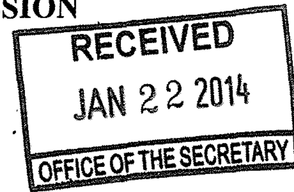
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of

DONALD J. ANTHONY, JR., :
FRANK H. CHIAPPONE, :
RICHARD D. FELDMANN, :
WILLIAM P. GAMELLO, :
ANDREW G. GUZZETTI, :
WILLIAM F. LEX, :
THOMAS E. LIVINGSTON, :
BRIAN T. MAYER, :
PHILIP S. RABINOVICH, and :
RYAN C. ROGERS. :

RESPONDENT WILLIAM F. LEX'S PREHEARING BRIEF

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I. INTRODUCTION

William Lex is an honest man who has dedicated his entire working life to doing what he thought was best for his clients. His philosophy has always been that if he did not consider a product worthy of investing his own money or his family's money, he would not present such a product to his clients. For more than 35 years he maintained an unblemished record, selling insurance products, fixed and variable annuities, and finally, in the late 1990s, the McGinn Smith Trust private placements. Not once in all those years was there a single complaint or claim against him.

With each sale of the products, Lex thought he was accomplishing something good for his clients. The McGinn Smith products had been so successful for so long prior to 2008 that he could not fill the demands of his clients wishing to be included in the McGinn Smith investments.

Mr. Lex is as devastated by the losses suffered by his clients as he is by the losses suffered by himself and his family from the secretive actions of Timothy McGinn and David Smith. Mr. Lex has worked tirelessly to assist his customers in any way he can to attempt to recoup the money lost or presently in limbo due to the concealed criminal misconduct of McGinn and Smith.

II. MR. LEX'S BACKGROUND AND RELATIONSHIP WITH MCGINN SMITH

William Lex is 67 years of age. He was born and raised in Philadelphia, Pennsylvania. He is a 1968 graduate of St. Joseph's College, with a Bachelor of Arts Degree in Business Administration. He has been married to his wife Kathleen for 48 years. He has two daughters and three grandchildren.

Mr. Lex started in the insurance business. He became associated with McGinn-Smith in 1983. Mr. Lex's office was located in King of Prussia, PA, far removed from the main office of McGinn Smith in Albany, New York. He was the only McGinn Smith broker in Pennsylvania.

From 1983 to 2003, Mr. Lex sold mutual funds, variable annuities, some stocks and bonds, and private placements. Up until 2003, the private placements sold by Mr. Lex were in the form of "Alarm Notes" (Trusts). Mr. Lex became aware of the alarm investments in the early to mid-1990s. For a period of time he observed their performance, and then purchased one himself. He began to offer the Alarm Notes to clients from about 1998 to 2002-2003, when they ceased being available.

By 2003, the substantial portion of Mr. Lex's client base were doctors and others related in the medical field. For example, Mr. Lex did a good amount of work with various hospitals in connection with tax-deferred annuities. It was in this way he met hospital administrators, nurses, as well as technicians and physicians. It is estimated that more than one-half of his clients during this time were in the medical field. As to the physicians who were his clients pre-2003, he provided products such as variable annuities, some mutual funds, and some private placements in the form of alarm notes (Trusts). He rarely sold stocks or bonds.

Mr. Lex's experience through 2003 was that the Alarm Notes were reliable, always paying interest on time, and always redeeming upon request. Still, Mr. Lex evaluated each new offering on the mertis and, contrary to the Division's insinuation, did not undertake to sell every McGinn Smith private placement that McGinn Smith offered.

As to those clients who had previously purchased alarm notes prior to 2003, Mr. Lex informed them of the availability of the new product and informed them that it was different from the alarm notes. It was his understanding in accordance with the PPMs that there was

broad discretion on the part of the Manager as to what the investments would be, but that much of the investments would be in debt-type securities as had been explained to Mr. Lex by David Smith. Mr. Lex also informed prospective investors that they would be relying on the discretion of Mr. Smith as to what the investments would be, and that Mr. Lex was not aware of the specific investments which the Fund would make.

Mr. Lex never signed up a client for any of the notes until they had received a PPM and had ample opportunity to review it. He would almost always conduct the sale at the home or office of the investor where he would go over the Subscription Agreement, whereupon the client would sign both the Subscription Agreement and Questionnaire. The Subscription Agreement and Questionnaire would then be submitted to Patty Sicluna or David Smith for approval. If the investor did not meet the accreditation criteria, before enrolling a client and submitting any material to Patty Sicluna, Mr. Lex would call Patty Sicluna or David Smith to find out whether there was room available for an unaccredited investor. Patty Sicluna would tell Mr. Lex she would check with David Smith. If Mr. Lex was given the okay that an unaccredited investor could be sold to, he would then submit the Subscription Agreement and Questionnaire directly to Patty Sicluna.

As of April 2010, Mr. Lex and his immediate family – his daughters and son-in-law, his mother-in-law, his daughter's life partner, his wife, his brother, and his own trust – had approximately $1.2 million invested in the various Trusts and Four Funds.

Mr. Lex first learned about the FIIN, the first of the Funds, in a telephone conference call between all brokers and David Smith. At the time, there were somewhere between 30 and 40 brokers affiliated with McGinn-Smith, and this was late 2003 when this first issue came out. In the telephone conference Smith explained the product and highlighted the fact that the senior and

senior subordinated tranches offered additional protection and security for the investments. It was in this first conversation, or in a conversation Lex had personally with David Smith within a few weeks of the joint broker conversation described above, that David Smith explained it was his intention to invest the FIIN money in secured "debt obligations" of various companies, and that although the PPM only required that no more than 25% could be invested in any one entity, it was Smith's hope that he would have 10 or more separate investments in the Fund.

These assurances along with McGinn-Smith's 20-year history as a prominent, SEC-registered broker-dealer and investment adviser that had never failed to make a timely interest payment or failed to timely redeem, along with Lex's belief that David Smith was a highly sophisticated businessman who had the requisite financial background and integrity to operate as Manager of the Funds, gave Mr. Lex comfort that these Funds could be successful.

While Mr. Lex recognized that even secured loans did not guarantee payment, he felt comfortable that the senior and senior subordinated tranches of the Funds provided some further degree of security for his investors. For this reason, Mr. Lex never sold junior notes.

With the foregoing knowledge, Mr. Lex began to offer the Funds as an alternative to other investments that he presented to his clients who were looking for short-term yield on their investments.

III. LEGAL POSITIONS

As to Mr. Lex's legal position, we incorporate by reference Lex's Motion for Summary Disposition filed January 10, 2014.[1] In addition, we state the following:

[1] Although Chief Judge Murray has denied Lex's Motion for Leave to File Motion for Summary Disposition, Mr. Lex maintains that the defenses raised in the Motion for Summary Disposition remain valid defenses, and that this tribunal lacks subject matter jurisdiction over the entire proceeding..

A. Lack of Subject-Matter Jurisdiction and Legal Authority to "Entertain" this Proceeding

It is clear that the claims made by the Division in the OIP, filed September 23, 2013, first accrued more than 5 years before the filing date, or before September 23, 2008. The vast majority of the sales alleged to have violated the law were made before September 23, 2008. The claims "first" accrued upon the first sale made with knowledge of the alleged "red flags." The Division alleges that red flags were contained within the offerings materials of the Four Funds, which were issued from September 15, 2003 through October 1, 2005, and that McGinn Smith's "redemption policy," allegedly known to the brokers in 2006/2007, was another red flag. Because Mr. Lex made sales after those dates but before September 23, 2008, this proceeding "shall not be entertained...." 28 U.S.C. § 2462.

Similarly, the allegation that the sales were of unregistered securities without a lawful exemption would have accrued upon the first sale of these securities. The Division takes the position that all sales were unlawful, and the sales began in September of 2003. The Division's two claims against Mr. Lex therefore first accrued well before September 23, 2008. (See the Division's expert report of Robert Lowry condemning sales occurring before 2008 based on what he and the Division identify as red flags.)

The effect of the accrual of the claims more than 5 years before the initiation of these proceedings is to deprive this tribunal of subject-matter jurisdiction. (See Lex's Motion for Summary Disposition at 7-8.) To proceed with the hearing, i.e., to entertain the claims, would violate the Congressional command that the proceeding "shall not be entertained."

B. Fraud/Exchange Act Section 10(b) and Securities Act Section 17(a)(1)

The scienter required for a violation of Exchange Act Section 10(b) and Securities Act Section 17(a)(1) is "a mental state embracing intent to deceive, manipulate, or defraud." Merck

& Co., Inc. v. Reynolds, __ U.S. __, 130 S.Ct. 1784, 1796 (2010); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). The broker must have "made a material misstatement *with an intent to deceive*--not merely innocently or negligently." Merck, 130 S.Ct. at 1796 (emphasis in original).

While scienter may be satisfied by evidence of "conscious misbehavior or recklessness." Gould v. Winstar Communications, Inc., 692 F.3d 148, 158 (2nd Cir. 2012). Conscious misbehavior in this context means "deliberate illegal behavior." Id.; Novak v. Kasaks, 216 F.3d 300, 308 (2nd Cir. 2000). And recklessness in this context means conduct that is:

> highly unreasonable, representing an **extreme departure** from the standards of ordinary care...to the extent that the danger was either **known** to the defendant or **so obvious that the defendant must have been aware of it.**

Gould, 692 F.3d at 158-159 (emphasis added); Rothman v. Gregor, 220 F.3d 81, 90 (2nd Cir. 2000); In re Computer Sciences Corporation Securities Litigation, 2012 WL 3779349 at *7 (E.D. Va. 2012). In other words, the broker may not ignore **"obvious signs of fraud."** Gould, 692 F.3d at 159; Novak, 216 F.3d at 308. In this case, unlike the cases on which the SEC relies, there were no "obvious signs of fraud."

Probably the most significant evidence that Mr. Lex had no intention to defraud his clients, nor was aware of any red flags, nor had any intent to deceive them into investing in any of the Four Funds or the Trusts, was the fact that he, his wife, his brother, his two daughters, and his mother-in-law all had money invested in both the Four Funds and in the Trusts. The total amount invested by his wife and his personal trust was approximately $500,000 to $600,000, with an additional $500,000 to $600,000 invested by the rest of his family members. Clearly, the danger of these investments could not have been known to Mr. Lex, nor could it have been "so obvious that [he] must have been aware of it." His own investments belie any "conscious

misbehavior" or "recklessness" or "deliberate illegal behavior." Like others invested in McGinn Smith products, Bill Lex and his family have lost most of these sums (but, unlike his clients, are precluded from any recovery in the pending receivership).

Rather than exhibiting any scienter or intent necessary for fraud, Mr. Lex presented the investments in good faith, reasonably relying on all of the following indications that the investments were sound:

- Lex invested his own money in the alarm Notes for several years so he could see first-hand how they worked before he ever started offering them to customers.
- He didn't start selling alarm Notes to customers until approximately 1995-1996, after he first invested his own money in them, learned how they worked first-hand, and observed their performance for several years.
- The alarm Notes were managed by Timothy McGinn and David Smith, who were upstanding, astute, successful experts in the business world.
- The alarm Notes performed without fail until 2002, when McGinn Smith bought out the Notes from clients and took the business public with an IPO.
- As an alternative to the alarm Notes, McGinn Smith in 2003 started offering investments in LLCs—blind pools.
- Lex had confidence in McGinn and Smith as managers of the LLC investments because he had observed their successful 20-year track record with the alarm Notes, and the operation of a successful broker-dealer.
- The offering documents stipulated that no more than 25% of the funds in any LLC would be invested in any one company.
- David Smith assured Lex that in fact each LLC would spread out the investments or loans to as many as 10-12 unrelated companies.
- The investments were divided into three "tranches" consisting of Senior Notes, Senior Subordinated Notes, and Junior Notes. Senior Notes were the most secure and paid the lowest yield, while Junior Notes were the riskiest and paid the highest yield. Lex minimized the risk to his customers by offering only Senior and Senior Subordinated Notes.

- In the event of a failure of the LLC and liquidation of the assets, the Senior Noteholders, who held 25% of the total investment in the LLC, would be entitled to the first 25% in any liquidation. Thus, each dollar invested in the Senior Notes was backed up by four dollars of assets in the event of liquidation. Senior Subordinated Noteholders were secured in the first 50% of any sale of assets.

- The private placement memoranda clearly disclosed all of the materials risks of the investments that were known to Mr. Lex.

- Lex was assured that McGinn Smith had performed due diligence on the investments in the LLCs.

- Lex knew that McGinn Smith was a prominent and respected SEC-registered broker-dealer and investment adviser that had an experienced team of accountants, lawyers, compliance officers and underwriters, who he expected would investigate the investments.

- From 2003 to September 2008, all interest payments and all redemptions were paid in full and on time to Lex's customers.

- David Smith repeatedly assured Lex that the LLCs were performing well, with no pending or suspected defaults.

- Lex periodically demanded and received information about the investments in the LLCs, and he received repeated assurances that they were performing well.

- Lex understood that FINRA, the SEC, and NFS (the custodian and clearing house) all periodically investigated and examined the private placements between 2002 and 2007. None of these entities notified the registered representatives that there was a problem with the structure or the substance of the deals.

- Through mid-2008, Lex knew of no failure on the part of McGinn Smith to timely redeem or pay interest on his clients' investments in the Notes.

- It was eventually discovered that the investments failed in large part because principals in McGinn Smith secretly diverted the invested funds for other purposes. Lex had no reason to foresee such criminal conduct.

The Division relies on disclosures made in the PPMs themselves, regarding high fees, blind pools, allowance of investments in McGinn Smith affiliates, and other alleged business-model flaws in the investments, to argue that the brokers are liable for fraud for selling the investments. The notion that brokers can be liable for fraud, not because of any

misrepresentations or material omissions, but rather because of accurate disclosures of risks, bears no support in any statute, regulation, rule or case.

The Division also seeks to impose liability on the brokers for fraud based on their failure to conduct "searching" due diligence investigations into alleged "red flags." Contrary to the Division's theory, liability for fraud requires both deception and scienter, and cannot be premised on a mere failure to conduct "searching" due diligence. Section 10(b) of the Exchange Act prohibits any "manipulative or deceptive device or contrivance in contravention of such rules and regulations **as the Commission may prescribe**…." 15 U.S.C. §78j(b)(emphasis added). The Commission has never issued a rule or regulation requiring each individual broker to duplicate the due diligence investigations performed by the broker-dealer. The Division instead relies on suitability rules issued by FINRA. The Division's reliance is misplaced because: (1) FINRA is not the Commission, and there is no basis for relying on an alleged violation of a FINRA rule to impose liability for fraud under Section 10(b); and (2) the FINRA suitability rule in effect at the time of the conduct underlying this case appropriately specified that it was the exclusive responsibility of the broker-dealer firm to perform the investigatory task that the Division now seeks to impose on the individual broker.

C. The Division's Mistaken Reliance on Overruled Case Law

In our motion for summary disposition on behalf of Mr. Lex, we explained in detail why the Division's predominant theory of scienter-based fraud under Section 10(b) and Rule 10b-5 – namely, that Mr. Lex committed fraud by failing to personally conduct a "searching" due diligence inquiry of investments that were described in detail in accompanying PPMs and already vetted by the relevant SEC-registered broker-dealer firm and its outside experts, all in alleged violation of his purported duty to conduct a "reasonable basis" suitability analysis – is

fatally flawed and futile. We incorporate that discussion by reference and will not reiterate it at length here.

After we filed our motion for summary disposition, however, we received a copy of the Division's expert report purporting to support its fraud theory, authored by Robert Lowry, which instead confirms beyond dispute just how dreadfully misguided the Division's Section 10(b) and Rule 10b-5 theory really is, and why that theory must not be permitted to clutter the record and over-complicate the hearing. Mr. Lowry is not a lawyer and has no legal training, yet the foundational portion of his expert opinion consists entirely of a legal opinion that infers a purported legal duty based on legal principles and legal authorities. *See* Lowry Expert Report Part IV. Worse yet, and perhaps not realizing the fatal error in his legal analysis due to his lack of legal training, the primary judicial opinion upon which his entire report is premised – the Second Circuit's 45-year-old opinion in Hanly v. SEC, 415 F.2d 589 (2d Cir. 1969), which Mr. Lowry repeatedly cites as the sole or principal authority for his opinion on a retail broker's "Duties and Obligations" – was in all material respects *overruled* by the Supreme Court in the landmark case of Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1975).[2]

Hochfelder, of course, is the seminal Supreme Court case that squarely held that liability under Section 10(b) and Rule 10b-5 requires proof of scienter – that is, intentional deception or possibly extremely reckless deception – and cannot be premised on merely negligent or unreasonable failures (for example, failure to have a "reasonable basis" for an investment recommendation). Before Hochfelder (particularly during the 1960s and early 1970s), the federal circuit courts of appeal were split on that issue, with the Second Circuit being the leading proponent of the *erroneous* view that scienter was *not* required, having repeatedly held that

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[2] As discussed at length in the Pre-Hearing Brief filed on behalf of Respondent Chiappone (at pages 20-31) , *Hanly* and similar cases are so obviously distinguishable on its facts that it should have no bearing on this case in any event.

"unreasonable" conduct or "negligence" was sufficient for liability. Hanly was just one example of several such cases decided by the Second Circuit during this pre-Hochfelder period. In Hanly, the court explicitly *assumed* the now-rejected premise that "negligence" or "unreasonable" conduct *could* violate Section 10(b) and Rule 10b-5. Indeed, the court quoted as foundational predicate for this assumption its opinion a year earlier in SEC v. Texas Gulf Sulphur, the relevant portion of which had emphatically staked out – contrary to the eventually more influential concurring opinion by Judge Friendly in that case – the position that scienter was *not* required for liability under Section 10(b) or Rule 10b-5:

> In an enforcement proceeding for equitable or prophylactic relief, the common law standard of deceptive conduct has been modified in the interests of broader protection for the investing public so that negligent insider conduct has become unlawful . . .. Absent any clear indication of a legislative intention to require a showing of specific fraudulent intent . . . the securities laws should be interpreted as an expansion of the common law both to effectuate the broad remedial design of Congress . . . and to insure uniformity of enforcement . . ..

Hanly, 415 F.2d at 596 (quoting verbatim from SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 854-55 (2d Cir. 1968) (*en banc*), *cert. denied*, 394 U.S. 976 (1969)). In fact, the sentences in Texas Gulf Sulphur that immediately follow the above-quoted passage *conclusively* expose the fatal flaw in the Division's reliance upon these cases. In the fuller passage from Texas Gulf Sulphur, the Second Circuit eerily presaged the Division's very theory here that Section 10(b) and Rule 10b-5 liability can be based on "negligence as well as active fraud," thus outlawing "lack of diligence, constructive fraud, or unreasonable or negligent conduct." Texas Gulf Sulphur, 401 F.2d at 855.

Hochfelder completely swept aside – root and branch – each and every assumption baked into the Second Circuit's flawed pre-Hochfelder approach to securities fraud, especially those assumptions baked into the fabric of that court's hoary decision in Hanly. Indeed, the

Hochfelder opinion itself explicitly cites to Texas Gulf Sulphur several times – not to the now-overruled majority opinion in that case quoted and relied upon by Hanly, but rather to Judge Friendly's prescient *concurring* opinion in which he vehemently disagreed with the majority's misguided view that "negligence" or failure to act "reasonably" can constitute securities fraud under Section 10(b) or Rule 10b-5. After Hochfelder, there is no plausible argument that "lack of diligence," or failure to act "reasonably," can support a claim under Section 10(b) or Rule 10b-5. In fact, we are somewhat astonished that the Division and its expert have decided to hang their entire fraud theory on this obviously erroneous and overruled proposition.

D. Exemption From the Registration Requirement

In this case, Lex understood that McGinn Smith had in place established procedures for ensuring that the number of non-accredited investors did not exceed 35. Specifically, before any broker made any sale to a non-accredited investor, the broker would contact the McGinn-Smith administrator, Patty Sicluna, who kept a central registry of each sale and each investor's status as accredited or non-accredited. Mr. Lex understood a broker would not proceed with the sale unless Ms. Sicluna informed the broker that the total of non-accredited investors had not yet reached 35. There were several occasions where Lex was told an unaccredited investor would have to wait for a new offering because 35 were already sold. The brokers reasonably relied on this system because it was the only source that collected the sales from all brokers. Without that resource, every broker would have had to constantly inquire of all other brokers about the sub-totals sold by each other broker, and then tally the responses from all of the brokers. But if the brokers followed such a haphazard method, the responses they received could never be definitive or reliable, because sales were always ongoing as to each broker. The situation was fluid with respect to each broker, with investors changing through purchases and redemption.

This procedure for ensuring compliance with Regulation D did not involve Mr. Lex. His position with McGinn Smith did not include participation in the process of tabulating the numbers of non-accredited investors. The records were maintained exclusively by Patty Sicluna at McGinn Smith, and the communications regarding those numbers were conducted between the brokers and Ms. Sicluna. Mr. Lex had no function with respect to these calculations, or knowledge that the numbers in the investments exceed 35 individually.

The Division's theory under Section 5 of the Securities Act inappropriately disregards the exemption to the registration requirement where the broker-dealer "reasonably believes" the number of non-accredited investors does not exceed 35. 17 C.F.R. § 230.506. Here, Mr. Lex reasonably relied on the central registry maintained by McGinn Smith to ensure that his sales of a particular product to non-accredited investors, when added to the sales of other brokers, did not exceed the limit of 35. The Division seeks to impose strict liability for alleged violations of Section 5, where the regulations issued under that Section specifically prohibit liability for conduct performed in good faith.

Moreover, the Division candidly acknowledges that none of the Trust offerings violated Section 5. The Division therefore seeks to "integrate" them as if there were only two such offerings, in violation of 17 C.F.R. § 230.502(a), which prohibits integration for this purpose where the separate offerings occurred more than six months apart from one another.

E. Due Process and the Rule of Lenity

This is, without question, a quasi-criminal prosecution initiated by a federal law enforcement agency[3] seeking to brand Mr. Lex a wrongdoer (indeed a fraudster), deprive him of

[3] *See, e.g.*, SEC Website, www.sec.gov/about/whatwedo.shtml ("First and foremost, the SEC is a law enforcement agency" and the Division "assists the Commission in executing its law enforcement function " by, among other things, bringing federal court cases and administrative proceedings and "prosecuting these cases on behalf of the Commission").

his livelihood, irreparably taint his personal reputation and future employment prospects, extract draconian financial penalties, and impose other predominantly punitive sanctions against him. As such, Mr. Lex has a fundamental constitutional right to due process, including having the alleged charges against him decided by a jury of his peers under the supervision of an independent Article III judge. *See* U.S. Constitution, Art. III, § 2 ("The Trial of all Crimes...shall be by Jury"); *id.* at Amendment V ("nor shall any person...be deprived of life, liberty, or property, without due process of law"); *id.* at Amendment VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"); Tull v. United States, 481 U.S. 412, 425 (1987) (right to jury trial in civil case where government seeks civil penalties).

Moreover, to prevail in its quest to punish Mr. Lex and brand him a lawbreaker – particularly based on any allegation of fraud – the Division must be required to prove its case by more than a mere preponderance of evidence, meaning at least by clear and convincing evidence if not beyond a reasonable doubt. See, e.g., Addington v. Texas, 441 U.S. 418, 424 (1979) (observing that clear and convincing evidence is typically required "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant").

Finally, the Rule of Lenity – the age-old rule that requires that all legal ambiguity to be resolved in the defendant's favor – should apply with full force and effect, with particular relevance to the Division's ill-conceived and largely inscrutable theories under Securities Act Section 5 and Exchange Act Section 10(b) and Rule 10b-5 thereunder. See, e.g., Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (Rule of lenity applies whenever the relevant statute "has both criminal and noncriminal applications"); County of Suffolk v. First Am. Real Estate Solutions, 261 F.3d 179, 195 (2d Cir. 2001) ("Due process requires that before a criminal

sanction or significant civil or administrative penalty attaches, an individual must have fair warning of the conduct prohibited by the statute or the regulation that makes such a sanction possible"); United States v. One 1973 Rolls Royce by & Through Goodman, 43 F.3d 794, 819 (3d Cir. 1994) (Rule of Lenity applies to ambiguous statute where proceeding is punitive and quasi-criminal).

With regard to Mr. Lex's right to have the Division's penal law enforcement charges tried before a jury in an Article III court, we recognize that Your Honor, as a practical matter, cannot simply order such a jury trial. We nevertheless urge Your Honor to decline to entertain this matter in its current form on the grounds that doing so would violate Mr. Lex's constitutional rights, or in the alternative expressly decline to consider all requests for punitive remedies for the same reason.[4] With respect to the standard of proof, we respectfully submit that in evaluating the Division's evidence, Your Honor should apply a standard no less strict than "clear and convincing." Finally, with respect to the Rule of Lenity, we respectfully request that Your Honor explicitly acknowledge and apply this rule to resolve all legal ambiguity in favor of the respondents.

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[4] As noted elsewhere, we separately moved for summary disposition on the ground that this proceeding, wholly apart from the jury trial issue, cannot lawfully be "entertained" because, under the unambiguous command of 28 U.S.C. § 2462, the Division's claims "first accrued" more than five years before this proceeding was commenced.

IV. CONCLUSION

For the foregoing reasons, Respondent William Lex respectfully requests that the proceedings against him be dismissed, and that counsel fees and costs be assessed against the Division and/or the Commission pursuant to, without limitation, 5 U.S.C. § 504(a)(1) and/or § 504(a)(4).

Respectfully submitted,

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