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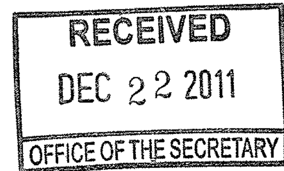
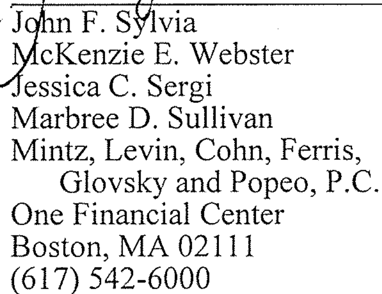
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of JOHN P. FLANNERY, AND JAMES D. HOPKINS Respondents.	ADMINISTRATIVE PROCEEDING File No. 3-14081



RESPONDENT JAMES D. HOPKINS' REPLY TO THE DIVISION'S OPPOSITION TO HOPKINS' MOTION FOR SUMMARY AFFIRMANCE



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The Division's Opposition to Hopkins' Motion for Summary Affirmance ("Opposition") is a compilation of overstatements and mischaracterizations, which serves to demonstrate only that the Division is in denial about what actually happened in this case. The Opposition barely addresses the legal and factual arguments in Mr. Hopkins' Motion for Summary Affirmance ("Hopkins' Motion"); instead, it essentially rehashes the Division's own insufficient Petition for Review and the numerous mischaracterizations – of both the evidence at trial and the Chief ALJ's findings – on which the Petition relied. The Division specifically highlights three "erroneous" legal findings and two "erroneous" factual findings.[1] However, these findings are only error if one defines "error" as something that the Division disagrees with. The Initial Decision is well reasoned, clearly supported by the evidence and definitive in its conclusions. The Commission need only read it to see that the Chief ALJ's thoughtful, rational findings make clear that the Division did not prove any of the elements in its case.

(1) <u>The ALJ Made Four Specific Findings of Fact Regarding Mr. Hopkins' Lack of Scienter.</u>

The Division mischaracterizes the record from the outset when it claims that "the Initial Decision made no findings regarding scienter or negligence as to any communication. At most it noted in passing as to the fact sheets – one of the six sets of communications that it need not address the issues." Opp. at 2. Here is what the Chief ALJ actually did: (1) with respect to the fact sheets, she found "no persuasive evidence that Hopkins conveyed information that he knew,

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[1] Three times in its Opposition, the Division makes the unfounded sweeping assertion that Mr. Hopkins admitted most of the Division's Proposed Findings of Fact: "proposed findings that Hopkins conceded for the most part were accurate statements of the record" (Opp. at 1); "Hopkins admitted that most of [the Division's Proposed] findings were accurate" (Opp. at 7); and that the Division's Findings of Fact were "*unrebutted* factually by Hopkins." Opp. at 8 (emphasis in original). Nothing could be further from the truth. In the 443 paragraphs of Proposed Findings of Fact set forth by the Division, Mr. Hopkins accepted only about 10% without modification. For the other 400 Findings, Mr. Hopkins either (1) responded in detail, accepting part of the FOF as true or false and adding further detail to describe the context, correct, or rebut the Division's proposals; or (2) stated that the proposed finding was irrelevant to the claims against Mr. Hopkins or that the document spoke for itself.

or should have known, was materially false or misleading," (Initial Decision at 45); (2) with respect to the communications with Hammerstein, she found "no persuasive evidence that Hopkins acted with scienter or negligence," (Initial Decision at 48, n.80); (3) with respect to the March 2007 letter, she found "no showing that Hopkins acted with scienter or that he acted recklessly," (Initial Decision at 50, n.82); and (4) with respect to the July 2007 letter, she found "no showing that Flannery or Hopkins acted with scienter or that they acted recklessly." (Initial Decision at 52, n.85). Hopkins' Motion at 10. Thus, the ALJ actually made *four* specific findings regarding Mr. Hopkins' lack of scienter. The Division's representations to the Commission that the Chief ALJ made "no findings regarding scienter" is, in a word, false.

(2) The ALJ Properly Concluded That There Was No Scheme Liability.

Blatantly ignoring a key finding in the Chief ALJ's decision, the Division states in its Opposition that "the Initial Decision (and Hopkins) wholly ignored" the Division's scheme liability theory. Opp. at 1. This is also false. Though the Division chooses to *ignore* the Chief ALJ's findings that are contrary to its theories, the Initial Decision nonetheless says what it says. Specifically, with regard to scheme liability, the Chief ALJ held: "Because I find there were no materially false or misleading statements or omissions, there can also be no fraudulent 'course of conduct' or 'scheme liability.'" Initial Decision at 57; *see also* Initial Decision at 42 (discussing scheme liability). The Chief ALJ's reasoning here is sound; if *none* of the Respondents' statements or alleged omissions were materially misleading, then, of course, they cannot form the elements of actionable scheme liability. Put another way, a fraudulent scheme cannot be constructed out of a series of true (or non-material) statements or omissions. Once the Chief ALJ explicitly found that there were no deceptive acts and no false statements, her work with respect to the scheme liability theory was done; the Division's claims about the remaining elements of

scheme liability – a manipulative or deceptive act done in furtherance of a scheme to defraud and scienter – were moot. *See* Div. Post-Hearing Brief at 66. Thus, the Initial Decision did not "ignore" scheme liability at all; it correctly reasoned that a fraudulent scheme cannot be based on a series of truths or non-material omissions, and said everything it needed to say about the issue.

(3) Application Of *Janus* Is Moot Because The Chief ALJ Found That The Division Did Not Prove There Were Any Materially Misleading Statements Or Omissions Or That Mr. Hopkins Had The Requisite State Of Mind To Be Found Liable.

The Division continues to churn its interpretation of *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S.Ct. 2296 (2011), and its assertion that the Chief ALJ's reasoned analysis regarding that case must be reviewed *de novo*. There is nothing to say about this that has not already been said. In the context of this case, the scope of *Janus* is a sideshow. Even if the Chief ALJ was wrong about it, her error could not affect the outcome of this matter because the Division failed to prove any other element of its claims against the Respondents. Forcing Mr. Hopkins and Mr. Flannery to litigate a moot issue, while their lives and careers remain on hold, would be inappropriate and unfair.

(4) The Initial Decision Properly Considered Investor Sophistication.

The Division's arguments in its Opposition regarding the ALJ's analysis of investor sophistication are more notable for what they do not say than for what they do say. The Division fails to address *any* of Mr. Hopkins' rebuttal arguments on this issue made in his Motion. Instead of countering Mr. Hopkins' analysis, which showed that investor sophistication was merely one of several bases for the Chief ALJ's conclusions and had nothing to do with the element of reliance, the Division simply ignores what it cannot refute and rehashes the misplaced arguments from its Petition for Review. Rather than restate his unrebutted arguments, Mr. Hopkins

respectfully directs the Commission to review those as set forth in his Motion for Summary Affirmance.

(5) The Initial Decision Definitively Found That The Typical Portfolio Slide Was Not False.

The Initial Decision shows that the Chief ALJ actually considered seven different factors when she found that the Typical Slide did not contain any material misrepresentations or omissions. Opp. at 8-9.[2] The Division claims that only three of those factors were erroneous, effectively conceding that the other four factors were supported by the evidence. The Division, moreover, has no answer for the argument that these factors alone amply support the Chief ALJ's finding. Specifically, the following findings suffice for the Chief ALJ to properly find that the Typical Slide was not materially misleading: (1) "the undisputed evidence is that when requested, SSgA provided information about the actual LDBF portfolio holdings to clients and consultants"; (2) "information about holdings of the LDBF and other similar funds was available from a variety of sources all within reasonable reach of the LDBF's sophisticated investors"; (3) "Hopkins had with him at the presentations information on the actual composition of the LDBF's portfolio" and, (4) in addition to Hopkins' testimony regarding the lack of materiality about the portfolio composition, "according to Carlson, Lowe [SSgA employees] and Peavy [expert], most investors do not inquire into the composition of a fund's portfolio holdings." *Id.* Most importantly, the Chief ALJ found that the slide was not misleading at all because she correctly noted that "typical is not actual" (Initial Decision at 46) and the Division did not prove that the sector breakdown was not in fact typical over the life of the LDBF.

[2] The Division erroneously states that the Typical Slide was used by Hopkins in "at least in five face-to-face presentations." Opp. at 2. However, other than Mr. Hammerstein's testimony regarding one meeting (testimony belied by the contemporaneous documentary evidence), the Division did not present audio, video, transcript, or client testimony regarding what Mr. Hopkins may actually have said at any of these presentations. Indeed, there was no evidence that the slide was used or talked about by *any* State Street representative at any of these meetings.

(6) The Initial Decision Correctly Found That Hopkins Did Not Make A Materially Misleading Statement During The April 9, 2007 Telephone Call With David Hammerstein.

Put charitably, the Division takes liberties with the record when it asserts that "the *unrebutted* evidence is that Hopkins specifically mislead Yanni Partners by stating that LDBF was only 2% exposed to subprime." Opp. at 10 (emphasis added). In support of this assertion, the Division cites to Mr. Hopkins' Response to Finding of Fact ¶ 237:

> 237. During the [April 9] phone call, Hopkins informed Hammerstein that the total exposure of LDBF to subprime was 2%. (Div. Ex. 69 at 2; Tr. 2450:20-2451:11, 2622: 4-24, 2626: 12-16 (Hammerstein).)
>
> Response: Agree that this accurately reflects Mr. Hammerstein's testimony. However, Mr. Hopkins disputes this assertion as stated in detail in his Post-Hearing Brief, pp 62-66 and his Reply Brief, pp 4-6. Mr. Hammerstein's testimony is based on his interpretation of his summary of the call and it is belied by the documentary evidence which has no mention of this 'misrepresentation' and in fact states the opposite. Hopkins Ex. 149; Div. Ex. 73; Hopkins Ex. 170.

Hopkins Resp. to FOF ¶ 237. Thus, the only way to conclude, as the Division has, that this was "unrebutted evidence," is to completely ignore both Mr. Hopkins' FOF responses and the record evidence. The Chief ALJ agreed with Mr. Hopkins, finding "confusion" on Hammerstein's part and concluding that Mr. Hopkins had used the 2% figure accurately, in reference to the LDBF's position in the BBB-ABX Index, which was the focus of his conversation with Hammerstein. Initial Decision at 48.

Since it cannot straightforwardly refute that finding, the Division mischaracterizes it, incorrectly stating that the Chief ALJ "based [her] finding [regarding the April 9 call] on the conclusion (*without specific support in the record*) that there were no other times that Hopkins has been asked for information and he failed to provide that information." Opp. at 11 (emphasis added). In fact, the Initial Decision explicitly recounted the "support in the record" for its finding. It said "[t]here are no other instances where, when asked, Hopkins is alleged to have

been anything but forthcoming about the LDBF's subprime exposure," and then it went on to say that "[t]he evidence is that in June 2007, he informed a SSgA person gathering information for a consultant that she was mistaken and that approximately 95% of the LDBF was in subprime. Div. Ex. 96." Initial Decision at 48. It was on the basis of this "specific support in the record" that the Chief ALJ concluded: "There is no reason why Hopkins would mislead Hammerstein and provide others with accurate information." *Id.* This passage vividly illustrates the depths of denial in which the Petition for Review is mired; the Division simply cannot see the record that it was responsible for creating, and that led to the correct outcome reported by the Initial Decision.

CONCLUSION

The Division has failed to clearly articulate any errors that would change the Initial Decision's just result. As stated in Mr. Hopkins' Motion for Summary Affirmance, the only outcome of additional litigation in this matter would be further waste of agency resources and further delay, unfairness, embarrassment, and inconvenience for Mr. Hopkins and Mr. Flannery. Therefore, Mr. Hopkins asks that the Commision summarily affirm the Initial Decision in favor of Mr. Hopkins and Mr. Flannery.