

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Securities and Exchange Commission,)	
)	
Applicant,)	
)	
v.)	Misc. No: 1:11-mc-00678-RLW
)	
Securities Investor Protection Corporation,)	
)	
Respondent.)	
)	

**SECURITIES AND EXCHANGE COMMISSION’S MEMORANDUM OF POINTS
AND AUTHORITIES IN OPPOSITION TO THE SECURITIES INVESTOR
PROTECTION CORPORATION’S (1) MOTION TO STRIKE SEC’S *EX PARTE*
MOTION FOR ORDER TO SHOW CAUSE AND (2) MOTION FOR
RULE 16 CASE MANAGEMENT CONFERENCE**

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RULE 16 CASE MANAGEMENT CONFERENCE**

Applicant U.S. Securities and Exchange Commission (“SEC” or “Commission”) respectfully submits this memorandum of law in opposition to the motion of respondent Securities Investor Protection Corporation (“SIPC”) to strike the SEC’s Motion for an Order To Show Cause and SIPC’s Motion for a Rule 16 Case Management Conference. For the reasons set forth below, SIPC’s motions should be denied.

PRELIMINARY STATEMENT

The SEC has filed an application with the Court seeking to compel SIPC to take steps to initiate a liquidation proceeding under the Securities Investor Protection Act of 1970, as amended, 15 U.S.C. § 78aaa, *et seq.* (“SIPA”), with respect to defunct broker-dealer and SIPC member Stanford Group Company (“SGC”). *See* Application of the Securities and Exchange Commission (“Commission Application” or “Application”). Such a liquidation proceeding

would provide SGC customers who bought certain securities issued by an SGC affiliate an opportunity to submit claims to a SIPC-designated trustee, and, if necessary, the federal courts, for coverage under SIPA.

As set forth in the Commission's prior filings, the text, structure, and purposes of SIPA and relevant case law show that this proceeding should be a summary one. *See* Securities and Exchange Commission's Memorandum of Points and Authorities in Support of Application at 29-30 ("Commission Memorandum in Support of Application").¹ These filings also reflect the Commission's well considered view that, under SIPA and other authorities, the Commission Application presents only two factual questions: (a) whether the Commission, in exercising its plenary supervision of SIPC, has determined that SGC has failed or is in danger of failing to meet its obligations to customers, and (b) whether one of the other statutory factual predicates for initiation of a liquidation proceeding (such as the insolvency of the broker-dealer or its being the subject of receivership) is present. There can be no dispute that both factual questions are easily answered in the affirmative here. *See* Commission Memorandum in Support of Application at 4.

Consistent with both the summary nature of this proceeding and the limited inquiry that SIPA provides for here, and drawing on the way that courts – including courts in this district – treat analogous summary proceedings, the Commission moved that SIPC be ordered to show cause why it should not be ordered to take steps to initiate a liquidation proceeding in the federal district court for the Northern District of Texas ("Texas Court") ("SEC Motion for Order To Show Cause" or "SEC Motion"). SIPC then moved to strike the SEC Motion and, additionally, for a Rule 16 Case Management Conference ("SIPC Motion To Strike" or "SIPC Motion").

¹ *See also* SEC's Ex Parte Motion for an Order To Show Cause Why SIPC Should Not Be Ordered To File an Application With Respect to SGC at 1-2.

The SIPC Motion confuses two distinct issues, namely whether the Court should issue the requested Order To Show Cause and whether the Court should grant the Commission's Application. Although SIPC makes several arguments targeting the latter subject – *e.g.*, challenging the Commission's position that it has discretion to determine customer need for protection under SIPA – these arguments by SIPC have no bearing on the issue here, namely whether the Court should issue the Order To Show Cause. Accordingly, the Commission will not address them here. The Order To Show Cause should issue because, contrary to SIPC's assertions, it is an appropriate procedural device for allowing the Court to consider the merits of the Commission Application. The SIPC Motion should be denied because:

- The SEC Motion for Order To Show Cause does not ask the Court to rule upon the Commission Application.
- Section 11(b) of SIPA expressly authorizes the Commission to “apply” for an order requiring SIPC to act, which is different than filing a complaint. SIPC's own practice of seeking orders to show cause when filing “applications” confirms that summary proceedings are preferred – if not required – under SIPA to accomplish the statute's objectives.
- The SEC Motion for Order To Show Cause was an appropriate way to initiate this summary proceeding and consistent with how summary proceedings often are initiated.
- SIPC cannot contend that it has been deprived of an opportunity to contest the Commission's requested relief, particularly given that the Commission gave SIPC four days' notice of its filing and immediately provided copies of the Commission Application and Motion to SIPC upon filing.
- The discovery process sought by SIPC is unnecessary because the Commission Application raises extremely limited, undisputed factual issues.

BACKGROUND

On Wednesday, December 7, 2011, the Commission notified SIPC that the Commission would take action to compel SIPC to take steps to initiate a liquidation proceeding if SIPC did not do so within 72 hours. SIPC requested that a copy of any filing be sent to SIPC by

electronic-mail. When SIPC failed to act, the Commission filed its Application with this Court at approximately 4 p.m. on Monday, December 12, 2011. Approximately forty-five minutes after filing its Application with the Court, the Commission sent a copy of its filings to SIPC by electronic mail as requested.

Included with the Commission Application was an SEC Motion for Order To Show Cause, requesting an Order directing the formal service of the filings on SIPC and setting the date by which SIPC should respond.² The Commission denominated the SEC Motion “ex parte” because it was filed prior to service of the Application on SIPC and before its appearance in this matter. But, as noted above, SIPC was provided with a copy of the SEC Motion within forty-five minutes of its filing. SIPC filed its Motion To Strike the SEC Motion the next day.

ARGUMENT

The SIPC Motion should be denied because it confuses the substantive issues in this case with the question whether this proceeding is summary in nature and properly initiated by a motion for an order to show cause. The SEC Motion is a procedural one designed simply to initiate a process for resolving the Commission Application. The text, structure, and purposes of SIPC, the relevant case law, and SIPC’s prior initiation of summary proceedings under SIPC, all demonstrate that this proceeding is a summary one that is properly initiated by a motion for an order to show cause. Accordingly, the SIPC Motion should be denied.

1. The SEC Motion for Order To Show Cause Seeks Only To Establish a Procedure For the Court To Decide the Commission Application

The SEC Motion for Order To Show Cause does not ask for *any* resolution of the merits of the Commission Application. Rather, the SEC Motion seeks only direction regarding how the Application should be served and the date by which SIPC must respond. The Commission made

² A copy of the proposed Order To Show Cause submitted to the Court with the SEC Motion is attached to this Opposition as Exhibit A.

this clear in both the SEC Motion and its supporting Memorandum. The Commission explained that, because this is a summary proceeding under SIPA Section 11(b), 15 U.S.C. § 78ggg(b), it had not filed a formal complaint under Rule 3 of the Federal Rules of Civil Procedure (“FRCP”), nor had it sought summons under FRCP Rule 4. *See* SEC Motion for Order To Show Cause at 2.³ Thus, through its SEC Motion, “the Commission seeks an order to show cause *that will provide SIPC with an opportunity to respond to the Commission Application.*” *Id.* (emphasis added). The SEC Motion does not seek the principal relief that the Commission seeks through the Application – *i.e.*, an order requiring SIPC to file an application for a protective decree in the Texas Court. In short, the SEC Motion is a procedural device to allow this proceeding to go forward on an expeditious basis.⁴

2. SIPA Authorizes the Commission To Bring This Summary Proceeding Through an Application

The text, structure, and purposes of SIPA, the relevant case law, and SIPC’s prior practice in initiating matters under SIPA all demonstrate that this proceeding is properly a summary one initiated through an application and a motion for an order to show cause.

a. SIPA expressly authorizes the Commission to file an application

SIPA Section 11(b) expressly provides that the Commission should “apply” for an order requiring SIPC to discharge its statutory obligations, not file a complaint. The distinction is important. A formal complaint “trigger[s] the full array of legal, procedural, and evidentiary

³ *See also* Securities and Exchange Commission’s Memorandum of Points and Authorities In Support of Ex Parte Motion for an Order To Show Cause Why the Securities Investor Protection Corporation Should Not Be Ordered To File An Application With Respect to Stanford Group Company.

⁴ SIPC’s reliance on *United States v. Libby*, 429 F. Supp. 2d 18 (D.D.C. 2006) and *Berntsen v. CIA*, 511 F. Supp. 2d 108 (D.D.C. 2007), to challenge the Commission’s ex parte aspect of its Motion (SIPC Memorandum at 4) is misplaced. In both cases the courts, in the context of needing to protect sensitive national security information from disclosure, addressed whether to allow a party to make ex parte filings that (1) would not be made available to the party’s adversary, and (2) would be used by the Court to resolve the merits of a dispute on an in camera basis. None of these circumstances is present here. *Libby* also is inapposite because it involved the application of the Classified Information Procedures Act.

rules governing the process by which a court adjudicates the merits of a dispute.” *SEC v. McCarthy*, 322 F.3d 650, 657 (9th Cir. 2003). A complaint typically initiates a civil action covered by the FRCP. An application, by contrast, is akin to a motion and initiates a summary proceeding. Notwithstanding FRCP Rule 1’s general application to civil lawsuits, “summary proceedings may be permissible in circumstances expressly authorized by statute.” *Id.* at 655 (citing *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404, 407-08 (1960)).⁵

b. The courts have recognized that “applications” are different than “complaints”

In *McCarthy*, the Court of Appeals for the Ninth Circuit upheld the use of a summary proceeding to enforce Commission orders under Section 21(e) of the Securities Exchange Act of 1934 (“Exchange Act”). The court explained at length why “applications” are “different” than actions initiated by a complaint:

An “application” is merely a “motion.” Black’s Law Dictionary 96 (7th ed.1999). A “motion” is defined as, “[a] written or oral application requesting a court to make a specified ruling or order.” *Id.* at 1031. An “application” is not a “lawsuit” or a “formal complaint.” It does not necessarily include or trigger “all the formal proceedings in a court of justice” as does the filing of an “action.” *See id.* at 28. Had Congress intended to require the Commission to bring a full-blown civil action under the Federal Rules in order to enforce its orders, Congress would have made this explicit by requiring the Commission to file an “action” in district court, rather than an “application.”

McCarthy, 322 F.3d at 657. Just as the provision for a Commission “application” under Exchange Act Section 21(e) indicates a summary proceeding, so too is a summary proceeding plainly authorized here under SIPA Section 11(b). Because SIPA generally functions as an amendment to the Exchange Act, *see* SIPA Section 2, 15 U.S.C. § 78bbb, there is even more

⁵ The modernization of the language of FRCP Rule 1 after *McCarthy* does not alter that court’s analysis with respect to summary proceedings. The version of Rule 1 interpreted by the *McCarthy* court, which referred to “suits of a civil nature,” was changed in 2007 to refer to “civil actions and proceedings.” The Advisory Committee Notes to Rule 1 state, “This change does not affect such questions as whether the Civil Rules apply to summary proceedings created by statute. *See SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003); *see also New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960).” FRCP Rule 1, Advisory Committee Note.

reason to construe the terms “apply for” and “application” in a similar fashion – *i.e.*, as express authorization for the Commission to exercise its enforcement power through a summary proceeding.

c. SIPC has interpreted its authority to make an “application” under SIPA as providing for a summary proceeding initiated by an order to show cause

The Commission’s authority to “apply” to the district court for an order under Section 11(b) must be read in the light of (1) SIPA’s overriding goal of prompt relief for investors, *see* Commission Memorandum in Support of Application at 26-29, and (2) SIPC’s own authority to “file an application” with an appropriate court seeking customer protection under Section 5(a)(3), 15 U.S.C. § 78eee(a)(3). SIPA Section 5(b) states that, absent consent by the broker-dealer to SIPC’s requested relief, its “application shall be heard three business days after the date on which it is filed, or at such other time as the court shall determine, taking into consideration the urgency which the circumstances require.” 15 U.S.C. § 78eee(b)(1). SIPC’s consistent practice shows that it understands this provision to mean that its application may be accompanied by an order to show cause. In one matter, for example, SIPC’s counsel declared that it sought such an order “[b]y reason of the applicable statutory provisions, and the need for prompt liquidation of the business of the Defendants as contemplated by SIPA . . . so that a hearing upon its Complaint and Application may be fixed for the earliest practicable date.” *SIPC v. Continental Capital Inv. Servs., Inc.*, Case No. 3:03-cv-07496 (N.D. Ohio filed Aug. 25, 2003), Declaration of Kenneth J. Caputo ¶ 2, attached to Martens Decl. Exh. 4 at Attachment K.⁶

⁶ In the context of a lawsuit already initiated by the SEC against a broker-dealer or related parties, SIPC usually files an “Application” seeking the commencement of a liquidation proceeding for the broker dealer. *See, e.g., SIPC v. North American Clearing, Inc.*, Case No. 6:08cv829 (M.D. Fla. filed May 27, 2008), Martens Decl. Exh. 4, Attachment E. Where SIPC itself initiates the proceeding in federal district court, it typically styles its initial paper a “Complaint and Application.” But this nomenclature does not result in anything more than a summary proceeding in the district court, as SIPC typically obtains an order directing commencement of a liquidation proceeding within days (or occasionally within weeks) of the filing of SIPC’s initial paper, as contemplated by the

This need for prompt action has propelled SIPC to seek orders to show cause in *Continental Capital* and various other matters. *See infra* Argument Number Three & footnote 9 (referencing SIPC proceedings). If SIPA and its objectives allow (if not require) SIPC to seek appropriate judicial relief by means of summary proceedings, the Commission's corresponding authority to apply for an order compelling SIPC to act must be similarly expedited. If it were otherwise, SIPA's protections for investors could be wholly undermined by a needless requirement, lacking any basis in the statute, that the Commission undertake protracted litigation to overcome SIPC's inaction where immediate action is warranted. In short, SIPA cannot reasonably be read to provide that SIPC can bring a summary proceeding and obtain a hearing within three days of its "application" to initiate a liquidation proceeding, but that the SEC's application to compel SIPC to file such an application is subject to full-blown litigation under the FRCP.

d. The term "application" as used in other sections of the federal securities laws has been interpreted to refer to a summary proceeding initiated by an order to show cause

The securities laws use the term "application" to authorize the Commission to bring summary proceedings for other purposes, including the adjudication of the merits of certain disputes. For example, Section 22(b) of the Securities Act of 1933, 15 U.S.C. 77v(b), allows for judicial enforcement of Commission subpoenas "upon application by the Commission." Based on this language, the court in *SEC v. Sprecher*, 594 F.2d 317 (2d Cir. 1979), held that the Commission could seek subpoena enforcement through summary proceedings. *Id.* at 320. This holding and the Commission's well-established and routine use of summary proceedings for

statute. *See* SIPA Section 5(b)(1), 15 U.S.C. § 78eee(b)(1); Martens Decl. Exh. 4 and Attachments A-O (providing docket sheets from 15 SIPC proceedings). Upon the district court's issuance of a protective decree, the court orders the removal of the entire liquidation proceeding to bankruptcy court. *See* Memorandum in Support of Commission Application at 5-6 (describing process).

subpoena enforcement, *see e.g., Application to Enforce Admin. Subpoenas Duces Tecum of the SEC v. Knowles*, 87 F.3d 413, 415 (10th Cir. 1996); *Sprecher*, 594 F.2d at 320, further refutes SIPC's position – including its argument (SIPC Memorandum at 9-10) that *McCarthy's* reasoning is limited to summary enforcement of previously-litigated orders.

e. The Supreme Court's reference to this type of proceeding as an "action" is not inconsistent with its being a summary proceeding

SIPC argues against a summary proceeding by selectively quoting the Supreme Court's statement in *SIPC v. Barbour*, 421 U.S. 412 (1975), that Congress did not intend SIPA to create "a private right of action parallel to that expressly given to the SEC," *id.* at 421. *See* SIPC Memorandum at 7 (quoting portion of phrase). This argument fails. While recognizing the critical importance of the Commission's enforcement power under Section 11(b), *see id.* at 417, the Court in *Barbour* did not address the nature of the proceeding that the Commission could bring. Thus, even had the Court expressly characterized this proceeding as a "right of action," which it did not, the use of the phrase would be inconsequential. Though the court in *McCarthy* discussed the word "action" in a specific sense – *i.e.*, as a lawsuit initiated by a complaint, distinct from an "application," *see McCarthy*, 322 F.3d at 657 – the word also can be used in a general sense. For example, FRCP Rule 26(a)(1)(B) exempts from the initial disclosure requirement, among other proceedings, "an action to enforce or quash an administrative summons or subpoena." Yet courts routinely treat this type of "action" as a summary proceeding that may be initiated through an application and motion for an order to show cause. *See supra* Argument Section 2.d.

Finally, SIPC's protestation against a summary proceeding is undermined by its own regular use of such proceedings to seek commencement of SIPA liquidations. SIPC's practice demonstrates that it typically files boilerplate applications under SIPA Section 5(a)(3) that in

most or all all cases are routinely granted by district courts. *See* Commission Memorandum in Support of Application at 21-23 and footnotes. Thus SIPC uses its authority to make “applications” under SIPA to initiate summary proceedings, not full-blown civil actions under the FRCP.

3. The Commission’s Request for an Order To Show Cause Was Appropriate

The Commission’s *ex parte* filing of the Motion for Order To Show Cause was an appropriate method for providing SIPC with an opportunity to respond to the Commission Application. The issuance of an order to show cause itself does not deprive SIPC of any substantive rights; the proposed Order simply directs SIPC to respond to the substance of the SEC’s claim – that the Commission has determined that SGC has failed to meet its obligations to customers and is insolvent and the subject of a receivership, such that SIPC should be required to take steps to initiate a liquidation proceeding. Only after SIPC has been served with the Order To Show Cause and has an opportunity to address the merits of the Application should the Court grant the SEC’s request that SIPC be ordered to take steps to start a liquidation proceeding.⁷

The Commission’s filing here was consistent with its general practice – and the practices of other federal agencies *and of SIPC* – in summary proceedings of initiating service of process through an order to show cause. This practice often (if not usually) involves moving *ex parte*, even where, as here, the Commission provides notice of the proceeding to the respondent before the order to show cause is issued. The reason is that, absent issuance of the order to show cause or a summons (which is usually associated with a regular civil action and not a summary

⁷ By letter dated December 13, 2011, SIPC’s counsel informed Commission staff that SIPC authorized its counsel “to accept service of the SEC’s lawsuit and papers on SIPC’s behalf – and SIPC waives the need for the SEC to serve a summons,” but that “SIPC does not waive any rights to object to any other procedural or substantive deficiencies in the SEC’s case.” Although this letter authorizes the Commission’s service of an Order To Show Cause upon SIPC’s counsel once the Order is issued, it apparently does not consent to the Order itself or the summary proceeding that the Order would initiate.

proceeding) there is no other clearly legitimate way to effectuate service of process. An order to show cause authorizes service of the application, including its *prima facie* factual support, on the respondent and provides the respondent with a time frame within which to respond.

For these reasons, an order to show cause is a standard way in which to commence an effort to enforce an administrative subpoena in the context of an ongoing SEC investigation.

See, e.g., SEC v. Lines Overseas Mgt., 04 Misc. 302, 2005 WL 3627141 (D.D.C. Jan. 7, 2005).⁸

The federal courts of appeals, including the D.C. Circuit, have reviewed such actions commenced in this manner without suggesting that a district court must provide a respondent with an opportunity to be heard *before* the issuance of an order to show cause. *See Resolution Trust Corp. v. Frates*, 61 F.3d 962, 963-64 (D.C. Cir. 1995) (approving district court's order to enforce an administrative subpoena and noting that "Judge Stanley S. Harris issued an *ex parte* order to show cause why the court should not grant the petition [to enforce an administrative subpoena] and, after oral argument, ordered the subpoena enforced"); *Application to Enforce Admin. Subpoenas Duces Tecum of the SEC v. Knowles*, 87 F.3d 413, 415 (10th Cir. 1996) (describing background procedure by which the SEC filed an *ex parte* application for an order to show cause and, thereafter, served the respondent with the order); *cf. NLRB v. Baker*, 166 F.3d 333, 1998 WL 827373, at *2-3 (4th Cir. 1998) (approving district court decision, in subpoena enforcement action, to issue order to show cause and direct that the order be served on respondent who had not yet appeared in the case).

Additionally, on multiple occasions *SIPC itself* has obtained orders to show cause when making "applications" under SIPA, demonstrating a common understanding that the procedure is

⁸ The opinion in *Lines Overseas* and docket sheet from the case indicate that the SEC applied for an Order to Show Cause and for an Order Requiring Obedience to a Subpoena without formally serving the Bermuda-based respondents with its application. Magistrate Judge Kay then issued an Order to Show Cause prior to any counsel appearing on behalf of the respondents. Upon issuance of the Order to Show Cause, the SEC served the respondents with the Court's Order and the respondents then appeared in the case.

a wholly appropriate way to start a summary proceeding under SIPA. In *Continental Capital*, SIPC filed an application with a counsel declaration and proposed order to show cause, but did not obtain a summons. On the same day, the court issued the order directing those defendants to show cause within two weeks why the Court should not issue an order adjudicating that the broker-dealer's customers were in need of protection (the requisite finding for the start of a liquidation proceeding). Copies of the docket sheet and relevant filings and orders from *Continental Capital* are attached to the December 12, 2011, Declaration of Matthew T. Martens as Attachment K to Exhibit 4.⁹

Thus, by its regular practice, SIPC has recognized that the text, structure, and purposes of SIPA render proceedings on "applications" under its provisions summary in nature and properly initiated by an *ex parte* order to show cause. SIPC's practice of initiating liquidation proceedings in such a manner undermines its contention here that the Commission must be subject to protracted litigation when filing an application under SIPA Section 11(b).

SIPC's contention that the Commission had "no basis for proceeding *ex parte*" (SIPC Memorandum at 4) – like many other contentions in its Memorandum that the Commission does not individually address here – is hyperbolic and wrong. The *ex parte* nature of the Motion for Order To Show Cause was no different than the *ex parte* nature of a summons for a complaint: the order from the Court would simply allow formal service and require a response by a certain date. The Commission's method was consistent with its own practice, SIPC's practice, common sense, and the Supreme Court's recognition that summary proceedings "may be conducted

⁹ See also *SIPC v. Great Eastern Securities, Inc.*, Case No. 1:08cv7516 (S.D.N.Y. filed Aug. 26, 2008), Martens Decl. Exh. 4, Attachment D (Order to Show Cause issued same day that SIPC filed Complaint and Application); *SIPC v. Financial World Corp.*, Case No. 2:06cv2011 (D. Kan. filed Jan. 12, 2006), Martens Decl. Exh. 4, Attachment H. (same); *SIPC v. Churchill Securities, Inc.*, Case No. 1:00cv11617 (S.D.N.Y. filed Nov. 30, 1999), Martens Decl. Exh. 4, Attachment N (same); *SIPC v. Cybertest Securities Inc.*, Case No. 0:03cv60753 (S.D. Fla. filed Apr. 21, 2003), Martens Decl., Attachment L (Order to Show Cause issued two weeks after filing of Complaint and Application).

without formal pleadings, on short notice, without summons and complaints, generally on affidavits, and sometimes even *ex parte*.” *Scanlon*, 362 U.S. at 406.

4. The Commission Gave SIPC Ample Notice

The Commission has provided SIPC with more than sufficient notice of the Commission’s allegations and the nature of the relief sought in this proceeding. On December 8, 2011 – more than four calendar days before it filed this proceeding – Commission staff told SIPC that it planned to file as early as December 12, 2011. On December 9, 2011, SIPC requested the Commission to provide it with courtesy copies of the filing at the time the filing was made. Honoring this request, Commission staff e-mailed the papers to SIPC within an hour of the filing on December 12, 2011.¹⁰ Thus, the *ex parte* nature of the Commission’s filing has not in any cognizable way impaired SIPC’s ability to review the Commission’s allegations or evidence.

5. Discovery and a Rule 16 Conference Are Unnecessary

The correctness of the Commission’s construction of the statute is confirmed by the practical reality that the discovery process SIPC urges would serve no useful purpose. When SIPC files an application to initiate a liquidation proceeding, the only factual predicates to be found by a court before granting such an application are (a) that SIPC has exercised its discretion and determined that customers are in need of protection under SIPA, and (b) that one of the other statutory predicates for initiation of a liquidation (such as the insolvency of the broker-dealer or its being subject to receivership) is present. *See* SIPA Section 5, 15 U.S.C. § 78eee; Memorandum in Support of Commission Application at 15-16. Similarly, the only factual prerequisites here for the grant of an order compelling SIPC to take steps to initiate a liquidation proceeding are (a) that the SEC, as the plenary supervisor of SIPC, has exercised its discretion

¹⁰ Commission staff made available to SIPC’s counsel a hard copy set of the exhibits to the Declaration of Matthew Martens on December 13, 2011.

and determined that customers are in need of protection under SIPA, and (b) that one of the other statutory predicates for initiation of a liquidation (such as the insolvency of the broker-dealer or its being subject to receivership) is present. *See* SIPA Section 5, 15 U.S.C. § 78eee; Memorandum in Support of Commission Application at 4, 18-23. The Commission filed with its Application evidence demonstrating both of these prerequisites, which SIPC does not – and cannot – dispute. There is simply no evidence to be discovered that would tend to show that the Commission in fact did not make the customer need determination, or that SGC is in fact not insolvent or not the subject of a receivership. Accordingly, there is no need for the discovery process SIPC seeks.

SIPC contends that the Court should require the full process afforded under the FRCP because this case presents “important statutory construction questions.” SIPC Motion at 2. The Commission has acknowledged these questions, and comprehensively supported its positions in its filings based on the text, structure, legislative history, and purposes of SIPA. These, however, are purely legal questions. Of course, it is not at all unusual for the courts to resolve such legal questions based on a traditional round of briefing by the parties. That is precisely what the Commission’s Motion for Order To Show Cause is designed to prompt. Upon the Court’s order, SIPC may respond directly to the Commission’s Application, and the Commission may then reply. A full-blown discovery process irrelevant to the Commission’s Application would be a waste of the parties’ and the Court’s time and resources.

The scope of the factual inquiry as framed by the Application is no more expansive than the scope of the inquiry in a subpoena enforcement action initiated by the Commission. There a court must be satisfied that (i) the inquiry has a legitimate purpose, (ii) the subpoena was issued in accordance with the required administrative procedures, and (iii) the information sought is

reasonably relevant to some subject of the inquiry. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964). The first two elements typically are met by a showing that the Commission issued a formal order of investigation that provided a basis for the subpoena, and that the subpoena was served. The Commission may provide a declaration that satisfies the third. Although the respondent then may try to show that the subpoena is unreasonable, this does not negate the legitimacy of the order to show cause that initiated the proceeding. Similarly here, any effort by SIPC to contest the Commission's construction in its Application of its authority under Section 11(b) by itself would not raise new factual issues and, in any event, cannot call into question the procedural mechanism the Commission has invoked to resolve this dispute.

* * *

Ultimately, what SIPC challenges is not the (nominally) "*ex parte*" nature of the SEC Motion for Order To Show Cause, but rather the Commission's contention that this is a summary proceeding in which many months of discovery and motions practice is not contemplated by SIPA, particularly given the limited factual issues presented for review. Of course, SIPC is entitled to challenge that understanding of SIPA. Indeed, the SEC Motion seeks the issuance of an order expressly inviting such a response by SIPC. But there is simply no reason for a full-blown invocation of the FRCP from the outset of this matter if, as the Commission contends, the factual issues and scope of judicial review presented by this matter are limited and summary in nature. The Commission's proposed Order To Show Cause presents that threshold issue for resolution by the Court. The Commission respectfully submits that that issue should be addressed before the invocation of Rule 16 conferences or other needless procedural mechanisms.

The Court should deny the SIPC Motion, grant the SEC Motion for Order To Show Cause, and set dates by which SIPC must respond to the Commission Application and by which the Commission may reply.

Dated: Washington, D.C.
December 19, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2011, I caused service of the foregoing SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE SECURITIES INVESTOR PROTECTION CORPORATION'S (1) MOTION TO STRIKE SEC'S *EX PARTE* MOTION FOR ORDER TO SHOW CAUSE, AND (2) MOTION FOR RULE 16 CASE MANAGEMENT CONFERENCE by ECF on the following:

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