

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2528/April 9, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of	:	
	:	
DONALD J. ANTHONY, JR.,	:	
FRANK H. CHIAPPONE,	:	
RICHARD D. FELDMANN,	:	ORDER ON MOTIONS TO CORRECT
WILLIAM P. GAMELLO,	:	MANIFEST ERRORS OF FACT IN THE
ANDREW G. GUZZETTI,	:	INITIAL DECISION
WILLIAM F. LEX,	:	
THOMAS E. LIVINGSTON,	:	
BRIAN T. MAYER,	:	
PHILIP S. RABINOVICH, AND	:	
RYAN C. ROGERS	:	

On February 25, 2015, I issued an Initial Decision in this proceeding, *Donald J. Anthony, Jr.*, Initial Decision No. 745, 2015 SEC LEXIS 707. Respondents Chiappone, Lex, Livingston, Mayer, and Rabinovich filed timely motions to correct manifest error of fact (manifest error), and I ordered the Division of Enforcement (Division) to file an opposition by March 20, 2015, which it did. *Donald J. Anthony, Jr.*, Admin. Proc. Rulings Release No. 2398, 2015 SEC LEXIS 910 (Mar. 10, 2015). Also on March 20, 2015, I accepted Respondent Guzzetti untimely manifest error motion. The Division filed its opposition to Guzzetti’s motion to correct on March 27, 2015. Respondents Chiappone, Lex, Livingston, Mayer, and Rabinovich submitted reply motions on March 25, 2015, and Respondent Guzzetti submitted his reply motion on April 1, 2015.

The Initial Decision found that by February 1, 2008, the Respondents, except for Gamello and Guzzetti, acting with the requisite scienter, had violated various securities laws, and ordered each of them to “disgorge all commissions earned *on sales after that date.*” *Donald J. Anthony, Jr.*, 2015 SEC LEXIS 707, at *313 (Mar. 25, 2015) (emphasis added). The disgorgement amount was set at the total of commissions earned by each of the Respondents after February 1, 2008, as shown in evidence of sales of the securities at issues and Respondents’ commissions on those sales. Div. Ex. 2. Respondents Chiappone, Lex, Livingston, Mayer, and Rabinovich argue that the disgorgement amount ordered constitutes a manifest error because the calculation included commissions for sales that occurred *before* February 1, 2008, but where the commissions were received after February 1, 2008 (so-called “trailing commissions”). They argue that trailing

commissions earned on sales made before February 1, 2008, should not be included in their disgorgement amounts.

In opposition, the Division argues that commissions earned after February 1, 2008, for sales occurring before that date still constitute ill-gotten gains and should be disgorged. 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.

It was a material error for the disgorgement amount to include commissions earned for sales before February 1, 2008.

Chiappone

Chiappone was ordered to disgorge \$103,800 and argues that amount is overstated by \$40,947. Chiappone Affidavit ¶¶ 3-12. Chiappone contends that he made no sales of the Four Funds¹ after February 1, 2008, and therefore any commissions for the Four Funds included in the disgorgement amount were the result of sales made before that date, and should not have been included. *Id.* at ¶ 8. The record confirms that Chiappone made no sales of FIIN, TAIN, and FAIN notes after February 1, 2008; he sold FEIN notes on July 7, 2008, however, he did not receive any commission for the sale. Div. Ex. 2, Exs. 4c, 4d.

The record supports Chiappone’s manifest error contentions, except as to the amount of disgorgement. My calculations indicate that the total is \$44,329, not \$40,947. Div. Ex. 2, Ex. 4d. Accordingly, I GRANT Chiappone’s motion, and will reduce his disgorgement amount by \$44,329.

Guzzetti

Guzzetti argues that I committed a material manifest error by finding, on page 111 of the Initial Decision, that he became Clifton Park branch manager “beginning in October 2006.”² Guzzetti Motion at 2-3. Guzzetti contends that he was not branch manager until October 2008. *Id.* Guzzetti is correct,³ and I GRANT Guzzetti’s motion to make the change.

Lex

¹ The Four Funds, a term used throughout this proceeding, refers to the notes First Independent Income Notes, LLC (FIIN), First Excelsior Income Notes, LLC (FEIN), Third Albany Income Notes, LLC (TAIN), and First Advisory Income Notes, LLC (FAIN).

² Page 111 refers to the pagination on the version of the Initial Decision found on the Commission’s website. The text in question appears at *Donald J. Anthony*, 2015 SEC LEXIS 707, at *300.

³ The Initial Decision also found that Guzzetti became branch manager in October 2008 on two separate occasions. *See Donald J. Anthony*, 2015 SEC LEXIS 707, at *56, *58.

Lex was ordered to disgorge \$335,066 and argues that amount is overstated by \$165,691. Lex Motion ¶ 7. Lex contends that the disgorgement amount includes commissions for sales of the Four Funds, totaling \$167,451, but that the majority of those sales were made before February 1, 2008, and should not be included for the purposes of disgorgement. *Id.* at ¶¶ 6-9. Lex admits that he made six sales of the Four Funds after February 1, 2008, totaling \$220,000, and argues that his commission on those sales was his standard rate of 0.8%, and therefore his commissions for those sales totaled \$1,760. *Id.* at ¶¶ 9-12; Div. Ex. 2, Exs. 4k, 4l; Tr. 4866. Lex argues that only \$1,760 of the \$167,451 in Four Funds' commissions included in the disgorgement amount were for sales after February 1, 2008, and thus his disgorgement figure was overstated by \$165,691. Lex. Motion ¶ 12. The record supports Lex's contentions. Div. Ex. 2, Ex. 4k.

Lex also argues that that I committed a manifest error when I characterized an arbitration panel as having “derided Lex for failing to diversify Chang’s holdings.” Lex Motion ¶¶ 15-22. Lex contends that “derides” is too harsh a word to accurately characterize the findings of the arbitration panel, and cites to a chain of dictionary entries as support. *Id.*

I GRANT Lex's motion as to disgorgement amount, and will reduce his disgorgement amount by \$165,691. I DENY Lex's motion as to my word choice, because I find that my use of the word “derides” is not a manifest error, which is defined as an error that is “plain and indisputable, and that amounts to a complete disregard of . . . the credible evidence in the record.” Black's Law Dictionary 563 (7th ed. 1999).

Livingston

Livingston was ordered to disgorge \$1,120, which he argues is a manifest error. Livingston Motion at 2. Livingston received two commissions after February 1, 2008, a \$420 commission for “2008 Annual FEIN, tain & fiin,” and a \$700 commission for “Net Private (TDMM Cable 09).” Div. Ex. 2, Ex. 4n. The record supports Livingston's claim that he stopped selling the Four Funds after January 9, 2007, and therefore the \$420 commission for “2008 Annual FEIN, tain & fiin” could not have been for a sale occurring after February 1, 2008. Livingston Motion at 2; Div. Ex. 2, Ex. 4m. Livingston also contends that there is no evidence that the \$700 commission for “Net Private (TDMM Cable 09)” actually stemmed from the sale of TDMM Cable 09, instead arguing that the commission was attributed, without any support, to TDMM Cable 09 by a Division witness. Livingston Motion at 2-3.

I GRANT IN PART Livingston's motion, and will reduce his disgorgement amount by \$420. Livingston has failed to show that including the \$700 commission that he received in the disgorgement amount was a material error. Simply questioning the methodology behind the Division witness's attribution does not conclusively show that my assessment was a “plain and indisputable” error.

Mayer

Mayer was ordered to disgorge \$34,962 and argues that amount is overstated by \$5,444. Rabinovich & Mayer Motion at 4-5; *Donald J. Anthony*, 2015 SEC LEXIS 707, at *320. Mayer

contends that, with one exception⁴, he did not make any sales of the Four Funds after February 1, 2008, and therefore any commissions for sale of the Four Funds included in the disgorgement amount were the result of sales made before that date, and should not have been included. Rabinovich & Mayer Motion at 4-5. The record supports Mayer's contentions. Div. Ex. 2, Ex. 4o.

I GRANT Mayer's motion, and will reduce his disgorgement amount by \$5,444.

Rabinovich

Rabinovich was ordered to disgorge \$158,542 and argues that amount is overstated by \$48,847. Rabinovich & Mayer Motion at 3-4; *Donald J. Anthony*, 2015 SEC LEXIS 707, at *320. Rabinovich contends that he did not make any sales of the Four Funds after February 1, 2008, and therefore any commissions for the sale of the Four Funds included in the disgorgement amount were the result of sales made before that date, and should not have been included. Rabinovich & Mayer Motion at 3-4. The record supports Rabinovich's contentions. Div. Ex. 2, Ex. 4q.

I GRANT Rabinovich's motion, and will reduce his disgorgement amount by \$48,847.

Ruling

I REJECT the Division's motion to modify the language of the Initial Decision.

I AMEND the Initial Decision to reflect the following:

Frank H. Chiappone is ORDERED to disgorge \$59,471, instead of \$103,800;

William F. Lex is ORDERED to disgorge \$169,375, instead of \$335,066;

Thomas E. Livingston is ORDERED to disgorge \$700, instead of \$1,120;

Brian T. Mayer is ORDERED to disgorge \$29,518, instead of \$34,962;

Philip S. Rabinovich is ORDERED to disgorge \$109,695, instead of \$158,542; and

The text "October 2006" at the top of page 111 of the Initial Decision is changed to read "October 2008."

Brenda P. Murray
Chief Administrative Law Judge

⁴ Mayer made a sale of TAIN on August 28, 2008. Div. Ex. 2, Ex. 4o. He has identified the commission corresponding to that sale, and that commission is not subject to his motion to correct or included in the adjustment to his disgorgement amount. Rabinovich & Mayer Motion at 5 n.3; Div. Ex. 2, Exs. 4o, 4p.