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

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

PETITIONER ALEXANDRE S. CLUG'S BRIEF IN OPPOSITION TO DIVISION'S CROSS-PETITION FOR REVIEW AND REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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

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INTRODUCTION

In my principal brief, I set forth good reasons for reducing the penalties (and violations) found by the ALJ. The Division offers little response to those arguments, instead using its brief to ask the Commission to find violations that the ALJ found to be unsupported by the evidence, and to impose penalties the ALJ found to be inappropriate. Rather than viewing the entire record in context, the Division's arguments rely on taking snippets of evidence out of context and drawing inferences that are unreasonable when viewed in context. The Division uses inflammatory rhetoric in place of evidence to try to paint me as an intentional fraudster who enriched himself at others' expense. But the evidence shows I not only was not enriched, but actually invested my personal funds in the businesses in the hope of keeping them afloat and enabling investors to realize returns. The ALJ, after observing me and my testimony, specifically concluded that I was an honest person who had simply made mistakes due to being in over my head and associating with the wrong people.

ARGUMENT

I. THE COMMISSION SHOULD REJECT THE DIVISION'S CHALLENGE TO THE ALJ'S FINDING THAT CROW NEEDED TO BE DISCLOSED AS A DE FACTO OFFICER

In its brief, the Division primarily asks the Commission to find violations related to PanAm Terra[2] based on the non-identification of Crow as an officer of PanAm Terra. The Commission should reject the Division's arguments because they are based on a misconstruction of the law. And the Division's arguments ask the Commission to ignore the ALJ's credibility determinations, and only consider the fraction of the evidence that the Division thinks supports its arguments, as well as to draw unsupported inferences from that fraction of the evidence rather than the reasonable inferences the ALJ drew after considering all of the evidence.

First and foremost, the Division misstates the law regarding what qualifies as a de facto officer, appearing to suggest that anyone who provides any input into the policies of the corporation is a *de facto* officer. But under the Commission's rules, as consistently interpreted by case law, the ability to make recommendations about company policymaking does not make one a *de facto* officer. Rather, to be a *de facto* officer, one must effectively be the decision-maker with final say to

[2] 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"); Transcript ("TR"); Division Exhibit ("DE"); Respondent Exhibit ("RE"); and Respondent Findings of Fact (FOF).

decide whether to accept recommendations and actually set the company's policies.

In fact, that is made clear in *SEC v. Prince*, 942 F. Supp.2d 108 (D.D.C. 2013), the primary case the Division cites in support of its argument:

> The few cases that have found an employee to be a de facto officer because of their ability to make policy involved alleged "consultants" who were actually in total control of a company. [*SEC v. Solucorp Indus.*, 274 F. Supp. 2d 379, 383 (S.D.N.Y. 2003)] (noting testimony that no one could do anything that alleged "consultant" did not "direct or approve"); [*S.E.C. v. Enterprises Solutions, Inc.*, 142 F. Supp. 2d 561, 568 (S.D.N.Y. 2001)] (finding that alleged officer was "running the company," and that company had been created as "a corporate shell with no employees, no facilities and no chief executive"); *Weeks*, S.E.C. Release No. 8313, 2003 SEC LEXIS 2572, 2004 WL 828 (Oct. 23, 2003) (determining that named officers "exercised neither authority nor influence in the management and operations of DACO" and that Weeks was actually running company). The SEC has never alleged that Prince was "running the company" and thus none of these cases involve factual situations similar to the present one.

Prince, 942 F.Supp. 2d at 134.

The cases discussed in *Prince* are the same cases the Division relies on here. And as the court in *Prince* concluded, they support determining a person to be a *de facto* officer only if he or she was "actually in total control of a company." In fact, the court specifically rejected the argument that merely making recommendations without having final decision-making authority makes a person a *de facto* officer.

Id. at 134-135 ("[T]he SEC argues that, because of his membership in G6/G7, Prince 'proposed and formulated policy' for Integral...It is undisputed that G6/G7 was a body that met to discuss important policy decisions and make recommendations to Chamberlain and that Prince participated fully as an equal member of that group...Indeed, Gaffney testified that Prince was a particularly influential member of G6/G7, second only to Chamberlain...However, as this Court has found in its Findings of Fact, G6/G7 members gave their opinions and advice to Chamberlain...at the end of the day, Chamberlain was the only person who had authority to make company policy for Integral.").[3]

Viewed in the light of this proper understanding of what constitutes a *de facto* officer, it is clear that the ALJ correctly concluded that Crow was not a *de facto* officer of PanAm. As the ALJ noted, the evidence showed that Crow did not have final decision-making authority over the very matters about which the Division claims Crow's involvement made him a *de facto* officer.

For example, the Division claims that Crow's recommendation that PanAm discontinue using Lana to prepare its SEC filings shows him to be a de facto

[3] Even if the Commission were to depart from this established case law and now adopt a broader definition of *de facto* officers, as the Division urges, the parties involved with PanAm's SEC filings could not be faulted for failing to predict that the definition would be expanded *post hoc*, so they could not have acted willfully in failing to disclose Crow's involvement.

officer, but as the ALJ found, the evidence shows that PanAm rejected Crow's recommendation:

> In June 2012, Crow recommended that someone other than Lana do the work on the Commission filings because he was frustrated that Lana was behind schedule and that Crow was being adversely affected as a PanAm investor. Div. Exs. 413-15; Tr. 1657. Since Crow had no control over PanAm, Lana did not take Crow's suggestion seriously. Tr. 911. Clug rejected Crow's suggestion that he replace Lana. Tr. 1657.

ID at 12.

Similarly, the Division claims that Ross stepping in for me as CEO when I transitioned to Chairman shows Crow was a *de facto* officer, but the ALJ correctly found that I was the person who made the ultimate decision to focus my energy on Aurum and bring in Ross, that Crow prepared an employment agreement for Ross at my direction, and that the Board had final say on hiring him:

> PanAm sought to transition the role of CEO from Clug to Steve Ross by mid-2012. *See, e.g.*, Div. Ex. 398 ("Contract for you is set and being incorporated into board package. Alex resigns etc. He is looking at pan am board meeting wi[t]h you and board on Friday July 6."); Div. Ex. 412. Clug and Ross knew each other years before the creation of PanAm and were introduced to each other by Crow. Tr. 1622. Crow recommended Ross as "an excellent public [company] CEO." Div. Ex. 128 at 1. In May 2012, Crow provided an introduction and consultant services with respect to PanAm's negotiations with Ross. Div. Ex. 398. At Clug's request, Crow prepared a draft of Ross's employment agreement with

> PanAm. Div. Ex. 395. Crow then asked Clug to review his draft of the Ross employment agreement. *Id.* Clug sent Ross his ultimate contract of employment as CEO. Div. Ex. 397.

ID at 12.

In fact, it was the Board of Directors that had ultimate authority over the direction of the company, and the evidence showed that Crow did not control the Board:

> Crow briefly joined the July 2012 board meeting to give a presentation about various aspects of agricultural land in Latin America. Tr. 1829. After the board meeting, Crow met informally with the board. Tr. 1833. Crow did not otherwise participate in PanAm's July 2012 board meeting or the board's decision-making. Tr. 1829. [Independent director] Gewanter felt that Crow "didn't try to influence any member of the board at any time." Tr. 1829.
>
> Chad Mooney, a member of PanAm's board...submitted a declaration under penalty of perjury that Crow was not a control person, officer, or director of PanAm. Resp. Exs. 130, 160. He declared, in pertinent part, that "[a]t no time . . . did Michael Crow ever direct me to make or not make any corporate decisions for PanAm[.]

ID at 12.

The evidence showed that

> Crow was not a signer on any bank account for PanAm, he approved no expenses or personnel, and had no authority to bind the company. Tr. 967-68, 1638, 1829. Crow had no operations role in PanAm, Tr. 987, 1638, and Crow did not go on any business trips with Ross to

> Uruguay, Tr. 1625, Tr. 1461. Crow testified that he never met with the Uruguay firm engaged to carry out the purchase of the farmland. Tr. 1376, Tr. 1461.

ID at 13.

And as the ALJ recognized, five separate witnesses, including the Division's star witness, Lana, and other witnesses that were not accused of wrongdoing, testified that Crow did not have decision-making authority or control over PanAm. The ALJ found their testimony credible. Unlike in cases where a person was found to be a *de facto* officer, such as *Solucorp*, there was no testimony here that no decisions were made without Crow's approval. To the contrary, the evidence shows that although Crow offered recommendations and input, the ultimate decision-makers were the Board, me, and Ross, and there were many instances in which we did not follow Crow's preferred course of action, or in which he had no input at all. As such, the ALJ correctly concluded that Crow did not meet the definition of a *de facto* officer.

The Division says the Commission should discount all of this testimony and documentary evidence because, it claims, it is "contradicted by contemporaneous emails and documents." Div. Brf. at 36. But there is no basis for disregarding this bulk of evidence and in its full context, the Division is simply drawing unreasonable inferences from its cherry-picked evidence.

An example of the unreasonable extrapolation by the Division: They refer to DE787 at 1 and seem to imply that Crow was in control and making decisions such as giving a Company credit card to PanAm Board member Mooney, when in fact Crow was not in control and could not make any decisions for the company. If you read the full email Exhibit you see clearly that the decision maker and control person is Steve Ross as the CEO, with me as Chairman giving my thoughts and recommendations as how to best handle Board members. More importantly, contradicting any argument that Crow was in control of PanAm, in fact PanAm did not give a company credit card to Mooney, despite Crow's urging that he should be given one.

There is no merit to the Division's argument that Crow was a de facto officer based on taking a primary role in negotiating an engagement agreement with Mickelson Capital. Every public company that has ever entered into a transaction has outside persons that negotiate deals on its behalf, be they outside counsel, CPAs, or consultants. If engaging in negotiations on behalf of a company made a person a *de facto* officer, then every public company is engaged in illegal non-disclosure for failing to discuss its outside legal counsel, CPA, and consultant as *de facto* officers. And what the Division fails to mention is that Crow did this work under a Board approved consulting agreement with The Corsair Group. At the same time, it was very clear that he had no decision-making authority and that

any deal had to go to Ross and the Board of Directors for approval. The Division's own list of quotes selectively taken from emails they provide show Crow reporting back to Ross and Clug on the status of Mickelson negotiations and asking for feedback, review of documents and decisions.

The Division also alleges that Crow negotiated with potential Uruguayan advisers to PanAm. This is factually incorrect. He may have been asked for his thoughts on how best to use the advisers and invited to listen in on one of the conference calls but he did not negotiate anything with them and never met with them or knew them personally. PanAm (Ross and the Board of Directors) eventually entered into an agreement with the Uruguayan advisers, Ariel Investment Management. Ariel was my relationship that I had developed and later handed off, in person in Uruguay, to Ross.

The Division alleges that Crow was unhappy with my performance as CEO and arranged for Ross to replace me. Again, these are extrapolations that are not backed by the facts or testimony. Crow may have been upset with me at a particular point in time, and particularly the CFO, Lana, for filings being late, but it is a large jump to then say that he was unhappy with me as CEO. Testimonies and facts do not back this conclusion. Nor did Crow have any ability or authority whatsoever to decide my role with PanAm. I was becoming busier with Aurum Mining and did not have as much time available to dedicate to PanAm. Ross has an

exemplary resume and was an unquestionably great find and fit as a CEO for a public company.

Crow as an investor and consultant obviously was keen in seeing PanAm be successful. He recommended many things such as Board Members and asked for other things such as the firing of the CFO, Lana. But he never had any control or decision making ability. As an example, Crow suggested to me to initially clean up PanAm when it was a private shell by taking it through bankruptcy. I did not do this. Crow asked for Dan Najor to be on the Board of Directors. I decided otherwise. Crow asked for Lana to be fired. Lana was not fired. All depositions and testimony confirmed that Crow was viewed as a consultant or adviser with no control or decision making ability.

The Division claims Crow exercised oversight of PanAm's CFO regarding PanAm's periodic filings. Crow's interest, and sometimes aggressiveness in wanting PanAm to get its filings completed was simply and obviously his desire for liquidity in his investment in PanAm. As it would be to calm any investor, he was regularly informed on the progress of the filings. The other option of ignoring an investor would most probably simply enrage that investor further and maybe lead to legal action by that investor against the company.

Nor do the circumstances surrounding the conversion of Crow's note show him to be a *de facto* officer. Once again, the Division's argument asks the

Commission to draw unreasonable inferences from snippets of evidence that the Division favors and taking them out of context, while ignoring the bulk of the evidence before the ALJ and the ALJ's credibility determinations. As the ALJ stated after weighing all of the evidence, "the Division did not meet its burden of proof" to show Crow was an actual or *de facto* officer. ID at 65. And the fact of the conversion did not change that conclusion. ID at 67.

Weighing all of the evidence rather than just the snippets the Division asks the Commission to consider, the ALJ found (1) that the Division had not established that Crow ever owned more than 4.99% of shares, (2) that the transaction (which occurred after I was no longer CEO) did not make Crow a *de facto* officer, (3) that I was not directly involved in the transaction, and (4) that if there was any illegality in the transaction, the involvement of counsel in structuring it would shield those involved from liability:

> The Division did not establish that Crow ever owned or controlled in excess of 4.99% of the shares of PanAm. His conversion of a convertible note into shares in order to sell some does not establish that Crow was a de facto officer, nor other wrongdoing by Clug or Crow. At the time of the conversion, CEO Ross, CFO Lana, and PanAm counsel Brantl were all aware of the note conversion by Crow and believed it to be a legal private transaction. Although Clug was not directly involved in this conversion and sale, 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 the relevant facts of the intended conduct to

> Brantl, sought his advice on the legality of the intended conduct, received Brantl's advice that the intended conduct was legal, and relied in good faith on that advice. *See Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994); *Rodney R. Schoemann*, Securities Act Release No. 9076, 2009 SEC LEXIS 3939, at *46 & n.41 (Oct. 23, 2009).

ID at 66.

With respect to the failure to disclose in connection with the conversion, the ALJ found that "Crow did not officially convert the note until after the third quarter," by which time I was no longer CEO of PanAm, and the violation resulted from the fact that "the conversion was not reported as a subsequent event, even though PanAm reported other subsequent events that occurred during the fourth quarter." ID at 66. And he correctly found that I was not responsible for that omission:

> Lana, who previously settled allegations of misconduct against him, took responsibility for failing to include that information in periodic filings with the SEC. Lana was credible and sincere in apologizing for his failure to include it, though he believed the conversion was not material. I do not find that Lana acted with scienter, though he did act negligently. The Form 10-Q was signed by Ross. Div. Ex. 839 at 24, 26, 28. Thus, I do not hold Clug responsible for that omission...

ID at 67. By the same reasoning, given that I was no longer CEO or responsible for PanAm's filings at the time, even if the conversion would have made it a violation

to fail to disclose Crow as a *de facto* officer, that disclosure violation would not be attributable to me.

In the face of multiple findings precluding liability for me in connection with the conversion, the Division cherry-picks the evidence to attempt to argue that the ALJ got all of those findings wrong. It says I knew of and assisted in a supposedly secret conversion and sale. As a matter of record it was a partial conversion not a complete conversion. It was also a private transaction, not a 'secret' one. The Note Conversion was an agreement with a 4.9% blocker that could be exercised by the holder at any time. His partial conversion and sale of some of the shares and distribution of the remaining shares was a private transaction authorized by the company's counsel, as testified to numerous times. As long as the 4.9% condition was abided to, the company could not refuse the holder to convert. I was informed of the transaction but was not involved in it. The Division seems to try to imply that I was assisting or involved with the transaction because I informed Crow, in an email, that Lana was taking care of some funding bank wires. Lana had simply asked me to transmit this information to Crow. Division: "Do you remember Mr. Clug ever asking you any questions about this transaction?" Lana: "No. I don't think he really got involved in this." (TR 934, line 24 to page 935, line 2). Lana 'was just interested in getting them stock at a good

price'. (TR 927, line 12-13) and he sought approval by company's counsel (TR 949, line 11-19).

As a matter of record, Crow mailed his request for conversion and distribution of shares to PanAm, addressed to Ross as CEO, on November 9, 2012. (DE 506). Ross would then, after checking that the 4.9% blocker would not be violated, sign and send issuance and distribution instructions to the Heritage Transfer Agent. The Division mistakenly discussed Crow's 'instructions to' the Transfer Agent. It simply does not work that way. No transfer agent takes instructions from a shareholder or potential shareholder, they take their instructions from the CEO and/or CFO, as they did in this case. The actual issuance and distribution of shares, as requested by Ross, occurred in 2013 (TR 1708, line 18). This would be the time when shareholders would be entered into the Transfer Agents' files as holders of record and when any control, or voting power, could be exercised. The Division states that the Conversion and resulting share issuances should be considered to have occurred when first discussed or requested in September 2012, even if only verbally. As explained above, this does not make any sense.

The Division alleges that I, Ross, and Lana allowed Crow to break the 4.9% blocker condition of the Note conversion and that Crow actually controlled 28.4%. This is incorrect. Firstly, for the conversion to occur and for shares to be

distributed, Ross, the CEO, needed to first sign and send a request to the Transfer Agent to issue shares per his directions. The transfer agent then issued shares in the names of people or entities as directed by the request that they received from Ross. The shares are thus then received and 'controlled' by the names on that list, not Crow. Per the 4.9% blocker conditions, neither Crow nor any of his related entities, ever received or owned more than 4.9% during or after the conversion and the distribution of the shares by the transfer agent. Crow never 'held' those shares that resulted from his conversion request and thus never exercised any ownership or control on these shares. The Division alleges that Ross was not really aware of either the note conversion or that he believed it to be a legal private transaction. This is contradicted by testimony and the fact that he executed the request to the Transfer agent to issue the shares per his directions.

The Division alleges that I improperly backdated the extensions of the Notes Conversions. These specific extensions were never filed or used with the auditors. Crow sent his signed extensions, the ones actually used by the auditors, directly to the auditors (DE 477). In addition, as testified by Crow, Crow had agreed several times in the past with me to extend the Notes (TR page 1409, line 2-3, 1410, line 21).

Importantly, the Division alleges that there was some sort of conspiracy to hide Crow's conversion of his Notes. This makes no sense as there is no reason or

motivation to hide the conversion of Crow's Notes. Converting the Notes is actually a positive in many ways. It reduces the debt on the balance sheet and increases the equity. And since the shares were being distributed to numerous small shareholders, it increases the number of shareholders and the potential liquidity of the company's shares. Crow was already being disclosed as the beneficial owner of the Notes so there was no motivation to 'hide' him as the Division alleges and the total number of shares on a fully converted basis were also already being disclosed, so there was no benefit in hiding the conversion for that reason either. This was also confirmed by the CFO Lana. (TR 1024-1025).

The Division alleges that apart from Lana's testimony, no evidence exists that any legal advice from Brantl was sought or received. This is incorrect. I, Crow, and Ross testified that advice from Brantl was regularly sought and received. (TR page 1394, line20; TR page 1484, line 19; TR page 1631, line 24).

II. THE PENALTIES IMPOSED ON ME SHOULD BE REDUCED, NOT INCREASED

Like its arguments regarding violations, the Division's arguments for imposing additional penalties are grounded in drawing unreasonable inferences from snippets of the evidence rather than a holistic view of the evidence. The ALJ, who had an opportunity to observe me and the other witnesses and assess our credibility, went out of his way to acknowledge that I am a well-intentioned

person, who simply got in over his head and made mistakes. I have lost many nights of sleep over those mistakes.

My goal was always to build successful business ventures that would generate handsome returns to their investors, all of whom were qualified investors. I was not motivated by greed and I did not use the companies to fill my own coffers. To the contrary, I invested my own personal funds in the businesses, and declined compensation to which I was entitled under employment agreements. The small sums I did earn are long gone, I cannot afford an attorney, and I have been unable to find suitable employment.

My family and I have already paid a severe price for my mistakes. This has been the most painful experience of my post-military life. No further deterrence is necessary, as whatever penalties the Commission may impose, I am quite certain that this is not only the first time an enforcement action has been taken against me, but also the last. Any further penalty would serve no purpose other than retribution.

Nonetheless, and despite the ALJ's finding that I lack the ability to pay, the Division asks the Commission to order additional disgorgement and penalties. In support, the Division misleadingly cites *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010), to argue that the amount of disgorgement should be "the total amount raised in the offering minus the amount returned to investors." Div. Brf. at 36. What the court in *Platforms* actually held was that disgorgement is

an equitable remedy "'designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable.'" *Id.* (quoting *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998)).

The conduct at issue was manifestly unprofitable for me, and there is no unjust enrichment to disgorge. I voluntarily did not accept any salary compensation from PanAm, despite that it was in fact due to me under an employment agreement (I was only reimbursed for pre-paid, out-of-pocket expenses). (RE 85; TR. 1929). The only compensation I received from Aurum was compensation for employment via Corsair, which was fully disclosed to all investors. Later, I voluntarily agreed to stop all payments from Aurum to Corsair, and I actually then invested whatever personal funds I had left back into Aurum. Given that there was no unjust enrichment to me, and I received no profits, there would be nothing equitable about ordering me to "disgorge" millions of dollars that I never received.[4]

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[4] Citing *Robert L. Burns*, Rel. No. 3260, 2011 WL 3407859 2722, at * 12, 2011 SEC LEXIS 2722 (Aug. 5, 2011), the Division also argues that the Commission should impose disgorgement and penalties without regard to ability to pay. But Burns involved an investment advisor whose violation was for directly unlawfully enriching himself by accepting personal gifts from brokers in exchange for directing clients to the brokers, unlike here, where any funds that may have been improperly obtained went to the coffers of the corporate entities, not to me. In contrast to the situation in *Burns*, the Division is asking that I be ordered to pay "disgorgement" of funds I never personally received.

Aurum Mining LLC

The Division ignores the ALJ's assessment of my character and uses inflammatory language to try to paint me as a greedy, maleficent serial liar and cheat. For example, the Division states that "Crow and Clug lied to investors and potential investors in virtually every communication." These inflammatory words have nothing to do with the facts, testimony, or the ALJ's conclusions.

The Division alleges that no money would have been raised if not for the alleged misrepresentations and omissions. This is incorrect. The alleged misrepresentations are said to have occurred at specific points in time, such as the initial non-disclosure of Crow's history, but that omission was subsequently corrected. So at most, the alleged omissions or misrepresentations could have affected certain fund raising periods and their associated documents, not all fundraising. And although the ALJ hypothesized about a 'reasonable' investor being misled or wanting additional information, the actual investors had no complaints or redemption requests, and in fact the evidence showed that they did not act differently after being informed of Crow's prior SEC issues and bankruptcy. Many actually reinvested.

Trying to recast hindsight as foresight, the Division makes statements such as "Crow and Clug knew, however, that there was reason not to trust Garate's findings." This is another example of the Division's attempt to use a single event

and extrapolate to conclusions that have no relation to reality and the day-to-day management of operations in a developing country over several years. The ALJ correctly concluded, based on expert witness testimony, that we, as managers, could rely on the work of our in-house experts, such as Mr. Garate. (TR page 1256-1260; TR page 1306; ID 54, 61, 62).

The Division selectively quotes from Transcripts such as with Daubeny's testimony thus giving an inaccurate image of what actually occurred. When the context and entire quotes are read, these allegations by the Division are revealed to be misleading. For example, the Division says Daubeny testified that "the test results done by Aurum "were fabricated...". Daubeny's actual testimony lists and discusses four reasons why test results may have differed from his results and further states that he never discussed any of his concerns with anyone in Aurum or the people who paid for his work. He confirmed that anyone should be able to rely solely on his report.

The Division attempts to portray me in a negative light by stating that I told investors that "production would commence in December [2013] and did not tell investors about the Daubeny and Park reports." The Division completely ignores timelines, context, information that had already been shared, and omits the fact that production did actually start that December and that a small amount of gold was produced. Plant processing issues, mineral selection problems and a lack of capital

to correct those issues then stopped any further progress. As a note, no funds were being sought from the investors at this meeting or thereafter.

The Division then selectively quotes 'negative results' reports or emails that are not, as portrayed by the Division, indicative of a cover up, but are in fact simply the normal ups and downs of attempting to develop a mining operation. For every negative report there were many more positive results. For the record, Bruno Palacio was not the mining geologist as stated by the Division, but a young consultant with a degree in mining engineering (TR 182, line 6).

Continuing with their selective extracts the Division continues to try to put me in as negative light as possible by selectively stating that in May 2011 I told a potential investor that there was over "5 billion worth of gold." This individual, actually a consultant, friend and banker, never invested and the representation was based on reliable information from Aurum's joint venture partner. This representation was from an earlier business plan that was not used for any investments. (FOF 160, 193). And before investing, actual investors were required to acknowledge that they were not relying on such statements.

An early presentation from the Brazilian partner Raiss and my West Point classmate Coogan sent to me shows, on page 10, "18" tons of gold; and on page 19 of the presentation it shows 104 tons of gold which, at the approximate price of $1,500/oz., lower than the actual price at that time, gives you $5 billion, thus

showing the source for the number included in that early email (DE 55). Page 1591, line 2-20. That presentation was admitted by the ALJ on TR 1996, line 22 to TR 1997, line 7. I asked for that presentation backing up our numbers to be admitted after the Division questioned me on the $5billion figure. I could have also explained and backed up the 'doubling of potential profit' issue that the ALJ and Division have referred to, the ALJ in his Initial Decision and the Division in their Brief, if I had been asked about them. But I was not afforded that opportunity. Basically, the projections increased because the business model had evolved from one Brazilian project into multiple projects in Peru.

The ABS Fund

The Division states as "fact" that Corsair acted as an unregistered broker-dealer because it received transaction-based compensation. As I have addressed in my Brief, it has been shown in many other court decisions that there needs to be more than just the transaction-based compensation issue to be considered an unregistered broker-dealer.

As I explained in my Brief, Lana had been having technical difficulties with his email system, and had lost or 'misplaced' many emails, so I told him to use a Corsair Group email that was on a Microsoft Exchange server, thus providing back up and synchronization between his various devices. I never told Lana to identify himself as CFO and from what I understand he only did this in a communication

with the ABS Fund, not investors. Lana testified, repeatedly, that he did not see himself as having any relation to Corsair (TR 819, line 11; TR 854, line 5; TR 857, line 19).

The Division also states that the "finders exception" fails in view of the close relationship between me, Crow and Cody Price (the Division mistakenly referred to him as Cody Ross) who ran the ABS Fund. Firstly, this does not relate to any of the courts' list of finders' exceptions and secondly, I did not have a close relationship.

The Division alleges that I was somehow referring people to the ABS fund. This is not true and the evidence does not support this either. Receiving a status update and then sharing this information with business partners is very different from the action of referring someone.

I was informed that the letters of support that I referred to in my Brief were sent, unsolicited, directly to the commission. I did not receive copies of all of them and only knew about them because the senders told me that they had sent them. I also believe these were done during or after the hearings. If requested or allowed, I will gladly provide numerous support letters.

The Division states that "Crow and Clug appear to have directed Aurum's bookkeeper to provide nonspecific ledger entries." This is, again, not backed by any evidence or testimony. The bookkeeper(s) reported to the Office Manager, and

then to the Finance Manager, Mr. Augusto Marin. Mr. Marin, an experienced finance and accounting executive, began working at Aurum in 2012. I would review such things as the larger payments to vendors but definitely would not get involved with, or even understand, how ledger entries need to be completed under Peruvian accounting rules. (TR page 1876-1877; TR page 1662; TR page 1881).

As a note, the Division subpoenaed every bank in Peru and did not find any bank accounts that I had not already disclosed and provided statements for (DE 3, page 1, para 4). I have consistently cooperated with any and all requests by the Division and to insinuate that money was somehow hidden goes against all the facts, evidence, and my conduct throughout this process.

All three entities, PanAm Terra, Aurum Mining LLC, and Corsair Group, no longer exist. None of them have any operations or bank accounts and of course they are no longer making any filings. PanAm filed its Final tax return for year ending 2013. The Corsair Group filed its Final tax return for year ending 2014. Aurum is filing its Final tax return for year ending 2015.

The Division states that my evidence of inability to pay was insufficient as it did not cover years 2010 to 2012. I provided all my financials per the ALJ's specific instructions which required me to cover years 2013 thru the time of submission. As a note, I closed and ceased making any payments for the small corporate office in Lima, Peru in September 2015.

The Division's Argument that the Cautionary Statements Should Be Disregarded is Incorrect

As discussed in my principal brief, the investors (all of whom were qualified investors) were aware of the riskiness of their investments, and the PPMs specifically warned investors not to rely on projections of results because any projection was

> merely a statement of the results we would expect if all relevant conditions remain unchanged and our underlying assumptions about the future proved accurate...Because those expectations and projection are very seldom fulfilled, the projection must be understood as a model for the purpose of explanation rather than as a prediction of something that we expect to happen...It should be assumed that these projections WILL NOT be achieved and only a good faith effort on the part of management is expected.

(ID at 21-22 (quoting Div. Ex. 314 at 17)).

Such "cautionary language, if sufficient, renders the alleged omissions or misrepresentations immaterial as a matter of law." *Parnes v. Gateway 2000*, 122 F.3d 539, 548 (8th Cir. 1997). Given the extensive cautionary language we used (not to mention the evidence that investors did not believe they were misled), many of the alleged misrepresentations were immaterial as a matter of law. At a minimum, the existence of the cautionary statements should be accounted for as a mitigating circumstance.

Based on *SEC v. Pittsford Capital Income Partners, L.L.C.*, No. 06 Civ 6353 T(P), 2007 U.S. Dist. LEXIS 62338 (W.D.N.Y. Aug. 23, 2007), the Division says the disclaimers should be disregarded because the disclosures did not relate to the actual risk. That is false. The court in *Pittsford* found the cautionary language in PPMs for a business that was to acquire notes secured by mortgages was not an effective defense because the cautionary language related to the riskiness of mortgage lending, but the conduct at issue did not relate to projections of the profitability of the lending portfolio, but rather to making unauthorized and undisclosed loans, including unsecured loans, and commingling funds with those of another company:

> [E]ach PPM stated that due to the nature of mortgage lending, the Pittsford and Jefferson offerings were highly speculative and involved a high degree of risk. However, this cautionary language in the PPM did not disclose the risks that arose from Palazzo and Tackaberry's decisions to make millions of dollars in unauthorized loans, fail to disclose defaults and commingle funds. Consequently, the cautionary language does not shield the defendants from liability because the risks that were disclosed were not the risks that harmed the investors.

SEC v. Pittsford Capital Income Partners, L.L.C., No. 06 Civ 6353 T(P), 2007 U.S. Dist. LEXIS 62338, at *39 (W.D.N.Y. Aug. 23, 2007).

By contrast, the disclaimers here told investors to assume that projections of the companies' profitability were inaccurate, and the alleged misrepresentations

related to the companies' profitability. Thus, unlike in *Pittsford*, the "cautionary language" here "relate[s] directly to that by which plaintiffs claim to have been misled," i.e., to the alleged misstatements.

The ALJ Correctly Declined to Impose an Officer/Director Bar

The Division argues that an Officer-and-Director bar should be imposed on me, notwithstanding the ALJ's conclusion that it would be inappropriate to impose because "[a]s the Division concedes, however, it did not seek an officer-and-director bar against Clug until after the hearing and for the first time in its post-hearing brief." ID at 72. The Division says it was not required by the Commission's Rules of Practice to disclose its intention to seek such a sanction prior to the hearing. The ALJ concluded otherwise, noting that 17 C.F.R. §201.200(b)(4) says "[t]he order instituting proceedings shall state the nature of any relief or action sought or taken." ID at 72. The ALJ was correct not only as a matter of the rules, but also as a matter of due process. *See, e.g.*, *In re Ruffalo*, 390 U.S. 544, 550-51 (1968) (finding Ohio's disbarment of attorney violated requirement of due process where attorney was given "no notice that his employment of Orlando would be considered a disbarment offense until after both he and Orlando had testified at length on all the material facts....The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended.... This absence of fair notice as to the

reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process.").

For the reasons stated in my principal brief, the Commission should decline to impose a penny stock bar on me under the circumstances, which do not in any way relate to a penny stock offering. As to all of the bars and cease-and-desist order, the Commission should consider that I have no prior history of violations and no continued involvement with Crow or any of the business ventures.

I am not a fraudster who intentionally enriched himself at the expense of others. Contrary to the picture the Division tries to paint, the ALJ, who had the opportunity to observe me and my testimony first hand, specifically found me to be an honest person who made mistakes due to being in over my head, and associated with the wrong people. I submit that these circumstances not only do not support imposing additional penalties, but support relieving me of the onerous bars and cease-and-desist order, the stigma of which is likely to continue to prevent me from obtaining positions in unrelated fields.

CONCLUSION

I respectfully ask for the Commission's patience and understanding for any mistakes and procedural errors I have surely committed in composing this Response and Reply Brief myself. After considering my arguments in this Brief and my opening Brief, I respectfully ask the Commission to reduce the penalties

(and violations) imposed on me, and reject the Division's request to find additional violations and impose additional penalties.

Dated: July 5, 2016

Respectfully submitted,

By: _____
Alexandre S. Clug

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2016, I served a copy of this Petition by fax and mail to the Commission's Secretary, Office of Administrative Law Judges, U.S. Securities and Exchange Commission, 100 F Street, NE, Mail Stop 1090, Washington, DC 20549, and a true and correct copy of the foregoing was furnished via Electronic Delivery to:

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

_____
Alexandre S. Clug