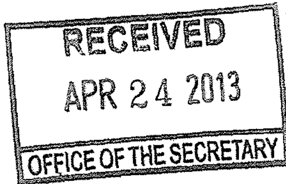

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **DANIEL BOGAR,** **BERNERD E. YOUNG, and** **JASON T. GREEN** **Respondents.**	**Administrative Proceeding** **File No. 3-15003** **Judge Carol Fox Foelak**

<u>REPLY BRIEF OF RESPONDENT DANIEL BOGAR</u>

THE TAYLOR LAW OFFICES, P.C.

Thomas L. Taylor III
Texas State Bar: 19733700
taylor@tltaylorlaw.com
Andrew M. Goforth
Texas State Bar: 24076405
goforth@tltaylorlaw.com

4550 Post Oak Place Drive, Suite 241
Houston, Texas 77027
Tel: 713.626.5300
Fax: 713.402.6154

COUNSEL FOR DANIEL BOGAR

TABLE OF CONTENTS

Table of Contents ii

Table of Authorities iv

I. PRELIMINARY STATEMENT 1

II. THE DIVISION FAILED TO PROVE THAT BOGAR VIOLATED THE ANTI-FRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS 4

A. The Division Has Failed to Prove Primary Violations of Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act and Rule 10b-5 thereunder 4

1. The Evidence Does Not Establish that Bogar "Made" Any Material Misrepresentations 4

2. The Evidence Does Not Establish that Bogar Omitted to State Any Material Facts Necessary to Make Statements He Made Not Misleading 10

3. The Evidence Does Not Establish that Bogar Committed a Manipulative or Deceptive Act as Part of a Scheme to Defraud. 16

4. The Evidence Does Not Establish that Bogar Acted with the Requisite Scienter 17

a. The Evidence Does Not Establish that Bogar Knowingly or Intentionally Committed Fraud, or Acted With Extreme Recklessness 17

1) The Evidence Does Not Establish that Bogar Knew that the Merchant Banking Portfolio was Related to the SIBL CD Portfolio 18

2) The Evidence Does Not Establish that Bogar was "Continu[ally] Inacti[ve]" in an Intentional or Reckless Manner in Regard to Information Requests from Pershing 19

3) The Evidence Does Not Establish that Bogar "Blindly" Relied on His Faith in Allen Stanford 24

b. The Evidence Does Not Establish that Bogar Acted Negligently and Therefore the Division Has Failed to Show Bogar Violated Securities Act Section 17(a)(2) and (3) 26

B. The Division Has Failed to Prove that Bogar Aided and Abetted or Caused Violations of Sections 10(b) and 15(c)(1) of the Exchange Act and Rule 10b-5 Thereunder, or Sections 206(1) and (2) of the Advisers Act 28

1. The Evidence Does Not Establish that Bogar Acted with the Scienter Necessary for Aiding and Abetting Liability 28

a. Bogar was not Reckless in Failing to Detect the SIBL Fraud Based Upon Pershing's Requests for Transparency 29

b. The Division Has Not Established that Bogar Had Any Knowledge of Communications from Clients and Their Representatives about the SIBL CD 30

c. Bogar was not Reckless in Failing to Detect the SIBL Fraud Based Upon Regulatory Inquiries Received by SGC 30

d. Bogar was not Reckless in Failing to Detect the SIBL Fraud Based Upon SIBL's Domicile in Antigua or its Antiguan Auditor 31

e. Bogar was not Reckless in Failing to Detect the SIBL Fraud Based Upon the Lack of Transparency into SIBL's Portfolio 32

f. Bogar was not Reckless in Failing to Detect the SIBL Fraud Based Upon His Work with the Merchant Banking Group 34

2. The Evidence Does Not Establish that Bogar Knowingly and Substantially Assisted Conduct Constituting Violations of the Anti-fraud Provisions... 34

3. The Evidence Does Not Establish that Bogar Caused Violations of the Anti-fraud Provisions... 36

C. The Relief Requested by the Division is Neither Warranted nor Justified....................... 36

1. The Division is Not Entitled to a Cease-and-Desist Order or a Bar Order Against Bogar 37

2. Disgorgement Against Bogar is Not Warranted; the Division has Failed to Meet Its Burden in Regard to Making a Reasonable Calculation... 39

3. Civil Penalties Against Bogar are Not Warranted 41

III. CONCLUSION **42**

TABLE OF AUTHORITIES

Cases

Aaron v. SEC,
446 U.S. 680 (1980) 26

Anderson v. McGrath,
2013 U.S. Dist. LEXIS 42575 (D. Ariz. Mar. 26, 2013) 10

Anixter v. Home-Stake Prod. Co.,
77 F.3d 1215 (10th Cir. 1996) 10

City of Monroe Employees Retirement System v. Bridgestone Corp.,
399 F.3d 651 (6th Cir.), *cert. denied*, 546 U.S. 936 (2005) 10

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 17

Howard v. SEC,
376 F.3d 1136 (D.C. Cir. 2004) 28

In re Lammert,
Initial Decision Rel. No. 348, 2008 SEC LEXIS 937 (April 28, 2008) 5

In the Matter of KPMG Peat Marwick LLP,
Exchange Act Rel. No. 43862 (Jan. 19, 2001) (Comm'n Opinion), *aff'd*, 289 F.3d 109 (D.C. Cir. 2002) 37

In the Matter of Raymond James Fin. Servs., Inc. et al.,
Release No. ID-296 (Sept. 15, 2005) 41

Janus Capital Group, Inc. v. First Derivative Traders,
131 S. Ct. 2296 (2011) 5

SEC v. Capital Gains Research Bureau, Inc.,
375 U.S. 180 (1963) 26

SEC v. Druffner,
353 F. Supp. 2d 141 (D. Mass. 2005) 11

SEC v. First City Financial Corp.,
890 F.2d 1215 (D.C. Cir. 1989) 39, 42

SEC v. Hughes Capital Corp.,
917 F. Supp. 1080 (D.N.J. 1996), *aff'd*, 124 F.3d 449 (3d Cir. 1997) 40

SEC v. PIMCO Advisors Fund Mgt. LLC,
341 F. Supp. 2d 454 (S.D.N.Y. 2004) 11

SEC v. Tambone,
417 F. Supp. 2d 127 (D. Mass. 2006) 5, 10, 11, 16, 17

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta,
552 U.S. 148 (2008) 10

Woods v. Barnett Bank of Ft. Lauderdale,
765 F.2d 1004 (11th Cir. 1985) 34

Statutes

15 U.S.C. 77q(a) 2, 3, 4, 5, 8, 10, 16, 17, 18, 25, 26, 28

15 U.S.C. 78j(b) 2, 3, 4, 5, 8, 10, 16, 17, 18, 25, 28, 29, 34, 36

15 U.S.C. 78o(c)(1) 2, 3, 4, 28, 29, 34, 36

15 U.S.C. 80b-6(1) 2, 3, 4, 28, 29, 34, 36

15 U.S.C. 80b-6(2) 2, 4, 28, 29, 36

17 C.F.R. 240.10b-5 .... 2, 3, 4, 5, 8, 10, 16, 17, 18, 25, 28, 29, 34, 36

I. PRELIMINARY STATEMENT

The Division of Enforcement's Post-Hearing Brief (the "Division's Brief," "DOE Br. _") presents a theory of liability as to Respondent Daniel Bogar which is not supported by the evidence; it describes a case that the Division hoped to make against Bogar, as chief executive officer of SGC, but failed to do so. The Division is required to prove each element of the statutory violations charged in the Order Instituting Proceedings ("OIP") by a preponderance of the evidence; it has failed to meet its burden.

In his Post-Hearing Brief ("Brief," "Br. _"), Bogar urged this court to focus with pin-point accuracy upon the conduct of each Respondent. The Division asks this court to do the opposite in that it repeatedly conflates the conduct of the "Respondents" as a group and with the Stanford entities themselves. (*See, e.g.,* DOE Br. 1.) ("Respondents assured investors ... that their investments were safe."). But there is no allegation -- let alone proof -- that Bogar spoke directly to any investor. There is no evidence that he drafted, revised or specifically passed on the offering documents in question. All evidence is that he acted upon the reasonable assumption that the offering documents -- which had been in use for nearly a decade -- had been prepared and vetted by competent outside counsel and on an ongoing basis by internal legal and compliance personnel, all under the scrutiny of multiple regulatory bodies.

As he testified, Bogar had a general awareness of the offering documents. But on their face they disclosed that investment in the SIBL CD was risky, that investors could lose all of their money and that the deposits were not FDIC insured. The documents also disclosed related party transactions, compensation and other material matters. The antifraud provisions of the federal securities laws clearly do not require that the most senior executive officer of a major broker dealer of SGC's size and scope independently parse and perfect these disclosures.

Bogar did not play an active role in training SGC's financial advisors ("FAs") but rather -- reasonably and consistent with industry standards -- delegated the training function to appropriate, qualified personnel and assured himself that they were doing their job. There is no evidence whatsoever that he authorized or condoned training which led to material misrepresentations to investors.

The Division's Brief completely disregards the context in which Bogar's purported violations occurred and analyzes all aspects of the case through hindsight, ignoring the years and years of history during which the SIBL CD program operated without a single dollar of customer losses, guided by distinguished national corporate and enforcement counsel and an extensive internal legal and compliance structure, in full visibility to the Securities and Exchange Commission (the "Commission") and the NASD/FINRA. As a part of the context in which allegations against Bogar arise, it was also shown at hearing that numerous distinguished members of the business, financial and political worlds leant their names and prestige to the Stanford business model, having received regular and extensive reports regarding the business of the Stanford entities.

The Division has alleged in the OIP that Bogar is primarily liable for violations of Section 17(a) of the Securities Act [15 U.S.C. 77q(a)] and Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. 240.10b-5], and is liable for the secondary violations of aiding and abetting or causing SIB and SGC's purported violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and SGC's purported violations of Section 15(c)(1) of the Exchange Act [15 U.S.C. 78o(c)(1)] and Sections 206(1) and (2) of the Advisers Act [15 U.S.C. 80b-6(1) and (2)]. The Division has failed to show by a preponderance of the evidence that Bogar violated any of these anti-fraud provisions.

Bogar cannot be held primarily liable for any of the forgoing violations because the evidence does not support a finding that Bogar was the "maker" of any material misstatements or omissions of material fact; nor does the evidence support a finding that Bogar committed a manipulative or deceptive act as part of a scheme to defraud. Because the evidence does not establish that Bogar engaged in such "fraudulent conduct" he cannot be liable for primarily violating any of the anti-fraud provisions, as alleged. *See* §II.A.1 – 3, *infra*.

The Division further has failed to meet its burden in establishing that Bogar acted with the requisite scienter to be liable for primarily violating Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The evidence does not support a finding that Bogar acted knowingly or intentionally with intent to deceive or defraud anyone, nor is there evidence of an extreme departure by Bogar from the standards of ordinary care in which the danger of misleading investors was so obvious that Bogar must have been aware of it. *See* §II.A.4.a, *infra*. Moreover, because the evidence also does not support a finding that Bogar acted negligently in the performance of his duties as the chief executive of SGC, the Division has not established Bogar's liability for primarily violating Section 17(a)(2) and (3) of the Securities Act. *See* §II.A.4.b, *infra*.

The Division has failed to meet its burden in establishing that Bogar acted with the requisite scienter to be liable for aiding and abetting any purported violations of the anti-fraud provisions by SIB or SGC, or for causing SIB or SGC's purported violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, or SGC's violations of Section 15(c)(1) of the Exchange Act and Section 206(1) of the Advisers Act. The evidence not only does not support a finding that Bogar acted knowingly, intentionally or with an extreme departure from the standards of ordinary care, as stated above, but the Division has failed to establish with legal

sufficiency that Bogar encountered "red flags" with respect to which he was reckless in failing to have detected the improper conduct of the perpetrators of the SIBL CD Ponzi scheme -- namely R. Allan Stanford, Jim Davis, Laura Pendergest-Holt and others who have been criminally convicted in the scheme. *See* §II.B.1, *infra*.

The Division has failed to meet its burden in establishing that Bogar aided and abetted SIB or SGC's purported violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, or SGC's purported violations of Section 15(c)(1) of the Exchange Act and Sections 206(1) and (2) of the Advisers Act, because the evidence does not establish that Bogar gave knowing and substantial assistance to the primary violator(s). *See* §II.B.2, *infra*.

Finally, the Division has failed to meet its burden in establishing an act or omission by Bogar that was a cause of a primary violation, and therefore a finding that Bogar caused violations of Section 206(2) of the Advisers Act cannot be sustained. *See* §II.B.3, *infra*.

Because the Division has failed to meet its burden in establishing each element of the alleged violations of the anti-fraud provisions, it is not entitled to the relief sought in the OIP and the Division's Brief. The OIP should be dismissed in all respects as against Respondent Bogar.

II. THE DIVISION FAILED TO PROVE THAT BOGAR VIOLATED THE ANTI-FRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS

A. The Division Has Failed to Prove Primary Violations of Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act and Rule 10b-5 thereunder

1. The Evidence Does Not Establish that Bogar "Made" Any Material Misrepresentations

The Division has failed to establish that Bogar is the "maker" of any material misrepresentations and therefore has failed to establish that Bogar is primarily liable under

Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

The Division contends that Bogar is liable for the representations in the SIBL CD offering documents (the "Offering Documents") because "[a]s President, Bogar approved SGC's offer and sale of the SIB CDs and the use of the SIB CD offering documents, namely the marketing brochure and the disclosure statement." (DOE Br. 10; *see also* DOE Br. 47.) This formulation sidesteps the outcome determinative question as to whether Bogar is chargeable upon the evidence presented as the "maker" of the statements alleged to be misleading. There is no allegation in the OIP that Bogar had any direct communication with investors; the Division has not contended otherwise.[1]

The evidence does not establish that Bogar made the statements in the Offering Documents in the manner required to implicate liability to him as a "maker." "[T]he maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011). Indeed, even "[o]ne who prepares or publishes a statement on behalf of another is not its maker." *Id.* The Supreme Court reasoned that "[w]ithout control, a person or entity can merely suggest what to say, not 'make' a statement in its own right ... [as best] exemplified by the relationship between a speechwriter and a speaker," a relationship in which the drafter of the speech is not its maker because the speaker is the one with the ultimate control. *Id.*

[1] If the Division cannot establish that Bogar personally made untrue statements, then his conduct could be, at most, aiding and abetting, "'and no matter how substantial that aid may be, it is not enough to trigger primary liability under Section 10(b).'" *In re Lammert*, Initial Decision Rel. No. 348, 2008 SEC LEXIS 937, at *55 (April 28, 2008) (Foelak, ALJ) (citing *SEC v. Tambone*, 417 F. Supp. 2d 127, 132 (D. Mass. 2006)).

The Division has not alleged -- let alone proven -- that Bogar played any role in the drafting, preparation or modification of the language used in the Offering Documents. The Division has failed to establish that Bogar had any input whatsoever into the statements in the Offering Documents, let alone "ultimate" authority over them. The Division admits that the Offering Documents did not substantively change over time. (DOE Br. 8.) SGC began offering the SIBL CD to U.S. accredited investors in approximately 1998, several years before Bogar became the chief executive of SGC in 2005. Nonetheless, the Division apparently seeks to attribute the static contents of these documents to Bogar. There is no evidence to support the Division's assertion.

Bogar became the chief executive of SGC at a time when SGC had sold the SIBL CD for approximately seven years under the regulation of the Commission and the NASD/FINRA without incident or customer losses. (Tr. 2605-9.) When Bogar became president, he acquainted himself with the CD product and its history and learned that the Offering Documents had been drafted, approved and periodically reviewed and updated by (1) Carolos Loumiet, a well-known partner practicing financial services law at the preeminent law firm of Greenberg Traurig LLP ("Greenberg") (Tr. 2571-2); (2) Yolanda Suarez, Loumiet's protégé at Greenberg who became in-house counsel at Stanford Financial Group ("SFG") as Allan Stanford's Chief of Staff (Tr. 2571-3; 2608); (3) Mauricio Alvarado, a former partner at Vinson & Elkins LLP, another preeminent law firm based in Houston, who was employed as General Counsel for SFG and SGC (Tr. 2576-8; 2608-9);[2] (4) Lena Stinson, formerly of Lehman Brothers, and a founding member of the SGC broker-dealer (Tr. 319; 2607-8); and others who reported to them. (Exs. B 346, 347; Tr. 4121-4.)

[2] Alvarado arrived at Stanford sometime in 2000. (Tr. 2576.) He was involved in the periodic review and revision of the Offering Documents following his arrival. (Tr. 2577, 3979.)

Bogar also acquainted himself with SGC's ongoing due diligence with respect to the CD product and the compliance function generally by meeting with, establishing and maintaining an appropriate working relationship with SGC's Chief Compliance Officer ("CCO") and due diligence officer Jane Bates. (Tr. 2611-2.) This is exemplified in his communications with her which are in evidence. (Exs. B 341, B 342, B 346, B 347.) Bogar requested information on the Compliance Department's achievements and goals, and was informed that the NASD had found no substantive issues in its most recent audit, and had in fact approved SGC's requests to increase its institutional market-making capabilities and to expand operations by adding offices and FAs. (Tr. 2612; Ex. B 341.)[3] At the outset, Bogar was assured that the NASD had found no substantive issues in its most recent audit. Going forward, he reasonably relied on Ms. Bates' representations that the Compliance Department was performing its functions properly and that SGC's efforts to sell the CD were in line with the securities laws and regulations of the United States.[4] (Tr. 2615-7; Exs. B 342, B 347.) Bogar recruited and hired respondent Young as SGC's CCO and due diligence officer. (Tr. 2620.) He continued to supervise Young's performance of those duties as delegated. (Tr. 2806-7.)

---

[3] The Division's dismissive statement that "Bogar's efforts to understand the ... SIB CD ... consisted only of having a conversation with Young's predecessor in the compliance department and going through her due diligence binder," (DOE Br. 14), is one of several examples of the Division attempting to support an alleged violation with actions which were completely reasonable and what would be expected of an incoming chief executive at a sizeable broker-dealer. (Tr. 411-4.) The statement also mischaracterizes the record, which reflects several actions that Bogar undertook -- in addition to meeting with the CCO -- to acquaint himself with the SIBL CD product and SGC operations in general, including learning the history of the CD, the legal and compliance professionals responsible for drafting and updating the Offering Documents, and ensuring that ongoing due diligence was performed (Tr. 2807, 2879-80.)

[4] The generalizations of the Division's expert regarding Mr. Bogar's performance of his responsibilities vis-à-vis compliance should be disregarded entirely; Mr. Henderson admitted he did not "request any documents regarding Mr. Bogar's performance vis-à-vis the compliance department." (Tr. 2010-16.) Mr. Henderson does, however, concede the importance of the chief executive officer's recruitment and hiring of a qualified CCO and competent regulatory/enforcement counsel, (Tr. 2020, 2026-7), as the Respondents' expert did. (Tr. 4111; 4127-8.)

The Division also attempts to tie Bogar's liability under Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act and Rule 10b-5 thereunder to his purported approval of materials that were used by Respondents Green and Young (and their predecessors) to train SGC Financial Advisors ("FAs") in selling the SIBL CD to clients. (DOE Br. 2, 31, 36 n.28, 47-8, 49, 50.) However the Division has not offered any evidence that Bogar was involved in any way with the creation, revision, or specific approval of these documents. As he testified, Bogar did not prepare any of the training materials. (Tr. 2793-4.) There is no contrary testimony or documentary evidence.

When Bogar became president of SGC, the training function was performed by Jane Bates and Eddie Rollins. (Tr. 2793.) Green began training FAs in approximately 2004. (Tr. 3764-5.) Following Young's arrival, he took over the compliance portion of the training. The training was delegated to experienced and qualified personnel. Bogar supervised the training function, to the extent appropriate for a CEO in assuring that it was properly delegated and carried out, became aware in a cursory way of the materials used, knew that meetings were taking place, and satisfied himself that the training was indeed occurring. (Tr. 2793-4.) It was not Bogar's responsibility as the chief executive to audit or otherwise vet the training materials used by those to whom the task was reasonably delegated.[5] There is no evidence whatsoever that Bogar authorized or condoned training which led to material misrepresentations. Nor is there evidence that he was ever made aware of any negative issues in regard to the training.[6]

---

[5] The Division contends that Bogar's testimony regarding his knowledge of Green's training PowerPoint presentation "deck" and the manner in which he reviewed it is somehow incongruent, "surprising," "curious[]," and "dodg[ing]." (DOE Br. 31 n.24.) These sharp characterizations do not comport with the record and represent another attempt by the Division to create non-existent facts to support a theory of liability and to make Bogar appear "evasive" or "disingenuous." (DOE Br. 83.) Read as a coherent body of testimony (as opposed to in fragments), Bogar's testimony establishes that he oversaw training in a manner consistent with industry standards. (Tr. 4131-2.)

[6] The Division alleges that FAs were confused by the training about the insurance coverage maintained by SIBL. (DOE Br. 58.) There is no evidence whatsoever that Bogar was made aware of any purported issues with FA

In regard to the so-called "Training and Marketing Manual" (Ex. DOE 742), the Division has failed to establish any nexus with Bogar outside of its existence on the Stanford intranet. In any case, as argued by Respondent Green, the evidence at trial established that Oreste Tonarelli was the author of it.[7] Bogar incorporates by reference Respondent Green's Post-Hearing Brief ("Green's Brief," "Green Br. _") detailing the origin and use of the Training and Marketing Manual. (Green Br. ¶¶ 85 – 6.) There is no evidence that Bogar was involved in its preparation or otherwise reviewed or commented on the language in the so-called Training and Marketing Manual. Bogar does not specifically recall reviewing it. (Tr. 3087-8.)

The Division also asserts that Bogar is liable for primary violations based upon the SIBL marketing brochure which was given to FAs as a reference in responding to client inquiries. (*See, e.g.*, Ex. DOE 607; *see* DOE Br. 10; Tr. 2874.). Like the other documents the Division seeks to tie to Bogar, there is no evidence that Bogar was involved in the creation, revision, or approval of this brochure. The Division has not offered any evidence that Bogar considered the "brochure" part of the offering documents, or that Bogar had knowledge that the "brochure" was given to investors. (DOE Br. 7.) (*See, e.g.,* Tr. 3259)

The Division relies on several cases to support its contention that Bogar is liable for primary violations of the anti-fraud provisions, despite the fact that there is no evidence of direct communications with investors. (DOE Br. 48 n.41.) Each of these cases is distinguishable because each involves the liability of a "maker" of statements that were then communicated to

confusion or with the training. In fact, he believed "everyone associated with the group of companies knew it had no depositor insurance", and was sure that if any FA presented the CD as an insured product, they would have been terminated or otherwise dealt with by Compliance. (Tr. 2794.)

[7] Similarly to the Division's dismissive statement regarding Bogar's review of Green's training PowerPoint presentation "deck," (*see supra* at n.5), the Division is again "surprise[ed]" that Bogar did not recall seeing the Training and Marketing Manual. (DOE Br. 36 n.28.) The evidence establishes that this document was no longer in use when Bogar became president of SGC in 2005. (*See* Green Br. ¶¶64 – 66, incorporated herein by reference) (describing the transition of SGC training from Oreste Tonarelli to Green in 2004).

third parties by others. *See Anderson v. McGrath*, 2013 U.S. Dist. LEXIS 42575 (D. Ariz. Mar. 26, 2013) (finding that the parties who "had ultimate control over the statements in the letter they issued" were "makers" under *Janus*, and could be liable for the statements "although not made directly to" investors) (citing *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 172 (2008)); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996) (it is not necessary for an accountant to directly communicate the accountant's false and misleading representations to plaintiffs for primary liability to attach); *City of Monroe Employees Retirement System v. Bridgestone Corp.*, 399 F.3d 651, 686 n.29 (6th Cir.), *cert. denied*, 546 U.S. 936 (2005) ("If [Plaintiff] can show that Firestone was the originator of Bridgestone's misrepresentations ..., primary liability should attach."). As established by the record, Bogar is not the "maker" of the statements made in the Offering Documents and presented to clients. Because he did not "make" those statements in the first instance, the communication of those statements to others cannot support a finding that he is primarily liable for violating the anti-fraud provisions.

2. **The Evidence Does Not Establish that Bogar Omitted to State Any Material Facts Necessary to Make Statements He Made Not Misleading**

Because Bogar was not the "maker" of any statements in the Offering Documents, he could not have omitted to state a material fact necessary in order to make statements he made, in the light of the circumstances under which they were made, not misleading. *Tambone*, 417 F. Supp. 2d at 135. Accordingly, the Division has failed to establish that Bogar is primary liable under Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, arising from omission.

Bogar did not owe "a duty to clarify a misleading statement" in the Offering Documents because the statements therein were not "attributable to [Bogar]." *Tambone*, 417 F. Supp. 2d at 135 (citing *SEC v. PIMCO Advisors Fund Mgt. LLC*, 341 F. Supp. 2d 454, 468 (S.D.N.Y. 2004) and *SEC v. Druffner*, 353 F. Supp. 2d 141, 148 (D. Mass. 2005)) (holding that because defendants "were not responsible for the misleading disclosures in the funds' prospectuses, they were under no duty to correct those statements if they became misleading").

The Division asserts that Bogar failed "to inform potential investors that SGC was not able to confirm representations made about SIB's CD portfolio," and that because he "knew that SIB's portfolio was a 'black box' into which SIB had refused to let them see" that he "had no basis to approve ... SGC's use of the claims about SIB's portfolio." (DOE Br. 47, 48.) However, notwithstanding that Bogar was not the "maker" of these statements and therefore could not omit material facts in regard to them, the Division mischaracterizes the lack of transparency into SIBL's CD portfolio.

In any case, transparency into the precise holdings of the SIBL CD portfolio was never represented to investors; this is a construct of the Division based upon hindsight.[8] The CD was presented by SIBL as a pooled portfolio of proceeds which would be invested in a diversified way. It was known by legal and compliance personnel, and by multiple regulatory bodies that the portfolio underlying the CD program was not transparent as to individual holdings. Bogar's openness with Pershing in this regard belies any intent to deceive with respect to this characterization of the CD offering. (Tr. 2627.) ("I mean, every time the message was the same.

[8] The clear evidence demonstrates that SIBL did not allow transparency into its investment portfolio (Tr. 2458, 2626-8), and that Bogar was always honest and forthright about this. (Tr. 2627.) Additionally, the Offering Documents do not represent otherwise. This raises the issue of materiality where the Offering Documents (which every CD investor represented in writing to have read) clearly do not represent transparency into the portfolio. (*See* discussion in Green Br. 54-6, 58-9, 60-61, incorporated herein by reference).

'Gentlemen, I'm a new kid on the block in this firm. You know, we clear through Bear Stearns. It's a major deal for this company, and we have a major proprietary product. It's offshore; and there's, you know, there's no transparency. ...") Bogar was told by legal and compliance personnel that the lack of transparency was due to concerns that the investment mix in the SIBL portfolio was proprietary, and further that Antiguan law did not allow for full transparency into the portfolio. (Tr. 2458, 2943.)

Further to the issue of transparency is that it is far from unique in the securities industry. The Division has gone to great lengths to persuade this Court that the SIBL CD was misleadingly compared to CDs offered by U.S. banks (DOE Br. 4 – 5), and yet when an investor purchases a U.S. bank CD, they are not offered transparency into the bank's loan portfolio so that the customer can assess the underlying risks of the bank.[9] The Division also omits other differences which are significant and detrimental to its position that the SIBL CD was misleadingly (and materially) marketed as an alternative to U.S. bank issued CDs. Most notably, U.S. Bank CDs are not offered through Rule 506 of Regulation D of the Exchange Act, requiring that purchasers be Accredited Investors and have a certain level of net worth and sophistication. Nor are U.S. Bank CD purchasers given offering documents and required to read and sign a Subscription Agreement making certain representations about their knowledge of the risks of the investment involved, and that they have read the offering documents and understood them. (Tr. 1063-4, 1337-8; Ex. G 15.) Furthermore, the returns generated by the SIBL CD were much higher than a

[9] Whereas U.S. bank CDs are insured up to $100,000 through the FDIC, the evidence establishes that the Disclosure Statement was clear that SIBL did not maintain FDIC-like depositor insurance on its holdings. (Ex. DOE 644 p. 11.) While certain of the Offering Documents did state that SIBL maintained a "comprehensive insurance program," (Ex. DOE 611 p.5.) the Division has failed to establish that any of the policies disclosed were not actually maintained by the Bank, or that the location of this phrase within the subheading of "depositor security" could overcome the clear language of the Disclosure Statement that the CD was not covered by FDIC- or SIPC-like insurance in the United States or Antigua.

traditional U.S. bank CD, and accordingly, carried greater risk -- as plainly stated in the Offering Documents. The SIBL CD was not presented as the equivalent of a U.S. bank CD. (Tr. 3977-8.)

The Division has further failed to present any evidence that Bogar ever made or condoned representation that the SIBL CD was like a U.S. bank CD or was an alternative to CDs issued by U.S. banks. (DOE Br. 5.) The Division's own description of the representations made to investors in the offering documents about the SIBL CD portfolio completely contradicts its contention that the SIBL CD was represented as equivalent or an alternative to a U.S. bank CD. (DOE Br. 8.) (Tr. 323-5, 350-1, 504-5, 3977-8.)

There are also other investment portfolios in the securities industry which are reasonably recommended by brokers and reasonably purchased by sophisticated investors, including the hedge fund industry and NREIT, or nontraded REIT, industry. (Tr. 4191-2.) The Division's own expert acknowledged that hedge fund managers do not as a matter of course disclose the underlying portfolio holdings to investors. (Tr. 1901-1904.) This lack of transparency does not mean that investors in hedge funds, and those who recommend them, are unreasonable.

The Division alleges that Bogar failed "to disclose facts inconsistent with those representations that the Respondents did know," (DOE Br. 47), including information regarding the investment of SIBL in private equity deals done by SGC's Merchant Banking group. The Division has mischaracterized the private equity portfolio managed by the Merchant Banking group in Miami, Florida (the "Merchant Banking Portfolio") as part of the SIBL portfolio made up of CD proceeds and managed by Laura Pendergest-Holt and Jim Davis. (*See, e.g.*, DOE Br. 5.) The foundation for the Division's construct is forensic accounting performed in hindsight, purporting to establish that the SIBL-owned assets in the Merchant Banking Portfolio were purchased with CD proceeds. However, as Karyl Van Tassel, the forensic accountant engaged

by the Stanford receiver, conceded on cross-examination, she had never seen a single original document supporting that characterization which was of her own invention. (Tr. 136-4.) There certainly is no competent testimony placing the private equity investments in a "CD portfolio."[10]

Osvaldo Pi, of the Merchant Banking group, testified that the CD-based portfolio which underlay the CDs "was totally unrelated to [his] job," and that he was never told he was managing the "CD portfolio." (Tr. 701.) Mr. Pi also learned from attorneys engaged by the Stanford receiver, after the Commission initiated the underlying enforcement action in the Northern District of Texas, that Jim Davis "had done other merchant banking deals outside of [the Merchant Banking] group," and that Pi had no knowledge of these deals throughout his employment at SGC. (Tr. 707.) Furthermore, Pi testified that Jim Davis "was not really involved in the merchant banking business." (Tr. 708.)[11]

The Division's construct further ignores Bogar's past experience in managing the Merchant Banking group from 2000 to 2004, prior to any SIBL involvement in the Merchant Banking Portfolio, when the portfolio investments were owned by SFG. (Tr. 2582-3.) At some point in time, the legal department, under Yolanda Suarez and Mauricio Alvarado, set up Stanford Venture Capital Holdings (Tr. 2575-6.) which began to hold assets in the Merchant

---

[10] The testimony of percipient witnesses is consistent with the SIBL interest in the Merchant Banking Portfolio being carried as balance sheet equity by the Bank. (Tr. 703-4) (Tr. 2450.)

[11] Bogar's and Pi's understanding of the Merchant Banking Portfolio is congruent with the findings of Special Agent Walther from the Federal Bureau of Investigation ("FBI"), who also testified that the Merchant Banking Portfolio "was a separate portfolio from what -- the bank's purported portfolio that was being managed by the Memphis group," and that the Miami employees in the Merchant Banking group "did not think that [the Merchant Banking Portfolio was part of the CD portfolio managed by Laura Pendergest-Holt]." (Tr. 2186-7.) In this regard, Bogar did not propound the testimony of Special Agent Walther to elicit her views on the legal standards under the federal securities laws. He certainly did not propound Ms. Walther's testimony to substitute her investigative findings for the authority of this Court to issue its own finding of facts as supported by the record. Ms. Walther's testimony was presented for the sole purpose of establishing that she had spent over four years investigating the core facts at issue in the present proceeding, had interviewed Bogar extensively regarding those facts, had conducted further investigation in order to corroborate the information Bogar had given her, and found Bogar to be completely credible. Among the facts she corroborated was the forgoing testimony regarding the Merchant Banking Portfolio.

Banking Portfolio. (Tr. 2582.) SIBL also eventually held assets. Bogar was initially told it was for tax purposes, but at no point was SIBL's involvement ever known to Bogar (or Pi) to be related to the SIBL CD portfolio. (Tr. 2585-6, 701, 136-4.) In fact Bogar never dealt with Ms. Pendergest-Holt or the Memphis or European money managers in relation to the Merchant Banking Portfolio. (Tr. 2582-6.) The Division asserts that because portions of the Merchant Banking Portfolio were "SIB assets" that they were in the "SIB portfolio." (DOE Br. 10.) This is a deduction -- based in part on the invention of Karyl Van Tassel -- which is a far cry from evidence of knowledge sufficient to impose liability under the anti-fraud provisions.

Bogar also reasonably relied on the compliance department to ensure that adequate disclosures were made in regard to affiliate revenue, and believed that the compliance department was doing its job. (Tr. 2906.) There was no evidence presented at hearing which established that issues with compliance-related disclosures were elevated to Bogar.

The Division has also failed to establish that Bogar approved the compensation received by SGC or the FAs for the sale of the SIBL CDs, or that he omitted to state what compensation was received by FAs to investors. Like the Offering Documents, the referral fees paid to SGC by SIBL had been in place for approximately seven years prior to Bogar's becoming president of SGC. The Disclosure Statement disclosed that SGC was paid a referral fee of 3% annually for the sale of the SIBL CDs. (Ex. DOE 607 p. 23.) Further disclosures were made to investors regarding the referral and incentive fees paid by SIBL to SGC and FAs. (Ex. DOE 632.)

Furthermore, Bogar's reasonable reliance on the legal and compliance personnel who drafted and thereafter monitored and updated the Offering Documents included his reliance that the disclosures in those documents regarding the referral fees paid by SIBL to SGC and bonuses paid by SIBL to FAs were in compliance with the necessary securities laws and regulations.

(*See* Ex. DOE 631.) The record further shows that Bogar, in conjunction with Respondents Young and Green, devised a compensation system to place greater emphasis on assets under management as opposed to sales of the CD product. (Tr. 478-9.) Pursuant to this initiative, Joan Stack, SGC's head of global human resources, engaged a consulting firm to study the existing compensation system. Proposed changes in the compensation system were rolled out at a meeting at or about January 2008. (Tr. 2784-6; Ex. B 399, B 400.)

Bogar likewise reasonably relied on the approvals of legal and compliance personnel in believing that SGC FAs' participation in the SIBL incentive program the "Top Producers Club," for representatives selling the CDs world-wide, was compliant with the necessary securities laws and regulations. Additionally, and consistent with the above initiatives regarding changes to the FA compensation system at SGC, Mr. Bogar moved to deemphasize participation by SGC representatives in the SIBL Top Producers Club, the last meeting of which was held in the summer of 2008. SGC, under Mr. Bogar's leadership, initiated a new program called the "Top Performer's Club," which was based upon total client assets under management rather than the sales of any particular product. The first meeting of the "Top Performer's Club" was held in January 2009. (Tr. 2791-2; 2810-11.)

3. **The Evidence Does Not Establish that Bogar Committed a Manipulative or Deceptive Act as Part of a Scheme to Defraud.**

Because the Division has failed to establish that Bogar was the "maker" of any material misrepresentations or omissions of material fact, the Division must show by a preponderance of the evidence that Bogar "committed a manipulative or deceptive act as part of a scheme to defraud" in order to establish liability for the violation of Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. *Tambone*, 417 F. Supp. 2d at 131

– 32; *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 nn. 20 – 21 (1976). The Division has failed to do so.

The Division relies on Bogar's alleged approval of SGC's use of the SIBL marketing brochure (*see*, *e.g.*, Ex. DOE 607) as evidence that he "knowingly or recklessly employed a device, scheme, or artifice to deceive investors." (DOE Br. 52) (internal quotations and alterations omitted). However, as stated *supra*, (§II.A.1) there is no evidence that Bogar was involved in the creation, revision, or approval of this brochure, nor has the Division offered any evidence that Bogar considered the "brochure" part of the offering documents, or that Bogar had knowledge that the "brochure" was given to investors. There is not a shred of evidence that Bogar "committed a manipulative or deceptive act" in his alleged approval of the brochure, or otherwise.

The Division has failed to prove that Bogar engaged in any "fraudulent conduct," *Tambone*, 417 F. Supp. 2d at 131, and therefore has failed to establish that Bogar violated Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

4. The Evidence Does Not Establish that Bogar Acted with the Requisite Scienter

a. The Evidence Does Not Establish that Bogar Knowingly or Intentionally Committed Fraud, or Acted With Extreme Recklessness

The Division has failed to establish that Bogar acted with scienter: that he knowingly or intentionally participated in the SIBL Ponzi scheme or that he acted with extreme recklessness, meaning his actions were "an extreme departure from the standards of ordinary care, ... which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *SEC v. Steadman*, 967 F.2d 636, 641 – 42

(D.C. Cir. 1992).[12] Because the Division has failed to prove scienter, Bogar cannot be held liable for violations of Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

1) The Evidence Does Not Establish that Bogar Knew that the Merchant Banking Portfolio was Related to the SIBL CD Portfolio

As detailed above (§II.A.2), the evidence does not establish -- or even support -- the Division's construct regarding the Merchant Banking Portfolio nor does it tend to show that Bogar acted with scienter, even if forensic accounting performed in hindsight establishes that the source of the funds used were derived from SIBL CD proceeds. Even if the forensic accountant's contention as to the source of funds is true, it does not bear on Bogar's state of mind during his employment at SFG and SGC regarding the Merchant Banking Portfolio. What does bear on Bogar's mental state is that, as discussed *supra*, (§II.A.2) SIBL's participation in private equity investments were never characterized to Bogar or anyone else that those investments were part of a "CD portfolio." There is no documentary evidence stating that SIBL was investing a portion of the portfolio of CD proceeds in the Merchant Banking Portfolio. Laura Pendergest-Holt made it clear that she was the Chief Investment Officer, and the SIBL portfolio was managed by her and the money managers in Memphis and globally whom she oversaw. (Tr. 2585.) In fact, Jim Davis was involved in other private equity deals that had nothing to do with the Merchant Banking group. (Tr. 707.) The Division has failed to meet its burden in showing that any SIB investment in the Merchant Banking Portfolio somehow imparted knowledge to Bogar about the SIBL CD portfolio. (Tr. 2566, 2585-6.)

---

[12] Extreme recklessness "is not merely a heightened form of ordinary negligence," *Steadman*, 967 F.2d at 641, but rather "a lesser form of intent." *Id.* at 642.

2) **The Evidence Does Not Establish that Bogar was "Continu[ally] Inacti[ve]" in an Intentional or Reckless Manner in Regard to Information Requests from Pershing**

The Division's contentions that SIBL's failure to grant Pershing transparency into its CD portfolio appear in substance to indicate that Bogar was not taking appropriate action to come up with a solution. This is controverted by an extensive evidentiary record.

Bogar was instrumental in establishing a clearing relationship with Pershing in the first place -- even against opposition from the "Legacy group" at Stanford who didn't believe Pershing would be comfortable with the affiliate, offshore, non-transparent CD. (Tr. 2626-7.) Implicit in this change was enhanced scrutiny and greater transparency in general. (Tr. 4146.) In fact, the resistance to the Pershing change was based upon their belief that it would have concerns or develop concerns regarding the CD product and the lack of transparency of its underlying portfolio (Tr. 2626.), which was known and understood by all concerned from the outset. Therefore, in recruiting Pershing to become SGC's clearing broker, Bogar was up-front about the SIBL CD, was open about the lack of transparency into the portfolio, and told Pershing's decision makers that they needed to get comfortable with the CD before agreeing to clear for SGC because it was a big piece of SGC's business. (Tr. 2627-8, Tr. 898-9, Tr. 806.)

In the initial discussions with Pershing, including with its CEO and the CEO of its parent, Bank of New York, the CD portfolio -- and its lack of transparency -- were presented in high relief. As Mr. Bogar recounted at hearing, he advised Pershing senior management that "we have a major propriety product; it's off-shore; and … there's no transparency." (Tr. 2627.) Thus, a general understanding of the SIBL CD product, the lack of transparency into the underlying portfolio and the reasons for the lack of transparency were a focus of discussions from the very beginning. (Tr. 2627-8.) With this understanding, Pershing commenced due diligence

procedures with respect to SGC, its affiliates including, very specifically, SIBL and its product line (Tr. 804-5), and informed by these extensive due diligence procedures,[13] entered into a five year clearing agreement with SGC in December 2005. (Tr. 804-6, Ex. B 394, B 395, B 396.)

In 2006 Richard Closs became the new head of risk management at Pershing. (Tr. 875-6.) Following Mr. Closs's arrival, Pershing requested from SGC additional information regarding SIBL and its underlying CD portfolio because of the percentage of SIBL revenue on SGC's balance sheet and the losses that SGC was sustaining because of the implementation of Bogar's business plan to grow the business. (Tr. 809.) This information had been known to Pershing since the inception of the relationship. Mr. Ward implied to Mr. Bogar that these requests for information were directly attributable to Mr. Closs rather than to Pershing institutionally or to Mr. Ward himself. (Tr. 2643.)

The record does not support the Division's implication that Pershing was requesting information into SIBL because it was suspicious that the CD was not a legitimate product or that SIBL was somehow engaged in fraud -- or that their requests for information should have alerted Bogar to such activity.[14] In this regard, the Division emphasizes that Pershing stopped executing transfers to SIBL for the purchase of CDs, asserting that "it no longer wanted anything to do with

[13] The Division's expert sought to downplay the significance of Pershing's due diligence on SGC and its affiliates by insisting -- incredibly -- that Pershing did not bear substantial risk in becoming SGC's clearing broker, (Tr. 1667-8; Tr. 2155-8.) This testimony casts doubt on Mr. Henderson's credibility as an expert. Such testimony is belied by the avalanche of litigation and arbitration which has been commenced against Pershing arising from the SIBL Ponzi scheme. (*See* Tr. 4140.) Furthermore, Henderson also insisted, contrary to evidence embodied in due diligence memoranda, that Pershing did not do significant due diligence on the SGC affiliates including SIBL and its principal product, the SIBL CD. (Tr. 1672.) Respondents' expert noted the substantial risk undertaken by a clearing broker and the specific due diligence performed by Pershing which informs upon this risk. (Tr. 4138-42.)

[14] The Division later mischaracterizes Pershing's requests for more information about SIBL in discussing the testimony of Mr. Kearny. (DOE Br. 25 n.19.) Pershing asked for information from the perspective of its risk management vis-à-vis SGC, based upon SGC's revenue mix and its losses tied to Bogar's growth plan. There is no evidence that Pershing believed SIBL was engaging in a massive fraud, as shown by the fact that they continued to clear for SGC until it was placed in receivership in February of 2009. Furthermore, Kearney was not designated as an expert by the Division, and he testified that he had no firsthand knowledge of the due diligence process of clearing brokers generally or of Pershing's due diligence of SGC specifically. (Tr. 1268.)

the Bank." (DOE Br. 24.) This assertion is an over-reach to say the least. If Pershing "no longer wanted anything to do with the Bank," Pershing would not have continued its clearing relationship with SGC, which at the time had substantial revenue from SIBL CD referral fees, as Pershing knew. In fact, the Division has contended that other products (necessarily housed at Pershing) were liquidated for the necessary purpose of purchasing CDs. (OIP ¶8). Pershing had never held the CDs of SGC clients in custody from the inception of the SGC relationship, and stopping the transfer of funds to SIBL was not an indication that anything nefarious was happening at the Bank.

The Division mischaracterizes Pershing's pursuit of information about SIBL as well. The Division creates the impression that Pershing was actively seeking information from SGC for over two and a half years starting in the middle of 2006. (DOE Br. 23.) The evidence simply does not support such an interpretation. Based on the testimony of John Ward, there was a single conference call in the "[l]ate summer of '06" in which there "was a miscommunication in terms of the intent of the call and what was going to be covered on the call." (Tr. 811) While that call was followed by "general[] ... continued ... discuss[ions]," (Tr. 812), the earliest documentary evidence presented by the Division regarding any discussion between Pershing and SGC about transparency into SIBL was an email from John Ward to Bogar in June of 2007, approximately a year following Pershing's purported commencement of inquiry into SIBL. (Ex. DOE 230.)[15] A reasonable interpretation of this timeline of events is that it was not a high priority for Pershing. The Division has adduced no evidence that Pershing had concerns regarding the Bank which were unrelated to the Bank as a disproportionately large source of SGC's revenue.

[15] The Division's expert report states that June 2007 is the first written request for more information from the Bank. (Ex. DOE 746, pp. 13.) Additionally, Ed Zelezen testified, "consistent with my role as information-gatherer in 2007 when our chief credit risk officer asked for a copy of the prospectus, I went and got the prospectus." (Tr. 0933.)

The record shows that Bogar facilitated Pershing's discussions with SIBL through a meeting in Memphis, Tennessee and a trip to Antigua. (Ex. B 364, DOE 269.) When Pershing was not satisfied, Bogar brought in his CFO Chuck Weiser to help facilitate a solution. (Tr. 2672-3.) Bogar believed that a solution would be found that would satisfy all parties, and worked to achieve it. (Tr. 2458, 2473, 2510.) John Ward testified that he never believed Bogar was trying to hide anything from him or delay the discussions with Pershing. (Tr. 0857.) There is no evidence whatsoever to the contrary.[16]

The Division's use of Ex. DOE 288, an email exchange between Jim Davis and Bogar, is misplaced and misleading. (DOE Br. 24.) The Division implies that Bogar knew that Davis would not comply with Pershing's request for information as early as June 2008. However, later in the same day Ex. DOE 288 was sent, other emails were sent and Davis and Bogar spoke on the phone in regard to a strategy going forward on the Pershing matter, and Bogar continued to work on a solution that would be acceptable to both sides. (Tr. 2725-32; Ex. B 397, DOE 298, 323.)

The Division again mischaracterizes the record because it is unable to otherwise support its allegations against Bogar. The Division questions Bogar's efforts to provide greater transparency to Pershing through a third-party accounting firm when he purportedly has failed to "explain ... why such a third party could obtain this information but SGC itself could not." (DOE Br. 19.) The Division's contentions in this regard are misguided. In fact, the record clearly demonstrates that Bogar and Chuck Wieser, SGC's CFO, were seeking a solution that circumvented the need to obtain the information that SIBL was unable or unwilling to provide to SGC or Pershing about the CD portfolio investment positions:

[16] The Division's expert also admitted that he had seen no evidence that Bogar was obfuscating or withholding information from Pershing. (Tr. 2055-7.)

> '[L]et's come up with a strategy to get [Pershing] the information they need without crossing any boundaries with the privacy laws or the transparency issues,' et cetera. And that's really when Chuck [Weiser] first got involved and started working on, you know, coming up with a scope of work for a third party.

(Tr. 2712-14.) The solution which SGC came up with included the following:

> determine the audited balances on the balance sheet tie to the general ledger at 12/31/07; determine that cash balances with other institutions were confirmed; determine that investment balances were agreed to the general ledger; determine that investments held by third parties were confirmed and statements were observed; determine the percentage of cash and investments managed internally.

(Tr. 2730; Ex. DOE 323.) These procedures clearly were an <u>alternative</u> to the privacy and proprietary based reasons SIBL would not disclose the underlying portfolio to Pershing. (Tr. 2730-31.)

The Division also places importance on the purported "ultimatum" issued by Pershing just before Thanksgiving in 2008. (DOE Br. 24.) It is quite a stretch to characterize Ex. DOE 344 as an ultimatum ("<u>It is likely</u> that any further delay <u>will be viewed as an indication</u> the review will not get done,") (emphasis added). The Division also mischaracterizes Bogar's response: he did not refuse to provide what Pershing was asking for, rather, Bogar restated SGC's "commit[ment] to work with [Pershing] to try and satisfy your issues as quick as possible," (Ex. DOE 344) even though other issues at the company were taking all of the executives' time. These other issues involved the ongoing collapse of the global financial markets which was affecting the entire industry at that time. (Tr. 2771.) Furthermore, SGC never refused to give Pershing any information -- SIBL did. SGC through Bogar was consistently working to reach a solution that would satisfy Pershing and SIBL. (Tr. 2727-9.)

The Division continues its overreach in regard to the evidentiary record when it contends that Bogar "stood (at best) silent when Green drafted a false explanation that emphasized that the

issue was 'tax reporting.'" (DOE Br. 64.) However, Ex. DOE 355, cited by the Division in support of its contention, is an email response from Bogar, who is on vacation (presumably for Christmas), to Green acknowledging receipt of Green's initial email. ("I got it.")

3) The Evidence Does Not Establish that Bogar "Blindly" Relied on His Faith in Allen Stanford

Overreaching in an attempt to improve upon a thin or non-existent record, the Division again takes a single statement made by Bogar in testimony out of context to support its narrative that Bogar failed reasonably to perform his duties as chief executive of SGC. (DOE Br. 64.) ("Bogar's own testimony confirms that he blindly relied on his faith in Allen Stanford.") While Bogar stated truthfully that he believed in Allan Stanford and Jim Davis, and in the CD product (Tr. 2606, 2841) ("It had been a great product. And, you know, we believed in the product. I mean, I believed in the people behind the product. I believed in -- I believed in the company."), the evidence is clear that Bogar did not "blindly" do so. In fact, his lengthy testimony -- both on direct and cross-examination -- is replete with evidence of him having performed his duties as a chief executive reasonably and in good faith. (*See, e.g.*, n.3, *supra*.)

As discussed *supra* (*see* §II.A.1), when Bogar became the president of SGC, he acquainted himself with the SIBL CD product, including its history with regard to performance, absence of regulatory action or customer complaints, and the experienced professionals who had drafted and approved the Offering Documents. Bogar further acquainted himself with SGC's ongoing due diligence of the CD product and reasonably relied on representations from the Compliance Department regarding the SIBL CD throughout his tenure, including when

Respondent Young, a highly qualified former regulator,[17] became the CCO and due diligence officer of SGC. (Tr. 2806-7.)

The Division also takes Bogar's statement regarding transparency into the SIBL portfolio out of context and misuses it. (DOE Br. 64.) As detailed above, transparency into the precise holdings of SIBL in the CD portfolio was never represented to investors. (Tr. 2458, 2626-8.) *See* §II.A.2, *supra*. Indeed the CD was presented by SIBL as a pooled portfolio of proceeds which would be invested in a diversified way. It was further known by legal and compliance personnel, and by multiple regulatory bodies that the portfolio underlying the CD program was not transparent. In regard to Pershing, Bogar was open about the lack of transparency into the SIBL portfolio from the start. (Tr. 2627.) Bogar also reasonably relied on legal and compliance personnel when they told him that the lack of transparency was due to concerns that the investment mix in the SIBL portfolio was proprietary, and further that Antiguan law did not allow for full transparency into the portfolio.

The Division's allegations that Bogar acted with scienter, or with extreme recklessness are not supported by the record. Because the Division has failed to establish that Bogar acted with scienter, its charges that Bogar violated Section 17(a)(1) of the Securities Act or Section 10(b) of the Exchange Act and Rule 10b-5 thereunder must fail. *See* §II.A.4.a, *supra*.

---

[17] The Division suggests that the manner of Young's departure from FINRA bears on the Respondents' expert's opinion of his credentials (DOE Br. 52 n.45) yet, curiously, states in the next sentence "that having a negative employment experience [did not] necessarily ma[ke] Young a bad choice." Notwithstanding the forgoing, there is no evidence that Bogar was aware of the apparently confused circumstances surrounding Young's departure from FINRA. FINRA didn't take the position that Young was terminated, as reflected I the public record, which includes Young's commendations for his work there.

b. **The Evidence Does Not Establish that Bogar Acted Negligently and Therefore the Division Has Failed to Show Bogar Violated Securities Act Section 17(a)(2) and (3)**

The Division has failed to establish that Bogar acted negligently, and therefore cannot sustain the charges in the OIP that Bogar violated Sections 17(a)(2) and (3) of the Securities Act. *Aaron v. SEC*, 446 U.S. 680, 701 – 702 (1980); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963). In fact, the record is replete with evidence that Bogar acted reasonably and with due care in the conduct of his duties as chief executive of SGC, as discussed throughout this Reply Brief. *See* §II.A.1, §II.A.4.a.2, §II.A.2, *supra*.

When Bogar became the chief executive of SGC, he formulated and implemented a business plan to grow SGC into a mainstream, successful and independently valuable business, which might one day be taken public, similarly to his work at CellStar. (Tr. 2601-2.) The implementation of his business plan informs every action Bogar took as the president of SGC.

To accomplish his plan, Bogar sought to recruit mainstream registered representatives from traditional wire houses (i.e. Merrill Lynch, UBS and others), which would broaden SGC's business base, improve the firm's product mix and the decrease its reliance on the SIBL CDs and other intercompany revenue sources as a percentage of total revenue. (Tr. 2569, Tr. 2588-9); (Ex. B 131.); (Tr. 2596-2600.) Consistent with this business plan, Bogar initiated and established a clearing relationship with Pershing, against the internal resistance of top executives, which necessarily implicated greater scrutiny of the business and compliance profile of SGC. (Tr. 2626-7.) When such scrutiny arose, Bogar acted diligently and in good faith to attempt to cause SIBL to provide greater transparency to Pershing. (Tr. 2662, Tr. 857, Tr. 877, Tr. 879) (Ex. B 124, B 197, B 355.)

When Bogar became the chief executive of SGC, he initiated appropriate oversight of the compliance and legal functions within the broker-dealer and established an appropriate level of

communication with those officials including, most notably, their interaction with regulators and oversight of sales practice and disclosure matters. *See* §II.A.1, *supra.* In this regard (and in response to the growth of the firm in accordance with Bogar's business plan), he recruited and hired a former NASD District Director, Respondent Young, to enhance the compliance capabilities of SGC as it grew. (Tr. 2620-1.) Bogar also took all appropriate steps to assure himself that responsible subordinates were conducting training of FAs who were engaged in the sale of securities, including the SIBL CD product. Bogar also assured himself that responsible subordinates were delegated with due diligence responsibilities. (Tr. 2615-8, Tr. 2793.)

When SGC received regulatory inquiries, Bogar ensured that they were addressed and that inquiries from the Commission were responded to by preeminent, national enforcement counsel, Thomas Sjoblom, who opined in writing that the firm's business was lawful and compliant. (Tr. 2796-8, 3306.)[18] Appropriately and consistent with industry practice, (as acknowledged by the Division's expert) outside counsel were overseen by Mauricio Alvarado, who functioned as SGC' General Counsel. (Cite DOE Expert; Ross) And, immediately upon learning of the fraudulent nature of the SIBL CD program (and in consultation with counsel), Bogar terminated all sales of the CDs by SGC and initiated the process engaging a third party for an internal investigation, further seeking counsel for SGC for the purpose of self-reporting to the Commission. (Tr. 2835-7; Exs. DOE 363, B 357, B 388, B 296.)

Bogar also acted reasonably in his attempts to facilitate Pershing's discussions with SIBL about obtaining increased information. See §II.A.4.a.2. Bogar set up meetings and a trip to

[18] The Division's expert admits that the receipt of and response to Commission and FINRA subpoenas by a large broker dealer are routine, and that it is common practice, on larger matters, that the General Counsel's office would appropriately engage and supervise outside counsel on a Commission subpoena. (Tr. 2073-5.) Furthermore that it was "reasonable conduct" on Bogar's part to rely on preeminent outside counsel's response to the Commission subpoena, acting under the general counsel. (Tr. 2082-3.)

Antigua, brought in his CFO and worked with him to find a solution "without crossing any boundaries with the privacy laws or the transparency issues." Bogar believed that they would be able to work out a solution that would satisfy all parties. (Tr. 2458, 2473, 2510.)

Because the evidence does not support a finding of negligence, the Division's charges that Bogar violated Section 17(a)(2) and (3) of the Securities Act also fails.

B. The Division Has Failed to Prove that Bogar Aided and Abetted or Caused Violations of Sections 10(b) and 15(c)(1) of the Exchange Act and Rule 10b-5 Thereunder, or Sections 206(1) and (2) of the Advisers Act

1. The Evidence Does Not Establish that Bogar Acted with the Scienter Necessary for Aiding and Abetting Liability

As discussed *supra*, (*see* §II.A.4.a) Bogar did not knowingly or intentionally participate in the SIBL Ponzi scheme, nor were his actions an extreme departure from the standards of ordinary care, nor was there a present danger of misleading CD investors that was either known to him or was so obvious that he must have been aware of it. The Division's failure to establish these circumstances of Bogar's state of mind also necessitate a finding that Bogar did not (1) aid and abet violations of Exchange Act Sections 10(b) and 15(c)(1) and Rule 10b-5 thereunder or Advisers Act Sections 206(1) and 206(2); or (2) cause violations of Exchange Act Sections 10(b) and 15(c)(1) and Rule 10b-5 thereunder or Advisers Act Section 206(1).

The Division has also failed to establish that Bogar is liable for aiding and abetting or causing violations of the above sections of the anti-fraud provisions because it has failed to establish that Bogar encountered "red flags" or suspicious events creating reason for doubt that should have alerted him to the improper conduct of the primary violator. *Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004) (citations omitted).

The Division alleges several purported "red flags" which it claims should have alert Bogar to the SIBL Ponzi scheme, however, the Division conflates the Respondents in alleging knowledge of these "red flags" and, to the extent Bogar had knowledge of them, they were not "red flags" at all. Because Bogar was not extremely reckless in failing to heed these purported "red flags" the Division cannot establish his liability for aiding and abetting violations of Exchange Act Sections 10(b) and 15(c)(1) and Rule 10b-5 thereunder or Advisers Act Sections 206(1) and 206(2).

a. **Bogar was not Reckless in Failing to Detect the SIBL Fraud Based Upon Pershing's Requests for Transparency**

As stated in detail above (*see* §II.A.4.a.2, *supra*) -- and in Bogar's Brief (Br. 19-20) -- Pershing's inquiry into the investment base of the CD portfolio was not based upon suspicions that the CD was not a legitimate product or that SIBL was somehow engaged in fraud, but rather related to business concerns arising from the disproportional reliance on an affiliate for its revenue stream, which originated from the new head of risk management, Richard Closs. Pershing employees downplayed these concerns in their conversations with Bogar, indicating that the concerns were amplified by Closs in his enthusiasm as a new employee. (Tr. 875, 2643.) In fact, if Pershing "no longer wanted anything to do with the Bank," as contended by the Division (DOE Br. 24), Pershing would not have continued its clearing relationship with SGC -- even after halting transfers to SIBL -- because SGC had this substantial revenue from SIBL CD referral fees, as Pershing well knew.

b. **The Division Has Not Established that Bogar Had Any Knowledge of Communications from Clients and Their Representatives about the SIBL CD**

The Division again conflates and misstates the record when it contends that "each Respondent learned that CPAs or other advisors counseling existing or potential SIB CD investors raised serious questions and criticisms about Stanford, SIB, and the SIB CD." (DOE Br. 28.) Indeed Bogar's name is not mentioned a single time in the subsection of the Division's Brief. (*See* DOE Br. 28 – 30.) The Division has adduced no evidence whatsoever that Bogar had any knowledge regarding outside parties' inquiry regarding the SIBL CD. (*See* Exs. DOE 71, 72, 74, 75, 76, 77, 79, 80.) There is no evidence. Nor did any of these isolated communications result in litigation or regulatory referral, which would have been elevated to Bogar as SGC's chief executive. To the extent these communications could be considered "red flags," they are not attributable to Bogar.

In regard to an outside law firm, Snyder Kearney, engaged by SGC's compliance department, there is no evidence whatsoever in the record that this law firm ever communicated with Mr. Bogar or that Mr. Bogar had any knowledge of the engagement. In fact, the principal of the firm, John Kearney, testified that he had never met Bogar, that he had never communicated with Bogar, and that he had no reason to think that Mr. Bogar was aware of his firm's activities on behalf of SGC. (Tr. 1267.)

c. **Bogar was not Reckless in Failing to Detect the SIBL Fraud Based Upon Regulatory Inquiries Received by SGC**

SGC's receipt of regulatory inquiries related, *inter alia*, to the SIBL CD would also not have alerted a Mr. Bogar to improper conduct. The SIBL CDs had been offered for years with substantially the same documentation and under scrutiny of various regulators -- including the Commission -- with no resulting enforcement action. Furthermore, the evidence established that

when regulatory inquiries were received by SGC, they were responded to, with Bogar's knowledge and at his direction, by prominent enforcement counsel who purportedly had engaged in extensive due diligence on the SIBL CD program and had determined it be authentic and compliant with applicable laws and regulation. (Tr. 2796, 2799, 3306, 4127-8.)

d. **Bogar was not Reckless in Failing to Detect the SIBL Fraud Based Upon SIBL's Domicile in Antigua or its Antiguan Auditor**

That SIBL was domiciled in Antigua and regulated by Antiguan law was not a "red flag" which would have alerted Bogar to the SIBL Ponzi scheme but for recklessness. SIBL's off-shore provenance had been known by everyone concerned (including regulators) for years, if not decades. In fact it is noteworthy that Pershing's CCO and in-house legal counsel commented favorably upon their impression of SIBL's Antiguan-based personnel and upon the Antiguan government's conduct vis-à-vis international regulatory norms. (Tr. 862-3; Ex. B 394; Ex. B 395.)[19] The Division cannot support its "red-flag" contention with random, adverse press regarding Antigua retrieved -- after-the-fact -- from the internet, nor has the Division connected any of these fragments of information to Mr. Bogar or articulated any basis upon which he should have been aware of them.

Nor was the size or domicile of the SIBL auditor C.A.S. Hewlett a "red flag." Bogar held the belief, like others, that a larger, more prominent auditor would be preferable, but because it would lend a higher degree of credibility to the CD product from a marketing perspective, not because of concerns about the auditor's integrity. (Tr. 2889-90.) Only when viewed in hindsight could SIBL's Antiguan auditor -- appropriately credentialed and acceptable to the relevant

[19] The Division's expert admits that Pershing did not see Antigua as a red flag. (Tr. 2043.)

regulatory authority -- alert one to the existence of improper conduct by Allan Stanford and Jim Davis.

e. **Bogar was not Reckless in Failing to Detect the SIBL Fraud Based Upon the Lack of Transparency into SIBL's Portfolio**

The lack of transparency into the precise holdings of SIBL CD portfolio was not a "red flag" which, short of recklessness, should have alerted Bogar to fraudulent activity. It had been represented to Bogar by both legal and compliance personnel that the CD portfolio had not been transparent from the very beginning, and that there were valid reasons for the lack of transparency, namely the proprietary nature of the underlying investment strategy and Antiguan law which, as represented to Bogar, prevented disclosure. The CD program had been in place for years with no transparency into the CD portfolio, as known by regulators. *See* discussion at §II.A.2, *supra*.

Bogar was not reckless in this regard. As Bogar knew, the CD program and Offering Documents had been prepared and subsequently revised by counsel and compliance personnel. Bear Stearns and Pershing had each performed extensive due diligence on SGC, including SIBL and other affiliates, had known that there was no transparency into the CD portfolio, and both had agreed to become SGC's clearing broker. (Tr. 2626-7, 806.) Pershing's eventual requests for more information would also not have been an additional "red flag" about transparency. As detailed above, John Ward implied to Bogar that these requests for information were directly attributable to Mr. Closs rather than to Pershing institutionally or to Mr. Ward himself. (Tr. 2643.) Furthermore, the evidence does not support the proposition that Pershing's requests for information about SIBL were due to any suspicion that SIBL was engaged in fraudulent or

otherwise illegal actions. Had that been the case, Pershing would not have continued as SGC's clearing broker, even after it stopped making wire transfers to the Bank.

The Division attempts to discredit the testimony of the Respondents and others in regard to the lack of transparency into the CD portfolio and Laura Pendergest-Holt's unwillingness to give the Respondents access to information about the CD portfolio[20] based upon the testimony of a single witness, Fred Palmliden, who worked under Ms. Pendergest-Holt in Memphis. (DOE Br. 17.) The Division relies heavily on the fact that Mr. Palmliden had access to the information regarding the CD portfolio even though he was a "non-SIB" employee, and further that he held his securities license through SGC. (DOE Br. 18.) The Division ignores the fact that -- unlike Bogar -- Mr. Palmliden's services were retained by, and his work was done on behalf of, SIBL, like others in the Memphis office. Furthermore, as elicited during cross-examination, Mr. Palmliden's securities licenses were obtained because he was involved in the publication of research analysis which was intended to reach the public; indeed he was not in a position to accept orders or execute trades for SGC clients, nor did he. (Tr. 789.) Palmliden's duties related to the SIBL CD portfolio were wholly separate from those related to his securities licenses. (Tr. 789-90.)

The Division has not established that Bogar had a duty to pursue information from Memphis personnel; nor have they established that it was unreasonable not to seek information

[20] As detailed previously, (see §II.A.2, n.11) testimony given by Special Agent Walther corroborates the evidence presented at hearing in regard to the secrecy of information in the Memphis office. (Tr. 2179-80; 2187.) (Ms. Walther's testimony that during her investigation, "individuals in the Memphis group stated that they had been told that they were not to discuss what they were doing, what they did, the investments with financial advisors in particular," and that "when it [came] to the bank, everything was siloed within the companies; and [Bogar] did not have access to the bank's portfolio").

from this (or any) mid-level Memphis employee, Mr. Palmliden, when his superior, Ms. Pendergest-Holt, has stated that the information sought could not be given.[21]

f. **Bogar was not Reckless in Failing to Detect the SIBL Fraud Based Upon His Work with the Merchant Banking Group**

SIBL's ownership of assets within the Merchant Banking Portfolio was not a "red flag" which, short of recklessness, should have alerted Bogar to fraudulent activity. As detailed *supra*, (§II.B.2) the evidence does not establish that anyone in the Merchant Banking group believed, or had reason to believe, that the SIBL assets in the Merchant Banking Portfolio were actually part of the CD portfolio. The testimony is clear, from Osvaldo Pi (Tr. 701), Bogar (Tr. 2585) and Special Agent Walther (Tr. 2186-7) that the CD portfolio was "totally unrelated" to the responsibilities of the Merchant Banking group. (Tr. 701.) The Merchant Banking group never dealt with Ms. Pendergest-Holt or the Memphis or European money managers in relation to the Merchant Banking Portfolio. (Tr. 2582-6.) Nor does any documentary evidence show otherwise.

2. **The Evidence Does Not Establish that Bogar Knowingly and Substantially Assisted Conduct Constituting Violations of the Anti-fraud Provisions**

The Division has failed to establish that Bogar gave knowing and substantial assistance to the conduct that constitutes the violation of Sections 10(b) and 15(c)(1) of the Exchange Act and Rule 10b-5 thereunder, or Sections 206(1) and (2) of the Advisers Act, and therefore has failed to meet its burden in proving that Bogar aided and abetted in violations of these anti-fraud provisions. *See Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1009 (11th Cir. 1985).

[21] The Division's implication that Bogar should be held liable for fraudulent conduct because he failed to access Palmliden's computer strains credulity. (DOE Br. 17 n. 14.)

As detailed *supra*, (§II.A.1), the evidence is clear that the Offering Documents under which the CD was sold cannot be attributed to Bogar, and had been in place in substantially the same form for approximately seven years before Bogar became the chief executive of SGC, and continued in substantially the same form until Bogar halted CD sales on February 5, 2009. (Tr. 2826-8; Ex. DOE 363.) The record also establishes that the training materials cannot be attributed to Bogar (Tr. 2793-4), and that they do not materially depart from the statements made in the Offering Documents. Both the Offering Documents (Tr. 2605-9) and training materials (Tr. 3798-9) were approved by legal and compliance personnel at Stanford.

The Division has also failed to establish that the representations in the Offering Documents regarding insurance coverage were materially misleading, or that SIBL did not maintain the insurance policies it disclosed to investors. (Ex. DOE 644 p. 11, DOE 611 p.5.) The documents specifically stated that the CDs did not carry FDIC protection, and that the investments were risky, including the risk of complete loss. (Ex. DOE 644.) Nor did the Offering Documents represent that SGC had transparency into the precise holdings of the SIBL portfolio.

Furthermore, Bogar's knowledge and experience with the Merchant Banking group did not give Bogar a "strong reason to doubt [the] claims [made in the Offering Documents or the training materials]," as alleged by the Division. (DOE Br. 71.) The continued assertion of this hindsight-based construct is a mischaracterization of the understanding pervasively held in the Merchant Banking group and SGC generally, and supported by the record. (See §II.A.2, *supra*). Additionally, Bogar's knowledge of the purported "red flags" propounded by the Division would not "undercut" Bogar's understanding of the CD product (DOE Br. 71.), nor was his understanding based upon "blind reliance on Stanford and the bank," but rather his knowledge

that the Offering Documents and CD program were approved by highly qualified legal and compliance professionals and had proceeded for years without customer losses or complaints. (Tr. 2607, 2616-7.)

3. The Evidence Does Not Establish that Bogar Caused Violations of the Anti-fraud Provisions

The Division has failed to establish with legal sufficiency that Bogar caused violations of Exchange Act Sections 10(b) and 15(c)(1) and Rule 10b-5 thereunder or Advisers Act Section 206(1) because the record does not support a finding of scienter. There is no evidence that Bogar knowingly participated in any fraud purportedly committed by SIBL or SGC (*See* §II.A.4.a, *supra*), nor does the record support a finding that he acted with extreme recklessness, either through (1) an extreme departure from the standards of ordinary care in which the danger of misleading investors was so obvious that he must have been aware of it (*See* §II.A.4.a, *supra*); or (2) encountering "red flags" or suspicious events creating reason for doubt that should have alerted him to the improper conduct. *See* §II.B.1, *supra*.

The Division has failed to establish with legal sufficiency that Bogar caused violations of Advisers Act Section 206(2) because the record does not support a finding that Bogar acted negligently in the performance of his duties as the chief executive of SGC. In fact Bogar at all times acted reasonably and with due care. *See* §II.A.1, §II.A.4.a.2, *supra*.

C. The Relief Requested by the Division is Neither Warranted nor Justified

The Division is not entitled to the relief sought in the OIP because it has not met its burden in establishing that Bogar violated, aided and abetted a violation or caused a violation of

the federal anti-fraud provisions. Yet, even if the Court were to conclude that a violation occurred, the relief sought by the Division is unwarranted and unjustified in equity and law.

1. **The Division is Not Entitled to a Cease-and-Desist Order or a Bar Order Against Bogar**

The D.C. Circuit has described injunctive relief, such as a cease-and-desist or bar order, as a "drastic remedy" that "should not be granted lightly, especially when the conduct has ceased." *Steadman*, 967 F.2d 636, 648 (D.C. Cir. 1992) (quoting 1 T. HAZEN, THE LAW OF SECURITIES REGULATION § 9.5, at 400 (2d ed. 1990)). In addition to whether a reasonable likelihood of future violations exists, the following factors may be considered in determining whether such sanctions are appropriate:

> [T]he seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the respondent's opportunity to commit future violations. In addition, we consider whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings.

In the Matter of KPMG Peat Marwick LLP, Exchange Act Rel. No. 43862 (Jan. 19, 2001) (Comm'n Opinion), *aff'd*, 289 F.3d 109 (D.C. Cir. 2002). Here, these factors demonstrate that a cease-and-desist order or a bar order is not appropriate or necessary.

As an initial matter, the Division has failed to establish any evidence that there is a reasonable likelihood of future violations by Bogar. The only allegation in the OIP in regard to the risk of future violations is that Bogar is unemployed. (OIP ¶1) The Division has not established through documentary evidence or testimony that Bogar is currently employed in the

securities industry or established evidence of any other risk of future violations. Mr. Bogar's only history of employment in the securities industry was through his employment at the Stanford group of companies. (Tr. 2873-4.)

Furthermore, the Division has offered no evidence -- nor could it have -- that Bogar has violated the securities laws in the past, or any other evidence regarding Bogar's past conduct which would indicate a likelihood of future violations. *See Steadman*, 967 F.2d at 647 (noting that the "ultimate test" of whether a cease-and-desist order should be issued is "whether the defendant's past conduct indicates ... that there is a reasonable likelihood of further violation[s] in the future"). Bogar's actions are not part of any pattern of conduct, nor has he been the subject of any other disciplinary action or proceeding prior to the collapse of the Stanford entities.

Additionally, the evidence overwhelmingly establishes that Bogar did not believe that SGC's offering of the SIBL CD to its clients was improper, nor was he reckless in this belief. To the contrary, Bogar understood that the SIBL CD Offering Documents were drafted and approved by competent compliance and legal personnel, that the SIBL CD was vetted by compliance, legal and securities professionals, under the scrutiny of multiple regulatory bodies, and that SGC's ongoing due diligence of the SIBL CD was performed in a reasonable manner by qualified professionals. *See*, §II.A.1, *supra*.

Finally, the alleged violations charged in the OIP occurred between three and eight years ago. This proceeding by itself has already severely adversely affected Bogar; to sanction him now would serve no remedial purpose, but would be purely and unnecessarily punitive.

2. **Disgorgement Against Bogar is Not Warranted; the Division has Failed to Meet Its Burden in Regard to Making a Reasonable Calculation**

Disgorgement is an equitable remedy which "primarily serves to prevent unjust enrichment." *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989). The remedy of disgorgement "may well be a key to the SEC's efforts to deter others from violating the securities laws, but disgorgement may not be used punitively. Therefore, the SEC generally must distinguish between legally and illegally obtained profits." *Id.* (citations omitted).

An award of disgorgement against Bogar would be inequitable under the present circumstances. The Division failed to meet its burden to prove that Bogar is liable for primary or secondary violations of the anti-fraud provisions of the securities laws. The evidence demonstrates that Bogar did not engage in any sort of fraudulent or deceitful conduct. To the contrary, Bogar's actions were consistent with achieving the valid business goal to grow SGC into a mainstream broker dealer. Furthermore, the Division has offered no evidence that Mr. Bogar received any "fruits" of the SIBL Ponzi scheme, other than his regular compensation as the chief executive of a large, national broker-dealer with substantial traditional securities business; nor has the Division established that Bogar's compensation was excessive in the industry for the president of a broker dealers of SGC's size.

Indeed, the Division's disgorgement calculation for Bogar does not "distinguish between legally and illegally obtained profits," as required. *First City Financial*, 890 F.2d at 1231. The Stanford receiver's forensic accountant, Karyl Van Tassel, found it necessary to calculate Respondent Green's alleged compensation in relation to funds he received which related to the sale of SIBL CDs. (Tr. 138.) However, in calculating the compensation allegedly received by Bogar, Ms. Van Tassel not only failed to distinguish what amount of compensation was related to the sale of the SIBL CD, she includes both regular payments, quarterly bonus payments, and

semi-annual bonus payments paid through the payroll system, and also Bogar's reimbursed business expenses paid through the Oracle financial system. (Tr. 138-41.) The Division -- and Ms. Van Tassel -- obviously thought it was necessary to tie compensation to the sale of the CDs, yet the Division and Ms. Van Tassel have not made any effort to do so in the case of Bogar.

SGC's brokerage business outside of the sale of the SIBL CDs was large. In fact, Pershing held billions of dollars of SGC client assets in custody when the receiver was appointed. (Tr. 2778.) Bogar was largely responsible for this diversified revenue mix from traditional brokerage assets through the implementation of his business plan. (*See* §II.A.4.b, *supra.*) There is no evidence that Bogar's compensation was tied to CD sales, as opposed to leading the large broker dealer and building it into a nationally known, mainstream wire house with hundreds of FAs across approximately 30 offices in the US. (Tr. 89.)

It would be inequitable sanction Mr. Bogar for the fraudulent acts of others of which he had no knowledge, particularly in light of the dearth of evidence in the record that Bogar's compensation derives from illegal profits.[22] Furthermore, it would not serve the stated policy goal of deterrence, as Mr. Bogar lacked the intent to defraud anyone, and did not commit any deceptive acts.

---

[22] An award of disgorgement would also be inequitable because when determining an approximate amount of illegal profits, "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty," *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1085 (D.N.J. 1996), *aff'd*, 124 F.3d 449 (3d Cir. 1997) and doubts "are to be resolved against the defrauding party." *Id.* In the instant case, Bogar is not the party whose "conduct created the uncertainty" in regard to the calculation of the disgorgement amount propounded by the Division. It would not be equitable for Bogar to bear the risk of uncertainty in a disgorgement calculation when such risk exists due to the conduct of convicted criminals. The Stanford group of companies was a global enterprise with sophisticated payroll systems which were not within the purview of Bogar. And it is clear that the disgorgement sought by the Division came from SGC's payroll and business expense tracking systems. Furthermore, the Division has not presented any evidence that Bogar misappropriated, comingled or otherwise any funds, which would necessitate tracing in order to

3. **Civil Penalties Against Bogar are Not Warranted**

Civil penalties are also inappropriate because Bogar did not violate any federal anti-fraud provisions or aid and abet any violations of federal anti-fraud provisions and, even if the Division had proven a violation, civil penalties are not in the public interest.

The following factors may be considered in determining whether civil penalties are in the public interest: (1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the harm resulting from such act or omission; (3) the extent to which any person was unjustly enriched; (4) prior violations; (5) the need for deterrence; and (6) such other matters as justice may require. *See In the Matter of Raymond James Fin. Servs., Inc. et al.*, Release No. ID-296 (Sept. 15, 2005). These factors overwhelmingly reason against the assessment of any civil penalties.

As an initial matter, the Division's characterization of Bogar as a "disingenuous" or "evasive" witness (DOE Br. 83) is wishful thinking and would not likely be accepted by those who were present in the courtroom; in fact, Bogar was at all times responsive, forthcoming and honest in his responses. The Division's contentions in this regard are, at best, supported by fragments of testimony which are misleading as presented in the Division's Brief, considered in the context of the entire testimony. (*See, e.g.,* discussion *supra*, at pp. 1, 7, 8, 9, 22, 23, 42.)

Special Agent Walther testified that she found "the information that [Bogar] provided [the FBI] to be truthful, accurate, and reliable" (Tr. 2184), that Bogar "was cooperative with [the FBI], answered questions that we asked, volunteered information that he thought would be helpful." (Tr. 2185.) Ms. Walther further testified that she had been able to "corroborate all of the things that [Bogar] told [her] during the course of the [Stanford] investigation." (Tr. 2185.)

As discussed above, the Division has not established that Bogar engaged in any fraudulent or deceitful conduct, or acted deliberately or recklessly in failing to detect the SIBL Ponzi scheme. To the contrary, Bogar's actions were consistent with achieving the valid business goal to grow SGC into a mainstream broker dealer. Furthermore, Mr. Bogar was not unjustly enriched -- the Division has failed to establish that Mr. Bogar received any "fruits" of the SIBL Ponzi scheme other than his regular compensation as the chief executive of SGC, nor has it established that Mr. Bogar's compensation was excessive in the industry for the president of a broker dealers of SGC's size. It has wholly failed to tie Bogar's compensation to "illegal profits" as opposed to "legitimate profits." *First City Financial*, 890 F.2d at 1231. There is also no evidence in the record that Mr. Bogar has committed any prior violations of the anti-fraud provisions of the securities laws.

The Division's mischaracterization that Bogar was in any way "evasive" or "disingenuous" in his testimony cannot be credited, and is belied not only by viewing his testimony in its entirety, but by the testimony of Special Agent Walther, discussed *supra*. Mr. Bogar was at all times honest and forthright during his testimony. A civil penalty would also not be in the public interest for deterrence reasons, because Mr. Bogar lacked the intent to defraud anyone, and did not commit any deceptive acts.

III. CONCLUSION

The Division has failed to meet its burden of proof with regard to all dispositive elements of the primary and secondary securities violations alleged against Respondent Bogar. All charges should be dismissed with prejudice, and the Division is not entitled to any of the relief sought in the OIP or the Division's Brief. The Order Instituting Proceedings should be dismissed in all respects as against Respondent Bogar.

Dated April 19, 2013

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.

By:

Thomas L. Taylor III
Texas State Bar: 19733700
taylor@tltaylorlaw.com
Andrew M. Goforth
Texas State Bar: 24076405
goforth@tltaylorlaw.com

4550 Post Oak Place Drive, Suite 241
Houston, Texas 77027
Tel: 713.626.5300
Fax: 713.402.6154

COUNSEL FOR RESPONDENT DANIEL BOGAR