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U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
LOS ANGELES

FILED

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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 **CV07-06180 CAS (AGRx)**

12 **SECURITIES AND EXCHANGE**
COMMISSION,

13 Plaintiff,

14 vs.

15 **MICHAEL B. UPTON,**

16 Defendant.

Case No.

COMPLAINT FOR
VIOLATIONS OF THE
FEDERAL SECURITIES
LAWS

17
18 Plaintiff Securities and Exchange Commission ("Commission") alleges as
19 follows:

20 **JURISDICTION AND VENUE**

21 1. This Court has jurisdiction over this action pursuant to Sections 20(b),
22 20(d)(1) and 22(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C.
23 §§ 77t(b), 77t(d)(1) & 77v(a) and Sections 21(d)(1), 21(d)(3)(A), 21(e) and 27 of
24 the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78(u)(d)(1),
25 78u(d)(3)(A), 78u(e) & 78aa. Defendant has, directly or indirectly, made use of
26 the means or instrumentalities of interstate commerce, of the mails, or of the
27 facilities of a national securities exchange in connection with the transactions, acts,
28 practices and courses of business alleged in this Complaint.

1 2. Venue is proper in this district pursuant to Section 22(a) of the
2 Securities Act, 15 U.S.C. § 77v(a), and Section 27 of the Exchange Act, 15 U.S.C.
3 § 78aa, because certain of the transactions, acts, practices and courses of conduct
4 constituting violations of the federal securities laws occurred within this district,
5 and the Defendant resides in this district.

6 SUMMARY

7 3. This case involves false and misleading statements to investors by
8 Defendant Michael B. Upton ("Upton"), a registered representative associated with
9 a registered brokerage firm, MCL Financial Group, Inc. ("MCL"). From August
10 2003 through March 2005, Upton sold various securities of various issuers
11 including G REIT, Inc. ("G REIT") and NNN 2003 Value Fund, LLC (the "Value
12 Fund"). Upton made the following false and misleading statements in connection
13 with these two securities offerings:

14 (a) In March and April 2004, Upton sent letters to hundreds of
15 prospective investors that misrepresented that G REIT shares would soon be
16 publicly traded. In one of those letters, Upton stated that G REIT's share price
17 could increase by 30% once they became publicly traded. Upton made these
18 fraudulent statements even though he knew from G REIT's prospectus, and had
19 been specifically advised by G REIT's officers, that it was uncertain if or when G
20 REIT shares would become publicly traded.

21 (b) From August 2003 through April 2004, Upton sent letters to up
22 to a thousand prospective investors that misrepresented the risks of an investment
23 in G REIT and Value Fund securities. Again, Upton made these fraudulent
24 statements despite knowing from G REIT's prospectus and the Value Fund's
25 private placement memorandum ("PPM") that G REIT and Value Fund were risky
26 investments.

27 4. From August 2003 through March 2005, Upton also failed to disclose
28 to investors that he was receiving an additional .8% override commission on sales

1 in the G REIT offering, Value Fund offering, and 25 other offerings sponsored by
2 a privately-held real estate company. Upton received \$287,496 in override
3 commissions from these 27 securities offerings.

4 **DEFENDANT**

5 5. Michael B. Upton (“Upton”), age 59, resides in Santa Ana, California.
6 During the period discussed in the Complaint, Upton worked as a registered
7 representative for MCL at its office located in Santa Ana, California. Upton holds
8 Series 6 (mutual fund sales/variable annuities contracts), 7 (registered
9 representative), 22 (financial principal), 63 (state securities), and 65 (investment
10 adviser) licenses.

11 **RELATED PARTIES**

12 6. G REIT, Inc., is a Virginia corporation headquartered in Santa Ana,
13 California. G REIT is a real estate investment trust that acquires and operates
14 commercial real estate with federal, state, and local government tenants. From
15 July 2002 through December 2003, through a registration statement filed with the
16 Commission, G REIT conducted its initial public offering for \$200 million, selling
17 20 million common shares at \$10 per share. Subsequently, from January 2004
18 through April 2004, through another registration statement filed with the
19 Commission, G REIT raised another \$270 million, selling 27 million common
20 shares at \$10 per share. G REIT has approximately 14,000 shareholders. While G
21 REIT is a public company (i.e., its shares are registered with the Securities and
22 Exchange Commission), its shares are not publicly traded on an exchange or
23 through an over-the-counter market.

24 7. NNN 2003 Value Fund, LLC, is a Delaware limited liability company
25 headquartered in Santa Ana, California. The Value Fund was a blind pool
26 established for commercial real estate investments; however, it did not identify all
27 of the properties to be acquired. From July 11, 2003, through October 2004, the
28 Value Fund sold \$50 million of its securities to approximately 785 investors in a

1 private placement. The Value Fund is a reporting company (i.e., it files quarterly
2 and annual financial reports with the Securities and Exchange Commission);
3 however, its shares are not publicly traded on an exchange or through an over-the-
4 counter market.

5 **UPTON'S FRAUDULENT CONDUCT**

6 8. From August 2003 through March 2005, Upton sold securities of at
7 least 27 issuers, including G REIT and the Value Fund. During this time period,
8 Upton sold approximately \$2 million in shares of G REIT and \$900,000 in
9 securities of the Value Fund.

10 9. Upton misrepresented and omitted to disclose to investors material
11 facts concerning G REIT's shares trading on a public securities exchange, the risks
12 associated with an investment in G REIT and the Value Fund, and undisclosed
13 compensation he received in connection with the 27 securities' offerings.

14 **Upton's Misrepresentations Regarding G REIT's Listing of its Shares on a** 15 **Stock Exchange**

16 10. G REIT's \$270 million offering was conducted from January through
17 April 2004. In the last two months of the offering, Upton sent three separate letters
18 in mass mailings to clients of MCL's Santa Ana office representing that G REIT's
19 shares would shortly be trading publicly. These letters stated, in part:

- 20 • "The Board of Directors [of G REIT] plans [to list G REIT's shares on
21 a national securities exchange] soon thereafter. . . . The attachments
22 [referring to a newspaper article] support that similar IPOs have
23 enjoyed a 30% 'pop.'"
- 24 • "I sent you a notice that G REIT is *closing* to new funds on April 30,
25 2004 to prepare for [listing on an exchange] later this year . . . I gave
26 this opportunity my highest recommendation . . . It is rare that
27 individual investors get a shot at pre-[exchange listed] shares."
(emphasis in original)
- 28 • "I give G REIT my highest recommendation . . . with the lowest real
estate risk and, after the [exchange listing], liquidity."

1 11. MCL sold \$5.6 million of its total sales of \$5.8 million in G REIT
2 securities after Upton sent his letters.

3 12. Upton's representations contained in the letters were false and
4 misleading based upon the disclosure in G REIT's prospectus, dated January 23,
5 2004. Specifically, G REIT's prospectus stated: "we are currently considering the
6 possibility of . . . the listing of our common stock on a national securities
7 exchange." Further, G REIT emphasized to prospective investors that it was
8 uncertain if, or when, G REIT's shares would be publicly traded. The prospectus
9 stated "[w]e are only in the early stages of assessing this type of transaction and
10 cannot guarantee that we will enter into such a transaction in the near future or at
11 all." Upton read and understood these statements in the prospectus at the time he
12 was selling the securities.

13 13. Upton's misrepresentations were material because a reasonable
14 investor would have considered them significant in making their investment
15 decision. Specifically, while G REIT was a "public company," its shares were not
16 publicly traded on an exchange or through an over-the-counter market.
17 Consequently, G REIT shares were illiquid. In addition, the real estate market in
18 general, and REITs in particular, have out performed the general stock market
19 since 2000. Thus, the possibility of G REIT's shares trading in a public market
20 enhanced its attractiveness as an investment and was therefore material. Moreover,
21 the large amount of sales of G REIT's to investors after receipt of the letters
22 demonstrates the significant that investors placed upon Upton's representations.

23 14. In addition, G REIT's officers orally and in writing communicated
24 this uncertainty to Upton. Also, in connection with these conference calls, Upton's
25 supervisor repeatedly cautioned Upton not to emphasize the likelihood of G
26 REIT's shares trading publicly because it was unclear if, or when, G REIT's shares
27 would trade publicly. To date, G REIT's shares have never traded publicly.

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1 15. Therefore, Upton knew, or was reckless in not knowing, that his
2 representations about G REIT's shares listing on a public exchange were materially
3 false and misleading.

4 **Upton Misrepresentation Regarding the Risks Associated with an Investment**
5 **in G REIT and the Value Fund**

6 16. Upton sent six separate letters in mass mailings to clients of MCL's
7 Santa Ana office representing that an investment in G REIT and the Value Fund
8 were safe. These letters stated, in part:

- 9 • "Whether for an IRA or conservative, hard-asset investment for
10 both income and growth, I know of nothing better."
- 11 • "Risk of '3' . . . on a scale of 1 = low to 10 = high."
- 12 • "On a risk scale from 1 (low) to 10 (high) G REIT is viewed as
13 being a '3'."
- 14 • "GREIT IS IDEAL FOR RETIREMENT PLANS. It is also
15 attractive for investors looking for low-risk [investments]."
(emphasis in original)
- 16 • "GREIT IS IDEAL FOR IRAS, ETC." (emphasis in original)
- 17 • "I give GREIT my highest recommendation . . . with the lowest
18 real estate risk."
- 19 • "On a scale of 1 (low risk)-to-10, I regard . . . the Value Fund a
20 '4'."
- 21 • "Risk of '4' = Value Fund, LLC." (emphasis in original)

22 17. Upton's representations contained in these letters were false and
23 misleading based upon the disclosure in G REIT's prospectus, dated January 23,
24 2004. Specifically, the G REIT prospectus repeatedly warned of the high risk of
25 loss associated with an investment in G REIT shares throughout the prospectus.
26 For example, the cover page stated, "This investment involves a high degree of
27 risk. You should purchase shares only if you can afford a complete loss."
28 Additionally, the prospectus contained a detailed 13-page "Risk Factors" section
outlining the risks associated with the offering including (a) management's limited

1 experience in managing a public REIT; (b) G REIT's reliance on its advisor; and
2 (c) G REIT's limited operating history. Upton read the prospectus and understood
3 its contents, including the Risk Factors section, before selling the securities.

4 18. Similarly, the Value Funds' July 2003 PPM also repeatedly warned of
5 the high risk of loss associated with an investment. For example, the PPM's
6 introductory section stated that **"THE PURCHASE OF INVESTOR UNITS**
7 **INVOLVES SIGNIFICANT RISKS."** (emphasis in original). The 12-page
8 "Risk Factors" section opened with the statement that **"INVESTORS SHOULD**
9 **BE AWARE THAT INVESTOR UNITS ARE SPECULATIVE AND**
10 **INVOLVE A HIGH DEGREE OF RISK. INVESTORS SHOULD**
11 **CAREFULLY READ THIS MEMORANDUM PRIOR TO MAKING AN**
12 **INVESTMENT AND SHOULD BE ABLE TO BEAR THE COMPLETE**
13 **LOSS OF THEIR INVESTMENT."** (emphasis in original) In addition, the
14 "Risk Factors" section outlined the risks that could cause an investment loss
15 including: (a) real estate risk; (b) risk of operating deficits; and (c) lack of liquidity.

16 19. According to the officers and directors of G REIT and the Value
17 Fund: (a) Upton's statements regarding the risk profile of G REIT and the Value
18 Fund were false and misleading in that they were speculative investments that
19 involved substantial risk as detailed in the prospectus and the PPM; and (b)
20 Upton's risk scale was highly inappropriate in light of the risk disclosure contained
21 in the prospectus and the PPM.

22 20. Upton's misrepresentations were material because a reasonable
23 investor would have considered them significant in making their investment
24 decision. Specifically, Upton's false statements were material because he
25 misrepresented the potential for a risk of loss to investors.

26 21. Upton knew, or was reckless in not knowing, that his representations
27 about the risks associated with an investment in G REIT and the Value Fund were
28 materially false and misleading.

1 **Upton's Material Omissions About His Additional Compensation**

2 22. In connection with the 27 offerings (G REIT, the Value Fund, and 25
3 other private placements), Upton did not disclose to the investors that he would
4 receive compensation over and above that described in the offering materials.
5 Specifically, the offering documents disclosed that Upton, through MCL, would
6 receive approximately 7%-8% in sales commissions and an additional 1%-1.5% for
7 marketing and due diligence expenses. Between August 2003 and March 2005,
8 Upton received an .8% commission override for his own sales and the sales of the
9 other registered representatives in MCL's Santa Ana office on the 27 offerings,
10 which amounted to \$287,496 in additional compensation.

11 23. Upton read either the prospectus or private placement memorandum
12 for the 27 offerings before selling the securities.

13 24. Upton negotiated the agreements for the override commissions, which
14 he was aware were not disclosed in the offering documents. Moreover, the
15 override payments were specifically prohibited by the offering documents.

16 25. Upton's omissions were material because a reasonable investor would
17 have considered them significant in making their investment decision.
18 Specifically, investors would have considered Upton's compensation a significant
19 factor in weighting the credibility of his investment advice and his personal
20 integrity in making their investment decisions.

21 26. Upton knew, or was reckless in not knowing, that the additional
22 undisclosed compensation to investors in the 27 offerings was a material omission.

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1 **FIRST CLAIM FOR RELIEF**

2 **FRAUD IN THE OFFER OR SALE OF SECURITIES**

3 **Violations Of Section 17(a) Of The Securities Act**

4 27. The Commission realleges and incorporates by reference paragraphs 1
5 through 26 above.

6 28. Defendant Upton by engaging in the conduct described above, directly
7 or indirectly, in the offer or sale of securities by the use of means or instruments of
8 transportation or communication in interstate commerce or by use of the mails:

- 9 a. with scienter, employed devices, schemes, or artifices to
10 defraud;
- 11 b. obtained money or property by means of untrue statements of a
12 material fact or by omitting to state a material fact necessary in
13 order to make the statements made, in light of the
14 circumstances under which they were made, not misleading; or
- 15 c. engaged in transactions, practices, or courses of business which
16 operated or would operate as a fraud or deceit upon the
17 purchaser.

18 29. By engaging in the conduct described above, Defendant Upton
19 violated, and unless restrained and enjoined will continue to violate, Section 17(a)
20 of the Securities Act, 15 U.S.C. § 77q(a).

21 **SECOND CLAIM FOR RELIEF**

22 **FRAUD IN CONNECTION WITH THE PURCHASE OR SALE OF**
23 **SECURITIES**

24 **Violations Of Section 10(b) Of The Exchange Act And Rule 10b-5 Thereunder**

25 30. The Commission realleges and incorporates by reference paragraphs 1
26 through 26 above.

27 31. Defendant Upton by engaging in the conduct described above, directly
28 or indirectly, in connection with the purchase or sale of a security, by the use of

1 means or instrumentalities of interstate commerce, of the mails, or of the facilities
2 of a national securities exchange, with scienter:

- 3 a. employed devices, schemes, or artifices to defraud;
- 4 b. made untrue statements of a material fact or omitted to state a
5 material fact necessary in order to make the statements made,
6 in the light of the circumstances under which they were made,
7 not misleading; or
- 8 c. engaged in acts, practices, or courses of business which
9 operated or would operate as a fraud or deceit upon other
10 persons.

11 32. By engaging in the conduct described above, Defendant Upton
12 violated, and unless restrained and enjoined will continue to violate, Section 10(b)
13 of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R.
14 § 240.10b-5.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, the Commission respectfully requests that the Court:

17 **I.**

18 Issue findings of fact and conclusions of law that Defendant Upton
19 committed the alleged violations.

20 **II.**

21 Issue judgments, in a form consistent with Fed. R. Civ. P. 65(d),
22 temporarily, preliminarily and permanently enjoining Defendant Upton and his
23 officers, agents, servants, employees, and attorneys, and those persons in active
24 concert or participation with any of them, who receive actual notice of the
25 judgment by personal service or otherwise, and each of them, from violating 17(a)
26 of the Securities Act, 15 U.S.C. §77q(a), and Section 10(b) of the Exchange Act,
27 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

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III.

Order Defendant Upton to disgorge all ill-gotten gains from his illegal conduct, together with prejudgment interest thereon.

IV.

Order Defendant Upton to pay a civil penalty under Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3).


V.

Retain jurisdiction of this action in accordance with the principles of equity and the Federal Rules of Civil Procedure in order to implement and carry out the terms of all orders and decrees that may be entered, or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

VI.

Grant such other and further relief as this Court may determine to be just and necessary.

DATED: September 24 2007



DAVID M. ROSEN
Attorney for Plaintiff
Securities and Exchange Commission