Before the
U.S. SECURITIES & EXCHANGE COMMISSION

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	:	**OF N.A.C. Decision in**
In the matter of the Appeal of	:	**Complaint No. 2011025675501**
	:	**Kimberly Springsteen-Abbott**
KIMBERLY SPRINGSTEEN-ABBOTT,	:	**ADMIN PRO.3-17560**
	:	**ORAL ARGUMENT REQUESTED**
Appellant.	:	
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APPELLANT'S REPLY BRIEF CONCERNING THE RELEVANCE OF THE KOKESH AND SAAD II DECISIONS

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TABLE OF CONTENTS

Page

Appellant Kimberly Springsteen-Abbott ("Appellant") respectfully submits this brief in response to the U.S. Securities and Exchange Commission's ("SEC" or "Commission") December 21, 2017 order (the "Briefing Order") directing Appellant and FINRA to address the relevance of *Kokesh v. SEC,* 137 S.Ct. 1635 (2017) ("*Kokesh*") and *Saad v. SEC*, 873 F.3d 297 (DC Cir. 2017) ("*Saad II*") to this appeal.[1]

PRELIMINARY STATEMENT

In March of 2017, when remanding an earlier decision of the National Adjudicatory Council (the "NAC") in this matter to FINRA, the Commission said, "it is important that a self-regulatory organization clearly explain the bases for its conclusions. If it fails to do so, [the SEC] cannot discharge properly [its] review function." *In the Matter of Kimberly Springsteen-Abbott,* Exchange Act Release No. 80360 (March 31, 2017) (the "Commission Order") at 7 *quoting Jonathan Feins,* Exchange Act Release No. 37091, 1996 WL 169441, at *2 (April 10, 1996). Finding that the NAC had not met these requirements, the Commission returned this matter to FINRA to "clarify the basis on which it is upholding liability and explain how its findings of violation inform the sanctions imposed." Commission Order at 7.

FINRA has once again failed to meet the requirements imposed on them by the Commission. After the Commission Order, the NAC – without the benefit of any additional evidence – rewrote their order and issued a second decision dated July 20, 2017 (the "NAC Remand Decision"). In the NAC Remand Decision, the NAC still does not clearly explain its basis for upholding liability. This is even more certain in light of recent precedent. The NAC Remand Decision has no analysis of why the sanctions imposed on Appellant, particularly the permanent bar, are appropriate rather than being oppressive or excessive as punishments, as is now required by *Kokesh* and *Saad II.* In fact, the NAC Remand Order does not address the issue

[1] On January 22, 2018 FINRA submitted a brief responsive to the Briefing Order (the "FINRA Brief").

of punitive sanctions. Further, even had the NAC attempted to analyze this matter in such a way, we believe that no such analysis could be sustained. At the very least, it would require an evidentiary hearing to present a factual record that would support such a decision.

Even if the Commission is currently unable to reach a conclusion on the question of the application of *Saad II* and *Kokesh* to this appeal, the NAC Remand Decision must be vacated, or the sanctions reduced, for the additional reasons set forth in Appellant's prior briefs[2]: the NAC: (i) erroneously relied on untrue testimony and a summary chart presented by a FINRA examiner; (ii) improperly imposed its own business judgment; (iii) made unsupported and erroneous conclusions that Appellant acted in bad faith; and, (iv) imposed sanctions on Appellant that are excessive, oppressive, and not consistent with current FINRA practice.

DISCUSSION

A. APPLICATION OF *SAAD II* AND *KOKESH*

Saad II questions whether, under the Supreme Court's *Kokesh* analysis, expulsion or suspension of a securities broker is a penalty, not a remedy. *Saad II* at 304. The U.S. Circuit Court for the D.C. Circuit (the "Circuit Court") was unwilling to enforce a bar against Mr. Saad until it better understood this question.[3] This is the majority holding. Thus, the Commission is not currently permitted to sanction a bar without considering whether the bar is unduly punitive. The concurrence in *Saad II* provides additional support for this position, but Appellant need not rely on the concurrence when the majority holding states the problem so plainly.

By way of background, John M.E. Saad was barred by FINRA for admittedly misappropriating his employer's funds on two occasions. Mr. Saad appealed to the SEC, which

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[2] *See* Appellant's briefs dated October 10, 2017 and November 30, 2017.

[3] The Commission has ordered Mr. Saad and FINRA to submit briefing on the application of *Kokesh*. *In the Matter of the Application of John M.E. Saad for Review of Disciplinary Action Taken by FINRA*, Release No. 82348 (Dec. 18, 2017). The current briefing schedule extends into April, 2018. *In the Matter of the Application of John M.E. Saad for Review of Disciplinary Action Taken by FINRA*, Release No. 82500 (Jan. 12, 2018).

affirmed FINRA's decision. From there, Mr. Saad appealed to the Circuit Court. The Circuit Court remanded the case back to the SEC because the Commission's analysis of the FINRA decision "failed to address potentially mitigating factors." *Saad v. SEC*, 718 F.3d 906, 913 (D.C. Cir. 2013). At that time, the Circuit Court "left open the question whether the lifetime bar was an 'excessive or oppressive' sanction, noting that the Commission had an obligation on remand to ensure that its sanction was remedial rather than punitive." *Id.* The SEC, in turn, remanded the case back to FINRA, specifically to the NAC, to reconsider the imposition of a bar on Mr. Saad. The NAC concluded, again, that Mr. Saad deserved to be barred, and the SEC agreed on appeal, concluding that the bar was "remedial, not punitive," and "necessary to protect FINRA members, their customers, and other securities industry participant[s]." *In the Matter of the Application of John M.E. Saad,* SEC Release No. 76118 at 10 (October 8, 2015). Once again, Mr. Saad appealed to the Circuit Court. On October 13, 2017, the Circuit Court remanded the case back to the SEC – again – to answer the question whether the permanent bar imposed on Mr. Saad was "impermissibly punitive"[4] in light of the Supreme Court's recent decision in *Kokesh v. SEC*. This remains an open question; *Saad II* has not been resolved.

In *Kokesh*, the case upon which the *Saad II* opinion relies, the Supreme Court ruled that disgorgement paid by a respondent to the Government as a sanction imposed by the SEC was a "penalty," overturning a line of cases that had concluded that disgorgement was remedial and not punitive. The Supreme Court's reasoning was that disgorged money paid to the Government does not go to victims; disgorged money also is not limited to the amount of harm to victims; and, both of these would need to be true for the sanction to be remedial rather than punitive. *Kokesh* at 1644.

Kokesh and *Saad II* alter the way SROs must approach sanctions decisions. As the concurring opinion in *Saad II* points out, "[u]nder any common understanding of the term

[4] *Saad II* at 304.

"remedial," expulsion and suspension of a securities broker are not remedial. Rather, expulsion and suspension are punitive." *Id.* (emphasis added). Like other punitive sanctions, expulsion and suspension may deter others and prevent the wrongdoer from further wrongdoing and may thereby protect the investing public, but expulsion and suspension do not provide a remedy to the victim. Similar to disgorgement paid to the Government, expulsion or suspension of a securities broker does not provide anything to the victims to make them whole or to remedy their losses. Prior to *Kokesh*, the Commission could claim to approve expulsion or suspension of a securities broker as a remedy, but not as a penalty. What *Saad II* says is that perhaps we ought to call an expulsion what it really is: a punishment. Thus, expulsion of Mr. Saad (or Appellant) is punitive, not remedial.

Kokesh and *Saad II* are not outliers. In *SEC v. Gentile*, 2017 WL 6371301 (D.N.J.) (December 13, 2017) ("Gentile"), Chief Judge Linares dismissed the SEC's complaint in its entirety against defendant Guy Gentile for securities fraud, ruling that permanent injunctions and penny stock bars sought by the SEC were punitive, not remedial.[5] The court flatly rejected the SEC's argument that an injunction and an industry bar were equitable remedies because they were necessary to prevent the defendant from committing future violations of the federal securities laws. Judge Linares concluded that because both remedies were "noncompensatory sanctions [they] must be considered penalties." *Id.* at 4. The court held:

> [T]here would be no retributive effect from such an order [imposing a permanent injunction and a penny stock bar], nor would such an order restore any "status quo ante." As a matter of fact, Plaintiff [SEC] has not identified a single "victim" or a specific harmed party that these injunctions would be designed to compensate or benefit. Hence, the only person who would be impacted by such an order would be Defendant, and the only purpose for such an order would be to penalize him for his alleged involvement in the [fraudulent stock] schemes.

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[5] *See also Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996); *SEC v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007).

Id. Appellant's case presents a similar pattern of facts. Like *Gentile*, imposing a bar upon Appellant would not return matters to their *status quo ante*. Further, there are no identifiable victims in Appellant's matter at all, and certainly none who would be compensated or benefit from a bar on Appellant.

Much of the FINRA Brief to the Commission on this issue is spent refuting a challenge to Exchange Act Section 15A.[6] Exchange Act Section 15A mandates that SROs like FINRA have rules that allow for the imposition of bars, suspensions and fines. Here, FINRA engages in that classic rhetorical tactic – the straw man. Here is how it works: FINRA mischaracterizes something its opponent has said, and then FINRA dismantles the mischaracterized argument. This form of argument is, of course, fallacious. The straw man is a slight of hand; a distraction from the real issues. And if the party who has been mischaracterized takes the bait and responds to the straw man argument, its opponent wins – the issue being debated has shifted to the straw argument.

We shall not let FINRA take Appellant (and the Commission) for a rhetorical ride. Nobody is questioning a SRO's ability to issue bars. Appellant has never said that SROs could not issue bars. *Saad II* and *Kokesh* do not dispute that an SRO can issue bars.[7] As we have made very clear, Appellant's argument is about *the way* an SRO determines who it will bar. And this is where *Kokesh* and *Saad II* come in to play in this appeal. After *Kokesh* and *Saad II*, if an SRO is issuing a bar, it can do so prophylactically, in which case it must show future harm (not at issue here); or, the bar is punitive, in which case you have to show that it is a permissible and appropriate penalty under the circumstances. As we explain in the next section, FINRA has failed to do this in the NAC Remand Order.

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[6] FINRA Brief at 1-5.

[7] *Saad II* at 306 ("My point is not to suggest that FINRA lacks the power to impose punitive sanctions such as expulsions or suspensions.")

Similarly, FINRA would have the Commission believe that Appellant is challenging the validity of Section 19(e)(2) of the Exchange Act. FINRA Brief at 5-11. Again, this is not one of Appellant's arguments. To the contrary, Appellant is pressing for fair enforcement of this section of the Exchange Act. Section 19(e)(2) states that when "a sanction imposed by a [SRO] . . . is excessive or oppressive, [the Commission] may cancel, reduce or require the remission of such sanction." From the start of this appeal, Appellant has argued, *inter alia*, that sanctions imposed upon her were excessive and oppressive and therefore the sanctions should be vacated or reduced. In his concurrence to the majority opinion in *Saad II*, Circuit Judge Kavanaugh does say that "after the Supreme Court's decision in Kokesh . . . our precedents characterizing expulsions or suspensions as remedial are no longer good law." FINRA seems to be responding to Judge Kavanaugh's concurrence. While we support Judge Kavanaugh's position, as stated above, Appellant need only rely on the majority holding in *Saad II* to reach the conclusion that the NAC Remand Order cannot stand. The application of Judge Kavanaugh's *Saad II* concurrence need not be decided by the Commission to resolve this matter.

FINRA also contends that *Kokesh* cannot be applied to matters arising from the Exchange Act because it was brought before the Supreme Court on a different federal statute. This is an intentionally myopic argument by FINRA; the Supreme Court's reasoning in *Kokesh* was not limited to the specific circumstances at issue there.[8] However, for the sake of discussion, we note that *Kokesh* is also about the Exchange Act. The SEC only had the authority to pursue charges against the defendant due to the Exchange Act. The Defendant was charged pursuant to the Exchange Act and "[a]fter a 5–day trial, a jury found that Kokesh's actions violated . . . the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m, 78n." *Kokesh* at 1641. It was this decision which found that defendant violated the Exchange Act that was appealed to the Supreme Court.

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[8] *See SEC v. Gentile*, 2017 WL 6371301 Civ. Action No.: 16-1619 (D.N.J.) (Dec. 13, 2017) (applying *Kokesh* to a request for an injunction and a bar).

Finally, FINRA argues that *Kokesh* is about a statute of limitations, not the meaning of punitive. This is akin to saying that *Citizens United* is about Section 203 of the McCain–Feingold Act, and not the First Amendment. It's the statute of limitations in 28 U.S.C. 2468 that gave Kokesh a vehicle (motion to dismiss) to get to the Supreme Court, but the case turns on the definition of "punitive." *Kokesh* at 1642-45; *see also Gentile* at 3.

B. THE NAC REMAND DECISION DOES NOT COMPLY WITH THE PRECEDENT SET BY *SAAD II* AND *KOKESH*

In light of *Saad II* and *Kokesh*, FINRA and the SEC can no longer simply characterize an expulsion or suspension as remedial, as FINRA has in the NAC Remand Order. In an order which mandates sanctions, FINRA must at least address the question of whether the sanction is punitive, and how the sanction is appropriate under the circumstances. *Saad II* at 304. The NAC Remand Decision clearly fails to meet this standard (and the NAC could not meet this standard given the principal considerations in FINRA's own sanction guidelines). The NAC Remand Order imposes three separate sanctions upon Appellant: a fine, disgorgement and a permanent bar. The first two, fine and disgorgement, are named as remedial. Even as remedial measures these two sanctions against Appellant do not withstand scrutiny. The NAC Remand Order (at 30) specifically states that Appellant's fine "serves the remedial effect of deterring any future mishandling of investor money." This is, of course, no different than saying that a criminal sanction may deter further criminal acts by others. Disgorgement is also stated to be a remedial remedy. *Id at 30.* ("Disgorgement is the appropriate sanction to remedy this injustice.") However, the disgorgement amounts are either unsupported or have already been the subject of a reallocation.

Finally, the NAC Remand Order never addresses what it alleges to be a third remedial measure. FINRA provides no rationale – punitive, remedial, or other – for the most serious sanction, the permanent bar from the industry. The bar from association with a member firm is

clearly not prophylactic, as the conduct attacked by FINRA was not committed within the scope of any role or in any capacity related to a member firm. The bar would not serve to govern the behavior erroneously attacked by FINRA.

There is no analysis of why the sanctions imposed on Appellant, particularly the permanent bar, are appropriate rather than being oppressive or excessive as punishments. The section of the NAC Remand Order that discusses Appellant's bar provides no stated rationale for sanctions. *Id.* at 26-28. The NAC Remand Order never discusses directly or alludes to the concept of punishment. At best, the NAC Remand Order is silent on whether Appellant's bar is intended to be punitive, or serve another purpose. The only reference in the NAC Remand Order which might be seen to apply to all of the sanctions (fine, disgorgement, and bar) says, "[Appellant's] decreased sanctions are remedial rather than punitive." *Id at* FN 27. If the NAC had applied a punitive analysis to this matter, the sanctions would not be what the NAC ordered in the Remand Decision. As a matter of punishment, the sanctions, particularly the bar, are clearly oppressive and excessive for the conduct alleged.

In *Gentile,* Judge Linares recognized an additional punitive impact that imposing an injunction and bar would have against a defendant: a significant reputational impact, that would, in the words of the court, "stigmatize the defendant in the eyes of the public." *Id.* Appellant operates a middle market equipment leasing business. A bar from the securities industry would unfairly affect her reputation in the equipment leasing business. This, in itself, is a punitive measure against Appellant that would result from a bar which is not addressed in the NAC Remand Order.

At the end of his concurrence in *Saad II*, Judge Kavanaugh waxed poetic: "*[o]ver time, a fairer, more equitable, and less arbitrary system of FINRA and SEC sanctions should ensue.*" *Saad II* at 306. Vacating or reducing the sanctions imposed upon Appellant—particularly, the permanent bar from association with any FINRA member—would be a step in this direction.

CONCLUSION

Accordingly, for the reasons set forth above and in Appellant's prior briefs, Appellant respectfully submits that the Commission should vacate or modify the sanctions imposed against Appellant, especially the permanent bar from the securities industry, to ensure compliance with the recent case law discussed above.

February 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Steven M. Felsenstein, certify that on this 5th day of February, 2018, I caused a copy of the foregoing Appellant's Reply Brief (File No. 3-17560) to be sent via Registered Email and overnight express delivery to:

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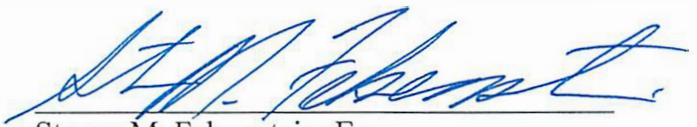

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February 5, 2018