IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. BENJAMIN DANIEL DEHAAN and LIGHTHOUSE FINANCIAL PARTNERS, LLC, Defendants.	:	Civil Action File No. 1:12-CV-1996- TWT
S. GREGORY HAYS, Receiver for LIGHTHOUSE FINANCIAL PARTNERS, LLC, Plaintiff, v. PAGE PERRY, LLC, ESTATE OF J. BOYD PAGE, ALAN R. PERRY, JR., J. STEVEN PARKER, ROBERT D. TERRY, and DANIEL I. MacINTYRE, Defendants.	:	Ancillary Proceeding File No. 1:13-cv-3925-TWT

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

INTRODUCTION

Reconsideration is appropriate in this case because the June 10, 2014 Order contains clear errors of law and fact which must be corrected in order to avoid manifest injustice. Indeed, the Order fundamentally misconstrues the true nature of Plaintiff's claims. Plaintiff's Complaint does not allege that Defendants were "obligated to violate their duty of confidentiality" by reporting "their client" to regulators for "regulatory violations", as the Order begins. Indeed, DeHaan's Ponzi scheme was an ongoing crime which is not protected by the attorney-client privilege under the crime-fraud exception to the privilege, and moreover, DeHaan was not the Defendants' client -- Lighthouse was their client. Thus, the Complaint alleges that the Defendants had a duty to act in the best interest of their client, Lighthouse, by **protecting** Lighthouse from the known (which knowledge could be inferred from all the circumstances) ongoing theft of its chief officer DeHaan -- and that in order to act in the best interest of Lighthouse, Defendants had both the ability and the duty to report **DeHaan's ongoing criminal conduct,** first within the organization (which they failed to do) and failing that, to the regulators (which they also failed to do), in order to stop the harm to Lighthouse. Thus, the Order was based on a clear error of law regarding the attorney-client privilege. Furthermore, the Order focused solely on Bar Rule 1.13(c) and ignored

multiple other breaches of the standard of care by Defendants under Bar Rules 4.1.a., 4.1.b., 1.2(d), and 1.7 as well as numerous breaches of the standard of care attested to by Dr. Bullard. In fact, long before the duty to report to regulators ever arose, Defendants failed to take any of the preliminary actions required under the applicable standard of care to protect Lighthouse from DeHaan's theft.

In fact, this Court appointed the Receiver and authorized him to pursue all suits that may be brought by the Receiver Estate to recover for harm or damage to Lighthouse. Notably, many other fiduciaries appointed in other Ponzi scheme cases have filed comparable claims against professionals who failed to act or assisted with the known criminal conduct of officers or employees of their clients[1]. In fact, Defendants themselves have recognized the viability of claims against professionals who were **merely negligent in failing to detect** a Ponzi scheme. In an article entitled "5 Ways to Recover from a Ponzi Scheme", one of the Defendants, the late J. Boyd Page, noted that an investor harmed in a Ponzi scheme can recover from a professional who negligently failed to detect the theft:

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[1] For local examples, *see,* substantial settlements obtained against professionsl in *Hays v. Paul, Hastings, Janofsky & Walker, LLP,* Civil Action File No. 1:06-CV-754-CAP (N.D. Ga. 2006) and *Perkins v. Smith Gambrell & Russell, LLP,* et. al., Civil Action File No. 1:08-CV-02673 (N.D. Ga. 2008). For national examples, *see,* litigation against national law firms arising from Madoff, Stanford, Nadel and Rothstein Ponzi schemes.

> There also may be accounting firms, banks, and other individuals who were **negligent in not spotting the fraud,** Page said. In February, the charitable foundation of Sen. Frank Lautenberg, D-N.J., and two of his children, sued Madoff's brother Peter, who was the chief compliance officer and general counsel....

(*See,* Exhibit 1, attached hereto). In this case, Plaintiff has alleged (supported by facts, documents, expert testimony, and a prior successful suit against Page Perry) that Defendants had knowledge of DeHaan's theft and assisted in and perpetuated his criminal conduct. Obviously, if mere negligence by an attorney in failing to detect a Ponzi scheme is actionable, the Complaint in this case alleging that Defendants had knowledge of the crime and assisted in perpetuating the fraud for years (*see,* Bullard Affidavit, ¶¶ 12-14 alleging Defendants were aware of the fraud) states a "plausible claim for malpractice and is not subject to immediate dismissal at the pleading stage under Fed. R. Civ. P. 12(b)(6).[2] As set forth below, the Order erred by failing to accept the factual allegations in the Complaint as true, but instead by adopting Defendants' version of disputed facts and construing documents and evidence in the light most favorable to the Defendants.

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[2] Plaintiff recognizes that this Court is not bound by O.C.G.A. § 9-11-9.1, but merely meant to convey that since O.C.G.A. § 9-11-9.1 sets out a *heightened* pleading standard for malpractice claims and Plaintiff had met that heightened pleading standard, that should necessarily meet the *lower* federal pleading standard applicable in this Court of stating a "plausible" claim for professional malpractice.

ARGUMENT

Under Local Rule 7.2(E), "[m]otions for reconsideration shall not be filed as a routine practice", but only when "absolutely necessary." Such absolute necessity arises when there is "a need to correct a clear error of law or fact." *Bryant v. Jones,* 696 F. Supp. 2d 1313 (N.D. Ga. 2010); *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers,* 916 F. Supp. 1557, 1560 (N.D. Ga. 1995), *aff'd,* 87 F. 3d 1242 (11th Cir. 1996).

In this case, Plaintiff meets the standard for reconsideration because the Order contains the following errors of law and/or fact:

1. The Court erred in holding that Defendants' disclosure of ongoing criminal conduct would violate the attorney-client privilege because

   (a) under the crime-fraud exception, knowledge of ongoing criminal or fraudulent conduct is not protected by the attorney-client privilege; and

   (b) the individual committing the crime, DeHaan, was not the Defendants' client.

2. The Court erred in holding that Defendants had no duty to report known, ongoing criminal conduct to the appropriate authorities or to otherwise act on knowledge of ongoing theft from its client because

   (a) under Bar Rule 1.13(b), Defendants had a duty to always act in the best interest of their client, Lighthouse, and to first report DeHaan's criminal conduct within the organization, which they failed to do;

(b) under Bar Rule 1.13(c), if no one within the organization would take the appropriate action, Defendants would have had the duty to report DeHaan's theft to regulators if it was in the best interest of Lighthouse to do so (which it clearly was);

(c) under Bar Rule 4.1.b., Defendants had a duty to disclose criminal conduct outside the organization if necessary to avoid assisting in the crime, which Defendants also failed to do; and

(d) Bar Rules 1.2(d) and 4.1.a. prohibit an attorney from assisting in criminal or fraudulent conduct or from making any false statements to third parties, and Defendants also violated both of these Rules.

3. The Court erred in ruling that Defendants' conflict of interest in representing DeHaan in his SEC deposition was not the proximate cause of any damage to Lighthouse because

(a) the Order was factually mistaken that no money was stolen after the SEC deposition when in fact more than $2.5 million was stolen after the SEC deposition.

4. The Court erred in ruling that Defendants' failure to meet the standard of care in the conduct of the 2010 and 2011 mock audits was not the proximate cause of any damage to Lighthouse because

(a) the financial records that Defendants' failed to properly review or evaluate were the exact documents that ultimately uncovered DeHaan's fraud in 2012 during the SEC investigation.

1. THE COURT ERRED IN HOLDING THAT DEFENDANTS' DISCLOSURE OF ONGOING CRIMINAL CONDUCT WOULD VIOLATE THE ATTORNEY-CLIENT PRIVILEGE.

The foundation of the entire Order is the sanctity of the attorney-client

privilege. The Court held that Defendants could not be required "to violate their duty of confidentiality" by reporting "regulatory violations" by "their client" to regulators. Concluding that everything the Defendants learned in the course of representing Lighthouse was privileged and could not be disclosed without violating confidentiality, the Court effectively held that an attorney who learns that an officer or employee of his client is operating an illegal Ponzi scheme, stealing millions of dollars from his client, and making misrepresentations to regulators in regulatory filings to hide the fraud (as alleged in the Complaint) is somehow duty-bound to keep that information secret. According to the Order, the attorney can even continue to represent the client and assist the officer to hide the crime, thereby perpetuating the theft to the detriment of his real client -- all in the name of protecting the sanctity of the attorney-client privilege.

This is clearly not the law. First, Defendants' knowledge of DeHaan's Ponzi scheme was not protected by the attorney-client privilege because of the crime-fraud exception. As pled in the Complaint, this was not merely a "regulatory violation", but an **ongoing crime** -- theft of over $7 million from public investors, systematically and continuously over a 3 1/2 year period, during Defendants' entire representation of Lighthouse. Pursuant to the crime-fraud exception to the attorney-client privilege,

> the attorney-client privilege does not cover communications with respect to proposed or **ongoing infractions of the law in the commission of a crime, or the perpetration of a fraud.**

Both v. Frantz, 278 Ga. App. 556, 563 (2006) (Emphasis added). The Georgia Supreme Court recently confirmed that "Georgia law recognizes an exception to the attorney-client privilege for communications in furtherance of a crime, fraud, or other unlawful end." *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.,* 293 Ga. 419, 427 (2013). *See also, In re Fulton County Grand Jury Proceedings,* 244 Ga. App. 380 (2000) ("Pursuant to the crime-fraud exception, the attorney-client privilege does not extend to communications that occur before perpetration of a fraud or commission of a crime and which relate thereto.").

> Under the crime-fraud exception, **the privilege may not be used to enable persons to carry out contemplated crimes against society, frauds or perjuries.** If, as was allegedly the case here, the client used the attorney as the instrument by which he perpetrated a crime, the crime-fraud exception would preclude the attorney from invoking the attorney-client privilege in respect to testimony regarding the crime.

Begner v. State Ethics Commission, 250 Ga. App. 327, 332 (2001) (Emphasis added). Thus, pursuant to the crime-fraud exception, Defendants' knowledge of DeHaan's ongoing Ponzi scheme was not protected by the attorney-client privilege. (*See,* Plaintiff's Brief in Opposition to Motion to Dismiss, p. 45, discussing the crime-fraud exception).

In addition, Defendants' knowledge of DeHaan's criminal conduct was not protected by the attorney-client privilege because DeHaan was not the Defendants' client. Indeed, the Defendants' retainer agreement and withdrawal letter both adamantly stated that Defendants represented Lighthouse only and did not represent DeHaan individually. (Complaint, Ex. 2, 32). In fact, the withdrawal letter expressly confirmed that "our law firm has never represented you [DeHaan] personally and will not do so in this matter or any related matter." (*Id.*) Thus, far from being attorney-client privileged or putting Defendants in the position of "policing **their client**" and reporting **their client** to the authorities, when Defendants learned that DeHaan was stealing **from** Lighthouse, that information was not protected by the attorney-client privilege -- and moreover, Defendants clearly had a duty at that point to act to protect their client, which was Lighthouse. (*See,* Plaintiff's Brief in Opposition to Motion to Dismiss, p. 45, noting that Lighthouse was Defendants' client, not DeHaan).

Thus, the Court erred in holding that Defendants' knowledge of DeHaan's ongoing crime was privileged and could not be reported to the authorities without violating attorney-client privilege. In fact, the Order failed to consider or even address the crime-fraud exception to the attorney-client privilege or the separate legal identity of Lighthouse and DeHaan. Since Defendants' knowledge of

DeHaan's criminal conduct was not protected by the attorney-client privilege, its disclosure could not have violated the duty of confidentiality, as the Order erroneously held.

2. THE COURT ERRED IN HOLDING THAT DEFENDANTS HAD NO DUTY TO REPORT KNOWN AND ONGOING CRIMINAL CONDUCT TO THE AUTHORITIES.

Although violations of Bar Rules do not give rise to an independent cause of action, Bar Rules are evidence of the standard of care applicable to professional malpractice claims in Georgia. *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 265 Ga. 374 (1995). As attested by Dr. Bullard, Defendants' failure under these circumstances to comply with Bar Rules 1.13, 4..a., 4.1.b., 1.2(d) and 1.7 fell below the minimum standard of care for securities compliance counsel.

(a) Bar Rule 1.13

The Order erroneously held that the Defendants could not be liable for malpractice under Bar Rule 1.13 for failing to report DeHaan's Ponzi scheme to the SEC because (1) "reporting out" under that particular Rule is permissive rather than mandatory, and (2) the SEC is not the "highest authority that can act on behalf of [Lighthouse]" under that particular Rule. This ruling is also erroneous for at least five reasons.

First, the Court focused too narrowly on whether the language regarding reporting out was permissive or mandatory under subsection (c) of the Rule, and failed to consider the context and meaning of the Rule as a whole, as set forth in the Complaint. The primary and overarching directive of Bar Rule 1.13 is that a lawyer who represents an organization, who discovers that a person associated with the organization is taking action that is likely to cause substantial injury to the organization, **"shall proceed as is reasonably necessary in the best interest of the organization."** Rule 1.13(b) (Emphasis added). All of the reporting duties that follow are couched in terms of whether or not a particular action is "reasonably necessary" to prevent substantial injury to the organization and must be read in light of the most important directive -- to protect the organization from harm and act in its best interest. Simply put, the ultimate mandate of Rule 1.13 is that the lawyer **must** always do what is in the best interest of the organization. Of course, it is axiomatic that if a lawyer representing a corporation discovers that an officer or employee is looting the company, it would be in the best interest of the corporation for the attorney to take all reasonable steps which are permitted under the Rules to put a stop to the theft. Clearly, reporting the theft to the authorities would put a stop to the crime. Accordingly, Rule 1.13(c) gives the attorney permission to disclose confidential information **"if the lawyer**

reasonably believes that the violation is reasonably certain to result in substantial injury to the organization." Rule 1.13(c)(2) also expressly provides that the lawyer may reveal information necessary to protect the organization "whether or not Rule 1.6 permits such disclosure." Thus, Rule 1.13 uses permissive language under subsection (c) because in this instance, the attorney may violate confidentiality if no one within the organization will take appropriate action and it is necessary to protect and avoid injury to the organization. It does not mean that when reporting out is necessary to avoid injury to the organization, the attorney has the option of not acting in the best interest of the organization by not reporting the criminal conduct. In other words, Rule 1.13 mandates that in all circumstances, the attorney act in the best interest of the organization. Thus, when reporting criminal conduct to the authorities is necessary to prevent injury to the organization, Rule 1.13 gives the attorney the **ability** to carry out that **duty,** even if it violates confidentiality under Rule 1.6. Clearly, reporting DeHaan's theft of millions of dollars from Lighthouse qualified under this standard.

Second, in accordance with Rule 1.13, Dr. Bullard provided testimony that in his professional opinion, the standard of care applicable to securities compliance attorneys representing SEC-licensed financial firms would require that such attorneys act aggressively upon learning of criminal or fraudulent conduct by

an officer or employee of their client, including **ultimately** reporting the ongoing theft to regulators **if** no one within the organization would put a stop to the theft. (Bullard Affi., ¶ 11). Thus, **if** Defendants had properly reported the theft within the organization **and** no one within the organization would take appropriate action, Plaintiff has established that reporting to the SEC would then be "reasonably necessary" to prevent substantial injury to Lighthouse -- and thus **required, not optional.** Since Rule 1.13(b) permits such disclosure when necessary to prevent injury to the organization, the jury would have to decide whether, under these circumstances, Defendants failed to meet the minimum standard of care by failing to take action that was necessary to protect their client.

Third, because the Court focused solely on the ultimate action that was permitted, *i.e.*, reporting out, it failed to consider that, before reporting out to regulators, Defendants were required under Rule 1.13(b) to report **the ongoing theft** to a higher authority **within the organization** -- and Defendants failed to do that either. Indeed, by their own admission, Defendants did not confront DeHaan **about his theft** until May 25, 2012 -- at which point the Ponzi scheme stopped and DeHaan's crime was immediately reported to the SEC. The Complaint also alleges that Defendants violated Rule 1.13 by failing to confront DeHaan **about his theft** sooner, which would have stopped the fraud earlier and

prevented millions of dollars from being stolen. Again, the jury must decide whether Defendants' three perfunctory emails to DeHaan advising Lighthouse not to take custody of client funds (despite clear evidence that he was continuing to do so) was the equivalent of confronting DeHaan **with his theft.**[3] Dr. Bullard states unequivocally that these minimal efforts "constituted an egregious failure to satisfy minimum professional standards." (Bullard Affi., ¶ 12). This clearly states a plausible claim for malpractice. The Order erroneously fails to accept these factual allegations as true and instead interprets these three emails in the light most favorable to Defendants.

Fourth, the Court did not consider that after November 2011, Defendants knew that Lighthouse had diversified its ownership and Anatoly Melamud ("Melamud") held an indirect interest in Lighthouse, incident to which he was actively involved in the activity of Lighthouse -- and Defendants never reported DeHaan's theft to Melamud either. Obviously, had they done so, Melamud would certainly have taken action to stop the fraud (including confronting DeHaan and,

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3 Rule 1.13(a) states initially that "the lawyer shall refer **the matter** to a higher authority within the organization..." (Emphasis added). In this case, "the matter" to be reported to a higher authority was **DeHaan's theft** -- not just rote custody instructions. Clearly, advising DeHaan of the custody rule is not the same as confronting him with his criminal misconduct and theft and advising him of the ramifications of his criminal conduct.

failing that, reporting the Ponzi scheme to the SEC) since Melamud and his family had invested approximately $1 million with Lighthouse. In fact, in his suit against Page Perry, Melamud's primary claim was that Page Perry "shielded DeHaan's fraudulent conduct . . . by failing to adequately advise him of the financial and legal uncertainty of DeHaan."[4] The trial court in that case denied Page Perry's motion for summary judgment and held that Melamud had viable claims for professional malpractice, breach of fiduciary duty, breach of contract, breach of the duty of good faith and fair dealing, fraud, and negligent misrepresentation -- all of which could proceed to a jury based on Page Perry's failure to report DeHaan's fraud to Melamud.

Thus, the Order failed to consider or address Defendants' failure to report DeHaan's theft **within the organization.** (*See,* Plaintiff's Brief in Opposition to Motion to Dismiss, p. 44, discussing Defendants' failure to timely confront DeHaan and their failure to report to Melamud).

Fifth, the Court erred in holding that the SEC was not "the highest authority that can act on behalf of [Lighthouse]." Indeed, Lighthouse was a

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[4] "There can be no doubt that a fiduciary relationship creates a duty to disclose material facts." *Cohen v. Morgan Schiff & Co. (In re Friedman's, Inc.),* 385 B.R. 381, 423 (S.D. Ga. 2008).

state-licensed investment adviser regulated by the SEC. Moreover, pursuant to Section 203 of the Investment Advisers Act of 1940, the SEC had full authority to audit Lighthouse and demand access to all its books and records, and could limit Lighthouse's activities, suspend or revoke its license, issue and enforce a cease and desist order, freeze and/or seize its assets, and ultimately have a receiver appointed to take over and liquidate the firm. In fact, when the SEC finally learned of DeHaan's Ponzi scheme, that's exactly what it did -- shut Lighthouse down, seized its assets, and had the Receiver appointed, thus clearly "acting on behalf of" Lighthouse to protect it from DeHaan and put a stop to the fraud. Clearly, the SEC was indeed the highest authority authorized to act on behalf of Lighthouse "pursuant to applicable law", under Rule 1.13(b).[5]

In any event, the issue of reporting out under Rule 1.13(c) is not dispositive of Plaintiff's claims because Plaintiff does not allege that Defendants had a duty **in the first instance** to report DeHaan's crime to regulators. Rather, Defendants had a duty under Rule 1.13 first to confront DeHaan, then to report to Melamud,

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5 The Order states that Plaintiff did not cite any legal precedent holding that the SEC was the "highest authority" under Rule 1.13(b). However, there are no Georgia cases interpreting Rule 1.13 at all, and though the Court ultimately disagreed with Plaintiff's interpretation, Plaintiff had a reasonable basis to argue for such an interpretation (and in fact, contends that the ruling is in error and should be reconsidered and reversed).

the minority owner, and failing both of those, to act in the best interest of Lighthouse by reporting non-privileged information about an ongoing crime by a non-client to regulators. Since Defendants failed to report within the organization, the duty to "report out" never actually arose under the facts alleged in the Complaint. Again, the Order failed to consider or address Defendants' failure to report within the organization to DeHaan or Melamud.

(b) Bar Rules 4.1 and 1.2

In addition to Rule 1.13 which permits disclosure when necessary to protect the organization, Rule 4.1.b. **mandates** that an attorney disclose an ongoing crime or fraud if necessary to avoid assisting in the crime or fraud:

> Rule 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS
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> In the course of representing a client a lawyer **shall not** knowingly:
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> b. **fail to disclose** a material fact **to a third person** when disclosure is necessary **to avoid assisting a criminal or fraudulent act** by a client, unless disclosure is prohibited by Rule 1.6[6]

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[6] Rule 1.6 does **not prohibit** disclosure under the circumstances alleged in the Complaint. Rather, it provides that a lawyer may reveal even confidential information when necessary "to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;..." In this case, as set forth above, this was not even confidential information, and its disclosure was clearly necessary to prevent

(Emphasis added). Thus, if an attorney learns that an officer or employee of his client is engaged in an ongoing crime or fraud, he cannot sit idly by while the officer continues to operate an illegal Ponzi scheme. As an officer of the court, the attorney must take reasonable action to put a stop to a known and ongoing crime -- and he certainly cannot assist the insider to continue with the fraudulent or criminal scheme. In addition to Rule 4.1.b., Bar Rule 1.2(d) also prohibits a lawyer from knowingly assisting a client in criminal or fraudulent conduct, and Rule 4.1.a. prohibits an attorney from making any false statement of material fact or law to a third party. Defendants also violated both of these Bar Rules.

Indeed, there is substantial factual support for the allegations in the Complaint that Defendants knew about and assisted DeHaan's fraud for years. The Complaint alleges that Defendants likely knew as early as January 2011 that DeHaan was taking custody of client funds and misappropriating those funds to his own use via the "Client Holding - Pass Through Account." In fact, it is undisputed that Defendants received Lighthouse's financial statements in January 2011 and were thus made aware of this highly suspicious and irregular Account. The Complaint also alleges numerous other red flags over the following 18

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substantial financial loss to Lighthouse and its investors.

months (most of which are similarly undisputed), the cumulative effect of which makes it difficult to believe that Defendants could possibly have been unaware of DeHaan's theft for that entire time. Indeed, Plaintiff's expert witness, a foremost authority on securities compliance law, opines that the theft was so flagrant and the evidence in Defendants' possession was so obvious that they must have known:

- Initially, Page Perry either had actual knowledge of or was willfully blind to DeHaan's violations of Georgia's custody rule and to his theft of client assets. (Bullard Affi., ¶ 12)

- Later in the course of DeHaan's fraud, Page Perry has actual knowledge of the fraud, actively participated in the cover-up of the fraud, and received proceeds of the fraud. (Bullard Affi., ¶ 12)

- This "Client Holding - Pass Through" account ran a negative balance in excess of $700,000 [in January 2011], which was direct evidence that client assets had been stolen by DeHaan with nothing more than a Lighthouse obligation left in their place. (Bullard Affi., ¶ 13)

- The signs that DeHaan was violating the custody rule and stealing from clients were open and notorious. (Bullard Affi., ¶ 13)

- Page Perry could not have [been] unaware of the import of the red flags described above. Two former Georgia Securities Commissioners would have been steeped in the lore of the kind of plain vanilla scam being run by DeHaan and quite familiar with the warning signs in the instant case as blatant indicators of misconduct. (Bullard Affi., ¶ 14)

Of course, for purposes of this Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), these **sworn** factual allegations must be accepted as true.

Yet despite their evident knowledge of DeHaan's crime, even before any discovery in this case, there is clear evidence that Defendants continued to assist DeHaan in numerous ways, thereby allowing the theft to continue. For example, they continued helping DeHaan prepare and file Lighthouse's annual form ADVs (in March 2011 and March 2012) representing that Lighthouse did **not** have custody of client funds, despite "open and notorious" evidence to the contrary, thereby avoiding or delaying an SEC audit. (Bullard Affi., ¶ 13) This was a clear violation of Bar Rule 4.1.a. prohibiting an attorney from making false statements to third parties and Rule 1.2(d) prohibiting an attorney from knowingly assisting in criminal conduct. Even if Defendants did not know that the form ADVs were false when they were filed, at a minimum they had a duty to correct the false information as soon as they learned that false information had been given to regulators (with their assistance). Defendants also assisted DeHaan in responding to the Georgia Securities Commissioner's audit in January, February and March of 2012; they drafted and provided implausible excuses to the Securities Commissioner for DeHaan's inability to produce basic client records; and they even represented DeHaan in his SEC deposition on April 3, 2012, thereby further delaying the SEC's eventual discovery of the crime, also in violation of Rules 1.2(d) and 4.1.a. In fact, Dr. Bullard noted that Defendants

"aided and abetted DeHaan's fraud and deception relating to the custody of Lighthouse's client's assets." (Bullard Affi., ¶ 16. See, also, ¶ 7, 10).

A jury must determine whether Defendants knew of DeHaan's ongoing criminal and fraudulent conduct prior to May 25, 2012 (and if so, at what point in time). But at the pleading stage, the Complaint states a "plausible" claim for relief because it alleges with sufficient factual and documentary support, as well as an expert affidavit, that Defendants knew or should have known of DeHaan's crime / fraud long before May 25, 2012. Accepting these factual allegations in the Complaint as true, the Complaint is not subject to dismissal because the facts known to Defendants were not covered by the attorney-client privilege and, under the applicable standard of care, Defendants were required to disclose these facts under multiple Bar Rules because it was necessary in order to prevent harm to Lighthouse and to avoid assisting in the criminal conduct.

Thus, the Court erred in holding that Defendants had no duty to report an ongoing crime or fraud to the authorities or to act within the organization to protect Lighthouse. Indeed, the Order failed to consider and did not even address Bar Rules 4.1.a., 4.1.b., and 1.2(d), all of which Defendants clearly violated, as

set forth in detail in Plaintiff's Brief in Opposition to Motion to Dismiss, p. 43.[7]

3. THE COURT ERRED IN RULING THAT DEFENDANTS' CONFLICT OF INTEREST IN REPRESENTING DEHAAN IN HIS SEC DEPOSITION WAS NOT THE PROXIMATE CAUSE OF ANY DAMAGE TO LIGHTHOUSE.

The Complaint also alleges that Defendants violated Bar Rule 1.7, which prohibits a lawyer from representing a client whose interests are "directly adverse" to another client. Though Defendants represented Lighthouse for 3 1/2 years, they also acknowledge that they undertook to represent DeHaan individually in his SEC deposition on April 3, 2012. Since it is alleged that Defendants knew DeHaan was stealing from Lighthouse at that time, this was a "concurrent conflict of interest", in violation of Rule 1.7 and Defendants' duty to act solely in the best interest of Lighthouse. Furthermore, Defendants failed to obtain Lighthouse's consent to the dual representation, as required by the retainer agreement, although Melamud clearly could have been consulted for such approval.

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[7] The Order also erroneously states that Plaintiff cited no legal support for his claim that the Defendants had a duty to report DeHaan's theft to regulators. On the contrary, Plaintiff cited Bar Rule 4.1.b., 4.1.a., 2.1(d), as well as Dr. Bullard's affidavit attesting to the applicable standard of care for securities compliance attorneys. Of course, if the Court concluded for any reason that these breaches of the standard of care were not adequately pled in the Complaint, the remedy would be to grant leave to amend the Complaint, not immediate dismissal of all claims with prejudice.

The Court erroneously dismissed this claim based on a clear error of fact. Specifically, the Order held that this undisputed conflict of interest was not the proximate cause of any damage to Lighthouse because DeHaan's theft occurred **prior** to the SEC hearing. On the contrary, millions of dollars were stolen by DeHaan **after** the April 3, 2012 deposition. (Complaint, ¶ 95). In fact, as the regulators closed in on DeHaan, the Ponzi scheme escalated as he desperately attempted to raise more money for his personal use. Clearly, had Defendants confronted DeHaan about his theft in early April 2012 (or reported the theft to Melamud), they could have stopped the fraud at that point and prevented millions of dollars in additional theft. Their decision instead to demand additional fees to represent DeHaan individually in the SEC deposition was a blatant conflict of interest which proximately caused significant additional damages to Lighthouse. Thus, the Order erroneously held that the conflict of interest was not the proximate cause of any damage to Lighthouse based on a clear factual error that no theft occurred after the SEC deposition on April 3, 2012.

4. THE COURT ERRED IN RULING THAT DEFENDANTS' FAILURE TO MEET THE STANDARD OF CARE IN CONDUCTING THE MOCK AUDITS WAS NOT THE PROXIMATE CAUSE OF ANY DAMAGE TO LIGHTHOUSE.

The Order also erroneously held that there was no causal link between

Defendants' failure to properly perform the mock audits and Lighthouse's subsequent damages. On the contrary, Dr. Bullard's affidavit attests that Defendants' "mock audits constituted an egregious failure to satisfy minimum professional standards" (Bullard Affi., ¶ 12) because they failed to review many of the basic documents that are part of "the most rudimentary mock audit." (Id., ¶ 14). Specifically, Defendants failed to review most of the basic client account documents at all, and reviewed others but failed to act on clear evidence of custody violations and theft that were apparent from the financial statements. Thus, there was a causal link between the deficient mock audits and the ensuing damages because the financial records that Defendants failed to properly review and evaluate were the very documents that ultimately led to the discovery of the Ponzi scheme by the SEC. (Bullard Affi., ¶ 11, 14). A properly conducted mock audit in July 2010 and/or August 2011 would have uncovered DeHaan's theft much earlier and prevented millions of dollars in damages to Lighthouse. Moreover, "[t]he issues of proximate cause and damages in legal malpractice cases are reserved for the jury except in plain and palpable cases." *Both v. Frantz,* 278 Ga. App. 556 (2006). Thus, the Order erroneously dismissed this claim based on a lack of proximate cause.

CONCLUSION

The Order contains errors of law and fact. Recognizing that Defendant's knowledge of DeHaan's ongoing criminal conduct was not protected by attorney-client privilege totally upends the entire analysis. Indeed, the Complaint does not allege that Defendants were required to violate the sanctity of the attorney-client privilege, which was apparently the beginning point of the Court's analysis.

The only remaining basis for the ruling -- that Bar Rule 1.13(c) did not *mandate* that Defendants' report DeHaan's crime to regulators -- is incomplete and does not warrant immediate dismissal of all of Plaintiff's claims. Indeed, the Complaint states a plausible claim for malpractice by sufficiently alleging facts which, assumed to be true, would establish that Defendants failed to meet the applicable standard of care by failing to act in the best interest of Lighthouse in numerous ways, as evidenced by multiple Bar Rules and Dr. Bullard's affidavit, which sufficiently alleges a failure to comply with the applicable standard of care by failing to properly conduct the mock audits, assisting in false regulatory filings, and failing to take reasonably necessary steps to stop the theft and prevent harm to Lighthouse. These allegations implicate the general standard of care to act in the best interest of the client, as well as Bar Rules 4.1.a., 4.1.b., 1.2(d), 1.7 and 1.13(b). Thus, the Court's narrow ruling that Bar Rule 1.13(c) did not

mandate reporting to regulators does not address the myriad other breaches of the standard of care and does not dispense with Plaintiff's entire malpractice claim. Finally, the holding that Defendants' breaches of the standard of care were not the proximate cause of Lighthouse's damages was based on factual errors because millions of dollars were stolen after April 3, 2012, and the financial records that Defendants failed to properly review in the mock audits were the very documents that ultimately uncovered the Ponzi scheme during the SEC investigation .

Accordingly, based on these four errors of law and fact, Plaintiff respectfully requests that the Court grant reconsideration and either (1) reverse the Order, or (2) grant Plaintiff leave to amend the Complaint in the event that any claim asserted is deemed by the Court to be insufficiently pled in the Complaint.

This 27th day of June, 2014.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This is to certify that, in accordance with the Local Rules for the Northern District of Georgia, LR 5.1A, I have this day electronically filed the within and foregoing MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION in the above-styled case with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

H. Lane Young
Christine L. Mast
Zachary Lewis

I further certify, in accordance with LR 7.1(D), that this MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION was prepared using Times New Roman 14-point, a font and point selection approved by the Court in LR 5.1(C).

This 27th day of June, 2014.

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By Greg Saltz • Bankrate.com

Highlights
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Hey you, got some money you want to invest? This is a can't-miss deal; good, no, great returns; stable performance even in bad times; and to top it off, everything is guaranteed.

Interested?

Unfortunately for many investors, the answer was yes. But what they invested their money in wasn't some sort of special high-interest CD or high-tech stock trading system that couldn't lose. It was a Ponzi scheme, a fraud that uses cash from newer investors to pay those attractive returns to older investors.

That is, until the scheme collapses.

In the past several months, thousands of investors who thought they had accounts worth billions of dollars have discovered it was all illusory. Earlier this month, Bernard Madoff pleaded guilty in federal court to running a Ponzi scheme that prosecutors said could involve more than $64 billion, by far the largest such fraud ever. In February, regulators charged Robert Allen Stanford and several of his companies with operating an $8 billion investment fraud.

Government regulators and prosecutors also recently filed civil and criminal cases against a handful of other money managers involving tens to hundreds of millions of investors' dollars.

"They're all depressed," said New York tax attorney Harold Levine of his Madoff investor clients. "Clearly people's lives have changed. Some people are in denial. Some people understand it. They're all angry."

So what do you do if you've been caught up in one of these scams? Here are five suggestions that might help.

1. Go to the shoebox. The first thing a victim should do is collect as many records as he or she can find relating to the investment, according to Boyd Page, an attorney who specializes in representing investors at the Page Perry law firm in Atlanta.

That's important, because those involved in investment schemes often don't keep records, have destroyed them or the files are in disarray and not complete, Page says. Gather account statements, canceled checks you sent or checks sent to you. Also look for anything acknowledging your investment such as emails or letters that may have trumpeted the alleged performance.

2. Visit the courthouse. You can file a lawsuit to try to recover your money, but there are lots of variables with this avenue that can make a big difference in the end. Much of it has to do with who you sue and how much assets they have.

"Generally speaking, legal actions directly against the perpetrator have little likelihood of being economic," Page says.

There are several reasons for this. First, chances are good that whoever ran the Ponzi scheme was living life high off the hog -- private jet flights, fancy vacations, lots of lavish spending. Second, once a fraud is exposed, the remaining assets of the firm and its operators almost always are seized by the government or court-appointed trustee in bankruptcy court.

However, others who were involved in varying degrees with the fraud may also be liable and have additional assets, says Alan Cosner, a former IRS agent and attorney in East Brunswick, N.J. Perhaps

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there were people who took part in transactions related to the scheme who knew about it but didn't act, says attorney Ron Geffner, a partner with Sadis & Goldberg in New York and a former lawyer with the Securities and Exchange Commission.

In the Madoff case, there were "feeder funds" that placed money from their investors with Madoff, perhaps without those investors' knowledge. Unbeknownst to Loretta Weinberg, a New Jersey state senator, her financial adviser in California invested her money with Madoff. The result: Her life savings, more than $1 million, is gone.

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30 Year Fxd FHA	3.375%	4.704%
15 Year Fxd FHA	2.750%	3.845%

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There also may be accounting firms, banks or other individuals who were negligent in not spotting the fraud, Page said. In February, the charitable foundation of Sen. Frank Lautenberg, D-N.J., and two of his children sued Madoff's brother Peter, who was the chief compliance officer and general counsel of Bernard L. Madoff Investment Securities. Peter Madoff has not been charged criminally in the case.

Some situations may exist in which individual victims have claims unique to them or a small group of investors, depending on how they became involved in the scheme and other factors, Page said. That could be helpful, especially if a fraud impacted hundreds or thousands of investors, all of whom are looking for ways to recover their money.

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