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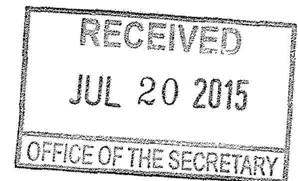
UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



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

PHILIP S. RABINOVICH'S INDIVIDUAL BRIEF

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Preliminary Statement

The evidence conclusively established that Rabinovich 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]

Rabinovich 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. Rabinovich 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. He continued to research and monitor his clients' investments, went beyond what was required of a registered representative, and went to extraordinary lengths to help his clients after leaving MS&Co. in October 2009.

The evidence irrefutably demonstrated that there were no "red flags" that should have caused Rabinovich to conduct a heightened inquiry. The PPMs of the Four Funds – the first of which was issued in September 2003 – contained industry standard provisions. The January 8, 2008 meeting at which it was announced that the interest rate on just the *junior* notes of the Four Funds was being reduced was unremarkable given the global liquidity and economic crisis. The ALJ's and the Division's position that Rabinovich should have "investigated" after the January 2008 meeting and "resolved" the so-called red flags is unsupported by the evidence. The contention is also unrealistic: Rabinovich, who was in the New York branch office, could not have uncovered McGinn and Smith's secret fraud in Albany. No case has ever imposed such a duty of investigation on a registered representative in these circumstances. In any event, neither the PPMs nor the January 2008 meeting were red flags that should have caused

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

Rabinovich to "investigate" or cease offering the separate and unrelated Trust Offerings, which had nothing to do with the Four Funds, and Rabinovich did not offer the Four Funds after January 2008.

In erroneously concluding that Rabinovich's conduct was fraudulent or negligent, the ALJ relied on "boiler room" 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 that Rabinovich knew about McGinn and Smith's secret theft and diversion of funds, and no witness testified that Rabinovich made a material misstatement or omission about any McGinn Smith Security, let alone within the governing five-year statute of limitations.

Rabinovich also took reasonable steps to avoid participating in any distribution in alleged violation of Securities Act Section 5. He presented McGinn Smith Securities to his accredited investor clients, and those few who were not accredited either had been accredited or had the requisite knowledge and experience in financial and business matters to evaluate the merits and risks of the investment. Rabinovich followed MS&Co.'s written procedures for offering private placements; had his clients complete subscription agreements and questionnaires to confirm their accredited status or knowledge and experience; spoke with and was informed by McGinn Smith's legal, compliance and investment banking departments that the securities were exempt from registration; and knew outside counsel had advised MS&Co. that the offerings were exempt from registration. Rabinovich 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 Rabinovich has a standing objection), an abbreviated statement of facts is presented.[2]

A. Philip Rabinovich

Rabinovich is [redacted] He has been in the securities industry since graduating Tufts University in 1996, during which time no customer has ever filed a complaint against him. Rabinovich worked in investment banking at Merrill Lynch and Bear Stearns before joining Mercer Partners as a registered representative in 1999. From 2001 to 2009, Rabinovich worked as a registered representative in MS&Co.'s New York City branch office. At MS&Co., Rabinovich proposed diversified portfolio allocations for his clients, who were mostly accredited investors with non-discretionary accounts, less than 20% of which included alternative investments, such as McGinn Smith Securities, which his family members also purchased. Rabinovich was never instructed to offer McGinn Smith Securities to clients. FoF ¶¶ 1-13, 377, 364, 366, 367, 385.

In October 2009, Rabinovich, together with Respondents Mayer and Rogers, left MS&Co. to form RMR, a SEC-registered investment advisory firm that provides a variety of

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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.

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. Rabinovich is a registered investment advisor representative with RMR. FoF ¶¶ 32-37.

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., Rabinovich 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 ¶¶ 49-52. 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 performed at sales meetings, which was similar to how Rabinovich learned about the due diligence for the McGinn Smith Securities at issue in the OIP. FoF ¶¶ 59-75.

Rabinovich 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. Pine Street was formed around the same time as the Four Funds and, similar to the Four Funds, investors purchased interests pursuant to the terms of a PPM and a subscription agreement. 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. Pine Street was not the subject of the OIP's allegations.

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"). Rabinovich provided all of his clients and prospective clients with the Offering Documents prior to investing in McGinn Smith Securities. No witness – whether called by Rabinovich or the Division – testified otherwise. Nor did any witness testify that they were directed by Rabinovich to complete a Purchaser Questionnaire other than truthfully and to the best of their knowledge. FoF ¶¶ 95-98.

The cover page of the PPMs for the Four Funds stated, 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 clearly disclosed that (i) "[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) "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) the Four Funds' 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. Rabinovich Fulfilled His Duties as a Registered Representative

Rabinovich conducted reasonable diligence to understand the product and his customers so he could make suitability determinations or investment recommendations to a client. Rabinovich 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. Similarly, no FINRA rule purports to require an individual broker to review the investment banking department's due diligence files. FoF ¶¶ 164-83.

After analyzing the product and assessing customer suitability, Rabinovich called or met the client, again explained the investment, reviewed the PPM with the client, and asked the client to read the PPM and raise any questions or concerns. Rabinovich followed up, and again reviewed the risks and the investment. If the client decided to proceed, Rabinovich sent the subscription documents, which the client would complete and send to MS&Co. employee, Patty Sicluna, in Albany. Rabinovich also followed the procedures detailed in the MS&Co. compliance manual for offering private placements. FoF ¶¶ 193-94.

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

1. The PPMs Contained Standard Disclosures

No evidence was presented that the disclosures in the PPMs for McGinn Smith Securities were other than ordinary and customary in the industry. A comparison to the PPMs with other MS&Co. private placements – none of which formed the basis for the Division's fraud charges – makes clear that the disclosures were standard. Rabinovich, 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 Rabinovich

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 Rabinovich, except for some details of a few loans to local Albany-area businesses, which Smith claimed confidentiality over. Smith discussed with Rabinovich the "types of investments he was making, both specific investments and specific sectors" (Tr. 1937:11-17), and Rabinovich knew the major investments made by the Four Funds, including alseT, Coventry, trust preferred CDOs (Dekania and InCaps), the ATM deals (Cherokee and Cochise), Pine Street, Deerfield, GSC, CMET, Palisades Pictures, Exchange Boulevard, alarm contracts, Vidsoft, Vigilant and Maracay Homes. From time to time, Rabinovich received schedules of investments and financial information for each of the Four Funds. FoF ¶¶ 320-28.

3. Rabinovich 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. Rabinovich was never told that his client could not redeem unless a replacement investor first had been found. Rabinovich's clients redeemed their Four Funds notes and Trust Offerings certificates during 2006 and 2007, and timely received interest payments from 2003 through 2007. Nowhere in the Division's nearly 400 exhibits is any email or document establishing that Rabinovich knew about or was told about a redemption policy. Prior to the maturity date of a private placement, MS&Co. asked investors if they wanted to redeem or "roll" the investment. When a client elected to redeem, the broker had the right of first refusal to see if one of his clients was interested in the private placement security. If not, it went into MS&Co.'s inventory for other brokers to present to their clients. During 2003 through 2009, MS&Co. tried to make a secondary market – match a buyer and a seller to trade a security – which was not a red flag, but rather an accommodation, as the PPMs stated the private placement investments were illiquid. FoF ¶¶ 329-35. The ALJ agreed: "[T]here is no evidence that a registered representative who did not find a new purchaser was ever unable to redeem a client. It was reasonable for the registered representatives to accept [MS&Co. 's] efforts to create a secondary market for illiquid securities." 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 global economic recession, but it was unrelated to, and did not affect, the Trust Offerings. After the meeting,

Rabinovich explained the impairments to his clients, and that MS&Co. would be attempting to work through the adverse market and economic environment. Rabinovich viewed MS&Co. 's 15-year restructuring plan as conservative, and believed it was achievable. FoF ¶¶ 338-43; Div. Exs. 132, 195; RMR Ex. 855.

5. Rabinovich 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 Rabinovich was unaware about the Firstline bankruptcy before September 2009. Rabinovich was shocked by not receiving disclosure earlier, and he immediately informed his Firstline investors. Although the Division contends that Rabinovich presented Trust Offerings to two customers after learning of the bankruptcy based on summary charts, Rabinovich explained that he presented, and his clients subscribed to, those investments in August 2009 before he learned of the bankruptcy. One week later, Rabinovich, Mayer and Rogers started RMR. FoF ¶¶ 349-51, 354.

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

During 2003 through 2009, Rabinovich did not make any material misrepresentations or omissions to any client about a McGinn Smith Security.

Five of Rabinovich's clients testified in person, all of whom were accredited investors at the time they invested in McGinn Smith Securities. Nine other investors who were subpoenaed, but unable to travel to the hearing, submitted affidavits, but the ALJ refused to admit or consider them. Of those who did testify, three were called by Rabinovich (Rowe, Favish, and Kogan); two by the Division (Patel and Chapman). They described how Rabinovich

provided them with PPMs that they reviewed with him and later signed if they chose to invest. As one investor explained, "Phil always provided thoughtful analysis," and "he was providing a valuable resource to me." Tr. 4375:21–4377:2. Another testified that Rabinovich presented investment opportunities that were within his comfort zone and consistent with his tolerance for risk. Rabinovich's investors described him as "a man of honesty and high integrity," and "thorough and honest and straightforward in his dealings with me." RMR Ex. 625, ¶ 12. Three of the testifying investors have remained as Rabinovich's client at RMR. FoF ¶¶ 371-415.

The two investors called by the Division admitted that they made their own investment decisions and did *not* invest in some of the investments that Rabinovich presented to them. And, although they claimed that they thought their investments were "safe," they admitted that nobody told them so, and they signed subscription agreements in which they acknowledged their investments involved "substantial risk." Chapman, who the Division only contacted *after* the OIP was filed, made one investment in a McGinn Smith Security, and did so in March 2005. Patel agreed to testify for the Division "if you can help me to get my money back." Tr. 198:11–199:2; FoF ¶¶ 398-415.

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

The evidence established that the Division tried to find support for the allegations in the OIP *after* it was filed. Rabinovich learned from clients that the Division first contacted them *after* the OIP was filed. As a result of the Division's calls, Rabinovich lost several clients, and another withdrew a portion of his account. Nevertheless, as the *Brady* disclosures revealed, Rabinovich's clients told the Division that Rabinovich is "honest," "ok," "got hurt a lot," "read her the 'element of risk' for every deal," was "[h]onest as the day is long," and "did nothing wrong." FoF ¶¶ 685-89; RMR Ex. 873.

Rabinovich explained in his testimony that he believes he "deserve[s] to continue to work, to continue to provide for my family and try to overcome the damage that ... McGinn Smith has done to me.... I just want the opportunity to continue to do what I love to do and I know that I can do to the best of my ability for my clients that depend on me and for my family that depends on me." Tr. 4489:2–4490:18. Rabinovich described the effect this proceeding has had on him and his family as "tremendously painful," causing "the loss of clients," and an "enormous hit to my reputation." *Id.* FoF ¶¶ 690-91.

ARGUMENT[3]

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

The ALJ erred in concluding that "Rabinovich willfully violated Securities Act Section 17(a)(1) and Exchange Act Section 10(b)(5) and Rule 10b-5 because he was reckless in offering and selling securities," and that he "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 108. 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 Rabinovich did *not* violate the law, and arbitrarily and capriciously applied facts to law. Rabinovich was neither reckless nor negligent, and there was no evidence that he made any material misrepresentations or omissions. The Commission should reverse.

A. Rabinovich Did Not Act With Scienter

In concluding that Rabinovich 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

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

98, 109 (2d Cir. 2009), the ALJ cited just three "facts": (1) Rabinovich "falsely represented to Chapman that FEIN was a low risk investment," (2) "he did not make Patel aware of material facts surrounding the Trust Offerings," and (3) "he failed to investigate several red flags that were apparent to him by January 8, 2008." Decision at 108. None is supported by the record.

Patricia Chapman, a former systems engineer and an accredited investor with a net worth greater than $1,000,000 when she invested in McGinn Smith private placements, was first contacted by the Division to be a witness only a few months before the hearings began. As relevant here, Chapman made a single investment in FEIN some eight years prior to the filing of the OIP. As was his practice, Rabinovich provided Chapman with PPMs to review and discuss with him prior to making any investment decision. Chapman testified that she made her own investment decisions, as shown by her decision *not* to invest in TAIN after receiving the offering documents from Rabinovich in November 2004. Further, the uncontroverted documentary evidence established that by signing her FEIN subscription agreement, Chapman expressly acknowledged that she read and understood the FEIN PPM, the front cover of which stated in bold print, "**[i]nvesting in the notes involves a high degree of risk**," Div. Ex. 6 at 1, and that she relied on herself – not Rabinovich – in evaluating the merits and risks of her investment in FEIN. FoF ¶¶ 409-15; RMR Ex. 820. The ALJ ignored these contemporaneous written attestations, and instead credited Chapman's oral testimony, some eight years after-the-fact, that she supposedly understood FEIN to be a "safe bond" based on her conversations with Rabinovich. Tr. 2184:7–2185:8. This conclusion is not only belied by the documentary evidence (RMR Ex. 820), it is contrary to law. *See* Joint Br. at 21-22. In any event, any claims by the Division arising out of Chapman's single 2005 investment are plainly time-barred. *See* 28 U.S.C. § 2462.

Ketan Patel, an accredited investor [redacted] [redacted] and an annual income between [redacted], agreed to testify for the Division "if you can help me to get my money back." Tr. 198:25–199:1. Similar to Chapman, Patel received PPMs from Rabinovich to review before deciding whether to invest, and made his own investment decisions. As relevant here, Patel made three investments in the Trust Offerings, the largest of which ($25,000) preceded the OIP by more than five years. Although Patel claimed that he *thought* his investments were "safe," he admitted that nobody *told* him they were safe. Tr. 157:6-9. Nevertheless, Patel expressly acknowledged in his subscription agreements that he relied on himself in evaluating the merits and risks of his investments in the Trusts. Most significantly, however, the "material facts surrounding the Trust Offerings" that the ALJ concluded Rabinovich "did not make Patel aware of" (i.e., substantial risk factors, fees and expenses), Decision at 108, were fully disclosed in the PPMs that Patel attested to reading and understanding at the time he invested. FoF ¶¶ 398-408; RMR Exs. 707, 710, 711. 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.

The ALJ also erroneously concluded that Rabinovich was reckless in failing "to investigate several red flags that were apparent to him by January 8, 2008." Decision at 108. 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.[4] As a threshold matter, it is undisputed that Rabinovich did not sell any Four Funds' notes – junior or otherwise – after December 2007. FoF ¶ 552. Thus, the ALJ effectively concluded that Rabinovich 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 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.

[4] The ALJ concluded that there was no "redemption policy" announced by MS&Co. in December 2006, *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 alleged red flag –the September 2009 disclosure of the Firstline bankruptcy – did not yet exist in January 2008. Further, the evidence established that Rabinovich did not present any McGinn Smith Securities to his clients after he learned of the Firstline bankruptcy. FoF ¶¶ 349-54.

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. It is telling that none of the other 35 to 50 brokers of MS&Co. who presented McGinn Smith Securities to clients told them that he or she was aware of any red flags. FoF ¶¶ 318-19.

Finally, the January 2008 meeting, at which Rabinovich 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. Rabinovich was unhappy and disappointed about the news conveyed at the meeting, but not shocked given what was going on in the credit and equity markets. After the meeting, Rabinovich explained the impairments to his clients, and that MS&Co. would be attempting to work through the adverse market and economic environment. FoF ¶¶ 338-43.

In sum, no reasonable and unbiased trier of fact could consider the evidence presented at the hearings and conclude that Rabinovich acted with scienter, particularly where, as

here, Rabinovich and his family invested, and lost, significant sums in McGinn Smith Securities – far more than Rabinovich earned selling them. Not surprisingly, the ALJ cited only a single case to supposedly support her conclusion. Decision at 108 (citing *SEC v. Milan Capital Group, Inc.*, 00 Civ. 108, 2000 U.S. Dist. LEXIS 16204 (S.D.N.Y. Nov. 9, 2000)). *Milan*, however, is easily distinguishable, as in that case, the defendant-broker enabled the sale of phony IPO securities that were obviously a sham. *Milan* at *5-6, *13-21. Here, Rabinovich presented legitimate private placements to his accredited investor clients when suitable, which securities suffered losses in a difficult market. Rabinovich in fact had less of a financial incentive to present McGinn Smith Securities than equities as commissions on equity trades were higher than private placements. Indeed, private placements comprised less than 20% of his client's assets. FoF ¶ 384. That Rabinovich, 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. Rabinovich Acted Prudently and Fulfilled His Duties as a Registered Representative

Equally unsupported is the ALJ's conclusion that Rabinovich "violated Securities Act Sections 17(a)(2) and (a)(3) because, acting at least negligently, he obtained money by means of untrue material statements: his representations that he had some reasonable basis for recommending the securities and the omissions that he was simply repeating the issuer's representations," which the ALJ concluded "operated as a fraud or deceit on his clients." Decision at 108. Aside from repeating statutory language, the ALJ failed to identify any "untrue material statements" Rabinovich made to any investor about any McGinn Smith Security, or any representations Rabinovich made to any investor about any McGinn Smith Security that

supposedly did not have a reasonable basis. The overwhelming evidence established that Rabinovich acted prudently and fulfilled his duties as a registered representative.

The ALJ's naked assertion that Rabinovich's "testimony was often inconsistent or contradicted by other evidence," Decision at 106, ignored the evidentiary record. While stating that "[i]t is impossible to know how much Rabinovich knew about" the Four Funds before the January 2008 meeting, the ALJ ignored Rabinovich's testimony, contemporaneous documents, and her own recital (*id.* at 106-07) which made clear that Rabinovich discharged his duties as required.

For example, Rabinovich did not present FIIN until some three years after it was offered and he saw some of the investments by FIIN, an undisputed fact acknowledged by the ALJ. Decision at 107. Rabinovich knew that FIIN was generating a weighted average annual return of 17.6% and knew specifics about more than $10 million of investments by FIIN, facts that were expressly noted in a Pine Street presentation that Rabinovich reviewed. RMR Ex. 46; Tr. 4436:10–4437:4. Unexplained by the ALJ is how having awareness of FIIN's investments prior to presenting it to clients in 2006 supports the assertion that "Rabinovich did not conduct a sufficient investigation into the Four Funds and Trust Offerings" to recommend them to clients, or that "Rabinovich dismissed a number of [unidentified] red flags." Decision at 107. It does not.

Moreover, the ALJ's reliance on Rabinovich'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 Rabinovich 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. The SEC never provided Rabinovich 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, which the ALJ has now termed "investigative" testimony.[5] Rabinovich did not learn that the SEC was considering charges against him until some 17 months after his non-party deposition. Had Rabinovich known his actions (or supposed inactions) were in question, he would have refreshed his recollection and provided *additional* – not *different* – information at his non-party deposition to demonstrate he fulfilled his obligations as a registered representative. The hearing was effectively Rabinovich'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 ¶¶ 527-30, 535, 537.

Nor was Rabinovich's non-party deposition testimony inconsistent with his trial testimony. In fact, Rabinovich's non-party deposition testimony only further demonstrates the steps he took to understand the products he offered to his clients, notwithstanding the Division's selective and misleading use of it at the hearing that was endorsed by the ALJ. For example, the Division purported to impeach Rabinovich's trial testimony that he knew of the due diligence performed on the Four Funds' investments by reputable Wall Street institutions, cherry-picking a statement from his non-party deposition that "Mr. Smith did the due diligence." Tr. 1967:15-18.

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5 Decision at 56. 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. Rabinovich likewise objected and filed a motion to that effect.

After Rabinovich noted the Division was mischaracterizing his testimony and even informed the ALJ that his answer was clarified "if you keep reading down [in the deposition transcript]," Tr. 1969:6-8, the ALJ denied Rabinovich the opportunity to clarify, stating "we can't go through the whole transcript." Tr. 1971:20-21. Later in the proceedings, Rabinovich's counsel did clarify the record with the following additional testimony from Rabinovich's non-party deposition: "I am referring to the offering within the [Four Funds] notes. So if you are talking about publicly traded companies or transactions that are underwritten by investment banks [as many investments of the Four Funds were], I think there is a level of due diligence and product and industry scrutiny that is assumed at that level." Tr. 2173:7-12.

In any event, the overwhelming evidence established that Rabinovich understood and fulfilled his duties as a registered representative. Rabinovich understood the product before presenting it to his clients. He analyzed the investment by (a) attending management's presentation of the investment, (b) reviewing the PPM, (c) asking follow-up questions of management, (d) discussing the investment opportunity with his colleagues, and (e) making a suitability determination regarding specific clients. Rabinovich also did independent research and spoke with others at MS&Co. Rabinovich determined client suitability by having detailed discussions with clients about their financial picture, investment objectives, risk tolerance, and overall goals, after which Rabinovich prepared plans for clients regarding asset allocation, plans he continues to prepare to this day. FoF ¶¶ 188-94.

Rabinovich knew about the due diligence performed and product and industry scrutiny by investment banks on large portions of the investments made by the Four Funds, including Deutsche Bank, Credit Suisse, Stifel Nicolaus, Merrill Lynch, Sandler O'Neill, and Citibank as did the SEC. *See* Livingston Ex. 103, at 12 (SEC's post-examination letter to

MS&Co. in February 2004 noting 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"). Rabinovich also informed himself about the due diligence performed by MS&Co.'s investment banking department through discussions with McGinn, Smith, Matthew Rogers, the Pine Street bankers and others, as well as through management's presentations of the investments. For example, when FIIN was first presented to brokers, they were told the details of the types of investments that would be made and the debt coverage for the senior, senior subordinated and junior note tranches. The debt coverage ratios for the senior and senior subordinated notes were in fact "substantially greater" than the Pre-2003 Trust Offerings. FoF ¶¶ 195-96.

Further, Rabinovich, together with Respondents Mayer 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 Rabinovich's *independent* analysis of these various investment opportunities, the team often reached different conclusions. For example, Rabinovich, after conducting his own independent inquiry, decided not to offer MSTF to his clients; Mayer, after conducting his own independent inquiry, decided not to offer the TDM Luxury Cruise Trust Offering 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.

While Smith was the ultimate decision-maker for investments made by the Four Funds, Rabinovich knew that Smith had a "large infrastructure around him that assisted him in the investment selection process." Tr. 1925:16-22. Among others, Tim Welles and Mike Lasch of Pine Street, and Scott Weisman, head of MS&Co.'s investment banking, assisted Smith in the

investment selection process. Rabinovich was aware of internal oversight (legal, compliance, accounting), outside counsel (Gersten Savage), outside accountants (Piaker Lyons) and regulatory oversight of Smith in managing the Four Funds. FoF ¶¶ 197-200.

At the hearing, Rabinovich testified at length about his knowledge of the due diligence performed on many of the Four Funds' investments. For example, Rabinovich worked closely with Weisman, who worked in the New York City branch office and conducted due diligence on Vigilant and Vidsoft, two Four Funds investments. Rabinovich learned of the due diligence performed on Dekania and CMET, also Four Funds investments, through his review of offering materials and his attendance at due diligence meetings. Rabinovich reviewed presentations and offering documents for Maracay Homes, GSC and Deerfield. The Four Funds invested in all of them. Rabinovich learned of the Four Funds' investment in 74 State Street through Welles, who was involved in due diligence on the investment, and Rabinovich met with management of State Street Hospitality, which owned 74 State Street. Rabinovich knew alseT was an intellectual property, royalty business in which the Four Funds had invested, and that Deutsche Bank and Goldman Sachs, among others, were interested in financing alseT. FoF ¶¶ 201-11; *see also*, FoF ¶¶ 46, 195-200.

Ignoring the uncontradicted evidence, the ALJ declared "there is no persuasive evidence that before January 8, 2008, Rabinovich requested balance sheets or factual information about the Four Funds or Trust Offerings.... [He] did not conduct a sufficient investigation, dismissed a number of red flags ... and parroted Smith's optimistic statements about the Four Funds to his customers as fact." Decision at 107. 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. For example, no witness testified that Rabinovich "parroted Smith's

optimistic statements about the Four Funds." Rabinovich also asked for and received balance sheets for the Four Funds between 2003 and 2007, which showed the Four Funds' assets. Rabinovich noted that the balance sheets held the investments at cost, and thus did not reflect the current value of the investments. Rabinovich also checked with Smith regarding the performance of the Four Funds and reviewed his clients' account statements to confirm that they had received interest on their investments. And, investors in the Four Funds did receive 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. Rabinovich had no complaints from clients about their investment in the Four Funds during 2004 through 2007, and he had no reason to be concerned about the performance of the Four Funds until January 2008. FoF ¶¶ 216-20.

Particularly egregious was the ALJ's reference to Rabinovich's October 20, 2008 letter to Stan Rowe, noting his view that a "fifteen-year amortization [of Four Funds notes] was too conservative," Decision at 58, meaning that the economic recession may resolve itself in fewer than 15 years. The ALJ failed to mention that the letter was sent to Rowe, who is Rabinovich's current client at RMR, testified on behalf of Rabinovich at the hearings, and referred to him as "thorough and honest and straightforward in his dealings with me." Tr. 4377:3-15; FoF ¶¶ 371-80. More fundamentally, however, the ALJ failed to explain how Rabinovich's October 2008 letter concerns any purchase by any client of TAIN or FAIN, as it is uncontroverted that Rabinovich did not offer any Four Funds notes after December 2007. FoF ¶ 552.

Rabinovich also performed his duties to understand the Trust Offerings. Similar to the Four Funds, he did so by attending management presentations and reviewing the PPMs,

and his contemporaneous notes (as well as his testimony) reflected his analysis and understanding of those investments. RMR Exs. 863-70. In addition, the PPMs for the Trust Offerings fully disclosed the underlying investments and the due diligence conducted on those investments. Based on management's presentations, the PPMs, and his understanding of the investments, Rabinovich viewed the Trust Offerings favorably. For example, Rabinovich believed the Benchmark investment, with its five-tier amortization structure, was very achievable given the distressed purchase price for the asset and "terminal value of eight times [EBITDA]." Tr. 4471:9–4472:5. As part of his due diligence, Rabinovich calculated the return needed to pay interest and principal before offering Benchmark to clients. Rabinovich explained that once the senior Benchmark notes were amortized, the asset should, under normal market conditions, potentially sell for 2½ times the price the Trust paid for it. Benchmark investors received their principal and interest payments until April 2010 when the Receiver was appointed. FoF ¶¶ 227-34.

In one of the most glaring examples of the arbitrary and capricious nature of the Decision, the ALJ ignored Rabinovich's testimony about Benchmark, yet noted the following about Gamello in concluding he did *not* violate the antifraud provisions of the federal securities laws: "[I]t was not unreasonable for Gamello to have accepted McGinn's assertions that the contracts underlying Benchmark were bought at a low price, and that, if the economy improved, the contracts could likely be sold for much higher multiples and the offering could earn the projected returns." Decision at 102. The ALJ also ignored that Rabinovich, like Gamello, did not offer the Four Funds after December 2007, FoF ¶ 552, and did not offer the Trusts after he learned of the Firstline bankruptcy in September 2009, FoF ¶ 349-54, two facts that the ALJ cited as support for her conclusion that Gamello did not violate the law. Decision at 102.

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.[6]

In short, the overwhelming documentary and testimonial evidence demonstrated that Rabinovich 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. Rabinovich Did Not Violate Securities Act Section 5

In imposing Section 5 liability on Rabinovich, 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 Rabinovich did not sell any Four Funds after December 2007, and any such claim is time-barred. FoF ¶ 552; *see also* 28 U.S.C. § 2462. Second, despite paying lip service to Rules 506 and 508, which allow for a defense based on Rabinovich's reasonable belief, the ALJ sweepingly declared that Rabinovich "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.

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6 Equally arbitrary and capricious was the ALJ's recitation of the testimony of Stephen Fowler, a client of Respondent Rogers (which calls into question whether the ALJ watched the video deposition or read the transcript at all). Decision at 67. Nowhere in her "findings of fact" does the ALJ mention the following: (1) Fowler has a net worth of $20 to $25 million; (2) Fowler earned approximately $1.5 million on a $50,000 investment in other private placements recommended by Rogers; (3) Fowler described his risk tolerance as "high," Fowler Dep. Tr. 10:2-7; (4) Fowler received PPMs from Rogers prior to investing and would "typically" discuss the risks and other terms with Rogers, *id.* 40:4-9, 42:4-6; (5) Fowler did not view the Four Funds' restructuring in 2008 as "any cause for alarm about the other investments" (i.e., the Trust Offerings), *id.* 17:18—18:5; (6) Fowler invested in MSTF following an in-person meeting with McGinn and Rogers because he "had cash looking for a high return," "had a high tolerance for risk," and "the investment [made] a very handsome return ... in the first year," *id.* 15:23—16:8; and (7) Fowler remained a client of Rogers at RMR at the time of the hearing. FoF ¶¶ 494-503.

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 Rabinovich's reasonable belief that both the Four Funds and the Trust Offerings were exempt from registration.

Rabinovich 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 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. Rabinovich understood that, under Regulation D, there could be up to 35 unaccredited investors in any McGinn Smith private placement, but was never told that more than 35 unaccredited investors had invested in any McGinn Smith private placement. Rabinovich nevertheless had no authority to accept subscriptions for McGinn Smith Securities, which were sent to Albany and processed by Sicluna, and thus no reason to know the number of unaccredited investors in any given private placement. Collectively, Rabinovich presented the Four Funds to five allegedly unaccredited investors, and the Trust Offerings in the fictitious conduits to just one allegedly unaccredited investor, and there was evidence that some of these investors were in fact accredited, only one of which invested after September 23, 2008. FoF ¶¶ 623-47.

Further, Rabinovich followed MS&Co.'s procedures when presenting private placements to his customers. Rabinovich 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 Rabinovich 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 Rabinovich.

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 Rabinovich 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. Rabinovich he did not sell any of the Four Funds after December 2007. FoF ¶ 552. Rabinovich also did not sell seven of the Trust Offerings after September 23, 2008, and did not sell three 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 Rabinovich.

Moreover, the Division identified 47 investors of Rabinovich who purchased a McGinn Smith Security. 43 of them (91%) first purchased a McGinn Smith Security prior to September 23, 2008, and 26 of them engaged *exclusively* in transactions prior to September 23, 2008, including Division witness Chapman, who invested more than eight years prior to the date the OIP was filed. FoF ¶ 547. Of those investors who did engage in transactions after September 23, 2008, this included Rabinovich, his father (Stan Rabinovich), his father-in-law (Jeffrey Kaplan), Rabinovich's own witness Stan Rowe, two investors identified in the Division's Brady disclosure (Amar and Ramesh Bhandari), and four investors who provided affidavits in support of Rabinovich (Dov Junik, Claude Penchina, Stan Rowe, and Amar Bhandari). Div. Ex. 2, at Ex. 4q; RMR Ex. 873; RMR Motion to Admit Prior Sworn Statements, dated Jan. 15, 2014, at 2-3. Collectively, these investors comprised approximately 69% of the dollar amount invested by clients of Rabinovich after September 23, 2008, 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. By contrast, the sole witness called by the Division who invested after September 23, 2008 (Ketan Patel), was responsible for 1% of the post-September 23, 2008 dollar amount invested. *Id.* There was no testimony offered or received by the remaining 30%.

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 $250,000, was unjustified and unnecessary to protect the public interest. Decision at 116-18; Order Correcting Decision at 4. The evidence demonstrated that Rabinovich 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.").

Rabinovich fulfilled his duties as a registered representative. Significantly, Rabinovich believed in the investments as his family *and Rabinovich himself* purchased them, undermining any suggestion he acted with scienter. RMR Ex. 803. The fifteen clients who

testified or submitted affidavits in support of Rabinovich showed that Rabinovich 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 ¶¶ 380, 388, 397, 688-89. None of this is mentioned in the ALJ's purported *Steadman* analysis.

Rabinovich has also acted in his clients' best interests since leaving MS&Co. in 2009. Among other things, Rabinovich has continued to monitor his clients' investments in the Four Funds and the Trust Offerings. Upon learning of the SEC Action, Rabinovich informed his clients, followed the Receiver's website, and helped his clients file claims and write to elected officials for legislation that would allow SIPC benefits. Since April 2010, McGinn Smith Securities have generated cash flows to support the Receiver's operations, and Rabinovich, along with Mayer, 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. Rabinovich also provided non-party deposition testimony in the SEC Action, and testified on behalf of the U.S. at trial in its criminal action against McGinn and Smith. FoF ¶¶ 527, 535, 538-44. These facts, too, are nowhere to be found in the ALJ's discussion of appropriate sanctions.

Seemingly, the sole justification for the suspension of Rabinovich was the ALJ's perfunctory conclusion that Rabinovich "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, Rabinovich 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 Rabinovich 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 its feigned 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 Rabinovich did not act fraudulently or even negligently.

In sum, to punish Rabinovich 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 "a little less than half" of her time over the course of three years 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 Rabinovich did not bury his head in the sand and blindly recommend securities to

his clients. To the contrary, Rabinovich performed product and customer suitability analyses before presenting investments to his accredited investor clients, only a fraction of which included McGinn Smith Securities. FoF ¶¶ 13, 191-93, 625-26. To require Rabinovich, a relatively young man with a family to support (FoF ¶ 2), 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 Rabinovich's unblemished, 20-year record in the securities industry, and investors affirming or testifying to his honesty, no sanctions should be imposed.

Conclusion

The Commission should dismiss all charges against Rabinovich.

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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 9,633 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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