UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of:

SOUTHEAST INVESTMENTS, N.C., INC. AND FRANK HARMON BLACK

For Review of Disciplinary Action Taken by FINRA

Admin. Proc. File No. 3-19185

APPLICANTS' OPENING BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

Alan M. Wolper
awolper@ulmer.com
Blaine F. Doyle
bdoyle@ulmer.com
Ulmer & Berne, LLP
500 West Madison Street, Suite 3600
Chicago, Illinois 60661
(312) 658-6500 – General
(312) 658-6565 – Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES i
INTRODUCTION 1
EXECUTIVE SUMMARY 1
RELEVANT FACTS AS TO APPLICANTS' APPEAL 3
EMAIL SUPERVISION SYSTEM 5
ARGUMENT 6
I. STANDARD OF REVIEW 6
II. APPLICANTS DID NOT PROVIDE FALSE TESTIMONY OR FABRICATE DOCUMENTS 8
A. FINRA Relied on Biased and Unreliable Witnesses 9
1. FINRA Cherry-Picked Biased Ex-SEI Employees to Serve as Witnesses. 9
2. FINRA Failed to Produce Documents Weighing on the Veracity of Witness Testimony. 12
a. Procedural History 12
b. The Notes Should have been Produced Under Rule 9253 as Written Statements. 14
c. The Notes (or Emails and Memo) Should have been Produced Because they are Exculpatory Evidence. 16
3. The Testimony of the Witnesses in Light of the Exculpatory Evidence Proves They Were Biased and Unreliable. 17
B. The Findings Should be Vacated Because of Evidence Spoliation 28
C. The NAC Affirmed a Decision in Which the OHO Failed to Consider Relevant Evidence 30
D. The NAC's Decision is Not in Keeping with the Purpose of the Exchange Act Because Mr. Black was Denied the Opportunity to Defend Himself 32
III. APPLICANTS' EMAIL SUPERVISION SYSTEM WAS REASONABLE 37
A. Email Supervision is Based Upon a Reasonableness Standard 37
B. The Use of Third-Party Email Addresses was Specifically Allowed by FINRA. 40
C. The Honor System was a Reasonable System to Supervise Emails 41
D. Regulators' Alleged Warnings about the System 43
E. Applicants' Adoption of SMARSH at FINRA's Request is Not a Cure-All 44
IV. THE SANCTIONS IMPOSED BY THE PANEL AND AFFIRMED BY THE NAC WERE NOT REMEDIAL AND DO NOT PROTECT THE PUBLIC .45
A. Email Supervision 46

B. Providing False Documents and Testimony 46

1. The Sanctions Imposed were Punitive and Failed to Serve a Remedial Purpose. 46

2. The Sanctions are at Odds with a Recent Supreme Court Ruling 47

C. The NAC Improperly Failed to Consider Mitigating Factors........ 49

V. THE CUMULATIVE EFFECT OF THE ERRORS 51

CONCLUSION........ 52

TABLE OF AUTHORITIES

Cases and Administrative Decisions

Bakalar v. Vavra, 619 F.3d 136 (2d. Cir. 2010) 8

Brady v. Maryland, 373 U.S. 83 (1963) 13, 16, 17, 27

Dep't of Enforcement v. CM, Discip. Proceeding No. C9B040020 (April 6, 2005) 39

Dep't of Enforcement v. Holaday, No. 2012032519101, (OHO May 21, 2015) 7

Dep't of Enforcement v. Respondent 1 & 2, No. 2010023367001 (OHO Aug. 30, 2012) 16

Dep't of Enforcement, No. CAF000045, 2001 NASD (OHO May 17, 2001) 16, 27

Dep't. of Enforcement v. Michael Bullock, No. 2005003437102 (NAC May 6, 2011) 35

Dep't of Enforcement v. Forest, No. 2009016159102 (NAC July 28, 2015) 7

Dep't of Enforcement v. Paul Bryan Zenke,
FINRA Disciplinary Action No. 2006004377701 (December 14, 2009) 36

Dep't of Enforcement v. Respondent 1 and Respondent 2
OHO Order 12-04 (2010023367001) (August 30, 2012) 16

Dep't of Enforcement v. Ryan Leopold,
FINRA Disciplinary Action No. 2007011489301 (Feb. 24, 2012) 46

Dep't of Market Regulation v. Jaloza,
Complaint No. 2005000127502 (NAC July 28, 2009) 52

Dep't of Enforcement v. Wall Street Strategies Inc., et al.,
Disciplinary Action No. 2012033508702 50

Dep't of Enforcement v. Wanda Sears, 2009 WL 2210529 (July 23, 2009) 35

Dirks v. S.E.C., 463 U.S. 646 (1983) 49

Dist. Bus. Conduct. Committee v. William A. Lobb.,
No. C07960105 (NAC April 5, 2000) 39

Harkabi v. SanDisk Corp., 275 F.R.D. 414 (S.D.N.Y. 2010) 28, 29

Hecht v. Harris, Upham & Co., 430 F.2d 1202 (9th Cir. 1970) 39

In re James H. Thornton, Exch. Act Rel. No. 41007 (Feb. 1, 1999) 39

In re Trujillo, Exch. Act Rel. No. 26635, 49 S.E.C. 1106 (1989) 39

In the Matter of Arthur James Huff, Fed. Sec. L. Rep. (CCH) ¶ 84, 719 (1991) 38

In The Matter Of Department Of Enforcement,
Complainant Austin Wayne Morton Spiro, OK, Respondent, 2019 WL 2176343 .... 7, 8, 31

In the Matter of Gary M. Kornman,
Exchange Act Release No. 59403 (Feb. 13, 2009) 49

In the Matter of Richard G. Strauss,
Exchange Act Release No. 31222 (Sept. 22, 1992) 7

In the Matter of the Application of John M. E. Saad,
Exch. Act Rel. No. 86751 (Aug. 23, 2019) 48

In the Matter of the Application of Rani T. Jarkas,
Exch. Act Rel. No. 77503 (Apr. 1, 2016) 6

In the Matter of the Application of Richard G. Cody,
Exch. Act Rel. No. 64565 (May 27, 2011) 6

In the Matter of the Application of U.S. Associates, Inc.
Exch. Act Rel. No. 33189 (November 9, 1993) 33, 51

In the Matter of the Application of Wanda P. Sears,
Exch. Act Rel. No. 58075 (July 1, 2008) 34

In the Matter of the Applications of Paulson Inv. Co., Inc.,
Exch. Act Rel. No. 19603 (Mar. 16, 1983) 34

Kokesh v. S.E.C., 137 S. Ct. 1635 (2017). 47, 48

Lightning Lube, Inc. v. Witco Corp.,
802 F. Supp. 1180 (D.N.J. 1992), *aff'd*, 4 F.3d 1153 (3d Cir. 1993) 8

McCarthy v. S.E.C., 406 F.3d 179 (2d Cir. 2005) 46, 47

Napue v. Illinois, 360 U.S. 264 (1959) 26

Outlaw v. Johnson, 190 N.C.App. 233 (2008) 28

Panos v. Timco Engine Ctr., Inc., 197 N.C. App. 510 (2009) 28

Paz Sec., Inc. v. SEC, 494 F.3d 1059 (D.C. Cir. 2007) 50

Perpetual Sec., Inc.,
Exchange Act Release No. 56613 (Oct. 4, 2007) 47

Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002) 28

Saad v. S.E.C., 873 F.3d 297 (D.C. Cir. 2017) 48

Seaton v. SEC, 670 F.2d 309, 311 (D.C. Cir. 1982)
aff'd, 693 F.3d 251 (1st Cir. 2012). 6

SEC v. Lum's, Inc., 365 F. Supp. 1046 (S.D.N.Y. 1973) 38

Singletary v. D.C., 766 F.3d 66 (D.C. Cir. 2014) 7, 8

United States v. Rivalta, 892 F.2d 223 (2d Cir. 1989) 8

West v. Goodyear Tire & Rubber Co., 167 F.3d 776 (2d Cir. 1999) 30

Wilburn and Cynthia Slagle v. Jonathan Roberts Financial Group, Inc., et al.,
FINRA Case 03-05830 49

Rules and Statutes

15 U.S.C. § 78(e)(1) 6
15 U.S.C. §78s(e)(2) 47
15 U.S.C.§78o-3(b)(8) 33
15 U.S.C.§78o-3(h)(1) 33
15 U.S.C.§78o-3(h)(2) 33

FINRA Regulatory Notice 07-59 .... 40, 41
FINRA Regulatory Notice 10-06 41

FINRA Rule 9120 14
FINRA Rule 9212 36
FINRA Rule 3010 38
FINRA Rule 9200 14
FINRA Rule 9251 .... 12, 16
FINRA Rule 9253 .... 12, 13, 14

FINRA Sanction Guidelines 45, 47

NASD Conduct Rule 3010 38
NASD Notice to Members 96-33 38

Other

Financial Industry Regulatory Authority, *Concentrate on Concentration Risk*, http://www.finra.org/investors/ concentrate-concentration-risk (last visited August 15, 2019) 9

Financial Industry Regulatory Authority, Enforcement, http://www.finra.org/industry/enforcement (last visited August 15, 2019) 9

Financial Industry Regulatory Authority, *Form U4 Explanation of Terms*, https://www.finra.org/sites/default/files/AppSupportDoc/p468051.pdf (last visited August 15, 2019) 15

Financial Industry Regulatory Authority, *Statistics*, https://www.finra.org/newsroom/statistics (last visited August 15, 2019) 10

INTRODUCTION

Pursuant to Rule 450 of the SEC of the Rules of Practice, Applicants Frank Harmon Black and Southeast Investments N.C., Inc. ("SEI" or together "Applicants") file their Opening Brief in Support of Application for Review. In support of their Application, Applicants state as follows:

On May 23, 2019, FINRA's National Adjudicatory Council ("NAC") issued a Decision affirming, in part, and reversing, in part, the findings, and affirming in part, reversing, in part, and modifying, in part, the sanctions imposed on the Applicants by the FINRA hearing panel in a disciplinary proceeding. Specifically, the NAC (1) affirmed findings that Applicants provided fabricated documents and false testimony; (2) reversed findings that Applicants failed to establish and maintain a system to ensure SEI offices were inspected; (3) affirmed findings that Applicants failed to establish and maintain a reasonable supervisory system, and to establish, maintain and enforce reasonably designed WSPs to ensure retention and review of business-related emails; (4) affirmed findings that Applicants failed to retain 16 business emails of Richard Sebastian; (5) reversed findings on willfulness; and (6) reversed findings that Applicants failed to retain other business related electronic correspondence.

The NAC (1) affirmed the bar imposed on Mr. Black and the $73,000 fine to SEI for providing false testimony and fabricated documents; (2) reduced the fine for failing to retain firm emails to $500 (joint-and-several); and (3) reduced the fine for supervision failures to $73,000 (joint-and-several). In light of the bar, the other sanctions were not imposed on Mr. Black (despite the fact they were characterized as being joint-and-several).

EXECUTIVE SUMMARY

The proceedings against Applicants were tainted from the start. As discussed below in greater detail, Mr. Black apparently angered a member of the FINRA staff, which led to a cascade of questionable, and in some cases, downright unfair, actions by that organization. A couple of

the highlights (or lowlights) have included FINRA cherry-picking only ex-SEI employees, with axes to grind against Mr. Black, to serve as witnesses, and the failure to turn over documents that directly contradicted the testimony of at least two witnesses and cast others in a bad light. By failing to turn over this exculpatory evidence, FINRA denied Applicants the chance to cross-examine those witnesses and demonstrate their bias to the hearing panel.[1] All of this occurred in a case where FINRA and the NAC have admitted that the credibility of the ex-brokers is the key issue to the disposition. Incredibly, the NAC as much as admitted that the investigation leading up to the hearing was unfair when it affirmed the hearing panel's findings. The issues of biased witnesses and exculpatory evidence aside, FINRA totally ignored the evidence put forth by Applicants.

Moreover, the hearing itself was unfair because FINRA introduced and relied upon evidence against Applicants for alleged violations for which they were not charged. Because of this, FINRA failed to prove its case by a preponderance of the evidence, which means that the findings related to Counts One and Two (giving false testimony and creating phony documents) should be vacated.

In addition, the NAC erroneously affirmed findings that Applicants had an unreasonable email supervisory system. FINRA's main concern was that the system incorporated the so-called "honor system" that required brokers using their personal email addresses to forward or carbon copy SEI on customer communications. However, FINRA specifically allows brokers to use their personal email addresses and Enforcement admitted that in certain situations the honor system could be a reasonable supervisory system. Given the limited number of SEI brokers using *any*

[1] With access to the documents they were not provided in advance of the hearing, Applicants have now been able to demonstrate substantial evidence to overturn the credibility determinations by the hearing panel.

email address (personal or SEI issued), the system was reasonable for SEI. Thus, the findings related to email supervision should also be vacated.

Moreover, the sanctions against Applicants have done nothing to stop any alleged wrongdoing or help the public. Further, the bar against Mr. Black is not permissible, in light of a recent Supreme Court decision. Finally, in considering all of the above, the cumulative effect of the unfair actions by FINRA has been to deny Applicants a fair hearing, which demands the findings be vacated or at least that the case be remanded so that Applicants have a meaningful chance to participate in a hearing where both sides have access to the pertinent evidence. That is not too much to ask.

RELEVANT FACTS AS TO APPLICANTS' APPEAL

Providing False Testimony and Fabricated Documents

The NAC affirmed findings that Applicants gave false testimony and fabricated documents related to branch office inspections. Around 2000, Charles Graham accepted a sanction relating to his insurance license that, unbeknownst to him, caused him to become statutorily disqualified (Tr. 844-848). In 2010, SEI attempted to hire Mr. Graham (Tr. 843). After his application for registration was denied because of the disqualification, SEI filed an MC-400, which was approved upon the condition of SEI subjecting Mr. Graham to heightened supervision (Tr. 843-50).[2] David Plexico was tasked with inspecting Mr. Graham's office under the firm's Heightened Supervision Plan ("HSP") (Tr. 849-50, CX-10).

SEI was routinely examined by FINRA's Atlanta office from approximately 1997 until 2012. This resulted in a mostly harmonious 14-year relationship between SEI and FINRA that

[2] Citations to the transcript of the hearing are abbreviated "Tr. __." Respondent's Exhibits are cited as "RX__." Claimant's Exhibit are cited as "CX_." The March 3, 2017 Decision of the Hearing Panel is referred to as "Decision __." The May 23, 2019 NAC Decision is referred to as "NAC Decision __."

featured meaningful back-and-forth between the two on regulatory issues. At times SEI changed its policies, and at other times FINRA retreated from its positions. The relationship was always cordial. On or about October 4, 2012, however, things deteriorated when Peter Cleven, former Associate Director of FINRA's Boca Raton office, and three of his colleagues contacted Mr. Black requesting information relating to details about an SEI trading program. The call initially appeared to be part of the routine 2012 Cycle Exam and Mr. Black assured Mr. Cleven he would retrieve the requested information, but was essentially told that was not good enough. Mr. Black uncomfortably asked if his attorney should join the call.

In response, Mr. Cleven accused Mr. Black of "evasiveness" and said that he would overload SEI with document requests (Applicants' Wells Submission, pp. 9-10). Next, Mr. Cleven demanded information about customer "Gayle Goodman." Not surprisingly, Mr. Black was unfamiliar with her because she had never executed a trade at SEI and her name was, in fact, "Glenda Goodman."

Since that conversation, it appears that FINRA has had it in for Mr. Black and SEI. (Applicants' Wells Submission pp. 9-10). On October 8-9, 2012 (mere days after the hostile telephone call with Mr. Cleven), examiners from FINRA's Boca Raton office made a surprise inspection of Mr. Graham's branch office to ensure compliance with the HSP (Tr. 181-182). Mr. Graham, who was 83 years old at the time, was distracted the first day of the exam because he was helping to run a charity golf tournament and, as a result, he needed to leave his office earlier than usual (Tr. 182-3, 871, RX-104).

Kelly Edwards, a FINRA examiner, testified that Mr. Graham initially told her that Mr. Plexico had not been inspecting his office in compliance with the HSP. According to Ms. Edwards,

Mr. Graham then changed his story after receiving a telephone call, allegedly from Mr. Black,[3] on the second day of the exam (Tr. 184-186).[4] On account of his small book of securities business, Mr. Graham resigned from SEI (Tr. 872-873). Disgusted by FINRA's tactics, Mr. Graham refused to provide testimony on the record (Tr. 188, 874).

FINRA subsequently investigated the performance of other SEI branch office inspections. Instead of looking at a random sampling of branches, as one might reasonably expect, FINRA contacted only *former* SEI brokers, all of whom had past disputes with Mr. Black and were, thus, biased. FINRA's complete reliance on jaded individuals as its only source for investigatory data was unfair and has called into doubt the findings that Mr. Black failed to conduct the inspections.

Mr. Black gave testimony to FINRA on two occasions, March 3, 2013 and April 3-4, 2014. Mr. Black maintained under oath that he visited all the branch offices. With one exception,[5] Mr. Black testified that he always traveled by car because he preferred driving to the hassle of air travel and that he paid in cash for all his travel-related expenses. Given an investigation, if one can even call it that, that was unquestionably biased, FINRA Enforcement, along with the Hearing Panel and the NAC, mistakenly believe that Mr. Black lied about conducting these branch office reviews and that he falsified documents relating to those inspections.

Email Supervision System

Applicants maintained a procedure whereby registered representatives who utilized email for communication with customers were allowed to use personal email addresses, provided that

[3] Notably, FINRA presented no credible evidence as to the actual identity of the person who placed the call to Mr. Graham; it is pure conjecture that it was Mr. Black on the other end of that call, and, as discussed below, evidence that is pure conjecture does not meet the preponderance of evidence standard.

[4] As a further example of FINRA's repeated distortion of events, Ms. Edwards indicated in a October 24, 2012 letter that Mr. Graham threw the examiners out of his office on the second day by "closing his office at 3 P.M." In reality, the examiners left his office at 3 P.M. in order to make their flight back to Florida (Tr. 212-213).

[5] Mr. Black's son accompanied him to an office inspection in Seattle, Washington.

they copied SEI on all such customer correspondence. FINRA has characterized this as the so-called "honor system." Mr. Black testified that this system and the corresponding language in the WSPs were originally suggested to him by a member of the FINRA staff (Tr. 801-803, 818). Although regulators took issue with the honor system at later dates, Mr. Black still believed it was adequate and, further, did not believe he was required to install Smarsh (an automated email archival system). Finally, in an effort to avoid any further issues and to comply with the request of the regulators, SEI installed Smarsh in 2015, which seemingly resolved matters to the satisfaction of FINRA.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing disciplinary action taken by a self-regulatory organization like FINRA, the Commission must determine: (1) whether the applicant engaged in the conduct found by the SRO; (2) whether such conduct violates the SRO's rules as specified in the SRO's determination; and (3) whether those rules were applied in a manner consistent with the purposes of the Securities Exchange Act of 1934 (the "Exchange Act").[6] The Commission is to base its findings on an independent review of the record and apply a preponderance of the evidence standard to determine whether the evidence supports the SRO's findings.[7] Further, the Commission reviews the sanctions FINRA imposed to determine whether they are excessive or oppressive, or impose an

---

[6] 15 U.S.C. § 78(e)(1).

[7] *See In the Matter of the Application of Rani T. Jarkas*, Exch. Act Rel. No. 77503, 2016 WL 1272876, at *4 (Apr. 1, 2016); *In the Matter of the Application of Richard G. Cody*, Exch. Act Rel. No. 64565, 2011 WL 2098202, at *1, 9 (May 27, 2011) (*citing Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982)) (upholding preponderance of evidence standard in FINRA disciplinary proceeding), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

unnecessary or inappropriate burden on competition.[8] Even if the Commission affirms the factual findings of the SRO, it may reduce or cancel the sanctions as it sees fit.[9]

In considering the preponderance of evidence standard, it is important to note that the Commission has set aside findings of violations and sanctions in the past when "the evidence adduced . . . is insufficient to support the NASD's judgement." *See In the Matter of Richard G. Strauss*, Exchange Act Release No. 31222, 1992 WL 252168 at *4 (Sept. 22, 1992).

More specifically, the NAC has dismissed a case because Enforcement did not prove the charges by a preponderance of the evidence and, therefore, did not carry "its evidentiary burden" and prove "it is more likely than not" that the conduct at issue occurred. *In The Matter Of Department Of Enforcement, Complainant Austin Wayne Morton Spiro, OK, Respondent*, 2019 WL 2176343, at *15.[10] The NAC found that the preponderance of the evidence standard incorporates a prerequisite that the facts meet a minimum level of reliability. *Morton Spiro*, 2019 WL 2176343, at *13 ("Courts have found that the preponderance standard itself incorporates a requirement that evidence 'must meet a minimum threshold of reliability.'") (*Quoting Singletary v. D.C.*, 766 F.3d 66, 73 (D.C. Cir. 2014).

In the *Morton Spiro* case, Enforcement argued that the respondent "contrived a story"[11] to bolster his defense, which is remarkably similar to the baseless allegations that Mr. Black repeatedly lied about trips he took and inspections he made. The NAC found in *Morton Spiro* that

---

[8] 15 U.S.C. §78(e)(2).

[9] *Id.*

[10] *See, e.g., Dep't of Enforcement v. Holaday*, No. 2012032519101, 2015 FINRA Discip. at *1-2 (OHO May 21, 2015) ("On appeal, we have concluded that Enforcement failed to prove, by a preponderance of the evidence, that Holaday forged or caused the forgery of the forms...As the complainant, Enforcement had the burden of proof in this case. Enforcement failed to meet that burden."). *See also Dep't of Enforcement v. Forest*, No. 2009016159102, 2015 FINRA Discip. at *5 ("We find that iTrade committed the underlying recordkeeping and net capital violations but find that the preponderance of the evidence does not establish that Forest acted as the *de facto* FINOP of iTrade or can be held liable for causing iTrade's violations. Therefore, we dismiss the complaint against Forest.").

[11] *See Id.* FN 51.

"Enforcement cannot satisfy its evidentiary burden with guess or conjecture." *Morton Spiro*, 2019 WL 2176343, at *13. *See also Lightning Lube, Inc. v. Witco Corp.*, 802 F. Supp. 1180, 1186 (D.N.J. 1992), *aff'd*, 4 F.3d 1153 (3d Cir. 1993); *Singletary*, 766 F.3d at 73 ("'[T]he government cannot meet its burden, even under only a preponderance standard, with evidence that is speculative, unsupported, and unreliable.'") (*Quoting United States v. Rivalta*, 892 F.2d 223, 230 (2d Cir. 1989)).[12]

This precedent is problematic for FINRA here because Enforcement repeatedly relied on conjecture, as well as unsupported and unreliable evidence (especially in the form of unreliable witnesses). For these reasons, and for others discussed below, FINRA failed to show by a preponderance of the evidence that any of the alleged wrongdoing took place and, therefore, all of the findings should be vacated.

II. APPLICANTS DID NOT PROVIDE FALSE TESTIMONY OR FABRICATE DOCUMENTS

The findings that Applicants lied and falsified documents are all predicated on the conclusion that four[13] particular branch office inspections did not take place. But, these findings are erroneous because FINRA (1) relied on biased and unreliable witnesses (in addition to failing to turn over exculpatory evidence relating to said witnesses), (2) failed to consider relevant evidence, and (3) because the hearing was not in keeping with the purposes of the Exchange Act.

[12] *See also Bakalar v. Vavra*, 619 F.3d 136, 151 (2d. Cir. 2010) (scenarios based on pure conjecture "do not constitute findings by a preponderance of the evidence that what 'could have' happened, actually did happen.).

[13] The OHO found that Applicants failed to inspect ***five*** offices, and therefore lied about and produced false documents relating to those inspections, but the NAC only affirmed the findings as to four. The NAC opted "not to address whether the record also demonstrates that respondents provided false docu ments and false testimony about Black's purported inspection of Mr. McCall's office." (NAC Decision FN 27 pp. 18-19).

A. FINRA Relied on Biased and Unreliable Witnesses

The NAC conceded that the credibility of the ex-broker witnesses "is the key issue" (NAC Decision p. 14) in this matter. Yet, FINRA not only relied on biased and unreliable witnesses, it also denied Applicants access to the very documents that demonstrated FINRA's witnesses were biased and unreliable until well after the hearing and oral argument. In other words, FINRA failed to produce exculpatory evidence that went directly to the credibility of the ex-broker witnesses who testified against Applicants and whose testimony was the "key" to the case. Because of this, the findings should be reversed.

1. FINRA Cherry-Picked Biased Ex-SEI Employees to Serve as Witnesses.

FINRA's mantra to investors is that they should never put all of their eggs into one basket. Why? Because if you own similar investments, "what happens to one investment is likely to happen to the others."[14] FINRA failed to heed its own advice, however, in conducting its exam of Applicants, inexplicably relying on only one type of witness, i.e., *ex*-SEI employees. FINRA exams are, admittedly, based on a mere sampling of a broker-dealer's total universe of activities, but, for an exam to have efficacy, that sample must be representative. Here, by only communicating with ***former*** SEI representatives, FINRA deliberately skewed the sample, creating an echo chamber of testimony.

The website for FINRA's Department of Enforcement assures the public it is committed to "vigorous, fair and effective enforcement."[15] Applicants agree that FINRA's enforcement in this matter has been vigorous, but it has hardly been fair. SEI had between 114 and 133 registered

---

[14] Financial Industry Regulatory Authority, *Concentrate on Concentration Risk*, http://www.finra.org/investors/concentrate-concentration-risk (last visited August 15, 2019).

[15] Financial Industry Regulatory Authority, Enforcement, http://www.finra.org/industry/enforcement (last visited August 15, 2019).

representatives during the review period (Decision p. 26), yet, FINRA did not deign to interview a single broker still employed with SEI. In so doing, in skewing its sample in such an obviously biased manner, FINRA purposely avoided persons who might have contradicted its conclusion that Mr. Black did not inspect all the offices he claimed.

In response to this criticism, Enforcement offered the paper-thin and, frankly, laughable excuse that it did not want to interrupt SEI's business by interviewing current brokers, and that it was attempting to avoid a situation akin to that of Mr. Graham, described in the fact section above, where FINRA erroneously maintained that Mr. Black convinced him to change his story in a phone call (Tr. 264, 314-316). FINRA conducts thousands of exams on an annual basis[16] – some by surprise! – and has no problem whatsoever interrupting the business of the broker-dealer in those instances, so for it to insist here that it was concerned about being a nuisance, is silly. Moreover, with regard to Mr. Black's supposed interference with Mr. Graham, and considering the inappropriate emphasis FINRA put on it (there were, after all, no charges in relation to inspections of Mr. Graham's office), it seems likely that FINRA would have relished the opportunity to "catch" Mr. Black interfering with additional current SEI employees.

Given the time that elapsed between the initial hearing and NAC decision, one might have thought that FINRA would come up with a better excuse, but in its Opposition to Mr. Black's Motion to Stay Sanctions (the "Opposition"), FINRA summarily dismissed critique of its decision to interview *ex*-SEI brokers[17] exclusively with an unsupported, conclusory statement that its choice "to interview former Firm representatives was entirely appropriate to gather evidence on the issue

---

[16] Financial Industry Regulatory Authority, *Statistics*, https://www.finra.org/newsroom/statistics (last visited August 15, 2019) (in 2017, FINRA conducted 1,492 Cycle and 914 Branch Exams).

[17] Notably, the CRDs of all the ex-brokers reflect that they had reason to dislike Mr. Black and SEI. The reasons are discussed in greater detail below.

of whether the Firm conducted office inspections." (Opposition p. 16). Zero effort was made even to attempt to justify ***how*** that decision was "appropriate."

Common sense dictates that the interview sample did not create an even playing field. In fact, the NAC either implicitly admitted the investigation was unfair, or concluded that whether or not the exam was fair was not relevant, when it found that "[t]he requirements in Section 15A(b)(8) of the Exchange Act that FINRA provide a 'fair procedure' in an adjudicatory proceeding 'does not extend to investigations.'" (NAC Decision p. 18). From a public policy standpoint, it is absurd for FINRA not just to argue but to extol, that its investigations can be unfair as long as the subsequent hearing is fair, as if that were even possible. Moreover, and as discussed below, FINRA doubled down on its unfair witness selection by denying Applicants access to exculpatory evidence relating to the testimony of those very witnesses.

Ironically, even cherry-picking ex-employees as interviewees had unintended consequences. During its exam, FINRA interviewed ex-SEI broker, Gregg Kucher, and FINRA's memo memorializing that interview indicates that he *did* have his office inspected and that he had met Mr. Black approximately 20 times.[18] Of course, as will be discussed below, FINRA failed to produce that memo to Applicants until well after the hearing, so this was not a subject on which Applicants were able to cross-examine FINRA's witnesses.

The devastating impact of FINRA's failure to produce this document in a timely manner also manifested itself during oral arguments before the NAC. There, the appellate panel asked FINRA attorney Sean Firley if any broker who was telephoned during the exam had confirmed that his office had been inspected and if said inspection matched the calendar of inspections. Mr. Firley replied, "I don't believe so." (NAC Argument p. 125). In light of the memo of Mr. Kucher's

[18] Ex-SEI broker Ronnie Franks also indicated that Mr. Black visited his office, although he was primarily a banker, so even if Mr. Black did visit for the purposes of an audit, Mr. Franks might not have appreciated that fact.

interview, however, which, admittedly, did not contain the date of the inspection, Mr. Firley either knew or should have known that his answer to the NAC was possibly untrue. As will now be shown, the FINRA documents that were not produced until after the hearing undermined the credibility of FINRA's cherry-picked witnesses.

2. FINRA Failed to Produce Documents Weighing on the Veracity of Witness Testimony.

a. Procedural History

FINRA compounded its decision to exclusively interview and call *ex*-brokers as witnesses by failing to produce exculpatory evidence weighing on and, at times, directly refuting their testimony. Documents relating to interviews of ex-SEI brokers should have been produced as written statements pursuant to FINRA Rule 9253 and because they were exculpatory evidence pursuant to Rule 9251(b)(3). The failure to produce these documents was not harmless error and demands the findings be vacated.

In terms of procedure, after Applicants' hearing and oral argument in support of their appeal, the NAC Interim Order[19] directed the OHO to do the following: (a) order FINRA to produce to Applicants the notes (the "Notes") made by FINRA examiner Pamela Arnold during telephone conversations with former SEI brokers, four of whom testified at Applicants' hearing; (b) determine if the Notes are "written statements" within the meaning of Rule 9253(a); and (c) if found to be "written statements," determine if FINRA's failure to provide them was not harmless error pursuant to Rule 9253(b).

On July 2, 2018, FINRA DOE produced declarations of Ms. Arnold and Mr. Firley representing that the Notes could not be located. No information was provided with respect to custody of the Notes, whether copies were ever made of them by or for counsel or otherwise, who

---

[19] On June 26, 2018, the NAC issued an Interim Order on the Discovery Issues.

last saw the Notes and where, and other critical information pertinent to an inquiry of what became of them. In lieu of producing the Notes, FINRA DOE provided (1) several e-mails from Ms. Arnold to Mr. Ray Palacios, written six (6) days after the telephone conversations with FINRA's witnesses (the "Emails")[20], that purportedly "summarized the information from [her] notes into the emails," and (2) Mr. Palacios's memorandum to the file (the "Memo").

After both parties briefed the issues as articulated by the NAC Interim Order, Hearing Officer Dixon found that "Arnold's notes do not constitute 'written statements' under Rule 9253(a)(2) because they were not made 'during a routine examination or inspection.' We also find that, based on the totality of the circumstances and the presence of compelling evidence, even if deemed erroneous, the failure to produce the notes was harmless error under Rule 9253(b). We also find that Arnold's notes do not contain exculpatory *Brady* material." (August 31, 2018 decision, p. 11).

The NAC, in a nod to the silliness of DOE's argument, declined to address whether or not the Notes were written statements in the context of Rule 9253 but affirmed that even if they were written statements, Applicants had not demonstrated that the failure to produce them was not harmless error (NAC Decision p. 20). The NAC, as noted earlier, also affirmed that the materials in question were not exculpatory (using only three sentences to do so!). These findings are erroneous, for reasons that will be discussed below.

[20] Ms. Arnold sent a separate email for each of the brokers. In other words, there was an email devoted to Mr. Marable and an email devoted to Mr. Ravella, etc. Thus, Applicants will refer to an Email when referring to one that is specifically tied to a broker or Emails when referring to the entire lot of emails from Ms. Arnold. The Emails and Memo are all found as attachments to "Enforcement's Response to Order Complying with National Adjudicatory Council's Interim Order" from July 2, 2018.

b. The Notes Should have been Produced Under Rule 9253 as Written Statements.

FINRA should have produced the Notes (or, given that it lost or destroyed the Notes, the Emails or Memo)[21] because they are written notes pursuant to Rule 9253(a)(2) and the failure to produce them was not harmless error.[22]

FINRA Rule 9253(a)(2) provides:

> A Respondent in a disciplinary proceeding may also file a motion requesting that the Department of Enforcement or the Department of Market Regulation produce for inspection and copying any contemporaneously written statement made by an Interested FINRA Staff member during a routine examination or inspection about the substance of oral statements made by a non-FINRA person when (a) either the Interested FINRA Staff member or non-FINRA person is called as a witness by the Department of Enforcement or the Department of Market Regulation, and (b) that portion of the statement for which production is sought directly relates to the Interested FINRA Staff member's testimony or the testimony of the non-FINRA witness.[23]

Incredibly, the OHO found that the Notes did not have to be produced because they were not made during a routine examination or inspection and, therefore, were not written statements under Rule 9253(a)(2).[24] The OHO made this finding despite acknowledging the fact that Enforcement itself was "'unclear' whether Arnold's notes were made 'during a routine examination or inspection'" (OHO Order Responding to Interim Order, August 31, 2018 p. 4). It is, however, indisputably clear that the Notes were made during a "routine examination or inspection."

The examination began with Charles Graham's statutory disqualification inspection in January 2012, including the visit to his office in October 2012. After that, On-the-Record

---

[21] Given that the FINRA lost the Notes, arguments that it should have produced the Notes should also apply to the Emails or Memo that were eventually produced in place of the Notes.

[22] The OHO Decision Responding to Interim Order concedes that Applicants' counsel made a proper motion for the documents.

[23] Under FINRA Rule 9120(t) Ms. Arnold was clearly an "interested FINRA staff member" with relation to a Rule 9200 series proceeding.

[24] The Notes also should have been produced as "contemporaneously written statements" under 9253(a).

Interviews occurred in March 2013. The phone calls with the brokers that resulted in the Notes occurred in August 2013. FINRA did not issue a *Wells* notice to Applicants until ***May 21, 2015*** – a year-and-a-half after the Notes were made. The Notes were clearly still made in the examination process.

On Form U-4, FINRA (as well as the SEC and every state) defines the term "FINRA investigation"[25] in two ways, i.e., "investigations after the 'Wells' notice has been given or after a person associated with a member, as defined by The FINRA By-Laws, has been advised by the staff that it intends to recommend formal disciplinary action."[26] Neither of those things happened before Ms. Arnold prepared her Notes in August 2013. Thus, by FINRA's own definition on the Form U-4, these Notes were made during a routine examination or inspection – not during an "investigation" – and were, therefore, written statements. The Panel's finding is wrong and it is telling that DOE itself was "unclear" on the issue and that, further, the NAC declined to even address it.

The NAC also found that even if the Notes should have been produced, Applicants failed to show the failure to produce them was not harmless error.[27] As discussed below, the failure was not harmless error and, as a result, the findings should be vacated.[28] Even if the Commission decides that the Notes (and Emails and Memo) were not written statements, they still should have been produced because they demonstrated that the ex-SEI brokers were unreliable and biased witnesses and, thus, constituted exculpatory evidence.

---

[25] The term "formal investigation" is not defined, and does not appear to be a part of the official FINRA lexicon.

[26] Financial Industry Regulatory Authority, *Form U4 Explanation of Terms*, https://www.finra.org/sites/default/files/AppSupportDoc/p468051.pdf (last visited August 15, 2019).

[27] The OHO made a similar finding even though Hearing Officer was only supposed to make a finding on the issue of harmless error if it was determined that the documents were written statements.

[28] FINRA's failure to produce said evidence until after the hearing was not harmless error and demands a re-hearing or amended decision pursuant to Rule 9253(b).

c. The Notes (or Emails and Memo) Should have been Produced Because they are Exculpatory Evidence.

The Notes, Emails and Memo should have been produced pursuant to FINRA Rule 9251(b)(3), which states that documents cannot be withheld if they contain material exculpatory evidence. The NAC concluded that "the Hearing Panel correctly found that the materials do not contain exculpatory material" (NAC Decision p. 23), but for the reasons discussed below, this affirmation was misguided.

In Disciplinary Proceedings, FINRA applies Procedural Rule 9251(b)(3), "consonant with the principles enunciated by the Supreme Court in Brady." *Dep't of Enforcement v. Respondent 1 and Respondent 2*. OHO Order 12-04 (2010023367001) August 30, 2012. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that the prosecution must produce documents that may contain exculpatory evidence. *Brady*, 373 U.S. at 87. The Supreme Court later held in *U.S. v. Bagley*, 473 U.S. 667, 676 (1985), that this includes impeachment evidence, as well.

In a FINRA disciplinary proceeding, material evidence "is evidence relating to liability or sanctions that might be considered favorable to respondent's case, which, if suppressed, would deprive the Respondent of a fair hearing." *Dep't of Enforcement v. Respondent 1 & 2*, No. 2010023367001, 2015 FINRA Discip. at *2 (OHO Aug. 30, 2012) (*citing Dep't of Enforcement*, No. CAF000045, 2001 NASD at *11 (OHO May 17, 2001) (*citing Bagley*, 473 U.S. at 675). The NASD (which later became FINRA) found that "as a matter of fundamental fairness, this same standard should apply to pre-hearing disclosure in NASD disciplinary proceedings relating to liability and sanctions." *Dep't of Enforcement*, No. CAF000045, 2001 NASD at *9 (applying standard from *Bagley*, i.e., government is obligated to disclose all evidence relating to guilt or punishment that might reasonably be considered favorable to the defendant's case, which if

suppressed, would deprive the defendant of a fair trial). With this in mind, it is clear that the materials FINRA failed to produce here did, in fact, constitute material evidence.

According to NASD/FINRA,[29] in *Brady*, the Supreme Court "was concerned with the prosecutor's ability to corrupt the trial by allowing the introduction of false testimony" (*Id.*) and that in suppressing evidence contradictory to that testimony, the due process of the accused was violated. *Id.* at *7. NASD/FINRA further explained the concern of the Supreme Court was over the "danger that a witness may testify at a trial, with the jury accepting the testimony as true, when the government has in its possession evidence that is relevant to the credibility of the witness." *Id.* This is precisely what happened to Applicants during their FINRA hearing: they were denied access to documents weighing on the veracity of the ex-SEI brokers, and thus were denied due process (even by FINRA's own interpretation of Supreme Court precedent and the corresponding FINRA Rule).

3. The Testimony of the Witnesses in Light of the Exculpatory Evidence Proves They Were Biased and Unreliable.

The determination whether Applicants provided false/fabricated documents hinges on one fact: whether or not Mr. Black inspected certain offices. If he did the inspections, then neither the documents nor his testimony were false. The NAC observed that this turned into a "he said/she said" situation, i.e., "[t]he Four Testifying SEI representatives testified that Black did not inspect their offices, but Black testified that he did." (NAC Decision p. 14). Thus, the disposition of the seminal issue came down, as the NAC concluded, to "the credibility of these witnesses" (NAC Decision p. 14). Despite that conclusion, in determining the witnesses' credibility, FINRA ignored

[29] In this matter, the OHO Ordered the DOE to conduct an expanded search for additional documents and for certification that there was no Brady material in its files.

that each former SEI registered representative was biased against Mr. Black and, therefore, unreliable as a witness.

Mr. Minor

Mr. Minor testified that the only time Mr. Black had been to his office, which is merely a few miles from SEI's home office, was when Mr. Black gave him a ride after he lost his keys, but that Mr. Black never inspected the office (Tr. 49-50). Mr. Minor worked at SEI twice. As with the other brokers, Mr. Minor had reason to dislike Applicants, testifying that he left SEI over a "disagreement" the first time (Tr. 64) and was terminated the second time (Tr. 77) over a commission dispute (Tr. 54). He testified that he was glad to "be away" from Mr. Black because he "never found Mr. Black a palliative individual." (Tr. 77-78) and that he did not much like Mr. Black (Tr. 78). However, as anxious as Mr. Minor says he was to get away, the record reflects that, in reality, Mr. Minor wrote to Mr. Black's daughter, an SEI employee, asking her to help him smooth things over with her father (RX-20 and Tr. 766). Mr. Black refused Mr. Minor's plea and terminated him the next day (RX-21), which left him upset and feeling that he had been treated unfairly (Tr. 70).

In fact, Mr. Minor felt so mistreated that, prior to testifying, he sued Mr. Black (Tr. 54, 752). Mr. Minor testified that the suit in small claims court was over $200, but that it was not really about the money; that it was the "principle of the thing." (Tr. 54-55). Therefore, by his own admission, Mr. Minor filed a lawsuit against Mr. Black that was not even about the money, but, rather, to make a point to Mr. Black about who was boss. Asked about the outcome of the case, Mr. Minor testified, "Nothing. Just didn't get heard; she dismissed it." (Tr. 57), which might have left him searching for another outlet to express his anger at Mr. Black.

What Applicants did not know at the time of the hearing – because FINRA failed to meet its obligation to produce Ms. Arnold's email reflecting her conversations with Mr. Minor – was that Mr. Minor went to great lengths to inflict damage on Mr. Black beyond his lawsuit. Mr. Minor testified that the "disagreement" that caused him to leave SEI the first time (i.e., not the fight over commissions that caused him to be fired the second time) was not really a "dispute" (Tr. 64), as if to downplay the severity of events and any potential bias. In the Email from Ms. Arnold that FINRA failed to produce, however, that dispute is described as a "verbal altercation" in which Mr. Black ordered Mr. Minor and an associate from ING Group out of his office. Needless to say, getting yelled at and kicked out of someone's office would probably qualify as a dispute to most people; at least those without an agenda.

But Mr. Minor was not satisfied with simply recounting his own interpretation of his own interactions with Mr. Black; he really wanted to poison the well. Mr. Minor told Ms. Arnold not only that Mr. Black had never been to ***his*** office, but that Mr. Black had "never gone to visit any other branches."[30] SEI had well over 100 registered representatives across the country, most of whom worked out of their own offices. Yet, somehow Mr. Minor told FINRA that Mr. Black did not visit any of them, a supposed fact of which Mr. Minor clearly had no knowledge whatsoever. That statement alone should have given FINRA reason to doubt Mr. Minor's motive and proceed without him. Instead, FINRA buried the document and forged ahead with Mr. Minor playing a starring role. Not surprisingly, Mr. Minor's head scratching declaration was not mentioned on direct examination by DOE at the hearing, and because Applicants did not have Ms. Arnold's Email, they were unaware of it, and thus unable to cross-examine him about it.

---

[30] Just to be clear, Mr. Minor only ever worked out of one office during both of his stints with SEI (Tr. 45), which leaves no doubt he was referring to the offices of other brokers in the Email.

In a clever bit of lawyering, Mr. Firley later argued that Mr. Minor's admission of dislike for Mr. Black actually bolstered his credibility: "if Mr. Minor came to this hearing to lie about whether a branch inspection occurred as his cottage, he certainly would have lied about whether he had any animus for Mr. Black." (Tr. 979). While Mr. Minor might have "owned" his animus, as FINRA put it (Tr. 979), the Email shows he was willing to lie or exaggerate (or at the very least speak about inspections that he could not possibly have known about) in order to harm Mr. Black. FINRA did not "own" up to knowing that Mr. Minor was prone to exaggeration or lying because it did not produce the Email. Moreover, Mr. Minor's statement captured in the Email directly contradicts the testimony of ex-SEI broker Mr. Marable, discussed below, and the portion of the Memo that relating to ex-SEI broker Gregg Kucher, both of whom told FINRA that Mr. Black had, in fact, inspected their respective offices. Simply put, Mr. Minor was not a credible witness and there is substantial evidence to demonstrate this. But, FINRA failed to provide this evidence to Applicants in accordance with its legal obligation to do so

Mr. Rivard

Mr. Rivard's office was a storefront in Pittsford, New York (a suburb of Rochester). Continuing a trend, he testified that he left SEI over a commission dispute. In this case, Mr. Rivard called to complain about a missing quarterly commission check, even though, as he admitted, the check arrived just a few days after his complaint to Mr. Black (Tr. 90-91). Despite receiving the payment, he testified that he was disappointed with Mr. Black (especially after Mr. Black became agitated over the complaint and slammed the phone down ending a conversation between the two) (Tr. 90-91).

Although he left SEI shortly thereafter, Mr. Rivard filed an arbitration claim against SEI over yet another commission dispute (Tr. 92). After multiple disputes, and an arbitration, there

can be little doubt that Mr. Rivard had reason to dislike Applicants. The opportunity to testify against Mr. Black gave him yet another opportunity to inflict damage on Mr. Black and SEI.[31] The Email relating to Mr. Rivard might have weighed on his credibility with the Panel. After all, although he testified that his dispute with Mr. Black did not impact his ability to tell the truth (Tr. 93), the Panel deserved to know that the Email indicates it was not a "no hard feelings" business dispute, but, rather, that "Black screamed at Rivard," which made it personal.

Mr. Marable

Mr. Marable worked in Mauldin, South Carolina (Tr. 145) and was terminated by Mr. Black for lack of production (Tr. 151-152), which gave him reason for animosity and bias against Applicants. Mr. Black testified that Mr. Marable did not take his termination well (Tr. 771). In addition, Mr. Marable made repeated annual false attestations, in writing, about his lack of outside business activities (Tr. 772-73). Mr. Marable claimed to not have any outside business activities when, in fact, he did (Tr. 159-161, RX-75). He admitted that he could not remember if he disclosed it to SEI (Tr. 161).

Mr. Marable testified at the hearing that he wrote a letter to Mr. Palacios stating, "I do not recall any on-site internal branch review/audit conducted while I was associated with the firm." (Tr. 148). The Emails, however, indicate Mr. Marable told Ms. Arnold something much more equivocal, that he was "not sure as to whether an onsite exam was ever conducted, probably not." He also told Ms. Arnold that another SEI employee (now deceased) might have come onsite for an exam, but that he was unsure. Finally, and so that Mr. Marable's ever changing story could cover every conceivable possible set of circumstances, he testified at the hearing that Mr. Black came to his office, but did not inspect anything (Tr. 149). Mr. Marable conceded his memory

[31] Notably, Mr. Rivard was fired from his next company after just two months after a dispute with management (Tr. 107-110)

might not be up to the challenge – "you're talking like a long time ago" (Tr. 158) – yet FINRA disregarded this admission of a faulty memory in its zest to find Applicants guilty.[32]

Had FINRA produced the Email, it would have allowed Applicants to demonstrate that Mr. Marable's story was inconsistent and rather malleable (perhaps due to his bias or an imperfect memory); but Applicants could not question his credibility as they were denied access to the Email.

Mr. Ravella

Mr. Ravella testified that he maintained a home office in Leetonia, Ohio (Tr. 119) and that his office was never inspected by Mr. Black or anyone else from SEI (Tr. 121). Mr. Ravella testified that he lost business over a supposed clerical error on the part of SEI and "kind of quit trying" because "it was really embarrassing to explain to the customer how this happened." (Tr. 132). This alone gave him motive to harm Applicants, as did the fact that he was terminated by SEI for a lack of production (Tr. 965) and he as much as admitted it: "Frank sent me the letter basically telling me off for not producing." (Tr. 134).

The above amply demonstrates Mr. Ravella's bias against Applicants. This bias manifested itself in form of false testimony[33] that critically damaged the credibility of Mr. Black and made it impossible for him to receive a fair hearing. Mr. Ravella testified at hearing:

> Q (Hinson): How did you first meet Mr. Black?
> A (Ravella): I'd talked to him on the phone. **This is the first time I've actually seen Mr. Black...**
> Q: Do you remember Mr. Black ever coming to your location in Ohio?
> A. No.
> Q: Did you ever meet in him Ohio?
> A: **This is the first time I've met Mr. Black**. I talked to him on the phone.
> Q: **You're sure about that?**
> A: **I'm positive.**

[32] Mr. Marable testified that he could not recall or remember repeatedly during his testimony, which calls into question his memory (Tr. 149, 156, 157, 158 and 159).

[33] Mr. Ravella was allowed to resign from John Hancock for selling away, which calls his character into further question (Tr. 138-9).

(Tr. 125-126). This testimony was, however, demonstrably false, but FINRA failed to give Applicants the means to demonstrate it. Ms. Arnold's Email regarding her conversation with Mr. Ravella included the following contradictory statement he had made to her:

> Ravella met Black once a year. Black would rent a conference room at a Holiday Inn and have all the RRs from Michigan come one day, and all RRs from Ohio another day. The meetings were a combination of compliance related and performance related.

Obviously, if Mr. Ravella told Ms. Arnold during the exam that he had met Mr. Black once a year, it necessarily follows that his testimony at the hearing that he was only then meeting Mr. Black for "the first time" was a lie. Without the Email, however, Applicants could not make that showing to the Hearing Panel. And what makes FINRA's failure to produce the Email especially galling here is that the OHO Decision actually quotes Mr. Ravella's testimony that he was "positive" Mr. Black had not been to his office and that the first time he had met Mr. Black was at the hearing, as if to place special emphasis on the veracity of his testimony; the proverbial nail in the coffin of Mr. Black's credibility (Decision p. 13). Any semi-competent lawyer could have used the Email to impeach Mr. Ravella and undermine his credibility, but that was impossible since FINRA purposefully denied Applicants' access to it.

The bias displayed by Mr. Ravella and discrepancy between his testimony at the hearing and what he told Ms. Arnold (that she captured in her Email) is the most glaring example, but, as shown above, each broker witness was biased, and Applicants could have used the Emails to demonstrate that bias. Importantly, the Emails contain only the information from the misplaced or destroyed Notes that Ms. Arnold thought was most important. The actual content of the Notes could have contained additional exculpatory information. Indeed, since she was conducting the interview through a regulator's lens, she likely failed to ask questions or record responses that

defense counsel would have found to be important. Unfortunately, because of FINRA's malfeasance, it will never be known what other exculpatory materials were contained in the Notes.

Even with the limited information available from the Emails and Memo, they are still exculpatory evidence, yet FINRA continues to deny the obvious. In its Opposition to the Motion to Stay Sanctions, FINRA argued, illogically, that "to the extent there were discrepancies in the testimony....they were immaterial to the crux of their testimony relevant to this case" (Opposition p. 14-15). But, as noted above, the NAC concluded that the credibility of the ex-SEI brokers was the key issue in the case, and the Emails showed that the ex-brokers were not credible (or at least would have supplied Applicants the evidence on which to base such an argument). For example, Mr. Ravella's testimony was directly contradicted by the Email and Mr. Minor's declaration in the Email that Mr. Black never visited any branch is contradicted by Messrs. Marable, Kucher and Franks.[34]

FINRA attempts to squirm out of its predicament by arguing that "as observed by the NAC, Black and the Firm had the opportunity to confront the Four Testifying Representatives during their testimony on the issues raised by Black." (Opposition p. 15). This is blatantly false. A few examples will highlight the fallacy of FINRA's position.

First, without the Email relating to Mr. Minor, it was impossible for counsel to have cross-examined him on his mindboggling assertion that Mr. Black did not visit a single branch. Counsel would have undoubtedly welcomed the opportunity to ask him how exactly he knew that Mr. Black had never once visited another branch or to ask him if Messrs. Marable, Franks and Kucher were lying about the occasions that they indicated Mr. Black visited their offices. With a tiny bit of

[34] The offices of SEI brokers Mr. Vicker (Tr. 314) and Mr. Briggs (RX-81) also appear to have been inspected.

pressure applied by counsel, Mr. Minor's house of cards might have tumbled, but FINRA refused to let that happen and so no one will ever know.

FINRA's misguided reasoning is also evident in footnote 6 of the Opposition, which states that ex-broker "Ravella testified that he had never met Black in person, whereas Arnold's emails reflect that Ravella met Black annually...At the hearing, Black had the opportunity to, but did not, question Ravella concerning his testimony." (Opposition p. 15 FN 6). In fact, Applicants *did* confront the ex-brokers at hearing, but the cross-examination was handicapped precisely because they did *not* have access to the Notes, Memo and Emails which were necessary to impeach Ravella and the others properly. The transcript of the hearing makes this abundantly clear in relation to Ravella.

To recap, Ravella was asked, "How did you first meet Mr. Black?" (Tr. 125). He responded, "This is the first time I've actually seen Mr. Black." (Tr. 125). Counsel could not confront Ravella with the notes from the FINRA examiner squarely contradicting that sworn testimony because FINRA denied Applicants access to those notes, and, as a result, they were completely unaware such notes even existed. Without the documents to properly cross him, counsel was literally limited to follow-up questions such as, "are you sure?" or "are you really sure?" Applicants were denied the opportunity to confront hostile witnesses with relevant evidence and that is a violation of due process.[35]

More importantly, the failure to provide the documents was devastating to Mr. Black's own credibility with the Panel. Consider the following exchange between the Hearing Officer and Mr. Black:

> Hearing Officer: Mr. Ravella came in and testified, and ***he looked at you*** while he was asked, I don't know what the question was, but he testified that this was –

[35] *See* Tr. 126 for an example of the limitations put on Applicants' counsel during cross examination.

> this week was the first time he ever met you, he'd never laid eyes on you. So this is a false statement? (TR.-963). (*emphasis added*).

Mr. Black responded that Mr. Ravella's statement was false, whereupon he was asked if Mr. Ravella was lying or if he forgot, to which Mr. Black responded he was lying (Tr. 963-4). Frankly, this exchange painted Mr. Black as a blatant liar when, in fact, it was FINRA's witness who was lying.[36] The Panel was interested enough about the contradictory testimony that it went back and specifically asked Mr. Black about it. Moreover, its emphasis on the fact that the witness was looking at Mr. Black highlights the importance of confronting a witness live and underscores the lack of efficacy that impeachment evidence has after the fact.

The issue was, again, at the forefront during the February oral argument:

> The Chairperson: Mr. Bursky, let me stop you before you go too far down that path. Because one of the things that I am struggling with is how to evaluate the credibility determinations for the live witnesses.

(Oral Argument p. 22). The withheld documents and the testimony that could have potentially been elicited from them could have provided the clarity that the Panel needed, but FINRA did not want that. Mr. Firley continued to highlight, both orally and in written briefs, testimony, that he knew or should have known, to be false. As just one example, at the oral argument, Mr. Firley once again emphasized that Ravella testified "that he had never seen Mr. Black before. Didn't even know what he looked like until he walked into the hearing to testify." (Oral Argument p. 96).

To be clear, absent the Interim Order, the exculpatory Emails and Memo never would have seen the light of day, which was seemingly FINRA's intent, as it continued to highlight testimony that was clearly contrary to the exculpatory evidence in its arguments and briefs. In a case where FINRA itself concedes that witness credibility was "the key issue," it is not just illogical but utterly

[36] Further, under *Napue v. Illinois*, 360 U.S. 264, 270 (1959), the prosecution may not sit back while the defense attempts to counter perjury but must correct the perjury. FINRA's failure to correct false testimony by the ex-brokers in this matter violated Applicants' due process and demands that the findings be vacated.

ridiculous to characterize FINRA's failure to produce the Notes (or Emails or Memo) prior to the hearing as harmless error, as those documents were of pivotal importance.

Remember, as mentioned above, FINRA/NASD argued that in ruling on *Brady*, the Supreme Court was concerned with the introduction of "false testimony." *Dep't of Enforcement*, No. CAF000045, 2001 NASD at *6-7. In other words, the concern was that a witness might testify about something while the government possessed documents relevant to the witness's credibility. *Id.* at 7. In this matter, the withheld documents weighed on the credibility of the witnesses and were, thus, exculpatory. This serves as the substantial evidence needed to overturn the credibility determinations FINRA made.

Speaking of which, FINRA chose five brokers to testify as their star witnesses against Applicants. On its face, that seems like a decent sized number. But assuming FINRA's allegations about Mr. Black are true, FINRA could have interviewed and then called as witnesses well over 100 current and ex-SEI brokers to testify that Mr. Black never inspected their offices. Instead, FINRA relied on a hearsay statement from Mr. McCall (rejected by the NAC on appeal) and Messrs. Minor and Ravella, whose respective credibility is shot for providing false testimony. One of the two remaining brokers, Mr. Marable, provided three different versions of his story and admitted to a faulty memory, and, at the very least, conceded that Mr. Black had previously been to his office (Tr. 149), while the final broker, Mr. Rivard was screamed at by Mr. Black and subsequently sued him over one of their several disputes. Surely if FINRA's theory about Mr. Black was correct, it could have found ***some*** broker that did not have a penchant for lying, a bad memory, a history of litigation and disputes with Mr. Black, or some combination thereof. Instead, FINRA only chose witnesses with questionable motives, and to make up for their shortfalls, denied Applicants access to the exculpatory documents that counsel could have used to winnow down the

number of ***reliable*** witnesses until it was zero. Without any reliable witnesses, FINRA did not, and cannot, carry its burden of proof.

Applicants have pointed to substantial evidence for overturning the credibility determinations relating to the ex-brokers. Moreover, FINRA's failure to produce exculpatory evidence was not harmless error, and that failure, in conjunction with its cherry-picked biased witnesses, shows that FINRA and the NAC relied on biased and unreliable witnesses. Because of this, FINRA failed to prove that Applicants provided false testimony and documents by a preponderance of the evidence. The findings should be vacated.

B. The Findings Should be Vacated Because of Evidence Spoliation

Findings that Applicants lied and provided false documents should also be vacated because of evidence spoliation. "'The spoliation doctrine recognizes that where a party fails to produce certain evidence relevant to the litigation, the finder of fact may infer that the party destroyed the evidence because the evidence was harmful to its case.'" *Panos v. Timco Engine Ctr., Inc.*, 197 N.C. App. 510, 521 (2009) (*quoting Outlaw v. Johnson,* 190 N.C.App. 233, 244, 660 S.E.2d 550, 559 (2008)). "Where a party seeks a severe sanction, such as dismissal or an adverse inference, the movant must show: (1) that the spoilating party had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) that the party acted with a culpable state of mind upon destroying or losing the evidence; and (3) that the missing evidence is relevant to the movant's claim or defense." *Harkabi v. SanDisk Corp.*, 275 F.R.D. 414, 418 (S.D.N.Y. 2010) (*citing Residential Funding Corp. v. DeGeorge Fin. Corp.,* 306 F.3d 99, 107 (2d Cir. 2002)). "'[T]he culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or *negligently.*'" *Harkabi*, 275 F.R.D. at 418 (*quoting Residential Funding* Corp., 306 F.3d at 108) (emphasis in original).

The NAC found that Applicants did not show the second *Harkabi* prong (that Enforcement acted with a culpable state of mind in losing/destroying Arnold's notes). The NAC found further that Applicants made no attempt to argue that there was a culpable state of mind; instead all that they did "was summarily assume that Enforcement's conduct was negligent." (NAC p. 23). The NAC's finding fails for the simple reason that documents do not just disappear. If they were destroyed it was because someone at FINRA intended to destroy them, "'even if without intent to breach a duty to preserve'" them. *Harkabi*, 275 F.R.D. at 418 (*quoting Residential Funding* Corp., 306 F.3d at 108).

In other words, a FINRA employee who innocently intended to shred the documents would satisfy the prong because the evidence was still knowingly destroyed (even if there was no ill intent). The NAC also argued that Applicants merely assumed negligence (the other way to satisfy the prong). Applicants submit that it is one or the other; FINRA either knowingly destroyed/lost the documents or negligently lost/destroyed them. The NAC's interpretation is not only wrong, but totally unfair from a public policy standpoint; allowing regulators to "lose" vital evidence without consequence. Because of this, Applicants have met the second prong. The NAC did not address the first prong, but it is evident that FINRA possessed the evidence and had a duty to preserve it[37] and that it was relevant (prong three). Moreover, for the reasons demonstrated above, the destruction of these documents was not harmless error.

Although not a Federal District Court, this panel should look to the guidance of relevant case law to aid in its determination. "A federal district court may impose sanctions under Fed. R.

[37] FINRA previously argued that it did not have a duty to preserve the evidence because counsel had not requested copies of the documents when they were lost (FINRA's Brief Addressing Findings in the Extended Hearing Panel's August 31, 2018 Order, p. 4). That argument is preposterous. The NAC has previously declined to address issues where FINRA makes silly arguments so it is probably not a coincidence that it ignored prongs one and three on this issue so it could avoid passing judgment on FINRA.

Civ. P. 37(b) when a party spoliates evidence in violation of a court order...Even without a discovery order, a district court may impose sanctions for spoliation, exercising its inherent power to control litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). Because vital evidence was spoliated, the findings should be vacated.

Finally, in its Opposition to the Motion to Stay Sanctions, FINRA stakes out the obvious, but ultimately pointless, position that the Hearing Panel and NAC already considered and dismissed all of these arguments (and the ones below) as immaterial or harmless error. Had either the Hearing Panel or the NAC ruled correctly on the issues before it, however, this appeal would not have been necessary. That is literally true of every appeal. Thus, to suggest that this appeal should be denied because the NAC already considered the arguments misapprehends the point of an appeal.

C. The NAC Affirmed a Decision in Which the OHO Failed to Consider Relevant Evidence

From the above, it is clear the NAC relied on faulty evidence, that FINRA failed to turn over exculpatory evidence, and that the NAC ignored said evidence. But that is not the only exculpatory evidence Applicants presented; they also presented evidence that the office inspections at issue were, in fact, conducted. In some cases, witnesses provided descriptions of routes to the offices and providing physical descriptions of the offices. (e.g. Tr. 724-725. 746-747, 849-50, 962). Mr. Black went so far as to identify a third person present at an earlier inspection (Nezi Jeter at Mr. Marable's office between 2003-2005) (Tr. 961) and Mr. Plexico described details of Mr. Graham's office and home.[38]) (Plexico OTR, March 19, 2013 p. 37-38, 44, 58-59, 72-73). Applicants also introduced records of the inspections (RX-1 through 5), the inspection

[38] Although FINRA did not charge Applicants in relation to Mr. Graham's office, it repeatedly presented evidence intended to show that it was not inspected and that Mr. Black did not inspect any offices.

checklist (RX-6 or CX-11), expense vouchers (RX-38), as well as vouchers and check images for checks written to David Plexico for expenses related to Charles Graham (RX-98). The OHO Panel completely ignored or dismissed such evidence, e.g., "Given the other reliable evidence in this case, the Panel finds that the mileage expense vouchers do not support Black's claim that he drove to each of the branches to conduct an inspection." (Decision p. 9).

Incredibly, in the ultimate case of confirmation bias, the decision dismissed such evidence "because it confirms that Black gave false testimony and fabricated documents about branch inspections" (Decision p. 20), and further found that it was "not directly relevant to whether Respondents performed the five branch inspections." (Decision p. 20). The NAC similarly speculated that the checklists and Inspection Forms "could easily have been fabricated." (NAC Decision p. 16). That is actually true of almost any type of document that is stored in-house at a broker-dealer and is certainly no reason to assume the documents were fabricated. As noted above in *Morton*, "Enforcement cannot satisfy its evidentiary burden with guess or conjecture," and that is exactly what the NAC relied on here. *Morton Spiro*, 2019 WL 2176343, at *13.

Further illustrating FINRA's willingness to rely on rampant conjecture is the Panel's finding that Mr. Plexico appeared at his OTR interview with $2,000 in cash because "he anticipated that he would be asked about how he customarily paid for out-of-pocket expenses and accordingly carried a considerable amount of cash with him to the interview." (Decision p. 23, FN 128). There was absolutely no evidence in the record supporting this wild assertion and it serves as an example of the lengths that FINRA was willing to go in order to denigrate Applicants and their employees.

Ironically, the same Decision that ignored the records that Mr. Black presented to prove he had conducted office inspections also faulted him for not presenting *other* records, such as credit

card and ATM receipts, that "could have supported Black's contention that he drove to and inspected 42 of the 43 branches." (Decision p. 9). This is despite the fact that Applicants cogently explained the absence of said records, such as Mr. Plexico's testimony that he did not have an ATM card (Tr. 655-656) and testimony that Messrs. Plexico and Black did not like credit cards and paid in cash whenever possible (Tr. 538, 968). Moreover, FINRA does not require receipts to be maintained and the IRS does not require them for expenses under $75 (Tr. 967).

The point is, Mr. Black simply could not win, no matter what he did. If he presented a document, it was ignored, but if he did not produce some other document, FINRA presumed it somehow would have been material. Mr. Black could not have possibly prevailed given this standard. Moreover, this construct shifted the burden to Mr. Black to prove that the audits took place instead of FINRA proving that they did not take place.[39] Because the NAC decided that the ex-brokers were credible, it seemingly decided that all testimony and evidence Applicants adduced was, necessarily, not credible. In reality, if both sides present equally credible evidence, it means FINRA failed to carry its burden.

The NAC affirmed a decision that relied on biased evidence and dismissed exculpatory evidence and, therefore, FINRA failed to prove the conduct violating SRO rules by a preponderance of the evidence.

D. The NAC's Decision is Not in Keeping with the Purpose of the Exchange Act Because Mr. Black was Denied the Opportunity to Defend Himself

The NAC Decision was not reached in a manner consistent with the purposes of the Exchange Act. As previously mentioned, the NAC as much as conceded that the examination that led to the Enforcement action was unfair when it stated, rather remarkably, that "the requirements

---

[39] This unfair shifting also violates the mandate of the Exchange Act that members be provided a fair hearing and that there be proof that the SRO's rules were violated.

in Section 15A(b)(8) of the Exchange Act that FINRA provide a 'fair procedure' in an adjudicatory proceeding 'does not extend to investigations.'" (NAC Decision p. 18). Regardless, the hearing, too, was unfair. The Exchange Act requires that self-regulatory organization rules provide a "fair procedure for the disciplining of members and persons associated with members."[40] Included in a fair procedure is an obligation by an SRO to provide members and associated persons with proper notice of specific charges:

> In any proceeding by a registered securities association to determine whether a member or person associated with a member should be disciplined...the association shall bring ***specific charges, notify such member or person of, and give him an opportunity to defend against such charges*** (Emphasis Added).[41]

In proceedings by a registered securities association where a person might be barred, the association is required to "notify such person and give him an opportunity to be heard upon, the specific grounds for...bar."[42]

Despite this mandate, Applicants were not afforded a fair opportunity to defend themselves. In the past, the Commission has vacated findings and sanctions because an unfair hearing violated the purposes of the Exchange Act. *In the Matter of the Application of U.S. Associates, Inc.* Exch. Act Rel. No. 33189, 1993 WL 469130 at *4-5 (November 9, 1993). The findings and sanctions in that matter were vacated in part because NASD turned over evidence, consisting largely of Applicants' own records, shortly before the District Business Conduct Committee Hearing. In the instant matter, Applicants were put in an even worse position since they were denied access to FINRA documents that could not possibly have been reviewed prior to their production, which did not occur until well ***after*** the hearing (and NAC oral argument).

---

[40] 15 U.S.C.§78o-3(b)(8).

[41] 15 U.S.C.§78o-3(h)(1) (*emphasis added*).

[42] 15 U.S.C.§78o-3(h)(2).

Beyond that, the hearing was unfair for other reasons. FINRA failed to correct false testimony and Mr. Firley told the NAC he did not believe any of the former brokers confirmed that they had been inspected on the date matching the inspection calendar, which might not have been true.[43] Moreover, the Complaint charged Applicants in connection with five office inspections and, accordingly, they prepared their defense in response to those charges. Nevertheless, the OHO not only heard evidence about, but also made affirmative findings regarding, office inspections other than the five put at issue in the Complaint.[44]

The Commission has in the past set aside FINRA findings of unauthorized trading in customer accounts precisely because the respondent lacked adequate notice of the claims. *In the Matter of the Application of Wanda P. Sears*, Exch. Act Rel. No. 58075, 2008 WL 2597567, at *4 (July 1, 2008).[45] Mr. Black was not charged in connection with the inspection of Mr. Graham's or Mr. Webber's office, yet both were used against him. The OHO decision contained the following admission:

> The Panel also considered that Respondents failed to ensure other branch[46] inspections, in addition to the five branches alleged in the Complaint. Although misconduct relating to the required monthly inspections of Graham's office in Ohio was not charged, the Panel finds that Enforcement proved that Respondents did not perform the inspections. The Panel accordingly considered this failure when fashioning appropriate sanctions...

(Decision, p. 41).

---

[43] NAC Oral Argument p. 125

[44] For example, the Panel found "[r]egardless of the date Black claims he conducted Webber's inspection in Texas, the Panel does not find it credible that he drove to all the branches he claimed." (Decision p. 8. fn. 31). The Webber inspection was *not* among the five at issue in the Complaint.

[45] *See also In the Matter of the Applications of Paulson Inv. Co., Inc.*, Exch. Act Rel. No. 19603, 1983 WL 32198 at *4 (Mar. 16, 1983) (setting aside violations not charged in NASD's complaint where the record indicates that applicants were not given adequate notice of additional allegations or a proper opportunity to defend themselves).

[46] Notably, the "other branch inspections" have still not been identified, which means that till this day, Applicants could not properly prepare their defense.

The NAC would have the Commission believe the Panel's consideration of evidence regarding extraneous inspections only went to sanctions, without any bearing on liability. This is not true. The OHO wrote, "in sum, the Panel finds that Plexico did not conduct the Graham inspections, lending further support to our findings that Respondents did not inspect the five offices that are the subject of the Complaint." (Decision, p. 22). Indeed, the Opposition admits "the issue of whether David Plaxico [sic] visited Charles Graham's office was alleged in the background section of the Complaint" (Opposition p. 18 FN 9), meaning that from start to finish, Mr. Black was subjected to evidence for alleged violations for which he was not charged. In essence, the evidence was continually used to paint him in a bad light, without giving him notice there would be actual findings made about such inspections. FINRA and the NAC cannot "un-ring" the bell once the evidence has been presented and findings made.

Even were the claim that the evidence was used only for sanctions believed,[47] the fact remains that Mr. Black was not given proper notice that the other inspections would play such an important role in the case. While he was not charged with failing to make those inspections, the Panel most certainly considered them in determining his fate. In dismissing Cause 3, the NAC ignored other inspections precisely because "it appears Respondents lacked notice that their conduct regarding those other branch inspections and visits was an additional basis of the alleged violations in cause three" (NAC Decision FN 36 p. 26). If Enforcement wanted to bring evidence with regard to other inspections, it should have charged Mr. Black in relation to them.

[47] *See Dep't. of Enforcement v. Michael Bullock*, No. 2005003437102, 2011 FINRA Discip. at *9-10, where the NAC partially reversed sanctions because the complaint did not adequately plead sanctions. *See also Dep't of Enforcement v. Wanda Sears*, 2009 WL 2210529 at *4 (July 23, 2009) where the NAC refused to consider unauthorized trades as aggravating factors because of the "lack of notice problem that the Commission highlighted in setting aside our initial finding." At a minimum, this means consideration of the extraneous office visits as to sanctions was inappropriate due to a lack of notice to Respondents.

Further, FINRA has no excuse as the information was not new, e.g., the initial Complaint mentioned "CG" or Charles Graham 18 times. Even assuming it was new information, under FINRA Rule 9212(b), a Hearing Office may grant a motion by Enforcement "to amend the complaint, including amendments so as to make the complaint 'conform to the evidence presented.'"[48] FINRA could have given fair notice to Mr. Black at any time. Instead, Enforcement charged him with regard to one set of inspections, only to pile on evidence relating to others.

Even if considering other inspections was proper, there was still no evidence presented that those inspections, or the ones at issue, did not take place. The OHO found "[a]dditional evidence reflects that Black could not have inspected the other offices as he claimed." (Decision p. 7). But the only basis for this seems to be FINRA's belief that it would have been impossible for Mr. Black to have conducted the inspections due to the amount of driving required.[49] As an example, directly contradicting that simplistic notion, Mr. Black testified that he can drive 23 hours straight, then take a two-hour nap and get back to driving (Tr. 972).[50] Exhibit RX-81 reflects that Mr. Black drove 1,170 miles in a single day in conducting an inspection for the office of Mac Briggs (585 miles each way).[51] The record is replete with evidence that Mr. Black drove distances that others might consider extreme,[52] while the only contradictory evidence was the implicit bias of the

[48] *See Dep't of Enforcement v. Paul Bryan Zenke*, FINRA Disciplinary Action No. 2006004377701, 2009 WL 4886421 at*3 (December 14, 2009).

[49] Mr. Black subsequently recreated a number of these trips and filed a Motion to Adduce Additional Evidence. The NAC did not directly rule in its Decision, but found the evidence to be immaterial. The failure to admit the evidence is reversible error and means the findings should be vacated or remanded.

[50] Mr. Black also testified that he can bike for 11 to 12 hours in a day, which demonstrates his stamina, and that the drive from South Carolina to Michigan is a "pretty short drive to him." (Tr. 962).

[51] The OHO also improperly relied on a tax court decision (CX-36), which was extremely prejudicial to Mr. Black. Enforcement cited to the decision regarding the extreme amount of miles that Mr. Black sought for deduction. However, at the time, he was deducting expenses for all miles driven by his employees, not just miles he drove himself. Moreover, even 30 years earlier, Mr. Black asserted that "he loved to drive." (CX-36, p. 33). In an implicit admission that the decision was improperly admitted, the NAC declined to rely on it (NAC p. 16, FN. 24). However, the damage was done at the OHO level and it demands that the findings be vacated.

[52] For instance, Mr. Black testified that he woke up at 2 a.m. and drove from Rock Hill, South Carolina to Quinter, Kansas with his son. The next day they continued to drive to Denver on business. After staying for a time, Mr. Black

hearing panel that Mr. Black could not possibly have driven as far as the evidentiary record indicates. Indeed, the Decision noted that Mr. Black would have to have driven 69,172 miles in roughly 27 months (roughly 679 miles per week), as if that was so implausible as literally to be humanly impossible. (Decision p. 8 FN.35). The NAC also discounted the possibility of at least two trips because they would "have involved substantial driving distances." (NAC Decision p. 15).[53]

The NAC affirmed a decision that made findings relating to conduct for which Applicants were not charged and also denied them access to exculpatory evidence. As such, the proceeding was not in keeping with the fairness requirements of the Exchange Act, which means the findings should be vacated. Taking into account all of the above, it is clear that findings that Applicants provided false testimony and fabricated documents should be vacated.

III. APPLICANTS' EMAIL SUPERVISION SYSTEM WAS REASONABLE

A. Email Supervision is Based Upon a Reasonableness Standard

The NAC affirmed findings that Applicants failed to establish and maintain a reasonable supervisory system and failed to establish, maintain and enforce reasonably designed written supervisory procedures to ensure the retention and review of business-related emails (NAC p. 1). In layman's terms, the crux of FINRA's argument is that SEI's email supervision, which involved the so-called "honor system" (described below), was bad or unreasonable. It is, however, undisputed by FINRA that the honor system is acceptable in certain situations and, therefore, not

---

and his son then drove from Denver back to Rock Hill, South Carolina without stopping (Tr. 970). This trip was memorialized by credit card receipts from gas stations because Mr. Black was starting to document his trips by this time (2016) and he also had his son along to help him with the credit card transactions. (*Id.*). The drive from Rock Hill, South Carolina to Quinter, Kansas was 1,303 miles and trip from Denver back to Rock Hill South Carolina was 1,420 miles.

[53] These trips were a 719-mile trip to Mr. Rivard's office and a 500-mile trip to Mr. Ravella's office. Again, it is mere conjecture that Mr. Black could not have driven that far.

per se bad (Oral Argument p. 83). In other words, it means that the honor system can be reasonable and, thus, the issue is whether or not the honor system was reasonable ***for SEI***, in light of its business model. Because it was reasonable, the findings of the NAC should be vacated.

As FINRA has conceded here, under applicable rules, a broker-dealer's duty to supervise is not based on strict liability, but, rather, merely on a "reasonableness" standard. *In the Matter of Arthur James Huff*, Fed. Sec. L. Rep. (CCH) ¶ 84, 719 at 81, 396 (1991). Rule 3010(a) requires that firms establish and maintain a system to supervise the activities of their representatives that is "reasonably designed to achieve compliance with applicable securities laws and regulations and the rules of the NASD." There are no specific requirements for such supervisory systems. Rather, broker-dealers are expected to develop and implement their own supervisory systems that are reasonably designed to detect and prevent violations of the law. *See* NASD Notice to Members 96-33.

FINRA gives wide latitude to broker-dealers with regard to the specifics of how they develop supervisory policies and procedures (other than requiring that they be in writing). The policies and procedures typically address, for example, the safeguarding of customer funds and securities; the manner and frequency of the review of communications with customers; the maintenance of books and records; the supervision of customer accounts serviced by branch office managers; the transmittal of funds between customers and registered representatives and between customers and third parties; and validating changes in customer account information. *See* NASD Conduct Rule 3010. The mere establishment and implementation of such supervisory standards, however, does not create absolute liability for every violation of securities laws committed by a supervised individual. *See SEC v. Lum's, Inc.*, 365 F. Supp. 1046, 1064-65 (S.D.N.Y. 1973).

Instead, "whether a broker-dealer's supervision of its employees is reasonable is determined based on the particular circumstances of each case" and "the burden is on Claimants to show that the respondent's procedures and conduct were not reasonable." *Dist. Bus. Conduct. Committee v. William A. Lobb.,* No. C07960105, 2000 NASD Discip. LEXIS 11, *16 (NAC April 5, 2000); *see also Hecht v. Harris, Upham & Co.*, 430 F.2d 1202, 1210 (9th Cir. 1970) (finding that the control person is only required to maintain an adequate system of internal control, and to maintain such system in a diligent manner). In attempting to satisfy this burden, "[i]t is not enough to demonstrate that an individual is less than a model supervisor or that supervision could has been better." *Lobb*, 2000 NASD Discip. LEXIS 11, at *17.

Likewise, the mere fact that a principal "could have taken stronger action" against the registered representative is not sufficient to find supervisory liability. *Dep't of Enforcement v. CM*, Discip. Proceeding No. C9B040020 (April 6, 2005); *see also In re Trujillo*, Exch. Act Rel. No. 26635, 49 S.E.C. 1106, 1109-10 (1989) (finding no supervisory liability regardless of the fact that a principal's supervisory record "was less than exemplary" because she "reacted inadequately to customer complaints"). A hindsight analysis cannot establish a failure to supervise. *Lobb,* 2000 NASD Discip. LEXIS 11, at * 22 (*citing In re James H. Thornton,* Exch. Act Rel. No. 41007 (Feb. 1, 1999) (Comm'r Unger, concurring) ("Commission's decisions [are] careful not to substitute the knowledge gleaned with hindsight, of actual wrongdoing by someone under a supervisor's control, for an assessment of whether the supervisor's conduct was proper under the circumstances.")).

Given the legal precedent above, and the circumstances at SEI as described below, the NAC's conclusion that Applicants' supervision of its electronic communication was unreasonable is misguided. SEI previously maintained a procedure whereby those associated persons who utilized e-mail for communication with customers were permitted to use their personal e-mail

addresses, however, they were required to copy Mr. Black on all such correspondence. The communications were then kept in written or electronic form. That procedure, as Mr. Black testified, was originally suggested to SEI by FINRA Examiner DePorres Cormier[54] (Tr. 801-803),[55] and was reasonable given the composition of the company and its business model.[56]

B. The Use of Third-Party Email Addresses was Specifically Allowed by FINRA

The NAC took issue with the fact that "SEI permitted its representatives to use their own private email accounts for the purposes of conducting SEI business." (NAC p. 26). But SEI's allowance of personal email addresses was not a crime or even a violation of securities regulations. FINRA Regulatory Notice 07-59, which was issued in December 2007, acknowledged that policies and procedures in connection with the supervision of electronic communications "may differ among members depending on their business model (e.g., size, structure, customer base and product mix)" (FINRA Regulatory Notice 07-59 p. 5), and allowed "members the flexibility to design supervisory review procedures for correspondence with the public that are appropriate to the individual member's business model." (*Id.*).

Mindful that technology was evolving, FINRA realized there would be instances where employees, such as those working at SEI, would "communicate via email through means other than their member-issued email addresses" (*Id.* p. 8). In fact, FINRA not only contemplated such correspondence, it specifically allowed for it: "if a member permits employees to communicate with customers through...other non-member employee addresses, the member is required to supervise and retain those communications"(*Id.*). Mr. Black testified that after Mr. Cormier's

---

[54] Mr. Cormier was the FINRA examiner who performed SEI's 2008 FINRA cycle exam.

[55] Jeanette Roberts testified similarly (Tr. 490-491), as did FINRA employee Matt Dale, who testified that he remembered Mr. Cormier making recommendations to SEI in relation to email retention (Tr. 376).

[56] Mr. Cormier actually suggested the language to use for SEI's WSPs (Tr. 802, 818). The updated WSP language was reflected in SEI's December 27, 2008 response letter to the 2008 cycle exam (RXs-39, 40, Exception 12(c)).

suggestions during the 2008 exam, SEI initiated a requirement that representatives copy SEI on their emails and, further, SEI began retaining the emails in either paper or electronic form (Tr. 802).

SEI brokers who used their personal email addresses were required to forward all customer correspondence to Mr. Black, where the correspondence was reviewed and retained. Thus, in formulating their procedures, Applicants followed verbal recommendations from FINRA staff and formal written guidance from FINRA (Regulatory Notice 07-59).[57]

C. The Honor System was a Reasonable System to Supervise Emails

FINRA's other chief complaint, as mentioned above, centered on the use of the honor system for brokers to forward or copy their emails to SEI. The NAC conceded, however, that SEI employees did comply with the honor system, pointing out times "when SEI representatives either forwarded or copied emails to the home office" (NAC p. 27). This adherence to the procedure was probably because "respondents also 'require[d] each employee to certify in writing, on at least an annual basis, that they were complying with SEI's procedure for copying' the home office 'on all electronic communications.'"(*Id.*).

Despite this adherence, the NAC found "the unreasonableness of SEI's reliance solely on the "honor system" is obvious" (NAC p. 28), and again focused on the fact that "for most of the relevant period, SEI permitted its numerous independent-contractor representatives, who were located throughout the United States, to use their own private emails to conduct SEI business." (*Id.*) In other words, the NAC found that because the "numerous" SEI representatives were spread

[57] As of the filing of the Appeal to the NAC, Regulatory Notice 07-59 had not been superseded or nullified. As recently as March 2019, FINRA cited to it in an AWC (AWC No. 2014042949704 p. 3 FN 1). In 2010, in Regulatory Notice 10-06 at page 6, FINRA also referred members back to the guidance in Notice to Member 07-59 "Firms may adopt supervisory procedures similar to those outlined for electronic correspondence in Regulatory Notice 07-59." Further, firms "must have policies and procedures, as described in Regulatory Notice 07-59, for the review by a supervisor of employee's incoming, outgoing and internal communications..." (*Id.*).

throughout the country, and "typically worked alone in their offices" (*Id.*), that the system was vulnerable to intentional abuse or mere oversight and, therefore, unreasonable.

During oral arguments, however, Enforcement counsel conceded that the honor system involving a limited number of brokers "maybe...fine." (Oral Argument p. 83). Through its word selection, i.e., "numerous" representatives "spread throughout the country," the NAC seems intent on leaving the impression that the SEI supervision process was inherently unwieldy, as if there were legions of registered representatives. In fact, the number was much more modest, more akin to the circumstance described by the FINRA attorney during oral arguments as acceptable. In June 2013, Mr. Black wrote to FINRA in response to the SEI 2012 Cycle Exam (RX. 52), specifically noting that "we surveyed all of our brokers regarding their use of email to communicate with clients and the number was 28 out of a then total 126 reps in 2011." (RX 52 p. 13). Notably, 28 refers to ***any*** broker using email; the number of brokers using their personal emails was likely even lower.[58] Mr. Black explained cogently in his letter to FINRA that "based on the very small number utilizing emails to communicate with clients, I believe the present system to be adequate." (*Id.*)[59] The NAC's own findings support his statement about the efficacy of the system as the NAC affirmed findings on Applicants' failure to retain just 16 emails (NAC Decision p. 1).[60] Given the above, it is clear that the honor system was reasonable for SEI.

---

[58] Mr. Black was consistent in his correspondence with various regulators, writing to the SEC in April 2012, "the vast majority of our brokers do not utilize emails to communicate with clients...we conducted a survey of all our brokers specifically asking if they use emails...the results of the survey showed only 28 of 126 use emails to communicate with clients re investments." (RX-115 p. 11). As he explained, "most of us are old fogies who have very little comfort level with communicating with clients except by telephone or written letters." (*Id.*). Again, the email supervision need only be reasonable in light of the business model and SEI's was not email focused on account of the numerous "old fogies" working there.

[59] As will be discussed below, Mr. Black's statement is also indicative of his believe that the regulatory process was collaborative.

[60] Further, Mr. Dale testified that the fact the emails were not retained is not indicative of any malicious or fraudulent activity by the broker (Tr. 380).

D. Regulators' Alleged Warnings about the System

The NAC makes much of the fact that Applicants were warned about their supervision system. Even if the Commission believes that the Applicants were warned, however, it can still find that the supervisory system was reasonable. The 2011 SEC exam resulted in a 2012 letter stating that SEI's e-mail retention system needed to be improved (RX-114). This letter cited exclusively to a FINRA Press Release (RX-114, p. 6 of 8 (or p. 4 of the letter's original numbering)). But, as Matthew Dale testified, a Press Release is not a regulation (Tr. 379). Similarly, Mr. Black testified that he did not believe the issues discussed in the Press Release represented a binding rule (Tr. 818).

The SEC's letter invited Applicants to "respond in writing to each of the matters described in the Examination Findings within thirty days...describing the steps you have taken or intend to take with respect to each of these matters." (RX-114 p. 1). Mr. Black took the Commission up on that invitation, writing back to explain why he disagreed with the SEC's statement (RX-115) regarding emails and making clear that the firm would not be taking any action relating to emails in response to the SEC's letter, "apparently our supervision of outside business activity and e-mail has been more than adequate compared to the major firms." (*Id.* p. 12). Mr. Black testified that the reason he believed that he could write a letter disagreeing with the findings was because that is what the SEC examiner, Mr. Harris, told him the procedure would be (Tr. 441-442).[61] Both Mrs. Roberts and Mr. Black confirmed their understanding that it was a collaborative process (Tr. 498, 797-799, 808-809). Indeed, on one occasion, FINRA actually changed *its* position after Mr. Black objected to one of its findings (Tr. 573-574). Upon information and belief, no one from

[61] As mentioned above, Mr. Black wrote a similar letter to FINRA in 2013 explaining why SEI's supervision was adequate (RX 52 p. 13) and lending credence to the notion that he believed the regulatory process was collaborative.

SEC appears ever to have reached out again relative to the emails or any other issues or weaknesses described in the letter.

Similar issues were brought up after the 2012 and 2014 FINRA exams. After the 2012 FINRA exam, it was noted that numerous e-mail attachments and threads were missing[62] (Tr. 273-274). There were no issues regarding attachments or incomplete e-mail threads being kept after the 2014 FINRA exam (Tr. 353-356) (or NAC affirmed findings, for that matter), implying SEI had corrected these issues. This was because Mr. Black always attempted to incorporate suggestions from FINRA that he (and/or with the advice of legal counsel) agreed with and would help him be in compliance with regulations. For example, upon FINRA's request, Mr. Black immediately implemented hard copy retention requirements on individual registered representatives (Tr. 819, 937-938). Notably, unlike the Press Release on which FINRA relied, this notification from FINRA (RX-55, p. 3) expressly indicated that action was required to be in compliance with securities regulations.

E. Applicants' Adoption of SMARSH at FINRA's Request is Not a Cure-All

The NAC Decision makes clear that in the view of FINRA, the installation of Smarsh was some kind of panacea: "in June 2015 – the month after the end of the relevant time period – SEI retained Smarsh, Inc., for messaging compliance services." (NAC Decision p. 27). Despite that, Mr. Black did not believe that the installation of a system such as Smarsh (an e-mail archival system) was *required* by FINRA Rules to be in compliance with securities regulations. FINRA confirmed as much when Mr. Dale testified that printing out hard copies of emails was considered an appropriate alternative to retaining a third-party custodian, like Smarsh, to electronically archive the emails (Tr. 376-77). Moreover, Mr. Dale conceded that Smarsh would not capture

[62] Though Ms. Arnold admitted she did not request them (Tr. 335).

emails from a broker who elected to use a personal email addresses not registered with the system or old-fashioned paper letters or correspondence (Tr. 381-383), making it, too, ultimately reliant on the honesty of the brokers. In other words, Smarsh, like the honor system that was at one time employed by SEI, relies on the honesty of employees and is, thus, an inherently imperfect – but still "reasonable" – means of supervising emails. In fact, SEI employee Jeanette Roberts testified to her belief that Smarsh, itself, was a form of the honor system (Tr. 571).

After the 2015 inspection of SEI, Mr. Cormier informed Mr. Black that the e-mail system that SEI utilized was compliant with FINRA rules, however, he also told Mr. Black that if SEI installed Smarsh, "[FINRA] will quit hassling you" and "[FINRA] will leave you alone." (Tr. 454, 527, 826). As a result, SEI installed Smarsh (NAC Decision p. 27, Tr. 374), trading one imperfect system for another. Because of this, FINRA failed to prove by a preponderance of the evidence that the SEI failed to establish and maintain a reasonable supervisory system and failed to establish, maintain and enforce reasonably designed written supervisory procedures to ensure the retention and review of business-related emails. Thus, the findings and sanctions should be vacated.

IV. THE SANCTIONS IMPOSED BY THE PANEL AND AFFIRMED BY THE NAC WERE NOT REMEDIAL AND DO NOT PROTECT THE PUBLIC

The NAC: (1) affirmed the bar imposed on Mr. Black and the $73,000 fine to SEI for providing false testimony and fabricated documents; (2) reduced the fine for failing to retain firm emails to $500 (joint-and-several); and (3) reduced the fine for supervision failures to $73,000 (joint-and-several). None of the fines were imposed on Mr. Black, however, in light of his bar from the industry.

According to the FINRA Sanction Guidelines, adjudicators should ensure that "sanctions imposed are remedial and designed to deter future misconduct, but are not punitive." (p. 2). "A remedial sanction is designed to correct the harm done by respondent's wrongdoing and to

protect the trading public from any future wrongdoing the respondent is likely to commit." *Dep't of Enforcement v. Ryan Leopold*, FINRA Disciplinary Action No. 2007011489301, 2012 WL 641038 at *8 n. 15 (Feb. 24, 2012) (*citing McCarthy v. S.E.C.*, 406 F.3d 179, 190 (2d Cir. 2005)). As discussed below, the sanctions handed down to Applicants were punitive and failed to serve a remedial purpose and, thus, should be vacated.

A. Email Supervision

The conduct for which FINRA sought sanctions against Applicants ceased four years ago. In June 2015, SEI installed Smarsh to automatically archive all emails, and procedures have been updated relating to the same (NAC Decision p. 27, Tr. 607-8). Moreover, there was not any alleged harm caused to customers (Decision p. 37) as a result of the alleged unreasonable email supervision system. Therefore, the sanctions imposed by the Panel and affirmed by the NAC relating to the email supervision system are not remedial and do not protect the public and should, thus, be vacated.

B. Providing False Documents and Testimony

1. The Sanctions Imposed were Punitive and Failed to Serve a Remedial Purpose.

For Causes One and Two, the NAC affirmed a $73,000 fine against SEI and barred Mr. Black from the industry, neither of which corrects any harm or protects the public; thus, they are not remedial. Even before his bar was implemented, the conduct which led to the imposition of the bar against Mr. Black had ceased. Mr. Black no longer had the responsibility of inspecting SEI branch offices and the firm now preserves documentary proof of office visits, such as "selfies"

and all credit card receipts (Tr. 783-784, 1001).[63] Thus, the implementation of the sanctions did not correct any harm.

Moreover, the sanctions do not protect the public from harm, given that there are no findings or, even allegations, that Mr. Black or SEI's alleged conduct has harmed any party. The Hearing Panel conceded as much when imposing sanctions on Mr. Black, acknowledging "the lack of harm to customers" (Decision p. 37). Because of this, the Sanctions that were affirmed by the NAC as to Counts One and Two are not remedial because they do not correct any harm and do not protect the trading public. They are, therefore, punitive and the Commission has the right to vacate or reduce punitive sanctions in favor of remedial ones. *Perpetual Sec., Inc.*, Exchange Act Release No. 56613, 2007 WL 2892696, at *12 (Oct. 4, 2007).

2. The Sanctions are at Odds with a Recent Supreme Court Ruling

Moreover, the bar against Mr. Black is at odds with a recent Supreme Court ruling. As noted above, FINRA sanctions must be remedial and not excessive and punitive.[64] *McCarthy*, 406 F.3d at 190. The Supreme Court recently ruled that sanctions imposed for the purposes of deterrence, which is one of the NAC's primary goal in this case,[65] are inherently punitive because deterrence is not a legitimate non-punitive government objective. *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1643 (2017).

[63] Further, FINRA's Sanction Guidelines allow adjudicators to "design sanctions other than those specified in these guidelines" (p. 3), which means that OHO or NAC could have simply barred Mr. Black from conducting inspections.

[64] In appeals from FINRA sanctions, the SEC must determine whether the FINRA-imposed sanctions are "excessive or oppressive." 15 U.S.C. §78s(e)(2).

[65] The NAC paid mere lip service to the notion of remediation, writing in the most general terms, "these sanctions are appropriate to remedy Black's and SEI's failure to provide truthful responses," (NAC Decision p. 37). On the other hand, the NAC specifically pointed to deterrence as justification because the sanctions "will deter other individuals and firms in the industry from engaging in similar violations." (*Id*).

Recently appointed Justice Kavanagh explained that expulsion and suspension do not provide a remedy to the victim[66] and that in light of *Kokesh*, "we can no longer characterize an expulsion or suspension as remedial." *See Saad v. S.E.C.*, 873 F.3d 297, 304-07 (D.C. Cir. 2017) (Kavanaugh, J. concurring).[67] With this new guidance in mind, prior decisions "characterizing expulsions or suspensions as remedial are no longer good law" (*Saad*, 873 F.3d at 304) or, more bluntly, "expulsion and suspension are punitive." (*Id.* at 304).[68] Thus, the bar handed down to Mr. Black is inherently punitive under *Kokesh*. *See Kokesh*, 137 S. Ct. at 1643.

Because of this, FINRA and the SEC "will no longer be able to simply wave the 'remedial card'" (which is exactly what they did with Mr. Black) but, instead, "will have to reasonably explain in each individual case why an expulsion or suspension serves the purpose of punishment and is not excessive or oppressive." *Saad*, 873 F.3d at 306. The NAC failed to offer a cogent explanation on this, instead relying on the proverbial playing of the remedial card. Thus, the bar is improper and should be vacated because it is punitive, excessive and oppressive.[69]

---

[66] As noted above, there is not even a victim to provide a remedy to in the instant matter. (Decision p. 37).

[67] John Saad was barred for life by FINRA after he misappropriated employer funds and then repeatedly misled investigators in an effort to cover up transgressions (findings that are remarkably similar to the ones that led to Mr. Black's bar.) *See Saad*, 873 F.3d at 298. The D.C. Circuit remanded the case to the Commission to determine if its affirmance of the lifetime bar was impermissibly punitive in light of *Kokesh*.

[68] In contrast, "our pre-Kokesh cases in turn say that the SEC may uphold FINRA Sanctions as not being excessive or oppressive if the sanctions are remedial, not punitive" *Saad*, 873 F.3d at 306 (internal citations omitted) and "our pre-Kokesh cases further say that an expulsion or suspension can be considered remedial, not punitive." (*Id*). This is no longer the case.

[69] Applicants acknowledge that on August 23, 2019, the Commission ruled that "*Kokesh* does not render FINRA bars impermissible," *In the Matter of the Application of John M. E. Saad*, Exch. Act Rel. No. 86751, at *3 (Aug. 23, 2019), because "*Kokesh* has no bearing on our determination that the bar 'is necessary to protect FINRA members, their customers, and other securities industry participants' and is therefore 'remedial, not punitive'" (*Id.* at *20). However, this ruling directly contradicts the D.C. Circuit, as stated above. Therefore, the bar imposed on Mr. Black is impermissibly punitive, for the reasons described above, and should be vacated.

C. The NAC Improperly Failed to Consider Mitigating Factors.

The NAC found that "there are no mitigating factors" (NAC p. 37), even though the OHO acknowledged "the lack of harm to customers" (Decision p. 37). In fact, there are numerous mitigating factors that the NAC failed to consider.

The NAC failed to consider that Mr. Black and SEI have assisted law enforcement as well as securities regulators on numerous occasions in helping to root out fraud and, therefore, create a safer securities marketplace for the investing public (Tr. 874-882, RX -109-113). For instance, Mr. Black contacted authorities and then allowed the FBI and a North Carolina Securities official to meet with an alleged wrongdoer in an SEI office and to tape the meeting (Tr. 882). After Mr. Black's suspicions were aroused, he also contacted the SEC over an entity called the Rockford Group. The entity was subsequently investigated and found to be a scam. Mr. Black's actions led to the recovery of investor money (Tr. 878-880 and RX-110-113). Demonstrating his continued commitment to a fair market, Mr. Black also contacted the SEC, specifically Brad Darfler and Marcus Chan out of San Francisco, with regard to another suspicious entity (Bridgewater Financial), which led to an investigation (Tr. 876-78).[70] Mr. Black also helped an aggrieved investor, who was not and never had been an SEI customer, sue and recover money via FINRA arbitration. *Wilburn and Cynthia Slagle v. Jonathan Roberts Financial Group, Inc., et al.*, FINRA Case 03-05830. Mr. Black did this because it was the right thing to do (Tr. 874-876).

The NAC also failed to consider mitigating factors relating to Count Five (email supervision). For instance, SEI is being sanctioned for its email procedure, but that procedure was

[70] The SEC has recognized that assisting an investigation to turn in wrongdoers is a mitigating factor. *See In the Matter of Gary M. Kornman*, Exchange Act Release No. 59403 at *16 (Feb. 13, 2009) ("In *Raymond L. Dirks*, we reduced respondent's sanction to a censure because of respondent's role in 'bringing [a] massive [insider trading] fraud to light.'"). This was recognized by the Supreme Court of the United States. *See Dirks v. S.E.C.*, 463 U.S. 646, 651-652 (1983) ("Recognizing, however, that Dirks 'played an important role in bringing [Equity Funding's] massive fraud to light,' the SEC only censured him.") (Internal citations omitted). Counsel has unable to locate the original *Raymond L. Dirks* S.E.C. decision, probably a result of age and its being superseded by the Supreme Court.

initially recommended by a FINRA employee in 2008 (Tr. 801-803). In addition, it is unreasonable to impute an employee's dishonest behavior to a supervisory failure. "When a representative cloaks an act in secrecy under circumstances like these, it is unreasonable to attribute the fault to a supervisory failure. Here, the supervisory system as written and implemented was reasonably designed to monitor and review correspondence. Kittlaus simply evaded it." *Dep't of Enforcement v. Wall Street Strategies Inc., et al.*, Disciplinary Action No. 2012033508702. Testimony from FINRA staff concedes that supervision of broker communications is, in part, always reliant on brokers following an honor system (e.g., Tr. 380-383).[71] It would be impossible, and require unreasonable supervision methods, to attempt stop a broker from creating third-party email addresses to use in contacting current or potential customers.

FINRA was bound to consider the above mitigating factors, but, instead, it failed to adequately address and to consider these factors with proper weight. *See Paz Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007) (which vacated Commission-affirmed sanctions by the NASD for failure to consider mitigating factors, including that the conduct did not result in "injury to the investing public" and was of "no potential monetary benefit to them.") Because these factors were not adequately considered and addressed, the sanctions should be vacated or substantially reduced.[72]

[71] The NAC found that Applicants failed to retain just 16 emails (all from Mr. Sebastian), which he "failed to forward to SEI." (NAC. P. 31).

[72] Moreover, as previously stated, SEI's delay in installing Smarsh to archive e-mails was not an aggravating factor and was due to the undisputed fact that Mr. Black was relying on the fact that it was originally FINRA representative DePorres Cormier who suggested the "honor" system in use by SEI. Obviously, this caused confusion and ultimately inaction on the part of SEI, as Applicants were given conflicting information from FINRA.

V. THE CUMULATIVE EFFECT OF THE ERRORS

The Commission has in the past vacated findings and sanctions because the cumulative effect of errors has created an unfair hearing. *In the Matter of the Application of U.S. Associates, Inc.*, 1993 WL 469130 at *5. In *U.S. Associates*, the Commission acknowledged that it commonly applies the principle of harmless error, but in that case, as is the case here, there were "multiple procedural problems with a significant cumulative effect." (*Id.)* In that matter, as mentioned previously, the NASD failed to turn over documents until the night before the hearing (unlike Applicants here, who did not get them until well after the hearing) and denied respondents the opportunity to put on their full case (similar to SEI and Mr. Black here, who could not properly demonstrate the bias of the ex-SEI brokers through cross-examination without the exculpatory evidence that FINRA did not produce). (*Id.*).

The Commission acknowledged that "Applicants were afforded several opportunities to present their case after the DBCC proceedings" through post-hearing submissions, for example, but emphasized that Applicants were prevented "from presenting a large portion of their case in person." (*Id.*). This logic perfectly encapsulates the inherent unfairness of turning over the exculpatory documents *after* the hearing. Such evidence needed to be put before the Panel at the hearing, not on paper afterwards. Here is why. The Commission found that because Applicants were not able to fully present their case, they were denied the opportunity to "have their credibility and demeanor carefully considered by the Panel, especially since Applicants were alleged to have committed fraud." (*Id.)*.

Mr. Black similarly deserved the opportunity to have his credibility and demeanor judged live by the Panel in light of the obvious dishonesty of the ex-SEI brokers that became evident only *after* the hearing. This is especially true since he was accused of lying and creating false documents, akin to fraud. Instead, because FINRA failed to correct false testimony by the ex-

brokers and turn over the aforementioned documents, the Panel was left with the impression that the brokers were honest and that Mr. Black was the liar. It is worth remembering that both the hearing panel and the NAC asked about witness credibility in relation to Mr. Black's credibility. Mr. Black deserved the opportunity to have his credibility judged with all of the cards on the table.

In vacating the findings, the Commission found that "perhaps some of the objections (considered in isolation) might be dismissed, but together they demonstrate unfairness."(*Id.*). Thus, the Commission vacated the findings and sanctions and remanded the matter to the NASD for a new hearing. Given the multitude of errors[73] present in the instant action that extinguished any opportunity Applicants had for a fair hearing, the Commission should apply that same logic and vacate the findings and sanctions against Applicants.[74]

CONCLUSION

For the foregoing reasons, Applicants request that the findings and sanctions affirmed by the NAC be vacated.

[73] In another example, the OHO Panel repeatedly allowed unreliable hearsay evidence to be used against Applicants, when only reliable hearsay evidence may be used. *Dep't of Market Regulation v. Jaloza*, Complaint No. 2005000127502, at 22 (FINRA NAC July 28, 2009)). For instance, Ms. Arnold's testimony about what Mr. Graham told her was biased and unreliable, as was her testimony about what Mr. Franks told her. Finally, the statement of Mr. McCall was unreliable and, therefore, improperly admitted as he was potentially biased against SEI. The NAC implicitly admitted his written statement was erroneously admitted in failing to affirm the findings related to the inspections of his office.

[74] The NAC also erroneously found that the Hearing Panel did not abuse its discretion in denying Applicants' written Motion to Compel the production of nine types of documents (including documents related to inspections, other than the ones described earlier in the brief, and Applicants' email supervisory system (NAC Decision p. 19). Applicants were entitled to these documents, including any notes taken by Ms. Kelley Edwards during phone calls with the ex-SEI brokers, pursuant to Rule 9251 (some of the documents may have contained exculpatory evidence, which should be produced under 9251(3)), and the failure to produce all nine groupings of documents was not harmless error.

Respectfully submitted this 4th day of September, 2019.

ULMER & BERNE LLP

Alan M. Wolper
awolper@ulmer.com
Blaine F. Doyle
bdoyle@ulmer.com
500 West Madison Street, Suite 3600
Chicago, Illinois 60661
(312) 658-6500 – General
(312) 658-6565 – Fax

Counsel for Applicants

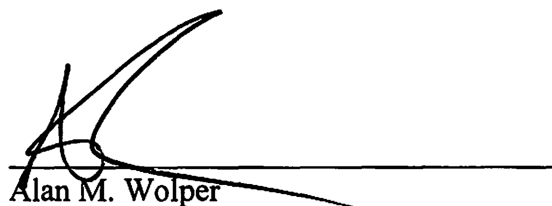
CERTIFICATE OF SERVICE

I hereby certify that APPLICANTS' OPENING BRIEF IN SUPPORT OF APPLICATION FOR REVIEW has been sent to the following parties entitled to notice as follows:

Securities and Exchange Commission
Office of the Secretary
100 F. Street N.E.
Washington D.C. 20549
Mail Stop 1090
Fax: 202-772-9324
(One copy via fax; original and three copies via overnight mail delivery)

Andrew Love, Esq.
FINRA, Office of the General Counsel
1735 K Street, NW,
Washington, DC, 20006-1506
nac.casefilings@finra.org
(Courtesy copy via e-mail, and one copy via overnight mail delivery)

This 4th day of September, 2019.



Alan M. Wolper

Certification pursuant to Rule 154(c)

I certify that this document conforms to the requirements of SEC Rules of Practice 154(c). The length of this brief, excluding the cover page, table of contents, table of authorities and signature blocks is 17,902 words.[75]

Alan M. Wolper
awolper@ulmer.com
ULMER & BERNE LLP
500 West Madison Street, Suite 3600
Chicago, Illinois 60661
(312) 658-6500 – General
(312) 658-6565 – Fax

Counsel for Respondents

[75] On July 10, 2019 the Commission granted an "Order Extending Time for Filing Briefs and Word Limitations," (Release No. 86349) that increased the word limitation on the instant brief from 14,000 words to 20,000 words. The word count in Applicants' brief complies with the extended word count.