UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

3-19214

In the Matter of:

BRENDAN FEITELBERG

For Review of Action taken by

FINRA

Re: FINRA No. 20180581236

BRIEF BY MEMBER BRENDAN FEITELBERG
IN SUPPORT OF HIS APPLICATION FOR REVIEW

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I. PRELIMINARY STATEMENT

Pursuant to Rule 450 of the Securities and Exchange Commission's (the "Commission") Rules of Practice, Brendan Feitelberg hereby submits this brief in support of his application for review of a decision by the Financial Industry Regulatory Authority ("FINRA") to issue a lifetime bar for failing to respond to an inquiry, despite the fact that FINRA's own record shows Mr. Feitelberg never received actual notice of his suspension or the possibility of a bar and Mr. Feitelberg had a [redacted] during the period in which he was non-responsive.

II. FACTS

On April 26, 2018, FINRA contacted Mr. Feitelberg with questions about a workplace misunderstanding.[1] RBN 000033-34.[2] Mr. Feitelberg sought and received two extensions from FINRA. RBN 000037-38. On July 24, 2018, FINRA sent Mr. Feitelberg a letter stating responses were due August 3, 2018. RBN 000041. FINRA's record makes clear this letter was never received by Mr. Feitelberg. RBN 000042 ("Transaction History" reflecting "NO AUTHORIZED RECIPIENT AVAILABLE").

This makes sense because in July of 2018 Mr. Feitelberg began to feel [redacted] with no clear cause. Feitelberg Affidavit at #2.[3] [redacted] in August 2018 [redacted] *Id.* at #3.

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[1] Mr. Feitelberg was fired from his job in the Spring of 2018 due to confusion regarding a tax lien. RBN 000082-83. He had tax liens with both the Commonwealth of Massachusetts and the federal government. *Id.* Because he had already set up a payment plan with the Commonwealth, he did not appreciate that still constituted a lien and thus only reported the federal government lien to his employer (and, through them, the appropriate regulatory agencies). *Id.*

[2] RBN 000XXX refers to the record bates number corresponding to the certified record provided by FINRA.

[3] Because FINRA has refused to afford Mr. Feitelberg a hearing before its National Adjudicatory Council, Mr. Feitelberg has not had the opportunity to enter this information into the record. Nevertheless, Mr. Feitelberg has included an affidavit regarding this matter, attached as Exhibit A ("Feitelberg Affidavit").

This ultimately [redacted]. *Id.* at #4. [redacted] from this was extensive and lasted well into 2019. *Id.* at #5.

FINRA sent Mr. Feitelberg two letters via registered mail alerting him of a possible suspension or bar and [redacted]) they were both undeliverable. *See* August 20, 2018 Letter, RBN 000047-53, (undeliverable reflected on RBN 0000052-53); September 13, 2018 Letter, RBN 000057-61, (undeliverable reflected on RBN 000059-61). On November 23, 2018, FINRA barred Mr. Feitelberg for life, despite the lack of notice, and sent him a letter alerting him of this action. RBN 000065-66. Although this letter is signed for, Mr. Feitelberg never received the letter, the signature is not his or anyone he knows, and during the time period in question [redacted] at a relative's residence. Feitelberg Affidavit at #7-8. Mr. Feitelberg also reports that the building on Newbury Street where the letter was signed for does not have a concierge service and he never authorized anyone to receive correspondence on his behalf. *Id.* at #9.

Mr. Feitelberg recovered and returned to work in February 2019, only to subsequently discover that, unbeknownst to him, FINRA had issued the lifetime bar on November 23, 2018, for not responding to its inquiry. Mr. Feitelberg retained counsel, gathered the requested documentation, and contacted FINRA. RBN 000070.[4] In May 2019, FINRA initially requested that Mr. Feitelberg respond to its initial questions, which he did. RBN 000081-89. On May 24,

[4] Counsel for Mr. Feitelberg originally reached out to Salvatore Traina, the investigator who was corresponding with Mr. Feitelberg on May 2, 2019. Mr. Traina and undersigned counsel corresponded via email, telephone, and voicemail for a week before the email with Ms. Kolisnyk on May 9, 2019. The emails are not substantive, but insomuch as it is relevant when Mr. Feitelberg reached out to FINRA, FINRA's record is incomplete.

2019, FINRA stated that it would not give Mr. Feitelberg any hearing and that Mr. Feitleberg was barred for life from associating with any FINRA member in any capacity. RBN 000111.[5]

III. ARGUMENT

a. Standard-of-Review

The Commission shall review the "barring of any person from becoming associated with a member of a self-regulatory organization [('SRO') (such as FINRA)]." 15 U.S.C. § 78s (f).[6] To uphold a sanction by a self-regulatory organization ("SRO"), the Commission must determine that the member violated the rule in question, that the rule was applied correctly, and that the rule was "applied in in a manner, consistent with the purposes of this chapter." *Id.* The purposes of the act are broad and include protecting interstate commerce, national credit, the national banking system, insuring "the maintenance of fair and honest markets," and providing for "regulation and control" of securities. 15 U.S.C. § 78b. When the record is unclear to determine whether a bar is the appropriate sanction, remand is appropriate. *See id*; *see also In the Matter of the Application of*

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[5] On August 23, 2018, a mere one business day before this brief was due, FINRA served a Motion to Stay the Briefing Schedule and Dismiss Mr. Feitelberg's Application for Review. FINRA's cookie-cutter Motion to Stay the Briefing Schedule should be summarily denied. FINRA claims such a stay is necessary because the Commission should address procedural issues before substantive ones, but Mr. Feitelberg spends significant portions of this brief addressing those procedural issues and explaining precisely why 1) this appeal is timely, *infra* n.11, and 2) under the doctrine of administrative exhaustion, Mr. Feitelberg's claims are not exhausted, *infra* III.e. Because of the lack of notice to Mr. Feitelberg, this is simply not a straightforward matter and the procedural issues blend with the substantive ones. *See McCarthy v. Madigan*, 503 U.S. 140, 144–45 (1992) ("Exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that the question of the adequacy of the administrative remedy ... [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit."). Thus, because the substantive and procedural issues are inevitably tied together, FINRA's eleventh hour Motion to Stay the Briefing Schedule will do nothing to conserve the resources of the Commission and should be denied.

[6] Because this bar stems from an expedited proceeding, the Commission has long held it is reviewed under only § 78s (f) instead of §§ 78s (e) and (f). § 78s (e) requires the Commission to consider whether FINRA's punishment was "excessive or oppressive" but § 78s (f) does not. While the Commission is bound by its precedents, Mr. Feitelberg believes this is in error and explicitly reserves the right to argue on appeal that the punishment handed out to him was from a final disciplinary proceeding, therefore § 78s (e) applies, and as such the Commission must determine whether this punishment is "excessive or oppressive."

Robert J. Langley For Review of Disciplinary Action Taken by NASD, Release No. 50917, 2004 WL 3486148 at *4 (Dec. 22, 2004) ("We further believe that a remand is necessary to give NASD an opportunity to determine whether a bar is the appropriate sanction. As indicated, Langley was barred based on NASD's expedited procedures, without any hearing or review by any NASD adjudicatory panel. On remand, the parties should more fully develop whether, under the circumstances of this case, barring Langley is consistent with the purposes of the Exchange Act.").

b. Remanding this matter to FINRA for disciplinary proceedings to determine whether a lifetime bar is appropriate punishment for Mr. Feitelberg's actions is consistent with the Commission's prior rulings.

FINRA Rule 8210 requires members to provide FINRA with information when requested. Failure to comply with this rule has led to FINRA issuing numerous lifetime bars from the industry each year. *See, e.g., In the Matter of the Application of Kalid Morgan Jones for review of Disciplinary Action taken by FINRA*, Release No. 3-17852, 2017 WL 1862331 (May 9, 2017); *In the Matter of the Application of Caryl Trewyn Lenahan for Review of Action Taken by FINRA*, Release No. 73146, 2014 WL 3547019 (Sept. 19, 2014). But, as the Commission has repeatedly stressed, not providing information is not an automatic bar. Rather, when FINRA issues a bar under expedited proceedings, whether the member has actual notice of the impending disciplinary notices, suspension, or ban, is critical to the Commission's determination. *See In the Matter of the Application of Destina Mantar for Review of Action Taken by FINRA*, Release No. 79851, 2017 WL 221653 at *4 (Jan. 19, 2017) ("In cases challenging a bar imposed in expedited proceedings where there is reason to believe the applicant did not have actual notice of FINRA's information requests or notices, we have regularly remanded the matter back to FINRA."); *see also In the Matter of the Application of Kevin M. Murphy for Review of Action Taken by FINRA*, Release No. 79016, 2016 WL 5571633, at *4 (Sept. 30, 2016); *Robert J. Langley*, 2004 WL 2973866, at *4; *In the Matter of the Application of Ryan R. Henry For Review of Action Taken by NASD*, Release No.

53957, 2006 WL 1565128, at *3 (June 8, 2006); *In the Matter of the Application of James L. Bari, Jr., For Review of Disciplinary Action Taken by NASD*, Release No. 48292, 2003 WL 21804686, at *2 (Aug. 6, 2003).

Here, the record accurately reflects that Mr. Feitelberg had no notice of any impending suspension or bar. The July 24, 2018 Letter, RBN 000041-42, August 20, 2018 Letter, RBN 000047-53, and September 13, 2018 Letter, RBN 000057-61, were all returned to sender. Thus, remand would be consistent with *Destina Mantar* and related cases.[7]

Remand is also consistent with the Commission's precedents for a wholly separate reason. In *Destina Mantar*, the member sent FINRA the requested information before her application for review was due to the Commission. *Destina Mantar* 2017 WL 221653 at *3. In light of this, the Commission explained:

> The record in this case contains no explanation from FINRA as to why, under these circumstances, a bar was appropriate notwithstanding the August 30 response that Mantar sent to FINRA before a timely appeal. We remand to give FINRA an opportunity to provide this explanation. Absent this explanation, we are unable to determine whether Mantar failed to exhaust her administrative remedies or otherwise opine on the merits of Mantar's appeal.

Id. at *4. "Indeed, FINRA has lifted bars under similar circumstances in previous cases." *Id.* Here, Mr. Feitelberg also responded to FINRA's original request before his application for review

[7] The record in *Destina Mantar* indicates the member was likely unaware of both the initial request for information and the following suspension and bar. Mr. Feitelberg was aware and initially responsive to the initial request. However, this only makes remanding this matter to FINRA for a hearing more important not less, because such a hearing would better build a record of whether Mr. Feitelberg's delay was excusable and what the appropriate punishment is (if any) for his failure to respond while he was [redacted] In any case, for the reasons outlined below, notice of the disciplinary action is the dispositive factor.

was due. RBN 000081-000089.[8] Nevertheless, FINRA upheld its bar and, like in *Destina Mantar*, provided no explanation for why Mr. Feitelberg's response was not sufficient. RBN 000093-94.

Finally, remand is appropriate to allow FINRA to explain how a lifetime bar of someone who was [redacted] and lacked any actual notice of any disciplinary proceedings against him, is consistent with the goals of the Securities Exchange Act of 1934 (the "Exchange Act"). *Cf. Robert Langley*, 2004 WL 2973866, at *3 (Dec. 22, 2004) ("We further believe that a remand is necessary to give NASD an opportunity to determine whether a bar is the appropriate sanction. As indicated, Langley was barred based on NASD's expedited procedures, without any hearing or review by any NASD adjudicatory panel. On remand, the parties should more fully develop whether, under the circumstances of this case, barring Langley is consistent with the purposes of the Exchange Act.").[9] Such an opportunity is critical because, while ensuring timely responses to its inquiries is *generally* a function that supports the purposes of the Exchange Act of 1934, § 78s (f) stresses that the function must support the purposes of the Act as *applied* to Mr. Feitelberg's matter. *Id.* (Commission must determine that the rule was "*applied* in in a manner, consistent with the purposes of this chapter") (emphasis added). It is hard to understand how such an application could support the goals of the Act given Mr. Feitelberg's severe [redacted] and his subsequent response to FINRA before his application for review was due to the Commission.

[8] Contrary to FINRA claims in the May 24, 2019 Letter and as explained in greater depth below, Mr. Feitelberg has not failed to exhaust his administrative remedies and the time to file a review with the SEC had not passed.

[9] In its Motion to Stay Proceedings and Dismiss the Application for Review, FINRA claims Mr. Feitelberg has not provided it with any medical records. *See id.* at 8. FINRA, of course, has not provided Mr. Feitelberg with any opportunity to give it medical records. Furthermore, insomuch as FINRA notes the lack of medical records to defend its bar, remand is appropriate. The Commission has repeatedly stressed to FINRA that "FINRA's assertion in its motion to dismiss is no substitute for FINRA providing an explanation in the record." *Destina Mantar* 2017 WL 221653 at *4.

c. FINRA's lack of actual notice violated the Exchange Act of 1934 and Mr. Feitelberg's procedural due process rights.

15 U.S.C. § 78o-3 (b)(8) requires that FINRA provide "a fair procedure for the disciplining of members" and § 78o-3 (h)(1) requires it to "bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record." The Fifth Amendment to the Constitution states that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. There is currently a circuit split regarding whether due process applies to FINRA proceedings. *Compare Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999) (holding the Due Process Clause does not apply to SRO actions), and *Epstein v. SEC*, 416 Fed. Appx. 142, 148 (3d Cir. 2010) (same), *with Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (applying due process). The Commission need not decide this issue because the requirements under § 78o-3 and the due process clause are effectively the same. *See Cody v. S.E.C.*, 693 F.3d 251, 257 (1st Cir. 2012) ("By statute, FINRA was required to give Cody the substance of procedural due process."); *Gold v. S.E.C.*, 48 F.3d 987, 991 (7th Cir. 1995) ("This statutory fairness requirement is closely related to the fairness requirements derived from the Fifth Amendment's Due Process Clause. We have therefore assessed the fairness of the NYSE's jurisdictional rules and enforcement action against Gold by relying on traditional due process principles.").

In *Hannah v. Larche*, the Supreme Court addressed when sound principles of due process require individuals to be given notice of administrative actions. 363 U.S. 420, 442 (1960). It distinguished between proceedings that "do[] not and cannot take any affirmative action which will affect an individual's legal rights" and ones where "governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals." *Id.* For the former, the Court declined to apply due process protections, but for the latter, which would obviously

include a hearing to permanently bar someone from one of the largest industries in the country, it stressed "it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Id.*; *see also Genuine Parts Co. v. F. T. C.*, 445 F.2d 1382, 1387 (5th Cir. 1971) ("Although it is quite possible to view investigative proceedings and adjudicative proceedings as merely constituent parts of the administrative enforcement process, they have long been recognized as separate and distinct proceedings serving different functions and entitling parties to different rights under the due process clause of the Fifth Amendment."). Indeed, "the parties to the adjudication are accorded *the traditional safeguards of a trial.*" *Hannah* at 363 U.S. 445 (emphasis added); *see also Gold v. S.E.C.*, 48 F.3d 987, 992 (7th Cir. 1995) (applying *Hannah* and declining to require actual notice regarding an SRO investigation only because (unlike here) there was no adjudicatory proceeding implicating "legal rights").

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950); *see also Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (stressing *Mullane* remains the law of the land). "The fundamental requisite of due process of law is the opportunity to be heard. And the 'right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Greene v. Lindsey*, 456 U.S. 444, 449 (1982). When considering whether the method of notice is reasonable, courts consider the importance of the matter pending. *See id.* at 450 (considering "the extent to which the court purports to extend its power."). On one end of the spectrum, a criminal defendant is afforded numerous protections that make it impossible for a court to render a judgement without a defendant

being aware of the charges. When an individual is sued civilly, the protections are slightly less, but still strong because "service of process laws are designed to ensure defendants receive notice in accordance with concepts of due process." *United States v. Jiles*, 102 F.3d 278, 282 (7th Cir. 1996). At the other end of the spectrum, such as when an individual has an option to opt out of a class action, "[c]onstructive notice by publication may be sufficient to satisfy due process." *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 224 (2d Cir. 2012).

Neither the Commission nor any Court has opined on what sort of notice is required by FINRA under either sound principles due process or § 78o-3.[10] But it is clear that the Supreme Court in *Hannah* envisioned that individualized adjudicatory proceeding would not occur unless the affected individual knew about the proceeding. The *Hannah* Court repeatedly emphasized that adjudicatory proceedings comply with principles of due process precisely because they have strong procedural protections, including relating to notice. 363 U.S. at 445 ("the parties to the adjudication are accorded *the traditional safeguards of a trial*") (emphasis added); *id.* at 446-47 (emphasizing the Commission's strong notice provisions). This language, and the totality of *Hannah*, plainly suggests that the Court did not intend for an SRO to hand out substantial, punitive punishment without a member being aware that his career was in jeopardy. Furthermore, an examination of the severity of the punishment FINRA handed out in this matter leads to the same conclusion. *Cf. Greene* 456 U.S. at 450 (considering "the extent to which the court purports to extend its power."). A lifetime bar is "the securities industry equivalent of capital punishment." *Saad v. S.E.C.*, 718 F.3d 904, 906 (D.C. Cir. 2013). Such a punishment is severe and comparable to the types of punishments handed out in criminal proceedings. Thus, it is reasonable to expect

[10] This is because, in each instance where a member has lacked actual notice of his disciplinary action, the Commission has remanded the matter back to FINRA for further review. Undersigned counsel has researched each member in question and FINRA appears to have not permanently barred any of them.

that similar protections would apply, and under § 78o-3, and sound principles of due process, Mr. Feitelberg could not be barred from effectively continuing his career during a disciplinary process that he did not know about because he was severely ill.[11]

d. New Supreme Court precedent suggests that FINRA's punishment of Mr. Feitelberg is impermissible.

As the Commission is currently grappling with *In the Matter of the Application of John M.E. Saad For Review of Disciplinary Action*, Release No. 3-13678r, the Supreme Court's recent ruling in *Kokesh v. S.E.C.*, 137 S.Ct. 1635 (2017), casts considerable doubt on the validity of FINRA's current punishment regime. *See Saad v. Sec. & Exch. Comm'n*, 873 F.3d 297, 304 (D.C. Cir. 2017) ("we can no longer characterize an expulsion or suspension as remedial.").

All punishment is either punitive or remedial. "Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because 'deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e].'" *Kokesh* 137 S.Ct. at 1643 (internal citations omitted). Whereas a remedial sanction "simply returns the defendant to the place he would have occupied had he not broken the law." *Id.* at 1644. "A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 1645 (emphasis added) (internal citations omitted). Because of this, then-Judge Kavanaugh stressed that the D.C. Circuit "can no longer characterize an expulsion or suspension as remedial." *Saad*, 873 F.3d at 304 (J. Kavanaugh concurring). Thus, the D.C. Circuit remanded *Saad* back to

[11] This is particularly true when FINRA knew Mr. Feitelberg did not have knowledge of the disciplinary proceedings. *Cf. Greene* 456 U.S. at 453 (considering the serving party's awareness that the effected individual did not have actual knowledge, in finding notice procedures inadequate).

the Commission for it to consider the implications of *Kokesh* on FINRA's disciplinary regime. That matter is currently pending before the Commission.

i. *A lifetime bar from the securities industry is plainly punitive.*

Likely any bar issued by FINRA, but certainly Mr. Feitelberg's bar, is punitive under the definition laid out in *Kokesh*. It does nothing to "simply return[] the defendant to the place he would have occupied had he not broken the law." *Id.* at 1644. Rather, at best, it is designed to deter others from failing to correspond with FINRA no matter how dire their circumstances. Thus, the bar is punitive under *Kokesh*. *Id.* at 1643 ("Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive... A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.").

ii. *The Commission should remand for FINRA to explain how its rules governing bars for failing to provide requested information to FINRA are in accord with* Kokesh.

Following *Kokesh*, as Judge Kavanaugh explained:

> If FINRA and the SEC must justify expulsions or suspensions as punitive (as I believe they must after *Kokesh*), they will have to explain why such penalties are appropriate under the facts of each case. FINRA and the SEC will no longer be able to simply wave the "remedial card" and thereby evade meaningful judicial review of harsh sanctions they impose on specific defendants. Rather, FINRA and the SEC will have to reasonably explain in each individual case why an expulsion or suspension serves the purposes of punishment and is not excessive or oppressive. Over time, a fairer, more equitable, and less arbitrary system of FINRA and SEC sanctions should ensue.

Saad, 873 F.3d 306. FINRA Rule 9552, in sum and substance, causes a lifetime bar to issue automatically after a predetermined amount of time following an unanswered request for information. The bar is arbitrary, not tailored to the facts of the case, and as outlined above, is plainly punitive. The Commission should remand this matter to FINRA to explain why the

procedure outlined in Rule 9552 complies with *Kokesh*. *See Destina Mantar*, Release No. 79851, 2017 WL 221653 at *5 (remanding to allow FINRA to clarify why bar was lawful).

e. Mr. Feitelberg has not failed to exhaust his administrative remedies, if the doctrine of administrative exhaustion applies to this matter.

In *Destina Mantar*, the Commission declined to apply the doctrine of administrative exhaustion because there was a legitimate question about actual notice and Ms. Mantar provided responses to FINRA's inquiry before her application for review was due to the Commission:

> Although we have previously found that applicants fail to exhaust their administrative remedies by providing a response to Rule 8210 requests as part of their application for review, we have done so because applicants must "provide the requested documents to FINRA in the first instance." Following this course, "instead of attaching documents to [an] application for review by the Commission," allows FINRA to "evaluate[] the sufficiency of [the] response and provide[] a record for us to review." It also allows FINRA to "correct[] any errors in its determination." Indeed, FINRA has lifted bars under similar circumstances in previous cases. The record in this case contains no explanation from FINRA as to why, under these circumstances, a bar was appropriate notwithstanding the August 30 response that Mantar sent to FINRA before a timely appeal. We remand to give FINRA an opportunity to provide this explanation.

Id. at 4; *see also Robert J. Langley*, 2004 WL 2973866 at *3-4 (declining to apply exhaustion doctrine under similar circumstances). Mr. Feitelberg's matter meets both of these criteria. He did not have actual notice of the disciplinary proceeding, which FINRA knew as all of its mailing were returned undeliverable, and he replied to FINRA before his application for review was due to the Commission.[12] Thus, under the Commission's precedents, Mr. Feitelberg has not failed to exhaust his administrative remedies.

[12] Mr. Feitelberg's application for review was due June 24, 2019 (June 23 was a Sunday). An application for review is due within "30 days after the notice of the determination is filed with the Commission *and received by the aggrieved person applying for review.*" SEC Rule of Practice 420 (emphasis added); *see also* 5 U.S.C. § 78s(d)(1). Because Mr. Feitelberg never received notice of the determination in November of 2018, *see* Feitelberg Affidavit at #7-8, his 30-day window did not start at that time. Mr. Feitelberg's 30-day window thus started on May 24, 2019, when FINRA, after reviewing his responses to its original inquiry, sent a final determination that he was barred. *See* RBN 000093-94.

Furthermore, while the Commission need not reach this issue, the doctrine of administrative exhaustion does not apply to Mr. Feitelberg's application for review. "This Court long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts." *McCarthy v. Madigan*, 503 U.S. 140, 144–45 (1992). "Administrative law, however, contains well-established exceptions to exhaustion." *Woodford v. Ngo*, 548 U.S. 81, 103 (2006) (J. Breyer concurring). Indeed, "Exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that the question of the adequacy of the administrative remedy ... [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit." *McCarthy* 503 U.S. at 148 (internal citations omitted) (internal quotations omitted). *Gibson v. Berryhill*, 411 U.S. 564 (1973), is illustrative on this point. In that case, the petitioner was an optometrist who failed to exhaust his administrative remedies when the state board stripped him of his license. Exhaustion was not necessary because the petitioner was mounting a procedural challenge to the nature of the administrative regime itself, rather than a challenge to the merits of the board's decision. *Id.* at 575 ("[T]he clear purport of appellees' complaint was that the State Board of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion."); *see also Barry v. Barchi*, 443 U.S. 55, 63, 99 n.10 (1979) (citing to Gibson and rejecting "contention that Barchi should not have commenced suit prior to exhausting the procedure contemplated under § 8022. Under existing authority, exhaustion of administrative remedies is not required when 'the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.'"); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 696 (3d Cir. 1979) (exhaustion does not apply to NASD's adjudication structure when the "administrative procedure is clearly shown to be inadequate to prevent irreparable injury"). This

is also simply common sense. Requiring a member to appeal to FINRA a FINRA disciplinary action for which they do not have notice is hopelessly circular—you cannot appeal an action you do not know exists. Thus, such an application of the exhaustion doctrine would effectively insulate FINRA from meaningful review regarding whether the member had notice.

Mr. Feitelberg's appeal is specifically and directly about the adequacy of FINRA's procedures. He brings claims that procedures that allow for a lifetime industry bar to someone that does not have actual notice of his disciplinary proceedings (especially when FINRA knows or should know he lacks actual notice) are insufficient under sound principles of due process, and that the procedures allow for a punishment that, under *Kokesh*, are now undeniably punitive. Thus, under *McCarthy*, *Gibson*, and *Barchi*, the doctrine of administrative exhaustion does not apply to Mr. Feitelberg's claims.

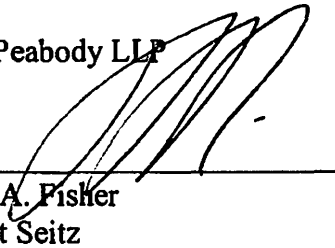
IV. CONCLUSION

"The fundamental requisite of due process of law is the opportunity to be heard. And the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Greene* 456 U.S. at 449 (internal citations omitted) (internal quotations omitted). Furthermore, "The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284 (1983). FINRA's lifetime bar of Mr. Feitelberg while he was [redacted] through a disciplinary process that FINRA's own mailings show he did not know about, violate both of these sacrosanct principles of American jurisprudence. Fortunately, the Commission need not reach any of these difficult questions. The Commission can simply remand this matter to FINRA for it to address the numerous deficiencies in this record (such as why a bar was appropriate notwithstanding the response that Mr. Feitelberg sent to FINRA before a timely appeal, *see Destina Mantar*, 2017 WL 221653 at *5, and why this bar meets the

goals of the Exchange Act of 1934, *see Robert J. Langley*, 2004 WL 2973866 at *2). Thus, for the foregoing reasons, Mr. Feitelberg respectfully requests that the Commission remand this matter back to FINRA or, in the alternative, rescind Mr. Feitelberg's permanent bar.

Respectfully submitted this 26th day of August, 2019.

Nixon Peabody LLP



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Dated: August 26, 2019

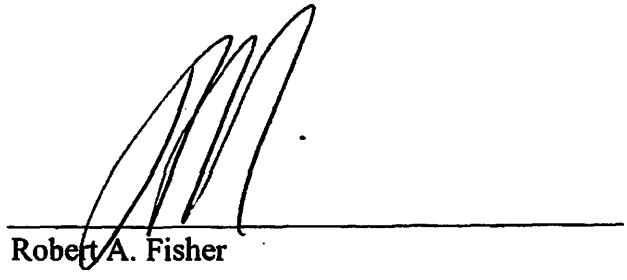
CERTIFICATE OF SERVICE

I hereby certify that Applicant's OPENING BRIEF FOR FINRA APPEAL has been sent to the following parties entitled to notice as follows:

Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Mail Stop 1090
Washington, DC 20549
(One copy via fax and hand-delivery; original and three copies via overnight mail)

Alan Lawhead, Esq.
Office of General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(One copy via email and hand-delivery, and one copy via overnight mail)

This 26th day of August, 2019.



Robert A. Fisher

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: **BRENDAN FEITELBERG** For Review of Action taken by FINRA	Re: FINRA No. 20180581236

AFFIDAVIT OF BRENDAN FEITELBERG
IN SUPPORT OF MEMBER BRENDAN FEITELBERG'S
BRIEF IN SUPPORT OF HIS APPLICATION FOR REVIEW

I, Brendan Feitelberg, hereby state as follows:

1. I have had a career of over ten years in the securities industry.

2. In July 2018, I began to [redacted] with no clear cause.

3. [redacted] in August 2018 with [redacted]

4. [redacted] It [redacted].

5. [redacted] and from mid-July 2018 into 2019 [redacted]

6. As FINRA's record indicates, I never received the letters FINRA sent on July 24, 2018, August 20, 2018, and September 13, 2018.

7. I also never received FINRA's letter dated November 23, 2018, and during that time period I was recovering at a relative's residence.

8. The signature on the November 23, 2018 certified mail receipt is neither mine nor one that I recognize.

9. I did not authorize anyone to accept mail for me and the building in question does not have a concierge service or some other service that receives mail.

Signed under the penalties of perjury this 26 day of August, 2019.

Brendan Feiteiberg