UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16353

In the Matter of	)
Spring Hill Capital Markets, LLC, Spring Hill Capital Partners, LLC, Spring Hill Capital Holdings, LLC, And Kevin D. White,	)
Respondents.	)

The Respondent, Spring Hill Capital Markets, LLC ("SHCM"), Spring Hill Capital Partners, LLC ("SHCP"), Spring Hill Capital Holdings, LLC ("SHCM") and Kevin White hereby submits its Proposed Findings of Fact and Conclusions of Law pursuant to Commission's Rule of Practice 340.

FINDINGS OF FACT

1. Kevin White started working at Lehman Brothers in 1991. Trial Testimony, p. 518, lines 3-9 (hereinafter "Tr.Tes. p.__, l.__"). He continued to work there until its bankruptcy in September of 2008. Tr.Tes. p. 518-520. After Lehman's bankruptcy, Mr. White started SHCP based on the old school merchant bank model. Tr.Tes.p. 522-523.
2. SHCP was a true start-up that was given free office space and became a meeting place for others displaced after Lehman's bankruptcy. Tr.Tes. p. 524, l. 12-23. People who were displaced by the Lehman bankruptcy began to migrate over to SHCP's office as it was a "life boat" for those looking for work. Tr.Tes. p.528, l. 16-

23. When SHCP was first started everyone was trying to figure out what sort of business to explore. Tr.Tes. p. 786, l.18-24.

3. In the beginning of 2009, SHCP had no business. Tr.Tes. p. 530, l. 11-13. In early 2009, Gramercy Capital Corp. ("Gramercy") hired SHCP to perform advisory work and paid $100,000 up front and then $50,000 per month for the approximately the next six months. Tr.Tes. p.530-531. The Gramercy advisory engagement was SHCP's first revenue. Id.

4. Sometime before March 23, 2009, Michael Rafferty, a principal at Rafferty Capital Markets, LLC ("Rafferty") and the President and CEO of Rafferty Holdings and Mr. White had a preliminary discussion, at the New York Athletic Club, regarding a potential business relationship between Rafferty, a registered broker-dealer, and SHCP. Tr.Tes. p. 1042-1044. Rafferty is a broker-dealer registered with the Commission. See Stipulation dated May 6 at 6. Their preliminary discussion was brief. Tr.Tes. p.1044, l. 18-24.

5. After their initial discussion, Michael Rafferty told Mr. White, on March 23, 2009, that he "spoke with some people at [Rafferty]" and then provided Mr. White with an outline of the proposed business relationship between Rafferty and SHCP, in relevant part, as follows:

> [Rafferty] can act as B/D of record for your registered reps. [Rafferty] would hold the licenses and assume those potential liabilities. [Rafferty] would keep a fair percentage of the commissions, [Rafferty would] cover [its] own clearing personnel, [SHCP] would be responsible for the associated clearing costs, and retain the remain (sic) commissions to pay the salesman and cover your overhead. Fails and/or mistakes (hooks) would be on our end. In effect, [SHCP] would be operating as a branch of the RaffCap B/D...

6. Mr. White did not believe that there was anything inherently wrong with Michael Rafferty's business proposal to SHCP because Michael Rafferty is the president of a broker-dealer, the broker-dealer has compliance and Mr. White had no reason to doubt anything that Michael Rafferty was proposing. Tr.Tes. p.542, l. 19-23; p. 543, l. 1-7. Mr. White believed that as soon as the SHCP's employees' licenses were transferred to Rafferty--so that they became registered representatives of Rafferty--they could conduct securities trading without an issue. Tr.Tes. p. 604, l. 12-23. John Fernando, Mr. White's partner (and a lawyer) at SHCP, was excited about the business arrangement with Rafferty and thought it made a lot of sense. Tr.Tes. p. 545, l. 9-12.
7. The entire proposal, that eventually became the agreement between SHCP and Rafferty, came from Michael Rafferty. Tr.Tes. p. 544, l. 5-14. The focal point of Michael Rafferty's proposal was that the SHCP's employees would become registered representatives of the Rafferty broker-dealer. Tr.Tes. p. 1047 l. 9-14. SHCP's employees becoming registered representatives of Rafferty was important to Michael Rafferty because those employees (as registered representatives of Rafferty) would be transacting trades and generating commission revenue. Tr.Tes. p. 1047, l. 9-25; p.1048, l. 3-7. It was Michael Rafferty's understanding that commission revenues could not be paid under the arrangement with SHCP otherwise. Tr.Tes. p. 1048, l. 3-7.

8. The SHCP employees, who were registered representatives of Rafferty, would be trading mortgage-related structured products. Tr.Tes. p. 1049, l. 17-22. In 2009, Rafferty did not have much experience trading mortgage-related structured products. Tr.Tes. p. 1049, l. 23-25; p.1050, l. 1. It was Michael Rafferty's hope that the SHCP employees would give Rafferty a new product line related to structured products. Tr.Tes. p. 1050, l. 3-7. Michael Rafferty understood that the SHCP's employees had significant expertise in structured products. Tr.Tes. p. 1070, l. 10-20.

9. On March 31, 2009, Keith Fell ("Fell"), an attorney and officer at Rafferty, sent an internal email at Rafferty to Michael Rafferty and Barbara Martens, Rafferty's compliance person, regarding the proposed relationship with SHCP. Resp. Ex. 2. In his email, Attorney Fell emphasized that "[t]here are three main points regarding our proposed relationship that I think are important: 1. We should have a basic service agreement that spells-out what we provide to Spring Hill; 2. There should be a non-solicit provision between Rafferty & Spring Hill; 3. Our proposal needs to include costs of clearing plus fully allocated costs for any and all other service which we provide. In addition we need to calculate a 'profit premium' for providing the services." Id. Michael Rafferty agreed with Attorney Fell that those were important points to discuss and include in the final agreement with SHCP. Tr.Tes. p.1052-1053, l. 23-25, 1. Michael Rafferty was able to negotiate a higher fee for Rafferty under its agreement with SHCP, from 10% to 15%. Tr.Tes. p. 1055, l. 13-15.

10. Larry Rafferty, Michael Rafferty's father and former CEO of Rafferty Holdings, thought that the arrangement with SHCP made sense to Rafferty. Resp. Ex. 3. Larry

Rafferty, as of 2009, had been in the securities business for approximately 25 years. Tr.Tes. p.1056-1057, l. 25, 1-4.

11. Between March 31, 2009 and April 13, 2009, Rafferty--through its managing director who is also an attorney--(Fell), compliance person (Martens) and owner (Michael Rafferty)--discussed, drafted and revised the agreement between Rafferty and SHCP before even sending a first draft to SHCP for its review on April 13, 2009. Resp. Ex. 2-13. Michael Rafferty was keenly focused on all of the financial and legal aspects of the arrangement that were important to Rafferty such as the percentage payment to Rafferty, the pricing schedule, liability, staff time and overall upside to Rafferty. Id.

12. Martens was the vice president at Rafferty and was the head of compliance there. Tr.Tes. p.1165, l.10-12. Martens assisted Fell in the drafting of the April 2009 Rafferty Contract and, in particular, attachment A. Tr.Tes. p.1167, l.19-24. As a model for the April 2009 Rafferty Contract, Rafferty used one of its earlier agreements that it had used with Keane Securities ("Keane") a year before. See Stipulation dated May 6, 2015 at 17; 1110-1111, lines 21-25, 1. Keane was a registered broker-dealer. Id.

13. Fell and Martens knew that SHCP was not a broker-dealer when they were drafting the April 2009 Rafferty Contract. Tr.Tes. p. 1115, l. 23-25; p. 1116, l. 1-3. Fell, when drafting the April 2009 Rafferty Contract, did not believe there was a distinction between using a contract for a broker-dealer (Keane) as opposed to using it for a non-broker-dealer (SHCP). Tr.Tes. p 1116, l. 10-14. Rafferty's outside counsel, Farrel Fritz, had drafted the Keane agreement. Tr.Tes. p. 111, l. 8-10.

14. It was partly a cost-savings measure for Rafferty not to use outside counsel (Farrel Frits) to draft the April 2009 Rafferty Contract with SHCP. Tr.Tes. p. 1137, l. 17-25; p. 1138, l. 1-6. Rafferty simply took the Keane contract and changed it only a little. Tr.Tes. p. 1138, l. 2-6.

15. Fell's primary contact at SHCP regarding the terms of the April 2009 Rafferty Contract was John Fernando. Tr.Tes. p. 1112, l. 6-10. During the negotiation process, Fell was in frequent contact with Fernando. Tr.Tes. p. 1114, l. 6-9. Fell and Martens had the most input on the draft contract on the Rafferty side. Tr.Tes. p. 1068, l. 7-11.

16. Fell, from Rafferty, sent the first draft of the April 2009 Rafferty Contract to Mr. White at 6:59 a.m. on April 13, 2009. See Stipulation dated May 6, 2015 at 16; Resp. Ex. 13. Only four hours later, Michael Rafferty asked Mr. White whether he needed any clarification or help regarding it. Resp. Ex. 14. Mr. White responded that he "just got the doc from [Fell] and that "he was looking at it now." Resp. Ex. 13.

17. When Mr. White received the draft of the April 2009 Rafferty Contract, he gave it to Fernando, his partner and a lawyer, who was responsible for all legal work at SHCP. Tr.Tes. p. 564, l. 14-22. Mr. White did not negotiate the April 2009 Rafferty Contract and did not make any changes to it. Tr.Tes. p. 565, l. 3-11; p. 571, l. 2-4. Fernando made all changes to it on behalf of SHCP. Tr.Tes. p. 565, l. 3-11; p. 571, l. 5-8.

18. On April 21, 2009, Fernando sent his black-line edits to the draft to Fell. Resp. Ex. 17. Between April 21, 2009 and April 30, 2009, Fernando and Fell negotiated the final terms of the April 2009 Rafferty Contract. Resp. Ex. 17-31.

19. Mr. White played no role in the negotiation of the April 2009 Rafferty Contract. Tr.Tes. p. 565, l. 3-11; p. 571, l. 2-8. Conversely, Michael Rafferty was a substantial contributor to the overall set-up of the Rafferty/SHCP's relationship and the terms of the April 2009 Rafferty Contract. Resp. Ex. 1-18.

20. Michael Rafferty expected the relationship with SHCP to include more than just trading. Tr.Tes. p. 1069, l. 15-19. Indeed, every week or two Michael Rafferty would discuss new business opportunities with Mr. White. Tr.Tes. p. 1070, l. 3-9. Michael Rafferty envisioned that SHCP would be more substantial in terms of advisory deals, banking deals, capital restructuring, debt conversions and analytic work for the registered representatives of Rafferty. Tr.Tes. p. 1071, l. 8-15. As part of SHCP's arrangement with Rafferty, Michael Rafferty felt that Mr. White gave him good advice and saved Rafferty money. Tr.Tes. p. 1072, l. 16-20.

21. On April 28, 2009, SHCP entered into the April 2009 Rafferty Contract wherein SHCP's employees would become registered representatives of Rafferty so that they could, among other things, execute trades using Rafferty's trading platform and capital. See Stipulation dated May 6, 2015 at 7; Resp. Ex. 36. At the time the April 2009 Rafferty Contract was executed, Rafferty had been a registered broker-dealer since 1989. See Stipulation dated May 6, 2015 at 15. Fernando executed the April 2009 Rafferty Contract on behalf of SHCP and Fell executed it on behalf of Rafferty. Tr.Tes. p. 574, l. 12-21; Stipulation dated May 6, 2015 at 18.

22. Pursuant to the April 2009 Rafferty Contract, Rafferty agreed to "(1) provide clearing and trade processing for trades introduced by Spring Hill; (2) make available certain of its employees to ensure that said trades are processed on a timely basis; and (3)

provide the necessary compliance and review associated with such trades." Resp. Ex. 36. With respect to SCHP's employees, Rafferty agreed to "register certain Spring Hill employees as registered representatives" of Rafferty. Id. Therefore, all of SHCP's employees that executed trades--pursuant to the April 2009 Rafferty Contract--did so as registered representatives of Rafferty. Tr.Tes. p. 1167, l. 9-17.

23. Rafferty is a licensed broker-dealer, FINRA and the SEC oversee and regulate its trading activities. See Stipulation dated May 6, 2015 at 6. As such, every trade that SCHP's employees executed, as registered representatives of Rafferty, was subject to FINRA and SEC oversight. Id.

24. Martens, before the first trade was ever executed, registered the SHCP employees as registered representatives of Rafferty. Tr.Tes. p. 1167, l. 9-17. She registered Paul Tedeschi, Lauren O'Neil, Phil Bartow, Kevin White and John Fernando as registered representative of Rafferty. Tr.Tes. p. 1171, l. 9-19. All of the SCHP employees that executed trades were registered representatives of Rafferty. Tr.Tes. p. 195-196, Div. Ex. 138A.

25. Rafferty had several fixed income trading desks. Tr.Tes. p. 1171, l. 20-23. Each trading desk at Rafferty had its own designated account at Rafferty's clearing firm. Tr.Tes. p. 1172, l. 3-5. After Martens registered the SHCP's employees as registered representatives of Rafferty, they also were issued their owned designated account at Rafferty's clearing firm with an account prefix of 3zz just like every other Rafferty trading desk. Tr.Tes. p. 1172, l. 11-15, p. 1174, l. 22-25, p. 1175, l. 1-3. The monthly profits in the 3zz account, along with the monthly profits of the other

Rafferty trading desks, were swept into one Rafferty bank account monthly. Tr.Tes. p 1175, l. 8-24.

26. Martens testified that every trade that Paul Tedeschi made was a Rafferty trade. Tr.Tes. p. 1176, l. 8-16. Every trade that Paul Tedeschi made, or any other SHCP employee as a registered representative of Rafferty, was figured into Rafferty's net capital calculation from April of 2009 through the end of 2010. Tr.Tes. p. 1176, l. 17-24.

27. Rafferty's net capital was calculated in connection with the Second Gramercy Trade. Tr.Tes. p. 769, l. 16-20. Rafferty's trade blotter shows that Rafferty purchased the Gramercy Bond in connection with the Second Gramercy Trade. Div. Ex. 181. Tedeschi testified that he bought the bond on behalf of Rafferty as a registered representative of Rafferty. Tr.Tes. p. 852, l. 17-21.

28. All of the counter-parties (or customers) on the trades with SHCP employees ,who were registered representatives of Rafferty, faced Rafferty. Tr.Tes. p. 194. All of the counterparties were large investment banks like Barclays, Citibank, Duetsche Bank and Morgan Stanley. Tr.Tes p. 194, l. 23-25, p. 195, l. 1-4. For all of the trades to settle, they had to be matched-up with Rafferty in Rafferty's back office. Tr.Tes. p. 210, l. 10-15.

29. Rafferty also set-up all of the accounts with the counterparties. Tr.Tes. p. 210, l. 16-25, p. 211, l. 1. As part of the account opening process with the counterparties, the counterparties would be provided with Rafferty's FOCUS reports and financials. Tr.Tes. p. 578, l. 21-25, p. 579, l. 1-4. SHCP became, essentially, the asset-backed securities trading desk at Rafferty. Tr.Tes. p. 580, l. 22-24.

30. The excel spreadsheet that SHCP and SHCM maintained was for internal use only and was not an official trade blotter. Tr.Tes. p. 105, l. 3-8. The official trade blotter was maintained at Rafferty. Tr.Tes. p. 105, l. 6-8. Rafferty maintained the blotter related to the trades executed by the SHCP employees who were registered representatives of Rafferty. Tr.Tes. p.105, l. 11-18. The excel spreadsheet maintained by SHCP and SHCM was used to track revenues. Id.

31. John Fernando was more involved in all of the invoices that were sent to Rafferty. Tr.Tes. p.198, l. 19-22. Indeed, Mr. Fernando created the model invoice that was sent to Rafferty monthly that called the payments to SHCP consulting payments. Tr.Tes. p. 200, l. 11-25, p. 201, l. 1-25, p.202, l. 1-6. Mr. White does not know why the payments were called consulting. Tr.Tes. p. 382, l. 2-13. Mr. White did not review the monthly invoices to Rafferty. Tr.Tes. p.334, l. 7-8. Mr. White's partners, John Fernando and Richard Egan, would inform Mr. White of SHCP's revenues. Tr.Tes. p. 334, l. 9-13.

32. Ms. O'Neil would communicate with Richard Egan and John Fernando about everything regarding the invoices. Tr.Tes. p. 199, l. 1-4. Mr. Fernando and Mr. Egan were the two primary people at SHCP that Ms. O'Neil relied upon when it came to invoices and the collection of funds from Rafferty. Tr.Tes. p. 202, l. 25, p. 203, l. 1-6.

33. Mr. Fernando recommended taking out $1,000,000 from Rafferty. Div. Ex. 130. Mr. Fernando also requested an increase in the monthly fee from Rafferty. Resp. Ex. 56. Rafferty agreed to increase the fee. Id.

34. Richard Egan was the CFO of SHCP and he was in charge of all of the financials. Tr.Tes. p. 95, l. 22-25, p. 96, l. 1-5. Lauren O'Neil was responsible for sending SHCP's monthly invoices to Rafferty for payment. Tr.Tes. p.118, l. 3-6. All of the revenues from the trades of the SHCP's employees who were registered representatives of Rafferty went to Rafferty's bank account first. Tr.Tes. p. 119, l. 23-25, p. 120, l. 1. Ms. O'Neil worked with Richard Egan on the invoices to Rafferty. Tr.Tes. p. 130-132.

35. John Fernando, Richard Egan and Patrick Quinn all made decisions with respect to the receipt of compensation from Rafferty. Div. Ex. 198; Tr.Tes. p.133-134. There is no evidence that Mr. White made any decisions, at all, regarding the payment of funds from Rafferty. Indeed, Fernando recommended that the payments from Rafferty at a flat rate. Tr.Tes. p. 136, l. 8-19.

36. Mr. White, along with his other four partners, made compensation decisions at SHCP. Tr.Tes. p. 609, l. 5-15; p. 813, l. 15-20. There were times when Richard Egan or John Fernando were very involved in compensation decisions at SHCP. Tr.Tes. p. 814, l. 19-25, p.815, l. 1-12.

37. Mr. White's primary responsibilities at SHCP was working on new business opportunities. Tr.Tes. p. 220, l. 24-25, p. 221, l. 1-4. Mr. White relied on his partners to make many decisions at SHCP. Tr.Tes. p. 258, l. 15-17. He spent a lot of his time reconnecting with former colleagues, people that he had done business with in the past and letting everyone know what SHCP was doing post-Lehman bankruptcy. Tr.Tes. p. 221, l. 5-12. Employees, such as Andre Hohenstein and Lauren O'Neil,

reported to all of the partners, not just Mr. White. Tr.Tes. p. 680, l. 14-18; p. 199, l. 1-4.

38. John Fernando was involved at SHCP in trying to figure out what types of securities the SHCP employees who were registered representatives of Rafferty could trade. Tr.Tes. p. 805, l. 2-9. Patrick Quinn, a series 27 license holder at SHCP and the FINOP for SHCM did not believe that SHCP was conducting a securities business because all of the SHCP's employees that were executing trades were doing so as registered representatives of Rafferty. Tr.Tes. p. 928, l. 14-25; 929, l. 13-16.

39. Chan did admit that Tedeschi, a registered representative of Rafferty, had the authority to trade on behalf of Rafferty. Tr.Tes. p. 999, l. 9-13. Indeed, Chan had no idea that Mr. Tedeschi testified that he bought the Gramercy bond on behalf of Rafferty. Tr.Tes. p.1000, l. 4-8.

40. Chan acknowledged that Rafferty's bank account statements prove that Rafferty purchased the Gramercy bond for 70.75. Tr.Tes. p. 1003, l. 3-9; Resp. Ex. 108. Chan also acknowledged that other Rafferty documents in evidence prove that Rafferty purchased the Gramercy bond. Resp. Ex. 112; Tr.Tes. p. 1004, l. 4-8.

41. Indeed Rafferty already stipulated to the Second Gramercy Trade as a Rafferty trade. Rafferty stipulated to the books and records violation for the Second Gramercy trade in its settlement with the Commission. See OIP related to Rafferty dated May 15, 2014 at 14 and 15. Thus, Rafferty admitted that the Second Gramercy Trade was a Rafferty trade (and was inaccurately listed on its trade blotter), not a SHCM's trade. As such, the Commission is judicially estopped from asserting now that the trade was

a SHCM's trade and should have been kept accurately on SHCM's books and records.

42. Even the Commission's expert, Chan, had to acknowledge that if SHCM did not purchase the Gramercy bond, then SHCM did not violate net capital rules. Tr.Tes. p. 994, l. 8-12.

43. Other than this case, Mr. White's conduct has never been the subject of enforcement proceedings by the Division of Enforcement. See Stipulation dated May 6, 2015 at 20. Patrick Quinn, who has worked with Mr. White in the securities industry for many years (and now works for Nomura), testified that Mr. White had the "highest moral character." Tr.Tes. p. 930, l. 9-11. Mr. Quinn is unaware of any other instances of Mr. White failing to turn over a trading ticket either at Lehman where they worked together or at SHCP. Tr.Tes. p. 931, l. 3-15. Likewise, Mr. Tedeschi worked with Mr. White at Lehman, SHCP and presently at SHCM (for more than 10 years total). Tr.Tes. p. 847, l. 5-7. He described Mr. White's work ethic as "very strong" and that he would not continue to work with Mr. White if he did not think he had a strong work ethic. Tr.Tes. p. 847, l. 10-16. Mr. Tedeschi testified that he was not aware of any instance at Lehman, SHCP or SHCM (other than the First Gramercy Trade) where Mr. White failed to submit a trading ticket. Tr.Tes. p. 847, l. 17-25, 848, l. 1-10.

CONCLUSIONS OF LAW

1. 28 U.S.C. §2462 imposes a five year statute of limitation on certain "actions, suits, or proceeding[s]" by the government of the United States including SEC enforcement actions. 28 U.S.C. §2462 states:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

2. In *Gabelli v SEC*, 133 S.Ct 1216, (2013), the United States Supreme Court unanimously held that an SEC enforcement claim accrues five years from the occurrence of the event that gives rise to the SEC's charge. *Id.* at 1220-1121. As such, the Supreme Court held that SEC enforcement actions seeking civil penalties for claims that accrued more than five years before the date of commencement are barred by the five year statute of limitations imposed by 28 U.S.C. §2462. *Id.*

3. In *Gabelli*, the Supreme Court explained that statutes of limitations are important because they "set a fixed date when exposure to the specified government enforcement efforts ends, advancing the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* at 1221 (internal quotation marks omitted). Moreover, the United States Supreme Court stated succinctly the inherent fairness of statutes of limitations as follows:

> statutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. They provide security and stability to human affairs. We have deemed them vital to the welfare of society, and concluded that even wrongdoers are entitled to assume that their sins may be forgotten.

Id. (internal quotation marks and citations omitted).

4. Indeed, following the United Supreme Court's decision in *Gabelli,* the Southern District of Florida applied the same rationale to conclude that the five year statute of limitation imposed by 28 U.S.C. §2462 applies to SEC enforcement actions that seek disgorgement, injunctive and declaratory relief. *SEC v. Graham,* 21 F. Supp. 3d 1300 (S.D. FL 2014)(5 year statute of limitations imposed by §2462 applies to SEC actions seeking disgorgement).

5. As a result of the conduct described above in the Proposed Findings of Fact, the SEC's claim against SHCP accrued on April 28, 2009 when the April 2009 Rafferty Contract was signed and, is therefore, time barred.

6. The D.C. Circuit concluded that "a 'penalty,' as the term is used in §2462, is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Johnson v. SEC,* 87 F.3d 484, 488 (D.C. Cir. 1996).

7. Courts have held that each category of remedy sought by the SEC in this case are "penalties" that are subject to the five year statute of limitations. *See Gabelli*, 133 S.Ct at 1220 (civil penalties are subject to 5 year statute of limitation); *SEC v. Graham,* 21 F. Supp. 3d 1300 (S.D. FL 2014)(disgorgement and injunctive relief are subject to 5 year statute of limitation); *Johnson* F.3d at 484, 488-492 (D.C. Cir. 1996)(suspension of an individual is subject to a 5 year statute of limitation); *SEC v. Bartek,* 484 Fed.Appx. 949, 956-57 (5th Cir. 2012)(bars of an individual subject to a 5 year statute of limitation). Since each of the remedies sought herein is subject to the five year statute of limitations--which expired prior to the filing of the OIP--the alleged conduct cannot be considered for the purposes of liability or remedies.

8. As a result of the conduct described above in the Proposed Findings of Fact, SHCP did not violate Section 15(a).

9. As early as the 1970s, the concept of an "independent contractor" of a broker-dealer evolved to allow the independent contractor to be affiliated with the registered broker-dealer for the purposes of offering securities for sale. *See* Alexander C. Dill, "Broker-Dealer Regulation Under the Securities Exchange Act of 1934: The Case of Independent Contracting," 1994 Columbia Bus. L. Rev. 189, 196 (1994).

10. Indeed, these independent contractor arrangements have grown commonplace in the industry: as of 2013, approximately 64% of all registered representatives of broker dealers operated as independent contractors. *See* Letter to Elizabeth Murphy, Secretary, Securities and Exchange Commission, from David Bellaire, Esq., Executive Vice President, Financial Services Institute, at 2 (July 5, 2013), available at: http://www.sec.gov/comments/4-606/4606-3138.pdf .

11. Securities regulatory agencies have formally recognized the concept of certain natural persons associating with a registered broker-dealer as independent contractors since at least 1982. *See* Letter to Gordon S. Macklin, President, NASD, from Douglas Scarff, Director, Division of Market Regulation, the Commission [1982-83 Transfer Binder], Fed. Sec. L. Rep. (CCH) 77,303, at 78,116 (June 12, 1982).

12. Simply receiving compensation that is derived from securities transactions, however, is not conclusive of broker activity. *See SEC v. Kramer*, 778 F.Supp.2d 1320, 1338-1341 (M.D. Fla. 2011).

13. SEC Registered broker-dealers are required to supervise their associated persons. See FINRA Rule 3010(a); SEC Division of Market Regulation, Staff Legal Bulletin No.

17, Remote Office Supervision (March 19, 2004) (The Commission has long emphasized that the responsibility of broker-dealer's to supervise their employees is a critical component of the federal regulatory scheme") (footnotes and internal quotes omitted). Associated persons include any person registered with the broker-dealer. See Restated Certificate of Incorporation of FINRA, Article 12, Definitions, paragraph T (defining "associated person of a member" to include a natural person registered with a FINRA member).

14. To the extent that a firm (like Rafferty) forms a relationship with an independent contractor (like SHCP), Rafferty is responsible for either (1) ensuring that the independent contractor was registered as a broker-dealer or (2) assuming the supervisory responsibilities attendant to a relationship with an associated person." Exchange Act Rel. No. 36742 (Jan. 19, 1996).

15. Thus, it was the responsibility of Rafferty, not SHCP, to perform supervisory duties over SHCP within the meaning of the Exchange Act in connection with the 2009 Rafferty Contract. This is especially true where, as here, "in the case of off-site representatives [i.e., independent contractors] whose day-to-day access to compliance personnel . . . may be limited." FINRA Notice to Members No. 86-65, "Compliance with the NASD Rules of Fair Practice in the Employment and Supervision of Off-Site Personnel" (Sept. 9, 1986); *see also Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1574 (9th Cir. 1990) (en banc)

16. As a result of the conduct described above in the Proposed Findings of Fact, Kevin White, and SHCH, did not aid and abet SHCP's 15(a) violation[1].

17. For Mr. White to be held liable for aiding and abetting SHCP's 15(a) violation, the Commission must prove "(1) the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party; (2) 'knowledge' of this violation on the part of the aider and abettor; and (3) 'substantial assistance' by the aider and abettor in the achievement of the primary violation." *SEC v. DiBella,* 587 F.3d 553 566 (2d Cir. 2009*) quoting Bloor v. Carro, Spanbock, Londin, Rodman & Fass,* 754 F.2d 57, 62 (2d Cir.1985). "[T]he three requirements cannot be considered in isolation from one another." *Id. quoting IIT v. Cornfeld,* 619 F.2d 909, 922 (2d Cir. 1980). Substantial assistance requires a showing that the alleged "aider and abettor" associated themselves with the venture, participated in something that they wished to bring about, and that by their actions sought to make it succeed. *SEC v. Apuzzo,* 689 F.3d 204, 212 (2d Cir. 2012) quoting *United States v. Peoni,* 100 F.2d 401, 402 (2d Cir.1938).

18. The broker-dealer registration requirement "facilitates both discipline over those who may engage in the securities business and oversight by which necessary standards may be established with respect to training, experience, and records." *Reg's Properties, Inc. v. Fin & Real Estate Consulting Co.*, 678 F.2d 552, 561 (5th Cir.1982); *Eastside Church of Christ v. Nat'l Plan, Inc.*, 391 F.2d 357, 362 (5thCir.1968). Every SHCP employee that executed the trades were registered

[1] The arguments related to Mr. White apply equally to SHCH because Mr. White is the majority owner of SHCH. See Stipulations Entered into By the Parties dated May 6, 2015, at 3.

representatives of Rafferty and, as such, were subject to FINRA and SEC oversight to ensure "discipline over those who may engage in the securities business and oversight by which necessary standards may be established with respect to training, experience, and records." *Reg's Properties, Inc.*, 678 F.2d at 561.

19. As a result of the conduct described above in the Proposed Findings of Fact, SHCM had no trades and, therefore, could not have a net capital violation, an inaccurate trade blotter or an obligation to notify the SEC of an alleged net capital violation related to the Second Gramercy Trade and, consequently, Mr. White and SHCH could not aid and abet such conduct.

20. Rafferty already stipulated to the Second Gramercy Trade as a Rafferty trade. Rafferty stipulated to the books and records violation for the Second Gramercy trade in its settlement with the Commission. See OIP related to Rafferty dated May 15, 2014 at 14 and 15. Thus, Rafferty admitted that the Second Gramercy Trade was a Rafferty trade (and was inaccurately listed on its trade blotter), not a SHCM's trade. As such, the Commission is judicially estopped from asserting now that the trade was a SHCM's trade and should have been kept accurately on SHCM's books and records.

21. As a result of the conduct described above in the Proposed Findings of Fact, SHCP was prejudged.

22. In its Order settling the proceedings against Rafferty, the Commission made several definitive statements about the Respondents that prove that the Commission has already decided--in advance of any administrative hearing involving the Respondents--that the Respondents violated securities laws. For example, the

Commission has decided that SHCP's business relationship with Rafferty resulted in "unregistered broker-deal activity by an unregistered entity." *See* Order at para. 1. With respect to specific trades that are currently the focus of the SEC's OIP, the Commission already concluded that SHCP's employee "was able to conceal two trades from Rafferty, which caused Rafferty's books and records to be inaccurate" and that the employee "purposefully delayed submitting tickets for the two purchases to Rafferty." *See* Order at para. 14 and 4. The Commission also decided that SHCP "despite the lack of registration...held itself out as a broker-dealer." *See* Order at para. 11.

23. On the same day it instituted administrative proceedings against Rafferty, the Commission issued a press release entitled "SEC Charges Rafferty Capital Markets with Illegally Facilitating Trades for Unregistered Firm." In that press release, the Commission made crystal clear that is has decided that Rafferty was "illegally facilitating trades for [Spring Hill] that wasn't registered as a broker-dealer as required under the federal securities laws." In that press release, Andrew M. Calamari--the director of the SEC's New York Regional Office--concluded as follows:

> Rafferty Capital Markets lent out its systems to **a firm that tried to sidestep the broker-dealer registration provisions**. These provisions require those involved in trading securities to adhere to the proper regulatory framework, and registrants like Rafferty must face the consequences if they fail to think carefully and **help unregistered firms avoid the rules**. (emphasis added).

24. "Under the due process clauses of the Fifth and Fourteenth Amendments, parties and the public are entitled to tribunals free of personal bias." *MFS Securities Corp. v.*

SEC, 380 F.3d 611, 617 (2nd Cir. 2004); *citing In re Murchison,* 349 U.S. 133, 136 (1955); *see also Chew v. Dietrich,* 143 F.3d 24, 28 n. 4 (2d Cir.) (observing that the due process clauses of the Fifth and Fourteenth Amendments create equivalent requirements for most purposes), *cert. denied,* 525 U.S. 948 (1998). "This requirement is applicable to administrative agencies such as the Commission in much the same way as it is applicable to courts." *Id.* at 617-618. The US Supreme Court has succinctly described the requirements of due process:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.

In re Murchison, 349 U.S. at 136.

25. The US Supreme Court has demanded not only a fair proceeding, but also that "justice must satisfy the appearance of justice." *Id.* Thus, as the court stated in *Amos Treat & Co.*:

> an administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.

306 F.2d at 267.

26. In *Antoniu*, a Commissioner at the SEC--in a speech prior to an administrative hearing--expressed his opinion as to Mr. Antoniu's guilt and punishment. *Antoniu*, 877 F.2d at 723. As a result, the court found that the Commissioner's pre-hearing statements "can only be interpreted as a prejudgment of the issue." *Id.* Consequently, the court held that the Commissioner " 'in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Id.* at 726;

quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2nd Cir. 1959). Because of the Commissioner's pre-hearing statements prejudging the case, the court nullified the result of the administrative hearing that was eventually conducted. Id.

27. Likewise, in *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C.Cir.1964) *vacated on other grounds*, the Chairman of the FTC, while administrative proceedings were pending against Texaco for alleged violations of the FTC Act, gave a speech in which he stated that Texaco had violated the Act. *Texaco, Inc.* 336 F.2d at 760. As a result of the Chairman's speech, the court found that the Chairman "had in some measure decided in advance that Texaco had violated the Act" and, consequently, the court invalidated the FTC's order because of the Chairman's prejudging of the case against Texaco, and his later participation in the case, was a denial of due process. *Id.* at 761.

28. In *Gilligan*, the court was highly critical of the SEC's behavior in issuing a press release before the conclusion of administrative proceedings stating in effect that Gilligan, Will & Co. had violated the Act. 267 F.2d at 468-469. The court stated that "[t]he Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it..." *Id.*

29. As a result of the conduct described above in the Proposed Findings of Fact, it is clear that the Commission has already decided that SHCP violated securities laws through its relationship with Rafferty. Consequently, it is not possible for the Respondents to obtain a fair and meaningful administrative hearing before the Commission. Thus,

any administrative proceeding before the Commission would be a violation of due process.

30. As a result of the conduct described above in the Proposed Findings of Fact, the administrative process is unconstitutional as ALJ appointments violate the Appointments Clause of Art. II of the United States Constitution.

31. The Appointments Clause provides as follows:

> [The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., art. II, sec. 2, cl. 2 (emphasis added).

32. In *Free Enterprise*, the Supreme Court ruled that for purposes of the Appointments Clause, the Commission is a "Department" of the United States, and that the Commissioners collectively function as the "Head" of the Department with authority to appoint "inferior Officers." 561 U.S. at 511-13.

33. As a result of the conduct described above in the Proposed Findings of Fact, no suspension is warranted for Mr. White.

34. In determining appropriate sanctions, if any, the Commission must consider

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

See SEC v. Sargent, 329 F.3d 34, 42 (1st Cir.2002); see also Steadman v. Securities and Exchange Commission, 603 F.2d 1126, 1140 (5th Cir.1979); *see also SEC v. Solow*, 554 F.Supp.2d 1356, 1365-1366 (S.D.Fla.2008).

35. As a result of the conduct described above in the Proposed Findings of Fact, SHCP should not be required to disgorge any money.

36. Disgorgement is an equitable remedy that Court's employ to deprive a "wrongdoer of his ill-gotten gain." *SEC v. ETS Payphone, Inc.*, 408 F.3d 727, 734 n. 6, 735 (11th Cir. 2005); *see also SEC v. Blatt,* 583 F.2d 1325, 1335 (5th Cir.) ("Because disgorgement is remedial and not punitive, a court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing."). The purpose of disgorgement is to ensure that defendants are not unjustly enriched through their illegal trading activities. *See, e.g., SEC v. Blavin*, 760 F.2d 706, 710 (6th Cir.1985*); SEC v. Washington County Util. Dist.*, 676 F.2d 218, 222 (6th Cir.1982); *SEC v. Freeman*, 290 F.Supp.2d 401, 406 (S.D.N.Y.2003). Consequently, "federal courts have routinely ordered disgorgement of insider trading profits to ensure that defendants are not unjustly enriched by their illegal actions." *SEC v. Blackwell*, 477 F.Supp. at 891.

37. Most importantly, the amount of the any disgorgement must be causally connected to the violation. *SEC v. First City Financial Corp. Ltd.,* 800 F.2d 1215, 1231 (D.C. Cir 1989); *SEC v. Inorganic Recycling Corp.,* 2002 WL 1968341, *2 (S.D.N.Y. Aug. 23, 2002)(amount of disgorgement needs to be causally connected to the violation). To be causally connected, the precise securities law violation must directly result in the trading profits realized. *See e.g. CFTC v. Hunt*, 591 F.2d 12, 1222-23 (7th Cir. 1979)(defendants can be ordered to disgorge profits from trades in soybean future contracts, that exceeded the limit that the CFTC

set for such trades, because any profits from those prohibited trades were a direct result of the violation)[2]; *CFTC v. Co Petro Marketing, Group, Inc.*, 502 F. Supp. 806, 819 (C.D.Cal 1980)(defendant can be ordered to disgorge profits from trades in gasoline futures that were prohibited because such trades were not made through authorized boards of trade and any profits from those prohibited trades were a direct result of the violation); *SEC v. Alpha Telecom, Inc.*, 187 F.Supp.2d 1250, 1262-63 (D. Ore. 2002)(defendant can be ordered to disgorge profits from the sale of unregistered securities because any profits from those prohibited trades were a direct result of the violation); *SEC v. Friendly Power Co.,* 49 F. Supp.2d 1363, 1372-73 (S.D. Fla. 1999)(same); *SEC v. Blackwell*, 477 F.Supp. at 914 (profits derived from insider trading must be disgorged).

38. A court is not required to order disgorgement, rather, "in the exercise of its equity powers a court *may* order disgorgement of *profits acquired through securities fraud.*" *SEC v. Patel*, 61 F.3d 137, 139 (2nd Cir.1995) (emphasis added); *see also SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474-75 (2nd Cir.1996) ("The district court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged."). Nonetheless, courts are only authorized to order disgorgement of illicit profits. *SEC v. Great Lakes Equities Co.*, 775 F.Supp. 211, 214 (E.D.Mich.1991). Consequently, courts cannot order the disgorgement of legitimate profits.

39. As a result of the conduct described above in the Proposed Findings of Fact, did not violate Section 15(a) as that claim is time barred.

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[2] In considering the equitable remedy of disgorgement in SEC actions, Court's often look to both cases involving the CFTC and the SEC in interpreting whether disgorgement is appropriate as the legal principals involved are nearly identical.

40. As a result of the conduct described above in the Proposed Findings of Fact, even if the 15(a) claim is not time barred, SHCP did not violate section 15(a) as the receipt of transaction based compensation is not enough to require registration.

41. As a result of the conduct described above in the Proposed Findings of Fact, Mr. White did not aid and abet SHCP's alleged 15(a) violation as he had a very minimal role in the arrangement with Rafferty and the day-to-day activities of SHCP's business as he was focused on business generation.

42. As a result of the conduct described above in the Proposed Findings of Fact, SHCM did not purchase the Gramercy Bond, Rafferty purchased it, and thus SHCM could not have a net capital violation, inaccurate trade blotter or an obligation to inform the SEC for a trade it did not enter into and Mr. White and SHCH could not aid and abet such conduct.

Respectfully Submitted,

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By Their Attorneys,

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Dated: June 29, 2015