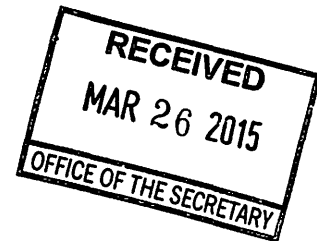


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

HARD COPY

ADMINISTRATIVE PROCEEDING
File No. 3-15514



In the Matter of

**DONALD J. ANTHONY, JR.,
FRANK H. CIAPPONE,
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.

**RESPONDENT, THOMAS E. LIVINGSTON'S REPLY IN
SUPPORT OF MOTION TO CORRECT MANIFEST ERRORS OF FACT**

Respondent Thomas Livingston ("Livingston") respectfully submits this Reply in Support of his Motion to Correct the Initial Decision and would show as follows:

The Division incorrectly asserts that Livingston's Motion to Correct the Initial Decision ("Motion") is improper and that simply urges Your Honor to reach different conclusions based on the evidence presented. Div. Opp. at 2. Under the SEC's Rules of Practice, a party may request a correction of manifest errors of fact. As several ALJ orders on this point have noted, Black's Law Dictionary defines a manifest error as "[a]n error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." BLACK'S LAW DICTIONARY 562 (7th ed. 1999); see, e.g. *In re Marketxt, Inc. and*

Amanat, Admin. Proc. Ruling Release No. 624, 2006 WL 327656 (ALJ Jan. 5, 2006); *In re Citizens Capital Corp, et al.*, Admin. Proc. Ruling Release No. 686 (ALJ Oct. 19, 2011).

As discussed in his Motion, Livingston was ordered to “disgorge all commissions earned on *sales* after” February 1, 2008. *See* Motion at 1 (quoting Initial Decision at 115 (emphasis added)). Yet, even though there was no evidence in the record to support the Division’s assertion that Livingston’s two commissions after that date were “earned on sales” of the relevant securities after February 1, 2008, he was ordered to disgorge \$1,120. This error is “plain and indisputable” and is contrary to the credible evidence in the record.

First, the Division implicitly concedes that the \$420 commission paid to Livingston on February 15, 2008 was for sales of Four Funds made before February 1, 2008. Indeed, there can be no argument to the contrary. The Division’s own evidence conclusively established that Livingston’s last sale of one of the Four Funds occurred on January 9, 2007, more than a year prior to the February 1, 2008 cutoff established by Your Honor. Div. Ex. 2 at Ex. 4n. The Division appears to instead argue that the Initial Decision should be substantively revised to order disgorgement, regardless of when the sale occurred, on any payments made after February 1, 2008. This argument improperly seeks to modify a substantive ruling in the Initial Decision, which is not permitted by SEC Rules of Practice nor would it be timely. Put simply, because it is undisputed that the \$420 paid to Livingston on February 15, 2008 was for a sale made prior to February 1, 2008, inclusion of the \$420 in the disgorgement was clear and manifest error of fact that should be corrected.

Second, Your Honor also ordered disgorgement of a \$700 payment on February 15, 2009, relying on Palen’s Declaration that incorrectly indicated that the payment was recorded by McGinn Smith as a “TDMM Cable 09” commission. Contrary to the Division’s claim (and

ignoring that it was not his burden of proof), Livingston did present evidence, both at the hearing and in his Motion, that Palen just assumed that the \$700 payment in February 2009 related to a January 2009 TDM sale.

While Palen testified generally about her methods to create the schedules (often relying on underlying documents never offered into evidence), she never testified specifically about the February 15, 2009 payment nor that the “Net Private 70%” line item referred to a TDM Note sale. Instead, the only specific evidence offered on the issue was by Livingston himself. *See* Livingston Exhibit 126. Specifically, while Palen stated that the McGinn Smith payroll records reflected that the \$700 payment was recorded as “Net Private (TDMM Cable 09),” she was wrong and the actual payroll records (Exhibit 126) shows that McGinn Smith recorded the payment as “Net Private 70%.” The payroll records also reflect three different line items in which McGinn Smith used to record TDM Note commissions -- all of which are blank for Livingston on February 15, 2009.

The Division’s only rebuttal to Palen’s error is to point out that Livingston sold a TDM Note in January 2009. Like Palen, the Division is simply assuming, without any evidence, that the \$700 payment in February 2009 must have related to the January 2009 sale. But, neither the Division nor Palen claimed that Livingston got paid a commission on the June 2009 TDMM Cable sale or the three McGinn Smith Transactional Funding note sales in October 2008. To accept the Division’s theory (which is made for the first time here), one would have to conclude that McGinn Smith (1) paid Livingston a \$700 commission for the January 2009 Note sale, but no commissions for any other McGinn Smith notes sold in 2008 and 2009 and then (2) recorded the supposed TDM commission under “Net Private 70%” rather than one of the three line items

dedicated for TDM Note commissions. This defies logic and is not supported by anything but pure speculation.

This error of fact can and should be corrected. The only credible evidence is that the \$700 payment in February 2009 related to something other than a McGinn Note sale. Neither the Division nor Palen offered any testimony or other evidence whatsoever on what the \$700 related to, but Livingston did. That uncontradicted evidence establishes that McGinn Smith's payroll records for February 15, 2009 show that Livingston did not receive a commission from a TDM Note sale. The Initial Decision incorrectly relied on Palen's misstatement of McGinn Smith's February 15, 2009 payroll records and that error should be corrected.

For all these reasons as well as those included in Livingston's Motion, Respondent Thomas E. Livingston respectfully requests that his Motion to Correct the Initial Decision be granted.

Dated: March 25, 2015

By:  _____

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**ATTORNEYS FOR RESPONDENT
THOMAS LIVINGSTON**

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I filed the foregoing pleading with the Office of the Secretary of the Commission via facsimile at (202) 772-9324, and served copies on the following persons via regular mail and email, except where otherwise indicated.

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Date: March 25, 2015

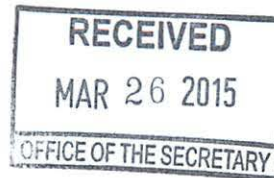
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March 25, 2015

Via Federal Express

Elizabeth M. Murphy, Secretary
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Washington, DC 20549

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

Dear Ms. Murphy:

Enclosed please find the signed non-facsimile original of Respondent, Thomas E. Livingston's Reply In Support of Motion To Correct Manifest Errors of Fact pursuant to Rule 152(d). The reply was filed via facsimile today.

Best regards,

A handwritten signature in blue ink, appearing to read "Debbie R. Reese".

Debbie R. Reese

drr

Enclosures

c: All Counsel