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Michael Earl McCune, Applicant
6118 West 158th Street
Overland Park, KS 66223

UNITED STATES OF AMERICA

Before The

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

MICHAEL EARL MCCUNE

For Review of Disciplinary Action

Taken By the Financial Industry

Regulatory Authority

("FINRA") and the National

Adjudicatory Council of FINRA

(FINRA Complaint No. 2011027993301

FINRA NAC Decision Dated

July 21, 2015)

Reply Brief of Applicant,

Michael Earl McCune

Admin. Proc. File No. 3-16768

December 7, 2015

Pursuant to the September 22, 2015 Order Scheduling Briefs in this matter and in response to the Brief in Opposition to Application for Review submitted by FINRA on November 23, 2015, Applicant Michael Earl McCune submits the following Reply Brief in support of his application for review and appeal by the Commission of a final disciplinary action by FINRA and the National Adjudicatory Council (the "NAC") of FINRA.

The Applicant's appeal involves a determination of the NAC in a decision dated July 27, 2015 which upheld the sanctions imposed on the Applicant in a decision of the FINRA Office of Hearing Officers ("OHO"). The NAC decision represents the final disciplinary decision of FINRA.

The Applicant must reiterate what FINRA and the NAC surely know: that the sanctions which FINRA is recommending against the Applicant are, for all practical purposes, a lifetime ban from the industry. When 95% of those accused of U-4 violations and who received a suspension as a sanction, regardless of the duration of the suspension, are no longer in the securities industry after the suspension, when the current environment in the industry is one of absolute fear of any regulatory issue, when even large producers with any U-4 issues have difficulty finding a FINRA member who will accept them upon receiving a suspension, it is undeniable that a smaller producer, such as the Applicant, who receives any suspension will be, for all practical purposes, receiving a lifetime

bar from the industry. There is no remedial effect for the decision of FINRA and the NAC as argued in page 20 of the FINRA brief because if the decision is affirmed, then the Applicant will no longer be in the securities industry. Evidently, FINRA is desirous of this outcome for they contend on page 18 of their brief that "...he is unable to meet the high standards required of those employed in the securities industry" (the Applicant's existing clients would strongly disagree with this conclusion, but nobody has bothered have any contact with any of them despite the Applicant's almost pleading with FINRA to do so). Instead, $5,000 and a 6 month suspension is deemed to be a "fair" result when everyone knows that, in effect, a lifetime bar will be the result.

The FINRA brief states that "The Commission has soundly rejected the argument that lesser sanctions should be imposed on repondents who claim they have suffered hardship as a result of their own misconduct" and refers to *Kent M. Houston*, Eschange Act Release No. 71589A, 2014 SEC LEXIS 614, at 34 – 36 and *Craig*, 2008 SEC LEXIS 2844, at *27. There is quite a difference between the acts committed in both these cases and the acts committed by the Applicant. Craig had five felony charges: larceny, possession of a controlled substance, writing checks on a financial institution when he did not hold an account at that institution, and forging a driver's license. Houston wrote checks to himself for over $355,000 and refused to comply with requests for information from FINRA and refused to attend an "on-the-record" interview with FINRA. Hardly an

apples-to-apples comparison with the "misconduct" of the Applicant.

The Applicant asks the Commission to reconsider its decisions that have held that intent is not a requirement for a willful violation. Determining that an act is "willful" when there is not intent to commit the act is not something that the Applicant understands. Applicant has stipulated his actions and agrees that his actions were negligent, but cannot understand how his actions can be held to be "willful" without intent to commit the action he is accused of committing, without a finding that he "was aware of the rule he violated or that he acted with a culpable state of mind" (page 10 of the FINRA brief quoting *Craig*, 2008 SEC LEXIS 2844, at *13).

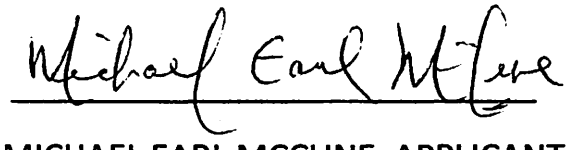
Next, FINRA contends that the Applicant's argument that the sanctions imposed by FINRA and the NAC on the Applicant violate the Constitution of the United States fails. While the Applicant argues that the sanctions are effectively a lifetime bar from the industry and has calculated the loss of income that the sanctions will cause for the Applicant by a basic method fundamental to any financial valuation process, the FINRA brief states that these arguments "strain credulity" (page 19 – Footnote 10). FINRA goes on to quote numerous cases (page 19 and also page 19 – Footnote 11) that supposedly support that the Constitution of the United States does not apply to FINRA. However, every case quoted by FINRA involves a Fifth Amendment Due Process issue; the case cited by the Applicant in

his Opening Brief, *United States v. Bajakajian*, 524 U.S. 321 (1998) does not involve a Fifth Amendment Due Process issue and so the cases that FINRA cites in its brief do not apply. *Bajakajian* was an application of the Eighth Amendment, specifically the Excessive Fines Clause. In *Bajakajian,* the Supreme Court ruled that it was "grossly disproportional" for Bajakajian to lose $357,144 for failing to report possession of more than $10,000 to the appropriate authorities when leaving the United States; the Applicant will lose a discounted value of $730,802 if the NAC decision stands for also failing to report events to the appropriate authorities. The common sense, everyday meaning of the word "fine" (according to the Merriam-Webster dictionary) includes a forfeiture which would include the forfeiture of earnings that would result to the Applicant if the NAC decision is upheld. It was "grossly disproportional" to take $357,144 from Bajakajian; it would be "grossly disproportional" to take $730,802 from the Applicant.

For all the foregoing reasons, the Applicant again respectfully submits that the NAC decision be modified and the suspension and statutory disqualification sanctions imposed by this decision be vacated.

Dated: December 20, 2015

Respectfully Submitted By:



MICHAEL EARL MCCUNE, APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that I have caused an original and three copies of the foregoing "Reply Brief of Applicant, Michael Earl McCune – Admin. Proc. File No. 3-16768, FINRA Complaint No. 2011027993301, FINRA NAC Decision Dated July 21, 2015" to be sent via facsimile to the United States Securities and Exchange Commission at 202-772-9324 on this 7th day of December, 2015 and by UPS Next Day Air on this same 7th day of December, 2015 to:

The Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Mail Stop 1090 – Room 10915
Washington, DC 20549.

Michael Earl McCune
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Overland Park, KS [redacted]
[redacted]

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing "Reply Brief of Applicant, Michael Earl McCune – Admin. Proc. File No. 3-16768, FINRA Complaint No. 2011027993301, FINRA NAC Decision Dated July 21, 2015" to be sent via facsimile to FINRA at 202-728-8264 on this 7th day of December, 2015 and by UPS Next Day Air on this same 7th day of December, 2015 to:

Colleen Durbin
FINRA – Office of General Counsel
1735 K Street, NW
Washington, DC 20006.

Michael Earl McCune
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