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.	:

ANSWER AND AFFIRMATIVE DEFENSES OF RESPONDENT WILLIAM LEX TO ORDER INSTITUTING PROCEEDINGS

1-10. Admitted.

11. Admitted in part, denied in part. Upon information and belief, the name of the entity referred to in this paragraph is McGinn, Smith & Co., Inc. rather than MS & Co. Upon information and belief, it is admitted that McGinn, Smith & Co., Inc. is a New York corporation, was founded in 1980 by David Smith and Timothy McGinn, and had its principal place of business at the address alleged in this paragraph. It is denied that McGinn, Smith & Co. had a branch office at King of Prussia, PA. Upon information and belief, it is admitted that FINRA terminated McGinn, Smith & Co., Inc.'s membership on August 4, 2010. As to the remaining

averments in this paragraph, Respondent Lex does not have, and has been unable to obtain, sufficient information to admit or deny said averments.

12. Admitted in part, denied in part. Upon information and belief, the name of the entity referred to in this paragraph is McGinn Smith Advisors, LLC rather than MS Advisors. Upon information and belief, McGinn Smith Advisors, LLC was a New York limited liability company rather than a New York corporation. Upon information and belief, it is admitted that McGinn Smith Advisors, LLC was formed in 2003 with its principal place of business as alleged in this paragraph. Upon information and belief, it is admitted that the ownership of McGinn Smith Advisors, LLC was as alleged in this paragraph. As to the remaining averments in this paragraph, Respondent Lex does not have, and has been unable to obtain, sufficient information to admit or deny said averments.

13. Admitted, upon information and belief.

14. Admitted, upon information and belief.

15. Admitted in part, denied in part. Admitted as to dates of Offerings, rates of return, amount of Offerings and date of PPM. Upon information and belief, it is admitted that the Four Funds were New York limited liability companies. Upon information and belief, the sole managing member of the Four Funds was McGinn Smith Advisors, LLC rather than MS Advisors. Upon information and belief, the placement agent for the Four Funds was McGinn, Smith & Co., Inc. rather than MS & Co. Upon information and belief, it is admitted that MS Capital acted as Trustee for the Four Funds. As to the remaining averments in this paragraph, Respondent Lex does not have, and has been unable to obtain, sufficient information to admit or deny said averments.

16. Admitted in part, denied in part. The first and last sentences in this paragraph constitute characterizations of PPMs, which are written documents that speak for themselves, and therefore these averments are denied. Upon information and belief, the placement agent for the Trust Offerings was McGinn, Smith & Co., Inc. rather than MS & Co. Upon information and belief, it is admitted that MS Capital acted as Trustee for the Trust Offerings.

17. Denied as stated. Upon information and belief, the name of the entity referred to in this paragraph is McGinn Smith Transaction Funding Corp. The remaining averments of this paragraph are admitted.

18. Admitted.

19. Admitted.

20. Admitted in part, denied in part. The averment that there were numerous red flags, including a "policy" which was clearly inconsistent with the terms of the offerings is denied. As to the existence of a "policy" requiring brokers to "replace" customers seeking to redeem notes with new customers before the redemption would be honored, Respondent Lex is unaware if such a "policy" existed, and this averment is therefore denied.

(a) Denied. Denied as a conclusion of law to which no response is required. By way of further answer, if Sections 5(a) or 5(c) were violated, Respondent Lex neither knew nor had the intention of violating these sections. To the contrary, Respondent Lex, in good faith, believed the sales came under an exception to the registration requirement. By way of further answer, paragraphs 8, 9, and 10 of Respondent Lex's Affirmative Defenses are incorporated herein by reference as though set forth *in extenso.*

(b) Denied. Denied as a conclusion of law to which no response is required. By way of further answer, denied that Respondent Lex had any reasonable basis suitability or

due diligence obligation with respect to the securities in question. To the contrary, the reasonable basis suitability obligation and due diligence required was to be performed by the broker-dealer, not by a registered representative. It is further denied that Respondent Lex made any material misrepresentations or omissions in recommending the Four Funds or Trust Offerings. By way of further answer, the averments in paragraphs 10 through 17, inclusive, of Respondent Lex's Affirmative Defenses are incorporated herein by reference as though the same were set forth *in extenso*.

(c) This averment is not directed at Respondent Lex, and therefore is not answered.

21. Admitted in part, denied in part. As to the averment that the investment losses exceeded $80 million and how much was raised, Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny said averment. The remaining averments of this paragraph are admitted on information and belief. By way of further answer, upon information and belief, some or all of the PPMs were prepared by counsel, as well as Smith.

22. Admitted in part, denied in part. As to the averment of how much was raised by the Four Funds, Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny said averment. The remaining averments of this paragraph are admitted.

23. Admitted in part, denied in part. Admitted that the Four Funds PPMs labeled each tranche as "secured." Respondent Lex believed Smith performed appropriate due diligence, that the underlying loans were appropriately documented and contained appropriate

security. Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny whether there were "secured assets subject to forfeiture."

24. Denied. The averments of this paragraph are characterizations and partial quotations from writings which speak for themselves, and therefore are denied. By way of further answer, it is denied that Respondent Lex ever received "incentive" commissions of 2%, or believed he was entitled to such commissions.

25. Admitted in part, denied in part. Admitted as to the contents of the PPMs quoted verbatim in this paragraph. As to Smith's authority in making investment decisions, this constitutes a characterization of a writing which speaks for itself to which no answer is required, and is therefore denied. As to Smith having no experience in making investment decisions and managing investments for entities like the Four Funds, Respondent Lex knew Smith as an experienced and successful businessman in the securities industry, a partner in a registered and reputable broker-dealer for 20 years, and therefore Smith was believed by Lex to have the knowledge and ability to invest or manage investments of the kind called for in the Four Funds, and this averment is therefore denied.

26. The averments of this paragraph which are characterizations of a writing and which speak for themselves are denied. The exact quotations from the writings are admitted.

27. As to the number of accredited investors, Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny said averment. By way of further answer, Respondent Lex was informed, and reasonably believed, that none of the Four Funds had more than 35 unaccredited investors. Admitted that Respondent Lex sold to accredited and unaccredited investors.

28. Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny the averments of this paragraph.

29. Admitted in part, denied in part. As to what the PPM disclosed or did not disclose, these constitute characterizations of writings which speak for themselves and are therefore denied. As to the returns required to meet the issuer's obligations to investors, on information and belief Respondent Lex has become aware as of the time of the filing of this Answer that the Four Funds investment did not generate sufficient returns, and this averment is admitted. As to the investments, Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny this averment.

30. Admitted in part, denied in part. Admitted that Trust Offerings were created to fund entities engaged in specific areas such as burglar alarm service and triple play service. Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny the remaining averments of this paragraph.

31. Denied. Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny the averments of this paragraph as to how the proceeds were used or handled. Denied that it is appropriate to aggregate the Trust Offerings for purposes of Rule 506.

32. Denied that aggregating the Trusts is appropriate under the law. As to the language of the Trusts, the PPMs constitute writings which speak for themselves, and therefore these averments are denied. Admitted that the quoted language is accurate. As to the number of unaccredited investors, Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny this averment. By way of further answer, Respondent Lex was informed, and reasonably believed, that none of the Trust Offerings had more than 35

unaccredited investors. As to breach of Rule 506, this is specifically denied, and it is denied that it is appropriate to aggregate the number of unaccredited investors By way of further answer, the averments of paragraph 9 of Respondent Lex's Affirmative Defenses are incorporated herein by reference as though the same were set forth *in extenso*. The remaining averments are denied as conclusions of law.

33. Denied. Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny the averments of this paragraph.

34. Denied. The averments of this paragraph constitute conclusions of law to which no response is required, and the averments are therefore denied. Respondent Lex further denies the characterizations of Respondent Lex's duties in this case. By way of further answer, paragraphs 15, 16 and 17 of Respondent Lex's Affirmative Defenses are incorporated herein by reference as though the same were set forth *in extenso.*

35. Denied. Denied that Respondent Lex blindly relied upon McGinn & Smith in the face of red flags. To the contrary, Respondent Lex made repeated inquiry as to the nature of the investments in the Four Funds and whether they were performing. By way of further answer, given Respondent Lex's 20 year relationship with McGinn and Smith, and, to Lex's knowledge, the more than 12-year history of impeccable performance of McGinn Smith private placements, it was reasonable to believe what Smith was telling Respondent Lex with respect to the Four Funds. Denied that Respondent Lex "parroted" marketing information furnished by Smith and McGinn. To the contrary, there was no "marketing information" provided in connection with the Four Funds, only PPMs, which were provided to the customers.

Denied that Respondent Lex failed to disclose the lack of information about the issuer. The products were clearly explained in the PPM, including the fact that these started as

blind pools and that the investors were relying on the discretion of David Smith with respect to the investments. By way of further answer, all risks were disclosed in the PPM and pointed out by Respondent Lex, including the fact of Smith's discretion.

As to Respondent Lex duty of investigation, this averment constitutes a conclusion of law to which no response is required and is denied. By way of further answer, paragraphs 14, 15, 16, and 17 of Respondent Lex's Affirmative Defenses are incorporated herein by reference as though the same were set forth *in extenso.*

36. Denied. To the contrary, Respondent Lex engaged in repeated inquiries as to the status of the investments and, in fact, was provided documentation from the CFO of McGinn Smith showing the area of investments and providing assurance that the investments were performing. Denied that Respondent Lex blindly sold whatever private placement McGinn and Smith told him to sell. To the contrary, there were many private placements which Respondent Lex chose not to sell. As to Respondent Lex's duties of due diligence and adequacy, these averments are denied. By way of further answer, paragraphs 14, 15, 16, and 17 of Respondent Lex's Affirmative Defenses are incorporated herein by reference as though set forth *in extenso.*

37. Denied.

38. Denied as a conclusion of law to which no response is required. By way of further answer, paragraphs 35 and 36 of this Answer are incorporated herein by reference as though the same were set forth *in extenso.* By way of further answer, the description of the PPMs constitutes characterizations of writings which speak for themselves, and are therefore denied.

(a) Admitted in part, denied in part. The averments of this subparagraph constitute characterizations of a writing which speaks for itself, and are therefore denied. As to

what steps Respondents "should have taken," these averments constitute conclusions of law to which no response is required. By way of further answer, the answer contained in paragraph 35 and 36 of this Answer, as well as paragraphs 14 through 17 of Affirmative Defenses, are incorporated herein by reference as though the same were set forth *in extenso.* Denied that Smith owned each of the issuers. To the contrary, on information and belief, MS Advisors was the sole owner of the Four Funds. Admitted that Smith had total control over the disposition of investor funds.

(b) Denied. Respondent Lex did not know that Smith had never before managed offerings of the size and scope of the Four Funds. As to what Respondent Lex should have known, this is also denied. Paragraphs 35 and 36 of this Answer, as well as paragraphs 14 through 17 of Affirmative Defenses, are incorporated herein by reference as though the same were set forth *in extenso.* As to the characterization of the pre-2003 note offering, this averment is admitted, except as to the characterization of "small-scale," a conclusion to which no response can be made. As to Respondent Lex's duties, the averments of what he "should have done" are denied as conclusions of law. By way of further answer, paragraphs 14 through 17 of Respondent Lex's Affirmative Defenses are incorporated herein by reference as though set forth *in extenso.*

Footnote 3: Denied as stated. Admitted only that, among other things, Respondent Lex considered the pre-2003 alarm note offerings to be indicative of Smith's skill. As to Smith's 2000 private letter to McGinn, Respondent Lex was not privy to these communications. As to the remaining averments of this footnote, Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny these averments.

(c) Admitted in part, denied in part. Portions of the averments of this subparagraph constitute characterizations of excerpts of a writing which speak for themselves. As quoted they are correct, and therefore admitted. As to what Respondents "should have done," this averment constitutes a conclusion of law to which no response is required, and is therefore denied. As to what Respondent Lex "would have discovered," this is speculative and also dependent on the timing – 2003, 2005, 2008? As to what Respondent Lex would have discovered, Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny this averment. As to Respondent Lex's duty of inquiry under the circumstances, this averment is denied. By way of further answer, paragraphs 14 through 17 of Respondent Lex's Affirmative Defenses are incorporated herein by reference as though set forth *in extenso.*

(d) Admitted that Respondent Lex knew sales were being made to unaccredited investors. By way of further answer, Respondent Lex believed that each of the offerings permitted up to 35 unaccredited investors, and sold to unaccredited investors only after first clearing with the MS & Co. administrative employee charged with the responsibility of keeping the tally for the entire company on the number of unaccredited investors, and only after being assured he was approved to make the sale. All sales were approved and finalized by the broker-dealer and manager of the Fund, conveyed to an administrator at MS & Co., who conveyed the information to the brokers.

39. Denied. To the contrary, Respondent Lex repeatedly requested information as to the nature of the investments and their performance. If the "searching inquiry" is alleged to describe Respondent Lex's duty under the circumstances, this constitutes a conclusion of law which is denied. By way of further answer, paragraphs 14 through 17of Respondent Lex's

Affirmative Defenses are incorporated herein by reference as though the same were set forth *in extenso*. By way of further answer, paragraphs 35 and 36 hereof are incorporated herein by reference as though the same were set forth *in extenso*.

40. Admitted in part, denied in part. It is denied that Smith provided no specific information about how he had invested the Offering proceeds. To the contrary, Smith informed Respondent Lex that for the most part the proceeds were being utilized to extend loans to local (Albany area) companies, and that loans were being issued after appropriate due diligence. Smith informed Respondent Lex of the industries in which the borrower companies were engaged and which, it appeared to Lex, were diversified. Respondent Lex repeatedly inquired of, and was assured by, Smith, as well as the CFO of the company, that all of the investments were performing.

It is admitted that Smith claimed he could not disclose the specific names of the companies due to many of the businesses requiring confidentiality being in the Albany area, and being non-public companies, and not wanting to disclose their financial condition for competitive reasons. This sounded reasonable to Respondent Lex .

By way of further answer, paragraphs 35 and 36 hereof are incorporated by reference as though the same were set forth *in extenso.* Given the performance of the Funds for five years, there was no reason to further question the propriety of the investments. So confident in the Funds was Respondent Lex, that he and his wife, his in-laws and his daughters invested approximately $600,000 to $700,000 in the Four Funds, most of which, as with the other investors, is almost totally lost.

41. Admitted in part, denied in part. Admitted as to the quoted portion of the PPM. Admitted that before 2008 Respondent Lex did not request a balance sheet or income statement

of the Four Funds. As to the characterization of what was "contrary to the PPMs," the PPMs are writings which speak for themselves, and the averment is therefore denied. As to the remaining averments of this paragraph, Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny these averments.

42. Admitted in part, denied in part. Denied that there were "red flags." Portions of this averment are excerpts and characterizations of a writing which speaks for itself, and are therefore denied. The remaining averments are admitted.

43. Denied. As to the "Redeption Policy," no one told Respondent Lex of such a policy, and this averment is denied. It is admitted that the PPMs did not require replacement before redemption. As to the ability after 2006 to meet redemption requests, Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny this averment.

44. Denied. Respondent Lex was not aware of a "Redemption Policy." Denied that a purported "Redemption Policy" of which Respondent Lex was unaware could constitute a "red flag." By way of further answer, Respondent Lex incorporates by reference paragraph 20 of this Answer as though the same were set forth *in extenso*. As to the Four Funds, Respondent Lex was never informed of this "Redemption Policy." It is denied that Respondent Lex failed to undertake investigation of offerings. By way of further answer Respondent Lex incorporates herein by reference paragraphs 35 and 36 of this Answer as though the same were set forth *in extenso*. Respondent did not have information about the "Redemption Policy," and therefore, could not disclose it.

45. Admitted in part, denied in part. Denied for the reasons set forth in paragraphs 43 and 44 of this Answer, which Respondent Lex incorporates herein by reference as though the same were set forth *in extenso.*

Denied as to the characterization of the PPM, a writing which speaks for itself. Admitted that if a customer decided to roll over his investment, Respondent Lex was to receive a commission. Respondent Lex also received a commission for a new sale. Respondent Lex believed that the managers of the Fund had numerous sources from which redemptions could be made.

46. Denied that Respondent Lex attended an "all-day meeting" on January 8, 2008 where disclosures of the kind described in this paragraph were made. If such a meeting were held, Respondent Lex does not have, and has been unable to obtain, information sufficient to either admit or deny what was disclosed at the meeting. As to the characterization of the investments made over time in the Four Funds allegedly made by Smith at this meeting, Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny this averment.

47. Admitted that Respondent Lex did not request a "probing investigation," since he did not attend the alleged meeting and was not aware of any announcement at that meeting that the Four Funds "were in default." Respondent did later learn as the result of seeing a letter addressed to the Junior note-holders in the Four Funds that their interest rate was being reduced from 10% to 5% due to, *inter alia*, problems in the credit markets, and the overall financial market crisis. Respondent Lex had no knowledge of problems with the alarm notes (Trusts) in January 2008. As to the amount raised in Trust Offerings after January 2008, Respondent Lex

does not have, and has been unable to obtain, sufficient information to either admit or deny this averment.

Denied that a "searching inquiry" should have been conducted by Respondents due to the "accumulation of red flags," for the reasons set forth hereinabove in this Answer and in Affirmative Defenses, all of which are incorporated herein by reference as though set forth *in extenso.*

Denied that there was "an accumulation of red flags." Denied that Respondent Lex did not have sufficient knowledge of how the Trust Offerings were supposed to work to recommend them.

48. Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny the averments of this paragraph.

49. Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny the averments of this paragraph.

50. Denied. Respondent Lex neither recommended nor sold, the August 2009 TDMM Benchmark Trust 09. As to the contents of the PPM, the allegations constitute characterizations of a writing which speaks for itself, and these averments are therefore denied.

51. Admitted in part, denied in part. As to the details of the amount raised, the actions of the McGinn Smith affiliate, what McGinn had been informed of, McGinn's personal involvement and the bankruptcy, these are facts about which, Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny these averments.

It is admitted that Respondent Lex was unaware of the bankruptcy until McGinn's disclosure to the brokers in September 2009 after which this Trust was neither offered nor sold by Respondent Lex. As to due diligence, Respondent Lex denies it was his responsibility or duty

to discover the web of facts described herein with respect to this product. By way of further answer, paragraphs 14 through 17 of Respondent Lex's Affirmative Defenses are incorporated herein by reference as though set forth *in extenso.*

52.-55. Denied. Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny the averments of this paragraph.

56. Admitted.

57.-60. Denied. Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny the averments of this paragraph.

61. Admitted in part, denied in part. Admitted that Guzzetti was the head of the Private Client Group. Denied that Guzzetti "supervised the registered representatives" with respect to the Four Funds and Trust Offerings. To the contrary, Smith supervised the registered representatives with respect to the Four Funds, and McGinn supervised the registered representatives with respect to the Trust Offerings.

62. Admitted in part, denied in part. Admitted that Guzzetti was involved in hiring and recruiting, and communicating with the Brokers. As to the other duties, Respondent Lex does not have, and has been unable to obtain, sufficient information to either admit or deny this averment. As to commissions, Respondent Lex does not have, and has been unable to obtain sufficient information to either admit or deny this averment. Admitted that Guzzetti was in charge of and supervisor of retail sales.

63. Admitted.

64. Denied. Respondent Lex was unaware there was a "Redemption Policy" in place with respect to the Four Funds, and this averment is therefore denied. As to the e-mails, said e-mails are portions of writings which speak for themselves, requiring no answer, and these

averments are therefore denied. With respect to instructions on the "Redemption Policy," Respondent Lex was not aware of any "Policy" regarding redemptions, and Lex never received such "instructions" from Guzzetti.

65. Denied. This averment is not directed to Respondent Lex, and therefore no answer is required. By way of further answer, Guzzetti's duties are a question of law to which no response is required, and are therefore denied. As to "red flags," Respondent Lex's Answer in its entirety is incorporated by reference as though the same were set forth *in extenso.* Denied that Respondent Lex "committed violations."

66. Denied for the reasons set forth in this Answer and in Affirmative Defenses, all of which are incorporated herein by reference as though set forth *in extenso.*

67. Denied for the reasons set forth in this Answer and in Affirmative Defenses, all of which are incorporated herein by reference as though set forth *in extenso.*

68. This averment is not directed at Respondent Lex, and therefore no answer is required.

AFFIRMATIVE DEFENSES

1. This proceeding was commenced on September 23, 2013.

2. This proceeding seeks civil penalties, fines and forfeitures.

3. Most of the sales and alleged conduct in question with respect to Respondent Lex occurred more than 5 years before the institution of these proceedings, or before September 23, 2008.

4. Each of the claims alleged by the Division first accrued, if at all, prior to September 23, 2008.

5. The Division's allegations fail to state a claim upon which relief may be granted.

6. This proceeding is statutorily barred by 28 U.S.C. § 2462 (i.e., the "*proceeding* . . . shall not be entertained") because it seeks civil penalties, fines, and forfeitures but "was not commenced within five years from the date on which the claim[s] *first accrued*" (emphasis added).

7. The Division's claims are otherwise barred in whole or in part by applicable statutes of limitations and repose, including without limitation 28 U.S.C. §§ 1658 and 2462.

8. The Division's claim under Section 5 of the Securities Act of 1933 is deficient because, among other things, Respondent Lex did not act with scienter, recklessness, negligence, or other than in good faith. The Private Placements were not subject to registration, and Respondent Lex had ample basis for reasonably believing, based on diligent inquiry, that each of the relevant offerings complied with an exception to the registration requirement.

9. The Division's claim under Section 5 of the Securities Act of 1933, to the extent it is based on the so-called "Trust" offerings, is deficient because the Division admits there were fewer than 35 non-accredited investors in each of the "Trust" offerings and there is no lawful basis for "integration" of those separate offerings.

10. To the extent the Division claims that Respondent Lex violated Section 17(a)(2) and/or 17(a)(3) of the Securities Act of 1933, the claim is deficient because, among other things, Respondent Lex did not act with scienter, recklessness, negligence, or other than in good faith.

11. Any claim under Section 17(a)(1) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and/or SEC Rule 10b-5 thereunder is deficient because, among other things, Respondent Lex acted in good faith and did not act with scienter.

12. Any claim under Section 17(a)(1) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and/or SEC Rule 10b-5 thereunder is deficient because, among other things, Respondent Lex did not engage in any manipulative or deceptive device or contrivance, and did not employ any device, scheme, or artifice to defraud.

13. Any claim under Section 17(a)(1) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and/or SEC Rule 10b-5 thereunder is deficient under the Supreme Court's opinion *in Janus Capital Group, Inc. v. First Derivative Traders*, because Respondent Lex did not make, and was not ultimately responsible for, any of the statements or omissions in the relevant private placement memoranda relied upon by the Division.

14. The Division's claim of fraud is deficient inasmuch as it relies predominantly on the self-contradictory premise that investors were deceived by risks and information that were explicitly disclosed to them in the relevant Private Placement Memoranda.

15. Any claim under Section 10(b) of the Securities Exchange Act of 1934 is deficient because, among other things, the failures alleged in support of such claim – in particular, the failure to perform "a searching inquiry" or other "reasonable due diligence" – were not prescribed by or through any rule or regulation promulgated by the SEC as necessary or appropriate in the public interest for the protection of investors.

16. The claims alleged by the Division constitute an improper attempt to use retroactive 20/20 hindsight derived from after-the-fact investigation and discovery of misconduct, committed entirely by others, that was not known by Respondent Lex during the relevant period.

17. The claims alleged by the Division constitute an improper attempt to retroactively apply the requirements and standards of FINRA Rule 2111 and its accompanying

"supplementary material" – which were not adopted until 2010 – to acts, transactions, and offerings that occurred many years earlier.

18. The cease-and-desist order demanded by the Division is improper and unnecessary because Respondent Lex is not committing or causing any violation of the federal securities laws and there is no likelihood that he will do so in the future.

19. The Division's demand for purported "disgorgement" is not disgorgement at all, but rather a punitive attempt to "claw back" legitimately earned compensation as a form of monetary damages, a remedy the SEC has no lawful authority to order.

20. Imposition of the disgorgement order demanded by the Division would violate the constitutional doctrine of separation of powers and exceed the lawful powers vested in the Executive branch by Article II of the Constitution because it would constitute an impermissible attempt by the SEC, acting in its executive law enforcement role, to exercise the equitable judicial powers reserved to Article III courts.

21. Imposition of the punitive sanctions demanded by the Division would violate the constitutional doctrine of separation of powers and exceed the lawful powers vested in the Executive branch by Article II of the Constitution because it would constitute an impermissible attempt by the SEC, acting it its executive law enforcement role, to exercise the core judicial powers reserved to Article III courts.

22. Imposition of the punitive sanctions demanded by the Division would violate Respondent Lex's rights under the Constitution of the United States, including without limitation: (i) his Fifth Amendment rights to due process and not to be compelled to be a witness against himself; (ii) his Sixth Amendment rights to an impartial jury, to be informed of the nature and cause of the allegations against him, to be confronted with the witnesses against him, and to

have compulsory process for obtaining witnesses in his favor; (iii) his Seventh Amendment right to trial by jury; and (iv) his Eighth Amendment right not to be subjected to excessive fines.

23. The sanctions demanded by the Division in the OIP are neither appropriate nor in the public interest.

24. The sanctions demanded by the Division in the OIP are excessive within the meaning of 5 USC §504(a)(4)

WHEREFORE, Respondent Lex requests that the proceedings be dismissed, and that counsel fees and costs be assessed against the Division and/or the Commission pursuant to, without limitation, 5 USC §504(a)(4).

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