UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceeding
File No. 3-15514

In the Matter of

Donald J. Anthony, Jr.,
Frank H. Chiappone,
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.

AFFIDAVIT OF
FRANK H. CHIAPPONE

STATE OF NEW YORK)
COUNTY OF RENSSELAER) ss:

FRANK H. CHIAPPONE, being duly sworn, deposes and says:

1. In submitting this additional evidence, we are in no way agreeing to the position taken by the Commission that the after-the-fact appointment of the ALJ's by the Commissioners (who are Department Heads within the contemplation of U. S. Constitution Art. II, § 2,cl 2 clause dealing with appointment of superior and inferior officers) and the ALJ's review and reconsideration of the record (consisting of 6,000 pages of testimony, 1,000 unique exhibits, more than 1,000 pages of motions, pre and post-hearing briefs, findings of fact and conclusions of law will retroactively legitimize the Initial Decision, when the entirety of the proceedings were conducted and presided over by an ALJ who was not appointed to that position until years after the hearings were concluded. We firmly believe that if the SEC ALJ's are determined to not have been properly appointed, then the appropriate action would be to dismiss the ALJ's findings, and terminate the proceedings, or conduct the hearings anew, subject however to the time limitations imposed by 28 U.S.C. § 2462.

Accordingly, we reserve all rights to argue that the deficiencies in the manner in which the ALJs were appointed renders all of the proceedings at the evidentiary hearings a nullity.

2. This Affidavit is being submitted as additional evidence as allowed by an Order issued by Brenda P. Murray, Chief Administrative Law Judge, dated December 15, 2017, and an Order Granting Motion for Extension, dated January 2, 2016.

3. 12 Month Suspension. The only evidence that I wish to bring to Your Honor's attention at this time does not have to do with my activities in connection with the sale of McGinn Smith private placement investments. Likewise, my arguments as to the amount of investigation and customer specific determinations made in selling those securities were adequately stated in my testimony and in the briefs submitted after the hearings were closed. The sole purpose of this Affidavit is to address Your Honor's conclusion that because I remain employed in the securities industry, I pose a continuing danger to the investing public, thus supporting your Honor's imposition of a 12 month suspension.

Since the date I left the employ of McGinn Smith & Co., in late 2009, I completely ceased selling any private placement securities, not just those issued by my employer, but also private placements issued by major, reputable issuers. At conclusion of the hearings, I had gone 4 ½ years without selling or even offering a private placement security of any kind. At the time oral arguments were made to the Commissioners, I had gone 7 ½ years since selling a private placement. At the present time I have gone almost 9 years without making a single sale or offering of a private placement. It must be remembered that the losses incurred by investors in this case involved only private placements, not churning, front running, penny stocks, or other typical transgressions of the rules. Prior to the McGinn Smith matter, my record had been spotless. I believe this evidence is more than sufficient to convince Your Honor that I pose absolutely no risk to the investing public, and I respectfully request that Your Honor reconsider that aspect of her Initial Decision as imposed the 12-month suspension..

In addition to the fact that I have not sold a single private placement since I left McGinn Smith & Co, I have migrated my practice towards assisting clients in planning for retirement, health care, life insurance, social security planning, and estate planning. In fact, that portion of my practice that deals with negotiable securities, is heavily focused primarily on advising clients on more conventional investments, such as annuities issued by reputable sponsors, in order to create a steady income stream.

4. Alleged Failure to Meet Suitability Requirements. As noted in my testimony in the original hearing held by ALJ Murray, and as was covered in my brief to the ALJ as well as the brief to the Commission, I had reasons to believe that the McGinn Smith personnel involved in finding, vetting, structuring, and investigating the private placements were doing their job as to product suitability, and that the accountants and attorneys (both in house and outside counsel) complied with the filing requirements of Reg. D. I am positive that I complied with the requirements relating to customer specific suitability. At the time in question, I had no reason to believe that my superiors were taking any actions that would put investors at risk. There was significant testimony at the hearings that it is not the function of the registered representatives to duplicate the work of the company's due diligence team, and valuing the underlying assets that

generate the income for investors. Both SEC pronouncements and case law delineate the duties of the sales force (customer specific suitability) and that of the persons involved in structuring the investment products and providing appropriate information in the private placement memorandums.

It is now known that Mr. McGinn and Mr. Smith in fact used customer money for their own personal expenses, including vacations, lavish residences, both in the Capital District and in sunny vacation locations, used customer money to make payrolls and to pay other obligations, and also used funds invested by some investors to prop up losses in investments that were failing. However, there was no evidence that I ever had knowledge that McGinn and Smith were moving funds from one investment to another. There was no testimony that I had any knowledge whatsoever that they were engaged in such conduct. In sum, I had no reason to know of the shifting of funds and misuse of funds that were the sole province of Messrs. Smith and McGinn, as well as the in-house accountant and possibly the in-house legal counsel in the later days.

I therefore respectfully request that Your Honor reconsider her holding that I could have or should have unearthed the fraudulent activities perpetrated by Messrs. McGinn and Smith concerning misuse of customer funds. As was noted during cross examination of the SEC's forensic accountant, Kerri Palen, it took her the better part of three years, allocating 50% of her time to the McGinn Smith case, to fully understand and document the fraudulent misuse of customer funds. I certainly did not have the training or background of Ms. Palen. I also had no access to the internal accounting records of McGinn Smith & Co. I and other registered representatives, whose obligation it was to make customer specific suitability determinations, could not have discovered the fraud that was so carefully hidden by Messrs. McGinn, Smith, and which if not assisted, was at least ignored by their in-house accountant and attorney. There was no evidence at the trial that any customer of mine had an income or net worth profile that would render sale of a private placement unsuitable for such customer.

5. I continue to upgrade my education. I took and passed a course entitled "A Professional's Guide to Ethical Decision Making" and I remain current on all of my licenses for both securities and insurance products.

I therefore respectfully request that Your Honor reconsider and revoke the twelve month suspension, reconsider the imposition of statutory fines, and reconsider if my conduct was of such nature as to require disgorgement.

[Signature on Following Page]

Dated: January 18, 2018

Frank H. Chiappone

Frank H. Chiappone

Sworn to before me this 18th day of January, 2018

Roland M. Cavalier, notary public

ROLAND M. CAVALIER
Notary Public, State of New York
No. 4725079
Qualified in Albany County
Commission Expires December 31, 12/31/2018

Tuczinski Gilchrist
Cavalier Tingley
ATTORNEYS AT LAW
TRUST·INTEGRITY·SERVICE

Roland M. Cavolier
rcavalier@tgtflegal.com
(518) 238-3759 ext. 208

January 18, 2018

COPY

VIA FACSIMILE AND FEDEX

The Honorable Brenda P. Murray
Chief Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Mail Stop 1090
Washington, D.C. 20549

HARD COPY

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

Dear Chief Judge Murray:

On behalf of Respondent Frank Chiappone, I submit this Letter Brief regarding the Commission's Order dated November 30, 2017 (the "Post Hoc Ratification Order"), in which the Commission (i) purports to retroactively "ratify" the alleged appointment of its ALJs nearly four years after the conclusion of hearings in this administrative proceeding and in the midst of Respondents' pending appeal to the Commission, which was fully briefed in 2015 and argued before the Commission on August 15, 2017, and (ii) remands this matter (and numerous others) for reconsideration of "the record, including all substantive and procedural actions taken by an administrative law judge." The record includes eighteen days of hearing testimony totaling more than 6,000 pages, nearly 1,000 unique exhibits, and more than 1,000 pages of motions, pre- and post-hearing briefing, findings of fact and conclusions of law and related submissions.

This Letter Brief also addresses the Order dated December 15, 2017, noting that you will reexamine the record and any challenged rulings, findings, or conclusions (the "Reexamination Order"). Mr. Chiappone objects to this process in its entirety, and the submission of this Letter Brief should not be construed as consent to, or acceptance of, the Commission's purported "ratification" of the appointment of its ALJs or your Honor's "reexamination" of the record.

We believe that it is improper for the Commission to attempt to negate the undisputed fact that the entirety of the proceedings (taking of testimony, ruling on objections, ruling on motions, deciding whether to admit evidence, making decisions on veracity of witnesses and all

other functions) were conducted by an officer not duly appointed in accordance with the requirements of the Appointments Clause of the U.S. Constitution. We believe that it is impossible for your Honor, given her work schedule in other ongoing matters, to review in depth every page of relevant testimony, review some 1,000 +/- exhibits, reconsider her rulings on motions made at trial, reconsider her rulings on admission of evidence, and then make findings of fact that may or may not confirm aspects of the original Initial Decision.

The Commission's suggestion that a cursory examination of the record will cure the fact that the entirety of the 18 days of hearings were conducted at a time when her Honor was not duly appointed and had no authority to make decisions on evidence is ludicrous. It is our belief that the lack of authority of the Commission's ALJ's to even conduct the hearings in this case renders the entirely of the proceedings a nullity. We also suggest that it is near impossible for your Honor to make determinations as to veracity of oral testimony by review of a transcript, without having the witness testifying live in the room, in the presence of all counsel.

It is our contention that the only legitimate way in which the prosecution of this case may proceed is if the entire hearings were conducted *di novo.* Of course, in that event, and as noted by Mr. Munno in his letter brief, there may not be much of a case to prosecute, since the five year limitation period requires that the cases either (i) be dismissed or (ii) be continued only to the extent that any actions referenced in the Order Instituting Proceedings (OIP) took place within the five year period of limitations set forth in 28 U.S.C. Section 2462, to be computed from the date that the new hearings are commenced, or a new OIP filed.

1. Adoption of Munno Letter. First, please note that, with the consent of William Munno and his colleagues at Seward & Kissel, LLP, and on behalf of Mr. Chiappone, we adopt the arguments made by Mr. Munno in his letter to your Honor, subject only to the modifications noted below, which apply specifically to Mr. Chiappone. A copy of Mr. Munno's letter is attached hereto as **Exhibit 1**, and incorporated into this letter brief.

2. David Smith Letter (Exhibits Liv 31 & 32). While taking no position on Mr. Munno's argument (made at ¶ II-C of his letter brief) that the admission of the handwritten David Smith 1999 letter into evidence was an error, I only point out that there is ample proof in that letter that Messrs. McGinn and Smith went to great lengths to hide their misuse of client funds from not only their clients, but also from their own registered representatives and other employees. A portion of the relevant passages from Mr. Smith's unsent letter and Mr. Chiappone's testimony establishing the date of that letter are quoted herein:

> "By not disclosing in the prospectus our poor history of collections, we are not providing the prospective investor an accurate picture of his risk. We both know

> why we don't make that disclosure – because such disclosure would cause our Salesman to cease selling and investors to cease buying. Thus, we are misleading both our own employees and the customers."

This text is taken verbatim from Livingston Exhibit 31, introduced into evidence. Mr. Chiappone's reading of this passage and similar provisions showing that McGinn & Smith hid their financial problems from their own brokers is found at Transcript pp. 5614-5618. The fact that McGinn and Smith went to great lengths to hide from the brokers the switching of funds from some offerings to shore up losses in earlier offerings and also used customer money to support lavish lifestyles cuts against Your Honor's finding that the brokers should have discovered this fraud. The fact that this misuse of funds, a classic element of a Ponzi scheme, was hidden from everyone except McGinn, Smith, their Chief Financial Officer and likely their in-house counsel (now deceased), cuts against your Honor's finding that the brokers should or even could have found out about the misuse of customer funds. That it took Ms. Palen (SEC's forensic accountant) three years working 50% of her time only on the McGinn Smith investigation, is clear evidence that the brokers could not have known of what took place in the back rooms and executive offices where decisions on money transfers were made.

3. Chiappone Poses No Threat To The Investing Public.

Attached hereto as **Exhibit 2** is Mr. Chiappone's Affidavit, which establishes that in the 7 ½ years since he left the employment of McGinn Smith & Co., he has not sold, nor even offered, a single private placement security, whether proprietary to his current employer or sponsored by any major securities firm. This establishes without a *scintilla* of doubt that he poses absolutely no danger to the investing public, and that even a 12-month suspension is not warranted. Moreover, as set forth in his Affidavit, he has migrated his practice towards assisting clients in planning for retirement, health care, life insurance, social security planning and estate planning. Additional details on this point can be found in Mr. Chiappone's Affidavit, attached hereto as Exhibit 2.

4. Chiappone Expressly Adopts and Incorporates By Reference All Appellate Filings Before The Commission

Additionally, Chiappone expressly adopts and incorporates by reference all facts and arguments set forth in the Appeal Briefs, the 2017 Letters, and the transcript of oral argument before the Commission held on August 15, 2017. He also refers to and incorporates his proposed findings of fact and conclusions of law and his post-hearing briefs.

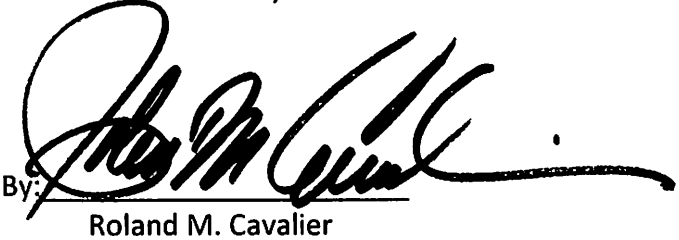
5. Reservation of Rights. Chiappone reserves all of his rights, including without limitation the ability to challenge any activities on the part of the Commission to legitimize the future findings of Your Honor by virtue of a reconsideration of the record, as directed by the Commission's Order dated November 30, 2017 and Your Honor's Order of December 15, 2017. It is the position of Mr. Chiappone that The Commission's administrative law judges are inferior officers of the United States, and that the retroactive re-appointment of all of the administrative law judges only allows them to conduct future proceedings, and does not retroactively re-constitute their findings, rulings and actions as having been done within the framework of the Constitution.

We respectfully request that this letter be posted on the docket.

Based on the record, the Appeal Briefs, and this letter brief, the proceeding should be dismissed against Mr. Chiappone.

Very truly yours,

TUCZINSKI, GILCHRIST,
CAVALIER & TINGLEY, P.C.



By: _____
Roland M. Cavalier

RMC/lam

cc: Brent J. Fields, Secretary (by FedEx)
David Stoelting, Esq. (by FedEx and email)
All Respondents' Counsel of Record (by email)

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January 18, 2018

VIA EMAIL AND FEDERAL EXPRESS

The Honorable Brenda P. Murray
Chief Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549

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

Rabinovich and Mayer Letter Brief

Dear Chief Judge Murray:

On behalf of Respondents Philip S. Rabinovich and Brian T. Mayer, we write regarding the Commission's order dated November 30, 2017 (the "Post Hoc Ratification Order"), in which the Commission (i) purports to "ratify" the alleged appointment of its ALJs nearly four years after the conclusion of hearings in this administrative proceeding and in the midst of Respondents' pending appeal to the Commission, which was fully briefed in 2015 and argued before the Commission on August 15, 2017, and (ii) remands this matter (and numerous others) for reconsideration of "the record, including all substantive and procedural actions taken by an administrative law judge." The record includes eighteen days of hearing testimony totaling more than 6,000 pages, nearly 1,000 unique exhibits, and more than 1,000 pages of

motions, pre- and post-hearing briefing, findings of fact and conclusions of law and related submissions.

We also write regarding the Order dated December 15, 2017, noting that you will reexamine the record and any challenged rulings, findings, or conclusions (the "Reexamination Order").

Rabinovich and Mayer object to this process in its entirety, and the submission of this letter should not be construed as consent to the Commission's purported "ratification" of the appointment of its ALJs or your Honor's "reexamination" of the record.

I. Dismissal Is The Only Appropriate Remedy To Cure The Constitutional Deprivation That Respondents Have Already Suffered

The Commission cannot, under the guise of "ratification" and "reconsideration," salvage this unconstitutional proceeding. Simply put, it is too little, too late. This administrative proceeding should now be dismissed with prejudice.

A. The "Ratification" Of An Unconstitutional Procedure Is Itself A Nullity

The Post Hoc Ratification Order purports to "ratif[y] the agency's prior appointment" of its ALJs notwithstanding the fact that the Commission never appointed those ALJs in the first place. As the government expressly admitted in its briefing before the United States Supreme Court in *Raymond J. Lucia v. SEC*, No. 17-130 (at p.19), the Commission "did not play any role in the selection" of its ALJs. Thus, there was no prior agency "appointment" to ratify.

B. Statutory Restrictions On The Removal Of The Commission's ALJs Violates the Constitution's Separation-of-Powers Principles

As "Officers of the United States," the Commission's ALJs must also be subject to removal in a manner that is consistent with the United States Constitution. *See Free Enterprise*

Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 492-93 (2010). As the government also admitted in *Lucia* (at p.20), ALJs are insulated by "at least two, and potentially three, levels of protection against presidential removal authority." These statutory restrictions on removal violate separation-of-powers principles and warrant dismissal. *See Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993).

C.e "Reconsideration" Will Not Cure The Constitutional Defects In Thise Proceedinge

In issuing the Post Hoc Ratification Order, the Commission acknowledges that itse ALJs are inferior officers for purposes of the Appointments Clause. Consequently, the ALJs were without constitutional authority to take any action in this proceeding prior to the datc of the Post Hoc Ratification Order. A "reexamination" of the record by the finder of fact years after hearings concluded and an initial decision was issued will not revive this unconstitutional proceeding. This action must be dismissed and started anew, either in an Article III forum (where it was required to havc been brought in 2013 to afford Respondents equal protection) or before what the Commission now claims are constitutionally appointed ALJs. But any new proceeding, like the original proceeding, would be barred by the five year limitation period in 28 U.S.C. Scction 2462.

Reconsideration, as opposed to a new hearing, is also inappropriate as it would deny Rabinovich and Mayer the substantive and procedural protections afforded to them under the Commission's current Rules of Practice, including the ability to depose up to five individuals prior to hearings and up to ten months to review the Division's gargantuan investigative record and prepare for hearings. In 2014, at the time this unconstitutional proceeding was heard,

Rabinovich and Mayer were unable to depose *any* witnesses and were given only four months to prepare for hearings (while the Division of Enforcement had four years).

D. Any New Proceeding Would Be Barred By Section 2462

Because Commission ALJs were without constitutional authority to hear this case until, at the earliest, November 30, 2017, any new proceeding would be barred by Section 2462. Thus, any new proceeding would be futile. Rabinovich or Mayer did not present any of the private placements at issue in this case after August 2009. There can be no dispute that any newly-filed proceeding would be barred by Section 2462, and no court or administrative tribunal would have jurisdiction to hear the matter.[1]

E. Prolonging This Proceeding Solely To "Make It Constitutional" Materially Prejudices Rabinovich and Mayer

Further administrative proceedings – either in the form of a new hearing *or* reconsideration – will materially prejudice Rabinovich and Mayer. Until the issuance of the Post Hoc Ratification Order, Rabinovich and Mayer were awaiting the issuance of a Commission Opinion – the final step in the administrative process before judicial review. They are now being directed to return to the starting line so the factual record can be reexamined. As a result, Rabinovich and Mayer must incur additional costs addressing the Post Hoc Ratification Order, await another decision from your Honor, and then return to the Commission for further proceedings which will likely include additional briefing and argument. This reexamination could take months, and possibly much longer. Meanwhile, the stigma that these ongoing

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[1] As Respondents have repeatedly stated, every claim in the OIP "*first accrued*" before September 23, 2008 (i.e., more than five years prior to the date the OIP was filed). Thus, even if Commission ALJs had been constitutionally appointed prior to the filing of the OIP (and they were not), this action could not be "entertained" in any event. *See* 28 U.S.C. § 2462.

proceedings have caused Rabinovich and Mayer is prolonged. And pre-judgment interest potentially would continue to accrue.

The remand here is fundamentally different than an ordinary remand by the Commission. The sole purpose of the Post Hoc Ratification Order is to retroactively repair the constitutional defects in this proceeding. Rabinovich and Mayer should not be forced to incur additional time, resources, and expenses so that the Commission can "fix" its administrative forum.

Moreover, this case -- filed in September 2013 and tried in January 2014 – is unlike any of the more than 100 other cases subject to the Post Hoc Ratification Order. Indeed, more than 80% of those cases were decided on default and without any hearing. Of the fewer than 20 cases in which ALJs did hold hearings, this case is one of only two that was heard four years ago, in 2014. Only this case, however, has been fully briefed and argued to the Commission. This case is also exceedingly complex, involving ten separate Respondents, twenty-six separate financial products, and included testimony from more than forty witnesses. The notion that, realistically, this case can now be appropriately "reexamined" four years later, is dubious at best.

The Commission has previously acknowledged the problems that an attempt at retroactively "fixing" the constitutional infirmities in its administrative proceedings might cause. Nearly three years ago, after a federal district judge suggested that any violation of the Appointments Clause might "easily be cured by having the SEC Commissioners issue an appointment,"[2] the Commission submitted a letter to Judge Berman of the Southern District of

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[2] *Hill v. SEC*, 114 F. Supp. 3d 1297, 1320 (N.D. Ga. 2015), *vacated and remanded by*, 825 F.3d 1326 (11th Cir. 2016).

New York addressing the issue. In the letter, the Commission wrote that it "should not act precipitously to modify its ALJ scheme," particularly "when the SEC has over 100 litigated proceedings at various stages of the administrative process." *See* Letter from the Commission to Hon. Richard M. Berman dated June 15, 2015, *Duka v. SEC*, No. 15-cv-357 (S.D.N.Y.), ECF No. 41, attached as Exhibit 1. These concerns should not be ignored here, especially as they uniquely and materially affect Rabinovich and Mayer.

II. If This Proceeding Is Not Dismissed, There Are Significant Legal Developments And Other Matters That Must Be Considered

In the four years since this matter was heard, there have been significant developments in the law and other matters that must be considered.

A.e Disgorgement Is A "Penalty" Within The Meaning Of § 2462e

On June 5, 2017, the United States Supreme Court held in *Kokesh v. SEC* thate "[d]isgorgement 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 claime accrues." 581 U.S. _(2017), slip op. at 1. The substantial effect that *Kokesh* has on the disgorgement awarded in the Initial Decision is set forth in full in our letters to the Commission dated July 10, 2017 and August 9, 2017 (the "2017 Letters"), which are publicly available on the administrative docket. Moreover, applying *Kokesh*, it is now clear that all of the relief sought by the Division is subject to Section 2462, and *no* evidence relating to the Four Funds and other events occurring prior to September 23, 2008 should have ever been considered. *See SEC v. Gentile*, Civ. Action No. 16-1619, 2017 U.S. Dist. LEXIS 204883, *8-11 (D. N.J. Dec. 13, 2017) (dismissing SEC complaint and holding that § 2462 bars injunctions and industry bars as punitive, not remedial).

B. A Collateral Bar Cannot Be Imposed Based On Pre-Dodd Frank Conduct

On January 17, 2017, the United States Court of Appeals for the District of Columbia in *Bartko v. SEC* (No. 14-1070) 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 Commission has expressly agreed with the *Bartko* decision, inviting requests to vacate bars imposed based on conduct that occurred before July 22, 2010.

Here, all of Rabinovich's and Mayer's alleged conduct occurred from 2003 to 2009 and solely in their capacity as registered representatives of a broker-dealer. For the reasons addressed more fully in the 2017 Letters, the collateral suspensions imposed on Rabinovich and Mayer in the Initial Decision – which went beyond association with a broker-dealer – must be vacated.

C. All "Unreliable" Evidence Previously Admitted Cannot Be Considered

Recent amendments to Rule 320 of the Commission's Rules of Practice added "unreliable" to the list of evidence that is excluded. All prior evidentiary rulings must be reconsidered under the amended rule, and any "unreliable" evidence must be excluded.

By way of example only, David Smith's 1999 *never-sent* letter – pure hearsay and filled with prejudicial statements – was received into evidence over Respondents' objections. In seeking its admission, the Division claimed that the letter was "used as evidence in the criminal trial" of McGinn and Smith, *see* Tr. 4574:24-25, and thereafter read prejudicial and inflammatory portions of the 1999 letter into the record during the testimony of Mary Ann Cody, *see* Tr. 4577:21–4580:25. The Division's conduct – reading the letter into the record "under the guise of asking questions" – is precisely what the Second Circuit found in 2015 to be "manifestly erroneous," and "especially prejudicial and improper" in the criminal trial of McGinn and Smith.

See United States v. McGinn, 787 F.3d 116, 128 (2d Cir. 2015). Under the Commission's current Rules of Practice – and the law of the Second Circuit – such evidence should have never been admitted. Moreover, the admission of the 1999 letter indelibly prejudiced the ALJ against Respondents as evidenced by this statement on the record: "how do you square all that with ... the letter that Smith wrote in 1999 that said the whole thing was a sham." Tr. 5703:22-25. On the basis of that crucial error alone, the proceeding should be dismissed.

Further examples of "unreliable evidence" that must be excluded and erroneous rulings on motions and the law that should be reversed are set forth in Rabinovich's and Mayer's Appeal Briefs.[3]

D. Affidavits Previously Offered By Rabinovich and Mayer Should Be Considered

Rabinovich and Mayer previously moved to admit affidavits from many individuals who were subpoenaed to testify, but unable to attend the hearings. Motion dated January 15, 2014. The motion was denied. Under the Commission's current Rules of Practice – which would apply in any new hearing – Rabinovich and Mayer would have had the opportunity to depose at least five witnesses prior to any hearing and would have undoubtedly used it to depose at least some of these witnesses. The affidavits should be considered as part of the record on remand.

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[3] "Appeal Briefs" refer to: (1) Philip S. Rabinovich's Individual Brief dated July 17, 2015; (2) Philip S. Rabinovich's Individual Reply Brief dated October 27, 2015; (3) Brian T. Mayer's Individual Brief dated July 17, 2015; (4) Brian T. Mayer's Individual Reply Brief dated October 27, 2015; (5) Joint Brief Addressing Certain Legal Issues In Accordance With The Commission's Order dated July 17, 2015; and (6) Joint Reply Brief Addressing Certain Legal Issues In Accordance With the Commission's Order dated October 28, 2015.

E.e The Incorrect And Prejudicial Statement In The Initial Decision That Mayer Settlede A Customer Complaint With FINRA For $20,000 Should Not Be Considerede

As set forth in the findings of fact submitted by Mayer (¶ 17) and acknowledgede by the Division (¶ 522), Mayer was *not* personally accused of any wrongdoing in the complaint referenced in his Broker Check Report, and Mayer made no settlement contribution. It was error to include such a statement in the Initial Decision (at 48 n.3). This incorrect statement should *not* be considered.

F.e Rabinovich and Mayer Pose No Threat To The Investing Publice

In the four years since this proceeding was heard, Rabinovich and Mayer havee continued to work in the securities industry running RMR Wealth Management, an SEC-registered investment advisory firm that offers no proprietary product and does not sponsor private placements or mutual funds. These facts further underscore that Rabinovich and Mayer pose no threat to the investing public. The suspension imposed by the Initial Decision is therefore unnecessary. The time has come to dismiss this proceeding.

G.e Rabinovich and Mayer Expressly Adopt And Incorporate By Referencee All Appellate Filings Before The Commissione

Additionally, Rabinovich and Mayer expressly adopt and incorporate by referencee all facts and arguments set forth in the Appeal Briefs, the 2017 Letters, and the transcript of oral argument before the Commission held on August 15, 2017. They also refer to and incorporate their proposed findings of fact and conclusions of law and post-hearing briefs. Please let us know if having any of these documents (electronically and/or hard copy) would assist your Honor, and we will provide them.

****

Rabinovich and Mayer reserve all of their rights. We respectfully request that this letter be posted on the docket. Three copies are enclosed.

Based on the record, the Appeal Briefs, and this letter brief, the proceeding should be dismissed against Rabinovich and Mayer.

Respectfully submitted,

M. William Munno

M. William Munno

cc: Brent J. Fields, Secretary (by Federal Express)
David Stoelting, Esq. (by Federal Express and email)
All Respondents' counsel of record (by email)

SK 88888 0211 7775658 v2

EXHIBIT 1

U.S. Department of Justice

Civil Division
Federal Programs Branch
20 Massachusetts Ave, N.W.
Washington, DC 20530

June 15, 2015

VIA ECF

The Honorable Richard M. Berman
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007

Re: *Duka v. SEC*, No. 15-cv-357 (RMB)

Dear Judge Berman:

We write on behalf of Defendant the Securities and Exchange Commission (the "SEC") in response to the Court's June 10, 2015 inquiry, ECF No. 40, regarding Judge Leigh Martin May's order granting a preliminary injunction in *Hill v. SEC*, No. 15-cv-1801 (N.D. Ga. June 8, 2015), and to Plaintiff's letter of June 10, 2015, ECF No. 39.

In *Hill*, Judge May found that the SEC administrative law judge ("ALJ") presiding in the administrative proceeding against the plaintiff in that case is likely an inferior officer under the Appointments Clause of the Constitution. Because the Appointments Clause permits Congress to vest the appointment of inferior officers, as relevant here, in Department heads, and because the government acknowledged in *Hill* that the SEC ALJ in that case was not appointed by the Commissioners of the SEC, Judge May concluded that the ALJ's appointment likely was unconstitutional. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010) (holding that Commissioners are the SEC's Department head for purposes of Appointments Clause). She noted that her conclusion "may seem unduly technical" because "the ALJ's appointment could easily be cured by having the SEC Commissioners issue an appointment or preside over the matter themselves." *Hill*, slip op. at 44.

This Court has asked what Judge May meant when she wrote that the "ALJ's appointment could easily be cured." Judge May appears to have been opining on the ease of remedying the likely constitutional defect in the SEC ALJ's appointment identified in her opinion. Judge May apparently believes that the Commissioners could, with little difficulty and consistent with the Appointments Clause, appoint the ALJ as if he were an inferior officer, preside over the administrative proceeding themselves or assign an individual Commissioner to do so. *See* 17 C.F.R. §§ 201.104(a)(5), 201.110 (providing that administrative proceedings shall

be presided over by the Commission itself, a panel of Commissioners constituting less than a quorum of the Commission, an individual Commissioner, an ALJ, or another duly authorized person); *see also* 5 U.S.C. § 556(b).

The government is likely to appeal the *Hill* preliminary injunction. Given the government's position that the SEC ALJ is a mere employee, and not an inferior officer who must be appointed in a manner consistent with the Appointments Clause, the government does not believe the SEC has any obligation to pursue the courses of action discussed by Judge May. Nor would the Commission be expected to do so at this time. Because appellate guidance on the propriety of the *Hill* injunction may be forthcoming if the Solicitor General approves the appeal, the government believes that the Commission should not act precipitously to modify its ALJ scheme. This is particularly the case when the SEC has over 100 litigated proceedings at various stages of the administrative process and the ALJ scheme has been in use for seven decades and is grounded in a highly-regulated competitive service system that Congress created for the selection, hiring and appointment of ALJs in the Executive Branch.

As to Plaintiff's June 10, 2015 letter, the government opposes Plaintiff's request that this Court enter a temporary restraining order enjoining the administrative proceeding, in which trial is scheduled to begin on September 16, 2015, pending adjudication of Plaintiff's anticipated motion for preliminary injunction. Plainly, there is no urgency here. And to the extent Plaintiff's request relies on Judge May's decision in *Hill*, we respectfully submit that *Hill* was wrongly decided. We will briefly address one of the errors in that court's reasoning.

The *Hill* court incorrectly determined that SEC ALJs are likely inferior officers. Despite finding that SEC ALJs have no final decision-making authority, the court concluded that SEC ALJs' "powers" are "nearly identical" to that of the Tax Court's special trial judges ("STJs"), who were held to be inferior officers by the Supreme Court in *Freytag v. Commissioner*, 501 U.S. 868 (1991). *See Hill*, slip op. at 40. But that is not so. As Defendant has already explained, STJs exercise a portion of the judicial power of the United States; they closely resemble federal district court judges and have the power to punish contempt by fines or imprisonment. *See Freytag*, 501 U.S. at 891. SEC ALJs' powers pale in comparison. For example, their power to punish contemptuous conduct is limited and does not include any ability to impose fines or imprisonment. *See* 17 C.F.R. § 201.180. And, while SEC ALJs may issue subpoenas, in cases of noncompliance, the agency would need to seek an order from a federal district court to compel compliance. *See* 15 U.S.C. § 78u(c). Moreover, SEC ALJs are subject to the Commission's plenary authority "over the course of [the] administrative proceeding . . . both before and after the issuance of the initial decision." *In the Matter of Michael Lee Mendenhall*, Securities Exchange Act of 1934 Release No. 74532, 2015 WL 1247374, at *1 (SEC Mar. 19, 2015). They are also subordinate to the agency on "matters of policy and interpretation of law." *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989). In sum, their authority in no way approaches that of STJs, even if they perform some of the same basic duties. And in concluding that SEC ALJs are nevertheless constitutional officers, the *Hill* court acknowledged that its reasoning conflicts with the only court of appeals decision to address the constitutional status of ALJs. *See Hill*, slip op. at

38-41 (disagreeing with *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), which concluded thate ALJs of the Federal Deposit Insurance Corporation are not officers of the United States).[1]

For the same reasons, the government further believes that there is no good cause for another round of briefing and hearing on a second motion for a preliminary injunction. Since the Court's ruling on Plaintiff's motion for a preliminary injunction on April 15, 2015, Plaintiff neither appealed from this Court's ruling nor pursued this case with any deliberate haste. Indeed, it was only after the parties had been negotiating for a month regarding whether they could potentially resolve this case without further litigation that Plaintiff indicated that she intended to amend the complaint (which she ultimately did on June 10, 2015) and seek to file another motion for a temporary restraining order and a preliminary injunction. This Court, however, has previously observed when denying Plaintiff's prior motion for emergency relief, that even had the Court not found that Plaintiff was unlikely to prevail on the merits, the Court nonetheless "would likely [have found] that she failed to demonstrate that the public interest weighs in favor of granting a preliminary injunction," Order at 15 n.13 (ECF No. 33) (April 15, 2015), in light of the vital role the SEC plays in "'protect[ing] investors and maintain[ing] the integrity of the securities markets," *United States v. Wiltig*, 575 F.3d 1085, 1105 (10th Cir. 2009). The SEC submits that the same reasoning should apply now with respect to Plaintiff's requests for a temporary restraining order and a preliminary injunction.

We thank you for your consideration of this letter.

Dated: June 15, 2015

Respectfully submitted

[1] As to Plaintiff's submission to this Court of an affidavit by the SEC's Deputy Chief Operating Officer, Jayne L. Seidman, that the SEC's Division of Enforcement submitted to the Commission in another administrative proceeding, the government acknowledges that there is no factual dispute in this case regarding ALJ Elliot's appointment. Consistent with his status as an employee, and as described in the affidavit, Judge Elliot was not appointed by the Commissioners of the SEC.

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceeding
File No. 3-15514

In the Matter of

Donald J. Anthony, Jr.,
Frank H. Chiappone,
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.

AFFIDAVIT OF
FRANK H. CHIAPPONE

STATE OF NEW YORK)
COUNTY OF RENSSELAER) ss:

FRANK H. CHIAPPONE, being duly sworn, deposes and says:

1. In submitting this additional evidence, we are in no way agreeing to the position taken by the Commission that the after-the-fact appointment of the ALJ's by the Commissioners (who are Department Heads within the contemplation of U. S. Constitution Art. II, § 2,cl 2 clause dealing with appointment of superior and inferior officers) and the ALJ's review and reconsideration of the record (consisting of 6,000 pages of testimony, 1,000 unique exhibits, more than 1,000 pages of motions, pre and post-hearing briefs, findings of fact and conclusions of law will retroactively legitimize the Initial Decision, when the entirety of the proceedings were conducted and presided over by an ALJ who was not appointed to that position until years after the hearings were concluded. We firmly believe that if the SEC ALJ's are determined to not have been properly appointed, then the appropriate action would be to dismiss the ALJ's findings, and terminate the proceedings, or conduct the hearings anew, subject however to the time limitations imposed by 28 U.S.C. § 2462.

Accordingly, we reserve all rights to argue that the deficiencies in the manner in which the ALJs were appointed renders all of the proceedings at the evidentiary hearings a nullity.

2. This Affidavit is being submitted as additional evidence as allowed by an Order issued by Brenda P. Murray, Chief Administrative Law Judge, dated December 15, 2017, and an Order Granting Motion for Extension, dated January 2, 2016.

3. 12 Month Suspension. The only evidence that I wish to bring to Your Honor's attention at this time does not have to do with my activities in connection with the sale of McGinn Smith private placement investments. Likewise, my arguments as to the amount of investigation and customer specific determinations made in selling those securities were adequately stated in my testimony and in the briefs submitted after the hearings were closed. The sole purpose of this Affidavit is to address Your Honor's conclusion that because I remain employed in the securities industry, I pose a continuing danger to the investing public, thus supporting your Honor's imposition of a 12 month suspension.

Since the date I left the employ of McGinn Smith & Co., in late 2009, I completely ceased selling any private placement securities, not just those issued by my employer, but also private placements issued by major, reputable issuers. At conclusion of the hearings, I had gone 4 ½ years without selling or even offering a private placement security of any kind. At the time oral arguments were made to the Commissioners, I had gone 7 ½ years since selling a private placement. At the present time I have gone almost 9 years without making a single sale or offering of a private placement. It must be remembered that the losses incurred by investors in this case involved only private placements, not churning, front running, penny stocks, or other typical transgressions of the rules. Prior to the McGinn Smith matter, my record had been spotless. I believe this evidence is more than sufficient to convince Your Honor that I pose absolutely no risk to the investing public, and I respectfully request that Your Honor reconsider that aspect of her Initial Decision as imposed the 12-month suspension..

In addition to the fact that I have not sold a single private placement since I left McGinn Smith & Co, I have migrated my practice towards assisting clients in planning for retirement, health care, life insurance, social security planning, and estate planning. In fact, that portion of my practice that deals with negotiable securities, is heavily focused primarily on advising clients on more conventional investments, such as annuities issued by reputable sponsors, in order to create a steady income stream.

4. Alleged Failure to Meet Suitability Requirements. As noted in my testimony in the original hearing held by ALJ Murray, and as was covered in my brief to the ALJ as well as the brief to the Commission, I had reasons to believe that the McGinn Smith personnel involved in finding, vetting, structuring, and investigating the private placements were doing their job as to product suitability, and that the accountants and attorneys (both in house and outside counsel) complied with the filing requirements of Reg. D. I am positive that I complied with the requirements relating to customer specific suitability. At the time in question, I had no reason to believe that my superiors were taking any actions that would put investors at risk. There was significant testimony at the hearings that it is not the function of the registered representatives to duplicate the work of the company's due diligence team, and valuing the underlying assets that

generate the income for investors. Both SEC pronouncements and case law delineate the duties of the sales force (customer specific suitability) and that of the persons involved in structuring the investment products and providing appropriate information in the private placement memorandums.

It is now known that Mr. McGinn and Mr. Smith in fact used customer money for their own personal expenses, including vacations, lavish residences, both in the Capital District and in sunny vacation locations, used customer money to make payrolls and to pay other obligations, and also used funds invested by some investors to prop up losses in investments that were failing. However, there was no evidence that I ever had knowledge that McGinn and Smith were moving funds from one investment to another. There was no testimony that I had any knowledge whatsoever that they were engaged in such conduct. In sum, I had no reason to know of the shifting of funds and misuse of funds that were the sole province of Messrs. Smith and McGinn, as well as the in-house accountant and possibly the in-house legal counsel in the later days.

I therefore respectfully request that Your Honor reconsider her holding that I could have or should have unearthed the fraudulent activities perpetrated by Messrs. McGinn and Smith concerning misuse of customer funds. As was noted during cross examination of the SEC's forensic accountant, Kerri Palen, it took her the better part of three years, allocating 50% of her time to the McGinn Smith case, to fully understand and document the fraudulent misuse of customer funds. I certainly did not have the training or background of Ms. Palen. I also had no access to the internal accounting records of McGinn Smith & Co. I and other registered representatives, whose obligation it was to make customer specific suitability determinations, could not have discovered the fraud that was so carefully hidden by Messrs. McGinn, Smith, and which if not assisted, was at least ignored by their in-house accountant and attorney. There was no evidence at the trial that any customer of mine had an income or net worth profile that would render sale of a private placement unsuitable for such customer.

5. I continue to upgrade my education. I took and passed a course entitled "A Professional's Guide to Ethical Decision Making" and I remain current on all of my licenses for both securities and insurance products.

I therefore respectfully request that Your Honor reconsider and revoke the twelve month suspension, reconsider the imposition of statutory fines, and reconsider if my conduct was of such nature as to require disgorgement.

[Signature on Following Page]

Dated: January 18, 2018

Frank H. Chiappone

Sworn to before me this 18th day of January, 2018

Roland M. Cavalier, notary public

ROLAND M. CAVALIER
Notary Public, State of New York
No. 4725079
Qualified in Albany County
Commission Expires December 31, 12/31/2018

COPY

CERTIFICATE OF SERVICE

I, Roland M. Cavalier, hereby certify that on this 18th day of January, I served a true and complete copy of Respondent Frank A. Chiappone's Affidavit and my Letter Brief with exhibits attached, upon the following parties in this action as follows:

Original and three (3) copies via FedEx Overnight to:

Securities and Exchange Commission
Office of the Secretary - Brent J. Fields
U.S. Securities and Exchange Commission
100 F. Street, NE
Mail Stop 1090
Washington, D.C. 20549

Also: Facsimile copy to the Securities and Exchange Commission: Facsimile (202) 772-9324

One (1) copy via FedEx Overnight and Facsimile to:

The Honorable Brenda P. Murray
Chief Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Mail Stop 1090
Washington, D.C. 20549

One (1) copy via FedEx Overnight and Electronic Mail to:

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Securities & Exchange Commission
Division of Enforcement
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New York, NY 10281-1022
stoeltingd@sec.gov

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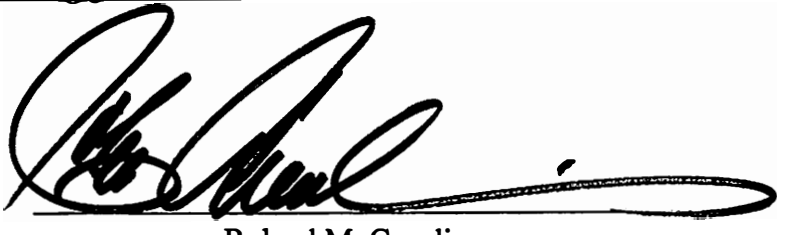
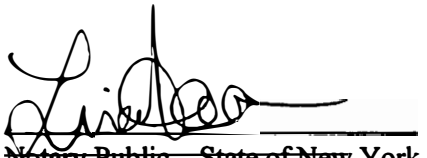


Roland M. Cavalier

Sworn to before me this
18th day of January, 2018.



Notary Public – State of New York

LINDSEY A. MEYER
Notary Public, State of New York
No. 01ME6336544
Qualified In Rensselaer County
Commission Expires 02/08/20