BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

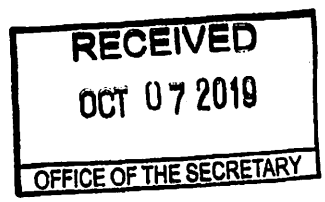
In the Matter of the Application of

Southeast Investments, N.C., Inc. and Frank Harmon Black

For Review of

FINRA Disciplinary Action

File No. 3-19185



FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

Alan Lawhead
Vice President and
Director – Appellate Group

Andrew Love
Associate General Counsel

FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8281

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I. INTRODUCTION

Southeast Investments, N.C., Inc. (the "Firm" or "SEI"), through its owner Frank Black (together "Applicants"), lied to FINRA concerning off-site office inspections of four Firm registered representatives. After Commission staff found that the Firm failed to inspect branch offices one year earlier, FINRA staff questioned Applicants to ensure that they had fixed these deficiencies. Instead of Black coming clean and informing FINRA that he and the Firm had again breached their supervisory obligations to inspect representatives' offices, Black repeatedly informed FINRA that he had inspected the four offices at issue. This was untrue. To make matters worse, Black fabricated Firm records to create the appearance that he had visited and inspected each office.

FINRA's National Adjudicatory Council ("NAC"), based on the credible and consistent testimony of the four representatives at issue, found that Black and the Firm testified falsely to FINRA and fabricated documents concerning office inspections. For this highly serious

misconduct, the NAC barred Black and fined the Firm $73,000. The NAC's findings and sanctions are well-supported and should be affirmed by the Commission.

The Commission should also affirm the NAC's findings that Black and the Firm failed to establish and maintain a reasonable supervisory system, and failed to enforce reasonably designed written supervisory procedures ("WSPs"), to ensure the retention and review of business-related emails. Despite warnings from both Commission and FINRA staffs concerning the adequacy of their email supervisory system, the Firm permitted its registered representatives to use personal email accounts to conduct Firm business and simply required them to copy or forward all business-related emails to the Firm's home office. The Firm thus depended on an "honor system" for retaining and reviewing business-related emails, which was the antithesis of a reasonably designed supervisory structure for a broker-dealer such as the Firm that has numerous registered representatives scattered across the country. The weakness of the Firm's system was evidenced by Applicants' failure to retain certain business-related emails of a registered representative, who failed to forward or copy his personal emails involving Firm business to the Firm's home office. The NAC's fines totaling $73,500 imposed upon the Firm for these violations are neither excessive nor oppressive, and should be sustained.

On appeal, Applicants have presented no persuasive arguments to overturn the NAC's well-supported decision. Instead, they mainly argue that they were deprived of a fair proceeding in connection with their false testimony and fabrication of documents. Black and the Firm claim that if only they had a FINRA examiner's notes of her conversations with the four representatives at issue, Applicants would have been able to show that the representatives were not credible or reliable witnesses. Black and the Firm further argue that summaries of the notes, created just several days after the conversations at issue and produced to them after the hearing,

would have also enabled them to demonstrate at the hearing that the four representatives were not credible and biased against them. Applicants base this bold assertion upon several immaterial inconsistencies between the summaries and snippets of the four representatives' testimony.

The Commission should reject these claims, which are nothing more than an attempt to obfuscate that four individuals independently and unequivocally testified, consistent with their prior responses to FINRA Rule 8210 requests, that Black did not inspect their offices as he had claimed. And the evidence shows that rather than helping their claims that the four representatives were not credible or reliable, the summaries of the notes firmly buttressed the representatives' straight-forward testimony that Black did not inspect their offices. Any inconsistencies identified by Applicants had no material impact on FINRA's credibility findings and the findings that Black and the Firm lied and fabricated documents. Nor should they have. To this day, Black has provided no legitimate reason why the Commission should set aside FINRA's findings that the four representatives at issue testified credibly and consistently that Black did not inspect their offices. And Black and the Firm have never presented any reliable evidence or documentation to support Black's incredible testimony to the contrary.

Accordingly, FINRA urges the Commission to dismiss Applicants' application for review.

II. RELEVANT FACTUAL BACKGROUND[1]

A. Black

Black has approximately 48 years of experience in the securities industry. (RP 1454.) Until the Commission denied Black's motion to stay the NAC's bar, Black had been associated with the Firm, which he founded, since 1997. *See* RP 0124, 1456; *see also* https://www.sec.gov/litigation/opinions/2019/34-86097.pdf (June 12, 2019 Order Denying Stay).

During the relevant period, Black served as the Firm's president, chief financial officer, chief compliance officer, anti-money laundering compliance officer, and financial and operations principal. (RP 0124, 1355.) Black was ultimately responsible for supervisory issues at the Firm, including its systems for inspecting offices, email retention, and its WSPs. (RP 0819-20.)

B. The Firm

The Firm is based in Charlotte, North Carolina. (RP 0007, 0124.) During the relevant period, it employed between 114 and 133 registered representatives and had 38 FINRA-registered branch offices. (RP 0017, 0128.) The Firm has an independent contractor business model. (RP 0653.) Consequently, its registered representatives typically work out of their homes or in insurance office locations, which are scattered throughout the country. (RP 0653-54, 1299.) During the relevant period, Black owned 95% of the Firm.

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[1] As described below, the NAC found Applicants liable for violating federal securities laws and FINRA rules on narrower grounds than the Hearing Panel. *See infra* Part III.C.3. Nonetheless, throughout their brief Applicants repeatedly refer to, and challenge, the Hearing Panel's findings. *See, e.g.*, Applicants' Opening Brief ("Brief") at 2-5, 31, 34-37, 52. Because it is the decision of the NAC, and not the Hearing Panel, that is the final FINRA action that is subject to the Commission's review, FINRA discusses below only those facts relevant to the NAC's decision. *See David Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *51 (July 27, 2015) (stating that it is the opinion of the NAC, and not the hearing panel, that is the final action of FINRA reviewable by the Commission).

C. Black and the Firm Fabricate Documents and Testify Falsely Concerning Office Inspections

FINRA, through its examiners Pamela Arnold ("Arnold") and Ray Palacios ("Palacios"), conducted an on-site cycle examination of the Firm in September 2012. (RP 0653-56.) During this examination, FINRA staff focused on the Firm's office inspection program and electronic correspondence because, during the Commission's 2011 examination of the Firm, it found that the Firm failed to conduct office inspections and its email retention system was inadequate. (RP 0654, 0657, 0677-88, 1853.) FINRA staff wanted to know whether the Firm had addressed these deficiencies. (RP 0657, 0677.)

FINRA examiners asked Black how he kept track of the Firm's office inspections. (RP 0656, 0722-23.) Black informed them that he tracked inspections using a running list on his computer. (RP 0722.) At the examiners' request, Black produced to FINRA a document he created entitled, "Office Inspections Checklist by Due Date" (the "Office Inspections Checklist"). (RP 0656, 1585.) The Office Inspections Checklist listed the purported due dates and completion dates of inspections of 43 Firm representatives' offices. (RP 1130-31, 1585.) As is relevant to this proceeding, the Office Inspections Checklist showed that the Firm, through Black, inspected the offices of the following four registered representatives: (1) Rocci Ravella ("Ravella") on October 1, 2010; (2) Scott Rivard ("Rivard") on May 11, 2011; (3) Tom Minor ("Minor") on August 11, 2011; and (4) Anthony Marable ("Marable") on July 16, 2012. (RP 1586-87.) As described below, Ravella, Rivard, Minor, and Marable (the "Four Testifying Representatives") credibly and consistently testified that neither Black nor anyone else at the Firm inspected their offices as Black claimed.

In March 2013, FINRA staff conducted an on-the-record interview of Black, and subsequently requested that the Firm produce, pursuant to FINRA Rule 8210, all documents

evidencing the 43 office inspections identified on the Office Inspections Checklist.[2] (RP 0822-23, 1589-90.) In response, the Firm produced documents that purported to show at least 10 office inspections (including those for the Four Testifying Representatives). (RP 0660, 1593, 1629-1723.) For each purported inspection, the documents included an "Internal Review Files and Forms Checklist" (which was a checklist that contained compliance-related tasks to be conducted as part of each inspection) and a document entitled, "Office Compliance Inspection." (RP 1642-1723.) The Office Compliance Inspection document falsely showed that Black inspected the Four Testifying Representatives' offices on the dates shown on the Office Inspections Checklist. *See* RP 1643, 1651, 1703.

The Firm also provided 29 expense vouchers, which purported to reflect amounts that the Firm reimbursed Black for travel expenses from March 2010 through June 2012. (RP 1594, 2323-52.) None of the vouchers, however, were linked to a specific office inspection. Instead, they simply listed the date the expense was allegedly incurred, an amount, and a description of either "mileage" or "mileage" and "meals." *See* RP 2323-52. Nor were they supported by receipts, bank statements, or credit card statements. *See* RP 1376-77, 1379, 2323-52.

On April 3-4, 2014, FINRA staff conducted another on-the-record interview of Black pursuant to FINRA Rule 8210. (RP 1627, 1629.) Despite acknowledging his obligation to testify truthfully, Black falsely testified that he personally inspected the Four Testifying Representatives' offices on or around the dates set forth in the Office Inspections Checklist. *See* RP 1632, 1635-38. He further falsely testified that he had the Office Compliance Inspection

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[2] The Rule 8210 request specified that the Firm's response should include the name of the individuals who conducted the inspection, all office inspection reviews, all expense reports and supporting documentation in connection with the inspections, and evidence of reimbursement for the submitted expenses. (RP 1590.)

document in front of him during onsite office inspections and went through the document with each respective representative. *See* RP 1638. Black also falsely testified that the Office Compliance Inspection document accurately reflects that he inspected the Four Testifying Representatives' offices. (RP 1636-38.) Black asserted that he drove to the Four Testifying Representatives' offices to conduct the inspections, including to two offices that were 11 hours away by car. (RP 0663-64.) Black, however, could not produce documents that specified his location, either during travel or at the purported inspections.

The Four Testifying Representatives each flatly contradicted Black's testimony that he inspected their offices. Indeed, they each testified before the Hearing Panel, unequivocally, that Black had *not* inspected their offices as he had claimed. *See* RP 0459, 0468 (testimony of Minor that Black did not inspect his office and there was no possibility that he forgot about a visit by Black); RP 0498 (testimony of Rivard that Black never inspected his office); RP 0531 (Ravella's testimony that Black never inspected his office); RP 0558-60, 0562-63 (Marable's testimony that Black visited him once when he first started but "he didn't really inspect anything" and he would have remembered if Black had visited him in 2012); *see also infra* Part III.B. The testimony of the Four Testifying Representatives was consistent with each of their responses to Rule 8210 requests that they provided to FINRA in September and October 2013. *See* RP 1603-25.

D. The Firm's Deficient Supervisory System and Procedures Concerning Email Retention

The Firm provided each Firm representative with an email account, but did not require registered representatives to strictly use their Firm email addresses for Firm business. *See, e.g.*, RP 0314. The Firm's WSPs identified Black as the supervisor responsible for all Firm registered representatives (except himself), the responsible party for reviewing all Firm correspondence, and the individual responsible for establishing written procedures for reviewing correspondence.

(RP 1362-64, 1727, 1736, 1759, 1834-37.)[3] The WSPs further provided that, "[r]eview of correspondence shall be evidenced by initialing and dating the [Firm's] file copy of written correspondence." (RP 1760.) The WSPs required all registered representatives "to copy the Main Office with all e-mail communications with clients." *See, e.g.*, RP 1760. At some point, the Firm required employees to certify annually that they were copying the home office on emails pursuant to the WSPs. (RP 0906-07, 1220, 2403.) Thus, the Firm used an "honor system" to supervise and retain email, which depended entirely on each of the Firm's 114 to 133 representatives across the country to copy or forward to the Firm business emails sent or received using non-Firm email addresses. *See* RP 0440, 0766.

The Firm used this honor system despite warnings from its regulators that it was unreasonable to do so. In fact, both the Commission and FINRA specifically warned Black and the Firm (in 2012 and 2014, respectively) that the Firm's "honor system" for email review and retention was inadequate. *See* RP 1858, 2469. Applicants finally abandoned the honor system in June 2015, but only after FINRA began its investigation underlying this proceeding and sent the Firm a Wells Notice concerning its inadequate supervisory system for email review and retention. *See, e.g.*, RP 0685-86. At this time, the Firm retained Smarsh, Inc. to preserve all Firm emails and required its representatives to use the Firm's Smarsh-controlled system when using email. (RP 1239, 2097, 2549, 2567.)

E. Black and the Firm Fail to Preserve Certain Emails

During FINRA's 2014 cycle examination of the Firm, FINRA staff visited the Bluffton, South Carolina office of Richard Sebastian ("Sebastian"). (RP 0767-68.) Sebastian was aware

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[3] The record contains several versions of, and excerpts from, the Firm's WSPs in effect from January 2011 through December 2014. *See* RP 1727, RP 2591-3309. For the issues relevant to this appeal, the different versions all contain the same provisions.

of the Firm's policy that required registered representatives to copy or forward all business-related emails to the Firm's home office, and asserted that he was "fully compliant" with that policy. (RP 0768-69.) Upon staff's review of one month's worth of Sebastian's emails on his computer, however, it discovered 16 business-related emails in Sebastian's personal email account that he had not forwarded or copied to the Firm's home office.[4] (RP 0769-71, 2061-87.) Sebastian blamed his failure on "simple oversight." (RP 0772.)

III. PROCEDURAL HISTORY

A. Enforcement's Complaint

FINRA's Department of Enforcement ("Enforcement") filed a five-cause complaint against Black and the Firm in September 2015. (RP 0001.) It alleged that: (1) the Firm, acting through Black, provided to FINRA during the 2012 Cycle Examination fabricated documents, which falsely showed that Black inspected the offices of the Four Testifying Representatives and one other representative (Joe McCall), when Black did not do so, in violation of FINRA Rules 8210, 4511, and 2010; (2) Black and the Firm provided false investigative testimony concerning these alleged office inspections during an on-the-record interview, in violation of FINRA Rules 8210 and 2010; (3) Black and the Firm established a deficient supervisory system regarding office inspections, in violation of NASD Rule 3010; (4) Black and the Firm failed to preserve and maintain all of the Firm's business-related emails, and in so doing the Firm willfully violated Section 17(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 17a-4, and Black and the Firm violated NASD Rule 3110 and FINRA Rules 4511 and 2010; and (5) Black and the Firm failed to establish, maintain, and enforce a supervisory system and WSPs

[4] FINRA staff was only able to review a single month's worth of Sebastian's emails because Sebastian had been locked out of, and could no longer access, two other personal email addresses that he had previously maintained. (RP 0772-74, 2095.)

designed to supervise the Firm's review and preservation of email, in violation of NASD Rule 3010 and FINRA Rules 3110 and 2010. (RP 0006-07.)

B. The Hearing Panel Finds that Applicants Engaged in the Misconduct Alleged by Enforcement

After a four-day hearing in September 2016, at which 10 witnesses testified (including the Four Testifying Representatives, Black, and FINRA examiner Arnold), the Hearing Panel found that Black and the Firm engaged in the misconduct alleged in the complaint. *See* RP 0411-1450 (hearing transcripts); RP 3631-74 (Hearing Panel decision.) For Applicants' misconduct, the Hearing Panel imposed fines upon the Firm totaling $243,000 (of which $170,000 was assessed jointly and severally with Black for all of the violations in the aggregate). (RP 3673.) For fabricating documents and testifying falsely, the Hearing Panel barred Black. (RP 3668.)

The Hearing Panel based its findings that Black and the Firm fabricated documents and testified falsely on, among other things, the testimony of the Four Testifying Representatives. (RP 3642, 3644.) The Hearing Panel found that the Four Testifying Representatives, who each testified that they had never met one another, credibly testified that Black did not inspect their respective offices as he had claimed, and that their testimony tracked their responses to previous FINRA Rule 8210 requests concerning the matter.[5] (RP 3638-42; 1603-25 (Rule 8210 responses of Four Testifying Representatives).) Specifically, the Hearing Panel found that

[5] Enforcement alleged, and the Hearing Panel found, that the Firm and Black fabricated documents and testified falsely about one additional registered representative who did not testify but provided a written statement (Joe McCall). (RP 3645.) The NAC, however, did not find it necessary to include McCall in its liability findings because of the credible testimony of the Four Testifying Representatives. (RP 4299-4300.)

- Minor testified credibly that he was associated with the Firm from 2004 to 2005, and again from 2008 until January 2012, worked by himself in a cottage in his yard in Charlotte, North Carolina, and that neither Black, nor any other Firm representative, ever visited his office to inspect it (RP 3640-41);

- Rivard testified that he maintained an office in Pittsford, New York, where he kept all of his customer files and documents. He was the only person who worked there, and testified credibly that neither Black, nor any other Firm representative, ever visited his office to do an audit or inspection (RP 3641-42);

- Ravella testified credibly that he worked alone from his home in Leetonia, Ohio and that neither Black, nor any other Firm representative, visited his office (RP 3643-44); and

- Marable testified that during the relevant period, he worked at an office in Mauldin, South Carolina, where he worked alone. Marable testified credibly that Black did not visit him in July 2012 as claimed by Black, and that Black visited him only once "over ten years ago," although Black "didn't really inspect anything." Marable testified that he would remember if Black had visited him in July 2012. (RP 3644-45.)

In contrast, the Hearing Panel found that Black's testimony that he inspected the offices of the Four Testifying Representatives was false, not credible, and unsupported by any reliable evidence. (RP 3636-40, 3650-53.) When asked by the Hearing Panel to explain why the Four Testifying Representatives each contradicted Black's claim that he inspected their offices, Black stated "I wish I could explain it. . . . But I do know, in each of these cases, that either we didn't part on good terms or there had been ill feelings before." (RP 1371.)

C. The NAC Finds that Black and the Firm Lied to FINRA, Maintained a Deficient Supervisory System Concerning Emails, and Failed to Preserve Emails

Black and the Firm appealed the Hearing Panel's decision to the NAC. (RP 3675.) The parties submitted appellate briefs to the NAC, and a NAC subcommittee conducted oral argument. *See* RP 3793, 3817, 3859, 3893, 3907 (parties' briefs); 3933-4064 (oral argument transcript).

1. The NAC Requests that the Hearing Panel Resolve a Discovery Issue

In June 2018, before issuing a decision, the NAC issued an interim order concerning a discovery issue (the "Interim Order"). (RP 4066-69.) The Interim Order requested that the Hearing Panel direct Enforcement to produce a copy of notes (the "Notes") that Arnold took of conversations she and Palacios had with the Four Testifying Representatives in August 2013. The NAC did so because it found that "respondents' counsel essentially made an oral argument" for copies of the Notes, and the Hearing Officer never ruled on the oral motion. (RP 4067.) The Interim Order directed the Hearing Panel to conduct further proceedings to determine whether the Notes constituted "written statements" under FINRA Rule 9253(a)(2) and if so, whether respondents had shown that the failure to provide the Notes was not harmless error under Rule 9253(b).[6]

In response to the Interim Order, the Hearing Officer directed Enforcement to produce the Notes, and ordered the parties to brief the issues raised in the Interim Order. (RP 4073.) Enforcement staff subsequently informed the Hearing Panel that they could not locate the Notes. (RP 4075-92.) Enforcement, however, produced emails from Arnold to Palacios, sent just six days after their conversations with the Four Testifying Representatives, summarizing those conversations from the relevant portions of the Notes (the "Emails"). (RP 4077-83.) Enforcement also produced a memo from Palacios, dated one day after Arnold's emails,

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[6] FINRA Rule 9253(a)(2) provides that a respondent may file a motion requesting that Enforcement produce "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" where these individuals are called as witnesses and the written statement directly relates to their testimony. *See* FINRA Rule 9253(a)(2). If a written statement is not made available to a respondent, he is not entitled to a rehearing or issuance of an amended decision *unless* he shows that the failure to provide the written statement was not harmless error. *See* FINRA Rule 9253(b).

summarizing the phone conversations with the Four Testifying Representatives (the "Memo"). (RP 4084-89.) The parties fully briefed the issues raised in the Interim Order. *See* RP 4111, 4123, 4141, 4149.

2. The Hearing Panel Finds that the Absence of the Notes and Production of the Emails and Memo After the Hearing Had No Impact on its Decision and Reemphasizes its Credibility Findings

After reviewing the parties' briefs and submissions, the Hearing Panel issued an order responding to the Interim Order on August 31, 2018 (the "Hearing Panel 2018 Order"). (RP 4157-67.) The Hearing Panel 2018 Order found that: (1) the Notes were not "written statements" pursuant to FINRA Rule 9253(a)(2) because they were not made during a routine exam or inspection; (2) Enforcement was not required to produce the Notes; (3) even if the Notes could be considered written statements, Black and the Firm did not show that the failure to produce them was not harmless error because the Notes "were consistent with and corroborated materially the testimony of the four brokers and their written response to the staff's request for information"; and (4) the Emails, which summarized the Notes, did not contain anything that altered the Hearing Panel's findings and "[t]here is no hint that the Notes contained any exculpatory *Brady* material." (RP 4162.)

The Hearing Panel, after reviewing the Emails, the Memo, and the parties' arguments concerning the importance of these documents and the Notes to the Hearing Panel's findings, emphasized that the "evidence presented at the hearing, when presented in its entirety, is overwhelming that Respondents did not perform the branch inspections . . . and that production of Arnold's notes would not have altered our findings of liability." (RP 4159.)

The Hearing Panel also rejected Applicants' arguments that the witnesses were not credible, and that they could have used the Emails or Memo to impeach the witnesses at the

hearing based on certain inconsistencies between the witnesses' testimony and these materials. (RP 4162-65.) The Hearing Panel found the purported inconsistencies raised by Applicants were immaterial and did not undermine the witnesses' credibility. *See id.* In fact, the Hearing Panel, after considering the Emails, the Memo, and the arguments raised by Applicants, reemphasized its findings that the Four Testifying Representatives were credible. It found that

> The brokers testified without contradiction that they did not know each other; thus, there is no evidence that they coordinated their testimony. The Panel considered that if the brokers had intended to provide false testimony—that is, testify that Respondents conducted no inspections of their offices, when in fact they did—Respondents would have been able to impeach them with evidence generated by the inspections. Such proof could reasonably include receipts evidencing Black's travel and hotel expenses, and records of communications about the inspections, that would have exposed each of the brokers in an elaborate lie. Black also would have been able to testify about what activities he engaged in with the brokers during the branch inspections. This did not occur.
>
> The brokers' testimony was consistent with what they told Arnold and Palacios over the telephone and what they submitted in writing in response to Rule 8210 requests for information. The Panel therefore found them credible.

(RP 4166.)

Finally, with respect to the Four Testifying Representatives, each of whom Black alleged was biased against him, the Hearing Panel found that their ability to be truthful was not impacted by purported disputes with Black. (RP 4162.) The Hearing Panel made these findings after it "carefully observed the demeanor of the four brokers at the hearing" and listened to their extensive testimony concerning their interactions with Black, and in certain instances, disputes with him. Notwithstanding this testimony, the Hearing Panel "found no evidence of animosity or bias towards Respondents." (RP 4162.)

3. The NAC Finds that Black and the Firm Engaged in Misconduct

After the Hearing Panel issued the Hearing Panel 2018 Order, jurisdiction of the proceeding reverted to the NAC. The NAC then ordered the parties to submit to it additional

briefs addressing the issues raised by the Hearing Panel 2018 Order. (RP 4175.) The parties did so. *See* 4179, 4193, 4217.

On May 23, 2019, the NAC issued its decision. (RP 4278-4322.) The NAC found that

- Black and the Firm provided to FINRA fabricated documents and testified falsely that they inspected the Four Testifying Representatives' offices; (RP 4294-99)

- Black and the Firm failed to establish, maintain, and enforce a reasonable supervisory system and WSPs to ensure the adequate retention and review of business-related emails by permitting representatives to use their personal email accounts for Firm business but requiring them, through an "honor system," to forward or copy the Firm's home office on business-related emails;[7] (RP 4307-11) and

- Black and the Firm failed to retain 16 of Sebastian's emails. (RP 4312-16.)[8]

a. Black and the Firm Provided False Testimony and Fabricated Documents

In concluding that Black, and the Firm through Black, testified falsely that they inspected the offices of the Four Testifying Representatives, the NAC held that the credibility of the Four Testifying Representatives and Black was crucial. (RP 4295.) The NAC found that Black and the Firm did not present substantial evidence to set aside the Hearing Panel's extensive determinations that the Four Testifying Representatives were credible when they testified, unequivocally, that Black did not inspect their offices, and that Black's contrary testimony was not credible. (*Id.*) The NAC rejected Applicants' arguments that the Four Testifying Representatives were biased and unreliable. (RP 4295-96.) It found that the Hearing Panel

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[7] The NAC reversed the Hearing Panel's findings that Black and the Firm maintained a deficient supervisory system regarding office inspections (cause three). (RP 4304-07.)

[8] The NAC's findings of liability for Applicants' failure to retain emails (cause four) was more narrow than the Hearing Panel, and unlike the Hearing Panel, the NAC found that Enforcement did not demonstrate that the Firm's violation was willful. (RP 4312-16.)

carefully considered any potential animosity of these witnesses towards Black and the Firm, and found none. *See* RP 4295-96.

The NAC further held that Black and the Firm presented no reliable evidence to corroborate Black's testimony that he inspected the four offices as he claimed. (*Id.*) It observed that Black did not submit any receipts documenting his alleged car trips (including trips to Rivard's office and Ravella's office, which were each 11-hour, one-way drives from Charlotte). Nor did Black and the Firm offer any communications, such as emails, to show any pre-inspection planning or scheduling with the Four Testifying Representatives (including the representatives who lived far distances from Charlotte). Instead, Black and the Firm simply produced Black's expense vouchers for travel that allegedly occurred during a more than two-year period, none of which were linked to a specific office inspection or supported by receipts, bank statements, or credit card statements. (RP 4296-96.) The NAC held that Black's explanation that he paid his travel expenses in cash "does not address the absence of receipts," and found that Black's explanations for the lack of receipts "strain credulity." (RP 4297.)

The NAC rejected Black's claim that his descriptions of the four offices, and knowledge of how to get to them, supported his testimony. (RP 4298.) Likewise, the NAC found that Black's testimony that another person, Nezi Jeter ("Jeter"), was present during Black's purported visit to Marable's office was uncorroborated (and inconsistent with Marable's testimony that Jeter stopped working in his office years before the purported inspection).[9]

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[9] Applicants state that Black identified Jeter as present at an earlier inspection of Marable's office between 2003 and 2005. *See* Brief at 30. Black, however, simply testified that this individual was present during "one of the visits." *See* RP 1373. In any event, the record shows, and Applicants do not dispute, that Jeter stopped working at Marable's office years before 2012 (i.e., the year that Black claims to have inspected Marable's office at issue here). *See* RP 556, 574-75 (Marable's testimony that Jeter worked in his office from 2004 to 2005); RP 1619

[Footnote continued on next page]

The NAC found that "substantial sanctions are appropriate to remedy respondents' misconduct" related to their false testimony and fabricated documents. Consequently, it barred Black and fined the Firm $73,000. (RP 4317-18.) The NAC observed that several aggravating factors warranted these sanctions. It found that the information sought by FINRA concerning Applicants' "fundamental supervisory obligations to inspect the Firm's geographically dispersed offices" was important because the Commission's 2011 examination flagged the Firm's previous failures to inspect offices. (RP 4317.) The NAC further found that Black acted intentionally and engaged in a pattern of misconduct over an extended period by providing FINRA with the fabricated Office Inspections Checklist in September 2012, additional fabricated documents in May 2013, and repeatedly testifying falsely concerning office inspections at his April 2014 on-the-record interview. The NAC held that the seriousness of Black's and the Firm's misconduct, along with these aggravating factors and the lack of any mitigating factors, warranted a bar and substantial fine. (RP 4317-18.)

b. The NAC Rejects Applicants' Procedural Arguments

The NAC rejected several procedural arguments raised by Black and the Firm (repeated to the Commission on appeal), which sought to undermine the NAC's findings related to Applicants' false testimony and fabrication of documents. *See* RP 4300-04. For example, they argued that the NAC should reverse the Hearing Panel's decision and vacate the sanctions imposed because the Hearing Panel 2018 Order erred in finding that the Notes were not written statements under FINRA Rule 9253(a)(2) and that Enforcement's failure to produce the Notes

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[cont'd]

(Marable's response to Rule 8210 request stating that Jeter worked out of his office from approximately 2004 to 2005). Thus, Jeter's purported presence at an earlier inspection not at issue here is irrelevant to the findings that Black lied about inspecting Marable's office in 2012.

was not harmless error. (RP 4301.) The NAC declined to do so. It found that even if the Notes were "written statements," Black and the Firm failed to show that Enforcement's failure to produce them was not harmless error (and failed to show that Enforcement acted with a culpable state of mind in losing the Notes). (RP 4301-03.) The NAC held that the Emails, which summarized Arnold's conversations with the Four Testifying Representatives, were consistent with, and corroborated, the testimony of the Four Testifying Representatives and their 2013 responses to Rule 8210 requests—all stating that Black did *not* inspect their offices. (RP 4301-03.)

The NAC further held that, "[a]lthough respondents argue that Arnold's emails reflect 'inconsistencies' with the witnesses' testimony, respondents have not identified any material discrepancies." (RP 4302.) The NAC correctly found that none of these purported discrepancies impacted the Four Testifying Representatives' testimony on the key issue—that Black never inspected their offices as he had claimed. (RP 4302-03.) It also correctly observed that Applicants had the opportunity to examine each of the witnesses, and address discrepancies, at the hearing. Applicants, however, did not do so. The NAC further affirmed the Hearing Panel's determination that the Emails and Memo did not contain exculpatory material that Enforcement should have produced earlier in the proceedings. (RP 4304.)

The NAC also rejected Applicants' arguments that FINRA did not provide them with evidence of office inspections actually conducted or not conducted by the Firm other than the five offices charged in the complaint. It found that Black and the Firm never sought to require Enforcement to turn over a withheld documents list, and never asserted that Enforcement improperly withheld documents. Consequently, the NAC held that the Hearing Officer did not

abuse his discretion in denying Applicants' motion for production of these documents. (RP 4300.)

Further, the NAC rejected Applicants' motion to adduce, among other items, Black's "re-created" evidence of trips to the Four Testifying Representatives' offices to show that it was feasible for Black to drive the distances in question. It found that Black and the Firm should have introduced this evidence during the hearing and, regardless, Black's re-creation of driving routes after the Hearing Panel's decision is immaterial to whether he drove the routes and conducted the inspections. (RP 4300-01.)

Finally, the NAC rejected Applicants' argument that Enforcement's focus on former Firm representatives to make its case against Applicants led to a flawed and biased investigation and deprived Black and the Firm a fair hearing. (RP 4298-99.) The NAC concluded that Black and the Firm were afforded a fair proceeding and had ample opportunity to present their defense. *See* RP 4299.

c. Black and the Firm Failed to Establish, Maintain, and Enforce a Reasonable Supervisory System for Retaining and Reviewing Email

The NAC also concluded that Black and the Firm failed to establish, maintain, and enforce a reasonable supervisory system and WSPs for retaining and reviewing email. (RP 4307-11.) It based these findings on the undisputed fact that Applicants did not require the Firm's numerous registered representatives (who were located across the country) to strictly use their Firm email addresses, but permitted them to use personal email to conduct Firm business. (RP 4307.) It found that the Firm's WSPs simply required registered representatives to copy the Firm's "Main Office" on, or forward to the Main Office, all email communications with customers. (RP 4308.) The NAC found that the Firm's practice of depending on representatives to forward or copy their emails to the Firm under an honor system was "obvious[ly]"

unreasonable and "vulnerable to SEI representatives simply not copying or forwarding their emails to the home office, whether due to oversight or bad faith." (RP 4309.) The NAC observed that "[m]aking the system even worse, SEI lacked strong supervisory controls over its honor system for email retention." (*Id.*)

For this misconduct, the NAC fined Black and the Firm, jointly and severally, $73,000.[10] (RP 4321). The NAC observed that "significant aggravating factors" warranted this sanction, including that Applicants maintained this deficient system for years and they ignored prior warnings from Commission and FINRA staffs that the Firm's email retention system was inadequate. (RP 4320.) The NAC appropriately rejected numerous arguments by Applicants to purportedly mitigate their misconduct. *See* RP 4320-21.

d. The NAC Finds that Black and the Firm Failed to Retain Specific Emails

Finally, the NAC found that Applicants failed to retain 16 emails of Sebastian because he failed to forward the business-related emails from his personal email account to the Firm pursuant to the Firm's honor system. (RP 4312-16.) The NAC reversed the Hearing Panel's broader findings that the Firm and Black failed to retain any other emails besides Sebastian's 16, and found that Enforcement did not prove that Sebastian's failure to forward his emails was not inadvertent. (RP 4312-16.) Thus, the NAC reversed the Hearing Panel's finding that the Firm willfully violated the Exchange Act's recordkeeping requirements. (RP 4316.) The NAC fined Applicants, jointly and severally, $500. (RP 4318.) It found that a significant reduction from the

[10] Although the NAC assessed the fine upon Applicants jointly and severally, it did not impose the fine upon Black because it barred him for testifying falsely and fabricating documents. (RP 4321.) Similarly, the $500 fine for Applicants' failure to retain Sebastian's emails, discussed below, was assessed but not imposed upon Black. (RP 4319.)

Hearing Panel's sanctions was warranted because its findings of liability were narrower than the Hearing Panel's findings. (RP 4318.)

Black and the Firm subsequently filed this appeal and Black sought to stay his bar. (RP 4323.) In a decision dated June 12, 2019, the Commission denied Black's stay request.

IV. ARGUMENT

The Commission must dismiss this application for review if it finds that Black and the Firm engaged in conduct that violated the Exchange Act and FINRA rules, FINRA applied its rules in a manner consistent with the purposes of the Exchange Act, and FINRA imposed sanctions that are neither excessive nor oppressive and that do not impose an unnecessary or inappropriate burden on competition.[11] *See* 15 U.S.C. § 78s(e).

The record, including the credible and consistent testimony of four different witnesses, conclusively supports the NAC's findings that applicants testified falsely and fabricated documents. Further, the undisputed facts establish that the Firm and Black failed to establish, maintain, and enforce a supervisory system and WSPs reasonably designed to supervise the Firm's review and preservation of email, and in fact failed to retain certain emails of a registered representative. Moreover, barring Black and fining the Firm a total of $146,500 are appropriately remedial sanctions given the presence of numerous aggravating factors. These sanctions are neither excessive nor oppressive for Applicants' serious misconduct.

Applicants' arguments on appeal, which focus mostly on the alleged unfairness surrounding the missing Notes (and thus Applicants' misconduct related to testifying falsely and

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[11] Black and the Firm do not contend that FINRA's sanctions impose an undue burden on competition.

fabricating documents), are factually without support and do not serve as a basis for disturbing the NAC's findings or sanctions. Simply put, the missing Notes—and production of the Emails and Memo after the hearing—were immaterial and had no impact on the ultimate findings that Black and the Firm lied to FINRA and fabricated documents to support those lies. The Commission should therefore dismiss Applicants' application for review.

A. Applicants Testified Falsely and Fabricated Documents

1. The Credible, Consistent Testimony of the Four Testifying Representatives Supports the NAC's Findings

The record conclusively shows that the Firm, through Black, testified falsely at the April 2014 on-the-record interview that Black had inspected the offices of the Four Testifying Representatives, in violation of FINRA Rules 8210 and 2010. It further shows that Applicants produced to FINRA fabricated documents, which falsely showed that Black inspected the offices of the Four Testifying Representatives, in violation of FINRA Rules 8210, 4511, and 2010.

FINRA Rule 8210 provides that, for the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, FINRA staff shall have the right to require a member, person associated with a member, or any other person subject to FINRA's jurisdiction to provide information orally, in writing, or electronically and to testify at a location specified by FINRA staff, with respect to any matter involved in the investigation, complaint, examination, or proceeding. The rule further provides that no member or person shall fail to provide information or testimony pursuant to the rule. FINRA Rule 8210(c). Providing false or misleading information to FINRA during an examination or investigation violates FINRA Rule 8210. *See Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *23 (Aug. 22, 2008).

FINRA Rule 4511(a) provides that members shall make and preserve books and records as required under FINRA rules, the Exchange Act, and applicable Exchange Act rules. The books and records rules "include[] the requirement that the records be accurate, which applies 'regardless of whether the information itself is mandated.'" *Eric J. Brown*, Exchange Act Release No. 66469, 2012 SEC LEXIS 636, at *32 (Feb. 27, 2012), *aff'd sub nom. Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013). Proof of scienter is not required to demonstrate a violation of FINRA Rule 4511. *See Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *48 (May 27, 2015). A violation of the Exchange Act or FINRA's rules violates FINRA Rule 2010.[12] *See William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *14-15 (Mar. 31, 2016), *aff'd sub nom. Harris v. SEC*, 712 F. App'x 46 (2d Cir. 2017).

Central to the NAC's findings that Applicants testified falsely and fabricated documents was the Hearing Panel's credibility findings, in which it found that the Four Testifying Representatives testified credibly and consistently with their prior Rule 8210 responses to FINRA that neither Black, nor anyone else from the Firm, inspected their offices as Black and the Firm had claimed.[13] *See* RP 4295-96. In contrast, the Hearing Panel found that Black's

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[12] FINRA Rule 2010 requires FINRA members to observe high standards of commercial honor and just and equitable principles of trade in conducting their businesses. FINRA Rule 0140 provides that all of FINRA's rules shall apply equally to members and associated persons, and that associated persons shall have the same duties and obligations as member firms.

[13] FINRA's Rule 8210 requests to the Four Testifying Representatives reminded them that "[y]ou are obligated to respond to this request fully . . . [and] supplement or correct any response that you later learn to have been incomplete or inaccurate. . . . Any failure on your part to satisfy these obligations could expose you to sanctions, including a permanent bar from the securities industry." *See, e.g.*, RP 1604.

testimony that he inspected the offices was not credible and not corroborated by any reliable evidence. *See id.*

The NAC found that Applicants did not present substantial evidence necessary to overturn these credibility findings, which are entitled to deference. *See Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *16 (Mar. 27, 2017) (holding that "credibility determinations are entitled to considerable weight and deference and can be overcome only where there is substantial evidence in the record for doing so"), *aff'd*, 733 F. App'x 571 (2d Cir. 2018); *Scholander*, 2016 SEC LEXIS 1209, at *30 n.45 (explaining that credibility determinations are "entitled to considerable weight and deference since [they are] based on hearing the witnesses' testimony and observing their demeanor"); *see also Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *16 (Sept. 30, 2016) (affirming credibility determinations of witnesses who testified similarly regarding respondent's representations). The NAC properly relied on those credibility determinations, made over several days of testimony, in finding that Applicants testified falsely and fabricated documents.[14]

On appeal, Black and the Firm fail to provide a legitimate reason, let alone substantial evidence, to disturb these credibility findings. Instead, they rehash their argument, made to both the Hearing Panel and the NAC, that the Four Testifying Representatives were biased (and thus unreliable) and the NAC ignored these biases. *See* Brief at 17-18. They argue that each of the former registered representatives had personal issues with Black and reasons to dislike him, and

[14] The Firm is liable for testifying falsely and fabricating documents through the actions of Black, its owner, president, and chief compliance officer. *See Merrimac Corp. Sec., Inc.*, Exchange Act Release No. 10662, 2019 SEC LEXIS 1771, at *78 (July 17, 2019) (holding firm liable for violations of Rule 8210 through its chief compliance officer).

speculate that they therefore must have had motive to testify falsely in support of Enforcement's case (and thus subject themselves to potential FINRA disciplinary action). *See* Brief at 18-23.

The Commission should reject these arguments. The Four Testifying Representatives testified—at length—about their relationships with Black and disputes they had with him while employed at the Firm. *See* RP 0453-0581. Indeed, when it assessed the credibility of the Four Testifying Representatives, the Hearing Panel expressly considered whether their testimony could not be trusted because they were biased based on these personal disputes. It found no bias on the part of these witnesses, and the NAC appropriately concluded that Black and the Firm had not met the high burden to set aside the Hearing Panel's credibility findings.[15] *See* RP 4296, 4298. Applicants point to nothing new in the record to overturn these credibility findings, and the Commission should decline their request to do so. *Cf. Harry Gliksman*, 54 S.E.C. 471, 481 (1999) (rejecting argument that witness was necessarily biased because she was a "dissatisfied customer"), *aff'd sub nom. Gallagher v. SEC*, 24 F. App'x 702 (9th Cir. 2001).

On appeal, Black and the Firm also argue that the NAC ignored the evidence they produced that purportedly corroborated Black's testimony that he inspected the offices of the

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[15] Black and the Firm state that the NAC has dismissed "remarkably similar" cases where Enforcement did not prove misconduct by a preponderance of the evidence. *See* Brief at 7 (citing *Dep't of Enforcement v. Morton*, Complaint No. 2016052347901, 2019 FINRA Discip. LEXIS 19 (May 15, 2019)). Although Applicants correctly point out that in *Morton*, the NAC dismissed a case against the respondent because Enforcement failed to show that it was more likely than not that he converted funds, the NAC did not overturn a credibility finding in doing so. Enforcement's case in *Morton* rested on circumstantial evidence, and the hearing panel did not make specific credibility findings of respondent or other witnesses. *Id.* at *34-50. In contrast, here the NAC based its findings that Black and the Firm lied about inspecting the offices at issue and fabricated documents to further those lies upon the credible and consistent testimony of the Four Testifying Representatives (none of whom knew one another), the incredible testimony of Black, and the lack of any reliable evidence supporting Black's claim that he inspected the offices. Applicants' repeated characterization of the evidence supporting their misconduct as "unreliable conjecture" does not change these facts.

Four Testifying Representatives. *See* Brief at 30-31. The NAC, however, *did* consider this so-called evidence—which consisted of Black's descriptions of the routes he allegedly took to get to the Four Testifying Representatives' offices, physical descriptions of these locations, the purported presence of Jeter at Marable's office during an inspection, the checklist created by Black, and random vouchers that were not connected to any specific office inspection—and properly discounted it for the reasons articulated in its decision. *See* RP 4296-98. The NAC also properly found that Black did not provide more reliable evidence that he in fact inspected the offices at issue, such as receipts, credit card statements, and pre-inspection communications with the Four Testifying Representatives to ensure that they would be present for Black's visits before he purportedly drove lengthy distances. *See* RP 4296-97. The NAC's weighing of the strong and consistent evidence supporting the testimony of the Four Testifying Representatives versus Black's unsubstantiated testimony did not, as Applicants assert, improperly "shift the burden" to Black to prove that the inspections took place.

2. Applicants' Procedural Arguments Are Meritless

Faced with the credible and consistent testimony of four independent witnesses, each stating repeatedly that Black did not inspect their offices, and the lack of any reliable evidence supporting Black's incredible testimony that he did in fact inspect the offices, Applicants raise numerous procedural arguments to try to undermine the NAC's findings and cast doubt upon the fairness of FINRA's proceedings. These arguments are without support. The Commission should therefore reject them.

a. The Notes, Emails, and Memo Are Immaterial to the Outcome of this Proceeding

The bulk of Applicants' procedural arguments focus on the alleged unfairness caused by Enforcement's failure to produce the Notes and to timely produce the Emails and Memo. Black

and the Firm argue that because they lacked access to these so-called "exculpatory" documents at the hearing, they were denied an opportunity to show that the Four Testifying Representatives were not credible and that their testimony was unreliable. Applicants assert that the Emails and Memo showed that the Four Testifying Representatives testified inconsistently on various matters and contained statements helpful to them. They surmise that these items would have allowed them to undermine the witnesses' credibility at the hearing.

The Commission should reject these baseless arguments, as Applicants are unable to demonstrate that the Notes, Emails, and Memo would have made any difference to the ultimate outcome of this proceeding such that the failure to produce these items was not harmless error. To begin with, Applicants' repeated characterization of the Notes, Emails, and Memo as containing "exculpatory" evidence is inaccurate. In fact, after reviewing the Emails (created by Arnold just days after she took the Notes and summarizing the relevant portions of the Notes) the Hearing Panel found that, "the Emails, which summarized the Notes, did not contain anything that altered the Hearing Panel's findings and "[t]here is *no hint* that the Notes contained any exculpatory *Brady* material." (RP 4162.) (emphasis added.) Applicants do not explain, other than asserting that these materials "weighed on the credibility of the witnesses and were, thus, exculpatory [and] serve[] as the substantial evidence needed to overturn the credibility determinations" exactly how the materials are exculpatory on the issue of whether they lied about, and fabricated documents concerning, inspecting the offices of the Four Testifying Representatives. *See* Brief at 27.

That these materials are not exculpatory and are immaterial to the NAC's findings that Black and the Firm lied and fabricated documents to support those lies, is readily apparent upon examining Applicants' alleged inconsistencies and other statements that they assert were crucial

to their defense. The inconsistencies pointed to by Black and the Firm to support their theory that the Notes, Emails, and Memo were somehow material to whether Applicants lied to FINRA and fabricated documents concerning office inspections are as follows:

1. Ravella testified that he met Black for the first time at the hearing, which conflicts with the Emails showing that Ravella told Arnold that he met Black annually at a Holiday Inn with the Firm's other Ohio representatives to discuss compliance and performance issues.

2. Marable testified that he initially did not recall any inspections of his office, but after he thought about it, he thought that Black may have come to inspect his office once years ago (although he "didn't really inspect anything"), which purportedly conflicts with the Emails showing that Marable was unsure whether a person other than Black had inspected his office "years ago" and that Black had "probably not" inspected his office.

3. The Emails reflect that Minor informed Arnold that Black had not inspected his office and "had never gone to visit any other branches."[16]

4. The Emails reflect that Minor informed Arnold that the first time Minor was associated with the Firm (from 2004 to 2005), Black sent out a memo regarding index annuities stating that representatives had to "transfer rep contacts to SEI," which led to a disagreement that caused Minor to leave, whereas Applicants argued that the Firm was never listed as the broker-of-record on any index fund (and they could have used this contradiction to show that Minor testified falsely).

5. Minor testified that he did not really have a dispute with Black the first time he left the Firm, which purportedly conflicted with Arnold's statement in the Emails that he had a "verbal altercation" with Black before he left the Firm for the first time.

6. Rivard testified that he had "no hard feelings" towards Black, which Applicants assert conflicted with Arnold's statement in the Emails that Black "screamed at Rivard."[17]

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[16] In contrast, the Memo states that Minor "believed Frank Black had never gone to visit any other branches." *See* RP 4088.

[17] Black and the Firm raised the first four points to the Hearing Panel and the NAC; on appeal to the Commission they also raise the last two points.

See Brief at 18-24.

None of these inconsistencies—to the extent that they can even be labeled as such—are material to whether Black inspected the offices as he claimed and the Four Testifying Representatives' unequivocal testimony that he did not, and thus would not have had any impact on the ultimate outcome of this proceeding.[18] Indeed, it is undisputed that the Four Testifying Representatives each: (1) told Arnold and Palacios in August 2013 that Black did not inspect his office as Black had claimed; (2) responded in writing to a Rule 8210 request in September or October 2013 that Black did not inspect his office as Black had claimed; and (3) testified at the hearing in September 2016 that Black did not inspect his office as Black had claimed. The six points raised by Applicants do not contradict any of this. In fact, the Emails and Memo

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[18] For example, Rivard testified that Black "became very agitated and slammed the phone down" when Rivard inquired about a commission check. *See* RP 500-501. This is similar to the statement in the Emails that Black "screamed at Rivard," and these statements do not conflict with Rivard's testimony that he had no hard feelings towards Black. Similarly, Minor testified that the first time he left the Firm, it was over "a disagreement about that aspect of the ownership of the agent-of-record status. I don't consider that to be a dispute. He had his viewpoint and I had mine. So I didn't agree with his and I left [the Firm.]" *See* RP 474. Applicants do not explain how this testimony contradicts the Emails' statement that he and Black had a verbal altercation.

Further, Applicants' portrayal of Marable's testimony as confused, changeable, and in conflict with the Emails is inaccurate and takes events out of order. *See* Brief at 21-22. The Emails reflect that Marable told Arnold in August 2013 that he was not sure whether an onsite exam occurred, "probably not." *See* RP 4081. Marable's Rule 8210 response dated September 30, 2013, stated that he did not recall Black ever visiting his office, "but if he did it surely was only one time (but I really don't remember him visiting at all"). *See* RP 1619. At the hearing, Marable repeatedly testified that after sending this response, he "went back and really started thinking about it" and recalled that Black visited him once, at his first office where he was located from 2003 until 2009 or 2010, but during that visit Black "really didn't inspect anything." *See* RP 0555-56, 0559, 0566-68, 0577-78. Marable further testified that he would have remembered if Black had visited him in 2012 as Black had claimed and that Black did not do so. *See* RP 0562-63. The Emails are completely consistent with Marable's testimony.

corroborate that Minor, Rivard, Ravella, and Marable told Arnold and Palacios that Black did not inspect their offices—a story that remained remarkably consistent over several years.

The Hearing Panel considered the alleged inconsistencies raised by Applicants and, nonetheless, reaffirmed that the Four Testifying Representatives testified credibly and consistently that Black did not inspect their offices, and emphasized that the evidence "overwhelmingly" demonstrated that Applicants lied and fabricated documents.[19] The immaterial inconsistencies pointed out by Black and the Firm simply cannot serve as a basis for disturbing the Hearing Panel's extensive findings that the Four Testifying Representatives were credible, and Black was not, on whether he inspected their offices. *See Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 SEC LEXIS 994, at *51-52 (Feb. 1, 2010) (rejecting argument that witnesses were not credible based on inconsistencies in their testimony and holding that "while the [witnesses'] testimony may not match up perfectly, any inconsistencies are, at worst, minor and fall well short of the substantial evidence needed to overturn the Hearing Panel's credibility determinations"), *aff'd*, 647 F.3d 1156 (D.C. Cir. 2011); *Douglas J. Toth*, Exchange Act Release No. 58074, 2008 SEC LEXIS 1520, at *22 (July 1, 2008) (affirming credibility findings despite immaterial inconsistencies in witness' testimony and finding that "Toth's attempts to discredit [the witness] based on these alleged inconsistencies provide no reason to reject the Hearing Panel's credibility determination."), *aff'd*, 319 F. App'x 184 (3d Cir.

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[19] After considering the inconsistencies in the Emails and Memo, the Hearing Panel could have found that all or some of the Four Testifying Representatives were not credible. The Hearing Panel, however, did not do so in the Hearing Panel 2018 Order. To the contrary, it *reaffirmed* its credibility findings in their entirety. Applicants' statement that the failure to produce the Emails was "especially galling" based on the Hearing Panel citing Ravella's testimony that he had never met Black before, ignores that the Hearing Panel reassessed, and reaffirmed, Ravella's credibility after it considered the inconsistency between Ravella's testimony and the Emails on this immaterial fact. *See* Brief at 23.

2009); *John Montelbano*, 56 S.E.C. 76, 88-89 (2003) (declining to overturn credibility determinations due to minor differences in testimony from two witnesses); *Anthony Tricarico*, 51 S.E.C. 457, 461 (1993) ("Neither these alleged inconsistencies (which in any event do not relate directly to whether [the customer] authorized the transaction), nor [the customer's] inability to recollect certain details of his conversations with Tricarico causes us to reject the credibility determination of the NYSE Hearing Panel.").

Moreover, Applicants did not need the Notes, Emails, or Memo to address some inconsistencies that they did not probe during the hearing but that they now assert were so important to their defense. They could have confronted the witnesses about certain of the inconsistencies or put on evidence contradicting the testimony of the witnesses, particularly where Black had firsthand knowledge of the inconsistency. They failed to do so. For example, and with respect to the immaterial inconsistency that Applicants focus most heavily on, Black could have testified that he met Ravella before the hearing, met him annually to discuss compliance and performance issues with other registered representatives, and could have produced corroborating evidence on this point. He did not do so. *See, e.g.*, RP 1139-47 (Black's direct testimony concerning Ravella's purported office inspection). In fact, the Hearing Officer directly asked Black about Ravella's statement that he had never met Black before. Rather than explaining why this may not have been true, and providing details, Black simply stated that Ravella was being untruthful (without mentioning his prior, annual meetings with Ravella). *See* RP 1375-76. That Black and his counsel passed on an opportunity to present this information undercuts its alleged importance in connection with Applicants' defense and their claim that "FINRA failed to give Applicants the means to demonstrate" Ravella's inaccurate testimony. *See* Brief at 23. Black could have testified about this point, but he did not.

Similarly, Applicants' counsel could have specifically asked Ravella on cross examination whether he attended the annual compliance and performance meeting that Black conducted to impeach Ravella's testimony that he never met Black, but counsel failed to do so. *See* RP 535-36. On appeal, Applicants gloss over these oversights by stating that they were somehow limited to asking "are you sure" to impeach Ravella's testimony that he had never met Black before. *See* Brief at 25; RP 535-36. Regardless, the discrepancy at issue does not alter that Ravella repeatedly and unequivocally denied that Black had inspected his office as claimed.[20]

Applicants further argue that the Notes, Emails, and Memo are exculpatory evidence and should have been produced by Enforcement pursuant to FINRA Rule 9521(b)(3) and *United States v. Bagley*, 473 U.S. 667 (1985). *See* Brief at 16. FINRA Rule 9251(b)(3), however, provides that Enforcement may not withhold documents that contain material, exculpatory evidence. As described above, the Notes, Emails, and Memo were immaterial and did not contain exculpatory evidence.[21]

Moreover, *Bagley*, does not support a different result. *Bagley* involved "the standard of materiality to be applied in determining whether a conviction should be reversed" for a failure to

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[20] It is true that without the Emails, Applicants were unable to question Minor on the statement in the Emails that Black did not inspect any branch offices and how Minor might have known that. *See* Brief at 24-25. This fact, however, was known to the Hearing Panel when it reaffirmed the credibility of Minor and his unequivocal testimony that Black did not inspect his office.

[21] Applicants also point to the NAC's three-sentence summary of its conclusion that the Notes, Emails, and Memo were not exculpatory, and thus did not need to be produced, to suggest that it did not carefully consider the issue in agreeing with the Hearing Panel. *See* Brief at 13; RP 4304. Applicants' brief, however, omits any discussion of the several pages before the summary where the NAC thoroughly addressed the inconsistencies and explained why they were not material (and thus not exculpatory). *See* RP 4302-04; *see also* RP 4162-65 (Hearing Panel 2018 Order addressing Applicants' arguments).

produce exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). *Bagley*, 473 U.S. at 669. In *Bagley*, the prosecutor failed to disclose that witnesses would be paid, despite the defendant's discovery motion explicitly asking whether witnesses were given any inducements in exchange for testimony. *Id.* at 669-71. The Court held that *Brady* requires disclosure of evidence that is both favorable to the accused *and* material to either guilt or punishment such that the suppressed evidence "might have affected the outcome of the trial" and "is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.* at 674-76. The Court found that impeachment evidence may fall under the *Brady* rule if it is favorable to the accused such that, "if disclosed and used effectively, it may make the difference between conviction and acquittal." *Id.* at 676. The Court emphasized that evidence is not material under *Brady* if might be "possibly useful to the defense but not likely to have changed the verdict." *Id.* at 677. This is exactly the case here, as the inconsistencies flagged by Black and the Firm were immaterial and, in fact, did not alter the Hearing Panel's credibility determinations or otherwise deprive Applicants of a fair proceeding.

For all of these reasons, the NAC correctly held that Black and the Firm failed to show that FINRA's failure to provide the Notes, and failure to provide the Emails and Memo prior to the hearing, was not harmless error. They were immaterial to the Applicants' ability to defend themselves and had no impact on the ultimate fairness and outcome of these proceedings.

b. Applicants Have Failed to Show that the Commission Should Vacate the NAC's Findings Under the Spoliation Doctrine

Black and the Firm argue that the Commission should vacate the findings that they lied and provided fabricated documents to FINRA because Enforcement failed to produce the Notes. They assert that vacating such findings is appropriate under the spoliation doctrine. *See* Brief at 28. The NAC rejected this argument, and so too should the Commission.

Where a party seeks dismissal for the alleged spoliation of evidence, federal courts have required that the movant prove that: (1) the spoliating party had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) the spoliating party acted with a culpable state of mind upon destroying or losing the evidence; and (3) the missing evidence is relevant to the movant's claim or defense. *See, e.g.*, *Harkabi v. SanDisk Corp.*, 275 F.R.D. 414, 418 (S.D.N.Y. 2010). The NAC found that Black and the Firm failed to show that Enforcement acted with a culpable state of mind in losing the Notes (which can be shown by demonstrating that the evidence was destroyed knowingly or negligently). *See* RP 4303-04; *Harkabi* 275 F.R.D. at 418. The NAC correctly held that in attempting to show that Enforcement acted with a culpable state of mind, Applicants simply "summarily assume[d] that Enforcement's conduct was negligent." RP 4304.

On appeal, Applicants continue to fall well short of their burden to demonstrate that vacating the NAC's findings is appropriate.[22] To support their argument, they curtly state that,

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[22] The NAC determined that, because Applicants must prove all three elements to demonstrate that dismissal of the charges is appropriate under the spoliation doctrine, and they failed to show that Enforcement acted with a culpable state of mind, it was unnecessary to determine whether they satisfied the other two elements. On appeal, Applicants simply state that "it is evident that FINRA possessed the evidence and had a duty to preserve it" and that it was relevant. *See* Brief at 29. Even assuming that Black and the Firm have demonstrated that Enforcement acted with the necessary culpable state of mind (they have not), they have not proven all of the other elements. Specifically, the Emails and Memo—created just days after Arnold took the Notes documenting her conversations with the Four Testifying Representatives—show that the Notes were irrelevant to whether Black and the Firm lied about inspecting offices, as confirmed by the credible and consistent testimony of four independent witnesses (which was unaffected by the contents of the Emails and Memo). *See Harkabi*, 275 F.R.D. at 419-20 (holding that the movant has the burden to show that the lost materials were relevant and may do so "by adducing sufficient evidence from which a reasonable trier of fact could infer that the destroyed or unavailable evidence would have been of the nature alleged" by the movant). Applicants can characterize the Notes as "vital" all they want, but the content of the Emails and Memo undercuts that claim.

"documents do not just disappear." *See* Brief at 29. They further state, without any support, that "FINRA either knowingly destroyed/lost the documents or negligently lost/destroyed them" and that FINRA acted with "malfeasance" with respect to the Notes. *See* Brief at 24, 26, 29. The record does not show that FINRA acted intentionally with respect to the Notes, and Applicants' assertion that FINRA's inability to produce the Notes is all they need to show to prove that FINRA acted with a culpable state of mind is without support and would render the second prong of the spoliation standard meaningless. Similarly, their claim that the NAC's interpretation of the spoliation doctrine would permit regulators to intentionally "lose vital evidence without consequence" is hyperbole. Applicants were required to show that, among other things, FINRA acted with a culpable state of mind in destroying or losing the Notes. They failed to carry their burden, and Black and the Firm cannot show that the NAC's findings with respect to their false testimony and fabrication of documents should be vacated.

c. Applicants' Argument Concerning FINRA's Investigation Is a Red Herring

The Commission should also reject Applicants' repeated argument that the investigation concerning their false testimony and fabrication of documents was unfair because FINRA "cherry-picked" only former registered representatives at the Firm to show that Black and the Firm lied about inspecting offices and fabricated documents. *See* Brief at 5, 9. Black and the Firm assert that FINRA should have randomly sampled representatives, including current Firm employees, to determine whether Applicants engaged in this misconduct. Applicants' arguments miss the mark. FINRA did not charge Black and the Firm with failing to inspect offices. Instead, FINRA charged them with lying about inspecting offices, in violation of FINRA Rule 8210 and their obligation to testify truthfully, as well as fabricating documents to bolster their lies. That FINRA investigators did not speak with other representatives, who may have stated

that Black inspected their offices, has no bearing on whether Black lied about inspecting the four offices at issue and does not render FINRA's investigation or subsequent proceedings unfair.[23]

Moreover, contrary to Applicants' assertion, the NAC has never implicitly or explicitly conceded that the investigation was unfair or, even more preposterously, extolled that FINRA investigations can be unfair. *See* Brief at 2, 11. Rather, it noted that the Commission has explicitly held that the requirement in Exchange Act Section 15A(b)(8) that FINRA provide a fair procedure in its proceedings "does not extend to investigations." *See* RP 4299 (citing *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *61 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012). This makes sense given that the purpose of an

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[23] Black and the Firm assert that FINRA could have interviewed "well over 100 current and ex-SEI brokers" but did not do so, and instead improperly focused on only former registered representatives. *See* Brief, at 9-10, 27. However, the Office Inspections Checklist initially produced by Applicants listed the purported due dates and completion dates of inspections of only 43 Firm representatives' offices (including the offices of the Four Testifying Representatives). *See* RP 1130-31, 1585. Fabricated documents subsequently produced by Applicants appeared to involve even fewer offices ("at least ten," including the offices of the Four Testifying Representatives). *See* RP 4288; 1642-1723.

Moreover, Arnold explained that FINRA only contacted former employees to avoid: (1) Black interfering with its investigation (which FINRA staff believed had previously occurred in connection with FINRA's statutory disqualification examination of a then employee of the Firm, Charles Graham); and (2) disrupting the Firm's business. *See* RP 0674. Arnold later explained that the second reason correlated to the first reason and FINRA "did not want to put a registered representative in the situation where they were still employed by Mr. Black and could be . . . contacted by him such as what happened with Charles Graham when he then changed his story after he was adamant that Mr. Black had never been to – or anyone had been to that branch." *See* RP 0725-26. Arnold further explained that after speaking with six former Firm representatives (the Four Testifying Representatives, Graham, and McCall), FINRA felt that it had sufficient information and evidence to proceed. *See* RP 0726. As was its right. *See Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at *59 (Aug. 12, 2016) (holding that FINRA has broad discretion to bring its cases), *aff'd*, 719 F. App'x 724 (9th Cir. 2018). Despite Applicants' characterization of this rationale as "paper-thin" and "laughable," the record shows that FINRA had legitimate reasons to conduct its investigation in the manner that it did and, as a result of its investigation, had ample evidence to prove that Applicants lied about inspecting offices and fabricated documents to support those lies.

investigation is not, as the Commission explained, to determine whether a violation occurred but rather to determine whether FINRA has produced evidence meriting further proceedings. *Id.* Here, FINRA's investigation did just that, and the NAC properly determined that the evidence showed that Applicants testified falsely and fabricated documents. Black and the Firm had a fair opportunity to challenge Enforcement's alleged violations throughout FINRA's proceedings.

d. Applicants' Other Procedural Arguments Are Meritless

Applicants had more than ample opportunity to defend themselves and FINRA afforded them the fair procedure required under the Exchange Act. They received notice of the allegations of violations; a multi-day hearing; and the opportunity to present evidence and make written and oral arguments (including numerous opportunities to discuss the Notes, Emails, and Memo).[24] *See* 15 U.S.C. § 78o-3(b)(8), (h)(1) (requiring that self-regulatory organizations provide fair procedures); *Sundra Escott-Russell*, 54 S.E.C. 867, 873-74 (2000) (finding requirements of the Exchange Act met when FINRA brought specific charges, respondent had notice of charges and an opportunity to defend himself, and FINRA kept a record of proceedings).

Nonetheless, Black and the Firm assert that the proceedings were unfair because FINRA did not correct inconsistent statements of witnesses, and argue that its failure to do so "violated Applicants' due process and demands that the findings be vacated." *See* Brief at 26, 34. In support, they cite to a criminal case (*Napue v. Illinois*, 360 U.S. 264, 270 (1959)). These arguments are meritless. As an initial matter, "[i]t is well established that the requirements of

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[24] In arguing that they did not receive adequate notice of the charges against them, Applicants argue that the Hearing Panel considered their failures to inspect offices other than the five identified in the complaint when assessing sanctions. *See* Brief at 34-36. The NAC, however, did not consider these failures in connection with sanctions or liability. *See* RP 4317-18; *Evansen*, 2015 SEC LEXIS 3080, at *51.

constitutional due process do not apply to FINRA because FINRA is not a state actor." *Asensio & Co.*, Exchange Act Release No. 68505, 2012 SEC LEXIS 3954, at *61 (Dec. 20, 2012); *see also Allen Mansfield*, 1978 SEC LEXIS 2543, at *30 (Aug. 4, 1978) (holding that "[w]ith respect to the nature of the [FINRA] proceeding, Mansfield is clearly in error in attempting to equate this proceeding with a criminal action").

Moreover, *Napue* does not support Applicants' position that Enforcement counsel needed to correct the testimony of the Four Testifying Representatives. In *Napue*, the prosecuting attorney had promised his principal witness, an accomplice to the murder charged, a recommendation of a reduced sentence for his testimony against the defendant. 360 U.S. at 265-67. The prosecuting attorney filed pleadings documenting his recommendation. *Id.* at 266-67. At the murder trial, the principal witness falsely testified that he had received no promise of consideration in exchange for his testimony, and the prosecuting attorney did not correct this false testimony. The Court held that defendant's conviction violated defendant's due process rights because the state had obtained its conviction through false evidence and allowed it to go uncorrected. *Id.* at 269.

Unlike that criminal case, here there is not a shred of evidence that FINRA's Enforcement lawyers personally knew that any statements of the Four Testifying Representatives were untrue, and any inconsistencies between the witnesses' testimony and the Emails and Memo were immaterial to whether Black lied about inspecting the offices and the credibility of the Four Testifying Representatives. Contrary to Applicants' assertion, Enforcement was not required to correct inconsistent witness testimony on immaterial facts, especially when Applicants could have cross-examined the witnesses on these discrepancies or elicited direct testimony to the contrary. The proceedings against Black and the Firm were fair.

Similarly, the Commission should reject Applicants' argument that these proceedings were somehow unfair because of an answer given by Enforcement counsel to the NAC subcommittee during appellate oral argument. *See* Brief at 11, 34. In response to a subcommittee member's question whether any Firm representative contacted by FINRA staff confirmed that an inspection occurred as indicated on the Office Inspection Checklist, counsel replied "I don't believe so." Applicants assert that this "might not have been true," but do not—and cannot—explain how this brief exchange at appellate oral argument about an immaterial fact rendered the proceedings below unfair.[25] Similarly, Black and the Firm fail to explain precisely how FINRA's production of the Emails after this exchange at oral argument had a "devastating impact" on the fairness of these proceedings. *See* Brief at 11.

The Commission should also reject Applicants' cursory argument that the NAC erred in finding that the Hearing Officer did not abuse his discretion in denying their motion to compel Enforcement to produce nine categories of documents, including documents related to office inspections other than the five charged in the complaint and the adequacy of the Firm's supervisory system. *See* Brief at 52; *see also* RP 0152 (motion to compel); RP 0179 (order denying in part and granting in part motion to compel); RP 4300 (NAC rejecting Applicants' argument). The Hearing Officer denied nearly all of Applicants' motion, finding that they did not provide any "reason to doubt that Enforcement's representations with respect to each of the

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[25] Black and the Firm imply that the fact that Black may have inspected other Firm representatives' offices, including the offices of several former representatives, somehow undermines the NAC's findings that they lied about, and fabricated documents concerning, the purported inspections of the Four Testifying Representatives. *See* Brief at 11. Applicants are mistaken. That they may have inspected other offices has no relevance to testifying falsely that they inspected the Four Testifying Representatives' offices and fabricated documents in support of that false testimony.

first eight requests are true." RP 0181. The NAC correctly found that Applicants did not carry their "heavy burden" to show that the Hearing Officer abused his discretion. *See Lin-Lu Hsu*, Exchange Act Release No. 78899, 2016 SEC LEXIS 3585, at *10 n.12 (Sept. 21, 2016). On appeal, Black and the Firm have not explained how the Hearing Officer abused his discretion.

Finally, Black and the Firm summarily assert that the NAC erred in denying Applicants' motion to adduce additional evidence on appeal. *See* Brief at 36. Applicants again have not met their burden to show that the NAC erred. *Cf. See Robert J. Prager*, 58 S.E.C. 634, 664 (2005) (reviewing refusal to admit additional evidence under abuse of discretion standard). The NAC properly held that the documents Applicants sought to introduce—"re-created" evidence of trips to Firm representative offices to show that it was feasible for Black to drive the routes in question, a transcript of an on-the-record interview of the Firm's minority owner and principal to show that he visited Graham's office, and Black's tax returns from 1991 and 1992 (to show that a 2007 decision of the U.S. tax court that sanctioned Black for grossly overstating travel expense deductions on his tax returns, including mileage expense deductions) was erroneous—were immaterial to its decision. *See* RP 4300-01. The NAC also properly concluded that Applicants could have sought to enter evidence of the recreated trips and the tax documents at the hearing, but did not. *See* RP 4301. On appeal, Black and the Firm offer no reason why the NAC abused its discretion in denying Applicants' motion to admit this additional evidence.

* * *

In sum, the record strongly supports the NAC's findings that Black and the Firm testified falsely and provided FINRA with fabricated documents. None of Applicants' procedural

arguments have merit (whether viewed individually or cumulatively, as urged by Applicants).[26] The Commission should therefore sustain these findings.

B. Applicants Maintained a Deficient Supervisory System Concerning Emails

The Commission should also sustain the NAC's findings that Black and the Firm failed to establish, maintain, and enforce a supervisory system and WSPs reasonably designed to retain and review the Firm's emails.

NASD Rule 3010 applied from the beginning of the relevant period until December 1, 2014.[27] NASD Rule 3010(a) provided that "[e]ach member shall establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules." NASD Rule 3010(b)(1) required that

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[26] Black and the Firm attempt to equate this case with *U.S. Associates, Inc.*, 51 S.E.C. 805 (1993), which is distinguishable. *See* Brief at 51. In that matter, the Commission vacated FINRA's findings that applicants engaged in fraudulent transactions and charged fraudulent markups, and remanded the case for a new hearing. The Commission did so because: FINRA did not produce until the eve of the hearing the bulk of exhibits that it intended to introduce at the hearing (including documents used to prove its case); the hearing panel refused to extend the hearing to permit applicants to adequately present their case; the hearing panel rushed applicants through their questioning; and one of the two panelists twice made substantive comments about witness testimony during the hearing. *Id.* at 807-09. The Commission held that under these "unusual" circumstances, applicants were not afforded a fair proceeding under FINRA's rules. *Id.* at 812. The Commission noted that its adherence to the principles of harmless error remained unchanged, but that this case presented multiple procedural issues in the aggregate. *Id.* In contrast, here Black and the Firm were afforded more than ample opportunity to present their case and to defend themselves. FINRA's inability to produce the immaterial Notes, and its production after the hearing of the Emails and Memo that confirmed the immateriality of the Notes (and, in fact, reiterated that Black did not inspect the offices as he claimed), did not impact the outcome of this proceeding or otherwise hinder Applicants' ability to defend themselves.

[27] Enforcement alleged, and the NAC found, that Applicants maintained a deficient supervisory system concerning the review and retention of emails from March 2010 to May 2015.

"[e]ach member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives, registered principals, and other associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable Rules of NASD." FINRA Rule 3110, which superseded NASD Rule 3010, contains essentially the same requirements. The Commission has stated that "[t]he reasonableness of a supervisory system is an objective standard based on the facts and circumstances." *Merrimac Corp.*, 2019 SEC LEXIS 1771, at *65.

The securities laws and rules for which the Firm was required to supervise its compliance included ones requiring the retention and review of business-related email. Exchange Act Section 17(a)(1) provides that a broker-dealer "shall . . . keep for prescribed periods such records . . . as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of" the Exchange Act. Exchange Act Rule 17a-4(b)(4) requires that a broker-dealer retain originals of all communications received or sent by the broker-dealer relating to its business for not less than three years, the first two years in an easily accessible place. This retention requirement applies to electronic communications, including emails, relating to a broker-dealer's "business as such." *See NASD Notice to Members 03-33*, 2003 NASD LEXIS 40, at *2 (June 2003). NASD Rule 3110 (which applied from the beginning of the relevant period until December 4, 2011) and FINRA Rule 4511 (which governed from December 5, 2011 forward) requires, in pertinent part, each member firm to preserve books and records in conformity with the Exchange Act, applicable Exchange Act rules, and FINRA rules. FINRA rules also required the Firm to review incoming and outgoing correspondence. *See* NASD Rule 3010(d)(1) and (d)(2); FINRA Rule 3110(b)(4).

The record shows, and Applicants do not dispute that, during the relevant period they permitted the Firm's registered representatives to use personal email for Firm-related business. It is also undisputed that they relied on an honor system for the Firm's registered representatives to forward to, or copy, the Firm on any business-related emails they sent or received on their personal email. Further, the Firm's WSPs designated Black as the supervisor for all of the Firm's registered representatives, and the individual responsible for the Firm's WSPs, for reviewing correspondence, and establishing written procedures for reviewing correspondence.

The NAC properly concluded that, under the circumstances and where the Firm had many representatives located across the country who worked alone in their home offices, the unreasonableness of Firm's honor system for maintaining and reviewing email was "obvious." RP 4309. Indeed, the NAC found that the Firm's supervisory system was "clearly vulnerable to SEI representatives simply not copying or forwarding their emails to the home office, whether due to oversight or bad faith."[28] *See* RP 4309. Under these facts and circumstances, the Commission should sustain the NAC's findings that the Firm's supervisory system for email was not reasonable.

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[28] Although unnecessary to support the NAC's findings that the Firm's supervisory system and WSPs were deficient with respect to email, Sebastian's failure through his oversight to forward all of his personal emails to the Firm so that it could review and retain them highlights the deficiencies with the Firm's supervision. *See Lek Securities Corp.*, Exchange Act Release No. 82981, 2018 SEC LEXIS 830, at *29 n.23 (Apr. 2, 2018) (stating that a violation of FINRA's supervision rules does not require an underlying rule violation). Nonetheless, Applicants argue that the NAC's findings that the Firm failed to preserve Sebastian's emails (and not more as alleged by Enforcement) demonstrate the "efficacy of the system." *See* Brief at 42. They are mistaken. The NAC determined that Enforcement did not prove that the Firm failed to retain more than Sebastian's 16 emails, not that the Firm had in fact preserved the emails pursuant to its honor system. Further, FINRA examiners asked for emails forwarded to Black by the Firm's registered representatives for a limited period, and FINRA staff was able only to review one month's worth of Sebastian's personal emails because he could no longer access two of his prior personal email accounts.

On appeal, Applicants argue that the supervisory system they used for emails may be acceptable in certain circumstances. *See* Brief at 37-38. They posit that the honor system for email review and retention was reasonable for the Firm because: (1) FINRA leaves it up to each firm to design and implement reasonable supervisory systems and permits firms to allow its representatives to use private email for firm-related business; (2) the NAC inappropriately used hindsight to determine that the Firm's email supervisory system was deficient; and (3) purportedly only 28 of the Firm's representatives used email to communicate with customers. *See* Brief at 38-42.

The Commission should reject these arguments. While it is true that FINRA grants firms flexibility in designing supervisory systems for electronic communications, it is crucial that whatever system a firm designs and implements is reasonably designed to achieve compliance with federal securities laws and FINRA rules. *See FINRA Regulatory Notice 07-59*, 2007 FINRA LEXIS 58, at *6-7, *27 (Dec. 2007). In connection therewith, FINRA has reminded firms that they have "an important" obligation to ensure that their use of electronic communications enables them to keep and maintain records pursuant to Exchange Act rules and FINRA rules (including supervising and retaining employee communications through non-firm email addresses). *Id.* at *5, 19-20. The NAC appropriately concluded, given the Firm's policy to permit its registered representatives to use non-firm email, the numerous representatives at the Firm, its business model, and the lack of strong supervisory controls over its honor system, that the Firm's system for the retention and review of emails was not reasonable.[29] *See* RP 4309.

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[29] As the NAC found, at some point the Firm required its representatives to certify that it was forwarding or copying emails to the Firm. But other than this certification, the record contains no evidence that the Firm did anything to ensure that its employees complied with its honor system (such as actually confirming that its representatives followed the policy).

Applicants' argument that its supervisory system was reasonable because only 28 of the Firm's representatives used any form of email to communicate with customers (and the Firm was thus akin to a two-person firm using an honor system to review and retain emails, which might be appropriate) is unpersuasive given that this still represents nearly 25 percent of the Firm's registered representatives as of 2011 and the other factors considered by the NAC in determining that an honor system was unreasonable for the Firm.[30]

Moreover, Applicants' argument that the NAC's analysis of its supervisory failures was done in hindsight is belied by the NAC's findings and the facts and circumstances surrounding the Firm's supervisory system for emails. A firm with numerous registered representatives scattered across the country that permits them to use personal email for firm business while employing an honor system to review and retain those emails—without doing anything to confirm that its representatives are actually complying with its honor system—simply does not have a reasonable system for email review and retention. Indeed, Commission and FINRA staffs specifically warned Black and the Firm (in 2012 and 2014, respectively) that the Firm's honor system for email review and retention was inadequate. *See* RP 1858, 2469. Applicants' quibbles with the bases for the conclusions reached by Commission and FINRA staffs, and their assertion that both regulators' concerns were unfounded, do not change the fact that they were on notice,

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[30] Further, although Black and the Firm now attempt to qualify their statements in the record concerning how many of the Firm's brokers used email, by suggesting that the number who used *personal* email was far lower than 28 representatives, they did not appear to do so when responding to Commission staff's initial concerns with the Firm's honor system in 2012. *See* RP 3607.

for several years prior to this proceeding, that Commission and FINRA staffs believed that the Firm's honor system was problematic.[31] *See* Brief at 43-44.

Black and the Firm argue that the Firm adopting Smarsh, Inc.'s email archival system in June 2015 was viewed by FINRA "as some kind of panacea," but in reality was simply "trading one imperfect system for another" because under it a broker's personal emails would still not be captured (making it also reliant on each broker's honesty). From this, they argue that FINRA failed to demonstrate that the Firm's email supervisory system was unreasonable. *See* Brief at 44-45. Applicants' argument is a non sequitur. A supervisory system does not have to be perfect; rather, it must be reasonably designed to achieve compliance with federal securities laws and FINRA rules. Black and the Firm cannot dispute that a system whereby each representative must use his firm's email system for firm business, which system automatically retains emails without having to rely upon each broker to forward or copy emails to the firm, is much more likely to ensure compliance with securities laws than a system that permits brokers to use personal email and then relies on an honor system to review and retain the emails. This is

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[31] Applicants state that in 2008, a FINRA examiner suggested the procedures adopted by the Firm for its supervision of email retention and review, and imply that this somehow negates the NAC's findings that Applicants maintained a deficient supervisory system from March 2010 through May 2015. *See* Brief at 40. The Commission should reject this argument. Even assuming that in 2008 the examiner suggested the system and procedures used by the Firm, it was ultimately the Firm's responsibility to design and implement a reasonable supervisory system. *See Thomas C. Kocherhans*, 52 S.E.C. 528, 531 (1995) ("We have repeatedly held that a respondent cannot shift his or her responsibility for compliance with an applicable requirement to . . . the NASD."). Moreover, the Firm was subsequently on notice that both Commission and FINRA staffs did not believe that the Firm's honor system for review and retention of emails was reasonable under the circumstances. Regardless, the NAC was ultimately charged with deciding in this proceeding whether the Firm's supervisory system was reasonable, and FINRA staff's 2008 suggestions do not bind the NAC in any way. *Cf. JJFN Servs., Inc.*, 53 S.E.C. 335, 342 (1997) (holding that statements made by Nasdaq staff with respect to an application for listing on the automatic quotation system did not bind NASD).

especially true where, as here, the firm in question has numerous representatives who are located across numerous offices throughout the country, and did nothing to confirm that representatives complied with its honor system.

C. Applicants Failed to Preserve Emails

Finally, Black and the Firm do not dispute, and the record demonstrates, that they failed to preserve and maintain 16 of Sebastian's business-related emails. The Commission should therefore affirm the NAC's findings that the Firm violated Exchange Act Section 17(a) and Exchange Act Rule 17a-4, and that the Firm and Black violated NASD Rule 3110 FINRA Rules 4511 and 2010.

As set forth above, Exchange Act Section 17(a) and Exchange Act Rule 17a-4(b)(4) require broker-dealers to retain originals of all communications, including emails, received or sent by the broker-dealer relating to its business for not less than three years. NASD Rule 3110 provided, and FINRA Rule 4511(a) provides, that members shall make and preserve books and records as required under FINRA rules, the Exchange Act and the applicable Exchange Act rules. Sebastian failed to copy or forward to the Firm 16 business-related emails. Sebastian's failure to do so meant that the Firm was not retaining these email communications, as required. The record thus demonstrates that Applicants engaged in the misconduct set forth in the NAC's decision.

D. The Sanctions Are Warranted and Are Neither Excessive Nor Oppressive

The NAC barred Black and fined the Firm $73,000 for their false testimony and fabrication of documents, and fined Black and the Firm a total of $73,500 for Applicants' supervisory violation and failure to preserve Sebastian's emails (although it imposed the fines

only upon the Firm). The Commission should affirm these sanctions, as they are neither excessive nor oppressive and are well-supported by the record.

Exchange Act Section 19(e)(2) governs the Commission's review of FINRA's sanctions, and provides that the Commission may eliminate, reduce, or alter a sanction if it finds that the sanction is excessive, oppressive, or imposes a burden on competition not necessary or appropriate to further the purposes of the Exchange Act. *See* 15 U.S.C. § 78s(e); *Jack H. Stein*, 56 S.E.C. 108, 120-21 (2003).

In considering whether sanctions are excessive or oppressive, the Commission gives significant weight to whether the sanctions are within the allowable range of sanctions under FINRA's Sanction Guidelines ("Guidelines"). *See Steven Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *25 n.37 (Mar. 29, 2016). The Commission considers the principles articulated in the Guidelines, and has regularly affirmed sanctions that are within the recommended ranges contained in the relevant Guidelines. *See Robert Tretiak*, 56 S.E.C. 209, 233 n.46 (2003).

1. Barring Black and Fining the Firm for Lying to FINRA and Fabricating Documents Are Appropriately Remedial Sanctions

The NAC appropriately observed that, "[s]ubstantial sanctions are appropriate to remedy" Applicants' false testimony and providing fabricated documents to FINRA in connection with office inspections that they did not perform. *See* RP 4317. The Commission should sustain the NAC's bar of Black, and fine of $73,000 upon the Firm, for this misconduct.

The Commission has stated that "the failure to provide truthful responses to requests for information renders the violator presumptively unfit for employment in the securities industry." *See Ortiz*, 2008 SEC LEXIS 2401, at *32. The Guidelines provide that for failing to respond truthfully to requests made pursuant to FINRA Rule 8210, adjudicators consider a fine of

$25,000 to $73,000.[32] Failing to provide truthful responses to requests for information is akin to failing to respond in any manner to a FINRA request for information, for which a bar is the standard sanction when the respondent is an individual and where there are no mitigating factors.[33]

The NAC carefully considered the Guidelines, including the General Principles Applicable to All Sanction Determinations and the Principal Considerations in Determining Sanctions, and properly determined that barring Black and fining the Firm $73,000 were appropriate. It concluded that several factors aggravated Black's and the Firm's misconduct.

First, the information sought by FINRA to determine whether Applicants were complying with "fundamental supervisory obligations to inspect the Firm's geographically dispersed offices," an issue first flagged by Commission staff in 2011, was important. *See* RP 4317; Guidelines, at 33. Second, Applicants' lies and fabrication of documents were not one-time lapses in judgment. Rather, they engaged in a pattern of misconduct over an extended period.[34] Black and the Firm first provided to FINRA fabricated documents in September 2012, again in May 2013, and then Black repeatedly testified falsely in April 2014 that he had conducted office inspections, when he did not. Third, by testifying falsely and providing FINRA with fabricated documents, the Firm and Black attempted to mislead FINRA that they had conducted office

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32 *FINRA Sanction Guidelines* 33 (2018) [hereinafter *Guidelines*], http://www.finra.org/sites/default/files/2018_Sanctions_Guidelines.pdf.

33 *Id.* at 33; *Ortiz*, 2008 SEC LEXIS 2401, at *32-33 (holding that supplying false information to FINRA is similar to "refusing to respond at all to requests for information" and "can conceal wrongdoing and thereby 'subvert[s]' [FINRA's] ability to perform its regulatory function and protect the public interest").

34 *Id.* at 7 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

inspections that never occurred.[35] Fourth, Applicants acted intentionally.[36] Black knew that Commission staff's 2011 examination of the Firm included findings that it failed to conduct office inspections, and he knew that FINRA was attempting to confirm that Black and the Firm had remedied these deficiencies. Rather than inform FINRA that they had again failed to conduct office inspections, Applicants lied to FINRA and fabricated documents to support those lies.

The NAC appropriately concluded that these aggravating factors, and the lack of any mitigating factors, warranted substantial sanctions for this serious misconduct. (RP 4318.) The Commission should sustain these sanctions, as they are neither excessive nor oppressive and within the range set forth in the Guidelines. On appeal, Applicants characterize Black's bar and the fine against the Firm as punitive because they purportedly do not correct any harm or protect the public. *See* Brief at 46. Violations of FINRA Rule 8210, however, "will rarely, in itself, result in direct harm to a customer." *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *17 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009). The Commission has nonetheless emphasized that a violation of Rule 8210 is highly serious because it "undermines [FINRA's] ability to detect misconduct that may have occurred and that may have resulted in harm to investors or financial gain to respondents." *Id.* Black's misconduct is fundamentally incompatible with FINRA's self-regulatory functions and poses a risk to investors

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35 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 10).

36 *Id.* at 8 (Principal Considerations in Determining Sanctions, No. 13).

that can be remedied only by barring him.[37] *See Ortiz*, 2008 SEC LEXIS 2401, at *32; *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *21-22 (Nov. 8, 2007). Similarly, the fine imposed upon the Firm appropriately reflects the seriousness of the violations and should be affirmed.

Applicants also argue that Black's bar "is inherently punitive" under the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). They argue this based on the D.C. Circuit's decision in *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017), and specifically Justice Kavanagh's statements in his concurring opinion that under *Kokesh* expulsions and suspensions can no longer be characterized as remedial and are instead punitive. *See* Brief at 48. Applicants are wrong for several reasons. The D.C. Circuit merely directed the Commission "to address, in the first instance, the relevance—*if any*—of the Supreme Court's" *Kokesh* decision to the bar imposed upon the respondent in *Saad*. *See* 873 F.3d at 304 (emphasis added). And in fact, the Commission did so, ruling that *Kokesh* does not apply to the Commission's determination of whether a FINRA-imposed bar is "remedial and not punitive" and "does not render FINRA bars

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[37] Black and the Firm argue that the bar and fine do not correct any harm because prior to the NAC barring Black, he had ceased the misconduct that led to the bar and he no longer has responsibility for office inspections. They further argue that the Firm now preserves documentation evidencing office inspections. *See* Brief at 46-47. Applicants continue to downplay, and otherwise misunderstand the implications of, their untruthful testimony to FINRA and fabrication of documents. By the time FINRA sanctions a respondent for violating Rule 8210 by testifying untruthfully, the misconduct at issue has almost always ceased. Claiming that this is mitigating is disingenuous. Further, the fact that Black no longer performs office inspections and the Firm now retains documents to support the occurrence of office inspections is irrelevant to whether Black and the Firm lied to FINRA about performing office inspections and created false documents to support those lies. Applicants' lies and fabrication of documents harmed FINRA's ability to accurately determine whether they were carrying out an important supervisory obligation. Black and the Firm's suggestion that the NAC could have remedied Black's misconduct simply by barring him from performing office inspections would remedy a violation that FINRA did not charge him with (i.e., failing to perform office inspections) while ignoring his false testimony and fabrication of documents.

impermissible." *John M.E. Saad*, Exchange Act Release No. 86751, 2019 SEC LEXIS 2216, at *5, *48-49 (Aug. 23, 2019). Indeed, the Commission rejected Saad's argument that a FINRA bar is "categorically punitive" under *Kokesh*. *Id.* at *4-5. Applicants' criticism of the Commission's decision as directly contrary to the D.C. Circuit's *Saad* decision misconstrues the directive of the D.C. Circuit and is meritless. Moreover, Applicants' argument ignores the well-established Commission precedent, discussed above, concerning the importance of testifying truthfully and complying fully with a FINRA Rule 8210 request. Applicants lied to FINRA and fabricated documents in support of their lies, which demonstrates Black's unfitness to remain in the securities industry and supports his bar and the Firm's fine.

Finally, Black and the Firm argue generally that the NAC ignored Applicants' assistance "in helping to root out fraud and, therefore, create a safer securities marketplace for the investing public." *See* Brief at 49. This is incorrect. The NAC considered, and rejected as mitigating, these claims. *See* RP 4321; *see also Evansen*, 2015 SEC LEXIS 3080, at *61 (finding that applicant violated FINRA Rule 8210 and holding that "Evansen's self-professed willingness to expose misconduct by others does not demonstrate a public interest in permitting his association with a member firm or mitigate the seriousness of his violations.").

Applicants state that the Commission has recognized as mitigating "turning in wrongdoers" to assist in an investigation, citing *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367 (Feb. 13, 2009) and *Raymond L. Dirks*, 47 S.E.C. 434 (1981), *aff'd*, 681 F.2d 824 (D.C. Cir. 1982), *rev'd on other grounds*, 463 U.S. 646 (1983). *See* Brief at 49. These cases, however, do not render Black's alleged assistance in unrelated matters mitigating. In *Kornman*, the Commission barred the applicant for providing a false statement to Commission staff during an ongoing investigation, stated that "deliberate deception of regulatory

authorities justifies the severest of sanctions," and found no evidence of mitigating circumstances. *Kornman,* 2009 SEC LEXIS 367, at *23, *35. In *Dirks*, the Commission found that Dirks came into possession of material, non-public corporate information concerning fraud at a publically traded company and violated the Exchange Act's antifraud provisions by communicating that information to others. *Dirks*, 47 S.E.C. at 448. The Commission reduced the sanction imposed by the administrative law judge because it was "clear that Dirks played an important role" in bringing the underlying fraud to light. *Id.*

In contrast, other than Applicants' self-serving statements, here it is not clear that Black ever played an "important" role in exposing fraud and other misconduct. Moreover, even assuming that he did, the instances described by Black have no connection to the case underlying his bar or his lies and fabrication of documents. *Cf.* Guidelines, at 8 (Principal Considerations in Determining Sanctions, No. 12) (instructing adjudicators to consider "[w]hether the respondent provided substantial assistance to FINRA in its examination and/or investigation of the *underlying misconduct*") (emphasis added). The NAC appropriately declined to give any mitigation to this purported factor.

2. A Substantial Fine is Appropriate for Applicants' Supervisory Violations

The Commission should also sustain the NAC's $73,000 fine against the Firm for Applicants' failure to exercise reasonable supervision to retain and review email communications.[38] This sanction is neither excessive nor oppressive, within the ranges suggested by the Guidelines, and supported by "significant aggravating factors." (RP 4320.)

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[38] The NAC reduced the fine from $120,000, which was the fine imposed by the Hearing Panel, to reflect that it set aside the findings concerning Applicants' supervisory violations related to office inspections.

The Guideline for "Supervision—Failure to Supervise" recommends that adjudicators consider a fine between $5,000 to $73,000, and that they consider independent monetary sanctions for a firm and any responsible individual.[39] In egregious cases, the Guideline recommends that adjudicators consider limiting activities of the branch office or department for more than 30 business days or suspending the firm with respect to any or all activities or functions for up to 30 business days, and also to consider suspending the responsible individual for up to two years or barring the responsible individual.[40]

The NAC found that several aggravating factors warranted a substantial fine against the Firm. First, The NAC found that Black and the Firm maintained a deficient system for email review and retention for more than five years.[41] Second, Applicants maintained this deficient supervisory system despite separate warnings, from both Commission staff in early 2012 and FINRA staff in 2014, that the Firm's email retention system was inadequate.[42] The NAC rightfully found this to be "especially troubling." *See* RP 4320. Third, the NAC observed that Applicants' supervisory deficiencies allowed violative conduct to occur.[43] These aggravating factors, as well as the lack of any mitigating factors, support the NAC's $73,000 fine (which is, appropriately, at the top end of the relevant range in the Guidelines).

On appeal, Applicants argue that the fine is not remedial and does not protect the public because this misconduct stopped four years ago when the Firm installed Smarsh to automatically

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39 *Id.* at 104.

40 *Id.*

41 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 9).

42 *Id.* at 8 (Principal Considerations in Determining Sanctions, No. 14).

43 *Id.* at 107 (Principal Considerations in Determining Sanctions, No. 1).

archive all employee emails and updated its WSPs. *See* Brief at 46. Applicants, however, did not take these corrective measures until after FINRA began its investigation and had received a Wells Notice. *See, e.g.*, RP 0685-86. Consequently, the NAC declined to consider this factor mitigating, and so too should the Commission. *See* RP 4320 (citing to Guidelines, at 7 (Principal Considerations in Determining Sanctions, No. 3) (stating that adjudicators should consider whether a respondent employed corrective measures before detection or intervention by a regulator). Likewise, the lack of customer harm is not mitigating and does not render the fine punitive, as suggested by Applicants. *See Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 SEC LEXIS 3225, at *44 (Sept. 16, 2011) ("We find no merit to Kaminski's claim that the NASD's failure to find that his supervisory failures caused customer harm was not a mitigating factor.").

The Commission should also reject Applicants' argument that the NAC should have considered mitigating that FINRA staff in 2008 allegedly recommended the supervisory system employed by the Firm. *See* Brief at 49-50. The NAC correctly concluded that, in light of Commission and FINRA staff's separate warnings to Applicants subsequent to 2008 concerning deficiencies with their email supervisory system, whatever recommendations they received from FINRA staff in 2008 "could not be treated as a source of reliable guidance." *See* RP 4320.

Finally, Black and the Firm argue that it "is unreasonable to impute an employee's dishonest behavior to a supervisory failure" and that supervision of broker communications always relies on brokers following an honor system. They therefore claim that it "would be impossible . . . to attempt to stop a broker from creating third-party email addresses to use in contacting current or potential customers." *See* Brief at 50. Applicants' broad argument misses the mark, and adopting it would absolve firms from any responsibility to reasonably supervise

email communications. While it is true that a broker can always use his personal email to evade supervision by a firm, this fact does not render the Firm's system, in which it permitted its numerous representatives scattered across the country to use personal email and simply required that they forward to the Firm or copy the Firm on such emails, reasonable. Moreover, it ignores the problem created not by brokers who intentionally sought to evade the Firm's system, but those who through negligence or inadvertence fail to forward or copy the emails (thus not permitting the Firm to review the emails in question and to retain them pursuant to its obligations under the Exchange Act).

3. The NAC Appropriately Sanctioned the Firm for Failing to Retain Sebastian's Emails

Finally, the Commission should affirm the $500 fine that the NAC imposed on the Firm for failing to retain 16 of Sebastian's emails. The NAC reduced substantially the fine imposed by the Hearing Panel, consistent with its significantly narrower findings of liability.

For recordkeeping violations, the Guidelines recommend a fine of $1,000 to $15,000; where aggravating factors predominate, a fine of $10,000 to $146,000; and where significant aggravating factors predominate, a higher fine.[44] For firms, the Guidelines recommend that adjudicators consider, where aggravating factors predominate, suspending the firm for 10 business days to two years or expulsion.[45]

Here, the $500 fine against the Firm falls below the lower-end in the Guidelines. This lower fine appropriately reflects that the NAC found that Applicants failed to retain 16 of Sebastian's business-related emails sent from his personal email account, which was a lesser

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44 *See Guidelines*, at 29.

45 *Id.*

number than found by the Hearing Panel. *See* RP 4318-19. On appeal, Applicants do not argue that this fine is excessive or oppressive, and the record supports this fine as appropriately remedial. The Commission should therefore affirm it.

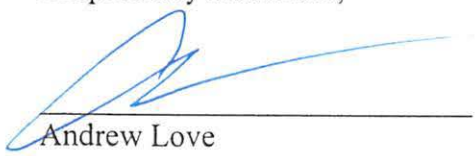
V. CONCLUSION

The Commission should sustain FINRA's action in all respects and dismiss Applicants' application for review. The credible and consistent testimony of the Four Testifying Representatives overwhelmingly supports the NAC's findings that Black and the Firm lied to FINRA about inspecting their offices and fabricated documents to make it appear that inspections had occurred. Black and the Firm have provided no legitimate reason to overturn this credible testimony, and have provided no reliable evidence to support Black's incredible testimony to the contrary. Further, FINRA's proceedings provided Applicants with ample opportunities to defend themselves. The minor and immaterial inconsistencies between the Four Testifying Representatives' testimony and the Emails and Memo—to the extent that they are inconsistencies—had no bearing on their testimony that Black did not inspect their offices. And, if anything, these materials supported FINRA's findings that these witnesses testified credibly and consistently. The NAC appropriately barred Black, and fined the Firm $73,000, for their highly serious misconduct.

Similarly, the Commission should sustain the NAC's findings that Applicants failed to have a reasonable supervisory system for emails and failed to maintain certain emails. Both Commission and FINRA staffs had warned the Firm that its honor system for email retention and review was unreasonable, yet for several years Black and the Firm continued to permit the Firm's numerous representatives to use personal email for Firm business and relied on each representative to forward or copy such emails to the Firm for review and retention. The Firm's

system was susceptible to a representative inadvertently or intentionally failing to forward to the Firm or copy the Firm on personal emails, which is exactly what happened. The sanctions imposed by the NAC are encouraged by the Guidelines in a case such as this, and appropriately serve to remediate Applicants' misconduct and protect investors. For all of these reasons, FINRA urges the Commission to dismiss Applicants' application for review.

Respectfully submitted,



Andrew Love
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8281

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