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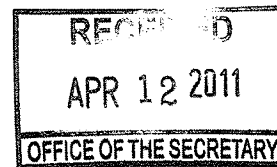
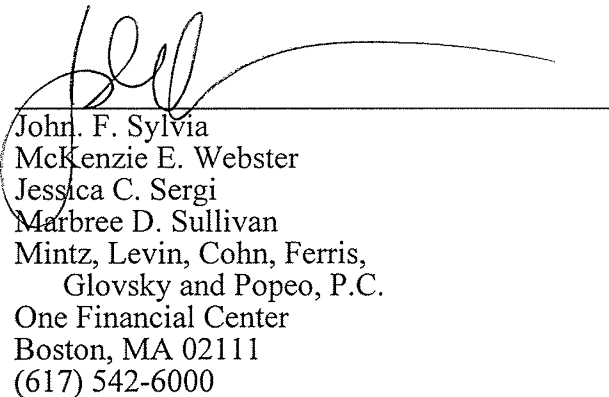
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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



RESPONDENT JAMES D. HOPKINS' POST-HEARING BRIEF



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INTRODUCTION

On September 30, 2010, the Securities and Exchange Commission's Division of Enforcement (the "Division") filed the Order Instituting Administrative Cease-and-Desist Proceedings ("OIP") against James ("Jim") Hopkins and John ("Sean") Flannery. The filing was accompanied by a press release linking State Street Global Advisors' ("State Street" or "SSgA") massive $300 million settlement of a "related case" to the inflammatory charge that "Hopkins and Flannery misled State Street's investors about the risks and credit quality of a fund concentrated in subprime bonds and other subprime investments." The consequences to Mr. Hopkins of this summary conviction were swift, predictable and devastating: he lost his job and his ability to hold any position in the financial field, his sterling reputation was indelibly tarnished, and he was forced to disassociate with business colleagues and friends.

Once put to its proof, however, the Division's story did not match its script. The Division presented no evidence that Mr. Hopkins misled *any* State Street investors about risks, credit quality *or anything else* associated with the Limited Duration Bond Fund ("LDBF" or the "Fund"). The Division likewise failed to proffer any evidence demonstrating that a single statement attributed to Mr. Hopkins was false or that Mr. Hopkins ever acted contrary to the interests of State Street's clients. In truth, this has always been an "omissions" case, with the thrust of the Division's contentions being that Mr. Hopkins should have ensured that State Street's communications provided more detail about "subprime." The Division is incorrect.

Although the legal and factual problems with the Division's case are myriad, at its foundation the case collapses under the weight of two false assumptions, to wit: everyone knew and believed that all "subprime" investments were "plain vanilla" and equally risky, and Mr. Hopkins was the gatekeeper through whom *all* State Street communications were funneled. The

reality, of course, is that "subprime" securities came in many flavors, each carrying significantly different risk/return profiles. As Dr. Sirri and Mr. Peavy explained without contradiction, no one – aside from a few contrarians, who became fabulously rich – anticipated the subprime meltdown. On the contrary, the marketplace as a whole did not believe that the performance of BBB-rated subprime securities had any bearing on the performance of AAA and AA-rated securities. They were, and still are, different instruments. This view was held by State Street's investment professionals and shared with Mr. Hopkins (who played no role in investment decisions). Absent a crystal ball, neither Mr. Hopkins nor anyone else at State Street would have (or even could have) considered the February 2007 technical widening of the spreads for the BBB ABX index a portent of the "perfect storm" that struck in July 2007. Without such a nexus, there obviously would have been no reason for Mr. Hopkins to discuss other subprime investments when explaining the reason for underperformance in the Fund.

It is equally clear that the Division's suggestion that Mr. Hopkins controlled the flow of information to State Street's clients was pure fiction. Remarkably, the Division did not call a single State Street client as a witness. The reasons are known only to the Division, but the result is that we do not actually know the number of times Mr. Hopkins communicated with any particular client or what Mr. Hopkins did and did not say on these occasions. More importantly, we also do not know the nature and the extent of the information that others, including portfolio managers, client facing people, sales representatives or other State Street employees, conveyed to State Street clients. Finally, we do not know the nature or the extent of the information clients accessed on State Street's internal internet sites (Clients' and Consultants' Corners) and from external sites (such as eVestments). Because Mr. Hopkins was not, and never was supposed to be, the gatekeeper for all information to clients, he also did not know – nor was he expected to

know – what information each client or consultant had, or didn't have, at any point in time. By definition, of course, an "omissions" case requires an omission. Here, however, the Division failed to circumscribe the total mix of information that actually flowed *from State Street* to any client. As the Division was required to prove that the allegedly omitted information was, in fact, omitted, this failure is fatal.

The Division undoubtedly will protest that David Hammerstein, Yanni Partners' Chief Strategist, cures these deficiencies. Issues of credibility aside – and there are issues – Mr. Hammerstein's testimony is of no assistance. The record is clear that the sole reason Mr. Hopkins was asked to speak with Yanni Partners in April 2007 was to explain the underperformance in the Fund. Mr. Hopkins did so, accurately. The next month, Mr. Hopkins was asked to repeat this explanation to National Jewish Medical Research Center ("National Jewish" or "NJMRC"), a Yanni Partners' client. As three independent sets of contemporaneous notes (including Mr. Hammerstein's) all attest, that is exactly what Mr. Hopkins did. Even Mr. Hammerstein, in a moment of candor, admitted that he learned nothing new during the May 10th presentation. The fact that Mr. Hammerstein *now* claims, with the clarity only hindsight affords, that Mr. Hopkins also should have disclosed the extent of the AA and AAA-rated subprime holdings in the Fund is no more compelling than the Division's own armchair criticism. Indeed, it is less so insofar as Mr. Hammerstein could have asked Mr. Hopkins or Mark Dacey, a State Street client representative, about the holdings in the Fund, but chose not to do so; the information was available to him via eVestments as of March 2007; and, most critically, Mr. Hammerstein conceded that the Fund's holdings were not relevant to his decision to recommend State Street's commodities fund to his clients.

In the final analysis, the ultimate question is whether this case should have been brought. As explained in detail below, after weighing the testimony and sifting the evidence, the answer is a resounding "no." Jim Hopkins' character and integrity are beyond reproach. He did nothing wrong. The only way to restore the reputation and ability to work in the financial arena that have been unfairly taken from him is to return a verdict in his favor on all charges.

ARGUMENT

I. The Division's Burden Of Proof.

In this enforcement proceeding, the Division bears the burden of proving every element of its claims against the respondents. See Steadman v. SEC, 450 U.S. 91, 95-96 (1981). The Division has alleged that Mr. Hopkins violated Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, and Sections 17(a)(1), (2) and (3) of the Securities Act of 1933. OIP, ¶¶ 42-44. Consequently, the Division must prove, by a preponderance of the evidence, all of the following elements:

A. Factual Responsibility: That Mr. Hopkins "Made," "Employed" Or "Engaged" In The Alleged Misrepresentations Or Omissions Of Fact, Or That He Obtained Money Or Property "By Means Of" Them.

Although the relevant statutes and regulation use different language to express the concept, each requires the Division to prove that Mr. Hopkins was a primary actor in the commission of the alleged violations. Thus, to sustain its claim under Section 10(b) and Rule 10b-5(b), the Division must show that Mr. Hopkins "**made**" an untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. 17 C.F.R. § 240.10b-5(b). Likewise, under Section 17(a), the Division must prove that Mr. Hopkins either (1) "**employed**" a device, scheme or artifice to defraud, (2) obtained money or property "**by means**

of" an untrue statement of material fact or a material omission, or (3) "**engaged**" in a transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser of a security. 15 U.S.C. § 77q(a). Absent proof that he "made," "employed" or "engaged" in the alleged violations, or that he profited "by means of" their commission, Mr. Hopkins could only be held liable for aiding and abetting a violation by somebody else, a theory that the Division has not pursued in its claims against him. See SEC v. Tambone, 597 F.3d 436, 444, 446 (1st Cir. 2010), citing Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) ("If Central Bank's carefully drawn circumscription of the private right of action is not to be hollowed – and we do not think that it should be – courts must be vigilant to ensure that secondary violations are not shoehorned into the category reserved for primary violations[,]" even in enforcement actions brought by the Division).

B. Materiality: That The Misrepresentations Or Omitted Facts Were Significant In Light Of The Total Mix Of Information Made Available To Investors.

The materiality requirement ensures that the enforcement powers conferred by the securities laws are deployed only against substantial misrepresentations or omissions, and do not create perverse incentives to "bury" investors "in an avalanche of trivial information [–] a result that is hardly conducive to informed decisionmaking." Basic, Inc. v. Levinson, 485 U.S. 224, 231 (1988) (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448-49 (1976)). "[T]o fulfill the materiality requirement 'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'" Basic, 485 U.S. at 231-32 (quoting TSC Indus., 426 U.S. at 449).

C. Culpability: That Mr. Hopkins (1) Acted With Conscious Intent To Defraud Or Highly Reckless Disregard For A Known Or Obvious Danger That He

Was Misleading Investors, Or (2) Failed To Take Reasonable Care Not To Mislead.

1. Scienter.

Section 10(b) and Section 17(a)(1) both require proof of "scienter," i.e., that Mr. Hopkins "consciously intended to defraud" investors or potential investors in the Fund, or that he acted with a "high degree of recklessness." See Aldridge v. A.T. Cross Corp., 284 F.3d 72, 82 (1st Cir. 2002); see also Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976); In the Matter of Albert Glenn Yesner, CPA, Securities Act Release No. 184, 2001 WL 58989, at *25 (ALJ May 22, 2001) (initial decision). "Recklessness," in this context, is not synonymous with negligence; it has "come closer to being a lesser form of intent than merely a greater degree of ordinary negligence." Greebel v. FTP Software, Inc., 194 F.3d 185, 199 (1st Cir. 1999). Thus, to satisfy the scienter requirement and prove the claims under Section 10(b) and Section 17(a)(1), the Division must show that Mr. Hopkins' actions or omissions were "highly unreasonable . . . , involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care," presenting a danger of misleading investors that was "either known to [him] or [was] so obvious that [he] must have been aware of it." SEC v. Fife, 311 F.3d 1, 9-10 (1st Cir. 2002), cert. denied, 538 U.S. 1031 (2003) (quoting Greebel, 194 F.3d at 198).

2. Negligence.

The Division acknowledges that the claims under Sections 17(a)(2) and (3) require it to "establish that the Respondents were negligent in making each of the misrepresentations at issue." Division Pre-Hearing Brief, pp. 35-36 (citing SEC v. Scott, 565 F. Supp. 1513, 1525-26

(S.D.N.Y. 1983). This requirement "enunciates a standard of care being that of a reasonable man under like circumstances." Yesner, 2001 WL 58989, at * 29.[1]

D. **Personal Benefit: That Mr. Hopkins Obtained Money Or Property By Means Of The Alleged Violation Of Section 17(a)(2).**

Proof of negligence, rather than scienter, will satisfy the Division's burden under Section 17(a)(2), but that statute also adds an essential element: that Mr. Hopkins "obtain[ed] money or property by means of" a material misrepresentation or omission. See, e.g., SEC v. Forman, No. 07-11151-RWZ, 2010 WL 2367372, at *8 (D. Mass. June 9, 2010) (granting summary judgment to defendant on Section 17(a)(2) claim where SEC produced no evidence that defendant had personally benefited from alleged misrepresentations).

II. **The Division Failed To Prove That Any Of The "Material Omissions" Attributed To Mr. Hopkins Even Occurred, i.e., That State Street Failed To Make The Allegedly "Omitted" Information Available To Investors Through Other Channels.**

The claims against Mr. Hopkins primarily concern four documents: (1) a fact sheet, updated on a quarterly basis, that provided a brief description of the Fund, (2) the "typical slide," one item in a deck of more than thirty Power Point slides that was included in some presentations to investors, (3) a letter that State Street sent to certain investors in March 2007, explaining the reasons for the Fund's recent underperformance, and (4) another letter that State Street sent to some investors in July 2007.

The claims against Mr. Hopkins rest in large part on the assertion that material information was *omitted* from at least three of these documents. The Division contends that the Power Point slide, while representing the extent of the Fund's "typical" investment in asset-backed securities ("ABS"), omitted its actual, current exposure to ABS on the date of any given

[1] The Division's prehearing brief asserted in a caption that both "Flannery and Hopkins Were Negligent." Division Prehearing Brief, p. 35. The body of the argument that followed it, however, said nothing about Mr. Hopkins. Id. at 35-37. It is unclear, therefore, whether the Division is pursuing any of its claims against him on a negligence theory.

presentation, and "failed to disclose any exposure to subprime investments" in the Fund's portfolio. Division Prehearing Brief, p. 7. The claims about State Street's letters to investors likewise relied on allegations that the communications omitted information about the Fund's exposure to "subprime" investments. Division Prehearing Brief, p. 9 (the "March letter omitted that besides the Fund's relatively small position in the BBB-rated ABX investment, the Fund was concentrated in subprime bonds and other subprime derivative investments"), p. 15 ("the July 26 letter omitted the material information that the Fund was concentrated in subprime").

The omissions-based claims are defective because the Division is cherry-picking here: it has selected documents in which the "omitted" information happens not to appear, but has ignored the wider context in which those communications were made. This is a flawed approach. As a matter of law, an actionable "omission" does not occur in a vacuum; therefore, it cannot be deemed to have occurred merely on proof that a particular item was left out of a particular communication. An omission is the failure "to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 15 U.S.C. § 77q(a)(2); 17 C.F.R. § 240.10b-5(b). Context is therefore essential: what was *not* said matters, to be sure, but what *was* said also matters, as do all of the relevant circumstances under which the statements were made. In particular, because materiality is an essential element, the relevant circumstances must include the "total mix of information made available" to the listener or reader. In other words, this tribunal must consider not only what was said or not said in the particular communication at issue, but also the information made available in *other* communications between the parties.

Whether Mr. Hopkins is legally responsible for an actionable "omission," therefore, is not something that can be determined simply by looking at the individual, decontextualized

documents that the Division has made the basis of this litigation. The fact that a piece of information did not appear in a letter or a presentation slide does not mean that it was "omitted" at all: its absence from one document doesn't prove that the information was excluded from the total mix of information made available to the recipients of the letter or the audience for the presentation. For example, State Street's letter to investors in March 2007 may have focused on the Fund's small exposure to the BBB-ABX index, without adding information about the extent of the Fund's investment in AA and AAA-rated "subprime" securities, but that does not mean that investors who received the letter could not have obtained – and did not in fact obtain – the "omitted" information from another source. This tribunal cannot assume that facts "omitted" from one communication were necessarily omitted from the total mix. Nor was it Mr. Hopkins' burden to provide the missing context. The Division has the burden of proving that a material omission occurred.

Any fair assessment of the "circumstances under which the [statements] were made" must also take into account another important fact: the role that Mr. Hopkins played in the Fund's operations generally, and in its communications structure in particular. Mr. Hopkins was not the sole proprietor of the Fund. He was only one representative of a large organization. His job, moreover, was not to be the "voice of State Street," or even the "voice of the Fund." He was not the sole channel of information about the Fund to investors and potential investors. Far from it. Mr. Hopkins was primarily an internal conduit of information, acting as a bridge between State Street's investment managers and the "client-facing" personnel who dealt primarily with investors. Tr. 337-38 (Hopkins). To be sure, he sometimes interacted directly with clients himself, but even then, information about the Fund was always "made available" to investors through many other sources: their own consultants and advisers; State Street's client-facing

personnel, who had primary responsibility for investor communications; websites such as Client's Corner and Consultant's Corner; the Fund's annual audited financial statements; as well as various other communications from the company (for example, the letters sent by State Street in August 2007) in which Mr. Hopkins played no part. See, e.g., Tr. 2667-70, 2723-24 (Carlson); Tr. 77 (Hopkins). This model for communicating with clients was reasonable and the standard for the industry. Hopkins Ex. 174, A. 40(c), A.46 ("Peavy").

Finally, the relevant circumstances include the fact that the Fund's investors were sophisticated entities as a rule, and that many of them retained even more sophisticated consultants to advise them. Tr. 2850-51 (Wands). Therefore, absent some evidence about their individual capabilities (which does not exist: the Division called no investors to testify), this tribunal cannot assume that any particular investor did not have actual access to all of the information contained in the total mix of information that State Street made available to them. See, e.g., In the Matter of Marc N. Geman, Exchange Act Release No. 112, 1997 WL 436272, at *7 (ALJ Aug. 5, 1997) (initial decision) (Court rejected the Division of Enforcement's allegation of false representation in part because Division failed to elicit testimony from anyone who had allegedly been misled).

The Division has failed to carry its burden of proving actionable omissions because its case ignored these relevant circumstances. The evidence did not describe the total mix of information made available to the Fund's investors. It did not indicate whether they knew, or could have known, about the Fund's allocation of its resources to the ABS sector or its exposure to subprime investments in particular. This tribunal, therefore, cannot determine whether the "omitted" information was necessary to make Mr. Hopkins' alleged statements to investors not misleading under the circumstances.

The failure of proof was essentially complete. Indeed, the most striking feature of the record in this case is the total absence of testimony from any of the investors who heard or received one of the supposedly-misleading communications. The Division cannot point to a single item of information and a single investor about whom it can credibly say: *this* information was never made available to *this* person or entity.

To the contrary, insofar as the record says anything about whether the "omitted" data was made available to investors through channels of communication other than two letters and one Power Point slide, it indicates that information about the Fund's allocation of its portfolio to asset-backed securities, as well as the extent of its investment in "subprime" securities, *were* part of the "total mix of information." Indeed, the allegedly "omitted" information was regularly made available by Mr. Hopkins himself. For example, it is undisputed that Mr. Hopkins prepared for presentations to investors by obtaining current data from portfolio managers and using it to mark up his copy of the standard slides; among the items that he updated in this manner was the "typical" slide, onto which he routinely recorded the Fund's actual allocation to investments in the ABS sector, so that the slide reflected *both* "typical" and current data. See, e.g., Div. Ex. 9, p.24; Div. Ex. 23, p. 12; Div. Ex. 34, p. 19; Div. Ex. 43, p. 35; and Div. Ex. 244. In April 2007, when a consultant asked him how much of the Fund's assets were invested in "subprime" securities, Mr. Hopkins immediately gave an accurate estimate, then followed up with a portfolio manager to confirm its accuracy. See Div. Ex. 246, pp. 6-7.

Likewise, in July 2007, when David Hammerstein of Yanni Partners – the consultant advising several indirect investors in the Fund, including NJMRC – put the same question to Mr. Hopkins and Mark Dacey (the consultant relations manager responsible for the Yanni Partners account), Mr. Hopkins and Mr. Dacey responded with detailed and accurate facts. Div. Ex. 128.

In that case, the question and the answer likely were redundant, because the evidence showed that Jennifer Powers, an employee of National Jewish, had already accessed State Street's Client's Corner website no fewer than eleven times in 2007. Hopkins Ex. 129, p. 19 at line 742. Client's Corner offered detailed information to State Street's clients about the funds in which they had invested. Hopkins Ex. 126.[2]

The omission-based claims against Mr. Hopkins fail at the outset, therefore, because the Division did not prove that any material omissions occurred. This major aspect of the case against Mr. Hopkins is defective because the Division presented the allegedly-actionable statements in isolation and in a vacuum. It failed to show that the information supposedly "omitted" from those documents had not been made available to the Fund's investors in the broader context of State Street's ongoing flow of communication with its clientele, which proceeded through many more channels than the fact sheets, presentation slides and letters at issue, and in which the voices of many more employees than Mr. Hopkins were heard.

III. The Division Failed To Prove That Mr. Hopkins Made, Engaged In, Employed Or Obtained Money Or Property By Means Of Any Material Misrepresentations Or Omissions In The Fund's Quarterly Fact Sheets.

A. The Division's Theory.

The Division argued, in its pre-hearing brief, that the fact sheets for 2006 and 2007 were misleading in two ways: (1) they "stated that the Fund was sector-diversified . . . when in reality by that time the Fund was concentrated in subprime bonds and derivatives tied to subprime

[2] While there was not affirmative evidence to conclude exactly what information Client's Corner contained as of January 2007, one can infer that it likely contained at least the same information that State Street made publicly available to external websites such as eVestments, as it would be illogical to believe that State Street would make information available to external sites that it did not also make available to its own clients. The evidence did show that as of at least March 31, 2007, eVestments contained (and made available to all its subscribers) the characteristics and sector allocations of the Fund. See Hopkins Ex. 154 (admission of this exhibit currently under advisement); Hopkins Ex. 156 (exhibit part of Mr. Sylvia's offer of proof). Also, as of June 28, 2007, Client's Corner also included the most recent Audited Financial Statement for the Fund. Hopkins Ex. 128A. Thereafter, the total mix of information made available to investors – including NJMRC – would have included a precise description, by name and amount, of each of the Fund's investments. Id.

bonds," and (2) they said that the Fund had "higher average credit quality" than a typical money market fund, when by February 2007 it actually "had an average credit quality that was lower than a money market fund." Division Prehearing Brief, p. 7. According to the Division, Mr. Hopkins is liable for these misstatements and omissions because he "was the State Street product engineer responsible for updating" the fact sheets (Id. at 6), and he therefore "knowingly misled the Fund's investors and potential investors by causing State Street to send fact sheets to investors that contained false and misleading statements concerning the Fund's sector diversification and average credit quality." Id. at 7.

All of this is wrong. Liability cannot arise from the statements in the fact sheets because (1) the Division has failed to prove that any of those statements were false, (2) it has failed to prove that any of the allegedly-misleading statements were material, and (3) it has failed to prove that Mr. Hopkins "caused" State Street to send the fact sheets to investors in any legally-significant sense of that word.

B. The Division Failed To Prove That The Fact Sheets Contained False Statements Or Actionably Misleading Omissions.

1. Higher Average Credit Quality.

The claim that the fact sheets falsely stated that the Fund had a higher average credit quality than a typical money market fund requires little discussion. The alleged falsehood was purely comparative; there is no way to assess the claim without knowing something about the "average" credit quality of a "typical" money market fund. But the Division produced no such evidence. Consequently, there is no basis in the record for an inference that the Fund's average credit quality was lower than that of a typical money market fund, and no basis for a conclusion that the fact sheets were wrong. Because the Division did not even try to introduce any evidence

to support it, Mr. Hopkins assumes that the "average credit quality" claim is no longer part of the case against him.[3]

2. Sector Diversification.

The Division, meanwhile, relies on misdirection and misinterpretation to maintain its claim about the Fund's sector diversification. The Division asserts that the fact sheets "stated that the Fund was sector-diversified." Division Prehearing Brief, pp. 6-7. This is untrue. Every quarterly iteration of the fact sheet actually said the same two things about diversification: (1) under the heading "Investment Objective," that the Fund invested in a "diversified portfolio," and (2) under the heading "Risk Management," that the Fund's investment "[s]trategy has better sector diversification" when compared to the typical regulated money market portfolio. Hopkins Ex. 1; Div. Ex. 20; Div. Ex. 29; Div. Ex. 97; Div. Ex 224.

There were no falsehoods here, either. The first statement, from the Investment Objective section of the fact sheet, did not purport to say anything about *sector* diversification in particular; it plainly described the Fund's "diversified portfolio" in general. That description was true: as several SSgA employees testified, the Fund's portfolio *was* diversified throughout the period covered by the fact sheets in evidence. See, e.g., Tr. 2810-11(Shegog); Tr. 1183-84 (Flannery). The Division offered no evidence to the contrary. Later, when its portfolio managers decided to concentrate the Fund's investments in the ABS sector, the Fund remained diversified with respect to the credit quality of the bonds, the geographic location of the underlying loans, the vintages of the loans, and so on. Id. The Fund's various investments in subprime mortgage-backed securities were not "correlated" (that is, did not become sensitive to movements in each other's prices) until July 2007 at the earliest; consequently, they remained economically

[3] As the Division did not establish a factual foundation for its premise, it also did not prove a second essential link in the evidentiary chain; namely, that Mr. Hopkins knew or reasonably should have known that the comparative statement allegedly was untrue.

"diversified" at least through the publication of the last fact sheet in evidence at the end of June 2007, and the statement about the Fund's "diversified portfolio" remained perfectly true.

The second statement, from the Risk Management section of the fact sheet, was also true, and the Division has to misrepresent its meaning to conjure up even a specious implication of falsehood. The Risk Management section of the fact sheets never said "that the Fund was sector-diversified." It plainly said, rather, only that the Fund's *strategy* had *better* sector diversification than a typical money market fund. See, e.g., Hopkins Ex. 1 ("When compared to the typical 2 A-7 regulated money market portfolio, the Strategy has better sector diversification . . .").

This statement did not purport to characterize the makeup of the Fund's investments at the effective date of any particular fact sheet.[4] It commented only on the sector diversification available to the Fund's managers under the Limited Duration Bond Strategy. And it offered only a comparative assessment of that availability: not whether the Fund's investment strategy offered "sector diversification" per se, but whether it offered "better sector diversification" than a typical money market fund.

These are the benchmarks against which the veracity of the fact sheets has to be measured. But when the fact sheets are assessed properly, there is not even a legitimate dispute. As Ms. Shegog testified, the Risk Management section of the fact sheet made a "simply factual" observation. Tr. 2810 (Shegog). Money market funds can invest only in "a regulated universe of securities" that are "heavily concentrated in bank and finance." Id. Because the Fund "was allowed to buy outside of that universe" and purchase, for example, mortgage-backed securities, its strategy (that is, the portfolio options available to its managers) *did* have better sector diversification than that of a typical money market fund. Tr. 2810-11 (Shegog). The Division

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[4] Current information was conveyed in another section of the fact sheet, under the heading "Strategy Composition as of [date]," and the sub-heading "Sector Distribution by Market Value." See, e.g., Hopkins Ex. 1.

offered no evidence to refute this testimony. To the contrary, the only relevant additional evidence established that others at SSgA agreed with Ms. Shegog's assessment. See, e.g., Tr. 1183-84 (Flannery).

C. The Division Failed To Prove That The Allegedly-False Statements In The Fact Sheets Were Material.

Even if one assumes for purposes of argument that the "better sector diversification" statement referred not to the Fund's strategic options, but to the actual breakdown of its investments on any given date, the statement was not material for at least two reasons: (1) the total mix of information made available to investors always contained accurate information about sector weights, and (2) the fact sheets themselves were not a significant part of the mix.

Accurate information about the sector diversification of the Fund's investments was always part of the total mix of information made available to investors. An investor who read the Risk Management section of the fact sheet did not even have to put the document down in order to obtain a precise description of the Fund's actual sector diversification. All she needed to do was to glance over – on the same page – at the section of the fact sheet entitled "Sector Distribution by Market Value." In that section she would find a chart that listed the sector weights of the Fund's assets as of the end of the preceding calendar quarter. See, e.g., Hopkins Ex. 1.

If the investor needed even more current information, that was part of the total mix, too. Every investor had access to the Fund's client-facing personnel, who in turn had access to contemporaneous data about the Fund's portfolio distribution through State Street's Characteristics Database. Tr. 417-18 (Hopkins). There is no evidence in the record that State Street ever refused to provide an investor with such information, or that it ever provided inaccurate information about the Fund's sector diversification when asked.

Even if deemed inaccurate (which it wasn't, for reasons already stated), the "better sector diversification" statement did not significantly alter the accurate total mix. The Fund's investors were a sophisticated group, and many of them had even more sophisticated independent consultants working on their behalf. The fact sheet was merely an introductory document, which "provide[d] a brief overview of the [F]und." Peavy, A.62. Before they decided to invest in the Fund, however, potential investors and their advisers would have performed much more extensive due diligence. Peavy, A.57-A.58. They would have understood that a "single, pre-prepared document" like a fact sheet "would not be designed nor intended to present every single aspect about a fund in detail." Peavy, A.59. Consequently, they would not rely on the fact sheet alone, but would "consider the totality of information provided by, among other sources, the fund's marketing materials, discussions with fund managers, and the fund's responses to questions and requests for information to determine whether to invest in a fund." Peavy, A.63. Mr. Hopkins testified that he does not recall any client that invested in the Fund based solely on the receipt of a fact sheet, and the Division presented no evidence that any SSgA client even considered, much less relied upon, the narrative contained in the fact sheet in making a decision to buy or sell the Fund. Tr. 447-49 (Hopkins). Mr. Peavy's expert testimony was unrebutted; consequently, it established that the fact sheets were *not* a material source of information for investors, and that a qualified, comparative statement in one of them, even if inaccurate, would not have significantly altered the total mix of information.[5]

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[5] This is especially true with respect to a statement in the fact sheets about the Fund's sector diversification, because there is nothing in the record to show that sector weights were a significant factor in investment decisions about the Fund before the second half of 2007. Mr. Hopkins testified that other factors, such as credit quality, tracking error and information ratios were of much greater concern to the investors and consultants with whom he dealt, and that inquiries about sector diversification were rare. Tr. 201-03 (Hopkins). The Division introduced no evidence to refute this – no investors at all testified on its behalf. But Mr. Hopkins' testimony was corroborated by that of David Hammerstein, the investment consultant whose firm, Yanni Partners, advised National Jewish Medical and Research Center in connection with its investment in the Fund. Hammerstein admitted that Yanni Partners had

D. The Division Failed To Prove That Mr. Hopkins Caused State Street To Include Misleading Statements In The Fact Sheets.

The fact sheets were not personal communications from Jim Hopkins. He didn't sign them, he didn't send them, and he didn't write the narrative portions in which the allegedly-misleading statements appeared. Those sections were drafted at the Fund's inception, in 2002, before Mr. Hopkins was responsible for the Fund in any way. In particular, the parts of the narrative that described the Fund's strategy were drafted by the portfolio manager at the time and vetted by State Street's lawyers. Tr. 2809 (Shegog). Mr. Hopkins had neither the authority nor the expertise to amend them, and cannot plausibly be said to have "caused" any alleged misstatements therein. Tr. 2813, 2817, 2833-34 (Shegog).

Insofar as Mr. Hopkins was "responsible for updating" any part of the fact sheets, as the Division asserts, Division Prehearing Brief, p. 6, his responsibilities extended only to the "Characteristics" sections of those documents, which provided quarter-end statistical information and required regular updating. Tr. 2813-14 (Shegog). But with only one exception there is no allegation – and without exception there is no evidence – that the data included in the Characteristics sections was inaccurate in any material way.

The only potential exception is found in the sub-section of the fact sheets entitled "Sector Weights by Market Value." The Division has suggested that the data reported there was misleading because it counted subprime-mortgage-backed investments as part of the ABS "bucket," rather than assigning the subprime investments to the "Mortgage Backed Securities" sector. OIP, ¶ 18. This allocation, however, was neither false, materially misleading, nor Mr. Hopkins' responsibility. It wasn't false because it was standard: "the term 'asset-backed securities,' as used in the industry, typically included structured securities backed by first-lien

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not considered sector weights when it performed its pre-investment due diligence on behalf of National Jewish, but instead focused on tracking error and information ratios. Tr. 2555-61 (Hamerstein).

subprime mortgages and home equity loans. . . ." Hopkins Ex. 161, ¶ 32 ("Sirri Report"); Hopkins Ex. 136, Hopkins Ex. 135; Tr. 2531 (Hammerstein). (Even the Division used the phrase that way. Sirri Report, ¶ 34.) It wasn't materially misleading because sophisticated investors and their advisers would certainly have known that this was common parlance (Sirri Report, ¶ 32) and could have inferred that the Fund's ABS "bucket" contained subprime investments from the yields that the Fund returned. Sirri Report, ¶ 39. And, finally, it wasn't Mr. Hopkins' responsibility because he did not initiate the practice of allocating subprime investments to the ABS "bucket," did not have the power to alter it and was never notified that anyone was confused by the allocation. Tr. 441-45 (Hopkins).

IV. The Division Failed To Prove That Mr. Hopkins Made, Engaged In, Employed Or Obtained Money Or Property By Means Of Any Material Misrepresentations Or Omissions In The February 2007 CAR Alert And The March 2007 Client Letter.

The Fund's strategy was to match or exceed the returns of the JP Morgan US Dollar LIBOR Index. See, e.g., Hopkins Ex. 1. In the early part of 2007, the Fund did not meet these expectations. Div. Ex. 46. Several other commingled State Street funds also "underperformed." Id. In all cases, the company's portfolio management team (which did not include Mr. Hopkins) attributed the negative results to the exposure these funds had to the "BBB-ABX," an index of derivative investments in the triple-B rated residential mortgage backed securities sector. Tr. 2853 (Wands).

The securities underlying the BBB-ABX index were backed by "subprime" mortgages, but that wasn't their salient characteristic. What distinguished them, rather, was their position in the lower "tranches" of the "cash flow waterfall." Sirri Report, ¶ 45. When consumer mortgage loans are bundled into investment vehicles, the various tranches of the security carry different credit ratings (AAA and BBB, for example), and the credit rating of each tranche depends on its

place in this hierarchy. Id. at ¶ 47. Payments on the underlying mortgage loans flow first to securities with AAA ratings, then to securities with AA ratings, and so on down to the BBB tranche and below. Id. at ¶ 45. *All* of these securities may be "subprime investments," in the sense that the source of the cash flow is payments on mortgage loans to "subprime" borrowers, but because the BBB tranche is the last investment grade security in line to receive the cash, it is the first investment grade security in line to bear the consequences of defaults by the mortgage debtors. BBB rated securities, therefore, are riskier than AAA rated securities (and consequently earn a higher return). Id. at ¶¶ 45-46. The truism holds for all rated fixed income securities; the "subprime" appellation is irrelevant. See Hopkins Ex. 162.

In early 2007, some hedge funds responded to negative publicity about the subprime housing market by using the BBB-ABX index to go "short" on the American housing market. Div. Ex. 45; Tr. 220 (Hopkins). Their speculation caused price spreads to widen on the index, and the increase in spreads hurt the performance of funds which used the index as a proxy for investing in BBB securities backed by residential mortgages. Div. Ex. 45. The performance of the Limited Duration Bond Fund suffered briefly along with those of others. Id.

State Street's investment managers, however, did not perceive in these events any fundamental flaw in the market for subprime-mortgage-backed securities; in particular, they did not believe that February's underperformance, driven by speculation in an index of BBB-rated securities, portended any problem with the future performance of higher-rated, AA and AAA, "subprime" bonds. Tr. 2853-2855 (Wands). And, in fact, the subprime market quickly rebounded, enabling the Fund to outperform expectations in April and May 2007. Id.

The Fund *had* underperformed at the beginning of the year, though, and in late February 2007 Mr. Hopkins was asked by his boss, Adele Kohler, to draft a Client At Risk (or "CAR")

alert about the situation. Div. Ex. 45. This was – and was intended to be – only a "short write-up" that would "broadly outline the reasons for what has occurred," and "not to present an in-depth treatise of what has happened." Div. Ex. 46. The sources of the information and opinions in the CAR alert were the portfolio managers. Tr. 220 (Hopkins). The CAR alert was drafted, moreover, strictly for internal consumption, and was distributed to State Street employees to enable them to communicate more effectively with investors and other interested parties. Tr. 220-21 (Hopkins).

Mr. Hopkins was then asked to edit the internal CAR alert into a form that could be distributed directly to investors. Hopkins Ex. 34. The revision, which became the template for the March letter, added some data in chart and graph form about the change in price spreads per Ms. Kohler, but it maintained the same focus on specific recent events (the Fund's underperformance) and their specific causes (speculative investment activity in the BBB-ABX index). Id.; Div. Ex. 58. The limited scope of the letter was not hidden; to the contrary, Mr. Hopkins' draft announced in its first paragraph that "[t]he purpose of this short write-up is not to present an in-depth treatise of what has happened," but "to broadly outline the reasons for and magnitude of what has occurred, to outline the impact of this on the market generally and on our Funds more specifically and to give a sense of what we are doing as it pertains to this situation and its impact on our portfolios." Div. Ex. 58. And, as was his practice, Mr. Hopkins had the letter reviewed by those who knew the investment information the best in order to ensure its accuracy. See Div. Ex. 55; Hopkins Ex. 36; Hopkins Ex. 39 (admission of this exhibit currently under advisement).

There is no dispute that the March letter delivered on its explicit promise. The Division has not alleged that the letter contained even a single affirmative misstatement. The Division's claim, rather, is that the letter was misleading because of what it did not say:

> At the time, Hopkins was aware that the Fund's investments were virtually all subprime. However, the internal alert and letter stated that the Fund's recent underperformance was caused by the Fund's 'modest' position in the lowest rated tranche of the ABX index, which represented credit default swaps on 20 different subprime investments rated BBB. The internal alert and March letter omitted that, besides the Fund's relatively small position in the BBB-rated ABX investment, the Fund was concentrated in subprime bonds and other subprime derivative investments.

Division Prehearing Brief, p. 9.

This is, in other words, strictly an "omission" claim. The Fund's position in BBB securities *was* relatively small, and its recent underperformance *was* caused by activity in the BBB-ABX index: the Division does not even suggest otherwise. For the claim to succeed, therefore, the Division needed to prove that disclosure of the Fund's *total* investment in *all* "subprime" securities was *necessary* in order to make the accurate statements made in the letter, in light of the circumstances in which they were made, not misleading, even though the vast majority of the Fund's other "subprime" investments (1) were rated AA or AAA, (2) were not considered vulnerable to the risks borne by BBB-rated investments, and were priced accordingly, (3) had nothing to do with the ABX index, (4) had not caused the Fund's recent underperformance, and (5) had not themselves been affected by those events. Tr. 2853-55 (Wands). See generally, 15 U.S.C. § 77q(a)(2); 17 C.F.R. § 240.10b-5(b).

The alleged "omission" was not actionable under that standard. The letter did not pretend to be exhaustive. It conspicuously disclaimed any intention to describe the Fund in full, or to consider every aspect of its past performance or future prospects. This was proper. The Division cannot mean to say that *every* communication to the investors in an unregistered fund must

address *every* aspect of the fund's portfolio and assess *every* risk that the investors may someday face. The securities laws were not enacted to rebuild the Tower of Babel. To be coherent, every communication must have a coherent subject. The March letter focused on the Fund's recent underperformance because it was undeniably the subject of the moment, and it focused on the behavior of the BBB-ABX index because that was undeniably the *cause* of the Fund's underperformance – and the *answer* to the questions clients were asking about the reasons for the Fund's underperformance. In these circumstances, a description of the other elements of the Fund's portfolio would have been out of place – like including a census of the apples in the refrigerator in an explanation of why the bananas on the counter have spoiled.

The Division's theory here rests on an unstated – and unproven – premise: that as of March 2007 there was some connection (or correlation) between (1) the Fund's indisputably modest (approximately 2%) investment in the BBB-ABX index and (2) its larger investment (about 94% of its asset-backed securities) in securities that could also be described as "subprime" (because of the nature of the assets that backed them), but that were themselves rated AA or AAA in terms of their credit risk. Sirri Report, ¶ 56. Absent such a correlation, there was no reason for Mr. Hopkins (or anybody else) to think that the performance of the BBB-ABX index signified anything about the prospects for blue-chip investments at the top of the cash-flow waterfall. Tr. 2855-56 (Wands). And if there was no reason to think that the past performance of the BBB-ABX index predicted the future performance of the AA and AAA securities, then it was not misleading to discuss the Fund's recent behavior in terms of the investments that had actually caused it to underperform, without disclosing that the Fund was also invested in other securities that had *not* caused the underperformance, and whose behavior was not correlated with the behavior of the underperforming index.

The Division's theory fails, therefore, because there is no evidence in the record to suggest, much less to establish, that this essential premise was satisfied as of February or March 2007. It is undisputed, rather, that at the time the correlation between different credit tranches of even a *single* "subprime" investment vehicle "was expected to be low . . . , on the assumption that the underlying pool of loans was geographically dispersed and housing downturns were usually regional." Sirri Report, ¶ 47, n.51.[6] As Mr. Wands testified, this was the view of the investment team as well, "I don't recall that at that point we were worried about the top part of the capital structure, so to speak, the AAA's or AA's that we owned. I think our focus was primarily just on the BBB trade at that point." Tr. 2853 (Wands). As the chart prepared by Dr. Sirri so vividly illustrates, the sharp downturn in the BBB tranche of the ABX index at the beginning of 2007 was *not* accompanied by any significant fluctuation in the AA and AAA tranches of the same index. Sirri Report, Ex. 10. The values of the higher tranches were unaffected by the dip and recovery of the lower tranches, and remained that way until the crisis broke much later in that year. Id. It was not until late July or early August that "[t]he broad sale of assets across asset classes by large investors led to a sharp increase in the correlation between the price movements of assets that were hitherto not thought to be highly correlated." Sirri Report, ¶ 66, Tr. 2182-83 (Sirri).

V. The Division Failed To Prove That Mr. Hopkins Made, Engaged In, Employed Or Obtained Money Or Property By Means Of Any Material Misrepresentations Or Omissions In The July 26, 2007 Client Letter.

While the OIP boldly described Mr. Hopkins as playing an "instrumental role in the misrepresentations in [the July 26th letter], which had the effect of causing the misled investors to

[6] There is no evidence that any of the Fund's AA and AAA subprime securities *were* part of the same vehicle that supported its BBB position (the BBB-ABX index), further reducing the likelihood that the BBB exposure was in any way correlated with the Fund's higher-rated investments.

continue to purchase or continue to hold their investments in the Fund and the related funds," (OIP, ¶ 31), the evidence at trial demonstrated quite the opposite. Contrary to being "instrumental" in the preparation of the July 26th letter, the evidence demonstrated that Mr. Hopkins made one suggestion to one of myriad drafts of a letter that was vetted by dozens of others including internal and external legal counsel. Further, what the evidence actually showed, and what the OIP failed to mention, is that (a) virtually from its inception, the letter was reviewed thoroughly and continuously by inside and outside counsel for SSgA, (b) Mr. Hopkins' role in drafting or reviewing the letter was extremely limited - he actually saw only a few of the *many* drafts that were circulated, and was only asked to comment on *one* draft that turned out to be the *fifth* to last draft of the letter, (c) the final version of the letter was vastly different than the last version Mr. Hopkins reviewed, and in fact, unbeknownst to Mr. Hopkins, the entire commentary section of the letter (which was the section he made a suggestion about) was removed before it was distributed to investors, and (d) there were other members of the investment team who were more intimately involved in drafting the letter and who had more firsthand information about the Fund and related funds, subprime performance issues, and client awareness of the funds' investments. Even if the Division had been able to establish that the July 26th letter contained *any* material omissions or misrepresentations, Mr. Hopkins cannot be held liable for any alleged fraud on investors because he was not the author, final arbiter, or even a person who bore responsibility for any of the statements made (or not made) in the letter.

A. The Drafting of the July 26th Letter

When the Fund underperformed significantly in June 2007, due primarily to the ripple effect triggered by Bear Stearns, Mr. Hopkins' boss, Adele Kohler, asked him to draft a CAR alert to explain the underperformance to SSgA's internal constituencies. See Div. Ex. 100; Tr.

364-65 (Hopkins). Mr. Hopkins drafted the CAR alert and sent it to the client facing teams on July 2nd, and, consistent with his practice, copied the portfolio managers and his superiors to ensure they had an opportunity to confirm the accuracy of the document. Id.; Tr. 2862 (Wands). The purpose of the CAR alert was to explain that June's underperformance in many of SSgA's fixed income funds was once again caused by the Fund's exposure to the BBB-ABX index and the concomitant volatility fueled by the Bear Stearns collapse. Div. Ex. 100 ("Again, the cause of our exposure to the subprime mortgage market, specifically our exposure to the triple B ABX ... what precipitated the most recent declines had to do with Bear Stearns repricing their holdings in two of their hedge funds."). The alert also conveyed the investment team's position that SSgA's "structured products credit analysts continue to remain confident in the underlying fundamentals of the exposure," and noted that SSgA "had not changed our view on this." Id. at p. 2. In conjunction with the CAR alert, Mr. Hopkins asked Patricia Hudson to take his initial draft letter (which was really just his CAR alert) and craft a client-friendly version which could be sent to clients at the relationship managers' discretion. Mr. Hopkins then left on vacation for ten days, from July 6th to 16th. See Div. Ex. 221 (Hopkins 2007 calendar), pp. 52-53; Tr. 382-83 (Hopkins).

Over the next several weeks, the draft client letter was substantially rewritten by various members of the investment and client relationship teams. Mr. Hopkins was neither asked for input nor copied on the relevant emails and exchanges during this entire period. On July 10th, Ms. Hudson circulated a new and significantly different version of the client letter, sending it to several members of the fixed income team (Mr. Wands, Mr. Greff), several client facing people (Mr. Carlson, Ms. Fitzgerald, Ms. Reardon), and Mr. Flannery and Ms. Kohler. Hopkins Ex. 71.

She noted that she "significantly added to/edited Jim's original notes," and would be "grateful if the other Fixed income folks and Adele could review before it's sent out." Id.

The next day, Michael Thompson, another fixed income product engineer, weighed in and changed the letter considerably, mostly to update the information in light of changes in the financial market since the original CAR alert was circulated on July 2nd. Hopkins Ex. 73. The same day, Frank Gianatasio, the head of the structured products group, circulated his edits and suggested that the letter should be reviewed by the legal department as well. Hopkins Ex. 72. Mr. Wands and Mr. Flannery also both circulated suggestions on the evening of July 11th. Hopkins Ex. 74; Div. Ex. 103. Ms. Hudson then sent the heavily edited letter to the heads of client relationship, Mr. Carlson, Ms. Reardon, and Ms. Fitzgerald, and indicated that it "might make sense to have the legal department review this before it goes out as well." Hopkins Ex. 78.

On July 12th, Mr. Wands forwarded the draft letter to Ms. Shegog and Ms. Ferullo and indicated that Mr. Flannery has instructed that the letter be reviewed by legal as well. Hopkins Ex. 77. Ms. Hudson gave the same instruction to Ms. Reardon, Mr. Carlson, and Ms. Fitzgerald, specifically stating that Mitch Shames, SSgA's general counsel, had agreed to review the letter. Flannery Ex. 52. Notably, that same day, Mr. Shames sent a meeting invitation to three of his deputies, Mark Duggan, Christopher Douglass, and Glenn Ciotti, to meet on July 16th to talk about "sub-prime." Hopkins Ex. 123. Mr. Shames testified that he asked Mr. Duggan and Mr. Douglass to assist him because his role as general counsel was "to make sure that I assembled the appropriate legal team to review the legal issues that came up." Shames Stipulation ("Shames Stip."), Ex. A, p. 204. Mr. Shames chose Mr. Duggan because "he was a senior lawyer, and he was really my right-hand person and Mark had a lot of experience in the '40 Act, securities issues, communications and disclosure issues," and Mr. Douglass because "one of his primary

areas of responsibilities was with respect to the fixed income area..." and "he was closest to the products that were being discussed in the letter." Id., p. 205. Prior to the meeting, Mr. Shames circulated the current draft of the subprime letter to his legal team. Div. Ex. 106. He then informed the investment and clients relations team (but not Mr. Hopkins) that he and his legal team were looking at the letter and meeting on Monday morning (July 16th). He indicated that after this meeting, he would send along any changes. Hopkins Ex. 79. That same day, Mr. Flannery circulated a memo to senior management, including Mr. Shames, detailing State Street's subprime exposures as of July 10, 2007. Hopkins Ex. 171 (Mr. Shames was a member of the SSgA-EMG@StateStreet.com email distribution group listed on the letter).

On Monday, July 16th, the legal team met to review the letter and Mr. Flannery circulated an updated subprime exposure memo. See Flannery Ex. 58. The next day, Mr. Shames emailed Mr. Flannery and referencing an earlier discussion about the letter said:

> I'm still processing some of our discussion earlier as it related to the proposed letter. I want to catch up with Mark Duggan and run some things by him. We'll be able to get back to you by mid-afternoon. There may be some additional comments....

Hopkins Ex. 80. Mr. Shames then emailed his legal team and indicated that Mr. Flannery was going to ask Mr. Armstrong to provide the legal team with "a breakdown of the allocation of CDOs/SubPrime exposure by funds and accounts..." Shames Stip., Ex. A, p. 213. Mr. Douglass responded by circulating further information on the ABX index. Id. at 217. Later on the 17th, Mr. Shames sent an updated draft of the letter to Mr. Flannery, asking whether he wanted to include information on the benchmark index as well. Hopkins Ex. 81. In addition to working with the investment team, Mr. Shames testified that during this time he was also regularly speaking with client-facing people. Shames Stip., Ex. A, p. 228.

During this same period, Mr. Shames also consulted with outside legal counsel. Specifically, on July 17th, Mr. Shames both called and emailed Elizabeth Fries, a partner at Goodwin Proctor, seeking advice about the letter. See Flannery Ex. 283. Mr. Shames considered Ms. Fries and her firm to have " an enormous amount of experience with respect to SSgA's products and documentations, and generally, in my judgment, was an expert with respect to investment issues and in particular bank commingled funds." Shames Stip., Ex. A, p. 207. Mr. Shames sent her a copy of the letter for her review, and believes he spoke with her not long afterwards, receiving comments from her, though he does not recall the details. Shames Stip., Ex. A, pp. 209-10.

As the foregoing uncontested evidence makes plain, the legal team was not only reviewing drafts and holding meetings to discuss the letter, but also diligently consulting both internal and external sources to understand the subprime issues as well. The following day, after wrapping up the legal due diligence, Mr. Shames sent Mr. Carlson an email indicating that he had given his comments to Mr. Flannery and that they were almost "ready to go." Hopkins Ex. 82. Significantly, this entire process, from the first draft that Ms. Hudson circulated on July 10th to Mr. Shames' communication to Mr. Carlson on July 18th, took place without *any* participation by Mr. Hopkins. He was not copied on a single email, nor invited to a single meeting. Put simply, Mr. Hopkins was not consulted at all. Even after he returned from vacation on the 16th, his input was not sought.

At the same time drafts of the letter were being circulated, Mr. Wands recognized that the volume of client information requests was increasing and on July 11th circulated an instruction to dozens of SSgA personnel, including client relationship managers, product engineers, and portfolio managers, counseling that he should be notified prior to sending any response to a

client-related request regarding subprime and other exposures. Div. Ex. 102 ("Going forward, please notify me prior to responding to any client-related requests regarding our exposure in any of the portfolios to subprime, ABS, CDOs, etc."). In his email, Mr. Wands made clear that he wanted "to be able to coordinate this process and make sure that we're reporting accurate and consistent information." Id. Similarly, on July 17th, a week later, Mr. Wands circulated a list of "Frequently Asked Questions" which were drafted as a result of a meeting with relationship management people. Flannery Ex. 63. These questions included queries about subprime mortgages, fund performance, and the composition of exposures in the different funds. Id. Mr. Wands clarified that, in addition to assisting with the client letter currently being circulated, he was the point person for all client requests regarding subprime. Id.; Tr. 2863-64 (Wands).

On July 18th, Mr. Flannery circulated to a number of people (including Mr. Hopkins) what was, at the time, the "final" subprime letter, and asked that someone accept the revisions and send out the final copies to the appropriate people. Div. Ex. 112. This was the first time a draft of the letter was shared with Mr. Hopkins and notably, no one asked him to review or edit it. Mr. Shames then "replied to all," advising:

> Here is an important point. If we send this letter out as a June letter, then we need to be prepared to send follow-ups in July, Aug, etc. ...the communications must be "regular and consistent...therefore, someone must take responsibility to make sure that letters go out on a regular basis. The Legal Group will be available to review the letters. Who will assume this responsibility?

Div. Ex. 113. Though not specifically asked, the next day Mr. Hopkins, in his typical cooperative fashion, raised his hand, accepting the redline edits, forwarding the edited letter to the client relations teams, and volunteering to help with future update letters. Div. Ex. 118; Tr. 297-300 (Hopkins).

Later that same day (July 18th), Nick Mavro, a client-facing person who was a member of the client-facing "SWAT team," sent Mr. Hopkins the team's edits to the letter. Div. Ex. 117. Without making any changes of his own, and within 23 minutes of receiving the draft, Mr. Hopkins forwarded the SWAT team's edits to Mr. Thompson, the product engineer coordinating the letter. Hopkins Ex. 138. Mr. Thompson incorporated the SWAT team's edits, made some of his own, and then left the revised letter for Mr. Wands to review. See Hopkins Ex. 85 ("I left some suggested edits to the client letter on Mike's desk..."); Tr. 392 (Hopkins). Mr. Thompson's changes to the letter in response to the SWAT team's suggestions were not shared with Mr. Hopkins. See Hopkins Ex. 85. At the same time Mr. Mavro forwarded the SWAT team's suggestions to Mr. Hopkins, he also sent a draft of the letter to Mr. Shames. Div. Ex. 123. There was no further correspondence regarding the letter until the following Tuesday, July 24th.

On July 24th, Mr. Mavro again forwarded the same version of the letter to Mr. Shames, and copied Mr. Carlson, Ms. Reardon, and Mr. Flannery. Id. Later that day, Mr. Shames forwarded a new version of the letter to Mr. Mavro, Mr. Brown, Mr. Flannery, Mr. Hopkins, Mr. Carlson, Ms. Reardon, and Mr. Duggan. See Div. Ex. 124. In his email he stated:

> I'm attaching my latest set of comments based up on the draft Nick attached below. I'm trying to meet with both Sean and Marc in the next 30-45 minutes. In the meantime, Jim, if you could at least make sure that my comments accurately reflect our intentions, that would be helpful.

Id. Mr. Shames' email attached the latest version of the letter. The changes he directed Mr. Hopkins to review pertained to two sentences in the commentary section on the third page of the letter:

downdraft in ABX valuations and the impact on the risk profile of our various portfolios. As a result, we are actively analyzing strategies which would enable us, if appropriate, to pare back subprime positions. However, any reductions in these positions will be based on an individual assessment of the specific investment objectives and risk parameters inherent in each investment fund and portfolio. We intend to get to positions that will allow us to reenter the trade when market dynamics are more favorable.

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Id. at p. 5. Significantly, Mr. Shames did not ask Mr. Hopkins to review the entire letter, but specifically focused Mr. Hopkins attention to his minimal changes. Id. Mr. Hopkins replied fourteen minutes later, adding Mr. Wands and Mr. Greff to the distribution list. Mr. Hopkins did not edit the document but rather solicited Mr. Shames' legal opinion:

> As it relates to your comments in the final paragraph, we have in fact lessened our exposure to the subprime sector in many of these portfolios and we are continuing our analysis in terms of further risk reduction. I'm not sure that your comments in the final paragraph reflect the fact that we have lowered our risk profile to this sector in many of the portfolios. Can we be more definitive here?

Div. Ex. 125. Mr. Hopkins testified that he had received the information regarding "risk reduction" from the portfolio management group, and had copied Mr. Wands and Mr. Greff because he wanted to ensure that he was clearly and accurately describing the portfolio team's actions. Tr. 401-402 (Hopkins). Mr. Hopkins' testimony is supported by Mr. Wands, who testified that he was actively involved in managing the subprime issues in all of the fixed income funds and was receiving "hourly, or if not by-the-minute updates on the market" during July 2007, and that he knew the trades and risk management actions that were being performed. Tr. 2865-66 (Wands). Specifically, Mr. Wands recounted that the investment team was indeed reducing risk in the portfolios in a variety of ways during this period, including reducing its BBB-ABX exposure and allowing total return swaps to roll off at the end of the month. Id. Mr. Shames responded to Mr. Hopkins approximately 40 minutes later, at 4:13 pm, making the following edit to one sentence in the commentary that appeared on the third page:

> We believe that what occurred in June was driven by the liquidity and leverage issues such as those faced by Bear Stearns, and not a fundamental subprime mortgage event. Still, we are mindful of the technical signs in the market, that is, the downdraft in ABX valuations and the impact on the risk profile of our various portfolios. As a result, we are actively analyzing strategies which would enable us, if appropriate, to pare back subprime positions, and we have in fact already begun the process of risk reduction. However, any reductions in these positions will be based on an individual assessment of the specific investment objectives and risk parameters inherent in each investment fund and portfolio. We intend to get to positions that will allow us to reenter the trade when market dynamics are more favorable.

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Div. Ex. 127, p. 6. Once again, Mr. Wands and Mr. Greff, along with many others, were copied on Mr. Shames' email. Id. This version of the letter, consisting of a one-page cover letter and two pages of commentary relating to the ten fixed income funds that were affected by the subprime issues, was the last draft that Mr. Hopkins received. Tr. 411-15 (Hopkins).

Over the next two days, before the final letter was sent to clients on July 26th, the draft changed dramatically. First, on the evening of July 24th, several senior level people, including Ms. Reardon, Mr. Flannery, Mr. Duggan, Mr. Greff, Mr. Wands, and Mr. Mavro, met to discuss the letter. See Div. Ex. 126. The Division presented no evidence that Mr. Hopkins was invited to, or attended the meeting. He also he was not included on Ms. Reardon's follow-up email. Id. After this meeting, Ms. Reardon circulated a revised version of the letter, noting that the only additional change "we" (referring to the meeting attendees) made after the meeting was to add a sentence to the last paragraph of the cover letter:

> valuations and the impact on the risk profile of our various portfolios. We have used this opportunity to reduce risk in the portfolio by taking advantage of liquidity in the market when it exists, and will continue to do so, without putting further pressure on asset valuations.

Id. at p. 2. Significantly, the sentence Ms. Reardon added is the only sentence the Division criticizes in the OIP, yet it is undisputed that Mr. Hopkins played no part in crafting this sentence and never saw the letter after the sentence was added. Tr. 309, 311-12 (Hopkins). Of equal significance, Ms. Reardon's email (that was addressed to Mr. Shames) continued:

> It is our understanding that you [Mr. Shames] do not want us to send with the letter the SSgA Fixed Income June 2007 commentary section (page 2 of the attached document).

Div. Ex. 126, p. 1. The "SSgA Fixed Income June 2007 commentary" to which Mr. Reardon referred was the last two pages of what had been a three-page letter. More importantly, this June commentary was the only part of the draft letter that Mr. Hopkins had been asked to review and comment upon. Thus, unbeknownst to Mr. Hopkins, Mr. Shames elected to eliminate the entirety of the commentary that Mr. Hopkins had received. The final letter that was distributed on July 26th, therefore, consisted only of the first page of the 3-page draft that had been circulating prior to the evening of July 24th. See Hopkins Ex. 97, p. 2 (the final 5-paragraph letter that was distributed to sales and marketing).

On the afternoon of July 25th, an Investment Committee meeting was held. See Div. Ex. 132. Mr. Greff, Mr. Wands, Mr. Pickett, Mr. Armstrong, and Mr. Duggan all attended this meeting (Mr. Hopkins did not). As the meeting minutes reflect, the subprime issues and the corresponding impact on each of the funds was discussed in detail:

> Paul Greff reviewed the events of the past few months. He described Bear Stearns' closing of funds which resulted in illiquidity, the rating agencies' downgrades and watchlists for many tranches of subprime asset backed deals from 2006, the ABX security price drop and the resulting performance in some of our portfolios which had exposure to these assets.
>
> The Committee agreed that an important issue to address is the need to provide liquidity in this relatively illiquid market should our clients choose to leave our funds. How, when, and the affect on the portfolios, including valuation, were discussed at length.

Div. Ex. 132. While Mr. Shames did not attend the meeting, Mr. Duggan did and testified that that he believes he shared what he learned at the meeting that day with Mr. Shames. Duggan Stip., p. 210. Later that day, around 5:00pm, Mr. Shames forwarded the "latest version of the letter" to many individuals, including Mr. Wands, Mr. Greff, and Mr. Duggan. Div. Ex. 127.

This version slightly changed the last sentence in the last paragraph of the one-page letter as follows:

valuations and the impact on the risk profile of our various portfolios. We have been seeking to reduce risk in those portfolios where we believe it is appropriate to do so by taking advantage of liquidity in the market when it exists, and will continue to do so, while we seek to avoid putting undue pressure on asset valuations.

We believe that our long term investment performance will reflect the care with which our credit research group has chosen our securities and assessed counterparty risk. We will keep you regularly informed. Please do not hesitate to contact us if you have any

informed. Please do not hesitate to contact us if you have any questions or concerns.¶

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Id. Again, Mr. Hopkins was not included in the distribution of the email or asked to review this version of the letter at any time. Later that evening and the following day, Mr. Shames and Mr. Duggan also consulted with Bill Hunt, SSgA's Chief Executive Officer, about the letter and asked him to review and comment on it as well. See Hopkins Ex. 94; Hopkins Ex. 95; Hopkins Ex. 172; Hopkins Ex. 173.

Finally, on the afternoon of July 26th, the final version of the letter was distributed to all of sales and marketing (U.S. and non-U.S.). Hopkins Ex. 97. As previously described, the final communication consisted of only a one-page, five-paragraph letter, and did not have any of the fixed income commentary that Mr. Hopkins had authored in his original CAR alert distributed on July 2nd. Furthermore, Mr. Hopkins was not a recipient of this email nor was there any other evidence that he even saw, much less reviewed, the final letter before or even after it was distributed to clients.

B. The Division Failed to Prove that Mr. Hopkins Made Any Material Misrepresentation Or Omissions In Connection With The July 26th Letter

1. The Commission's Theory of the July 26th Letter

In Paragraph 33 of the OIP, the Division claims that the July 26th letter omitted three material facts: (1) "the Fund was concentrated in subprime bonds," (2) "the Fund's performance had been and could continue to be adversely affected because it was leveraged through other

subprime investments," and (3) "State Street was planning to sell the Fund's highest rated assets to meet investor redemptions." OIP, ¶ 33. However, with regard to Mr. Hopkins, the Division alleges that he is responsible for only the *first* omission, specifically charging that "Hopkins knew or was reckless in not knowing that the July 26 letter omitted the material information that the fund was concentrated in subprime." Id. at ¶ 35; Division Prehearing Brief, p 15. The Division more specifically claims that because Mr. Hopkins was both (a) aware that the Fund was concentrated in AA and AAA rated securities that were underperforming by late July, and (b) aware by this time that "at least some investors and client service personnel believed that the Fund's only subprime exposure was the relatively small BBB-rated subprime…," that his *one* suggestion regarding adding risk reduction language to the commentary section of the letter (which the Division misleadingly claims "gave rise to the risk reduction language in the final version") was a "knowing" act in which "he chose to ignore the factors driving underperformance," and suggested an edit "that Hopkins *knew* would lull investors to stay in the Fund…" Id. (emphasis added). In short, the Division's specious argument is that because Mr. Hopkins suggested language on the one issue (risk reduction) in the letter that he was requested to review – which they conspicuously don't claim was a misrepresentation – he somehow became an author or responsible reviewer of the entire letter and responsible for any omissions in the letter as a whole, even though he was *not once* asked or invited to review it in its entirety. The Division's feeble allegations concerning the July 26th letter fail for this reason and several others.

C. There Is No Evidence That Hopkins Reviewed The July 26th Letter As A Whole Or Was Responsible For The Letter, Thus He Cannot Be Responsible For Any Alleged Omissions.

First, while Mr. Hopkins' July 2nd CAR alert was the starting point for what became the July 26th letter, there is no question that the ultimate letter contained virtually none of language of the CAR alert. In fact, the 2-page "commentary" portion of the letter that did contain language from the CAR alert was dropped in its entirety at the instruction of Mr. Shames on July 24th. See Div. Ex. 126. Thus, Mr. Hopkins cannot be said to have actually authored any portion of the July 26th letter based on his original authorship of the CAR Alert.

Second, there is absolutely no evidence that Mr. Hopkins ever reviewed the letter in its entirety or was asked to review the entire letter to ensure it was accurate or complete, so he cannot be responsible for any alleged omissions. To the contrary, the record is replete with indications that others were responsible for the letter and its content, including legal counsel (Mr. Shames and Mr. Duggan), client relations managers (Mr. Carlson, Ms. Reardon, Ms. Fitzgerald), fixed income product engineers (Mr. Thompson) and most importantly, senior investment team members (Mr. Wands and Mr. Greff). All of these individuals clearly reviewed the letter, made substantive edits, attended one or more meetings about the letter, and most actually reviewed the final version of the letter. See exhibits discussed infra at section V(A). On the other hand, the only evidence of Mr. Hopkins' involvement was that he was invited by counsel to comment on only *two sentences* of *one* draft of a 3-page correspondence that was subsequently drastically altered in the next four iterations.[7] See Div. Ex. 127. Mr. Hopkins obligingly followed that specific direction and commented on the two sentences – but did not actually edit the letter – and that was it. That was the entire extent of his direct involvement in the review and drafting of a

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[7] As described previously, Mr. Hopkins also received a draft of the letter from Mr. Mavro, a consultant relations representative, on July 19th (Div. Ex. 117), but the evidence clearly supports the inference that Mr. Hopkins never reviewed or commented on the draft. Rather, he almost immediately forwarded it unedited to Mr. Thompson, another fixed income product engineer that had been working on the letter, for his review and comment. Hopkins Ex. 138. Mr. Thompson then made edits and left those edits for Mr. Wands, not Mr. Hopkins. Hopkins Ex. 85.

precursor to what became the July 26th letter. As noted, Mr. Hopkins never even saw the final version of the July 26th letter before, or after, it was sent to clients.

Astoundingly, it is on this thin basis that the Division claims Mr. Hopkins "played an instrumental role" in the letter's misrepresentations and omissions and blames him for "knowingly mis[leading] investors." OIP, ¶ 35. However, the law simply does not support a claim that Mr. Hopkins can be responsible, either recklessly or negligently, for SSgA's omissions in the July 26th letter when there is no evidence that he reviewed it or was responsible for it in any way. See generally Tambone, 597 F.3d at 443-45 (cannot be held liable absent proof that he made, employed or engaged in actual violations); Plumbers and Pipefitters Local Union 719 Pension Fund v. Zimmer Holdings, Inc., No. 1:08-cv-01041, 2011 WL 338865, at *25 (S.D. Ind. Jan. 28, 2011) (*scienter* element was not satisfied where defendants' involvement was "minimal" and "vague", and further holding that "[d]efendants' [additional] public disclosures . . . weigh against an inference that their [allegedly misleading] statements were knowingly false.").

D. The Letter Was Reviewed (And Re-Reviewed) By Both Internal And External Counsel And Advice Of Counsel Was Sought By Senior Investment Team Members Of SSgA

While the OIP is conspicuously silent on the issue, the trial in this case was chock-full of evidence that both inside and outside counsel were intimately involved in the drafting and review of the July 26th letter. Their input was both sought (see, e.g. Hopkins Ex. 72; Hopkins Ex. 77, Hopkins Ex. 78) and received (see, e.g. Hopkins Ex. 79; Hopkins Ex. 80; Hopkins Ex. 81; Hopkins Ex. 95; Hopkins Ex. 98) from July 12th, virtually the inception of the letter, through to the absolute end, July 26th. Id. Moreover, as described, Mr. Shames and Mr. Duggan were not just tangentially involved, but reviewed many drafts, consulted a variety of sources, and held and attended several meetings on the letter and subprime issues in general. While their "testimony"

in this case revealed that they do not recall many of the details at this point in time,[8] the contemporaneous documentary evidence indicates that the legal team was diligently collecting information both internally and externally regarding the subprime market and its effects on SSgA's funds. See, e.g. Flannery Ex. 58; Hopkins Ex. 171; Shames Stip., Ex. A, pp. 213-17 (collecting subprime and ABX information); Shames Stip., Ex. A, p. 228 (working with and speaking with client-facing management). Reliance on the advice of counsel is evidence of good faith to be considered in evaluating a respondent's scienter. Howard v. SEC, 376 F.3d 1136, 1147 (D.C. Cir. 2004) (citing Bisno v. U.S., 299 F.2d 711, 719 (9th Cir. 1961)). And showing reliance on counsel's advice is "a means of demonstrating good faith and represents possible evidence of an absence of any intent to defraud." SEC v. Snyder, 292 Fed. Appx. 391, 406 (5th Cir. 2008) (quoting U.S. v. Peterson, 101 F.3d 375, 381 (5th Cir. 1996)); see also Steed Finance v. Nomura Sec. Int'l, Inc., 148 Fed. Appx. 66, 69 (2d Cir. 2005) (affirming summary judgment on § 10(b) claim for defendant on scienter and other grounds where defendant provided evidence of reliance on counsel in determining how to represent nature of securities). While as described, Mr. Hopkins' minimal involvement in the drafting of the letter meant that he was not privy to all that was discussed and disclosed to counsel, the fact that he knew counsel was reviewing the letter and that counsel was working closely with those who *did* have substantial investment and client information (i.e. Mr. Wands, Mr. Greff, Mr. Carlson, Ms. Reardon, etc.) is relevant. It is enough to establish that Mr. Hopkins properly relied on the fact that his superiors and those with the most knowledge were working closely with counsel, and thus Mr. Hopkins could not have knowingly, recklessly, or negligently omitted material information from a letter for which he was not responsible. See, e.g., Howard, 376 F.3d at 1148-49 (a reliance on counsel defense need not

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[8] See e.g., Shames Stip., Ex. A., pp. 207, 209-10, 213-14.

involve direct communications in that an employee can rely on the fact that senior officers with the same information were working with legal counsel).

E. Mr. Hopkins Was Not In A "Unique Position To Understand Investors" And He Reasonably Relied On His Superiors Who Had The Same Knowledge As He Did, Thus He Did Not Act Recklessly Or Negligently

As already described in great detail, the July 26th letter went through many reviewers at virtually all levels of seniority at SSgA, including investment team members, client relations personnel, inside and outside legal counsel, and SSgA executive-level managers, most of whom had as much, or more, knowledge than Mr. Hopkins about both the investment information or the client relations side. Yet, the Division misleadingly alleges that Mr. Hopkins was in a "unique position to understand that many investors were unaware of what was driving the Fund's risks and underperformance," and thus he should be solely responsible for any omissions in the letter. OIP, ¶ 35. This allegation fails for several reasons.

First, this theory requires the Court to entertain the assumption that because Mr. Hopkins answered questions from some clients about the amount of subprime in the funds, he should have made the factual leap to assume that *all or most* of SSgA's clients had the same exact questions. It's simply illogical and there was no evidence presented that Mr. Hopkins made this assumption. As an initial matter, despite having reviewed millions of documents and emails produced by SSgA, the Division only introduced four exhibits where clients or client facing people asked Mr. Hopkins this question. See Div. Ex. 92; Div. Ex. 96; Div. Ex. 121; Div. Ex. 246. On this slender basis, the Division contends that Mr. Hopkins should have not only assumed that most clients had the same question, but that he should have concluded that a mass disclosure was necessary to cure their "confusion." However, as has been discussed infra, at no point in time was Mr. Hopkins privy (nor was he intended or expected to be privy) to all of the information that clients

were receiving; rather, what he did know is that clients had access to details about the funds from a variety of sources. Thus, he could just have easily, and more logically, concluded from the same evidence, that most clients *knew* the makeup of the funds, and that he was simply answering questions for some of the few that didn't (or hadn't paid attention to the information they previously received). The Division simply did not present any evidence for the Court to form a conclusion that (a) "many investors" were in fact "confused" as of July 2007, or (b) Mr. Hopkins understood or should have understood that "many investors were unaware of" the amount of subprime in the funds.

Second, even assuming the Division could establish that Mr. Hopkins knew of this wholly speculative mass client confusion, he was not the only one who would have had such information. For example, individuals such as Mr. Wands (and possibly Mr. Greff) also knew (a) that some clients had been asking questions about the amount of subprime in the funds, and (b) some of the funds, such as LDBF, were highly concentrated in subprime. Specifically, Mr. Wands testified that he was aware by mid-July that some clients had questions about the subprime exposures and he was extremely well-versed in the subprime exposures in the active funds because by July he was on the trading desk daily keeping abreast of developments. See Hopkins Ex. 75, Tr. 2863-66 (Wands). In comparison to Mr. Hopkins, Mr. Wands was much more involved in the development of the July 26th letter from beginning to end: he reviewed and edited early drafts (Hopkins Ex. 74; Hopkins Ex. 77), was copied on later drafts (Div. Ex. 112; Div. Ex. 113; Div. Ex. 118), given exclusive edits to review (Hopkins Ex. 85), copied by Mr. Hopkins on his comments (Div. Ex. 125), participated in the final senior management team meeting about the letter (Div. Ex. 126), participated in the July 25th investment committee meeting where subprime and client issues were discussed (Div. Ex. 132), and he was sent the

final version of the letter by Mr. Shames for review before it was sent out on July 26th (Div. Ex. 137). Thus, if anyone was in a "unique position" to understand both the investment and client perspectives on the letter, it was Mr. Wands. And as Mr. Hopkins was justified in doing given that Mr. Wands was his superior, he relied on Mr. Wands' position in this space and knew that Mr. Wands' knowledge and understanding of the issues was substantially greater than his. Tr. 374-75 (Hopkins); Tr. 401-02 (Hopkins). Significantly, Mr. Wands unwaveringly testified that he knew the details of the funds' subprime exposures, he knew that some clients had questions about subprime, and yet he did not believe *at any point* that the July 26th letter was misleading or omitted any material information. Tr. 2870-71 (Wands). As there was no evidence that Mr. Hopkins held, or should have held, any contrary belief, he cannot be held responsible for omitting material information from the July 26th letter.

F. Mr. Hopkins Cannot Be Responsible For Any Alleged Omissions Or Misrepresentations Because The Letter Changed Drastically After His Last Review And He Was Not Give An Opportunity To Review The Final Version.

Finally, even if the Court should find that Mr. Hopkins' brief involvement in the letter is enough to confer liability for omitting information, and that contrary to the evidence, he was the only one in a "unique position" to evaluate the letter, a finding of liability here would require an anachronistic interpretation of the facts because the final letter was drastically different than the last version that Mr. Hopkins reviewed. Simply put, the Division alleges that the final letter omitted the "material information that the Fund (LDBF) was concentrated in subprime." OIP, ¶¶ 2, 35. However, the last version of the letter that Mr. Hopkins saw was not limited to LDBF at all. Rather, the version he commented on included a 1-page cover letter and a 2-page commentary section that discussed and referenced *ten* of SSgA's active fixed income funds, all of which had varying levels of subprime exposure. See Div. Ex. 127. Thus, while some of the funds were

highly concentrated in subprime (such as LDBF), others were not and several contained significantly less subprime. For example, the Absolute Return Mortgage Fund (one of the ten funds included in the draft of the letter that Mr. Hopkins reviewed) contained only 25% subprime. See Div. Ex. 98, p. 4 (CM6D is the Absolute Return Mortgage Fund). Accordingly, it would not have made sense for Mr. Hopkins to even make the suggestion that the Division contends was necessary to make the letter not misleading, i.e. that the Fund was concentrated in subprime, because the last version of the letter Mr. Hopkins reviewed was not limited to the Fund. In fact, had Mr. Hopkins actually made the suggestion the Division is contending he should, he could have been responsible for *actual* misrepresentations in the letter.

To be sure, the final version of the letter was significantly more generic and less detailed than the version Mr. Hopkins saw, as the language was further changed and the 2-page commentary was dropped upon the instructions of legal counsel. See Hopkins Ex. 97. But it is undisputed that Mr. Hopkins never saw this version of the letter or *any* draft of the letter that did not contain the commentary that referenced ten of SSgA's active funds, not just LDBF. Accordingly, Mr. Hopkins cannot be held responsible for omissions in a version of a letter that he never saw.

VI. The Division Failed To Prove That Mr. Hopkins Made, Engaged In, Employed Or Obtained Money Or Property By Means Of Any Material Misrepresentations Or Omissions In Any Presentation Slide Or In Communications With National Jewish Medical And Research Center And Its Consultant, Yanni Partners.

A. The Division's Theory.

Like pretty much every other business in America, State Street used Microsoft Power Point in its dealings with clients and prospective clients. In particular, when making presentations to investors, the company's client-service personnel and product engineers

(including Mr. Hopkins) sometimes included "standard" Power Point slides that gave an overview of certain aspects of the Fund's portfolio and strategy. Tr. 83 (Hopkins). The Division alleges that Mr. Hopkins "was also responsible for drafting or updating" these standard slides (Division Prehearing Brief, p. 7) and that two of the slides were materially misleading.

First, the Division complains about a slide that "represented that one of the Fund's objectives was '[m]odest use of leverage to manage risk and enhance returns.'" Division Prehearing Brief, pp. 8-9. This was misleading, the Division says, because in 2007 "the Fund's use of leverage often resulted in exposure to the subprime market in excess of 150% of the Fund's market value" and, in the Division's opinion, "[t]his was not modest leverage...." Division Prehearing Brief, p. 9.

Second, the Division alleges that the so-called "typical" slide was misleading. Division Prehearing Brief, pp. 7-8; OIP, ¶¶ 15-17. The "typical" slide was entitled "Typical Portfolio Exposures and Characteristics – Limited Duration Bond Strategy." E.g., Div. Ex. 23, p. 12. It contained some text, as well as two bar charts under the heading "Breakdown by market value." Id.; OIP, ¶¶ 15-17. The left-hand bar chart, under the sub-heading "By sector," indicated that a "typical" distribution would have 55% of the Fund's portfolio invested in asset-backed securities. E.g., Div. Ex. 23, p. 12. The Division claims that this bar chart was misleading in two ways: (1) it "failed to disclose any exposure to subprime investments," because it did not note that "subprime" securities were categorized as asset-backed, and (2) it "also indicated a greater level of sector diversification than actually existed" in 2006 and 2007 because it suggested that the Fund's ABS exposure represented only 55% of its portfolio, when in fact "its actual investments during this time were almost all ABS, of which almost all was subprime ABS." Division Prehearing Brief, p. 7; OIP, ¶¶ 15-17.

B. The Division Failed To Prove That The Presentation Slides Were Materially Misleading.

1. The Fund's Leverage Was "Modest" During The Period In Question.

According to the Division, Mr. Hopkins first "used" the "modest leverage" slide on December 11, 2006, and last "used" it on May 16, 2007. Div. Ex. 33, p. 41; Flannery 305, p. 17. During this period, the Fund's leverage never exceeded a ratio of 1.5. Div. Ex. 181, p. 3. Contrary to the naked opinion offered in the Division's prehearing brief, Mr. Wands testified this was a modest amount of leverage (Tr. 2852 (Wands)), if not in fact a "conservative to moderate" amount (Tr. 1758 (Pickett)) in the opinion of the Fund's lead portfolio manager, Mr. Pickett. Tr. 494-95 (Hopkins), 1545 (Pickett). The Division offered no evidence to rebut these characterizations; thus, there is no basis in the record for the assertion that the "modest leverage" slide was materially misleading.

2. "Subprime" Investments Were "Asset-Backed Securities."

Nor was there anything misleading – or even unusual – about classifying subprime mortgage-backed investments as ABS. As noted above, this is a common, even standard, denotation, and even the Division itself used the phrase "asset-backed securities" during this period to refer to structured securities backed by mortgage loans. See, e.g., Sirri Report, ¶¶ 32-39; Hopkins Ex. 136, 165; Tr. 3045-46 (Peavy). There was virtually no risk that a sophisticated investor would reasonably have thought otherwise, and the Division introduced absolutely no evidence to suggest that any State Street investors did. In fact, Mr. Hammerstein testified that he knew that "the ABS sector did include residential mortgages, certain residential mortgages and home equity loans." Tr. 2531 (Hammerstein).

3. The Division Failed To Show That The Fund's "Typical" ABS Exposure Was Not 55%.

Finally, the Fund's actual ABS exposure may have been greater than 55% during the first half of 2007, but the slide at issue did not purport to offer a snapshot of current investments at any given time. It was conspicuously labeled "Typical Portfolio Exposures and Characteristics," not "Current Portfolio Exposures and Characteristics." E.g., Div. Ex. 23, p. 12. Current data was always available to investors elsewhere. See, e.g., Hopkins Ex. 126; Peavy, A40; Tr. 3031-3032, 3093 (Peavy); Hopkins Ex. 154 (admission of this exhibit currently under advisement); Hopkins Ex. 156 (see offer of proof regarding this exhibit Tr. 3135-38). "Typical," however, means "representative," not actual or current. See, e.g., The Random House Dictionary of the English Language 1533 (unabridged ed. 1973) (primary definition of "typical" is "of the nature or serving as a type or representative specimen").

The Division's claim, then depends on the notion that the sophisticated investors who attended the presentations in which Mr. Hopkins allegedly discussed the "typical" slide would have taken it to mean something it didn't say. But there is, of course, no evidence that the slide, if used, had such a "misleading" effect on any of those investors: none testified.

Nor did the Division prove that this speculative effect would have been material. The evidence uniformly indicated that it would not, for at least two reasons. First, the total mix of information available to all of the investors to whom Mr. Hopkins spoke included the actual, current allocation of the Fund's portfolio which was noted on the quarterly fact sheets, available through the Client's Corner and Consultant's Corner websites, and available to any investor's client-facing representative by virtue of his or her access to the Characteristics Database. See Hopkins 126; Tr. 417, 425-26 (Hopkins), 2774-76 (Carlson).

Second, as noted, sector diversification was not a significant factor at this time. Tr. 208-9 (Hopkins) (Hopkins testified: "I was never – I never addressed these sector breakdowns [in the

"typical" slide] and I was never asked a question on them. Had I been asked a question, I was prepared to answer them and that's what my notes were there for."); Tr. 2673 (Carlson testified that no client "ever" asked him for a sector breakdown of LDBF). Indeed, David Hammerstein, who advised National Jewish Medical and Research Center on its investment in the Fund, admitted that his firm had not even bothered to collect information about the Fund's sector diversification as part of its pre-investment due diligence. Tr. 2444, 2549 (Hammerstein).

C. The Division Failed To Prove That Mr. Hopkins Used The "Typical" Slide In A Materially Misleading Way.

Even if the "typical" slide had been used, and *could* have misled anybody about the Fund's actual ABS exposure, any misimpression would have been negated if, when presenting the slide to investors, a representative of State Street supplemented its description of the Fund's "typical" exposure to asset-backed securities with information about its actual, current position in the ABS sector. The Division cannot plausibly contend that a communication which said, "This is our 'typical' exposure, and this is our actual exposure," was misleading in any way.

Mr. Hopkins did nothing wrong, then, because the testimonial and documentary evidence shows that this was in fact his practice during the period in question. Tr. 486-87 (Hopkins). Before making a presentation to investors, he routinely obtained current information that might be relevant to his audience from the Fund's investment team, then marked up his hard copies of the presentation slides with that information. Id. In particular, he consistently annotated the "typical" slide with a notation about the percentage weight of the Fund's actual, current investment in asset-backed and other securities. See, e.g., Tr. 486-87 (Hopkins); Div. Ex. 9, p. 24; Div. Ex. 23, p. 12; Div. Ex. 34, p. 19; Div. Ex. 43, p. 35. With only one dubious exception, the Division presented no evidence to suggest that Mr. Hopkins ever deviated from this practice.

The dubious exception is the testimony of David Hammerstein, the chief strategist for Yanni Partners, an investment consultant which advised National Jewish Medical and Research Center about, among other things, its indirect investment in the Fund. Tr. 2429-2661 (Hammerstein). Through Mr. Hammerstein, the Division presented evidence that Yanni and National Jewish had received a set of the standard presentation slides, including an unannotated copy of the "typical" slide, from State Street in advance of a presentation to National Jewish on May 10, 2007. Hopkins Ex. 57. Mr. Hopkins took part in the presentation. Tr. 154 (Hopkins), 2455 (Hammerstein); Div. Ex. 83; Hopkins Ex. 59, 167. He did not, however, send the unannotated slide to Yanni Partners or its client. It was transmitted, via e-mail, by another State Street employee, who did not even copy Mr. Hopkins on the e-mail. Hopkins Ex. 57. There is no evidence, therefore, that Mr. Hopkins bears any responsibility for this communication.

The Division will try to cover this gap in its case with testimony from David Hammerstein that Mr. Hopkins actually "provided" the unannotated "typical" slide at the May 10 meeting, leading Hammerstein to understand "[t]hat portfolios generally had an allocation among sectors based on these percentages [in the "By sector" bar chart], 55 percent ABS, 25 percent CMBS, and down the line." Tr. 2461-62 (Hammerstein). This testimony is not credible or reliable, however, and fails to support the claim against Mr. Hopkins for the following reasons:

1. The Division Failed To Prove That The Unannotated "Typical" Slide Would Have Been Materially Misleading To Yanni Partners Or National Jewish.

For reasons already stated, even an unannotated version of the "typical" slide would not have been misleading to an audience of sophisticated investors: the classification of mortgage-backed securities as "ABS" was standard, and the slide conspicuously described only "typical," or representative allocations and did not purport to give current sector weights. See, e.g.,

Hopkins Ex. 136, 165; Tr. 486-87 (Hopkins); Div. Ex. 9, p. 24; Div. Ex. 23, p. 12; Div. Ex. 34, p. 19; Div. Ex. 43, p. 35. In the context of an ongoing relationship with an existing investor such as National Jewish, moreover, the slide represented only a tiny component of the total mix of information available, which included detailed data about the Fund's current portfolio allocation. See Hopkins Ex. 126; Hopkins Ex. 128A. Not only was such information "made available" *to* this investor, but it was very likely reviewed *by* National Jewish, whose employee accessed the Client's Corner website eleven times between January and May 2007. Hopkins Ex. 129, p. 19 at line 742. Moreover, SSgA had posted this information to eVestments, a third-party resource for consultants to which Yanni Partners subscribed. See Hopkins Ex. 154, 156; Tr. 2532-33 (Hammerstein), 3092 (Peavy).[9]

There is no evidence that National Jewish was not a sophisticated investor. Its sophistication is demonstrated by its willingness to employ an experienced investment consultant, Yanni Partners, and its chief strategist, David Hammerstein. See Hopkins Ex. 139. Mr. Peavy's expert testimony established (and the Division did not refute) that it would have been unusual and unreasonable for a sophisticated investor, or for an even more sophisticated investment consultant, to have relied exclusively – or even extensively – on a single Power Point slide. See, e.g., Peavy, A40, A55-A63; Tr. 3066 (Peavy).

There is no evidence, moreover, that National Jewish or Yanni Partners did consider the sector breakdowns on the "typical" slide to be material information. To the contrary, the

[9] At the close of evidence, Mr. Hopkins made an offer of proof regarding the evidence that would have been adduced had the cross-examination of Mr. Hammerstein not been truncated. Tr. 3133-38. In particular, the evidence would show that within days after being sued by a client for failure to ascertain the securities held in the LDBF portfolio, Yanni Partners accessed eVestments and printed a March 2007 report indicating that LDBF was 100% invested in ABS. See Tr. 2657-58 (Hammerstein), 3133-38; Hopkins Ex. 156. This is significant for two reasons: first, the evidence demonstrates that SSgA was proactively posting LDBF fund information to third-party data resources used by consultants, and second, Yanni Partners obviously knew where and how to immediately access information regarding LDBF to the extent Yanni Partners believed that information to be relevant to the provision of its consulting services. See also Hopkins Ex. 154 (pending).

breakdowns obviously were *not* important to Yanni Partners when the investment recommendation was made. It did not request information about the Fund's holdings or sector breakdown as part of the "due diligence" it performed. Tr. 2444, 2549 (Hammerstein); Hopkins Ex. 140, 146. This was not an oversight. When Yanni Partners believed sector allocations were relevant to the formulation of its investment recommendation, it asked. Hopkins Ex. 147 (last page). Tellingly, Mr. Hammerstein saw no need to comment on the issue when he compiled his report about the May 10 meeting. Div. Ex. 83. His debriefing notes to National Jewish regarding the SSgA presentation, which he ostensibly wrote on May 11, said, *in toto*:

> Amanda Williams and Jim Hopkins entered the meeting. Amanda provided an organizational overview. Jim talked about the limited duration bond fund. He noted that in the February/March period, the fund adhered to the investment guidelines and SSgA's compliance procedures. The ABX issue is very cheap, reflecting fears in the market. The spike in volatility led SSgA to sell a portion of the ABX issue to comply with SSgA's risk controls, based on value at risk framework. SSgA is closely monitoring the credit markets. Jim provided a detailed explanation of the group's monitoring procedures.
>
> Jim and Amanda made a very good presentation.

Div. Ex. 83.[10]

The fact that Mr. Hammerstein's notes say nothing about the "typical" slide or the subjects it covered casts grave doubt on his testimony that Mr. Hopkins presented the "typical" slide at all. If the slide was presented, however, then Mr. Hammerstein's account debunks the notion that the slide's contents were material to him or his client: he didn't even bother to mention it.[11]

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[10] At trial, Mr. Hammerstein testified that Mr. Hopkins spoke for thirty minutes, and was not rushed. Tr. 2455, 2458 (Hammerstein). By contrast, he testified that his introductory remarks were delivered in 2-3 minutes. Tr. 2644 (Hammerstein). His testimony is betrayed by his contemporaneous narrative. His summary of his own presentation takes up seventeen lines of text, dwarfing the six sentences he dedicates to Mr. Hopkins' commentary.

[11] This point is significant. Mr. Hammerstein testified that it was his practice to update his clients regarding new developments. Tr. 2508, 2510, 2516 (Hammerstein). He also averred that Yanni Partners would never selectively disclose important information to some clients, but not others. See id. Thus, when Yanni Partners was debriefed in April 2007 regarding LDBF's underperformance due to the Fund's exposure to the BBB-ABX index, Yanni Partners

Nor was the Fund's portfolio allocation a matter on which Mr. Hammerstein felt any need to inquire in the spring of 2007. Tr. 2549 (Hammerstein). Had he bothered to avail himself of the total mix of information made available to him and his client, he could easily have obtained a precise understanding about the level of the Fund's investment in asset-backed securities, and the extent to which the assets in back of those securities were "subprime" mortgage loans. For example, Mr. Hammerstein could simply have looked at the Fund's most recent quarterly fact sheet, dated March 31, 2007, which accurately and publicly disclosed that 100% of the Fund's portfolio was currently invested in ABS. Div. Ex. 29. By comparing the fact sheet to the "typical" slide, he would have seen the discrepancy between the 55% "typical" figure and the 100% current figure. Div. Ex. 78. Or, more likely, he would have understood that there was no discrepancy, merely apples in one document and oranges in the other, because the slide reported only "typical" sector weights while the fact sheet disclosed the actual, current breakdown.

If, having obtained this information, Mr. Hammerstein had been curious about the extent to which the Fund's asset-backed securities were supported by "subprime" mortgage loans, he could simply have asked State Street. Tr. 3031-32, 3043-46 (Peavy); Peavy, A45-47, A60. He could, for example, have contacted Mark Dacey or another of the client-facing personnel responsible for Yanni Partners' clients. Any of them could have obtained the information for Mr. Hammerstein through the Characteristics Database (to which they all had access) or by asking a member of the investment team. Div. Ex. 246, pp. 6-7. When a consultant from Cambridge

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sent a communiqué to all clients exposed to LDBF. Div. Ex. 73; Hopkins Ex. 150; Tr. 2452, 2628 (Hammerstein). After the May 10th presentation, however, Mr. Hammerstein confirmed that Yanni Partners did not send an update to its clients. When asked why, Mr. Hammerstein admitted that no *new* information was provided during the May 10th presentation. Tr. 2651-52 (Hammerstein). This admission must signify one of three things: Mr. Hammerstein already knew the actual sector breakdown, Mr. Hopkins did not present the typical slide on May 10th, or Mr. Hammerstein did not believe that the information was material enough to bother sharing with his clients.

Associates asked Mr. Hopkins for that information in late April 2007, for example, he got a prompt and accurate answer. Div. Ex. 246 (And Mr. Hopkins followed up with a call to one of the Fund's portfolio managers to make sure that he had given an accurate response. See id.) When Mr. Hammerstein himself finally asked the same question in late July (after the subprime crisis erupted and the extent of the Fund's subprime exposure *had* become material to him), he got a prompt and accurate answer from Jim Hopkins and Mark Dacey. Div. Ex. 128. There is nothing in the record to suggest that he would not have received a similar response two months earlier, or at any other time that he requested it.

To sum up, then, even if Jim Hopkins had presented the unannotated "typical" slide to Yanni Partners and National Jewish in May 2007, the alleged omission of current sector-weight information on the slide would not have been misleading, given the total mix of information available to the client and its consultant, and it would not have been material, given the consultant's utter lack of interest in the information at that time, and at any time before late July 2007. By late July, however, the circumstances had drastically and unexpectedly changed; consequently, Mr. Hammerstein's belated interest in deflecting "blame" casts no light on the information's materiality to him or his client back in May.

2. Mr. Hopkins Did Not Use The Unnanotated "Typical" Slide In The May 10, 2007 Presentation.

Yanni Partners may have received a slide deck containing an unannotated version of the "typical" slide from another State Street employee before the May 10 meeting, but the Division failed to carry its burden of proving that Mr. Hopkins showed or referred to the unannotated slide at the presentation itself. To be sure, David Hammerstein testified to that effect, but his "memory" is far from dispositive; indeed, the record indicates that it was not even a memory at all. Tr. 2482-84 (Hammerstein).

Had it been established, Mr. Hammerstein's ability in March 2011 to recall the specifics of the May 2007 meeting from memory would truly be an amazing thing. State Street's presentation was not at the time a major event for his client (as evidenced by the fact that Mr. Hammerstein devoted only seven lines of text to it in his debriefing). Hopkins Ex. 158. Indeed, Mr. Hammerstein admitted that he learned nothing new from the presentation. Tr. 2651 (Hammerstein). Nothing in the record suggests, moreover, that the meeting was for him the kind of personally extraordinary event that people are actually able to recall in detail years after the fact. It does not, for example, appear to have been Mr. Hammerstein's first meeting with the representatives of an investment fund, or his last, and there was no evidence that the meeting took place at the same time as some other significant occurrence (such as the birth of a child or a great historical event) that might have made it memorable by association. And, finally, the record does not suggest that Mr. Hammerstein just has the kind of unusual memory that would enable him to remember unremarkable events in detail.

To the contrary, it was established on cross-examination that Mr. Hammerstein's remarkable ability to "recall" his interactions with Mr. Hopkins in the spring and summer of 2007 was not a function of his memory at all. His testimony, rather, was reconstructed from the documents that he found in Yanni's files after the fact. Tr. 2482-84 (Hammerstein). Thus, for example, Mr. Hammerstein claimed on direct examination to "remember" that a phone call with State Street had "occurred on July 24" in 2007. Tr. 2464 (Hammerstein). This memory not only turned out to be wrong – Yanni's own e-mails showed that the call was still being *planned* on July 25 (Hopkins Ex. 153) and both the e-mails and Mr. Hopkins' calendar indicated that it ultimately took place on July 27. Hopkins Ex. 153; Div. Ex. 221, p. 59. It also turned out to be less a true "memory" than something that Hammerstein had manufactured from a (misdated)

document. Div. Ex. 128; Tr. 2482-84 (Hammerstein). On cross-examination, before being confronted with documents, he insisted that his recollection was specific and certain. Once confronted, however, this specific and certain recollection that the call had occurred on July 24 became merely an "understanding," and the basis of this "understanding" was revealed to be the incorrect "date on the memo." Tr. 2482 (Hammerstein). Tellingly, when shown the documents that refuted this "understanding," Mr. Hammerstein's memory shifted right along with them. Tr. 2488-89 (Hammerstein); Div. Ex. 128; Hopkins Ex. 153.

Likewise, the unannotated "typical" slide that Mr. Hammerstein found in Yanni's files is the most likely source of his curiously precise "memory" that Mr. Hopkins used the unannotated slide at the May 10 meeting. Hopkins Ex. 57. The presence of the slide in Yanni's files, however, is not a reliable indication of what Mr. Hopkins said or did at the meeting, because it is clear that Yanni received the slide from a different State Street employee a couple of days before the meeting. See id. Even if there was no evidence to refute it, therefore, Mr. Hammerstein's "recollection" would be insufficient to support an inference that Mr. Hopkins actually used the unannotated slide at the meeting.

But there is refuting evidence. Mr. Hopkins does not recall what materials he used at the meeting – unlike David Hammerstein, he was unwilling to reconstruct a "memory" of the event that he didn't truly have – but there is ample documentary evidence to show that he almost certainly did *not* use the "typical" slide in the way that Mr. Hammerstein claimed. Tr. 155, 159-162 (Hopkins). As noted, the slide wasn't mentioned at all in Yanni's "client meeting debriefing" document (Hopkins Ex. 58), or in the "client history" that Mr. Hammerstein authored on the day after the meeting (Div. Ex. 83). It wasn't mentioned in the note entered into State Street's Onyx system on May 11 by Amanda Williams, the "client-facing" representative who attended the

meeting along with Mr. Hopkins. Hopkins Ex. 59. And it wasn't mentioned in the minutes of the meeting of National Jewish Medical and Research Center's Investment Committee, at which the presentation took place. Hopkins Ex. 62, 167. Mr. Hammerstein, of course, was asked to review these minutes for accuracy, yet he added no discussion regarding the "typical" slide – or any of the other 30-plus slides from the presentation in Yanni's files. Hopkins Ex. 62. Finally, the presentation was not attached to Yanni Partners' internal summary, despite Yanni's "typical" practice to attached slides used in presentations. Hopkins Ex. 152 (admission of this exhibit currently under advisement).

a. Mr. Hopkins Almost Certainly Used A Different Set Of Slides, Which Did Not Even Include The "Typical" Slide.

All four of these contemporaneous accounts agree that State Street's presentation at the May 10 meeting had a specific agenda. Div. Ex. 83; Hopkins Ex. 58, 59, 62. According to the National Jewish Investment Committee minutes, Mr. Hammerstein himself summarized it as follows: "The State Street commodities fund sustained a 100 basis point performance shortfall in the first quarter of 2007. . . ."[12] During February 2007, during the market's concerns about the sub prime mortgage markets, a securitized issue that tracks the ABS market suffered a large loss. The fund had a 2.5% exposure to this issue and it caused the performance shortfall." Hopkins Ex. 62.

Mr. Hopkins, the minutes go on to say, "spoke with the committee about the reasons for State Street's underperformance. He expanded on ABX trading and this strategy[,]" noting that "State Street had just fewer than 3% of BBB sub prime investment exposure; 2.5% of that was in BBB ABX." Hopkins Ex. 62. Mr. Hammerstein's account is consistent with this report; he noted

[12] National Jewish was actually invested in the commodities fund, not directly in the Limited Duration Bond Fund. It was indirectly invested in the LDBF because the commodities fund invested some of its assets there. Tr. 2434-35 (Hammerstein).

that "Jim talked about the limited duration bond fund" and mentioned the "ABX issue" as the only specific subject he discussed. Hopkins Ex. 58. Amanda Williams likewise recorded that "Jim began to talk about the reason the Limited Duration Bond Fund underperformed" before being interrupted with questions about the fixed income strategy. Hopkins Ex. 59.

The purpose of Mr. Hopkins' presentation to National Jewish, in other words, was essentially the same as the purpose of the client letter he had drafted back in March and the April 9, 2007 call with Yanni Partners: to discuss the Fund's underperformance in the first quarter of 2007 in light of the issues that had arisen then with the BBB/ABX index. See, e.g.,Tr. 165, 232, 254-55 (Hopkins), 2460-61 (Hammerstein). This was, unsurprisingly, a familiar topic in the spring of 2007. Mr. Hopkins had dealt with it not only in the CAR alert and client letter, but also in a presentation he had made to another investor, Catholic Healthcare Partners, on April 25, only a couple of weeks before the National Jewish presentation. E.g., Hopkins Ex. 135; Tr. 232-35 (Hopkins).

Mr. Hopkins did not use the "standard" set of Power Point slides for the Catholic Healthcare meeting. Hopkins Ex. 135. He used a different slide deck, which focused more specifically on the recent performance issue and its causes. Hopkins Ex. 135. This customized presentation did not include the typical slide, which after all wasn't relevant to the discussion that Mr. Hopkins intended to have with Catholic Healthcare, an existing investor. Catholic Healthcare had already done its due diligence and in April 2007 was more concerned to learn about the Fund's recent performance than to be reminded of its "typical" characteristics.

As was his practice when making any presentation supported by Power Point slides, Mr. Hopkins marked up his copy of the customized Catholic Healthcare slide deck with handwritten notes that added pertinent information and current data. Hopkins Ex. 135.

Among the areas he addressed in these notes was the extent of the Fund's current "subprime" investments. Hopkins Ex. 135, p. 8 (slide captioned "Short Duration Portfolio Performance"). This was not an item that Mr. Hopkins usually included in his presentations, because at the time it wasn't a matter of interest or concern for most clients or prospective investors. Tr. 203 (Hopkins). As it happened, however, Mr. Hopkins had very recently been asked about the Fund's subprime exposure by a consultant at Cambridge Associates, and after answering the question from memory he had double-checked his response with one of the Fund's portfolio managers. Div. Ex. 246, pp. 6-7; Tr. 534 (Hopkins). Thus, when he marked up the customized, BBB-ABX-focused slide deck in preparation for his meeting with Catholic Healthcare, Mr. Hopkins wrote down:

What % is subprime in portfolio? 75%
Where is ABX now?
Sold 1/3 position in late February.
Now about 3%.

Hopkins Ex. 135; Tr. 533-43 (Hopkins). It is not clear whether Mr. Hopkins spoke about the Fund's subprime exposure at the meeting with Catholic Healthcare. Tr. 235 (Hopkins). It is clear, though, that Mr. Hopkins came to the meeting *prepared* to give truthful and accurate information about the subject, just as he had given truthful and accurate information about the subject to Cambridge Associates just a day or two earlier. Div. Ex. 246, pp. 6-7.

The foregoing account is relevant to the matter at hand because it offers a plausible and contemporaneous refutation of Mr. Hammerstein's suspect "memory" that Mr. Hopkins used the standard slide deck, including the "typical" slide, at the meeting with National Jewish on May 10. Tr. 2461-62 (Hammerstein). It is more likely, if not certain, that when Mr. Hopkins met with Yanni Partners and National Jewish he actually used a different set of slides: the very same, customized slide deck he had used for the meeting with Catholic Healthcare two weeks earlier.

Tr. 159, 238-40, 540-42 (Hopkins); Hopkins Ex. 135. Again, as one would expect, Mr. Hopkins did not recall the details of a meeting that had taken place years earlier (Tr. 158-62), but there is a wealth of circumstantial evidence to support this inference and to refute David Hammerstein's suspiciously detailed "memory."

The meeting with National Jewish took place in the same time frame, and concerned the same subject, as the meeting with Catholic Healthcare. Tr. 238-40, 540-42 (Hopkins); Hopkins Ex. 135; Div. Ex. 78; Div. Ex. 221, pp. 32-37. The Catholic Healthcare slides contain additional notes, in a different colored ink, indicating that Mr. Hopkins updated the information on his copy of the slides *after* the meeting with Catholic Healthcare, and only a couple of days *before* the meeting with National Jewish. For example, on Slide 12 of the Catholic Healthcare deck, he added "current" prices for the BBB-ABX as of May 4 and May 8, 2007. Hopkins Ex. 135.[13] This information couldn't possibly have been added for the meeting with Catholic Healthcare on April 25, and aside from his meeting with National Jewish on May 10, there is no evidence that Mr. Hopkins gave any other presentations on the subject during this period. Div. Ex. 221, pp. 32-37. Moreover, Mr. Hopkins' calendar indicates that he was preparing for the National Jewish presentation during this period. See id. If he was following his custom and adding this current information for use at an upcoming client presentation, therefore, Mr. Hopkins *must* have been including it for use at the meeting on May 10 with National Jewish and Yanni. If he marked up these slides to use at the May 10 meeting, then it is highly likely that he *did* use them then. And if he used the Catholic Healthcare slides instead of the standard slide deck at the May 10

[13] Further, there is specific language contained in Mr. Hopkins handwritten notes from the "Market Review- Triple B Exposure" pages of Hopkins Ex. 135 which are also contained in the summaries of the May 10th presentation to National Jewish; for example, "cheap" (Hopkins Ex. 135, p.13; Div. Ex. 83); "fear" (Hopkins Ex. 135, p. 15; Div. Ex. 83); "volatility" (Hopkins Ex. 135; Div. Ex. 83); "monitoring" (Hopkins Ex. 135, p. 15; Div. Ex. 83); "07-1 [will be most vol.]" (Hopkins Ex. 135, p. 10) and "They are not invested in the ABS 07-1 because it's a more volatile market..." (Hopkins Ex. 62); "technicals...Tech situation" (Hopkins Ex. 135, p. 11) and "It is hard to defend against a technical issue." (Hopkins Ex. 62).

meeting, then there is no possibility that he showed or discussed the "typical" slide, because the Catholic Healthcare slide deck did not even contain a copy of the "typical" slide.[14]

b. If Mr. Hopkins Used The "Typical" Slide, Then He Almost Certainly Annotated It With Information About The Fund's Current Sector Weights.

The only other plausible scenario is that when he spoke at the May 10 meeting, Mr. Hopkins used the slides that Amanda Williams had forwarded to Yanni Partners a couple of days earlier (Hopkins Ex. 57) but did *not* rely on or refer to a "naked" version of the "typical" slide. There are two reasons for this.

First, although the Power Point presentation that Yanni Partners received from State Street does contain a copy of the "typical" slide, it is unlikely that Mr. Hopkins referred to it at all. Div. Ex. 78. Mr. Hammerstein's document-enhanced "memory" is not persuasive. With respect to both the details and the broad strokes, it is at odds with the other evidence, including his own contemporaneous report of the meeting. For example, at trial, Mr. Hammerstein purported to remember that Jim Hopkins spoke to the investment committee for thirty minutes. Tr. 2455 (Hammerstein). It is doubtful that he actually remembered this detail, several years after the fact, and just as doubtful that his recollection is accurate. Mr. Hopkins remembered getting lost on the way to the meeting, arriving late as a consequence and having limited time to speak. Tr. 159-60 (Hopkins). This is consistent with Amanda Williams' contemporaneous note, made at a time when the duration of the meeting was not an issue, and which recorded that she and Mr.

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[14] There is more to the story. On May 16, 2007, Mr. Hopkins again discussed the underperformance in the Fund due to the BBB-ABX at a presentation to a client called Mercer. Div. Ex. 85, 86. A comparison of the slides he used at the Catholic Healthcare meeting and the slides he used at the Mercer presentation (Hopkins Ex. 135; Div. Ex. 85; Div. Ex. 86) show that Mr. Hopkins, consistent with his practice, copied information from his Catholic Healthcare presentation and updated it with more current information for the Mercer presentation. Tr. 538-40 (Hopkins). For example, on the page titled "Recent Price Action and Current Relative Value[,]" Mr. Hopkins updated the price and spread as of "5/14" from the "5/4" and "5/8" numbers while copying verbatim his "vs. 3.25 when we put a trade on" language regarding the spreads. See Hopkins Ex. 135, P. 12; Div. Ex. 86, p. 20. It is very unlikely that Mr. Hopkins updated his Catholic Healthcare presentation after April 25, used the presentation as a template for a May 16, 2007 presentation, yet *didn't* use it on May 10.

Hopkins had only fifteen minutes to present to the Investment Committee, which had several other items on its agenda. Hopkins Ex. 159. It is also consistent with Mr. Hammerstein's own written debriefing, which used two single-spaced pages to describe a two-hour meeting, but devoted only seven lines of text to State Street's presentation. Div. Ex. 83.

Whether it lasted for fifteen or thirty minutes, moreover, it is both unproven and unlikely that Mr. Hopkins used the "typical" slide when speaking to the Investment Committee. There wouldn't have been enough time. The slide deck that Yanni Partners received consisted of thirty-five slides. Hopkins Ex. 57. Mr. Hammerstein claimed that Mr. Hopkins discussed "most" of them. Tr. 2459 (Hammerstein). This is not credible, and casts further doubt on Mr. Hammerstein's claim to have an independent memory of the meeting. Even with thirty minutes, and even if he had done nothing but read the slides without discussion, Mr. Hopkins could barely have read through "most" of them.

If time constraints forced him to pick and choose among the slides for his discussion, however, then there is no reason think that Mr. Hopkins would have chosen to spend precious moments focusing on the "typical" slide. Tr. 199-202 (Hopkins). The purpose of State Street's presentation was not to describe the Fund's typical characteristics, but to discuss "the reasons for [the Fund's] underperformance" during the first quarter of 2007. Hopkins Ex. 62. The "typical" slide did not concern that issue. The slides that Yanni Partners received, however, *did* contain a section – entitled "Market Review – Triple B Exposure" – which covered the underperformance issue in depth. Hopkins Ex. 57, pp. 18-23. This section consisted of six slides, respectively captioned: (1) What is the ABX Trade?, (2) What Happened in the Last 2 Weeks of February?, (3) Recent Price Action and Current Relative Value, (4) What Do Current ABX Levels Imply?, (5) 2 Potential Scenarios Going Forward, and (6) Actions Taken. Id. Because these slides

addressed, in great detail, exactly the topics that were noted as the focus of the meeting in Mr. Hammerstein's memo, by Ms. Williams' memo, and by the Investment Committee's minutes, the only plausible inference is that they – not the irrelevant "typical" slide – were what Mr. Hopkins used when he made his presentation on May 10. Notably, and not surprisingly, these slides are identical to the slides Mr. Hopkins marked up in the Catholic Healthcare and Mercer presentations. Hopkins Ex. 135; Div. Ex. 85.

Second, in the unlikely event that he used the "typical" slide at all, it is virtually certain that Mr. Hopkins presented it with the benefit of an annotation that would have corrected any misleading impression a "naked" slide might have engendered. As noted, the trial established that it was Mr. Hopkins' practice to use handwritten notes to "customize" the slides he presented for his particular audience and the issues in which it was interested. For example, and in particular, the evidence showed that when he used the "typical" slide, he always took the time to ascertain and mark down on his copy of it the actual, current percentage allocation of the Fund's portfolio to the ABS "bucket."

- He did it again in February 2006, when he presented to W.H. Smith. Div. Ex. 9.
- He did it again in July 2006, when he presented to Johns Hopkins. Div. Ex. 23.
- He did it again in December 2006, when he presented to Kalson & Associates. Div. Ex. 34.
- He did it again in February 2007, when he presented to LACERA. Div. Ex. 43.

The Division offered no evidence that Mr. Hopkins *ever* deviated from this practice – i.e., that he ever included a "naked," unannotated version of the "typical" slide in one of his investor presentations.[15] Nor did the Division offer any evidence to explain *why* Mr. Hopkins would have

[15] The slides that Mr. Hopkins used for his presentation to Catholic Healthcare on April 25, 2007 (and that he may well have used in his presentation to National Jewish) were similarly annotated. Hopkins Ex. 135.

deviated from this practice with respect to National Jewish alone among the numerous clients to whom he made presentations. The assumption offered by Mr. Hammerstein's testimony is therefore utterly implausible. The only plausible inference is that, if Mr. Hopkins used it in the National Jewish presentation, he annotated the "typical" slide in his usual fashion to (1) draw a distinction between "typical" and current ABS exposure, and (2) to include accurate data about the latter item.

D. Mr. Hopkins Did Not Tell David Hammerstein That The Fund's "Total Exposure" To "Subprime Issues" Was Only 2% In April 2007.

David Hammerstein also testified that during a telephone call with representatives of State Street on April 9, 2007, Mr. Hopkins told him "that the portfolio's total exposure to subprime issues is 2 percent." Tr. 2450-51 (Hammerstein). It is clear, though, that Mr. Hammerstein again had no independent "memory" – he "remembered" only what a contemporaneous memorandum of that call allowed him to assert. Div. Ex. 69. The Division elicited no testimony from Mr. Hammerstein to suggest that he could independently remember anything that hadn't been written down soon after the fact. Tr. 2429-81 (Hammerstein).

The reason for the phone call in April, like the purpose of the meeting in May, "was to evaluate the reasons for the fund's cumulative 100 basis point performance shortfall during February and March 2007." Div. Ex. 69. Again, Mr. Hammerstein's client, National Jewish, was not invested directly in the Fund; its money was in the State Street Global Advisors' Commodities Fund, but the LDBF served "as the collateral for the commodities futures exposures from the swap position." Div. Ex. 69.

There is no question that State Street attributed the Fund's recent underperformance to the behavior of its 2-3% investment in the lower tranches of the "subprime" investment market – that is, the BBB-ABX index – alone. See, e.g., Div. Ex. 46, 86; Hopkins Ex. 34, 135. The client

letter that State Street sent to its investors in March was captioned "Triple B Exposure and Impact to SSgA's Limited Duration Bond Fund." The relevant sections of the slide deck used in the presentation to Catholic Healthcare in late April, and of the slides that State Street e-mailed to Yanni Partners a couple of days before the meeting on May 10, were both entitled "Market Review – Triple B Exposure." Hopkins Ex. 135; Div. Ex. 78. And, according to National Jewish's Investment Committee Minutes (which Mr. Hammerstein vetted for accuracy), Mr. Hopkins stated "State Street had just fewer than 3% of BBB sub prime investment exposure…." Hopkins Ex. 62. Had Mr. Hopkins been discussing the Fund's total subprime exposure, there would have been no need to add the credit rating qualifier to the statement.

There is no reason to believe, therefore, that a telephone call conducted to evaluate the reasons for the same underperformance would have focused on anything other than the BBB-ABX index as well. The Division hangs its claim, however, on the fact that, in several places throughout his memorandum of the phone call, Mr. Hammerstein referred generally to "subprime" issues: (1) noting that State Street had attributed the Fund's underperformance to the collapse in prices for "sub-prime mortgage issues," (2) noting that "[r]ecently, the Fund has a 2.5% position in floating rate notes with sub-prime mortgage exposure," and (3) recording that "[t]he Fund's current exposure to the sub-prime issues is now 2% because it trimmed this exposure slightly to manage risks." Div. Ex. 69. The last two statements would be false only if they reflected information given by State Street about the Fund's *total* investment in all grades of "subprime" securities (which was much more than 2% at the time); they would be true if they reflected information given by State Street about the Fund's investment in BBB-rated subprime securities alone (which was actually in the 2% range at the time).

The case against Mr. Hopkins therefore depends on assigning retrospective precision to patently imprecise language. Context is important here. In April 2007, "subprime" was not the familiar, effectively-pejorative term that it would later become. Sirri Report, ¶ 41. "[P]rior to the financial crisis of 2007-2008, subprime was merely a technical descriptor of certain assets…[.]" Id. It referred to a security backed by mortgage loans given to borrowers with certain credit characteristics. Id. The word "subprime" described the credit quality of the underlying assets (the mortgage loans), and not the credit quality of the mortgage-backed security itself. "Subprime" securities could and did (and still do) have high-quality, AA and AAA, credit ratings. See, e.g., Sirri Report, ¶¶ 40, 50, 56. In fact, the vast majority of the Fund's "subprime investments" were of such high quality, with only a small percentage, always less than 5%, in a BBB tranche. Div. Ex. 69.

Because "subprime" was not a significant descriptor at the time – i.e., because the distinction between a BBB and an AAA security was *much* more significant than the distinction between a "subprime" security and, e.g., a credit-card backed ABS – it is certainly understandable that somebody like Mr. Hammerstein (who after all had not to that point assigned any significance himself to the "sector" diversification of the Fund) might be less than precise when using such descriptors. Indeed, under these circumstances, it would have been the most natural thing in the world for Mr. Hammerstein to conflate the specific ("BBB subprime") and the generic ("subprime"), and to casually record an accurate, specific statement ("the Fund now has about a 2% position in BBB subprime investments") in inaccurately general terms ("the Fund's current exposure to the sub-prime issues is now 2%").

There is nothing in Div. Ex. 69 – and therefore nothing in the testimony that Mr. Hammerstein derived from it – to suggest that Mr. Hammerstein did *not* write down something

that Jim Hopkins did not say on April 9. Tr. 2448-50 (Hammerstein). To the contrary, the context strongly indicates that Mr. Hopkins' remarks *were* focused on the Fund's BBB position, and that when Hammerstein wrote down "sub-prime issues," he was reflecting comments about "BBB subprime" securities alone.

For example, consider the following sequence of statements from page 1 of Mr. Hammerstein's memo: "The lowest rung of investment grade securities is BBB; the Fund limits BBB exposure to 5%. Recently, the Fund has a 2.5% position in floating rate notes with sub-prime mortgage exposure." Div. Ex. 69, p. 1. The first of these two sentences plainly indicated that Mr. Hopkins had been talking only about BBB investments. Id. The second sentence just as plainly referred to the same subject – its evident purpose was to compare the Fund's actual BBB position (2.5%) with its BBB limit (5%). Id. Yet in the next sentence Mr. Hammerstein used the phrase "sub-prime mortgage exposure" to loosely characterize the same information – in other words, he used "sub-prime mortgage exposure" when he *must* have meant "BBB subprime mortgage exposure." Id.

Later, on page 2 of his memorandum, when he noted that "the Fund's current exposure to the sub-prime issues is now 2% because it has trimmed this exposure slightly to manage risks," Mr. Hammerstein was obviously referring back to the same information about the same subject, once again comparing apples to apples. Div. Ex. 69. Now the specific subject of comparison was the Fund's *current* exposure (2%), "trimmed" from what had recently been a slightly larger exposure – which could only be its recent 2.5% position in *BBB* subprime securities. Id. When Mr. Hammerstein used the phrase "sub-prime issues" on the second page of his memorandum, then, he must have been recording Mr. Hopkins' *accurate* report of the Fund's position in BBB securities alone. Id. Any claimed confusion on Mr. Hammerstein's part would have been cleared

up by May 10th,when, as noted by National Jewish, Mr. Hopkins limited his remarks to the BBB tranche. Hopkins Ex. 62.

Consequently, there is no basis for concluding that Mr. Hopkins made an affirmative misstatement about the extent of the Fund's total subprime investment during the April 9 call. The most that could be inferred is that he reported BBB-subprime exposure correctly, but "omitted" the Fund's broader position in subprime investments of all grades. This, however, was not an actionable omission, for reasons already stated.

VII. The Claims Under Section 10(b) And Rule 10b-5(b) Are Barred By The Rationale Expressed In The First Circuit's Decision In *SEC v. Tambone*.

Before the evidentiary hearing began, Mr. Hopkins submitted a motion for summary disposition that spoke, in part, to the inadequacy of the claim that he violated Section 10(b). A copy of the memorandum in support of that motion is attached to this memorandum and incorporated herein by reference. The legal insufficiency of the Section 10(b) claim has only become more apparent in light of the evidentiary record.

Rule 10b-5(b) authorizes punishment only of actors who "make an untrue statement" or who omit information necessary to render a statement the actor "made . . . not misleading." 17 C.F.R. § 240.10b-5(b). The United States Court of Appeals for the First Circuit – to which any appeal from this tribunal's decision will ultimately lie – has recently explained that it will construe this rule according to its narrow textual scope. SEC v. Tambone, 597 F.3d 436, 446 (1st Cir. 2010) (en banc). In Tambone, the defendants had merely *used* statements made by others – they had disseminated prospectuses issued by a corporation. See id. at 447. Even if the prospectuses contained false statements, the First Circuit held, the defendants had not "made" them within the meaning of Rule 10b-5(b). This was partly a matter of simple exegesis – to "use" is not to "make." See 597 F.3d at 445. But it was also necessary to maintain the critical

distinction between primary and secondary violations of the securities laws, which the Supreme Court had constructed in Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994). "If Central Bank is to have any real meaning," the First Circuit said, then "a defendant must actually make a false or misleading statement in order to be held liable [as a primary violator] under section 10(b). Anything short of such conduct is merely aiding and abetting." Tambone, 597 F.3d at 447 (quoting Shapiro v. Cantor, 123 F.3d 717, 720 (2d Cir. 1997)).

In Tambone, the SEC advanced an alternative theory to the trial court: that the defendants had "made" the alleged misrepresentations because they had "participat[ed] in the drafting process that went into the development" of the prospectuses. Id. at 440. The District Court rejected this theory as well, ruling that the SEC had failed to make "a specific allegation linking either defendant to a statement in a particular prospectus[.]" SEC v. Tambone, 473 F. Supp. 2d 162, 166 (D. Mass. 2006).

The SEC dropped its "authorship" theory on appeal. 597 F.3d at 447 n.10. The First Circuit therefore did not have occasion to decide whether behind-the-scenes participation in drafting a document could come any closer than simple dissemination or use of the document to proving that a defendant had "made" an offending statement therein. Mr. Hopkins submits, however, that the "authorship" issue must be resolved in the same way, and for the same reasons, as the First Circuit's resolution of the "use" issue. The person who drafts language for another person to speak or publish does not "actually make" the statements in the speech or publication. See Tambone, 597 F.3d at 447. At least, he does not "make" them to the audience for the speech or to the readers of the publication, and that of course is the only way in which one can "make" a statement that violates Rule 10b-5. The President's speechwriter may substantially participate in

the drafting of a State of the Union address – indeed, the speechwriter may be its only "author" – but he or she does not "actually make" the statements in the speech to Congress. Just as the President bears political responsibility for the statements in his speeches, the person or entity who publishes a misleading communication to investors bears primary legal responsibility for the statements therein – "[a]nything short of such conduct is merely aiding and abetting." Tambone, 597 F.3d at 447.

The Division's Section 10(b) claim against Mr. Hopkins fails this test. He has *not* been charged as an aider and abettor. But he *cannot* be held liable as a primary violator because he did not "make" the allegedly-offending statements in any legally-recognizable sense of the word. He did not even "author" or "use" the alleged misstatements in the Fund's quarterly fact sheets – the narrative sections of those documents were written by others, and there is no evidence that Mr. Hopkins even disseminated a fact sheet during the period in question to an investor or prospective investor in the way that the defendants in Tambone disseminated the prospectuses to buyers (but still did not "make" the statements contained in those documents). See Section III.D, supra, at 14-15. In order to do what the Division suggests, and hold Mr. Hopkins liable as a primary violator for failing to edit documents that were written by other people for publication and dissemination by State Street, this tribunal would have to (1) define the word "make" in a way that no dictionary (or court) ever has, and (2) flout the Supreme Court's instruction to maintain a clear distinction between primary and secondary violations of the securities laws.

Mr. Hopkins played no more than a draftsman's role, meanwhile, in the creation of the March and July client letters. To call him even an "author" of those documents would be a considerable stretch, especially with respect to the July letter, which bore little resemblance to his initial draft and which was revised substantially without his participation. See Section IV,

supra, at 17-28; Section V.A, supra, at 22-31. It should be noted, moreover, that the Division says the letters were misleading only because of what they omitted, not because of what they contained. Mr. Hopkins had no control over the focus of these communications. In each case, he was assigned to write something that addressed a specific topic; in each case, what he wrote was perfectly accurate. The claim here, apparently, is that Mr. Hopkins ought nevertheless have insisted on adding the "omitted" information to his initial drafts, even though he had no reason to believe that the information was material to the matter at hand, and even though he had no control over the final product. Whether the Division might be able to spread this thin fabric to cover a viable aiding-and-abetting claim is a moot point. Mr. Hopkins did not "make" the alleged omissions, and so a primary violation of Section 10(b) cannot be conjured out of these facts.

This leaves the "typical" presentation slide, and Mr. Hopkins' interactions with Yanni Partners and its client. To be sure, if David Hammerstein is to be credited with the amazing powers of recall that he claims to possess, then Mr. Hopkins may have "made" the statements that Mr. Hammerstein put in his mouth during the phone call in April 2007 and at the meeting on May 10. But Mr. Hammerstein is not to be credited, for all the reasons stated elsewhere in this memorandum: he was not shown to have an extraordinary memory in general; the events he purported to remember were not extraordinarily memorable; it is clear that he manufactured his "memories" out of the contents of contemporaneous documents, and yet his recollections are at odds with the documents in several important ways – in particular, in the way that Mr. Hammerstein claims to have attached material significance to statements that he did not even bother to write down.

Absent Mr. Hammerstein's assertions, this tribunal is left with the claim that Mr. Hopkins "made" the alleged misstatements in the "typical" slide because he (1) did not edit the slide to

make it accurate, and (2) may have shown the slide to investors. This theory withers for lack of evidence: the record does not establish that Mr. Hopkins ever actually showed the "typical" slide to anybody, and yet it does show that whenever he *prepared* to make a presentation using the slide deck that included the "typical" slide, he annotated it to add precisely the information that the Division complains was omitted. The Division's theory, finally, also dies under the rationale expressed in Tambone: even if Mr. Hopkins showed the unannotated slide to some investors, and even if the unannotated slide was misleading, by merely "using" the slide in that manner he did not "make" the statements that it contained, and therefore did not commit a primary violation of Rule 10b-5.

VIII. Mr. Hopkins Did Not Act Culpably.

As noted, the Section 10(b) and Section17(a)(1) claims require the Division to prove that Mr. Hopkins acted with "scienter" – either a conscious intent to defraud or highly reckless disregard of a known or obvious danger of misleading his audience. The Section 17(a)(2) and (3) claims, meanwhile, require proof of at least negligence – the failure to exercise a reasonable level of care under the circumstances. Whatever it may say about the truth and/or materiality of the communications at issue, the record does *not* permit an inference that Mr. Hopkins acted with the requisite culpability.

A. Mr. Hopkins Did Not Consciously Intend To Defraud Anybody.

The Division does not affirmatively contend that Mr. Hopkins consciously intended to defraud any investors – its pre-trial memorandum, for example, goes no further than to assert that he "acted with at least extreme recklessness." Division Prehearing Brief, p. 26. This is a prudent concession. There is absolutely no evidence that Mr. Hopkins ever had anything that remotely resembled a conscious intent to defraud. With respect to the subject-matter of the allegedly-

misleading statements and "omissions" – that is, the extent of the Fund's exposure to asset-backed securities and "subprime" investments of all qualities – the record shows, rather, that Mr. Hopkins repeatedly and willingly disclosed such information to interested parties:

- Various dates in 2006 and 2007 – When preparing for presentations to investors, Mr. Hopkins obtained current data from State Street's investment team, then marked up his copy of the "typical" slide to include a percentage figure that reflected the Fund's current investment in the ABS "sector." Div. Ex. 9, p.24; Div. Ex. 23, p. 12; Div. Ex. 34, p. 19; Div. Ex. 43, p. 35; Div. Ex. 244; Tr. 486-87 (Hopkins).

- April 24, 2007 – Asked by a consultant from Cambridge Associates about the Fund's subprime exposure, Mr. Hopkins disclosed the figure; he then double-checked the accuracy of his disclosure with the Fund's portfolio manager. Div. Ex. 246, pp. 6-7.

- April 25, 2007 – Because the issue had very recently come up, Mr. Hopkins marked up his copy of the Catholic Healthcare presentation slides to include the Fund's subprime exposure. Hopkins Ex. 135. Although Mr. Hopkins may not have had an opportunity to discuss this information at the meeting with Catholic Healthcare, the fact that he went to the meeting prepared to disclose it if asked refutes any suggestion that he harbored an intent to conceal the Fund's subprime exposure from investors in the spring of 2007.

- June 28, 2007 – When another consultant from Cambridge Associates asked a client-service representative named Nicole Chang about the Fund's subprime exposure, Mr. Hopkins made sure that she had accurate information for her response. Div. Ex. 96.

- July 27, 2007 – After the subprime crisis erupted and the Fund's position in subprime securities became a matter of material interest to investors, David Hammerstein of Yanni Partners (who had previously shown no interest in the subject) asked Mr. Hopkins and

Mark Dacey about the Fund's subprime investment. Mr. Hammerstein's own notes of the call show that Messrs. Hopkins and Dacey readily disclosed that 82% of the Fund's portfolio was invested in the subprime mortgage market as of June 30. Div. Ex. 128.

These are not the actions of a man with a conscious intent to defraud. To the contrary, they reflect a sincere concern to provide investors with accurate information about all material matters, and a willingness to disclose any information clients or consultants requested, whether or not the information was deemed significant. And, quite frankly, what would be the point of concealment? The extent of the Fund's subprime exposure was readily available to clients and consultants from a variety of sources. There would have been no reason for, or benefit to, Mr. Hopkins to keep that information secret.

B. Mr. Hopkins Did Not Recklessly Or Negligently Ignore A Danger That His Actions Would Mislead Investors.

Insofar as the "recklessness" aspect of the scienter element is properly viewed as a "lesser form of intent," Greebel v. FTP Software, Inc., 194 F.3d at 199, the preceding argument establishes that the Division has failed to establish either form of culpability sufficient to support its claims under Section10(b) and Section 17(a)(1). Evidence of any form of intent – "conscious" or "lesser" – is simply absent from the record.

There is no proof of culpability, moreover, even if "recklessness" *is* viewed as an extreme form of negligence – i.e., even if recklessness is defined as "an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious the actor must have been aware of it." SEC v. Fife, 311 F.3d at 9-10 (quoting Greebel, 194 F.3d at 198). The Division's recklessness and negligence theories both fail for the same reasons: because the Division has failed to prove that Mr. Hopkins *could* have been aware of the danger that it claims he ignored.

It is important to keep in mind a couple of relevant principles when discussing this issue. First, the culpability requirement applies to *all* elements of the Division's claims. Thus, Mr. Hopkins had to have recklessly or negligently disregarded both (a) the fact that the "omitted" information caused the statements he made to be misleading, *and* (b) the fact that the misleading omissions were material. See Geffon v. Micrion Corp., 249 F.3d 29, 35 (1st Cir. 2001).

Second, whether cast in terms of recklessness (an extreme departure from the standard of ordinary care) or negligence (an unreasonable departure from the same standard), the culpability requirement is contemporaneous. The securities laws do not countenance allegations of "fraud by hindsight." "[T]he fact that something turned out badly" does *not* "mean defendant knew earlier that it would turn out badly." Mississippi Public Employees' Ret. Sys. v. Boston Scientific Corp., 523 F.3d 75, 91 (1st Cir. 2008). Because culpability is an essential element of any statutory fraud charge, "scienter by hindsight" and "negligence by hindsight" are equally impermissible; and because culpability must be proved with respect to both falsity and materiality, "materiality by hindsight" is impermissible as well. The mere fact that an item of information may have turned out to be material in light of subsequent events does not mean that Mr. Hopkins earlier knew it would turn out to be material.

This is the defect in the Division's culpability theory. The charges against Mr. Hopkins depend on proof that, *at the time the allegedly-misleading statements and omissions occurred*, he must have known, or at least should have known, that the extent of the Fund's total investment in all grades of "subprime" securities was material – that it would have significantly altered the total mix of information available to investors who already knew, or were manifestly capable of knowing, that most of the Fund's investments were rated AA or AAA, and that most of them (or all of them, depending on the moment) were categorized as asset-backed securities.

The charges fail, then, unless the Division proves that Mr. Hopkins must have known, or at least should have known, that during the period in question it would be *important* for investors to know that the assets backing the Fund's AA and AAA rated securities were "subprime" mortgage loans, rather than, e.g., credit card debt or student or automobile loans.

The Division did not prove these essential facts. The record shows that Mr. Hopkins sincerely did not believe, and had absolutely no reason to believe, that the extent of the Fund's "subprime" exposure was a material matter. He testified without contradiction (and with support from expert witnesses) that sector allocations were *not* a subject of interest among the investors and consultants with whom he interacted. He was rarely questioned about the issue. Tr. 199-202 (Hopkins); Sirri Report, ¶¶ 32-39. As far as the record discloses, he was asked about it only once (by a consultant), and knew that one colleague had been asked about it (again by a consultant, from the same firm as the first), before the subprime crisis erupted in the summer of 2007. See Div. Ex. 46, pp. 6-7.

It is true that Mr. Hopkins failed to anticipate that crisis. It is true that he did not foresee that the crisis would be caused by weaknesses in the subprime market. But so did everybody else – including SSgA's experienced investment team. "[T]he vast majority of market participants did not anticipate the eventual severity of the subprime crisis during the first six months of 2007." Sirri Report, ¶ 76.

Indeed, the subprime crisis would not have happened otherwise: "For the crisis to occur, it must be unanticipated by almost all market participants and regulators." Sirri Report, ¶ 73 (quoting Alan Greenspan, Testimony to the Financial Crisis Inquiry Comm'n, April 7, 2010). This unrefuted (and irrefutable) observation is key. It means that Mr. Hopkins *could not* have known what he is accused of ignoring. The Division's theory of falsehood and materiality is

predicated on the notion that the Fund's investors deserved to be informed about the Fund's position in subprime securities because that information would have enabled them to avoid the consequences of the imbalances in the subprime market that produced the crisis (e.g., the credit-worthiness of the borrowers who took out subprime mortgage loans, their dependence for refinancing on a rising housing market, the dependence of the securities market on their ability to refinance, the prospect of an unprecedented collapse in housing prices). But those imbalances *must* have been hidden from the general view until the crisis occurred, because if they had been visible, then there would not have been a crisis. As Mr. Greenspan put it: "If the imbalances that precipitate a crisis are visible, they tend to be arbitraged away." Sirri Report, ¶ 73 (quoting Alan Greenspan, Testimony to the Financial Crisis Inquiry Comm'n, April 7, 2010).

The evidence bears this out. In March, April and May 2007, *nobody* saw what Mr. Hopkins is supposed to have recklessly or negligently ignored: That a crisis was looming beyond the horizon that would specifically and inordinately disrupt the market for *all* subprime investments, and that the cause of this crisis was a qualitative difference between AA/AAA subprime-backed ABS, on the one hand, and all other forms of AA/AAA non-subprime-securities on the other. The investment community didn't see it, the regulatory community didn't see it, the media didn't see it, David Hammerstein and his colleagues at Yanni Partners didn't see it, the portfolio managers at State Street didn't see it, and so on.

The fact that Mr. Hopkins didn't see it, either, is therefore unremarkable. What's remarkable, rather, is that the SEC would accuse a mid-level functionary with no special expertise (and no responsibility for making investment decisions at State Street) of recklessness or negligence in his failure to discern what virtually nobody else in the market saw either.[16]

[16] The Division may, of course, be able to point to a few Cassandras who expressed concerns about the subprime market. Their influence was obviously negligible. Even if a handful of them got rich betting against the

IX. Mr. Hopkins Did Not Obtain Any Money Or Property By Means Of The Alleged Misrepresentations Or Omissions.

The Section 17(a)(2) claim against Mr. Hopkins fails for lack of proof that the defendant "obtain[ed] money or property" by means of his actionable omissions or misstatements. 15 U.S.C. § 77q(a)(2). There is no evidence in the record that Mr. Hopkins obtained any money or property for himself by means of his alleged misconduct. His compensation was not dependent on, or affected by, the attraction or retention of particular investors or by his participation in any of the events at issue. Tr. 331-32 (Hopkins). He was not a salesman who earned commission on sales made by means of alleged misstatements. Cf. SEC v. Tambone, 550 F.3d at 106, 110, 112-13 (1st Cir. 2009) (reversing dismissal of Section 17(a)(2) claim where SEC had alleged that "more than half of the total compensation that defendants received each year consisted of commission" from sales of mutual funds, and claim was that defendants had obtained money by means of omissions from fund prospectuses where, if the omitted information had been disclosed, investors might have been deterred from buying into the funds). He did not receive a bonus "explicitly tied" to his work on the transactions he had caused his employer to misrepresent. Cf. In re CVS Caremark Corp., Securities Act Release No. 8815, Exchange Act Release No. 55982, 2007 WL 1880048, at *5-6 (June 29, 2007). The Division did not prove that his alleged violations of the securities laws had such a substantial effect on State Street's bottom line that compensation tied to general corporate performance could have been affected by it. Cf. SEC v. Hopper, No. H-04-1054, 2006 WL 778640, at *12 (S.D. Tex. Mar. 24, 2006) (Division had a factual basis for alleging that "dramatic increase" in a defendant's bonus was correlated with "dramatic boosts" in her employer's trading volume and revenue, and it was "reasonable to

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market, they evidently didn't move the market or the crisis would have been defused. If the markets didn't heed their warnings, then it cannot plausibly or fairly be said that Mr. Hopkins was reckless or negligent in hewing to the conventional wisdom and failing to heed them himself.

infer that those inflated trading volumes and revenues factored into the calculation of her bonuses, and hence, that [defendant] obtained all or part of those bonuses at least indirectly by means of [her] violation of §17(a)(2)").

This case, rather, is much like SEC v. Forman, No. 07-11151-RWZ, 2010 WL 2367372 (D. Mass., June 9, 2010), in which the District Court granted summary judgment on a Section 17(a)(2) claim against the controller of a corporation who had allegedly drafted and filed misleading financial statements on the company's behalf. Id. at *4, 8. Although the SEC had evidence that all of the company's employees had received a 3% bonus, and that its executives had received a bonus "tied to [its] financial performance[,]" id. at *8, the claim was doomed by the lack of "evidence that the employee bonus was tied to company performance or that [the defendant] was an executive within the meaning of the bonus plan." Id.

The Division has suggested that this failure of proof is not fatal because *personal* aggrandizement is not required by the "obtain money or property" clause of Section 17(a)(2), and that Mr. Hopkins can be held personally and primarily liable because "State Street . . . obtained investors' money as a result of Respondents' conduct." Division Pre-Hearing Brief, p. 38. This is a textually implausible proposition for which the Division has cited no competent authority.[17] Even if it were correct, the Section 17(a)(2) claim is nevertheless doomed by the

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[17] The Division relies on SEC v. Delphi Corp., No. 06-14891, 2008 WL 4539519 at *20 (E.D. Mich. Oct. 8, 2008). That decision relies, in turn, on the District Court's decision in SEC v. Youmans, 543 F. Supp. 1292, 1299 (E.D. Tenn. 1982). But Youmans does not stand for the proposition cited. It held that *scienter* need not be proved in a Section 17(a)(2) case, not that the "obtain money or property" requirement was impersonal. The Youmans decision, rather, merely noted in passing that the defendant's actions had enabled an entity to obtain money. The Court gave no indication that the meaning of the "obtain money or property" clause had been raised or considered. In SEC v. Burns, No. 84-0454, 1986 WL 36318 at *4 (S.D. Cal. Feb. 19, 1986), by way of contrast, the Court explicitly held that "[t]here is no evidence before this Court that Mr. Burns personally acquired money or property, hence the Court finds no violation of Section 17(a)(2)." The Division's position, moreover, is inconsistent with the District Court's holding in SEC v. Forman, discussed above in the text. In that case, the defendant's misconduct allegedly enabled his corporate employer to recognize some $2 million in revenue which it had not yet earned. 2010 WL 2367372 at *1-2. The Section 17(a)(2) claim against Forman nevertheless failed as a matter of law because the District Court agreed with the defendant that there was "no evidence he 'obtain[ed] money or property' by means of

lack of evidence that Mr. Hopkins' alleged misconduct obtained any money or property for his employer. The argument thus ends where it began: with the startling fact that the Division did not call a single investor in the Fund to testify against either Respondent. As a consequence, there is no evidence in the record to suggest that a single investor made, increased, or maintained an investment in the Fund as a consequence of Mr. Hopkins' alleged violations of Section 17(a)(2), and no basis for an inference that State Street "obtain[ed] money or property" thereby. Even if David Hammerstein is deemed to have testified on behalf of his client, National Jewish Medical and Research Center, his testimony adds nothing to the analysis: there is no evidence that NJMRC added to its existing investment in the Fund-associated commodities fund after any of Mr. Hopkins' communications with Mr. Hammerstein.

X. The Division Failed To Establish A Basis For Imposing Sanctions Against Mr. Hopkins.

A. No Civil Penalty Can Be Imposed Under The Pre-Dodd-Frank Statutory Scheme Applicable In This Proceeding.

The Division instituted these proceedings pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, Section 203(f) of the Advisors Act and Section 9(b) of the Investment Company Act. OIP, p.14. It seeks to "impose civil penalties" pursuant to Section 8A of the Securities Act, Section 21B(a) of the Exchange Act, Section 203(i) of the Adviser Act, and Section 9(d) of the Investment Company Act. Id. In seeking to impose these civil penalties in this forum, the Division is trying to goad this Court into impermissibly applying the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the "Dodd-Frank Act" or "Dodd-Frank") to conduct for which Congress did not intend for it to apply. In so doing, the Division is blatantly overstepping its authority – authority that it knows it

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the alleged misstatements. . . ." Id. at *8 (emphasis added). If the Division's position were correct, then the Forman decision would have come out the other way.

does not have – and violating Mr. Hopkins's constitutional rights in the process. And while blatant in one sense, the Division is underhanded in the sense that it does not specify the particular sub-sections which it believes provide the bases for the sanctions sought – presumably so as not to draw too much attention to its lack of legitimate bases.

1. The Division Does Not Have Jurisdiction To Bring Claims Against Mr. Hopkins Under the Investment Advisors Act.

The Division initiated this Cease-and-Desist Proceeding pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, Section 203(f) of the Investment Advisors Act of 1940, and Section 9(b) of the Investment Company Act of 1940. As the Division stated in its Pre-Hearing Brief:

> ***Because the funds that State Street advises are not investment companies and State Street is not an investment adviser, the Division does not allege that the Respondents violated the Advisors Act or the Investment Company Act directly***. However, during their tenure with State Street, the Respondents were also associated with SSgA FM. SSgA FM's portfolio managers, and their managers, reported to Flannery, and Hopkins was the product engineer for certain registered funds advised by SSgA FM. ***Respondents' associations with SSgA FM during the period of their alleged misconduct involving State Street's unregistered funds provides the basis for instituting this action pursuant to Section 203(f) of the Advisors Act and Section 9(b) of the Investment Company Act.***

Division Pre-Hearing Brief, p.1, n.1 (emphasis added). Although the Division acknowledged from the outset that it had to prove a connection between Mr. Hopkins and State Street Global Advisors Fund Management ("SSgA FM"), the Division failed to present any evidence linking Mr. Hopkins and SSgA FM at any time, let alone "at the time of the alleged misconduct." 15 U.S.C. § 80b-3(f). At most, the Division adduced passing commentary that Mr. Hopkins had some unspecified "responsibility" for some mutual funds during an unidentified time period. Tr. 20-21 (Hopkins). In fact, Mr. Hopkins testified that he does not recall doing work on the mutual fund side in 2006 or 2007. Tr. 619 (Hopkins). He likewise did not recall understanding that he was affiliated with an investment advisor during 2006 and 2007. Tr. 618-619 (Hopkins).

This fleeting nexus does not suffice. For Hopkins to be deemed "associated" with an investment advisor, the Division must prove that he was a "partner, officer, or director of [an] investment advisor (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment advisor, including any employee of such investment advisor." 15 U.S.C. § 80b-2(a)(17). The Division did not prove that Hopkins performed any of these functions for an investment advisor. See In re Maynard, Investment Advisors Act Release No. 2875, 2009 WL 1362796, at *1 (May 15, 2009) (associated person was president of registered investment advisor); SEC v. Bolla, 401 F. Supp. 2d 43, 61, 62-63, 65 (D. D.C. 2005) (defendant was associated with investment advisor where he was an unnamed owner and principal of advisor, received advisory fees, managed clients, and served as point of contact for clients); In re Kornman, Securities Exchange Act and Investment Advisors Act Release No. 2840, 2009 WL 367635, at *4 (Feb. 13, 2009) (defendant associated with broker, dealer, and investment advisor where he was registered representative and part owner of broker-dealer and sole managing member of the investment advisor); In re Armstrong, Investment Advisors Act Release No. 2926, 2009 WL 2972498, at *3 (Sept. 17, 2009) (defendant was associated with investment advisor where he controlled all of the investment advisor's subsidiaries and the subsidiaries managed the investment advisor's funds).[18]

Because the Division has not proven Mr. Hopkins' "association" with SSgA FM, there can be no liability under the Advisors Act or the Investment Company Act and, accordingly, the Division's claims predicated on these statutes must be dismissed.[19]

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[18] The Division introduced Div. Ex. 254 in an attempt to demonstrate a link between SSgA and SSgA FM. Tellingly, the document specifically identifies SSgA employees with dual responsibilities (e.g. Robert Pickett). Div. Ex. 254; Tr. 1559. Mr. Hopkins is not identified as having any role at SSgA FM.

[19] Further, even if the Investment Company Act applied, the Division has not proven that Mr. Hopkins willfully violated the securities laws. 15 U.S.C. § 80a-9(b).

2. Dodd-Frank Cannot Be Applied Retroactively to the Facts in this Case.

Dodd-Frank amended Section 8A of the Securities Act of 1933, Section 21B(a) of the Securities Exchange Act of 1934, Section 203(i) of the Investment Advisors Act and Section 9(d) of the Investment Company Act. Dodd-Frank permitted the Commission, for the first time in an administrative cease and desist proceeding, to obtain monetary penalties against a non-regulated person who violated provisions of those Acts. Prior to Dodd-Frank, the Commission could only obtain civil monetary penalties in a proceeding brought in a U.S. district court.

In passing Dodd-Frank, Congress did not intend for it to apply to conduct occurring before its enactment. Section 4 of Dodd-Frank states that "[e]xcept as otherwise specifically provided in this Act or the amendments made by this Act, this Act and such amendments *shall take effect 1 day after the date of enactment of this Act*." (emphasis added). As Section 929P does not contain any specific prescription for retroactive application, Dodd-Frank does not apply to conduct prior to July 22, 2010, Dodd-Frank's effective date. See AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1971 (2009) (general presumption against retroactivity of statute absent clear intent of Congress); Lockheed Corp. v. Spink, 517 U.S. 882, 896 (1996) (language indicating the date a statute is to take effect "compels the conclusion that the amendments are prospective").

Moreover, assuming *arguendo* that there was no clear indication of Congressional intent, which there is regarding Dodd-Frank, under the familiar test of Landgraf v. USI Film Prods., retroactive application fairs no better. 511 U.S. 244 (1994). Absent Congress explicitly prescribing retroactive application, a court must determine "whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities or duties on the basis of conduct arising before its enactment. If the answer is yes, we then apply the presumption against retroactivity by construing the statute as

inapplicable to the event or act in question owing to the absence of a clear indication from Congress that it intended such a result." Fernandez-Vargas v. Gonzalez, 548 U.S. 30, 37-38 (2006) (internal quotations omitted).

Prior to Dodd-Frank, because Mr. Hopkins was not a regulated person or associated with a regulated person, his conduct could not have subjected him to civil penalties. Applying Dodd-Frank would subject him to newly available civil penalties. Doing so would "affect[] his substantive rights [and] liabilities" and therefore Dodd-Frank is inapplicable to his conduct. Fernandez-Vargas, 548 U.S. at 37-38; see, e.g., In re Castle Secs. Corp., Initial Decision Release No. 244, 2004 SEC LEXIS 154, *18-25 (Jan. 23, 2004) (SEC ALJ ruled, despite the Commission's position to the contrary, following Landgraf analysis, that Penny Stock Reform Act of 1990 did not apply to conduct that occurred before passage of the Act). Even if Mr. Hopkins was a regulated person, subjecting him to the enhanced civil penalties now available in any cease and desist proceeding would increase his potential liability for pre-Act conduct. Regardless of whether he was or was not a regulated person, retroactive application of Dodd-Frank is not permitted under the Landgraf test. In discussing Dodd-Frank, one Commissioner recently highlighted the retroactivity issue regarding Dodd-Frank Section 929P's grant of new authority to the Commission to seek civil penalties in the administrative context. Noting the SEC's unsuccessful attempts to apply the Penny Stock Reform Act of 1990 and the Sarbanes-Oxley Act of 2002 retroactively, Commissioner Casey urged the Commission, despite the "tremendous public and media pressure to hold Wall Street accountable" not to "embrace toughness at the expense of fairness." Commissioner Kathleen L. Casey, Address to Practicing Law Institute's SEC Speaks in 2011 Program (Feb. 4, 2011).

3. The Applicable Pre Dodd-Frank Statutes Do Not Permit Civil Penalties Against Non-Regulated Persons in Administrative Actions.

Section 8A of the Securities Act: As applied to conduct occurring prior to the effective date of Dodd-Frank, section 8A of the Securities Act provides for a cease and desist order. Although the Division did not cite to a particular sub-section of section 8A as a basis for seeking money penalties, it may be presumed that the Division is referring to section 8A(g), which provides for a civil penalty in a cease and desist proceeding. Section 8A(g) was added by Dodd-Frank and is not applicable to Hopkins. In this case, section 8A allows for a cease and desist order – nothing else.

Section 21(B)(a) of the Exchange Act: Section 21(B)(a) of the Exchange Act does not provide a basis for any sanctions again Hopkins. As it applies to conduct occurring prior to Dodd-Frank's effective date, section 21(B)(a) provides for civil penalties against an enumerated list of specific categories of regulated persons, none of which cover Mr. Hopkins: 15(b)(4) – broker/dealers; 15(b)(6) – persons associated with a broker/dealer; 15D – securities analysts; 15B – municipal securities dealers; 15C – government securities broker/dealers; 15E – credit rating agencies; and 17A – clearing agencies. Mr. Hopkins did not, nor is he alleged to have performed any of these functions. Section 21B(a) therefore does not even apply to Mr. Hopkins, let alone provide a basis for sanctions against him. The Division, however, presumably seeks to apply section 21B(a)(2) – a section added by Dodd-Frank that allows for civil penalties in cease and desist proceedings.[20] Because this provision had not been enacted at the time of Mr. Hopkins' conduct and because it does not apply retroactively, there is no applicable basis under section 21B(a) for civil penalties against Mr. Hopkins.

Section 203(i) of the Investment Advisors Act: Regardless of the applicability of Dodd-Frank, under section 203(i), Mr. Hopkins is not subject to civil penalties because the Division's

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20 While the OIP does state that the case is instituted pursuant to section 21C, it does not cite section 21C as a basis for imposing civil penalties. Rather it is cited solely as a basis for imposing a cease and desist order.

assertion that he was "associated with an investment advisor" was utterly unsupported by the evidence at trial (as discussed in further detail above). Section 203(i) provides for civil penalties in cases instituted pursuant to 203(e) – against an investment advisor – or 203(i) – against a person "associated with an investment advisor." The Division instituted the proceeding against Mr. Hopkins under 203(f).[21] As discussed above, because it cannot prove that he was an "associated" person and thus not subject to 203(f), he is not eligible for sanctions in a case brought under section 203(f).

Section 9(d) of the Investment Company Act: The Investment Company Act, enacted along with the Investment Advisors Act in 1940 provides for a limited set of sanctions in administrative proceedings. As with all proceedings brought administratively rather than in federal district court, the Division, prior to Dodd-Frank, had no basis to seek monetary penalties. Dodd-Frank amended section 9(d), adding 9(d)(B) to provide for civil penalties in cease and desist proceedings instituted pursuant to section 9(f). The case against Mr. Hopkins was instituted pursuant to 9(b), which provides, in the event of certain violations, for a bar against serving in various different roles at a registered investment company.

B. Even If Sanctions Were Permissible In This Matter, None Should Be Imposed.

The Order Instituting Proceedings asks this tribunal to extract civil penalties from Mr. Hopkins and to issue a cease-and-desist order against him. OIP, p. 14. Even if this tribunal accepts the Division's allegations and finds that a violation of the securities laws occurred, monetary penalties would be improper and injunctive punishment would be disproportionate and grossly unfair.

[21] Dodd-Frank added section 203(i)(B), which provides for civil penalties in cease and desist proceedings instituted under 203(k). Even if Dodd-Frank did apply retroactively, the Commission could not seek penalties against Hopkins under section 203(i)(B) because it did not institute its proceeding under 203(k), but rather did so under 203(f).

The Division acknowledges that it cannot obtain civil penalties absent proof that the defendant's violations (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, and (2) directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the defendant. Division Pre-Hearing Brief, p. 41. This standard has not been satisfied. The Division has effectively conceded that Mr. Hopkins did not engage in conscious fraud or a deliberate violation of his regulatory obligations. If he violated a standard of care (an inference that he strenuously contests, for all the reasons stated in this memorandum), he did not do so recklessly – that is, he did not disregard a danger of misleading investors so obvious that he "must have been aware of it." SEC v. Fife, 311 F.3d at 9-10. Essentially nobody in the markets understood at the time that that the information Mr. Hopkins allegedly omitted – the extent of the Fund's investment in highly-rated mortgage-backed securities – was material. His conduct did not ever rise to the level of negligence. The Division has not, moreover, presented an iota of evidence to show that the alleged violations caused or threatened to cause pecuniary harm to investors, as the Division did not call any investors, and it has already been shown that Mr. Hopkins did not himself gain any money or property as a result.

A cease and desist order would be equally unwarranted under the circumstances. Even taking them exactly as the Division portrays them, the violations alleged here were committed with no greater culpability than a failure to foresee that which the market in general failed to foresee. They caused no demonstrable harm, and occurred only sporadically for a short period of time, with Mr. Hopkins involved in no more than a handful of activities occurring over a period of several months. See, e.g., WHX Corp. v. SEC, 362 F.3d 854, 860 (D.C. Cir. 2004); Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (factors to be considered in determining appropriate

administrative sanctions include egregiousness of defendant's actions, isolated or recurrent nature of the infraction, degree of scienter involved and likelihood of future violations).

Those events should, moreover, properly be measured against a much broader span of time – the decades that Mr. Hopkins has spent in the financial industry, during which his record is unblemished. As witnesses testified, Mr. Hopkins has a spotless reputation for integrity both on and off the job. He has demonstrated that he is a man of high moral character: a collegial and resourceful colleague, a good citizen and an active and compassionate member of his community.

In considering whether to impose sanctions, finally, this tribunal should consider both the nature of this enforcement action and the nature of Mr. Hopkins' role in the alleged misconduct. Mr. Hopkins did not cause the subprime crisis, and he did not benefit personally from the bubble that preceded it. He was merely a mid-level functionary in one of the many financial institutions that failed to anticipate it. The true problem here is that the Division is seeking to assign blame to a once in a lifetime event where blame cannot be readily assigned. As Dr. Peavy testified, the subprime meltdown was "a financial crisis...the greatest in our lifetime." Tr. 3069 (Peavy). Plucking Mr. Hopkins out for punishment in order "to send a message," as the Division has put it (Division Pre-Hearing Brief, p. 40), would send a message alright: no good deed goes unpunished. Better to keep one's head down than volunteer to get the message out. Such a "message", of course, would not advance the remedial purpose of the federal securities laws one inch.

CONCLUSION

Despite more than two weeks of testimony and the introduction of hundreds of exhibits, the Division utterly failed to present any evidence demonstrating that Mr. Hopkins committed

any of the violations charged in the OIP. Not a single witness testified that Mr. Hopkins did anything improper. Not a single exhibit evinces any wrongdoing by Mr. Hopkins (or anyone else). What the evidence does show is that Jim Hopkins did his job, and did it diligently, conscientiously and honestly. He already has been unfairly and wrongly penalized in the court of public opinion. The only way to give Mr. Hopkins his reputation back is to return a verdict in his favor on all charges. We respectfully submit that the evidence permits no other result.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

MEMORANDUM IN SUPPORT OF RESPONDENT JAMES D. HOPKINS' MOTION FOR SUMMARY DISPOSITION

Respectfully Submitted,

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Respondent James D. Hopkins submits this memorandum in support of his motion for summary disposition of all the charges asserted against him in this matter. As the Hearing Officer will see, there is no legal or factual basis for those charges. Even if one assumes that certain documents distributed by his employer in 2006 and 2007 did contain material misstatements or omissions (which is itself a deeply dubious assumption), Mr. Hopkins (1) did not "make" those misstatements or omissions within the meaning of Rule 10b-5, and (2) did not "obtain money or property by means of" their dissemination as is required to prove a violation of Section 17(a)(2).

I. Background

A. Limited Duration Bond Fund

In 2002, State Street Global Advisors ("SSgA") established two essentially identical funds that were together referred to as Limited Duration Bond Fund ("LDBF" or the "Fund"). As described in its fact sheet, LDBF was an active fixed income fund that invested in a variety of securities including collateralized mortgage obligations, adjustable rate mortgages, fixed rate mortgages, corporate bonds, and asset backed securities. As also described in the fact sheet, the Fund utilized a variety of forms of leverage including futures, options, and swaps. Since its inception, LDBF was considered a relatively low risk fund, often described as an "enhanced cash fund," because the vast majority of the securities held by the fund were of a very high credit quality (mostly "AAA" or "AA") and the fund had no interest rate risk. Significantly, prior to the subprime crisis that played out in the late summer and early fall of 2007, no one internal to SSgA, or external questioned the credit worthiness and stability of these high quality asset backed securities (securities which were both prime and subprime). Thus, not surprisingly, through June 2007, LDBF's portfolio managers continued to manage the Fund consistent with

the broader marketplace's understanding of the stability of these securities, maintaining the portfolio's high average credit quality and staying within SSgA's conservative risk budget for the Fund. While the Fund was leveraged, it was primarily leveraged in the area of these same high credit quality securities so the levered position was not considered to have increased the risk in the Fund.

Then, in the summer of 2007, an unprecedented liquidity crisis rattled the markets due to the unanticipated collapse of the residential mortgage markets, and SSgA's funds (in tandem with the market sector as a whole) experienced dramatic underperformance. During this period, those high quality subprime asset backed securities which were viewed by the marketplace to carry little risk, suffered significant volatility and underperformance. As the markets seized up in July and August, SSgA devoted extensive time and resources to regularly communicating with its clients regarding the ongoing and unanticipated events in the market and the effect the unprecedented conditions were having on LDBF. This effort and these communications were spearheaded by SSgA's portfolio managers, legal department, and executives, and all information about the LDBF, its exposures and its performance, was carefully monitored and controlled by these departments. Mr. Hopkins' role during this period was to take direction from all of these departments and communicate the information to clients in the most efficient and transparent manner possible.

B. Mr. Hopkins' Role As A Product Engineer.

During the relevant time period, Mr. Hopkins was employed at SSgA as a fixed income product engineer, a mid-level employment position in the fixed income space. As a Product Engineer, Mr. Hopkins' primary role was to facilitate the distribution of information to clients about SSgA's fixed income products. As such, he served as a conduit between the portfolio

managers and the client-facing personnel. On a day-to-day basis, he answered questions from SSgA's client relationship managers and kept them apprised of the status of the fixed income funds he was responsible for, including LDBF. Thus, as a Product Engineer, Mr. Hopkins managed neither clients, nor funds, and there were many aspects of the business that Mr. Hopkins did not control or have the authority to change. Notably, Mr. Hopkins (a) did not have input into investment decisions or have a portfolio manager's knowledge of or perspective into any fund's strategies; (b) did not control the use or distribution of marketing materials; (c) lacked authority to intervene in, or direct client relationships and trading decisions; and (d) did not have authority to dictate what SSgA's written communications to clients should or should not include.

When it came to providing information to clients, in other words, Mr. Hopkins was essentially a messenger. His job was to package the information provided to him by the investment team into one of several different formats, and then to distribute the material - most often to client-facing personnel, but sometimes to clients themselves - under the supervision of the relationship manager. Hopkins could (and sometimes did) voice an opinion about content but he was never the final arbiter. The source of the information was almost always the portfolio managers, with the risk group, and legal, having a say about content as well. Importantly, Mr. Hopkins' integrity, professionalism, and conscientious attention to his work and clients, were not only recognized, but lauded by his co-workers and his supervisor during this critical time. His performance reports for this period were replete with references to the fact that he worked diligently throughout this entire period to obtain accurate and relevant information from the investment team so that he could adequately inform the relationship managers and clients themselves. Further attesting to his character, Mr. Hopkins was recognized by SSgA for his significant charitable contributions to the Boston community when he was awarded State Street's

Chairman's Community Service Award for his unparalleled commitment to charitable causes, including his distinguished role as President of the Ronald McDonald House, a home away from home for cancer patients. It is within the context of Mr. Hopkins' limited role and authority as a product engineer, coupled with his impeccable professional and personal reputation for integrity, that the SEC's allegations must be considered.

C. Specific Charges Against Mr. Hopkins

The specific charges against Mr. Hopkins revolve around four documents: (1) fact sheets used to introduce investors to the Fund; (2) PowerPoint slides used in presentations to investors; (3) a letter that State Street – not Mr. Hopkins – sent to certain investors in March 2007, explaining the reasons for the Fund's recent underperformance; and (4) another letter that State Street – again, not Mr. Hopkins – sent to some investors in late July 2007. The Commission alleges that the fact sheets and presentation slides contained affirmative misstatements about the Fund, and that the two letters, while truthful in content, omitted additional information that was needed in order to make the letters not misleading.[1/] The Commission claims that Mr. Hopkins is liable as a primary violator for these statements and omissions because he "used or was responsible for drafting and/or updating" the fact sheets and presentation slides, and because he played some role in drafting the two letters. Even assuming, *arguendo*, that the SEC has accurately characterized Mr. Hopkins' role and involvement, these allegations are not sufficient as a matter of law to make him liable for a violation of Section 10(b) or Section 17(a).

II. Legal Standards

Motions for summary disposition in a proceeding like this one are governed by 17 C.F.R. § 201.250(b). The standard is virtually identical to the standard for granting summary judgment

1/ Additional facts relevant to the resolution of the motion are stated and supported by citations to the pleadings and evidence in the following sections of this memorandum.

under Fed. R. Civ. P. 56(c)(2). The regulation provides that the hearing officer may grant the motion "if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 17 C.F.R. § 201.250(b). "The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to § 201.323." 17 C.F.R. § 201.250(a).

However, "[a] factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. Once the moving party has carried its burden, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. The opposing party must set forth specific facts showing a genuine issue for a hearing and a determination made as to whether there is a genuine issue for resolution at a hearing." *In re Comverse Tech., Inc.*, SEC Release No. 400, AP File No. 3-13828, 2010 WL 2886397, at *1 (July 22, 2010) (internal citations and quotation marks omitted).

Because Mr. Hopkins resides in Massachusetts (Complaint, ¶ 7), an appeal from the Commission's final order in this matter will lie to the United States Court of Appeals for the First Circuit. 15 U.S.C. §§ 77i(a), 78y(a)(1); 15 U.S.C. §§ 80a-42, 80b-13. Consequently, insofar as relevant precedent exists in the First Circuit, Mr. Hopkins will argue for the application of that decisional law.

III. The Character Of The Charges Against Mr. Hopkins.

It is important to establish at the outset what this proceeding is and is not about. First, this is *not* an aiding and abetting case. The Order Instituting Administrative And Cease-And-Desist Proceedings Pursuant To Section 8A Of The Securities Act Of 1933, Section 21C Of The Securities Exchange Act Of 1934, Section 203(f) Of The Investment Advisers Act Of 1940, And

Section 9(b) Of The Investment Company Act Of 1940 (which Mr. Hopkins will, for the sake of brevity, refer to in this motion as "the Complaint") alleged only "primary violations" of both Section 17 of the Securities Act and Section 10(b) of the Exchange Act. (Complaint, ¶s 42-44)

Second, although the charges were characterized somewhat loosely in Paragraphs 42-44 of the Complaint, their substantive contours are made clear by the facts actually pled in that document. Mr. Hopkins has been accused of committing primary violations only (1) by making certain specific statements (Complaint, ¶s 13-15, 16-17, 18-21), or (2) by omitting material facts needed in order to make specific statements he supposedly made not misleading. (Complaint, ¶s 22-23, 32-35)

The claims against Mr. Hopkins, therefore, arise and must be analyzed under (1) Section 17(a)(2) of the Securities Act, which makes it unlawful "to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading," 15 U.S.C. § 77q(a)(2), and (2) Rule 10b-5(b), which makes it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b).

IV. Mr. Hopkins Is Entitled To Summary Disposition Of The Charge Brought Under Section 10(b) Of The Exchange Act And Rule 10b-5(b).

Mr. Hopkins is entitled to summary disposition of the Section 10(b) charge based on the interplay of three factors: (1) the nature of the factual allegations, which assert that Mr. Hopkins committed primary violations by *making* untrue statements or material omissions, (2) the state of the law in the First Circuit, under which a statement or omission cannot be imputed to a defendant unless he or she *actually made* it, and (3) the state of the record, which establishes that

Mr. Hopkins did *not* "make" the allegedly-actionable misstatements or omissions within the meaning of the rule.

A. Charges Under Rule 10b-5(b) Require Proof That The Defendant Actually Made The Allegedly-Actionable Misstatements.

The Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) established that private plaintiffs can sue only for "primary" violations of Section 10(b) and Rule 10b-5. Consequently, "[i]f *Central Bank's* carefully drawn circumscription of the private right of action is not to be hollowed – and we do not think that it should be – courts must be vigilant to ensure that secondary [i.e., aiding and abetting] violations are not shoehorned into the category reserved for primary violations." *SEC v. Tambone*, 597 F.3d 436, 446 (1st Cir. 2010) (en banc). As the *Tambone* decision itself illustrates, this vigilance must be maintained in both private lawsuits and enforcement actions initiated by the SEC.

In cases involving the application of Rule 10b-5(b), the distinction between primary and secondary is marked, in the first instance, by the explicit statutory instruction to punish only a defendant who "make[s] an untrue statement" or omits information necessary to render a statement that he or she "made . . . not misleading." 17 C.F.R. § 240.10b-5(b). The *Tambone* decision demonstrates that this "maker" requirement is essential to the proof of any charge or claim that the defendant has committed a primary violation of the rule.

The defendants in *Tambone* were senior executives of a registered broker-dealer known as Columbia Distributor. 597 F.3d at 438. Columbia Distributor underwrote and distributed a complex of mutual funds known as Columbia Funds. *Id.* at 439. Among other things, "Columbia Distributor sold shares in the Columbia Funds and disseminated their prospectuses to investors." *Id.*

The enforcement action against Tambone and his co-defendant, Hussey, concerned alleged misrepresentations in several of the Columbia Funds' prospectuses. These documents said that the Funds did not permit the practice known as "market timing." *Id.* In fact, the SEC alleged, Columbia Funds had allowed "certain preferred customers to engage in market timing forays in at least sixteen different Columbia Funds. . . ." *Id.*

The SEC argued that Tambone and Hussey had "made" the statements in the prospectuses for two reasons, asserting what Mr. Hopkins will refer to as an "authorship" theory and a "use" theory, respectively. First, in its amended complaint, the SEC contended that Tambone and Hussey had "made" the alleged misrepresentations in the prospectuses, within the meaning of Rule 10b-5(b), because they had "participat[ed] in the drafting process that went into the development of the market timing language." *Id.* As the District Court described it:

> The new complaint contains two paragraphs that do allege involvement with drafting a prospectus by both Tambone and Hussey. In paragraphs 36 and 37 of the new complaint the defendants are alleged to have exchanged e-mails with in-house counsel for Columbia Advisors regarding draft language on market timing for the fall 2001 prospectus. Those allegations are particularized in that they allege specific activity on approximate dates by Tambone and Hussey.

SEC v. Tambone, 473 F. Supp. 2d 162, 166 (D.Mass. 2006).

The District Court rejected this "authorship" theory, ruling that the allegations of involvement in the drafting process were insufficient as a matter of law to satisfy the "particularity" requirement for pleading fraud claims under Fed. R. Civ. P. 9(b). The amended complaint had failed "to identify the substance of the comments made by either Tambone or Hussey in those e-mails, and, furthermore, fail[ed] to allege that any of the language reviewed or proposed by either defendant was ever actually incorporated into the fall 2001 prospectus." *Id.* At bottom, then, the flaw in the SEC's "authorship" theory was that its complaint lacked "a specific allegation linking either defendant to a statement in a particular prospectus." *Id.*

The SEC dropped the "authorship" theory on appeal, electing instead to stake its claim on the argument that Tambone and Hussey had "made" the offending statements by "using the prospectuses in their sales efforts, allowing the prospectuses to be disseminated and referring clients to them for information." 597 F.3d at 440. But the First Circuit rejected this alternative "use" theory as well. Sitting en banc, it reasoned, first, that the presence of the word "make" in Rule 10b-5(b) reflected a "deliberate word choice" that "virtually leaps off the page." *Id.* at 443. Although Rule 10b-5(b) was modeled on Section 17(a)(2) of the Securities Act, the drafters of the rule had chosen *not* to mimic the statute "with respect to the types of conduct that may render a person liable for a false statement." *Id.* at 444. Where Section 17(a)(2) makes it unlawful "to obtain money or property *by means of* any untrue statement of a material fact," Rule 10b-5(b) is narrower, and only makes it unlawful "to *make* any untrue statement of a material fact." *Id.* (emphasis added).[2/]

"The import of this eschewal," the First Circuit said, "is clear: although section 17(a)(2) may fairly be read to cover the 'use' of an untrue statement to obtain money or property, Rule 10b-5(b) is more narrowly crafted and its reach does not extend that far." *Id.* To the court, it was "self-evident . . . that if the SEC intended to prohibit more than just the actual making of a false statement in Rule 10b-5(b), then it would not have employed the solitary verb 'make' in the text of the rule." *Id.* at 445.

The First Circuit had an additional reason to apply the rule as written: the Supreme Court's mandate to enforce a clear distinction between primary and secondary violations. The en banc panel in *Tambone* agreed with the Second Circuit that "[i]f *Central Bank* is to have any real

[2/] Although Rule 10b-5(b) is narrower than Section 17(a)(2) in this respect, it is *broader* than its statutory model in another way. Under Rule 10b-5(b) it is unlawful to "make" a materially misleading statement or omission, whether or not the act bestows a pecuniary benefit on the speaker. Section 17(a)(2), on the other hand, makes it unlawful only to "obtain money or property" by means of a misleading statement or omission. This requirement disposes of the charges against Mr. Hopkins under the Securities Act. *See* Section V, below.

meaning, a defendant must *actually make* a false or misleading statement in order to be held liable [as a primary violator] under section 10(b). Anything short of such conduct is merely aiding and abetting." *Id.* at 447 (*quoting Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997)) (emphasis added). Every recognized judicial test for distinguishing between primary and secondary violations focuses "on the *actual role* that a defendant played in creating, composing, or causing the existence of an untrue statement of material fact." *Id.* (emphasis added). Given the uncontested inadequacy of the SEC's allegations that Tambone and Hussey had been involved in drafting the allegedly actionable statements, the Commission's "attempt to impute statements to persons who may not have had any role in their creation, composition or preparation [fell] well short" of any acceptable benchmark. *Id.*

B. The SEC Contends – As It Did In *Tambone* – That Mr. Hopkins "Made" The Alleged Statements And Omissions By Virtue Of His Supposed "Use" And "Authorship" Of The Documents At Issue.

It is useful to bear in mind here that the Complaint followed, rather than preceded, both (1) the First Circuit's decision in *Tambone*, and (2) complete discovery. The SEC's investigation of SSgA lasted over two years, during which time the Commission subpoenaed and reviewed millions of documents, emails, and electronic records. The SEC also took over 50 days of investigative testimony from former and current SSgA employees and several third parties. Mr. Hopkins himself testified four times; each time he was fully responsive, cooperative and forthcoming. For several years before it issued the Complaint, moreover, the SEC had in its possession all of Mr. Hopkins' work e-mails, hard copy documents, and shared drive documents.

If evidence existed to show that Mr. Hopkins actually made the statements and omissions at issue, therefore, the SEC would not only have it now, but it would have possessed the evidence back when it drafted the Complaint. Although that document may not have been strictly

subject to the particularity requirements of Fed. R. Civ. P. 9(b), the SEC's burden in opposing this motion is comparable – indeed, effectively identical – to the burden it would have in opposing a motion for summary judgment filed in federal court. Consequently, Rule 9(b) and its application in *Tambone* come squarely into play here because if the record, as it is reflected in the Complaint, would not enable the Commission to satisfy even the lesser pleading requirement, it *must* be insufficient to satisfy the greater burden of coming forward with sufficient evidence to justify a trial. *See, e.g., Sanchez v. Triple-S Mgmt. Corp.*, 492 F.3d 1, 11 (1st Cir. 2007) (affirming grant of summary judgment to defendant where fraud claims failed even to satisfy the particularity requirements of Rule 9(b)); *cf. Cochran v. Quest Software*, 328 F.3d 1, 7 n.2 (1st Cir. 2003) (noting that the "standards applicable at the summary judgment stage are far more demanding" on non-moving plaintiffs than the pleading requirements imposed by Rule 12(b)(6)).

The allegations against Mr. Hopkins are remarkably similar in approach to the allegations that the SEC made against the defendants in *Tambone*, and are inadequate as a matter of law for remarkably similar reasons. The Complaint here repeatedly invokes the refrain that Mr. Hopkins either "used or was responsible for drafting and/or updating" the documents that contained the alleged misstatements of material fact. (*See, e.g.*, Complaint, ¶s 18, 19, 20). This catchphrase is primarily notable for its lack of detail. It says precious little about the actual nature of Mr. Hopkins' supposed involvement. It does, however, serve to make clear that – like the complaint against Tambone and Hussey – the SEC's complaint against Mr. Hopkins is predicated on theories of "use" and "authorship," that is, on the notion that he committed primary violations of Rule 10b-5(b) either by (1) "participating in the drafting process that went into the development of" the offending statements, or (2) "using [the documents in his] sales efforts, allowing [them] to be disseminated and referring clients to them for information."

597 F.3d at 440. Because the evidentiary support for these theories here is no better than (and to a large extent, is worse than) the allegational support for them in *Tambone*, the Section 10(b) charge against Mr. Hopkins – like the primary-violation charge against Tambone and Hussey – fails as a matter of law.

C. Allegations And Evidence That Mr. Hopkins "Used" The Documents At Issue Fail As A Matter Of Law To Create A Genuine Issue Of Material Fact.

The evidence that Mr. Hopkins "used" the documents at issue is a hit-or-miss – and mostly "miss" – affair. Insofar as it concerns Mr. Hopkins at all, the Complaint revolves around four documents: (1) "fact sheets" that State Street may have provided to potential investors for informational purposes (Complaint, ¶s 13-14, 18-20), (2) PowerPoint slides shown in presentations to investors and potential investors (Complaint, ¶s 15-21), (3) a letter that State Street sent "to some investors in the Fund and the related funds in early March 2007" (Complaint, ¶s 22-23), and (4) a five-paragraph "investor letter" from State Street dated July 26, 2007 (Complaint, ¶s 32-35).

With respect to the two letters, there is no evidence of "use" at all. State Street may have sent them to "some investors," as the SEC alleges (Complaint, ¶22), but Mr. Hopkins did not. He didn't sign the letters or disseminate them. His "use" of those documents, therefore, did not rise to even the (legally-inadequate) level of involvement on which the Commission predicated its failed charges in *Tambone*.

With respect to the fact sheets and presentation slides, the record is murky at best. The Complaint *alleges* that Mr. Hopkins "used" the documents, but the evidence to support the assertion of "use" is far from clear. The Complaint provides only one specific example of Mr. Hopkins "using" either type of document: an allegedly-misleading presentation slide. According to the Commission, "on or around May 8, 2007" Mr. Hopkins made a presentation "to a hospital

that was invested in a passive commodities strategy that invested its cash in the Fund." (Complaint, ¶16) In the course of this presentation, he supposedly "used" a chart that "was false or misleading for several reasons." (Complaint, ¶17)[3/]

The Complaint, however, does not say *how* Mr. Hopkins "used" the offending chart, and the record does not indicate that it will be able to demonstrate that he in fact "used" the slide in any way at all on the date alleged. First, it is clear that Mr. Hopkins did not "use" the slide in the way that the defendants "used" the offending prospectuses in *Tambone* – i.e., by disseminating it to investors. The record here shows that Mr. Hopkins did *not* disseminate the presentation slides to the investors who attended the May 2007 meeting; they were distributed in advance, rather, by another State Street employee named Amanda Williams. *Sylvia Aff.*, Ex. B.

Notes of the meeting, recorded soon after it occurred by Ms. Williams, indicate moreover that the presentation was very brief ("we only had 15 minutes"), that Ms. Williams spoke for the first five minutes, that Mr. Hopkins only got three minutes into his presentation before he was interrupted with questions from the audience, and that he spent the remaining seven or so minutes allotted to him discussing specific issues raised by the investors. *Sylvia Aff.*, Ex. A. Whether Mr. Hopkins even showed the offending slide to the investors, therefore, is strictly a matter of speculation. *See In re Comverse Tech., Inc.*, 2010 WL 2886397, at *1 ("Once the moving party has carried its burden, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts").

If this allegation is the best that the Commission can do in the way of proof – and it is, after all, the factual centerpiece around which the SEC chose to arrange its theory that Mr. Hopkins committed a primary violation by "using" misleading slides in investor presentations –

3/ The meeting in question actually took place on May 10, 2007. The "hospital" that attended the presentation was National Jewish Medical and Research Center. *See* Affidavit of John F. Sylvia, Esq. in Support of Respondent James D. Hopkins' Motion for Summary Disposition ("*Sylvia Aff.*"), Exs. A, B.

then its evidentiary insufficiency casts grave doubt on the SEC's ability to prove what it has alleged. But the hearing officer can give the Commission the benefit of the doubt here without changing the outcome of this motion. In this hearing, the First Circuit's word is the law, and *Tambone* says that an individual defendant does not "make" a statement contained in a document even when he or she "uses" it in the manner that the Commission has (however vaguely) here asserted. Even if Mr. Hopkins personally showed the slide at issue to the investors at the May 2007 presentation – indeed, even if he had showed the slide repeatedly to investors, repeatedly distributed the Fund's fact sheet, and personally disseminated the March and July 2007 letters to investors in the Fund – *Tambone* says that he would not, by doing so, have "made" any of the statements in those documents. It is clear as a matter of law, therefore, that the Rule 10b-5 charge against Mr. Hopkins cannot rest on the allegations of "use."

D. Allegations And Evidence That Mr. Hopkins "Authored" The Documents At Issue Fail As A Matter Of Law To Create A Genuine Issue Of Material Fact.

This leaves the theory that Mr. Hopkins "made" the statements or omissions in the documents at issue because he was "responsible for drafting and/or revising" them, as the Complaint repeatedly (if unspecifically) alleges. This claim fails as a matter of law as well, for two reasons. First, the theory is legally untenable: the First Circuit must and will reject the notion that an individual can become liable for the statements contained in a document when he merely drafts those statements for others to "make." Second, even if "authorship" alone was a viable theoretical basis for imposing primary liability, the record here is as deficient as the Complaint was in *Tambone*. The SEC has not shown, and cannot show, that Mr. Hopkins "actually made" – that is, that he "caus[ed] the existence" – of any of the statements or omissions at issue. *Tambone*, 597 F.3d at 447.

1. As A Matter Of Law, Even Dispositive Proof Of "Authorship" Would Not Establish Primary Liability For Statements A Defendant Drafted For Others To "Make."

When the First Circuit in *Tambone* gave a common-sense construction to the word "make," it acted in the only context that the Court, in that case, needed to address: Whether an individual defendant (call him "Mr. X") "makes" the statements in a document issued by his employer when Mr. X merely disseminates the document to investors. The First Circuit's textual focus was buttressed, moreover, by its obligation to maintain the distinction between primary and secondary violations of Rule 10b-5. Mr. X's dissemination of documents on behalf of his employer may *help* the company to make the statements therein, but holding Mr. X primarily liable for rendering such assistance would blur the line drawn by *Central Bank*, a line that must be drawn clearly even in enforcement cases brought by the SEC.

Because the SEC dropped its alternative, "authorship" theory of liability on appeal in *Tambone*, the First Circuit did not have to decide whether Mr. X "makes" the statements in a document issued by his employer when Mr. X has drafted, or played some role in drafting, the document. There is no plausible reason, however, to think that the First Circuit would not apply the same analytical approach to that theory – i.e., that it would not continue to give the word "make" its natural meaning, and continue to interpret Rule 10b-5(b) in light of *Central Bank's* injunction to maintain the distinction between primary and secondary liability. This tribunal must conclude, therefore, that if presented with the "authorship" theory by this case, the First Circuit will decline to impose primary liability on a defendant whose only *alleged* involvement was his putative responsibility "for drafting and/or updating" statements to be "made" by others.

The "authorship" issue was very recently argued before the Supreme Court in *Janus Capital Group Inc. v. First Derivative Traders*, No. 09-525 (December 7, 2010). *Sylvia Aff.*, Ex.

C. As Justice Scalia put it at the argument, the "authorship" issue can be encapsulated as follows: "If someone writes a speech for me, one can say he *drafted* the speech, but I *make* the speech." *Sylvia Aff.*, Ex. C., p. 31 (emphasis added).

In some situations, the fact that somebody has "created" something might qualify him as the party who "makes" it: "If you're talking about making heaven and earth, yes, ["make'] means to create. . . ." *Sylvia Aff.*, Ex. C., p. 31. But in the particular context to which Rule 10b-5(b) applies – the "making" of statements and omissions from statements – creator-status is manifestly insufficient: ". . . but if you're talking about making a representation, that means presenting the representation to someone, not . . . drafting it for someone else to make." *Sylvia Aff.*, Ex. C., p. 31. Thus, as Justice Scalia put it, "I would not say I'm making a speech [even] indirectly if I have drafted the speech." Rather, "[t]he person for whom I drafted the speech is making the speech." *Sylvia Aff.*, Ex. C., p. 52.

Justice Scalia's remarks focused on the meaning of the word "make" – that is, on the same specific definitional limitation that the First Circuit had identified in *Tambone*. Justice Alito, on the other hand, emphasized the complementary aspect of the analysis that motivated the en banc decision in *Tambone*: the interpretive restraints imposed by *Central Bank's* command to respect the distinction between primary violations and aiding-and-abetting liability in cases brought under Section 10(b). After counsel for the plaintiff-respondents explained that lawyers for companies which issue securities would not be primarily liable for drafting language in a prospectus where the lawyers were merely "reacting on information provided by the company" *id.* at 37, and that the SEC could proceed against them only as aiders and abettors even if they knew that the information they had included in the document was false, *id.* at 38, Justice Alito observed that "[t]he distinction you're drawing is between making the statement and assisting in

making the statement." *Id.* at 42. "[A]iding and abetting," he explained, "is assisting in making these statements . . . as in something you want to take place. . . ." *Id.* at 43.

In the face of these observations – which essentially stated both parts of the rationale used by the First Circuit in *Tambone* – even counsel for the plaintiff-respondents in *Janus Capital Group* had to concede that primary liability would *not* attach to defendants who have merely drafted statements for others to "make." Positing a classic "boiler room" situation, in which salesmen deliver a script representing that the company has sold "a thousand tons of oil instead of only a ton," Justice Breyer asked whether a subordinate could be held primarily liable for drafting the script if "four people told him to go do something like that, but he's the guy who wrote it." *Id.* at 52-53. In response, counsel for the plaintiff-respondents agreed that "he obviously isn't liable." *Id.* at 53.

To be sure, *Janus Capital Group* concerned a claim against a "secondary actor" – a management company that provided advisory and administrative services to the entity that issued the allegedly-misleading prospectuses. *See Janus Capital Group Inc. v. First Derivative Traders*, Petition for a Writ of Certiorari, 2009 WL 3614467, at *2 (Oct. 30, 2009). That, however, is a distinction without a difference. As *Tambone* illustrates, there is only one "maker" requirement in Rule 10b-5(b), and it applies equally to claims against corporate insiders (like Tambone, Hussey and Mr. Hopkins) and secondary actors (like the defendant in *Janus Capital Group*).

The logic advanced by the petitioners in *Janus*, therefore, is effectively identical to the logic employed by the First Circuit in *Tambone*, and it precludes the SEC's charges against Mr. Hopkins. Even if the Hearing Officer pushes the inferential process past the limits of plausibility, the worst that can be assumed here is that Mr. Hopkins drafted representations later "made" by others. With respect to some of the documents at issue (but not others), he may at most have (1)

taken information that was provided to him by the portfolio managers and other State Street employees with primary knowledge (which he lacked), and (2) transcribed that information into a format that he hoped would be acceptable to those who possessed the authority and discretion to determine whether and how it should be included in the documents at issue, and whether and how the documents should be disseminated.

Even if one assumes that Mr. Hopkins played so substantial a draftsman's role, and even if it is assumed as well that he knew the statements he had drafted were materially misleading or misleadingly incomplete, the dispositive fact thus remains that Mr. Hopkins was at most like Justice Scalia's hypothetical speechwriter, who drafts representations for inclusion in a politician's speech, and not at all like the speechgiver who actually "makes" the statements.

The analogy is precise with respect to the two letters mentioned in the Complaint. Even if Mr. Hopkins drafted those letters exactly as they were later transmitted, he indisputably drafted them for somebody else's letterhead and signature.

The distinction drawn by Justice Scalia is equally dispositive of the allegations about the fact sheets and presentation slides. Even if Mr. Hopkins drafted those documents exactly as State Street later used them, he did not "make" the statements contained therein. They were not his statements to make. With respect to these documents, Mr. Hopkins may not be precisely like the speechwriter who drafts remarks for another individual to deliver, but he *is* just like the copywriter who composes text for statements to be "made" by his corporate employer in its advertisements.

There is, moreover, no principled distinction to be drawn between the speechwriter-speechmaker scenario and the copywriter-advertiser relationship. In both situations, the person who drafts the documents (the speechwriter or the copywriter) does not "make" the

representations contained in them. He can, rather, plausibly be accused only of having *assisted* the politician or the advertiser in making them. Under Rule 10b-5(b), therefore, his role in the creation of the document *might* qualify him as an aider-and-abettor, but he cannot be held liable for a primary violation of Rule 10b-5(b). Consequently, because the SEC elected not to charge Mr. Hopkins as an aider-and-abettor, but only as a primary violator, the Section 10(b) claim against him cannot possibly stand.

2. The SEC Cannot Establish That Mr. Hopkins "Authored" The Allegedly-Misleading Statements In The Documents At Issue, Or That He Caused The Existence Of The Allegedly-Misleading Omissions From Them.

Even if a defendant could hypothetically commit a primary violation of Rule 10b-5(b) by virtue of his responsibility "for drafting and/or updating" documents containing material misstatements (or omitting material information), the charges against Mr. Hopkins would fail for lack of evidence that specifically links him to any particular misstatements or omissions. *Cf. Tambone*, 473 F. Supp. 2d at 166. On this record, the Commission cannot show that Mr. Hopkins "actually made" any of the alleged misstatements in, or omissions from, the fact sheets, presentation slides, or letters at issue.

The Fact Sheet. First, there is clear and dispositive evidence that Mr. Hopkins did *not* "draft and/or update" the relevant portions of the LDBF's fact sheet. The Complaint alleges that in 2006 and 2007, the fact sheet falsely represented that the Fund had "better sector diversification" and "higher average credit quality" than typical money market funds. (Complaint, ¶s 13-14) The Complaint quotes the narrative portion of the fact sheet as the source of the alleged misrepresentation. (Complaint, ¶13)

The record shows, however, that Mr. Hopkins did not draft that narrative. Mr. Flannery testified that "[t]he narrative description . . . was one that was driven by legal, and I believe

taking – taken from the fund declaration or paraphrasing the fund declaration." *Sylvia Aff.*, Ex. D, at 820. Asked specifically whether anyone in product engineering was involved in drafting the narrative for the fact sheets, Mr. Flannery reiterated that his "understanding was that . . . the descriptive text on the fact sheets was . . . put in place by legal at some point, maybe several years ago." *Id.*[4/]

The Presentation Slides. The Commission will be similarly unable to establish Mr. Hopkins as the "author" of the "Typical Portfolio Exposures and Characteristics" slide that Mr. Hopkins may have used (but probably did not use) at the presentation he attended on May 10, 2007. (Complaint, ¶s 16-17) There is no evidence that Mr. Hopkins drafted this slide. He testified without contradiction, rather, that when preparing for a presentation he would obtain the relevant slides from State Street's presentation group, or ask that group to compile a slide deck for him to use. *Sylvia Aff.*, Ex. E at 38-39. He might then note more recent detailed information on the slide, so that it would be available for him to convey at the presentation, but he played no role in drafting or updating the slide itself: this was all done by the presentations group. *Id.* at 272-73, 697-98. Even if Mr. Hopkins displayed the allegedly misleading slide at the May 2007 presentation, therefore, he did so in exactly the manner addressed by the First Circuit in *Tambone*: as one who "merely uses a statement created entirely by others." 597 F.3d at 443.

The March 2007 Letter. Mr. Hopkins *did* play a role in drafting the March 2007 letter. The LDBF and certain other State Street funds had underperformed their benchmarks in February of that year, and the cause of the underperformance had been identified as recent activity in the BBB tranche of the ABX Index, in which the Fund had a modest position. Mr. Hopkins wrote an internal report explaining the recent events. Later, he was instructed to rework

[4/] Mr. Flannery's testimony is particularly significant on this issue because at the time the LDBF fact sheet was likely created he had been the head of product engineering for several years.

the internal document into a "client-friendly" (i.e., plainer-English) version, suitable for investors. Once again, Mr. Hopkins carried out his assignment. *Sylvia Aff.*, Ex. F.

It *can* be said, therefore, that Mr. Hopkins *was* "responsible for drafting" the statements in the March 2007 letter. Those statements, however, are not the basis of the charge. There is no evidence (and no allegation) that anything Mr. Hopkins said in the letter was false or misleading. The Fund *had* underperformed in January, and activity in the BBB tranche of the ABX Index *had* driven the underperformance, despite the Fund's modest position in that investment. Mr. Hopkins' historical account was perfectly accurate and complete.

The basis of the charge, according to the Complaint, is that investors could have been misled, not by what the March 2007 letter said, but by what it did not say. According to the Commission, although it accurately discussed the Fund's recent performance as a result of its position in the ABX Index, the letter did not disclose the extent of the Fund's position "in subprime bonds and other subprime derivative investments." (Complaint, ¶22) The SEC claims that this was a materially misleading omission in light of the problems that arose later in 2007 in the subprime market, and the effect of those subsequent events on the value of the Fund.

There are any number of flaws in this theory. It is, for one thing, a "classic" example of "fraud by hindsight," which occurs when a plaintiff asserts that "the fact that something turned out badly must mean defendant earlier knew that it would turn out badly." *Mississippi Public Employees' Ret. Sys. v. Boston Scientific Corp.*, 523 F.3d 75, 91 (1st Cir. 2008).

The notion that the "omitted" information was material in March 2007 – or that anyone would have acted with scienter by omitting it – is belied here by the Complaint itself, which alleges that when the problems in the subprime market became apparent to State Street, the company's internal advisory groups quickly recommended to their clients that they withdraw

from the exposed funds (including the LDBF). This recommendation, and the ensuing exodus of internal investors, however, did not come until late July 2007 – and as the Complaint tacitly acknowledges, Mr. Hopkins had nothing to do with it. (Complaint, ¶s 25-30) The Commission, meanwhile, has no evidence that four months earlier, back in March 2007 when the letter was drafted and posted, anybody at State Street knew or had any reason to know that the Fund's position in the subprime market would eventually expose it to material loss.

But the Hearing Officer need not attend to those weaknesses in order to grant summary disposition to Mr. Hopkins on this aspect of the Rule 10b-5 charge. Mr. Hopkins cannot, as a matter of law, be primarily liable under an "authorship" theory for the alleged omission from the March 2007 letter because there is no evidence that Mr. Hopkins in any way "caus[ed] the existence" of that omission. *Tambone*, 597 F.3d at 447. The *contents* of the letter had two relevant characteristics: (1) they were completely true and accurate, and (2) they were narrowly historical in focus. When he drafted the internal alert, and when he revised that document into the letter, Mr. Hopkins gave a truthful and accurate account of what *had* caused the *past* underperformance of the Fund because that is exactly what he had been asked to do.

It was, moreover, *all* that he had been asked to do. The statements in the internal alert and the client letter, which Mr. Hopkins drafted, were deliberately and exclusively *retrospective* in scope; indeed, Mr. Hopkins was careful to point out, in both documents, that "[t]his is not meant to be the final missive on this matter." *Sylvia Aff.*, Ex. F, G. The alleged omission from the letter, on the other hand, was entirely *prospective*. The omitted information was material at the time, according to the Commission's tenuous theory, because of the effect that it *might* have on the Fund's *future* performance.

Mr. Hopkins cannot be deemed to have "actually made" the allegedly-actionable omission, therefore, because there is absolutely no evidence in the record to suggest that he was responsible for determining the scope of the letter. An actionable omission occurred here only when (and only if) *somebody* at State Street decided not to include a description of the Fund's exposure to the subprime market in the letter, even though that person knew the omitted information was necessary to make the letter not misleading. Whether anybody made such a decision, and whether anybody acted with such knowledge, is a matter of speculation. It is crystal clear, however, that Mr. Hopkins was not that person. He drafted the account he was asked to draft, and left out nothing of material value. He was not the "author" of the alleged omission and cannot possibly be held liable for "making" it.

The July 2007 Letter. The allegation that Mr. Hopkins is liable for the July 2007 letter to investors suffers from the same disability: the claim is that the letter misled investors by omission of the Fund's concentration in subprime bonds (Complaint, ¶s 31-35), but the SEC cannot establish that Mr. Hopkins caused the existence of, or otherwise bore responsibility for, the omission.

Indeed, any suggestion to that effect would be ridiculous. In his supplemental Wells submission, Mr. Hopkins explained to the Commission that the drafting history of the July 2007 letter could be reconstructed, and that Mr. Hopkins was mostly absent from all but the preliminary stage of that process. A copy of the supplemental Wells submission with the exhibits thereto, is attached as Exhibit H to the Affidavit of John F. Sylvia, and Mr. Hopkins refers the Hearing Officer to it for details. Suffice it to say here that, while Mr. Hopkins again drafted the internal alert from which the July 2007 letter was adapted, he was only minimally involved in the adaptation process. Before it was finished, the July 2007 letter went through numerous iterations.

The final product contained input from dozens of people, it was vetted by the company's lawyers at several points, and was even reviewed and edited by the chief executive officer. Mr. Hopkins played a minor role in reviewing the letter (as did dozens of other mid-level employees), but he was not in any way responsible for its contents, charged with verifying its accuracy, or even given an opportunity to review the final product. If *Tambone* was a case of blaming the messenger, then imputing "authorship" and liability to Mr. Hopkins under these circumstances would be a case of blaming a mere bystander.

V. Mr. Hopkins Is Entitled To Summary Disposition Of The Charge Brought Under Section 17(a) Of The Securities Act.

Section 17(a)(2) may be *broader* than Rule 10b-5(b) in that the Securities Act does not require a defendant to "make" the alleged misstatements or omissions in order to incur primary liability, but only requires him to do something "by means of" such acts. But the statute is also *narrower* than the rule because of what it requires the defendant to have done "by means of" his or her behavior. An individual commits an unlawful act under Section 17(a)(2) only if he has "obtain[ed] money or property" through the actionable statements or omissions.

There is no genuine issue about this dispositive fact. The Commission cannot show that Mr. Hopkins obtained any money or property when he "used or was responsible for drafting and/or revising" the documents in question. This is not a case like *In re CVS Caremark Corp.*, SEC Release No. 8815, 90 SEC Docket 2689, 2007 WL 1880048, at *5-6 (June 29, 2007), where the Commission could assert (1) that the defendants' year-end bonuses were tied to the financial results that they had caused their employer to materially overstate, such that their alleged omissions had "caused each to receive a higher bonus than he otherwise would have," and (2) that one of the defendants had received an additional, discretionary bonus that was "explicitly tied" to his work on the transaction that he had caused the company to misreport.

Nor is this a case like *SEC v. Hopper*, No. Civ. A. H-04-1054, 2006 WL 778640, at *12 (S.D. Tex. Mar. 24, 2006), where the Commission had a factual basis for alleging that the "dramatic increase" in a defendant's bonus was correlated with the "dramatic boosts" in her employer's trading volume and revenue, and where it was "reasonable to infer that those inflated trading volumes and revenues factored into the calculation of her bonuses, and hence, that [defendant] obtained all or part of those bonuses at least indirectly by means of [her] violation of §17(a)(2)." *See also SEC v. Tambone*, 550 F.3d 106, 112 (1st Cir. 2008) (reversing dismissal of Section 17(a)(2) claim where SEC had alleged that "more than half of the total compensation that defendants received each year consisted of commissions" from sales of mutual funds, and claim was that defendants had obtained money by means of omissions from fund prospectuses where, if the omitted information had been disclosed, investors might have been deterred from buying into the funds).

This case, rather, is much like *SEC v. Forman*, No. 07-11151, 2010 WL 2367372 (D. Mass., June 9, 2010), in which the District Court granted summary judgment on a Section 17(a)(2) claim against the controller of a corporation who had allegedly drafted and filed misleading financial statements on the company's behalf. *Id.* at *4. Although the SEC had evidence that all of the company's employees had received a 3% bonus, and that its executives had received a bonus "tied to [its] financial performance," *id.* at *8, the claim was doomed by the lack of "evidence that the employee bonus was tied to company performance or that [the defendant] was an executive within the meaning of the bonus plan." *Id.*

The Section 17(a)(2) claim against Mr. Hopkins is similarly deficient. The SEC has no evidence, and its Complaint does not even allege, that any of Mr. Hopkins' compensation depended on either the performance of the Fund or the amount of investments made in it. The

SEC cannot produce any such evidence because neither Mr. Hopkins' salary nor his bonus were linked to the Fund. Unlike a portfolio manager or a client relationship manager, a product engineer's compensation consisted solely of a base salary and a bonus tied solely to the attainment of personal professional goals – none of which were dependent upon a specific fund or a fund's performance. Accordingly, the SEC cannot show that Mr. Hopkins obtained *any* money or property when he "used or was responsible for drafting and/or revising" the documents in question, thus its Section 17(a)(2) claim wholly fails on that basis. *Id.*

Indeed, the Commission has no evidence to suggest that *anybody* – e.g., State Street or SSgA – obtained any money or property by means of Mr. Hopkins' alleged violations. With the exception of National Jewish Medical and Research Center, to which Mr. Hopkins allegedly helped make the presentation described in Paragraphs 16 and 17 of the Complaint, the Commission apparently cannot identify any investors or potential investors affected by his conduct. It is clear, however, that State Street did not obtain money or property from that entity "by means of" anything Mr. Hopkins said or did at the meeting in May 2007, because National Jewish Medical and Research Center made no additional investments in the Fund after the meeting took place. *Sylvia Aff.*, Ex. I, J.

VI. CONCLUSION

Wherefore, for all of the foregoing reasons, Respondent James D. Hopkins moves to dismiss all of the charges against him in this matter.

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