UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of Matthew R. Logan For Review of Action Taken by the Financial Industry Regulatory Authority	Admin. Proc. File No. 3-20922

BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

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I. INTRODUCTION

This is an appeal of the Decision of FINRA's National Adjudicatory Council ("NAC") dated June 2, 2022 ("NAC Decision") which imposed a permanent bar. (*See* Certified Record of Appeal ("ROA") at 1108). For the reasons discussed below, the bar is excessive and oppressive, is unnecessary to protect investors, and must be reversed.

This case was tried mostly on stipulated facts. Respondent admits asking the office receptionist to log onto certain continuing education websites with his credentials and complete four continuing education ("CE") courses for him, including the FINRA Regulatory Element CE. He admits this violates FINRA Rule 2010 and that punishment is warranted. But FINRA sanctions in eleven other matters where brokers instructed subordinates to take CE courses range from mere censure to months-long suspensions.

Here, however, FINRA imposed a permanent bar, "the securities industry equivalent of capital punishment." *PAZ Sec., Inc. v. S.E.C.*, 494 F.3d 1059, 1065 (D.C. Cir. 2007). In so doing, FINRA purported to follow its Sanctions Guidelines, which recommend a bar for "using an imposter" to cheat on FINRA qualification exams and on the FINRA Regulatory Element CE. *See* FINRA Sanctions Guidelines, page 40 (Oct. 21, 2021) ("*Cheating, Using an Impostor, or Possessing Unauthorized Materials in Qualifications Examinations or in the Regulatory Element of Continuing Education*.").

That a bar is recommended for cheating or using an imposter is not surprising – this Guideline was drafted back when the Regulatory Element was offered *only* at heavily proctored formal, in-person testing centers such as Prometric. Given the strict anti-cheating protocols in place, only the most unscrupulous, deliberate, and premeditated cheating on the Regulatory Element could occur in such testing centers.

As discussed below, however, in 2015 FINRA began to offer the Regulatory Element on a website that allowed one to take the course from home, or wherever, without any proctors, just like all of the other routine and informal CE courses brokerages and insurance companies regularly offer.

Unaware of this change, and during a period of intense personal and professional stress, Respondent hastily forwarded reminder emails containing links for four online CE courses to the office assistant to complete, including by mistake, a course that he was not even required to take.

Unfortunately, he also did not realize that one of the courses he forwarded was the FINRA Regulatory Element CE, which was previously offered only at strict, in-person formal testing centers. In short, as he testified, Respondent did not realize the FINRA Regulatory Element CE was involved. Instead, he understood he was forwarding only ordinary firm-required CE courses – which of course is not permitted, but such conduct typically results only in mere censures or months-long suspensions, not a permanent bar.

This is the core issue. Enforcement never proved Respondent knew that the far more serious Regulatory Element CE was involved, the one previously offered only in formal testing

centers. The FINRA hearing panel largely ignored this key point in its decision. *See* Hearing Panel Decision (ROA at 895). On appeal, FINRA's NAC assumed Respondent did not realize the Regulatory Element was involved, and also assumed that he did not intend to cheat on that specific course, but nevertheless affirmed the bar. NAC Decision (ROA at 1117). This was error.

In addition, it is clear that one of the hearing panelists was unfamiliar with the basic facts of the case and was not paying attention at the hearing. We know this because at the very end of the hearing, he sought clarification by absurdly asking Respondent to confirm that he had asked his female assistant to impersonate him for an "exam" at a Prometric testing center – an understanding that is *impossible* to reach given the Complaint, Answer, Pre-Hearing Briefs and testimony at the hearing.

This travesty of fair process was raised by Respondent in post-hearing briefing, but the hearing panelists ignored it in their Decision. On appeal, the National Adjudicatory Council ("NAC") held that even assuming there was a "misunderstanding" by the panel member, the review is *de novo* and it upheld the bar. NAC Decision (ROA 1115-16). This too was error.

Respondent admits his mistake and stipulated to a Rule 2010 violation, but for these reasons, and others discussed below, the NAC's decision to impose a permanent bar must be reversed.

II. PROCEDURAL BACKGROUND

Following an investigation, FINRA's Enforcement Department filed a Complaint on October 7, 2020 (ROA at 1). Respondent filed an Answer and Request for Hearing on November 9, 2020 (ROA at 19). On March 30, 2021, a hearing was held before FINRA Office of Hearing Officers. (See Transcript, ROA at 239). On May 14, 2021, Respondent filed a Post-Hearing Brief (ROA at 861). The Hearing Panel Decision issued on June 29, 2021 (ROA at 895). Respondent filed a notice of appeal to the NAC on July 8, 2021 (ROA at 911). Briefs were filed and an oral argument was held on December 7, 2021 (ROA at 997). The NAC Decision issued on June 2, 2022 (ROA at 1105). Respondent filed an Application for Review with the Securities Exchange Commission on June 29, 2022 (ROA at 1125).

III. ARGUMENT

A. Standard of Review of FINRA Disciplinary Sanctions

1. The Review is De Novo

The Commission reviews *de novo* a disciplinary sanction imposed by FINRA. *Turbeville v. FINRA*, 874 F.3d 1268, 1271 (11th Cir. 2017) ("a broker may, as of right, seek de novo review of the NAC's decisions in the SEC. 15 U.S.C. §78s(d)(2))." In its *de novo* review, the Commission reviews the original record and makes its own findings." *Birkelbach v. S.E.C.*, 751 F.3d 472, 478 (7th Cir. 2014); *PAZ Sec., Inc. v. S.E.C.*, 494 F.3d 1059, 1064 (D.C. Cir. 2007) (Commission review is *de novo*).

2. Sanctions Cannot Be "Excessive or Oppressive" and must be "Remedial and Not for Punishment."

"By statute, the SEC must set aside or reduce any FINRA sanction that is "not necessary or appropriate in furtherance of the purposes of [the act] or is excessive or oppressive." *ACAP Fin., Inc. v. S.E.C.*, 783 F.3d 763, 768 (10th Cir. 2015) (quoting 15 U.S.C. § 78s(e)(2)); *Saad v. S.E.C.*, 980 F.3d 103, 104 (D.C. Cir. 2020) ("The Commission may set a sanction aside if . . . the sanction 'is excessive or oppressive.'").

Courts have generally "read the statute as imposing two related requirements on FINRA's selection of appropriate relief: that it do so with 'due regard for the public interest and the protection of investors,' 15 U.S.C. § 78s(e)(2), and that it avoid "excessive or oppressive" sanctions . . . by acting "for a remedial purpose, [and] not for punishment." *Saad v. S.E.C.*, 980 F.3d at 105–06 (citations omitted).

"[T]he agency "may impose sanctions for a remedial purpose, but not for punishment." *Siegel v. S.E.C.*, 592 F.3d 147, 157 (D.C. Cir. 2010)(citation omitted); *PAZ Sec., Inc. v. S.E.C.*, 566 F.3d 1172, 1176 (D.C. Cir. 2000) (there is a "statutory requirement[ ] that a sanction be remedial," rather than a form of punishment."). "[T]he Commission may approve expulsion not as a penalty but as a means of protecting investors." *Saad v. S.E.C.*, 980 F.3d at 109. In cases where a permeant bar is imposed, this requires "mak[ing] the necessary 'findings regarding the protective interests to be served' by expulsion…" *Siegel*, 592 F.3d at 157 (citation omitted).

"The Commission may approve 'expulsion not as a penalty but as a means of protecting investors.... The purpose of the order [must be] remedial, not penal." *Saad v. S.E.C.*, 718 F.3d 904, 913 (D.C. Cir. 2013) (citation omitted). "If the Commission upholds a sanction as remedial, it must explain its reasoning in so doing; 'as 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 linking the sanction imposed to those circumstances.'" *Id*. (citation omitted).

In *PAZ Sec., Inc*., 566 F.3d at 1175 the Court, addressing a permanent bar, "directed the Commission to 'explain why imposing the most severe, and therefore apparently punitive sanction is, in fact, remedial.'" "The Commission must be particularly careful to address potentially mitigating factors before it affirms an order . . . barring an individual from associating with an NASD member firm – the securities industry equivalent of capital punishment." *PAZ Sec., Inc. v. S.E.C.*, 494 F.3d at 1065. In this case, the bar is oppressive, is unnecessary to protect investors, and serves only as a penalty.

B. The Permanent Bar is Excessive and Oppressive.

1. Respondent Logan's Uncontested Personal and Professional Stress.

The Post-Hearing Brief of Respondent describes Respondent and his circumstances at length, including that he is an insurance manager and agent, that securities business was only a very minor part of his job and was not part of his sales goals, that Penn Mutual put unrealistic and sky rocketing sales goals on him without providing support, that he received hundreds of emails

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per day making careful review impossible, that he repeatedly complained about this to management to no avail, that CE courses were downplayed as not important at Penn Mutual, that his personal family life was highly stressful, that he was thoroughly overwhelmed during the relevant time period, and that all of this testimony was uncontested at the hearing. *See* Post-Hearing Brief of Respondent (ROA 862-68) (outlining and quoting extensive uncontested testimony on these points). It has been recognized that personal and professional stress can be mitigating. *See e.g.*, *Saad v. S.E.C.*, 873 F.3d 297, 302 (D.C. Cir. 2017).

2. The Sanctions Guidelines Recommendation of a Bar Contemplated Strict in-Person Testing Protocols.

Prior to October 1, 2015, FINRA required representatives to take the Regulatory Element of the Continuing Education requirements at a testing center, often a Prometric testing center. These testing centers are formal and have strict protocols in place. Identification is required to enter; the participant must sign out each time they leave the testing room and must sign in and present identification to reenter; the materials one is permitted to have are strictly limited; lockers are provided to store any prohibited items during the exam; talking during testing is prohibited; the use of any technology or communications equipment is forbidden even during restroom breaks; participants must not deviate on the way to the restroom and may not access their lockers; written materials may not be removed from the testing room; and strict confidentiality of the questions and answers is required. Further, the testing facilities are staffed with proctors and personnel who always keep an eye on all participants. Further, the areas are both audio and video taped. None of this is contested.

Respondent testified that he took the FINRA Regulatory element in 2015. (ROA at 326). To take the Regulatory Element CE course, he had to go to a formal testing center and show identification (*Id.*). He was photographed and subjected to a metal detecting wand just to get in. (ROA 327). There were cameras all over the place (*Id.*). There were test proctors; they did not allow materials into the testing rooms, and they made participants sign in and sign out. (*Id.*). This was the same type of testing center and strict protocols used for the FINRA Series Exams – such as the Series 7 to get registered in the first place. (*Id.*). This included getting wanded, showing multiple forms of identification, and having to put any materials into lockers, and sign in and out just to use the bathroom. (ROA 327-28). Cheating or using an imposter in such a test center is nearly impossible.

But effective October 1, 2015, FINRA made a major change. As described in FINRA Regulatory Notice 15-28, FINRA removed the requirement that the Regulatory Element be administered at a formal testing center. Instead, FINRA amended Rule 1250 "to provide that the Regulatory Element program will be administered through Web-based delivery, or such other technological manner and format as specified by FINRA." *See* FINRA Regulatory Notice, Continuing Education, SEC Approves Amendments Relating to Web-based Delivery of the Regulatory Element, October 1, 2015 (ROA at 791). Contrary to the prior protocol, the Regulatory Element was now offered online, just like all the other continuing education requirements.

3. Respondent Was Unaware of the Substantial Change in Protocol.

Respondent was scheduled to take the FINRA Regulatory Element in 2018. (ROA at 328). Asked if he knew at the time that the FINRA Regulatory Element was no longer being given in formal testing centers he said, "I did not." Asked if he knew that the Regulatory Element could now be taken at home on the couch, he said "I did not." (*Id.*).

The key issue of whether Respondent *knew* it was the Regulatory Element was simply ignored by the Hearing Panel in its Decision. And given his testimony and the context, it is clear that *he did not know* it was the Regulatory Element that was formerly taken in testing centers, as discussed next.

4. Logan Hastily Instructed the Office Receptionist to Complete Four CE Courses for Him.

Respondent has admitted that in the crunch of a high-pressure job with Penn Mutual, he instructed the receptionist to take four CE courses for him. He did so in writing through the company email system and he was aware that his emails were being monitored and reviewed by his firm. (ROA 330-31). Indeed, he would simply take a reminder email from the company and "forward the regular company e-mail to her company e-mail." (ROA at 330). Asked if he was aware that a broker-dealer is required to keep that email and monitor it, he responded "Yes, I am fully aware… I was not thinking clearly…" (*Id.*). Asked why, he explained: "It was at a time in my life, with given the situation at Penn Mutual and what they were requiring, and just with my personal life, I forwarded the e-mail without even thinking about it." (*Id.*). Asked if the receptionist had any problem with these requests, or any complaints, the answer was no, she just got them done. (*Id.*).

Asked if, when he forwarded a CE reminder email to her, he was "aware that this was the course that was previously being offered in the formal testing center" he replied: "No, I was not." (ROA at 331). Asked "[w]ere you aware that misconduct on [this] CE exposed you to a potential bar," he replied: "Absolutely not" (*Id.*). Asked if he "would have forwarded it to her if you knew?" he replied: "Absolutely not." (*Id.*).

So hasty was Respondent in his forwards to the receptionist that he mistakenly asked the receptionist to take a CE course for him *that he was not even required to take*. (ROA at 301; JX-24 (ROA at 787-90). An investigator from Penn Mutual acknowledged this fact at the hearing, and reported this fact to FINRA, explaining in writing that Respondent had his assistant take a check processing course, although he was not required to take it. (ROA 301-02). This fact is acknowledged in the Hearing Panel Decision. ("In May 2018, Logan erroneously believed he had to complete a continuing education course title "HTK Processing Checks and Securities Training…") (ROA 898).

There could be no better evidence that Logan was acting carelessly ***and was certainly not acting with a state of mind equivalent to someone who sent an imposter to a formal testing center.*** Yet, as discussed below, Respondent is being treated like someone who walked into a formal Prometric testing center and cheated – or sent an "imposter" to impersonate him at a formal

testing center – an act of such brazen and unscrupulous premeditation only the most dedicated of cheaters would even consider it.

Unfortunately for Respondent the key difference between negligence and intent makes no appearance in the Hearing Panel Decision. It was ignored. And on Appeal, the NAC held that it did not matter:

> Nevertheless, for the reasons discussed below, we conclude that a bar is the appropriate sanction even assuming Logan did not realize he was forwarding the Regulatory Element to the Assistant for completion. Because we conclude that a bar is appropriate even assuming Logan's credibility on this point, we may resolve this appeal without a credibility finding addressing this aspect of Logan's testimony.
>
> For the same reason, we reject Logan's argument that the Hearing Panel's decision is deficient because it failed to address whether he specifically intended to cheat on the Regulatory Element.

NAC Decision (ROA at 1118). The NAC went further still, holding that it was *not even a mitigating factor* that he was unaware he was cheating on the Regulatory Element:

> Logan does not argue that the Guidelines for cheating on the Regulatory Element do not apply. Rather, he appears to argue that his lack of awareness that he was cheating on the Regulatory Element is a mitigating factor. For the reasons discussed herein, we do not agree.

NAC Decision (ROA at 1122, n. 25). Under this theory, FINRA can bar representatives for mere negligence, where there was no customer harm.

In the FINRA Sanctions Guidelines, as in the securities laws more generally, it matters "***Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence***." FINRA Sanctions Guidelines, Principal Considerations, #13 (Oct. 2021). No review of this record could conclude that Respondent was anything but negligent – negligent in not realizing that the Regulatory Element, the course normally taken at formal testing centers, was involved here. That his conduct was the result of negligence and not intent should reduce the bar to a suspension. *See e.g.*, *In the Matter of Winkelmann, Sr.,* Admin. Proc. File No. 3-17253 (July 2, 2019) (judge who barred an individual for acting with scienter accepted later evidence that showed the conduct was merely negligent and reduced the bar to a six-month suspension).

As explained at the hearing, Respondent was overwhelmed with work responsibilities and chose to blind forward the CE courses to the receptionist. As discussed above, so inattentive was he, that he asked her to take a CE course he was not even required to take. This sort of behavior cannot be equated to someone who walks into a Prometric test center, presents identification, empties their pockets, is surrounded by proctors, is recorded by audio and video and nevertheless cheats. Nor can it be equated the mental state of someone who sends an imposter to a formal testing center to impersonate him. The difference in intent is vast.

Respondent's conduct is more akin to the conduct of the Credit Suisse senior managers discussed below who had their assistants take multiple CE courses and received mere censures. But at any rate, the Hearing Panel Decision is defective because it simply ignores this key issue. Ignoring a main issue is not fair process. And the NAC Decision is defective because it says it does not matter and is not mitigating. Enforcement has the burden and it failed to prove Respondent knew that FINRA Regulatory Element was involved here or that he intended to cheat on it.

5. FINRA Itself Has Recognized the Risk of the Trap Respondent Fell Into.

In an online FINRA publication dated September 14, 2020 (long after the incident here) Jessica Hopper, Executive Vice President, FINRA Enforcement specifically warns the industry about the potential pitfalls of online administration, stating: "Test Cheaters Beware." In this public notice, Ms. Hopper warns those taking "exams" such as the Series 6 and 7, that even though they are now online, one should not cheat.[1] She explains (again, long after the incident here): "Regardless of the testing environment, Enforcement will pursue disciplinary action against the individual and, in most instances, seek to bar them from the broker-dealer industry." (*Id.*).

Please ask, if Respondent's position on appeal is not valid, then why would such an emphatic warning from the Department of Enforcement have been necessary? Please also note that Ms. Hopper only refers to "exams" here, with no warning regarding the FINRA Regulatory Element CE. As one can see, FINRA itself plainly realizes that advisors could fail to recognize the seriousness of the situation when formal in-person testing is replaced with online administration.

Consider also what happened when the Series exams, such as the Series 7, went online due to Covid-19. Formal in-person testing was no longer required, and the exams were offered online. But FINRA did not simply offer them online without further precautions. Unlike in Respondent's situation, one could not simply log on as another person and complete the material. That would be nearly impossible because these online exams are heavily proctored by a live proctor.[2] The protocols are very strict.

For example, a test taker must provide "a 360-degree view" of the workstation; there is a "sleeve, pocket and glasses check"; identification is required; a host of items are prohibited from the workstation; one must verify that "your pockets are empty, pulling up your pant legs and your sleeves," and one must "show your ears to ensure nothing could provide an unfair advantage (such as a Bluetooth earpiece)" and the list goes on. Indeed, the Proctor Guide for the online FINRA Exams is intensely regimented.[3] No such precautions – or indicia of seriousness – were in place when Respondent's assistant completed the Regulatory Element. It was entirely unproctored and casual just like the other continuing education courses routinely offered. FINRA clearly thought

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[1] Working on the Front Lines of Investor Protection – Test Cheaters Beware, FINRA Media Center (Sept. 14, 2020), https://www.finra.org/media-center/blog/working-front-lines-investor-protection-test-cheaters-beware (last visited June 1, 2022).

[2] https://www.finra.org/registration-exams-ce/qualification-exams/testonline (last visited Sep. 10, 2022).

[3] https://www.prometric.com/sites/default/files/2020-04/PrometricProUserGuide_3.1_1.pdf (last visited Sep. 10, 2022).

warnings, and extensive proctoring were appropriate for "exams" but did no such things for the Regulatory Element.

Under these circumstances it is unfair to treat Respondent as if he cheated at a formal testing center or during a heavily proctored online administration. It takes an entirely different degree of wrongdoer – one with explicit, premeditated intent – to cheat under such circumstances. No such intent was proven here. The fact is, Respondent thought he was asking the assistant to take the ordinary CE courses routinely offered casually online. Again, this is obviously not allowed, but such unintentional or negligent conduct cannot support a permanent bar. A plain application of the Sanctions Guidelines, which requires an analysis of whether the conduct was negligent suggests far more leniency here than a case where someone cheats under the strict conditions of a testing center or heavily proctored on-line exam. Treating the two as equal is unfair. As the Sanctions Guidelines specifically state, it is a Principal Consideration "[w]hether the respondent's misconduct was the result of an intentional act, recklessness or negligence."

Here, Respondent thought and intended to have the assistant take ordinary online CE courses. And in such cases – cases where subordinates were instructed to take such CE courses – the sanctions typically ranged from mere censures to months-long suspensions, not a bar, as discussed next.

6. Respondent Should be Not Receive a Bar for Conduct that Typically Results in Mere Censures and Months-Long Suspensions.

In the proceedings below, Respondent repeatedly pointed out that advisors – including Series 24 Principals – regularly receive mere censures or months-long suspensions, not bars, for having assistants take CE courses on their behalf. While it is true the referenced matters were FINRA settlements, Respondent is not offering them as binding precedent. FINRA settlements are public and they are further publicized in FINRA's quarterly disciplinary reports. As such, these settlements inform the industry generally of the types of sanctions that will apply to various types of conduct. A review of the cited matters shows an unmistakable pattern: censures and suspensions, not bars.

In *Dryden*, for example, the Respondent was a Series 24 General Securities Principal, "a Managing Director at Credit Suisse," and the "Head of Global Asset Finance."[4] The case involved the FINRA Firm Element CE requirements. Over a 16-month period, Dryden had two administrative assistants complete nine courses using his log in credentials. During the Relevant period (Oct. 2013 to Feb. 2015) while Dryden was a Managing Director and supervisor at the Firm, he and his administrative assistant received notices that he was required to complete certain eLearning modules by a given deadline. Rather than complete each eLearning module himself, as required, Dryden, during the Relevant Period, provided his log-in credentials to two administrative assistants and requested that they complete certain trainings for him. Dryden permitted administrative assistants to complete at least nine eLearning modules for him during the Relevant Period. Among the eLearning modules he permitted others to complete were his 2014 Annual Compliance Certification; "2013 Effective Supervision at Credit Suisse"; "Understanding Money

[4] *Dryden*, FINRA AWC, No. 2015045496902 (01/29/2018).

Laundering, Terrorist Financing, Sanctions and Corruption" and training on "Operational Risk, Business Continuity and Information Security-2014." For this, Dryden received a "censure" and a requirement to retake the Series 24. Please note that Dryden was far more senior, engaged in the conduct over a longer time, enlisted two different administrative assistants, and had them take nine courses including the mandatory FINRA Firm Element. This conduct is far more egregious than that by the Respondent here. Other than the fact the Regulatory Element was not involved (at the time, testing centers were used for that, a fact that cannot be ignored), the underlying conduct here is essentially indistinguishable – indeed it is far more egregious. And far beyond Respondent's insurance sales in his local area, Dryden had real power and authority over large broker-dealer transactions.

There are two other examples of a censure being meted out for conduct that is indistinguishable, indeed far worse, from that here. The *Kim* case also involved a Series 24 General Securities Principal (since 1998), who was also a Managing Director of Credit Suisse, and was Head of Securitized Products.[5] In this case, over a period of 20 months, "while Kim was a managing Director and supervisor," he had two different administrative assistants log on to the system as him and complete at least five modules of the FINRA Firm Element. For this, he also received a censure and a requirement to retake the Series 24.

The third is the *Sack* case.[6] Sack was also a Series 24 General Securities Principal, a Managing Director, and a supervisor. Over a period of 18 months, Sack provided his login credentials to his administrative assistant and had her complete at least four courses of the FINRA Firm Element, including his 2013 and 2014 Annual Compliance Certifications. Sack also received a censure and a requirement to retake the Series 24.

These FINRA AWCs were publicly posted by FINRA in its news releases and are available on FINRA's public disciplinary website.[7] They were also reported in industry press. *See e.g.*, *Credit Suisse Bankers Got Secretaries to Do Their Compliance Training, TheStreet,* Feb. 14, 2018.[8]

The Hearing Panel made no effort to address the disparate treatment of Respondent here. Instead, the Panel and the NAC has said that settlements have no precedential effect and that it is not even appropriate to cite them. But please understand that this is not the point. These published settlements inform the industry about the type of conduct that will be sanctioned and how severely. FINRA's settlements are publicly available and are posted in their quarterly disciplinary reports. While they may not be controlling precedent, they absolutely guide and inform the industry, and the settlements, including the Credit Suisse settlements get reported in the press. This type of gross discrepancy undermines FINRA's regulatory legitimacy. Where senior investment bankers get mere censures for what is nearly identical misconduct engaged in by an insurance agent, one cannot help but conclude that an excessive sanction has been imposed here.

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[5] *Kim*, FINRA AWC, No. 2015045496901(08/23/2017).
[6] *Sack*, AWC, No. 2015045496903(01/29/2018).
[7] FINRA Disciplinary Actions Online, www.finra.org/rules-guidance/oversight-enforcement/finra-disciplinary-actions-online (last visited Sep. 10, 2022).
[8] https://www.thestreet.com/markets/currencies/credit-suisse-bankers-pawned-off-compliance-training-on-secretaries-14488740 (last visited Sep. 2022).

There are several other cases where representatives asked assistants to take CE courses and were not barred, but instead received suspensions:

- *Cole:* Representative directed a subordinate to take his FINRA Firm Element CE for two different years. He received a 10-business day suspension.[9]

- *Brown:* Representative directed a subordinate to take his FINRA Firm Element CE for two different years. He received a 10-business day suspension.[10]

- *Swanson:* Representative directed a subordinate to take his FINRA Firm Element CE for two different years. He received a 30-day suspension.[11]

- *Hardy:* Representative had assistant take FINRA Firm Element CE. He received a 30-day suspension.[12]

- *Callaway*: Respondent directed his subordinate to complete FINRA Firm Element and other courses – and he also condoned allowing the subordinate and others to take CE courses for other representatives in the group. He received a 3-month suspension.[13]

- *Velicki*: Representative directed assistant to complete four FINRA Firm Element modules – he received a 3-month suspension.[14]

- *Rainwater*: Representative directed assistant to complete FINRA Firm Element training. She received a 3-month suspension.[15]

- *Kimmel*: Representative who had been registered since 1983, directed, over a three-year period, two different people to complete his FINRA Firm Elements course on at least three occasions, and instructed a third person to complete a State insurance CE course.[39] He received a 6-month suspension.[16]

Again, given that Respondent did not realize he was dealing with anything other than ordinary firm CE, why treat him differently than the Respondents in these cases? We submit that to do so would be unfair, excessive, punitive and serve no investor protection function.

Enforcement identifies only two cases supposedly supporting a bar but both are distinguishable. The first is *Kennedy*.[17] But this case has no precedential value – it is a hearing

[9] *Cole*, FINRA AWC, No. 2006004155202 (12/05/2008).
[10] *Brown*, FINRA AWC, No. 2006004155203 (12/05/2008).
[11] *Swanson*, FINRA AWC, No. 2006004155201(12/05/2008).
[12] *Hardy*, FINRA AWC, No. 2005003511207 (03/05/2008).
[13] *Calloway*, FINRA AWC, No. 2006004155204 (12/05/2008).
[14] *Velicki*, FINRA AWC, No. 2017056514301 (12/04/2018).
[15] *Rainwater*, FINRA AWC, No. 2016048397101 (10/12/2016).
[16] *Kimmel*, FINRA AWC, No. 2013036812201 (05/09/2014).
[17] *Kennedy,* No. 2009019276105 (OHO, Apr. 17, 2012).

panel decision issued after the Respondent *defaulted* for failing to Answer or respond to a motion for default.[18]

The second is *Holloway*, but that case is also not binding precedent as it was issued by a hearing panel.[19] Also, in that case, the Respondent was faulted for a host of egregious conduct, with the CE violation playing only one role. Respondent improperly recommended variable annuity exchanges for dozens of clients; responded to Rule 8210 requests for documents and information by improperly withholding documents and providing altered documents; impersonated customers; completed blank, pre-signed annuity exchange applications and related documents for customers, and overstated his advisory business on his Form ADV. Such a list of wrongdoing would naturally affect the sanctions assessment by the Hearing Panel and that is absent here.

The NAC cites as aggravating that Respondent was initially not honest during his firm's investigation of the situation. *See* NAC Decision (ROA at 1119). While this is aggravating, it should not result in a bar. *See e.g.*, *Dept. of Enforcement v. Milberger*, No. 2015047303901 (March 27, 2020) (Respondent who falsified customer wire request forms, provided false documents to her firm during an investigation, and provided a false document to FINRA suspended for one year).

7. The Proceedings Were Contaminated by a Hearing Panelist Who Was Not Paying Attention.

Counsel for Respondent objected to Enforcement's opening statement (after it was completed) because the Enforcement lawyer repeatedly and inaccurately referred to the Regulatory Element Continuing Education Course as an "exam" and had called it an "exam" at least 80 times in Enforcement's prehearing brief.[20] Unfortunately, this repeated erroneous reference to "exam" seems to have influenced one of the hearing panelists who was also not paying attention to the proceedings. It seems clear this hearing panelist must not have read the Complaint, or the Answer, or the Pre-hearing Briefs of either side, and paid no attention during the full day of hearing testimony. This much is clear because at the very end of the hearing this hearing panelist asked Respondent to confirm an absurd understanding of the facts of the case:

Hearing Panelist:

> When you asked [the assistant] in 2018 to take that exam for you, and I believe you testified there was a series of e-mail chains back and forth to her, then let me understand correctly, ***you were asking her to go to an offsite location, Prometric, Pierson, something like that and to impersonate you; is that correct***?

Respondent:

> No, that's not correct.

[18] Enforcement refers to this default case as one of "two litigated cases" in its brief. *See* Department of Enforcement's Brief (ROA at 973). But this case is no more litigated than any of the AWCs cited above.
[19] *Holloway*, Disc. Proc. No. 2016050025401, Amended Hearing Panel Decision (Apr. 11, 2019).
[20] *See* Hearing Transcript (ROA at 264-650); Department of Enforcement's Pre-Hearing Brief (ROA at 125-140).

See Hearing Transcript (ROA at 388) (emphasis added). This hearing panelist apparently sat through the entire hearing thinking that Respondent asked his female assistant to impersonate him for an "exam" at a Prometric testing center. Such an understanding is utterly impossible for anyone who read the Complaint, Answer, Prehearing Briefs and sat through the testimony. This problem was discussed in Respondent's Post-Hearing Brief (ROA at 873), but the hearing panel ignored it in the Hearing Panel Decision. As for the NAC Decision, it correctly summarized Respondent's position:

> [Respondent] contends that a question posed by the panelist demonstrates that the panelist mistakenly believed that he asked the Assistant to impersonate him at a testing center. Logan reasons that the panelist must not have paid attention during the hearing and, therefore, was incompetent to participate in the Hearing Panel's decision.

NAC Decision (ROA at 1115). The NAC nevertheless held that Respondent failed to demonstrate that the "purported misunderstanding" by a hearing panelist undermined the fairness of the disciplinary proceeding. NAC Decision (ROA at 1115). This is so, according to the NAC, because "there is no evidence that a misunderstanding was the basis for the Hearing Panel's decision." (*Id.*). But this reasoning disregards the hearing panelist's role in evaluating the evidence. It is clear that the hearing panelist thought (despite all of the briefing and testimony) that Respondent instructed his female assistant to impersonate him at a testing center. Such an understanding is *impossible* to reach in this case by anyone with even a cursory familiarity with the case. Nothing in the entire record suggests this happened, and the whole point of Respondent's position was that the course (not exam) was offered online, and it is unfair to treat him like someone who instructed an assistant to impersonate him at a formal test center. Yet the hearing panelist thought this is what happened.

Not only did the hearing panelist fail to understand this crucial defense, but he labored under the highly prejudicial understanding that Respondent had sent his female assistant to impersonate him at a testing center. Quite obviously his understanding that the Respondent would send a female associate to impersonate him at a formal testing center negatively colored his evaluation of Respondent throughout the hearing. How can the Respondent expect the panelist to credit his assertion that he did not realize the Regulatory Element was involved when the panelist so thoroughly misunderstood the basic facts?

The NAC also concludes that the panelist's question does not demonstrate a misunderstanding because Respondent clarified (again, this was the very end of the hearing) that he "*was certainly not asking her to go to a testing center.*" (ROA at 1115). By then, however, he had already heard all of the evidence with his deeply prejudicial mindset, one that would quite obviously not be giving Respondent any benefit of the doubt – after all, who sends their female assistant to impersonate them at a formal test center? That this would affect his assessment of credibility and the evidence in general and render the process unfair was discussed at length in Respondent's Reply Brief to the NAC (ROA 985-89) but was not addressed by the original hearing panel.

The NAC suggests that if further "clarification" were necessary, counsel could have taken steps to make that clarification (*Id.*). But again, this was literally at the end of the hearing – long after the Complaint, Answer, and Prehearing Briefs, and after all of the testimony was in.

Finally, the NAC asserts in footnote that Respondent is not entitled to constitutional due process because FINRA is not a state actor. (ROA at 1115, n. 5). This may be true, but FINRA is required under the Exchange Act to provide "fair procedure[s]." *In the Matter of Epstein*, Release No. 59328 (Jan. 30, 2009); *In the Matter of Quattrone*, No. CAF030008, 2004 WL 2692229, at *13 (Nov. 22, 2004) ("Section 15A(b)(8) of the Exchange Act requires that SRO rules "provide a fair procedure for the disciplining of members and persons associated with members." Section 15A(h)(1) of the Exchange Act requires that NASD proceedings be fair."). Fair procedure, if it means anything, means that hearing panelists must review the Complaint, Answer and Prehearing Briefs dictated by the rules, and listen to the testimony at the hearing prescribed by the rules.

In summary, none of the reasons offered by the NAC for the hearing panelist's abdication of his duty are persuasive, particularly not in a case seeking a lifetime bar. Respondent lost the potential benefit of having a hearing panelist actually entertain the defense he was offering. If the Commission is not inclined to reverse the bar and impose a suspension instead, fundamental fairness requires a new hearing. *See In the Matter of U.S. Rica Financial, Inc. and Nguyen Respondents,* No. C010000032003, WL 22149390, at *2, n.1 (Sep. 9, 2003) (new hearing ordered where first decision was rendered without the participation of one of the hearing officers); *In the Matter of Wicker*, 2021 WL 6050421, at *1 (Dec. 15, 2021) (decision vacated and new hearing before a new hearing officer was ordered "where the fairness of the presiding Hearing Officer … might reasonably be questioned.").

IV. CONCLUSION

For the reasons above, imposing a bar in this case is excessive and oppressive, is punitive, and does not serve to protect investors. It must be reversed. Instead, the Commission should exercise its authority to reverse the bar and impose a two-year suspension, the maximum recommended suspension in the FINRA Sanctions Guidelines (at page 11), or in the alternative, order a new hearing.

Respectfully submitted,

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Certificate of Service

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