UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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| IN THE MATTER OF THE APPLICATION OF: | ) | ADMIN. FILE NO. 3-19892 |
| ROBERT L. BRYANT, III | ) | **REPLY BRIEF IN SUPPORT OF APPLICATION FOR REVIEW OF ACTION TAKEN BY FINRA AND TO SET ASIDE STATUTORY DISQUALIFICATION** |
| For Review of Action Taken by FINRA | ) | |

As acknowledged by FINRA in its Opposition Brief, the sole basis for its statutory disqualification of Petitioner Bryant is 15 U.S.C. §§78c(a)(39)(F),78o(b)(4)(H)(ii). That statute provides that a person is statutorily disqualified if such person is subject to a final order of a state securities regulator that is "based on violations of laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct." Here, the Nebraska Department of Banking and Finance (the "NE Department") made clear—on at least two separate occasions—that the subject Consent Order with Mr. Bryant is <u>not</u> based on any violations of laws or regulations prohibiting fraudulent, manipulative or deceptive conduct ("FMD conduct"). This, alone, should be determinative and require that FINRA's statutory disqualification be set aside as not based in fact.

FINRA, however, would have this Commission ignore the NE Department's detailed investigation and conclusion that there was no FMD conduct in favor of FINRA's unilateral pronouncement to the contrary. But the Nebraska regulators are in the best position to interpret and apply their own laws, which FINRA acknowledges are not identical to Exchange Act Rule 10b-5 on which FINRA solely relies. Moreover, it was the NE Department that conducted the

factual investigation surrounding Mr. Bryant's conduct; FINRA did not conduct any factual investigation or even conduct an interview of Mr. Bryant before disqualifying him. When FINRA's own Department of Enforcement eventually did do such an investigation into the very same conduct and entered into an AWC with Mr. Bryant, even FINRA declined to find that Mr. Bryant had engaged in any FMD conduct, concluding only that Mr. Bryant had violated FINRA Rule 2010 with regard to observing high standards of commercial honor and just and equitable principles of trade, and FINRA Rule 4511 by causing Mr. Bryant's prior firm to maintain inaccurate books and records.

To allow FINRA to invoke statutory disqualification on this record would be unjust and improper. Significantly, FINRA's Brief in Opposition cites no decisions upholding statutory disqualification where a state's regulators, like Nebraska's Department of Banking and Finance, have affirmatively found no FMD conduct.

For these and other reasons discussed more fully below, Petitioner Bryant respectfully renews his request that the Commission review FINRA's SD Notice and set aside FINRA's determination that the Nebraska Consent Order subjects him to statutory disqualification.

## RESPONSIVE ARGUMENT

### 1. The NE Department's repeated holdings that the Consent Order is not based on violations of any laws prohibiting FMD conduct should be determinative.

FINRA does not dispute that the Form U6, filed by the NE Department, provides that the Consent Order with Mr. Bryant is not a "final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct." Instead, FINRA claims that it has the right to simply ignore the findings reflected in the Form U6 and issue a contrary determination. FINRA has cited no authority for such a proposition, and not one of the multitude of decisions

cited by FINRA in its Opposition Brief upholds a statutory disqualification where, as here, the state securities regulators have expressly determined that there is no FMD conduct.

The lack of any authority for FINRA's arguments comports with the reality that it is the state regulators, not FINRA, who are situated to review and assess the relevant conduct. Here, the regulators in Nebraska were the ones who reviewed the documents, interviewed Mr. Bryant, and came to the conclusion that there was no FMD conduct based on their construction of Nebraska's own laws. Conversely, FINRA did no investigation other than reading the Consent Order and did not even interview Mr. Bryant before statutorily disqualifying him. Indeed, although FINRA states that it "would have been derelict in its duties … if it did not question the characterization of the [Consent] Order by the [NE] Department on its Form U6" (Brief in Opposition, p. 13), there is no evidence in the record that FINRA in fact questioned, or even contacted, the NE Department. Contrary to FINRA's repeated characterization, Petitioner Bryant is not arguing that "a state regulator's characterization of an order on its Form U6 is the *only* relevant consideration" in determining statutory disqualification (Brief in Opposition, p. 10)(emphasis in original), but, rather, that some modicum of factual inquiry must be required of FINRA if it seeks to act in contradiction to the state regulator's express determinations.

The Form U6 submitted by the NE Department was not, as FINRA portrays in its Opposition, "nothing more than a box they [the state commissions] check or do not check", but was the end result of a lengthy investigation conducted by the ultimate trier of fact. To the extent there could be any legitimate concern that 'checking off a box' on the Form U6 is somehow fraught with potential error or risk of inconsistency[1] as FINRA suggests in its Opposition (Brief in

[1] FINRA has provided no evidence supporting such an assertion.

Opposition, fn. 11), the NE Department prepared a separate letter duly reiterating its holding that Mr. Bryant's conduct was not FMD conduct. (R. at 000021)

FINRA's continued insistence that Mr. Bryant is still subject to statutory disqualification notwithstanding the Nebraska regulators' clear and repeated affirmations that he did not commit fraudulent conduct is untenable. The NE Department is best suited to construe its own laws, and it duly determined that the Consent Order was not based on any Nebraska laws that prohibit fraudulent conduct. It was the NE Department, not FINRA, that was the finder of fact. FINRA should not be permitted *ex post facto* to substitute its judgment for that of the Nebraska regulators who actually conducted the investigation.

Because the NE Department duly determined that the subject Consent Order with Mr. Bryant is <u>not</u> based on any violations of laws or regulations prohibiting fraudulent, manipulative or deceptive conduct, FINRA's statutory disqualification, respectfully, should be set aside as not based in fact and contrary to its rules.

**2. Nothing in the Consent Order Compels a Different Result**.

The fact that the Consent Order references a Nebraska statute that is similar to Exchange Act Rule 10b-5 should not compel a different result. Although FINRA repeatedly characterizes the Nebraska statute as "Nebraska's statute prohibiting fraudulent practices" (See *e.g.*, Brief in Opposition at p. 10), Nebraska's statute is not defined as such. Rather, Nebraska's statute is broader and is defined as "fraudulent *and other prohibited practices*." Accordingly, simply because the Consent Order references a violation of Nev. Rev. Stat. §8-1102(1) does not mean that the violation was based in fraud but, only, that it was some "prohibited practice." Of course, the fact that the NE Department confirmed in two separate documents that Mr. Bryant's conduct was

not fraudulent, manipulative or deceptive establishes that it must have been some "other prohibited practice" as the statute contemplates.[2]

Further, nothing in the Consent Order uses terms such as fraudulent, manipulative or deceptive to describe Mr. Bryant's conduct.[3] The Consent Order (which Mr. Bryant entered into without admitting or denying the allegations) merely indicated that Mr. Bryant "had signed customer signatures on five New Account Documents" without any attribution of deceit or even intent. (R. at 000001-00007). Although FINRA argues that signing a customer's name is "inherently deceptive," there has been no such finding that Mr. Bryant was acting fraudulently, manipulatively or deceptively in signing several names on what were duplicative, purely administrative forms that were internal to his then-employer.

Indeed, in all the decisions relied on by FINRA to argue that unauthorized signatures should be deemed "inherently" deceptive, the subject individuals were involved in elaborate and purposeful schemes to defraud customers and to seize ill-gotten gains. See *Nicolas S. Savva,* Exchange Act Release No. 72485, 2014 SEC LEXIS 5100 (June 26, 2014) (individual who had at least 10 customer complaints and two regulatory complaints engaged in unauthorized consumer transactions, making unsuitable customer recommendations and engaging in high pressure sales tactics as part of a "boiler room" operation that the Commission noted were "serious" and not "technical in nature"); *The Dratel Group, Inc.*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035 (Mar. 17, 2016) (individual purposefully conducting illegal trades by purchasing securities and waiting to allocate the trades until he saw how they performed (*i.e*, cherry-picking

[2] At a minimum, the Consent Order should be deemed to be ambiguous, thereby requiring the introduction of evidence, which would include the Form U6, as to the intent of the Consent Order.

[3] Throughout its Brief in Opposition, FINRA repeatedly describes Mr. Bryant's conduct as "improper" or "deceptive", but there is no such language in the Consent Order to that effect.

the best trades for himself) and receiving ill-gotten gains of approximately $489,000); *Richard P. Sandu*, Exchange Act Release No. 70161, 2013 SEC LEXIS 2346 (Aug. 12, 2013) (individual purposefully misrepresenting account balances and misappropriating at least $308,000 by fraudulently adding costs to financial planning engagement agreements after the clients had already signed them); *Brendan E. Murray*, Initial Decisions Release No. 332, 2007 SEC LEXIS 1486 (July 10, 2007) (individual intentionally creating false invoices that inflated amounts due to vendors in order to falsely secure payment and fraudulently seize the difference for his own personal benefit).

Here, there was no evidence of any scheme, purposeful or otherwise, to defraud customers or secure any ill-gotten gains. Mr. Bryant signed five of his existing customers' names on purely administrative forms confirming the addresses and financial profiles for customers who had been Mr. Bryant's clients for many years. (See Bryant Aff., at ¶ 3) Such forms were never used to create new accounts and did not result in any transfer of funds in or out of any accounts. (Id.) The forms did not impact any of the clients' financial condition, effectuate securities trades or otherwise negatively impact the clients' positions in any way; they were purely administrative forms, internal to his employer. (Id.) Further, Mr. Bryant had no prior regulatory violations or any customer complaints in his career spanning more than 20 years. (Id. at ¶ 2).

Indeed, if Mr. Bryant's conduct were so inherently fraudulent or deceptive as FINRA now claims it to be, FINRA's own Department of Enforcement would have made such a determination when it reviewed the same misconduct a year and a half later. Instead, FINRA agreed through its AWC with Mr. Bryant that Mr. Bryant had only violated FINRA Rule 2010 with regard to observing high standards of commercial honor and just and equitable principles of trade, and FINRA Rule 4511 by causing Mr. Bryant's prior firm to maintain inaccurate books and records.

(R. at 000009-000017). Even FINRA did not characterize Mr. Bryant's conduct as fraudulent, manipulative or deceptive and did not invoke any fraud-based FINRA rules. Instead, and acknowledging the lesser nature of the misconduct, Mr. Bryant received only a three-month suspension and a $5,000 fine. For FINRA to now claim that the very same conduct should warrant statutory disqualification is unsupportable and an unjust interpretation and application of section 3(a)(39) of the Securities Exchange Act.

Because neither the express terms of the Consent Order, nor the nature of Mr. Bryant's misconduct underlying the Consent Order, supports FINRA's imposition of statutory disqualification, FINRA's statutory disqualification should, respectfully, be set aside.

**3. Neither the Exchange Act's purpose, nor the public interest is served, through statutory disqualification of Mr. Bryant.**

Finally, FINRA contends that it issued the SD Notice to "further the purposes of the Exchange Act's statutory disqualification provisions and to ensure Bryant's continued participation was in the public interest and did not create an unreasonable risk of harm to the markets or investors." (Brief in Opposition, p. 17). But the purpose of statutory disqualification cannot be met where the state regulators have confirmed that there was no violation of any Nebraska laws prohibiting FMD conduct—the sole basis for FINRA's SD Notice.

Likewise, with no determination that Mr. Bryant has acted fraudulently, manipulatively or deceptively, there is no public interest served by statutorily disqualifying him. Mr. Bryant has had a long and positive career in the securities industry as a registered representative that continued uninterrupted for more than twenty years without incident.[4] To uphold the SD Notice on these

[4] FINRA argues that these and other extenuating facts outlined in Mr. Bryant's prior Brief and Affidavit are not relevant here, but only at such time that "Mr. Bryant may seek to associate with a member firm through a FINRA eligibility proceeding." (Brief in Opposition, fn. 12). Arguing that Mr. Bryant must wait to bring forward any of these facts until the remote possibility of a MC-

facts and when the NE Department and even FINRA's own Department of Enforcement both determined that there were no violations of any law or regulation that prohibit FMD conduct would be contrary to the basic principles that underpin both FINRA's and the Commission's disciplinary systems.

## CONCLUSION

Based on all of the foregoing, Mr. Bryant renews his request that the Commission review FINRA's SD Notice and set aside FINRA's determination that the Nebraska Consent Order subjects Mr. Bryant to statutory disqualification.

Respectfully submitted,

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400 application, however, is akin to the same arguments FINRA made, and the Commission rejected, in *Acosta*. Specifically, the Commission held that merely because an individual may be able to persuade a FINRA member firm to sponsor a MC-400 application on his behalf does not negate the fact that the SD notice—which otherwise acts as a bar—is immediately reviewable. *Gregory Acosta,* Exchange Act Release No. 89121, 2020 SEC LEXIS 3589 (June 22, 2020). As in *Acosta*, FINRA should not be able to simply brush away any analysis of the underlying facts here when its SD Notice has the immediate impact of a bar and an eligibility proceeding is likely to never happen due to the realities of the industry.

## CERTIFICATE OF SERVICE

I, Jennifer A. Lesny Fleming, certify that on this 16th day of November, 2020, I caused the foregoing Reply Brief In Support of Application For Review of Action Taken By FINRA And To Set Aside Statutory Disqualification, in the matter of the Application for Review of Robert L. Bryant, III, Administrative Proceeding No. 3-19892, to be served by electronic service on:

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