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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16353


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

**RESPONDENTS' REPLY BRIEF**

Respectfully Submitted,
SPRING HILL CAPITAL PARTNERS, LLC,
SPRING HILL CAPITAL MARKETS, LLC
SPRING HILL CAPITAL HOLDINGS, LLC and
KEVIN WHITE

By Their Attorneys

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## Introduction

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 to the Division of Enforcement's Brief in Opposition to Respondent's Petition For Review and In Support of the Division's Cross-Petition For Review ("Brief in Opposition").

After a four day hearing involving the testimony of 18 witnesses, hundreds of exhibits and extensive post-hearing briefing, Judge Foelak (in a well-reasoned decision) correctly rejected the Division's request to impose the draconian sanction of a suspension or industry bar for Mr. White. Not to be deterred, the Division is now asking the Commission to impose the exact same draconian sanctions. The Commission should join Judge Foelak in rejecting the Division's over-reaching request.

In her initial decision, Judge Foelak found that "White sough to comply with the registration provisions" and that "[t]here was no financial harm to investors and the marketplace, and the transactions that SHCP introduced (which involved major financial firms) were otherwise entirely legitimate." *See* Initial Decision at pp. 15, 19. In light of these findings, the absence of any allegation of fraud, and the well-known *Steadman/Patel* factors, there is no factual or legal basis to suspend or bar Mr. White from the securities industry. Indeed, to impose a suspension or bar, would not only be impermissibly punitive, but would also discourage people from trying in good faith to comply with the requirements of 15(a). If the punishment for attempting in good faith to comply with 15(a), without any resulting harm to investors, is a suspension or bar, it will only drive people further into the shadows and away from appropriate regulation making the marketplace a more dangerous place for the investors that the Commission is charged with protecting.

While Judge Foelak's decision to reject the Division's request for a suspension or bar is well reasoned, her decision to require Mr. White to disgorge nearly $4 million must be reversed. Judge Foelak's disgorgement order constitutes an impermissible penalty that is barred under the applicable statute of limitations contained in 28 U.S.C. §2462. Notwithstanding the fatal nature of statute of limitations issue, Judge Foelak's disgorgement order is inconsistent with the purpose of disgorgement – which is to require a wrongdoer to return their ill-gotten gains. Judge Foelak's Initial Decision, however, orders Mr. White to disgorge not only more money than the gross revenues remitted from Rafferty to SHCP, but also vastly exceeds the amounts that Mr. White received personally between April 2009 and February 2010.

In fact, during the course of the four day hearing, the Division failed to introduce any evidence that Mr. White profited--in any manner--from the revenues generated by the SHCP employees who were also registered representatives of Rafferty. Conversely, the Division succeeded in introducing evidence that Mr. White did not receive the proceeds of the trading revenues generated by the SHCP employees who were registered representatives of Rafferty. As a result, the Commission must vacate Judge Foelak's disgorgement order against Mr. White.

Notwithstanding the Division's distortions of the evidence and applicable law, Mr. White--a 25 year industry veteran with a spotless record apart from this case--should not be suspended or barred from the securities industry nor should he be assessed with a disgorgement order that is nothing more than an impermissible penalty.

## Argument

### I. Judge Foelak's Disgorgement Order Must be Vacated.

#### A. The Division completely ignores that the $3,953,609 disgorgement order against Mr. White personally is an impermissible penalty.

In its Brief in Opposition, the Division does not even address Mr. White's arguments--in the Opening Brief--that the $3,953,609 disgorgement order against Mr. White personally is an impermissible penalty. *See* Brief in Opposition at p. 30-33. The Division's silence speaks volumes as the case law, and Congress' understanding, is clear that disgorgement cannot be ordered as an "economic penalty." *See Official Comm. Of Unsecured Creditors of WorldCom., Inc. v. S.E.C.*, 467 F.3d 73, 81-81 (2d Cir.2002) (Sotomayor, J.); *see also* H.R.Rep. No. 101-616 (1990); *see also SEC v. E-Smart Technologies*, 2015 WL 5952237, at *8 (D.C. Cir. Oct. 13, 2016) ("order to disgorge is not a punitive measure"). Disgorgement is only permissible to force the wrongdoer to return those funds that he actually received. *See S.E.C. v. Inorganic Recycling Corp.*, No. 99 CIV. 10159 (GEL), 2002 WL 1968342, at *2 (S.D.N.Y. Aug. 23, 2002) ("the principal issue…in determining the amount of disgorgement to be ordered is the amount of gain received by each defendant from the fraud") (emphasis added); *see also SEC v. Wang*, 944 F.2d 80, 85 (2nd Cir.1991) (disgorgement "extends only to the amount…by which the defendant profited from his wrongdoing"); *see also SEC v. ETS Payphone, Inc.*, 408 F.3d 727, 73-735 (11th Cir.2005) (disgorgement is an equitable remedy the Court's employ to deprive a wrongdoer of his ill-gotten gain.") (emphasis added).

Indeed, the Second Circuit specifically requires an individual to profit from the ill-gotten gains before ordering disgorgement. *See SEC. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d. Cir.1996) (joint and several liability appropriate where corporation's "owner and chief executive office has collaborated in [the unlawful] conduct and has profited from the violations…"); *see*

*also SEC v. E-Smart Technologies*, 2015 WL 5952237, at *12 (D.C. court acknowledged that the Second Circuit, in order to impose joint and several liability for disgorgement, requires "that the individuals *profit from* the ill-gotten gains").

In *SEC v. E-Smart Technologies*, the DC court refused to order disgorgement against a joint tort-feasor because, as here, "the SEC has not clearly identified what benefit, if any, [the joint- tortfeasor] obtained *because of* his fraudulent acts." 2015 WL 5952237, at *13. The DC court acknowledged that "courts have not hesitated to exercise their discretion in reducing or rejecting joint-tortfeasor liability when particular defendants 'have differing levels of culpability' for securities-law violations or have received different amounts of 'illicit profits' from those violations." *Id. quoting SEC v. Opulentica, LLC*, 479 F.Supp.2d 319, 330 (S.D.N.Y. 2007). As such, it is clearly the SEC's "burden to reasonably approximate profits and tie those profits to the benefits received by [the joint-tortfeasor]." *E-Smart Technologies*, 2015 WL 5952237, at *13; *see e.g. SEC v. Chapman*, 826 F.Supp.2d 847, 859 (D.Md.2011) (rejecting SEC's request for disgorgement of salary where "the SEC has not shown a causal relationship between [defendant's] salary and bonuses and the fraud."); *see also SEC v. Resnick*, 604 F.Supp.2d 773, 783 (D.Md.2009) (rejecting disgorgement of chief marketing officer's salary where SEC failed to show salary was causally linked to the unlawful conduct).

It is not surprising that the Division failed to address the issue of the disgorgement order against Mr. White personally because it is, quite simply, indefensible as the Division failed to carry its burden as to what ill-gotten gains Mr. White actually received. The Division's investigation lasted several years, the Respondents produced financial documents for every year requested including internal financials and bank account statements. The Respondents withheld nothing.

At the hearing, the Division failed to introduce any evidence that Mr. White received any compensation from SHCP's alleged ill-gotten gains. Indeed, the Division failed to introduce any evidence regarding Mr. White's compensation in 2009 or 2010. The Division sought to remedy this failure through the introduction, post hearing, of Mr. White's 2010 K-1 from SHCH that consists of one page (Division Exhibit 196, contained on the "Division Exhibits Offered but Not Admitted List" provided to Judge Foelak). Respondents objected to the introduction of the one page (Division Exhibit 196) and, therefore, subject to Respondents' objection it is found on the "Division Exhibits Offered but Not Admitted List" as Div.Ex. 196, SH-AP-00001456.

In its desperate attempt to justify the disgorgement order against Mr. White, in its Brief in Opposition, the Division now relies upon, for the first time, SH-AP-00001444-1445 ("Mystery Exhibit"). *See* Brief in Opposition at p. 7. The Mystery Exhibit, however, does not exist and is found nowhere in the record. The Mystery Exhibit was originally part of the Division's much larger Proposed Exhibit 196 at trial but was never introduced before or after the hearing. Consequently, the Mystery Exhibit is not part of the record for the Commission to consider and it should be disregarded.

Moreover, the Commission should not even consider the one page document that actually comprises the Division's Proposed Exhibit 196. The Division did not offer it into evidence at the hearing, where Judge Foelak 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 SHCM's CFO, Andre Hohenstein, the opportunity to explain what is depicted on Mr. White's SHCH 2010 K-1--is not an acceptable tactic and the Commission should not permit it.

Further, the Division's interpretation of Mr. White's 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.

The hearing in May of 2015 lasted four days and the Division spent a considerable amount of the hearing reviewing financial documents and the flow of revenue with witnesses. Nevertheless, in the last several years and during the hearing, the Division has yet to prove that Mr. White received any ill-gotten gains personally. Indeed, the Division introduced evidence showing that Mr. White did not receive the proceeds that the SHCP's employees (who were registered representatives of Rafferty) generated through trades. *See* Div.Ex. 283A and 283B. Given the length of the Division's investigation--and the complete cooperation of the Respondents--it is clear that Mr. White did not receive any ill-gotten gains and, consequently, the $3,953,609 disgorgement order against him is an impermissible economic penalty that must be vacated.

B. Payments from Rafferty to its own registered representatives are, unquestionably, legitimate and cannot be part of Judge Foelak's disgorgement order.

Also, the Division did not address Judge Foelak's failure to deduct from any disgorgement order the $540,000 in undeniably legitimate payments from Rafferty directly to its own registered representatives (who were also SHCP employees). With respect to the payments made directly to the registered representatives of Rafferty, there can be no argument that those payments were legitimate and did not violate securities laws. Indeed, the Commission did not even challenge those payments as illegal.

It is undisputed that Rafferty made direct payments, in the amount of $540,000, to Rafferty registered representatives, Paul Tedeschi, Patrick Quinn and Phil Bartow between June 2009 and March 3, 2010. *See* Tr.Tes. 209:17-210:4. As a result, SHCP never received the $540,000 that Rafferty paid directly to its representatives – and SHCP cannot be ordered to disgorge that amount.

It is axiomatic that "disgorgement…must be tied to the amount of gains derived from unlawful, as opposed to lawful, conduct." *SEC. v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C.Cir.1989). Consequently, courts are only authorized to order disgorgement of illicit profits. *SEC v. Great Lakes Equities Co.*, 775 F.Supp. 211, 214 (E.D.Mich.1991). As such, Judge Foelak's disgorgement order, that included lawful payments made directly to the registered representatives of Rafferty, must be vacated.

II. Judge Foelak heard testimony from Mr. White and the principals of Rafferty and found that Mr. White, through his arrangement with Rafferty, sought to comply with securities laws and that his conduct did not warrant a suspension.

Judge Foelak presided over the four day hearing in this case and observed, among others, Mr. White, Mr. Rafferty, Keith Fell (an attorney and Rafferty principal) and Barbara Martens (Rafferty's compliance officer) testify about the arrangement between SHCP and Rafferty. After

the hearing, Judge Foelak found their testimony to be credible that the arrangement between SHCP and Rafferty was established with the intent to comply with securities laws. Consequently, Judge Foelak found that "White **sought to comply with the registration provisions** through the arrangement with Rafferty, whereby certain SCHP employees became registered representatives associated with Rafferty and Rafferty acted as introducing firm for transactions negotiated by these SHCP employees." (emphasis added) *Id.* at 15.

In addition, Judge Foelak found that--in an attempt to comply with registration requirements--Mr. White arranged for "traders employed by SCHP to become associated with Rafferty and for a piggyback arrangement with Rafferty such that Rafferty would be the introducing broker for their trades which would be cleared by Rafferty's clearing brokerage." Initial Decision, p. 6-7. And, as importantly, Judge Foelak found that "there were no trades done by SCHP personnel prior to their becoming associated with Rafferty as registered representatives." Initial Decision, p. 7. Moreover, Judge Foelak found that "Rafferty provided authorized trader letter to their counterparties, stating that Rafferty authorized them to trade with the counterparties." *Id.*

The Commission gives "considerable weight to the credibility determination of a law judge since it is based on hearing the witnesses' testimony and observing their demeanor." *Michael R. Pelosi*, Adv. Act Rel. No. IA3-805, 2014 SEC LEXIS 4596, at *6 (Mar. 27, 2014). "Such determination can be overcome only where the record contains substantial evidence for doing so." *Id.* at *6-7.

The Division, in pre-hearing briefing, during the hearing last year, in post-hearing briefing and now in its Brief in Opposition, attempted to paint Mr. White as the sole mastermind of a grand scheme to skirt securities laws and operate an unregistered broker dealer business.

The Division's tale, however, quickly fell apart once an actual hearing was conducted before Judge Foelak. As the evidence at the hearing proved--and as Judge Foelak found--Mr. White had a brief preliminary discussion with Mr. Rafferty at the New York Athletic Club and then Mr. Rafferty, his compliance officer and a lawyer at Rafferty, outlined the agreement between Rafferty and SHCP, discussed it extensively internally at Rafferty and then Rafferty provided the first draft of the agreement to SHCP. Tr.Tes. p. 1042-1044; Resp. Ex. 1, 2-13.[1] Mr. White forwarded the draft agreement to SHCP's chief legal officer, John Fernando, and then Mr. White had nothing whatsoever to do with the drafting or signing of the final agreement. Tr.Tes. p. 564, l. 14-22, p. 565, l. 3-11; p. 571, l. 2-8; Div.Ex. 8 ("Mr. Fernando will be responsible for operational and legal matters for the Firm [SHCM] and its affiliates [SHCP]").

Mr. White did not believe that there was anything inherently wrong with Michael Rafferty's business proposal to SHCP because Michael Rafferty is the president of a broker-dealer, the broker-dealer has compliance and Mr. White had no reason to doubt anything that Michael Rafferty was proposing. Tr.Tes. p.542, l. 19-23; p. 543, l. 1-7. Mr. White believed that as soon as the SHCP's employees' licenses were transferred to Rafferty--so that they became registered representatives of Rafferty--they could conduct securities trading without an issue. Tr.Tes. p. 604, l. 12-23. Indeed, John Fernando, Mr. White's partner (and a lawyer) at SHCP, and Larry Rafferty (Michael Rafferty's father and former CEO of Rafferty Holdings) were excited about the business arrangement and thought it made a lot of sense. Tr.Tes. p. 545, l. 9-12; Resp. Ex. 3; Tr.Tes. p.1056-1057, l. 25, 1-4.

[1] As a model for the April 2009 Rafferty Contract, Rafferty used one of its earlier agreements that it had used with Keane Securities ("Keane") a year before. *See* Stipulation dated May 6, 2015 at 17; 1110-1111, lines 21-25, 1. Keane was a registered broker-dealer. *Id.*

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

In furtherance of the Division's request for a suspension or industry bar, the Division distorts the facts and applicable law and baldy asserts that Mr. White--and SHCM--intentionally deceived FINRA during its 2009 application process and attempted to deceive the OCIE during a subsequent investigation. The Commission should reject these meritless arguments just as Judge Foelak did after a four day hearing where the Division made the exact same arguments. Neither SHCM nor Mr. White deceived FINRA during SHCM's application process or anyone else at any time.

The Division's argument is a house of cards built on the false premise that Mr. White and SHCM knew that SHCP was acting as an unregistered broker-dealer in 2009 and actively concealed it from FINRA. There is no evidence to support this outlandish claim. The Division's argument is premised on incorrect circular logic that a finding in this case - six years after the

FINRA application process - that that SHCP should have registered as broker-dealer means that in 2009 Mr. White knew that SHCP was conducting a securities business and actively sought to deceive FINRA. To the contrary, the evidence is overwhelming that not only did Mr. White and SHCM not engage in any deception, but that Mr. White and SHCM were forthright regarding its relationship with Rafferty and responded to all of FINRA's questions and requests throughout the application process.

At the May 2015 hearing in this matter, Mr. White, Patrick Quinn, and Paul Tedeschi each testified that SHCP did not conduct a securities business. Quinn Tr.Tes. p. 928, l. 14-25; 929, l. 13-16; Tedeschi Tr.Tes. p. 848:11-855:19; White Tr. Tes. 575:18-576:8.
Their testimony is consistent with SHCM's and Mr. White's 2009 representations to FINRA that SHCP did not conduct a securities business. It is undisputed that Mr. White, Mr. Quinn, John Fernando, Paul Tedeschi, Phil Bartow and any other employee of SHCP, that engaged in securities transactions, were registered representative of Rafferty and that every transaction they engaged in was a Rafferty transaction. Tr. Tes. 1161:7-19; Tr.Tes. at pp. 1176-1177.

Moreover, each of these transactions were Rafferty securities transactions. *Id.* In light of these undisputable facts, there is no basis to conclude that Mr. White or SHCM deceived FINRA during SHCM's 2009 application process. Consequently, even if the Commission concludes now that SHCP committed a 15(a) violation (which SHCP did not), that finding cannot be used to impute an intent to deceive FINRA back in 2009. Accordingly, the Division's attempt to cast a sinister spin on SHCM's FINRA application process must be rejected.

During the rigorous FINRA application process, FINRA had the right to ask whatever questions it wanted to ask, request whatever documents it desired and could reject SHCM's application at any time. Veres Tr.Tes. at 70:19-72:2. As such, SHCM and Mr. White answered

every question asked by FINRA and provided FINRA with every document that it requested. *Id.* During the application process, SHCM and Mr. White did not conceal their existing relationship with Rafferty. *Id.* at 73:2-74:4.

Indeed, at the hearing, Nina Veres acknowledged that during the application process SHCM was "very clear" that its principals had a relationship with Rafferty. *Id.* at 73:19-74:4. Further, SHCM disclosed the names and CRD's of its prospective employees, and a CRD search would have revealed that many of them were registered representatives of Rafferty. *See* Div. Ex. 1 at pp. 31-46; Veres Tr. Tes. at. 80:5-21.

Furthermore, throughout the FINRA application process, FINRA was entitled to request information regarding SHCP since it was providing capital to SHCM. Veres Tr.Tes at 75:4-16. Indeed, on November 21, 2009, FINRA requested documentation supporting the financial wherewithal of SHCP. Div. Ex. 7; Veres Tr.Tes.75:4-16. In response to this request, SHCP provided FINRA with copies of its bank statements from September 1, 2009 through November 30, 2009. Div. Ex. 8 at pp. 45-62; Veres Tr.Tes at 76:18-77:23.[2] The bank statements show a November 19, 2009 wire from Rafferty to SHCP in the amount of $285,031.03. *See* Div. Exhibit 8 at p. 47. This entry alone refutes the Division's assertion that SHCP structured payments from Rafferty in "flat" amounts to appear as if there was a set fee for "consulting" services.[3]

The Division also ignores that Rafferty and SHCP had an Advisory Services Agreement that obligated Rafferty to pay SHCP $75,000/month for advisory and consulting services.[4] *See.* Div. Ex. 115. This Agreement was negotiated and executed by SHCP's chief legal officer, John

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[2] By this time, SHCM had already provided SHCP's banks statements for February, May, and June 2009, including a copy of a $108,000 check from Rafferty. *See* Div. Ex. 1A at pp. 86-117.

[3] Moreover, there is no evidence that Mr. White played any role in characterizing payments as "consulting" payments. *See* Opening Brief at 9-10 for record citations.

[4] SHCP also had a consulting engagement with Gramercy Capital Corp. During the FINRA application process SHCM provided FINRA with a copy of checks issued by Gramercy to SHCP. *See* Div. Ex. 1A at pp. 114-116.

Fernando. *Id;* Tr. Tes. at pp. 1160:23:1163:3; Res. Ex. 38;46. The existence of the consulting agreement also belies the Division's argument that the term "consulting" was some sort of nefarious code word.

Indeed, Michael Rafferty testified that it was envisioned that SHCP and Rafferty would have a very broad relationship and that trading would not constitute the "lions share" of the relationship. *Id.* 1071:8-23. Mr. Rafferty testified that Kevin White provided him with consulting services that constituted "good advice" and saved Rafferty money. Rafferty Tr.Tes. 1072:6-1073:2.

Additionally, during the subsequent OCIE investigation, Mr. White did not play any role or try to conceal SHCP's activities. There is no evidence that Mr. White communicated in any manner with the OCIE. In fact, the Division's bald assertion is exclusively premised on an e-mail from Mr. Hohenstein (not Mr. White) to the OCIE explaining the $1,000,000 payment by Rafferty to SCHP. Further, Mr. Hohenstein's e-mail accurately describes SHCP and its employees' roles (who were also registered representatives of Rafferty) from April 2009 through February 2010. Mr. Hohenstein truthfully and clearly stated that "the facilitation of transactions occurred through SHCP employees who were registered representatives of Rafferty and who were acting in their capacity as registered representatives of Rafferty." *See* Div. Ex 130 at p. 1.

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

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

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

As the court stated in *Steadman*:

> We heartily endorse the Commission's view that while scienter is not required to make out violations of several of the statutory sections involved here, **the respondent's state of mind is highly relevant in determining the remedy to impose. It would be a gross abuse of discretion to bar an investment adviser from the industry on the basis of isolated negligent violations.** (emphasis added)

*Steadman v. S.E.C.*, 603 F.2d at 1140-41.

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.

Mr. White was acting in good faith relative to SHCP's arrangement with Rafferty. As he testified, and as Judge Foelak credited, he did not believe that there was anything inherently wrong with the arrangement with Rafferty and he believed that once SHCP's employees' licenses were transferred to Rafferty--so that they became registered representatives of Rafferty--they could conduct securities trading without an issue. Tr.Tes. p.542, l. 19-23; p. 543, l. 1-7; Tr.Tes. p. 604, l. 12-23. Indeed, John Fernando and Michael Rafferty thought the arrangement was fine too. Tr.Tes. p. 545, l. 9-12; Resp. Ex. 3; Tr.Tes. p.1056-1057, l. 25, 1-4.

Mr. White took personal responsibility, throughout the trial, for holding onto the trading ticket related to the First Gramercy Trade that caused Rafferty's books and records to be inaccurate and stipulated to that charge against him. *See* Supplemental Stipulations Entered into by the Parties dated May 11, 2015. The First Gramercy Trade was an isolated incident, over two years and almost 200 trades, and is not a reflection of how Mr. White has conducted himself over the last twenty-five years in the securities industry.

Moreover, Mr. White was extremely cooperative with the Commission throughout the investigation. He was deposed twice and provided every document that the Commission requested. Equally important is that there were absolutely no victims and nobody has complained to the Commission as a result of Mr. White's, SHCP's or SHCM's conduct. In Mr. White's case--where there is absolutely not a shred of evidence of fraud and he has never been disciplined in the past--a suspension of any length would be a draconian sanction. It is patently unfair for the Commission to seek a suspension of Mr. White for precisely the same conduct that the Commission failed to charge either Rafferty or Mr. Rafferty with.

Indeed, the Division's argument that Mr. White should be barred because he has not taken responsibility for his actions is without legal justification. Because 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.*[5]

Judge Foelak noted that Mr. White acknowledged his secondary liability for Rafferty's inaccurate trade blotter related to the first Gramercy Trade. Initial Decision at p. 19. Judge Foelak also found that "consistent with a vigorous defense of the charges against" Mr. White, he has "not otherwise affirmatively recognized the wrongful nature of [his] conduct or given assurances against future violations." *Id.* Clearly, Judge Foelak appreciated Mr. White's good faith, vigorous defense, of the charges against him and did not (rightfully) hold that against him when determining the appropriate sanction. Without a doubt, Judge Foelak knows the difference between mounting a vigorous defense in good faith and failing to take personal responsibility warranting a suspension or bar. *See In re Gregg C. Lorenzo*, 107 SEC Docket 5934, 2013 WL 6858820, *8 (December 31, 2013) (Foelak, ALJ) (Judge Foelak made a distinction between a vigorous defense and wrongfully deflecting blame to others to avoid responsibility); *see also In re Leaddog Capital Markets, LLC*, 104 SEC Docket 2604, 2012 WL 4044882, *18 (September 14, 2012) (Foelak, ALJ) (same); *see also In re Mark Feathers*, 108 SEC Docket 2634, 2014 WL 2418472, *4 (Judge Foelak found that "lack of assurances against future violations and recognition of the wrongful nature of the conduct goes beyond the vigorous defense of the charges"); *see also In re Donald L. Koch*, 103 SEC Docket 2664, 2012 WL 1894251, *15 (same). Judge Foelak has a long of history of thoughtful decisions, applying the *Steadman* factors, and her decision not to suspend Mr. White is one of them and should not be disturbed.

The Division, after hearing and post-hearing briefs, did not even come close to convincing Judge Foelak that a suspension or bar of Mr. White was appropriate based upon the

[5] 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.

authorities cited in its post-hearing briefs (mostly settlements). Now, in a desperate attempt to justify its request for a suspension or a bar, the Division is relying upon a completely new line of cases that bear absolutely no resemblance to the facts of this case. The Commission should not countenance such conduct.

For example, the Division relies on *Khaled Eldaher,* Exch. Act Rel. No. 76132 (October 13, 2015) to support a suspension of Mr. White. In *Khaled Eldaher*, Eldaher was suspended for six months for unregistered broker dealer violations after a long history of customer complaints, selling away, civil and criminal judgments against him and pending notations on his U-5 wherein he was being investigated for other securities violations. In *Mitchell H. Fillett,* Exch. Act Rel No. 75054 (May 27 2015), Fillett received a two year time out for committing fraud through falsifying documents to FINRA, failing to disclose to investors that the principal of his client had a long criminal record, forging documents and presenting them to a FINRA auditor in the middle of audit. In *Eugene Ichinose*, Exch. Act Rel. No. 17381 (Dec. 16, 1980), Ichinose was suspended because he participated in the unlawful sale of unregistered Cal-am securities and failed to disclose additional compensation that he received from the sale of the unregistered securities to the investors. In *Roth v. SEC*, 22 F.3d 1108 (D.C. Cir 1994), Roth was suspended for 6 months for not only unregistered broker-dealer conduct but also selling away and serious fiduciary duty violations such as usurping corporate opportunities for his own personal gain.

To support a bar of Mr. White, the Division relies upon *In re Kenneth C. Meissner*, Initial Decision Rel., No. 850 (Aug. 4, 2015). In *Meissner*, James Doug Scott was barred after committing unregistered broker-dealer violations involving 13 investors over 2 years. At the time, he was not registered with the Commission in any capacity and the Pennsylvania Securities Commission had previously sanctioned him twice (for unlawfully selling securities resulting in a

severally against SHCM, SHCH, and White is the appropriate penalty for the record keeping and net capital violation.

## Conclusion

For the foregoing reasons, the Commission should reject the Division's Cross-Appeal and decline to enhance any of penalties imposed by Judge Foelak in her Initial Decision. Moreover, the Commission should vacate Judge Foelak's disgorgement order against the Respondents.

Respectfully Submitted,
SPRING HILL CAPITAL PARTNERS, LLC,
SPRING HILL CAPITAL MARKETS, LLC,
SPRING HILL CAPITAL HOLDINGS, LLC and
KEVIN WHITE,

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Dated: April 14, 2016

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,<br>Spring Hill Capital Partners, LLC,<br>Spring Hill Capital Holdings, LLC,<br>And Kevin D. White, | ) |
| Respondents. | ) |

**Rule 450 (d) Certification of Compliance**

I, Ronald W. Dunbar, Jr., counsel for Respondents hereby certifies in accordance with SEC Rule of Practice 450(d), that the foregoing brief complies with Rule 450 because it contains fewer than 9,000 words. Using the Microsoft Word program, I have performed a word count, which indicated that the brief, exclusive of this certification, contains 6,070 words.

Respectfully Submitted,

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Dated: March 1, 2016

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CERTIFICATE OF SERICE

I certify that on April 14, 2016, I have served the Respondent's Reply Brief by facsimile and overnight mail on the following:

Brent J. Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E., Mail Stop 3528
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I certify that on April 14, 2016, I have served the Respondent's Reply Brief by electronic mail on the following:

The Honorable Carol Fox Foelak
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Re: In the Matter of Spring Hill Capital Markets, LLC, Admin. File No. 3-16353

Dear Mr. Fields:

Enclosed for filing please find the original and three copies of the Respondents' Reply Brief.

Respectfully submitted,

Ronald W. Dunbar, Jr.

Enclosures

cc: Nicholas Pilgrim and Daniel Loss (vie e-mail)
Judge Carol Fox Foelak (via e-mail)