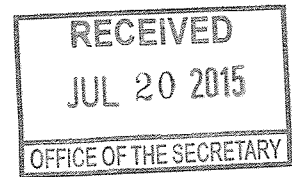


SECURITIES AND EXCHANGE COMMISSION



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,

Respondents.

ADMINISTRATIVE PROCEEDING

File No. 3-015514

**RESPONDENT ANDREW G. GUZZETTI'S
INDIVIDUAL BRIEF IN SUPPORT OF HIS PETITION FOR REVIEW**

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INTRODUCTION

Respondent Andrew G. Guzzetti, by and through his attorneys, hereby submits this Individual Brief in Support of his Petition for Review of the Administrative Law Judge's (ALJ) Decision, made final on June 17, 2015. For the reasons stated herein, the ALJ's Decision should be reversed and all charges against Mr. Guzzetti should be dismissed.

STATEMENT OF FACTS

In late 2004, Guzzetti was contacted by McGinn Smith & Co. ("MS & Co.") because the firm was interested in building its retail wealth management business. (*Tr. 4593:20-4954:18*). Specifically, the goal of MS & Co. was to transition its financial consultants from a commission, or transactional, based structure, to a fee based, or account management, approach. (*Tr. 4598:11-4599:6*). However, after joining the firm, Guzzetti, along, with Brian Mayer, spent over a year locating a clearing firm with the appropriate platform to handle the firms new fee based structure. (*Tr. 4601:4-4604:9*).

Guzzetti also spent time recruiting and training MS & Co. brokers. (*Tr. 4606:11-4607:16*). Throughout most of 2006 and 2007, a significant portion of Guzzetti's time was spent developing an innovative investment program for baby-boomers nearing retirement, including both post-retirement career and investment planning called the My Way program. (*Tr. 4607:17-4612:6*).

At no point during his time with MS & Co. was Guzzetti ever responsible for the supervision of investments in private placements, including those involved in this matter. (*Tr. 3227:7-3229:3, 4606:6-10*). Guzzetti was not involved in the creation of what the Division refers to as the Four Funds or Trusts. (*Tr. 3227:7-3229:3*). Guzzetti was not responsible for presenting

these investments to the Selling Respondents and had no role in selecting the investments in any of the 25 plus offerings involved in this matter.¹ (*Tr.* 4632:21-4634:12).

As it pertains to the Four Funds and Trusts, Guzzetti's only role was to act as a conduit, passing information about the offerings from the firm's owners and supervisors David Smith and Timothy McGinn to the brokers at the firm. (*Tr.* 3227:4-3229:3, 4606:6-10, 4630:16-4631:16, 4632:21-4634:12). In addition, Guzzetti would also pass on any inquiries he received from the brokers about the Four Funds and Trusts to Smith or McGinn, depending on the investment at issue. (*Id.*) Guzzetti was not responsible for reviewing or approving customer investments or the subscription agreements in the offerings at issue. (*Tr.* 3227:7-3229:3).

Although Guzzetti became the office manager of MS & Co.'s Clifton Park, New York office in October of 2008, supervision of sales in the private placements at issue remained the responsibility of either David Smith or Timothy McGinn, depending on the offering involved. (*Tr.* 3225:7-10, 3227:7-3229:3).

At the hearing, the Division alleged that Guzzetti was aware of a number of "red flags" and failed to "put in place procedures that would have detected and prevented [] unlawful conduct" allegedly committed by the Selling Respondents. Division of Enforcement's Prehearing Memorandum ("DOE Opening Statement"), at 24.² However, the implementation of such procedures was well beyond the duties, responsibilities, and authority of Guzzetti while he was employed by MS & Co. Furthermore, there is no applicable securities rule or regulation requiring an individual in Guzzetti's position to implement such a procedure. (*Tr.* 3223:16-3229:3). To the

¹ Selling Respondents include Donald J. Anthony, Frank H. Chiappone, Richard D. Feldmann, William P. Gamello, William F. Lex, Thomas E. Livingston, Brian T. Mayer, Philip S. Rabinovich and Ryan C. Rogers; not Guzzetti. Division of Enforcement's Prehearing Memorandum ("DOE Opening Statement"), at 2; Division of Enforcement's Post-Hearing Brief, at 1.

² Pursuant to the ALJ's ruling, each party was to submit a Prehearing Brief or Memoranda as that parties opening statement in this matter.

extent that the ALJ relied on such an accusation as a basis for finding that Guzzetti was a supervisor of the transactions at issue, such reliance was made in error and the Decision should be reversed.

Prior to the institution of these proceedings, Guzzetti had no disciplinary or regulatory history and continues to maintain a stellar reputation in the securities industry. (*Tr. 4594:19-4595:2*); (*See also, Division Exhibit ("Div. Ex.") 481; Tr. 4587:3-19; Tr. 4588:18-4590:2*).

For the reasons that follow, the evidence accepted by the Court during the hearing in this matter shows that throughout his time with MS & Co. Guzzetti was not responsible for supervising sales of the private placements at issue in this matter. As a result, the Court's decision in this matter should be reversed and all charges against Guzzetti should be dismissed.

ARGUMENT

I. RESPONDENTS' JOINT BRIEF.

As addressed in the Respondents' Joint Brief, Guzzetti objects to the Commission's *sua sponte* decision requiring the Respondents to file a Joint Brief together, as well as the arbitrary limitation on the parties' Individual Briefs to less than what is provided under the Commission's Rules of Practice.

Although addressed in the Joint Brief, there are a few issues which should be discussed briefly herein as well. Guzzetti and the other Respondents were denied their Constitutional rights to have this matter heard by a jury and presided over by an independent Article III judge, as well as denied equal protection under the law and their due process rights. The Respondents were discriminated against throughout this process and were forced to present their case to an ALJ who, as will be discussed below, had decided this case before the first day of the hearing.

Furthermore, the evidence presented by the Division and relied on by the ALJ was beyond the scope of the applicable statute of limitations and this matter should not have been entertained.

Most egregiously, the ALJ applied incorrect legal standards to the Division's alleged fraud claim and inappropriately expanded the holding of *Hanly v. SEC*, 415 F.2d 589 (2d Cir. 1969), and other cases cited in the Decision. Finally, the ALJ misconstrued and misunderstood a number of alleged "red flags" in formulating her decision.

For the reasons stated in the Respondent's Joint Brief, as well as those stated below, Guzzetti respectfully requests that the ALJ's Decision be reversed and the charges against him be dismissed in their entirety.

II. THE DIVISION DID NOT MAKE A REQUEST FOR EQUITABLE RELIEF AGAINST GUZZETTI AND THEREFORE, THE ALJ ERRED WHEN SHE SUSPENDED MR. GUZZETTI FROM THE INDUSTRY FOR A YEAR.

The ALJ overlooked, or ignored, the fact that the Division did not request a suspension or bar for Guzzetti in the Order Instituting Proceedings ("OIP") or its opening statement (its prehearing brief). The Division's only request for relief in the OIP and opening statement was a civil penalty and not a suspension. 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 ALJ erred in suspending Guzzetti.

The ALJ failed to recognize a key distinction regarding this issue. In her decision, the ALJ confines her discussion to the Division's prehearing brief (its opening statement). However, the objection was that the Division did not seek equitable relief in either the OIP or its opening statement; i.e. a suspension of Guzzetti was never requested. As a result, it was an error for the ALJ to suspend Mr. Guzzetti. Therefore the ALJ's decision to do so should be reversed and all charges against Guzzetti should be dismissed.

III. GUZZETTI DID NOT RECEIVE A FAIR HEARING.

As is thoroughly discussed in the Respondents Joint Brief, a number of the actions of the ALJ, the Division, and the Commission have acted to deprive Respondents of their constitutional rights and the ability to have a fair trial. In addition to the reference in the Joint Brief to the ALJ's refusal to "second guess" the conclusions of the Commission in the OIP, there is additional evidence that the ALJ had accepted the Commission's version of the case prior to the start of the hearing.

On the very first day of the hearing, while discussing an Exhibit offered by the Division, the ALJ asked the Division's witness if she handled Guzzetti differently when preparing Div. Ex. 4 because Guzzetti "was a supervisor." (*Tr. 315:11-13*). Before the hearing had even begun the ALJ had already decided that Guzzetti was in fact a supervisor. As a result, the next three weeks of hearing were not about the Division meeting its burden of showing that Guzzetti was responsible for supervising the transactions at issue, but rather whether Guzzetti could convince the ALJ that her belief that Guzzetti "was a supervisor" was incorrect. This is completely inappropriate.

In addition to the Constitutional violations referenced in the Joint brief and the denial of the Respondents due process rights, the ALJ herself had already determined before the start of the hearing that Guzzetti was a supervisor. As a result, Guzzetti was denied a fair hearing and the ALJ's decision should be reversed and all charges against Guzzetti should be dismissed.

IV. THERE CAN BE NO SUPERVISORY VIOLATION IF THE SELLING RESPONDENTS DID NOT COMMIT AN UNDERLYING VIOLATION.

In the OIP the Division alleges that Guzzetti failed to adequately supervise the activities of the 9 Selling Respondents, located in multiple offices in three states. To successfully make a claim under Section 15(b)(6)(A)(i) of the Securities Exchange Act of 1934 ("Exchange Act"), incorporating by reference Section 15(b)(4)(E), the Division had the burden of "showing that under

all of the circumstances, [Guzzetti] failed to exercise reasonable supervision.” (*In the Matter of Arthur James Huff*, 1991 SEC LEXIS 551, 5-6, 50 S.E.C. 524, 526 (S.E.C. 1991)). Section 14(b)(4)(E) also “provides that no person shall be deemed to ‘have failed to reasonably supervise any other person’ if that person ‘reasonably discharged the duties and obligations incumbent upon him by reason of [his firm’s] procedures.’” (*Id.*)

Therefore, according to the language of the statutes at issue in this matter, Guzzetti cannot be found to have failed in his duty to supervise without 1) a violation by an individual subject to Guzzetti’s supervision *and* 2) the firm’s procedures vesting him with the duty to supervise such activity.

For the reasons described in the Respondents Joint Brief, as well as the Selling Respondents’ individual briefs, the Selling Respondents did not commit any violation upon which a supervision violation against Guzzetti can be found. Furthermore, as will be discussed in more depth below, MS & Co.’s written procedures did not vest Guzzetti with the responsibility for supervising the sales at issue in this case.

Therefore, the ALJ’s decision finding Guzzetti guilty of supervisory violations should be reversed and all charges against Guzzetti should be dismissed.

V. MR. GUZZETTI WAS NOT RESPONSIBLE FOR SUPERVISING THE TRANSACTIONS AT ISSUE.

A. Legal Standard.

As noted in the ALJ’s decision, no person is deemed to have failed to reasonably supervise any other person if:

- (i) There have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by any such person; and

- (ii) Such person has reasonably discharged his duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe such procedures and system were not being complied with.

(15 U.S.C. § 78o(b)(4)(E)).

In order to prove that Guzzetti was a supervisor of the transactions at issue the Division would have needed to show that either 1) there was no system of procedures which would reasonably be expected to detect or prevent violations of the securities laws in place at MS & Co., or 2) that although there was a system, Guzzetti failed to discharge his duties and obligations pursuant to such procedures or system without a reasonable basis for believing the procedures and system were being complied with.

As will be discussed in greater depth below, the evidence admitted and testimony given at the hearing established that there was a system of procedures which were reasonably designed to detect violations of the securities laws in place at MS & Co. In addition, the evidence and testimony also establishes that Guzzetti discharged all of his duties under those procedures and had no reasonable cause to believe that the procedures were not being complied with in relation to the transactions at issue.

Simply put, the Division failed to meet its burden. The Division presented no evidence that Guzzetti was tasked with the responsibility of supervising the transactions at issue. In fact, evidence showing the exact opposite was offered and admitted into evidence in the form of the 2007 and 2008 Supervisory Compliance Manuals.

B. The ALJ Ignored The Testimony Of Multiple Witnesses Regarding The Supervisory Responsibilities Of Guzzetti.

The ALJ overlooked, discounted, or ignored the testimony of Guzzetti, Lex, Gamello, and Mayer that David L. Smith was responsible for supervising the transactions at issue. (*Tr. 1620:24-1621:4 (Lex; testified that Guzzetti was not his supervisor); Tr. 1736:24-1738:16 (Gamello;*

identified Guzzetti as one of many supervisors but that he did not know his exact role); Tr. 3247:21-3248:19; 3255:22-3256:12 (Mayer; identifies himself as having certain supervisory responsibilities, identifies David Smith as supervisor for the private placements at issue in this case, and states that he did not report to Guzzetti); Tr. 4629:5-11 (Guzzetti; identified Mr. Smith as supervisor of the transactions at issue); Tr. 3675:8-11 (Rodgers; testified that he reported to Brian Mayer). In fact, no witness identified Guzzetti alone as their supervisor. The testimony of the Respondents was merely that Guzzetti was *A* supervisor, not *THE* supervisor when it came to the offerings at issue; a rather large distinction.

Furthermore, the ALJ ignored the uncontroverted testimony of Guzzetti's expert witness Kevin Carreno. Mr. Carreno is currently a FINRA Board of Governors Member and testified that the responsibilities of Mr. Guzzetti are those belonging to a sales manager. (*Ex. AG-71, at 5; Tr. 4808:19-4809:7*). The Division did not challenge the finding of Mr. Carreno's expert report that "[a] sales manager is not a supervisory role in the ordinary use and custom of the retail brokerage industry." (*Ex. AG-71, at 5*). Mr. Carreno's report further states that a sales manager's main role and function is to "disseminate information about the markets, particular stocks that are being followed by the firm, and firm products that are available for the sales force." (*Id.*) This is exactly what Guzzetti did through his emails, which are referenced throughout the Decision.

In October of 2008, Mr. Guzzetti became the branch office manager for the Clifton Park, New York Office. (*Tr. 4626:24-4627:4*). When asked if he was approving sales in the private placements at issue after becoming the branch office manager at Clifton Park, Mr. Guzzetti testified "[n]o. Actually no one did other than David Smith." (*Tr. 4629:5-11*). Mr. Guzzetti also testified that sales of the private placements at issue in the New York office and those made by outside RRs, such as Mr. Lex, were approved by Mr. Smith as well. (*Tr. 4629:12-21*).

Mr. Guzzetti also testified that his morning emails were sent in his role as a sales manager, which was supported by the testimony of Mr. Carreno referenced above. (*Tr. 4630:16-4631:16*). Mr. Smith and others would ask Mr. Guzzetti to pass on information to the brokers, or vice versa. (*Tr. 4631:4-4631:16*). When asked about his involvement in the Four Funds, Mr. Guzzetti testified that he would attend the sales meetings introducing the Four Funds to the brokers, and if the brokers had any questions he “would relay it up to Dave Smith or ask Dave to get on one of our calls . . . because Dave ran the funds.” (*Tr. 4632:21-4633:18*). His involvement was the same as to the Trusts, with the exception that questions related to the trust would be directed at Tim McGinn, as he managed the Trusts. (*Tr. 4633:11-18*).

The duties and responsibilities described above represent the limit of Mr. Guzzetti’s role at the firm; that of a sales manager. This is also supported by the compliance manuals that were in place at the time of his employment. Mr. Guzzetti was never responsible for supervising the transactions at issue and the ALJ’s decision should be reversed and all charges against Guzzetti should be dismissed.

C. The Supervisory Compliance Manuals Prove That Guzzetti Was Not The Supervisor For The Transactions at Issue.

The expert witness for both the Division and Guzzetti stated that the first place to start when conducting analysis of a firm supervision is the supervisory or compliance manuals. (*Tr. 1154:14-18, 1154:24-1155:4, 4832:13-20*).

Pursuant to the language of the 2007 MS & Co. Supervisory Compliance Manual (“2007 SCM”) “[a]ll brokers in the NYC office [were] under Brian Mayer's direct supervision," and Brian Mayer was "under David L. Smith's supervision." (*Ex. AG-2, at 46*). At the same time, "[a]ll brokers in the Clifton Park office [were] under Carl Nicolosi's direct supervision," who was also

under David L. Smith's direct supervision. (*Id.*) The 2007 SCM also states that “[a]ll Non-NYC brokers are under David L. Smith’s direct supervision.” (*Id.*)

In an effort to avoid the clear language of the SCM described above, the Division focused on a section of the 2007 SCM entitled “Supervision of Off-Site Personnel” which states that “Andy Guzzetti, as Managing Director – Private Client Group, is directly responsible for all outside RR’s.” (*Id.* at 37). However, the very same document also clearly states that “[a]ll Non-NYC brokers are under David L. Smith’s direct supervision,” which would include all off-site personnel, creating a rather large discrepancy which was left unaddressed by the ALJ’s Decision. (*Id.* at 46).

The only specific responsibility delegated to Mr. Guzzetti in this section, that isn’t directly contradicted by another portion of the SCM, was “for communications and distribution of sales material to all outside RRs.” (*Id.* at 37). Although this section includes language regarding securities transactions made by outside RRs, it does not delegate that duty to Mr. Guzzetti, and establishes that he is a sales manager, not a supervisor. (*Id.*)

Furthermore, this section states that “[i]t is up to the compliance officer to ensure that these RRs are current in their out-of-state registration and that they are kept current with changes in supervisory regulations,” and that “it is the responsibility of the compliance office to ensure [a] high level of professionalism.” (*Id.* at 37).

In addition, throughout the 2007 SCM there is only one person referred to as a compliance officer; David L. Smith. (*Id.* at 3, 4, 12, 25, 28, 30, 39, 45, 55). If Mr. Guzzetti was responsible for all of the duties described in this section, the SCM would not use the phrase compliance officer throughout, and then mention Guzzetti by name in the final sentence. The clear language of the manual indicates that the duties not specifically enumerated for Guzzetti in this section belong to the compliance officer, David L. Smith.

The evidence establishes that Guzzetti did not become a supervisor in any capacity until October 2008. The limited "proof" of any supervisory responsibilities referenced in the ALJ's decision was prior to October 2008 and occurred more than 5 years prior to the filing of the OIP, and are therefore barred by 28 USC § 2642. (*Tr. 4626:24-4627:4*).

Neither the Division during its case in chief, nor the ALJ in her decision, made any attempt to address this rather large discrepancy in the SCM. Instead, the ALJ and the Division merely cherry picked those portions of the SCM that supported the Commission's position in the OIP.

There was no evidence submitted that Guzzetti was responsible for reviewing or supervising any of the transactions at issue and it was error for the ALJ to suspend him for a year for supervisory failures.

In addition to the failures related to the 2007 SCM cited above, the ALJ also ignored an extremely important section of both the 2007 and 2008 manuals entitled "PRIVATE PLACEMENTS/LIMITED PARTNERSHIPS." (*Ex. AG-2, at 42; Div. Ex. 329 at 44*). There can be no argument that the transactions at issue in this case would be considered a private placement and this of the manual relates directly to the transactions at issue and the supervision of same.

This section of the 2007 and 2008 SCMs described the due diligence requirements and subscription procedures when selling a private placement at MS & Co. (*Id.*) Included in this section is a discussion of the approval process for the sale of private placements. Glaringly, Guzzetti's name does not appear at all in this section which states that "[e]ach subscriber must be reviewed and accepted by a principal of the firm, with acceptance indicated by a principal signature on each Subscription Agreement." (*Id.*) As a result, there was no evidence presented at the hearings that Guzzetti had any supervisory function in relation to the offerings at issue.

The ALJ simply ignored this section of the compliance manuals, as well as the discrepancies contained throughout the SCMs regarding supervision, and found Guzzetti to be a supervisor of the Selling Respondents for the transactions at issue. This comes as no surprise. As will be discussed below, the ALJ referred to Guzzetti as a supervisor on the very first day of the hearing. (*Tr. 315:11-13*). Therefore, it appears that the ALJ only focused on those portions of the compliance manuals that fit with her prejudgment of Guzzetti, as opposed to those sections of the SCMs which directly related to the transactions at issue and makes no reference to Guzzetti at all.

D. There Is No Evidence That The Branch Office Procedure Manual Referenced In The ALJ's Decision Was Ever In Effect.

Not wanting to address the clear discrepancies in the 2007 and 2008 SCM's referenced above, or the section that clearly evidences that Guzzetti was not responsible for supervising the transactions at issue, both the Division and the ALJ's decision instead turn their focus to the MS & Co. Branch Office Procedure Manual. (*Decision at 24*). There are a number of issues with the ALJ's reliance on this document.

First, the ALJ references the document as a part of the 2008 SCM. (*Decision at 24*). However, the branch office procedure manual is undated and there was no evidence or testimony at trial that this document was a part of the 2008 SCM. Second, although accepted into evidence at the start of the hearing, this undated document was never authenticated and never identified. (*Div. Ex. 328*). The record is devoid of any evidence as to what this document was, when it was created, if it was ever used, and if it was used, when it was used. This document could have been in effect in the years before Mr. Guzzetti arrived at the firm, while he was at the firm, or in 2010 after Mr. Guzzetti left the firm. Any reliance on this document by the Division should be disregarded entirely as the Court has no information as to when it was in existence, or if it was ever in effect.

Finally, Guzzetti did not become a branch office manager until 2008, and when questioned about Div. Ex. 328, Guzzetti testified that he did not remember ever seeing this document. (*Tr. 3005:17-20*). The Division did not offer any documents or witnesses to contradict Guzzetti's testimony regarding this document or establish that such a document was ever in effect.

Considering that this document was not authenticated, there is no record of when same was in effect, and the uncontroverted testimony of Guzzetti was that he has no recollection of seeing such a document, any reliance by the ALJ on this document in finding a supervisory violation by Guzzetti was made in error. Therefore, the ALJ's decision should be reversed and all charges dismissed.

E. The Cases Cited In The ALJ's Decision Are Distinguishable From The Matter At Hand.

The cases upon which the ALJ relied to find that Guzzetti had supervisory responsibility in relation to the transactions at issue are inapposite and distinguishable from the facts of this case. In the *Matter of Gutfreund*, Respondent Fuerstein was found to have failed in his duty to supervise certain brokers at Salomon Brothers, Inc. (*In the Matter of Gutfreund, et al.*, No. 3-7930, 1992 SEC LEXIS 2939, 51 S.E.C. 93, 113 (Dec. 3, 1992)). As is the case with Guzzetti, Respondent Fuerstein did not have direct supervisory responsibility for the misconduct at issue. However, under the facts of that case, which the Division has not proven are present here, Respondent Fuerstein was found to have gained supervisory responsibility for the misconduct at issue once he became "involved in formulating management's response to the problem." (*Id.*, at 48-49).

Respondent Fuerstein's involvement in formulating a response for the firm vested him with the responsibility to insure that the misconduct he was tasked with responding to was addressed and corrected. The uncontroverted evidence shows that Guzzetti was not even aware of the nefarious actions of Messrs. McGinn and Smith until after he had left MS & Co. (*Tr. 4634:20-23*).

Furthermore, there was no evidence presented that showed Guzzetti was given responsibility by the firm to look into the funds, review the investments of the Four Funds and Trusts, investigate Messrs. Smith or McGinn, nor was he ever told that the two gentlemen, who were running the firm, along with a handful of others, were participating in such a fraudulent scheme. As a result, *Gutfreund* is easily distinguished from the matter at hand.

In the Matter of Bloomfield, Respondent Gorgia failed to supervise other Respondents in the matter because he was their direct supervisor and was involved in formulating the firm's response to concerns expressed by the firm's clearing firm, Pershing. (*In the Matter of Bloomfield, et. al.*, No. 3-3871, 2011 WL 1591553 (Apr. 26, 2011), *aff'd*, 2014 WL 768828 (S.E.C. Feb. 27, 2014)). Therefore, he had an affirmative obligation to follow up on those concerns, and Respondent Gorgia failed to undertake the required follow up. (*In the Matter of Bloomfield, et. al.*, 2014 WL 768828 (S.E.C. Feb. 27, 2014)). In addition, unlike the matter at hand, Mr. Gorgia was expressly given responsibility to supervise the specific misconduct at issue in the firm's Written Supervisory Procedures, whereas Guzzetti was not. (*Id.*)

In *Kolar*, Respondent Kolar was found to have violated his supervisory responsibilities because his supervisor, O'Neil, "entrusted Kolar with the specific responsibility of investigating the serious allegations that had been made against [the broker]." (*In the Matter of Kolar*, No. 3-9570, 2002 SEC LEXIS 3420, 17, 55 S.E.C. 1009, 1018 (S.E.C. June 26, 2002)). O'Neil testified that he "relied on and trusted Kolar's judgment with respect to that investigation." (*Id.*) Therefore, on appeal the Commission found that "in that instance, Kolar was specifically vested with supervisory authority." (*Id.*) At no point during the hearing in this matter did the Division present any evidence showing that Guzzetti received explicit instructions to investigate the alleged red flags identified by the Division, or the private placements at issue, as was the case in *Kolar*.

Each of these cases are inapposite to the matter at hand. Guzzetti was not given supervisory responsibility for the investments at issue. The 2007 and 2008 SCMs admitted as evidence during the hearing do not identify Guzzetti as the individual responsible for approving investments in the private placements at issue in this matter. Furthermore, the Division did not present any evidence that Guzzetti was assigned or assumed the responsibility of supervising sales of the private placements.

F. The ALJ's Decision, and the Division of Enforcement, Cite to Numerous "Facts" That Have No Relation to Supervision.

The ALJ's decision cites to a number of alleged "facts" that have no relation to whether Guzzetti had the responsibility, ability or authority to affect the conduct of the employees whose behavior is at issue. For example, the fact that Mr. Guzzetti and Mr. Mayer were involved in the process of finding a new clearing firm, is completely unrelated to the Division's supervisory allegations; as are MS & Co.'s implementation of the "Guzzetti ranking system," the fact that he recruited brokers, assigned customers to brokers, and consulted with managers regarding broker evaluations. (*Decision at 110*).

None of these acts are those of a Series 24 registered supervisor, none require registration as a supervisor, and none point to whether Guzzetti had the responsibility, ability or authority to affect the conduct of the employees whose behavior is at issue. During its recitation of proposed facts, the Division fails to mention that Guzzetti could not hire a broker without the approval of someone else at the firm. (*Tr. 4624:5-22*). More importantly, the Decision fails to mention that Mr. Guzzetti did not have the ability to fire brokers on his own, which would be the strongest evidence of an individual's ability or authority to affect the conduct of the Selling Respondents. (*Tr. 4625:2-5*).

In addition, the fact that Mr. Guzzetti “had the training and background for a supervisory position” does not mean that he was actually given the supervisory responsibilities alleged by the Division; or that he exercised such authority. Nor does his experience training financial consultants during the years prior to his joining of MS & Co., or the fact that he is working as a supervisor at another brokerage firm today. (*DOE Post-Hearing Brief, at 33*).

As such, this laundry list of facts discussed in the Decision have no bearing on whether Guzzetti supervised the transactions outlined in the OIP, during the post October 2008 time period, and discussed at the hearing in this matter.

G. There Was No Redemption Policy.

The Division premised almost its entire case against Guzzetti upon allegations that he was instrumental in enforcing MS & Co.’s redemption policy. However, as the ALJ held in her decision, there was no redemption policy at MS & Co. (*Decision at 93*). What the Division refers to as a redemption policy is actually a single email in December 2006 (*Div. Ex. 17*), followed by a series of emails nearly a year later, sent during an extraordinary economic crisis. The Division alleges that the fraud perpetrated by Messrs. McGinn and Smith had “nearly 900 investors.” (*DOE Post-Hearing Brief, at 1*). However, Division Exhibit 17 relates to a single redemption request, made by a single client, in only one of the 20 plus investments at issue in this matter. (*See, Div. Ex. 17*). A single email is hardly evidence of a firm wide policy.

In all the millions of pages of documents exchanged between the parties in this matter there is not a piece of evidence related to the alleged redemption policy in 2003, 2004, or 2005; and only Division Exhibit 17 in all of 2006. The Division did not produce any other evidence of redemption issues in 2006, because every other redemption request in 2006 was paid in full without the requirement that a replacement be found prior to, or following, the request.

All the remaining evidence of the alleged redemption policy presented in this matter is a series of emails sent during the final few months of 2007. Not surprisingly, the issues with redemptions experienced by MS & Co. coincided with a significant economic downturn. (*Ex. AG-71 at 5*). The Division moved Division Exhibit 278, and others, in as evidence to support its argument that a redemption policy was in place.

When the Division questioned Kevin Carreno, Mr. Guzzetti's expert and a member of the FINRA Board of Governors, as to whether Division Exhibit 278 should have caused Mr. Guzzetti to question Mr. Smith regarding his request that all redemptions be replaced, he testified that "in 2007, there were a number of managers from public mutual funds to private equity fund managers that were experiencing significant liquidity problems." (*Tr. 4813:8-4814:3*). Mr. Carreno continued, "[s]o looking at [Div. Ex. 278] and the context at the time, again, I wouldn't expect Mr. Guzzetti or any supervisor to necessarily respond in the manner you suggested." (*Tr. 4813:8-4814:3*).

In addition, the possibility of the Four Funds not being able to make payments as a result of adverse market performance was disclosed to investors in the private placement memoranda (PPM) for each of the funds prior to their investment. Each PPM contains a section describing the risks factors related to that particular fund which contains the subheading "**We May Be Harmed By Adverse Economic Conditions.**" (*Div. Ex. 5, 6, 9B, and 12 at 8* (emphasis in original; section appears on page 8 of each of the Four Funds private placement memoranda)).

A prolonged downturn in the economy could have a material adverse impact upon us, our results of operations and our ability to implement our business strategy. Similarly, adverse economic conditions or other factors might adversely affect the performance of our Investments, including the level of delinquencies, which could materially and adversely affect our results of operation, financial condition and cash flows and our ability to perform our obligations under the notes. These economic conditions could result in severe reductions in our revenues or the cash flows available to us and adversely affect our ability to make payments on the notes.

(Div. Ex. 5, 6, 9B, 12 at 8)

As everyone later discovered, Messrs. McGinn and Smith perpetrated an enormous fraud. However, considering the market condition at the time that Division Exhibit 278, and all but one of the emails related to the alleged redemption policy were sent to and from Mr. Guzzetti, these emails would not cause a supervisor conduct an additional inquiry. *(Tr. 4813:8-4814:3)*.

As a result, all of the evidence against Guzzetti that was presented by the Division has no bearing on whether he was actually a supervisor as the ALJ found that there was no redemption policy at MS & Co.

H. Guzzetti's Morning Emails Are Not Evidence Of Supervisory Responsibilities.

The ALJ's Decision seems to place a lot of weight on the morning note emails that were sent by Guzzetti while he was employed by MS & Co. As Guzzetti testified, his morning emails were originally started so he could get information to the sales force as a whole. *(Tr. 4619:4-14)*. A majority of the time, the purpose of the emails was "to motivate people to get on the phones . . . to get in front of the client." *(Tr. 4619:4-4620:6)*.

Guzzetti also testified that the information in the bottom portions of the email, which contained the deal availability for products offered by the firm, came "from Patty Sicluna or, I guess, David Smith . . . or Tim McGinn." *(Tr. 4621:7-14)*. If Sicluna, Smith or McGinn did not send this information to Mr. Guzzetti, it did not go in the deal availability portion of his emails as he "had no way of knowing" what was available in each offering. *(Tr. 4621:15-19)*. As a perfect example of this, Guzzetti testified that there were occasions where deals that were no longer available ended up in his morning emails as a result of the fact that he was copying and pasting the previous day's emails. *(Tr. 4621:20-25)*.

Guzzetti's morning note emails were not an attempt to push MS & Co. proprietary products, but rather contained quantities of investments the firm had available. (*Tr. 4622:10-23*). Furthermore, any reference the morning note emails to the amount that clients had currently invested in money markets was also not an attempt to push or solicit brokers. When asked about Division Exhibit 83, an email where Guzzetti references that clients had \$24 million in money market accounts, Guzzetti testified that the purpose of that email was "to get the folks on a call to start a conversation." (*Tr. 3025:3-3026:3*). Guzzetti was telling the brokers "if you have an accredited investor in [a money market account], that does not have to keep the money liquid" the FAIN investment may appear to be an attractive choice. (*Tr. 3029:15-24*). Guzzetti was certainly not telling brokers to make unsuitable recommendations to their clients and his morning note emails certainly do not provide proof that Mr. Guzzetti was responsible for supervising the transactions at issue in this matter.

Therefore, to the extent the Decision relies on the morning note emails to find that Guzzetti was responsible for supervising the transactions at issue same should be reversed and the charges against Guzzetti should be dismissed in their entirety.

VI. THERE WAS INSUFFICIENT EVIDENCE ADMITTED DURING THE HEARING TO SUPPORT SUSPENDING GUZZETTI.

Considering the testimony of the witnesses, and the documents admitted into the record, there was insufficient evidence to suspend Guzzetti for one year. The ALJ suspended Guzzetti despite the lack of evidence of any supervisory failure by Guzzetti which occurred during the applicable time frame, i.e., after September 23, 2008. Although the Decision does reference a handful of emails that were sent by Guzzetti after September 23, 2008, each of these relate to the Division's alleged redemption policy, which the ALJ found did not exist. (*Decision at 93*).

Although the ALJ addressed numerous sales manager emails, correspondence, and events which occurred prior to September 23, 2008, there were no findings of a supervisory failure after September 23, 2008, and no basis for the suspension of Mr. Guzzetti. After September 2008 Guzzetti only supervised the activities of four of the Selling Respondents, Anthony, Feldmann, Gamello and Chiappone. The Administrative Law Judge specifically found that Gamello did not violate any rule, law or statute.

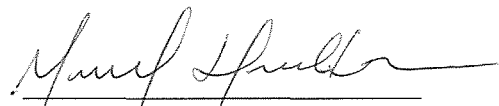
The Division's evidence established that there were no sales of the Four Funds by these brokers after the disclosures by McGinn and Smith, and limited sales of the trust offerings. The number and nature of these transactions do not support a year suspension for Guzzetti, in particular when he was not the individual supervising or approving the sales. It was an error of law to find that Guzzetti violated Exchange Act Section 15(b)(6)(A)(i), in conjunction with Section 15(b)(4)(E), by failing to supervise those individuals for these transactions.

CONCLUSION

For the reasons stated herein Andrew G. Guzzetti respectfully requests that the Decision of the ALJ be reversed and all charges against him are dismissed in their entirety.

Dated: July 17, 2015

Respectfully submitted,



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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,

Respondents.

ADMINISTRATIVE PROCEEDING

File No. 3-015514

CERTIFICATE OF SERVICE

I, Michael D. Handelsman, Esq., certify that on this 17th day of July 2015, I caused a true and accurate copy of Respondent Andrew G. Guzzetti's Brief in Support of his Petition for Review and Motion for Oral Argument to be delivered upon the following:

One Original and Three Copies via Federal Express:

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549

[Continued on Next Page]

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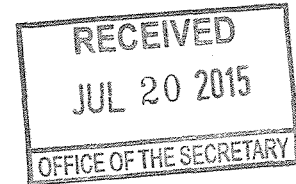
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July 17, 2015



VIA FEDEX

Brent J. Fields
Secretary, US Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549

Re: *In the Matter of Donald J. Anthony, Jr., et al.*
Administrative Proceeding File No. 3-15514

Dear Mr. Fields:

This firm represents Respondent Andrew G. Guzzetti in the above referenced matter. Enclosed herewith you will find an original and three (3) copies of Mr. Guzzetti's Individual Brief in Support of his Petition for Review of the ALJ's Decision of February 25, 2015. In addition, you will also find an original and three (3) copies of Mr. Guzzetti's Motion for Oral Argument, as well as a certificate of service.

Very truly yours,

s/ Michael D. Handelsman

Michael D. Handelsman

cc: David Stoelting, Esq. (By Federal Express)
Respondents' Counsel (By Email)