**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

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| **In the Matter of**<br><br>**Jay T. Comeaux**<br><br>**Respondent.** | **ADMINISTRATIVE PROCEEDING**<br>**File No. 3-15002** |

# RESPONDENT JAY COMEAUX'S REPLY IN SUPPORT OF HIS PETITION FOR REVIEW

Respondent Jay T. Comeaux ("Comeaux" or "Respondent") files this Reply in Support of his Petition for Review to the U.S. Securities and Exchange Commission ("Commission") and would show as follows:

## I. SUMMARY OF THE REPLY

The Division's Response to Comeaux's Brief in Support of his Petition for Review (the "Response") fails to substantively address key arguments made by Comeaux in his Brief: (1) the Initial Decision ("I.D.") fails to properly recognize Comeaux's extensive cooperation; (2) Comeaux's limited role in the Stanford incident was not egregious; and, for these reasons, (3) the finding that Comeaux has the financial ability to pay the ordered financial sanction is clearly erroneous. Instead, the Division relies upon the "misconduct of individuals such as Comeaux," not Comeaux himself, in an attempt to label Comeaux's conduct "egregious." The Division conveniently ignores the ALJ's determination that Comeaux "was not a principal actor in the creation and concealment of the Ponzi scheme operated by R. Allen Stanford, the owner of his former employer." Instead, the Response essentially deems "largely irrelevant" the Commission's longstanding and express policy to encourage and promote cooperation. Because

the Commission's policy is to promote cooperation and the Division both encouraged and benefited from Comeaux's cooperation, that cooperation should be recognized. In view of his extensive cooperation, the Commission should properly consider Comeaux's financial condition and his inability to pay the financial sanctions currently ordered.

## II. ARGUMENT AND AUTHORITY

### A. COMEAUX'S COOPERATION SHOULD BE RECOGNIZED.

The Response ignores that the failure to recognize Comeaux's cooperation disincentivizes cooperation, the encouragement of which is an important policy of the Commission. *See* 17 C.F.R. § 202.12. It does not dispute that the imposition of excessive financial sanctions on Comeaux will serve to deter individuals from cooperating with the Commission in the future. Indeed, if the I.D. stands, the SEC defense bar is certain to conclude that there is no benefit in advising their clients to cooperate with the Commission and Division in the future. The Division does not substantively dispute the extent of Comeaux's cooperation, but in a footnote the Division merely deems the Hedges Affidavit detailing the extent of Comeaux's cooperation "largely irrelevant to the issues." *See* Response p.11, n.7. It does not, however, explain why any future litigant will cooperate with the Commission if such cooperation is deemed largely irrelevant.

The policy and history of the Commission demonstrates that cooperation is of significant relevance to the ultimate determination of sanctions. *See* 17 C.F.R. § 202.12 (cooperation can "contribute significantly to the success of the agency's mission"). Further, the Commission has regularly held that sanctions in the context of cooperation and settlement are often less than sanctions imposed in litigated cases because such decisions "reflect pragmatic considerations such as the avoidance of time-and-manpower-consuming adversarial litigation." *See In re Philip*

*A. Lehman*, Release No. 2565, 2006 WL 3054584 at *9 (Oct. 27, 2006). *See also Phlo Corp.*, Exchange Act Rel. No. 55562 (Mar. 30, 2007) (noting that the "rationale for the imposition of lower sanctions is, at least in part, that settlement lets the Commission avoid time-consuming adversary proceedings and the concomitant expenditure of staff resources").

The I.D. failed to properly admit the Hedges Affidavit, which documented Comeaux's cooperation with the Commission's various investigations, including cooperation prior to the OIP. *See* Ex. E to Comeaux's Brief. Although the Division ignores it, the Offer of Settlement and OIP eliminated the need for the Commission to conduct a time consuming, expensive, and potentially contentious adversary hearing. Because the I.D. failed to admit the Hedges Affidavit and appropriately consider Comeaux's cooperation and its importance as the policy of the Commission, Comeaux requests that the Commission reverse the ALJ's order and give proper consideration to Comeaux's cooperation and, as a result, his current financial status.

**B. COMEAUX'S CONDUCT WAS NOT EGREGIOUS.**

Throughout this proceeding, Comeaux has never denied or contradicted the determinations of the OIP. The Division, however, has bent over backwards to exaggerate his role in the Stanford Ponzi scheme in order to exact an outrageous and unreasonable financial sanction against Comeaux. As it did before the ALJ, the Division relies upon the misconduct of others, specifically Allen Stanford, Jim Davis, Laura Pendergest-Holt, and the Stanford Entities, to suggest that Comeaux's conduct was "egregious." *See* Response at p.9. That reliance is made express when the Division notes that it is relying upon the "the misconduct of *individuals such as Comeaux,*" not Comeaux's conduct itself. *See* Response at p.13. The Division cannot point to any evidence in the record to support its characterization of Comeaux's conduct as "egregious." To the contrary, Comeaux presented the Commission with testimony in the Bogar/Green/Young

proceeding that Comeaux "made a point of telling [his financial advisors] not to overallocate to the bank" and "to be mindful of their suitability obligations in recommending the SIB CDs to clients..." *See* Brief at n.11. The Division also entirely ignores that the ALJ specifically found that Comeaux "was not a principal actor in the creation and concealment of the Ponzi scheme operated by R. Allen Stanford, the owner of his former employer." *See* I.D. at p.5.

In the record before the Commission, the following are the only violations contained in the OIP and deemed true for purposes of this proceeding:

- Because Comeaux could not confirm Stanford Investment Bank's ("SIB") representation regarding the safety of the SIB CDs and the liquidity of SIB's investment portfolio, Comeaux did not have a reasonable basis to recommend SIB CDs to investors (OIP at p.4);

- By failing to fully disclose Stanford Group Company ("SGC") and his own financial interest in selling the SIB CDs, Comeaux failed to disclose material conflicts of interest (*id.*);

- As a result of these inactions, Comeaux willfully violated and aided and abetted and caused violations of Section 17(a) of the Securities Act, which prohibits fraudulent conduct in the offer or sale of securities (*id.* at p.4-5);

- Comeaux willfully aided and abetted and caused violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the purchase and sale of securities (*id.* at p.5);

- Comeaux willfully aided and abetted and caused violations of Sections 206(1) and 206(2) of the Advisers Act, which make it unlawful for an adviser to employ any device, scheme, or artifice to defraud any client or prospective client or to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client. (*Id.*)

The Commission is also bound by the OIP, which does not support the notion that Comeaux was involved with the principal acts of fraud and deceit perpetrated by Stanford and others. Instead, based solely on the above mentioned violations, the Commission must now determine, in its discretion, the appropriate sanctions for such violations, giving regard to Comeaux's

cooperation, the sanctions previously agreed to, Comeaux's circumstances, and the public interest.

### C. COMEAUX'S INABILITY TO PAY SHOULD BE CONSIDERED.

Comeaux does not dispute that the consideration of his financial condition is at the discretion of the Commission. Comeaux asserts, however, that given his extensive cooperation, his Offer of Settlement, and the fact that his conduct was not egregious, the Commission should give due consideration to his inability to pay the financial sanction currently ordered. As demonstrated in Comeaux's Brief, Comeaux does not have the assets, even including both the frozen assets in the custody of the court-appointed receiver,[1] his wife's separate property, and their exempt assets, to pay a substantial portion of the Effective Judgment. The Division does not substantively dispute Comeaux's financial condition, instead it 'crosses-its-fingers and hopes' for a "future financial gain or windfall." *See* Response at p.11. The Division instead baselessly asserts that Comeaux's reasonable resistance to its incredible over-reach for financial sanction, much of which was appropriately rejected by the ALJ, is an attempt to "keep fraudulently obtained earnings." *See* Response at p.9 and 11. The evidence in the record shows the opposite.

As demonstrated conclusively by the uncontroverted evidence before the Commission, if Comeaux and his wife were forced to liquidate all assets (leaving them penniless and homeless) he would still be left with debt of almost $2.3 million. The Commission has previously noted that it should be:

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[1] The Division's baseless suggestion that Comeaux is attempting to ignore the $1.4 million of frozen assets is entirely incorrect. *See* Response at p.10, n.5. In Comeaux's Brief, he specifically noted that the ALJ ordered that Comeaux must disgorge a total of $5,155,346.88 in disgorgement and prejudgment interest and that the ALJ further ordered that amount is to be reduced by the $1,435,236 in the control of the court-appointed receiver. *See* Brief at p.3. The Brief defined this net amount ($3,386,974.50) as the "Effective Judgment" and all discussions of inability to pay involve this net amount. The Division's assertion is entirely without merit.

> cognizant of the inadvisability of assessing penalties so heavy that the persons against whom they are assessed are unable to pay them. Such a situation results in the expenditure of agency resources in unsuccessful attempts to collect the penalties. Moreover, the imposition of a [penalty] that cannot be enforced may ultimately render the deterrent message intended to be communicated by the [penalty] less meaningful. For these reasons, consideration of adequate, credible evidence of inability to pay is appropriate for us to consider as a discretionary matter.

*See In re Philip A. Lehman*, 2006 WL 3054584 at *9 (quoting *First Secs. Transfer Systems, Inc.*, 52 S.E.C. 392, 397 (1995)). Comeaux is not attempting to avoid sanctions—he accepted the permanent bar and cease and desist order. Instead, it is the Division who overreaches[2] in an attempt to make destitute an individual who "was not a principal actor in the creation and concealment of the Ponzi scheme." *See* I.D. at p.5.

The uncontroverted evidence in the record establishes that Comeaux does not have the financial ability to pay the disgorgement plus prejudgment interest currently ordered.[3] Based on both his cooperation and the lack of egregiousness of his conduct – as specifically noted by the ALJ – Comeux requests that the Commission consider his financial condition, determine that given his age,[4] the fact that he has no prior violations of securities laws, has been permanently deprived of work in the securities industry and, therefore, future employment will not present the opportunity for him to violate securities laws (*see* I.D. at p.5), the permanent bar and cease and desist order are sufficient penalties for Comeaux's conduct. In the alternative, Comeaux requests that the disgorgement and prejudgment interest be reduced to the amount of Comeaux's assets under the control of the court-appointed receiver.

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[2] The Division does not even substantively address Comeaux's objections to its evidence containing overt miscalculations (which indicates that there may be other miscalculations if the Division were to actually present evidence of its detailed calculations, which it failed to do); the lack of a causal connection to allegedly illegally obtained profits; and the conclusory nature of the Division's evidence.

[3] Because Comeaux is currently living off the assets disclosed in his Financial Disclosure Statement, his total assets are actually less today than at the time of the Financial Disclosure Statement.

[4] Comeaux is 66 and will turn 67 in December 2013, not 64 as asserted by the Division. *See* Response at p.5.

Dated: November 20, 2013.

Respectfully submitted,

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