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April 1, 2021

VIA ELECTRONIC MAIL

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U.S. Securities and Exchange Commission
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Re: Robbi J. Jones and Kipling Jones Company, Ltd.
Admin. Proc. File No.: 3-20209

Dear Sir or Madam:

Enclosed please find Appellants' Brief in Support of the Application for Review and Appellants' Motion Requesting Oral Argument in the above-captioned matter. Pursuant to Exchange Act Release No. 88415, Appellants' previously filed Notice of Appeal, and FINRA's Unopposed Motion to Extend Time for Filing the Certified Record, the parties have agreed to accept electronic service of filings in this matter.

Sincerely,

By: /s/ *Matthew P. Hoxsie*
Steven M. Felsenstein
William B. Mack
Matthew P. Hoxsie

U.S. SECURITIES & EXCHANGE COMMISSION
Washington, D.C.

In the Matter of the Application of ROBBI J. JONES Houston, TX and KIPLING JONES & COMPANY, LTD. Houston, TX For Review of Disciplinary Action Taken by FINANCIAL INDUSTRY REGULATORY AUTHORITY	**APPELLANTS' MOTION REQUESTING ORAL ARGUMENT** **Admin. Proc. File No.: 3-20209** **Date of Service** **April 1, 2021**

Appellants Robbi J. Jones and Kipling Jones & Company, LTD. (collectively, the "Appellants"), respectfully request oral argument with respect to their appeal in the above captioned matter, pursuant to Rule 451 of the Rules of Practice.[1]

Rule 451 provides that oral argument is appropriate where "the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument." 17 C.F.R. § 201.451(a). As set forth in Appellants' concurrently filed Brief in Support of the Application for Review, Appellants raise a challenge to the appropriateness of a lifetime bar, which involves factual and procedural questions as to which the Commission will benefit from counsel's clarification and elucidation. Indeed, the Appellants have raised substantial issues regarding the treatment of the record in this matter. Similarly, Appellants raise constitutional challenges which involve complex questions of law and are appropriate for argument. For example, Appellants raise a challenge to the procedural protections provided by FINRA's rules and the private/governmental-actor status of FINRA. Either FINRA is a state actor,

[1] 17 C.F.R. § 201.451.

which mandates that it provide due process, and for which there were significant violations here that materially impaired the NAC's decision, or it is not a state actor, which would cause its exercise of delegated authority to be unconstitutional. The consequence of the Commission's decision is significant, as this issue continues to arise and is clearly ripe for Commission and judicial review. Oral argument will assist the Commission in considering the merits of Appellants' appeal.

Due to the complexity of the case and numerous constitutional questions raised, Appellants request thirty (30) minutes to present their oral argument.

Dated: April 1, 2021 Respectfully submitted,

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Washington, D.C.

In the Matter of the Application of ROBBI J. JONES Houston, TX and KIPLING JONES & COMPANY, LTD. Houston, TX For Review of Disciplinary Action Taken by FINANCIAL INDUSTRY REGULATORY AUTHORITY	**CERTIFICATE OF SERVICE**

I, Matthew P. Hoxsie, being of full age, hereby certify:

1. I am an Associate in the firm of Greenberg Traurig, LLP.

2. On April 1, 2021, I caused electronic copies of APPELLANTS' MOTION REQUESTING ORAL ARGUMENT to be served via email to the following:

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3. I certify under penalty of perjury that the foregoing is true and correct.

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U.S. SECURITIES & EXCHANGE COMMISSION
Washington, D.C.

In the Matter of the Application of ROBBI J. JONES Houston, TX and KIPLING JONES & COMPANY, LTD. Houston, TX For Review of Disciplinary Action Taken by FINANCIAL INDUSTRY REGULATORY AUTHORITY	**Admin. Proc. File No.: 3-20209** **Date of Service** **April 1, 2021**

APPELLANTS' BRIEF IN SUPPORT OF THE APPLICATION FOR REVIEW

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I. PRELIMINARY STATEMENT

Appellants Robbi J. Jones ("Ms. Jones") and Kipling Jones & Company, LTD[1] ("KJC") (collectively, the "Appellants"), respectfully submit this Brief in Support of the Application for Review of the December 17, 2020 decision by the National Adjudicatory Council ("NAC") of the Financial Industry Regulatory Authority ("FINRA") (the "NAC Decision"). That decision permanently barred Ms. Jones from the securities industry in all capacities; statutorily disqualified KJC; fined KJC $38,000; ordered Appellants to pay costs of $13,914.58; and imposed appeal costs of $1,573.34.

Ms. Jones' actions in this case were, by her own admission, imperfect. That being said, the decision below imposes a burden that is unnecessary and inappropriate, excessive and oppressive, and detached from the public interest and protection of investors. *See Saad v. SEC* (*Saad II*), 980 F.3d 103, 104 (D.C. Cir. 2020). The punishment imposed against Ms. Jones is not remedial. It is punitive.

Further, FINRA, by its actions and prosecution, violated Ms. Jones' rights to due process, which the NAC ratified and exacerbated. Given FINRA's essentially government function and entwinement with the Securities and Exchange Commission ("SEC"), FINRA must be considered a state actor. As such, it is required to provide due process, and to comply with the Appointments Clause of the United States Constitution, which it fails to do.[2] For these reasons, the punishments imposed on KJC and Ms. Jones must be reversed so a more appropriate sanction can be imposed.

II. BACKGROUND FACTS AND PROCEDURAL HISTORY

A. Jones and KJC

KJC is a small, minority-woman owned firm founded by Ms. Jones in 2008. KJC is, in essence, Ms. Jones. She is the firm's President, Chief Executive Officer, Chief Compliance

[1] KJC notified FINRA on March 29, 2021 of its intent to file Form BD-W.

[2] It is highly doubtful that the Commission has the authority to rule on these constitutional questions. *See Springsteen-Abbott v. SEC*, 989 F.3d 4, 8 (D.C. Cir. 2021) (citing *Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987) ("[R]egulatory agencies are not free to declare an act of Congress unconstitutional.")). Nevertheless, Ms. Jones presses these objections here to prevent any waiver of the issue.

Officer and Financial and Operations Principal. The firm is both a registered broker-dealer and a registered municipal advisor. Its business is primarily focused on providing municipal finance advice to public sector entities, especially in socioeconomically distressed communities traditionally not serviced by larger firms. KJC has no retail business, does no proprietary trading, has no customer accounts, and does not maintain custody or control of any customer funds.

Prior to the current investigation, Ms. Jones had an unblemished 20-plus year career in the securities industry, served on professional boards, participated in licensing examinations, and served on various City of Houston blue ribbon committees.

Beginning in late 2013, Ms. Jones has endured a multitude of personal tribulations that have affected her ability to function at the highest level of business efficiency – the level that she exhibited at all prior times. In 2015, her [redacted]. Although they were divorced at the time of his death, Ms. Jones maintained a very close friendship with her ex-husband, who was the father of her only child, and frequently visited him in the hospital as his health failed. During the same time period, Ms. Jones' mother, in her 80s, was suffering from a variety of ailments endemic to a person of her age; her [redacted] another relative with whom Ms. Jones was very close passed away; Ms. Jones' brother became seriously ill; and [redacted]

The weight and stress of these competing demands on her time and energy resulted in a few unintended mistakes and lapses in judgment. As a result, she provided insufficient or delayed responses to the FINRA staff conducting a Cycle Examination of KJC, which uncovered that Ms. Jones was unintentionally filing incorrect Financial and Operational Combined Uniform Single ("FOCUS") reports.

B. CD-0331

KJC is required to maintain a minimum net capital of $100,000. In 2011, Ms. Jones increased the amount of net capital to be reported in KJC's fourth-quarter FOCUS report. To do so, she obtained a roughly $70,000 one-year CD from CNB Bank ("CD-0331") to list as an asset in KJC's net capital computation. To pay for the CD, Ms. Jones took a one-year loan from CNB

("Loan-0331"). Because Ms. Jones was required to have an ownership interest in the CD, the CD was titled in both Ms. Jones and KJC's name. She did not believe the CD was encumbered. [FINRA 004176 (CX-113 at 171)] By its terms, CD-0331 was to renew automatically on its maturity date, December 30, 2012 (and every year thereafter). [FINRA 004176 (CX-113 at 173)]

In early 2014, CNB contacted Ms. Jones regarding renewal of the CD and Loan. [FINRA 003917 (CX-95 at 11 of 18)] Ms. Jones provided what she believed were the relevant records in order to renew the Loan, though she did not provide the proof of income CNB requested as [redacted] [FINRA 003267–68 (Tr. 1235–36)] CNB separately sent Ms. Jones a letter advising Ms. Jones that the funds from the CD would be used to pay off the Loan. [FINRA 003915 (CX-95 at 9)] Ms. Jones did not receive, or recall receiving, the Loan payoff letter. [FINRA 003266–67 (Tr. 1234–35)] (On March 5, 2014, CNB used CD-0331 to pay off the $70,313 loan balance.) Nor was she made aware that the CD had been closed. [FINRA 003267 (Tr. 1235)] As a result, Ms. Jones believed CD-0331 was still in effect and KJC continued to list CD-0331 as an asset in its books and records and subsequent FOCUS reports. Ms. Jones eventually obtained a new, two-year CD in December 2014.

C. The City of Houston's Credit Card Investigation

In May 2013, Houston's Office of the Controller investigated Ms. Jones for her purported use of a city credit card to pay for five airline tickets in her name. Houston asked Ms. Jones for records of all flights, which Ms. Jones provided. [FINRA 003158, 003263–64, 004169 (Tr. 1126, 1231–32; CX-113 at 142–43)] Ms. Jones was immediately able to disprove three of the alleged flights. [FINRA 004164, 004166 (CX-113 at 124–25, 132)] For example, Ms. Jones informed Houston that a Memphis flight in question was purchased using points/miles. [FINRA 004169 (CX-113 at 142–43)] Of the remaining two flights – one for Birmingham and the other for Chicago – Ms. Jones never had a City of Houston credit card but paid for the tickets herself, using her mother's credit card. [FINRA 004086–87, 004089–90, 004091–95 004150, 004170 (CX-106; CX-107; CX-108; CX-113 at 66–68, 148)]

Indeed, Ms. Jones practice was to pay her expenses before submitting reimbursement requests to the City for its approval. [FINRA 004097, 004149, 004150 (CX-109; CX-113 at 65, 69)] Ms. Jones never sought reimbursement for non-City of Houston flights or expenses. [FINRA 004156 (CX-113 at 91)] During the City of Houston's investigation, Ms. Jones pulled up her Southwest account to show the City Controller and Inspector that she personally purchased the flights in question. While Houston requested documents from Southwest, Houston never subpoenaed Southwest for records. [FINRA 004154 (CX-113 at 83–84)] Instead, the City focused on the fact the last four digits of her mother's credit card matched the last four digits of the City of Houston card. [FINRA 004155, 004164 (CX-113 at 86, 124)][3] Ms. Jones asked the City of Houston for documents and information supporting its allegations, which the City failed to provide. [FINRA 004151, 004154 (CX-113 at 70, 84)] Because the allegations against her were based on documented trips one or two days removed from the trips she actually took, Ms. Jones believed her identity was stolen. [FINRA 004107–32, 004157, 004163–64 (CX-112; CX-113 at 95–97, 120–22)]

At that point, Ms. Jones asked for assistance from her brother, an attorney, and hired a criminal defense attorney to represent her before the City. Soon thereafter, the City of Houston informed her attorney that it had closed its investigation, who informed Ms. Jones that the City of Houston would not be pursuing any charges. [FINRA 004097, 004153 (CX-109; CX-113 at 80)]

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[3] Unsurprisingly, FINRA's Post-Hearing Brief agreed in this regard. FINRA noted:

> Jones explained that she had used her mother's credit card to purchase the SWA [Southwest Airlines] Houston-Birmingham roundtrip ticket on September 20, 2012 and the SWA Chicago-Houston one-way ticket on April 13, 2013. Jones also offered to access her SWA online account to show [City of Houston Inspector Curtis] the list of credit cards that Jones had used to purchase tickets. The list of credit cards displayed for each an assigned named and the last four digits of the credit [sic] card. One of [the] credit cards listed had the assigned name, "Gwendolyn Jones," and reflected "2907" as the last four digits of the card. Curtis informed Jones at that time that the card listed as "Gwendolyn Jones" ha[d] the same last four digits as the City of Houston credit card that was used to purchase the tickets at issue.

Department of Enforcement's Post-Hearing Brief at 11 [FINRA 004489].

(Ms. Jones did not see the City of Houston's letter until January 2018 when she was preparing for the hearing in this proceeding.) The City of Houston continued to work with Ms. Jones and KJC during its investigation and thereafter.

D. The 2014 Cycle Examination and Ensuing Investigation

In November 2014, FINRA began its scheduled 2014 cycle examination of KJC. [FINRA 003653, 003655 (CX-1; CX-2)] FINRA asked Ms. Jones for various financial records including a general ledger for the month of September 2014, a trial balance and balance sheet as of September 30, 2014, and proof of all allowable assets claimed in KJC's net capital computation. Ms. Jones provided the general ledger, balance sheet, and trial balance on November 25, 2014. [FINRA 003927–28, 003929–36, 003937–38 (CX-97; CX-99; CX-101)] The ledger, balance sheet, and trial balance identified CD-0331 with a balance of $70,313.09.

On December 4, 2014, FINRA requested that Ms. Jones provide a copy of KJC's general ledger covering the period January 2012 through October 2014, [FINRA 003657 (CX-3)] which she provided the following week. On December 11, 2014, FINRA emailed Ms. Jones requesting more documents and proof of the $70,313.09 balance for the CD. [FINRA 003661, FINRA 004295–302 (CX-8; *E.g.* CX-124)] Ms. Jones emailed FINRA on December 18, 2014 with additional documents and represented that CNB was unable to provide a statement of the balance, but in lieu of a balance sheet, Ms. Jones sent FINRA a screenshot showing the balance of the CD from December 30, 2011 through December 30, 2013. [FINRA 003677–87, 003689–90 (CX-17; CX-18]

On January 16, 2015, Ms. Jones informed FINRA she had just returned from Alabama where she was caring for her ill mother. [FINRA 003699 (CX-27)] Ms. Jones told FINRA the CD had rolled over and that she had requested a new two-year maturity from CNB, requiring the creation of CD-0577, via a check with accumulated interest, which Ms. Jones had not yet received from CNB. FINRA requested documents pursuant to Rule 8210, but Ms. Jones was unable to provide the requested documents. On February 24, 2015, Ms. Jones provided FINRA with a copy of the new December 2014 CD. [FINRA 003733–35 (CX-35)] She further informed FINRA that

she had requested additional records relating to CD-0331 from CNB. [FINRA 003747–48 (CX-46)] Indeed, Ms. Jones contacted CNB multiple times, [FINRA 003759–63 (CX-50)] and forwarded information to FINRA when she received it. [FINRA 003765–69, 003783–85 (CX-51; CX-62)]

In March 2015, FINRA issued a "Notice of Current Net Capital Deficiency." [FINRA 003797–99 (CX-69)] The notice was based in part on KJC's failure to provide sufficient documentation to verify CD-0331, "bringing into question the balance of this allowable asset."

During the same 2014 cycle examination, FINRA discovered $2,500 paid to the criminal defense attorney Ms. Jones hired during the City of Houston investigation and requested information. [FINRA 003669 (CX-12)] Ms. Jones met with FINRA on December 12, 2014 and informed FINRA of the City of Houston credit card investigation. On December 23, 2014, Ms. Jones forwarded a letter drafted by the criminal defense attorney that stated:

> Dear Sirs:
>
> > In August of 2014, I was retained by Kipling and Jones on behalf of Robbie Jones to represent her in a potential legal matter involving the City of Houston. An investigation was conducted by the City of Houston regarding two airplane tickets purchased with a City of Houston credit card in the name of Robbie Jones. After a thorough investigation, it was determined that the City of Houston did not suffer any financial loss and Ms. Jones was cleared of any wrongdoing. Furthermore, none of the current contracts between Kipling, Jones and Company were affected and the firm continues to do business with the City of Houston. [FINRA 003692 (CX-19)]

On February 5, 2015, FINRA sent Ms. Jones a Rule 8210 letter requesting a written statement regarding the City of Houston investigation. [FINRA 003713–16, 003717 (CX-31; CX-32)] Ms. Jones acknowledged delays in her responses while caring for her sick mother. Nevertheless, Ms. Jones provided written statements in mid-February corroborating what she had told the City of Houston Inspector, though the written statements focused on the flights she actually took on behalf of the City of Houston (which she was able to disprove); and not the Birmingham and Chicago flights (which Ms. Jones believed concluded with no charges). [FINRA 003725–31, 004097 (CX-34; CX-109)] To the extent her first statements were deficient, Ms. Jones emailed

FINRA additional documents just one month later showing the Birmingham and Chicago flights were purchased from her mother's account – as she had demonstrated to the City of Houston. [FINRA 003793–94, 003795–96 (CX-66; CX-67)] Ms. Jones told FINRA that she had difficulties finding the documents because of a death in her family. When asked if it was her mother who had recently passed away, she wrongly said it was. *See* NAC Decision at 7 [FINRA 004967]. That being said, FINRA had separately been in communication with the City of Houston and had also requested any and all information that the City of Houston had. [FINRA 003789–90 (CX-64)]

In early April 2015, [redacted] [FINRA 003813 (CX-73)] Despite substantially complying with numerous requests and submitting hundreds, if not thousands of pages of documents and records, Ms. Jones acknowledged her health and hospitalization delayed some responses to FINRA but that she also could have done better. [FINRA 003843 (CX-82)]

Ms. Jones' on the record ("OTR") examination was scheduled for May 8, 2015. Before the hearing, Ms. Jones and FINRA agreed that no personal questions would be asked. [FINRA 003851 (CX-84)] As to CD-0331, Ms. Jones informed FINRA that she had recently learned the CD was closed and therefore did not exist at the end of 2014, [FINRA 003853 (CX-85)] but that she had created a two-year CD at the end of 2014. As to the City of Houston investigation, Ms. Jones testified the Southwest tickets were bought on a personal card, not the city's credit card. She also testified that she had later learned that the secretary overseeing the City's cards had her responsibilities removed, leading Ms. Jones to believe something nefarious by the City secretary had occurred (comporting somewhat with her initial belief that her identity might have been stolen). [FINRA 004107, 004157, 004163–64 (CX-112 (card belonging to "Stephanie Chavez"; CX-113 at 97, 120–22)] Nearly half of the OTR was spent discussing the City of Houston's investigation, during which she answered nearly every question that was asked. [*See generally* FINRA 004133–71 (CX-113 at 1–153)] As to her mother's health however, Ms. Jones refused to answer personal questions. To the extent FINRA explained that they were simply trying to determine whether her mother could request or obtain records from Southwest, Ms. Jones directly

answered that those requests had already been made and that all three of Ms. Jones, her mother, and her brother were unable to obtain any further documents. [FINRA 004180–82 (CX-113 at 189–91, 194)] In truth, Ms. Jones provided both the City of Houston and FINRA with all documents and records she had or otherwise could obtain. Nevertheless, Ms. Jones' refusal to answer personal questions was held against her and used as the basis for a separate violation.

On June 15, 2015, FINRA issued an additional Rule 8210 request, asking for "yes" and "no" answers regarding CD-0331. [FINRA 003853–56 (CX-85)] For example, FINRA asked whether the CD was effective as of September 30, 2014. Ms. Jones provided a detailed narrative representing that she did not recall giving CNB authority to use the CD as collateral for the loan but understood it would negatively impact the net capital requirements. She further stated she believed the CD was still with CNB during the beginning of the Cycle Exam and did not learn until March 2015 that CNB had liquidated the CD to pay off the loan. [FINRA 003857–60 (CX-86)] Accordingly, Ms. Jones provided not only the answer FINRA sought – "that the CD was not in place on September 30, 2014" – but context why the submission of the inaccurate FOCUS reports was not willful. To that point, CNB's president admitted "that he could not verify that the bank had notified Ms. Jones that the CD would be used to satisfy her outstanding loan" and "acknowledged that he first told her about it in March 2015." [FINRA 003859] (FINRA would later hold against Ms. Jones the fact she did not answer simply "yes" or "no.")

In August 2015, Ms. Jones called FINRA and apologized for previously stating her mother had died [redacted]r, her mother being ill, and her own health, and that she didn't expect this personal detail to be a violation of FINRA rules. [FINRA 004219–25 (CX-114)] In September, FINRA contacted CNB requesting additional records. Roughly one month later, CNB confirmed Ms. Jones' representations that CNB closed out CD-0331 in March 2014. [FINRA 003897–900, 003901–05, 003907–24 (CX-93; CX-94; CX-95)]

E. FINRA's Complaint

On April 24, 2017, FINRA Enforcement filed a four-count complaint against Ms. Jones and KJC. *See* Complaint [FINRA 000007–40]. The first cause alleged that Ms. Jones had caused KJC to willfully violate Section 17(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Exchange Act Rules 17a-3 and 17a-5,[4] and that Ms. Jones and KJC had violated FINRA Rules 4511 and 2010. Specifically, the first cause charged that Ms. Jones caused KJC's books and records to be inaccurate because Ms. Jones did not record the cancellation of CD-0331, but instead allowed it to be shown as an asset through December 30, 2014. Enforcement also alleged that Ms. Jones filed, or caused to be filed, materially inaccurate FOCUS reports that inflated KJC's reported net capital by treating CD-0331 as an allowable asset, despite the fact that CD-0331 had been pledged as collateral for the loan and had then been cancelled. [FINRA 000031–32]

The second cause alleged that Ms. Jones violated FINRA Rule 2010 because she provided false and misleading information to FINRA staff about CD-0331, the City of Houston investigation, and her mother's death. [FINRA 000032–38]

The third and fourth causes alleged that Ms. Jones violated FINRA Rules 8210 and 2010 because she provided false and misleading information about CD-0331, the City of Houston investigation, and her mother's death to FINRA staff in response to FINRA Rule 8210 requests and refused to answer questions at her OTR regarding her mother. [FINRA 000038–39] Ms. Jones denied the allegations and a five-day hearing was held.

F. The Extended Hearing Panel's Decision

On October 17, 2018, the Extended Hearing Panel issued its decision finding KJC liable under the first cause and Ms. Jones liable under all causes. Extended Hearing Panel Decision [FINRA 004613]. The Extended Hearing Panel did not, however, find many of the allegations proven. (Under cause three, Enforcement alleged that Jones made ten specific misstatements. The Extended Hearing Panel found only two were proven.)

[4] The fact FINRA charged violations of the Exchange Act and Exchange Act Rules only underscores its state-actor status, as discussed below.

Under cause one, the Extended Hearing Panel found that Ms. Jones caused KJC to fail to record the cancellation of CD-0331 as an allowable asset. [FINRA 004641–43] The Extended Hearing Panel determined that KJC willfully violated Section 17(a) of the Exchange Act, Exchange Act Rules 17a-3 and 17a-5, and FINRA Rules 4511 and 2010, and that Ms. Jones violated FINRA Rules 4511 and 2010. Under cause two, the Extended Hearing Panel found that Ms. Jones violated FINRA Rule 2010 by failing to inform FINRA staff that she had pledged CD-0331 as collateral for a personal loan and by misrepresenting to FINRA staff that her mother had died. [FINRA 004643–44] Under cause three, the Extended Hearing Panel found that Ms. Jones violated FINRA Rules 8210 and 2010 by omitting the Birmingham and Chicago airline tickets from her February 2015 statements describing the City of Houston investigation and by falsely testifying at her OTR that CD-0331 was never pledged as security for a loan. [FINRA 004644–46] Under cause four, the Extended Hearing Panel found that Ms. Jones violated FINRA Rules 8210 and 2010 because she repeatedly refused to respond to questions at her OTR concerning her representations to FINRA staff about her mother's purported death. [FINRA 004646–47]

For the first cause, the Extended Hearing Panel fined KJC $38,000, suspended Ms. Jones from associating with any FINRA member firm in any capacity for two years, barred her from associating with any FINRA member firm in any supervisory or principal capacity, and fined her $35,000. [FINRA 004647–49] Because the Extended Hearing Panel determined that KJC's violation was willful, the Extended Hearing Panel found that KJC was subject to statutory disqualification. For the second, third, and fourth causes of action, the Extended Hearing Panel imposed a unitary sanction and suspended Ms. Jones from associating with any FINRA member firm in any capacity for two years and fined her $35,000. [FINRA 004649–53] The Extended Hearing Panel ordered that Ms. Jones's suspension under cause one run consecutively with the suspension imposed under causes two, three, and four. [FINRA 004653–54] Ms. Jones and KJC appealed the Extended Hearing Panel's decision to the NAC. FINRA did not cross-appeal. [FINRA 004657–59]

G. The NAC Decision

On December 17, 2020, the NAC issued its decision affirming the Extended Hearing Panel's findings under cause one that KJC willfully violated Section 17(a) of the Exchange Act, Exchange Act Rules 17a-3 and 17a-5, and FINRA Rules 4511 and 2010 by creating and maintaining inaccurate books and records and by filing inaccurate FOCUS reports. NAC Decision at 18 [FINRA 004978]. The NAC affirmed the $38,000 fine against KJC and affirmed the finding that KJC was subject to statutory disqualification. *Id.* The NAC also affirmed the Extended Hearing Panel's findings that Ms. Jones violated FINRA Rules 4511 and 2010 by causing KJC to create and maintain inaccurate books and records and by causing the Firm to file inaccurate FOCUS reports. *Id.* The NAC extended Ms. Jones' suspension into a lifetime bar in all capacities. *Id.*

Under causes two through four, the NAC affirmed the Extended Hearing Panel's findings that Ms. Jones violated FINRA Rules 8210 and 2010 by providing false and misleading information to FINRA and by refusing to respond to FINRA staff's questions during her OTR. *Id.* For these violations, the NAC extended Ms. Jones' punishment by barring her in all capacities, effective immediately. *Id.* Finally, the NAC affirmed the Extended Hearing Panel's order that Respondents pay, jointly and severally, hearing costs of $13,914,58 and imposed appeal costs of $1,573.34. *Id.* The NAC did not affirm the $35,000 fine against Ms. Jones.

Ms. Jones and KJC timely noticed their appeal to the SEC. [FINRA 005007–10]

III. ARGUMENT

A. The NAC's Imposition of a Lifetime Bar and Statutory Disqualification are Excessive, Not Supported by the Record, and Punitive

"The Commission may set a sanction aside if it imposes any burden on competition not necessary or appropriate to further the purposes of the Securities Exchange Act, or if the sanction is excessive or oppressive." *Saad II*, 980 F.3d at 104 (internal quotations and citations omitted). "The Exchange Act directs the Commission to give 'due regard [to] the public interest and the protection of investors.'" *Id.* (quoting 15 U.S.C. § 78s(e)(2)). The court "has characterized those

provisions as imposing, among other things, a 'statutory requirement[ ] that a sanction be remedial,' rather than a form of punishment." *Id.* (quoting *PAZ Sec., Inc. v. SEC* (*PAZ II*), 566 F.3d 1172, 1176 (D.C. Cir. 2009)); *see also Siegel v. SEC*, 592 F.3d 147, 157 (D.C. Cir. 2010) ("As an initial matter, it is important to remember that the agency 'may impose sanctions for a remedial purpose, but not for punishment.'" (quoting *McCurdy v. SEC*, 396 F.3d 1258, 1264 (D.C. Cir. 2005))).

A sanction is not remedial if "it imposes a punishment going beyond the harm inflicted by the defendant." *See Johnson v. SEC*, 87 F.3d 484, 491 n.11 (D.C. Cir. 1996). Still further, the Commission must adequately state its reason for holding any sanction imposed is warranted to protect investors by carefully and thoughtfully addressing each potentially mitigating factor supported by the record. *Saad II*, 980 F.3d at 108. "'[A]s the circumstances in a case suggesting that a sanction is excessive and inappropriately punitive become more evident, the Commission must provide a more detailed explanation.'" *PAZ Sec., Inc. v. SEC* (*PAZ I*), 494 F.3d 1059, 1065–66 (D.C. Cir. 2007) (quoting *McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005)).

FINRA's Sanction Guidelines provide eight factors to be considered when imposing sanctions: (1) the need for the sanction to be remedial, to deter future misconduct, and to improve business standards in the securities industry; (2) the violator's status as a repeat or one-time violator; (3) the appropriateness of the sanction for the specific misconduct; (4) the need in a particular case either to aggregate or to sanction individually similar violations; (5) the appropriateness of restitution or rescission; (6) the remediation needed to ensure the individual does not benefit from ill-gotten gains; (7) the necessity of requalification before permitting continued participation in the securities industry; and (8) the violator's ability to pay a fine or restitution. *Saad v. SEC* (*Saad I*), 873 F.3d 297, 299 (D.C. Cir. 2017). In addition to those factors, FINRA must consider any other mitigating or aggravating factors, including but not limited to

acceptance of responsibility, voluntary corrective actions, and whether the misconduct engaged in occurred over an extended period of time or was repeated. *Id.*

To the extent a lifetime bar could ever be remedial,[5] the bars imposed here are improper; they are excessive and unsupported by the record; and they are punitive.

1. The NAC's Conclusion re: Materially Inaccurate FOCUS Reports and Inaccurate Books and Records (Cause I)

The NAC affirmed the Extended Hearing Panel's findings that KJC willfully violated Section 17(a) of the Exchange Act and Exchange Act Rule 17a-3 by failing to record the cancellation of CD-0331 in its books and records. NAC Decision at 10 [FINRA 004970]. In addition, the NAC affirmed the Extended Hearing Panel's findings that KJC willfully violated Section 17(a) of the Exchange Act, Exchange Act Rule 17a-5 and FINRA Rules 4511 and 2010, and that Ms. Jones violated FINRA Rules 4511 and 2010, because they filed FOCUS Reports that reflected CD-0331 as an allowable asset "despite the fact that [Ms.] Jones had pledged CD-0331 as collateral for a personal loan and CNB had cancelled CD-0331 in March 2014." *Id.*

Ms. Jones does not dispute that the FOCUS Reports were inaccurate. She does, however, dispute that the inaccuracies were "knowing" or "willful" to the extent a lifetime bar would be appropriate or that KJC should be statutorily disqualified. While FINRA claims Ms. Jones lied regarding the CD in question and suggests improper motive, Ms. Jones consistently testified that she did not borrow against or pledge the CD to her knowledge. [FINRA 004176 (CX-113 at 171)] In a similar vein, CNB's president acknowledged that CNB would not have ensured that notice of the CD's closure was conveyed to Ms. Jones, [FINRA 002564–65 (Tr. 537–38)] to which the

[5] While Appellants recognize the binding precedent in the D.C. Circuit that is *Saad II*, Appellants do not waive the right to challenge the appropriateness of a lifetime bar generally should that case be appealed *en banc* or to the United States Supreme Court. *See Saad II* (Kavanaugh, J., dissenting) (noting that an SEC lifetime bar is punitive); *cf. Kokesh v. SEC*, 137 S. Ct. 1635, 1643 (2017) (stating SEC disgorgement is imposed for punitive purposes).

Extended Hearing Panel concluded that there was "no evidence that Jones or KJC received contemporary notice of the cancellation of the CD." Extended Hearing Panel Decision II.B.5 [FINRA 004621]. It is unsurprising, therefore, that Ms. Jones honestly believed that the CD was an allowable asset through December 2014 [FINRA 003071, 003076 (Tr. 1039, 1044)] and that her FOCUS reports were not intentionally false or misleading.

Nevertheless, the Extended Hearing Panel erroneously concluded that Ms. Jones knew that she had pledged the CD and therefore that her "omi[ssions]" were intentionally "misleading" and that any violations were willful. Extended Hearing Panel Decision II.D.1.a [FINRA 004625–27]. The NAC adopted the Extended Hearing Panel's decision. *See* NAC Decision at 2 [FINRA 004962] ("Knowing that the bank had canceled the CD, Jones nonetheless testified that she had never pledged or assigned the CD as collateral"); *id* at 11 [FINRA 004971] (concluding KJC's violation of Section 17(a) of the Exchange Act was "willful" as a result); *id.* at 14 [FINRA 004974] (stating Ms. Jones "knew that CD-0331 was not an allowable asset"). But again, those conclusions are directly contradicted by the fact that there was "no evidence that Jones or KJC received contemporary notice of the cancellation of the CD." *Id.* at 2 [FINRA 004962]. Her uncontroverted testimony was that she did not know, and testimony from CNB's president supported that conclusion.

In keeping with Ms. Jones' testimony and with the actual evidence presented, the Extended Hearing Panel concluded FINRA had failed to prove several of its underlying allegations: that Ms. Jones falsely represented that "she first learned in March 2015 that [CD-0331] was not in place on September 30, 2014"; that Ms. Jones falsely represented "she first learned in March 2015 that [CD-0331]" had been pledged as collateral for the loan; and that Ms. Jones falsely represented when she learned that CD-0331 had been used to satisfy the loan. Extended Hearing Panel Decision III.C.8, 9, and 10 [FINRA 004646]. To that point, while Enforcement alleged ten misstatements

under cause three, the Extended Hearing Panel determined that Enforcement had proven only two. NAC Decision at 9 n.4 [FINRA 004969].

For these reasons, it is difficult to square: (a) the NAC's recognition that FINRA did not prove numerous allegations regarding Ms. Jones' purported knowledge that the CD was pledged and separately that it was closed; with (b) the NAC's conclusion that Ms. Jones nonetheless knew the CD was pledged and separately that it was closed out. The evidence and findings do not support the conclusion that Ms. Jones' and KJC's inaccurate FOCUS reports were willfully or intentionally submitted.

The conclusion actually supported by the evidence, which is consistent with the allegations FINRA proved (and acknowledging the allegations FINRA failed to prove) is that the FOCUS Reports were inaccurate but that Ms. Jones' actions – and therefore KJC's – were not willful. For this unintentional violation, a lifetime bar should not have been imposed nor should KJC have been statutorily disqualified.

2. The NAC's Conclusion re: Providing Inaccurate and Misleading Information, Documents, and Testimony and Refusing to Answer Questions (Causes II, III, and IV)

As shown above, Ms. Jones' testimony regarding CD-0331 was consistent and true. Accordingly, when she initially attempted to obtain relevant records showing CD-0331's balance as of September 31, 2014 – as she believed it was still active as of that date – she was unable to locate said records. FINRA nevertheless punished her for failing to provide records that ultimately did not exist.

As to the City of Houston investigation, FINRA's conclusion that one written statement omitted mention of the Birmingham and Chicago flights [FINRA 003725–31 (CX-34)] ignores the numerous documents Ms. Jones provided, the fact she provided exonerating information just one month later, and the fact that half her OTR testimony was spent discussing the complete account

of the City of Houston's investigation. Indeed, FINRA and the NAC ignored every instance where Ms. Jones provided honest and complete explanations, faulting her for one impartial response and treating it as a basis for a lifetime bar. This, despite the fact Ms. Jones' conduct underlying the City of Houston investigation was not dishonest, unjust, or inequitable.

Supporting the lack of improper conduct by Ms. Jones underlying the City of Houston's investigation, FINRA acknowledged the City of Houston credit card was not in her name. Instead, FINRA examiner Mr. Hartman testified during the hearing that his belief was that she potentially had "access" to the card, [FINRA 002969–72 (Tr. 937–40)] which Mr. Hartman speculated might have meant she took it from a City of Houston office or copied the card's numbers. FINRA's wildly speculative belief that Ms. Jones had "access" to a City card and misused it, was not based on actual evidence, and ignored that Ms. Jones immediately disproved three of five flights; rather it was based on Mr. Hartman's recollection of conversations from years earlier and on hearsay (or double hearsay). [FINRA 002175–79, 002213–14, 002296–98 (Tr. 149–53, 187–88, 270–72)] Importantly, the City of Houston did not charge Ms. Jones or seek reimbursement but has continued to work with Ms. Jones in numerous capacities ever since. [FINRA 004153 (CX-113 at 80)]

One incomplete response regarding a City of Houston investigation that had closed without any charges should not constitute a Rule 8210 and/or 2010 violation, and in any event certainly does not justify a lifetime bar. In this manner, the NAC also erroneously conflated the provision of incomplete responses with false responses. *See* NAC Decision at 17–18 [FINRA 04977–78] (citing *Michael A. Rooms*, Exchange Act Release No. 51467 (Apr. 1, 2005)). *Rooms* included actual <u>false</u> responses, not an incomplete response as is the worst case here. Reliance on *Rooms* is therefore inappropriate here.

To the contrary, FINRA Enforcement denied Ms. Jones due process by materially misleading the Extended Hearing Panel in its Post-Hearing Brief. FINRA argued the City of Houston's investigation related only to the two Birmingham and Chicago flights. *See* Department of Enforcement's Post-Hearing Brief at 9–10 (citing CX-106) [FINRA 004487–88]. The record citation FINRA cites evidences discussion of all flights, however, including the flight to Memphis. And it is directly contradictory to FINRA's later acknowledgement that the City of Houston "requested that [Ms.] Jones provide information about air travel purchases she had made for travel relating to City of Houston business." *Id.* at 10. [FINRA 004488] FINRA has continuously portrayed the City of Houston's investigation as limited to only two flights in an attempt to portray Ms. Jones' production of documents related to all flights as misleading and deceptive. In truth, Ms. Jones provided evidence of the flights she had taken on behalf of the City of Houston because that is what the City of Houston requested.

As to her mother, Ms. Jones was assured before her OTR that no personal questions would be asked. FINRA nevertheless asked whether her mother was still alive. Ms. Jones refused to answer what her attorney advised her were inappropriate, personal questions beyond the scope of the exam set forth by FINRA. In fact, FINRA has acknowledged that the personal misstatement did not impede its investigation. Extended Hearing Panel Decision at 40 [FINRA 004652].

In sum, the case FINRA actually presented was based on: (1) Ms. Jones unintentionally causing KJC to file inaccurate FOCUS reports; (2) Ms. Jones providing one truthful but incomplete written description while otherwise providing all relevant documents and fully answering all City of Houston related questions during her OTR; and (3) Ms. Jones failing to respond as FINRA wished when she was asked personal questions about her mother even though she had been informed beforehand that no personal questions would be asked. These violations do not support the imposition of a lifetime bar or statutory disqualification.

3. The NAC Failed to Properly Weigh Mitigating Factors

FINRA adjudicators are required to consider mitigating factors. *See Saad II*, 980 F.3d at 104. But whereas FINRA aggravated every minor inconsistency or imperfection in its view, FINRA and the NAC dismissed any factor that weighed in Ms. Jones' favor. For example, FINRA and the NAC ignored, as to the production of documents and responses to FINRA's requests, that Ms. Jones was plagued, for example, by health problems, severe life events [FINRA 002801 (Tr. 769)] and CNB's own failures to provide documents to Ms. Jones. [FINRA 002495–15 (Tr. 468–88)] Despite these difficulties, FINRA Examiner Ms. Duhon thanked Ms. Jones for her assistance in FINRA's Cycle Exam and investigation. [FINRA 002297 (Tr. 271)] And Ms. Jones has still acknowledged that she should have been better and more responsive with documents. [FINRA 003314 (Tr. 1282)]

FINRA also ignored the many steps Ms. Jones actively took to assist with FINRA's examination. [FINRA 002305, 002840 (Tr. 279, 808)] As to the OTR, the Extended Hearing Panel acknowledged that Ms. Jones "answered many questions posed at her OTR and ultimately provided . . . the information that she refused to provide at her OTR" regarding her mother. Extended Hearing Panel Decision at 38 n.236.[6] [FINRA 004650] To that point, Ms. Jones acknowledged during the OTR that she and her mother previously attempted to obtain additional documents from Southwest but were unable to – rendering moot FINRA's question whether her mother could request additional documents. [FINRA 004180–82 (CX-113 at 189–91, 194)]

In a glaring example of error, the NAC ignored the complete absence of customer harm. In the absence of customer harm, the Guidelines for falsification of records instructs adjudicators

[6] And even then, the Extended Hearing Panel found that "Enforcement ha[d] not . . . established that [Ms.] Jones' refusal to testify" on that subject "impeded the staff's investigation." Extended Hearing Panel Decision at 40. [FINRA 004652]

to consider a suspension of ten business days to six months. Sanction Guidelines at 37.[7] For recordkeeping violations, the Guidelines instruct adjudicators to pay particular attention to the nature and materiality of the inaccurate information and whether the inaccurate information was intentionally entered, *id.* at 29, and to consider a suspension of ten business days to two years, or more, only if aggravating factors predominate.

Despite the Guidelines stressing attention to (1) the existence or lack of customer harm (2) consideration of the nature and materiality of the inaccurate information, and (3) the members' intent (which here was not willful), the NAC rejected the fact that there was no customer harm, NAC Decision at 16 [FINRA 004976] (stating the absence of customer harm is not mitigating), ignored the absence of findings supporting FINRA's allegation that Ms. Jones' knew CD-0331 was improperly pledged, and rejected Ms. Jones' lack of prior disciplinary history, NAC Decision at 16 [FINRA 004976] ("the absence of prior disciplinary history is not a mitigating factor").

If a FINRA action is meant to be remedial and not punitive, the law clearly requires that these mitigating factors must be considered and given due weight. It is clear that has not happened here. And if the Guidelines failed to account for mitigating factors, they would be held to violate the requirements of the Exchange Act and therefore constitute a denial of due process that significantly impacted the result for Ms. Jones.

4. The NAC Improperly Increased Ms. Jones' Sanctions

The NAC improperly increased Ms. Jones' sanctions even though FINRA did not appeal the original sanctions and despite the fact the sanctions imposed by the Extended Hearing Panel were already excessive. In doing so, the NAC based its decision on a severe misunderstanding of

[7] There were no allegations that Ms. Jones falsified records, forged a signature, or used a signature without authorization. She did not falsify bank records, forge CNB's president's signature, or anything of the like.

the record below and disregarded FINRA's own Guidelines. As discussed infra, FINRA is a state actor and as such neither FINRA nor the NAC is free to disregard its own rules, disregard the record below, or impose excessive sanctions without a cross-appeal, all of which serve as a further example of the denial of due process in this matter.

The United States' Supreme Court has repeatedly affirmed that, absent a cross-appeal, an appellee "may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) (quoting *United States v. Am. Railway Express Co.*, 265 U.S. 425, 435 (1924)). "The purpose of the cross-appeal rule is to give 'fair notice' to [a defendant] that the appellate court may increase his sentence." *United States v. Avila*, 634 F.3d 958, 961 (7th Cir. 2011). In *United States v. Harvey*, the government conceded, and the court agreed, that the government's failure to file a cross-appeal precluded it from obtaining a sentence "more favorable" than that already imposed. 2 F.3d 1318, 1326, 1330 (3d Cir. 1993). The same outcome should have resulted here.

FINRA did not file a cross-appeal. Instead, FINRA argued only in response to Ms. Jones' brief before the NAC that the sanctions imposed by the Extended Hearing Panel should be extended to a lifetime bar. In her reply, Ms. Jones argued that FINRA was "precluded from seeking a bar since it chose not to challenge the imposed sanctions in a cross-appeal." Respondent's Reply Brief to Department of Enforcement's Brief at 8 [FINRA 004838].

The NAC increased the sanctions against Ms. Jones, despite the record establishing that FINRA had failed to prove a number of its allegations, and despite FINRA's failure to give notice to Ms. Jones of its intent to seek such a result. The NAC's decision thus presents a severe inconsistency with the record below and with FINRA Sanction Guidelines. All this leaves Ms. Jones and KJC – the only appellants – in a far worse position despite FINRA not cross-appealing.

5. With These Violations in Their Proper Scope, the Lifetime Bar and Statutory Disqualification are Excessive, Punitive, and in No Way Remedial

The Commission may not affirm sanctions that are "excessive or oppressive" or "not necessary" to achieve the goals of the Exchange Act. 15 U.S.C. § 78s(e)(2). While the Exchange Act permits punitive sanctions in some cases, the Commission must "explain why such penalties are appropriate under the facts of each case." *Saad I*, 873 F.3d at 306 (Kavanaugh, J., concurring). The NAC failed to properly explain why a lifetime bar was appropriate in this case, and indeed, based on the facts of the case, cannot do so. Because Ms. Jones' mitigating factors were not given the weight they deserved under the Guidelines, and because the sanctions imposed are not proportional to the violations that FINRA was able to prove, the NAC's imposition of a lifetime bar is unjustified, excessive, and therefore punitive.

Furthermore, the lifetime bar and statutory disqualification does nothing to compensate victims or otherwise remedy a harm to them, nor does it protect investors in the future. It serves only the goal of punishment (and even then, it does so excessively). *See United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 44 F.3d 1082, 1089 (2d Cir. 1994) ("Dissociation orders and lifetime bans neither compensate victims nor prevent unjust enrichment. On the contrary, they serve to punish wrongdoers and deter others from similar courses of action.").

As to an appropriate sanction, Ms. Jones' actions are closer in kind to cases in which two to four-month suspensions have been imposed. *See Dep't of Enf't v. Craig Scott Hartman*, No. 2016052604602 (OHO Nov. 11, 2018) (respondent fined $5,000 and suspended four months for failing to provide documents and information requested pursuant to FINRA Rule 8210)[8]; *Dep't of*

[8] In *Craig Scott Hartman*, the Respondent was otherwise barred for "failing twice to appear and give testimony" and "essentially refused to cooperate with FINRA in the conduct of its investigation." Ms. Jones produced relevant and material documents and sat for a lengthy OTR during which she answered numerous questions regarding CD-0331 and the City of Houston's

Enf't v. Rani T. Jarkus & William H. Carson, No. 2009017899801 (OHO Feb. 7, 2014) (respondent suspended two months, fined $5,000 for filing inaccurate FOCUS reports); *Dep't of Enf't v. Richard Novack*, No. 2009016159103 (OHO Aug. 12, 2013) (respondent suspended for one year and fined $25,000 for approving inaccurate FOCUS reports).

Ms. Jones' actions are less severe than even those in *Department of Enforcement v. Larson*, No. 2014039174202, 2018 FINRA Discip. LEXIS 22, at *172 (OHO June 14, 2018), where the Hearing Panel found that the respondent: submitted materially misleading Continuing Membership Applications (for which he was suspended for 18 months); failed to provide complete and timely responses to FINRA's document and information requests (for which he was fined $37,000 and suspended for two years); and falsified firm records by backdating supervisory documents and then submitting some of them to FINRA (for which he was suspended for 18 months). The *Larson* Panel pointedly noted that it "took into account that the Guidelines recommend that suspensions not exceed two years" and that the "totality of Larson's misconduct [did not] warrant[ ] a bar." *Id.* Ms. Jones did not submit falsified and/or backdated records. Nor did she submit materially misleading records. There are no extraordinary circumstances here that warrant a lifetime bar.

Notably, the NAC imposed a punishment greater still than the punishment imposed in the extraordinary case of Elizabeth Holmes, the still-CEO of Theranos. Despite duping patients, falsifying records, and depriving investors of $700 million, Ms. Holmes suffered only a $500,000 fine and 10-year bar to serving as a principal or officer in a publicly traded company. *See* SEC Press Release No. 2018-41, *Theranos, CEO Holmes, and Former President Balwani Charged with Massive Fraud*, *available at* https://www.sec.gov/news/press-release/2018-41. If Ms. Holmes' conduct does not warrant a lifetime bar, Ms. Jones' conduct certainly does not.

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investigation. Even the principal FINRA examiner thanked Ms. Jones for her cooperation. [FINRA 002297 (Tr. 271)] No bar is justified here.

* * *

The NAC increased the punishment against Ms. Jones by inflicting the securities industry equivalent of the death penalty upon her. The NAC did not offer adequate explanation how the lifetime bar is needed to protect investors – and indeed, on these facts, there is no ground for which it could do so. *See PAZ II*, 566 F.3d at 1175–76. The lifetime bar is excessive and must be overturned, as should KJC's statutory disqualification because Ms. Jones' bookkeeping and FOCUS report violations were not willful.

B. FINRA and the NAC Violated Ms. Jones' Constitutional Right to Due Process and Deprived her Fair Process Under FINRA's Rules and Regulations[9]

"The Fifth Amendment guarantees that no person shall be 'deprived of life, liberty, or property, without due process of law.'" *Fitzgerald v. Hampton*, 467 F.2d 755, 760 (D.C. Cir. 1972) (quoting U.S. Const. amend. V). "The Supreme Court has held that the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty and property' concepts of the Fifth Amendment, 'property' being the employment, and 'liberty' being the freedom to practice a chose profession." *Id.* (applying due process in administrative proceedings) (citations omitted). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955).

In the current case, the NAC panel was not fair and impartial, thereby depriving Ms. Jones due process from the start. Beyond that structural violation, FINRA and the NAC infringed Ms. Jones' due process rights and deprived her of a fair trial in a fair tribunal by improperly duplicating

[9] Under Section 15A(b)(8) of the Securities Exchange Act, FINRA must provide a fair and impartial procedure for the disciplining of members. For the same reasons the proceedings deprived Ms. Jones due process, they were unfair and not impartial. To the extent FINRA and the NAC's actions comported with FINRA process, FINRA process is currently insufficient to protect Ms. Jones' due process rights.

specific violations with Rule 2010 violations, using allegations of falsity or misdirection as both evidence justifying a violation and as aggravation of the violations, and by punishing her when she refused to answer personal questions. The APA forbids such actions because they are arbitrary and capricious, an abuse of discretion, "contrary to constitutional right," and "without observance of procedure required by law." 5 U.S.C. § 706(2). Indeed, FINRA regularly orders disgorgement, imposes fines, and bars persons from the industry without due process of law.

1. The NAC Panel was Not Fair and Impartial

Trial before an impartial judge or adjudicatory body is a basic requirement of due process. The NAC panel, however, was not fair and impartial as one of its members – Duncan Williams – was an owner and associated person of a competitor broker-dealer but failed to recuse himself in violation of FINRA Rule 9332. Rule 9332 provides:

> If at any time a member of the National Adjudicatory Council . . . determines that the member [or] Panelist . . . has a conflict of interest or bias or circumstances otherwise exist where the fairness of the member [or] the Panelist . . . might reasonably be questioned, the member [or] Panelist . . . shall notify the Chair or the Vice Chair of the National Adjudicatory Council [who] shall issue and serve on the Parties a notice stating that the member [or] Panelist . . . has withdrawn from the matter.

That requirement to recuse is an affirmative duty of a panel member, and Mr. William's failure to recuse himself was in violation of FINRA Rule 9332. The failure of a biased panelist presents a fault of structural nature, affecting the entire framework within which the NAC decision was rendered. *See Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991) (citing as an example of a structural error the presence of a biased judge). "[T]rial before a biased judge is an archetypal example of a constitutional error that necessarily renders a trial fundamentally unfair." *Sims v. Rowland*, 414 F.3d 1148, 1153 (9th Cir. 2005) (citing *Neder v. United States*, 527 U.S. 1, 8 (1999)). Accordingly, in such cases, prejudice is presumed. Indeed, because the structure of FINRA hearings allows industry participants to appear as panelists and thus invites the potential that a

competitor will serve as an adjudicator over another, the requirement for recusal is a necessary safeguard against such constitutional infirmity.

Because a competitor sat on the NAC panel, prejudice should be both apparent and presumed, and the result of the failure to disclose and recuse must require, at the very least, a new hearing. In any event, it seriously calls into question the NAC's decision to increase the original sanctions to a lifetime bar.

2. FINRA and the NAC Improperly Treated Rule 4511 and 8210 Violations as de facto Rule 2010 Violations

It is well accepted that the double jeopardy clause prohibits multiple punishments for the same offense. *See Commonwealth v. Negron*, 967 N.E.2d 99 (Mass. 2012); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (stating the Fifth Amendment's double jeopardy clause "protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense").

FINRA deprives its members of due process by duplicating rule violation charges, such as violations of Rules 4511 and 8210, with Rule 2010 violations. *See, e.g.*, *Barnes v. Veath*, No. 14-cv-01277-NJR, 2014 WL 7005190, at *2 (S.D. Ill. Dec. 11, 2014) ("Nevertheless, knowingly filing duplicative charges and imposing a duplicative punishment falls within the realm of the Due Process Clause."). Here, for example, FINRA imposed Rule 2010 violations per se for commission of a Rule 4511 violation. *See* NAC Decision at 11 [FINRA 004971] ("A violation of FINRA Rule 4511 also constitutes a violation of FINRA Rule 2010."). FINRA thus turned one rule violation into two. And when FINRA concluded that Ms. Jones' inaccurate FOCUS reports – the basis for the Rule 4511 violation, which itself became a basis for the Rule 2010 violation – were intentionally submitted with incorrect information because they believed Ms. Jones knew

CD-0331 was pledged as security for a loan, FINRA pursued an additional Rule 2010 violation (Count Two) as well as a Rule 8210 violation (Count Three, for falsely testifying CD-0331 was never pledged as security), which also became a duplicative Rule 2010 violation. FINRA also pursued one Rule 8210 violation and two Rule 2010 violations for misrepresenting that her mother had died (Counts Two and Four). For all its overcharging, FINRA converted one or two Rule violations into more than four.

Rule 2010 is a blanket requirement that members "observe high standards of commercial honor and just and equitable principles of trade." FINRA Rule 2010. That said, it is commonly understood as a "catch-all" provision. *See, e.g.*, John Curley, *Recent FINRA Cases Highlight Rule 2010's Broad Reach*, N.Y. Law J. (Jan. 24, 2020), *available at* https://www.fedbar.org/securities-law-section/wp-content/uploads/sites/129/2020/02/Recent-FINRA-Cases-Highlight-Rule-2010s.pdf; John Curley, *FINRA Rule 2010: A Short Rule With a Long Reach*, ThinkAdvisor (Aug. 31, 2018), *available at* https://www.thinkadvisor.com/2018/08/31/finra-rule-2010-a-short-rule-with-a-long-reach/ ("The rule is a catch-all that provides flexibility to penalize conduct that is not expressly prohibited elsewhere either in FINRA's rules or the securities laws."); *FINRA Rule 2010: Standards of Commercial Honor and Principles of Trade*, Sonn Law Group (Mar. 16, 2017) ("It can be used to enforce unethical broker or brokerage firm conduct that might not be a direct violation of any other rule."), *available at* https://www.sonnlaw.com/faq/finra/finra-rule-2010/#:~:text=FINRA%20Rule%202010%20is%20perhaps,this%20provision%20is%20intentionally%20broad. But Rule 2010 should not be used to duplicate charges. It should only be used when another rule is inapplicable. And it should not be given such wide, indeterminate breadth. *Cf. Timpinaro v. SEC*, 2 F.3d 453, 460 (D.C. Cir. 1993) ("A vague rule denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions.").

In prior cases, for example, FINRA has relied on Rule 2010 when Rule 8210 was not cited and thus no Rule 8210 violation could be pursued. *See, e.g.*, *Dep't of Enf't v. Elgart*, No. 2013035211801, 2017 FINRA Discp. LEXIS 9, at *32–33 (NAC Mar. 16, 2017) (imposing a six-month suspension for willfully filing false Form U4s and a consecutive 30-day suspension for knowingly providing false information to FINRA); *Dep't of Enf't v. Stonegate Partners, LLC*, Discip. Proc. No. E112005002003, 2008 FINRA Discip. LEXIS 26, at *31–32 (OHO May 15, 2008) (imposing a one-year suspension for providing misleading information to FINRA and failing to maintain and enforce an adequate supervisory system and written procedures relating to the collection and retention of information and internal inspections).

FINRA abuses Rule 2010 by treating it not just as a catch-all when the conduct at issue is not covered by a separate FINRA or SEC rule (or when FINRA fails to cite Rule 8210 in a document request), but instead as a de-facto charge when some other FINRA rule is violated. FINRA imposed multiple punishments and otherwise exacerbated lesser violations resulting in Ms. Jones' lifetime bar and KJC's statutory disqualification.

3. FINRA and the NAC Improperly Used Evidence of Misconduct as Both Justification for the Violations and as Aggravation for Said Violations

FINRA's charges against Ms. Jones are based on FINRA's belief that Ms. Jones intentionally submitted false FOCUS reports, withheld documents during Rule 8210 requests, and misled FINRA investigators – or as FINRA stated in its post-hearing brief: "engaged in subterfuge over the course of many months" in "a deliberate attempt to hinder and delay FINRA's investigation." Department of Enforcement's Post-Hearing Brief at 39 [FINRA 004517]. FINRA abused its discretion and deprived Ms. Jones due process by treating Ms. Jones' purported deception both as (1) underlying Rule 8210 and 2010 violations, and (2) aggravation of said violations and of her purported Rule 4511 and 2010 violation. *See, e.g.*, NAC Decision at 14–15

[FINRA 004974–75]. By treating the conduct as both the underlying cause of the violation and as aggravation of the punishment for the violation, FINRA deprived Ms. Jones due process.

FINRA committed the same error when it treated Ms. Jones' failure to answer personal questions as both the fact underlying the Rule 8210 and 2010 violation, and as aggravation serving as a basis for increasing the punishment for the violation. *See* Extended Hearing Panel Decision at 40 [FINRA 004652] (stating "the question of whether [Ms. Jones' mother] was still alive is aggravating"). Ms. Jones' response regarding her mother cannot both be a violation and aggravation of her violations.

In sum, FINRA and the NAC used a few improper or deficient actions to impose an overly severe and excessive lifetime bar on Ms. Jones and to statutorily disqualify KJC.

4. FINRA and the NAC Punished Ms. Jones for Refusing to Answer Personal Questions

Through Rules 8210 and 2010 and with the weight of its unrestrained enforcement powers, FINRA punishes members who fail to answer questions – even personal questions that FINRA previously agreed would not be asked.

Rule 8210(a) provides that FINRA shall have the right to: "require a member . . . to testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation, complaint, examination, or proceeding." Sub-provision (c) requires compliance by broker-dealers, stating "[n]o member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule." Accordingly, Rule 8210 allows FINRA to request any document based only on "a determination made by the [FINRA] staff," and "does not require that [FINRA] explain its reasons for making the information request or justify the relevance of any particular request." *Morton Bruce Erenstein*, Exchange Act Release No.

56768, 2007 SEC LEXIS 2596, at *12–13 (Nov. 8, 2007). Although FINRA Rule 8210 requests can be extremely broad and invasive, there is no formal appeal process when dealing with a Rule 8210 information request, and "respondents may not second guess FINRA's requests, or substitute their judgment as to the appropriateness of the request." *Rani T. Jarkas & William H. Carson*, No. 2009017899801 at 20. If a member nevertheless refuses to produce requested documents or answer all questions, FINRA can file an enforcement action charging the member with a failure to cooperate and then impose a suspension or otherwise bar the person for life. A defendant in any other proceeding, civil or criminal, is allowed without negative repercussion to challenge the scope of a discovery request or the relevancy of questions during a hearing.

In this case, while Ms. Jones was dealing with family emergencies and her mother's ill health, she requested that FINRA not ask personal questions during the OTR. FINRA advised her counsel that it would agree to honor her request. Nevertheless, FINRA asked during the OTR about Ms. Jones' mother. Ms. Jones refused to answer personal questions. FINRA turned her initial misstatement and failure to respond during the OTR into an additional violation, stating any and all "[r]epresentations that an associated person makes to FINRA staff during an exam are clearly business related." Extended Hearing Panel Decision at 25 [FINRA 004637].

And the NAC affirmed the Extended Hearing Panel's finding that Ms. Jones "violated FINRA Rules 8210 and 2010 by refusing to answer questions during her OTR regarding whether her mother was still alive and whether Jones had previously represented to FINRA staff that she had died." NAC Decision at 12 [FINRA 004972]. This, despite the Extended Hearing Panel's conclusion that "Enforcement ha[d] not . . . established that [Ms.] Jones's refusal to testify that her mother was still alive impeded the staff's investigation." Extended Hearing Panel Decision at 40 [FINRA 004652]. It should not be the case that FINRA is allowed to find a violation for refusal to answer personal questions that even FINRA acknowledged did not impede or interfere with

their investigation. In any event, refusing to answer personal, immaterial questions does not constitute dishonest, unjust, or inequitable conduct.

* * *

FINRA Enforcement is ostensibly a prosecutor of the broker-dealer industry. That being the case, "[i]t is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935). The prosecutor's role is to uphold the constitutional rights of the accused – to seek justice and fairness, not solely convictions. *See id.*; *United States v. Bagley*, 473 U.S. 667, 680 (1985). Indeed, lawyers who act on behalf of the government "serve truth and justice first." *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993).

The result of FINRA's abuse here is a cornucopia of Rule violations and aggravators producing a severe, excessive, and unconstitutional punishment for what was primarily the simple mistaken filing of inaccurate FOCUS reports. And rather than decreasing the patently excessive sanctions, the NAC increased the punishment to a lifetime bar despite FINRA not cross-appealing the issue. It may be that some of FINRA's rules, such as those mandating compliance with a Rule 8210 request, serve pertinent and useful interests for a self-regulating organization when utilized correctly, but FINRA is not simply a private actor and as such cannot deprive its members of their due process rights by abusing the authority granted to it in order to obtain as many convictions or as excessive a sanction as possible.

C. Either FINRA is a State Actor or its Exercise of Delegated Authority is Unconstitutional

As FINRA correctly notes: FINRA "Play[s] a Big Role." About FINRA, *available at* https://www.finra.org/about#:~:text=FINRA%20is%20authorized%20by%20Congress,billions%

20of%20daily%20market%20events (stating "FINRA is authorized by Congress to protect America's investors by making sure the broker-dealer industry operates fairly and honestly"). Because of its large role, substantial public function, and entwinement with the SEC, FINRA must be considered a state actor.

The state-actor doctrine imposes on ostensibly private parties – such as FINRA – the obligation to comply with constitutional norms in the same way it confers government benefits like immunity from suit. *See Dexter v. Depository Tr. & Clearing Corp.*, 406 F. Supp. 2d 260, 263 (S.D.N.Y. 2005) (affording immunity to FINRA predecessor because of its "quasi-governmental authority"). As to the SEC and Self-Regulatory Organizations, lawmakers recognized this bargain when they adopted the 1975 amendments to the Exchange Act, stating: because SROs "exercise government power . . . by imposing a disciplinary sanction, broadly defined, on a member or person affiliated with a member . . . [they] must be required to conform their activities to fundamental standards of due process." *S. Comm. on Banking, Housing & Urban Affairs, Securities Acts Amendments of 1975*, S. Rep. No. 94-75, at 24–25 (1975). FINRA may well be entitled to immunity benefits as a state actor, but they come with co-equal, attendant responsibilities. At least when performing the adjudicatory function at issue in this case, FINRA cannot continue to have its cake and eat it too.

The Supreme Court has announced three principles to identify state action. First, the private party must perform a "public function" of the sort traditionally performed by the government. *See Marsh v. Alabama*, 326 U.S. 501, 506 (1946). Second, there must be "a sufficiently close nexus between the State and the challenged action" by the private organization such "that the action of the latter may be fairly treated as that of the State itself." *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972)). Third, some cases suggest an additional inquiry into whether the government is

"jointly participating" or "entwined" with the work of the private actor. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296, 302 (2001). These factors are not exclusive, owing to the fact that "the Court has articulated a number of different factors or tests in different contexts," resulting in a "necessarily fact-bound inquiry." *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 939 (1982). Regardless of the test that is applied, FINRA should be considered a state actor.

"Congress, through the Exchange Act, delegated the power to register national securities associations ('RSAs' or 'associations') to the Securities and Exchange Commission ('SEC'). Pursuant to this authority, the SEC registered FINRA as an RSA." *Scottsdale Cap. Advisors Corp. v. FINRA* (*Scottsdale I*), 844 F.3d 414, 417 (4th Cir. 2016). Through historical consolidation, including the SEC terminating its own SRO-style direct oversight of firms registered solely with the SEC, FINRA now oversees virtually the entire population of broker-dealers. And it does so with considerable SEC involvement. *ACAP Fin., Inc. v. U.S. SEC*, 783 F.3d 763, 765 (10th Cir. 2015) (stating FINRA is a "quasi-governmental agency responsible for overseeing the securities brokerage industry").

"As a national securities association, FINRA is undoubtedly subject to the SEC's jurisdiction. FINRA 'creates and enforces rules that govern the industry alongside the SEC and is subject to significant SEC oversight.'" *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 735 (D. Neb. 2014) (quoting *Aslin v. FINRA*, 704 F.3d 475, 476 (7th Cir. 2013)). "The SEC must approve all of FINRA's rules, and may abrogate, add to, and delete from all FINRA rules as it deems necessary." *Id.*; *see also Scottsdale Cap. Advisors Corp. v. FINRA* (*Scottsdale II*), 390 F. Supp. 3d 72, 75 (D.D.C. 2019); NAC Decision at 15 [FINRA 004975] (noting the SEC's stress of compliance with recordkeeping rules under the Exchange Act); *Saad*, 980 F.3d at 108 (refusing to extend *Kokesh* to SEC lifetime bars because they are authorized under the Exchange Act).

The duplication and entwinement of government functions is further troublesome given federal law requires virtually every broker-dealer that is not solely an exchange member to become a member of FINRA, and every FINRA adjudication is subject to non-discretionary appeal to the SEC, which then reviews the record produced by FINRA. *See Brentwood*, 531 U.S. at 296. Oversight of the markets is, as the application of the Exchange Act's rules evidences, a traditionally public function.[10] *Cf. Terry v. Adams*, 345 U.S. 461, 469 (1953); Michael Deshmukh, *Is FINRA a State Actor*, 67 Vand. L. Rev. 1173, 1194 (2014) ("[T]he government's intentions with FINRA are highly analogous to the regulatory dynamics in *Terry v. Adams*."). Indeed, the adjudication of cases is among "the core functions of the governmental unit involved." *See Ass'n of Admin. Law Judges v. Colvin*, 777 F.3d 402, 409 (7th Cir. 2015). And certainly, there is a sufficient nexus if not hand-in-hand relationship between the government and the challenged action of the regulated entity here. *Jackson*, 419 U.S. at 351. FINRA's entire purpose is delegated by the SEC as a duplication of governmental function. *Cf. Birkelback v. SEC*, 751 F.3d 472, 475 (7th Cir. 2014); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) ("joint participant").

The ultimate question for any test looking to identify state action is whether seemingly private action "may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351. As current Commissioner Hester Peirce noted, "on the strength of a government mandate and carrying out a regulatory mission using government-like tools, FINRA is difficult to distinguish from its patron agency." Hester Peirce, *The Financial Industry Regulatory Authority: Not Self-Regulation After All*, *in* Building Responsive and Responsible Financial Regulators in the Aftermath of the

[10] As further evidence of the public function of FINRA, the majority of FINRA board members are public governors, not private. *See* FINRA Board of Governors, *available at* https://www.finra.org/about/governance/finra-board-governors.

Global Financial Crisis 246 (Pablo Inglesias-Rodriguez ed., 2015). Again, the overlap and public function of FINRA is the premise for FINRA claiming state-actor benefits and why it is even recognized by the IRS as "an agency or instrumentality of the government of the United States." *See* Internal Revenue Service Memorandum No. 201623006 (Jun. 3, 2016). But as a state actor, it must provide due process.

If FINRA is not a state actor, the constitutional implications for its status under the Exchange Act are even more severe. Under that approach, the statutory scheme would be held to effectuate a "pass-through" or "double delegation" to a private entity – *i.e.*, from Congress through the SEC to FINRA.

The D.C. Circuit and Supreme Court confronted a similar structure in a pair of cases related to Amtrak's authority to issue standards in conjunction with the Federal Railroad Administration. *See Ass'n of Am. R.R. v. U.S. Dep't of Transp.* (*American Railroads I*), 721 F.3d 666 (D.C. Cir. 2013); *Dep't of Transp. v. Ass'n of Am. R.R.* (*American Railroads II*), 575 U.S. 43 (2015).

In *American Railroads I*, the D.C. Circuit accepted Congress's statement that Amtrak "is not a department, agency, or instrumentality of the United States' Government" and "shall be operated and managed as a for-profit corporation." 721 F.3d at 675 (quoting 49 U.S.C. § 24301(a)(2), (3)). As such, the D.C. Circuit concluded that Amtrak was a private entity but consequently that "it was impermissible for Congress to 'delegate regulatory authority to a private entity.'" *American Railroads II*, 575 U.S. at 51 (quoting *American Railroads I*, 721 F.3d at 670)); *see also Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (prohibiting any such delegation of authority). In so holding, the D.C. Circuit gave one of the clearest statements of the pass-through or double delegation doctrine. *See also United States v. Juvenile*, 229 F.3d 737, 748 (9th Cir. 2000) ("We have found lurking in the penumbra of this case a new enemy of the law – double delegation.").

The Supreme Court reversed, but only by concluding that Amtrak was actually a state actor. *American Railroads II*, 575 U.S. at 51, 54. Echoing concerns in the present case, the Court explained that "[t]o hold otherwise would allow the Government to 'evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.'" *Id.* at 54 (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995)). The Court reasoned that Amtrak exists "for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees, and that the Government exerts its control over Amtrak 'not as a creditor but as a policymaker.'" *Id.* (quoting *Lebron*, 513 U.S. at 394, 398–99). Thus, "'for the purpose of individual rights guaranteed against the Government by the Constitution,'" Amtrak is an instrumentality of the federal government. *Id.* (quoting *Lebron*, 513 U.S. at 394, 398–99).

The Constitution and Bill of Rights, including the Fifth Amendment's Due Process Clause, ensure that the actors in each department cannot evade the Framers' carefully constructed regulatory scheme by delegating their federal lawmaking power to unaccountable private parties beyond the direct legal and political control of superior federal officeholders and the electorate. FINRA cannot be considered a private actor. But as a state actor, FINRA is required to (1) respect due process and (2) ensure its officers and inferior officers are properly appointed under the Constitution. FINRA does neither.

D. FINRA and the NAC Panel's Construction Violates the Appointments Clause

The Appointments Clause "preserves . . . the Constitution's structural integrity" by ensuring that officials remain "accountable to political force and the will of the people." *Freytag v. C.I.R.*, 501 U.S. 868, 878, 884 (1991). The Due Process violations above are compounded by

the fact FINRA's governing members and NAC adjudicators are not appointed in a manner consistent with the separation of powers and the Appointments Clause.

The Appointments Clause provides that the President shall name "officers of the United States" while permitting that "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." U.S. Const. art. II, § 2, cl. 2. The clause protects the President's prerogative to helm the executive branch and also serves the separation of powers by preventing "Congress from dispensing power too freely." *Freytag*, 501 U.S. at 880. "The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Id.*

The appointment power takes on an additional dimension where Congress has created an independent agency, allowing removal of its principal officers only for cause. *Humphrey's Executor v. United States*, 295 U.S. 602, 625–26 (1935). For those agencies, which include the SEC, good-cause removal is a permissible limitation on the President's executive authority under Article II. *Id.* at 629. But when an independent agency in turn makes appointments that provide only for-cause removal, the "multilevel protection from removal is contrary to Article II's vesting of the executive power in the President." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010). At issue in *Free Enterprise Fund* was FINRA's governmental twin: the Public Company Accounting Oversight Board ("PCAOB"). Like FINRA, the PCAOB enforces federal laws along with its own rules and has the ability to impose stiff penalties, including a lifetime ban from the public accounting industry. *Id.* at 485. Also "like the officers and directors of the self-regulatory organizations," PCAOB members were insulated from SEC control, including removal only for cause. *Id.* at 486–87 (comparing 15 U.S.C. § 78y(a)(1) with 15 U.S.C. § 78s(h)(4)). In fact, the PCAOB "was modeled on" SROs. *Id.* at 484.

Thus, what is constitutionally deficient in the PCAOB is constitutionally deficient in FINRA—provided that FINRA is a state actor. If it is, then FINRA's board is unconstitutionally comprised. Its board would need to be appointed either by the President as officers of the United States or by the SEC as inferior officers. U.S. Const. art. II, § 2, cl. 2. Moreover, the additional layer of good-cause protection for the hearing officers and NAC members who adjudicated Ms. Jones' case fulfill the Supreme Court's nightmare of "a Matryoshka doll" of removal protections that preclude presidential oversight "even as they exercise[ ] power in the people's name." *Free Enter. Fund*, 561 U.S. at 497.

Lest there be any question, FINRA hearing panel members and NAC panel members are officers (even if inferior) of the United States. According to the Supreme Court, an officer is generally "any appointee exercising significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), or, more specifically:

> (1) those charged with "the administration and enforcement of the public law"; (2) those granted "significant authority"; (3) those with "responsibility for conducting civil litigation in the courts of the United States"; and (4) those "who can be said to hold an office . . . that has been created either by "regulations" or by "statute."

Free Enter. Fund, 561 U.S. at 539 (Breyer, J., dissenting) (internal quotations omitted). Using those guides, the following "inferior officers" have been discovered: "thousands of clerks in the Departments of the Treasury, Interior, and the othe[r]" departments, *United States v. Germaine*, 99 U.S. 508, 511 (1878); Tax Court special trial judges, *Freytag*, 501 U.S. at 881–82; and, analogously, SEC administrative law judges, *see Bandimere v. SEC*, 844 F.3d 1168, 1179–82 (10th Cir. 2016). So too here must FINRA's Hearing Panel Adjudicators and NAC panel members be considered "inferior officers."

First, as stated above, FINRA is the principal SRO to which SEC authority over broker-dealers is delegated. In essence, FINRA hearing panel members and NAC panel members serve

as the sole SRO for all non-exchange members pursuant to federal law. *See Seattle Master Builders Ass'n v. Pac. N.w. Elec. Power & Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986). And just as SEC ALJs have the power to "conduct hearings" and "proceedings," *see Bandimere*, 844 F.3d at 1179, so too do FINRA panel members.

Second, there is no SEC role in appointing FINRA's leadership, and FINRA hearing officers and NAC panel members are protected from removal. As currently structured, FINRA hearing panels are appointed by the Chief Hearing Officer and consist of a hearing officer and two panelists. FINRA Rule 9231(a)-(b). Hearing officers "may not be terminated except by the FINRA Chief Executive Officer, with a right to appeal to the Audit Committee of FINRA's Board of Governors." FINRA Office of Hearing Officers' Decisions and Orders, *available at* https://www.finra.org/rules-guidance/adjudication-decisions/office-hearing-officers-oho. The Chief Hearing Officer is chosen by the Chief Executive Officer of FINRA. *See* by-laws of the Corporation Art. VIII § 1. The panelists are discretionarily selected from among a variety of persons. *See* FINRA Rule 9231(b). As to the NAC panel, the NAC is delegated review authority by FINRA's by-law, Art. V, § 5.1, the NAC's members are appointed by the FINRA board, FINRA by-law Art. V, § 5.3, NAC members are appointed to 4-year terms, *id.* § 5.6, and essentially may be removed only for cause, *id.* § 5.8 (for "refusal, failure, neglect, or inability to discharge the duties of such office by majority vote of the FINRA Board").

Third, both FINRA and the NAC's panel members exercise significant discretion in performing "important functions" commensurate with the SEC ALJs' functions in *Bandimere* and STJs' functions in *Freytag*. They develop the administrative record, file charges pursuing both FINRA and SEC rule violations, take evidence, rule on dispositive and procedural motions, and preside over trial-like hearings. When presiding over trial-like hearings, they make credibility findings to which the SEC affords considerable weight during review. *See John Edward Mullins*,

Exchange Act Release No. 66373, 2012 WL 423413, at *13 (Feb. 10, 2012). Finally, following the conclusion of a trial-like hearing, FINRA and the NAC "have authority to issue initial decisions that declare respondents liable and impose sanctions." *Bandimere*, 844 F.3d at 1180. To the extent an appeal is not timely filed, the Hearing Panel's or NAC's decision becomes final.

As officers who exercise power similar to that discussed in *Freytag* and *Lucia v. SEC*, 138 S. Ct. 2044 (2018), their appointment must come from the President, the courts, or the (constitutional) head of a department. U.S. Const. art. II, § 2, cl. 2. As currently constructed, their appointments do not meet that test. Only through the ruse of claiming to be a private organization has FINRA eluded the constitutional requirements applied to the PCAOB.

Finally, the Commission's review – by properly appointed Commissioners – cannot save the constitutional infirmities that occurred below. FINRA's enforcement created a misleading and biased record, which was adopted and ratified by the Extended Hearing Panel and by the NAC with significant denials of due process that materially impacted the result. Errors are too ingrained by the time a case reaches the Commission's review (for the same reason that the faults noted in *Freytag* and *Lucia* could not be saved on review to the D.C. Circuit. The law is clear that district courts may not infringe upon a defendant's or litigant's due process even though there is a right to appeal any case to a circuit court).

IV. CONCLUSION

For the reasons stated above, Appellants respectfully request that the Commission reverse KJC's statutory disqualification and the lifetime bar imposed against Ms. Jones and remand for a more appropriate sanction.

Dated: April 1, 2021 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Matthew P. Hoxsie, certify that the Brief in Support of the Application for Review complies with the length limitation set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 13,322 words.

*/s/ Matthew P. Hoxsie*_____

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U.S. SECURITIES & EXCHANGE COMMISSION
Washington, D.C.

In the Matter of the Application of ROBBI J. JONES Houston, TX and KIPLING JONES & COMPANY, LTD. Houston, TX For Review of Disciplinary Action Taken by FINANCIAL INDUSTRY REGULATORY AUTHORITY	**CERTIFICATE OF SERVICE**

I, Matthew P. Hoxsie, being of full age, hereby certify:

1. I am an Associate in the firm of Greenberg Traurig, LLP.

2. On April 1, 2021, I caused electronic copies of APPELLANTS' BRIEF IN SUPPORT OF THE APPLICATION FOR REVIEW to be served via email to the following:

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3. I certify under penalty of perjury that the foregoing is true and correct.

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