

UNITED STATES OF AMERICA

Before the
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of the Application of :
 : **Administrative Proceeding**
Robert R. Tweed, : **File No. 3-19652**
 :
For Review of Disciplinary Action Taken by :
FINRA :
 :
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**ROBERT R. TWEED'S REPLY BRIEF IN FURTHER SUPPORT OF APPLICATION
FOR MODIFICATION OR REVERSAL OF THE DECISION BY THE NATIONAL
ADJUDICATORY COUNCIL**

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Robert R. Tweed (“Tweed”) hereby submits this reply brief in further support of his application for modification or reversal of the decision by the National Adjudicatory Council (“NAC”) of the Financial Industry Regulatory Authority (“FINRA”) dated December 11, 2019 (the “NAC Decision”) on the following grounds: (1) the NAC erred in upholding the FINRA Office of Hearing Officer’s (“OHO”) Panel’s finding that the statute of limitations in 28 U.S.C. § 2462 does not apply, and further, that Tweed was not unfairly prejudiced by FINRA’s seven-and-a-half year delay in bringing the proceeding against him; (2) the sanction against Tweed of a permanent bar is unwarranted, excessive in light of the OHO Panel’s findings, not supported by the evidence provided at the Hearing, and punitive in violation of General Principle No. 1 of the FINRA Sanction Guidelines; and (3) the NAC erred in upholding the OHO Panel’s finding that Tweed was obligated to reimburse Athenian investors *pro rata*.

In the interest of judicial economy, Tweed will not repeat all of his arguments here, and respectfully refers the Securities and Exchange Commission (“SEC” or the “Commission”) to his opening brief for a full recitation of his arguments.

As explained in detail in Tweed’s opening brief, the Panel erred in not applying the five-year statute of limitations applicable to SEC enforcement actions, codified at 28 U.S.C. § 2462, to this FINRA enforcement action, especially because Tweed was unfairly prejudiced by FINRA’s filing delay. To the extent FINRA cites cases in its opposition where this statute of limitation has been held not to apply to FINRA enforcement actions, FINRA misses the point. Any such cases have been wrongfully decided, as Tweed’s case was wrongfully decided, and should be overturned for reasons dictated not only by logic but by fundamental fairness.

As our Supreme Court eloquently stated, “[S]tare decisis isn’t supposed to be the art of methodically ignoring what everyone knows to be true. Of course, the precedents of this Court

warrant our deep respect as embodying the considered views of those who have come before. But *stare decisis* has never been treated as an inexorable command....To balance these considerations, when it revisits a precedent this Court has traditionally considered the quality of the decision’s reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.”¹

Indeed, it is well-established that the five-year statute of limitations contained in 28 U.S.C. § 2462 applies to SEC enforcement actions. That statute states:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained within five years from the date the claim first accrued, if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.²

The Supreme Court unanimously held in Kokesh that this five-year statute of limitation applies when the SEC seeks monetary civil penalties.³ Other federal courts have held that the statute applies when the SEC commences civil enforcement actions seeking other forms of relief, including disgorgement, censures, and suspensions.⁴ It is important to note that this statute does not mention the SEC, nor any other regulatory entity.

Similar to the SEC, FINRA is a regulatory entity which seeks to maintain the integrity of the securities markets and protect the investing public. “FINRA also has enforcement powers. It operates as a “‘quasi-governmental agency’ authorized ‘to adjudicate actions against members who are accused of illegal securities practices and to sanction members found to have violated the

¹ Ramos v. Louisiana, 140 S. Ct. 1390, 1404–05 (2020) (internal citations and quotation marks omitted).

² 28 U.S.C. § 2462.

³ Kokesh v. S.E.C., 137 S. Ct. 1635, 1638, 198 L. Ed. 2d 86 (2017) (internal citations omitted).

⁴ See, e.g., Id.; Johnson v. S.E.C., 87 F.3d 484 (D.C. Cir. 1996) (SEC proceeding resulting in a censure and a six-month disciplinary suspension of a securities industry supervisor was subject to the five-year statute of limitations period of Section 2462)

Exchange Act or ... [SEC] regulations issued pursuant thereto.”⁵ “As a self-regulatory organization registered under the Securities Exchange Act of 1934, FINRA ‘supervises the conduct of its members under the general aegis of the SEC.’ ...Thus, while FINRA is a private party, Congress granted FINRA ‘quasi-governmental power[]’ to act in a regulatory capacity.”⁶ FINRA’s authority to bring actions against its broker-dealer members, and their associated persons such as Tweed, is directly derived from the SEC. “The Securities Exchange Act of 1934 (‘Exchange Act’) authorizes the Securities and Exchange Commission (‘SEC’) to register self-regulatory organizations (‘SROs’). Pursuant to that authority, the SEC registered FINRA, a non-profit membership corporation comprised of financial brokers and dealers.”⁷ “All rules promulgated by FINRA must be approved by the SEC and must be consistent with the Exchange Act. The SEC also has power to amend any existing FINRA rule to ensure that it comports with the purposes and requirements of the Exchange Act.”⁸ A further example of the SEC’s oversight of FINRA is that FINRA disciplinary decisions are appealable to the SEC first, and then to the United States Courts of Appeal.

Logic and fairness dictate that the same five-year statute of limitations should apply to FINRA enforcement actions as apply to those of the SEC. Under this same principle, FINRA

⁵ Scottsdale Capital Advisors Corp. v. Fin. Indus. Regulatory Auth., 390 F. Supp. 3d 72, 75–76 (D.D.C. 2019) (internal citations omitted) (appeal pending).

⁶ Hurry v. Fin. Indus. Regulatory Auth. Inc., No. CV-14-02490-PHX-ROS, 2015 WL 11118114, at *4–5 (D. Ariz. Aug. 5, 2015), aff’d, 782 F. App’x 600 (9th Cir. 2019) (internal citations omitted); see also National Ass’n of Securities Dealers v. Securities and Exch. Comm’n, 431 F.3d 803, 804 (D.C.Cir.2005) (internal citations omitted) (“By virtue of its statutory authority, NASD wears two institutional hats: it serves as a professional association, promoting the interests of its members and it serves as a quasi-governmental agency, with express statutory authority to adjudicate actions against members who are accused of illegal securities practices and to sanction members found to have violated the Exchange Act or Securities and Exchange Commission regulations issued pursuant thereto.”); Standard Inv. Chartered, Inc. v. Nat’l Ass’n of Sec. Dealers, Inc., 637 F.3d 112, 116–17 (2d Cir. 2011) (holding that FINRA had absolute immunity because, “The statutory and regulatory framework highlights to us the extent to which an SRO’s bylaws are intimately intertwined with the regulatory powers delegated to SROs by the SEC and underscore our conviction that immunity attaches to the proxy solicitation here.”).

⁷ Scottsdale Capital Advisors Corp. v. Fin. Indus. Regulatory Auth., 390 F. Supp. 3d 72, 75–76 (D.D.C. 2019) (internal citations omitted) (appeal pending).

⁸ Id. (internal citations omitted).

should not have an untempered ability to discipline its members for actions that occurred beyond a reasonable time frame, beyond which the SEC itself cannot seek penalties. This is especially so where the sanction imposed is the most punitive of all, such as Tweed's permanent bar at issue here.⁹ The constraints placed on the SEC by the law, should be similarly applicable to a self-regulatory agency that derives its regulatory authority from the very agency whose actions are constrained by the statute of limitations. To hold otherwise would result in inconsistent results and gross unfairness.

A case such as this requires the Commission to take bold and decisive action. No governmental agency wants to take action which disrupts the status quo of prior precedents, but how else can law evolve and progress without such measures? FINRA would like nothing more than to continue to be exempt from the statute of limitation constraints that bind the Commission, but should not be permitted to continue to do so.

⁹ Kokesh v. S.E.C., 137 S. Ct. 1635, 198 L. Ed. 2d 86 (2017); In the Matter of the Application of John M.E. Saad for Review of Disciplinary Action Taken by Finra, Release No. 86751 (Aug. 23, 2019).

In view of the foregoing, Tweed respectfully requests that the SEC reverse in part the NAC's decision to uphold the OHO Panel's imposition of the severe and excessive sanction of a permanent bar against Tweed.

Dated: June 11, 2020

Respectfully Submitted,

ROBERT R. TWEED

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