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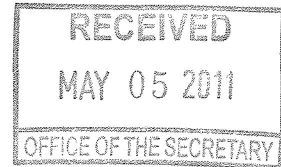
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of

JOHN P. FLANNERY, AND
JAMES D. HOPKINS,

Respondents.

Administrative Proceeding
File No. 3-14081

DIVISION OF ENFORCEMENT'S
REPLY TO REPONDENT JAMES D. HOPKINS' POST-HEARING BRIEF

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In his eighty-six page post-hearing brief Respondent James Hopkins ("Hopkins") suggests that the Division of Enforcement put on a case that it did not. The Division did not argue that Hopkins was the only gatekeeper of information and it did not argue that Hopkins was required to have a crystal ball foretelling that the subprime investment market would melt down months or years before it did. Instead, the Division has always had a relatively simple case: Hopkins made material misrepresentations and omissions to investors and prospective investors when he provided information regarding the investments of the Limited Duration Bond Fund ("LDBF"). Good, bad or indifferent, investors and prospective investors were entitled to the truth about the investments in LDBF. In the more than two-week hearing, the Division demonstrated through documents, the unrebutted credible testimony of David Hammerstein, and perhaps most importantly the testimony of Hopkins himself that he recklessly made material misrepresentations and omissions regarding LDBF and the funds that were invested in LDBF. Hopkins' eighty–six page brief cannot change that evidence. Moreover, the Division is entitled to an investment adviser bar and a penalty against Hopkins.

I. HOPKINS' OMISSIONS AND MISREPRESENTATIONS WERE MATERIAL IN LIGHT OF INFORMATION REASONABLY AVAILABLE TO INVESTORS.

Hopkins argues that his numerous misrepresentations and omissions should not matter because corrective information was available from other sources. Hop. Br. at 7-12. However, Hopkins has admitted that generally the available information was a mixed bag. The information that SSgA sent to each client differed widely. FOF ¶¶ 99, 106. Some clients received quarterly commentary, some received quarterly or annual presentations, and some received monthly performance reports or account summaries from SSgA, while others received different reports from a third-party investment consultant or recordkeeper or received custom reports. FOF ¶

106, 100. The contents of these communications would also differ depending on the fund. FOF ¶¶ 100, 104, 106.

For example, Hopkins argued that National Jewish Medical Center ("National Jewish"), client of Yanni Partners and David Hammerstein, had access through Clients' Corner to other information regarding LDBF, and thus the numerous misrepresentations he made to National Jewish were not an important part of the total mix of information available to it. *See* Hop. Br. at 12. Hopkins is wrong. As Hopkins admitted in his sworn affidavit, his hearing testimony, and his brief, clients were only provided with information regarding the funds in which they were invested. Hop. Br. at 12; FOF ¶¶ 99, 104, 109; Div. Ex. 221 ¶ 59. National Jewish was not directly invested in LDBF but was invested indirectly through the Enhanced Dow Jones-AIG Commodities Fund ("Commodities Fund"). FOF ¶ 223, Hop. Br. at 55 n.12. National Jewish's performance packages provided no information regarding LDBF. FOF ¶ 101. Instead, it provided information on the performance of the Commodities Fund against its benchmark and a statement of the investor's asset changes in the Commodities Fund. *Id.*

To the extent that National Jewish could access audited financial statements on Clients' Corner, the only audited financial statements available to it would be those of the Commodities Fund and not LDBF. The December 2005 audited financial statements for the Commodities Fund identified LDBF as comprising 98.7% of its investment, but provided no detail whatsoever regarding LDBF's holdings. Div. Ex. 267 at SS 6986782. The December 31, 2006 audited financial statements for the Commodities Fund were not even available on Clients' Corner until June 28, 2007. Hopkins Ex. 128A. Even if the December 31, 2006 audited financial statements had been available earlier, it is unlikely that it would have contained any more detailed information regarding LDBF holding than the 2005 financial statements.

In addition, Yanni Partners, on behalf of National Jewish and its other clients, sent due diligence questionnaires to SSgA in both April of 2006 and February of 2007 seeking information regarding the Commodities Fund so that it would have a good understanding of the structure and strategy of the Fund. *Id.* SSgA's responses to Yanni Partners' questionnaires suggested, however, that LDBF was much more diversified than it was. FOF ¶¶ 225-27.

Hopkins argues, without legal support, that the availability of other sources of information should be considered to determine whether Hopkins' omissions were actionable and material. Hop. Br. at 5, 12. Hopkins ignores, however, that he made numerous affirmative misrepresentations such as telling Hammerstein that LDBF only contained 2% subprime. *See infra* at 6-7.

Hopkins also fails to acknowledge that the total mix of information only includes information "reasonably available" to the investor. *Koppel v. 4987 Corp.*, 167 F.3d 125, 131-32 (2d Cir. 1999); *SEC v. Mozilo*, 2009 WL 3807124 at *10 (C.D. Cal. Nov. 3, 2009); *In re Matter of Dolphin & Bradbury*, 88 SEC Docket 1135, 2006 WL 1976000 at *9 (July 13, 2006). Courts have refused to find information "reasonably" available to an investor even when the information was publically available but difficult to decipher. *Mozilo,* 2009 WL 3807124 at *10. Courts have also refused to find information "reasonably available" when the information was available through public access or newspapers. *Koppel*, 167 F.3d at 132 (information not reasonably available when report could be copied and reviewed at offices of company); *In re Dolphin & Bradbury*, 2006 WL 1976000 at *9 (publication of information in local newspaper of limited circulation not considered "reasonably available"). Here, the relevant information was not publicly available but rather in the hands of Hopkins and his employer. At best, the evidence suggests that if a client repeatedly asked the right question, it *might* be able to get information

that *might* alter the mix of information. *See, e.g.* Hopkins Ex. 26 (Catholic Healthcare received holdings information after requesting the information multiple times and prodding client-facing person); Tr. 890:1-9, 1039:19-1040:18 (Flannery) (FAQs regarding subprime exposure in LDBF only to be provided orally and typically *only* in response to a query from a client).

II. HOPKINS MATERIALLY MISLED HAMMERSTEIN AND HIS CLIENTS.

Hopkins spends almost twenty pages of his brief trying to refute the unrebutted testimony of Hammerstein – a consultant to at least six clients who had invested in the Commodities Fund - to whom Hopkins made specific misrepresentations during an April 9, 2007 conference call and a May 10, 2007 meeting. Hop. Br. at 47-66. Specifically Hopkins argues that Hammerstein was not misled by the use of a slide in the standard presentation entitled "Typical Portfolio Exposures and Characteristics – Limited Duration Bond Fund" ("Typical Slide") during the May 10, 2007 meeting. Hop. Br. at 47-62. Hopkins also argues that he did not tell Hammerstein that LDBF's subprime exposure was limited to 2% during the April 9, 2007 conference call. Hop. Br. at 62-66. Hopkins' attempts to avoid the consequences of Hammerstein's testimony are unavailing.

A. Hopkins' Use of the Typical Slide During the May 10, 2007 Meeting with National Jewish was Materially Misleading.

Contrary to Hopkins' argument, the use of the Typical Slide was materially misleading. Hammerstein specifically testified that the sector allocations reflected in the Typical Slide suggested a fund that was sector diversified and less risky that the fund actually was. FOF ¶¶ 253-54. Hopkins suggests that other available information such as an eVestments blurb regarding LDBF would have rectified the representations made by Hopkins. Hop. Br. at 49. However, the eVestments blurb suffered from a similar lack of definitions as many of SSgA's documents. The eVestment document, instead of stating that LDBF was invested in 100% subprime RMBS, instead stated that 100% of the fund was invested in MBS/ABS without

providing any further explanation. Hopkins Exs. 154, 156. Thus, even with the benefit of the eVestments blurb and the Typical Slide, Hammerstein would only have known that LDBF was diversified across the various mortgage and ABS sectors —the same information reflected in the Typical Slide (95% of LDBF was invested in ABS, CMBS, MBS and Agency). Moreover, other information available to National Jewish as an investor in the Commodities Fund would have failed to correct Hopkins' misrepresentations. *See supra* at 2-3.

The uncontroverted testimony in the record as provided by David Hammerstein is that Hopkins not only presented the Typical Slide but made oral misrepresentations regarding the portfolio while using that Slide – a slide that he had the responsibility to update for accuracy. FOF ¶¶ 160, 252-53. At the hearing Hopkins attempted to counter this evidence by "logically reconstructing" a memory that he had not used the presentation book containing the Typical Slide when he made his presentation to National Jewish. FOF ¶ 251. However, in direct questioning from the Court, he admitted that he had no such memory. Tr. 162:13-19 (Hopkins).

Hopkins now argues that Hammerstein's specific testimony that the Typical Slide was used at the May 2007 meeting is not credible. Hopkins claims: 1) it is improbable that Hammerstein could remember in March 2011 the use of a slide in May of 2007; and 2) Hammerstein's initial confusion as to the date of a later meeting undermines the credibility of his entire testimony because his memory was "reconstructed" based on the documents. Hopkins Brief at 52-55. Neither of these arguments is availing.

Hammerstein's testimony regarding the May 2007 meeting must be seen in context. In July 2007, Hammerstein found out the truth regarding LDBF's sector allocations and the exposure to subprime. FOF ¶¶ 258-61. He participated in the drafting of two documents within months of the May 2007 meeting – one in July of 2007 and one in August of 2007 - that laid out

the use of the Typical Slide and how the use of that slide was misleading. FOF ¶¶ 261, 263, 265-66, 268-70. He then recommended that numerous clients terminate their relationship with SSgA based in part on the misrepresentations made at the May 2010 meeting. FOF ¶¶ 266-67. Hammerstein's clients lost a significant amount of money from investing in the Commodities Fund –a result that was further likely to further etch the memory of the May 2010 meeting permanently in Hammerstein's memory. FOF ¶ 271.

Hammerstein's initial confusion as to the specific date of the July 2007 conference call does not in any way lessen Hammerstein's credibility. Yanni Partners' internal document suggested that the date of the call was July 24, 2007 while emails suggested a date of July 27th. FOF ¶ 259 n.2. Although Hammerstein initially testified that the date was July 24th, he did not slavishly accept the emails' suggestion of July 27th when confronted with them by Hopkins' attorney. Tr. 2488:22-2489:8. Instead, those emails refreshed his recollection that neither date was correct. Demonstrating that he has an excellent memory of the events that occurred in the spring and summer of 2007, Hammerstein testified that the call occurred on the afternoon of July 25, 2007. Tr. 2489:1-8. His ability to recall information not specifically reflected by the documents further supports the conclusion that he independently recalls the events during the spring and summer of 2007, unlike Hopkins, whose memory is a "reconstruction."

B. Hopkins Misled Yanni Partners and Its Clients By Stating That LDBF Only Had a 2% Exposure to Subprime.

Hopkins also tries to avoid Hammerstein's specific testimony that Hopkins told him during the April 2007 conference call that LDBF was only 2% exposed to subprime by arguing that Hammerstein has no independent recollection that Hopkins provided that information and that logically the 2% must have referred to only the BBB-rated ABX exposure. Hop. Br. at 62-

66. He does so by attempting to recreate logically the call based on supposition and a strained interpretation of documents.

Hammerstein repeatedly testified, however, that, after he asked Hopkins about subprime exposure, Hopkins told him that the total exposure to subprime was 2%.. FOF ¶ 237. He did so even when Hopkins' counsel attempted to mislead Hammerstein by suggesting that he had never actually asked about subprime exposure. Tr. 2620:6-2621:2. Hammerstein also testified that Hopkins told him that the total exposure was 2% when counsel for Hopkins specifically confronted Hammerstein with his theory that the 2% in the memo referred only to the ABX exposure. Tr. 2622:4-24 (Hammerstein). Thus the unrefuted evidence is that Hopkins specifically misled Yanni Partners by stating that LDBF was only 2% exposed to subprime.

III. HOPKINS WAS AT LEAST RECKLESS WHEN HE MADE HIS MISREPRESENTATIONS AND OMISSIONS.

Hopkins argues that he was not reckless or negligent at the time that he made his numerous misrepresentations and omissions because he did not know that misstatements or omissions regarding LDBF's exposure to subprime, use of leverage, and lack of sector diversification were important to investors. Hop. Br. at 72-75. Yet, during the time period, he knew or should have known that certain clients and prospects cared enough to ask repeatedly regarding just these issues. For example, he knew that clients cared about leverage because they asked about it and he talked about it with clients. FOF ¶ 121. Hopkins even avoided discussing leverage in connection with another fund because he was afraid that the "humongous" leverage would scare the potential client off. FOF ¶ 123.

Hopkins knew that subprime exposure was material to investors because he discussed it with them and he knew there were concerns about the subprime market at the macro level. At least one prospect in the fall of 2006 sought information regarding sector exposure and the

holdings of LDBF. Div. Exs. 32, 33. In February of 2007, Hopkins wrote a CAR alert stating that the subprime market had received negative press that suggested to hedge funds difficulties in that market. FOF ¶ 199. By April of 2007, Hopkins had discussed the extent of LDBF's exposure to subprime with Yanni Partners. FOF ¶ 237. In April 2007, Cambridge Associates had asked about LDBF's exposure to subprime. Div. Ex. 246 at 6-7. Hopkins asked for updated holdings information from LDBF's portfolio manager in April so he could be prepared to provide that information to Catholic Healthcare if asked. Div. Ex. 246 at 6-7. In June another consultant asked about sector diversification in LDBF. FOF ¶ 153. In fact, Hopkins himself acknowledged that he provided information regarding subprime exposure at various times in 2007. Hop. Br. at 70-71.

Although Hopkins annotated the Typical Slide with the actual sector breakdown of the portfolio, Hopkins could not remember ever actually providing that information to a client even though he knew of clients' interest. FOF ¶ 165, 170-72. He admitted that his handwritten notes on a presentation did not indicate one way or another whether he provided that information to the client. FOF ¶ 165. He testified that he couldn't remember ever talking about this slide. FOF ¶ 174. Yet he later admitted that he could not remember anything that happened during three client presentations where the slide was actually used. FOF ¶ 176. Moreover, it is clear that Hammerstein has a clear memory that Hopkins presented the Typical Slide in a misleading way.

Hopkins tries to avoid the overwhelming evidence by citing his own testimony that he "testified without contradiction" that he was "rarely questioned" about sector allocations. Hop. Br. at 74. In fact, his testimony – in response to questions from this Court – was that he "didn't recall ever talking about [the Typical Slide] and [he] didn't recall ever answering any questions about this slide." Tr. 199:24-200:11 (Hopkins); FOF ¶ 174. However, it became clear that he

could testify this way because he had no memory regarding what happened at the numerous presentations he attended where he used the Typical Slide and provided other information regarding the LDBF portfolio. FOF ¶¶ 170, 171, 172, 176, 245, 251.

IV. HOPKINS "MADE" MISREPRESENTATIONS PURSUANT TO SECTION 10(B) AND RULE 10B-5(B) OF THE EXCHANGE ACT.

Hopkins argues that he cannot be held liable for making misrepresentations in fact sheets, presentations, letters to clients, and other communications with clients because he was not involved in "making" those statements as required by Rule 10b-5(b). Hop. Br. at 6-7, 66-70.

Hopkins relies almost exclusively on *SEC v. Tambone*, 597 F.3d 436 (1st Cir. 2010), a recent First Circuit *en banc* case. *Tambone* addressed a narrow issue -- whether underwriters "made" a misstatement under Rule 10b-5(b) when they sent to clients a prospectus they had no part in drafting. *Id.* at 442. The *Tambone* court dismissed the Division's Rule 10b-5(b) claim because it found that dissemination *by itself* did not constitute "making" a misstatement. *Id.* at 442. Alhough there had been arguments in the district court about the level of the underwriters' participation in preparing the prospectuses, those facts and legal arguments were not before the First Circuit in either its panel or *en banc* decisions. *See id.* at 441. The *Tambone* decision specifically left open how much involvement in the preparation of a document was necessary for a person to have "made" a misstatement under Rule 10b-5(b), and did not address at all the proof required by Rules 10b-5(a) and (c). *See id.* at 441.

As this Court noted, the *Tambone* decision is not controlling law in this Commission proceeding. *See* January 10, 2011 Order, at 4-5. Even if it were, however, the decision does not answer the question that determines Respondents' liability in the situation presented here – how much involvement in the preparation of a fraudulent statement is necessary to hold a person liable for violating Rule 10b-5(b). Although Hopkins continues to argue that *Tambone*'s logic

requires exclusive and attributable authorship, this Court has explicitly rejected that reading of the case. *See id.* at 5 n.4. The *Tambone* court recognized that two divergent tests had developed to answer the "how much participation" question: the "substantial participation" test and the "bright line" test. *See* 597 F.3d at 447. It did not select one of these tests, or create its own, as it determined that the underwriters' conduct did not constitute "making" a misstatement under any reasonable test. *See id.* Hopkins, however, is liable under a proper reading of any of the applicable legal standards. Div. Post-Hr. Br. at 58-62.

Fact Sheets

Although Hopkins did not draft the template for the LDBF fact sheets, he was responsible for reviewing them each quarter to ensure their accuracy. He could have changed them if they were inaccurate. FOF ¶ 141. Hopkins knew that the fact sheets were disseminated to prospects and consultants. FOF ¶¶142, Div. Ex. 91. It is unnecessary for Hopkins to disseminate the fact sheets directly to investors for him to be liable for the misstatements they contained. *See SEC v. Wolfson,* 539 F.3d 1249, 1264 (10th Cir. 2008). Because Hopkins was responsible for their contents, Hopkins "made" a misrepresentation every time the fact sheets were issued.

Presentations

Hopkins admitted that he was responsible for reviewing the contents of the LDBF standard presentation, including the Typical Slide, each quarter to ensure its accuracy. FOF ¶ 160. He could have changed the Typical Slide if he had wished. FOF ¶¶ 182, 187. On numerous occasions from August 2006 through May of 2007 he was given the opportunity to change the standard presentation including the Typical Slide. FOF ¶¶ 180-86. He changed parts of the standard presentation on at least two occasions but chose not to edit the Typical Slide's sector breakdown chart even though it was misleading. FOF ¶¶ 180, 185, 178. Although Hopkins

claims that the only evidence that he presented the Typical Slide to an investor is the May 10, 2007 meeting with Hammerstein, the evidence reflects that Hopkins personally participated in delivering the standard presentation including the Typical Slide on at least three other occasions — at a July 2006 meeting with Johns Hopkins, at a December 2006 meeting with Kalson & Associates, and at a February 2007 meeting with the Los Angeles County Retirement Association. FOF ¶¶ 164-66, 170-72. Hopkins also knew that the Typical Slide was available to others to use in presentations to clients. FOF ¶ 177. Clearly, as the person responsible for the presentations' contents and as a person who presented the presentations to clients, Hopkins "made misrepresentations" under either test.

March Letter

Hopkins argues that he played "no more than a draftsman's role" in the March letter. Hop. Br. at 68. Hopkins was the author of the February 2007 CAR alert that served as the basis of the March letter, of which he was also the author. FOF ¶¶ 199, 204. Hopkins attempts to avoid responsibility by contending that the portfolio managers controlled the information and the opinions in the letter. Hop. Br. at 21 (citing Tr. at 220). Yet, the evidence reflects that Hopkins used the portfolio managers only as a source of information; they did not control the content of the communications. Tr. 220:4-15. As the person who drafted the March 2007 letter, Hopkins made the misrepresentations and omissions contained therein.

July 26, 2007 letter

Hopkins also tries to downplay his role in drafting the July 26 letter by highlighting the involvement of others in its drafting. Hop. Br. at 26-35, 36-38, 68. Hopkins ignores the following salient facts: 1) Hopkins drafted the July 2, 2007 CAR alert that became the skeleton of the July 26, 2007 letter, FOF ¶ 339; 2) Hopkins was the point person for the subject matter of

the letter, FOF ¶ 200; 3) after he returned from vacation, he circulated a draft of the "promised" letter, FOF ¶ 339; 4) Hopkins suggested the edit that is at the core of the Division's allegations—that SSgA had taken steps to "reduce risk" in the fund, FOF ¶ 346; 5) although the language regarding the reduction of risk that Hopkins suggested including was moved to another part of the letter, the content of his suggested edit remained the same, FOF ¶ 354; Hop. Br. at 33, 36; and 6) the final version of the letter went out with his suggested risk reduction language intact. FOF ¶ 357. Hopkins' involvement in that misrepresentation alone is enough for him to have "made" a misstatement under any of the potential legal standards. Moreover, as the LDBF product engineer - the liaison between the portfolio managers and the client-facing managers and their client - he was in the position of having full information regarding the LDBF portfolio while also knowing what information clients were receiving and the extent to which they were confused. FOF ¶¶ 25-28, 318-21, 338.

Hopkins argues without any support that because Michael Wands, a member of the investment team, also had contact with clients regarding LDBF in July 2007 and also reviewed drafts of the letter, Hopkins' responsibility is in some way eliminated. Hop. Br. at 41. Another individual's participation in the drafting process does not alleviate Hopkins' responsibility for the misrepresentations and omissions in the July 26 letter. Ultimately it was Hopkins and not Wands who recommended the inclusion of the risk reduction language. It was Hopkins who had been the point person for the subprime exposure issue and it was his letter that served as the skeleton for the letter that went to investors.

V. HOPKINS OBTAINED MONEY BY MEANS OF HIS MISREPRESENTATIONS AND OMISSIONS.

Hopkins argues that the Division failed to demonstrate that he "obtain[ed] money or property" by means of his actionable omissions or misstatements because he did not personally

obtain money from his omissions or misstatements. Hop. Br. at 76-77. However, Section 17(a)(2) does not require that the individual making the misrepresentations obtain the money personally. It is enough that an employee obtains money on behalf of his employer. *See SEC v. Delphi*, 2008 WL 4539519 at *20 (E.D. Mich. Oct. 8, 2008)[1]; *see also SEC v. Wolfson*, 539 F.3d 1249, 1264 (10th Cir. 2008) (defendant consultant obtained money or property for purposes of 17(a)(2) when received consulting payments for drafting misleading filings).

SEC v. Forman, 2010 WL 2367372 (D. Mass. June 9, 2010), cited by Hopkins, is not to the contrary. *See* Hop. Br. at 77. In *Forman*, defendant controller argued that that "there is no evidence that he 'obtain[ed] money or property' by means of the alleged misstatements...." *Id.* at 8. The Commission attempted to prove that *either* defendant obtained money personally or that his employer sold unidentified securities for an inflated price due to the misrepresentations. *Id.* Because the Commission produced no evidence that *either* was the case, the court allowed defendant's motion for summary judgment. *Id.* Here, in contrast, the evidence demonstrates that Hopkins' duties as an employee including making representations to investors. FOF ¶ 29. He understood that, when he participated in presentations, he was selling securities. *Id.* Throughout the time period that Hopkins was making the misrepresentations at issue in this case, SSgA received money from purchases of LDBF and funds invested in LDBF. Div. Exs. 229, 231.

VI. THE DIVISION IS ENTITLED TO A PENALTY AND A BAR AGAINST HOPKINS.

Hopkins attempts to avoid the imposition of a penalty or a bar by arguing that none of the three independent bases for obtaining a penalty and the two independent bases for obtaining an

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[1] Contrary to Hopkins' argument, *Delphi* properly relied on *SEC v. Youmans*, 543 F. Supp. 1292, 1299 (E.D. Tenn 1982), *rev'd other grounds*, 729 F.2d. 413 (6th Cir. 1984). *See* Hop. Br. at 77 n.17. *Youmans*, found officers of a company liable for violating Section 17(a)(2) for misstatements made on behalf of the company. *Id.* at 1292. There was no evidence that those officers personally obtained property through their misstatements; their liability only stemmed from their roles as "officers responsible for preparing, reviewing and filing SEC reports." *Id.*

investment adviser bar are applicable in this case. He is wrong. Even before the enactment of the Dodd-Frank Act, both the Investment Company Act and the Investment Advisers Act support the imposition of both a bar and a penalty. In addition, under the Dodd-Frank Act the Division is entitled to seek a penalty against Respondents.

A. Both the Investment Company Act and the Investment Advisers Act Support a Bar and a Penalty Against Hopkins.

The Division may seek an investment adviser bar and a penalty pursuant to Section 9(b) of the Investment Company Act. Under that section, the Commission may bar ***any*** **person** from affiliation with an investment adviser or investment company if he has willfully violated the Securities Act or the Exchange Act.[2] 15 U.S.C. §80a-9(b) (emphasis added). Section 9(d) of the Investment Company Act allowes for a penalty in any proceeding instituted under 9(b) of Act. 15 U.S.C. §80a-9(b)(1)(A).

Even assuming *arguendo* that the Division could not seek a penalty and a bar pursuant to the Investment Company Act, it could obtain those remedies under Section 203(f) of the Investment Advisers Act, which permits a bar for any person associated with an investment adviser who has willfully violated the Securities Act or the Exchange Act. 15 U.S.C. §80b-3(f) (for violations of Section 203(e)(5) of the Act). Section 202(a)(17) defines "person associated with an investment adviser" to mean "any partner, officer or director of such investment adviser...or any person directly or indirectly controlling or controlled by such investment adviser, *including any employee of such investment adviser....*" 15 U.S.C. §80b-3(2)(a)(17) (emphasis

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[2] Hopkins argues that the Division has failed to prove that Hopkins "willfully" violated the securities laws. Hop. Br. at 80 n.19. However, willfulness only requires a showing "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "'also be aware that he is violating one of the Rules or Acts.'" *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)). Here, Hopkins knew he was making the statements that are the basis for his violations of the securities laws.

added). In any proceeding instituted pursuant to Section 203(f), the Commission may impose a civil penalty against any person who has willfully violated any provisions of the Securities Act, the Exchange Act or any rule thereunder. 15 U.S.C. §80b-3(i)(1).

Relying on his self-serving failure to recollect his exact role with the registered funds, Hop. Br. at 79-80, Hopkins argues that he lacks the necessary nexus with SSgA Funds Management, Inc. ("SSgA FM"), the registered Investment Adviser subsidiary of State Street Corporation, to be considered "associated with" SSgA FM. FOF ¶ 7. Yet, Hopkins admitted that he was the product engineer for registered funds advised by SSgA FM and had other responsibilities for those mutual funds. He thus clearly functioned as an employee of the registered entity. FOF ¶ 21. He also testified that at the point that Mike Thompson became the product engineer responsible for the registered funds, Hopkins supervised him. FOF ¶ 22. As of May 30, 2007, Hopkins continued to supervise Thompson. FOF ¶ 17. During 2006 and 2007, Hopkins was also providing relationship managers with information regarding registered funds because, he admitted, he was the appropriate person to do so. Div. Ex. 28; Tr. 115:8-20, 122:16-123:18. Hopkins thus qualifies as a person "associated with an investment adviser" who is subject to the bar and penalty provisions of the Investment Advisers Act. *See In re Zilka*, Initial Decision No. 415, 2011 WL 1425710, * 6, 13 (ALJ Apr. 13, 2011) (employee hired to provide stock tips to an investment adviser was "affiliated" for purposes of Section 202(a)(17) of the Investment Advisers Act).

B. The Division is Entitled to Seek a Penalty under the Dodd-Frank Act.

Hopkins also tries to avoid the imposition of a penalty by arguing that the Dodd-Frank Act's penalty provision cannot apply retroactively to his conduct. At issue is Section 929P of the Dodd-Frank Act, which amended Section 8A of the Securities Act, 21B(a) of the Exchange Act, Section 9(d)(1) of the Investment Company Act, and Section 203(i) of the Investment Advisers

Act to allow for the imposition of a penalty in an administrative cease and desist proceeding against a non-regulated person. Hopkins contends that the general presumption against retroactive application of statutes prohibits this court from applying Section 929P to impose a penalty for his conduct that occurred before its enactment. Hop. Br. at 81-82. Despite that general presumption, courts have recognized that new statute may apply retroactively when the statute only acts to confer or withdraw jurisdiction from a particular forum.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 273 (1994), the Supreme Court noted that it has regularly applied statutes that confer or oust jurisdiction in cases where the underlying controversy occurred before the provision's enactment because application of a new jurisdictional rule "usually takes away no substantive right but simply changes the tribunal that is to hear the case." *Id.* at 274 (citing *Hallowell v. Commons*, 239 U.S. 506, 508-09 (1916)). Courts have applied this principle even in cases where jurisdiction is transferred from an Article III court to an administrative tribunal. *See, e.g., Hallowell*, 239 U.S. at 508 (upholding retroactive application of a statute transferring jurisdiction of probate disputes among American Indians from an Article III court to the Department of Interior)*;see also Kolster v. INS*, 101 F.3d 785, 788 (1st Cir. 1996) (upholding retroactive application of statute stripping Article III courts of jurisdiction over appeals of deportation proceedings involving certain crimes, leaving final appeal to an administrative body). Because the Commission was able to seek penalties in district court against non-registered persons for violations of the Securities Act or the Exchange Act before passage of the Dodd-Frank Act, the ability to seek civil penalties for the same conduct in administrative proceedings does not change the nature or extent of a defendant's potential liability for conduct, only the forum in which the relief may be sought.

Cases cited by Hopkins are not to the contrary. Those cases prevented the retroactive application of a statute when substantive rights would have been affected by the retroactive application of the statute. *See, e.g., Lockheed Corp. v. Spink*, 517 U.S. 882, 896-97 (1996) (no retroactive application of statute that substantively changed an employee's right to participate in an ERISA plan); *AT&T v. Hulteen,* 129 S. Ct. 1962, 1971 (2009) (Court refused to apply Pregnancy Discrimination Act retroactively because it substantively changed rights of women affected); *In re Castle Sec. Corp.*, Initial Release No. 244, 82 SEC Docket 205, 2004 WL 115193, *18-25 (ALJ Jan. 23, 2004) (court refused to apply penny stock bar retroactively to pre-enactment misconduct because it would have increased the consequences of the misconduct). However, in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006), because the newly-enacted immigration law did not have a substantive effect on the rights of illegal immigrants who reentered the country after a deportation order, the Court allowed the retroactive application of the statute. *Id.* at 37.

Finally, although Commissioner Casey discussed her concerns regarding the retroactive application of certain provisions of the Dodd-Frank Act during her *SEC Speaks* speech, she did not focus on Section 929P of the Act. *See* Hop. Br. at 82 (citing Kathleen Casey, Address to Practicing Law Institute's *SEC Speaks in 2011 Program* (Feb. 4, 2011), http://sec.gov/news/speech/2011/spch020411klc.htm. Instead, she focused on Section 925, which allows the Commission to impose collateral suspensions and bars across all of the securities professions regulated by the Commission. *Id.* at 5-6. This section also granted the Commission brand-new authority to suspend or bar persons from associating from a municipal advisor or a nationally recognized statistical rating organization. *Id.* Commissioner Casey focused on the new bars and opined that, because these bars created new consequences for

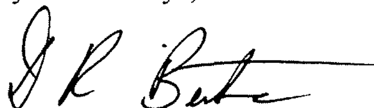
violations occurring prior to the enactment of the statute, such bars should not be applied retroactively. *Id.*; *see also In re Lawton,* No. 3-14162, Initial Decision at 4-5, 2011 WL 162014 at 3-4 (ALJ April 29, 2011) (because barring association with a municipal advisor and a nationally recognized statistical rating organizations are new consequences for prior actions court refused to impose bars for conduct prior to enactment of Dodd-Frank). In explaining the *Landgraf* decision to the audience, Commissioner Casey specifically contrasted statutes conferring or withdrawing jurisdiction from a tribunal as an exception to the general presumption against retroactivity — exactly the situation here. *See* Casey Speech at 8.

CONCLUSION

For the reasons stated above, the Division requests that the court grant the relief sought in its post-hearing brief.

Respectfully submitted,

DIVISION OF ENFORCEMENT,
by its attorneys,



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