

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

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 1171/January 15, 2014

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 SEVERAL MOTIONS

The Securities and Exchange Commission (Commission) initiated this proceeding on September 23, 2013. Donald J. Anthony has been found in default. Donald J. Anthony, Admin. Proc. Rulings Release No. 1081, 2013 SEC LEXIS 3808 (Dec. 4, 2013). The hearing will begin on January 27, 2014.

**Pending Motions**

I will decide all the described pending matters because the hearing begins in just seven working days. See 17 C.F.R. § 201.111.

**Motion for Deposition**

On December 31, 2013, I received the Division of Enforcement's (Division) Motion for Leave to Take the Deposition of Stephen Fowler Under Rule 233 (Motion for Deposition). On January 7, 2014, I received Respondents Philip S. Rabinovich (Rabinovich), Brian T. Mayer (Mayer), and Ryan C. Roger's (Rogers) Memorandum of Law in Opposition to the Division's Motion for Deposition (Opposition), with the Affidavit of Rogers attached. On January 10, 2014, I received the Division's Reply Memorandum in Support of its Motion for Deposition (Reply), with a series of e-mails between Stephen Fowler (Fowler) and the Division attached.

## **Motion to Compel Production**

On January 6, 2014, I received Respondents Rabinovich, Mayer, and Rogers's Motion to Compel the Production of (I) the Identity of Witnesses Contacted by the Division after the OIP [Order Instituting Proceedings] Was Filed, and (II) all Brady Material (Motion to Compel).<sup>1</sup> These Respondents take the position that, pursuant to Commission Rules of Practice 230(a)(2) and (b)(2), the Division should be required to identify each of these Respondents' clients it has contacted since September 23, 2013, and to provide these Respondents with any Brady material relating to the Division's calls with these Respondents' clients. Motion to Compel at 2. Respondents William F. Lex (Lex), Frank H. Chiappone (Chiappone), and Andrew G. Guzzetti joined in the Motion to Compel.

On January 13, 2014, I received the Division's Opposition to the Motion to Compel (Motion to Compel Opposition), with Exhibit A, which contends that (1) since the Motion to Compel was filed, the Division has provided Respondents with both a witness list and "Rule 230(b) disclosures," and (2) the Commission's Rules of Practice do not require the Division to provide a list of individuals contacted after the OIP was filed. Motion to Compel Opposition at 1-4.

## **Joint Motion for Stay**

On January 6, 2014, the Division and Respondent Richard D. Feldmann (Feldmann) filed a Joint Motion for Stay as to Feldmann (Joint Motion).

## **Motion for Leave to File Motion for Summary Disposition**

On January 10, 2014, I received the Motion of Respondent Lex for Leave to File Motion for Summary Disposition (Motion for Leave). Respondents Rabinovich, Mayer, Rogers, and Chiappone joined in the Motion for Leave.

## **Rulings**

### **Motion for Deposition**

Commission Rule of Practice 233(b) provides that:

In the discretion of the Commission or the hearing officer, an order for a deposition may be issued upon a finding that the prospective witness will likely give testimony material to the proceeding; that it is likely the prospective witness, who is then within the United States, will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment, other disability, or absence from the United States, unless it appears that the absence of the witness was procured by the party

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<sup>1</sup> Also on January 6, 2014, I received Respondents Rabinovich, Mayer, and Rogers's Motion to Compel Production of OCIE Examination Reports, Exit Letters, and McGinn Smith Responses; this motion was withdrawn by letter dated January 9, 2014.

requesting the deposition; and that the taking of a deposition will serve the interests of justice.

17 C.F.R. § 201.233(b).

The Opposition does not dispute the Division's representation that Fowler resides in Surrey, United Kingdom, and that he is a former customer of Rogers who will testify about representations Rogers made to him about private placements. See Motion for Deposition at 2. I disagree with the Opposition's claims that a person must be in the United States to be deposed and that Fowler is available to come to the hearing. See Opposition at 1-2. Rogers's Affidavit and the e-mails furnished by the Division show that Fowler will not be in the United States at the time of the public hearing, and that he has a strong preference not to travel to New York, but that he "would be willing" to come to testify if the Division can find funds and Rogers blocks Fowler's deposition from being introduced in evidence. See Reply, Ex. A. There has been no showing that the Division procured or arranged for Fowler's absence at the time of the hearing.

I disagree with the Opposition that taking Fowler's deposition "on the eve of the hearing" is prejudicial to Respondents. See Opposition at 2. It appears the Division gave Respondents notice of its intent to depose Fowler on December 20, 2013, so Respondents bear some responsibility for the delay. Motion for Deposition at 2 n.1.

Fowler wants to give evidence and the Division's request for a videoconference deposition – which Respondents can attend, which will be transcribed by a court reporter, and at which Respondents can question Fowler who will be under oath – is a fair and common-sense way of achieving that goal. I agree with the Division that Commission Rule of Practice 233 should be read in conjunction with Rule 235, which describes when a prior sworn statement is admissible. See Motion for Deposition at 2. I GRANT the Division's Motion for Deposition by videoconference.

### **Motion to Compel Production**

As relevant, Commission Rule of Practice 230 provides

(a) . . . (2) Nothing in this paragraph (a) shall limit the right of . . . a respondent to seek access to or production pursuant to subpoena of any other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to a subpoena.

(b) . . . (2) Nothing in this paragraph (b) authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of Brady v. Maryland, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence.

17 C.F.R § 201.230(a)(2), (b)(2).

I disagree with Respondents Rabinovich, Mayer, and Rogers that the Division is obligated pursuant to Rule of Practice 230(a)(2) to identify all investors that it has communicated with since

the OIP was issued. See Motion to Compel at 7. The Division's obligation to produce any Brady materials exists throughout the proceeding; however, I disagree with these Respondents that the views of some customers that they were not misled is Brady material. See id. at 7-8. The Motion to Compel is DENIED.

### **Joint Motion for Stay**

The Joint Motion is GRANTED as it satisfies the requirements of Commission Rule of Practice 161(c)(2) by representing that the parties have agreed in principle to a settlement on all major terms. See 17 C.F.R. § 201.161(c)(2). The parties shall notify my Office if they fail to meet the deadlines set forth in Rule 161(c)(2) or if the Commission rejects the Offer of Settlement.

### **Motion for Leave to File Motion for Summary Disposition**

Commission Rule of Practice 250(a) requires leave to file a motion for summary disposition if it is to be filed before the Division has completed presentation of its case in chief. 17 C.F.R. § 201.250(a). A motion for summary disposition is to be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b).

The main basis of this motion for summary disposition is 28 U.S.C. § 2462, which provides that "a proceeding for the enforcement of any civil fine, penalty, or forfeiture . . . shall not be entertained unless commenced within five years from the date when the claim first accrued." Motion for Leave at 1. Respondent Lex argues that "[b]ecause virtually all of the remedies sought by the Division in this proceeding constitute fines, penalties, and forfeitures," § 2462 prohibits the proceeding, and that none of the remedies that the Division seeks can be predicated on conduct or transactions that occurred before September 23, 2008. Motion for Leave, Attachment at 12.<sup>2</sup> He also argues that the Division's theory of fraud under Section 10(b) of the Securities Exchange Act of 1934 is fatally flawed. Id. at 13-19.

I DENY leave to file a motion for summary disposition. Respondent Lex acknowledges that § 2462 does not prohibit some relief under the terms of the OIP if the allegations are proven. See id. at 11-12. There have been no changes in fact since the Commission considered the allegations and decided to set them for hearing. When it adopted Rule 250 in its present form in 1995, the Commission stated: "Based on past experience, the circumstances when summary disposition prior to hearing could be appropriately sought or granted will be comparatively rare." SEC Rules of Practice, Exchange Act Release No. 34-35833, 60 Fed. Reg. 32738, 32768 (June 23, 1995). The Motion for Leave is not persuasive that there are no material facts in dispute and that Lex is entitled to summary disposition as a matter of law.

### **Order**

Pursuant to Commission Rule of Practice 161(c)(2), I STAY the proceeding as to Respondent Richard D. Feldmann.

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<sup>2</sup>The attachment to the Motion for Leave is Lex's Motion for Summary Disposition itself.

Pursuant to Commission Rule of Practice 233, I ORDER that the Division of Enforcement's Motion for Leave to Take the Deposition of Stephen Fowler is GRANTED.

I ORDER that Respondents Philip S. Rabinovich, Brian T. Mayer, and Ryan C. Rogers's Motion to Compel Production of the Identity of Witnesses Contacted by the Division after the OIP Was Filed, is DENIED. The Division's obligation to produce Brady material is ongoing; however, statements by persons that Respondents did not mislead them is not Brady material.

I ORDER that the Motion of Respondent William F. Lex for Leave to File Motion for Summary Disposition is DENIED.

I will deal with any unresolved matters, such as Respondents Rabinovich, Mayer, and Rogers's Motion, received today, to Admit Prior Sworn Statements of Witnesses, either at the telephonic prehearing conference on Tuesday, January 21, 2014, at 9:30 a.m. EST, or at the start of the hearing on January 27, 2014.

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Brenda P. Murray  
Chief Administrative Law Judge