UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of

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

PHILIP S. RABINOVICH'S AND BRIAN T. MAYER'S RESPECTIVE PETITIONS FOR REVIEW OF THE INITIAL DECISION AS AMENDED BY THE ORDER REVISING AND RATIFYING PRIOR ACTIONS

Respondents Philip S. Rabinovich ("Rabinovich") and Brian T. Mayer ("Mayer") respectfully submit their respective petitions for review of the law judge's Initial Decision dated February 25, 2015, as corrected by Order on Motions to Correct Manifest Errors of Fact in the Initial Decision dated April 9, 2015 (the "2015 Decision"), and amended by Order Revising and Ratifying Prior Actions dated March 30, 2018 (the "2018 Order," and together with the 2015 Decision, the "2018 Decision"). The Commission should grant these petitions because, as summarized below, (1) erroneous conclusions of law were made and applied, (2) erroneous findings of fact were made despite overwhelming evidence to the contrary,[1] and (3) prejudicial error was committed in the conduct of the hearing. The Commission also should grant these petitions because important policy issues are raised by the selective enforcement and pursuit of an administrative proceeding in the circumstances here.

Introduction

On April 29, 2015, Rabinovich and Mayer filed petitions for review of the 2015 Decision, which were granted by Order of the Commission dated May 21, 2015. Rabinovich and Mayer's appeal to the Commission was fully briefed as of October 28, 2015, and, unlike any other administrative proceeding subject to the Commission's Order dated November 30, 2017 (the "Post Hoc Ratification Order"), argued before the Commission on August 15, 2017. More than three months after oral argument – but prior to the issuance of an opinion by the Commission – the Solicitor General filed a brief in the United States Supreme Court on behalf of the Commission, and for the very first time took the position that the Commission's ALJs are

---

[1] Pursuant to Rule 410(b), Rabinovich and Mayer petition for review of all findings contrary to their Rule 240 Proposed Findings.

"inferior officers" and must be constitutionally appointed.[2] Thus, by the Commission's own admission, this proceeding was unconstitutional – the very position Rabinovich and Mayer have maintained throughout these proceedings. Notwithstanding its admission, the Commission subsequently issued the Post Hoc Ratification Order and purported to resurrect this unconstitutional proceeding through "reconsideration and ratification."

By letters dated January 18, 2018 and February 14, 2018, Rabinovich and Mayer objected to this process in its entirety, and, reserving all rights, raised a number of significant developments in the law and other matters for consideration by the law judge, and expressly adopted and incorporated by reference all facts and arguments set forth in their then-pending appeal before the Commission and related pre-hearing and post-hearing motions, briefs, findings of fact and conclusions of law, and other filings. *See* Ltr. from M. William Munno to Chief Judge Murray dated Jan. 18, 2018 at 2-9; Ltr. from M. William Munno to Chief Judge Murray dated Feb. 14, 2018 at 1-3.

After concluding that this case was "an unusual situation," *see* 2018 Order at 6, the law judge expressly rejected Rabinovich and Mayer's challenge to the ratification process, their continuing objection to the constitutionality and timeliness of these administrative proceedings, and their challenges to various evidentiary rulings. *See* 2018 Order at 6-12. Bound by subsequent legal decisions, the law judge did, however, amend the 2015 Decision, in part, reducing the amount of disgorgement pursuant to *Kokesh v. SEC*, 137 S. Ct. 1635 (June 5, 2017), and vacating the collateral suspension of Rabinovich and Mayer, but only from the municipal securities dealer, municipal advisor, transfer agent, or statistical rating organization categories

---

[2] *See* Brief for Respondent Securities and Exchange Commission dated November 29, 2017, filed in *Raymond J. Lucia v. SEC*, No. 17-130 ("*Lucia* Brief") at 10-18 (arguing that "the Commission's ALJs are 'inferior officers' rather than 'mere employees'").

pursuant to *SEC v. Bartko*, 845 F.3d 1217 (D.C. Cir. 2017). *See* 2018 Order at 12-20. The law judge also revised *sua sponte* the calculation of pre-judgment interest to run from November 1, 2009. *See* 2018 Order at 20-21. Finally, despite purporting to reconsider the entire record – a gargantuan file consisting of more than 6,000 pages of transcripts spanning eighteen days of hearing testimony, nearly 1,000 unique exhibits, and more than 1,000 pages of motions, pre- and post-hearing briefing, findings of fact and conclusions of law and related submissions – the law judge summarily rejected all other arguments made by Rabinovich and Mayer, without any mention beyond a cursory footnote. *See* 2018 Order at 6 n.3.

The 2018 Decision continues to suffer from the same infirmities as the 2015 Decision and contains additional erroneous conclusions of law and findings of fact that warrant further briefing and review by the Commission. Accordingly, Rabinovich and Mayer petition for review of the 2018 Decision as set forth below:

I. The Issues Actually Addressed In The 2018 Order

A Collateral Suspension Based on Pre-Dodd Frank Conduct Is Improper

1. The law judge erred in collaterally suspending Rabinovich and Mayer from association with an investment adviser based solely on alleged conduct in their capacity as registered representatives of a broker-dealer that occurred prior to the passage of the Dodd Frank Act in July 2010. In *Bartko v. SEC*, 845 F.3d 1217 (D.C. Cir. 2015), which the law judge purported to follow, the Court stated that "[a] collateral bar is a tool by which the SEC can ban a market participant from associating with *all classes* based on misconduct regarding *only one* class," and may be imposed only based on conduct that occurred after July 22, 2010. *Id.* at 1220 (emphasis added). The law judge acknowledged that the OIP did not allege any violation of the Advisers Act and noted that "the Division did not pursue disgorgement" or any penalty under the

Advisers Act. 2015 Decision at 114-15 nn.129-30. Nevertheless, the law judge collaterally suspended Rabinovich and Mayer from association with an investment adviser. There was no legal or factual basis to do so.

As support for punitively suspending Rabinovich and Mayer from associating with their investment advisory firm (RMR Wealth Management, LLC), which has operated without incident for 8 years, the law judge relied on *Teicher v. SEC*, 177 F.3d 1016, 1020-21 (D.C. Cir. 1999), which is not remotely similar to circumstances here. In *Teicher*, the defendants, who were convicted of securities fraud, conspiracy and mail fraud in an insider trading scheme and barred from the securities industry, were also properly barred from association with an unregistered investment advisor.

The law judge's citation to Rabinovich and Mayer's registration with McGinn Smith Advisors, for which there was no evidence that they conducted any business, does not support their suspension as investment advisors of RMR. Rabinovich and Mayer did not have any investment advisory clients at McGinn Smith Advisors, no investment advisory agreements were offered in evidence, and no evidence was presented that they acted as investment advisors. The law judge's statement that "clients also considered them their investment advisers" is grossly misleading and beside the point. 2018 Order at 17 n.12. It was the Division who referred to Mayer as an investment advisor, not the customer (Tr. 829:2-3); the customer called Mayer a "senior broker" (*see, e.g.*, Tr. 931:2-6). As to Rabinovich, the ALJ cited testimony of a customer who found Rabinovich "responsive[]" and "always extremely diligent" (Tr. 4387:8-9) as compared with other "brokers and advisors" he has used, and testified that he was "satisfied with Rabinovich's performance as [his] broker in May of 2008." Tr. 4388:21-24.

The Steadman Factors Were Not Assessed Against The Entire Record

2. The law judge misapplied the *Steadman*[3] factors in affirming her twelve-month suspension of Rabinovich from association with a broker-dealer and an investment adviser. The law judge acknowledged that Rabinovich and Mayer left McGinn Smith in October 2009, established an SEC-registered investment advisory firm, RMR which has operated without regulatory incident, and does not present any proprietary product, as McGinn Smith did. Writing this off as "but one of the *Steadman* factors," the law judge erroneously concluded that "what is determinative is that Respondents violated the antifraud provisions of the securities statutes." 2018 Order at 19. Rabinovich and Mayer do not agree that they violated the law, but if that were all that was required to impose a suspension, there would be no need to ever engage in a *Steadman* analysis. The *Steadman* factors must be assessed against the entire record, something the law judge failed to do.

Ratification Was A Nullity

3. The law judge erroneously concluded that the Commission can "ratif[y] the agency's prior appointment" of its ALJs, *see* Post Hoc Ratification Order at 1, notwithstanding the fact that the Commission never appointed those ALJs in the first place. In so doing, the law judge ignored the Commission's admission in briefing before the United States Supreme Court that it "*did not play any role in the selection*" of its ALJs, *see Lucia* Brief at 19 (emphasis added), and instead relied on principles of agency law – a theory never put forth by the Commission in the Post Hoc Ratification Order.[4]

---

[3] *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979).

[4] The law judge also detailed the process by which the Commission's ALJs were purportedly selected and "appointed," *see* 2018 Order at 7, facts that are nowhere to be found in this record due to the prior position of the Commission and its staff that appointment pursuant to the United States Constitution was unnecessary.

Moreover, the cases relied upon by the law judge to reach her conclusion did not, as here, involve the improper appointment of a judge overseeing the principal legal and fact-finding stage of proceedings, but instead the simple ratification of administrative decisions entirely distinct from judicial or quasi-judicial decision-making. *See* 2018 Order at 7; citing, *e.g.*, *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 204-05, 213-14 (D.C. Cir. 1998) (finding that a written decision by a properly appointed Director of OTS, following a trial before a properly appointed ALJ, effectively ratified the Notice of Charges that were signed at the outset of the case by the "Acting Director" of the OTS); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, (D.C. Cir. 1996) (upholding a vote by a reconstituted FEC to find probable cause to continue a pending case where the FEC was not properly constituted at the time of its initial probable cause finding); *Advanced Disposal Services East, Inc. v. NLRB*, 820 F.3d 592 (3d Cir. 2016) (finding that a properly constituted NLRB could ratify the actions of its Regional Director in overseeing an election of whether employees would choose to unionize; the authority of the hearing officer that adjudicated the dispute was not at issue).

Restrictions on the Removal of ALJs Violate Separation-of-Powers

4. The law judge erred in concluding that the restrictions on removal of Commission ALJs do not violate the United States Constitution's separation-of-powers principles based on a mechanical application of the Commission's opinion in *Timbervest*. The law judge reached this conclusion despite the fact that (i) the Commission expressly admitted in *Lucia* that its ALJs are insulated by "at least two, and potentially three, levels of protection against presidential removal authority," *see Lucia* Brief at 20, and (ii) much of the justification supporting the Commission's decision in *Timbervest* has since been abandoned by the Commission in *Lucia*, *see Timbervest, LLC*, Investment Advisers Act of 1940 Release No. 4197,

2015 SEC LEXIS 3854, at *107-12 (Sept. 17, 2015) (finding removal restrictions not unconstitutional because, among other things, ALJs are mere "employees," and "every one of their decisions can be revisited in the course of [the Commission's] *de novo* review"). The statutory restrictions on removal violate separation-of-powers principles and warrant dismissal. *See FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993).

A New Proceeding Was Required

5. The law judge erroneously concluded that she could cure the constitutional defects in this proceeding through "reconsideration and ratification." It was not feasible for the law judge to review this four-year-old, gargantuan record and make, as she must, a "detached and considered affirmation" of the 2015 Decision. Nor did she. This action should have instead been started anew, either in an Article III forum (where it was required to have been brought in 2013 to afford Respondents equal protection) or before a properly appointed judge, and in either case, the renewed action would be indisputably time-barred by 28 U.S.C. § 2462. *See, e.g.*, *Ryder v. United States*, 515 U.S. 177 (1995) (holding that an individual subjected to a trial before an unconstitutionally appointed judge "is entitled to a hearing before a properly appointed panel of that court"); *United States v. L.A. Trucker Truck Lines, Inc.*, 344 U.S. 33 (1952) (where the appointment of the adjudicator in an administrative proceeding is legally deficient, and the respondent objects, "the defect in the examiner's appointment [is] an irregularity which would invalidate a resulting order"); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) (administrative hearing before examiner not properly appointed rendered resulting orders null and void and required release of immigrant detained by the government), *superseded by statute as recognized in, Ardestani v. INS*, 502 U.S. 129 (1991). As the Supreme Court recognized in *Ryder*, retroactively blessing an adjudication before an unconstitutional judge "would create a

disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments." *Ryder*, 515 U.S. at 188.

Section 2462 Bars This Proceeding

6. The law judge erred in concluding that this entire proceeding is not barred by 28 U.S.C. § 2462, which provides that "an action . . . shall not be entertained unless commenced within five years from the date when the claim first accrued." In the 2018 Order, the law judge reiterated her prior (incorrect) conclusion that "Respondents had the requisite scienter to violate the antifraud provisions of the securities laws by February 1, 2008," *i.e.*, more than five years prior to the date the OIP was filed, but nevertheless found that the proceeding *could* be entertained, because "Respondents continued to recommend and sell the fraudulent products after September 23, 2008." 2018 Order at 11. Rabinovich and Mayer did not sell any of the Four Funds –the centerpiece of the untimely OIP – after September 23, 2008. In fact, the only products at issue that Rabinovich presented to his clients after September 23, 2008, were the Trust Offerings, and the overwhelming evidence at trial established that these were not "fraudulent." Nor were *any* of the McGinn Smith Securities "fraudulent," a falsity repeatedly uttered by the Division that the law judge adopted against the weight of the evidence. Rather, McGinn and Smith secretly stole and diverted funds earmarked for investment unbeknownst to Rabinovich and Mayer.

Moreover, the law judge overlooked or misapprehended Rabinovich and Mayer's overarching position – namely, by alleging claims in the OIP that occurred more than five years before the OIP was filed, the proceeding could not be entertained. The Division's assertion of claims prior to September 23, 2008 thus deprived the ALJ (and any other forum) of jurisdiction to hear the case. *See, e.g.*, *Williams v. Warden*, 713 F.3d 1332, 1337-40 (11th Cir. 2013) ("the

great weight of authority" holds that the statutory command – "shall not be entertained" – is "jurisdictional in nature"). Not only did the OIP allege claims prior to September 23, 2008, but the Division also presented testimony and exhibits that the law judge admitted over Respondents' objections based on the Four Funds (none was sold after September 23, 2008) and conduct prior to September 23, 2008 – including hearsay allegedly dating back to 1999 that was highly prejudicial and contaminated the entire proceeding.

The Record Should Have Been Reconsidered, If At All, Under The Amended Rules of Practice

7. The law judge erred in refusing to reconsider her prior evidentiary rulings under recent amendments to the Commission's Rules of Practice. Because the law judge was without constitutional authority to conduct these proceedings until, at the earliest, November 30, 2017, any action taken prior to such date is a nullity. Thus, assuming the law judge had the authority to reconsider the record after November 30 (and she did not), she should have done so as though these proceedings began at such time, when the new rules were in effect.

8. The law judge erred in refusing to exclude all "unreliable" evidence as expressly required by amended Rule 320, dismissing the recent amendment as superfluous. *See* 2018 Order at 9 ("I do not consider the addition of the adjective 'unreliable' to Rule 320 to be a significant change in the criteria for evidence because Section 556(d) of the Administrative Procedure Act already required that sanctions may not be imposed unless they are supported by 'reliable' evidence." (citations omitted)). The law judge repeatedly allowed "unreliable" evidence to be received, over Respondents' objections, including but not limited to David Smith's 1999 *never-sent* handwritten ramblings – pure hearsay and filled with prejudicial statements. Tr. 4575:5-11, 4577:20. Indeed, the Division's conduct – reading the document into the record, *see* Tr. 4577:21-4580:25, "under the guise of asking questions" – is precisely what

the Second Circuit found in 2015 to be "manifestly erroneous," and "especially prejudicial and improper" in the criminal trial of McGinn and Smith. *See United States v. McGinn*, 787 F.3d 116, 128 (2d Cir. 2015). Incredibly, the law judge concluded that "the notes are not unreliable," simply because the material was seized from Mr. Smith's home by federal agents and allegedly authored by Mr. Smith. 2018 Order at 9. This was error. Seeking to minimize the effect of her plainly erroneous ruling, the law judge claimed that she did not rely on the handwritten ramblings in issuing her decision. This ignores the law judge's own statement on the record when she questioned one Respondent, "how do you square all that with . . . the letter that Smith wrote in 1999 that said the whole thing was a sham." Tr. 5703:22-25. It also ignores the fact that the Division expressly relied on and quoted the 1999 letter in the OIP. *See* OIP at 9 n.3.

Equally puzzling is the law judge's admission that the handwritten ramblings "predated the allegations in the OIP and did not involve any of the Respondents," *see* 2018 Order at 10, further begging the question of why the document was received in evidence at all. Misleading the reader, the law judge noted that the handwritten ramblings are in evidence as Livingston Exhibits 31 and 32, *see* 2018 Order at 9 n.5, as though a Respondent sought their admission. She fails to mention that the document was offered by the Division, over Respondents' repeated objections, and when Livingston's counsel was not present. *See* Tr. 2434:7-13, 2948:12-20, 4574:5-11.

9. The law judge erred in refusing to consider on remand affidavits from many individuals who were subpoenaed to testify, but unable to attend the hearings. Citing the amended rules, under which Respondents are permitted to depose at least five witnesses prior to any hearing, Rabinovich and Mayer argued that they would have undoubtedly utilized the new rule in lieu of offering testimony by affidavits. The law judge dismissed this argument, because

the ability to depose witnesses under the new rules "does not automatically translate into admissibility of those depositions." *See* 2018 Order at 9 (citing 17 C.F.R. § 201.235(a)(5)). The law judge denied Rabinovich and Mayer's prior motion (in 2014) to admit the affidavits – which she now refers to as a "fuss" – based on a purported concern that the Division would be unable to cross-examine the witnesses. Of course, had Rabinovich Mayer been given the opportunity to depose those witnesses, the Division would be present, and there would be no such concern. In any event, insofar as some of the witnesses who submitted affidavits were called to testify at the hearing, the Division elicited little, if any, testimony on cross-examination. The affidavits should have been received in evidence.[5]

It is also not relevant that the law judge claims she "took [it] as a given" that Rabinovich and Mayer had "many satisfied customers." 2018 Order at 10 n.6. First, the affidavits proved far more than the fact that the customers of Rabinovich and Mayer were satisfied. They demonstrated that Rabinovich and Mayer did not make material misstatements or omissions to their customers and that they adequately and accurately explained the risks and rewards of investing in McGinn Smith Securities. Second, not all affidavits were submitted by customers. *See, e.g.*, RMR Ex. 611 (affidavit of James E. Hacker, an attorney who provided 28 boxes of McGinn Smith's due diligence materials regarding the McGinn Smith Securities to the U.S. Attorney's Office in connection with their criminal action against Timothy McGinn and David Smith). Nor is the law judge's supposed internal thought process about unadmitted evidence of any use to either the Commission or the Circuit on appeal.

---

[5] The statement by the law judge that Respondent Mayer "was allowed to put affidavits from several supporting witnesses into evidence" (2018 Order at 9) is misleading, as only affidavits by witnesses who provided live testimony were received.

Mayer Has An Unblemished Record

10. The law judge erred in claiming that she "accurately summarized the contents of Mayer's BrokerCheck report with FINRA," *see* 2018 Order at 10, when she wrote that "Mayer settled a customer complaint with FINRA for $20,000." *See* 2015 Decision at 48 n.63. This statement is nowhere to be found in Mayer's BrokerCheck report. *See* Div. Ex. 484. Mayer was *not* personally accused of any wrongdoing in the complaint, and Mayer made no settlement contribution. *See* FoF ¶ 17; Division FoF ¶ 522. The law judge now claims she did not to rely on the FINRA complaint and settlement in imposing sanctions and for that reason these facts were relegated to a footnote. This is not clear from the 2015 Decision, and the reader should not be required to speculate on what the law judge did or did not rely upon based on its placement in the initial decision.

Pre-Judgment Interest Is Punitive

11. The law judge erred in *sua sponte* ordering pre-judgement interest to run from November 1, 2009. Pre-judgment interest under these circumstances – where Rabinovich and Mayer have been ensnared in prolonged proceedings as a result of the Commission's failure to properly appoint its ALJs – is punitive. There should be no award of prejudgment interest. *See, e.g.*, *Matter of Jordan*, 2017 FINRA Discip. LEXIS 39, at *72 (Sept. 26, 2017) (finding it "unduly punitive" to require respondent to pay prejudgment interest in prolonged proceeding where last trades at issue occurred five years earlier); *Matter of Coxon*, Securities Act of 1933 Release No. 8271, 2003 SEC LEXIS 3162, at *65 (Aug. 21, 2003) (cutting prejudgment interest in half due to "the passage of time" – nearly ten years – from the last violation to the Commission's opinion); *see also City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S.

189, 195-96 (1995) (noting that prejudgment interest may be denied in "peculiar" circumstances, and "the most obvious example" would be a plaintiff's "undue delay").

II. The Issues Ignored In The 2018 Order

Rabinovich and Mayer Should Not Suffer Due To The Commission's Missteps

12. The law judge ignored (and erred in rejecting) Rabinovich and Mayer's argument that prolonging this proceeding solely to "make it constitutional" materially and uniquely prejudiced them. This case – filed in September 2013 and tried in January 2014 – is unlike any of the more than 100 other cases subject to the Post Hoc Ratification Order. Indeed, more than 80% of those cases were decided on default and without any hearing. Of the fewer than 20 cases in which ALJs did hold hearings, this case is one of only two that was heard four years ago, in 2014. Only this case, however, was fully briefed and argued to the Commission prior to the issuance of the Post Hoc Ratification Order. This case is also exceedingly complex, involving ten separate Respondents, twenty-six separate financial products, and included testimony from more than forty witnesses. The notion that, realistically, the law judge in fact "reexamined" the record is dubious at best. The law judge agreed that this case was "an unusual situation," but nevertheless ignored this argument entirely.

The Commission May Not Impose Disgorgement

13. The law judge ignored (and erred in rejecting) Rabinovich and Mayer's argument that the Commission may not, as a matter of law, impose disgorgement for any period of time even within the five year statute of limitations of § 2462. *See Kokesh*, 137 S. Ct. at 1642 n.3 ("Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context.").

Numerous Errors Identified In the April 2015 Petitions for Review

14. The law judge ignored (and erred in rejecting) numerous additional arguments – including that the overwhelming evidence established that Rabinovich and Mayer knew of, and complied with, their obligations and duties as registered representatives, which did not include replicating an investment banker's due diligence, that Rabinovich and Mayer did not make any material misrepresentation or omission about a security to any customer or otherwise act with the intent to deceive, manipulate, or defraud, and that the law judge erroneously expanded the holdings of *Hanly v. SEC*, 415 F.2d 589 (2d Cir. 1969) – that were incorporated by reference in the letters of January 18 and February 14, 2018, which are more fully detailed in Rabinovich's and Mayer's separate petitions for review, filed in April 2015, copies of which are attached hereto as Exhibits A and B for ease of reference to the factual and legal issues that were not addressed in the 2018 Order.

Conclusion

For all of these reasons, Rabinovich and Mayer respectfully request the opportunity to submit supplemental briefing to the Commission to address the foregoing issues insofar as they have not been addressed in his prior briefing to the Commission.[6]

[6] *See, e.g.*, *Timothy W. Carnahan*, Securities Act Rel. No. 10457 (Feb. 8, 2018) (directing the submission of supplemental briefing to address any matters deemed pertinent in light of an ALJ's ratification order).

DATED: New York, New York
April 13, 2018

SEWARD & KISSEL LLP

By: M. William Munno

M. William Munno
Michael Weitman
One Battery Park Plaza
New York, New York 10004
Telephone: (212) 574-1587
Facsimile: (212) 480-8421

Attorneys for Respondents
Philip S. Rabinovich and Brian T. Mayer

SK 88888 0211 7860118

A

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of

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

PHILIP S. RABINOVICH'S PETITION FOR REVIEW OF THE INITIAL DECISION

Rabinovich Petition for Review

Respondent Philip S. Rabinovich ("Rabinovich") respectfully submits this petition for review of the law judge's Initial Decision dated February 25, 2015 and corrected by Order dated April 9, 2015 (the "Decision"). The Commission should grant Rabinovich's petition because, as summarized below, (1) erroneous conclusions of law were made and applied, (2) erroneous findings of fact were made despite overwhelming evidence to the contrary,[1] and (3) prejudicial error was committed in the conduct of the hearing. The Commission also should grant Rabinovich's petition because important policy issues are raised by the selective enforcement and pursuit of an administrative proceeding in the circumstances here.

Introduction

Rabinovich has been in the securities industry for 18 years since graduating college in 1996. *See* Phil Rabinovich, Brian Mayer and Ryan Rogers' Joint Proposed Findings of Fact and Conclusions of Law ("FoF") ¶ 3. During that time, no client of Rabinovich has filed a complaint against him. *Id.* For more than the past five years, Rabinovich has managed (along with Respondent Brian Mayer) RMR Wealth Management ("RMR"), an SEC registered investment advisory firm, which does not sponsor private placements or mutual funds or offer proprietary product. FoF ¶¶ 33, 34. RMR has had an unblemished regulatory record. FoF ¶ 35. Rabinovich is a registered investment advisor representative of RMR. *See* FoF ¶ 36.

Before establishing RMR in October 2009 with Respondents Mayer and Ryan Rogers, Rabinovich was a registered representative in the New York branch office of Albany-headquartered McGinn, Smith & Co., Inc. ("McGinn Smith"), an SEC-registered broker-dealer founded in 1980 by Timothy McGinn ("McGinn") and David Smith ("Smith"). *See* FoF ¶¶ 9,

---

[1] Pursuant to Rule 410(b), Rabinovich petitions for review of all findings contrary to his Rule 240 Proposed Findings.

41.eWhile there, Rabinovich proposed diversified portfolio allocations for his clients (mostlye accredited investors), including certain McGinn Smith private placements ("McGinn Smith Securities").[2] *See, e.g.*, FoF ¶¶ 377, 385. His clients' portfolios were significantly impacted by the Great Recession in late 2007 and throughout 2008, as were most stock and bond portfolios. FoF ¶ 339, RMR Ex. 305.

In 2010, it was discovered that McGinn and Smith had secretly stolen and diverted funds from certain McGinn Smith Securities. Tr. at 2455-57. The Commission thus sued McGinn and Smith civilly in federal court, and U.S. Attorney prosecuted them criminally. *Id.*; Div. Ex. 453.[3e]

In September 2013, during the pendency of the civil and criminal federal court actions against McGinn and Smith, the Commission filed an administrative proceeding selectively blaming just Rabinovich and nine others for not seeing the supposed red flags the Division claims existed. *See* OIP ¶¶ 1-10, 38-51. Yet, more than 35 other registered representatives also did not see the supposed red flags. FoF ¶ 319. Nor did the NASD or the SEC see them when they examined McGinn Smith including its private placement offerings. *See* FoF ¶¶ 630-34.

The overwhelming evidence at the hearings demonstrated that Rabinovich did not violate any securities law. The testimony, including testimony from the Division's own witnesses, showed that Rabinovich fulfilled his duties as a registered representative and at all

---

2 "McGinn Smith Securities" means, collectively, the Four Funds, the Trust Offerings and McGinn Smith Transaction Funding Corporation ("MSTF"). The "Four Funds" means First Independent Incomes Notes, LLC ("FIIN"), First Excelsior Income Notes LLC ("FEIN"), Third Albany Income Notes LLC ("TAIN"), and First Advisory Income Notes LLC ("FAIN"), single purpose, New York limited liability companies formed in September 2003, January 2004, November 2004 and October 2005, respectively. "Trust Offerings" refers to the 21 offerings referred to in FoF ¶ 47.

3 Smith and McGinn are serving lengthy sentences in federal prison. *See* Div. Exs. 459, 460.

times acted in the best interests of his clients. FoF ¶¶ 188-234, 538-44. He researched and fully understood the features, risks, and rewards of McGinn Smith Securities, all of which were fully disclosed in the offering documents in any event. FoF ¶¶ 105-63. Nevertheless, the law judge accepted the Division's theory of liability based on erroneous conclusions of law and findings of fact in a proceeding that was infected with error and that should have been brought in federal court where the Commission sued McGinn and Smith. Accordingly, Rabinovich petitions for review of the Decision as set forth below:

1.e The overwhelming evidence showed, and expert testimony confirmed, thate Rabinovich knew of, and complied with, his obligations and duties as a registered representative. He performed product suitability and client suitability assessments before offering McGinn Smith Securities to his clients. He knew the due diligence that McGinn Smith and others were performing on the investments. He understood the features, risks and rewards of the investments he was offering. And, he presented them only to clients for whom they were suitable. He more than complied with the obligations of a registered representative. *See generally* FoF ¶¶ 188-234.

Nevertheless, the law judge improperly extended the holdings of *Hanly* and *Milan*,[4] cases with vastly different facts and circumstances, in concluding that Rabinovich violated Section 17(a) of the Securities Act of 1933 (the "Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), and Rule 10b-5 thereunder (the "Fraud Claims"). In so doing, the law judge erroneously concluded that, during the period in question (2003-2009), individual registered representatives had a duty to "investigate" and "verify" statements in private placement memoranda ("PPM" or "PPMs") and effectively replicate the due diligence conducted by their employer's investment banking department.

---

[4] *Hanly v. SEC*, 415 F.2d 589 (2d Cir. 1969); *SEC v. Milan Capital Group, Inc.*, 00 Civ. 108, 2000 U.S. Dist. LEXIS 16204 (S.D.N.Y. Nov. 9, 2000).

2.e The law judge ignored controlling Supreme Court precedent in *Aaron* ande *Ernst & Ernst*[5] in concluding that Rabinovich violated Securities Act Section 17(a)(1), Exchange Act Section 10(b), and Rule 10b-5 thereunder. There was no evidence that Rabinovich acted with scienter – a state of mind embracing the intent to deceive, manipulate or defraud. Indeed, the OIP did not allege, and the Division did not contend, that Rabinovich had a motive to defraud his clients.[6] The overwhelming evidence was to the contrary — Rabinovich acted at all times in the best interests of his clients and tried to help his clients, who testified that, among other things, Rabinovich "was always thorough and honest and straightforward in his dealings." FoF ¶ 375; *see also, e.g.*, FoF ¶¶ 374, 379, 380, 388, 397. Tellingly, Rabinovich's own family members invested significant amounts in McGinn Smith Securities. *See* FoF ¶ 367; *see also* Decision at 60 (noting that Rabinovich and his family members "had $4.5 million in assets invested in MS & Co. private placements").

Nor was there any competent evidence that Rabinovich made a material misrepresentation or omission about a security to any client. FoF ¶ 360. While two investors claimed that they thought their investments were "safe," they admitted that the PPMs and subscription agreements they signed clearly stated that they were risky — not "safe." Significantly, neither testified that Rabinovich told them that the investments were "safe". FoF ¶¶ 403, 412.

---

5 *Aaron v. SEC*, 446 U.S. 680 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

6 *See, e.g., In re Merrill Lynch Auction Rate Sec. Litig.*, 851 F. Supp. 2d 512, 528 (S.D.N.Y. 2012) (alleged motive "to increase or maintain profit" deemed insufficient as such motive "could be imputed to any for-profit endeavor"); *Defer LP v. Raymond James Fin., Inc.*, 654 F.Supp. 2d 204, 217-18 (S.D.N.Y. 2009) (brokers' supposed motive to "earn substantiale sales commissions and fees for underwriting" auction rate securities rejected as support fore Section 10(b) liability because it does not show an intent to defraud).e

3.e The law judge erroneously concluded that Rabinovich violated Securitiese Act Sections 17(a)(2) and (3), because he supposedly "obtained money by means of untrue material statements." Decision at 108. The law judge failed to identify any untrue material statement that Rabinovich made to a client or any issuer's misstatements Rabinovich repeated to a client. *See id.*[7] Further, the overwhelming evidence showed that Rabinovich had "some reasonable basis for recommending" (*id.*) the specific securities he presented to clients. *See, e.g.*, FoF ¶¶ 235-237, 240-258.

The law judge also ignored well-established precedent that "there is no general fiduciary duty inherent in an ordinary broker/customer relationship,"[8] and that a registered representative engaging in transactions in a non-discretionary account – as Rabinovich did here (*see* FoF ¶ 366) – owes limited duties of "diligence and competence in executing the client's trade orders, and is obliged to give honest and complete information when recommending a purchase or sale."[9] Rabinovich more than complied with his duties and obligations here. *See generally* FoF ¶¶ 188-234.

4.e The law judge erred in concluding that Rabinovich violated Securities Acte Section 5(a) or 5(c) (the "Section 5 Claim"). Decision at 95-97. Although the law judge rejected the Division's theory that the Trust Offerings should be integrated into two fictitious conduits (*id.* at 96) – a theory the Division did not advance in the proceedings against McGinn and Smith

---

7 Despite the law judge's conclusion that Rabinovich "falsely represented to Chapman that FEIN was a low risk investment," Chapman expressly acknowledged in her signed subscription agreement that she relied on herself – nor Rabinovich – in evaluating the merits and risks of her investment in FEIN, and that she had read and understood the PPM and the substantial risks in investing. FoF ¶ 412; RMR Ex. 820.

8 *See Independent Order of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 940-41 (2d Cir. 1998).

9 *See De Kwiatkowski v. Bear, Stearns & Co.*, 306 F.3d 1293, 1302 (2d Cir. 2002).

in federal district court – the law judge nevertheless concluded that the Trust Offerings did not comply with Rule 502, which requires "the substantial disclosure of financial and non-financial information to all unaccredited investors." *Id.* In so doing, the law judge overlooked that financial and non-financial disclosure was made in the PPMs and provided to all investors (not just those who may have been unaccredited). *See, e.g.*, FoF ¶ 626. The law judge reached the same incorrect conclusion with respect to the Four Funds. *See* Decision at 95.

The law judge also gave no consideration at all to the fact that no court or the Commission has ever imposed Section 5 liability on an individual registered representative in circumstances such as these. Unlike here, the SEC has filed Section 5 charges, and the courts have found Section 5 violations, *only* (a) where there has been an obvious failure to comply with the registration requirement or with any claimed exemption, *and* (b) where there has been knowing or recklessly deceptive conduct.[10]

Finally, the law judge categorically rejected Rabinovich's argument that he took all reasonable steps to avoid participation in any distribution violative of the registration

---

[10] *See, e.g., SEC v. Cavanagh*, 98 Civ. 1818, 2004 U.S. Dist. LEXIS 13372, at *83 (S.D.N.Y. July 16, 2004) (defendants "merged a shell company with a small and not yet successful operating company, sold stock . . . in an unregistered transaction, took control of virtually the entire market float, created a false impression of interest in the stock . . . issued a false press release, and drove the stock price north of $5 in a 'pump and dump' scheme from which they . . . pocketed millions of dollars."); *SEC v. Gagnon*, 10 Civ. 11891, 2012 U.S.e Dist. LEXIS 38818, at *2-14ę *19-27 (E.D. Mich. Mar. 22, 2012) (defendant helpede orchestrate and promote a massive Ponzi scheme and made outlandish recommendations without basis, soliciting investors on his website, via email and in online chatrooms); *SEC v. mUrgent Corp.*, 11 Civ. 0626, 2012 U.S. Dist. LEXIS 25626, at *2 (C.D. Cal. Feb. 28,e 2012) (defendants sold unregistered securities, "cold-called investors, used high pressure sales tactics, and made material misrepresentations about . . . mUrgent's allegedly imminent IPO"); *see also SEC v. iShopNoMarkup.com, Inc.*, 04 Civ. 4057, 2007 U.S. Dist. LEXIS 70684, at *28 n.6 (E.D.N.Y. Sept. 24, 2007) (where the Division seeks equitable relief and the Regulation D safe harbor is at issue, the applicable standard is negligence and a Defendant's state of mind is relevant) (citing *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1047 (2d Cir. 1976)).

provisions of Section 5(a) and (c) of the Securities Act despite overwhelming evidence to the contrary. Among other things, Rabinovich followed McGinn Smith's written procedures for offering private placements; he had his clients complete subscription agreements and questionnaires to confirm their accredited status; he spoke with and was informed by McGinn Smith's law, compliance and investment banking departments that McGinn Smith Securities were exempt from registration; and he knew outside counsel had advised McGinn Smith that McGinn Smith Securities were exempt from registration. *See* FoF ¶¶ 616, 623-31.

Rabinovich, who was in the New York City branch office, was not aware, and had no reason to know, that McGinn Smith had accepted subscriptions from more than 35 *un*accredited investors. FoF ¶ 628. Subscriptions were sent to the Albany headquarters for review and acceptance by Smith or McGinn, and processed by McGinn Smith employee Patricia Sicluna, who was responsible for tracking the number of unaccredited investors in McGinn Smith Securities. *See* FoF ¶¶ 193, 574, 630. At no time did Smith, McGinn, the General Counsel, the Chief Compliance Officer or anyone else advise Rabinovich that more than 35 *un*accredited investors had been accepted on any Regulation D offering. FoF ¶¶ 617, 628. Under the circumstances, liability is not appropriate.[11] And, despite all of the foregoinge evidence, the law judge incorrectly concluded that Rabinovich's belief that there were fewer than 35 *un*accredited investors was not reasonable. *See* Decision at 95.

5.e The law judge erred in her findings throughout the Decision, as shee arbitrarily and capriciously cherry-picked snippets of testimony, thereby grossly distorting the evidence. For example, in setting forth the testimony of Dr. Ketan Patel (Decision at 61), the

---

[11] *See* 17 C.F.R. § 230.508(a)(3) ("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].").

law judge made no mention of the following undisputed evidence: (a) Dr. Patel was an accredited investor (FoF ¶ 398) who was introduced to McGinn Smith by his friend, Dr. Bhandari (a Rabinovich client fully satisfied with his investments) (FoF ¶ 400); (b) Dr. Patel considered but decided not to invest in several securities Rabinovich presented to him (FoF ¶ 401); (c) Dr. Patel invested only after reviewing the PPMs and signing the subscription agreements in which he represented that "investment in the Certificates involves substantial risk factors" (FoF ¶ 402); (d) Dr. Patel admitted that he was *not* told his investment in TDM Verifier 08 was "safe" (FoF ¶ 403); (e) Dr. Patel was concerned about the stock market and was aware of the turmoil in the global markets in 2008 and 2009, so much so that he stopped watching how his 401K investments were performing because everything was going down (*id.)*, (f) Dr. Patel's investments in the McGinn Smith Security had performed for 1½ years and thus he decided — without any input from Rabinovich — not to redeem the maturing McGinn Smith Security (TDM Verifier 08) and gifted it to his son's 529 college plan because the plan was earning only 1 or 2 percent (FoF ¶ 404); (g) Dr. Patel decided to make additional investments in McGinn Smith Securities based on how his initial investment had performed (FoF ¶ 405); (h) Dr. Patel received interest payments on his McGinn Smith Securities, which performed before and since the Receiver was appointed April 2010 (FoF ¶ 408); (i) Dr. Patel lied when he claimed he was physically unable to travel to testify because of an accident 25 years earlier (FoF ¶ 399); and (j) Dr. Patel testified because he wanted to "get my money back" not because of anye misrepresentation by Rabinovich (*id.*). The Decision is replete with other examples where uncontroverted documentary and testimonial evidence was ignored. *See, e.g.*, FoF ¶¶ 409-14.

6.e The law judge erred in concluding that certain disclosures in the PPMs fore McGinn Smith Securities constituted "red flags." As evidence adduced at the hearings

conclusively established, disclosures regarding conflicts of interest, fees, and related party transactions were standard in the industry and not any cause for concern. *See, e.g.*, RMR Ex. 861. Similarly, the law judge erred in concluding that the January 2008 reduction of the interest on the Four Funds' junior notes was a "red flag" in light of the fact that this event coincided with the economic downturn that impacted the entirety of the global markets. *See* FoF ¶¶ 338-48. Notwithstanding, the law judge sweepingly concluded that Rabinovich and other registered representatives should have stopped presenting *all* McGinn Smith Securities after February 1, 2008, including senior and senior subordinated notes and the unrelated Trust Offerings. *See* Decision at 115. Nevertheless, Rabinovich did not present the Four Funds to any of his clients after January 2008. *See* Div. Ex. 2, Ex. 4q.

7. The law judge misapplied the *Steadman*[12] factors in imposing sanctions of a twelve month suspension, third-tier penalties, and a cease-and-desist order. The law judge ignored that a suspension was not necessary to protect the public interest especially in light of the fact that Rabinovich left McGinn Smith in October 2009, established an SEC-registered investment advisory firm, RMR Wealth Management, which has operated for five years without regulatory incident or client complaint, and does not present any proprietary product, as McGinn Smith did. *See* FoF ¶¶ 32-35. The law judge never assessed the *Steadman* factors against the entire record. The law judge ignored the efforts Rabinovich (along with Mayer and Rogers) made after he left McGinn Smith to protect his clients and the assistance provided to the Receiver to help maximize recovery on several McGinn Smith Securities. *See, e.g.*, FoF ¶¶ 523,

[12] *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979).

538, 541, 544. The law judge's wooden application of the *Steadman* factors is devoid of analysis or consideration of the uncontroverted evidence.[13]

8.e The law judge erred in ordering Rabinovich to disgorge *all* commissionse earned on sales of McGinn Smith Securities after February 1, 2008, *see* Decision at 115, based on the testimony of a few investors. In so doing, the law judge ignored (i) the testimony of Rabinovich's own investor witness, Stanton Rowe, who testified unequivocally that Rabinovich "was always thorough and honest and straightforward in his dealings with [Rowe]," that Rabinovich always provided Rowe with documents, including offering materials, before Rowe made a decision to invest, that Rabinovich was a "trusted partner" who always did his job "dutifully," and that Rowe has found "no reason to believe in any misconduct" by Rabinovich (FoF ¶¶ 375-76, 379), (ii) the testimony of more than a dozen investors who either testified in person or provided an affidavit (that the law judge refused to receive in evidence) that Rabinovich had not made any material misrepresentation or omission to them (FoF ¶ 689), (iii) the fact that Rabinovich and his own family invested substantial sums in McGinn Smithe Securities, (iv) the fact that the Trust Offerings continued to pay scheduled interest, and (v) the utter lack of evidence with regards to numerous clients of Rabinovich who invested in McGinn Smith Securities. Nevertheless, the law judge arbitrarily and capriciously imputed the testimony of a few witnesses – which we respectfully submit did not establish fraud in any event – onto every single investment made by Rabinovich's clients after February 1, 2008.

---

[13] *See Monetta Financial Services, Inc. v. SEC*, 390 F.3d 952 (7th Cir. 2004) ("Although the SEC's opinion references the[] [*Steadman*] factors, the opinion does not reflect that the SEC meaningfully considered the[m] when it imposed sanctions."). The law judge also failed to consider the impact this proceeding had and will have on Rabinovich's ability to work in the securities industry, *see* FoF ¶ 691, yet concluded that no penalties against Respondent Gamello were appropriate "because it would likely severely impact his future participation in the securities industry." Decision at 102.

The law judge also failed to comply with Rule 600(a) regarding the disgorgement, as the Decision does not "specify each violation that forms the basis for the disgorgement ordered" and other requirements of the Rule, including but not limited to "stat[ing] the amount of prejudgment interest owed as of the date of the disgorgement order."

9.e The law judge erred in concluding that the Fraud and Section 5 Claimse were not barred in their entirety under 28 U.S.C. Section 2462 (*see* Decision at 89), as every claim in the OIP "first accrued" before September 23, 2008 (more than five years prior to the date the OIP was filed).[14] Because all alleged claims "first accrued" prior to September 23, 2008, there was no subject matter jurisdiction to "entertain" this case.[15] Further, the Division knew of the alleged claims at least by April 2010, when it commenced an action against McGinn and Smith in federal district court, but inexplicably waited three and one-half years to file the OIP against Rabinovich.

10.e The hearing violated Commission rules, deprived Rabinovich of duee process and equal protection rights and was otherwise fundamentally flawed. Examples abound.

a)e Rabinovich was never fully or fairly informed of the claims against him.e Fundamental fairness requires that parties be "timely" informed "of the matters of fact and law asserted."[16] The law judge ignored this mandate and denied Rabinovich's (and Mayer's and Rogers') motion for a more definite statement. Rabinovich requested information as basic as the names of any investor to whom he allegedly made a material misstatement or omission, about which specific McGinn Smith Security, and when (the month/year) he supposedly made the

---

14 *See Gabelli v. SEC*, 133 S. Ct. 1216, 1220-21 (2013).

15 *See Williams v. Warden*, 713 F.3d 1332, 1337-40 (11th Cir. 2013).

16 *See* 5 U.S.C. § 554(b); *see also Locurto v. Giuliani*, 447 F. 3d 159 (2d Cir. 2006) (party in hearing before administrative law judges does not receive "a full and fair opportunity to litigate" where he was "denied adequate discovery" on the relevant issues).

material misstatement or omission. The OIP was devoid of these essential factual allegations that are necessary even to state a claim for violation of Securities Act Section 17 and Exchange Act Section 10(b) and Rule 10b-5. The Division's post-OIP document dump – consisting of a terabyte of data – and its offer to permit Respondents' counsel to inspect more than 100 boxes of documents at the Division's offices did not resolve this deficiency.[17] Yet, the motion was denied.

b)e The Division improperly targeted Rabinovich even though McGinn Smithe employed more than 30 registered representatives during the relevant time period. Despite the fact that more than 20 other registered representatives sold over $69 million of McGinn Smith Securities to investors, the Division discriminatorily singled out Rabinovich and the other Respondents in the OIP. *See* Div. Ex. 591. The Division failed to explain why none of these twenty-plus registered representatives saw any supposed "red flags" that formed the basis of the claims against Rabinovich, or why the Division took no enforcement action against any of these individuals. *See* FoF ¶ 319. Nor did the SEC, the NASD, or outside compliance consultants see any red flags when they examined McGinn Smith's operations between 2004 and 2007, including its private placement offerings. *See, e.g.*, FoF ¶ 200; Livingston Ex. 103 (letter regarding 2004 SEC examination), RMR Exs. 874 (letter regarding 2004 SEC examination), 40 (exit conference summary regarding 2004 NASD examination), 120 (letter regarding 2006 NASD examination), 135 (letter regarding 2007 NASD examination); 161 (report regarding 2007 inspection by outside consultant).

---

[17] *See SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 410 (S.D.N.Y. 2009) ("While the responsive documents exist somewhere in the ten million pages produced by the SEC, the production does not respond to the straightforward request to identify documents that support the allegations in the Complaint, documents [defendant] clearly must review to prepare his defense.").

c)o The Division improperly gathered evidence after the OIP was filed.o Ignoring the explicit command of SEC Rule of Practice 230(g) — "The hearing officer shall order such steps as necessary and appropriate to assure that the issuance of investigatory subpoenas after the institution of proceedings is not for the purpose of obtaining evidence relevant to the proceedings" — the Division improperly and prejudicially solicited witnesses to support the OIP *after* it was filed. In denying Rabinovich's motion to preclude the Division from offering evidence obtained from this post-OIP fishing expedition, the law judge implicitly endorsed the Division's violation of Rule 230(g). FoF ¶ 686.

d) The law judge's evidentiary rulings were arbitrary and capricious. Theo law judge erroneously refused to consider or admit testimony proffered at the hearing and in supporting affidavits that demonstrated that Rabinovich's clients held him in high opinion and did not believe he had made a material misrepresentation or omission to them. *See, e.g.*, FoF ¶¶ 374, 375, 379, 380, 388, 397, 689. These statements were sworn under oath, and served the purpose of both streamlining the hearings and sparing witnesses the considerable burden and expense of traveling to the hearings for purposes of giving testimony that likely would have lasted less than an hour. The Division made a pro forma objection to their admission, citing a desire to cross-examine the witnesses, yet asked few, if any, questions of those investor witnesses who were able to travel to testify. *See, e.g.*, Tr. at 5542-43 (asking Favish if statements in his affidavit were based on his own beliefs as opposed to access to internal McGinn Smith documents). On the other hand, the law judge permitted the Division to elicit – *and in fact relied upon in her initial decision* – triple hearsay from investor witness Vincent O'Brien. *See* Decision at 53 (accepting testimony from O'Brien as to what his sister told him that Mayer supposedly told her at a meeting where O'Brien was not present); *see also* Tr. at 1472

(permitting the Division to elicit testimony from an investor witness via the Division's cellphone speakerphone).

e)i The Division improperly commenced this proceeding before ani administrative law judge despite the existence of a related federal district court action. This administrative proceeding came on the heels of a pending federal district court action filed by the Commission against McGinn, Smith, and others. *See* FoF ¶ 93. In fact, much of the supposed "investigative record" against Rabinovich was developed under the guise of Rule 45 subpoenas issued in the federal action. Despite the indisputable fact that the matters at issue in the OIP and the federal action are interrelated and that a central issue was McGinn and Smith's fraud, the Division commenced this proceeding against Rabinovich in an administrative forum. Further amplifying the prejudicial effect of the Division's forum shopping, the Division devoted much of the hearing to (a) McGinn and Smith, who were not parties to or present at the hearing for examination, and (b) the records of McGinn Smith – that Rabinovich did not have – as described by the Division's summary witnesses (Kerri Palen and Olumiseun Ogunye), who had already spent several years analyzing this information. Particularly in these circumstances, the failure to bring this proceeding in federal court was materially prejudicial to Rabinovich.

f)i Rabinovich was denied access to traditional tools of discovery available toi litigants in federal court. The law judge ignored that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[18] Despite the stakes of this proceeding – Rabinovich's professional and financial livelihood – Rabinovich was denied meaningful time (just four months) to review the Division's gargantuan investigative record — consisting of approximately one *terabyte* (1000 gigabytes) of data and

[18] *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

more than 100 cartons of documents housed at the Division's offices. It was literally impossible for Rabinovich to review the Division's materials. *See also* FoF ¶ 190 n.4 (describing the Division's eve-of-trial document dump). Nor did Rabinovich have the opportunity to conduct depositions or narrow the scope of this proceeding on statute of limitations or subject matter jurisdiction grounds. This was especially prejudicial given the complexity of this case – 26 transactions spanning seven years (2003-2009) with numerous individual Respondents working in four separate locations serving different kinds of customers as part of an investment banking and brokerage firm with some 35 to 50 registered representatives. While the Division had four years to prepare, Rabinovich had four months. Rabinovich was not accorded sufficient due process.

g)o The law judge erred in admitting Rabinovich's non-party depositiono testimony voluntarily given in connection with the Commission's federal court action. The law judge erred in admitting Rabinovich's non-party deposition testimony given in 2011 to assist the Commission in its federal court action against McGinn, Smith, and others. *See* FoF ¶¶ 527-30. Rabinovich provided this testimony voluntarily and with the explicit understanding that his testimony was required to assist the Commission in its action against McGinn and Smith. At no time did the Division disclose that Rabinovich was under investigation. Tellingly, the Division never provided Rabinovich with SEC Form 1662 as it customarily does for individuals that are the targets or potential targets of Commission investigations. FoF ¶ 529. Nor was there any formal order of investigation indicating that the Commission was investigating Rabinovich or the other Respondents more than a year after it commenced its federal court action against McGinn and Smith. Rabinovich did not try to refresh his recollection about events from 2003 prior to his deposition, *see* FoF ¶ 529, nor was he ever given his deposition transcript to review, correct,

amplify or sign. *See id.* After being misled as to the Division's true intentions, the Division, and in turn, the law judge, relied primarily on this non-party deposition testimony to purportedly impeach Rabinovich. Notwithstanding the foregoing undisputed facts, the law judge denied Rabinovich's motion to exclude the use of his non-party deposition testimony, and referred to it as his "investigative testimony" throughout the Decision. By contrast, and as further evidence of the arbitrary and capricious nature of this proceeding, Respondent Gamello's testimony was repeatedly referred to as "deposition testimony," and the law judge remarked in a footnote that Gamello took "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." Decision at 20 n.31. No such statement was made by the law judge about Rabinovich's non-party deposition testimony.

DATED: New York, New York
April 29, 2014

SEWARD & KISSEL LLP

By: M. William Munno

M. William Munno
Michael Weitman
One Battery Park Plaza
New York, New York 10004
Telephone: (212) 574-1587
Facsimile: (212) 480-8421

Attorneys for Respondent Philip S. Rabinovich

SK 27029 0001 6404327

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of

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

BRIAN T. MAYER'S PETITION FOR REVIEW OF THE INITIAL DECISION

Respondent Brian T. Mayer ("Mayer") respectfully submits this petition for review of the law judge's Initial Decision dated February 25, 2015 and corrected by Order dated April 9, 2015 (the "Decision"). The Commission should grant Mayer's petition because, as summarized below, (1) erroneous conclusions of law were made and applied, (2) erroneous findings of fact were made despite overwhelming evidence to the contrary,[1] and (3) prejudicial error was committed in the conduct of the hearing. The Commission also should grant Mayer's petition because important policy issues are raised by the selective enforcement and pursuit of an administrative proceeding in the circumstances here.

Introduction

Mayer has been in the securities industry for 19 years since graduating college in 1995. *See* Phil Rabinovich, Brian Mayer and Ryan Rogers' Joint Proposed Findings of Fact and Conclusions of Law ("FoF") ¶ 16. During that time, no client of Mayer has filed a complaint against him. *Id.* For more than the past five years, Mayer has managed (along with Respondent Philip Rabinovich) RMR Wealth Management ("RMR"), an SEC registered investment advisory firm, which does not sponsor private placements or mutual funds or offer proprietary product. FoF ¶¶ 33, 34. RMR has had an unblemished regulatory record. FoF ¶ 35. As a registerede investment advisor representative of RMR, Mayer serves between 100 to 200 clients. *See* FoFe ¶¶ 38, 39.e

Before establishing RMR in October 2009 with Respondents Rabinovich and Ryan Rogers, Mayer was a registered representative in the New York branch office of Albany-headquartered McGinn, Smith & Co., Inc. ("McGinn Smith"), an SEC-registered broker-dealer founded in 1980 by Timothy McGinn ("McGinn") and David Smith ("Smith"). *See* FoF ¶¶ 20,

---

[1] Pursuant to Rule 410(b), Mayer petitions for review of all findings contrary to his Rule 340 Proposed Findings.

41. While there, Mayer proposed diversified portfolio allocations for his clients (mostlye accredited investors), including certain McGinn Smith private placements ("McGinn Smith Securities").[2] *See, e.g.*, FoF ¶¶ 424, 456, 477. His clients' portfolios were significantly impacted by the Great Recession in late 2007 and throughout 2008, as were most stock and bond portfolios. FoF ¶ 339, RMR Ex. 305.

In 2010, it was discovered that McGinn and Smith had secretly stolen and diverted funds from certain McGinn Smith Securities. Tr. at 2455-57. The Commission thus sued McGinn and Smith civilly in federal court, and U.S. Attorney prosecuted them criminally. *Id.*; Div. Ex. 453.[3]

In September 2013, during the pendency of the civil and criminal federal court actions against McGinn and Smith, the Commission filed an administrative proceeding selectively blaming just Mayer and nine others for not seeing the supposed red flags the Division claims existed. *See* OIP ¶¶ 1-10, 38-51. Yet, more than 35 other registered representatives also did not see the supposed red flags. FoF ¶ 319. Nor did the NASD or the SEC see them when they examined McGinn Smith including its private placement offerings. *See* FoF ¶¶ 630-34.

The overwhelming evidence at the hearings demonstrated that Mayer did not violate any securities law. The testimony, including testimony from the Division's own witnesses, showed that Mayer fulfilled his duties as a registered representative and at all times acted in the best interests of his clients. FoF ¶¶ 235-79, 538-44. He researched and fully

---

[2] "McGinn Smith Securities" means, collectively, the Four Funds, the Trust Offerings and McGinn Smith Transaction Funding Corporation ("MSTF"). The "Four Funds" means First Independent Incomes Notes, LLC ("FIIN"), First Excelsior Income Notes LLC ("FEIN"), Third Albany Income Notes LLC ("TAIN"), and First Advisory Income Notes LLC ("FAIN"), single purpose, New York limited liability companies formed in September 2003, January 2004, November 2004 and October 2005, respectively. "Trust Offerings" refers to the 21 offerings referred to in FoF ¶ 47.

[3] Smith and McGinn are serving lengthy sentences in federal prison. *See* Div. Exs. 459, 460.

understood the features, risks, and rewards of McGinn Smith Securities, all of which were fully disclosed in the offering documents in any event. FoF ¶¶ 105-63. Nevertheless, the law judge accepted the Division's theory of liability based on erroneous conclusions of law and findings of fact in a proceeding that was infected with error and that should have been brought in federal court where the Commission sued McGinn and Smith. Accordingly, Mayer petitions for review of the Decision as set forth below:

1.e The overwhelming evidence showed, and expert testimony confirmed, that Mayer knew of, and complied with, his obligations and duties as a registered representative. He performed product suitability and client suitability assessments before offering McGinn Smith Securities to his clients. He knew the due diligence that McGinn Smith and others were performing on the investments. He understood the features, risks and rewards of the investments he was offering. And, he presented them only to clients for whom they were suitable. He more than complied with the obligations of a registered representative. *See generally* FoF ¶¶ 235-79.

Nevertheless, the law judge improperly extended the holdings of *Hanly* and *Milan*,[4] cases with vastly different facts and circumstances, in concluding that Mayer violated Section 17(a) of the Securities Act of 1933 (the "Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), and Rule 10b-5 thereunder (the "Fraud Claims"). In so doing, the law judge erroneously concluded that, during the period in question (2003-2009), individual registered representatives had a duty to "investigate" and "verify" statements in private placement memoranda ("PPM" or "PPMs") and effectively replicate the due diligence conducted by their employer's investment banking department.

---

[4] *Hanly v. SEC*, 415 F.2d 589 (2d Cir. 1969); *SEC v. Milan Capital Group, Inc.*, 00 Civ. 108, 2000 U.S. Dist. LEXIS 16204 (S.D.N.Y. Nov. 9, 2000).

2.e The law judge ignored controlling Supreme Court precedent in *Aaron* ande *Ernst & Ernst*[5] in concluding that Mayer violated Securities Act Section 17(a)(1), Exchange Act Section 10(b), and Rule 10b-5 thereunder. There was no evidence that Mayer acted with scienter – a state of mind embracing the intent to deceive, manipulate or defraud. Indeed, the OIP did note allege, and the Division did not contend, that Mayer had a motive to defraud his clients.[6] The overwhelming evidence was to the contrary — Mayer acted at all times in the best interests of his clients and tried to help his clients, who testified that, among other things, he was a "forthright and effective investment professional." FoF ¶ 431; *see also, e.g.*, FoF ¶¶ 425, 433, 438, 439, 447, 455, 477. Tellingly, Mayer's own family members invested significant amounts in McGinn Smith Securities. *See* FoF ¶ 420; *see also* Decision at 48 (noting that Mayer's family members "invested in the private placements at issue").

Nor was there any competent evidence that Mayer made a material misrepresentation or omission about a security to any client. FoF ¶ 416. Yet, the law judge erroneously accepted the testimony of witnesses with faded memories of events occurring more than a decade prior to the hearing who claimed they thought their investments were "safe," notwithstanding express statements to the contrary in the PPMs and subscription agreements they signed. Significantly, neither testified that Mayer told them that the investments were "safe." *See* FoF ¶¶ 457, 470.

---

5 *Aaron v. SEC*, 446 U.S. 680 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

6 *See, e.g., In re Merrill Lynch Auction Rate Sec. Litig.*, 851 F. Supp. 2d 512, 528 (S.D.N.Y. 2012) (alleged motive "to increase or maintain profit" deemed insufficient as such motive "could be imputed to any for-profit endeavor"); *Defer LP v. Raymond James Fin., Inc.*, 654 F.eSupp. 2d 204, 217-18 (S.D.N.Y. 2009) (brokers' supposed motive to "earn substantiale sales commissions and fees for underwriting" auction rate securities rejected as support fore Section 10(b) liability because it does not show an intent to defraud).e

3. The law judge erroneously concluded that Mayer violated Securities Act Sections 17(a)(2) and (3), because he supposedly "obtained money by means of untrue material statements." Decision at 106. The law judge failed to identify any untrue material statement that Mayer made to a client or any issuer's misstatements Mayer repeated to a client. *See id.* Further, the overwhelming evidence showed that Mayer had "some reasonable basis for recommending" (*id.*) the specific securities he presented to clients. *See, e.g.*, FoF ¶¶ 235-237, 240-258.

The law judge also ignored well-established precedent that "there is no general fiduciary duty inherent in an ordinary broker/customer relationship,"[7] and that a registered representative engaging in transactions in a non-discretionary account – as Mayer did here (*see* FoF ¶ 419) – owes limited duties of "diligence and competence in executing the client's trade orders, and is obliged to give honest and complete information when recommending a purchase or sale."[8] Mayer more than complied with his duties and obligations here. *See generally* FoF ¶¶ 235-79.

4. The law judge erred in concluding that Mayer violated Securities Act Section 5(a) or 5(c) (the "Section 5 Claim"). Decision at 95-97. Although the law judge rejected the Division's theory that the Trust Offerings should be integrated into two fictitious conduits (*id.* at 96) – a theory the Division did not advance in the proceedings against McGinn and Smith in federal district court – the law judge nevertheless concluded that the Trust Offerings did not comply with Rule 502, which requires "the substantial disclosure of financial and non-financial information to all unaccredited investors." *Id.* In so doing, the law judge overlooked that

---

[7] *See Independent Order of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 940-41 (2d Cir. 1998).

[8] *See De Kwiatkowski v. Bear, Stearns & Co.*, 306 F.3d 1293, 1302 (2d Cir. 2002).

financial and non-financial disclosure was made in the PPMs and provided to all investors (not just those who may have been unaccredited). *See, e.g.*, FoF ¶ 651. The law judge reached the same incorrect conclusion with respect to the Four Funds. *See* Decision at 95.

The law judge also gave no consideration at all to the fact that no court or the Commission has ever imposed Section 5 liability on an individual registered representative in circumstances such as these. Unlike here, the SEC has filed Section 5 charges, and the courts have found Section 5 violations, *only* (a) where there has been an obvious failure to comply with the registration requirement or with any claimed exemption, *and* (b) where there has been knowing or recklessly deceptive conduct.[9]

Finally, the law judge categorically rejected Mayer's argument that he took all reasonable steps to avoid participation in any distribution violative of the registration provisions of Section 5(a) and (c) of the Securities Act despite overwhelming evidence to the contrary. Among other things, Mayer followed McGinn Smith's written procedures for offering private placements; he had his clients complete subscription agreements and questionnaires to confirm

---

[9] *See, e.g., SEC v. Cavanagh*, 98 Civ. 1818, 2004 U.S. Dist. LEXIS 13372, at *83 (S.D.N.Y. July 16, 2004) (defendants "merged a shell company with a small and not yet successful operating company, sold stock . . . in an unregistered transaction, took control of virtually the entire market float, created a false impression of interest in the stock . . . issued a false press release, and drove the stock price north of $5 in a 'pump and dump' scheme from which they . . . pocketed millions of dollars."); *SEC v. Gagnon*, 10 Civ. 11891, 2012 U.S. Dist. LEXIS 38818, at *2-14, *19-27 (E.D. Mich. Mar. 22, 2012) (defendant helped orchestrate and promote a massive Ponzi scheme and made outlandish recommendations without basis, soliciting investors on his website, via email and in online chatrooms); *SEC v. mUrgent Corp.*, 11 Civ. 0626, 2012 U.S. Dist. LEXIS 25626, at *2 (C.D. Cal. Feb. 28, 2012) (defendants sold unregistered securities, "cold-called investors, used high pressure sales tactics, and made material misrepresentations about . . . mUrgent's allegedly imminent IPO"); *see also SEC v. iShopNoMarkup.com, Inc.*, 04 Civ. 4057, 2007 U.S. Dist. LEXIS 70684, at *28 n.6 (E.D.N.Y. Sept. 24, 2007) (where the Division seeks equitable relief and the Regulation D safe harbor is at issue, the applicable standard is negligence and a Defendant's state of mind is relevant) (citing *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1047 (2d Cir. 1976)).

their accredited status; he spoke with and was informed by McGinn Smith's law, compliance and investment banking departments that McGinn Smith Securities were exempt from registration; and he knew outside counsel had advised McGinn Smith that McGinn Smith Securities were exempt from registration. *See* FoF ¶¶ 616, 648-54.

Mayer, who was in the New York City branch office, was not aware, and had no reason to know, that McGinn Smith had accepted subscriptions from more than 35 *un*accredited investors. FoF ¶ 653. Subscriptions were sent to the Albany headquarters for review and acceptance by Smith or McGinn, and processed by McGinn Smith employee Patricia Sicluna, who was responsible for tracking the number of unaccredited investors in McGinn Smith Securities. *See* FoF ¶ 574. At no time did Smith, McGinn, the General Counsel, the Chief Compliance Officer or anyone else advise Mayer that more than 35 *un*accredited investors had been accepted on any Regulation D offering. FoF ¶¶ 617, 653. Under the circumstances, liability is not appropriate.[10] And, despite all of the foregoing evidence, the law judgee incorrectly concluded that Mayer's belief that there were fewer than 35 *un*accredited investors was not reasonable. *See* Decision at 95.

5.e The law judge erred in her findings throughout the Decision, as shee arbitrarily and capriciously cherry-picked snippets of testimony, thereby grossly distorting the evidence. For example, in setting forth the testimony of Division witness Gary Von Glinow (Decision at 53-54), the law judge made no mention of the following undisputed evidence: (a)eVon Glinow was a retired partner in Ernst & Young's consulting practice with a net worthe greater than $1 million when he began investing in McGinn Smith Securities, and considerable

[10] *See* 17 C.F.R. § 230.508(a)(3) ("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].").

investment experience having "started investing in call options" when he was in graduate school (FoF ¶¶ 434-35); (b) When presenting private placements, Mayer typically called Von Glinow to describe the structure of the investment, how it worked, and how it would pay off, and after Von Glinow read the PPM, he would discuss it further with Mayer at times asking "30 or 50, 70 questions on each one of these [private placement] memoranda," which Mayer would answer (FoF ¶ 438); (c) Prior to investing, Von Glinow "discussed the risks" with Mayer and tried "to come up with ways" that the investment could fail (FoF ¶ 446); (d) Von Glinow was satisfied with Mayer as his broker and recommended him to his mother-in-law and to a friend (FoF ¶¶ 437, 447); and (e) Von Glinow believed that nothing "did go wrong [with his investments in McGinn Smith Securities] . . . other than the theft that occurred" by McGinn and Smith (FoF ¶ 447).

Similarly, in setting forth the testimony of Division witness Thomas Alberts, the law judge failed to mention that Alberts, an 84-year-old retiree, could not recall the names of several other firms where he had brokerage accounts, could not recall if he had opened an account with McGinn Smith, and could not recall which of his two brokers at McGinn Smith (one of which was Mayer) was his broker at the time he invested in FAIN. *See* FoF ¶¶ 463, 466, 468.eYet, the law judge concluded that Alberts "gave credible, persuasive testimony" about whate Mayer did or did not say to him a decade ago. Decision at 106. The law judge also allowed this supposedly "credible, persuasive testimony" to trump the numerous contemporaneous representations to the contrary that Alberts read and signed in the PPMs and the subscription agreements. *See* FoF ¶ 467.

The Decision is replete with other examples where uncontroverted documentary and testimonial evidence was ignored. One particularly troublesome example underscores the

law judge's biased recitation of the evidence. The Decision recites – erroneously – that "Mayer settled a customer complaint with FINRA for $20,000" (Decision at 48, n.3) despite the testimony that Mayer was *not* personally accused of any wrongdoing in the complaint referenced in his Broker Check Report, that the broker who was properly the subject of the complaint was asked to resign from McGinn Smith in December 2002, and that Mayer made *no* settlement contribution. FoF ¶ 17; *see also* Division's Findings of Fact ¶ 522 ("Mayer did not individually contribute to this settlement.").

6. The law judge erred in concluding that certain disclosures in the PPMs for McGinn Smith Securities constituted "red flags." As evidence adduced at the hearings conclusively established, disclosures regarding conflicts of interest, fees, and related party transactions were standard in the industry and not any cause for concern. *See, e.g.*, RMR Ex. 861. Similarly, the law judge erred in concluding that the January 2008 reduction of the interest on the Four Funds' junior notes was a "red flag" in light of the fact that this event coincided with the economic downturn that impacted the entirety of the global markets. *See* FoF ¶¶ 338-48. Notwithstanding, the law judge sweepingly concluded that Mayer and other registered representatives should have stopped presenting *all* McGinn Smith Securities after February 1, 2008, including senior and senior subordinated notes and the unrelated Trust Offerings. *See* Decision at 115. Nevertheless, Mayer did not offer a Four Funds' junior note after January 2008. *See* Div. Ex. 2, Ex. 4o.

7. The law judge misapplied the *Steadman*[11] factors in imposing sanctions of a twelve month suspension, third-tier penalties, and a cease-and-desist order. The law judge ignored that a suspension was not necessary to protect the public interest especially in light of the

[11] *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979).

fact that Mayer left McGinn Smith in October 2009, established an SEC-registered investment advisory firm, RMR Wealth Management, which has operated for five years without regulatory incident or client complaint, and does not present any proprietary product, as McGinn Smith did. *See* FoF ¶¶ 32-35. The law judge never assessed the *Steadman* factors against the entire record. The law judge ignored the efforts Mayer (along with Rabinovich and Rogers) made after he left McGinn Smith to protect his clients and the assistance provided to the Receiver to help maximize recovery on several McGinn Smith Securities. *See, e.g.*, FoF ¶¶ 523, 538, 542, 544. The law judge's wooden application of the *Steadman* factors is devoid of analysis or consideration of the uncontroverted evidence.[12]

8.e The law judge erred in ordering Mayer to disgorge *all* commissions earnede on sales of McGinn Smith Securities after February 1, 2008, *see* Decision at 115, based on the testimony of a few investors. In so doing, the law judge ignored (i) the testimony of Mayer's own investor witness, William Strawbridge, who testified unequivocally that he "had enough information to make an informed investment decision" and that he did not believe Mayer ever misled him on any investment (FoF ¶¶ 425, 431; *see also id.* ¶¶ 427, 429), (ii) the testimony of a Division investor witness, Gary Von Glinow, who testified that he had extensive conversations with Mayer regarding McGinn Smith Securities, their features, risks, and rewards and believed Mayer to be an honest broker (FoF ¶¶ 438, 450), (iii) the fact that Mayer's own family invested substantial sums in McGinn Smith Securities, (iv) the fact that the Trust Offerings continued to

---

[12] *See Monetta Financial Services, Inc. v. SEC*, 390 F.3d 952 (7th Cir. 2004) ("Although the SEC's opinion references the[] [*Steadman*] factors, the opinion does not reflect that the SEC meaningfully considered the[m] when it imposed sanctions."). The law judge also failed to consider the impact this proceeding had and will have on Mayer's ability to work in the securities industry, *see* FoF ¶ 698, yet concluded that no penalties against Respondent Gamello were appropriate "because it would likely severely impact his future participation in the securities industry." Decision at 102.

pay scheduled interest, and (v) the utter lack of evidence with regards to numerous clients of Mayer who invested in McGinn Smith Securities. Nevertheless, the law judge arbitrarily and capriciously imputed the testimony of a few witnesses – which we respectfully submit did not establish fraud in any event – onto every single investment made by Mayer's clients after February 1, 2008.

The law judge also failed to comply with Rule 600(a) regarding the disgorgement, as the Decision does not "specify each violation that forms the basis for the disgorgement ordered" and other requirements of the Rule, including but not limited to "stat[ing] the amount of prejudgment interest owed as of the date of the disgorgement order."

9.e The law judge erred in concluding that the Fraud and Section 5 Claimse were not barred in their entirety under 28 U.S.C. Section 2462 (*see* Decision at 89), as everye claim in the OIP "first accrued" before September 23, 2008 (more than five years prior to the date the OIP was filed).[13] Because all alleged claims "first accrued" prior to September 23, 2008, there was no subject matter jurisdiction to "entertain" this case.[14] Further, the Division knew of the alleged claims at least by April 2010, when it commenced an action against McGinn and Smith in federal district court, but inexplicably waited three and one-half years to file the OIP against Mayer.

10.e The hearing violated Commission rules, deprived Mayer of due processe and equal protection rights and was otherwise fundamentally flawed. Examples abound.

a)e Mayer was never fully or fairly informed of the claims against him.e Fundamental fairness requires that parties be "timely" informed "of the matters of fact and law

---

[13] *See Gabelli v. SEC*, 133 S. Ct. 1216, 1220-21 (2013).

[14] *See Williams v. Warden*, 713 F.3d 1332, 1337-40 (11th Cir. 2013).

asserted."[15] The law judge ignored this mandate and denied Mayer's (and Rabinovich's and Rogers') motion for a more definite statement. Mayer requested information as basic as the names of any investor to whom he allegedly made a material misstatement or omission, about which specific McGinn Smith Security, and when (the month/year) he supposedly made the material misstatement or omission. The OIP was devoid of these essential factual allegations that are necessary even to state a claim for violation of Securities Act Section 17 and Exchange Act Section 10(b) and Rule 10b-5. The Division's post-OIP document dump – consisting of a terabyte of data – and its offer to permit Respondents' counsel to inspect more than 100 boxes of documents at the Division's offices did not resolve this deficiency.[16] Yet, the motion was denied.

b)e The Division improperly targeted Mayer even though McGinn Smithe employed more than 30 registered representatives during the relevant time period. Despite the fact that more than 20 other registered representatives sold over $69 million of McGinn Smith Securities to investors, the Division discriminatorily singled out Mayer and the other Respondents in the OIP. *See* Div. Ex. 591. The Division failed to explain why none of these twenty-plus registered representatives saw any supposed "red flags" that formed the basis of the claims against Mayer, or why the Division took no enforcement action against any of these individuals. *See* FoF ¶ 319. Nor did the SEC, the NASD, or outside compliance consultants see any red flags when they examined McGinn Smith's operations between 2004 and 2007,

---

[15] *See* 5 U.S.C. § 554(b); *see also Locurto v. Giuliani*, 447 F. 3d 159 (2d Cir. 2006) (party in hearing before administrative law judges does not receive "a full and fair opportunity to litigate" where he was "denied adequate discovery" on the relevant issues).

[16] *See SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 410 (S.D.N.Y. 2009) ("While the responsive documents exist somewhere in the ten million pages produced by the SEC, the production does not respond to the straightforward request to identify documents that support the allegations in the Complaint, documents [defendant] clearly must review to prepare his defense.").

including its private placement offerings. *See, e.g.*, FoF ¶ 200; Livingston Ex. 103 (letter regarding 2004 SEC examination), RMR Exs. 874 (letter regarding 2004 SEC examination), 40 (exit conference summary regarding 2004 NASD examination), 120 (letter regarding 2006 NASD examination), 135 (letter regarding 2007 NASD examination); 161 (report regarding 2007 inspection by outside consultant).

c)e The Division improperly gathered evidence after the OIP was filed.e Ignoring the explicit command of SEC Rule of Practice 230(g) — "The hearing officer shall order such steps as necessary and appropriate to assure that the issuance of investigatory subpoenas after the institution of proceedings is not for the purpose of obtaining evidence relevant to the proceedings" — the Division improperly and prejudicially solicited witnesses to support the OIP *after* it was filed. In denying Mayer's motion to preclude the Division from offering evidence obtained from this post-OIP fishing expedition, the law judge implicitly endorsed the Division's violation of Rule 230(g). FoF ¶ 692.

d)e The law judge's evidentiary rulings were arbitrary and capricious. Thee law judge erroneously refused to consider or admit testimony proffered at the hearing and in supporting affidavits that demonstrated that Mayer's clients held him in high opinion and did not believe he had made a material misrepresentation or omission to them. *See, e.g.*, FoF ¶¶ 425, 431, 433, 438, 447, 477, 696. These statements were sworn under oath, and served the purpose of both streamlining the hearings and sparing witnesses the considerable burden and expense of traveling to the hearings for purposes of giving testimony that likely would have lasted less than an hour. The Division made a pro forma objection to their admission, citing a desire to cross-examine the witnesses, yet asked few, if any, questions of those investor witnesses who were able to travel to testify. *See, e.g.*, Tr. at 5528-31 (asking Strawbridge if statements in his

affidavit were based on his own beliefs as opposed to access to internal McGinn Smith documents). On the other hand, the law judge permitted the Division to elicit – *and in fact relied upon in her initial decision* – triple hearsay from investor witness Vincent O'Brien. *See* Decision at 53 (accepting testimony from O'Brien as to what his sister told him that Mayer supposedly told her at a meeting where O'Brien was not present); *see also* Tr. at 1472 (permitting the Division to elicit testimony from an investor witness via the Division's cellphone speakerphone).

e)e The Division improperly commenced this proceeding before ane administrative law judge despite the existence of a related federal district court action. This administrative proceeding came on the heels of a pending federal district court action filed by the Commission against McGinn, Smith, and others. *See* FoF ¶ 93. In fact, much of the supposed "investigative record" against Mayer was developed under the guise of Rule 45 subpoenas issued in the federal action. Despite the indisputable fact that the matters at issue in the OIP and the federal action are interrelated and that a central issue was McGinn and Smith's fraud, the Division commenced this proceeding against Mayer in an administrative forum. Further amplifying the prejudicial effect of the Division's forum shopping, the Division devoted much of the hearing to (a) McGinn and Smith, who were not parties to or present at the hearing for examination, and (b) the records of McGinn Smith – that Mayer did not have – as described by the Division's summary witnesses (Kerri Palen and Olumiseun Ogunye), who had already spent several years analyzing this information. Particularly in these circumstances, the failure to bring this proceeding in federal court was materially prejudicial to Mayer.

f) Mayer was denied access to traditional tools of discovery available toe litigants in federal court. The law judge ignored that "[t]he fundamental requirement of due

process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[17] Despite the stakes of this proceeding – Mayer's professional and financial livelihood – Mayer was denied meaningful time (just four months) to review the Division's gargantuan investigative record — consisting of approximately one *terabyte* (1000 gigabytes) of data and more than 100 cartons of documents housed at the Division's offices. It was literally impossible for Mayer to review the Division's materials. *See also* FoF ¶ 190 n.4 (describing the Division's eve-of-trial document dump). Nor did Mayer have the opportunity to conduct depositions or narrow the scope of this proceeding on statute of limitations or subject matter jurisdiction grounds. This was especially prejudicial given the complexity of this case – 26 transactions spanning seven years (2003-2009) with numerous individual Respondents working in four separate locations serving different kinds of customers as part of an investment banking and brokerage firm with some 35 to 50 registered representatives. While the Division had four years to prepare, Mayer had four months. Mayer was not accorded sufficient due process.

g)e The law judge erred in admitting Mayer's non-party deposition testimonye voluntarily given in connection with the Commission's federal court action. The law judge erred in admitting Mayer's non-party deposition testimony given in 2011 to assist the Commission in its federal court action against McGinn, Smith, and others. *See* FoF ¶¶ 527-28, 531-32. Mayer provided this testimony voluntarily and with the explicit understanding that his testimony was required to assist the Commission in its action against McGinn and Smith. In fact, Smith was present at Mayer's deposition, which never would have been permitted had this had been "investigative testimony." FoF ¶ 532. At no time did the Division disclose that Mayer was under investigation. Tellingly, the Division never provided Mayer with SEC Form 1662 as it

[17] *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

customarily does for individuals that are the targets or potential targets of Commission investigations. FoF ¶ 532. Nor was there any formal order of investigation indicating that the Commission was investigating Mayer or the other Respondents more than a year after it commenced its federal court action against McGinn and Smith. Mayer did not try to refresh his recollection about events from 2003 prior to his deposition, *see* FoF ¶ 531, nor was he ever given his deposition transcript to review, correct, amplify or sign. *See* FoF ¶ 532. After being misled as to the Division's true intentions, the Division, and in turn, the law judge, relied primarily on this non-party deposition testimony to purportedly impeach Mayer. Notwithstanding the foregoing undisputed facts, the law judge denied Mayer's motion to exclude the use of his non-party deposition testimony, and referred to it as his "investigative testimony" throughout the Decision. By contrast, and as further evidence of the arbitrary and capricious nature of this proceeding, Respondent Gamello's testimony was repeatedly referred to as "deposition testimony," and the law judge remarked in a footnote that Gamello took "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." Decision at 20 n.31. No such statement was made by the law judge about Mayer's non-party deposition testimony.

DATED: New York, New York
April 29, 2015

SEWARD & KISSEL LLP

By: M. William Munno

M. William Munno
Michael Weitman
One Battery Park Plaza
New York, New York 10004
Telephone: (212) 574-1587
Facsimile: (212) 480-8421

Attorneys for Respondent Brian T. Mayer

SK 27029 0001 6418040

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 April 13, 2018, I filed an original and three copies of Respondents Philip S. Rabinovich's and Brian T. Mayer's Letter Motion requesting leave to file petitions for review in excess of the page limitations set forth in the Commission's Rules of Practice and their accompanying Respective Petitions for Review of the Initial Decision as Amended By The Order Revising and Ratifying Prior Actions with the Office of the Secretary of the Commission via Federal Express, and served copies of the foregoing documents via Federal Express on:

David Stoelting, Esq.
U.S. Securities and Exchange Commission
Division of Enforcement
Three World Financial Center
New York, New York 10281
stoeltingd@sec.gov

Gilbert B. Abramson, Esq.
Gilbert B. Abramson & Associates, LLC
One Presidential Boulevard, Suite 315
Bala Cynwyd, Pennsylvania 19004
gabramson@gbalaw.com
Counsel for Respondent William F. Lex

Roland M. Cavalier, Esq.
Tuczinski, Cavalier, & Gilchrist, P.C.
54 State St., Suite 803
Albany, New York 12207
rcavalier@tgtflegal.com
Counsel for Respondent Frank H. Chiappone

Matthew G. Nielsen, Esq.
Stanton LLP
1717 Main Street, Suite 3800
Dallas, Texas 75201
mnielsen@stantonllp.com
Counsel for Respondent Thomas E. Livingston

Mark Astarita, Esq.
Sallah Astarita & Cox, LLC
60 Pompton Avenue
Verona, New Jersey 07044
mja@sallahlaw.com
Counsel for Respondent Andrew G. Guzzetti

Dated: April 13, 2018
New York, New York

M. William Munno

SK 88888 0211 7867316