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May 15, 2020

VIA ELECTRONIC SERVICE

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549-1090

RE: In the Matter of the Application for Review of Blackbook Capital, Inc. and Franklin Ogele, Admin. Proceeding No. 3-19771

Dear Ms. Countryman:

Enclosed please find FINRA's Motion to Dismiss Application for Review and to Stay Briefing Schedule in the above-referenced matter.

Please contact me at (202) 728-8281 if you have any questions.

Sincerely,

/s/ Andrew J. Love

Andrew J. Love

Enclosures

cc: Franklin Ogele
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BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application for Review of

Blackbook Capital, Inc. and Franklin Ogele

File No. 3-19771

FINRA'S MOTION TO DISMISS APPLICATION FOR REVIEW AND TO STAY BRIEFING SCHEDULE

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May 15, 2020

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BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application for Review of

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File No. 3-19771

FINRA'S MOTION TO DISMISS APPLICATION FOR REVIEW AND TO STAY BRIEFING SCHEDULE

I. INTRODUCTION

In May 2014, Blackbook Capital, LLC ("Blackbook"), a former FINRA member firm, entered into a settlement with FINRA to resolve allegations that it overcharged, and mischaracterized fees to, its customers, violated anti-money laundering rules, and failed to preserve emails. Blackbook agreed to pay a $50,000 fine, payable in installments, and to certain undertakings.

Blackbook did not fulfill its obligation to pay the $50,000 fine in full. Consequently, in June 2016, FINRA expelled the firm. FINRA updated its Central Registration Depository ("CRD"®) records to reflect the firm's expulsion for failing to pay the fine, and FINRA's BrokerCheck system made this disclosure available to the public.

Now, nearly four years after FINRA expelled the firm and publicly disclosed the expulsion, Blackbook and its former owner, Franklin Ogele, have filed an application for review with the Commission. Applicants admit that their appeal to the Commission is simply a placeholder in the event that a civil complaint filed against FINRA in federal district court, which alleges nearly identical claims as the application for review, is unsuccessful. Underlying applicants' appeal is their disagreement with the June 2016 entry in CRD and BrokerCheck

concerning Blackbook's expulsion, and allegations that FINRA purposefully and arbitrarily imposed regulatory requirements upon Blackbook beginning in 2012, which eventually rendered the firm unable to pay the $50,000 fine and purportedly drove it out of business.

Against this backdrop, applicants argue that, among other things, FINRA is unconstitutional, abused its discretion by expelling Blackbook because FINRA disclosed that the firm owed the entire $50,000 fine at the time it was expelled, and libeled applicants. They seek from the Commission an order that FINRA expunge the June 2016 disclosure from CRD and BrokerCheck and to publish a public retraction of the disclosure. Applicants also seek an order and judgment declaring FINRA and its Board of Governors unconstitutional, FINRA's actions against applicants to be null and void, and enjoining FINRA's Board from exercising its obligations under federal securities laws. Finally, applicants seek unspecified damages, costs, and fees against FINRA.

The Commission should dismiss applicants' application for review on several grounds. First, applicants' appeal is untimely. Indeed, the alleged actions that Blackbook and Ogele contest are FINRA's June 2016 CRD and BrokerCheck disclosure (which has existed for nearly four years) and their assertion that in 2012 FINRA unfairly and arbitrarily required the firm to start filing monthly Financial and Operational Combined Uniform Single ("FOCUS") reports. The time to seek review of these matters has long passed. Applicants should not now be permitted to seek review of actions that occurred years ago, and they have not shown that extraordinary circumstances warrant extending the statutory appeal deadline by several years.

Second, the Commission should dismiss applicants' appeal because it lacks the statutory jurisdiction to entertain it. There is no FINRA action that is "subject to review" under Section 19(d) of the Securities Exchange Act of 1934 ("Exchange Act"). Thus, none of the four possible

grounds for Commission jurisdiction set forth by Exchange Act Section 19(d) applies to this case. FINRA, by virtue of the June 2016 CRD and BrokerCheck disclosure and the 2012 monthly FOCUS reporting requirement, did not impose any final disciplinary sanction or bar on Blackbook or Ogele, did not deny Blackbook FINRA membership, and did not prohibit or limit the firm or Ogele in respect to access to services offered by FINRA. The Commission should follow its well-established precedent related to its jurisdiction and dismiss applicants' appeal.

Third, Blackbook and Ogele expressly waived any right to challenge their inability to pay the $50,000 fine imposed by the 2014 settlement with FINRA for any reason, including that FINRA unfairly imposed the monthly FOCUS reporting requirement on the firm. For all of these reasons, FINRA urges the Commission to dismiss this appeal.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Blackbook's Background

Blackbook registered as a FINRA member firm in 2003, which it remained until June 2016. (RP 045, 074.)[2] At all relevant times, Ogele was the majority owner of Blackbook and served as its chief executive officer, president, chief compliance officer, and finance and operations principal. (RP 047.) Ogele has not been associated with a firm since June 2016. (RP 093.)

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[1] Pursuant to Commission Rule of Practice 161, FINRA requests that the Commission stay issuance of any briefing schedule while this motion is pending. *See* 17 C.F.R. § 201.161. The Commission should first evaluate the dispositive arguments that applicants' appeal should be dismissed on procedural and jurisdictional grounds before it reaches the underlying substance of this appeal.

[2] "RP ___" refers to the page numbers in the certified record filed by FINRA on May 8, 2020.

B. Blackbook Settles Allegations of Misconduct

In May 2014, FINRA accepted from Blackbook a Letter of Acceptance, Waiver and Consent (the "2014 AWC"). (RP 001.) Pursuant to the 2014 AWC, Blackbook settled allegations that it: (1) charged unreasonable fees and mischaracterized those fees to its customers; (2) failed to search its records in response to requests by the Financial Crimes Enforcement Network of the Department of the U.S. Treasury and failed to conduct an adequate anti-money laundering test; and (3) failed to preserve all of its business-related emails. FINRA censured Blackbook, fined it $50,000, and imposed upon the firm certain undertakings.

Pursuant to the 2014 AWC, Blackbook agreed to pay the $50,000 fine upon notice that the 2014 AWC had been accepted, through a plan whereby the firm agreed to make an initial payment of $12,500 and monthly payments of $1,700 thereafter, until the fine was paid in full. (RP 006, 137.) The 2014 AWC also stated that, "Blackbook specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, the monetary sanction imposed in this matter."[3] (RP 006.)

C. Blackbook Fails to Pay the $50,000 Fine in Full and is Expelled

Blackbook admits that it stopped making its monthly payments in connection with the $50,000 fine before it was paid in full, and its last payment was made in February 2016. *See* Application for Review, at 3-4; *see also* RP 145. Consequently, on June 14, 2016, FINRA

[3] The firm also acknowledged that the 2014 AWC would become part of its "permanent disciplinary record," that the 2014 AWC would be "made available through FINRA's public disclosure program in response to inquiries about its disciplinary record," and that "FINRA may make a public announcement concerning this agreement and the subject matter thereof." (RP 006.) The Firm further agreed that it would not take any action to deny (either directly or indirectly) the allegations contained in the 2014 AWC or to create the impression that the 2014 AWC is without factual basis. (RP 007.)

notified the firm that it had canceled the installment payment agreement in connection with the fine. (RP 011.) FINRA further notified Blackbook that if the remaining balance of the $50,000 fine, $7,599.85, was not paid within seven days, FINRA would expel the firm pursuant to FINRA Rule 8320.[4]

Blackbook did not pay the balance of the $50,000 fine. Consequently, on June 28, 2016, FINRA notified the firm that it had been expelled.[5] (RP 013.) In connection with the Firm's expulsion, FINRA updated Blackbook's CRD records to state that the firm "failed to pay fines and/or costs of $50,000" in connection with the 2014 AWC. (RP 055.) The disclosure in CRD further explained that, "pursuant to FINRA Rule 8320, [Blackbook] is expelled from FINRA membership as of the close of business on June 28, 2016 for failure to pay fines and/or costs." (RP 055-56.) FINRA's BrokerCheck system contained identical disclosures (hereinafter referred to as, the "June 2016 Disclosure").[6] (RP 083-84.)

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[4] FINRA Rule 8320(b)(1) provides that:

> After seven days notice in writing, FINRA may summarily suspend or expel from membership a member that fails to . . . pay promptly a fine or other monetary sanction imposed pursuant to Rule 8310 or cost imposed pursuant to Rule 8330 when such fine, monetary sanction, or cost becomes finally due and payable[.]

FINRA Rule 8310 provides that after complying with its procedural rules, FINRA may sanction a member, including fining a firm, for violations of federal securities laws or FINRA's rules. *See* FINRA Rule 8310(a)(2). FINRA Rule 9216 provides the framework for parties to agree to, and FINRA to accept, a Letter of Acceptance, Waiver and Consent ("AWC").

[5] Blackbook implies that it could not have been expelled by FINRA on June 28, 2016, because on June 21, 2016, it withdrew its membership by filing a Uniform Request for Broker-Dealer Withdrawal. *See, e.g.*, Application for Review, at 4, 24. Under FINRA's By-Laws, a member firm's withdrawal from FINRA membership, however, "shall not take effect until 30 days after receipt [of the firm's resignation] by [FINRA] and until all indebtedness due [FINRA] from such member shall have been paid in full and so long as any complaint or action is pending against the member under the Rules of [FINRA]." *See* FINRA's By-Laws, Article IV, Section 5.

[6] Pursuant to the Exchange Act, FINRA must maintain a system for collecting and

[Footnote cont'd on next page]

D. Blackbook Is Subject to an Expedited Proceeding for Failing to Pay Additional Fees

On July 1, 2016, FINRA further notified Blackbook that it owed FINRA $51,433.45 in fees (which consisted of the $7,599.85 in unpaid fines related to the 2014 AWC, plus unpaid regulatory and arbitration fees unrelated to the 2014 AWC). (RP 015.) FINRA warned the firm that if it did not pay FINRA this amount within 21 days, FINRA would cancel Blackbook's membership pursuant to FINRA Rule 9553.[7]

Blackbook failed to make this payment or to take any other action in connection with the July 1 notice. Consequently, on July 22, 2016, FINRA informed the firm that it had canceled its

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[cont'd]

retaining registration information concerning its members and their associated persons. *See* 15 U.S.C. 78o-3(i). "Registration information" includes "the information reported in connection with the registration or licensing of brokers and dealers and their associated persons, including disciplinary actions, regulatory, judicial, and arbitration proceedings, and other information required by law, or exchange or association rule, and the source and status of such information." *See* 15 U.S.C. 78o-3(i)(5). FINRA collects and maintains this information through its CRD system, which serves as the online registration and licensing database for the securities industry. *See Eric David Wanger*, Exchange Act Release No. 79008, 2016 SEC LEXIS 3770, at *1 n.1 (Sept. 30, 2016). The public does not have access to the information contained in CRD. *See id.*; *see also* http://www.finra.org/industry/crd (last visited May 13, 2020) ("Web CRD is a secure system that only firms and regulators that have been granted access by FINRA can use."). Certain information contained in CRD, however, is available to the public via BrokerCheck. *See* FINRA Rules 8312(a) and (b) (providing that information concerning final disciplinary or regulatory actions against current and former firms reported by regulators on a Uniform Disciplinary Action Reporting Form shall be published in BrokerCheck); *see also Wanger*, 2016 SEC LEXIS 3370, at *1 n.1. "BrokerCheck is a free online tool that enables public investors to research the professional backgrounds of current and former FINRA-registered broker-dealers and their representatives, as well as investment adviser firms and their representatives." *Id.*

[7] FINRA Rule 9553 provides that if a member firm fails to pay any fees, dues, assessment or other charge required to be paid under FINRA's By-Laws or rules, FINRA may issue a written notice stating that the failure to comply within 21 days of service of the notice will result in cancellation of the firm's membership. *See* FINRA Rule 9553(a). Absent any action taken by the firm, the cancelation is effective 21 days after service of the notice. *See* FINRA Rule 9553(d).

membership. (RP 017.) FINRA disclosed information concerning this matter in CRD and BrokerCheck. (RP 057-58, 082-83.)

E. Applicants' Civil Suit

In late December 2019, applicants filed a "Petition for Review of FINRA's Action Under the Administrative Procedures Act and Complaint for Libel/Defamation and Negligence" (the "Complaint") in federal district court in the district of New Jersey. (RP 019-38.) The Complaint asserts six causes of action against FINRA, including many of the same causes applicants assert in the current proceeding. The Complaint remains pending, although FINRA has moved to dismiss it on numerous grounds. (RP 040.)

F. Applicants' Application for Review

In response to FINRA's motion to dismiss the Complaint, applicants filed the instant appeal on April 24, 2020. Indeed, applicants acknowledge that they filed this appeal simply to hedge their bets against an unfavorable ruling on the Complaint, and ask the Commission to take no action in this proceeding until the Complaint is resolved in federal court. *See* Application for Review, at 2; *see also infra* Part III.D.

In the application for review, Blackbook and Ogele assert that the "gravamen" of their appeal "stems from the actions of FINRA, including the publication of falsehood in regard to expulsion of Blackbook from FINRA which publication has damaged, tarnished, and continues to damage and tarnish the reputation of Petitioners."[8] Application for Review, at 3. They argue that the June 2016 Disclosure, whereby FINRA reported that Blackbook had been expelled for

[8] Applicants, however, also characterize their claims related to the June 2016 Disclosure and the 2012 monthly FOCUS report requirements as "ancillary" to their claims that FINRA's Board of Governors is unconstitutional. *See* Application for Review, at 2.

failing to pay the $50,000 fine, is a "blatant falsehood" (because the firm owed only a portion of the $50,000 fine) that caused damage to Ogele when financing that he was seeking in connection with a real estate transaction was withdrawn, in August or October 2019 and purportedly based on the June 2016 Disclosure.

Applicants further assert that Blackbook was unable to pay the $50,000 fine in full because of "unrelenting and unfairly burdensome examinations and extraordinary financial reporting obligation[s] stemming from FINRA's New York City's notorious bias against small firms and in favor of big investment banking firms where FINRA staff usually land enormously lucrative positions after their short gigs at FINRA." Application for Review, at 4. Blackbook and Ogele claim that this started in 2012 (two years *before* Blackbook agreed to the 2014 AWC), when FINRA unfairly singled out the firm and required it to file monthly FOCUS reports.[9] *See* Application for Review, at 7.

The application for review then asserts the following "causes of action" against FINRA: (1) "violation of separation of powers/improper exercise of executive power"; (2) "violation of the appointments clause and the non-delegation doctrine"; (3) "abuse of power and discretion"; (4) "biased and unfair discriminatory regulatory enforcement scheme, including enforcement of SEC Rule 17a-5"; (5) "constructive expulsion"; (6) libel; and (7) "negligence for failure to supervise FINRA/CRD personnel". Blackbook and Ogele seek an order from the Commission

[9] Applicants provide several examples that they claim demonstrate FINRA's bias against them, including actions allegedly taken by FINRA against Ogele's former firm in 2003. *See* Application for Review, at 8. They also point to events that purportedly occurred in 2015 that required Blackbook to record the conversations of its registered representatives pursuant to FINRA's "Taping Rule" as an example of how the monthly FOCUS report requirements "distracted and hobbled" them, ultimately causing the firm to default on its payment of the $50,000 fine under the 2014 AWC. *See* Application for Review, at 22-23.

directing that FINRA expunge the June 2016 Disclosure from CRD (and presumably BrokerCheck) and issue a public retraction. They also seek an order nullifying and voiding FINRA's actions. Moreover, they seek a declaration that FINRA and its Board of Governors are unconstitutional and an order enjoining the board from carrying out its obligations under the Exchange Act. Finally, applicants seek various damages, costs, and expenses (including attorneys' fees) from FINRA.

III. ARGUMENT

The Commission should dismiss this appeal because: (1) the appeal is untimely; (2) the Commission lacks jurisdiction to entertain the appeal; and (3) Blackbook expressly waived its rights to contest its ability to pay the $50,000 fine imposed by the 2014 AWC for any reason, including because FINRA's requirement that the firm file monthly FOCUS reports beginning in 2012 was unduly burdensome and "ultimately led to Blackbook's demise."

A. Applicants' Appeal Is Untimely

The Commission should reject applicants' application for review because it is untimely. Under Exchange Act Section 19(d), a party must file an application for review of an action by a self-regulatory organization within 30 days of notice of the action. *See* 15 U.S.C. § 78s(d)(2); *see also* 17 C.F.R. § 201.420(b). The Commission has "long held that [it] will not extend the thirty-day period for seeking review absent extraordinary circumstances." *Wanger*, 2016 SEC LEXIS 3770, at *9. The extraordinary circumstances exception to timely filing an appeal is "narrowly construed and applied only in limited circumstances." *Michael Ross Turner*, Exchange Act Release No. 81693, 2017 SEC LEXIS 2974, at *16 (Sept. 22, 2017).

Here, applicants' appeal falls well outside of the 30-day statutory deadline. The purported FINRA actions on which Blackbook and Ogele base their appeal occurred in 2012,

when applicants assert that FINRA first required them to file monthly FOCUS reports, and June 2016, when FINRA disclosed Blackbook's expulsion for failure to pay the $50,000 fine.[10] Applicants have not shown that extraordinary circumstances exist that warrant extending the 30-day period for review, and the Commission should decline to do so here. *See Wanger*, 2016 SEC LEXIS 3770, at *8-9 (dismissing application for review as untimely where complained of action, a description of a regulatory order on BrokerCheck, had been published more than three years before the application for review). Indeed, applicants' candid statement that they filed this appeal simply to preserve their rights in the event the federal district court dismisses the Complaint undercuts any claim that extraordinary circumstances exist to allow this late-filed appeal.

Perhaps realizing how far beyond the 30-day deadline they are, applicants claim that they only discovered the negative impact of the June 2016 Disclosure in "August or October 2019," when financing that Ogele sought for a real estate transaction purportedly fell apart because the

[10] Applicants' appeal focuses on disclosure of the firm's expulsion, and not the expulsion itself, and how the monthly FOCUS report filings purportedly caused the firm to go out of business. For example, even where applicants purport to challenge FINRA's expulsion of Blackbook in June 2016 as an "abuse of power and discretion," they focus exclusively on the way that FINRA disclosed the expulsion, and not the expulsion itself. *See* Application for Review, at 19 ("The expulsion of BlackBook for failure to pay $50,000 in fines is an abuse of power and/or discretion . . . Indeed the amount owed to FINRA was only $7,599.85 . . . The violation continues because FINRA has not corrected the record."); *see also* Application for Review, at 29 (asserting claim for negligence for failing to properly supervise CRD personnel to ensure the accuracy of information reported in CRD). Similarly, in connection with their claims of "constructive expulsion," applicants focus on how FINRA unfairly required them to file monthly FOCUS reports, which allegedly led to the firm's closure. *See* Application for Review, at 25-27. Regardless, and even assuming that applicants are challenging the firm's underlying expulsion, they cannot plausibly argue that they were unaware that FINRA expelled the firm when it happened nearly four years ago. Thus, any direct challenge of the expulsion is similarly untimely.

June 2016 Disclosure made Ogele and Blackbook look like "deadbeats."[11] *See* Application for Review, at 3. Similarly, they claim that they only discovered the discriminatory nature of the requirement that Blackbook file monthly FOCUS reports (which FINRA required the firm to file starting in 2012) in April 2019. *See* Application for Review, at 8.

Applicants' self-serving and generalized claims do not constitute extraordinary circumstances necessary to warrant extending the deadline for appeal. *See, e.g., Caryl Trewyn Lenahan*, Exchange Act Release No. 73146, 2014 SEC LEXIS 4589, at *11 (Sept. 19, 2014) (rejecting appeal as untimely and holding that ignorance of action's consequences does not constitute extraordinary circumstances). And, even using applicants' timeline for when they purportedly discovered an appealable FINRA action, their appeal *still* falls well outside of the 30-day deadline. *See Bruce Zipper*, Exchange Act Release No. 81788, 2017 SEC 3107, at *14-15 (Sept. 29, 2017) (dismissing appeal as untimely and finding that even using a later date as the date from which the 30-day appeal period began, applicant's appeal was still 2.5 months late and he provided no justification for his late appeal); *cf. Pennmont Secs.*, Exchange Act Release No. 61967, 2010 SEC LEXIS 1353, at *18-19 (Apr. 23, 2010) ("Even when circumstances beyond the applicant's control give rise to the delay, however, an applicant must also demonstrate that he or she promptly arranged for the filing of the appeal as soon as reasonably practicable thereafter. An applicant whose application is delayed as a result of extraordinary circumstances remains under an obligation to proceed promptly in pursuing appellate recourse.").

[11] Blackbook and Ogele make this claim without mentioning that CRD and BrokerCheck contain a separate disclosure that reflected negatively on their financial wherewithal (i.e., the July 2016 disclosure that FINRA canceled the firm's membership pursuant to FINRA Rule 9553 for failing to pay more than $50,000 in fees and costs, the majority of which were unrelated to the unpaid fine). (RP 057-58, 082-83.)

By applicants' own admissions, they waited seven to nine months to file their appeal after purportedly learning of the June 2016 Disclosure's negative consequences, and 12 months after allegedly discovering that FINRA unfairly required them to file monthly FOCUS reports. Because applicants did not act promptly after their alleged discoveries, but rather waited to file the current appeal as a tactic to hedge against dismissal of the Complaint, the Commission should dismiss this appeal. *See Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 SEC LEXIS 1153, at *10-11 (May 20, 2008) (holding that a "tactical decision" to delay filing a timely appeal "does not constitute extraordinary circumstances" to warrant review of a late-filed appeal).

B. No Statutory Basis for Review Exists Under Section 19(d)

The Commission should also dismiss applicants' application for review because it lacks a statutory basis to exercise jurisdiction. The Commission's authority to review FINRA actions is governed by Exchange Act Section 19(d), which grants the Commission authority to review only four classes of actions by a self-regulatory organization such as FINRA. *See* 15 U.S.C. § 78s(d). Specifically, Section 19(d) authorizes Commission review of a FINRA action only if that action: (1) imposes any final disciplinary sanction on any member (or person associated with a member) of FINRA or participant therein; (2) denies membership or participation to any applicant; (3) prohibits or limits any person in respect to access to services offered by FINRA or member thereof; or (4) bars any person from becoming associated with a member. *See* 15 U.S.C. § 78s(d)(1), (2).

The Commission has ruled repeatedly that these four grounds are the only ones upon which a review of FINRA action can occur. *See Allen Douglas Sec., Inc.*, 57 S.E.C. 950, 954-55 (2004). The Commission cannot review FINRA determinations simply because an applicant

claims "extraordinary circumstances" or "compelling reasons." *Id*. at 955 n.14; *WD Clearing, LLC*, Investment Company Act Release No. 75868, 2015 SEC LEXIS 3699, at *10 (Sept. 9, 2015) (stating that "there must be a statutory basis for us to exercise jurisdiction" in connection with a FINRA action). Nor is an action by FINRA reviewable simply because it has an adverse effect on an applicant. *See Sky Capital, LLC*, Exchange Act Release No. 55828, 2007 SEC LEXIS 1179, at *11 (May 30, 2007).

The Commission should dismiss Blackbook and Ogele's appeal because none of the four jurisdictional grounds under Section 19(d) are present. The FINRA actions that applicants complain of do not qualify as a final disciplinary sanction or a bar. The Commission has "interpreted the term 'disciplinary' to refer to action responding to an alleged violation of an [SRO] rule or Commission statute or rule, or action 'in which a punishment or sanction is sought or intended.'" *Tower Trading, L.P.*, 56 S.E.C. 270, 277-78 (2003) (quoting *Pac. Stock Exch. Options Floor Post X-17*, 51 S.E.C. 261, 266 (1992)).

FINRA, by requiring that Blackbook file monthly FOCUS reports beginning in 2012, and disclosing in June 2016 the firm's expulsion for failing to pay the $50,000 fine in CRD and BrokerCheck, did not employ its disciplinary procedures nor make any determination that Blackbook violated federal securities laws or FINRA rules, actions that are prerequisites to imposing a "final disciplinary sanction" that is reviewable under Section 19(d) of the Exchange Act. *See Allen Douglas Sec.*, 57 S.E.C. at 955-56 ("NASD did not employ its disciplinary procedures, did not make a determination that Allen Douglas had violated a statute or rule, and did not impose a final disciplinary sanction."). Further, FINRA's June 2016 Disclosure whereby it reported Blackbook's expulsion for failing to pay the fine was a collateral consequence of the expulsion—the disclosure itself does not constitute a sanction. *Cf. Wanger*, 2016 SEC LEXIS

3770, at *12 (holding that "FINRA's disclosure of [a Commission order] on BrokerCheck was also not a product of FINRA disciplinary action; rather, it was a collateral consequence of the Commission's Order, and that disclosure did not itself impose any sanction on Wanger").

FINRA also did not take any action against Blackbook or Ogele that qualifies as a denial of membership or participation under Section 19(d). This basis for review is directed at SRO decisions that actually deny applications for membership or impose restrictions on business activities as a condition of membership. *See WD Clearing*, 2015 SEC LEXIS 3699, at *12. Blackbook is not a FINRA member, and Ogele is not associated with a FINRA member (and neither has applied for membership or associational status). FINRA's June 2016 Disclosure, and requiring the firm to file monthly FOCUS reports, does not deny, alter, or otherwise affect applicants' membership or participation in FINRA. *See Wanger*, 2016 SEC LEXIS 3770, at *14-15.

Further, FINRA's June 2016 Disclosure and requirement that the firm file monthly FOCUS reports beginning in 2012 do not qualify as a prohibition or limitation of access to FINRA services. When the Commission has found a denial of access to services, "an SRO had denied or limited the applicant's ability to utilize one of the fundamentally important services offered by the SRO." *Morgan Stanley & Co.*, 53 S.E.C. 379, 385 (1997). Applicants do not, and cannot, identify any services to which they were denied access by virtue of FINRA's CRD and BrokerCheck disclosure and requiring the firm to file monthly FOCUS reports. *See Wanger*, 2016 SEC LEXIS 3770, at *15 (holding that applicant who appealed determination that dispute concerning disclosure on BrokerCheck was ineligible for investigation "does not identify any services to which he has been denied access by virtue of FINRA's BrokerCheck disclosure, and our independent review of the record reveals none").

Although applicants attempt to create contested issues for this appeal by seeking far-reaching relief, applicants' request cannot by itself create a reviewable matter for the Commission under Exchange Act Section 19(d). *See Allen Douglas Sec.*, 57 S.E.C. at 954-55; *WD Clearing*, 2015 SEC LEXIS 3699, at *10; *Sky Capital*, 2007 SEC LEXIS 1179, at *11. Moreover, much of the relief sought is not available to them in connection with this proceeding. For example, the Commission has repeatedly held that it lacks authority to award damages. *See, e.g.*, *Sharemaster*, Exchange Act Release No. 70290, 2013 SEC LEXIS 2597, at *23 (Aug. 29, 2013) ("As we have previously held, Congress has not authorized the Commission in Sections 19(d) and (e) to award damages or direct payments to applicants in SRO proceedings under review."). Similarly infirm are applicants' arguments and various requests for declarations concerning the constitutionality of FINRA's Board of Governors. *See Newport Coast Secs., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911 (Apr. 3, 2020) (holding that the Appointments Clause does not apply to FINRA because it is a "private organization, not an arm of the government"); *Meyers Associates, L.P.*, Exchange Act Release No. 81778, 2017 SEC LEXIS 3096, at *26 n.37 (Sept. 29, 2017) (holding that FINRA is not a state actor and not subject to the Constitution); *Mission Secs. Corp.*, Exchange Act Release No. No. 63453, 2010 SEC LEXIS 4053, at *39 (Dec. 7, 2010) ("self-regulatory organizations, such as FINRA, are not 'Government-created, Government-appointed entit[ies].' FINRA, therefore, is not 'contrary to Article 2 of the Constitution's vesting of executive power in the President,' as Applicants contend").

Further, although applicants repeatedly refer to "discovery" that they anticipate will provide documentation for their myriad unsubstantiated claims, a proceeding to review under Exchange Act Section 19(d) is not the appropriate vehicle for discovery. *See, e.g.*, *Zipper*, 2017

SEC 3107, at *12 ("We have previously rejected requests for discovery related to unsubstantiated allegations that FINRA is biased, and do so again here because Zipper has failed to substantiate any claim of bias."); *Wanger*, 2016 SEC LEXIS 3770, at *21 n.47 (rejecting applicant's request to engage in discovery as not permitted by Commission's rules and finding that regardless, the information sought by applicant was not relevant to the issues of whether he filed a timely application for review or whether the Commission has jurisdiction).

For all of these reasons, the Commission should dismiss applicants' application for review.

C. Applicants Waived Their Right to Appellate Review

If another reason is needed, the Commission should dismiss applicants' appeal because they waived their right to challenge the 2014 AWC, including any claim that they cannot pay the $50,000 fine imposed thereunder. The Commission has stated that an applicant may not appeal any final action contained in an AWC, and "that an appellate waiver in an otherwise valid AWC is presumptively enforceable." *Zipper*, 2017 SEC LEXIS 3107, at *8. Here, applicants do not contest the validity of the 2014 AWC, and they have not, and cannot, overcome the presumption that the 2014 AWC that they agreed to is enforceable.

This includes the waiver provisions set forth in the 2014 AWC. As is relevant to the application for review, the 2014 AWC provided that "Blackbook specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, the monetary sanction imposed in this matter." (RP 006.) Applicants, however, now attempt to argue to the Commission that FINRA's alleged bias against them, as evidenced by FINRA's requirement starting in 2012 that Blackbook file monthly FOCUS reports, harmed the firm and eventually rendered it unable to pay the $50,000 fine in full. Applicants waived any right to claim an

inability to pay the fine, including the assertion that unfairly imposed and onerous reporting requirements (imposed two years before Blackbook agreed to the 2014 AWC) rendered the firm unable to pay the fine in full. The Commission should therefore dismiss applicants' appeal with respect to its claims concerning the FOCUS reports.

D. Applicants' Request to Stay this Appeal Should be Denied

Finally, the Commission should reject applicants' request to stay this proceeding until the federal district court "rules on" the Complaint, which aligns with applicants' acknowledgment that this appeal is simply a placeholder in the event that they are not successful in federal court. Applicants argue that an indefinite delay of this proceeding will "aid the cause of justice in that it would preserve Petitioners rights to bring their grievance before the SEC within the statute of limitations period in the event of unfavorable ruling" on the Complaint. *See* Application for Review, at 2. They further argue that they are likely to prevail in their claims challenging the constitutionality of FINRA.

FINRA urges the Commission to deny applicants' request, particularly where FINRA believes that the current appeal should be dismissed on several grounds—including that applicants' appeal is untimely. Indeed, the facts show that the Commission can dispose of this untimely appeal without waiting for applicants' civil litigation to conclude, and delaying this outcome will not "aid in the cause of justice" as alleged by applicants.

IV. CONCLUSION

The Commission should dismiss applicants' appeal, which in substance is a civil suit against FINRA. Their appeal is untimely in all respects, and the Commission lacks jurisdiction under Exchange Act Section 19(d) over the purported FINRA actions that Blackbook and Ogele

now seek to challenge. Further, applicants waived their right to appellate review of their claims that FINRA was biased against them for requiring them to file monthly FOCUS reports. Thus, dismissal of applicants' appeal is also appropriate on those grounds.

For all of these reasons, FINRA urges the Commission to dismiss this appeal.

Respectfully submitted,

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May 15, 2020

CERTIFICATE OF COMPLIANCE

I, Andrew Love, certify that this brief complies with the Commission's Rules of Practice by filing a motion not to exceed 7,000 words. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 5,436 words.

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CERTIFICATE OF SERVICE

I, Andrew Love, certify that on this 15th day of May 2020, I caused a copy of FINRA's Motion to Dismiss Application for Review and to Stay Briefing Schedule, in the matter of Application for Review of Blackbook Capital, Inc. and Franklin Ogele, Administrative Proceeding No. 3-19771, to be served by electronic mail on:

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