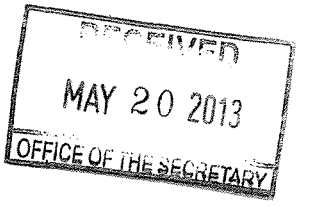
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



SECURITIES ACT OF 1933
Release No. 9361 / September 14, 2012

SECURITIES EXCHANGE ACT OF 1934
Release No. 67860 / September 14, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3464 / September 14, 2012

INVESTMENT COMPANY ACT OF 1940
Release No. 30202 / September 14, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15024

In the Matter of

WALTER V. GERASIMOWICZ, MEDITRON ASSET MANAGEMENT, LLC, MEDITRON MANAGEMENT GROUP, LLC,

Respondents.

RESPONDENTS' RESPONSE TO DIVISION OF ENFORCEMENT'S DAMAGES BRIEF

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I. STIPULATED FACTUAL BACKGROUND

The stipulated facts in this case arise from a settlement by Respondents[1] with the SEC that was drafted by SEC Enforcement staff. While Respondents are not permitted to deny the findings, they are permitted under the Order to provide evidence necessary for this proceeding. Most of these facts come from Enforcement's trial exhibits (including many not referenced by Enforcement in its Damages Brief). A few come from documents in Enforcement's possession that were not included in its Trail Exhibits, and a few from documents just recently authored and thus not previously available in this case. Relevant to this proceeding, those facts (and supporting documents) are as follows:

First, as noted in the Order, Gerasimowicz was the chairman of SMC, not the president. As such, he did not exercise day-to-day control or oversight of SMC; rather, that was done by the presidents of SMC (Theodore Doumazios through September 2008, and George Kazantzis thereafter). *See* Declaration of Walter Gerasimowicz. In fact, at all relevant times in this matter, Respondents' office was located on Lexington Avenue in Manhattan while the SMC offices were located in Queens, New York, which made any hands-on oversight of SMC by Gerasimowicz highly impractical. *Id.*

Second, as noted in the Respondents' Answer and discussed with Enforcement, Respondents were as much a victim of affiliated persons of SMC as the investors were, and are actively and vigorously pursuing restitution for investors.[2]

As proof of same, Gerasimowicz has undertaken two litigations and is coordinating a third, as follows:

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[1] For purposes of this brief, Respondents adopt all defined terms from Enforcement's damages brief dated May 3, 2013.

[2] In fact, Gerasimowicz feels like he is the only party in this proceeding who is directly pursuing restitution for investors. At a meeting with Enforcement staff in January 2013, when Respondents requested more time to pursue restitution for investors (actions they had already formally commenced via the above-described lawsuits), staff responded that the SEC "doesn't care about investors or their restitution," that the "policy of the SEC is to punish" investment professionals and that the lawsuits I had commenced for investors was against "miscreants" and was "your problem, not ours." *See* Declaration of Walter Gerasimowicz.

- Gerasimowicz caused MREP to file a lawsuit against former SMC president Theodore Doumazios in June 2011 charging him with fraud, embezzlement, and unjust enrichment, among other things, which resulted in an Order against Doumazios in January 2013 that could result in recovery of almost $2.4 million.
- Gerasimowicz caused SMC to file a lawsuit in December 2012 against James Cardenas and 7 others in December 2012, charging such former SMC employees and subcontractors with fraud, breach of fiduciary duty, and conversion, among other things, arising from the their operation of a competing electrical contracting business out of SMC's offices, using SMC's employees and resources for their own personal gain, stealing materials and equipment, mismanaging projects, and causing SMC to lose millions as a result. The claim is for over $5 million plus interest and punitive damages;
- Gerasimowicz has prepared for SMC a complaint for breach of fiduciary duty, misappropriation, conversion, diversion of SMC assets, unjust enrichment, and fraud against SMC's former Superintendent, former Purchasing Agent, former Controller and other former key employees of SMC and various companies owned and operated by them. That lawsuit will allege that Defendants wrongfully diverted SMC contracts, money, materials and manpower and resources to companies owned by them, embezzled funds, caused SMC to enter into and make payments based on sham contacts with entities owned by them, and attempted to defraud SMC by diverting SMC funds to through the creation of a second business entity with a name similar to SMC, damaging SMC in an amount estimated as at least $4 million; and

- Gerasimowicz has entered into an agreement with the SMC bankruptcy trustee which will permit Gerasimowicz to pursue SMC's above-described legal claims, pending bankruptcy court approval.

See Respondents Exhibit D.

Third, Enforcement conveniently isolates certain fund flows from the Fund to MAM and conveniently ignores others that do not fit into its polarizing summary of the facts in this case. Enforcement does not dispute that Gerasimowicz and MAM ran a legitimate investment advisory business for several years; in fact, its "demonstrative" Trial Exhibits 261 and 262 highlight how MAM's assets under management as recently as September 2009 were invested 94% in legitimate, non-SMC-related investments (approximately $5.5 million) before slowly sliding over time to only 20% in September 2011 and then 3% in March 2012.

MAM had legitimate expenses for its investment advisory operations separate and apart from SMC throughout that time frame, including rent, employee salaries, expert analyst payments and other costs typical for a legitimate investment advisory business. Enforcement assiduously and meticulously detailed the payments for such expenses in its Trial Exhibit 149, but conveniently ignores them when referencing that same exhibit for the proposition that Respondents had an additional $811,000 in "ill-gotten gains" that it factors into its disgorgement argument. A closer scrutiny of that same exhibit reveals MAM paid out approximately $1,196,276 in legitimate expenses for its investment advisory business, including for salaries to employees (not Gerasimowicz), benefits for employees, rent and many other proper and legitimate expenses. *See* Respondents Exhibit C. Even net payments from the Fund to Gerasimowicz ($245,484.98, as seen on the last page of that exhibit) are appropriate to the extent they are related to the legitimate investment advisory services he did perform for his investors. *Id.*

II. RELIEF SOUGHT

Respondents agree that the assessment of whether a particular sanction recommended by the Division is in the public interest is derived from the Court's analysis in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981), which includes the following elements: (1) the egregiousness of the defendant's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the defendant's assurances against future violations; (5) the defendant's recognition of the wrongful nature of his or her conduct; and (6) the likelihood that the defendant's occupation will present opportunities for future violations. Furthermore, Respondents do not argue with Enforcement's statement that the Commission has listed three additional factors to be considered in making the public interest determination concerning sanctions: (1) the age of the violation; (2) the degree of harm to investors and the marketplace as a result of the violations (*see In the Matter of Marshall E. Melton, et al.*, Release No. 2151, 2003 WL 21729839, at *2 (July 25, 2003)); and (3) the "extent to which the sanction will have a deterrent effect" (*see McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005); *see also Schield Management Co. and. Marshall L. Schield, Exchange Act* Release No. 53201, 2006 WL 231642, at *8 (Jan. 31, 2006)).

Where Respondents greatly diverge with Enforcement is how those legal principles get properly applied in this case.

A. Disgorgement

Disgorgement is "a method of forcing a defendant to give up the amount by which he was unjustly enriched." *Federal Trade Commission v. Bronson Partners, LLC*, 654 F.3d 359, 372 (2d Cir. 2011) (quoting *SEC v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978)). The remedy of disgorgement "consists of fact-finding by a district court to determine the amount of money acquired through wrongdoing [...] and an order compelling the wrongdoer to pay that amount plus interest to the

court." *SEC v. Cavanagh*, 445 F.3d 105, 116 (2d Cir. 2006). Since the purpose of disgorgement is remedial, not punitive, disgorgement may not be awarded above that amount. *Id.* at 116, n. 25. "A district court order of disgorgement forces a defendant to account for all profits reaped through his securities law violations and to transfer all such money to the court...." *Id.* at 117.

Enforcement proposes that Respondents are subject to disgorgement of two sums: "over $2.7 million"[3] of "funds diverted from the Meditron Fund to SMC between approximately September 2009 and September 2011," and "$811,093.14" in "management, performance and other fees paid to Respondents by the Meditron Fund between approximately September 2009 through the present."

As for the "over $2.7 million" in "diverted" funds, a simple fact that Enforcement either ignores, avoids or misapprehends must be clearly conveyed and understood in any analysis of disgorgement in this case: Respondents – especially Gerasimowicz – neither received nor benefitted from almost all the "over $2.7 million" in such "diverted" funds. What Enforcement well knows but conveniently fails to mention in its damages brief is that for the relevant period, while MREP owned all of SMC, Respondents in total (in fact, MAM only) owned only one percent (1%) of MREP, and investors who owned the other 99% of MREP (and thus, SMC). *See* Respondents Exhibit B. Therefore, every loan or payment by the Fund to SMC was, at worst, 1% belonging to Gerasimowicz (and none belonging to MAM nor MMG, neither of which had any ownership interest in SMC). As shown in Enforcement's Trial Exhibit 256, that would include $1,025,000 in notes and other transfers from the Fund to SMC directly; $1,098,950 in "transfers" from the Fund to MREP and even the $484,190 in "transfers" from the Fund to creditors of SMC.[4]

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[3] Respondents remind the Court that $2.65 million was the total amount set forth as a finding in the Order, and so Respondents respectfully request that any amounts claimed by Enforcement that exceed that amount be disregarded for this analysis.

[4] Enforcement's math in its "demonstrative" trial exhibits – especially 256, 257 and 258 – is a little confusing and perhaps in need of correction, or at least clarification. In terms of "transfers" from the Fund directly to SMC, Enforcement totals it as $1,137,000 in Trial Exhibits 256 and 258. Enforcement then goes on to detail 17 transfers totaling $1,137,000 in Trial Exhibit 258 and four note-related transfers totaling $1,025,000 in Trial

The fact that Respondents received, at most, a relatively minimal "ill-gotten gain" of perhaps $27,000 (i.e., $2.7 million x 1%) cannot be overemphasized. Case law on disgorgement – including the cases cited by Enforcement, is replete with instances of where defendants actually received the "ill-gotten gains," but that uniquely is not the case here. In its footnote 4 of its damages brief, Enforcement's cited cases are not on point here, as in each instance the defendant/respondent was in individual possession of the funds subject by the applicable Court as subject to disgorgement. Here, the $2.7 million in "funds diverted" to MREP and SMC were still 99% owned by the investors, not Gerasimowicz or the other Respondents, and thus no more than $27,000 of those funds should be subject to disgorgement.[5] As for the "$811,093.14" that Enforcement proposes be disgorged because they were "management, performance and other fees paid to Respondents by the Meditron Fund between approximately September 2009 through the present," Respondents again respectfully submit that Enforcement has conveniently cherrypicked the facts that suit its purposes and ignored other, highly relevant facts from the same exhibits. Enforcement's accountant states that she prepared the summary that reaches the $811.093.14 number from her analysis of certain bank and brokerage account statements for Respondents, MREP and the Meditron Fund for the period of as early as April 2009 to as recent as June 2012. *See* Declaration of Doreen Rodriguez. Her summary consists almost exclusively of transfers to Gerasimowicz, or transfers to MAM as "mgmt.," "HF" or "incentive" "fees," which she says she gathered from Enforcement Trial Exhibits 12 and 90, among other, unspecified sources.

Exhibit 257. But while two of those note-related transfers show up on both 257 and 258 (specifically, $315,000 on "9/21/09" and $185,000 on "12/21/09"), four other note-related payments totaling $525,000 do not. That partial inclusion begs the question as to exactly what amount Enforcement claims was transferred directly from the Fund to SMC.

[5] On page 12 of its brief, Enforcement posits that "Nor does it matter that a defendant may be currently unable to pay," after which it cites several federal court decisions to that effect. That argument is incorrect, as Rule 630(a) of the SEC Rules of Fair Practice explicitly permit an administrative law judge in an administrative hearing consider inability to pay. Because of the massive amount of documentation necessary for such an application, however, Respondents in this case have chosen to not make such an application to the Court and instead preserve its right under Rule 630(a) to subsequently make such an application directly to the Commission, as they determine appropriate

What Enforcement's accountant exhibit neglects to include, however, are any of the thousands of legitimate expenses totaling millions of dollars for the undisputed legitimate investment advisory business of Gerasimowicz and MAM. In contrast, Respondents' Exhibit C details an array of legitimate payments made by MAM and Gerasimowicz for legitimate business expenses not tied to any securities violations, as well as payments by SMC, Gerasimowicz and others to the Meditron Fund and other cash flows not at all involving the Meditron Fund.[6] In sum, the most that could be deemed received by Gerasimowicz totals only $391,909.89.

Case law supports separating legitimate from illegitimate profits for purposes of determining disgorgement. When determining disgorgement, "the SEC generally must distinguish between legally and illegally obtained profits." *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989)

> Since disgorgement primarily serves to prevent unjust enrichment, the court may exercise its equitable power only over property causally related to the wrongdoing. The remedy may well be a key to the SEC's efforts to deter others from violating the securities laws, but disgorgement may not be used punitively. *See SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972). Therefore, the SEC generally must distinguish between legally and illegally obtained profits. *See CFTC v. British Am. Commodity Options Corp.*, 788 F.2d 92, 93 (2d Cir.), cert. denied, 479 U.S. 853, 107 S. Ct. 186, 93 L. Ed. 2d 120 (1986).

Id. at 1231.

By way of further examples, in several cases, only part of a defendant's salary was found to be subject to disgorgement. *See, e.g. SEC v. Kelly*, 765 F.Supp.2d 301, 325-26 (S.D.N.Y. 2011) (declining to order disgorgement of the defendants' entire yearly compensation and bonuses absent any evidence that they were linked to the company's financial performance or were otherwise causally connected to the alleged wrongdoing); *SEC v. Resnick*, 604 F.Supp.2d 773, 783 (D. Md. 2009) (declining to order

[6] As set forth in the annexed Exhibit [A], which is the accompanying May 17, 3013 Declaration of consultant Jay Creutz, with accompanying spreadsheet, this figure was obtained through an analysis primarily of SEC Trial Exhibit 12.

disgorgement of the defendant's salary where there was no evidence that the defendant's salary was causally linked to his unlawful conduct).

Finally, courts have specifically found it appropriate to offset expenses incurred in effecting a fraudulent transaction:

> In determining the proper amount of restitution, a Court may consider as an offset the sums which a defendant paid to effect a fraudulent transaction. *See Restatement of Restitution*, ch. 7 (1937); *see also* Ellsworth, Disgorgement in Securities Fraud Actions Brought by the SEC, 1977 Duke L.J. 641, 651.
>
> Even where Congress has expressly provided a disgorgement remedy in a statutory context, as in the area of trademark infringement, it has provided that a violator is entitled to set off all proven costs or deductions against the profits accruing from his violation. *See, e.g.*, 15 U.S.C.A. § 1117 (West 1982 and Supp. 1990); *see also Aladdin Manufacturing Co. v. Mantle Lamp Co. of America*, 116 F.2d 708 (7th Cir. 1941) (disgorgement of profits from [*95] trademark infringer necessarily involves deduction of the cost of the realization of those profits.)

SEC v. Thomas James Assoc., Inc., 738 F. Supp. 88, 94-95 (W.D.N.Y. 1990).

In short, because of the legitimate business and the appropriate offsets, Respondents should be subject to disgorgement of a small percentage of $391,909.89 instead of Enforcement's proposed $811,000 calculation.

B. Prejudgment Interest

"In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, the Commission or the appropriate regulatory agency may enter an order requiring accounting and disgorgement, including reasonable interest." Section 21B(e) of the Exchange Act, , [15 U.S.C. § 78u-2(e)], (emphasis added).

"In deciding whether an award of prejudgment interest is warranted, a court should consider "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." *Wickham Contracting Co. v. Local Union No. 3*, 955 F.2d 831, 833-34 (2d Cir.), *cert. denied*, 506 U.S. 946, 121 L. Ed. 2d 302, 113

S. Ct. 394 (1992); *see also Commercial Union Assurance Co. v. Milken*, 17 F.3d 608, 613 (2d Cir.), *cert. denied*, 130 L. Ed. 2d 130, 115 S. Ct. 198 (1994)." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476 (2d Cir. N.Y. 1996).

Here, given Gerasimowicz's permanent bar; de facto personal bankruptcy; advanced age; unemployment (and inability to earn a living in the only field he knew for the last 20+ years); and his assertive past and current efforts to recover investors' lost investments, "considerations of fairness and the relative equities" dictate that no prejudgment interest be charged to Respondents.

C. Civil Penalties

Enforcement seems to have an almost gleeful time in its brief when it cherry-picks precedent to lay out for the Court the multitude of ways in which the Court could multiply the third-tier civil penalties in this matter, suggesting that the Court could choose the number of violative money transfers (which Enforcement posits as totaling 43), the number of quarterly statements, the number of investors or the number of "Quarterly Communiques." Given that the third-tier penalties reach as high as $150,000 for Gerasimowicz and $725,000 for each of MAM and MMG, it appears that Enforcement would be perfectly satisfied with, for example, total civil penalties of over $60 million (which number would be reached if the maximums were applied and multiplied by the supposed 43 violative money transfers) – this, of course, being on top of Enforcement's proposed disgorgement of more than $3.5 million, and the permanent bar for Gerasimowicz.

In so doing, however, Enforcement glosses over some important underlying standards for the Court to apply here.

In determining civil penalties in an administrative proceeding, the Court is statutorily directed as follows:

In considering under this section whether a penalty is in the public interest, the Commission or the appropriate regulatory agency may consider--

1. whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;
2. the harm to other persons resulting either directly or indirectly from such act or omission;
3. the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;
4. whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in section 15(b)(4)(B) of this title;
5. the need to deter such person and other persons from committing such acts or omissions; and
6. such other matters as justice may require.

Section 21B(c) of the Exchange Act, , [15 U.S.C. § 78u-2(c)].

"Considering the discretionary nature of the civil penalty framework, prior decisions and consent decrees are of little comparative value for any individual matter. Each case, of course, has its own particular facts and circumstances which determine the appropriate penalty to be imposed." *SEC v. Moran*, 944 F. Supp. 286, 296-297 (S.D.N.Y. 1996) (where the SEC sought $1.8 million in civil penalties but the court only imposed $100,000).

Also, "in determining the amount of a third-tier civil penalty to impose, it is appropriate to 'also consider[] the extent to which other aspects of the relief and/or judgment ... will have the desired punitive effect.'" *SEC v. Razmilovic*, 822 F. Supp. 2d 234, 281 (E.D.N.Y. 2011) (*citing SEC v. Universal Exp., Inc.*, 646 F.Supp.2d at 568, (S.D.N.Y. 2009)).

While determining civil penalties, the Court in Moran took considerable notice of the impact of the SEC investigation and prosecution on defendants (in a contested hearing, no less), including as follows:

- "While recognizing that the SEC seeks significantly less than potential maximum aggregate penalty of $1,800,000, the court feels that the SEC's request is nonetheless too

severe under the circumstances of this case. In making this determination the court considers the personal suffering which Moran Sr. has experienced, the substantial loss of business incurred by Moran Sr.'s firms, the other measures imposed by the court, and the nature of Moran Sr.'s violations. Taking into account all of the facts and circumstances in this case, the court imposes civil penalties in the amount of $25,000 for Moran Sr.'s aggregate violations, $50,000 for the conduct of Moran Asset, and $25,000 for the violations of Moran Brokerage. The amount of civil penalties then, totals $100,000." *Id.* at 296 (emphasis added).

- Due to the extreme loss of business suffered by Moran Asset, the court will not impose upon it the maximum penalty of $50,000." Id. at 297.
- "[T]he court is mindful of the financial losses and pain personally suffered by Moran Sr." *Id.* at 298 (ultimately assigning penalties far below the maximum for Form ADV violations).

Further, it must be noted that defendants in Moran received no bars, meaning they were permitted to continue in the business of being broker-dealers and investment advisers. Here, on the contrary, Gerasimowicz has agreed to a permanent bar and his wholly-owned subsidiaries (and co-Respondents), MAM and MMG, are effectively defunct and cannot operate without Gerasimowicz. Therefore, there exists no need in the present case to "deter" Respondents from "future" violations when they all Respondents are out of this business (and agreed with the Commission to accept that fate).

Similarly to Moran, it is evidenced that Gerasimowicz has endured a great amount of suffering. Gerasimowicz has been devastated by these actions personally, professionally, and financial, as he attests to in his attached affidavit. *See* Declaration of Walter Gerasimowicz.

When looking at the Section 21B(c) factors, it would clearly be in appropriate to impose the maximum third-tier penalties on Respondents, much less apply a multiple to same. While the Order may show that fraud was involved and others were harmed, it has been clearly set forth above that Respondents unjustly enriched a minimal amount if at all; Gerasimowicz has filed suit for the benefit of investors and is prosecuting same; neither Gerasimowicz nor MAM or MMG were ever found by the Commission or any other regulatory body to have committed any securities law violations; and given the bar to Gerasimowicz as well as his age, his medical problems and his utterly destroyed finances and

career prospects, there is no need to further "deter" him from future violations more than what has already been done.

III. CONCLUSION

Respondents' violations were serious, but Gerasimowicz is making verifiable, significant efforts to recover investor funds stolen from SMC, despite his lifelong medical problems, his being barred from his pursuing the only livelihood he knows, his de facto bankruptcy and his great embarrassment and regret at ever having gotten involved in SMC and what that involvement resulted in for so many valued friends and investors. He has suffered greatly and will continue to do so for the rest of his life because of this situation he put himself in. He respectfully requests that the Court consider all the mitigating factors enumerated above and assess him with minimal disgorgement and civil penalties in this matter, if any. Truthfully, he has already received significant remedial consequences before this Court even takes action in this phase of the proceeding.

Dated: May 17, 2013
Stamford, Connecticut

RESPONDENTS,

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