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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.	:
	:

DIVISION OF ENFORCEMENT'S BRIEF IN OPPOSITION TO RESPONDENTS' PETITION FOR REVIEW AND IN SUPPORT OF THE DIVISON'S CROSS-PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Administrative Materials

Statutes

Rules

INTRODUCTION

The Division of Enforcement (the "Division") respectfully submits this brief in opposition to Respondents' petition for review and in support of the Division's cross-petition for review of the Initial Decision by Administrative Law Judge ("ALJ") Carol Fox Foelak, dated November 30, 2015 (the "Initial Decision").

The evidence presented at a hearing before ALJ Foelak established that Kevin White ("White"), a former managing director at Lehman Brothers ("Lehman") and Series 24 general securities principal, unlawfully operated Spring Hill Capital Partners, LLC ("SHCP") as an unregistered broker-dealer, taking in approximately $4 million of commission income for his firm. White was aware that firms had to be registered to conduct a broker-dealer business. For that reason, at the same time he was managing SHCP, White also applied to register an affiliated firm, Spring Hill Capital Markets, LLC ("SHCM"), with FINRA so that it could eventually take over the exact broker-dealer activities that SHCP was already conducting. In 2009 and 2010, while SCHM's membership application was pending with FINRA, White personally marketed the unregistered SHCP as a broker-dealer to prospective customers. However, because White knew that operating an unregistered broker-dealer business was unlawful, he and his employees falsely represented to FINRA that SHCP exclusively earned "advisory" or "consulting" fees and that it did "not conduct a securities business." Essentially, at the same time that White was sending marketing materials to institutional investors advising that SHCP was a broker-dealer that could buy and sell securities on their behalf, he was telling FINRA a completely different story to conceal SHCP's unregistered broker-dealer operations.

In addition, White approved a decision to withhold a trade ticket for ten days from Rafferty Capital Markets, LLC ("RCM"), the firm through which SHCP and SHCM processed

and cleared their trades, to conceal that White had directed the purchase of a security without having an order from a customer.

In the Initial Decision, ALJ Foelak correctly concluded that White and his companies, SHCM, SHCP, and parent entity Spring Hill Capital Holdings, LLC ("SHCH") (collectively, the "Respondent Entities" or "Spring Hill," and together with White, "Respondents"): (1) engaged in misconduct that was "egregious and recurrent over a period of ten months"; (2) "flout[ed]" regulatory requirements and were "at least reckless"; (3) have not affirmatively recognized the wrongful nature of their conduct; (4) failed to "give[] assurances against future violations" of the securities laws; and (5) would have an "opportunity for future violations." Initial Decision at 19.

Based on the factual record and the relevant case law, the Commission should affirm ALJ Foelak's findings that SHCP willfully violated Section 15(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and that White and SHCH willfully aided and abetted and caused SHCP's violation. The Commission should also uphold the Initial Decision's disgorgement order of $3,953,608 plus prejudgment interest jointly and severally against White, SHCP, and SHCH. As set out below, Respondents' arguments challenging these findings lack merit and are contrary to the factual record as well as established legal precedent.[1]

In the Initial Decision, ALJ Foelak also ordered a censure of White pursuant to Section 15(b) of the Exchange Act and ordered a single civil money penalty of $75,000, jointly and severally, against SHCP, SHCH, and White for violations relating to SHCP's operations as an

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[1] The Initial Decision also found that SHCM willfully violated Exchange Act Sections 15(c)(3) and 17(a) and Rules 15c3-1, 17a-3(a)(1), and 17a-11(b)(1); and White and SHCH caused SHCM's violations of Exchange Act Sections 15(c)(3) and 17(a) and Rules 15c3-1 and 17a-11(b)(1). Respondents only challenge the primary and secondary violations pertaining to the Section 15(a) rulings, however, and, therefore waive any unraised arguments with respect to the other violations. *See generally* Respondents' Brief in Support of Petition for Review ("Resp. Br.") at 1-31.

unregistered broker-dealer and a single penalty of $7,500, jointly and severally, against SHCM, SHCH, and White for various net capital and recordkeeping violations. Based on the factual record and ALJ Foelak's findings of the "egregious and recurrent" nature of White's conduct and his "reckless disregard" of regulatory requirements, the Division requests that the Commission impose a bar or suspension against White as a more appropriate remedial sanction. The Division also requests that, based on the facts of this case, the Commission increase the penalties against Respondents and assess them individually rather than jointly and severally.

FACTS[2]

A. White Forms a Broker-Dealer Firm Without Registering and Introduces Trades to Generate Transaction-Based Compensation.

In the wake of the 2008 collapse of Lehman, White, a former managing director at Lehman, formed his own broker-dealer firm, SHCP. (White Tr. 273:6-12, 520:2-523:18.) With nearly two decades' experience in the securities industry, White understood that firms had to be registered with FINRA to operate as a broker dealer. (Div. Ex. 1K; White Tr. 323:16-20.) Nevertheless, White elected to operate SHCP as an unregistered broker-dealer to begin generating trading revenues for his start-up company, which he had been personally funding, at the same time that he formed a second entity, SHCM, to apply for membership with FINRA and become a registered broker-dealer. (*See* Div. Exs. 1G; 2 at F002250-51; 204; White Tr. 533:7-13.) As White admitted, "[I] realized it was going to take – I think it's 270 days to complete [the FINRA application process], and . . . we didn't have the time to sit and do nothing for nine months. . . ." (White Tr. 535:23-536:2.)

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[2] References to the Hearing Transcripts are denoted by "Tr." preceded, where applicable, by the testifying witness' last name and followed by the page number(s). References to exhibits introduced by the Division are abbreviated as "Div. Ex. __", while exhibits introduced by Respondents are abbreviated as "Resp. Ex. __".

Accordingly, in March 2009, White approached Michael Rafferty ("Rafferty"), a close acquaintance and the president of Rafferty Holdings, LLC ("Rafferty Holdings"), and the two men negotiated an arrangement whereby SHCP would introduce trades to RCM, a registered broker-dealer owned by Rafferty Holdings, and "piggyback" on RCM's clearing relationships. (Rafferty Tr. 1042:20-22, 1044:2-24, 1078:4-12; White Tr. 416:7-417:6, 534:8-17, 535:5-536:25.) As envisioned in correspondence between White and Rafferty, RCM would "act as B/D of record for [SHCP's] registered reps," "keep a fair percentage of the commissions," and "cover [its] own clearing personnel," while SHCP would pay the "associated clearing costs," "retain the remain[ing] commissions," and "manage the business [itself]." (Div. Ex. 127.) White and Rafferty eventually agreed that SHCP would receive 85 percent of the trading revenues because it "had the relationships and [was] transacting the business." (Rafferty Tr. 1085:12-22.) RCM was to receive the 15 percent balance as a fee for processing and clearing the SHCP-introduced trades. (Div. Ex. 204 at RCML-SEC-00167; White Tr. 416:25-417:12; Fell Tr. 1146:8-13.)

In April 2009, the arrangement negotiated by White was memorialized in a written Services and Cost Sharing Agreement (the "CSA") designed to "facilitate transactions initiated by [SHCP] with clients." (Div. Ex. 204 at RCML-SEC-001642; Stipulations Entered into by the Parties, 5/6/15 ("Stip.") ¶ 7.) "Attachment A" to the CSA specified, "RCM shall provide clearing and trade processing for trades introduced by [SHCP].[3] RCM will . . . ensure that said trades are processed on a timely basis. RCM shall provide the necessary compliance and review associated with such trades.... For the above Services performed, [SHCP] agrees to pay RCM 15% of all gross revenues for trades settled and processed by RCM on behalf of [SHCP]." (Div. Ex. 204 at RCML-SEC-001647; *see also* Martens Tr. 1207:7-11.) In addition, certain SHCP

[3] The CSA defined SHCP as "Spring Hill." (Div. Ex. 204 at RCML-SEC-001642.)

employees were to be registered as "independent" representatives of RCM. (Div. Ex. 204 at RCML-SEC-001647.)[4]

From May 2009 through February 2010, at White's direction, SHCP regularly sourced bonds for customers, and it conducted approximately 95 trades in securities in SHCP-designated customer accounts – that is, 95 purchases and 95 contemporaneous sales – earning approximately $3,953,608 in transaction-based compensation, net of RCM's 15 percent share of SHCP's trading revenue.[5] (Div. Ex. 138A at Tab "Monthly BD Totals," Tab "2009" - Cell 126Y, Tab "2010– Cell 78AB; Stip. ¶ 10; Tedeschi Tr. 840:20-841:9; O'Neill Tr. 110:2-16.) This income was recorded as "trade revenue" or "BD" (*i.e.*, broker-dealer) revenue in SHCP's blotter (Div. Ex. 138A at Tab "2009" - Columns R-V, Tab "2010" - Column S-W, Tab "Monthly BD Totals"; O'Neill Tr. 103:23-104:12, 154:4-8), and as "commission income" in the firm's accounting records.[6] At the time, White knew that receipt of commission-based income was a hallmark of broker-dealer activity requiring registration. (White Tr. 507:8-20; Div. Ex. 189 at SH-SEC0011537.)

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[4] Contrary to White's testimony that he never reviewed the CSA, (White Tr. 425:22-426:8), the evidence shows that he received and reviewed copies of the agreement prior to its execution. (Div. Exs. 192-193; 275-276; Rafferty Tr. 1087:5-9.) The CSA was also reviewed by SHCP partner John Fernando, an investment banker, and RCM managing director John Keith Fell. Respondents' Brief repeatedly refers to Fernando and Fell as attorneys; however, when the CSA was prepared, neither one had practiced law in over a decade. (Div. Ex. 1K at F000444-45; White Tr. 229:22-231:10; Tedeschi Tr. 805:7-19; Fell Tr. 1143:14-1145:7.)

[5] RCM has settled charges with the Division relating to its conduct described herein. *Rafferty Capital Mkts., LLC,* Exch. Act Rel. No. 72171, 2014 SEC LEXIS 1688 (May 15, 2014).

[6] Specifically, SHCP's 2009 and 2010 income statements recorded a combined $4,632,730 in "commission income" less a "RCM Capital Fee" of $679,122 to equal the $3,953,608 in net SHCP trade revenue reflected in the firm's blotter. (Div. Exs. 185; 215A at 83-94 (2009 general ledger recording SHCP's "commission income"); Hohenstein Tr. 670:5-8, 670:19-22, 671:11-20, 674:9-14; *see also* Div. Ex. 214 at SH-AP-00000322; O'Neill Tr. 152:4-153:11.)

Consistent with the original framework envisioned by White and Rafferty, SHCP managed its trading business independently of RCM.[7] (Rafferty Tr. 1089:16-24.) SHCP's

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[7] For example:

(a) SHCP maintained its own blotter, which the firm referred to in its internal records as its "Master Trade Blotter." (Stip. ¶¶ 8-9; Div. Exs. 138A; 205; O'Neill Tr. 103:6-8, 117:8-13, 189:2-19; Hohenstein Tr. 549:6-25, 657:13-16, 659:6-24, 660:13-661:2, 662:12-19.);

(b) SHCP made its own trading decisions. (*See* White Tr. 609:25-610:6.) RCM only learned about trades after SHCP entered into them. (Heaney Tr. 748:24-749:2; *see also* White Tr. 305:10-12.);

(c) SHCP management made its own decisions about what investment advice to provide its customers, without any input from RCM. (White Tr. 611:3-10.);

(d) SHCP-employed traders were supervised by White, without the involvement of any RCM employee, and without access to RCM's supervisory procedures. (White Tr. 222:20-223:3, 257:12-18, 421:23-422:6; Fell Tr. 1139:17-20; Martens Tr. 1178:18-25, 1185:14-23, 1200:11-15; Quinn Tr. 872:20-22.) RCM personnel therefore distinguished SHCP's traders from RCM's "actual" registered representatives. (Div. Ex. 114; Martens Tr. 1203:7-1204:5.);

(e) SHCP-employed traders worked in Spring Hill's own offices, in a different location than RCM. (Rafferty Tr. 1090:22-1091:4; Fell Tr. 1139:2-16; Martens Tr. 1184:5-13, 1199:25-1200:10; Tedeschi Tr. 812:5-12; White Tr. 423:11-424:4.);

(f) SHCP-employed traders communicated with customers using SHCP's own e-mail and Bloomberg messaging addresses to which RCM lacked access; thus, SHCP's electronic communications could not be reviewed or archived by RCM. (Martens. Tr. 1184:14-1185:2; 1201:6-9; *see also* White Tr. 424:6-25; Tedeschi Tr. 796:12-22, 808:6-8.) When communicating via e-mail, SHCP-employed traders also used a SHCP signature block that made no mention of RCM. (*See, e.g.*, Div. Ex. 299; Tedeschi Tr. 819:19-821:5.);

(g) Compensation for SHCP-employed traders was determined by White and his SHCP partners, including Richard Egan who was never associated with RCM, without any involvement by RCM management (White Tr. 608:13-609:24; Rafferty Tr. 1090:5-21; Tedeschi Tr. 813:15-24, 815:12-18; Martens Tr. 1185:9-13, 1185:24-1186:7; O'Neill Tr. 120:15-121:8.) Specifically, between May 2009 and March 2010, SHCP directed RCM to pay a total of $540,000 out of SHCP's $3,953,608 share of trading revenues directly to the registered representatives employed by SHCP. (Div. Exs. 226 ($100,000); 230 ($25,000); 11 ($25,000); 241 ($190,000); 247 ($100,000); 244 ($100,000); *see also* Div. Ex. 215A at 103.) The amounts and timing of these payments were determined solely by SHCP, with direct involvement by White (Div. Ex. 130; Rafferty Tr. 1090:5-21; Tedeschi Tr. 813:15-20, 815:12-18; Martens Tr. 1185:9-13, 1185:24-1186:7; O'Neill Tr. 120:15-121:8), and such payments were recorded as expenses on SHCP's income statements. (Div. Exs. 185; 214 at SH-AP-00000322.);

(h) SHCP made its own hiring and firing decisions for SHCP's traders, without any involvement by RCM (White Tr. 609:16-24.). In recruiting employees, White described SHCP as its own "Broker-Dealer." (Div. Ex. 38; White Tr. 451:15-19.); and

activities were directed, through White, by parent company SHCH, which exercised the "full and exclusive right, power and authority" to manage SHCP and to conduct SHCP's business and affairs. (Div. Exs. 4 at SH-SEC0011644; 180B; Supplemental Stipulations, 5/11/15 ("Supp. Stip.") ¶ 2; White Tr. 483:5-9, 484:12-485:6.) SHCH also profited from SHCP's trading activity and managed the revenues generated by SHCP. (Div. Exs. 1B at F209; 1V; 217B; 302 & 302A.) Specifically, SHCH directed SHCP to transfer approximately $2.7 million of its trade revenues to affiliated entities, in lieu of equity distributions to SHCH, including $108,000 that went to SHCM to provide capital in connection with SHCM's broker-dealer application. (Div. Exs. 1B at F209; 1V; 217B; 302; 302A; Stip. ¶¶ 11-13; *see also* Hohenstein Tr. 715:6-16 (indicating that SHCP's revenues were used to fund SHCH expenses).) As the 80 percent owner of Spring Hill, White personally benefitted from SHCP's unregistered broker-dealer activity. (Div. Ex. 1C.) For example, White received at least approximately $2.1 million in equity distributions and salary from the Spring Hill entities for 2010. (Div. Ex. 196 at SH-AP-1444-1445.)

B. White Successfully Holds Out SHCP as a Broker-Dealer to the Investing Public.

In 2009 and early 2010, White participated directly in the preparation, review, and distribution of marketing materials that advertised SHCP's "Broker/Dealer" services. (*See* Div. Exs. 20-37; 39-52b; 57-58b; 63; 66-67B; White Tr. 454:9-455:15, 472:10-19.) Almost invariably without any mention of RCM, these materials touted SHCP's ability to satisfy "a full range of client needs" relating to ABS, CMBS, RMBS, CDOs, and other securitized products as well as the firm's "unique[]" qualifications to both "trade and originate structured securities."

(i) SHCP produced its own marketing materials, which held the firm out as its own broker-dealer and most often did not even refer to RCM. (*See, e.g.,* Div. Exs. 20-37; 40-52; 52A; 56A; 57B; 58A; 63; 65; 66A; 67; 67B.) RCM played no role in the creation or review of such materials and had no input into which investment firms SHCP solicited for business. (Rafferty Tr. 1092:8-12; White Tr. 609:25-610:6, 610:20-611:2.)

(Div. Exs. 66; 66A at 4, 6.) White's marketing materials also showcased "recent broker/dealer activity" by SHCP and proclaimed, "Our Broker/Dealer is active across the spectrum of structured finance asset classes, with a focus on esoteric and illiquid securities. (*See, e.g.*, Div. Exs. 33; 33A at 12; 40; 49.) One marketing piece circulated by White was titled "SHCP BD Deck," in reference to SHCP's broker-dealer business, and listed contact information for SHCP's "Broker/Dealer Key Contacts." (Div. Exs. 66; 66A at 12; White Tr. 481:9-23.)

White also made personal solicitations on behalf of SHCP and commonly found new opportunities for SHCP to buy or sell securities for customers. (Tedeschi Tr. 819:13-18; Div. Exs. 74; 89; 175; Cozzi Tr. 732:18-733:4, 733:16-19, 734:20-735:18; Supp. Stip. ¶ 1; White Tr. 224:12-225:2, 225:17-226:17, 231:14-21, 237:21-238:19.) In doing so, White described SHCP to prospective customers as a "broker dealer." (Div. Exs. 49-49A; White Tr. 439:22-441:12, 448:17-450:3, 452:21-454:8, 463:18-464:5, 478:21-479:10; Dillon Tr. 646:11-24, 647:17-648:3.) At the time he engaged in these marketing activities, White knew that soliciting business for a broker-dealer was a hallmark of broker-dealer activity requiring registration. (White Tr. 507:8-20.)[8]

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[8] At the hearing, in an attempt to argue that he had not solicited business for an unregistered broker-dealer, White initially claimed that certain of the referenced materials were not "marketing activities" but instead "just informational." (Div. Ex. 49; White Tr. 438:25-439:21.) However, after being confronted with multiple pitch books offering prospective investors "early looks at hard-to-access opportunities in securities" as well as his own e-mails holding out SHCP as a broker-dealer (Div. Exs. 52; 52A at 7), White acknowledged that the materials were "Marketing 101," designed for SHCP to attract the attention of prospective customers that managed large sums of investment capital. (White Tr. 467:13-468:13.)

White's marketing activities on behalf of SHCP were successful. Multiple recipients of SHCP's pitch books, including Bracebridge Capital, MSD Capital, L.P., and Citi, subsequently became customers of SHCP. (*See, e.g.*, Div. Ex. 40 at 1, 8; White Tr. 444:7-16; Div. Ex. 138A at Tab "2010" – Trade No. 128; Div. Ex. 20 at 1, 11, 14; Div. Ex.138A at Tab "2009 – Trade No. 15; Div. Ex. 65 at 1, 10; Div. Ex. 138A at Tab "2010" – Trade No. 161.)

C. Respondents Deceive FINRA to Conceal SHCP's Unregistered Broker-Dealer Business.

In July 2009, White directed SHCM to apply for membership in FINRA. (Div. Exs. 2-3.) Throughout an eight-month application process, White and his employees repeatedly misrepresented SHCP's business activities to FINRA to conceal the firm's operation as an unregistered broker-dealer. Nina Veres, the principal examiner at FINRA responsible for SHCM's application, and George Steers, the regulatory coordinator at FINRA assigned to SHCM, appeared as witnesses at the hearing. They both testified that in response to multiple questions concerning SHCP's business activities, White and Spring Hill never disclosed that the unregistered firm was engaged in a transactional business and receiving commission income. (Steers Tr. 946:2-15, 947:25-948:14; Veres Tr. 26:24-27:5, 28:16-29:2, 31:12-17; 35:6-17, 42:16-25, 49:16-50:3, 58:12-16; 64:18-65:3, 69:6-17; White Tr. 400:15-21.)

Rather than tell FINRA the truth, White and his employees repeatedly represented to FINRA that SHCP did "not conduct a securities business" and that it was instead a "consulting firm" that was "only providing consulting services" and received "consulting payments" for "non-transaction related services." (*See* Div. Exs. 1C, 1D; 1F; 2 at F2251; Veres Tr. 28:16-29:2, 30:6-16, 32:2-18, 33:20, 35:6-17, 84:9-13.) White and Spring Hill made these representations to FINRA even though White knew he was simultaneously distributing "broker-dealer" decks to prospective clients for SHCP that "describ[ed] a transactional business." (White Tr. 481:9-23.) At a membership interview for SHCM in November 2009 designed to confirm the accuracy and completeness of the firm's written submissions, FINRA staff asked White, among other things, to describe SHCP's business activities. (Veres Tr. 40:21-41:9, 41:10-42:8; *see also* Div. Ex. 5 at 2; Steers Tr. 943:19-23; White Tr. 387:20-23.) In response, White reiterated the inaccurate representation that SHCP was exclusively an advisory business that earned only consulting and

advisory fees. (Veres Tr. 42:9-25, 49:16-50:3; Steers Tr. 946:1-21; *see also* Div. Exs. 2 at F2251; 7 at 1-2.) At the conclusion of the interview, White then personally attested to the accuracy and completeness of his firm's representations. (Div. Ex. 6 at F2199; Veres Tr. 46:18-47:8; White Tr. 388:4-389:20.) In a follow-up letter copying White, Spring Hill again expressly denied that SHCP engaged in a securities business, and it represented that SHCP offered only "management consulting services, including analytics and non-transaction related services."[9] (Div. Ex. 8 at SH-SEC-11747-11749; Veres Tr. 53:16-54:4.) In February 2010, White once more affirmed the truth and completeness of his firm's (false) representations. (Div. Exs. 10 at 3; 1A at F85; 1B at F209; Veres Tr. 61:24-62:16; White Tr. 389:5-10.) Similarly, in response to a Commission query by the Office of Inspection and Examinations ("OCIE") in 2011, Spring Hill, with White's knowledge, falsely claimed that RCM had paid SHCP $1.9 million in January and February 2010 for "consultation and advice." (Div. Ex. 178 at SH-SEC14315.) Confronted by multiple documents that Spring Hill submitted to FINRA with his knowledge, White conceded that his firm had consistently told regulators that SHCP only earned consulting revenues. (White Tr. 502:25-503:6.)

In addition to mischaracterizing its revenue, which White knew was "commission" income or a "mark-up" received for trading securities on behalf of customers (White Tr. 383:4-384:8, 400:15-23), SHCP, with White's approval, requested that RCM only transfer a portion of

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[9] From the onset of their relationship in May 2009 onwards, all of the revenue that SHCP received from RCM came from introducing trades. (Fell Tr. 1146:22-1147:2; Rafferty Tr. 1094:7-11, 1095:6-11; O'Neill Tr. 134:25-135:10, 136:20-25.) Although White knew that the revenue SHCP earned constituted "commission" or "mark-up" income from trading activity (White Tr. 384:4-8), during the months in which SHCM's application was pending, SHCP misleadingly prepared monthly schedules that characterized the transfers from RCM as "consulting payments." (O'Neill Tr. 125:20-126:16; *see also* Div. Exs. 226 (June 2009); 228 (July 2009); 230 (Aug. 2009); 233B (Sept. 2009); 11 (Oct. 2009); 238 (Nov. 2009); 241 (Dec. 2009); 247 (Jan. 2010); 244 (Feb. 2010); 249 (Mar. 2010).)

the monthly trading revenue earned by the firm, with SHCP choosing to carry over the balance of its trading revenues to subsequent months. (O'Neill Tr. 137:23-138:15; *see also* Div. Ex. 126 (noting that SHCP schedules detailed "what they made during the month . . . , how much is being carried forward from the prior month, and how much they want [RCM] to pay out").) For example, with respect to a January 2010 invoice, White approved that SHCP direct RCM to remit to SHCP an even-number figure of $1,000,000 from the gross trading revenue earned by SHCP "leaving $490,872.78 at [RCM]." (Div. Ex. 130; O'Neill Tr. 138:23-139:7, 204:3-205:6.) White knew that the purpose of "keep[ing] payments from [RCM] at a flat rate" was so that the trading revenue would resemble payments for "consulting." (Div. Ex. 130.)

D. SHCP Immediately Becomes Dormant Once SHCM's Registration is Approved.

SHCM's broker-dealer registration became effective on February 26, 2010, and the firm was authorized to commence operations on March 4, 2010. (Div. Ex. 187 at SH-AP-00000253-255; White Tr. 315:12-316:10, 338:12-16.) Immediately thereafter, SHCP became a dormant entity. (Stip. ¶ 4; White Tr. 595:25-596:7.) In other words, as soon as SHCM obtained the registration that White knew was required for a firm to lawfully operate as a broker-dealer, he had SHCP cease business operations and began conducting Spring Hill's broker-dealer activities exclusively through SHCM. (*See id.*) While Spring Hill's financial records reflected that subsequent trading revenues were earned by SHCM rather than SHCP, (*see* Div. Ex. 199), nothing substantive changed in the way Spring Hill introduced trades, had its trades processed and cleared, or earned transaction-based compensation. (*See* O'Neill Tr. 101:9-13, 117:4-118:2; Martens Tr. 1201:22-25, 1202:2-9, 1202:13-19, 1207:7-15; Tedeschi Tr. 809:6-12, 811:3-20.) For example:

- Spring Hill continued to introduce its trades to RCM and to piggyback on RCM's clearing arrangements. (Tedeschi Tr. 809:6-12; O'Neill Tr. 101:9-13, 117:18-20; Martens Tr. 1201:22-25; Fells Tr. 1152:7-1153:7.)

- RCM continued to fulfill a back-office function to process and settle Spring Hill trades. (Tedeschi Tr. 810:4-11, 811:16-20.)

- The clearing fee that Spring Hill paid to RCM remained the same. (O'Neill Tr. 117:4-7; Martens Tr. 1202:13-15.) Thus, Spring Hill's 85 percent share of the revenues for the trades it introduced to RCM also remained the same. (Div. Ex. 121; O'Neill Tr. 117:21-118:2; Martens Tr. 1207:7-15.)

- There continued to be an account designated for Spring Hill's trades at Merrill Lynch Broadcort, the clearing firm used by RCM. (Martens Tr. 1202:16-19.)

- SHCM's trading revenues continued first to be collected by RCM, the broker-dealer it introduced its trades to, and then to be paid to SHCM, as had occurred with SHCP. (O'Neill Tr. 119:23-120:2, 120:9-14; Heaney Tr. 779:5-24; *see also* Div. Exs. 157B; 170J-170L.)

- Spring Hill continued to use the same blotter to record its trades and revenues. (O'Neill Tr. 117:8-13, 113:20-114:15; 189:2-19; White Tr. 332:15-21.)

- Spring Hill continued to have the same traders, who continued to work from Spring Hill's office (not RCM's), whose job duties remained the same, and most of whom continued to be registered representatives of RCM. (O'Neill Tr. 117:14-17; Martens Tr. 1202:7-9; Tedeschi Tr. 811:25-813:8.)

- Spring Hill's counterparties also continued to receive letters from RCM identifying the registered representatives as authorized traders. (Div. Ex. 156; Quinn Tr. 939:5-16.)

- The counterparties also remained subject to RCM's approval. (Martens Tr. 1202:10-12.)

In short, there were no changes in the day-to-day relationship between Spring Hill and RCM from before to after SHCM became a registered broker-dealer. (Martens Tr. 1202:2-6.) The only difference was that White now had a business that could lawfully carry out the broker-dealer services that SHCP had already conducted to generate nearly $4 million in revenue.

E. SHCM and White Engage in Multiple Net Capital and Record-Keeping Violations.

After successfully deceiving FINRA and obtaining registration for SHCM, White once again chose to disregard regulatory requirements in order to earn revenue for his company. Although White knew that SHCM did not have the capital to take on proprietary risk, he twice

directed a trader to purchase a security without having a corresponding customer order because he did not want the bond – which he hoped subsequently to be able to sell to a client at a substantial profit –"to trade away" in the interim. (Div. Ex. 76.) SHCM's trade blotter concealed this conduct through falsified entries for both transactions that made it appear, erroneously, that the "buy-side" and "sell-side" trades happened the same day. Initial Decision at 16-17. In connection with the same security, White approved his firm's decision to withhold a trade ticket from RCM for ten days, so that RCM would not learn about the unmatched trade even though he knew that RCM expected Spring Hill to engage only in agency trading and understood that RCM would want to be alerted to the trade on the date it took place. (Supp. Stip. ¶¶ 6-13.) Like SHCP, SHCM was, through White, under the exclusive management of SHCH. Initial Decision at 5.

ARGUMENT

A. Respondents' Procedural Arguments Lack Merit.

Respondents' arguments that the Section 15(a) claims are time-barred and that the administrative process is unconstitutional ignore relevant Commission precedent and were correctly rejected by Judge Foelak.

1. The Section 15(a) Charges Are Not Time Barred.

The Initial Decision correctly found that disgorgement is not subject to Section 2462. Initial Decision at 4. In the original 1933 and 1934 securities acts, Congress authorized seven express private claims and included a statute of limitations for each. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359-360 (1991). But Congress "deliberate[ly]" refrained from enacting any express statute of limitations for Commission enforcement actions. *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993). Accordingly, it is well-

settled that Section 2462 does not limit the time for the Commission to file claims seeking equitable or remedial relief. *See, e.g., Riordan v. SEC*, 627 F.3d 1230, 1234-35 (D.C. Cir. 2010) (cease and desist order not subject to limitations period); *In re Terence Michael Coxon*, Sec. Act Rel. No. 8271, 2003 SEC LEXIS 3162, at *967 n.60 (Aug. 21, 2003) (Commission opinion) (same); *Herbert Moskowitz*, Exch. Act Rel. No. 45609, 2002 SEC LEXIS 693, at *42-45 (Mar. 21, 2002) (same); *Zacharias v. SEC*, 569 F.3d 458, 471-72 (D.C. Cir. 2009) (disgorgement and prejudgment interest not subject to limitations period); *SEC v. McCaskey*, 56 F. Supp. 2d 323, 324, 326 (S.D.N.Y. 1999) (injunctions, disgorgement, and officer bar not subject to limitations period); *SEC v. Kelly*, 663 F. Supp. 2d 276, 286-87 (S.D.N.Y. 2009) (equitable remedies not subject to limitations period). "Courts have found that SEC suits for equitable and remedial relief . . . are not governed by § 2462 because they are not actions or proceedings for a 'penalty' within the meaning of the statute." *SEC v. Tandem Mgmt. Inc.*, No. 95-civ-8411, 2001 WL 1488218, at *6 (S.D.N.Y. Nov. 21, 2001).[10]

Respondents rely on a single case, which is contrary to Commission precedent, for the proposition that following the Supreme Court's decision in *Gabelli v SEC,* 133 S. Ct 1216 (2013), enforcement actions for equitable relief and disgorgement are subject to a five-year limitations period. Respondents' Brief in Support of Petition for Review ("Resp. Br.") at 12-13 (citing *SEC v. Graham*, 21 F. Supp. 3d 1300, 1307-11 (S.D. Fla. 2014)). However, as Judge Murray explained in a recent administrative proceeding, the *Graham* opinion "is not controlling law and is an outlier." *Donald J. Anthony, Jr.*, Initial Decision Rel. No. 745, 2015 SEC LEXIS

[10] The terms "fine, penalty, or forfeiture" under Section 2462 reach legal remedies that are "intended to punish" wrongdoers. *Gabelli v. SEC*, 133 S.Ct. 1216, 1223 (2013) (citing *Meeker v. Lehigh Valley RR Co.*, 236 U.S. 412, 423 (1915)). These terms do not include "equitable remedies" intended to protect the public. *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *United States v. Banks*, 115 F.3d 916, 918-19 (11th Cir. 1997).

707, at *50 (Feb. 25, 2015); *see also Dennis J. Malouf*, Initial Decision Rel. No. 766, 2015 SEC LEXIS 1251 (Apr. 7, 2015) ("I am not persuaded by [the *Graham*] opinion's reasoning that the longstanding precedents on the pertinent limitations period were swept aside ... by the Supreme Court's decision in *Gabelli,* which specifically noted that its holding did not extend to injunctive relief and disgorgement claims."). Indeed, the overwhelming weight of post-*Gabelli* authority rejects the interpretation proposed by Respondents and is consistent with the longstanding rule that the Section 2462 limitations period does not apply to equitable or remedial claims.[11] Furthermore, contrary to Respondents' argument that "disgorgement is 'forfeiture,'" (Resp. Br. at 13), the Supreme Court has distinguished between the "equitable remed[y]" of requiring a person to "disgorge" his unlawful gains and "forfeiture." *Kaley v. United States*, 134 S.Ct. 1090, 1102 n.11 (2014). *See also SEC v. Contorinis*, 743 F.3d 296, 306-30 (2d Cir. 2014) (highlighting "substantive distinctions" between disgorgement and forfeiture and concluding that "the two remedies reflect different characteristics and purposes").[12]

Respondents' argument that civil penalties stemming from SHCP's unregistered broker-dealer activity are time barred also lacks merit. Although certain unregistered broker-dealer activity by SHCP occurred more than five years before the OIP was filed on January 22, 2015,

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[11] *See, e.g., SEC. v. LeCroy*, No. 2:09-cv-2238, 2014 U.S. Dist. LEXIS 126836, at *2-5 n.1 (N.D. Ala. Sept. 5, 2014); *SEC v. Geswein*, 2 F. Supp. 3d 1074, 1084-85 (N.D. Ohio 2014); *SEC v. Amerindo Inv. Advisors Inc.*, No. 05 Civ. 5231, 2014 WL 2112032, at *11 (S.D.N.Y. May 6, 2014); *SEC v. Syndicated Food Serv. Int'l., Inc.*, No. 04 Civ. 1303, 2014 WL 1311442, at *25 (E.D.N.Y. Mar. 28, 2014); *SEC v. Radius Capital Corp.*, No. 2:11-cv-116-Ftm-29DNF, 2015 U.S. Dist. LEXIS 51525, at *18 (M.D. Fla. Apr. 20, 2015); *SEC v. Fujinaga*, No. 2:13-cv-1658, 2014 WL 4977334, at *6 (D. Nev. Oct. 3, 2014).

[12] *See also SEC v. Collyard,* ---F. Supp. 3d ----, 2015 WL 8483258 (D. Minn. Dec. 9, 2015) ("Crawford's invitation to read into Section 2462 a limitation on requests for equitable relief as well as 'any civil fine, penalty, or forfeiture' runs counter to 'the well-established rule that an action on behalf of the United States in its governmental capacity ... is subject to no time limitation, in the absence of congressional enactment clearly imposing it.'") (citations and internal quotation marks omitted).

SHCP committed new and independently actionable violations of Section 15(a) of the Exchange Act within the limitations period through the solicitation of customers and execution of approximately 20 additional matched trades (*i.e.*, 20 purchases and 20 sales) after January 22, 2010, which yielded nearly $1 million in additional transaction-based compensation. Civil penalties are warranted for these violations that fall within the five-year statute of limitations period. *See Donald J. Anthony, Jr.*, 2015 SEC LEXIS 707, at *237 ("The Commission has long permitted penalties to be sought for violations occurring within the limitations period, even when similar violations first occurred outside that period."); *Guy P. Riordan*, Exch. Act Rel. No. 61153, 2009 SEC LEXIS 4166, at *74-75 (Dec. 11, 2009) ("Five of [respondent's] approximately eighty agency securities transactions . . . occurred . . . within the five-year period before the institution of this proceeding. Accordingly . . . this proceeding is not time-barred."). Respondents' contention that, here, there was only a single violation, the signing of the CSA, completely disregards the illegal trading activity and marketing efforts which persisted through February 2010.[13]

Finally, contrary to Respondents' unsupported argument that conduct occurring outside of the statute of limitation should not be considered for any purposes, Judge Foelak, citing to several cases, properly recognized that "acts outside the statute of limitations may be considered to establish a respondent's motive, intent, or knowledge in committing violations that are within the statute of limitations." Initial Decision at 4 (citing *Sharon M. Graham*, Exch. Act Rel. No. 40727, 1998 SEC LEXIS 2598, at *41 n.47 (Nov. 30, 1998), *aff'd*, 222 F.3d 994 (D.C. Cir.

[13] Respondents provide no authority for the proposition that signing the CSA was an actionable offense, much less the only actionable offense, such that a Section 15(a) cause of action accrued from the moment it was signed, irrespective of when or whether it was ever followed upon by actual broker-dealer conduct on SHCP's part.

2000); *Terry T. Steen*, Exch. Act Rel. No. 40055, 1998 SEC LEXIS 1033, at *14-15 (June 1, 1998)). "Further, such acts may be considered in determining the appropriate sanction if violations are proven." *Id.* (citing *Steen*, 1998 SEC LEXIS 1033, at *14-17.)

2. The Administrative Process Does Not Violate the Appointments Clause.

Respondents erroneously assert that these administrative proceedings have been held in violation of the Constitution's Appointments Clause because ALJ Foelak was not appointed by the Commission. Resp. Br. at 20-28. But it is uncontested that the Appointments Clause's requirements apply only to constitutional officers, not employees. As the Commission found in *David F. Bandimere*, Exch. Act Rel. No. 76308, 2015 WL 6575665, at *19-21 (Oct. 29, 2015), *Timbervest, LLC*, Investment Advisers Act Rel. No. 4197, 2015 WL 5472520, at *23-28 (Sept. 17, 2015), and *Raymond J. Lucia Cos.*, Exch. Act Rel. No. 75837, 2015 WL 5172953, at *21 (Sept. 3, 2015), Commission ALJs are employees, not constitutional officers, and thus are not subject to the Appointments Clause's requirements.

B. SHCP Acted as an Unregistered Broker-Dealer and Violated Section 15(a)(1) of the Exchange Act.

Section 15(a)(1) of the Exchange Act makes it "unlawful for any [unregistered or unaffiliated] broker or dealer . . . to make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security . . . unless such broker or dealer is registered" with the Commission in accordance with Section 15(b) of the Exchange Act. Scienter is not required for a violation of this provision. *SEC v. Nat'l. Exec. Planners, Ltd.*, 503 F. Supp. 1066, 1073 (M.D.N.C. 1980).

1. SHCP Acted as a Broker-Dealer.

Section 3(a)(4)(A) of the Exchange Act defines a broker as any person "engaged in the business of effecting transactions in securities for the account of others." The phrase "engaged

in the business" connotes a "certain regularity of participation in securities transactions at key points in the chain of distribution." *SEC v. Benger*, 697 F. Supp. 2d 932, 944 (N.D. Ill. 2010) (citing *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003)); *see also SEC v. Hansen*, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984). Broker activity can be evidenced by such things as receipt of transaction-based compensation or commissions (as opposed to salary), selling the securities of other issuers, negotiating between an issuer and investor, making valuations as to the merits of an investment, and active recruitment of investors. *See, e.g.*, *Benger*, 697 F. Supp. 2d at 944-45; *SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998). Prior cases have recognized that the "[r]eceipt of commissions is a 'hallmark' of being a broker." *Dennis J. Malouf*, Initial Decision Rel. No. 766 (Apr. 7, 2015). "[H]olding [oneself] out as being in the business of being a broker-dealer in securities" also represents a "clear indication" of broker-dealer activity. *SEC v. Schmidt*, No. 71 Civ. 2008, 1971 WL 293, at *2 (S.D.N.Y. Aug. 26, 1971); *cf. also* No Action Letter to e-Media, 2000 SEC No-Act. LEXIS 1006, at *1-2 (Dec. 14, 2000) (stating that no action will be taken, provided, among other conditions, recipient of letter does not "hold itself out as providing any securities-related services"); No Action Letter to David A. Cifrino, P.C., 2000 SEC No-Act. LEXIS 1034, at *7 (Dec. 1, 2000) (same).

The Initial Decision correctly found that "[t]here is no dispute that SHCP received transaction-based compensation for its activities, amounting to 85% of the commissions generated by its trading." Initial Decision at 15. ALJ Foelak also concluded that: (1) "White and his Spring Hill partners, not Rafferty, decided what trades were made and determined the compensation of the Rafferty-registered SHCP traders, refuting the argument that the trades were Rafferty's rather than SHCP's"; (2) "White also sought to generate business for SHCP by

distributing marketing materials touting its broker-dealer services" and (3) "SHCP and Rafferty's Services and Cost Sharing Agreement made clear that the parties expected SHCP to act as a broker; it specified that the services provided included 'clearing and trade processing for trades introduced by Spring Hill.'" *Id.* Each of these factual findings is amply supported in the evidentiary record; indeed, they are not contested. *See supra*, at 5-9; (Div. Ex. 204 at RCML-SEC-001642, 001647.)

As established by the Division at the hearing, for approximately ten months spanning 2009 and 2010, SHCP actively solicited prospective customers by distributing scores of marketing decks touting the firm's "Broker/Dealer" services as designed to satisfy "a full range of client needs" relating to ABS, CMBS, RMBS, CDOs, and other securitized products.[14] *See George*, 426 F.3d at 797 (finding that defendant acted as broker due to his regular involvement in "communications with and recruitment of investors for the purchase of securities"). In these marketing decks, which White distributed to numerous prominent investment firms, SHCP advised prospective customers that: "Our Broker/Dealer is active across the spectrum of structured finance asset classes, with a focus on esoteric and illiquid securities . . . . We trade with a wide range of institutions and asset managers across a broad geographic footprint"; "Our clients get early looks at hard to access opportunities and securities through our relationships with key market players"; and "Our . . . Broker/Dealer trades securities on an agency basis, focusing on highly structured consumer and non-consumer ABS, CMBS, and RMBS . . . . Our three complementary services – Advisory, Broker/Dealer, and Investment Manager, provide us with a unique perspective on the market and allow us to satisfy a full range of client needs." (*See, e.g.*, Div. Ex. 33A.) All of this activity demonstrates that White and SHCP were holding

[14] (*See* Div. Exs. 20-37; 39-52b; 57-58b; 63; 66-67B.)

the unregistered firm out "as being in the business of a broker-dealer in securities," which is a "clear indication" of broker-dealer activity. *Schmidt*, 1971 WL 293, at *2.

SHCP's marketing efforts were successful, as multiple recipients of SHCP's pitch books and solicitations subsequently elected to engage in multi-million dollar trades with the firm. *See supra*, at 7-8. In fact, between May 2009 and February 2010, SHCP generated more than $4.6 million in transaction-based compensation by conducting approximately 95 matched trades – that is, 95 purchases and 95 contemporaneous sales of securities – in SHCP-designated customer accounts. *See SEC v. Margolin*, No. 92 Civ. 6307, 1992 WL 279735, at *5 (S.D.N.Y. Sept. 30, 1992) (participation in dozens of transactions for clients establishes "'regularity of business activity' which supports the statutory definition of broker or dealer"). Pursuant to an arrangement with RCM, SHCP's trades were processed and cleared by RCM in return for a 15 percent fee, which allowed SHCP to retain 85 percent, or $3,953,608, of the transaction-based compensation. *See Margolin*, 1992 WL 279735, at *5 (finding that "receiving transaction-based compensation" is "evidence of brokerage activity").

In addition to regularly trading securities on behalf of customers, receiving transaction-based compensation, and holding itself out as a provider of broker-dealer services, SHCP acted as a link between issuers and investors as occurred in connection with the securitization of legal fees owed by certain tobacco companies. (*See* Div. Ex. 60 at 2.) In fact, White acknowledged that an investor reading SHCP's trade highlight, which advertised his firm's ability to "leverage its vast network of capital markets partners to develop liquidity for illiquid securities," would reasonably conclude that SHCP had the ability to match buyers and sellers for complex securitized products. (Div. Ex. 60 at 2; White Tr. 477:10-478:7; *see also* White Tr. 507:8-20.)

Further, SHCP expressly informed customers that it sourced bonds and achieved "efficient execution for both buyers and seller." (*See* Div. Ex. 60 at 2.) As White confirmed, SHCP also educated investors on the merits of bonds, (*Id.;* White Tr. 475:21-476:6), which is further evidence that it conducted a broker-dealer business. *See SEC v. Gagnon*, No. 10 Civ. 11981, 2012 WL 994892, at *11 (E.D. Mich. Mar. 22, 2012) (finding that defendant acted as a broker-dealer where he "solicited persons to purchase ... securities, acting as the link between the issuer and the investor," "received transaction-based compensation," and "advised investors about the merits of the [investment]").

Despite engaging in all of the aforementioned activities, SHCP has never been registered with the Commission as a broker or dealer. (Stip. ¶ 2.) Accordingly, it acted and operated as an unregistered broker of securities in violation of Section 15(a).

2. SHCP's Arrangement with RCM Confirms It Acted as a Broker-Dealer.

Respondents argue that SHCP did not violate Section 15(a) because the SHCP employees only commenced trading after they were registered with RCM and because natural persons are allowed to enter into independent contractor arrangements. Neither of these arguments alters the fact that SHCP, a corporate entity, conducted a broker-dealer business by, *inter alia*, receiving transaction-based compensation and holding itself out as a broker-dealer. Respondents claim that "the only likely misstep was SHCP's receipt of compensation that derived from the securities transactions that [RCM] effectuated." Resp. Br. at 29. However, even this concession ignores the facts of this case as well as the agreement SHCP entered into with RCM, which made clear that RCM only provided clearing and processing for "trades introduced by [SHCP]" and that the trades were "settled and processed by RCM on behalf of [SHCP]." (Div. Ex. 204 at RCML-SEC-001647.) *See* "Guide to Broker-Dealer Registration," Division of Trading and

Markets, U.S. Securities and Exchange Commission, April 2008 ("[I]ntroducing brokers that conduct a business in securities . . . must be registered as general-purpose broker-dealers.").

In addition, numerous authorities – including the *Kramer* case on which Respondents attempt to rely – have recognized receipt of transaction-based compensation as a "hallmark" of broker-dealer activity. *See, e.g., Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, No. 8:04CV586, 2006 U.S. Dist. LEXIS 68959, at *20 (D. Neb. Sept. 12, 2006); *Dennis J. Malouf*, 2015 SEC LEXIS 1251, at *61-62; *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011); *Landegger v. Cohen*, No. 11-cv-01760-WJM-CBS, 2013 U.S. Dist. LEXIS 140634, at *16 (D. Colo. Sept. 30, 2013). Here, it is undisputed that SHCP received 85 percent of the transaction-based compensation for securities trades it initiated, netting the unregistered firm approximately $4 million. (Div. Ex. 138A at Tab "Monthly BD Totals," Tab "2009" - Cell 126Y, Tab "2010– Cell 78AB; O'Neill Tr. 110:2-16.)

Moreover, SHCP not only collected transaction-based compensation for effecting trades on behalf of others, it engaged in all of the conduct that has traditionally been found to constitute broker-dealer activity. Specifically, SHCP, which operated independently of RCM, managed the traders, recorded the trades in its own blotter,[15] received the lion's share of the revenue from the trades, and held itself out to investors as the entity conducting the trades, including in marketing materials highlighting its "Broker/Dealer" services offered to customers and "illustrative" securities transactions. *See supra,* at 5-6. (*See also* Div. Ex. 49 at SH-AP-28.)

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[15] According to White, SHCP maintained its own trade blotter or "spreadsheet" because "we're trading regularly and wanted to keep records, so we understand the trades, the counterparties, the pricing, the revenue. Everything. So it was a way for us to inventory our trading activity, manage our trading activity." (White Tr. 333:3-24.) Maintaining these records allowed him to track how many trades SHCP's employees were conducting. (*Id.*)

Finally, it is simply irrelevant that "[s]ecurities regulatory agencies have ... recognized the concept of certain natural persons associating with a registered broker-dealer as independent contractors" because SHCP was undeniably neither a natural person nor an associated person of RCM. Instead, SHCP was an independent firm whose trading activity, marketing efforts, and commission income reflected known attributes of a broker-dealer. Accordingly, like its successor SHCM, which also engaged in broker-dealer activity through its employees who were simultaneously registered representatives of RCM, SHCP, which conducted an identical business through the same employees using the same piggyback arrangement for the same 85 to 15 percent trading revenue split, was also a broker-dealer. *See supra*, at 11-12.

C. White and SHCH Willfully Aided and Abetted and Caused SHCP's Section 15(a) Violation.

To establish aiding and abetting liability, the Division must prove: "(1) a primary or independent securities law violation committed by another party; (2) awareness or knowledge by the aider and abettor that his or her role was part of an overall activity that was improper; and (3) that the aider and abettor knowingly and substantially assisted the conduct that constitutes the violation." *John Thomas Capital Mgmt. Grp. LLC*, Initial Decision Rel. No. 693, 2014 SEC LEXIS 4162, at *77 (Oct. 17, 2014); *see SEC v. Slocum, Gordon, & Co.*, 334 F. Supp. 2d 144, 184 (D.R.I. 2004). A "high degree of substantial assistance may lessen the SEC's burden in proving scienter." *SEC v. Apuzzo*, 689 F.3d 204, 215 (2d Cir. 2012). Accordingly, "the knowledge or awareness requirement can be satisfied by recklessness when, as here, "the alleged aider and abettor is a fiduciary or active participant." *John Thomas Capital Mgmt.*, 2014 SEC LEXIS 4162, at *78 (citing *Ross v. Bolton,* 904 F.2d 819, 824 (2d Cir. 1990); *IIT v. Cornfeld*, 619 F.2d 909, 923, 925 (2d Cir. 1980); *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 47-48 (2d Cir. 1978); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975)). An

aiding and abetting violation will be established where a respondent either acted with knowledge or encountered "red flags" or "suspicious events" that should have alerted him to improper conduct of the primary violator. *John Thomas Capital Mgmt*, 2014 SEC LEXIS 4162, at *78-79. A person cannot escape aiding and abetting liability by claiming ignorance of the securities law. *Graham*, Exch. Act Rel. No. 40727, 1998 SEC LEXIS 2598, at *28 n.33 (Nov. 30, 1998), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000).

Negligence is sufficient to establish "causing liability" where, as here, the primary violation does not require scienter. *KPMG, LLP v. SEC*, 289 F.3d 109, 120 (D.C. Cir. 2002). Further, the fact that others also may have caused a violation "does not insulate [a respondent] from liability for [one's] own acts and omissions." *In re Eric W. Chan*, Sec. Act. Rel. No. 8078, 2002 SEC LEXIS 1059, at *31 (Commission opinion) (Apr. 4, 2002).

1. White and SHCH Were Active Participants in SHCP's Unlawful Broker-Dealer Activity.

As CEO of the Respondent Entities, White was responsible for their executive management and "involved in all aspects of their decision-making and policy." (Div. Exs. 8 at SH-SEC0011742; 1H at F325, F347; Tr. 484:12-485:6.) White played an especially active role in promoting SHCP's unregistered broker-dealer activity. For example, he recruited, supervised, and determined the compensation for SHCP's traders, drafted and circulated numerous marketing decks holding SHCP out as a "Broker/Dealer," and made personal pitches soliciting "broker-dealer" business so that SHCP could buy or sell securities for investors. *See supra*, at 7-8. Indeed, Respondents' Brief acknowledges that White's "primary responsibilities at SHCP was [sic] working on new business opportunities" and that "[h]e 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." Resp. Br. at 10. White also personally

negotiated the revenue-splitting arrangement that earned SHCP nearly $4 million in trading commissions over a ten-month period. (White Tr. 416:25-417:12; Fell Tr. 1146:8-13; Rafferty Tr. 1085:12-22.) Accordingly, the evidentiary record amply supports the Initial Decision's conclusion that "White aided and abetted and caused SHCP's violation of Section 15(a)(1) of the Exchange Act" and that he was an "active participant" in marketing SHCP's unregistered broker-dealer services to the investing public. Initial Decision at 15.

SHCH, with White as its majority owner, also actively participated in SHCP's unlawful activity. A corporate entity is "accountable for the actions of its responsible officers." *Horton & Co.*, Initial Decision Rel. No. 208, 2002 WL 1430201 at *10 (July 2, 2002). At trial, the Division established that SHCH, acting through White, played a substantial role in (and derived significant profits from) SHCP's trading activities, its generation of transaction-based compensation, solicitations of customers, and decision not to become registered, none of which activities could have taken place without authorization from SHCH, which had the "exclusive right" to manage SHCP's operations. (Div. Exs. 4 at SH-SEC0011644, 180B; Supp. Stip. ¶ 2; White Tr. 483:5-9, 484:12-485:6.) ALJ Foelak, therefore, correctly found that SHCH and its majority owner White aided and abetted SHCP's violation of Section 15(a). Initial Decision at 13, 15. *See also In re Centreinvest, Inc.*, Sec. Act. Rel. No. 60413, 2009 SEC LEXIS 2611 (July 31, 2009) (finding that affiliate of unregistered broker-dealer caused Section 15(a) violation).

2. White's "Good Faith" Defense is Not Supported by the Evidence.

White knew that SHCP's unregistered broker-dealer activity was improper. Indeed, White conceded that in 2009 he was aware that soliciting business for a broker-dealer, effecting transactions in securities, and receiving commission-based compensation were all hallmarks of broker-dealer activity requiring registration. (White Tr. 507:8-20; Div. Ex. 189 at SH-

SEC0011537; *see also* White Tr. 323:16-20.) Yet, with White's knowledge and complicity, SHCP engaged in each of the foregoing activities as an unregistered entity. *See supra*, at 18-21. At the time of this conduct, White was a veteran of the securities industry, including ten years spent as a high-level managing director at Lehman whose responsibilities covered ensuring compliance with regulatory requirements, such as the maintenance of required registrations. (Div. Ex. 1K.) With this experience, White understood that firms had to be registered as a prerequisite to operating a broker-dealer business in the United States. (White Tr. 323.2-20.) *See Harrison Securities, Inc.*, Initial Decision Rel. No. 256, 2004 SEC LEXIS 2145, at *129-130 (Sept. 21, 2004) (concluding that "general awareness" of impropriety necessary for aiding and abetting liability was established because respondent was a long-time "securities industry professional . . . [with] knowledge of the applicable statutes and regulations far exceeding that of the general public").[16]

As ALJ Foelak properly found, White and his firm engaged in "[e]quivocation" to mislead FINRA. Initial Decision at 9. "[H]is knowledge that his role was part of an overall activity that was improper is shown by his awareness that Respondents affirmatively represented to FINRA that SHCP was not conducting a securities business. This is shown as well by the facts that SHCM sought to become registered and that White knew this would be a lengthy process, during which he did business through SHCP." Initial Decision at 15. ALJ Foelak's decision was carefully rooted in the factual record of this case. (*See, e.g*, Quinn Tr. 920:4-13, 923:2-924:4, 925:22-926:3) (acknowledging that White was aware Spring Hill was telling FINRA that SHCP did not conduct a securities business).)

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[16] In addition, in connection with SHCM's FINRA application, White was required to take the Series 24 license exam in 2009, which specifically covered broker-dealer registration requirements under Section 15(a) of the Exchange Act. (White Tr. 323:11-20; Div. Ex. 197.)

White knew FINRA registration was required for SHCM to conduct its securities business; after all, he testified that he believed it would be a securities violation if SHCM commenced trading activity before the date FINRA authorized it to do so. (White Tr. 339:22-340:3.) The fact that SHCP, through the same piggyback arrangement with RCM that SHCM later adopted, conducted identical business activities in the ten months leading up to SHCM's registration with White at the helm and that, following registration, SHCM simply replaced SHCP as the entity through which White did business – without any substantive change in operations or in Spring Hill's relationship with RCM – shows clearly that White knew SHCP's broker-dealer activities required registration. White disregarded this requirement; however, in his eagerness to get his broker-dealer business off the ground. (*See* White Tr. 535:23-536:2 ("[I] realized it was going to take . . . 270 days to complete [SHCM's registration with FINRA], and we didn't have the time to sit and do nothing.")

Moreover, as the Initial Decision correctly determined, White's awareness that SHCP's unregistered broker-dealer activities were improper is evident from his complicity and participation in a scheme to deceive FINRA in response to questions about SHCP's business activities and the nature of the payments that SHCP received from RCM. While White was "letting everyone know what SHCP was doing post-Lehman bankruptcy," (Resp. Br. at 10), by telling them SHCP was a "Broker/Dealer" trading mortgage-backed securities, White and his firm were *repeatedly* representing to FINRA that SHCP did not conduct a securities business and that its revenues were for consulting services rendered to RCM and that SHCP provided only "non-transaction-related" "management consulting services." *Supra,* at 10. White's complicity in misleadingly referring to SHCP's commission income earned from buying and selling securities as "consulting revenues" during the pendency of SHCM's FINRA application

confirms his consciousness of wrongdoing. *See, e.g., DiPlacido v. CFTC*, No. 08-559-ag, 2009 U.S. App. LEXIS 22692 (2d Cir. Oct. 16, 2009) (defendant's use of "code words ... suggest[s] actual notice that his conduct was wrongful"); *United States v. Peltier*, 585 F.2d 314 (8th Cir. 1978) (use of "code words" provide "significant evidence of [defendant's] state of mind"); *Howard v. United States*, 867 A.2d 967, 972 (D.C. Cir. 2005) (use of a "code word ... show[s] consciousness of guilt").[17]

Accordingly, White's arguments that he acted in good faith and that SHCP's contractual arrangement with RCM – the CSA – shows he "sought to comply with the registration provisions" have no grounding in fact.[18] Respondents' Brief claims that "the Initial Decision is replete with evidence that White sought to comply with securities laws through SHCP's arrangement with Rafferty," (Resp. Br. at 31), but fails to identify this alleged evidence. This silence speaks volumes. Far from evidencing a good faith attempt to comply with Section 15(a), the CSA, a cost-sharing agreement which Respondents never provided to FINRA when questioned about SHCP's business activities, was entered into because, as a practical matter, SHCP traders could not trade without the support of an entity like RCM, because SHCP could not clear, process, and settle their trades on their own or even do business directly with institutional investors, which had minimum capital and credit requirements for counterparties that SHCP could not meet. (Div. Ex. 204; Rafferty Tr. 1084:4-19.) As White admitted, "[t]he

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[17] At minimum, these repeated misrepresentations, which were known to him, must have represented "red flags" for White "creating reasons for doubt" in his mind as to the propriety of SHCP's conduct, which is sufficient to establish his liability for aiding and abetting. *See Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004).

[18] To the extent ALJ Foelak's opinion could be construed as so holding, as Respondents' Brief repeatedly claims, it is inconsistent with the entire tenor of the Initial Decision as well as the factual record. *See, e.g.*, Initial Decision at 9 ("Equivocation").

arrangement we had with [RCM] is that [RCM] had capital, they had [a] FINOP, they had clearing arrangements. They had all of the proper documentation to transact with institutional investors and other broker-dealer counterparties. We did not." (White Tr. 375:10-18.) Rather than try to comply with registration provisions, White and RCM entered into their business arrangement to "facilitate transactions initiated by [SHCP] with clients in order to accommodate the administration, clearing and settlement of these trades," just as the CSA states. (Div. Ex. 204 at RCML-SEC-001642.) Through the CSA, White recognized that SHCP needed a piggyback arrangement to conduct its broker-dealer operations. The same was true – as evidenced by the continuation of the piggyback relationship – when SHCM registered and took over Spring Hill's broker-dealer operation. (Tedeschi Tr. 809:6-12; O'Neill Tr. 101:9-13, 117:18-20; Martens Tr. 1201:22-25; Fells Tr. 1152:7-1153:7.)

At any rate, the clearest indication that the arrangement with RCM was not an attempt to comply with the regulatory requirements, as Respondents now claim, is that there would have been no reason for White and SHCM to repeatedly conceal SHCP's trading activity and commission income from FINRA, along with the very existence of the written agreement with RCM, unless White believed that SHCP's conduct was improper. Initial Decision at 15 ("The facts that Respondents sought to disguise the commission payments that SHCP received as consulting payments and that they represented to FINRA that SHCP was not conducting a securities business (a representation of which White was aware) indicates that White was aware that the arrangement was not a completely legitimate method of speeding up Spring Hill's entry into the securities business."). Accordingly, White acted knowingly, and the Initial Decision

correctly found that he aided and abetted and caused SHCP's unregistered broker-dealer activity.[19]

Finally, as the Initial Decision correctly found, SHCH's state of mind may be imputed from White, as the firm's CEO and majority owner. *See SEC v. Blinder, Robinson & Co. Inc.*, 542 F. Supp. 468, 476 n.3 (D. Colo. 1982) (citing *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096-97 n.16-18 (2d Cir. 1972)); *SEC. v. Watermark Fin. Servs. Grp., Inc.*, 2012 WL 501450, at *6 (W.D.N.Y. Feb. 14, 2012). Accordingly, SHCH, which managed SHCP's business activities and $4 million in ill-gotten revenues, also had the requisite scienter or recklessness for aiding and abetting liability. *See In re Horton & Co.*, 2002 WL 1430201, at *10 ("A company's state of mind may be imputed from that of individuals controlling it.").

D. White, SHCP, and SHCH Should Be Held Jointly and Severally Liable for Disgorgement for the Section 15(a) Violations.

Respondents' Brief challenges the Initial Decision's determination that White be ordered to disgorge $3,953,608 on a joint and several basis with the companies he controlled, SHCP and SHCH. Resp. Br. at 17-20. This argument is meritless.

In particular, Respondents fault ALJ Foelak for "ma[king] absolutely no attempt to determine what, if any, ill-gotten gains specifically went to [] White." *Id.* at 17. They also claim that because the Division purportedly "did not introduce any evidence whatsoever as to how

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[19] Respondents' Brief devotes a lot of attention to the alleged acts and views of RCM personnel who negotiated the CSA. (*See, e.g.*, Resp. Br. at 7) ("[] White played no role in the negotiation of the April 2009 Rafferty Contract.... Conversely, Michael Rafferty was a substantial contributor. . . .") However, this line of argument is irrelevant and erroneous. As an initial matter, RCM has already settled with the Division. *Rafferty Capital Mkts., LLC,* Exch. Act Rel. No. 72171, 2014 SEC LEXIS 1688 (May 15, 2014). Second, it is well-settled that the fact that others also may have caused a violation "does not insulate [a respondent] from liability for [one's] own acts and omissions." *Eric W. Chan*, 2002 SEC LEXIS 1059, at *31. Third, despite White's efforts to distance himself from the CSA, White negotiated critical elements of the business arrangement including the 85-15 percent commission split, and White proposed the business arrangement with Rafferty, not *vice versa*. (Rafferty Tr. 1047, 1082-83, 1087; White Tr. 416:25-417:12, 535:20-536:7.)

much money, if any, flowed to [] White, no disgorgement order should enter against [him] personally." *Id.* at 20. However, the Commission has previously rejected identical arguments. *See In re Coxon,* Rel. Exch. Act Rel. No. 48385, 2003 WL 21991359 (Aug. 21, 2003) (Commission opinion). In *Coxon*, a respondent who was a general manager and founder of an investment adviser ("WWM") similarly argued that "the Division failed to establish his separate liability for disgorgement." *Id.* at *14. The Commission rejected this argument, noting that "[c]ourts have held that, 'where two or more individuals or entities collaborate or have a close relationship in engaging in the violations of the securities laws, they have been held jointly and severally liable for the disgorgement of illegally obtained proceeds." *Id.* The Commission also held that the respondent, who had the burden of proving the propriety of any apportionment of the disgorgement amount" had "failed to make the required demonstration." *Id.* White's argument challenging the disgorgement award as applied to him fails for a similar reason: he failed to prove the propriety of any apportionment of the ill-gotten gains Spring Hill received.[20] *Id.* at *13-14; *see also In re Gordon Brent Pierce*, Rel. No. 9555, 2014 WL 896757, at *25 (Mar. 7, 2014) (Commission opinion) ("[C]ourts routinely order disgorgement of the entire amount of ill-gotten gains jointly and severally from individuals who received only part of the proceeds of the wrongdoing, or did not receive any of the proceeds at all."); *SEC v. E-Smart Technologies,*

[20] Undisputedly, courts "ha[ve] broad discretion in subjecting the offending parties on a joint-and-several basis to the disgorgement order." *SEC v. Whittemore*, 659 F.3d 1, 9 (D.C. Cir. 2011). *See also SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997) (recognizing the same). Several circuit courts have held, like the Commission, that joint-and-several liability is appropriate in securities cases when two or more individuals or entities collaborate or have a close relationship in engaging in the illegal conduct. *Whittemore*, 659 F.3d at 9-10; *Hughes Capital*, 124 F.3d at 455; *Hateley v. SEC*, 8 F.3d 653, 656 (9th Cir. 1993) (affirming disgorgement order imposed jointly and severally against broker-dealer securities firm, its president, and its executive vice-president for violations of NASD rules where defendants "acted collectively in violating the association's rules and because of the close relationship among the three of them"); *accord SEC v. First Pac. Bancorp,* 142 F.3d 1186, 1191 (9th Cir. 1998).

Inc., ---F. Supp. 3d, --- 2015 WL 5952237, at *12 (D.C. Cir. Oct. 13, 2015) ("Once the SEC establishes collaboration or a close relationship in carrying out the illegal acts, the burden shifts to the defendant to prove apportionment—*i.e.*, that she should only be held responsible for certain amounts that she personally benefited from.").

White undeniably had a close relationship to SHCP and SHCH and collaborated (and, indeed, orchestrated) in SHCP's unregistered broker-dealer activities. ALJ Foelak properly recognized this fact. Initial Decision at 20 (noting "the common ownership among the Spring Hill entities, White's ultimate 80% ownership and leadership, and the flow of funds among the entities"). As the ultimate 80% owner of SHCP and SHCH, White personally benefitted from SHCP's illegal trading revenues. Furthermore, White failed to demonstrate that he should be responsible for a smaller apportionment. Accordingly, Respondents' challenge to the disgorgement order is without merit. *Coxon,* 2003 WL 21991359 at *14; *SEC v. First Jersey Secs.*, 101 F.3d 1450, 1475 (2d Cir. 1996).

Respondents also attack the Initial Decision for not deducting the amounts paid to SHCP employees "directly" from RCM or "legitimate business expenses of SHCP." Resp. Br. at 19. Once more, Respondents are resorting to an argument that has been soundly rejected by numerous courts and the Commission. "The Commission has not permitted the wrongdoer to reduce the amount of disgorgement to reflect taxes paid or expenses incurred." *In re Kevin Goldstein*, Initial Decision Rel. No. 243, 2004 WL 69156, at *19 (Jan. 16, 2004) (citations omitted). In addition, "the overwhelming weight of authority holds that securities law violators may not offset their disgorgement liability with business expenses." Initial Decision at 20 (citing *SEC v. Brown*, 658 F.3d 858, 861 (8th Cir. 2011) (quotation omitted). *See also SEC v. United*

Energy Partners, Inc., 88 Fed. Appx. 744, 746-47 (5th Cir. 2004) (same) (quoting *Kenton Capital, Ltd.*, 69 F.Supp. 2d at 16)).

In short, the relevant case law simply does not support Respondents' contention that the disgorgement award should be offset for expenses SHCP incurred or revenue Respondents directed be paid to their employees.[21] This is because a disgorgement order "establishes a personal liability, which the defendant must satisfy regardless [of] whether he retains the selfsame proceeds of his wrongdoing." *Whittemore*, 659 F.3d at 9 (citing *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000). In light of the "overwhelming weight" of this case law, Respondents' claim that they should not be required to disgorge proceeds that they directed be paid to their employees or be used to cover other expenses fails. Initial Decision at 20.

E. The Commission Should Impose a Suspension or Bar Against White.

Section 15(b) of the Exchange Act provides that the Commission shall censure, limit, suspend, or bar any person acting as a broker from being associated with a broker, dealer, investment adviser. . . if the Commission finds that such censure, limitation, suspension, or bar is in the public interest and, in pertinent part, that person has willfully violated or willfully aided and abetted violations of the federal securities laws.[22]

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[21] *See, e.g., SEC v. Rockwell Energy*, No. H-09-4080, 2012 U.S. Dist. LEXIS 12902 (S.D. Tex. Feb. 1, 2012) (expressly rejecting argument for business expenses offset in connection with violations of § 15(a) of the Exchange Act and §§ 5(a) and 5(c) of the Securities Act); *SEC v. Crow*, No. 07 Civ. 3814 (CM), Dkt No. 93 (Dec. 3, 2008) (in § 15(a) case, dismissing motion for reduction of disgorgement by amount of rent and payroll expenses); *Alchemy Ventures*, Initial Decision Rel. No. 473, 2012 SEC LEXIS 3658 (Nov. 28, 2012) (ordering disgorgement in § 15(a) case of total trading profits and commissions); *David F. Bandimere*, Initial Decision Rel. No. 507, 2013 SEC LEXIS 3142 (Oct. 8, 2013) (ordering disgorgement of all management fees earned while operating as unregistered broker).

[22] A finding of willfulness does not require intent to violate the law, but merely intent to do the act which constitutes a violation of the law. *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000); *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 180 (2d Cir. 1976).

In analyzing the public interest, the Commission considers the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, the likelihood that the respondent's occupation will present opportunities for future violations, and the extent to which a sanction will have a deterrent effect. *David R. Wulf*, Exch. Act Rel. No. 77411, 2016 SEC LEXIS 1074 (Mar. 21, 2016) (Commission opinion) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)). These factors support a bar, or at minimum a suspension, for White.

ALJ Foelak found that White and his companies: 1) engaged in "egregious and recurrent [conduct] over a period of ten months"; 2) "flout[ed]" regulatory requirements and were "at least reckless"; 3) have not ... affirmatively recognized the wrongful nature of their conduct"; 4) failed to "give[] assurances against future violations" of the securities laws; and 5) would have an "opportunity for future violations." Initial Decision at 19. In light of these findings and the factual record discussed above, an industry suspension or bar is in the public interest.

In imposing the lesser sanction of a censure, ALJ Foelak noted that "no Commission opinion in a litigated administrative proceeding has imposed a bar on a respondent solely for operating as an unregistered broker-dealer." *Id.* at 22. Yet, numerous litigated actions have involved the imposition of a suspension or bar for violations of Section 15(a) of the Exchange Act, where the respondent has not also violated the antifraud provisions. *See, e.g., Khaled A. Eldaher*, Exch. Act Rel. No. 76132, 2015 SEC LEXIS 4183 (Oct. 13, 2015) (declining to review law judge's imposition of six-month suspension for unregistered broker-dealer violations); *Kenneth C. Meissner*, Initial Decision Rel. No. 850, 2015 SEC LEXIS 3166 (Aug. 4, 2015)

(ordering industry bar against respondent who committed unregistered broker-dealer violations involving 13 investors during two-year period); *Centreinvest, Inc.*, Initial Decision Rel. No. 387, 2009 SEC LEXIS 2966 (Aug. 31, 2009) (imposing bar for Section 15(a) violation despite absence of harm to specific investors). The Commission itself has also upheld suspensions imposed by SROs for unregistered broker-dealer conduct and other non-fraud violations on multiple occasions. *See, e.g., Eugene T. Ichinose, Jr.*, Exch Act Rel. No. 17381, 1980 SEC LEXIS 105 (Dec. 16, 1980) (Commission opinion) (upholding suspension from association with any NASD member firm despite expressly making "no finding of fraud"); *Roth v. SEC*, 22 F.3d 1108 (D.C. Cir. 1994) (denying petition for review of Commission order upholding NASD-imposed six-month suspension for unregistered broker-dealer conduct).

Insofar as the Initial Decision implies that a suspension or bar is generally appropriate only "where the respondent has ... violated, or aided and abetted violation of, the antifraud provisions" of the securities laws (Initial Decision at 22), such analysis constitutes an improper narrowing of Exchange Act Section 15(b). With respect to broker-dealer registration, the Commission has recognized that such a requirement serves as the "keystone of the entire system of broker-dealer regulation" and that unregistered broker-dealer conduct "deprive[s] the public of protection [to which] it is entitled. *Eugene T. Ichinose, Jr.*, 1980 SEC LEXIS 105, at *15. As an unregistered entity, SHCP, among other things, did not retain electronic correspondence and distributed marketing materials to securities investors without regulatory oversight. (Div. Exs. 270 at 1; 12; White Tr. 471:21-472:13, 506:21-25; Quinn Tr. 906:14-907:2.) Furthermore, the unregistered broker-dealer conduct orchestrated by White was "egregious and recurrent," involving the receipt of nearly $4 million in illegal commissions over a ten-month period. Initial Decision at 19-20. Yet, White has not expressed remorse and as CEO of a broker-dealer remains

in a position to commit future securities law violations. These facts alone merit a suspension at minimum to safeguard the public interest. *Compare Khaled A. Eldaher*, 2015 SEC LEXIS 4183, at *28 (imposing six-month suspension for unregistered broker-dealer violations that were "not . . . egregious" and involved only a "small number of transactions" for which the respondent "expressed remorse").

In addition, White and Spring Hill committed recordkeeping and net capital violations, which, like the Section 15(a) violation, reflected deliberate decisions to circumvent known regulations in order to earn money for his firms. Initial Decision at 10-12, 16-18. White was also complicit in deceiving FINRA regarding SHCP's illegal activities and, under White's leadership, SHCM continued its misrepresentations concerning SHCP's business activities when confronted with specific questions from the Commission's OCIE staff about payments SHCP had received from RCM. Initial Decision at 9 ("White was aware that SHCM represented to FINRA that SHCP offered 'consulting services' and 'does not conduct a securities business.' In responding to a Commission query, Respondents again represented SHCP's revenues as for 'consulting,' not as 'commissions.'"). White's firm even went so far as to manipulate, not just its trade blotter, but its own financial records before providing them to OCIE and the Division in an attempt to conceal SHCP's unregistered broker-dealer activity. (Hohenstein Tr. 676:11-21, 677:14-678:14, 678:23-679:16, 679:25-687:18 (reflecting Spring Hill's manipulation of income statements produced to OCIE and the Division to disguise trading revenues as consulting payments). This deceptive conduct, which sought to undermine the integrity of the regulators' investigative process and covered a period of several years, represents an aggravating factor that weighs in favor of a suspension or bar to protect the public interest. *See Peter J. Kisch*, Exch. Act Rel. No. 19005, 1982 WL 529109, at *6 n.23 (Aug. 24, 1982) ("[D]eception practiced on

regulatory authorities ... is clearly an aggravating factor to be considered in assessing appropriate sanctions."). *See also Mitchell H. Fillet*, Exch. Act Rel. No. 75054 (May 27, 2015) (Commission opinion) (upholding two year time-out for general securities principal who compounded recordkeeping violations by providing falsified documents to FINRA); *Gary M. Kornman*, Advisers Act Rel. No. 2840, 2009 WL 367635, at *9 n.42 (Feb. 13, 2009) (Commission opinion) (barring broker and investment adviser and noting that "the Commission's processes were harmed by [respondent's] false statement to Commission staff").

In addition to aiding and abetting SHCP's Section 15(a) violations and deceiving FINRA (and attempting to deceive OCIE) to conceal the unlawful conduct, White also willfully aided and abetted a recordkeeping violation by RCM by duplicitously approving the withholding of a trade ticket from RCM for ten days to conceal that he had directed the purchase of a security without a customer order. Accordingly, White's conduct has contributed to multiple "serious" violations of the securities laws. Initial Decision at 19.

Based on the Initial Decision's factual findings and the above factors, including the need to deter other industry professionals from engaging in similar misconduct, a suspension or bar against White is appropriate and in the public interest.

F. The Commission Should Impose Civil Penalties Individually Based on the Facts of the Case.

Under Section 21B of the Exchange Act, the Commission may impose a civil money penalty on a respondent who willfully violated, or was the cause of the violation of, any provision of the Exchange Act, or rules thereunder, where such penalties are in the public interest. 15 U.S.C. § 78u-2(a). In considering whether a penalty is in the public interest, the Commission considers: (1) fraud or deliberate or reckless disregard of a regulatory requirement; (2) harm to others; (3) unjust enrichment; (4) previous violations; (5) deterrence; and (6) such

other matters as justice may require. *New Allied Dev. Corp.*, Exch. Act Rel. No. 37990, 1996 SEC LEXIS 3262, at *30 n.33 (Nov. 26, 1996) (Commission opinion).[23]

1. The Commission Should Impose Third Tier Civil Penalties for the Unregistered Broker-Dealer Violations.

ALJ Foelak correctly concluded that SHCP's operations as an unregistered broker-dealer involved a reckless disregard of a regulatory requirement and resulted in unjust enrichment as well as "harm to the marketplace [as] evident from the flouting of the requirement that a broker-dealer be licensed." Initial Decision at 19, 21. She further acknowledged that "deterrence also requires penalties" for the Section 15(a) violations. *Id.* at 21.

While the Initial Decision imposed a single second-tier civil penalty of $75,000, jointly and severally, on SHCP, SHCH, and White for violations relating to unregistered broker-dealer conduct (*Id.*), these violations involved the reckless disregard of a regulatory requirement and resulted in substantial pecuniary gain. Therefore, maximum third tier penalties are most appropriate, particularly since Respondents willfully committed these violations and schemed to conceal their conduct from regulators. *See* 15 U.S.C. § 78u-2(b)(3). Furthermore, the Division requests that penalties relating to the unregistered broker-dealer conduct be assessed individually

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[23] Pursuant to Section 21B(b)(1) of the Exchange Act, the maximum first tier penalty for the time period at issue is $7,500 for a natural person and $75,000 for any other person. 17 C.F.R. § 201.1004. The maximum second tier penalty, which is applicable in pertinent part to cases involving reckless disregard of a regulatory requirement, is $75,000 for a natural person and $375,000 for any other person. *Id.*; 15 U.S.C. § 78u-2(b)(2). The maximum third tier penalty, which is applicable in pertinent part to cases involving reckless disregard of a regulatory requirement and resulting in substantial losses *or* creating a significant risk of substantial losses *or* resulting in substantial pecuniary gain, is $150,000 for a natural person and $725,000 for any other person. 17 C.F.R. § 201.1004; 15 U.S.C. § 78u-2(b)(3).

against White, SHCH, and SHCP so that the companies pay an appropriate penalty for their violations and for deterrence purposes that is not capped at the "natural person" limit.[24]

2. The Commission Should Impose First Tier Civil Penalties for the Net Capital and Recordkeeping Violations, Individually, Against White, SHCM, and SHCH.

The Initial Decision imposed a single first tier civil penalty of $7,500, jointly and severally, on SHCM, SHCH, and White for net capital and recordkeeping violations relating to a series of transactions in which White directed the purchase of a bond without a customer order – when he knew his firm lacked the net capital to do so – and approved the withholding of a trade ticket and in which SHCM falsified entries in its trade blotter to conceal the foregoing conduct. Initial Decision at 21. This series of events culminated in a trade that enriched Respondents by about $414,000. *Id.* at 11. Respondents would not have earned this profit absent White's knowing decision to make a purchase that rendered SHCM net capital deficient. *See id.*

ALJ Foelak correctly concluded that the net capital violation resulted in potential harm to investors. *Id.* at 19. ALJ Foelak further acknowledged that "[d]eterrence also requires penalties" for the violations relating to these transactions. *Id.* at 21. However, the single first tier civil penalty of $7,500 imposed jointly and severally on SHCH, SHCH, and White for these violations represents less than 2% of Respondents' $414,000 profit.[25] On its face, this penalty serves little to no deterrent value since it merely requires Respondents to pay $7,500 for violations that facilitated the generation of a $414,000 profit. Under the circumstances, a greater penalty

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[24] Although Respondents have been ordered to disgorge the full amount of the ill-gotten gains from the Section 15(a) violations, civil penalties serve a different purpose and are in the interests of justice here given Respondents' deliberate decision to disregard multiple known regulatory requirements to serve their own pecuniary interests and the need to deter such misconduct.

[25] This amount is not included in the disgorgement order, which is based solely on revenues stemming from SHCP's unregistered broker-dealer activity.

amount is warranted and the Division requests that, based on the facts of this case, any penalties relating to Respondents' net capital, reporting, and recordkeeping violations be imposed individually rather than jointly and severally.

CONCLUSION

The Commission should affirm the Initial Decision's findings that SHCP willfully violated Exchange Act Section 15(a) and that White and SHCH willfully aided and abetted and caused SHCP's violation. The Commission should also uphold the Initial Decision's disgorgement award of $3,953,608 plus prejudgment interest against White, SHCP, and SHCH on a joint and several basis. However, because of the egregious and repeated nature of the conduct and deception of regulators involved in this case as well as the high degree of scienter on White's part, the Commission should impose an industry suspension or bar against White sufficient to ensure that White is not in a position to engage in further misconduct and to deter similar misconduct. Based on the facts of the case, the Commission should also impose third tier penalties against SHCP, SHCH, and White and first tier penalties against SHCM, SHCH, and White individually, as opposed to jointly and severally.

Dated: March 31, 2016
New York, New York

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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.	:
	:

CERTIFICATE OF SERVICE

I certify that on March 31, 2016, I have served the Division of Enforcement's Opposition Brief by facsimile and overnight mail on the following:

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I further certify that on March 31, 2016, I have served the Division of Enforcement's Opposition Brief by electronic mail on the following:

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	:
Respondents.	:
	:

Rule 450(d) Certification of Compliance

I, Nicholas A. Pilgrim, co-counsel for the Division of Enforcement, hereby certify in accordance with SEC Rule of Practice 450(d), that the foregoing brief complies with Rule 450 because it contains fewer than 14,000 words. Using the Microsoft Word program, I have performed a word count, which indicated that the brief, exclusive of the certifications and tables of authorities and contents, contains 13,150 words.

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