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UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of

FRANK H. CHIAPPONE,	:
ANDREW G. GUZZETTI,	:
WILLIAM F. LEX,	:
THOMAS E. LIVINGSTON,	:
BRIAN T. MAYER,	:
PHILIP S. RABINOVICH,	:

Respondents.

RESPONDENT WILLIAM F. LEX'S BRIEF IN SUPPORT OF PETITION FOR REVIEW OF INITIAL DECISION AS AMENDED BY THE MARCH 30, 2018 ORDER REVISING AND RATIFYING PRIOR ACTIONS

TABLE OF CONTENTS

TABLE OF CITATIONS..... ii

I. The Entire Proceeding Must Be Rendered a Nullity Because The ALJ Considered Testimony and Evidence of Matters and Claims Brought by the Division Which, As a Matter of Law, Were Not Permitted to be Entertained by Virtue of 28 U.S.C. § 2462..... 2

II. The Unconstitutional Nature of Judge Murray's Appointment Prior to Her Sitting as the Adjudicative Officer in the Proceeding May Not Be Cured by Way of Post Facto Ratification..... 7

III. The Unconstitutional Nature of Judge Murray's Appointment Prior to Her Sitting as the Adjudicative Officer in the Proceeding May Not Be Cured by Way of Permitting Her to "Reconsider the Record" Now that She Has Since Been Appointed as Provided by the Constitution and the Law..... 9

IV. The Separation of Powers Clause Precludes the ALJ's Decision..... 9

V. As a Matter of Law, There Was Insufficient Evidence on the Record for the ALJ to Make a Finding of Fraud..... 10

VI. The Penalty Upon Respondent Lex is Disproportionate and Unjustified.... 10

TABLE OF CITATIONS

CASES **PAGE**

Abernathy v. Wandes,
713 F.3d 538, 557-558 (10th Cir. 1013) 2

Advanced Disposal Services East v. NLRB,
820, F.3d 592 (3d Cir. 2016) 8

City of Milwaukee v. Cement Div.,
515 U.S. 189, 195-96 (1995) 10

Consumer Financial Protection Bureau v. Gordon,
819 F.3d 1179 (9th Cir. 2016) 8

Doolin Security Savings Bank v. Office of Thrift Supervision,
139 F.3d 203 (D.C. Cir. 1998) 8

Federal Election Comm'n v. Legi-Tech, Inc.,
75 F.3d 704 (D.C. Cir. 1996) 8

Gabelli v. SEC,
568 U.S. 442, 448-49, 133 S.Ct. 1216, 1221 (2013) 6

Harrison v. Ollison,
519 F.3d 952, 961 (9th Cir.),
cert. denied, 555 U.S. 911 (2008) 2

Matter of Coxon,
Securities Act of 1933 Release No. 8271,
2003 SEC LEXIS 3162, at *65 (Aug. 21, 2003) 10

Matter of Jordan,
2017 FINRA Discip. LEXIS 39, at *72 (Sept. 26, 2017) 10

Rice v. Rivera,
617 F.3d 802, 807 (4th Cir. 2010) 2

Ryder v. United States,
515 U.S. 177; 115 S.Ct. 2031, 132 L.ED.2d 136 (1995) 8

Wilkes-Barre Hosp. Co. v. NLRB,
820 F.3d 529, 602-03 (3d Cir. 2016) 8

Williams v. Warden,
713 F.3d 1332, 1337-40 (11th Cir. 2013)..... 2

Wong Yang Sung v. McGrath,
339 U.S. 33 (1952)..... 8

STATUTES AND OTHER AUTHORITIES

5 U.S.C.A. §706(2)..... 7, 8

28 U.S.C. §2462..... 2, 5, 10

This brief is submitted in support of Respondent William F. Lex's Petition for Review of the Order Revising and Ratifying Prior Actions issued by Judge Murray of March 30, 2018 ("Ratification Order"). Respondent Lex renews and reasserts each of the claims of error and grounds for review filed on April 30, 2015 (attached hereto for convenience as Exhibit "A"), which was granted by the Commission on May 21, 2015. Following the grant of the original Petition for Review, on August 15, 2017, after briefing, the then constituted Commission heard argument. The matter was remanded to Administrative Law Judge Brenda Murray for "reconsideration and ratification." The entire remand and ratification process was objected to by Respondent Lex in a letter to ALJ Murray dated January 18, 2018 which is incorporated by reference and attached hereto as Exhibit "B."

For the reasons set forth hereinafter, and for the reasons set forth in Respondents' Individual and Joint Briefs and Reply Briefs filed in connection with the original Petition for Review on appeal from the Initial Decision ("ID"), Respondent Lex requests the Commission:

(1) Reverse the decisions of ALJ Murray, including imposition of disgorgement and penalties; and

(2) Dismiss the OIP and all charges and claims and requests for relief contained therein, with prejudice.

In connection with and as part of this brief, Respondent Lex incorporates by reference all of the briefs and submissions provided to this Commission by Respondent Lex and all other Respondents, including the Joint Briefs and Joint Reply Brief originally filed, pursuant to the appeal from the ID. In addition, Respondent Lex incorporates by reference all the arguments contained in all other Respondents' Briefs submitted in connection with Judge Murray's March 30, 2018 Order Revising and Ratifying Prior Actions, as well as Briefs submitted previously to the Commission, and all arguments before the Commission in connection with the original

Petition for Review. This brief is submitted without prejudice to Respondent's Lex's continued assertion that by virtue of 28 U.S.C. §2462, neither the ALJ nor this Commission had, or has, subject matter jurisdiction to hear this matter, and further, without prejudice to Respondent Lex's claim that all proceedings before Judge Murray were and are a nullity by virtue of her unconstitutional appointment.

I. The Entire Proceeding Must Be Rendered a Nullity Because The ALJ Considered Testimony and Evidence of Matters and Claims Brought by the Division Which, As a Matter of Law, Were Not Permitted to be Entertained by Virtue of 28 U.S.C. § 2462.

From the outset of these proceedings, and at every stage thereafter, Respondent Lex has argued that the ALJ and the Commission did not have subject matter jurisdiction over the claims made in the OIP filed September 23, 2013. This assertion was and is based upon 28 U.S.C. §2462, which states:

> "[A] proceeding for the enforcement of any civil fine, penalty, or forfeiture ... shall not be entertained unless commenced within five years from the date when the claim first accrued."

This statute is not written like a typical statute of limitations. The language "shall not be entertained" makes it clear that Congress intended this statute to be one that is jurisdictional in nature.[1] The purpose of "not being entertained" language is to prevent a respondent/defendant from being required to even have to defend claims that are more than five (5) years old. Thus, if a proceeding seeks penalties, fines or forfeitures for conduct which accrued more than five (5) years prior to the commencement of the proceeding, even though it also contains charges which accrued within the five-year period, the entire proceeding lacks subject matter jurisdiction and is

[1] Williams v. Warden, 713 F.3d 1332, 1337-40 (11th Cir. 2013)("A plain reading of the phrase 'shall not entertain' yields the conclusion that Congress stripped the court of subject-matter jurisdiction"); *accord* Abernathy v. Wandes, 713 F.3d 538, 557-558 (10th Cir. 1013); Rice v. Rivera, 617 F.3d 802, 807 (4th Cir. 2010); Harrison v. Ollison, 519 F.3d 952, 961 (9th Cir.), cert. denied, 555 U.S. 911 (2008).

barred. The harm Congress sought to prevent when electing to use the "shall not be entertained" language in the statute is, among other things, the harm that most certainly befall respondents if required to search for evidence (documents, witnesses, and via stretch of their own recollections) where documents may have disappeared and where memories have faded.

The prosecutor (in this case, the Division) prepares and maintains control of the charging document (OIP or Complaint). The Division could have charged only events which accrued within the allowable five (5) year period. Had that occurred, Respondent Lex would not have had to face charges regarding events which, by the time of trial in 2013, went back ten (10) years and more.

Judge Murray's endeavors to resolve this issue by attempting to determine when the cause of action accrued by analyzing whether the Division's claims constitute continuing violations or "a series of discreet wrongs". This attempt by Judge Murray altogether misses the point. Respondent is not arguing that there was a continuing violation, and, accordingly, the remanded *Kokesh* case neither addresses nor answers the issue raised by Respondent Lex. Even conceding, which we do not, that each sale is a separate act with a separate date of accrual of the cause of action, this analysis does not answer Respondent Lex's objection that he was required to defend a case and answer claims where more than 80% of the proceeding alleged conduct going back as far as 2003, and beyond.

The ALJ obviously framed her opinion of Respondent Lex based on testimony of witnesses called to testify as to their recollection of individual sales made by Respondent Lex in 2003, 2004, 2005, 2006, 2007 and early 2008, inclusive, when those sales were clearly outside the statute of limitations. For example, the Division's direct examination of Marvin Weinar begins:

Q. Do you remember a time in July 2004 when Mr. Lex mentioned to you something called First Excelsior Income Notes?

(Transcript ("N.T."), p. 737, lines 3-6.) The testimony goes on to talk about sales made in June 2005 (N.T. p. 743, l. 23 to p. 744, l. 4); an additional sale in January 2006 (N.T. p. 744, l. 15-19); a sale in March of 2007 (N.T. p. 745, lines 22-24), a sale in November 2007 (N.T. p. 746, l. 11-17), and the last sale in June 2008 (N.T. p. 746, l. 25 to p. 747, l. 4). With the exception of the June 2008 investment, all of the prior investments were Four Funds notes, but all outside the five-year period.

Witness Joanne Forsythe states in her testimony that her first purchase was in December 2004 (N.T. p. 1477, line 24 to p. 1478, line 3); and the evidence elicited and heard includes sales from December 2004 (N.T. p. 1480, lines 12-19); January 2006 (N.T. 1482, lines 10-19); March 2006 (N.T. p. 1482, lines 20-25); January 2007 (N.T. p. 1483, lines 2-6); February 2007 (N.T. p. 1485, lines 7-15), April 2007, p. 1485, lines 16-20); July 2007 (N.T. 1486, lines 8-11); August 2007 (N.T. p. 1486, lines 15-18 and p. 1486, line 23 to p. 1487 lines 7); and December 2007 (N.T. p. 1487, lines 14-18). There are another two investments in early 2009 in the Trusts (N.T. 1487, lines 19-25). The former sales are all Four Funds.

The first purchase mentioned in witness Barbara Monahan's testimony was January 2006 (N.T., p. 786, l. 8-14). Through Ms. Monahan, the Division presented evidence of investments from July and August of 2007 (N.T. 787, l. 21-24); January 2008 (N.T. p. 789, lines 6-8); and July 2008 (N.T. p. 789, lines 14-20). None within the five-year statute.

These witnesses were offered for the purpose of presenting conversations that occurred 8, 9 and 10 years before the trial, and they were only able to provide any evidence at all based upon the Division's counsel "filling in the gaps" with his questioning (with what amounted to

clearly leading questions, objections to which were universally overruled at the beginning of the proceedings before the ALJ), and then only after private meetings with Division's counsel which informed the witness that Respondent Lex was accused of securities fraud. (*See, e.g.,* N.T., p. 799, l. 22 – p. 800, l. 12.) The three above-mentioned witnesses were the *only* witnesses offered by the Division, and 95% of their testimony related to alleged actions which accrued *more than five (5) years before the commencement of the proceeding.*

When it established §2462, Congress understood the unfairness and vagaries of subjecting individuals to defend their conduct stretching back so many years. Nevertheless, the ALJ was content to admit, consider, and utilize this outside-the-statute-of-limitations conduct as a basis for her findings of fraud and her imposition of penalties on Respondent Lex. Moreover, the findings were all made despite written documents where the witnesses acknowledged that they read the offering materials and also understood the risks involved in connection with the purchase of these products. (*See* N.T. p. 1513, l. 3-10 (Forsythe); p. 763, l.18 to p. 767, l. 3 (Weinar); p. 795, l. 10 to p. 796, l. 22 (Monahan).) Furthermore, in order to establish knowledge and impute wrongdoing on the part of Respondent Lex and the other Respondents, the Division presented so-called "red flag" evidence, all of which evidence and testimony occurred more than five (5) years prior to the commencement of the proceeding (*i.e.,* prior to **September** 23, 2008). In fact, in the original ID, the Judge claimed that, as a result of a meeting which occurred on **January** 31, 2008, all of the Respondents knew that there was a problem with the Four Funds products, and therefore, the subsequent sale of these products constituted securities fraud. (*See* ID, p. 92.) Disgorgement was imposed for all sales from that day forward. Of course, this was before *Kokesh* when, as had been argued by Respondents from the outset, disgorgement was a penalty subject to the five-year limitations period.

Still, the proceedings entertained by the ALJ required Respondent Lex to give his recollection of events which occurred six (6) years before the hearing – even as far back as 2003.[2] Respondent Lex was questioned about what he learned about the products when they were first presented to the sales people. He was required to give a recollection of what occurred in 2003 and 2004 – 10 and 11 years before the hearing. While witnesses testifying against Respondent Lex had their recollections refreshed by the Division before testifying, Respondent Lex had no such opportunity, not having been informed, despite request, of even the most basic description as to what those witnesses would be testifying.

The above citations are just some of the examples of the unfairness of having to defend ancient claims. The entire purpose of the statute was to prevent respondents like Respondent Lex from having to defend events which occurred ten (10) years or more before the hearing. The fact that Respondent Lex also had to defend claims within the five (5) years does not provide relief for the oppressive nature, including the expense, of having to defend claims beyond the five (5) years. As stated in *Gabelli v. SEC,* 568 U.S. 442, 448-49, 133 S.Ct. 1216, 1221 (2013):

> "Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' *Railroad Telegraphers v. Railway Express Agency, Inc.,* 321 U.S. 342, 348-349, 64 S.Ct. 582, 88 L.Ed 788 (1944). They provide 'security and stability to human affairs.' *Wood v. Carpenter*, 101 U.S. 135, 139, 25 L.Ed. 807 (1879). We have deemed them 'vital to the welfare of society.' *Wilson v. Garcia,* 471 U.S. 261, 271, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985.)"

Judge Murray glibly writes:

> "Respondents apparently believe that as long as someone has been committing the same violation of the securities laws for more than five years, that person is free to continue violating the law in the same manner indefinitely without fear of sanction."

[2] Including at N.T. p. 4851, 4860, 4897, 4951-53, and 4957-58.)

She goes on to state:

> "This is a nonsensical result and contrary to limitation periods' purposes of eliminating stale claims, promoting certainty, and avoiding surprise and unfairness."

This is not Respondent Lex's position. Although correctly grasping the purpose of limitation periods, Judge Murray utterly failed to apply those principals when she permitted stale - even ancient - claims to be part of this proceeding. Further prejudicing Respondent Lex, Judge Murray applied the evidence received on those matters as a substantial factor in forming her conclusions that Respondent Lex had the requisite scienter and committed fraud. It was unfair to require Respondent Lex, without discovery, to defend claims being made by captive witnesses of the SEC, where recollections were refreshed ***ex parte.*** No doubt those witnesses believed that if their Government (the SEC) accused Mr. Lex of fraud, it must be true. All of this could have been cured by the Division in the prosecuting document, the OIP, and the Division's failure to do so (and the ALJ's erroneous decision to entertain such matters) was a denial of Respondent Lex's due process in the face of these stale claims brought on by the stale recollections of witnesses.

II. The Unconstitutional Nature of Judge Murray's Appointment Prior to Her Sitting as the Adjudicative Officer in the Proceeding May Not Be Cured by Way of *Post Facto* Ratification.

The original proceeding before Judge Murray was presided over by a judge who was not constitutionally appointed, and therefore, the proceeding was a nullity. Under the circumstances, it was, and is, this Commission's duty to hold it unlawful and set aside Judge Murray action, findings and conclusions.[3]

[3] *See*, 5 U.S.C.A. §706 2(B)

Judge Murray, in her Ratification Order cites a litany of cases allowing for "ratification." The ALJ relies on *Wilkes-Barre Hosp. Co. v. NLRB*, 820 F.3d 529, 602-03 (3d Cir. 2016) as support for the propriety of ratification (*see* p. 7 of Ratification Order), and thereafter identifies the host of the decisions cited by the *Wilkes-Barre* court to support the ALJ's position that ratification is proper. (Id.) However, none of the cases cited for the precedent that ratification is authorized and permissible involve the ratification of the prior acts of an official who purported to act in an adjudicatory capacity, required to make findings of fact and conclusions of law.[4]

The appropriate remedy was for a new proceeding to be commenced and tried before an Article III Judge or before a constitutionally appointed official with no validity given to the prior acts of the ALJ. Here we clearly have a constitutional violation in the proceeding presided over by Judge Murray. Section 706 of the APA requires that when such a matter reaches a reviewing court, that court shall: "hold unlawful and set aside agency action, findings and conclusions." (5 U.S.C.A. § 706 (2)). *See*, *Ryder v. United States*, 515 U.S. 177; 115 S.Ct. 2031, 132 L.ED.2d 136 (1995); *see also, Wong Yang Sung v. McGrath*, 339 U.S. 33 (1952). By now, any new proceeding will be barred by the statute of limitations. As such, this case must be dismissed with prejudice.

[4] *Advanced Disposal Services East v. NLRB*, 820, F.3d 592 (3d Cir. 2016)(ratification permissible in case of a not properly appointed director who initiated ALJ proceedings); *Doolin Security Savings Bank v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998)(ratification of actions of acting director who had initiated proceedings but who had not been constitutionally appointed at the time the proceedings were initiated held permissible); *Federal Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996)(ratification of a finding of probable cause to initiate proceedings issued by officer who had not at the time been constitutionally appointed held to be permissible); *Consumer Financial Protection Bureau v. Gordon*, 819 F.3d 1179 (9th Cir. 2016)(permitting ratification of actions taken by a director to initiate administrative law proceedings despite not having been properly appointed at the time the director authorized the initiation of the proceedings.)

III. The Unconstitutional Nature of Judge Murray's Appointment Prior to Her Sitting as the Adjudicative Officer in the Proceeding May Not Be Cured by Way of Permitting Her to "Reconsider the Record" Now that She Has Since Been Appointed as Provided by the Constitution and the Law.

The Commission's belated attempted cure of the fatal defect in this administrative proceeding due to its having been presided over by an unconstitutionally appointed adjudicator cannot be cured by "reconsideration of the record, including all substantive and procedural actions taken." This administrative proceeding encompassed 18 days of testimony, more than 6,000 pages of transcript, and nearly 1,000 exhibits. Scores of rulings were made during the trial and pretrial by what has now been conceded to be an unconstitutionally appointed adjudicator. Decisions regarding admissibility of evidence were based on law which has been either changed or clarified by various federal courts, including the Supreme Court itself. Scores of trial, as well as pretrial, rulings were made based on the ALJ's view of the law at the time of the initial hearing held some four years ago. Credibility determinations were made and attitudes formed with respect to witnesses in this case by a judge not authorized to hear the case and make those rulings and determinations. Questions of credibility and the reasonableness of the positions taken by the parties based on the then state of the law cannot be "reconsidered" by the "Post-Hoc" appointment of the ALJ. To permit otherwise would be a manifest miscarriage of justice and would make a mockery of the rule of law that governs and authorizes these proceedings.

IV. The Separation of Powers Clause Precludes the ALJ's Decision

Respondent Lex specifically incorporates by reference the positions and arguments of Co-Respondents that restrictions of removal on ALJ's violate the United States Constitution's separation of powers. For the reasons set forth therein, the ALJ erred in relying on the *Timbervest* case.

V. As a Matter of Law, There Was Insufficient Evidence on the Record for the ALJ to Make a Finding of Fraud.

There is no evidence of affirmative misrepresentations or omissions with respect to the Trusts, and therefore it was error for the ALJ to find fraud with respect to the only products whose sale came within the allowable statute of limitations (even using the Division's manner of making that determination under §2462). It was wrong for the ALJ, and it would be wrong for this Commission, to brand an honest man with the label "fraud" because he trusted people he knew for more than 20 years. This is especially so given Kerri Palen's testimony and the ALJ's concession that none of Respondents knew of McGinn and Smith's fraud.

VI. The Penalty Upon Respondent Lex is Disproportionate and Unjustified.

Under the facts and circumstances of this case, the $130,000 third-tier penalty is completely unjustified, nor is pre-judgment interest running from November 1, 2009 justified. Given the prolonged nature of these proceedings, much of which is not due to the fault of Respondents but, rather, the Division's inclusion of charges outside the applicable statute of limitations, even under the most generous interpretation of §2462. Furthermore, the use of an improperly appointed ALJ has caused further delay in these proceedings. Time should not be charged against Respondents by imposition of interest which is, under reasonable interpretation, punitive and therefore impermissible. *See, Matter of Jordan*, 2017 FINRA Discip. LEXIS 39, at *72 (Sept. 26, 2017)(unduly punitive to require respondent to pay prejudgment interest in prolonged proceeding where most recent trades at issue were 5 years old); *Matter of Coxon*, Securities Act of 1933 Release No. 8271, 2003 SEC LEXIS 3162, at *65 (Aug. 21, 2003)(cutting prejudgment interest in half due to the passage of time); *see also, City of Milwaukee v. Cement Div.*, 515 U.S. 189, 195-96 (1995)(prejudgment interest may certainly be denied the obvious circumstance of a plaintiff's undue delay).

For all the reasons stated herein, and the briefs and arguments incorporated herein by reference, the proceedings against Respondent William Lex should be dismissed.

Respectfully submitted,

ABRAMSON & ABRAMSON, LLC

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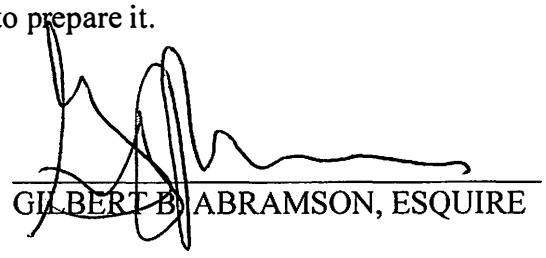
DATED: May 21, 2018

CERTIFICATE OF COMPLIANCE

The within brief complies with the word limit in the Commission's Supplemental Briefing Order dated April 20, 2018. The brief contains 3,449 words, exclusive of the Table of Contents, the Table of Cites, this Certification and the Certificate of Service, as counted by Microsoft Word, the word processing system used to prepare it.

DATED: May 21, 2018



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SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of

FRANK H. CHIAPPONE, :
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WILLIAM F. LEX, :
THOMAS E. LIVINGSTON, :
BRIAN T. MAYER, :
PHILIP S. RABINOVICH, and :

Respondents.

CERTIFICATE OF SERVICE

Gilbert B. Abramson, Esquire, hereby certifies that on May 21, 2018, service of Respondent William F. Lex's Brief in Support of Petition for Review of Initial Decision as Amended by the March 30, 2018 Order Revising and Ratifying Prior Actions was made, upon the following persons in the following manner:

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EXHIBIT “A”

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
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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,	:
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RESPONDENT WILLIAM F. LEX'S PETITION FOR REVIEW OF INITIAL DECISION

Introduction

Respondent William F. Lex files this Petition for Review from the Initial Decision of Chief Administrative Law Judge Brenda Murray, dated February 25, 2015, as amended by the Order of April 9, 2015. The Judge found Mr. Lex liable under the federal securities laws in connection with the sale of certain private placements issued by McGinn Smith & Company, for which he was a registered representative and independent contractor.

Through a civil suit against McGinn Smith and a criminal suit against its principals, it was eventually learned that Timothy McGinn and David Smith were fraudulently diverting funds of McGinn Smith investors. But, as the Administrative Law Judge acknowledged: "The

Division's expert had no reason to believe that Respondents [including Respondent Lex] were aware of McGinn and Smith's fraud. Tr. 1220." (Initial Decision at 4.) Nevertheless, the Administrative Law Judge found Mr. Lex liable under Section 5 of the 1933 Securities Act and the anti-fraud provisions of the Securities Act and the 1934 Exchange Act.

As set forth below, the Commission should grant review under SEC Rule 411(a)(2) because there were numerous prejudicial errors in the conduct of the proceeding, there were numerous clearly erroneous findings and conclusions of material fact, there were numerous erroneous conclusions of law, and there are important decisions of law that the Commission should review.

Grounds for this Petition for Review

1.e The Administrative Law Judge erred in disregarding the plain wording of 28e U.S.C. § 2462, which provides that a "proceeding for the enforcement of any civil fine, penalty, or forfeiture...**shall not be entertained** unless commenced within five years from the date when the claim first accrued," because the claim here first accrued more than five years before the case was commenced by the filing of an Order Instituting Proceedings (OIP), to wit, on September 23, 2013. 28 U.S.C. § 2462. See Gabelli v. SEC, 133 S.Ct. 1216 (2013).

2.e Because the claim first accrued more than five years before September 23, 2013,e the wording of 28 U.S.C. § 2462 deprived the Administrative Law Judge of jurisdiction to entertain the proceeding against Respondent Lex. See Williams v. Warden, 713 F.3d 1332, 1337-40 (11th Cir. 2013)(where statute provided that a habeas petition "shall not be entertained" unless certain conditions are satisfied, statute is jurisdictional, and deprives the court of subject-matter jurisdiction unless the conditions are satisfied).

3.o The Administrative Law Judge erred in holding that disgorgement is not a "civilo fine, penalty, or **forfeiture"** subject to 28 U.S.C. § 2462 because courts, and even the SEC itself, routinely use the terms "forfeiture" and "disgorgement" interchangeably, and seeking disgorgement of commissions is a forfeiture of those commissions. United States v. Usery, 518 U.S. 267, 284 (1996); United States v. Davis, 706 F.3d 1081, 1084 (9th Cir. 2013); SEC Press Release No. 2002-126 (Aug. 21, 2002).

4.o The Administrative Law Judge demonstrated a lack of judicial independence ando commingling of judicial and prosecutorial functions in her handling of Lex's Motion for Summary Disposition and Motion for Leave to File the Motion for Summary Disposition. For the reasons set forth above, Lex was entitled to summary disposition in his favor under 28 U.S.C. § 2462 because the proceeding was commenced more than five years after the claim firsto accrued. The Administrative Law Judge nevertheless refused to even consider the merits of Lex's Motion for Summary Disposition, reasoning that Mr. Lex's Motion differed from the obvious position of the Judge's employer, the Commission. The Judge therefore denied Lex's Motion for Leave to File Motion for Summary Disposition, and in a telephone conference on the issue the Judge explained as follows:

> My belief is that when the Commission sets a case down for hearing, and there has been no factual changes between when they made the decision to set it down and when the motion for summary disposition has been filed, that **the agency does not want motions of summary disposition granted because you're second-guessing their decision that the case needs to get set down for hearing and that there is a legal basis for it**....I work for the Federal Government. I am an Administrative Law Judge. The case is in this office. **It's been assigned to me for decision. So I have to hear it.**

(N.T. of 1/21/14 pre-hearing telephone conference at pages 30, 33-34)(emphasis added). This demonstrated that the Judge was not independent and in a position to rule on matters before her, but was bound by the Commission's prosecutorial arm, thus violating Mr. Lex's due-process right to a fair hearing before an independent tribunal.

5. Respondent Lex was denied a fair hearing because the Administrative Law Judgeo was not impartial, drawing every inference against Respondent Lex and/or in favor of the Division.

6.o The Administrative Law Judge's reliance on Hanly v. SEC, 415 F.2d 589 (2nd Cir.o 1969) to establish violations of Securities Act Section 17(a)(1), Exchange Act Section 10(b), and SEC Rule 10b-5, was misplaced because:

(a)o In Hanly, the defendant brokers were held liable because they made glowing,o specific, affirmative misrepresentations about the future performance of the stock in question, with no reasonable basis whatsoever. In this case there was no evidence that Mr. Lex made any such representations;

(b) Any notion that securities fraud can be premised on mere negligence or failure of due diligence is dispelled by Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1975), which overruled Hanly and held that proof of scienter and actual deception was required for a finding of securities fraud.

(c)o The Supreme Court has repeatedly emphasized that the *sine qua non* of ao securities violation is deception, not the mere failure to perform due diligence, even in breach of a fiduciary duty. See, e.g., United States v. O'Hagan, 521 U.S. 642, 655 (1997)("§10(b) is not an all-purpose breach of fiduciary duty ban; rather, it trains on conduct involving manipulation or deception.");

(d)e Failure to investigate facts is nothing more than negligence, and cannot give risee to securities fraud;

(e)e Here, the Administrative Law Judge:e

- e Found a duty to investigate in the absence of specific representations ofe fact made to customers by Mr. Lex;
- e Found the duty to investigate in the absence of any SEC, NASD or FINRAe rule or regulation establishing, let alone clearly establishing, such a duty on the part of the individual broker;
- e Found that the failure to investigate translated into recklessness; ande
- e Then found that recklessness in turn translated into fraud.e

7.e The Administrative Law Judge erred in finding that conflicts of interest betweene the issuers of the securities and McGinn Smith were red flags (Initial Decision at 91) because the conflicts were clearly spelled out in the Private Placement Memoranda that were provided to every customer, and because such conflicts are a common occurrence in the industry, and are commonly disclosed.

8.e The Administrative Law Judge erred in discounting the warnings and riskse disclosed to customers in the Private Placement Memoranda on grounds that the customers allegedly "did not study them [the PPMs] in detail." (Initial Decision at 91.) As a matter of law, customers are imputed with notice of disclosures they receive in writing in the PPMs, regardless of whether, or how thoroughly, they read them. Brown v. The E.F. Hutton Group, Inc., 991 F.2d 1020 (2nd Cir. 1993); Carr v. CIGNA Securities, Inc., 95 F.3d 544, 547 (7th Cir. 1996); Wamser v.eJ.E. Liss, Inc., 838 F.Supp. 393, 399 (E.D. Wisc. 1993).e

9.e The Administrative Law Judge erred in disregarding the testimony from Mr.e Lex's customers that he provided them with all written materials related to the various investments and gave them a full opportunity to read the materials before deciding whether to invest. (Dr. Forsyth testimony at 1514:3-10; Dr. Weinar testimony at 747:15-24.)

10.e Lex presented testimony, through experts, that conflicts pointed out in the PPMse are not red flags because they are often present in the offerings of major investment banks. The Administrative Law Judge then erred in finding that the details of the conflicts present in offerings by major investment banks are not a part of the record. In fact, there was testimony on that matter from Charles Bennett, Mr. Lex's expert witness, and David Tilkin, the expert witness for Respondents Chiappone, Mayer, Rabinovich and Rogers. The Judge ignored this testimony.

11.e The Administrative Law Judge erred in finding that the Four Funds' transactionse with affiliates constituted a red flag (Initial Decision at 92) because this feature was clearly disclosed in the PPMs.

12.e The Administrative Law Judge erred in finding that the January 8, 2008 notice ofe reduction in interest in the Four Funds' junior Notes constituted a red flag, even as to the Four Funds' junior Notes, because the possibility of such a restructuring was specifically disclosed and authorized in the Private Placement Memorandum, particularly in the event of an economic downturn. (See, e.g., Division Exhibit 5 at 13 & 14 [pages 7 & 8 of PPM].) McGinn Smith's rationale for the reduction in interest, to protect the Senior and Senior Subordinated Notes in the face of the severe, worldwide financial crisis, where Mr. Lex's clients all held Senior or Senior Subordinated Notes, did not give any indication of fraud or mismanagement.

13.e The Administrative Law Judge's finding that the January 8, 2008 notice ofe reduction in interest in the Four Funds' junior Notes constituted a red flag (Initial Decision at 92)

was irrelevant as to Mr. Lex because: (a) it was undisputed that Mr. Lex never sold any junior Notes; and (2) as the Administrative Law Judge acknowledged, Mr. Lex neither attended the January 8, 2008 meeting nor was informed what occurred there. (Initial Decision at 34.)

14.e The Administrative Law Judge's finding that the September 3, 2009 disclosure of e the Firstline bankruptcy filing constituted a red flag (Initial Decision at 93) is irrelevant as to Mr. Lex, because Mr. Lex sold no securities after September 3, 2009. (See Exhibit 4k to Division Exhibit 2, Summary of Lex Sales). In fact, Lex's last sale of a McGinn Smith private placement--a Trust Offering--was July 17, 2009. (Id.) Because Mr. Lex made no sales after that date, he could not be liable for having failed to impart that information to customers in connection with sales.

15.e The Administrative Law Judge erred in finding that alleged red flags in the Foure Funds provided a basis to impose a duty on Lex to investigate the Trust Offerings, because, as the Division conceded (OIP ¶38b), the Trust Offerings were entirely different investments from the Four Funds. Unlike the Four Funds, the Trust Offerings were not blind pools. The Trust Offerings were collateralized by specific receivables, whereas the Four Funds were Notes initially dependent on unknown investments. The Trust Offerings investments were selected by Timothy McGinn, who had substantial successful experience in alarm and triple play offerings. The Trust Offerings' investments were vetted by the McGinn Smith due diligence team. All of this gave the brokers confidence in the Trusts, independent of what may have happened with the Four Funds.

16.e The Administrative Law Judge erred in concluding that evidence of cash flowe problems in the Four Funds should have alerted brokers to problems in the alarm Notes (Trusts), or to suspect every new investment proposal affiliated with McGinn Smith. This error was

particularly prejudicial because all of Mr. Lex's sales of the Four Funds were before September 23, 2008, and therefore outside the statutory (5-year) period. With no evidence of red flags pertaining to the Trust Offerings themselves, the Judge improperly imposed liability for sales of the Trust Offerings based on alleged red flags that: (a) pertained to entirely different investments, and (b) were outside the statutory (5-year) period. Furthermore, it was error to impose a duty to investigate the Trusts, when the purported red flags all related to the Four Funds.

17.o The Administrative Law Judge erred in imposing liability based on a failure too investigate because the perpetrators of the fraud at McGinn Smith deliberately concealed their fraud and falsified financial records in order to escape detection This was further reflected in the inability of NASD, FINRA and the SEC to discover the fraud until the damage had already been done, even though those agencies had far greater personnel, resources and authority to conduct intrusive examinations and investigations than did Mr. Lex.

18.o The Administrative Law Judge erred in holding that Mr. Lex violated Section 5 ofo the Securities Act (sale of unregistered securities) where the investments in question qualified for the exemption for private offerings set forth in Section 4(2) of the Securities Act.

19.o The Administrative Law Judge erred in holding that a violation of Section 5 of theo Securities Act does not require scienter where Regulation D provides an exemption to the registration requirement if there are, or the issuer **"reasonably believes"** there are, no more than 35 unaccredited investors. 17 C.F.R. § 230.506. Because broker liability under this section has only been established by extension, the broker is entitled to the same standard as the issuer.

20.o The Administrative Law Judge erred in holding that Respondent Lex willfullyo violated Section 5 of the Securities Act where the undisputed testimony was that Mr. Lex reasonably relied on the operations manager at McGinn Smith who was charged with keeping a

running total of the number of unaccredited investors for each offering, to ensure that it did not exceed the maximum number of 35, thus qualifying for the registration exemption set forth in Regulation D/SEC Rule 506.

21.e The Administrative Law judge ruled that Respondent Lex failed to qualify for thee exemption from registration for private offerings and for offerings to no more than 35 unaccredited investors because he failed to provide the investors with certain "financial and non-financial information" recited in Regulation D. (Initial Decision at 94, 96-97.) The Judge erred because: (a) the Regulation imposes that duty on the "issuer," not on the individual broker, 17 C.F.R. § 230.502(b)(2); 17 C.F.R. § 230.506(b)(incorporating requirements of § 502); and (b)e the PPMs provided investors with all required information.

22.e The Administrative Law Judge erred in holding that, as of 2003-2009, individuale brokers had a duty to investigate investment products, when the Notice in effect at that time, NASD Notice to Members 03-71, imposed that duty exclusively on the institutional broker-dealer (member firm).

23.e The Administrative Law Judge erred in holding that a failure to investigatee constitutes fraud.

24.e To the extent that the Administrative Law Judge held that individual brokers hade a duty to investigate proposed investment products, the Judge erred in finding that Mr. Lex breached that duty in this case, where the evidence established that he familiarized himself with the PPMs; reviewed them with his clients; reasonably relied on the due diligence performed by the broker-dealer that is specifically charged with the investigatory responsibility, and was particularly equipped and staffed to perform extensive due diligence; reasonably relied on the

long-time, successful experience of McGinn Smith private placements; and regularly inquired of David Smith and the CFO of McGinn Smith about the status of the investments in question.

25.e The Administrative Law Judge erred in finding that Mr. Lex learned about "rede flags" on or about January 8, 2008 (Initial Decision at 103) because, as the Judge found, Mr. Lex neither attended, nor was informed about, the January 8, 2008 meeting at which those alleged red flags were disclosed. (Initial Decision at 34.)

26.e The Administrative Law Judge erred in stating that the arbitration decision ine Chang, et al. v. McGinn, Smith & Co., et al., Case No. 08-04924 "derided" Mr. Lex for failing to diversify Chang's holdings. (Initial Decision at 37.) Nowhere in the decision did the arbitration Panel deride Mr. Lex. (See Division Exhibit 514.) To the contrary, the Panel found he was a "conscientious broker."

27.e The Administrative Law Judge erred in holding Mr. Lex liable for securities fraude under Section 10(b) of the Exchange Act, SEC Rule 10b-5, and Section 17(a) of the Securities Act because there was no evidence of scienter.

28.e The Administrative Law Judge erred in finding that "Lex did not inform any of e these investors of the risky nature of private placements...." (Initial Decision at 103.) Even apart from Lex's testimony to the contrary, the undisputed evidence was that all pertinent risks were fully disclosed in the written Private Placement Memoranda that all investors received. As long as the risks are disclosed in the written materials, any alleged oral omissions or misrepresentations are legally immaterial. Brown v. The E.F. Hutton Group, Inc., 991 F.2d 1020 (2nd Cir. 1993); Acme Propane, Inc. v. Tenexco, Inc., 844 F.2d 1317, 1322 (7th Cir. 1988).

29.e The Administrative Law Judge erred in holding that mere negligence is sufficiente to establish violations of Sections 17(a)(2) and (a)(3) of the Securities Act where the title of

Section 17 is **"fraudulent** interstate transactions, 15 U.S.C. § 77q (emphasis added), and the title of Section 17q(a) in particular is "use of interstate commerce **for purpose of fraud or deceit."** 15 U.S.C. § 77q(a)(emphasis added).

30.s The Administrative Law Judge erred in holding that any alleged omissions ors misrepresentations were material where all pertinent risks of the investments were set forth in writing in the private placement memoranda and subscription agreements.

31.s The Administrative Law Judge erred in finding that the default of the Four Funds's junior notes constituted a "red flag" regarding sale of the Trust Offerings.

32.s The Administrative Law Judge erred in failing to credit Mr. Lex with $511,438.00s that he and his wife invested in Four Funds and Trust Offerings investments that to this day is being sequestered by the McGinn Smith Receiver. (Lex Ex. 153 [summary of Lex family investments per Receiver's website]; Lex Ex. 55 [back-up documentation from the Receiver's web site showing the Lex family investments]; N.T. 4880.)

33.s The Administrative Law Judge erred in failing to credit Mr. Lex with $125,000s that he and his wife contributed to the Firstline rescue plan on April 12, 2010, some five months after he had terminated all association with McGinn Smith (N.T. 4919), and just days before the receivership froze all McGinn Smith assets on April 20, 2010. This was his voluntary contribution to the "rescue plan," and an attempt to save his clients from the losses in the Firstline investment.

34.s The Administrative Law Judge erred in issuing a cease and desist order againsts Mr. Lex (Initial Decision at 114) because before imposing such an order, "the Commission must establish a sufficient evidentiary predicate to show that such **future** violation may occur." Aaron v.sSecurities and Exchange Commission, 446 U.S. 680, 701 (1980)(emphasis added), citing SECs

v.eCommonwealth Chemical Securities, Inc., 574 F.2d 90, 98-100 (2nd Cir. 1978). Here, theree was no such evidentiary predicate because: (a) Mr. Lex had an untarnished record of 40 years in the securities industry, with his only blemish resulting from a secret Ponzi scheme of which he admittedly had no knowledge; and (b) it was undisputed that Mr. Lex has been out of the securities industry ever since October 2010, and he had, and has, no intention of ever returning to that industry.

35.e The Administrative Law Judge erred in imposing a permanent bar on Mr. Lex'se association with any broker-dealer or investment advisor (Initial Decision at 117) because such a sanction, with the attendant "loss of livelihood and the stigma attached to permanent exclusion," requires evidence "that **future** misconduct will occur." Securities and Exchange Commission v. Patel, 61 F.3d 137, 141-142 (2nd Cir. 1995)(emphasis added). There was no such evidence in this case for the reasons set forth above.

36.e The Administrative Law Judge erred in imposing a permanent bar on Mr. Lex'se association with any broker-dealer or investment advisor (Initial Decision at 117) because Lex was not the primary actor, but rather (just like NASD, FINRA and the SEC itself) failed to detect a fraud perpetrated by Timothy McGinn, David Smith, who were criminally convicted. In Johnson v. Securities and Exchange Commission, 87 F.3d 484, 490 (D.C. Cir. 1996), the court reversed a **6-month** suspension where Johnson was not the primary actor in the fraud, but merely failed to detect the fraud of another broker **under her supervision**. Here, Mr. Lex was **not** responsible for supervising McGinn or Smith, yet the Judge imposed a **lifetime** suspension. This was clear error.

37. The Administrative Law Judge erred in imposing a third-tier monetary penalty, the highest level, on Mr. Lex (Initial Decision at 115-116, 118) because: (1) the Judge

acknowledged that only conduct occurring on or after September 23, 2008 could be considered in assessing the penalty (Initial Decision at 116); (2) the only evidence against Mr. Lex consisted of failure to conduct a sufficient investigation, as opposed to actual fraud or deceit; and (3) there is no need for deterrence because Mr. Lex has been out of the securities industry since 2010. (See Initial Decision at 116, acknowledging that scienter and need for deterrence are relevant factors in assessing monetary penalty).

38.e The Administrative Law Judge erred in ordering disgorgement becausee disgorgement is a "forfeiture" within the meaning of 28 U.S.C. § 2462. See United States v. Usery, 518 U.S. 267,e284 (1996); United States v. Davis, 706 F.3d 1081, 1084 (9th Cir. 2013). It follows that, because the proceeding was commenced more than five years after the claim first accrued, the request for disgorgement is time-barred. Indeed, the entire "proceeding for the enforcement of any civil fine, penalty, or forfeiture...shall not be entertained...." 28 U.S.C. § 2462.

39.e The Administrative Law Judge erred in ordering disgorgement because the onlye "red flags" that the Judge found related to the Four Funds, and Lex did not sell any Four Funds within the statutory period, i.e., after September 23, 2008. Lex's only sales after September 23, 2008 were of Trust Offerings. Because there were no red flags as to the Trust Offerings, Lex had no ill-gotten gains from sales after September 23, 2008 that could be subject to disgorgement.

40.e The Administrative Law Judge erred in ordering disgorgement of $169,375e (Initial Decision at 117, as modified by April 9, 2015 Order on Motion to Correct Manifest Errors of Fact) because the order: (1) improperly included commissions earned on sales before September 23, 2008; and (2) constituted gross figures, from which Mr. Lex paid approximately

25% for expenses in office supplies and equipment, utilities, rent, telephones, computers, clerical help, and so on. (N.T. 4867:9-22; 4868:3-5; 4868:22-4869:4; 1583:11-14.)

41.e The administrative proceeding against Mr. Lex was unconstitutional in that: (1)e the SEC is exercising a prosecutorial function, seeking to impose severe, punitive sanctions, yet it affords Respondent none of the protections of a criminal defendant: trial by a jury of his peers, with a presumption of innocence, and the government bearing the burden of proving guilt beyond a reasonable doubt; and (2) the power to adjudicate cases and controversies is entrusted under the Constitution to independent courts under Article III, not Article II executive agencies, such as the SEC.

42.e The Judge acknowledged Lex's argument "that this entire proceeding violatese numerous provisions of the United State Constitution." (Initial Decision at 86.) Yet that one-sentence acknowledgment of Lex's constitutional argument constitutes the full extent of the Judge's mention of the argument. Although Lex devoted 12 pages of his Post-hearing Brief to the constitutional challenge, nowhere in the Judge's 119-page Decision does the judge address the merits of the argument.

43.e This glaring omission in the Judge's Decision corroborates the fact that, becausee of the very structure of the combined prosecutorial and adjudicatory body in this case, the Judge is unable to independently evaluate the merits of Respondent's defenses.

44.e The case was penal and punitive in nature, in light of the claims of fraud and thee requests for enhanced monetary penalties, the cease-and-desist order, and the lifetime suspension order. Accordingly, Respondent Lex was deprived of his constitutional rights to:

(a)ehave his case decided by a jury (Article III, Sec. 2, ¶3);e

(b) have the case presided over by an independent Article III judge of the federal judiciary rather than an Article II judge employed by the same agency that initiated and prosecuted the charges;

(c) have sufficient time and opportunity to conduct discovery and prepare his defense;e

(d)eimpose the burden on the Division to prove its case beyond a reasonable doubt, or, ate least, by clear and convincing evidence; and

(e)eapply the rule of lenity, requiring all statutory ambiguities to be resolved ine Respondent Lex's favor.

45.e Mr. Lex's due process right to a fair hearing and an impartial adjudicator wase violated because the Commission prejudged the case against the brokers as evidenced by, *inter alia,* the following: (a) the Commission's Complaint, Motions and Briefs filed in SEC v. McGinn, Smith & Co., et al., N.D. N.Y. No. 10-CIV-457; (b) the Commission's press release issued in connection with the filing of the OIP in the instant enforcement proceeding; and (c) the Commission's Findings of Fact and Conclusions of Law filed in connection with the case against Respondent Richard D. Feldmann in the instant enforcement proceeding. The above-described documents reflect that, even before the Administrative Law Judge reached her decision in this case, the Commission had already prejudged many of the issues underlying this case in a manner adverse to the brokers, including Mr. Lex.

46.e This was a massive case in both size and potential adverse monetary, professionale and reputational consequences for the Respondents. It took an entire month to try, where the Division produced an overwhelming volume of documents, including a 3-terabyte hard drive and 59 depositions from the case of SEC v. McGinn, Smith & Co., et al., N.D. N.Y. No. 10-CIV-457, in which Mr. Lex was not a party. Yet Respondents were deprived of a meaningful opportunity

to take discovery and prepare a defense. They had no opportunity to take depositions, and they were allowed a woefully inadequate time, some four months, between the filing of the Division's OIP and the start of trial. The Division, on the other hand, had years to investigate, subpoena and review documents, take depositions, and have experts review and analyze their materials, before they even filed their OIP. This created an egregiously uneven playing field and violated Respondent Lex's rights to due process of law.

47.s The Commission deposed Respondent Lex in the case of SEC v. McGinn, Smiths & Co., et al., N.D.N.Y. No. 10-CIV-457, in which he was not a party, under the guise that they merely wanted his cooperation in the case against McGinn, Smith. They asked him questions "on the fly" about 9 years of events, without any opportunity or suggestion that he review notes, e-mails, or other historical documents, and without any notice that they were in fact investigating alleged wrongdoing by Mr. Lex. With no prior notice that Mr. Lex was a target of any investigation, the Commission turned the deposition into an inquisition designed to build a case against Mr. Lex himself. When Mr. Lex testified in the instant administrative proceeding, he knew he was a named Respondent with much at stake, he knew the claims asserted against him in the OIP, and he had an opportunity beforehand to review his records and documents. Despite these stark differences in the conditions underlying the two hearings, whenever there was a perceived disparity between his testimony at this hearing and at the prior deposition, the Division was permitted to use that prior deposition to attack Lex's credibility in this enforcement proceeding. This deceptive and oppressive abuse of governmental subpoena power against a non-party in the prior case, and exploitation of the fruits of that abuse in the present enforcement action, violated Mr. Lex's rights to fair notice and due process. See, e.g., SEC v. ESM

Government Securities, Inc., 645 F.2d 310, 316 (5th Cir. 1981)(condemning such trickery as and abuse of the "trust between the government and the people.").d

48.d Respondent Lex incorporates by reference the claims and assertions raised by thed other Respondents in this case regarding the process, the findings and conclusions, the penalties,d and any other issues applicable to all Respondents.d

Because of the numerous prejudicial errors set forth above, Respondent, William F. Lex,d respectfully requests that the Commission grant this Petition for Review and reverse the Decisiond of the Administrative Law Judge.d

GILBERT B. ABRAMSON & ASSOCIATES, LLC

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DATE: 4-30-15d

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.	:

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I served copies of the foregoing pleading on the following persons via Federal Express and e-mail to the Division of Enforcement, and via 1st class mail, postage prepaid, and e-mail to all other parties listed below, addressed as follows:

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January 18, 2018

VIA FAX 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

This Letter is Submitted on Behalf of Respondent William F. Lex

Dear Chief Judge Murray:

I represent Respondent, William F. Lex. Reference is made to the Commission's Order of November 30, 2017, purporting to ratify the appointment of its Administrative Law Judges, remanding this administrative proceeding to Your Honor, and Your Honor's Order of December 15, 2017 reflecting your intention to carry out the Commission's Order in connection with the above-captioned proceedings.

The Commission's belated attempted cure of the fatal defect in this administrative proceeding due to its having been presided over by an unconstitutionally appointed adjudicator, cannot be cured by "reconsideration of the record, including all substantive and procedural actions taken." This administrative proceeding encompassed 18 days of testimony, more than 6,000 pages of transcript and nearly 1,000 exhibits. Scores of rulings were made during the trial and pretrial by what has now been conceded to be an unconstitutionally appointed adjudicator. Decisions regarding admissibility of evidence were based upon law which has been either changed or clarified by various federal courts including the Supreme Court itself. Scores of trial, as well as pretrial, rulings were made based on the ALJ's view of the law at the time of the initial hearing

held some four years ago. Credibility determinations were made and attitudes formed with respect to witnesses in the case, by a judge not authorized to hear the case and make those rulings and determinations. Questions of credibility and the reasonableness of the positions taken by the parties based on the then state of the law cannot be "reconsidered" by the "Post-Hoc" appointment of the ALJ. Evidence was admitted which today would be inadmissible based on court decisions of the last four years. Concepts of due process have been adopted by the Commission in its Rules of Practice which were not recognized at the time these proceedings were initiated and at the time of trial.

We therefore object to the entire process begun by the Commission in its November 30, 2017 Order and followed up by Your Honor's Order of December 15, 2017. The process put into place by the Commission and Your Honor cannot cure the constitutional infirmity of this proceeding. It is the entire trial proceeding that was defective and void, and "reconsideration of the record" cannot cure what was an unconstitutional proceeding to begin with.

In addition, we join in all of the arguments made in the letter of January 18, 2018 addressed to Your Honor of Respondents, Rabinovich and Mayer[1]. We suggest that the only remedy in keeping with the due process rights of Respondent Lex, is for the entire proceeding to be dismissed with prejudice.

We have described in great detail the errors and defects in Your Honor's rulings and Initial Decision. They are contained in the following documents: Motion for Summary Disposition; Lex Pre-Hearing Brief; Lex Post-Hearing Brief; Lex Proposed Findings of Fact and Conclusions of Law; Motion to Correct Manifest Errors; Petition for Review; Lex Individual Brief (before the Commission); Joint Brief (before the Commission); Lex Reply Brief (before the Commission); and Joint Reply Brief (before the Commission).

We submit this letter brief without prejudice to our view that the process instituted by the Commission on November 30, 2017, and followed up by Your Honor's Order of December 15, 2017, is a nullity with respect to this case. To the extent Your Honor undertakes to reexamine or reconsider, we call your attention to the objections and arguments made at the hearing and in our pre and post hearing briefs before Your Honor, as well as those presented to the Commission. In addition, we submit this letter without prejudice to our continuing assertion that, pursuant to 28 U.S.C. §2462, Your Honor and the Commission do not have subject matter jurisdiction over this case by virtue of its having been commenced more than five years after the action first accrued. (See Motion for Summary Disposition).

To the extent Your Honor wishes us to provide copies of the various documents and briefs referred to herein, we will be happy to provide same under separate cover, as requested.

[1] All of the alleged conduct by Respondent Lex occurred between 2003 and 2009 and only in his capacity as a registered representative, and therefore the collateral bars should be vacated. *Bartko v. SEC* (No. 14-1070)

We respectfully request that this letter be posted on the docket.

Very truly yours,

GILBERT B. ABRAMSON

GBA:ija
Cc: Brent J. Fields, Secretary (via Fax and Federal Express)
David J. Stoelting, Esquire (via email and Federal Express)
All Respondents' counsel of record (via email)