UNITED STATES OF AMERICA
BEFORE THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

SCOTTSDALE CAPITAL ADVISORS CORPORATION, JOHN J. HURRY, TIMOTHY B. DIBLASI, AND D. MICHAEL CRUZ

For Review of Disciplinary Action Taken by FINRA

3-18612

OPENING BRIEF FOR APPEAL OF JOHN HURRY

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John Hurry appeals the decision of the National Adjudicatory Council ("NAC") dated July 20, 2018 in FINRA Complaint No. 2014041724601. FINRA's Department of Enforcement ("Enforcement") brought a single charge against Mr. Hurry, namely that he personally violated Section 5 of the Securities Act of 1933 ("Securities Act"). The NAC declined to conclude that Mr. Hurry violated Section 5 but instead found that he had acted unethically in violation of FINRA Rule 2010 for having engaged in perfectly lawfully activity that included such things as creating a broker-dealer in the Cayman Islands, using FaceTime on his iPhone to make telephone calls, and having a practice of writing "Privileged" in email communications with his lawyer. Although Enforcement never alleged that Mr. Hurry had violated FINRA Rule 2010 for those reasons, the NAC nevertheless permanently barred Mr. Hurry from associating with any FINRA member firms.

This case thus boils down to a very basic question: May FINRA impose the equivalent of its death penalty against a person based upon a theory of liability that was not charged in the complaint, argued in any prior briefing, or advanced during the hearing? Of course, the answer must be "no." Concluding otherwise would violate the statutory requirement for FINRA to provide a fair disciplinary process, conflict with legal precedent, and contradict basic notions of common sense.

On August 6, 2018, the Commission granted Mr. Hurry's motion to stay the effectiveness of the bar because he raised "serious legal questions" as to whether FINRA provided him with appropriate notice of the allegation that now forms the basis of the NAC's decision. The Commission should take the next logical step and dismiss the NAC's findings of liability and sanctions against Mr. Hurry.

I. STANDARD OF REVIEW

When a broker-dealer appeals the disciplinary findings of a self-regulatory organization ("SRO"), the Commission conducts an independent review of the record.[1] The Commission must overturn the SRO's decision if a preponderance of the evidence does not support its findings.[2] Even if the Commission affirms the factual findings of the SRO, it may reduce or cancel the sanctions as it sees fit.[3]

II. EXECUTIVE SUMMARY

Mr. Hurry co-founded Scottsdale Capital Advisors ("SCA"), which is a market-leading broker-dealer in microcap-securities trading. Mr. Hurry has been active in the securities industry for over twenty-five years and has a spotless disciplinary record.[4] Enforcement alleges that, between December 2013 and June 2014 (the "Relevant Period"), a number of foreign financial institutions ("FFIs"), on behalf of their own customers, deposited and unlawfully sold unregistered stock at SCA through Cayman Securities Clearing and Trading SEZC Ltd. ("CSCT"), a Cayman Islands-based broker-dealer that Mr. Hurry established. Enforcement alleged a small fraction of those deposits that SCA accepted and sold violated Section 5, which prohibits the sale of unregistered securities absent an exemption. Enforcement's sole charge against Mr. Hurry was that he personally violated Section 5 by being a substantial and necessary participant in the allegedly improper sales of unregistered stock for three issuers. By virtue of those alleged

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[1] *In re Lane & Lane*, Exchange Act Rel. No. 74269, 2015 WL 627346, at *5 (S.E.C. Feb. 13, 2015), *In re Cespedes*, Exchange Act Rel. No. 59404, 2009 WL 367026, at *6 (S.E.C. Feb. 13, 2009).
[2] *Id.*
[3] 15 U.S.C. § 78s(e)(2).
[4] For purposes of efficiency, we will not repeat all of the facts from Mr. Hurry's Motion to Stay Sanctions and Incorporated Memorandum of Points and Authorities in Support that was filed with the Commission on July 23, 2018 ("Motion to Stay").

violations, Enforcement contended that Mr. Hurry violated FINRA Rule 2010 which requires that associated persons "observe high standards of commercial honor and just and equitable principles of trade." FINRA R. 2010.

Although personal liability under Section 5 is evaluated under a well-established framework, the Hearing Panel imposed Section 5 liability on Mr. Hurry by using its own self-created standard. Presumably in recognition of the Hearing Panel's error, the NAC declined to impose liability on Mr. Hurry for Section 5 and instead *sua sponte* applied an uncharged theory of liability against Mr. Hurry supposedly premised on Rule 2010 and upheld his permanent bar.

The disparity between the evidence and legal arguments presented to the NAC and the substance of its decision evidences a fundamentally negative bias and an unfair process reflective of the extraordinary lengths to which the highest levels of FINRA is willing to go to try to get Mr. Hurry out of the industry. By way of background, shortly before the commencement of this matter, Mr. Hurry had sued FINRA for its egregious conduct in a prior investigation in which FINRA filed no charges.[5] Shortly thereafter, Mr. Hurry and Michael Cruz, one of the other Petitioners in this matter, met with the Commission about establishing a competing SRO. In light of the post-hoc theories of uncharged conduct that the NAC has created out of whole cloth in an effort to bar Mr. Hurry, the timing of these various events seems far from coincidental. FINRA has gone too far and the Commission needs to exercise is supervisory authority to restore rationality to this process.

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[5] Mr. Hurry sued FINRA in November 2014, six months before Enforcement issued the Complaint in this matter. *Compare* Compl. ¶ 1, *Hurry v. FINRA*, No. 2:14-cv-02490 (D. Ariz. Nov. 10, 2014), *with* Compl. at 1 (FINRA 000001). The Commission may take official notice of the fact and status of Mr. Hurry's litigation against FINRA, and the allegations in the suit, as these facts are reflected in court records. SEC Rule of Practice 323 (providing that official notice may be taken of any material fact that can be judicially noticed by a district court of the United States); *see also Gen. Elec. Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081-82 (7th Cir. 1997) (court records are judicially noticeable).

Not only is the NAC's decision rife with factual errors and flawed legal conclusions based on theories and arguments that Enforcement never raised, but the NAC also relied upon improperly admitted and untrustworthy hearsay evidence from an individual who none of the Petitioners in this matter ever had an opportunity to cross-examine and who has now been found to be mentally incompetent. Finally, as an independent ground for reversal, FINRA lacks the statutory authority to bring enforcement actions for alleged violations of the Securities Act, including Section 5.

The NAC abdicated its role as a check on the Hearing Panel, and its deeply flawed and concerning approach to executing the judicial functions of an SRO demands that the Commission reverse its findings and vacate the NAC's decision.

III. THE NAC IMPROPERLY PREMISED LIABILITY ON AN UNCHARGED THEORY

A. The Sole Charge Against Mr. Hurry Was An Alleged Violation Of Section 5

As explained in Mr. Hurry's Motion to Stay, there can be no real dispute that Enforcement's only charge against Mr. Hurry was that he was a necessary participant and substantial factor in an alleged Section 5 violation. Indeed, the heading of the *sole claim* against Mr. Hurry states, in bold, small-caps font:

FIRST CAUSE OF ACTION
UNREGISTERED SECURITIES – SALES OF
(VIOLATIONS OF FINRA RULE 2010 BY SCOTTSDALE AND HURRY)[6]

The Complaint goes on to allege in *four separate paragraphs* that Mr. Hurry was a "necessary participant and substantial factor" in the allegedly violative sales of unregistered securities.[7] FINRA grossly overreached with this charge, though, as none of the evidence linked Mr. Hurry to

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[6] Complaint at 26 (FINRA 000032).
[7] Complaint at ¶¶ 2, 5, 152, 157 (FINRA 000007-8, 9, 34, 35).

any of the transactions at issue. The Hearing Panel ignored this fatal flaw in Enforcement's case and nevertheless imposed Section 5 liability on Mr. Hurry by applying its own newly-created theory of liability that was in blatant contravention of settled federal law.

Not even the NAC could countenance the Hearing Panel's disregard of the law. But instead of doing the right thing and dismissing the charges against Mr. Hurry, the NAC decided to swap out the Hearing Panel's newly-created theory for individual Section 5 liability, and instead sanctioned Mr. Hurry based on uncharged theories that Enforcement *never* advocated during the hearing (or in any related briefing).

The NAC's basis for sanctioning Mr. Hurry had absolutely nothing to do with Section 5. Indeed, the NAC (correctly) did not conclude that Mr. Hurry had violated Section 5. Instead, the NAC decided to bar Mr. Hurry "regardless of whether Hurry was a necessary participant or substantial factor in the unlawful sales of [the three issuers]."[8] Aside from the inherent unfairness of barring an individual based on a previously unarticulated theory, the facts the NAC pointed to in support of its decision involve entirely legal conduct.

In connection with the Motion to Stay, Enforcement attempted to justify the NAC's sudden shift by pointing to cherry-picked portions of the NAC Decision, claiming that they match the charges in the complaint against Mr. Hurry. Specifically, Enforcement pointed to the fact that the Complaint references Mr. Hurry's (1) establishment of CSCT, (2) "delegation of responsibility" to Mr. Ruzicka, and (3) "indirect ownership of, and ability to exercise control over," CSCT, SCA, and Alpine.[9] While those statements are in the Complaint, the Complaint made no suggestion that those alleged facts were, themselves, an independent basis for liability. There is a vast difference

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[8] NAC Decision at 76 (FINRA 010906).
[9] FINRA Opp. Br. 9, 10 (FINRA 011062, 63).

between referencing something in a recitation of facts and identifying something as a wrongful act upon which liability may be imposed. However Enforcement tries to dress this up, the reality is that, as described above, the Complaint contained a single charge against Mr. Hurry—his alleged necessary and substantial participation in supposed Section 5 violations.

To be sure, the Complaint itself reflects the deficiencies in Enforcement's desperate reasoning. Those "three facts" that Enforcement touted in its opposition to the Motion to Stay are referenced in a single paragraph in the section charging Mr. Hurry with the sale of unregistered securities, and the remaining *fourteen paragraphs* in that section meticulously lay out the elements of a Section 5 claim.[10] These paragraphs include the allegations that (1) "the Rule 144 safe harbor and the Section 4(a)(1) exemption . . . could not be relied upon *by Hurry* . . . because the sales were part of a plan or scheme to evade the registration requirements of the Securities Act," (2) "the Section 4(a)(4) exemption is unavailable to . . . *Hurry* because [he *and* SCA] failed to conduct reasonable inquiries of the circumstances surrounding the [subject] deposits," and (3) "*Hurry* was a necessary participant and substantial factor in the [subject] sales" and "played a significant role in the[ir] occurrence."[11] Even the one paragraph seized on by Enforcement centers on Section 5: "It was foreseeable that CSCT, through its account at Scottsdale, would *sell unregistered shares* of microcap stocks in *transactions that were not exempt from registration* . . . ."[12]

Enforcement's actions during the Hearing Panel proceedings further demonstrate that the theory of liability charged and pursued against Mr. Hurry was grounded in Section 5. When Mr. Hurry filed a motion for summary disposition, arguing that he could not be held liable for any Section 5 violation because he was not a "necessary participant and substantial factor" in the

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[10] *See* Complaint ¶¶ 143-57 (FINRA 000032-35).
[11] *Id.*
[12] *Id.* at ¶154 (FINRA 000034-35).

subject transactions,[13] Enforcement opposed that motion, insisting it "c[ould] prove that Hurry was a necessary participant and substantial factor in the microcap stock liquidations at issue" and arguing for fifteen pages that "genuine issues of material fact regarding Hurry's role in the liquidations preclude summary disposition."[14] Nothing in Enforcement's opposition suggested that there were other grounds for imposing liability on Mr. Hurry, and certainly not for the reasons upon which the NAC premised its decision. The Hearing Officer denied that motion because "Hurry's level of involvement" was in dispute."[15]

At the hearing, Enforcement both opened and closed with the assertion that Mr. Hurry "was a necessary participant and a substantial factor" in the "Section 5 violations," going so far as to urge the Hearing Panel in closing to "find [Mr. Hurry] *liable under Section 5*.[16] The titles of Enforcement's headings in its post-hearing brief are similarly telling: "Enforcement Proved that SCA and Hurry Participated in a Distribution of Unregistered Securities, and Respondents Failed to Establish that an Exemption from Registration Applied (Count I)"; "Hurry Provided Substantial Assistance Facilitating the Firm's Section 5 Violations"; and "Hurry Personally Monitored, and Was Involved in, CSCT's Day-to-Day Activities and the Panel Should Find that He Participated in Any Transactions Involving CSCT Customers' Liquidations at SCA."[17] Remarkably absent are arguments that there were reasons other than the alleged Section 5 violations that should serve as a basis for imposing liability on Mr. Hurry.

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[13] Respondents' Motion for Summary Disposition at 13–18 (FINRA 000523–28); Respondents' Reply at 6–11 (FINRA 001094–11).
[14] DOE's Opposition to Motion for Summary Disposition at 10–25 (FINRA 000735–50).
[15] Order Denying Motion for Summary Disposition at 11–12 (FINRA 001455–56).
[16] Tr. 37:8–13 (FINRA 002375); Tr. 2811:23–2812:1 (FINRA 002811–12) (emphasis added); Tr. 2815:17–19 (FINRA 005212).
[17] DOE's Post-Hearing Brief at 41, 46 (FINRA 009498, 9503).

Clearly, per the Complaint, the prior briefing, and the focus of the hearing, Enforcement's sole basis for seeking liability against Mr. Hurry was that he had personally violated Section 5. Mr. Hurry logically mounted a defense dedicated to establishing that he had no connection to the transactions at issue—a defense that, in light of the NAC's decision, was ultimately successful. FINRA has now conceded that the conduct alleged in its own charging instrument and found by the NAC is "***not a direct violation of Section 5***."[18]

B. The *Post Hoc* Theory the NAC Conjured Up Violates the Exchange Act's Fairness Requirement

The undeniable variance between the sole charge against Mr. Hurry in the Complaint and the NAC's *post hoc* theory is a flagrant violation of the Exchange Act's guarantee of fairness in FINRA proceedings. *See* 15 U.S.C. § 78o-3(h)(1) (requiring that SRO disciplinary proceedings be fair).[19] One cannot reasonably conclude that a person should be barred from the securities industry for engaging in perfectly legal conduct that FINRA never alleged constituted a rule violation. Doing so would unquestionably violate the fundamental concepts of basic fairness that the Exchange Act requires for disciplinary proceedings.

C. The Commission Routinely Vacates FINRA Attempts to Impose Sanctions Based Upon Uncharged Theories of Liability

The Commission has not hesitated to vacate FINRA sanctions predicated on uncharged theories of liability. *See James W. Browne*, Exchange Act Release No. 58916, 2008 WL 4826020,

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[18] FINRA Op. Br. 13 (FINRA 011066)(emphasis added).

[19] FINRA's Rules of Procedure authorize Enforcement to move to amend the complaint, "including amendments so as to make the complaint conform to the evidence presented," so long as Enforcement shows "good cause" and no respondent will "suffer unfair prejudice." FINRA R. 9212(b). Enforcement never made such a motion, nor would there have been a proper basis for granting one.

at *1, *10–11 (Nov. 7, 2008) (reversing FINRA's finding of liability where a disparity arose between the complaint and the evidence presented at the hearing because '[w]e cannot know how [the respondent's] defense of [the charge] might have changed or been augmented if Enforcement had given [him] notice with more specific charges" of its theory of liability); *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 WL 2597567, at *1, *3–4 (July 1, 2008) (reversing FINRA's findings of unauthorized trades in certain customer accounts where the complaint did not charge violations in those accounts and Enforcement did not request findings of violations in those accounts); *cf. D.E. Wine Invs., Inc.*, Exchange Act Release No. 43929, 2001 WL 98581, at *4 (Feb. 6, 2001) (reversing ALJ's finding of liability based on a variance between the charged violations and the found violations because '[w]e will not now apply a standard that was neither initially charged nor fairly litigated at the hearing").

The Complaint plainly alleged only a Section 5 violation against Mr. Hurry. The NAC ultimately agreed that Enforcement failed to prove that violation. The NAC found Mr. Hurry liable on a fundamentally different and uncharged cause of action. These facts are undeniable, and reversal is the only cure for this flagrant violation of Mr. Hurry's rights.

D. The NAC Had To Ignore Substantial Evidence To Support Its Uncharged Theory

1. Mr. Hurry Created CSCT for Tax-Driven Reasons

Putting aside the fundamental unfairness of the NAC's shift to an uncharged theory, a review of the record shows that the NAC *still* had to ignore the relevant evidence to support that theory. The NAC's uncharged theory revolves around Mr. Hurry's creation and control of CSCT,

and the notion that CSCT only existed to insulate SCA from regulatory scrutiny.[20] The NAC pointed to Mr. Hurry's ownership of CSCT, SCA, and Alpine Securities Corporation ("Alpline"), a broker-dealer that provides clearing services to SCA and other broker-dealers, and the resulting "vertical[] integrat[ion]" of those businesses, along with Gregory Ruzicka's (who ran CSCT) alleged lack of directly relevant experience, as evidence of a supposed plan to conduct business beyond the reach of the federal securities laws.[21] The NAC was unable to identify any actual or even alleged wrongdoing by CSCT.

Had the NAC instead focused on the facts, it would have arrived at the conclusion that nothing about the structure, operation, or existence of CSCT is unlawful, illegitimate, or somehow unethical. The fact is that Mr. Hurry established CSCT for legitimate business purposes: Alpine, SCA's clearing firm, was no longer accepting foreign business other than through qualified intermediaries.[22] Multiple witnesses confirmed this fact, *including Alpine's CEO*, and nothing contradicted it.[23] To address this issue, Mr. Hurry founded CSCT, which went through the

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[20] *See*, NAC Decision at 83 (FINRA 010913).

[21] *Id.*; *see also id.* at 1, 15-16, 76 (FINRA 010831, 010845-46, 010906)

[22] "A qualified intermediary (QI) is any foreign intermediary (or foreign branch of a U.S. intermediary) that has entered into a qualified intermediary withholding agreement with the IRS. . . . [T]he QI assumes primary withholding responsibility and primary Form 1099 reporting and backup withholding responsibility for a payment." *Miscellaneous Qualified Intermediary Information*, IRS.gov, https://www.irs.gov/businesses/international-businesses/miscellaneous-qualified-intermediary-information (last updated Aug. 4, 2016).

[23] Tr. 305:23–306:5, 316:1–2 (Day 2) (Cruz) (FINRA 002643–44, 002654); Tr. 563:1–9 (Day 3) (Cruz) (FINRA 002902); Tr. 861:17–20 (Day 4) (Diekmann) (FINRA 003200); Tr. 1117:3–10 (Day 5) (Noiman) (FINRA 003457); Tr. 1642:21–1644:18 (Day 7) (Hurry) (FINRA 003983–85); Tr. 2346:2–23 (Day 10) (Frankel) (FINRA 004689).

significant and lengthy IRS application and approval process to become a qualified intermediary.[24] CSCT also retained KPMG to fulfill the mandatory qualified intermediary audit process.[25]

The NAC's theory then is that somebody who wants to run a sham company to engage in illicit activity would voluntarily subject themselves to IRS scrutiny and select one of the "Big Four" accounting firms to audit its compliance with complicated regulations. Indeed, if the goal was to prevent regulators from accessing information, one would not set up shop in the Cayman Islands, a jurisdiction that has had a robust Memorandum of Understanding with the Commission providing for the exchange of information.[26] The Decision's silence on these points is a testament to the NAC's aversion to engaging with the facts.

2. The Creation of CSCT Did Not Change Any of SCA's Work or Result in Moving Documents Outside of FINRA's Reach

Contrary to the NAC's unsupported statement that Mr. Hurry established CSCT so that SCA could "evade regulatory scrutiny,"[27] none of SCA's work related to approving a microcap stock deposit for sale in the U.S. was transferred to CSCT. SCA still performed the same due diligence, gathered the same documents and information, and asked the same follow-up questions. The creation of CSCT did not shift any diligence outside of the U.S. or beyond the reach of U.S. regulators, as the NAC claims. Indeed, there is no evidence in the record or findings in the Hearing Panel or NAC decisions that the use of CSCT resulted in SCA not having information that it

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[24] Tr. 1373:17–22 (Day 6) (Hurry) (FINRA 003714); Tr. 1552:7–19, 1553:5–9 (Day 7) (Hurry) (FINRA 003893–94); *see* CX-22 at 1–7 (FINRA 005523–29); RX-33 at 3, 12–17, 50–51 (FINRA 009149, 009158–63, 009196–97).
[25] Tr: 1553:16–19 (Day 7) (Hurry) (FINRA 003894).
[26] Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Supervision of Cross-Border Regulated Entities, Cayman Is.-U.S., March 9, 2012.
[27] NAC Decision at 83 (FINRA 010913).

otherwise would have had. The quality and quantity of information available to regulators remained the same. The only change brought about by the creation of CSCT—indeed, the entire reason for CSCT's creation—was the easing of tax withholding complications and tax deferral. The notion that Mr. Hurry created CSCT in order to help SCA evade regulatory scrutiny is not supported by any facts.

3. Hiring Gregory Ruzicka to Manage CSCT was a Reasonable Business Decision

The NAC then reasoned that Mr. Hurry must have had bad intentions with respect to CSCT because he hired Gregory Ruzicka to manage the firm. The NAC unfairly based this belief on the fact that, at the time, Mr. Ruzicka was an out-of-work attorney who had been experiencing some personal issues. Looking beyond that, Mr. Ruzicka was also a lawyer with a long history of founding and running his own law firm with multiple attorneys, which provided him with valuable insight into being entrepreneurial and managing a business.[28] He had two masters degrees, one of which was a Master of Laws in Taxation (LLM), and held himself out as having extensive investment knowledge.[29] He even represented Mr. Hurry for several years prior to his job at CSCT, so Mr. Hurry knew him and had confidence in him.[30] Mr. Ruzicka also spent months studying the nuances of Rule 144-related issues before starting at CSCT.[31] Indeed, hiring Mr. Ruzicka to run

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[28] Tr. 1574:24–1575:5 (Day 7) (Hurry) (FINRA 003915–16).
[29] Tr. 1575:8–11, 1575:20–1576:6 (Day 7) (Hurry) (FINRA 003916–17); *see* CX-29 at 15 (FINRA 005659).
[30] Tr. 1366:17 (Day 6) (Hurry) (FINRA 003707); Tr. 1574:24–1575:7 (Day 7) (Hurry) (FINRA 003915–16).
[31] CX-29 at 15 (FINRA 005659); RX-59 at 1 (FINRA 009403); Tr. 1575:16–1577:11 (Day 7) (Hurry) (FINRA 003916–18). Mr. D'Mura agreed that Mr. Ruzicka was intelligent and well qualified for his position. Tr. 2262:18–24, 2276:16–18 (Day 10) (D'Mura) (FINRA 004605, 004619).

CSCT at that time was a reasonable and logical decision and certainly one over which Mr. Hurry was entitled to exercise his own personal business judgment.

Nowhere in this voluminous record is there a document or witness testimony stating that Mr. Hurry hired Mr. Ruzicka for nefarious purposes. Whether the NAC thought it was a wise decision, whether the members of the NAC would have run their own company differently, or whether Mr. Hurry could have hired somebody with a different background, is irrelevant to any pertinent analysis in this matter.

4. Mr. Hurry's Email Practices and Usage of FaceTime Were Not Unethical

The NAC inexplicably transformed perfectly legal and normal email and cell phone usage into supposedly unethical conduct worthy of bar from the industry. An objective review of the facts demonstrates the absurdity of the NAC's conclusion.

One of the bases of the NAC's decision was Mr. Hurry's practice of marking his emails with attorneys as "attorney–client privileged," even though many of them turned out not to be privileged. The NAC held that this was evidence that he was trying to hide something, although the NAC never specified what "something" was.[32] This is nonsensical—Mr. Hurry is a non-lawyer with no legal training, let alone expertise on the nuances of attorney–client privilege. He would be far from alone in thinking that the concept of privilege is broader than it is.

Importantly, and ignored by the NAC, is the fact that Mr. Hurry produced all non-privileged emails irrespective of whether he had written "privileged" on them.[33] During the investigation, his counsel even provided Enforcement with a privilege log for emails over which

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[32] NAC Decision at 82 (FINRA 010912).
[33] Tr. 1380:1–14, 1453:5–6, 1455:3–11 (Day 6) (Hurry) (FINRA 003721, 003794, 003796); Tr. 1544:7–16, 1605:3–1607:17 (Day 7) (Hurry) (FINRA 003885, 003946–48).

he asserted privilege, and Enforcement took no issue with the log.[34] Thus, Mr. Hurry used lawyers to review his emails to determine whether they were, in fact, privileged and to produce the non-privileged emails. These are not the actions of a man trying to hide something. Nor are these actions that can credibly be interpreted as unethical conduct warranting the death penalty from the securities business.

The NAC also found that Mr. Hurry acted unethically because he used FaceTime on his iPhone.[35] The use of FaceTime is commonplace. Yet the NAC believed that it was somehow a means for Mr. Hurry to conceal his participation in CSCT, presumably because FaceTime calls do not appear on telephone bills.[36] Of course, this ignores the well-known fact that iPhones maintain a log of FaceTime calls. The NAC's theory simply cannot be taken seriously.

The real explanation for this practice, and the only explanation supported by all of the evidence on the issue, is that Mr. Hurry used FaceTime as a means of making free international video and audio communications.[37] FaceTime is a modern technology that provides a low-cost alternative for making international audio and video calls, and there is no law, rule, or regulation prohibiting its use.

The NAC found it suspicious that Mr. Hurry occasionally called Mr. Ruzicka and then had Mr. Ruzicka patch in customers using a speakerphone on a landline. Mr. Hurry explained that was a simple means of facilitating conference calls as he did not know how to do so from his iPhone.[38] Not knowing how to add additional parties to a call on a cell phone is a common issue and is by

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[34] CX-176 at 1–3 (FINRA 006163–65).
[35] NAC Decision at 82 (FINRA 010912).
[36] *Id.*
[37] Tr. 1541:4–14 (Day 7) (Hurry) (FINRA 003882); CX-178 at 68:3–4, 70:22–25 (FINRA 006234, 006236).
[38] Tr. 1541:4-14, 1541 :23-1542: 14 (FINRA 003882-83)

no means unique to Mr. Hurry.[39] In any event, Mr. Ruzicka confirmed that the few times those conference calls happened, they generally were unrelated to CSCT business.[40] Noticeably absent from the NAC's finding on this issue was any explanation of what improper or unethical purpose was supposedly achieved by conducting conference calls in this manner.

Finally, the NAC also faulted Mr. Hurry for using a CSCT email address that did not contain his name, as though it was part of an elaborate scheme to conceal his identity within the company.[41] Mr. Hurry's email address at CSCT was "x@csct.ky". Tellingly, though, the NAC was unable to cite to any authority that requires one to include one's name in a company email address. There are no such FINRA or SEC regulations, and Petitioners are unaware of any portion of the United States Code that requires such an email address. Similarly, there are no allegations or documents that indicate that Mr. Hurry tried to hide his name or conceal his identity from any regulatory authority. In fact, he provided an eminently reasonable and benign explanation for this email choice—he wanted a short email address that would only be used for internal CSCT business.[42] He did not want outsiders to have access to the email address, unless it was explicitly provided to them.[43] And when FINRA asked Mr. Hurry for his CSCT email address, Mr. Hurry provided it to them along with his emails; Mr. Hurry never tried to hide anything from FINRA or anybody else.

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[39] *See, e.g.*, *Can't Merge FaceTime Audio Calls*, AppleVis (July 22, 2015) *available at* https://www.applevis.com/forum/ios-ios-app-discussion/cant-merge-facetime-audio-calls (last visited October 4, 2018).
[40] CX-178 at 126:14–17, 126:20–24, 127:3–18 (FINRA 006292–93).
[41] NAC Decision at 82 (FINRA 010912).
[42] Tr. at 1459:21-1460:4 (FINRA 003800-01).
[43] *Id.*

IV. MR. HURRY CANNOT BE FOUND LIABLE FOR SECTION 5 VIOLATIONS

It is not surprising that the NAC opted not to uphold the Hearing Panel's findings of Section 5 liability with respect to Mr. Hurry given the incredibly stringent standards for imposing such liability and the dearth of any evidence to get there. The standard for participatory liability under Section 5 is understandably very high: before liability can attach, an individual's "role in the transaction must be a significant one." *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1255 (9th Cir. 2013) (quoting *SEC v. Murphy*, 626 F.2d 633, 648 (9th Cir. 1980)). "Defendants play a significant role when they are both a 'necessary participant' and 'substantial factor' in the sales transaction." *Id.* (quoting *SEC v. Phan*, 500 F.3d 895, 906 (9th Cir. 2007)). This means that the defendant's acts must "be a substantial factor in bringing about the transaction." *Murphy*, 626 F.2d at 650–51. As a result, "[a] participant's title, standing alone, cannot determine liability under Section 5, because the mere fact that a defendant is labeled as an issuer, a broker, a transfer agent, a CEO, a purchaser, or an attorney, does not adequately explain what role the defendant actually played in the scheme at issue." *CMKM Diamonds*, 729 F.3d. at 1258.

Despite more than two weeks of testimony and hundreds of exhibits presented to the Hearing Panel, there is not a shred of evidence that Mr. Hurry had any role in the relevant transactions. Mr. Cruz, Mr. Diekmann, Mr. D'Mura, and even Mr. Ruzicka himself, all confirmed that it was Mr. Ruzicka, not Mr. Hurry, who ran the daily operations of CSCT.[44] All that Enforcement could do was introduce into evidence numerous emails between Mr. Hurry and Mr. Ruzicka regarding such non-substantive issues as office furniture, internet providers, and the firm's website design.

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[44] Tr. 575:23–576:9 (Day 3) (Cruz) (FINRA 002914–15); Tr. 759:23–25 (Day 4) (Diekmann) (FINRA 003098); Tr. 2271:5–2273:7 (Day 10) (D'Mura) (FINRA 004614–16); CX-178 at 38:18–19, 55:7–10, 56:6–9 (FINRA 006204, 006221–22).

Both the Hearing Panel and the NAC believed that these communications showed Mr. Hurry was involved in the day-to-day management of CSCT, and that he therefore must have been aware of the transactions at issue. That is flawed logic. As Mr. Hurry explained, November 2013 through January 2014 was a "transitional period" for CSCT that required Mr. Hurry's periodic involvement to finish issues that started before Mr. Ruzicka's hiring and to pass the torch to Mr. Ruzicka.[45] Of the 56 emails from the Relevant Period admitted into the record, 45 were sent before January 30, 2014. Only 11 were sent between February 1, 2014 and June 30, 2014. Once deposits began arriving at CSCT and Mr. D'Mura arrived in the Cayman Islands to assist Mr. Ruzicka, Mr. Hurry's emails dropped dramatically. There were four emails in February; five emails in March; no emails in April; one email in May; and one email in June. This sudden drop in traffic is indicative of the fact that Mr. Hurry was involved in the administrative set-up of CSCT, and nothing more. Section 5 liability simply cannot be premised on a few emails coordinating office furniture and selecting cable packages.

Mr. Cruz, Mr. Diekmann, Mr. D'Mura, and Mr. Ruzicka further confirmed that Mr. Hurry did not ask them about any particular deposit requests or to reconsider any rejections.[46] This is especially notable because Mr. Ruzicka estimated that he rejected approximately 80% of the deposits he reviewed, including roughly 50% of the deposits from the FFIs that submitted the five deposits for the three issuers that Enforcement contended violated Section 5.[47] For deposits that passed through Mr. Ruzicka's and Mr. D'Mura's review, SCA then rejected an additional 46%.[48]

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[45] Tr. 1550:18-1551:5 (Day 7) (Hurry) (FINRA 003891–92).
[46] Tr. 149:12–15 (Day 1) (Cruz) (FINRA 002487); Tr. 573:6–574:14 (Day 3) (Cruz) (FINRA 002912–13); Tr. 1822:23–1823:5 (Day 8) (Diekmann) (FINRA 004164–65); Tr. 2304:16–25, 2318:18–22 (Day 10) (D'Mura) (FINRA 004647, 004661); CX-178 at 76:16–21, 85:11–18, 85:24–86:15 (FINRA 006242, 006251–52).
[47] CX-178 at 92–93 (FINRA 006258–59).
[48] *See* RX-40 at 2 (FINRA 009256).

Despite all of these rejections, there is absolutely no suggestion that Mr. Hurry ever complained or asked the reviewers at CSCT or SCA to do anything differently.

Even more, there is not a single document relating to the stocks in question with Mr. Hurry's name anywhere on it. To find liability against Mr. Hurry, one must indulge Enforcement's wild speculation, disregard the complete lack of evidence, and ignore every fact witness, including Enforcement's own two witnesses (Mr. Ruzicka and Mr. D'Mura). Given the absence of any link between Mr. Hurry and the transactions at issue, there is no legal basis for Section 5 imposing liability. Even the NAC ultimately agreed with that conclusion.

V. THE NAC AND THE HEARING PANEL ADMITTED PREJUDICIAL AND UNRELIABLE EVIDENCE

The Hearing Officer improperly admitted, and the NAC improperly factored into its decision, patently unreliable hearsay that prejudiced Petitioners' right to a fair proceeding.

A. The NAC and The Hearing Panel Improperly Admitted and Selectively Credited Mr. Ruzicka's OTR

Prior to the filing of the Complaint, Mr. Ruzicka provided an OTR to Enforcement. Counsel for Petitioners was not present and therefore did not have the opportunity to cross-examine him. Mr. Ruzicka did not testify at the hearing. Thus he has never been subject to cross-examination in this matter. Over Petitioners' objections, the Hearing Officer admitted Mr. Ruzicka's OTR into evidence. Entering the OTR into evidence was improper. The error was not harmless as the Hearing Panel and the NAC used selected excerpts from the OTR to justify their decisions.

B. Mr. Ruzicka's Demonstrated Bias Against Mr. Hurry and Multiple Prior Contrary Statements Rendered His OTR Unreliable

Hearsay evidence, such as an OTR, must be found to be reliable before it can be admitted into evidence. Mr. Ruzicka had a demonstrably strong bias against Mr. Hurry that rendered his OTR unreliable. For instance, after declining to appear voluntarily for an OTR, he reconsidered the day after he received notice that his Cayman work permit would be canceled—a development he blamed on Mr. Hurry.[49] As Mr. Ruzicka then told Enforcement, he wanted to testify against "our common foe."[50] At his OTR, he acknowledged that he "didn't particularly care for [Mr. Hurry]" or his wife;[51] he repeatedly expressed hostility towards Mr. Hurry;[52] and he portrayed himself as a "fall guy" with a clear incentive to shift blame for any alleged securities law violations to Mr. Hurry and the other Petitioners.[53]

Such acknowledged hostility and bias should have resulted in the exclusion of the OTR transcript because Mr. Ruzicka's statements cannot be presumed to be reliable. *See e.g.*, *Gary L. Greenberg*, Exchange Act Rel. 28076, 1990 WL 1104065, at *3 (June 1, 1990) (discrediting

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[49] RX-35a (FINRA 009217) (indicating the request to cancel Mr. Ruzicka's Cayman work permit was on April 13, 2015); RX-83b at 4 (FINRA 009412) (indicating that Mr. Ruzicka agreed to speak with FINRA investigators on April 15, 2015).

[50] Tr. 1585:9–1586:2, 1590:3–10 (Day 7) (Hurry) (FINRA 003926–27, 003931); Tr. 2227:17–24, 2228:25–2229:7 (Day 9) (Byrne) (FINRA 004569, 004570–71); *see* RX-35A (FINRA 009217); RX-83B at 1 (FINRA 009409).

[51] CX-178 at 30:1, 127:23–24 (FINRA 006196, 006293).

[52] *See id.* at 159:9–25 (FINRA 006325) (describing a dispute with Mr. Hurry as a "caning" that caused "life [to be] hell for about 90 days"); *id.* at 231:7–22 (FINRA 006397) (alleging that Mr. Hurry abruptly terminated his residential lease in the Cayman Islands and describing this as "the last straw"); *id.* at 232:3–8 (FINRA 006398) (claiming that he declined other positions Mr. Hurry offered him because he "did not want to work any long[er] for that man").

[53] *See id.* at 274:17–19 (FINRA 006439) ("I was just betrayed and just played for a fool, fall guy in this thing."); RX-83b at 1 (FINRA 009409) ("I have come to a conclusion to be fully cooperative out of conscious [*sic*] but was advised to seek a 'Statement of non prosecution', in the event this ramps to Federal charges. In light of what I have to offer it seems not unreasonable to ask for a place of 'safe haven' until this process concludes.").

hearsay due to "possible bias . . . resulting from the fact that [the respondent] named [the declarant] as a defendant in a wrongful termination action"); *Dep't of Mkt. Regulation v. Jaloza*, Compl. No. 2005000127502, 2009 WL 2424485, at *17 (NAC July 28, 2009) (same, where the declarant was "not on good terms" with the respondents' firm); *Dep't of Enforcement v. White,* Disciplinary Proceeding No. 2012033128703, 2015 WL 5782974, at *15 (OHO June 30, 2015) (same, where the respondent testified that the declarant "had a personal vendetta" against him because he had sued the declarant for fraud, "may have tried to shift blame" to the respondent "to place himself in a more favorable light" before FINRA, and "was 'still extremely upset and bitter' at [the respondent]" when he executed his declaration); *Dep't of Enforcement v. Rieu,* Disciplinary Proceeding No. C9A980032, 1999 WL 33261822, at *4 (OHO Aug. 26, 1999) (same, where the declarant testified that he was "jealous" of the respondent and referred to him as "this son of a bitch"). Indeed, the mere prospect of such strong bias demands the safeguard of cross-examination. *See Richard G. Strauss*, SEC Release No. 31222, 1992 WL 252168, at *4 (Sept. 22, 1992) ("We need not conclude that such motivations existed. It is enough to note that, at the very least, [the respondent] deserved to explore those possibilities through cross-examination.").

Further, even Enforcement had to acknowledge during Mr. Ruzicka's OTR that his testimony was incoherent and inconsistent.[54] Mr. Ruzicka also contradicted his OTR testimony in a sworn affidavit.[55] These numerous contradictions provide yet another reason why the OTR

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[54] *See* CX-178 at 83:12–91:7 (FINRA 006249) (attempting to clarify inconsistent testimony regarding requests for reconsideration of rejected deposits by CSCT customers, SCA staff, and/or Mr. Hurry); *id.* at 268:12–274:22 (FINRA 006434–40) (conceding "some inconsistencies" between Mr. Ruzicka's first and second statements to Enforcement and affording Mr. Ruzicka "the opportunity to explain why" those discrepancies existed).

[55] *Compare* CX-178 at 104:5–22 (FINRA 006270) (claiming that Mr. Hurry referred Montage, Titan, and Unicorn to CSCT), *with* RX-110 (FINRA 009417) (swearing in affidavit that Mr. Hurry did not refer those customers to CSCT). Even Mr. Ruzicka's OTR was not consistent on this point, as Mr. Ruzicka later claimed that only Titan and Unicorn had been referred by Mr. Hurry, and Mr.

should have been excluded from evidence. *See Jaloza*, 2009 WL 2424485, at *17 (declining to credit "incoherent," "rambling," and "internally inconsistent" OTR testimony); *Rieu*, 1999 WL 33261822, at *4 (same, given the "'back and forth' character" of the declarant's testimony, "noted by the interrogator herself").

Despite this overwhelming evidence of unreliability, though, the Hearing Officer admitted the entire OTR transcript.[56] With respect to conflicting statements he gave in his OTR and a prior interview, the Panel simply concluded that Mr. Ruzicka "still felt 'beholden' to [Mr.] Hurry" when he gave his first statement,[57] when in fact Mr. Ruzicka *never gave that explanation.*[58] To the contrary, Mr. Ruzicka unequivocally stated that he had been "coy" and "cautious" when he first spoke with Enforcement, and Enforcement did not pursue the issue further.[59] The Panel should not have ignored this red flag.

In addition, the Panel dismissed an affidavit in which Mr. Ruzicka contradicted his OTR testimony regarding the means by which certain FFIs became customers of CSCT.[60] Mr. Ruzicka's willingness to sign a false affidavit should have raised serious doubts about the reliability of Mr. Ruzicka's OTR and his propensity for truthfulness. *See Rieu*, 1999 WL 33261822, at *4 (declarant's "admitted indifference to truth and to legality" rendered hearsay unreliable). Mr. Ruzicka admittedly lied to Enforcement at least once, either in his initial interview

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Ruzicka "got" the Montage account "partially on [his] merit." CX-178 at 203:6–204:13 (FINRA 006369–70).

[56] Tr. 1303:8–1305:12 (Day 6) (FINRA 003644–46); *see also* Original Decision at 62 (FINRA 009774); Amended Decision at 62 (FINRA 010368).

[57] Original Decision at 62 & n.366 (FINRA 009774) (citing Tr. 1298 (FINRA 003639) (remarks of counsel)); Amended Decision at 62 & n.366 (FINRA 010398) (citing Tr. 1298 (FINRA 003639) (remarks of counsel)).

[58] *See* CX-178 at 268:12–274:22 (FINRA 006434–40).

[59] *Id.* at 269:4–11, 272:23–273:12 (FINRA 006435, 006438–39).

[60] Original Decision at 63 (FINRA 009775); Amended Decision at 63 (FINRA 010369).

or at his OTR (or both). If one were to believe the Hearing Panel's view of the affidavit, then Mr. Ruzicka's sworn affidavit was also an outright lie. In these circumstances, given the manifest unreliability of Mr. Ruzicka, both the admission of the OTR and the weight accorded to it were contrary to federal and administrative case law. *See Jaloza*, 2009 WL 2424485, at *17.

C. The Hearing Panel and the NAC Chose Only to Believe the Portions of the OTR that were Negative About Mr. Hurry

Compounding the problem of admitting the OTR into evidence, the Hearing Panel wholly ignored the critical aspects of the testimony that directly refuted any notion that Mr. Hurry was involved in the approval process for any stock deposits, let alone the deposits in question.[61] This type of cherry-picking is fundamentally unfair. And the NAC did nothing to address these serious issues. Even though it would be the right (and logically sound) thing to do, the NAC has not acknowledged and credited the testimony that Mr. Ruzicka (and Mr. D'Mura while he worked at CSCT)—not Mr. Hurry—made all of the decisions about whether to forward a stock deposit to SCA for its consideration and additional due diligence, that Mr. Ruzicka rejected most deposit requests from the FFIs in question, and that Mr. Hurry never asked him to reconsider a rejection.[62]

Despite the NAC's assertion that they considered the "possible bias of the declarant" and "whether the statements are contradicted by direct testimony," it is clear that they did not engage in any form of critical analysis on this point.[63] The lack of thought by the NAC is evidenced by its statement that it deferred to the Hearing Panel's assessment of Mr. Ruzicka's demeanor[64]

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[61] *See, e.g.*, CX-178 at 55:7–10, 62:3–13, 75:3–10, 76:16–21, 85:13–14 (FINRA 006221, 006228, 006241, 006242, 006251).
[62] *See* CX-178 at 85:24–86:15, 90:15–91:7, 92:3–93:13 (FINRA 006251–52, 006256–57, 006258–59).
[63] NAC Decision at 92 (FINRA 010922).
[64] *Id.* at n.190 (FINRA 010922).

despite the fact that 1) the Hearing Panel made *no* assessment of his demeanor and 2) the Hearing Panel could not have made any assessment of his demeanor, as Mr. Ruzicka never appeared before them. The NAC's reasoning on this point is based on a fabrication.

As a result of these errors, the only material statements that contradicted Mr. Hurry's testimony, and the primary evidence used against Mr. Hurry here, comes from unreliable and inconsistent *ex parte* testimony from an individual that neither Mr. Hurry nor the other Petitioners ever had an opportunity to cross-examine.

D. Mr. Ruzicka's Progressive Mental Deterioration and Ultimate Declaration of Mental Incompetence Underscores the Unreliability of his OTR

As further evidence that Mr. Ruzicka's OTR is unreliable, after the hearing Mr. Ruzicka was charged with felony second-degree robbery and was subsequently declared mentally incompetent by a court in California. This is the culmination of a slow mental decay that casts significant doubt over Mr. Ruzicka's competency at the time that he provided his OTR testimony.

Mr. Ruzicka had several communications with Enforcement prior to appearing for an *ex parte* OTR, during which time he provided a number of materially conflicting and irreconcilable statements concerning Mr. Hurry. For example, in his initial statement to Enforcement, Mr. Ruzicka described Mr. Hurry as uninvolved in CSCT's operations; but the day after he received notice that his Cayman work permit would be canceled, Mr. Ruzicka reached out to Enforcement and voluntarily agreed to appear for an OTR to testify against "our common foe."[65] Mr. Ruzicka's pre-OTR comments were also scattered and exhibited Mr. Ruzicka's paranoia and

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[65] Tr. 1585:9-1586:2, 1590:3-10 (Hurry) (FINRA 003926-27, 003931); Tr. 2227:17-24, 2228:25-2229:7 (Byrne) (FINRA 004569, 004570-71); see RX-35A (FINRA 009217); RX-83B at 1 (FINRA 009409).

delusions of grandeur.[66] In an email to FINRA Counsel Aimee Williams-Ramey dated April 19, 2015—roughly one month before his OTR—Mr. Ruzicka wrote: "Motivation still to right wrongs, cynically, your sincerity subject to proof. Many respected friends say my 'martyrhood' inclination is insane. Disagree, though with increasing trepidation. If I step up, my life changes forever. Very high stakes games. Past blue smoke and mirrors .... "[67] Further, and as referenced above, Mr. Ruzicka contradicted his own OTR testimony in a sworn affidavit, and even Enforcement had to admit that Mr. Ruzicka's OTR was incoherent and inconsistent.[68]

Mr. Ruzicka has now been arrested and charged with felony robbery,[69] was ordered to undergo a psychiatric evaluation in connection with those proceedings,[70] and was subsequently found to be a "mentally incompetent person" under California Penal Code § 1367(a).[71] Further, his criminal case was consolidated with a host of other outstanding charges against him, including 1) obstructing or intimidating a business or its customers; 2) refusing or failing to leave land when ordered by a peace officers upon the owner's request; 3) petty theft; 4) resisting a public or peace officer; 5) urinating or defecating in a public place; and 6) trespass or occupation by a squatter.[72] These charges are characteristics of homelessness, mental illness, and desperation, and directly undercut the reliability of Mr. Ruzicka's OTR in this matter.

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[66] *See* RX-83b at 1-5 (FINRA 009409-12).
[67] *Id.*
[68] Supra note 55.
[69] Respondents' Motions for Leave to Introduce Additional Evidence, Exhibit B (FINRA 010783).
[70] *Id.* at Exhibit A (FINRA 010781).
[71] Respondents' Supplemental Motions for leave to Introduce Additional Evidence , Exhibit A (FINRA 010809).
[72] Respondents' Motions for Leave to Introduce Additional Evidence, Exhibit C (FINRA 010786-97).

This evidence alone calls into question the NAC's substantial reliance on Mr. Ruzick's testimony. Petitioners intend to file a motion with the Commission to introduce an expert report on whether Mr. Ruzicka had begun his mental decline at the time of his OTR.

VI. FINRA DOES NOT HAVE THE AUTHORITY TO IMPOSE SANCTIONS PREDICATED ON SECTION 5

Perhaps one of the reasons the NAC tried to avoid addressing the Section 5 allegations against Mr. Hurry is because the Petitioners have been advocating that a plain English reading Sections 15A and 19(g) of the Securities Exchange Act of 1934 ("Exchange Act") make clear that FINRA does not the statutory authority to administer discipline with respect to the Securities Act, including Section 5. The causes of action in the Complaint against Mr. Hurry and the other Petitioners are all wrongly predicated on FINRA having a general police power over Section 5. FINRA does not have the requisite statutory authority to bring such charges. Therefore, the Commission should reverse the NAC's findings and vacate any liability or sanctions imposed upon on Mr. Hurry and the other Petitioners.

A. Exchange Act Sections 15A and 19(g) Together Limit FINRA's Disciplinary Authority with Respect to the Federal Securities Laws to Violations of the Exchange Act

FINRA is a creation of the Exchange Act. *See Fiero v. FINRA*, 660 F.3d 569, 571–72, 577 (2d Cir. 2011) (describing the limits of FINRA's authority under the Exchange Act and holding that FINRA is not statutorily empowered to bring judicial actions to enforce disciplinary fines). As a registered securities association and self-regulatory organization, FINRA's disciplinary authority is governed by Sections 15A and 19 of the Exchange Act. *See* 15 U.S.C. §§ 78o-3, 78s.

Sections 15A(b) and 15A(h) use identical language to cabin the disciplinary jurisdiction of registered securities associations. *See id.* § 78o-3(b)(2) (association must "ha[ve] the capacity to

. . . enforce compliance" by its members and associated persons "with the provisions of *this chapter*, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, and the rules of the association" (emphasis added)); *id.* § 78o-3(b)(7) (association's rules must provide that its members and associated persons "shall be appropriately disciplined for violation of" the same listed authorities); *id.* § 78o-3(h)(1)(B) (association's disciplinary sanctions must "be supported by a statement setting forth . . . the specific provision" of the same listed authorities the respondent has violated). Section 19(g) similarly requires a self-regulatory organization to "comply with the provisions of *this chapter*, the rules and regulations thereunder, and its own rules" and empowers it to "enforce compliance[,] in the case of a registered securities association, with *such provisions* . . . by its members." *Id.* § 78s(g)(1)(B) (emphasis added). The term "this chapter" in Sections 15A(b), 15A(h), and 19(g) refers to the chapter of the United States Code where FINRA's enabling legislation appears: Chapter 2B of Title 15 of the Code—the Exchange Act.

B. Exchange Act Section 19(h) Empowers the SEC Alone to Discipline FINRA Members for Violating the Securities Act

Consistent with this framework, Section 19(h) specifically names the SEC as the only regulatory body with statutory authority to sanction members of registered securities associations and self-regulatory organizations (i.e., FINRA-member broker-dealers and associated persons) for violations of the Securities Act and other federal securities laws. *See* 15 U.S.C. § 78s(h)(3) (authorizing "[t]he appropriate regulatory agency for a national securities exchange or registered securities association" to impose sanctions, "in the case of a registered securities association," for violations of "any provision of the Securities Act of 1933"); *see also id.* § 78s(h)(2) (same, for "[t]he appropriate regulatory agency for a self-regulatory organization").

Section 3 of the Exchange Act, in turn, defines the "appropriate regulatory agency" for a registered securities association as the SEC. *Id.* § 78c(a)(34)(E). The difference between the express grants of disciplinary authority in Sections 15A(b), 15A(h), and 19(g), on one hand, and Section 19(h), on the other, is striking. While the SEC may sanction broker-dealers for violations of any of the federal securities laws enumerated in section 19(h), FINRA is strictly limited to sanctioning its members for violations of the Exchange Act.

Indeed, when Congress added Section 19 to the Exchange Act in 1975, it used the phrases "the Securities Act of 1933" and "the securities laws"—a term Section 3 defines to include the Securities Act, the Exchange Act, and the Investment Company Act of 1940, among other federal laws, *id.* § 78c(a)(47)—in numerous provisions *other than* those relating to registered securities associations and self-regulatory organizations like FINRA.[73] In the subsections relating to FINRA's jurisdiction, Congress opted neither to list the Securities Act by name, as in Section 19(h), nor to use Section 3's inclusive shorthand. This confirms a specific Congressional intent to limit FINRA's disciplinary authority to violations of the Exchange Act.

To interpret Sections 15A and 19 as functionally equivalent despite their starkly different language would violate fundamental principles of statutory construction. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *see also Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) ("Our practice . . . is to 'give effect, if possible, to every clause and word of a statute.'").

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[73] *See, e.g.*, Securities Acts Amendments of 1975, Pub. L. No. 94-29, sec. 17(3), § 21(g), 89 Stat. 97, 155 (1975).

Unsurprisingly, federal appellate decisions interpreting the scope of FINRA's statutory mandate have been sensitive to these considerations and have accorded controlling weight to the text and structure of the Exchange Act, including its discrepant grants of authority to the SEC and FINRA. *See, e.g.*, *Fiero*, 660 F.3d at 574–77. In *Fiero*, the Second Circuit reversed the dismissal of a federal complaint seeking a declaration that FINRA lacked statutory authority to bring judicial actions to collect disciplinary fines. *Id.* at 573. Importantly, the court contrasted the Exchange Act's grant of "express statutory authority [to] the SEC to seek judicial enforcement of penalties" with the statute's conspicuous silence regarding FINRA, and it rejected the notion that "the seemingly inexplicable nature of a gap in the FINRA enforcement scheme . . . support[ed] an inference of inadvertent omission." *Id.* at 574–76. The same reasoning applies here: Congress "was well aware of how to grant an agency" disciplinary authority over the Securities Act, and its decision not to grant FINRA such authority merits respect, especially given the internal logic of the statutory scheme. *Id.* at 575–76.

C. FINRA Rule 2010 Does Not Confer a General Police Power on FINRA

While Sections 15A and 19 of the Exchange Act authorize FINRA to discipline its members for violations of the organization's own rules, those sections are not the broad grant of authority. The provision delineating the permissible scope of an association's rules presents a clear limiting principle: The rules cannot be "designed to . . . regulate by virtue of any authority conferred by this chapter matters not related to *the purposes of this chapter* or the administration of the association." 15 U.S.C. § 78o-3(b)(6) (emphasis added). This unambiguous language forecloses any claim by FINRA to a general police power over the securities industry. And, contrary to what FINRA may suggest, no judicial decision has squarely resolved the scope of

FINRA's jurisdiction with respect to the Securities Act in the wake of the 1975 amendments to Section 19 of the Exchange Act.

To the extent FINRA attempts to cobble together authority supporting its position,[74] the Supreme Court's recent *Cyan* decision renders those efforts nugatory. The Supreme Court left no doubt that, when interpreting the federal securities laws, as in every statutory context, the actual text of the statute prevails over imputed legislative intent and even longstanding practice: "This Court has long rejected the notion that '*whatever* furthers the statute's primary objective must be the law.' Even if Congress could or should have done more, it still 'wrote the statute it wrote—meaning, a statute going so far and no further." *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1073 (2018).

FINRA's limitless interpretation of Rule 2010 cannot be reconciled with the text and structure of the Exchange Act. Concluding that Rule 2010 enables FINRA to unilaterally grant itself authority to police all aspects of the federal securities laws would nullify the jurisdictional limits set forth in the Exchange Act and disrupt the clear restraints that Congress has imposed on FINRA's authority in the regulation of securities markets. *Cf. Fiero*, 660 F.3d at 574–77.[75]

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[74] *See, e.g.*, FINRA's Opp. To John Hurry's Motion to Stay at 12-13 & n.13 (FINRA 011065-66). None of the decisions cited by FINRA have resolved the question presented here—namely, whether FINRA's disciplinary authority reasonably may be interpreted to reach the Securities Act despite the unequivocal textual limitations in the Exchange Act. *See KCD Fin. Inc.*, Exchange Act Release No. 80340, 2017 WL 1163328, at *4 (Mar. 29, 2017) (petitioners made no jurisdictional argument, and Commission conducted no statutory analysis); *ACAP Fin., Inc.*, Exchange Act Release No. 70046, 2013 WL 3864512, at *7 (July 26, 2013) (petitioners conceded the violation); *Midas Sec., LLC*, Release No. 66200, 2012 WL 169138, at *11 n.63 (Jan. 20, 2012) (no statutory analysis).

[75] Indeed, even if Congress's words were not clear enough, its intent is plain. Given that FINRA lacks jurisdiction over issuers of securities, the Commission alone can gather the evidence necessary to investigate violations of the Securities Act, which often turn on information in the issuer's sole possession. The limits of FINRA's authority are on full display in this case—FINRA could not compel any of the subject issuers to produce evidence relating to the charged transactions, making the case all about FINRA's inferences, however unreasonable they may be,

D. FINRA Never Went Through the Required Rulemaking Process

Even if the Commission were to conclude that FINRA has the statutory authority to impose discipline predicated upon violations of Section 5, FINRA needed to go through the statutorily mandated public notice and comment process and obtain Commission approval before it could be permitted to exercise that authority. That never happened.

SROs, such as FINRA, are required to file with the Commission notice of any proposed rule changes, and the Commission, in turn, must publish such notice and solicit comments about the proposed rule change. 15 U.S.C. § 78s(b)(1). "No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection." *Id.* Any change in the interpretation, policy, or practice of an SRO is a proposed rule change unless it is "reasonably and fairly implied by an existing rule of the self-regulatory organization" or is concerned only with the administration of the SRO, and is not a policy, practice, or interpretation with respect to the meaning or enforcement of an existing rule of the SRO. 17 C.F.R. § 240.19b-4(c).

FINRA's interpretation of Rule 2010 to encompass violations of the Securities Act, including Section 5, is a "rule change" that required proper notice and comment. Rule 240.19b-4(c) presumes that *any* change in an SRO's interpretation, policy, or practice is a "rule change" under the applicable legislation. FINRA Rule 2010 simply reads: "a [FINRA] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." FINRA R. 2010. Nothing in this rule contemplates Section 5 of the Securities Act, so any interpretation that considers a violation of Section 5 to be a violation of Rule 2010

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and denying Mr. Hurry and the other petitioners the opportunity to disprove those inferences through third-party discovery.

would necessarily be a change. *See General Bond & Share Co. v. SEC*, 39 F.3d 1451 (10th Cir. 1994) ("[T]he establishment of a new standard of conduct . . . must be considered a rule change under any common sense definition of that term.") (internal quotations omitted).

Case law further confirms this conclusion. In *General Bond & Share Co*, 39 F.3d 1451 (10th Cir. 1994), the 10th Circuit considered whether the NASD could sanction a broker-dealer under the NASD's general ethical rule for violating a prohibition on accepting issuer-paid compensation for making a market in that issuer's security, when that interpretation of the general ethical rule had never been approved by the Commission. *Id.* at 1454. Even though the NASD provided notice to all of its members regarding its new interpretation of the general ethical rule, the NASD never sought or received approval of the new rule from the Commission. *Id.* 1457-58. The court found that the type of conduct covered by the interpretive expansion was not the "type of conduct [that is] so inherently deceptive that a ban against it was clearly implied by the [general ethical rule]," and ruled that the NASD could not enforce it until it received proper approval by the Commission. *Id.* at 1459-60.

VII. THE SANCTIONS ARE EXCESSIVE

Even if the Commission were inclined to conclude incorrectly that Mr. Hurry violated FINRA Rule 2010 by acting unethically, the sanctions imposed compared to the conduct cited by the NAC, all of which was legal, can only be viewed as punitive. FINRA sanctions must be remedial, not punitive. *McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005) The NAC has decided to impose FINRA's equivalent of the death penalty against Mr. Hurry despite that fact that the NAC did not identify a single substantive violation of the securities laws. Barring Mr. Hurry for establishing a foreign broker-dealer for tax purposes that has not been accused of wrongdoing, writing "privileged" in his emails with attorneys and ultimately producing to FINRA any such

emails that were not privileged, and using FaceTime on his iPhone cannot credibly be described as being remedial in nature.

Moreover, recent Supreme Court precedent calls into question whether a permanent bar can be considered remedial, which changes the SEC's analysis of whether such a bar is "excessive or oppressive." *See, e.g.*, *Saad v. SEC*, 873 F.3d 297, 304–07 (D.C. Cir. 2017) (Kavanaugh, J. concurring) (discussing the impact of *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), on whether FINRA bars are punitive or remedial). In *Kokesh*, the Supreme Court ruled that disgorgement paid to the government is a "penalty" because "[s]anctions imposed for the purpose of deterring infractions or public laws are inherently punitive because deterrence is not a legitimate nonpunitive governmental objective." 137 S. Ct. at 1643. Applying this ruling in the securities context, Judge Kavanaugh explains that the expulsion of an individual from the securities industry "does not provide anything to the victims to make them whole or to remedy their losses," and thus is a penalty under the Supreme Court's ruling. *Saad*, 873 F.3d at 305.

The bar against Mr. Hurry should be vacated.

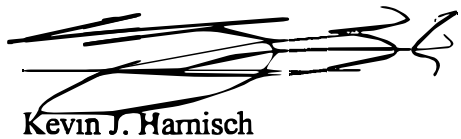
VIII. CONCLUSION

A fundamental aspect of the United States justice system is that a person has the right to be provided with the specific notice of the charges against him and to be provided a full and fair opportunity to rebut them. Creating a new theory of liability after the trial, about which the defendant was never advised and therefore never had the opportunity to formulate an appropriate defense, flies in the face of how a regulator like FINRA, which is supervised by an agency of the federal government, is supposed to behave.

The Commission should reverse the NAC's decision with respect to Mr. Hurry.

Dated: October 5, 2018

Respectfully Submitted,



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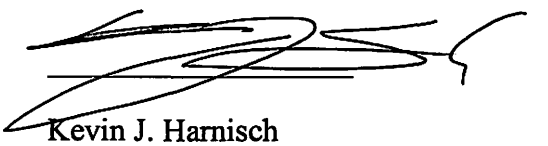
ATTORNEY CERTIFICATION

Pursuant to Rule 154(c) of the Commission's Rules of Practice, I hereby certify that foregoing document contains 10,250 words, exclusive of the tables of contents and authorities.



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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2018, I caused the foregoing to be served by facsimile on the following:

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