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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.

RESPONDENTS' REPLY BRIEF

Respondents, Spring Hill Capital Markets, LLC ("SHCM"), Spring Hill Capital Partners, LLC ("SHCP"), Spring Hill Capital Holdings, LLC ("SHCH") and Kevin White (collectively the "Respondents") submit their reply brief.

Introduction

In its opening brief, the Division continues its trial tactic of misconstruing or ignoring uncontroverted evidence. This is because the Division has failed to meet its burden of proving any securities law violations, except for the lone violation that Mr. White stipulated to prior to the commencement of the hearing regarding aiding and abetting Rafferty's books and records violation arising out of the First Gramercy Trade. Despite the utter lack of factual and legal support for the alleged violations and requested sanctions, the Division still argues that the Court should impose the most draconian sanctions possible against the Respondents – including barring Mr. White (who has an unblemished record in over 25 years in the securities industry) and requiring him to disgorge millions of dollars that he never received. The Court should decline to

impose these draconian sanctions as they are not supported by the facts or law – especially in a case that does not involve fraud, victims, investment losses, retail investors, or any alleged securities violations in the last five years.

Emblematic of the Division's desire to "take down" Mr. White is the Division's refusal to accept the uncontroverted evidence that Rafferty (not SHCM) purchased the Gramercy Bond in connection with the Second Gramercy Trade. And, consequently, SHCM did not keep an inaccurate trade blotter and did not have a net capital violation with respect to the Second Gramercy Trade. The Division takes this untenable position because the Division believes that it needs the three associated aiding and abetting charges against Mr. White to justify its draconian request that Mr. White should be barred from the securities industry.

In continuing to advance these utterly unsupportable charges, the Division ignores the un-contradicted testimony of (1) the Rafferty registered representative who actually purchased the Gramercy bond (Paul Tedeschi), (2) the director of operations for Rafferty, Cameron Heaney, who documented the trade for Rafferty (3) Rafferty's vice-president, Barbara Martens and (4) SHCM FINOP, Patrick Quinn. Likewise, the Division ignores the myriad of documents showing (1) Rafferty's purchase of the Gramercy Bond and (2) Rafferty's settlement with the Commission in which Rafferty admitted that it purchased the Gramercy Bond and failed to keep accurate records relating to it. The Court should reject these tactics.

Moreover, the Division asks the Court to ignore the *Patel* and *Steadman* factors and the requirement that the Division prove that Mr. White's continued participation in the securities industry poses a risk to any investors. This is because there is no risk to the investing public. This fact is indisputable - as there is no allegation that Mr. White has committed any securities

violations since March 2010 – more than five years ago. The Division is asking this Court to unlawfully punish Mr. White and the Court should decline the Division's invitation.

Argument

I. SHCP did not violate Section 15(a)

SHCP did not operate as an unregistered broker-dealer in violation of Section 15(a). In its pursuit of SHCP, the Division advances a novel legal theory that an entity alone can act as an unregistered broker dealer without a single individual violating Section 15(a). Further, the Division's novel legal theory has no factual support because every SHCP employee, who engaged in securities transactions, was a registered representative of Rafferty and Kevin White, who was also a registered representative of Rafferty, owns nearly 100% of SHCP. Moreover, it cannot be disputed that all of the transactions involving SHCP employees--who were registered representatives of Rafferty--were Rafferty transactions. As a result, this Court should reject the Division's unsupported legal theory and hold that SHCP did not violate Section 15(a).

Despite the Division's attempts to recast the evidence, it does not alter the fact that SHCP did not act as an unregistered broker-dealer. The term "broker" is defined as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4). The term "dealer" is defined as "any person engaged in the business of buying and selling securities for his own account." *Id.* § 78c(a)(5). By the plain terms of the statute, therefore, SHCP does not qualify as either a broker or a dealer because it was not "engaged in the business of effecting transactions in securities" (broker) or "engaged in the business of buying and selling securities" (dealer).

Whether SHCP was "engaged in the business" of "effecting transactions in securities" depends on the "regularity of [its] participation in securities transactions at key points in the chain of distribution." *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011). Courts

have considered several factors in determining whether a party has acted as a broker. These factors include: regular participation in securities transactions, employment with the issuer of the securities, payment by commission as opposed to salary, history of selling the securities of other issuers, involvement in advice to investors and active recruitment of investors. *SEC v. George,* 426 F.3d 786, 797 (6th Cir. 2005) *citing SEC v. Hansen*, 1984 WL 2413, at *10 (S.D.N.Y. Apr.6, 1984), and *SEC v. National Executive Planners, Ltd,* 503 F.Supp. 1066, 1073 (M.D.N.C.1980)). SHCP did not partipate in any of the key points in the chain of distribution.

The Division alleges--and SHCP has already acknowledged--that it received transaction based compensation. Simply receiving compensation that is derived from securities transactions, however, is not conclusive of broker activity. *See Kramer*, 778 F. Supp. 2d 1338-1341. Indeed, SEC no-action letters that propose a "single-factor 'transaction-based compensation' test for broker activity…[are] an inaccurate statement of the law…" *Id.* at 1341 n. 54. Moreover, no-action letters are not judicial pronouncements and they are "entitled to no deference beyond whatever persuasive value they might have." *see, e.g., Gryl ex rel. Shire Pharm. Grp. PLC v. Shire Pharm. Grp. PLC*, 298 F.3d 136, 145 (2d Cir. 2002) (citations omitted).

As such, an evaluation of the factors that are used to determine whether a party has engaged in broker-dealer activity proves that SHCP did not engage in broker-dealer activity. First, SHCP did not participate in any securities transactions or buy and sell securities. Each and every securities transaction between May 2009 and February 2010 involved SHCP's employees who were registered representatives of Rafferty. *See* Division Exhibit 138-A, Tr. Tran. 195:16-197:17. As registered representatives of Rafferty, these individuals were authorized to engage in securities transactions on behalf of Rafferty. During the relevant time period, Kevin White, John Fernando, Paul Tedeschi, Philip Bartow and Patrick Quinn were registered representatives

of Rafferty and each and every transaction at issue was executed by a registered representative of Rafferty. Further, Barbara Martens (from Rafferty) acknowledged that all trades conducted by Spring Hill personnel were Rafferty trades. Tr. Tran. 1176:8-24.

SHCP did not have any trading counterparties. Tr. Tran. 210:5-211:2. All counterparty relationships were Rafferty's relationships and were established using Rafferty's FOCUS reports and the implementation of Rafferty's know-your-customer (or KYC) process. Tr. Tran. 577:9-579-14. Further, all trades were conducted through Rafferty's clearing relationships, using Rafferty's MPID, and Rafferty's counterparty relationships. Tr. Tran 1176:23-1177:12. Indeed, when Barbara Martens was asked at trial who Paul Tedeschi was the first words she uttered were "[h]e was a broker for Rafferty Capital Markets." *See* Tr. Tran. 1166:17-18. Accordingly, SHCP had no involvement in the keys points on any securities transactions. Rafferty alone was involved in every aspect of the securities transactions at issue in this case.

Next, SHCP did not provide any investment advice or recruit any investors. Any advice given to investors, and any recruitment of investors, was conducted by individuals that were registered representatives of Rafferty and authorized to advise and recruit investors on behalf of Rafferty. Further, the record does not indicate any advice provided by SHCP to any entity. The mere fact that three recipients of "decks" subsequently engaged in securities transactions with Rafferty registered representatives does not provide an evidentiary basis for a finding that SHCP recruited investors.

Additionally, the "decks" that were distributed by SHCP--that the Division contends were marketing materials designed to solicit investment on behalf of SHCP--were not SHCP marketing material. Tr. Tran. 586:11-15. Nowhere in the "decks" did SHCP identify SHCP as a registered broker-dealer. In fact, in several of the "decks," SHCP specifically identified that its

broker-dealer application was pending and that it traded through Rafferty. *See* Respondents' Exhibit 60, 62,101-103, 115-115A.[1] Moreover, the "decks" all state that they are for "**For Informational Purposes Only**" (emphasis in original") and none of them "pitch" a specific products or trades.

Moreover, the references in the "decks" to "our broker/dealer" are not representations that SHCP was a broker-dealer. Tr. Tran. 586:19-22. SHCP's personnel were registered representatives of a broker-dealer, Rafferty. As such, the reference to "our" relates to Rafferty.

Indeed, the Division did not introduce any evidence that, at any point prior to the execution of the Rafferty Contract, SHCP ever held itself out as being part of a broker-dealer or had made any statements discussing "our broker/dealer". *See* Div. Ex. 20 (earliest "deck" introduced into evidence dated June 2009 at least 5 weeks after the execution of the Rafferty Contract). To the contrary, the evidence is overwhelming that SHCP only began to discuss broker-dealer activity once its personnel became registered representatives of Rafferty and were authorized to engage in securities transactions on behalf of Rafferty.

The Division wants to ignore that all of the SHCP personnel were registered representatives of Rafferty. Indeed, the Division goes so far as to grossly mischaracterize Mr. White's testimony in order to manufacture support for the Division's 15(a) claim. FOF#12; Opening Brief at 7). The Division, in its findings of fact, contends that Mr. White testified that Paul Tedeschi's status, as a registered representative of Rafferty, had nothing to do with Mr. Tedeschi's day-to-day activities. The Division, however, completely disregards Mr. White's testimony and the context in which it was given.

[1] Footnote 6 to the Division's Finding of Fact is a mischaracterization of Mr. White's testimony. Mr. White did not testify that the "deck" for Societe Generale, that contains references to SHCP's pending FINRA application and its relationship with Rafferty, was provided to Societe Generale for a different purpose than the other "decks."

In response to a specific question regarding how Mr. Tedeschi could withhold a ticket from Rafferty if he was acting as a registered representative of Rafferty, Mr. White responded "I'm struggling reconciling the logic. He's a registered representative of Rafferty. His license was moved to Rafferty, so that's factual. That has nothing to do with what he does on a daily basis." Mr. White's response clearly related to the withholding of the trading ticket. His response was not a general characterization of Mr. Tedeschi's day-to-day activities *vis a vis* his status as a registered representative of Rafferty.

As Mr. White unambiguously testified, Mr. Tedeschi's status as a registered representative of Rafferty, as well as the other traders, was critical and that is the key factor that allowed them to participate in securities transactions on behalf of Rafferty. Additionally, the location of the registered representatives of Rafferty and their e-mail addresses have no relevance to determining whether SHCP violated Section 15(a). Moreover, even if they were relevant, Rafferty (not SHCP) was responsible for all compliance and electronic monitoring pursuant to the Rafferty Contract and any failure to provide that service was Rafferty's failure. Accordingly, the Court should reject the Division's novel legal theory and find that SHCP did not violate Section 15(a).

II. Kevin White Did Not Aid and Abet and Cause SHCP's Alleged 15(a) Violation

While the evidence is overwhelming that SHCP did not violate Section 15(a), assuming *arguendo,* even if SHCP violated Section 15(a), Mr. White did not aid and abet and cause the violation. 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 "aiders and abettors" 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). The Division has failed to carry its burden.

Despite the Division's grand pronouncements, Mr. White was not the mastermind of SHCP's purported unregistered broker-dealer activities. Mr. White set out to conduct a business that complied with all requirements of the securities laws. He had high level discussions with the owner of an established broker-dealer, Michael Rafferty, of Rafferty. Following these high level discussions, Mr. Rafferty (not Mr. White) outlined the broad strokes of a potential business arrangement.

In its Findings of Fact #9-11, the Division grossly mischaracterizes the formation of the relationship between SHCP and Rafferty. Conversely, the evidence is overwhelming that Rafferty (1) developed the outline of the arrangement between SHCP and Rafferty, (2) had extensive, and weeks-long, internal discussions regarding the Rafferty Contract before Rafferty provided a draft to SHCP and (3) prepared the first draft of the Rafferty Contract. Additionally, John Fernando--and not Mr. White--was SHCP's point person on the negotiation of the contract and the formation of the relationship with Rafferty.

The uncontroverted evidence is that Mr. White and Mr. Rafferty had a high-level discussion regarding a potential business relationship. Following that discussion, on March 23,

2009, Mr. Rafferty sent Mr. White an e-mail outlining the broad strokes of a potential agreement. *See* Respondents' Exhibit 1. Over the course of the next three weeks, the highest level of Rafferty's personnel assembled a draft agreement for SHCP. *See* Respondents' Exhibits 2-11. These discussions included Michael Rafferty, Larry Rafferty, Thomas Mulrooney, Barbara Martens, and Keith Fell. *Id.* Further, Rafferty used as a template for an agreement it had previously entered into with another broker-dealer, Keane Securities. Rafferty did not inform Mr. White (or anyone at SHCP) that the template for the agreement was based on an agreement with another broker-dealer.

Once the draft agreement was sent to Mr. White on April 13, 2009, Mr. White provided no input regarding the proposed agreement. Mr. White simply forwarded the agreement to Mr. Fernando, who was a partner and attorney at SHCP, to review and negotiate the terms. Mr. Fernando was responsible for reviewing contracts and overseeing legal matters at SHCP.

Between April 21, 2009 and April 20, 2009, Mr. Fernando exchanged numerous e-mails with Keith Fell his counterpart at Rafferty negotiating the terms of the contract. *See* Respondents' Exhibits 17-32. The Rafferty Contract was executed by Mr. Fernando on behalf of SHCP and Mr. Fell on behalf of Rafferty.

Further, SHCP invoicing to Rafferty was overseen by John Fernando. In fact, Mr. Fernando developed the template for the invoicing Rafferty. *See* Exhibit 38 at p. 7. Mr. Fernando created the terminology "consulting" with respect the characterization of the payments from Rafferty. *Id.* There is no evidence that Mr. White played any role whatsoever in the decision to characterize payments as "consulting" payments or to maintain a "remaining balance" at Rafferty.

Also, surprisingly missing from the Division's recounting of the evidence is any reference to the Advisory Services Agreement entered into between SHCP and Rafferty that Mr. Fernando exclusively negotiated and executed on behalf of SHCP. *See* Respondents Exhibits 38, 46; Division Exhibit 115. The Advisory Services Agreement was initially was drafted so that SHCP received a flat salary for "advisory and consulting services." *See* Respondent Exhibit 38 at pp 1, 2, 6. Mr. Fernando, however, changed the agreement to correlate the monthly salary for advisory and consulting services to securities transactions entered into by SHCP personnel who were registered representatives of Rafferty. *See* Respondents Exhibit 46 at p. 5. It is this second agreement (the Advisory Services Agreement) that is the genesis of the term "consulting" to describe the services provided by SHCP to Rafferty. There is no evidence that Mr. White participated in the negotiation of, or had any knowledge of, the Advisory Services Agreement.

In addition to creating the template for the SHCP's invoices to Rafferty, Mr. Fernando oversaw the collection of money from Rafferty. In fact, when Mr. Fernando wanted SHCP to received additional money from Rafferty, he contacted Keith Fell seeking an increase in SHCP's "consulting" fee. *See* Respondents Exhibit 56. When Mr. Fernando left SHCP, Richard Egan took over that responsibility. Mr. White played no role in the monetary aspect of the relationship. Despite the Divisions spin, Mr. Fernando--not Mr. White--was the primary driver of the specifics of the relationship and the flow of money between SHCP and Rafferty.

Further, in Divisions Finding of Fact #12 and its Opening Brief at p. 8-9, the Division (1) mischaracterizes evidence; (2) ignores the fact that Mr. White was a registered representative of Rafferty; and (3) Rafferty contracted with SHCP to provide various supervisory responsibilities that it ultimately abdicated.

Moreover, the Division consistently mischaracterizes Nina Veres' testimony and puts a sinister spin on the truthful information that SHCP provided to FINRA. The bottom line is that nobody at SHCP, including Mr. White, lied to Ms. Veres or FINRA about the nature of SHCP's business. Patrick Quinn and others at SHCP truly believed then--and according to their trial testimony in this case still believe today--that SHCP did not conduct a securities business. Moreover, Mr. White played a minor role in providing information to FINRA and relied justifiably, almost exclusively, on competent co-workers and partners.

III. SHCM Did Not Violate Anv Securities Laws

In its Opening Brief, the Division continues to ignore the uncontroverted documentary and testimonial evidence that SHCM did not commit any securities law violations. *See* Division Opening Brief at pp 12-19. Noticeably absent from the SEC's Opening Brief is any reference to Paul Tedeschi--the Rafferty registered representative who actually purchased the Gramercy Bond--who testified that he purchased the bond on behalf of Rafferty. Also, noticeably absent from the Division's Opening Brief are any references to Barbara Martens, Rafferty's Vice-President, who supervised and provided compliance services for Mr. Tedeschi. Ms. Martens testified that every trade conducted by Mr. Tedeschi in 2009 and 2010 was a Rafferty trade and was included in Rafferty's net capital calculation. Also, noticeably absent is any reference to Cameron Heaney, Rafferty's Director of Operations, who testified that Rafferty purchased the Gramercy Bond and that the purchase was included in Rafferty's net capital calculation.

Further, Patrick Quinn (whose testimony the Division heavily relies upon), who was also Spring Hill's FINOP, testified that Gramercy Bond was purchased from Barclays by Rafferty and any net capital impact would have been Rafferty's. Tr. Tran. 932:23-933:13.

Further, not to be deterred, the Division is also silent with respect to the following documentary evidence[2]:

- Respondents' Exhibit 108, which is Rafferty's March 2010 bank statement, reflecting Rafferty's purchase of the Gramercy Bond;
- Respondents' Exhibit 109, which is Rafferty's internal record keeping reflecting the purchase of Gramercy Bond by Rafferty registered representative, Paul Tedeschi;
- Respondents Exhibit 110, which is a statement from Gramercy's clearing agent reflecting Gramercy's purchase of the Gramercy Bond from Rafferty; and
- Respondents Exhibit 112, which reflects Rafferty's purchase of the Gramercy Bond from Barclays (Line 8)

In the face of this mountain of documentary and testimonial evidence--that the Gramercy Bond was purchased by Rafferty and not SHCM--the Division still argues blindly that SHCM maintained an inaccurate trade blotter with respect to the Second Gramercy Trade and violated its net capital obligations. The Division's arguments should be rejected.

A. SHCM Did Not Violate Section 17(a) or Rule 17a-3(a)(1) By Having An Inaccurate Trade Blotter.

SHCM did not maintain an inaccurate trade blotter. Pursuant to Rule 17a-3(a)(1), a broker-dealer must maintain a trade blotter "containing an itemized record **of all purchase and sales of securities**..." (emphasis added). Since SHCM did not purchase the Gramercy Bond from Barclays (or any other securities during the relevant time period), it cannot be held liable for violating Section 17(a) or Rule 17a-3(a)(1). Based on the unambiguous language of Rule 17a-3(a)(1), SHCM had no obligation to record the purchase of the Gramercy Bond in a trade blotter because SHCM neither purchased nor sold the Gramercy Bond.

[2] It is of note that each of these documents were in the possession of the Division well before the Commission issued its OIP. These documents were produced by the Division to Respondents.

As detailed in Respondents' Opening Brief and above, the uncontroverted evidence is that Rafferty purchased the Gramercy Bond from Barclays and, therefore, Rafferty was obligated to accurately record that purchase in its trade blotter. To that end, Rafferty actually did record the purchase of the Gramercy Bond in its trade blotter. *See* Division Exhibit 181, (SH-AP-559, Entry for 3/17/2010); Tr. Tran. 774:12-775:5. Moreover, Rafferty's purchase of the Gramercy Bond is further corroborated by Rafferty's Settlement with the Commission in which it acknowledged that its books and records were inaccurate with respect to the purchase of the Gramercy Bond. *See* Respondents' Proposed Exhibit 113 (Judicial Notice Taken by the Court). Also, noticeably absent from the record is any testimony from Barclays that it believed that it was selling the Gramercy Bond to SHCM and not Rafferty. The record at trial demonstrates, without a doubt, that Barclays purchased the Gramercy Bond from Rafferty in the first instance by sending Rafferty more than $10.5 and then sold it back to Rafferty. *See* Respondents' Exhibit 112 line 7.[3]

To the extent that the Division also contends that SHCM maintained an inaccurate blotter for the first purchase of the Gramercy Bond from Citi (Div. Opening Brief at 18), the same rationale applies as SHCM did not purchase the Gramercy Bond from Citi – it was purchased by Rafferty. The purchase of the Gramercy Bond from Citi is reflected on Rafferty's trade blotter and account statements. *See* Respondents' Exhibits 108, 112; Division Exhibit 181 (SH-AP-559, Entry for 3/11/2010).

Since SHCM never purchased the Gramercy Bond, it did not have any obligation to maintain an accurate trade blotter with respect to the Gramercy Bond. The language of Section

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[3] In fact, the Division identified that Barclays registered representative, Kevin Carney, on its witness list, but did not call him to testify. As a result, it can be inferred that Mr. Carney was not going to provide the Division with the testimony it wanted.

17(a) and Rule 17a-3(a)(1) is unambiguous and SHCM did not violate any of the obligations imposed by 17(a) and Rule 17a-3(a)(1). As such, the Division should not be permitted to ignore the language of the rules it is charged with enforcing.

B. SHCM Did Not Commit a Net Capital Violation Because It Did Not Purchase the Gramercy Bond From Barclays.

By urging the Court to find that SHCM committed a net capital violation, the Division is asking the Court to ignore the evidence presented at the hearing. As discussed above, the documentary evidence presented at the hearing demonstrates that the Gramercy Bond was purchased by Rafferty. *See* Respondents Exhibits 108-12, Division Exhibit 181, (SH-AP-559, Entry for 3/17/2010). Further, the undisputed testimony from the people involved in the transaction all testified that the Gramercy Bond was purchased by Rafferty (testimony of Paul Tedeschi, Cameron Heaney, Barbara Martens, and Patrick Quinn). Indeed, Ms. Martens and Mr. Heaney from Rafferty each testified that the purchase of the Gramercy Bond impacted Rafferty's net capital – this assessment of which firms' net capital was impacted was corroborated by SHCM's FINOP, Patrick Quinn.

Since the Gramercy Bond was not purchased by SHCM there cannot be a net capital violation on the part of SHCM.[4] Further, since SHCM did not violate the net capital rules, it did not have any obligation to inform the Commission of a net capital deficiency nor did Mr. White or SHCH aid and abet any violations relating to the net capital rules.

[4] The Court should give no weight to Mr. Chan's testimony as his testimony was conflicting, contradictory and was premised on the incorrect assumption that Paul Tedeschi purchased the bond on behalf of SHCM and not on behalf of Rafferty despite the overwhelming documentary evidence to the contrary. This is not surprising as Mr. Chan conceded at trial that he had not been provided with critical documents by the Division even though the Division had these documents years before the OIP was filed and Mr. Chan's report was generated. Tr. Tran 987-1000. Further, Mr. Chan conceded that if the purchase of the Gramercy Bond had been a SHCM purchase, through a piggyback arrangement, he would have expected the account at the clearing company to be in SHCM name and not in Rafferty's name. Tr. Tran 1018:15-25. As such, the fact that the Purchase of the Bond is reflected on Rafferty's supports that the Gramercy Bond was purchased by Rafferty. Further, it is apparent that Mr. Chan was unaware that the 3ZZ account designated for Spring Hill was not unique to Spring Hill and, indeed, was consistent with the way Rafferty assigned accounts to Rafferty's different trading desks within Rafferty. Tr. Tran. 1171:20-1176:7.

C. Mr. White Did Not Aid, Abet, and Cause a SHCM Net Capital Violation.

Assuming *arguendo* that SHCM committed a net capital violation (which it did not) and that it failed to inform the Commission of the net capital deficiency, Mr. White did not aid and abet and cause the net capital violation or failure to notify the commission. As a result, Mr. White cannot be held liable for these charges.

Prior to the purchase of the Gramercy Bond on March 16, 2010, Mr. White lined up the buyer, Gramercy, which agreed to pay a price higher than the amount that Paul Tedeschi was going to purchase the Gramercy Bond from Barclays. *See* Division Exhibit 104. At 10:45 p.m. on March 15, 2010, Mr. White e-mailed Paul Tedeschi that Gramercy had agreed to purchase the Gramercy Bond the following day between $74-$75 ("We're done. Tomorrow, he's going to show us a bid between 74-5."). The next day Barclays (the owner of the Gramercy Bond) agreed to sell the Gramercy Bond for $70.75, which was less than the amount in which Gramercy committed to purchase the bond. Also of importance, that same day Gramercy consummated the purchase of the Gramercy Bond for $74.[5]

As such, Mr. White could not have acted with the requisite scienter to aid, abet, and cause a subsequent net capital violation.[6] As far as he knew, he had lined up a buyer to purchase the Gramercy Bond for more than Mr. Tedeschi was going to pay to purchase the Gramercy Bond from Barclays. There is nothing reckless or negligent about Mr. White's conduct. In fact, it is quite the opposite. Mr. White's involvement with the Second Gramercy trade was responsible

[5] While the Division's argument that Gramercy did not purchase the bond until March 17, 2010 is ultimately irrelevant because Gramercy did not purchase it from SHCM, it is also belied by Gramercy's own internal documents that state the bond was purchased on Tuesday, March 16, 2010. *See* Respondents' Exhibit 71.

[6] The Division's argument that Mr. White was complicit in not turning over the trade ticket to Rafferty for the First Gramercy Trade provides the requisite scienter for the purported aiding and abetting of an alleged net capital violation for the Second Gramercy Trade is meritless. The two transactions are separate and there is no causal link between the first transaction and the alleged net capital violation on Second Gramercy Trade. As such, Mr. White's complicity in not turning over the trade ticket cannot provide the requisite scienter to aid and abet a net capital violation on a separate transaction.

and is consistent with the manner in which a transaction of this nature should occur as outlined by Mr. Chan. Tr. Tran 1005:19-1007:3 (responding to the Court's question about how a transaction can occur without a moment to moment net capital violation).

Moreover, even if there was a net capital violation (which there was not), Mr. White did not aid and abet and cause SHCM's failure to not inform the Commission of the net capital deficiency. Mr. White did not have any specific day to day responsibility for net capital at SHCM. Indeed, Patrick Quinn served as SHCM's FINOP and was responsible for net capital calculations and did not inform Mr. White of any net capital deficiency.

Additionally, SHCM specifically contracted with, and paid Rafferty for, FINOP oversight – which included "reviewing the Firm's proprietary securities positions...and estimating "haircut deductions" and "Preparing appropriate notices to the SEC and FINRA in the event the Firm's net capital declines for any reason below the minimum net capital requirements required by law." *See* Respondents' Exhibit 58 at p. 2; Division Exhibit 170K. Also, to provide these FINOP oversight services, Rafferty's FINOP, Steve Sprague, also registered with SHCM. *See* Respondents' Exhibit 59. As such, Mr. White acted responsibly in putting in place mechanisms with respect to calculating net capital and notifying the SEC of any deficiency in an attempt to ensure compliance. As a result, Mr. White cannot be held liable for aiding and abetting and causing SHCM's alleged net capital violation and its failure to notify the Commission of a net capital deficiency.

IV. Remedies Sought by the Commission

A. Collateral Bar for Kevin White

Both the Second Circuit and the Commission emphasize that the purpose of an industry bar is remedial, not punitive. *See McCarthy v. SEC,* 406 F.3d 179, 188 (2d. Cir 2005); *In re*

Howard F. Rubin, 58 SEC Docket 1426, 1994 WL 730446 at * 1 (Dec. 30, 1994)("It is well-settled that such administrative proceedings are not punitive but remedial. When we suspend or bar a person, it is to protect the public from future harm at his or her hands.") "Our foremost consideration must therefore be whether [the] sanction protects the trading public from further harm. *McCarthy,* 406 F.3d at 188. Here the investing public does not need protection from Mr. White because he poses no threat. Accordingly, an industry bar of Mr. White is inappropriate as it would be punitive and not remedial.

Among the factors used when deciding the proprietary of an industry bar, are: (1) the egregiousness of the underlying securities law violation; (2) the defendant's repeat offender status; (3) the defendant's role or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will occur. *See SEC v. Patel*, 61 F.3d 37, 41 (2d Cir. 1995); *see also Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979)

These factors weigh decidedly in favor of no suspension or bar for Mr. White. Any suspension or bar of Mr. White would solely be punitive in nature and would be inappropriate given the D.C. Circuit's holding in *Johnson*, 87 F.3d 487.[7] As an initial matter, the investing public does not need any protection from Mr. White. As the Division concedes, Mr. White and the Spring Hill Entities did not engage in any fraud, there are no victims, there were no investment losses and all of the transactions involved in this case involved large sophisticated institutional investors – not individual retail investors.

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[7] Further, the manner in which the Division proposed to calculate prejudgment interest is a concession that the Division's claim accrued on April 28, 2009 upon the execution of the Rafferty Contract as the Division seeks to calculate prejudgment interest on the total gross revenues of all trades from June 1, 2009 not the date upon which each trade occurred. As of June 1, 2009 only 3 trades had occurred. *See* Division Exhibit 138-A. As such, as stated in Respondents' Opening Brief, Mr. White cannot be suspended since the Division's claim accrued more than five years before the issuance of the OIP.

Specifically, with respect to the *Patel* factors, there is no dispute that Mr. White is not a repeat offender as this episode is the only blemish on his record in the securities industry. The fact that Division has not alleged any violations by Mr. White from March 2010 to the present, despite its dogged multi-year investigation – is *prima facia* evidence that Mr. White is unlikely to engage any future securities law violations. This fact belies Division's rank conjecture that future violations are likely to occur based on Mr. White's role as CEO of SHCM. (Division Opening Brief 25-26). As an initial matter, the Division seeks a bar of Mr. White because of his purported involvement with an unregistered broker-dealer, however, the chances of future unlicensed broker-dealer activity is non-existent as SHCM is a registered broker-dealer. Accordingly, there is no potential for Mr. White to have any involvement with an unregistered broker-dealer.

Further, the Division's contention that Mr. White should receive a bar because he has the ability to control the entries that are "inputted and omitted" from his firm's books is belied by the fact that the Division did not even charge Mr. White with aiding and abetting SHCM's alleged books and records violations from 2010. As such, the Division recognized that Mr. White does not control what information is "inputted and omitted" from SHCM's books.

Indeed, the SEC's argument that Mr. White should be barred because he has not taken responsibility for his actions is without legal justification. (Division Opening Brief at 26). In the first instance, the evidence presented at his hearing exonerated him of aiding and abetting an unlicensed broker dealer – however, if the Court disagrees – the fact that Mr. White mounted a meritorious defense against an alleged violation cannot be a justification to bar him from the securities industry. If that is the case, then what is the point of a hearing? Since this is not a situation where Mr. White denies liability after there was a prior adjudication on the merits (such

as a criminal conviction or the issuance of a permanent injunction by a Federal Court), there should be no relationship between his denial of committing securities law violations and any punishment. To bar Mr. White as a punishment for mounting a meritorious defense (even it is ultimately unsuccessful) would be patently unfair and not consistent with the factors articulated in *Patel* and *Steadman.*[8]

Further, the Division erroneously argues that "bars are commonly ordered in unregistered broker-dealer cases that do not contain fraud-based charges" and purports to cite to sixteen (16) cases. (Division Brief at 25). The Division's grand pronouncement regarding the routine nature of a bar is belied by the fact that all 16 of the cases it cited are <u>settlements</u> offered by Respondents not punishment imposed after a trial. Moreover, the Division fails to inform the Court that many of the settlements involved individuals who had no relationship whatsoever to the securities industry which renders a bar of those individuals meaningless to them and mere window dressing for the Division. *See Kenneth Wolkoff* (medical doctor); *David Affeldt* (attorney); *Todd Martin* (Mortgage Broker); *George Sobol* (65 year old "businessman"); *Ronald St. Clair* (tax preparer); *Lawrence Swan* (CPA); *Kenneth Baum* (Business Adviser to senior citizens).

Moreover, the cases involving individuals that were involved in the securities industry involve far more egregious conduct than any of the conduct that the SEC alleges Mr. White engaged in. *See Steve Mazur* (involved "selling away" whereby he engaged in the sale of securities for his personal gain outside his employment and then backdated agreements); *John Flanders* ("selling away" for his personal gain outside of his employment); *Allan Sheinwald* (never registered with Commission in any capacity and operated Investment Relations firm that

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[8] Further, Mr. White cannot be barred from associating with a municipal advisor or NRSRO because his alleged conduct occurred prior to the passage of Dodd-Frank in July 2010 and its enactment in December 2010. As such, any application of the powers provided by Dodd-Frank would be retro-active and not permitted.

sold securities); *Joshua Singer* (never registered with the Commission in any capacity and solicited and sold securities; *Eugene Giaquinto, Lee Heiss and Jason Medvin* (involved in a scheme with a partner in Visionary (Joseph Dondero) who engaged in a sophisticated, manipulative trading strategy intended to induce buyers to pay inflated prices for securities).

Accordingly, neither the specific facts of this case nor the applicable legal precedent that the Division relies upon support a suspension or bar for Mr. White. Additionally, SHCM should not be censured as it did not commit any securities law violations as set forth herein.

B. <u>Disgorgement</u>

As an initial matter, disgorgement in this case constitutes a penalty and is subject to the five year statute of limitations imposed by 28 U.S.C. §2462. *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). Accordingly, since the SEC's claim accrued on April 28, 2009 (when the Rafferty Contract was executed) and the OIP was not filed until January 22, 2015, SHCP cannot be ordered to disgorge compensation it received pursuant to the Rafferty Contract.[9] This is supported by the Division's calculation of pre-judgment interest in which it seeks interest on the total gross proceeds of all of the trades dating back to June 1, 2009 – even though only 3 trades occurred prior to June 1, 2009.

Disgorgement constitutes a penalty because the compensation that SHCP received was derived from trades conducted by individuals that were registered representatives of Rafferty authorized to trade and receive compensation from those trades and SHCP was nearly exclusively owned by a registered representatives of Rafferty, Kevin White. As such, any

[9] Alternatively, at most, any disgorgement must be limited to the proceeds of trades conducted between January 23, 2010 and February 26, 2010 (the period of conduct as alleged in OIP within 5 years of the issuance of the OIP). *See SEC v. Graham, supra.*

compensation SHCP received was from lawful trading activity. As a result, requiring SHCP to disgorge these proceeds is unquest[illegible]ly a punishment and not an equitable remedy.

Alternatively, if the Court de[illegible] [illegible]ment appropriate (which it is not), the [illegible] of the disgorgement sought by the Division, and its request that Kevin White and SHC[illegible] held jointly and severally liable, is not supported by the evidence. The SEC seeks disgor[illegible]ment in the amount of $3,953,608 which it alleges represent "illegal commission income." This amount, however, is not representative of (1) the amounts received by SHCP; or (2) the lawful amount of money that SHCP could be ordered to disgorge.

SHCP did not receive $3,953,608. First, as the SEC is forced to concede, Rafferty made direct payments in the amount of $540,000 to Rafferty registered representative, Paul Tedeschi, Patrick Quinn and Phil Bartow between June 2009 and March 3, 2010. *See* Tr. Tran 209:17-210:4. As a result, SHCP never received the $540,000 that Rafferty paid directly to its representatives – and cannot be ordered to disgorge that amount.

Additionally, SHCP should not be required to disgorge money that was used to pay legitimate business expenses. *See SEC v. JT Wallenbrock & Assoc.,* 440 F.3d 1109 (9th Cir. 2006)(recognizing that deducting legitimate business expenses from disgorgement may be acceptable); *SEC v. Thomas James & Assoc.*, 738 F. Supp. 88, 94-95 (W.D.N.Y. March 10, 2006) (district court deducted certain business expenses, such as commissions, telephone charges and underwriting expenses from disgorgement order.). Additionally, Division Exhibit 283A outlines SHCP's $1,348,870.80 in 2009 legitimate business expenses – including additional payments to Rafferty Registered Representatives totaling an additional $340,000. Further, Division Exhibit 283B outlines SHCP's $896,795.56 in legitimate business expenses, including $200,000 in additional payments to Rafferty Registered Representative, Paul Tedeschi.

Accordingly, in 2009 and 2010, SHCP's legitimate business expenses, plus the $540,000 that Rafferty paid directly to its registered representatives total $2,785,666.30. As such, the maximum amount of money that SHCP could possibly be ordered to disgorge is $1,167,941.70.

Further, there is no basis to hold Mr. White and SHCH jointly and severally liable for any disgorgement order entered against SHCP. At the hearing, the Division failed to introduce any evidence that Mr. White received any compensation from SHCP's alleged ill-gotten gains. The Division failed to introduce any evidence regarding Mr. White's compensation in 2009 or 2010. The Division seeks to remedy this failure in two ways. First, the attempted post hearing introduction of Mr. White's 2010 K-1 from SHCH (Division Exhibit 196). Second, baldly asserting that Spring Hill's accounting makes it difficult to account for the money SHCP received. Both of these tactics should fail.

The Court should not consider Division Proposed Exhibit 196. The Division did not offer it into evidence at the hearing, where the Court would have had the opportunity to (1) rule on its admissibility; and (2) hear testimony regarding what information is depicted on the 2010 K-1. The Division's failure to offer it into evidence and deprive Mr. White or Mr. Hohenstein the opportunity to explain what is depicted on Mr. White's SHCH 2010 K-1 is not an acceptable tactic and the Court should not permit it.

Further, the Division's interpretation of the 2010 K-1 is facially incorrect. First, Mr. White's 2010 K-1 is for all 12 months of 2010 and not just January and February 2010 – which is the period in which the Division alleges that SHCP derived ill-gotten gains. As such, the 2010 K-1 provides no probative information regarding the amount of money Mr. White received from SHCP's business activities in 2010. Conversely, the Division ignores that SHCM--which operated from March 2010 through December 31, 2010--earned nearly $9.5 million in legitimate

revenues during those ten months and posted a profit of more than $2.8 million. *See* Division Exhibit 283B. Accordingly, there is no basis for the Division's contention that Mr. White earned $2.1 million in 2010 from SHCP's activities alone. Moreover, on its face, Mr. White's 2010 K-1 reflects that he received $1,781,654 for calendar year 2010 not the $2.1 alleged by the Division. Accordingly, the Division's attempt to mount an end run around the hearing, and its burden of proof should, not be permitted.

Additionally, the Division's argument that Mr. White and SHCH should be held jointly and severally liable due to the fact that Mr. White is the majority owner of SHCH--which is the owner of SHCP--is not supported by applicable legal principles. In support of its contention, the SEC relies on cases where joint and several liability is imposed where the Respondents have used bookkeeping to conceal the flow of money. This, however, is not the case here.

As the Division proved at trial, the Respondents kept detailed business records detailing its revenue and expenses. As such, there is no legal basis to impose joint and several liability upon Mr. White and SHCH for any disgorgement ordered – let along for the more than $4.7 million the Division seeks.

C. Civil Penalties

Third tier penalties are clearly inappropriate in this case where there was no fraud or victims. Moreover, any penalties are barred because of the statute of limitations as stated above. Moreover, the cases that the Division cites to support third tier penalties--*Bandimire*, *Winkler*, and *JW Barclay*--all involved fraud. Obviously, the Division has not even alleged fraud here because there was none.

D. Cease and Desist Order

The Court should not enter the requested cease and desist order as there is no evidence that any of the Respondents are likely to commit any future securities laws violations. The Division argues that a cease and desist order is warranted because there is a risk of a future violation because the SHCM, SHCH, and SHCP have not been dissolved. This justification for a cease and desist order has been rejected by the D.C. Circuit. *WHX Corp. v. SEC,* 362 F.3d 854, 861 (D.C. Cir. 2004). In *WHX Corp,* the Court stated "The 'risk of future violation' cannot be the sole basis for its imposition of the [cease and desist] order, as the SEC's standard for finding such a risk is so weak that it would be met in (almost) every case. *Id.* As such, since there have not been any alleged securities laws violations by the respondents in more than 5 years, there is in fact not a likelihood of future violations. Accordingly, there is no basis for the entry of a cease and desist order.

Respectfully Submitted,
SPRING HILL CAPITAL PARTNERS, LLC,
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Dated: July 10, 2015

D U N B A R L A W P . C .
COUNSELORS AT LAW

July 22, 2015

Jessica Canaday
Office of Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: In the Matter of Spring Hill Capital Markets, LLC, Admin. File No. 3-16353

Dear Jessica:

Pursuant to our conversation today, enclosed please find the signed Respondents' Reply Brief.

Thank you and please feel free to contact me with any questions.

Very truly yours,

Annie Croft
Assistant to Ronald W. Dunbar, Jr.

Enclosure

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