ORIGINAL

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	
RONALD S. BLOOMFIELD, ROBERT GORGIA, VICTOR LABI, JOHN EARL MARTIN, SR. and EUGENE MILLER,	**ADMINISTRATIVE PROCEEDING File No. 3-13871**
Respondents.	

SUPPLEMENTAL BRIEF OF RESPONDENTS RONALD S. BLOOMFIELD AND JOHN EARL MARTIN SR

Respondents Ronald S. Bloomfield and John Earl Martin Sr., by and through their counsel of record, in compliance with the Commission's Order Directing Additional Briefing entered July 11, 2012, hereby submit their Supplemental Brief responding to the questions set forth in the Commission's Order.

I. INTRODUCTION

On April 27, 2010, the Commission entered an OIP herein that contains 55 numbered paragraphs of allegations that identified ten specific securities but also contained multiple references to unidentified "penny stocks", "certain securities", unidentified "customers", as well as unidentified "entities", "shareholders" and "affiliates". Acting pursuant to Rule 220(d) of the Commission's Rules of Practice, Respondents filed a motion on May 18, 2010 for a more definite statement in order to require the Division to identify the issuers of the securities and the specific transactions by which the Respondents had allegedly committed the violations set forth in the OIP. In particular, the Respondents moved for a more definite statement of the following specified matters of fact:

C. That Paragraph 14 be made more definite to specify the "various times"

and the issuers of the "certain securities" that Bloomfield and Martin are alleged to have sold to the public when no registration statement was in effect and no exemption from registration was available.

D. That Paragraph 15 be made more definite to specify the "penny stock sales" and the identity of the "customers" by which Bloomfield and Martin generated "significant commissions" on their sale to the public without a registration statement being in effect, and without an available registration exemption.

In response, on June 2, 2010, the Division responded to Respondent's foregoing requests as follows:

"*C. That Paragraph 14 be made more definite to specify the "various times" and the issuers of the "certain securities" that Bloomfield and Martin are alleged to have sold to the public when no registration statement was in effect and no exemption from registration was available.*

Response: Subject to the General Comments above and to the attached Memorandum of Law, the Division responds as follows: As set forth in paragraphs 1, 4, 7-10, and 12-28 of the OIP, the selling of penny stocks without registration or demonstrable exemption occurred throughout the Relevant Period (see also OIP paragraphs 47-48). However, for the specific instances that the Division reasonably anticipates at this point to present at trial, the Division responds as follows:

Adrenaline Nation Entertainment, Inc., 11/21/05 – 2/1/06
China Gold Corp., 3/24/06 – 7/11/06
Equipment and Systems Engineering, Inc., 11/28/05 –1/26/06; 12/1/06 – 12/8/06
Golden Apple Oil and Gas, Inc., 2/24/06 – 5/18/07
Goldmark Industries, Inc., 7/7/06 – 11/6/07
iPackets International, Inc., 2/21/06 – 3/8/06
LOM Logistics, Inc., 2/7/07 - 2/20/07
Spooz, Inc., 1/11/06 – 3/14/06
Viyya Technologies, Inc., 3/7/06 – 12/15/06

D. That Paragraph 15 be made more definite to specify the "penny stock

sales" and the identity of the "customers" by which Bloomfield and Martin generated "significant commissions" on their sale to the public without a registration statement being in effect, and without an available registration exemption.

Response: See Response to Paragraph C above. In addition, the customers' identities for the securities listed are as follows:

> Thimble Capital Ltd. (China Gold Corp., Golden Apple Oil and Gas, Inc., Goldmark Industries, Inc., iPackets International, Inc., and LOM Logistics, Inc.)
>
> OTC Services, Inc. (Equipment and Systems Engineering, Inc., Viyya Technologies, Inc.
>
> Valores Fund LP (Equipment and Systems Engineering, Inc., Viyya Technologies, Inc.
>
> Firemark Capital LLC (Adrenaline Nation Entertainment, Inc., Spooz, Inc.)
>
> Scott R. Sieck (Spooz, Inc., Viyya Technologies, Inc.)"

The securities of the nine issuers identified above are the only identified securities placed into issue in the OIP and at the hearing of this case. These are the only securities at issue herein and are referred to throughout Respondents' briefs as the "Relevant Securities." (In footnote 4 to the Commission's Order Directing Additional Briefing, it is noted that the OIP specifically identifies ten securities, the nine listed above and Nanoforce, Inc. The latter was not mentioned in the Division's response to Respondents' motion for a more definite statement and no evidence with respect to that security was introduced at the hearing.)

The Initial Decision, based on evidence pertaining only to the Relevant Securities, found that Bloomfield and Martin while acting as a broker for the sale of "certain customer securities", violated the registration provisions of the Securities Act, and aided and abetted and caused violations of section 17(a) of the Exchange Act and Rule 17a-8 by failing to file Suspicious Activity Reports under the Bank Secrecy Act. It then concluded that Bloomfield and Martin should "not be permitted to gain from blatantly illegal conduct" and ordered them to pay disgorgement with respect to transactions in

securities that were never at issue in the OIP and are not listed above. In doing so the ALJ ignored the requirement of the law that disgorgement needs to be "a reasonable approximation of profits causally connected to the violation." *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989).

The operative words here are "causally connected to the violation." The OIP and the case as developed at the hearing involved alleged registration violations and aiding and abetting violations pertaining solely to the Relevant Securities purchased and sold during the Relevant Period. Nevertheless, the Initial Decision adopted a calculation of commissions (Div. Ex. 361) prepared by the Division's "expert" that included every commission that was generated in the seven accounts set forth in Exhibit 361 for the entire life of the account at Leeb, including a substantial number of transactions in other than the Relevant Securities. (Bloomfield Tr. 1424:15-17). In particular, there were over 100 securities traded through the Thimble Capital Account only five of which are included in the Relevant Securities. (Bloomfield Tr. 1424:21-1425:3). Counsel for the Division stated on the record that he did not dispute this. (Adam Tr. 1425:6-7). Nor does the Division dispute this in its Supplemental Brief. As a consequence, the Division's expert concluded that Bloomfield earned $272,342 and Martin earned $964,868 from transactions in about seven accounts that traded in unregistered securities. And, once again the ALJ adopted the conclusion of the Division's expert without reasoning and ordered disgorgement of more than $1.2 million of commissions earned on the sale of hundreds of securities in these accounts, notwithstanding that these accounts and the securities and transactions that took place in these accounts were never the subject of the OIP.

In its Supplemental Brief the Division does not dispute the above facts but appears to contend that since the Relevant Securities were traded in the customer accounts of persons deemed unsavory by the Division, it is proper to require disgorgement of all profits earned in such accounts. And, to explain away the inclusion of commissions on the sale of securities that were never the subject of this proceeding, the Division argues that the securities named in the OIP "were examples and were not intended to represent an exclusive list of securities that were sold in violation of Section 5."

The problem with this argument is that it entirely disregards the violations alleged. Sections 5(a) and 5(c) of the Securities Act make it unlawful to offer or sell a security in interstate commerce if a registration statement has not been filed as to that security, unless the transaction qualifies for an exemption. Section 4(4) of the Securities Act provides such an exemption to brokers. Specifically, it exempts "brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders." Both sections are concerned with specific securities. The section does not make unlawful a "pattern" of selling unidentified securities that may or may not be registered. It deals with specific securities and specific transactions.

Consistent with this, the OIP in fact alleges that Bloomfield and Martin while acting as a broker for the sale of "certain customer securities", violated the registration provisions of the Securities Act, and aided and abetted and caused violations of section 17(a) of the Exchange Act and Rule 17a-8 by failing to file Suspicious Activity Reports under the Bank Secrecy Act. The OIP identifies but ten such certain securities and the Division thereafter identified nine such certain securities in the reply to Respondents' motion for a more definite statement. The evidence at the hearing pertained only to such securities and the Initial Decision in finding the existence of violations identified only the Relevant Securities. To then require "disgorgement" of all commissions earned by Respondents from the sale of all securities in the accounts in which the Relevant Securities happened to be held cannot therefore possibly represent "a reasonable approximation of profits causally connected to the violation."

Ironically, in support of its position the Division cites a case from the 9th Circuit – the Circuit to which an appeal of this case would follow – that not only does not support its position but shows exactly why it is wrong. In *Hateley v. SEC*, 8 F.3d 653, 655-56 (9th Cir. 1993), a broker dealer and two officers of a securities firm were ordered to disgorge 100% of the profits obtained based on an illegal agreement, even though the agreement itself appropriated to them only 10% of the profits as a commission. The Court held that it was error to order disgorged more than the amount the individuals ultimately received, because, "the very agreement that was the source of their liability" also limited their ill-gotten gains, and courts "must view the agreement as a whole and cannot single out the

aspects of it that are favorable to the SEC's position and disregard the parts that are not.

In *Hately*, the 9th Circuit reiterated that the purpose of disgorgement is to deprive a person of "ill-gotten gains" and prevent unjust enrichment. (Citing *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir.1991)). Further, as the SEC admitted in that case, the disgorgement order was not, in fact, a fine levied as punishment but rather the means by which the petitioners were required to remedy the unjust enrichment. Further, once disgorgement is selected as the method of sanction, the Court held the amount must be reasonable, i.e. approximately equal to the unjust enrichment and that an amount ten times the amount of unjust enrichment was not reasonable.

In the present case, the OIP charged that Bloomfield and Martin while acting as a broker for the sale of "certain customer securities", violated the registration provisions of the Securities Act, and aided and abetted and caused violations of section 17(a) of the Exchange Act and Rule 17a-8 by failing to file Suspicious Activity Reports under the Bank Secrecy Act. Those "certain customer securities" are identified in the OIP and in the Division's reply to Respondents' motion for a more definite statement as the Relevant Securities. The evidence establishes that the total commissions received by Respondents from the sale of the Relevant Securities during the Relevant Period was $134,090. The amount ordered disgorged is in excess of $1.2 million, which is more than nine times the amount of any possible unjust enrichment from the violations charged. That amount is manifestly unreasonable and cannot be said to be a reasonable approximation of profits causally connected to the violations charged.

II. QUESTIONS ASKED

The Commission's Order Directing Additional Briefing directed the parties to address questions set forth below. In reply, Respondents answers those questions as follows:

(1) Do Bloomfield's and Martin's alleged Securities Act Section 5 violations relate solely to the securities specifically identified in the OIP?

Yes. As set forth above, the Relevant Securities were the only securities specifically identified in the OIP and in the Division's response to Respondents' motion for a more definite statement. Furthermore they are the only securities on which evidence was introduced at the hearing in this matter.

(2) What are the amounts of commissions earned by Bloomfield and Martin that may be attributed to the Securities Act Section 5 violations alleged in the OIP as wrongfully obtained profits of such alleged violations?

The OIP alleged "(A) while acting as a broker for the sale of certain customer securities, Bloomfield and Martin willfully violated the registration provisions of the Securities Act, specifically sections 5(a) and 5(c) thereof." [Emphasis added] That is the violation alleged. And, assuming *arguendo* that Bloomfield and Martin willfully violated the registration provisions of the Securities Act, the wrongfully obtained profits would be the commissions that Bloomfield and Martin earned while acting as a broker for the sale of the Relevant Securities. In this regard, it may also be noted that it is undisputed that Bloomfield and Martin did not otherwise receive any compensation pertaining to such sales.

Respondents introduced an exhibit (Bloomfield Ex. 1), which contains a calculation of the gross commissions on every transaction in the Relevant Securities in the Relevant Accounts. (Bloomfield Tr. 1416:21-1417:1). As stated in Bloomfield Exhibit 1, during the Relevant Period Martin realized gross broker commissions in connection with the sale of the Relevant Securities that totaled $134,090. That Exhibit also demonstrates that during the Relevant Period Martin realized gross broker commissions in connection with the purchase of the Relevant Securities that totaled $16,027. Gross commissions on the purchase and sale of the Relevant Securities during the Relevant Period therefore totaled $150,117.

Martin and Bloomfield also testified with respect to the division of those commissions. Martin's share of the gross broker commissions in connection with the purchase and sale of the Relevant Securities was approximately 45-55%. (Bloomfield Tr. 1417:11-19; Bloomfield Ex. 1; Martin Tr. 1711:23-1712:1). Bloomfield's share of the gross broker commission in connection with the purchase and sale of the Relevant Securities was approximately 5%. (Bloomfield Tr. 1417:19-21; Bloomfield Ex. 1).

Based on these figures it is easy to make "a reasonable approximation of profits causally connected to the violation." Applying the 55% figure to the gross commissions establishes that Martin realized profits not in excess of $82,564. And, applying the 5% figure establishes that Bloomfield realized profits not in excess of $7,506.

(3) Did Bloomfield's and Martin's conduct underlying the alleged Exchange Act Section 17(a) and Exchange Act Rule 17a-8 violations relate solely to the securities specifically identified in the OIP?

Yes. As set forth above, the Relevant Securities were the only securities specifically identified in the OIP and in the Division's response to Respondents' motion for a more definite statement. Furthermore they are the only securities on which evidence was introduced at the hearing in this matter.

(4) What are the amounts of commissions earned by Bloomfield and Martin that may be attributed to the Exchange Act Section 17(a) and Exchange Act Rule17a-8 violations alleged in the OIP as wrongfully obtained profits of such alleged violations?

The OIP alleged "(B) Bloomfield and Martin willfully aided and abetted and caused violations of section 17(a) of the Exchange Act and Rule 17a-8 by failing to file Suspicious Activity Reports under the Bank Secrecy Act." That is the violation alleged. There is no allegation that Bloomfield or Martin were paid or received any compensation for failing to Suspicious Activity Reports under the Bank Secrecy Act. Indeed, it is hard to imagine how the failure to file such reports would have profited them at all, particularly since the Division has neglected to demonstrate that such reports were required or how anyone profited by the failure to file such reports. In any event, the only profits Bloomfield and Martin ever realized from the sale of the Relevant Securities were the commissions received on their sale in broker transactions, the amount of which is detailed in the answer given to question number (2) above.

(5) How did the conduct underlying the alleged Exchange Act Section 17(a) and Exchange Act Rule 17a-8 violations result in Bloomfield's and Martin's gaining those wrongfully obtained profits?

Assuming *arguendo* that Respondents were required to file Suspicious Activity Reports pertaining to the transactions in the Relevant Securities, Respondents are unable to see how their failure to do so resulted in their gaining any profits other than the commission realized on the sale of the Relevant Securities in broker transactions.

(6) How are those wrongfully obtained profits a reasonable approximation of the amounts of Bloomfield's and Martin's unjust enrichment resulting from the alleged Exchange Act Section 17(a) and Exchange Act Rule 17a-8 violations?

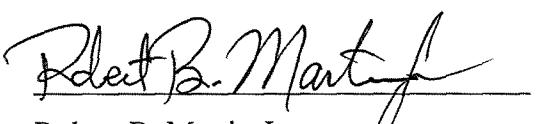
The answer is that they are not.

III. CONCLUSION

As noted in the Commission's Order Directing Additional Briefing, the OIP herein specifically identifies only ten securities. Thereafter, Respondents filed a motion for a more definite statement to require the Division to specifically identify which securities were the subject of this proceeding. The Division specifically identified nine such securities and the time periods involved. These are the Relevant Securities and the Relevant Period. No evidence was presented with respect to any other securities at the hearing in this matter. Nevertheless, the Initial Decision in this case orders the "disgorgement" of commissions earned on the sale of hundreds of securities not the subject of the OIP that were sold by Respondents acting solely as brokers over periods of time well outside the Relevant Period. Furthermore, the Division has entirely failed to explain how even the commissions earned on the sale of the Relevant Securities can be a reasonable approximation of the amounts of Bloomfield's and Martin's unjust enrichment resulting from their alleged failure to file Suspicious Activity Reports. In short, there is no way on earth that the amount of commissions ordered disgorged can be considered a reasonable approximation of profits causally connected to either of the two violations alleged in the OIP.

Dated: July 25, 2012

Respectfully submitted,



Robert B. Martin Jr.
Counsel for Respondents, Ronald S. Bloomfield and John E. Martin Sr.
The Law Offices of Robert B. Martin Jr.
3291 Old Oak Tree Lane
Escondido, CA 92026

Phone: (760) 670-3735
Fax: (760) 690-8600
E-mail: rbmartin@rbmartinlaw.com