UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of:

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

Respondents

JUDGE BRENDA P. MURRAY

POST-HEARING BRIEF OF WILLIAM P. GAMELLO

William Gamello, entered the securities industry in 1987. For over twenty five years he has serviced retail clients without being subject to a complaint or regulatory inquiry until the present matter. He has faithfully recommended that his clients purchase balanced portfolios of quality securities.

As the government's case made clear, only about 10% of Mr. Gamello's business at McGinn Smith & Co. was in the "private placements" at issue in this matter. Similarly, clients who invested in private placements were generally advised to limit their private placement exposure to 10% of their portfolios by Mr. Gamello. Mr. Gamello utilized private placements clients for diversification purposes in the "Alternative Investment" asset class. Lost in the tenor of the trial is the fact, testified to by Mr. Gamello and others, that McGinn Smith & Co. had an excellent regional reputation for excellent results in their private placement products.

Two sets of securities are involved in this case. The so called "funds", FAIN, TAIN, FEIN and FIIN were the first group of relevant private placements. They were blind pools purporting to use the money raised to invest in private and public debt instruments. When Mr. Gamello arrived at McGinn Smith & Co three of the Four Fund deals had been offered and closed. Successful financial results were being reported by the entities. The Four Funds were put together by Dave Smith whose reputation in the Albany area was a major factor for the excellent local reputation McGinn Smith & Co. had in the private placement area. As was testified to by Mr. Gamello, he had incidental sales in the first three of the Four Funds, and each of those sales was an unsolicited secondary market transaction. Clients already aware of McGinn Smith & Co.'s reputation in the Albany area sought out participation in those earlier deals based upon their own knowledge.

Mr. Gamello did sell units of the fourth fund. The staff contends he was obligated to do independent due diligence before selling the fund. However, they have failed to put forth what Mr. Gamello was supposed to do. The fund was being run by an experienced manager with an excellent reputation. Three prior funds were reporting excellent results in their audited financials. The fourth, which Mr. Gamello sold, was a classic blind pool. The offering circular described the type of investments the manager had historically made, but no specific investments had been selected prior to funding.

Even after the trial it is totally unclear how the government feels Mr. Gamello could have done additional due diligence. He knew the manager had a fine reputation, and he knew the audited financials were favorable on the previous three deals. Surely, the Staff does not contend that Mr. Gamello should have repeated the audit or that he even had any ability to do so. The investment was a blind pool. Inherent in blind pools is that there was nothing which could be checked in due diligence.

Of course, all the above is predicated on the thought that Mr. Gamello had some obligation to conduct independent due diligence. We join in the chorus of protest expressed by the defense as to this concept. It is clear to anyone who has spent time in the industry that this is not the case. The government was unable to cite reported examples of this theory being applied. However, if it were reality, the landscape would be littered by civil and regulatory cases based on this theory. However, we are left with the *Hanley* case, a classic outlier. The Staff's expert was unable to cite a case in which he had actually pursued this theory despite more than twenty years of examination experience.

Mr. Gamello received an e-mail from Mr. Guzzetti in December 2007, which dealt with potential replacement of a fund to facilitate a sale. The government contends that should have been a red flag. Mr. Gamello testified that he did not view it as such and never understood there to be a required redemption policy. Contrary to the Staff's allegations, the Proposed Findings of Fact and Conclusions of Law of the Division of Enforcement, do not support the proposition that Mr. Gamello was aware of or participated in the alleged "Redemption Policy". The Staff merely points to the statements of third parties, about which Mr. Gamello was not questioned. In fact Gamello had two funds in 2008 which were paid without request for redemption. More important, perhaps, is to examine his conduct after the receipt of the e-mail. He made only two fund sales after the e-mail. One was a $25,000 sale to an existing unit holder, and the other was a $75,000 sale to his mother-in-law. We trust the court will be satisfied that these sales are a reflection of Mr. Gamello's judgment, however wrong, that the investment was a desirable one, and that his actions were in the best of faith. One doesn't select his mother-in-law as the buyer of what one perceives is an unfavorable investment. It is on this thin reed that the government seeks to bar Mr. Gamello from the industry. We argue to the court the lack of justice in the proposition that in a unblemished 25 year career the fact that a registered representative made a good faith error as to the merits of an investment should not result in his bar from the industry.

Turning to the "trusts," Mr. Gamello did have sales. Again these were not the central part of his business and he saw to it that his client's portfolio remained diversified. The trusts were managed by Tim McGinn as opposed to David Smith. McGinn had left McGinn Smith & Co. for several years to run the country's largest alarm monitoring company.

The trusts did have disclosed agreements primarily in receivables from "Triple Play" agreements with certain communities. ("Triple play" is used to convey a bundled homeowners service of telephone, cable and internet services).

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There was no practical way for an individual broker to verify the credit worthiness or desirability of those contracts. None of the government's alleged "red flags" relevant to the Four Funds have any applicability to the Trusts. Once again the individual broker had neither the ability, opportunity or obligation to attempt to verify the truth of the underwriter's representations as to the underlying financials.

The government, almost conceding that point, argues a broker should never sell a deal in which the due diligence is done solely by the underwriter. It argues, in effect, that strict liability is imposed on the individual selling representative if an offering proved to be flawed or fraudulent. They, in effect, argue that the selling individual broker is an insurer of wrongdoing of which he was unaware. The position is that the offering circulars' notice to buyers of the underwriters conflict of interest is irrelevant. That position is founded in the argument that no one reads disclosures or risk warnings and the risk falls solely on the selling individual broker. This is not the law. Rather, the "bespeaks caution" doctrine, a matter of settled law, is contrary to that position. It imposes duties upon the buyer to read disclosures and to bar recovery based on disclosed risks. This is particularly true when recovery is sought against an individual broker who is equally without fault or knowledge. If the government seeks to impose strict liability against a selling individual registered representative when there is a disclosed risk in an offering circular it should do so by rule or bar the sale of private placements that depend on underwriters for their due diligence. The government's requested penalty is totally unwarranted. Five year bars, and Level 3 penalties are normally used for persons who have consciously gone out of their way to harm clients. Here, it is clear that Mr. Gamello was lacking in evil intent. As far as the division's purported "Red Flags" as alleged in the OIP and during the hearing. The bulk surround the pre-2003 alarm offerings, IASG IPO and the first launch of the "Funds" in 2003, all of which occurred well prior to Mr. Gamello's employment with McGinn Smith. During his tenor at McGinn Smith & Co. the division has produced no evidence to show that Mr. Gamello was subject to any "Blackout" of information or was ever denied any information. The January 8th, 2008 meeting which also is a purported "Red Flag" was not attended by Mr. Gamello, nor was he even aware of it until the hearing. Mr. Gamello, also had no involvement in Alset that was covered so heavily in the hearing.

Your honor was present for his testimony. We believe his testimony demonstrates he should receive a defense finding. The court should, however, if it chooses to find against Mr. Gamello adjust any penalty to reflect his good faith attempt to do the right things.

There is no suggestion in this matter that Mr. Gamello acted with ill intent. The government funds its scienter claim in alleged recklessness. That is not the case. Mr. Gamello believed certain McGinn Smith & Co. statements were true when they were not The people who perpetrated the lies have gone to jail. However, it is not reckless to rely on the statements made by registered broker-dealer, or to rely on audited financials. Nevertheless Mr. Gamello still limited his recommendations to approximately 10% of suitable clients' portfolios. He was not a broker out to build his career on having risky private placements. Rather he is who he came across to be. A moderately successful broker who was obsessed about diversification of investment vehicles. He devoted approximately 10% of his clients portfolio's to the investments in question in the full belief they were meritorious. No customer has filed a complaint against him to this date presumably because overall their portfolios are profitable and they believe he dealt with them in a straight forward manner.

Mr. Gamello, unlike many of the other defendants, was fired by his new employer. He is on the verge of depleting his modest savings. His 401K is about to be exhausted which will leave him unable to make required child support payments. He is unable to pay his attorney. His wife, a mid-level manager of a Retirement community, is now the primary support of his family.

We continue to urge the Court to find totally in favor of Mr. Gamello. We also join in the point eloquently raised by others to argue that a five year statute of limitations applies to any concept of discouragement (though we continue to maintain disgorgement is not warranted). We particularly ask to the court to focus on the totally unwarranted penalties the government seeks. To argue that a man with a twenty five year unblemished record should be barred from the business for not discovering a fraud that deceived the regulators, as well as him, is truly unwarranted. Bars from the industry are a penalty that should he reserved for conscious wrong doers, not a decent man like Mr. Gamello, against whom there is no showing of conscious wrongdoing.

Similarly Level 3 penalties are not to be imposed upon well-meaning people who failed to discover a well-hidden and elaborate fraud. They are by statute reserved for the most flagrant intentional wrongdoers.

We ask the Court to reflect upon Mr. Gamello's conduct and testimony. We ask that the Court do the right thing to protect the public as well as to reflect upon the impact of your ruling on the life of a good well-meaning man whose only fault was to fail to discover a fraud he had nothing to do with perpetrating.

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