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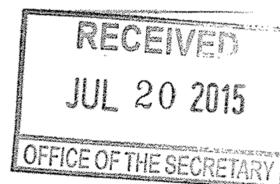


UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of,

FRANK H. CHIAPPONE,
ANDREW G. GUZZETTI,
WILLIAM F. LEX,
THOMAS E. LIVINGSTON,
BRIAN T. MAYER, and
PHILIP S. RABINOVICH

# BRIAN T. MAYER'S INDIVIDUAL BRIEF

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## Preliminary Statement

The evidence conclusively established that Mayer did *not* violate Securities Act Section 17(a), Exchange Act Section 10(b) and Rule 10b-5 thereunder (the "Fraud Claim"), or Securities Act Section 5 (the "Section 5 Claim").[1]

Mayer did not make any material misrepresentations or omissions in presenting any McGinn Smith Security to any clients and no evidence was presented to the contrary. Mayer fulfilled his obligations as a registered representative by understanding the product and performing a client suitability assessment before presenting each McGinn Smith Security to clients.

In erroneously concluding that Mayer's conduct was fraudulent or negligent, the ALJ relied on cases like *Hanly* and *Milan* (Decision at 89). *Hanly* and *Milan* involved registered representatives who actively and knowingly participated in fraud. Here, no allegation was made Mayer even knew about McGinn and Smith's secret theft and diversion of funds, and no witness testified that Mayer made a material misstatement or omission about any McGinn Smith Security, let alone within the governing five year statute of limitations of Section 2462.

The ALJ's and the Division's position that Mayer (and the other Respondents) should have "investigated" after the January 2008 meeting and not presented Trust Offerings, entirely separate investments from the Four Funds, is unsupported by the evidence. The contention is also unrealistic: Mayer, who was in the New York branch office, could not have uncovered McGinn and Smith's secret fraud in Albany, which was aided and abetted by inside and outside accountants. No case has ever imposed such a duty of investigation on a registered representative in these circumstances, let alone branded him for life as a fraudster.

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1 Capitalized terms not otherwise defined shall have the meaning given to them in Respondents' Joint Brief.

Mayer also took reasonable steps to avoid participating in any distribution in alleged violation of Section 5 and did all that any registered representative could do to comply with the exemption. Moreover, as a matter of law (explained in the Joint Brief), Section 2462 barred any Section 5 Claim on the Four Funds, and, as conceded by the Division, none of the Trust Offerings had more than 35 unaccredited investors. *See* OIP ¶ 32.

Because he did not act fraudulently or negligently, and because he has had an unblemished record for more than five years running RMR Wealth Management ("RMR"), no penalty, suspension, disgorgement, or other relief is warranted. Nor would it be necessary to protect the public interest.

## STATEMENT OF FACTS

As much of the evidence is discussed in the argument section of this brief, (and because of the reduced word limitation to which Mayer has a standing objection), an abbreviated statement of facts is presented.[2]

### A. Brian Mayer

Mayer is [redacted] He has been in the securities industry since graduating from the University of Rhode Island [redacted] during which time no customer has ever filed a complaint against him. Mayer started his career in the securities industry with Oppenheimer & Company, and later worked as a registered representative at Mercer Partners and, from 2001 to 2009, in MS&Co.'s New York City branch office. As a registered representative, Mayer proposed diversified portfolio allocations for his clients, who were mostly accredited investors with non-discretionary accounts, a small

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2 Except as otherwise noted, the statement of facts are drawn from Phil Rabinovich, Brian Mayer and Ryan Rogers' Joint Proposed Findings of Fact and Conclusions of Law, dated May 12, 2014 ("FoF"), each paragraph of which contains specific citations to the transcript (page and line) and exhibits in the record.

percentage of which included alternative investments, such as McGinn Smith Securities, which his family members also purchased. FoF ¶¶ 14-24, 424, 456, 477.

In October 2009, Mayer, together with Respondents Rabinovich and Rogers, left MS&Co. to form RMR, a SEC-registered investment advisory firm that provides financial services to high net worth individuals and small businesses. RMR has an unblemished regulatory record, does not sponsor private placements or mutual funds, and has "zero proprietary product." Tr. 4965:11-25. FoF ¶¶ 32-35, 38-39.

## B. The Business of McGinn Smith

MS&Co., founded in 1980 by David Smith and Timothy McGinn, was a SEC-registered broker-dealer with its principal place of business in Albany, NY, and branch offices in New York, NY, Clifton Park, NY, and King of Prussia, PA. FoF ¶¶ 41-48.

At the time he joined MS&Co., Mayer knew of McGinn's and Smith's extensive and impressive experience as investment professionals and the extensive due diligence performed in the alarm trust business. MS&Co. had been operating for over twenty years, had a national reputation in the alarm trust business, and had done multiple offerings and municipal bond transactions. FoF ¶¶ 49, 53-55.

Mary Ann Cody, then MS&Co.'s General Counsel, detailed this due diligence process at the hearing, although it is mentioned nowhere in the Decision. Cody described how brokers at MS&Co. were informed of the due diligence at sales meetings, which was similar to how Mayer learned about the due diligence for the McGinn Smith Securities at issue in the OIP. FoF ¶¶ 59-75.

Mayer also knew of Smith's position as a managing partner of Pine Street Capital Partners ("Pine Street"), which was affiliated with MS&Co. and located at its Albany headquarters. In marketing materials, Pine Street touted its connection to MS&Co. and its access

to MS&Co.'s network of relationships. Smith and the other principals at Pine Street worked together on investments made not only by Pine Street, but also the Four Funds. FEIN, TAIN, and FAIN each invested substantial amounts in Pine Street, which was a profitable investment for them. FoF ¶¶ 87-94.

### C. The Offering Documents

Investors in McGinn Smith Securities purchased notes pursuant to the terms of a PPM, a Subscription Agreement, and a Purchaser Questionnaire (collectively, the "Offering Documents"). Mayer provided all of his clients and prospective clients with the Offering Documents prior to investing in McGinn Smith Securities, and no witness – whether called by Mayer or the Division – testified otherwise. Nor did any witness testify that they were directed by Mayer to complete a Purchaser Questionnaire other than truthfully and to the best of their knowledge. FoF ¶¶ 95, 99-101.

The cover page of the PPMs for the Four Funds states, in bold print, that the notes are not "**guaranteed or insured**," and that "**[i]nvesting in the notes involves a high degree of risk**." The PPMs also include, among other disclosures, (i) notices to investors, including that "[n]o person has been authorized to make any representations concerning this offering, ... other than as set forth in this memorandum, and, if made or given, these other representations or information must not be relied upon by prospective investors," (ii) risk factors, including that "the notes are suitable for purchase only by investors who are capable of bearing the economic risks of holding the notes for an indefinite period of time," and (iii) a broad investment mandate. Investors who, after receiving a PPM, decided to invest in the Four Funds, signed a Subscription Agreement in which they expressly "represent[ed], warrant[ed], and agree[d]" that, among other things, they had "carefully read the Offering Materials," and they "fully underst[ood] the Offering Materials," and they relied only on "that set forth in the Offering Materials and [their]

own independent investigation" in making an investment decision. *See* Div. Ex. 5, at 1, 3, 15, 38. FoF ¶¶ 105-37.

The Offering Documents for the Trust Offerings contained similar disclosures, except that the investment mandate specified the securitized asset in which the Trust would invest – triple-play contracts, alarm contracts, or luxury cruise bookings. The PPMs also disclosed the fees and expenses associated with each Trust Offering. Investors in the Trust Offerings acknowledged in the Subscription Agreement that they "received and have carefully read and understood the [PPM]." *See* Div. Ex. 264, at 23. FoF ¶¶ 138-63.

**D. Mayer Fulfilled His Duties as a Registered Representative**

Mayer conducted reasonable diligence to understand the product and his customers so he could make suitability determinations or investment recommendations to a client. Mayer was not, however, required to conduct his own independent due diligence investigation. Even the Division's expert witness, a 23-year veteran of the SEC who never worked as a registered representative or for a broker-dealer, admitted that the word "investigate" is not used in the federal securities law, or any SEC or FINRA rule or regulation, regarding the duties of a registered representative before presenting a private placement security to a client for whom it would be suitable. Similarly, no FINRA rule purports to require an individual broker to review the investment banking department's due diligence files. FoF ¶¶ 164-83.

Mayer learned enough of the Four Funds' top holdings to feel comfortable that Smith would be able to achieve his mandate. FoF ¶¶ 256-62; *see also* FoF ¶¶ 242-55. Mayer did not understand the principal of the Four Funds to be in danger until April 2010 when the SEC Action commenced and the Receiver was appointed. Investors in the Four Funds received interest from 2004 until April 2010 when the Receiver was appointed, except for junior note-holders, who received interest until January 2008 (when interest was reduced to 5%) and no

interest thereafter. FoF ¶¶ 265-66. Mayer did not know that McGinn and Smith secretly commingled and misused investor funds from the Trust Offerings. FoF ¶¶ 269-79.

## E. There Were No Red Flags Which Should Have Caused Mayer to Conduct a Heightened Inquiry. In Any Event, His Inquiry Was Sufficient.

### 1. The PPMs Contained Standard Disclosures

The Division did not present any evidence that the disclosures in the PPMs for McGinn Smith Securities were other than customary in the industry. A comparison to the PPMs for other MS&Co. private placements – none of which formed the basis for the Division's fraud charges – makes clear the disclosures were standard. Mayer, other Respondents, and experts testified that the disclosures in the Four Funds' PPMs were commonplace and not a cause for concern. FoF ¶¶ 311-19.

### 2. Smith Never Concealed the Four Funds' Investments from Mayer

There was nothing secretive about the investments that Smith was considering and executing on behalf of the Four Funds. To the contrary, Smith looked to MS&Co. personnel to support him in making investment decisions for the Four Funds. There was no evidence that Smith concealed the Four Funds' investments from Mayer, except for some details of a few loans to local Albany-area businesses, which Smith claimed confidentiality over. Mayer knew that the Four Funds had invested in Dekania, Pali Capital (ATM deals), an Arizona real estate transaction (Maracay), CMET, Pine Street, Crystal Springs, CMS Financial, Palisades Pictures, Aquatic Development, alseT, Deerfield and GSC. Mayer received information he requested about the Four Funds and the Trust Offerings from McGinn, Smith and MS&Co.'s controller Rees. FoF ¶¶ 320-21; 325-26.

### 3. Mayer Was Unaware of Any Purported Redemption "Policy"

MS&Co. did not announce a "policy" in December 2006 that clients only could redeem their investment in a Four Funds note if their brokers first found a replacement investor. Mayer was never told that his client could not redeem unless a replacement investor first had been found and his clients were able to redeem their Four Funds notes and Trust Offerings certificates during 2006 and 2007. FoF ¶¶ 329-32, 336. The ALJ agreed there was no redemption policy: "[T]here is no evidence that a registered representative who did not find a new purchaser was ever unable to redeem a client." Decision at 93.

### 4. The January 2008 Meeting Was Unsurprising Given the Economic Downturn that Impacted the Entirety of the Global Markets

At a January 2008 meeting in Albany, McGinn and Smith informed brokers that interest would be reduced on the junior notes of the Four Funds (but not the senior notes or the senior subordinated notes). The interest reduction was unsurprising given the economic climate in 2007 and 2008, but it was unrelated to, and did not affect, the Trust Offerings. FoF ¶¶ 338-40, 344-45.

### 5. Mayer Was Unaware of the Firstline Bankruptcy Until After He Ceased Presenting McGinn Smith Securities to His Clients

In September 2009, McGinn, Smith and Joe Carr, General Counsel, revealed that Firstline Securities, Inc. – a residential alarm contract company that borrowed funds from the Firstline Trust offering of October 2007 – had filed for bankruptcy on January 25, 2008 in Utah. The Division admits that Mayer was unaware about the Firstline bankruptcy before September 2009. Although the Division contended that Mayer presented a Trust Offering to one customer after learning of the bankruptcy based on summary charts, that investor's dated subscription agreement makes clear that is not so. RMR Ex. 429 (dated August 28, 2009). One week later, Mayer, Rabinovich, and Rogers started RMR. FoF ¶¶ 349-50, 352, 354.

## F. Mayer Made No Material Misrepresentations or Material Omissions to His Clients and Presented McGinn Smith Securities Only When Suitable

During 2003 through 2009, Mayer did not make any material misrepresentation or omission to a client about a McGinn Smith Security. Mayer had between approximately 75 to 125 accounts that were generally obtained through referrals. Mayer did *not* cold call at MS&Co. and has not done so at RMR. In presenting McGinn Smith Securities, Mayer reviewed the private placement with the client, pointed out the risks, explained that higher interest rates meant more risk, and explained that the investments were not guaranteed. Mayer's clients had non-discretionary accounts and those who invested in McGinn Smith Securities signed a subscription agreement expressly representing, among other things, that (i) they carefully reviewed the Offering Documents, (ii) in making an investment they were relying on their own evaluation of the product and the terms of the offering, (iii) no representations were made to them other than as set forth in the Offering Documents, and (iv) if such representation was made, they were not relying on it. Demonstrating his confidence in McGinn Smith Securities, Mayer presented them to his family, who purchased approximately $155,000 of the Four Funds and the Trust Offerings. FoF ¶¶ 416-20.

At the hearing, four of Mayer's clients testified in person, all of whom were accredited investors at the time they first invested in a McGinn Smith Security, and three others submitted affidavits, but the ALJ refused to admit or consider them. These investors described how Mayer provided and reviewed PPMs with them and later signed if they chose to invest. As the Division's own witness Gary von Glinow explained, prior to investing, he would "discuss[] the risks" with Mayer and tried "to come up with ways that that thing could go bad." At times, he would ask Mayer "30 or 50, 70 questions on each one of these [PPMs]," which Mayer would answer. Tr. 2818:17-22. This is mentioned nowhere in the Decision. Another investor, William

Strawbridge, who had worked with Mayer for ten years, described his interaction with Mayer as follows:

> He [Mayer] will sort of identify investment opportunities, he will bring those to me, he'll describe to me what the nature of that investment is, sort of what the business model behind it is; he'll provide me with relevant supporting information. Then I'll take that away and I will do my own independent analysis. We'll get back together, talk about it and then make a decision. And we'll do that pretty much for any type of investment we make.

Tr. 5515:12-23. Mayer's investors described him as a "forthright and effective investment professional," "the most conscientious and analytical of any of the brokers that I deal with," and an honest broker who did "a lot of good things ... for our family." RMR Ex. 606, ¶ 22; Tr. 2280:4-18. FoF ¶¶ 421-78.

Even those investors called by the Division admitted that they made their own investment decisions and decided *not* to invest in some offerings Mayer presented to them. And, although some claimed they thought their investments were "safe," they admitted that nobody told them so, they signed subscription agreements in which they acknowledged their investments involved "substantial risk," or both. Similarly, Vincent O'Brien and Thomas Alberts – both of whom had hazy recollections of investments they had made more than five years prior to the date the OIP was filed – claimed that Mayer did not tell them they could lose their investment, or the amount of certain fees charged by the Trusts, despite the fact that this information was disclosed in the Offering Materials that they attested to reading before investing. Two of the investor witnesses (Von Glinow and Alberts) were first contacted by the Division *after* the OIP was filed, and the third (O'Brien) contacted the Division because he did not get a response from the Receiver. FoF ¶¶ 451, 461, 471; *see also,* FoF ¶¶ 434-71.

### G. The Division's Post-OIP Conduct And Its Effect on Mayer

Mayer learned from clients that they were first contacted by the SEC to testify against him *after* the OIP was filed on September 23, 2013. Several refused, as reflected in the Division's *Brady* disclosure. As a result of the SEC's calls, Mayer lost one 401(k) client "who had nothing to do with this case at all," but who left "because of these allegations" by the SEC. Tr. 5073:25–5074:19. Mayer also lost business from Jerry Colihan, a former client who nevertheless provided an affidavit in support of Mayer (which was not allowed into evidence or considered by the ALJ). *Id.* Mayer's clients told the SEC that they "[h]old[] Mayer in the highest regard[,] ... and never stopped trusting Mayer." RMR Ex. 873, at 2. FoF ¶¶ 692-96.

Mayer believes he should not be barred from the securities industry because (a) he did "everything that [he] possibly" could for his clients, as well as his colleagues and his employers, (b) he has been running RMR with his partners (including Rabinovich) for five years without any issues, and (c) he worked to the best of his ability. Tr. 5076:16–5077:21. This proceeding has already exacted an extraordinary toll on Mayer. He has had to sell his home, his family has been affected "beyond words," and his business reputation has been damaged such that "everyone looks at me differently now than they used to look at me." Tr. 5079:16–5080:13. FoF ¶¶ 697-98.

## ARGUMENT[3]

### I. Mayer Did Not Violate the Antifraud Provisions of the Federal Securities Laws

The ALJ erred in concluding that Mayer willfully violated Securities Act Section 17(a)(1) and Exchange Act Section 10(b)(5) and Rule 10b-5 because "Mayer was reckless in

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[3] Legal arguments common to all Respondents who petitioned for review are set forth in the Joint Brief. The brief addresses primarily the application of the governing law – as stated in the Joint Brief – to the facts specific to Mayer.

offering and selling securities" and that he "willfully violated Securities Act Sections 17(a)(2) and (a)(3) because, acting at least negligently, he obtained money by means of untrue material statements." Decision at 106. To reach this conclusion, the ALJ cherry-picked testimony and misconstrued the factual record before her, ignored significant evidence that would lead any reasonable trier of fact to conclude that Mayer did *not* violate the law, and arbitrarily and capriciously applied facts to law. Mayer was neither reckless nor negligent, and there was no evidence that he made any material misrepresentations or omissions.

### A. Mayer Did Not Act With Scienter

In concluding that Mayer acted recklessly, which as a matter of law required a showing by the Division of "a state of mind approximating actual intent, and not merely a heightened form of negligence," *see South Cherry St., LLC v. Hennessee Group LLC*, 573 F.3d 98, 109 (2d Cir. 2009), the ALJ relied on two blanket assertions: (1) Mayer made "material misrepresentations and omissions ... to the witnesses who purchased private placements," and (2) Mayer "failed to investigate several red flags that were apparent to him by January 8, 2008." Decision at 106. Neither is supported by the record.

According to the ALJ, Mayer supposedly "did not mention material information to [Thomas Alberts and Vincent O'Brien] when he recommended their private placement purchases." Decision at 106. Alberts and O'Brien, both accredited investors at the time they first invested in McGinn Smith private placements, testified that they received PPMs from Mayer to review and discuss with him prior to making any investment decision. Both had hazy recollections of investments they had made more than five years prior to the date the OIP was filed, yet claimed to recall that Mayer did not tell them they could lose their investment, or the

amount of certain fees charged by the Trusts.[4] Nevertheless, both admitted that they signed subscription agreements and purchaser questionnaires in which they expressly acknowledged that they had read and understood the PPMs which disclosed all of these facts, and that they relied on themselves – not Mayer – in evaluating the merits and risks of their investments. FoF ¶¶ 452-71; RMR Exs. 400, 428-29, 733. O'Brien in fact reconfirmed at the hearing that the fees in the Benchmark Trust that he was supposedly unaware of were clearly stated on the face of the Benchmark PPM, a 15-page document. Tr. 953:18–954:6; Div. Ex. 63 at 1, 8.

The ALJ ignored these witnesses' contemporaneous written attestations that they had read the PPMs, and instead credited their contrary oral testimony, years after-the-fact. This conclusion is not only belied by the documentary evidence (RMR Exs. 428-29, 733), it is contrary to law. *See* Joint Br. at 21-22. Moreover, it ignores the credible testimony of the Division's own witness – Gary Von Glinow – who testified that he would review PPMs with Mayer prior to investing to "discuss[] the risks," and that Mayer did not tell him anything that was not in the PPM. Tr. 2815:10-14, Tr. 2824:9–2825:11. We are aware of no legal authority – and the ALJ cited none – holding an individual broker liable for a supposed material omission of fact that is expressly disclosed to the investor in offering documents he is given to read and review (and which he acknowledged reading and reviewing) prior to investing. In any event, any claims by the Division arising out of Alberts' investments are plainly time-barred. *See* 28 U.S.C. § 2462.

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[4] Alberts, an 84-year-old retiree, could not recall the names of several other firms where he had brokerage accounts, could not recall if he had opened an account with MS&Co., and could not recall which of his two brokers at MS&Co. (one of which was Mayer) was his broker at the time he invested in FAIN. FoF ¶¶ 463, 466, 468. Yet, the ALJ concluded that Alberts "gave credible, persuasive testimony" about what Mayer supposedly did or did not say to him a decade ago. Decision at 106.

The ALJ also erroneously concluded that Mayer was reckless in failing "to investigate several red flags that were apparent to him by January 8, 2008." Decision at 106. The ALJ identified three supposed red flags as of January 8, 2008 (which is, notably, more than five years prior to the filing of the OIP): (1) the Four Funds PPMs' disclosure of potential conflicts of interest; (2) the Four Funds PPMs' disclosure of its ability to acquire investments from affiliates; and (3) the January 2008 reduction in interest payments to junior noteholders in the Four Funds, the latter of which she claimed triggered a "duty to investigate the Four Funds' junior notes default before selling the Four Funds." Decision at 91-92.[5] As a threshold matter, it is undisputed that Mayer did not sell any Four Funds' notes – junior or otherwise – after December 2007. FoF ¶ 552. Thus, the ALJ effectively concluded that Mayer was reckless in selling the Trust Offerings based on supposed red flags relating to the Four Funds. This ignores, however, that the Four Funds had nothing to do with the Trust Offerings, which the Division's own expert witness admitted "were not at all similar" to the Four Funds. Div. Ex. 1 at 25. The Trust Offerings were managed by McGinn, not Smith, were based on cash flow from income-generating assets such as "triple play" contracts with homeowner associations that could be amortized or sold to pay the stated interest due on the trust certificates, and were unrelated to the types of investments made by the Four Funds. FoF ¶¶ 47, 273, 338.

Moreover, the disclosures in the PPMs were standard in the industry, a fact confirmed by the testimony of three of four expert witnesses, including the Division's expert witness who admitted the PPMs' discussion of potential conflicts of interest "is standard

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5 The ALJ concluded that there was no "redemption policy," *see* Decision at 93, and the Division has waived its right to challenge this finding by not filing a cross-petition for review. The last red flag – the September 2009 disclosure of the Firstline bankruptcy – did not exist in January 2008. Mayer did not present any McGinn Smith Securities to his clients after he learned of the Firstline bankruptcy. FoF ¶¶ 349-54.

language." Tr. 689:21; *see also* FoF ¶¶ 311-17 & RMR Ex. 861. The ALJ ignored this evidence, too, and instead misconstrued the testimony of a fourth expert witness as having "never [been] aware of a situation where the broker-dealer was both the issuer and the placement agent in a private placement," Decision at 92, when he in fact testified that he "hadn't been involved in a situation like that," but agreed it was not unusual. Tr. 4772:11-13.

To purportedly bolster her conclusion that heightened scrutiny of the Four Funds was required based on the PPMs, the ALJ incorrectly stated that MS&Co. "was a small company creating newly formed entities." Decision at 92. As expert testimony established, and the record confirmed, "McGinn Smith was not a small company and was definitely not of recent origin. While they may have created LLCs to issue product through, which are new entities technically, they are all part of McGinn Smith, which had a long track record." Tr. 3927:3-8. Nor was the level of control that Smith exerted over the Four Funds of any great significance given McGinn and Smith's long and diverse backgrounds in capital markets, and Smith's sufficient experience and background in underwriting to launch private placements such as the Four Funds. Tellingly, none of the other 35 to 50 brokers told clients that he or she was aware of any red flags. FoF ¶¶ 318-19.

Finally, the January 2008 meeting, at which Mayer learned that interest would be reduced on the junior notes of the Four Funds (but not the senior or senior subordinated notes), was unsurprising given the global economic recession. At the meeting, Smith went over specific investments, identified where there was stress on the portfolio, and stated his belief that the stress was a temporary, not permanent, issue. McGinn talked about undertaking additional revenue initiatives to shore up some of the problems in the Four Funds. Mayer did not regard the news as a red flag because (a) numerous, similar investments were suffering impairments, and (b) other

investments could not refinance because of the credit crisis. Mayer informed his clients who purchased junior notes about the reduction of interest, and Smith sent letters to investors explaining the situation. Mayer believed Smith's plan to amortize the junior notes could succeed because he had "seen other trusts amortized down to zero," and because he "believed strongly that at some point in the future the markets would rebound." Tr. 5032:12–5034:12; FoF ¶¶ 338-40, 344-45.

In sum, no reasonable and unbiased trier of fact could consider the evidence presented at the hearing and conclude that Mayer acted with scienter. Mayer presented McGinn Smith Securities to his clients when suitable. That Mayer, along with the SEC, the NASD, and countless others, did not uncover the secret theft and diversion of funds by his superiors does not make him liable for fraud.

### B. Mayer Acted Prudently and Fulfilled His Duties as a Registered Representative

Equally unsupported is the ALJ's conclusion that Mayer "violated Securities Act Sections 17(a)(2) and (a)(3) because, acting at least negligently, he obtained money by means of untrue material statements." Decision at 106. According to the ALJ, Mayer's "recommendation of these private placements indicated to his clients that he had some reasonable basis for believing they were good investments when he had done no investigation of their worth," and "[b]y simply repeating the issuer's unchecked representations, he engaged in an act, practice, or course of business that operated as a fraud or deceit on his clients." *Id.* Aside from repeating statutory language, the ALJ failed to identify any "untrue material statements" Mayer made to any investor about any McGinn Smith Security, or any representations Mayer made to any investor about any McGinn Smith Security that supposedly did not have a reasonable basis. The

overwhelming evidence established that Mayer acted prudently and fulfilled his duties as a registered representative.

The ALJ's naked assertion that Mayer's "credibility is highly suspect because Mayer gave very different testimony on the same subject at different times," Decision at 105, ignored the evidentiary record. Any objective reading of Mayer's testimony demonstrates that he testified truthfully and to the best of his then-recollection, whether during his non-party deposition or at trial. Mayer's testimony, together with that of his investors and the contemporaneous documents, made clear that Mayer discharged his duties as required.

The ALJ's reliance on Mayer's 2011 non-party deposition testimony from the SEC's separate action against McGinn and Smith in federal court (the "SEC Action") to purportedly undermine his credibility should be disregarded as fundamentally flawed. At the time Mayer testified as a non-party deponent, he had not refreshed his recollection or understood that he was a target of the SEC's investigation. The SEC in fact (mis)led him to believe he was assisting in the SEC Action, which is contrary to its stated mission to act "honestly, forthrightly, and impartially in every aspect of [its] work." SEC Enforcement Manual (June 4, 2015), § 1.4.1. Indeed, Smith sat across from Mayer as he provided what the ALJ has now termed "investigative" testimony.[6] The SEC never provided Mayer with Form 1662, or showed him a Formal Order of Investigation. Nor did the SEC ever send him a copy of his non-party deposition transcript to review, correct, clarify or sign. Had Mayer known his actions (or supposed inactions) were in question, he would have refreshed his recollection and provided

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6 Decision at 48. Ironically, the ALJ referred to Respondent Gamello's non-party deposition testimony as "deposition testimony," and noted that he "takes issue with the Division's use of his deposition testimony, where he testified without any records and in the belief he was called to assist the Commission's case against McGinn and Smith." *Id.* at 20 n.31. Mayer likewise objected and filed a motion to that effect.

*additional* – not *different* – information at his non-party deposition to demonstrate he fulfilled his obligations as a registered representative. The hearing was effectively Mayer's first opportunity to tell his side of the story in response to the Division's charges against him, and he should not be penalized for expanding upon the answers given during his non-party deposition. FoF ¶¶ 527, 531-32.

Nor was Mayer's non-party deposition testimony inconsistent with his trial testimony. For example, the ALJ asserted that Mayer testified during his non-party deposition that he "didn't have specific investments" as to the Four Funds, but testified at the hearings that he knew a number of the investments made by the Four Funds. Decision at 105. The ALJ's cherry-picked quotation from Mayer's deposition is highly misleading. The answer given during Mayer's non-party deposition was in response to a question about what he knew FIIN was "*going to* invest in" at the time Gary Von Glinow invested in FIIN (October 2003). Tr. 3290:10-11; Tr. 3357:24–3358:18; Div. Ex. 2, Ex. 4o. At that time, FIIN was a blind pool with no investments, something the ALJ later acknowledged in finding Gamello "credible" when he gave similar testimony as to his knowledge of the Four Funds' investments shortly after they were offered. Decision at 101.

At the hearing, and after Mayer learned that the Division was challenging his knowledge and understanding of the Four Funds' portfolios, he provided details as to his knowledge of investments the Four Funds had made during the broader time period of 2003 to 2007. Tr. 3278:8–3283:24. His testimony included details as to what he knew regarding specific investments, when he learned them, who he learned them from, and what he saw to verify them. These details were provided in response to the following question posed by the Division: "[f]or any of the Four Funds between 2003 and 2007, did you have an understanding of some of the

investments that were made by those LLCs?" Tr. 3278:3-6. The ALJ, however, interrupted Mayer mid-answer, and inexplicably said, "I think maybe she is talking about did you see a balance sheet or an income statement or a statement of assets that had these things listed? I mean, this is talk about deals, and I guess that's what investment people and broker dealers do all the time." Tr. 3283:25–3284:7. That was *not* the question, and for the ALJ to now discredit Mayer's testimony, further establishes the infirmity of the Decision.

The other supposed inconsistency was with respect to Mayer's knowledge of an investment in alseT. Decision at 105. Mayer testified at both his non-party deposition *and* the hearing that he knew of the alseT investment, but did not know all of the details of the investment. Tr. 3462:2-3 ("I knew about Alset. I did not know the structure of the investment.") (quoting non-party deposition testimony); Tr. 3305:3-4 ("I recall knowing that some of the McGinn Smith funds invested in Alset.") (hearing testimony). This testimony is not inconsistent.

The ALJ blindly accepted the Division's arguments and ignored Mayer's testimony. For example, the Division repeatedly inferred that any investment in alseT was improper because it was a venture capital investment despite the fact that the Four Funds' PPMs did *not* preclude such an investment. After Mayer explained why he thought an investment in alseT *was* consistent with the Four Funds' investment mandate and that alseT had attracted financing interest from Deutsche Bank, Tr. 3306:17-23, the ALJ interrupted with the following outburst: "I don't care whether it was Pope Francis that was advising this Alset. I am saying the thing is these investors put their money in something, and that that money was going into a completely different thing." Tr. 3306:25–3307:11. Shockingly, the ALJ's comments – evidencing extreme bias, prejudgment and a misapprehension of the testimony – came before Mayer's own counsel had elicited any testimony from him.

The overwhelming evidence established that Mayer understood and fulfilled his duties as a registered representative. Before presenting any private placements (including McGinn Smith Securities), Mayer had a practice of first understanding the offering, deciding if he liked the product and, if so, presenting it to clients for whom the investment would be suitable, generally in face-to-face meetings. As Mayer explained, he understood "the mechanics of the product ... the structure of the product, the risk/reward of the product," but he also went further and tried "to poke holes how the investment is not going to work." Tr. 5006:10–5007:19. Division witness Gary Von Glinow confirmed Mayer's testimony, stating that in discussing prospective investments with Mayer, he tried "to come up with ways that that thing could go bad." Tr. 2824:9–2825:11. Tr. 2818:17-22. As a result of Mayer's independent inquiry and analysis, there were "numerous transactions over the years that were offered at McGinn Smith" that Mayer did *not* present to his clients. Tr. 5022:10-18. When he did present suitable investment opportunities to clients, Mayer had a process of (a) analyzing "the client's goals and objectives," (b) "doing our research" to "come up with an asset allocation strategy," (c) going back to the client about the proposed allocation strategy, (d) implementing the strategy, and (e) monitoring the assets and managers. Tr. 5023:3–5025:2; FoF ¶¶ 235-37.

Before the Four Funds launched in October 2003, Mayer had numerous conversations with Smith about what the Four Funds would invest in, including transactions not otherwise available to retail investors, such as trust preferreds. Mayer also spoke with Smith about the debt coverage, and saw that the Four Funds' investments were targeted to yield more than 12%. FoF ¶¶ 240-41. Despite the ALJ's sweeping conclusion that "[n]owhere in the record is there any evidence that Mayer challenged or verified Smith's major assumption that ... Smith

was able to achieve a 12% return on investments," Decision at 105, the evidence was replete with examples of how Mayer verified this information. FoF ¶¶ 242-44.

First, the evidence showed that Mayer independently analyzed whether the Four Funds' interest rates were achievable before offering the notes to investors and independently researched the types of investments going into the Four Funds. Tr. 3335:14-23. In so doing, Mayer saw that some investments were targeted to yield *more* than 12%, notably Deerfield, Dekania and InCaps, which were underwritten by Deutsche Bank, Merrill Lynch, and Sandler O'Neill, among others. Mayer in fact gave detailed testimony as to how the Four Funds' interest rates were achievable given these returns. Tr. 3332:20–3335:4; RMR Exs. 502A, 513D, Lex Ex. 141.[7] Mayer, however, did not think of his inquiry and analysis as an "investigation" or "due diligence," which are terms he uses to describe what investment bankers or compliance personnel do. Tr. 3342:13-25; FoF ¶¶ 240-42.

Second, Mayer reviewed the Pine Street presentation, which stated that FIIN was in fact generating a weighted average annual return of 17.6%, far more than the 12% needed to achieve the Four Funds' interest rates. RMR Ex. 46. The presentation also disclosed specifics about more than $10 million of investments by FIIN. RMR Ex. 46.

Finally, Mayer's independent analysis of these investments, including the interest rates and debt coverage, are reflected in his contemporaneous notes that he took at sales meetings when investments were presented. RMR Ex. 280. As a result of his analysis, Mayer viewed the interest rates on McGinn Smith Securities as reasonable given the risk/reward in comparison to

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7 In fact, the SEC's post-examination letter to MS&Co. in February 2004 noted that "reputable financial institutions, which included Sandler O'Neill & Partners, L.P., Friedman, Billings, Ramsey & Co. Inc., and Merrill Lynch International, underwrote ... investments purchased by FIIN." Livingston Ex. 103, at 12.

similar investments. Mayer also reasonably believed that MS&Co. had conducted reasonable due diligence on its private placements. FoF ¶¶ 246-49.

Mayer explained that investments for the Four Funds came from different sources, and, although Smith made the ultimate decision, various people conducted due diligence on potential investments and gave feedback to Smith. Mayer was aware of due diligence performed by MS&Co.'s investment banking department regarding the Four Funds, including review of (a) alarm contracts, (b) transactions offered by Wall Street firms, and (c) deal flow from firms Smith had prior relationships with, including Pine Street and Gersten Savage, which dealt with many smaller investments. Mayer learned about specific investments that were considered by the Four Funds from Smith and reputable investment bankers, including Deutsche Bank, Goldman Sachs, UBS, and Morgan Stanley. Mayer also attended due diligence meetings with CMET, Palisades, Pine Street and CMS, all Four Funds' investments. As a result of his inquiries, Mayer knew that the Four Funds had invested in, for example, Pine Street, Deerfield, and GSC Capital, as had Mayer's clients. Mayer saw prices paid for the investments and evidence that the investments had been made. Mayer also knew the Four Funds invested in alarm contracts, but there was no evidence that he was aware these contracts were purchased from the Pre-2003 Trust Offerings. FoF ¶¶ 245-51. In a particularly poignant passage of Mayer's testimony – mentioned nowhere in the Decision – he described in detail what he did and who he spoke with to understand the products her offered to his clients. Tr. 4998:4—5002:17.

Further, Mayer, together with Respondents Rabinovich and Rogers, worked as a team, frequently discussing with each other the details of the various investment opportunities presented by MS&Co. prior to offering them to their clients. As further evidence of Mayer's *independent* analysis of these various investment opportunities, he often reached different

conclusions about an investment. For example, Mayer, after conducting his own independent inquiry, decided not to offer the TDM Luxury Cruise Trust Offering to his clients; Rabinovich, after conducting his own independent inquiry, decided not to offer MSTF to his clients. Respondent Gamello – who the ALJ deemed "credible" (Decision at 101) – confirmed that "the RMR guys ... are different personalities.... They are very thorough." Tr. 5945:7-11; Decision at 20 n.33; FoF ¶¶ 283-85.

Ignoring this evidence, the ALJ declared that "[t]here is no evidence in the record that Mayer did any serious, objective analysis or review of the private placements, which would provide a basis for recommending them to investors." Decision at 105. No unbiased fact finder could make such a declaration given the evidence adduced at the hearing, and the ALJ cited nothing to support these baseless assertions.

In one particularly convoluted portion of the Decision, the ALJ recited a handful of out-of-context statements regarding whether Mayer had seen balance sheets or income statements for the Four Funds, seemingly to make Mayer seem incredible. Decision at 105. Mayer, however, succinctly and logically explained how he requested, received, and reviewed cash flow information on the Four Funds, which showed sufficient money coming in to satisfy debt coverage. Mayer explained that seeing cash flow information was more important than seeing a balance sheet, because the balance sheet does not show "if a security is paying or not" and "just tells you ... whether they are holding at par, greater than par or less than par." Tr. 4981:17–4982:16; RMR Ex. 229. Mayer explained that an income statement is also not relevant because it does not show yield. Mayer further testified that the "only value that matters is [the] initial purchase price and sales price" of the investment. Tr. 5117:11–5118:7. By way of example, Mayer noted that Pine Street's portfolio had a loss in the first year, yet ultimately

returned 160% to investors. FoF ¶¶ 256-62. That the ALJ chastised Mayer for this testimony only shows her misapprehension of the mechanics of the Four Funds – not that Mayer failed to fulfill his duties as a registered representative.

Mayer also understood the Trust Offerings, as these types of deals had been offered by MS&Co. for decades. Upon joining MS&Co. in 2001, Mayer went to Albany for product training in MS&Co.'s alarm contract business in which the Pre-2003 Trust Offerings invested. MS&Co. provided Mayer with written materials describing a "step by step overview" of the alarm contract business. Tr. 4971:21–4972:15. Although MS&Co. did not originate new alarm trusts between 2003 and 2006, the Trust Offerings commenced in 2006 upon the return of McGinn, and were similar to the Pre-2003 Trust Offerings. Mayer noted that a team of individuals, including McGinn, Matthew Rogers, and others, presented the Trust Offerings to MS&Co.'s brokers. During these presentations, Mayer saw the cash flow numbers presented and achieved on the Trust Offerings. In presenting the Trust Offerings to his clients, Mayer's general practice was to explain the history of MS&Co.'s alarm contract financing and how the trust amortization process worked. Mayer also explained to his clients MS&Co.'s various roles in the transaction. FoF ¶¶ 269-79.

Notably, the ALJ's legal conclusions contain no discussion of Mayer's analysis and understanding of the Trust Offerings. Decision at 105-06. At most, the ALJ mentions the Trusts in passing when she inexplicably concluded that Mayer engaged in securities fraud when he did not orally convey certain information to investors that was provided to them in writing, a concept that is non-existent in the relevant caselaw. The ALJ's omission is a significant one, because all of the alleged conduct relating to the Four Funds took place far more than five years

prior to the date the OIP was filed, and cannot be considered as a basis to impose penalties on Mayer.

The ALJ also ignored several undisputed facts about Mayer, which she nevertheless highlighted to conclude that Gamello did *not* violate the antifraud provisions of the federal securities laws. For example, in clearing Gamello of all charges, the ALJ found significant the following facts: (1) twelve of Gamello's twenty-two FAIN sales occurred within three and a half months of the offering, at a time when it was a blind pool with no investments, (2) Gamello did not sell any of the Four Funds after December 2007, and (3) Gamello did not sell any of the Trust Offerings after August 2009. Decision at 101-02. The same was true about Mayer: (1) both of Mayer's FIIN sales, two of his three FEIN sales, and all nine of Mayer's TAIN sales (excluding TAIN rollovers) were made *within the first month of the offering*, (2) Mayer did not sell any of the Four Funds after January 2008 (a single senior TAIN was rolled over in August 2008), and (3) Mayer did not sell any of the Trust Offerings after early September 2009, when he learned of the Firstline bankruptcy. Div. Ex. 2, at Ex. 4o; FoF ¶¶ 352, 553. To conclude that these facts are relevant to Gamello, but not Mayer, is plainly arbitrary and capricious. Notably, the Division did not petition for review of the ALJ's decision as to Gamello, and the Commission declined to review it on its own initiative.

In short, the overwhelming documentary and testimonial evidence demonstrated that Mayer did not violate Securities Act Section 17(a)(2) or (3), and that he acted prudently and fulfilled his duties as a registered representative.

## II. Mayer Did Not Violate Securities Act Section 5

In imposing Section 5 liability on Mayer, the ALJ ignored two critical points. First, as a matter of law, there can be no actionable Section 5 claim regarding the Four Funds, as Mayer did not sell any Four Funds after January 2008 (there was an August 2008 rollover, noted

above), and any such claim is time-barred. FoF ¶ 553; *see also* 28 U.S.C. § 2462. Second, despite acknowledging that Rules 506 and 508 allow for a defense based on Mayer's reasonable belief, the ALJ sweepingly declared that Mayer "d[id] not explain how [his] supposed lack of knowledge of the number of unaccredited investors could be considered a 'reasonable' belief that there were fewer than thirty-five unaccredited investors." Decision at 95. This statement ignores the overwhelming evidence to the contrary.

Under Rule 506, offerings of unregistered securities may be made to an unlimited number of "accredited investors," provided ... the issuer *reasonably believes* there are no more than, 35 additional unaccredited investors. 17 C.F.R. § 230.506(b)(2)(i) (emphasis added). Rule 508 further provides that "[a] failure to comply with a term, condition or requirement of [Rule 506] will not result in the loss of the exemption ... if the person relying on the exemption shows: ... (3) A good faith and *reasonable* attempt was made to comply with all applicable terms, conditions and requirements of [Rule 506]." *Id.* § 230.508(a)(3) (emphasis added). The record was replete with examples of Mayer's reasonable belief that both the Four Funds and the Trust Offerings were exempt from registration.

Mayer presented McGinn Smith Securities to primarily accredited investors and did not engage in general solicitations or "cold calls." He did so after qualifying his clients in advance to be sure that they were an accredited investor (or had the financial knowledge to invest) and that the investment product was suitable for their particular investment objectives. He provided his clients with PPMs that he reviewed with them before they made any decision to invest in McGinn Smith Securities. Mayer understood that, under Regulation D, there could be up to 35 unaccredited investors and was never told that more than 35 unaccredited investors had invested in any McGinn Smith private placement. Mayer had no authority to accept

subscriptions for McGinn Smith Securities, which were sent to Albany and processed by Sicluna, and had no reason to know the number of unaccredited investors in any given private placement. Collectively, Mayer presented the Four Funds to two allegedly unaccredited investors, and the Trust Offerings to four allegedly unaccredited investors. There was evidence, however, that some of these investors were in fact accredited. Only two invested after September 23, 2008. FoF ¶¶ 648-66.

Further, Mayer followed McGinn Smith's procedures when presenting private placements to his customers. Mayer also knew that the SEC, the NASD, and MS&Co.'s outside compliance consultant, conducted examinations of MS&Co. during 2004 to 2007, and that none raised any issues regarding the number of unaccredited investors in McGinn Smith Securities. The SEC specifically examined for Section 5 violations regarding FIIN, but found none. The NASD specifically examined Form D filings for TAIN and FAIN, but did not find that more than 35 unaccredited investors had been accepted in any offering. FoF ¶¶ 616-22.

Thus, the ALJ's conclusion that Mayer failed to explain how he held a "reasonable" belief that the offerings complied with Rule 506 is belied by the record. There was simply no legal or factual basis to impose Section 5 liability on Mayer.

## III. In Imposing Sanctions, the ALJ Did Not Objectively Consider The *Steadman* Factors And Ignored That The Vast Majority of Alleged Misconduct Occurred Prior to September 23, 2008

The ALJ expressly acknowledged that "[i]ndustry bars are considered penalties under Section 2462," and that "[t]o determine whether a sanction is in the public interest, the Commission considers the *Steadman* factors," Decision at 112-13, yet failed to objectively apply either principle of law to the facts of this case. When appropriately considered, it is apparent that Mayer should not be subject to the sanctions ordered by the ALJ.

Notwithstanding the ALJ's baseless assertion that "multiple recurrent violations ... occurred on or after September 23, 2008," Decision at 112, the evidence proved otherwise. Mayer did not sell any of the Four Funds after January 2008. FoF ¶ 553. Mayer also did not sell six of the Trust Offerings after September 23, 2008, and did not sell four of the Trust Offerings *ever*. FoF ¶ 556. Thus, by the ALJ's own reasoning, as mandated by the Supreme Court's decision in *Gabelli*, not a single scrap of evidence or line of testimony relating to the Four Funds or these ten Trust Offerings can be considered in imposing penalties upon Mayer.

Moreover, the Division identified 23 investors of Mayer who purchased a McGinn Smith Security. 20 of them (87%) first purchased a McGinn Smith Security prior to September 23, 2008, and 15 of them engaged *exclusively* in transactions prior to September 23, 2008, including Division witness Alberts, who invested more than six years prior to the date the OIP was filed. FoF ¶ 548. Of those investors who did engage in transactions after September 23, 2008, this included Mayer's own witness William Strawbridge and Gregg Chaplin, an investor identified in the Division's *Brady* disclosure, both of whom also provided affidavits in support of Mayer. Div. Ex. 2, at Ex. 4q; RMR Ex. 873; RMR Motion to Admit Prior Sworn Statements, dated Jan. 15, 2014, at 2-3. Of the dollar amount invested by clients of Mayer after September 23, 2008, more than 80% came from these and other non-testifying investors, and cannot possibly have been considered as part of the alleged "multiple recurrent violations ... [that supposedly] occurred on or after September 23, 2008." Decision at 112. Indeed, Strawbridge described Mayer as a "forthright and effective investment professional," RMR Ex. 606, ¶ 17, and "the most conscientious and analytical of any of the brokers that I deal with." Tr. 5527:20–5528:7. Chaplin told the Division that he did not think Mayer "intentionally misled him." RMR Ex. 873.

Turning then to the *Steadman* factors, as applied to the limited evidence of conduct that occurred *after* September 23, 2008, the ALJ's cursory analysis was utterly deficient. As noted in *Steadman*, "when the Commission chooses to order the most drastic remedies at its disposal, it has a greater burden to show with particularity the facts and policies that support those sanctions and why less severe action would not serve to protect investors." *Steadman v. SEC*, 603 F.2d 1126, 1137 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see also Paz Sec. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007) ("The Commission must be particularly careful to address mitigating factors before it affirms an order expelling a member from the NASD or barring an individual from associating with an NASD member firm – the securities industry equivalent of capital punishment."). Here, the ALJ merely "reference[d] the[] [*Steadman*] factors," but the Decision "does not reflect that the [ALJ] meaningfully considered these factors when [she] imposed sanctions." *Monetta Fin. Servs., Inc. v. SEC*, 390 F.3d 952, 957 (7th Cir. 2004).

The ALJ's imposition of a one-year suspension – a financial death knell for all practical purposes – a cease-and-desist order, disgorgement, a third-tier penalty, and an unstated amount of interest totaling in excess of $160,000, was unjustified and unnecessary to protect the public interest. Decision at 116-18; Order Correcting Decision at 4. The evidence demonstrated that Mayer did not act with scienter and his conduct was not egregious, which is highly relevant to the question of what, if any, remedial action should be taken in the public interest, or whether penalties should apply at all. *See In re Steadman Sec. Corp.*, 1977 SEC LEXIS 1388, 30, 46 S.E.C. 896, 909 (June 29, 1977) ("[I]ntent is ... highly germane to determining the quantum of the remedial action, if any, that due regard for the public interest requires us to take"); *Steadman*,

603 F.2d at 1140-41 ("respondent's state of mind is highly relevant in determining the remedy to impose.").

Mayer fulfilled his duties as a registered representative. Significantly, Mayer believed in the investments as his family purchased them, undermining any suggestion he acted with scienter. RMR Ex. 804. The five clients who testified or submitted affidavits in support of Mayer showed that Mayer worked with them to further their interests, and dealt with them fairly, honestly, and in good faith. They stood by him even after learning of McGinn and Smith's secret theft and diversion of funds. Indeed, many remain clients. FoF ¶¶ 433, 694-96. Even Division witness Gary Von Glinow described Mayer as an honest broker who did "a lot of good things ... for our family." Tr. 2280:4-18. None of this is mentioned in the ALJ's purported *Steadman* analysis.

Mayer has also acted in his clients' best interests since leaving MS&Co. in 2009. Among other things, Mayer has continued to monitor his clients' investments in the Four Funds and the Trust Offerings. Upon learning of the SEC Action, Mayer informed his clients, followed the Receiver's website, and helped his clients pursue actions against NFS, which valued McGinn Smith Securities at par (or par less amortization). Since April 2010, McGinn Smith Securities have generated cash flows to support the Receiver's operations, and Mayer, along with Rabinovich, helped the Receiver collect assets for the estate by liquidating two Four Funds' investments (Deerfield Capital and CMET) and by identifying a market for a third (InCaps). He "offered [his] assistance to the receiver from day one," and helped liquidate these securities "at the best possible price to maximize the value" to investors. Tr. 5078:3–5079:15. Mayer also provided non-party deposition testimony in the SEC Action, and cooperated with the Assistant U.S. Attorney in its criminal action against McGinn and Smith, provided testimony as requested,

and was listed as a government trial witness. FoF ¶¶ 527, 536, 538-44. These facts, too, are nowhere to be found in the ALJ's *Steadman* discussion.

Seemingly, the sole justification for the suspension of Mayer was the ALJ's perfunctory conclusion that Mayer "currently work[s] in the securities industry, so there appears to be a strong likelihood for recurrence." Decision at 113. The ALJ, however, did not consider that for more than five years, Mayer has provided financial services to clients through RMR, a SEC-registered investment advisory firm, without any client or regulatory complaint. RMR has "zero proprietary product" and does not sponsor private placements or mutual funds. FoF ¶¶ 33-35. There simply is no basis to believe that Mayer is a threat to the investing public. *See, e.g., SEC v. Bausch & Lomb*, 565 F.2d 8, 18 (2d Cir. 1977) (requiring "positive proof of a reasonable likelihood that past wrongdoing will recur"); *see also Monetta*, 390 F.3d at 958 (remanding to reconsider appropriate sanctions where respondent's different client-base made "the possibility of a future violation remote"). The Division's delay in bringing this case – more than three years after commencing its federal action against McGinn and Smith and significantly longer since the alleged violations occurred – also undermines any concern for the recurrence of future violations. *Monetta*, 390 F.3d at 357 ("the allocations took place a decade ago ... suggesting that the likelihood of a future violation is slight") (citing *Johnson v. SEC*, 87 F.3d 484, 490 n.9 (D.C. Cir. 1996)).

Moreover, the ALJ's claw back of *all* commissions earned after February 1, 2008, including commissions earned from clients who testified or submitted affidavits on his behalf and were identified in the Division's *Brady* disclosure, none of whom believed they were misled (and were not misled), has no basis in fact or in law. It is particularly unjustified because the evidence demonstrated that Mayer did not act fraudulently or even negligently.

In sum, to punish Mayer for his failure to uncover the fraud of McGinn and Smith, or as the ALJ put it, to "resolve" the so-called red flags, Decision at 108, ignores that their fraud went undiscovered for years by the SEC, the NASD, and countless others. Indeed, it took the SEC's seasoned staff accountant three years, devoting "a little less than half" of her time, to piece together her declaration that was a centerpiece of the Division's case. Tr. 392:5–393:18. This is not, as the ALJ claimed, "blam[ing]" others, Decision at 113, but rather, proof positive that Mayer did not bury his head in the sand and blindly recommend securities to his clients. To the contrary, Mayer performed product and customer suitability analyses before presenting investments to his accredited investor clients, only a fraction of which included McGinn Smith Securities. FoF ¶¶ 235-37, 650-51. To require Mayer, a relatively young man with a family to support (FoF ¶ 15), to pay a substantial penalty, disgorgement, and interest, and at the same time, effectively end his career in the securities industry, is not remedial, but punitive. It is unwarranted based on the evidence presented. Given Mayer's unblemished, 20-year record in the securities industry,[8] and investors affirming or testifying to his honesty, no sanctions should be imposed.

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[8] The ALJ's statement that "Mayer settled a customer complaint with FINRA for $20,000" (Decision at 48, n.3) is false. Mayer was *not* personally accused of any wrongdoing in the complaint referenced in his Broker Check Report, and Mayer made *no* settlement contribution. FoF ¶ 17; *see also* Division's FoF ¶ 522 ("Mayer did not individually contribute to this settlement.").

## Conclusion

The Commission should dismiss all charges against Mayer.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the Commission's Extension and Word Limit Order, dated June 5, 2015. The brief contains 9,831 words, exclusive of the Table of Contents, Table of Authorities, Signature Block, and this Certification, as counted by Microsoft Word, the word processing system used to prepare it.

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