

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of :
: INITIAL DECISION
JOHNNY CLIFTON : November 29, 2011

APPEARANCES: Toby M. Galloway and D. Dee Raibourn III for the Division of Enforcement, Securities and Exchange Commission.

Jonathan Pace and William Pace of Pace & Pace, LLP, for Respondent Johnny Clifton.

BEFORE: Robert G. Mahony, Administrative Law Judge

I. INTRODUCTION

The Securities and Exchange Commission (Commission) issued its Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) against Johnny Clifton (Respondent or Clifton) on February 17, 2011, pursuant to Section 8A of the Securities Act of 1933 (Securities Act) and Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act).

The OIP alleges that Clifton, the president and principal of a registered broker-dealer known as MPG Financial, LLC (MPG Financial), made material misrepresentations and omissions relating to an oil-and-gas well project while he possessed material and materially adverse information pertinent to potential investors. OIP at 1-5. The OIP further alleges that Clifton failed to implement day-to-day supervision over MPG Financial sales representatives (Sales Representatives) and sales practices and that he failed to draft and approve written supervisory procedures.¹ Id. at 4-5. As a result, the OIP alleges that Clifton willfully violated Section 17(a) of the Securities Act, which prohibits fraudulent conduct in the offer and sale of securities, and Section 15(b) of the Exchange Act. Id. at 5.

A hearing was held in Forth Worth, Texas, on September 26 and September 27, 2011. The Division of Enforcement (Division) called nine witnesses, including Respondent. Clifton

¹ The Division acknowledges that Clifton was not responsible for drafting or approving MPG Financial's written supervisory procedures (WSPs). Rather, Clifton received a copy of the WSPs when he became employed by MPG Financial. (Tr. 78-79.)

testified on his own behalf but did not call any additional witnesses. Numerous exhibits were admitted into evidence. The Division filed a Post-Hearing Brief and a Post-Hearing Reply Brief. Respondent filed a Post-Hearing Brief and a Post-Hearing Reply Brief.²

II. FINDINGS OF FACT

The findings and conclusions herein are based on the hearing record. Preponderance of the evidence was applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91 (1981). All arguments, proposed findings, and conclusions set forth by the parties were considered and only those consistent with this Initial Decision are accepted.

A. Relevant Entities

MPG Financial is a Texas limited liability company, wholly owned by Managed Petroleum Group, Inc. (Managed Petroleum), with its principal place of business in Richardson, Texas. (Joint Ex. at 1.) MPG Financial was a broker-dealer registered with the Commission from August 5, 2008, until December 31, 2010. (Id.)

Managed Petroleum, managing partner of MPG Financial, is a Texas corporation with its principal place of business in Richardson, Texas. (Joint Ex. at 1; Div. Ex. 4 at 8, 29.) Managed Petroleum is in the oil-and-gas exploration business and is not registered with the Commission in any capacity and has no securities registered with the Commission. (Joint Ex. at 1.) Managed Petroleum began drilling a six-well oil-and-gas project in Oklahoma, the 2009-1 Osage, L.P. (Osage Project), in April 2009 using seed money provided by industry partners. (Id. at 2.)

B. Relevant Persons

Clifton was the president and principal of MPG Financial from April 2009 until April 2010. (Joint Ex. at 1; Tr. at 35, 234-35.) Prior to joining MPG Financial, he worked in the financial services industry, specifically the insurance business, from 1990 until 2006. (Tr. 27-29.) From 2006 until 2008, Clifton worked as a consultant with nonregistered oil-and-gas issuers in Texas. (Tr. 29-30.) In December 2008, Clifton purchased Wall & Company Securities, a registered broker-dealer and is currently its owner and president. (Tr. at 29, 35.) Clifton received a bachelor's degree in business administration and a minor in accounting. (Tr. 27.) Clifton holds various securities licenses, including Series 6, 7, 24, 26, 27, 63, 65, and 66 licenses. (Tr. 36, 38.)

Brian Anderson (Anderson) was hired by Managed Petroleum in November 2007. (Tr. 232-33.) He was promoted to vice president in 2008, senior vice president in April 2009, and

² Citations to the transcript of the hearing are noted as “(Tr. ____.)”. Citations to Clifton’s Answer are noted as “(Answer at ____.)”. Citations to exhibits offered by the Division are noted as “(Div. Ex. ____.)”. The Division and Respondent jointly offered the Stipulation of Facts, which is noted as “(Joint Ex. at ____.)”. The Division’s post-hearing brief is noted as “(Div. Br. at ____.)” and Clifton’s post-hearing brief is noted as “(Clifton Br. at ____.)”. Clifton’s reply to the Division’s post-hearing brief is noted as “(Clifton Reply Br. at ____.)”.

president on December 16, 2009. (Tr. 48-49, 232-33.) Prior to Managed Petroleum, Anderson worked for an oil-and-gas consulting company. (Tr. 231.) Thereafter, he worked as a federal contractor and then, as a title auditor. (Id.) He graduated from the University of North Texas with a bachelor's degree in criminal justice in 1994. (Tr. 229.) He obtained his law degree in 1997 from the University of Tulsa Law School, and received his MBA from the University of Texas at Dallas in 2000. (Tr. 229-30.) Anderson does not hold any professional licenses. (Tr. 231.)

Brad Simmons (Simmons) was MPG Financial's part-time compliance officer from September 2009 until June or July 2010. (Tr. 308, 310-11, 358.) He was promoted to president and held that position until December 31, 2010, when the firm closed. (Tr. 310-11, 358.) Simmons worked as a compliance officer for ten years prior to joining MPG Financial and served as the president of another firm. (Tr. 311-12.) He currently works as a consultant, primarily for the broker-dealer industry. (Tr. 309.) Simmons is not presently registered anywhere but holds a Series 24 license and has held Series 7, 28, 55, and 63 licenses. (Tr. 312-13.)

Laura Elwell (Elwell) was hired by MPG Financial in October 2008 as the assistant to the president to perform receptionist and secretarial duties. (Tr. 173, 175.) She was eventually promoted to production manager and reported to Anderson. (Tr. 175-77, 187, 220.) Prior to MPG Financial, she helped run a construction company. (Tr. 173.) Elwell is currently a college student studying sociology and criminal justice. (Tr. 172.)

Frank Cooksey (Cooksey) was hired by Clifton in June or July of 2009 and worked as a Sales Representative at MPG Financial but subsequently resigned. (Tr. 415-17, 431.) Prior to joining MPG Financial, Cooksey worked in the securities industry for five or six years. (Tr. 416.) He attended Texas Christian University but did not obtain a college degree. (Tr. 415.)

Steve Allen (Allen) worked at MPG Financial from October 2008 until May 2010 as a Sales Representative and team leader. (Tr. 267-68.) He reported directly to Clifton. (Tr. 269.) Allen graduated college in 1984 and holds Series 22, 39, and 63 licenses. (Tr. 265-66, 268.)

Melinda Mulcare (Mulcare) co-owns and operates a metal recycling company and lives in Tulsa, Oklahoma, approximately five miles from the Osage Project site. (Tr. 377, 379.) In November 2009, Chris Santorella (Santorella), a Sales Representative, contacted Mulcare to discuss an investment opportunity in the Osage Project. (Tr. 378-79.) Mulcare invested \$17,000 and received \$4,100 in return when the project was shut down in February 2010. (Tr. 388.) Mulcare had previously invested with Managed Petroleum through Santorella.³ (Tr. 378, 380, 389-91.)

Tony Caudill (Caudill) is part-owner and president of a family-owned aerospace machine shop located in Grove, Oklahoma. (Tr. 396.) In or about December 2009, Cooksey contacted

³ In 2008, Mulcare and her brother were contacted by Santorella and invested in MPG Hunter 12-1 and 12-2, a MPG Financial project. (Tr. 389-91.)

him to discuss an investment opportunity. (Tr. 399.) On December 3, 2009, Caudill invested \$14,000 in the Osage Project. (Tr. 398, 408.) Caudill's investment resulted in a loss of approximately \$12,000 by the time the Osage Project was shut down. (Tr. 405.) He had not previously invested with Managed Petroleum or MPG Financial. (Tr. 400.)

Michael Mastromonica (Mastromonica) has worked for the Commission as a staff accountant for more than seven years and has approximately twenty-six years of experience in the financial services industry. (Tr. 462-64.) He conducted an onsite examination at MPG Financial and interviewed Clifton on February 16, 17, and 25, 2010. (Tr. 466-67.)

C. Limited Partnership Offering in MPG Financial's Osage Project

Prior to April 2009, MPG Financial began offering limited partnership (LP) interests in the Osage Project. (Joint Ex. at 1; Div. Ex. 4 at 8; Tr. 46.) MPG Financial offered fifteen units at \$71,250 each, for a total offering of \$1,068,750.⁴ (Joint Ex. at 1; Div. Ex. 4 at 8; Tr. 46-47.) No LP interest in the Osage Project was sold until at least June 8, 2009, after two wells had been drilled. (Tr. 51-54, 109.) Additional units were sold after December 28, 2009, after three wells had been drilled. (Tr. 166-70; 349-50.) In total, MPG Financial raised approximately \$500,000 from twenty-two investors when the offering closed at year-end 2009. (Joint Ex. at 2; Tr. 75.) In February 2010, Managed Petroleum shut down the Osage Project and refunded approximately twenty-five percent of the investors' principal. (Joint Ex. at 2; Tr. 75, 166, 383, 386-88.)

D. Osage Project Drilling

The Osage Project consisted of six wells⁵ and the project was shut down in February 2010. (Joint Ex. at 1-2; Div. Ex. 11; Tr. 75.)

1. Osage 1-5

In April 2009, the well test data indicated that Osage 1-5, the first well to be drilled, would produce between twenty to thirty barrels of oil per day (BOPD). (Joint Ex. at 2; Div. Exs. 11, 57; Tr. 50-51, 183-84, 211, 244-45.) Between August 2009 and October 12, 2009,⁶ the potential oil production estimate for Osage 1-5 was reduced to approximately ten to fifteen BOPD because of excess saltwater produced by the well.⁷ (Joint Ex. at 2; Div. Exs. 37, 38; Tr.

⁴ According to the private placement memorandum, the minimum investment was to be one-half unit (or \$35,625). However, MPG Financial accepted investments as small as one-eighth unit and one-tenth unit. (Div. Ex. 4; Tr. 167-68.)

⁵ The six wells that make up the Osage Project, in the order they were drilled, are Osage 1-5, Osage 1-1, Osage 1-4, Osage 1-6, Osage 1-2, and Osage 1-3.

⁶ Division's Exhibits 37 and 38, both dated October 12, 2009, contain the revised oil production rate of ten to fifteen BOPD. (Div. Exs. 37, 38; Tr. 217-18.)

⁷ Osage 1-5 was producing approximately 100 to 150 barrels of water per day, approximately twenty-five barrels of saltwater for each barrel of oil. (Div. Exs. 11, 57; Tr. 51, 244.)

50-51, 184-86, 189, 212-13, 217-18.) As a result of mechanical difficulties and the production of excess water, the actual oil production of Osage 1-5 was between one and five BOPD. (Joint Ex. at 2; Tr. 50-51; 245; 256-57, 470.) This meant that Osage 1-5 was not commercially viable as an oil-and-gas well because the saltwater had to be trucked approximately seventy miles to the closest saltwater disposal well at a cost of approximately \$2.75 per barrel. (Div Ex. 11; Joint Ex. at 2; Tr. 192-93, 196, 246-47.) In August 2009, Managed Petroleum decided to “shut in”⁸ Osage 1-5 until it could secure a more cost-effective means of disposing of the saltwater. (Joint Ex. at 2; Div. Ex. 11; Tr. 57, 195-97.) Osage 1-5 was never reopened. (Joint Ex. at 2; Div. Ex 11; Tr. 261-62.)

2. Osage 1-1

On May 21, 2009, Managed Petroleum began drilling the second well, Osage 1-1. (Div. Ex. 57.) The drilling was finished on May 31, 2009, and the well was completed on June 16, 2009. (Joint Ex. at 2; Div. Exs. 11, 57; Tr. 51, 125, 179.) Initial testing showed some potential to produce gas, but after completion the well produced excessive amounts of water and was deemed not commercially viable. (Joint Ex. at 2; Div. Ex. 57; Tr. 54.) In August 2009, Managed Petroleum decided to convert Osage 1-1 to a salt water disposal well (SWDW) and seek a permit that would allow it to dispose of saltwater from other wells in the Osage Project, specifically Osage 1-5, and from other MPG Financial wells⁹ in the area. (Joint Ex. at 2; Div. Ex. 57; Tr. 54-58, 190-91.) The process for obtaining a SWDW permit takes several months and requires approval from the Environmental Protection Agency and the Bureau of Indian Affairs. (Joint Ex. at 2; Div. Ex. 11; Tr. 194-95, 245-47.)

Clifton, Elwell, and Anderson testified that the use of Osage 1-1 as a SWDW could produce revenue by reducing expenses associated with trucking saltwater to a distant SWDW from the Osage Project and other MPG Financial projects in the area. (Tr. 65-67, 190-94, 213, 219, 245-46.) However, Elwell testified that Managed Petroleum did not intend to use Osage 1-1 as a commercial SWDW, and therefore, it would not generate revenue from providing saltwater disposal services to unrelated third parties. (Div. Ex. 11; Tr. 193-94.) Managed Petroleum never obtained a SWDW permit for Osage 1-1. (Div. Ex. 57; Tr. 195.)

3. Osage 1-4

On December 17, 2009, Managed Petroleum began drilling the third well, Osage 1-4. The drilling was finished on December 19, 2009, but the well was never technically completed.¹⁰ (Div. Exs. 11, 57; Tr. 60, 199.) On December 20, 2009, because Osage 1-4 did not show promising results, geologists were asked to re-evaluate the logs and re-examine the potential

⁸ I.e., to turn the well off. (Div. Ex. 11; Tr. at 57.)

⁹ Elwell testified that the other MPG Financial wells would include the Mud Creek wells 2-1, 2-2, 2-3, and 2-4 located across the street from the Osage Project. (Tr. 191-92.)

¹⁰ Completion of a well involves setting production casings and pumps, and pumping the well, none of which occurred. (Tr. 199.)

production zones. On December 28, 2009, the geologists informed MPG Financial that the well was not commercially viable and that it should be plugged and abandoned. (Div. Exs. 11, 57; Tr. 60-63; 199-200.)

4. Osage 1-6

On December 19, 2009, Managed Petroleum began drilling the fourth well, Osage 1-6. On December 20, 2009, drilling was temporarily suspended because of the well's close proximity to Osage 1-4, and its poor quality of cuttings.¹¹ (Div. Ex. 57; Tr. 200-01.) Managed Petroleum decided to halt operations on Osage 1-6 until geologists were able to evaluate Osage 1-4 and decide whether its location should be moved. Osage 1-6 was only drilled to a depth of three hundred sixty feet, and the drilling never resumed. (Joint Ex. at 2, Div. Ex. 57; Tr. 200-01; 252.)

5. Osage 1-2 & Osage 1-3

On January 20, 2010, Managed Petroleum began drilling the fifth and sixth wells, Osage 1-2 and Osage 1-3, respectively. The drilling was finished on January 23, 2010. (Joint Ex. at 2; Div. Ex. 57; Tr. 201-02.) Both wells were deemed to be dry holes and not commercially viable; they were plugged and abandoned. (Joint Ex. at 2; Div. Ex. 57; Tr. 201-02.) The Osage Project was closed in or about February 2010. (Joint Ex. at 2; Div. Ex. 57; Tr. 199-202.)

E. Timeline

Clifton prepared a timeline covering April 9, 2009, through February 4, 2010, that established when he received information relating to the events of the Osage Project and, in some instances, from whom he received the information. (Div. Ex. 11; Tr. 61-62, 210-11, 242-43, 347-48.) The relevant portions of Clifton's timeline as well as relevant testimony from Elwell and Anderson are set out below.

- On April 20, 2009, Anderson informed Clifton that Osage 1-5 was completed. (Div. Ex. 11; Tr. 244-45.)
- On June 1, 2009, Anderson informed Clifton that Osage 1-1 was drilled. (Joint Ex. at 2; Div. Ex. 11; Tr. 51, 125.)
- On June 8, 2009, Anderson informed Clifton that Osage 1-5 was having mechanical difficulties and that it was producing approximately one to four BOPD. (Div. Ex. 11; Tr. 245.)

¹¹ "Cuttings" is not specifically defined on the record. According to OilGasGlossary.com, an oil and gas field technical terms online glossary, cuttings are "small pieces of rock that break away due to the bit teeth." The cuttings are "screened out of the liquid mud system...and are monitored for composition, size, shape, color, texture, hydrocarbon and other properties." OILGASGLOSSARY.COM, OIL & GAS FIELD TECHNICAL TERMS GLOSSARY, <http://www.oilgassglossary.com/cuttings.html> (last visited November 18, 2011.)

- On August 2, 2009, Anderson told Clifton that Osage 1-1 was not commercially viable and would be converted into a SWDW. (Joint Ex. at 2; Div. Ex. 11; Tr. 245.) During the week of August 2, 2009, Elwell informed Clifton that Osage 1-1 could earn revenues for saltwater disposal from wells in the Osage Project as well as other projects. (Div. Ex. 11; Tr. 190-91.)
- On August 24, 2009, Anderson informed Clifton that Osage 1-5 would be “shut in” awaiting Osage 1-1’s conversion to a SWDW. (Div. Ex. 11; Tr. 256-57.)
- In October 2009, Anderson attended one of Clifton’s weekly meetings with the Sales Representatives and informed them that Osage 1-5 had been drilled and shut in, Osage 1-1 would be converted to a SWDW, and Osage 1-4 would be drilled in the next few months. (Tr. 260-61.)
- On December 16, 2009, Anderson informed Clifton that Osage 1-4’s spud date¹² would be December 17, 2009, and that drilling would commence the weekend of December 19, 2009. (Div. Ex. 11; Tr. 248-49.)
- On December 20, 2009, Elwell told Anderson that a decision had been made to suspend the drilling of Osage 1-6. (Tr. 200.)
- On December 21, 2009, Anderson informed Clifton that the commercial viability of Osage 1-4 was uncertain and required additional analysis. (Tr. 250-51.) Clifton does not recall having such conversation. (Tr. 61.) On December 28, 2009, Clifton was informed by Anderson that Osage 1-4 was not commercially viable and would be plugged and abandoned. (Joint Ex. at 3; Div. Exs. 11, 57; Tr. 62-63; 277-78.)
- On February 1, 2010, Anderson informed Clifton that both Osage 1-2 and Osage 1-3 were dry holes, and that there was little hope that Osage 1-6 would be viable. (Div. Ex. 11.)
- On February 4, 2010, Clifton was provided with a copy of a letter to be sent to investors informing them that the Osage Project would be shut down and that they would be refunded a percentage of their investment. (Div. Ex. 11; Tr. 75, 383, 386-87.)

F. Misrepresentations to Investors

On December 23, 2009, Clifton held a conference call for investors and prospective investors in the Osage Project. (Answer at 4; Div. Ex. 41; Tr. 61, 352, 399-400, 402, 494.) Between two and four investors or potential investors participated in this conference call, including Caudill, who had previously purchased an LP interest. (Tr. 126-27, 494.) Participants

¹² The “spud date” is the date when drilling of a well begins. (Tr. 198-99.)

in the conference call were not permitted to ask questions. (Answer at 4; Div. Exs. 53, 54; Tr. 121, 403.)

Clifton omitted information relating to the status of Osage 1-5 and Osage 1-1, and the information he provided concerning the six wells and potential pay zones was inaccurate.¹³ (Tr. 135-36, 493-94.) Additionally, Clifton made several misrepresentations as to the overall status of the project. (Div. Exs. 53, 54; Tr. 41-42, 133-34.)

Clifton repeatedly led investors to believe that drilling on the Osage Project had not yet begun. He stated, “[w]e’ve got a *year-end* project that we’re excited about.” (Div. Exs. 53, 54 at 3.) (emphasis added.) He also stated, “we’ve decided to put together here *at the end of the year* a six-well package.” (Div. Exs. 53, 54 at 4.) (emphasis added.) Additionally, Clifton led potential investors to believe that he, and perhaps other MPG Financial employees, invested in the Osage Project by stating, “we’re putting our money in this deal, too.” (Div. Exs. 53, 54 at 6.) In fact, Clifton did not invest his own money in the Osage Project. (Tr. 162.)

Clifton misrepresented the production potential of the six wells, knowing that two wells had been drilled and were not currently producing any oil. He stated, “with six wells, that’s - - that’s 60 opportunities that we have to - - to - - to hit on this particular project.” (Div. Exs. 53, 54 at 4.) Clifton also stated, “we’re looking at producing between probably a hundred and 150 barrels of oil per day between the six wells.” (Div. Exs. 53, 54 at 8, 9.) He further stated, “each one of these wells can generate 10, 15, 20 barrels a day.” (Div. Exs. 53, 54 at 8, 9.) Simmons testified that Clifton’s omissions during the conference call concerned him, especially the failure to disclose information concerning the wells that had been drilled. (Tr. 356.)

In addition to omitting information relating to the status of Osage 1-5 and Osage 1-1, Clifton agreed that he did not communicate the uncertainty of Osage 1-4 to investors or potential investors during the December 23, 2009, conference call. (Div. Exs. 53, 54.) Anderson testified that on December 21, 2009, he informed Clifton that the commercial viability of Osage 1-4 was uncertain and required additional analysis; however, Clifton does not recall this conversation. (Tr. 250-51.) On the morning of December 28, 2009, Anderson called Clifton and informed him that Osage 1-4 was a dry hole. (Joint Ex. at 3; Div. Ex. 11; Tr. 59-60, 278-79, 495-96.) Clifton testified that the status of Osage 1-4 as a dry hole was material information that should have been communicated to investors, regardless of whether they asked about the status of the Osage Project. (Tr. 63-64.) Nevertheless, after receiving confirmation that Osage 1-4 was a dry hole, MPG Financial received a transfer of funds from three or four additional investors who had submitted subscription paperwork, pursuant to the terms of the private placement memorandum (PPM). (Joint Ex. at 3; Tr. 64, 68; 279-80, 349-50, 495.) Allen testified that investors did not learn that Osage 1-4 was a dry hole until after they purchased an LP interest. (Tr. 280.)

Sales Representatives also misled potential investors. Mulcare testified that based on the information provided to her during a call with Santorella, she decided to invest. (Tr. 380-81.)

¹³ Pay zone refers to ten different depths of a well at which oil could be present. For the Osage Project, with six wells, there were a total of sixty potential pay zones. (Div. Exs. 53, 54; Tr. 136.)

Santorella did not tell Mulcare that drilling had already occurred or update the status of any of the drilled wells, specifically, Osage 1-5 and Osage 1-1. (Tr. 382.) Rather, Santorella informed her that the drilling would begin in January 2010. (*Id.*) Caudill, also, was similarly not informed by the Sales Representative that drilling on the Osage Project had already occurred; he was led to believe that none of the wells had been drilled. (Tr. 400-01, 404.) Additionally, both testified that the Sales Representatives did not inform them that Osage 1-5 had been “shut in” prior to their decision to invest in the Osage Project. (Tr. 382-83, 406-07.) Mulcare testified that the Sales Representative misrepresented Osage 1-5’s oil production rate. (Tr. 382, 386.) Santorella informed her that Osage 1-5 would produce at least twenty BOPD. (*Id.*) Both Mulcare and Caudill stated that the Sales Representatives failed to inform them that Osage 1-1 was being converted to a SWDW. (Tr. 383, 400-01, 407.)

The Sales Representatives sent several e-mails relating to the Osage Project, including Osage 1-5 and Osage 1-1. (Div. Exs. 20, 21, 22, 25, 27; Tr. 419-36.) Cooksey testified that the information contained in these e-mails was obtained from Clifton and Allen. (Tr. 418, 420, 423, 428, 434.) Certain e-mails omitted the “shut in” status of Osage 1-5 and/or omitted the fact that Osage 1-1 was not commercially viable as an oil-and-gas well and would be converted to a SWDW. (Div. Exs. 20, 21, 22, 25, 27; Tr. 422, 424-26, 436.) Other e-mails suggested that Osage 1-5 and Osage 1-1 were “complete and successful.” (Div. Exs. 20, 21, 22.) Some e-mails sent by Cooksey reported the production rate of Osage 1-5 as twenty to thirty BOPD, rather than the reduced or actual production rate. (Div. Exs. 25, 27.) After the Osage 1-5 production rate estimate was reduced to between ten and fifteen BOPD, Cooksey sent an e-mail dated December 28, 2009, stating that Osage 1-5 was producing twenty-two BOPD. (Div. Ex. 25; Tr. 212-13, 217-18.) He also sent a subsequent e-mail dated December 29, 2009, stating that Osage 1-5 was producing between twenty-two and twenty-five BOPD. (Div. Ex. 27.) In addition, the Sales Representatives misrepresented production figures and potential returns on investment because their statements were based on the production of six wells when, in fact, at the time the e-mails were sent, Osage 1-5 had been “shut in” and Managed Petroleum had decided to convert Osage 1-1 to a SWDW. (Div. Exs. 25, 26, 27; Tr. 427-28, 432.)

G. Supervision of the Sales Representatives

Clifton became MPG Financial’s principal prior to the sale of any LP interests in the Osage Project. He was responsible for supervising the Sales Representatives and, if necessary, taking disciplinary action against them. (Joint Ex. at 3; Div. Ex. 46 at 8; Answer at 3; Tr. 43, 50, 83, 287, 342-44, 367.)

Between April 2009 and approximately August 2009, Jennifer Cockrell (Cockrell) served as the chief compliance officer at MPG Financial. (Tr. 77.) Following her termination, Simmons was hired, part-time, as the chief compliance officer. (Tr. 77, 79-80, 320.) Simmons, along with a compliance consultant, drafted new Written Supervisory Procedures (WSPs) that were finalized in October 2009. (Tr. 80-81; Div. Ex. 46.) According to the newly drafted WSPs, Clifton was responsible for supervising Sales Representatives, and Simmons was responsible for supervising “persons not involved in sales.” (Div. Ex. 46 at 8; Tr. 82-83, 91-92, 343-45.)

1. Written and Electronic Correspondence

The WSPs specify that outgoing written and electronic correspondence of Sales Representatives was subject to review and approval by their designated supervisor, Clifton. (Div. Ex. 46 at 14; Tr. 84-85.) Clifton testified that MPG Financial's unwritten policy was to review e-mail at random to ensure that correspondence sent by its Sales Representatives was not exaggerated and was truthful. (Tr. 84-85.) Sales Representatives were provided with copies of pre-approved sample e-mails drafted by Clifton. (Div. Ex. 29; Tr. 101, 316-17, 321-24, 361, 491.) These e-mails could be sent out without supervisor approval. (Tr. 101, 317.) Approximately fifteen to twenty e-mails that did not require pre-approval by Clifton were sent each day by Sales Representatives. An additional five to twenty that required pre-approval by Clifton were sent daily. (Tr. 88, 321-22.)

Cockrell supervised e-mail correspondence prior to her termination. (Tr. 85.) Thereafter, but prior to Simmons joining MPG Financial, e-mails were sent directly into Clifton's in-box for review. (Tr. 89-90.) Upon his arrival, Simmons implemented a new e-mail system whereby all outgoing e-mail sent by Sales Representatives was archived in a central in-box to which both Simmons and Clifton had access. (Tr. 87, 316-19.) Simmons also recommended a system to ensure e-mails that did not receive approval were not sent. However, MPG Financial did not implement such a system because of its cost. (Tr. 324-25.)

Clifton represents that he delegated to Simmons, as chief compliance officer and creator of the e-mail archive system, primary responsibility for reviewing electronic correspondence. (Tr. 85, 90.) According to Simmons, Clifton was responsible for reviewing and approving e-mails because Simmons was part-time and worked approximately 4 to 5 hours a day. Also, the WSPs specified that Clifton was responsible for reviewing electronic communication. (Div. Ex. 46; Tr. 315, 320, 325-26, 332-33, 344.) Simmons stated that he only conducted keyword searches of e-mails that had been sent. (Tr. 320, 333, 362.)

There is considerable documentary evidence that some e-mails sent by Sales Representatives provided prospective investors with misleading information.¹⁴ (Div. Exs. 12, 13, 14, 15, 20, 22, 26; Answer at 7; Tr. 44, 98-106.) In these e-mails, Sales Representatives misrepresented that Osage 1-5 was producing thirty or thirty-five BOPD, and that Osage 1-1 was producing oil and gas. They also exaggerated the long-term production capabilities and return on investment. (Div. Exs. 12, 13, 14, 15, 20, 22, 26.)

2. Osage Project Updates

Historically, MPG Financial did not have a set procedure for managing the flow of information between it and Managed Petroleum. (Tr. 108, 208-09.) Sales Representatives would obtain information through informal conversations with Managed Petroleum officers in

¹⁴ Clifton identified Jeff Britto and Cooksey as two Sales Representatives who provided misleading information to potential investors. (Tr. 45.) Both of these Sales Representatives were hired by Clifton. (Tr. 45.)

hallways and the break room. (Tr. 108-09.) Shortly after joining MPG Financial,¹⁵ and prior to the sale of any LP interest in the Osage Project, Clifton established a “flow of information” system, whereby he became the person primarily responsible for providing information updates on the Osage Project to the Sales Representatives. (Tr. 108-09, 337.) Clifton’s system established that information was to flow from Elwell to Anderson, Anderson to Clifton, and finally, from Clifton to the Sales Representatives. (Tr. 187-88, 212-13, 216, 337.) No project updates were provided during monthly luncheons or gatherings in the break room and hallways. (Tr. 205-06.)

Anderson and Clifton met weekly, at which time Anderson provided Clifton with updated information regarding the Osage Project. (Tr. 239-40.) If Anderson received information relating to a major event such as completion of a well, the information was communicated immediately to Clifton. (Tr. 240-41.) Thereafter, Clifton was responsible for providing Sales Representatives with complete and timely information. (Tr. 187-88, 212-13, 216.) Clifton updated the Sales Representatives on the Osage Project during weekly meetings. Clifton’s updates were oral and he did not provide any written materials. (Tr. 106-07, 269, 338-40, 437, 491.) Clifton also met with the Sales Representatives one-on-one at various times during the week. (Tr. 269, 491.)

However, Allen testified that the Sales Representatives did not always receive updated information from Clifton. (Tr. 277-79, 281-82, 496.) For example, Allen was informed on December 28, 2009, during a call with a former Managed Petroleum partner, that Osage 1-4 had been drilled and was a dry hole. (Tr. 277-78.) According to Allen, Clifton asked him not to tell anybody at MPG Financial about Osage 1-4. (Tr. 278-79, 491-92.) Allen stated that as a result of Clifton’s request, one MPG Financial investor was not informed that Osage 1-4 was a dry hole until about January 1, 2010. (Tr. 280.) On a different occasion, Santorella, not Clifton, told Allen that Osage 1-2 and Osage 1-3 were dry holes. (Tr. 280-81.) Upon receiving this information, Allen approached Clifton who indicated that he had not heard anything regarding the status of Osage 1-2 and Osage 1-3. (Tr. 281.) Later that day, Clifton asked both Santorella and Allen not to share the updated Osage 1-2 and Osage 1-3 information with other Sales Representatives. (Tr. 281-82, 496.)

3. Oral Communications

As supervisor of the Sales Representatives, Clifton should have listened to phone calls between the Sales Representatives he was responsible for supervising and the potential investors. (Div. Ex. 46 at 8, 17, 26.) Allen testified that Clifton walked the floor listening to these conversations “very infrequently.” (Tr. 285.) However, Clifton testified that he listened to these conversations “every day.” (Tr. 491.)

Clifton listened to a call where Cooksey provided inaccurate information to a potential investor. (Tr. 432.) Cooksey was uncertain whether Clifton was able to hear both sides of the conversation or only Cooksey’s. (Tr. 432-33.) Clifton told him he did a “good job” on the call.

¹⁵ The flow of information system was established shortly after Osage 1-5 was drilled. (Tr. 226.)

(Tr. 432.) Cooksey stated that he sent an e-mail to the investor following the call that also contained inaccurate information. (Div. Ex. 26; Tr. 432-33.)

H. Commission Investigation

From February 2010 to March 2010, the Commission investigated MPG Financial. (Tr. 180, 466.) As part of the investigation, Mastromonica conducted an onsite examination. (Tr. 466.) While onsite, he interviewed Clifton twice; on February 16-17, 2010, and on February 25, 2010. (Tr. 467.) During the first interview, Clifton provided incorrect information pertaining to the dates the first three wells were drilled. (Tr. 468-69.) Clifton stated that the first well, Osage 1-5, was drilled in August and September 2009, the second well, Osage 1-1, was drilled in November 2009, and the third well, Osage 1-4, was drilled in December 2009. (Tr. 469-70.) Clifton stated that he held Monday meetings with Sales Representatives to provide information regarding the status of the wells and that he told the Sales Representatives to inform potential investors that Osage 1-5 was producing one to five BOPD. (Id.)

Clifton outlined his duties and responsibilities at MPG Financial. (Tr. 474.) According to Mastromonica, during the first interview, Clifton stated that he was responsible for the sales force, including the hiring and firing. (Tr. 474-75.) Clifton also stated that he had supervisory duties including the responsibility to review e-mails and correspondence sent by Sales Representatives. (Id.) However, Clifton was unsure whether there was any documentation or evidence that e-mails had been reviewed. (Tr. 475-76.)

During the interview on February 25, 2010, Clifton provided a different timeline of events than was provided during the first interview. (Tr. 479-80.) Clifton stated that Osage 1-5 was “shut in” and that such information was communicated to the Sales Representatives on August 23, 2009. (Tr. 480.) On December 28, 2009, Clifton learned that Osage 1-4 was a dry hole from Managed Petroleum. (Tr. 481.) He informed the Sales Representatives, individually, that same day. (Id.)

Because four investors bought LP interests in the Osage Project on or after December 28, 2009, Mastromonica was concerned whether they were provided with all material information concerning the wells that had already been drilled. (Tr. 481-82.) Clifton stated that he provided the information to the Sales Representatives and it was their job to provide the information to potential investors. However, he concedes that these investors were not contacted or given the opportunity to reconsider their investment. (Id.)

III. CONCLUSIONS OF LAW

The Division alleges Respondent willfully violated Securities Act Section 17(a), which prohibits fraudulent conduct in the offer and sale of securities.¹⁶ The Division also alleges that

¹⁶ “Willful” means intentionally committing the act that constitutes the violation. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000). There is no requirement that a person be aware that he is violating a statute or regulation. Id.

Respondent failed reasonably to supervise the Sales Representatives within the meaning of Section 15(b)(6)(A) of the Exchange Act, which incorporates by reference, Section 15(b)(4)(E) of the Exchange Act.

A. Securities Act Section 17(a)

Securities Act Section 17(a)(1)-(3) makes it unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly –

- (1) To employ any device, scheme, or artifice to defraud, or
- (2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (3) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. 15 U.S.C. § 77q(a).

1. Offer or Sale of a Security

Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act define a “security” to include an investment contract. 15 U.S.C. § 77b(a)(1). An investment contract includes any contract, transaction, or scheme whereby a person (1) invests money, (2) in a common enterprise, (3) with the expectation of profits derived solely from the efforts of the promoter or third party. SEC v. W.J. Howey Co., 328 U.S. 293, 298-299 (1946). MPG Financial offered LP interests in the Osage Project. MPG Financial solicited investors to purchase LP interests in the Osage Project, thereby satisfying the first Howey requirement. Investors hoped to receive their principal investment plus a percentage of return. In other words, investors in the Osage Project were seeking a profit derived from the efforts of others. Additionally, the limited partners and general partners would share in any profits that are dependent upon the efforts of Managed Petroleum. Accordingly, the third Howey requirement is satisfied. The requirement that a common enterprise exist is also satisfied because the funds received from individual investors are pooled together. Accordingly, all three requirements set forth in Howey are satisfied. As such, the LP interests are securities for purposes of Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act.

Section 2(a)(3) of the Securities Act defines “offer” to include “every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.” 15 U.S.C. § 77b(a)(3). Clifton was hired by MPG Financial in April 2009 and was tasked with selling LP interests in the Osage Project. Clifton contends that no “offer” was made during the December 23, 2009, call. (Clifton Br. at 8.) Rather, he takes the position that the call was structured as an interview and was not intended to be an offering of any securities. (Id.) During this conference call, Clifton informed the potential investors what the Osage Project was, the cost of a unit, and how to obtain additional information on investing in the Osage Project. In short,

the information provided by Clifton went beyond informational purposes. Additionally, the potential investors were not permitted to ask questions. There is no doubt that the purpose of the December 23, 2009, conference call was, in fact, to “obtain some last-minute sales of securities at year-end.” (Div. Br. at 23.) This evidence supports a finding that Clifton engaged in the offer or sale of securities as required by Section 17(a) of the Securities Act.

2. Clifton Violated Section 17(a)

To establish a violation of Section 17(a) of the Securities Act, the Division must establish that Respondent made material misrepresentations or materially misleading omissions in connection with the offer, sale, or purchase of securities, either acting with scienter or negligently. See S.E.C. v. Pirate Investor LLC, 580 F.3d 233 (4th Cir. 2009); SEC v. Morgan Keegan & Co., 2011 U.S. Dist. LEXIS 71481, (N.D. Ga. 2011) (citing SEC v. Merch. Capital, LLC, 483 F.3d 747, 766 (11th Cir. 2007)); SEC v. Steadman, 967 F.2d 636, 641-42 (D.C. Cir. 1992). Violations of Sections 17(a)(1) require a showing of scienter; Sections 17(a)(2)-(3) require only a showing of negligent conduct. See Steadman, 967 F.2d at 641 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976); Aaron v. SEC, 446 U.S. 680, 686 n.5 (1980)).

Scienter is a mental state consisting of an intent to deceive, manipulate, or defraud. Ernst & Ernst, 425 U.S. at 193 n.12. Scienter has also been described by the Supreme Court as a “wrongful state of mind.” Dura Pharm. v. Broudo, 544 U.S. 336, 341 (2005). Scienter may be established by indirect evidence and may extend to a form of extreme recklessness. See Herman & MacLean v. Huddleston, 459 U.S. 375, 379 n.4 (1983) (noting that while the Supreme Court has not explicitly addressed the issue, it is the prevailing view of the appellate courts that reckless behavior may satisfy the scienter requirement); In re Cabletron Sys., Inc., 311 F.3d 11, 38 (1st Cir. 2002); In re Scholastic Corp., 252 F.3d 63, 74 (2d Cir. 2001). Recklessness is defined as an extreme departure from standards of care such that the danger of misleading buyers or sellers is either known or so obvious that the person must have been aware of it. Steadman, 967 F.2d at 641-42 (D.C. Cir. 1992); Bradbury, Inc. v. SEC, 512 F.3d 639 (D.C. Cir. 2008).

Clifton understood the laws prohibiting the dissemination of material misrepresentations and prohibiting the omission of material information in connection with the offer or sale of a security. Having been in the securities industry for over fifteen years and holding several securities licenses, Clifton was well aware that the standard of care applicable to a person in his position required him to exercise good faith, fair dealing, and honesty.

Clifton’s statements, as well as his omissions of material information, during the December 23, 2009, conference call violated his duties as a member of the financial industry as well as those set forth in the WSPs. In the afternoon of December 28, 2009, Clifton provided an e-mail to one of the Sales Representatives containing a link to a broadcast of the conference call, which he knew the Sales Representative intended to provide to a potential investor. When he sent this e-mail, he had actual knowledge or was reckless in not knowing that the broadcast contained material misrepresentations and omissions. Despite knowing that the Osage Project was not producing oil and that at least one dry hole had been drilled, Clifton did not contact any investors to ensure they were provided with complete information or to allow them to rescind

their investment. Clifton's failure to do so supports a finding that he acted with the requisite scienter under Section 17(a).

3. Clifton Violated Section 17(a)(1)

Clifton violated or caused violations of Section 17(a)(1) of the Securities Act in the offer or sale of the Osage Project LP interests. By failing to provide accurate and timely updates, including negative information, to the Sales Representatives, he caused them to make material misrepresentations or omissions to potential investors, including, but not limited, to the status of the Osage Project wells and their oil production capacity. Further, Clifton himself misled investors and omitted material information during the December 23, 2009, conference call with potential investors. Specifically, Clifton failed to disclose negative information relating to Osage 1-5 and Osage 1-1 and led potential investors to believe that drilling on the Osage Project had not yet begun. Because he had actual knowledge of the status of the Osage Project, including negative information that he intentionally failed to disclose, Clifton employed a device, scheme, or artifice to defraud investors in violation of Section 17(a)(1) of the Securities Act.

4. Clifton Violated Section 17(a)(2)¹⁷

A violation of Section 17(a)(2) requires that money or property be obtained through a misrepresentation or an omission of material fact. 15 U.S.C. § 77q(a)(2). Respondent contends that this requirement is not satisfied because "none of the three or four people who actually listened to the [December 23, 2009, conference call] subsequently invested." (Clifton Br. at 9.) The Division argues that Clifton cannot avoid liability under Section 17(a)(2) because he earned an override¹⁸ on the commissions received by Sales Representatives. (Div. Br. at 23.) The Division further states that Clifton received money or property after December 28, 2009, when four additional investors submitted their funds. (Div. Br. at 23.) While none of the investors on the December 23, 2009, conference call ultimately invested in the Osage Project following the call, Clifton still received money, indirectly, as a result of misrepresentations and/or omissions made by the Sales Representatives that he supervised. Clifton earned an override of approximately 3.75% of the commissions received on the sale of LP interests in the Osage Project by the Sales Representatives. As such, each sale resulted, indirectly, in money paid to Clifton.

Section 17(a)(2) also requires that the untrue statement or omission be of a material fact. 15 U.S.C. § 77q(a)(2). A fact is material if there is a substantial likelihood that a reasonable

¹⁷ Sections 17(a)(2) and 17(a)(3) require a showing of negligent conduct. See Steadman, 967 F.2d at 641 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976); Aaron v. SEC, 446 U.S. 680, 686 n.5 (1980)). Because the evidence establishes that Clifton acted with scienter a negligence analysis is unnecessary.

¹⁸ An override is a percentage of subordinates' aggregate sales. STOCKTON B. COLT JR., THE SALES COMPENSATION HANDBOOK (2nd Edition, 1998), page 273, available at http://books.google.com/books?id=Lo5hqXB5kGAC&pg=PA273&dq=Sales+managers+AND+override&hl=en&ei=W5LKTumtM8Pv0gG11m&sa=X&oi=book_result&ct=result&resnum=1&ved=0CDIQ6AEwAA#v=onepage&q=Sales%20managers%20AND%20override&f=false.

investor would consider it important in making an investment decision and if disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available. See Matrixx Initiatives Inc. v. Siracusano, 131 S. Ct. 1309 (2011); Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). It is not sufficient to allege that the investor might have considered the information important, nor is it necessary to assert that the investor would have acted differently had the disclosure been made. See Ganino v. Citizens Utils. Co., 228 F.3d 154, 162 (2d Cir. 2000).

Information relating to the overall status of the Osage Project, the status of individual Osage Project wells, and/or their oil production status is most certainly material information that would be considered important in making an investment decision relating to an oil-and-gas project. During the December 23, 2009, conference call, Clifton misled potential investors to believe drilling on the Osage Project had not yet started. Also, Clifton's failure to provide timely and complete updates, including negative information, to Sales Representatives caused them to send e-mails to investors containing material misrepresentations and/or omissions relating to the status of Osage 1-5. Sales Representatives sent e-mails as late as December 2009, containing inaccurate information relating to the oil production rate of Osage 1-5. Further, prospective investors were not informed that Managed Petroleum was converting Osage 1-1 to a SWDW and oil production figures were exaggerated by including Osage 1-1 in the calculation. Clifton conceded that the status of Osage 1-4 as a dry hole should have been communicated to potential investors. Lastly, Clifton made direct requests of Allen and Santorella not to share updated information with other Sales Representatives.

Clifton acknowledged that he did not inform the investors of the negative developments or contact them to determine whether they had received adequate information to invest. He did not permit them to rescind their investments. This information would have significantly altered the total mix of information that was made available to the Osage Project investors. Accordingly, Clifton misrepresented and omitted material information relating to the Osage Project or caused material information to be misrepresented or omitted by Sales Representatives. As such, Clifton violated Section 17(a)(2) of the Securities Act.

5. Clifton Violated Section 17(a)(3)¹⁹

Securities Act Section 17(a)(3) makes it unlawful for any person in the offer or sale of any securities "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." Clifton contends that the single conversation on December 23, 2009, "cannot rise to the status of a practice or course of business." (Clifton Br. at 9-10.) Clifton further argues that "this single conversation did not result in a transaction that operated as a fraud or deceit upon a purchaser since there was no purchase" as a result of the December 23, 2009, conference call. (Clifton Br. at 10.) However, the Osage Project in its entirety would qualify as a "transaction, practice or course of business" as required under Section 17(a)(3) of the Securities Act.

¹⁹ See supra note 17.

Clifton operated the offering of LP interests in the Osage Project as a fraud or deceit upon its investors because Clifton himself made, or caused the Sales Representatives to make, fraudulent and/or deceptive statements or omissions regarding the Osage Project, causing several investors to purchase LP interests. Specifically, his material misstatements and his omissions of material information during the December 23, 2009, conference call were fraudulent. Clifton forwarded an e-mail containing the link to the December 23, 2009, conference call to a Sales Representative knowing that it would be forwarded to a potential investor, and knowing that the information was materially incorrect and/or incomplete. Further, Clifton's failure to timely update the Sales Representatives caused them to make material misrepresentations and omissions in various e-mails sent to potential investors. Both Mulcare and Caudill testified that they were not provided with all material information prior to making their investment decisions.

The evidence supports a finding that Clifton's practices operated as a fraud or deceit upon investors in the Osage Project. Additionally, he caused Sales Representatives to engage in a course of business that operated as fraud or deceit upon investors in the Osage Project in violation of Section 17(a)(3) of the Securities Act.

B. Exchange Act Section 15(b)

Section 15(b)(6) of the Exchange Act authorizes the Commission to bar from association with a broker or dealer any person who has committed or omitted any act enumerated in Section 15(b)(4)(E), and who, at the time of the misconduct, was associated with a broker or dealer. 15 U.S.C. § 78o(b)(4)(E).

Section 15(b)(4)(E) references, among other things, a failure "reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such person is subject to his supervision." 15 U.S.C. § 78o(b)(4)(E).

Section 15(b)(4)(E) further states that no person shall be deemed to have failed reasonably to supervise any other person, if: (1) there are established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person; and (2) a person has reasonably discharged his duties and obligations without reasonable cause to believe that the established procedures and system were not being complied with. 15 U.S.C. § 78o(b)(4)(E).

The Commission has held, when addressing Section 15(b)(6) of the Exchange Act, incorporating by reference Section 15(b)(4)(E):

The supervisor may establish an affirmative defense if the supervisor can show procedures established by the broker-dealer with whom she was associated at the time of the violations at issue. Supervisors must respond not only when they are "explicitly informed of an illegal act" but also when they are "aware only of 'red flags' or 'suggestions' of irregularity."

Donna N. Morehead, Exchange Act Release No. 46121 (June 26, 2002), 77 SEC Docket 3388, 3392 (quoting John H. Gutfreund, 51 S.E.C. 93 (1992)). See also George J. Kolar, Exchange Act Release No. 46127 (June 26, 2002), 77 SEC Docket 3400, 3405; Consol. Inv. Servs., Inc., 52 S.E.C. 582, 588 & n.27 (1996) (collecting cases); Quest Capital Strategies, Inc., Exchange Act Release No. 44935 (Oct. 15, 2001), 76 SEC Docket 131.

MPG Financial had established WSPs. Clifton testified that he received a copy of the WSPs when he was hired and that he reviewed them and was familiar with them. The WSPs were updated by Simmons when he joined MPG Financial in September 2009. Simmons testified that everyone was provided with a copy of the updated WSPs and was required to sign-off that they had read and understood them. The due diligence section of the WSPs stated that “[MPG Financial] and any person associated with it shall have reasonable grounds to believe, based on information provided by the issuer, that all material facts are adequately and accurately disclosed.” (Div. Ex. 46 at 53.) Further, due diligence requires “[m]aintenance of records indicating steps taken in order to verify the adequacy of the disclosures made to investors.” (Div. Ex. 46 at 53.)

1. Clifton Violated Section 15(b) of the Exchange Act

MPG Financial’s updated WSPs state that “associated person[s] involved in sales are assigned to Johnny Clifton.” (Div. Ex. 46 at 8; Tr. 83.) They further state that “[o]utgoing written and electronic correspondence of registered representatives...is subject to review and approval by the designated supervisor.” (Div. Ex. 46 at 14; Tr. 84-85.) The WSPs make it clear that Clifton is the designated supervisor of the registered representatives involved in sales and as such, is also responsible for reviewing and approving written and electronic correspondence drafted by the Sales Representatives. Clifton admitted that the WSPs charged him with supervisory duties over Sales Representatives and required him to review their e-mail to ensure that they were not exaggerated and were truthful. (Tr. 85.)

Clifton contends that, despite what is stated in the WSPs, he delegated the task of reviewing electronic correspondence to Simmons. When Simmons joined MPG Financial as the chief compliance officer, he designed an e-mail system whereby e-mails would be stored in a central location that could be accessed by both himself and Clifton. Both Clifton and Simmons agreed that there were only between five and twenty e-mails sent per day. Simmons stated that it was primarily the responsibility of Clifton to review electronic communications sent by the Sales Representatives. In support of this contention, Simmons stated that he was only employed at MPG Financial part-time and was charged with numerous other duties, including conducting a FINRA Rule 3012 review, which was very time consuming. (Tr. 315-16, 320.) Simmons testified that he was charged by the WSPs with supervisory duties of “associated persons not involved in sales,” and based on a discussion with Clifton, he only conducted keyword search reviews of electronic communications, not a review of individual e-mails. (Div. Ex. 46 at 8; Tr. 320-21, 333.)

Clifton did not implement any formal review of the correspondence process or tracking system to record whether he had reviewed e-mails. In fact, both Clifton and Simmons testified that there were no formal policies or procedures in place to ensure that electronic

communications were being regularly reviewed. Clifton failed to conduct regular and systematic reviews of e-mail correspondence sent to investors or prospective investors. He also failed to keep records of project updates and whether investors received updated information about the projects. Failure to keep adequate records caused the Sales Representatives to misrepresent or omit material facts relating to the Osage Project to potential investors. (Tr. 69, 106-07, 109.) In fact, Clifton's misrepresentations and omissions during the December 23, 2009, conference call are similar to the misrepresentations or omissions in e-mails sent by the Sales Representatives. For example, in an e-mail from Cooksey to a potential investor, Cooksey discussed the potential rate of return based on ten possible pay zones and omitted information relating to Osage 1-1 being converted to a SWDW and Osage 1-5 being "shut in." (Div. Ex. 25.)

Based on the foregoing, I conclude that Clifton violated Section 15(b) of the Exchange Act by failing to reasonably supervise the Sales Representatives. I further conclude, that Clifton cannot establish an affirmative defense to his violation of Section 15(b) of the Exchange Act because he did not fulfill the duties charged to him by the WSPs that included reviewing and approving the written and electronic communications of the Sales Representatives.

IV. SANCTIONS

The Division seeks a cease-and-desist order, a collateral bar under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), and a third-tier civil penalty. (Div. Br. at 33.) Clifton objects generally to the sanctions sought by the Division and requests that only the mildest sanctions be imposed, if any. (Clifton Reply Br. at 9-10.)

In determining sanctions, the Commission considers the following Steadman factors: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infractions; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (citing SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)), aff'd on other grounds, 450 U.S. 91 (1981). The severity of sanctions depends on the facts of each case and the value of the sanctions in preventing a recurrence of the violative conduct. See Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963); Schild Mgmt. Co., 87 SEC Docket 848, 862 & n.46 (Jan. 31, 2006).

Clifton's conduct was egregious. Clifton has over fifteen years of industry experience and holds various securities licenses. Clifton is well aware that the standard of care applicable to a person in his position required him to exercise good faith, fair dealing, and honesty. He placed himself in a supervisory position, and knew that he was responsible for ensuring those he supervised, the Sales Representatives, exercised the same fundamental values. He clearly breached his duty through his own material misrepresentations and omissions relating to the Osage Project, as well as by failing to adequately supervise the Sales Representatives to ensure the information they provided was accurate, complete, and truthful.

As previously noted, Clifton acted with scienter. In at least one instance, Clifton knowingly sent information containing material misrepresentations and omissions, to a Sales Representative

for distribution to a potential investor. Additionally, Clifton told both Santorella and Allen not to share updated information relating to Osage 1-2 and Osage 1-3 with other Sales Representatives. This conduct is evidence of the degree of scienter with which Clifton acted.

Clifton breached his duties on several occasions during his tenure at MPG Financial by providing materially misleading information or omitting material information altogether. Clifton does not acknowledge his wrongdoing and believes he exercised the requisite standard of care, thus failing to recognize his wrongful conduct. Clifton has not provided any assurances against future violations. Finally, Clifton currently is the owner and president of a registered broker-dealer, which provides future opportunities for him to violate securities laws. Based on the foregoing, I find that it is in the public interest to impose a cease-and-desist order, collateral bar, and third-tier civil penalties.

A. Cease-and-Desist Order

Section 8(A) of the Securities Act and Section 21C of the Exchange Act authorize the imposition of a cease-and-desist order on any person who has violated any provision of the Securities Act or Exchange Act or the rules and regulations thereunder.

In KPMG Peat Marwick LLP, , Exchange Act Release No. 43862 (Jan. 19, 2001), 74 SEC Docket 384, 428-38, recon. denied, 74 SEC Docket 1351, petition denied, 289 F.3d 109 (D.C. Cir. 2002), the Commission considered the standard for issuing cease-and-desist relief. It concluded that it would consider the Steadman factors in light of the entire record, noting that no one factor is dispositive. It explained that the Division must show some risk of future violation. See 74 SEC Docket at 430. However, it also ruled that such a showing should be “significantly less than” required for an injunction and that, “absent evidence to the contrary,” a single past violation ordinarily suffices to establish that the violator will engage in the same type of misconduct in the future. See 74 SEC Docket at 430, 435.

Clifton’s multiple failures to comply with MPG Financial’s WSPs and act within the standard of care required of a person in his position demonstrate disregard for regulatory requirements. When these facts are coupled with the discussion of the Steadman factors above, I conclude that there is a risk of future violation and that a cease-and-desist order is fully warranted.

B. Collateral Bar Under the Dodd-Frank Act

The Division requests that Clifton be barred from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization (NRSRO). (Div. Br. at 28-30.) The requested sanction will be granted as to all of the above except municipal advisor and NRSRO.

The Dodd-Frank Act, enacted July 21, 2010, added collateral bar sanctions to Section 15(b)(6)(A). The new sanctions authorize the Commission to simultaneously suspend or bar an individual who has engaged in certain unlawful conduct from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO.

Prior to Dodd-Frank, such sanctions were generally authorized only on a piecemeal basis, i.e., only when an individual sought association with that particular branch of the securities industry at issue. Teicher v. SEC, 177 F.3d 1016, 1020-21 (D.C. Cir. 1999) (the Commission could not impose sanctions as to any specific branch until it could “show the nexus matching that branch”). The issue is whether the Dodd-Frank Act’s broader collateral bar can be applied to Clifton, whose misconduct occurred prior to the Dodd-Frank Act’s enactment. The Commission has not yet ruled on this issue.²⁰

The Division takes the position that the collateral bar under the Dodd-Frank Act “is a prospective remedy imposed based on conduct that was unlawful even prior to enactment of the Dodd-Frank Act” and, “[i]n this respect, the bar is indistinguishable from the prospective injunction relief that the Supreme Court has held does not raise retroactivity concerns.” (Div. Br. at 30.) The Division contends that all of the Steadman factors are satisfied and, therefore, the imposition of the Dodd-Frank Act collateral bar is appropriate to protect the investing public from prospective harm. (Div. Br. at 31.) Clifton generally objected to the imposition of a collateral bar under the Dodd-Frank Act.²¹ (Clifton Reply Br. at 10.)

The leading case on retroactivity is Landgraf v. USI Film Products, 511 U.S. 244, 245 (1994), where the Court stated:

when a case implicates a federal statute enacted after the events giving rise to the suit, a court’s first task is to determine whether Congress has expressly prescribed the statute’s proper reach. If Congress has done so, there is no need to resort to judicial default rules . . . Even absent specific legislative authorization, application of a new statute to cases arising before its enactment is unquestionably proper in many situations. However, where the new statute would have a genuinely retroactive effect—*i.e.*, where it would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed—the traditional presumption teaches that the statute does not govern absent clear congressional intent favoring such a result.

“The presumption against statutory retroactivity is founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.” *Id.* See also Sacks v. SEC, 2011 WL 590308 (9th Cir. 2011), amended, 2011 WL 3437088 (9th Cir. 2011); Koch v. SEC, 177 F.3d 784 (9th Cir. 1999). Under Landgraf, a statute is impermissibly retroactive when it “attaches new legal consequences to events completed before [the statute’s] enactment.” See Landgraf, 511 U.S. at 269-70.

²⁰ See e.g., Petitions for Review (Petitions) in John W. Lawton, Initial Decision Release No. 419 (April 29, 2011); Evelyn Litwok, Initial Decision Release No. 426 (Aug. 4, 2011). These Petitions are pending before the Commission.

²¹ Clifton did not argue the issue of retroactivity with respect to the collateral bar under the Dodd-Frank Act.

Clifton's willful violation of Section 17(a) of the Securities Act and Section 15(b) of the Exchange Act clearly subjects him to an associational bar with brokers and dealers. 15 U.S.C. § 77q(a); 15 U.S.C. §§ 78o(b)(4)(D), 78o(b)(6)(A)(iii) (2006). Thus a broker and dealer associational bar on Clifton is appropriate.

The question, however, is whether Clifton had a reasonable expectation that his misconduct would not affect his ability to associate with industry segments other than brokers or dealers. Before the Dodd-Frank Act, willful violation like those of Clifton, while associated with a broker or dealer, subjected a person to a collateral bar from associating with investment advisers, municipal securities dealers, and transfer agents, even though the bar could not be imposed until the person actually sought such association. 15 U.S.C. § 78o-4(c)(4) (2002); 15 U.S.C. § 78q-1(c)(4)(C) (2002); 15 U.S.C. § 80b-3(e)(5), (f) (2006); Teicher, 177 F.3d at 1020-21. Therefore, as to these collateral bars, Clifton had no pre-existing right to associate with investment advisers, municipal securities dealers, or transfer agents, and such collateral bars do not attach new legal consequences to pre Dodd-Frank Act conduct.

Amended Section 15(b) of the Exchange Act also includes two newly-created associational bars: municipal advisors and NRSROs. Because such bars did not exist at the time of Respondent's conduct, I find that they attach new legal consequences to Respondent's conduct and are impermissibly retroactive.²²

Based on the foregoing, Clifton is subject to Section 15(b) of the Exchange Act, and grounds exist to impose remedial sanctions, including a collateral bar under the Dodd-Frank Act, if such sanctions are in the public interest. As previously stated, imposition of a collateral bar satisfied the Steadman factors and, therefore, is in the public interest. Therefore, barring Clifton from associating with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent is fully warranted.

C. Third-Tier Civil Penalties

Under Section 20(d)(2)(C) of the Securities Act and Section 21B(a) of the Exchange Act, the Commission may impose a civil monetary penalty for each violation if it finds that a respondent has willfully violated a statutory Act or the rules and regulations thereunder. 15

²² Landgraf provides an exception to statutory retroactivity: "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." Landgraf, 511 U.S. at 273. Application of the Landgraf exception requires determining whether a Commission bar is a form of prospective remedial relief or a punitive sanction. Such a determination is fact-specific and the case law is ambiguous. See e.g., Commissioner Kathleen L. Casey, Address to Practising Law Institute's SEC Speaks in 2011 Program (Feb. 4, 2011); SEC v. Johnson, 87 F.3d 484 (D.C. Cir. 1996) (vacating the Commission's order imposing a six-month suspension of a securities industry supervisor as time barred under 28 U.S.C. § 2462 because the sanction sought operated as a penalty and was not remedial). I therefore decline to apply the Landgraf exception with respect to the municipal advisor and NRSRO industry bars.

U.S.C. § 78u-2. The Commission must also find that such a penalty is in the public interest. Six factors are relevant: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other matters as justice may require. See 15 U.S.C. § 78u-2(c).

Both the Securities Act and the Exchange Act employ a three-tier system setting the maximum amount of a civil penalty. 15 U.S.C. § 78u-2(b). Clifton's conduct occurred between April 2009 and April 2010. During that time, for each "act or omission" by a natural person, the maximum penalty in the first tier was \$6,500; in the second tier, \$65,000; and in the third tier, \$130,000.²³ 15 U.S.C. § 78u-2(b). A first-tier penalty is imposed for each statutory violation. 15 U.S.C. § 78u-2(b)(1). A second-tier penalty is permissible where the conduct involves fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. 15 U.S.C. § 78u-2(b)(2). A third-tier penalty involves conduct where such state of mind is present and where the conduct directly or indirectly (i) resulted in substantial losses, (ii) created a significant risk of substantial losses to other persons, or (iii) resulted in substantial pecuniary gain to the person who committed the act or omission. 15 U.S.C. § 78u-2(b)(3).

The Division requests a maximum third-tier penalty of \$130,000 be imposed on Clifton. Div. Br. at 32-33. Clifton's willful, fraudulent actions and misrepresentations resulted in substantial losses to Osage Project investors. Clifton was paid through receipt of overrides on the investments generated by the Sales Representatives. In an effort to deter future violations, and because it is in the public interest, a civil penalty in the amount of \$130,000 will be ordered.

V. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on November 9, 2011, and Respondent's Reply Brief which the Secretary of the Commission received on November 14, 2011.

VI. ORDER

IT IS ORDERED, pursuant to Section 8(A) of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, that Johnny Clifton cease and desist from committing or causing any violations, or any future violations, of Section 17(a) of the Securities Act of 1933 and Section 15(b) of the Securities Exchange Act of 1934;

IT IS FURTHER ORDERED, pursuant to Section 15(b)(6)(A) of the Securities Exchange Act of 1934, that Johnny Clifton is barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; and

IT IS FURTHER ORDERED, pursuant to Section 20(d)(2)(C) of the Securities Act of 1933 and Section 21B of the Securities Exchange Act of 1934, that Johnny Clifton shall pay a total civil monetary penalty of \$130,000.

²³ These amounts reflect inflationary adjustments, as required by the Debt Collection Improvement Act of 1996, as of April 2009, the time Clifton began his violative conduct. See 17 C.F.R. § 201.1003.

Payment of the civil monetary penalty shall be made no later than twenty-one days after the date of this Order. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying Respondent and Administrative Proceeding No. 3-14266, shall be delivered to: Office of Financial Management, Accounts Receivable, 100 F Street, N.E., Mail Stop 6042, Washington, DC 20549. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111(h) of the Commission's Rules of Practice, 17 C.F.R. § 201.111(h). If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact, or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Robert G. Mahony
Administrative Law Judge