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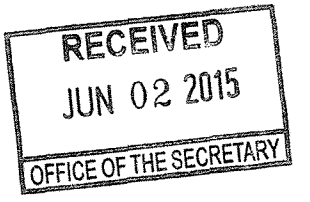
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16182

In the Matter of

PAUL EDWARD "ED" LLOYD, JR., CPA

Respondent.

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RESPONDENT'S REPLY BRIEF

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Respondent Paul Edward "Ed" Lloyd, Jr., CPA offers this brief in reply to the Enforcement Division's Post-Hearing Brief. Respondent also addresses the substantive issues on which ALJ Elliot ordered additional briefing.

I. ARGUMENT

A. THE ENFORCEMENT DIVISION CONTINUES TO MAKE FACTUAL ALLEGATIONS THAT ARE EITHER UNSUPPORTED BY ANY EVIDENCE OR MISSTATE THE APPLICABLE TESTIMONY AND/OR EVIDENCE.

The Enforcement Division ("Division") continues to make factual allegations, discussed below, that are either unsupported by any evidence or misstate the applicable testimony and/or evidence admitted during the hearing. From the outset of this inquiry, the Division crafted a fairy tale of stolen money and devious cover-ups, a tale which has changed shape several times throughout this process in order to suit the Division's needs. With no evidence to support its theory of theft, the Division concocts a story that "but for" a cover up, there would be such evidence. The Division has the burden of proof and has only a fable unsupported by evidence.

Each of the Division's renditions has been nothing short of a farce. The bottom line is that each client who participated in the Forest Conservation 2012 ("FC 2012")

transaction with Piney Cumberland Holdings, LLC ("PCH") knew what they were doing at the time of the transaction. Whether they now have perfect recall of the intricate details of this complicated transaction, which is precisely why they willingly pay Respondent for his services, is entirely irrelevant. Not one witness testified that they failed to receive exactly what was promised.

1. "Rather than investing all the clients' funds, however, Lloyd invested only $502,500 in the name of fourteen clients and misappropriated the remaining $130,000 for personal expenses, including his own fraudulently inflated personal participation in the scheme." (DOE's PH Brief 4.)

   RESPONSE: False. Respondent deposited a total of $649,302.00, including his personal contribution of $16,802.00, into the FC 2012, LLC bank account. (Resp. Ex. 18.) Of the total amount deposited, $105,750.00 constituted Respondent's tax service fee, which was earned income, not misappropriated funds. (Lloyd 876:16-878:12.) Respondent wired $543,552.00, not $502,500 as the Division contends, from the FC 2012 bank account to PCH on December 7, 2012, and FC 2012 purchased 228 units in PCH. (Lloyd 857:5-12; DOE Ex. 123.) The FC 2012, LLC entity purchased the units, not individual clients, and whether individual names were included on a list requested by SFA (but not required by Wyoming LLC law) is entirely irrelevant. Thus, the $130,000 figure the Division keeps referencing as the amount that Respondent "stole" from Brown, Carson, and Malloy is merely another plot line in the fairy tale. It is a "tale . . . full of sound a fury, Signifying nothing."

Respondent testified that his contribution amount was a "plug." (Lloyd 1020: 16-24.) Put simply, the FC 2012, LLC was allowed a certain amount of units to purchase, which required a sum certain. Once his clients made their contributions, Respondent contributed the difference needed to reach the sum certain. Thus, the amount available for his contribution fluctuated as monies were contributed by Respondent's clients, and it was only set once the clients' funds were collected. Respondent received a K-1 reflecting his actual contribution of $16,802.00. (Resp. Ex. 25.) His contribution amount was never "fraudulently inflated." The membership interest in the LLC was the percentage based on $16,802.00.

2. "After the Commission's National Exam Program staff began looking into the Forest Conservation investments in approximately March 2013, Lloyd took further steps to conceal his scheme. In May 2013, Lloyd prepared and distributed to all seventeen of his clients . . . and to himself individual IRS Schedule K-1s that were misstated. To the three tax-planning clients whose money he stole, Lloyd gave Schedule K-1s that allocated a tax deduction that none of the three clients had earned because their funds were not used to acquire ownership interests in [FC 2012] in their names, they were not listed on the [FC 2012] Operating Agreement as members, and they were never identified to, or approved by, the broker-dealer handling the Regulation D offering as accredited investors." (DOE's PH Brief 5.)

RESPONSE: False. The Division's implication that Respondent's preparation of the K-1s in May in any way correlated to the National Exam Program's

investigation is not based in fact. Respondent received the K-1 for FC 2012, LLC in May 2013, and he completed the tax return and individual K-1s that same month. (Resp. Ex. 24; Resp. Ex. 25; Lloyd 887:10-888:6.)

There is no evidence Respondent "stole" anyone's money. Each client's funds were deposited into the FC 2012, LLC bank account, including Carson, Brown, and Malloy's contributions. They "acquired ownership interests in," or more appropriately worded: became members of, the LLC upon the acceptance of their contribution. Respondent was not required as a matter of Wyoming LLC law to list their names on the Operating Agreement, or any other document. *See* Wyo. Stat. Ann. § 17-29-401 (2010) (stating that the organizer acts on behalf of the persons forming the company); *see also* Wyo. Stat. Ann. § 17-29-102(xiv) (2010) (stating that the operating agreement for an LLC may be oral or implied); (*See also* Long Report Resp. Ex. 40.) There is no valid, legal argument that Brown, Carson, and Malloy were not members of FC 2012, LLC.

The failure to identify Carson, Brown, and Malloy to SFA and prove their status as accredited investors does not negate the fact that they were members of FC 2012, LLC. Their membership is entirely a question of state law. In any event, since neither the PCH membership interest nor the FC 2012 membership interest were securities, it mattered not whether the members of FC 2012 were "accredited" or otherwise met SFA's arbitrary requirement. In the end, FC 2012 purchased 228 units in PCH; FC 2012, LLC received a K-1 for the PCH transaction; and each person who was a member of FC 2012, LLC was entitled

to and did receive a K-1 allowing them to deduct their share of the total deduction.

3. "To the remaining fourteen clients, Lloyd sent Schedule K-1s that understated the deductions that they should have earned—the result of Lloyd having to allocate across all seventeen clients and himself an aggregate tax deduction from the third-party issuer that in actuality was based on Lloyd's use of only fourteen clients' funds, plus his own falsely inflated contribution, to purchase units in the offering." (DOE's PH Brief 5.)

RESPONSE: False. This statement is incorrect both mathematically and factually. First of all, there is no way to discern whose money was used to purchase the membership units from PCH and whose money was retained in the account to pay Respondent's tax planning fee. All of the money received was deposited into the FC 2012, LLC bank account, and all of the participants became members of the LLC. Thus, all 18 participants were entitled to the deduction. If, for argument's sake, the $130,000 from Brown, Carson, and Malloy were excluded from the total amount collected, then it is true that the remaining 14 participants would have received a larger *percentage* of the deduction. However, the *amount* of the deduction would have been smaller because less money would have been contributed to the purchase of the property. Thus, they would have gotten a larger percentage of a smaller amount. Essentially, it is a wash.

4. "In an email, Zak informed Lloyd that any LLC that he formed to pool investor funds in 2012 could not charge management fees . . . ." (DOE's PH Brief 7.)

RESPONSE: Misleading. The implication that Respondent was "warned" about charging management fees and therefore should not have charged a fee to his clients is misleading and ultimately incorrect. Respondent did not charge a "management fee." He charged a tax planning fee which compensated him for the work he performed prior to the purchase of membership units in PCH. Respondent analyzed each client's financial status and determined what amount of contribution would yield the best result for tax purposes. He did not "manage" any interests involved in the transaction. In any event, SFA's instructions or desires were irrelevant to Lloyd's relationship with his client. He was under no legal or contractual obligation to SFA.

5. "All investors, including those participating through an LLC, would need to be accredited investors which would enable the [PCH] offering to qualify under the Regulation D exemption from registration with the Commission." (DOE's PH Brief 8.)

RESPONSE: False. Zak testified that SFA "required" the investor paperwork proving that all investors were accredited investors, but she did not say that this was required so that the PCH offering would qualify under the Regulation D exemption, nor did Peter Hardin. Most importantly, this assertion is incorrect as a matter of law.

Hardin testified that he structured the PCH transaction as a 506 offering under Regulation D. (Hardin 516:25-517:22.) In 2012, Section 506 allowed sales to up to 35 investors who were not accredited.[1] 17 C.F.R. § 230.506 (b)(2)(i) (2012). It is an inaccurate statement of law to claim that the PCH transaction could only involve accredited investors in order to qualify for a Regulation D exemption from registration. Moreover, between Respondent's knowledge and experience in financial and business matters and that of his clients, there is no doubt that they would meet the additional restrictions placed on an unaccredited investor by § 230.506(b)(2)(ii), even if they were considered "unaccredited" based on the lack of paperwork.

6. "Lloyd created [FC 2012] and solicited his advisory and tax clients to contribute investments so that [FC 2012] could buy units in the [PCH] offering." (DOE's PH Brief 8.)

RESPONSE: False. Respondent did not "solicit" his clients to contribute to FC 2012. In some instances, Respondent recommended participating in the PCH transaction as one type of potential tax strategy which was part of the tax analysis he performed for several clients. (Resp. Ex. 74.) In other cases, the clients themselves asked to participate in the transaction. (Resp. Ex. 82.)

7. "On December 10, 2012, Lloyd advised SFA that the amount of his personal investment in [FC 2012] was $41,052. The difference between Lloyd's actual

[1] It is worth nothing that the three individuals whose paperwork was not submitted to SFA would have qualified as accredited investors in 2012. Moreover, the fact that Judge Foelak's order already determined that the FC 2012 transaction did not involve the purchase or sale of a security makes this entire inquiry moot as there is no need to prove one is an accredited investor when there is no security involved.

deposit and the amount he claimed to SFA as his personal investment was $24,250." (DOE's PH Brief 8.)

RESPONSE: Misleading. At the time of the December 10 statement to SFA, Respondent had the capability to contribute $41,052 because the income he earned from his tax planning fee was deposited into the FC 2012, LLC bank account from which the wire was drawn. (Lloyd 880:5-10.) Had that contribution amount remained available at the close of the transaction, Respondent would have contributed the $41,052 amount; however, it was not, because Carson's contribution remained in the bank account, and Respondent contributed only the $16,802 he deposited via personal check. (Resp. Ex. 17.)

8. ". . . Lloyd knowingly and intentionally took Carson out of the [FC 2012] offering. . . ." (DOE's PH Brief 11.)

RESPONSE: Misstates the testimony. Respondent testified that he "*intended* to take [Carson] back out of [FC 2012] . . ." (emphasis added). However, he did not do so. Thus, Carson remained a member of FC 2012, LLC and participated in the PCH transaction.

9. "Although Lloyd previously documented the fees he charged to [FC 2011] investors in writing . . ., he never did so with respect to any of the [FC 2012] investors . . . ." (DOE's PH Brief 13.)

RESPONSE: Misleading. The lack of a writing does not equate to a lack of knowledge. Eight of the participants in FC 2012 also participated in FC 2011. They were well aware that Respondent was not in the habit of working for free and that he charged a tax planning fee in connection with the conservation

easement transactions. Moreover, each participant who testified or provided an affidavit indicated they knew there was a fee. (Powell 618:10-15; Losby 939:1-13; Brown 964:18-965:12; Hooks 1060:1-16, 1063:13-1064:3, 1066:8-1067:2, 1073:17-1074:9; Branch 1088:10-1090:7; Price 1107:1-1108:11, 1116:19-1117:14; Goss 1129:11-1132:14, 1156:17-1157:6, 1163:20-1165:4; Hall 1171:1-1173:23; Admitted Portions of Resp. Ex. 39.)

10. "He did not reveal that he was involved in the [FC] entities as an outside business activity until he was confronted with it by the Exam staff . . . ."

RESPONSE: Misstates the testimony. Respondent testified that he disclosed that Ed Lloyd & Associates does tax planning, and the FC transactions were a strategy that was used in tax planning. (Lloyd 719: 10-21.) The FC entities themselves were not required to be disclosed as an outside business activity because they were covered under the umbrella of Ed Lloyd & Associates.

11. "Further, when the Commission issued document subpoenas to Lloyd's clients during its investigation, Lloyd fed them an after-the-fact story about the 'fees' they were supposedly charged. Lloyd testified that he 'reminded' his clients about the fees he purportedly charged them . . . because they would not have remembered the fee amounts on their own." (DOE's PH Brief 16.)

RESPONSE: False. As discussed above, Respondent's clients were aware of the tax planning fee associated with the FC 2012 transaction. It is preposterous for the Division to continue to claim Respondent's clients did not know a fee was involved despite the fact that they have not provided one scintilla of evidence to support the claim, nor did they put up one single client to testify on this matter,

and every witness who testified, testified to the contrary. (*See* citation to testimony in Section A, Response to Paragraph 9 *supra*.) Respondent provides a myriad of services for his clients, most of whom are sophisticated, business persons who deal with a multitude of transactions on a daily basis. To fault Respondent for his clients' failure to have perfect recall of how a transaction was structured that took place over two years ago is absurd.

12. "He further admitted that he assisted his clients with the language used in their respective cover letters to the Commission." (DOE's PH Brief 16.)

RESPONSE: False. The Division provided no cite to any such admission in the transcript. In fact, Judge Elliot sustained an objection during Jennifer Brown's testimony to Mr. Schroeder's characterization of Respondent's testimony on this specific issue when he asked if Brown was aware that Respondent "assisted investors in preparing their responses to SEC document production requests." (Brown: 974:16-975:2.) Despite the ruling, the Division still continues to make this false claim, and even takes it a step further by alleging that Respondent assisted clients with the *language* used in their cover letters, which is completely unsupported by the evidence. Moreover, several clients testified specifically that Respondent did not help them draft their letters or suggest language to include in their response. (Losby 942:5, Hooks 1080:16-1081:1, Price 1110:7-12, Goss 1133:20-1134:12.)

13. ". . . Lloyd continued with his cover-up scheme by urging his clients to sign an Amended Operating Agreement . . . ." (DOE's PH Brief 17.) "Ashley Shawn Hooks testified that Lloyd's counsel told her that she needed to sign the

Amended Operating Agreement so that she might not have to appear in court for the hearing in this matter." (DOE's PH Brief 17 FN8.)

RESPONSE: False. The reference to Hooks' testimony is entirely false and yet another attempt to insinuate that Respondent's counsel badgered the participants into helping him "cover up" his wrongdoings. Hooks never testified that Respondent's counsel told her she needed to sign the *Amended Operating Agreement* in order to avoid an appearance in court. She actually testified that it was her "hope" that providing the *affidavit* would alleviate the need for her live testimony. (Hooks 1069:5-1070:1.)

14. "Finally, in preparation for the hearing in Charlotte, Lloyd convinced some, *but not all*, of his clients to sign affidavits saying they received the outcome they always expected . . . Brown and Malloy . . . did not provide signed affidavits for Lloyd" (emphasis in original). (DOE's PH Brief 17.)

RESPONSE: False, misleading, and not in evidence. The only affidavits admitted from Respondent's Exhibits were those of Hooks and Goss; the remainder were excluded and are not in evidence; which participants did or did not submit affidavits should not even be discussed, much less considered by the Court in reaching a decision in this matter.

The Division seeks to insinuate that Respondent convinced some of the participants to do his bidding, but was unable to do so with the participants the Division claims were defrauded.[2] However, this is untrue and an insult to both

[2] At this point, it is difficult to determine exactly which participants the Division thinks were defrauded. The story has changed from "cheating" the three people left off of the Operating Agreement ("OA"), to cheating the other 14 participants by allocating a portion of the deduction to the three people left off the OA, to cheating the entire FC 2012 entity. Unfortunately, the "cheating" allegations switch from group to group based off of when it best suits the Division's current version of the tale.

Respondent and his counsel. In actuality, the FC 2012 participants who did not submit affidavits declined to do so for various reasons ranging from being contacted by attorneys for *both* sides to the point of distraction to simply not wanting to get involved in an ongoing legal dispute.

B. RESPONDENT DID NOT COMMIT A PRIMARY VIOLATION OF SECTIONS 206(1), (2), OR (4) OF THE INVESTMENT ADVISERS ACT OF 1940.

Sections 206(1), (2), and (4) of the IAA of 1940 provide that it is unlawful:

> [F]or any investment adviser . . . (1) to employ any device, scheme, or artifice to defraud any client or prospective client; (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client . . . (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

15 U.S.C. § 80b-6 (2014). In order to be charged with a primary violation of Section 206, the individual must be an "investment adviser." *Russell W. Stein*, Securities Exchange Act of 1934 Release No. 47504, 2003 WL 1125746, at *3 (Mar. 14, 2003). "'Persons associated with investment advisers' must be charged as aiders and abettors." *Id.*

"Section 206 is an anti-fraud provision and applies only to 'investment advisers.'" *Kaufman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 464 F. Supp. 528, 537 (D. Md. 1978); *Hall v. Paine, Webber, Jackson & Curtis, Inc.,* No. 82 CIV. 2840 (DNE), 1984 WL 812, at *2 (S.D.N.Y. Aug. 27, 1984). The Definitions section of the IAA defines an "investment adviser" as:

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.

15 U.S.C. 80b-2(11).

1. Respondent was an associated person of an investment adviser and could not commit a primary violation of Sections 206(1), (2), or (4).

Stein involved an administrative proceeding against Stein for failing to disclose a potential conflict of interest to his employer and his employer's clients, among other alleged violations. *Stein*, 2003 WL 1125746. The SEC argued that Stein's conduct violated Sections 206(1) and (2) of the IAA. *Id.*

Stein was a registered representative with Merrill Lynch ("ML"), a broker-dealer and investment adviser. He marketed and managed an investment consulting service and assisted institutional funds with investment manager searches. *Id.* at *1. Stein allegedly advised ML's clients to select a particular investment manager, ACF, which hired the Dover Company, owned by Stein's friend, to solicit new business for ACF. Dover received retainer and referral fees for any advisory fees ACF collected from clients solicited by Dover. *Id.* at *2.

Dover offered hunting and fishing incentives to ACF and its clients organized by Mayfair Services, a company owned by Stein's son, which was funded initially by loans from Stein to his son. *Id.* at *3. Stein also loaned money to his friend who owned the Dover company. *Id.* at *2. Both Stein's friend and his son were able to pay back the loans he made to them by virtue of the business he directed their way through the Dover and Mayfair companies, and Stein did not disclose any of these potential conflicts of interest to ML. *Id.* at *3.

The SEC charged Stein as a "primary violator" of Section 206 of the IAA because he did not disclose this alleged conflict between his personal interests and those of ML's clients. *Id.* In upholding the ALJ's dismissal of the Section 206 charges, the

Commission noted that "Section 206 applies by its terms only to investment advisers, rather than associated persons of investment advisers." *Id.* Therefore, "[o]nly investment advisers can be charged with primary liability pursuant to Section 206, and 'persons associated with investment advisers' must be charged as aiders and abettors." *Id.*

In this case, Respondent was charged with primary violations of Section 206 (1), (2), and (4). In 2012 at the time of the conservation easement transaction, Respondent was a registered representative of LPL Financial. By definition, he was a "person associated with an investment adviser," which includes ". . . any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser." 15 U.S.C. § 80b-2(a)(17) (2014). He quite literally could not be an "investment adviser" for purposes of the IAA both based on the definitions above as well as the *Stein* holding, and he could not commit a primary violation of Section 206.

Stein makes it clear that Section 206 is only applicable to investment advisers, and Respondent was not an investment adviser; he was an associated person of an investment adviser. For that reason, Respondent could not, and did not, commit a primary violation of Sections 206(1), (2), or (4), and those charges should be dismissed.

2. In the alternative, Respondent did not commit a primary violation of Sections 206(1), (2), or (4) because he was not acting as an investment adviser and is excluded from the IAA pursuant 15 U.S.C. 80b-2(a)(11).

In the alternative, even if Respondent was deemed to be an investment adviser, he did not violate Section 206 because he was not acting as an investment adviser during the FC 2012 transaction. Respondent, and the participants who testified, noted

that this was a tax saving technique used with Respondent's tax clients. That four of them were investment advisory clients does not change the nature of the transaction. This technique used to obtain a charitable deduction is no different than donating money to Goodwill. That is precisely why all communications utilized Respondent's Ed Lloyd & Associates email address and letterhead instead of Lloyd Wealth Management. Respondent provided this service with his tax planning "hat" on, not his investment advisor hat.

Furthermore, absent evidence that Respondent received compensation specifically in return for providing investment advice to investors, he was not an investment adviser within the meaning of the IAA. *See Luzerne Cnty. Ret. Bd. v. Makowski*, 627 F. Supp. 2d 506, 573 (M.D. Pa. 2007).

In addition to the fact that Respondent does not fall within the definition of an investment adviser within the IAA, the definitions section of the IAA specifically creates an exception to this definition for "any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession." 15 U.S.C. 80b-2(11). *See Abrahamson v. Fleschner,* C.A.2 (N.Y.) 1977, 568 F.2d 862, certiorari denied 98 S.Ct. 2236, 436 U.S. 905, 56 L.Ed.2d 403, certiorari denied 98 S.Ct. 2253, 436 U.S. 913, 56 L.Ed.2d 414; *see also Kaufman*, 464 F. Supp. at 537. As discussed in Respondent's initial post-hearing brief, during the FC 2012 transaction, Respondent was acting as a CPA within a tax planning transaction, putting him squarely within the accountant exception. The Division must establish by more than conclusory allegations that Respondent was an investment adviser. *Polera v. Altorfer, Podesta, Woolard and Co.*, 503 F. Supp. 116, 119 (N.D. Ill. 1980).

3. In the alternative, Respondent did not commit any acts sufficient to establish a primary violation of 206(1), (2), or (4).

SEC v. DiBella, 584 F.3d 533 (2d Cir. 2009) was an appeal of a district court jury trial of an enforcement action brought by the SEC against a State Senator, DiBella, and the Senator's business, North Cove Ventures, LLC, alleging the defendants aided and abetted violations of §10(b) and Rule 10b-5 by the Connecticut State Treasurer as well as the aiding and abetting a violation of the IAA by an investment firm and its chairman.

S.E.C. v. DiBella, 584 F.3d 553 (2d Cir. 2009) held that "any transaction that functions or otherwise results in a fraud is punishable" under the IAA, including negligent acts. *S.E.C. v. DiBella,* No. Civ. 304CV1342EBB, 2005 WL 3215899, at *8 (D. Conn. Nov. 29, 2005) explained that a primary violation of Section 206(2) of the IAA, and, effectively, by extension Section 206(1), need not be "in connection with" the provision of investment advice. The *DiBella* decisions apply this analysis to activities that took place outside of the advisory relationship and conclude that liability is in fact possible in specific circumstances.[3] However, the Division did not prove all of the requirements for a primary violation of Sections 206(1), (2), or (4).

Moreover, there also cannot be a violation of Sections 206(1) and (2) because there was no fraud upon a client or prospective client. If anything, Respondent's actions affected SFA; they did not affect the four investment advisory clients. SFA wanted the accredited investor paperwork, which was not required, as discussed *supra*, and the

[3] It is worth nothing that both *DiBella* decisions apply this analysis in the context of aider and abettor liability, which was not plead in the OIP nor is it applicable based on the specific facts of the case. The elements of an aiding and abetting claim are (1) the existence of an independent wrongful act, (2) knowledge by the aider and of that wrongful act, and (3) substantial assistance in effecting that wrongful act. *Kaufman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 464 F. Supp. 528, 535 (D. Md. 1978) (internal citations omitted). *SEC v. DiBella* specifically states that the government must prove "the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party." *DiBella* 584 F.3d at 566. Furthermore, scienter must also be shown. *Kaufman*, 464 F. Supp. at 535. (internal citations omitted). Respondent cannot be held liable as an aider and abettor for his own actions.

lack of paperwork did not change the fact that the three individuals at issue were still members of FC 2012, LLC. The members of FC 2012, LLC were entitled to the tax deduction that FC 2012, LLC earned, as per Wyoming state law. *See* Wyo. Stat. Ann. § 17-29-401 (2010) (stating that the organizer acts on behalf of the persons forming the company); *see also* Wyo. Stat. Ann. § 17-29-102(xiv) (2010) (stating that the operating agreement for an LLC may be oral or implied).

i. Respondent did not commit a primary violation of 206(1).

As discussed in Respondent's initial post-hearing brief, Respondent has not violated 206(1) because he does not meet the statutory requirements of a 206(1) violation. *See* statute cited *supra*. In order to violate Section 206, one must be an investment adviser for the purposes of the act. *See* definition of "investment adviser" *supra*.

At the time of the transaction, Respondent was a registered CPA providing a tax planning vehicle for his clients. The fees associated with the FC 2012 transaction were related to the tax planning vehicle each client knew that there was a tax planning fee related to FC 2012. (*See* citation to testimony in Section A, Response to Paragraph 9 *supra*.) Furthermore, ALJ Foelak's February 27, 2015 Order included findings of fact that the FC 212 transaction was not a security. *Paul Edward "Ed" Lloyd, Jr., CPA*, Admin. Proc. Rulings Release No. 2366, 2015 SEC (Feb. 27, 2015).

ii. Respondent did not commit a primary violation of 206(2).

A violation of § 206(2) requires the following: (1) the Defendant is an investment adviser; (2) the Defendant used the mails or any other means or instrumentality of interstate commerce, directly or indirectly; (3) to make a misstatement or omission of

material fact to a client or prospective client; and (4) the Defendant acted negligently." *Morris v. Wachovia Sec., Inc.*, 277 F. Supp. 2d 622, 644 (E.D. Va. 2003).

As discussed *supra*, Respondent was not acting as an investment adviser. Furthermore, § 206(2) requires a misstatement or omission of material fact to a client or prospective client. The only misstatement made to any person was Respondent's statement to Zak at SFA. Zak was not a client or prospective client.

iii. Respondent did not commit a primary violation of 206(4).

As discussed *supra*, Respondent was not acting as an investment adviser. Furthermore, as the transaction was a tax planning vehicle, created by Respondent in his role as a CPA, Respondent is specifically excluded from the definition of investment adviser. 15 U.S.C. §80b-2(a)(11) (2014). *See Abrahamson,* 568 F.2d at 871. As Respondent was not subject to the IAA in his role as a CPA in this transaction, he has not committed a primary violation of § 206(4).

C. PENALTIES

Given that violations of Sections 206(1), (2), and (4) of the IAA are only applicable to investment advisers and that Respondent served as an associated person of an investment adviser, there was no violation of Section 206, and there can be no penalty assessed. In the event that the Court finds that Respondent was an investment adviser *and* that he was acting in that capacity during the FC 2012 transaction, as opposed to in a tax planning capacity, the following considerations should be taken into account.

1. The request for a cease and desist order is both moot and overly broad.

Respondent resigned as a registered representative of LPL Financial in March 2013. He has not been associated with any broker-dealer since that time, and as a result, all of his securities licenses have expired. Thus, the Division's request for a cease-and-desist order is moot.

Should the Court decide that the issue is not moot and find a violation of Section 206, the Division's request for a cease-and-desist order is overly broad and should therefore be denied. The Division requested an order that Respondent "cease and desist from committing or causing violations of or any future violations of Sections 206(1), 206(2) and 206(4) of the Advisers Act." (DOE PH Brief 32.) This request is entirely too broad and puts Respondent at risk for contempt for acts that are not related to the alleged harm to be prevented and/or deterred.

A cease-and-desist order is akin to an injunction because both seek to restrain future activity. "Rule 65(d) of the Federal Rules of Civil Procedure provides: 'Every order granting an injunction . . . shall be specific in terms and shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . .'" *S.E.C. v. Washington Inv. Network*, 475 F.3d 392, 398 (D.C. Cir. 2007). An order that simply references "future violations" of certain sections of the IAA "fails to clarify 'the act or acts sought to be restrained.'" *Id.* In practice, this broad language "might subject defendants to contempt for activities having no resemblance to the activities that led to the injunction" making it "overly broad in its reach." *Id.*

Here, the Division seeks to effectively enjoin Respondent from committing any violations of Rule 206 (1), (2), and (4), which subjects him to contempt for actions that could in no way relate to the conduct at issue in the FC 2012 transaction. Should a different type of violation of Rule 206 occur in the future, that should be handled via a new, separate OIP. It is entirely too broad to say that *any* possible violation of these sections should result in contempt, especially when dealing with rules that are all-encompassing themselves. Thus, the request for a cease-and-desist order against all future violations of Sections 206(1), (2), and (4) should be denied.

2. There are no funds to disgorge.

First, as discussed *supra*, Respondent was not subject to the IAA and therefore did not violate Section 206 and cannot be ordered to disgorge any funds. Second, even if Respondent is found to have violated Section 206(1), (2), or (4), there are no funds to disgorge.

"To gain or be enriched by something, you have to receive a benefit or use it in some way." *In the Matter of Raymond James Fin. Servs., Inc., J. Stephen Putnam & David Lee Ullom*, Securities and Exchange Act Release No. 296, 2005 WL 2237628, *62 (Sept. 15, 2005). The Division insists that Carson, Brown, and Malloy were not members of FC 2012 because their money was not "used to acquire ownership interests in [FC] 2012 in their names." They continue to confuse the issue of membership in the LLC with the issue of paperwork requested by SFA. As examined *supra*, these three individuals were members of FC 2012 according to Wyoming LLC law when Respondent accepted their funds and used his power as organizer to deem them members. Wyoming law does not require that they be listed on an operating agreement.

To say that Respondent "stole" the $130,000 in contributions from Brown, Carson, and Malloy is incorrect as a matter of law and as a matter of fact. Respondent did not pocket $130,000. He placed it into the FC 2012, LLC bank account and used those funds to purchase the interests in PCH. He also did not "abandon" the $24,250 that he "used to inflate his personal contribution" in an effort to conceal his actions. (DOE PH Brief 33.) He issued K-1s reflective of the percentages contributed by each member, including his own contribution of $16,802, and each client got exactly what they planned to receive. No one was cheated out of one, red cent.

As the chart attached as Exhibit A[4] demonstrates, the fact that Respondent arranged the transaction with the fees taken out wholly benefited every client (except for Steven Kezman who hypothetically would have gained an additional $3.00 deduction had the gross amount been used) because the fees were 100% deductible. Each client received greater deductions than he would have if Respondent had calculated percentages and allocated the contribution based on gross (pre-fee) contributions. The aggregate benefit to the client using the gross contributions calculation was $101,729.00. Thus, as there was no loss for the participants nor any gain for Respondent, there are no funds to disgorge.

3. There is no basis to assess civil penalties, or, in the alternative, the requested penalties are excessive and incorrectly calculated.

Again, as discussed *supra*, Respondent was not an investment advisor; therefore, the IAA does not apply to him, and there is no basis to assess civil penalties.

In the alternative, the penalties the Division requested are both absurdly high and inaccurately calculated. The Division's assertion that Respondent should pay a $30,000

[4] Note that Exhibit A utilizes figures which are already in evidence and annotates their source.

penalty for the "three clients whose money [he] stole" is illogical. Again, Respondent did not "steal" their money; it was placed into the FC 2012, LLC bank account, and they became members of FC 2012, LLC who were therefore entitled to share in the tax deduction attributed to FC 2012, LLC. There is no evidence that they were not members, and the Division's repeated assertion to the contrary is a misrepresentation to this Court.

The Division is also wrong that Respondent should pay a fine for decreasing the percentages of the remaining 14 participants because if Carson, Brown, and Malloy were excluded from participating in the transaction, their money would have been, too, and FC 2012 would have purchased fewer units. (*See* Exhibit B.) The remaining 14 participants, plus Respondent, would have received a larger percentage of a smaller tax deduction. If FC 2012 had been operated as the Division seems to think appropriate, every participant would have received a slightly lower deduction, except for Respondent, who would have had both his contribution and his deduction reduced to account for the $2,384 unit price. Their percentages were based on *their portion* of the total amount of money contributed; if there was less money in the pot, then they would receive a larger percentage of ownership in FC 2012, LLC, not a larger tax deduction. In addition to spinning a fairy tale with respect to fraud, the Division cannot do basic math. They are, once again, simply wrong. Thus, there should be no penalty assessed in regards to the remaining 14 participants. The Division continues to argue two conflicting, and mathematically erroneous, positions.

Given that no participant lost any money, that they were all entitled to the tax deductions they received by virtue of their membership in FC 2012, LLC, and given that

Respondent is no longer working in the securities industry, any civil penalty assessed should be minimal, and it certainly should not be as excessive as the Division would have it be. *See S.E.C. v. Bolla*, 401 F.Supp.2d 43 (2005) (holding that the requested fines were excessive because no investor lost any money, and the defendant was no longer associated with the investment adviser.)

D. DUE PROCESS

In its opening brief, the Division essentially asks ALJ Elliot to overturn the Order Granting Partial Summary Disposition which was entered by ALJ Foelak. The Division requests that ALJ Elliot not only overturn the order but also enter judgment in favor of the Division on issues not addressed at the hearing.

1. The Division did not follow the appropriate procedure to request a reconsideration of Judge Foelak's order.

The proper procedure for the reconsideration of an order is contained in Rule 470 of the SEC Rules of Practice. "A party or any person aggrieved by a determination in a proceeding may file a motion for reconsideration of a final order issued by the Commission." 17 C.F.R. § 201.470(b) (2015).

Furthermore, "[a] motion for reconsideration shall be filed within 10 days after service of the order complained of, or within such time as the Commission may prescribe upon motion for extension of time filed by the person seeking reconsideration, if the motion is made within the foregoing 10-day period. The motion for reconsideration shall briefly and specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought." *Id.*

The Order on Respondent's Motion for Summary Disposition was entered on February 27, 2015. In order to comply with Rule 470, the Division needed to file either a

motion for reconsideration or a motion for an extension of time to file a motion for reconsideration by March 9, 2015. No such motion was filed. Instead, as part of the post-hearing brief filed on May 1, 2015, the Division argues that ALJ Foelak erred in granting partial summary disposition. This argument is untimely and should not be considered by ALJ Elliot.

The Division essentially reargues its prior position regarding the Division's claims under Sections 15(a) and 10(b) of the Exchange Act, Rule 10b-5 thereunder, Section 17(a) of the Securities Act, and Advisers Act Rule 206(4)-8. The procedure for requesting reconsideration is clear, and the consideration of any of the exhibits or testimony to which the Division cites within this argument would be a violation of due process, as Respondent did not have appropriate notice or an opportunity to be heard on the substance of any of the allegations that were dismissed with the partial summary disposition order.

2. Overturning Judge Foelak's order and rendering an opinion on issues previously decided would be a violation of due process.

Although "administrative agencies are not bound by the same details of procedure as the courts...the agencies are governed by the same basic requirements of fairness and notice . . . ."*Hess & Clark, Div. of Rhodia, Inc. v. Food & Drug Admin.,* 495 F.2d 975, 984 (D.C. Cir. 1974). Should Judge Foelak's order be overturned and judgment entered, it would be a clear violation of due process in an administrative proceeding.

In addition to violating the rules set out by the administrative body itself, making findings or ordering remedies not . . . litigated in the subsequent hearing, would be a violation of the Administrative procedure act codified at 5 U.S.C. §554(b). See *N. L. R.*

B. v. Blake Const. Co., 663 F.2d 272 (D.C. Cir. 1981)."Under the Administrative Procedure Act § 5(b), 5 U.S.C. § 554(b), persons entitled to notice of an administrative hearing must be informed of "the matters of fact and law asserted."*Golden Grain Macaroni Co. v. F.T.C.*, 472 F.2d 882, 885-86 (9th Cir. 1972) (internal citations omitted). Furthermore, "if an issue was not litigated, and the party proceeded against was not given an opportunity to defend himself, an adverse finding on that issue by the agency does violate due process."*Id.* (internal citations omitted).

Respondent was not given notice that the claims disposed of by Judge Foelak's order would be litigated during the hearing and was not afforded the opportunity to defend himself. Should the order be overturned and an adverse decision be rendered with regard to the dismissed claims, there would be a clear violation of due process.

II. CONCLUSION

For the reasons set out above, Respondent respectfully requests an initial decision which reflects the foregoing facts, legal analysis, and conclusions and dismisses all charges.

This the 29th day of May, 2015.

Frederick K. Sharpless (By JSB)
Frederick K. Sharpless
Attorney for Respondent

OF COUNSEL:
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[redacted]

CERTIFICATE OF COMPLIANCE

The signature of respondent's attorney below certifies that, in compliance with the requirements of Securities Exchange Commission Rule 154(c), the word count for the RESPONDENT'S REPLY BRIEF filed with the Securities and Exchange Commission on May 29, 2015, contains a total of 6,998 words, as reported by the word processing program used to prepare the respondent's reply brief.

This the 29th day of May, 2015.

Frederick K. Sharpless
Attorney for Respondent

OF COUNSEL:

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Greensboro, North Carolina 27420
Telephone: (336) 333-6384
[redacted]

CERTIFICATE OF SERVICE

I certify that the **RESPONDENT'S REPLY BRIEF** was served upon the parties to this action as follows:

Honorable Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549
(***via email & US mail***)

Mr. Brent J. Fields (***Via fax & US Mail - Original & 3 copies)***
Secretary of Commission
Securities and Exchange Commission
100 F Street N.E.
Mail Stop 1090
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Fax: 202-772-9324

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This the 29th day of May, 2015.

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Benefit to Client if Percentages Determined After Fee Paid Within LLC versus Percentages Determined Before Fee Paid

Member	Check Amount	Contribution	Fee	K1 % of ownership	Date of Check	Bates	EXH	% Membership gross	% Membership net	Deduction on Gross	Deduction on net (From K-1 R25)	Benefit or loss	Tax Benefit of Fee in LLC
				See R25			(Check)	Check/$649,302	(Check-Fee)/$543,552	Gross%*Deduct from PCH	Line1,13A,13C		40.00%
FC 12		ELA_000126, 128, 131; SEC 39443											
K-1													
13A	$4,277.00												
13C	$2,310,095.00						R24						
	$2,314,372.00									B9 * Row I %			
Appel	$30,000.00	$24,500.00	$5,500.00	4.507388%	11/xx/2012	ELA_2221	R17	4.62035%	4.50739%	$106,932.00	$109,637.00	$2,705.00	$2,200.00
Bouley	32,500.00	26,750.00	5,750.00	4.921332%	11/16/2016	SEC-Def-9524/ELA_002223	R17	5.00538%	4.92133%	115,843.00	119,451.00	3,608.00	2,300.00
Branch	40,000.00	33,500.00	6,500.00	6.163164%	11/13/2016	ELA_002224	R17	6.16046%	6.16316%	142,576.00	148,891.00	6,315.00	2,600.00
Brown	50,000.00	42,500.00	7,500.00	7.818939%	8/31/2016	SEC_Defense_000009510	R17	7.70058%	7.81894%	178,220.00	188,145.00	9,925.00	3,000.00
Carson	30,000.00	24,500.00	5,500.00	4.507388%	12/1/2016	ELA_002225	R17	4.62035%	4.50739%	106,932.00	109,637.00	2,705.00	2,200.00
Clay	45,000.00	38,000.00	7,000.00	6.991051%	9/29/2016	ELA_002226	R17	6.93052%	6.99105%	160,398.00	168,517.00	8,119.00	2,800.00
Garrett	30,000.00	24,500.00	5,500.00	4.507388%	11/29/2012		R17	4.62035%	4.50739%	106,932.00	109,637.00	2,705.00	2,200.00
Goss	35,000.00	29,000.00	6,000.00	5.335276%	11/20/2016	ELA_002227	R17	5.39040%	5.33528%	124,754.00	129,262.00	4,508.00	2,400.00
Hall	27,500.00	22,250.00	5,250.00	4.093445%	11/13/2016	ELA_002228	R17	4.23532%	4.09344%	98,021.00	99,824.00	1,803.00	2,100.00
Hooks	35,000.00	29,000.00	6,000.00	5.335276%	11/21/2016	ELA_002229	R17	5.39040%	5.33528%	124,754.00	129,262.00	4,508.00	2,400.00
Kezman	22,500.00	17,750.00	4,750.00	3.265557%	11/27/2016	ELA_002230	R17	3.46526%	3.26556%	80,199.00	80,196.00	-3.00	1,900.00
Knight	30,000.00	24,500.00	5,500.00	4.507388%	11/30/2016	ELA_002231	R17	4.62035%	4.50739%	106,932.00	109,637.00	2,705.00	2,200.00
Lloyd	16,802.00	16,802.00		3.091151%	12/8/2016	ELA_002231A	R17	2.58770%	3.09115%	59,889.05	71,417.00	11,527.95	0.00
Losby	40,000.00	33,500.00	6,500.00	6.163164%	11/14/2016	ELA_002232	R17	6.16046%	6.16316%	142,576.00	148,890.00	6,314.00	2,600.00
Malloy	50,000.00	42,500.00	7,500.00	7.818939%	11/9/2016	ELA_002232A	R17	7.70058%	7.81894%	178,220.00	188,145.00	9,925.00	3,000.00
Mitchell	35,000.00	29,000.00	6,000.00	5.335276%	12/4/2016	ELA_002233	R17	5.39040%	5.33528%	124,754.00	129,263.00	4,509.00	2,400.00
Powell	60,000.00	51,500.00	8,500.00	9.474714%	9/26/2016	ELA_002234	R17	9.24069%	9.47471%	213,864.00	227,400.00	13,536.00	3,400.00
Price	40,000.00	33,500.00	6,500.00	6.163164%	11/13/2016	ELA_002234A	R17	6.16046%	6.16316%	142,576.00	148,890.00	6,314.00	2,600.00
	$649,302.00	$543,552.00	$105,750.00	100.000001%						$2,314,372.00	$2,416,101.00	$101,729.00	$42,300.00

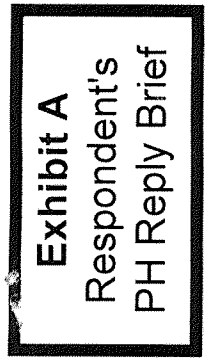

Exhibit B
Respondent's
PH Reply Brief

Forest Conservation 2012, LLC - Comparison of Tax Deduction Based on Number of Members

DOE 15 member analysis is detrimental to members because individual charitable deductions to each member are slightly reduced

	18 Members						15 Members						
	Check Amount	Tax Planning Fee	Contribution	Membership Percentage K1 R. Ex. 25	Allocation of Charitable Deduction ~ Line 13C - K1 Resp. Ex. 25	Member's Total Deduction* K1 R. Ex. 25	Check Amount	Tax Planning Fee	Contribution #	Membership Percentage (Contribution/ Total)	Revised Allocation of Charitable Deduction † Line 13C - K1 Resp. Ex. 25	Member's Total Deduction‡ Revised Allcation plus Lines 1 & 13A of Resp. Ex. 25	Detriment to Member under DOE theory
Appel	30,000	5,500	24,500	4.507388%	**104,125**	**109,637**	30,000	5,500	24,500	5.646618%	**104,125**	**109,625**	**(12)**
Bouley	32,500	5,750	26,750	4.921332%	**113,687**	**119,451**	32,500	5,750	26,750	6.165185%	**113,687**	**119,437**	**(14)**
Branch	40,000	6,500	33,500	6.163164%	**142,375**	**148,891**	40,000	6,500	33,500	7.720886%	**142,375**	**148,875**	**(16)**
Brown	50,000	7,500	42,500	7.818939%	**180,625**	**188,145**	0	0	0	0.000000%	**0**	**0**	**0**
Carson	30,000	5,500	24,500	4.507388%	**104,125**	**109,637**	0	0	0	0.000000%	**0**	**0**	**0**
Clay	45,000	7,000	38,000	6.991051%	**161,500**	**168,517**	45,000	7,000	38,000	8.758021%	**161,500**	**168,500**	**(17)**
Garrett	30,000	5,500	24,500	4.507388%	**104,125**	**109,637**	30,000	5,500	24,500	5.646618%	**104,125**	**109,625**	**(12)**
Goss	35,000	6,000	29,000	5.335276%	**123,250**	**129,262**	35,000	6,000	29,000	6.683752%	**123,250**	**129,250**	**(12)**
Hall	27,500	5,250	22,250	4.093445%	**94,562**	**99,824**	27,500	5,250	22,250	5.128051%	**94,562**	**99,812**	**(12)**
Hooks	35,000	6,000	29,000	5.335276%	**123,250**	**129,262**	35,000	6,000	29,000	6.683752%	**123,250**	**129,250**	**(12)**
Kezman	22,500	4,750	17,750	3.265557%	**75,437**	**80,196**	22,500	4,750	17,750	4.090917%	**75,437**	**80,187**	**(9)**
Knight	30,000	5,500	24,500	4.507388%	**104,125**	**109,637**	30,000	5,500	24,500	5.646618%	**104,125**	**109,625**	**(12)**
Lloyd	16,802		16,802	3.091149%	**71,408**	**71,416**	16,638		16,638	3.834630%	**70,711**	**70,711**	**(705)**
Losby	40,000	6,500	33,500	6.163164%	**142,375**	**148,890**	40,000	6,500	33,500	7.720886%	**142,375**	**148,875**	**(15)**
Malloy	50,000	7,500	42,500	7.818939%	**180,625**	**188,145**	0	0	0	0.000000%	**0**	**0**	**0**
Mitchell	35,000	6,000	29,000	5.335276%	**123,250**	**129,263**	35,000	6,000	29,000	6.683752%	**123,250**	**129,250**	**(13)**
Powell	60,000	8,500	51,500	9.474714%	**218,875**	**227,400**	60,000	8,500	51,500	11.869423%	**218,875**	**227,375**	**(25)**
Price	40,000	6,500	33,500	6.163164%	**142,375**	**148,890**	40,000	6,500	33,500	7.720886%	**142,375**	**148,875**	**(15)**
Members Total	649,302	105,750	543,552	100.000000%	2,310,095	2,416,101	519,138	85,250	433,888	100.000000%	1,844,023	1,929,273	(901)
FC 2012 LLC Total			543,552		2,310,095				433,888		1,844,023		

~ 18 Member Charitable Deduction is the amount listed on line 13C of the individual K-1s admitted as Respondent's Exhibit 25; this represents the amount of charitable deduction each participant was entitled to claim.

* 18 Member Total Deduction is the charitable deduction on line 13C plus the amounts listed on lines 1 and 13A of the individual K-1s admitted as Respondent's Exhibit 25; this includes the charitable deduction, the fee deduction & flow-thru deductions from PCH, LLC

The new purchase is of 182 units of PCH. Units were priced at 2384 each (See DOE Exhibit 56, page 1 of Offering Summary) 182*2384 = 433,888.. Lloyd interest reduced to balance to whole unit price

† 15 Member Charitable Deduction is calculated by multiplying the now higher member percentage by the now lower total FC 2012 LLC deduction. New deduction flowing through from PCH is reduced because of purchase of 182 instead of 228 units. New deduction is (182/228) * 2,310,095 =1,844,023

‡ 15 Member Total Deduction assumes the amounts of lines 1 and 13A (fee deduction and flow-thru deduction) stay the same.

SHARPLESS STAVOLA

FREDERICK K. SHARPLESS
Attorney at Law
Direct Dial: 336-333-6384
FKS@sharpless-stavola.com

May 29, 2015

Sent via fax 202-772-9324 and US Mail

Mr. Brent J. Fields
Secretary of Commission
Securities and Exchange Commission
100 F Street N.E.
Mail Stop 1090
Washington, DC 20549

Re: In the Matter of Paul Edward "Ed" Lloyd, Jr., CPA;
Administrative Proceeding File No. 3-16182; Our File No. 10965

Dear Mr. Fields:

Enclosed are an original and three copies of Respondent's Reply Brief.

Sincerely yours,

Frederick K Sharpless (By dcb)

Frederick K. Sharpless

FKS:drc
Encls.
cc: Honorable Cameron Elliot (via email and US mail)
Mr. Robert F. Schroeder/Mr. Brian Basinger (via email & US mail)
Mr. Alex Rue (via email & US mail)
Mr. Woody Webb (via email & US mail)
Mr. Ed Lloyd (via email)