BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Kimberly Springsteen-Abbott

For Review of Disciplinary Action Taken by

FINRA

Administrative Proceeding File No. 3-17560r

FINRA'S RESPONSE BRIEF CONCERNING THE RELEVANCE, IF ANY, OF THE *KOKESH* AND *SAAD II* DECISIONS TO THIS APPEAL

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The Supreme Court's decision in *Kokesh v. SEC* has no relevance to this appeal. Neither does the D.C. Circuit's recent remand decision in *Saad v. SEC* ("*Saad II*"), which only directed the Commission "to address, in the first instance, the relevance—if any" of *Kokesh* to the bar that FINRA imposed in that case. *Saad v. SEC*, 873 F.3d 297, 304 (D.C. Cir. 2017) ("*Saad II*").

First, *Kokesh* and *Saad II* leave untouched Section 15A of the Securities Exchange Act of 1934 ("Exchange Act"), which mandates FINRA to have rules allowing it to impose bars, suspensions, fines, and other fitting sanctions in its disciplinary proceedings. Second, neither *Kokesh* nor *Saad II* overturns 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. Third, *Kokesh* carries no weight here because it interpreted the meaning of a completely different statute that serves a completely different purpose. Nothing in *Kokesh* or *Saad II* supports the Commission vacating the bar, $50,000 fine, and $36,225.85 disgorgement order that the NAC imposed on Springsteen-Abbott. Those sanctions are proportional to the

gravity of her egregious pattern and practice of misusing the assets of the Commonwealth Funds, serve the remedial goal of protecting the investing public and member firms from the threat that she poses, and counteract her misuse of funds by ordering the return of ill-gotten gains.

I. ARGUMENT

On December 21, 2017, the Commission ordered that the parties file submissions limited to the issue of the relevance, if any, of the *Kokesh* and *Saad II* decisions to this appeal. As explained below, those decisions have no relevance here.

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

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.[1] *Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017). The Court held that the federal statute of limitations does apply to Commission disgorgement actions, on the grounds that disgorgement is a "'penalty' within the meaning of [28 U.S.C.] § 2462."

In her reply brief, Springsteen-Abbott argues that *Kokesh* and *Saad II* have "called into question" the securities industry's "use of bars . . . as an appropriate remedial remedy." Reply Br. at 10. That argument, however, necessarily assumes that *Kokesh* or *Saad II* vacated Exchange Act Section 15A(b)(7), which expressly *mandates* that SROs like FINRA have rules that allow for the imposition of bars—as well as expulsions, suspensions, fines, and other fitting

[1] 28 U.S.C. § 2462 establishes a five-year limitations period for a government "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture."

sanctions.[2] This assumption is baseless, and Section 15A remains valid in all respects. *Kokesh* did not concern disciplinary sanctions imposed by SROs like FINRA, let alone 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, 1643 (stating that "[t]his case presents the question whether [28 U.S.C.] § 2462 applies to claims for disgorgement imposed as a sanction for violating a federal securities law" and holding that, when considering a federal court's ability to order disgorgement sought by the Commission, "disgorgement constitutes a 'penalty' within the meaning of § 2462").[3]

Unsurprisingly, therefore, to import *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 apply *Kokesh* to categorically preclude the Commission from sustaining FINRA-imposed bars and other non-compensatory sanctions, would render the Exchange Act's scheme incoherent. It would be nonsensical for one provision of the Exchange Act (Section 15A) to *require* SROs to have a disciplinary process that allows for expulsions, bars, suspensions, and fines, and for the *Kokesh* decision to *categorically prohibit* those same remedies because they are impermissible "penalties."

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[2] Section 15A(b)(7) of the Exchange Act requires that an SRO like FINRA include in its rules the ability to "appropriately discipline[ ]" members and associated persons who violate the SRO's rules, the Exchange Act, or Exchange Act rules by, inter alia, "expulsion, suspension, . . . fine, . . . being suspended or barred from being associated with a member, or any other fitting sanction." 15 U.S.C. § 78o-3(b)(7).

[3] Section 15A also remains valid after *Saad II*, which contained no legal holdings about the relevance of *Kokesh* to SRO-imposed sanctions or any holdings that vacated Section 15A of the Exchange Act.

Indeed, such an illogical interpretation of the Exchange Act would be inconsistent with fundamental canons of statutory construction. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (holding that "statutory language cannot be construed in a vacuum" and that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *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). Moreover, applying *Kokesh* to strip FINRA of the ability to impose non-compensatory sanctions would be an interpretation of the Exchange Act that runs counter to its primary purpose of protecting investors. *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.*, 306 F.2d 606, 608 (2d Cir. 1962) ("[F]ederal securities laws are to be construed broadly to effectuate their remedial purpose.").[4] Courts avoid statutory interpretations that undermine the primary purposes of the statute. *See Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 810 (6th Cir. 2015) (rejecting proposed interpretation of the

[4] Even as to the sanction directly at issue in *Kokesh*—disgorgement that can be dispersed to the United States Treasury—several courts have held that *Kokesh* does not prevent the Commission from seeking disgorgement. *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" 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); *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).

whistleblower provisions of the Sarbanes-Oxley Act that would have undermined the legislative purpose and conflicted with the statutory design); *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.").

For these reasons alone, the Commission should not import the discussion in *Kokesh* about the meaning of "penalty" under 28 U.S.C. § 2462 into the Exchange Act's scheme that governs reviews of SRO-imposed disciplinary sanctions.

B. Neither *Kokesh* nor *Saad II* Overrules Judicial Precedents that Interpret the Standard in Section 19(e)(2) of the Exchange Act that FINRA-Imposed Sanctions Be Reviewed for Whether, with Due Regard for the Public Interest and the Protection of Investors, They Are Excessive or Oppressive.

The statutory foundation that governs the Commission's reviews of FINRA-imposed sanctions is 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 [SRO] . . . is excessive or oppressive, the [Commission] may cancel, reduce, or require the remission of such sanction." 15 U.S.C. § 78s(e)(2); *see, e.g.*, *KCD Fin., Inc.*, Exchange Act Release No. 80340, 2017 SEC LEXIS 986, at *39 (Mar. 29, 2017) (beginning the analysis of FINRA-imposed sanctions by quoting Section 19(e)(2)). Moreover, there are a wealth of federal court cases that review the Commission's sustaining of FINRA-imposed sanctions and interpret the meaning of Section 19(e)(2) of the Exchange Act. In sum, these federal cases permit FINRA to impose remedial, 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* or *Saad II* overrules these numerous, authoritative, federal judicial interpretations of Section 19(e)(2).

Courts have applied numerous principles for reviewing the Commission's affirmance of SRO-imposed sanctions. Courts have held that specific sanctions imposed by SROs should be reviewed for whether they are appropriately "remedial" and not "punitive."[5] Courts have required that the Commission's Section 19(e) review must consider the nature of the violation involved and any aggravating and mitigating factors that are present.[6] 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[7] and, relatedly, whether it

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[5] *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"); *PAZ Sec. v. SEC*, 494 F.3d 1059, 1065-1066 (D.C. Cir. 2007) (holding that the Commission must explain why the most severe sanctions are remedial, rather than punitive).

[6] *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); *PAZ Sec.*, 494 F.3d at 1064-1065 (stating that "[w]hen evaluating whether a sanction imposed by the NASD is excessive or oppressive [pursuant to Section 19(e) of the Exchange Act], ... [the Commission] must give some explanation addressing the nature of the violation and the mitigating factors presented in the record") (internal quotation marks omitted); *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").

[7] *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

[Footnote continued on next page]

has a "deterrent value to the offending broker" that responds to a risk and potential of repeat violations.[8] Significantly, the judicial focus on the protective value of SRO-imposed sanctions is supported *directly* by Section 19(e)(2) itself, which makes plain that the meaning of "excessive or oppressive" must relate to a "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 the FINRA Sanction Guidelines ("Guidelines").[9] Reviewing the Guidelines provides vital context for a Section 19(e) examination of whether a FINRA-imposed sanction is proportional or excessive or oppressive.

[cont'd]
ability to carry out his obligations as a securities professional in any capacity"); *PAZ Sec.*, 494 F.3d at 1065 (explaining, in a case involving an expulsion, that the language of Section 19(e) "'authorizes the Commission to order expulsion not as a penalty but as a means of protecting investors'") (internal brackets omitted; quoting *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940)); *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.").

[8] *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").

[9] *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 v. SEC*, 718 F.3d 904, 911-912 (D.C. Cir. 2013) ("*Saad I*") (endorsing the Commission's application of the Guideline for conversion or improper use when assessing the bar that FINRA imposed).

The Guidelines contain an extensive list of considerations that FINRA's National Adjudicatory Council ("NAC") has determined are relevant to an assessment of the gravity of all kinds of violations, and specific sanction ranges that the NAC has determined are appropriate starting points when assessing sanctions for numerous different violations. *See, e.g.*, *FINRA Sanction Guidelines*, at 6-7 (2015) (hereinafter "*Guidelines*"), http://www.finra.org/sites/default/files/2015_Sanction_Guidelines.pdf (setting forth 19 "Principal Considerations in Determining Sanctions"); *id.* at 13-104 (violation-specific Guidelines setting forth additional principal considerations and recommended sanctions ranges). The Guidelines are designed to help adjudicators in "determining appropriate remedial sanctions" and "provide direction . . . in imposing sanctions consistently and fairly." *Id.* at 1. The Guidelines' recommended sanctions "reflect the seriousness of the misconduct," and are "tailored to address the misconduct involved in each particular case." *Id.* at 2-3.[10]

As for disgorgement, FINRA may impose that sanction to "serve[ ] the remedial purpose of depriving [a respondent] of the benefit of his [or her] misconduct." *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *103 (July 2, 2013) (sustaining FINRA's imposition of a $585,174 disgorgement order), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014). FINRA-imposed disgorgement is not excessive or oppressive when it is in an amount that is a reasonable approximation of the ill-gotten gains causally connected to the respondent's violation. *See Murphy*, 2013 SEC LEXIS 1933, at *103-104 (sustaining

[10] The fact that FINRA and the Commission routinely apply the Guidelines when assessing or reviewing sanctions is a compelling reason why the existing system of FINRA-imposed sanctions does not have—as the concurrence in *Saad II* opinion suggested—an arbitrary, inequitable, or unfair quality when it results in "harsh sanctions." *Saad II*, 873 F.3d at 306. Registered persons with FINRA member firms are on notice of the recommended sanctions for numerous violations.

FINRA's $585,174 disgorgement order where the disgorgement amount was a "reasonable approximation of the ill-gotten gains [respondent] retained from his violative misconduct"); *The Dratel Group, Inc.*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035, at *73-74 (Mar. 17, 2016) (sustaining FINRA's $489,000 disgorgement order where the disgorgement amount was "a reasonable approximation of [respondent's] unjust enrichment").

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 of a specific sanction to the specific offense at issue, the ill-gotten gains earned, and the specific risks of future harm posed by the violator. Indeed, the case law is replete with decisions that *sustain* FINRA-imposed, non-compensatory sanctions, like bars, suspensions, fines, where those sanctions were appropriate for the facts and circumstances presented.[11]

Kokesh did not overrule any of the federal case law that relates to Section 19(e) of the Exchange Act. Courts exercise great restraint when evaluating whether a Supreme Court opinion has overruled prior circuit precedents. 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." *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.*

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[11] *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 Sec., Inc.*, 566 F.3d 1172, 1175-1176 (D.C. Cir. 2009) (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").

Williams, 194 F.3d 100, 105 (D.C. Cir. 1999)). Other circuits follow similarly high thresholds. *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"). 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*.

Similarly, *Saad II* did not overrule any D.C. Circuit precedent about Section 19(e). In *Saad II*, the D.C. Circuit resolved *nothing* pertaining to the relevance of *Kokesh* to the Commission's reviews of SRO-imposed sanctions. Instead, all *Saad II* did was remand the proceeding 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 opining 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 (J. Millett, dubitante opinion)). Such a holding is not contained in *Saad II*.

Accordingly, nothing in *Kokesh* or *Saad II* changes the existing Section 19(e) landscape, let alone suggests the need for a wholesale reinvention of the process and standards by which the Commission reviews SRO-imposed sanctions. As the Exchange Act's statutory language directs, the Commission should continue to evaluate FINRA's sanctions, like those imposed on Springsteen-Abbott, not for 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.[12] And consistent with binding judicial precedent, that review should be a facts-and-circumstances analysis that looks to the proportionality and protective value of a particular sanction, the specific violations at issue, any aggravating and mitigating factors present in the evidentiary record, and the Guidelines' recommended sanctions ranges.

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[12] The Commission routinely acts consistent with the existing federal case law when conducting its Section 19(e) reviews of FINRA-imposed, non-compensatory sanctions. *See, e.g., KCD Fin.*, 2017 SEC LEXIS 986, at *39-40, 48 (considering whether FINRA-imposed sanction was "excessive or oppressive," with "due regard for the public interest and the protection of investors," whether it was "remedial or punitive," the nature of the violation, any "aggravating or mitigating factors" present in the record, and the Guidelines); *Rani T. Jarkas*, Exchange Act Release No. 77503, 2016 SEC LEXIS 1285, at *34-36, 59 (Apr. 1, 2016) (same); *The Dratel Group, Inc.*, 2016 SEC LEXIS 1035, at *74-75 (sustaining FINRA-imposed disgorgement that was a reasonable approximation of respondent's unjust enrichment and finding that disgorgement "serves the remedial purpose of depriving [respondent] of the benefit of his misconduct").

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.

Finally, *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 about a federal statute of limitations. FINRA's disciplinary action against Springsteen-Abbott is *not* about a federal statute of limitations. Instead, the Commission's review of the sanctions imposed on Springsteen-Abbott 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 very different considerations and protections 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. 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 her victims.

Also unlike the statute of limitations—meant to preclude an action from getting out of the starting gate—the Section 19(e)(2) scheme of review is applicable after allegations of wrongdoing have been proven before the SRO and the Commission. 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. *See Krull v. SEC*, 248 F.3d 907, 914 & n.9 (9th Cir. 2001) (finding unconvincing an argument that a "penalty" within the meaning of 28 U.S.C. § 2462 is also "punitive rather than remedial" for purposes of Section 19(e) of the Exchange Act); *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"); *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").

Moreover, 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." There is no apparent reason why an adjudicator, when interpreting the meaning of "excessive or oppressive" in a statute that specifies the Commission's oversight of securities-industry SROs, would stretch the meaning of a different word in a different statute that serves a different purpose. *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 . . . ."). The Commission should reject Springsteen-Abbott's invitation to apply *Kokesh* beyond its narrow context, just as other courts have dismissed similar arguments. *See Saad II*, 873 F.3d at 310 (dubitante opinion, J. Millett) ("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]"); *see also 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); *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).

II. CONCLUSION

Kokesh and *Saad II* are of no relevance or consequence to the appropriateness of the sanctions FINRA imposed on Springsteen-Abbott. Binding federal jurisprudence left untouched by *Kokesh* establishes that FINRA-imposed sanctions—including non-compensatory remedies

like bars, expulsions, fines, and disgorgement paid to FINRA—which serve the goals of protecting investors and the public interest, that ensure that violators do not retain the financial gains from their misconduct, that are proportional to the misconduct at issue, and that are consistent with the Guidelines, are *not* "excessive or oppressive" within the meaning of Section 19(e)(2) of the Exchange Act.

Consistent with that precedent, the sanctions that FINRA imposed on Springsteen-Abbott are not excessive or oppressive. The NAC imposed the bar after considering the seriousness of Springsteen-Abbott's misuse of funds, the several aggravating factors, Springsteen-Abbott's unpersuasive mitigation arguments, and the fact that the applicable Guideline recommended a bar. The NAC's express intent was that the fine it imposed would protect the public, and that its disgorgement award reflected a reasonable approximation of her unjust enrichment. *See generally* RP 8241-8246. The NAC's sanctions should be sustained, and nothing in *Kokesh* or *Saad II* leads to any other conclusion.

Respectfully submitted,

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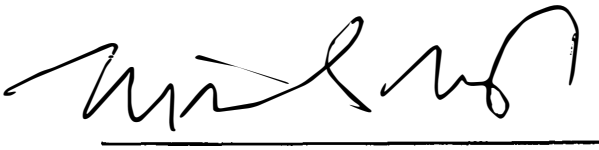
Dated: January 22, 2018

CERTIFICATE OF COMPLIANCE

I, Michael Garawski, certify that the foregoing FINRA's Response Brief Concerning the Relevance, If Any, of the *Kokesh* and *Saad II* Decisions to this Appeal (File No. 3-17560r) complies with the 7,000-word length limitation set forth in the Commission's Order Granting Request to Submit Additional Brief (dated Dec. 21, 2017). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 4,692 words.



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CERTIFICATE OF SERVICE

I, Michael Garawski, certify that on this 22nd day of January 2018, I caused a copy of the foregoing FINRA's Response Brief Concerning the Relevance, If Any, of the *Kokesh* and *Saad II* Decisions to this Appeal (File No. 3-17560r) to be sent via overnight delivery (and a courtesy copy by email) to:

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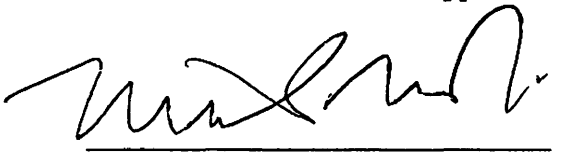
and the original and three copies sent via messenger to:

Brent Fields, Secretary
Securities and Exchange Commission
100 F Street NE
Room 10915
Washington, DC 20549-1090

Service was made on the Commission by messenger and on the Applicant's counsel by overnight delivery service due to the distance between the offices of FINRA and Applicant's counsel.



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