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.

RESPONDENT FRANK CHIAPPONE'S JOINDER IN THE MOTION OF RESPONDENT WILLIAM F. LEX FOR LEAVE TO FILE MOTION FOR SUMMARY DISPOSITION

Respondent Frank H. Chiappone ("Chiappone"), respectfully submits this joinder in the Motion of Respondent William F. Lex for Leave to File Motion for Summary Disposition (the "Motion"). Mr. Chiappone hereby adopts and incorporates by reference all arguments set forth in the Motion and its accompanying exhibit.

As set forth in the Motion, the OIP is based on stale allegations that may not be "entertained" pursuant to a controlling federal statute, 28 U.S.C. § 2462, and the U.S. Supreme Court's unanimous decision in *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). According to the allegations of the OIP, the Division complains about claims that "first accrued" long before

September 23, 2008. As explained in the Motion, each of the Division's claims "first accrued" when they were fully chargeable as alleged violations of the relevant securities laws provisions.

For the Division's claims relating to the alleged sale of unregistered securities, such claims "first accrued" upon the first sale of a Four Funds investment, which according to the Division, occurred for Frank Chiappone on October 3, 2003.

For the Division's claims relating to the alleged failure to undertake an investigation of the complained-of investments, those claims "first accrued" on October 3, 2003 for Four Funds investments and in November 2006 for the Trust Offerings.

With respect to the Division's claims that after Respondents learned about the alleged "Redemption Policy", Frank Chiappone allegedly violated the securities laws by continuing to sell McGinn Smith investments without conducting an investigation, such claims "first accrued" on November 15, 2007, the sale of the first investment after Frank Chiappone allegedly learned of the "Redemption Policy." And even if the Division relies solely upon the date on which Respondents learned that the Four Funds had been mismanaged (January 8, 2008), the Division's claim that thereafter Frank Chiappone violated the securities laws by failing to investigate future McGinn Smith investments, such a claim "first accrued" upon Frank Chiappone's first sale of one of the complained-of investments after January 8, 2008, which according to the Division, occurred on January 10, 2008. Even at that late date, this proceeding was required to be commenced on or before January 10, 2013—approximately nine months *before* this proceeding was commenced.

The Division's witness list, received by email on the evening of Friday, January 10, 2014, further solidifies this point. The Division has identified 5 investor-witnesses who are expected to offer testimony against Mr. Chiappone concerning their investments in McGinn Smith

Securities, which the Division itself alleges were first purchased by those witnesses prior to September 23, 2008. Thus, there can be no doubt that this "proceeding" seeks punitive relief for claims that "first accrued" before September 23, 2008, and thus, under 28 U.S.C. § 2462, cannot be entertained.[1]

The parties have already expended a substantial amount of time and money in defending the untimely, baseless claims against them. With the impending hearing date approaching, these costs will increase exponentially if the hearing is allowed to proceed, or at a minimum, if the Division is permitted to present its case—along with the 590 exhibits and 55 witnesses on which it intends to rely—based on facts and transactions occurring before September 23, 2008.

Furthermore, as explained in the Motion, the Division's fraud theory under Exchange Act § 10(b) is fatally flawed because (i) the Division's case is premised on the investment documents having provided *too much* clarity with respect to the risks associated with the investments, rather than concealing or misleading investors; and (ii) the text of Section 10(b) limits securities fraud cases thereunder to conduct or omissions in contravention of SEC rules, and there is no SEC rule that imposes an obligation on the part of retail representatives to conduct a so-called "searching" due diligence investigation.

Finally, the Division's claim that Frank Chiappone violated Section 5 is likewise fatally flawed, since the Division does not even purport to claim that Frank Chiappone individually sold any of the complained of offerings to more than 35 unaccredited investors, nor does the Division purport to claim that Frank Chiappone knew or could have known that the sales of those investments were made to more than 35 unaccredited investors in the aggregate.

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[1] The Division has also identified a witness who is expected to testify solely with regards to "[p]re-2003 alarm note offerings," and a witness who is expected to testify solely to authenticate two exhibits which are communications from October 4, 2007 and January 25, 2008, respectively.

For all of these reasons, and those set forth in the Motion, Mr. Chiappone respectfully joins in the Motion.

Dated: January 14, 2014
Albany, New York

By: _____

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