UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16353

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

RESPONDENTS' SUBMISSION PURSUANT TO ORDER DATED DECEMBER 18, 2017

Pursuant to ALJ Foelak's order dated December 18, 2017, the Respondents hereby submit the following.

Introduction[1]

In light of the US Supreme Court's recent decision in *Kokesh v. SEC*, the Initial Decision should be amended to remove, in its entirety, the $3,953,608.61 disgorgement order because the SEC's claim for disgorgement is time barred because the SEC's claim accrued on April 28, 2009 (when SHCP signed the 2009 Rafferty Contract that allowed SHCP to receive transaction based compensation) and the OIP was filed more than five years later. At the very least, the Initial Decision should be amended to include only the 23 trades that are not time barred, and that generated only $450,000 in gross revenue, and resulted in no profit to SHCP after deducting the expenses associated with generating the $450,000 in gross revenue. And, in all events, the Initial

[1] The Respondents re-assert and incorporate all of the arguments contained in their post-hearing briefing to this Court and in briefing to the Commission as if set forth herein.

Decision should be amended to eliminate, in its entirety, the disgorgement award against Mr. White because there is no evidence that he received any of the $3,953,608.61.

I. The SEC's entire claim for disgorgement against SHCP and White is time barred pursuant to the US Supreme Court's recent decision in *Kokesh v. SEC.*

In *Kokesh v. S.E.C*, 137 S.Ct. 1635 (2017), the Supreme Court unanimously, and unambiguously, held that disgorgement constitutes a penalty that is subject to the five year statute of limitations contained in §2462. Specifically, the Supreme Court held

> [d]isgorgement, as it is applied in SEC enforcement proceedings, operates as a penalty under §2462. Accordingly, any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued.

137 S.Ct. at 1639.

The SEC's claim against SHCP accrued on April 28, 2009 when the April 2009 Rafferty Contract was signed. The April 2009 Rafferty Contract structured the fee split between SHCP and Rafferty and entitled SHCP to receive transaction based compensation. It is the April 2009 Rafferty Contract that forms the basis of the SEC's claim that SHCP acted as an unregistered broker-dealer.

After the execution of the April 2009 Rafferty Contract, SHCP did not engage in any further purported broker-dealer activities and, instead, simply received compensation periodically from Rafferty as a result of registered representatives of Rafferty's lawful trades. Consequently, the claim that SHCP acted as an unregistered broker-dealer accrued on April 28, 2009 when the April 2009 Rafferty Contract was signed and SHCP became entitled to receive transaction based compensation from Rafferty.

April 28, 2009, as the date upon which the SEC's claim against the Respondents accrued, is consistent with the principles articulated in *Gabelli v. SEC*, 568 US 442 (2013), and numerous

other courts before, and after, *Gabelli* that the five year statute of limitation accrues when the alleged violation occurs. *See also 3M v. Browner,* 17 F.3d 1453, 1462 (D.C. Cir. 1994)(explaining under §2462 , a claim accrues "at the moment a violation occurs"). In this case, the activity that the SEC alleges required SHCP to register as a broker-dealer is the April 2009 Rafferty Contract that established SHCP's right to receive transaction based compensation. As such, the alleged violation accrued on April 28, 2009 more than five years before the OIP was filed. *See New York v. Niagra Mohawk Power Company,* 263 F. Supp. 2d 650, 660 (rejecting continuing violation theory as it requires "continual unlawful acts, not continual ill effects from a single violation"); *SEC v. Jones,* 2006 WL 1084276 *5 (S.D.N.Y. April 25, 2006)(rejecting SEC argument that each time defendant collected fees pursuant to the Defendant's alleged unlawful action that a new statute of limitations was triggered). Because the SEC's claim accrued on April 28, 2009--and the OIP was not filed until January 22, 2015--the claim (and all remedies sought including all disgorgement) are time barred pursuant to §2462. Accordingly, the Initial Decision should be amended to vacate the entire disgorgement order against all of the Respondents.

II. Even if the execution of the April 2009 Rafferty Contract, on April 28, 2009, is not the date upon which the SEC's claim accrued against SHCP, trades that occurred before January 22, 2010 are not subject to disgorgement.

Alternatively, if this Court were to hold that the SEC's claim against SHCP did not accrue upon the execution of the April 2009 Rafferty Contract but instead accrued each time a trade was executed, all evidence of trades that occurred prior to January 22, 2010 cannot be considered because that conduct is time barred pursuant to the five year statute of limitations contained in §2462. In its OIP, the SEC alleges that between May 2009 and February 2010 SHCP introduced approximately 100 trades. While this contention is inaccurate--because

registered representatives of Rafferty (and not SHCP) introduced and executed the trades--all but 23 of the trades occurred before January 22, 2010 (five years prior to the commencement of the OIP).

Thus, all trades that occurred prior to January 22, 2010 are not subject to disgorgement. Moreover, evidence relating to trades prior to January 22, 2010 is time barred and irrelevant to this case. *See SEC v. Radius Capital Corp.,* 2013 WL 3716394 *2 (M.D. FL July 15, 2013) (following *Gabelli,* Court barred the SEC, with the SEC's agreement, from seeking civil penalties for five of the fifteen securities subject to the SEC's claims as those five securities were issued more than five years before the SEC filed its action). Furthermore, since the five year statute of limitations applies to all remedies sought (and not just to liability), all evidence of trades and other conduct occurring before January 22, 2010 is time barred and irrelevant to the remedies to be fashioned in this case.

Pursuant to Rafferty's trade blotter, the registered representatives of Rafferty executed 23 trades between January 22, 2010 and February 26, 2010 generating approximately $450,000 in gross revenue to SHCP. *See* Div. Proposed Exhibits 181, 137, 244. Consequently, at most, the SEC's claim of unregistered broker-dealer activity is limited to the time period of January 22, 2010 through February 26, 2010--a period of 35 days encompassing 23 trades that generated approximately $450,000 in gross revenue to SHCP. All other evidence regarding SHCP trades and conduct prior to January 22, 2010 is irrelevant and immaterial to the SEC's claim that SHCP violated Section 15(a) of the Exchange Act and should be excluded. Consequently, at most, only those 23 trades (and $450,000 in gross trading revenue) are not time barred.

Therefore, the Respondents respectfully request that this Court re-examine the record, in light of *Kokesh*, and find that the SEC's claim for disgorgement against the Respondents is time

barred (in its entirety) because the claim accrued on April 28, 2009 (more than five years before the OIP was filed) or, in the alternative, find that only 23 trades, amounting to $450,000 in gross trading revenue, are not time barred.

Because the $450,000 in gross trading revenue, however, was used for SHCP's legitimate business expenses, the Initial Decision should be revised to eliminate any disgorgement order. As the US Supreme Court stated in *Kokesh*, the Restatement (Third) section 51, Comment h at 216, states that:

> As a general rule, the defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement. Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction that the law of restitution normally attempts to avoid.

137 S.Ct. at 1644-45.

Thus, in *Kokesh* the US Supreme Court acknowledged that failing to deduct costs incurred in producing the revenues before ordering disgorgement, "does not simply restore the status quo; it leaves the defendant worse off." *Id.* at 1645. Thus, in light of *Kokesh*, this Court must, before ordering disgorgement as it relates to the $450,000 in gross revenue, deduct expenses incurred in generating the $450,000 and, as the evidence proves, doing so would result in no funds remaining to disgorge.

III. Kevin White did not receive any of the $3,953,608.61 that he was ordered to disgorge and, under disgorgement principles articulated clearly in *Kokesh*, Mr. White cannot be ordered to disgorge funds he never received.

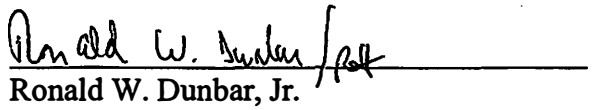
The Initial Decision should be revised--under all circumstances--to eliminate the entire disgorgement order against Kevin White. In *Kokesh*, the US Supreme Court reiterated and reaffirmed long-established disgorgement principles that "disgorgement is a form of '[r]estitution **measured by the defendant's wrongful gain.**'" 137 S.Ct. at 1640 (emphasis added). Therefore, "[b]eginning in the 1970's, courts ordered disgorgement in SEC enforcement

proceedings in order to **deprive...defendants of their profit** in order to remove any monetary reward for violating securities laws..." *Id.* (emphasis added) (internal quotations omitted). Consequently, Mr. White can be ordered to disgorge only his "wrongful gain" or "profit."

In this case, however, Mr. White was ordered to disgorge $3,953,608.61, SHCP's entire gross revenue from its relationship with Rafferty, even though there was absolutely no evidence submitted that Mr. White received any of that money. Clearly, in light of the US Supreme Court's recent decision in *Kokesh* (and long-established disgorgement case law) Mr. White cannot be ordered to disgorge funds he never received. Further, in light of *Kokesh,* there is no scenario in which Mr. White can be liable for disgorgement of funds prior to January 22, 2010. As a result, Mr. White respectfully requests that this Court re-examine the entire record, in light of *Kokesh*, and vacate the disgorgement award against Mr. White and enter an order that Mr. White does not have to disgorge any funds.

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

By Their Attorneys,



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