BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.

In the Matter of the Application of THOMAS J. LYKOS, JR. For Review of FINRA Disciplinary Action by the National Adjudicatory Counsel Complaint No. 2018059510201

RESPONDENT THOMAS J. LYKOS, JR.'S REPLY BRIEF

Respondent Thomas J. Lykos, Jr. respectfully submits the following Reply Brief to the United States Securities and Exchange Commission.

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I. OVERVIEW

Mr. Thomas J. Lykos, Jr. incorporates here by reference the facts set forth in his Brief to the United States Securities and Exchange Commission filed on May 9, 2022 (the "**Lykos Brief**"). With respect to FINRA's Brief in Opposition (the "**Opposition Brief**" or "**Opp.**"), FINRA did not dispute any of the factual statements set forth in the Lykos Brief. On the other hand, FINRA sets forth several purportedly factual statements in its Opposition Brief that merit a reply. In addition, FINRA's argument regarding the application of circumstantial evidence to this case merits a reply.

II. FACTUAL ISSUES

First, FINRA did not dispute any of the factual statements set forth in the Lykos Brief, including that Mr. Lykos:

- did not bring any personal items into the Exam;
- did not access any books, study materials, computers, or electronic devices during the Exam; and
- did not obtain third-party assistance with the Exam during the Break.

Second, FINRA made several factual statements that have no evidentiary support in the record. These include the unsupported statements that Mr. Lykos:

- during the Break, "had access to any number of sources of outside information" (Opp. at 2);
- wrote on his driver's license and hand "so that he could remember what information he wanted to search for when he left the testing center...." (*id.* at 18);
- "searched for that information during his visit to the bank" (*id.*);
- "removed and attempted to remove test material from the testing center by writing it on his driver's license" (*id.*); and
- "removed the test material when he signed out for the break and when he left the testing center after finishing the exam" (*id.*).

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FINRA statements were made without any evidentiary proof in the record and therefore should be rejected. First, there is no evidence in the record to support the first three statements whatsoever. And with respect to the fourth and fifth statements, it assumes that Mr. Lykos was writing Exam content on his person or license with the intent to remove it from the testing center when, as discussed below, the circumstantial evidence does not establish that it was Exam content nor compel the inference that it was Exam content.

Third, FINRA argues that Mr. Lykos provided contradictory testimony at his On-the-Record interview in November 2018 versus the Hearing in January 2020 as to whether he wrote on the business card that he picked up during the Break. (Opp. at pp. 9-10). Mr. Lykos, however, did not testify at the OTR that he wrote on the business card and then, at the Hearing, withdraw that testimony, as FINRA implies. Mr. Lykos confirmed during the Hearing that he previously testified that he *might* have written on the business card.[1] At the Hearing, he believed that he had not done so.[2] Thus, Mr. Lykos' use of the words "may" or "might" during this OTR does not render his testimony contradictory, but, rather, shows that he may have had a better recollection in 2018 than he did in 2020. On the other hand, the proctor did not recall seeing any writing on the card when she saw it in Mr. Lykos' front jacket pocket and told him to throw it away. In any event, Mr. Lykos threw the business card away before re-entering the test center.

III. LEGAL ARGUMENT

FINRA fails to respond to the arguments presented in the Lykos Brief that the circumstantial evidence[3] in the record does not constitute sufficient evidence of either the *actus*

[1] *Id.* at 143:21-145:25.
[2] *Id.*
[3] "Circumstantial evidence is indirect evidence that does not, on its face, prove a fact in issue but gives rise to a logical inference that the fact exists. Circumstantial evidence requires drawing

reus or the *mens rea* necessary to support FINRA's allegation of "cheating." Instead, FINRA repeats the same arguments it made before the Hearing Panel and the NAC; in essence, that the evidence of conduct that may violate a FINRA Qualification Examinations Rule of Conduct ("**ROC**") constitutes circumstantial evidence sufficient to infer that cheating occurred. To support the argument, FINRA misstates the factual record in several respects and substitutes speculation for reasonable inferences from the facts.

But once the Opposition Brief is stripped of unsupported statements and speculation, *i.e.*, as it is presented in the unrebutted fact section in the Lykos Brief, the record shows that Mr. Lykos wrote on his person instead of using the dry-erase boards, took a longer-than-usual break in an adjacent office instead of using the restroom, was distressed, and quibbled with the proctor when confronted about the smeared writing on his person. The record also shows that there is no direct evidence that the writing on his person contained Exam content as opposed to letters and symbols to aid in answering the questions, activity that is approved by FINRA (given that they provide dry-erase boards and markers for that very purpose). FINRA concludes that the writing was Exam content, but the evidence does not support it. Similarly, the record is devoid of any direct evidence that Mr. Lykos accessed outside assistance while on the Break. FINRA concludes that he did, but the evidence does not support it.

There are not many FINRA cases that address these issues, but all relevant cases are cited in the Lykos Brief. All involve direct evidence of an *actus reus* that constitutes cheating, or attempted cheating. And the requisite *mens rea*, in all cases, was either admitted by the respondent or established by the direct evidence of the act itself.

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additional reasonable inferences in order to support the claim." Available at: https://www.law.cornell.edu/wex/circumstantial_evidence.

Here, there is no direct evidence of either the *actus reus* or the *mens rea* necessary to establish that Mr. Lykos cheated or attempted to cheat. Instead, FINRA asserts there is circumstantial evidence that, taken as a whole, can only result in one conclusion: that "Lykos cheated on the exam." (Opp. at 2). But the circumstantial evidence *does not compel the inference* that cheating actually occurred. The SEC cases below illustrate how the circumstantial evidence here falls short.

Ruggieri

In *Joseph C. Ruggieri*, SEC Rel. No. 81143, Admin. Proc. No. 3-16178 (July 13, 2017), an insider trading case, the administrative law judge dismissed the case and the Division of Enforcement appealed to the Commission. Enforcement alleged that Ruggieri, the purported tippee, had received a tip and traded on material non-public information. The Commission first cited the elements of an insider trading case brought against a tippee, including establishing that the tipper breached a duty to the owner of the confidential information by tipping the information, that the tippee knew or had reason to know that the tipper had improperly obtained the information, and that the tippee, while in knowing possession of the material non-public information, used that information by trading for his own benefit. *Id.* at 2. Thus, establishing the charge would require demonstrating both *actus reus* elements and the *mens rea* element on the part of the tippee.

But the Commission dismissed the appeal, in part, because *the circumstantial evidence* as to whether a tip occurred – evidence of phone calls followed by trades – was insufficient to compel the inference that a tip actually occurred during those calls. While it "may reasonably *permit an inference* that material nonpublic information was conveyed on the calls . . . such evidence *does not necessarily compel that inference*. Other facts may weigh against such an

inference when a factfinder considers the totality of the circumstances." *Id.* at 2-3 (emphasis added).

Further, Enforcement's other evidence to infer that a tip occurred was inconclusive. Enforcement argued that, "the existence of a tip may be inferred because Ruggieri's bonus was tied to the profits he generated for Wells Fargo. However, Ruggieri's incentive to make profitable trades does not establish that [the purported tipper] tipped him." *Id.* at 4. Enforcement also argued that, "the supposed implausibility of Ruggieri's explanations for his trades support a finding that he was tipped. Courts have held that a respondent's implausible explanations for his trades may, together with other facts, be sufficient to infer that the respondent was tipped with material non-public information." The Commission, however, did not find Ruggieri's explanations for his trades "to be so implausible on their face as to raise an inference of a tip given the nature of the other evidence." *Id.* at 5.

The Commission concluded:

> "In sum, while certain evidence is consistent with [Enforcement's] allegations against Ruggieri, there is also countervailing evidence. Given the record as a whole, and after considering the evidence in its totality, I conclude that [Enforcement] has not demonstrated by a preponderance of the evidence that [the purported tipper] provided nonpublic information to Ruggieri in connection with these four trades."

The case was dismissed. *Id.*

Charles L. Hill, Jr.

Another insider trading case is illustrative. In *Charles L. Hill, Jr.*, SEC Rel. No. 1123, Admin. Proc. No. 3-16383 (April 18, 2017), Hill, the purported tippee, traded while in possession of certain information about a tender offer. But the administrative law judge found

that, while Hill was in possession of certain information, the circumstantial evidence was insufficient to establish insider trading:

> "Although suspiciously timed trades constitute significant circumstantial evidence, evidence of suspiciously timed trades, without more, is not sufficient to carry the Division's burden. This is the case because such trades alone do not allow a factfinder to infer what information a Respondent possessed or from whom he obtained the information.
>
> . . .
>
> The outcome of this case turns on whether the Division carried its burden to show that Hill knew or had reason to know that he traded while in possession of nonpublic information that he acquired from Andrew via Murphy. The Division argues that in light of Hill's unusual trading pattern, his relationship with Murphy, Murphy's relationship with Andrew, Murphy's pattern of communications with Hill and Andrew, and allegedly non-credible denials by Andrew and Murphy, I should infer both that Hill learned inside information *and* that he learned it from Andrew via Murphy, knowing or having reason to know it came from Andrew. Drawing reasonable inferences is part of an adjudicator's bread and butter. An adjudicator errs, however, when he or she relies solely on speculation, *i.e.*, when he or she reaches a conclusion in the "complete absence of probative facts to support the conclusion." [citations omitted]

Id. at 22-23. The ALJ continued:

> Here, Hill's trading pattern only goes so far. The timing of Hill's trades and the amounts he invested and profited, in light of his previous trading patterns, strongly suggests that Hill knew something about Radiant . . . Indeed, Hill concedes that his trades were sufficiently suspicious to warrant the Division's investigation. . . The trades, however, offer no basis to infer *who* told him whatever he knew, much less what he knew. At most, the Division has offered speculation, based on the fact Murphy and Hill spoke by phone and Murphy and Andrew spoke by phone, exchanged texts, and met in person, that Hill learned information from Andrew via Murphy. But nothing about the fact of Hill's trading pattern remotely suggests that Hill received information about Radiant *from Andrew via Murphy*, as opposed to some other source. In other words, the trading pattern does not reveal what Hill knew or from whom he learned it. In the face of credible denials from Murphy and Andrew, and the absence of any other evidence, there is no basis to credit the Division's speculation that, because Hill's trades were suspicious, Andrew gave Murphy information, intentionally or otherwise, or that Murphy gave information to Hill.

Id. at 23. The case was dismissed.[4]

[4] In dismissing the case, the ALJ made another observation of note. With respect to the failure of some respondents to produce copies of text messages between them during the relevant period, the ALJ opined

In both of the above cases, there was evidence that could permit the inference that prohibited conduct occurred, but the evidence *did not compel the inference* in either case. In *Ruggieri,* the evidence of numerous calls between the purported tipper and tippee followed by trades was circumstantial evidence of insider trading, *but it did not compel the inference* that a tip between the purported tipper and tippee actually took place during those calls. And Ruggieri's explanations for his trades were not "so implausible on their face as to raise an inference of a tip." Similarly, in *Hill*, there was evidence of suspicious trading, but the *evidence did not compel the inference* that tipping actually occurred, even though there were numerous texts and phone calls between the purported tipper and tippee that provided the opportunity to convey a tip.

It is axiomatic that, while a case may be proved through circumstantial evidence, the burden of proof must still be met for each element of the charged offense.[5] It is also axiomatic that the *actus reus* and *mens rea* for the charge must be aligned; *i.e.,* that the *mens rea* must relate to the *actus reus* at issue. This evidentiary principle is most evident in criminal and bankruptcy cases but also has application here. For example, in *U.S. v. Burden,* 934 F.3d 675, 693-94 (D.C. Cir. Aug. 20, 2019), the Court stated:

> The requirement that the *mens rea* relate to the charged *actus reus* is the baseline for any criminal mental standard. *See Dixon v. United States*, 548 U.S. 1, 6 (2006) ("[C]riminal liability is normally based upon the concurrence of two factors, an evil-meaning mind [and] an evil-doing hand." (internal quotation marks omitted)). If a statute requires that the defendant knowingly perform the act

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that, while this was not the fault of Enforcement, Enforcement must nevertheless "actually produce some evidence" to support an inference regarding the content of such communications. *Id.* at 23, n. 20.

[5] *See, e.g., SEC v. Ginsburg*, 362 F.3d 1292, 1298 (11th Cir. 2004); *SEC v. All Know Holdings, Ltd.,* 949 F. Supp. 2d 814, 817 (N.D. Ill. 2013); *see also United States v. Rodriguez*, 392 F.3d 539, 544 (2d Cir. 2004) (holding that even in a criminal case, "the government is entitled to prove its case solely through circumstantial evidence, provided, of course, that" it meets its burden of proof as to "each element of the charged offense"). As set forth in the Lykos Brief, cheating is a form of fraud and therefore requires proof of both the act (the *actus reus)* that would constitute cheating *and* "scienter" (the *mens rea).*

> that violates the law—even where he need not also know that the act is illegal—then he must knowingly perform the charged *actus reus*, not some other, uncharged act. *See Bryan v. U.S.*, 524 U.S. 184, at 193 (1939) ("[T]he term 'knowingly' merely requires proof of knowledge of the facts *that constitute the offense*." (emphasis added)). So, too, with willfulness. The district court and the parties agree that willfulness requires that the defendant "acted with knowledge that his conduct was unlawful." App. 66; *see Bryan*, 524 U.S. at 193. The conduct that he must know was unlawful is the *actus reus* of the crime with which he is charged.[6]

Accordingly, Mr. Lykos' conduct regarding writing on his person *while taking the Exam* cannot serve as circumstantial evidence to infer that he cheated by accessing outside information while on the Break. Similarly, his conduct *while on the Break* cannot serve as circumstantial evidence to infer that he was cheating by copying and removing Exam content during the test. The two areas of conduct involve separate times, places, and different alleged conduct. And no evidence in the record links the two or suggests a common enterprise.

Thus, the allegations of misconduct must be considered separately. With respect to the writing on his person, there is no direct evidence that it constituted copying of Exam content instead of writing to assist in answering the questions. To be sure, there are many conclusory statements and speculation by FINRA that it must have been Exam content, but no testimony or photographic evidence establishes that it was Exam content. Indeed, Enforcement made much about a purported motive to cheat by accessing outside assistance in order to pass the test but presented no evidence of a motive for removing Exam content.[7] Further, there is countervailing evidence that it was ***not*** Exam content. For example:

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[6] *See also U.S. v. Oseguera Gonzalez,* 507 F. Supp. 3d 137 (D.C. D.C. December 11, 2020) ("jury instruction must make clear the *mens rea* relates to the specific *actus reus* of the offense") (criminal case). For a bankruptcy case, *see In re Lett,* 238 B.R. 167 (W.D. Mo. Aug. 24, 1999) (the "debtor's *mens rea* must be concurrent with the *actus reus*").

[7] Motive is not an element of cheating; if the specific intent to cheat (*i.e.,* the *mens rea* or scienter) is proved, the motive is immaterial. *U.S. v. Kabat*, 797 F.2d 580, 587-88 (8th Cir. 1986); *see also U.S. v. Easterday,* 539 F.3d 1176, 1181 (9th Cir. 2008) ("there is no requirement of proving 'evil motive' beyond

- Mr. Lykos continued to lick off the writing as he progressed through the questions, which is wholly inconsistent with an intent to copy Exam content for removal but is consistent with writing on his person to assist in answering a lengthy series of questions;

- there was no evidence of a plan by Mr. Lykos to remove Exam content or identification of any intended recipient of Exam content for the Series 24 qualification exam;

- the medium chosen for allegedly copying Exam content – writing with dry erase markers provided by the proctor on one's largely visible skin – does not indicate prior planning or intent, and could hardly have been a worse medium for copying Exam content; and

- Mr. Lykos consistently testified as to a plausible purpose for writing on his person; *i.e.*, to assist in answering the test questions.

And while it is true that Mr. Lykos stated he may have written "OATS" and "TRACE" on his person during the Exam, the reasonable inference is not that this was Exam content, but simply an aid to distinguish between the two different FINRA reporting systems in answering questions. Indeed, the words "OATS" and "TRACE" are not questions.

Taken as a whole, the circumstantial evidence regarding the writing on his person does not compel the inference that Mr. Lykos attempted to copy and remove Exam content from the test site. Without such an inference, FINRA cannot establish the *mens rea* or the *actus reus* to establish that Mr. Lykos cheated by writing on his person.

Next, with respect to the Break in the adjacent bank office, there is simply no evidence that Mr. Lykos accessed outside information during that time period. To be sure (again), there are many conclusory statements and speculation by FINRA that he must have accessed outside

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a specific intent to violate the law"). Here, FINRA cannot establish the specific intent to cheat (the *mens rea)* and instead presents evidence of a motive for Mr. Lykos to pass the examination to keep his job, which is ubiquitous to all test-takers who must pass examinations to keep their jobs. FINRA's statements regarding motive are immaterial here.

information, but no testimony or other evidence supports it. Further, there is countervailing evidence that he did not. For example:

- Mr. Lykos testified consistently as to a plausible purpose in taking the Break as he did (he sought a place to take pain medication to alleviate the pain before returning to the Exam);

- the only available witness at the bank – a VP who was contacted by FINRA following the test – did not report any misconduct on Mr. Lykos' part to FINRA; and

- when Mr. Lykos returned to the test center, he continued the Exam by proceeding to answer the next question. Approximately 10 minutes later, he did change two prior answers, but only one successfully.

As such, the circumstantial evidence regarding this conduct does not compel the inference that Mr. Lykos must have attempted to access outside information during the Break. Without such an inference, FINRA cannot establish either the *actus reus* or the *mens rea* to establish that Mr. Lykos cheated by accessing outside information during the Break.

Finally, with respect to Mr. Lykos' apparently furtive conduct regarding the writing on his person and the conversation with the proctor about it, this does not relate to any conduct while on the Break but does relate to the writing on his person. It is circumstantial evidence that he was concerned about its discovery. But again, there is a plausible explanation – he became concerned that, in writing on his person, he had violated an exam ROC. While this conduct may be regrettable, it is not circumstantial evidence that compels the inference that he was attempting to cheat, especially in contrast to the countervailing evidence described above.

In sum, viewing the record in the light most favorable to FINRA, the evidence may permit an inference of cheating but, as in *Ruggieri* and *Hill,* it *does not compel* such an inference in light of the countervailing evidence and plausible explanations. And without the inference, the charge of cheating fails.

Viewing the record in a more neutral light, the evidence shows that, in this case, FINRA overreached and overcharged, and employed a one-size-fits-all approach to an Enforcement matter where a nuanced approach would have been more effective. And more just.

IV. ORAL ARGUMENT SHOULD BE GRANTED

FINRA opposes Mr. Lykos's request for oral argument because, it argues, "the sufficiency of circumstantial evidence to prove a violation in a FINRA disciplinary proceeding is well-settled" and not "novel." (Opp. at 14, n.9). Yet, FINRA misunderstands the arguments in the Lykos Brief and the novelty of the issues presented. Unlike every other case that FINRA has brought to a hearing, this case does not involve direct evidence of cheating or attempted cheating. In all of the prior cases, direct evidence of cheating was also direct evidence of the requisite scienter to cheat. Both the *actus reus* and the *mens rea* were established by the nature of the conduct itself, whether by admission, default, or adjudication, unlike here. Given the novel issues, Mr. Lykos respectfully requests oral argument.

V. CONCLUSION

For the above reasons and those set forth in the Lykos Brief, it was not appropriate for FINRA to sanction Mr. Lycos for cheating on the Exam. Given that Mr. Lykos has been out of the industry now for more than three years as a result of these proceedings, the only appropriate result here is to grant the relief Mr. Lykos requests.

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Respectfully Submitted,

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