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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16318

In the Matter of

MICHAEL W. CROW,
ALEXANDRE S. CLUG,
AURUM MINING, LLC,
PANAM TERRA, INC., and
THE CORSAIR GROUP, INC.,

Respondents.

DIVISION OF ENFORCEMENT'S BRIEF IN SUPPORT OF ITS CROSS-PETITION FOR REVIEW, AND IN OPPOSITION TO ALEXANDRE S. CLUG'S PETITION FOR REVIEW OF INITIAL DECISION

DIVISION OF ENFORCEMENT

David Stoelting
Senior Trial Counsel
Securities and Exchange Commission
New York Regional Office
200 Vesey Street, Suite 400
New York, NY 10281-1022
(212) 336-0174

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The Division of Enforcement respectfully submits this memorandum of law in support of its Petition for Review dated April 1, 2016, and in opposition to the Petition for Review of Respondent Alexandre S. Clug dated February 29, 2016.[1]

PRELIMINARY STATEMENT

During the eight-day hearing, Administrative Law Judge Jason S. Patil heard evidence of schemes devised by Crow and Clug involving three entities: Aurum, Corsair, and PanAm. In the Initial Decision, the ALJ found that the evidence proved that Clug and Crow, along with their entities, Aurum and Corsair, had committed a range of violations, including fraud, and imposed sanctions.[2]

With regard to PanAm, however, the public company that Crow and Clug founded and ran for two years, the ALJ found only a single negligent violation by PanAm. This narrow liability finding was grounded in the ALJ's conclusion that Crow was merely a "consultant" rather than a *de facto* officer of PanAm. Contemporaneous documents, however, including

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[1] This brief adopts the following abbreviations: Alexandre S. Clug ("Clug"); Michael W. Crow ("Crow"); Aurum Mining LLC ("Aurum"); The Corsair Group, Inc. ("Corsair"); PanAm Terra, Inc. ("PanAm"); Initial Decision dated February 8, 2016 ("ID"); Division Exhibit ("DE"); and Respondent Exhibit ("RE").

[2] Specifically, the ALJ found that Crow, Clug and Aurum violated Section 17(a) of the Securities Act of 1933; Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; and that Crow and Clug aided and abetted and caused Aurum's violations of those provisions. Regarding Corsair, the ALJ found that Crow, Clug and Corsair violated Exchange Act § 15(a)(1); Crow and Clug aided and abetted and caused Corsair's violation; Crow violated Exchange Act §15(b)(6)(B); and Clug aided and abetted and caused that violation. Finally, the ALJ found that PanAm violated Securities Act § 17(a)(2). ID at 1.

For the Aurum and Corsair violations, the ALJ imposed collateral industry and penny stock bars on Crow and Clug, as well as cease-and-desist orders. The ALJ also ordered Crow to pay disgorgement of $447,971, plus prejudgment interest, and a third-tier civil penalty of $982,500. The ALJ set Clug's disgorgement at $406,591.51, but reduced it to $50,000, plus prejudgment interest, based on an inability to pay, and imposed no penalty. ID at 77. Neither Crow nor Clug were sanctioned for PanAm's violation, and no sanctions were imposed on Aurum, Corsair or PanAm. ID at 69-83.

dozens of emails, conclusively prove Crow's role as a *de facto* officer. Crow was involved in everything PanAm did. He conceived PanAm with Clug; shepherded it through the transformation from a private shell to a public company; provided its initial funding, a $25,000 loan; solicited investors; negotiated business agreements with potential partners; helped Clug oversee the CFO, Angel Lana[3]; and arranged for Steven Ross to become CEO when Crow became unsatisfied with Clug's performance.

In addition to the contemporaneous documents and emails, Crow's dominance over PanAm is evidenced in a series of events relating to a Convertible Note issued to Crow in exchange for his $25,000 loan to PanAm. In September 2012, Crow exercised a right to convert, which entitled him to receive 1.9 million PanAm shares, or 28.4% of PanAm's stock. In need of cash to pay back alimony and child support, Crow directed PanAm's CFO, Angel Lana, to find purchasers for 300,000 of these shares at 25 cents per share, a price selected by Crow to maximize his payout. The investors were never told that they were buying shares from Crow instead of directly from PanAm. These investors thought their investments would be used to fund PanAm's operations; instead, Crow received a windfall of $75,000, tripling his initial investment.

Crow's Convertible Note had been reported as a liability in PanAm's Form 10, and in all of its periodic reports. After the conversion, PanAm issued one Form 10-K and two Forms 10-Q, which falsely reported that the Note had been extended. Clug, who was PanAm's board chairman at the time, helped conceal Crow's conversion from PanAm's auditor by backdating an audit confirmation document. At the hearing, the auditor testified that the conversion was

[3] In a settled OIP dated December 16, 2014, the Commission found that "Lana willfully violated Sections 17(a)(2) and 17(a)(3) of the Securities Act," and imposed a cease-and-desist order and a $50,000 penalty, and barred Lana from appearing or practicing before the Commission as an accountant. DE 803.

material, that it should have been disclosed, and that his firm would have withdrawn from the representation had it been made aware of the conversion.

The ALJ discounted the documentary evidence, and instead relied on the hearing testimony of Clug, Lana and Ross that Crow's role was merely that of a consultant. Clug, Lana and Ross, however, were PanAm insiders who knew about Crow's history as a recidivist and his officer-and-director bar; as a result, to hide their own culpability they had an incentive to minimize Crow's role. The ALJ also relied on the hearing testimony of a board member, Henry Gewanter, who was far removed from PanAm's activities and knew next to nothing about what Crow actually did at PanAm.

The ALJ made two other findings related to Crow's Convertible Note transaction that were unsupported by the evidence. First, the ALJ found that, based on the testimony of CFO Lana, the elements of advice-of-counsel defense were satisfied. ID at 66. The record, however, is devoid of contemporaneous evidence of legal advice being given or received. Second, the ALJ found that "Clug was not directly involved in this conversion and sale," and that Lana "took responsibility" for the nondisclosure, and "apologize[d] for his failure to disclose." ID at 67. Clug, however, was directly involved in all aspects of the transaction, and took steps to conceal it from the auditor. Lana, moreover, neither apologized nor accepted responsibility; instead, Lana testified that the conversion was immaterial and that he had informed the auditor of the conversion.

In addition to the finding that Crow was not a *de facto* officer of PanAm, the Division's appeal challenges four other aspects of the Initial Decision. First, the ALJ incorrectly determined disgorgement for Crow's and Clug's Aurum and PanAm violations. In offering fraud cases, courts routinely measure disgorgement by determining the amount raised from

investors minus any amounts returned to investors. The costs of operating a fraudulent issuer should not reduce the amount to be disgorged. In addition, issuers and fraudsters who collaborate, as Crow, Clug, Aurum and PanAm did, are appropriately found jointly and severally liable for the disgorgement amount.

The ALJ instead based disgorgement on the amounts actually received by Crow and Clug, rather than the total amount raised, and did not hold Crow, Clug, Aurum and PanAm jointly and severally liable. The ALJ also found that Aurum's and PanAm's "startup and operational costs" need not be disgorged. The overall result is inequitable. Crow and Clug raised a total of 4,395,775 from Aurum and PanAm investors, DE 2A at 4, 11, but they have been ordered to disgorge a total of only $497,971. In effect, Crow and Clug are being allowed to retain a total of $3,897,804 in investor funds that were received through fraud.

The remaining three bases of the Division's appeal are the ALJ's reduction of Clug's disgorgement to $50,000 and his penalty to zero; the ALJ's decision not to impose an officer-and-director bar on Clug; and the failure to impose any sanction on Aurum, PanAm and Corsair. The Division submits that Clug's inability-to-pay reduction was not warranted, and Clug should be required to pay a civil penalty. In addition, Clug should be barred from being an officer-or-director of a public company, and sanctions should be imposed on Aurum, PanAm and Corsair.

Clug's appeal asks the Commission to reverse the ALJ's liability findings with regard to the Aurum and Corsair schemes and to vacate the collateral and penny stock bars and the cease-and-desist order. Clug argues that the ALJ should not have found certain misrepresentations and omissions to be material, that Corsair was not a broker-dealer, and that the bars were not appropriate. Each of these arguments is without merit. The ALJ identified numerous material and clearly false misrepresentations and omissions in Aurum's investor solicitations, all of which

were written by Crow and Clug. That Crow and Clug operated Corsair as an unregistered broker-dealer was based on indisputable evidence: a written referral agreement Corsair entered into, and bank records proving that Corsair received transaction-based compensation. Given the findings of Clug's egregious conduct, the industry and penny stock bars were appropriate. Clug's Petition for Review should be denied in all respects.

STATEMENT OF FACTS

The Division incorporates by reference the Findings of Fact in the Initial Decision pertaining to Crow's and Clug's backgrounds (ID at 3-5, 6); and Aurum and Corsair (ID at 7-9, 15-54). The evidence summarized below relates primarily to Crow's and Clug's conduct relating to PanAm.

Clug, With Knowledge of Crow's Recidivism, Teams Up With Crow in 2010

From 2005 to 2008, Clug reported to Crow as Chief Operating Officer at DC Associates, a management company that Crow controlled in New York. Tr. 1466-1468. In 2008, DC Associates "completely died," and Clug spent the next several years liquidating DC Associate's assets and making distributions to its investors. Tr. 1468. During his years working for Crow before 2010, Clug knew about the 1998 and 2008 SEC federal court actions against Crow, the final judgments against Crow that those Courts imposed, as well as the follow-on bars that the Commission imposed after both proceedings. Tr. 1468-1471.

In early 2010 – shortly after Crow filed his Chapter 7 bankruptcy petition – Crow sent to Clug a "Memo to Alex . . . to get us started again," proposing new investment ventures, with Clug as Crow's "right hand man." DE 810. Crow and Clug first focused on organizing PanAm as a public company. Crow and Clug handled all of the arrangements, including the "financial

model" to be included in the Form 10 filing, to transform the inactive entity, Ascentia Biomedical Corp., into PanAm. DE 30.

Crow Provided PanAm's Initial Funding, and PanAm Issued Him Two Convertible Notes in Return

Crow provided PanAm's initial funding through transfers: August 2010 ($15,000), September 2010 ($5,000) and December 2010 ($5,000). DE 2A at 11; DE 23. In return, in March 2011, PanAm (under its prior name Ascentia Biomedical) issued two "On Demand Convertible Notes," for $25,000 and $28,000, to Pacific Trade, Ltd ("Pacific Trade"), a Crow-owned company. DE 746, 747. The $25,000 note became convertible into 1,935,284 shares, and the $28,000 note became convertible into 473,204 shares, for a total of 2,408,488 shares - representing 28.4% of PanAm's common stock. DE 197 at 38-39 (10-K); DE 717 at 54. The Convertible Notes were attached as exhibits to PanAm's April 20, 2011 Form 10 filing, and the Notes were disclosed in periodic filings as "Notes Payable" liabilities on the balance sheet. DE 715 at 3 (10-Q); DE 717 at 28 (10-K). Both notes were to mature in September 2012. *Id.* at 54-55.

The Convertible Notes contained an "ownership limitation" providing that any conversion could not cause Pacific Trade to acquire more than 4.99% of PanAm's shares. DE 746 at 1; 747 at 1. The purpose was to prevent Crow from triggering the reporting obligations under Section 13(d) of the Exchange Act that apply to holders of 5% or more of a company's stock. Tr. 1485-1486. This limitation, however, was "contractual" and "could be waived by the Company." DE 717 at 54-55 (10-K).

On November 23, 2012 – more than eighteen months after the Form 10 filing – PanAm for the first time disclosed in a periodic filing that Michael Crow was the beneficial owner of the shares Crow was entitled to acquire through the Convertible Notes.[4]

Crow and Clug Selected PanAm's Board Members

In October 2010, Crow selected Chad Mooney for one of the two independent board seats. Tr. 2083 (Clug: "Mr. Crow recommended Chad Mooney"); DE 741 (10.13.10 Crow to Clug email: "Chad [Mooney] has agreed to join the Board of Pan AM Terra. great news. great guy"). Mooney then emailed Clug that "michael has been speaking to me for some time re Pan Am Terra." DE 741. On December 16, 2010, Mooney emailed Clug that he was "very proud of what you/michael/we are building." DE 744.

Like Crow, Mooney had filed for Chapter 7 bankruptcy protection. Crow testified that Mooney had "lost all his money" in the 2008 mortgage crisis, and "was trying to rebuild his credit." Tr. 1110.

One consequence of Mooney's bankruptcy was that he could not get a [redacted], and had to ask Crow whether PanAm could supply one. *Id.* Mooney then emailed Clug, stating "Michael [Crow] [redacted] etc." DE 787 at 1. Mooney's bankruptcy was disclosed in PanAm's filings, DE 708 at 22 (Form 10), and

[4] PanAm's eventual disclosure of Crow as the beneficial holder followed numerous exchanges between Clug and the Division of Corporation Finance focusing on, among other things, the Convertible Notes. DE 709 at 6 (5.27.11 CorpFin to Clug: asking if holder of Convertible Notes "is a related party"); 710 at 16 (8.22.11 Clug to CorpFin: "The holder of the note is not a related party."); 719 at 1-2 (1.30.12 Clug to CorpFin: list of PanAm beneficial shareholder omitting Crow/Pacific Trade); 830 at 1 (3.16.12 CorpFin to Clug: "Considering the substantial nature of the convertible note, please revise to discuss the relationship between Mr. Clug and Pacific Trade and its control person."); 831 at 2-3 ("Michael Crow has sole control over the voting and disposition of shares owned by Pacific Trade." . . . [The 4.99%] limitation is contractual only, and could be waived by the Company.").

Clug testified that Mooney's bankruptcy was important information for investors to have. Tr. 1488-1489.

Crow also reached out to others about serving on PanAm's board of directors. DE 27 at 1 (11.12.10 Crow email to Daniel Najor re "board seat": "do you really want to be involved with pan Am Terra?"). Clug selected Henry Gewanter, who ran a public relations firm in London, England, as the other independent director. Tr. 1827.

Crow Played a Primary Role in Negotiating an Engagement Agreement With Mickelson Capital

On November 19, 2012, PanAm entered into an Engagement Agreement with Mickelson Capital Consulting ("Mickelson"), a management services firm based in California run by Simon Leach ("Leach"). DE 513. Leach was a contact of Crow's. Tr. 1135.

The Engagement Agreement required PanAm to pay Mickelson a $6,000 "monthly retainer" as well as a $25,000 "start-up cash fee." DE 513 at 7. PanAm was also obligated to grant Mickelson warrants to purchase "a 5% equity position" in PanAm, and other forms of stock and cash incentive compensation. *Id.* In return, the "scope of services" Mickelson was required to provide were primarily development of offering materials and creating a board of advisors. DE 513 at 1-2.

The Engagement Agreement with Mickelson resulted from negotiations during 2011 and 2012 between Crow and Leach. Crow prepared and circulated term sheets and discussed and resolved issues as they arose. As his emails show, Crow acted on behalf of PanAm and Leach, who negotiated on behalf of Mickelson, clearly recognized Crow's authority. In the latter stages of the negotiations, Crow involved Steve Ross, whom Crow had arranged to become PanAm's part-time CEO in July 2012. Crow and Ross took part in a meeting on October 17, 2012, in which final terms were agreed upon.

The numerous emails between Crow and Leach during 2011 and 2012 demonstrate Crow's negotiations on behalf of PanAm:

April 2011 emails

- 4.25.11 Crow to Leach: "I have attached a proposal on how we can have your fund take an early loan stake [in PanAm] and then double its money when we complete the raise, the downside is addresse[d] by giving you a first on assets so if nothing ever[] happened you would have a shell which is worth over $250k on the OTCBB. . . Let me know when you want to discuss the term sheet. . . . this week would be ideal." DE 42 at 1. Crow attached to this email a "Proposed Term Sheet" for a $100,000 "Senior Convertible Note" in PanAm which would be "[s]ecured by all assets of the company and shell itself (estimated value on OTCBB over $250,000)." DE 42 at 2-3.

- 4.26.11 Crow to Clug: "on phone with mickelson group guys for hr and half.. very good results after initial issues were overcome." Clug's response: "Great!!!" DE 43 at 1.

June 2011 emails

- 6.13.11 Leach to Crow/Clug: "Gents Please provide the following ASAP. . . First round comments from SEC on Form 10." DE 63 at 2.

- 6.13.11 Crow to Leach/Clug: "spoke to alex this am, he will send you pan am info you request. . . . we are looking forward to launching this with you." DE 63 at 2.

- 6.13.11 Leach to Crow/Clug: "The one I don't have is the conv-preferred term sheet for Panam...that is the deal we will roll into the raise. As discussed with [Crow] that may become its own fund as it has the largest ongoing appetite for capital." DE 63 at 1.

- 6.14.11 Clug to Leach/Crow: "Simon, attached is the PanAm Draft Preferred Term sheet and the PanAm Draft Convertible Term Sheet." *Id.*

- 6.14.11 Crow to Clug/Leach: "Simon we will be updating [Term Sheet] as we go as well." *Id.*

May 2012 emails

- 5.8.12 Crow to Clug: "Subject: Mickelson." "[W]ent very well. They will lead term sheet and go for min 100 mm. . . . Using panam as asset mgt co is correct plan." Clug response to Crow: "Great!" DE 376.

- 5.22.12 Crow to Clug: "I sent you a couple days ago term sheets to review for pan am, one for mickelson and one for Europe debt deal." Clug response to Crow: "Thank you. I will review asap." DE 395.

September 2012 email

- 9.12.12 Crow to Ross: "I will be in LA and SD the week of October 15th. I would like to set up the meeting with Mickelson Capital in Oceanside with you to introduce you and

discuss how they want to participate in the investment in farmland. They had talked about leading the $250 million." DE 464.

October 2012 emails

- 10.17.12 Leach to Crow: "Gents, Thank you for an enjoyable meeting today. I'd like to recap my understanding and next steps. . . . Michael and Steve. If you have more details on the current business plan than the presentations shared with us today please send them to me." DE 492 at 1.

- 10.18.12 Ross to Gewanter/Mooney/Clug: "Henry and Chad, Michael and I had a terrific meeting with Mickelson Capital yesterday, and they are very interested in leading a $100 million+ debt placement for us." *Id.*

- 10.23.12 Leach to Crow/Ross: "I have worked up three options for a comp structure. If you like this I will write up a formal proposal for you with detail on the engagement." DE 512 at 7.

- 10.24.12 Ross to Leach/Crow: "Michael has been travelling back to Peru, so we will get back to you as soon as Michael and I have had a chance to catch up." DE 512 at 6.

November 2012 emails

- 11.3.12 Leach to Crow/Ross: "When do you want to discuss our deal?" DE 512 at 5.

- 11.4.12 Ross to Leach/Crow: "My apologies for the delay. Michael and I were able to catch up on Thursday, and Michael was going to give you a call . . . We definitely want to move things forward . . . Michael and I felt that collaborating with Mickelson over the range of services you suggested makes sense, and that an engagement agreement and outline of terms for acquisition funding would help us close on at least a portion of the seed capital over the next several weeks." *Id.*

- 11.5.12 Leach to Ross: "I spoke with Michael and we are pretty close to agreement. Could you please send me the Panam latest Cap table and link to the filings." *Id.*

- 11.13.12 Ross to Crow: "Michael, Mickelson revised two areas on the attached. Based on comments from their attorney, they modified the language to make it clear that they were not raising the money directly but rather assisting us in raising the money . . . They also wanted the stock granted now with a claw back feature tied to performance . . . I pushed back a bit on the timing of the $25k, and thought that I would ask for a 30 or 45 day window . . . Please give me your comments (or call Simon directly if you like)." DE 512 at 2.

- 11.14.12 Ross to Crow: "Michael, I wanted to get back to Simon this morning – any feedback?" *Id.*

- 11.14.12 Crow to Ross/Clug: "Your points are valid and I would concur. It is important that they and we all do everything per our attorney advice . . . Your call but seems like it is acceptable to all parties." DE 512 at 1-2.

- 11.14.12 Ross to Crow: "I wouldn't think that pushing back the $25k should be a sticking point, but the sensitive issue I have is their compensation associated with 'seed capital.' Was the intention for Mickelson to receive the additional $50k and 1.25% equity stake regardless of whether the seed capital came from their sources?" DE 512 at 1.

- 11.14.12 Crow to Ross: "don't think so but they are smart and may know it is their association that makes it easier to rasie [sic] the money." *Id.*

- 11.14.12 Ross to Crow: "That's the argument I would make from their side – should I push back?" *Id.*

- 11.14.12 Crow to Ross: "Think you need to make the deal. Only way to move forward." *Id.*

- 11.14.12 Ross to Crow: "We're in complete agreement." *Id.*

- 11.14.12 Crow to Ross: "Simon called me today and was going to call you. . . pan am came up. They are ready to go." *Id.*

- 11.8.12 Leach to Crow, Ross: "Sorry for the delay, we have had a few rounds structuring the engagement fees . . . We have changed them a little from our discussion but well within the spirit of our talks." DE 505.

- 11.9.12 Crow to Leach, cc Ross and Clug: "Also, we discussed the need for a pro forma term sheet attached on the structure prop[o]sed by [Mickelson] for the A/B shares. . please get asap." DE 505.

On November 10, 2012, Ross (without copying Crow) emailed the proposed agreement to board members Mooney and Gewanter. DE 507. Gewanter, however, objected to the $6,000 monthly retainer and a $25,000 start-up cash fee. *Id.* Ross immediately forwarded Gewanter's critical email to Crow. *Id.* Crow curtly dismissed Gewanter's concerns: "Not sure [Gewanter's] comments make sense. Maybe [h]e can deliver capital and then talk?" *Id.*

Crow Negotiated With Potential Uruguayan Advisers to PanAm

Crow took part on behalf of PanAm in negotiations with a Uruguayan company named Ariel Investment Management. DE 248 (2.7.12 Clug to Crow email forwarding Uruguay

proposal: "FYR. Let's go over tomorrow."). Crow was listed as "required attendee" – the only PanAm representative – on a February 9, 2012, conference call with Ariel. DE 249; Tr. 1375-1376 (Crow testimony that he participated in call with Ariel). Clug then copied Crow on a follow-up email summarizing the conference call and put forward a proposal that "we have discussed amongst ourselves and that we believe is the best way to move forward." DE 250.

In November 2011, Crow emailed a potential PanAm investor about "our Uruguay partners" and identified Ariel as one of "two groups we are working with in Uruguay on a pipeline of potential acquisitions." DE 150. *See also* DE 184 (12.16.11 Clug to Crow email: "let me know your thoughts on" proposal from Ariel).

Crow Arranged for Ross to Replace Clug as PanAm's CEO

Crow was unhappy with Clug's performance as CEO. As Clug testified, "Crow was very upset with me on the late filings as an investor, and I think he wanted liquidity in his shares." Tr. 1657.

In October 2011, Ross – at Crow's request – signed an Independent Contracting Agreement with Corsair. Tr. 1633-1634. "Serving as CEO of portfolio companies" was listed as one of Ross's duties. DE 106. The next month, in an email to an investment banker, Crow described Ross as "[o]ne of our partners" and added that Ross was "an excellent public co CEO" and that "we have built several companies together." DE 128 at 1.

On May 14, 2012, Ross emailed Crow: "Are you still planning on getting me started this week?" Crow responded, "Yes. Myg [sic] with Alex tomorrow. All good." DE 380. Later in May 2012, Crow continued to update Ross on his actions to finalize Ross's role at PanAm: "Just talked toalex. Yes. All good. He sent employment contract. Need to do termination deal plus new corsair agreement as well." DE 397.

Crow drafted Ross's employment agreement with PanAm, and told Clug that he should review the draft "after the 15c211 is finished as well as 10k and 10q." DE 395.

On May 31, 2012, Crow emailed Ross:

> Contract for you is set and being incorporated into board package. Alex resigns etc. He is looking at pan am board meeting in Miami with you and board on Friday July 6. Would that work? Contract effective with meeting but has July 1 start date. Consulting for June of 5k can be paid when you get back and have call with Alex to start handoff. DE 398.

On July 6, 2012, Clug resigned as CEO and became Chairman of the Board of Directors, and Steven Ross became the part-time CEO. DE 431 (Board Resolution); DE 432 at 1 (Employment Agreement: "the position will be part-time employment").

During his nine months as part-time CEO, Ross looked to Crow for guidance. DE 454 (8.9.12 Ross to Crow email: "I'm a quick study, but I still need support from Alex/you. If this were a full-time role, maybe less so").

Crow Exercised Oversight of PanAm's CFO Regarding PanAm's Periodic Filings

As numerous emails show, Crow and Clug both exercised oversight as to Lana's preparation and filing of PanAm's periodic reports:

September 2011 emails

- 9.7.11 Clug to Crow: "On PanAm we need 10Q done, SEC review finished, symbol." DE 75.

- 9.25.11 Clug to Crow: "Angel says 10Q definitely finished tomorrow." DE 91 at 1.

May 2012 emails

- 5.12.12 Lana to Crow, Clug: "Hello Alex & Michael: ... The status of the accounting issues are as follows: 1. 10-K: The financial statements are completed. The notes will be completed today and by the end of the day all will be submitted to the auditors. 2. 10-Q: The accounting for the 1st quarter has been completed. I will prepare the financial statements tomorrow. It will be sent to the auditors on Monday." DE 768.

- 5.15.12 Clug to Lana/Salsavilca/Crow: "Look forward to seeing you both tomorrow. Here is a draft agenda to make sure we don't forget anything... PanAm Terra 2011 Tax

Return," "PanAm Funding – at what valuation, how much, PanAm 10K/10Q, 15C211. DE 381.

- 5.22.12 Clug to Lana/Crow: "Angel, as discussed, and as you know, this lack of progress/response is out of control for the CFO of a public company."); DE 394

June 2012 emails

- 6.1.12 Crow to Lana: "Status of work on pan am? Lets try to get some meetings for next week on whatever we can." DE 404.

- 6.1.12 Lana to Crow: "Tomorrow I WILL work on PanAm Terra, Inc. so that I can complete the F/S for 10-K and 10-Q." DE 774.

- 6.2.12 Clug to Crow, Lana: "Angel, what is status of 10K and 15c211?" DE 412 at 1.

- 6.3.12 Crow to Lana: "How did you do on your Pan am work?" DE 408.

- 6.5.12 Lana to Crow: "Subject: 10k status." "I will complete it today and call you." DE 411.

- 6.5.12 Crow to Lana: "cant wait! impt for all of us." *Id.*

- 6.6.12 Crow to Lana, cc Clug: "Now you wont take my calls? This is just not acceptable. . . . We cant have business partners that let us down so often. If you cant get the work finished on everything it is really best if we move the work and limit the damage. . . . You will have to explain to people that you are not the CFO of our affiliated entities." DE 414.

- 6.6.12 Lana to Crow: "Subject: 10K STATUS." "Hello Michael. . . . I not picking up the phone until I finish the 10-K. I am on a roll now and I will definitely finish it today." DE 415.

- 6.6.12 Crow to Salsavilca, cc Clug, Lana: "We really are frustrated, disappointed, unhappy. . . . I hope it doesn't come to this but if the work isn't done before Monday we are out of time and patience. And we need a smooth transition." DE 413

August 2012 emails

- 8.27.12 Lana to Clug, Crow: "Just sitting down now to complete the 10-K. I'll make arrangements with LS to see her this week to finish the 10-Qs." DE 459.

- 8.27.12 Clug to Lana, Crow: "We have been extremely late in our PanAm filings. This obviously has tremendous negative repercussions on all our plans. . . . I have received several calls from our Auditors very concerned with what is going on and conveying the message that the SEC has been on top of this as well and can only interpret these delays as red flags. . . . if you do not get these filings ALL submitted THIS WEEK I will have no choice but to recommend to the Board of Directors that you be immediately replaced

as responsible for any of our filings . . . This is the last thing that I wish to do, but I really do not know what else to do!" DE 459.

Crow Solicited Investors in PanAm

In addition to Mickelson, Crow pitched Pan Am to many of his own contacts, and Clug also included Crow in his investor solicitations. In January 2011, for example, Crow emailed a contact in Argentina stating "[o]ur farmland investment company is at www.panamterra.com." DE 35 at 3. In March 2011, Crow emailed prospective investors about PanAm, copying Clug, stating that "the form 10 being filed this week for it to return as a US public company." DE 39 at 1. Crow predicted PanAm would acquire "$100 million in assets" and that "we plan to double the asset size within 5 years." *Id.*

In November 2011, Crow emailed Clug about "a great two hour meeting" he had with potential PanAm investors "on farmland and Pan Am etc with a view towards seeing if they can add value in the fund raising and capital formation for this business." DE 150. Crow also attached the "short and long business plans," which he described as "[a] little outdated but good data" and offered to "draft a term sheet for a starting point." *Id.*

In December 2011, Clug emailed Crow regarding an investor solicitation: "Michael, let's work on term sheet to send Henry [Gewanter]." DE 190. During the next month, Crow and Clug developed the term sheet, and Crow advised Clug where to set the strike price for the warrants that were being prepared. DE 225 (1.12.12 Crow/Clug emails).

Clug regularly included Crow on emails relating to fundraising. DE 47 (5.6.11 Clug to Crow email advising Crow of broker-dealer "interested in discussing PanAm further"); 100 (10.6.11 Clug email to potential investor, copying Crow).

Clug Knew of and Assisted in Crow's Undisclosed Note Conversion and Secret Stock Sale

On August 27, 2012, while connecting through the Chicago airport en route to Peru, Crow learned that, [redacted], his passport was being held. Crow immediately emailed Clug that he was "stuck in the USA until I get this resolved." DE 796.

Two days later, Crow emailed Clug and Lana with a solution to "get my arrears handled so my passport is renewed." DE 460. Crow's proposal: "convert [the $25,000 note] in part into common shares and sell them in a direct private deal to accredited investor." *Id.*[5] On September 13, 2012, Crow emailed Lana asking "if you can at least get me that 25k ASAP." DE 465.

On September 14, 2012, Crow emailed Lana again "to summarize the structure we discussed on sale of Pan am shares at .25 cents. I will take my convert note and convert into common shares as much as needed." DE 468. *See also* Tr. 919:6-10 (Lana). Later that day, Crow sent Lana a "letter for investors to sign," in which the investor acknowledged "buying ___ common shares of Pan Am Terra at 25 cents per share." DE 467 at 2. The letter, however, did not state that Crow was the seller or that their funds would be transferred to Crow and not PanAm. DE 467 at 1-2.

Lana solicited three Aurum investors – Mitchell Melnick, Simon Stern and Elisa Ramirez – to purchase 100,000 shares each at the .25/share price that Crow dictated. At the time, PanAm had no revenue, no assets, and no market for its shares. Lana instructed each of the investors to transfer the $25,000 purchase price to Lana's personal checking account at Bank of America.

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[5] Crow's email to Lana also stated that "[PanAm attorney] Bob Brantl can oversee everything." *Id.* As discussed *infra* at 33-34, however, no contemporaneous documents exist showing that any legal advice relating to the conversion, the sales, or the nondisclosure of these events, was ever sought or received.

DE 466 (9.14.12 executed stock purchase letter); DE 485 at 2 (BOA records); Tr. 925-926 (Lana).

On September 18, 2012, Clug emailed Crow that "[Lana] says your $25k from Ramirez on track." DE 472 at 1. Crow, however, was anxious to receive the $75,000 and complained to Clug that "angel cant find the wires..not sure he is capable of administration." *Id.* Clug assured Crow that "[Lana] told me yesterday that both wires into his BofA accnt had come in." *Id.* Lana wired $50,000 to Crow on September 18 and $25,000 on September 24. DE 485 at 3.

The three investors did not know that their investments were transferred to Crow to pay his alimony and child support arrears. Tr. 927 (Lana), 159 (Stern testimony that he was never told his investment would result in "putting money in [Crow's] personal account"). Melnick testified that he believed that his $25,000 was going to fund PanAm's business operations. Tr. 69:5-12. Simon Stern also believed that his $25,000 would go to PanAm's business operations because he knew PanAm "would need money to get [off] the ground."[6] Tr. 158:15-20.

As his emails show, Clug – PanAm's board chairman – knew that Crow had converted, not extended, the $25,000 Note. On September 20, 2012, however, Lana emailed Clug, Ross and Crow that PanAm's auditor, Nathan Hartman of Peterson Sullivan, CPAs, had asked for "something in writing" regarding the status of the Convertible Notes. DE 475. Instead of making sure the auditor knew that Crow had converted the $25,000 Note, Clug emailed Lana that "[w]e had agreed to a 3 year extension and I thought the paperwork had been done. I will check." *Id.*

[6] At the time the investors' $75,000 was transferred to Crow, PanAm's Citibank account balance had dropped from $119,349 to $22,405. DE 2A at 14. Lana knew that these funds could have been used by PanAm for business operations. Tr. 927:14-16. *See also* DE 536 (1.31.13 Ross to Lana email: "I don't need to tell you how critical that $25,000 is to us. Please at least deposit the $10,000 regardless so we have something to work with").

On September 25, 2012, Crow signed auditor Confirmation Requests indicating the Notes had been "extended 3 years," and emailed them to Hartman, copying Lana. DE 477 at 1-3. *See also* Tr. 487:18-22. On October 4, 2012, Lana instructed Crow to submit the names of the investors to the transfer agent so the investors could receive their shares from Crow. DE 480. Crow agreed and requested the transfer agent information. *Id.*

Hartman emailed Clug and Ross on October 18, 2012, asking whether "these two notes have been officially extended? Can I get executed copies of the extensions if so?" DE 493. The next day, Clug emailed Ross and Lana: "I will take care of the note extension w Pacific Trade." *Id.* Clug then created Extension Agreements. DE 494, 496. The Extension Agreements Clug prepared stated that they had been "Signed on this 10th day of September 2012," although Clug signed them on October 24, 2012, and Clug signed as PanAm's "CEO" although Clug was not the CEO. *Id.* Clug's email to Lana and Ross with the backdated Extension Agreements stated: "I assume this has been reflected in 10K." DE 496. After obtaining Crow's signatures, Clug emailed the backdated Extension Agreements to Lana and Ross. DE 497.

Crow's conversion of the $25,000 Note gave him ownership and control of 1.9 million shares. Crow exercised that control by disposing of those shares: on November 9, 2012, Crow submitted instructions to the transfer agent relating to "conversion of the note in the amount of $25,000 plus interest representing 1,935,284 common shares when converted." DE 506 at 2. The list of names attached to Crow's letter included Melnick, Stern and Ramirez, for 100,000 common shares each. *Id.*

The 1.9 million shares represented 28.4% of PanAm's common stock, well above the 4.99% conversion limitation. Nevertheless, Clug, who was board chairman, CEU Ross, and

CFO Lana, permitted Crow to convert without seeking to enforce the 4.99% conversion limitation. Tr. 1017-1018.

After the conversion, PanAm made three periodic filings: two Forms 10-Q and one Form 10-K. Each of these filings falsely represented that the maturity date of the $25,000 note was extended to September 2015. DE 717 at 46 (10-K); DE 721 at 17 (10-Q); DE 724 at 14; DE 839 at 14 (10-Q). Clug – who knew that the $25,000 Note had been converted, not extended – signed the false Form 10-K as a Director. DE 717 at 58.

Hartman testified that Crow's conversion was not disclosed to him, that the conversion was a material transaction, and that Peterson Sullivan would have withdrawn as PanAm's auditor had it known of the transaction:

> Q. Did anyone at PanAm Terra ever tell you . . . that Michael Crow exercised the conversion option on the $25,000 note in September 2012?
>
> HARTMAN: No.
>
> Q. Is that something that would have been material for you to know?
>
> HARTMAN: Yes.
>
> Q. Did anyone ever tell you that he exercised the conversion feature on the $25,000 note and received the 1.9 million shares and that 300,000 of those shares were sold to three investors and that the $75,000 proceeds from that sale was then transferred to Michael Crow's bank account through the personal account of the CFO?
>
> HARTMAN: No.
>
> Q. Was all that information, information that would have been material to you as PanAm Terra's auditor?
>
> HARTMAN: Yes.
>
> Q. If you had found out about that transaction, . . . what would Peterson Sullivan have done?

HARTMAN: The transaction should have been disclosed, first of all. But in any event, if that was what had happened, and we knew about that, we would have withdrawn.

Tr. 489-491.

Crow, the only PanAm shareholder to make a profit on PanAm stock, earned a $50,000 premium from the conversion.

Crow Participated in PanAm's Only Board of Directors Meeting

PanAm's board of directors only met once, on July 6, 2012, in Miami. DE 431; Tr. 1830. Gewanter testified that Crow joined the meeting "briefly to give a presentation about various aspects of agricultural land in Latin America . . . a factual presentation about agricultural and financial aspects of land." Tr. 1829-1830. After the board meeting, Crow socialized with Clug and the board. Tr. 1833 (Gewanter: "after our board meeting . . . I did go out socially with Alex and Michael and Chad [Mooney]").

PanAm Paid Crow's Expenses

PanAm paid Crow's expenses when he travelled on PanAm business, for example, his trips to California negotiating with the Mickelson Group. DE 393 (5.21.12 Clug to Lana: "Attached is Michael's expense report. Half has been paid by Aurum, the other half by PanAm."); DE 511 (11.14.12 Crow to Clug, Lana: "If you want to allocate some % of the SD trip to PanAm, I would estimate it to be about $1,000 of the cost for the trip with steve Ross and the Mickelson Capital deal.").

Lana testified that PanAm paid Crow's expenses. Tr. 878:4-11. *See also* Tr. 912:15-16 (Lana: "I somewhat recall some expense reports being submitted by Mr. Crow to PanAm."). Clug submitted Crow's expenses to attend an agricultural conference in New York in April 2012. DE 392 at 2.

By Early 2013, PanAm Had No Money, No Assets, and the Engagement Agreement with Mickelson Produced Nothing

By February 2013, PanAm had spent all of the $400,000 raised from investors. DE 2A at 13-14; DE 800 at 3. Approximately one third of this amount was paid to Crow and Clug. DE 2A at 12.

Crow advised the board that the "[c]urrent path of Pan am makes little sense as Mickelson will take months to get a large investor and they want to be private anyway." DE 558 at 2. Mooney emailed that "after a long and thorough discussion with Michael," he intended to "resign from the board, effective immediately," unless PanAm could get a ticker symbol and start trading. DE 556.

In late February 2013, Ross emailed the board that "we do not have the money to pay for our auditors to begin their annual audit work, so we have gone as far as we can go with our SEC filings. . . . Angel's investor base is basically tapped out[.]"). DE 557 at 2. Shortly thereafter, in a Form 15 filing dated May 1, 2013, PanAm, which was almost entirely out of money (DE 2A at 14), terminated its reporting obligations. DE 841.

ARGUMENT

I. PanAm Willfully Violated Section 17(a)(1), and (3), and Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder and Crow and Clug Willfully Aided and Abetted and Caused Such Violations; PanAm Also Willfully Violated Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder; Crow and Clug Willfully Aided and Abetted and Caused PanAm's Violations; and Clug Willfully Violated Rule 13a-14 Under the Exchange Act

A. Legal Standards for the Antifraud and the Exchange Act Reporting Provisions

Section 17(a) of the Securities Act prohibits fraud in the offer or sale of a security, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit fraud in connection with the purchase or sale of a security. *Basic, Inc. v. Levinson*, 485 U.S. 224, 235 n.13 (1988) (citing *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969); *SEC v. Int'l Loan Network, Inc.*, 770 F. Supp. 678, 694 (D.D.C. 1991), *aff'd*, 968 F.2d 1304 (D.C. Cir. 1992).

To prove a Section 10(b) violation, the Commission must show material misrepresentations or omissions, or the existence of a scheme, in connection with the purchase or sale of securities, made with scienter. *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 766 (11th Cir. 2007) (citing *Aaron v. SEC*, 446 U.S. 680, 695-702 (1980)).

To show a violation of section 17(a)(1), the Commission must prove material misrepresentations or materially misleading omissions; in the offer or sale of securities; made with scienter. *Id.* Negligence is sufficient under Sections 17(a)(2) and (3). *Aaron*, 446 U.S. at 697.

Misrepresentations and omissions must be material to be actionable under the antifraud provisions. *See Basic,* 485 U.S. at 231. Information is considered material if there is a substantial likelihood that a reasonable investor would consider such information important in

making an investment decision or if the information would significantly alter the total mix of available information. *Id.* at 231-32. However, the information need not be important enough that it would necessarily cause a reasonable investor to change his or her investment decision. *SEC v. Meltzer*, 440 F. Supp. 2d 179, 190 (E.D.N.Y. 2006) (citing *Folger Adam Co. v. PMI Indus., Inc.*, 938 F.2d 1529, 1533 (2d Cir. 1991)).

Section 10(b) of the Exchange Act requires that the alleged actions be "in connection with" the purchase or sale of securities. The phrase "in connection with" "should be construed not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151(1972)).

Aiding and abetting is shown when there is a primary violation; substantial assistance to the conduct constituting the primary violation; and the requisite scienter. *vFinance Investments, Inc.*, Rel. No. 62448, 2010 WL 2674858, at *13 (July 2, 2010) (Commission opinion citing *Graham v. SEC*, 222 F.3d 994, 1000 (D.C. Cir. 2000)); *see also Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004); *SEC v. Treadway*, 430 F. Supp. 2d 293, 339 (S.D.N.Y. 2006). "A respondent who aids-and-abets a violation also is a cause of the violation." *Leaddog Capital Markets, LLC*, Rel. No. 468,2012 WL 4044882, at *13 (Init. Dec. Sept. 14, 2012) (citing *Graham*, 222 F.3d at 1085 n.35).

Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder require issuers with classes of securities registered with the Commission pursuant to Section 12 of the Exchange Act to file complete and accurate periodic reports with the Commission. Rule 13a-1 requires an annual report (Form 10-K) and Rule 13a-13 requires a quarterly report (Form

10-Q). Rule 13a-14 requires each report to include certifications as to the information in the report. No proof of scienter is necessary. *SEC v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998).

B. PanAm's Violation of Securities Act § 17(a)(2) in the Initial Decision

The ALJ found two limited violations by PanAm of Section 17(a)(2) of the Securities Act. First, the ALJ found "that PanAm incorrectly reported the facts and circumstances surrounding Crow's note conversion." ID at 66. Specifically, the ALJ found that the note was "officially convert[ed]" after the third quarter 2012[7]; that "the conversion was not reported as a subsequent event"; and that a "reasonable investor would have wanted to know whether a noteholder with the right to receive such a large number of PanAm shares had converted all or a portion of the note, as that conversion would affect other investors' ownership percentage." ID at 67.

Second, the ALJ stated that "I find Clug negligent in allowing" the PanAm Executive Brief, which was provided to investors, to falsely represent that an application for listing on the OTCBB had been submitted, when such an application was never submitted. The ALJ found this omission to be a "careless error in characterization, as opposed to an intentional or reckless act." ID at 67. The ALJ also found that Clug's "negligence is properly attributed to PanAm" because Clug was CEO when the Executive Brief was given to investors.

These findings, while justified, do not sufficiently reflect the scope of the wrongdoing with regard to PanAm. As set forth below, sufficient evidence exists to find Crow, Clug and

[7] The ALJ stated that "Crow did not officially convert the note until after the third quarter" 2012, meaning after September 30, 2012. Crow's conversion, however, should be considered to have occurred during September 2012, when Crow expressed his intent to convert and sold his shares. In any event, the conversion was complete by October 4, 2012, when Lana asked Crow to submit the investors' names to the transfer agent. DE 480.

PanAm liable for intentional or reckless fraud, and for nondisclosure under the Exchange Act reporting provisions.

C. Crow Acted as an Undisclosed *De Facto* Officer of PanAm

"[A] company [should] not be allowed to 'hide a significant figure in the management of a company' behind a vague title, such as 'consultant.'" *SEC v. Prince*, 942 F. Supp.2d 108, 134 (D.D.C. 2013) (citations omitted). Nevertheless, that is exactly what PanAm, with the assistance of Crow and Clug, did for nearly two years. PanAm failed to disclose in any periodic filing that Crow, a person with a pending bankruptcy proceeding, history as a recidivist and securities industry bars, was running PanAm as a *de facto* officer.

Courts look beyond the corporate title to the individual's functional role with the company, including the person's duties, responsibilities, and level of influence over company policy and affairs. *See Prince*, 942 F. Supp. 2d at 133 ("functional, fact-intensive analysis of an alleged officer's duties and responsibilities . . . is a fair and reasonable approach" in determining whether one is a *de facto* officer); *SEC v. Solucorp Industries, Ltd.*, 274 F. Supp. 2d 379, 382-87 (S.D.N.Y. 2003) (individual "consultant" was an officer because he performed a policymaking function and duties analogous to those of an officer); *SEC v. Enterprises Solutions*, 142 F. Supp. 2d 561, 574 (S.D.N.Y. 2001) (executive officers include "not only those formally designated as such, but also any person who performs a similar role for the company"); *CRA Realty Corp. v. Crotty*, 878 F.2d 562, 563 (2d Cir. 1989) (employee's functions, rather than title, determine whether he is an officer).[8]

[8] In addition, Exchange Act Rule 3b-7 defines an "executive officer" as a company's "president, any vice president . . . in charge of a principal business unit, division or function . . ., any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant." 17 C.F.R. § 240.3b-7. Exchange Act Rule

Crow performed policy-making functions similar to corporate officers, rather than as an outside consultant. Crow exercised significantly more authority and control over PanAm than did the defendant in *Prince*. The company in *Prince* was relatively large, with numerous departments and chains of authority. In contrast, PanAm's day-to-day affairs and policy making were handled by just two people: the CEO (whether Clug or Ross) and Crow.

Crow selected Steven Ross as CEO and Chad Mooney as director. *Supra* at 12-13. He conducted lengthy negotiations on behalf of PanAm with Mickelson Capital, which resulted in a press release announcing the deal – PanAm's only such agreement. Crow also oversaw PanAm's public filings and threatened to discipline CFO Lana for Lana's perpetual tardiness with the filings. *Supra* at 14. Crow was compensated for his work, both through reimbursement of expenses and through the Advisory Agreement with Corsair. *Supra* at 15-18, 20.

PanAm was a start-up company whose day-to-day operations were handled by two or three people. Other than the CEO and CFO, both of who were part-time, PanAm had no employees, and was run out of Clug's Miami apartment. DE 717 at 21 ("Our executive offices are . . . the residence of our Chairman of the Board"). Under these circumstances, a reasonable investor would have wanted to know that PanAm effectively was being run by Crow, a bankrupt individual who was barred from serving or acting as an officer or director of a public company and from associating with a broker-dealer. *See SEC v. Huff*, 758 F.Supp.2d 1288 (S.D. Fla. 2010) (imposing officer-and-director bar on behind-the-scenes person of public company for failing to disclose his involvement, bankruptcy and negative background).

PanAm's deliberate failure to disclose Crow's significant role in its operations was a material omission in violation of Section 17(a)(1) and (3) of the Securities Act, Section 10(b) of

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16a-1 defines an "officer" to include "any . . . person who performs similar policy-making functions of the issuer [as the company's named officers]." 17 C.F.R. § 240.16a-1(f).

the Exchange Act and Rule 10b-5 thereunder. Crow and Clug acted with scienter. Clug knew that Crow was acting behind the scenes controlling PanAm, and he knew about Crow's bankruptcy and industry bars. *See Huff*, 758 F.Supp.2d at 1347-48 (defendant took undisclosed position with company to avoid disclosing his prior criminal insurance dealings and debarment). Alternatively, Crow, Clug and PanAm acted at least negligently. *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012); *SEC v. U.S. Pension Trust Corp.*, No. 07-22570-CIV, 2010 WL 3894082, at *19 (S. D. Fla. Sept. 30, 2010).

The scienter of Crow and Clug is imputed to PanAm. *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 812 (2d Cir. 1975); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1096 n.16 (2d Cir. 1972) (scienter of an individual who controls a business entity may be imputed to that entity).

PanAm failed to identify Crow as an officer in its Form 10-K and 10-Q filings.[9] As CEO, Clug was primarily responsible for ensuring that PanAm's periodic filings with the Commissions were complete and accurate. Crow and Clug knew that PanAm's filings with the Commission did not disclose Crow's background and his role with PanAm, and signed certifications under Rule 13a-14. DE 824 at 22, 24; DE 825 at 22, 24.

Accordingly, PanAm willfully violated Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder; and Crow and Clug willfully aided and abetted and caused PanAm's violation. Clug further willfully violated Rule 13a-14 under the Exchange Act.

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[9] PanAm did not even disclose Crow's role as an alleged consultant. PanAm's only Form 10-K filed November 13, 2012, disclosed PanAm's Advisory Agreement with Corsair, but stated that the "consultation services . . . will be provided primarily by Mr. Clug." DE 717 at 55. The two Forms 10-Q filed in January 2013 referred to the Advisory Agreement as being with "an entity related to the terminated CEO," without referring to Crow or Corsair. DE 721 at 17; DE 724 at 17.

D. The ALJ's Finding that Crow Was Not a De Facto Officer

The ALJ concluded that "Crow served PanAm as an actual consultant and did not act as a policy-maker." ID at 66. In support, the ALJ stated that Crow did not "select" Ross as CEO, and that Crow's threats to fire Lana for late filings were not taken seriously. Both findings are contradicted by the evidence.

With regard to Ross's appointment as CEO in July 2012, the emails and other evidence support the conclusion that Crow brought Ross in to replace Clug. Crow's unhappiness with Clug's performance as CEO is undisputed. *Supra* at 12. In late 2011, Crow induced Ross, who had a long professional relationship with Crow, to sign a consulting agreement with Corsair, which provided that Ross would become "CEO of portfolio companies." *Id.*

Ross's emails to Crow in early 2012 show that Ross regarded Crow as his advocate for the position, and that Crow was essentially instructing Clug how the hiring will work. The points that the ALJ viewed as determinative – that Clug also knew Ross, and that Ross was regarded as a "sound choice" – merely underscore that Clug acquiesced in Crow's selection.

The ALJ also rejected the evidence showing Crow's oversight of Lana's handling of the public filings demonstrated *de facto* officer. The ALJ stated that "Lana never took the threat seriously," ID at 66, even though the evidence demonstrates the opposite. Lana's emails, in fact, show that at the time, Lana took Crow's threats seriously and that Lana was consistently responsive and deferential to Crow's demands. *Supra* at 13-14. Even Clug joined Crow's threats to dismiss Lana. *Id.*

In considering Crow's role, the ALJ also dismissed the extensive evidence showing that Crow negotiated on behalf of PanAm. ID at 66 ("the Division cites to its belief that Crow . . . negotiated on behalf of PanAm"). In numerous emails over nearly two years, however, Crow

took the lead in negotiating on behalf of PanAm, proposed conditions, drafted documents, and presented himself as a representative of PanAm. Not once did Crow ever indicate to Leach, his negotiating partner at Mickelson, that he did not speak for PanAm. Even Ross, the nominal CEO, deferred to Crow's judgment, as the contemporaneous emails show. *Supra* at 9-11.

The ALJ also erred by accepting at face value the testimony of Crow, Clug, Lana and Ross that Crow was merely a "consultant," even though this testimony was contradicted by contemporaneous emails and documents. Crow and Clug, of course, have obvious motivations to misrepresent Crow's role; indeed, they concealed Crow's role all during PanAm's existence.

Ross's testimony, that Crow "had nothing to do with PanAm," is not credible. Ross was a longtime Crow associate who was well aware that Crow was subject to an officer-and-director bar. Ross minimized Crow's role in the Mickelson negotiations, claiming that he merely "bounced a couple of ideas off Michael," and nothing more. Tr. 1641. The many emails that Crow sent and received demonstrate this testimony to be false. *Supra* at 9-11.

The ALJ also found that PanAm's board of directors and officer "set corporate policy and made decisions." ID at 66. The ALJ, however, did not cite to single such policy or decision that did not involve Crow. Crow cast a long shadow over PanAm, and the evidence shows that Clug, Lana, and the two "independent" directors never did anything of substance without first making sure Crow was notified and on board.

E. The Testimony of Gewanter and Mooney, the Two "Independent Directors," Should Be Given Little Weight

The ALJ acknowledged, in a significant understatement, that Gewanter "was unaware of some of Crow's activities." ID at 66. By his own admission, Gewanter was almost totally ignorant of Crow's background and his actions at PanAm. Gewanter testified that "Crow never had anything to do with running the company," Tr. 1831, 1834, but he did not know that Crow

billed expenses to PanAm. Tr. 1838. Gewanter also was not aware of Crow's role in Ross' hiring as CEO. Tr. 1836. Gewanter knew that Corsair had "a modest consultancy contract to advise PanAm Terra" but he did not know that Crow was an owner of Corsair. Tr. 1836. Gewanter also testified that he "was not aware of [Crow] being a shareholder" of PanAm, and was "not aware of any convertible notes" issued to Crow. Tr. 1838, 1841. Gewanter did not know that Crow had been barred from being an officer or director of a public company, Tr. 1833, and "was not aware of any [Crow] bankruptcy." Tr. 1833.

Gewanter, who sent an email criticizing the Mickelson deal, also was unaware of Crow's prominent role in negotiating the Mickelson Capital deal. Tr. 1836 (Gewanter: "Q. Were you aware of any involvement by Michael Crow in PanAm's negotiations with Mickelson Capital? A. No.").

The other "independent" director, Chad Mooney – who was an old friend of Crow's (tr. 1108) – signed a brief, one-page "Sworn Statement" stating that "Crow did not perform any service for PanAm other than that of a consultant through Corsair." RE 160. In his "Sworn Statement," Mooney claims that he attended "meetings" of the PanAm board, and that "Crow did not participate in any of the meetings." *Id.* PanAm only had one board meeting, however, and Crow did participate in that meeting, as Gewanter testified. Tr. 1829-1830, 1833. Mooney, in fact, emailed Crow shortly after the July 2012 board meeting stating: "Its great to be in business with you michael. I wish that I could do more for you." DE 446 at 2. Mooney's own emails, moreover, show that Mooney regarded Crow as involved with PanAm on a policymaking level. DE 741, 744, 461, 462, 556. For these reasons, and because the Division did not have an opportunity to cross-examine this witness since he did not testify live, Mooney's "Sworn Statement" should be given little weight.

F. Clug's Conduct in Connection With the Conversion

Crow's dominance of PanAm is also shown through the Convertible Note scheme, the only goal of which was to enrich Crow. Clug, Ross and Lana all acquiesced, even though they knew that the investors and PanAm's auditor did not know the truth. And Clug, Lana and Ross completely ignored the 4.99% blocker provision when Crow received his shares, even though Clug referenced the blocker in his letter to CorpFin and touted it in periodic filings regarding the Convertible Notes.

Crow had the right to convert the $25,000 Note into PanAm shares "on demand." The Note, however, did not require PanAm to located buyers for those shares at a price dictated by Crow. Nevertheless, when Crow told Clug and Lana that he wanted Lana to find buyers for 300,000 of his unregistered shares, at 25 cents per share, Clug and Lana readily agreed. The 25 cents per share price had no logical rationale other than to enrich Crow. PanAm's Form 10-K filed November 13, 2012, in which PanAm's auditor issued a "going concern" opinion, stated that there was "no market for the Company's common stock, nor has there been any price quoted publicly." DE 717 at 22, 27.

The 4.99% conversion cap, which PanAm represented in every periodic filing would prevent Crow from acquiring more than 4.99% of PanAm, was ignored. No evidence exists than Clug, Lana or Ross sought to enforce the limitation. The ALJ found that "[t]he Division did not establish that Crow ever owned or controlled in excess of 4.99% of shares of PanAm." ID at 66. The evidence, however, is undeniable that Crow possessed 28.4% of PanAm when he converted,

given that Crow directed the disposition of the 1.9 million shares, or 28.4% of PanAm, that he received through the conversion.[10]

The ownership limitation, at least in theory, was supposed to cap Crow's acquisition to 4.99%, and if the ownership limitation were valid and binding, it could have operated to prevent Crow from acquiring shares in excess of the cap. *See Levner v. Prince Alweed*, 61 F.3d 8, 9-10 (2d Cir. 1995) (finding conversion cap at issue to be valid). The Commission, however, has taken the position that the validity of conversion caps "must be examined on a case-by-case basis to determine whether they are binding and valid. Factors that may indicate that a conversion cap is *illusory* include whether the cap: is easily waivable by the parties (particularly the holder of the convertible securities); lacks an enforcement mechanism; [or] has not been adhered to in practice[.]" Amicus Brief of Securities and Exchange Commission in *Levy v. Southbbrook Int'l Inv. Ltd.*, 263 F.3d 10 (2d Cir. 2001) (emphasis in original) (available at www.sec.gov/litigation/amicusbriefs).

These factors support the conclusion that the 4.99% cap in the Convertible Notes was illusory. The PanAm conversion cap "could be waived," as PanAm stated in its Form 10-K. DE 717 at 55. In addition, the cap had no enforcement mechanism, such as a notice provision. And it was ignored at the time Crow exercised his conversion rights. Lana testified that he was "not aware" of anyone taking steps to enforce the 4.99% blocker, and that at the time he "wasn't thinking of it at all." Tr. 1017-1018. Indeed, Crow and Ross were copied on the email in which

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[10] Under Exchange Act Rule 13d-3, beneficial ownership of a security included the right to acquire that security. 17 C.F.R. § 240.13d-3(d)(1)(i). As a result, since Crow could exercise his conversion rights "on demand," Crow was the beneficial owner of 1.9 million PanAm shares, or 28.4% of PanAm. In addition, beneficial ownership encompasses the right to dispose of shares, which Crow did through his instructions to the transfer agent.

Crow directed the disposition of his 1.9 million shares, and neither sought to enforce the 4.99% conversion cap.[11]

The conversion and the subsequent stock sale demonstrate the power that Crow exerted over PanAm. It is inconceivable that a company's mere outside "consultant" could ever direct a public company's CFO to sell shares at an arbitrary price selected only to enrich the "consultant," and that the CFO would comply and then conspire with the board chairman to conceal the conversion and sale from the company's auditor.

G. The Elements of Advice of Counsel Defense Were Not satisfied

The ALJ stated that "based on Lana's testimony, the requirements for an advice of counsel defense were satisfied, in that Ross and Lana made a complete disclosure of intended conduct, received Brantl's advice that the intended conduct was legal, and relied in good faith on that advice." ID at 66. These conclusions do not hold up under scrutiny. In fact, apart from Lana's testimony, no evidence exists that any legal advice from Brantl was sought or received. And Lana testified only to a single conversation with Brantl, in which Lana claims that he told Brantl that Crow was exercising his conversion rights, selling some of the shares he would receive upon the conversion, and that the buyer's funds would go to Crow not to PanAm. Tr. 957. According to Lana, Brantl responded: "Legally, you're entitled to do it." Tr. 957

Reliance on advice of counsel is not a complete defense to a securities law violation, but only a factor for consideration. *Enterprises Solutions*, 142 F. Supp. 2d at 576 (citing *Markkowski v. SEC*, 34 F.3d 99, 105 (2nd Cir. 1994)). To establish reliance on advice, four elements must be satisfied: (1) complete disclosure of all relevant information must be made to counsel, (2) advice

[11] Ross testified vaguely that "the conversion needed to be less than 5 percent," but he could not recall any details. Tr. 1631. No contemporaneous evidence exists that Ross ever sought to enforce the conversion cap.

as to the legality of the conduct must be requested; (3) legal advice that the conduct was legal must be given; and (4) the advice must be relied upon in good faith. *Id.*

First, there is no contemporaneous evidence of any conversation between Lana and Brantl relating to the conversion. No email, correspondence or written legal opinion exists. Brantl did not testify at the hearing. Tr. 935. Lana admitted that he never memorialized the conversation, and Brantl was never copied on any of the numerous emails relating to the conversion. Tr. 1002. Lana, moreover, testified that Brantl "didn't give me specific advice . . . He didn't provide me any advice." Tr. 958.

Without some contemporaneous evidence of legal advice being given, the advice-of-counsel defense fails. *See SEC v. Jones*, 13-cv-163, 2015 WL 5774204, *13 (D. Utah Sept. 30, 2015) ("Importantly, [the attorney] did not testify at trial, and there is no documentation in the record of any advice from him to [the defendant]"; rejecting advice-of-counsel defense).

Even assuming Brantl rendered some advice, there is insufficient evidence that Brantl was given complete information. Lana's testimony that he disclosed "[a]bsolutely all of" the facts to Brantl (ID at 14) is undermined by other testimony of Lana. According to Lana, his question to Brantl was limited to whether Crow could exercise his conversion rights under the Note and then sell shares. Tr. 957. Lana, however, testified that he did not provide Brantl any documents, such as the investor letter Crow drafted. Tr. 958-959. Lana also admitted that he did not tell Brantl that the investors did not know that Crow was the seller in the transaction. Tr. 1005. There is also no evidence that Brantl was aware that Crow dictated the purchase price, or that Lana and Clug concealed the conversion from PanAm's auditor.

Lana's admission that he did not give Brantl all relevant information should have caused the advice-of-counsel defense to fail. *Jones*, 2015 WL 5775204, at *13 (rejecting advice-of-

counsel defense because "there is inadequate evidence that [defendant] fully disclosed to [his lawyer] all relevant facts"); *David J. Bandimere*, Rel. No. 507, 2013 WL 5553898, *50 (Init. Dec. Oct. 8, 2013) (rejecting advice-of-counsel defense because "the evidence does not reflect that [the Respondent] made complete disclosure to [his lawyer]").

The ALJ also found that Ross was "aware of the note conversion by Crow and believed it to be legal private transaction." Tr. 66. This finding exaggerates Ross's testimony. At the hearing, Ross only had only a vague recollection of the conversion, and could not recall any details. Tr. 1636-1640. Although Ross testified that it was his practice to consult with Brantl, PanAm's outside counsel, Ross could not recall any specifics. Tr. 1630-1631. Crow also testified that Ross "put no specific importance" on the conversion as long as "counsel had said that the transaction was fine." Tr. 1404.

H. Clug Was Directly Involved in all Aspects of the Note Conversion Scheme, and Ensured that PanAm's Auditor Was Not Told of the Conversion

The ALJ found that "Clug was not directly involved in this conversion and sale," ID at 66, and that Lana "took responsibility" for not disclosing the conversion to the auditor, and that Lana "was credible and sincere in apologizing for his failure to include it." ID at 67. These findings are not supported by the record.

Clug's own emails show his critical role. When Crow complained to Clug that Lana was taking too long to complete the transfer of the $75,000, Clug reassured Crow that Lana would get it done. As numerous emails and other documents prove, Clug was involved in every stage of the scheme, and took affirmative steps to hide the conversion from PanAm's auditor, including by backdating documents.

In addition, Lana did not apologize and did not take responsibility. On the contrary, Lana claimed that he recalled told Hartman about the extension. Tr. at 930 (Lana: "I thought I did

[disclose to Hartman].") Tr. 1006 (Lana: "I believe I had told Mr. Hartman that the transaction had taken place"). Even after being shown emails relating to the extension that did not include Hartman, Lana continued to insist that "I really thought there was another email" that included Hartman. Tr. 1007. And Hartman disputed that Lana disclosed the conversion to him:

> Q. Is it possible Mr. Lana had had a conversation with you where he told you the $25,000 note had been converted and the sale happened, and there's just no e-mail or written document reflecting that?
>
> HARTMAN: Not that I recall.
>
> Q. Is that something you would have remembered?
>
> HARTMAN. I would have remembered that, because it would have required disclosure[.]

Tr. 489:24-491:12.

And while Lana did concede that he was "disappointed" in himself because he "missed that disclosure," Lana was defensive and insisted that the failure to disclosure was simply "based on the auditor's judgment," and that the disclosure "was not material because the investors already knew how many potential dilutive shares were out there already." Tr. 995.

II. The ALJ Erred in Determining the Appropriate Sanctions

A. Disgorgement for the Aurum and PanAm Offering Frauds

The typical measure of disgorgement in offering fraud cases brought by the Commission is based on the total amount raised in the offering minus the amount returned to investors. *E.g., SEC v. Platform Wireless Int'l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010) ("total proceeds . . . [is] a reasonable approximation of the profits obtained from [defendants'] unlawful sales"); *SEC v. Sahley*, No. 92 civ. 8842, 1994 WL 9682 (S.D.N.Y. 1994) ("The investors who lost their entire investment are entitled to an order of disgorgement of the full amount raised through those fraudulent statements."). In *SEC v. Smith*, the US Court of Appeals for the Second Circuit

affirmed a judgment in which the "district court ordered [a defendant], jointly and severally with [another defendant], to disgorge the amount obtained from investors, minus the amount returned to investors via interest and other payments." __ Fed.Appx. __, 2016 WL 1552535, *2 (2d Cir. Apr. 18, 2016) (Summary Order) (affirming $87 million disgorgement judgment).

The same approach is applied in administrative proceedings. In *L&L Energy, Inc.*, Rel. No. 962, 2016 WL 626601, *14 (Init. Dec. Feb. 17, 2016), for example, an issuer raised $748,300 from investors using public filings that were materially false. Applying the Commission's opinion in *Jay T. Comeaux*, the ALJ in *L&L Energy* found that the "$748,300 raised from investors is a reasonable approximation of profits causally connected to the violation," and therefore set disgorgement at $748,300. *Id.* at *15. *L&L Energy* further stated that "the requisite causal link between L&L's violation and the $748,300 raised from investors is present because L&L's material misstatements struck at the heart of its public filings and perpetuated a scheme to deceive investors." *Id.* Consistent with the federal court cases, *L&L Energy* held that "how a respondent choses to spend ill-gotten gains generally does not entitle the respondent to an offset in disgorgement. On the other hand, money repaid or distributed to investor victims could offset disgorgement." Id. at *15.

The ALJ departed from the approach taken by the federal courts and administrative decisions like *L&L Energy*. While acknowledging that this "measure would be appropriate where the full amount unjustly enriched the violators," the ALJ determined that the Division did not establish "'but-for causation between' these violations and the full amount." ID at 79. The ALJ added that he "cannot assume without explanation that the full amount raised through a securities offering is automatically subject to disgorgement merely because some violations occurred around the same period that the offering took place." ID at 79. The ALJ further found

that "most of the money was never realized as a profit by either Crow or Clug, but rather was spent on startup and operational costs of Aurum." ID at 79.

The ALJ's disgorgement methodology was incorrect. As the evidence proves, every penny raised by Aurum and PanAm was received through multiple misrepresentations and omissions. Crow and Clug lied to investors and potential investors in virtually every communication. The "but-for" test is satisfied because Crow and Clug would not have raised any investor funds without making misrepresentations and omissions. Similar to *L&L Energy*, Crow's and Clug's misrepresentations and omissions "struck at the heart" of their scheme to deceive investors; therefore, the requisite causal link is established.

The primary case cited by the ALJ to support his reasoning was *Jay T. Comeaux*, Rel. No. 3902, 2014 WL 4160054 (Comm'n Aug. 21, 2014). *Jay T. Comeaux*, however, presents starkly different facts. In *Jay T. Comeaux,* the respondent, a registered representative and supervisor at the Stanford Group, earned $7.4 million in earnings, commissions and bonuses. Only $3.3 million, however, was related to the sale of fraudulent securities; the remainder included "payments received through legitimate activities." *Id.* *3.

Jay T. Comeaux merely stands for the proposition that a broker's sales of non-fraudulent securities may not be subject to disgorgement. It does not support the ALJ's conclusion that Crow and Clug need not disgorge "startup and operational costs." *L&L Energy*, which relied on *Jay T. Comeaux*, is more on point.

The ALJ also stated that a "more specific analysis" of the amount raised was needed. ID at 79. The Division, however, tracked the entire $3,995,775 received from Aurum investors and the $400,000 raised from PanAm PanAm investors. DE 2A, 3A. Regarding the Aurum funds, from February 2012 to February 2014, Crow and Clug transferred $2,724,000 from Aurum's

Citibank (US) account to four Peruvian bank accounts they controlled. DE 2A at 5; DE 2A at 8-9.

The Division was not able to establish with certainty how the $2.7 million that Crow and Clug transferred to Peru was spent, DE 3A, due in part to the fact that Crow and Clug appear to have directed Aurum Peru's bookkeeper to provide nonspecific ledger entries. Tr. 610-61. This should have been a factor against reducing Crow's and Clug's disgorgement. Once the Division proved the investor funds were transferred to Crow and Clug controlled accounts in Peru, the burden shifted to Respondents to show disgorgement of those funds would not be appropriate. By requiring "a more specific analysis from the Division," ID at 79, the ALJ improperly shifted the burden back to the Division from the wrongdoers. *See SEC v. First City Fin'l Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989) ("[T]he risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty."); *see also SEC v. Sierra Brokerage Servs.*, 608 F. Supp. 2d 923, 968 (S.D. Ohio 2009) ("All doubts concerning the amount of disgorgement must be resolved against the violator.").

The evidence shows that all $3.9 million raised by Aurum was obtained through fraud. Crow's and Clug's material misrepresentations and omissions with respect to Aurum began as soon as they began soliciting investors for their Brazil venture in April 2011. At that time, Aurum had no assets, no money, and not even a bank account. DE 2A at 6-7. Crow, nevertheless, told a potential investor that Aurum had "reserves of $440 million" in Brazil and that an investor could "double your money" with "little risk." DE 39, 42. A few weeks later, in late May 2011, Clug told a potential investor that there was "over $5 billion worth of gold" in Brazil and that a $100,000 investment would yield $3 million, a "30 to 1" return. DE 55.

Crow and Clug drafted every false and misleading written communication, including the PPMs and Quarterly Reports, that caused victims to invest nearly $4 million in Aurum.[12] While CFO Angel Lana was a component of the fraud, Lana was primarily a conduit who repeated to investors the misinformation that Crow and Clug provided. DE 45, 59, 64, 73; Tr. 843, 851, 1168.

At the hearing, the evidence showed that Crow's and Clug's statements of gold content and projections had no basis in fact. In a striking uniformity of opinion, the three geologists who testified – Allan Moran, the Division's expert; Peter Daubeny, a Canadian geologist; and Steven Park, Crow and Clug's fact and expert witness – agreed that Molle Huacan was a mere exploration site with no proven gold resources; that Aurum's ever-increasing statements of gold content – which inexplicably rocketed up from 1.2 million ounces in late 2012 to 2.7 million ounces in early 2013 – had no basis in any observable or measurable data; and that the "quick to production" approach that Crow and Clug repeatedly touted to investors had no foundation in geological principles. DE 1 at 4-5 (Moran Report); DE 484 at 7 (10.8.12 Park Report: "Given the low average grade and small tonnage potential, this Property is not ready for production."); DE 581 at 21, 25 (5.24.13 Daubeny Report: prior testing unreliable due to possibility of "[c]ontamination of the samples, deliberate or otherwise"; "An ore body has yet to be found on the Molle Huacan property.").

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[12] *E.g.*, DE 64 at 2 (6.27.11 Clug to Crow email: "Please look at PPM draft when you have time. Attached with my comments after a quick review."); DE 124 (11.6.11 Crow to Clug email: "I went thru the whole PPM"); DE 125 (11.7.11 Clug to Crow: "Been working on the PPM - still needs work"); DE 732 (2.29.12 Crow to Clug email re "draft ppm": "Attached my revisions.")

The PPMs, Quarterly Reports and Business Plan attributed their statements regarding gold content – and the cash flow projections that arise from the gold content – to an in-house geologist Elias Garate. DE 577 at 10 ("Our senior geologist, Elias Garate, is becoming increasingly convinced that Molle Huacan is a major gold concession and may have more than 1 million ounces of gold"). Crow and Clug knew, however, that there was reason not to trust Garate's findings. DE 384 (Clug to Crow email re Cobre Sur" "Looks like a write off . . . Hope Elias [Garate] also understands that we can't make this kind of mistake again").

As Crow and Clug knew, both Park and Daubeny made geological findings that contradicted Garate's. DE 581 at 26 (Daubeny Report: "Sampling by the author yielded lower grades than those returned for previous sampling"). Daubeny also testified that the test results done by Aurum "were fabricated. . . . the samples . . . may have deliberately had gold added to them after they were collected." Tr. 462-463. Daubeny further testified that there was "no possibility" of production at Molle Huacan because there was "no ore body defined [and] . . . . No indication on site of any of the infrastructure that would be needed to sustain [production] . . . none of that was in place." Tr. 392-393. Daubeny's Report concluded that that "[t]he Molle Huacan property does not contain any known mineral resources or reserves." DE 581 at 25.

According to Moran, "Garate's estimates are highly exaggerated and not supported by Aurum's own data[.]" DE 1 at 31. Moran also highlighted Elias Garate's report of January 11, 2013, finding a "mineral potential of 2,842,443 ounces of gold," and the statement three weeks later in the Aurum Business Plan that "[w]e estimate that the Molle Huacan property currently has inferred gold mineral resources of a minimum 2,842,000 ounces, calculated solely on the Monica vein using a length of 1,700 meters and a depth of 500 meters." Tr. 701:3-13. Moran

found the leap from "mineral potential" in the Garate report to "inferred gold mineral resources" in the Business Plan inexplicable and unjustified. Tr. 701-702.

Moran's expert report concluded that the information available to Crow and Clug was that the Molle Huacan property had no gold resource and that the rosy predictions of gold production had no basis in fact. DE 1 at 48-50. Steven Park, testifying as Respondents' expert, stated that he found Moran's report to be "very thorough" and that he "[didn't] really have any general objections to his report." Tr. 1274:11-17 (Park testimony: "Q. In your opinion do you have any exceptions or issues with [Moran's] testimony or report with respect to the way he uses terminology or his conclusions with large mining companies? A. No, I don't. I found his report to be very thorough and I don't really have any general objections to his report.").

Like Moran, Park and Daubeny also found nothing to support the estimates of gold resources attributed to Garate in the PPMs, Quarterly Reports and Business Plan. Tr. 545-547, 1278-1279. Tr. 381.

Projections should have a good faith basis, and prior statements should be corrected when contradictory information comes to light. *Merchant Capital,* 483 F.3d at 769 (what may once have been a good faith projection became, with experience, a materially misleading omission of material fact). *See also Meltzer*, 440 F. Supp.2d at 189 (quoting *Chill v. General Elec. Co.*, 101 F.3d 263, 269 (2d Cir.1996)) (stating that an egregious refusal to see the obvious, or to investigate the doubtful, may give rise to an inference of recklessness).

Clug knew the grim reality. Even until late 2013, however, when Aurum was almost out of money and the Park and Daubeny reports had been received, Clug continued to tell investors that production was right around the corner. At a November 26, 2013 meeting in Florida, Clug

told investors that "production would commence in December [2013]," and did not tell investors about the Daubeny and Park reports. Tr. 898.

The PPMs, Quarterly Reports and Business Plan also failed to disclose material aspects of Crow's background regarding his prior SEC cases, his industry bars, and his prolonged bankruptcy proceedings. These deliberate misrepresentations were material. *See, e.g.*, *Merchant Capital,* 483 F.3d at 770–71 (failure to disclose management's personal bankruptcy and a previous cease-and-desist order, which prohibited the sale of unregistered securities, were material omissions); *SEC v. Carriba Air*, 681 F.2d 1318, 1323 (11th Cir. 1982) (finding that failure to disclose a company's bankruptcy was a material omission); *SEC v. Kirkland*, 521 F.Supp.2d 1281, 1303 (M.D.Fla. 2007) (noting that failure to disclose "[d]esist and [r]efrain" orders entered against management was a material omission); *Siemers v. Wells Fargo & Co.,* 2007 WL 1140660, at *8 (N.D.Cal. Apr.17, 2007) (stressing the materiality of information indicating management's lack of integrity).

Clug's brief argues that the investors knew "they were making a risky investment," Clug Br. at 9, and the PPMs did contain risk disclosures that focused on the risks of gold mining in South America. DE 68 at 24-27; 346 at 26-29; 469 at 13-16; 577 at 14-17; 552 at 25-28. These disclosures, however, ignored the actual risk that investors faced: that Crow and Clug would conceal material information. *See SEC v. Pittsford Capital Income Partners, L.L.C.*, No. 06 Civ. 6353, 2007 WL 2455124 *11 (W.D.N.Y. Aug. 23, 2007), *aff'd in part and app. dismissed in part*, 305 Fed. Appx. 694 (2d Cir. 2008) ("the cautionary language does not shield the principals from liability because the risks that were disclosed in the PPMs were not the risks that harmed investors").

"[O]mission of past performance information occurs when a promoter makes optimistic statements about the prospects of the business but fails to include past performance information that would be useful to a reasonable investor in assessing those statements." *Merchant Capital, LLC*, 483 F.3d at 768. *See also Joint Council Pension Trust Fund v. Am. West Holding Corp.*, 320 F.3d 920, 935 (9th Cir.2003) (material omission where optimistic disclosures of airline's financial prospects, while knowing of undisclosed specific problems); *Rubinstein v. Collins,* 20 F.3d 160, 170 (5th Cir. 1994) (optimistic statements that omit known substantial adverse facts are actionable under antifraud provisions).

B. Clug's Nominal Disgorgement and Zero Penalty

The ALJ reduced Clug's disgorgement obligation to the nominal figure of $50,000, and imposed no penalty, based on Clug's "convincing showing of an inability to pay." ID at 80. Given the egregiousness of Clug's conduct and the harm to investors, the Division submits that this was not appropriate.

The Commission may consider a respondent's ability to pay in determining civil penalties under the Securities Act and the Exchange Act. *See* 15 U.S.C. §§ 77h-1(g)(3), 78u-2(d). However, even when a respondent demonstrates an inability to pay, the Commission has discretion not to waive the penalty, disgorgement, or prejudgment interest, "particularly when the misconduct is sufficiently egregious." *Robert L. Burns*, Rel. No. 3260, 2011 WL 3407859 2722, at *12 (Aug. 5, 2011) (rejecting Respondent's claim of inability to pay).

In addition, Clug's evidence of inability to pay was insufficient and did not comply with Rule 630(b). The Form D-A referenced in Rule 630(a), for example, requires financial account information from 2010, the date of the initial violations, but the records submitted to the ALJ

only cover 2013 and 2014. On July 21, 2015, Clug testified that he was "still paying for a corporate office and the little apartment" in Lima, Peru. Tr. 1810.

While ability to pay may also be considered in determining disgorgement, *see* 17 C.F.R. § 201.630, it should be given less weight than when determining civil penalties because disgorgement is designed to reverse unjust enrichment, and giving ability to pay significant weight in the disgorgement context would create a perverse incentive for securities law violators to spend ill-gotten gains quickly and without restraint. *See SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996) ("The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits").

C. Officer-and-Director Bar as to Clug

Clug's conduct as CEO and Chairman of PanAm warrants an officer-and-director bar. The ALJ, however, declined to impose an officer-and-director bar based on the conclusion that Clug did not have an adequate opportunity during the hearing to defend against that sanction. ID at 72-74. The Rules of Practice, however, do not provide that a particular form of relief is waived if not disclosed in the Division's pre-hearing brief. Clug's intentional and deceitful conduct in his role as CEO and Chairman at PanAm, which lasted for two years, merits an officer-and-director bar.

D. Sanctions on Aurum, Pan Am and Corsair

Although Aurum, PanAm and Corsair were found to have committed serious violations, the ALJ imposed no sanctions on these entities "because each of the entities is without money (according to the Division's own summary analysis." ID at 79. Given the egregiousness of the

violations, however, and their close relationships with Clug and Crow, they should be jointly and severally liable for with Crow and Clug for disgorgement. *Edgar R. Page*, Re. No. 4400, 2016 WL 3030845 *13 (Comm'n May 27, 2016) (joint and several liability when respondent aided and abetted entity's violations).

In addition, neither Aurum, Corsair nor PanAm made an ability-to-pay argument during the hearing. These entities were represented by counsel at the hearing, but chose not to make a submission under Rule 630(a). Although the Division's summaries of the entities' bank accounts show minimal or no funds, as the ALJ noted, those summaries are not current and reflect account balances as of dates prior to the issuance of the OIP. DE 2A at 6-7 (Aurum), 13-14 (PanAm), 16 (Corsair). The appropriate manner to assess these entities' ability to pay is a submission pursuant to Rule 630(a). In the absence of such a submission, disgorgement and penalties should be imposed, along with a cease-and-desist order.

III. The Arguments in Clug's Petition for Review Are Without Merit

Clug's Petition for Review argues that a number of the misrepresentations and omissions for which he was found liable were not material; that Corsair was not a broker-dealer; and that he should not be barred or subject to a cease-and-desist order.

Crow's materiality arguments all fail. The Initial Decision correctly focuses on the serious misrepresentation and omissions in the PPMs and Update letters, and the materiality of these statements to a reasonable investor is undeniable. For example, Aurum's August 2011 PPM and December 2011 PPM both contained completely gigantic profit projections. The August 2011 PPM stated that "[t]he projections indicate a return of a potential $100,000 Class A capital contribution as $1,700,000 which is 17x the original investment." DE at 12. The December 2011 PPM, in a section entitled "Summary of Projected Returns on Investment,"

projected a "Dividend Distribution" of $4,000,000 from an initial investment of $100,000, which represented a "Multiple Returned on Investment: 40x." DE 346 at 21; DE 314 at 21.

These projections are undermined by the information Crow and Clug had that the test results in the Summer and Fall of 2011 showed poor or inconclusive results. DE 81 (test results "not as expected"); 87 ("results are definitely not reliable"); 105 (Clug email stating map "shows ZERO gold). Bruno Palacio, the mining geologist on the project, testified that he never even determined the total gold content for the Batalha property. Tr. 226.

As to the increase in projections from "17x" to "40x" the original investment, the ALJ found that "Crow and Clug did not have any information to justify doubling their projected profits" and concluded that "Crow and Clug doubled the profit projection to entice additional investors." ID at 61. This is an understatement, because by the time the December 2012 PPM was distributed to investors Crow and Clug had realized that the Brazil project was worthless. DE 264 (Crow accused Raiss of "poor results and misappropriated funds" and threatened to "engage lawyers." DE 732 Crow emailed Clug that "the brazil project is really a problem now." DE 732 at 1. *See also* DE 316 (3.29.12 Crow to Raiss, Clug email: "Batalha has been a disaster so far and we are trying to save it").

The ALJ found that the profit projection increase was "severely reckless and highly material," ID at 61, and Clug cites to no evidence to justify increasing the profit projections from 17x to 40x. Instead, Clug emphasizes the risk disclosures in the December 2011 PPM that investors should assume "that these projections WILL NOT be achieved and only a good faith effort on the part of management is expected." Clug Br. at 8. The ALJ, however, gave Clug the benefit of the doubt on this point and took into account that investors were told that "they could

not rely on the projections." ID at 61. Even so, the ALJ found that "a reasonable investor would want to know that the projection had been doubled, without any additional resource." ID at 61.

Clug also argues that increasing the projections from 17 times to 40 times without any basis "was consistent with the nature of an investment in gold mining and was consistent with other PPMs and projections." Clug Pet. at 9. Clug offers no evidence to support this theory.

In one of their most egregious and consequential misrepresentations, Crow and Clug told investors in a January 2012 letter that "[w]e have satisfied the conditions of closing on the Aurum original PPM." DE 217 at 1 (January 2012 Update signed by Melnick); DE 218 at 2 (January 2012 Update signed by Melnick). The ALJ correctly found that this statement was "clearly false" and that "categorically false in that essentially none of the August 2011 PPM's conditions were ever met." ID at 60.

Clug expresses regret that he "did not catch this apparently erroneous one line," and asserts that it should be excused due to "reliance of counsel." Clug Br. at 10. No evidence exists, however, that any legal advice was ever sought or received in connection with the Update letter. The ALJ properly rejected this argument, finding that "[Crow and Clug], not Brantl, finalized and issued the document." ID at 60.

Clug also argues that investors did not testify that they "relied on these specific lines or wording to make an investment." ID at 10. Reliance, however, is not an element in cases brought by the Commission. *Joseph John Vancook*, Rel. No. 61039, 2009 WL 4005083, *10 (Comm'n Nov. 20, 2009) ("Unlike litigants in private causes of action, [] the Division is not required to prove reliance as an element"). In any event, the ALJ found that the investors "decided to keep their money invested in Aurum," rather than exercise their right to have the money returned, "under the false pretense that the closing condition had been satisfied." ID at

60. *See also* DE 226, 217, 218 (Update letters signed by investors); Tr. 1067 (Crow testimony that "it's fair to say" that investors converted to equity based on belief closing conditions were satisfied).[13]

Regarding Steven Park's October 2012 report, the ALJ found that Crow and Clug were "extremely reckless in deciding to keep Park's findings from investors and Daubeny." ID at 62. Clug argues that the Park report was not material because it was "outdated" because Park's testing was done several months before the date of the report, which might be "confusing." Clug Br. at 12. The ALJ disagreed, noting that "Crow and Clug clearly credited Park's opinion" because they called him as a fact witness and paid for his expert testimony. As the ALJ found, Crow and Clug were "severely reckless to keep this material information a secret. Investors would have wanted to be aware that an independent geologist had made such findings. Instead, Crow and Clug provided investors with ever-increasing reports of Molle Huacan's gold in late 2012 and 2013." ID at 62.

Clug's arguments regarding the Corsair violations also fail. Clug argues that he believed ABS to be a "legitimate fund," Clug Br. at 3; however, scienter is not an element of a violation of Section 15(a)(1). *See, e.g., SEC v. Martino*, 255 F. Supp.2d 268, 283 (S.D.N.Y. 2003). Clug also states that he and Crow never "referred even one person" to ABS, other than his father. Clug Br. at 3. Clug, however, solicited others and, together with Crow, Clug caused Lana to refer investors to benefit Corsair. DE 311 at 1-2 ((3.27.12 Crow to Price email: "Alex just saw him again today and he says he is willing and wants to put in 300k GNMA and 100k plus aurum to start, wants to double it within 2-3 months if it goes well."); DE 276 at 1 (3.8.12 Clug to

[13] Clug also states that "some support letters for me were sent, unsolicited, to the ALJ's office." Clug Br. at 11. No such letters, however, were ever offered or received into evidence at the hearing, and no "support letters" are part of the Record Index.

Crow, Lana email: "Good info in attached. Shows $550K so far in GNMA and $210K to come to Aurum (150 already received)."

Clug also seeks to distance himself from the customers that Lana referred. Clug Br. at 3-4. Clug's own emails, however, show that he knew and encouraged Lana to portray himself as affiliated with Corsair when making ABS referrals. Lana identified himself as "ANGEL LANA CFO (THE CORSAIR GROUP)" in an email to materials to send to a potential investor; Crow and Clug were copied on the email. DE 241. Lana also used his alana@thecorsairgroup.com email address to stream investor referrals to ABS on behalf of Corsair; Crow and Clug were also copied on these emails. DE 243, 244, 260, 262. Lana testified that Clug "established an email (alana@thecorsairgroup.com) for me and he insisted I use it." Tr. 854.

Clug also argues that the "finders exception" applies. Clug Br. at 4. This argument fails in view of the close relationship between Crow and Clug and Cody Ross, who ran the ABS Fund.

The Referral Agreement entitled Corsair to a 3% fee for each referral, which was to be "paid out over 90 days." DE 199 at 2. Clug drafted the invoices to ABS. DE 300 (3.22.12 Clug to Crow email re "ABS Fund invoice": "Gave it a shot FYR, attached").

Clug also argues against a penny stock bar because there is "no logical nexus between the conduct I engaged in and penny stock bars." As the ALJ pointed out, however, Clug's conduct as an unregistered broker provides a sufficient statutory predicate. ID at 70.

CONCLUSION

The Division of Enforcement respectfully requests that the Commission, following its independent review of the evidentiary record, find that:

- PanAm willfully violated Section 17(a)(1), and (3), and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Crow and Clug Willfully Aided and Abetted and Caused Such Violations; PanAm also willfully violated Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder; Crow and Clug willfully aided and abetted and caused PanAm's violations; Clug willfully violated Rule 13a-14 under the Exchange Act;
- Crow, Clug, Aurum and PanAm should be jointly and severally liable for disgorgement of the total amount raised through Aurum and PanAm, which totals $4,395,775 (DE 2A at 4, 11), plus prejudgment interest;
- A third-tier penalty should be imposed on Clug;
- Cease-and-desist orders should be issued as to Aurum, PanAm and Corsair;
- Clug should be barred from serving as an officer-and-director of a public company; and
- The liability findings as to Aurum, PanAm and Corsair, and the cease-and-desist, industry and penny stock bars, in the Initial Decision should be affirmed.

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New York, NY

Respectfully submitted,

DIVISION OF ENFORCEMENT

David Stoelting
Senior Trial Counsel
Securities and Exchange Commission
200 Vesey Street, Suite 400
Brookfield Place
New York, NY 10281-1022
Tel: 212.336.0174
Fax: 212.336.1323