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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of,

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

BRIAN T. MAYER'S INDIVIDUAL REPLY BRIEF

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Preliminary Statement

As demonstrated in his initial brief,[1] Mayer conducted reasonable diligence to understand the products he presented to his accredited investor clients. The evidence established that there were no "red flags" that should have caused Mayer to conduct a heightened inquiry. Nor was there any evidence that Mayer made any material misrepresentations or omissions in presenting McGinn Smith Securities. Mayer also took reasonable steps to avoid participating in any distribution in alleged violation of Securities Act Section 5.

In response, the Division ignores the evidence and the arguments Mayer presented and concedes by silence at least the following facts:

- Division witness Gary Von Glinow undermined the Division's theory of the case when he described Mayer as an honest broker who reviewed and discussed PPMs with him prior to investing, and answered each of the "30 or 50, 70 questions" Von Glinow would ask him prior to investing. Mayer Br. at 8-9, 12.

- William Strawbridge described Mayer as a "forthright and effective investment professional" who he had worked with for ten years, and "the most conscientious and analytical of any of the brokers that I deal with." *Id.* at 8-9, 27.

- No testifying investor claimed that Mayer made any material misrepresentations to him. *Id.* at 9.

- Each purported omission claimed by Vincent O'Brien and Thomas Alberts was disclosed in the documents they signed and attested to reading and understanding at the time they invested. *Id.* at 11-12.

- The "red flags" identified by the ALJ related only to the Four Funds. Decision at 91-93.

- Mayer did not sell any Four Funds' notes after January 2008 (a single senior TAIN was rolled over in August 2008). Mayer Br. at 24.

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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 Mayer's Individual Brief, dated July 17, 2015 ("Mayer Br.).

- Any supposed red flags relating to the Four Funds were unrelated to the separate Trust Offerings. *Id.* at 13.

Rather than addressing these and other points, the Division rehashes its post-hearing arguments, many of which were expressly rejected by the ALJ. The Commission should reverse the Decision, and allow Mayer 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 there for the past six years, and twenty years overall.

ARGUMENT

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

The ALJ's conclusion that Mayer 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 and capricious application of facts to law. *See* Mayer Br. at 10-24. Rather than addressing the Decision, the Division all but ignores it, and engages in its own cherry-picking of the evidence, presenting to the Commission with a gross misrepresentation of eighteen days of testimony and hundreds of exhibits. An objective view of the record demonstrates that Mayer did not act intentionally, recklessly, or negligently in presenting McGinn Smith Securities to his clients, and he did not make any material misrepresentations or omissions to them.

A. Mayer Did Not Act With The Requisite State Of Mind For A Finding Of Fraud

As an initial matter, the Division fails to point to anything Mayer 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 two blanket assertions to support her conclusion, none of which was supported by the record. *See* Mayer Br.

at 11-15 (discussing the stale testimony of Alberts and O'Brien which was contrary to their contemporaneous written representations and related to alleged "omissions" which were disclosed to them in writing, and purported red flags which were not red flags at all and related only to the Four Funds which Mayer did not present to his clients after January 2008). Indeed, Mayer's family invested, and lost, significant sums in McGinn Smith Securities, undermining any finding of scienter. Mayer Br. at 29; *see also* RMR Exs. 215B, 804; Tr. 5016:5-14. To this, the Division has no response. Simply put, the Division cites nothing that would lead a reasonable and unbiased trier of fact to conclude Mayer acted with scienter.

The Division also fails to rebut the clear, consistent, and comprehensive testimony from Mayer about what he did to understand the products he presented to his clients and to fulfill his customer suitability obligation. *See* Mayer Br. at 15-24. Mayer understood "the mechanics of the product ... the structure of the product, [and] the risk/reward of the product," but he also went further and tried "to poke holes how the investment is not going to work." Tr. 5006:10-5007:19. This testimony was confirmed by the Division's own witness, Von Glinow, who stated that, in discussing prospective investments with Mayer, he tried "to come up with ways that [the investment] could go bad." Tr. 2818:17-22; Tr. 2824:9-2825:11. That there were "numerous transactions over the years that were offered at McGinn Smith" that Mayer did *not* present to his clients only further establishes that Mayer conducted an independent inquiry and analysis into the products he offered. Tr. 5022:10-18. The Division does not dispute this evidence, but does distort the evidentiary record.

For example, the Division cites three snippets of testimony to supposedly support its claim that "Mayer recommended MS&Co. securities without conducting any meaningful investigation." *See* Division's Brief in Response to Respondents' Individual Briefs, dated Sept.

30, 2015 ("Div. Ind. Br."), at 28. Each of these cherry-picked quotations is irrelevant, incomplete, or both.

First, the Division states that "Mayer never asked for or saw a Four Funds balance sheet." *Id.* at 28. This claim ignores Mayer's testimony that cash flow information – which he did see (e.g., RMR Ex. 229) – was more important than a balance sheet, because the balance sheet does not show "if a security is paying or not" and "just tells you ... whether they are holding at par, greater than par or less than par." Tr. 4981:17-4982:16. Mayer further explained that the "only value that matters is [the] initial purchase price and sales price" of the investment. When an asset is sold, the buyer wants to see "the payment history," and "every single month of every single dollar that came in." Tr. 5117:11-5118:7; 5118:22-24; Tr. 5119:4-20.[2]

Second, the Division claims that Mayer "'never did an independent investigation' to determine whether the interest rates that Smith selected for the Four Funds were achievable." Div. Ind. Br. at 28. Mayer testified that he *did* conduct such an investigation, *see* Tr. 3335:14-23, but that is not the term he used to describe what he did. Providing the necessary context for his non-party deposition testimony that the Division misleadingly cites, Mayer explained:

> What they [the Division] termed as an independent investigation, your Honor, what they [the Division] term as due diligence are not the terms that are common place for a registered rep.... If I look on the Street and I talk to other people that work on Wall Street and I ask them about trust preferreds and get background on that or get background on alarm contracts or get background on Biodel [a successful MS&Co. private placement], I don't call that an independent investigation, and I don't call that due diligence.... Do I do more than just read the memorandum and listen to the sales manager or the investment bankers talk about it? Of course I do. I

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2 The Division's implicit suggestion that Mayer would have "figured out" the fraud had he simply requested a balance sheet is fanciful. MS&Co., its brokers (i.e., Mayer and the other Respondents), and their clients were defrauded by the criminal acts of the firm's principals (McGinn and Smith), its managing director (Rogers), CFO (Shea), and outside accountant (Simons, Piaker & Lyons).

> have to face Gary Von Glinow. If I don't know it, I have no shot....

Tr. 3336:21-3338:2.

Mayer's analysis of investments in the Four Funds, including the interest rates and debt coverage, is reflected in the contemporaneous notes that he took at sales meetings when investments were presented. *See, e.g.*, RMR Ex. 280 at pp. RMR 5399 (Four Funds), RMR 5386 (alseT, a Four Funds' investment); *see also* Tr. 5055:15-5059:4; 5059:16-5060:8; 5063:22-5064:17.

Third, the Division claims that Mayer was unable to provide specific information about Four Funds' investments because "[he] didn't have specific investments." Div. Ind. Br. at 28 (quoting Tr. 3290:9-3291:2). The Division's selective use of this quotation – which was addressed in Mayer's initial brief (at 17) – is highly misleading. The cited testimony comes from Gary Von Glinow and was in response to a question about what Mayer knew FIIN was "*going to* invest in" at the time Von Glinow invested in FIIN (October 2003). Tr. 3290:10-11; Tr. 3357:24–3358:18; Div. Ex. 2 at Ex. 4o. At that time, FIIN was a blind pool with *no* investments, and Mayer could not possibly have had information on "specific investments." Nevertheless, Mayer provided extensive testimony at the hearings about investments the Four Funds had later made, including details as to what he knew about the investments, when he learned them, who he learned them from, and what he saw to verify them. Mayer Br. at 17-18; Tr. 3278:8-3283:24.

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

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

Nowhere is there evidence of any material misrepresentations or omissions by Mayer. Yet, the Division claims that "Mayer's customers' testimony highlighted *numerous*

material misrepresentations." Div. Ind. Br. at 31 (emphasis added). This statement is false.[3] The Division does not reference a single *alleged* material misrepresentation in its brief, but instead purported omissions. This, however, is a distinction without a difference. The evidence supports neither.

Four of Mayer's clients testified at the hearing: William Strawbridge, Gary Von Glinow, Vincent O'Brien, and Thomas Alberts. None testified that Mayer made any material misrepresentations or omissions to them about any McGinn Smith Security.

William Strawbridge – Strawbridge has approximately 30 years of investing experience and has been investing a portion of his assets with Mayer for ten years. Tr. 5513:3-6, 18-20; Tr. 5514:4-12; *see* RMR Ex. 606, ¶ 2. He was initially contacted by the Division *after* the OIP was filed but was not called by the Division presumably because he told them he was fully aware of the risks of his investments. RMR Ex. 606, ¶ 4. In testifying on Mayer's behalf, Strawbridge described Mayer as a "forthright and effective investment professional," and "the most conscientious and analytical of any of the brokers that I deal with." Tr. 5527:20-5528:7; RMR Ex. 606, ¶ 17. Strawbridge always felt comfortable with Mayer's understanding of the markets, explanation of investment opportunities, and understanding of his investment objectives and risk tolerance. RMR Ex. 606, ¶ 7. Strawbridge stated that Mayer made him aware of the features of each investment and its risks through their conversations and by presenting the private placement memorandum associated with each investment. RMR Ex. 606, ¶ 21. Strawbridge does not believe that Mayer made any material misrepresentation or omission to

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[3] The Division also falsely claims in its brief that the January 2008 meeting 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 that assertion. Far from "fraud," it was unsurprising (although distressing) for Mayer to learn that the Four Funds' investments were not doing well at a time of global economic turmoil. *See* Mayer Br. at 8-9.

him about any security, including the McGinn Smith Securities at issue in the OIP. RMR Ex. 606, ¶ 3. Strawbridge is not mentioned in the Division's brief.

Gary Von Glinow – Von Glinow, although called by the Division, provided what can only be described as some of the most materially exculpatory evidence about Mayer. Von Glinow described Mayer as an honest broker who did "a lot of good things ... for our family," testified that he reviewed PPMs with Mayer prior to investing, peppered Mayer with "30 or 50, 70 questions on each" PPM (all of which Mayer would answer), discussed the risks of investing with Mayer, and was never told anything by Mayer that was not in the PPM. Tr. 2815:10-14; Tr. 2818:17-22; Tr. 2824:9–2825:11.

Although the ALJ did *not* conclude that Mayer made any material misrepresentations or omissions to Von Glinow, the Division now claims otherwise. Div. Ind. Br. at 32-33. The record, including the Division's own exhibits, does not support its claim. For example, Von Glinow's testimony that Mayer told him the Four Funds were diversified both "within each and amongst each," *id.* at 33 (quoting Tr. 2818:5-2819:17), is true. *See, e.g.*, Div. Ex. 2, at Ex. 14 (Four Funds 2007 balance sheets, reflecting a diversity of investments within and amongst the Four Funds); *see also* Tr. 3353:8-3354:13 (describing diversity of Four Funds' investments and that certain investments were only available for certain of the Four Funds depending on the timing of the offering).

Vincent O'Brien – O'Brien did not testify that Mayer made any material misrepresentations to him about any McGinn Smith Security. The Division, however, identifies two statements by Mayer that it claims are material misrepresentations. They are neither material nor untrue.

First, the Division chastises Mayer for "tout[ing] MS&Co.'s supposed track record to Mr. O'Brien," despite the fact that "Mayer knew MS&Co. used the IASG IPO to redeem investors in many of the early deals he was touting as part of the firm's successful track record." Div. Ind. Br. at 31. There was ample evidence in the record to support MS&Co.'s track record, including the IASG IPO. *See* FoF ¶¶ 49-86. And, there is nothing unusual or "fraudulent" about the fact that the IASG IPO created a liquidity event for earlier investors in the Pre-2003 Trusts, a fact that was fully disclosed in the prospectus and is standard practice in an IPO. *See* Div. Ex. 373 at 12; Tr. 3677:16-3678:3.

Second, the Division claims Mayer told O'Brien that Fortress was a "good deal." Div. Ind. Br. at 31. While this is too vague to be considered material, O'Brien's testimony was not so precise and must be considered in context. When asked what Mayer told him about Fortress, O'Brien responded as follows: "That it had a high return [this is true], that it was going to be just a portion of [O'Brien's] investments [this is true], and that it was basically a good deal." Tr. 901:22-25. In elaborating on "why it was a good deal," O'Brien testified that the interest rates on Fortress were "higher than what the market was doing at that time," another true statement. Tr. 902:2-6.[4]

Nor did Mayer make any material omissions to O'Brien, as each of the "omissions" identified by the Division was expressly disclosed in the PPMs that O'Brien attested to reading and understanding. FoF ¶¶ 452-62; RMR Exs. 428-29. Neither the Division nor the

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[4] The Commission should ignore O'Brien's testimony that Mayer supposedly told his sister that he would "swear on his father's grave" that certain private placement investments were safe. O'Brien was not present for this alleged conversation, nor did Mary Ellen O'Brien testify in person. The ALJ appeared to sustain Mayer's objection to the admission of statements about "what Mr. Mayer told your sister because that should come from your sister." Tr. 927:8;11. Nevertheless, the Division elicited, and the ALJ accepted, this prejudicial, unreliable, and untrue testimony.

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 Division also faults Mayer for failing to tell O'Brien about the Firstline bankruptcy. Div. Ind. Br. at 32. As the undisputed documentary established, O'Brien subscribed to Benchmark in August 2009, before Mayer knew about the Firstline bankruptcy. RMR Ex. 429 (dated Aug. 28, 2009).

Thomas Alberts – Alberts, an investor with a hazy recollection of investments he made more than five years prior to the date the OIP was filed, also did not testify about any material misrepresentations. The Division concedes as much by its silence. *See* Div. Ind. Br. at 32. Instead, the Division rehashes the same material omission theory as with O'Brien, claiming that Mayer was required to orally convey to Alberts every risk expressly set forth in the PPMs Alberts attested to reading and understanding. FoF ¶¶ 463-71; RMR Exs. 400, 733. As with O'Brien, this theory should be rejected as it has no basis in law.

As the foregoing makes clear, the investor testimony simply did not support the Division's theory of the case, and the documentary evidence – subscription agreements and PPMs – directly undermined it. The Division, however, accuses Mayer of "blam[ing] [his] customers" because he referred to their subscription agreements. *See* Division's Brief in Response to Respondents' Joint Brief, dated Sept. 30, 2015 ("Div. Br."), at 22-23. There are at least three reasons why an investor's attestations are relevant. First, contemporaneous written representations undermine the veracity of vague oral testimony provided years after-the-fact. Alberts, who claimed he thought his investments were "safe" based on conversations that took place nearly a decade ago, is a perfect example. *See* Mayer Br. at 12 n.4 (describing Albert's poor memory about basic facts such as the identity of his broker). 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,* Joint Br. at 21-22.

C. The Division's Evidentiary Arguments Regarding Mayer Are Flawed

The Division tries to relitigate a number of 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.

The Division expressly acknowledged that only those red flags identified in the OIP are at issue, Tr. 272:11-13 ("[T]here are red flags listed in the OIP. Those are the red flags we are presenting in the case."), and Respondents specifically relied on the Division's representation.[5] 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. Nevertheless, and as noted above, there was nothing unusual or "fraudulent" about the fact that the IASG public offering created a liquidity event for earlier investors in the Pre-2003 Trusts. *See supra* at 8.

Similarly, the Division did not allege in the OIP that Mayer's supposed knowledge of an alleged "net capital violation" was a red flag. Div. Ind. Br. at 29; *see also id.* at 4 (claiming MS&Co. had "repeated net capital violations"). Nor has the Division ever claimed,

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[5] *See* Reply Memorandum of Rabinovich, Mayer and Rogers In Further Support Of Their Motion For A More Definite Statement, Dec. 2, 2013, at 7-8.

as it does now, that Mayer's supposed knowledge of a potential net capital violation in March 2009 was a prohibition on any further sales of the Trust Offerings or something he should have disclosed to investors. *Id.* at 29, 32. In any event, the Division has misconstrued the factual record. There is no evidence that Mayer learned at a March 2009 meeting that MS&Co. was in danger of a net capital violation, or that MS&Co. was in "serious financial trouble." In the testimony cited by the Division to support this point, Mayer simply described a March 2009 meeting where it was discussed that "revenue was certainly anticipated to be lower than other historical years [given the recession] so we need to figure out a way to cut costs and obviously generate revenue." Tr. 3399:16-3400:8. There was also no testimony by Rabinovich, as the Division claims, that "Mayer knew about the potential net capital violation by the second or third quarter of 2009." Div. Ind. Br. at 30. Moreover, it was not until December 2009, months *after* Mayer had left MS&Co. to form RMR, that MS&Co. in fact failed its FINRA net capital requirement because of an adverse arbitration ruling (which is materially distinct from its contractual net capital requirement with its clearing agent, NFS). Tr. 2128:4-7; *see also* FoF ¶¶ 523-26.

Equally meritless (and waived) is the Division's attempt to rehash "red flags" that were rejected by the ALJ. The ALJ listed all of the alleged red flags that the Division claimed Mayer and others "failed to investigate." Decision at 84. This included, among others, the so-called "redemption policy," and "features" of the Trust Offerings that supposedly "constituted red flags." *Id.* These same "red flags" are cited in the Division's brief as purported proof that Mayer acted with scienter. Div. Ind. Br. at 29-30. Yet, in analyzing the Division's alleged red flags, the ALJ "decline[d] to discuss several of the[m] that I have determined to *not* constitute a red flag." *Id.* at 91 (emphasis added). This included the Trust Offerings' allegedly "extremely

high fees" (which were fully disclosed in its PPM) and the fact that the proceeds of TDM Verifier 07R would be used "to retire certificates issued by TDM Verifier 07" (which was also disclosed in the PPM). *See* Div. Ex. 298, at 6. They were therefore rejected.[6] 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 ¶¶ 329-37 (the "redemption policy" was non-existent).

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

The overwhelming evidence established that Mayer 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. Mayer Br. at 24-26. The Division does not address these points in its response to the individual briefs. Instead, it merely asserts in its response to Respondents' joint brief that "[i]ndividual liability was appropriate." Div. Br. at 26-27. No further reply is warranted. Mayer 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 ¶¶ 616-22, 648-66.

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

Neither the ALJ nor the Division performed a meaningful *Steadman* analysis. The ALJ's imposition of a one-year suspension and other punitive remedies, and the Division's

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[6] The Division also falsely claims that Mayer "did not question the 13% return" on Fortress, citing page 3445, line 8, through 3447, line 3, of the transcript. Div. Ind. Br. at 29. Yet, the very next question posed to Mayer was whether he performed any calculations to determine if the interest rates were achievable, to which he responded in considerable detail that he did. *See* Tr. 3447:4-3448:23.

procedurally improper request for a lifetime bar and monetary payments that dwarf those imposed by the ALJ, are *not* supported by the law or the record.[7]

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* Respondents' Joint Reply Brief at 17-18. 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.

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. Mayer did not sell any of the Four Funds after September 23, 2008. Nor did he sell six of the Trust Offerings after that date, and four others, he never sold. FoF ¶¶ 553, 556. Only one investor called by the Division (O'Brien) even purchased a McGinn Smith Security after September 23, 2008, and as shown, Mayer made no misrepresentation or omission to him.

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[7] *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 Mayer *sua sponte*, the Division is not, absent a cross-petition, permitted to advocate for such a result, and to do so infringes upon Mayer's right to due process.

Mayer was not "deceptive," he had no "prior violations,"[8] and any claimed need for deterrence is a fiction: Mayer offers "zero proprietary product" at RMR, which has been examined twice by the SEC (OCIE), and he has had an unblemished record in his 20 years in the securities industry.[9] Tr. 4965:11-25.

Nor was Mayer unjustly enriched. His family lost significant amounts in McGinn Smith Securities. *See* RMR Exs. 215B, 804. The Division's request for more severe penalties, as well as the single third-tier penalty imposed by the ALJ, ignores that Mayer did not act recklessly, or even negligently, and that the Division elicited testimony from only one post-September 23, 2008 investor. Mayer Br. at 27.

Likewise, the Division's request that Mayer should be forced to disgorge $122,455, *see* Div. Ind. Br. at 48, more than four times the amount awarded by the ALJ ($29,518), *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 Mayer's behalf, or were identified in the Division's *Brady* disclosure, none of whom believed they were misled (and were not misled). Mayer 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

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8 The Division's attempt to bootstrap all of the time-barred transactions at issue in the OIP into alleged "prior violations" is not supported by the record.

9 The Division's claim that Mayer's "disciplinary history also supports a significant sanction," is baseless. Mayer was *not* personally accused of any wrongdoing in the single settled customer complaint from 2003 referenced in his Broker Check Report and, as the Division expressly acknowledged, made no contribution to the settlement. *See* Mayer Br. at 31 n.8.

public is not at risk. Div. Ind. Br. at 50. The evidence established that Mayer did not violate the federal securities laws, and he certainly did not commit "egregious securities laws violations spanning years," as the Division claims. *Id.* 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. Mayer 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).

The Division's case was about the fraud of McGinn and Smith; but to punish Mayer for their wrongs – which were unknown to Mayer and everyone else – is unfair and unjust. Nor does the record or the law support it. Mayer is a relatively young man with a young family to support (FoF ¶ 15), 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 Mayer.

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CERTIFICATE OF COMPLIANCE

This brief complies with the Commission's Extension and Word Limit Order, dated June 5, 2015. The brief contains 4,861 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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