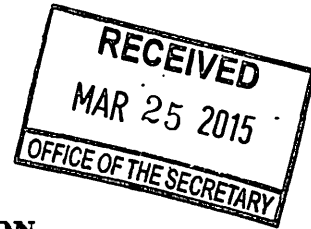


UNITED STATES OF AMERICA

Before the

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.

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**RESPONDENT, FRANK H. CHIAPPONE'S REPLY BRIEF IN SUPPORT OF
MOTION TO CORRECT MANIFEST ERRORS OF FACT**

**Because the Division confirms the facts underlying Mr. Chiappone's
Motion to Correct Manifest Errors of Fact and provides no basis
for denying the Motion, the Motion should be granted.**

In the Initial Decision in this case, the Chief Administrative Law Judge found that Respondent Frank H. Chiappone (and the other selling respondents, except William Gamello) "by at least February 1, 2008" had knowledge that certain McGinn Smith offerings (the Four Funds) were unsustainable, and she therefore determined that sales by Respondents after that date were made with the requisite *scienter* to violate the antifraud

statutes (Initial Decision at 115). On that basis, two sentences after that finding, Judge Murray ordered Respondent Chiappone (and other respondents) “to disgorge all commissions earned on sales after that date....” (*Id.*, emphasis added.)

The Judge determined that that amount to be disgorged by Mr. Chiappone was \$103,800, and ordered Mr. Chiappone to disgorge commissions in that amount (*Id.* at 115, 117). However, Chiappone’s Motion to Correct Manifest Errors of Fact (“Motion to Correct”)¹ established that the \$103,800 figure was incorrect, based on the Division’s own evidence admitted at the hearing, and therefore a manifest error of fact. The \$103,800 figure improperly includes \$40,947 in commissions that Chiappone earned on sales made before February 1, 2008, thus not properly assessed under the Judge’s holding that disgorgement pertained only to sales made after February 1, 2008. The correct figure for commissions he earned on sales made after February 1, 2008 is \$62,853. See, Chiappone’s Affidavit supporting Motion to Correct ¶¶ 11 & 12.

The Division’s Brief in Opposition does not dispute the facts alleged in Mr. Chiappone’s Motion. To the contrary, the Division confirms that Chiappone’s figures are accurate. (See chart at page 4 of the Division’s Brief.) Rather, the Division contends that the Judge *should have* invoked a different rationale for her disgorgement order and should not have restricted disgorgement to commissions on sales made after February 1, 2008. What the Division is really requesting is for the Judge to amend the Initial Decision to order disgorgement of “all commission payments *received* on or after February 1, 2008,”

¹ Mr. Chiappone’s motion papers also included a motion permission to submit additional evidence relating to the computational error, made pursuant to SEC Rule 452.

regardless of when the sales underlying the commissions were made. (Division's Brief at 4, emphasis in original.)

The Division's argument and request that Judge Murray change her decision defies logic. It suggests that Respondents should disgorge commissions earned (but not paid) before they acquired the very knowledge that Judge Murray determined was sufficient to satisfy the *scienter* requirement. By holding Respondent liable for sales made after February 1, 2008, the Judge had to have determined either (i) that no *scienter* existed before that date, or (ii) there was insufficient evidence to prove *scienter* existed before such date. The Division nevertheless maintains that Respondents should be punished for not violating Section 10-b of the 1934 Act and Rule 10b-5, a position that is simply untenable.

Moreover, there is no authority for the Division's request. The SEC Rules of Practice provide for two means of challenging an Initial Decision: (1) a Motion to Correct Manifest Errors of Fact and (2) a Petition for Review. The Division has not filed a Motion to Correct, and such a Motion would be impermissible both procedurally and substantively. Procedurally, "[a]ny motion to correct must be filed within ten days of the initial decision." 17 C.F.R. § 201.111(h). Here, the Initial Decision was filed February 25, 2015, and the deadline for a Motion to Correct expired on Monday, March 9, 2015 (because the tenth day fell on a Saturday).

Substantively, a "motion to correct is properly filed under this Rule only if the basis for the motion is a patent misstatement of fact in the initial decision." (*Id.*) Here, the Division does not point to any "patent misstatement of fact in the initial decision." Rather,

the Division wants the Judge to alter her legal rationale. Such a request by the Division is not permitted by the Rules and is not an authorized basis for a Motion to Correct. 17 C.F.R. § 201.111(h).

Mr. Chiappone was the first to point out a manifest error of fact in the Initial Decision that drastically and adversely affects the monetary sanctions imposed on Respondents. Because the Division is unable to dispute the facts underlying his Motion, Mr. Chiappone's Motion should be granted.

Finally, in order to avoid duplication of effort, Mr. Chiappone hereby adopts the arguments made by Respondents Rabinovich and Mayer in their Reply Brief submitted by their counsel, Seward & Kissel, LLP.

For the foregoing reasons, as well as those set forth in Chiappone's Motion to Correct Manifest Errors of Fact, Respondent, Frank H. Chiappone respectfully requests that his Motion to Correct Manifest Errors of Fact be granted.

TUCZINSKI, CAVALIER & GILCHRIST, P.C.

By: 

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Dated: March 25, 2015

CERTIFICATE OF SERVICE

I, Roland M. Cavalier, hereby certify that on this 25th day of March, 2015, I served a true and complete copy of Respondent Frank A. Chiappone's Reply Brief in Support of Motion to Correct Manifest Error of Fact upon the following parties in this action as follows:

Original and three (3) copies via First Class Mail to:

Securities and Exchange Commission
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, NE
Mail Stop 1090
Washington, D.C. 20549
Facsimile (202) 772-9324

One (1) copy via First Class Mail and Electronic Mail to:

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Division of Enforcement
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New York, NY 10281-1022
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One (1) copy via Federal Express and Electronic Mail to:

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Washington, D.C. 20549
alj@sec.gov

Courtesy Copies via U.S. Mail and Electronic Mail to:

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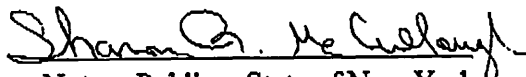
Donald J. Anthony, Jr. (*pro se*)

[REDACTED]



Roland M. Cavalier

Sworn to before me this
25th day of March, 2015.


Notary Public – State of New York

SHARON R. MCCULLOUGH
Notary Public, State of New York
Qualified in Albany County
No. 4700869
Commission Expires December 31, 2017

TUCZINSKI, CAVALIER & GILCHRIST, P.C.

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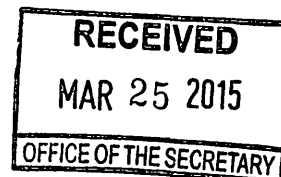
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March 25, 2015

VIA FACSIMILE AND FIRST CLASS MAIL

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, Jr., et al
Administrative Proceeding File No. 3-15514
Frank Chiappone Reply Brief – Motion to Correct**

Dear Sir/Madam:

Enclosed for filing in the above-captioned matter, please find the original and three (3) copies of Respondent Frank Chiappone's Reply Brief in Support of Motion to Correct Manifest Errors of Fact.

Very truly yours,

TUCZINSKI, CAVALIER
& GILCHRIST, P.C.

By: 

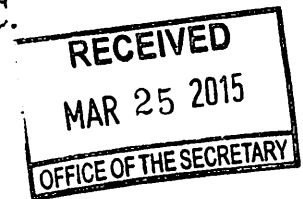
Roland M. Cavalier

RMC/acs
Encs.

cc: Hon. Brenda P. Murray (via e-mail and Federal Express w/enc.)
All attorneys of record & unrepresented parties (via e-mail and U.S. mail) (w/encl.)

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| FROM: | Roland M. Cavalier, Esq. |
| RE: | Frank J. Chiappone |
| DATE: | March 25, 2015 |

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