and daughter-in-law, who are not his dependents. Thus, it is unfair for Gorgia to claim that such liabilities necessarily reflect amounts that he cannot and should not be expected to pay should he be found liable for money damages.

In that regard, it is significant that (1) the financial disclosure form requires information about spouses (see Philip A. Lehman, 2006 SEC LEXIS 659 at *24 (Mar. 20, 2006) (stating that respondent should, at a minimum, have deducted one-half of the joint expenses from his sworn financial statement in absence of complete information regarding wife's assets and income); and (2) there is nothing in the form that was filed indicating that expenses would also have included payment for two additional adults living in Gorgia's house—particularly as neither of them was identified in response to the question "Identify any other members of your household."

Despite Gorgia's rhetoric on this point, the Division has no intent to dictate to "an American father" how he leads his life, and is not suggesting that the securities laws preclude him from assisting his children (including his fourth child, whom the Division

did *not* include in its arguments in its post-hearing brief). Rather, the only real issue is this: Has Gorgia proven that those funds are truly not available to him, such that a waiver of any penalties would be appropriate? Gorgia's degree of generosity towards income-earning adult members of his household is of course up to him, but that does not mean that such generosity should necessarily entitle him to a waiver of penalties if indeed he has violated the securities laws.

V. THE DIVISION DID NOT MALIGN GORGIA IN ITS POST-HEARING FILINGS

In points III and IV of Gorgia's brief, he suggests that the Division's post-hearing filings contain repeated mischaracterizations or misrepresentations of the record, and include "ad hominem abuse" of Gorgia. We recognize that Gorgia disagrees with our recitation and interpretation of the evidence, and has his own view of the evidence, but we believe that our findings and record citations speak for themselves and do not illustrate a false attack upon any of the respondents. Nonetheless, the discussion above does speak to many of the factual disputes raised by Gorgia in points III and IV of his brief. Two additional points, however, bear response.

First, Gorgia accuses the Division of "malign[ing]" him by "infer[ring]" that he "colluded" with the firm that conducted an AML audit of Leeb. (Gorgia Br. at 46). The finding of fact that Gorgia is challenging (FOF 242) reads, in its entirety (but with record citations omitted here): "When Leeb was required to have an outside auditor examine the firm's AML procedures, he allowed—and contributed to—the consultant creating a report saying that the firm had not identified any unusual or suspicious activity requiring further inquiry (despite everything that had already pointed out to Leeb by Pershing)." That is about as neutral a description of the facts as could have been written. We did not

malign him by "outrageous assumption" or "inference," and if a motive for Gorgia's actions need be inferred, a possible one was supplied by Gorgia himself when he testified to a desire not to "chop the legs off my employer" (Div. FOF ¶ 261).

Second, Gorgia accuses the Division of misleading the court by a "false impression" in our Finding of Fact ¶ 202. That finding points out that after the SEC staff inquired about the source of 390,000 shares delivered into Thimble's account, Gorgia's response to staff (Div. Ex. 84) was that Leeb did not know who had transferred the shares to Thimble. Contrary to Gorgia's intimation, the Division was not falsely suggesting that Leeb should have known the transferor's identity from the four corners of the transactional documentation itself. Rather, the Division's point was that they were supposed to have asked their customer who the transferor was at the time of transfer, particularly since one of the red flags in their own AML program is if a customer "fails to provide a source of transfers (if any)." (Div. Ex. 10 at 17). Not only does Gorgia's response to the staff highlight the lack of any reasonable inquiry at the time of the transaction itself, but the fact that after being confronted with a regulator's question he did not even investigate the matter, or ask Bloomfield to get the information from their client, evidences a failure to take the issue of "reasonable inquiry" seriously.

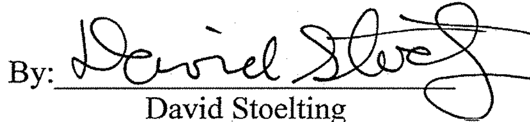
CONCLUSION

Based on the foregoing, the Division respectfully requests that this Court enter the Division's proposed findings of fact and conclusions of law and impose the requested sanctions on the Respondents.

Dated: New York, New York
December 6, 2010

Respectfully submitted,

DIVISION OF ENFORCEMENT

By: 

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