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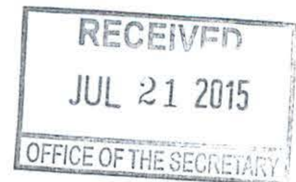

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of

DONALD J. ANTHONY, JR.,
FRANK H. CIAPPONE,
RICHARD D. FELDMANN,
WILLIAM P. GAMELLO,
ANDREW G. GUZZETTI,
WILLIAM F. LEX,
THOMAS E. LIVINGSTON,
BRIAN T. MAYER,
PHILIP S. RABINOVICH, and
RYAN C. ROGERS,

Respondents.

OPENING INDIVIDUAL BRIEF OF THOMAS LIVINGSTON

Matthew G. Nielsen
Crystal L. Jamison

ANDREWS KURTH LLP
1717 Main Street, Suite 3700
Dallas, Texas 75201
Telephone: (214) 659-4400
Facsimile (214) 659-4401

Attorneys for Thomas Livingston

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LIST OF ABBREVIATIONS AND TERMS

"FoF" -- Proposed Findings of Fact and Conclusions of Law of Respondent Thomas Livingston

"ID" -- Chief Judge Brenda Murray's February 25, 2015 Initial Decision

"Div. Ex. __" -- Division of Enforcement's Exhibit

"TL Ex. __" -- Thomas Livingston Exhibit

Capitalized terms, unless otherwise indicated, have the same meaning as defined in Respondent's Joint Brief.

I. SUMMARY

Throughout this case, the Division and ALJ have ignored that McGinn and Smith masterminded a sophisticated and pervasive fraud. They exploited the 20-plus year successful track record and local prominence of their firm to perpetuate their fraud. Smith and McGinn colluded with others within the firm--including its CFOs, senior accounting and legal officers--and its auditors to further their fraud, which made it virtually impossible for their crimes to be detected. Indeed, McGinn and Smith's misconduct went undetected in at least three regulatory examinations. They used "Ponzi-like" payments, false accounting entries, fraudulent tax returns, and created false documents to hide their scheme. When liquidity problems with the Four Funds arose, Smith was able to hide the true nature of the issues because the problems were completely consistent with the general economic downturn, which the Division and ALJ pretend did not exist.

The fact is that McGinn and Smith stole from their investors. Mr. Livingston is not to blame for what happened. He did not lie to anyone or commit fraud. While the ALJ included boilerplate language that Mr. Livingston made misrepresentations, none are discussed within the Initial Decision and there was no evidence of any. The ALJ's findings that Mr. Livingston failed to disclose material information to the two investor witnesses is wholly inconsistent with the evidence -- indeed, in the 119-page Decision, the ALJ completely ignored three letters that the investors received detailing the very information that the ALJ claims Mr. Livingston did not disclose. In finding Mr. Livingston negligent, the ALJ again completely ignores the uncontradicted evidence of Mr. Livingston's due diligence of the Offerings that he sold. Even putting aside that the violations cannot stand, the ALJ did not (and cannot) explain why Mr. Livingston should be permanently barred from the securities industry, while the other respondents, who were found to have violated the exact same securities laws with the exact same scienter and who received the exact same monetary penalty, were suspended for one year.

Neither the law nor facts support liability against Mr. Livingston and the charges against him should be dismissed and the punishment reversed.

II. BACKGROUND

Mr. Livingston is [redacted]

[redacted] Mr. Livingston has been in the securities industry for over 35 years, focusing almost exclusively on institutional sales and capital markets. Other than this matter, Mr. Livingston's career has been unblemished--he has never been the subject of any investigation and has no disciplinary history--both before, during, and after MS&Co. FoF 1-5.

Mr. Livingston joined MS&Co. in 1988 as an institutional salesman. He started the firm's Syndicate Department in 1995 and ran it until 2009, when he left MS&Co. Mr. Livingston's work generally focused on participation with large banks on underwriting public debt and equity offerings. While Mr. Livingston became a minority shareholder of MS&Co. in 2003, he had no role in running MS&Co. FoF 10, 16. Indeed, as the Commission stated in its civil case against McGinn and Smith, "Since [2006], [McGinn] and Smith have actively controlled virtually every aspect of the McGinn Smith Entities' operations." Sec. Am. Compl. at ¶ 38.

Importantly, no one, even the Division, claims that Mr. Livingston was knowledge of the fraud that McGinn and Smith perpetrated. *See, e.g.,* Tr. 1220, ID at 4. Mr. Livingston did not create, manage, or oversee what turned out to be fraudulent securities offerings. He had no role, much less supervisory, in the retail brokerage operations from which the investments were sold. Mr. Livingston had no participation in making the investments or otherwise handling investor proceeds, nor did he have a role in overseeing or monitoring the investment portfolio. Mr. Livingston was not involved in, nor did he have special access to, the accounting or auditing functions of the firm and had no access to its bank accounts. He did not receive the firm's financial

statements except to review net capital when the firm was participating in an underwriting. Mr. Livingston did not share in the profits of the firm, but rather received a set draw that was determined by Smith based on his individual revenue generation in the syndicate department. FoF 12-17.

While at MS&Co., Mr. Livingston had a handful of retail clients. He did not act as any client's sole financial advisor nor did he manage any client's entire investment portfolio. Rather, he executed limited transactions for clients. FoF 11. Livingston did not solicit any of the sales at issue in this case. Rather, the sales came mostly from clients who had participated in the pre-2003 alarm notes, which until the fraud was revealed, had by all accounts been sound and successful investments. For instance, Daniel Ferris, who testified at the hearing, had invested in the pre-2003 alarm offerings and when those ended, he wanted to continue to invest in MS&Co. offerings. Others, like David LaFleche, knew of MS&Co.'s reputation and sought out the investment. In fact, LaFleche, who was good friends with Ferris and Mr. Livingston, knew of Ferris' investing success and wanted to invest in whatever Ferris invested in. FoF 21, 64, 65. Mr. Livingston always provided the Offering Documents to his clients and discussed the risks, which were described throughout the PPMs, with each client. FoF 69. Ultimately, Livingston sold $1,904,000 of the Four Funds offerings, not $3.5 million as the Division alleges and sold $280,000 of the Trust Offerings, not $380,000 as the Division alleges. These sales account for less than 2 percent of the $127 million in total sales by MS & Co. FoF 23-25.

Mr. Livingston currently runs the capital markets group at Halliday Financial Group. Mr. Livingston deals exclusively with underwriting SEC-registered securities in transactions primarily led by major banks, including Merrill Lynch, J.P. Morgan Chase, Wells Fargo, and Morgan Stanley. The bulk of the transactions in which Mr. Livingston is involved are fixed income securities, such as preferred stocks issued by large companies, and structured products that are FDIC insured. He is

not involved in underwriting or selling unregistered securities, including private placements. He has no retail clients and has no intention of doing any retail business in the future. FoF 6-8.

Mr. Livingston is a well-respected member of the securities industry, especially within the syndication sector, and has a very strong reputation for integrity and truthfulness. He serves on the Board of Directors of the National Syndicate Association, which is the leading syndicate organization in the country. According to the co-head of capital markets for Stiffel Nicholas, who testified at the hearing, Indeed, Stiffel Nicholas does business with Halliday, a small regional firm, based solely on the reputation and character of Mr. Livingston. FoF 9. The ALJ heard testimony about Mr. Livingston's strong attitude towards compliance from Andrew Halliday, Mr. Livingston's supervisor. Tr. 5919:16 - 5921:21. As one witness put it, Mr. Livingston is a man of "impeccable" character. Tr. 5882:17 - 24.

III. ARGUMENT

The Rules of Practice provide that the Commission may "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record." Rule 411(a). The ALJ committed prejudicial errors during the course of the proceeding, made findings and conclusions of fact that were clearly erroneous, and reached erroneous conclusions of law.

The Decision fails to consider the appropriate relevant evidence in reaching its conclusions. Under the APA, "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d). The written decision must demonstrate the fact-finder's consideration of the "whole record" and must "show the ruling on

each finding, conclusion, or exception presented," including "all the material issues of fact, law, or discretion presented." *Id.* §§ 556(d), 557(c)(3)(A).

The Decision fails to comply with the APA's requirement that the agency consider "the evidence on both sides; evidence that is substantial viewed in isolation may become insubstantial when contradictory evidence is taken into account." *Landry v. FDIC*, 204 F.3d 1125, 1140 (D.C. Cir. 2000) (emphasis in original); see also *Siegel v. SEC*, 592 F.3d 147, 155 (D.C. Cir. 2010). It is reversible error for an agency to "pa[y] no heed to [respondent's] evidence." *Rockies Fund, Inc. v. SEC*, 428 F.3d 1088, 1098 (D.C. Cir. 2005). As the Commission has held, an ALJ must have "a sufficient basis on which to conclude" that the Division has proved each of its allegations. *In the Matter of Pelosi, Inv.* Advisors Act Rel. No. 3805, 2014 SEC LEXIS 1114, at *8 (Mar. 27, 2014).

Due process similarly requires the agency to base its decisions on a "full ... appreciation of all of the evidence"; the agency cannot simply "review selected parts of the record ... while ignoring other matters of record." *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 585 n.3 (D.C. Cir. 1970). Courts expect "that agencies will treat fully 'each of the pertinent factors' and issues before them"; otherwise, "the opportunities for notice and hearing in administrative proceedings would be largely illusory, with agencies free to disregard those facts or issues that prove difficult or inconvenient." *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992) (*quoting Public Serv. Comm'n for NY. v. Fed. Power Comm'n*, 511 F.2d 338, 345 (D.C. Cir. 1975)).

Here, the Decision does not consider the evidence on both sides--it perfunctorily adopts the Division's view and dismisses without even considering Mr. Livingston evidence on virtually all issues. And, while the Division's view of the evidence in isolation may appear persuasive as described in the Decision, it is insubstantial and inadequate when the complete story and all the evidence are considered. Unfortunately, that's not what occurred.

As just one example, before Mr. Livingston was able to even begin putting on evidence, it's clear that the ALJ had already made up her mind that the Four Funds' investment in alseT was improper. During one Respondent's testimony about why he thought alseT was consistent with the Four Funds' investment mandate, the ALJ abruptly interrupted and proclaimed "I don't care whether it was Pope Francis advising this Alset. I am saying the thing is these investors put money in something, and that that money was going into completely different thing." Tr. 3306:25-3307:11. This explains why the ALJ cut off testimony from Yoav Millet, a witness for Mr. Livingston, who was attempting to testify about the legitimacy of alseT, its immediate prospects for success in 2006-2007, and its negotiations with major Wall Street firms for permanent financing. Tr. 5863.

The Decision's errors, alone and in combination, violate the APA and Mr. Livingston's right to basic fairness and due process. Accordingly, for the reasons stated herein and the Joint Brief, the Commission should reverse the Decision.

A. Mr. Livingston Did Not Commit Fraud and the Evidence Does Not Support Such a Finding.

Despite the length of the ALJ's Initial Decision, the findings against Mr. Livingston are narrow. The Division presented only two investor witnesses against Mr. Livingston, Daniel Ferris and David LaFleche. The ALJ based her findings that Mr. Livingston violated Securities Act Section 17(a)(1) and Exchange Act Section 10(b)(5) and Rule 10b-5 on the premise that "Mr. Livingston was reckless in offering and selling securities based on material misrepresentations and omissions that he made to the witnesses who purchased private placements." ID at 104. The ALJ's conclusion is overwhelmingly contradicted by the evidence and cannot stand.

1. The ALJ Does Not Identify Any Misrepresentations Made by Mr. Livingston.

While the ALJ includes the same boiler-plate legal conclusion used for other Respondents that Mr. Livingston made "material misrepresentations," the ALJ does not identify any such alleged

misrepresentations or even discuss any affirmative representations allegedly made by Mr. Livingston. *See generally* ID at 46-47, 104-05. There was no testimony about any alleged misrepresentations by either investor witness. Put simply, there are no findings in the Initial Decision or evidence introduced at the hearing to support the ALJ's finding that Mr. Livingston made "material misrepresentations." The ALJ's conclusions that Mr. Livingston made "material misrepresentations" have no support and must be reversed.

2. The ALJ's Finding that Mr. Livingston Failed to Disclosed Material Facts is Not Supported by the Evidence.

In concluding that Mr. Livingston was reckless in offering and selling securities based on material omissions to the two investor witnesses, the ALJ found that Mr. Livingston failed to disclose to Messrs. Ferris and LaFleche (1) his ownership interest in alseT and (2) Mr. Livingston's concerns about the financial trouble of the Four Funds before selling any Trust Offering. ID at 104. Both of these findings are contrary to the undisputed evidence, which the ALJ wholly ignored.

(A) Neither Ferris nor LaFleche purchased a Four Fund investment that had made a loan to alseT and, therefore, Mr. Livingston's indirect interest in alseT did not need to be disclosed.

In finding that Mr. Livingston should have disclosed his ownership interest in alseT, the ALJ completely ignored the fact that Mr. Livingston did not sell any Four Funds to Messrs. Ferris and LaFleche which, at the time of the sale, had made loans to alseT.[1]

It is undisputed that LaFleche did not purchase a Four Fund investment after December 2004. Div. Ex. 2 at 108. alseT was not even formed until 2005 and, therefore, none of the Four

[1] The ALJ does not cite to any support for her conclusion that Mr. Livingston individually had such an obligation of disclosure. Moreover, Mr. Livingston believed that, before any of the Four Funds loaned any money to alseT, David Smith had obtained a legal opinion that Mr. Livingston's involvement in alseT did not create any legal issues or disclosure requirements. FoF 86. The ALJ ignored that evidence. Further, the ALJ seems to chastise Mr. Livingston's denial that alseT was an "affiliate" of MS&Co. (ID at 42), but oddly, neither the ALJ nor the Division used the term "affiliate" as it is defined in federal securities laws. Tr. 523:5 - 524:7, Tr. 5348:2-3. alseT did not qualify as an affiliate, as defined by the '33 Act. Nevertheless, transactions with related parties were not only not prohibited by the Four Fund PPMs, but even the ALJ found that they were specifically contemplated in the PPMs. Div. Ex. 5 at 1, ID at 92.

Funds in existence as of December 2004 could have made any loans to alseT to that point. FoF 85, Div. Ex. 2 at 156. Nor was there any evidence introduced that there was any intention in December 2004 for any of Funds in which LaFleche had invested to make any loans to alseT. Therefore, there was nothing to disclose to Mr. LaFleche about alseT.

Further, Ferris only made one Four Fund investment after alseT was created.[2] In January 2006, Ferris purchased an investment in FAIN. Div. Ex. 2 at 108. The ALJ ignored the fact that as of January 2006, FAIN had not loaned any money to alseT. *Id.* at 156. There was no evidence introduced that Mr. Livingston knew or should have known that FAIN would loan money to alseT. Indeed, Mr. Livingston was not involved in the loans between the Four Funds and alseT at all. Moreover, in January 2006, Mr. Livingston believed that alseT was about to obtain permanent financing. At the time, alseT was in advanced negotiations with Merrill Lynch for permanent financing, which would have eliminated the need for any additional loans from any of the Four Funds and provided repayment of loans. FoF 94,Tr. 2282, TL Ex. 94, 98. But again, at the time that Ferris made his investment in FAIN, there were no loans to alseT by FAIN to disclose.

Accordingly, the ALJ's finding that Mr. Livingston should have disclosed the Four Fund loans to alseT to Ferris and LaFleche is based on a failure to recognize that no such investments had been made at the time those investors purchased their investments. Therefore, the ALJ's finding is wholly contrary to the evidence and was in error.

[2] The ALJ also failed to note the limited nature of Ferris' testimony. Ferris gave limited testimony and was only able to testify about the details of one investment (November 2007). Tr. 28:20-23, 34:7-15, 42:9-13. Notably, while Ferris claimed that investment was made without his authorization, that testimony was shown to be completely inaccurate. *See* FoF 83, 84. That entire subject is omitted from the Initial Decision. Ferris was unable to give any details whatsoever about any of his other investments -- indeed, his refusal to do so resulted in a heated conversation between counsel for the Division and Ferris before the hearing. Tr. at 71-73. Again, this subject was ignored in the Initial Decision. The only testimony that Ferris was able to offer about his purchase of Four Fund investments was that is was Smith, not Livingston, who described the investments to Ferris. Tr. 45-46, FoF 78. Yet again, this fact was absent from the Initial Decision.

(B) The financial troubles of the Four Funds were disclosed to Ferris and LaFleche before they made their investments in the Trust Offerings.

The core of the ALJ's fraud findings against Mr. Livingston are based upon the ALJ's erroneous conclusion that the financial troubles of the Four Funds, of which Mr. Livingston learned in December 2007, were not disclosed to Ferris or LaFleche before they made investments in the Trust Offerings in late 2008 through January 2009. ID at 104.[3] Incredibly, in reaching this conclusion the ALJ wholly ignored three letters sent to both Ferris and LaFleche during 2008, before either made a purchase of a Trust Offering in 2008, that detail the severe liquidly issues of the Four Funds. In fact, before either invested in a Trust Offering in 2008, both Ferris and LaFleche were told, initially, that their interest payments were cut by more than half, then later, that their interest payments were being suspended entirely, and finally, that the maturities on their investments were being extended from 5 years to 20 years and the interest permanently reduced. FoF 74-75, 80-82; Div. Ex. 132, 188, and 193.

As the Commission itself previously noted, a series of letters was circulated to Four Funds' investors during 2008, putting them on notice of various issues with their investments. *See, e.g., Securities Exchange Commission v. McGinn, Smith & Co., Inc., et al.*, No. 1:10-cv-00457-GLS-CFH, Plaintiff's Statement of Material Facts in Support of Motion for Summary Judgment, Dkt. No. 711, at ¶¶ 137, 140-44 (July 8, 2014). The first letter—sent within days of Mr. Livingston's memo––"was sent to Four Funds junior note holders, informing them that their interest payments would be reduced to 5% from 10.25%." *Id.* ¶ 137.[4] After setting forth an in-depth description of problems plaguing the financial markets as a result of the credit crisis, the letter states "[t]he FUNDS in which

[3] Ferris made a purchase of TDM Luxury Cruises in November 2007, before Mr. Livingston or any other Respondent learned of the Four Funds' liquidity problems. The ALJ's conclusions about what should have been disclosed to Ferris relate only to his October 2008 Trust Offering investments. ID at 104.

[4] Ferris and LaFleche were junior noteholders in each of the Four Funds in which they invested. Div. Ex. 2 at 108.

you are invested have some of those similar problems." *Id.* It goes on to outline specific issues relating to the investments, including the following:

- "The impact on the FUNDS from the aforementioned credit crisis has primarily been on liquidity and the upcoming need to sell assets in the next year to pay off maturing notes.
- "Our real concern is the present and future ability to sell our present investments at a value that is needed to meet the FUND's obligations.
- "[T]he ability to retire the entire issue at the same time as the Senior notes is most unlikely.
- [T]here is presently no market at fair prices that exist for non-public debt securities...In addition, many of the investments in these companies are dependent on new financings to have the capital to pay off their existing debt to the FUNDS. Several of our investments fall into this category."

The letter also specifically identifies alseT as a company that falls within the aforementioned category, then goes on to discuss potential issues with alseT as follows:

> Another example is a company that we have financed that is in the business of evaluating and providing capital to companies based on the worth of the company's intellectual property. A major investment bank has given the company a term sheet that will provide $750 million of financing over the next five years. However, the original structure called for a substantial portion of that capital to be provided up front and that would be used to repay our debt. The investment bank is now only willing to provide the capital on a staggered basis over the next five years, with the result that while we are confident of being repaid in full, it is not likely that we will be paid out until the fourth and fifth year of their commitment.

MS&Co. continued to provide updates on these issues to Four Funds investors as the prognosis worsened. On or about April 11, 2008, the firm sent a second letter to junior note holders in the Four Funds, including Ferris and LaFleche. App. Ex. 355 at 1. The April 2008 letter stated

that, in light of the circumstances highlighted in the earlier January 2008 letter, and because two investments had eliminated their dividends or ceased distributions, the Four Funds were forced to eliminate the interest payments on Secured Junior Notes for the quarter. App. Ex. 355 at 1-2.

Finally, on or about October 13, 2008, a third letter was distributed to note holders in all tranches of the Four Funds. App. Ex. 356 at 1. The October 2008 letter stated "McGinn, Smith Advisors, LLC (MSA) has determined that as a result of losses incurred in the FUND's investments and the total illiquidity for the vast majority of the FUND's investments it is not possible to redeem the Notes on the due date of December 15, 2008 and will require a restructuring of all classes of Notes." Attached was a restructuring plan extending the maturity dates of the notes from 2008 until 2023 and reducing interest payments for all tranches. App. Ex. 356 at 8-9.

These three letters were precisely the reasons Smith provided to Mr. Livingston, both in December 2007 and after, for why the Four Funds were experiencing liquidity issues. FoF 49. Despite the Commission specifically acknowledging these letters and their forewarnings, the ALJ chose to completely ignore them in assessing Mr. Livingston's culpability. In fact, there is not a single mention of these letters in the entire Initial Decision. The ALJ does acknowledge in passing that LaFleche admitted Mr. Livingston told him his Four Fund notes were being suspended and delayed. ID at 47. But, the ALJ completely failed to acknowledge that Ferris testified that Mr. Livingston told him that his TAIN and FIIN investments were in trouble. FoF 82.[5] The overwhelming evidence is that Ferris and LaFleche were acutely aware of the significant liquidity issues and that, by the time they purchased Trust Offering on October 31, 2008, they knew that their

[5] The ALJ instead cites to testimony from Ferris about his October 2008 investments in the McGinn Smith Transactional Fund. ID at 46. However, before the Division asked Ferris about what he could recall concerning what Mr. Livingston allegedly did and did not tell him in connection with the October 2008 investments, Ferris was asked "Do you remember anything about the circumstances of those [October 2008 MSTF] investments?" Ferris said "No." Tr. at 42:9-13. Counsel for Mr. Livingston objected to further questions about the circumstances of the investments, which Ferris admittedly did not recall, but despite "having a point," the objection was overruled and the Division was allowed to ask Ferris about an investment about which he did not recall any details. *Id.* at 42:17-22. That ruling was likewise in error and the testimony about what Ferris was supposedly not told should be ignored.

Four Fund investments were in distress and that they were at risk of losing money on those investments.[6]

(C) The ALJ's Reliance on the December 2007 Memorandum is Misplaced.

In finding that Mr. Livingston acted with scienter, the ALJ places great weight on two statements in a December 2007 memorandum sent by Mr. Livingston to McGinn and Smith. ID at 104. The ALJ stated: "In the memorandum, Mr. Livingston acknowledged that funds controlled by McGinn and Smith had losses approaching $45 million dollars, and that, unbeknownst to him, the Four Funds now owned 10% of alseT and had made huge investments in companies controlled by McGinn and Smith, which Mr. Livingston described as "HUGE conflicts" and that it was 'unbelievable' such conflicts had not been disclosed. Div. Ex. 585; Tr. 5309." As shown above, Ferris and LaFleche were aware before they purchased their October 2008 Trust Offerings that their Four Fund investments were in distress. Even putting this aside, the ALJ's reliance on the December 2007 memo is misplaced and misstates the evidence surrounding it and the statements contained therein.

In December 2007, alseT was on the verge of obtaining permanent financing from Goldman Sachs, which not only would have paid off loans from the Four Funds, but more importantly, would have also provided the capital needed for alseT to progress and begin purchasing IP royalty streams. FoF 95-98. All of the effort and time that Mr. Livingston (and others) put into alseT was about to

[6] The ALJ's conclusion also assumes, without support, that there was a duty of disclosure. To demonstrate liability under Section 10(b); Rule 10b-5; or Section 17(a) based upon a failure to disclose, the SEC must show both the existence of a duty to disclose the information and the materiality of the information. *In re Time Warner, Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir.); *Hoffman v. UBS-AG*, 591 F. Supp. 2d 522, 532 (S.D.N.Y. 2008); *SEC v. Pasternak*, 561 F. Supp. 2d 459, (D.N.J. 2008). "It is a well-established principle of federal securities law that silence absent a duty to disclose cannot be actionably misleading, and the mere possession of material non-public information does not create a disclosure duty." *Harborview Master Fund, L.P. v. Lightpath Techs., Inc.*, 601 F. Supp. 2d 537, 543 (S.D.N.Y. 2009); *see also Chiarella v. United States*, 445 U.S. 222, 235 (1980). "[S]ilence, [i.e., an omission] absent a duty to disclose, is not misleading under Rule 10b-5." *Wang v. Bear Stearns Companies, LLC*, 14 F. Supp. 3d 537, 543 (S.D.N.Y. 2014). Generally, a registered representative's only duty is to correct previously made affirmative statements if they later become inaccurate and to give full information regarding statements they do make if the statement would be misleading absent full disclosure. *Time Warner*, 9 F.3d at 267; *In re Marsh & Mclennan Companies, Inc. Sec. Litig.*, 501 F. Supp. 2d 452, 469 (S.D.N.Y. 2006).

be realized. Apparently seeing no more use for Mr. Livingston, others within alseT sought to push him out so that they did not have to share in alseT's success with Mr. Livingston. *Id.* McGinn and Smith, focused on getting the Four Funds repaid, sided with alseT management and asked Mr. Livingston to resign from alseT in a meeting on December 19, 2007. Mr. Livingston was furious and, in a stream of consciences, wrote the December 20, 2007 memorandum.[7] Tr. 2293.

The December 2007 memorandum is not about the Four Funds at all. The document discusses alseT, the efforts to remove Mr. Livingston, and his reasons for being so upset about what was occurring. Despite how the ALJ makes it appear, the December 2007 memo was not a manifesto by Mr. Livingston about wrongdoing he believed was occurring in the Four Funds. Mr. Livingston made clear that he did not believed that any wrongdoing was occurring at all nor did Smith reveal any to him. Tr. 5250.

Importantly, Mr. Livingston made abundantly clear that he did not understand that the Four Funds had "losses" of $45 million, but rather that $45 million of the Four Funds' investments were not performing. Tr. 2293. This is consistent with what Smith told other brokers and investors. Moreover, Mr. Livingston did not believe that Four Funds had real conflict of interest issues. Rather, this was an excuse being used by McGinn and Smith to convince Mr. Livingston to resign from alseT and he was merely pointing to instances where they had made investments in entities in which they had some ownership interest. Furthermore, in discussing the investment in Coventry, it is clear this did not relate to the Four Funds -- he mentioned "another $20 million" investment, which did not relate to the Four Funds' investment, which was significantly smaller at that time. Div. Ex. 2 at 140. Nevertheless, Mr. Livingston's point in the memorandum was that he believed investments in related parties had been fully vetted by legal counsel. He describes the alseT

[7] The memorandum was sent on December 20, 2007 and references a meeting the prior day. Div. Ex. 585. Mr. Livingston testified that the date on the memorandum (10/22/07) was from a previous document and was an error. All of the evidence indicates that the issues between Mr. Livingston and alseT management were occurring in December 2007 and not in October. *See, e.g.*, ID at 44.

investment as being "all above board" and discusses the significant sums paid by the firm to its lawyers for opinions on such issues. Div. Ex. 585 at 4.[8]

It is undisputed that Mr. Livingston did not sell a Four Fund investment after January 2007-- nearly a year before he learned of the liquidity issues. The ALJ effectively found that Mr. Livingston was reckless in selling five Trust Offerings during 2008 through January 2009 due to the problems with the Four Funds. ID at 104. But, the ALJ ignores that the Four Funds had nothing to do with the Trust Offerings. Indeed, the Division's own expert admitted that the two offerings "were not at all similar." Div. Ex. 1 at 25. Trust proceeds were used to purchase assets and revenue streams from specific purpose entities, usually related to long-term contracts for burglar alarm service, "triple play" (broadband, cable and telephone) service, or luxury cruise cabin bookings. ID at 7. The Trust Offerings were similar to the pre-Four Funds notes offered by MS&Co., for which the firm a "national reputation." ID at 3.

Moreover, unlike with the Four Funds, the shortcomings with the Trust Offerings were not the result of alleged undisclosed investments and conflicts; rather it was simply a matter of McGinn and Smith stealing funds and falsifying accounting records to cover their tracks. *See, e.g.*, *Securities Exchange Commission v. McGinn, Smith & Co., Inc., et al.*, Memorandum-Decision and Order, No. 1:10-cv-00457-GLS-CFH, at 10-11 (Feb. 17, 2015) (hereinafter, "MDO I") at 31 (McGinn and Smith used the Trust Offerings "to structure a series of transactions that would allow various McGinn Smith Entities to siphon off millions of dollars in transaction fees and commissions…"). Nothing on the face of the Trust Offerings was improper. Instead, monies raised were actually invested in the specific streams of receivables and disclosed assets as promised,

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[8] Furthermore, as stated previously, the ALJ noted that the Four Fund PPMs disclosed potential related party transactions. ID at 92 (citing Div. Ex. 5 at 1).

including the purchase of contracts for security alarm services, broadband cable services, telephone services, and luxury cruises. *Id.* at 13-14.

Mr. Livingston was concerned to learn in December 2007 that the Four Funds had substantial non-performing assets, but it was not a surprise given the severe economic conditions facing the debt markets at the time. FoF 50. Indeed, Mr. Livingston testified: "The world was melting down. The institutional accounts that I talked to were going through virtually [sic] calamity. So this was not unique to McGinn Smith to have non-performing assets at the time." Tr. 2295:2-6. There was nothing to suggest wrongdoing by Smith. Rather, Smith appeared to have a full grasp on the situation, a plan to remediate it, and fully communicated the issues to investors. Tr. 5249-5252.

Moreover, the non-performance of the Four Funds had nothing to do with whether the Trust Offerings were sound investments. The Trust Offerings were run by McGinn and were similar to the pre-2003 offerings for which MS&Co. had a national reputation. Ultimately, those failed because McGinn and Smith stole from investors with the help of people like MS&Co.'s CFO. Mr. Livingston was not, and could not reasonably have been, aware of McGinn and Smith's crimes. ID at 71; FoF 53-55.

In sum, the ALJ's finding of scienter was unreasonable and inconsistent with a fair and balanced review of the evidence.

(D) *The ALJ Erred in Finding Scheme Liability.*

Putting aside that there were no material omissions, the ALJ's finding that Mr. Livingston's sales "constituted a necessary part of MS&Co.'s fraud and were thus part of a device, scheme, or artifice to defraud ..." is not supported by the law. The ALJ did not find any conduct by Mr. Livingston beyond alleged misrepresentations and omissions. Indeed, Mr. Livingston was not

involved in the creation and management of the Four Funds or Trust Offerings, nor has it been suggested that Mr. Livingston was aware of McGinn and Smith's fraudulent scheme.

Scheme liability under subsections (a) and (c) of Rule 10b-5 hinges on the performance of an inherently deceptive act that is distinct from an alleged misstatement. *SEC v. Kelly*, 817 F.Supp.2d 340, 344 (S.D.N.Y. 2011); *Cf. In the Matter of Vancock*, No. 34-61039A, 2009 WL 4026291, at *9 (S.E.C. Nov. 20, 2009). Putting aside that Mr. Livingston did not make any material misrepresentations or omissions, liability does not attach by merely repackaging fraudulent misrepresentations as a "scheme to defraud." *See SEC v. Goldstone*, 952 F.Supp.2d 1060, 1203-04 (D.N.Mex. 2013). Rather, scheme liability hinges on the performance of an inherently deceptive act that is distinct from an alleged misstatement. *SEC v. Familant*, 910 F. Supp. 2d 83, 93 (D.D.C. 2012); *WPP Lux. Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011); *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005); *SEC v. Goldstone*, 952 F. Supp. 2d 1060, 1234 (D.N.M. 2013); *SEC v. Kelly*, 817 F.Supp.2d 340, 344 (S.D.N.Y. 2011).

To hold a defendant accountable for an alleged "scheme," the Division must show acts by the defendant that demonstrate "illegitimate, sham, or inherently deceptive transactions where the defendant's conduct or role has the purpose and effect of creating a false appearance." *SEC v. St. Anselm Exploration Co.*, 936 F. Supp. 2d 1281, 1299 (D. Colo. 2013). "Stated differently, scheme liability exists only where there is deceptive conduct going beyond misrepresentations." *Id.* (citing *Public Pension Fund Group v. KV Pharmaceutical Co.*, 679 F.3d 972, 987 (8th Cir. 2012)). "Allegations of a scheme based on the same misstatements that would form the basis of a misrepresentation claim under Rule 10b–5(b) and nothing more are not sufficient." *Id.*

Here, the ALJ imposed scheme liability on Mr. Livingston solely based on alleged misrepresentations and omissions. ID at 104. The ALJ identified no deceptive conduct intended to defraud. Without more, this is inherently insufficient to support a finding of a violation of Section

17(a) and Rule 10b-5. While McGinn and Smith took deceptive actions with the intent of defrauding buyers, Mr. Livingston took no such actions, and the ALJ identifies none other than the bare allegation that he allegedly failed to disclose certain information. Although this might raise an inference that McGinn and Smith used registered representatives such as Mr. Livingston as innocent conduits to advance their own fraud, it raises no inference whatsoever that Mr. Livingston was engaged any such scheme. And, as discussed above, the supposed "failures to disclose" are not actionable. Thus, as a matter of law, the ALJ erred in holding that the supposed omissions were sufficient to impose scheme liability on Mr. Livingston.

B. Mr. Livingston Did Not Violate Sections 17(a)(2) or 17(a)(3).

The ALJ found that: "Mr. Livingston 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, i.e., his 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. By 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 at 105. This finding is not supported by the evidence or even within the Initial Decision.

First, there was absolutely no evidence that Mr. Livingston repeated anything from either the Four Fund or Trust Offering PPMs. Indeed, neither Ferris nor LaFleche testified about any affirmative representations that Mr. Livingston made to them and the ALJ does not cite any in the Initial Decision. This again is a boilerplate finding as to other Respondents, but for which the ALJ provides no support as to Mr. Livingston. Even so, Mr. Livingston cannot be liable for any alleged misstatements within the PPMs, or those which he repeated, because Mr. Livingston did not "make" the statements. *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011).

Second, the ALJ's finding that Mr. Livingston did not conduct any due diligence is simply wrong. Mr. Livingston did conduct due diligence of the Four Funds and the Trust Offerings which he sold. The Division's records show that as of December 31, 2003, FIIN had more than $17.68 million invested in 8 different investments. Mr. Livingston knew about all of those investments except for an alarm contract investment (SPT 01 Trust). Indeed, two of the investments (Cochise and Maracay Homes) came through introductions made by Mr. Livingston. Moreover, in reviewing the Division's 2004 balance sheet for FIIN, TAIN, and FEIN, Mr. Livingston was also personally aware of the funds' 2004 investments in, among others, Deerfield Capital, Pine Street Capital, and Raging River Apparel. Comparing the investments in which Mr. Livingston was aware to the total invested, Mr. Livingston was personally aware of at least 83% of TAIN's investments and 78% of FIIN's investments as of December 31, 2004 (TAIN and FIIN accounted for all but one of Mr. Livingston's sales to that point). Notably, 95% of Mr. Livingston's sales of the Four Funds occurred by May 2005 (all but two sales). FoF 27-29.

By the time the Four Funds were created, Mr. Livingston had worked with Smith for 15 years and had seen Smith successfully handle numerous transactions, including bank acquisitions and financing of a civic center and local hospital. FoF 19. While the ALJ mocked his testimony as not being credible, Mr. Livingston did in fact, unlike anyone else, personally observed Smith evaluating potential investment opportunities and rejecting potential investments. Mr. Livingston was the only respondent that was in the same office as Smith. Mr. Livingston saw Smith conducting due diligence on potential investments, with an experienced team, and personally observed that the due diligence was consistent with what Mr. Livingston conducted on an underwriting. Mr. Livingston frequently attended meetings with Smith and frequently spoke to him (and others) about the Four Funds investments. In fact, Mr. Livingston introduced Smith to a number of companies in which the Four Funds invested. Again, while the ALJ simply disregarded

his uncontradicted testimony, because Mr. Livingston had knowledge about the companies in with the Four Funds invested, he understood the returns that the Funds could expect, and believed the interest payments to Four Fund investors were reasonable.[9] Mr. Livingston believed, based on his personal observations that Smith was making sound investment decisions consistent with the broad purpose of the Four Funds. FoF 30-33.

As for the Trust Offerings, Mr. Livingston testified about the thorough due diligence of the TDM Cable Trust 09 offering. Among other things, Mr. Livingston reviewed the assets that were being purchased, verified the assets were actually being purchased, verified that the debt service reserve fund had been funded, and talked to the servicer of the contracts. Mr. Livingston also conducted thorough due diligence on the TDM Luxury Cruise offering, including speaking to the travel agent who was booking the cruises, reviewed the company's financial statements, and confirmed the company's cash flows against what was represented in the PPM. The court-appointed receiver in the Commission's civil case identified no underlying issues with the TDM Luxury Cruise operations except that after liquidation, there was an overall loss. In looking at TDM offerings in hindsight with forensic review of its financial statements and operations, the receiver's opinion was that its underwriting was poor. The receiver admitted that there was no evidence that the brokers were aware of the poor underwriting. FoF 37-40.

The ALJ's conclusion that Mr. Livingston did no investigation is another example of the ALJ blindly accepting the Division's position without paying any heed to the actual evidence. The actual evidence does not support the ALJ's conclusion and it should be reversed.

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[9] The returns in the investments were substantiated by Pine Street Capital, a related fund to MS&Co. that was universally deemed as an enormous success, and with whose management Mr. Livingston had frequent contact. RMR 46, Tr. 5215-16.

C. The Evidence Does Not Support Upholding the ALJ's Permanent Securities Industry Bar

The ALJ's punishment of Mr. Livingston, especially imposing a permanent securities industry bar, lacks any rational basis and is an abuse of discretion.

First, for the reasons set forth at the hearing, in the Joint Brief, and in this Brief, the finding that Mr. Livingston committed fraud is not supported. There were no findings or evidence that Mr. Livingston made any material misrepresentations. As for alleged material omissions, the evidence shows that either no disclosure was needed or that the facts were known to the investors. Moreover, the evidence does not support that Mr. Livingston acted with scienter and, therefore, a permanent bar is not warranted. *Steadman v. SEC*, 603 F.2d 1126, 1141 (5th Cir. 1979) ("It would be a gross abuse of discretion to bar a [financial professional] from the industry on the basis of isolated negligent violations.").[10]

Second, even putting aside that the ALJ's finding of reckless conduct is not supported by the evidence, even if it were, the ALJ was required to, but did not, make meaningful, individualized findings to support her punishment of Respondents, especially with regard to Mr. Livingston due to the permanent bar imposed upon him. *Steadman*, 603 F.2d at 1139; *see also McCarthy v. SEC*, 406 F.3d 179, 189 (2nd Cir. 2005); *Monetta Fin. Servs, Inc. v. SEC,* 390 F.2d 952, 957 (7th Cir. 2004). The ALJ's decision to impose sanctions on the respondents merely recites the *Steadman* factors and provides vague references to the "egregious" nature of the violations. There is no meaningful consideration of each factor; rather, the ALJ makes conclusory legal declarations without discussing the unique facts of the case. ID at 112-113. Further, the ALJ discusses the *Steadman* factors as

[10] To the extent that the bar was based on Section 5 violations, there was no finding of scienter with regard to those violations nor was there any evidence that Mr. Livingston was aware or should have been aware that the offerings were not subject to an exemption from registration. Mr. Livingston reasonably relied on the representations of the issuer, the Funds' advisor (Smith), the MS&Co. compliance department, and outside counsel regarding the legality of the offering. TL Ex. 1, 2, 17, 60. Mr. Livingston was not aware that any of the offerings exceeded 35 unaccredited investors. Tr. 5237:3-21.

they relate to ***all*** of the respondents, not to each respondent individually, but then applies a different and significantly harsher punishment for Mr. Livingston. *Steadman*, 603 F.2d at 1140. In fact, she provided no reason for distinguishing Mr. Livingston at all. ID at 112-113.

Each of the selling Respondents, except Gamello, were all found to be liable for the same violations of the federal securities laws, with the same level of scienter, and each received the same monetary penalty ($130,000). ID at 93-109. Yet, Mr. Livingston was permanently barred from the securities industry, while most others were suspended for one year. *Id.* at 113. The only others permanently barred was a respondent who defaulted and Lex, who is no longer in the securities business. There is no justification given for such inequitable treatment, nor is there a rational reason to punish Mr. Livingston more than the others. *Id.* Indeed, Mr. Livingston made sales to three customers totaling $255,000 after September 23, 2008 (the relevant statute of limitations period) for which he allegedly received a total of $700 in commissions.[11] Only Feldmann (who settled) and Guzetti (an alleged supervisor) had fewer sales during the relevant time period. The ALJ further completely ignored all mitigating factors, including that Mr. Livingston has never been the subject to regulatory investigation or sanctions, is not allegedly to have engaged in any misconduct since leaving MS&Co., and he is not a threat for repeat offense because he is not a retail broker -- he deals exclusively with underwriting SEC-registered securities in transaction primarily led by the major banks, including Merrill Lynch, J.P. Morgan Chase, Wells Fargo, and Morgan Stanley. Tr. 5176:8-14. The bulk of the transactions in which Mr. Livingston is involved are fixed income securities, such as preferred stocks issued by large companies, and structured products that

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[11] As set forth in his Motion to Correct the Initial Decision, with regard to the $700 payment on February 15, 2009, there is no evidence that payment related to the sale of TDMM Cable 09. In reviewing the bi-monthly schedule that Palen used for her entry for the payment on February 15, 2009, it reveals that there is no indication that payment was for a sale of TDMM Cable 09. See Liv. Ex. 126 (last page), attached hereto as Exhibit "B." Indeed, the bi-monthly schedule states the $700 was for "Net Private 70%." *Id.* The Division offered no testimony on what the Net Private 70% line item represented in the McGinn Smith bi-monthly schedules. Further, on the same schedule, there are three separate line items for TDM notes. *Id.* If the $700 related to the sale of a TDM note, it follows that the payment would have been listed under one of those three lines reserved for TDM note commissions.

are FDIC insured. He is not involved in underwriting or selling unregistered securities, including private placements. Tr. 5174:6 - 5176:7.[12]

Put simply, even if Mr. Livingston was reckless and violated the antifraud provisions (which he strongly denies), there is not a rational basis to impose "the most drastic sanction at the Commission's disposal"--a securities industry bar--against Mr. Livingston while suspending others found to have engaged in the exact same violations.[13]

Third, in supplement to the Joint Brief, the ALJ improperly relied upon pre-September 23, 2008 conduct to impose a bar against Mr. Livingston. The ALJ wrongly found that she can rely on conduct outside of the statute of limitations in imposing a bar. ID at 2, fn 2; *In the Matter of the Application of Eric J. Brown*, SEC Release No. 3376, 2012 WL 625874 (2012); *In the Matter of Edgar B. Alacan*, SEC Release No. 8436, 2004 WL 1496843 (2004); *In the Matter of Feeley & Wilcox Asset Mgmt. Corp.*, SEC Release No. 2143, 2003 WL 22680907 (2003).

In finding Mr. Livingston violated the antifraud provisions, the ALJ relied on conduct that occurred outside the statute of limitations -- specifically, Mr. Livingston's alleged failure to disclose his interest in alseT in sales of Four Funds (all of which occurred outside the statute of limitations) and his failure to disclose his "concerns" about the Four Funds that came about in late 2007. ID at 104. Virtually all sales at issue in the case occurred outside the statute of limitations. The following timeline (using the Division's disputed list of sales and commissions) illustrates that the

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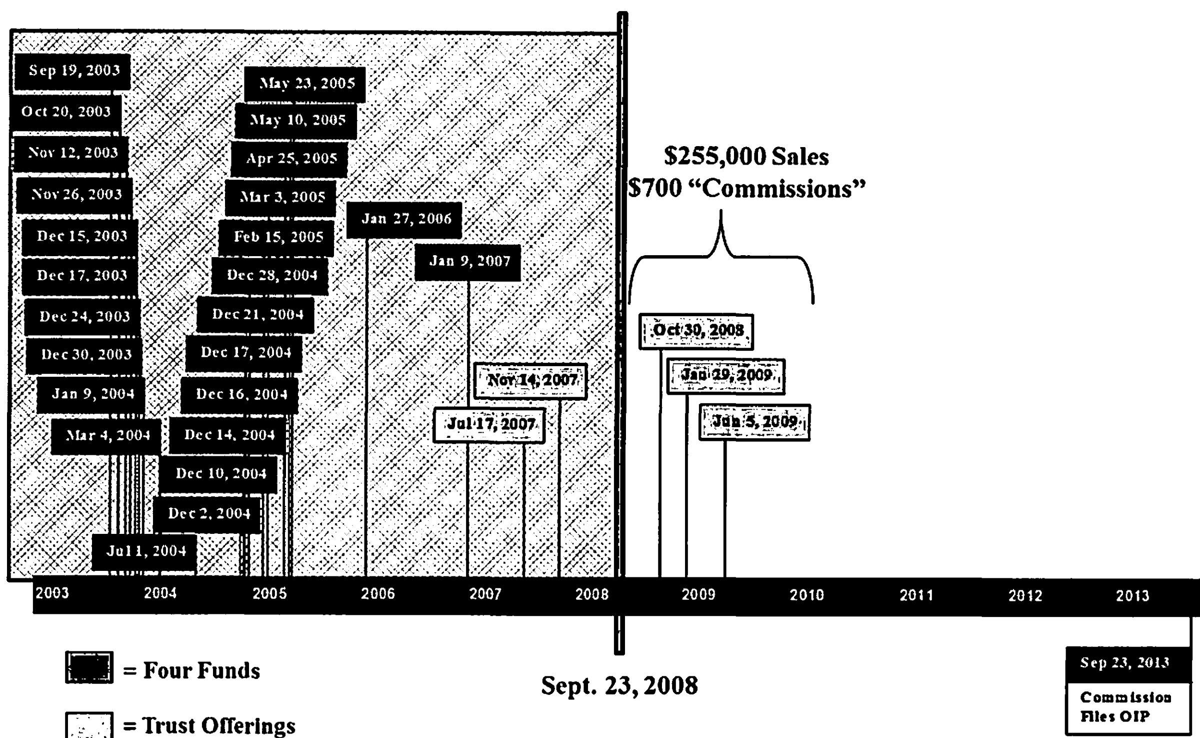
[12] The ALJ also ignored several undisputed facts about Mr. Livingston, which she nevertheless highlighted to conclude that Gamello did not violate the anti-fraud provisions of the federal securities laws. ID at 101-02. Just like Gamello, except for a single sale, all of Mr. Livingston's Four Fund sales occurred shortly after the Funds began -- all FAIN sales were within first 3 months it was offered; all TAIN sales, save one, were within first 8 months of the offering; all FIIN sale were within first 6 months, and only FEIN sale was within the first 6 months. Div. Ex. 2 at 108. Moreover, just like Gamello, Mr. Livingston did not sell any Four Funds after December 2007 -- in fact, his last sale was in January 2007. *Id.* And, just like Gamello, Mr. Livingston did not sell any of the Trust Offerings after August 2009 -- his last sale was in June 2009. *Id.* It was arbitrary and capricious for the ALJ to apply one set of rules for Gamello, while ignoring the same facts as to Mr. Livingston.

[13] While no bar is appropriate, even if the Commission overrules every point of error raised by Mr. Livingston, at a minimum, he should not be treated differently than the other respondents and should only receive a year suspension.

Division's claims are based on conduct first accruing and occurring outside the statute of limitations:



While earlier events may be used to "shed light" on the character of conduct within the statute of limitations, a timely claim cannot only rely on evidence outside of the statute of limitations. *Local Lodge No. 1424 v. Nat'l Labor Relations Bd.*, 80 S.Ct.822, 826 (1960). If it is, the timely claim is not really a valid claim; it is a lawful practice cloaked in the illegality of a time-barred event. *Id.* This is a perversion of the statute of limitations and allows the Division to circumvent § 2462 to prove claims they otherwise would not be able to prove. *Id.*

Both *SEC v. Microtune* and *SEC v. Graham* considered and rejected the use of time-barred actions to prove conduct within the statute of limitations. In *Microtune*, the Court dismissed all claims reliant upon misrepresentations made in filings more than five years before the SEC complaint. *SEC v. Microtune*, 783 F.Supp.2d at 871. Specifically, the court rejected an argument that a filing within the statute of limitations was actionable for misrepresentation based on the "materially false and misleading" conduct of the defendant outside of the SOL. *Id.* at 891 n.37. The

court noted this stretch of the limitations period created extensive liability beyond the limitations period, eroding the purpose of the statute of limitations. *Id.*

Graham involved a series of real estate investments that were actually unregistered securities. *SEC v. Graham*, 21 F.Supp.3d 1300, 1302 (S.D. Fl. 2014). The SEC attempted to establish violations within the statute of limitations by relying on time-barred conduct to show the actions taken during the statute of limitations were wrongful. *Id.* at 1314. For instance, the SEC claimed the prior relationship between a company run by a defendant and the violating "real estate" company was sufficient to impute time-barred violative behavior on the defendant. *Id.* The court rejected this argument stating that the evidence could not prove a violation occurred within the applicable limitations period. *Id.* The court refused to allow the SEC to create violations within the statute of limitations based upon their relationship with activities outside of limitations. *Id.*

Courts outside of the securities context have held similarly. In *US v. EME Homer City Generation L.P.*, the court determined that the new owners of a coal-fired power plant could not be held liable for their ongoing "Prevention of Significant Deterioration," ("PSD") program "violations" because the current violations were dependent on the old owners failure to obtain a PSD permit upon construction of the power plant. *EME Homer City Generation*, 823 F.Supp.2d at 285. This same rationale has been applied in the context of the statute of limitations contained in § 10(b) of the National Labor Relations Act. *Local Lodge No. 1424,* 80 S.Ct. at 822. In *Local Lodge*, the Supreme Court held an unfair union security clause claim could not be considered a violation of the National Labor Relations Act. *Id.* at 827. The Court held that the "entire foundation for the unfair labor practice charged" was the unlawful collective bargaining agreement executed outside of the statute of limitations. *Id.* The union security clause was legal on its face and relying on the time-barred agreement was an attempt to "convert what is otherwise legal into something illegal." *Id.* at 828.

Much like the new owners in *EME Homer City Generation*, Mr. Livingston's later decisions regarding the Trust Offerings cannot be considered violations without the violative conduct that occurred outside of the statute of limitations. *EME Homer City Generation*, 823 F.Supp.2d at 285. The Trust Offerings claims are wholly dependent on the untimely Four Funds violations. To allow conduct relating to the Four Funds to serve as the basis for the Trust Offerings claims would inappropriately stretch the limitations period to bring in Four Funds conduct which is time-barred by § 2462. Similar to the unfair security clause claim in *Local Lodge*, without the "red flags" and securities violations that occurred during the Four Funds time period, there is absolutely no valid claim for misrepresentation or failure to disclose by Mr. Livingston. To hold otherwise contravenes both significant case law as well as the critical public policy supported by the statute of limitations.

D. Objections to the ALJ's Factual Findings

While it is unclear to what extent the ALJ relied upon the "Factual Findings" relating to Mr. Livingston not discussed in connection with her conclusions and punishment (ID at 41-47), there are substantial errors in those findings. Most notably, Mr. Livingston objects to the following "findings":[14]

- The ALJ states that "Mr. Livingston claimed he did not know that Smith used $2 million of the FIIN offering proceeds to redeem investors in a pre-2003 alarm notes ...." ID at 43. The ALJ's statement that "Mr. Livingston claimed" to not have the knowledge is further evidence of the bias against Mr. Livingston in this proceeding -- there was never any evidence or suggestion that Mr. Livingston was aware of Smith's use of FIIN offering proceeds.

- The ALJ stated that Mr. Livingston received FOCUS reports. ID at 43. However, the ALJ omitted that Mr. Livingston only received the FOCUS reports when MS&Co. was participating in an underwriting so that Mr. Livingston could assess the firm's net capital position. Tr. 5199. Mr. Livingston did not regularly receive FOCUS reports nor did he ever receive any reports that gave him concern about the firm's financial status. Tr. 5200.

[14] It is not reasonably possible to include context to every statement that the ALJ chose to include. Mr. Livingston reserves the right to include additional information on any evidence relied upon by the Division in its Response to either the Joint or Individual Brief.

- Mr. Livingston objects to the ALJ's reliance on Division Exhibit 623. Not only is it hearsay (an objection not entertained by the ALJ during the hearing), but it's pure speculation to what "entity" or restructuring Smith was discussing. Indeed, the "entity" to which Smith appears to be referencing is a potential new entity for an IPO. The e-mail in no way indicates a financial issue with the Four Funds and any suggestion otherwise is pure speculation.

- Mr. Livingston objects to the ALJ's reliance on Division Exhibit 620 (ID at 44) because the e-mail was a privileged communication between Mr. Livingston and counsel. The ALJ incorrectly found that Mr. Livingston had waived the privilege although he had not testified about advice given from Mr. Goldstein on potential conflict of interest issues. Tr. 5327-28.

- Mr. Livingston objects to the ALJ's reliance on Division Exhibit 631. ID at 44. While the redemption issue was found to be irrelevant by the ALJ, the e-mail at issue does not indicate that Mr. Livingston was aware of a policy of having to replace customers before an investor could redeem their investment. Exhibit 631 does not involve a redemption of an investor whose note had matured. Rather, the e-mail involved a May 2007 request from an investor for an early withdrawal from his TAIN investment that was not due to mature until December 2009. Investors had no right to require repurchase of the notes before maturity. FoF 57. The Division's own expert admitted that there are no e-mails or other documents that indicate that Mr. Livingston was told investors whose notes had matured had to be replaced before they could be redeemed. FoF 56.

- Mr. Livingston objects to the ALJ's finding that Mr. Livingston "acknowledged that Rees told him [McGinn and Smith] were 'pulling money out of TDM or Verifier'." ID at 45. The ALJ omitted that Mr. Livingston made clear in his testimony that Rees told him that McGinn and Smith were legitimately making money on separate investment vehicles, like TDM and Verifier, in which Mr. Livingston did not have an interest. Mr. Livingston did not believe that McGinn and Smith were stealing investor funds, but were making money off of something that Mr. Livingston had no interest in. Tr. 2309-2311.

- The ALJ claimed that Mr. Livingston "did not mention any financial problems at MS & Co." in connection with William Carroll's purchase of TDMM Cable on June 9, 2009. ID at 46. Mr. Carroll did not testify at the hearing. And, Mr. Livingston did not testify that he "did not mention any financial problems at MS & Co." Instead, Mr. Livingston testified that he did not discuss the liquidly issues concerning the Four Funds that he noted in his December 2007 memorandum. Tr. at 5339-40. Mr. Carroll had not invested in the Four Funds and Mr. Livingston's concerns about the performance of the Four Funds in December 2007 had no relevance to Mr. Carroll's purchase in June 2009 of a trust investing in triple-play contract receivables. *Id.*

- Mr. Livingston objects to the ALJ's recitation of the testimony of Ferris and LaFleche, both because the ALJ omits any cross-examination points entirely and largely omits Mr. Livingston's testimony about his interaction with Messrs. Ferris and LaFleche. *See* FoF 61-77. In the one instance that the ALJ does note Mr.

Livingston's testimony (concerning whether one of LaFleche's purchaser questionnaires was changed), the ALJ failed to note that the change to the questionnaire was inconsistent with LaFleche's testimony because the new asset range still would have made LaFleche an unaccredited investor. FoF 77.

IV. CONCLUSION

The Commission should dismiss all charges against Livingston.

Dated: July 20, 2015

By:

Matthew G. Nielsen
Crystal L. Jamison
ANDREWS KURTH LLP
1717 Main Street, Suite 3700
Dallas, Texas 75201
Telephone: (214) 659-4400
Facsimile (214) 659-4401

ATTORNEYS FOR THOMAS LIVINGSTON

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 450(c) that this Opening Brief of Thomas Mr. Livingston is 9,819 words, exclusive of pages containing the table of contents, table of authorities, this certificate, the certificate of service, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits, and is therefore within the word limit set by the Commission's June 5, 2015 order.

By:
Matthew G. Nielsen

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I filed the foregoing pleading with the Office of the Secretary of the Commission via facsimile at (703) 813-9793, and served copies on the following persons via regular mail and email, except where otherwise indicated.

David Stoelting, Esquire
Haimavathi V. Marlier, Esquire
Michael D. Birnbaum, Esquire
U.S. Securities and Exchange Commission
Division of Enforcement
Three World Financial Center
New York, NY 10281
stoeltingd@sec.gov
marlierh@sec.gov
birnbaumm@sec.gov

Hon. Brenda Murray
Chief Administrative Law Judge
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20545-2557
alj@sec.gov

Roland M. Cavalier, Esquire
Tuczinski, Cavalier & Gilchrist, P.C.
54 State Street
Suite 803
Albany, NY 12207
RCavalier@tcglegal.com

Counsel for Respondent Frank H. Chiappone

Mark J. Astarita, Esquire
Sallah, Astarita & Cox LLC
60 Pompton Avenue
Verona, NJ 07044
mja@sallahlaw.com

Counsel for Respondent Andrew G. Guzzetti

Gilbert B. Abramson, Esquire
One Presidential Boulevard, Suite 315
Bala Cynwyd, PA 19004
(610) 664-5700
(610) 664-5770 (Fax)
gabramson@gbalaw.com

Counsel for Respondent William F. Lex

M. William Munno, Esquire
Brian P. Maloney, Esquire
Seward & Kissell LLP
One Battery Park Plaza
New York, NY 10004
munno@sewkis.com
maloney@sewkis.com

Counsel for Respondent Philip S. Rabvinovich and Bryan T. Mayer

Date: July 20, 2015

By:
Matthew G. Nielsen