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 SUPPLEMENTAL BRIEF REGARDING THE LAW JUDGE'S 2018 DECISION

TABLE OF CONTENTS

Page

In accordance with the Commission's Supplemental Briefing Order dated April 20, 2018, Respondent Philip S. Rabinovich submits this brief regarding the law judge's 2018 Decision.[1]

Far from reconsidering "the record, including all substantive and procedural actions taken"[2] as the Commission directed, the law judge ignored the overwhelming record evidence that Rabinovich did not make any material misrepresentations or omissions in presenting any McGinn Smith Security to any clients.

The Commission should dismiss the charges against Rabinovich because (1) the overwhelming evidence demonstrated that he did not violate any securities laws,[3] (2) the law judge applied incorrect legal standards to the Fraud and Section 5 Claims,[4] (3) the law judge's conduct of the proceeding was rife with prejudicial error and bias,[5] and (4) the proceeding was time barred and fraught with due process, equal protection, and constitutional infirmities.[6]

---

1 The "2018 Decision refers to 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").

2 Commission Order dated November 30, 2017 at 1 (the "Post Hoc Ratification Order").

3 *See, e.g.*, Rabinovich's Individual Brief dated July 17, 2015 at 11-24; Rabinovich's Individual Reply Brief dated October 27, 2015 at 1-12.

4 *See, e.g.*, Joint Brief Addressing Certain Legal Issues In Accordance With The Commission's Order ("Joint Brief"), dated July 17, 2015 at 10-25; Joint Reply Brief Addressing Certain Legal Issues In Accordance With The Commission's Order ("Joint Reply Brief") dated October 28, 2015 at 1-8.

5 *See, e.g.*, Joint Brief at 31; Joint Reply Br. at 15-16.

6 *See, e.g.*, Joint Brief at 6-9, 28-33; Joint Reply Brief at 9-10, 10-14; Rabinovich's and Mayer's Respective Petitions For Review Of The Initial Decision As Amended By The Order Revising And Ratifying Prior Actions ("PFR") dated April 13, 2018 at 5-8.

Rabinovich also respectfully urges the Commission to consider that it was unreasonable and unfair to single out Rabinovich (and nine others) when (a) approximately 40 other registered representatives sold over $69 million of the McGinn Smith Securities, (b) those other individuals also did not see alleged "red flags" or uncover the secret theft and diversion of funds by McGinn and Smith (with the aid of inside and outside accountants), and (b) despite examinations of MS&Co. by the SEC, the NASD/FINRA, and an outside compliance firm, none were unable to uncover the fraud of McGinn and Smith for years.

1. The Law Judge Did Not Reexamine The Record Which Shows Rabinovich Made No Material Misrepresentations Or Omissions

The law judge did not reexamine the record which showed that Rabinovich did not make any material misrepresentation or omission to any client about any McGinn Smith Security. Although the Division identified 47 investors of Rabinovich, it only called two – Patricia Chapman and Ketan Patel. Neither testified that Rabinovich made a material misrepresentation or omission, and the law judge's 2018 Decision is devoid of any citation to one.

a. Patricia Chapman, a former systems engineer and an accredited investor with a net worth greater than $1,000,000 when she invested in McGinn Smith Securities, made a single investment in FEIN some *eight years* before the OIP was filed. Rabinovich provided Chapman with the PPM and discussed it with her. Chapman testified that she made her own investment decisions, as shown by her decision *not* to invest in TAIN (another McGinn Smith Security) after receiving the offering documents from Rabinovich in November 2004. FoF ¶ 411.[7] Chapman acknowledged that she read and understood the FEIN PPM, the front cover of

[7] "FoF" refers to Rabinovich, Mayer and Rogers' Joint Proposed Findings Of Fact And Conclusions Of Law dated May 12, 2014.

which stated in bold print, "**[i]nvesting in the notes involves a high degree of risk,**" Div. Ex. 6 at 1, and that she relied on herself – not Rabinovich – in evaluating the merits and risks of her investment in FEIN. FoF ¶¶ 409-15; RMR Ex. 820. The law judge failed to mention this evidence, and instead cited Chapman's testimony – some eight years after-the-fact – that she *thought* FEIN was a "safe bond." Nowhere does Chapman testify that Rabinovich said FEIN was a "safe bond." Tr. 2184:7–2185:8. As a matter of law, what Chapman supposedly *thought* is not a material misrepresentation or omission. *See* Joint Br. at 21-22. This controlling legal principle is not mentioned in the law judge's 2015 Decision or in her 2018 "reexamination" of the record.

b. Ketan Patel, also an accredited investor, with medical degrees from India and the United States and an annual income between $200,000 to $300,000, received PPMs from Rabinovich to review before deciding whether to invest, and made his own investment decisions. Patel made three *unsolicited* investments, after waiting several months before deciding to invest, in Trust Offerings, the largest of which ($25,000) preceded the OIP by more than five years (and is time barred by § 2462). Tr. 169:15-18, 171:20-172:5, RMR Exs. 700, 702. Patel also *thought* his investments were "safe," but admitted that nobody *told* him they were safe. Tr. 157:6-9 (law judge Q: "Did anybody, tell you it was safe? Patel A: "No."). Patel expressly acknowledged in his subscription agreements that he relied on himself in evaluating the merits and risks of his investments in the Trust Offerings. The law judge concluded Rabinovich "did not make Patel aware of" "material facts surrounding the Trust Offerings" (i.e., substantial risk factors, fees and expenses). 2015 Decision at 108. But these facts were fully disclosed in the PPMs that Patel attested to reading and understanding. FoF ¶¶ 398-408; RMR Exs. 707, 710, 711. No legal authority supports holding an individual broker liable for a supposed material omission of fact

that is specifically disclosed in offering documents that the investor acknowledged reading and reviewing prior to investing. These facts and law are ignored in the law judge's 2015 Decision and in her 2018 "reexamination" of the record.

c. Rabinovich presented three witnesses (Rowe, Favish and Kogan) who testified that Rabinovich fully discussed each proposed investment with them. For example, Rowe testified: "Phil always provided thoughtful analysis," and "he was providing a valuable resource to me." Tr. 4375:21–4377:2; FoF ¶¶ 371-80. Favish testified that Rabinovich presented investment opportunities that were within his comfort zone and consistent with his tolerance for risk. FoF ¶ 385. Kogan described Rabinovich as "a man of honesty and high integrity," and "thorough and honest and straightforward in his dealings with me." FoF ¶ 397, RMR Ex. 625, ¶ 12. In her conclusions in her 2015 Decision, the law judge makes no reference to the testimony of these witnesses and ignores them entirely in her 2018 "reexamination" of the record.

Nine other investors, who were subpoenaed but could not attend the hearing, attested to Rabinovich's thorough presentation of each security – McGinn Smith Securities or other securities. RMR Exs. 607, 610, 612, 614-16, 618, 620, 624-25.

d. The law judge did not reexamine her (erroneous) conclusion that Rabinovich was reckless in selling Trust Offerings based on supposed red flags relating to a different investment product – the Four Funds (the sale of which predated the OIP by more than five years). FoF ¶ 552. The law judge ignored that the Four Funds had nothing to do with the Trust Offerings, which the Division's own expert witness admitted "were not at all similar" to the Four Funds. Div. Ex. 1 at 25. The Trust Offerings were managed by McGinn, not Smith, were based on cash flow from income-generating assets such as "triple play" contracts with

homeowner associations that could be amortized or sold to pay the stated interest due on the trust certificates, and were unrelated to the types of investments made by the Four Funds. FoF ¶¶ 47, 273, 338.

The evidence demonstrated that Rabinovich did not act with scienter. Indeed, Rabinovich and his family invested, and lost, significant sums in McGinn Smith Securities – far more than Rabinovich earned selling them. Yet, the law judge, citing only *Milan*[8], erred as a matter of law in concluding that Rabinovich acted with scienter. 2015 Decision at 108. Unlike *Milan* –where the defendant-broker enabled the sale of phony IPO securities that were obviously a sham (*Milan* at *5-6, *13-21) – Rabinovich (a) presented McGinn Smith Securities to accredited investor clients only when suitable, (b) had less of a financial incentive to present them, as commissions on equity purchases and sales were higher, and (c) McGinn Smith Securities comprised less than 20% of his accredited investors' assets. FoF ¶ 384. An objective review – and "reexamination" – of the record demonstrate that Rabinovich did not act with scienter. The law judge did not undertake that "reexamination" in her 2018 Order.

2. The Law Judge Did Not Reexamine The Record Which Shows Rabinovich Acted Prudently And Fulfilled His Duties As A Registered Representative

The law judge did not reexamine the overwhelming evidence that established that Rabinovich acted prudently and fulfilled his duties as a registered representative. The law judge ignored Rabinovich's testimony, contemporaneous documents, and her own recital (2015 Decision at 106-07) which made clear that Rabinovich discharged his duties as required of a registered representative and did not violate Securities Act sections 17(a)(2) and (a)(3).

---

[8] *SEC v. Milan Capital Group Inc.* 00 Civ. 108 2000 U.S. Dist. LEXIS 16204 (S.D.N.Y. Nov. 9, 2000).

As the record showed, Rabinovich understood each McGinn Smith Security (and other securities) before presenting them. FoF ¶¶ 201-11; *see also*, FoF ¶¶ 46, 195-200 (Four Funds due diligence); FoF ¶¶ 227-34 (Trust Offerings due diligence). He analyzed the investment by (a) attending management's presentation of the investment, (b) reviewing the PPM, (c) asking follow-up questions of management, (d) discussing the investment opportunity with his colleagues, and (e) making a suitability determination regarding specific clients. Rabinovich also did independent research and determined client suitability by having detailed discussions with clients about their financial picture, investment objectives, risk tolerance, and overall goals. FoF ¶¶ 188-94. As Respondent Gamello testified – who the law judge deemed "credible" (Decision at 101) – "the RMR guys [Rabinovich, Mayer and Rogers] are very thorough." Tr. 5945:7-11; *see also* 2015 Decision at 20 n.33; FoF ¶¶ 283-85.

Based on the evidence adduced at the hearing, no reexamination of the record could support the law judge's assertions that Rabinovich "did not conduct a sufficient investigation, dismissed a number of red flags ... and parroted Smith's optimistic statements about the Four Funds to his customers as fact." 2015 Decision at 107. The law judge cites no evidence supporting these assertions. Nor does her 2018 "reexamination."

3. The Law Judge Did Not Meaningfully Reexamine The *Steadman* Factors And Ignored That The Vast Majority Of Alleged Misconduct In The OIP Occurred Prior To September 23, 2008

The law judge's *Steadman* reexamination was utterly deficient. Aside from referencing the *Steadman* factors, the law judge never meaningfully considered (or reconsidered) them. *See Monetta Fin. Servs., Inc. v. SEC*, 390 F.3d 952, 957 (7th Cir. 2004) (Commission abused discretion by not meaningfully considering *Steadman* factors; sanctions vacated).

The law judge's imposition of a one-year suspension – a financial death knell for all practical purposes – was unjustified and unnecessary to protect the public interest. The

evidence demonstrated that Rabinovich did not act with scienter and his conduct was not egregious, which is highly relevant to the question of what, if any, remedial action should be taken in the public interest, or whether penalties should apply at all. *See In re Steadman Sec. Corp.*, 1977 SEC LEXIS 1388, 30, 46 S.E.C. 896, 909 (June 29, 1977) ("[I]ntent is ... highly germane to determining the quantum of the remedial action, if any, that due regard for the public interest requires us to take"); *Steadman*, 603 F.2d at 1140-41 ("respondent's state of mind is highly relevant in determining the remedy to impose.").

Rabinovich and his family purchased McGinn Smith Securities, undermining any suggestion he acted with scienter. RMR Ex. 803. The fifteen clients who testified or submitted affidavits in support of Rabinovich, or who were contacted by the Division, showed that Rabinovich worked with them to further their interests, and dealt with them fairly, honestly, and in good faith. FoF ¶¶ 380, 388, 397, 688-89; RMR Ex. 873 at 2. None of this is mentioned in the law judge's *Steadman* analysis.

The law judge's sole justification for the suspension in the 2015 Decision was that Rabinovich "currently work[s] in the securities industry, so there appears to be a strong likelihood for recurrence." 2015 Decision at 113. In purporting to reconsider the record in 2018, the law judge ignored that (1) for more than eight years as a registered investment adviser of RMR, Rabinovich has had an unblemished record, and (2) RMR has "zero proprietary product" and does not sponsor private placements or mutual funds, *see* FoF ¶¶ 33-35, concluding that "the likelihood that a respondent's occupation will present opportunities for future violations is but one of the *Steadman* factors." 2018 Order at 19. There simply is no basis to believe that Rabinovich is a threat to the investing public. *See, e.g., SEC v. Bausch & Lomb*, 565 F.2d 8, 18 (2d Cir. 1977) (requiring "positive proof of a reasonable likelihood that past wrongdoing will

recur"). The record and case authority do not support the imposition of any sanction against Rabinovich.

4. A Collateral Suspension Based On Pre-Dodd Frank Conduct Is Improper

The law judge erred in her 2018 Order which collaterally suspends Rabinovich from association with an investment adviser based solely on alleged conduct in his capacity as a registered representative of a broker-dealer that occurred prior to the passage of the Dodd Frank Act in July 2010. 2018 Order at 17 n.12.

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, or conduct after 2009, 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 suspends Rabinovich from association with an investment adviser in her 2018 Order.

As support for punitively suspending Rabinovich from associating with his 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 the facts here. Victor Teicher was the sole general partner and 75% owner of Teicher & Co., L.P., an unregistered investment adviser. He, as well as Teicher & Co., was criminally convicted of securities fraud, conspiracy and mail fraud in an insider trading scheme while working as an unregistered investment adviser. Thereafter, the SEC brought a follow-on administrative proceeding and barred Victor Teicher from associating

with an *unregistered* investment adviser. Unsurprisingly, the Court affirmed the Commission's authority and decision to bar Victor Teicher from associating with any unregistered investment adviser. Unlike Victor Teicher, Rabinovich's conduct at issue was not as an investment adviser at McGinn Smith Advisors. The allegations of the OIP and the evidence presented at the hearings related exclusively to Rabinovich's sale of McGinn Smith Securities in his capacity as a registered representative of MS&Co.

The law judge's citation to Rabinovich's registration with McGinn Smith Advisors, for which there was no evidence that he worked as an advisor or conducted any business in that capacity, does not support his suspension as an investment adviser of RMR. No investment advisory agreements were offered in evidence. The law judge's justification that "clients also considered them [Rabinovich and Mayer] their investment advisers" is grossly misleading and beside the point. 2018 Order at 17 n.12. As to Rabinovich, the law judge 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.

5. A New Proceeding Was Required

Adopting the Commission's and the Solicitor General's newly-stated positions[9] – rather than independently examining them – the law judge erroneously concluded that she could cure the constitutional defects in this proceeding through "reconsideration and ratification." 2018 Order at 8. 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. *See Adv. Disposal Servs. East v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016). Nor did she.

---

[9] Post Hoc Ratification Order at 1; *Compare* 2018 Order at 7 *with* Brief for Respondent SEC dated April 2018 at 20 in *Lucia*.

This proceeding should have been started anew in an Article III forum (where it was required to have been brought in 2013 to afford Rabinovich equal protection). *Gupta v. SEC*, 796 F.Supp. 2d 503, 513-14 (S.D.N.Y. 2011).

Having admitted that the proceeding was unconstitutional, a new proceeding was required. *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. In all events, any renewed action – whether in court or an administrative forum – would be time-barred by 28 U.S.C. § 2462.

6. Section 2462 Barred This Proceeding And Would Bar Any Renewed Or New Proceeding

The law judge failed to reexamine the OIP, and Rabinovich's (and other Respondents') motions to dismiss the OIP on the grounds that neither the law judge nor any other forum had jurisdiction to hear any of the claims because more than half of them arose more

than five years before the OIP was filed – that is before September 23, 2008.[10] 28 U.S.C. § 2462 ("[A] proceeding for the enforcement of any civil fine, penalty, or forfeiture... shall not be entertained unless commenced within five years from the date when the claim first accrued."). All of the Four Funds and 11 of the Trust Offerings claims predated September 23, 2008. *See* OIP ¶¶ 15, 16.

According to the OIP, starting in 2003, Respondents failed to conduct a reasonable investigation in offering McGinn Smith Securities (*see* OIP ¶¶ 34, 35, 37), and allegedly "held out the pre-2003 alarm note offering as indicative of Smith's and McGinn's integrity and skill," despite a *never-sent* "handwritten letter from Smith to McGinn in 2000" allegedly "characteriz[ing] the pre-2003 offerings as a 'Ponzi scheme,'" that Rabinovich did not know about. OIP ¶ 38(b) n.3.

Having asserted mostly pre-September 23, 2008 claims, no claim asserted in the OIP – pre or post-September 23, 2008 – could be "entertained." *See, e.g., Williams v. Warden*, 713 F.3d 1332, 133740 (11th Cir. 2013) (the "great weight of authority" holds that the statutory command – "shall not be entertained" – is jurisdictional in nature"). For there to have been subject matter jurisdiction, only post-September 23, 2008 claims could have been alleged in the OIP. Nevertheless, the law judge summarily denied Rabinovich's (and other Respondents') motions stating only that "when the Commission sets down a case for hearing ... the agency does not want motions...because you're second guessing their decision that ... there is a legal basis for it...."[11]

---

[10] Rabinovich, Mayer And Rogers' Joinder In The Motion Of Lex For Leave To File Motion For Summary Disposition dated January 13, 2014.

[11] Pre-Hearing Tr. (Jan. 21, 2014), at 30:13-21.

In her 2018 Order, the law judge did not address jurisdiction to "entertain" any claim in the OIP where most of the claims pre-dated September 23, 2008, or acknowledge the severe prejudice to Rabinovich (and other Respondents) in having to defend these stale claims and the evident impact they had on her decision. Had the law judge been asked to consider solely post-September 23, 2008 claims relating to the Trust Offerings – as the statute requires – there would be no objective basis on which to conclude Rabinovich violated the antifraud provisions of the federal securities laws. The law judge instead allowed the Division to pollute the record with stale allegations relating to the pre-September 23, 2008 Four Funds, a different investment product altogether.

7. Ratification Was A Nullity

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.[12]

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,

---

[12] 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.

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).

8. Restrictions On The Removal Of ALJs Violate Separation-of-Powers

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) (finding "no theory that would permit us to declare the Commission's structure

unconstitutional without providing relief to the appellants in this case" where "appellants raise the constitutional challenge as a defense to an enforcement action").

9. The Law Judge Did Not Reexamine Prior Evidentiary Rulings

a. The law judge erred in refusing to exclude all "unreliable" evidence as expressly required by amended Rule 320, and dismissed 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 Rabinovich's 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.

The Division's conduct – reading the *never-sent* 1999 letter 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). In 2018, despite having the benefit of the Second Circuit's decision, the law judge refused to acknowledge her error. Instead, she reached the opposite conclusion stating that "the notes are not unreliable," because the material was seized from Smith's home by federal agents and "[t]here was no doubt" that Smith – a non-party who did not testify – was the author. 2018 Order at 9. This was prejudicial error. Nevertheless, the law judge now contends 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 interrupted one Respondent's answer and declared: "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.

Misleadingly, the law judge also 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. The admission of the 1999 *never-sent* handwritten ramblings alone requires dismissal, as it indelibly prejudiced the law judge against Respondents.

b. The law judge erred in refusing to consider on remand affidavits from Rabinovich's investors 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 argued that he would have 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's (and Mayer's) 2014 motion 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.[13] Of course, had Rabinovich 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.

---

[13] *See* Rabinovich, Mayer and Rogers' Motion To Admit Prior Sworn Statements Of Witnesses Pursuant To Rule 235 dated January 15, 2014.

The law judge's assertion that she "took [it] as a given" that Rabinovich had "many satisfied customers," 2018 Order at 10 n.6, misses the point. First, the law judge imposed disgorgement on post-September 23, 2008 purchases by customers who were "satisfied" and were not misled. Second, the affidavits demonstrated that Rabinovich did not make material misstatements or omissions to his customers and that he explained the risks and rewards of investing in McGinn Smith Securities (and other securities). Moreover, 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 MS&Co.'s due diligence materials regarding the McGinn Smith Securities to the U.S. Attorney's Office in connection with its criminal action against McGinn and Smith); and RMR Ex. 619 ¶ 12 (affidavit of Kyle Weeks, a former FINRA Senior Compliance Examiner and the CEO of Securities Compliance Management who provided compliance consulting and audit services to MS&Co. and found that the New York branch RRs "pre-qualified their customers" for private placement securities, including McGinn Smith Securities.).

10. The Commission May Not Impose Disgorgement

The law judge ignored (and erred in rejecting) Rabinovich'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.").

11. The Law Judge Did Not Reexamine The Equal Protection And Due Process Deprivations

a. The law judge did not reexamine that *this* proceeding should have been brought (if at all) in federal court given the interrelated issues between the OIP and the SEC's

federal court action against McGinn and Smith. While McGinn and Smith could take depositions and other discovery under the Federal Rules of Civil Procedure, and had the protections of the Federal Rules of Evidence, trial by jury, and an Article III judge, Rabinovich (and other Respondents) were deprived of those benefits and protections. The prejudicial effect of the administrative forum was amplified because much of the hearing was devoted to (a) McGinn and Smith, who were not parties to or present for examination, and (b) the records of MS&Co. – that Rabinovich (and others) did not have, but which the Division's summary witnesses spent several years analyzing.

b. The law judge did not consider or reexamine that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *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).

c. Nor did the law judge reexamine Rabinovich's (and other Respondents') motions challenging the patent pleading deficiencies in the OIP, which failed to state a fraud claim.[14]

d. The law judge did not reexamine whether Rabinovich's (and other Respondents') equal protection rights were violated when they were singled out, even though approximately 40 others sold over $69 million of McGinn Smith Securities to investors were not charged. *See* Div. Ex. 591. There was no legitimate basis to single out Rabinovich when 40 others also offered McGinn Smith Securities, also did not see any red flags, also did not conduct

[14] *See* Rabinovich, Mayer And Rogers' Motion For A More Definite Statement dated November 7, 2013; Rabinovich's Answer dated November 15, 2013 at 4-8.

an "investigation" (Rabinovich conducted "due diligence"), also did not "verify" statements in the PPM or statements by McGinn and Smith, and also did not uncover the secret fraud and diversion of funds by McGinn and Smith. *Gupta*, 796 F. Supp. 2d at 513-14.

e. The law judge did not reexamine whether she had prejudged the case as evidenced by her statement that certain proffered evidence had "nothing to do with *the violations*," Tr. 2412:5-6 (emphasis added). The statement was a blatant violation of due process. *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.") (internal citations and quotations omitted); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009) (the Due Process Clause does not require "proof of actual bias," but rather whether there is a real risk of actual bias or prejudgment.).

12. Pre-Judgment Interest Is Punitive

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 has 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").

Conclusion

The Commission should dismiss all charges against Rabinovich.

DATED: New York, New York
May 18, 2018

SEWARD & KISSEL LLP

By: M. William Munno

M. William Munno
Michael B. Weitman
One Battery Park Plaza
New York, New York 10004
munno@sewkis.com
weitman@sewkis.com
Counsel for Philip S. Rabinovich

SK 88888 0211 7880858

CERTIFICATE OF COMPLIANCE

This supplemental brief complies with the word limit in the Commission's Supplemental Briefing Order dated April 20, 2018. The brief contains 5,680 words, exclusive of the Table of Contents, Signature Block, and this Certification, as counted by Microsoft Word, the word processing system used to prepare it.

Dated: New York, New York
May 18, 2018

M. William Munno

M. William Munno

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 May 18, 2018, I filed an original and three copies of Respondent Philip S. Rabinovich's Supplemental Brief Regarding The Law Judge's 2018 Decision, and Respondent Brian T. Mayer's Supplemental Brief Regarding The Law Judge's 2018 Decision 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
111 Presidential Boulevard, Suite 228
Bala Cynwyd, Pennsylvania 19004
gabramson@gbalaw.com
Counsel for Respondent William F. Lex

Roland M. Cavalier, Esq.
Tuczinski, Cavalier, & Gilchrist, P.C.
500 Federal Street, 4th FlLoor
Troy, New York 12180
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: May 18, 2018
New York, New York

M. William Munno

M. William Munno

SK 88888 0211 7898282