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

REPLY BRIEF IN SUPPORT OF THE 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

Applicant Frank Black,[1] by and through his undersigned counsel, hereby submits this Reply Brief in support of his Expedited Motion to Stay the effectiveness of the sanctions entered by FINRA's National Adjudicatory Counsel ("NAC") barring him from associating with any FINRA member firm. In support of this Motion, Mr. Black states as follows:

Mr. Black filed a timely Expedited Motion to Stay Sanctions on May 28, 2019 (the "Motion") and FINRA, in turn, filed its Brief in Opposition to Motion to Stay on May 31, 2019 (the "Opposition"). FINRA's Opposition merely rehashes the erroneous findings of the NAC while completely ignoring salient points Mr. Black raised in his Motion. Because Mr. Black has demonstrated that his appeal is likely to succeed, that he will suffer irreparable harm if the Motion is not granted, that no other party will suffer substantial harm if the Motion is granted, and that granting the Motion will serve the public interest, the Commission should grant his Motion.

II. 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. 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

[1] Southeast Investments, N.C., Inc. ("SEI") was also a Respondent in the underlying FINRA matter; together with Mr. Black, the two are hereinafter referred to as Applicants.

of a stay would likely serve the public interest." *Elec. Transaction Clearing, Inc.*, 2014 WL 6680112 at *1.

Mr. Black's Motion demonstrated that all four factors weigh in his favor. FINRA's Opposition, on the other hand, merely rehashed previous, erroneous arguments. Thus, the Motion should be granted.

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

Mr. Black has shown that he is likely to succeed in his appeal for the following reasons: (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, among 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 faulty conclusion that four particular branch inspections did not take place. Mr. Black's Motion pointed to evidence showing that the inspections did take place, as well as multiple occurrences that prevented a fair hearing for Mr. Black. The Opposition repeatedly argues that such evidence and occurrences were already considered and dismissed. But that is the entire point of the appeal; namely that these arguments were inappropriately dismissed by the NAC.

a. The NAC Relied on Biased and Unreliable Witnesses.

The NAC Decision conceded that the credibility of the ex-broker witnesses "is the key issue" (NAC Decision p. 14) in this matter. Mr. Black's Motion demonstrated that FINRA unfairly cherry-picked those witnesses, all of whom had an existing bias towards Mr. Black (one even admitted to disliking Mr. Black). FINRA's Opposition summarily dismisses critique of FINRA's decision only to interview ex-SEI brokers with an unsupported, blanket statement that

its choice "to interview former Firm representatives was entirely appropriate to gather evidence on the issue of whether the Firm conducted office inspections." (Opposition p. 16). Not surprisingly, the Opposition does not mention NAC's implicit admission that it agreed with Mr. Black that 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). From a public policy standpoint, it is absurd not just to argue but to extoll that FINRA investigations can be unfair as long as the subsequent hearing is fair; as if it were even possible.

Given that the decision only to interview ex-brokers led to an unfair investigation, it should come as no surprise that the hearing itself was also tainted by the testimony of the ex-brokers. FINRA failed to produce exculpatory documents until after the hearing that, had they been produced prior to the hearing, as FINRA's Code of Procedure dictates, would have provided Mr. Black the opportunity at the hearing to attack the credibility of the ex-brokers mentioned above. The omitted documents included emails and notes that were inconsistent with or, even, contradicting of the testimony of the ex-brokers at the hearing.

The Opposition argues, illogically, that "to the extent there were discrepancies in the testimony....they were immaterial to the crux of their testimony relevant to this case." (Opposition p. 14-15). However, discrepancies between testimony provided at the hearing and the ex-broker's own, earlier version of the same events discussed at the hearing is most definitely material as impeachment evidence, and therefore at least potentially exculpatory. As an example of the type of discrepancy that FINRA deems "immaterial," consider that at the hearing, ex-broker Ravella swore under oath that he was positive that he had not met Mr. Black prior to the hearing. (TR. 125-126). The FINRA Emails, however, indicate that Ravella told FINRA during

an interview that preceded the filing of the Complaint that, in fact, he "met Black once a year." The relevance is clear. Yet, FINRA failed to produce those emails to Mr. Black until the hearing was already complete. Under *Brady v. Maryland*, 373 U.S. 83 (1963) – the principles of which FINRA has embraced – the U.S. Supreme Court held that prosecution must produce documents that "may contain material exculpatory evidence." It is undisputed that FINRA did not do this. Accordingly, the finding by the NAC that the documents were not exculpatory is not just faulty, but fatally so.

FINRA attempts to squirm out of its predicament by arguing that, "as observed by the NAC, Black and the Firm had the opportunity to confront the Four Testifying Representatives during their testimony on the issues raised by Black." (Opposition p. 15). The fallacy of FINRA's argument is encapsulated perfectly in footnote 6 of the Opposition, which states that ex-broker "Ravella testified that he had never met Black in person, whereas Arnold's emails reflect that Ravella met Black annually...At the hearing, Black had the opportunity to, but did not, question Ravella concerning his testimony." (Opposition p. 15 FN 6). In fact, Applicants *did* confront the ex-brokers at hearing, but the cross-examination was handicapped precisely because they did *not* have access to the notes and emails which were necessary to impeach Ravella properly. The transcript of the hearing makes this abundantly clear.

Ravella was asked, "How did you first meet Mr. Black?" (TR. 125). He responded, "This is the first time I've actually seen Mr. Black." (TR. 125). Counsel could not confront Ravella with the notes from the FINRA examiner squarely contradicting that sworn testimony, however, because FINRA had denied Applicants access to those notes, and, as a result, they were completely unaware such notes even existed.

The failure to provide the documents impacted the ability to impeach Mr. Ravella but, more importantly, was devastating to Mr. Black's credibility with the Panel. Consider the following exchange between the Hearing Officer and Mr. Black:

> Hearing Officer: Mr. Ravella came in and testified, and he looked at you while he was asked, I don't know what the question was, but he testified that this was – this week was the first time her ever met you, he'd never laid eyes on you. So this is a false statement? (TR-963).

Mr. Black responded that Mr. Ravella's statement was false, whereupon he was asked if Mr. Ravella was lying or if he forgot, to which Mr. Black responded he was lying. (TR 963-4). Frankly, this exchange painted Mr. Black as a blatant liar when, in fact, it was FINRA's witness who was lying or, at least, mistaken. The Panel was interested enough about the contradictory testimony that they went back and specifically asked Mr. Black about it. Moreover, their emphasis on the fact that the witness was looking at Mr. Black highlights the importance of confronting a witness live and underscores the lack of efficacy that impeachment evidence has after the fact. In a case where FINRA itself concedes that witness credibility is "the key issue," it is not just illogical but utterly ridiculous to characterize FINRA's failure to produce the notes and emails prior to the hearing as harmless error, as those documents were of pivotal importance.

Finally, as noted above, FINRA stakes out the obvious, but ultimately pointless, position that the Hearing Panel and NAC already considered and dismissed all of these arguments as immaterial or harmless error. However, had either the Hearing Panel or the NAC ruled correctly on the issue relating to FINRA's failure to have timely produced the *Brady* materials, this appeal would not have been necessary. That is literally true of every appeal. Thus, to suggest that this motion should be denied because the NAC already considered the argument misapprehends the point of an appeal.

In short, Mr. Black deserved the opportunity to confront these witnesses[2] with a full quiver of arrows, but that did not happen because FINRA denied him access to relevant exculpatory documents. For all of the reasons above, as well as those described in the Motion, Mr. Black has provided substantial evidence that the Hearing Panel and NAC relied on unreliable and biased witnesses in barring Mr. Black.

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

Mr. Black's Motion demonstrated that the Hearing Panel and NAC each ignored evidence demonstrating that Mr. Black performed the branch inspections at issue. The Opposition dismisses the wide-ranging, tangible evidence Mr. Black offered on a wholesale basis, arguing that "the NAC properly weighed this evidence in determining whether Black's testimony, contradicted the testimony of the Four Testifying Representatives, was credible." (Opposition p. 17). In essence, FINRA argues that because the NAC believed the ex-brokers, all of the contradictory evidence provided by Mr. Black was necessarily wrong or fabricated. As demonstrated above, however, the Hearing Panel and NAC should not have deferred to the ex-brokers, as there was substantial evidence that their testimony was unreliable and biased. Thus, the outright dismissal of all of the evidence provided by Mr. Black is improper.

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.

Mr. Black's Motion is replete with evidence that he did not receive a fair hearing as is mandated by the Securities Exchange Act. Mr. Black did not receive the exculpatory emails and notes mentioned above. Further, there was evidence presented against him at the hearing relating

[2] It bears repeating that the NAC considered the credibility of the ex-brokers to be the central issue. (NAC Decision p. 14). FINRA's argument that the notes and emails, which were inconsistent with or, even, contradicted the ex-brokers, are not exculpatory is wrong.

to branch inspections for which he had not been charged. Thus, he could not properly defend himself. The NAC, as mentioned above, found that the hearing was fair, even though it implicitly admitted that the investigation that served as the impetus for the hearing was not fair. FINRA's Opposition hastily dismisses Mr. Black's arguments that evidence was presented relating to branch inspections for which he had not been charged because the "NAC did not consider alleged improprieties with respect to the other offices." (Opposition p. 18).

FINRA's Opposition is incorrect. The Hearing Panel not only considered evidence about those other branch inspections, but also, incredibly, actually made findings on them. The NAC necessarily reviewed and considered those findings, as well as the evidence that was cited to in the Panel Decision. The Panel Decision repeatedly mentioned branch inspections not at issue, making them an important part of the case. Indeed, the Opposition admits, "the issue of whether David Plaxico [sic] visited Charles Graham's office was alleged in the background section of the Complaint" (Opposition p. 18 FN 9), meaning that from start to finish, Mr. Black was subjected to evidence for alleged violations for which he did not have fair notice and with which he was not charged. The NAC cannot magically snap its fingers and forget the evidence that was presented or travel back in time and give Mr. Black a fair hearing, i.e., one where he actually had notice of the alleged violations for which he was being tried. Because of this, Mr. Black has shown that his hearing was unfair and not in keeping with the mandate of the Securities Exchange Act.

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.[3]

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." Mr. Black showed that the penalties were punitive and not remedial because he no longer makes branch inspections; the conduct that led to the bar. The Opposition argues the "NAC barred Black for testifying untruthfully and fabricating documents, not for failing to inspect offices and maintain records." (Opposition p. 18). However, the root cause of any alleged conduct was, in fact, the inspections and Mr. Black ceased making those well before the NAC Decision was announced. Moreover, barring Mr. Black has no effect towards remediation as there have been no allegations that he ever harmed the public.

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.

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

Mr. Black's Motion showed that he will suffer irreparable harm if the stay is not granted. The Opposition, however, argues that financial and economic consequences do not constitute irreparable harm. The Commission has, in fact, found irreparable harm and granted a stay in analogous situations, where the applicant argued that a permanent bar would serve as a "professional death sentence" from which the he could "never recover." *See In the Matter of the Application of Scattered Corp.*, 52 SEC 1314, 1997 SEC LEXIS 2748 at *6 (Apr. 28, 1997). Mr.

[3] 15 U.S.C.§78o-3(h)(1).

Black will not suffer the "mere injuries" described by FINRA in its Opposition, but rather a professional death sentence as described in *Scattered Corp.*

Because *Scattered Corp.* is on point, the Opposition tries to distinguish the facts and circumstances of that case from Mr. Black's situation. The Opposition argues in *Scattered Corp.* (1) the Commission granted a stay with conditions (in his Motion, Mr. Black suggested that his request be granted upon condition that he not perform branch inspections; (2) the applicant made a substantial case on the merits (Mr. Black has done so, *see* above); and (3) the public interest would be served and the business and employees would be harmed (*see* Mr. Black's Motion p. 18-19) and the applicant would lose the benefit of any reduction in his bar (Mr. Black's career will be destroyed without the stay). Thus, all of FINRA's attempt to distinguish *Scattered Corp.* from Mr. Black's situation fail. Mr. Black 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 Mr. Black's Motion. The Opposition argues that, "Mr. Black's assumption that only violations that directly cause customer harm can result in a bar is mistaken." (Opposition p. 21). But Mr. Black made no such assumption; he merely stated that in his case there has been no harm (or even allegations of harm) done to customers. The Opposition goes on to state, "A Rule 8210 violation, 'will rarely in itself, result in direct harm to a customer.'" (Opposition p. 21). The Opposition is making Mr. Black's point for him. There was no harm and there is no threat of future harm if the stay is granted. Thus, this prong of the test weighs in favor of Mr. Black.

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

Finally, Mr. Black demonstrated that granting his Motion will serve the public interest because Mr. Black will be allowed to continue reporting illegal investment schemes. The

Opposition merely argues that the possible benefit of Mr. Black's continued vigilance is outweighed by the seriousness of the violations that Mr. Black allegedly committed and the "ongoing risk to investors." (Opposition p. 22). Mr. Black has provided evidence that he helped detect fraudulent schemes in the past and, on those occasions, went to the proper authorities. On the other hand, there has been no evidence of any harm to the public caused by Mr. Black. Thus, granting the stay would positively impact the public interest as Mr. Black can continue to report misconduct in the securities industry.

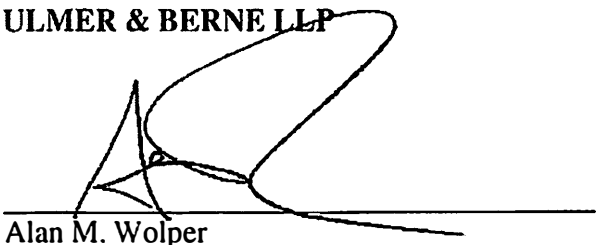
Accordingly, all requirements for the granting of a stay are satisfied: (1) Mr. Black is likely to succeed on appeal (in the alternative, he has at least raised a serious legal question on the merits); (2) he will suffer irreparable harm if the stay is not granted; (3) other parties will not suffer harm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

III. CONCLUSION

For the foregoing reasons, Applicant 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 3rd day of June, 2019.

ULMER & BERNE LLP



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CERTIFICATE OF SERVICE

I hereby certify that Applicants' **REPLY BRIEF IN SUPPORT OF THE EXPEDITED MOTION TO STAY SANCTIONS PURSUANT TO SEC RULE OF PRACTICE 401 AND INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** has been sent to the following parties entitled to notice as follows:

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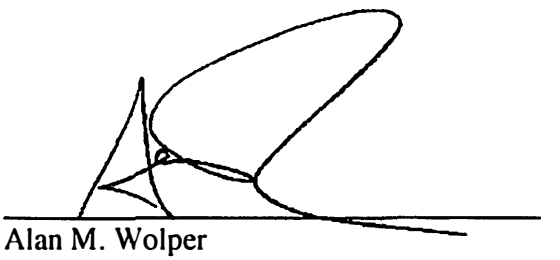
This 3rd day of June, 2019.



Alan M. Wolper

CERTIFICATE OF SERVICE

I, Andrew Love, certify that on this 11th day of June, 2019, I caused the certified record, and three copies of the index to the certified record, in the matter of Southeast Investments, N.C., Inc. and Frank Harmon Black, Administrative Proceeding No. 3-19185, to be served by messenger on:

Vanessa A. Countryman
Acting Secretary
Securities and Exchange Commission
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On this date, I also caused one copy of the index to the certified record to be served via overnight FedEx (and a courtesy copy via email) on:

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Different methods of service were used because courier service could not be provided to Mr. Wolper.

Respectfully submitted,

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