UNITED STATES OF AMERICA Before the SECURITIES AND EXCHANGE COMMISSION

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ADMINISTRATIVE PROCEEDING File No. 3-14081

RESPONDENT JAMES D. HOPKINS' REPLY TO THE DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTIONS FOR LEAVE TO FILE MOTIONS FOR SUMMARY DISPOSITION

In response to the Division of Enforcement's Opposition to Respondent Hopkins' Motion for Leave to File a Motion for Summary Disposition, Respondent James D. Hopkins respectfully responds as follows.

As stated in his Motion for Leave, Mr. Hopkins moved for summary disposition because controlling legal precedent warrants entry of judgment in Mr. Hopkins' favor <u>as a matter of law</u> on several, if not all, of the allegations against him.¹ Rule 250 of the Commission's Rules of Practice clearly sanctions Mr. Hopkins' right to move for partial summary disposition, stating that either party "may make a motion for summary disposition of *any or all* allegations of the order instituting proceedings with respect to that respondent." 17 C.F.R. §201.250(a) (emphasis added). While the Division of Enforcement may dispute whether such partial resolution would, in fact, shorten the evidentiary hearing, Mr. Hopkins is nevertheless entitled to summary

¹ It is Mr. Hopkins' position that the Division of Enforcement has not alleged and will not be able to adduce facts that would support a finding that Mr. Hopkins either acted with the requisite *scienter* or that he engaged in any transactions, practices or course of business that either operated or would operate a as a fraud or deceit upon any purchaser of securities. Accordingly, although Mr. Hopkins has not yet moved for summary disposition on the Division's Section 17(a)(1) and Section 17(a)(3) claims, he reserves the right to do so either before or after the Division has completed presentation of its case in chief.

disposition on those issues to which there is "no genuine issue with regard to any material fact." 17 C.F.R. §201.250(a). Notably, the Division's reliance on SEC Release No. 35833 for the proposition that the proper summary disposition circumstances are "comparatively rare" is in the context of a bona fide dispute as to material facts and based on the generality that "typically, enforcement and disciplinary proceedings that reach litigation involve genuine disagreement between the parties as to material facts." SEC Release 35833, 59 SEC Docket 1170, 1995 WL 368865, *66 (Jun. 9, 1995). Here, for all of reasons stated in Mr. Hopkins' Memorandum in Support of Motion for Summary Judgment, the crux of the issues in this case are clear questions of law, including the direct application of the recent precedent setting case of Securities and Exchange Commission v. Tambone, 597 F. 3d 436 (1st Cir. 2010). Even assuming, arguendo, the Division actually could prove each of the allegations set forth in the Order Instituting Proceeding ("OIP"), Tambone holds that Mr. Hopkins cannot be liable under Section 10(b) and Section 17(a) because he did not "make a statement" or "obtain money or property." Where, as here, the dispositive issue is the straightforward application of controlling law, and not the resolution of a factual dispute, summary disposition is both appropriate and warranted.

Moreover, while the Division attempts to characterize the granting of such leave as "comparatively rare," a Westlaw search yielded over 100 opinions in which leave to file was granted and only 3 releases in which leave was denied. Clearly, leave to file a motion for summary disposition is not rare. Indeed, summary disposition is appropriate and warranted in the instant case because the Division's OIP is devoid of evidentiary allegations that Mr. Hopkins did in fact "make a statement" or "obtain money or property" under controlling First Circuit law. Mr. Hopkins should not be forced to incur time and expense preparing for and defending against

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claims that are legally without merit. To the contrary, the efficacy-focused goals of Rule 250 are best served by having this Court to address the serious deficiencies in the Division's case now.

Respectfully Submitted,

JAMES D. HOPKINS

By his attorneys,

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