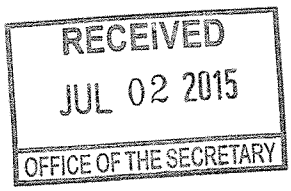
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



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' POST-HEARING BRIEF

Respondents, Spring Hill Capital Markets, LLC ("SHCM"), Spring Hill Capital Partners, LLC ("SHCP"), Spring Hill Capital Holdings, LLC ("SHCH") and Kevin White (collectively the "Respondents") submit their post-hearing brief pursuant to this Court's Scheduling Order dated April 6, 2015.

I. Introduction

The Commission alleges that SHCP acted as an unregistered broker-dealer. As a result, the Commission is seeking disgorgement from SHCP of all trading profits generated during the period in which it allegedly operated as an unregister broker-dealer in violation of Section 15(a) of the Exchange Act. Additionally, the Commission alleges that Mr. White and SHCH willfully aided and abetted SHCP's alleged 15(a) violation.

The Commission is not alleging that SHCP engaged in any fraud, intentional conduct or that there were any victims of its activities. Thus, the Commission is seeking significant disgorgement and civil penalties despite the absence of any fraud or intentional wrongdoing.

SHCP did not act as an unregistered broker-dealer and, indeed, took significant steps to make sure that it complied with the securities laws as they relate to broker-dealer registration requirements through the Rafferty Contract it signed in April of 2009 ("April 2009 Rafferty Contract"). Every SHCP employee that executed a trade did so as a registered representative of Rafferty Capital Markets, LLC ("Rafferty").

Moreover, Mr. White had very little involvement in the day-to-day activities of SHCP and its arrangement with Rafferty. Mr. White relied upon well educated and sophisticated employees and partners. Mr. White's primary role at SHCP was the generation of new business.

Mr. White has taken personal responsibility and stipulated to aiding and abetting a books and records violation at Rafferty arising out of a trade in which SHCP's employees, as registered representatives of Rafferty, bought a bond from Citigroup ("Citi") and then sold to Barclays (the "First Gramercy Trade"). Thus, when Mr. White is intimately and personally involved in a securities transaction that causes a violation of securities laws (like the First Gramercy Trade), he admits it and takes personal responsibility.

Moreover, the Commission alleges that SHCM had a net capital violation and a books and records violation arising out of the purchase of a Gramercy bond on March 16, 2013 (the "Second Gramercy Trade"). SHCM, however, did not purchase the Gramercy bond, Rafferty purchased it, and all of the evidence introduced at trial is overwhelming on that point. Consequently, SHCM cannot be held liable for a net capital violation, a books and records violation and a failure to notify the SEC of the net capital violation arising out of a bond that it never purchased.

Mr. White, other than aiding and abetting Rafferty's books and records violation arising out of the First Gramercy trade, did not commit any securities law violations and his conduct

does not warrant a suspension of any length as Mr. White has been in the financial industry for twenty five years and has never been disciplined and, as the evidence at the hearing proves, enjoys a stellar reputation among his peers. At all times, Mr. White made good faith efforts to comply with all of the requirements of the Exchange Act and operate SHCP and SHCM in compliance with all laws and regulations.

II. Facts

Kevin White started working at Lehman Brothers in 1991. Trial Testimony, p. 518, lines 3-9 (hereinafter "Tr.Tes. p.__, l.__"). He continued to work there until its bankruptcy in September of 2008. Tr.Tes. p. 518-520. After Lehman's bankruptcy, Mr. White started SHCP based on the old school merchant bank model. Tr.Tes.p. 522-523.

SHCP was a true start-up that was given free office space and became a meeting place for others displaced after Lehman's bankruptcy. Tr.Tes. p. 524, l. 12-23. People who were displaced by the Lehman bankruptcy began to migrate over to SHCP's office as it was a "life boat" for those looking for work. Tr.Tes. p.528, l. 16-23. When SHCP was first started everyone was trying to figure out what sort of business to explore. Tr.Tes. p. 786, l.18-24.

In the beginning of 2009, SHCP had no business. Tr.Tes. p. 530, l. 11-13. In early 2009, Gramercy Capital Corp. ("Gramercy") hired SHCP to perform advisory work and paid $100,000 up front and then $50,000 per month for the approximately the next six months. Tr.Tes. p.530-531. The Gramercy advisory engagement was SHCP's first revenue. Id.

Sometime before March 23, 2009, Michael Rafferty, a principal at Rafferty Capital Markets, LLC ("Rafferty") and the President and CEO of Rafferty Holdings and Mr. White had a preliminary discussion, at the New York Athletic Club, regarding a potential business relationship between Rafferty, a registered broker-dealer, and SHCP. Tr.Tes. p. 1042-1044.

Rafferty is a broker-dealer registered with the Commission. See Stipulation dated May 6 at 6. Their preliminary discussion was brief. Tr.Tes. p.1044, l. 18-24.

After their initial discussion, Michael Rafferty told Mr. White, on March 23, 2009, that he "spoke with some people at [Rafferty]" and then provided Mr. White with an outline of the proposed business relationship between Rafferty and SHCP, in relevant part, as follows:

> [Rafferty] can act as B/D of record for your registered reps. [Rafferty] would hold the licenses and assume those potential liabilities. [Rafferty] would keep a fair percentage of the commissions, [Rafferty would] cover [its] own clearing personnel, [SHCP] would be responsible for the associated clearing costs, and retain the remain (sic) commissions to pay the salesman and cover your overhead. Fails and/or mistakes (hooks) would be on our end. In effect, [SHCP] would be operating as a branch of the RaffCap B/D...

Resp. Ex. 1

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. John Fernando, Mr. White's partner (and a lawyer) at SHCP, was excited about the business arrangement with Rafferty and thought it made a lot of sense. Tr.Tes. p. 545, l. 9-12.

The entire proposal, that eventually became the agreement between SHCP and Rafferty, came from Michael Rafferty. Tr.Tes. p. 544, l. 5-14. The focal point of Michael Rafferty's proposal was that the SHCP's employees would become registered representatives of the

Rafferty broker-dealer. Tr.Tes. p. 1047 l. 9-14. SHCP's employees becoming registered representatives of Rafferty was important to Michael Rafferty because those employees (as registered representatives of Rafferty) would be transacting trades and generating commission revenue. Tr.Tes. p. 1047, l. 9-25; p.1048, l. 3-7. It was Michael Rafferty's understanding that commission revenues could not be paid under the arrangement with SHCP otherwise. Tr.Tes. p. 1048, l. 3-7.

The SHCP employees, who were registered representatives of Rafferty, would be trading mortgage-related structured products. Tr.Tes. p. 1049, l. 17-22. In 2009, Rafferty did not have much experience trading mortgage-related structured products. Tr.Tes. p. 1049, l. 23-25; p.1050, l. 1. It was Michael Rafferty's hope that the SHCP employees would give Rafferty a new product line related to structured products. Tr.Tes. p. 1050, l. 3-7. Michael Rafferty understood that the SHCP's employees had significant expertise in structured products. Tr.Tes. p. 1070, l. 10-20.

On March 31, 2009, Keith Fell ("Fell"), an attorney and officer at Rafferty, sent an internal email at Rafferty to Michael Rafferty and Barbara Martens, Rafferty's compliance person, regarding the proposed relationship with SHCP. Resp. Ex. 2. In his email, Attorney Fell emphasized that "[t]here are three main points regarding our proposed relationship that I think are important: 1. We should have a basic service agreement that spells-out what we provide to Spring Hill; 2. There should be a non-solicit provision between Rafferty & Spring Hill; 3. Our proposal needs to include costs of clearing plus fully allocated costs for any and all other service which we provide. In addition we need to calculate a 'profit premium' for providing the services." Id. Michael Rafferty agreed with Attorney Fell that those were important points to discuss and include in the final agreement with SHCP. Tr.Tes. p.1052-1053, l. 23-25, 1.

Michael Rafferty was able to negotiate a higher fee for Rafferty under its agreement with SHCP, from 10% to 15%. Tr.Tes. p. 1055, l. 13-15.

Larry Rafferty, Michael Rafferty's father and former CEO of Rafferty Holdings, thought that the arrangement with SHCP made sense to Rafferty. Resp. Ex. 3. Larry Rafferty, as of 2009, had been in the securities business for approximately 25 years. Tr.Tes. p.1056-1057, l. 25, 1-4.

Between March 31, 2009 and April 13, 2009, Rafferty--through its managing director who is also an attorney--(Fell), compliance person (Martens) and owner (Michael Rafferty)--discussed, drafted and revised the agreement between Rafferty and SHCP before even sending a first draft to SHCP for its review on April 13, 2009. Resp. Ex. 2-13. Michael Rafferty was keenly focused on all of the financial and legal aspects of the arrangement that were important to Rafferty such as the percentage payment to Rafferty, the pricing schedule, liability, staff time and overall upside to Rafferty. Id.

Martens was the vice president at Rafferty and was the head of compliance there. Tr.Tes. p.1165, l.10-12. Martens assisted Fell in the drafting of the April 2009 Rafferty Contract and, in particular, attachment A. Tr.Tes. p.1167, l.19-24. 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.

Fell and Martens knew that SHCP was not a broker-dealer when they were drafting the April 2009 Rafferty Contract. Tr.Tes. p. 1115, l. 23-25; p. 1116, l. 1-3. Fell, when drafting the April 2009 Rafferty Contract, did not believe there was a distinction between using a contract for a broker-dealer (Keane) as opposed to using it for a non-broker-dealer (SHCP). Tr.Tes. p 1116,

l. 10-14. Rafferty's outside counsel, Farrel Fritz, had drafted the Keane agreement. Tr.Tes. p. 111, l. 8-10.

It was partly a cost-savings measure for Rafferty not to use outside counsel (Farrel Frits) to draft the April 2009 Rafferty Contract with SHCP. Tr.Tes. p. 1137, l. 17-25; p. 1138, l. 1-6. Rafferty simply took the Keane contract and changed it only a little. Tr.Tes. p. 1138, l. 2-6.

Fell's primary contact at SHCP regarding the terms of the April 2009 Rafferty Contract was John Fernando. Tr.Tes. p. 1112, l. 6-10. During the negotiation process, Fell was in frequent contact with Fernando. Tr.Tes. p. 1114, l. 6-9. Fell and Martens had the most input on the draft contract on the Rafferty side. Tr.Tes. p. 1068, l. 7-11.

Fell, from Rafferty, sent the first draft of the April 2009 Rafferty Contract to Mr. White at 6:59 a.m. on April 13, 2009. See Stipulation dated May 6, 2015 at 16; Resp. Ex. 13. Only four hours later, Michael Rafferty asked Mr. White whether he needed any clarification or help regarding it. Resp. Ex. 14. Mr. White responded that he "just got the doc from [Fell] and that "he was looking at it now." Resp. Ex. 13.

When Mr. White received the draft of the April 2009 Rafferty Contract, he gave it to Fernando, his partner and a lawyer, who was responsible for all legal work at SHCP. Tr.Tes. p. 564, l. 14-22. Mr. White did not negotiate the April 2009 Rafferty Contract and did not make any changes to it. Tr.Tes. p. 565, l. 3-11; p. 571, l. 2-4. Fernando made all changes to it on behalf of SHCP. Tr.Tes. p. 565, l. 3-11; p. 571, l. 5-8.

On April 21, 2009, Fernando sent his black-line edits to the draft to Fell. Resp. Ex. 17. Between April 21, 2009 and April 30, 2009, Fernando and Fell negotiated the final terms of the April 2009 Rafferty Contract. Resp. Ex. 17-31.

Mr. White played no role in the negotiation of the April 2009 Rafferty Contract. Tr.Tes. p. 565, l. 3-11; p. 571, l. 2-8. Conversely, Michael Rafferty was a substantial contributor to the overall set-up of the Rafferty/SHCP's relationship and the terms of the April 2009 Rafferty Contract. Resp. Ex. -18.

Michael Rafferty expected the relationship with SHCP to include more than just trading. Tr.Tes. p. 1069, l. 15-19. Indeed, every week or two Michael Rafferty would discuss new business opportunities with Mr. White. Tr.Tes. p. 1070, l. 3-9. Michael Rafferty envisioned that SHCP would be more substantial in terms of advisory deals, banking deals, capital restructuring, debt conversions and analytic work for the registered representatives of Rafferty. Tr.Tes. p. 1071, l. 8-15. As part of SHCP's arrangement with Rafferty, Michael Rafferty felt that Mr. White gave him good advice and saved Rafferty money. Tr.Tes. p. 1072, l. 16-20.

On April 28, 2009, SHCP entered into the April 2009 Rafferty Contract wherein SHCP's employees would become registered representatives of Rafferty so that they could, among other things, execute trades using Rafferty's trading platform and capital. See Stipulation dated May 6, 2015 at 7; Resp. Ex. 36. At the time the April 2009 Rafferty Contract was executed, Rafferty had been a registered broker-dealer since 1989. See Stipulation dated May 6, 2015 at 15. Fernando executed the April 2009 Rafferty Contract on behalf of SHCP and Fell executed it on behalf of Rafferty. Tr.Tes. p. 574, l. 12-21; Stipulation dated May 6, 2015 at 18.

Pursuant to the April 2009 Rafferty Contract, Rafferty agreed to "(1) provide clearing and trade processing for trades introduced by Spring Hill; (2) make available certain of its employees to ensure that said trades are processed on a timely basis; and (3) provide the necessary compliance and review associated with such trades." Resp. Ex. 36. With respect to SCHP's employees, Rafferty agreed to "register certain Spring Hill employees as registered

representatives" of Rafferty. Id. Therefore, all of SHCP's employees that executed trades--pursuant to the April 2009 Rafferty Contract--did so as registered representatives of Rafferty. Tr.Tes. p. 1167, l. 9-17.

Rafferty is a licensed broker-dealer, FINRA and the SEC oversee and regulate its trading activities. See Stipulation dated May 6, 2015 at 6. As such, every trade that SCHP's employees executed, as registered representatives of Rafferty, was subject to FINRA and SEC oversight. Id.

Martens, before the first trade was ever executed, registered the SHCP employees as registered representatives of Rafferty. Tr.Tes. p. 1167, l. 9-17. She registered Paul Tedeschi, Lauren O'Neil, Phil Bartow, Kevin White and John Fernando as registered representative of Rafferty. Tr.Tes. p. 1171, l. 9-19. All of the SCHP employees that executed trades were registered representatives of Rafferty. Tr.Tes. p. 195-196, Div. Ex. 138A.

Rafferty had several fixed income trading desks. Tr.Tes. p. 1171, l. 20-23. Each trading desk at Rafferty had its own designated account at Rafferty's clearing firm. Tr.Tes. p. 1172, l. 3-5. After Martens registered the SHCP's employees as registered representatives of Rafferty, they also were issued their owned designated account at Rafferty's clearing firm with an account prefix of 3zz just like every other Rafferty trading desk. Tr.Tes. p. 1172, l. 11-15, p. 1174, l. 22-25, p. 1175, l. 1-3. The monthly profits in the 3zz account, along with the monthly profits of the other Rafferty trading desks, were swept into one Rafferty bank account monthly. Tr.Tes. p 1175, l. 8-24.

Martens testified that every trade that Paul Tedeschi made was a Rafferty trade. Tr.Tes. p. 1176, l. 8-16. Every trade that Paul Tedeschi made, or any other SHCP employee as a registered representative of Rafferty, was figured into Rafferty's net capital calculation from April of 2009 through the end of 2010. Tr.Tes. p. 1176, l. 17-24.

Rafferty's net capital was calculated in connection with the Second Gramercy Trade. Tr.Tes. p. 769, l. 16-20. Rafferty's trade blotter shows that Rafferty purchased the Gramercy Bond in connection with the Second Gramercy Trade. Div. Ex. 181. Tedeschi testified that he bought the bond on behalf of Rafferty as a registered representative of Rafferty. Tr.Tes. p. 852, l. 17-21.

All of the counter-parties (or customers) on the trades with SHCP employees ,who were registered representatives of Rafferty, faced Rafferty. Tr.Tes. p. 194. All of the counterparties were large investment banks like Barclays, Citibank, Duetsche Bank and Morgan Stanley. Tr.Tes p. 194, l. 23-25, p. 195, l. 1-4. For all of the trades to settle, they had to be matched-up with Rafferty in Rafferty's back office. Tr.Tes. p. 210, l. 10-15.

Rafferty also set-up all of the accounts with the counterparties. Tr.Tes. p. 210, l. 16-25, p. 211, l. 1. As part of the account opening process with the counterparties, the counterparties would be provided with Rafferty's FOCUS reports and financials. Tr.Tes. p. 578, l. 21-25, p. 579, l. 1-4. SHCP became, essentially, the asset-backed securities trading desk at Rafferty. Tr.Tes. p. 580, l. 22-24.

The excel spreadsheet that SHCP and SHCM maintained was for internal use only and was not an official trade blotter. Tr.Tes. p. 105, l. 3-8. The official trade blotter was maintained at Rafferty. Tr.Tes. p. 105, l. 6-8. Rafferty maintained the blotter related to the trades executed by the SHCP employees who were registered representatives of Rafferty. Tr.Tes. p.105, l. 11-18. The excel spreadsheet maintained by SHCP and SHCM was used to track revenues. Id.

John Fernando was more involved in all of the invoices that were sent to Rafferty. Tr.Tes. p.198, l. 19-22. Indeed, Mr. Fernando created the model invoice that was sent to Rafferty monthly that called the payments to SHCP consulting payments. Tr.Tes. p. 200, l. 11-

25, p. 201, l. 1-25, p.202, l. 1-6. Mr. White does not know why the payments were called consulting. Tr.Tes. p. 382, l. 2-13. Mr. White did not review the monthly invoices to Rafferty. Tr.Tes. p.334, l. 7-8. Mr. White's partners, John Fernando and Richard Egan, would inform Mr. White of SHCP's revenues. Tr.Tes. p. 334, l. 9-13.

Ms. O'Neil would communicate with Richard Egan and John Fernando about everything regarding the invoices. Tr.Tes. p. 199, l. 1-4. Mr. Fernando and Mr. Egan were the two primary people at SHCP that Ms. O'Neil relied upon when it came to invoices and the collection of funds from Rafferty. Tr.Tes. p. 202, l. 25, p. 203, l. 1-6.

Mr. Fernando recommended taking out $1,000,000 from Rafferty. Div. Ex. 130. Mr. Fernando also requested an increase in the monthly fee from Rafferty. Resp. Ex. 56. Rafferty agreed to increase the fee. Id.

Richard Egan was the CFO of SHCP and he was in charge of all of the financials. Tr.Tes. p. 95, l. 22-25, p. 96, l. 1-5. Lauren O'Neil was responsible for sending SHCP's monthly invoices to Rafferty for payment. Tr.Tes. p.118, l. 3-6. All of the revenues from the trades of the SHCP's employees who were registered representatives of Rafferty went to Rafferty's bank account first. Tr.Tes. p. 119, l. 23-25, p. 120, l. 1. Ms. O'Neil worked with Richard Egan on the invoices to Rafferty. Tr.Tes. p. 130-132.

John Fernando, Richard Egan and Patrick Quinn all made decisions with respect to the receipt of compensation from Rafferty. Div. Ex. 198; Tr.Tes. p.133-134. There is no evidence that Mr. White made any decisions, at all, regarding the payment of funds from Rafferty. Indeed, Fernando recommended that the payments from Rafferty at a flat rate. Tr.Tes. p. 136, l. 8-19.

Mr. White, along with his other four partners, made compensation decisions at SHCP. Tr.Tes. p. 609, l. 5-15; p. 813, l. 15-20. There were times when Richard Egan or John Fernando were very involved in compensation decisions at SHCP. Tr.Tes. p. 814, l. 19-25, p.815, l. 1-12.

Mr. White's primary responsibilities at SHCP was working on new business opportunities. Tr.Tes. p. 220, l. 24-25, p. 221, l. 1-4. Mr. White relied on his partners to make many decisions at SHCP. Tr.Tes. p. 258, l. 15-17. He 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. Tr.Tes. p. 221, l. 5-12. Employees, such as Andre Hohenstein and Lauren O'Neil, reported to all of the partners, not just Mr. White. Tr.Tes. p. 680, l. 14-18; p. 199, l. 1-4.

John Fernando was involved at SHCP in trying to figure out what types of securities the SHCP employees who were registered representatives of Rafferty could trade. Tr.Tes. p. 805, l. 2-9. Patrick Quinn, a series 27 license holder at SHCP and the FINOP for SHCM did not believe that SHCP was conducting a securities business because all of the SHCP's employees that were executing trades were doing so as registered representatives of Rafferty. Tr.Tes. p. 928, l. 14-25; 929, l. 13-16.

III. Argument

A. SHCP and White cannot be held liable under Section 15(a)

1. The 15(a) violation is time barred.

28 U.S.C. §2462 imposes a five year statute of limitation on certain "actions, suits, or proceeding[s]" by the government of the United States including SEC enforcement actions. 28 U.S.C. §2462 states:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

In *Gabelli v SEC*, 133 S.Ct 1216, (2013), the United States Supreme Court unanimously held that an SEC enforcement claim accrues five years from the occurrence of the event that gives rise to the SEC's charge. *Id.* at 1220-1121. As such, the Supreme Court held that SEC enforcement actions seeking civil penalties for claims that accrued more than five years before the date of commencement are barred by the five year statute of limitations imposed by 28 U.S.C. §2462. *Id.*

In *Gabelli*, the Supreme Court explained that statutes of limitations are important because they "set a fixed date when exposure to the specified government enforcement efforts ends, advancing the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* at 1221 (internal quotation marks omitted). Moreover, the United States Supreme Court stated succinctly the inherent fairness of statutes of limitations as follows:

> statutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. They provide security and stability to human affairs. We have deemed them vital to the welfare of society, and concluded that even wrongdoers are entitled to assume that their sins may be forgotten.

Id. (internal quotation marks and citations omitted).

Indeed, following the United Supreme Court's decision in *Gabelli,* the Southern District of Florida applied the same rationale to conclude that the five year statute of limitation imposed

by 28 U.S.C. §2462 applies to SEC enforcement actions that seek disgorgement, injunctive and declaratory relief. *SEC v. Graham,* 21 F. Supp. 3d 1300 (S.D. FL 2014)(5 year statute of limitations imposed by §2462 applies to SEC actions seeking disgorgement).

a. 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 the lawful trades executed by the SHCP Registered Representatives of Rafferty. 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.

April 28, 2009, as the date upon which the SEC's claim against SHCP accrued, is consistent with the principles articulated by the Supreme Court in *Gabelli* 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 upon the execution of the April 2009 Rafferty Contract 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 and holding that the claim accrued at the time of the alleged lack of disclosure and not upon the collection of fees as the collection of fees were nothing more than the "continued ill effect" of the defendant's alleged violation).

b. Because the claim accrued on April 28, 2009--and the OIP was not filed until January 22, 2015--the claim (and all remedies sought) are time barred pursuant to §2462.

The SEC is seeking civil penalties, disgorgement, and a cease and desist Order from SHCP, SHCH and Mr. White. Additionally, the SEC is seeking to censure, suspend or bar Mr. White from the securities industry. The D.C. Circuit concluded that "a 'penalty,' as the term is used in §2462, is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Johnson v. SEC,* 87 F.3d 484, 488 (D.C. Cir. 1996).

Courts have held that each category of remedy sought by the SEC in this case are "penalties" that are subject to the five year statute of limitations. *See Gabelli*, 133 S.Ct at 1220 (civil penalties are subject to 5 year statute of limitation); *SEC v. Graham,* 21 F. Supp. 3d 1300 (S.D. FL 2014)(disgorgement and injunctive relief are subject to 5 year statute of limitation); *Johnson* F.3d at 484, 488-492 (D.C. Cir. 1996)(suspension of an individual is subject to a 5 year statute of limitation); *SEC v. Bartek,* 484 Fed.Appx. 949, 956-57 (5th Cir. 2012)(bars of an individual subject to a 5 year statute of limitation). Since each of the remedies sought herein is

subject to the five year statute of limitations--which expired prior to the filing of the OIP--the alleged conduct cannot be considered for the purposes of liability or remedies.

c. Even if the execution of the April 2009 Rafferty Contract is not the date upon which the claim accrued against SHCP, trades and conduct that occurred before January 22, 2010 (more than five years before the OIP was filed) cannot be considered because it is time barred.

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, all evidence of trades and conduct that occurred prior to January 22, 2010 cannot be considered because that conduct is time barred pursuant to the five year statute of limitations imposed by §2462. In its OIP, the SEC alleges that between May 2009 and February 2010 SHCP introduced approximately 100 trades. *See* Exhibit 2 at ¶¶3, 17. While this contention is inaccurate, as these trades were all introduced and executed by registered representatives of Rafferty, all but 23 of the trades occurred before January 22, 2010 (five years prior to the commencement of the OIP). As such, evidence relating to trades, or SHCP's conduct, 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). Further, since the five year statute of limitations applies to all remedies sought by the SEC (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

revenue to SHCP. *See* Div. Proposed Exhibits 181, 137, 244 attached hereto as Exhibit 6 (relevant portions only have been appended). 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 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.

2. SHCP did not violate Section 15(a).

SHCP attempted, in good faith, to establish a legitimate and well-established business relationship with Rafferty. A relationship that Rafferty--a registered broker-dealer since 1989--was advocating. As early as the 1970s, the concept of an "independent contractor" of a broker-dealer evolved to allow the independent contractor to be affiliated with the registered broker-dealer for the purposes of offering securities for sale. *See* Alexander C. Dill, "Broker-Dealer Regulation Under the Securities Exchange Act of 1934: The Case of Independent Contracting," 1994 Columbia Bus. L. Rev. 189, 196 (1994).

Indeed, these independent contractor arrangements have grown commonplace in the industry: as of 2013, approximately 64% of all registered representatives of broker dealers operated as independent contractors. *See* Letter to Elizabeth Murphy, Secretary, Securities and Exchange Commission, from David Bellaire, Esq., Executive Vice President, Financial Services Institute, at 2 (July 5, 2013), available at: http://www.sec.gov/comments/4-606/4606-3138.pdf. Securities regulatory agencies have formally recognized the concept of certain natural persons associating with a registered broker-dealer as independent contractors since at least 1982. *See* Letter to Gordon S. Macklin, President, NASD, from Douglas Scarff, Director, Division of

Market Regulation, the Commission [1982-83 Transfer Binder], Fed. Sec. L. Rep. (CCH) 77,303, at 78,116 (June 12, 1982).

All SHCP's employees that traded became registered representatives of Rafferty before they executed a single trade and all customers faced Rafferty. In the structure of the SHCP/Rafferty relationship, the only likely misstep was SHCP's receipt of compensation that derived from the securities transactions that Rafferty effectuated. Simply receiving compensation that is derived from securities transactions, however, is not conclusive of broker activity. *See SEC v. Kramer*, 778 F.Supp.2d 1320, 1338-1341 (M.D. Fla. 2011). Nevertheless, even if SHCP's receipt of compensation from securities transactions was not the perfect way to set-up the SHCP/Rafferty arrangement, Rafferty bears equal, if not more, responsibility for the conduct because of its role as the licensed broker-dealer. As Mr. Rafferty's email states, Rafferty was a proponent of SHCP retaining trading revenues to pay SHCP's employees that were also registered representatives of Rafferty.

Without a doubt, as between Rafferty and SHCP, Rafferty was in the best position to insure that the business relationship was established properly because of its superior knowledge of securities laws and regulatory responsibilities. SEC Registered broker-dealers are required to supervise their associated persons. See FINRA Rule 3010(a); SEC Division of Market Regulation, Staff Legal Bulletin No. 17, Remote Office Supervision (March 19, 2004) (The Commission has long emphasized that the responsibility of broker-dealer's to supervise their employees is a critical component of the federal regulatory scheme") (footnotes and internal quotes omitted). Associated persons include any person registered with the broker-dealer. See Restated Certificate of Incorporation of FINRA, Article 12, Definitions, paragraph T (defining "associated person of a member" to include a natural person registered with a FINRA member).

To the extent that a firm (like Rafferty) forms a relationship with an independent contractor (like SHCP), Rafferty is responsible for either (1) ensuring that the independent contractor was registered as a broker-dealer or (2) assuming the supervisory responsibilities attendant to a relationship with an associated person." Exchange Act Rel. No. 36742 (Jan. 19, 1996). Thus, it was the responsibility of Rafferty, not SHCP, to perform supervisory duties over SHCP within the meaning of the Exchange Act in connection with the 2009 Rafferty Contract. This is especially true where, as here, "in the case of off-site representatives [i.e., independent contractors] whose day-to-day access to compliance personnel . . . may be limited." FINRA Notice to Members No. 86-65, "Compliance with the NASD Rules of Fair Practice in the Employment and Supervision of Off-Site Personnel" (Sept. 9, 1986); *see also Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1574 (9th Cir. 1990) (en banc) (the registered broker-dealer bears the responsibility to effectively supervise an independent contractor).

With respect to SCHP's employees, Rafferty agreed to "register certain Spring Hill employees as registered representatives" of Rafferty. Therefore, all of SHCP's employees that executed trades--pursuant to the 2009 Rafferty Contract--did so as registered representatives of Rafferty. Rafferty is a licensed broker-dealer, FINRA and the SEC oversee and regulate its trading activities. As such, every trade that SCHP's employees executed, as registered representatives of Rafferty, was subject to FINRA and SEC oversight.

In the Commission's case against Rafferty, the Commission did not even name Michael Rafferty individually--and obviously did not seek to suspend him--even though he was the supervising principal from Rafferty. Incredibly, the Commission did not even charge Rafferty with failing to supervise SHCP. The Commission's charges against Rafferty focused exclusively on SHCP's conduct (in allegedly engaging in unlicensed broker-dealer activity and failing to

submit a trading ticket to Rafferty timely) and completely ignored Rafferty's conduct and regulatory responsibilities.

B. Kevin White, and SHCH, did not aid and abet SHCP's 15(a) violation[1].

For Mr. White to be held liable for aiding and abetting SHCP's 15(a) violation, the Commission must prove "(1) the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party; (2) 'knowledge' of this violation on the part of the aider and abettor; and (3) 'substantial assistance' by the aider and abettor in the achievement of the primary violation." *SEC v. DiBella,* 587 F.3d 553 566 (2d Cir. 2009*) quoting Bloor v. Carro, Spanbock, Londin, Rodman & Fass,* 754 F.2d 57, 62 (2d Cir.1985). "[T]he three requirements cannot be considered in isolation from one another." *Id. quoting IIT v. Cornfeld,* 619 F.2d 909, 922 (2d Cir. 1980). Substantial assistance requires a showing that the alleged "aider and abettor" associated themselves with the venture, participated in something that they wished to bring about, and that by their actions sought to make it succeed. *SEC v. Apuzzo,* 689 F.3d 204, 212 (2d Cir. 2012) quoting *United States v. Peoni,* 100 F.2d 401, 402 (2d Cir.1938).

With respect to SHCP's arrangement with Rafferty, that has led the Commission to conclude that SHCP was acting as an unlicensed broker-dealer, White relied upon SHCP's general counsel and partner, Fernando, to negotiate the terms of the 2009 Rafferty Contract so that it complied with securities laws. Fernando not only negotiated the 2009 Rafferty Contract, he also signed it on behalf of SHCP. Moreover, Mr. White was confident, and had no reason to believe otherwise, that the relationship established with Rafferty complied with securities laws given the extensive experience of Rafferty, Rafferty's compliance personnel and Rafferty's

[1] The arguments related to Mr. White apply equally to SHCH because Mr. White is the majority owner of SHCH. See Stipulations Entered into By the Parties dated May 6, 2015, at 3.

personnel that drafted the agreement (one of which, Fell, is a lawyer). Mr. White believed, rightfully, that if the 2009 Rafferty Contract violated securities laws that Rafferty--and SHCP's general counsel and partner Fernando--would not have agreed to it.

Through the 2009 Rafferty Contract, Mr. White did not intend to circumvent the securities laws as they relate to the broker-dealer registration requirements. Neither Mr. White nor Mr. Rafferty believed that there was anything inapprorpriate about the relationship establishd throught the 2009 Rafferty Contract. To the contrary, the 2009 Rafferty Contract clearly establishes that the parties intended to comply with the securities laws as Rafferty, the registered broker-dealer, was required to provide the "necessary compliance and review associated with such trades" and certain SHCP's employees were required to "be registered representatives of [Rafferty] as that term is defined by FINRA, and shall enter into trades between counterparties which trades shall be processed by employees of [Rafferty]." *See* 2009 Rafferty Contract at Attachment A.

Indeed, the 2009 Rafferty Contract is *prima facie* evidence of Mr. White's good faith. If Mr. White intended to circumvent the registration requirements, there would have been no reason for SHCP to enter into the 2009 Rafferty Contract or to have all of its personnel register with FINRA. The 2009 Rafferty Contract was established for the very purpose of complying with broker-dealer registration requirements.

The broker-dealer registration requirement "facilitates both discipline over those who may engage in the securities business and oversight by which necessary standards may be established with respect to training, experience, and records." *Reg's Properties, Inc. v. Fin & Real Estate Consulting Co.*, 678 F.2d 552, 561 (5th Cir.1982); *Eastside Church of Christ v. Nat'l Plan, Inc.*, 391 F.2d 357, 362 (5thCir.1968). Every SHCP employee that executed the trades

were registered representatives of Rafferty and, as such, were subject to FINRA and SEC oversight to ensure "discipline over those who may engage in the securities business and oversight by which necessary standards may be established with respect to training, experience, and records." *Reg's Properties, Inc.*, 678 F.2d at 561.

Mr. White's primary responsabilty at SHCP was business developent (the same as Mr. Rafferty's responsabilities at Rafferty). Mr. White, rightfully, relied upon well educated and skilled employees in the conduct of SHCP's business. Mr. White had no involvemnt in the contract negotiation, the request of funds from Rafferty or the determination as to when or how much of the money should be sent to SHCP from Rafferty. Mr. Fernando, Mr. Egan, Ms. O'Neil and other very competent SHCP employees primarily made those decisions.

SHCP's arrangement with Rafferty was completely transparent. Mr. White, acting in good faith and with the assistance of SHCP's general counsel, entered into an arrangement with Rafferty that he, along with Rafferty, its personnel (including a lawyer) and compliance personnel, believed fully comported with securities laws. Mr. White believed that he was doing everything necessary to comply with securities laws.[2] Mr. White was acting in good faith relative to SHCP's arrangement with Rafferty.

C. SHCM had no trades and, therefore, could not have a net capital violation, an inaccurate trade blotter or an obligation to notify the SEC of an alleged net capital violation related to the Second Gramercy Trade.

Every witness that testified about the Second Gramercy Trade, from both Rafferty and SHCM, testified that the Second Gramercy Trade was a Rafferty trade and impacted Rafferty's net capital. Martens, from Rafferty, testified that every trade that Paul Tedeschi made was a

[2] Also, Mr. White, when he intended actually to conduct a broker-dealer business, created SHCM and hired Dechert, at great expense, to guide him through the broker-dealer registration process.

Rafferty trade. Tr.Tes. p. 1176, l. 8-16. Every trade that Paul Tedeschi made, or any other SHCP employee as a registered representative of Rafferty, was figured into Rafferty's net capital calculation from April of 2009 through the end of 2010. Tr.Tes. p. 1176, l. 17-24. Rafferty's net capital was calculated in connection with the Second Gramercy Trade. Tr.Tes. p. 769, l. 16-20. Rafferty's trade blotter shows that Rafferty purchased the Gramercy Bond in connection with the Second Gramercy Trade. Div. Ex. 181. Tedeschi testified that he bought the bond on behalf of Rafferty as a registered representative of Rafferty. Tr.Tes. p. 852, l. 17-21. Patrick Quinn, the FINOP at SHCM, testified that Mr. Tedeschi executed the Second Gramercy Trade on behalf of Rafferty and that any impact on net capital would have been Rafferty's net capital. P. 933, lines 2-13.

The only witness who testified that it was a SHCM's trade was the Commission's expert, Yui Chan ("Chan"), who failed to consider, or simply completely ignored, relevant documents and testimony of all parties involved in the trade that prove, beyond doubt, that the Second Gramercy Trade was a Rafferty trade. Chan did admit that Tedeschi, a registered representative of Rafferty, had the authority to trade on behalf of Rafferty. Tr.Tes. p. 999, l. 9-13. Chan, however, just simply decided to ignore that fact because it was inconvenient with his theory of the case as presented to him by the Commission. Indeed, Chan had no idea that Mr. Tedeschi testified that he bought the Gramercy bond on behalf of Rafferty. Tr.Tes. p.1000, l. 4-8.

Chan acknowledged that Rafferty's bank account statements prove that Rafferty purchased the Gramercy bond for 70.75. Tr.Tes. p. 1003, l. 3-9; Resp. Ex. 108. Chan also acknowledged that other Rafferty documents in evidence prove that Rafferty purchased the Gramercy bond. Resp. Ex. 112; Tr.Tes. p. 1004, l. 4-8.

Indeed Rafferty already stipulated to the Second Gramercy Trade as a Rafferty trade. Rafferty stipulated to the books and records violation for the Second Gramercy trade in its settlement with the Commission. See OIP related to Rafferty dated May 15, 2014 at 14 and 15. Thus, Rafferty admitted that the Second Gramercy Trade was a Rafferty trade (and was inaccurately listed on its trade blotter), not a SHCM's trade. As such, the Commission is judicially estopped from asserting now that the trade was a SHCM's trade and should have been kept accurately on SHCM's books and records.

SHCM cannot be held liable for a net capital violation for a bond it did not buy, an inaccurate trade blotter for a trade it did not make or a failure to notify the SEC about a non-existent net capital violation. Even the Commission's expert, Chan, had to acknowledge that if SHCM did not purchase the Gramercy bond, then SHCM did not violate net capital rules. Tr.Tes. p. 994, l. 8-12.

D. SHCP was prejudged.

On May 15, 2014, the SEC instituted administrative proceedings against Rafferty. In its Order settling the proceedings, the Commission made several definitive statements about the Respondents that prove that the Commission has already decided--in advance of any administrative hearing involving the Respondents--that the Respondents violated securities laws.[3]

For example, the Commission has decided that SHCP's business relationship with Rafferty resulted in "unregistered broker-deal activity by an unregistered entity." *See* Order at para. 1. With respect to specific trades that are currently the focus of the SEC's OIP, the

[3] The Commission refers to Spring Hill as "Company A" but there is no dispute that the Commission is referring to Spring Hill.

Commission already concluded that SHCP's employee "was able to conceal two trades from Rafferty, which caused Rafferty's books and records to be inaccurate" and that the employee "purposefully delayed submitting tickets for the two purchases to Rafferty." *See* Order at para. 14 and 4. The Commission also decided that SHCP "despite the lack of registration...held itself out as a broker-dealer." *See* Order at para. 11.

On the same day it instituted administrative proceedings against Rafferty, the Commission issued a press release entitled "SEC Charges Rafferty Capital Markets with Illegally Facilitating Trades for Unregistered Firm." In that press release, the Commission made crystal clear that is has decided that Rafferty was "illegally facilitating trades for [Spring Hill] that wasn't registered as a broker-dealer as required under the federal securities laws." In that press release, Andrew M. Calamari--the director of the SEC's New York Regional Office--concluded as follows:

> Rafferty Capital Markets lent out its systems to **a firm that tried to sidestep the broker-dealer registration provisions.** These provisions require those involved in trading securities to adhere to the proper regulatory framework, and registrants like Rafferty must face the consequences if they fail to think carefully and **help unregistered firms avoid the rules.** (emphasis added).

"Under the due process clauses of the Fifth and Fourteenth Amendments, parties and the public are entitled to tribunals free of personal bias." *MFS Securities Corp. v. SEC*, 380 F.3d 611, 617 (2nd Cir. 2004); *citing In re Murchison,* 349 U.S. 133, 136 (1955); *see also Chew v. Dietrich,* 143 F.3d 24, 28 n. 4 (2d Cir.) (observing that the due process clauses of the Fifth and Fourteenth Amendments create equivalent requirements for most purposes), *cert. denied,* 525 U.S. 948 (1998). "This requirement is applicable to administrative agencies such as the

Commission in much the same way as it is applicable to courts." *Id.* at 617-618. The US Supreme Court has succinctly described the requirements of due process:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.

In re Murchison, 349 U.S. at 136.

The US Supreme Court has demanded not only a fair proceeding, but also that "justice must satisfy the appearance of justice." *Id.* Thus, as the court stated in *Amos Treat & Co.*:

> an administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.

306 F.2d at 267.

In *Antoniu*, a Commissioner at the SEC--in a speech prior to an administrative hearing--expressed his opinion as to Mr. Antoniu's guilt and punishment. *Antoniu*, 877 F.2d at 723. As a result, the court found that the Commissioner's pre-hearing statements "can only be interpreted as a prejudgment of the issue." *Id.* Consequently, the court held that the Commissioner " 'in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Id.* at 726; *quoting Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2nd Cir. 1959). Because of the Commissioner's pre-hearing statements prejudging the case, the court nullified the result of the administrative hearing that was eventually conducted. Id.

Likewise, in *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C.Cir.1964) *vacated on other grounds*, the Chairman of the FTC, while administrative proceedings were pending against Texaco for alleged violations of the FTC Act, gave a speech in which he stated that Texaco had violated the Act. *Texaco, Inc.* 336 F.2d at 760. As a result of the Chairman's speech, the court

found that the Chairman "had in some measure decided in advance that Texaco had violated the Act" and, consequently, the court invalidated the FTC's order because of the Chairman's prejudging of the case against Texaco, and his later participation in the case, was a denial of due process. *Id.* at 761.

In *Gilligan*, the court was highly critical of the SEC's behavior in issuing a press release before the conclusion of administrative proceedings stating in effect that Gilligan, Will & Co. had violated the Act. 267 F.2d at 468-469. The court stated that "[t]he Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it..." *Id.*

In this case, it is clear that the Commission has already decided that SHCP violated securities laws through its relationship with Rafferty. Consequently, it is not possible for the Respondents to obtain a fair and meaningful administrative hearing before the Commission. Thus, any administrative proceeding before the Commission would be a violation of due process.

E. The Administrative Process is unconstitutional as the ALJ's appointments violate the Appointments Clause of Art. II of the United States Constitution.

The Appointments Clause provides as follows:

> [The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., art. II, sec. 2, cl. 2 (emphasis added).

In *Free Enterprise*, the Supreme Court ruled that for purposes of the Appointments Clause, the Commission is a "Department" of the United States, and that the Commissioners collectively function as the "Head" of the Department with authority to appoint "inferior Officers." 561 U.S. at 511-13. The Commission's use of SEC ALJs violates the Appointments Clause. It bears emphasis that these defects are specific to SEC ALJs. For example, Immigration Court administrative judges are appointed by the Attorney General (the "Head" of the Department of Justice, for Article II purposes), as required by the Appointments Clause. *See* 8 C.F.R. § 1003.10.

It also bears emphasis that in other cases challenging the status of SEC ALJs under Article II, the SEC has never claimed the Commissioners appoint ALJs. Rather, the Commission has argued only that SEC ALJs are mere employees rather than "inferior Officers" subject to Art. II appointment and tenure protection rules. *SEC v. Duka*, No. 15 Civ. 00357 (Doc. 13), at 11-12 (Jan. 28, 2015). In fact, on May 11, 2015, the SEC has conceded during the hearing on the application for a preliminary injunction in *Tilton v. SEC* that SEC ALJ Foelak was not appointed by the Commissioners. *See* Goloboy Declaration at Exhibit 4 at pp. 25:22—26:3 ("[W]e acknowledge that the commissioners were not the ones who appointed, in this case Judge Foelk [sic]"). Thus, the decisive constitutional question in this case is whether SEC ALJs are "inferior Officers" under Article II. As described below, Spring Hill is likely to succeed on this decisive question.[4] Further, at the *Tilton* preliminary injunction hearing in *Tilton* the SEC conceded, "We acknowledge, that, your Honor, if this Court were to find ALJ Foelk [sic] to be an inferior

[4] Judge Rudolph Randa of the Eastern District of Wisconsin dismissed a complaint raising an Article II challenge (among other constitutional challenges) for lack of jurisdiction, despite "find[ing] that [Plaintiff]'s claims are compelling and meritorious." *Bebo v. SEC*, No. 15-C-3, 2015 WL 905349, at *2 (E.D. Wis. Mar. 3, 2015).

officer, that that would make it more likely that the plaintiffs can succeed on the merits of the Article II challenge, at least with respect to the appointments clause challenge." *Id.* at 29:10-17.

1. The Broad Powers Exercised by SEC ALJs

In determining whether administrative officers qualify as "inferior Officers" subject to the restrictions imposed by Article II, courts have repeatedly quoted the general rule formulated by the Supreme Court in *Buckley v. Valeo*: that "[a]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' . . . ." 424 U.S. 1, 126 (1976).

The Commission's own description of the role played by its ALJs in administrative proceedings easily satisfies this test, illustrating the broad range and scope of responsibilities of an SEC ALJ:

> Administrative Law Judges are independent judicial officers who in most cases conduct hearings and rule on allegations of securities law violations initiated by the Commission's Division of Enforcement. They conduct public hearings at locations throughout the United States in a manner similar to non-jury trials in the federal district courts. Among other actions, they issue subpoenas, conduct prehearing conferences, issue defaults, and rule on motions and the admissibility of evidence. At the conclusion of the public hearing, the parties submit proposed findings of fact and conclusions of law. The Administrative Law Judge prepares an Initial Decision that includes factual findings, legal conclusions, and, where appropriate, orders relief.
>
> The Commission may seek a variety of sanctions through the administrative proceeding process. An Administrative Law Judge may order sanctions that include suspending or revoking the registrations of registered securities, as well as the registrations of brokers, dealers, investment companies, investment advisers, municipal securities dealers, municipal advisors, transfer agents, and nationally recognized statistical rating organizations. In addition, Commission Administrative Law Judges can order disgorgement of ill-gotten gains, civil penalties, censures, and cease-and-desist orders against these entities, as well as individuals, and can suspend or bar persons from association with these entities or from participating in an offering of a penny stock.

See S.E.C., Office of Administrative Law Judges, About the Office, *available at* www.sec.gov/alj (emphasis added).

2. *SEC ALJs are Indistinguishable from Other Judges Who Are Deemed "Officers"*

The SEC ALJs at issue in this case are indistinguishable from Officers described by the Supreme Court in *Freytag* when it determined that the special trial judges appointed by the Tax Court in that case qualified as inferior Officers. First, the Supreme Court in *Freytag* found that "the office of special trial judge is established by law. . . ." 501 U.S. at 881 (quotation marks and citations omitted). The position of an SEC ALJ is similarly established by law. *See* 5 U.S.C. § 556; 15 U.S.C. § 78d-1.[5] Next, *Freytag* found that "the duties, salary, and means of appointment for [special trial judges] are specified by statute. 501 U.S. at 881 (citations omitted). Again, the same is true for SEC ALJs. *See* 5 U.S.C. §§ 556(c), 557 (setting forth responsibilities and powers of administrative law judges under the Administrative Procedure Act); 5 U.S.C. §§ 5311, 5372 (governing the salaries available to administrative law judges); 5 U.S.C. § 3105 (governing the appointment of administrative law judges by federal agencies).

Regarding the responsibilities performed by special trial judges, the Supreme Court found that they were authorized to take sworn testimony. 501 U.S. at 881. SEC ALJs can also take testimony. *See* 5 U.S.C. §§ 556(c)(1), (4). The Supreme Court found that the special trial judges could conduct trials. 501 U.S. at 881-82. The same is true of SEC ALJs, *see* 17 CFR § 201.111, and the Commission itself compares the hearings conducted by its ALJs to "non-jury trials in the federal district courts." *See supra* at 15. The Court in *Freytag* found that special trial judges were authorized to rule on the admissibility of evidence, 501 U.S. at 881-82, as are SEC ALJs.

---

[5] Further, in addition to the factors identified in *Freytag,* Section 21 of the Securities Act of 1933 strictly limited who may preside at an SEC hearing, "All hearings shall be public and may be held before the Commission *or an officer of officers* of the Commission designated by it..." 15 U.S.C. §77u (emphasis added). In sum, since 1933, Congress and the Commission have used the word "officer" to denote who must preside at an SEC hearing in the absence of the Commissioners. This is because the SEC ALJ's perform a function otherwise reserved exclusively for the Commissioners.

17 CFR § 201.320. Finally, the Supreme Court found that special trial judges had "the power to enforce compliance with discovery orders." 501 U.S. at 881-82. Similarly, SEC ALJs have the authority to oversee discovery efforts, 17 CFR § 201.230; to issue, quash or modify subpoenas, 17 CFR § 201.232; and to oversee depositions, 17 CFR § 201.233. In short, ALJs are indistinguishable, for purposes of the Appointments Clause, from the judges found to be Officers in *Freytag*. *See SEC v. Duka*, No. 15 Civ. 00357 (Doc. 33), at 16 (April 15, 2015) ("The Supreme Court's decision in *Freytag* . . . would appear to support the conclusion that SEC ALJs are also inferior officers.")

In a trilogy of cases involving the constitutional status of military tribunals, the Supreme Court likewise has treated adjudicative officers as "Officers" for purposes of Article II, and the question addressed by the Court in such cases is frequently whether those officers are principal officers requiring direct Presidential appointment with the advice and consent of the Senate, or if they are inferior Officers subject to less stringent appointment restrictions. *See, e.g.*, *Weiss v. United States*, 510 U.S. 163, 169 (1994) ("[t]he parties do not dispute that military judges, because of the authority and responsibilities they possess, act as "Officers" of the United States") (citing *Freytag*, 501 U.S. 868; *Buckley*, 424 U.S. at 126); *Edmond v. United States*, 520 U.S. 651, 661-63 (1997) (evaluating whether military judges qualify as "principal" or "inferior" officers for purposes of Article II); *Ryder v. United States*, 515 U.S. 177, 180 (1995) (acknowledging lower court's determination "that appellate military judges are inferior officers").

3. The Finality of SEC ALJ Decisions

The "significant authority" exercised by SEC ALJs over the matters assigned to them is further augmented by the fact that they are able to issue findings and orders that become final, without the requirement of any further review by the Commission itself. Under the relevant

provisions of the APA, an SEC ALJ is authorized to issue an "initial decision" that "becomes the decision of [the Commission] without further proceedings" unless the Commission affirmatively decides to review the decision in question and take action. 5 U.S.C. § 557(b). The SEC's Rules of Practice also provide that the Commission is not required to review an initial decision issued by an SEC ALJ, and that if the Commission declines to do so, the initial decision will be promulgated by the Commission as a final decision. 17 CFR § 201.360(d)(1), 17 CFR § 201.410, 17 CFR § 201.411. Once this process is complete, the federal securities laws provide that "the action of the . . . administrative law judge . . . shall, for all purposes, including appeal or review therefore, be deemed the action of the Commission." 15 U.S.C. § 78d-1(c). Given the practical realities of litigation in front of SEC ALJs — in which the majority of initial decisions issued by SEC ALJs become final decisions without additional review by the Commission — this structure grants additional plenary powers to SEC ALJs beyond those described above.

The SEC has argued in other cases that SEC ALJs are not inferior Officers subject to Article II because the decisions they issue are "only preliminary" because they are subject to further review by the Commission. *See, e.g.*, *Duka*, No. 15 Civ. 00357 (Doc. 13), at 13. But this argument ignores the fact that, as discussed, ALJ decisions can become final without further review. In any event, the Supreme Court squarely rejected this same argument in *Freytag*: "The Commissioner reasons that special trial judges may be deemed employees . . . because they lack authority to enter a final decision. *But this argument ignores the significance of the duties and discretion that special trial judges possess*." 501 U.S. at 881 (emphasis added).

The SEC has in other cases sought to avoid *Freytag* by citing to *Landry v. F.D.I.C.*, 204 F.3d 1125 (D.C. Cir. 2000), in which the D.C. Circuit held that FDIC ALJs were not officers subject to Article II. But the court in *Landry* distinguished *Freytag* based on two special factors

peculiar to the FDIC regulatory regime, neither of which is present in this case. First, the court in *Landry* held that the "Tax Court [in *Freytag*] was required to defer to the STJ's factual and credibility findings unless they were clearly erroneous, . . . whereas here the FDIC Board makes its own factual findings" (i.e., conducts *de novo* review). 204 F.3d at 1133. Here, the Commission reviews factual findings for clear error, 17 CFR § 201.411(a)(2)(ii)(A), and thus this case falls squarely within *Freytag* and outside *Landry*. Second, the court in *Landry* found that "the STJs' power of final decision in certain classes of cases was critical to the [Supreme] Court's decision" in *Freytag*, and emphasized that the FDIC ALJ's could "never render the decision of the FDIC." 204 F.3d at 1134. But here the Commission's review of ALJs decisions is purely discretionary, and, absent the Commission's affirmative decision to review, are "deemed the action of the Commission." 15 U.S.C. § 78d-1(c); *cf.* 12 C.F.R. § 308.40 (contemplating mandatory, not discretionary, FDIC review). Thus, again, the facts here fall within *Freytag*, not *Landry*.

To the extent the Court reads *Landry* more broadly, it is inconsistent with *Freytag*, as D.C. Circuit Judge Randolph explained in his powerful concurrence, 204 F.3d at 1140-44 (Randolph, J., concurring). A broader reading of *Landry* is also inconsistent with binding precedent in this Circuit. *Samuels, Kramer & Co. v. Comm'r*, 930 F.2d 975, 985-86 (2d Cir. 1991) (holding that the special trial judges are Article II officers without any reference to their ability to make final decisions). Finally, such a reading is inconsistent with guidance released by the Office of Legal Counsel for the Department of Justice, which has stated that "independent discretion is not a necessary attribute of delegated sovereign authority." Office of Legal Counsel, *Officers of the United States Within the Meaning of the Appointments Clause* (Apr. 16,

2007) (quotation marks omitted).[6] The Court should not adopt an interpretation of *Landry* that is inconsistent with Supreme Court precedent, Second Circuit precedent, and Executive Branch guidance.[7]

F. An industry bar for Kevin White is not appropriate

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 now works for Nomura), testifed 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 instatnce 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 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

---

[6] http://www.justice.gov/sites/default/files/olc/opinions/2007/04/31/appointmentsclausev10.pdf

[7] Notably, the Supreme Court explicitly declined to endorse the holding in *Landry* in a footnote to its decision in *Free Enterprise*, 561 U.S. at 507 n.10, while the dissenters flatly rejected the conclusions of the D.C. Circuit in that case. 561 U.S. at 542 (Breyer, J., dissenting) (quoting Justice Scalia's concurrence in *Freytag*, 501 U.S. at 878, finding that "[administrative law judges] are all executive officers.")

> 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).

Mr. White was acting in good faith relative to SHCP's arrangement with Rafferty. He 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 has been extremely cooperative with the Commission throughout the investigation as he has been deposed twice and has provided every document that the Commission has 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.

G. Remedies against SHCM and SHCP

The Commission's proposed remedy that SHCM disgorge its profits of $414,375 from the Second Gramercy Trade is inappropriate. The Commission does not, and cannot, allege that

SHCM engaged in any fraud, insider trading or the like that customarily results in the equitable remedy of disgorgement.[8] *See e.g. SEC v. Blackwell*, 477 F.Supp. 891, 914 (S.D.Ohio.2007). Instead, the Commission is seeking disgorgement solely because SHCM allegedly submitted the trading ticket on the Second Gramercy Trade to Rafferty one day late resulting in a minor books and records violation of Rafferty.

Disgorgement is an equitable remedy that Court's employ to deprive a "wrongdoer of his ill-gotten gain." *SEC v. ETS Payphone, Inc.,* 408 F.3d 727, 734 n. 6, 735 (11th Cir. 2005); *see also SEC v. Blatt,* 583 F.2d 1325, 1335 (5th Cir.) ("Because disgorgement is remedial and not punitive, a court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing."). The purpose of disgorgement is to ensure that defendants are not unjustly enriched through their illegal trading activities. *See, e.g., SEC v. Blavin*, 760 F.2d 706, 710 (6th Cir.1985*); SEC v. Washington County Util. Dist.*, 676 F.2d 218, 222 (6th Cir.1982); *SEC v. Freeman*, 290 F.Supp.2d 401, 406 (S.D.N.Y.2003). Consequently, "federal courts have routinely ordered disgorgement of insider trading profits to ensure that defendants are not unjustly enriched by their illegal actions." *SEC v. Blackwell*, 477 F.Supp. at 891.

Most importantly, the amount of the any disgorgement must be causally connected to the violation. *SEC v. First City Financial Corp. Ltd.,* 800 F.2d 1215, 1231 (D.C. Cir 1989); *SEC v. Inorganic Recycling Corp.,* 2002 WL 1968341, *2 (S.D.N.Y. Aug. 23, 2002)(amount of disgorgement needs to be causally connected to the violation). To be causally connected, the precise securities law violation must directly result in the trading profits realized. *See e.g. CFTC*

[8] Once again, the Commission's proposal of Tier 1 penalties confirms that the Commission does not believe that SHCM's engaged in fraudulent conduct.

v. Hunt, 591 F.2d 12, 1222-23 (7th Cir. 1979)(defendants can be ordered to disgorge profits from trades in soybean future contracts, that exceeded the limit that the CFTC set for such trades, because any profits from those prohibited trades were a direct result of the violation)[9]; *CFTC v. Co Petro Marketing, Group, Inc.*, 502 F. Supp. 806, 819 (C.D.Cal 1980)(defendant can be ordered to disgorge profits from trades in gasoline futures that were prohibited because such trades were not made through authorized boards of trade and any profits from those prohibited trades were a direct result of the violation); *SEC v. Alpha Telecom, Inc.*, 187 F.Supp.2d 1250, 1262-63 (D. Ore. 2002)(defendant can be ordered to disgorge profits from the sale of unregistered securities because any profits from those prohibited trades were a direct result of the violation); *SEC v. Friendly Power Co.,* 49 F. Supp.2d 1363, 1372-73 (S.D. Fla. 1999)(same); *SEC v. Blackwell*, 477 F.Supp. at 914 (profits derived from insider trading must be disgorged).

A court is not required to order disgorgement, rather, "in the exercise of its equity powers a court *may* order disgorgement of *profits acquired through securities fraud.*" *SEC v. Patel*, 61 F.3d 137, 139 (2nd Cir.1995) (emphasis added); *see also SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474-75 (2nd Cir.1996) ("The district court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged."). Nonetheless, 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). Consequently, courts cannot order the disgorgement of legitimate profits.

There is absolutely no causal connection between SHCM's trading profits on the Second Gramercy Trade and the alleged books and records violation. SHCM's profits from the Second

[9] In considering the equitable remedy of disgorgement in SEC actions, Court's often look to both cases involving the CFTC and the SEC in interpreting whether disgorgement is appropriate as the legal principals involved are nearly identical.

Gramercy Trade were the direct result of legitimate trades. SHCM's profit on the Second Gramercy would have been exactly the same whether the trade ticket was submitted to Rafferty on the March 16th or March 17th.[10] Because SHCM's profit on the Second Gramercy Trade was the result of a legitimate trade, disgorgement is not appropriate. Instead, the civil penalties that the Commission is proposing is the only appropriate remedy.

SHCP has not had active business activity since the commencement of SHCM's operations on approximately March 4, 2010. See Stipulation dated May 6, 2015, at 4. As such, SHCP does not have any funds to disgorge. To the extent that disgorgement is warranted, only the net income received by SHCP should be disgorged (not gross trading revenues) as a significant amount of the trading revenue was used to pay legitimate business expenses and was paid directly to registered representatives of Rafferty (which even the Commission does not argue was inappropriate).

IV. Conclusion

SHCP should not be found liable for violating Section 15(a) as that claim is time barred. Even if the 15(a) claim is not time barred, SHCP did not violate section 15(a) as the receipt of transaction based compensation is not enough to require registration. Mr. White did not aid and abet SHCP's alleged 15(a) violation as he had a very minimal role in the arrangement with Rafferty and the day-to-day activities of SHCP's business as he was focused on business generation. SHCM did not purchase the Gramercy Bond, Rafferty purchased it, and thus SHCM

[10] This analysis is true even if it is determined that the trade between SHCM and Barclays occurred on March 12th or 15th, 2013 because the date of the trade had no impact whatsoever on the amount of the profits derived from the Second Gramercy Trade.

could not have a net capital violation, inaccurate trade blotter or an obligation to inform the SEC for a trade it did not enter into.

Respectfully Submitted,

SPRING HILL CAPITAL PARTNERS, LLC,
SPRING HILL CAPITAL MARKETS, L.L.C. and
KEVIN WHITE,

By Their Attorneys,

/s/ Ronald W. Dunbar, Jr.

Ronald W. Dunbar, Jr.
Andrew E. Goloboy
Dunbar Law P.C.
197 Portland Street, 5th Floor
Boston, MA 02114
(617) 244-3550 (telephone)
(617) 248-9751 (facsimile)
dunbar@dunbarlawpc.com
goloboy@dunbarlawpc.com

Dated: June 26, 2015