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To: Vanessa Countryman, Esq.
SEC of the Secretary

From: Franklin Ogele

Subject: Admin Proceeding No. 3-19771. Petitioners Reply in Further Opposition to Motion to Dismiss and Leave to File Amended Petition.

Date: June 10, 2020

Via Fax No. 703 813 9793

Number of Pages: 39 (Including Cover Page)

BEFORE THE UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

BLACKBOOK CAPITAL, INC.
FRANKLIN OGELE

Admin Proceeding No. 3-19771

Petitioners

THE FINANCIAL INDUSTRY
REGULATORY AUTHORITY, INC.
Respondent.

PETITIONERS' BLACKBOOK CAPITAL INC. AND FRANKLIN OGELE'S REPLY AND BRIEF IN FURTHER OPPOSITION TO MOTION TO DISMISS BY RESPONDENT, THE FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC. AND MOTION FOR LEAVE TO FILE AMENDED PETITION

Petitioners, BlackBook Capital Inc., ("BlackBook") represented by Franklin Ogele, Esq. and Franklin Ogele, ("Ogele") appearing pro se, files the within Reply and Brief In Further Opposition to Motion to Dismiss by The Financial Industry Regulatory Authority, Inc. ("Respondent") and Motion for Leave to File Amended Petition and will show as follows:

PROCEDURAL POSTURE

1 Petitioners filed the instant petition with the SEC on April 23, 2020.

2 Respondent FINRA filed Motion to Dismiss on or about May 15, 2020.

3 Petitioners responded with a Reply in Opposition to Respondent's Motion to Dismiss and a Motion for Leave to File Amended Complaint on May 21, 2020.

4 Respondent filed a Reply to Petitioners Opposition to Motion to Dismiss and Motion For Leave to File Amended Complaint on June 1, 2020. ("Respondent's June 1st Brief")

Petitioners now files the within Reply and Brief In Further Opposition to Motion to Dismiss by Respondent and Motion for Leave to File Amended Petition and argues as follows:

It appears from our reading of Respondent's June 1st Brief that Respondent is of the position that our case should not proceed for two reasons: (1) Untimeliness and (2) lack of SEC jurisdiction. We address the Untimeliness challenge first and proceed with the issue of SEC's lack of jurisdiction.

COMMON OPERATIVE FACTS AS TO TIMELINESS

Petitioners discovered that FINRA had engaged in discriminatory imposition of SEC Rule 17a-5 on BlackBook in April 2019 when Ogele was representing a client in the purchase of a broker-dealer similar to BlackBook which never carried customer accounts nor cleared customer trades and which was not required to file monthly FOCUS Reports, an imposition that was contrary to the law and which drove BlackBook out of business.

At the time of the imposition of the discriminatory monthly FOCUS Reporting requirement [which Ogele was later to discover it was not being required of other similarly situated broker-dealers] Ogele objected to the imposition and sought to know why BlackBook was being required to file monthly FOCUS Reports. FINRA's Tanya Crosbourne, supervised by Evelyn Krieger, concealed the facts of

the discriminatory imposition and insisted that FINRA was requiring other broker dealers who do not carry customer accounts nor clear customer trades to file monthly FOCUS Reports.

During all times relevant to this litigation, Petitioner, Ogele would diligently search SEC's Edgar to see whether other broker-dealers similar to BlackBook were being asked to file monthly FOCUS Report without success. The concealment of the facts of the disparate practice and the fact that information of monthly FOCUS filing is not publicly available on SEC Edgar, made it impossible for Petitioners to timely uncover the wrongdoing.

On the libel action, Petitioners discovered the injury or harm to Ogele's reputation caused by FINRA's false publication of BlackBoook being expelled for failure to pay $50,000.00 fine, when the actual amount was only $7,599.85 – a 557% exaggeration, in August 2019 when a funding source refused to do business with Ogele because of FINRA's false publication that Ogele was associated with a $50,000.00 deadbeat. *See Exhibit 1 - Affidavit of Ogele.*

I. THE UNTIMELINESS DEFENSE

1. PETITIONERS CONSTITUTIONAL CHALLENGE TO FINRA.

Petitioners have challenged the constitutionality of FINRA on the grounds of separation of powers, appointments clause and non-delegation doctrine.

42 U.S. Code § 1983 provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ..."

There is no statutes of limitations contained within the language of 42 U.S. Code § 1983. However, in Owens v. Okure, 488 US 235, 240 (1989), the U.S. Supreme Court ruled that 42 U.S. § 1988, "requires courts to borrow and apply to all §1983 claims the one most analogous state statute of limitations.

Therefore as to the untimeliness of Petitioners' constitutional claims, Petitioners aver the principles of state discovery rule, equitable tolling rule, continuing violation rules in rebuttal to the untimeliness defense asserted by Respondent.

2 BIASED AND UNFAIR DISCRIMINATORY REGULATORY ENFORCEMENT SCHEME, INCLUDING ENFORCEMENT OF SEC RULE 17A-5.

The cause of action accrued when Petitioner BlackBook operated out of New York and continued until 2016 when BlackBook operated out of New Jersey. Respondent appears to be focusing on the date of the imposition of the discriminatory regulatory regime as opposed to when Petitioners ***discovered*** the discrimination. The controlling principle is the date of the discovery of the discriminatory imposition of Rule 17a-5 on BlackBook not the date harm causing action was taken.

Therefore, as to the discriminatory regulatory enforcement action, the following legal principles apply to rebut the untimeliness defense asserted by Respondent:

i DISCOVERY RULE

Generally, the statute of limitations begins to run from the time of the accrual of the action (Prudential Ins. Co. of Am. v. U.S. Gypsum Co., 828 F. Supp. 287, 297-298 (D.N.J. 1993)). However, in the interests of equity, New Jersey has adopted the discovery rule (Prudential, 828 F. Supp. at 298). The discovery rule delays the accrual of an action until the plaintiff discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts that form the basis of a cause of action or provide a basis for an actionable claim (Henry v. N.J. Dep't of Human Servs., 9 A.3d 882, 892 (N.J. 2010)).

Petitioners ***discovered*** that FINRA had engaged in discriminatory imposition of SEC Rule 17a-5 on BlackBook in April 2019 when Ogele was representing a client in the purchase of a broker-dealer similar to BlackBook which never carried customer accounts nor cleared customer trades and which was not required to file monthly FOCUS Reports, an imposition that was contrary to the law and which drove BlackBook out of business.

ii EQUITABLE TOLLING

Equitable tolling, unlike the discovery rule, "presumes claim accrual." Oshiver v. Levin, Fishbein, Sedran & Berman, F. 3d 1380, 1390 (3d Cir. 1994), abrogated on other grounds by Rotkiske, 890 F. 3d 422. Rather than delaying the start of a

limitations period, it "step in to toll, or stop, the timing of the statute of limitations in the light of established equitable considerations" Id. To demonstrate a basis for equitable tolling, a plaintiff must show three elements: "(1) that the defendant actively misled the plaintiff; (2) which prevented the plaintiff from recognizing the validity of her claim within the limitations period; and (3) where the plaintiff's ignorance is not attributable to her lack of reasonable due diligence in attempting to uncover the relevant facts." Cetel v. Kirwan Fin. Grp., Inc. 460 F. 3d 494, 509 (3d. Cir. 2006). See also (Prudential Ins. Co. of Am. v. U.S. Gypsum Co., 828 F. Supp. 287, 303 (D.N.J. 1993).)

At the time of the imposition of the discriminatory monthly FOCUS Reporting requirement [which Ogele was later to discover it was not being required of other broker-dealers] Ogele objected to the imposition and sought to know why BlackBook was being required to file monthly FOCUS Reports. FINRA's Tanya Crosbourne, supervised by Evelyn Krieger, concealed the facts of the discriminatory imposition and insisted that FINRA was requiring other broker dealers who do not carry customer accounts nor clear customer trades to file monthly FOCUS Reports. The concealment of the facts of the disparate practice and the fact that information of monthly FOCUS filing is not publicly available on SEC Edgar, made it impossible for Petitioners to timely uncover the wrongdoing.

Therefore, as to the untimeliness defense relating to the discriminatory regulatory enforcement claim, Petitioners assert the discovery rule or in the alternative the equitable tolling rule[1].

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[1] *New Jersey has also adopted the doctrine of fraudulent concealment, which tolls the statute of limitations to prevent wrongdoers from benefiting by fraudulently*

3 LIBEL

Defamation is the all-encompassing and overarching legal definition and term for the spoken, written publication of a false assertion of fact to a third party, which subsequently results in injury or damage to another party's reputation. Common law legal jurisdictions categorize defamation as a civil wrong or injury, as such, defamation may commonly be referred to as the "tort of defamation" or "defamation of character."

The libel cause of action we allege accrued when Petitioner BlackBook operated out of New Jersey. Therefore, New Jersey legal precedent on the tolling of statute of limitations apply. N.J. Stat. § 2A:14-3 provides that action for libel or slander shall be commenced within 1 year next to the publication.

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*concealing a cause of action until the statute of limitations has run (Prudential Ins. Co. of Am. v. U.S. Gypsum Co., 828 F. Supp. 287, 300 (D.N.J. 1993)). The doctrine tolls the running of the statute until the plaintiff discovers the cause of action or discovers facts that reasonably put him on notice of it (Prudential, 828 F. Supp. at 300). For example, if a plaintiff alleges fraud and the doctrine applies, the statute of limitations accrues on the date the fraud was or reasonably should have been discovered by the plaintiff (Bauer v. Bowen, 164 A.2d 357, 361 (N.J. Super. Ct. App. Div. 1960)). Equally, In general, New York Fraud law is governed not only by the common law causes of action of fraudulent inducement and fraudulent concealment among others, but also by the New York Statute, the '**Deceptive Practices Act**'. In New York, the statute of limitations for fraud causes of action is the greater of six years from the date of the fraud or two years from the date it was discovered, or reasonably could have been discovered through due diligence (CPLR §213(8); see Cusimano v Schnurr, 137 AD3d 527, 531[1st Dept. 2016]). Petitioners reserve the right to move for a leave to add fraudulent concealment in their cause of action.*

However, Petitioners ***discovered*** the injury or harm to Ogele's reputation caused by FINRA's false publication that BlackBoook was expelled for failure to pay $50,000.00 fine [when the actual amount was only $7,599.85 – a 557% exaggeration] in August 2019 when a funding source refused to do business with Ogele because of FINRA's false publication that Ogele was associated with a $50,000.00 deadbeat.

Therefore, as to Petitioners libel claim, the following legal principles apply to rebut the untimeliness defense asserted by Respondent:

i DISCOVERY RULE

Generally, the statute of limitations begins to run from the time of the accrual of the action (Prudential Ins. Co. of Am. v. U.S. Gypsum Co., 828 F. Supp. 287, 297-298 (D.N.J. 1993)). However, in the interests of equity, New Jersey has adopted the discovery rule (Prudential, 828 F. Supp. at 298). The discovery rule delays the accrual of an action until the plaintiff discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts that form the basis of a cause of action or provide a basis for an actionable claim (Henry v. N.J. Dep't of Human Servs., 9 A.3d 882, 892 (N.J. 2010)).

ii CONTINUING VIOLATION THEORY

A plaintiff may have a viable claim under the continuing violation theory, which is "a judicially created doctrine . . . [that] has developed as an equitable exception to the statute of limitations". Bollinger v. Bell Atl., 330 N.J. Super. 300, 306 (App. Div.), certif. denied, 165 N.J. 491 (2000). The doctrine provides that when an

individual experiences "a continual, cumulative pattern of tortious conduct, the statute of limitations does not begin to run until the wrongful action ceases." Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999). The premise underlying the doctrine is that conduct becomes actionable because of its "'continuous, cumulative, synergistic nature.'" Id. at 273 (quoting Bustamento v. Tucker, 607 So. 2d 532, 542 (La. 1992)); see also Ali v. Rutgers, 166 N.J. 280, 286 (2000) (reaffirming "existing jurisprudence" as articulated in Wilson, supra, 158 N.J. 272).

As we alleged in our Petition, the libel on Ogele is of "continuous, cumulative and synergistic nature" because FINRA has not bothered to correct the falsehood.

Therefore, as to Petitioners libel claim, Petitioners assert the discovery rule or in the alternative the continuing violation rule as rebuttal to Respondent's untimeliness defense.

4 NEGLIGENCE FOR FAILURE TO SUPERVISE FINRA/CRD PERSONNEL

The cause of action arose in 2016 when BlackBook operated out of New Jersey and is directly related to the libel action. As we allege in our Petition, Respondent owed a duty of care to Petitioners to ensure that its CRD Personnel are properly supervised so as to not enter falsehoods in FINRA's CRD, a publicly accessible platform.

Respondent appears to be focusing on the date of the negligent supervision of FINRA CRD resulting in entry of the falsehood in FINRA'S CRD as opposed to when Petitioners discovered the harm. Petitioners assert that the controlling principle is the date of the discovery of the harm, the date that Petitioner discovered that the false publication that Ogele was associated with a $50,000.00 deadbeat, caused a

financing source to withdraw doing business with Ogele. The earliest of the discovery date was August 2019.

Under N.J. Stat. § 2A-14-1, the limitations period for property related claim is 6 years from the accrual date. Accrual date for negligence claim is the date of the act or omission giving rise to the claim or the date the injured party ***discovers,*** or reasonably should have discovered that he may have a basis for an actionable claim. Hardwicke v. Am. Boychoir Sch., 902 A. 2nd 900, 925 (N.J. 2006).

Petitioners ***discovered*** the injury or harm to Ogele's reputation caused by FINRA's negligent supervision of the CRD Personnel resulting in the false publication of BlackBoook being expelled for failure to pay $50,000.00 fine [when the amount owed was only $7,599.85 – a 557% exaggeration] in August 2019 when a funding source refused to do business with Ogele because of FINRA's false publication that Ogele was associated with a $50,000.00 deadbeat.

Therefore, as to Petitioners negligence claim, Petitioners assert that the following legal principles apply to rebut Respondent's untimeliness defense:

i DISCOVERY RULE

Generally, the statute of limitations begins to run from the time of the accrual of the action (Prudential Ins. Co. of Am. v. U.S. Gypsum Co., 828 F. Supp. 287, 297-298 (D.N.J. 1993)). However, in the interests of equity, New Jersey has adopted the discovery rule (Prudential, 828 F. Supp. at 298). The discovery rule delays the accrual of an action until the plaintiff discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts that form the basis of a cause

of action or provide a basis for an actionable claim (Henry v. N.J. Dep't of Human Servs., 9 A.3d 882, 892 (N.J. 2010)).

ii CONTINUING VIOLATION THEORY

A plaintiff may have a viable claim under the continuing violation theory, which is "a judicially created doctrine . . . [that] has developed as an equitable exception to the statute of limitations". Bollinger v. Bell Atl., 330 N.J. Super. 300, 306 (App. Div.), certif. denied, 165 N.J. 491 (2000). The doctrine provides that when an individual experiences "a continual, cumulative pattern of tortious conduct, the statute of limitations does not begin to run until the wrongful action ceases." Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999). The premise underlying the doctrine is that conduct becomes actionable because of its "'continuous, cumulative, synergistic nature.'" Id. at 273 (quoting Bustamento v. Tucker, 607 So. 2d 532, 542 (La. 1992)); see also Ali v. Rutgers, 166 N.J. 280, 286 (2000) (reaffirming "existing jurisprudence" as articulated in Wilson, supra, 158 N.J. 272).

As we allege in our Petition, the effect of FINRA's negligent conduct is of "continuous, cumulative and synergistic nature" because FINRA has not bothered to correct the falsehood posted on CRD by FINRA's negligently supervised CRD Personnel.

Therefore, as to Respondent's untimeliness defense to the negligent supervision claim, Petitioners assert the claim is not untimely based on the 6 years limitations period under N.J. Stat. §2A-14-1 negligence claim. In the alternative, Petitioners assert discovery rule or in the alternative continuing violation rule.

5 BREACH OF IMPLIED CONTRACT AND BAD FAITH

The limitation period for non-sales contractual disputes New Jersey is 6 years. See N.J. Stat. § 2A-14-1. In New York, the limitations period for bad faith claim is also 6 years. See Gahnney v. State Farm Ins. Co., 56 F. Supp 2d 491, 495 (D.N.J. 1999).

The cause of action accrued when Petitioner BlackBook operated out of New York and continued until 2016 when BlackBook operated out of New Jersey. At the time BlackBook became a member of FINRA, there existed an implied contract pursuant to which FINRA was to act in good faith and deal fairly with BlackBook. The imposition of unwarranted, unjustified, and extraordinary monthly financial reporting obligation on BlackBook which neither cleared customer trades nor carried customer accounts was a breach of implied contract and an act of bad faith by FINRA.

Petitioners ***discovered*** that FINRA had breached the implied contract to act in good faith and deal fairly by engaging in discriminatory imposition of SEC Rule 17a-5 on BlackBook in April 2019 when Ogele was representing a client in the purchase of a broker-dealer similar to BlackBook which never carried customer accounts nor cleared customer trades and which was not required to file monthly FOCUS Reports, an imposition that was contrary to the law which drove BlackBook out of business.

Therefore, as to any untimeliness defense asserted by Respondent on Petitioners breach of implied contract and bad faith, the following legal principles apply:

i DISCOVERY RULE

Generally, the statute of limitations begins to run from the time of the accrual of the action (Prudential Ins. Co. of Am. v. U.S. Gypsum Co., 828 F. Supp. 287, 297-298 (D.N.J. 1993)). However, in the interests of equity, New Jersey has adopted the discovery rule (Prudential, 828 F. Supp. at 298). The discovery rule delays the accrual of an action until the plaintiff discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts that form the basis of a cause of action or provide a basis for an actionable claim (Henry v. N.J. Dep't of Human Servs., 9 A.3d 882, 892 (N.J. 2010)).

ii NEW YORK'S EXCEPTION TO THE 6 YEARS LIMITATIONS PERIOD

Under New York law, the general statute of limitations applicable to contractual dispute is also six years. C.P.L.R. §3211(a)(5). The cause of action accrues, and the statute of limitations begins to run, "at the time of the breach." Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399, 402 (1993). An exception to this rule exists, however, where a contract imposes a duty of "continuing performance over a period of time." Where such a continuing duty is imposed, "each successive breach may begin the statute of limitations running anew." Guilbert v. Gardner, 480 F.3d 140, 150 (2d Cir. 2007) (applying Bulova Watch v. Celotex, 46 N.Y.2d 606 (1979)).

The implied contract we allege, imposes a duty of "continuing performance over a period of time" i.e., over the course of BlackBook's membership of FINRA and "each successive breach" i.e., FINRA's requirement that BlackBook file monthly FOCUS Report [which was not required of other similarly situated broker-dealers] caused "the statute of limitation running anew." FINRA continued to require that

BlackBook file monthly FOCUS Report until on or about May 2016. Therefore under New York law, the limitations period continued to run anew on or about May 2016. The Petition was commenced in April 2020 which is within the limitations period.

Therefore, as to any untimeliness defense asserted by Respondent on Petitioners breach of implied contract and bad faith claim, Petitioners assert their lawsuit is not untimely based on the "each successive breach" exception rule. In the alternative, Petitioners assert discovery rule.

II THE JURISDICTION OF THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Petitioners initially brought this lawsuit in the United Stated District Court of New Jersey on December 30, 2019. In response, Respondent moved for Motion to Dismiss on, among other grounds, Petitioner's failure to exhaust administrative remedies under 15 U.S. Code § 78s. *See pg. 3, Exhibit 2.*

Petitioners have now filed their complaint with the SEC to "exhaust their administrative remedies" and Respondent is again objecting that the SEC has no jurisdiction to hear Petitioners grievance. We respectfully submit that Respondent may not be on both sides of the legal argument.

CONCLUSION

In view of the foregoing, we ask the Commission to DENY Petitioners Motion to Dismiss and stay action on our Petition pending a ruling by Hon. Judge Michael Vasquez, USDJ, United States District Court of New Jersey.[2]

MOTION FOR LEAVE TO FILE AMENDED PETITION

In our Motion for Leave to File Amended Complaint, Petitioners moved to add Breach of Implied Contract and Bad Faith as a cause of action. Petitioners, in their brief, have provided the legal basis for the motion for leave to file amended petition and respectfully pray the SEC rule on the motion based on the brief already submitted.

[2] *The Commission may also choose to dismiss our Petition on jurisdictional grounds at which point Petitioners would immediately seek appellate de novo review, with a motion to consolidate the amended Petition with the case currently before Judge Vasquez.*

Respectfully submitted.

Dated this 10th June 2020

/s/Franklin Ogele

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New York Bar # 2364974
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Newark, New Jersey 07102
Phone: 973 277 4239
Fax: 862 772 3985
As Pro Se Petitioner
And as Counsel for Petitioner, BlackBook Capital Inc.

CERTIFICATE OF SERVICE

I, Franklin I. Ogele, an attorney, certify that on June 10, 2020 I served the foregoing Petition on Respondent by service on the counsel of record as follows:

Andrew Love
Associate General Counsel
FINRA
1735 K. Street, NW
Washington, DC 20006
(202) 728 – 8281
Andrew.love@finra.org

/s/ Franklin Ogele
Franklin I. Ogele

EXHIBIT 1

STATE OF New Jersey *
COUNTY OF Union * **Affidavit**

Before me, the undersigned authority, personally appeared Franklin I. Ogele and who being by me duly sworn, deposed the following:

1 I am President and majority shareholder of Plaintiff, BlackBook.

2 During on or about August and October 2019, I sought financing on a Phase 1, $60,000,000 real estate development project in Myrtle Beach, SC[1] and for a $100,000,000 hotel and condominiums development in St Thomas, United States Virgin Islands.

3 The funding sources conducted a search of my name on the internet and withdrew from the transaction after the search disclosed that I was associated with BlackBook expelled by FINRA for failure to pay $50,000.00 in fine.

4 I was not aware of the harm to my reputation and business interest caused by FINRA's publication of expulsion of BlackBook for failure At all times relevant to this litigation, Ms. Tanya Crosbourne, CPA was the BlackBook's Coordinator at Defendant, FINRA.

5 In or about 2012[2], FINRA imposed a monthly FOCUS Reporting requirement on BlackBook.

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[1] *The total projected capital outlay for the 26 buildings, 520 Units, Summit Shores, Myrtle Beach, SC development is $134,641,970.*

[2] *The exact date of the imposition would be determined in discovery.*

6 Upon information and belief, the FINRA official who imposed the monthly FOCUS Reporting requirement on BlackBook was Ms. Evelyn Kriegel, currently a FINRA Deputy District Director.

7 The imposition was discriminatory because other similarly situated broker-dealers were not required to file monthly FOCUS Reports.

8 Unlike Audited Annual Report required of broker-dealers and available on SEC's Edgar, information as to who files monthly FOCUS Report is not publicly available; as a result, it was difficult to uncover the discriminatory practice imposed on BlackBook by FINRA.[3]

9 When I inquired as to whether other broker-dealers who do not carry nor clear customer trades were being asked by FINRA to file monthly FOCUS Reports, FINRA's Tanya Crosbourne concealed the facts of the discriminatory enforcement regime from me, insisting that FINRA was requiring similar firms, i.e., firms that do not carry nor clear customer accounts, to file monthly FOCUS Reports.

10 During all times relevant to this litigation, I occasionally searched SEC's Edgar to see whether other broker-dealers similar to BlackBook were being asked to file monthly FOCUS Report without success.

11 The active concealment of the facts of the disparate practice and the fact that information of monthly FOCUS filing is not public, made it impossible for me to timely uncover the wrongdoing.

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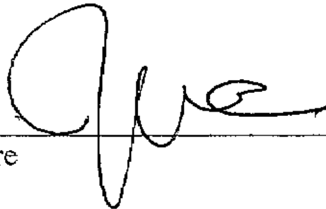
[3] *See, for example,* https://www.sec.gov/cgi-bin/browse-edgar?company=blackbook+capital+&owner=exclude&action=getcompany, *for BlackBook and* https://www.sec.gov/cgi-bin/browse-edgar?company=AARDVARK+SECURITIES+LLC&owner=exclude&action=getcompany, *for Aardvark Securities LLC showing only Audited Annual Reports filed in the FOCUS Report formats but not monthly FOCUS Reports.*

12 I only found out about the discriminatory regulatory regime when in or about April 2019, I was representing Client A in the proposed purchase of Broker-Dealer B, a FINRA member firm similar to BlackBook, and upon investigation, discovered that Broker-Dealer B was not required by FINRA to file monthly FOCUS Reports.

I make the above statement based on information and belief and I am aware that if they are found to be willfully false, I may be subject to punishment.



Signature

SUBSCRIBED AND SWORN TO BEFORE ME on this the 10 day of June, 20 20, by Franklin I. Ogele.

Notary Public in and for
Union County, New Jersey
My commission Expires on 01-24-2023

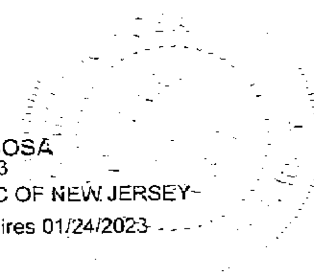


EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BLACKBOOK CAPITAL, INC., and FRANKLIN OGELE,	)	Civil Action No. 2:19-cv-21772-JMV-JBC
Plaintiffs,	)	
v.	)	
THE FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC., et al.,	)	
Defendants.	)	

DEFENDANT FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.'S

REPLY IN SUPPORT OF MOTION TO DISMISS

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Defendant Financial Industry Regulatory Authority, Inc. ("FINRA") submits this Reply in support of its Motion to Dismiss Plaintiffs Blackbook Capital, Inc. ("Blackbook") and Franklin Ogele's ("Mr. Ogele") (collectively "Plaintiffs") First Amended Complaint ("Complaint").

I. ARGUMENT

The Exchange Act requires Plaintiffs to exhaust their administrative remedies, and Plaintiffs' Opposition simply ignores this inconvenient reality. Because all of the asserted claims arise from FINRA's exercise of its regulatory authority under the Exchange Act, it is also entitled to absolute immunity from this harassing litigation. No court in this country has ever allowed FINRA to be sued for regulating firms and brokers under the Exchange Act. More than half of Plaintiffs' brief also argues that FINRA's existence and regulatory conduct violate the United States Constitution. However, Plaintiffs fail to cite even one case that states FINRA is a state actor capable of violating their alleged constitutional rights. By not rebutting the law that states there is no private right of action against FINRA under the Exchange Act, Plaintiffs concede the point. Plaintiffs likewise ignore the argument that many of their asserted claims do not exist as a matter of law, and instead offer an irrelevant equitable tolling argument that does not apply to their alleged tort claims. Nothing asserted in the Opposition changes the

NASD, 875 F. Supp. 230, 233-35 (S.D.N.Y. 1995) (dismissing complaint against FINRA where plaintiffs failed to exhaust administrative remedies regarding alleged violations of FINRA rules).

Courts consistently refuse to allow private enforcement of the Exchange Act beyond the mechanisms set forth in the Act itself and an SRO's rules. *See Scottsdale Capital Advisors, Inc. v. FINRA*, 844 F.3d 414, 419, 424 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1838 (Apr. 24, 2017) (holding district court lacked subject matter jurisdiction over complaint that FINRA was acting outside of its regulatory jurisdiction and misinterpreting its authority and that objections must be channeled through the SEC and courts of appeals); *Browne v. NASD*, 2006 U.S. Dist. LEXIS 35507 at *15-21 (N.D. Tex. May 31, 2006) (dismissing claims related to a NASD disciplinary hearing for failure to exhaust administrative remedies); *Dobbins v. NASD*, 2007 U.S. Dist. LEXIS 61767, at *7 (N.D. Ohio Aug. 22, 2007) (Exchange Act provides "the exclusive judicial remedy for complaints arising from the NASD's enactment and interpretation of its rules").

If Plaintiffs believed FINRA's rules governing financial filing requirements are unfair the exclusive remedy is to petition FINRA's regulator, the SEC, pursuant to Section 19(b) of the Exchange Act. From there, Plaintiffs may appeal to the Court of Appeals pursuant to Section 25 of the Exchange Act. *See, e.g.*, *Dobbins*, 2007 U.S. Dist. LEXIS 61767 at *6-7 (rather than challenging application of FINRA Rule

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3070, broker's exclusive remedy lies in the appeal to the SEC and then to the United States Court of Appeals).

Plaintiffs also fail to dispute that instead of exercising its statutory rights to contest FINRA's regulatory action, Blackbook entered into an AWC, with the advice of counsel, and waived its available administrative and judicial remedies. *See* Motion, pp. 16-17. To allow Plaintiffs to pursue these claims in this forum, after Blackbook voluntarily waived required administrative and judicial remedies, would lead to the absurd result of allowing plaintiffs to get out of required administrative remedies simply by waiving them. This cannot be the law. *See* *Santos-Buch v. FINRA*, 591 F. App'x. 32, 33 (2d. Cir. 2015).

Plaintiffs seek to avoid the congressionally-established framework by challenging FINRA's regulatory actions and FINRA rules in this Court without first pursuing the administrative review process mandated by the Exchange Act. Accordingly, the Court is without subject matter jurisdiction to hear the claims, and it should dismiss them pursuant to Fed. R. Civ. P. 12(b)(1).

B. FINRA's Regulatory Immunity Is Absolute And Neither Converts FINRA Into A State Actor Nor Creates Any Inconsistency

1. FINRA Is Entitled To Absolute Regulatory Immunity

The Opposition also fails to address the long line of cases holding that FINRA has absolute regulatory immunity when acting in its regulatory capacity. *See* Motion, pp. 19-22. There is no dispute that this action against FINRA arises

exclusively from FINRA's exercise of its regulatory functions. *See*, Opposition, p. 2 ("the gravamen of the lawsuit is that FINRA expelled Blackbook for failing to pay $50,000 in fines arising from Complaint No. 2011025700901 when the amount owed on the $50,000 was only $7,599.85 . . ."). Regulating firms like Blackbook, entering into regulatory settlements, publishing those settlements, expelling firms for failure to pay those settlements, and reporting that expulsion all fall directly within FINRA's regulatory duties mandated by the Exchange Act. *See* 15 U.S.C. § 78o-3(i).

2. *FINRA Is Not a State Actor*

Plaintiffs' constitutional claims also fail because Courts have held without exception that FINRA is a private entity and not a state actor. *See* Motion, pp. 26-27; *see also First Jersey Sec., Inc.*, 605 F. 2d at 699 n.5 ("NASD is not a state agency; therefore, First Jersey is unable to state a claim under section 1983"); *Epstein v. SEC*, 416 F. App'x 142, 148 (3d Cir. 2010) ("[Appellant] cannot bring a constitutional due process claim against [FINRA], because [FINRA] is a private actor, not a state actor").

To establish constitutional violations, Plaintiffs "must demonstrate 'that in denying plaintiff's the constitutional rights, the defendant's conduct constituted state action.'" *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002) (quoting *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999);

see also Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (finding that origin and history of the Fourth Amendment shows it "was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies"); *Sybalski v. Indep. Grp. Home Living Program, Inc.*, 546 F.3d 255, 256-57 (2d Cir. 2008) (court dismissed First Amendment claims and other claims where plaintiff failed to plead state action).

In this case, Plaintiffs fail to demonstrate the requisite state action for their constitutional claims and offer no case law that would contravene longstanding precedent that FINRA is not a state actor. Instead, Plaintiffs argue that when FINRA (then NASD) acquired the regulatory operations of the New York Stock Exchange (in 2007), FINRA somehow ceased to be a self-regulatory organization and thus cases decided before 2007 are inapplicable.[1] *See* Opposition, p. 9, n. 37. This argument conflicts with the Exchange Act and ignores the reality that FINRA is a private, not-for-profit Delaware corporation and self-regulatory organization registered with the SEC as a national securities association. *See* 15 U.S.C. § 78o-3.

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[1] FINRA was formerly known as the National Association of Securities Dealers, Inc. ("NASD"). On July 30, 2007, FINRA acquired the member regulation, enforcement and arbitration operations of the New York Stock Exchange ("NYSE") and changed its corporate name to FINRA. The SEC approved this name change, and this transaction did not change the primary role of FINRA as a self-regulatory organization responsible for regulating the securities industry. *See* Exchange Act Rel. No. 34-56145 (July 26, 2007), 72 F.R. 42169 (Aug. 1., 2007).

To be clear, FINRA is not a state actor or a government agency. It does not receive state or federal funding. No government official serves as a FINRA employee, and the government does not appoint any FINRA employees or officers. *See Buscetto v. FINRA*, 2012 U.S. Dist. LEXIS 65116, *7 (D. N.J. May 9, 2012) ("FINRA is a self-regulatory organization registered with the Securities and Exchange Commission ("SEC")); *McGinn Smith & Co. v. FINRA*, 786 F. Supp. 2d 139, 147 (D.D.C. 2011) ("Courts have repeatedly held that FINRA is a private entity and not a government functionary") (citations omitted); *Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 2010 U.S. Dist. LEXIS 19174, *1 (S.D.N.Y. Mar. 1, 2010) ("It is patent that the consolidation that transferred NASD's and NYSE's regulatory powers to the resulting FINRA is, on its face, an exercise of the SRO's delegated regulatory functions and thus entitled to absolute immunity"), *aff'd*, 637 F.3d 112 (2d Cir. 2011).

Plaintiffs attempt to bootstrap their flawed argument by relying on a law review article advocating "reform" for FINRA's role in securities regulation. *See* Opposition, pp. 4-10. Plaintiffs also mistakenly rely on language from the IRS to support their state actor argument. *Id.* at 8. There is no question that FINRA exercises regulatory authority delegated to it via the Exchange Act. Tax treatment accorded to FINRA, like its regulatory immunity, does not convert FINRA into a

state actor. Nor have Plaintiffs provided an ounce of support for this misguided theory.

3. *There Is No Inconsistency Between FINRA's Absolute Regulatory Immunity and Status as a Private Entity*

Contrary to Plaintiffs' unsupported assertions (Opp., pp. 1, 4-10), there is no inconsistency between the fact that FINRA is not a state actor and the absolute immunity it receives when performing its regulatory duties. In addressing this exact issue, the court in *Scher v. NASD*, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005) held "it is by no means 'inconsistent' to find that, on the one hand, the NASD exercises insufficient state action to trigger constitutional protections . . . while nevertheless holding that the NASD is entitled to absolute immunity in the exercise of its quasi-public regulatory duties." *See also Barbara v. NYSE*, 99 F.3d 49, 58 (2d Cir. 1996), *aff'd,* 99 F.3d 49 (2d Cir. 1996) ("Although the Exchange is a private, rather than a governmental entity, immunity doctrines protect private actors when they perform important governmental functions"); *North v. Smarsh, Inc.*, 160 F. Supp. 3d 63, 78, 86-87 (D.D.C. 2015) (finding that FINRA was absolutely immune for its regulatory acts and also finding that FINRA was not a "federal agency" for purposes of the Administrative Procedures Act); *Lucido v. Mueler*, 2009 U.S. Dist. LEXIS 89775, *11, 18-19 (E.D. Mich. Sep. 29, 2009) ("Courts have held without exception that [FINRA] is a private actor, not a state

actor" and finding that FINRA is not an "agency" under the Privacy Act), *aff'd*, *Lucido v. FBI*, 427 F. App'x. 497 (6th Cir. Aug. 22, 2011).

Plaintiffs accuse FINRA of abusing its regulatory power and of improperly regulating Blackbook. Whether these allegations are accurate (which they are not) is immaterial. The accusations arise from FINRA's exercise of its regulatory power and fall squarely within FINRA's regulatory duties. Because FINRA's absolute regulatory immunity bars these claims and because FINRA is not a state actor, the Complaint should be dismissed in its entirety.

C. Plaintiffs Ignore, And Thus Concede, No Private Right Of Action Exists Against FINRA Under The Exchange Act

Plaintiffs also fail to rebut the cases cited by FINRA holding that there is no private right of action under the Exchange Act to sue FINRA for its regulatory acts or omissions in connection with its duties as a securities regulator. *See* Motion, pp. 22-24; *see also North v. Smarsh, Inc.*, 160 F. Supp. 3d at 77 ("The Exchange Act governs securities regulation, as well as the role of SROs, such as FINRA. It does not provide a right of action for common-law torts, such as spoliation claims") (*citing In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110 (D.C. Cir. 2008)). Those same cases squarely rebut the argument that constitutional and state law claims – like the ones asserted here – can proceed against FINRA for its regulatory actions. *Id.* Because no private right of action

exists against FINRA for exercising its regulatory authority, the Complaint must be dismissed without leave to amend.

D. Plaintiffs Ignore, And Thus Concede, That Many Of Their Claims Do Not Exist As A Matter Of Law

Plaintiffs fail to rebut that counts 1, 2, 3 and 4 are not legally cognizable claims. *See* Motion, p. 25. Having failed to respond to this argument in their Opposition, Plaintiffs concede that such claims cannot survive a motion to dismiss.

E. Plaintiffs' Equitable Tolling Arguments Fail

Even if Plaintiffs could avoid every other legal obstacle, the statute of limitations on their libel and negligent supervision claims has lapsed. Indeed, FINRA argued that these two specific claims are barred by the statute of limitations, and Plaintiffs have offered no argument to the contrary. *See* Motion, pp. 27-28. Even if Plaintiffs' equitable tolling argument was meant to extend to these two claims, equitable tolling would not save these claims.

In Plaintiffs' own words, their libel and negligent supervision claims hinge on FINRA's allegedly false publication that "Blackbook was expelled for failing to pay $50,000.00 in fines." Am. Compl. ¶¶ 74, 85. As such, Plaintiffs' libel and negligent supervision claims accrued on June 29, 2016, when FINRA published Blackbook's failure to pay the sanction and resulting expulsion. *See* Motion, pp. 11, 28. Because a libel claim has a one-year statute of limitations from the date of publication, Plaintiffs had to bring their libel claim by June 29, 2017. *See* N.J.S.A.

2A:14-3 ("Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander"). Similarly, because their negligent supervision claim relates to the June 29, 2016 publication and because it has a two-year statute of limitations from the date of accrual, Plaintiffs should have brought their negligent supervision claim by June 29, 2018. N.J.S.A. 2A:14-2. Plaintiffs failed to bring either claim within the limitations period, waiting instead until December 26, 2019, and equitable tolling arguments do not save these claims.

II. CONCLUSION

This lawsuit is an impermissible, collateral attack on a final regulatory settlement that Plaintiffs voluntarily entered into with FINRA. Plaintiffs arguments are inherently flawed, and FINRA's Motion to Dismiss should be granted. The Complaint should be dismissed with prejudice.

Dated: March 23, 2020

Respectfully submitted,

By: */s/ John P. Mitchell*

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CERTIFICATE OF SERVICE

I certify that, on March 23, 2020, the foregoing document was served electronically by the Court's CM/ECF system and United States First Class Mail upon:

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By: */s/ John P. Mitchell*
John P. Mitchell