UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of: **SOUTHEAST INVESTMENTS, N.C., INC. AND FRANK HARMON BLACK** **For an Expedited Motion to Stay Sanctions Imposed by FINRA**	**Appeal of FINRA No. 2014039285401** 3-19185

EXPEDITED MOTION TO STAY SANCTIONS PURSUANT TO SEC RULE OF PRACTICE 401 AND INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

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I. INTRODUCTION

Pursuant to Rules 401 and 420(d) of the SEC Rules of Practice, Respondent Frank Black submits this Expedited Motion to Stay the effectiveness of the sanction entered by FINRA's National Adjudicatory Counsel ("NAC") barring him from associating with any FINRA member firm in any capacity. In support of this Expedited Motion, Mr. Black states as follows:

On May 23, 2019, the NAC affirmed some findings by the FINRA Hearing Panel and reversed others. The NAC also affirmed, vacated and modified parts of the sanctions against Respondents. The affirmed sanctions included the imposition of a bar against Mr. Black. Mr. Black (as well as Southeast Investments N.C., Inc. ("SEI"), the other Respondent in the FINRA action) have filed a timely Application for Review of the NAC Decision to the Securities and Exchange Commission on May 28, 2019. Mr. Black requests that the bar imposed on him be stayed pending the conclusion of this appellate proceeding.

The Commission has held that "FINRA Rule 9370 provides '[t]hat the filing with the SEC of an application for review by the SEC shall stay the effectiveness of any sanction, other than a bar or an expulsion, imposed in a decision constituting a final disciplinary action of FINRA.'" *In the Matter of the Application of Thaddeus J. North*, Exch. Act Rel. No. 81661, 2017 WL 4150909 at *1 (Sept. 19, 2017) (quoting *In the Matter of the Application of Thaddeus J. North*, Exch. Act Rel. No. 80490, 2017 WL 1397541, at *1 (Apr. 19, 2017)). As such, this Expedited Motion will only address the imposition of the bar, as all other sanctions have been automatically stayed by rule.

II. RELEVANT FACTS AS TO MR. BLACK'S BAR

Mr. Black was barred for allegedly lying to FINRA and creating false documents related to branch office inspections. In 2010, SEI attempted to hire broker Charles Graham. After his application for registration was denied because of an issue with his insurance license from 2000,

SEI filed an MC-400, which was approved upon the condition of SEI subjecting Mr. Graham to heightened supervision. (TR. 843-50).[1] David Plexico was tasked with inspecting Mr. Graham's branch under the firm's Heightened Supervision Plan ("HSP") (TR. 849-50).

SEI was routinely examined by FINRA's Atlanta office from approximately 1997 until 2012. This resulted in a mostly harmonious relationship. On or about October 4, 2012, however, things deteriorated when Peter Cleven, of FINRA's Boca Raton office, contacted Mr. Black requesting information relating to details about an SEI trading program. Mr. Black assured Mr. Cleven he would retrieve the information, but was told that was not good enough. Mr. Black uncomfortably asked if his attorney should join the call.

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

Since that conversation, it appears that FINRA went gunning for Mr. Black and SEI. On October 8-9, 2012 (mere days after the hostile telephone call with Mr. Cleven), FINRA examiners from the Boca Raton office made a surprise inspection of Mr. Graham's office to ensure compliance with the HSP (TR. 181-182). Kelly Edwards, a FINRA examiner, testified that Mr. Graham initially told her that Mr. Plexico was not inspecting his office in compliance with the HSP. According to Ms. Edwards, Mr. Graham then changed his story after receiving a

[1] Citations to the transcript of the hearing are abbreviated "TR. __." Respondent's Exhibits are cited as "R. Ex__." The Affidavits of Respondent Frank H. Black and David Plexico will be referred to as "AFF. __" and "DP AFF__," respectively. The March 3, 2017 Decision of the Hearing Panel will be referred to as "Decision __." The May 23, 2019 NAC Decision is referred to as "NAC Decision_."

telephone call, allegedly from Mr. Black,[2] on the second day of the exam (TR. 184-186). On account of his small book of securities business, Mr. Graham resigned from SEI (TR. 872-873). Disgusted by FINRA's tactics, Mr. Graham refused to provide testimony on the record. (TR. 188, 874).

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

Mr. Black gave testimony to FINRA on two occasions: March 3, 2013 and April 3-4, 2014. Mr. Black maintained that he visited all the branch offices. With one exception,[3] Mr. Black testified that he always drove to the branches because he preferred driving to the hassle of air travel and that he paid in cash for all his travel-related expenses. Given an investigation, if one can even call it that, that was unquestionably biased, FINRA Enforcement, along with the Hearing Panel and the NAC, believe that Mr. Black lied about conducting these branch reviews and that he falsified documents relating to those inspections. It is this conduct that led to his bar from the industry. For the following reasons this bar should be stayed pending his appeal.

III. ARGUMENT

The Commission has previously granted a Motion to Stay Sanctions imposed by an SRO. *See In the Matter of the Application of Elec. Transaction Clearing, Inc.*, Exch. Act Rel. No.

[2] Notably, FINRA presented no evidence as to the actual identity of the person placing the call to Mr. Graham; it is pure conjecture that it was Mr. Black on the other end of that call.

[3] Mr. Black's son accompanied him to a branch inspection in Seattle, Washington.

73698, 2014 WL 6680112 at *1 (Nov. 26, 2014). In that matter, the Commission considered four factors to determine that the stay was warranted: "(1) whether the applicants have shown a strong likelihood that they will prevail on the merits of the appeal; (2) whether the applicants have shown that they will be irreparably harmed if the stay is not granted; (3) whether the granting of a stay would result in substantial harm to other parties; and (4) whether the issuance of a stay would likely serve the public interest." *Elec. Transaction Clearing, Inc.*, 2014 WL 6680112 at *1. More recently, the Commission determined that the "criterion are not accorded equal weight. For example a stay may be granted where there is a high probability of irreparable harm, but a lower probability of success on the merits or vice versa." *See In the Matter of the Application of Michael Earl McCune*, Exch. Act Rel. No. 77921, 2016 WL 2997935 at *1 (May 25, 2016). In order to obtain a stay, "a movant need not necessarily establish that it is likely to succeed on the merits of its appeal but must at least show 'that the other factors weigh in its favor' and that it has 'raised a serious legal question on the merits'" *In the Matter of the Application of Scottsdale Capital Advisors Corp.*, Exch. Act Rel. No. 83783, 2018 WL 3738189 at *2 (August 6, 2018) (quoting *In the Matter of the Application of Bruce* Zipper, Exch. Act Rel. No. 82158, 2017 WL 5712555 at *6 (Nov. 27, 2017)).

In weighing those factors in the manner prescribed, the Commission has, in the past, stayed sanctions, including permanent bars by the SRO, pending appeal. *See In the Matter of the Application of Scattered Corp.*, 52 SEC 1314, 1997 SEC LEXIS 2748 at *13-15 (Apr. 28, 1997). *See also Scottsdale*, 2018 WL 3738189 at* 1, 4. In the instant Expedited Motion, all four of the factors described above militate in favor of granting Mr. Black's Expedited Motion.

A. Mr. Black has a Strong Likelihood of Success on Appeal.

In reviewing disciplinary action taken by a self-regulatory organization like FINRA, the Commission must determine: (1) whether the applicant engaged in the conduct found by the

SRO; (2) whether such conduct violates the SRO's rules as specified in the SRO's determination; and (3) whether those rules were applied in a manner consistent with the purposes of the Securities Exchange Act of 1934 (the "Exchange Act").[4] The Commission is to base its findings on an independent review of the record and apply a preponderance of the evidence standard to determine whether the evidence supports the SRO's findings.[5]

Mr. Black is likely to succeed on appeal because (1) he did not engage in the conduct as found by FINRA; (2) his hearing was not in keeping with the purpose of the Exchange Act because, amongst other reasons, FINRA failed to produce relevant exculpatory materials; and (3) the sanctions imposed were excessive and do not serve a remedial purpose.

1. Mr. Black did not Engage in the Conduct that Led to his Bar.

The findings that Mr. Black lied and falsified documents are all predicated on the conclusion that four particular branch inspections did not take place. Mr. Black is likely to succeed because FINRA erred in making that finding. In *Scattered Corp.*, the Commission stayed a permanent bar, in part because of a ruling by the U.S. Court of Appeals for the Seventh Circuit called into question whether or not a violation of the SRO's rules had actually occurred. *Scattered Corp.*, 1997 SEC LEXIS 2748 at *14. Mr. Black's situation is analogous because the Commission will likely decide that Mr. Black did not actually engage in conduct that violated the SRO's rules.

a. The NAC Relied on Biased and Unreliable Witnesses.

FINRA's mantra to investors is that they should never put all of their eggs into one basket. Why? Because if you own similar investments, "what happens to one investment is

[4] 15 U.S.C. § 78(e)(1).

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

likely to happen to the others."[6] FINRA failed to heed its own advice, however, in conducting its exam of Respondents, inexplicably relying on only one type of witness, i.e., ex-SEI employees. FINRA exams are, admittedly, based on a mere sampling of a broker-dealer's total universe of activities, but, for an exam to have efficacy, that sample must be representative. Here, by only communicating with former SEI representatives, FINRA deliberately created a skewed sample. In fact, the NAC implicitly admitted the investigation was unfair, finding that "the requirements in Section 15A(b)(8) of the Exchange Act that FINRA provide a 'fair procedure' in an adjudicatory proceeding 'does not extend to investigations.'" (NAC Decision p. 18). An admittedly unfair investigation poisons the well and calls into question all findings by the Panel.

Moreover, FINRA failed to produce notes taken by its examiners while interviewing those ex-brokers, notes that weighed negatively on their credibility. Only after the Interim Order[7] (issued after the hearing) directed Enforcement to produce the handwritten notes (the "Notes") FINRA examiner Pam Arnold made during phone conversations with four of the ex-SEI brokers did FINRA act.[8] But, instead of the Notes, FINRA produced declarations from Ms. Arnold and Sean Firley reciting that the Notes could not be found. In lieu, FINRA produced (1) several emails from Ms. Arnold to Mr. Palacios written six days after the phone conversations with the ex-SEI brokers (the "Emails"), and (2) Mr. Palacios's memorandum to the file (the "Memo"). The Emails and Memo[9] would have been crucial to Respondents' defense as they cast doubt on the credibility of the ex-brokers, which, as discussed below, the NAC considered to be the critical issue. To be clear, absent the Interim Order, this exculpatory

[6] http://www.finra.org/investors/concentrate-concentration-risk.

[7] On June 26, 2018, the NAC issued an Interim Order on a discovery issue that arose during the 2017 Hearing.

[8] The Notes should have been produced pursuant to FINRA Rule 9253(a)(2) and or Rule 9251(b)(3).

[9] Importantly, the Emails contain only the information from the misplaced Notes that Arnold thought was most important. The actual content of the Notes could have contained other exculpatory information, but will never be known.

evidence never would have seen the light of day, which was seemingly FINRA's intent, as they continued to highlight testimony that was clearly contrary to the exculpatory evidence, in their arguments and briefs. FINRA's failure to produce said evidence until after the hearing was not harmless error and demands a re-hearing or amended decision pursuant to Rule 9253(b).

The NAC Decision conceded, "the credibility of these witnesses is the key issue" (NAC Decision p. 14), yet ignored that each of the former registered representatives was biased against Mr. Black and, therefore, unreliable as a witness. For instance, Mr. Minor's office was approximately three miles from SEI's main office (TR. 46, 49), yet he maintained that his branch was never inspected. Worse yet, Mr. Minor's registration was terminated by SEI (RX-21) and he explicitly testified of his dislike for Mr. Black (TR. 77-78). The veracity of Mr. Rivard's testimony against Mr. Black is in doubt because he left SEI over a commission dispute (TR. 961). Mr. Ravella was terminated for lack of production (TR. 965), and he testified that he was positive[10] that he had not met Mr. Black prior to the hearing. (TR. 125-126). The FINRA Emails, however, indicate that Ravella told FINRA that, in fact, he "met Black once a year." Any semi-competent lawyer could have used the Emails to impeach Mr. Ravella and undermine his credibility, but that was impossible since FINRA purposefully denied Respondents access to them. Finally, at the hearing, Mr. Marable read a letter he wrote to FINRA in a response to their request (TR. 147-148). This letter/testimony was inconsistent with the FINRA Emails relating to his initial interview. Notably, Mr. Marable was also terminated for inadequate sales production (TR. 151-152).

[10] Page 13 of the OHO Decision quoted Mr. Ravella, which emphasized the importance that the Panel attributed to his certainty that he had not met Mr. Black; certainty that now, in light of the Emails, appears to be a lie at worst, or misguided at best.

The website for FINRA's Department of Enforcement assures the public it is committed to "vigorous, fair and effective enforcement."[11] Mr. Black agrees that FINRA's enforcement in this matter has been vigorous, but it has hardly been fair. Putting aside the fact that FINRA failed to turn over the Emails and Memo, SEI had between 114 and 133 registered representatives during the review period. (Decision pg. 26) Yet, FINRA did not deign to interview a single broker still employed with SEI. In so doing, in skewing its sample in such an obviously biased manner, FINRA purposely avoided persons who might have contradicted its conclusion that Mr. Black did not inspect all the branch offices he claimed.

In response to this criticism, Enforcement offered the paper-thin and, frankly, laughable excuse that it did not want to interrupt SEI's business by interviewing current brokers, and that it was attempting to avoid a situation akin to that of Mr. Graham, described in the fact section above, where FINRA erroneously maintained that Mr. Black convinced him to change his story in a phone call (TR. 264, 314-316). FINRA conducts thousands of exams on an annual basis[12] – some by surprise! – and does not seem to have any problem interrupting business in those instances.

Ironically, even cherry picking witnesses had unintended consequences. FINRA interviewed ex-SEI broker Gregg Kucher and the Memo memorializing that interview indicates that he *did* have his office inspected and that he met Mr. Black approximately 20 times. Of course, FINRA failed to produce the Memo until after the hearing. During oral arguments before the NAC, Mr. Firley was asked if any broker that was telephoned confirmed that he had been inspected and if said inspection matched the calendar of inspections. He replied that he did not believe so. (NAC Argument transcript pg. 125). In light of Mr. Kucher's interview, however,

[11] http://www.finra.org/industry/enforcement.

[12] https://www.finra.org/newsroom/statistics (in 2017, FINRA conducted 1,492 Cycle and 914 Branch Exams).

Mr. Firley either knew or should have known that his answer was false, and the question itself demonstrates that the Memo and Emails could have impacted Respondents' and the brokers' credibility (again, the key issue), and, therefore, the ultimate outcome of the hearing.

The Memo and Emails also presented other inconsistencies which might also have impacted the outcome of the hearing. Rule 9251(b)(3) provides that documents that contain "material exculpatory evidence" may not be withheld pursuant to Rule 9251(b)(1). Moreover, under *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court has held that prosecution must produce documents that "may contain material exculpatory evidence."[13] The Supreme Court later held in *U.S. Bagley*, 473 U.S. 667, 676 (1985), that this includes impeachment evidence as well. Thus, under FINRA rules and Supreme Court precedent, the Notes or, at least, the Emails and Memo, should have been produced to Respondents.[14] Because they were not produced, Respondents were denied a fair hearing.

FINRA failed to show by a preponderance of the evidence that the branch inspections did not take place and, in turn, that Mr. Black lied and falsified documents in violation of SRO rules.

b. The NAC Affirmed a Decision in which the OHO Failed to Consider Relevant Evidence.

From the above, it is clear both that the OHO and NAC relied on faulty evidence, that FINRA failed to turn over exculpatory evidence and that the NAC ignored said evidence. But that is not the only exculpatory evidence Respondents presented. Mr. Black and Mr. Plexico testified that the branch inspections at issue were, in fact, conducted (TR. 724-725. 746-747, 849-50, 962). In certain instances, Mr. Black testified about the physical appearance of the

[13] In its March 8, 2016 Response to Respondent's Motion to Compel, Enforcement argued that none of the documents it withheld under 9251(b) were Brady material, which is false.

[14] Further, "the spoliation doctrine recognizes that where a party fails to produce certain evidence relevant to the litigation, the finder of fact may infer that the party destroyed the evidence because the evidence was harmful to its case.' *Panos v. Timco Engine Center, Inc.*, 197 N.C. App. 510, 521 (2009).

branch office, which would have been impossible for him to do without having actually conducted the branch audit; he even identified a third party who was present at one of the branch inspections (TR. 961).

Beyond that, Respondents presented evidence including expense reimbursement vouchers, office inspection checklists and check images to prove that the office inspections did, in fact, take place (R. Ex. 1-6, 11, 38 and 98). The OHO dismissed such exculpatory evidence under the logically flawed notion that "the mileage expense vouchers do not support Black's claim that he drove to each of the branches to conduct an inspection." (Decision p. 9). Incredibly, in the ultimate case of confirmation bias, the decision dismissed such evidence "because it confirms that Black gave false testimony and fabricated documents about branch inspections." (Decision Pg. 20). The NAC similarly found the checklists and Inspection Forms, "could easily have been fabricated." (NAC Decision p. 16), which is actually true of almost any type of document that is stored in house at a broker-dealer and is certainly no reason to assume the documents were fabricated. Mere conjecture is not proof. Illustrative of the overall bias is the Panel's finding that Mr. Plexico appeared at his OTR interview with $2,000 in cash because "he anticipated that he would be asked about how he customarily paid for out-of-pocket expenses and accordingly carried a considerable amount of cash with him to the interview." (Decision Pg. 23, FN 128).

Ironically, the same Decision that ignored records presented by Mr. Black reflecting that branch inspections occurred also faulted him for not having *other* types of records, such as credit card and ATM receipts, that "could have supported Black's contention that he drove to and inspected 42 of the 43 branches." (Decision Pg. 9). This is despite the fact that Respondents cogently explained the absence of said records, such as Mr. Plexico's testimony that he did not

have an ATM card (TR. 655-656) and that Messrs. Plexico and Black habitually carried large amounts of cash and paid in kind whenever possible.

FINRA seemed to determine the sufficiency of evidentiary documents based on their existence, i.e., those that exist are not sufficient evidence, while those that do not exist would have been sufficient. Mr. Black could not have possibly prevailed given this standard. Moreover, this construct shifted the burden to Mr. Black to prove that the branch audits took place instead of FINRA proving that they did not take place.[15] Because the NAC decided that the ex-brokers were credible, it seemingly decided that all testimony and evidence put on by Respondents was, necessarily, not credible. In reality, if both sides present credible evidence, it means FINRA failed to carry its burden.

Because the NAC affirmed a decision that relied on biased evidence and dismissed exculpatory evidence, the Commission is likely to find FINRA failed to prove that the violative conduct at issue actually occurred, and grant Mr. Black's appeal.

2. The NAC's Decision is not in Keeping with the Purpose of the Exchange Act because Mr. Black was Denied the Opportunity to Defend Himself.

The NAC Decision is also likely to be overturned because it was not reached in a manner consistent with the purposes of the Exchange Act. The Exchange Act requires that self-regulatory organization rules provide a "fair procedure for the disciplining of members and persons associated with members."[16] Included in the fair procedures is an obligation by an SRO to provide members and associated persons with proper notice of specific charges:

> In any proceeding by a registered securities association to determine whether a member or person associated with a member should be disciplined...the

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

[16] 15 U.S.C.§78o-3(b)(8).

> association shall bring ***specific charges, notify such member or person of, and give him an opportunity to defend against such charges*** (Emphasis Added).[17]

In proceedings by a registered securities association where a person might be barred, the association is required to "notify such person and give him an opportunity to be heard upon, the specific grounds for...bar."[18]

Despite this mandate, Mr. Black was not afforded a fair opportunity to defend himself. In the past, the Commission has vacated sanctions because an unfair hearing violated the purposes of the Exchange Act. *In the Matter of the Application of U.S. Associates, Inc.* Exch. Act Rel. No. 33189 , 1993 WL 469130 at *4-5 (November 9, 1993). Mr. Black's hearing was similarly unfair; first, Mr. Black did not have access to the exculpatory Emails or Memo during the hearing. Moreover, Mr. Firley told the NAC he did not believe any of the former brokers confirmed that they had been inspected, which was not the case. Beyond that, the Complaint charged him in connection with five branch inspections; accordingly, he prepared his defense in response to those charges. Nevertheless, the OHO not only heard evidence about, but also made affirmative findings regarding, branch inspections other than the five put at issue in the Complaint.[19] The OHO Decision also found, "in sum, the Panel finds that Plexico did not conduct the Graham inspections, lending further support to our findings that Respondents did not inspect the five branch offices that are the subject of the Complaint." (Decision, p. 22).

The Commission has in the past set aside FINRA findings of unauthorized trading in customer accounts precisely because the respondent lacked adequate notice of the claims. *In the Matter of the Application of Wanda P. Sears*, Exch. Act Rel. No. 58075, 2008 WL 2597567, at

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[17] 15 U.S.C.§78o-3(h)(1) (*Emphasis Added*).

[18] 15 U.S.C.§78o-3(h)(2).

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

*4 (July 1, 2008).[20] Mr. Black was not charged in connection with the inspection of Mr. Graham's or Mr. Webber's office, yet both were used against him. The OHO decision contained the following admission:

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

(Decision, p. 41).

The NAC would have the Commission believe the Panel's consideration of evidence regarding extraneous inspections only went to sanctions, without any bearing on liability. Moreover, the NAC dismissed the assertions about Mr. Graham arguing they were only included as "background," which even if true does nothing to "un-ring the bell" with regard to the bias caused by said assertions. (NAC Decision p. 18). Even were these claims believed,[21] the fact remains that Mr. Black was not given proper notice that the other branch inspections would play such an important role in the case. While he was not charged with the inspections, the Panel most certainly considered them in determining his fate. In dismissing Cause 3 (which is not at issue in this Motion), the NAC ignored other branch inspections precisely because, "it appears Respondents lacked notice that their conduct regarding those other branch inspections and visits was an additional basis of the alleged violations in cause three" (NAC Decision FN 36 p. 26)

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

[21] *See Dept. of Enforcement v. Wanda Sears,* FINRA Disciplinary Action No. C07050042, 2009 WL 2210529 at *4 (July 23, 2009), where the NAC refused to consider unauthorized trades as aggravating factors because of the "lack of notice problem that the Commission highlighted in setting aside our initial finding." At a minimum, this means consideration of the extraneous branch visits as to sanctions was inappropriate due to a lack of notice to Respondents.

Here, Respondents lacked notice but were subjected to evidence on the other branch inspections. In the past, the Commission has stayed sanctions in part based on serious questions as to the NAC's finding of liability "on a basis that appears not to have been alleged in the complaint." *See Scottsdale*, 2018 WL 3738189 at *3. Thus, if Enforcement wanted to bring evidence with regard to other branch inspections, it should have charged Mr. Black in relation to them. Further, FINRA has no excuse as the information was not new, e.g., the initial Complaint mentioned "CG" or Charles Graham 18 times. Even assuming it was new information, under FINRA Rule 9212(b), a Hearing Office may grant a motion by Enforcement "to amend the complaint, including amendments so as to make the complaint conform to the evidence presented."[22] FINRA could have given fair notice to Mr. Black at any time. Instead, Enforcement charged him with regard to one set of branch inspections, only to pile on evidence relating to others.

Even if considering other branch inspections was proper, there was still no evidence presented that those inspections did not take place. The Decision relied on the flawed premise that it was impossible for Mr. Black to have conducted the inspections due to the amount of driving required. As an example, directly contradicting that train of thought, RX-81 reflects that Mr. Black drove 1,168 miles in a single day in conducting an inspection for the office of Mac Briggs. The record is replete with evidence that Mr. Black drove distances that others might consider extreme, while the only contradictory evidence was the implicit bias of the hearing panel that Mr. Black could not possibly have driven as far as the evidentiary record indicates. Indeed, the Decision noted that Mr. Black would have to have driven 69,172 miles in roughly 27

[22] *See Dept. of Enforcement v. Paul Bryan Zenke*, FINRA Disciplinary Action No. 2006004377701, 2009 WL 4886421 at*3 (December 14, 2009).

months (roughly 679 miles per week), as if that was so implausible as literally to be humanly impossible. (Decision Pg. 8 FN 35).

The NAC affirmed a decision that made findings relating to conduct for which Mr. Black was not charged and also denied him access to exculpatory evidence. As such, the Commission is likely to uphold his appeal because the NAC's decision was not in keeping with the fairness requirements of the Exchange Act.[23]

3. The Sanctions Affirmed by the NAC were Punitive and Failed to Serve a Remedial Purpose.

According to the FINRA Sanction Guidelines, adjudicators should ensure that "sanctions imposed are remedial and designed to deter future misconduct, but are not punitive." (p. 2) "A remedial sanction is designed to correct the harm done by respondent's wrongdoing and to protect the trading public from any future wrongdoing the respondent is likely to commit." *Dept. of Enforcement v. Ryan Leopold*, FINRA Disciplinary Action No. 2007011489301, 2012 WL 641038 at *10 n. 15 (Feb. 24, 2012) (*quoting McCarthy v. S.E.C.*, 406 F.3d 179, 188-189 (2d Cir. 2005)). For providing false documents and testimony, the Panel barred Mr. Black. For the following reasons, Mr. Black respectfully asserts that the sanctions were draconian and failed to serve a remedial purpose.

The conduct which led to the imposition of the bar for Mr. Black has ceased. He no longer inspects branch offices and the firm now preserves documentary proof of office visits, such as "selfies" and all credit card receipts (TR. 783-784, 1001). Further, FINRA's Sanction Guidelines allow adjudicators to "design sanctions other than those specified in these guidelines" (p. 3), which means that OHO could have simply barred Mr. Black from conducting branch

[23] 15 U.S.C.§78o-3(h)(1).

inspections. Moreover, barring Mr. Black has no effect towards remediation as there have been no allegations that he ever harmed the public.

Finally, recently, Federal courts have clouded the issue of whether a permanent bar can even be considered remedial or if it is instead "excessive or oppressive." *See Saad v. S.E.C.*, 873 F.3d 297, 304-07 (D.C. Cir. 2017) (Kavanaugh, J. concurring) discussing if FINRA bars are remedial or punitive in light of *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017). Given this, the Commission should grant Mr. Black's Expedited Motion, given the open question whether or not FINRA is even allowed to issue a bar under the circumstances.

For the reasons described above, the Commission is likely to grant Mr. Black's appeal and, thus, the likelihood of success factor weighs in favor of granting a stay. Even assuming *arguendo* that the Commission does not find that Mr. Black is likely to succeed in his appeal, Mr. Black has, at a very minimum, raised a "serious legal question on the merits" and it will be demonstrated, *infra*, that the remaining three criteria or "balance of hardships tips in favor of stay" as well. *Scottsdale*, 2018 WL 3738189 at* 2, 3. Thus, a stay is warranted. *See also Scattered Corp.*, 1997 SEC LEXIS 2748 at *11-12 (Commission granted a stay even after finding that it was, "unclear....whether applicants have met their burden of showing there is a strong likelihood they will succeed on the merits." but did "find, however, that applicants have shown this to be a substantial case on the merits" and that, "the other three factors support granting a stay.").

B. Mr. Black will Suffer Irreparable Harm Without a Stay.

In *Scattered Corp.*, the applicant argued that a failure by the Commission to stay a permanent bar would serve as a "professional death sentence" from which the he could "never recover." *Id.* at *6. In that instance, the Commission ruled that "the benefit of any possible reduction of his bar and fines, however, would be lost, absent a stay at this juncture." *Id.* at *16.

Thus, the Commission granted the stay because to do otherwise would have caused irreparable harm to the applicant. The Commission should grant the stay here, because Mr. Black would similarly lose the benefit of a possible reduction of his permanent bar and suffer irreparable harm.

Absent a stay, Mr. Black's career will receive the proverbial death sentence described above. Mr. Black has been involved in the securities industry since 1971 and has had limited work experience in other fields. (AFF. 1). Because he lacks experience in other sectors, if the stay is not granted, he will have difficulty finding work. Consequently, he will not be able to support himself financially. Even if his appeal is ultimately granted, his career will have been destroyed with little prospect for starting anew. In other words, he will have suffered irreparable harm, as described in *Scattered Corp.*

C. Other Parties will not Suffer Substantial Harm as a Result of a Stay.

There is no risk that another party will suffer harm if the Commission grants the instant Expedited Motion. In *Scottsdale*, the Commission granted a stay even where FINRA argued that allowing respondent to continue working in the industry would pose a threat to the investing public and the securities market. *Scottsdale, 2018 WL 3738189 at*2, 4.* In contrast, there are no findings or, even allegations, that Mr. Black's alleged conduct has harmed any party. The Hearing Panel conceded as much when imposing sanctions on Mr. Black, acknowledging "the lack of harm to customers" (Decision Pg. 37).

Moreover, Mr. Black was barred from the industry because of allegations that he made false statements and fabricated documents to prove that he had, in fact, made certain branch inspections. Mr. Black no longer makes branch inspections, removing any motivation to lie or fabricate documents (AFF. 3). There have been no allegations of past harm and there is no danger of future harm if the Commission grants this Expedited Motion.

D. A Stay's Impact on the Public Interest.

Granting the instant Expedited Motion will serve the public interest because Mr. Black will be allowed to continue reporting illegal investment schemes. While it is incontrovertible that Mr. Black has done nothing to harm the public, he has, in fact, provided a service through his employment in the securities industry. Mr. Black has either helped investors avoid scams or gone to the authorities on dozens of occasions. (AFF. 5). For example, Mr. Black suspected wrongdoing on the part of the Rockford Group, LLC, and, thus, contacted FINRA and subsequently cooperated with the SEC, U.S. Postal Service, and FBI, ultimately resulting in action against the alleged wrongdoers and monetary recovery by the victims (AFF. 7 and TR. 878-881).

Mr. Black also contacted the SEC over suspicions of Bridgewater Financial Corporation, which appears to have led to an investigation (AFF. 8). Finally, Mr. Black went to authorities over a suspected scam in North Carolina. He introduced agents from the FBI and North Carolina Securities Division, who were posing as SEI employees, to the suspected scam artists. The meeting took place in an SEI conference room and was taped by law enforcement officials (TR. 882 and AFF. 9).

Far from being a danger to the public, Mr. Black has regularly attempted to expose corruption. But his aid has not been limited to regulators and law enforcement. For instance, Mr. Black thought that a married couple had been wronged by a broker, so he assisted them during their FINRA arbitration (*Wilburn and Cynthia Slagle v. Jonathan Roberts Financial Group, Inc., et al.*, FINRA Case 03-05830). He did this because it was the right thing to do (AFF. 6).

Moreover, Mr. Black's continued involvement in the industry will directly benefit SEI, its employees and customers. SEI principal, David Plexico states that Mr. Black is vital to the

existence of the company (DP AFF 4.) and that if he is barred it will severely hamper SEI's ability to function. (DP AFF 5). In turn, SEI's employees, as well as its approximately 80 registered representatives and 5,500 customers, will be harmed as a result of the bar. (DP AFF 2, 3, 5). In *Scottsdale,* the Commission took into account impending negative consequences on companies and their employees and customers when granting a stay to the companies' owner.[24] *Scottsdale, 2018 WL 3738189 at*3.* SEI, its employees and customers would similarly suffer, and, thus, it is in their best interest that the bar is stayed.

Mr. Black's continued involvement in the industry will not result in any public harm but, instead, will result in continued cooperation with law enforcement and regulators. The benefit of granting the stay far outweighs risks to anyone. To alleviate concerns, Mr. Black is willing to accept a stay conditioned on a prohibition against him conducting branch inspections. *See Scattered Corp.*, 1997 SEC LEXIS 2748 at *17 (motion granted subject to a restriction on certain activities).

Accordingly, all requirements for the granting of a stay are satisfied: (1) Mr. Black is likely to succeed on appeal (in the alternative, he has at least raised a serious legal question on the merits); (2) he will suffer irreparable harm if the stay is not granted; (3) other parties will not suffer harm if the stay is granted; and (4) the public will benefit from a stay.

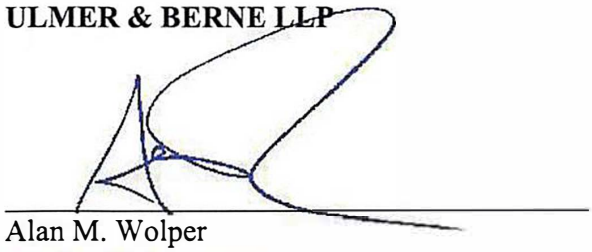
[24] Mr. Black concedes that he no longer owns SEI, which is distinguishable from the situation in *Scottsdale.* However, the Commission was clearly concerned about the impact that the bar in *Scottsdale* would have on the companies, employees and customers. If Mr. Black's bar is not stayed, SEI, its employees and customers will similarly suffer, regardless of who owns the company.

IV. CONCLUSION

For the foregoing reasons, Respondent Black requests that the Commission enter an order staying the bar imposed by the NAC's Order until the pending appeal is resolved.

Respectfully submitted this 28th day of May, 2019.

ULMER & BERNE LLP



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CERTIFICATE OF SERVICE

I hereby certify that Applicants' **EXPEDITED MOTION TO STAY SANCTIONS PURSUANT TO SEC RULE OF PRACTICE 401** has been sent to the following parties entitled to notice as follows:

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

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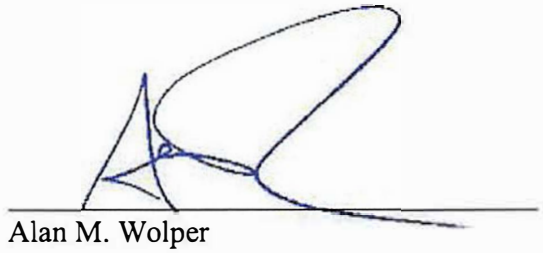
nac.casefilings@finra.org
(Courtesy copy via e-mail, and one copy via overnight mail delivery)

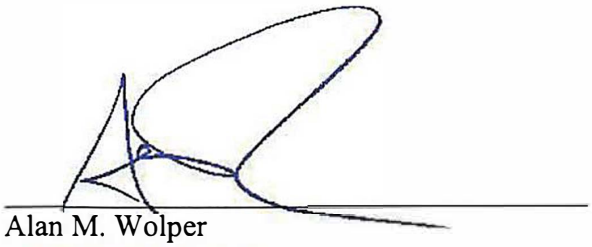
This 28th day of May, 2019.



Alan M. Wolper

Certification pursuant to Rule 154(c)

I certify that this Motion brief conforms to the requirements of SEC Rules of Practice 151(c). The length of this brief, excluding the table of contents, attached affidavits and table of authorities is 6,735 words.



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ATTACHMENTS

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of: **SOUTHEAST INVESTMENTS, N.C., INC.** **&** **FRANK HARMON BLACK** **For Review of Action taken by FINRA**	**Appeal of FINRA No. 2014039285401**

AFFIDAVIT OF RONALD DAVID PLEXICO, Jr.

I, Ronald David Plexico, Jr., being first duly sworn, testify as follows:

1. I am a Principal of Southeast Investments, N.C., Inc. ("SEI").

2.o SEI has approximately 80 registered representatives and approximately 5 employees.o

3.o SEI has approximately 5,500 customers spread throughout the United States.o

4.o Frank Harmon Black serves in several roles that are vital to the existence of SEI.o

5. If Frank Harmon Black is barred from the securities industry it will severely impact the ability of SEI to function and will negatively impact SEI's employees ando customers.o

FURTHER AFFIANT SAYETH NOT.

Ronald David Plexico, Jr., as Principal of SEI

Date: January 25, 2019

Sworn and sworn to before me

this 25 day of January 2019

Notary Public

My commission expired 10/18/2021

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of: **SOUTHEAST INVESTMENTS, N.C., INC.** **&** **FRANK HARMON BLACK** **For Review of Action taken by FINRA**	**Appeal of FINRA No. 2014039285401**

AFFIDAVIT OF FRANK HARMON BLACK

I, Frank Harmon Black, being first duly sworn, testify as follows:

1. I have been involved in the securities industry since 1971 and have limited experience working in other fields.
2. If I am not allowed to continue working at SEI, I will lose my only source of income and will not be able to financially support myself or my family.
3. I no longer conduct branch inspections for SEI.
4. Over the course of my career I have attempted to protect SEI customers and the investing public, in general.
5. From 1971 until 2018, I estimate that I have either advised members of the investing public to avoid suspicious investments or actually turned in suspected wrong doers on dozens of occasions.
6. I assisted a married couple in an arbitration case because I felt that they had been wronged by another broker. They could not afford a lawyer so I spent three days assisting them without any monetary compensation. The couple was awarded

$142,228 [redacted] *v. Jonathan Roberts Financial Group, Inc., et al.*, FINRA Case 03-05830).

7. In September 2009, I turned in the [redacted], to FINRA officials because I thought they were operating a scam. I cooperated with an SEC representative, a U.S. postal department representative, and the FBI in New York. This resulted in a government action prosecuting several individuals from the [redacted] I believe the case number was [redacted] and court docket [redacted].
8. I notified [redacted] about suspected scam artists [redacted] located in Seattle, Washington in August of 2012. I do not know what ultimately happened to the firm, but I did note that their website was taken down shortly after.
9. I contacted the FBI in [redacted] regarding a suspected scam which was being conducted in Charlotte. [redacted] The meeting took place in my office and was taped by law enforcement for evidence.

FURTHER AFFIANT SAYETH NOT.

Frank H. Black

Date: 1-25, 2019

Sworn and sworn to before me

this 25th day of January, 2019

Notary Public

RONALD DAVID PLEXICO JR
NOTARY PUBLIC
SOUTH CAROLINA
MY COMMISSION EXPIRES
AUGUST 28, 2021