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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)	
	)	**ADMINISTRATIVE PROCEEDING**
JOHN P. FLANNERY	)	**File No. 3-14081**
AND JAMES D. HOPKINS	)	
	)	
Respondents.	)	
	)	

RESPONDENT JAMES D. HOPKINS' PRE-TRIAL BRIEF

Respondent James D. Hopkins respectfully submits this pre-trial memorandum summarizing the relevant legal standards and the story the evidence will tell at trial. In short, contrary to the Division of Enforcement's ("Division") charge that Mr. Hopkins, as a product engineer, engaged in a course of business intending to defraud State Street Global Advisors' ("SSgA") investors, the admissible evidence actually limns the opposite conclusion. Specifically, the documentary evidence will demonstrate that Mr. Hopkins faithfully and immediately responded to all client requests for information (usually through the client-facing person), affirmatively pushed out information whenever directed to do so by the investment team or others, and diligently and proactively retrieved current investment information from the investment team. Witness testimony will establish that Mr. Hopkins was viewed both internally, and by clients, as performing his designated role expertly and with the highest character, integrity and professionalism. Because of his reputation for candor and credibility, Mr. Hopkins was asked to respond to client requests for updates during the July-August 2007 timeframe when liquidity in the subprime market seized and the value of SSgA's funds declined precipitously. The Division will not be able to present evidence that Mr. Hopkins had any motivation –

monetary or otherwise – to mislead investors, that he *ever* refused to provide them with information that was available to him, or that he was instructed by anyone else at SSgA to do anything that would be detrimental to a client's interests.

I. BRIEF NARRATIVE OF THE CASE

A. Limited Duration Bond Fund

In 2002, State Street Global Advisors ("SSgA") established two essentially identical funds that were together referred to as Limited Duration Bond Fund ("LDBF" or the "Fund"). As described in its fact sheet, LDBF was an active fixed income fund that could invest in a variety of securities including collateralized mortgage obligations, adjustable rate mortgages, fixed rate mortgages, corporate bonds, asset backed securities, futures, options, and swaps. Since its inception, LDBF was considered a relatively low risk fund because the vast majority of the securities held by the fund were of a very high credit quality (mostly "AAA" or "AA") and the fund had no interest rate risk. Significantly, prior to the subprime crisis that played out in the late summer and early fall of 2007, no one internal or external to SSgA questioned the credit worthiness and stability of these high quality asset backed securities (securities which were both prime and subprime).

Then, in the summer of 2007, an unprecedented liquidity crisis rattled the markets due to the unanticipated collapse of the residential mortgage markets, and SSgA's funds (in tandem with the market sector as a whole) experienced dramatic underperformance. During this period, those high quality subprime asset backed securities which were viewed by the marketplace to carry little risk, suffered significant volatility and underperformance. As the markets seized up in July and August, SSgA devoted extensive time and resources to regularly communicating with its clients regarding the ongoing and unanticipated events in the market and the effect the unprecedented conditions were having on LDBF. This effort and these communications were spearheaded by SSgA's portfolio managers, legal department, and executives, and all information about LDBF, its exposures and its performance, was carefully monitored and controlled by these departments. Mr. Hopkins' role during this period was to take direction from all of these departments and communicate the information to clients in the most efficient and transparent manner possible.

B. Mr. Hopkins' Role As A Product Engineer

During the relevant time period, Mr. Hopkins was employed at SSgA as a fixed income product engineer, a mid-level employment position in the fixed income space. As a product engineer, Mr. Hopkins' primary role was to facilitate the distribution of information to client-facing personnel and, in turn, to clients. As such, he served as a conduit between the portfolio managers and the client-facing personnel. On a day-to-day basis, he answered questions from SSgA's client relationship managers and kept them apprised of the status of the fixed income funds he was responsible for, including LDBF. Thus, as a product engineer, Mr. Hopkins managed neither clients, nor funds, and there were many aspects of the business that Mr. Hopkins did not control or have the authority to change. Notably, Mr. Hopkins (a) did not have input into investment decisions or have a portfolio manager's knowledge of or perspective into any fund's strategies; (b) did not control the use or distribution of marketing materials; (c) lacked authority to intervene in, or direct client relationships and trading decisions; and (d) did not have authority to dictate what all of SSgA's written communications to clients should or should not include.

C. Specific Charges Against Mr. Hopkins

The specific charges against Mr. Hopkins revolve around four documents: (1) fact sheets used to introduce investors to the Fund; (2) a single standard PowerPoint slide that was contained in some investor presentations ("typical slide"); (3) letters that State Street – not Mr. Hopkins – sent to certain investors in March and April 2007, explaining the reasons for the Fund's recent underperformance; and (4) another letter that State Street – again, not Mr. Hopkins – sent to some investors in late July 2007. The Division alleges that the fact sheets and presentation slides contained affirmative misstatements about the Fund, and that the letters, while truthful in content, omitted additional information that was needed in order to make the letters not misleading. The Division claims that Mr. Hopkins is liable as a primary violator for these statements and omissions because he "used or was responsible for drafting and/or updating" the fact sheets and the typical slide, and because he played some role in drafting the letters. However, the Division cannot show that Mr. Hopkins acted with the requisite state of mind and the documents the Division criticizes aren't materially misleading whether viewed in isolation or in the context of the other information provided to clients. In whole, the Division's allegations fail to state a claim for a violation of Section 10(b) or Section 17(a) under controlling precedent.

II. LEGAL STANDARDS

Mr. Hopkins is charged with violating the following securities laws:

- Section 17(a)(1) of the Securities Act, which makes it unlawful to "employ any device scheme or artifice to defraud." 15 U.S.C. § 77q(a)(1);
- Section 17(a)(2) of the Securities Act, which makes it unlawful "to obtain money or property by means of any untrue statement of a material fact or any omission to state a

material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 15 U.S.C. § 77q(a)(2);

- Section 17(a)(3) of the Securities Act, which makes it unlawful to "engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchases." 15 U.S.C. § 77q(a)(3).
- Section 10(b) of the Exchange Act and Rule 10b-5(b) promulgated thereunder, which make it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b).

In addition to the affirmative defenses pleaded in his answer, Mr. Hopkins will rely upon the following legal theories:

A. <u>Section 10(b) and Rule 10b-5(b) and Section 17(a)(1)</u>

To prove a violation under Section 10(b) and Rule 10b-5(b), the Division must prove that Mr. Hopkins made a material misstatement or omitted a material fact in connection with the purchase or sale of a security and acted with the requisite scienter. *SEC v. Tambone,* 417 F. Supp. 2d 127, 131-35 (D. Mass. 2006) ("*Tambone I*"). Section 17(a)(1) requires the same proof that Mr. Hopkins made or omitted a material statement and acted with scienter. *SEC v. Rocklage*, 470 F.3d 1, 5 n. 1 (1st Cir. 2006). As described herein, the Division will not be able to demonstrate evidence that will support a violation of Section 10(b), Rule 10b-5 or Section 17(a)(1).

1. <u>Scienter</u>: To prove scienter under Section 10(b), Rule 10b-5 and Section 17(a)(1), the Division must show that Mr. Hopkins "consciously intended to defraud" or acted with a

"high degree of recklessness." *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 82 (1st Cir. 2002), *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Recklessness requires "a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *SEC v. Fife*, 311 F.3d 1, 9-10 (1st Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003) (internal alteration and citation omitted); *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 198-99 (1st Cir. 1999) (holding that recklessness is closer to being a lesser form of intent than a greater degree of negligence). The evidence will clearly show that in no way did Mr. Hopkins consciously defraud anyone, nor did any of his actions rise to the level of negligence, much less recklessness.

Moreover, with regards to his involvement in the drafting of the July 26, 2007 letter to clients, Mr. Hopkins knew that SSgA's legal counsel was intimately involved in the editing, drafting, and review of the letter, and he and others relied on their counsel in good faith. Reliance on the advice of counsel is evidence of good faith to be considered in evaluating a respondent's scienter. *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004) (citing *Bisno v. U.S.*, 299 F.2d 711, 719 (9th Cir. 1961)). Showing reliance on counsel's advice is "a means of demonstrating good faith and represents possible evidence of an absence of any intent to defraud." *SEC v. Snyder*, 292 Fed. Appx. 391, 406 (5th Cir. 2008) (quoting *U.S. v. Peterson*, 101 F.3d 375, 381 (5th Cir. 1996)); *see also Steed Finance v. Nomura Securities Intern., Inc.*, 148 Fed. Appx. 66, 69 (2d Cir. 2005) (affirming summary judgment on § 10(b) claim for defendant on scienter and other grounds where defendant provided evidence of reliance on counsel in determining how to represent nature of securities). Mr. Hopkins' good faith reliance on counsel with respect to the July 26th Letter further negates a finding of scienter.

2. <u>Made a Statement or Omitted a Fact</u>

A primary violation of Rule 10b-5(b) requires that one actually *make* a misleading statement of material fact or omit a fact that he was obligated to disclose. *SEC v. Tambone*, 597 F.3d 436, 447 (1st Cir. 2010) (en banc) ("*Tambone II*"). The en banc panel in *Tambone II* agreed with the Second Circuit that "[i]f *Central Bank* is to have any real meaning, a defendant must *actually make* a false or misleading statement in order to be held liable [as a primary violator] under section 10(b). Anything short of such conduct is merely aiding and abetting." *Id.* (quoting *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997)) (emphasis added). With regard to the documents that the Division claims contain material misstatements (fact sheets and typical slide), it will not be able to prove that Mr. Hopkins actually *made* any of those statements. In short, the evidence will show: (1) that the fact sheets were created and approved in 2002, several years before Mr. Hopkins became the LDBF product engineer, and (2) that Mr. Hopkins did not send, make or use the typical slide on the *one* occasion the Division claims he did. With regard to the alleged "omissions" contained in the fact sheets and letters, Mr. Hopkins cannot, as a matter of law, be primarily liable because there is no evidence that Mr. Hopkins in any way "caus[ed] the existence" of those omissions, nor is there any evidence that Mr. Hopkins "made" those statements to investors. *Tambone II*, 597 F.3d at 447. The fact sheets and letters were not created by Hopkins nor did he "make" the statements by sending them to clients. *Id.*

3. <u>Statement or Ommission Must be Material</u>: To be actionable, an alleged misstatement or omission must relate to a material fact. A fact is said to be material if it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of

information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-42 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). The Division will not be able to establish that among the significant information the investors received (most of which was provided by the client-facing personnel), either the alleged misstatements (the typical slide and fact sheets) or any of the alleged subprime omissions in the letters would have been viewed by a reasonable investor to have altered the total mix of information at the relevant time for each of these allegations, i.e. in the first six months of 2007. Rather, the evidence will demonstrate that neither Mr. Hopkins *nor anyone else at SSgA* believed in the first half of 2007 that the general amount of "subprime" in LDBF was relevant to be disclosed to anyone, because there was no understanding that all of the various credit traunches of subprime were correlated, and thus were material or cause for concern.

B. <u>Section 17(a)(2)</u>

An individual commits an unlawful act under Section 17(a)(2) only if he has "obtain[ed] money or property" through an actionable statement or omission. 15 U.S.C. § 77(q)(a)(2). There will be no evidence, indeed there are no allegations, that Mr. Hopkins received any money or property as a result of any alleged misconduct. Because Mr. Hopkins' compensation was not tied in any way to the asset levels or success of LDBF, the Division will not be able to meet its evidentiary burden. *See SEC v. Forman*, Civ. A. No. 07-11151, 2010 WL 2367372 (D. Mass., June 9, 2010).

C. <u>Section 17(a)(3)</u>

The Division also cannot prove that Mr. Hopkins "engage[d] in any transaction, practice, or course of business which operate[d] or would operate as a fraud or deceit upon the purchaser." *See* 15 U.S.C. § 77q(a)(3). Like Rule 10b-5(c), the "alleged conduct must be more than a reiteration of the misrepresentations underlying the [§ 17(a)(2)] misstatement claims." *SEC v. Brown*, Civ. A. No. 09-1423, 2010 WL 3786563, at *18 (D. D.C. Sept. 27, 2010) (citing *SEC v. Lucent Techs., Inc.*, 610 F. Supp. 2d 342, 361 (D. N.J. 2009)). Moreover, as an alleged "material misstatement or omission" was the only possible "transaction, practice or course of business" that Mr. Hopkins could have engaged in, the Division must prove that Mr. Hopkins *made* a misstatement. *See SEC v. Espuelas*, 579 F. Supp. 2d 461, 471 n.6 (S.D.N.Y. 2008) ("The necessary elements to state a claim under Section 17(a)(3) are identical to those required under both Section 10(b) and 17(a)(1)" except for the required degree of scienter) (internal citation omitted); *SEC v. Todd*, No. 03 CV 2230, 2007 WL 1574756, at *1 (S.D. Cal. May 30, 2007) (§ 17(a)(3) requires that defendant negligently made material misrepresentations in the offer or sale of a security). Thus, for the same reasons already described, the Division will not be able to prove that Mr. Hopkins made a misstatement or omitted a material fact and, accordingly, will not be able to prove a § 17(a)(3) violation.

Respectfully Submitted,

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