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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
October 21, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 789041/October 21, 2016

Admin. Proc. File No. 3-17402

In the Matter of the Application of
BERNARD G. MCGEE
For Review of Disciplinary Action Taken by
FINRA

OPENING BRIEF

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PRELIMINARY STATEMENT

Respondent, Bernard G. McGee, respectfully offers this brief in support of the appeal from the findings and conclusions set forth in the Decision of the National Adjudicatory Council dated July 18, 2016, which affirmed the Amended Extended Hearing Panel Decision dated December 22, 2014. First and foremost, Mr. McGee wholeheartedly shares and believes in the rules that are the subject of this proceeding, and believes strongly in the purpose behind these rules, and the importance of strictly abiding by the rules in every circumstance, with every client. This was the case throughout his entire career spanning over 30 years.

The overriding purpose behind the subject rules can be found in the words of the United States Supreme Court: "to protect the investing public and honest business"; and, to provide for the "confidence of the prospective investor in his ability to select sound securities". *United States v.*

Naftalin, 441 U.S. 768, 775-776. Mr. McGee lived this philosophy throughout the entirety of his 30 year practice. As AB, the DOE's witness who the panel found highly credible, testified at the hearing in this matter, Mr. McGee was always very meticulous with his recommendations (tr. 212-213), Mr. McGee was always extremely professional (213), Mr. McGee always made appropriate decisions for clients (213), Mr. McGee always serviced the clients properly (213), and Mr. McGee always made suitable decisions (213). AB's serves as a backdrop to these proceedings and to provide the fundamental corroboration that Mr. McGee's actions were, in all respects, honest and in line with the spirit and purpose of the rules at issue.

Thus, while Mr. McGee strongly shares the belief that investor protection is of the utmost importance in this case and every case, and he put this belief into practice, always, over the last 30 years, we are bringing this matter before the SEC to further another important purpose behind the rules; namely, the "desire to protect ethical businessmen". *United States v. Naftalin*, 441 U.S. at 776. As noted by the Supreme Court, such rules are "designed to protect not only the investing public but at the same time to protect honest corporate business." *Naftaliln, supra at* 776. It is clear , as set below, that the overwhelming testimony and evidence at the hearing demonstrated there were no violations of any rules by Mr. McGee. Thus, the NAC Decision, which affirmed the Extended Hearing Panel's Decision, should be reversed with respect to all findings and conclusions adverse to Mr. McGee. By doing so, the purposes of the subject rules will be justly served.

POINT I: MR. MCGEE TIMELY UPDATED HIS FORM U4

To first demonstrate why the NAC Decision should be reversed with respect to findings against Mr. McGee, the issue of updating the U4 provides the simplest and clearest example. Additionally,

findings by the NAC and Hearing Panel on this issue serve as a predicate to other findings and, as such, the U4 issue will be addressed first. On this issue, the NAC and Hearing Panel determined that Mr. McGee's U4 was updated on December 5, 2011 to reflect that he moved to [redacted]. It then incorrectly found that the move occurred in late 2010 or early 2011 and, since this was more than 30 days before updating the U4, the update was untimely. The finding by the NAC and Hearing Panel that the move occurred in late 2010 or early 2011 is clearly not what the hearing showed. The incorrect finding was based upon OTR testimony given by Mr. McGee prior to the hearing. However, the pre-hearing OTR testimony does not support the finding of the NAC and Hearing Panel. Just the opposite. During the hearing, Mr. McGee's OTR testimony was read into evidence (tr. 1065 -1066). Mr. McGee testified during his OTR testimony that he was at [redacted] "probably" for "the first seven or eight months in 2012" (tr. 1066-1067). This OTR testimony was simply ignored by the NAC and Hearing Panel. This testimony was given during the pre-hearing OTR testimony which the Hearing Panel determined should be given great weight because it was given closer in time to the actual event, and memories were more intact. It is true that a couple pages later in the OTR transcript Mr. McGee inadvertently misstated that the move was late 2010, early 2011 (tr. 1067), contrary to his immediately preceding OTR testimony that the move was in late 2011 or early 2012, but the later testimony was clearly a misstatement, especially in light of the overwhelming testimony at the hearing.

At the hearing on this issue, AB provided conclusive testimony in support of Mr. McGee. AB testified that when he was asked during his pre-hearing OTR testimony when he and Mr. McGee moved into the [redacted]d address, he could not recall exactly when they moved in but advised the DOE that he could find out (243). The DOE never followed up to find out (243). However, AB did follow up. AB

testified that he determined when he and Mr. McGee moved into [redacted] by the timing of his business card order which added the [redacted] to the cards (243-244). AB was confident that he ordered business cards immediately after he and Mr. McGee moved into the [redacted] (244). AB gave uncontradicted testimony that he ordered the business cards in January of 2012, which was verified based upon an examination of his records (244-245). From his investigation into the matter, AB determined and testified that Mr. McGee timely updated his U4 (245-247). This testimony was not challenged or contradicted. Mr. McGee also independently verified that he moved to [redacted] in December of 2011 by reviewing his own files (1070-1071). Finally, Ms. Johnson of Cadaret Grant testified that she had no reason to believe that Mr. McGee did not timely update his U4 (1280).

In sum, the NAC and Hearing Panel incorrectly found a violation of Article V, Section 2c of the FINRA By-Laws and FINRA Rules 1122 and 2010 and the decision of the NAC should be reversed.

POINT II: MR. MCGEE PROVIDED HONEST INFORMATION TO HIS FIRM

As with the U4 issue above, it is submitted that the finding by the NAC and Hearing Panel that Mr. McGee violated FINRA Rule 2010 by failing to properly disclose a business email address was wholly unsupported by the hearing testimony and, as such, the NAC Decision should be reversed. This issue again provides a simpler and clear example of what the NAC and Hearing Panel did on every issue; namely, ignored the hearing testimony and evidence to reach its conclusions.

On this issue, the NAC and Hearing Panel incorrectly found a violation of FINRA Rule 2010 based upon AB's testimony that he and Mr. McGee communicated with each other using Mr. McGee's yahoo! email account. The yahoo! email account was not disclosed to Cadaret Grant; however, it was not required to be disclosed, as supported by the overwhelming, uncontradicted, unbiased, testimony at the

FINRA hearing. At the hearing, AB gave unchallenged, highly credible testimony that he and Mr. McGee never used the subject email account to discuss securities. AB testified that "we would typically use his yahoo! and probably my gmail. And I - - and it wasn't necessarily - -***didn't have anything to do with securities business***." (207). The FINRA panel found AB "persuasive" and did not find "any reason to distrust either AB's memory or his motives." There was not a single email, or any evidence, produced by the DOE to contradict AB's testimony on this issue.

Cadaret Grant's Compliance Officer, Ms. Johnson, testified that Cadaret representatives were not required to disclose e-mail accounts that were used for insurance or non-securities business (1280-1281). According to Cadaret Grant, the only e-mail addresses that were required to be disclosed were those related to securities business (1281). As such, AB's unchallenged testimony that the subject yahoo! account "didn't have anything to do with securities business" defeats any finding of a violation of Rule 2010. Thus, the NAC decision should be reversed.

In addition, the NAC decision affirming the Hearing Panel's decision incorrectly indicates that Mr. McGee falsely represented to his firm on a questionnaire that he had not been involved, without Cadaret's written permission, in the offer or sale of any security or other investment that was not processed through Cadaret. There is nothing in the record to support this finding by the NAC and Hearing Panel. Rather, all of the testimony and evidence are contrary to the NAC and Hearing Panel's finding. The only product that could be at issue under this rule is the 54Freedom Charitable Gift Annuity. The sole issue applicable under this rule would be whether the purchase of the Charitable Gift Annuity needed to be processed through Cadaret Grant. Because the Charitable Gift Annuity was an insurance product, the answer is clearly no, the CGA did not need to be processed through Cadaret. Thus, Mr.

McGee was honest in his response in this regard on the questionnaire. Ms. Johnson of Cadaret confirmed that if Mr. McGee received compensation related to the sale of an insurance product, he would not have to process this through Cadaret Grant. (1255-1256). Here, there can be no dispute that the compensation received by Mr. McGee in this case was "commissions" related to the purchase of the CGA. ***This was agreed to by both parties in the pretrial stipulations***. Nothing was processed through Cadaret in the instant case because the commissions were for the purchase of an insurance product (tr. 995-998) (RX-5, pp. 51, 56). This was the uncontradicted, stipulated-to, testimony at the hearing. (1255-1256). Thus, it is submitted that the finding by the NAC and Hearing Panel that Mr. McGee violated Rule 2010 should be reversed which, again, would serve to protect the ethical conduct on the part of Mr. McGee in this case.

POINT III: MR. MCGEE DISCLOSED HIS OUTSIDE BUSINESS ACTIVITIES

In this case, Mr. McGee properly disclosed all outside business activity and, again, the hearing testimony and evidence overwhelmingly demonstrated, both quantitatively and qualitatively, that there was no violation of Rules 3270 and 2010. The only outside business activity Mr. McGee had was as an independent insurance agent which allowed him to sell insurance products independent of Cadaret Grant, meaning he could receive compensation related to the purchase of an insurance product, and not have to report that to Cadaret Grant (tr. 999-1000). Mr. McGee disclosed to Cadaret Grant that he was an independent insurance agent at the inception of his relationship with Cadaret (CX-61, response to number 7). Ms. Johnson of Cadaret Grant confirmed that if Mr. McGee received compensation related to the sale of an insurance product, he would not have had to disclose anything further to Cadaret beyond what he disclosed to Cadaret at the beginning of his relationship with them (1255-1256). Here, there can be no dispute that the compensation received by Mr. McGee in this case was "commissions" related to the

purchase of the CGA, an insurance product. Thus, there was no obligation to disclose it to Cadaret.

Finally, it was noted by the Hearing Panel that Mr. McGee received free rent while at 54F and the question was raised by the Hearing Panel whether that could be considered compensation and thus an outside business activity that should have been disclosed. First, the DOE never advanced such a claim or theory in its Complaint, and no such argument was advanced during the hearing. In any event, to be sure, FINRA Rule 3270 states:

> *No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member. Passive investments and activities subject to the requirements of NASD Rule 3040 shall be exempted from this requirement.*

As mentioned, the Hearing Panel noted that Mr. McGee received rent-free space from 54F for a period of time. As applied to Rule 3270, the question becomes whether this could be considered compensation and thus an outside business activity that should have been disclosed. The answer is clearly no. The DOE neither pled, nor provided any evidence in support of, this theory. There was not a single piece of evidence or testimony on this issue offered by the DOE. Clearly the DOE, having produced no testimony or evidence on the issue, and having made no legal argument on the issue, and having not even advanced the argument at the hearing, failed to meet its burden of proving that free rent constituted income to support a finding that Rule 3270 was violated. Moreover, Mr. McGee testified that he believed he was getting free rent as an inducement for a long-term lease as a tenant (1141). There is no basis to conclude that free rent to induce a long-term lease is considered compensation. No testimony was offered at the hearing in this regard. The DOE has the burden of proof. Again, it did not even make

an allegation in its Complaint with respect to free rent, it offered no testimony or evidence on the subject, and advanced no such argument at the hearing. Thus, the free rent theory cannot form the basis of an outside business activity claim.

Next, the NAC and Hearing Panel incorrectly found that Mr. McGee's "relationship" with 54F needed to be disclosed to Cadaret, and was not. There was no evidence to support this finding, and ample evidence showing the finding was incorrect and improper. The testimony and evidence showed that all of the interactions between Mr. McGee and the members of 54 Freedom were for one purpose: obtaining leads to securities' clients (271). Getting leads and referrals was crucial to the business of Mr. McGee, this included meeting people and getting introduced to people (238). There was nothing wrong with engaging in the activity of seeking referrals (238). Ms. Johnson of Cadaret Grant testified that it is a normal part of a Cadaret representative's business to network with other professionals to try to get leads and referrals for securities business. This networking did not have to be disclosed to Cadaret (1272). The testimony and evidence showed that 54F's only relationship with Mr. McGee was on the insurance side of Mr. McGee's business. Mr. McGee did not do any securities business with 54F and the record reflects there was no securities business between Mr. McGee and 54F. This was not disputed or contradicted. In addition, there was no proof that Mr. McGee was compensated by 54F for any business activity other than the commissions related to the purchase of the CGA, an insurance product. To the overwhelming contrary, the DOE's investigator provided substantial proof that Mr. McGee did not receive compensation from 54F for any business activity other than the commissions related to the purchase of the CGA. In this regard, Ms. Valez of the DOE produced CX-80, the bank account registers for 54 Freedom Tele, Inc (457); CX-79, the bank account register for 54 Freedom Foundation (460-461); CX-78, the bank account

register for 54 Freedom Services, Inc. for all transactions from January 2011 through July 2012 (463-465); and, CX-77, the bank account register for 54 Freedom Securities, Inc. (466). These voluminous records showed no payments to Mr. McGee other than the commissions related to the purchase of the CGA, an insurance product.

Additionally, there is no evidence that Mr. McGee was "an employee, independent contractor, sole proprietor, officer, director or partner" of 54F. All the evidence at the hearing showed the opposite. (CX-28) (427-433). AB, a highly credible witness, testified: there was no formal relationship between Mr. McGee and 54 Freedom (222); Mr. McGee was never employed by 54F (222); Jim Griffin of 54F was simply attempting to establish a referral relationship with Mr. Baker and Mr. McGee, nothing more (222); Mr. McGee was never an officer, director or trustee of 54F (222); Mr. McGee was never on 54F's payroll (223); Mr. McGee never had ownership interest in 54F (226); Mr. McGee never represented to anyone that he was a member of 54F (226); Mr. McGee never had business cards with 54F on them (226-227); Mr. McGee never had 54F letterhead (227); Mr. McGee had no authority to act on behalf of 54F (227); Mr. McGee could not sign checks on behalf of 54F and had no control over 54F's operations (227); and, Mr. McGee did not participate in managing any of the 54F companies (227). AB testified that Mr. McGee was completely independent of 54F (227). This independence from 54F is confirmed by the fact that Mr. McGee received a 1099 for the commissions relating to the purchase of the CGA (435).

As with every issue in this case, it is submitted that the testimony and evidence overwhelmingly demonstrated there was no violation on the part of Mr. McGee. His actions were at all times in line with "honest business" and ethical behavior. As such, the NAC's decision should be reversed.

POINT IV: MR. MCGEE DID NOT COMMIT FRAUD

In addition to the above, it is submitted that the hearing produced no valid basis to find fraud on the part of Mr. McGee relative to the 54Freedom entities and products. Initially, as the SEC is aware, James Griffin and his 54Freedom entities are the guilty parties here. They are the perpetrators of fraud against an unsuspecting public, not the brokers such as Mr. McGee. As noted in the Complaint in the matter of the *Securities and Exchange Commission v. James P. Griffin, et al* (5:15-CV-0927-FJS/TWD), "Griffin controlled all 54Freedom investor funds" (p. 19 of SEC's Complaint), "Griffin controlled all of the 54F entities" (p. 18), unbeknownst to the brokers and the public "Griffin intended to take money at will for himself from the funds raised" (p. 19), Griffin deposited funds "directly into his personal bank account" (p. 19), "ordered transfers...to his personal account" (p. 19), "repeatedly used 54Freedom credit and debit cards to pay his personal expenses - all without any oversight" (p. 19), "diverted at will at least $1.2 million in...funds to himself and his wife" (p. 19), and used funds "to purchase for himself and his wife, among other items, a large boat, expensive vacations, luxury cars, expensive clothing and jewelry, and country club memberships" (pp. 19-20). There is not a single allegation in the SEC's 32-page Complaint that any broker was a part of the corrupt scheme organized and executed by Griffin and his 54Freedom entities. Additionally, as the SEC is undoubtedly aware, Griffin was recently convicted in federal court, Northern District of New York, of 23 counts of mail and wire fraud and money laundering relative to the schemes surrounding his 54Freedom entities. The criminal case against Griffin was investigated by the Internal Revenue Service and the Federal Bureau of Investigation, and was prosecuted by multiple members of the U.S. Attorney's Office. At the conclusion of the matter, as the SEC is aware, the trial showed without question that the brokers, such as Mr. McGee, were completely unaware of the fraud being perpetrated by Griffin, and the brokers in no way participated in the fraud.

Turning to the decisions of the NAC and Hearing Panel on the fraud issue against Mr. McGee. In the decisions, it is noted that whether Mr. McGee recommended that CF liquidate her four VAs and recommended she purchase a CGA is at the core of both the fraud claim and suitability claim against Mr. McGee. The NAC and Hearing Panel recognized in its decision that, unless Mr. McGee made such recommendations, there could be no finding against Mr. McGee on the fraud claim or suitability claim. With that in mind, the NAC and Hearing Panel concluded that Mr. McGee, who spent his career always being very meticulous with his recommendations for clients (tr. 212-213), always being extremely professional (213), always making appropriate decisions for clients (213), always servicing the clients properly (213), and always making suitable decisions (213), did an about-face and changed course after 30 impeccable years to devise and execute a fraudulent scheme against CF, a relatively long-time client and sophisticated investor, solely to make money he had little need for. The finding is, to put it mildly, devoid of any substantiation and refuted by all of the testimony at the hearing. The conclusion by the NAC and Hearing Panel that Mr. McGee perpetrated a fraud relative to Griffin's 54Freedom CGA is completely undermined by what is now known of Griffin and 54Freedom as outlined in the SEC's Complaint which shows that, at all times, it was Griffin and his 54Freedom entities committing fraud against the public, not brokers like Mr. McGee. Notably, the SEC Complaint makes no allegation that brokers, including Mr. McGee, were in any way involved or aware of the fraud being perpetrated by Griffin and his 54Freedom entities. Likewise, the finding by the NAC and Hearing Panel that it was Mr. McGee that committed fraud is further undermined by what was revealed in the criminal case of *U.S. v. Griffin*, which was investigated by the IRS, FBI, and U.S. attorneys office, and tried in federal court this past summer, only to conclude that the brokers, such as Mr. McGee, were completely unaware of the

schemes and fraud being perpetrated by Griffin and his 54Freedom entities, and that brokers such as Mr. McGee did not partake in any fraud against the public. These investigations, trials, findings, and determinations of fraud against Griffin and 54Freedom that have occurred since Mr. McGee's hearing, which essentially exonerate all brokers of any wrongdoing, should serve as a basis to immediately reverse any findings of fraud against Mr. McGee in connection with the 54Freedom CGA.

We also need only look at the hearing testimony from CF, who gave the following testimony at the hearing on the issue of whether Mr. McGee recommended the 54F CGA:

Q. Did Mr. McGee give you any written materials about 54Freedom at this meeting?

A. No.

Q. Did Mr. McGee ever give you any written materials about 54Freedom?

A. No.

Q. **Did Mr. McGee suggest** a particular charity that you should give money to?

A. **No.**

Q. **Did he ever suggest** a particular charity you should donate money to?

A. **No.**

Q. And **did you ever discuss with Mr. McGee** giving money to 54Freedom Foundation?

A. **No.**

(Tr. 509-510, 564-565)

The above testimony conclusively establishes that Mr. McGee did not recommend the CGA to CF. There is no testimony to refute it. CF further testified:

Q. Ms. Fox, from time to time **did Mr. McGee recommend** that you make

investments with your money?

A. **No.**

(Tr. 513)

The above testimony by CF was in response to the DOE's questions. Clearly, the DOE was not expecting such responses from CF, but the totally exonerating responses cannot simply be ignored. Further:

Q. While you worked with Mr. McGee, **did he ever suggest** that you invest with a certain company or another?

A. **No.**

(Tr. 513)

This is uncontradicted testimony from CF.

Q. And did you ever discuss with Mr. McGee giving money to 54Freedom Foundation?

A. No.

(Tr. 565-566)

Q. Did you ever discuss with Mr. McGee giving money to Creative Healing Connections (A 54F charity)?

A. No.

Q. Did you ever discuss with Mr. McGee giving to the American Legion?

A. No.

Q. Did you ever discuss investing with Lincoln Financial with Mr. McGee...?

A. No.

(Tr. 565-565, 567).

The NAC and Panel certainly cannot reconcile any of the above testimony with its decision.

Q. Did Mr. McGee ever tell you to call James Griffin?

A. No.

(Tr. 573)

Q. Is it your testimony that you never had a conversation about donating to charity?

A. Correct.

A. We didn't discuss charities.

Q. You didn't discuss charities?

A. No...

Q. You discussed giving to charities; is that your testimony?

A. We did not discuss it.

Q. You did not discuss it?

A. No, we didn't...

(Tr. 591 - 593)

In the face of such testimony, it cannot be concluded under any circumstances that Mr. McGee recommended the CGA. As can be seen in the above testimony, CF is insistent that Mr. McGee never even discussed it with her, and certainly did not make a recommendation. This was completely unexpected by the DOE, but it completely exonerates Mr. McGee. CF could not have been asked more times, and could not have been given more opportunity to say Mr. McGee recommended the CGA, but on each and every occasion she denied that Mr. McGee made the recommendation. It is certain the DOE did

not anticipate such testimony, but it was in fact the testimony at the hearing.

The same holds true on the issue of whether Mr. McGee recommended the liquidation of the VAs. There was no testimony that he did, but there was considerable testimony and evidence that he did not. When asked whether Mr. McGee made statements about liquidating the four VAs, CF stated "I don't recall him saying those things" (Tr. 593). In response to being asked whether she recalled any discussion relating to liquidating the annuities, CF replied "No" (Tr. 596). CF stated she had no knowledge about the liquidation of the annuities (Tr. 594). Again asked if she recalled discussions with Mr. McGee about liquidating the annuities, CF stated "absolutely not" (Tr. 596). Asked if she recalled any conversations with Mr. McGee relating to the liquidation of the annuities, CF testified "I didn't have any conversations with him about it" (Tr. 605-606). There are over 250 pages of transcript for CF's testimony. Not a single time, though asked often, did CF say Mr. McGee recommended the liquidation of the annuities. Rather, each and every time CF testified Mr. McGee did not make such a recommendation. Again, it was clear the DOE was not expecting CF to testify that Mr. McGee never recommended the liquidation of the annuities, but that was indeed her testimony. In fact, it was her unwavering testimony. There is no reason to disregard it, and no finding to the contrary can be supported by any testimony and evidence presented at the hearing.

Even further supporting a reversal of a fraud determination against Mr. McGee is the fact that CF, the alleged victim in this case who, very notably, never herself brought an action or complaint of any kind against Mr. McGee, was a very sophisticated money-manager with a significant amount of investment experience. When this is viewed in the light of the DOE's allegation of fraud against Mr. McGee as outlined below, it makes the fraud allegation against Mr. McGee preposterous, and the finding of fraud

against Mr. Mcgee wholly incredible.

There is no doubt CF was a sophisticated and experienced manager of her money. Mr. Roy, an unbiased and highly credible witness, testified that CF "asked questions that a savvy investor would ask: rates of return, historical things." (1337). Mr. Roy considered CF an experienced investor and "knowledgeable of what she had." (1337). At the time of his initial meeting with CF in 2007, she had over 15 years of investment experience (1337). CF always read documents before signing, and always asked sophisticated questions about the documents (1347). Additionally, according to Ms. Johnson, CF filled out a new account form for Cadaret wherein she certified she had 20 years of investment experience (1276). The fact that CF was, and is, a sophisticated investor was unchallenged at the hearing. Over the years, CF routinely removed money from her investments in a manner that cleverly avoided penalties demonstrating her investment sophistication (see RX-29). Also, numerous documents were admitted into evidence where CF expressly acknowledged over many years that she fully understood surrender charges and tax liabilities associated with liquidation (see the 142 pages of RX-29). In this light, the alleged fraudulent scheme asserted by the DOE at the hearing is completely nonsensical.

The allegation of fraud against Mr. McGee is as follows: Mr. McGee showed up to CF's house one day and convinced CF, a sophisticated investor who routinely took careful measures to avoid even the smallest financial penalty, to liquidate nearly a half million dollars of variable annuities, incur $36,000 in surrender charges, and potentially face $100,000 tax liability. And if that were not incredible enough, it was alleged by the DOE that Mr. McGee then documented his illicit scheme on exhibit CX-13 and, not only documented his alleged fraud, he then allegedly gave a copy of CX-13 to CF so she had documented proof of the illicit behavior. In order to reach such a nonsensical conclusion, the NAC and

Hearing Panel essentially had to reach a determination that cannot possibly be reached under any reasonable or rational standard: a determination that Mr. McGee actually devised a plan that would involve him allegedly duping a very sophisticated, very "frugal", (772) client that was "very nervous about taxes" (995), into liquidating nearly $500,000 in variable annuities by showing her the substantial surrender charges and a substantial tax liability she would incur if she liquidated the VAs (CX-13). Can it really be found that Mr. McGee would put his 30-year impeccable career at risk, and that he put it at risk with such a ridiculously flawed "plan". It seems a great miscarriage of justice to end a person's career with something so nonsensical, most especially since it is now well-known by all that the only at-fault parties in this instance are Griffin and the 54Freedom entities. To conclude that CF, who on several prior occasions craftily and strategically withdrew money from her annuities to avoid penalties, would simply follow Mr. McGee's recommendation to liquidate and incur penalties, is not a supportable conclusion. Likewise, based upon the testimony and evidence, a conclusion that Mr. McGee would make such a recommendation solely based upon a desire to get a commission is not supportable. Every witness testified that Mr. McGee was not in need of money at anytime (215) and would not be motivated to make a recommendation solely for financial gain (212 - 213). As such, the decision of the NAC that affirmed the decision of the Hearing Panel should be reversed.

Further on the issue of the fraud claim, the NAC and Hearing Panel seem to rely quite heavily on AB's testimony that Mr. McGee said there was a "perfect client" for the CGA. The NAC and Hearing Panel believed that this testimony by AB about the "perfect client" must have been a reference to CF and showed Mr. McGee's intent to defraud. One obvious problem with this finding now is, again, the determinations by the SEC outlined in its Complaint against Griffin and the 54F entities, as well as by the

IRS, FBI, and U.S. Attorneys Office that the brokers like Mr. McGee had no role in the massive fraudulent schemes of Griffin and the 54Freedom entities. Another obvious problem that undermines the finding by the NAC and Hearing Panel is AB's testimony that "I do believe we were in the carriage house when Bernie - I felt like he made a comment along the lines of 'I have a perfect client' or 'I have a client that would be a good fit for this gift annuity'". As discussed above, Mr. McGee and AB moved into the carriage house in December 2011, long after CF purchased the CGA. Thus, the inference drawn by the NAC and Hearing Panel that the "perfect client" testimony related to CF cannot be supported; rather, the inference is wholly refuted by AB's testimony, the only testimony on the subject.

The only supportable version of events is Mr. McGee's version, that he did not recommend the liquidation of the VAs, nor the purchase of the CGA. He assisted in the liquidation as directed by CF, and had no involvement with the purchase of the CGA. These facts alone defeat the claims with respect to fraud and suitability. *Epstein*, 2007 FINRA Discip. LEXIS 18, at 61. It is respectfully submitted that the record clearly does not support a finding that Mr. McGee made any recommendations in this case. As such, the NAC decision should be reversed.

The testimony showed that sometime in the first part of 2011, it was made known to Mr. McGee by CF that the relationship with her daughters had disintegrated and that she wanted to take steps to ensure her daughters did not receive any money from her in the future (950-956). Contrary to the assertions of the NAC and Hearing Panel, this was corroborated with credible testimony by Andrew Roy. Mr. Roy knew CF from April of 2007 until August of 2007, and spoke with CF "quite frequently" about the relationship with her children (1320-1321). CF "would frequently" talk with Mr. Roy about the animosity between her and her children (1322-1323). On many occasions, Mr. Roy talked

with CF about her children where she described a sour relationship between her and her kids (1324). Based upon Mr. Roy's knowledge of CF and from conversations with her, he would fully expect that CF would want to remove her children as beneficiaries on her annuities (1324). This testimony from Mr. Roy should be given significant weight since his testimony is in no way tainted by bias, interest, or motive in the proceedings.

Because CF insisted upon the liquidation of the variable annuities, Mr. McGee was required to comply with the request (979). Mr. McGee was not in favor of CF liquidating the four annuities and he expressed this to her and provided multiple alternatives (976-978). He advised CF of the surrender charges and potential tax consequences verbally and in writing (see CX-13). CX-13 is clearly a document reflecting Mr. McGee's discussion with CF about her decision to liquidate her annuities and the consequences of doing so. It is clearly not reflective of an effort to induce CF to liquidate. The assertion that such a fraudulent inducement would, or could, be made by showing CF surrender charges of $36,000 and a potential tax consequence of $100,000 is the single most preposterous assertion that could be set forth, yet it is the crux of the DOE's claim. Clearly, if a fraud was to be perpetrated, it would necessarily involve hiding such penalties. It would not involve disclosing the penalties, discussing the penalties and length, writing them down on paper, and leaving that paper with CF. One could not think of a more ridiculous method of perpetrating a fraud, especially from a broker with over 30 years of impeccable service to his clients. The fact that the DOE's claim hinges entirely on such a theory, wholly contradicted by CF, the alleged victim who has never sought to make a complaint against Mr. McGee, is a gross miscarriage of justice.

Turning back to the facts, during the meeting on March 9, 2011, CF insisted that she wanted to liquidate the annuities, that she did not want to name anyone as a beneficiary, and that she wanted to make sure no money was left to her children (972-975). Despite the assertion by the NAC and Hearing Panel that there is no corroborating evidence on this issue, this testimony is indeed corroborated by the Lincoln Annuity applications for CGA in CX-29 and CX-30 which show that CF changed her beneficiary from her daughters to the "Estate of Carol-Lynn Fox".

Additionally, CF told Mr. McGee during this March 9, 2011 meeting that she wanted to move her money to 54F (981). Mr. McGee never recommended or solicited the purchase of the CGA (982), and had no involvement with where CF's money would be placed. As noted in the SEC Complaint against Griffin, "Griffin controlled all 54Freedom investor funds" (p. 19 of the SEC's Complaint) and "Griffin controlled all of the 54Freedom entities" (p. 18 of the Complaint). The fact that Mr. McGee had no involvement in the CGA is corroborated with the email exchange in CX-40. In emails between Mr. McGee and Griffin, Mr. McGee makes comments to JG about the CGA of "what is going on?" and "you guys have left me out in the cold". The only reasonable inference from CX-40 is that Mr. McGee had no involvement with, and no control over, what 54Freedom was doing with CF's money. Again, this has now been proven to be true beyond doubt, as referenced in the SEC Complaint, and as determined through the criminal trial against Griffin. How then could a conclusion be reached that the CGA was purchased at the recommendation of Mr. McGee? There is no rational basis to reach such a conclusion at this point and, as such, the NAC decision should be reversed.

With respect to the fraud charge, a violation of Section 10(b) of the Exchange Act and SEC Rule 10b-5 is established by the following elements: (1) a misrepresentation, or an omission where there is a

duty to speak; (2) in connection with the purchase or sale of securities; (3) made with scienter; (4) the misrepresentation or omission is material; and (5) the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange. *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450. FINRA Rule 2020 generally requires a showing of the same elements, with the exception of element number 5 relating to the use of interstate commerce. *DOE v. Brookstone Sec's, Inc.*, 2012 FINRA Discip. LEXIS 52, 72-73. FINRA Rule 2010 states that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."

As outlined above, the fraud claim against Mr. McGee cannot justifiably stand at this point. The testimony and evidence at the hearing, now combined with the SEC case against Griffin and the verdict in the criminal trial against Griffin, makes it beyond dispute that the NAC decision should be reversed. If this were not enough, a further look into the decision of the NAC and Hearing panel shows additional reasons to reverse the finding of fraud against Mr. McGee The means by which the NAC and Hearing Panel reached its conclusion required the failure to consider the testimony from half of the DOE's witnesses; namely, the Cadaret Grant witnesses. There appears to be no basis to simply throw all of the testimony out and "not accord weight" to any of the substantial amount of testimony presented by the Cadaret witnesses. Such testimony should be afforded great weight, particularly where the witnesses were called by the DOE and gave testimony against the DOE's fraud claims. It is a well settled principle in the law that such statements made against a party by its own witnesses should be afforded heightened credibility, not less credibility, or just completely discarded as in this case. At the hearing, the DOE called Beda Lee Johnson, the Chief Compliance Officer of Cadaret Grant, who testified that, after a

thorough investigation, there was no evidence of fraud, and nothing to even support an allegation of fraud (1268, 1270) (CX-1). In addition, Ms. Johnson testified that: there was no evidence that Mr. McGee made misrepresentations or false statements to CF (1270); there was no evidence that Mr. McGee made a misrepresentation to CF pertaining to a tax liability (1270); there was no evidence that Mr. McGee failed to disclose surrender charges to CF (1270); there was no evidence that CF did not want the liquidation of the four subject variable annuities (1270-1271); there was no evidence that CF did not want her money donated to charities (1271); there was no evidence that Mr. McGee recommended the liquidation of the four subject variable annuities (1268-1271); and, no evidence that Mr. McGee solicited the sale of the four subject variable annuities (1269). Additionally, Shannon O'Brien of Cadaret Grant corroborated Ms. Johnson's testimony, and further testified that after Cadaret's investigation which included among other things, interviewing witnesses, reviewing documents, reviewing the matter with lawyers, and reviewing complaints by CF's lawyer, Cadaret found there was no evidence that Mr. McGee failed to disclose anything or made a material omission (113-115). It is respectfully submitted that these statements made by Cadaret witnesses called to testify by the DOE, which are stunningly adverse to the DOE's fraud claim, should be assigned heightened credibility under the principle that it is highly improbable that a party's witnesses will admit anything adverse unless it is true.

Further adding to the overwhelming evidence that there was no fraud and, specifically, that there was no material omission in this case, is the letter from Sam Bonney dated August 1, 2012 (CX-48). Sam Bonney was CF's attorney and was retained by her to investigate the matter that is the subject of the instant hearing. The August 1, 2012 letter from Mr. Bonney is a formal complaint letter to Cadaret Grant on behalf of CF and clearly is the result of in-depth conversations between CF and Mr. Bonney. It is

submitted that long standing legal principles necessitate the conclusion that a failure to assert a particular wrongdoing in the August 1, 2012 letter can be taken as affirmative proof that a particular wrongdoing did not occur. Silence when one would presumably speak can be as significant as an express admission. In that letter, which was written almost a year and a half after the liquidation of the VAs, one would undoubtedly expect there to be a complete and thorough outline of any and all acts or omissions that were in any way relevant to the transactions that occurred. In this letter, Attorney Bonney states concisely that the VAs were "liquidated under Mr. McGee's supervision." Attorney Bonney does not assert in the letter that Mr. McGee recommended the liquidation of the annuities, he does not allege that Mr. McGee solicited the liquidation of the annuities, he does not allege that Mr. McGee recommended the purchase of the CGA, there is no allegation of fraud, no allegation of a misrepresentation or omission, no assertion by Attorney Bonney of false statements relating to a tax liability, no allegation of a failure to disclose surrender charges, the letter does not assert that 54F was Mr. McGee's business, it does not allege that CF objected to giving money to charities, it does not allege Mr. McGee failed to disclose a commission. In fact, the letter does not accuse Mr. McGee of any wrongdoing. This August 1st letter from CF's lawyer, a formal complaint letter, is important because any alleged wrongdoing that actually happened would have been in that letter and the absence of any particular act or omission from the letter is an admission that the act or omission did not occur. Logic, common sense, and everyday experience dictates the same conclusion.

Further, the assertion by the NAC and Hearing Panel that Mr. McGee was motivated to lie and defraud to make a commission has no basis in the record. To the contrary, it would have been more profitable to Mr. McGee to keep CF's assets and the VAs under his control (960-962). He would have

generated annual commissions from the annuities (960). Moreover, upon the death of CF, it would be highly likely that any beneficiaries would reinvest the beneficiary proceeds with Mr. McGee which would have generated additional commissions (961-962). Reinvesting the money would generate a brand new commission of roughly 7 percent (962-963). Additionally, there was certainly little economic incentive to introduce CF to another broker that may result in CF purchasing a CGA from that broker. Mr. McGee could have sold a CGA himself, earned a commission, and retained the assets under his control. The only reason for introducing CF to 54F was because CF wanted to liquidate her VAs as the result of her deteriorating relationship with her daughters, and Mr. McGee had little experience with charitable gifting. Further, Mr. McGee was never promised any type of compensation for introducing a client to 54F (966), Mr. McGee did not have any agreement whereby he would receive compensation if he sent somebody to 54F (966), and Mr. McGee would have no legal recourse if he was not compensated for introducing a client to 54F (966-967).

Next, Mr. McGee's "omission" of his commission cannot form the basis of fraud. It is first important to again note that Mr. McGee did not recommend the liquidation of the annuities, nor the purchase of the CGA to CF. These facts alone, or together, defeat the fraud claim. Clearly, there is no duty to disclose a commission where Mr. McGee did not recommend the liquidation of the VAs or purchase of the CGA. Imposing such an obligation finds absolutely no support in law or equity, and would result in expansive obligations on the broker beyond reason.

Also, the DOE is required to show that the alleged fraudulent omission was made in connection with a securities transaction. Exchange Act Section 3(a)(10) defines a "security" through 15 U.S.C. §78c(a)(10) as any note, stock, treasury stock, security future, bond, debenture, certificate of interest..."

It well understood and settled that a fixed annuity is considered an insurance product, and not an annuity. The Lincoln fixed indexed annuities purchased for CF by 54 Freedom were fixed insurance products and not securities. *See e.g. Otto v. Variable Annuity Life Ins. Co., 814 F.2d 1127, 1131, cert denied, 486 U.S. 1026; SEC v. United Benefit Life Ins. Co., 387 U.S. 202, 207-208; SEC v. VALIC, 359 U.S. 65, 69-70.* Because the subject Lincoln annuities are exempt from federal securities laws, they cannot form the basis of any fraud claim brought under securities law. That fact alone is fatal to the DOE's fraud claim as it relates to the failure to disclose Mr. McGee's commission since the DOE and FINRA do not have jurisdiction over insurance products. Nor is there jurisdiction over the activity of insurance agents when that activity relates strictly to the purchase of insurance products. Nor would there be jurisdiction relating to the donation of money to charities, such actions are governed by the IRS.

Nevertheless, out of thoroughness, it should be noted that because the Lincoln annuities were not securities, but rather insurance products, Mr. McGee was not required to disclose that he earned a commission under New York State Insurance Law. *See e.g. The Office of General Counsel ("OGC") Opinion Number* 08-01-10 (1/30/2008); *OGC Opinion Number* 06-11-19 (11/20/2006); and, *OGC Opinion Number* 05-08-18 (08/30/2005), all of which state that neither the Insurance Law nor the regulations promulgated thereunder require an insurance broker to disclose to its clients the commission it earns on the policies it places. To place an obligation on an insurance broker to disclose a commission under these circumstances would create chaos in the industry. A cursory review of the expansive written decisions by the NAC and Hearing Panel in this case proves this point. If it takes the NAC and Hearing Panel this much time and effort to determine whether a duty was owed to disclose a commission, how could an individual broker who sells both securities and insurance in New York State ever make a determination of when to disclose a commission. This is an unprecedented, and unlawful, reach of

FINRA's jurisidiction and it unlawfully imposes upon a broker a duty to disclose a commission of an insurance product where one is not required under New York Law. There appear to be no cases on the "in connection with" issue with a finding involving a third party such as this case. To make a finding against Mr. McGee in such a circumstance is a gross departure from the typical situation because the third party here was a registered dealer who actually made the purchase without any input from Mr. McGee.

Also, in the same manner, Mr. McGee's decision not to disclose his insurance commission cannot form the basis of scienter, one of the necessary elements of the DOE's fraud claim. Scienter is a principle that must be applied using a subjective, not objective standard. *Gebhart v. SEC,* 595 F.3d 1034, 1039 (9th Cir.). As agreed upon in the pretrial stipulations, Mr. McGee earned a "commission" relating to the purchase of the CGA, an insurance product. In fact, there has never even been an allegation that the CGA was a security. Given the fact that New York State does not require the disclosure of commissions earned on fixed annuities, including fixed/indexed annuities, Mr. McGee's state of mind cannot possibly have the requisite scienter necessary to sustain a cause of action for fraud as it relates to the disclosure of his commission. Since Mr. McGee earned no commission for the liquidation of CF's variable annuities, which was in any event unsolicited, there was nothing to disclose with regard to the liquidation. By all accounts, Mr. McGee's decision not to disclose his commission relative to the purchase of the CGA, an insurance product, was entirely proper, in full compliance with all applicable rules and regulations, and totally consistent with the manner in which the sale of insurance products are governed in the State of New York.

Regardless of the personal beliefs of anyone about the disclosure of commissions, the Courts have made it clear that attaching scienter using a reckless, rather than intentional standard requires a subjective test. In *Gebhart v. SEC*, 595 F.3d 1034, 1039 (9th Cir.) the Court vacated the SEC's original decision

and remanded in an unpublished decision, *Gebhart v. SEC*, 255 Fed. App'x 254, 2007 WL 4144635 (9th Cir.), out of concern that the Commission had applied a purely objective scienter standard that disregarded Gebharts' actual state of mind. Mr. McGee's decision not to disclose his commission not only fails to meet the scienter standard, his conduct and state of mind were consistent with the standard practice of every insurance agent in the State of New York. For these reasons, the DOE has not met its burden on the required element of scienter and the NAC's decision should be reversed.

The DOE's argument that not disclosing Mr. McGee's commission to CF can constitute a fraudulent omission is totally misplaced. Case law establishes such a theory is applicable only when the commission is earned on the purchase of a security. *See, Basic Inc. v. Levenson*, 485 US 224. Silence, in the absence of a duty to disclose, is not misleading under Rule 10b-5. *Basic Inc., supra.* There is no dispute that Mr. McGee's commission here was not earned as a result of the purchase of any security. It was earned from the purchase of an insurance product. This was stipulated to by all parties. It is also undisputed that in New York commissions earned on any insurance product, including fixed or indexed annuities, are not required to be disclosed under New York Insurance Law.

For all of the above reasons, it is submitted that the fraud claim has no merit, and the finding by the NAC and Hearing Panel that Mr. McGee committed fraud should be reversed.

POINT V: MR. MCGEE DID NOT MAKE AN UNSUITABLE RECOMMENDATION

The DOE alleges that Mr. McGee violated NASD Rule 2310 and IM-2310-2 because Mr. McGee

"had no reasonable basis to recommend that CF sell her variable annuities and purchase the CGAs" and, in so doing, he "did not deal fairly with CF". This cause of action has no merit and the NAC decision should be reversed.

As alleged in the Complaint, when recommending the purchase, sale, or exchange of any security to a customer, NASD Rule 2310 requires that a registered representative "have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs." NASD IM-2310-2 provided that "[i]mplicit in all member and registered representative relationships with customers is the fundamental responsibility of fair dealing."

As stated above, there was no evidence or testimony at all that showed Mr. McGee recommended or solicited the sale of the four subject variable annuities. To the contrary, all of the testimony and evidence shows the liquidation of the four variable annuities was solely at the direction of CF, without any recommendation or solicitation on the part of Mr. McGee (Johnson 1268-1271; O'Brien 113; Bonney CX-48; McGee 978-979). Because the DOE did not meet its burden of demonstrating that Mr. McGee recommended the sale of a security, the DOE's claim on suitability must fail.

Beyond the fact that Mr. McGee did not recommend the sale of any of the subject variable annuities, Mr. McGee clearly performed due diligence: Mr. McGee researched and reviewed 54F's website; Mr. McGee reviewed marketing materials from 54F; he talked to people in Cazenovia and determined Jim Griffin had a great reputation in the community; Mr. McGee met with Jim Griffin and other members of 54F (964, 965), among many other things. By all outward appearances of 54F, it was a very successful company. It had a strong reputation in Cazenovia and had multiple locations around the country. There were no red flags with 54F back in early 2011. This is supported throughout the SEC's Complaint against Griffin and the 54Freedom entities. By any measure, looking at it from the perspective of back in early 2011, more than sufficient due diligence was accomplished by Mr. McGee.

Moreover, if it were necessary to reach the issue of suitability, it can hardly be argued that the

DOE met its burden to demonstrate the CGA was not suitable. No evidence on suitability was offered by the DOE. The only testimony on the suitability issue came from Mr. Baker, who testified as follows:

"Q. And if a client did not want to leave money to any family, then a charitable donation or a CGA would be a perfect product; right?"

A. ...I would think so." (229-230).

Further, the annuities were purchased from Lincoln, an A+ rated company, and were entirely suitable for someone in Ms. Fox's demographic. The DOE offered no evidence to the contrary.

Additionally, Mr. McGee gave testimony on the issue of suitability that was not acknowledged by the NAC or Hearing Panel in their decisions. Mr. McGee testified (tr. 1355) that, based upon CF's changed objectives in March 2011 "pertaining to disinheriting her kids, that the CGA could have been an appropriate investment."

The DOE presented no evidence on suitability, not one witness, not one piece of evidence, not one argument. Again, suitability is not an issue because the transactions were unsolicited. However, it could not be reasonably argued that moving money from a securities based variable annuity to a fixed or indexed annuity is unsuitable for a 70 year old individual. This move represents much less risk to the customer. Moreover, AB, the DOE's own witness, testified that the transaction was completely suitable for Ms. Fox (229-230). Mr. McGee did not agree with the decision to liquidate the four variable annuities, but there is absolutely no evidence that giving the money to charity or placing the money into a fixed or indexed annuity could constitute an unsuitable transaction for a 70 year old individual.

Further, how can it be argued that donating to charity is a "loss" to a customer. Under the undeniable truth that if we sow generously, we reap generously, the donations by CF were certainly not a loss to her. And it cannot be rationally argued that donating to charitable organizations is a "bad idea"?

At the very least, CF clearly ratified the donations by never objecting to them. At anytime, CF could have asked for her money back, she never did. Generally, ratification occurs when a party accepts the benefits of an unauthorized action and fails to act promptly to repudiate it. See, *Allen v. The Reese Organization Inc.*, 106 A.D.3d 514; *Dinhofer v. Medical Liab. Mut. Ins. Co.*, 92 A.D.3d 480, 481, lv. denied, 19 N.Y.3d 812. Here, CF took the charitable deductions on her taxes and never objected to the donations (623). Also, an attorney's failure to raise an issue in correspondence has been deemed a ratification of the agreement. *See In re Levy*, 69 A.D.3d 630. Here, Attorney Bonney made no mention is his correspondence (CX-48) about CF not wanting the charitable donations, although he knew about them.

The NAC and Hearing Panel also noted that Mr. McGee's actions were suspect because he had surrender forms with him when he met CF. According to the uncontradicted testimony, "99.5 percent" of Mr. McGee's business is "on the road seeing clients" (981). Mr. McGee had been doing this for 30 years. It would seem extraordinary if he did not bring basic forms with him since all of his business is done on the road. It has always been his normal practice (981). There was no testimony to the contrary.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that all findings by the NAC and Hearing Panel that are adverse to Mr. McGee should reversed and dismissed.

Dated: October 21, 2016

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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
October 21, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 789041/October 21, 2016

Admin. Proc. File No. 3-17402

In the Matter of the Application of BERNARD G. MCGEE For Review of Disciplinary Action Taken by FINRA	CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2016, I caused a copy of the foregoing Brief to be sent by fax and overnight mail to following at the fax numbers and addresses below:

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