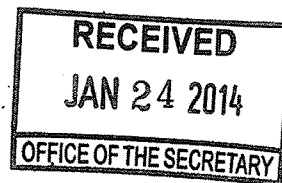


SECURITIES AND EXCHANGE COMMISSION



In the Matter of:

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

ADMINISTRATIVE PROCEEDING
File No. 3-15514

Respondents.

RESPONDENT ANDREW G. GUZZETTI'S
MOTION FOR LEAVE TO FILE SUMMARY DISPOSITION MOTION

Respondent Andrew G. Guzzetti, by and through his attorneys, Sallah Astarita & Cox, LLC, moves, pursuant to Rule 250 of the SEC's Rules of Practice, for leave to file the attached Motion for Summary Disposition of the Division of Enforcement's claims against Mr. Guzzetti.

Considering the Division of Enforcement makes no request for equitable relief as to Mr. Guzzetti in the OIP, nor in its Prehearing Memorandum of law, i.e. the Division's Opening Statement, the causes of action against Mr. Guzzetti "shall not be entertained" pursuant to 28 U.S.C. § 2462 as more than five years have passed since those "claims first accrued." 28 U.S.C.S. § 2462.

As the attached Summary Disposition Motion will show, although Your Honor has previously ruled on Motions for Leave filed by the other Respondents in this matter, the claims against Mr. Guzzetti, specifically the relief requested by the Division, completely alters the analysis that must be conducted. There is no argument that the Division's decision to pursue only

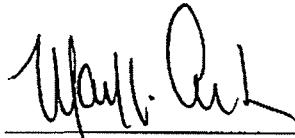
civil penalties against Mr. Guzzetti triggers § 2462 and removes this tribunal's subject matter jurisdiction to "entertain" the Division's claims against Mr. Guzzetti.

Furthermore, Mr. Guzzetti is the only Respondent that is alleged to have had supervisory duties at McGinn Smith & Co., Inc. and the Division's claims against Mr. Guzzetti are dependent on the Division first being able to prove its claims against at least one of the other respondents. As a result, Respondent respectfully requests that if Your Honor does not grant this Motion, that the proceedings be stayed as to Mr. Guzzetti until a conclusion can be reached as to the Division's claims against the other Respondents.

Dated: January 23, 2014

Respectfully submitted,

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Respondents.

ADMINISTRATIVE PROCEEDING

File No. 3-015514

**RESPONDENT ANDREW G. GUZZETTI'S
MOTION FOR SUMMARY DISPOSITION**

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Respondent Andrew G. Guzzetti, by and through his attorneys, Sallah Astarita & Cox, LLC, hereby submits this Motion for Summary Disposition pursuant to Rule 250 of the Securities and Exchange Commission's Rules of Practice.

PRELIMINARY STATEMENT

As a result of the Division of Enforcement's failure to request equitable relief in the OIP, or the Division's Prehearing Memorandum/Opening Statement, the Division's claims against Mr. Guzzetti are barred by 28 U.S.C. § 2462. As a result, this tribunal lacks subject matter jurisdiction to "entertain" this matter. For this reason, and those discussed below, Your Honor must dismiss the claims against Mr. Guzzetti in their entirety.

RELEVANT FACTS

The facts of this matter have been presented and discussed throughout the pleadings and various motions filed in this matter. We will not repeat those facts here. However, there are facts pertaining strictly to this motion that require a more in depth discussion. Mr. Guzzetti is the only respondent in this matter who is alleged to have committed any supervisory violations. *See*, OIP, ¶ 68. Mr. Guzzetti is also the only respondent in this matter that is not accused of making any sales practice violations. *Id.*, ¶¶ 66-67.

In addition to the differences in the claims, the relief requested for the claims against the other Respondents is also significantly different than the relief requested for the claims against Mr. Guzzetti. *Id.*, p. 14. The Division of Enforcement has made the request for equitable relief from all of the other Respondents, including cease and desist orders. However, the Division has not made the same request as to Mr. Guzzetti, limiting its request for relief to "disgorgement and civil penalties." *Id.* Nowhere in the OIP does the Division make any request for injunctive relief against Mr. Guzzetti or request any form of suspension, ban or complete bar. *Id.* The Division

also does not make any request for equitable relief from Mr. Guzzetti in the Division's Prehearing Memorandum of Law. According to Your Honor, the Prehearing Memoranda or Briefs will be used as the parties opening statements in this matter. As will be discussed below, these differences have a drastic effect on the implications of 28 U.S.C. § 2462.

As a result, and for the reasons discussed below, Mr. Guzzetti respectfully requests that all claims against him be dismissed in their entirety.

I. MR. GUZZETTI'S MOTION FOR SUMMARY DISPOSITION SHOULD BE GRANTED BECAUSE THE DIVISION'S FAILURE TO MAKE A CLAIM FOR EQUITABLE RELIEF PREVENTS THE CLAIMS AGAINST HIM FROM BEING "ENTERTAINED" BY THIS TRIBUNAL.

According to 28 U.S.C. § 2462, "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, **SHALL NOT BE ENTERTAINED** unless commenced within five years from the date when the claim first accrued." *See*, 28 U.S.C.S. § 2462 [emphasis added].

As opposed to private plaintiffs, the SEC is not provided with the benefit of the discovery rule where enforcement actions are concerned. *See, Gabelli v. SEC*, 133 S. Ct. 1216, 1222, (U.S. 2013) ("The SEC, for example, is not like an individual victim who relies on apparent injury to learn of a wrong. Rather, a central 'mission' of the Commission is to 'investigat[e] potential violations of the federal securities laws.'). Furthermore, actions are said to "first accrue[]" under § 2462 once the Division "has a complete and present cause of action." *Id.*, at, 1220-21.

Although the Division of enforcement has requested cease and desist orders be issued for the other Respondents, the Division has not made the same request in relation to Mr. Guzzetti. As to Mr. Guzzetti, the relief requested is limited to "disgorgement and civil penalties." However, since the filing of the OIP the Division has confirmed that it is not alleging that Mr.

Guzzetti sold any securities in this action and does not include him with the rest of the Respondents as a "Selling Respondent."

The Division is not basing any of its claims against Mr. Guzzetti on sales practice violations. Instead, the Division's claims against Mr. Guzzetti result from its mistaken belief that Mr. Guzzetti was the supervisor of the other Respondents in the offer or sale of the private placements at issue. Therefore, if the claims against Mr. Guzzetti do not relate to any sales made by him, there are no commissions. If there are no commissions, what is it precisely that the SEC wants Mr. Guzzetti to disgorge . . . his salary? Clearly this would be punitive in nature, not remedial. Therefore, the Division is not actually seeking any disgorgement from him. The only actual relief identified in the request in the OIP is a fine, and this is confirmed in the Division's Prehearing memorandum.

As briefly discussed above, Your Honor has held that the Prehearing Memoranda or Briefs of the parties will serve as the parties' opening statements in this matter. The Second Circuit Court of Appeals has held that "the binding effect of an opening statement within the four corners of a single trial, are . . . well established." *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984). As a result, the Division is limited to the relief requested in the OIP, which was confirmed in its Prehearing Memorandum.

Since there is nothing to disgorge, the Division is only requesting "civil penalties" against Mr. Guzzetti. Therefore, the claims against Mr. Guzzetti are covered by § 2462's 5 year filing period. *See. SEC v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y 2007) (civil monetary penalties are "unquestionably a penalty" under § 2462). Since the OIP was filed on September 23, 2013, no claims that "first accrued" before September 23, 2008 can be "entertained" in this proceeding.

The Division makes the argument that events that occurred prior to September 23, 2013 may come into evidence against the other Respondents to put the transactions in context. While this is contortion, designed to prejudice the other Respondents, the Division makes no such argument as to Mr. Guzzetti.

In the OIP, the Division is making two separate groups of claims against the other Respondents; fraud/misrepresentation claims and registration claims. According to the Division, all allegations contained within the OIP relate to the offer and sale of interests in what the Division is calling the "Four Funds," and two separate trust conduits. The Division has integrated 22 separate trust offerings into two conduits in order to make the claim that the offerings were sold without an effective registration statement or applicable exemption. Piggybacking on this integration argument, the Division alleges that Mr. Guzzetti failed to prevent the other Respondents from violating applicable registration requirements.

As a result of the Division's decision to integrate the trust offerings, all claims related to the registration of the offerings first accrued on the date the first offer was made. Therefore, the Division's time to file any claims related to registration would be five years following the first day that the offering materials were deemed effective.

It is important to remember that § 2462 provides 5 years to file a cause of action from the date the claim "first accrued." According to the OIP, the dates that the alleged registration violations first accrued are as follows:

1. Four Funds
 - a. FIIN – 9/15/2003
 - b. FAIN – 10/1/2005
 - c. FEIN – 1/16/2004

d. TAIN – 11/1/2004

2. TDM Cable Funding Conduit – 11/13/2006

3. McGinn Smith Funding Conduit – 5/19/2007

Therefore, it is clear that the Division's claims against the other Respondents for alleged registration violations related to these transactions are all time barred by § 2462. The Division's time to file these claims was exhausted as early as September 15, 2008 and as late as May 19, 2012. Clearly the Division has failed to file before these cut off dates as the OIP was filed on September 23, 2013. As a result, the Division's claims against Mr. Guzzetti for alleged supervision violations related to the registration of the Four Funds and trust conduits cannot be "entertained" by this tribunal pursuant to § 2462.

In addition, the Division's fraud allegations center on a supposed "redemption policy" that the Division believes was in place at MS & Co. Putting aside that the possibility of redemption limitations was communicated to investors in the offering memoranda, the Division alleges that all of the Respondents in this matter were aware of the alleged "redemption policy" by the end of 2007. As a result, all misrepresentation claims based on the "redemption policy" would first accrue at the moment the first sale was made by the Respondents following their learning of the "redemption policy."

Giving the Division the benefit of the doubt by assuming no sale was made for over 6 months, if the first sales following the disclosure of the "redemption policy" occurred in June of 2008 the OIP still would need to have been filed by June 2013, a full three months before it was actually filed. As a result, all of the claims against Mr. Guzzetti based on alleged misrepresentations by the other Respondents are time barred by § 2462 and also cannot be "entertained."

The fact that the Division has made a claim for equitable relief as to the other Respondents but not Mr. Guzzetti, completely changes the § 2462 analysis that needs to be conducted. It is well settled that where there is no claim for equitable relief, § 2462 applies. As a result, the claims against Mr. Guzzetti are time barred, and this Motion for Summary Disposition should be granted.

II. IF THIS MATTER IS ALLOWED TO GO FORWARD, THE DIVISION SHOULD BE LIMITED TO PRESENTING EVIDENCE RELATED TO FACTS AND TRANSACTIONS OCCURRING AFTER SEPTEMBER 23, 2008.

If this proceeding is allowed to continue against Mr. Guzzetti, despite the clear limitations present in § 2462, the Division should be limited to presenting evidence related to facts and transactions occurring after September 23, 2008. The parties are in agreement that there is a 5 year statute of limitations in this matter. See, 28 U.S.C.S § 2462; *see also, Gabelli v. SEC*, 133 U.S. 1216, 1219 (2013). As a result, if the claims against Mr. Guzzetti are allowed to move forward, no evidence of any transactions occurring prior to September 23, 2008 should be presented at the proceedings.

III. IN THE ALTERNATIVE, IF THIS MATTER IS ALLOWED TO CONTINUE AGAINST MR. GUZZETTI THE PROCEEDINGS SHOULD BE STAYED UNTIL A CONCLUSION HAS BEEN REACHED AS TO THE CLAIMS AGAINST THE OTHER RESPONDENTS.

Although based on the same private placements, the differences between the claims against Mr. Guzzetti and the claims against the other Respondents will result in such an unwieldy proceeding that your honor should stay the proceedings until a conclusion is reached as to the claims against the other Respondents.

The manner in which the Division has chosen to pursue this case has led to two separate cases being tried as one. The other Respondents are alleged to have committed sales practice and

registration violations. On the other hand, Mr. Guzzetti is alleged to have failed to prevent these violations.

As a result, the Division must be successful on its claims against the other Respondents before Mr. Guzzetti can be found to have committed any supervisory violations. Without an underlying violation, there can be no failure to supervise. Implicitly, the Division has conceded that they are really pursuing two separate cases.

According to the order of witnesses provided by the Division, at Your Honor's request, the Division will not be calling Mr. Guzzetti until it has concluded calling all of the other Respondents. As a result, Mr. Guzzetti will be required to expend significant time and money to participate in days or weeks of hearings before the Division even begins its case against him.

For the reasons below, if this matter is not dismissed, the proceedings should be stayed as to the claims against Mr. Guzzetti, pending the conclusion of the Division's claims against the other Respondents.

A. The Claims Against Mr. Guzzetti and the Other Respondents Arise Out of Separate Occurrences or Transactions.

Although the claims against all Respondents are related to the 26 private placements at the heart of this matter, the occurrences giving rise to the claims against Mr. Guzzetti are quite different than those giving rise to the claims against the other Respondents. The allegations against Mr. Guzzetti are based on the Division of Enforcement's erroneous belief that Mr. Guzzetti was responsible for supervising the other Respondents' offer and sale of the 26 different private placements involved in this matter. Therefore, the occurrence giving rise to the claim against Mr. Guzzetti would have to be some action he took, or did not take, as a result of information he knew or should have known, in relation to his alleged supervisory duties.

On the other hand, the allegations against the other Respondents in this matter are related to the actual offer and/or sale of the private placements at issue. As a result, the Division's claims against the other Respondents arise out of specific interactions that each had with their clients, whether that client was accredited or unaccredited, the due diligence review of the product that was conducted, etc.

Despite the similarities, the transactions and occurrences giving rise to the claims against Mr. Guzzetti are different than the transactions and occurrences giving rise to the claims against the other Respondents.

B. The Allegations Against Mr. Guzzetti Present Different Questions of Law and Fact Than the Allegations Against the Other Respondents.

The OIP itself makes the differences in the law abundantly clear when it describes the allegations against the Respondents. Mr. Guzzetti is alleged to have violated Section 15(b)(6) of the Exchange Act. *See*, OIP, at ¶ 68. While the other Respondents are alleged to have violated Sections 5 and 17 of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act, as well as Rule 10b-5, promulgated thereunder. *See*, OIP, at ¶¶ 66-67. One is concerned with supervisory action, while the others are designed to prevent fraudulent sales to investors. Any argument that the laws at issue in the claims against Mr. Guzzetti and those against the other Respondents are the same is disingenuous at best.

As a result of the above differences in the law, and that the claims arise from different transactions or occurrences, the relevant facts are quite different as well. The facts relevant to the claims against Mr. Guzzetti will be related to his supervisory duties. For example, which individuals did he supervise, when did he supervise them, and what transactions were a part of Mr. Guzzetti's duties.

On the other hand, the conversations the other Respondents had with their clients, their investigation of the private placements, and any potential red flags will comprise the relevant facts related to the Division's claims against the other Respondents.

This is not to say that there won't be some overlap in the relevant facts at issue. Clearly, the claims against Mr. Guzzetti and the other Respondents both involve the same private placements and the same brokerage firm. However, it cannot be said that the most salient facts related to the claims against Mr. Guzzetti and the claims against the other Respondents are the same.

C. Judicial Economy Would Be Better Served by Granting A Stay.

Considering the number of Respondents, the 10 million pages of documents produced by the Division of Enforcement, the thousands of premarked exhibits identified by the parties, the numerous witnesses that will be called during this matter, and the completely different law and facts at issue in this matter, judicial economy would be better served by staying these proceedings as to Mr. Guzzetti.

As discussed above, in order for the Division to be successful in its claims against Mr. Guzzetti the proceedings will have to take a dual track. To make a claim against Mr. Guzzetti, the Division must first prove that one of the other Respondents is in violation of the statues cited in the OIP. Only after the allegations against the other Respondents have been proven or disproven, can the case against Mr. Guzzetti proceed. If not, every allegation against Mr. Guzzetti will be made based on an unproven allegation against one of the other Respondents.

According to the witness list provided by the Division, 24 of the 57 witnesses identified will provide no testimony related to the claims against Mr. Guzzetti. These 24 individuals have been identified as clients of the other Respondents and will be offering testimony as to their

discussions with their individual broker. None of the testimony offered by these 24 individuals is likely to relate to the supervisory claims against Mr. Guzzetti at all.

In addition, almost all of the other witnesses will offer testimony as to a broker's duty to investigate, the use of the funds of the offering, the development and creation of the offerings, as well as other topics that have absolutely no bearing on the claims against Mr. Guzzetti. After reviewing the witness list, not a single witness is identified as offering testimony against Mr. Guzzetti alone. In fact, it appears that only 1 non-party witness, the Division's expert, will provide any testimony related to Mr. Guzzetti's supervisory duties.

Furthermore, although we have full confidence in Your Honor's ability to do so, the trier of fact should not have to separate and parse which of the thousands of exhibits, hundreds of witnesses, and/or evidence are offered in relation to claims against Mr. Guzzetti, and which are offered in relation to claims against the other Respondents. If Your Honor does not grant this stay, it will result in an unwieldy proceeding where two separate cases are presented and argued at once. Staying these proceedings as to Mr. Guzzetti would streamline the process and possibly reduce the total time needed for both trials, as the need to delineate between exhibits, witnesses, and evidence will not exist.

D. The Division Will Not Suffer Any Prejudice if This Matter is Stayed.

In the matter at hand, the Division of Enforcement will suffer minimal or no prejudice should the proceedings be stayed. Much of the cost of this matter has already been absorbed by Mr. Guzzetti and the Division. Documents, witness lists, and exhibit lists have already been exchanged and can be used with little updating in the separate proceeding. As a result, any prejudice suffered by the Division would be minimal, and this proceeding should be stayed.

E. The Claims Against Mr. Guzzetti Will Require Different Witnesses and Evidence Than The Claims Against the Other Respondents.

In addition to all of the differences that have been previously discussed, the Claims against Mr. Guzzetti will also require the testimony of different witnesses, as well as presentation of different evidence, than the claims against the Other Respondents.

In its case against the other Respondents, the Division will be required to present evidence relating to specific conversations these other Respondents had with their clients, the investigatory obligations required of brokers, the due diligence conducted by these Respondents, when they became aware of the alleged red-flags discussed in the OIP, as well as other areas that may be of interest. Naturally, the witnesses that will be called to provide testimony against the other Respondents will be the clients of these other Respondents and experts regarding a broker's due diligence obligations.

On the other hand, in its case against Mr. Guzzetti, assuming *arguendo* a violation by one of the other Respondents has already been proven, the Division will be required to present evidence related to the supervisory structure of MS & Co., as well as the specific supervisory responsibilities of Mr. Guzzetti. Witnesses will be required to testify as to what Mr. Guzzetti either did or did not do in relation to the execution of his duties. In addition, experts will be required to testify as to the obligations of Mr. Guzzetti and whether, in the experts' opinions, he met those obligations.

As a result, it is clear that both the witnesses and evidence presented against Mr. Guzzetti will be drastically different than the witnesses and evidence that will be presented against the other Respondents.

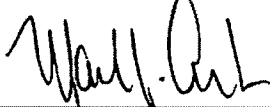
CONCLUSION

For the reasons stated herein, Respondent Andrew G. Guzzetti respectfully requests that this Motion to Sever be granted in its entirety, as well as all other relief deemed just and proper.

Dated: January 23, 2014
Verona, NJ

Respectfully submitted,

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