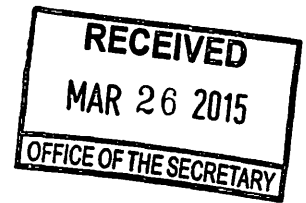


ORIGINAL

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.

**RESPONDENTS PHILIP S. RABINOVICH AND BRIAN T. MAYER'S
REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION
TO CORRECT THE INITIAL DECISION**

Respondents Philip S. Rabinovich ("Rabinovich") and Brian T. Mayer ("Mayer") respectfully submit this Reply Memorandum in Further Support of Their Motion to Correct the Initial Decision.

As set forth in the Motion, the Initial Decision expressly ordered Rabinovich and Mayer (and other Respondents) "to disgorge all commissions earned on sales *after* [February 1, 2008]." *See* Motion at 2 (quoting Initial Decision at 115 (emphasis added)). The disgorgement order, however, included commissions earned on sales *prior to* February 1, 2008. *See id.* at 3-5. This constitutes a manifest error of fact that should be corrected.

In its opposition, the Division says nothing that would change this result and, in fact, concedes all that is necessary to grant Rabinovich and Mayer their requested relief. First, the Division concedes that the Initial Decision "orders disgorgement of commissions earned on

'sales' after February 1, 2008." Div. Opp. at 1 (citing Initial Decision at 115). Second, the Division concedes by its silence that the commissions identified by Rabinovich and Mayer were earned on sales prior to February 1, 2008. Finally, the Division admits that to grant the requested relief would "drastically reduce[] the disgorgement amount" thus necessitating the conclusion that the error is manifest. Div. Opp. at 4. No further analysis is required. The Motion should be granted.

Nevertheless, the Division makes a series of arguments in opposition to the Motion, none of which has merit. First, the Division argues that it would be unfair to allow Rabinovich and Mayer "to keep commissions made on pre-February 1, 2008 sales," because they were received after the date on which – according to the Initial Decision – they knew of certain alleged red flags. Div. Opp. at 2-3. This is not a proper basis to oppose the Motion as the Initial Decision did not order disgorgement of such commissions. The Initial Decision clearly and unambiguously limited disgorgement to "commissions earned on sales *after* [February 1, 2008]." Initial Decision at 115 (emphasis added).

Nor is the Division's logic consistent with the reasoning of the Initial Decision, which ordered disgorgement based on a finding that "all Selling Respondents, except Gamello, had requisite scienter to violate the antifraud provisions by at least February 1, 2008." *Id.* That the Division cites cases in which disgorgement was awarded absent scienter is irrelevant, as even those cases make clear, disgorgement "is a discretionary, equitable remedy." *See, e.g., SEC v. Contorinis*, 743 F.3d 296, 307 (2d Cir. 2014); *see also SEC v. Seghers*, 404 F. App'x 863, 864 (5th Cir. 2010) (affirming district court's denial of the SEC's request for disgorgement despite a jury verdict finding defendant liable for securities fraud). The Division's opposition is nothing more than a veiled attempt to reargue issues that have already been considered and decided in the

Initial Decision. *See* Div. Post-Hearing Br. at 39-40 (seeking disgorgement of *all* commissions paid to Respondents in connection with the offerings at issue in the OIP); *see also* Initial Decision at 111 (noting that the Division sought disgorgement of all “commissions [Respondents] received on the private placements at issue”).

Finally, the Division’s request for “clarification” of the Initial Decision should be rejected as an untimely motion to correct. The Division requests that the Initial Decision be changed to order disgorgement of “all commission payments *received* on or after February 1, 2008,” *see* Div. Opp. at 4, despite the fact that the Initial Decision limited disgorgement to “commissions *earned on sales after* [February 1, 2008].” *See* Initial Decision at 115 (emphasis added). The Division is well aware that the time to move for such a correction has expired. *See* Letter from Michael D. Birnbaum to Chief Judge Murray dated Mar. 9, 2015 (admitting that March 9, 2015 was “the last day on which . . . a motion [to correct] may be timely filed”). In fact, the Division admitted that it was considering filing such a motion, *see id.*, but apparently opted not to do so. Affirmative relief is not appropriately requested in an opposition brief, and no “clarification” is required.¹

¹ For the avoidance of doubt, Rabinovich and Mayer did not claim that “the Individual Decision’s use of the word ‘sales’ after February 1, 2008 . . . requires clarification.” *See* Div. Opp. at 4. The Initial Decision was clear which commissions were ordered to be disgorged – only those commissions earned on sales after February 1, 2008.

Conclusion

For all of these reasons and those stated in their Motion, Rabinovich and Mayer respectfully request that their Motion to Correct the Initial Decision be granted, and the order of disgorgement in the Initial Decision as to Rabinovich and Mayer be reduced to \$109,695 and \$29,518, respectively.

New York, New York
March 25, 2015

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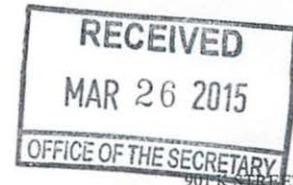
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March 25, 2015

VIA FEDERAL EXPRESS

Elizabeth M. Murphy
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 Ms. Murphy:

We enclose an original and three copies of Respondents Philip S. Rabinovich and Brian T. Mayer's Reply Memorandum in Further Support of Their Motion to Correct the Initial Decision. We have also enclosed a Certificate of Service.

Sincerely,

M. William Munno

Enclosures

cc (w/encls.): David Stoelting, Esq. (stoeltingd@sec.gov)
Haimavathi Varadan Marlier, Esq. (marlierh@sec.gov)
Michael D. Birnbaum, Esq. (birnbaumm@sec.gov)
By Federal Express and Email

Brenda P. Murray
Administrative Law Judge
(ALJ@sec.gov)