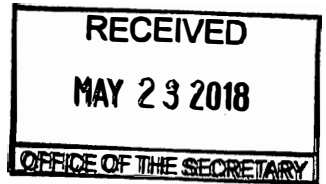


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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-015514

In the Matter of:

FRANK H. CHIAPPONE,
ANDREW G. GUZZETTI,
WILLIAM F. LEX,
THOMAS E. LIVINGSTON,
BRIAN T. MAYER, and
PHILLIP S. RABINOVICH

**ANDREW G. GUZZETTI'S SUPPLEMENTAL BRIEF
REGARDING THE LAW JUDGE'S ORDER
REVISING AND RATIFYING PRIOR ACTIONS**

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I. INTRODUCTION

Respondent Andrew G. Guzzetti, by and through his attorneys, hereby submits this Supplemental Brief Regarding the Law Judge's Order Revising and Ratifying Prior Actions in accordance with the Commission's Order.

II. INCORPORATION OF PRIOR FILINGS

Mr. Guzzetti incorporates by reference the following documents:

1. Guzzetti's individual brief to the Commission filed July 17, 2015, and the Respondents' Joint Brief and Joint Reply Brief filed July 17, 2015 and October 28, 2015;
2. All arguments made by other Respondents in their Petitions For Review and Briefs submitted pursuant to the Commission's Supplemental Briefing Order, to the extent same pertain to the securities law findings against them. Since the other Respondents did not violate the securities laws, Mr. Guzzetti could not have violated same, regardless of whether he was a supervisor.

III. PRELIMINARY STATEMENT

Respondent Andrew Guzzetti, the firm's sales manager, was named in this action as a supervisor of the other respondents, despite ample evidence that he was not the supervisor, and ample evidence as to the identity of the actual supervisors.

Documentary evidence, all in the possession of the Staff, established that Mr. Guzzetti was not the supervisor of the office in question, nor for the products in question. Despite these undisputed facts, the Administrative Law Judge, in her initial

decision and in her Order Revising and Ratifying Prior Actions, reaffirmed that clearly erroneous finding in an unconstitutional matter.

Guzzetti's initial brief contains a complete review of the evidence. Briefly stated the facts of this matter demonstrate that Guzzetti was hired by McGinn Smith & Co. ("MS & Co.") because the firm was interested in building its retail wealth management business. (*Tr. 4593:20-4954:18*). Specifically, the goal of MS & Co. was to transition its financial consultants from a commission, or transactional, based structure, to a fee based, or account management, approach. (*Tr. 4598: 11-4599:6*).

After joining the firm, Guzzetti, performed related duties, having no responsibilities for supervising sales, including locating a clearing firm with the appropriate platform to handle the firms new fee based structure (*Tr. 4601:4-4604:9*), recruiting and training MS & Co. brokers. (*Tr. 4606: 11-4607: 16*) and developing an innovative investment program for baby-boomers nearing retirement, including both post retirement career and investment planning called the My Way program. (*Tr. 4607:] 7-4612:6*).

At no point during his time with MS & Co. was Guzzetti ever responsible for the supervision of investments in private placements, including those involved in this matter. (*Tr. 3227:7-3229:3, 4606:6-10*). Guzzetti was not involved in the creation of what the Division refers to as the Four Funds or Trusts. (*Tr. 3227:7-3229:3*). Guzzetti was not

responsible for presenting these investments to the Selling Respondents and had no role in selecting the investments in any of the offerings in this matter. (Tr. 4632: 21-4634: 12).

As it pertains to the Four Funds and Trusts, Guzzetti's only role was to act as a conduit, passing information about the offerings from the firm's owners and supervisors David Smith and Timothy McGinn to the brokers at the firm. (Tr. 3227:4-3229:3, 4606:6-10, 4630:16-4631:16, 4632:21-4634:12). In addition, Guzzetti would also pass on any inquiries he received from the brokers about the Four Funds and Trusts to Smith or McGinn, depending on the investment at issue. (*Id.*)

Guzzetti was not responsible for reviewing or approving customer investments or the subscription agreements in the offerings at issue. (Tr. 3227:7-3229:3). Although Guzzetti became the office manager of MS & Co.'s Clifton Park, New York office in October of 2008, supervision of sales in the private placements at issue remained the responsibility of either David Smith or Timothy McGinn, depending on the offering involved. (Tr. 3225:7-10. 3227:7-3229:3).

At the hearing, the Division alleged that Guzzetti was aware of a number of "red flags" and failed to "put in place procedures that would have detected and prevented [] unlawful conduct" allegedly committed by the Selling Respondents. (*Division of Enforcement's Prehearing Memorandum ("DOE Opening Statement")*, at 24). However, the implementation of such procedures was well beyond the duties, responsibilities, and authority of Guzzetti while he was employed by MS & Co. Furthermore, there is no

applicable securities rule or regulation requiring an individual in Guzzetti's position to implement such a procedure. (*Tr. 3223:16-3229:3*).

Additionally, the Division's main argument regarding Mr. Guzzetti was their allegation that he was instrumental in implementing a "redemption policy" where the firm would allegedly not accept a sell order for the funds unless there was a corresponding buy order. The ALJ specifically rejected the argument, and found that such a policy did not exist at the firm. (*ALJ's Initial Decision (ID) at 93*).

Prior to the institution of these proceedings and in the years since, Guzzetti had no disciplinary or regulatory history and continues to maintain a stellar reputation in the securities industry. (*Tr. 4594: 19-4595: 2*); (*See also, Division Exhibit ("Div. Ex. ") 481; Tr. 4587: 3-19; Tr. 4588: 18-4590: 2*).

For the reasons that follow, and in the incorporated documents, the evidence accepted by the Court during the hearing in this matter shows that throughout his time with MS & Co. Guzzetti was not responsible for supervising sales of the private placements at issue in this matter.

As briefed by the Sales Representative Respondents in their respective briefs, far from reconsidering "the record, including all substantive and procedural actions taken" as the Commission directed in sending the matter back to her, the ALJ ignored the overwhelming record of Mr. Guzzetti's role at the firm, the lack of evidence establishing

him as a supervisor for the Selling Respondents and the products during the relevant time period, and evidence identifying the actual supervisors.

The Commission should dismiss the charges against Mr. Guzzetti as (1) the overwhelming evidence demonstrated that he was not the supervisor of the Respondent Brokers, and (2) the Respondent Brokers did not violate any securities laws, (3) the ALJ's conduct of the proceeding was rife with prejudicial error and bias, and (4) the proceeding was time barred and fraught with due process, equal protection, and constitutional infirmities

IV. ARGUMENT

As noted in the prior filings, the allegations against Mr. Guzzetti were that he was responsible for an alleged "redemption policy" which the ALJ found did not exist. The only other basis for a claim was the allegations that he was a sales supervisor for the products at issue. Despite ample evidence disproving the secondary theory, the ALJ ratified her prior finding that despite the identification of other employees as supervisors, in documents and in testimony, that Mr. Guzzetti was the supervisor.

We incorporate our arguments from the original briefs, and in this supplemental filing, adopt and incorporate the arguments of the other respondents. Since the Respondent Brokers did not violate the securities law, there cannot be any liability for Mr. Guzzetti, even if one were to assume he was their supervisor.

We also adopt and incorporate our original arguments regarding the unconstitutional manner in which these hearings were held, as well as the arguments of the other Respondents as to the supposed reappointment of the ALJ and her supposed ratification of her previous findings.

As noted in the incorporated documents once there is a decision that the hearings were not conducted in accordance with the law, or contrary to a constitutional right, power, privilege, or immunity or without observance of procedure required by law, the procedure is to set aside those proceedings. *See, e.g., Ryder v. United States*, 515 U.S. 177 (1995) (holding that an individual subjected to a trial before an unconstitutionally appointed judge "is entitled to a hearing before a properly appointed panel of that court"); *United States v. L .A. Trucker Truck Lines, Inc.*, 344 U.S. 33 (1952) (where the appointment of the adjudicator in an administrative proceeding is legally deficient, and the respondent objects, "the defect in the examiner's appointment [is] an irregularity which would invalidate a resulting order"); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) (administrative hearing before examiner not properly appointed rendered resulting orders null and void and required release of immigrant detained by the government), *superseded by statute as recognized in, Ardestani v. INS*, 502 U.S. 129 (1991); see also, *APA §706 (5 U.S.C.A. §706)*.

As discussed by the other Respondents, proper procedure calls for setting aside improperly held proceedings, not ratifying them. The ALJ may not cure her lack of

constitutional status by simply reviewing the transcript and re-affirming her prior findings, as she was not constitutionally appointed in the first place.

We respectfully submit that Mr. Guzzetti's career should not be impacted as a result of hearings held by an ALJ who was not properly appointed until long after the hearings were completed.

V. CONCLUSION

For the foregoing reasons, the Commission should dismiss all charges against Mr. Guzzetti and grant him such other relief as is deemed just and proper.

Dated: May 21, 2018

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