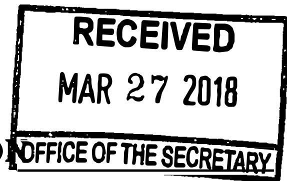

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

John M.E. Saad

For Review of

FINRA Disciplinary Action

File No. 3-13678r

FINRA'S BRIEF IN OPPOSITION

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FINRA'S BRIEF IN OPPOSITION

I. INTRODUCTION

The United States Court of Appeals for the District of Columbia Circuit remanded this matter to the Commission to determine, with respect to the bar imposed on Saad for his misappropriation of employer funds based on false expense reports and receipts, whether the Supreme Court's recent decision in *Kokesh v. SEC* "has any bearing on Saad's case." The Commission, in turn, has ordered the parties to file briefs "limited" to a specific issue: "the relevance—if any—of the Supreme Court's recent decision in *Kokesh v. SEC*." *See* Order Scheduling Briefs, at 2, Dec. 18, 2017 (quoting *Saad v. SEC*, 873 F.3d 297, 304 (D.C. Cir. 2017) ("*Saad II*")). The answer is that *Kokesh* has *no* relevance, either to this case or any other case involving FINRA-imposed disciplinary sanctions. There are several reasons why.

First, *Kokesh*—a case that was expressly limited to the meaning of the federal statute of limitations—leaves untouched Section 15A of the Exchange Act, which requires FINRA to discipline its members and their associated persons for violations of the federal securities laws

and FINRA rules by expulsions, bars, suspensions, fines, and other fitting sanctions. Second, *Kokesh* did not overturn the wealth of existing federal case law that interprets Section 19(e)(2) of the Exchange Act, which governs the Commission's review of FINRA-imposed sanctions. Those precedents have long shown that sanctions that are proportionally measured to address the misconduct at hand and are designed to protect the public interest and investors are not "excessive or oppressive" within the meaning of Section 19(e)(2) and, necessarily, serve a remedial function that furthers the Exchange Act's purpose. Third, *Kokesh* interpreted the meaning of the word "penalty" in a federal statute of limitations—different language in a different statute that serves a completely different purpose than the statutory language and statute at issue here, Section 19(e)(2) of the Exchange Act, which does not even include the word "penalty." Fourth, the terms "remedial" and "penal" have specific meanings in the Section 19(e)(2) context that relate directly to whether a sanction imposed by a self-regulatory organization ("SRO") serves to protect investors and the public interest. These meanings come from a line of cases—80 years old—that developed independently from the precedents on which *Kokesh* relied to find that disgorgement is a penalty within the meaning of the federal general statute of limitations.

Saad's brief responds to the Commission's question by simply assuming that *Kokesh* is relevant. Then, without confronting the Exchange Act or the express language in *Kokesh* that limits that opinion's applicability, Saad makes the illogical leap that because *Kokesh* held that disgorgement sought in an SEC enforcement proceeding is a "penalty" within the meaning of the federal statute of limitations, 28 U.S.C. § 2462, a FINRA-imposed bar is an impermissibly "punitive" sanction. His far-reaching contention that FINRA cannot impose bars or expulsions *at all* is at direct odds with what the Exchange Act says, would excise from the Exchange Act the

explicit public interest concerns on which it is premised, and is inconsistent with numerous precedents.

Once the Commission has concluded that *Kokesh* has no bearing here, it should sustain the bar imposed on Saad for the precise reasons it articulated the last time it sustained the bar. The bar is proportional to the gravity of Saad's misappropriation of employer funds based on his submission of false expense reports and receipts, misconduct that was aggravated by numerous factors and accompanied by no mitigating ones. The bar is consistent with FINRA's Sanction Guidelines. And the bar protects member firms and the investing public from the continuing and direct threat Saad poses to firms and customers and to industry participants' faith in the integrity of the securities industry.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Commission and the D.C. Circuit have already made extensive factual findings concerning Saad's misappropriation of employer funds through his creation of false expense reports and forged receipts, his "considerable effort in forging documents," his "persevere[nce] in his dishonest scheme despite partial exposure by his administrator," his attempts to conceal his misconduct through numerous falsehoods, and his obstruction of investigators that occurred months after his employer terminated him. The Commission and the D.C. Circuit also have already found that Saad's conduct violated NASD Rule 2110.[1] The relevant history of the *Saad* proceeding and the Supreme Court's opinion in *Kokesh* follows.

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[1] *See Saad v. SEC*, 718 F.3d 904, 906-908 (D.C. Cir. 2013) ("*Saad I*") (noting that "Saad does not contest his culpability"); *John M.E. Saad*, Exchange Act Release No. 76118, 2015 SEC LEXIS 4176, at *3-8, 19-20 (Oct. 8, 2015); *Saad II*, 873 F.3d at 300-301.

A. The D.C. Circuit's Opinion in *Saad I*

In June 2013, the D.C. Circuit considered this case for the first time. Saad had appealed from the first Commission decision that sustained the FINRA-imposed bar. Before the D.C. Circuit, Saad did not contest the Commission's findings that he misappropriated employer funds by accepting reimbursement based on his submission of false expense requests and receipts, in violation of NASD Rule 2110. *Saad I,* 718 F.3d at 906. Instead, Saad argued that the Commission abused its discretion in sustaining the bar. *Id.*

The D.C. Circuit did not disturb the Commission's findings that Saad misappropriated funds, but it remanded for further consideration of the sanction, after finding that the Commission had not addressed some potentially mitigating factors. The court directed the Commission to address all potentially mitigating factors and held that the Commission may approve an expulsion only if its purpose is "remedial, not penal." *Id.* at 913-914 (internal quotation marks omitted).

B. The Commission's First Remand Opinion

The Commission, in turn, remanded to FINRA. *John M.E. Saad*, Exchange Act Release No. 70632, 2013 SEC LEXIS 3133 (Oct. 8, 2013). FINRA again imposed a bar. *Dep't of Enforcement v. Saad*, Complaint No. 2006006705601r, 2015 FINRA Discip. LEXIS 49 (FINRA NAC Mar. 16, 2015).

In October 2015, the Commission again sustained the bar. *Saad*, 2015 SEC LEXIS 4176. The Commission explained that, under Section 19(e)(2) of the Exchange Act, it will sustain a FINRA sanction "unless we find that it is 'excessive or oppressive' or imposes an unnecessary or inappropriate burden on competition," and that it "also consider[s] whether the sanctions imposed by FINRA are remedial in nature and not punitive." *Saad*, 2015 SEC LEXIS 4176, at

*13-14. The Commission noted that "FINRA's Sanction Guidelines state that a 'bar is standard' for conversion 'regardless of [the] amount converted"; that "[t]his approach reflects the judgment that, absent mitigating factors, conversion poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry"; and that although Saad's action constituted misappropriation not conversion, "the same public interest concerns motivate us." *Id.* at *14-15 (internal quotation marks and footnotes omitted).

The Commission then listed the numerous aggravating factors—that Saad "repeatedly used dishonest means," that he "attempted to conceal his misconduct from [his employer] and regulators" through "repeated omissions and affirmative misrepresentations" even after he was terminated by his firm, that he "profited from his actions," and that his employer "suffered loss." *Id.* at 17-19. The Commission considered, but rejected, Saad's claims of mitigation. *Id.* at *17-24. Then, summarizing why imposing a bar on Saad was "remedial, not punitive," the Commission highlighted the protections that a bar would provide:

> We, like FINRA, believe that one who, regardless of motivation, intentionally misappropriates money from others on more than one occasion, may do so again. In short, Saad's actions betray a dishonest character that is wholly inconsistent with the high standards demanded of securities professionals. They demonstrate that he cannot be entrusted with firm or customer money, and that therefore he would pose a continuing and unacceptable threat to investors and other industry participants if not barred. . . .

Id. at *25-26. The Commission concluded that the bar was "remedial, not punitive," because the "bar [was] necessary to protect FINRA members, their customers, and other securities industry participants." *Id.* at *26.

Saad filed with the D.C. Circuit a petition for review. While the appeal was pending, the Supreme Court issued *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

C. *Kokesh v. SEC*

The "sole question" that the Supreme Court addressed in *Kokesh* was whether the five-year statute of limitations in 28 U.S.C. § 2462 applies when the Commission seeks an order of "disgorgement" for violating a federal securities law. *Kokesh*, 137 S. Ct. at 1639, 1640-41, 1642 n.3. That statute provides that an "action, suit or proceeding for the enforcement of any civil fine, *penalty*, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462 (emphasis added).

Kokesh involved misconduct that spanned fourteen years. The SEC brought its civil enforcement action in late 2009 alleging that, between 1995 and 2009, Charles Kokesh, through two investment-adviser firms he owned, misappropriated $34.9 million from four business development companies. *Kokesh*, 137 S. Ct. at 1641. The SEC sought, in pertinent part, civil monetary penalties and disgorgement. *Id.* After a jury found Kokesh liable for various securities law violations, the federal district court turned to imposing remedies. The court imposed $2.4 million in civil penalties for conduct that occurred after October 27, 2004, which represented the amount of funds that Kokesh had received "during the limitations period." *Id.* The court also ordered that Kokesh disgorge $34.9 million that he misappropriated from the business development companies beginning in 1995, including $29.9 million that "resulted from violations outside the limitations period." *Id.* In doing so, the district court found that disgorgement is not a "penalty" within the meaning of 28 U.S.C. § 2462, and that, therefore, the statute of limitations did not apply to the Commission's claims for disgorgement. *Id.* The Tenth Circuit affirmed. *SEC v. Kokesh*, 834 F.3d 1158 (10th Cir. 2016).

The Supreme Court reversed. The Court held that "SEC disgorgement constitutes a penalty *within the meaning of [28 U.S.C.] § 2462.*" *Kokesh*, 137 S. Ct. at 1643 (emphasis added). As a result, the Court ruled that, pursuant to that statute of limitations, "any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued." *Id.* at 1645.

D. The D.C. Circuit's Opinion in *Saad II*

Four months after *Kokesh*, the D.C. Circuit issued *Saad II.* The court of appeals affirmed the Commission's decision in part but remanded in part. The court held that the Commission "reasonably balanced the relevant mitigating and aggravating factors before determining that the gravity of Saad's behavior warranted remedial action," "directly addressed the mitigating evidence, as required by our prior remand order," and "provided a careful and comprehensive analysis of Saad's arguments seeking a reduction in his sanction." 873 F.3d at 298, 302, 304. The court also emphasized that the Commission "reasonably focused on . . . Saad's prolonged pattern of falsehoods and deception, as well as the direct threat that his misconduct posed to customers' and other participants' faith in the integrity of the securities industry." *Id.* at 304. The court noted, however, that Saad had challenged the bar as "impermissibly punitive," and it remanded "that question to the Commission to address . . . the relevance—if any—of the Supreme Court's recent decision in *Kokesh v. SEC.*" *Id.* at 304. Two of the three judges on the D.C. Circuit panel—Judge Kavanaugh and Judge Millett—issued concurring and *dubitante* opinions, respectively, revealing their deep disagreement about the import of *Kokesh.*

On remand, the Commission ordered Saad and FINRA to file briefs "limited to the issue of 'relevance—if any—of the Supreme Court's recent decision in *Kokesh.*'"[2]

III. ARGUMENT

Kokesh is not relevant here. *Kokesh*—a narrow case that only interprets the meaning of the word "penalty" in a statute of limitations—did not overturn the Exchange Act provision that expressly authorizes SROs to impose disciplinary bars, did not overrule precedents that interpret the Commission's statutory authority for analyzing SRO-imposed sanctions, and did not interpret the words "excessive or oppressive" in the Exchange Act. Rather, *Kokesh* interpreted different language, in a different statute, that has a different purpose than the statutory language at issue here. Whether the Commission should uphold the bar imposed on Saad turns on whether it was "excessive or oppressive" under Exchange Act Section 19(e), and nothing in *Kokesh* requires the Commission to address that issue any differently than it did the last time it addressed it.

When the Commission and federal courts of appeals have used the terms "remedial" and "penal" in the Section 19(e) context, they have used the term "remedial" to refer to sanctions that serve the purpose of protecting the public interest and investors, and they have used the term "penal" in counterpoint to *that* use of the term remedial. Protecting investors and the public interest *is* the goal served by the bar on Saad, who the Commission has determined poses a "continuing and unacceptable threat to investors and other industry participants if not barred." *Saad*, 2015 SEC LEXIS 4176, at *26. For that reason, the bar is not excessive or oppressive and should be sustained.

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[2] Order Scheduling Briefs, at 2, Dec. 18, 2017.

A. Nothing in *Kokesh* Alters Section 15A of the Exchange Act's Authorization of FINRA to Impose Bars, Fines, and Other Fitting Sanctions in Its Disciplinary Proceedings.

Section 15A(b)(7) of the Exchange Act requires SROs like FINRA to have rules that "appropriately discipline[ ]" members and associated persons for violating the federal securities laws and the SROs' own rules by "expulsion, suspension, . . . fine, . . . being suspended or barred from being associated with a member, or any other fitting sanction." *Kokesh* did not alter or limit FINRA's ability to impose sanctions under Section 15A(b)(7).

In *Kokesh*, the Supreme Court considered the narrow question of whether the five-year statute of limitations in 28 U.S.C. § 2462 applies to Commission disgorgement actions filed in federal district courts. *Kokesh*, 137 S. Ct. at 1639. The Court held that the statute of limitations does apply, on the ground that disgorgement is a "'penalty' within the meaning of [28 U.S.C.] § 2462." *Id.* *Kokesh* did *not* concern the ability of SROs like FINRA to impose disciplinary sanctions or Section 15A of the Exchange Act. Rather, *Kokesh* was only about the meaning of the term "penalty" in 28 U.S.C. § 2462, a federal statute of limitations that is completely separate from the Exchange Act. *Kokesh*, 137 S. Ct. at 1639, 1642 n.3, 1643 (emphasizing that the "*sole question* presented . . . is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period") (emphasis added).

Saad argues that under *Kokesh*, "expulsions are categorically punitive" and that the bar imposed on him should be "rescinded" because "under current D.C. Circuit law, the Commission can approve *only* sanctions that are remedial." Br. 9-12, 16-17.[3] But that argument necessarily assumes that *Kokesh* eviscerated Exchange Act Section 15A(b)(7) by prohibiting FINRA from

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[3] References to "Br. _____" are to Saad's opening brief on remand.

ever imposing a permanent bar. Not even Judge Kavanaugh would go so far. He emphasized that his "sole point" was to "cast doubt" on the D.C. Circuit's "pre-*Kokesh* cases' characterization of an expulsion or suspension as remedial rather than punitive," "not to suggest that FINRA lacks the power to impose punitive sanctions such as expulsions or suspensions." *Saad II*, 873 F.3d at 306 (Kavanaugh, J., concurring). Thus, Judge Kavanaugh acknowledges that *Kokesh* does not call into question FINRA's underlying disciplinary powers. Saad's assumption that *Kokesh* vacated Section 15A(b)(7) is baseless.

Indeed, the natural implication of importing *Kokesh*'s discussion of what the term "penalty" means in 28 U.S.C. § 2462 into the wholly different Exchange Act scheme that governs the appropriateness of SRO-imposed disciplinary sanctions, and then applying *Kokesh* to categorically preclude the Commission from sustaining FINRA-imposed bars and other non-compensatory sanctions—as Saad argues the Commission should do (Br. 6-12, 16-17)—would be to render the Exchange Act's scheme incoherent. Specifically, one provision of the Exchange Act (Section 15A) requires SROs to have a disciplinary process that allows for bars, expulsions, suspensions, and fines, while Saad argues that *Kokesh* categorically prohibits those same remedies because they are impermissible "penalties." The result of Saad's position is wholly illogical.

Indeed, such an illogical interpretation of the Exchange Act would be inconsistent with fundamental canons of statutory construction. "It is a 'cardinal principle . . .' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)). Also, "statutory language cannot be construed in a vacuum" and "the words of a statute

must be read in their context and with a view to their place in the overall statutory scheme."[4] Saad's interpretation of *Kokesh* would either void the words "expulsions" and "barred" in Section 15A(b)(7) of the Exchange Act or create an incoherent scheme for SRO-imposed sanctions.

Likewise, applying *Kokesh* to void language in Section 15A that requires FINRA to discipline its members and associated persons with a range of non-compensatory sanctions would run counter to the Exchange Act's primary purpose of protecting investors and the public interest. *See* Section 19(e) of the Exchange Act (requiring the Commission to evaluate SRO-imposed sanctions with "due regard for the public interest and the protection of investors").[5] Courts avoid statutory interpretations that undermine the primary purposes of the statute.[6] To read *Kokesh* as precluding FINRA from imposing non-compensatory sanctions like expulsions, bars, and suspensions would undermine investor protection by reducing SRO-imposed sanctions to nothing more than a "cost of doing business." *FINRA Sanction Guidelines*, at 2 (2017) (hereinafter "*Guidelines*"), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf.

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4 *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into an harmonious whole.") (citations and internal quotation marks omitted).

5 *See also Sharp v. Coopers & Lybrand*, 649 F.2d 175, 184 (3d Cir. 1981) ("Protection of investors is . . . the primary purpose of the securities laws."); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-187 (1963) (recognizing "how essential it is that the highest ethical standards prevail in every facet of the securities industry") (internal quotation marks omitted).

6 *See United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) (stating that the court "must avoid an interpretation that undermines congressional purpose"); *see also Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("[I]n all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve.").

Saad insinuates that other cases buttress his claim that SRO-imposed bars are categorically punitive. They do not. For example, Saad highlights that, in *PAZ Securities v. SEC*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) ("*PAZ I*"), the D.C. Circuit described a FINRA-imposed bar as "apparently punitive" (Br. 11-12), but he omits that the D.C. Circuit subsequently sustained the bar as remedial. *PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009) ("*PAZ II*"). For his contention that FINRA-imposed bars "indisputably serve punitive purposes," Saad quotes language in *Saad I* that FINRA-imposed bars are "the securities industry equivalent of capital punishment" (Br. 10), but he omits that *Saad I* remanded to assess whether the bar was remedial, and that *Saad II* made no holding that bars are categorically punitive. Saad also cites *Talman Harris*, Initial Decisions Release No. 1213, 2017 SEC LEXIS 3450, at *23 (Oct. 30, 2017) (cited at Br. 17 n.10), *order ratifying actions*, Admin. Proceedings Rulings Release No. 5548, 2018 SEC LEXIS 299 (ALJ Jan. 29, 2018). But there an administrative law judge refrained from opining about whether, under *Kokesh*, a collateral bar imposed in a Commission-instituted proceeding is categorically punitive. That ALJ's reluctance to read *Kokesh* as categorically defining sanctions as penalties outside the statute of limitations context is consistent with the larger trend of how courts interpret *Kokesh*. Even as to the sanction directly at issue in *Kokesh*—disgorgement that can be disbursed to the United States Treasury—several courts have held that *Kokesh* does not prevent the Commission from seeking disgorgement categorically.[7]

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[7] *See SEC v. Drake*, No. 2:17-cv-06204-CAS(GJSx), 2017 U.S. Dist. LEXIS 208662, at *20 (C.D. Cal. Dec. 18, 2017) (citing *Kokesh* for the principle that disgorgement is "proper" in Commission enforcement proceedings because it "is to deprive violators of their ill-gotten gains); *SEC v. Sample*, Civ. Action No. 3:14-CV-1218-B, 2017 U.S. Dist. LEXIS 191025, at *4 (N.D. Tex. Nov. 20, 2017) ("*Kokesh* had no effect on how courts apply disgorgement principles"

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In sum, the Commission should reject Saad's argument that *Kokesh* invalidated a crucial part of the Exchange Act's scheme that authorizes SRO-imposed disciplinary sanctions. FINRA's ability to impose sanctions as provided in Section 15A of the Exchange Act, including bars and expulsions, remains valid after *Kokesh.*

B. *Kokesh* Does not Overrule Judicial Precedents that Interpret the Standard in Section 19(e)(2) of the Exchange Act that FINRA-Imposed Sanctions Be Reviewed for Whether They Are Excessive or Oppressive.

The Commission's review of FINRA-imposed sanctions is governed by Section 19(e)(2) of the Exchange Act. It provides that if the Commission, "having due regard for the public interest and the protection of investors, finds . . . that a sanction imposed by a[n] [SRO] . . . is excessive or oppressive, the [Commission] may cancel, reduce, or require the remission of such sanction." There are a wealth of federal court cases interpreting this language. In sum, these federal cases permit FINRA to impose non-compensatory sanctions—like bars, expulsions, suspensions, and fines—that serve to protect investors, member firms, and the public interest from the violator, and that are proportional to the violative conduct. Nothing in *Kokesh* overrules these numerous, authoritative, federal judicial interpretations of Section 19(e)(2).

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in Commission enforcement proceedings); *FTC v. J. William Enters., LLC*, Case No. 6:16-cv-2123-Orl-31DCI, 2017 U.S. Dist. LEXIS 174955, at *4-5 (M.D. Fla. Oct. 23, 2017) (rejecting argument that *Kokesh* raised doubts about the courts' authority to order disgorgement in agency enforcement actions), *summary judgment granted in part*, 2017 U.S. Dist. LEXIS 183911 (Nov. 7, 2017); *SEC v. Jammin Java Corp.*, No. 15-cv-08921 SVW (MRWx), 2017 U.S. Dist. LEXIS 157730, at *5-9 (C.D. Cal. Sept. 14, 2017) (rejecting argument that *Kokesh* precludes entirely the Commission from seeking disgorgement in district courts).

Courts have held that specific sanctions imposed by SROs should be reviewed for whether they are appropriately "remedial" and not "punitive."[8] As explained more fully below, by "remedial," courts and the Commission have always meant a purpose of protecting investors and the public interest. *See* Part III.D, *infra*. Courts also have required that the Commission's Section 19(e) review consider the nature of the violation involved and any aggravating and mitigating factors that are present.[9] And courts have made clear that the Commission's Section 19(e) review should look to whether an SRO-imposed sanction serves to protect investors and the public from the wrongdoer[10] and, relatedly, whether it has a "deterrent value to the offending

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[8] *See ACAP Fin., Inc.*, 783 F.3d 763, 768-769 (10th Cir. 2015) (describing, in a case involving a FINRA-imposed sanction, the numerous factors that are considered and balanced when analyzing whether a sanction is "appropriately remedial and not excessive and punitive"); *World Trade Fin. Corp. v. SEC*, 739 F.3d 1243, 1250 (9th Cir. 2014) (evaluating whether FINRA-imposed sanctions were "excessive and punitive").

[9] *See ACAP Fin.*, 783 F.3d at 768-769 (affirming the Commission's sustaining of a FINRA-imposed sanctions, agreeing that "[t]he seriousness of the offense" is a relevant factor when "fashioning a remedial sanction," and noting that the Commission "analyzed each of the mitigation arguments presented to it"); *Birkelbach v. SEC*, 751 F.3d 472, 480-481 (7th Cir. 2014) (noting that, when considering FINRA-imposed sanctions, the SEC considers "the egregiousness of a respondent's actions" and other factors); *McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005) (explaining, in a case involving an NYSE-imposed sanction, that "characteristics of the offense will often be relevant to remedial justifications for suspension" and that "[s]ome explanation addressing the nature of the violation and the mitigating factors presented . . . is required"). These cases belie Saad's argument that the Commission's discussion in its last decision of the aggravating factors, and the lack of mitigating factors, is somehow only indicative of a punitive, retributive purpose. Br. 13-14. A remedial sanction in FINRA proceedings, as defined in decades of precedents, means a sanction that serves to protect investors and the public interest.

[10] *See, e.g.*, *ACAP Fin.*, 783 F.3d at 768 (noting, when sustaining FINRA-imposed all-capacity suspension, that the "evidence of extensive supervisory failures . . . cast doubt on his ability to carry out his obligations as a securities professional in any capacity"); *McCarthy*, 406 F.3d at 188 (holding that, when evaluating a trading suspension, "[o]ur foremost consideration must . . . be whether [the] sanction protects the trading public from further harm"); *Assoc. Sec. Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir. 1960) ("Exclusion from the securities business is a remedial device for the protection of the public.").

broker" that responds to a risk and potential of repeat violations.[11] Significantly, the judicial focus on the protective value of SRO-imposed sanctions is supported directly by Section 19(e)(2) itself, which states that determining whether a sanction is "excessive or oppressive" must be informed by "due regard for the public interest and the protection of investors."

Courts also have embraced the Commission's consideration, when performing Section 19(e) reviews, of whether FINRA's sanctions are consistent with FINRA's Sanction Guidelines ("Guidelines").[12] Reviewing the Guidelines provides vital context for a Section 19(e) examination of whether a FINRA-imposed sanction is proportional instead of excessive or oppressive. The Guidelines contain an extensive list of principles and considerations that FINRA adjudicators must consider when assessing the gravity of all kinds of violations, and specific sanction ranges that serve as starting points when assessing sanctions for numerous

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11 *McCarthy*, 406 F.3d at 190; *see ACAP Fin.*, 783 F.3d at 769 (noting that "the potential for repetition" of a violation and "the deterrent value to the offending broker" are relevant to whether a FINRA-imposed sanction is appropriately remedial); *Birkelbach*, 751 F.3d at 480 (noting that the Commission, when considering a FINRA-imposed sanction, considers "the likelihood of recurring violations" and "the sincerity of a respondent's assurances against future violations"). These cases vividly illustrate why Saad's attempt to categorize deterrence (along with "incapacitation") as indicative of only a "punitive" purpose (Br. 11, 13, 14) fails as a matter of law. Indeed, logic dictates that when the goal of a remedial sanction is to protect investors and the public interest, specific deterrence of the offender (which sometimes can only be achieved with a sanction that precludes the offender from being in a position where he could offend again) should be one of the available means towards achieving that end.

12 *See, e.g.*, *ACAP Fin.*, 783 F.3d at 767-768 (sustaining FINRA-imposed sanctions where, among other things, the Commission had considered respondents' arguments that there were mitigating factors identified in the Guidelines and that the fines were "within the baseline range suggested by the . . . Guidelines"); *Birkelbach*, 751 F.3d at 480 (looking to FINRA's Guidelines when analyzing FINRA-imposed sanction); *World Trade Fin. Corp.*, 739 F.3d at 1250 (sustaining FINRA-imposed sanctions where they "were in the mid-range" of the Guidelines); *Saad I*, 718 F.3d at 911-912 (endorsing the Commission's application of the Guideline for conversion or improper use when assessing the bar that FINRA imposed on Saad).

different violations.[13] The Guidelines are designed to help adjudicators in "determining appropriate remedial sanctions" and "provide direction . . . in imposing sanctions consistently and fairly." *Guidelines*, at 1. The Guidelines' recommended sanctions "reflect the seriousness of the misconduct," and are "tailored to address the misconduct involved in each particular case."[14] *Id.* at 2-3. The comprehensive disciplinary framework set forth in the Guidelines establishes exactly the type of "fair[ ]," "equitable," and non-"arbitrary system of FINRA . . . sanctions" that Judge Kavanaugh sought to foster in his concurring opinion. *Saad II*, 873 F.3d at 306.

All of this case law shows that courts do not brand entire categories of FINRA-imposed sanctions—non-compensatory or otherwise—as impermissibly punitive but instead focus on the proportionality and tailoring of a specific sanction to the specific offense at issue and any aggravating or mitigating factors, the specific risks of future harm posed by the violator, the types and ranges of sanctions that are recommended for different offenses, and whether a sanction protects investors and the public interest.[15] Indeed, the case law is replete with

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13 *See, e.g.*, *Guidelines*, at 2-8 (2017) (setting forth nine "General Principles Applicable to All Sanction Determinations" and 19 "Principal Considerations in Determining Sanctions"); *id.* at 13-107 (violation-specific Guidelines setting forth additional principal considerations and recommended sanctions ranges). Because FINRA discusses in this brief the Guidelines in a general way, references to the Guidelines are to the 2017 version (the most recent version). The 2007 version is what FINRA originally applied when imposing the bar on Saad.

14 Registered persons with FINRA member firms are on notice of the recommended sanctions for numerous violations.

15 FINRA has expressly recognized the concepts of proportionality and tailoring in its sanctions determinations. *See, e.g.*, *Dep't of Enforcement v. Kraemer*, Complaint No. 2006006192901, 2009 FINRA Discip. LEXIS 39, at *32 (FINRA NAC Dec. 18, 2009) (noting that the imposed sanctions were "proportional" to the misconduct); *Dep't of Enforcement v. Kelly*, Complaint No. E9A2004048801, 2008 FINRA Discip. LEXIS 48, at *33-34 (FINRA NAC Dec. 16, 2008) (finding that sanctions were "proportional to the seriousness of

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decisions that sustain FINRA-imposed, non-compensatory sanctions, like bars, expulsions, suspensions, and fines, where those sanctions were appropriate for the facts and circumstances presented.[16]

Kokesh did not overrule any of the federal case law that relates to Section 19(e) of the Exchange Act. For example, in the D.C. Circuit, "whether [a] Supreme Court opinion supersedes Circuit precedent interpreting [a] statute depends on whether [that] opinion 'effectively overrules,' i.e. 'eviscerate[s]' precedent."[17] The Fifth, Ninth, and Eleventh Circuits

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[respondent's] violations); *Guidelines*, at 3 (explaining that sanctions should be "tailored to address the misconduct involved in each particular case"). Although Saad endorses the concept of proportionality, he frames it as something that FINRA "should ensure" in "revised Guidelines." Br. 21-22 & n.22. To support this, Saad cites *Solem v. Helm*, 463 U.S. 277, 284 (1983). But *Solem* is completely unhelpful, not just because it dealt with the different context of criminal law and the Eighth Amendment's Cruel and Unusual Punishment Clause, but because *Solem* was *expressly* overruled by the Supreme Court. *See Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) ("*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.").

[16] *See, e.g.*, *ACAP Fin.*, 783 F.3d at 768 (sustaining FINRA-imposed suspension); *Birkelbach*, 751 F.3d at 480-482 (sustaining FINRA-imposed bar where evidence demonstrated respondent's violative conduct was "sufficiently egregious"); *Gebhart v. SEC*, 595 F.3d 1034, 1045 (9th Cir. 2010) (finding that the SEC did not abuse its discretion in sustaining a FINRA-imposed bar on respondent); *Siegel v. SEC*, 592 F.3d 147, 158 (D.C. Cir. 2010) (sustaining FINRA-imposed consecutive suspensions and fines to protect the public from two types of harms); *PAZ II*, 566 F.3d at 1175-1176 (sustaining debarment that was "to protect investors" and that redressed a "significant harm to the self-regulatory system"); *Rooms v. SEC*, 444 F.3d 1208, 1214-1215 (10th Cir. 2006) (sustaining a FINRA-imposed bar to "protect investors"). Saad's weak attempt to grapple with these kinds of cases in the D.C. Circuit is to suggest, strangely, that their clear results are somehow not clear. *See* Br. 24 (acknowledging only that "the D.C. Circuit *may* have previously suggested that the Commission may approve expulsions") (emphasis added).

[17] *Nat'l Inst. of Military Justice v. United States DOD*, 512 F.3d 677, 682-683 n.7 (D.C. Cir. 2008) (quoting *United States v. Williams*, 194 F.3d 100, 105 (D.C. Cir. 1999)).

follow similarly high thresholds.[18] Nothing in *Kokesh* touches on federal precedents involving the Commission's review of SRO disciplinary sanctions, let alone "eviscerates" them or renders them clearly irreconcilable with *Kokesh*. So while *Kokesh* is the "law of the land" for purposes of the general statute of limitations, it has no applicability to the assessment of sanctions imposed in an SRO disciplinary proceeding.

Similarly, *Saad II* did not overrule any D.C. Circuit precedent about Section 19(e). Not even Saad argues that the opinion had that effect. And with good reason. In *Saad II*, the D.C. Circuit did not resolve the relevance of *Kokesh* to the Commission's reviews of SRO-imposed sanctions. Instead, all *Saad II* did was remand to the Commission and direct it to address, "in the first instance, the relevance—if any"—of *Kokesh* to the bar that FINRA imposed on Saad. *Saad II*, 873 F.3d at 304. For a circuit decision to overrule prior circuit precedent about the meaning of Section 19(e) would require a legal holding of some sort. And it would further require more than just a single judge on a three-person D.C. Circuit panel asserting in a concurrence that prior circuit precedent is no longer good law. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (holding that only the "full court" has the authority to overrule a decision of a three-judge D.C. Circuit panel) (cited in *Saad II*, 873 F.3d at 311 (Millett, J., *dubitante* opinion)). Such a holding is not contained in *Saad II.*

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[18] *See, e.g.*, *Pilgrim's Pride Corp.*, 690 F.3d 650, 663 (5th Cir. 2012) (following the "rule of orderliness" that "for a Supreme Court decision to change our Circuit's law, it must be more than merely illuminating with respect to the case before the court and must unequivocally overrule prior precedent"); *United States v. Vega-Castillo*, 540 F.3d 1235, 1237 (11th Cir. 2008) ("For the Supreme Court to overrule a case, its decision must have 'actually overruled or conflicted with [this court's prior precedent]" and that, in applying that principle, "[t]here is a difference between the holding in a [Supreme Court] case and the reasoning that supports that holding."); *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (finding that a Supreme Court decision is controlling over prior circuit precedent where it "undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable").

Accordingly, nothing in *Kokesh* or *Saad II* changes the existing Section 19(e) landscape. As the Exchange Act's statutory language directs, the Commission should continue to evaluate FINRA's sanctions, like the bar imposed on Saad, not for a dollars-only review of whether they financially compensate a victim, but for whether they are excessive or oppressive, with due regard for the public interest and the protection of investors.

C. *Kokesh* Has No Relevance Here, or to FINRA Disciplinary Proceedings in General, Because the Federal Statute of Limitations Interpreted in *Kokesh* Is a Fundamentally Different Statute from the Exchange Act.

Kokesh has no relevance here, or to any court's review of FINRA-imposed sanctions, because it interpreted a statute that is completely different from the Exchange Act statutory provision that governs the Commission's review of FINRA-imposed sanctions, and it interpreted different statutory language.

Kokesh is exclusively about a federal statute of limitations, while FINRA's disciplinary action against Saad is not. Instead, the Commission's review of the bar imposed on Saad concerns Section 19(e) of the Exchange Act, which directs the Commission, when reviewing an SRO-imposed disciplinary sanction, to evaluate whether it is "excessive or oppressive."

These two statutes are fundamentally different. The five-year federal statute of limitations in 28 U.S.C. § 2462 is a time-based, mandatory, procedural requirement that applies generally to federal governmental actions. In marked contrast, Section 19(e)(2) of the Exchange Act is a substantive, discretionary limitation on disciplinary sanctions that securities-industry SROs impose, as well as a part of the Congressionally designed system of Commission oversight over securities-industry SROs.

Section 19(e) reviews of SRO- or FINRA-imposed sanctions involve fundamentally different considerations than those involved under the federal statute of limitations. 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." *Gabelli v. SEC*, 568 U.S. 442, 448 (2013) (internal quotation marks omitted); *see also Kokesh*, 137 S. Ct. at 1641-1642. In contrast, the Section 19(e) review, with its combined requirements to assess whether a sanction is "excessive or oppressive" and with "due regard for the public interest and the protection of investors," has elements that protect a proven wrongdoer and also his victims.

Also unlike the statute of limitations, the Section 19(e)(2) scheme of review applies once allegations of wrongdoing have been proven before the SRO and the Commission. Indeed, the Commission has held that even if 28 U.S.C. § 2462 applied to FINRA disciplinary actions, which it does not, it would not be a barrier to claims that are timely brought. *See William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *95 (July 2, 2013), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014). Section 19(e), to the contrary, concerns not the timeliness of a claim, but the substantive merits of an SRO-imposed sanction.

Given these vast differences between the two statutes, the Commission should not interpret Section 19(e)(2) of the Exchange Act based on an interpretation of 28 U.S.C. § 2462.[19] In fact, one court has explicitly refused to do. In *Krull v. SEC*, the appellant argued that an NASD-imposed suspension—which the SEC sustained as not excessive or oppressive within the meaning of Section 19(e) of the Exchange Act—was "punitive rather than remedial." 248 F.3d 907, 914 (9th Cir. 2001). In support of his argument, the appellant attempted to rely on the D.C. Circuit's decision in *Johnson v. SEC*, which held that 28 U.S.C. § 2462 applied to an SEC

[19] *Cf. Joye v. Franchise Bd.*, 578 F.3d 1070, 1078 (9th Cir. 2009) (declining to interpret the meaning of one statute by looking to interpretations of a "wholly different statute").

proceeding that resulted in a censure and a six-month suspension because those sanctions were a "penalty" within the meaning of the statute of limitations. *Krull*, 248 F.3d at 914 n.9; *Johnson v. SEC*, 87 F.3d 484, 492 (D.C. Cir. 1996). The Ninth Circuit, however, dismissed the appellant's reliance on *Johnson* as "not persuasive," for the reason that *Johnson* "only addressed whether the sanction imposed was a 'penalty' for the purposes of the statute of limitations defined under 28 U.S.C. § 2462." *Krull*, 238 F.3d at 914 n.9. Thus, the Ninth Circuit saw no reason to look to an interpretation of the statute of limitations when assessing an SRO-imposed sanction. Similarly, the D.C. Circuit, in numerous cases after *Johnson*, has affirmed FINRA-imposed suspensions and bars as remedial sanctions and has never suggested that 28 U.S.C. § 2462 has any bearing on Section 19(e). *See* Part III.E, *infra*.[20]

Not only did *Kokesh* involve a completely different statute, it interpreted entirely different statutory language. *Kokesh* was about the meaning of the term "penalty" in the federal statute of limitations. Section 19(e) of the Exchange Act does not even contain the word "penalty." Rather, it mandates that the Commission review a FINRA-imposed sanction for whether it is "excessive or oppressive," with "due regard for the public interest and the protection of investors." Adjudicators would invite a finding of error if they interpreted the meaning of "excessive or oppressive" in a statute that specifies the Commission's oversight of

[20] Moreover, recent examples show how adjudicators have declined to apply *Kokesh*'s interpretation of the statute of limitations to other contexts. *Cf. Jammin Java Corp.*, 2017 U.S. Dist. LEXIS 157730, at *8 ("*Kokesh* is best seen as a decision clarifying the statutory scope of [28 U.S.C.] § 2462, rather than one redefining the essential attributes of disgorgement."); *SEC v. Brooks*, Case No. 07-61526-CIV-ALTONAGA/Goodman, 2017 U.S. Dist. LEXIS 122377, at *24 (S.D. Fla. Aug. 3, 2017) (holding that "[t]he mere fact that a claim seeks a 'penalty' under a specific statutory provision does not mean the action is penal for [other] purposes"); *John Thomas Capital Mgmt. Group, LLC*, Admin. Proceedings Rulings Release No. 5647, 2018 SEC LEXIS 720, at *8-9 (ALJ Mar. 14, 2018) (rejecting attempt to extend *Kokesh* to an analysis of whether the sanctions imposed breached maximum penalty restrictions in the securities statutes).

securities-industry SROs by stretching the meaning of a different word in a different statute that serves a different purpose. *See Russello v. United States*, 464 U.S. 16, 25 (1983) ("Language in one statute usually sheds little light upon the meaning of different language in another statute . . . .").

Saad does not explain *why* the meaning of the word "penalty" in 28 U.S.C. § 2462 should inform the meaning of "excessive or oppressive" under Section 19(e) of the Exchange Act—despite the fact that Judge Millett highlighted it as a critical hurdle for him. *See Saad II*, 873 F.3d at 310 (*dubitante* opinion of Millett, J.) ("Saad cannot wrap himself in *Kokesh* without first establishing that the meaning of 'penalty' in 28 U.S.C. § 2462[ ] . . . directly dictates the meaning of 'excessive or oppressive' under [Section 19(e)(2) of the Exchange Act]"). Instead, Saad just assumes that *Kokesh*'s interpretation of the word "penalty" in the statute of limitations has relevance to Section 19(e) of the Exchange Act. Considering all the differences between the two statutes, the Commission should reject Saad's invitation to "pluck[ ] [*Kokesh*] from the statutory context that gives it force" and apply it to the different context of Section 19(e), just as courts have dismissed similar attempts to apply *Kokesh* beyond its narrow confines.[21]

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[21] *Brooks*, 2017 U.S. Dist. LEXIS 122377, at *22-25 (stating that *Kokesh*'s holding about a federal statute of limitations "cannot be plucked from the statutory context that gives it force" and applied to different law that governs the survivability of federal causes of action after the death of a litigant); *see Jammin Java*, 2017 U.S. Dist. LEXIS 157730, at *7 (noting that courts have been rejecting attempts to extend *Kokesh* "beyond its current confines"); *CFTC v. Reisinger*, Case No. 11-CV-08567, 2017 U.S. Dist. LEXIS 152730, at *11-12 (N.D. Ill. Sept. 19, 2017) (rejecting argument that a footnote in *Kokesh* raised doubts about courts' authority to order disgorgement).

D. Courts' and the Commission's Use of the Terms "Remedial" and "Penal" When Analyzing SRO-Imposed Disciplinary Sanctions Have Specific Definitions That Developed Independently from the Century-Plus-Old Precedents on which *Kokesh* Primarily Relied.

A fourth reason why *Kokesh* is not relevant here is because the courts' and the Commission's use of the terms "remedial" and "penal" when evaluating whether SRO-imposed sanctions are excessive or oppressive derives from a line of cases that is completely separate and distinct from the line of cases on which the Supreme Court relied in *Kokesh.* As explained below, the relevant jurisprudence for Section 19(e) shows that when courts and the Commission have referred to the "remedial" nature of SRO-imposed sanctions, they have always meant a purpose of protecting investors and the public interest. At the same time, when they have used the term "penal" (and its variants, such as "punitive"), they have used it as a counterpoint to *that* definition of the term "remedial."

The relevant line of cases begins with a Commission enforcement action. The term "remedial" appeared in *Harold T. White*, 3 S.E.C. 466 (1938), in a discussion about the Commission's enforcement authority pursuant to Section 19(a)(3) of the Exchange Act.[22] Respondents moved to dismiss on the grounds that the Exchange Act and Section 19(a)(3) "are remedial" and "have no application" when "violations have ceased prior to the date of issuance of the order." *Id.* at 538-539. Rejecting that limitation, the Commission explained that "[u]nder

[22] During the relevant time, Exchange Act Section 19(a)(3) provided, in pertinent part, that "[t]he Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—. . . (3) . . . by order to suspend for a period not exceeding twelve months or to expel from a national securities exchange any member or officer thereof whom the Commission finds has violated any provision of this title or the rules and regulations thereunder . . . ." *See* Pub. L. No. 73-291, §19(a)(3), 48 Stat. 881, 898 (June 6, 1934). In 1975, this provision was amended (and renumbered) to authorize similar orders concerning persons associated with registered securities associations. *See* Section 19(h)(3) of the Exchange Act; Pub. L. No. 94-29, sec. 16, § 19(h)(3), 89 Stat. 97, 153 (June 4, 1975).

Section 19(a)(3) the only requisite for the issuance of . . . an order is the finding . . . that the member . . . has violated a provision of the Act and that expulsion or suspension is *necessary or appropriate for the protection of investors*." *Id.* (emphasis added).

Likewise, in *Wright v. SEC*, 112 F.2d 89 (2d Cir. 1940), the Second Circuit considered a Commission order that, pursuant to Section 19(a)(3) of the Exchange Act, expelled the petitioner from membership in the NYSE based on findings that he manipulated the market of a security and engaged in matched orders. *Wright*, 112 F.2d at 91-96. The court rejected Wright's argument that his expulsion was "punishment" and his related contention that the Commission was required to prove his violation "beyond a reasonable doubt." *Id.* at 94. In doing so, the Second Circuit held that "Section 19(a)(3) [of the Exchange Act] authorizes an order of expulsion not as a penalty but as *a means of protecting investors*," and that "[s]ince the purpose of the [Commission's] order is remedial, not penal, there is no basis for the contention that Wright's violation of the statute must be proved beyond a reasonable doubt." *Id.* at 94 (emphasis added).[23]

In *R.H. Johnson & Co.*, 33 S.E.C. 180 (1952), *aff'd*, 198 F.2d 690 (2d Cir. 1952), the Commission relied on *Wright* when applying the terms "remedial" and "penal" to an NASD disciplinary proceeding. Defending against allegations that it was responsible for a salesman's over-trading, the applicant firm cited criminal law cases to contend that "knowledge" and "consent" were required elements to prove a violation of NASD rules. *Id.* at 185 n.6. Rejecting that argument, the Commission held that "[t]he purpose of Section 15A [of the Exchange Act] is

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[23] Because the court reversed the findings that pertained to the matched orders, it remanded to the Commission to consider the sanction again. *Id.* at 96.

not penal but remedial, namely, to protect the public interest and the interests of investors," and, therefore, "responsibility is not necessarily based on actual knowledge and consent." *Id.*

Although their contexts differ, when early cases like *White*, *Wright*, *R.H. Johnson*, and others[24] used the term "remedial," they referred to protecting investors or the public interest. At the same time, when they used the term "penal" (or its variants), they defined it in counterpoint to that specific meaning of "remedial"—i.e., as "not remedial." Those meanings of "remedial" and "penal" are the same meanings that the Commission and courts used when applying those terms to cases involving the appropriateness or excessiveness of SRO-imposed sanctions. And in some cases, the Commission and courts have explained that the remedial goal of protecting investors and the public goes hand-in-hand with deterrence (both specific and general).

For example, in *C.B. Beal & Co.*, 46 S.E.C. 395 (1976), the Commission rejected a broker-dealer president's arguments that an NASD-imposed bar in any principal or supervisory capacity was an "impermissible penalty" on the grounds that it "serve[d] no substantial remedial purpose" in light of his "technical" violations of the net capital rule and the absence of any injury to investors, and was "so harsh" as to be "punitive." *Id.* at 399. Focusing on how the sanction achieved protective purposes, the Commission explained that "[t]he firm's financial impairment posed a serious danger to public investors," that the net capital rule "operates to assure confidence and safety to the investing public," and that the respondent was "either incapable of completely understanding the net capital rule" or "simply unwilling to adhere to the prescriptions attendant on compliance with that rule." *Id.*

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[24] *See Pierce v. SEC*, 239 F.2d 160, 163 (9th Cir. 1956) (rejecting appellant's argument that the Commission's denial of his application for registration was a "penalty" that was "cruel, unusual and excessive," and explaining that it was not a penalty but "a means to protect the public interest") (citing *Wright*).

Likewise, in *General Securities Corp. v. SEC*, 583 F.2d 1108 (9th Cir. 1978), the court rejected a broker-dealer's and its vice president's arguments that an NASD-imposed, and SEC-sustained, expulsion and bar in any principal or supervisory capacity (which were imposed for net capital reporting and recordkeeping violations) were "punitive rather than remedial" and "not necessary to protect the public" in light of "mitigating circumstances." *Id.* at 1109. The court noted that the Commission found that the sanctions "were in the public interest," given the vice-president's "inattention to the firms' recordkeeping and reporting obligations," his demonstrated "disregard" for those obligations, and the "ineptitude" of his management. *Id.* Cases like *C.B. Beal* and *General Securities* were just the start of a decades-long line of cases in which the term "remedial" was used, in evaluations of the appropriateness of SRO-imposed sanctions, to mean sanctions that protect investors or the public interest, and the term "penal" (and its variants) was used as a counterpoint to that definition of remedial.[25]

In all of these cases—80 years of jurisprudence—there is *no* indication that the use of the terms "remedial" and "penal" therein derives from the kinds of principles (or case law) on which the Supreme Court based its holding in *Kokesh*. None of them discussed or defined the meaning

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[25] For a sample of these cases, *see, e.g.*, *Staten Sec. Corp.*, 47 S.E.C. 766, 769-770 (1982) (finding that a $2,000 fine, censure, and prohibition from supervising or effecting transactions in municipal securities until qualified, imposed by NASD on broker-dealer's president, were not "penal" sanctions but served "an important remedial function" because the proceeding was "designed to protect the public interest" in furtherance of the Exchange Act and Maloney Act "scheme to protect the public"); *Krull*, 248 F.3d at 911, 914-915 (rejecting representative's argument that NASD's imposition of a one-year suspension for unsuitable switches was "punitive rather than remedial," where the sanctions accounted for factors "consistent with one of the key purposes of the . . . Exchange Act, to protect the public interest by insuring the stability of the markets and integrity of representation by its participants"); *McCarthy*, 406 F.3d at 188-189 (holding, in case involving a two-year suspension imposed by NYSE against a floor broker, that "the purpose of expulsion or suspension from trading is to protect investors, not to penalize brokers," and that "[o]ur foremost consideration must therefore be whether [the] sanction protects the trading public from further harm").

of the terms "remedial" or "penal" with reference to whether the "wrong sought to be redressed is a wrong to the public . . . or . . . to the individual," to whether the sanctions were "for an offense committed against the State," or to whether the sanctions "compensat[ed] a victim for his loss." *See Kokesh*, 137 S. Ct. at 1642. *Kokesh* principally relied on several cases from the late-1800s and early 1900s that pre-dated the existence of SROs by decades, and that were not about whether a particular remedy imposed was appropriate or excessive in size or amount. *See Kokesh*, 137 S. Ct. at 1642-43 (relying on *Huntington v. Attrill*, 146 U.S. 657 (1892); *Brady v. Daly*, 175 U.S. 148 (1899); and *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412 (1915)). Maintaining the distance between these two separate lines of cases makes perfect sense. "Remedial" and "compensatory," as Judge Millett explained, do not mean the same thing. A compensatory sanction is a "remedy" because it undoes the harm to the victim, but it is not the only type of remedy. *See Saad II*, 873 F.3d at 311-312 (*dubitante* opinion of Millett, J.) ("Victimization and harm entail more than just replacing lost dollars. There can be non-pecuniary harms too. There certainly were here.").

In sum, the line of cases that informs the meaning of "remedial" and "penal" here is independent from the cases that led to the holding in *Kokesh*. And it shows that, despite Saad's focus on the fact that the Commission, in its prior decision, "addresse[d] the importance of protecting the public" and explained that the bar served "important deterrence objectives" (Br. 13-14), evaluating whether the bar serves protective goals is *exactly* what the Commission was required to do as part of its analysis of FINRA's sanction.[26]

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[26] For similar reasons, Saad's reliance on the references to "remedial" and "punitive" in the Guidelines is misplaced (Br. 21), because, like the opinions discussed above, nothing about the Guidelines' use of these terms suggests that FINRA was incorporating the distinct set of

[Footnote continued on next page]

E. Saad Relies on Precedents that Are Distinguishable for the Same Reasons That *Kokesh* Is Distinguishable.

Throughout his brief, Saad supports his arguments with a handful of cases that are readily distinguishable for the same reasons that *Kokesh* has no relevance here.

For example, Saad cites: (1) *American Business Ass'n v. Slater*, 231 F.3d 1, 6-7 (D.C. Cir. 2000) (cited at Br. 7 n.4), which held that the Department of Transportation (DOT) lacked statutory authority to adopt a rule authorizing money damages for a bus company's failure to comply with the Americans with Disabilities Act, and which contained dicta that the sanctions authorized by DOT's rule would be penalties; (2) *Graham v. Florida*, 560 U.S. 48, 71-74 (2010) (cited at Br. 11), which held that sentencing a juvenile offender to life in prison without parole for a nonhomicide crime is a categorical violation of the Eighth Amendment's Cruel and Unusual Punishments Clause, and which contains a passage about the various goals that "criminal punishment" can serve; and (3) *United States v. Godoy*, 706 F.3d 493, 496 (D.C. Cir. 2013) (cited at Br. 11), which addressed whether a prison sentence was impermissibly imposed to serve the purpose of rehabilitation, and which contains a general description of the goals of sentences for crimes. *Slater*, *Graham*, and *Godoy*, however, were not about whether non-compensatory sanctions imposed by a securities-industry SRO were "excessive or oppressive" within the meaning of Section 19(e) the Exchange Act or Section 15A of the Exchange Act, or

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[cont'd]

considerations that the Supreme Court addressed in defining the statutory term "penalty" in *Kokesh*. Rather, the purpose of the Guidelines is abundantly clear: to facilitate sanctions that "protect investors, other member firms and associated persons, and . . . promote the public interest." *Guidelines*, at 1.

about the meaning of the terms "remedial" and "penal" as applied to imposing or evaluating non-compensatory sanctions in SRO disciplinary proceedings.

Saad also cites *Johnson v. SEC*. Br. 12 n.9. But *Johnson*—just like *Kokesh*—was only about the meaning of the word "'penalty', as the term is used in [28 U.S.C.] § 2462 [the five-year, general statute of limitations]." *Johnson*, 87 F.3d at 488. *Johnson* held that a censure and a six-month supervisory suspension, imposed by the Commission, were penalties within the meaning of the statute of limitations. *Id.* at 488-492. *Johnson* was *not* about whether non-compensatory sanctions are "excessive or oppressive" within the meaning of Section 19(e) of the Exchange Act, or about Section 15A of the Exchange Act. In fact, *Johnson* supports FINRA's position here, because *Johnson* recognized that the words "remedial" and "penalty" can have different meanings depending on the context, and the *Johnson* court emphasized that *its* focus was on interpreting the meaning of the word penalty in the context of the statute of limitations. *Id.* at 491 & n.11; *see Krull*, 248 F.3d at 914 n.9 (distinguishing *Johnson* as a case that "only addressed whether the sanction was a 'penalty' for the purposes of the statute of limitations"). Indeed, that *Johnson* had no reach beyond the statute-of-limitations context is punctuated by the fact that, after *Johnson*, the D.C. Circuit repeatedly sustained FINRA- or SEC-imposed non-compensatory sanctions—including in *Stoiber*, which was authored by Judge Wald just two years after she wrote *Johnson*. *See, e.g.*, *Stoiber v. SEC*, 161 F.3d 745, 752-754 (D.C. Cir. 1998) (sustaining NASD-imposed suspension and fine); *PAZ II*, 566 F.3d at 1174-1176 (sustaining a FINRA-imposed expulsion and bar); *Markowski v. SEC*, 274 F.3d 525, 528-530 (D.C. Cir. 2001) (sustaining FINRA-imposed censures, bars, and fines); *Siegel*, 592 F.3d at 157-158 (sustaining FINRA-imposed consecutive suspensions); *see also Horning v. SEC*, 570 F.3d 337, 343-348

(D.C. Cir. 2009) (sustaining Commission-imposed bar in a supervisory capacity and a 12-month all-capacity suspension).[27]

Accordingly, the cases that Saad cites throughout his brief do not help him. They are distinguishable, just like *Kokesh* is.

F. Because *Kokesh* is Irrelevant to the Bar Imposed on Saad, There Is No Need to Entertain Saad's Far-Reaching Contentions About How *Kokesh* Should Be Implemented in FINRA Disciplinary Proceedings.

In the latter part of Saad's brief, he is off to the races, making various premature claims that do not address the question that the Commission directed the parties to brief. First, Saad suggests baselessly—and gratuitously—that the Commission may behave improperly when it rules in this remand proceeding. Saad all but asserts that the Commission may "[s]imply relabel[ ]" the bar, engage in "inconsistent[ ] and opportunistic[ ] fram[ing]," be "so committed to [the] result" that it will "resist engaging in any genuine reconsideration of the issues," engage in a "futile" and "barren exercise of supplying reasons to support a pre-ordained result," and may not "address[ ] the court's concern." Br. 19-20 & n.12. The Commission, however, is the expert agency that is well-equipped to interpret the meaning of the relevant Exchange Act statutory provisions. Saad's foreboding is especially unfounded considering that when the Commission last sustained the bar, it issued a "thoroughgoing decision" that performed the precise tasks "required by [the D.C. Circuit's] prior remand order." *Saad II*, 873 F.3d at 304.

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27 *SEC v. Rind*, 991 F.2d 1486 (9th Cir. 1993) (cited at Br. 7) also does not support Saad. *Rind* concerned whether a Commission civil enforcement action that alleged securities fraud, and that sought a permanent injunction and disgorgement, was subject to any statute of limitations. *Rind*, which did not discuss the general statute of limitations at issue in *Kokesh*, contains no discussion about the meaning of the words "remedial" or "penal," let alone any interpretation of Section 19(e) of the Exchange Act.

After these groundless predictions, Saad then presents his extreme vision of what should happen next, including the development of "fundamentally revised standards," a general overhaul of FINRA's Sanction Guidelines, and specific revisions to the Guideline that applies specifically to Saad's misconduct. Br. 20-21. Before he's through, Saad even dishes out dubious legal theories, like arguing that FINRA is subject to Constitutional "due process" requirements without acknowledging that the weight of authority is to the contrary,[28] and incorrectly claiming that FINRA—a private organization—is somehow covered by the Administrative Procedure Act. Br. 22-23; *see* 5 U.S.C. § 551(1) (defining "agency" as "each authority of the Government of the United States").

FINRA will not engage with these arguments, and neither should the Commission. *Kokesh* has no relevance here, and there is no need to explore what path would be needed if it were.[29]

IV. CONCLUSION

For all the reasons explained above, *Kokesh* is of no relevance to the appropriateness of the bar imposed on Saad. As a result, all of the Commission's previously provided reasons for sustaining the bar remain untouched. The bar is consistent with the Guidelines, which recommend a bar as the standard sanction for the specific type of misconduct at issue here. It is

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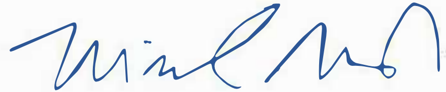
[28] *See Cody v. SEC*, 693 F.3d 251, 257 (1st Cir. 2012) (explaining that, on the issue of whether FINRA is required to provide "due process under the Fifth Amendment," "[t]wo circuits have said no, others have expressed doubt and one has dicta referring to due process as governing NASD rules").

[29] FINRA also will not respond to Saad's argument that he properly presented and preserved the *Kokesh* issue. Br. 24. That appears to go beyond the limited question that the Commission ordered the parties to address. If, however, the Commission would like further briefing on the waiver issue, FINRA is prepared to do so.

proportional to Saad's egregious misconduct. And it is tailored to protect against the continuing risks that Saad poses to firms, investors, and the public interest. As the Commission previously expressed, a person like Saad who, "regardless of motivation, intentionally misappropriates money from others on more than one occasion, may do so again." *Saad*, 2015 SEC LEXIS 4176, at *26. Saad's actions, which "betray a dishonest character that is wholly inconsistent with the high standards demanded of securities professionals," "demonstrate that he cannot be entrusted with firm or customer money" and that he "would pose a continuing and unacceptable threat to investors and other industry participants if not barred." *Id.* Accordingly, the bar is neither excessive nor oppressive, and it should be sustained.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I, Michael Garawski, certify that the foregoing FINRA's Brief in Opposition (File No. 3-13678r) complies with the length limitation set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 10,219 words.

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