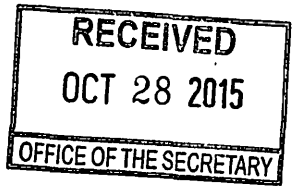
ORIGINAL

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 INDIVIDUAL REPLY BRIEF

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## Preliminary Statement

As demonstrated in his initial brief, Rabinovich did not violate the federal securities laws, and to blame and punish him for the secret theft and diversion of funds by his superiors – McGinn[1] and Smith – is unfair and unjust. But more significantly, it is not supported by the law or the evidence presented at the hearings. Rabinovich conducted reasonable diligence to understand the products he presented to his accredited investor clients. The overwhelming evidence established that there were no "red flags" that should have caused Rabinovich to conduct a heightened inquiry. Nor was there any evidence that Rabinovich made any material misrepresentations or omissions in presenting any McGinn Smith Security to any clients. Rabinovich also took reasonable steps to avoid participating in any distribution in alleged violation of Securities Act Section 5.

In response, the Division ignores much of the evidence and the arguments presented in Rabinovich's brief, and thus concedes by silence at least the following facts:

- Each purported omission described by Ketan Patel was fully disclosed in the documents Patel signed and attested to reading and understanding at the time he invested. Rabinovich Br. at 13.
- Patricia Chapman made a single investment in FEIN some eight years prior to the filing of the OIP and expressly acknowledged that her investment involved substantial risk. *Id.* at 12.
- Patel and Chapman were the *only* investor witnesses called to testify against Rabinovich by the Division. *Id.* at 9.
- Three investor witnesses were called to testify by Rabinovich. They spoke to his "thoughtful analysis," "honesty," and "integrity." All three remain clients of Rabinovich today. *Id.* at 9-10.
- The "red flags" identified by the ALJ related only to the Four Funds. Decision at 91-93.

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[1] Capitalized terms not otherwise defined shall have the meaning given to them in Respondents' Joint Brief, dated July 17, 2015 ("Joint Br."), and Rabinovich's Individual Brief, dated July 17, 2015 ("Rabinovich Br.).

- Rabinovich did not sell any Four Funds' notes after December 2007. Rabinovich Br. at 13-14.
- Any supposed red flags relating to the Four Funds were unrelated to the separate Trust Offerings. *Id.* at 14.

Rather than addressing these and other points, the Division rehashes a series of its own post-hearing arguments, many of which were expressly rejected by the ALJ. For example, the Division claims that Smith instituted a so-called "redemption policy" in December 2006, and that Rabinovich ignored this supposed red flag. The ALJ disagreed. Decision at 93. The Division also advocates for a lifetime bar from the securities industry for Rabinovich (the ALJ imposed a suspension) and disgorgement more than five times the amount awarded by the ALJ. Absent a cross-petition for review of the Decision, the Division has waived its right to present these arguments on appeal.[2] Yet, even if the Commission considers the Division's arguments, they are unsupported by the record.

As discussed below, and in Rabinovich's initial brief, the Commission should reverse the Decision, and allow Rabinovich to continue to work as a registered investment advisor representative at RMR, where he offers no proprietary product, and has maintained an unblemished regulatory record for the past six years, and twenty years overall.

## ARGUMENT

### I. Rabinovich Did Not Violate The Antifraud Provisions Of The Federal Securities Laws

The ALJ's conclusion that Rabinovich violated Securities Act Section 17(a), Exchange Act Section 10(b)(5) and Rule 10b-5 thereunder was infected with error, stemming from the ALJ's cherry-picking of testimony, misconstruction of the factual record, and arbitrary

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[2] *See* SEC Rules of Practice 410(b) and 411(d). While the Commission reviews the record *de novo* and has the ability to decrease or increase any sanctions against Rabinovich *sua sponte*, the Division is not, absent a cross-petition, permitted to advocate for such a result, and to do so infringes upon Rabinovich's right to due process.

and capricious application of facts to law. *See* Rabinovich Br. at 11-24. The Division's response, rather than addressing the Decision, all but ignores it, and instead engages in its own cherry-picking of the evidence and presents to the Commission a gross misrepresentation of the record. An objective view of the record leads to only one conclusion: Rabinovich did not act intentionally, recklessly, or negligently in presenting McGinn Smith Securities to his accredited investor clients, and he did not make any material misrepresentations or omissions to investors.

### A. Rabinovich Did Not Act With the Requisite State Of Mind For A Finding Of Fraud

The Division fails to point to anything Rabinovich did or did not do which would establish "a state of mind approximating actual intent, and not merely a heightened form of negligence," a prerequisite for a finding of recklessness. *See South Cherry St., LLC v. Hennessee Group LLC*, 573 F.3d 98, 109 (2d Cir. 2009). The ALJ cited only three such "facts," none of which was sufficient. *See* Rabinovich Br. at 11-16 (discussing the stale testimony of Chapman which was contrary to her written representations, testimony by Patel about alleged "omissions" which were disclosed to him in writing, and purported red flags which were not red flags at all, but in any event related only to the Four Funds which Rabinovich did not present to his clients after December 2007). Rabinovich and his family invested, and lost, significant sums in McGinn Smith Securities, an amount far in excess of what he earned selling them. Rabinovich Br. at 15-16; *see also* RMR Exs. 215A, 803; Tr. 4320:17-4322:10. The Division has no response to this evidence. In short, the Division cites nothing in the Decision or the record that would lead a reasonable and unbiased trier of fact to conclude Rabinovich acted with scienter.

The Division also fails to rebut the clear, consistent, and comprehensive testimony from Rabinovich about what he did to understand the products he presented to his clients and to fulfill his customer suitability obligation. *See* Rabinovich Br. at 16-24. This is

because there is no basis to dispute, for example, that Rabinovich did not present FIIN until some three years after it was first offered and he knew about some of the investments by FIIN. This undisputed fact does not come from any testimony, subject to the ALJ's or the Division's misinterpretation, but from documentary evidence that is clear on its face. *See* Div. Ex. 2, at Ex. 4q (identifying Rabinovich's first FIIN sale in October 2006); RMR Ex. 46 at 8 (Pine Street presentation disclosing to Rabinovich and other MS&Co. brokers more than $10 million of investments made by FIIN in 2003 and 2004 and that FIIN was generating a weighted average annual return of 17.6%). Rabinovich also learned about a number of investments made by the Four Funds through due diligence sessions he attended. *See, e.g.*, Tr. 1942:14-1944:9.

Unable to challenge these undisputed facts, the Division instead makes an argument never before presented to the ALJ: if Rabinovich knew FIIN's investments, then he "defrauded his customers knowingly, rather than recklessly." *See* Division's Brief in Response to Respondents' Individual Briefs, dated Sept. 30, 2015 ("Div. Ind. Br."), at 34. Knowledge of FIIN's investments is not the equivalent of knowledge of McGinn and Smith's secret theft and diversion of funds. Nor did the Division allege in the OIP that Rabinovich knew of any fraud, and the Division's expert in fact admitted Rabinovich had no actual knowledge of any fraud. *See* Decision at 4 (noting that "[t]he Division's expert had no reason to believe that Respondents were aware of McGinn and Smith's fraud"). In any event, the Commission should reject the Division's "heads I win, tails you lose" logic. Rabinovich never suggested he knew every single investment in FIIN, but rather, that he had sufficient information about FIIN (and other McGinn Smith Securities) from which to present them to clients where suitable. More importantly, however, the Division ignores that Rabinovich and countless others were lied to by McGinn and Smith, and no "independent investigation" would have revealed their fraud. Not only were the

SEC, the NASD, and McGinn Smith's outside compliance consultant, who conducted examinations of MS&Co. during 2004 to 2007, unable to uncover the secret theft and diversion of funds by McGinn and Smith, *see* Livingston Ex. 103, RMR Exs. 40, 120, 135, 161, 874, but it took the Division's own seasoned staff accountant "a little less than half" of her time over the course of three years to piece together the core facts that made up the Division's case, which focused on McGinn and Smith's secret fraud. Tr. 392:5-393:18.

These experts, however, were not alone. Many of the Four Funds' investments were scrutinized by reputable financial institutions and auditors. Rabinovich Br. at 19-20. Incredibly, the Division claims "the only 'evidence' of due diligence by 'investment banks on large portions' of the Four Funds investments is [Rabinovich's] own testimony." Div. Ind. Br. at 34. This is utterly false. Not only did the SEC itself write to MS&Co. in February 2004 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," *see* Livingston Ex. 103 at 12, but numerous documents received in evidence – most notably, offering memoranda – confirm this fact. *See* FoF ¶ 46 (citing RMR Exs. 502A, 503F, 513D, 514B; Livingston Exs. 95, 97, 98; Lex Exs. 141, 142). These investments alone made up more than half of the assets under management in FIIN by the end of 2004. *See* Div. Ex. 2, at Ex. 11.

In sum, the Division failed to prove, because the record does not support, that Rabinovich acted knowingly, recklessly, or even negligently.

### B. There Was No Evidence That Rabinovich Made Any Material Misrepresentations Or Omissions

Nowhere in the eighteen days of testimony and hundreds of exhibits is there evidence of any material misrepresentations or omissions by Rabinovich. Yet, the Division

claims that "[t]he record is *replete* with Rabinovich misrepresentations and omissions." Div. Ind. Br. at 38 (emphasis added). This statement is, most charitably, zealous advocacy, but actually, outright false.[3] As the alleged basis for its claim, the Division cites to five exhibits (Div. Ex. 15, 35, 40, 42, 43) and the testimony of two witnesses. None supports the Division.

Division Exhibits 40 and 42, in which Rabinovich accurately described the features FEIN and FAIN, respectively, were sent to individuals who did *not even* invest in any McGinn Smith Securities and cannot possibly form the basis for a securities fraud claim. The remaining exhibits – Division Exhibits 15, 35, and 43 – were sent to Stan Rowe and Michael Favish, both of whom testified on Rabinovich's behalf. Rowe described Rabinovich as "thorough and honest and straightforward in his dealings with me," and, together with his wife, invested more than $3 million in McGinn Smith Securities. Tr. 4377:3-15; Div. Ex. 2, at Ex. 4q. Rowe does not believe that Rabinovich made any material misrepresentation or omission about any McGinn Smith Security in which he invested, or that any loss he incurred was the result of anything Rabinovich did, said or failed to do or say. Tr. 4404:13-24; RMR Ex. 616 ¶¶ 7-8. Similarly, Favish described Rabinovich as "honest," and affirmed that, without exception, Rabinovich clearly explained the private placements and other offerings in which he invested, including their risks. Tr. 5541:12-24; RMR Ex. 610 ¶ 5.

Moreover, the statements in this handful of exhibits cited by the Division are true:

- "[T]he Income Notes represent a basket of asset backed securities with substantial cash flow, a history of performance and limited liquidity in the

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[3] Another example of the Division's over-the-top hyperbole is its description of the January 2008 meeting, which it now claims was not just a red flag which required investigation, but "put certain Respondents on notice of fraud." Div. Ind. Br. at 8. There is no basis in the record to make such an outrageous claim, and far from "fraud," it was unsurprising (although distressing) for Rabinovich to learn that the Four Funds' investments were not doing well at a time of global economic turmoil. *See* Rabinovich Br. at 8-9.

marketplace." Div. Ex. 35. This is true. *See* Tr. 1963:15-24 (testifying that his reference to substantial cash flow and a history of performance was not to the Notes (as the Division falsely suggests, *see* Div. Ind. Br. at 38), but to "the securities within the notes").

- "The portfolio includes securities from both the public and private sector. Asset classes consist of bonds, notes, preferred stock, leases, mortgages, limited partnerships, and securitized cash flow instruments." Div. Ex. 35. This is true. *See* Div. Ex. 2, at Exs. 11-14 (Four Funds' balance sheets that reflected investments in public and private securities and the different asset classes identified in Rabinovich's email); *see also* Div. Ex. 6, at 7 (FEIN PPM which disclosed the assets classes in which capital will be invested).
- "Our most active market of ideas comes from small private placements ($25-$50 million) originated by our banking group and/or are offered by larger investment banks primarily to institutional investors. We take comfort in these ideas [i.e., the small private placements] due to the fact that these offerings are usually proceeded [sic] with substantial due diligence, scrutinized by product and industry professionals, and underwritten by top-tier investment banking firms . . . ." Div. Ex. 35. This is true. *See* FoF ¶ 46 (citing numerous private placement memoranda identifying the top-tier investment banks and auditors involved in the offerings).

The Division went to great lengths to paint these emails as "material misrepresentations," but as reflected by the evidence, they are not. In any event, they all relate to the Four Funds, and are time-barred. *See* 28 U.S.C. § 2462.

The testimony of two investors cited by the Division also does not establish Rabinovich made any material misrepresentations or omissions. With a single exception (discussed below), the Division points only to supposed omissions: (i) that Chapman was allegedly not told "that there were three different tranches of FEIN with different levels of risk"; (ii) that Chapman was allegedly not told of "the significant risks" of investing in FEIN; (iii) that Patel was allegedly not told that "he risked losing his money"; and (iv) that Patel was allegedly not told that the proceeds of the TDM Verifier 07R offering would be used to refinance an earlier

TDM Verifier offering. Div. Ind. Br. at 38-39.[4] Each of these "omissions" was fully and clearly disclosed to Chapman and Patel in the offering documents that they attested to reading and understanding, and ultimately, signing. *See* Div. Ex. 6, at 1 (identifying three different tranches of FEIN); *id.* at 11 (disclosing risks associated with investing in FEIN, including the greater risk associated with investing in the senior subordinated and junior notes); Div. Ex. 702 (Patel subscription agreement in which he attested that he could "bear the economic risk of [his] investment for an indefinite period of time" and recognized that "investment in the Certificates involves substantial risk factors" as set forth in the PPM); Div. Ex. 298, at 6 (TDM Verifier 07R PPM, which disclosed that proceeds from the offering would be used "to retire certificates issued by TDM Verifier 07"); *see also* RMR Ex. 820 (Chapman subscription agreement in which she represented that she read and understood the PPM); RMR Exs. 702, 707, and 710 (Patel subscription agreements in which he represented that he read and understood the PPMs). Neither the Division nor the ALJ cited a single case holding a broker liable for fraud, where the supposed "omission" was expressly disclosed to the investor in writing. There is none.

The single alleged material misrepresentation was Chapman's claim that Rabinovich told her eight years ago that FEIN was a "safe bond." Div. Ind. Br. at 38.[5] Notwithstanding Chapman's stale testimony, she 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 ¶¶ 412-13; RMR

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[4] The Division's claim that Rabinovich should have told Patel – an investor in *the Trust Offerings* – about the January 2008 meeting relating to *the Four Funds* is illogical and warrants no response. Div. Ind. Br. at 39.

[5] To be clear, Patel claimed that he *thought* his investments were "safe," but he admitted that nobody *told* him they were safe. Tr. 157:6-9.

Ex. 820. The Division distorts this undisputed evidence, accusing Rabinovich of "blam[ing] [his] customers." *See* Division's Brief in Response to Respondents' Join Brief, dated Sept. 30, 2015 ("Div. Joint Br."), at 22-23. Rabinovich did nothing of the sort by referring to Chapman's attestations. First, her contemporaneous written representations undermine the veracity of her vague oral testimony some eight years after-the-fact. Second, the test for materiality is an objective, not subjective one. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). Thus, there is no basis for the Commission to conclude that a reasonable investor would have believed his or her investment to be safe where, as here, there are clear, written disclosures to the contrary. *See, e.g., Matter of Raymond Lucia Cos., Inc.*, File No. 03-15006 (Oct. 2, 2015) (Commissioners Gallagher and Piwowar, dissenting). Third, as a matter of law, the Commission should find that these statements are not actionable, consistent with governing federal law. *See, e.g., Rissman v. Rissman*, 213 F.3d 381, 383 (7th Cir. 2000) ("[s]ecurities law does not permit a party to a stock transaction to disavow such representations – to say, in effect, 'I lied when I told you I wasn't relying on your prior statements' and then to seek damages for their contents."); *see also* Joint Br. at 21-22.

### C. The Division's Evidentiary Arguments Regarding Rabinovich Are Flawed

The Division tries to relitigate factual points – despite waiving its right to do so in the absence of a cross-petition – and to manufacture new "red flags" that are outside the scope of the OIP. The Commission should ignore these baseless and forfeited arguments.

At the outset, it bears noting that the Division expressly acknowledged at the hearings – as it must – that only those red flags identified in the OIP are at issue in this case. Tr. 272:11-13 ("[T]here are red flags listed in the OIP. Those are the red flags we are presenting in the case."); *see also* SEC Rule of Practice 200(b)(3) (OIP must "contain a short and plain statement of the matters of fact and law to be considered and determined"). Notably, the OIP

does not include any allegation that "MS&Co.'s Fraud Began with the Pre-2003 Trusts." Div. Ind. Br. at 2-3. In fact, it is this very "red flag" which led to the colloquy between the ALJ and counsel that concluded in the Division's acknowledgement that it was limited by the OIP. Nevertheless, there was nothing "fraudulent" about the fact that the IASG public offering created a liquidity event for earlier investors in the Pre-2003 Trusts. This fact was fully disclosed in the prospectus and is standard practice in an IPO. *See* Div. Ex. 373 at 12; Tr. 3677:16-3678:3; *see also* FoF ¶¶ 76-86.

Similarly, the Division did not allege in the OIP that Rabinovich's supposed knowledge of an alleged "net capital violation" was a red flag or something he should have told Patel in August 2009. Div. Ind. Br. at 37; *see also id.* at 4 (claiming MS&Co. had "repeated net capital violations"). In any event, the Division has misconstrued the factual record. There is a significant difference between MS&Co.'s *contractual* net capital requirement with its clearing agent (NFS), and its *regulatory* net capital requirement with FINRA. The former is what the Division is referring to when it claims there were "repeated net capital violations." *See id.* at 4. Notwithstanding, Rabinovich knew as late as the end of October 2009 that NFS had *not* terminated its clearing agreement with MS&Co. Tr. 4466:14-22. Moreover, it was not until December 2009, months after Rabinovich had left MS&Co. to form RMR, that MS&Co. in fact failed its FINRA net capital requirement. Tr. 2128:4-7; *see also* FoF ¶¶ 523-26.

Equally meritless (and waived) is the Division's attempt to rehash a series of "red flags" that were rejected by the ALJ. In the Decision, the ALJ listed all of the alleged red flags that the Division claimed Rabinovich and others "failed to investigate." Decision at 84. This included, among others: (i) "Smith was secretive regarding on the [sic] investment of Four Fund offering proceeds and their performance"; (ii) "By at least December 2006, Smith instituted a

redemption policy where to redeem a client's maturing note, a registered representative had to find a new buyer"; and (iii) "The Trust Offerings that began in November 2006 had features that constituted red flags." *Id.* These same three "red flags" are cited in the Division's brief as purported proof that Rabinovich acted with scienter. Div. Ind. Br. at 36-37. Yet, in analyzing the Division's alleged red flags, the ALJ noted that she "decline[d] to discuss several of the[m] that I have determined to *not* constitute a red flag." *Id.* at 91 (emphasis added). Smith's alleged refusal to disclose investments to Rabinovich and Benchmark's allegedly "exorbitant fees" (which were fully disclosed in its PPM) were not discussed by the ALJ. They were therefore rejected. And, while the "redemption policy" was discussed, it was expressly rejected by the ALJ as unsupported by even the preponderance of the evidence. Decision at 93. There is no reason to disturb these conclusions. *See also* FoF ¶¶ 320-28 (Smith did not conceal the Four Funds' investments from Rabinovich), ¶¶ 329-37 (the "redemption policy" was non-existent); ¶¶ 368-69 (there was nothing atypical about Rabinovich's father's bridge investments in Firstline and TDMM Cable 09, which helped close both transactions and did not establish any "redemption policy").

Finally, the Division's claim that "Rabinovich accepted customer funds for a Benchmark purchase" in September 2009, "even after learning of the Firstline bankruptcy" is simply false. Div. Ind. Br. at 37. It is undisputed that Rabinovich never "accepted customer funds" for *any* security, as subscriptions and redemptions were processed in Albany by MS&Co. employee, Patty Sicluna. FoF ¶ 193. Rabinovich worked out of MS&Co.'s New York office. Moreover, Rabinovich presented Benchmark to his clients no later than August 2009, before he learned of the Firstline bankruptcy. Tr. 2142:12-20. Indeed, it was shortly after learning that

McGinn and Smith had concealed the Firstline bankruptcy from MS&Co.'s brokers that Rabinovich, together with Respondents Mayer and Rogers, left the company to form RMR.

## II. The Division Failed To Address Rabinovich's Individual Arguments Concerning Section 5 Liability

The overwhelming evidence established that Rabinovich followed MS&Co.'s procedures when offering private placements and reasonably believed that the Four Funds and the Trust Offerings were exempt from registration, thus undermining any individual Section 5 liability pursuant to Rules 506 and 508. Rabinovich Br. at 24-26. The Division does not address these points in its response to the individual briefs. Instead, it merely declares in its response to the joint brief that "[i]ndividual liability was appropriate." Div. Joint Br. at 26-27. No further response is warranted, and Rabinovich respectfully refers the Commission to the underlying facts – none of which are disputed by the Division – that support the reasonableness of his belief and the appropriate steps he took when presenting McGinn Smith Securities. FoF ¶¶ 616-47.

## III. The *Steadman* Factors Do Not Support Any Sanctions, Let Alone The Division's Procedurally Improper Request For *Increased* Sanctions

The Division's and the ALJ's review of the *Steadman* factors was perfunctory. Neither the ALJ's imposition of a one-year suspension and other punitive remedies, nor the Division's procedurally improper request for a lifetime bar and monetary payments that dwarf those imposed by the ALJ, are supported by the law or the record.

No civil fine, penalty, or forfeiture is properly based on events that took place prior to September 23, 2008, *i.e.*, the majority of the alleged conduct at issue. *See* 28 U.S.C. § 2462. And, as the ALJ expressly acknowledged, "[i]ndustry bars are considered penalties under Section 2462." Decision at 112. Notwithstanding the Commission's recent Opinion that industry bars are not subject to *any* statute of limitations, *see Matter of Timbervest*, 2015 SEC LEXIS 3854, at *55 (Sept. 17, 2015), numerous decisions – including several by the

Commission – hold otherwise. *See SEC v. Bartek*, 484 F. App'x 949, 957 (5th Cir. 2012); *Johnson v. SEC*, 87 F.3d 484, 489-92 (D.C. Cir. 1996); *see also Matter of Eric J. Brown*, 2012 SEC LEXIS 636, at *45 (Feb. 27, 2012) (Commission opinion refusing to consider conduct outside the five-year period "as violative conduct forming the basis for imposing a bar"); *Matter of Trautman*, 2009 SEC LEXIS 4173, at *75-76 (Dec. 15, 2009) (same); *Matter of Warwick Capital Mgmt.*, 2008 SEC LEXIS 96, at *33 (Jan. 16, 2008) (same). The Division admitted as much in its post-hearing brief, and it should be judicially estopped from now taking a contrary position. *See* Division's Post-Hearing Brief, dated Apr. 9, 2014 ("Div. Post-Hearing Br."), at 37-38 (distinguishing between alleged "equitable relief" and civil monetary penalties and an associational bar in analyzing the statute of limitations).

The Division's request that the Commission impose third-tier penalties "for *each* of Respondents' [alleged] violations," *see* Div. Ind. Br. at 49 (emphasis added), is procedurally barred by the Division's failure to file a cross-petition for review of the Decision and should be rejected as meritless in any event. Rabinovich did not sell any of the Four Funds after September 23, 2008. Nor did he sell seven of the Trust Offerings after that date, and three others, he never sold. FoF ¶¶ 547, 556.

The evidence showed that Rabinovich was not "deceptive," he had no "prior violations,"[6] and any claimed need for deterrence is a fiction: Rabinovich offers "zero proprietary product" at RMR, which has been examined twice by the SEC (OCIE), and has an unblemished record in his 20 years in the securities industry. Tr. 4965:11-25.

Nor was Rabinovich unjustly enriched. He and his family lost millions of dollars in McGinn Smith Securities. *See* RMR Exs. 215A, 803. The Division's request for more severe

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6 The Commission should ignore the Division's attempt to bootstrap all of the time-barred transactions at issue in the OIP into alleged "prior violations."

penalties, as well as the single third-tier penalty imposed by the ALJ, ignores that Rabinovich did not act recklessly, or even negligently, and that most of Rabinovich's limited post-September 23, 2008 sales were to clients who testified or submitted affidavits on his behalf and were identified in the Division's *Brady* disclosure. Rabinovich Br. at 27. Indeed, the Division only elicited testimony from one post-September 23, 2008 investor (Patel). *Id.*

Likewise, the Division's request that Rabinovich should be forced to disgorge $586,741, *see* Div. Ind. Br. at 48, more than five times the amount awarded by the ALJ ($109,695), *see* Order Correcting Decision at 4, is also barred by the Division's failure to cross-petition for review of the Decision. Nevertheless, no disgorgement is warranted, particularly of commissions earned from clients who testified, submitted affidavits on Rabinovich's behalf, or were identified in the Division's *Brady* disclosure, none of whom believed they were misled (and were not misled). Rabinovich Br. at 30. Many remain his client today.

Finally, there is no basis in the record for a suspension, or the Division's procedurally improper request for a lifetime bar from the securities industry. The Division's parroting of the *Steadman* factors does not justify such a career-ending sanction, as the investing public is not at risk. Div. Ind. Br. at 50. The evidence established that Rabinovich did not violate the federal securities laws, and he certainly did not commit "egregious securities laws violations spanning years," as the Division claims. Div. Ind. Br. at 50. He acted prudently, diligently, and at all times, in his client's best interests. He went to great lengths to serve his clients, and he continues to do so today. Rabinovich Br. at 28-29. He does not pose any threat to the investing public, and the Division's conclusory statement to the contrary has no support in the record. *See, e.g., Steadman v. SEC*, 603 F.2d 1126, 1137 (5th Cir. 1979) ("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"), *aff'd on other grounds*, 450 U.S. 91 (1981); *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 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.").

The Division's case was about the fraud of McGinn and Smith; but to punish Rabinovich for their wrongs – which were unknown to Rabinovich and everyone else – is unfair and unjust. Nor does the record or the law support it. Rabinovich is a relatively young man with a young family to support (FoF ¶ 2), who has worked hard to serve his clients for 20 years, a fact that is evident from the investors who testified or submitted affidavits on his behalf and who stand by him today despite the collapse of MS&Co. In sum, no penalty, disgorgement, or any other sanctions should be imposed.

**Conclusion**

The Commission should dismiss all charges against Rabinovich.

DATED: New York, New York
October 27, 2015

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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 4,913 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.

Dated: New York, New York
October 27, 2015

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October 27, 2015

**VIA FEDERAL EXPRESS**

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549

Re: *In the Matter of Donald J. Anthony, Jr., et al.,*
Administrative Proceeding File No. 3-15514

Dear Mr. Fields:

We enclose an original and three copies each of (1) Philip S. Rabinovich's Individual Reply Brief, and (2) Brian T. Mayer's Individual Reply Brief. We have also enclosed a Certificate of Service.

Sincerely,

M. William Munno

M. William Munno

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SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of

DONALD J. ANTHONY, JR.,
FRANK H. CHIAPPONE,
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.

**CERTIFICATE OF SERVICE**

I hereby certify that on October 27, 2015, I filed an original and three copies with the Office of the Secretary of the Commission via Federal Express, and that on October 27, 2015, I served the enclosed (1) Philip S. Rabinovich's Individual Reply Brief, and (2) Brian T. Mayer's Individual Reply Brief via Federal Express and email on:

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