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August 9, 2017

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. We briefly respond to the Division of Enforcement's letter dated August 7, 2017 (the "August 7 Letter"), which responded to our letter dated July 10, 2017. [1]

I. The Date of Sale is the Only Relevant Date

The Division challenges our revised calculations, arguing that "[a]ll commissions *received* on or after September 23, 2008 (five years before the OIP was filed) . . . should be disgorged," regardless of the date on which the underlying sale occurred. August 7 Letter at 2

[1] At the Division's request, we explained how we recalculated the disgorgement based on *Kokesh*. The Division advised that they would review and contact us so the disgorgement amount could be agreed by the parties. However, we did not hear back from the Division; instead, we received the August 7 Letter nearly one month later.

(emphasis added). This issue was previously considered – and rejected – by the ALJ (relating to a different date):

> The Division also moves to modify the Initial Decision to clarify that "all commission payments *received* on or after February 1, 2008" shall be disgorged. I REJECT the Division's motion to modify the language of the Initial Decision because Respondents should disgorge the proceeds received from their violations committed after February 1, 2008, based on their violations after that date.

Order on Motions to Correct Manifest Errors of Fact in the Initial Decision, dated Apr. 9, 2015, at 2 (emphasis in original). Any alleged violation of the securities laws occurred at the time of the sale, *not* the date on which Respondents received commission payments. Nor is it correct, as the Division contends without any authority, that a complete and present cause of action only accrues "when Respondents received their ill-gotten gains." August 7 Letter at 2. That has never been the law. Disgorgement is a remedy, *not* a cause of action.

The fallacy of the Division's argument is underscored by their request to disgorge commissions paid to Mr. Mayer after September 23, 2008, that plainly relate to the sale of a security (MSTF) prior to that date. *See* Div. Ex. 2 at Ex. 4o (reflecting no sales of MSTF by Mr. Mayer after August 1, 2008). After *Kokesh*, such disgorgement claims are barred by Section 2462.

The Division's argument about Fortress is equally unsupported. First, the Division admits that their self-constructed sales charts show only "the date the investor funds were deposited into the issuer's escrow account," and *not* the date on which a Respondent presented or sold a security to an investor. *See* August 7 Letter at 2 n.2. The Division's summary exhibit was frequently shown at the hearing to be inaccurate. *Compare, e.g.*, RMR Ex. 429 (O'Brien subscription agreement for Benchmark investment dated Aug. 28, 2009), *with* Div.

Ex. 2 at Ex. 4o (reflecting a date of 9/10/2009 for O'Brien's investment in Benchmark). Second, the date of the Fortress PPM does not "provid[e] further evidence that these Fortress sales occurred after September 23, 2008." August 7 Letter at 2. Indeed, evidence at trial established that Respondents presented the Fortress investment to their customers *prior* to September 23, 2008. *See, e.g.*, RMR Ex. 178 (email from Mayer to prospective investor dated September 22, 2008, attaching Fortress PPM), Tr. 931:10-24. In so doing, Respondents sent their customers a Fortress PPM provided by McGinn Smith that was dated September ***22***, 2008. The relevant page from RMR Ex. 178 is attached.

II. *Bartko* and the Division's OIP Allegations Confirm that a Collateral Bar is Unwarranted Here

The Division agrees with Respondents that, under *Bartko*, "the collateral bars imposed in the ID should be modified." August 7 Letter at 3. The Division nevertheless argues that Rabinovich and Mayer should be collaterally barred from association with an investment adviser based solely on their alleged misconduct as registered representatives of a broker-dealer. *Id.*

First, as stated in *Bartko*, "[a] collateral bar is a tool by which the SEC can ban a market participant from associating with *all classes* based on misconduct regarding only *one* class." *Bartko*, slip op. at 3. Significantly, a collateral bar may only be imposed based on conduct that occurred after July 22, 2010, the date on which the Dodd-Frank Act first authorized the Commission to impose collateral bars. *Id.* at 5. All alleged conduct here occurred *before* 2010.

Second, the OIP only alleges securities law violations based solely on Respondents' conduct as registered representatives of a broker-dealer. See OIP, at Section E

("The Respondents' Illegal Conduct") and paragraph 34 ("The Respondents, as associated persons of a broker-dealer, ... implicitly represented to their customers that they had an adequate basis for the recommendation."). No conduct as an investment adviser is alleged in the OIP and no evidence was presented that any Respondent ever acted in the capacity of an investment adviser. There is no legal or factual basis to bar Respondents from association with an investment adviser.[2]

We request that this letter be provided to the Commissioners and filed of record on the docket in this proceeding. Four copies are enclosed.

Respectfully submitted,

M. William Munno

M. William Munno

Enclosures

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[2] The ALJ expressly noted that the Division did not pursue penalties and disgorgement under Section 203 of the Advisers Act or Section 9 of the Investment Company Act. *See* Initial Decision at 114-15 nn.128-29.

CONFIDENTIAL PRIVATE PLACEMENT MEMORANDUM

$2,550,000

FORTRESS TRUST 08

MAXIMUM OFFERING $2,550,000 CONTRACT CERTIFICATES
MINIMUM OFFERING $250,000 CONTRACT CERTIFICATES
THIRTY-SIX MONTHS: 13.00%

FORTRESS TRUST 08 (the "Trust Fund") is hereby offering $2,550,000 of Senior Contract Certificates, entitled to interest at the rate of 13.00% per annum (the "Certificates"). Interest on the Certificates is payable in monthly installments commencing November 1, 2008. See "Description of Trust Agreement and the Certificates". Principal and interest in the Certificates is payable in monthly installments commencing June 1, 2009.

The Certificates will be issued and registered in the names of the purchasing Certificateholders. Interests in the Certificates will be shown on, and transfers thereof will be effected through, records maintained by the Trustee under the Trust Agreement. See "Description of Trust Agreement and the Certificates."

Price of Certificates 100%

See "Risk Factors" for a discussion of certain risks that should be considered by prospective purchasers of the Certificates offered hereby.

THESE CERTIFICATES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION OR ANY STATE SECURITIES COMMISSION NOR HAS THE SECURITIES AND EXCHANGE COMMISSION OR ANY STATE SECURITIES COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS MEMORANDUM. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

	Price to the Public	Underwriting Discount	Proceeds to the Trust Fund
	100%	6.00%	94.00%
Minimum Offering	$250,000	$15,000	$235,000
Maximum Offering	$2,550,000	$153,000	$2,397,000

The date of this Memorandum is
September 22, 2008

McGinn, Smith & Co., Inc.
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