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.

RESPONDENTS' POST-HEARING BRIEF

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October 2, 2015

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Securities Act of 1933

Securities Exchange Act 1934

The above Respondents respectfully submit this Post Hearing Brief.

Preliminary Statement

The case before this tribunal is unique in the sense that not a single investor complained to the Division that they had been defrauded, misled, or that they wanted their investment returned. In fact, the investors, who are all accredited, and defined under Reg D as investors that are financially sophisticated and have a reduced need for the protection provided by certain government filings, were notified by Respondents' that an SEC investigation had been initiated and did not complain, were earlier notified that an "OIP" had been filed and did not complain, were contacted by the Division staff by phone, in person and through service of subpoenas but again, did not complain. (FOF 111, 112, 149). The Division aggressively sought out investors to appear and testify none of whom had a desire to act as witnesses against the Respondents. In fact, the investors supported Respondents. The Division was relegated to one disgruntled individual, Richard Weissman, who was not even an investor (FOF 150-154).

Mitchell Melnick testified that he did not want to speak with the Division, purposely did not return their telephone calls and the Division in order to force him to cooperate served him with a subpoena. Simon Stern also stated that the only reason he attended the Hearing was because he had been subpoenaed. (FOF 149).

The investors who provided testimony all were aware that both PanAm and Aurum were development stage start-up companies with no revenues that contemplated business transactions in South America, and understood the high degree of risk involved.

At no time was Crow a director or officer of PanAm nor was he as the Division contends a defacto officer. PanAm at all times had a board of directors and/or officers who made corporate decisions. It was a company that was initially controlled by Alexandre Clug and

Michael Crow never had owned or controlled in excess of 4.99% of the shares of PanAm. (FOF 16).

Crow did not participate in Board of Director meetings. (FOF 11, 12, 18).

Angel Lana, the CFO of PanAm believed Crow was merely a consultant to the Company. So did Ross, Gewanter and Mooney. (FOF 7, 8, 11, 13, 15, 18, 19).

Contrary to the Division's assertion, the fact that Crow converted a convertible note into shares does not support the Division's claim that he was a defacto officer. At this time, Clug who was no longer the CEO. Ross who was the CEO, and Lana as CFO, in conjunction with Company's counsel Brantl, were aware of the Note conversion. (FOF 25, 26). The Note conversion by Crow was a legally allowed private transaction that could not be stopped by the Company without risking being sued. The executed extensions of the Convertible Notes were sent directly to the auditors. (FOF 27). Crow did not exercise control over the operations of PanAm. (FOF 4-19).

Clug and Crow never introduced an investor to the ABS fund, had no involvement in structuring or negotiating investments in the ABS fund. Only one investor was introduced to the ABS fund by Clug and that was Clug's father and even in this instance no documents were provided to him by Clug. (FOF 37).

Crow and Clug were not engaged in the business of transaction based compensation, and Lana who had no role in Corsair, was the individual who introduced his accredited accounting clients to the fund and who became investors in the fund. (FOF 38-45).

As to Aurum, the investors were all aware of the quick-to-production approach. (FOF 114). Daubeney, who did not speak Spanish, prepared a report based on a one day visit to the Molle Huacan mine in April of 2012 (FOF 88-97) creating a report which was utilized to

prepare a valuation by RWE Growth Partners, an independent accredited valuation company of over 20 million dollars. (FOF 98-101). No credible testimony was introduced by the Division to refute this valuation. This same report, which was reviewed as relatively positive in nature included a reference to a potential amount of gold at the Molle Huacan mine of 195,000 oz of gold, which at $1,400 per ounce would equate to 273 million dollars. (FOF 101). The two Independent Reports on Molle Huacan received by management were only a very small part in the overall mountain of data and information received by Aurum management. Beyond the actual information in the reports received there were no further communications, comments or feedback from the authors. Based on the very limited data and short visit times that were used to produce them, they were considered positive and their recommendations were followed. (FOF 79-81, 101).

The Park Report, based on a one day visit in April 2012, was only delivered to Aurum Management in October 2012 (FOF 83) and thus did not include anything whatsoever that had occurred between those dates, such as Induced Polarization testing (Resp. Ex. 47), and numerous additional metallurgy (Resp. Ex. 48), analysis, exploration, testing and sampling. The report was thus out of date and not relevant to the actual status of Molle Huacan in October 2012. Thus, to share this report with outsiders when it was received in October 2012 could be confusing since it was discussing the situation of the mine as of April 2012 and readers could understandably mistakenly think that it was discussing the mine as of October 2012.

STATEMENT OF FACTS

Respondents incorporate their findings of fact filed in this action as well as the transcripts of testimony witnesses and the exhibits introduced at trial.

ARGUMENT

I. Crow, Clug, Aurum and PanAm Did Not Willfully Violate the Anti-Fraud Provisions of the Federal Securities Laws; Crow and Clug Did Not Willfully Aid and Abet or Cause Aurum's and PanAm's Violations

A. Legal Standards

In order to establish liability under the Exchange Act and Rule 10b-5, a plaintiff must prove "that [1] in connection with the purchase or sale of a security the defendant, [2] acting with scienter, [3] made a material misrepresentation (or a material omission if the defendant had a duty to speak) or used a fraudulent device." *S.E.C. v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1467 (2d Cir.1996). The Securities Act applies "essentially the same elements," except that scienter need not be established to obtain an injunction under Section 17(a)(2) or (3). *First Jersey Secs.*, 101 F.3d at 1467 (citing *Aaron v. SEC*, 446 U.S. 680, 701-02, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980)).

"Scienter, as used in connection with the securities fraud statutes, means intent to deceive, manipulate, or defraud, or at least knowing misconduct." *First Jersey Secs.*, 101 F.3d at 1467. Some aspect of the projection must be actually false, and known to be false to the defendant making the promise at the time it was made, for the projection to be fraudulent. *See In re Integrated Resources Real Estate Ltd. Partnerships Securities Litigation*, 850 F.Supp. 1105, 1141 (S.D.N.Y.1993).

Additionally, if the conduct was highly reckless, it may rise to the level of scienter without an actual showing. Under such circumstances, the decision must have been "highly unreasonable," representing "an extreme departure from the standards of ordinary care ... to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir.1978); *see also Rothman v. Gregor*, 220 F.3d 81, 90 (2d Cir.2000); *SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir.1998)

The misrepresentation must be material.

A factual statement, misrepresentation, or omission is material if there is a substantial likelihood that the misrepresentation "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976)).

1112 Materiality is a "fact-specific inquiry," *Basic*, 485 U.S. at 241, 108 S.Ct. 978, and a "relative concept, so that a court must appraise a misrepresentation or

> omission in the complete context in which the author conveys it." *In re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig.*, 7 F.3d 357, 364 (3d Cir.1993) (citing *I. Meyer Pincus & Assocs. v. Oppenheimer & Co.*, 936 F.2d 759, 763 (2d Cir.1991)).

In order to prevail on its claim that Respondents violated Section 17(a)(1), (2), or (3), the Division of Enforcement ("Division") must first prove that Clug, Aurum and PanAm each made "a material misrepresentation or materially misleading omission," and such misrepresentation and/or omission was "in the offer or sale of a security." See *SEC v. Morgan Keegan & Co.,* 678 F.3d 1233, 1244 (11th Cir. 2012); *SEC v. Merch Capital, LLC,* 483 F.3d 747, 766 (11th Cir. 2007). For a violation of Section 17(a)(1), the Division must prove that the Respondents made the material misrepresentation and/or omission with scienter. See *Morgan Keegan & Co.,* 678 F.3d, 1244; *Merch Capital, LLC,* 483 F. 3d at 766. The U.S. Supreme Court has defined "scienter" as a mental state embracing intent to deceive, manipulate, or defraud." See *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 194, n. 12, 96 S. Ct. 1375, 1380, 47 L. Ed. 2d 668, 676 (1976); *see also Aaron v. SEC,* 446 U.S. 680, n. 5, 100 S. Ct. 1945, 64 L. Ed. 2d 611 (1980) (applying *Ernst* definition of scienter to Section 17(a)). For violations of Section 17(a)(2) and (3), the Division must prove that the accused party negligently made such material misrepresentation and/or omissions. See *Morgan Keegan & Co.,* 678 F.3d at 1244; *Merch Capital, LLC,* 483 F. 3d at 766.

> Scienter is an element of the Commission's claims under Section 17(a)(1) of the Securities Act (Count III) and Section 10(b) and Rule 10b–5 of the Exchange Act (Count II). Scienter is defined as either knowing misconduct or severe recklessness. *Carriba Air,* 681 F.2d at 1324. In this Circuit, "[s]evere recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." *McDonald v. Alan Bush Brokerage Co.*, 863 F.2d 809, 814 (11th Cir.1989) (citation omitted).

In order to aid and abet a violation, the Division must prove scienter. Under 10b-5, the Division in order to establish liability based upon aiding and abetting must prove:

Although variously formulated, three principal elements are required to establish liability for aiding and abetting a violation of section 10(b) and Rule 10b-5: (1) that a principal committed a primary violation; (2) that the aider and abettor provided substantial assistance to the primary violator; and (3) that the aider and abettor had the necessary "scienter"-i.e., that she rendered such assistance knowingly or recklessly. *(Citations Omitted).*

B. Aurum, Crow, Clug Did Not Willfully Violate Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-6 Thereunder in the Offer and Sale of Aurum Securities; Crow and Clug Did Not Willfully Aid and Abet and Cause Aurum's Violations

The Division claims that Clug in May 2011 told a potential investor there was over "5 billion worth of gold." This individual, actually a consultant 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).

As shown from the exhibits and testimony elected at trial, the representations included in the PPM's and quarterly updates provided materially accurate information for the investors. (FOF 157-176).

1. May 10, 2011 Term Sheet and Notes

A total of $250,000 was raised through the convertible notes. Convertible Notes were used as a way to better compensate investors for the higher risk they were taking as initial investors by giving them a 50% discount. Compensation of $120,000 and reimbursement of pre-paid and allowed expenses of approximately $45,577 was disclosed. (FOF 66, 67). Additional funds were raised for Aurum and for the Division to contend that the compensation and expenses were solely from these funds ignores the fact that additional funds were invested. The proposed Term Sheet was not an offer to purchase securities and this was clearly stated. The terms of the

transactions with note holders whose debt could be converted at any time was set forth in the promissory notes. (FOF 66 - 69). Other than the disclosed compensation, the proceeds derived from note holders were used to pursue the business Plan of Aurum. (FOF 67).

A Joint Venture Agreement for Batalha was in fact entered into and Aurum received an immediate ownership of 50% of the Joint Venture. (FOF 55). Contrary to the Division's assertion the note conversions were not predicated only upon closing of the land and rights for gold of Batalha. This was merely one option available to the note holders. (FOF 69).

The rights that needed to be obtained as to Batalha as set forth in the August PPM was that "Batalha JV owns or has irrevocable rights." (FOF 49). The December 31, 2011 PPM stated that the land and mining rights would be owned or controlled. (FOF 50). According to the certified and translated contracts and Thomas Raiss, who could be relied upon by Respondents (even according to the testimony of Bruno Palacio) the JV did acquire or control the rights to Batalha. (FOF 51, 53, 54, 5, 58).

2. The August 2011 PPM

The total amount raised from investors under the August 2011 PPM was $115,000 and these funds were held in a segregated bank account serving as an "escrow" and were retained as required until the $250,000 closing condition was met under the new and accepted December 2011 PPM. The bank statements of Aurum clearly show these funds in trust in 2012. (FOF 73). In light of the fact that the Batalha project was encountering delays and the business model of the company now included Peru and the closing condition of the original August PPM were no longer applicable, a rescission offer was made to all seven (7) investors who invested under the August PPM. (FOF 71, 72). All seven (7) of the investors executed Subscription Agreements

and continued their investment under the terms of the December 2011 PPM. (FOF 74 – 76). The only closing condition under the December 2011 PPM was for the Company to raise $250,000 in funds. Clearly the individual investors' decisions to remain with the Company after further disclosure cannot be ignored. (FOF –70, 74).

These investors represented they reviewed the December 2011 PPM in its entirety and specifically stated they wished to continue their investment. (FOF 74). Each investor knew that the closing conditions of the August 2011 PPM were no longer relevant by confirming their review of the December 2011 PPM. The Division is taking one single line from the January 2012 update letter out of context and urging an interpretation that ignores a common sense understanding that the only closing condition was that set forth in the December 2011 PPM. (FOF 72).

Since the funds were retained in the bank by Aurum, had any investor who purchased under the August 2011 PPM elected to rescind, they would have received their funds back. (FOF 73). The investors were continuously apprised of the progress of the Company and apprised of setbacks that affected the ability of the company to meet its business plan through the use of a data room and various updates. (FOF 138-142).

As stated, the closing conditions of the August 2011 PPM were not applicable based on the update letter and December 2011 PPM. (FOF 70, 71, 72, 74).

3. Crow and Clug Provided Accurate Information as to the Mining and Land Rights in Brazil and the Purchase of Equipment

The August 2011 PPM, which was replaced by the December 2011 PPM, then became irrelevant as to the investors who opted to continue their investment in Aurum. This December PPM stated the licensing process had already been started and the land and mining rights were

owned and controlled by Arthom and/or Raiss, and were contributed to the JV. As set forth in both the September 2011 JV and Amended JV of December 2011, these representations were in fact true. Various powers of attorney were executed, transferring all rights from Barbossa to Raiss. (FOF 51-55). Aurum, upon execution of the JV Agreement, received an immediate ownership of 50% of the Joint Venture. (FOF 55). Even Palacio, after reviewing the powers of attorney conceded that the land rights as to Batalha were transferred from Lima to Raiss. (FOF 54). The representation in the JV Agreement that loans were to be used for investment for the Corporation was also true (Resp. Ex. 18).

4. Crow and Clug Reasonably Relied Upon Information Supplied to Them in Making Projections

As set forth in the various PPM's, the investors were well aware of the high level of risk associated with their investment, which were the only offering documents provided to investors. (FOF 113, 117, 118). Numerous risk facts were disclosed to investors including that "the Projections included in this Private Offering Memorandum are based on a series of assumptions that may not prove to be accurate." "It should be assumed that these projections WILL NOT be achieved and only a good faith effort on the part of management is expected." *(emphasis supplied).* (FOF 118). These types of disclosures were also set forth in documents which were not offers to purchase securities. (FOF 119). Melnick testified for instance when asked about potential return multiples, he knew that his investment would not increase 40 times. (FOF 116). Based upon the information available to Crow and Clug, the projections in the email(s) were reasonable. The projections were backed up by data provided by sources that Crow and Clug had a right to rely on. The representation that Molle Huacan had 10 significant gold veins that had tested as high as 24 g/t was based on reliable data. (FOF 57, 58, 78, 157-176).

The two independent reports were not critical to a determination of the viability of the

mining operations of Aurum. Daubeny was there only one day and very little can be accomplished in one day. (FOF 79-97). Neither Park nor Daubeny provided follow up to management. (FOF 81). Still, Park testified that even based on his short visit that management had an opportunity to go profitably into production. (FOF 87). Daubeny agreed that it was possible to go into production without establishing an ore body. (FOF 97).

The Division contends that because Elias Garate made an error as to the viability of Cobre Sur that he could not be trusted. However, Garate and others who formed the Aurum team had highly credible backgrounds and experience in mining in Peru. (FOF 78). Management reasonably relied upon Garate's report in as to the projections of gold content and cash flow projections. (FOF 78).

Contrary to the Division's assertions, Aurum did not conceal Park's report from Daubeny rather the Company felt it was not of significance as sampling and mapping was only partially complete and out of date. (FOF 82, 83, 84, 145). Contrary to the Division's assertions, the Daubeny report was not hidden from investors but was promptly provided to investors in the next communication update, the Q1 2013 update letter, that they received. (FOF 129).

Offering documents which include meaningful cautionary language that informed investors of the risk inherent in any investment render initial return projections immaterial for purposes of federal securities laws. *Securities and Exchange Commission v. Merchant Capital, LLC*, 483 F.3rd 747 (11th Cir. 2007) at 768-769.

The projections to which the Division claims were false clearly were tempered with cautionary language that falls under the Bespeaks-Caution Doctrine. Disclosure was a cautionary process and as new, different or more reliable information was obtained, it was disclosed. Clug had the right to rely on those individuals such as Garate, Raiss and others, who had more detailed

knowledge of the Brazil and Peru mines. As stated in *SEC v. Meltzer*, 440 F. Supp. 2d 179 (E.D. NY 2006), some aspect of the projection must be false and known to be false to the defendant making the promise at the time it was made for the projection to be fraudulent, *at* 188. Here, the evidence is to the contrary as Clug reasonably relied on those with superior knowledge in making the projections which were not false, but even if they were as the Division asserts, does not establish securities laws violations by Clug, as information was not known to him to be false.

5. Crow's Background Was Known to Investors and Was Not Material to Them

Crow's background as to his prior securities issues were disclosed in the December 2011 PPM and his bankruptcy was disclosed in the September 2012 PPM and thereafter. (FOF 120-124). Not a single investor requested a return of their investment based upon these disclosures. The Division relies on *Merchant Capital, supra*, and various other cases that said disclosure was a material omission. What makes these cases distinguishable is that the investors in Aurum, even after full disclosure, did not deem Crow's bankruptcy or prior securities issues to be material. There is evidence from a subjective view point of the investors themselves that Crow's background was not material. This type of evidence was not presented in *Merchant, supra.*

Here, there is uncontradicted evidence that said disclosures were not material to the investors which contradicts the general rule asserted by the Division.

6. Investor Materials Properly Disclosed Use of Proceeds

Clug's and Crow's compensation was clearly and consistently disclosed. The actual advisory agreement with Corsair was also provided via the data room. Nothing was concealed from investors. (FOF 118, 125-129).

Common sense reveals investors knew that from investor proceeds in a company with no income that compensation, which again was fully disclosed, and to which no investor thought unreasonable, even under pressure by the Division (FOF 149), was being paid to Clug. Crow and Clug only received 16% of the total funds raised by Aurum and Clug only 7%. (FOF 177). The Division's assertions that the compensation was 66% of $250,000 fails to take into consideration additional funds raised and is intentionally misleading. (FOF 67). Crow's and Clug's ownership interest in the Class B shares was disclosed and they did in fact advance costs and developed the business plan as consideration for said units.

7. The Risk Disclosures in the PPMs Were More Than Adequate

The risks that harmed the investor were the failure of Aurum to meet its business objectives in spite of good faith efforts to do so. Clug moved to Peru, spent countless hours on location, engaged a team of geologists and support staff, and in good faith dedicated countless hours to the mining projects. (FOF 179-183).

Contrary to the Division's assertion the loss to investors was not concealment of information or false estimates, but the failure of the mines to produce sufficient gold in spite of good faith efforts. Any statement of existing fact was accurate and not misleading.

8. Neither Crow nor Clug Violated Securities Laws - Aurum

No violation of Section 18(a)

As previously stated, Crow was not a defacto officer of PanAm and his background was not required to be disclosed. Crow did in fact extend the due date on the Notes. (FOF 20-24, 27). The objective of PanAm was to acquire farmland and PanAm had in fact started the process of being registered on OTCBB contrary to the Division's assertions. (FOF 31).

Crow did not perform a policy making function and did not have duties analogous to those of an officer for PanAm. *SEC v. Solucorp Industries, Ltd*, 274 F. Supp. 2d 379, 382-387 (S.D. N.Y. 2003).

Crow did not have sufficient control over PanAm. He was not a director and had less than 4.99% of the stock in the Company and could not have more at any one time. See *SEC v. Prince*, 942 F. Supp. 2d 108 (D.C. 2013). Clug did not act with scienter. He had no intent to deceive, manipulate or defraud. See *Merchant Capital, LLC, supra*, at 766.

Gewanter was recruited by Clug as a director. (FOF 5). Clug knew Ross for many years and even though Crow may have recommended a director, Crow did not choose who was selected. Crow did not participate in board meetings. (FOF 4-23). Clug was not CEO at the time the Form D was filed. (FOF 28). PanAm was going through the process to obtain a trading symbol, and the investors knew the shares were not publicly traded and there was no market for them. (FOF 31). Further, Clug did not act negligently contrary to the Division's assertion that he was in violation of § 17(a)(2) or 17(a)(3), and the alleged misrepresentations were not material. See *SEC v. Morgan Keegan*, 678 F.3rd 1233 (11th Cir. 2012) at 1244-1245.

9. Neither Clug nor PanAm Violated Section 13(a) of the Exchange Act or Rules 12b-20, 13a-1 and 13a-13 Thereunder Nor Did Clug Aid and Abet

Crow was not required to be identified as an officer as previously argued and accordingly, the reports filed with the Commission were not accurate. Further, at no time was PanAm stock publicly traded.

10. There is No Violation of Section 15(a)(1) of the Exchange Act Nor Did Clug Aid and Abet

Neither Clug nor Crow acted as a broker-dealer. Even though Corsair mistakenly entered into a referral agreement with ABS, it did not perform under the Agreement. The Initial Term

Sheet the Division alleged was drafted by Crow and Clug was never used. (FOF 46). Lana did not have a role in Corsair and investors in the ABS fund were all obtained from prior relationships and introductions of Lana. (FOF 44). As stated in *SEC v. Kramer*, 778 F. Supp. 1320 Fla. M.D. 2011) merely bringing together parties to transactions even those involving purchase and sale of securities is not enough to trigger broker-dealer registration under 15(a), Clug could not be liable for aiding and abetting Crow as claimed by the Division, as there was no underlying violation.

11. Clug Should Not Be Subject to a Penny Stock Bar

Clug does not concede that the Division established the securities are "penny stocks" but even if they were, Clug did not file a false or misleading statement with the Commission, as Crow was not a defacto officer.

Further, Clug has never been the subject of an SEC action and the Division claims against him are isolated. Once the Division brought its action, Clug refused to accept any further investments from investors. (Resp. Ex. 38). The Division's recidivist argument has no application to Clug. There is no indication that Clug would violate securities laws in the future as clearly evidenced by his refusal to raise or accept funds from investors post SEC action. In fact, Clug has utilized what little funds he has of his own to try to salvage what is left of the business in Peru by investing in Alta Gold. Likewise, the Division has failed to demonstrate that any other bar including an officer and director bar is appropriate as to Clug. Further since the relief was never sought against Clug, he was not put on notice of same, and would be prejudiced if the Division was to obtain this relief post hearing. No doubt Clug could have put additional evidence to rebut this relief sought by the Division.

As to PanAm once Ross became CEO, Clug stepped down from his position. When the Form D was filed in September 2012, Clug was no longer CEO. (FOF 28). The fact that Clug and all investors stood to gain if PanAm succeeded does not compel nor warrant any bar against Clug.

12. Cease and Desist Orders Are Not Warranted

In light of the Division's failure to prove violations of the Securities Act or Exchange Act or rules or regulations thereunder, the Division's relief for a cease and desist order should be denied.

13. Clug

The Division is Not Entitled to Disgorgement

As stated above, the Division has failed to establish violations of the Securities Act.

Secondly, to the extent any disgorgement is required, and it should not, it should be limited to the amount received by Clug as he was not enriched by monies received by Crow, Aurum, PanAm and Corsair. If the intent is to deprive Clug of his unjust enrichment, then this amount would be the appropriate amount. *SEC v. First Jersey, Inc.*, 101 F. 3rd 1450, 1474 (2d Cir. 1996). In *SEC v. McGinn Smith & Co.*, 2015 WL 1446018 (N.D. NY 2015) cited by the Division, broad discretion is given in tailoring appropriate and reasonable sanctions (at p. 9). This case cited by the Division for the argument that disgorgement should equate to the total amount raised is the remedy in the Ponzi scheme case. The instant case is not a Ponzi scheme and the appropriate amount would equate to $286,810.01. (FOF 158), assuming it is determined that disgorgement is appropriate, which it is not as stated above.

Additionally, Clug clearly established his inability to pay disgorgement. He is unemployed, lives at his parents' home, and if he were to liquidate his assets he would not have

any funds to pay disgorgement or even to live on.

As to Corsair as previously stated, Clug did not act as a broker-dealer, and no disgorgement should be ordered. Prejudgment interest would not be applicable as disgorgement is not warranted.

14. Penalties

As to Respondents who have submitted this brief, penalties are not appropriate as no liability has been established. In the event that penalties are imposed, it should be a tier one penalty not to exceed $7,500.00 as Respondents have no prior violations and there is no need for deterrence as Respondents voluntarily ceased raising money from investors.

15. Adoption of Prior Pre-Hearing Brief and Co-Respondent Crow's Pre and Post Hearing Submissions

Respondents adopt argument in its prior submissions and all submissions by co-Respondents Crow to the extent relevant and consistent with these Respondents' defense of this action. Further, Respondent contends that this Administrative Proceeding violates the Appointments Clause. See *Free Enterprise Fund v. Pub Co. Accounting Oversight Board*, 561 U.S. 477 (2010). *Hill v. SEC*, 15 cv 1801 (N.D. Ga. 2015). Further said proceeding violates Article II of the U. S. Constitution based upon Free Enterprise, supra. Further said administrative hearing violates Art. I delegation doctrine and a right to a jury trial.

Conclusion

Based upon the evidence addressed at the hearing and law as applied to said evidence, the Division's claims should be dismissed.

Respectfully submitted,

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