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February 13, 2018

VIA EMAIL AND FEDERAL EXPRESS

The Honorable Brenda P. Murray
Chief Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549

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

Rabinovich and Mayer Clarification Letter

Dear Chief Judge Murray:

We submit this clarification letter because the Division's January 30 letter misapprehends several arguments raised in our January 18 letter on behalf of Rabinovich and Mayer. References are to the Section and points in the Division's January 30 letter.

Section I, point 1, at p.1 – The Division states: "It is undisputed that the Commission . . . has the constitutional authority . . . to ratify any such appointments after the fact." Our point – overlooked by the Division – is that there were never "any such appointments" to ratify. The Commission had not previously appointed the ALJs.

Section I, point 2, at p. 1-2 – The Division argues that we are attacking the procedures for ratification as insufficient. The Division misses our point. We are arguing that it

is not feasible for Your Honor to review this four year old, gargantuan record and then make a "detached and considered affirmation" of the Initial Decision.

Section I, point 3, at p. 2 – The Division argues that we are trying to "short-circuit" the administrative process by arguing we should not be forced to incur the time and cost of ratification. We are not trying to "short-circuit" anything. Our point is that the parties have been through an entire proceeding and are now being asked to return to the starting line so that the SEC can fix its prior mistakes. Respondents should not have to bear the burden of the Commission's and Division's prior mistakes.

Section II, point 1, at p. 2 – Relying on the Commission's decision in *Timbervest*, the Division argues that our constitutional argument regarding the manner prescribed for the removal of ALJs is "foreclose[d]." The Division's argument ignores that the Commission also held in *Timbervest* that the Appointments Clause does not apply to ALJs – a position the Commission has now reversed in declaring that ALJs were *not* constitutionally appointed.

Section II, point 2, at p. 3 – The Division argues that we are claiming it is a violation of due process to ratify decisions rendered prior to the Commission's amended Rules of Practice. That is not our argument. Rather, we argue that any ratification/reconsideration should be implemented as though the new rules are in effect, because the ALJs were not properly appointed, if at all, until November 30, 2017.

The Division argues that the admission of David Smith's handwritten 1999 *never sent* letter was not prejudicial or irrelevant. Yet, the "letter" preceded Rabinovich and Mayer's date of hire by years. The "letter" was totally irrelevant to their conduct and so prejudiced Your Honor's view, which you stated on the record – "how do you square all that with … the letter

Smith wrote in 1999 that said the whole thing was sham" (Tr. 5703:22-25) – that reversal is required.

Section III, at p. 4-5 – The Division states that "Section 2462 applies only to certain forms of relief . . . and *not* to entire actions." (Emphasis in Division Letter) That is not correct. Section 2462 provides that "**an action**, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, **shall not be entertained unless commenced within five years from the date when the claim first accrued**." (Emphasis added)

While the Division argues that the limitations period is relevant "only on the question of monetary relief," Your Honor expressly ruled that an industry bar is subject to the limitations period, "when, as here, the bars would be imposed punitively rather than remedially." Initial Decision at 89.

Section IV, at p. 5-6 – The Division argues that the "Initial Decision makes no comment on whether Mayer was personally accused of wrongdoing or whether he contributed to the settlement." Yet, the Initial Decision incorrectly, and contrary to the evidence, states: "Mayer settled a customer complaint with FINRA for $20,000." Initial Decision at 48 n. 63.

While the Division now states that it "made no 'acknowledgement' of Mayer's lack of personal responsibility in this dispute," the Division previously stated: "Mayer did not individually contribute to this settlement." Division proposed FoF ¶ 522.

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Rabinovich and Mayer reserve all of their rights. We respectfully request that this letter be posted on the docket. Three copies are enclosed.

Respectfully submitted,

M. William Munno

M. William Munno

cc: Brent J. Fields, Secretary (by Federal Express)
David Stoelting, Esq. (by Federal Express and email)
All Respondents' counsel of record (by email)

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