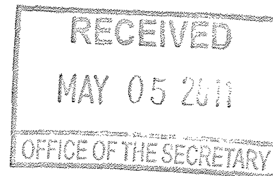
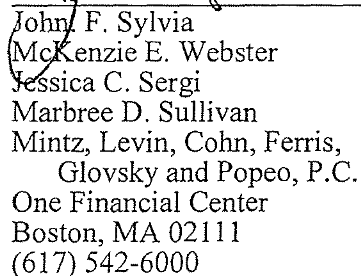
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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



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



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I. INTRODUCTION

The Division kicks off its post-trial brief with the bold assertion that investors in LDBF and other State Street funds "were deceived about the nature and the extent of subprime residential mortgage-backed securities held in those funds," and follows up with the contention that Mr. Hopkins and Mr. Flannery "bear unique responsibility for the deceptions visited upon these investors." Division of Enforcement's Post-Hearing Brief ("Div. Post-Hearing Brief"), p. 2. Neither assertion is true, of course. Both are, however, emblematic of a fundamental problem with the Division's case: an abject failure of proof. The Division's *ipse dixits* are not evidence, no matter how many times they are repeated. The fact remains that the Division did not call a single investor to testify or introduce a single document indicating that an investor was deceived about anything, much less that Mr. Hopkins was the source of the deception.

But the flaw in the Division's case runs deeper than the Division's failure to meet (or even discuss) its burden of proof. The entire premise that State Street deceived anyone regarding subprime investments is invalid. Yes, there was a meltdown in the subprime market (a once in a lifetime event), and yes, investors lost money. But that loss stemmed from the meltdown itself, not from any deception by State Street or Mr. Hopkins. To the contrary, the undisputed evidence is that State Street's investment team believed AAA- and AA-rated subprime securities to be good investments. Further, while we do not know the total mix of information possessed by any particular State Street investor at any particular time, the evidence introduced at trial demonstrated that State Street *did* disclose and/or make available detailed information regarding its subprime investments through a variety of independent channels. Any lack of clarity on what

particular investors knew, however, is of no concern to Mr. Hopkins. He was not required to prove what investors were told; rather, the Division was required to prove what investors were not told. This the Division did not do. Critiquing the content of cherry-picked investor communications is no substitute for establishing the total mix of information actually provided to investors. Without this context, the Division's "omissions" case simply has no meaning.

There also is the question of motive. Why would a mid-level employee want to conceal the extent of subprime holdings from State Street's customers and what would he gain from doing so? The Division provides no good answers. Not only did Mr. Hopkins actually tell clients about the extent of LDBF's subprime holdings, his compensation was not dependent upon investor retention. To the contrary, as the Division notes, he received a promotion after the subprime crisis had taken its toll.

Many of the points argued by the Division are adequately addressed in Mr. Hopkins' opening brief and need not be repeated. To the extent that points need further amplification, they are discussed below. In the final analysis, however, Mr. Hopkins submits that the Division did not prove the case it charged. But the evidence goes even further, and actually establishes that Mr. Hopkins did nothing wrong. We respectfully request that this tribunal so find.

II. THE DIVISION FAILED TO ESTABLISH THAT ANY MISREPRESENTATIONS WERE MADE TO MR. HAMMERSTEIN.

Much of the Division's case hangs on the testimony of David Hammerstein, and yet in its recitations of that testimony, the Division ignores a key aspect of its burden of proof. It is not enough for Mr. Hammerstein merely to have said things that appear to support the claims; his testimony be reliable and credible if the Division is to satisfy its

burden. But the Division makes no effort to establish the credibility of the *only* witness it called who – though not himself an investor in the Fund – could at least testify from the "investor" side of the equation. It apparently expects this tribunal to take Mr. Hammerstein's testimony on faith, despite (1) its inherent lack of credibility, and (2) the documentary evidence that casts serious doubt upon his testimony.

A. Mr. Hammerstein And Yanni Partners Knew The Limited Duration Bond Fund Used Leverage.

The leverage employed by the Fund was disclosed to Mr. Hammerstein and his employer, Yanni Partners ("Yanni"). The record shows Mr. Hammerstein well understood that the Fund was levered. His trial testimony to the contrary is not credible: Mr. Hammerstein and Yanni "did not know that LDBF … used leverage" (Div. Post-Hearing Brief, p. 19); "Hopkins told Hammerstein for the first time that LDBF employed leverage [on the July call]" (Id. at 20); and "Hammerstein was surprised and dismayed, for LDBF's use of leverage made the fund far riskier than he had understood it to be based on Hopkins' prior representations[.]" Id.

In fact, as early as April 2007, Yanni and Mr. Hammerstein understood that LDBF was the alpha strategy of the Dow Jones-AIG Commodities Fund ("DJ-AIG Fund"). Mr. Hammerstein co-authored a memo from Yanni to its clients, dated April 24, 2007, stating that LDBF invests in "investment grade fixed income spread products, primarily asset-backed and mortgage-backed securities, to generate the target alpha. The fund's exposure to mortgages, including a 2.5% allocation to BBB rated securities tied to sub-prime mortgages, was the primary reason for underperforming LIBOR." Div. Ex. 73. Mr. Hammerstein and Yanni knew that a portable alpha "strategy *utilize[d] the benefit of leverage* to gain exposure to both the beta source through derivatives (cheaply)

and essentially farm out the alpha engine. The key is that the alpha engine outperforms LIBOR and does not correlate to the beta source. Yanni Partners believes portable alpha programs come with significant risks." Hopkins Ex. 170 (emphasis added). Mr. Hammerstein acknowledged on the stand that the LDBF strategy sought to generate a return of LIBOR plus 50-75 basis points and that excess returns correlate to excess risk. Tr. 2540 (Hammerstein); see also Hopkins Ex. 170 ("[c]lients seeking alpha (returns in excess of beta exposures) ... are assuming active risk. The risks are that beta returns may not meet policy expectations and underperforms objectives").

Mr. Hammerstein also understood that derivatives were used in the DJ-AIG Fund as a portable alpha source. Tr. 2538-39 (Hammerstein). On the stand, he conceded that he relied upon SSgA's 2006 Response to Yanni's Request for Information in making his decision to recommend the strategy to Yanni's clients. Tr. 2439-40, 2557-60, 2568-69 (Hammerstein). Yet, that document specifically highlighted that "swaps" – classic derivative instruments – were used in LDBF. Hopkins Ex.140; Div. Ex. 161 at SEC-Yanni-000042 (pending). The Division itself acknowledged that derivatives and swaps are a form of leverage which were utilized by LDBF. Div. FOF, ¶¶ 77-79. As a seasoned investment professional, Mr. Hammerstein could not have been ignorant of this fact. His claim, therefore, that he did not know LDBF used leverage, rings hollow.

If that weren't enough, there is more. The presentation slides that Mr. Hammerstein claims to have relied upon, specifically referenced LDBF's use of leverage through the term "TRR Swaps," and stated that SSgA was "systemic[ally] de-leveraging ... all spread products to levels not seen in over 20 years." Hopkins Ex. 57, pp. 14, 21. It is undisputed that this presentation was e-mailed to Yanni by SSgA's Amanda Williams.

See id. If Mr. Hammerstein saw the slides, as he claimed, then he could not have failed to notice – as early as May 8 or May 10 – that the Fund employed leverage. Tr. 2638 (Hammerstein).

B. The Division Failed To Prove That Mr. Hopkins Misrepresented The Fund's Subprime Exposure To Mr. Hammerstein During The April 9, 2007 Call.

Long before Mr. Hopkins had any communications with Mr. Hammerstein and Yanni, they already understood that LDBF primarily utilized ABS and CMBS. Tr. 2542 (Hammerstein). In fact, Yanni presented the following information to National Jewish in May 2006:

> SSgA Enhanced DJ-AIG Commodities Index Strategy seeks to outperform the DJ-AIG by replicating the commodities return while enhancing cash collateral … [LDBF] seeks to outperform LIBOR by 50-75 bps annually, which is the source of the expected outperformance of the Commodities Strategy ... [in addition, LDBF keeps an] average credit quality of AA [and utilizes] *[a]sset-backed and [c]ommercial [m]ortgage-backed [s]ecurities*, two sectors that are not well represented in broad fixed income indexes.

Hopkins Ex. 142 (emphasis added). Mr. Hammerstein knew that the ABS sector "include[d] residential mortgages, certain residential mortgages and home equity loans" (Tr. 2531) and that subprime securities have different credit ratings including AA and AAA. Tr. 2624-25 (Hammerstein).

Almost a year later, in April 2007, Mr. Hopkins was asked to join a phone call with Yanni Partners. The express purpose of the call was to discuss the Fund's underperformance in February 2007.[1] Consequently, as Mr. Hammerstein's

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[1] Interestingly, the Division ignores that fact that there was another individual who participated in this call, Bailey Bishop, a Certified Financial Advisor ("CFA") and internal SSgA expert on Structured Products. Div. Ex. 69; Div. Ex. 161 (pending); Div. Ex. 73; Hopkins Ex. 57; Tr. 2449 (Hammerstein). Besides the first paragraph of Mr. Hammerstein's notes which indicate that Mr. Dacey was relaying information, the notes do not specify who was giving information regarding the Fund and therefore it is likely that Mr.

contemporaneous notes reflect, the participants spoke primarily about the Fund's exposure to BBB-ABX subprime securities, the cause of the underperformance. Div. Ex. 69; Tr. 2624 (Hammerstein); Div. Post-Hearing Brief, pp. 19-20. The Division's brief, however, ignores the totality of the information relayed to Mr. Hammerstein, selectively highlighting *one sentence* from Mr. Hammerstein's summary of the call. From this select citation, the Division argues "Hopkins misrepresented LDBF's total subprime RMBS exposure – telling Hammerstein that LDBF's total exposure to subprime RMBS was only 2% (rather than 80% plus)." Div. Post-Hearing Brief, pp. 19-20. In his Post-Hearing Brief, Mr. Hopkins has already outlined the numerous flaws and inconsistencies in Mr. Hammerstein's testimony about this phone call. Hopkins Post-Hearing Brief, pp. 62-66. Rather than repeat those arguments here, Mr. Hopkins notes two additional points: First, in connection with other presentations discussing LDBF's underperformance, Mr. Hopkins not only responded candidly and accurately to a specific question regarding the total exposure to subprime investments in the Fund, he also double-checked with Mr. Pickett to confirm the accuracy of the percentages in the event he was asked the same question at the April 25th meeting with Catholic Healthcare. See Div. Ex. 246, pp. 6-7.[2] It simply makes no sense that Mr. Hopkins would reverse course two weeks later and

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Bishop relayed some information during this call. Div. Ex. 69. However, despite the fact that Mr. Hammerstein testified Mr. Bailey was on the call and his name appears several times in Yanni documents as a source of information, the Division fails to even mention him in its recitation of the facts. Tr. 2449 (Hammerstein); Div. FOF ¶¶ 233-40. Mr. Bishop was involved in several ways: SSgA's responses to Yanni's requests for information in February 2007 lists Mr. Bishop as a member of the Structured Products team which controlled the DJ-AIG Fund (Div. Ex. 161 (pending)); the April 24 memorandum to Yanni clients states that the representatives from "both the Structured Products team (which includes commodities) and the Global Fixed Income team" had a conference call on April 9 (Div. Ex. 73); and, Bailey Bishop, a CFA, was listed in the May 8, 2007 National Jewish presentation as a manager of the index strategies including DJ-AIG Fund (Hopkins Ex. 57).

[2] Mr. Hopkins was asked by a consultant at Cambridge Associates what the total amount of subprime was in the Fund and Mr. Hopkins responded that he thought it was about 75%. After that presentation, Mr. Hopkins called Mr. Pickett to confirm that number was accurate in case he was asked the question again. See Div. Ex. 246, pp. 6-7.

"misrepresent" the same information – particularly when Yanni or any of its clients could have obtained this information at any time from one of their consultant/client relations representatives or requested the holdings in the Fund. Tr. 2734-36 (Carlson: "[A]ny institutional client would know" they could seek information from SSgA beyond that which had already been provided); Tr. 418-21 (Hopkins) (current clients could request holdings). The second point dovetails with the first: the contemporaneous documents *never* mention Mr. Hopkins' alleged "misrepresentation" and in fact say the opposite. For example, a contemporaneous summary of the April 9 call by Mr. Lennie (another Yanni employee), said nothing about a representation that only 2% of the Fund was invested in subprime (Hopkins Ex. 149) nor did Yanni's April 24 memorandum to clients, which essentially reported the results of the April 9 call. Div. Ex. 73; Div. FOF ¶ 239 ("Hammerstein worked with Lennie in drafting the letter, basing it largely off of the memo of the April 9, 2007 conference call with SSgA").

It is undisputed, moreover, that in late July 2007, Mr. Hopkins and Mark Dacey notified Yanni and Hammerstein that the Fund's exposure to "subprime" securities was then 82%. Div. Ex. 128. Hammerstein, who professed to be surprised by this disclosure, reported his findings to Yanni's Investment Policy Committee. Hopkins Ex. 170. If Mr. Hopkins had actually told him that the Fund's entire subprime exposure was only 2% a few months earlier, Mr. Hammerstein surely would have reported this "misrepresentation" to the Committee. But Yanni's Investment Policy Committee did not reach that conclusion: while it felt that SSgA's "disclosure was misleading and certainly selective, the Committee felt that SSgA was *not dishonest or fraudulent* in their communications." Hopkins Ex. 170 (emphasis added). In other words, Mr.

Hammerstein's complaint was not that Mr. Hopkins lied to Yanni, but that he also should have mentioned the Fund's entire exposure to subprime investments. Notably, he doesn't claim that anything that Mr. Hopkins actually said was inaccurate. Whether Yanni, in the midst of the subprime crisis and with the benefit of hindsight, portrayed Mr.Hopkins' presentation as "selective" is irrelevant. While hindsight may justify a customer's dissatisfaction, it is not a legitimate foundation to build a claim of securities fraud. Yanni's own Investment Policy Committee understood this, and sensibly concluded – at a point when it possessed all the information – that SSgA had not been "dishonest or fraudulent in [its] communications." Hopkins Ex. 170. Hammerstein's testimony gave the Division no reason to claim otherwise.

C. Mr. Hammerstein's Recollections About The "Typical Slide" Are Belied By The Contemporaneous Documentary Evidence.

The specificity of Mr. Hammerstein's "recollections" on the stand was both uncanny and unexplained. As Mr. Hopkins discussed in his opening brief, the Division gave this tribunal no reason to believe that Mr. Hammerstein actually could remember the details of interactions that took place several years before his testimony. The events may have become important in retrospect, but they were routine when they occurred, and therefore not memorable for their intrinsic significance. Nor were they shown to be memorable by association in time or location with other unique events. And, nothing in the record indicates that David Hammerstein just has an extraordinary memory – that, unlike most of humanity, he can remember what he ate for lunch a week ago Thursday, much less recall exactly which PowerPoint slides a representative for a fund referred to in a meeting that took place nearly four years ago.

The evidence shows, moreover, that to the extent Mr. Hammerstein's memories inculpate Mr. Hopkins, they are inconsistent with the documentary record. Specifically, Mr. Hammerstein's claim that Mr. Hopkins presented and discussed the "typical slide" during the May 10th meeting conflicts with the strong circumstantial evidence that Mr. Hopkins used a completely different set of slides in his presentation (if any slides were used at all). Hopkins Post-Hearing Brief, pp. 43-62. Mr. Hopkins reasserts the arguments from his post-hearing brief, and points to additional information from contemporaneous notes that highlight the degree to which Mr. Hammerstein's "memory" conflicts with the record:

- Hammerstein, who testified that Mr. Hopkins spoke for 30 minutes and went through most of over 50 slides in the deck, did not recall that, according to a contemporaneous account of the meeting, "Michael Salem stopped Jim about 3 minutes into his presentation and exclaimed he didn't realize they were in a fixed income strategy as well." Hopkins Ex. 59; Tr. 2455, 2459, 2642 (Hammerstein).

- Hammerstein did not remember that, according to the same account, "We finished the meeting and the chairman, Tom Gart, stated that he was expecting to hear about commodities but was thankful for Jim's explanation on the underperformance issue." Hopkins Ex. 59; Tr. 2642 (Hammerstein).

- Hammerstein's notes of the meeting did not reflect this question: "Ms. Strauss asked how State Street protects themselves from a hedgefund ripple effect." Hopkins Ex. 167; Div. Ex. 83.

- Hammerstein's notes do not reflect any discussion about the typical slide or its contents, nor any slide in general. Div. Ex. 83.

One of the strongest pieces of circumstantial evidence that Mr. Hopkins did not show or discuss the typical slide (or any slides at all) at the May 10th meeting, are the contemporaneous notes of Yanni's own client who attended the meeting, Jennifer Powers of National Jewish, which may no mention of the slides at all. Ms. Powers took detailed notes of the entire meeting, which included presentations not just by SSgA, but also

another presentation from an investment manager called Lotsoff. Hopkins Ex. 167. When Lotsoff talked about *its* handout material, Ms. Powers noted the references in detail, e.g.: Lotsoff "briefly overviewed the management on page 4 of the handout;" it "discussed the Investment Process further detailed on page 6 of the handout;" and "[t]he committee reviewed a few graphs to get a better understanding about Lotsoff's investment philosophy. These graphs are on pages 7 and 8 of the handout." Hopkins Ex. 167, p. 2. Ms. Power's took equally detailed notes of SSgA's presentation, but they make *no* reference to any documentary material (slides, handouts, etc.) discussed by Mr. Hopkins or his colleague from SSgA, and don't cite a single page of the handout Hammerstein claims was discussed slide by slide. Id. at pp. 2-3; Tr. 2640 (Hammerstein).[3] Hammerstein reviewed and had the opportunity to edit his summary, but saw no need to add references to any PowerPoint slides discussed by SSgA. Tr. 2613 (Hammerstein). Thus, while Mr. Hammerstein now claims to remember that all 50 slides were discussed seriatim, all of the objective, contemporaneous documentary evidence belies that contention.

D. Mr. Hammerstein's Bias.

Mr. Hammerstein had ample reason to "remember" his interactions with SSgA in a way that inculpated Mr. Hopkins, because to the extent that he did so he excused his own lack of diligence. Mr. Hammerstein may now complain that he was not given information in specific documents or communications, but the fact is that his ignorance of the Fund's investment profile was due entirely to his failure to review the total mix of

[3] As noted in Mr. Hopkins opening brief, Yanni's "typical" practice was to attach slides to the firm's internal memoranda that recapped presentations. Hopkins Ex. 152 (pending). The fact that no slides were attached to Yanni's memoranda for the May 10th meeting coupled with Ms. Powers' failure to reference a single slide in her detailed notes is compelling evidence that Mr. Hopkins did not use any slides during this presentation.

information provided to Yanni Partners, much less to request additional information that he knew was part of the total mix of information that SSgA made available to investors and their consultants. See Hopkins Post-Hearing Brief, pp. 7-12. Specifically, Mr. Hammerstein had an incentive to point fingers at Mr. Hopkins and SSgA to distract clients' attention from Yanni's own woefully inadequate due diligence:

- Hammerstein did not review SSgA's April 2006 responses to Yanni's requests (Tr. 2546) even though he had reviewed the requests themselves and thus knew that the responses existed. Tr. 2597 (Hammerstein).

- Hammerstein never reviewed or discussed the March client letter, even though a version was provided to Yanni by Mr. Dacey in early March 2007. Div. Ex. 61; Tr. 2600-01 (Hammerstein).

- Hammerstein was notified that "[client] reports and a wealth of other information can be obtained online at the Clients Corner portion of the SSgA website." Hopkins Ex. 160; Tr. 2581 (Hammerstein). He was informed that sector weights, return by sector, holdings, and other information could be provided with the monthly performance reports upon request. Hopkins Ex. 160; Tr. 2582-84 (Hammerstein). He never asked for any of this information or accessed SSgA's website.

- Hammerstein's practice was to review information requests before they were made and therefore knew that Yanni could have requested and received more detailed information about LDBF – much as it did in September 2006 for another SSgA fund, the Limited Duration Alpha Strategy, when Yanni asked for and received information about that fund's average credit quality, credit quality breakdown, sector breakdown, and the fund's top ten holdings. Tr. 2597-98 (Hammerstein); Hopkins Ex. 147.

- Hammerstein knew that audited financial statements for unregistered funds contain holdings information, yet neither he nor Yanni asked for the financial statements of either the DJ-AIG Fund or LDBF. Tr. 2550-51 (Hammerstein).

- Hammerstein and Yanni did not ask for holdings information for the DJ-AIG Fund or LDBF. Tr. 2444, 2620 (Hammerstein).

- Hammerstein knew LDBF was concentrated in ABS, was aware that he could have obtained the performance of various types of asset-backed securities and did not request, research, or evaluate this information. Tr. 2542-45 (Hammerstein).

- In presenting information regarding the Commodities Fund to National Jewish in May 2006, Yanni Partners – including Mr. Hammerstein – analyzed only the correlation between SSgA Commodities Fund and the DJ-AIG Commodities Index. Hopkins Ex. 142; Tr. 2557-61, 2566-68 (Hammerstein). Yanni's analysis of the Commodities Fund presented to National Jewish did not "get into" the diversification of LDBF. Tr. 2567 (Hammerstein).

After the subprime crisis arose, negatively impacting Yanni's clients;' investments, Yanni quickly began to look for scapegoats. Even as it recognized that it could not plausibly accuse SSgA of "dishonest or fraudulent" activity, Yanni's Investment Policy Committee absolved itself of all responsibility. Hopkins Ex. 170. The Committee constructed the narrative:

> Based on the information our team was given and our discussions with SSgA, the track record of the Limited Duration bond fund that was in question, and the general investment process, it seems unlikely we could have identified this problem much earlier. While there was some underperformance in the first quarter, SSgA seemed to present a viable case for maintaining their current strategy as the majority of their portfolio was in high quality AAA and AA securities. Also, they had sold off their allocations to BBB and lower as the portfolio had fallen outside of their risk budget. April and May performance improved adding credibility to the first quarter [conference call]. SSgA then notified YP on July 24 of the significant underperformance of their bond fund causing the collateral to underperform LIBOR and the strategy to lag the Commodities index by almost 10%.

Hopkins Ex. 170. This is a selective account, to put it mildly. It ignores the fact that Yanni Partners – which charged an $85,000 *annual* fee to just one of its clients (Tr. 2517 (Hammerstein)) – performed *no* due diligence (beyond simply comparing the DJ-AIG Fund's performance to the DJ AIG Index) before placing its clients in the Commodities Fund and LDBF. It ignores the fact that Yanni thereafter sought *no* information from SSgA about these funds - even after the underperformance in February 2007. Yanni waited passively until SSgA reached out to explain what had taken place. Yanni, obviously, wasn't ignorant of these events. Hopkins Ex. 170 (proposing a "thought

piece" to update clients about the "recent market turbulence from a historical context"). Yanni knew what was going on in the market but did nothing to justify its substantial fee.

Yanni, of course, could not legitimately be blamed for failing to anticipate the subprime crisis, but it could expect questions to be asked and knew that it didn't have any good answers. (Its negligence eventually led it to pay a $200,000 settlement to its client, Welborn Baptist. Tr. 3136-37 (offer of proof regarding Welborn settlement). Resorting to an age old tactic, it decided that the best defense was a good offense, and immediately began to point fingers at SSgA. Indeed, on August 3, 2007, Yanni sent a letter to its clients cataloging the alleged infirmities in SSgA's disclosures, clearly implying that Yanni had actually relied on these disclosures when making its investment recommendations. Div. Ex. 161, 161A.[4] The truth, of course, is that Yanni had not relied on any of these representations when making its investment recommendation to National Jewish. Tr. 2557-60, 2568-69, 2572-73 (Hammerstein). This lack of candor was not an isolated occurrence for Yanni. When Yanni "learned" in the spring of 2007 that LDBF was not an "index" fund, it faced a dilemma because it had told Welborn Baptist that LDBF was an index fund when recommending the investment. Hopkins Ex. 149. Rather than correct its mistake, however, Yanni elected to remain silent. Id. ("Since we have

[4] Interestingly, despite relying on Div. Exs 161 and 161A extensively throughout its brief (together they are cited 21 times in the Division's Brief and Proposed FOFs), the Division fails to mention even once that neither exhibit has yet been admitted into evidence. Tr. 3101-03. After Respondents objected that no proper foundation was laid to support the truth and accuracy of the data contained in these exhibits, the Court took the admissibility issue under advisement. Mr. Hopkins continues to maintain that the exhibits should be excluded from evidence because they are not reliable. Tr. 2473-76, 3102-03. For example, the graph on page 5 of Div. Ex. 161A in its brief, titled "SSgA Sector Allocations: Since Inception," is totally unreliable and unsubstantiated. There was no testimony to explain what the underlying data was or where it came from, preventing the Respondents from testing its accuracy. U.S. v. Milkiewicz, 470 F.3d 390, 396 (1st Cir. 2006) (to admit a summary document, the offering party "must show that the voluminous source materials are what the proponent claims them to be and that the summary accurately summarizes the source materials"). The chart, moreover, is inaccurate on its face. It claims to reflect the Fund's allocations "Since Inception," yet the data does not start until 2003. It is undisputed that the Fund was created in 2002. Stip ¶ 8. At the very least, then, the chart is incomplete and whoever created it was incorrect.

stated indexing to the DJAIG is our recommendation, I do not see any current alternative but to go [forward] with [SSgA] for WBF."). When weighing Mr. Hammerstein's credibility, therefore, Mr. Hopkins submits that Mr. Hammerstein's motives and Yanni's candor must be factored into the analysis.

III. THE DIVISION FAILED TO PROVE AN ACTIONABLE ALLEGATION IN CONNECTION WITH SSgA'S TYPICAL SLIDE.

A. The Division Failed To Prove That The Fund's "Typical" ABS Allocation Was Anything Other Than 55%.

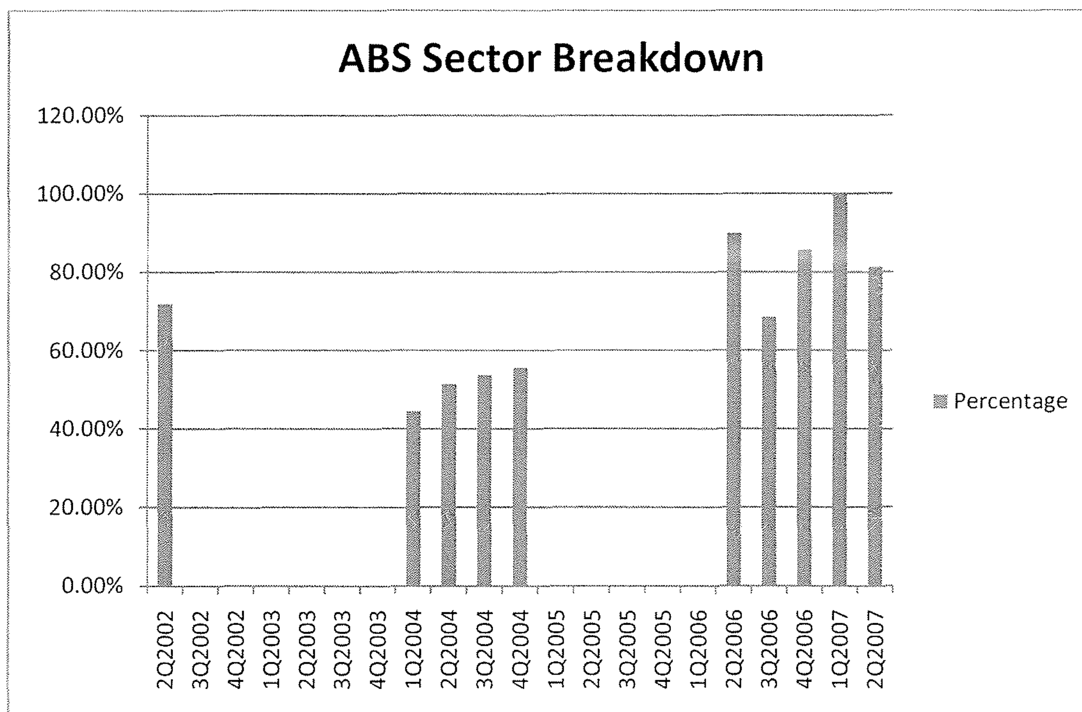
With respect to the so-called "typical" slide, the Division starts its argument with a non sequitur: "Although the presentation stated that LDBF's 'typical' exposure to ABS was 55%, its actual investments during this time were almost all ABS, and specifically almost all subprime RMBS. . . . Thus, the Fund's typical ABS exposure was never 55% during the time period." Div. Post-Hearing Brief, p. 16.

This argument may take the form of a syllogism, but its substance is defective. The Division cannot logically maintain that, "Although he said *X* was 55%, *Y* was actually almost 100%; thus, *X* was never 55%." The premises do not generate the conclusion. The Division's argument makes no more sense than: "Although he said the fruit in the refrigerator was an apple, the fruit on the counter was a pear; thus, the fruit in the refrigerator was not an apple."

To show that the typical slide was false, the Division needed to do more than use flawed logic to assume an unsupported conclusion; it needed to *prove* that the Fund's "typical" ABS exposure was "never 55%." It never did. In its brief, it merely cherry-picked a chronologically small (and conveniently favorable) set of data about the Fund's portfolio over four calendar quarters in 2006-2007, and insisted that the 55% figure is not

"typical" because the Fund's ABS exposure was larger than 55% during that brief slice of time. Div. Post-Hearing Brief, p. 16; Div. FOF ¶ 269.

However, the relevant time period for determining the "typical" sector-composition of the Fund is not any-time-period-in-which-the-composition-favors-one-party's-case. Mr. Hopkins could play that game, too. As the chart below demonstrates, there is another chunk of evidence in the record about the Fund's composition, and it shows that, for the four quarters of 2004, the portfolio's exposure to ABS hovered almost exactly around the 55% figure.[5]



The Division has not explained why a four-quarter slice of 2006-2007 data, which it emphasized, is a more "typical" sample than a four-quarter slice from 2004, which it

[5] This chart was created from all of the fact sheets that were admitted into evidence, including one from 2002 (Hopkins Ex. 1), four from 2004 (Div. Ex. 224), three from 2006 (Div. Ex. 20), and two from 2007 (Div. Ex. 29). There was no other information put into evidence concerning the sector breakdowns of the missing quarters.

ignored. And, of course, the chart is incomplete, because the Division did nothing at trial to provide data about the Fund's sector weights in most of 2002, all of 2003 and 2005, or the first quarter of 2006. What the graph really shows, therefore, is a failure of proof. The Division has the burden of proving that the slide was inaccurate; Mr. Hopkins does not have to prove its accuracy. Steadman v. SEC, 450 U.S. 91, 95-96 (1981) (Commission bears burden of proving charges by a preponderance of the evidence). But the Division provided no evidence of the Fund's sector allocation for more than *half* the quarters (11 out of 21) of its existence. With a data set that is as empty as it is full, there is no basis for an *objective* determination of the Fund's "typical" ABS exposure, and no legitimate basis for a finding that the typical slide was untrue in this respect.

B. The Division Failed To Prove That Mr. Hopkins Knew The Typical Slide Was Inaccurate In Any Way.

The Division had to do more than prove that the typical slide was misleading; it also had to show that Mr. Hopkins *knew* (or was extremely reckless in not knowing) that the slide was inaccurate, and that he somehow communicated the inaccurate information to investors. The Division's argument here is both illogical and deceptive. First, the Division contends that Mr. Hopkins *knew* the Fund's "typical" ABS allocation was not 55% because he made efforts to obtain the Fund's *actual* sector allocations before he made presentations to investors, going so far as to record the information by hand on the hard copies of the slides he used. Div. Post-Hearing Brief, p. 17.

This evidence, to be sure, indicates that Mr. Hopkins was aware of the difference between the Fund's typical and actual sector allocations. But it also proves that he went to his presentations ready to provide both "typical" and actual sector allocations – i.e., ready to *dispel* any potential confusion about the matter. Nevertheless, the Division

implores this tribunal to find that he did not actually do so, simply because he "does not recall telling clients during those presentations that the Typical Slide was very different from the portfolio's actual composition." Id.

It is here that the Division approaches the line between spurious and deceptive argument (and once again flouts its burden of proof), as there is no logic to the proposed inference. In a rational universe, a person's diligent preparations to *disclose* information do not imply that he acted to *conceal* the information. That is absurd. If Mr. Hopkins' purpose, as the Division maintains, was to conceal the actual data from investors, then why would he have bothered to (1) obtain the information and (2) write it down where he could access it easily during his presentations? In a rational universe, rather, the fact that Mr. Hopkins marked his copies of the typical slide with actual sector allocations implies that, if he referred to the slide at all, he provided both the "typical" and actual data.

As to what Mr. Hopkins said or didn't say in his presentations, the Division's tactic is to insinuate that, because Mr. Hopkins doesn't specifically remember *providing* the actual data, he must have *withheld* it. This argument, too, is illogical. Mr. Hopkins' inability to remember what he *did* say at the presentations isn't proof of what *he didn't* say: it's proof only of what he doesn't *remember*. (And of course it is not surprising that Mr. Hopkins doesn't recall exactly what he said at meetings several years ago. Rather, to his credit, he did not feign a particular memory of distant events, although he could and did testify generally that it was his practice to present such information if he was asked questions about it. Tr. 402 (Hopkins).

The Division's maneuvering here, moreover, barely conceals its purpose: to flout the burden of proof. As a hypothetical proposition, Mr. Hopkins' behavior *might* have

been misleading *if* he (a) had used the typical slide at one of these presentations and (b) didn't disclose the actual sector weights. But the Division hasn't proved either assumption – it didn't even call any investors who attended any of the presentations – and it has used non sequitur and insinuation to effectively shift the burden of *disproving* the conclusion to the Respondent. The Division is arguing in effect that Mr. Hopkins' liability can be predicated on what he understandably cannot remember, rather than on what the Division has actually proved (e.g., through contemporaneous documents or the testimony of a witness with credible recall). This is impermissible.

C. The Typical Slide Was Not Misleading Because It Did Not Discuss Leverage.

The Division also claims that the typical slide was misleading because it did not disclose the use of subprime derivatives or leverage. Div. Post-Hearing Brief, p. 17. But the slide concealed nothing; it simply didn't speak to the issue of leverage. As the Court observed during Mr. Hopkins' testimony, the slide says that the sector breakdown is "by market value," not by notional value. See e.g., Div. Ex. 244; Tr. 191-92 (Hopkins). Any sophisticated investor – or investment consultant – reading the slide would therefore be well aware that it did not purport to discuss leverage, which is a function of notional value.

The typical slide, however, was just one piece of a larger presentation, and other slides disclosed that the Fund used leverage. See e.g. Div. Ex. 43 at SSP 5067; Div. Ex. 85 at SS 8750707 (one of the Fund's stated objectives included "modest use of leverage to manage risk and enhance returns"). Thus, the Division's argument here, as elsewhere, skews the appropriate focus, asking the Court to draw conclusions from isolated bits of

information while ignoring the total mix of information that SSgA made available to investors.

IV. THE DIVISION FAILED TO PROVE AN ACTIONABLE ALLEGATION IN CONNECTION WITH SSgA'S FACT SHEETS.

With little evidence to support it, the Division asserts that "Hopkins had both the responsibility and the authority to correct information about LDBF that was made available to investors and potential investors through quarterly fact sheets ..." Div. Post-Hearing Brief, p 11. The Division goes on to claim that Mr. Hopkins violated the securities laws by failing to exercise his putative responsibility and authority to change the fact sheets in three ways: (1) to update the list of securities the Fund utilized and correct two statements about the Fund's diversification, (2) to explicitly disclose that the ABS sector includes subprime RMBS, and (3) to change the sector weight information to show the Fund's "use of leverage." Div. Post-Hearing Brief, pp. 12-14.

Responsibility and Authority. The argument rests on a faulty premise: that Mr. Hopkins had authority and responsibility for the facts sheets *as a whole* and could unilaterally have forced the changes suggested. The Division's problem is that it has missed or ignored the difference between (1) the narrative section of the fact sheet, and (2) the parts of the document that described the Fund's "characteristics" and reported performance data. Mr. Hopkins may have shared responsibility and authority to review and correct the latter portions, but not the former. The narrative was written before he was assigned to the Fund and he could not alter it on his own authority. Tr. 2813, 2817 (Shegog); Tr. 1429-30 (Flannery).

Liability could arise, therefore, only if Mr. Hopkins had abdicated his "responsibility and authority" to correct the characteristics and performance sections of

the fact sheets. That did not happen. There is no dispute about the accuracy of the performance and characteristics data. The Division's concerns regard either (1) the narrative, or (2) SSgA's structural decisions to categorize subprime securities as ABS and to list the Fund's sector weights by market value rather than notional value. But these were not things that Mr. Hopkins had "the authority to correct" on his own. These portions of the fact sheets reflected decisions that had been made by the investment team, and the supposedly-offending language had been reviewed by SSgA's lawyers when those decisions were made. Tr. 431-32 (Hopkins); Tr. 2813, 2817 (Shegog); Tr. 1429-30 (Flannery). Mr. Hopkins cannot be punished for failing to exercise "responsibility and authority" that never belonged to him.

Diversification. The Division's claim fails at the outset, then, but there are additional, equally serious flaws in its argument about the fact sheets. The Division claims that, because he knew that the Fund was primarily invested in subprime securities, Mr. Hopkins should have "changed the fact sheet's statements that the fund was 'investing in a diversified portfolio' [and] had 'better sector diversification' than a 'typical 2A-7 regulated money market portfolio.'" Div. Post-Hearing Brief, p. 13. The problem with this assertion is that, as Mr. Hopkins has already described in great detail in his Post-Hearing Brief, the two statements about diversification in the fact sheets were true. The Fund *was* invested in a diversified portfolio, and its strategy *did* offer better sector diversification than a typical money market fund. See Hopkins' Post-Hearing Brief, pp. 14-16. The Division has not rebutted this. Substituting assumption for evidence, it has not pointed to any testimony or exhibits to support its assertion that the statements were false.

Allocation To The ABS Sector. The Division further claims that (a) "sector weight information was misleading to the extent that it concealed LDBF's concentration in subprime RMBS, " and (b) the fact sheets "never defined" the ABS sector, and "never specified whether subprime RMBS was contained in the ABS sector, or in the MBS or 'mortgage-backed securities' sector in which LDBF also invested." Div. Post-Hearing Brief, p. 13. To support this allegation the Division claims that the testimony "demonstrated intelligent investment professionals had differing opinions about whether subprime RMBS was, or should have been, categorized in the ABS sector or the MBS sector or in some other sector." Id. The testimony actually demonstrated quite the opposite.

There is nothing to this for two reasons. First, the decision to classify subprime investments as ABS was not made by Mr. Hopkins, nor was he capable of gainsaying it. Others in the company made that determination, basing the structure on the Lehman Aggregate Index, which allocated the sectors in exactly this manner. Tr. 431-32 (Hopkins); Tr. 1591 (Pickett); Hopkins Ex. 136.

Second, the Division's assertion that "intelligent investment professionals had differing opinions" about how to classify subprime securities is an extreme exaggeration, if not an outright fiction. The Division has conjured a "difference of opinion" out of the testimony of Erik Sirri and Lawrence Carlson. Div. Post-Hearing Brief at 13; Div. FOF ¶¶ 156, 159. Mr. Hopkins will stipulate that both witnesses are "intelligent." However, while Dr. Sirri is undeniably an expert "investment professional," Mr. Carlson is not – not, at least, in any sense that matters here. Mr. Carlson was a client-relations manager. He acknowledged on the stand that he was not an investment professional and testified

that he did not know what "subprime" really meant. Tr. 2676, 2724, 2737-38 (Carlson). Further, Mr. Hammerstein – the only consultant to testify in this matter – stated that he knew that ABS included residential mortgages and home equity loans. Tr. 2531 (Hammerstein).

The putative difference of opinion on which the Division relies, therefore, is not even a fair fight. Dr. Sirri was opining on the basis of his expertise and experience, while Mr. Carlson was merely illustrating his ignorance. Dr. Sirri, moreover, wasn't simply reporting his personal opinion. His testimony demonstrated that the allocation of subprime home equity loans as a subset of ABS was well established in the industry. Sirri Report, ¶¶ 11, 33-38; Tr. 2074-75 (Sirri).[6] The SEC itself, along with scholars and commentators, credit rating agencies, industry organizations, staffers at the Federal Reserve, indices such as the Lehman ABS Index, and other funds that invested in RMBS – *all* put subprime securities in the ABS "bucket." Sirri Report, ¶¶ 33-38. Even if Mr. Carlson's testimony allows the Division to say with a straight face that there were "differing opinions," the overwhelming weight of those opinions agreed with SSgA's characterization of RMBS as ABS. Mr. Hopkins could not possibly have committed securities fraud by failing to "correct" a characterization that most people in the business – including the SEC itself – would have agreed was perfectly accurate.

Leverage. Finally, the Division claims the "sector weight information" in the fact sheets "was misleading to the extent it concealed LDBF's use of leverage." Div. Post-

[6] In its proposed FOFs, the Division attempts to characterize Dr. Sirri's live testimony as standing for the proposition that he believed that subprime mortgage securities (home equity loans) were not classified in ABS. Div. FOFs, ¶¶ 155, 157-59. As described in Mr. Hopkins' responses to these FOFs, this is a tortured and misleading reading of his testimony as a whole, and it is contrary to what he explains in detail in his report; ABS, as used in the industry, included subprime mortgage securities and home equity loans in addition to other types of debt. Sirri Report, ¶¶ 32-39. See also, Hopkins' Responses to Div. Proposed FOFs, ¶¶ 155, 157-59. Even Mr. Hammerstein testified that he knew that ABS included residential mortgages and home equity loans. Tr. 2531 (Hammerstein).

Hearing Brief, p. 14. But, like the typical slide, the fact sheets expressly indicated that they did *not* include leverage. Their sector weight breakdowns were clearly labeled "Sector Distribution *by Market Value*" or "Sector Weights – *Market Value*." See e.g., Hopkins Ex. 1 (emphasis added); Div Ex. 29 (emphasis added).

The leverage argument is, moreover, literally misplaced. The Division has focused on a part of the fact sheets that did not mention leverage, while ignoring another part that did. The characteristics section of the fact sheets did not even purport to discuss the subject, but the narrative section actively *disclosed* the Fund's use of leverage, noting that the Fund utilizes "futures, options, and swaps." Id. These investments all use leverage, and sophisticated parties, such as the investors in the Fund and their advisers, would have known it. See e.g., Div. FOF ¶¶ 78-79; Sirri Report, ¶ 21-31.

In the face of this information, the contention that the fact sheets "concealed" the Fund's use of leverage is incredible. The claim based on that contention becomes even more incredible when one considers that SSgA had also disclosed the Fund's use of leverage elsewhere. The Division surely knows this; in fact, it previously alleged that the standard slide deck, which Mr. Hopkins sometimes used in presentations to investors, was misleading precisely because it *said* that one of the Fund's objectives was "modest use of leverage." Div. Pre-Hearing Brief, pp. 8-9. According to the Division, the slide was misleading because the Fund's leverage was not "modest." Id. at 9. This allegation has disappeared from the Division's case (and with good reason, given the complete absence of any evidence to suggest that the Fund's use of leverage was *not* in fact "modest"). But the allegation was made, and it carried with it an implicit admission that

remains probative: the Division is well aware that SSgA had freely disclosed the Fund's "use of leverage" as part of the total mix of information it made available to investors.

V. THE DIVISION FAILED TO PROVE THAT THE MARCH CLIENT LETTER CONTAINED ANY MATERIAL MISREPRESENTATIONS OR OMISSIONS.

A. The Division's Allegation That Mr. Hopkins Omitted Material Information From The March Client Letter Fails For Lack Of Evidence And Ignores The Fact That The Division Did Not Prove What Other Information Was Available To Investors.

In its post-hearing brief, the Division argues that "though the March letter discloses that LDBF and the Related Funds were invested in the BBB-rated tranche of the ABX Index, it fails to disclose" that (a) the BBB-rated ABX exposure was only about 3% of the Fund's assets, (b) that the Fund was invested in higher-rated tranches of the ABX index and in higher rated subprime bonds and derivatives, and (c) that the Fund was invested almost exclusively in subprime. Div. Post-Hearing Brief, p. 18. "These omissions mattere[d]," the Division says, because "SSgA relationship managers (who were providing information to clients) and clients themselves were misled into thinking that LDBF's BBB-rated ABX investment was its sole exposure to subprime RMBS." Id.

This argument is defective because it ignores two very important and undisputed facts: (a) the *only subject* of the March letter was the Fund's recent underperformance, and (b) the *only cause* of the Fund's recent underperformance was its small, but significant exposure, to the BBB tranche of the ABX index. Tr. 214-17, 516 (Hopkins); Tr. 2853 (Wands); Div. Ex. 57. Thus, the alleged "omissions" did *not* "matter," in the sense that the securities laws require, because the allegedly omitted information about the Fund's AA and AAA investments was not necessary, in light of the circumstances, to make the statements made in the March letter not misleading. The letters set out to

explain the cause of the Fund's recent underperformance, and they accomplished that purpose, accurately and completely.

There is more. While acknowledging, as it must, that an omission "matters" only if it actually misled somebody, the Division offered no evidence that anyone actually *was* misled by the March letter. In support of its claim, the Division cites to only two e-mails from SSgA client-facing personnel. Div. Post-Hearing Brief, p. 18; Div. FOF ¶¶ 320, 338. The first was sent by Nicole Chang, a relationship manager, to Jim Hopkins on June 28, 2007. Div. Post-Hearing Brief, p. 18; Div. FOF ¶ 320, citing Div. Ex. 96. This was more than *three months after* Hopkins drafted the March letter. Not surprisingly, then, the e-mail doesn't so much as mention the March letter. Indeed, there is no evidence in the record that Ms. Chang ever saw the letter. Therefore, even if it reflects Ms. Chang's confusion about the extent of the Fund's subprime investments, the e-mail does not prove (or even suggest) that she was confused by the March letter, or for that matter by anything that Jim Hopkins ever said or did. To the contrary, the e-mail indicates that Mr. Hopkins' only role here was to *dispel* Ms. Chang's confusion; his part of the exchange informed her (accurately) that "virtually all" of the Fund's exposure was subprime, but noted (again, accurately) that more than 90% of its assets were invested in AA and AAA rated subprime securities. It is obvious from the context of their exchange, moreover, that Mr. Hopkins expected Ms. Chang to share this information with her clients, not to conceal it from them. Div. Ex. 96.

The Division also cites to Div. FOF ¶ 338 which refers to an e-mail exchange between Jim Hopkins and another relationship manager in July 2007. Div. Ex. 121. This exchange also (a) took place several months after the March letter (this time in mid-July

2007), (b) does not refer in any way to the March letter, and (c) does not prove (or again, even suggest) that the relationship manager's putative confusion about the extent of the Fund's subprime exposure was due to the March letter or to anything that Jim Hopkins ever did or said. Div. FOF ¶ 338, citing Div. Ex. 121. All the e-mail proves, rather, is that Mr. Hopkins once again acted quickly to *dispel* any possible confusion by providing accurate information to the relationship manager to share with his client.

Finally, as discussed at length in Mr. Hopkins' Post-Hearing Brief, the March client letter cannot be said to have caused a material omission of any particular item of information because the Division did not establish that the omitted items were not already part of the "total mix of information" that SSgA made available to investors. Hopkins Post-Hearing Brief, pp. 7-12, 48-52. Mr. Hopkins was only one potential source of information for investors, who were able to obtain information about the Fund from a variety of sources within SSgA, and potentially outside of it as well (e.g., the eVestments website, which reported the Fund's characteristics in 2007). Mr. Hopkins, moreover, *knew* that he was only one potential source of information. See e.g., Tr. 417-27 (Hopkins). Knowing that, he also knew that he could not "conceal" information from investors simply by failing to mention it in a letter; no "omission" would occur unless the information was absent from the "total mix." Thus, the Division cannot prove that the March/April client letters omitted material information without showing that the information was *also* omitted from the total mix. Once again, it is not Mr. Hopkins' burden to prove what the total mix contained; it is the Division's burden to prove what it did not contain, and the Division failed to present that proof.

B. The Division Failed To Prove That The Omissions Were Otherwise Material.

In further support of its claim that the March letter was material, the Division elsewhere says that "Hopkins' March letter to clients and his continuing presentations about LDBF's ABX exposure in the spring of 2007 led investors to believe that LDBF's subprime exposure was very small, and had been reduced in response to the February performance problems…." Div. Post-Hearing Brief, p. 54.

This statement is most notable for its utter lack of evidentiary support. When the Division said that SSgA relationship managers were "misled" by the letter, it at least offered a citation – albeit misplaced – to the record. But here, when it says that the March letter "led *investors* to believe" certain things, the Division makes only a naked allegation. No evidence is cited for the proposition, nor could any be, because the Division called no investors to testify about what any of them might or might not have been "led to believe" by the March letter. This unclothed assertion exposes both the factual emptiness of the Division's case and the arrogance of its position. About a key proposition – what an allegedly "misleading" document actually "led" its audience to believe – the Division has no evidence, and yet it deems itself entitled to excuse its own failure of proof by making an unfounded allegation in a post-trial brief, the purpose of which is to summarize, and then argue on the basis of, the evidentiary record. See Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 n.2 (1st Cir. 1988) ("'[A]s the greenest of counsel should know,' representations in a brief are an impuissant surrogate for a record showing") (internal citation omitted).

The Division goes on to argue that "[i]t is fundamental that misleading statements about the identity of an investment are material, particularly when the risks of the

concealed investments are the subject of a well-publicized crisis." Div. Post-Hearing Brief, p. 55. Of course, absent evidence that the statements in the March letter *were* misleading, this argument is ineffectual, but that is not its only flaw. By its own terms, the Division's argument supposes that statements which conceal the "identity" of investments may be material when the risks of the concealed investments *are* the subject of a well-publicized crisis. The Division used the present tense ("are") here for a reason. It would be nonsense to suggest that a material misstatement occurred *in the past* because the speaker did not disclose the identity of an investment that only *later* became the subject of a *future* crisis. That would be "materiality by hindsight."

And yet materiality-by-hindsight is exactly the Division's game here. It knows that there was no subprime crisis when Mr. Hopkins drafted the March letter. Therefore, when it insists that the letter's failure to disclose the Fund's subprime investments was material because those risks were the subject of a "well-publicized crisis" – *which did not occur until July* – it is asking this tribunal to hold Mr. Hopkins accountable under the law for a lack of clairvoyance.

VI. THE DIVISION'S MISCHARACTERIZATION OF THE JULY 26TH LETTER.

A. Mr. Hopkins Was Not Responsible For Any Alleged Omissions Or Misrepresentations In The July 26th Letter.

The Division's post-hearing brief makes clear that in order for the Division to support its specious allegations regarding Mr. Hopkins involvement in the July 26th letter, one must conspicuously ignore the actual testimony and exhibits in the case and blindly assume the Division's unsupported assertions that Mr. Hopkins was the primary person responsible for the letter and his "self-interest led [him] to misrepresent the riskiness of

the funds" in the July 26th letter. Div. Post-Hearing Brief, p. 33. While the Court was compelled to accept this type of conjecture in the Division's OIP and pre-hearing brief, the three-week hearing eviscerated the Division's allegations and demonstrated (a) that Mr. Hopkins' role in the July 26th letter was minimal at best, (b) that other more knowledgeable investment team members and client-facing managers were intimately involved in the letter's revisions, and (c) that these individuals worked closely with legal counsel to finalize the letter.

First, despite the dozens of exhibits that demonstrated that other investment team members and client-facing managers were the primary reviewers and architects of the July 26th letter and that Mr. Hopkins in fact saw just a handful of the many drafts that were circulated (and indisputably did not see the final drafts of the letter), the Division has astonishingly persisted with its allegation that Mr. Hopkins played an "instrumental role" in the July 26th letter. Div. Post-Hearing Brief, pp. 31-32. To support this falsity, the Division relies primarily on the investigative testimony of Mr. Shames. After testifying that he did not have a clear memory of the events, Mr. Shames speculated that Mr. Hopkins "became a key person in coordinating" comments about the letter. Div. Post-Trial Brief, p. 34; Div. FOF ¶ 343.[7] Significantly, when Mr. Shames made this comment (a) the Division had shown him only a handful of the dozens of e-mails relating to the drafting of the letter so his testimony was colored by what he presumably believed to be the universe of correspondence regarding the July 26th letter, (b) it was before SSgA

[7] The Division also surprisingly continues to misread the language in Mr. Hopkins' e-mail where he promises to be responsible to "updates to the letter," as meaning that Mr. Hopkins was going to take charge of all revisions to the July 26th letter going forward. Div. Ex. 118. As Mr. Hopkins explicitly testified and the Court acknowledged was more logical, Mr. Hopkins was indicating in his e-mail that he would take responsibility for drafting *future* update letters. Tr. 297-300 (Hopkins). This interpretation is borne out by the fact that Mr. Hopkins was *not* responsible for coordinating revisions to the July 26th letter and was not even sent the later drafts of it.

had waived its attorney-client privilege on this issue, so presumably Mr. Shames had not reviewed, prior to testifying, the plethora of correspondence relating to the letter which makes *no* mention of Mr. Hopkins, and (c) the e-mails the Division did show him were heavily redacted because the privilege had not yet been waived. Interestingly, to that end, when he testified again *post-waiver* and he was asked "who on the business side was the quarterback" for the letter, he said he couldn't recall. Shames Stip., p. 231. Thus, for the Court to find that Mr. Hopkins was any sort of "coordinator" of the July 26th letter based on Mr. Shames' incomplete and untested testimony, it would have to ignore all of the testimony and exhibits to the contrary.

Second, the Division has persisted with its claim that "[Mr. Hopkins], perhaps alone among the letter's reviewers, knew what clients had not yet been told ... and understood the causes of LDBF's underperformance." Div. Post-Hearing Brief, p. 32. The sum and substance of the Division's evidence that Mr. Hopkins knew what *all* clients had or had not been told about the amount of subprime in LDBF in 2007? *Three* e-mails where a client-facing person asks a question about subprime and Mr. Hopkins' forthright testimony that he recalls "some" (but not "a lot") of client-facing people had general subprime questions. Id.; Div. FOF ¶¶ 318-20, 338; Tr. 518-19 (Hopkins).

Moreover, completely ignoring Mr. Wands' testimony at trial, the Division claims that not only did Mr. Hopkins know what clients knew, he was the *only one* who knew this and thus the only one of the letter's dozens of reviewers who was responsible for omitting that the Fund was concentrated in subprime securities and leveraged by other subprime investments. However, Mr. Wands forthrightly testified that he knew that some clients had questions about the Fund's subprime exposures, that he understood

(better than Mr. Hopkins) the investment and performance details of the Fund, and the objective evidence shows that he was much more intimately involved in drafting the July 26th letter. Tr. 2862-63 (Wands); Tr. 373 (Hopkins). Yet *at no time* before, during, or after the July 26th letter was drafted, did Mr. Wands believe it omitted or misrepresented material information. Tr. 2870 (Wands). Thus, even assuming the letter contained material misrepresentations or omissions, Mr. Hopkins was not the one individual at SSgA who could or should have spotted and rectified any issues. As described in detail in his post-hearing brief, Mr. Hopkins did not even see the last several drafts of the letter and the last version he saw was radically different from the version that was sent to clients. Hopkins Post-Hearing Brief, pp. 24-35.

B. The July 26th Letter Did Not Contain Misrepresentations Or Omit Material Information.

The Division asserts that the July 26th letter's "risk reduction" language (that it incorrectly insists was attributable solely to Mr. Hopkins) was misleading because "it emphasized risk reduction *based on LDBF's past sales of its BBB-rated ABX investment* when its greatest risks were then coming from its exposure to higher-rated AA and AAA subprime bonds and derivatives." Div. Post-Hearing Brief, pp. 37-38 (emphasis added). But neither Mr. Hopkins' e-mail nor the letter say *any such thing.* Rather, Mr. Hopkins' e-mail, referring to all the portfolios (not just LDBF), more generally states: "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." Div. Ex. 127. Additionally, the letter does not say what *types* of risk reduction actions were being taken, but rather says (both before and after Mr. Hopkins' suggestion) only generally that "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." Div. Ex. 127. Despite the Division's claims, *absolutely nowhere* is it mentioned that the risk reduction is just based on the BBB-ABX sales. To the contrary, while Mr. Hopkins simply couldn't recall on the stand exactly how LDBF had reduced its risk at that time (Tr. 304), he testified that he relied on Mr. Wands (and others) for this type of information (Tr. 401-402); Mr. Wands testified that the portfolio team was reducing risk in a variety of ways including selling the BBB-ABX *and* allowing the total return swaps (on the AAA and AA rated securities) to expire. Tr. 2865-66 (Wands). Nothing in the record would allow one to jump to the conclusion the Division demands, i.e., that Mr. Hopkins - or anyone else - said that the only risk reduction actions taken were the sales of the BBB-ABX tranches.

C. Mr. Hopkins' Appropriately Relied On His Superiors And Their Use Of Internal And External Counsel.

Finally, the Division incorrectly tries to turn Mr. Hopkins' *reliance* on counsel defense into an *advice* of counsel defense and claims that Mr. Hopkins cannot rely on an advice of counsel defense because he did not make complete disclosures to Mr. Shames. First, the law is established that reliance on 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). A respondent is entitled to the benefit of this principle even without showing that complete disclosures were made to counsel by the respondent because it contemplates the exact

scenario here: a situation where a lower-level employee relies on his or her superiors (who have the same knowledge he or she has) to interact with counsel and make whatever disclosures are necessary. In Howard, the Court chastised the Division for the same position it is taking in this matter and noted

> Under the SEC's theory, the president could avoid charges of fraudulent conduct by using the attorney's advice to prove his lack of scienter while those working under him could not. That is illogical and makes no sense whatsoever. If the SEC were right, all corporate employees below the top echelon would have to consult outside counsel directly in order to receive the same legal advice given top management. That not only would run up the legal bills, but it would be impractical and highly inefficient.

376 F.3d at 1148-49. Precisely because Hopkins' involvement in the letter was so tangential, he was not in a position to interact with counsel on all aspects of the letter and he assumed that more senior investment professionals who had the same information he did (i.e. Mr. Wands, Mr. Greff, etc.) were holding the necessary discussions with counsel. As described, he did not attend the meetings with counsel, he was not asked to review the letter as a whole, and rather was only asked to look at one sentence in the letter.[8] Hopkins Post-Hearing Brief, pp. 38-40. Accordingly, as he knew that counsel was intimately involved in the process and he knew they were interacting with the senior investment and client facing management personnel in drafting the letter, Mr. Hopkins was justified in relying on those individuals and that process, and that is sufficient to negate scienter. See id.

[8] Additionally, Mr. Shames obviously did not consider Mr. Hopkins' involvement critical or even important, as there is no evidence that he ever sent Mr. Hopkins any of the final drafts of the letter, even after Mr. Shames completely deleted the one sentence Mr. Hopkins commented on.

D. If, As The Division Contends, Materiality Is Demonstrated By Investor Response, Then The Fund's Investment In Subprime Securities Wasn't A Material Fact.

With yet another unsupported blanket assertion, the Division claims that the materiality of the Fund's investment in subprime securities "is clearly demonstrated by the fact that, once SSgA made the truth available to many of these institutional investors, they decided to liquidate their holdings in LDBF and the Related Funds." Div. Post-Hearing Brief, pp. 56-57. While the materiality of information may in some cases be reflected in the actions of people to whom that information is "made available," using that test here shows that the significant item of information that caused investors to liquidate was not the Fund's exposure to subprime securities, but rather the precipitous decline in the value and liquidity of those securities in late-July and August 2007. In this case, there is substantial evidence that many investors knew exactly how many total subprime securities the Fund held throughout 2007, yet they only choose to redeem in either late-July or August. For example:

- There was evidence that in April 2007, Mr. Hopkins himself disclosed to a consultant, Cambridge Associates, that 75% of the Fund's assets were invested in subprime securities. Despite having this information, there was no evidence that any of Cambridge Associates clients redeemed prior to July or August 2007. Div. Ex. 246, pp. 6-7.

- Catholic Healthcare Partners also had all of the specific information on how much subprime RMBS was in the Fund since at least March 2007 and was receiving monthly updates. Div. Ex. 259; Hopkins Ex. 64. Likewise, it did not redeem its investment in the Fund until the crisis hit in the summer of 2007.

- GAA and OFA were aware of the total amount of subprime investments in the Fund since early 2007, yet did not choose to recommend redemption to its clients until July 27, 2007 and August 2, 2007. Tr. 1999-2000 (Lowe); Div. FOF ¶ 384.

- Internal investors, i.e. those portfolio managers running the Related Funds that invested in LDBF, always knew how much subprime investment was in the Fund, yet they did not pull out of the Fund until the liquidity crisis hit in late-July and

early-August 2007. Div. FOF ¶ 384.

And these are just a few examples of investors we *know* had this information. There are likely countless other investors who had the same information either through a client-facing person, consultants, Client's Corner, Consultant's Corner, or an external website such as eVestments. There was no evidence that any clients redeemed their holdings prior to the market crisis in the late summer of 2007.

Looking at these examples, it is clear that the "material information" that caused investors to redeem their investments in LDBF was not the amount or quality of the subprime securities in the Fund, but the fact that a liquidity crisis had unexpectedly seized the market for these securities across the board. Neither internal, nor external, clients who had known for at least months that the Fund was concentrated in subprime securities, redeemed until *after* the crisis came to a boil in the final days of July. Div. Post-Hearing Brief, p. 28 (internal investors "largely redeemed from LDBF on July 27 and August 2"). But the crisis was not a fact that Jim Hopkins *could* have disclosed before it erupted, because it was not anything that he knew or had any reason to know in advance. Indeed, Hopkins cannot be held liable for failing to "disclose" an impending crisis because a crisis – by definition – is an unpredictable event.

Once again, however, Mr. Hopkins is making a case that is not his to have to make. Materiality is an essential element of the Division's allegations and the Division bears the burden of proving it. It has always been the Division's obligation to prove that at least some investors either (a) liquidated as soon as they knew that the Fund was invested in subprime, or at least (b) didn't know and would have liquidated if they had known. In this regard, there is a complete failure of proof.

VII. HOPKINS DID NOT "MAKE" ANY STATEMENTS UNDER THE FIRST CIRCUIT'S DECISION IN *SEC V. TAMBONE.*

The Division's utter disregard for the key precedential case,[9] SEC v. Tambone, 597 F.3d 436, 446 (1st Cir. 2010) (en banc), on the issue of whether Mr. Hopkins "made" a misrepresentation or omission – the Division devoted four pages of its brief to the issue and *never* discusses the case – only emphasizes how detrimental the law is to the Division's claims. Instead of trying to feebly attack or distinguish Tambone, the Division, to its detriment, simply ignores it.

As described in great detail in Mr. Hopkins' motion for summary disposition and post-trial brief, the First Circuit in Tambone clearly declined to adopt the "substantial participation" test the Division relies wholly on in its brief, and the Court instead opted to enforce the Rule according to its plain terms. Id. at 446-47. Thus, for all the reasons previously described in Mr. Hopkins' filings, Mr. Hopkins cannot be liable for "making" a statement because he did not author the relevant materials (fact sheets, typical slide, and July 26th letter).[10] Id.; Hopkins Post-Hearing Brief, pp. 66-70.

In addition to ignoring Tambone, the Division relies heavily on the Tenth Circuit Court case SEC v. Wolfson, 539 F.3d 1249 (10th Cir. 2008), a case that is very different than Mr. Hopkins' because the defendant in that case "played an integral role in preparing" the relevant filings. Id. at 1261. In Wolfson, the Tenth Circuit said that the test was whether the defendant (a consultant hired to draft a company's 10Qs and 10K)

[9] As Mr. Hopkins resides in Massachusetts, 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.

[10] A stronger argument could be made that Mr. Hopkins authored the CAR alert and March client letter (though all his information was second-hand and they were reviewed by investment experts), but for the reasons already described herein, the Division's claims regarding misrepresentations and omissions in those letters fail for a host of other reasons.

"can fairly be said to have caused [the company] to make the relevant statements, and whether he knew or should have known that the statements would reach investors." Id. There, the Court answered the question in the affirmative because the consultant had

> played an integral role in preparing those filings that contained the misstatements and omissions at issue here. Not only did he prepare the drafts of both the 10-QSB and 10-KSB, the draft of the 10-QSB (the more misleading of the two filings) was not modified by either F10's CEO or CFO, at least insofar as the Sukumo arrangement was portrayed. It was filed as [the defendant] drafted it. Additionally, F10 hired [the defendant] for the very purpose of preparing the relevant SEC filings, based on his prior financial reporting experience, and he well knew that those documents would be distributed to the public and available to investors.

Id. The same cannot be said about Mr. Hopkins or his position. First, he was not hired for the "very purpose" of preparing the documents at issue here (his job description was much broader), nor did he "prepare the drafts" of the relevant documents. With regard to the facts sheets, it is undisputed that they were authored prior to his involvement in the Fund, and while he may have updated the characteristics data he did not make (or prepare the draft that reflected) the initial decision to categorize subprime backed securities as ABS (which is the allegedly misleading aspect of the data sections). Tr. 431-32 (Hopkins); Tr. 2812-14, 2817 (Shegog); Tr. 1429-30 (Flannery). There is no evidence that he created the typical slide, even if he was given the opportunity to review the slide at various times. Tr. 196 (Hopkins). Unlike the 10-Q that the consultant prepared in Wolfson, Mr. Hopkins' first draft of the July 26th letter was so heavily edited by others that the final product bore virtually no resemblance to his initial effort. Wolfson, in short, actually illustrates how ludicrous it would be to accuse Mr. Hopkins of having "made" the alleged misrepresentations in any of these documents, because there is no good-faith basis on which to say that he "caused" SSgA to make any of the offending statements.

The Wolfson case is also significant because the Court applies the primary/secondary violator distinction to *both* Section 10(b) and Section 17(a) claims. Under Wolfson, both the Section 10(b) and Section 17(a) claims depend on proof that Mr. Hopkins "can fairly be said" to have caused a misleading statement or omission only where (1) he actually drafted the documents that contained the misleading statements, *and* (2) his drafts were *not* edited by others. 539 F.3d at 1261. It does not suggest that the same can be said where a defendant merely edited documents drafted by others (unless possibly there is proof that the defendant either personally edited in a misleading statement or edited out information that created an actionable omission), much less that a defendant can fairly be said to have caused a misleading statement where he or she merely *failed to edit* documents drafted by others, and still much less that it can be said where a defendant merely *failed to suggest* edits to documents over which others retained final editorial control. Thus, Wolfson actually carves out any finding of liability under either § 10(b) or § 17(a) where, as here, Hopkins cannot "fairly be said to have caused" the various statements in the fact sheets, presentations, and letters.

VIII. THE DIVISION DOES NOT HAVE JURISDICTION TO BRING CLAIMS AGAINST MR. HOPKINS UNDER THE INVESTMENT ADVISORS ACT OR THE INVESTORS COMPANY ACT.

As predicted, the Division's post-hearing brief does not provide any support for the requisite connection between Mr. Hopkins and State Street Global Advisors Fund Management ("SSgA FM") necessary for the Division to bring claims against him under the Investor Advisors Act or the Investors Company Act. Rather, the Division relies on passing commentary that Mr. Hopkins had some unspecified "responsibility" for some mutual funds during an unidentified time period. Div. Post-Hearing Brief, pp. 6, 49. 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. 618-19 (Hopkins). 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. See also Hopkins Post-Hearing Brief, pp. 78-86.

IX. THE DIVISION FAILED TO PROVE THAT MR. HOPKINS ACTED CULPABLY.

The Division's failure to establish that Mr. Hopkins acted negligently or with scienter – whether a conscious intent to defraud or extreme recklessness – was covered at length both in Mr. Hopkins' Post-Hearing Brief and at the various topical sections *supra* and thus will not be rehashed here, but a few of the Division's dubious evidentiary claims that Hopkins acted culpably must be examined in some detail.

The heart of the Division's scienter case is a recklessness argument, specifically that "[a]t the time he made each of these misrepresentations or omissions, he knew the information that was being misrepresented or concealed. [ ] He was, at a minimum, extremely reckless in failing to correct these statements and omissions." Div. Post-Hearing Brief, p. 62. Essentially, the Division argues that Mr. Hopkins acted with extreme recklessness simply because he knew that certain information (e.g., the extent of the Fund's subprime exposure) was left out of the documents that he drafted, edited or was in some other attenuated way connected to. In other words, the Division's argument comes down to this: Mr. Hopkins was extremely reckless in leaving Item X out of Document Y because when he "made" the statements in Document Y he *knew* that it

didn't also say X. But for all the reasons set forth in Mr. Hopkins' post-trial brief, that is not enough as a matter of law. What it leaves out is that in order to be culpable, Mr. Hopkins had to know more than that the document he "made" didn't say X; he 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). This requirement applies to the Division's §§ 10(b), 17(a)(1), and 17(a)(3) claims.[11]

With respect to the fact sheets, typical slide/presentations, and the March letter, the Division completely ignores this essential element of its burden of proof. It rests on the proposition that, because Mr. Hopkins knew what he didn't say, he was extremely reckless or negligent. It does not, because it cannot, demonstrate that Mr. Hopkins knew that the misleading omissions were material, because the testimony was clear that *no one* at the time thought the omitted material was important. Tr. 2853, 2855-56 (Wands); Sirri Report, ¶ 66; Tr. 2182-83 (Sirri). In fact, there is a surprising failure on the Division's part to even address all of the countervailing evidence that proves why Mr. Hopkins had every reason at the time to think that he wasn't saying anything misleading, or leaving out anything material to the discussion at hand.

Perhaps in order the cure this defect, the Division attempts to characterize Mr. Hopkins as self-motivated, "careless with the truth," and having a "cavalier attitude[.]" Div. Post-Hearing Brief, p. 63. First, completely speculating and providing no basis in evidence, the Division itself carelessly states "Hopkins wanted to keep investors in the

[11] For all of the reasons stated in Mr. Hopkins' post-hearing brief, the Division also failed to prove a violation of § 17(a)(2) because Mr. Hopkins did not "obtain money or property" as a result of any alleged violation. Hopkins Post-Hearing Brief, pp. 76-78. As the Division's Post-Hearing Brief provided no new allegations to address, the arguments will not be repeated here.

LDBF and the Related Funds, and his goal made him careless with the truth." Id. Yet, even the Division's own expert, Mr. Lyons, conceded that of course everyone wants to keep clients, but not everybody tells lies to achieve that. Tr. 1849-50 (Lyons). Not surprisingly, the Division ignores the evidence that none of Mr. Hopkins' compensation was based on how many clients were kept or how much money was invested in SSgA funds. Tr. 331-32 (Hopkins).

The Division further argues that "Hopkins' cavalier attitude towards investors is exemplified by his response to a colleague looking to sell LDBF to a new investor: 'Isn't there some rule that states that you can't sell an investment to an entity that has recently come out of bankruptcy that might send it back into bankruptcy[?]" Div. Post-Hearing Brief, p. 63. Putting aside the lack of authority that a "cavalier attitude" could somehow amount to scienter, the notion that the e-mail containing this statement reflected even a "cavalier attitude" is pure spin. Mr. Hopkins explained at the hearing that he was merely making a humorous comment here, directed at (1) the fact that in May 2007, when he wrote the e-mail, investors were still wary of the Fund (based on its underperformance at the beginning of the year) even though it had just come back with a very strong performance in April and May, and (2) the fact that SSgA couldn't have sold an investment in the Fund to Delta even if it had wanted to buy because Delta couldn't invest in this type of fund. Tr. 513-15 (Hopkins).

Moreover, all of this speculation about Mr. Hopkins' self-motivation or reckless or cavalier attitude is completely antithetical to the character of Mr. Hopkins as testified to by *every single witness* at the hearing who personally knew him. Witness after witness

vouched for Mr. Hopkins' integrity, honesty, diligence, and the fact that he looked out for clients' interests:

- "He's, in my opinion, honest and straightforward, and ... I think he cares genuinely about clients and making sure that we all keep moving things forward in a way and deliver what we should to clients." Tr. 1814 (Donovan).

- "Totally trustworthy, totally honest, hard-working, and very much trying to get information for clients ... I don't think he would ever willfully mislead clients. He always tried to tell them how it was." Tr. 2046 (Lowe).

- "Mr. Hopkins ... had the highest integrity and honesty of individuals that I worked with ... He was conscientious. Mr. Hopkins' reputation at SSgA was for being conscientious and honest" with "a high level of integrity." Tr. 2260 (Armstrong).

- Mr. Hopkins "was a great worker. He had great attention to detail. He knew how to communicate very complex concepts to people of varying abilities ... [t]he client relationship people always wanted Jim and the sales people always wanted to bring out Jim because ... not only is he knowledgeable and capable and, you know, he did know the products very well but he also is engaging and pleasant and he's kind of the whole package." Tr. 1433 (Flannery).

- "Jim always arrived at a meeting very well prepared. He took diligent notes ... he would always make sure that he knew what the client was looking for [and be] prepared to discuss that ... he always looked out for the best interests of the participants, wanted to give them any information they needed. He was just an excellent colleague to have." Tr. 2815 (Shegog).

- Mr. Hopkins was a "very moral, very ethical person that had clients' interests in his mind ... somebody that tried to do the best for clients [ ] and be helpful to us [client] relationship people." Tr. 2778 (Carlson)

- Mr. Hopkins was a conscientious worker. Tr. 1755-56 (Pickett).

- Mr. Hopkins was "the ideal person to be answering questions for clients related to the Limited Duration Bond Fund or just about any other fixed income strategy...." Tr. 2396 (Johnson).

- "Jim is one of the most honest and straight-shooting people I know ... I would trust him with anything." Tr. 2838 (Richards).

- Mr. Hopkins is "one of the most, you know, honest, truthful people of integrity I've ever worked with ... [t]hat's his reputation in the industry, and certainly within SSgA." Tr. 2871 (Wands).

The Division's unsupported assertions to the contrary simply do not stand up against the tide of evidence demonstrating Mr. Hopkins' honesty and integrity are beyond reproach.

X. CONCLUSION

To say Jim Hopkins is a good person is an understatement. He is selfless, dedicated, hard-working, conscientious, and intelligent. The subprime crisis was a once in a generation – if not once in a lifetime – event. Mr. Hopkins did not cause it, and he certainly could not have predicted it. Yet, the Division essentially seeks to hold Jim Hopkins responsible for the aftermath of the crisis. Based upon a fair weighing of the evidence, however, the Division has failed to prove the charges levied in the OIP. On the contrary, the evidence actually shows that Jim Hopkins did nothing wrong. We respectfully request that this Court confirm this truth and permit Jim Hopkins the opportunity to salvage the career that was decimated by this wholly unnecessary proceeding.