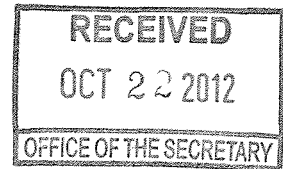


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



| | | |
|----------------------|---|----------------------------------|
| In the Matter of | : | |
| | : | |
| GREGORY BARTKO, ESQ. | : | PETITIONER'S BRIEF IN SUPPORT OF |
| | : | PETITION FOR REVIEW OF INITIAL |
| | : | DECISION |
| | : | |

I. Procedural History

The Securities and Exchange Commission ("Commission") issued its Order Instituting Administrative Proceedings ("OIP") on January 18, 2012 against respondent, Gregory Bartko ("Bartko"). The OIP is a "follow-on" proceeding following Bartko's criminal conviction on November 18, 2010 in the U.S. District Court for the Eastern District of North Carolina in the case of United States v. Gregory Bartko, Case No.: 5:09-CR-321-D. Bartko's Judgment of Conviction reflects that the jury found him guilty of one count of conspiracy; four counts of mail fraud; and one count of the sale of unregistered securities. Bartko has appealed his conviction to the Fourth Circuit Court of Appeals, which remains pending. Following the filing of this proceeding, Bartko filed his answer to the OIP, with an Exhibit A attached, on February 14, 2012 ("Answer"). The Hearing Officer conducted a pre-hearing conference on March 8, 2012. Thereafter on April 23, 2012, the Division filed a Motion for Summary Disposition and Memorandum of Law ("Motion for Summary Disposition). Bartko filed his Memorandum of Law in Response to the Division's Motion on May 9, 2012, which included Exhibits A through H ("Response"). The Initial Decision entered

in this proceeding on August 21, 2012 does not refer to Bartko's exhibits or the contents thereof. Nor does the Initial Decision refer to the exhibit attached to Bartko's Answer.

Following the March 8, 2012 pre-hearing conference, Bartko sought the production of documents from the Division pursuant to 17 C.F.R. 201.230 (hereinafter referred to as the "Rules"). The Division failed to respond to Bartko's request for production and the Hearing Officer never compelled the Division to produce any written material. Not one piece of paper. In fact, during the March 8, 2012 prehearing conference the Division's counsel represented that the only document contained in the Division's file in connection with this proceeding was the 120 -page order entered by Bartko's trial judge in the antecedent criminal case. Following the filing of the Division's Motion for Summary Disposition, Bartko also filed a Motion to Stay Proceedings. The Division failed to respond to that motion and the Hearing Officer has never addressed Bartko's motion.

Following the filing of the Initial Decision on August 21, 2012, Bartko timely filed a Petition for Review of the Initial Decision ("Petition"), which the Commission granted by order dated September 20, 2012. That order included a briefing schedule for review of the Initial Decision. Bartko submits this memorandum in further support of his request for review and for the relief sought in the Petition. Bartko's Petition raises several issues which are restated and fully briefed herein. For clarity of presentation, the issues are more succinctly framed to enable Bartko to address the legal and factual basis why the Initial Decision should be vacated. Bartko included various legal arguments in his Petition but due to the page limitations of the Rules merely refers to those arguments.

II. Factual Background Relevant to the Commission's Review

Bartko's Answer and Response sets forth factual information relevant for the Commission's review of the Initial Decision. Nevertheless, some additional background given here should aid in the Commission's review. The OIP was filed one day after the trial court in Bartko's criminal case entered a 120-page order denying Bartko's four new trial motions which became necessary after the prosecution admitted a series of Due Process violations seven months after Bartko's conviction. The lengthy order is dated January 17, 2012 and was the basis for the Division's Motion for Summary Disposition. For every stage of this proceeding, in every filing made by Bartko in opposition to the OIP, respondent has admitted the fact that he was indicted, tried by a jury over a three week period, and was convicted on November 18, 2010. After wrangling for over 16 months concerning the prosecutor's suppression of a series of exculpatory documents and information from Bartko's defense, the trial court sentenced Bartko on April 4, 2012 to a term of detention in the custody of the Bureau of Prisons for 276 months or 23 years. At 59 years of age, the trial court realistically gave Bartko a life sentence. At all times pertinent to Bartko's criminal case, he has steadfastly maintained his innocence and expressed his grave disappointment in the prosecution's improper tactics in permitting, and in fact sponsoring, materially false and misleading testimony presented at his trial by the government's primary witness, Bartko's former client. If this false and misleading testimony is exposed and the prosecutors' complicity in presenting it is revealed, Bartko's conviction cannot stand.

The events giving rise to the government's investigation and indictment of Bartko occurred between January 2004 and April, 2005. During that time period, Bartko was a practicing securities lawyer with an office located in Atlanta, Georgia. Coincidentally, for the 13 years prior to Bartko's indictment, his office was located in the same building as the Commission's Atlanta Regional Office. Bartko's securities

practice was a unique combination of a transactional and civil SEC litigation practice. Beginning in 2004, Bartko's practice attracted a national clientele seeking defense of SEC civil injunctive actions and administrative proceedings. Until his conviction, Bartko handled such cases with Division enforcement staff in virtually every regional office of the Commission. Based in Atlanta, Bartko most frequently interacted with enforcement staff located in the Atlanta office of the Commission.

In 1999, an opportunity arose for Bartko to purchase a controlling interest in a fully-registered broker-dealer, Capstone Partners, L.C. ("Capstone"). The purchase was consummated; Bartko became fully licensed through the NASD as a principal and served as the chief executive officer of Capstone; and the membership agreement with Capstone and the NASD was approved in due course in 1999. Capstone's NASD office of supervision was transferred from Salt Lake City, UT to Atlanta, GA.

Capstone's business model was limited to investment advisory services, private placement agent services and related investment banking functions. Between 1999 and his conviction, Capstone was subject to a number of routine NASD examinations without incident. One examination in 2004 did result in a letter of caution which arose from short term net capital violations. In 2008, Capstone registered as an investment adviser and Bartko then also became licensed as an investment adviser representative. As Bartko's investment banking activities blossomed and his reputation as an SEC defense lawyer thrived, Bartko partnered with an experienced private equity and finance professional from La Jolla, Ca. with a view towards developing a small private equity fund, the Caledonian Fund. Their joint efforts to develop this fund transpired between late 2003 until approximately November 2004, at which time a seed funding commitment to the Caledonian Fund was breached resulting in the need to wind down fund operations. Having seen the market demand for the type of bridge financing planned by the Caledonian

Fund, Bartko began the organization and development of a second small private equity fund, the Capstone Fund. Bartko's trial and conviction related to both funds.

Bartko was first admitted to the Bar in Michigan in July 1979 after receiving his juris doctor degree from the Detroit College of Law, which is now the Michigan State University School of Law. After ten years of practice, Bartko elected to return to law school and received his LL.M. degree in securities regulation from the Georgetown University Law Center in 1989. Bartko gained admission to the North Carolina Bar in 1988 and the Georgia Bar in 1996. During his more than 30 years of practice, he has had no disciplinary action until he was required to consent to the revocation of his licenses in all three states due to his felony convictions. Since his detention on November 18, 2010, Bartko has practiced no law; conducted no securities-related activities; processed a form BDW for Capstone; and pursued his exoneration from the wrongful conviction and detention he has been subjected to. Bartko answered and objected to the relief sought by the Division consisting of a lifetime associational bar because such a sanction would be premised on a criminal conviction based upon a plethora of government misconduct; misconduct perpetrated not only by his federal prosecutors, but misconduct perpetrated by the Division's own enforcement staff. The relevancy to this proceeding of such misconduct is not to collaterally attack Bartko's criminal conviction. Instead, the relevancy is to the public interest the Commission claims to protect and the reasonableness of any remedial sanctions against Bartko that may be imposed by the Commission in light of Bartko's conviction.

Finally, for purposes of mitigating considerations which the Hearing Officer failed to address in the Initial Decision, reference is made herein by Bartko to various docket entries in Bartko's criminal case cited above. On review of the Initial Decision, the Commission is permitted to take official notice of such

official public records pursuant to Rule 201.323. In particular, the initial indictment filed on November 4, 2009 (Doc. No. 1) and the superseding indictment filed on January 6, 2010 (Doc. No. 30) included allegations and certain objects of the conspiracy alleged in Count I relating to Bartko's obstruction of SEC proceedings and false statements to the SEC. Not until two days prior to trial did the government move to dismiss all charges against Bartko that included allegations of obstructing SEC proceedings. (Doc. Nos. 135 and 137). During the entire year between indictment and trial, Bartko was compelled to defend against SEC-related charges that were unfounded and ultimately dismissed.

III. Issues Upon Review of Initial Decision

A. The Commission Has No Statutory Authority to Sanction Bartko Under Section 203(f) of the Investment Adviser's Act.

The Initial Decision relied solely on Section 203(f) of the Adviser's Act as a proper statutory basis for the sanction imposed by the Hearing Officer (Initial Decision, Pg. 5, n.9). The Initial Decision includes no conclusions of law with respect to any statutory basis for the OIP under Section 15(b)(6)(A) of the Securities Exchange Act of 1934 ("Exchange Act"). In fact, it is clear in the government's indictment as well as the trial court's lengthy order of January 17, 2012, that Capstone (the registered broker-dealer controlled by Bartko) had no factual connection to the events described at Bartko's criminal trial. There was never any doubt that the Capstone Fund was held out to be separate and distinct from Capstone, the broker-dealer. In short, Section 15(b)(6)(A) of the Exchange Act is not a proper statutory basis for this proceeding. The Hearing Officer recognized this limitation by concluding that the sanction of a lifetime associational bar was authorized by Section 203(f) of the Adviser's Act. The problem with that conclusion of law is that it is not correct and this is clearly erroneous and should be set aside and vacated by the Commission.

The statutory language in 15 U.S.C. Section 80(b)-3(f) is clear. A sanction may be imposed by the Commission if "at the time of the alleged conduct, Bartko was associated or seeking to become associated with any investment advisor..." There is no dispute about or allegation that Bartko was a person associated, seeking to become associated or at the time of the alleged misconduct associated or seeking to become associated with an investment adviser. In support of this conclusion, the Initial Decision includes a finding that the jury heard no inculpatory evidence post-dating the year 2005. (Initial Decision, Pg. 8). Since Bartko was not associated with or seeking to become associated with, or, at the time of the alleged misconduct, associated with or seeking to become associated with an investment adviser, Section 203(f) of the Adviser's Act is likewise not a proper statutory basis for the imposition of sanctions imposed by the Initial Decision. On this jurisdictional basis alone, this proceeding should be dismissed.

The Hearing Officer's finding on that issue is clearly erroneous and should be vacated. See Gary M. Kornman, Release No. 335, 91 SEC Docket 2234, 2007 SEC LEXIS 2375 (October 9, 2007), aff'd at Kornman v. SEC, 592 F.3d 173 (D.C. Cir. 2010). Based upon matters contained in the public records of the Commission and Rule 201.323, Bartko was not associated with or intending to become associated with an investment adviser at any time during 2004-2005 or on the date this proceeding was instituted.

B. Summary Disposition Barring Bartko From Association With A Broker-Dealer or Investment Adviser Was Erroneous

Rule 201.250 allows a Hearing Officer to grant a summary disposition to a party to this proceeding only where there is "no genuine issue with regard to any material fact and the party making the motion is

entitled to summary disposition as a matter of law. 17 C.F.R. Section 201.250(b). The Rule also provides that, "the facts of the pleadings of the parties against whom the motion is made shall be taken as true, except....." See Section 201.250(a). The Commission modeled Rule 201.250 on Rule 56 of the Federal Rules of Civil Procedure. See Jeffrey L. Gibson, Rel. No. 57266, 92 SEC Docket 2104 at 2112, 2008 SEC LEXIS 236, *22 n.26 (February 4, 2008). This means that the standard which must be met to grant summary disposition to the Division is clear and unambiguous. But, the error made in the Initial Decision in granting the Division relief was that although the Hearing Officer recites the conclusions that the factual allegations in Bartko's Answer were taken as true, in reality and by practical effect, that finding was hollow and carried no meaningful application. Nowhere in the Initial Decision does the Hearing Officer address Bartko's statements of fact contained in his Answer and reiterated in the Response to the Division's Motion for Summary Disposition. (Response, Pg. 2-3). One can only assume that the Hearing Officer deemed Bartko's factual statements not to be material to the relief sought in the OIP. As explained below, there is no express finding to this effect in the Initial Decision and even if there was, such a finding would be clearly erroneous under the holding of *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *aff'd* on other grounds, 450 U.S. 91 (1981). Facts that relate to the appropriateness of any remedial sanction in this proceeding against Bartko cannot seriously be argued not to be material for purposes of summary disposition.

Bartko contends that the factual issues in this proceeding that are material to a determination of what sanction, if any, against Bartko is in the public interest were not addressed or litigated in his criminal trial. There is no question that a judgment of conviction against Bartko was entered following the return of the jury's verdict. But, nowhere in the record in Bartko's criminal case were any findings or conclusions reached with respect to the statements of alleged facts in Bartko's Answer which describe

government misconduct by the Division's staff in collusion with the federal prosecutor who led Bartko's prosecution. Nowhere has the Division denied or responded to the details of this misconduct. For purposes of the Commission's review of the Initial Decision, these factual details should be deemed to be true. The question then becomes whether the Commission believes the government misconduct described in Bartko's Answer gives rise to genuine issues of material fact in this proceeding, which disables the propriety of summary disposition.

To put the misconduct perpetrated by the Division staff, Mr. Rue and the lead AUSA in Bartko's criminal trial in perspective, the recent opinion affirming a permanent associational bar against Gary M. Kornman in *Kornman v. SEC*, *supra*, is instructive. The Commission found that the conduct underlying Kornman's conviction for making a false material statement to a federal official during an insider trading investigation was egregious. Kornman had entered a plea to one count of a violation of 18 U.S.C. 1001, meaning he expressly admitted his guilt and a knowing, intentional false statement to Commission attorneys investigating his conduct. In support of the Commission's sanction against Kornman, the following finding is illustrative of the materiality of the government's misconduct in Bartko's case:

"Here, the egregiousness of Kornman's dishonest behavior is compounded because he made his false Statements to the Commission staff during an ongoing investigation into possible insider trading violations. Providing information to investigators is important to the effectiveness of the regulatory system, and the information provided must be truthful. We have consistently held that deliberate deception of regulatory authorities justifies the severest of sanctions." 2009 SEC LEXIS 367, at *23.

Rhetorically, why should untruthful statements made by the regulator to the regulated be treated any differently than the reverse proposition? There should be no difference; no distinction. In Bartko's criminal case, Division staff member, Mr. Rue, made false statements to Bartko's legal counsel on June 28, 2005, the morning that the unannounced Capstone broker-dealer examination was begun by SEC staff member, David McLellan. The purpose of Mr. Rue's false statements was to mislead Bartko and his counsel to believe that the Capstone exam was a regularly cycled examination having nothing to do with the earlier exchange of information between Mr. Rue and Bartko which related to the Capstone and Caledonian Fund(s). In fact, it was Mr. Rue himself who initiated the Capstone broker-dealer examination as a subterfuge for the Division to obtain information and documents relative to the Capstone Fund without alerting Bartko or his counsel to Mr. Rue's intention of providing Bartko's criminal prosecutors with the information. In short, Bartko was duped into voluntarily disclosure of Capstone Fund materials Mr. Rue had not right to examine or request.

Mr. Rue and Mr. McLellan testified for the government at Bartko's criminal trial. When confronted by Bartko's counsel on cross-examination with a telephone memorandum prepared by FINRA examination supervisor, Shane Dornburg, dated March 1, 2005, Mr. Rue could not deny the substance of his conversation with Mr. Dornburg. (see Bartko's Answer, Paragraph B(2)(j) and Exhibit A attached thereto). Instead, Mr. Rue disingenuously said that his comments to Mr. Dornburg evidencing an intent to prosecute Bartko criminally and not to tell Bartko about the call, were "standard investigatory techniques." Testimony of J. Alexander Rue, Tr. Pg. 623 to 629, attached as Exhibit A. Bartko believes the question is just who was Mr. Rue conducting an investigation for? Apparently not for the SEC, since Mr. Rue also testified at Bartko's trial that since Bartko voluntarily initiated and completed the return of all funds held by the Capstone Fund to the investor-sources of those funds, Mr. Rue and his supervisor

believed no further action by the Commission was necessary. Testimony of J. Alexander Rue, Tr. Pg. 595 to 596, attached as Exhibit B. Mr. Rue's initiation of the Capstone broker-dealer examination that began on June 28, 2005 and resulted in a lengthy, detailed report authored by examiner, David McLellan, did not relate to the broker -dealer but related to the Capstone Fund. That report was given to Bartko's federal prosecutor, Clay C. Wheeler, and was not shared with Bartko or his defense counsel until his criminal trial. (See Bartko's Response, Pg. 9-10). Bartko contends on review of the Initial Decision that summary disposition was wholly inappropriate in the face of all of the contested issues of fact that are relevant to the sanction, if any, to be imposed by the Commission following Bartko's conviction. Bartko also strongly believes that the misconduct perpetrated by the Division staff in clandestine conjunction with Bartko's federal prosecutors requires close scrutiny for collusion and Due Process violations.

Bartko's Answer describes Mr. Rue's investigatory misconduct similar to that of a "Trojan Horse" used by the government (notably Bartko's lead AUSA prosecutor, Clay C. Wheeler) to conduct an unlawful, undisclosed parallel criminal investigation (See Bartko's Answer, Paragraphs B(2)(i)-(m), (q) and (u)). The only way Mr. Rue could accomplish the intended result was to actively mislead Bartko concerning the origin and purpose of the Capstone broker-dealer examination, which is what he did. The supervising examiner, David McLellan, also facilitated the undisclosed parallel nature of the examination by actively participating in Mr. Rue's subterfuge. The facts summarized in Bartko's Answer describing this misconduct by the Division's staff should be allowed to be presented in the context of a hearing before the Hearing Officer rather than disposing of these important policy and public interest considerations by granting summary disposition. Various federal courts around the country have developed a "misconduct line" which the SEC staff may not cross or risk tainting a follow-on criminal prosecution, which is precisely what occurred in Bartko's case. See *United States v. Scrusby*, 366 F. Supp. 2d 1134 (N.D. Ala.

2005); *Sterling Nat. Bank v. A-1 Hotels Intern., Inc.*, 175 F. Supp. 2d 573 (S.D.N.Y. 2001); *United States v. Teyibo*, 877 F. Supp. 846 (S.D.N.Y. 1995); *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1997); and *United States v. Posada-Carriles*, 541 F.3d 344 (5th Cir. 2008).

Not only is summary disposition inappropriate at this stage of the proceeding, the Commission should also require the Division to provide Bartko with all of the documents he seeks pursuant to Rule 230. One of the documents Bartko requested the Division to produce following the pre-hearing conference in this proceeding was the "secret" investigatory report referenced above. The Division refused to produce that document or any documents in this proceeding. The Hearing Officer failed to require any such production. Bartko to this day still has no access to the "secret" report. A summary disposition pursuant to F.R.C.P. 56 normally should not be granted before discovery is completed. *Murrell v. Bennett*, 615 F.2d 306 (5th Cir. 1980). Especially while the non-moving party opposing summary disposition seeks production of potentially favorable information that may have an impact on the outcome of the motion. *Olin Corp. v. Insurance Co. of N. America*, 603 F. Supp. 445 (S.D.N.Y. 1985).

Because the Hearing Officer failed to independently review the testimony which was presented at Bartko's criminal trial, the Initial Decision failed to consider various aspects of the government's proofs and the defense evidence which included highly relevant mitigating information in determining an appropriate remedial sanction. For example, the testimony of broker-dealer examiner, David McLellan, is just one prime illustration. The prosecution called Mr. McLellan as a witness to establish that during the course of the SEC's examination of Capstone which commenced on June 28, 2005, Bartko failed to give full and complete information to Mr. McLellan in response to his requests in connection with the Caledonian Fund and the Capstone Fund. However, a fair reading of his actual trial testimony reveals

otherwise that Bartko did fully cooperate with the SEC examiners; provided each and every document and record requested during the examination; and never misled the examiners or withheld any detail or record. Of Mr. McLellan's 50 pages of trial testimony, attached hereto as Exhibit C are 25 pages of his testimony (Trial Tr. Pages 828-839 and 845-857) which demonstrates that Mr. McLellan had to begrudgingly admit Bartko's full compliance. Perhaps most importantly, Mr. McLellan confirms under oath that it was Mr. Rue who was responsible for initiating the examination of Capstone with absolutely no notice. (See Exhibit C, Pages 834-835). This of course is directly contrary to Mr. Rue's misleading version of why the examination occurred. Mr. Rue's statements to Bartko's legal counsel on the morning of June 28, 2005 were not only misleading, they were false. Just as the Commission asserts in *Kornman v. SEC*, supra, that providing truthful information to investigating regulators is of paramount importance, the inverse of that proposition by the false and deceptive statements made to Bartko's counsel by Rue "justifies the severest of sanctions." *Kornman*, Id. at 180.

The grant of summary disposition by the Hearing Officer in this case completely sidesteps any factual inquiry and adjudicative proceeding to determine Bartko's state of mind, the need for remedial sanctions and the public policy implications of the government misconduct described in Bartko's Answer. Allowing the Initial Decision to stand in this case would be tantamount to approving the government misconduct perpetrated by the Division staff which contributed materially to Bartko's conviction. Bartko understands that the Commission has found that summary disposition is not disfavored in follow-on disciplinary proceedings. However, there are "rare" or unique situations where summary disposition would be inappropriate when a respondent seeks to mitigate his or her alleged misconduct in a follow-on proceeding. In *re Conrad P. Seghers*, 91 SEC Docket 1945, 2007 SEC LEXIS 2238, 2007 WL 2790633 (Sept. 26, 2007). This case presents that rare or unique situation.

In conducting his summary disposition determination, the Hearing Officer conducted no factual analysis concerning an appropriate remedial sanction vis-a-vis the public interest factors set forth in *Steadman v. SEC*, supra. Instead the Hearing Officer abdicated his statutory responsibility to craft an appropriate remedial sanction by subsuming the denial of Bartko's new trial motions from his criminal case into the Initial Decision. Although in theory issue preclusion or collateral estoppel are doctrines that apply in administrative proceedings following a criminal conviction, there are notable exceptions to the use of collateral estoppel. Bartko contends that it was inappropriate and clearly erroneous for the Hearing Officer to simply "incorporate by reference" the criminal court's order denying Bartko's post-conviction new trial motions. On review to the Commission, it is Bartko's position that issue preclusion or collateral estoppel prevents the relitigation of those issues actually litigated in Bartko's criminal trial, not matters that may have been addressed in post-conviction proceedings that became necessary after Bartko's discovery of a series of "Brady/Giglio/Napue" violations perpetrated by Bartko's prosecutors. See *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951); *McCord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980, cert. denied, 451 U.S. 983 (1981)). It is the Judgment of Conviction entered following the jury's guilty verdict which the Division uses to seek a bar from Bartko's future association as allowed under Section 203(f) of the Adviser's Act. None of the facts described in Bartko's Answer were actually litigated in his criminal case. Therefore there can be no issue preclusion relied upon by the Hearing Officer as a disposition of those factual matters in granting summary disposition to the Division in this proceeding.

Until a hearing is conducted in this proceeding, summary disposition is not appropriate because there are genuine issues with regard to facts that mitigate Bartko's conduct alleged in the criminal case. The commentary to Rule 201.250 provides support for this view:

"Motions for disposition prior to hearing may provide particular benefits in regulatory proceedings. Enforcement or disciplinary proceedings in which a motion for disposition prior to hearing would be appropriate are likely to be less common. Typically, enforcement and disciplinary proceedings that reach litigation involve genuine disagreement between the parties as to the material facts. Where genuine issue as to material facts clearly exists as to an issue, it would be inappropriate for a party to seek leave to file a motion for summary disposition or for a hearing officer to grant the motion. While partial disposition may be appropriate in some cases, a hearing will still often be necessary in order to determine a respondent's state of mind and the need for remedial sanctions if liability is found." 17 C.F.R. Section 201.250 (2009); accord *In re Melvin Mullin*, 61 SEC Docket 2517, 1996 WL 281717 (May 17, 1996).

The administrative review scenario described in *Otherton v. Department of Justice, Immigration and Naturalization Service*, 711 F.2d 267 (D.C. Cir. 1983) supports Bartko's contentions in this proceeding. In *Otherton*, the petitioner sought review of his discharge as an INS border patrol agent following his conviction on two counts of depriving aliens of their federal rights. Before review by the District of Columbia Circuit Court of Appeals, *Otherton* appealed his discharge to the Merit Systems Protection Board ("MSPB"), an administrative review of the discharge by INS. The MSPB upheld the discharge finding that the doctrine of issue preclusion, also known as collateral estoppel, foreclosed *Otherton's* relitigation of facts established in the criminal trial. On further review to the Court of Appeals, it held that issues determined in a criminal conviction may be accorded preclusive effect at a later administrative proceeding if the normal standards of preclusion are satisfied. *Otherton v. Department of Justice*, *Id.* at 271. But, it is also true that issue preclusion is appropriate in only certain circumstances and is subject to important exceptions to prevent unfairness to the party against who the doctrine is

sought to be applied. See generally RESTATEMENT (SECOND) OF JUDGMENTS, Sections 27-29 (1982) and *Chisolm v. Defense Logistics Agency*, 656 F.2d 42 (3rd Cir. 1981). A determination of which issues were litigated may not be immediately discernable when the antecedent criminal case resulted in a general verdict of the jury without special findings. *Emich Motors Corp. v. General Motors Corp.*, *supra*; *Chisolm v. Defense Logistics Agency*, *supra*. Such was the case in Bartko's criminal trial. Perhaps most compelling as a basis for vacating or remanding this proceeding back to the Hearing Officer is the Supreme Court's decision in *Ashe v. Simpson*, 397 U.S. 436, 444 (197), where the court held that when a prior criminal judgment is sought to be used as an estoppel, the court (here the Hearing Officer) must examine the record of the criminal proceedings, including the pleadings, evidence, jury instructions and other relevant matters to determine specifically what issues were decided. In this case, the Hearing Officer failed to conduct that plenary review. Instead, the fact that Bartko was convicted morphed into the Hearing Officer's conclusion which resulted in a permanent bar as sought by the Division. See *Steadman v. SEC*, *supra*, at 1140. As in *Chisolm*, *supra*, the Hearing Officer accorded conclusive weight to Bartko's criminal conviction based solely on the post-conviction order attached to the Division's Motion for Summary Disposition. No review by the Hearing Officer was conducted of the record in Bartko's criminal trial. Even if there was such a plenary review, there are no facts that were litigated on the factual statements made in Bartko's Answer to the OIP. It was clearly erroneous to rely on collateral estoppel under these circumstances.

Even assuming the Hearing Officer committed no error by reliance on the preclusive effect of Bartko's conviction, the doctrine should not control the remedial sanctions imposed on Bartko in this proceeding. This precept was approved in the *Otherton*, *supra*, decision on appeal to the Circuit Court of Appeals. "Employees whose misconduct is established preclusively will thus still have an undiminished

opportunity to press other arguments before the Board (MSPB), such as whether removal would promote the efficiency of the service." *Otherton v. Department of Justice*, supra, at 272. At a bare minimum under this concept, Bartko should have been given the right to pursue his factors of mitigation and present evidence at a hearing which addresses the Steadman factors. Such a hearing would have enabled him to present evidence bearing on the government's misconduct alleged in Bartko's Answer to the OIP. Summary disposition thwarted that entire process and therefore was granted improvidently.

There are three conditions that must be met before issue preclusion may control the outcome of this proceeding. First, as mentioned above, the issues presented in this proceeding must have been actually litigated in the prior proceeding. Second, the issues must have been actually and necessarily determined by a court of competent jurisdiction in the first trial. *Montana v. United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). And third, the second proceeding must not work an unfairness to the respondent in that proceeding. *Blonder-Tongue Laboratories v. Shore of Illinois Foundation*, 402 U.S. 313 (1971). In this proceeding, the Division and the Hearing Officer not only failed to address these three conditions, the first and third condition cannot even arguably be said to have been satisfied. The unfairness imposed upon Bartko by the lock-step application of collateral estoppel in this proceeding stemming from Bartko's conviction is that more than half of the six Steadman factors were not factually litigated in Bartko's criminal case. None of the SEC/AUSA collusive misconduct described in Bartko's Answer was directly or indirectly litigated. Refusal to require production of documents requested by Bartko in this proceeding, coupled with the grant of summary disposition, results in the Division never having to respond or address the misconduct by Division staff which materially contributed to Bartko's conviction.

This is a civil administrative proceeding, not a criminal or quasi-criminal action. The Commission should be foreclosed from reliance upon remedial sanctions against Bartko based upon collateral estoppel since such application works material unfairness to Bartko. The doctrine of *in pari delicto* provides that wrongdoers ought to bear their consequences of their wrongdoing without legal recourse against each other. The doctrine embodies the common law notion that a plaintiff's recovery may be barred by his own wrongful conduct under well established public policy considerations. *Rogers v. McDorman*, 521 F.3d 381, 385 (5th Cir. 2008) (internal quotation marks and footnote omitted). "A court will not extend aid to either party to a criminal act or listen to their complaints against each other but will leave them where their own acts have placed them." *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955 (5th Cir. January 9, 2012). See also *Pinter v. Dahl*, 486 U.S. 622,632 (1988) and *In re Food Mgmt. Group*, 380 B.R. 677,693 (Bankr. S.D.N.Y. 2008).

IV. Summary and Relief Sought

The grant of summary disposition in this case, in the manner that it was done, essentially has denied Bartko any meaningful opportunity to present mitigating considerations to the Hearing Officer with a view towards establishing that a lifetime associational bar is unreasonable and oppressive as a remedial sanction. By foreclosing Bartko from presenting evidence at a hearing designed to address the Steadman factors before a determination is made on an appropriate remedial sanction, if any, the Initial Decision is tantamount to a summary revocation of Bartko's future interest and ability to become associated with an investment adviser or broker-dealer. If the Commission believed it was in the public interest to summarily bar an individual from association with a broker-dealer or investment advisor for life upon the entry of a judgment of conviction against the agent, the Commission would have clearly expressed that goal in commentary or express language in the adoption of its Rules of Practice. There can be no

question that a lifetime bar entered by the Hearing Officer in this proceeding was punitive and not remedial. "When the Commission chooses to order the most drastic remedies at its disposal, it has a greater burden to show with particularity the facts and policies that support those sanctions and why less severe action would not serve to protect investors." Cf. *Steadman v. SEC*, 603 F.3d 1126, 1137-40 (5th Cir. 1979), *aff'd* on other grounds, 450 U.S. 91 (1981). That result has not been obtained here.

The decision in *Paz Securities, Inc. v. SEC*, 404 F.3d 1059 (D.C. Cir. 2007) is also persuasive and supports Bartko's position on review to the Commission. In *Paz Securities*, the court held that the Commission abused its discretion in upholding the expulsion from NASD membership of the petitioner, a broker-dealer and barring for life the president of the firm. Admittedly, the case presented a different procedural background in that the NASD had initiated the disciplinary action against Paz Securities and its president and the Commission had affirmed the NASD sanctions upon review as required by Section 19(e) of the Exchange Act, 15 U.S.C. Section 78s(e)(2). On review, the Commission determined that the NASD's choice of sanctions was "standard" considering the complained of conduct of the respondents and that the sanctions were neither excessive nor oppressive.

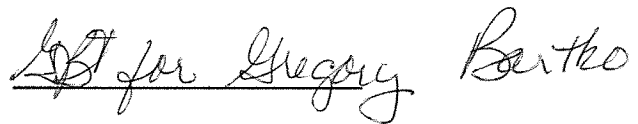
The District of Columbia Circuit Court of Appeals rejected the Commission's determinations and remanded the proceeding back to the Commission for further proceedings consistent with the opinion. Most relevant to Bartko's arguments presented here is the clear holding by the appellate court that the Commission abused its discretion on review by failing to address certain mitigating factors that petitioners in *Paz Securities* raised and by affirming severe sanctions imposed on them by the NASD without first determining whether the sanctions were remedial or punitive. When evaluating whether a sanction imposed by the NASD is excessive or oppressive, "the Commission must do more than say, in

effect, petitioners are bad and must be punished." Paz Securities, Inc. v. SEC, Id. at 1064, quoting Blinder, Robinson & Co., v. SEC, 837 F.2d 1099, 1113 (D.C. Cir. 1988). Bartko's situation is analogous in the sense that the import of the Initial Decision is "Bartko was convicted and must be barred for life from association with either a broker-dealer or investment adviser."

The considerations that Bartko would present at a hearing in this proceeding to demonstrate that a less severe sanction is reasonable and warranted are compelling. Some of those considerations are set forth in Bartko's Response. The Response likewise sets forth a proposed alternative to a lifetime associational bar of Bartko, which he continues to believe would be a reasonable remedial achievement for the Commission as well as the respondent. (See Response, Pg. 9).

Dated this 17th date of October, 2012.

Respectfully Submitted,

Handwritten signature in cursive script that reads "GB for Gregory Bartko". The signature is written in black ink and is positioned above the printed name.

Gregory Bartko, Respondent

1 Q. DURING THE NEXT WEEK, THE NEXT EXHIBIT WE SEE IS NOT
 2 UNTIL MARCH 9TH, BUT BETWEEN FEBRUARY 22ND, WHEN YOU WRITE
 3 THAT LETTER AND YOU GET THE RESPONSE ON MARCH 9TH, DID YOU
 4 TALK TO ANYBODY OVER AT THE NATIONAL ASSOCIATION OF
 5 SECURITIES DEALERS?
 6 A. I MAY HAVE.
 7 Q. DO YOU KNOW A MAN NAMED SHANE DORMBERG?
 8 A. NOT OFF THE TOP OF MY HEAD, NO.
 9 Q. DO YOU REMEMBER TALKING TO A COMPLIANCE SPECIALIST
 10 OVER AT THE NASD ABOUT THE FACT THAT YOU ARE GOING TO TRY
 11 TO SET UP GREG BARTKO?
 12 A. NO. I REMEMBER CALLING THE NASD BECAUSE I HAD
 13 LEARNED THAT CAPSTONE PARTNERS WAS A BROKER/DEALER AND I
 14 WANTED TO FIND OUT WHAT EXAMINATIONS HAD BEEN CONDUCTED.
 15 Q. AND DO YOU REMEMBER TELLING HIM WE'RE GOING TO KEEP
 16 IT A SECRET FROM MR. BARTKO?
 17 A. I DON'T REMEMBER SAYING THAT.
 18 Q. DO YOU RECALL HAVING A CONVERSATION WITH A COMPLIANCE
 19 SPECIALIST?
 20 A. I REMEMBER HAVING A CONVERSATION WITH THE NASD.
 21 Q. OKAY. WITH A COMPLIANCE SPECIALIST?
 22 A. I PRESUME THAT'S WHO I TALKED TO.
 23 Q. ON MARCH 1ST?
 24 A. (NODDING.)
 25 Q. LET ME SHOW YOU SOMETHING THAT I JUST --

EXHIBIT A

1 MR. WHEELER: YOUR HONOR, I OBJECT TO HIM
 2 SHOWING THIS DOCUMENT. HE CAN ASK IF THERE'S SOMETHING
 3 THAT HE CAN LOOK AT TO REFRESH HIS MEMORY, BUT I DON'T
 4 THINK HE SHOULD JUST PUT AN INTERNAL NASD DOCUMENT IN
 5 FRONT OF THE WITNESS.
 6 MR. SAMUEL: IF I SHOWED A DOCUMENT, MIGHT IT
 7 REFRESH YOUR RECOLLECTION?
 8 THE COURT: THAT'S FINE.
 9 BY MR. SAMUEL:
 10 Q. READ IT TO YOURSELF, THE HIGHLIGHTED PORTION.
 11 A. YES.
 12 Q. DOES THAT REFRESH YOUR RECOLLECTION ABOUT A
 13 CONVERSATION YOU HAD WITH A COMPLIANCE SPECIALIST AT THE
 14 NASD?
 15 A. YES, IT DOES.
 16 Q. OKAY. AND WHAT IS THE NASD?
 17 A. THE NATIONAL ASSOCIATION OF SECURITIES DEALERS.
 18 Q. ANOTHER REGULATORY BODY?
 19 A. IT IS A SELF-REGULATORY BODY FOR BROKER/DEALERS THAT
 20 ARE NOT MEMBERS OF THE NEW YORK STOCK EXCHANGE, THAT ARE
 21 NOT REGISTERED WITH THE NEW YORK STOCK EXCHANGE.
 22 Q. OKAY. SO THE SEC KIND OF MONITORS WHAT'S GOING ON
 23 WITH BROKER/DEALERS AND SO DOES THE NASD. I'M SURE YOU
 24 HAVE DIFFERENT JURISDICTIONS, BUT WHATEVER, YOU BOTH
 25 REGULATE BROKER/DEALERS, CORRECT?

1 A. YES.
 2 Q. OKAY. AND YOU LEARNED THAT THE NASD HAD, AT SOME
 3 POINT IN THE PAST, DONE A TYPICAL EXAMINATION OF CAPSTONE,
 4 CORRECT?
 5 A. YES.
 6 Q. OKAY. AND YOU SPOKE TO THIS MAN, SHANE DORMBERG, WHO
 7 IS A COMPLIANCE SPECIALIST OVER AT NASD, KIND OF A
 8 COLLEAGUE OF YOURS, MORE OR LESS, CORRECT?
 9 A. YEAH.
 10 Q. DO YOU KNOW HIM NOW, BY THE WAY?
 11 A. NO.
 12 Q. AND THE CONVERSATION YOU HAD WITH HIM WAS THAT YOU
 13 HAD FOUND OUT FROM JOHN CURRY, THE INVESTIGATOR UP HERE IN
 14 NORTH CAROLINA, ABOUT WHAT HOLLENBECK HAD GIVEN TO SHIRLEY
 15 BIBEX, CORRECT?
 16 A. YES.
 17 Q. AND YOU DIDN'T WANT MR. BARTKO TO KNOW THAT YOU KNEW
 18 ABOUT THAT YET, RIGHT?
 19 A. I PRESUME, YES.
 20 Q. AND YOU SAID, I'M GOING TO KEEP TALKING TO MR.
 21 BARTKO, I'M GOING TO KEEP TRYING TO GET INFORMATION FROM
 22 HIM AND SEE WHAT HE TELLS US, RIGHT?
 23 A. THAT'S TYPICAL INVESTIGATIVE TECHNIQUE.
 24 Q. INVESTIGATIVE TECHNIQUE?
 25 A. YES.

1 Q. OKAY. I'M NOT GOING TO JUST COME RIGHT OUT AND ASK
 2 MR. BARTKO WHAT'S GOING ON WITH MR. HOLLENBECK, I'M GOING
 3 TO KINDA TRY TO SEE IF I CAN TRAP HIM, CORRECT?
 4 A. I WOULDN'T CHARACTERIZE IT THAT WAY.
 5 Q. THAT'S MARCH 1ST, CORRECT?
 6 A. I GUESS.
 7 Q. ON MARCH 9TH, MR. BARTKO, NOT KNOWING ABOUT YOUR
 8 CONVERSATION WITH SHANE DORMBERG, NOT KNOWING THAT YOU HAD
 9 GOTTEN THE INFORMATION ABOUT SHIRLEY BIBEX AND HOLLENBECK
 10 UP HERE IN NORTH CAROLINA, RESPONDS TO YOUR EARLIER
 11 LETTER, CORRECT? AND THAT'S EXHIBIT 303 THAT WE LOOKED
 12 AT?
 13 A. YES.
 14 Q. DO YOU REMEMBER THAT?
 15 A. YES, SIR.
 16 Q. AND HE WRITES -- NOW, YOU'VE WRITTEN A LETTER TO HIM
 17 THAT WE JUST LOOKED AT ON FEBRUARY 22ND, SIX SHORT
 18 ONE-SENTENCE QUESTIONS, CORRECT?
 19 A. YES, SIR.
 20 Q. HE WRITES BACK A SINGLE-SPACED DOCUMENT THAT IS
 21 THREE-PLUS PAGES, CORRECT?
 22 A. YES, SIR.
 23 Q. WITH A LOT OF DETAIL, CORRECT?
 24 A. YES, SIR.
 25 Q. ANSWERING QUESTIONS ABOUT MR. HOLLENBECK, CORRECT?

1 A. THE DOCUMENT SAYS WHAT IT SAYS, YES.

2 Q. THE DOCUMENT SAYS WHAT IT SAYS. YOU KNOW AT THIS
3 POINT THAT YOU'RE MORE INTERESTED OR EQUALLY INTERESTED IN
4 MR. BARTKO HIMSELF AND CAPSTONE, RIGHT?

5 A. I'M INTERESTED IN MR. HOLLENBECK AND HIS ACTIVITIES
6 WITH REGARD TO MOBILE BILLBOARDS AND CAPSTONE, YES.

7 Q. RIGHT. BUT YOU HAVE BEEN TALKING TO JOHN CURRY UP
8 HERE IN NORTH CAROLINA, RIGHT?

9 A. YES.

10 Q. AND YOU HAVE BEEN TALKING TO THE NASD PEOPLE SAYING
11 LET'S SEE WHAT MR. BARTKO SAYS TO US, RIGHT?

12 A. I DOUBT THAT I SAID THAT TO THEM, BUT I WANTED TO SEE
13 THE EXAM FILE THAT THEY HAD DONE WITH THE BROKER/DEALER.

14 Q. WELL, IT WAS MORE THAN THAT. WHAT YOU JUST SAW,
15 WHICH REFRESHED YOUR RECOLLECTION IS, IS IT TRUE --

16 **THE COURT:** NOW, MR. SAMUEL, HE SAID THAT THE
17 DOCUMENT REFRESHED HIS RECOLLECTION BUT I DON'T KNOW IF
18 YOU REALLY ASKED HIM WHAT HE REMEMBERED ABOUT IT ALL THAT
19 MUCH. SO YOU ARE NOT GOING TO READ FROM THE DOCUMENT THAT
20 HE USED TO REFRESH HIS RECOLLECTION WITH.

21 **BY MR. SAMUEL:**

22 Q. BUT MR. BARTKO DOESN'T KNOW ABOUT THOSE THINGS,
23 CORRECT? HE'S STILL PLAYING THE ROLE OF LAWYER FOR MR.
24 HOLLENBECK, CORRECT? HE'S JUST ANSWERING YOUR QUESTIONS,
25 CORRECT, WHEN IT COMES TO THE MARCH 9TH EXHIBIT 303?

EXHIBIT A

1 A. YEAH.

2 Q. HE DOESN'T KNOW YOU ARE CURIOUS ABOUT CAPSTONE. HE
3 DOESN'T KNOW YOU ARE CURIOUS ABOUT SHIRLEY BIBBY. HE
4 DOESN'T KNOW ANY OF THOSE THINGS, HE'S JUST STILL ACTING
5 AS THE LAWYER FOR MR. HOLLENBECK, ANSWERING YOUR
6 QUESTIONS, RIGHT?

7 A. YES.

8 Q. BECAUSE YOU HAVEN'T CONFRONTED HIM YET WITH WHAT YOU
9 FOUND OUT FROM JOHN CURRY ABOUT SHIRLEY BIBBY, CORRECT?

10 A. I DON'T BELIEVE SO.

11 Q. OKAY. AND IN THIS LETTER HE WRITES BACK TO YOU, PAGE
12 TWO, EXHIBIT 303, THE TOP PARAGRAPH STARTING WITH
13 "OCCASIONALLY MR. HOLLENBECK REFERS CLIENTS TO OTHER
14 SOURCES OF INVESTMENT AND MAY RECEIVE A FINDER'S OR
15 INTRODUCING FEE", CORRECT?

16 A. YES.

17 Q. HE TELLS YOU THAT IN THE LETTER?

18 A. YES.

19 Q. OKAY. AND THEN HE TALKS DOWN HERE ABOUT, "MR.
20 HOLLENBECK MAY GET SOME REFERRAL FEES", CORRECT?

21 A. YES.

22 Q. AGAIN, YOU HAVE ASKED HIM A WHOLE BUNCH OF QUESTIONS
23 ABOUT WHERE ARE HIS SOURCES OF INCOME, WHERE IS HE MAKING
24 MONEY, THINGS LIKE THAT, AND THIS IS HIS LENGTHY ANSWER TO
25 YOU, GOVERNMENT'S EXHIBIT 303, CORRECT?

1 A. YES.

2 Q. AND, AGAIN, IT'S A VERY LENGTHY LETTER, BUT WE ARE
3 INFORMED HIS ACTIVITIES HAVE BEEN STRICTLY LIMITED TO
4 REFERRING CUSTOMERS TO OTHERS, CORRECT?

5 A. THAT'S WHAT IT SAYS.

6 Q. AND WITHOUT BELABORING THE POINT, THIS IS ALL IN
7 RESPONSE TO YOUR FEBRUARY 22ND LETTER TO HIM, CORRECT?

8 A. YES, SIR.

9 Q. AND ATTACHED TO THIS LETTER ARE MORE SPREADSHEETS,
10 CORRECT?

11 A. YES, SIR, I BELIEVE SO.

12 Q. HUH?

13 A. I BELIEVE SO.

14 Q. OKAY. PROVIDING YOU WITH MORE INFORMATION ABOUT
15 WHERE MR. HOLLENBECK GETS HIS MONEY FROM AND STUFF LIKE
16 THAT, CORRECT?

17 A. YES.

18 Q. NOW, THAT'S THE MARCH 9TH LETTER. NOW, THERE'S YET
19 ANOTHER LETTER THAT COMES FROM MR. BARTKO TO YOU AFTER
20 MARCH 9TH. AND IF YOU WILL TAKE A LOOK AT DEFENDANT'S
21 EXHIBIT 52.

22 A. YES, SIR.

23 Q. YOU STILL HAVEN'T TOLD HIM ANYTHING ABOUT YOUR
24 DISCOVERY IN NORTH CAROLINA, CORRECT? IT'S MARCH 11TH.

25 A. YES.

1 MATTER.
 2 Q. AND WHAT DID HE TELL YOU?
 3 A. THAT I REMEMBER, HE TOLD ME THAT THEY HAD LOOKED AT
 4 IT AND THAT MR. BARTKO WAS GOING TO RETURN THE MONEY TO
 5 INVESTORS, LESS COMMISSIONS THAT HAD BEEN PAID.
 6 Q. WHEN YOU HEARD THAT, MR. RUE, WHAT WAS YOUR RESPONSE
 7 TO THAT?
 8 A. WELL, I WAS HAPPY THAT THE INVESTORS WERE GETTING
 9 BACK 90-PLUS PERCENT OF THEIR MONEY.
 10 Q. DID YOU FEEL YOU HAD MORE WORK TO DO ON THIS AT THAT
 11 POINT?
 12 A. I DISCUSSED THIS WITH MY SUPERVISORS AND, YOU KNOW,
 13 WE ELECTED NOT TO PURSUE ANY FURTHER INVESTIGATION.
 14 Q. AND YOU WERE ON THE ENFORCEMENT SIDE; IS THAT
 15 ACCURATE?
 16 A. YES.
 17 Q. DID YOU MAKE A REFERRAL TO THE EXAMINATION SIDE OF
 18 THE SEC?
 19 A. YES, I DID.
 20 Q. AND EXPLAIN JUST BRIEFLY TO THE JURY WHAT THE
 21 DIFFERENCE IS.
 22 A. WELL, THE ENFORCEMENT GROUP LOOKS FOR VIOLATIONS OF
 23 THE FEDERAL SECURITIES LAWS BUT MORE THAN HALF OF THE
 24 PEOPLE IN MY OFFICE ARE EXAMINERS, WHO ARE ACCOUNTANTS,
 25 CPA'S, WHOSE RESPONSIBILITY IT IS TO GO EXAMINE BROKERS

EXHIBIT B

1 AND DEALERS AND INVESTMENT ADVISORS TO BE SURE THAT
 2 THEY'RE COMPLYING WITH THE RULES THEY ARE REQUIRED TO
 3 COMPLY WITH.
 4 Q. AND WAS IT YOUR UNDERSTANDING THAT THE DEFENDANT HAD
 5 A BROKER/DEALER?
 6 A. YES.
 7 Q. SO HE WAS SUBJECT TO THAT KIND OF EXAM?
 8 A. AND I LEARNED THROUGH THE COURSE OF THIS THAT MR.
 9 BARTKO HAD A BROKER/DEALER --
 10 MR. SAMUEL: OBJECTION TO WHAT HE LEARNED.
 11 HEARSAY.
 12 THE COURT: WELL, I'LL SUSTAIN TO THAT LAST
 13 CLAUSE WHEN YOU REFERRED TO THE EXAMINATION SIDE. NEXT
 14 QUESTION.
 15 BY MR. WHEELER:
 16 Q. WHO WAS IN CHARGE OF THE EXAM THAT WAS CONDUCTED; DO
 17 YOU REMEMBER?
 18 A. THE EXAM TEAM WAS DAVID MCCLELLAN AND GANNON -- I'M
 19 NOT SURE HOW TO PRONOUNCE HIS LAST NAME.
 20 MR. WHEELER: NOTHING FURTHER, YOUR HONOR.
 21 THE COURT: LET'S GO AHEAD AND TAKE OUR
 22 AFTERNOON BREAK. WE'LL BE IN RECESS UNTIL 3 O'CLOCK.
 23 DON'T TALK ABOUT THE CASE OR LET ANYONE TALK ABOUT THE
 24 CASE WITH YOU. EVERYONE REMAIN SEATED WHILE THE LADIES
 25 AND GENTLEMEN OF THE JURY LEAVE THE ROOM.

1 CORRECT?
 2 A. YES.
 3 Q. AND IN 2005 THE NAME OF THAT OTHER AGENCY WAS CALLED
 4 THE NASD, CORRECT?
 5 A. YES.
 6 Q. NASD IS COMPLETELY SEPARATE FROM THE SEC?
 7 A. CORRECT.
 8 Q. NASD WILL DO EXAMINATIONS, SEC WILL DO EXAMINATIONS?
 9 A. RIGHT.
 10 Q. SOMETIMES WHAT THE SEC DOES IS IT FOLLOWS ON AN NASD
 11 EXAMINATION TO SEE IF NASD DID A GOOD JOB, RIGHT?
 12 A. YES.
 13 Q. WE CALL THOSE OVERSIGHT EXAMINATIONS, CORRECT?
 14 A. YES.
 15 Q. WHAT YOU ARE DOING IS MUCH AS LOOKING AT THE
 16 BROKER-DEALERS, YOU ARE TRYING TO FIGURE OUT WAS NASD
 17 DOING A GOOD JOB WHEN IT WAS EXAMINING THE BROKER-DEALER?
 18 A. YES.
 19 Q. LIKE A PRINCIPAL COMING WATCHING A TEACHER IN THE
 20 CLASSROOM MAKING SURE THE TEACHER'S DOING A GOOD JOB,
 21 RIGHT?
 22 A. RIGHT.
 23 Q. WHEN YOU CAME ON JUNE 28 OF 2005, YOUR EXAMINATION
 24 FOLLOWED ON THE HEELS OF THE NASD EXAMINATION, CORRECT?
 25 A. YES.

EXHIBIT C

1 Q. THE NASD DID ITS EXAMINATION IN THE SPRING OF '04,
 2 CORRECT?
 3 A. YES.
 4 Q. YOU HAD ACCESS TO THAT EXAMINATION?
 5 A. YES.
 6 Q. BECAUSE, IN FACT, AS WE JUST SAID, ONE OF THE THINGS
 7 YOU WERE DOING WAS NOT ONLY LOOKING AT CAPSTONE, YOU WERE
 8 TRYING TO MAKE SURE THAT NASD HAD DONE A GOOD JOB?
 9 A. CORRECT.
 10 Q. SO YOU HAD THE NASD EXAMINATION?
 11 A. EXCUSE ME?
 12 Q. YOU HAD THE NASD PAPERWORK?
 13 A. YES.
 14 Q. AND BY THE WAY, NASD IS NOW A DIFFERENT NAME CALLED
 15 FINRA, BUT THAT DOESN'T EXIST BACK IN '04, RIGHT?
 16 A. RIGHT.
 17 Q. FORGET FINRA, WE'LL JUST CALL IT NASD.
 18 A. OKAY.
 19 Q. SO, NOW, THE OTHER THING ABOUT THIS JUNE 28, 2005
 20 EXAMINATION WAS YOU DIDN'T CALL UP MR. BARTKO AND SAY, CAN
 21 WE MAKE A RESERVATION TO COME SEE YOU A FEW MONTHS FROM
 22 NOW? THIS WAS WHAT'S KNOWN AS A SURPRISE EXAMINATION?
 23 A. RIGHT. WE DIDN'T GIVE ADVANCE NOTICE.
 24 Q. NO ADVANCE NOTICE?
 25 A. RIGHT.

1 Q. I ASSUME YOU WERE POLITE. YOU GAVE THEM A COUPLE
 2 HOURS NOTICE, RIGHT?
 3 A. NO.
 4 Q. NOT EVEN THAT?
 5 A. NO.
 6 Q. IT'S NOT A LONG TRIP FROM THE SEC TO MR. BARTKO'S
 7 OFFICE. YOU DON'T HAVE TO TAKE A TAXI OR MARTA, THAT'S
 8 OUR SUBWAY SYSTEM, DO YOU?
 9 A. NO, HE WAS LOCATED IN THE SAME BUILDING.
 10 Q. YOU TAKE AN ELEVATOR DOWNSTAIRS ONE FLIGHT?
 11 A. DOWN ONE.
 12 Q. RIGHT, DOWN ONE FLIGHT?
 13 A. YES.
 14 Q. YOU ARE ON THE FIFTH FLOOR; HE'S ON THE FOURTH FLOOR?
 15 A. RIGHT.
 16 Q. YOU GO IN THERE, YOU SAY, I'M GOING TO DO AN
 17 EXAMINATION OF ALL YOUR BOOKS AND PAPERWORK, CORRECT?
 18 A. CORRECT.
 19 Q. OF THE BROKER-DEALER?
 20 A. YES.
 21 Q. AND YOU ARE NOT ALONE?
 22 A. RIGHT.
 23 Q. YOU HAVE A YOUNG COLLEAGUE, I THINK THAT THIS WAS
 24 GOING TO BE HIS FIRST ONE, RIGHT?
 25 A. HIS FIRST EXAM?

1 Q. DO YOU RECOLLECT WHAT HIS NAME WAS?
 2 A. OH, GANNON LASAGNE.
 3 Q. THIS WAS GOING TO BE HIS FIRST ONE, CORRECT?
 4 A. NO. HE WAS FAIRLY NEW BUT IT WASN'T HIS FIRST EXAM.
 5 Q. AND THE EXAM DOESN'T LAST LIKE 30 MINUTE OR AN HOUR,
 6 DOES IT?
 7 A. NO.
 8 Q. IT GOES FOR A COUPLE WEEKS, RIGHT?
 9 A. RIGHT. I BELIEVE WE WERE DONE WITH THE FIELD WORK
 10 AROUND JULY 6.
 11 Q. OKAY. AND WHEN YOU SAY FIELD WORK, YOU MEAN BEING ON
 12 THE FOURTH FLOOR?
 13 A. RIGHT.
 14 Q. SO YOU WERE ACTUALLY IN HIS OFFICE FOR A WEEK PLUS?
 15 A. YES.
 16 Q. NOT ON JULY 4 BUT IN BETWEEN THERE, RIGHT?
 17 A. RIGHT.
 18 Q. AND WHILE YOU WERE THERE, YOU TELL HIM, I WANT TO
 19 LOOK AT DOCUMENT A, DOCUMENT B, DOCUMENT C, BANK ACCOUNTS,
 20 WHATEVER, AND HE GIVES IT TO YOU?
 21 A. YES.
 22 Q. THERE WASN'T A SINGLE TIME WHEN YOU SAID, I WANT TO
 23 SEE WACHOVIA BANK STATEMENT OR WHATEVER BANK STATEMENT
 24 THAT HE SAID I'M NOT GIVING THAT TO YOU?
 25 A. NO.

1 Q. THAT REALLY COULDN'T HAPPEN, COULD IT?
 2 A. NO. I MEAN, IT COULD BUT IT DIDN'T.
 3 Q. RIGHT. IN FACT, YOU ASKED FOR IOLTA RECORDS BUT YOU
 4 ONLY ASKED FOR 2005 IOLTA RECORDS, CORRECT?
 5 A. ACTUALLY MY COLLEAGUE, MR. LASAGNE DID, BUT, YES, WE
 6 DID.
 7 Q. WHEN I SAY IOLTA, THAT'S THE LAW FIRM BANK RECORDS,
 8 CORRECT?
 9 A. RIGHT.
 10 Q. SO WHEN YOU ASKED FOR THEM, HE GAVE THEM TO YOU?
 11 A. YES.
 12 Q. OR YOUR COLLEAGUE?
 13 A. RIGHT.
 14 Q. I CAN'T TELL FROM LOOKING AT THE RECORDS WHAT'S YOU
 15 AND WHAT'S HIM. I JUST KNOW THINGS WERE ASKED FOR AND HE
 16 GAVE IT TO YOU, RIGHT?
 17 A. RIGHT.
 18 Q. IN ADDITION TO THE, AS YOU CALL IT, FIELD WORK WHERE
 19 YOU ARE LITERALLY IN HIS OFFICE, IN HIS CONFERENCE ROOM
 20 GATHERING DOCUMENTS, IT ALSO GOES ON FOR MANY, MANY MORE
 21 WEEKS AFTER THAT OF EXCHANGES OF PAPERWORK WHERE YOU WRITE
 22 HIM A LETTER, HE WRITES BACK, CORRECT?
 23 A. RIGHT.
 24 Q. AND HE DELIVERS STUFF TO YOU, CORRECT?
 25 A. YES.

EXHIBIT C

1 Q. THE STACK OF STUFF I GAVE IN FRONT YOU THERE -- WE'LL
 2 GO THROUGH SOME OF IT, NOT ALL -- IS SOME OF THE STUFF HE
 3 GAVE YOU, RIGHT?
 4 A. CORRECT. YES.
 5 Q. HE ALSO GIVES YOU -- HAVE YOU SEEN THIS BOX OF
 6 MATERIAL? ALL OF THIS STUFF FROM YOUR OFFICE, SEC STUFF
 7 THAT THE GOVERNMENT HAS HAD DOWN IN THEIR BASEMENT HERE?
 8 A. OKAY.
 9 Q. ALL OF THIS -- WHEN YOU DO AN EXAMINATION, THIS IS
 10 THE KIND OF PAPERWORK YOU GET FROM HIM AND FROM YOUR OTHER
 11 WORK. QUITE A BIT OF PAPERWORK, RIGHT?
 12 A. YES.
 13 Q. AND AGAIN, MOST OF IT COMES FROM HIM GIVING YOU BANK
 14 RECORDS?
 15 A. RIGHT.
 16 Q. YOU DON'T HAVE SUBPOENA POWER, DO YOU?
 17 A. NO.
 18 Q. YOU CAN'T GO TO A BANK AND SAY, I WANT ALL YOUR
 19 RECORDS ON SOMETHING. YOU RELY ON THE BROKER-DEALER TO
 20 GIVE YOU THE RECORDS?
 21 A. CORRECT.
 22 Q. SO OTHER THAN YOUR INTERNAL REPORTS HERE, I'M NOT
 23 GOING TO GO THROUGH THAT, THAT'S WHAT HE GIVES YOU, RIGHT?
 24 A. YES.
 25 Q. WHICH IS WHAT YOU ASKED FOR?

1 A. RIGHT.
 2 Q. AND YOUR COLLEAGUE ASKED FOR?
 3 A. YES.
 4 Q. AND HE GAVE IT?
 5 A. YES.
 6 Q. YOU WERE ASKED BY THE PROSECUTOR ABOUT ALEX RUE. YOU
 7 KNOW ALEX RUE, OF COURSE?
 8 A. YES.
 9 Q. YOU HAVE BEEN IN THE SAME, DIFFERENT FLOORS BUT
 10 YOU-ALL ARE IN THE SEC FOR DECADES TOGETHER, CORRECT?
 11 A. WELL, I WOULDN'T SAY DECADES. YEARS.
 12 Q. OKAY. AND YOU AND ALEX RUE HAVE TALKED ABOUT THIS
 13 BEFORE YOU WENT DOWNSTAIRS, CORRECT?
 14 A. YES.
 15 Q. NOT ONLY WAS THIS A SURPRISE AUDIT, NOT ONLY WAS
 16 THIS, I SAY AUDIT, EXAMINATION. NOT ONLY WAS THIS AN
 17 OVERSIGHT OF WHETHER NASD WAS DOING ITS JOB RIGHT, IT WAS
 18 ALSO BECAUSE ALEX RUE CALLED YOU BECAUSE HE HAD BEEN
 19 DEALING WITH THEM BACK IN MARCH OF '05. HE SAID I WANT
 20 YOU GUYS TO GO DOWNSTAIRS, SEE WHAT YOU CAN FIND OUT, MAKE
 21 IT LOOK LIKE AN OVERSIGHT AUDIT EXAM BUT, IN FACT, THERE'S
 22 CERTAIN THINGS WE WANT TO KNOW, CORRECT?
 23 A. WE DON'T MAKE IT LOOK LIKE ANY KIND OF EXAM. WE
 24 DON'T DISCLOSE WHY WE'RE GOING INTO DOING AN EXAMINATION.
 25 Q. THAT'S PRETTY MUCH WHAT I WAS JUST ASKING. ALEX RUE

1 TOLD YOU THAT HE HAD ISSUES, FOR LACK OF A BETTER TERM,
 2 AND THAT'S WHAT REALLY PROMPTED YOU-ALL TO GO DOWNSTAIRS
 3 AND LOOK, RIGHT?
 4 A. YES. CORRECT.
 5 Q. OKAY. WHEN YOU WENT DOWNSTAIRS AND YOU FIRST WALKED
 6 INTO HIS OFFICE TO START THE FIELD EXAM, YOU GIVE HIM WHAT
 7 I MARKED AS DEFENDANT'S EXHIBIT 1; AM I CORRECT?
 8 A. YES.
 9 Q. AND WHAT DEFENDANT'S EXHIBIT 1 IS, SOMEWHAT OF A FORM
 10 BUT SOMEWHAT TAILORED TO HIM, CORRECT?
 11 A. IT'S A FORM WE GIVE ON ALL THE EXAMINATIONS.
 12 Q. BUT SOME OF THE INFORMATION IS OBVIOUSLY TYPED IN SO
 13 IT APPLIES TO HIM?
 14 A. OKAY, YES. THE INFORMATION REQUEST IS TAILORED, YES.
 15 Q. AND THIS IS, IN FACT, THE DOCUMENT YOU GAVE HIM,
 16 CORRECT?
 17 A. YES.
 18 MR. SAMUEL: YOUR HONOR, I WOULD ASK TO -- I'M
 19 NOT GOING TO PUBLISH IT.
 20 BY MR. SAMUEL:
 21 Q. IT IS WHAT IT IS, CORRECT?
 22 A. YES.
 23 Q. IT'S A MANY PAGE DOCUMENTS, LISTS THE TYPES OF THINGS
 24 YOU ARE GOING TO WANT TO SEE FROM HIM, CORRECT?
 25 A. RIGHT.

EXHIBIT C

1 Q. RATHER THAN PUTTING EVERY SINGLE PAGE ON THE SCREEN,
2 YOU WANT TO KNOW ABOUT FIXED ASSETS, YOU WANT TO KNOW
3 ABOUT BANK ACCOUNTS, RIGHT?
4 A. RIGHT.
5 Q. RIGHT?
6 A. YES.
7 Q. AND YOU GIVE THIS TO HIM, SAY HERE'S WHAT WE WANT?
8 A. RIGHT.
9 Q. OKAY. AND AS YOU SAID BEFORE, HE GAVE YOU EVERYTHING
10 ON THE LIST, CORRECT?
11 A. RIGHT.
12 Q. NOTHING ON THIS HE DIDN'T GIVE YOU OR YOU WOULDN'T
13 HAVE CLOSED OUT THE EXAMINATION, RIGHT?
14 A. RIGHT.
15 Q. YOU WOULD HAVE SAID, WE HAVE SOME OPEN MATTERS, YOU
16 DIDN'T COMPLY WITH QUESTION NUMBER 17 OR 19 OR WHATEVER.
17 HE GAVE YOU EVERYTHING YOU ASKED FOR?
18 A. CORRECT.
19 Q. ALL RIGHT. YOU ALSO CREATE WHAT IS KNOWN AS A
20 CONTROL SHEET, CORRECT?
21 A. YES.
22 Q. IS THERE MORE THAN ONE CONTROL SHEET OR JUST ONE
23 CONTROL SHEET?
24 A. THERE'S MORE THAN ONE.
25 Q. AND A CONTROL SHEET IS KIND OF AN INDEX OF WHAT YOU

1 ARE ACTUALLY GIVEN, RIGHT?
2 A. NO.
3 Q. OKAY. WELL, TELL ME WHAT A CONTROL SHEET IS.
4 A. CONTROL SHEET SUMMARIZES THE EXAMINATION WORK WE DID
5 FOR A SPECIFIC SECTION.
6 Q. OKAY. WELL, TAKE A LOOK AT DEFENDANT'S EXHIBIT 2.
7 DO YOU HAVE THAT UP THERE?
8 A. YES.
9 Q. IS THAT THE CONTROL SHEET IN THIS CASE?
10 A. NO. THIS IS AN INDEX OF THE WORK PAPERS.
11 Q. OKAY. SO NO. 2 IS AN INDEX OF WORK PAPERS?
12 A. RIGHT.
13 Q. DOES THIS REFLECT THINGS YOU OBTAINED FROM HIM?
14 A. YES.
15 Q. OKAY. AND IT IS AN ACCURATE LIST OF WHAT IN FACT WAS
16 PROVIDED BY CAPSTONE, MEANING GREG BARTKO, TO YOU IN
17 RESPONSE TO YOUR REQUEST FOR INFORMATION, CORRECT?
18 A. YES.
19 Q. AND I NOTE JUST A COUPLE OF ITEMS.
20 MR. SAMUEL: YOUR HONOR, CAN I PUT 2 UP ON THE
21 SCREEN?
22 THE COURT: YOU MAY.
23 BY MR. SAMUEL:
24 Q. IF I COULD JUST ASK YOU TO TAKE A LOOK AT A COUPLE OF
25 ITEMS I NOTE HERE. YOU SEE NUMBER FIVE?

1 A. GENERAL LEDGER. OH, THAT ONE, YES.
2 Q. THIS IS WHAT WE TALKED ABOUT BEFORE WHERE YOU GOT A
3 COPY OF -- THIS IS THE NASD EXAMINATION THAT HAD BEEN DONE
4 ABOUT A YEAR EARLIER, CORRECT?
5 A. CORRECT.
6 Q. YOU GOT A COPY OF THAT?
7 A. YES.
8 Q. THEIR FULL REPORT?
9 A. YES.
10 Q. ANYTHING IN THAT REPORT YOU GOT?
11 A. YES.
12 Q. IT HAS RECORDS OF ALL THE IOLTA AND ALL THE TRANSFERS
13 FROM CALEDONIAN AND THE WHOLE HISTORY OF ALL THAT MONEY.
14 YOU HAD THAT, TOO?
15 MR. BRAGDON: OBJECTION TO THE NATURE OF THE
16 QUESTION. FOUNDATION.
17 THE COURT: SUSTAINED.
18 BY MR. SAMUEL:
19 Q. IF IT'S IN THE FINRA REPORT, AND YOU HAVE THE FINRA
20 REPORT -- YOU HAD IT?
21 A. YES.
22 Q. RIGHT. BECAUSE THIS SAYS YOU HAD THE FINRA REPORT.
23 A. YES, WE HAD THE REPORT.
24 Q. AND, IN FACT, IF WE WANT TO GO WADING THROUGH THIS,
25 IT'S IN HERE, THE FINRA REPORT, CORRECT?

1 A. CORRECT.
2 Q. IF YOU WILL LOOK AT NUMBER 14, PLEASE. THIS IS WHERE
3 YOU OBTAINED HIS IOLTA RECORDS, CORRECT?
4 A. CORRECT.
5 Q. INTEREST ON LAWYER'S TRUST ACCOUNT, WE CALL IT IOLTA?
6 A. RIGHT.
7 Q. THESE ARE THE BANK RECORDS AS OPPOSED TO THE
8 BROKER-DEALER THAT THE LAW FIRM MAINTAINS?
9 A. CORRECT.
10 Q. YOU HAD IT?
11 A. YES.
12 Q. OKAY. NOW, IF WE COULD SCROLL DOWN TO NUMBER TEN
13 UNDER OPERATIONAL. THESE ARROWS ARE MINE, THEY'RE NOT ON
14 YOUR ORIGINAL DOCUMENTS.
15 FINDER'S FEE AGREEMENTS. YOU ACTUALLY HAD FINDER'S
16 FEE AGREEMENTS, RIGHT?
17 A. CORRECT.
18 Q. OKAY. WHILE WE'RE ON THAT TOPIC, IN RESPONSE TO THE
19 PROSECUTOR'S QUESTIONS YOU SAID THAT YOU FOUND IT
20 SURPRISING OR UNUSUAL THAT A COMMISSION WAS GIVEN TO
21 LEGACY WHEN LEGACY MADE AN INVESTMENT, RIGHT?
22 A. CORRECT.
23 Q. DID YOU ACTUALLY LOOK AT THE FINDER'S FEE AGREEMENT
24 WITH LEGACY?
25 A. YES.

1 A. YES.

2 Q. EVEN THOUGH YOU ARE ONE FLOOR AWAY, YOU GO BACK

3 UPSTAIRS, SAY MR. BARTKO I NEED TO REVIEW SOMETHING ELSE.

4 YOU WOULD DO THAT OVER THE PHONE?

5 A. YES.

6 Q. YOU WOULD E-MAIL EACH OTHER FROM ONE FLOOR AWAY FROM

7 EACH OTHER?

8 A. OCCASIONALLY, YES.

9 Q. AND SEND LETTERS BACK AND FORTH FROM ONE FLOOR AWAY,

10 CORRECT?

11 A. YES.

12 Q. SO YOU ASK HIM ABOUT CALEDONIAN AND HE EXPLAINS TO

13 YOU THAT HE'S MORE ON THE END OF IT OF RAISING CAPITAL,

14 CORRECT?

15 A. RIGHT.

16 Q. AND HE TALKS ABOUT THE WEBB GROUP, CORRECT?

17 A. YES.

18 Q. AND, IN FACT, HE GIVES YOU A WHOLE STACK OF DOCUMENTS

19 DEALING WITH THE WEBB GROUP, RIGHT?

20 A. I DON'T RECALL A STACK OF DOCUMENTS. HE GAVE ME SOME

21 DOCUMENTS.

22 Q. LET ME SHOW YOU -- I HAVEN'T MARKED THESE, YOUR

23 HONOR. I'M NOT GOING TO INTRODUCE THESE BUT ARE THESE ALL

24 DOCUMENTS RELATING TO CPE AND THE FINANCING FROM WEBB?

25 A. YES.

EXHIBIT C

1 Q. OKAY. AND GIVE THE JURY, JUST BECAUSE WE'RE ON THE

2 RECORD HERE, HOW MANY PAGES DID I JUST HAND YOU THERE FROM

3 THE SEC BOX?

4 A. HOW MANY PAGES?

5 Q. ROUGH IDEA.

6 A. I DON'T KNOW, MAYBE 30.

7 Q. THOSE WERE DOCUMENTS THAT HE GAVE YOU DEALING WITH

8 WEBB AND WEBB'S FINANCING AND JOHN COLVIN'S SUBSCRIPTION

9 AGREEMENT, CORRECT?

10 A. RIGHT.

11 Q. AND THE MONEY THAT WAS THE 700,000, CORRECT?

12 A. RIGHT.

13 Q. THIS IS BACK FROM '04, CORRECT?

14 A. RIGHT.

15 Q. OKAY. DID YOU ASK FOR ANYTHING ELSE THAT HE DIDN'T

16 GIVE YOU?

17 A. WELL, IN GENERAL WE ASKED FOR INFORMATION AS FAR AS

18 BANK ACCOUNTS OR ANYTHING THAT WAS AVAILABLE AND HE SAID

19 HE DIDN'T HAVE ACCESS TO THOSE RECORDS.

20 Q. HE SAID HE DIDN'T HAVE ACCESS, BUT DID YOU ASK FOR

21 ANYTHING ELSE THAT HE SAID, I'M NOT GOING TO GIVE YOU?

22 A. NO.

23 Q. OKAY. SO HE TELLS YOU THAT HE'S ON THE RAISING MONEY

24 SIDE OF THE FUND, CORRECT?

25 A. RIGHT.

1 Q. HE'S DEALING WITH WEBB, HE'S DEALING WITH TRYING TO

2 GET MR. COLVIN TO HONOR HIS COMMITMENT TO PAY THE

3 \$3 MILLION, RIGHT?

4 A. RIGHT.

5 Q. AND THE ACTUAL FUND IS BEING ADMINISTERED OUT IN

6 CALIFORNIA, LA JOLLA, CALIFORNIA, RIGHT?

7 A. RIGHT.

8 Q. HE TELLS YOU THERE'S A MAN NAMED DARRYL LAWS, HIS

9 PARTNER, WHO'S RUNNING THE FUND OUT THERE?

10 A. CORRECT.

11 Q. HE'S KIND OF THE OPERATIONS GUY, IF YOU WILL?

12 A. RIGHT.

13 Q. IN FACT, THERE'S EMPLOYEES OUT THERE IN CALIFORNIA,

14 ALEX DRESSER, STANLEY YOUNG. THOSE WERE THE PEOPLE

15 WORKING OUT THERE IN CALIFORNIA, CORRECT?

16 A. I'M NOT SURE.

17 Q. THERE WAS AN OFFICE IN CALIFORNIA?

18 A. I ASSUME SO.

19 Q. OKAY.

20 A. I DIDN'T GO VISIT THE OFFICE.

21 Q. OKAY. AND HE TOLD YOU -- HE SPECIFICALLY TOLD YOU

22 THAT THEY RAISED \$700,000?

23 A. RIGHT.

24 Q. THAT THEY WERE EACH GETTING \$3 MILLION?

25 A. CORRECT.

1 Q. BUT THE GUY HAD STIFFED THEM, RIGHT?

2 A. RIGHT.

3 Q. HE HADN'T PAID THE MONEY HE WAS SUPPOSED TO PAY?

4 A. RIGHT.

5 Q. HE SPECIFICALLY TOLD YOU, AND THE \$700,000 WAS USED

6 FOR OPERATIONAL EXPENSES?

7 A. HE SAID HE WASN'T SURE WHAT THE MONEY WAS USED FOR.

8 HE SPECULATED THAT IT WAS USED FOR OPERATIONAL EXPENSES

9 BUT THAT HE DID NOT HAVE ACCESS TO THE RECORDS OF THE FUND

10 SO THEREFORE HE DIDN'T KNOW SPECIFICALLY WHAT THE MONEY

11 WAS USED FOR.

12 Q. DO YOU REMEMBER BEING INTERVIEWED BY THE FOLKS OVER

13 ON THIS TABLE ABOUT THREE WEEKS AGO? I'M SORRY, TWO

14 MONTHS AGO?

15 A. YES.

16 Q. DO YOU HAVE A COPY OF THE INTERVIEW YOU GAVE TO THEM?

17 A. NO.

18 MR. SAMUEL: YOUR HONOR, MAY I APPROACH?

19 THE COURT: YOU MAY.

20 BY MR. SAMUEL:

21 Q. JUST READ TO YOURSELF WHAT I HAVE HIGHLIGHTED RIGHT

22 THERE.

23 (PAUSE IN THE PROCEEDINGS.)

24 A. OKAY.

25 Q. DOES THAT REFRESH YOUR RECOLLECTION ABOUT WHAT YOU

1 TOLD THEM THAT MR. BARTKO TOLD YOU BACK IN --

2 **MR. BRAGDON:** OBJECTION. HE HASN'T ASKED THE

3 WITNESS WHAT HE SAID IN PRIOR INTERVIEW.

4 **MR. SAMUEL:** I DID. OKAY, LET ME DO IT THE

5 RIGHT WAY.

6 **BY MR. SAMUEL:**

7 **Q.** FIRST QUESTION: WHAT DID MR. BARTKO SAY TO YOU ABOUT

8 THE \$700,000 BEING USED TO PAY FOR OPERATIONAL EXPENSES?

9 **A.** THAT'S WHAT HE BELIEVED THE MONEY WAS USED FOR.

10 **Q.** OKAY. DID YOU TELL MR. WHEELER, MR. BRAGDON, AND MR.

11 CARROLL, THE POSTAL INSPECTOR, BARTKO TOLD YOU AND YOUR

12 COLLEAGUE, MR. WHATEVER HIS NAME IS, THAT THE FUNDS,

13 MONEY, WAS USED TO COVER OPERATING EXPENSES? IS THAT WHAT

14 YOU TOLD THESE GENTLEMEN TWO MONTHS AGO?

15 **A.** I DON'T BELIEVE THAT'S WHAT I TOLD THEM. I MEAN --

16 **Q.** DOES THE DOCUMENT NOT REFRESH YOUR RECOLLECTION WHAT

17 YOU TOLD THEM? WANT TO LOOK AT IT AGAIN?

18 **MR. BRAGDON:** OBJECTION. ASKED AND ANSWERED.

19 THE DOCUMENT IS NOT A TRANSCRIPT. IT'S NOT A --

20 **THE COURT:** I'LL SUSTAIN IT. SO YOUR MEMORY OF

21 THE EVENT IS DIFFERENT FROM -- WHATEVER YOU TALKED ABOUT

22 TWO MONTHS AGO IS DIFFERENT FROM WHATEVER IS ON THE PIECE

23 OF PAPER YOU SAW?

24 **THE WITNESS:** RIGHT.

25 **THE COURT:** NEXT QUESTION.

EXHIBIT C

1 **BY MR. SAMUEL:**

2 **Q.** THEN YOU TURNED TO THE TOPIC OF THE BRIDGE AND

3 MEZZANINE FUND, WHICH WERE EVENTS THAT HAPPENED BEGINNING

4 IN NOVEMBER, DECEMBER OF '04 AND INTO THE SPRING OF '05,

5 CORRECT?

6 **A.** CORRECT.

7 **Q.** CALEDONIAN IS BACK THE YEAR BEFORE, CORRECT?

8 **A.** YES.

9 **Q.** THAT'S WITH DARRYL LAWS OUT IN LA JOLLA?

10 **A.** RIGHT.

11 **Q.** THAT'S THE 700,000?

12 **A.** RIGHT.

13 **Q.** NOW YOU TURN YOUR ATTENTION TO THE BRIDGE AND

14 MEZZANINE FUND, WHICH IS LATE '04 AND '05, CORRECT?

15 **A.** YES.

16 **Q.** HE SAYS TO YOU THAT HE ORIGINALLY RECEIVED THESE

17 CHECKS, SOME OF WHICH WERE SHOWN UP ON THE BOARD HERE BY

18 THE PROSECUTOR. AND HE CAME TO REALIZE WHATEVER THE EXACT

19 TIMING WAS THAT THESE PEOPLE WERE NOT ACCREDITED, CORRECT?

20 **A.** YES.

21 **Q.** SO HE SENT THE MONEY BACK?

22 **A.** YES.

23 **Q.** AND HE GAVE YOU--ALL THOSE CHECKS, RIGHT?

24 **A.** CORRECT.

25 **Q.** YOU GOT COPIES OF THE CAPSTONE CHECKS WHERE HE IS

1 SENDING THE MONEY BACK BECAUSE THE PEOPLE AREN'T

2 ACCREDITED?

3 **A.** YES.

4 **Q.** AND THE CHECKS ARE WHAT THEY ARE, THEY ARE JUST WHAT

5 WAS SHOWN ON THE SCREEN, CORRECT?

6 **A.** YES.

7 **Q.** THE CAPSTONE CHECKS BEING REFUNDED?

8 **A.** RIGHT.

9 **Q.** AND THEN SOMETIME LATER LEGACY SENDS THE MONEY TO

10 HIM, CORRECT?

11 **A.** YES.

12 **Q.** AND THAT'S THE FINDER'S FEE AND THAT'S RELATED TO THE

13 FINDER'S FEE AGREEMENT YOU JUST LOOKED AT, DEFENDANT'S

14 EXHIBIT 81?

15 **A.** YES.

16 **Q.** AND HE SENDS A FINDER'S FEE TO LEGACY, CORRECT?

17 **A.** YES.

18 **Q.** PURSUANT TO THE CONTRACT THAT HE'S OBLIGATED TO DO,

19 HE SENDS THEM 6 PERCENT, CORRECT?

20 **A.** YES.

21 **Q.** AND HE SHOWED YOU THOSE CHECKS?

22 **A.** YES.

23 **Q.** YOU COULD SEE THE 6 PERCENT CHECKS FROM MR. BARTKO TO

24 LEGACY?

25 **A.** YES.

1 **Q.** OKAY. WERE THERE ANY BANK STATEMENTS RELATING TO THE

2 BRIDGE AND MEZZANINE FUND THAT YOU DIDN'T GET THAT YOU

3 KNOW OF?

4 **A.** NO, NOT THAT I'M AWARE OF.

5 **Q.** I MEAN, TO THIS DAY THERE'S NO BANK RECORDS YOU DON'T

6 HAVE WITH REGARD TO THE BRIDGE AND MEZZANINE FUND?

7 **A.** NOT THAT I'M AWARE OF.

8 **Q.** ALL RIGHT. LET ME GO THROUGH A COUPLE MORE EXHIBITS

9 HERE. TAKE A LOOK AT DEFENDANT'S EXHIBITS 3, 4, 5. ARE

10 THESE DOCUMENTS THAT WERE PROVIDED TO YOU DURING THE

11 COURSE OF YOUR EXAMINATION?

12 **A.** YES.

13 **Q.** OKAY. NUMBER 3 IS A INTERNAL, WHAT YOU CALL IT,

14 PROCEDURES DEALING WITH HOW TO PREVENT MONEY LAUNDERING,

15 CORRECT?

16 **A.** YES.

17 **MR. BRAGDON:** OBJECTION, RELEVANCE. THIS

18 INVESTIGATION COVERED OTHER THINGS LIKE MONEY LAUNDERING

19 AND BACKGROUND AND THINGS THAT HAVE NOTHING TO DO WITH

20 THIS CASE.

21 **THE COURT:** HE'S ASKING HIM ABOUT -- THE TOPIC

22 IS THE EXAMINATION. SO THE OBJECTION IS RELEVANCE AND HE

23 SAID HE GOT IT IN THE EXAMINATION. THE OBJECTION ON

24 RELEVANCE IS OVERRULED.

25 **BY MR. SAMUEL:**

1 Q. YOU GOT COPIES OF EXHIBIT 3 WHICH TALKED ABOUT THE
2 INTERNAL PROCEDURES FOR MONEY LAUNDERING, CORRECT?
3 A. YES.
4 Q. FROM MR. BARTKO, CORRECT?
5 A. CORRECT.
6 Q. YOU GOT COPIES OF NO. 4, WHICH IS THE CAPSTONE
7 COMPLIANCE MANUAL, CORRECT?
8 A. YES.
9 Q. YOU GOT COPIES OF NO. 5, WHICH ARE MORE BUSINESS
10 PLANS AND OPERATIONS MANUALS FOR CAPSTONE, CORRECT?
11 A. CORRECT.
12 Q. NUMBER 6 IS DUPLICATES. PUT THAT ASIDE. DO YOU SEE
13 DEFENDANT'S EXHIBIT 7?
14 A. YES.
15 Q. IS THIS AN EXAMPLE OF MR. BARTKO WRITING YOU A LETTER
16 ON JUNE 29, WHICH IS, I GUESS, THE DAY AFTER THE
17 EXAMINATION BEGINS, INCLUDING HUNDREDS OF PAGES OF LEDGERS
18 AND BANK RECORDS DEALING WITH CAPSTONE?
19 A. YES.
20 Q. OKAY. AND THIS WAS TYPICAL OF WHAT YOU WOULD RECEIVE
21 FROM HIM WHEN YOU ASKED, CORRECT?
22 A. CORRECT.
23 Q. THAT'S DEFENDANT'S EXHIBIT 7?
24 **THE COURT:** WITH RESPECT TO THAT, I REMIND YOU,
25 LADIES AND GENTLEMEN OF THE JURY, OF MY PREVIOUS

EXHIBIT C

1 INSTRUCTION.
2 **BY MR. SAMUEL:**
3 Q. DEFENDANT'S EXHIBIT 8. DO YOU RECALL RECEIVING THAT?
4 A. YES.
5 Q. AND IS THIS INCLUDED IN THIS, MAY BE THE LAST PAGE OF
6 IT, IS THIS THE CHECK THAT GOES BACK TO THE UNITED STATES
7 DISTRICT COURT WHEN THE MONEY THAT CAME FROM LEGACY WAS
8 RETURNED?
9 A. WHICH PAGE?
10 Q. DO YOU HAVE DEFENDANT'S EXHIBIT 8? MINE ARE STAPLED.
11 A. MINE AREN'T STAPLED.
12 Q. IS THE LAST PAGE THE CHECK?
13 A. DELAWARE FOR \$200, IT'S A CHECK.
14 Q. CAN YOU JUST LOOK THROUGH YOUR STACK REAL QUICK AND
15 SEE IF YOU HAVE A COPY OF CHECK NUMBER 1036?
16 A. IT'S NOT HERE.
17 Q. LET ME SHOW YOU MY COPY. I'M SORRY IF YOURS CAME
18 LOOSE. DOES YOURS HAVE IT, YOUR HONOR. DO YOU HAVE IT?
19 **MR. BRAGDON:** I DO HAVE IT.
20 **MR. SAMUEL:** THIS SHOULD BE PART OF DEFENDANT'S
21 8. I'LL FIX IT.
22 **THE WITNESS:** YES.
23 **BY MR. SAMUEL:**
24 Q. OKAY. AND YOU KNOW FROM YOUR CONVERSATIONS WITH MR.
25 BARTKO AND FROM YOUR EXAMINATION THAT THE LEGACY MONEY WAS

1 SENT BACK TO UNITED STATES DISTRICT COURT IN
2 WINSTON-SALEM, CORRECT?
3 A. CORRECT.
4 Q. YOU WERE ASKING HIM ABOUT THAT AND THAT'S WHEN HE
5 SENT YOU ALL OF THESE CHECKS THAT WERE REFUNDS AND THE
6 COVER LETTER FROM CAPSTONE, CORRECT?
7 A. RIGHT.
8 Q. THAT'S DEFENDANT'S EXHIBIT 8.
9 **THE COURT:** AGAIN, LADIES AND GENTLEMEN, I
10 REMIND YOU AS TO THE LIMITING INSTRUCTION AS TO 8.
11 **BY MR. SAMUEL:**
12 Q. I JUST FOUND THE DELAWARE SECRETARY OF STATE. THAT
13 LOOKS LIKE THE BACK OF DEFENDANT'S EXHIBIT 9. WERE YOU
14 PICKING UP THE WRONG ONE, MAYBE?
15 A. NO. THIS IS 9. THESE AREN'T STAPLED.
16 Q. DEFENDANT'S EXHIBIT 9 IS ANOTHER EXAMPLE OF A LETTER?
17 A. I THINK YOU HAVE THIS MISLABELED.
18 Q. DEFENDANT'S EXHIBIT 9 ARE MORE CHECKS AND SOME OF THE
19 6 PERCENT COMMISSIONS, RIGHT?
20 A. YES.
21 Q. YOU ASKED FOR IT, HE GAVE IT TO YOU?
22 A. RIGHT.
23 Q. DIDN'T HIDE THE FACT THAT THE COMMISSIONS WERE GIVEN;
24 DIDN'T HIDE ANY OF THESE CHECKS, CORRECT?
25 A. NO.

1 Q. DEFENDANT'S EXHIBIT 10. BIG STACK?
2 A. YES.
3 Q. THIS DEALS WITH CALEDONIAN, CORRECT? PROBABLY SOME
4 OF THE SAME THINGS THAT WE SHOWED YOU FROM THE SEC BOX,
5 CORRECT?
6 A. YES.
7 Q. WEBB DOCUMENTS AND FRANKLIN DOCUMENTS, CORRECT?
8 A. RIGHT.
9 **MR. SAMUEL:** MAY I HAVE ONE SECOND, YOUR HONOR?
10 **THE COURT:** YOU MAY.
11 (PAUSE IN THE PROCEEDINGS.)
12 **THE COURT:** AGAIN, LADIES AND GENTLEMEN, I
13 REMIND YOU WITH RESPECT TO THOSE DOCUMENTS THAT WERE
14 REFERENCED AND PUBLISHED TO YOU, THE EVIDENCE WAS OFFERED
15 FOR THE LIMITED PURPOSE OF SHOWING THE EFFECT ON THE
16 WITNESS' STATE OF MIND AT THE TIME HE RECEIVED THE
17 DOCUMENTS AND THE FACT THAT THEY WERE SENT BY MR. BARTKO.
18 THE EVIDENCE IS NOT OFFERED TO PROVE THE TRUTH OF ANY
19 STATEMENTS OR ASSERTIONS MADE IN THE DOCUMENTS OR THAT THE
20 AUTHOR OF THE DOCUMENTS BELIEVED THE STATEMENTS WERE TRUE.
21 **BY MR. SAMUEL:**
22 Q. YOU WOULD AGREE WITH ME YOU WERE GIVEN ALL THE 2004
23 CAPSTONE BANK RECORDS; IS THAT CORRECT?
24 A. YES.
25 Q. I SHOW YOU WHAT I RETRIEVED FROM THE SEC FILE HERE.

EXHIBIT C

1 IS THAT IN FACT A LEDGER OF ALL THE 2004, NOT '05. YOU
2 WERE ALSO GIVEN '05 BUT THESE ARE THE '04 RECORDS FROM
3 CAPSTONE, CORRECT?
4 A. YES.
5 Q. SHOWING ALL THE TRANSFERS OF MONEY IN AND OUT OF THE
6 CAPSTONE ACCOUNT?
7 A. RIGHT.
8 Q. OKAY.
9 A. YES.
10 MR. SAMUEL: THAT'S ALL THE QUESTIONS I HAVE,
11 YOUR HONOR.
12 THE COURT: THANK YOU, MR. SAMUEL. REDIRECT,
13 MR. BRAGDON.
14 MR. BRAGDON: YES, YOUR HONOR.
15 REDIRECT EXAMINATION
16 BY MR. BRAGDON:
17 Q. MR. MCCLELLAN, YOU-ALL DID NOT GET BANK RECORDS
18 RELATING TO THE CALEDONIAN FUND?
19 A. NO, WE DID NOT.
20 Q. AND WHY DID THE DEFENDANT TELL YOU HE WAS NOT
21 PROVIDING THOSE RECORDS?
22 A. HE DID NOT HAVE ACCESS TO THOSE RECORDS.
23 Q. AND LOOKING AT EXHIBIT 650 UP ON THE SCREEN, LET'S
24 ZOOM IN ON THE BOXES THEMSELVES. DID YOU HAVE ANY RECORDS
25 THAT SHOWED CAPSTONE PARTNERS' MONEY GOING TO MR. BARTKO'S