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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

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In the Matter of:	:	ADMINISTRATIVE PROCEEDING
ALEXANDRE S. CLUG,	:	File No. 3-16318

PETITIONER ALEXANDRE S. CLUG'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

ALEXANDRE S. CLUG, *pro se*[1]
[redacted]

[1] I am *pro se* at this time due to insufficient funds to retain an attorney represent me in pursuing review. For the sake of full disclosure, I did consult with an attorney, who reviewed and provided some help to me in preparing this brief.

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INTRODUCTION

While the ALJ recognized my inability to pay substantial monetary penalties, he imposed on me non-monetary sanctions that will have a severe impact on me and my family, which I believe were not warranted by my conduct. This is a case of someone who was well-intentioned and intended to comply with the law getting involved with the wrong people. I admittedly made the mistake of associating myself with Mr. Crow, who has long been on the Division's radar.

But even ALJ Patil recognized that I acted with good intentions, did not act with greed or avarice, and in fact, did not reap significant gains:

> There was no evidence that Clug lived lavishly or spent money recklessly. He appeared to be as a sincere individual who made regrettable decisions, in large part because he attempted to undertake endeavors that he was ill-equipped for. He strove committedly to ensure the businesses succeeded, in order to return money to investors, but was unable to do so. He appears to be a hard-working, generally good person.

Initial Decision at page 80.

This finding is accurate, and the evidence supports it. I may have made mistakes, but I have learned from them. And my mistakes have not caused grievous harm to the public—in fact, no investor has ever come forward to say they were misled or hurt by my actions. In light of these circumstances, and as further discussed below, imposing penny stock and industry bars as well as a

cease-and-desist order was unwarranted, unduly punitive, and lacking a sufficient connection to the violations found. I would also ask the Commission to consider rejecting the ALJ's conclusions that I committed some of those violations.[2]

ARGUMENT

For the reasons explained below, the Commission should vacate the Industry and Penny Stock bars imposed on me. I also maintain that some of the violations should be vacated.

I. The Commission Should Vacate or Modify the Sanctions Imposed

Because the circumstances do not warrant a permanent penny stock or industry bar, the Commission should reject those sanctions.

A. Consideration of the Nature of the Violations Found and the Mitigating Evidence Counsels Against Imposing Permanent Penny Stock and Industry Bars

Under section 16(b)(6)(A), the Commission is empowered to "censure, place limitations on,...suspend for a period not exceeding 12 months, or bar...from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating

[2] I also continue to assert the constitutional challenges I raised before the ALJ, which are incorporated herein by reference. I will not focus on those arguments in this Brief because I recognize that the Commission disagrees with them, and there has not (at least not yet) been a ruling by a court of appeals rejecting the Commission's conclusions. But I mention them here because I want to preserve the arguments so that I can raise them to a court of appeals if I seek further review, and also so that I can raise them to the Commission if an appeals court rules against the Commission's position on the Constitutional issues while this Petition is pending.

organization, or from participating in an offering of penny stock," a person who "was associated or was seeking to become associated with a broker or dealer, or any person participating, or, at the time of the alleged misconduct, who was participating, in an offering of any penny stock..." 15 U.S.C. § 78o(b)(6).

The ALJ concluded it was appropriate to impose the most severe sanctions, permanent Penny Stock and Industry bars, on me because I was "associated with Corsair, an unregistered broker." Initial Decision at 70. Corsair was an unregistered broker, he found, because it: (1) entered into a referral agreement with a financial advisor, ABS, under which Corsair was to receive transaction-based commissions; and (2) received commissions associated with 6 referrals made by Lana, a CPA who was employed by another business with which I was involved. Initial Decision at p 67.

The 'referral' agreement (Div. Ex. 199) was entered into and signed by Michael Crow alone, without my knowledge or involvement (Tr. 1046). Only after the fact did I find out and was asked to assist in doing due diligence and sending invoices, for example. The goal of the relationship, as Michael Crow explained it to me, was to enable investment in Aurum Mining LLC via a supposedly safer way for investors to invest into a higher risk project, as Investors in the ABS Fund were able to borrow up to 70% of their investment at a relatively low interest rate. (Tr. 844, 1941).

Within three months of entering into the agreement, we were advised by counsel that the transaction-based compensation arrangement in the agreement could be problematic. (Tr. page 1052, line 6-12; Tr. page 1942, line 10). We immediately revised the agreement to eliminate transaction-based compensation. The only person I ever referred to ABS was my own father. (Tr. page 1941, line 9).

A permanent bar is the "the securities industry equivalent of capital punishment." *Paz Sec. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007) (citing *Steadman v. SEC*, 603 F.2d 1126, 1137-40 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)). Thus, although the Commission has broad discretion to impose sanctions, it should use caution before imposing such serious sanctions, and should "be particularly careful to address potentially mitigating factors before it affirms an order" imposing a permanent bar. *Paz*, 494 F.3d at 1065; *see also Steadman*, 603 F.2d at 1137-40 ("[W]hen the Commission chooses to order the most drastic remedies at its disposal, it has a greater burden to show with particularity the facts and policies that support those sanctions and why less severe action would not serve to protect investors.").

"To say that past misconduct gives rise to an inference of future misconduct is not enough." *Steadman*, 603 F.2d at 1140. The *Steadman* factors provide guidance for evaluating the appropriateness of a permanent bar:

> These factors include (1) the egregiousness of the defendant's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the defendant's assurances against future violations; (5) the defendant's recognition of the wrongful nature of his conduct; (6) the likelihood that the defendant's occupation will present opportunities for future violations.

Lowry v. SEC, 340 F.3d 501, 505 (8th Cir. 2003).

Consideration of these factors does not support imposing a collateral industry ban on me. As to (1) egregiousness, I would ask the Commission to bear in mind that I had limited experience with the matters at issue, consulted with and followed the advice of counsel, and, as the ALJ found, I was acting with good intentions but made the mistake of trusting Mr. Crow, who had experience in the securities industry and should have known better.

I would argue that the conduct that should be considered in determining the appropriateness of a bar is the conduct that Congress has designated as triggering the power to impose debarment as a sanction, i.e., the violation associated with involvement with an unlicensed broker, Corsair. But if the other charged conduct is considered, permanent bars still should not be imposed on me.

The ALJ recognized that I am not someone who set out to steal from investors, prey on the vulnerable, or enrich myself by deceiving others. He did find that I acted recklessly in making statements to investors. And I admit that mistakes

were made and if I could go back, I certainly would have been more careful about the information given to investors. But I would ask the Commission to consider that, as the ALJ found, I always sincerely intended to do right by the investors, and make their investments profitable. It should also be noted that all of the investors were accredited investors, who knew the investments were very high risk, and that there was a serious possibility that the project would fail. I tried to make as much information as possible available online. None of the investors has complained that I misled or defrauded them.

As to recurrence, the referral arrangement, which I would argue is the only conduct that should be considered, was a short term arrangement that was ceased as soon as I learned it was improper. So there was no recurrence. Recurrence also does not weigh against me if the other charged conduct is considered. Although the ALJ considered the other charged conduct, he still found that "on a day-to-day basis I find that neither Crow nor Clug were committing recurring infractions," and instead resulted from "a handful of decision-points..." Initial Decision at 71. After finding that Crow's conduct was recurring based on his unrelated prior conduct, with which I had no involvement, the ALJ recognized that this consideration did not apply to me. But despite saying even Crow's conduct in this case standing alone was not recurring, he inconsistently concluded that recurrence weighs against me because I "nonetheless was complicit in various reckless or otherwise unlawful

activities." *Id.* If the conduct in this case was not recurring for the main actor, Crow, it certainly was not for one who merely was complicit in it, me.

As to the degree of scienter, the record reflects that Crow entered into the referral agreement without my knowledge, and I corrected the situation when informed it might be problematic. If the other charged conduct is considered, although the ALJ found conduct to have been reckless, I never intended to deceive anyone or take advantage of investors. The ALJ himself found that I "appeared to be as a sincere individual who made regrettable decisions, in large part because he attempted to undertake endeavors that he was ill-equipped for. He strove committedly to ensure the businesses succeeded, in order to return money to investors, but was unable to do so. He appears to be a hard-working, generally good person." While I may have committed errors, they were never intentionally made.

The ALJ lumped me with Crow and stated without elaboration that I had given no assurances against future violations and had not recognized the wrongful nature of my conduct because I defended myself against the Division's claims. Crow is a repeat offender who the ALJ found hid information from me as well as investors. But he also recognized based on my background, history, and behavior that I was sincere and trying to do the right thing, but in over my head. I admit that I made mistakes. I have paid dearly for them and years later I still have sleepless

nights distraught about the losses to our investors. If I could go back, I would have never associated with Crow in the first instance. I certainly would have been more conservative in making any statements to investors and would do so if given the opportunity in the future. This has been an experience I would never wish to repeat. But at the same time, given how this case has uprooted my life and imperiled my ability to support my family, I have defended myself. The fact that I have tried to defend myself in litigation should not be held against me.[3]

And finally as to the sixth factor, my occupation does not present opportunities for future violations. Here again the ALJ lumped me in with Crow in stating that "based on their history and future prospects, both Crow and Clug would likely engage in activities that would present opportunities for future violations." Initial Decision at 72. The "history" can only refer to Crow's history, as the ALJ identified no history in my life suggesting such a possibility, because there is no such history. As for future prospects, I no longer have any relationships with any of the parties to this SEC Action, including Crow, Corsair, or Aurum. I have no current occupation. Though I hope to find employment soon (I have,

[3] There is also a vast gap between saying that I did not intentionally make misleading statements about material facts and saying I did nothing wrong and would do the same in the future if given the chance. I have never said the latter. To the contrary, I have admitted that I made many mistakes, including in statements about Aurum, and if given the chance, certainly would not repeat those mistakes.

unfortunately, not yet been able to obtain new employment), I do not intend to find employment having anything to do with the various issues in this case.[4]

The Commission should also consider other mitigating factors. First, when given the opportunity (which I was not given until after Mr. Crow had entered into the referral agreement), I consulted with counsel and followed counsel's advice. I also consulted with counsel regarding the other conduct the ALJ found to be violations. *See Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 184 (2d Cir. 1976) (Friendly, J.) (finding mitigating circumstances where the respondents "did act under the supervision of experienced although in our view not disinterested counsel and, while they knew exactly what they were doing, there is no evidence that they had any thought they were violating the law..."); *accord Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1114 (D.C. Cir. 1988) (Ruth B. Ginsburg, J., concurring) (approvingly citing *Arthur Lipper* as "impressive decisional authority" for the proposition that "when securities law violators 'act under the supervision of experienced . . . counsel,' SEC sanctions should be mitigated."

And when informed that the agreement was improper, we quickly corrected our error and modified the agreement so that it would not provide for improper,

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[4] I am not licensed to sell securities and could not seek employment with a broker-dealer even if I was not barred from associating with one. Nonetheless, the stigma of the permanent bar jeopardizes my prospects of finding employment in other fields.

per-transaction compensation. Prompt correction of a violation is an additional mitigating factor. *See, e.g., Kornman v. SEC*, 592 F.3d 173, 188 (D.C. Cir. 2010). And the conduct giving rise to the ALJ's finding of a violation of Section 16 occurred over a relatively short period of a few months' time, another mitigating factor. *See Monetta Fin. Servs. v. SEC*, 390 F.3d 952, 957-58 (7th Cir. 2004) (noting conduct occurred over an "an eight-month period, making it a fairly isolated occurrence and suggesting that the likelihood of a future violation is slight."). I would not have engaged in the offending conduct if I had been told by counsel that it was improper.

The imposition of a Penny Stock bar is even less justified. The ALJ acknowledged that I did not participate in, and the charged conduct did not in any way relate to, an offering of penny stock, but concluded that it was appropriate to impose a penny stock bar on any person found to have been associated with a broker or dealer. Initial Decision at 70. In my view, the more logical way to read section 16(b)(6)(A) is that debarment "from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization," applies to a person who "was associated or was seeking to become associated with a broker or dealer," while debarment "from participating in an offering of penny stock," applies to a person "who was participating, in an offering of any penny stock..."

But whether or not my reading of the statute is the correct one as a general matter, imposing a penny stock bar is especially unwarranted in my case given that most of the conduct the ALJ found to constitute violations had nothing even to do with association a broker or dealer, and none of it had anything to do with penny stock. There is no fit between the conduct I engaged in and penny stock offerings. So barring me from associating with entities engaged in penny stock offerings seems arbitrary and unconnected to any past or risk of future misconduct. *See Teicher v. SEC*, 177 F.3d 1016, 1020 (D.C. Cir. 1999).

My past conduct has given no reason to believe there is a risk of future harm to the public if I were associated with an entity engaged in a penny stock offering. So there is no remedial purpose to imposing that bar on me. Since I have never been a member of the securities industry, and have never engaged in a penny stock offering, there is also no deterrent effect, whether individual or general. As such, such a bar can only be punitive, a purpose at odds with the nature of the Commission's sanctions authority. *See SEC v. Brown*, 658 F.3d 858, 861 (8th Cir. 2011) ("[E]ven when the remedy is intended to deter misconduct by members of the securities industry in general, it must be remedial, not punitive.").

B. The Commission Should Vacate the Cease and Desist Order

The ALJ also imposed a cease and desist order on me. He relied on the same analysis as used in determining whether to impose industry and penny stock bars.

He also stated that the mere finding of a past violation is sufficient to conclude there is a risk of a future violation. Initial Decision at 74. But by that reasoning, every finding of a violation would be sufficient for a cease-and-desist order. *Steadman* long ago rejected that approach: "To say that past misconduct gives rise to an inference of future misconduct is not enough." *Steadman*, 603 F.2d at 1140. Rather, the Commission should make an individual assessment of whether there is a real and present danger of future misconduct:

> 'The ultimate test' " of whether an injunction should issue " 'is whether the defendant's past conduct indicates... that there is a reasonable likelihood of further violations in the future.'" *SEC v. Savoy Indus.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978) (quoting *SEC v. Commonwealth Chem. Securities, Inc.*, 574 F.2d 90, 99-100 (2d Cir. 1978)) (emphasis in original), cert. denied, 440 U.S. 913 (1979). There must be "some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). The relevant factors we consider when assessing the likelihood of recurrent violation include "whether a defendant's violation was isolated or part of a pattern, whether the violation was flagrant and deliberate or merely technical in nature, and whether the defendant's business will present opportunities to violate the law in the future." SEC v. First City Fin. Corp., 890 F.2d 1215, 1228 (D.C. Cir. 1989). Injunctive relief is reserved for willful

> lawbreakers or those whose operations are so extremely or persistently sloppy as to pose a continuing danger to the investing public.

SEC v. Steadman, 967 F.2d 636, 647-48 (5th Cir. 1992).

The ALJ offered analysis of specific risks of future conduct only for Crow. He explained that "given Crow's legacy of repetitive securities laws violations, I find it extremely likely that he will commit future violations." *Id.* at 75. But there was no such analysis for me. And there is no history for me of repetitive violations nor any indication that I am likely to commit violations in the future.

There is no ongoing conduct. I no longer have any association with Mr. Crow or ABS, or for that matter, the businesses at issue in this case. I have no involvement in the securities industry.

The only actions attributed to me that the ALJ said indicated a risk of future misconduct was a statement in the debarment section that "...Crow and Clug would likely engage in activities that would present opportunities for future violations. Evidencing this risk, in June 2015, Crow and Clug wrote a letter to Aurum's investors stating that 'there is indeed gold' at Molle Huacan and that they were looking for a potential merger partner. Div. Ex. 737. Such statements give me considerable concern for their future actions." I believe that the ALJ's statement mischaracterizes the statement in the letter to which he refers, as well as the circumstances.

I voluntarily abided by a proposed cease and desist order from the day it was filed by the Division, although investors pressured me to find more funds to keep Aurum Mining LLC going primarily via its Alta Gold mine. I instead invested my meagre savings to keep the business going in the hope of packaging it enough to be able to sell it or 'merge' it and thus get some money back to investors. I obtained a NI-43101 standard mining report showing that there was indeed potential gold at the Alta Gold mine. I demonstrated my abidance to a recommendation, voluntarily, of a cease & desist by the Division and continued, via my own work and investments, to work for the investors and get a return to those investors. I do not see how this shows any bad faith or should give anyone concern for my future actions nor how this behavior could have been characterized as being "so extremely or persistently sloppy as to pose a continuing danger to the investing public."

I understand that Bars are recommended by the Division when there exists a risk that the respondent might be at risk to repeat past infractions. I humbly submit that this is not the case for me. I have served my country with honor and have spent my life doing my best to live up to my alma maters motto of Duty, Honor, Country. I still have sleepless nights distraught about the loss that our investors have taken, even though they were all Accredited. I always insisted that we would never accept funds from any non-Accredited investors. In the ALJ's own opinion:

"there was no evidence that Clug lived lavishly or spent money recklessly. He appeared to be as a sincere individual who made regrettable decisions, in large part because he attempted to undertake endeavors that he was ill-equipped for. He strove committedly to ensure the businesses succeeded, in order to return money to investors, but was unable to do so. He appears to be a hard-working, generally good person." Initial Decision at 64. I understand that several support letters and emails for me were sent, unsolicited, to the ALJ's office.

My family and I have suffered greatly over the last few years since this process began as we tried to scrape enough funds together to hire counsel and, to this day, with this SEC issue hanging over me, I have been unable to find any employment. I have thus been barely able to support my family and have most definitely felt the consequences of my actions.

I deeply regret the many mistakes I have made and hope to never make them again. I have learned a great deal through this entire process with the SEC and am much clearer now on what can and can't be done. I understand now more than ever the utter importance of clarity and transparency and partnering with persons of high integrity and similar ethical standards. There is no reason to believe I would ever engage in conduct in any way similar to the actions that landed me before the Commission. I am certain I will not.

II. The Commission Should Exercise its Discretion to Review, and Vacate, the ALJ's Conclusions as to My Alleged Violations

As noted above, I acknowledge that I made mistakes. But that is a different question from whether those mistakes amounted to willful violations of the securities laws. For the reasons stated below, I ask the Commission to consider whether the ALJ properly found all of the legal requirements satisfied for violations he found I committed.

A. The ALJ Was Incorrect in Concluding that My Conduct Amounted to Recklessly Causing Corsair to Violate and Aided and Abetted Corsair or Crow in Violating Exchange Act Section 15(a).

ALJ Patil concluded that Corsair violated Exchange Act §15 based on the reasoning that Corsair's entry into an agreement that Corsair quickly abandoned when it was realized that it was problematic, and receipt of commissions for referrals by a non-employee to a financial advisor who was helping us raise capital, standing alone, made Corsair a "broker" under Section 15(a). The SEC later alleged that the financial advisor was engaged in wrongdoing, but there is no evidence we knew about that. In fact, ALJ Patil found that "Clug believed ABS was a legitimate fund, as demonstrated by the fact that he recommended it to his father." Initial Decision at 25.

A "broker" is defined as "any person *engaged in the business* of effecting transactions in securities for the account of others." 15 U.S.C. §78c (emphasis

added). "To demonstrate that someone is acting as a broker, the SEC is required to show a regularity of participation in securities transactions 'at key points in the chain of distribution.'" *SEC v. StratoComm Corp.*, 2 F. Supp. 3d 240, 262 (N.D.N.Y. 2014) (quoting *Mass. Fin. Servs, Inc. v. Sec. Investor Prot. Corp.*, 411 F. Supp. 411, 415 (D. Mass. 1976) aff'd, 545 F.2d 754 (1st Cir. 1976)). "[R]egularity of participation is the primary indicia of being 'engaged in the business.'" *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998). "Regularity of participation has been demonstrated by such factors as the dollar amount of securities sold...and the extent to which advertisement and investor solicitation were used..." *Id.* (citations omitted).

Corsair, which was engaged in the business of management consulting, lacked the regularity of participation necessary to be "engaged in the business." In fact, there is no evidence that Corsair, Michael Crow, or I ever referred even one person (other than my father, who was also a client of Lana) to ABS. Corsair merely entered into a referral agreement and received a commissions from several transactions by existing clients of Lana. And Lana was *not* an employee of Corsair, so his actions cannot be attributed to Corsair. Lana never received any compensation from Corsair (Tr. p 812, line 20) and his own testimony confirms that he played no role at Corsair (Tr. p 819, line 11). Lana used a Corsair email

address at one point, but that did not make him a Corsair employee.[5] At most, Corsair was involved in a few isolated events, not regular participation. In fact, within three months of receiving the first commission, Corsair nullified the agreement that called for it to receive transaction-based commissions.

And aside from the incidents being isolated, according to case law from the courts, even if they had been more frequent, receiving a finder's fee for introducing the parties to a securities transaction does not in itself make one a broker:

> [A] series of cases [have] identified a limited, so-called 'finder's exception' that permits a person or entity to 'perform a narrow scope of activities without triggering the b[r]oker/dealer registration requirements.'... "Merely bringing together the parties to transactions, even those involving the purchase and sale of securities, is not enough" to warrant broker registration under Section 15(a)...Rather, the evidence must demonstrate involvement at "key points in the chain of distribution," such as participating in the negotiation, analyzing the issuer's financial needs, discussing the details of the transaction, and recommending an investment.

SEC v. Kramer, 778 F. Supp. 2d 1320, 1336 (M.D. Fla. 2011) (citations omitted).

1. Corsair sold no securities.

2. Corsair did no advertising or solicitation of investors.

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[5] Lana had been having technical difficulties with his email system, and had lost or 'misplaced' many emails, so I told him to use a Corsair Group email that was on a Microsoft Exchange server, thus providing back up and synchronization between his various devices. I never told him to identify himself as CFO.

3. Corsair did not participate in negotiations. These all took place directly between ABS and investors. (e.g. Tr. 114, 973).
4. Corsair did not analyze financial needs or discuss the details of any transaction.
5. Corsair did not provide investment advice.
6. Corsair's temporary referral agreement with the ABS Fund was a single isolated incident and there was thus absolutely no regularity of participation in these kinds of securities transactions.

That a management consultant mistakenly entered into an agreement for a side project and received finder's fees for introducing the parties to several transactions did not turn Corsair into a broker.

If Corsair was not a broker, it did not need to register with the Commission, and did not violate Section 15(a) by failing to register. And if Corsair did not violate Section 15(a), then I obviously could not have caused Corsair to violate Section 15(a), or aided and abetted Corsair in violating Section 15(a).

Nor could I have aided and abetted Michael Crow in violating Section 15(b)(6)(B). The ALJ found Crow violated Section 15(b)(6)(B) "by engaging in the conduct with Corsair," and that I "aided and abetted and caused Crow's violations as the other principal of Corsair" because I "should have known that entering into a referral agreement for transaction-based compensation would cause

Crow to violate his bar." Initial Decision at 69. If Corsair was not a broker, then Crow did not violate his bar, and I couldn't have aided and abetted him in doing so.

In any event, the ALJ's findings were insufficient to find I aided and abetted or caused Crow to violate his bar. The agreement was entered into by Crow without my knowledge so I certainly didn't cause him to enter into it. According to the case law mentioned above, an agreement to receive a finder's fee, without anything more, does not make one a broker, so it's unclear why I "should have known" that entering into the agreement would cause Crow to violate his bar. Aiding and abetting requires that: "(1) there is a primary violation; (2) the aider and abettor generally was aware or knew that his or her actions were part of an overall course of conduct that was improper or illegal; and (3) the aider and abettor substantially assisted the primary violation." *Monetta Fin. Servs. v. SEC*, 390 F.3d 952, 956 (7th Cir. 2004) (quotation marks and citations omitted). The ALJ merely found that I "should have known" that Crow was violating his bar, but did not find that I did anything to substantially assist Crow or that I knew I was part of an improper course of conduct. At all times we had an attorney reviewing our contracts to make sure that we were not part of anything illegal or improper. That is why when the attorney told us that it would be better to not receive a commission for referrals, we stopped that arrangement.

B. The Conclusion that I Violated Section 17(a) by Instructing Lana to Send the May 2011 Executive Brief to an investor.

Quoting from the ALJ's Initial Decision: "The executive brief stated, in part that "the name and symbol change to PanAm is in process with a Form 10 and application for listing on the OTCBB submitted on April 29, 2011." *Id.* at 10. However, no application to the OTCBB had been submitted on April 29, 2011, though the Form 10 was filed on that date. (Div. Ex. 708)."

The ALJ characterized the statement in question within the Executive Brief as "the result of careless error in characterization, as opposed to an intentional or reckless act, since PanAm had commenced the process of seeking such a listing." (ALJ Initial Decision, page 67 para 3).

While the mischaracterization was regrettable and should have been avoided, I believe that this violation should be set aside, based on the fact that the Division did not prove that the misstatement in the Executive Brief was material or relied on by any investor. The Division had ample time and opportunity to question investors on this but did not do so and was unable to get any investor to agree that it was material or relied on by any of them.

The Division initially submitted a long list of investors that they planned on questioning during the Hearings. However, after the first few of the investors that

they called to the stand did not substantiate their claims they then cancelled calling any more.

The ALJ failed to discuss Section 17(a)(2)'s requirement of materiality and that a person "obtain money or property" through the allegedly untrue statement. Courts have interpreted this to mean the SEC must prove that the defendant *personally* obtained money or property as a result of the defendant's conduct or role in the alleged fraud. For example, *in SEC v. Syron*, the court applied the ordinary meaning of "obtain" to Section 17(a)(2) to conclude that "to obtain an object is to gain possession of it." *SEC v. Syron*, 934 F. Supp. 2d 609, 638 (S.D.N.Y. 2013). The court found that "the final step, whereby the defendant personally gains money or property from the fraud, is essential," and that the person charged with the violation must have had personal gain from the statement. I did not receive anything as a result of the statement. In fact, I did not collect any salary or pay from PanAm Terra at all. I only received reimbursements for pre-paid expenses.

All our documentation was prepared and/or reviewed and approved by our counsel, Robert Brantl, who also did all of our filings, working with our CFO Lana. Angel Lana was the CFO and thus deeply involved with all the SEC filings and, along with counsel, was also producing and reviewing all these documents. As the ALJ states himself, it was an error in characterization, as opposed to an

intentional or reckless act and the Division did not prove that any funds were received by PanAm Terra as a result of that representation in the executive brief. Again, the Division had ample opportunity to question investors on this but failed to do so.

C. The Finding That There Was a Material misrepresentation based on increasing the projected gold yield in the 12/2011 private placement memorandum (PPM). The ALJ called that reckless because there had been no new information to lead to increasing projections.

At the time the PPM was put out, I did not intend to present an overly optimistic picture, and in hindsight, would have made sure it was done differently. But I will point out that this was not the only information in the mix for investors to consider, and when asked, I provided back up for any and all projections. The ALJ seemed to agree with this in his Initial Decision. I was never specifically asked about this 'doubling'. The ALJ's decision seems inconsistent and unfair in that while stating that all other projections were reasonable as they were based on documentation and the company's managers and experts which he agreed we had a right to rely upon, it found me reckless for this statement, which I was not afforded the opportunity to explain. I also note that these projections were communicated as only projections with the disclaimer that: "It should be assumed that these projections WILL NOT be achieved and only a good faith effort on the part of management is expected." The WILL NOT was in CAPS in the original

documents. The ALJ concluded that there were plenty and sufficient risk disclosures in these same PPMs (ALJ Initial Decision, pages 60-61):

> I do not find that the gold estimates and corresponding cash projections for the gold properties in the August 2011 PPM were material misrepresentations. While the highly favorable estimates were not ultimately confirmed, from the outset Crow and Clug based them on data and information they received from local subject matter experts. Furthermore, the PPMs gave investors considerable pause to believe that they could rely upon these projections, and investors were advised of numerous circumstances in Latin America that may prevent the operational success and preclude a profit. For example, the PPM language that "[i]t should be assumed that these projections WILL NOT be achieved and only a good faith effort on the part of management is expected" was plainly forewarned. *E.g.*, Div. Ex. 68 at 17. The PPMs also provided multiple pages of risk disclosures, many specific to the gold mining business. *See supra* for a discussion of those risk disclosures. All investors understood that Aurum was a high-risk investment with the potential of a high reward, and that they may lose all of their money. Thus, I do not find that Aurum's initial favorable projections for its mining property prospects to be a material misrepresentation. Offering documents, which include meaningful – i.e., not boilerplate – cautionary language that informs investors of the risk inherent in any investment, render such initial return projections immaterial for purposes of federal securities laws. *SEC v. Merch. Capital, LLC*, 483 F.3d 747, 767-68 (11th Cir. 2007).

I believe this finding of a violation should be set aside because the Division did not show that this statement satisfied the legal definition of materiality in the context of other information provided. "Materiality is proved by showing a

substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *SEC v. Ginsburg*, 362 F.3d 1292, 1302 (11th Cir. 2004). In the context of the other information and communications provided to investors, investors' knowledge of the high risk nature of the investment, the projection(s) did not change the total mix of information. Investors had already been told about these projections.

Again, all investors testified that they understood that they were making a risky investment and that they could lose all of their money (e.g. Tr. page 92, line 8-23; Tr. page 1518, line 11-17). None has filed any complaint, despite all the pressure that both I and the investors have been under during these last few years as a result of this action. The Division had ample opportunity to question investors on this subject and attempt to get support for their point of view on whether this was material. They failed to do so.

And while the statement may have been a mistake, I do not think the ALJ applied the correct standard of recklessness in assessing whether I acted willfully. As courts have explained:

> Reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable, negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either

> known to the defendant or is so obvious the actor must have been aware of it..."reckless" in these circumstances comes closer to being a lesser form of intent than merely a greater degree of ordinary negligence. We perceive it to be not just a difference in degree, but also in kind.

Greebel v. FTP Software, Inc., 194 F.3d 185, 198-99 (1st Cir. 1999) (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)).

The ALJ applied a standard of recklessness that was difficult to distinguish from negligence. In view of all of the above, combined with the clear disclaimers and reliance on counsel, among other things, I believe the Division failed to carry its burden of showing that I willfully made a material misstatement.

D. The 1/12 letter stating that the closing conditions of the 8/2011 PPM had been satisfied.

I acknowledge that this statement should not have been made. But although it was negligent and should not have been made, I do not think that the Division proved that it was willful. I relied on counsel and I agreed directly with the ALJ that it was obviously an error and that the one single line stating that 'closing conditions have been met' made no sense and contradicted all other communications we had had made, including those with Angel and the investors. (Tr. page 1668-1670). In fact, Lana was clear in his communications with the investors who were converting under the new PPM, which no longer had those

closing conditions, that they could receive their funds back (Resp. Ex. 188a-e, Tr. page 103).

Although it is no way an excuse, at the time that the new PPM and 'rescission' were being discussed, I was then spending my nights in a hospice taking care of my dying mother and then dealing with the aftermath of my mother's death. I only bring this up to hopefully help the Commission in understanding that I have never intended to mislead any investors and there was no extreme recklessness in my behavior. In a difficult situation, I unfortunately did not catch that apparently erroneous one line in that one document, which was prepared with counsel and all managers, until the Division highlighted it in their filings (Tr. 1668-1670).

The Division again had ample opportunity to ask investors whether they relied on these Closing Conditions being met. They failed to get any supporting statements from Investors (Tr. 105). All investors that were questioned, all accredited, testified that they understood that their investment was very risky and that they could lose all of their investment (Tr. 92, 165, 1988, 1991). Not one investor stated that they felt misled or had relied on these specific lines or wording to make an investment. To this date there has not been one single investor complaint. To the contrary, they showed support for me throughout this difficult

process and I understand that some support letters for me were sent, unsolicited, to the ALJ's office.

E. The 1/13 PPM's statement describing gold potential at Molle Huacan without disclosing Park's findings.

The Division is required to "prove" that material representations were made that misled investors. "Moreover, it bears emphasis that] § 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information. Disclosure is required under these provisions only when necessary 'to make . . .statements made, in the light of the circumstances under which they were made, not misleading.'" *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) (quoting 17 CFR § 240.10b-5(b)). As a legal matter, I believe the lack of disclosure of Park's findings was not material under the 'total mix' standard in that case.

The ALJ stated in conclusory fashion that the omission was material. But that was insufficient. Again, the Division had ample opportunity to ask investors whether they felt misled or whether that information would have been important to them, but failed to do so and in fact were given the opposite message from them – thus the reason why the Division canceled calling any more investors after the first few were called. And the division did not call an expert to testify about whether mentioning the report in the PPM would have been important to investors.

As I testified, and nothing the Division has shown proves otherwise, the Park findings that the Division refers to were outdated by the time Mr. Park delivered his report over six months after his site visit, were based on only a very small dozen samples (Tr. 532-533, 536), and contained errors and losses, confirmed by Park, on another "40 or 44" samples (Tr. 536). Thus, by the time we received this report, it was outdated, based on too few samples, and it recommended further investment and testing be done. Since we in fact did a lot more investing and testing on the mine since he had visited the mine and his report was, in our judgement at the time, outdated, it might indeed be confusing as a reader might think that since it was dated October 2012, and not April 2012, it might convey a mistaken status of the mine as it actually was in October 2012.

F. The fact that the Park report was not included in the third quarter 2012 update letter did not result in at least two additional investments in Aurum.

This is a stretch by any standards. It is also not backed up by any of the investors' testimony, and if, as explained above, the Park reports is not deemed material, then not including the report in the third quarter 2012 update letter cannot be material either. By third quarter of 2012 there had been hundreds of more sampling and metallurgical tests completed and these were all available to investors via the data room. As explained previously, the Park report was based on

an extremely small amount of samples taken over six months earlier and it had stated that further exploration would need to be done. That further exploration along with significant related expenditures had been more than accomplished by the time the third quarter 2012 update letter had been shared.

Despite ample opportunity to confirm whether investors thought the Park report was important to them, i.e. material, the Division failed to do so. In fact, investors' response was quite the opposite. (Tr. 170).

G. Using the term "inferred reserves" instead of potential in the PPMs.

These are technical terms that mean similar things to a layperson investor and therefore were not material. Again, the Division had ample opportunity to ask investors whether they felt misled by these terms during the hearings but failed to do so and in fact were given the opposite message – thus the reason why the Division canceled calling any more investors after the first few were called. The Division had even met with all their witnesses days or weeks prior to calling them to the stand and thus had ample opportunity to get these specific topics covered during questioning. (Tr. 85, 135).

The ALJ stated that "the precise meaning of potential, reserves, and resources may have escaped Crow and Clug, and may not have actually mattered a great deal to the testifying investors, a reasonable investor in a gold mining

operation would want to know that the gold in question was more than notional potential." It appears to be quite a jump to make such a judgement on what 'a reasonable investor' would think when the actual investors' testimony said it was not material to them. It is also a jump to reach the opinion of recklessness. Also as a note, the managers, engineers, geologists and metallurgists, people that the ALJ agrees I had a right to rely on, did sometimes use the word 'reserves' or economic potential in their reports (e.g. Resp. Ex. 68b, 95, 71b).

H. Crow's prior securities law violations from May to December 2011.

I believe the ALJ's finding that I acted recklessly with regard to this omission again applied an incorrect standard. There was no evidence of I consciously disregarding a known risk. That is evidenced by the fact that when I did become conscious of the omission, it was quickly corrected in subsequent materials. As with the other documents, I consulted with and relied on counsel throughout the production of all these documents. In addition, it should be noted that after Crow's past violations were communicated to investors, no one complained, and in fact many made further investments.

I. The ALJ Erred in his Conclusions and Reliance with regards to where he wrote: "On May 16, 2012, Clug emailed Luna and copied Crow, writing with regards to the copper results that Cobre Sur "[l]ooks like a write off!" and that it was "[n]o surprise based on our sampling." Div. Ex. 384; *see also* Div. Ex. 382 (May 15, 2012, email

stating that Cobre Sur "may be a complete write-off!"). Less than two hours later, Clug solicited an investor using the December 2011 PPM and the May version of the 1st Quarter 2012 update letter containing positive projections on Cobre Sur."

The email to an investor was a message I sent to a good friend of mine, a sophisticated entrepreneur, discussing the possibility of joining a board of advisors and investing. It was simply a way to open up a discussion by sending him the latest offering documents that we had available. The documents contained a great deal of information, including links to the data room where original sampling test results, maps, reports, etc. etc. were available to any investor. He did not invest. I do not believe that this shows severe recklessness or any intent to mislead nor was any damage done as he did not invest. The next communication to investors which was the second quarter 2012 update (Resp. Ex. 29), which again was not an offering document, informed the investors that Cobre Sur did not work out. This again demonstrates that there was no intent to mislead as we did communicate bad news, not just positive things. As another example of sharing negative, not just positive news, is that we had also informed our investors that the Brazil project was having issues via our first quarter 2012 update (Resp. Ex. 28). The Brazil project was basically on a stand-still sometime in the second quarter of 2012.

J. The ALJ Erred in Stating that "a material misrepresentation occurred later regarding the preconditions allowing the triggering of

the conversion option, namely, when "the financing and closing of the acquisition on the land and rights for gold deal known as Baltalha [sic] event" occurred. Div. Ex. 51 at 1. Aurum represented that it had "[c]losed on acquiring the 50% interest in Batalha".

This does not make sense since in the preceding paragraph the ALJ stated that "I do not find a material misrepresentation in the language that Aurum "will have a 49% interest in the JV that owns the land and rights to the gold property" because, at the time the term sheet was issued, it was the intent to obtain the rights to the gold property to the extent permitted by Brazilian law. *Id.* at 1."

In fact upon signing the JV agreement dated December 2011 (Resp. Ex. 18), Aurum would indeed own 50% of Batalha. (Resp. Ex. 18, p2). The 49% interest that the ALJ referred to above is simply based on a prior similar JV agreement dated September 2011 (Resp. Ex. 19) and which the December 2011 JV agreement replaced.

K. The ALJ Erred in Concluding that the Conversion Option was not available to Note Holders. The ALJ stated that Under the Notes, "investors could receive principal plus interest at maturity nine months later, in spring 2012. Div. Ex. 51 at 1. However, the term sheet also provided that upon the triggering event, "the principal and all accrued but unpaid interest may be converted, at the election of the Holder, into ... [Aurum Mining] LLC units at the offering price contained herein less a 50% discount." *Id.* By those terms, because the land and rights for Batalha were never obtained, the conversion option was unavailable."

It is incorrect to state that the Note Holders did not have a conversion option.

The "Term Sheet" that the ALJ refers to was not used for Investors' investments, and in any case, it stated that it was only 'proposed' and also stated the following at the bottom in bold: "This Term Sheet is not an offer to Purchase Securities and any such offer will only be made by the subscription agreement and associated memorandum." (Div. Ex. 51)

The actual wording in the executed Notes stated as follows: "...shall be due and payable on '*date*' or, *if converted at Holder's choice prior to such date,...*". In italics for emphasis.

Note Holders thus did have a conversion option independent of closing conditions or anything else. (Resp. Ex. 14)

CONCLUSION

I respectfully submit that I am not a menace to society and that the lifetime bars proposed by the ALJ are not commensurate with my past, current, or potential future behavior. For the reasons stated above, I respectfully ask the Commission to vacate the industry and penny stock bars, and to reconsider whether, although I admittedly made mistakes, my actions, as distinguished from Crow's, amounted to willful violations.

As the ALJ noted, I may have made mistakes and judgment errors, but I worked hard, acted sincerely and with good intentions, and tried to do right by

investors. My track record before and since this SEC case shows that I am not a risk to the public or at risk of committing future violations.

For the reasons stated above, I respectfully request that the Commission vacate the:

1) permanent bar from association with a broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization;

2) permanent bar from participating in an offering of penny stock;

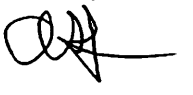
3) permanent bar from acting or serving as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and

4) disgorgement of $50,000 plus prejudgment interest.

I respectfully ask for the Commission's patience and understanding for any mistakes and procedural errors I have surely committed in composing this Brief, as I was not able to afford to hire counsel to prepare it for me.

Dated: April 21, 2016

Respectfully submitted,



By:_____
Alexandre S. Clug

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2016, I served a copy of this Petition by fax and mail to the Commission's Secretary, Office of Administrative Law Judges, U.S. Securities and Exchange Commission, 100 F Street, NE, Mail Stop 1090, Washington, DC 20549, and a true and correct copy of the foregoing was furnished via Electronic Delivery to:

Office of the Administrative Law Judges at alj@sec.gov
Honorable Judge Jason S. Patil at Patilj@sec.gov
David Stoelting at StoeltingD@sec.gov