SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of WILLIAM JOSEPH KIELCZEWSKI For Review of Disciplinary Action Taken by FINRA	Admin Proc. File No. 3-20636

REPLY BRIEF SUBMITTED ON BEHALF OF WILLIAM JOSEPH KIELCZEWSKI

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Introduction

For more than two years, Huntington Investment Company ("Huntington") deceived FINRA about its responses to Rule 8210 requests. In response to requests for documents and information, Huntington ignored FINRA's clear directive to identify any documents that were withheld and the justification for withholding them. Rather, Huntington simply withheld documents without giving the notice that the Rule 8210 requests required. Huntington *never* produced all the documents requested and *never* identified the documents it withheld.

As a result, the decision against Kielczewski below was achieved on a record chosen entirely by non-party FINRA-member Huntington. Thus, a hostile former employer decided what documents and information FINRA would consider in deciding whether to bring charges against Kielczewski. A hostile former employer decided what documents were available for FINRA and Kielczewski at hearing. And this, in a case in which FINRA's theory rested on the absence of *written* notice to Huntington, in which even one email could have changed the entire case, FINRA refused to take the minimal steps necessary to obtain a complete record even after FINRA learned that Huntington had sabotaged FINRA's efforts to obtain discovery.

Rather than addressing the fundamental problem of proceeding on such a record, FINRA tries to blame Kielczewski, asserting that it would have tried to provide a fair hearing but for Kielczewski's failure to act, asserting that Huntington's use of the term "non-privileged" should have put Kielczewski on "notice" – despite the fact that the FINRA Rule 8210 requests specifically identified the exact steps Huntington needed to undertake in order to withhold documents under a claim of attorney-client privilege, steps that Huntington never took.

In addition, FINRA's argument ignores decades of caselaw affirming that the burden of asserting a privilege is on the party asserting it. Even in the absence of the specific instructions in

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the Rule 8210 requests, it is axiomatic that a party can assert and preserve a claim of attorney-client privilege only by clearly indicating the documents being withheld and stating the reasons for doing so. Withholding documents is not sufficient. Assertions of producing "non-privileged" documents are not sufficient. Not a single case supports FINRA's argument in its brief: every decision supports Kielczewski. And for good reason: were courts to adopt FINRA's view, every case would become a contest as to how little notice a producing party could give of the documents it had chosen to withhold and get away with it. FINRA's decision should be vacated because this fundamental defect in the proceeding denied Kielczewksi the "fair procedure" to which he is entitled under the Exchange Act of 1934.

As to the remainder, FINRA makes several material misstatements of fact and omits mention of other critical pieces of evidence. For the reasons described below, FINRA reached conclusions as to Kielczewski's *mens rea* that are not supported by the evidence and should be rejected, and imposed sanctions that were meaningfully excessive in the absence of a willful or intentional violation.

I. SROs Have a Duty to Provide a Fair Procedure When Imposing Discipline

FINRA's authority to discipline, as well as its entire existence within the framework of securities regulation, is a result of the Exchange Act. Under Section 15A(b) of the Exchange Act, SROs like FINRA "have a statutory authority and obligation to 'appropriately discipline' their members for violations of any provision of the Exchange Act, the rules or regulations promulgated thereunder, or their own rules, 'by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.'" *Fiero v. Fin. Indus. Regul. Auth., Inc.*, 660 F.3d 569, 574 (2d Cir. 2011) (quoting 15 U.S.C. § 78o–3(b)(7)).

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The authority that FINRA "exercises in this realm [is] as a first-level adjudicator of disciplinary actions …. Congress was clear in 1975 that self-regulatory organizations exercise authority subject to SEC oversight." *Nat'l Ass'n of Sec. Dealers, Inc. v. S.E.C.*, 431 F.3d 803, 811 (D.C. Cir. 2005) (citation omitted and internal quotation marks omitted). Accordingly, FINRA must "provide a fair procedure for the disciplining of members and persons associated with members[.]" 15 U.S.C. § 78o-3(b)(8). Section 19(e)(1)(A) of the Exchange Act governs the Commission's review of disciplinary actions taken by self-regulatory organizations ("SROs"), including FINRA. Whether an SRO has provided a "fair procedure" is a core function of the Commission.

In reviewing disciplinary decisions by SROs, "a fundamental principle governing all SRO disciplinary proceedings is fairness." *In the Matter of Hayden*, Exchange Act Release No. 42772 (May 11, 2000). The Commission has explained that the fairness of the proceeding is determined based on "the entirety of the record" and looks to whether the respondent has shown that his "ability to mount a defense was harmed[.]" *Mark H. Love*, 57 S.E.C. 315, 324-25 (2004).

a. The Fairness of a Hearing Is Reviewed De Novo, Not for Abuse of Discretion

Contrary to FINRA's assertion, (FINRA Br. 30 n. 11), the standard of review that applies here is whether FINRA provided a "fair procedure" as required by the Exchange Act and not "abuse of discretion." This standard is clear from the case cited by FINRA itself for the applicable standard of review. In *In re Robert J. Prager*, Exchange Act Release No. 51974, 2005 WL 1584983 (July 6, 2005), the Commission held that the "Exchange Act Section 15A(b)(8) requires NASD to 'provide a fair procedure for the disciplining of members and persons associated with members.' 15 U.S.C. § 78o-3(b)(8)." *Id.* at *12, n. 54. Review for fairness is conducted on a *de novo* basis. *Prager* at *12. While the Commission has treated certain types of administrative

decisions by hearing officers, such as decisions whether to continue a hearing or to admit or exclude a given document under the abuse of discretion standard, *see, e.g.*, *Prager* at *13, the standard of review here is *de novo*.[1]

That is because the decision at issue was not to admit or exclude a document into evidence, or even the decision as to whether a document or group of documents was subject to attorney-client privilege. Rather, the decision here was the one by FINRA to allow non-party FINRA-member Huntington to decide what documents and information FINRA and Kielczewski could use both at the investigation and hearing stage without any review whatsoever. This was structural error that infected the entire course of proceedings and requires vacatur of the FINRA findings and remand for a new hearing. *See Laccetti v. Sec. & Exch. Comm'n*, 885 F.3d 724, 728 (D.C. Cir. 2018) (Kavanaugh, J.)

b. The Harmless Error Standard Does Not Apply Here

In the alternative, FINRA asserts that its error in prosecuting Kielczewski without having any idea what documents and information were secretly withheld by Huntington was "harmless."

FINRA misapprehends its own rule. By its own terms, FINRA Rule 9251(g) does not apply to the facts presented here. FINRA Staff, due to FINRA's continued opposition to Kielczewski's attempt to get relief, never possessed the documents in the first place. (*See* FINRA Br. 31 n. 13 ("Kielczewski is seeking documents that Huntington never produced to FINRA")). By its title and plain terms Rule 9251 addresses "Inspection and Copying of Documents *in Possession of Staff*." (emphasis added). The text of that rule is as follows: "In the event that a Document required to be made available to a Respondent pursuant to this Rule is not made available *by the Department of*

[1] In addition, and in the alternative, because the hearing officer erred as a matter of law in ruling against Kielczewksi on the notice issue, as described in more detail below, Kielczewski should prevail. "[A]ny error of law constitutes an abuse of discretion." *United States v. Johnson*, 446 F.3d 272, 277 (2d Cir. 2006).

Enforcement, no rehearing or amended decision of a proceeding already heard or decided shall be required unless the Respondent establishes that *the failure to make the Document available [by the Department of Enforcement]* was not harmless error." (emphasis added). Here, the error was not that the Department of Enforcement through some neglect or oversight failed to turn over documents that it had gathered in its investigation. The error was that once FINRA became aware that Huntington had withheld documents unilaterally and in plain violation of its Rule 8210 obligations, it took no measures to address Huntington's disregard of its obligations and instead opposed Kielczewski's efforts to get the documents that FINRA staff had never obtained. This was error and requires vacatur of the decision and remand.

If anything, the inapplicability of Rule 9251(g) underscores the unique facts presented by this case. This is not a situation in which there was an argument about the relevance or admissibility, or even the application of the attorney-client privilege, of documents that were obtained by FINRA and available for review at least by FINRA or the Hearing Officer. The documents and information at issue here never even made it into FINRA's hands.

c. <u>FINRA's Argument that Kielczewski Has No Right to Obtain Discovery in FINRA Proceedings Misses the Point</u>

In a last-ditch effort to defend its own failure to provide Kielczewski the "fair procedure" the Exchange Act requires, FINRA resurrects an argument that it made to the Hearing Officer (FINRA 487-489; 5174-5176), that Kielczewski lacks standing under Rule 8210 to require a third party to produce documents or information, much less a privilege log for documents, and so cannot have been prejudiced by Huntington's failure to produce documents. (FINRA Br. 35).

This argument misses the point. Fundamental to a "fair procedure" is that respondents have some ability to access documents and information that would exculpate them or mitigate the sanctions to be imposed. FINRA, for whatever reason, has chosen to structure its disciplinary

proceedings so that only one party, FINRA Enforcement, has the ability to obtain documents and information, but leaving a path for respondents to petition Enforcement or the Hearing Officer to issue requests for documents. *See* Rule 8210, 9252. Kielczewksi made every effort to utilize those mechanisms to obtain documents and information for his defense, such as, for example, documents that might reflect "written notice" given to Huntington before engaging in the private securities transactions at issue.[2] Having set up a discovery system that bars respondents from obtaining discovery directly themselves, FINRA cannot then turn around and argue that respondents lack standing to obtain documents and information that would exculpate them.

FINRA simply cannot enforce a rule that would result in a violation of its enabling statute, the Exchange Act. "[W]here FINRA enforces statutory or administrative rules, or enforces its own rules promulgated pursuant to statutory or administrative authority, it is exercising the powers granted to it under the Exchange Act." *Fiero*, 660 F.3d at 575–76. FINRA cannot enforce rules that exceed or contradict the legislation that enables it to exist in the first place. *See id.* The fairness of the proceeding is determined based on "the entirety of the record" and looks to whether the respondent has shown that his "ability to mount a defense was harmed[.]" *Mark H. Love*, 57 S.E.C. at 324-25.

d. Production of Huntington's Privilege Log is Fundamental to a Fair Enforcement Proceeding and Hearing

Where documents are not produced, a privilege log is essential to fairness: "The importance of providing a privilege log . . . cannot be understated." *Main Street Am. Assurance Co. v. Savalle*, Civil No. 3:18CV02073(JCH), 2019 WL 4437923, at *3 (D. Conn. Sept. 16, 2019); *Alleyne v. N.Y. State Educ. Dep't*, 248 F.R.D. 383, 386 (N.D.N.Y. 2008) (recognizing importance of privilege log

[2] Because the Hearing Officer deferred ruling on Kielczewski's motion until after the fact hearing closed, Kielczewski had no opportunity to proffer as to the contents of the documents Huntington improperly withheld.

by stating the "court's task" of conducting an in-camera privilege review "is nearly impossible absent a detailed privilege log"). The importance of the privilege log is derived, in part, from that fact that "[a]n invocation of a claim of privilege without producing an accompanying privilege log can be an unfair discovery tactic . . . ." *Savalle*, 2019 WL 4437923, at *3 (citation omitted).

e. Cross-Examination Permitted at the Hearing Regarding Privileged Documents Was Meaningless Without a Privilege Log

The decision to allow cross-examination at the hearing on the issue of privilege, as opposed to compelling production of a privilege log identifying the documents withheld, resulted in a meaningless exercise at the hearing to ascertain whether privilege attached to documents that had not been identified or produced. It also improperly shifted the burden of establishing privilege, which rests on the proponent of the privilege, to the respondent, who is otherwise entitled to the documents. For example, Huntington refused to allow its witness(es) to respond to Respondent's questions on the types of documents and information that Huntington had withheld. The Hearing Officer sustained Huntington's objections. "When a privilege is claimed, [a] deponent must answer questions relevant to the existence, extent and/or waiver of the privilege, including questions addressing the date of privileged communication, who made the privileged communication, and the identity of persons to whom the contents of the statement have been disclosed." *Greer v. Mehiel,* No. 15-CV-6119 (AJN) (JLC), 2017 WL 543453, at *4 (S.D.N.Y. Feb. 10, 2017); *see also Fed Haus. Fin. Agency v. UBS Ams., Inc.,* No. 11 Civ 5201 (DLC), 2012 WL 5954817, at *6 (S.D.N.Y. Nov. 28, 2012).

A privilege log would have described the nature of the documents or communications in a manner sufficient to protect the privileged information from disclosure while enabling Kielczewski to assess each claim of privilege. *See*, *e.g.*, Fed. R. Civ. P. 26(b)(5)(A).

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f. Huntington's Failure to Provide a Privilege Log Resulted in a Waiver of Privilege

"[C]ourts in the Second Circuit have uniformly concluded that '[t]he failure of a party to list a document withheld during the course of discovery on a privileged log...ordinarily results in a finding that the privilege otherwise asserted has been waived.'" *Cice (Beijing) Science & Technology Co., Ltd. v. Misonix, Inc*., 331 F.R.D. 218, 228 (E.D.N.Y. Apr. 11, 2019) (citing *Feacher v. Intercontinental Hotels Grp*., No. 3:06-cv-0877, 2007 WL 3104329, at *5 (N.D.N.Y. Oct. 22, 2007)); *FG Hemisphere Associates, L.L.C. v. Republique Du Congo*, No. 01-cv-8700, 2005 WL 545218, at *6 (S.D.N.Y. Mar. 8, 2005) ("As other judges in this District and I have repeatedly held, the unjustified failure to list privileged documents on the required log of withheld documents in a timely and proper manner operates as a waiver of any applicable privilege." (citations omitted).

g. The Hearing Officer Had Good Cause to Postpone the Hearing If Needed

A hearing officer may "extend or shorten any time limits prescribed by the Code ***for the filing of any papers and may***, consistent with [FINRA Rule 9222](b), ***postpone*** or adjourn ***any hearing***." FINRA Rule 9222(a) (emphasis added). The standard for extending a time limit is good cause. *Id.* For example, a party can seek to submit additional evidence, notwithstanding the 10-day requirement of FINRA Rule 9261(a), if the party shows good cause and the hearing officer, in his discretion, determines the evidence sought to be admitted is relevant and necessary for a complete record. FINRA Rule 9261(c). Similarly, a hearing officer may "extend or shorten any time limits prescribed by the Code ***for the filing of any papers and may***, consistent with [FINRA Rule 9222](b), ***postpone*** or adjourn ***any hearing***." FINRA Rule 9222(a) (emphasis added). The standard for extending a time limit is also good cause. *Id.*

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Here, there were nine days before commencement of the hearing in which Huntington could have produced a log of the documents that it already must have identified and set aside from production and in which the Hearing Officer could have determined both whether any of those documents were subject to a privilege and whether Huntington had waived any such privilege by its delay in asserting same. And if this was insufficient time, "good cause" existed: the proceeding had not commenced; there had been no prior postponements; discovery had otherwise concluded; a postponement would not pose any potential harm to the investing public; and the other factors cited previously support both the importance of the information sought for the elemental fairness of the proceeding.

h. Public Policy Considerations Demand Vacatur

Kielczewski's opportunity to present evidence at the hearing was impermissibly limited by FINRA under circumstances that should be examined by the Commission. In this case, FINRA failed to enforce its own request for information and documents under Rule 8210 and thus could not produce such information and documents to Kielczewski before the hearing. While the regulator's lapse regarding its own diligence to enforce its rules against a FINRA member cannot be directly challenged on appeal, "all FINRA activities are subject to comprehensive SEC oversight."[3] And here, FINRA's lapse as a regulator was followed by FINRA's opposition to Kielczewski's efforts to correct FINRA's lapse. As a matter of public policy, Kielczewski respectfully submits that it is not appropriate for a regulator – charged under its first By-Law "[t]o

[3] To this point, Robert Cook testified before Congress on May 6, 2021, stating that:

> "FINRA fulfills its mission by, among other things, adopting rules that supplement those of the SEC, examining its member firms for compliance with FINRA and SEC rules applicable to broker-dealers … and enforcing member firm compliance where necessary. All FINRA activities are subject to comprehensive SEC examination and oversight…" Available at: https://www.finra.org/media-center/speeches-testimony/statement-financial-services-committee-us-house-representatives.

promote and enforce just and equitable principles of trade and business, [and] to maintain high standards of commercial honor and integrity"[4] – to follow its own lapse in reasonable diligence with *opposition* to efforts to correct it. FINRA, were it to maintain high standards of commercial honor and integrity, should not have had such a lapse, of course, but more importantly, should not have opposed efforts to correct it.

In other words, FINRA's lapse in exercising reasonable diligence regarding Huntington's non-compliant Rule 8210 responses may not have been problematic by itself under other circumstances and, separately, FINRA's opposition to the motion to compel may not have been problematic by itself under other circumstances. But here, where the regulator had a lapse in reasonable diligence *and* subsequently opposed the request necessitated to address that lapse, then the regulator did not act in accordance with the highest standards of commercial honor and integrity.

Here, the underlying policy goals behind the claims asserted by FINRA – that the motion to compel was untimely – are those associated with the expeditious handling of cases. These policy goals are important, but certainly not more important than requiring the production of a privilege log that could lead to exculpatory evidence and the production of which likely would not have necessitated a delay of the hearing or, if it did, that such a delay would have been minimal.

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[4] FINRA By-Laws, Article XI, Section 1. Available at: https://www finra.org/rules-guidance/rulebooks/finra-rules/0130; *see also* FINRA's (Restated) Certificate of Incorporation, which has similar language about FINRA's "Objects or Purposes:"

"(3) To adopt, administer, and enforce rules of fair practice and rules to prevent fraudulent and manipulative acts and practices, and in general to promote just and equitable principles of trade for the protection of investors[.]

The public policy goals on the other side of the issue are far more serious: that is, the Commission should hold its self-regulating organizations to the same "high standards of commercial honor and integrity" that the SROs require of their members. In other words, FINRA, which strictly enforces its rules against its members, must be held accountable for lapses in its own diligence. This case presents a unique opportunity to send the right message to FINRA; that is, that FINRA must be more diligent in its investigations when it comes to members who violate FINRA rules regarding requests for information and, in particular, where, as here, the potential evidence sought may be exculpatory in a subsequent Enforcement proceeding.

In sum, regardless of how FINRA chooses to conduct its discovery practices, it must do so in a way that does not so fundamentally disadvantage the respondent as to harm his ability to mount a defense. In this case, by yielding to Huntington the sole, and unreviewed discretion to determine what documents and information would be available at the disciplinary hearing (regardless of how that decision is characterized), FINRA failed to live up to its obligations under the Exchange Act.

II. FINRA's "Notice" Defense Fails on the Facts and the Law

As its sole defense to Kielczewski's argument that FINRA failed to provide him a fair procedure in his disciplinary hearing, FINRA asserts that Kielczewski waived his rights because he was "on notice" that Huntington had withheld documents and information from its responses to its Rule 8210 request.

This argument fails both on the facts and the law.

In evaluating Huntington's response to FINRA's 8210 requests, Kielczewski was entitled to rely on Huntington's compliance with what the rule requires, just as FINRA did. Nothing in Huntington's actual responses would have put a reasonable person on notice that Huntington had no intention of complying with the requests.

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Further, as a matter of law, courts have universally held that the deliberately vague language used by Huntington of producing "non-privileged" documents or "reserving attorney-client" privilege are insufficient as a matter of law to preserve attorney-client privilege. In fact, such ambiguous statements result in the waiver of any otherwise applicable privilege.

a. Kielczewski Reasonably Relied on Huntington to Comply with the Rule and the Plain Text of the Rule 8210 Requests

FINRA argues that Kielczewski was put on notice that Huntington was asserting attorney-client privilege over certain documents in July 2019 when Enforcement produced Huntington's June 23, 2017 responses to FINRA's first request for documents to Kielczewski. This is not the case.

FINRA's Rule 8210 requests specifically stated that, "[Huntington] is obligated to respond to this request fully, promptly, and without qualification . . . If any responsive document or information is withheld, specifically identify what is being withheld and state the basis for doing so." (FINRA 5291-5292). In its responses, Huntington stated that it produced copies of "all non-privileged" communications[5] or the like without identifying any documents that were withheld. (*Id.*) Notably, in the more than two years following Huntington's non-compliant response, FINRA Enforcement took no action to follow up on its document requests or to ask Huntington to clarify whether and what documents and information were being withheld.

The burden of establishing "notice" falls upon the proponent of the claim, *see, e.g.*, *First Savings Bank, F.S.B. v. First Bank System, Inc.,* 101 F.3d 645, 652 (10th Cir. 1996); *LeRoux v. NCL (Bahamas), Ltd.,* No. 15-23095-CIV-WILLIAMS, 2017 WL 10410815, at *5 (S.D. Fla.

[5] Without identifying the reasons why, FINRA notes that Kielczewski received October 7, 2019 cover letters from Huntington on October 11, 2019. (FINRA Br. 34). Because those cover letters do no better at identifying the withholding of documents or the assertion of attorney-client privilege than any of the preceding responses from Huntington, their contents do not affect the analysis.

2017), which in this case was FINRA. This burden was not met in the hearing below. Huntington's responses did not provide actual or constructive notice to Kielczewski that Huntington *had withheld documents* on the basis of privilege, let alone notice of *what* documents had been withheld and *why* they were withheld. FINRA points to no evidence that Kielczewski (or his counsel) had "actual notice," *i.e.*, had been expressly informed that Huntington had in fact invoked attorney-client privilege, at least not before December 2, 2019 when Kielczewski took immediate action. *See, e.g., Notaro v. Performance Team*, 77 N.Y.S.3d 700, 702 (N.Y. App. Div. 2018). Constructive notice may be imputed only if Kielczewski should have known documents were withheld in the exercise of reasonable diligence, in light of all the evidence. *See Luksch v. Latham*, 675 F. Supp. 1198, 1199 (N.D. Cal. 1987); *In the Matter of David Zilkha*, Exchange Act Release No. 415, 2011 WL 1425710, at *15 (Apr. 13, 2011). Further, substantial evidence, not merely a preponderance of the evidence, is required to establish constructive notice. *See, e.g., Munos-Banega v. Holder*, 475 Fed. Appx. 516, 516 (5th Cir. 2012); *Funai Elec. Co., Ltd. v. Daewoo Electronics Corp.*, 616 F.3d 1357, 1375 (Fed. Cir. 2010).

Here, it was reasonable for Kielczewski to believe that Huntington had complied with FINRA's request to respond "fully, promptly, and without qualification" (FINRA 5291) when Kielczewski had no evidence to the contrary. If FINRA's argument that Kielczewski was on some kind of "notice" then FINRA cannot deny that it similarly was "on notice" and for much, much longer than Kielczewski was. FINRA says that Kielczewski delayed for "months" (FINRA Br. 33 n.14).[6] By contrast, FINRA had the document responses from Huntington placing it on "notice" for more than two-and-a-half years. FINRA does not even acknowledge this point in its response.

[6] In addition and in the alternative, neither the four months delay nor the nine days between the time of the request and the time of hearing is sufficient to show waiver. As noted above, more than sufficient time remained for FINRA to provide Kielczewski effective relief had FINRA chosen to do so.

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FINRA's inaction, by itself, shows that Kielczewski acted reasonably in relying on Huntington to appropriately respond to FINRA's Rule 8210 requests.[7]

b. The Vague Language Used by Huntington Regarding Its Production Is Insufficient to Preserve Attorney-Client Privilege Over Withheld Documents

In addition, and in the alternative, FINRA's "notice" argument fails as a matter of law. Courts have universally held that statements that a party was producing "all non-privileged documents" or the like are not sufficiently specific to constitute a claim of privilege as to *any* documents. *See, e.g.*, *Brown v. Tellermate Holdings Ltd*, No. 2:11-CV-1122, 2013 WL 1363738, at *4 (S.D. Ohio Apr. 3, 2013) ("Tellermate's general assertion that it was producing all non-privileged documents…was not sufficiently specific or express to constitute a claim of privilege as to any withheld documents."). "It would be manifestly unfair … to permit a party, after failing to make a timely disclosure that it had withheld documents and the reason why it did so, to succeed on a claim of privilege by first asserting the privilege in response to a motion to compel (or under the threat of an impending motion)." *Id*. Kielczewski provided citations to a half-dozen more cases in his opening brief to the same effect. (Kielczewski Pr. Br. 18). Tellingly FINRA addresses not a single one. Nor does FINRA cite a single case in support of its argument that Huntington's vague assertions put Kielczewski "on notice".

Kielczewski was not "on notice" until he received Huntington's motion to intervene on December 2, 2019, where Huntington revealed, for the first time, that it possessed documents and communications that it had withheld from its Rule 8210 responses on the asserted basis of

[7] FINRA incorrectly asserts that Kielczewski was relying on FINRA "to bring a Rule 8210 action against Huntington." (FINRA Br. 33 at n.14). While it is surprising, to be sure, that Huntington has gotten a free pass from FINRA for conduct that could have resulted in a lifetime bar, *see, e.g., Li-Lin Hsu*, Exchange Act Release No. 78899, 2016 WL 5219504, at *2-3 (Sept. 21, 2016) (affirming lifetime bar for registered representative who withheld documents from Rule 8210 response on advice of counsel), what Kielczewski was relying on was that FINRA, as the party issuing the Rule 8210 requests, would take reasonable steps to assure that the responses it received from Huntington were complete. (Kielczewski Pr. Br. 19).

privilege. (FINRA 437-441). By that point, more than two years after Huntington's first response to a Rule 8210 request, Huntington's delay *by itself* resulted in the waiver of any privilege. Kielczewski acted immediately, filing his motion the same day he received notice of the withheld documents. (FINRA 443-451). Kielczewski waived no rights to the documents and information he and FINRA had requested. Notwithstanding his clear entitlement to the documents and information that Huntington had improperly withheld, FINRA granted him no relief, not even allowing him to question the basis for Huntington's assertion at privilege: as described below, even that crumb of relief that had been tendered by the Hearing Officer was swept away at hearing.

III. FINRA Misstates the Evidence, Omits Critical Evidence in Mitigation, and Mischaracterizes the Record

In its response, FINRA misstates the relevant evidence on several points, including the extent to which Kielczewski was allowed to inquire into the foundation of Huntington's assertion of the attorney-client privilege, the schedule for filing motions under Rule 9252, and the contents of Huntingon's WSPs.[8] In addition, FINRA omits from its narrative of events critical evidence in mitigation of Kielczewski's conduct.

a. FINRA Misstates the Evidence on Several Critical Points

FINRA asserts that "the record reflects that the testimony Kielczewski elicited provides no support for his assertion that Huntington improperly asserted privilege or that Huntington's privilege objections deprived him of any documents or information material to his defense. ([FINRA] 1560-96, 1664-82.)". (FINRA Br. 37). This is true only because the Hearing Officer *sustained every objection* Huntington's counsel made to questions that would have addressed the

[8] Kielczewski does not concede the accuracy of any point raised by FINRA but unaddressed here.

bases for the assertion of the privilege.[9] As is apparent from FINRA's own brief, the purportedly "wide latitude" given to Kielczewski to question FINRA's witnesses was sharply limited by the fact that the Hearing Officer "sustained Huntington's objections when witnesses testified they could not respond without referring to communications with firm counsel." (FINRA Br. 37). To reiterate, the Hearing Officer never reached the merits of whether Huntington even had an attorney-client privilege to assert. Throughout this case, FINRA has again and again argued that Kielczewski has the burden to identify the documents and information that Huntington withheld and to disprove Huntington's attorney-client privilege. This is exactly the opposite of what the law requires.

FINRA asserts that Kielczewski simply failed to timely make a motion under Rule 9252 and should be barred from relief for that reason. (FINRA Br. 32-33). FINRA disregards that Kielczewski moved under Rule 9252 to compel FINRA to issue Rule 8210 requests not once but twice. (FINRA 53-72; FINRA 141-154). In fact, it was as a result of Kielczewski's second Rule 9252 request that Huntington made its final production of documents in October 2019. FINRA's 'untimeliness' argument is simply recasting its 'notice' argument in slightly different form. As pointed out above, Huntington did not tell anyone that it had withheld documents and information on the basis of attorney-client privilege until December 2, 2019. (FINRA 437-441). While this was after the 21-day deadline for a FINRA 9252 motion,[10] the timing of this disclosure was not up to Kielczewski but entirely controlled by Huntington. As noted in Kielczewski's opening brief,

[9] In support of its argument, FINRA cites to the transcript where the Hearing Officer cut off any inquiry into Huntington's assertion of privilege. Huntington's Counsel objected to every question put to its witness as to why the attorney-client privilege was invoked and what documents were withheld, notwithstanding the fact that Huntington's Chief Compliance Officer, Stephen Dahlke, answered "yes" as to whether he had "knowledge" regarding documents separate and apart from any "conversations with Ms. Hill or another lawyer for Huntington." (FINRA 1587-1588). The Hearing Officer sustained every objection by Huntington's counsel to this line of questions. (FINRA 1560-96).

[10] FINRA also disregards the fact that the Scheduling Order the Hearing Officer entered (FINRA 123-136) required Kielczewski to file his Rule 9252 motion in September 2019, well before the 21-day deadline provided by the Rule.

(Kielczewski Pr. Br. 19-21), and *supra*, the Hearing Officer has every ability to allow a motion to be filed out of time, to continue hearing dates, or take other action to provide relief. Despite the obvious need for such relief, the Hearing Officer refused to take any such action.

Finally, FINRA argues that "Huntington's written supervisory procedures … prohibited registered representatives from participating in PSTs. ([FINRA] 310, 2861-62.)" This assertion, while technically correct, ignores the fact that Huntington's WSPs applied to a substantially narrower range of conduct than FINRA Rule 3280. Rule 3280(a) provides that "No person associated with a member shall participate in any manner in a private securities transaction except in accordance with the requirements of this Rule." Huntington's WSPs, by contrast, provide that:

> A 'Private Securities Transaction,' as defined by FINRA, is the sale of a security by a broker working for a FINRA-licensed firm wherein a) the security is not recognized by the employer or typically sold by the broker, b) the broker receives outside compensation for the transaction, or c) both. The Company requires strict adherence to the following policy: Under no circumstances is the Registered Representative to: Purchase a security directly for a client [;] Sell a security directly for a client[;] Purchase a security directly from a client[;] Sell a security directly from a client[.] (FINRA 2861).

Huntington's WSPs not only lack the "participate in any manner" language of Rule 3280(a), they focus on the "direct… sale of a security by a broker." Accordingly, while Kielczewski concededly "participate[d] in any manner" in the sales of the securities at issue even though he did not receive selling-related compensation, there is a more than plausible argument that Taylor was the person who effected the sales in question, although he was assisted by Kielczewski. Far from supporting FINRA's position, the WSPs illustrate the confusion at every level within Huntington as to what activities were prohibited by Rule 3280 at the time Kielczewski worked there.

b. FINRA Excludes From Its Narrative Critical Evidence of Mitigation

FINRA spent a significant part of its lengthy brief to reprise incidents and events that were uncontested and with which Kielczewski had relatively little to do. FINRA, for example, details how Kielczewski transferred funds in a Huntington account at the direction of a Huntington customer who wanted to purchase an interest in Mariemont. (FINRA Br. 10). Elsewhere, FINRA notes that, on a handful of occasions, Kielczewski identified potential securities for Taylor to consider acquiring for Mariemont's portfolio and that Kielczewski on another occasion suggested that someone other than Taylor should lead an investor presentation. (FINRA Br. 13). On the basis of these, and other similarly ministerial tasks carried out over the three-and-a-half years Kielczewski was associated with Huntington, FINRA asserts that Kielczewski was an "active" participant in Mariemont, as opposed to the "passive general/limited partner" he had described himself as.

However, in constructing this narrative, FINRA leaves out critical evidence to the contrary. For example, FINRA asserts that in 2015 "Kielczewski falsely responded 'no' to the question asking, 'Have you engaged in Private Securities Transactions while employed through [Huntington]?'" (FINRA Br. 12) despite the fact that, in 2014, Kielczewski had a series of direct communications with Huntington's Chief Compliance Officer that gave Kielczewski a reasonable basis for his belief (incorrect as it was) that his planned activities with Mariemont would not violate FINRA rules or Huntington policies. (Kielczewski Pr. Br. 6 n.2). FINRA similarly argues that Chapman testified that there would be a clear distinction between Taylor's job responsibilities, facing Mariemont customers, and Kielczewski's, facing Huntington customers. (FINRA Br. 5). While this accurately conveys this part of Chapman's testimony, it skips over that part of Chapman's testimony that he knew Kielczewski planned to talk to his Huntington customers about

Mariemont (FINRA 2084), and that he was in fact talking to those customers after he started work at Huntington in 2014. (FINRA 2076). In fact, even in the part of Chapman's testimony cited by FINRA, Chapman admitted that he knew that Kielczewski would be engaging in private securities transactions as defined by FINRA 3280, although Chapman never recognized it as such: "[Q.] You didn't anticipate him raising money for Mariemont? A. No, I anticipated he would probably be asked questions by investors and I expected that he would answer those questions." (FINRA 2107).

This exchange illustrates the tension that runs through the entire case between how Chapman, and presumably Gregory, who knew everything Chapman knew, (FINRA 2120), viewed Kielczewski's conduct and what the applicable FINRA rule actually provided. Chapman recoiled at the notion that Kielczewski would "solicit" customers for Mariemont; for that matter, so did Kielczewski. (FINRA 5334 (Chapman); FINRA 2273-2275 (Kielczewski)). However, the term "solicit" nowhere appears in Rule 3280 and, contrary to both Chapman's and Kielczewski's (and Gregory's) understanding at the time, both "soliciting" customers for Mariemont and "talking to" potential customers for investment in Mariemont were violations of Rule 3280.

Notwithstanding the absence of a distinction, in order to separate Kielczewski from Chapman and Gregory, FINRA continues to harp on this false dichotomy between "solicitation" and "talking". FINRA uses the term "solicit" no fewer than 37 times in its brief, notwithstanding the fact that is not a term used in any of the rules Kielczewski is accused of violating, much less an element of any. In sum, the persons responsible for maintaining Huntington's compliance with FINRA's rules, Chapman, the head of the investment bank, and Gregory, its chief compliance officer, knew what Kielczewski planned to do and did, which was to talk to his Huntington clients

about investing in Mariemont.[11] While this does not excuse Kielczewski's violations of Rule 3280, it certainly mitigates them.

Conclusion

Given all of the reasons addressed herein and in Kielczewski's principal brief, the decision by FINRA that Kielczewski engaged in willful, intentional or reckless conduct should be vacated, as should the findings that he violated FINRA Rule 2010; Article V, Section 2(c) of FINRA's By-Laws and FINRA Rule 1122; and the matter should be remanded for a new fact hearing. In the alternative, even if the FINRA's findings are upheld, the sanctions imposed are meaningfully excessive and oppressive concerning the misconduct at issue and should be substantially reduced.

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Respectfully submitted,

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[11] FINRA argues that the Commission should defer to the Panel's credibility determinations regarding Chapman's and Gregory's testimony. (FINRA Br. 28). But it was Chapman who testified that Kielczewski told him he would "talk to his customers" about Mariemont and further, that he, Chapman, had told that to Gregory. Gregory did not contradict Chapman on either point.

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CERTIFICATE OF COMPLIANCE

I, Andrew St. Laurent, certify that this brief complies with the Commission Rule of Practice 151(e) by omitting or redacting any personal or sensitive information.

I further certify that this brief complies with Commission Rule of Practice 450(c) because it contains 6,990 words. I have relied upon the word count feature in Microsoft Word in making this representation.

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