

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

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 1311/March 18, 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 ADMITTING EXHIBITS  
OFFERED BY THE DIVISION OF  
ENFORCEMENT

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP), on September 23, 2013. The public hearing concluded on February 24, 2014; final briefing concludes on June 9, 2014; and an Initial Decision is due by August 28, 2014.

**Parties' Positions**

Division of Enforcement's Proposed Exhibits

On February 24, 2014, shortly before the hearing concluded, the Division of Enforcement (Division) offered nine emails, Division Exhibits (Div. Exs.) 18, 124, 279, 283, 304, 393, 435, 504, and 572, described as "rebuttal exhibits," into evidence. Tr. 6041.<sup>1</sup> I delayed ruling on admissibility and gave Respondents ten days, or until March 6, 2014, to state any objections in written submissions. Tr. 6042.

On March 7, 2014, the Division filed a letter, dated March 5, 2014, representing it was offering only some of the previously offered emails into evidence, Div. Exs. 18, 279, 283, 393, and 435 (Five Emails), and it was now also offering 2011-dated subpoenas, Div. Exs. 688-97 (Subpoenas), addressed to Respondents Philip S. Rabinovich (Rabinovich), Brian T. Mayer

<sup>1</sup> Citation is to the hearing transcript.

(Mayer), Ryan C. Rogers (Rogers), Andrew G. Guzzetti (Guzzetti), William F. Lex (Lex), William P. Gamello, Frank H. Chiappone (Chiappone), and Thomas E. Livingston in SEC v. McGinn Smith and Co., 10-cv-457 (N.D.N.Y.) (SEC v. McGinn Smith). In this letter, argues that the Subpoenas are rebuttal exhibits that counter Respondents' descriptions of the circumstances surrounding their deposition testimony in SEC v. McGinn Smith.

The Division alternatively asks that I take official notice of the Subpoenas under Rule 323 of the Commission's Rules of Practice. The Division argues that the Subpoenas are rebuttal exhibits that counter Respondents' descriptions of the circumstances surrounding their deposition testimony in SEC v. McGinn Smith.

### Respondents' Objections

On February 27, 2014, Rabinovich, Mayer, and Rogers (collectively, RMR) filed an objection to the admissibility of the exhibits. RMR maintains that it is improper to use the Five Emails against them because they are not copied on any of the emails except the one addressed to "all-brokers." RMR argues that: (1) none of the emails are proper rebuttal exhibits, although the Division provided them to Respondents in early January, they were not used as part of the Division's direct case; and (2) Div. Exs. 689-97 are inadmissible because they were not offered at the hearing.

On March 7, 2014, RMR filed a second letter, which objects to the Division's reference to "the defense case" as inaccurate and misleading. RMR emphasizes that Respondents should not be lumped together as each Respondent's situation is different in many respects.

In a letter dated February 28, 2014, Chiappone objects to the admissibility of the exhibits that the Division has offered. Chiappone argues that these exhibits should have been introduced as part of the Division's direct case, and that it is prejudicial to allow the emails to be received without allowing Respondents' the ability to provide context and to cross-examine a testifying witness.

On March 5, 2014, Lex filed a letter objecting to the admissibility of the proposed exhibits, excluding Div. Ex. 279, because they are not true rebuttal exhibits, and noting that Lex was not a party to them.

On March 6 and 7, 2014, Guzzetti filed letters objecting to the admissibility of the Division's proposed exhibits. Guzzetti argues that the Division's forgetfulness to offer exhibits into evidence as part of its direct case, prevents Respondents from addressing the emails on the record.

### Division of Enforcement's Reply

In a filing on March 10, 2014, the Division stated that; (1) it showed Div. Exs. 279 and 393 to Guzzetti during the hearing; (2) counsel for one of the Respondents counsel used Div. Ex. 279 during the hearing; and (3) Div. Ex. 393 was shown to one of Respondent's experts. The Division represents that it stated during the hearing, Tr. 3018-19, that it would offer Div. Exs. 279 and 393 collectively with other exhibits, and its omission to do so was inadvertent.

## **Ruling**

The Five Emails have been on the Division's exhibit list since January 10, 2014 – which Respondents concede. See Tr. 6041-42; Chiappone Letter (Feb. 28, 2014), Guzzetti Letter (Mar. 7, 2014); Lex Letter (Mar. 5, 2014); RMR Letter (Feb. 27, 2014). Each of the Five Emails relates to a factual dispute over whether a “redemption policy” was in place at McGinn, Smith & Co., Inc. (MS & Co.), the broker-dealer with which each Respondent was a registered representative. Tr. 581; OIP at 2, 10. The Division maintains further that they support its claim that Guzzetti was in a supervisory role at MS & Co. Guzzetti's name appears on four of the Five Emails; Chiappone's name appears on one of the Five Emails; and an early part of one of the Five Emails was sent to “all-brokers,” but this early part does not touch upon redemptions.<sup>2</sup>

As part of its direct case the Division read into evidence answers that certain Respondents gave in depositions the Division took of them as non-parties in SEC v. McGinn Smith. See, e.g., Prehearing Tr. 44; Tr. 2127-28, 3442-43. Respondents complained about the use of their depositions, noting, among other things, that when they provided deposition testimony they: believed they were testifying to help the Division prosecute David Smith and Timothy McGinn, the primary owners of MS & Co. who are now in jail for lengthy prison terms; were never given an opportunity to review, correct, and sign the deposition transcripts; and had not been provided with Commission Forms 1662.<sup>3</sup> See, e.g., Prehearing Tr. 40-44; Tr. 1941, 3336-37.

The Commission's Rules of Practice specifically allow rebuttal evidence, and provide that the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial, or unduly repetitious. 17 C.F.R. §§ 201.111(c), .320, .326. The Five Emails are admissible under this standard. They are proper rebuttal exhibits because they take issue with Respondents' factual representation. The timing of the introduction of the Five Exhibits is not unfair to Respondents because they were on notice that the Division might introduce the emails since early January.

The Commission's Rules of Practice allow judicial notice “of any material fact which might be judicially noticed by a district court of the United States, any matter in the public official records of the Commission, or any which is peculiarly within the knowledge of the Commission as an expert body.” 17 C.F.R. § 201.323. I cannot find any authority that would support taking official notice of subpoenas issued by United States District Courts for the Southern and Northern District of New York in SEC v. McGinn Smith either as a material fact that might be judicially noticed by the District Court or as a matter in the official file of the Commission. The case law cited by the Division, Rodic v. Thisledown Racinf Club, Inc., 615 F.2d 736, 738 (6th Cir. 1980), is not persuasive. Accordingly I will not take official notice of the Subpoenas. However, given the

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<sup>2</sup> Respondent Richard D. Feldmann, who has agreed in principle to a settlement of this proceeding on all major terms, is on one of the Five Emails. See Donald J. Anthony, Jr., Admin. Proc. Rulings Release No. 1171, 2014 SEC LEXIS 146, at \*3, \*7 (Jan. 15, 2014).

<sup>3</sup> SEC Form 1662 is titled Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena.

considerable controversy about the circumstances of Respondents' deposition testimony, the language of the Subpoenas is relevant, material, and not unduly repetitious evidence which will be admitted as proper rebuttal evidence.

**Order**

For the reasons stated, I ADMIT INTO EVIDENCE Division Exhibits 18, 279, 283, 393, 435, and 688-697.

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Brenda P. Murray  
Chief Administrative Law Judge