**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**Admin. Proc. File 3-17909**

**In the matter of the Application of**
**THADDEUS J. NORTH**
**For Review of Disciplinary Action Taken**
**by FINRA**

# OPENING BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

Submitted this 12th day of June 2017 on behalf of Thaddeus J. North

by: Constance J. Miller

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On March 15, 2017, the National Adjudicatory Council ("NAC") Panel affirmed[1] the December 1, 2015[2] FINRA Hearing Panel decision in Disciplinary Action 2010025087302 with enhanced penalties after the NAC Subcommittee denied Applicant Thaddeus J. North's ("Mr. North") Motion for Admission of Additional Evidence,[3] submitted March 2, 2016, which included evidence not available at the time FINRA Hearing Panel convened in April 13-14, 2015. The new evidence suggests that FINRA Enforcement engaged in collusion with Smarsh Inc. ("Smarsh"), engaged in unlawful and unconstitutional conduct, and committed fraud on the tribunal respecting compliance actions attributed to Mr. North and includes: (i) findings and conclusions of expert, Frank Huber, whom Mr. North consulted between March 2015 and December 2015 to analyze the Email, its metadata, and XML messaging that FINRA Enforcement produced to Mr. North in November 2013 and early 2014 as sources of information about the Email archiving and compliance services Smarsh allegedly hosted on the Smarsh Management Console ("SMC") from which Smarsh allegedly produced compliance reports ("Smarsh Reports"), which were admitted over objection as material evidence against Mr. North, and which were substantially relied upon by the FINRA Hearing Panel; (ii) a declaration from technician Tom McCay, employed by Southridge Technologies Grp LLC ("Southridge Tech"), the email service provider for the Southridge Investment Group LLC ("Southridge") (CRD 45531); (iii) email instructions from Smarsh; and (iv) testimony of FINRA Examiner(s) James

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[1] Record ("R.") 005151.

[2] R. at 003351.

[3] R. at 003755.

McKennedy and a declaration from Smarsh General Counsel, all of which support the conclusions reached by Mr. Huber.

Due to errors in the admission and rejection of evidence considered by the FINRA Hearing Panel and the error by the NAC Subcommittee in rejecting the additional and new evidence despite the reasonable inferences and conclusions that may be drawn from the evidence offered, Mr. North, requested review of the FINRA Hearing Panel and NAC Panel decisions and penalties assessed by them.

## QUESTIONS PRESENTED

I. Whether, according to FINRA Rule 9251(g), the outcomes before the Hearing Panel and subsequently the NAC Panel would have been different but for the errors made by the Hearing Officer in his evidentiary rulings,[4] *e.g.*, finding email allegedly archived by Smarsh and expert testimony about the email's condition when delivered to Mr. North and the causes of the condition(s) to be irrelevant *in toto* and allowing the introduction of the Smarsh Reports allegedly prepared by Smarsh, over Mr. North's objections regarding admissibility.

II. Whether the outcomes before the NAC Panel would have been different but for the error in refusing to allow admission of additional evidence, including proof that Smarsh does not own, control, or operate any server equipment necessary to archive Email and support the SMC platform that allegedly recorded information used to produce the Smarsh Reports, and that Smarsh instructions to users was the device that allowed for the interception and delivery of Email to a network controlled and accessed by FINRA employees who "made up" exhibits, including the Smarsh Reports.

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[4] R. at 002019 (Sonnenberg Order); R. at 002253 (Perkins Order); R. at 2371 (Sonnenberg Order). *See also* R. at 002635 (Hr'g Tr. 156:1-173:25, Apr. 13, 2015).

III. Whether the cumulative effect of the evidentiary decisions by the FINRA Hearing Officer(s) influenced the FINRA Hearing and NAC Panels' findings of willfulness and failure in developing and enforcing the Southridge firm's written supervisory procedures ("WSP") because of a singular scrivener's error in identifying a random percentage for email review.

IV. Whether the cumulative effect of the evidentiary decisions by the FINRA Hearing Officer influenced the Hearing and NAC Panels' interpretation and application of NASD Rule 3070 (9)[5] and findings of willfulness respecting a relationship between a broker registered with Southridge and a statutorily disqualified person when information about the relationship is learned during a FINRA audit and or examination coincidental to FINRA examiners.[6]

V. Whether the FINRA Hearing Officer's and NAC Subcommittee's decisions respecting admissibility of evidence and new evidence were motivated by bias.

**STATEMENT OF THE CASE**

On December 22, 2005,[7] Greenfield Capital Partners LLC ("Greenfield") (CRD 45531) executed a contract with Smarsh to archive electronic communications, including email and like messaging (collectively, "Email") in compliance with 17 C.F.R. § 240.17a-4 and to provide a

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[5] On July 26, 2007 the SEC approved consolidation of the New York Stock Exchange and the National Association of Securities Dealers, Inc. ("NASD") to create FINRA. https://www.sec.gov/news/press/2007/2007-151.htm. The following year, Information Notice 3/12/2008 provided information regarding the Rule Consolidation Process for the NYSE and NASD rules. It is believed that FINRA prepared Information Notice 3/12/2008 for its members, however, links on FINRA's website to the notice currently report, "This part has been declared private." On July 30, 2010 the SEC approved consolidation of NASD Rule 3070 and FINRA Rule 4530 with proposed amendments. *See* Notice, 75 Fed. Reg. 69508-69514 (November 12, 2010). FINRA Rule 4530 superseded NASD Rule 3070 (9) on July 1, 2011.

[6] FINRA identified no person, who *voluntarily informed* Mr. North or FINRA about the alleged wrongdoing Mr. North was to have reported or from which Mr. North should or could have demanded information about the alleged conduct of LK and TC.

[7] *See North, et al v. Smarsh, Inc. et al*, 16-cv-001922 (RMC) ("*North 2*") Ex. 2, ECF No. 1-2.

platform for compliance actions, the SMC, *e.g.*, performing random sampling and key word searches of Email to detect securities law violations and recording those actions for reporting purposes. Greenfield sent a "To Whom It May Concern" letter of confirmation, dated February 9, 2006 and executed by Smarsh CEO Stephen D. Marsh, to the National Association of Securities Dealers ("NASD"),[8] FINRA's predecessor, regarding Southridge's compliance with 17 C.F.R. § 240.17a-4. Subsequently, Greenfield changed its name to Southridge; new contracts with Smarsh were executed on or about March 29, 2007 and May 15, 2008.[9]

In February 2008 Mr. North was employed with Southridge as its Chief Compliance Officer ("CCO").[10] Fifteen months later, Southridge CEO WES[11] met with LK and TC[12] to discuss potential registration with Southridge as brokers; LK was hired on or about July 1, 2009 and TC was not hired because he was statutorily disqualified in 2006.[13] In the 2006 proceedings involving TC, FINRA Regional Counsel Mark J. Fernandez[14] was prosecuting co-counsel, the

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[8] *North 2* Compl. ¶¶ 19, 35-41, ECF No. 1-0. The letter specifically states:

> [I]n reference to SEC Rule 17a-4(f)(vii) Smarsh is a third party ("the undersigned"), who has access to and the ability to *download information from the member's, broker's, or dealer's electronic storage media* to any acceptable medium under this section .... (Emphasis added.)

*Id.* Ex. 3, ECF No. 1-3.

[9] *Id.*, Compl. ¶¶ 31-32, ECF No. 1-0.

[10] *Id.*, Compl. ¶¶ 5-6, ECF No. 1-0. Mr. North completed the FINRA Institute at Wharton Certified Regulatory and Compliance Professional program in 2009. R. at 002913 (Hr'g Tr. 348:11-349:21, April 14, 2015).

[11] WES is William E. Schloth (CRD No. 2644188).

[12] LK is Leslie L. King (CRD No. 5280908). TC is Todd Cowle (CRD No. 19335345). *See* R. at 005151 (NAC Order at 2-3). There was no evidence regarding the circumstances of either interview; Mr. North was not present.

[13] R. at 003443 (CX-2); R. at 003525 (CX-9). *See also* R. at 005151 (NAC Order at 2-3).

[14] R. at 003525 (CX-9).

Hearing Officer in this case, David R. Sonnenberg, was a director then "head of litigation for [FINRA] enforcement",[15] and the Chief Deputy Hearing Officer for FINRA who assigned Hearing Officer Sonnenberg to this case, Andrew H. Perkins, was the Hearing Officer.[16]

After hiring LK, Southridge established a branch office near Dallas, Texas where LK resided. Despite the distance, Southridge CEO WES was LK's direct supervisor. On July 8, 2009 LK faxed hiring documents including disclosures to Mr. North respecting outside business activities and relationships.[17] In March 2010, during an audit conducted by FINRA's Boston District Office, examiners requested financial documents related to the Texas branch office;[18] LK produced copies of a contract[19] executed on July 15, 2009 between a company she established, King Asset Management ("KAM"), a limited liability company,[20] and another company, Ultimate Tier Advisors ("UTA") and invoices[21] for several months beginning in July 2009 indicating payment for services relating to business consulting, meetings and supplies, introductions, and training.

After receiving the contracts and invoices, as LK's direct supervisor and Southridge's CEO, WES inquired about the contracts and services on behalf of Southridge management.[22] There was no evidence that LK or WES disclosed a securities trading business relationship

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[15] R. at 002635 (Hr'g Tr. 185:6-9, Apr. 13, 2015).

[16] R. at 003525 (CX-9).

[17] *See* R. at 002913 (Hr'g Tr. 402-06, 414-16, Apr. 14, 2015); R. at 003619 (RX-13).

[18] These records were kept at the Texas branch office according to FINRA Rules.

[19] R. at 003481 (CX-7).

[20] The purpose of companies like KAM is to limit personal liability for independent contractors like LK. R. at 002913 (Hr'g Tr. 343:17-345:18, April 14, 2015)

[21] R. at 003483 (CX-8).

[22] R. at 003465 (CX-3 at 2-8).

between TC and LK to Mr. North at any time before March 2010 or during WES's investigation. WES concluded that no unlawful or reportable activities had occurred.

Having no information or access to information to the contrary,[23] Mr. North relied on the conclusions reached by WES. Mr. North was not instructed by WES or other management to file a NASD Rule 3070 report. There was no evidence that criticism or cautionary instructions respecting LK were issued to the firm from the FINRA Boston District Office audit in March 2010.[24] Mr. North admitted that after the audit, he did not undertake an independent parallel investigation to that of WES and LK's other supervisors[25] and there was no evidence WES or LK disclosed to Mr. North any knowledge that UTA is TC's consulting company or that LK had consulted a compliance professional in 2009 about the protocol and resources needed if a firm were to associate TC.[26]

As part of its investigation to a tip it received, about December 2010, the FINRA New Orleans District Office issued the first of many Rule 8210 requests and WES prepared the responses,[27] Mr. North recognized the relationship between TC and UTA.[28] The requests required production of Email allegedly archived by Smarsh; all drafts or versions of WSPs; documentation supporting LK's municipal bond transactions; information about LK's relationship with TC; and explanation regarding supervision and compliance actions undertaken

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[23] R. at 002913 (Hr'g Tr. 320-334, Apr. 14, 2015).

[24] R. at 002913 (Hr'g Tr. 425:3-8, Apr. 14, 2015).

[25] Michael Byl, the Municipal Securities principal, supervised and reviewed LK trading documentation and Email. R. at 002913 (Hr'g Tr. 342:19-343:3, Apr. 14, 2015).

[26] R. at 003615 (RX-5).

[27] R. at 005151 (NAC Order at 3). *See also* R. at 002635 (Hr'g Tr. 196:13 - 201:17, Apr. 13, 2015). The requests continued into February 2015.

[28] *Id. See also* R. at 003465 (CX-3 at p. 2-8).

by principals of the Southridge firm.[29]

Beginning in September 2011, FINRA Enforcement interviewed LK, and later CEO WES, Mr. North, and other Southridge employees. Southridge closed in mid-September 2011 and about half of the Southridge brokers went to work for Ocean Cross Capital Markets, LLC ("Ocean Cross"); many Southridge customers transferred accounts to Ocean Cross.[30]

In July 2012, FINRA issued Wells Letters to LK, WES, Mr. North, and one or more Southridge brokers. On July 12, 2013, FINRA Enforcement charged Mr. North with three counts of securities laws violations:[31] failing to review Email, failing to ensure the existence and enforcement of a reasonable WSP, and failing to report an association with a member firm according to NASD Rule 3070(a)(9). In November 2013, after Mr. North answered the complaints against him, FINRA delivered the first of over fifty CD/DVDs[32] containing records pertaining to brokers registered by Southridge, customer transactions, Email allegedly archived, and reports allegedly prepared by Smarsh.[33]

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[29] R. at 003465 (CX-3 at 2-8).

[30] WES became CEO for Ocean Cross and Mr. North the CCO. FINRA Enforcement in Boston commenced an examination of Ocean Cross in March 2012.

[31] R. at 000001. The Complaint against LK alleged aiding and abetting the unlawful securities trading of TC. The Complaint against CEO WES alleged supervisory failures. LK and CEO WES entered into Agreement, Waiver and Consent ("AWC") settlements with FINRA. R. at 000149, 002383.

[32] One CD/DVD contained photocopies of Smarsh labeled disks with date stamps of June 20, 2011, and were initialed by FINRA Examiner Jackson, inferring that Smarsh prepared the disks and sent them to FINRA. *North 2*, Opp. to Mot. to Dismiss Ex. 3 (Smarsh Labeling), ECF No. 15-3.

[33] FINRA provided the alleged Smarsh Reports on December 30, 2014; the reports were allegedly prepared under Smarsh witness Robert Sherman's supervision on November 10, 2014. R. at 002635 (Hr'g Tr. 26-35, Apr. 13, 2015).

LK filed a motion to compel disclosure[34] of documents believed to have been wrongfully withheld, alerted the Hearing Officer to compatibility issues when accessing the data and disks, and a motion for summary disposition urging there was no evidence of charges against TC for unlawful securities trading.[35] To prove inferences of securities law violations involving LK and TC from Email content, FINRA New Orleans District Examiner Leslie D. Jackson executed a declaration dated February 25, 2014 authenticating eighteen Emails printed on her letterhead and allegedly in the CD/DVDs delivered in November 2013.[36] Later however, FINRA adjusted its position about the Email's relevance, and offered no document or Email content as the source of information that should have alerted Mr. North to unlawful securities trading.[37]

Because the CD/DVDs from FINRA presented problems in opening and reading, and there appeared to be a substantial discrepancy in the amount of Email produced and the Email known to exist, business owner and computer technician, Andy Thomas, was retained in March 2014 to assist with the ESI[38] and to collect Email from reliable third parties for comparison.[39] On April 14, 2014 Mr. Thomas assisted in a secure download of Bloomberg Email directly from Bloomberg LP corresponding to the period of time encompassing FINRA's examination of Southridge.[40] After Dustin Sachs with Navigant Legal Technology Solutions examined the Email

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[34] R. at 000525.

[35] R. at 000317.

[36] *See, e.g.*, R. at 000395 (Decl. of Leslie D. Jackson, etc.); R. at 002635 (H'rg Tr. 281:7-283:14, April 13, 2015).

[37] *Id.*

[38] *North 2* Compl. ¶ 46, ECF No. 1-0. Mr. Thomas is managing member of To the Rescue Texas, a generalized computer services firm.

[39] *Id.* ¶¶ 48, 51.

[40] *Id.* ¶¶ 47-48, 51.

allegedly archived by Smarsh, on or about July 22, 2014 Mr. North advised FINRA Enforcement attorneys that the Email produced by FINRA to Mr. North appeared spoliated and contained other anomalies.[41]

On or about August 8, 2014 Mr. North delivered a copy of the Email obtained from Bloomberg to FINRA Counsel Fernandez.[42] Coincidental to delivering the Bloomberg files, Mr. North and LK jointly filed a motion for summary disposition previously discussed with FINRA counsels in late July 2014. Mr. North advised FINRA counsels that professionals consulted determined that ESI produced by FINRA demonstrated pervasive spoliation. The motion alleged the spoliation could have only occurred at the hands of Smarsh (the archivist) or FINRA (which received the data directly from Smarsh), and that such a pervasive failure and spoliation justified dismissal.[43] The motion noted that critical compliance information and content in the Email had been subject to processing and third party reconstruction to the point that the Email was unreliable and inadmissible to demonstrate unlawful securities trading.[44] The motion further urged that compliance reporting derived from Email and the Email database, *e.g.*, Smarsh Reports, was equally unreliable because the condition of the Email indicated that SMC database was unreliable.[45]

On or about October 15, 2014 FINRA delivered to Mr. North two CD/DVDs allegedly

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[41] *Id.* ¶ 52. *See* R. at 000835, 0003955.

[42] Coincidental to filing the Motion for Summary Disposition, etc., on August 19, 2014 (R. at 000835, 003955) FINRA Enforcement for the FINRA Boston District obtained a letter from Smarsh employee Jimmy Douglas stating that Smarsh hosted the email servers, services, and archiving to the Ocean Cross firm as a "seamless process" in the proceeding involving Mr. North's actions as CCO at Ocean Cross. *North 2* Compl. ¶¶ 53, 55, 57, ECF No. 1-0.

[43] R. at 000835, 003955.

[44] R. at 000835, 003955.

[45] R. at 000835, 003955. *See* R. at 001129 (FINRA's Opp. at 12-14).

received from Smarsh containing Bloomberg "messaging" allegedly overlooked by Smarsh when it previously allegedly delivered archived copies of Email to FINRA. The Bloomberg messages were in a completely different format than the same messages contained in the original CD/DVDs delivered in November 2013.[46]

On October 28, 2014 Mr. North obtained backup files from Southridge Tech, believed to have been maintained by that company because it hosted the Email server and services for Southridge, for comparison to the CD/DVDs delivered by FINRA in November 2013, the Bloomberg Email obtained in April 2014, and the Bloomberg records produced by FINRA on October 15, 2014.

On or about November 20, 2014, LK decided to enter in an AWC with FINRA, and withdrew her support for the Motion for Summary Disposition, etc.[47] On December 8, 2014 Hearing Officer Sonnenberg denied the Motion for Summary Disposition[48] stating:

> [T]he Hearing Officer finds that there are genuine issues as to certain material facts (or, at a minimum conflicting inferences that can be drawn from the facts), which preclude summary disposition. These genuine issues include: (1) whether there was a difference between the ESI (including the quantity of ESI) that Smarsh provided to Enforcement and the ESI that Enforcement produced to Respondents in discovery; and (2) to the extent that there was a difference, (a) what accounted for that difference; (b) did Enforcement alter, omit, or delete any

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[46] *North 2* Compl. ¶ 54 ECF No. 1-0.

[47] R. at 001973, 001991, 002015, 002383. The Hearing Officer(s) were aware that coincidental to these proceedings, the Ocean Cross matter was on a parallel track. On November 5 and 25, 2014, Hearing Officer Carla Carloni, who had also been appointed by Chief Deputy Hearing Officer Perkins, convened an evidentiary hearing in the Ocean Cross matter in which FINRA attorneys solicited statements from the Smarsh employee, Jimmy Douglas. Mr. Douglas insisted that Smarsh provided the email servers, email services, and archiving servers for brokers registered by the Ocean Cross firm. Even though FINRA Enforcement employees had received documentation showing that web.com hosted the email server and services for the Ocean Cross firm. *North 2* Compl. ¶¶ 55-57 ECF No. 1-0. *See also* R. at 002635 (Hr'g Tr. 33-36, Apr. 13, 2015).

[48] R. at 002019 (Order at 8).

ESI it received from Smarsh before producing ESI to Respondents and, if so, how and why did this occur and was it done intentionally or unintentionally.

After the ruling Mr. North retained Jon Berryhill as an expert witness to address the Hearing Officer's concerns; however, the Hearing Officer denied Mr. North's motion to permit Mr. Berryhill's testimony.[49] Even so, on March 2, 2015 Mr. North received Mr. Berryhill's report, which concluded that Email allegedly archived by Smarsh was 100% corrupted and reports derived from it unreliable.[50]

On March 24, 2015 Mr. North filed pre-hearing motions and objections respecting the admissibility of the Smarsh Reports, according to the Federal Rules of Evidence ("FRE") and again offered expert testimony.[51] His motions were denied.[52]

On April 13, 2015, the Hearing Officer ordered an evidentiary hearing for FINRA attorneys to solicit telephonic testimony from Smarsh employee Robert Sherman about how the Smarsh Reports were allegedly prepared and what the reports demonstrated, even though, according to Mr. Sherman, records and compliance actions involving Bloomberg Email were allegedly lost to a failed migration in early 2014.[53] Mr. Sherman also testified that Bloomberg records were previously reviewable in a separate location on the SMC,[54] suggesting that Mr. North's ignorance of the SMC's operations explained why the Smarsh Reports recorded no

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[49] R. at 002079, 002149, 002253, 002371, 002447.

[50] *North 2* Compl. ¶¶ 55, 58-60, ECF No. 1-0; Ex. 4, ECF No. 1-4. Mr. Berryhill, as had Mr. North, reasonably presumed based on the service contracts and testimony of Smarsh witness Douglas that Smarsh archived the Email, but that Smarsh's improper handling corrupted the Email and ESI necessary for the Smarsh Reports. *See supra* note 42 and accompanying text.

[51] R. at 002433, 002447.

[52] R. at 002519.

[53] *North 2* Compl. ¶ 61, ECF No. 1-0; R. at 002635 (Hr'g Tr. 114-120, Apr. 13, 2015).

[54] R. at 002635 (Hr'g Tr. 114-120, Apr. 13, 2015).

separate review of Bloomberg Email.

On April 27, 2015 FINRA Boston District Examiner James McKennedy testified in the Ocean Cross hearing that he changed reports respecting compliance actions to "fix" a leap year issue that is known to exist in non-Y2K compliant equipment and software, neither of which is regulatory compliant.[55] Excerpts of Mr. McKennedy's testimony were tendered with Mr. North's Motion for Admission of Additional Evidence.[56]

After the April 2015 hearings Mr. North retained Frank Huber because of Mr. Huber's background in XML (the language of Bloomberg), Y2K compliance, programming, and federal government computer and network systems.[57] Mr. Huber examined the Email and the Email metadata to determine its sources, transportation, and handling, and prepared several reports as he systematically examined over 1.2 million Email files, the Email metadata, the reports prepared by Messrs. Thomas, Sachs, and Berryhill, statements of witnesses and parties, and testimony from hearings and interviews of Southridge employees.[58]

On June 9, 2015 Mr. North received Mr. Huber's first report. Mr. Huber concluded that the Email had not been archived and that the false positives present throughout the Email were

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[55] *North 2* Compl. ¶ 62, ECF No. 1-0. *See* Y2K Act, 15 U.S.C §§ 6601-6617 (1999); 17 C.F.R. § 240.15b7-3T (2008). Non-Y2K compliant resources were used to create compliance reports, meaning the data from which the reports were created was stored on non-Y2K compliant resources. *North 2* Compl. ¶ 2, 7, 64, ECF No. 1-0; R. at 003755 (Ex. 4 ¶ 13).

[56] R. at 003755 (Ex. 6).

[57] R. at 003755 (Ex. 1 at 10); *North 2* Compl. ¶ 64, ECF No. 1-0.

[58] This included on the record interviews of LK, WES, and Mr. North. *See* R. at 003755 (Ex. 1 ¶¶ 4-5). Mr. Huber's reports relied in part on the professionals Mr. North consulted: Andy Thomas, Dustin Sachs, and Jon Berryhill, who, like Mr. Huber, had different skills and experience with Email and ESI. *See, e.g.*, the evidence and reports examined by Mr. Huber, referenced and listed in R. at 003755 (Ex. 1 ¶ 18 and p.14).

the result of processing.[59] On August 12, 2015 Mr. North received a supplement to Mr. Huber's June 9, 2015 report with analysis of the Email Internet headers, *e.g.*, metadata associated with the Email. Mr. Huber concluded, "The files identified as emails provided by FINRA DOE are files digitally reinvented to make them look like real emails."[60]

On September 3, 2015 Smarsh's General Counsel described the Smarsh archiving process as having users:

> ... configure the server ... to copy messages to journaling address [*sic*]...[which] translates to an IP address ... associated with an archive server to which the messages will be sent to be archived. ... [by] Smarsh archive server sands.smarsh.com. In July 2014, Smarsh decommissioned the server drives associated with sands.smarsh.com according to standard maintenance and technical operations procedures and migrated any current customers to an alternative server (with a different IP address).[61]

On September 4, 2015 Mr. North obtained a declaration from Southridge Tech employee, Tom McCay, confirming delivery of a copy of backup files and that Smarsh did not attach to the Southridge email server at any time for archiving operations.[62]

On November 17, 2015 Mr. North obtained a set of one hundred one archival Emails from a third party broker, who corresponded with one of Southridge's registered brokers from 2010 to 2012, for Mr. Huber to compare with Email allegedly archived by Smarsh and Email obtained from Southridge Tech.[63]

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[59] R. at 003755 (Ex. 1 ¶ 6; Ex. 2 ¶¶ 8-10, 13; Ex. 5 ¶ 6).

[60] R. at 003755 (Ex. 3 ¶ 5a).

[61] R. at 003755 (Ex. 5 ¶ 6; Ex. 7 ¶ 4); *North 2* Compl. ¶ 63, ECF No. 1-0.

[62] R. at 003755 (Ex. 4 ¶ 5; Ex. 9). Joe Garzi, Southridge Tech CEO, confirmed in a declaration that Smarsh did not archive Email at or from the Southridge server and that "all emails were *journaled* according to Smash's instruction...." (Emphasis added.) *North 2* Opp. to Mot. to Dismiss Ex. 9, ECF No. 15-9.

[63] *North 2* Compl. Ex. 5 ¶¶ 3, 7, ECF No. 1-5. *See also* R. at 003755 (Ex. 5 ¶ 3).

On November 28, 2015 Mr. North received a third declaration from Mr. Huber, who observed that no IP addresses in any Email metadata resolve to Smarsh. He further concluded, "The Smarsh Reports were derived from the same storage servers where the SIG[64] and OCC[65] Emails were allegedly archived and which storage servers are non-Y2K compliant."[66]

On December 23, 2015 Mr. North received a fourth report summarizing Mr. Huber's overall conclusions that Smarsh facilitated the real time interception and redirection of the Email by the set-up instructions given to each user, in order to deliver the Email to a private collaborative network in real time where FINRA agents tampered with and reconstructed the files to appear like email and create exhibits to suggest securities law violations.[67]

On December 1, 2015 the FINRA Hearing Panel issued its decision finding against Mr. North in all three counts, imposing suspensions and monetary fines.[68] The FINRA Hearing Panel findings and conclusions reflected the view that Mr. North was not credible and did not accept responsibility for his failures, primarily because the Smarsh Reports contradicted his testimony and written submissions to FINRA in response to Rule 8210 requests for information. The firm and Mr. North had relied on the electronic records Smarsh allegedly represented it could produce[69] and so, there was no tangible evidence to contradict the Smarsh Reports except for Mr. North's own testimony and the Rule 8210 responses from the firm to FINRA. Mr. North contends that the Smarsh Reports poisoned the Hearing Panel's view and led them to believe Mr.

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[64] SIG signifies Southridge.

[65] OCC signifies Ocean Cross.

[66] R. at 003755 (Ex. 4 ¶¶ 11-12)

[67] *North 2* Compl. ¶ 64, ECF No. 1-0; Ex. 5 ¶ 15, ECF No. 1-5. *See also* R. at 003755 (Ex. 1).

[68] R. at 003351 (Hr'g Panel Order at 1).

[69] R. at 002931 (Hr'g Tr. 337-43, 356-58, 374-77, Apr. 14, 2015).

North would lie about his actions rather than accept the truth.

The damage done by admitting the Smarsh Reports also influenced the FINRA Hearing Panel to conclude that a scrivener's error in the WSP that Mr. North developed using a template combined with the appearance of Email compliance deficiencies was an intentional or willful failure to develop and enforce a reasonably tailored WSP.[70] The FINRA Hearing Panel also construed the ambiguous context in which Mr. North and the firm learned about LK's undisclosed outside business relationship with TC, as Mr. North's willful failure to conduct a parallel independent investigation about LK and TC, reach a different conclusion from that of CEO WES and other supervisors who performed the investigation for senior management,[71] and file a NASD Rule 3070 report.[72]

On July 12, 2015 the NAC Hearing in Disciplinary Proceeding 2010025087302 was held.[73] Subsequently, Mr. North filed a whistleblower complaint with the Securities and Exchange Commission ("SEC") on July 12, 2016[74] and a federal district court lawsuit respecting the unlawful actions of FINRA and Smarsh on September 28, 2016.[75]

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[70] R. at 005151 (NAC Order at 23-24).

[71] R. at 002931 (Hr'g Tr. 370-74, 380-84, Apr. 14, 2015).

[72] *Id.* (Hr'g Tr. 320-336, 391-93, Apr. 14, 2015).

[73] R. at 005071. The NAC Panel hearing took place on March 8, 2016 in Disciplinary Proceeding 2012030527503 involving Mr. North's compliance at Ocean Cross; no decision has been rendered by that Panel.

[74] *See* TCR 1471893940443 dated July 12, 2016.

[75] Mr. North contends in *North 2* that FINRA and Smarsh are liable to him as private entities under the Electronic Communications Privacy Act, 18 U.S.C. ¶¶ 2510-2521 (2012) ("ECPA"), for procuring Smarsh to intercept and convert digital data and for other tortious conduct.

## ARGUMENT

### I. The Email reveals Smarsh did not have the intent or ability to produce the alleged Smarsh Reports because it does not own, operate, or control the equipment necessary to archive or host a compliance platform.

#### A. FINRA and Smarsh engaged in a scheme to intercept Email and create evidence for spurious prosecutions.

A central but false presumption on which the decisions before the FINRA Hearing and NAC Panels hinged is that Smarsh had the ability to provide regulatory compliance archiving for the Southridge employees' Email *and* that it hosted and controlled the equipment, software, and platform for performing and recording compliance actions of reviewing the Email from which the Smarsh Reports were produced by Smarsh employees who allegedly queried the Smarsh SMC records of Mr. North's compliance.

The condition of the Email, in particular, produced in November 2013 by FINRA to undersigned counsel compelled Mr. North to consult professionals[76] with experience and expertise in analyzing electronic data. While all persons Mr. North consulted recognized a failure in archiving as evidenced by the false positives and other corruption to the data files turned over by FINRA, expert Frank Huber conducted the most comprehensive analysis and concluded:

- Smarsh does not own, operate or control any servers according to the American Registry of Internet Numbers or ARIN,[77] and therefore, had neither the intent nor the ability to provide regulatory compliance archiving; and because Smarsh does not own, control or operate any server equipment, Smarsh did not have the intent or ability to host the alleged SMC platform for performing compliance actions.

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[76] *See North 2* Compl. ¶¶ 46, 47, ECF No. 1-0.

[77] R. at 003755 (Ex. 3 ¶ 6; Ex. 4 ¶¶ 5-8).

- Non-Y2K federal government resources were used,[78] and between Smarsh and FINRA, FINRA was the only entity actually possessing, controlling, and handling the data and who would have had access to non-Y2K compliant resources.[79]
- Smarsh provided instructions to users, *e.g.*, Southridge employees, as the device that triggered the process by which the Email was intercepted,[80] bypassing the servers actually hosting the Southridge Microsoft Exchange email system hosted by Southridge Tech, and then redirected[81] and delivered the Email into a private network.[82]
- As between FINRA and Smarsh, the metadata, admissions by FINRA and Smarsh employees, ARIN records, and the fact that FINRA was the only entity that actually possessed and handled the data FINRA employees accessed in the private network and changed the Email and made up the Smarsh Reports.[83]

The Email, the Email metadata, and FINRA's and Smarsh's collaborative conduct strongly suggest that FINRA procured Smarsh as early as or before 2005 to assist in intercepting Email, albeit illegally, for delivery to FINRA before any regulatory event. Throughout the Email metadata are server stamps that refer to Greenfield.[84] In order for FINRA to obtain access to

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[78] R. at 003755 (Ex. 6 (Hr'g Tr. 35:11-37:19, 107:5-6, Apr. 27, 2015 (Ocean Cross)).

[79] Public records show that Smarsh registered in New York on January 24, 2002.

[80] R. at 003755 (Ex. 5 ¶¶ 8-11).

[81] *Compare* R. at 003755 (Ex. 8) *with* R. at 3755 (Ex. 7 ¶ 4)).

[82] *North 2* Compl. ¶ 20, ECF No. 1-0; Ex. 1, ECF No. 1-1. Certain IP addresses identified in the Email metadata are from blocks reserved for private and government networks.

[83] R. at 003755 (Ex. 5 ¶ 12).

[84] R. at 003755 (Ex. 3 ¶ 10).

broker's communications before a regulatory event Smarsh operated as a "front" for securing an archiving contract for brokers registered first at Greenfield and later Southridge. Allegedly to accomplish regulatory compliance archiving for each broker when hired, Smarsh instructed individual users to change the settings on their computers and electronic devices as each user and device was set up to send and receive Email relating to Southridge business.[85]

Instead of ensuring regulatory compliance archiving, however, the instructions from Smarsh were the device[86] used to intercept the Email of Southridge brokers, and redirect it to servers in a private network, according to ARIN, where the Email was accessed and altered by FINRA employees and the alleged Smarsh Reports were made up to reflect compliance deficiencies.[87] By design of the prosecutors and with the willful cooperation of the FINRA Hearing Officer and NAC Subcommittee, the FINRA Hearing and NAC Panels were only exposed to intentionally corrupted evidence,[88] the sources and handling of which Smarsh witnesses misrepresented at FINRA's solicitation,[89] in the presence of Smarsh's General Counsel who later described the process implemented by Smarsh in a declaration entered into a federal court[90], which process violates SEC requirements for regulatory compliance archiving.

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[85] *See supra* notes 80-82 and accompanying text.

[86] *See supra* note 75.

[87] R. at 003755 (Ex. 4 ¶¶ 11, 12).

[88] *See generally* R. at 003755 (Exs. 1-5).

[89] *North 2* Compl. ¶¶ 55-57, ECF No. 1-0. *See also* R. at 002635 (Hr'g Tr. 69.1-114:5, 119:6-12, April 13, 2015).

[90] R. at 002635 (Hr'g Tr. 49:18-25, Apr. 13, 2015); R. at 003755 (Exs. 7, 9); *North 2* Compl. ¶ 64, ECF No. 1-0.

### B. The Hearing Officer's determination that Email was irrelevant was designed to hide the fact that FINRA corrupted it.

The private network identified by Mr. Huber used "sounds-like" naming conventions for the multiple servers processing the Southridge employees' Email and allegedly recording compliance actions in order to maintain the appearance of archiving, even though none of the servers identified by name in the Email—"emailarchive@greenfieldcapitalarchive.com", "sands.smarsh.com", and "POP01.smarsh.com"—and no IP address in the metadata or in instructions provided by Smarsh resolve to Smarsh or the known server hosted by Southridge Tech.[91] Instead, all IP addresses contained in the metadata and instructions from Smarsh resolve to servers hosted and owned by other companies.[92]

References in the metadata to Southridge Tech—mail.southridgetech.com—resolve with multiple geo-locations and to other companies (not Smarsh) demonstrating the existence of the private network Mr. Huber identified; a server connected to the public Internet can have only one IP address.[93] Certain IP addresses identified in the metadata, *e.g.*, those in the range 172.16.0.0 through 172.31.255.255,[94] also do not resolve to Smarsh, but are distinctly assigned to private networks typically reserved for government and government-related entities.[95]

The Email is not irrelevant because Enforcement chose to abandon arguments dependent on the content of Email after LK entered into an AWC and was no longer under FINRA's

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[91] *North 2* Compl. ¶¶ 64, 95, ECF No. 1-0. Likewise, in the related case involving Mr. North, web.com allegedly hosted the Email service for the Ocean Cross, however, in the Ocean Cross Email metadata, there is no resolution to Smarsh or web.com.

[92] *Id.*

[93] R. at 003755 (Ex. 5 ¶ 7 at 5).

[94] The private network IP addresses are different from IP addresses in Smarsh's instructions. *Compare* R. at 003755 (Ex. 8) *with North 2* Compl. ¶ 20, ECF No. 1-0 and Ex. 1, ECF No. 1-1.

[95] *North 2* Compl. ¶ 20, ECF No. 1-0; Ex. 1, ECF No. 1-1.

jurisdiction.[96] The Hearing Officer recognized there were discrepancies in the ESI;[97] he should have known that Email metadata may reveal why the Email exhibited indicia of spoliation whether intentional or due to improper handling or third party reconstruction. Instead, the Hearing Officer and NAC Panel rejected the Email and expert testimony as irrelevant, protecting FINRA from having to defend the content and other failures presented by the Email[98] in acquiescence to FINRA's proffer to introduce testimony that the "Smarsh Reports are neither derived from electronic communication nor do they reference them."[99]

The Hearing Officer's admission of the Smarsh Reports[100] was prejudicial because there were no supporting records to validate their content.[101] The altered condition of the Email means that the Email metadata was also altered raising significant concern regarding searchability for purposes for creating the Smarsh Reports.[102] Mr. North's reliance on Smarsh to record his compliance actions, in lieu of creating a paper file, appeared to be reasonable in 2009-2012; as electronic record keeping is endorsed by FINRA. With the benefit of hindsight, however, considering the findings of Mr. Huber and others, his reliance on Smarsh to record his compliance actions was misplaced, and in no way is an endorsement of the reports' content. In

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[96] R. at 002383 (AWC); R. at 002407 (DOE Obj. at 5-8).

[97] R. at 002019 (Order at 6). *See also FINRA Discovery, Abuses and Sanctions Training and Exam* at 8-11 (November 2013).

[98] R 002635 (Hr'g Tr. 15:5-17:9, Apr. 13, 2015); R 005151 (NAC Order at 15-17). The initial files presented multiple access issues and a computer failure. FINRA acknowledged the access issues with the ESI delivered to Mr. North. R. at 001129 (DOE Opp. at 14).

[99] R. at 002519 (Order at 2 n. 3).

[100] R. at 002635 (Hr'g Tr. 156:15-173:25, Apr. 13, 2015)

[101] R. at 002433 (North's Obj. 1-4).

[102] R 002519 (Order at 2).

fact, Mr. North's testimony was adamant that the reports were inaccurate.[103]

Mr. North contends that the Email is relevant because queries search the metadata and because the metadata demonstrates the chain of custody of the Email from origin to destination, and it contains information about the handling, security, integrity, and reliability of the Email.[104] Said another way, the Email is material and relevant if it contains proof that Smarsh did not have the capacity or intent to support the alleged SMC from which the alleged Smarsh Reports were derived.

The Hearing Officer, however, intended to foreclose questioning, discovery, and introduction of testimony and evidence that the content of the Email was unreliable to prove securities law violations, and that its condition proves that Smarsh never archived the Email as required by SEC rules and could not host the SMC as a legitimate compliance tool.[105] Because the Hearing Officer in the parallel proceeding involving the Ocean Cross made like decisions as in this case about Email and expert testimony being irrelevant and Smarsh Reports being admissible without supporting data, if the scheme to intercept and convert Email and make up compliance records was not perpetrated by a rogue few FINRA employees, then the arrangement has become practice in at least two FINRA districts.

NAC Subcommittee also intended to avoid the inevitable quandary presented by evidence

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[103] R. at 002913 (Hr'g Tr. 340-342, 356:9-358:2, Apr. 14, 2015).

[104] "Metadata describes how, when, and by whom electronically stored information (ESI) was collected, created, accessed, or modified, and how it is formatted. For example, an email contains many pieces of metadata, such as the date and time it was sent, who sent it, and who received it." *FINRA Discovery, Abuses and Sanctions Training and Exam* at 9.

[105] Mr. North suggests that the failure to have archived according to SEC rules is a serious breach of duty, yet FINRA and the Hearing Officer ignored that implication respecting the condition of the Email. *See, e.g.*, http://www.finra.org/newsroom/2016/finra-fines-12-firms-total-144-million-failing-protect-records-alteration.

Mr. North moved to have admitted as additional evidence:[106] that Smarsh and FINRA employees conspired to intercept the Email and had it delivered to a private network controlled and accessed by FINRA employees,[107] who changed the data to suggest securities law violations for corrupt prosecutions of innocent persons, like Mr. North. Therefore, to keep the NAC Panel uninformed, the NAC Subcommittee denied Mr. North's Motion for Admission of Additional Evidence.[108]

### C. The Smarsh Reports were designed to create the impression of dishonesty and were never admissible.

Having avoided the introduction of expert testimony that may have proven that Smarsh had no archive and no SMC, the Hearing Officer abused his discretion and committed reversible error when he failed to require that FINRA deliver *all* of the Email allegedly collected and archived by Smarsh[109] and deliver *all* SMC-related supporting electronic data—server, transaction, and any relevant event logs recording Email transportation and compliance actions—from which the Smarsh Reports were allegedly compiled. Mr. North asserts that the Hearing Officer's failure to require that FINRA produce all Email archived and provide access to the electronic records used to create the Smarsh Reports was intended to avoid expert testimony, inquiry into accuracy of the content of the Smarsh Reports, and inquiry about the equipment, software, and "data" used to create the reports.

Mr. North argued, consistent with the Federal Rules of Evidence ("FRE"),[110] that summaries like the Smarsh Reports are hearsay and admissible only when the authenticity and

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[106] R. at 003755 (Mot. and Exs. 1-9).

[107] *See, e.g., id.* (Exs. 1-5).

[108] R. at 005065 (Cover Letter).

[109] R. at 002433 (North Obj.); R 002635 (Hr'g Tr. 15-55, 173, Apr. 13, 2015).

[110] *See supra* note 109.

accuracy of the records can be assured, which ordinarily means that the summaries are accompanied by the data from which the summaries are derived or access to the underlying data is granted.[111] FRE 1006 permits the use of a summary of business records *provided* "all of the records from which it is drawn are otherwise admissible. . . .[112] Further, "[i]t is essential that the underlying records from which the summaries are made be admissible in evidence, and available to the opposing party for inspection," even though underlying evidence does not itself have to be admitted in evidence and presented to the trier-of- fact[113]

While the admission of summaries under FRE 1006 is within the discretion of the tribunal, avoiding production of the underlying records when a Smarsh witness admitted that records allegedly supporting the Smarsh Reports as to Bloomberg Email were lost to migration and unsuccessful reingestion in early 2014 to explain why the underlying records for the Smarsh Reports were not available,[114] was an abuse of discretion because the Bloomberg Email comprised eighty-five percent or more of all of the Email Mr. North was to review.[115] It is evident now, in light of Mr. Huber's conclusions about Smarsh's inability to archive, that Mr. Sherman's testimony about the Smarsh SMC, running reports, the content of the reports, including even the fifteen percent random sampling Mr. North testified to using, was designed to make the Smarsh Reports appear credible. In fact, Mr. Sherman admitted that his knowledge of

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[111] *Id. See also* FRE 803(6), 901.

[112] *State Office Sys., Inc. v. Olivetti Corp. of America,* 762 F.2d 843, 845 (10th Cir.1985) (citations omitted). *See also Gomez v. Great Lakes Steel Div. Nat 'l Steel Corp.,* 803 F.2d 250, 257 (6th Cir. I986); *Ford Motor Co. v. Auto Supply Co., Inc., 661* F.2d 1171, 1175 (8th Cir.1981); *United States v. Johnson,* 594 F.2d 1253 (9th Cir. 1979), *cert. denied,* 444 U.S. 964 (1979).

[113] *United States v. Rizk,* 660 F.3d 1125, 1131 (9th Cir. 2011).

[114] R. at 002635 (Hr'g Tr. 69:1-114:5, 119:6-12, Apr. 13, 2015).

[115] R. at 003755 (Ex. 2 ¶ 5a-c).

the SMA and database operations was "conceptual" only[116] and so improper foundation for the admission of the reports.

Knowing that, according to ARIN records, Smarsh does not own, operate or control any servers, and therefore, had no intent to archive Email or host the SMC platform or produce the Smarsh Reports from a platform that does not exist,[117] it should be evident that the alleged Smarsh Reports tracking Mr. North's compliance actions were fake. Smarsh did not produce the reports, as Mr. Sherman described, but instead the reports could only have been made up by FINRA employees for the spurious claim that Mr. North failed to review Email as he testified and described to FINRA in responses during FINRA's examination of the firm.[118] That only FINRA employees could have made up the Smarsh Reports is confirmed by FINRA Examiner McKennedy's admission in the Ocean Cross proceedings that he fixed the Smarsh Reports because the reports were produced on non-Y2K compliant equipment and software.[119] Respecting this foul, Mr. Huber observed,

> [I]t is a known practice for decommissioned noncompliant government servers to remain available to federal agencies for storage[120][and] [t]he Smarsh Reports were derived from the same storage servers where the SIG and OCC Emails were allegedly archived and which storage servers are Y2K non-compliant.[121]

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[116] R. at 002635 (Hr'g Tr. 135:3-137:25, Apr. 13, 2015); R. at 002433.

[117] *See FINRA Discovery, Abuses and Sanctions Training and Exam* at 8-11.

[118] R. at 002913 (Hr'g Tr. 298-299, Apr. 14, 2015); R. at 003465 (CX-3 at 9-10).

[119] *North 2* Compl. ¶ 62, ECF No. 1-0; R. at 003755 (Ex. 6 (Hr'g Tr. 35:1-37:5, 107:5-6, Apr. 27, 2015 (Ocean Cross)); R. at 003755 (Ex. 4 ¶¶ 12-13).

[120] R. at 003755 (Ex. 4 ¶¶ 12-13).

[121] *Id.*

This means that the Smarsh Reports FINRA Examiner McKennedy admitted to "fixing"[122] were created on the same non-Y2K compliant equipment that stored the Email.[123] This information was new and material because it proves Smarsh did not archive Email or prepare the reports FINRA attributed to Smarsh. Instead, the use of non-Y2K compliant equipment credibly infers that FINRA prosecutors suborned perjury from Smarsh employee Sherman about how Smarsh produced the Smarsh Reports, when it was actually FINRA employees creating them on federal government resources to which FINRA had access and which Smarsh could not lawfully use.[124]

Taken together, the fact that Smarsh could not provide the archiving it claims to provide and the fact that Smarsh Reports were prepared using non-Y2K resources means that the FINRA Hearing Panel decision was based on unreliable, inadmissible, and incompetent evidence, admitted vis-à-vis perjured testimony of Smarsh witnesses about Smarsh Reports that were actually made up by FINRA and designed to portray Mr. North as a compliance failure.[125]

**D. The Hearing Officer and NAC Subcommittee were motivated by bias.**

The first indicia of bias is that Hearing Officer Sonnenberg, FINRA lead prosecutor Fernandez, and the Chief Deputy Hearing Officer Perkins had participated either directly or indirectly in the 2006-07 prosecution and statutory disqualification of TC.[126] This relationship suggests that the cumulative effect of the Hearing Officer's evidentiary rulings were intended to

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[122] R. at 003755 (Ex. 6 (Hr'g Tr. 35:1-37:5, 107:5-6, Apr. 27, 2015 (Ocean Cross)). *See also North 2* Compl. ¶ 62, ECF No. 1-0.

[123] R. at 003755 (Ex. 4 ¶¶ 12-13).

[124] *See* 17 C.F.R. § 240.15b7-3T.

[125] *See supra* note 10.

[126] R. at 003525 (CX-9); R. at 002635 (Hr'g Tr. 184:23-185:17, Apr. 13, 2015). *But see DOE v. Cowle*, http://www.finra.org/sites/default/files/OHODecision/p037785.pdf at 15 (November 6, 2007); page 15 shows Hearing Officer Sonnenberg being copied on the original decision involving TC.

favor FINRA in prosecuting anyone who may have had contact with TC, no matter how innocuous.

Mr. North contends that the NAC Subcommittee refused to accept the additional evidence tendered because it too was motivated to avoid confronting FINRA's and Smarsh's illegal conduct and kept the NAC Panel ignorant of the additional evidence.[127] As a result the NAC Panel (i) rubber-stamped the FINRA Hearing Panel decision that was based on perjury and false evidence, (ii) vilified Mr. North in the wrongly fostered belief that Mr. North acted willfully, would lie about compliance actions, and refused to accept responsibility for his actions, and (iii) to discount any and all mitigating factors and punitively and disproportionately enhance sanctions.[128]

The NAC has observed that "[a]bsent mitigating factors, a bar should be the standard sanction for failing to respond truthfully to FINRA," but if there are mitigating factors, suspension and other sanctions short of bar should be considered.[129] Contrary to FINRA's evidence, the evidence and conclusions reached by the professionals Mr. North was compelled to consult and that were tendered to the FINRA Hearing Officer and NAC Subcommittee,[130] mean that whatever FINRA claimed happened, did not happen.

Because the Smarsh Reports contradicted Mr. North's testimony and responses to FINRA's Rule 8210 inquiries and Mr. North was precluded from introducing evidence and

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[127] R. at 005065 (Cover Letter).

[128] R. at 005151 (NAC Decision at 1-2, 19-24).

[129] *See In re Hedge Fund Capital Partners, LLC, et al*, NAC Decision in Complaint No. 2006004122402 at 32 (May 1, 2012). In *In re Hedge Fund Capital*, the Hearing Panel did not consider the testimony of one of the principals of the firm, Howard Jahre, to be credible in part because he had provided false information to FINRA.

[130] *See, e.g.*, R. at 003755 (Mot. and Exs. 1-5).

testimony about the failed archive and false Smarsh Reports. Both panels rejected Mr. North's concerns respecting the condition of the Email and the Smarsh SMC, concluding in error that Mr. North was lying about his compliance actions and therefore, both tribunals discounted any and all defense to or mitigating factors respecting any of the claims made by FINRA.[131]

Now knowing that Smarsh does not own, operate or control any of the necessary equipment for archiving and hosting its alleged SMC, it should be evident that Mr. Huber's conclusions are correct, *e.g.*, that FINRA and Smarsh conspired to intercept and change Email, and that Mr. North's contentions have merit and substance, *e.g.*, that the Smarsh Reports were intentionally misleading and never admissible, were admitted using false testimony and were designed by FINRA employees with malice to destroy Mr. North's credibility. Mr. North had no duty to admit to or accept responsibility for actions or inaction FINRA contrived from false evidence that FINRA employees created and false testimony FINRA prosecutors procured.

## II. The WSP developed by Mr. North was reasonable.

### A. A single scrivener's error in the WSP is not sanctionable.

Respecting the alleged failure to have adequate supervisory procedures, a single scrivener's error in identifying a specific percentage for random Email review in one draft version of WSPs is correctable and should not result in disciplinary sanctions, enhanced fines and statutory disqualification; no regulator rule or guidance prohibits the use of templates in developing WSPs nor do they require a specific percentage be established for email compliance. Rather FINRA and SEC rules and guidance all propose that WSPs reflect procedures overall and email compliance that is reasonable given the size and nature of a firm's business.[132]

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[131] R. at 005151 (NAC Order at 15-17, 23).

[132] *See generally* FINRA Notice 07-59 (December 2007). The guidance states: "Members may chose to use a reasonable percentage . . . . There is no prescribed minimum or fixed percentage

In this case, a comprehensive and detailed WSP existed and Mr. North's practice of reviewing a ten or fifteen percent random sample was not doubted.[133] Only the frequency of the Email review was doubted, due to the content of the Smarsh Reports, which it is now known Smarsh could not have prepared because Smarsh does not own the server equipment to support the alleged SMC.[134]

Mr. North contends that the Smarsh Reports were contrived to reflect compliance failures in order to influence the FINRA Hearing and NAC Panels' perspective about Mr. North's intention to ensure the completeness and enforcement of the firm's WSP. There was no criticism respecting the WSP being otherwise complete and reasonable and enforced as to all other business operations and details. However, because the Smarsh Reports reflected a false picture of Mr. North's conduct, the panels succumbed to the wrong belief that Mr. North willfully avoided selecting a percentage in this one instance in this one draft WSP because he was not committed to and was avoiding compliance.[135]

Such a conclusory assessment was fostered by the contrived Smarsh Reports and caused the panels to reject Mr. North's objective in developing the 2010 WSP version for the firm—a genuine effort to put in place a better and more comprehensive set of rules.[136] Instead, inferences

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that is required by regulation." *Id.* at 13. Mr. North's practice of using a ten or fifteen percentage random sample was completely overlooked because of this apparent scrivener's error.

[133] Mr. North's believes that the Smarsh Reports were made to appear credible and otherwise unobjectionable to Mr. North because they were consistent with Mr. North's self-disclosed commitment to a fifteen percent random sample of Email.

[134] *See supra* discussion at 16-18.

[135] Although not addressed before the Hearing Panel, FINRA had requested all copies and drafts of the WSP, which were delivered as Word documents. Considering the manipulation of the Email and compliance records, Mr. North is left to wonder whether the singular flaw in the WSP was likewise created for him by an overzealous FINRA employee.

[136] R. at 002913 (Hr'g Tr. 349:22-351:3, April 14, 2015).

generated from the false Smarsh Reports, influenced the tenor of the panelists' questions and led both the FINRA Hearing and the NAC Panels to discredit Mr. North's testimony about his compliance practices as dishonest. Because the Hearing Panel did not believe him, it penalized Mr. North; because the NAC Panel had no evidence to the contrary, it punitively rendered enhanced penalties.[137]

## III. Mr. North did not willfully fail to report suspected misconduct.

### A. NASD and FINRA interpretations mean that Rule 3070(a)(9) does not apply to Mr. North.

FINRA also claimed that Mr. North failed to timely report an unlawful relationship between LK and TC.[138] From a practical perspective, whether Mr. North knew or had reason to know sufficient information to make a Rule 3070 report *on behalf of the firm* depended on his access to reliable information and the reasonable conclusions reached by the Southridge's management.[139] NASD notices provided little or no guidance on the interpretation or description of circumstances in which Rule 3070(a)(9) applies[140] and there is no litigated case on point.[141] Guidance with respect to the similar FINRA Rule 4350,[142] which the Hearing Panel concluded did not apply, provides the following:

> Regarding violative conduct by an associated person the provision *requires a firm* to report only conduct that has widespread or potential widespread impact on the firm, its

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[137] R. at 003355, 005151. (Hr'g Panel Order at 1; NAC Panel Order at 1).

[138] R. at 00001 (Compl. at 11-12). Mr. North based on Email review reported another broker. R. at 002913 (Hr'g Tr. 354:5-23, April 14, 2015).

[139] *See, e.g.*, R. at 003465 (CX-3 at 2-8).

[140] *See generally* NASD Notices to Members 94-95, 95-81, 96-85, 02-34, 03-23, 06-34 (1994-2006).

[141] There are significantly more AWC's than litigated matters on all issues.

[142] FINRA Regulatory Notice 11-06 at 2 (February 2011).

> customers or the markets; conduct that has a significant monetary result on a member firm(s); customer(s), or markets(s); or multiple instances of any violative conduct.

An associated person, according to the NASD By-Laws, is means:

> . . . a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member [firm], whether or not such a person is registered or exempt from registration.[143]

FINRA has applied a "reasonably should have concluded" standard to internal conclusions reached *by firms* about reporting according to Rule 3070, for purposes of compliance and interpret it to mean that "FINRA will rely *on the firm's good faith reasonable determination.*"[144] Further, it is the "*firm* that determines the person(s) within the firm responsible for reaching such conclusions, including the person's required level of seniority." Nothing in the advisory notice respecting Rule 4350 imposes on chief compliance officers the duty to investigate potentially noncompliant conduct or imposes on CCOs vicarious or strict liability when the *firm or an appropriate supervisor or principal of the firm has undertaken a reasonable investigation*[145] *and made a reasonable determination* that conduct is not reportable.

In this case, CEO WES was LK's direct supervisor. WES took over the duty to investigate and his conclusions were the determination of the firm.[146] In an appropriate balance of responsibility, the WSP places only the duty of reporting on Mr. North. Even though Mr. North is designated by the WSP to report Rule 3070 violations, it is the firm's duty according to FINRA to investigate and reach reasonable conclusions about reporting. CEO WES and LK's

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[143] NASD Bylaw, Article I (d).

[144] *See supra* note 142.

[145] *See, e.g.*, R. at 003465 (CX-3 at 2-8).

[146] *Id. See also* R. at 002913. (Hr'g Tr. 318:20-319:24; 321:6-322:25; 335:8-25; 409:24-410:6, Apr. 14, 2015).

other supervisors who investigated and supervised LK's activities concluded, as management that the services provided by TC to LK did not present a securities violation.

Mr. North believes that FINRA's argument that he is responsible under Rule 3070 is misplaced. FINRA may disagree with the investigation taken on by CEO WES and LK's other supervisors, and FINRA may disagree with their judgment and conclusions about reporting the LK-TC relationship, but it may not *ad hoc* impose on Mr. North duties that were not his because the firm is no longer registered with FINRA to answer for the failure. The panels also presumed facts not in evidence, i.e., that the member firm, Southridge, vis-à-vis LK, and LK or the firm knowingly associated TC, directly or indirectly controlled TC, or were controlled by TC, and that Mr. North had access to material but unidentified facts from unidentified sources and would have reached different conclusions than the firm's management.

### B. Timing, information delivery, ambiguity, rule transition, and FINRA's manipulation of the data are mitigating factors that relieved Mr. North of the duty to file a Rule 3070 report.

#### 1. FINRA's actions corrupted the most reasonable source of information.

FINRA failed to show any source of information to which Mr. North had alternate or reasonable access to have over-ridden the conclusion(s) reached by CEO WES and others that no Rule 3070(a)(9) violation occurred for the firm to report. Because it is now known that the Email archive and alleged SMC do not exist, the Email or the SMC queries as sources of information were not good sources of information for exposing securities violations. Had the content of Email revealed either an unlawful relationship between LK and TC or unlawful transacting, FINRA would have lobbied to have the Email designated relevant and admissible.

The Smarsh Reports allegedly derived from the SMC that does not exist also did not reveal information about the alleged relationship or securities violations FINRA's contends Mr.

North should have known about to report.[147] Had any random or keyword searches returned Email with content about the alleged relationship, Mr. North suggests that FINRA would have offered Email, Email content, and a set of Smarsh Reports showing such content.[148]

There was no evidence of voluntary disclosure to Mr. North from persons with actual knowledge or reliable information, such as third party brokers with whom LK transacted, LK herself, *and WES*, LK's supervisor.[149] The firm did not hire TC in 2009. Mr. North never met TC and did not know that TC and UTA were essentially the same until December 2010 when a Rule 8210 brought out the connections between TC, UTA, and LK.[150]

Mr. North contends that he reasonably relied on information available to him.[151] Even though invoices[152] contained last names of persons to whom TC allegedly introduced LK, Mr. North had no authority to intrude on the business or operations of other firms or their brokers to investigate what other brokers might know about alleged services LK received from TC; there was no evidence that it is a normal or accepted practice (or required by FINRA rules) for firms like Southridge to investigate brokers by calling a broker's other broker contacts.[153]

Unless a third party broker, or a customer, or one of Southridge's brokers complained or disclosed to Mr. North the relationship or evidence of an alleged breach or participation in securities law violations, or that Mr. North stumbled upon it himself, the only other sources of

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[147] R. at 002913 (Hr'g Tr. 335:8-339:12, Apr. 14, 2015).

[148] R. at 003583, 003601, 003611 (CX-13, CX-14, CX-16).

[149] *See, e.g.*, R. at 003619 (RX-13).

[150] R. at 002913 (Hr'g Tr. 323:2-334:23, Apr. 14, 2015).

[151] R. at 003465 (CX-3 at 7-8).

[152] R. at 003483 (CX-8).

[153] R. at 003465 (CX-3 at 5-6).

information respecting the allegedly reportable misconduct, in this case were the firm's Email, the electronic devices belonging to the alleged perpetrators, LK and TC, and third parties with whom LK and TC were dealing. Neither LK nor TC were subject to Mr. North's supervision or direct control, and both resided and worked in separate locations near Dallas, Texas a significant distance from Connecticut where Mr. North worked.[154] Also noteworthy is that the FINRA Hearing and NAC Panels recognized that Mr. North only learned about the contract and relationship between LK and TC's *company* because of FINRA's inquiry during a routine audit in or about March 2010, meaning that FINRA examiners and Mr. North learned about the contract at the same time.[155]

**2. The firm's management conducted the Rule 3070 investigation.**

During this same time the NASD and FINRA Rules were being consolidated; even so, no regulatory notice offers clear guidance for the geographical and practical constraints presented by circumstances in this case. After obtaining copies of the contract between LK's and TC's companies, unlike FINRA, which has the power of Rule 8210 inquiries, Mr. North was constrained by resources and management's direction and discretion in evaluating the circumstances. There was no evidence that Mr. North refused a direct command from management to make a Rule 3070 report. The Hearing Panel's indictment of Mr. North imposed an *ad hoc* obligation on CCOs to launch parallel investigations to second-guess the reasonableness and discretion exercised by firm's management in applying NASD Rule 3070(a)(9). FINRA guidance respecting the similar Rule 4350 and the Federal Register

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[154] R. at 003465 (CX-3 at 7-8).

[155] No caution or advisement was issued to Southridge after the audit. (Hr'g Tr. 321:6-322:6; 425:3-14, Apr. 14, 2015).

recognize that Rules 3070 and 4350 clearly require that "a *firm* must report to FINRA after the *firm* "knows or should have known of" reportable events.[156]

Even so, CEO WES questioned LK, cautioned her about her duties, and concluded no unlawful business or securities trading occurred.[157] FINRA presented no evidence that contradicted CEO WES's conclusions. In fact, Mr. North continued to provide information to FINRA in response to its multiple Rule 8210 requests that consumed twenty-five to forty percent of his time.[158]

The FINRA Hearing and NAC Panels ignored logic and mitigating factors:[159] there is no NASD publication addressing the circumstances that arose in this case; *FINRA guidance places the onus on firm management to determine reportability, not individuals or CCOs specifically* notwithstanding the Southridge WSPs putting the duty of filing the report on the CCO;[160] there was no evidence that any person disclosed LK's relationship with TC to Mr. North, verbally or in writing; LK made no disclosures in paperwork she prepared and delivered to Mr. North at or around the time she went to work with the firm;[161] CEO WES was LK's direct supervisor and he and her other supervisors performed the investigation for the firm about the LK-TC relationship with Mr. North's knowledge; it is apparent that SMC platform search did not retrieve Emails

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[156] Notice, 75 Fed. Reg. 69508-69514 (November 12, 2010).

[157] R. at 003465 (CX-3 at 5).

[158] R. at 002913 (Hr'g Tr. 411:4-412:14, Apr. 14, 2015).

[159] Coincidental to Mr. North learning that a contract and business relationship existed, the FINRA reporting rules were in flux and NASD Rule 3070 was ultimately replaced by FINRA Rule 4530 in 2010, effective July 1, 2011. Such rule changes, by their very nature result in periods of adjustment in policies, practices, interpretations, and applications, and, as in this case, *ad hoc* application. *See supra* note 142.

[160] R. at 003535 (CX-10 at 26).

[161] R. at 003619 (RX-13).

sent to or received from TC by LK or else FINRA would not have urged that the Email content was irrelevant to the Smarsh Reports and Mr. North's compliance actions; and when Mr. North made the connection that UTA and TC were the same, he was cooperating fully in providing documentation and responses to all verbal and FINRA Rule 8210's inquiries.

Mr. North asserts that the FINRA Hearing and NAC Panels ignored mitigating factors, because their views were poisoned by the misleading Smarsh Reports respecting Email compliance suggesting he shirked his duties and would lie about it. Mr. North's cooperation in providing information and documentation to FINRA that he, WES, and other of LK's supervisors obtained, was in substance, if not also in form, compliance with NASD Rule 3070, and less likely to result in duplication of effort and confusion.

### C. Mr. North's conduct was not willful for purposes of enhanced sanctions.

> Willfulness is usually understood to be contextual. ("Willful ... is a word of many meanings, and its construction [is] often ... influenced by its context.") (internal quotation marks omitted) In the context of the provision at issue here, we have rejected the knowledge and the reckless disregard standards and defined willfulness thus:
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> It is only in very few criminal cases that "willful" means done with a bad purpose. Generally, it means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.
>
> ...
>
> "[i]t has been uniformly held that 'willfully' in this context means intentionally committing the act which constitutes the violation" and rejected the contention that "the actor [must] also be aware that he is violating one of the Rules or Acts."[162]

[162] *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965).

The Hearing Panel found that Mr. North was willful in two respects: failing to file a NASD Rule 3070 report and failing to implement and enforce a reasonable WSP.[163] To have committed these acts of omission, presupposes that there were identifiable duties clearly imposed. The panels' conclusion of failure to file the Rule 3070 report, in absence of facts, presumed Mr. North willfully failed a duty to investigate LK's relationship with TC or his refusal to follow management's directive. In this case, as the above discussion demonstrates, FINRA's published interpretation of the reporting rule places the duty of investigation upon the firm and those persons designated by firm management.[164] It was not contradicted by any fact or evidence that the person designated by the firm to investigate LK and TC was CEO WES. The panels disbelieved Mr. North because the false Smarsh Reports infected their views of Mr. North's credibility and truthfulness. That Southridge management, *e.g.*, CEO WES and LK's other supervisors, reached the conclusion that no reportable misconduct occurred does not impose a duty or create a new duty upon Mr. North to find otherwise or convert following the direction of management into willful avoidance of a duty not clearly imposed by the circumstances, when he had no evidence to contradict management's findings.

The Hearing Panel seized upon the LK-TC contract having one signature (LK's) and the names of the companies including the words "asset" and "advisors"[165] as suggesting misconduct that imposed a separate duty upon Mr. North to commence an investigation of his own, speculating that Mr. North could do more or better in a parallel or duplicate investigation than the firm's CEO and LK's supervisors. Mr. North contends that neither FINRA rules nor the

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[163] R. at 003351, 005151 (NAC Order at 1, 21-22).

[164] *See* Notice, 75 Fed. Reg. 69508-69514 (November 12, 2010); FINRA Regulatory Notice 11-06 at 2-3.

[165] R. at 002913 (Hr'g Tr. 321:6-322:6, Apr. 14, 2015).

WSP imposed on him the duty to investigate the investigation by management or overrule its determination, and therefore, he did not willfully fail to report conduct that the firm's management in its reasonable assessment determined did not rise to that level. Because CEO WES and LK entered into AWCs and TC was not under FINRA supervision, their conduct was never adjudicated.

The willfulness finding respecting preparation of the WSP is equally disingenuous. It is true that Mr. North willfully completed a template prepared by an industry-accepted resource. However, neither the use of templates to create WSPs nor single scrivener's error in a document over 450 pages long is a willful act or omission deserving of statutory disqualification. The scrivener's error could have been due to a computer failure or a template flaw. There is no case imposing such harsh punishment for the use of a template or a single scrivener's error neither of which caused a direct rule violation or harm to the market, the firm or the general public. Considering the condition of the Email and the evidence that FINRA agents tampered with it, it is just as possible that the WSP document provided to FINRA was altered to fit FINRA's theory of misconduct.

## IV. The Maloney Act did not contemplate FINRA's abuse of process and power.

The Maloney Act provided a path for the SEC to delegate securities law enforcement to SROs, like FINRA.[166] However, the Maloney Act contemplated that approved SROs would *enforce* securities laws,[167] *not violate federal laws* to achieve prosecutions by whatever means the SRO might have at its disposal. Mr. North asserts that FINRA's misconduct in procuring Smarsh to intercept business and personal Email of his and of other Southridge brokers violated

[166] *See* Maloney Act of 1938, 15 U.S.C. § 78o-3 (2012).

[167] *Id.*

the mandates of the Maloney Act,[168] the ECPA,[169] and the fourth amendment to the U.S. Constitution.

Mr. North believes that the evidence in this case illustrates how FINRA has exerted tyrannical control over brokers and intruded upon the minute details and operations of their business—as an example, intercepting electronic communications without a warrant or other lawful authority.[170] Mr. North did not know that Smarsh did not have the intent or ability to archive Email or that Smarsh facilitated FINRA in intercepting all business and personal[171] communications of all registered brokers and employees of the Southridge firm (and later the Ocean Cross firm) because of the instructions delivered to each person by Smarsh from the time each broker was hired and given a firm email address.

FINRA has no discretion to violate federal law or the U.S. Constitution. This case illustrates how FINRA's control of the record allowed it to hide its misconduct and required extraordinary effort to uncover its misconduct. Mr. North asserts that FINRA is either an out-of-control SRO or it has a rogue group of actors who have disregarded all propriety; the SEC has a duty to stop FINRA's unlawful behavior. There was and is no "better good" served by FINRA procuring the interception of Email and related data vis-à-vis its arrangement with Smarsh.

### A. FINRA has no authority or immunity for its unlawful actions.

While Mr. North acknowledges that FINRA, as an SRO, is traditionally protected by immunity for prosecutorial and administrative actions, FINRA's actions towards the Email and

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[168] Maloney Act, 15 U.S.C. § 78o-3 (b)(8).

[169] *See supra* note 75 and accompanying text.

[170] *See, e.g.*, Amend. IV, U.S. Constitution.

[171] In other words, because personal Email was also intercepted and delivered to FINRA, FINRA employees knew about personal, social and family relationships, events, and plans.

alleged Smarsh Reports are not entitled to immunity because FINRA's conduct was not regulatory but illegal and unconstitutional. [172] The evidence shows that FINRA's conduct commenced as early as 2005 prior to there being probable cause to initiate an investigation, examination, or judicial proceeding against Mr. North or any registered members of Southridge and so, was not regulatory but criminal and tortious.

Mr. North anticipates that FINRA will argue that its prosecutors are privileged and absolutely immune for their conduct towards Mr. North. However, considering the origins of the immunity doctrines,[173] "immunity must be narrowly construed"[174] and it only applies to those acting *within the scope of the official duties of prosecutors* that immunity protects to ensure "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."[175] Mr. North emphasizes that absolute immunity[176] is

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[172] *North, et al v. Smarsh Inc., et al*, 160 F. Supp. 3d. 63, 88 (2015).

[173] After the enactment of 42 U.S.C. § 1983 (2012), the Supreme Court developed the common law of absolute and qualified immunity as a matter of public policy to protect certain classes of persons from the potential of frivolous litigation based on § 1983. The statute created a cause of action for damages against "[e]very person who, under the color of " state or local law, subjects "any citizen ... to the deprivation of any rights privileges, or immunities secured by the Constitution and laws" of the United States.

[174] *Weissman v. National Ass'n of Securities Dealers*, 500 F.3d 1293, 1297 (11th Cir. 2007) (NASDAQ's advertising activity was not an adjudicatory, regulatory, or prosecutorial function.) (citations omitted).

[175] *See Imbler v. Pachtman*, 424 U.S. 409, 427-31 (1976). It is noteworthy that legislators have absolute immunity for legislative functions, *Tenney v. Brandhove*, 341 U.S. 367, 372-373 (1951), but not for actions outside of the legislative function, however, such as the publication of official documents. *Gravel v. United States*, 408 U.S. 606, 625-26 (1972). Judges enjoy absolute immunity for judicial acts, but not for administrative acts, such as disparaging a campaign opponent in a political flyer or terminating a staff member or employee. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967).

[176] *Imbler* described the doctrine of qualified immunity is associated with investigative conduct and protects the actor—whether an investigator, examiner, law enforcement officer, or prosecutor—from liability for all other conduct not "intimately associated with the judicial

limited to conduct within the professional function the immunity was designed to protect,[177] applies to the judicial phase of a criminal process,[178] or regulatory action,[179] and it attaches when there is probable cause, for example, to arrest an identified defendant,[180] or as in the case of FINRA, probable cause to investigate a broker or a firm. Immunity also includes decisions about whether to prosecute,[181] suppress exculpatory evidence,[182] subpoena witnesses,[183] and witness testimony preparation.[184]

Immunity does not sanction violating federal law or the U.S. Constitution. None of the conduct Mr. North attributes to FINRA and Smarsh involves determinations, decisions, or conduct entitled to immunity. Immunity does not retroactively protect misconduct begun outside of a regulatory event or probable when the misconduct continues into a regulatory action.

### 1. The actions of FINRA and Smarsh violated the ECPA and U.S. Constitution.

Intercepting electronic communications violates the ECPA and the Fourth Amendment of the U.S. Constitution. Neither FINRA nor Smarsh have the privilege or right to intercept any

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phase" and when the person acted in good faith and without malice. *Imbler*, 424 U.S. at 430. Qualified immunity has been applied to performing investigative activities and decisions such as ordering the police to arrest certain suspects, *Day v. Morgenthau*, 909 F.2d 75, 77-78 (2d Cir. 1990) or to organized raids, *Hampton v. Hanrahan*, 600 F.2d 600, 632 (7th Cir. 1979).

[177] *Pierson*, 386 U.S. at 553-55.

[178] *Imbler*, 424 U.S. at 430.

[179] *In re Series 7 Broker Qualification Exam Scoring Litigation*, 548 F.3d 110, 114 (D.C. Cir. 2008); *Weissman*, 500 F.3d at 1296.

[180] *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993).

[181] *Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir. 1991).

[182] *Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir. 1986).

[183] *Betts v. Richard*, 726 F.2d 79, 81 (2d Cir. 1984).

[184] *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1243-45 (7th Cir. 1990).

person's email absent probable cause and a court order, subpoena, warrant, or other lawful authority. Neither FINRA nor Smarsh is above the law.

In this case, not only had FINRA *procured the interception* of the business Email of the Southridge brokers when they became registered at Southridge, but it had procured and was intercepting all forms of *personal and private communications* sent and received over the individuals' devices and delivering it to the private network without regard to the host or the communication media.[185] This interception disrupted the lawful chain of custody for all Email, which should have started at the contracted Email server for Southridge Tech (and Web.com for Ocean Cross); the interception and processing altered the Email, its metadata, and security, rendering it a questionable source for queries to produce the Smarsh Reports.[186]

**2. Mr. Huber's analysis confirms ECPA violations.**

Smarsh General Counsel Page's declaration[187] submitted as additional evidence, confirms Mr. Huber's conclusion, also submitted as additional evidence, that the settings users and Southridge Tech were instructed by Smarsh to make triggered interception of the Email and, that the interception occurred from individual devices—computers, iPhones, Smart Phones, Blackberries and the like. Mr. Huber confirms that the interception caused Email to bypass the destination and origination email servers hosted by Southridge Tech (and Web.com in the Ocean Cross matter), for immediate delivery of copies to the private network he identified. Mr. Huber's

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[185] *See generally* R. at 003755 (Exs. 1-5).

[186] *Id.*

[187] R. at 003755 (Ex. 7). Ms. Page's Declaration strongly suggests that statements made by Mr. Sherman *in Ms. Page's presence* during the evidentiary hearing in this case, R. at 002635 (Hr'g Tr. 56:24-156:25, Apr. 13, 2015) were deceptive and intended to promote the false presumption that Smarsh delivered the promised compliance services for admitting the Smarsh Reports. *See also* supra note 42 and accompanying text.

analysis confirms that FINRA agents changed the Email and created the Smarsh Reports, as Smarsh could not.

**a. There is no immunity or privilege for criminal or unconstitutional conduct.**

The Supreme Court has maintained the *Imbler* and *Buckley* distinctions for prosecutors acting within the scope of official prosecutorial duties after probable cause is established.[188] However, the cases also reason that immunity may give way when there are clear violations of statutory and constitutional law. In *al-Kidd v. Ashcoft*[189] the Supreme Court extended immunity because it was not shown that Attorney General Ashcroft violated a clearly established law. Likewise, in another Supreme Court case, the Court reversed the Fifth Circuit's conclusion that the district attorney's office was liable for failing to train staff respecting *Brady*[190] responsibilities, in part, because the prosecutor's office committed only one *Brady* violation. Mr. North urges that decisions in *Ashcroft* and *Thompson* suggest that the Court may have decided differently had al-Kidd demonstrated that the attorney general violated a clearly established law and had the district attorney's office and staff in *Thompson* committed multiple, substantial, due process *Brady* violations.

Consistent with *Buckley's* recognition that immunity attaches at the judicial phase of prosecution, *McGhee v. Pottawattamie Cnty., Iowa,*[191] held that the prosecutor was not immune for fabricating evidence *prior to filing formal charges. McGhee* is instructional because the facts demonstrate that FINRA's and Smarsh's unlawful actions commenced when Greenfield was

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[188] *Imbler*, 424 U.S. at 430; *Buckley*, 509 U.S. at 274.

[189] *al-Kidd v. Ashcoft*, 580 F.3d 949, 952 (9th Cir. 2009), *rev'd*, 563 U.S. 731, 740-743 (2011).

[190] *Thompson v. Connick*, 578 F.3d 293, 311 (5th Cir. 2009), *rev'd*, 131 S. Ct. 1350, 1366 (2011). *See also Brady v. Maryland*, 373 U.S. 83 (1963).

[191] *McGhee v. Pottawattamie Cnty., Iowa*, 547 F.3d 922, 933 (8th Cir. 2008).

operating,[192] and resulted in the interception of Mr. North's and other Southridge employees' Email contemporaneous to their employments with Southridge, *prior to probable cause existing for any regulatory actions against them.* Like *McGhee*, which involved the fabrication of evidence for later use in prosecutorial proceedings, Email and ESI in this case was being intercepted before FINRA commenced disciplinary proceedings, and the Email and ESI was processed and reconstructed into exhibits that resembled real Email and reports that falsely suggested compliance failures. Ironically, the greater compliance failure, *e.g.*, the failure to archive the Email was ignored, because, as the circumstances suggest, the failure was motivated by FINRA's and Smarsh's scheme to circumvent regulatory compliance archiving, intercept the Email, and fabricate prosecution evidence.[193]

**b. Immunity does not apply because FINRA's actions occurred outside of the boundaries of absolute or qualified immunity.**

Prosecutorial or absolute immunity extends to SROs like FINRA; "... when they perform their statutorily delegated adjudicatory, regulatory, and prosecutorial functions."[194] Importantly, however, it is consistent with the caution to narrowly construe immunity "[w]hen an SRO is not performing a purely regulatory, adjudicatory, or prosecutorial function, but rather acting in its own interest as a private entity, absolute immunity from suit ceases to obtain."[195]

*Weissman* highlights two critical points respecting immunity: an SRO like FINRA enjoys immunity when "engaged in conduct consistent with the quasi-governmental powers delegated to

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[192] *See supra* notes 7-9, 91 and accompanying texts.

[193] *See supra* note 105.

[194] *Weissman*, 500 F.3d at 1296; *Barbara v. New York Stock Exch.*, 99 F.3d 49, 59 (2d Cir.1996); *Austin Mun. Sec., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 692 (5th Cir.1985); *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1215 (9th Cir. 1998); *Zandford v. Nat'l Ass'n of Sec. Dealers, Inc.*, 80 F.3d 559, 559 (D.C. Cir. 1996).

[195] *Weissman*, 500 F.3d at 1297.

it ...." but that immunity applies "only when an SRO is "*acting in its capacity as a[n] SRO.*"[196] *Weissman* emphasized that immunity does not apply "*whenever*" SROs engage in conduct that is simply "*consistent with*" their powers.[197] Mr. North urges that it is not consistent with an SRO's authority to violate the law and initiate regulatory action in which the SRO's absolute control over the record allows it to cover up its illegal conduct.

Mr. North contends that the plan to intercept Southridge employee Email in violation of the ECPA occurred outside of a regulatory proceeding and because it was implemented as early as 2005 there was no probable cause for prosecutorial action. Therefore, the plan to intercept the Email and it and related records before a regulatory event was not implemented in good faith nor was it done without malice; therefore, there is no immunity for FINRA or indirectly for Smarsh.[198] The interception and destruction of Email, its security, and encryption, interfered with and sabotaged Mr. North's and the firm's efforts in compliance—from the requirement to archive to the duties to review Email for content and report violations of law.

## V. CONCLUSION

FINRA's hands are unclean; its employees broke the law to obtain "evidence", corrupted the evidence that they unlawfully obtained, then acted with deception and without regard for truth in contriving the Complaint against Mr. North, suborning perjury from Smarsh witness(es),

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[196] *Id.*

[197] *Id.* (emphasis added).

[198] Mr. North believes that Smarsh's statements that Smarsh provided the email server, services and archiving for Ocean Cross, were intended to make it appear that it was an electronic communications service provider or ECS. *North 2* Compl. ¶¶ 16, 17, 22, 32, 55, ECF No. 1-0. The Stored Communications Act, 18 U.S.C. §§ 2701-2712 (2012) immunizes any ECS for accessing email on its own servers. *In re Yahoo Email Litigation*, 7 F. Supp. 3d 1016, 1026-27 (N.D. Cal. 2014). In this case, neither Smarsh nor FINRA is an ESC, and immunity as an ESC does not apply. In addition, neither Smarsh nor FINRA is an Internet Service Provider or ISP.

and presenting its case before the FINRA Hearing and NAC Panels. Consistent with federal law addressing such extreme failures in evidence, the Hearing Officer should have dismissed FINRA's complaint against Mr. North and insisted on an investigation into whether Smarsh was a trusted source or reliable third party archiving entity and to what extent FINRA was involved.

But for errors in the admission and rejection of evidence and the biases demonstrated by the rulings and tenor of the panelists questions the outcome of the proceedings would have been different. In addition, due to FINRA's unlawful and unconstitutional conduct, it is in the interest of justice that the Complaint against him and all sanctions imposed by FINRA Hearing Panel and the NAC Hearing Panel must be reversed and dismissed with prejudice. He further requests that FINRA be charged with his costs and attorney's fees, and that the SEC commence investigation into the SRO's management, operations, and other activities, beginning with the persons involved in this prosecution, who, by their conduct, have demonstrated they have first hand knowledge of the illegal arrangements between FINRA and Smarsh.

Respectfully submitted this 12th day of June 2017 for THADDEUS J. NORTH

by: _____

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**CERTIFICATE OF WORD COUNT**

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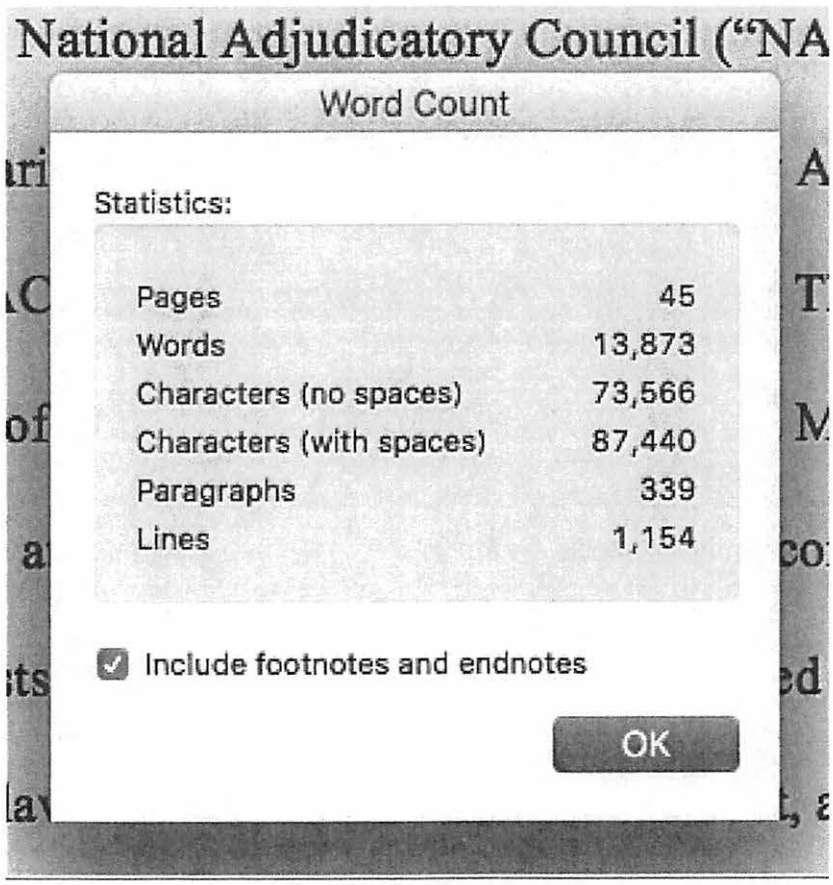


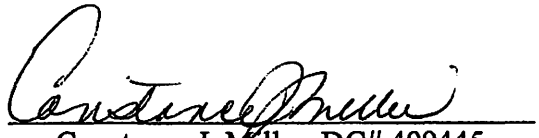
## CERTIFICATE OF SERVICE

Notice is hereby given that on this 12 day of June 2017, undersigned Counsel sent the foregoing Opening Brief of Thaddeus J. North before the Securities and Exchange Commission, In the Matter of Thaddeus J. North, by certified first class USPS mail to the following:

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

Attention: Megan Rauch
FINRA Office of General Counsel
1735 K Street, NW
Washington, DC 20006

For THADDEUS J. NORTH

by: 

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