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.

SURREPLY IN FURTHER SUPPORT OF RESPONDENTS' RESPONSE TO DIVISION OF ENFORCEMENT'S APPLICATION FOR DAMAGES

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I. STIPULATED FACTUAL BACKGROUND

In its May 31, 2013 Reply Brief ("Reply Brief") to Respondents' May 17 Response Damages Brief ("Response Brief"), Enforcement makes a dizzying array of misleading factual speculations and misrepresentations that demand correction and clarification by Respondents.[1] Enforcement also misstates applicable law in this case. Therefore, Respondents respectfully request that the Court take note of this Surreply by Respondents.[2]

First, as a thematic issue, Enforcement presents completely inconsistent arguments about Gerasimowicz's efforts to seek a return for investors in the SMC bankruptcy by acquiring the various legal claims that the defunct SMC has (and would otherwise let waste) (collectively, the "SMC Litigation"). On the one hand, Enforcement protests that such efforts are "quixotic" (Enforcement really likes that word), which would indicate that such claims are impractical, and thus (in this circumstance) meaningless and harmless to investors. But then in the next breath they protest that investors are not covered by any recovery of these "quixotic" suits. Well, if the suits are "quixotic," logic dictates that they should be of no issue or concern to investors, as they are bound to be fruitless. So, does Enforcement argue that the SMC Litigation is meaningless, or is meaningful? The contradictions abound. In any event, a plan is in place to have investors participate in the recovery, as will be discussed below.

Meanwhile, what really galls are the significant facts that Enforcement either fails to mention or outright misrepresents in its Reply Brief. In no particular order, they are as follows:

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1 Enforcement stated in its May 31, 2013 email to the Court (when it filed its Reply Brief) that the parties "agree" that "there are no factual issues," but that was before Respondents had even seen the Reply Brief, much less digested it.

2 The Court has considered surreplies in other administrative proceedings even where they were not contemplated nor explicitly permitted. *See, e.g.*, *In the Matter of J. Kenneth Alderman, CPA, et al..*, Administrative Proceedings Ruling Release No. 744 at *3, *fnt.* 1 (February 1, 2013).

- Expedited Approval – Who Sought Same - Enforcement states as fact that it was Gerasimowicz who sought expedited approval for the assignment of the SMC Litigation to him, when in fact the motion papers Enforcement presented to this Court clearly show that it was the bankruptcy trustee – and the trustee alone – who did so.[3] (In fact, Gerasimowicz had no legal standing in the bankruptcy proceeding to pursue such expedited treatment.)

- Expedited Approval – Rationale – Enforcement maliciously and (at best) recklessly distorts the rationale behind the expedited approval of the assignment of the SMC Litigation to Gerasimowicz, speculating without a single basis in fact that "the only potential explanation for this is that Gerasimowicz is seeking … the divestment of certain assets, prior to any Order by this Court directing him to pay the Meditron Fund investors he defrauded." In fact, as Enforcement either knew or should have known from its various conversations with the Trustee and others involved in the SMC Litigation, the simple explanation was a statute of limitations concern. Specifically, since the prolonged SMC bankruptcy proceedings have essentially stalled or precluded active prosecution of the SMC Litigation, the Trustee and Gerasimowicz's counsel were in agreement that various statutes of limitation may run on the underlying claims unless the assignment was expeditiously approved. *See* Affirmation of Simos Dimas, Esq., attached hereto as Surreply Exhibit E ("Dimas Affirmation") (esp. par. 11 therein), for further details about that simple, verifiable explanation (for which Enforcement never bothered to seek verification).

- SMC Litigation Defendants – Enforcement blithely dismisses defendants in the SMC Litigation as mere "personnel" and "low-level employees." But it is hard to understand how Enforcement considers essentially all former senior executives of SMC – including its former CEO, several COOs and its former CFO – to be "low-level," and why Enforcement neglects to mention that other defendants in the current and planned lawsuits include several other construction, contracting and electrical companies that (allegedly) conspired in massive and pervasive fraud against SMC – in other words, the exact cause of all the losses for investors (and Respondents) that are at the heart of this present matter. *See* Enforcement's Trial Exhibit 164 for the Verified Complaint in *SMC v. Metrotek, James Cardenas, et al.* (Sup Ct, NY County Dec. 21, 2012). *See also* Dimas Affirmation (esp. par. 3-5, plus referenced exhibit).[4]

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[3] *See* May 13, 2013 Motion by Chapter 7 Trustee in SMC Bankruptcy Action ("Trustee Motion"), attached to Enforcement's Reply Brief as Exhibit 1 – especially par. 28 therein, which states as follows [emphasis added]:

> The Trustee respectfully requests that the Court schedule the hearing seeking approval of the Agreement on shortened notice. The quickest pursuit of these Litigations will create an estate and provide for maximum recovery. These Litigations have effectively been on hold since the case was converted to decided how best to proceed. Rapid approval of the Agreement will now allow Walter to pursue the various claims as set forth above. Lastly, in reaching the Agreement, Walter was concerned that the Agreement had to be approved quickly so he could maximize his recovery. Consequently, the Trustee is moving on shortened notice for approval of the Agreement.

[4] Among other things, the Dimas Affirmation states as follows:

> The majority of individuals named or contemplated to be named in the SMC Litigations were either officers, or key employees with management authority and control sufficient to perpetrate the acts alleged

- Funds for SMC Litigation Assignment – Enforcement recklessly speculates that the $150,000 Gerasimowicz paid to acquire the SMC Litigation "might be among those stolen from investors" when nothing could be further from the truth. Gerasimowicz was fortunate enough to find a lender willing to lend him funds sufficient to prosecute the SMC Litigation. *See* Dimas Affirmation for more details (esp. par. 10), including a copy of the loan.

- Assignment Objection Withdrawn – Enforcement boldly flouts the objection by the Joint Industry Board to the assignment by the trustee of the SMC Litigation to Gerasimowicz, but brazenly omits for this Court's consideration the fact that the Joint Industry Board officially withdrew its detailed objection before the bankruptcy court approved the assignment, which fact occurred one full week before Enforcement filed its Reply Brief and which was set forth by the bankruptcy court on page 1 of its order approving the assignment (a document that was publicly available but that Enforcement conveniently neglected to enclose with its Reply Brief, despite including for the Court's review the Trustee's motion and the Joint Industry Board's objection that preceded the order). *See* Surreply Exhibit F for the May 24, 2013 Order Approving the Assignment Agreement.

- "Life Savings" – Without a single substantiation in the Order or in the exhibits before this Court, Enforcement inexplicably claims that Respondents lost "victims' life savings" in "many instances" and that such investors finances were "devastated." Meanwhile, Enforcement has in its many files in this case (but omitted from its almost 300 trial and brief exhibits) the exact investor questionnaires that the investors reviewed, completed and executed, which documents included representations by such investors as to, among other thing, their accredited investor status and their net worth. In fact, only one individual investor invested as much as $300,000, but every investor clearly indicated they had over $1 million in net worth at the time of their investment. (This is not meant in any way to downplay the seriousness of the losses nor the financial hardships suffered by the investors; rather, it is simply a rebuttal of Enforcement's patently unsubstantiated statement about "many instances" of losses of investors' "life savings.") *See* Surreply Exhibit G for the relevant pages from the investors' questionnaires for the Meditron Fund.

- Timing of SMC Investments – In its disgorgement argument, Enforcement puts focus on Respondents' "significant infusions of their own capital into SMC," stating they did so to "keep[] SMC alive with money stolen from Fund investors." However, such statements misrepresent the facts, which show that Gerasimowicz and MAM invested their own money (or paid SMC expenses directly) fairly concurrent with investor funds. *See* Exhibit 149 from Enforcement's Reply Brief and Exhibit D from Respondents' Response Brief.

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against them. A list of each named or possible defendant and their title or role in SMC is included as Exhibit A hereto. [Par. 5.]

In fact, while Enforcement obviously expended significant efforts in its Reply Brief to protest Gerasimowicz's actions in the SMC bankruptcy for its purported concern for investors' well-being and financial recovery in this matter, it also failed to take the simple step of attending the bankruptcy hearing on these issues that occurred a mere few blocks from Enforcement's offices a week before Enforcement filed its Reply Brief, despite being on notice of such hearing and even calling the Trustee's office several times prior to the hearing to ask some narrow, loaded questions about same. (*See* Dimas Affirmation, par. 13.)

What Enforcement conveniently ignores or downplays are (i) the multitude of meritorious claims that SMC was defrauded, in a number of ways, by a number of trusted officers, directors, employees and business associates and over a significant period of time, and (2) the fact that investors own 95% of SMC while Gerasimowicz (and no other Respondents) own only 5%. Gerasimowicz was (unfortunately) a trusting, hands-off chairman, and it cost him – and more importantly, his investors – dearly. So now, the SMC Litigation is the only viable remaining source of funds for the investors in this matter, and Gerasimowicz is, for all intents and purposes, the only person who could reasonably pursue these claims,[5] and he's trying to do so not just for his benefit, but for that of his investors. Gerasimowicz's plan is to fully repay the investors with the proceeds of the SMC Litigation, taking into account moneys that would be owed his lender for the purchase of the SMC Litigation, his contractual obligations to the SMC estate, any funds payable to the SEC pursuant to this proceeding, and other related obligations and costs.

[5] "…[T]he party acquiring the Litigations is also the party with first-hand knowledge of the facts of the Litigations. Therefore, the chances of a recovery are much greater if the Litigations are pursued by [Gerasimowicz]." Trustee Motion (Exhibit 1 to Enforcement's Reply Brief), par. 20.

II. RELIEF SOUGHT

A. Disgorgement of Meditron Fund Investments in SMC

With its thousands of staff (including scores dedicated to crafting legal arguments in hundreds of securities fraud cases every year) and weeks to research and prepare argument in this matter (twice), Enforcement has still failed to cite a single case on point for its argument that Respondents should disgorge the $2.7 million of investor funds that were invested in SMC.

Enforcement highlights two cases to support its argument that all investor funds lost in this case should be the measure of disgorgement, but neither case is on point. In fact, given the unique fact pattern of this case, it is not clear that any other case is truly on point, thereby leaving the Court to exercise its own considered discretion.

Regarding *SEC v. Thomas James Assoc., Inc.*, 738 F. Supp. 88 (W.D.N.Y. 1990), Enforcement presents that case for the proposition that "violator cannot escape disgorgement simply because 'he is no longer in possession of such funds do to subsequent, unsuccessful investments.'" [Emphasis added.] First, the use of the word "subsequent" clearly distinguishes that case from this one, in that the subject investor funds in this case were found to have directly passed to the company owned 95% by investors (and were never in Respondents' possession nor control), while in *Thomas James*, the defendants possessed cash profits from IPO sales and post-IPO secondary market trades.

Second, Enforcement conveniently and misleadingly truncates its selected quote from the *Thomas James* decision. The full quote is as follows:

> Nor may a securities law violator avoid or diminish his responsibility to return his ill-gotten gains by establishing that he is no longer in possession of such funds due to subsequent, unsuccessful investments or other forms of discretionary spending.

Id. at 95 [emphasis added].

Hence, it is clear from the complete quote that what the court referenced were instances where the violators had possession of the funds and subsequently squandered them. (Actually, such

understanding was already clear from Enforcement's truncated quote, but it is made manifestly clear by the complete quote.) In contrast, Respondents in this case never had such possession nor control of the funds, as the funds were invested into a company (SMC) that then lost the funds due to fraud committed by others unaffiliated with Respondents.

Regarding *SEC v. Inorganic Recycling Corp.*, 2002 WL 1968341, *4 (S.D.N.Y. Aug. 23, 2002), Enforcement presents that case for the proposition that "'to withhold the remedy of disgorgement or penalty simply because a swindler claims that she has already spent the loot and cannot pay would not serve the purposes of the securities laws.'" [Emphasis added.] But again, in that case, defendants diverted over $1 million from a scam offering for their own personal use, including to one defendant's personal checking account. That is a clear example of "ill-gotten gain" for disgorgement analysis purposes, but completely off point here, as Respondents in this case never had possession nor control of the funds (possession and control belonging instead to the officers, directors, employees and affiliates of SMC who embezzled and defrauded the investor-owned company of such funds).

In short, Respondents never had the investor money because it was directly invested into the entity (SMC) that lost it (an entity owned 95% by investors and only 5% by Gerasimowicz, at that). Put another way, the investors owned the money when it was at the Meditron Fund, and owned it again when it was invested in to SMC (where officers, directors, employees and business affiliates had control of such funds and embezzled and defrauded the company of such funds), while Respondents never had possession nor control of such funds sufficient to constitute "ill-gotten gains" subject to disgorgement.[6]

B. Disgorgement of Compensation

In their Response Brief, Respondents have already succinctly set forth the legal and factual rationale regarding the proper calculation for disgorgement of their compensation. Respondents

[6] Respondents respectfully request an offset of any disgorgement ordered in this case against any and all funds Gerasimowicz returns to investors in the SMC Litigation.

respectfully disagree with Enforcement regarding its presentation of deduction of business expenses. Respondents had a thriving investment advisory business separate and apart from the actions at issue here (which business was sold to FNWM – *See* Enforcement Reply Brief Exhibit 3) and had legitimate expenses for it as well as for operation of the Meditron Fund (which was invested in standard investments, as discussed in the Response Brief and which Enforcement does not deny),[7] and the cited case law supports deduction of same.

C. Prejudgment Interest

In their Response Brief, Respondents have already succinctly set forth the legal and factual rationale that argue in favor of no prejudgment interest, which legal basis Enforcement does not contest. Factually, Enforcement would have the Court believe that Respondents (especially their sole owner, Gerasimowicz) maliciously threw investor money side-by-side with its own money into a company that was being defrauded of all such funds by others – a proposition that is completely counterintuitive (and false). In short, Respondents did not act maliciously; rather, they trusted in others who acted maliciously in perpetrating a fraud, and Respondents greatly regret and are remorseful for unknowingly permitting the fraud to continue by their repeated infusions of cash to SMC, which fraud caused significant investment losses not just to investors but to Gerasimowicz, as well.

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); serious disability and ongoing medical problems; and his verifiably 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.

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[7] *See, e.g.*, Enforcement's "demonstrative" Trial Exhibits 261 and 262, which reflect that 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.

discussed above in the context of disgorgement, there was no "pecuniary gain" here for Respondents; thus, those cases are inapplicable here.

Third, Enforcement's reference to *SEC v. Constantin*, 2013 U.S. Dist. LEXIS 49826 (S.D.N.Y. Apr. 2, 2013) is also misplaced, in that that case involved a longstanding scheme by two stockbrokers of a small firm (the firm was essentially them alone) to misappropriate $1.2 million from seven customers over several years with fraudulent claims about fictitious reverse mergers and IPOs and "200 percent" returns in one year, all so that defendants in that case could pocket the proceeds for their own personal use – something that did not happen in this case.

Therefore, as discussed in Respondents' Response Brief, Respondents respectfully submit that it would be inappropriate to impose the maximum third-tier penalties on Respondents, much less a multiple of same. The Order shows that securities fraud was involved and others were seriously harmed, but it has also been established (relevant to his analysis) that Respondents were unjustly enriched a minimal amount, if at all; Gerasimowicz previously filed suit for the benefit of investors and is now prosecuting same; neither Gerasimowicz nor MAM or MMG were ever found by the Commission or any other regulatory body to have previously committed any securities law violations; and given the bar to Gerasimowicz as well as his age, his lifelong medical disabilities and resultant complications and his utterly destroyed finances and career prospects, there is no need to further "deter" him from future violations any 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 remorse, regret and embarrassment 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 in which he put himself and his investors. 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: June 26, 2013
Stamford, Connecticut

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