UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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ADMINISTRATIVE PROCEEDING
File No. 3-15006

In the Matter of

RAYMOND J. LUCIA COMPANIES, INC.
and RAYMOND J. LUCIA, SR.

Respondents.

OPENING BRIEF OF RESPONDENTS RAYMOND J. LUCIA COMPANIES, INC. AND RAYMOND J. LUCIA, SR. ON APPEAL OF INITIAL DECISION ON REMAND

March 24, 2014

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I. INTRODUCTION

Throughout Ray Lucia's 40-year career in the investment industry, he enjoyed a spotless disciplinary record and sterling reputation. Such was Mr. Lucia's popularity among investors that, in recent years, he has become a prominent radio and television personality and in-demand public speaker on topics ranging from retirement planning to his thoughts on finance and lifestyle matters. It has now been several years since Mr. Lucia has actually acted as an investment adviser or registered representative of a broker-dealer, focusing instead on his media career and consulting business, and he has no intention of ever re-entering the industry.

In 2012, the Division initiated an administrative proceeding charging Mr. Lucia and the now-inoperative advisory firm with which he was once affiliated, Raymond J. Lucia Companies, Inc. ("RJLC," jointly "Respondents"), with making misrepresentations during retirement seminars Mr. Lucia conducted. Mr. Lucia's seminars presented a general strategy called "Buckets of Money," advancing the non-controversial concept of diversifying holdings among "buckets" of varying risk, and spending money from the least risky buckets first. Notably, there was no allegation that Mr. Lucia ever recommended securities or sold any investments at any of his seminars. Rather, attendees had the option of providing contact information after the seminar. Some later became clients of RJLC (a firm whose assets were later sold and which has no ongoing activities). The Division did not allege that any of these individuals received anything short of complete and accurate information, including all relevant prospectus disclosures, in connection with any investment decisions they ultimately made. Nor did the Division allege that any investors suffered any losses, or that Mr. Lucia received any unjust enrichment, as a result of the representations at issue here.

Notwithstanding these undisputed facts, the Division contended at the hearing held before the Administrative Law Judge ("ALJ") between November 8 and December 18, 2012 (the

"Hearing") that certain slides Mr. Lucia used during his retirement seminars—not his radio show or other public appearances—in which Mr. Lucia illustrated why his strategy was more prudent than other alternatives, failed to adequately disclose that the slides were based on hypothetical assumptions and not historical trading and market data. Even a cursory review of the actual slides shows that, on slide after slide, investors were told "**rates of return are hypothetical in nature**" and that "**this is a hypothetical illustration and is not representative of an actual investment.**" Yet the Initial Decision on Remand ("Initial Decision") concluded that by using the word "backtest" twice in a 100-plus page slideshow (a word with no definition under the securities laws), respondents had nonetheless conveyed that the illustrations were based on historical fact. Not only did the ALJ erroneously conclude that this constituted a deliberate fraud, but one so egregious that it warranted a lifetime associational bar for Mr. Lucia.

The Commission is thus presented with a 40-year industry veteran with no disciplinary record, in a case with no allegations whatsoever of misappropriation or investor losses and no claims that a single one of the 50,000 people who attended Mr. Lucia's programs over the years ever complained about the seminar presentations or the content of the slideshow. There was no contention that Mr. Lucia recommended any securities at his retirement seminars, or that any seminar attendees who chose to purchase any securities through his firm many months later received any misinformation or inadequate disclosures in connection with those purchases. At worst, the Initial Decision lays out findings which suggest that Respondents should have used even more precise disclaimers than they did in explaining the illustrations set forth in a lengthy PowerPoint presentation, and better explained their use of the term "backtesting"—a term that has no standard industry definition, as demonstrated by admitted evidence. Whatever language might or might not have been used, however, the Division never alleged, much less proved, that the retirement strategy advanced by Mr. Lucia would not, in fact, have produced superior outcomes than the other illustrative examples he depicted.

And yet, shockingly, Mr. Lucia is facing a lifetime associational bar. This draconian sanction is wholly disproportionate to the merits of the claims and the evidence presented at hearing. And quite clearly, this sanction is inconsistent with Commission precedent.

In the twilight of his career, Mr. Lucia is no longer in the securities industry, having dissolved his advisory business; he is neither an investment adviser nor a registered representative of a broker-dealer, and raises no challenge to the ALJ's order that both he and RJLC have their adviser registrations permanently revoked. He simply wishes to continue his role as a public media personality, offering his personal insights on retirement-related topics. While the associational bar does not legally prevent him from doing so, based on both First Amendment protections and the legal scope of what constitutes "associating with" an adviser or broker, this lifetime bar casts an inescapable cloud over him, deterring any business from working with Mr. Lucia in connection with his radio shows and public appearances through advertising, sponsorships, or consulting arrangements. Similarly, should he ever wish to sell products not regulated by the federal securities laws, whether insurance or real estate, he faces a comparable limitation. He is thus faced with a lifetime bar that has propelled him towards personal bankruptcy.

II. Statement of Facts

A. Background

Raymond J. Lucia is a 64-year-old investment professional with, as the ALJ recognized, an unblemished regulatory record dating back nearly 40 years. (Initial Decision at 3-4, 60.) The Initial Decision acknowledged that Lucia has been working in the industry as an investment adviser, registered representative of a broker-dealer, and, most recently, public speaker, for nearly 40 years; he "has a clean regulatory record and [was] cooperative with examiners and investigators." (Initial Decision at 60.)

Mr. Lucia is the host of a nationally-syndicated radio show and the author of several books on retirement planning. It is undisputed that Mr. Lucia does not personally advise investors regarding the purchase or sale of any particular securities. Rather, at all relevant times he has promoted a general retirement planning strategy, encouraging investors to diversify their investments among multiple "buckets" of investments of varying risk and liquidity, ranging from low-risk, liquid assets such as cd's and treasury notes, to bonds and fixed annuities, to a mix of stocks and real estate (including real estate investment trusts (REITs)). While given the colorful name of "Buckets of Money," Mr. Lucia's strategy was itself straightforward and non-controversial: it reflected his own opinions on retirement strategies, based on various academic studies supporting his view, and specifically the belief that investors should spend their income and principal from safer assets first, giving riskier and more illiquid investments a longer time to grow in value. (Initial Decision at 7-8.) In this respect, his work was not unlike the work of dozens of high-profile media personalities who routinely discuss their own investment ideas and strategies with their television or radio audiences or readers of their books, without any threatened or actual enforcement actions or sanctions imposed.

During the relevant period, Mr. Lucia also presented his strategy at free seminars marketed primarily to retirees and pre-retirees—again, much like many other media personalities in this field. The presentations included illustrations of hypothetical investment and asset withdrawal approaches, and showed how, using assumptions repeatedly described as hypothetical, the "Buckets of Money" strategy could generate better results than alternative strategies.

The Division's case at the Hearing centered on the allegation that a handful of PowerPoint slides used by Mr. Lucia at his seminars were misleading. Specifically, the Division contended that the hypothetical illustrations relied on an assumed 3% annual inflation rate and an assumed rate of return for REITs of around 7%, rather than the actual annual inflation rate and return rates for specific REITs over the duration of the illustrations. Similarly, the Division alleged that the slides failed to deduct advisory fees or follow precisely the rebalancing methodology advocated by Mr. Lucia. (Initial Decision at 2.) The Initial Decision found these slides to have been materially misleading notwithstanding the unrebutted fact that Mr. Lucia's presentations repeatedly described the illustrations as hypotheticals using assumed, rather than actual historical, rates.

B. Disclosures About Hypothetical Illustrations

It is important to begin with the slides themselves, as well as the actual words spoken by Mr. Lucia at his presentations. The first half of Mr. Lucia's seminar consisted of general observations about the market and historical stock performance, about which the Division raised no concerns and asserted no claims. (Division Exhibit ("DX") 1 at SEC-LA3937-00092 through 145.) When the seminar first began to compare various retirement strategies, it opened with a full disclosure page on REITs and real estate investments. (*Id.* at 147.)[1] The page emphasized that "REITs and/or Real Estate is a long-term investment," that there is a "lack of a public trading market for" REIT shares, and that there is "limited liquidity and demand" for REITS and real estate investments, while emphasizing that "[m]ore information, on the specific risks, fee[s] and expenses can be found in the prospectus. Please obtain a copy of the prospectus from your

[1] This same disclaimer slide was then repeated verbatim later in the presentation, before Mr. Lucia begins to address the "Buckets of Money" strategy's use of real estate investments. (*Id.* at 180.)

financial professional and read it carefully before investing." The warnings given to audience members could not have been clearer.

This slide was followed by yet another page of "Notes & Disclaimers," stating that "[t]he following examples are for hypothetical purposes only" and "[t]he following scenarios are not actual investors." (*Id.* at 151.) The presentation then went into the various illustrations of different retirement strategies, ranging from the "Conservative Campbells" to the "High Rolling Hendersons" to the "Balanced Buttafuccos," culminating in the "Bold Buckateers" who followed Mr. Lucia's recommended strategy. (*Id.* at 152-213.) The dozens of slides running through these illustrations were repeatedly emblazoned with the legend, **"This is a hypothetical illustration and is not representative of an actual investment**."

The "Buckets of Money" illustration slides specifically and repeatedly explained that **"[r]ates of return are hypothetical in nature and are for illustrative purposes only**." (*Id.* at 176-201.) The slides expressly provided that they were based on an *assumed* inflation rate of 3%, not the actual, fluctuating inflation rates over the years of the illustrations. (*Id.* at 198, 204.) On a slide entitled "Notes & Assumptions," the presentation expressly stated that a 3% inflation rate and a 7% annual REIT return rate were *assumptions* (in contrast to the *actual* rates used for bond and stock returns). (*Id.* at 204.)

In addition to the explicit warnings described above, it was undisputed at the Hearing that Mr. Lucia also verbally advised audience members that the illustrations were hypothetical. For example, the script of one such Webinar, introduced into evidence at the Hearing, shows how Mr. Lucia underscored the point: "Let's pretend that from that point forward, inflation was 3 percent. We knew it was more. But we wouldn't have known that at the time." (Transcript of February 16, 2009 Webinar ("Webinar"), Respondents' Exhibit ("RX") 66 at 48-49.) The Initial

Decision conceded as much: "True enough, seminar attendees would understand that a flat 3% rate did not reflect year-by-year historical rates, especially because attendees were mostly retirees and near-retirees who lived through the tumultuous high-inflation years of the late 1970s and early 1980s, and would understand that inflation varies year to year." (Initial Decision at 34.)

Indeed, the Webinar itself opened with Mr. Lucia launching into an extended cautionary statement for participants:

> Now, before we get started, I want you to know that… [t]here's a whole lot of stuff that goes on in this business today; people promising all kinds of big-time returns. Understand, nothing can be guaranteed. So please read the disclaimer. The attorneys make us do that, but it really is important, because when we talk about different rates of return and so forth, understand that we can't guarantee rate of return.

(RX 66 at 3-4.)

Thus, while the Initial Decision conceded it was "true enough" that seminar attendees understood these were hypotheticals, Mr. Lucia nevertheless was found to have committed securities fraud for causing these audience members to believe otherwise. The Initial Decision simply cannot be squared with what the PowerPoint slides *actually* disclosed, and what Mr. Lucia *actually* said.

Finally, while the Division challenged the assumptions used in the seminar illustrations, the Division made no showing that, had Mr. Lucia used historical data rather than hypothetical assumptions, and deducted fees, his "Buckets of Money" strategy would have failed to outperform the other investment strategies illustrated at the retirement seminars. Nor, as noted below, did the Division establish that any investors were harmed by following the "Buckets of Money" strategy.

C. What Is *Not* Alleged Here

It is equally important to note what the Division did *not* allege, and what the ALJ did *not* find. There is no dispute that Mr. Lucia neither recommended nor sold any securities at his seminars. Rather, attendees at Mr. Lucia's retirement seminars had the option of filling out a form indicating their interest in speaking with an investment adviser from Lucia's affiliated firm, RJLC, which Mr. Lucia sold in 2010, two years before these proceedings were initiated. (Initial Decision at 7, 9.) According to the unrebutted testimony at the Hearing, attendees interested in talking further with RJLC would generally have 3-4 meetings with a potential advisor, and for those who decided to become clients of the firm, the process of becoming clients would typically take over six months. (Hearing Transcript ("Tr.") at 1285.)

The Division did not allege (much less prove) that any seminar attendee who ultimately chose to work with an RJLC adviser was provided with anything less than 100% complete and accurate disclosures about any securities he or she decided to purchase. Nor did the Division rebut the evidence that, over the years, some 50,000 individuals attended Mr. Lucia's retirement seminars, and not a single one lodged any sort of complaint about the allegedly misleading nature of the seminar presentation generally, or the slides relating to the "Buckets of Money" strategy in particular. (Initial Decision at 8, 47; Tr. 671-2, 677, 1274, 1477-78, 1557.)[2]

In short, there was no evidence that any seminar attendees who later became RJLC clients were in any way harmed by the investment advice they received from the firm, or that Mr. Lucia made any specific investment recommendations to them that were based on misleading

[2] Notably, the enforcement action originated from a 2010 examination cause exam, triggered by a complaint from an investor complaining he was not provided with a prospectus. The exam specifically found the complaint to be unfounded, as RJLC "appears to have provided the complainant with links to the respective prospectuses for each product via email, contrary to the complainant's assertion." (SEC Examination Report, DX 2 at SEC-LA3937-04984.)

information, or that Mr. Lucia misappropriated a penny from investors. As the ALJ himself conceded in rejecting the Division's request for higher penalties, "in this case the evidence of actual losses to individual investors is virtually nonexistent... [T]here is no evidence of the amount of any unjust enrichment as to any particular investor." (Initial Decision at 60.) Instead, the Division's case amounted to the contention that a few slides in a lengthy presentation did not adequately convey that the hypothetical illustrations were in fact hypothetical, and that Mr. Lucia's representation that he had "backtested" the illustrations using assumptions rather than historical data was misleading because the word "backtest" means that historical data was used (notwithstanding the clear disclaimers to the contrary). For this, the Initial Decision forces the 64-year-old Mr. Lucia into immediate retirement and metes out the harshest penalty available under the federal securities laws, after an unblemished, nearly 40-year career.

III. THE RELIEF ORDERED BY THE ALJ WAS LEGALLY ERRONEOUS IN LIGHT OF THE EVIDENCE PRESENTED AT THE HEARING

A. The Initial Decision Based Sanctions on an Erroneous Application of the *Steadman* Factors

The determination of whether sanctions against an investment professional serve the public interest turns on an application of the factors set forth in *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). These factors include: the egregiousness of the purported misconduct; the isolated or recurrent nature of the infraction; the degree of scienter; the respondent's recognition of the wrongful nature of the conduct and sincerity of assurances against future violations; and the likelihood of recurrence. The Initial Decision misapplied these factors, none of which support the draconian relief ordered below.

1. The Purported Misrepresentations Were Far From Egregious

Even if the Commission were to conclude that the PowerPoint slides challenged by the Division were somehow misleading, Respondents' conduct was not remotely egregious.

a. Use of Hypothetical Inflation Rates

The Division contended, and the ALJ found, that in a presentation consisting of over a hundred slides, Respondents' use of two slides referencing "backtesting" misled investors into believing that the illustrations "us[ed] historical data to test a particular investment strategy." (Initial Decision at 27.) This conclusion is belied by the actual slides themselves, which expressly and repeatedly warned that the illustrations were *not* based on historical data. Any seminar attendee viewing Mr. Lucia's slideshow presentation was repeatedly told, slide after slide, that "**rates of return are hypothetical in nature and are for illustrative purposes only**" and that "**this is a hypothetical illustration and is not representative of an actual investment.**" Attendees similarly were told that the inflation rate and REIT rate of return used in the illustrations were *assumed*, not actual.

The ALJ himself conceded that no reasonable attendee of one of Mr. Lucia's seminars, comprised primarily of retirees and near-retirees who had lived through periods of high inflation, would have understood the 3% annual inflation rate used in the seminar to be based on actual historical inflation. The conclusion that the rate rendered the slides misleading also fails because it ignores the fact that the same assumption was incorporated into the other illustrations. For example, the slide on the "Conservative Campbells'" retirement strategy similarly showed the impact of 3% inflation (*see* DX 1 at SEC-LA3937-00155). If the "Buckets of Money" strategy was inflated through the use a low inflation rate, then so was the comparative strategy.

By the same token, the slides' use of an assumed annual rate of return for REITs of 7% or 7.75% for illustrations that show a hypothetical multi-decade investment could hardly suggest to a reasonable investor that REITs delivered a static actual return of 7% or 7.75%, year after year, for 20+ years. Obviously, a reasonable investor understands that in reality return rates fluctuate, and respondents' illustrations, rather than being based on real-life data, incorporated an assumed constant rate of return. That these returns were entirely hypothetical was laid out in black and white on the "Notes and Assumptions" slide, which contrasted the assumed REIT returns with the "actual market returns" used for bond and stock indices. (*Id.* at 204.)[3]

The Initial Decision's conclusion that Mr. Lucia falsely represented to seminar attendees that his illustrations were based on actual, historical data not only disregards the plain language of the slides themselves, but Mr. Lucia's own testimony as to his state of mind, as well as other evidence presented by Respondents at the Hearing. Mr. Lucia testified that he used the word backtesting to convey that he ran his investment strategy through hypothetical, assumed returns (*see, e.g.,* Tr. 1269)—an understanding confirmed by the explicit disclaimers he included in his slides, and that he reiterated verbally ("let's pretend..."). Other evidence supported Mr. Lucia's testimony that his use of hypothetical inflation rates in his illustrations was consistent with industry practice. For example, Respondents introduced a brochure from American Funds (one of the nation's oldest and largest mutual fund complexes) that included multiple illustrations of "back-testing withdrawal rates," all using hypothetical (rather than actual) inflation rates over an historical period—just like Mr. Lucia did. (RX 46). Finally, it bears repeating that there is no legal meaning to the word "backtest," and the Division cited no statute or regulation defining the term. Thus, the Division's core allegation that Mr. Lucia used the term "backtest" to mislead

[3] The Initial Decision devoted inordinate attention to RJLC's sale of REITs, arguing, among other things, that "a major focus of the backtests was to sell REITs" and that "non-traded REITs were the lifeblood of Lucia and RJLC's business, generating a substantial portion of revenues for them." (Initial Decision at 15, 29.) But it is important to remember that the Division did not challenge the sale of REITs by RJLC. Indeed, as noted earlier, the 2010 SEC examination which culminated in this enforcement action was triggered by a complaint that the firm had failed to provide a prospectus and information about the costs of these investments—and the Exam staff found this complaint to have been unfounded. (DX 2 at SEC-LA3937-04984.)

seminar attendees into believing his illustrations reflected actual, historical data is directly contravened by the evidence presented at the Hearing.[4]

Having nonetheless reached the conclusion that the slides conveyed actual performance—contrary to their plain language—and having adopted his own definition of the term "backtest," the ALJ concluded that the assumptions used by Mr. Lucia were inconsistent with historical data and therefore not an accurate depiction of "backtested" performance. This hindsight assessment of the applicable return rates turned in significant part on disputed expert testimony. Respondents submitted at the Hearing expert testimony supporting the reasonableness of the assumed inflation rates and REIT return rates used in the illustrations. For example, John Hekman, Ph.D. testified that the use of a 3% inflation rate for hypothetical retirement planning calculations is universally recognized (Tr. 1401; RX 35); *see generally* Respondents' Post-Trial Reply Brief at 40-43. Similarly, Kevin Gannon testified that a 7% REIT return rate for 1966-2003, and 7.75% for 1973-2003, was reasonable and supported by available indices (Tr. 1366-69, 1387, 1391-9; RX 34); *see generally* Respondents' Post-Trial Reply Brief at 43-45.[5] That the ALJ gave greater weight to the Division's expert than Respondents' experts

[4] It is well-settled under Constitutional jurisprudence that "laws regulating persons or entities must give fair notice of what conduct is required or proscribed." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2309 (2012), *citing Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The ALJ's ascribing to the term "backtest" a firm definition not found in the securities laws, and imposing significant penalties on Respondents for their purported misuse of a heretofore undefined term, further mandates a reversal of the Initial Decision.

[5] The Initial Decision took issue with the use of an assumed rate of return for REITS during a period in which REITs were not readily available in the marketplace. But in both the slides themselves and the verbal presentations, Mr. Lucia used REITs and direct real estate investments interchangeably. This portion of the slideshow was preceded by a slide discussing "[i]nvestments in REITs and/or Real Estate" (DX 1 at 148), and, as verified by the Webinar transcript, Mr. Lucia repeatedly referenced "direct ownership of real estate" when discussing the "Buckets of Money" strategy. (DX 66 at 33-35, 50.) An

does not lead to the conclusion that the conduct in question was egregious. On the contrary, the disputed expert testimony merely underscores that the rates which Mr. Lucia described as "pretend" portrayed a form of "backtesting" that may not have been universally accepted in the industry, but were not contrary to any known legal standard.

b. Other Alleged Omissions

The remaining omissions cited in the Initial Decision in support of the ALJ's finding that the slides were misleading likewise lack support, and at worst were far from the sort of egregious misconduct one would expect to see in an order barring someone from the investment industry for life.

The Initial Decision found that the failure of the hypothetical illustrations used in Mr. Lucia's PowerPoint slides to deduct advisory fees was materially misleading. Yet the Initial Decision failed to adequately address the unrebutted fact that Mr. Lucia was comparing multiple retirement strategies, all of which would involve the payment of fees by investors, and all his illustrations excluded fees from the calculations. The ALJ found that because the strategies were different, the magnitude of fees would have varied, and thus Respondents could not simply assume the impact of fees would be neutral across strategies. But the Division introduced no evidence that the impact of fees incurred by the "Buckets of Money" strategy would have been materially greater than for any of the alternative strategies pictured in the slides, and that the omission of fees thus inured to the benefit of Mr. Lucia's suggested retirement strategy. (Initial Decision at 37.) In the absence of any such evidence, the ALJ clearly erred in holding that Respondents' alleged failure to deduct fees was misleading, much less intentionally so.

RJLC adviser similarly testified that, for some investors, she would recommend direct ownership of real estate rather than REITs. (Tr. 1566.) Again, though, the presentation was clear that Mr. Lucia was not basing his illustration on actual returns, but rather hypothetical ones.

In any event, the illustrations hypothesized general retirement strategies, not particular securities, and thus any attempt to incorporate fees would have been highly speculative. Again, the PowerPoint plainly laid out the relative merits of different retirement approaches, and did not purport to portray the actual results an actual investor would earn on an actual portfolio. Indeed, had Mr. Lucia's illustrations attempted to calculate advisory fees on generalized hypotheticals, those illustrations could very well have been found misleading by the ALJ for the same reason he questioned the hypothetical return rates and inflation rates used in the slides. Mr. Lucia believed in good faith that he could not have estimated fees for such purely hypothetical strategies not tied to specific securities. (TR. 1284-85.) Thus, the fact that the illustrations did not deduct fees is not indicative of a deliberate, egregious fraud.[6]

In a similar vein, the ALJ's conclusion that it was egregiously misleading not to reallocate (or "rebucketize") assets in the illustrations was erroneous. The Initial Decision held that the "Buckets of Money" retirement strategy advised periodically reallocating assets, but the hypothetical illustrations did not do so. But, as is the case with advisory fees—and to a much greater extent—incorporating reallocation into the illustrations would have been highly speculative, and could have subjected Mr. Lucia to even greater criticism by the Division and the ALJ. The strategy illustrated by Mr. Lucia did not represent an actual portfolio with specific investments, but rather a general approach to diversification. Deciding when and how to shift

[6] All audience members who sought investment advice from Mr. Lucia's affiliated firm following any of his presentations were given complete and accurate fee disclosures, and the Initial Decision conceded this point. "The Division does not allege that RJLC advisers failed to provide full disclosure concerning fees to potential investors, and I have no reason to doubt that they did." (Initial Decision at 37.) Moreover, the very first slide in the PowerPoint presentation specifically cautioned potential investors to consider charges and expenses before investing. (DX 1 at SEC-LA3937-00093.) While the comparative illustrations in the seminar did not net out advisory fees (nor did they claim to do so), no actual clients of RJLC were alleged or found to have been deceived about the impact of fees on their actual investment decisions.

asset classes would turn entirely on a client's individualized holdings and the market conditions at the time. (Tr. 883-86, 1130-32, 1625.) There was no way, in the context of a broad, hypothetical overview, to "rebucketize" without opening up the possibility of being accused of manipulating rebalancing dates. Respondents thus made a good faith determination to keep the illustrations simple and straightforward. Nothing in the illustrations falsely represented otherwise.

To the contrary, as Mr. Lucia testified, and as confirmed by the Webinar, Mr. Lucia deliberately kept the presentation at a basic level, but explained to audiences how "rebucketizing" would work in reality. (Tr. 1130-1131; DX 66 at 81-82.) Mr. Lucia further pointed out that such rebalancing was client-specific and thus would be done with an adviser based on market conditions at the time. (*Id.*)

c. The Purported Misrepresentations And Omissions Were Not Material

What is perhaps most striking about the Initial Decision is that it concludes that Mr. Lucia's illustrations were materially misleading without any allegation (much less an evidentiary showing) by the Division that, had Mr. Lucia used actual rates of return, deducted fees, and "rebucketized," his recommended strategy would not have outperformed the alternative approaches illustrated in the seminar. The Division offered no expert testimony on this point, and the ALJ cited no other evidence to support this finding. Again, this is not a case in which Respondents sold specific securities and promised a particular rate of return. Rather, Mr. Lucia explained alternative retirement strategies, and attempted to illustrate why, using hypothetical assumptions, his "Buckets of Money" strategy was optimal. The Division never showed this was false.

Finally, Respondents submitted unrebutted evidence at the hearing showing that after Respondents ceased using the illustrations in question once concerns were raised by the SEC examination staff, the response rate of seminar attendees who filled out contact cards requesting to meet with an RJLC adviser did not decline. (Tr. 1633-34.) Hence, far from being "egregious," the particular hypothetical illustrations that the ALJ found to have been misleading do not even appear to have been relevant to investors.

2. Respondents Did Not Act With Scienter

Under *Steadman,* the Commission must consider the degree of scienter involved in the alleged violation. The ALJ found that Mr. Lucia was "intentionally misleading clients and prospective clients" in conducting his seminars. (Initial Decision at 58.) But the evidentiary record is devoid of any evidence of actual intent to mislead. Mr. Lucia himself testified that he subjectively believed his use of the term "backtest" encompassed the utilization of hypothetical information. (Tr. 1269-71). The ALJ came to the conclusion that Mr. Lucia's understanding was incorrect; but nowhere did the Initial Decision cite any contemporaneous evidence establishing that Mr. Lucia in fact had a different understanding than he testified to, or was put on notice that his understanding was wrong.

To the contrary, the record established that the Mr. Lucia was explicitly *not* given any such notice. To reach the conclusion that Mr. Lucia made intentional misrepresentations, the ALJ effectively ignored substantial unrebutted evidence showing that Mr. Lucia repeatedly subjected the PowerPoint slides at issue here to third party review by both the registered broker-dealers who had supervisory oversight of his firm, as well as the examination staff of the SEC, and was never told that the slides were in any way misleading. There is no evidence of any red flags that his disclosures were somehow problematic. While Mr. Lucia does not shirk responsibility for the contents of the presentations, his repeated submission of the materials for review without any indication that the slides were misleading conclusively rebuts the conclusion that he acted with scienter.

The evidence admitted at the Hearing confirmed that Mr. Lucia repeatedly submitted copies of his slide presentations over the years to the two successive supervising broker-dealers which executed trades for RJLC clients. (*See, e.g.*, RX 25-29; Tr. 674-76, 1034, 1077, 1305, 1503.) The Initial Decision acknowledged that both broker-dealers reviewed RJLC's marketing materials, "including the slideshow presentations at issue, from a compliance perspective." (Initial Decision at 5.) Neither broker-dealer ever indicated that the slides were misleading, and the evidence in the record shows that revisions to slides requested by the brokers were made by RJLC. (*See, e.g.*, Tr. 1290-1291.)

The ALJ nonetheless dismissed this evidence by asserting that broker Securities America had suggested at some point that the basis for the assumed REIT rate of return should be included in the slides, and the slides were not subsequently changed. (Initial Decision at 48.) But the ALJ based this conclusion on an unattributed line on an attachment to an exhibit about which there was no testimony by any witness; there was no other evidence presented by the parties as to the context of the comment, or concerning any subsequent communications regarding whether revisions were made to the slides. There was simply no evidence that Mr. Lucia was put on notice that the slides were misleading, or that he ever disregarded a request by his broker to revise the slides in regards to the REIT disclosures, and neither the Division nor the ALJ asked him questions about this at the hearing.[7]

Importantly, when Respondents sought leave to brief the issue—since the Division referenced this document for the very first time in its post-hearing brief—the ALJ denied Respondents' request. The Initial Decision's reliance on an unexplained line in a document

[7] The Initial Decision's conclusion also ignores the fact that Securities America only acted as a supervising broker until 2007. Thereafter, the slides were reviewed by broker First Allied for compliance purposes, and the Division makes no allegation that this broker raised concerns about the hypothetical illustrations.

never authenticated or addressed by any witness, coupled with the ALJ's prejudicial error in refusing Respondents leave to brief the matter, constituted legal error and an abuse of discretion by the ALJ.

The ALJ further downplayed the third-party broker-dealers' repeated review and approval of the slide presentations with the conclusory assertion that, because the broker-dealers earned commissions from RJLC clients (as *all* broker-dealers do), they had an inherent conflict and their review of the materials was thus irrelevant. (Initial Decision at 47-48.) This conclusion, reached without any evidence in the record establishing any actual conflict of interest, represented a novel legal position with no basis in precedent. Indeed, both SEC and FINRA regulations impose a duty of supervision on broker-dealers, and FINRA specifically implies a legal obligation to review advertising materials, even when broker-dealers derive revenues from the sales of securities by their affiliates. (*See, e.g.,* FINRA Rule 2210). Had these brokers been found to have conducted inadequate reviews, due to an inherent conflict or otherwise, they could have been subject to significant regulatory repercussions. In holding that the purported conflict of these two broker-dealers rendered their review of the materials irrelevant, without any precedent supporting its position, the Initial Decision renders the regulatory regime governing advertising oversight a legal nullity.

The ALJ also failed to give any weight to the unrebutted fact that the SEC examination staff had reviewed Respondents' slide materials during their 2003 exam without expressing any concerns about the presentation. (Tr. 1305.) The Initial Decision concluded that the Examination report did not make an express determination that the slides did not violate the federal securities laws. (Initial Decision at 48.) But this misses the point. There is no dispute that the Examination staff was set up in a room at the RJLC offices to review the slideshow, requested copies of certain slides, and ultimately included no reference to the slides in its written report to RJLC. The slides reviewed by Examination staff in 2003 presented contain the identical representations or omissions for which the ALJ has barred Mr. Lucia, namely, a 3% historical inflation rate, an assumed REIT rate of return, failure to deduct advisory fees and failure to rebucketize the investments.[8] Indeed, the Examination staff found that the slideshow did not constitute sales performance materials, and did not alert Respondents of any potential issues regarding the slides. The absence of any red flags or adverse findings by the Examination staff renders the Initial Decision's finding of scienter unfounded, and the lifetime bar clearly excessive.

A federal court found against the Commission on nearly identical facts. In *SEC v. Slocum*, 334 F.Supp.2d 144 (D.R.I. 2004), the SEC exam staff conducted an examination of a registrant and found no deficiency regarding the registrant's Form ADV disclosure. When a subsequent exam resulted in an enforcement action related to the same issue, the defendant raised his reliance on the prior exam as a defense to scienter. The court found this reliance to be reasonable, and held that the Commission had failed to meet its burden to show the defendant acted with the requisite mental state. *Id.* at 181-182.

Respondents emphasize that they are not taking the position that the SEC's 2003 review of the materials exonerates them from any arguably misleading representations *per se*. Mr. Lucia consistently testified that he is ultimately responsible for the content of the slides. (Tr. 1066-1067.) But the record is also clear that immediately upon learning of the SEC Examination staff's concerns about the slides in 2010—long before the initiation of the present enforcement

[8] Hence, the ALJ's refusal to give weight to the staff review because some of the slides were added only after the 2003 examination was erroneous. All of the representations and omissions on which the ALJ based his liability determination were present in the slideshow reviewed by the staff.

proceedings—he ceased using the slides in question (and withdrew his books from circulation). For the ALJ to have concluded that Lucia intentionally defrauded investors, despite the fact that Lucia repeatedly subjected his seminar materials to review by his broker-dealers and by his regulators and was never put on notice of the alleged improprieties, was plain error and an abuse of discretion. And to find this conduct sufficiently serious under *Steadman* to demand that Mr. Lucia be forever prohibited from being associated with an investment adviser or other regulated entity is a clear error of law.

3. The ALJ Had No Basis To Conclude That Respondents Posed A Significant Risk of Future Violations

Finally, in barring Mr. Lucia from pursuing his livelihood for the rest of his life, the ALJ improperly applied the *Steadman* factors relating to the sincerity of Mr. Lucia's assurances against future violations and recognition of the wrongful nature of his conduct, and the potential for future violations as a result of his occupation. There is no dispute that, immediately upon being put on notice of the Examination staff's concerns and receiving a deficiency letter in 2010–long before the Division provided him with a Wells notice and ultimately filed the immediate action–Mr. Lucia ceased using the slides in question, and withdrew his books from publication (even though such publications were not included as part of this action). (RX 7 at 8-9; Tr. 689-90.) The ALJ conceded that, "to his credit, Lucia has made efforts to end the violative conduct." (Initial Decision at 58.) Beyond that, Mr. Lucia has wound down all operations of RJLC and sold its assets, and withdrawn its registration as an investment adviser. Mr. Lucia is no longer associated with any investment adviser or broker-dealer. At 64, he has no intention of *ever* being an investment adviser or registered representative of a broker-dealer, and he makes no challenge to the provision of the Initial Decision ordering the registrations of Mr. Lucia and RJLC as investment advisers permanently revoked.

Yet the ALJ nonetheless ignored these undisputed facts and concluded that Mr. Lucia's abandonment of his licenses, and his severing of any association with any registered entity, failed to give adequate assurances against future violations and thus warranted the most severe sanction available to the Commission. The ALJ based this determination in part on an assertion that certain minor deficiencies noted during the 2003 exam were not effectively corrected. (Initial Decision at 58.) The Initial Decision conceded, however, that Mr. Lucia immediately remedied those deficiencies during the 2010 exam, and the Division did not find them sufficiently important to include them as a basis for its enforcement action. Moreover, those deficiencies related to background information included in the advertising materials of RJLC, a firm which is no longer operative and which, as Mr. Lucia has repeatedly indicated, he has no intention of ever reviving.

The ALJ also concluded that Mr. Lucia has failed to show sufficient remorse for his actions because he "now tries to shift partial blame to the Commission for failing to detect problems" with his slideshow. (*Id.*) The evidence supporting this observation is weak at best, and certainly not sufficient to find that Mr. Lucia poses a significant risk of future violations. Mr. Lucia did not and does not seek to blame the Commission for anything. Rather, in defending the scienter charge brought against him, Mr. Lucia truthfully testified that the Examination staff reviewed the PowerPoint slideshow during its 2003 examination, that the staff expressed no concerns about the slides in question, and therefore he was not aware of red flags suggesting that the slides were misleading. The ALJ's harsh conclusion that this undisputed evidence amounted to "shifting blame" flies in the face of the entire statutory scheme allowing respondents to defend themselves in administrative proceedings. By this reasoning, any registered person who points to the fact of a "clean" SEC examination will be deemed to be "blaming" the Commission, and must suffer a lifetime bar should he or she lose at trial. Such reasoning renders the *Steadman* factors mere surplusage, and constitutes a plain error of law.

Finally, there can be no significant risk of future violations where, as here, the registered person is already out of the business of acting as an investment adviser. As already noted, Mr. Lucia divested his business in 2010. He no longer holds his license as a registered representative, and voluntarily withdrew his registration with the SEC as an investment adviser. He has no interest in working as a broker or adviser going forward, and thus makes no challenge to the order revoking his registration. Despite Mr. Lucia's voluntary actions, the ALJ imposed a lifetime collateral associational bar that potentially prevents Mr. Lucia from earning a living as a public speaker, even in the absence of being compensated through commissions or advisory fees. There is simply no support in the record for the proposition that Mr. Lucia poses a threat to the investing public requiring the draconian relief ordered here.

B. The Imposition Of A Permanent Bar Is Inconsistent With Commission Precedent

Absent any of the kinds of aggravating factors upon which lifetime bars typically have been based, the bar imposed here is excessive in light of the evidence presented at the hearing. In the past couple years alone, the Commission has instituted several comparable cases involving alleged misrepresentations in illustrations and models used in an adviser's promotional materials. The Commission has consistently agreed to settlements with investment advisers that provided no time out, much less permanent bars. For example, in *In the Matter of New England Investment and Retirement Group, Inc.*, Advisers Act Rel. No. 3516 (Dec. 18, 2012), the firm used advertising materials purporting to show how its investment models would have outperformed indices such as the S&P 500 (including for periods in which the firm's models did not even exist), yet described the hypotheticals to clients as portraying actual historical performance. The firm was censured, while the individual respondent received a cease-and-desist order and no bar or suspension. In *In the Matter of Modern Portfolio Management*, Advisers Act Rel. No. 3702 (Oct. 23, 2013), the adviser's marketing materials included model results that failed to deduct advisory fees. The firm and the individual respondents were censured; again, no bar or suspension was ordered. And in *In the Matter of Equitas Capital Advisors, LLC*, Advisers Act Rel. No. 3704 (Oct. 23, 2013), the adviser's advertisements calculated the firm's historical performance using outdated and unverifiable data. Again, the firm was censured and the individual respondents received no bars or suspensions.[9] *See also, e.g., In the Matter of Independent Financial Group*, 2000 SEC LEXIS 1639 (Aug. 8, 2000) (one-year IA bar where adviser used advertising materials stating past performance was based on actual trading rather than hypotheticals).[10]

The Initial Decision failed to cite any legal support for such extreme relief under these circumstances, or cite any comparable precedent for imposing permanent and collateral bars in the absence of any aggravating factors.[11] For this reason alone, the Commission would be

[9] *Equitas* also involved aggravating factors not present here, including fee overcharges to clients, undisclosed fees and conflicts of interest, and misrepresentations to clients about past SEC exam findings.

[10] Notably, *Independent Financial Group* also involved findings that the adviser fraudulently inflated its assets under management and falsified its Form ADV, allegations not made by the Division in the present case.

[11] The one case cited by the Initial Decision as support for a collateral bar, *In the Matter of John W. Lawton*, Advisers Act Rel. No. 3513 (Dec. 13, 2012) (Initial Decision at 58), involved a broker who had lost millions of dollars in investor funds, sent them phony account statements to conceal the losses, and pled guilty to criminal wire fraud.

justified in overturning the collateral bar order. Indeed, to order relief so inconsistent with precedent would subject the Commission to reversible error.[12]

As the D.C. Circuit wrote late last year, in an appeal of a civil penalty imposed by the Commission:

> [F]or a court not to require uniformity or "mechanical formulae" is not the same as for it to be oblivious to history and precedent. Review for whether an agency's sanction is "arbitrary or capricious" requires consideration of whether the sanction is out of line with the agency's decisions in other cases.

Collins v. SEC, 736 F.3d 521, 525-26 (D.C. Cir. 2013), *citing Friedman v. Sebelius*, 686 F.3d 813 (D.C. Cir. 2012). The *Collins* decision ultimately found the SEC's penalty, while seemingly high, to have been adequately justified based on the egregiousness of the case. Here, in contrast, ordering a permanent associational bar is completely disproportionate to SEC remedies ordered in factually similar cases.

C. The Lifetime Associational Bar Does Not Serve The Public Interest

The Investment Advisers Act gives the Commission great latitude to place limitations on an adviser's activities short of an associational bar. Even if the Commission were to conclude that Respondents' seminars were misleading, the absence of aggravating factors and a review of comparable cases support the imposition of relief that better fits the misconduct, and will not

[12] The Commission recently declined to overturn an ALJ's imposition of a permanent bar based on the entry of a stipulated civil injunctive order, explaining that appropriate sanctions are necessarily fact-specific. *In the Matter of Peter Siris*, Advisers Act Rel. No. 3736 (Dec. 12, 2013). But the circumstances of that case were extreme and in stark contrast to the facts of this case. *Siris* involved multiple instances of insider trading and a complex market manipulation scheme in violation of the registration and antifraud provisions of the 1933 and 1934 Acts—conduct which clearly harmed investors and unlawfully enriched the adviser. Further, respondent in *Siris* had settled the underlying injunctive action on terms that expressly prohibited him from contesting the Division's factual allegations, yet he nonetheless did so in the follow-on administrative proceeding.

have collateral consequences that may prevent Mr. Lucia from engaging in even activities not precluded by the bar.

As noted above, Mr. Lucia no longer works as an investment adviser or registered representative, and has no intentions of ever doing so again, regardless of the bar. Rather, Mr. Lucia simply desires to continue serving as an in-demand public speaker, consultant, and media personality on retirement planning and other topics. Any compensation for this work is derived from advertising, speaker fees, consulting arrangements and the like; he derives, and will not derive, any advisory fees or securities brokerage commissions. Having given up all of his licenses, Mr. Lucia is not and will not be providing investment advice to individual clients or generating fees from managing assets. In short, Mr. Lucia is not remotely engaged in the investment advisory business.

The work Mr. Lucia currently is pursuing today to earn a livelihood is outside the scope of the associational bar, and cannot be prohibited by the Commission. As the Supreme Court held in the landmark decision *Lowe v. SEC*, 472 US 181 (1985), *bona fide* publications are exempt from the Investment Advisers Act, and a Commission order barring someone from associating with an investment adviser did not justify restraining him from future publication of newsletters. The Court distinguished individualized securities advice tailored to a client's particularized needs from information disseminated "to the public at large in a free, open market," noting that to restrain the latter could run afoul of the First Amendment. *Id.* at 208, 210. *See also US v. Wenger*, 427 F.3d 840, 848 (10th Cir. 2005) (recognizing First Amendment protection for disinterested financial analysis under *Lowe* by publisher and radio host, noting that "disinterested investment advice will still qualify for full First Amendment protection"; but upholding constitutionality of Section 17(b) of the Securities Exchange Act of 1934); *SEC v. RG*

Reynolds Enterprises, 952 F.2d 1125, 1135 (9th Cir. 1991) (in securities fraud action against radio host and newsletter publisher, injunction for failure to register as an investment adviser upheld based on defendant's "personal consultations with investors" outside scope of the bona fide publication exception).

Based on these precedents, Mr. Lucia's public speaking engagements and radio and television appearances featuring his generalized retirement planning strategies do not make him an investment adviser, and would not constitute a violation of a bar order. Similarly, the statutory definition of what it means to be associated with a broker under the Exchange Act further supports the conclusion that these public speaking activities are not be limited by an associational bar. *See* Section 3(a)(18) of the Exchange Act, 15 USC 78c(a)(18) (defining "person associated with a broker or dealer" as including partner, officer, director, and employee of broker, or person controlling or controlled by broker); *SEC v. Zahareas*, 272 F.3d 1102 (8th Cir. 2001) (associational bar order not violated where barred person not controlled by registered broker).

While the public speaking activities Mr. Lucia is pursuing today unarguably fall outside the scope of the ALJ's order, Mr. Lucia is deeply and legitimately concerned that he faces ostracism from the industry based on an otherwise broad and sweeping associational bar. Potential advertisers and sponsors—particularly those who are securities registrants—may choose not to work with Mr. Lucia or his radio or television affiliates, notwithstanding his understanding of the bar's scope, in the absence of a "bright line" sanction that makes clear that by pursuing his current line of work, he will not be in violation of any associational bar, whether permanent or otherwise.

In sum, Respondents respectfully submit that, in order to ensure that any remedy comports with the Commission's authority and the nature of the alleged violations, the Commission should reject the bar order and, at most, impose an appropriate censure and undertakings in keeping with the narrow scope of the conduct that the Division actually challenged.[13]

D. The ALJ Similarly Erred In Ordering Third-Tier Penalties

For similar reasons, the Initial Decision erred in ordering that respondents pay third-tier penalties. The standards applied by the Initial Decision are comparable to the *Steadman* factors, including the level of intent, resulting harm to investors, unjust enrichment, and respondents' prior regulatory record. (Initial Decision at 60.) As explained more fully above, the hearing record does not support a finding that these factors weigh in favor of a third-tier penalty. Indeed, as the ALJ himself explained in rejecting the Division's request for an even more severe sanction, "in this case the evidence of actual losses to individual investors is virtually nonexistent… [T]here is no evidence of the amount of any unjust enrichment as to any particular investor. Additionally, Respondents have a clean regulatory record and were cooperative with examiners and investigators." (*Id.*) Stripped of these criteria, the ALJ's determination to nonetheless award third-tier penalties rests almost entirely on his assessment of the level of scienter—a determination that is erroneous for the reasons already discussed.

The penalty determination is also flawed by the ALJ's reference to "the substantial financial success Respondents have enjoyed at their clients' expense." (Initial Decision at 60.)

[13] For example, an appropriate order could require Mr. Lucia to retain a monitor to ensure that any public presentations he makes do not utilize "backtests" or hypothetical illustrations of relative strategy performance.

This assertion is entirely at odds with the ALJ's concession, in the very same penalty discussion, that there were no investor losses or unjust enrichment.

Finally, imposing a monetary penalty against RJLC is not warranted. As the Initial Decision recognized, Mr. Lucia sold the assets of the entity, and it no longer has any assets or operations. It is no longer registered as an investment adviser, and at this point is simply a dormant corporate shell. Ordering an uncollectable judgment against this entity will simply further prejudice Mr. Lucia, the titular head of this now-defunct entity, without any benefit to the "public interest" which penalties are intended to serve. For this reason as well, the Commission should decline to assess penalties against RJLC.

IV. THE ALJ ERRED IN HOLDING THAT RESPONDENTS VIOLATED THE ADVISERS ACT

As should be evident from the foregoing, Mr. Lucia's primary concern is with the permanent associational bar ordered by the Initial Decision. For a 64-year-old, 40-year veteran of the securities industry with a heretofore clean record, this sanction is a professional death sentence. While Mr. Lucia has no intention of ever acting as a registered investment adviser or securities broker, the sanction awarded below will have a chilling effect on his ability to earn a living even where his work does not constitute an association with an adviser or broker.

Still, as the above discussion makes clear, the underlying ruling on the merits by the ALJ is itself unsupported by the evidence. For the same reasons that the ALJ lacked a basis for imposing the remarkable sanctions ordered here, the Initial Decision erred in finding Respondents liable for violations of the Investment Advisers Act. Without reiterating at length the ALJ's many errors, Respondents respectfully submit that the Initial Decision made erroneous findings of material fact and conclusions of law in finding that Respondents made misrepresentations; that such misrepresentations and omissions were material; and that Respondents acted with scienter.

A. The Alleged Misrepresentations and Omissions

The Initial Decision erred in concluding that the slides challenged by the Division were misleading. Specifically, the Initial Decision erred in holding that the assumed rate of return for REITs, the assumed inflation rate, the failure to deduct fees, and the failure to reallocate assets among "buckets" in the illustrations were misleading. As discussed above, the ALJ's conclusion that a reasonable investor would view the models as historically accurate is contradicted by the plain language of the slides and the representations made during Mr. Lucia's seminars. Moreover, Respondents presented evidence at the hearing demonstrating that the assumptions behind the illustrations had a basis in industry practice, that audience members were repeatedly cautioned that the illustrations were hypothetical, and that these materials were subjected to repeated independent review by third-party broker-dealers. The determination that the slides were misleading also is undermined by the absence of any contention by the Division, or any finding by the ALJ, that the "Buckets of Money" model was not in fact more beneficial to investors than the other retirement strategies presented at Mr. Lucia's seminars. Finally, the conclusion that the slide materials contained material misrepresentations and omissions is insupportable in light of the fact that, throughout the years in question, not one of thousands of audience members who later sought advisory services from RJLC complained to Mr. Lucia or the Commission that the slides in question were misleading.

B. The Alleged Misrepresentations Were Not Material

The Initial Decision also erred in concluding that the purported misrepresentations and omissions were material. There is no dispute that Respondents neither recommended nor sold any investments at the seminars, nor that any seminar attendees who subsequently decided to seek advisory services from RJLC received anything short of complete and accurate disclosures about any investments they decided to make. Hence, even if an attendee of one of Mr. Lucia's retirement seminars ultimately decided, months later, to become a client of RJLC and consider deploying a "Buckets of Money" strategy, there was no basis for the ALJ to conclude that, once provided with complete prospectus disclosures showing investment fees and relevant financial information, the seminar illustrations would be material to that client's investment decision.

The Initial Decision also failed to account for the unrebutted evidence showing that the rate of seminar attendees seeking advisory services remained unchanged after the slides challenged by the Division were removed, further calling into question the ALJ's conclusion that investors viewed these particular representations as material to their investment decisions.

C. Mr. Lucia Did Not Act With Scienter

Finally, the Initial Decision erred in concluding that Respondents acted with scienter. As discussed more fully above, and in Respondents' post-hearing briefs, the Initial Decision erroneously ignored or discounted the undisputed evidence showing the absence of any red flags despite repeated review of the slides for compliance purposes by Mr. Lucia's affiliated broker-dealers during the relevant period, as well as by the SEC's Examination staff in 2003. The Initial Decision similarly erred in failing to recognize that Respondents had a reasonable basis for concluding that the slides and the assumptions made therein were not misleading, based on the plain text of the slides and the industry standards and practices presented at the hearing.

V. CONCLUSION

For the reasons set forth above, the Commission should reverse the Initial Decision on Remand and overturn the sanctions ordered therein.

* * *

Respectfully submitted,

Dated: March 24, 2014

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CERTIFICATE OF WORD COUNT

I hereby certify that this OPENING BRIEF OF RESPONDENTS RAYMOND J. LUCIA COMPANIES, INC. AND RAYMOND J. LUCIA, SR. ON APPEAL OF INITIAL DECISION ON REMAND complies with the length limitation set forth in Rule 450(c) of the Commission's Rules of Practice. According to the Microsoft Word word count function, this brief contains 9,554 words, excluding pages containing the tables of contents and authorities.

Robin McBain