UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
December 5, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 789041/December 5, 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

REPLY BRIEF

Kevin R. Van Duser, Esq.
Sugarman Law Firm, LLP
Attorneys for Bernard G. McGee
Office and Post Office Address
211 West Jefferson Street
Syracuse, New York 13202
Telephone: (315) 474-2943

Dated: December 5, 2016

TABLE OF CONTENTS

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	]	REPLY BRIEF
For Review of Disciplinary Action Taken by	]	
FINRA	]	

PRELIMINARY STATEMENT

Respondent, Bernard G. McGee, respectfully offers this reply brief in further 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. As the record amply shows, Mr. McGee did not violate any rules as alleged by the DOE in his dealings with Ms. Fox.

POINT I

THE SEC INVESTIGATED MR. MCGEE AND NEVER BROUGHT ANY ALLEGATIONS OF WRONGDOING AGAINST HIM

In addition to the overwhelming testimony and evidence set forth in the initial brief on behalf of Mr. McGee demonstrating that he did not violate any rules, it must not go unmentioned that the SEC itself took 219 pages of sworn testimony from Mr. McGee on December 7, 2012 in connection with its

investigation of 54Freedom, and relative to Mr. McGee's dealings with Ms. Fox. *In the Matter of 54 Freedom, Inc.*, SEC File No. NY-8705. Further, the SEC subpoenaed a number of documents from Mr. McGee relative to its investigation. Despite its extensive investigation, the SEC never brought an action against Mr. McGee, and has never made an allegation of wrongful conduct against Mr. McGee.

One of the main missions of the SEC is to protect investors, and it does this in part through its investigative branch. In this instance, as part of its investigation, the SEC subpoenaed Mr. McGee to testify in the *Matter of 54 Freedom, Inc.* and subpoenaed a number of documents from Mr. McGee. From this investigation of Mr. McGee, the SEC never recommended or authorized a civil action or administrative action against Mr. McGee. The SEC has never even alleged any wrongful conduct on the part of Mr. McGee.

POINT II

MS. FOX NEVER ALLEGED ANY WRONGFUL CONDUCT ON THE PART OF MR. MCGEE

In addition to the SEC never alleging wrongful conduct on the part of Mr. McGee, Ms. Fox likewise has never alleged Mr. McGee did anything wrong. One of the most stunning parts of the underlying hearing involving Mr. McGee was that the alleged victim, Ms. Fox, never alleged any wrongful conduct on the part of Mr. McGee, ever. Not before the hearing, not during the hearing, and not since the hearing. Not only has Ms. Fox never alleged wrongdoing on the part of Mr. McGee, she has been careful to avoid any such allegation. As an example, Ms. Fox's highly experienced lawyer, Sam Bonney, in his complaint letter dated August 1, 2012 (CX-48), makes it absolutely clear that Ms. Fox was not alleging that Mr. McGee did anything wrong. In that letter, Attorney Bonney uses his words very

carefully, knowing full well the relevance and significance of each of his words. Attorney Bonney states concisely that the variable annuities were "liquidated under Mr. McGee's supervision." He 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 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 Bonney 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. See *Brennan v. National Equitable Inv. Co.*, 247 NY 486, which stands for the proposition that silence when one would presumably speak is essentially an express admission. Logic, common sense, and everyday experience dictates the same conclusion.

POINT III

CADARET GRANT NEVER MADE AN ALLEGATION OF FRAUD AGAINST MR. MCGEE

In addition to the above, Cadaret Grant never found, and never even alleged, fraud on the part of Mr. McGee. Cadaret witnesses represented half of the witnesses called by the DOE ***in support*** of the DOE's fraud claim at the hearing. 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. What makes the testimony of the Cadaret witnesses so unacceptable? What is the rationale for discarding all of it, and according none of it any weight? 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. Here, the DOE called Beda Lee Johnson, the Chief Compliance Officer of Cadaret Grant, to testify at the hearing. She testified as follows with regard to the fraud claim.

"Q. So over a year and a half after the liquidation of the four annuities, Cadaret's conclusion after its investigation was there was no fraud, right?

A. Right." (1268)

"Q. And in fact after Cadaret's investigation, after they reviewed everything, talked to everybody, looked at all the documents, talked about the case internally with attorneys, there was not even an allegation, right, not even an allegation of fraud; right?

A. Yes." (1268).

Ms. Johnson actually testified on multiple occasions that Cadaret determined that Mr. McGee did not commit fraud and further reiterated multiple times that there was not even an allegation of fraud against Mr. McGee relating to the CF (1268, 1270) after Cadaret performed a thorough investigation into the matter. This was documented in the U5 prepared by Cadaret (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). This was a DOE witness!

Likewise, another DOE witness, Shannon O'Brien, provided undisputed testimony demonstrating there was no fraud. Mr. O'Brien is an Assistant Vice President in the Cadaret Compliance Department (65). He 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 fraud by Mr. McGee, and further determined there was not even any support for an allegation of fraud against Mr. McGee (110-111). Mr. O'Brien also testified that: there was no evidence that Mr. McGee made a misrepresentation to CF (114); there was no evidence that Mr. McGee failed to disclose anything or made a material omission (114); there was no evidence that Mr. McGee made a false statement (114); there was no evidence that Mr. McGee made a misrepresentation about a tax liability (114-115); there was no evidence that the variable annuities were liquidated pursuant to Mr. McGee's recommendation (113); and, no evidence that the liquidation was solicited by Mr. McGee (113). This was a DOE witness.

Again, 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. Additionally, it is well established that, by putting a witness on the stand, the party asserts or admits the credibility of that witness. These were the DOE's key witnesses, completely undermining the DOE's fraud theory. It is difficult to see how the DOE can continue to advocate fraud in the face of this testimony from its own witnesses, who provide conclusive proof there was no fraud. *See e.g. Cox v. State*, 3 NY2d 693, 698-699; *Reed v. McCord*, 160 NY 330; *Hanrahan v. New York Edison Co.*, 238 NY 194; *Cammarota v. Drake*, 285 AD2d 919.

POINT IV

ALTHOUGH CRIMINAL CHARGES HAVE BEEN BROUGHT AGAINST JAMES GRIFFIN, NONE HAVE BEEN BROUGHT AGAINST MR. MCGEE

In addition to the above, as the SEC is aware, James 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, 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. *USA v. James P. Griffin*, Criminal No. 5:15-CR-207.

As part of the charges that a jury found James Griffin guilty of, it was determined that James Griffin marketed a financial product called the 54 Freedom Charitable Gift Annuity (CGA), *USA v. James P. Griffin*, Criminal No. 5:15-CR-207, Document 1; that "from on or about July 2009 and continuing through the date of James Griffin's indictment of July 22, 2015, Griffin devised and intended

to devise a scheme and artifice to defraud persons by soliciting investments under false pretense and concealing, disguising and failing to disclose material information and to obtain money and property by means of material false and fraudulent pretenses, representations, promises and material omissions by fraudulently inducing donors to purchase CGAs upon the false promise that the annuities would be issued by a highly rated major insurance carrier and that the annuity would provide guaranteed lifetime income from the donor" (*Id.*); and, "it was a part of the scheme that 54 Freedom represented in promotional materials supplied to brokers that its CGA provides lifetime fixed income for one or two individuals (*Id.*); "it was further part of the scheme that 54 Freedom represented in promotional materials to brokers that it reinsures transactions through a carrier rated 'A' or higher by A.M. Best" (*Id.*); "it was further part of the scheme that 54 Freedom promoted its CGAs on its website as providing payments backed by highly rated, state regulated insurance carriers" (*Id.*); "it was further part of the scheme that brokers and broker dealers were provided what 54 Freedom described as its 'principle marketing piece - a 3-page cartoon explaining the unique transactions offered by 54 Freedom', the cartoon represented that the 54 Freedom CGA is an annuity purchased from an A rated insurer" (*Id.*); "it was further part of the scheme that 54 Freedom provided brokers and broker dealers with a form letter purportedly from a Certified Public Accounting firm, intended to be sent to the donor of a 54 Freedom CGA advising that the annuity contract is with an insurance company and is guaranteed" (*Id.*); "it was further part of the scheme that 54 Freedom used a CGA Training Video to promote and market its CGA. In this video it was represented that: a) the 54 Freedom CGA provides security, flexibility and certainty to an audience aged 50 to 90; b) the CGA policies are underwritten with major life insurance companies; c) the annuity promise is kept by a major highly rated insurance carrier annuity giving donors confidence that they will received annuity payments

that are guaranteed; and d) the CGA was an annuity product with no risk of loss of principal which will provide a tax advantaged future stream of income guaranteed for life" (*Id.*); "it was further part of the scheme that the 54 Freedom CGA application materials included an application for an annuity from a major insurance company which was intended to deceive the donor into believing that the annuity would be issued by a major insurance carrier" (*Id.*); "it was further part of the scheme that 54 Freedom used telemarketers to promote and market the CGAs. The telemarketers were provided with a script to read to potential donors. The script included statements that, 'the annuity promise (guarantee) is kept by a national insurance carrier (e.g. Lincoln Life, Penn, etc),' and 'your money is PROTECTED WITH THE GUARANTEE OF A HIGHLY RATED INSURANCE COMPANY'" (*Id.*, original emphasis); and, "it was further part of the scheme that, as [James Griffin] well knew, the 54 Freedom CGAs were not underwritten with major insurance companies, did not provide a stream of income guaranteed for life and did have risk of loss. Rather, the monies paid by donors to purchase CGAs which amounted to over $1.6million were converted by [Griffin] to his own use to pay the liabilities and expenses of the 54 Freedom companies." (*Id.*).

Again, James Griffin, in connection with the above facts and determinations, was convicted of 23 counts of fraud related charges. While this may not relieve any duties on the part of Mr. McGee, there can be no doubt that Mr. McGee would not have drawn the ire of FINRA had James Griffin not perpetrated the above outlined scheme prosecuted successfully by the United States. In other words, had the promises of James Griffin been true, there would have been absolutely no reason or basis for any entity to investigate Mr. McGee. This shows that Mr. McGee's conduct was completely innocent and the conduct of James Griffin at the very least constitutes a superseding cause relieving Mr. McGee of alleged

wrongdoing. *Saugerties Bank v. Delaware & Hudson Co.*, 236 N.Y. 425, 430 (1923). If the consequences were made possible only by the intervening act of a third party that was not reasonably anticipated, then the party sought to be charged is relieved of liability. *Saugerties Bank*, 236 N.Y. at 430. In this case, the alleged damages caused to Ms. Fox are a result of the fraud, money laundering, and theft by James Griffin. Mr. McGee was not aware of the fraudulent scheme being perpetrated by James Griffin. The criminal actions of Griffin were an intervening or superseding cause. Mr. McGee could not have reasonably anticipated this conduct by Griffin. Additionally, any consequences to Ms. Fox were a direct result of Griffin's criminal actions. But for Griffin's crimes, Ms. Fox would not have lost money and there would therefore not be any possible basis to bring a claim against Mr. McGee or anyone else, including Griffin. The commission of an intentional tort or criminal act, because not reasonably foreseeable, is a superseding cause. *Benenson v. National Surety Co.*, 260 NY 200; *Bolsenbroek v Tully & Di Napoli, Inc.*, 12 AD2d 376. It would be unjust to end the upstanding 30 year career of Mr. McGee under circumstance that would never have existed but for the criminal fraudulent schemes perpetrated by James Griffin. The United States, like the SEC, concluded this and brought no action against Mr. McGee.

CONCLUSION

For the foregoing reasons and the reasons set forth in the initial papers on behalf of Mr. McGee, it is respectfully submitted that all findings by the NAC and Hearing Panel that are adverse to Mr. McGee should reversed and dismissed.

Dated: December 5, 2016

Kevin R. Van Duser, Esq.
SUGARMAN LAW FIRM, LLP
Attorneys for Respondent
Office and Post Office Address
211 West Jefferson Street
Syracuse, New York 13202
Telephone: (315) 474-2943

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
December 5, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 789041/December 5, 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 December 5, 2016, I caused a copy of the foregoing Reply Brief to be sent by fax and overnight mail to following at the fax numbers and addresses below:

Jante C. Turner
FINRA Department of Enforcement
15200 Omega Drive
Rockville, MD 20850
Fax No.: 202-728-8264

Securities and Exchange Commission
Office of the Secretary
100 F Street NE
Washington, DC 20549
Mail Stop 1090
Attn: Secretary of the Commission, Brent J. Fields
Fax No.: 202-772-9324

Dated: December 5, 2016

Kevin R. Van Duser, Esq.
SUGARMAN LAW FIRM, LLP
Attorneys for Bernard G. McGee
Office and Post Office Address
211 West Jefferson Street
Syracuse, New York 13202
Telephone: (315) 474-2943