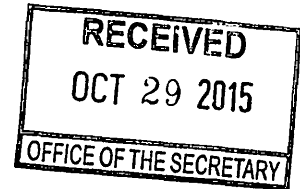
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of

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

Respondents.

THOMAS LIVINGSTON'S INDIVIDUAL REPLY BRIEF

Matthew G. Nielsen
Crystal L. Jamison

ANDREWS KURTH LLP
1717 Main Street, Suite 3700
Dallas, Texas 75201
Telephone: (214) 659-4400
Facsimile (214) 659-4401

Attorneys for Thomas Livingston

October 28, 2015

TABLE OF CONTENTS

Preliminary Statement 1

Argument 2

I. Livingston Did Not Commit Fraud 2

A. The Division Ignores the Fatal Flaws in the ALJ's Fraud Findings 2

B. Livingston Had a Reasonable Basis to Recommend the Offerings at Issue 3

C. The Four Funds' Investment in alseT Was Not Improper 6

D. There is No Evidence of Misrepresentations or Material Omissions 7

II. The *Steadman* Factors Do Not Support the Sanctions Against Livingston, Let Alone the Increased Sanctions Sought by the Division 11

III. Conclusion 14

TABLE OF AUTHORITIES

Page(s)

Cases

Johnson v. SEC,
87 F.3d 484 (D.D.C. 1996) 12

McCarthy v. SEC,
406 F.3d 179 (2nd Cir. 2005) 11

Monetta Fin. Servs, Inc. v. SEC,
390 F.2d 952 (7th Cir. 2004) 11

Proffitt v. FDIC,
200 F.3d 855 (D.D.C. 2000) 12

SEC v. Jones,
476 F. Supp. 2d 374 (S.D.N.Y. 2007) 12

SEC v. Jones,
No. 05 Civ. 7044(RCC), 2006 WL 1084276 (S.D.N.Y. April 25, 2006) 13

SEC v. Opulentica, LLC,
479 F. Supp. 2d 319 (S.D.N.Y. 2007) 13

SEC v. Robinson,
00 Civ. 7452, 2002 WL 1552049 (S.D.N.Y. July 16, 2002) 13

SEC v. Savino,
No. 01 C 2438, 2006 WL 375074 (S.D.N.Y. Feb. 16, 2006) 13

Steadman v. SEC,
603 F.2d 1126 (5th Cir. 1979) 11, 12

Statutes

Chief Administrative Law 17

Securities Act Section 17(a)(1) and Exchange Act Section 10(b)(5) 2

Other Authorities

Rule 10b-5 2

Rule 450(c) 16

Preliminary Statement

Thomas Livingston files this Reply in Support of his Individual Brief. This Reply is accompanied by the Respondents' Joint Reply Brief, which addresses identical issues raised by the Division of Enforcement (the "Division") in both its Responses to the Individual Briefs and Joint Brief that are not otherwise addressed herein.

In the few pages of the Division's Response directed to Livingston, the Division largely ignores both the ALJ's Initial Decision and Livingston's Opening Brief. For instance, the Division completely disregards that the ALJ made no findings of fact to support the conclusory finding that Livingston made material misrepresentations. Nor does the Division address the fact that the linchpin of the ALJ's findings -- that Livingston failed to disclose financial troubles of the Four Funds to two investor witnesses prior to their Trust investments -- was flat wrong and completely contrary to the evidence. The Division also continues to rely on supposed "red flags," although the vast majority of them were rejected by the ALJ.

Instead of properly addressing the errors in the Initial Decision raised by Livingston, the Division rehashes its post-hearing brief arguments and relies on snippets of testimony taken out of context or, worse, completely misstates the evidence. The Division's Response is a thinly-veiled effort to distract from the glaring factual and legal errors in the ALJ's Initial Decision, which require that the charges against Livingston be dismissed and the punishment against him reversed.

Argument

I. Livingston Did Not Commit Fraud

A. The Division Ignores the Fatal Flaws in the ALJ's Fraud Findings

For the reasons set forth in his Opening Brief, the ALJ's findings that Livingston violated Securities Act Section 17(a)(1) and Exchange Act Section 10(b)(5) and Rule 10b-5 are overwhelmingly contradicted by the evidence and cannot stand. First, while the ALJ includes the same boiler-plate legal conclusion used for other Respondents that Livingston made "material misrepresentations," the ALJ does not identify any such alleged misrepresentations or even identify any affirmative representations allegedly made by Livingston. *See generally* Initial Decision ("ID") at 46-47, 104-05. In its Response, the Division completely ignores the ALJ's failure to identify any supposed misrepresentations to support the finding against Livingston.

Second, the core of the ALJ's fraud findings against Livingston were that he failed to disclose the financial troubles of the Four Funds before selling certain Trust Offerings to the two investor witnesses, Messrs. Ferris and LaFleche. ID at 104. But, the ALJ's finding is overwhelmingly contradicted by the evidence. The ALJ wholly overlooked that Ferris and LaFleche (a) received multiple letters disclosing the Four Funds' substantial financial trouble before making investments in the Trust Offerings and (b) both admitted that Livingston told them of the Four Funds' financial issues. *See* Opening Brief at 9-12. Yet again, however, the Division completely ignores these fatal flaws in the ALJ's Initial Decision.

Rather than address the issues before the Commission, the Division rehashes arguments made in its post-hearing briefing and either cherry-picks snippets of evidence from an 18-day trial, ignoring the contradictory evidence, or just misstates/mischaracterizes the actual evidence.

As an example, the Division claims that Livingston "profited enormously during the fraudulent scheme to the tune of $2 million from MS & Co. ...," suggesting that Livingston shared with David Smith and Tim McGinn in their illegal profits. Resp. at 22. But, as the Division is well aware, that is not the case. The Division's reference to $2 million is the total income that Livingston earned <u>over seven years</u> for running MS & Co.'s syndicate department, which no one has suggested was unreasonable. *See* Div. Ex. 681. No one, not even the Division, claims that Livingston was aware of the fraud that McGinn and Smith perpetrated. *See, e.g.*, Tr. 1220, ID at 4. The Division's attempt to suggest otherwise in its Response is reprehensible.

B. Livingston Had a Reasonable Basis to Recommend the Offerings at Issue

Livingston had no knowledge of the fraud that McGinn and Smith perpetrated nor could he have reasonably uncovered it. *See, e.g.*, Tr. 1220, ID at 4. Even the Division's own expert agreed that absent a forensic accounting review, Livingston could not have known of the diversion of money. Tr. 1244:14-18, 1244:25 - 1245:4, 1250:7-18. Instead, the evidence shows that Smith and McGinn carried out an orchestrated fraud, not only on investors, but also on employees like Livingston. *See* Tr. 5618. Smith and McGinn were aided in their fraud through the knowing collusion of, among others, their auditors, accounting department, CFO, and general counsel. *See* Livingston Ex. 1, 2, 60, Tr. 2420:6 - 2423:10. With these key players' participation, McGinn and Smith were able to systematically conceal their fraud not only from numerous firm employees and hundreds of investors, but also from trained examiners of both the SEC and the NASD, who conducted multiple examinations of MS & Co. during the relevant time.

The Division claims that Livingston and the other Respondents knew, or should have known, that the pre-2003 alarm Trusts were a failure, and that this should have prompted

questions about the use of Four Fund proceeds and MS & Co.'s successful track record. Resp. at 5. But, the Division offered no such evidence to support that claim. In contrast, the evidence shows the Respondents were not aware that the pre-2003 alarm Trusts were financially distressed. Tr. 2431:21 - 2432:6. Indeed, MS & Co.'s CFO admitted that while he knew McGinn and Smith were taking profits out of those Trusts and using them to facilitate payments to investors, Livingston and the MS & Co. brokers were not aware of the fraud. Tr. 2432:17-23. Indeed, the only way these diversions could have been discovered would have been by examination of multiple sets of financial records. Tr. 2433:13-14.

The Division fails to address the substantial evidence establishing the due diligence conducted by Livingston, instead resorting to misstating Livingston's testimony. Resp. at 23. For instance, when Livingston stated that he did not do a "deep dive" into the "whole due diligence," Livingston was testifying about whether he reviewed all of the underlying due diligence conducted by MS & Co. into the investments made by the Four Funds. He was not testifying about the breath of his due diligence on the Four Funds. *See* Tr. 2243:16-2244:9.

The uncontroverted evidence is that Livingston was aware of nearly all of the underlying investments at the time he sold Four Fund investments—sales that all occurred early in those offerings. *See* Opening Br. at 18 and FN 12. This is completely contrary to the Division's baseless claims that Smith kept the Four Fund investments secret. By the time the Four Funds were created, Livingston had worked with Smith for 15 years and had seen Smith successfully handle numerous transactions, including bank acquisitions and financing of a civic center and local hospital. FoF 19. While the ALJ mocked his testimony as not being credible, Livingston did in fact, unlike anyone else, personally observe Smith evaluating potential investment opportunities and rejecting potential investments. Livingston was the only respondent that was

in the same office as Smith. Livingston saw Smith conducting due diligence on potential investments, with an experienced team, and personally observed that the due diligence was consistent with what Livingston conducted on an underwriting.

Livingston frequently attended meetings with Smith and often spoke to him (and others) about the Four Funds' investments. In fact, Livingston introduced Smith to a number of companies in which the Four Funds invested through Livingston's investment banking contacts. Indeed, the SEC itself acknowledged that the Four Fund investments were underwritten by "reputable financial institutions" such as Merrill Lynch and Sandler O'Neill. Livingston Ex. 103 at 12. Again, while the ALJ simply disregarded his un-contradicted testimony, because Livingston had knowledge about the companies in which the Four Funds invested, he understood the returns that the Funds could expect, and believed the interest payments to Four Fund investors were reasonable.[1] Livingston believed, based on his personal observations, that Smith was making sound investment decisions consistent with the broad purpose of the Four Funds. FoF 30-33.

As for the Trust Offerings, Livingston testified about the thorough due diligence of the TDM Cable Trust 09 offering. Among other things, Livingston reviewed the assets that were being purchased, verified the assets were actually being purchased, verified that the debt service reserve fund had been funded, and talked to the servicer of the contracts. Livingston also conducted thorough due diligence on the TDM Luxury Cruise offering, including speaking to the travel agent who was booking the cruises, reviewing the company's financial statements, and confirming the company's cash flows against what was represented in the PPM. The court-

---

[1] The returns in the investments were substantiated by Pine Street Capital, a related fund to MS&Co. that was universally deemed an enormous success, and with whose management Mr. Livingston had frequent contact. RMR 46, Tr. 5215-16.

appointed receiver in the Commission's civil case identified no underlying issues with the TDM Luxury Cruise operations except that after liquidation, there was an overall loss. In looking at TDM offerings in hindsight with forensic review of its financial statements and operations, the receiver's opinion was that the underwriting was poor. The receiver admitted, however, there was no evidence that the brokers were aware of the poor underwriting. FoF 37-40.

C. The Four Funds' Investment in alseT Was Not Improper

In its persistent effort to distract from the weaknesses in its case, the Division continues to beat the drum of alseT. alseT was an intellectual property fund started by, among others, Livingston, in which the Four Funds made loans. Yes, because of the 2008/09 financial crisis, alseT ultimately did not receive permanent financing to repay loans from the Four Funds. But, alseT is a red herring that has been misused by the Division.

First, the Division eventually admitted at the hearing that alseT was a legitimate company and that it was not disputing alseT was a real company, with a real business plan, with real prospects for permanent financing. *See, e.g.,* Tr. 5266:12-5267:21. The Division has not, and cannot, attack the legitimacy of alseT. alseT's core team included two intellectual property valuation experts, a securitization expert from GE Capital, a private equity expert, and Livingston, who was an experience investment banker. TL Ex. 121 at 61-79, Tr. 5853:10 - 5854:6, 5857:3 - 11. alseT was advised by the law firm of White & Case, LLP, who had previously formed the leading fund for acquiring royalty interest. Tr. 5857 8-11, 5859:18-20. alseT's Advisory Board included notables such as James Carville, Mary Matalin, a Nobel Prize winning scientist, Harvard University Medical School professors, and other leading academic, business, legal, and intellectual property experts. TL Ex. 123. In December 2007, alseT entered into a term sheet with Goldman Sachs Mortgage Company to fund alseT, who anticipated

funding of approximately $750 to 800 million. Tr. 5875:4 - 22, TL Ex. 97, 130. alseT anticipated paying off all loans from the Four Funds with the Goldman Sachs funding. TL Ex. 130, Tr. 5875:23 - 5876:24.

Rather, the Division claims that the Four Funds should not have invested in alseT at all because it was an "affiliate."[2] But, the Division admits in its Response that the PPMs did disclose that the Four Funds could engage in transactions with affiliates -- indeed, the Division now claims that the Four Funds' disclosed ability to transact with affiliates was a "red flag."[3] Resp. at 6. The Division cannot have it both ways.

Second, neither of the investor witnesses purchased Four Fund investments which had made loans to alseT, therefore, there was nothing for Livingston to disclose to them.[4] Opening Brief at 7-8. Moreover, there was no evidence that Livingston was aware that any of the Four Funds in which either Messrs. Ferris and LaFleche invested intended to make any loans to alseT. Indeed, the evidence established that Livingston had nothing to do with loans made to alseT. *See, e.g.,* Tr. 5265:8-18.

D. There is No Evidence of Misrepresentations or Material Omissions.

The most egregious mischaracterization of evidence by the Division relates to the two investor witnesses -- Messrs. Ferris and LaFleche. The Division falsely claims that Livingston made "many misrepresentations" to these investors. Yet, the Division does not identify any

---

[2] As previously noted, oddly, neither the ALJ nor the Division used the term "affiliate" as it is defined in federal securities laws. Tr. 523:5 - 524:7, Tr. 5348:2-3. It is undisputed that alseT did not qualify as an affiliate, as defined by the '33 Act.

[3] The Division also continues to improperly rely upon a privileged communication between Livingston and David Goldstein, an attorney with White & Case, LLP, where Mr. Goldstein was providing legal advice to Livingston. Resp. at 26. Livingston previously raised the improper admission of this exhibit and, while it does not stand for what the Division claims, it should be excluded. Opening Brief at 26.

[4] Additionally, before any of the Four Funds loaned money to alseT, Smith sought out and obtained an opinion from legal counsel to MS & Co., Jay Kaplowitz of Gersten Savage, that Livingston's involvement in alseT did not create any legal issues or disclosure requirements. Tr. 2283:6 - 2285:25.

alleged misrepresentations in its Response—because neither witness testified to any. And, as previously noted, the ALJ also did not identify any alleged misrepresentations made by Livingston, but rather seemed to just accept the Division's persistent, but baseless, claim.

Perhaps best exemplifying the extent to which the Division will pursue baseless arguments, it claims that Livingston caused Ferris to invest $25,000 in TDM Luxury Cruise in direct contravention of Ferris' instructions and without his knowledge.[5] This is patently false. The evidence shows that Ferris and his wife (a) signed a letter asking that $25,000 be transferred to purchase TDM Luxury Cruise; (b) signed a Subscription Agreement to purchase TDM Luxury Cruise, which disclosed the risk in the investment; (c) received a confirmation of their purchase of TDM Luxury Cruise; and (d) received monthly statements showing their TDM Luxury Cruise investment. TL Ex. 65, Tr., 65:15-20; 66:18 - 67:6. Ferris reviewed his account statements routinely with Livingston and never objected to his $25,000 TDM Luxury Cruise Trust note. Tr. 5259:14-18; 5260:7-10. It is absurd to claim that Ferris did not know about or consent to the investment. This is the singular issue to which Ferris could provide testimony (Tr. 28:20-23, 34:7-15, 42:9-13), but—although his testimony was contrary to ever piece of evidence—the ALJ had no pause in blindly believing Ferris' testimony and the Division has had no hesitation in pursuing this frivolous claim.[6]

---

[5] The Division originally claimed that Ferris instructed Livingston to put the $25,000 into a money market account. *See* Div. Second Suppl. Disclosure at 7. Ferris testified that claim is false. Tr. 63:10-17. Moreover, the Division (and the ALJ) ignored that Ferris was oddly unable to give any details whatsoever about any of his other investments -- indeed, his refusal to do so resulted in a heated conversation between counsel for the Division and Ferris before the hearing. Tr. at 71-73. Again, this subject was ignored in the Initial Decision. The only testimony that Ferris was able to offer about his purchase of Four Fund investments was that it was David Smith, not Livingston, who described the investments to Ferris. Tr. 45-46, FoF 78. As previously noted, this fact was absent from the Initial Decision.

[6] The Division also claimed that Ferris was an "unsophisticated investor," but this is simply false. Ferris never testified that he was unsophisticated or inexperienced in investing. Indeed, Ferris qualified as an accredited investor, who owned his own successful business.

As another example, the Division claims that Livingston instructed LaFleche to represent his net worth was more than $1 million. Resp. at 26. But, yet again, the evidence shows this claim to be false. In the exhibit upon which the Division relies, LaFleche indicated that his net worth was $500,000 to $1 million, which did not make him an accredited investor. Div. Ex. 633; Tr. 2353:7-22. While Livingston had nothing to do with how LaFleche completed the document, the form itself contradicts LaFleche and the Division's claim and undermines the credibility of the Division's arguments.

The Division attempts to paint a picture that Livingston preyed on LaFleche's retirement money, but the evidence shows otherwise. LaFleche made three investments with Livingston. LaFleche invested $10,000 in TAIN in December 2004, $25,000 in the McGinn Smith Transactional Fund in October 2008, and $20,000 in TDMM Cable in January 2009. Div. Ex. 2 at 108. LaFleche was one of Livingston's very close friends for more than a decade before LaFleche's first purchase of a MS & Co. investment. Tr. 101: 14-23, 5233:9-24. Along with Dan Ferris, LaFleche and Livingston saw each other at least every week, had dinner usually once a week, and took trips together. Tr. 101:24 - 102:11. Over their friendship, Livingston did not solicit LaFleche as a client nor did Livingston ask LaFleche to invest any money with him. Instead, LaFleche came to Livingston wanting to invest in TAIN. Tr. 102:12 - 103:5, 5230:15 - 5231:18.

LaFleche knew that Ferris had been a long-time investor in MS & Co. products and had done well in those investments. Based on hearing Ferris talk about his investments for years and the good performance of those investments, LaFleche decided he wanted to invest in the MS & Co. products too. LaFleche's investment philosophy was succulent -- he wanted to invest in the same products that Ferris invested in and he followed Ferris's lead. Tr. 103:6 - 106:11, 5230:15

- 5231:18. Indeed, LaFleche invested in TAIN and MSTF on the same day as Ferris invested in those products. Div. Ex. 2 at 108; Tr. 105:21- 106:4. LaFleche did not tell Livingston that he wanted to invest conservatively. Tr. 5234:18 - 5235:3. LaFleche did not indicate that the $10,000 he invested in TAIN was a substantial portion of his retirement savings. Tr. 5234:15-17. With regard to his investments in MSTF and TDMM, LaFleche used a portion of money he inherited, which he did not indicate to Livingston that he needed for retirement. Tr. 5241:9 - 5242:17. Instead, LaF;eche indicated to Livingston that he was looking to maximize his returns. Tr. 5242:18 - 5243:4.

Livingston personally handed PPMs to LaFleche for each investment he made. Tr. 5229:20-24. LaFleche does not dispute being given PPMs or signing Subscription Agreements for the investments that he made. Tr. 113:5-20, 117:10-12, 127:16-20. LaFleche also recalls receiving documents in connection with his investments, which he claims to not have read. Tr. 118:23 - 119:5. With each investment, Livingston went through the entire PPM with LaFleche and explained what the investment was, what the risks were, and what the potential loss of all his capital was if things did not work out in the investment. Tr. 5231:9 - 5232:17. Livingston never told LaFleche that the investments were "safe and secure." Tr. 5234:24 - 5235:3. Livingston frequently discussed the MS & Co. investments with LaFleche and Ferris when they saw each other socially at least once per week. Tr. 5230:15-24, 5233:4-8. LaFleche is not an unsophisticated businessman; rather he understood that every investment has risk and that he could lose his money. Tr. 107:22-25, 125: 10-13, 134:23-25. LaFleche acknowledged that Livingston never told him that he could not lose his money. Tr. 107:19-21, 135:2-4.

Moreover, the Division cannot provide an explanation for why Livingston would defraud Ferris and LaFleche, who were his two best friends. Livingston had no motive to do so -- he was

an investment banker, not a retail broker. Livingston did not except to receive any commissions for LaFleche's (or Ferris') investments. Tr. 5180:11 - 5190:12. Livingston had no involvement with the creation or management of the Four Funds or Trust Offerings, nor did he share in the profits of MS & Co. It defies logic that he defrauded his closest companions and, when the actual evidence is layered on top of the Division's baseless claims, it shows Livingston is innocent.

II. The *Steadman* Factors Do Not Support the Sanctions Against Livingston, Let Alone the Increased Sanctions Sought by the Division.

For the reasons set forth at the hearing, in the Joint Brief, in Livingston's Opening Brief, and in this Brief, the finding that Livingston committed fraud is not supported. There were no findings or evidence that Livingston made any material misrepresentations. As for alleged material omissions, the evidence shows that either no disclosure was needed or that the facts were known to the investors. Moreover, the evidence does not support that Livingston acted with scienter and, therefore, a permanent bar is not warranted. *Steadman v. SEC*, 603 F.2d 1126, 1141 (5th Cir. 1979) ("It would be a gross abuse of discretion to bar a [financial professional] from the industry on the basis of isolated negligent violations.").[7]

In addition, the ALJ did not make individualized findings to support her punishment of Respondents, especially with regard to Livingston due to the permanent bar imposed upon him. *Steadman*, 603 F.2d at 1139; *see also McCarthy v. SEC*, 406 F.3d 179, 189 (2nd Cir. 2005); *Monetta Fin. Servs, Inc. v. SEC,* 390 F.2d 952, 957 (7th Cir. 2004). There was no meaningful consideration of each factor; rather, the ALJ makes conclusory legal declarations without

[7] To the extent that the bar was based on Section 5 violations, there was no finding of scienter with regard to those violations nor was there any evidence that Livingston was aware or should have been aware that the offerings were not subject to an exemption from registration. Livingston reasonably relied on the representations of the issuer, the Funds' advisor (Smith), the MS&Co. compliance department, and outside counsel regarding the legality of the offering. TL Ex. 1, 2, 17, 60. Livingston was not aware that any of the offerings exceeded 35 unaccredited investors. Tr. 5237:3-21.

discussing the unique facts of the case. ID at 112-113. Further, the ALJ discussed the *Steadman* factors as they relate to ***all*** of the respondents, not to each respondent individually, but then applied a different and significantly harsher punishment for Livingston. *Steadman*, 603 F.2d at 1140. In fact, she provided no reason for distinguishing Livingston at all and, indeed, there is no reasonable basis to do so. ID at 112-113. [8]

The ALJ also improperly relied on pre-September 23, 2008 conduct to impose a bar against Livingston. The ALJ wrongly found that she can rely on conduct outside of the statute of limitations in imposing a bar. ID at 2, n. 2; *In the Matter of the Application of Eric J. Brown*, SEC Release No. 3376, 2012 WL 625874 (2012); *In the Matter of Edgar B. Alacan*, SEC Release No. 8436, 2004 WL 1496843 (2004); *In the Matter of Feeley & Wilcox Asset Mgmt. Corp.*, SEC Release No. 2143, 2003 WL 22680907 (2003). Livingston made no sales of the Four Funds after January 2007 and made only three sales of Trust Offerings after September 23, 2008, for which the Division claims he received $700 in commissions.

Although it did not file a cross petition for review, the Division nevertheless seeks increased sanctions against Livingston. Those sanctions are not supported by the evidence or law.

---

[8] There is no evidence – nor any allegation – that Livingston has engaged in any misconduct since he left MS & Co. in 2009, and nothing demonstrates that he is likely to do so in the future. *See SEC v. Jones*, 476 F. Supp. 2d 374, 384 (S.D.N.Y. 2007) (fact that "several years have passed since Defendants' . . . misconduct apparently without incident . . . undercuts [SEC's] assertion that Defendants pose a continuing risk to the public"); *Proffitt v. FDIC*, 200 F.3d 855, 861 (D.D.C. 2000) (same); *Johnson v. SEC*, 87 F.3d 484, 490 n.9 (D.D.C. 1996) (same). Mr. Livingston had no prior disciplinary history. Livingston does not have any retail clients nor does he intend to do any retail business in the future. Tr. 5176:8-14. He is currently employed by Halliday Financial Group, where he runs its capital markets group. Tr. 5172:24 - 5173:2, 17-21. Livingston deals exclusively with underwriting SEC-registered securities in transaction primarily led by the US's major banks, including Merrill Lynch, J.P. Morgan Chase, Wells Fargo, and Morgan Stanley. The bulk of the transactions in which Livingston is involved are fixed income securities, such as preferred stocks issued by large companies, and structured products that are FDIC insured. He is not involved in underwriting or selling unregistered securities, including private placements. Tr. 5174:6 - 5176:7.

First, while the ALJ imposed a single third-tier penalty (the impropriety of which has been previously briefed), the Division seeks a third-tier monetary penalty for each alleged violation, even though the Division's case against the Respondents involves allegations of a course of conduct. The "per violation" approach to penalties has been flatly rejected and is inappropriate. *See SEC v. Robinson,* 00 Civ. 7452, 2002 WL 1552049, at *1 (S.D.N.Y. July 16, 2002); *see also SEC v. Opulentica, LLC*, 479 F. Supp. 2d 319 (S.D.N.Y. 2007); *SEC v. Jones*, No. 05 Civ. 7044(RCC), 2006 WL 1084276, at *12 (S.D.N.Y. April 25, 2006); *SEC v. Savino*, No. 01 C 2438, 2006 WL 375074 (S.D.N.Y. Feb. 16, 2006);

Second, the Division improperly seeks to increase Livingston's disgorgement from $700 to $143,879. Resp. at 48. Even the ALJ found that disgorgement of funds received prior to February 2008 was inappropriate. Still, the Division seeks disgorgement of all "commission" paid to Livingston. While the evidence does not support disgorgement, there are several problems.

Livingston did not actually receive commissions. Until shortly before he left MS & Co., Livingston received a salary for running its syndicate department. Div. Ex. 272, 625. While he received commissions for syndicate transactions, he did not receive commissions on retail sales.[9] What is more, the Division improperly imputed significant sales to Livingston, which he did not make. Livingston did not discuss, offer, or sell the Four Fund offerings to Thomas Walker

[9] Beyond a Division employee's testimony (Keri Palen) about what she believes some unspecified documents (which were not offered into evidence) showed, the Division offered no evidence that Livingston was actually paid any commissions for retail sales beyond a single payment in January 2008, which Livingston was unaware that he received. Palen theorized that Livingston in essence "received" retail commissions because she believed that the commission revenue (institutional and retail) attributable to Livingston did not exceed his salary over the relevant time period, but she did not provide the Court with an analysis of this. Tr. 550:17-23, 553:6-17, 561:18 - 563:3; 576:14-24. There's no evidence that Livingston received any information showing he was being paid for retail sales. Tr. 6034:23 - 6035:9, 6038:10-13.

Nevertheless, it is undisputed that Livingston agreed to return $120,000 in compensation he received, plus interest (total of $132,000), to MS & Co. as part of his settlement with the receiver. Tr. 5193:2-24, 5195:21 - 5196:12.

($300,000). or to Michael Reilly or his company, Energy Insurance Brokers, Inc. (together $1.31 million).[10] Nor did Livingston discuss, offer, or sell any Trust Offerings to Michael Reilly ($100,000). Tr. 5243:23 - 5248:7, 5358:17 - 5359:14. Indeed, Reilly was considered by David Smith to be one of his preferred customers and was given a special repurchase agreement by Smith, under which Smith repurchased at least $810,000 of Reilly's investments. Tr. 5359:8-14, Div. Ex. 2 at ¶ 62 and 525. However, Livingston's alleged "commission" include over $1.7 million in sales he never made.

Simply put, neither the facts nor law support sanctions against Livingston, much less increased sanctions.

III. Conclusion

The Commission should dismiss all charges against Livingston.

[10] The Division named Michael Reilly as witness in its pre-trial disclosures and, tellingly, chose not to call him to rebut the testimony he did not purchase investments from Livingston.

Dated: October 28, 2015

By:

Matthew G. Nielsen
Crystal L. Jamison
ANDREWS KURTH LLP
1717 Main Street, Suite 3700
Dallas, Texas 75201
Telephone: (214) 659-4400
Facsimile (214) 659-4401

ATTORNEYS FOR
THOMAS LIVINGSTON

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 450(c) that this Reply Brief is 4,613 words, exclusive of pages containing the table of contents, table of authorities, this certificate, the certificate of service, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits, and is therefore within the word limit set by the Commission's June 5, 2015 order.

By:
Matthew G. Nielsen

DAL:928827.2

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2015, I filed the foregoing pleading with the Office of the Secretary of the Commission via facsimile at (703) 813-9793, and served copies on the following persons via regular mail and email, except where otherwise indicated.

David Stoelting, Esquire
Haimavathi V. Marlier, Esquire
Michael D. Birnbaum, Esquire
U.S. Securities and Exchange Commission
Division of Enforcement
Three World Financial Center
New York, NY 10281
stoeltingd@sec.gov
marlierh@sec.gov
birnbaumm@sec.gov

Hon. Brenda Murray
Chief Administrative Law Judge
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20545-2557
alj@sec.gov

Roland M. Cavalier, Esquire
Tuczinski, Cavalier & Gilchrist, P.C.
54 State Street
Suite 803
Albany, NY 12207
RCavalier@tcglegal.com

Counsel for Respondent Frank H. Chiappone

Mark J. Astarita, Esquire
Sallah, Astarita & Cox LLC
60 Pompton Avenue
Verona, NJ 07044
mja@sallahlaw.com

Counsel for Respondent Andrew G. Guzzetti

Gilbert B. Abramson, Esquire
One Presidential Boulevard, Suite 315
Bala Cynwyd, PA 19004
(610) 664-5700
(610) 664-5770 (Fax)
gabramson@gbalaw.com

Counsel for Respondent William F. Lex

M. William Munno, Esquire
Brian P. Maloney, Esquire
Seward & Kissell LLP
One Battery Park Plaza
New York, NY 10004
munno@sewkis.com
maloney@sewkis.com

Counsel for Respondent Philip S. Rabvinovich and Bryan T. Mayer

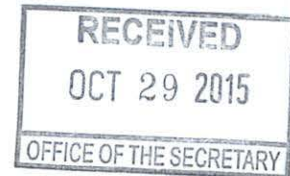
By:
Matthew G. Nielsen

ANDREWS
KURTH

Andrews Kurth LLP
1717 Main Street, Suite 3700
Dallas, Texas 75201
+1.214.659.4400 Phone
+1.214.659.4401 Fax
andrewskurth.com

Debbie R Reese
+1.214. 659.4642 Phone
debbiereese@andrewskurth.com

October 28, 2015



Via Federal Express

Brent J. Fields, Secretary
Securities and Exchange Commission
Office of the Secretary
SEC Headquarters
100 F. Street, N.E.
Washington, DC 20549

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

Dear Mr. Fields:

Pursuant to Rule 152(d), we enclose the original and four (4) copies of the signed non-facsimile originals of Respondent Thomas E. Livingston's Individual Reply Brief.

The brief was filed with the Commission today via facsimile (703) 813-9793 and I spoke with Regina via telephone to confirm receipt of the brief by the Office of the Secretary.

Best regards,

Debbie R. Reese

Enclosures
c: Hon. Brenda Murray (via E-mail and regular mail)
David Stoelting, Esq. (via E-mail and regular mail)
Respondents' Counsel (via E-mail and regular mail)