

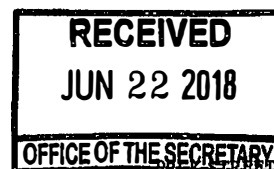
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June 21, 2018

### 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,<sup>1</sup> *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

<sup>1</sup> 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.

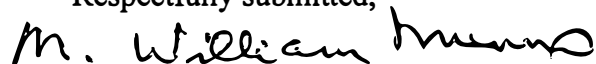
In this case, however, any new proceeding would be time-barred under 28 U.S.C. § 2462, and the only appropriate next step is dismissal with prejudice. The now-defunct OIP, which was filed on September 23, 2013, concerned events dating back to 2003 (and before), but no more recently than September 2009. 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 becomes 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,

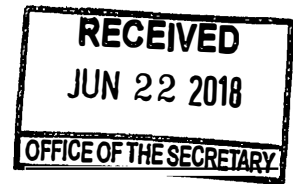


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By Federal Express

SECURITIES AND EXCHANGE COMMISSION

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.

**CERTIFICATE OF SERVICE**

I hereby certify that on June 21, 2018, I filed an original and three copies of Respondents Philip S. Rabinovich's and Brian T. Mayer's Letter Brief regarding the Supreme Court's decision in *Lucia v. SEC* with the Office of the Secretary of the Commission via Federal Express and facsimile, and served a copy of the foregoing document via Federal Express on:

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Dated: June 21, 2018  
New York, New York



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