


O'CONNELL ARONOWITZ
ATTORNEYS AT LAW

HARD COPY

June 22, 2018

VIA FACSIMILE & FEDEX
FAX NO. 202-772-9324

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

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

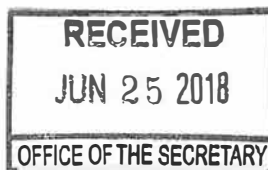
Dear Sir/Madam:

We represent Frank Chiappone, one of the Respondents in the above-referenced matter. This letter concerns the effect of the decision of the United States Supreme Court in *Lucia, et al v. Securities and Exchange Commission*, 585 U.S. _____, 2018. That decision held that the Commission's administrative law judges are "Officers" of the Commission and, as such, were not properly appointed to their positions. Accordingly, the Court found that the proceedings were tainted, and the Initial Decision of ALJ Elliot had no validity.

Moreover, the Court ordered that a new trial must be held, and that ALJ Elliot could not preside over any proceeding that the Commission may institute against Mr. Lucia.

The *Lucia* holding involves a situation that is substantially identical to the current proceeding presided over by ALJ Murray. Accordingly, we join the other Respondents in requesting that the Commission reverse ALJ Murray's Initial Decision, the Commission's Order that allowed ALJ Murray to ratify her Initial Decision, and her subsequent Order Revising and Ratifying Prior Actions ("Ratification Order").

As was stated by Mr. Munno on behalf of his clients, we firmly believe that the only appropriate action to be taken by the Commission at this time is to reverse the decisions of ALJ Murray, and then dismiss the proceedings with prejudice, thereby



EDWARD J. O'CONNELL
1925-1939
SAMUEL E. ARONOWITZ
1925-1973
LEWIS A. ARONOWITZ
1951-1979

CORNELIUS D. MURRAY
FRED B. WANDER
STEPHEN R. COFFEY
JEFFREY J. SHERRIN
THOMAS J. DINOVO
PAMELA A. NICHOLS
JEFFREY A. SIEGEL
JAMIDURANTE
ROGOWSKI
DAVID R. ROSS
KURTE BRATTEN
MICHAEL P. McDERMOTT
KELLY J. MIKULLITZ
WILLIAM F. BERGLUND
ROBERT J. KOSHGARIAN
MATTHEW J. DORSEY
GEORGE R. SLINGERLAND
F. MATTHEW JACKSON
SCOTT W. ISEMAN
BRITTNEY M. McMAHON

OF COUNSEL

RICHARDS S. HARROW
MEREDITH H. SAVITT
PAUL A. FEIGENBAUM
KEITH J. ROLAND
ARTHUR A.
PASQUARIELLO
FLORENCE M.
RICHARDSON
CRISTINA D. COMMISSO
GRAIG F. ZAPPIA
DANIEL J. TUCZINSKI
KAREN MARTINO VALLE
ROLAND M. CAVALIER

ELIZABETH A. CONNOLLY
CHAD A. JEROME
DANIELLE E. HOLLEY
KATHLEEN M. BROWN
MARY T. CONNOLLY
COURTNEY L. ALPERT
KELLAN B. POTTS

HOLLY E. VEGAS*
(DIRECTOR, HEALTHCARE
CONSULTING GROUP)

*NOT A MEMBER OF THE
LEGAL PRACTICE

54 STATE STREET • ALBANY, NY 12207 • (p) 518-462-5601 • (f) 518-462-2670
SERVICE BY FAX NOT ACCEPTED.

With offices in Albany, Latham, New York City, Plattsburgh and Saratoga Springs.

www.oalaw.com

June 22, 2018

putting an end to a proceeding that was filled with errors and erroneous decisions by the ALJ. For instance, when Mr. Chiappone, via his testimony and subsequent briefs, requested that the 12-month suspension she imposed be lifted, proving that he had not sold a single private placement security for a period of almost eight (8) years since leaving McGinn Smith & Co., she refused to do so. Her reason, as stated in her Ratification Order, was that he still posed a threat to investors because there were other securities that he was licensed to sell, such as stocks. She totally ignored that Mr. Chiappone had been in the securities industry for over 36 years, without ever having been the subject of any lawsuit, arbitration proceeding or any disciplinary action by NASD/FINRA or any other government agency, and that he had a spotless record both before and after his time at McGinn Smith & Co.

We agree with the arguments raised by Mr. Munno in his letter sent to the Commission yesterday, June 21, 2018. However, to avoid repetition, we hereby incorporate the arguments presented by Mr. Munno on behalf of our client, Frank Chiappone. In that regard, we attach a copy of Mr. Munno's letter and ask that it be included in Mr. Chiappone's submissions to the Commission. On behalf of Mr. Chiappone, we also adopt the arguments and proposals set forth by Counsel for the other Respondents in any letters they have filed or will hereafter file with the Commission.

As noted above, we believe the correct action would be to dismiss the proceedings with prejudice. However, in the event that the Commission decides to continue proceedings against Respondents, that such proceeding be conducted in a court of law, and not via another administrative proceeding.

Very truly yours,

O'CONNELL AND ARONOWITZ

By: 

Roland M. Cavalier
54 State Street
Albany, NY 12207
518-462-5601 (Phone)
518-462-2670 (Fax)

RMC:bab

Encl.

cc: David Stoelting, Esq. (via U.S. First Class Mail and Email)
Haimavathi V. Marlier (via U.S. First Class Mail and Email)
Mark J. Astarita, Esq. (via Email)
Gilbert B. Abramson, Esq. (via Email)
Matthew G. Nielson, Esq. (via Email)
M. William Munno, Esq. (via Email)

ATTACHMENT "A"

MUNNO LETTER TO COMMISSION DATED JULY 21, 2018

SEWARD & KISSEL LLP

ONE BATTERY PARK PLAZA
NEW YORK, NEW YORK 10004

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

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

June 21, 2018

VIA FEDERAL EXPRESS AND FAX

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

Dear Mr. Fields:

We represent Respondents Philip S. Rabinovich and Brian T. Mayer. We submit this letter regarding the impact of the Supreme Court's decision today in *Lucia v. SEC*, 585 U.S. ____ (2018). Rabinovich and Mayer respectfully submit that, in addition to the overwhelming evidence that neither of them violated any securities laws, the numerous other legal infirmities with this administrative proceeding, and the erroneous and prejudicial rulings by the law judge,¹ *Lucia* mandates that this case now be dismissed with prejudice.

In *Lucia*, the Court held that (i) Commission's ALJs are "Officers of the United States," subject to the Appointments Clause, slip op. at 5-11, and (ii) one who timely challenges the constitutional validity of the appointment of an officer who adjudicates his case (as Rabinovich and Mayer have done here) is entitled to a new hearing before a properly appointed official who has not previously heard his case and issued an initial decision on the merits, *id.* at 12-13.

This case was heard by ALJ Murray in 2014, who issued an initial decision in 2015. ALJ Murray, like ALJ Elliott in *Lucia*, heard and decided this case without a constitutional appointment. And Rabinovich and Mayer, like Raymond Lucia, "contested the

¹ See, e.g., Joint Brief Addressing Certain Legal Issues In Accordance With The Commission's Order dated July 17, 2015 ("Joint Brief"); Joint Reply Brief Addressing Certain Legal Issues In Accordance With The Commission's Order dated Oct. 28, 2015; Rabinovich's Individual Brief dated July 17, 2015; Rabinovich's Individual Reply Brief dated Oct. 27, 2015; Mayer's Individual Brief dated July 17, 2015; Mayer's Individual Reply Brief dated Oct. 27, 2015; Rabinovich's Supplemental Brief Regarding the Law Judge's 2018 Decision dated May 18, 2018; Mayer's Supplemental Brief Regarding the Law Judge's 2018 Decision dated May 18, 2018; Rabinovich's and Mayer's Supplemental Reply Brief Regarding the Law Judge's 2018 Decision dated June 14, 2018.

Mr. Brent J. Fields
June 21, 2018
Page 2

validity of [the law judge's] appointment before the Commission." *Lucia*, slip op. at 12; *see also* Joint Brief at 2, 11. "To cure the constitutional error," Rabinovich and Mayer are entitled to a new hearing before "another ALJ (or the Commission itself)." *Lucia*, slip op. at 12-13.

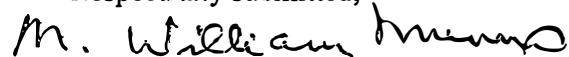
In this case, however, any new proceeding would be time-barred under 28 U.S.C. § 2462, and the only appropriate next step is dismissal with prejudice. The now-defunct OIP, which was filed on September 23, 2013, concerned events dating back to 2003 (and before), but no more recently than September 2009. While Rabinovich and Mayer maintain that the predominance of pre-September 23, 2008 alleged claims required dismissal of the entire proceeding, there can be no dispute that any new proceeding commenced in 2018 would be time-barred, as the most "recent" alleged claims would be nine years old. For this reason alone, this case should be dismissed.

Moreover, it would be patently unfair to subject Rabinovich and Mayer to a new hearing in 2018, pertaining to events that are now, at a minimum, nearly a decade old. As noted by the Division's former Director of Enforcement, Andrew Ceresney, "administrative proceedings typically [but not here] result in presentation of evidence when it is relatively fresh. With the passage of time, witnesses' memories might fade and some types of evidence become stale." Declaration of Andrew Ceresney, dated June 24, 2015, ¶ 4 (submitted in *Hill v. SEC*, 1:15-cv-01801-LMN (N.D. Ga.)). These concerns cannot be ignored here.

For reasons that have been amply addressed in prior submissions, this case never should have been brought in the first place, let alone in an administrative forum. Further, the Division's alleged claims have been whittled down as the result of Supreme Court and appellate court decisions. *See, e.g., Kokesh v. SEC*, 137 S. Ct. 1635 (2017); *Bartko v. SEC*, 845 F.3d 1217 (D.C. Cir. 2015). This case remains the sole case subject to the Commission's Post-Hoc Ratification Order that was argued to the Commission before it was remanded for the law judge's purported "reexamination" of the record. As the Commission said, this case is "unique." Commission Order dated May 31, 2018, at 2. With the issuance of *Lucia*, the time has come to dismiss all charges against Rabinovich and Mayer.

We appreciate the Commission's attention to these matters. An original and three copies of this letter brief are enclosed. We respectfully request that this letter brief be posted on the docket.

Respectfully submitted,



M. William Munroe

cc: David Stoelting, Esq. (stoeltingd@sec.gov)
Haimavathi Varadan Marlier, Esq. (marlierh@sec.gov)
Gilbert B. Abramson, Esq. (gabramson@theabramsonfirm.com)
Matthew G. Nielsen, Esq. (mnielsen@stantonllp.com)
Mark J. Astarita, Esq. (mja@sallahlaw.com)
Roland M. Cavalier, Esq. (rcavalier@oalaw.com)
By Federal Express