HARD COPY

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.,

THE DIVISION OF ENFORCEMENT'S REPLY BRIEF IN FURTHER SUPPORT OF ITS CROSS-PETITION FOR REVIEW OF INITIAL DECISION

The Division of Enforcement respectfully submits this reply brief in further support of its cross-petition for review, which requests that the Commission: (1) reverse the finding in the Initial Decision that Michael Crow acted as a mere "consultant" with regard to PanAm Terra, Inc., rather than a *de facto* officer; and (2) reverse the lenient sanctions the Initial Decision ordered as to Alexandre Clug, and impose sanctions commensurate with the gravity of Clug's conduct and the investor losses he caused.[1]

PRELIMINARY STATEMENT

Clug's opposition brief contends that PanAm was a public company with a responsible and attentive board of directors, and diligent officers who set policy and made corporate

[1] The Commission's Order dated May 4, 2016, directed that this reply brief "be limited to the issues presented by the Division's cross-petition for review," and stated that Respondents Aurum Mining, LLC, PanAm Terra, Inc., The Corsair Group, Inc., and Michael W. Crow were permitted to file briefs "responding to the Division's appeal with respect to them" by July 5, 2016. No briefs, however, were filed by these Respondents. Abbreviations used herein conform to those in note 1 of the Division's brief in support of its cross-petition for review and opposing Clug's petition for review dated June 3, 2016 ("Div. Br."). "Clug Opp. Br." refers to Clug's brief opposing the Division's cross-petition for review and reply brief in support of petition for review dated July 5, 2016.

decisions. According to Clug's version of the facts, PanAm decided to retain Crow as an outside "consultant" and, in this role, Crow purportedly kept his distance from the decision-making process at PanAm, and only offered recommendations.

This story, which the Initial Decision accepted based largely on Crow's and Clug's self-serving testimony, bears little resemblance to the clear picture captured by the weight of the contemporaneous evidence. That evidence proves that Crow's role at PanAm – a tiny start-up that had no assets, no revenues and collapsed after less than two years – was substantial and should have been disclosed. Crow conceived of PanAm, provided its initial funding, and was a large shareholder as well as its primary promoter. Crow also negotiated PanAm's only business contract, the Mickelson Capital deal. In short, Crow did not play second fiddle to anyone at PanAm and, although he and Clug sought to create the illusion that Crow was a mere "consultant," the reality is apparent from the emails and documents.

Crow's influence over PanAm was demonstrated in September 2012, when Crow decided to exercise his right to convert a note into 1.9 million shares. Crow then directed PanAm's CFO to sell 300,000 of those shares to third-party investors at a price dictated by Crow. The CFO followed Crow's orders without question, and never informed the investors that the purpose of the transaction was to put cash in Crow's pocket, not to fund PanAm. As a result of the transaction – and unlike all of PanAm's other investors who lost every penny of their investment – Crow tripled his initial $25,000 investment in PanAm. Crow was the man behind the curtain, and investors were entitled to know that Crow, a recidivist who had been barred from serving as an officer or director of a public company, had a prominent role in all aspects of PanAm.

Clug also opposes the Division's challenge to the nominal disgorgement ($50,000) and penalty (zero) imposed by the Initial Decision. These light monetary sanctions followed from

the Initial Decision's finding that Clug – who defrauded investors of $4 million – was a "good person" who "strove committedly . . . to return money to investors." ID at 80. Clug's briefs reiterate this characterization; however, that Clug was otherwise a "good person" is largely irrelevant in determining the appropriate monetary remedies, given that the Initial Decision found that Clug intentionally violated the antifraud provisions of the securities laws, and aided and abetted and caused other violations.

ARGUMENT

I. Crow Was a *De Facto* Officer of PanAm

Clug makes three arguments regarding Crow's role at PanAm: (1) the Division "misstates the law" regarding *de facto* officers; (2) the hearing testimony of Clug, Crow and others associated with PanAm is more reliable than the dozens of contemporaneous emails and other documents; and (3) the events relating to Crow's conversion of his note into PanAm shares were perfectly above board and, in any event, Clug was "not directly involved." Clug Opp. Br. at 14. Clug is wrong on all points.

First, Clug erroneously argues that the Division must prove that Crow was in "total control" of PanAm. Clug Opp. Br. at 6. Even the Initial Decision, however, does not apply this "total control" standard. Instead, the Initial Decision correctly states that the inquiry is "fact-intensive analysis of the employee's duties and responsibilities to determine if they are a de facto officer." ID at 65.

Clug seeks to buttress his point by arguing that "there were many instances in which we did not follow Crow's preferred course of action." Clug Opp. Br. at 10. Clug, however, cannot point to a single instance of this ever happening. The two examples that both Clug and the Initial Decision refer to as illustrating Crow's inability to assert his control do not withstand scrutiny.

First, Clug states that "Crow asked for Dan Najor to be on the Board of Directors. I decided otherwise." Clug Opp. Br. at 13. In the only email relating to Najor, however, there is nothing to suggest that Clug overruled Crow; instead, the email suggests that Najor was not interested in PanAm's board. Div. Ex. 27.

Clug also claims that "Crow asked for Lana to be fired. Lana was not fired." Clug Opp. Br. at 13. A review of all the emails among Crow, Clug and Lana, however, show something different. These emails, sent from September 2011 through August 2012, demonstrate that Lana reported to Crow in the same manner that any CFO reports to a senior officer. Div. Br. at 13-15 (collecting emails). Lana provided updates on his progress on filings to both Crow and Clug, and both Crow and Clug provided direction to Lana as CFO. *Id.*

To be sure, both Crow and Clug become exasperated with Lana's performance and hinted at his termination. And, as Clug points out, Lana was not fired. The reason, however, was not because Crow was a mere consultant. Rather, Crow and Clug realized that Lana played an essential role in their schemes. Most importantly, by soliciting the clients of his tax preparation business to invest in Aurum and PanAm, Lana brought in millions of dollars of investor funds. Lana, moreover, never demanded any monetary compensation and also served as Aurum's CFO.

Second, Clug argues that "five separate witnesses" testified that "Crow did not have decision-making authority or control over PanAm." Clug Opp. Br. at 10. The Initial Decision similarly found the hearing testimony of Crow and Clug, supplemented by that of Lana, part-time CEO Steven Ross, and board member Henry Gewanter to be more persuasive than the documentary record. In this regard, the Initial Decision erred.

The testimony and the documents present dramatically different accounts of Crow's role. With regard to the Mickelson Capital negotiations, for example, Crow, Ross and Clug testified

that Ross took the lead in the negotiations and Crow merely made introductions. ID at 13. The full scope of the emails, however, shows the opposite: over an eighteen-month period Crow acted on behalf of PanAm and negotiated all of the deal terms. Crow only included Ross in the negotiations at the end, and Ross took a subservient role to Crow. Div. Br. at 9-11 (collecting emails). *See also* Div. Ex. 502 (11.5.12 Crow email to Mickelson relating "the basics of the Pan am proposal" and stating that "[PanAm] wants you as partners"); Div. Ex. 499 (10.29.12 Ross to Crow email seeking Crow's advice on proposal "so that we can respond to his proposal").

The stark contrast between these contemporaneous emails and the hearing testimony shows that the testimony of Crow, Clug and Ross should be deemed not credible as to Crow's role at PanAm. Each of these witnesses, like Crow, had an undeniable incentive to minimize Crow's role in the company at the hearing. Crow's credibility, moreover, cannot be evaluated without considering the finding of the federal judge who handled his 2008 SEC trial and determined that Crow "perjured himself" during that trial. Div. Ex. 689 at 5.

In addition, Gewanter's testimony that "Crow never had anything to do with running [PanAm]," tr. 1834, simply demonstrates that Gewanter himself was almost completely removed from PanAm's operations. Gewanter, for example, did not know that Crow negotiated the Mickelson Capital deal, that Crow was a PanAm shareholder, or that Crow was a co-owner of Corsair. Tr. 1833-1838. PanAm's absentee board members, Gewanter and Chad Mooney, were entirely disengaged and exercised no oversight or supervision over PanAm. Lana, similarly, only had a narrow understanding of Crow's activities at PanAm.

Finally, the circumstances surrounding Clug's resignation as CEO and Ross's appointment provides another illustration of the sharp differences between the documents and the hearing testimony relied upon by the Initial Decision and cited now by Clug. The Initial

Decision, based on hearing testimony of Clug, Ross and Crow, disagreed with the Division's argument that Crow engineered the replacement of Clug with Ross as CEO. ID at 66. Clug's brief argues that "Crow [did not] have the ability or authority whatsoever to decide my role with PanAm." Clug Opp. Br. at 12.

The emails, and even Clug's own testimony, tell a much different story. Although Clug now denies it in his briefs, at the hearing he admitted that "Crow was very upset with me on the [PanAm] late filings . . . he wanted liquidity in his shares." Tr. 1658. Accordingly, in October 2011, Crow solicited Ross to sign a consulting agreement that anticipated that "[s]erving as CEO of portfolio companies" would be among Ross' duties. Div. Ex. 106. The next month, Crow touted Ross as "[o]ne of our partners" who would make "an excellent public co CEO." Div. Ex. 128. Subsequent emails show that Crow negotiated the terms of Ross' contract, drafted the agreement, and made sure it was effective as of the July 2012 board meeting. Div. Ex. 395, 397, 380, 398, 431, 432. No documents support Clug's current position that he voluntarily resigned from PanAm because he "did not have as much time available to dedicate to PanAm." Clug Opp. Br. at 12.

Third, Clug minimizes the significance of the convertible note scheme and claims that, in any event, he was "not involved in it." Clug Opp. Br. at 16. The convertible note scheme, however, starkly illustrates Crow's control over PanAm. Although Crow did have the right to convert the note into 1.9 million shares, the note did not require PanAm to find buyers for the shares at a price dictated by Crow. Div. Ex. 746. But that is exactly what happened: Crow instructed Lana to find buyers for 300,000 of the 1.9 million shares in order to generate cash to allow Crow to pay back alimony and child support. Div. Ex. 796, 460, 465, 468. Crow also decided on a 25 cents per share price, which was selected solely in order to maximize Crow's

payout. Div. Ex. 468. Clug, Ross and Lana readily acceded to Crow's requests, even though those requests exceeded the scope of PanAm's obligations under the terms of the convertible note.

Clug's argument that he was not involved in the scheme is contradicted by his own emails. Clug knew about the conversion, including that Lana was routing the buyers' funds through his personal checking account. Div. Ex. 796, 472. Clug also was aware that PanAm's auditors were told that the note had been extended rather than converted. Div. Ex. 475, 493.

Clug understood the importance of Crow's convertible note, and that the note was under scrutiny from the Commission's Division of Corporation Finance ("CorpFin"). As the correspondence shows, Clug only revealed that Crow was the noteholder following a series of pointed letters from CorpFin inquiring as to the identity of the noteholder. Div. Ex. 830 (3.16.12 CorpFin letter to Clug: "identify the natural person that beneficially owns the convertible notes"). *See also* DE 709, 710, 831 (letters between CorpFin and Clug re the convertible note and other PanAm issues).

Clug argues, without citation to any documents, that the "actual issuance and distribution of shares" took place in January 2013, not earlier. Clug Opp. Br. at 17. In any event, the record is clear that Crow told PanAm of his intent to convert the note into 1.9 million shares in September 2012, and at the same time three PanAm investors paid $75,000 for 300,000 of those shares. Div. Ex. 460, 465, 466, 467, 468, 485. In addition, Crow exercised beneficial ownership and control over the 1.9 million shares he received in the conversion in November 2012 when his instructions for the shares were communicated to the transfer agent. Div. Ex. 480, 506. It was at that point that Crow's ownership in PanAm reached the 28.4% level, far in excess of the 4.99% blocker.

Finally, Clug argues that "if there was any illegality in the transaction, the involvement of counsel in structuring it would shield those involved from liability." Clug Opp. Br. at 14. The evidence, however, proves that – contrary to the Initial Decision's unsupported finding that "the requirements for an advice of counsel defense were satisfied," ID at 66 – no legal advice was given. Even assuming there was legal advice, no evidence exists that the advice was based on a full disclosure of all relevant facts or that the advice was followed. Div. Br. at 33-35.

II. Clug's Sanctions Should Be Increased Commensurate With His Misconduct

The Division's brief set forth the erroneous findings in the Initial Decision regarding the appropriate sanctions against Clug. Div. Br. at 36-46. Clug's primary defense is that he is "an honest person," that he acted "in the hope of keeping [the investors] afloat." Clug Opp. Br. at 4, 31. Clug adds that his "goal was always to build successful business ventures that would generate handsome returns to . . . investors." Clug Opp. Br. at 1, 20. Clug repeatedly quotes the Initial Decision's statement that Clug was a "sincere individual," "a hard-working, generally good person," who "strove committedly to ensure the businesses succeeded, in order to return money to investors." ID at 80.

The level of sanctions in a securities fraud case should not be based primarily on a finding that an individual who committed fraud was well-intentioned. Whether Clug is a "good person" or is "sincere" is irrelevant to whether Clug violated the antifraud provisions and deceived investors. "[T]he fact that the defendant . . . had the best of motives, and that he thought he was doing the plaintiff a kindness, will not absolve him from liability, so long as he did in fact intend to mislead." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 192 n.39, 84 S. Ct. 275, 283 n.39 (1963); *accord Abrahamson v. Fleschner*, 568 F.2d 862, 878 n.27 (2d Cir. 1977) ("Scienter does not require a showing of intent to cause a loss").

As the Seventh Circuit held in an SEC case:

> [a defendant's] motive [is] irrelevant; securities fraud is wrongful even if committed in the belief that lies serve . . . investors' interests. The plaintiff in a securities-fraud suit must show intentional deceit; the motive for that deceit is beside the point.

SEC v. Koenig, 557 F.3d 736, 740 (7th Cir. 2009); *see also SEC v. Caterinicchia*, 613 F.2d 102, 106 n.7 (5th Cir. 1980) (defendant's assertion that he "did not intend to harm investors, does not negate a finding of scienter"); *U.S. v. Hickey*, 580 F.3d 922, 931 (9th Cir. 2009) ("even if [defendant] genuinely believed his investment scheme would be profitable . . . he would still be guilty of securities fraud . . . if he knowingly lied to investors"); *U.S. v. Benny*, 786 F.2d 1410, 1417 (9th Cir. 1986) ("good-faith belief that the victim will be repaid and will sustain no loss is no defense" to fraud charge).

Clug offers little defense to the cases cited in the Division's brief that disgorgement in offering fraud cases is based on the total amount raised minus the amount returned. Clug's argument that he "never received" the $3.9 million raised from Aurum investors is contradicted by the fact that Clug was a co-owner of Aurum and controlled Aurum's bank accounts. Clug's untenable argument, which the Initial Decision erroneously accepted, essentially is that fraudsters found liable for securities fraud get the benefit of a deduction for the costs of running their fraudulent enterprises.

Finally, Clug also argues that his primary mistake was to be "associated with the wrong people," an apparent reference to Crow. Clug Opp. Br. at 31. The Initial Decision, which imposed a disproportionately large disgorgement and penalty on Crow, apparently agreed that Crow bore more responsibility for the duo's illegal conduct and resulting investor losses. The evidence shows, however, that Crow and Clug were equally culpable, and therefore equally responsible, for the Aurum Mining, PanAm and Corsair schemes. Clug, moreover, partnered

with Crow knowing of Crow's history as a recidivist. As a result, Clug's sanctions for his knowing role in the illegal conduct should be increased.

CONCLUSION

The Division of Enforcement respectfully requests that the Commission grant the relief requested in its cross-petition for review and deny the relief requested by Clug.

Dated: July 19, 2016
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

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 450(d) that the Division of Enforcement's Reply Brief in Further Support of its Cross-Petition For Review of Initial Decision dated July 19, 2016 complies with the length limitations set forth in the Commission's Order dated May 4, 2016. The Division's Reply Brief is 3,002 words.

David Stoelting

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2016, I filed the Division of Enforcement's Reply Brief in Further Support of its Cross-Petition For Review of Initial Decision dated July 19, 2016 with the

Office of the Secretary of the Commission via facsimile at (202) 772-9324,

and served copies on the following person by email (aclug@thedolphingroupllc.com) and by UPS Next Day Air to:

Alexandre S. Clug
150 Waters Edge Drive
Jupiter, FL 33477

And by UPS Next Day Air and to alj@sec.gov upon:

Office of the Secretary (original plus three copies)
U.S. Securities and Exchange Commission
100 F Street, N .E.
Washington, DC 20549

David Stoelting