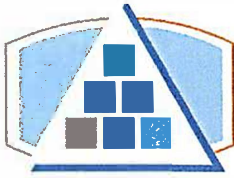

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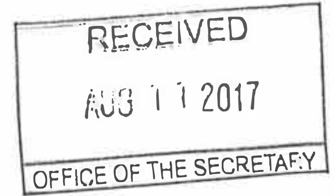
August 10, 2017



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AUG 11 2017
OFFICE OF THE SECRETARY

VIA FEDEX and FACSIMILE
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
Recent Legal Developments Affecting the Initial Decision

Dear Mr. Fields:

We represent Respondent Frank Chiappone. We briefly respond to the Division of Enforcement's letter dated August 7, 2017 (the "August 7 Letter"), which responded to our letter dated July 17, 2017.

1. The Date of Sale is the Only Relevant Date

The Division challenges our revised calculations, arguing that "[a]ll commissions *received* on or after September 23, 2008 (five years before the OIP was filed)...should be disgorged," regardless of the date on which the underlying sale occurred (Division's August 7 Letter at 2 [emphasis added]). This issue was previously considered—and rejected—by the ALJ in her Order on Motions to Correct Manifest Errors of Fact in the Initial Decision, dated April 9, 2015:

> "The Division also moves to modify the Initial Decision to clarify that 'all commission payments received on or after February 1, 2008' shall be disgorged. I REJECT the Division's motion to modify the language of the Initial Decision because Respondents should disgorge the proceeds received from their violations committed after February 1, 2008, based on their violations after that date." [1]

Any alleged violation of the securities laws occurred at the time of the sale, not the date on which Respondents received commission payments. Nor is it correct, as the Division contends without any authority, that a complete and present cause of action only accrues "when Respondents

[1] Note that her decision related to a different date.

received their ill-gotten gains" (Division's August 7 Letter at 2). That has never been the law. Disgorgement is a remedy, not a cause of action.

The Division's position that disgorgement of commissions received during the five-year period beginning on September 23, 2008 is untenable. The Division contends that the brokers caused investor losses at the time they sold the McGinn Smith private placements to customers. While we do not agree that investors' losses were caused by the brokers (they were the result of post-sale misuse of funds by McGinn and Smith), the Division cannot have it both ways. If they insist the brokers caused the loss, then they must acknowledge that only commissions on sales made during the five-year window are subject to their disgorgement claims.

The Division's argument about sales of Fortress by Mr. Chiappone is equally unsupported. First, the Division admits that their self-constructed sales charts show only "the date the investor funds were deposited into the issuer's escrow account," and *not* the date on which a Respondent presented or sold a security to an investor. *See* Division's August 7 Letter at 2n.2. Upon direct examination by the Division, the SEC's expert witness (Karri Palen) testified that the dates listed in Div. Ex. 4-C (list of Chiappone's sales) showed the date investor funds were deposited into escrow, which is not the date sales were made. See Transcript, pp. 239–240.

II. y **_Bartko_ and the Division's OIP Allegations Confirm that a Collateral Bar is Unwarranted Here.**

The Division agrees with Respondents that, under Bartko[2], "the collateral bars imposed in the ID should be modified." Division's August 7 Letter at 3. The Division nevertheless argues that Chiappone should be collaterally barred from association with an investment adviser based solely on their alleged misconduct as registered representatives of a broker-dealer. *Id*

First, as stated in Bartko, "[a] collateral bar is a tool by which the SEC can ban a market participant from associating with all classes based on misconduct regarding only one class." *Bartko*, slip op. at 3. Significantly, a collateral bar may only be imposed based on conduct that occurred after July 22, 2010, the date on which the Dodd-Frank Act first authorized the Commission to impose collateral bars. *Bartko* at 1225–1226 All sales made by Mr. Chiappone occurred *before* 2010.

Second, the OIP only alleges securities law violations based solely on Respondents' conduct as registered representatives of a broker-dealer. See OIP, at Section E ("The Respondents' Illegal Conduct") and paragraph 34 ("The Respondents, as associated persons of a broker-dealer, . . . implicitly represented to their customers that they had an adequate basis for the recommendation."). No conduct as an investment adviser is alleged in the OIP and no evidence was presented that any Respondent ever acted in the capacity of an investment

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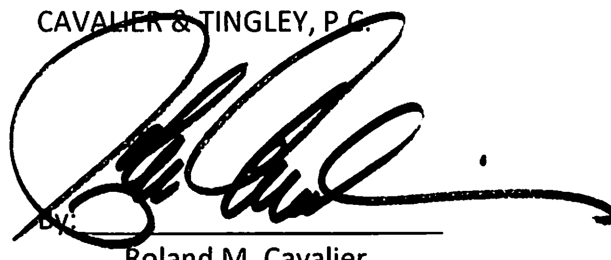
[2] *Gregory Bartko v. SEC,* 845 F 3d 1217 (D.C. cir. 2017).

adviser[3]. There is no legal or factual basis to bar Respondents from association with an investment adviser.

We request that this letter be provided to the Commissioners and filed of record on the docket in this proceeding. Four copies are enclosed.

Very truly yours,

TUCZINSKI, GILCHRIST,
CAVALIER & TINGLEY, P.C.



By: ____________________
Roland M. Cavalier

RMC/lam

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[3] The ALJ expressly noted that the Division did not pursue penalties and disgorgement under Section 203 of the Advisers Act or Section 9 of the Investment Company Act. *See* Initial Decision at 114–115 nn. 128–129.