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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

REPLY BRIEF FOR APPEAL OF JOHN HURRY

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FINRA's continued approach to John Hurry is to ignore the facts and distort the law. FINRA tries to argue with a straight face that the National Adjudicatory Council's ("NAC") decision to bar Hurry was proper, even though FINRA now concedes that he was not liable for the sole charge levied against him in the complaint. FINRA self-servingly ignores the fact that the only way for the NAC to reach this unjust result was by inventing new theories of liability that FINRA never advanced during the hearing or in any related briefing. It further ignores the fact that using such *post hoc* theories necessarily deprived Hurry of any meaningful opportunity to construct a defense.

Imposing liability under such circumstances cuts at the heart of the fundamental fairness that the Exchange Act requires for SRO disciplinary proceedings. The Commission and courts have not hesitated to overturn decisions when an SRO has shifted its theory of liability after the hearing. The Commission cannot permit FINRA to continue to trample Hurry's rights, and it should reverse the NAC's decision.

I. HURRY'S SANCTIONS ARE DIVORCED FROM THE ALLEGATIONS IN THE COMPLAINT

A. The Charges Against Hurry Were Based Expressly and Exclusively on Section 5 Violations

FINRA cannot credibly dispute that its sole allegation against Hurry was that he violated Section 5 of the Securities Act and, as a result, violated FINRA Rule 2010, which requires the observance of "high standards of commercial honor and just and equitable principles of trade." The NAC, however, expressly rejected this theory.[1] FINRA has acknowledged this rejection, and ***now openly concedes that Hurry did not violate Section 5***: "Hurry's conduct," FINRA writes,

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[1] NAC Decision at 75–76

was "not a direct violation of Section 5 of the Securities Act."[2] Thus, it cannot seriously be debated that the NAC sanctioned Hurry on a theory of liability that FINRA *never alleged*. Sanctioning Hurry based upon such uncharged theories that the NAC manufactured long after the conclusion of the hearing conflicts with long-standing precedent and violates Hurry's statutory right to a fair disciplinary process. 15 U.S.C. § 78o-3(h)(1) (requiring that SRO disciplinary proceedings be fair). Indeed, it was principally on the basis of the admitted variance between FINRA's charging instrument and the NAC's ultimate finding that the Commission stayed Hurry's sanctions.[3]

FINRA tries to avoid this uncontroversial application of basic legal principles by affirmatively misrepresenting the nature of the charges against Hurry. FINRA asserts that it charged Hurry with violating Rule 2010, not Section 5.[4] A plain reading of the Complaint belies FINRA's claim. The section of the Complaint containing the sole charge against Hurry is entitled **"UNREGISTERED SECURITIES – SALES OF (VIOLATIONS OF FINRA RULE 2010 BY SCOTTSDALE AND HURRY)."**[5] This section then recites the alleged facts that FINRA incorrectly believed linked Hurry to the transactions at issue such that the imposition of individual Section 5 liability would be warranted,[6] and culminates in the lone charge against him: "By being a necessary participant and substantial factor in the foregoing sales of unregistered securities in transactions not subject to an exemption from the registration requirements, Hurry acted in contravention of Section 5, and

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[2] Opp. at 60; *see also* FINRA 011066.
[3] *See* Order Granting Stay at 3–4, Exchange Act Release No. 83783 (Aug. 6, 2018).
[4] Opp. at 61.
[5] Complaint at 26 (FINRA 000032).
[6] Complaint at ¶¶ 152–157 (FINRA 000034-35).

thus violated FINRA Rule 2010."[7] FINRA's argument that its only theory of liability against Hurry was somehow *not* premised upon him personally violating Section 5 is patently false.

B. Hurry Was Not Provided Notice of the NAC's Uncharged Theory

FINRA also fails in its argument that Hurry was somehow on notice that his creation of Cayman Securities Clearing and Trading SEZC Ltd. ("CSCT") was a potential basis for liability.[8] FINRA's theory, as reflected in its Complaint, pre- and post-hearing briefing, and conduct during the hearing (including opening and closing arguments) has always revolved around the misguided notion that Hurry's creation and ongoing involvement in CSCT satisfied the stringent criteria for imposing individual Section 5 liability.[9] That theory failed.[10] At no point did FINRA ever allege that Hurry's creation of CSCT constituted a standalone violation of Rule 2010, and its bald assertion that the creation of CSCT was "in contention" does not change the result.[11] The fact is that the first six paragraphs of the relevant section of the Complaint lay out Section 5's registration requirements and certain exceptions, the next six paragraphs outline FINRA's theory as to how Hurry and SCA violated Section 5, and the final three paragraphs assert in conclusion that Hurry violated Section 5, and therefore Rule 2010.[12] FINRA cannot try and untangle its Section 5 charge from its Rule 2010 charge now.

Indeed, FINRA's brief undercuts its argument that the NAC decision should be upheld simply because Hurry's involvement with CSCT was a fact "in contention." FINRA

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[7] Complaint at ¶ 157 (FINRA 000035).
[8] Opp. at 62.
[9] FINRA 000735–50; Tr. 37:8–13 (FINRA 002375); Tr. 2811:23–2812:1 (FINRA 002811–12); Tr. 2815:17–19 (FINRA 005212); FINRA 009498, 009503.
[10] NAC Decision at 76 (FINRA 010906).
[11] Opp. at 62.
[12] Complaint ¶¶ 143–157 (FINRA 000032–35).

acknowledges that a Rule 2010 violation cannot stand unless the petitioner had "adequate notice that the conduct in question was sanctionable."[13] This is, in the Commission's longstanding view, a requisite of "[b]asic due process." *James L. Owsley*, Exchange Act Release No. 32491, 1993 WL 226056, at *3 (June 18, 1993). As described above, FINRA never advanced a standalone Rule 2010 claim. It is only doing so now in the hope of saving the NAC's decision from being overturned. But "[a] respondent may not reasonably be expected to defend itself against every theory of liability or punishment that might theoretically be extrapolated from a complaint or order if one were to explore every permutation of fact and law there alluded to or asserted." *Jaffee & Co. v. SEC*, 446 F.2d 387, 394 (2d Cir. 1971).

Moreover, the NAC's *post hoc* theory of liability created a stark variance from the charging instrument. This variance mandates reversal, as a long line of Commission authority confirms. *See James W. Browne*, Exchange Act Release No. 58916, 2008 WL 4826020, at *1, *10–11 (Nov. 7, 2008) (reversing FINRA's finding of liability based on uncharged theory because "[w]e cannot know how [respondent's] defense of [the charge] might have changed or been augmented if Enforcement had given [him] notice with more specific charges"); *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); *Owsley*, 1993 WL 226056, at *3–4 (setting aside NASD's findings of violations based on uncharged conduct, and explaining that not even "the addition to a complaint of words such as 'including but not limited to' or 'among other things' can justify findings of misconduct on matters that have not been charged and which respondents have not had a fair chance to rebut"); *Paulson Inv. Co., Inc.*,

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[13] Opp. at 62.

Exchange Act Release No. 19603, 1983 WL 32198, at *4 (Mar. 16, 1983) (setting aside NASD's findings of inadequate supervision based on uncharged deficiencies and noting that petitioners were not "given adequate notice of these additional allegations, or a proper opportunity to defend themselves against them").

In short, "[h]aving drawn all the firm's resources to the defense of the . . . claim so elaborately limned in the order instituting the proceedings, it was improper and a breach of the notice and hearing requirements of [the Exchange Act] for [FINRA] then to find (almost as an afterthought because it was not successful in its main thrust), that [petitioner] had won a battle but lost a war it had no reason to know it was waging on a battlefield it had never entered." *Jaffee*, 446 F.2d at 394.

C. The Facts Do Not Support the NAC's Uncharged Theory

Neither the NAC nor FINRA has ever explained how the bare assertions that Hurry's conduct violated Rule 2010 are consistent with the legal standards necessary to support such a standalone violation. The Commission "ha[s] long applied a disjunctive 'bad faith or unethical conduct' standard to disciplinary action under just and equitable principles of trade rules" like FINRA Rule 2010. *Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 WL 32128, at *5 (Jan. 6, 2012).

"Unethical conduct is defined as conduct that is '[n]ot in conformity with moral norms or standards of professional conduct,'" while "'[b]ad faith' has been defined as '[d]ishonesty of belief or purpose.'" *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at *5 (Nov. 15, 2013) The NAC found that Hurry's conduct in establishing CSCT and overseeing its

operations was unethical; it did not find that Hurry acted in bad faith.[14] Therefore, the only ground for Rule 2010 liability before the Commission is the NAC's finding of unethical conduct.

Unlike violations of certain laws or other FINRA rules, which the Commission customarily views as *per se* unethical conduct, standalone violations of Rule 2010 require proof that specific moral or professional norms have been breached. *See, e.g.*, *Joseph R. Butler*, Exchange Act Release No. 77984, 2016 WL 3087507, at *7 (June 2, 2016) (affirming Rule 2010 violation for converting customer funds and falsifying documents, and explaining that such conduct is "extremely serious and patently antithetical to the high standards of commercial honor and just and equitable principles of trade that [FINRA] seeks to promote"). "In determining whether a securities professional's conduct is inconsistent with just and equitable principles of trade, [the Commission] look[s] to whether the conduct implicates a generally recognized duty owed to either customers or the firm." *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 WL 6985131, at *6 (Dec. 11, 2014).

Absent proof of ***both*** a duty ***and*** a breach of said duty, a standalone Rule 2010 violation falls. *See Robert J. Jautz*, Exchange Act Release No. 24346, 1987 WL 757991, at *2 (Apr. 15, 1987) (vacating violation of NASD ethical rule based on investment advisor's solicitation of loan from customer, and noting that while "the solicitation of loans from customer's by a firm's principals or salesmen is an area of legitimate concern because of its potential for abuse," the evidence "does not establish any unethical conduct within the meaning" of NASD rules); *Dep't of Enforcement v. Biney*, 2016 WL 6092316, at *7 (FINRA OHO Aug. 31, 2016) (dismissing Rule

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[14] *See* NAC Decision at 75–83 (FINRA 010905-13). This stands in sharp contrast to the Hearing Panel, which found, as a novel alternative to Enforcement's charged theory of liability, that Hurry acted in bad faith *but not unethically*. *See* Amended Panel Decision at 89–90 (FINRA 010395-96). In other words, the NAC declined to adopt the Hearing Panel's finding of bad faith, and instead rendered its own finding that Hurry's conduct was unethical.

2010 charge premised on bank manager's approval of certain customer checks contrary to bank policy, and noting that "the actual evidence presented at the hearing of 'common banking practices' or 'professional norms' was insubstantial").

In addition to requiring a breach of a duty or an industry norm, the conduct underlying a standalone Rule 2010 violation must be willful and not merely negligent. *See Dep't of Enforcement v. Meyers Assocs., L.P.*, 2016 WL 3548048, at *11 (FINRA OHO Apr. 27, 2016) (dismissing Rule 2010 charge because Respondents' "issuance of inaccurate W-2 tax forms . . . was negligent and inadvertent, rather than willful"); *Dep't of Mkt. Regulation v. Dotson*, 2015 WL 5782969, at *28 (FINRA OHO Aug. 7, 2015) (dismissing Rule 2010 charge because Respondent's violation of firm policies relating to suspected insider trading was, "[a]t most, . . . negligent[]").

Against this backdrop, the NAC's finding of unethical conduct is not just unmoored from the record—it is legally unsupportable. The NAC expressly based its holding on five factors: (1) Hurry's establishment of CSCT, (2) Hurry's indirect ownership of CSCT, (3) Hurry's "management of [CSCT's] business," (4) Hurry's "control over [CSCT] and its personnel," and (5) Hurry's "prospecting for [CSCT's] customers."[15] Somehow, to the NAC, this meant that Hurry established CSCT in order to shield SCA from regulatory scrutiny.[16] As detailed at length and with record support in Hurry's opening brief, several of these factors have no basis in the record, and none involved unlawful or unethical conduct.[17]

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[15] NAC Decision at 76.
[16] *Id.*
[17] Hurry Br. 9–15.

Hurry established CSCT in response to Alpine's decision not to accept business from foreign financial institutions unless a qualified intermediary was involved.[18] He chose to form CSCT in the Cayman Islands because of certain tax-deferral advantages, and he registered the firm in the Caymans' "special economic zone" in order to facilitate the acquisition of work permits.[19] He hired Gregory Ruzicka to run the firm because he knew Ruzicka to be an accomplished professional—an attorney with two masters' degrees, including one in tax, who had managed a law firm.[20] He readily acknowledged that he formed CSCT, helped get it off the ground, and took steps to ensure that the firm's staff was on task and working to bring in business; that is, he was no different than the owner of any business.[21]

Further, the existence of CSCT in no way affected SCA's diligence or prevented SCA from obtaining necessary information, despite FINRA's efforts to tar the Caymans as a "bank secrecy jurisdiction."[22] Indeed, CSCT could not approve the sale of any securities in U.S. markets; it could only accept proposed deposits from its customers, conduct its own diligence—which was so rigorous that a majority of proposed deposits never even made it to SCA[23]—and send approved deposits to SCA for a ***second round*** of independent diligence. And SCA's own diligence remained the same: It asked the same questions, collected the same records, and applied the same demanding

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[18] *Id.* at 10–11. Alpine's CEO, Chris Frankel, provided uncontroverted testimony at the hearing that Alpine had made a business decision not to accept foreign financial institution business that did not come through a qualified intermediary. Tr. 2346:2–23 (FINRA 4689). As explained in Hurry's opening brief, a qualified intermediary is a foreign financial entity that assumes primary tax-withholding and -reporting responsibilities for its customers. Hurry Br. 10 n.22.

[19] Tr. 1552:7–1557:6, 1561:21–1565:16 (FINRA 003893–98, 003902–06).

[20] Hurry Br. 12–13.

[21] Tr. 1547:8–1548:4 (FINRA 003888–89).

[22] Hurry Br. 11–12.

[23] *See* Tr. 2311:18–21, 2325:15–2326:4 (FINRA 4654, 4668–69); CX-178 at 81–83, 92–93 (FINRA 6247–49, 6258–59); RX-40 at 2 (FINRA 9256).

standards that led it to reject nearly half of the deposits received from CSCT.[24] No diligence or recordkeeping moved abroad. Again, the only change to SCA and Alpine's operations from the formation of CSCT related to tax compliance.[25] FINRA does not even attempt to refute any of these points in its brief.[26] It does not point to single thing that SCA did not do, or a single document that SCA did not obtain, as a result of the deposits coming to SCA through CSCT. Instead, FINRA simply repeats the NAC's conclusory and unsubstantiated refrain that Hurry established CSCT to help shield SCA from regulatory scrutiny.[27] Buzzwords in the absence of facts cannot serve as a basis for liability.

Reflecting FINRA's further desperation to find some reason to sanction Hurry, the NAC and FINRA latched on to references to Hurry having a desire to maintain privacy as somehow being unethical. Tellingly, there are no citations to authority supporting this outlandish position in either the NAC decision or FINRA's opposition brief.[28] Countries around the world, not to

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[24] RX-40 at 2 (FINRA 9256).

[25] FINRA cannot reconcile its theory that Hurry sought to evade regulation with CSCT's QI designation, which required a detailed application to the IRS prepared in conjunction with KPMG, to say nothing of the Cayman Islands' Memorandum of Understanding with the Commission pledging cooperation in the enforcement of U.S. securities laws. *See* Hurry Br. 11 & n.26. That Memorandum of Understanding is subject to official notice by the Commission. *See* 17 C.F.R. § 201.323; *cf. United States v. Benoit*, 730 F.3d 280, 285 n.8 (3d Cir. 2013) (federal courts "may take judicial notice of a treaty and its terms").

[26] Confusingly, FINRA argues that this fact somehow bolsters its argument by jumping to the conclusion that "Cayman Securities made little economic sense." FINRA's argument, then, is that because *it* cannot understand a particular business strategy, that strategy must be unethical. Thankfully, this is not a cognizable legal standard.

[27] NAC Decision at 83 (FINRA 010913).

[28] Moreover, FINRA grossly mischaracterizes Hurry's testimony. Hurry never "denied that he had an interest in secrecy." Opp. at 19 n.21. He acknowledged that Cayman law protects the confidentiality of certain financial information, but he denied FINRA's accusation that he chose to form CSCT in the Cayman Islands *because of* its privacy laws. Tr. 1361–62, 1365 (FINRA 003702–03, 3705). Even Ruzicka testified in his OTR that he believed Hurry selected the Cayman Islands in part for its "cachet" and "because it was sort of the big players are playing in the Cayman Islands." CX-178 at 36:11–16 (FINRA 006202).

mention American states, have been significantly enhancing their privacy laws.[29] Clearly,e establishing a business in such locations cannot be considered unethical.

The NAC also attempted to justify its self-created rationales for barring Hurry with the unsupported and internally inconsistent statement that Hurry had somehow tried to conceal his involvement with CSCT.[30] To this end, the NAC cited three decisions by Hurry: (1) selecting x@csct.ky as his CSCT email address, (2) writing "attorney–client privilege" on most of his emails with Ruzicka, who was an attorney, and (3) using FaccTime as a makeshift substitute for telephonic conference calls.[31] Yet none of this conduct is unlawful, nor does it implicate any dutye owed to customers or the firm, *Tomlinson*, 2014 WL 6985131, at *6, and FINRA has not cited to any authority to the contrary. Nor, for that matter, did FINRA present any evidence of industry norms that Hurry supposedly breached. *See Biney*, 2016 WL 6092316, at *7. Similarly, neither FINRA nor the Commission has issued any applicable rules or guidance on email address conventions, the use of FaceTime, or how and when a non-lawyer should assess the potential application of attorney–client privilege in his written communications with lawyers. Nevertheless, as detailed in Hurry's opening brief, Hurry provided rational business explanations for each of his decisions.[32e]

More to the point, though, this *post hoc* theory raises a critical question: Who was deceived by this purported "concealment"? It obviously was not CSCT's customers, as the NAC and FINRA both contend that Hurry himself solicited CSCT's customers and communicated directly

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[29] *See, e.g.*, Regulation 2016/679, 2016 O.J. (L119) 1 (EU) (Europe's General Data Protection Regulation).
[30] NAC Decision at 81–83 (FINRA 010911–13).
[31] *Id.* at 81–82 (FINRA 10911–12).e
[32] Hurry Br. 13–15.

with them.[33] In its brief, FINRA acknowledges that CSCT marketing and promotional materials identified Hurry as a director and described his experience as an asset to the firm.[34] And there is no dispute that CSCT's and SCA's employees knew of Hurry's connection to CSCT. In sum, even a cursory review of the NAC's and FINRA's own positions and evidence readily demonstrates the absurdity of their claims and underscores the lengths to which they have gone to invent reasons to try to justify their pre-determined results.

The infirmity of the NAC's and FINRA's theories on these issues is further confirmed by the points that FINRA did not—and could not—rebut in its opposition brief. Specifically, Hurry produced all of his non-privileged emails with Ruzicka irrespective of whether Hurry wrote "privileged" in the emails.[35] And he provided a privilege log for the emails that were not produced, the sufficiency of which FINRA has never challenged.[36] FINRA does not address, let alone dispute, those incontrovertible facts.

FINRA's concern about Hurry's use of FaceTime as an alleged means of concealing his communications with customers also falls flat for numerous reasons, not the least of which is the fact that iPhones do, indeed, maintain a log of FaceTime calls. Neither the NAC nor FINRA attempted to explain how Hurry's calling preferences impacted anything from a regulatory perspective. This is not surprising, as CSCT had its own phone records, and CSCT's customers assuredly also had phone records.

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[33] NAC Decision at 83 (FINRA 010913); Opp. at 67–68.
[34] Opp. at 15.
[35] Tr. 1380:1–14, 1453:5-6, 1455:3-11 (Hurry) (FINRA 003721, 003794, 003796); Tr. 1544:7–16, 1605:3–1607: 17 (Hurry) (FINRA 003885, 003946-48). FINRA confirmed as much in oral argument before the NAC. NAC Tr. 159:15–160:4 (FINRA 10709–10).
[36] CX-176 at 1–3 (FINRA 006163-65).

In view of the above, the NAC's finding of a Rule 2010 violation by Hurry, and its associated draconian sanction of a lifetime bar, must be vacated.[37]

II. THE IMPROPER ADMISSION OF RUZICKA'S OTR CONSTITUTES REVERSIBLE ERROR

The Hearing Panel admitted into evidence Ruzicka's *ex parte* OTR transcript despite his manifest bias against Hurry, his provision of materially conflicting information to FINRA during prior interviews, and his prior sworn affidavit that is directly contrary to various aspects of his OTR. In the face of these undisputed facts, the Hearing Panel should not have admitted the OTR. Compounding this mistake was the extent to which the Hearing Panel and the NAC both relied on the *ex parte* OTR as a basis for their findings against Hurry. The NAC alone relied exclusively on Ruzicka's testimony for no fewer than ***seven*** material factual findings.[38] Reversal is the only way to address these grievous errors.

It is a basic evidentiary rule that hearsay evidence may not be admitted unless it is first found to be reliable. *See, e.g.*, *Richard G. Strauss*, Exchange Act Release No. 31222, 1992 WL 252168, at *3 (Sept. 22, 1992) ("Before reliance can be placed on [hearsay] evidence, . . . its reliability and probative value must be carefully assessed."). Thus, hearsay statements by somebody who has expressed hostility and bias against the person about whom the statements

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[37] Even on *de novo* review, the Commission cannot now sustain the charge against Hurry as a standalone Rule 2010 violation because the charge was predicated on the sole basis that Hurry engaged in the sale of unregistered securities. *See John P. Goldsworthy*, Exchange Act Release No. 4000, 1998 WL 248377, at *1 n.1, *3 (May 18, 1998) (vacating ethical violation premised on private securities transactions because NASD failed to marshal evidence bearing on the *Reves* test, and declining to affirm on alternative grounds because "this case was pled and tried as a case involving private securities transactions").

[38] NAC Decision at 80–82 (FINRA 010910-12).

were made should be excluded as unreliable.[39] As recounted at length in Hurry's opening brief, the record is replete with evidence of Ruzicka's strong and pronounced disdain for Hurry, including referring to Hurry as his "foe," admitting to FINRA that he disliked both Hurry and his wife, and incorrectly blaming Hurry for the cancelation of his Cayman Islands work permit.[40]

Given the ample evidence of Ruzicka's strong bias against Hurry and the conflicting statements Ruzicka had made in prior FINRA interviews and in a prior sworn affidavit, the safeguard of cross-examination was essential to preserve Hurry's right to a fair proceeding. *See Strauss*, 1992 WL 252168, at *4 ("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.").[41]

As FINRA cannot dispute the existence of Ruzicka's multiple conflicting statements and manifest bias against Hurry, FINRA suggests that the Commission should ignore those troubling issues because Ruzicka decided to cease cooperating with FINRA and declined to appear at the hearing after learning from Hurry's counsel what FINRA had said about him during its opening statement. It is common and appropriate for counsel to parties in litigation to communicate with potential witnesses who are not represented by counsel, like Ruzicka. Indeed, FINRA had been in

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[39] *See* Hurry Br. 19–20.

[40] Hurry Br. 19.

[41] The NAC's asserted deference to the Hearing Panel's "assessment of Mr. Ruzicka's credibility and demeanor" is concrete proof that the NAC had predetermined the outcome of this case. NAC Decision at 92 n.190 (FINRA 010922). The Hearing Panel had no greater opportunity than the NAC to observe Ruzicka; both adjudicators theoretically should have reviewed the same written transcript. *See Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at *11 n.81 (Nov. 15, 2013) (the NAC's decision to credit a witness's testimony "is not entitled to any deference because, unlike a credibility finding by an initial fact finder, the NAC did not base its decision on a first-hand observation of [the witness's] demeanor"). The NAC plainly did not even bother to read Ruzicka's OTR.

regular communication with Ruzicka during the hearing and had scheduled a time to meet with him prior to calling him to the stand, presumably to discuss topics and anticipated questions.[42] The fact that Hurry's counsel attempted to do the same thing should be no surprise. And, importantly, FINRA has never contested the accuracy of counsel's description, as counsel merely quoted from FINRA's opening statement. In short, there was nothing untoward in counsel's communication with Ruzicka, much less anything justifying the denial of Hurry's right to cross-examine the key witness against him.[43] *See Dep't of Enforcement v. Jaloza*, 2009 WL 2424485, at *18 (FINRA NAC July 28, 2009) ("The [FINRA] rules do not limit or otherwise address whether parties or their attorneys can contact witnesses listed by opposing parties. We do not find anything inherently inappropriate in [respondent's] contacting [Enforcement witnesses].").

Any possible doubt about the unreliability of Ruzicka's *ex parte* OTR should be dispelled by a California court's finding that Ruzicka is mentally incompetent.[44] FINRA hopes that the Commission will disregard Ruzicka's mental incompetency because the adjudication on that point was not made until three years after his OTR.[45] FINRA's troubling position on this point ignores the widespread research that mental illness generally begins early in life, often in a person's teens and twenties, and then progresses over time.[46] As explained in Hurry's opening brief, there is

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[42] *See, e.g.*, Tr. 748:10-12 (FINRA 003087) (indicating that counsel for Enforcement would contact Ruzicka that evening).

[43] Hurry and the other Petitioners would have welcomed the opportunity to cross-examine Ruzicka on these numerous issues. Moreover, as explained in prior briefing in the proceedings below, Ruzicka said many things in his OTR that contradict some of FINRA's theories, and Petitioners' counsel would have wanted to explore those statements in great detail.

[44] *See* FINRA 010809.

[45] Opp. at 66.

[46] *See, e.g.*, *Warning Signs of Mental Illness*, Am. Psychiatric Ass'n, https://www.psychiatry.org/patients-families/warning-signs-of-mental-illness; Pct'rs' Mot. to Introduce Additional Evid. ex. A.

significant evidence in the record that is consistent with Ruzicka experiencing a progressive mental deterioration at the time of his OTR.[47]

The Commission should have grave concern about barring Hurry from the broker-dealer industry when the primary person who "testified" against him was never subjected to cross-examination, had admitted disdain for Hurry at the time of his OTR, gave materially conflicting statements to FINRA in prior interviews, provided materially conflicting information in a sworn declaration prior to his OTR, and has been found by a court to be mentally incompetent. Reversal is the appropriate remedy.

III. FINRA LACKS AUTHORITY TO ENFORCE THE SECURITIES ACT OF 1933

As a self-regulatory organization ("SRO") and registered securities association ("RSA"), FINRA derives its authority from its enabling statute—the Securities Exchange Act of 1934 (the "Exchange Act"). *See Fiero v. FINRA*, 660 F.3d 569, 574 (2d Cir. 2011). As with federal administrative agencies, when assessing the scope of an SRO's powers, the text of the organic statute controls. *Id.*; *see also, e.g.*, *Nat'l Shooting Sports Found., Inc. v. Jones*, 840 F. Supp. 2d 310, 317 (D.D.C. 2012) ("A court must look to the agency's enabling statute and subsequent legislation to determine whether it has acted within the bounds of its authority."). Indeed, "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The "inquiry thus 'begins with the statutory text, and ends there as well if the text is unambiguous.'" *Tex. Educ. Agency v. U.S. Dep't of Educ.*, --- F.3d ----, 2018 WL 5817072, at *2 (5th Cir. 2018). This venerable principle is dispositive here, as the text of the Exchange Act unambiguously forecloses FINRA's position.

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[47] Hurry Br. 23–24; Pet'rs' Mot. to Introduce Additional Evid. ex. A.

The text of the Exchange Act is clear: SROs and RSAs such as FINRA have authority to enforce the provisions of "this chapter," "the rules or regulations thereunder," "the rules of the Municipal Securities Rulemaking Board," and "the rules of the association." *See* 15 U.S.C. § 78o-3(b)(2), (7), (h)(1)(B); *id.* § 78s(g)(1)(B). "This chapter" self-evidently refers to the Exchange Act. There is no question that Congress knew how to identify the Securities Act; it did so expressly in other provisions of Sections 15A and 19 of the Exchange Act, using either the statute's full name or the shorthand "securities laws," a term defined to include the Securities Act. *See id.* § 78o-3(k)(2)(A), (C); *id.* § 78s(h)(2), (3); *see also id.* § 78c(a)(47). "[W]hen 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—[courts] 'presume' that Congress intended a difference in meaning." *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014). There is, therefore, no textual basis for FINRA's claim that its authority extends to the Securities Act. And as the Supreme Court warned earlier this year, "[c]ourts are required to give effect to Congress' express inclusions and exclusions, not disregard them." *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018).

To the extent that FINRA cites administrative and federal appellate decisions affirming Rule 2010 charges rooted in Section 5 violations, those authorities are of no aid here. *See* Opp. at 25–26. First and foremost, none of the cited decisions address the scope of FINRA's jurisdiction in light of the clear textual limitations of the Exchange Act.[48] Moreover, even if those decisions

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[48] In particular, FINRA mischaracterizes the Fourth Circuit's decision in *Scottsdale Capital Advisors Corp. v. FINRA*, 844 F.3d 414 (4th Cir. 2016). There, Petitioners filed suit against FINRA in federal district court to enjoin these very disciplinary proceedings as *ultra vires*. The district court dismissed the suit for lack of subject matter jurisdiction, holding that the Exchange Act sets forth a comprehensive scheme for administrative and judicial review of FINRA disciplinary decisions, such that federal jurisdiction resides exclusively in the courts of appeals. The Fourth Circuit affirmed on the narrow grounds that FINRA's interpretation of Rule 2010 was "plausible" for purposes of the exception to jurisdiction-stripping set out in *Leedom v. Kyne*, 358

could be read to broadly support FINRA's position, that would not control the Commission's analysis because the plain text of the Exchange Act is decisive: FINRA does not now have, and never has had, statutory authority over the Securities Act. "If we are doing our job of reading [a] statute whole, we have to give effect to [its] plain command, even if doing that will reverse the longstanding practice under the statute and the rule." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (citations omitted).

This principle applies with full force to the federal securities laws. Just this year, the Supreme Court held that the Securities Litigation Uniform Standards Act ("SLUSA") did not divest state courts of concurrent jurisdiction over class actions alleging only violations of the Securities Act, despite SLUSA's apparent legislative purpose of combatting legal gamesmanship in securities class actions, and despite two decades of removals of such class actions to federal court. *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1073 (2018). As the Court explained: "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, still it 'wrote the statute it wrote—meaning, a statute going so far and no further.'" *Id.* (citation omitted). The same is undoubtedly true of FINRA's enabling statute.[49]

FINRA's resort to legislative history is equally unavailing. At the outset, legislative history "need not be consulted when, as here, the statutory text is unambiguous." *United States v. Woods*,

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U.S. 184 (1958); it unequivocally stated that it "ha[d] not decided the 'ultimate merits' of FINRA's position." *Scottsdale*, 844 F.3d at 422. In other words, the dismissal was grounded in a species of exhaustion, rather than any form of merits review, and Petitioners are doing exactly as the Fourth Circuit instructed by raising this critical issue to the Commission.

[49] For similar reasons, FINRA's own interpretation of Rule 2010 commands no deference: "A regulation's age is no antidote to clear inconsistency with a statute, and the fact . . . that [the regulation] flies against the plain language of the statutory text exempts courts from any obligation to defer to it." *Brown v. Gardner*, 513 U.S. 115, 122 (1994).

571 U.S. 31, 46 n.5 (2013). Regardless, the relevant legislative history undermines FINRA's position. When Congress amended the Exchange Act in 1975 to add the current Section 19, it specifically designated the securities laws to which FINRA's jurisdiction and the Commission's jurisdiction separately extend. Congress stated, explicitly, that SROs like FINRA have authority to enforce violations of "this title"—the Exchange Act—while the SEC's power encompasses the Securities Act, the Investment Advisors Act of 1940, and the Investment Company Act of 1940, *in addition to* "this title." *See* Securities Acts Amendments of 1975, Pub. L. No. 94-29, sec. 12(2), (4), 89 Stat. 97, 127–28, 130; *id.* sec. 16, 89 Stat. at 152–53; *accord* 15 U.S.C. § 78o-3(b)(2), (7), (h)(1)(B); *id.* § 78s(g)(1)(B), (h). Sections 19(h)(2) and (3) are unequivocal in their sweep: "The appropriate regulatory agency for a self-regulatory organization" or "[t]he appropriate regulatory agency for a national securities exchange or registered securities association"—in either case, the Commission—"is authorized, by order," to "suspend," "expel," or "bar" any "member thereof or participant therein," if the Commission "finds, on the record after notice and opportunity for hearing, that such member or participant has willfully violated or has effected any transaction for any other person who, such member or participant had reason to believe, was violating with respect to such transaction . . . any provision of the Securities Act of 1933." 15 U.S.C. § 78s(h)(2), (3); *see also id.* § 78c(a)(34)(E) (defining "appropriate regulatory agency"). FINRA strains to avoid this command, writing only that the Commission's authority to institute proceedings under Sections 19(h)(2) and (3) "include[s] when an SRO has failed to enforce compliance with the SRO's rules." Opp. at 27. Plainly, that is not all—or even most—of what Section 19(h) contemplates.[50]

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[50] This allocation of authority makes good sense. As FINRA lacks jurisdiction over issuers of securities, the Commission alone can gather the evidence necessary to investigate violations of the

In fact, the legislative history of the Securities Acts Amendments of 1975 conclusively establishes that Congress ***knew*** the limits of the regulatory authority of SROs like FINRA and deliberately chose ***not*** to expand those limits. In its comments to Congress on the proposed legislation, ***the Commission itself expressed the view that the disciplinary authority of SROs like FINRA did not extend to the Securities Act***:

> Section 6(b)(6) and its companion Section 15A(b)(7), if our suggested amendments are accepted, will require national securities exchanges and associations to discipline members for violations of the Securities Exchange Act as well as the rules of the exchange or association. ***It should also be noted that we have not requested additional language to require that the Securities Act of 1933, the Investment Advisers Act of 1940 or the Investment Company Act of 1940 similarly be enforced***; however, we believe the Subcommittee should address itself to the dilemma with which we are faced. On the one hand, as the Subcommittee is aware, the limited budget and staff of the Commission often circumscribe our ability to maintain as comprehensive an inspection and enforcement program as would be desirable; ***unless such budgetary allotments are to be expanded, consideration should be given to charging the exchanges or the NASD with some measure of responsibility, coextensive with our own, to discipline their members for violations of the latter three Acts.*** On the other hand, such a course should not be embarked upon lightly, since the result might well be to duplicate regulatory activities, tax the resources of the self-regulatory bodies beyond their present capabilities and to create unwarranted legal liability or the assertion thereof against self-regulatory organizations. The point we wish to emphasize is that the present regulatory scheme is deficient to the extent that the Commission lacks the necessary resources to conduct a more complete inspection program, and since ***no exchange or association has any regulatory responsibility in this regard.***

Securities Exchange Act Amendments of 1973—Part 2: Hearings on H.R. 5050 and H.R. 340 Before the Subcomm. on Commerce & Fin. of the H. Comm. on Interstate & Foreign Commerce, 93d Cong. 448 (1973) (statement of Philip A. Loomis, Jr., Comm'r, Sec. & Exch. Comm'n) (emphasis added). And the Commission was far from alone in that regard:

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, nor could Petitioners obtain probative third-party discovery.

> Neither the present statute nor the bill refers in this connection to the other statutes administered by the Commission. Nevertheless, for many years there have been unresolved questions as to whether and to what extent an exchange is responsible for compliance with the Securities Act of 1933 by its members. It would seem that to the extent any such obligation is intended, it ought to be spelled out in the law. Otherwise, it would be helpful if the Committee's report were to negative any such intention.

Id. at 509 n.6 (statement of Michael E. Tobin, President, Midwest Stock Exch., Inc.). In short, Congress was fully aware of the statutory limits on FINRA's authority, and it elected not to expand FINRA's disciplinary powers to be coextensive with those of the Commission. This decision merits respect, as "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). The Commission must restore the meaning of the Exchange Act and confine FINRA to its delegated authority.

IV. THE SANCTIONS ARE EXCESSIVE

In line with its theme, FINRA has either ignored or misstated the substantive arguments put forth by Hurry as to why his sanctions are excessive and punitive. As an initial matter, it is important to note that FINRA does not dispute that its sanctions must be remedial, not punitive. *McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005). At the end of the day, the NAC has decided to impose "the securities industry equivalent of capital punishment" against Hurry, *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007), despite that fact that neither the NAC nor FINRA is able to identify even a *single* substantive violation of the securities laws. What's more, as explained in section I.C above, the facts here do not even support a standalone Rule 2010 violation. Barring Hurry for establishing a foreign broker-dealer for tax purposes (one that has not been accused of wrongdoing), writing "privileged" in his emails with attorneys and ultimately producing to FINRA all non-privileged emails, and using FaceTime on his iPhone, when there

have been no substantive securities laws violations or unethical conduct, is not only punitive, but vindictive.

FINRA also misstates Hurry's argument with regards to the importance of *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). In *Kokesh*, the Supreme Court ruled that sanctions imposed for the purpose of deterring misconduct—which is one of the NAC's primary goals with the sanctions in this case[51]— are necessarily punitive because deterrence is not a legitimate non-punitive governmental objective. *Id.* As now-Justice Kavanaugh noted in *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017), the logical import of *Kokesh* is that securities industry bars, which serve only a deterrent purpose, are inherently punitive. *Saad*, 873 F.3d at 305 (Kavanaugh, J. concurring). Accordingly, administrative and judicial "precedents characterizing expulsions or suspensions as remedial are no longer good law,"[52] and FINRA must "reasonably explain . . . why an expulsion or suspensione serves the purposes of punishment and is not excessive or oppressive." *Id.* at 306. FINRA has made no such effort here, asserting only on a vague and groundless concern for the public interest.[53] Hurry's permanent bar is inherently improper and must be vacated.e

V. CONCLUSION

At every turn in these proceedings, FINRA has disrespected the principles of due processe that underpin the United States justice system. It has based material conclusions on unreliable and often times demonstrably false evidence; it has misstated legal principles to avoid long-standing precedent; and it has ignored facts that cut against its preordained conclusions. And when all of that was not enough for FINRA to prove the merits of its case, it pivoted to uncharged theories of

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[51] NAC Decision at 98 (FINRA 010928).e

[52] That includes the "wealth of federal court and Commission opinions" cited by FINRA. *See* Opp.e at 87.

[53] NAC Decision at 101–02; Opp. at 87–88.

liability that were never before in contention. The Commission cannot ignore the improprieties that riddle this case, and it must reverse the NAC's findings and vacate Hurry's sanctions.

Dated: November 30, 2018

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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 6,995 words, exclusive of the tables of contents and authorities.

Kevin J. Harnisch

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, I caused the foregoing to be served via courier on the following:

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