SEWARD & KISSEL LLP

ONE BATTERY PARK PLAZA
NEW YORK, NEW YORK 10004

TELEPHONE: (212) 574-1200
FACSIMILE: (212) 480-8421
WWW.SEWKIS.COM

901 K STREET, NW
WASHINGTON, DC 20001
TELEPHONE: (202) 737-8833
FACSIMILE: (202) 737-5184

M. WILLIAM MUNNO
PARTNER
(212) 574-1587
munno@sewkis.com

July 10, 2017

HARD COPY

VIA FEDERAL EXPRESS and FACSIMILE

Mr. Brent J. Fields
Secretary
U.S. 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

Recent Legal Developments
Affecting The Initial Decision

Dear Mr. Fields:

We represent Respondents Philip S. Rabinovich and Brian T. Mayer.

There have been significant legal developments that directly affect the Initial Decision, as subsequently corrected, since the separate appeals to the Commission were fully briefed by the parties more than a year and half ago.

We provide this letter to identify those legal developments and their impact on the Initial Decision with respect to Messrs. Rabinovich and Mayer. We request that this letter be provided to the Commissioners and filed of record on the docket in this proceeding. Four copies are enclosed.

1. *Kokesh v. SEC*

On June 5, 2017, the United States Supreme Court held in *Kokesh* that "Disgorgement in the securities-enforcement context is a 'penalty' within the meaning of § 2462, and so disgorgement actions must be commenced within five years of the date the claim accrues." 581 U.S. ___ (2017), slip op. at 1.

While Messrs. Rabinovich and Mayer each maintains the evidence did not support a finding that either had violated any securities law or is liable for any disgorgement, under *Kokesh*, the disgorgement amounts for each of them must, at minimum, be reduced. For Mr. Rabinovich, the disgorgement must be reduced from $109,695 to $53,119. For Mr. Mayer, the disgorgement amount must be reduced from $29,518 to $16,591.

Relatedly, neither Rabinovich nor Mayer sold any of the Trust Offerings in the alleged "MSF Conduit" to unaccredited investors after September 23, 2008. *See* Phil Rabinovich, Brian Mayer and Ryan Rogers' Joint Proposed Findings of Fact and Conclusions of Law, dated May 12, 2014, FoF ¶¶ 644-45, 664-65. Thus, there can be no Section 5 claim against Rabinovich and Mayer as to the fictitious "MSF Conduit," alleged in the OIP.

Messrs. Rabinovich and Mayer continue to maintain that, as a matter of law, neither the courts nor the Commission may impose disgorgement for any period of time even within the 5 year statute of limitations of § 2462. *See Kokesh*, slip op at 5 n. 3 ("Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context."). Whether courts possess such authority or not, neither the Commission nor its ALJs have any constitutional authority to grant equitable remedies, a point expressly noted in Respondents' prior submission to the Commission. *See* Joint Brief

Addressing Certain Legal Issues in Accordance with the Commission's Order at 9 (citing U.S. Const. Art. III, §§ 1, 2).

2. *Bartko v. SEC*

On January 17, 2017, the United States Court of Appeals for the District of Columbia held that the Commission could not retroactively apply the Dodd Frank Act to impose a collateral bar on conduct that occurred prior to its passage in July 2010. The D.C. Circuit Court vacated collateral bars against Bartko, who was associated only with a broker-dealer at the time of his securities law violations, from association with investment advisers, municipal securities dealers, transfer agents, municipal advisors, and nationally recognized statistical rating organizations.

The Commission has announced its determination not to seek further review of the *Bartko* decision and has invited respondents to request that the Commission issue an order vacating bars where the relevant conduct occurred before July 22, 2010.

The Division of Enforcement's allegations in its OIP in this matter (*Matter of Donald J. Anthony, Jr. et al.*) concerned alleged securities law violations from 2003 to 2009. With respect to Messrs. Rabinovich's and Mayer's respective conduct, the OIP alleged securities law violations in their capacity as registered representatives of a broker-dealer. The collateral bars in the Initial Decision went beyond association with a broker-dealer, but also included all of the other bars imposed in *Bartko*, despite the fact that all of the alleged violations pre-dated the Dodd Frank Act's July 22, 2010 effective date.

The collateral bars beyond association with a broker-dealer cannot be imposed under *Bartko* and Commission's determination not to seek further review of *Bartko*.

Messrs. Rabinovich and Mayer maintains that, in light of the evidence, as well as the *Steadman* factors (603 F.2d 1126, 1137 (5th Cir. 1179), *aff'd on other grounds*, 450 U.S. 91 (1981)), no bar is warranted.

3. *Bandimere v. SEC*; *Lucia v. SEC*

On December 27, 2016, the United States Court of Appeals for the Tenth Circuit held that SEC ALJs are inferior officers who must be constitutionally appointed. *Bandimere v. SEC*, 844 F.3d 1168, 1170 (10th Cir. 2016) (citing *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991)). The Tenth Circuit observed:

> SEC ALJs "are more than mere aids" to the agency. . . . . They "perform more than ministerial tasks." The governing statutes and regulations give them duties comparable to the STJ's duties described in *Freytag*. SEC ALJs carry out "important functions," and "exercis[e] significant authority pursuant to the laws of the United States." The SEC's power to review its ALJs does not transform them into lesser functionaries. Rather, it shows the ALJs are inferior officers subordinate to the SEC commissioners.

Id. at 1188 (internal citations omitted). Although the D.C. Circuit Court of Appeals reached a different conclusion months earlier, *see Raymond J. Lucia Cos. V. SEC*, 832 F.3d 277 (D.C. Cir. 2016), a petition for rehearing en banc was subsequently granted in a per curiam order, *see Raymond J. Lucia Cos. v. SEC*, 2017 U.S. App. LEXIS 2732 (D.C. Cir. Feb. 16, 2017). Ultimately, an equally divided panel of ten D.C. Circuit judges denied the petition for review. *See Raymond J. Lucia Cos. v. SEC*, 2017 U.S. App. LEXIS 11298 (D.C. Cir. June 26, 2017).

It is anticipated that *Bandimere* and *Lucia* will be appealed to the Supreme Court. Messrs. Rabinovich and Mayer each maintain that the SEC ALJ in this proceeding was not constitutionally appointed, and that, for other reasons, detailed in each of their prior submissions,

this proceeding should not have been brought against either of them in any forum, let alone as an administrative proceeding.

We appreciate the Commission's attention to these developments and their affect on the Initial Decision.

Respectfully submitted,

M. William Munno

M. William Munno

Enclosures

cc : David Stoelting, Esq. (stoeltingd@sec.gov)
Haimavathi Varadan Marlier, Esq. (marlierh@sec.gov)
Michael D. Birnbaum, Esq. (birnbaumm@sec.gov)
By Federal Express and Email

Gilbert B. Abramson, Esq. (gabramson@gbalaw.com)
Matthew J. Nielsen, Esq. (matthewnielsen@andrewskurth.com)
Mark J. Astarita, Esq. (mja@sallahlaw.com)
Roland M. Cavalier, Esq. (rcavalier@tgtflegal.com)
By Email

SK 88888 0211 7545399