**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.**

# RESPONDENT THOMAS LIVINGSTON'S PETITION FOR REVIEW OF INITIAL DECISION AS AMENDED BY THE MARCH 30, 2018 ORDER REVISING AND RATIFYING PRIOR ACTION

Respondent Thomas Livingston ("Livingston") hereby petitions the Commission for review of the Initial Decision issued on February 25, 2015, as amended by the Order Revising and Ratifying Prior Actions dated March 30, 2018. This Petition is filed in supplement to Livingston's Petition for Review filed on April 30, 2015 (attached hereto for convenience as Exhibit "A"), which was granted by the Commission on May 21, 2015. Livingston's initial appeal was fully briefed and argued to the then-constituted Commission on August 15, 2017 but was referred to ALJ Murray for "reconsideration and ratification" before a decision was issued due to the Solicitor General's position in *Raymond J. Lucia v. SEC* which makes the hearing in this proceeding unconstitutional.

Livingston objected to the "reconsideration and ratification" process in its entirety and, with reserving all rights, argued that the 2015 Initial Decision should be set aside based on new legal developments and for the reasons set forth in Livingston's briefing to the Commission. While the ALJ claimed to have reconsidered her prior decision, she failed to address any prior points of error.

Among the other points completely ignored, the ALJ failed to reconsider that there was no evidence and no factual findings in the 2015 Initial Decision that supported the ALJ's finding that Livingston violated Section 17(a) and Section 10(b) in connection with the four sales of Trust offerings that he made within the 5-year period preceding the OIP. Mr. Livingston made *four* sales after September 23, 2008; those sales were to three individuals totaling $225,000 for which Mr. Livingston allegedly received, in total, $700 in commissions.[1] Two investors testified against Mr. Livingston, but neither testified about any representations made by Mr. Livingston about any products nor does the ALJ detail any in her Initial Decision. Moreover, both witnesses

[1] As set forth in Livingston's Motion to Correct Manifest Error and his briefing before the Commission, the $700 payment on its face did not relate to the sale of any product at issue in this case.

received numerous disclosures about the speculative nature of their investments and both were specifically told multiple times about the financial distress of their prior McGinn Smith investments before they chose to make the trust investments during the relevant period, which the ALJ completely ignored.

The ALJ also failed to reconsider her error in failing to make specific findings, as required by *Steadman v. SEC,* 603 F.2d 1126 (5th Cir. 1979), to support barring Mr. Livingston from associating with a broker dealer. The ALJ erred in the amended Initial Decision in focusing exclusively on the alleged violations and no other factors. The ALJ also erred in disproportionately punishing Mr. Livingston when all but one of the other Respondents, who were found to engage in precisely the same conduct as Mr. Livingston and received the same financial penalty, received one-year suspensions. The ALJ failed to consider that Mr. Livingston has had not one customer complaint, including from the investors who testified against him, in the 9 years since leaving McGinn Smith. The ALJ's decision to end Mr. Livingston's 40-year career--which focuses exclusively on the syndication of registered securities underwritten by major investment banks--over four sales for which Mr. Livingston received at most $700 in total commissions is arbitrary and capricious.

In addition to the issues already before the Commission through Livingston's prior Petition for Review and briefing before the Commission, Livingston seeks review of the following findings of the Initial Decision, as amended:[2]

[2] These issues have been set forth in more detailed in the Petitions for Review filed by other Respondents, but which were subject to a motion for extension of the three-page limit that had not been ruled upon at the time this Petition was filed.

1. The ALJ erred in concluding that the Commission can "ratif[y] the agency's prior appointment" of its ALJs when the Commission never properly appointed ALJ Murray in the first place.

2. The ALJ erred in concluding that the restrictions on removal of SEC ALJs do not violate the Constitution's separation-of-powers principles.

3. The ALJ erred in concluding that she could cure the constitutional defects through the reconsideration of a record from an unconstitutional proceeding rather than through an entirely new proceeding.

4. The ALJ erred in concluding that the entire proceeding is not barred by 28 U.S.C. § 2462. The ALJ further erred in finding violations and imposing penalties based upon events that occurred more than 5 years before the OIP.

5. The ALJ erred in refusing to reconsider her prior evidentiary ruling under the new Rules of Practice and in refusing to exclude all unreliable evidence as required by amended Rule 320.

6. The ALJ erred in rejecting the argument that Livingston was materially and uniquely prejudiced by "reexamination" of the record in this old and complex case involving 10 individual Respondents.

7. The ALJ erred in ignoring the numerous arguments set forth in Livingston's April 2015 Petition for Review and briefing before the Commission which were expressly incorporated by reference in Livingston's January 19, 2018 letter brief.

For all of these reasons, Livingston respectfully requests that the Commission grant this Petition for Review, order supplemental briefing, and hold oral arguments before the entire Commission.

Dated: April 19, 2018

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## CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I filed the foregoing pleading (original and three copies) with the Office of the Secretary of the Commission via Federal Express and served copies on the following persons via Federal Express and email.

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Date: April 19, 2018

By: _____
Matthew G. Nielsen

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**RYAN C. ROGERS,**

**Respondents.**

## RESPONDENT THOMAS LIVINGSTON'S PETITION FOR REVIEW OF INITIAL DECISION

Pursuant to the Commission's Rules of Practice 410 and 411, Respondent Thomas Livingston ("Livingston") hereby petitions the Commission for review of the Initial Decision issued by Chief Judge Brenda Murray on February 25, 2015, and in support thereof, states as follows:

### Background

This case involves private placements that were offered through the now-defunct broker-dealer, McGinn Smith & Co. ("MS & Co."). The private placements are referred to in the Initial Decision in two groups -- the "Four Funds" and the "Trust Offerings." It is through these offerings that David Smith and Tim McGinn (the founders and principals of MS & Co.), "orchestrated an elaborate Ponzi scheme, which spanned over several years, involved dozens of

debt offerings, and bamboozled hundreds of investors out of millions of dollars." Memorandum-Decision and Order [Dkt # 807] at 7, *SEC v. McGinn & Smith, Co., et al.* Case 1:10-cv-00457-GLS-CFH (Feb. 17, 2015).[1] Smith and McGinn colluded with others -- including seniore accounting and legal officers -- to hide and perpetrate their fraud and ultimately pocketed millions in investor proceeds. In addition to the civil action brought by the Commission, Smith and McGinn were tried and found guilty on a combined 42 criminal counts and were sentenced to 15 and 10 years, respectively, in federal prison for their crimes.[2e]

This case was brought against the nine "selling" Respondents because they were, according to the Division, the MS & Co. representatives who sold the most, by dollar volume, of the Four Funds and Trust Offerings.[3] Neither Livingston nor any of the other Respondents aree alleged to have actual knowledge of, or participation in, McGinn and Smith's fraudulent conduct. Rather, the Division alleged that Livingston sold unregistered securities, ignored "red flags," and made material misrepresentations and/or omissions in the sale of the private offerings.

In her Initial Decision, Judge Murray ruled against Livingston and found that:

(a) the Four Funds and Trust Offerings were not subject to an exemption from registration and, therefore, Livingston sold unregistered securities in violation of Sections 5(a) and (c) of the 1933 Securities Act;

(b) Livingston was reckless in offering and selling securities based on materiale misrepresentations and omissions that he made to the witnesses who purchased private

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[1] Judge Murray took official notice of the records in the Commission's civil suit. Initial Decision at n. 3.

[2] Three other individuals were also convicted in connection with McGinn and Smith's fraud. *Id.* at 3.

[3] Judge Murray incorrectly accepted the Division's allegations on the sales made by Livingston. The evidence was that Livingston sold $1,904,000 of the Four Funds offerings not $3.5 million as the Division alleged, and sold $280,000 of the Trust Offerings, not $380,000 as the Division alleged. *See* Livingston Proposed Findings of Fact at ¶¶ 23-25.

placements in violation of Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5, and that his sales constituted a necessary part of MS & Co.'s fraud, thus were part of a device, scheme, or artifice to defraud in willful violation of Securities Act Section 17(a)(1) and Exchange Act Section 10(b)(5) and Rule 10b-5; and

(c)d "Livingston willfully violated Securities Act Sections 17(a)(2) and (a)(3) because,d acting at least negligently, he obtained money by means of untrue material statements, i.e., his recommendation of these private placements iddicated to his clients that he had some reasonable basis for believing they were good investments when he had done no investigation of their worth."

Although Livingston was not found to be more culpable or to have committed any different or additional violations than the other Respondents (most of whom were suspended for one year), and despite his unblemished 35-year career in the securities business, Judge Murray permanently barred Livingston from the securities industry. Judge Murray also issued a cease-and-desist order against Livingston, ordered him to disgorge $1,120, and ordered him to pay a third-tier penalty of $130,000.

Livingston timely filed a Motion to Correct a Manifest Error of Fact, challenging the disgorgement amount ordered in the Initial Decision. Livingston's Motion was granted in part and Judge Murray reduced Livingston's disgorgement to $700.

This Petition for Review of Initial Decision is filed within 21 days of Judge Murray's April 9, 2015 Order on the Motions to Correct Manifest Error of Fact and is, therefore, timely.

**Point of Error and Summary of Supporting Reasons**

Under Rule 411, the Commission has the discretion to review "prejudicial error" committed in the conduct of the proceeding or if "the decision embodies: (A) a finding or

conclusion of material fact that is clearly erroneous; or (B) a conclusion of law that is erroneous; or (C) an exercise of discretion or decision of law or policy that is important and that the Commission should review." For the reasons set forth below and addressed in more detail in Livingston's post-hearing proposed findings and supporting brief, this Petition makes such a showing and should be granted.

Livingston seeks review of the following findings in the Initial Decision and raises the following additional matters in support of his Petition for Review:

1.o The finding that Livingston violated, and did so willfully, Section 5 of theo Securities Act by selling unregistered securities was not supported by a preponderance of the evidence in the record taken as a whole, was clearly erroneous, and was based upon improper legal conclusions. Further, Livingston took reasonable steps to avoid violating Section 5, any purported violation is either *de minimis*, time-barred, or both, and there is no authority for the proposition that an individual broker should be held liable under these circumstances.

2.o The finding that Livingston was reckless in offering and selling securities basedo upon material misrepresentations and omissions that he made to the witnesses who purchased private placements in violation of Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5 was not supported by a preponderance of the evidence in the record taken as a whole, was clearly erroneous, and was based upon improper legal conclusions.

Without limitation, the finding was in error because in the Initial Decision, Judge Murray did not identify any misrepresentations made by Livingston to any customer, including the two witnesses who testified against him at the hearing,[4] and there was no credible evidence that Livingston made any material misrepresentations. Further, the offering documents, which all

[4] Judge Murray also cherry-picked the testimony of Livingston and the two customers who testified, virtually ignoring any testimony not elicited by the Divsiion.

investors received and acknowledged reading, fully and adequately disclosed the risks of the investments. Judge Murray furthered erred by discounting the risk disclosures because many investor-witnesses did not recall reading the disclosures, because the investors were deemed to have notice of the disclosures as a matter of law.

In addition, there was no evidence of material omissions as to the two witnesses (Messrs. Ferris and LaFleche) who purchased private placements. While Judge Murray cited Livingston's alleged failure to disclose his involvement in alseT, to which the Four Funds made loans, neither Ferris nor LaFleche purchased any of the Four Funds after such loans were made to alseT. Further, Judge Murray erroneously concluded that Livingston did not disclose the financial difficulties of the Four Funds before selling the Trust Offerings. In fact, both Ferris and LaFleche were told--both by Livingston and in letters sent to investors--of the Four Funds' financial issues. And, both were aware before they purchased any Trust Offering that, with regard to the Four Fund investments, their interest payments had been suspended and the maturities of the notes were substantially extended.

Judge Murray further erred in holding that any alleged omissions or misrepresentations were material where, *inter alia,* all pertinent risks of the investments were set forth in writing in the private placement memoranda and subscription agreements.

Further, Judge Murray applied an erroneous standard for scienter. While scienter may be established through a showing of reckless disregard for the truth, the type of extreme recklessness necessary to satisfy the scienter requirement is "an extreme departure from the standards of ordinary care, ...which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *SEC v. Infinity Group*, 212 F.3d 180, 192 (3d Cir. 2000). In other words, it must amount to intent to

deceive. Judge Murray did not apply this standard when finding Livingston's conduct was "reckless." As stated above, the evidence established that Livingston had a reasonable basis to recommend the securities at issue. Further, Judge Murray's finding of recklessness was based upon an improper basis that Livingston had a "duty to investigate." Moreover, the few alleged "red flags" that Judge Murray sustained were, even if "red flags," not indicia of fraud or the type of "red flags" that can sustain a finding of scienter.

3.e The finding that "Livingston's sales of MS & Co.'s private placements constitutede a necessary part of MS & Co.'s fraud and were thus part of a device, scheme, or artifice to defraud in willful violation of Securities Act Section 17(a)(1) and Exchange Act Section 10(b)(5) and Rule 10b-5" is not supported by a preponderance of the evidence in the record taken as a whole, was clearly erroneous, and was based upon improper legal conclusions. Among other reasons, Judge Murray incorrectly used MS & Co.'s scheme to impose scheme liability upon Livingston. Merely being a part of MS & Co. is insufficient to impose scheme liability on Livingston, especially when the evidence establishes Livingston was not involved in the creation and management of the Four Funds or Trust Offerings, and was not directly linked to the deception at issue.

4.e The finding that "Livingston willfully violated Securities Act Sections 17(a)(2)e and (a)(3) because, acting at least negligently, he obtained money by means of untrue material statements, *i.e.*, his recommendation of these private placements indicated to his clients that he had some reasonable basis for believing they were good investments when he had done no investigation of their worth" was not supported by a preponderance of the evidence in the record taken as a whole, was clearly erroneous, and was based upon improper legal conclusions.

Without limitation, the finding was in error because Judge Murray applied an improper legal standard upon Livingston and other selling Respondents in recommending a security, incorrectly concluding that individual representatives have the same duty of investigation as the broker-dealer firm before recommending a security. Judge Murray incorrectly and in error confused the suitability obligations of an individual representative with a member firm's duty to investigation a security. Moreover, Judge Murray completely ignored the evidence that Livingston did have a reasonable basis to recommend the securities at issue and, even if he did have a duty to investigate, he fulfilled his obligations. The evidence established that Livingston, *inter alia*, had substantial knowledge of Smith and McGinn's previous successful offerings, investment acumen, and reputation; conducted a reasonable investigation of both the Four Funds and the Trust Offerings that he sold; only sold securities that were consistent with the customer's investment objectives and risk tolerance; had substantial knowledge of the investments in the Four Funds; and had knowledge of Smith's evaluation and due diligence of potential investments in the Four Funds.

5. The findings that conflicts of interest that existed between the issuers and MS &e Co., and the disclosed ability of the Four Funds to engage in related transactions, were "red flags"[5] and that Livingston (and the other Respondents) "had a duty to investigate the Four Funds' junior notes default before selling the Four Funds and to investigate Smith's misrepresentations as to the diversity of Four Funds' holdings and undisclosed investment in alseT before selling any Four Funds or Trust Offerings" were not supported by a preponderance of the evidence in the record taken as a whole, were clearly erroneous, and were based upon

[5] Judge Murray also found that the September 3, 2009 disclosure of the Firstline bankruptcy filing constituted a red flag, but this finding is irrelevant to Livingston, as the Division's own expert conceded, and Judge Murray erred to the extent it was relied upon against Livingston.

improper legal conclusions. Further, the supposed "red flags" dealt exclusively with the Four Funds and were irrelevant as to the Trust Offerings.

6.e Judge Murray incorrectly applied the statute of limitations -- 28 U.S.C. § 2462. Ine particular, Judge Murray erroneously concluded that the proceeding and all claims asserted therein were not barred even though they first accrued more than five years before the OIP, and erroneously and impermissibly penalized Livingston (including by imposing the permanent industry bar, monetary penalty, and disgorgement) based on conducting occurring more than five years before the OIP. Indeed, the findings (and allegations by the Division) against Livingston are based almost exclusively on the Four Funds -- which Livingston did not sell after January 2007 -- and conduct occurring before September 23, 2008. Livingston made only five sales of the Trust Offerings to three individuals after September 23, 2008 and there was no evidence of any misconduct relating to those sales. Livingston was impermissibly punished for alleged misconduct that occurred more than five years before this proceeding was initiated in violation of Section 2462. The admission of evidence of events and occurrences before September 23, 2008 and the use of those events against Livingston was clearly erroneous and based on improper legal conclusions. Further, Section 2462 explicitly and unambiguously precluded the proceeding from being "entertained" because the Division sought penalties and forfeitures based on claims that first accrued more than five years before the OIP.

7.e The findings that Livingston should be permanently and collaterally barrede pursuant to Exchange Act Section 15(b)(6), and permanently prohibited from associating with the enumerated persons in Investment Company Act Section 9(b), are arbitrary, capricious, inconsistent with statutory and other legal standards, and not supported by a preponderance of the evidence in the record taken as a whole. Among other reasons, and in addition to the

application of the statute of limitation which bars such a penalty, there was no legitimate basis to permanently bar Livingston, while most other Respondents were only suspended for one year. All of the "selling" Respondents were found liable for the same basic conduct, found to have the same scienter, and found to have violated the same provisions of the federal securities laws. Further, Judge Murray misapplied the *Steadman* factors and did not assess the factors against the entire record. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). Without limitation, the finding as to the degree of scienter was in error, Livingston was not the primary actor and cannot be barred for failing to detect the fraud of others, there was no evidence that there was a reasonable likelihood of future violations by Livingston, and Judge Murray impermissibly relied upon conduct outside the statute of limitations in the same proceeding in deciding to impose a bar.

8.o The imposition of a cease-and-desist order upon Livingston is arbitrary,o capricious, inconsistent with statutory and other legal standards, and not supported by a preponderance of the evidence in the record taken as a whole.

9. The imposition of a third-tier penalty of $130,000 is arbitrary, capricious, inconsistent with statutory and other legal standards, and not supported by a preponderance of the evidence in the record taken as a whole.

10. The finding that Livingston should disgorge $700 was not supported by a preponderance of the evidence in the record taken as a whole, was clearly erroneous, and was based upon improper legal conclusions. As was set forth in more detail in Livingston's Motion to Correct Manifest Error of Fact, the evidence conclusively establishes that the $700 payment upon which the disgorgement was based did not relate to the sale of either the Four Funds or the Trust Offerings.

11.o Livingston was not given adequate notice of the facts and law on which theo violations found in the Initial Decision were based, depriving him of his rights under the Commission's Rules of Practice (including specifically Rule 200(b)(3)), the Administrative Procedure Act, and due process of law, as well as a fair opportunity to defend himself, all of which constitute prejudicial error in the conduct of the proceeding. Without limitation, Livingston's motion for a more definite statement was summarily denied.

12.o Livingston was deprived of his rights under the Commission's Rules of Practice,o the Administrative Procedure Act, and due process of law, including his rights to have documents produced that were relevant to his defense and to have irrelevant and unreliable evidence excluded at the hearing. Livingston's efforts to obtain documents relevant to his defense were refused in a manner that was arbitrary, capricious, and not in accordance with law. Among other reasons, the Division produced to Respondents a 3-Terabyte hard drive, which consisted of millions of unprocessed documents that were impossible to manually review and prohibitively expensive to process to even begin a database review. Despite having millions of documents, the Division did not produce a single document or any information that was potentially exculpatory, as it was required to do. Further, Judge Murray summarily overruled evidentiary objections with respect to evidence that was not relevant, reliable, and/or timely provided by the Division. Judge Murray also admitted and relied upon a privileged communication between Livingston and counsel (Div. Ex. 620).

13.o The proceeding violated Livingston's rights under the Constitution of the Unitedo States. Among other reasons, the administrative proceeding exceeds the executive powers conferred by Article II, infringes upon the judicial powers conferred by Article III, violates the constitutional separation of powers, violates Livingston's due process rights, and deprived him of

equal protection of the laws. For instance, the Commission prejudged the case against the brokers as evidenced by, *inter alia,* the following: (a) the Commission's Complaint, Motions and Briefs filed in SEC v. McGinn, Smith & Co., et al., N.D. N.Y. No. 10-CIV-457; (b) the Commission's press release issued in connection with the filing of the OIP in the instant enforcement proceeding; and (c) the Commission's Findings of Fact and Conclusions of Law filed in connection with the settlement reached with Respondent Richard D. Feldmann in the instant enforcement proceeding. Also, Livingston and the other Respondents were unfairly targeted in this proceeding, although more than 35 other individuals sold the same products at issue. Further, as demonstrated during the hearing and in pre-hearing conferences, Judge Murray was not independent and was bound by Commission's prosecutorial arm in violation of Livingston's due process rights. Moreover, the Division had years to investigate, subpoena and review documents, take discovery and depositions in the civil case, and have experts review and analyze their materials, before they even filed their OIP. In contrast, Respondents had no opportunity to take discovery and prepare a defense -- indeed, there was only about four months between the filing of the Division's OIP and the start of trial. This created an egregiously uneven playing field and violated Livingston's rights to due process of law.

In addition to the points set forth above, pursuant to Rule 410(b), Livingston also relies upon his post-hearing proposed findings (as further set forth in his supporting brief) in further support of, and as a basis for, this Petition for Review. Further, because many of the findings were made as to all Respondents, Livingston hereby incorporates by reference the exceptions and points of error raised by the other Respondents in this case regarding the process, the findings and conclusions, the penalties, and any other issues applicable to other Respondents.

As a result of the unsupported findings and conclusions in the Initial Decision, the improper application of law, and the deprivation of Livingston's rights under federal securities laws, the Administrative Procedure Act, and the Constitution of the United States, Livingston has made a reasonable showing that there were multiple prejudicial errors committed during the proceeding, that the Initial Decision embodies findings and/or conclusions of material fact which are not supported by a preponderance of the evidence in the record taken as a whole, and that the Initial Decision embodies conclusions of law that are erroneous. Moreover, the determination of law and policy embodied in the Initial Decision are important, and should be reviewed by the Commission.

**Conclusion**

For the reasons set forth herein, and in Livingston's post-hearing brief and proposed findings, the Commission should grant this Petition for Review of the Initial Decision.

Dated: April 30, 2015

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## CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I filed the foregoing pleading with the Office of the Secretary of the Commission via facsimile (with the appropriate copies sent via Federal Express), and served copies on the following persons via Federal Express and email, except where otherwise indicated.

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