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

In the Matter of the Application of JOHN J. HURRY (CRD No. 2146449), For a Motion to Stay Sanctions Imposed by FINRA

REPLY IN SUPPORT OF PETITIONER'S MOTION TO STAY SANCTIONS

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INTRODUCTION

FINRA's opposition brief marks the culmination of a breathtaking—and profoundly unfair—shift in FINRA's proceedings, from a disciplinary charge rooted exclusively in a violation of Section 5 of thc Securities Act to a lifetime bar based on lawful conduct that FINRA has deemed "unethical" on mere speculation and innuendo. At every stage of these proceedings, beginning with the issuance of FINRA's complaint in 2015, FINRA has maintained that Mr. Hurry personally violated Section 5 through the sale of unregistered shares of NHPI, VPLM, and ORFG stock between December 2013 and June 2014 by the firm he indirectly owned. Those transactions earned SCA only $38,000 in revenue, including both commissions and fees, and accounted for 0.4 percent of the firm's revenues and 0.088 percent of the total number of shares liquidated by the firm during that seven-month span.[1] Notwithstanding those trifling figures, when the NAC was finally forced to acknowledge that Mr. Hurry had no involvement whatsoever in the subject transactions, it abruptly changed course and averred that Mr. Hurry's actions in forming CSCT in the Cayman Islands and monitoring its operations—actions taken openly and in full compliance with U.S. laws—amounted to "unethical" conduct in contravention of FINRA's general ethical rule. But that was not, and never has been, FINRA's charge against Mr. Hurry. To the contrary, the sole offense by Mr. Hurry alleged in FINRA's charging instrument is the "sale of unregistered securities"—an offense FINRA now concedes it failed to prove, as Mr. Hurry's conduct, it admits, was "***not a direct violation of Section 5.***" FINRA Br. 13 (emphasis added).

The variance between FINRA's complaint and the violation ultimately found by the NAC *alone* raises a "serious legal question" on appeal meriting a stay to preserve the status quo. The same

[1] SCA sold 60,000,000 shares of NHPI, 7,812,500 shares of VPLM, and 6,403,298 shares of ORFG on behalf of CSCT, for a total of 74,215,798 shares. *See* JX-268 (FINRA 7859); JX-281 (FINRA 7915); JX-310 (FINRA 8239). Between December 1, 2013 and June 30, 2014, SCA liquidated a total of 84,466,045,877 shares of stock for its customers, and earned revenues of $9,613,724. *See* RX-40 at 1, 3 (FINRA 9255, 9257).

is true of FINRA's dubious claim of authority to police violations of the Securities Act—another plausible explanation for FINRA's hasty about-face. And if that were not enough, the record evidence refutes each of the asserted grounds for FINRA's speculative theory of "unethical" conduct.

The other requisites of injunctive relief are amply satisfied as well, and FINRA presents no evidence to the contrary. Mr. Hurry will suffer the irreparable harm of the likely collapse of SCA and Alpine—harm that will reverberate through those firms' staff and customers—and the violation of his statutory right to a fair proceeding. No member of the public will be harmed by a stay, as FINRA acknowledges that its allegations do not involve violations of the substantive securities laws, and Mr. Hurry has had and will continue to have no involvement in SCA's day-to-day operations. And the public interest will be served by averting the collapse of SCA and Alpine and preventing FINRA from exceeding its statutory authority and violating Mr. Hurry's rights. In short, fundamental fairness demands immediate intervention by the Commission.

ARGUMENT

I. FINRA Misstates the Standard for a Stay of FINRA Sanctions

From the opening of its brief, FINRA grossly mischaracterizes both the facts and the governing law in a blatant effort to cover for the NAC's wholesale disregard of its duty to issue a reasoned opinion based upon the record. FINRA portrays the test for a stay as comprising four independent prongs, each of which must be satisfied to justify that "extraordinary and drastic remedy." FINRA Br. 10–11. The Commission has long been clear, however, that the four factors are "not accorded equal weight," and "a stay may be granted where there is a high probability of irreparable harm, but a lower probability of success on the merits, or vice versa." *Michael Earl McCune*, Exchange Act Release No. 77921, 2016 WL 2997935, at *1 (May 25, 2016). In fact, Mr. Hurry need only show "a substantial case on the merits" where, as here, a stay is necessary to prevent irreparable harm and would serve the public interest. *Scattered Corp.*, 52 S.E.C. 1314, 1315 (Apr.

28, 1997); *see also Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *6 (Nov. 27, 2017) (a stay is warranted where the petitioner "raise[s] a serious legal question on the merits" and "the other factors weigh heavily in its favor"). As explained in Mr. Hurry's opening brief, all four prongs of the SEC's stay tcst arc casily met here. Moreover, there can be no serious dispute that Mr. Hurry's petition raises "serious legal question[s]" regarding the fairness of FINRA's proceedings, the scope of FINRA's disciplinary authority, and the foundations of its key findings and conclusions. Thus, a stay is warranted.

II. Mr. Hurry Has Shown a Strong Likelihood of Success on the Merits or, at a Minimum, a Substantial Case and Serious Legal Questions

FINRA's own opposition brief confirms that Mr. Hurry has raised serious legal questionse justifying a stay pending the Commission's review of the NAC decision.

A. FINRA Did Not Prove the Sole Offense Charged Against Mr. Hurry—a Section 5 Violation

FINRA tries to reinvent history by repeatedly insisting that this case is, and always has been, about "unethical conduct," and that Scction 5 of thc Sccurities Act has no bearing on Mr. Hurry's liability. FINRA Br. 11–12, 14–15. FINRA's astonishing position cannot be reconciled with the plain text of its own charging instrument, which references "Section 5" *twenty-three times*. 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)

FINRA Br. Ex. B at 26. And the Complaint alleges in *four separate paragraphs* that Mr. Hurry was a "necessary participant and substantial factor" in the allegedly violative sales of unregistered securities. *Id.* ¶¶ 2, 5, 152, 157. FINRA, however, overreached by charging Mr. Hurry, as none of the evidence linked Mr. Hurry to any of the transactions at issue. Although the Hearing Panel

simply ignored the evidence in order to further FINRA's goal of effectively shutting down the microcap market by imposing Section 5 liability on Mr. Hurry in contravention of settled federal law, not even the NAC could bring itself to adopt such a legally unsupportable theory. Thus, despite the plain language in the Complaint, the NAC declined to "examine [Mr.] Hurry's conduct within the construct of the necessary participant and substantial factor analysis."[2]

Rather than doing the right thing by vacating the charge and the sanctions against Mr. Hurry, the NAC instead invented its own new and uncharged theory of liability. 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 involved entirely legal conduct, did not result in shifting any information beyond FINRA's reach, and created no misimpressions.

FINRA attempts to justify the NAC's *post hoc* legal theory by claiming that certain disparate aspects of the NAC's opinion were the basis for the Complaint's charge against Mr. Hurry, namely 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. FINRA Br. 9, 10. Again, the Complaint belies FINRA's characterization. Those "three facts" are referenced in a single paragraph in the section charging Mr. Hurry with "sales of" unregistered securities, and the remaining fourteen paragraphs in that section are dedicated to laying out the elements of a Section 5 claim. *See* FINRA Br. Ex. B ¶¶ 143–57. That includes, most importantly, 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

[2] NAC Decision at 76.

(3) "*Hurry* was a necessary participant and substantial factor in the [subject] sales" and "played a significant role in the[ir] occurrence." *Id.* ¶¶ 147, 149, 152, 153, 157 (emphasis added). Even the one paragraph seized on by FINRA 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* . . . ." *Id.* ¶ 154 (emphasis added).

If the charging instrument were not clear enough, the course of the proceedings below dispels any uncertainty. 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 subject transactions, as FINRA had alleged.[3] FINRA opposed that motion, insisting that "Enforcement c[ould] prove that Hurry was a necessary participant and substantial factor in the microcap stock liquidations at issue" and arguing at length—fifteen pages—that "genuine issues of material fact regarding Hurry's role in the liquidations preclude summary disposition."[4] The Hearing Officer denied that motion, reasoning that "Hurry's level of involvement" was in dispute."[5] 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*.[6] The titles of Enforcement's headings in its 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

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[3] Respondents' Motion for Summary Disposition at 13–18 (FINRA 523–28); Respondents' Reply at 6–11 (FINRA 1094–11).

[4] DOE's Opposition to Motion for Summary Disposition at 10–25 (FINRA 735–50).

[5] Order Denying Motion for Summary Disposition at 11–12 (FINRA 1455–56).

[6] Tr. 37:8 -13 (FINRA 2375); Tr. 2811:23–2812:1 (FINRA 5208–09) (emphasis added); Tr. 2815:17–19 (FINRA 5212).

Activities and the Panel Should Find that He Participated in Any Transactions Involving CSCT Customers' Liquidations at SCA."[7] In short, Section 5 and the standards for participatory liability were the whole case against Mr. Hurry, and Mr. Hurry constructed his defense accordingly.

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—and, by the NAC's reasoning, successfully—mounted a defense demonstrating that such charges could not stand.[8] FINRA has confirmed as much in its briefing to the Commission: It now *concedes* that the conduct alleged in its own charging instrument and found by the NAC is "***not a direct violation of Section 5***." FINRA Br. 13 (emphasis added). The undeniable variance that has arisen between the charge in the Complaint and the *post hoc* theory conjured by the NAC 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 FINRA proceedings be fair).[9]

The Commission has not hesitated to vacate FINRA decisions in these circumstances. *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 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

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[7] DOE's Post-Hearing Brief at 41, 46 (FINRA 9498, 9503).

[8] For the reasons explained in Mr. Hurry's opening brief, FINRA failed to prove, and the facts found by FINRA did not establish, that Mr. Hurry was a "necessary participant and substantial factor" in the subject transactions, as required for participatory liability under Section 5. *See* Motion to Stay Sanctions at 8–14.

[9] Importantly, 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.

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) (reversingeALJ'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").

As the Complaint plainly alleged a Section 5 violation against Mr. Hurry as the sole predicate for FINRA's Rule 2010 charge, FINRA admits it did not prove a Section 5 violation or seek to amend the Complaint to conform to the evidence, and FINRA found Mr. Hurry liable on a fundamentally different and uncharged theory of liability, FINRA's decision must be reversed. Thus, Mr. Hurry has demonstrated both a strong likelihood of success and a substantial legal question as to the merits of FINRA's decision and the fairness of its proceedings.

B. FINRA Lacks Statutory Authority to Enforce Section 5

FINRA's desperate *post hoc* change of course has another plausible explanation: FINRA recognizes that its longstanding claim of authority to enforce violations of the Securities Act, such as Section 5, is now in serious doubt.

1. 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.

2. 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), the authority of FINRA to sanction its members is limited to 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.[10] 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.'").

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

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

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 respecting FINRA, and it rejected the notion that "the seemingly inexplicable nature of a gap in the FINRA enforcement scheme . . . supports 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.

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

While FINRA correctly notes that Sections 15A and 19 of the Exchange Act authorize FINRA to discipline its members for violations of the organization's own rules, FINRA Br. 12 & n.13, that is not the end of the matter. 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 FINRA's suggestion, 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, FINRA Br. 12–13 & n.13,[11] the Supreme Court's recent *Cyan* decision—which FINRA does not address—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, still it '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.[12]

Against this backdrop, it is not surprising that the NAC has tried mightily to distance its reasoning from any tie to Section 5. Given the significant legal issues Mr. Hurry has raised, even

[11] None of the decisions cited by FINRA has 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 Section 5 violation); *Midas Sec., LLC*, Exchange Act Release No. 66200, 2012 WL 169138, at *11 n.63 (Jan. 20, 2012) (no statutory analysis). Moreover, FINRA conspicuously neglects to mention that Mr. Hurry's previous federal suit to enjoin FINRA's disciplinary proceeding as *ultra vires* was dismissed on jurisdictional grounds. *See Scottsdale Capital Advisors Corp. v. FINRA*, 844 F.3d 414, 424 (4th Cir. 2016). The Fourth Circuit said only that FINRA's interpretation of Rule 2010 was "plausible" for purposes of the exception to jurisdiction-stripping set out in *Leedom v. Kyne*, 358 U.S. 184 (1958); it unequivocally stated that it "ha[d] not decided the 'ultimate merits' of FINRA's position." *Id.* at 422.

[12] 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, and denying Mr. Hurry and the other respondents the opportunity to disprove those inferences through third-party discovery.

if the Commission were of the view that Mr. Hurry does not have a "strong likelihood" of success, it must at least acknowledge that Mr. Hurry has set forth a "substantial case" on the merits and has raised "serious legal questions" warranting a stay to preserve the status quo pending the Commission's review. *Zipper*, 2017 WL 5712555, at *6. This is especially true in light of the irreparable harm that will result from FINRA's bar absent the Commission's timely intervention.

III. FINRA Did Not Prove that Mr. Hurry Engaged in Any Unethical Conduct in Violation of Rule 2010

Leaving aside the fact that Mr. Hurry was never charged with committing generally "unethical conduct" unconnected to Section 5, the record evidence cannot support a standalone Rule 2010 violation.

The NAC expressly based its decision on five factors: (1) Mr. Hurry's establishment of CSCT, (2) Mr. Hurry's indirect ownership of CSCT, (3) Mr. Hurry's "management of [CSCT's] business," (4) Mr. Hurry's "control over [CSCT] and its personnel," and (5) Mr. Hurry's "prospecting for [CSCT's] customers."[13] As detailed at length and with record support in Mr. Hurry's opening brief, several of these factors have no basis in the record, and not a single one involved unlawful or unethical conduct.[14] Mr. Hurry established CSCT in response to Alpine's decision not to accept business from foreign financial institutions unless a qualified intermediary was involved.[15] He chose to form CSCT in the Cayman Islands because he recognized certain tax-deferral advantages from this arrangement, and he registered the firm in the Caymans' "special economic zone" in order to facilitate the acquisition of work permits.[16] He hired Mr. Ruzicka to

[13] NAC Decision at 76.

[14] Motion to Stay Sanctions at 4–7, 10–16.

[15] *Id.* at 5–6. 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).

[16] Motion to Stay Sanctions at 6.

run the firm because he knew Mr. Ruzicka to be an accomplished professional—an attorney with two masters' degrees, including one in tax.[17] Mr. Hurry 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 financial firm.[18] And the existence of CSCT in no way affected the diligence independently conducted by SCA or prevented SCA—or any regulatory body, for that matter—from obtaining necessary information, despite FINRA's efforts to tar the Caymans as a "bank secrecy jurisdiction."[19] At root, FINRA does not, and cannot, allege that the formation of CSCT was unlawful in any way.

FINRA's only response is to recite, verbatim, the NAC's findings. *Compare* FINRA Br. 3–9, 13–14, *with* NAC Decision at 76–83. But those findings cannot be reconciled with the record evidence, as just discussed. Even if one were to agree with the NAC's factual conclusions, those do not equate to unethical behavior in violation of Rule 2010. As explained in Mr. Hurry's opening brief, the existence of CSCT changed absolutely nothing from a regulatory or Section 5 compliance perspective. CSCT could not approve the sale of any securities in U.S. markets; it could only accept proposed deposits from foreign financial institutions, conduct its own diligence—which, by all accounts, was so rigorous that a majority of proposed deposits never even made it to SCA[20]—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 standards that led it to reject nearly half of the deposits *approved by CSCT*.[21] No diligence moved abroad, beyond the reach of SCA or any regulatory body, nor did

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[17] *Id.* at 6–7.
[18] *Id.* at 10–12.
[19] *Id.* at 14–16.
[20] *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).
[21] RX-40 at 2 (FINRA 9256).

the mere fact of certain CSCT customers' foreign citizenship ever impede legal compliance. Again, the only change to SCA and Alpine's operations from the formation of CSCT related to tax compliance, as a product of CSCT's transparent and expertly vetted QI application.[22]

None of this supports an inference of unethical conduct, much less conduct so egregious as to merit a lifetime bar for a 27-year industry veteran with a sterling record. For all of the foregoing reasons, Mr. Hurry has demonstrated the requisite likelihood of success to justify a stay. *See Scattered Corp.*, 52 S.E.C. at 1315 (granting stay of sanctions).

IV. Mr. Hurry Will Be Irreparably Harmed Absent a Stay

In an unvarnished effort to begin inflicting damage upon Mr. Hurry immediately, FINRA distorts the fundamental concept of irreparable harm beyond recognition. Simply put, irreparable harm is actual and imminent harm that cannot be remedied by monetary compensation. *See, e.g., Tom Doherty Associates, Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995); 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2948.1 (3d ed. 2018). Mr. Hurry has demonstrated concrete and particularized harm that will occur if a stay is not ordered, and that harm cannot be alleviated by subsequent monetary compensation after a successful appeal.[23] If the Commission does not stay the bar, SCA and Alpine are likely to lose all necessary lines of

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[22] Indeed, FINRA cannot reconcile its theory that Mr. Hurry fastidiously sought to evade U.S. regulation with CSCT's QI status, which required a detailed application to the IRS prepared in conjunction with KPMG. The same is true of FINRA's contention that Mr. Hurry "made concerted efforts to conceal his involvement with [CSCT]." FINRA Br. 7. In the same breath, FINRA points out that CSCT's marketing materials identify Mr. Hurry as a "director" and "tout[] [his] experience" with SCA and Alpine "as an asset of Cayman Securities' business operations." *Id.* at 4. Likewise, FINRA complains that Mr. Hurry "insisted on asserting attorney–client privilege on almost all communications with Ruzicka," yet *each such email* was produced to FINRA or detailed on a privilege log that FINRA never has challenged. FINRA Br. 8.

[23] Monetary compensation, in fact, is a virtual impossibility because FINRA is likely to assert absolute immunity from suit. *See Smoking Everywhere, Inc. v. FDA*, 680 F. Supp. 2d 62, 77 n.19 (D.D.C. 2010) (inability to recover damages from government agency due to sovereign immunity renders compliance costs irreparable); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."); *Texas v. EPA*, 829 F.3d 405, 433–34 (5th Cir. 2016) ("When determining whether injury is irreparable, 'it is not so much the magnitude but the irreparability that counts . . . .'").

credit and capital through Mr. Hurry. *See* Declaration of Justine Hurry ¶ 3 (attached hereto as Exhibit 1). This will threaten the jobs of dozens of employees and the investments of thousands of customers. *See id.* This unquestionably constitutes irreparable harm. *See Zipper*, 2017 WL 5712555 at *4 (recognizing that "the destruction of a business could provide a sufficient basis to support a finding of irreparable harm").

Moreover, because FINRA's proceedings were infected by unfairness—including, most prominently, the variance between FINRA's charge and the NAC's decision—enabling FINRA's bar before full Commission review would effectively sanction a violation of the Exchange Act's guarantee of a fair process.[24] *See, e.g., Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (the denial of a statutory right "is a harm that cannot be adequately compensated monetarily" and therefore constitutes irreparable injury); *Hunt v. SEC*, 520 F. Supp. 580, 608–09 (N.D. Tex. 1981) (issuing injunction to prevent violation of statutory rights).

A stay is further warranted where the benefit of a successful appeal would otherwise be lost. *Scattered Corp.*, 52 S.E.C. at 1320. FINRA disingenuously asserts that it is "unclear" what the benefit of a successful appeal would be to Mr. Hurry, or how he would lose this benefit absent a stay.[25] FINRA Br. 18 n.18. The answer, frankly, could not be clearer. The benefit of a successful appeal is that SCA and Alpine will remain liquid and continue employing staff and serving customers, and Mr. Hurry's statutory right to a fair proceeding will be vindicated.

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[24] As will be explained in Respondents' appellate briefs, other unfair aspects of FINRA's proceedings include, but are not limited to, FINRA's post-hearing shift to a novel theory of Rule 144 noncompliance, FINRA's admission of unreliable and untested hearsay evidence, FINRA's reliance on evidence of uncharged conduct to draw inferences of culpability, FINRA's refusal to admit relevant new evidence casting further doubt on the credibility of Enforcement's key witness, and FINRA's unilateral amendment of the Hearing Panel decision to correct a material factual error without any opportunity for briefing or argument.

[25] FINRA somehow argues that Mr. Hurry will not lose a benefit that FINRA, by its own admission, is unable to identify. FINRA Br. 18 n.18.

V. Mr. Hurry Has Established that a Stay Will Serve the Public Interest

As evidenced by the ample case law cited in Mr. Hurry's opening brief, the Commission generally looks for substantive securities laws violations or patently offensive and egregious behavior in violation of FINRA's rules when determining whether a stay is against the public interest. *See, e.g., Ahmed Gadelkareem*, Exchange Act Release No. 80586, 2017 WL 1735943, at *1 (May 3, 2017); *Kenny A. Akindemowo*, Exchange Act Release No. 78352, 2016 WL 3877888, at *3 (July 18, 2016); *Meyers Assocs., L.P.*, Exchange Act Release No. 77994, 2016 WL 3124674, at *4–5 (June 3, 2016); *Christopher A. Parris*, Exchange Act Release No. 77500, 2016 WL 1298225, at *3 (April 4, 2016); *William Scholander*, Exchange Act Release No. 74437, 2015 WL 904234, at *7–8 (Mar. 4, 2015). Neither of these factors is present here.

There are no allegations, let alone actual findings, that Mr. Hurry violated any substantive securities laws. In fact, the NAC went out of its way to make clear that it was *not* finding that Mr. Hurry had violated Section 5 (or any other statutory provision, for that matter). And, despite FINRA's contention, Mr. Hurry does not ignore the NAC's findings regarding allegedly "egregious" behavior—he vigorously disputes them. The NAC's decision mischaracterizes the "primary purpose" of CSCT and reads ill intent into legal conduct without justification. At bottom, the NAC's decision concludes that Mr. Hurry's actions were "egregious [] and antithetical to the underpinnings of securities regulation as a whole" because he: (1) created a lawful entity that provided a valuable service to its customers; (2) located this entity in a jurisdiction that made legitimate business sense; and (3) employed legal means of securing his personal privacy in managing that business. Neither the NAC's decision nor FINRA's opposition points to any unlawful or unethical conduct by Mr. Hurry; rather, FINRA baselessly ascribes nefarious intent to all of Mr. Hurry's legal actions to paper over its own critical failure of proof. Viewed objectively, the facts here do not amount to the

violations of substantive securities laws or the patently offensive and egregious behavior that the Commission typically cites when finding that a stay is against the public interest.

Similarly, no one will be harmed by the order of a stay. FINRA voices a vague concern that Mr. Hurry's ownership of SCA will lead to the evasion of federal securities laws, but Enforcement's entire case against Mr. Hurry centers on Mr. Hurry's purported control of *CSCT* and has nothing to do with any alleged actions by Mr. Hurry at *SCA* or any involvement by Mr. Hurry in the approval or sale of any stock. FINRA Br. 20–21. Nor could FINRA argue otherwise, given that Enforcement conceded before the NAC that there are no records of *any communications* between Mr. Hurry and others during the time that the subject deposits were being evaluated.[26] There is simply no evidence that, absent a stay, Mr. Hurry will *begin* exerting control over SCA or exploiting the firm to evade federal securities laws.

FINRA also dismisses, without proper consideration, Mr. Hurry's commitment to remain uninvolved in the stock deposit review process or otherwise be involved in the day-to-day management of SCA, Alpine, or any other registered broker-dealer. It is well within the Commission's powers under Rule 401(b) to condition a stay on any conditions it deems appropriate. While Mr. Hurry's offer to be uninvolved in the management of any broker-dealers during the pendency of his appeal should assuage any of the Commission's public interest-related concerns, Mr. Hurry is also open to other conditions the Commission may deem necessary for a stay. Such a solution would be in the public interest by preventing unnecessary irreparable harm to Mr. Hurry, and would satisfy FINRA's concerns about potential harm to individuals. And, of course, it is always in the public interest to restrain quasi-governmental bodies from exceeding their authority and violating their enabling legislation. *See, e.g.*, *Cent. United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321,

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[26] NAC Oral Argument Tr. 160:12–23.

330 (D.D.C. 2015) ("Forcing federal agencies to comply with the law is undoubtedly in the public interest, and defendants have not shown to the Court's satisfaction that this clear benefit would be outweighed by the harms putatively caused by plaintiffs' [actions]."); *Advanta Bank v. FDIC*, 684 F. Supp. 2d 17, 28 (D.D.C. 2010) (recognizing the public interest in "restraining federal agencies to the limits Congress has set").

CONCLUSION

For the foregoing reasons, Mr. Hurry respectfully requests that the Commission stay the effectiveness of the NAC's decision barring Mr. Hurry in all capacities pending the Commission's full review of this matter.

Dated: July 30, 2018

Respectfully Submitted,

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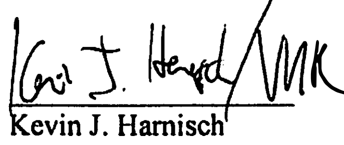
ATTORNEY CERTIFICATION

Pursuant to Rule 154(c) of the Commission's Rules of Practice, I hereby certify that foregoing document contains 6,293 words, exclusive of the tables of contents and authorities.



Kevin J. Harnisch

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2018, I caused the foregoing to be served by courier service on the following:

The Office of the Secretary
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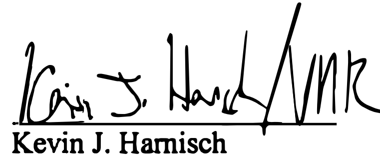


Kevin J. Harnisch

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

In the Matter of the Application of

JOHN J. HURRY
(CRD No. 2146449),

For a Motion to Stay Sanctions Imposed by
FINRA

REPLY IN SUPPORT OF PETITIONER'S MOTION TO STAY SANCTIONS

EXHIBIT 1

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

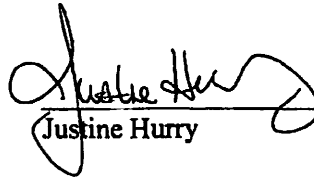
In the Matter of the Application of JOHN J. HURRY (CRD No. 2146449), For a Motion to Stay Sanctions Imposed by FINRA

DECLARATION OF JUSTINE HURRY

I, Justine Hurry, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

1. I am LLC Manager for the LLC Manager SCA Clearing LLC, who is the LLC Manager for the holding company for Scottsdale Capital Advisors ("SCA") and the holding company for Alpine Securities ("Alpine);
2. I am familiar with the business operations of SCA and Alpine.
3. SCA and Alpine rely on significant credit lines and capital associated with Mr. Hurry. If SCA and Alpine lose access to funds associated with Mr.Hurry, SCA and Alpine will likely be forced to cut staff and will likely become insolvent, causing the loss a large percentage of jobs and the stoppage and closure of many customer accounts.

Executed on July 30, 2018 at Scottsdale, Arizona.



Justine Hurry