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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

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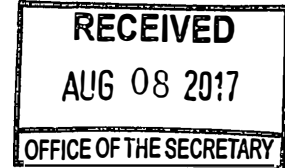
DIVISION OF
ENFORCEMENT

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August 7, 2017

BY FACSIMILE AND UPS

Mr. Brent J. Fields
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549
Fax: (202) 772-9324



Re: Matter of Chiappone, et al., File No. 3-15514

Dear Mr. Fields:

On behalf of the Division of Enforcement, I write to respond to the letter dated July 10, 2017, from counsel to Respondents Philip Rabinovich ("Rabinovich") and Brian Mayer ("Mayer"), and the letter dated July 17, 2017, from counsel to Respondent Frank Chiappone ("Chiappone"). These letters discuss three issues:

- g The proper measure of disgorgement in view of *Kokesh v. SEC*, 137 S.Ct. 1635 (2017);
- g The scope of industry bars in view of *Bartko v. SEC*, 845 F.3d 1217 (D.C. Cir. 2017); and
- g The impact of *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016) and *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016)

Disgorgement of ill-gotten gains under *Kokesh v. SEC*

The Division agrees with Chiappone, Mayer and Rabinovich that *Kokesh* requires the disgorgement ordered in the Initial Decision ("ID") to be reduced. The reduction should also be applicable to the disgorgement orders as to Respondents William ("Lex") and Thomas Livingston ("Livingston").

Kokesh held that "any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued." 137 S. Ct. at 1645. "[T]he 'standard rule' is that a claim accrues 'when the plaintiff has a complete and present cause of

action.”¹ Here, that is when Respondents received their ill-gotten gains. As a result, the Division’s disgorgement claims did not accrue until Respondents received their commissions. All commissions received on or after September 23, 2008 (five years before the OIP was filed), therefore, should be disgorged.

Division Exhibit 2, which is based on McGinn Smith & Co. (“MS & Co.”) payroll records, is a summary exhibit which, among other things, lists all commission payments to the Respondents for their sales of the offerings referenced in the OIP. Div. Ex. 2 was the sole basis for the disgorgement calculations by Judge Murray, *see* ID at 115, and is the most authoritative evidence of commission payments in evidence. Based on Div. Ex. 2, the Attachment hereto lists the commission payments to Rabinovich, Mayer, Chiappone, Livingston and Lex that are subject to disgorgement.

As the following table below shows, the commission figures proposed by Rabinovich, Mayer and Chiappone in their letters, which also appear to be based on Div. Ex. 2, are lower than the Division’s figures.

	Chiappone	Mayer	Rabinovich
Disgorgement ordered in Initial Decision	\$59,471	\$29,518	\$109,695
Proposed disgorgement per Respondents’ letters	\$23,329	\$16,591	\$53,119
Proposed disgorgement per Division’s letter	\$44,328	\$22,429	\$90,529

The differences can be attributed to the fact that Rabinovich, Mayer and Chiappone appear to have incorrectly excluded commissions paid on October 15, 2008, from the brokers’ sales of Fortress Trust. *See* Attachment. Sales corresponding to these commission payments occurred on or after September 23, 2008. *See* Div. Ex. 2 at Ex. 4c at 9 (Chiappone); Ex. 4o at 2 (Mayer); and Ex. 4q at 4 (Rabinovich).² The Fortress 08 PPM, moreover, is dated September 24, 2008, Div. Ex. 202 at 1, providing further evidence that these Fortress sales occurred after September 23, 2008.

Finally, a small amount of commissions (\$638) paid to Mayer after September 23, 2008, were for MSTF sales before that date. These commissions also should be disgorged because these sales were after February 1, 2008, which was the date by which Judge Murray found that Rabinovich, Mayer, Lex, Livingston and Chiappone “had requisite scienter to violate the antifraud provisions.” ID at 115.

¹*Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013) (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)).

² These citations are to the “Date” column in the “Summary of Sales” shows the date the investor funds were deposited into the issuer’s escrow account. Tr. at 239.

Scope of the Industry Bars under *Bartko v. SEC*

All of the conduct alleged in the OIP took place prior to the enactment of the Dodd-Frank Act in July 2010. As a result, and in light of *Bartko* and the Commission's Public Statement dated February 23, 2017, announcing its decision "not to seek further review" of *Bartko*, the Division agrees with Rabinovich, Mayer and Chiappone that the collateral bars imposed in the ID should be modified.

Should the Commission find that the evidence supports the imposition of remedial bars to protect the investing public, it is clear that a bar from association with a broker-dealer would be appropriate.

In addition, however, a bar from association with an investment adviser is warranted based on the following evidence:

- | From April 2009 to December 2009, Rabinovich, Guzzetti, Livingston, Mayer, Chiappone and Lex were registered with MS & Co., and during that time MS & Co. was dually registered as a broker-dealer and investment adviser. Ans. of Philip Rabinovich at 12 (admitting OIP allegation, at paragraph 11, that MS & Co. was registered "as an investment adviser in April 2009"); Ans. of Brian Mayer at 12 (same); Ans. of Frank Chiappone at 3 (same).
- | From January 2006 through April 2009, Rabinovich, Guzzetti and Mayer were employed by McGinn Smith Advisors LLC ("MS Advisors"), a registered investment adviser. Div. Ex. 485 at 7 (Rabinovich); Div. Ex. 481 at 7 (Guzzetti); Div. Ex. 484 at 7 (Mayer). *See also* Tr. at 1912 (Rabinovich testimony that he was an investment adviser registered with MS Advisors from 2006 through 2009); 3241 (Mayer: "I was advisor with [MS Advisors] until late 2009."); 892, 895 (Vincent O'Brien testimony that Mayer was his investment adviser); Tr. at 2963 (Guzzetti: "I was head of MS Advisors.").
- | From 2010 to the present, Rabinovich and Mayer have been registered with RMR Wealth Management, an investment adviser. Div. Ex. 485 at 7 (Rabinovich); Div. Ex. 484 at 7 (Mayer). *See also* Tr. at 1912-1914 (Rabinovich testimony that he has been a registered investment adviser since 2010 and provides "investment advisory services" to his clients); 3243 (Mayer: "RMR is the registered investment advisor. I believe I am a registered investment adviser.").
- | Since 2010, Guzzetti has been registered with DLG Wealth Management LLC, an investment adviser. Div. Ex. 481 at 6 (Guzzetti). |
- | Chiappone testified that his current "advisory business goes through DLG Wealth Management . . . a registered investment advisor." Tr. at 2570. |
- | Rabinovich (2006) and Guzzetti (1992) passed the Uniform Investment Adviser Law Examination (Series 65). Div. Ex. 485 at 6 (Rabinovich); Div. Ex. 481 at 6 (Guzzetti).

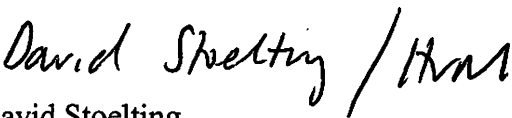
Accordingly, the Respondents should be barred from association with any broker-dealer and investment adviser.

Impact of *Bandimere v. SEC* and *Lucia v. SEC*

The Commission should reject Respondents' argument that the Commission's method of hiring of administrative law judges violates the Appointments Clause of the Constitution. See U.S. Const. art. II, § 2, cl. 2. The Commission has consistently held that the Appointments Clause's requirements apply only to officers of the United States, not employees, and that its administrative law judges are employees. See, e.g., *Bennett Gr. Fin. Serv., LLC & Dawn J. Bennett*, Securities Act Rel. No. 10331, 2017 WL 1176053, at *5 (Mar. 30, 2017), *pet. filed* May 26, 2017 (10th Cir. No. 17-9524). The Commission has also reiterated that holding in two decisions that post-date the Tenth Circuit's contrary determination in *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), on which Respondents rely. See *Bennett*, 2017 WL 1176053, at *5; *Harding Advisory LLC & Wing F. Chau*, Securities Act Rel. No. 10277, 2017 WL 66592, at *19 & n.90 (Jan. 6, 2017), *pet. filed* Mar. 6, 2017 (D.C. Cir. No. 17-1070).

The Commission's position remains correct, and Respondents have offered no compelling reason why the Commission should depart from its carefully considered and established approach.

Respectfully submitted,


David Stoelting

cc (by email): All Counsel

ATTACHMENT

CHIAPPONE (source: Div. Ex. 2 at 57-68)

Date of Comm'n Payment	Offering	Commission Payment
10/15/2008	Fortress (sales made from 9/23/08 through 9/30/08)	\$21,000
11/15/2008	Fortress	\$3,000
12/15/2008	Fortress, TDM Cable Roll	\$1,200
1/15/2009	TDM Verifier	\$1,920
2/15/2009	TDM Verifier	\$480
3/15/2009	TDM Verifier and TDMM Cable	\$4,218
6/15/2009	TDMM Cable, TDM Verifier	\$5,933
7/15/2009	TDMM Cable)	\$750
9/15/2009	TDMM Benchmark	\$5,023
10/15/2009	TDM Verifier, TDMM Benchmark	\$805
	Total commissions paid on or after 9/23/2008 for sales that violated the antifraud provisions	\$44,328

MAYER (source: Div. Ex. 2 at 110-115)

Date of Comm'n Payment	Offering	Commission Payment
10/15/2008	Fortress (sales made 9/25/08 and 9/30/08)	\$6,000
11/15/2008	Fortress	\$1,500
12/15/2008	TDM Verifier, TDM Cable	\$1,860
1/15/2009	TDM Verifier	\$480
1/15/2009	Fort13%, TDM Cable Roll	\$(800)
2/15/2009	TDMM Cable, TDM Verifier	\$840
6/15/2009	MSTF	\$399
7/15/2009	TDMM Cable, TDM Verifier	\$1,945
9/15/2009	TDMM Benchmark	\$9,966
9/15/2009	MSTF	\$239
	Total commissions paid on or after 9/23/2008 for sales that violated the antifraud provisions	\$22,429

RABINOVICH (source: Div. Ex. 2 at 116-123)

Date of Comm'n Payment	Offering	Commission Payment
10/15/2008	Fortress (sales made on 9/29/08)	\$37,500
11/15/2008	Fortress	\$11,400
12/15/2008	Fortress, TDM Cable	\$800
1/15/2009	TDM Verifier	\$1,200
2/15/2009	TDMM Cable 09, TDMM Verifier	\$8,750
2/15/2009	TDM Verifier	\$3,600
3/15/2009	Firstline	\$1,663
6/15/2009	TDMM Cable	\$1,750
7/15/2009	TDMM Cable	\$1,920
9/15/2009	TDMM Benchmark	\$12,793
10/15/2009	TDM Verifier and TDMM Benchmark	\$9,153
	Total commissions paid on or after 9/23/2008 for sales that violated the antifraud provisions	\$90,529

Lex (source: Div. Ex. 2 at 85-106)

Date of Comm'n Payment	Offering	Commission Payment
10/15/2008	Fortress	\$16,200
11/15/2008	Fortress	\$1,800
12/15/2008	TDM Verifier	\$1,520
2/15/2009	TDMM Cable	\$5,761
2/15/2009	TDM Verifier	\$9,840
3/15/2009	TDMM Cable, TDM Verifier	\$8,904
4/15/09	TDMM Cable, TDM Verifier	\$1,470
5/15/09	TDM Verifier	\$280
6/15/2009	TDMM Cable	\$6,800
7/15/2009	TDMM Cable	\$6,800
8/15/2009	TDM Verifier	\$21,081
9/15/2009	TDM Verifier	\$8,470
	Total commissions paid on or after 9/23/2008 for sales that violated the antifraud provisions	\$88,926

Livingston (source: Div. Ex. 2 at 108-109)

Date of Comm'n Payment	Payroll Record Description	Commission Payment
2/15/09	TDMM Cable	\$700
	Total commissions paid on or after 9/23/2008 for sales that violated the antifraud provisions	\$700