

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1098/December 12, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of

DONALD J. ANTHONY, JR.,
FRANK H. CHIAPPONE,
RICHARD D. FELDMANN,
WILLIAM P. GAMELLO,
ANDREW G. GUZZETTI,
WILLIAM F. LEX,
THOMAS E. LIVINGSTON,
BRIAN T. MAYER,
PHILIP S. RABINOVICH, AND
RYAN C. ROGERS

ORDER ON MOTIONS FOR A MORE
DEFINITE STATEMENT

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on September 23, 2013. A prehearing conference was held on October 28, 2013. A few Respondents requested implementation of Rule 240(c)(2) of the Commission's Rules of Practice, and at their request a settlement conference is scheduled for December 16, 2013. The hearing will begin on January 27, 2014.

The OIP alleges that McGinn, Smith & Co., Inc. (MS & Co.), a registered broker-dealer beginning in 1980 and a registered investment adviser from April 2009 to March 2010, was owned by Timothy McGinn (McGinn), David Smith (Smith), and after 2004, Thomas E. Livingston (Livingston). OIP at 3. McGinn, Smith, and Livingston also owned McGinn, Smith Advisors, LLC (MS Advisors), a registered investment adviser from January 3, 2006 to April 24, 2009. *Id.* On February 6, 2013, following a four-week jury trial, McGinn, Chairman and Secretary of MS & Co., and Smith, President, CEO, and until 2007, Chief Compliance Officer of MS & Co., were found guilty of conspiracy to commit mail and wire fraud, mail fraud, wire fraud, securities fraud, and filing a false tax return in United States v. McGinn, 12-CR-28 (DNH) (N.D.N.Y.). OIP at 4-5; Judgments in McGinn, of which I take official notice pursuant to 17 C.F.R. § 201.323. McGinn was sentenced to fifteen years in prison, three years of supervised release, and ordered to pay restitution of \$5,992,800, and a \$100,000 fine. Judgment in McGinn (Aug. 13, 2013). Smith was sentenced to ten years in prison, three years of supervised release, and ordered to pay restitution of

\$5,989,736 and a \$50,000 fine. OIP at 5; Judgment in McGinn (Aug. 13, 2013). The OIP also alleges that Respondents were registered representatives associated with MS & Co., and Respondents Donald J. Anthony, Jr. (Anthony), Brian T. Mayer (Mayer), Philip S. Rabinovich (Rabinovich) and Ryan C. Rogers (Rogers) were also associated with MS Advisors. OIP at 2, 5.

Motions for a More Definite Statement

Respondents' Motions

Respondents Rabinovich, Mayer, and Rogers filed a Motion for a More Definite Statement (Rabinovich, Mayer, and Rogers Motion) on November 8, 2013. The Rabinovich, Mayer, and Rogers Motion has an attachment consisting of charts with columns to be filed in with the names of investors, securities, offering dates, and brokers that are within the scope of OIP paragraphs 27, 32, 35-37, 45, and 47. Respondents Frank H. Chiappone (Chiappone), Richard D. Feldmann (Feldmann), William P. Gamello (Gamello), Andrew G. Guzzetti (Guzzetti), William F. Lex (Lex), and Livingston each filed individual Motions for a More Definite Statement (Motions) on either November 18 or 19, 2013. With the exception of Guzzetti's Motion, each individual Motion joins in the Rabinovich, Mayer, and Rogers Motion; Respondent Feldmann also joins in Respondent Chiappone's and Lex's Motions, and Respondent Livingston joins in the Motions of the other Respondents. In addition, Respondents Feldmann and Chiappone want specifics on OIP paragraph 44, and Respondent Gamello wants specifics on OIP paragraphs 34, 39, 44, and 46. Respondent Guzzetti requests that the Division of Enforcement (Division) provide specific answers to the questions posed in the appendix to his Motion.

In essence, the Motions all claim that the OIP and the material subsequently furnished by the Division do not provide Respondents with sufficient information to defend against the securities violations that the OIP alleges occurred over a seven-year period. Each Respondent who filed a Motion wants to know the specifics of each violation that he allegedly committed, such as the date, investor name, specific offering or security name, and alleged misrepresentation or omission. See Rabinovich, Mayer, and Rogers Motion at 5, Appendix; Lex Motion at 2-3. In addition, certain Respondents argue that the OIP does not sufficiently identify the "red flags" referred to in the OIP. See Rabinovich, Mayer, and Rogers Motion at 4-6; Lex Motion at 3.

Division's Opposition

The Division filed a Memorandum of Law in Opposition to Respondents' Motions for a More Definite Statement (Opposition) on November 26, 2013. Attached to the Opposition are four exhibits which the Division characterizes as previously made supplemental disclosures to Respondents: Exhibit 1: Summaries of Respondents' Sales, provided on October 23, 2013; Exhibit 2: Narrative Providing Details of Each Respondent's Illegal Conduct, provided on November 10, 2013; and Exhibits 3 & 4: Lists of Unaccredited Investors in Four Funds and Trust Offerings, respectively provided on October 23 and November 21, 2013.¹

¹ According to Respondent Lex, the Division on October 23, 2013, furnished Respondents with a list of allegedly unaccredited investors and a list of sales by each Respondent. Lex Motion at 2-3.

The Division maintains that the OIP provides extensive details on the illegal conduct alleged, and that disclosures made to Respondents after filing the OIP satisfy Respondents' various requests for further information:

Each of the fraudulent offerings is identified and the illegal conduct, including numerous red flags ignored by Respondents, is described with particularity. In addition to the OIP, the Division has provided each of the Respondents with charts listing every customer and every purchase and sale in every one of the fraudulent offerings made during the period of the fraud; an 11-page narrative that provides further detail on each Respondent's illegal conduct, including misrepresentations and omissions; and lists of every unaccredited customer and the basis for that conclusion.

Opposition at 1-2. The Division further maintains that Respondents improperly – and contrary to the Commission's Rules of Practice and precedent – request that it “identify each piece of evidence it will offer at trial.” Opposition at 2.

Respondents' Replies

On December 3, 2013, Respondents Rabinovich, Mayer, and Rogers filed a Reply Brief in Support of the Motion (Rabinovich, Mayer, and Rogers Reply), which maintains that Respondents' Motions are not seeking evidence, but merely sufficiently specific allegations. Rabinovich, Mayer, and Rogers Reply at 3. Respondents Chiappone, Guzzetti, Lex, and Livingston each filed a Reply on December 3 or 4, 2013. Respondent Lex argues that the Division has omitted the salient portion of the applicable Rule of Practice (Rule 200(b)), which requires that the OIP:

contain a short and plain statement of the matters of fact and law to be considered and determined, **unless the order [OIP] directs an answer pursuant to § 201.220 in which case the order shall set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto.**

Lex Reply at 2 (emphasis in original). The rule is at 17 C.F.R. § 201.200(b)(3).

Ruling

The determinative consideration when deciding any motion for a more definite statement is whether the respondents have sufficient knowledge of the factual basis of the allegations in the OIP, so as to have an opportunity to defend themselves at the evidentiary hearing. See Rita J. McConville, Exchange Act Release No. 51950 (June 30, 2005), 85 SEC Docket 3127, 3149 (OIP allegations sufficient where respondent was put “on notice” of the issues that “would be an issue in the proceeding”), petition denied, 465 F.3d 780 (7th Cir. 2006).

In addition to providing information on its allegations in the OIP, the Division on September 23, 2013, made its investigative file available to Respondents for inspection and copying. See 17 C.F.R. § 201.230(a). The Division provided Respondents with the additional factual information on October 23, November 10, and November 21, 2013, as described in the Division's Opposition. The

Division represents that on September 25, 2013, just after the OIP was issued, it provided Respondents with every deposition taken in SEC v. McGinn, Smith & Co., 10-cv-457 (N.D.N.Y.) (GLS/CFH), in which on April 20, 2010, a temporary restraining order was issued and a Receiver appointed. OIP at 3 n.1; Opposition at 6. It is the Division's position that Respondents who testified in the civil case "admitted to the core facts that form that basis of the OIP."² Opposition at 6. In addition, under the procedural schedule, Respondents will receive the names of the Division's witnesses, a list of its exhibits, and any written expert reports by three weeks before the start of the hearing.

I do not find the cases cited by Respondents persuasive because Respondents have been provided a great deal more information than what appears to have occurred in the cited cases. See David F. Bandimere, Admin. Proc. Rulings Release No. 749 (Feb. 11, 2013), 2105 SEC Docket 64268 (motion granted in part; Division required to identify allegedly defrauded investors and potential investors and specify by month when each alleged misrepresentation or omission or "red flag" occurred); W. Pac. Capital Mgmt. LLC, Admin. Proc. Rulings Release No. 691 (Feb. 7, 2012), 102 SEC Docket 51083 (motion granted in part; Division required to identify customers who allegedly did not receive information about success fee); Next Fin. Gr., Inc. (Sept. 19, 2007), Admin. Proc. No. 3-12738 (unpublished) (motion granted in part; Division must provide the number of each type of alleged misconduct, range of dates when misconduct occurred, the number of websites involved, whether there was one or more "recruit," and "the range of dates").

I consider applicable and persuasive, and thus rely on, the often cited language that "a respondent is entitled to be sufficiently informed of the charges against him so that he may adequately prepare his defense, but that he is not entitled in advance of the hearing to a disclosure of the evidence on which the Division intends to rely." The Stuart-James Co., Inc., 52 SEC Docket 679, 681 (May 8, 1989) (citing Charles M. Weber, 35 S.E.C. 79 (1953); J. Logan & Co., 38 S.E.C. 984 (1959); M.J. Reiter Co., 39 S.E.C. 484 (1959)); see also Jeffrey A. Wolfson, Admin. Proc. Rulings Release No. 699 (Mar. 28, 2012), 103 SEC Docket 52647 (denying motion for more definite statement where investigative file and supplemental materials provided to respondents following initiation of proceeding); Rita J. McConville, 85 SEC Docket at 3149 (OIP must inform the respondent of the charges in enough detail to allow a respondent to prepare a defense, but need not disclose the evidence upon which the Division intends to rely); J. Logan & Co., 38 S.E.C. 827 (request for bill of particulars denied, but if fraud allegations relate to any securities of issuers not specifically named in the order, parties should be informed of names of issuers); Murray Sec. Corp., 37 S.E.C. 780 (1957) (in a broker-dealer revocation proceeding, Division ordered to disclose the name of securities involved in the allegations, but motion otherwise denied).

For the reasons stated, I DENY all the motions for a more definite statement.

Brenda P. Murray

² According to the Division, Chiappone and Livingston asserted their Fifth Amendment privileges when the Commission sought to depose them in McGinn, Smith & Co., but Chiappone testified in July 2013, in response to a Commission investigative subpoena. Opposition at 6 n.3.

Chief Administrative Law Judge