**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

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In the Matter of the Application of

Laurence G. Allen
As a General Securities Representative and
General Securities Principal with
NYPPEX, LLC

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APPLICATION FOR REVIEW
OF FINRA NAC DECISION IN
SD-2265

FILE No. 03-21222

# LAURENCE G. ALLEN'S OPENING BRIEF IN SUPPORT OF APPLICATION FOR REVIEW OF FINRA NAC DECISION

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## INTRODUCTION

In this appeal, Laurence G. Allen ("Mr. Allen") asks the Commission to reverse a FINRA decision denying his membership continuance application on the grounds that FINRA's rules were applied in a manner inconsistent with the purposes of the Exchange Act. FINRA did not "independently evaluate" Mr. Allen's application "based upon the totality of the circumstances" concerning the disqualifying event, as it is required to do. Conversely, Mr. Allen adequately demonstrated that it is in the public interest to permit his continued membership notwithstanding a statutory disqualification.

This appeal presents a novel issue: what happens when a statutory disqualification is based on a court order in an underlying civil action, but mitigating evidence exists which not only contradicts the findings in that order but was in fact *omitted* from the order? According to FINRA, the answer is nothing, as an applicant is not permitted to "collaterally attack" the event giving rise to statutory disqualification. Mr. Allen argues otherwise. Pointing out that a court omitted material evidence is not an "attack" so much as an assertion of fact, as the evidence exists, notwithstanding that the court inexplicably ignored it. But even if it does constitute an attack, it should not matter. If FINRA is required to "independently" evaluate a membership application based on the "totality of the circumstances" (as the Commission has often held), then it should, at the very least, consider compelling evidence that a material omission occurred in the court below, particularly if the evidence omitted flatly contradicts the court's findings. FINRA is not required to blindly accept every court order as inviolate, and true independence requires that it consider mitigating circumstances when evaluating whether the continued membership of an associated person is in the public interest.



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In this case, FINRA accepted without question the trial court's findings and conclusions and turned a blind eye to Mr. Allen's arguments regarding material omissions in the court's findings. In fact, FINRA mischaracterized those arguments in its decision, which only reinforces that it had no interest in understanding Mr. Allen's arguments or in conducting an "independent" evaluation. That was wrong, and it was inconsistent with the purposes of the Exchange Act.

## SUMMARY OF THE CASE

Prior to December 2018, Mr. Allen was a widely respected pioneer in the development of secondary private markets, having founded NYPPEX, LLC, one of the world's leading providers of secondary market liquidity and which, to date, has executed and settled more than 1,650 private equity transactions in the secondary market. Mr. Allen was also a trusted advisor to securities regulators, including a member of the Commission. He had no disciplinary history, no customer complaints and no history of litigation with investors over the course of a career spanning more than three decades.

Mr. Allen was also the manager of the general partner of a small private equity limited partnership known as ACP X, LP (the "Fund"). His actions were governed by a limited partnership agreement, and he was advised by a general counsel, outside counsel and an investor advisory committee ("LPAC"), which represented the interests of the limited partner investors. The decisions which Mr. Allen made on behalf of the general partner – such as investing Fund assets in an affiliate entity in 2008 and thereafter, and proposing amendments to the limited partnership agreement in 2013, 2015 and 2017 – were non-controversial at the time, largely because almost every significant decision was reviewed and approved by legal counsel and the LPAC. Nevertheless, if a limited partner had legitimate concerns about Mr. Allen's actions, she had recourse in the form of a civil action for breach of contract or breach of fiduciary duty. But that



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never happened; since inception of the Fund in 2004 no investor has ever filed an action accusing Mr. Allen of wrongdoing of any sort.

In December 2018, the limited partners voted overwhelmingly to approve an amendment to the limited partnership agreement which proposed a plan for dissolution and liquidation of the Fund and payment of final distributions to the partners beginning in January 2019. But, that same month, the Office of the New York Attorney General ("NYAG") went to a state court judge in secret, accused Mr. Allen of fraud in connection with the Fund and obtained an *ex parte* order imposing injunctive relief, which among other things halted (still, to this day) dissolution of the Fund and distributions to the limited partners.

Further litigation ensued, and Mr. Allen is now subject to statutory disqualification as a result of a series of orders entered by New York courts between 2018 and 2021 which found him liable for fraud under New York's Martin Act and for breach of his fiduciary duties. The first court order – which FINRA contends was the initial disqualifying event – resulted from the December 2018 *ex parte* proceeding in which Mr. Allen had no opportunity to present evidence or defend himself. The second and third orders entered preliminary and permanent injunctive relief, respectively, but those are the orders which omitted significant mitigating evidence.

The allegations against Mr. Allen all concerned actions which he took on behalf of the general partner of the Fund. The authority to take those actions was specifically addressed in and governed by the limited partnership agreement (as well as a private placement memorandum), and NYAG expressly alleged in its complaint that Mr. Allen's actions were *in violation of those contracts.* Yet, incredibly, the trial court which found him liable for "fraud" failed to address, discuss, analyze or even *acknowledge* any of the pertinent provisions of the operative contracts. This material omission led the court to hold that



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> "Allen fraudulently caused ACPX ***to purchase equity in*** NYPPEX [an Affiliate] in each of 2014, 2015, 2016, and 2017-18" (emphasis added)

even as the limited partnership agreement states unequivocally that

> "[T]he General Partner … is hereby authorized … ***to purchase property in*** … any Affiliate of the General Partner" (emphasis added)

For the avoidance of doubt – and to the extent the court held that "follow on" investments in the affiliate entity between 2014 and 2018 were fraudulent – the partnership agreement also states that

> "It is hereby reiterated that the General Partner ***is permitted to make follow-on investments*** in portfolio companies and funds ***including affiliates*** without requiring the consent of Limited Partners as deemed appropriate by the General Partner" (emphasis added)

Further, the court described Mr. Allen as being "hopelessly conflicted" as a result of the affiliate investments, even though the limited partnership agreement states that "[e]ach Limited Partner ***acknowledges and agrees*** that the purchase or sale of property … may give rise to conflicts of interest between the Partnership and the Limited Partners, on the one hand, and the General Partner or such Affiliate, on the other hand" (emphasis added). The fact that conflicts might arise was fully disclosed and was accepted by the limited partners as a known risk factor.

As a result of these court orders, Mr. Allen is in the bizarre position of having been found liable for "outright fraud" and "a shocking level of self-dealing" (according to the court), even though there are contracts which expressly authorized the actions which were purportedly fraudulent and which fully disclosed the potential conflicts of interest inherent in those actions – contracts which the court refused to acknowledge. The court was able to reach its conclusions only by omitting reference to mitigating evidence which flatly contradicted those conclusions. Put simply, the court ignored, disregarded or simply did not care about the contractual relationship



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between Mr. Allen and the limited partners and instead substituted its own subjective judgment about the propriety of Mr. Allen's investment decisions (and other actions). And no subsequent court or regulator has ever addressed or acknowledged the contractual language quoted above. Rather, each subsequent reviewing court or regulator (including FINRA) has simply accepted the trial court's findings without question, all in the name of "discretion."

Mr. Allen is now trapped in a Kafkaesque legal and regulatory purgatory in which there exists compelling written evidence that would exonerate him from fraud allegations (and might have done so from the outset had he had the opportunity to appear and defend himself), but literally no one sitting in judgment of him – not the New York Attorney General, not the New York trial courts or multiple appellate courts, not FINRA or multiple state securities regulators – has ever addressed that evidence on the merits. To be clear, not a single court or regulator – including FINRA – has ever acknowledged, discussed, analyzed or even referenced a single provision of the limited partnership agreement regarding affiliate investments, even though those provisions are dispositive. In denying Mr. Allen's membership continuance application, FINRA was perfectly content to ignore mitigating evidence that contradicted the court's findings, in effect (like the court) burying its head in the sand and pretending that the operative contract does not exist.

Moreover, FINRA ignored – as did the court – the perspective of the Fund's limited partners, many of whom testified at trial that Mr. Allen acted within the scope of his contractual authority and engaged in no wrongdoing. Perhaps the most compelling evidence presented to FINRA at the membership continuance hearing was an amicus brief submitted in a related (and pending) matter before the Commission by the LPAC, in which the limited partners stated that:

> Since inception of the Fund, we have provided advice to the general partner ("General Partner") in connection with "investment strategy, potential conflicts of interest, portfolio valuation and other Partnership matters" as



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> per the LPA. However, the LPAC represents the interests of the Limited Partners, not the General Partner. …
>
> Because we are the investors whom Mr. Allen purportedly misled (and whose assets he purportedly diverted for his own benefit), we have numerous insights and a strong opinion on this matter, and a direct economic interest at stake. We are very familiar with the Fund's private placement memorandum ("PPM"), limited partnership agreement and its approved amendments ("LPA"). As parties to the LPA, we have a vested interest to see that the General Partner adheres to those terms, and the proper interpretation of that agreement by non-parties, such as the NYAG, the New York court and the Commission. We also have first-hand knowledge of the issues raised in the New York Action. …
>
> We do not believe that Mr. Allen acted contrary to the LPA or the PPM, nor that he misled the Limited Partners, nor that he diverted assets for his own benefit, nor or that he engaged in "fraud." We do not agree with or support the Court's decision or its various injunctions, and we do not agree with or support this SEC proceeding against Mr. Allen. We take the allegations against Mr. Allen in the New York Action seriously. As investors in the Fund, it goes without saying that we have a strong vested interest in knowing whether the NYAG's and SEC's allegations are true and in protecting our interests. If we believed that Mr. Allen had exceeded his contractual authority or acted contrary to our interests as Limited Partners – much less misappropriated our assets or committed fraud – we would be the first to say so. We are not beholden to Mr. Allen and do not have any loyalty or obligation to him, other than our mutual interest in the success of the Fund. We have studied the allegations and the evidence carefully and do not see any logical reasons for the New York Action or this SEC proceeding. In our view, the New York Action was an ill-informed, poorly-conceived effort by the NYAG to find fraud where none existed. …
>
> The [New York Attorney General] and the Court … sought to impose their own judgment and to effectively rewrite the terms of our contractual relationship. … We may not always agree with each and every investment decision that the General Partner made, but we clearly gave the General Partner the authority to make those decisions in order to maximize returns. If an investor or a regulator or a court can second guess every decision or criticize the size of any particular investment, it defeats the purpose of our contractual relationship.

Although the LPAC represents the interests of the affected investors (and thus the public interest in Mr. Allen's continued membership), FINRA's decision makes no mention of the LPAC



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or the perspective articulated above. Like the trial court, FINRA effectively whitewashed from the record any evidence which conflicted with or contradicted the fraud narrative.

To deny Mr. Allen's membership continuance application, FINRA was required under the Exchange Act to *independently* evaluate the application based upon the totality of the circumstances. Yet FINRA held that "the seriousness of Allen's misconduct underlying the disqualifying injunction supports denying the Application" without considering evidence in mitigation of that purported conduct. The "disqualifying injunction" is one data point material to FINRA's review, but it is not the only one. Mr. Allen has specifically pointed to evidence in mitigation of that data point, which FINRA refused to consider. In treating the trial court order as beyond reproach, and in refusing to independently consider the circumstances raised by Mr. Allen, and in ignoring the voices of the limited partners themselves, FINRA failed to apply its rules in a manner consistent with the purposes of the Exchange Act.

FINRA also committed an additional error in finding that the proposed supervision plan for Mr. Allen was inadequate without acknowledging the unique and limited nature of NYPPEX's secondary private market liquidity business.

For these and other reasons discussed herein, FINRA's decision to deny Mr. Allen's membership continuance application should be reversed.

## FACTUAL BACKGROUND AND HISTORY

The basic facts in this matter are not in dispute. Mr. Allen took certain actions on behalf of the general partner, and the fact that he took those actions has never been disputed. In fact, all of his actions were done openly and were fully disclosed to the Fund's investors. Rather, the fundamental issue is whether Mr. Allen's actions were permitted or not. If those actions were permitted by contract, then there cannot have been "fraud" or a breach of fiduciary duty if Mr.



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Allen acted in a manner consistent with his contractual authority. The problem – and that which distinguishes this case from others which have come before the Commission – is that the trial court made no effort to make that determination and omitted critical mitigating evidence. In its orders – those which led to Mr. Allen's statutory disqualification and FINRA's denial of Mr. Allen's membership continuance application – the court did not subject NYAG's allegations to scrutiny by reference to the partnership's operative contracts, nor did it even acknowledge those contracts at all. The court omitted entirely any citation to the agreements which governed Mr. Allen's actions. It also omitted reference to the sworn testimony of numerous limited partners who stated that Mr. Allen acted in a manner consistent with his contractual authority.

Thus, even though the basic facts are not in dispute, it is necessary to discuss the "totality of the circumstances" giving rise to the disqualifying event(s) in order to understand how these material omissions occurred. The Commission cannot fully understand Mr. Allen's arguments without understanding exactly what happened below, and how it came to be that the Court omitted reference to significant mitigating evidence that might have changed the outcome had it been acknowledged. Due to word count limits, Mr. Allen will explain this only by reference to the primary allegation in the underlying court action, in which NYAG alleged that Mr. Allen fraudulently invested approximately $6 million in Fund assets in an affiliate entity in purported violation of his contractual authority. In so doing, this brief will make occasional reference to the trial court record, which is publicly available online.[1]

[1] The Commission may take judicial notice of the trial court record, as the New York State Unified Court System docket is a source whose accuracy cannot reasonably be questioned and establishes facts that can be accurately and readily determined. *See e.g.*, Fed.R.Evid. 201(b).



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1. **Laurence Allen.**

Mr. Allen entered the securities industry in 1982. He founded a registered broker dealer, NYPPEX, LLC ("NYPPEX"), in 1999, and also holds a majority ownership interest in NYPPEX Holdings, LLC ("NYPPEX Holdings"), which wholly owns NYPPEX (among other entities). NYPPEX focuses exclusively on providing secondary private market liquidity to sophisticated investors that seek to buy and sell interests in private equity partnerships.

Mr. Allen is also the managing principal of ACP Investment Group, LLC ("ACP"), a registered investment adviser, and the managing member of ACP Partners X, LLC, the general partner ("General Partner") of ACP X, LP (the "Fund"), a private equity limited partnership.

Prior to December 2018, Mr. Allen had no disciplinary history whatsoever. ACP and NYPPEX are regulated by the SEC and/or FINRA. Prior to 2021, neither the SEC nor FINRA initiated any action against Mr. Allen or alleged that he had engaged in wrongdoing. In fact, the same allegations advanced in the New York state court action against Mr. Allen were reported to the SEC (in 2011) and FINRA (in 2014) by a purported whistleblower, but neither regulator deemed them worthy of action.[2] Mr. Allen also has no history of customer complaints, even to this day. Nor has any customer or investor ever sued Mr. Allen.

2. **ACP X, LP.**

Mr. Allen formed the Fund in 2004 and was the manager of its general partner ("General Partner"). ACP X is a private fund consisting of seventy-five limited partners ("Limited Partners") all defined as "qualified purchasers" under federal law (*i.e.*, the investors were individuals or family-owned businesses which represented that they owned $5 million or more in investments).

[2] R-882; https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=YHUBeL8u8M7daXxNiF7y9g== , p. 449-450.

The rights and obligations of the partners are set forth in multiple written agreements, including a private placement memorandum ("PPM") and a limited partnership agreement, as amended ("LPA"). The Fund raised approximately $17.2 million in capital between 2004 and 2006, and through the efforts of the General Partner the net asset value ultimately reached approximately $31 million.[3]

In December 2018, a majority of Limited Partners approved a seventh amendment to the LPA, which provided for dissolution and liquidation of the Fund, with final distributions to Limited Partners totaling approximately $15 million to begin in January 2019. The Fund was ranked by Preqin (an alternative investment data source) as the number one performing secondary private equity fund of its vintage in terms of total return (*i.e.*, cumulative distributions plus unrealized value/capital contributed), ranking ahead of AXA Early Secondary Fund II and Goldman Sachs Vintage Fund III, among others, with a net investment multiple of approximately 1.99x. After fourteen years (ten year initial Fund term, with two two-year renewals), every Limited Partner stood be redeemed in full at somewhere between 119% and 184% of his or her initial investment, depending on the value of private company investments as of the liquidation date.[4]

3. **The New York Action.**

**A. *The Ex Parte Proceeding*.**

In December 2018, with the Fund set to liquidate and make distributions to the Limited Partners, and notwithstanding its performance and the lack of complaints by investors, NYAG went to a New York state court judge on an *ex parte* basis and accused Mr. Allen of fraud, with no opportunity for Mr. Allen to object, defend himself or otherwise rebut NYAG's allegations.

[3] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=YHUBeL8u8M7daXxNiF7y9g== , p. 479; 510.
[4] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=bMNb/wCZhuC5DVe8_PLUS_K_PLUS_vgQ== , p. 650.

Based on that one-sided, secret proceeding, the judge entered a temporary injunction (the "Ex Parte Order"), finding that "it is expedient and proper to grant certain preliminary injunctive relief against Respondents because *alleged fraudulent practices of Respondents* threaten continued and immediate injury to the public" (emphasis added).[5] Mr. Allen was presumed "guilty" of fraud from the outset, before he ever appeared in the action, and NYAG has never had to explain or account for why it deliberately excluded him from its initial presentation of evidence.[6]

***B. The Complaint.***

After securing the preliminary injunction, NYAG then waited a full year – until December 2019 – before filing a complaint against Mr. Allen. When NYAG finally did get around to filing its complaint, that pleading was rife with misrepresentations and factual errors – errors which might have been corrected if Mr. Allen had been heard a year earlier.

NYAG's primary allegation – highlighted in the introductory paragraphs and forming by far the largest purported "fraud" – was that a "highly conflicted" Mr. Allen "diverted" or "funneled" approximately $6 million in Fund assets to an affiliate entity, NYPPEX Holdings, in violation of the PPM and LPA, which, according to the complaint, "do not disclose or contemplate an investment by ACP into any of its affiliates."[7] Specifically, NYAG alleged that Mr. Allen "divert[ed] millions of dollars of the fund's money directly to NYPPEX, *in violation of the offering documents*" (emphasis added).[8] According to the complaint, "[s]ince 2008, Allen has invested approximately $5.7 million from ACP into NYPPEX [and] during that same period, Allen paid

[5] R-874.
[6] The New York Action might have proceeded in an entirely different manner, and might have had an altogether different outcome, had Mr. Allen had the opportunity to defend himself and provide critical context from the outset, or had the Limited Partners – many of whom vehemently opposed (and still oppose) NYAG's interference with their private fund – been heard.
[7] R-888, ¶ 5.
[8] *Id.*, ¶ 6.

himself nearly $5.7 million in salary from NYPPEX."[9] In other words, according to NYAG, Mr. Allen "funneled" money illicitly to NYPPEX Holdings and then distributed a similar amount to himself on a nearly dollar-for-dollar basis.

On paper, NYAG's allegations appear damning. But in reality, none of the fraud narrative was true. First, although NYAG utilized ominous-sounding words like "funneled" and "diverted" to imply that Mr. Allen had done something sinister and in secret, the money that was transferred to NYPPEX Holdings was in the form of equity investments, all of which were made openly and were fully disclosed to investors in quarterly reports. And, although NYAG alleged that "the PPM "prohibited" ACP from investing in NYPPEX,"[10] that representation was not only false but, in fact, the opposite was true. The PPM (in a section entitled "Certain Activities of ACP and its Affiliates") and LPA (in a section entitled "Transactions with Affiliates") both state that the General Partner "is hereby authorized, on behalf of the Partnership, *to purchase property in* or obtain services from … any Affiliate of the General Partner …" (emphasis added).[11] An investment is a "transaction." Securities are "property," and to "purchase property" in a company means to invest in it by purchasing equity in the form of securities.

Moreover, potential conflicts of interest inherent in related party transactions were fully disclosed in the PPM and LPA and accepted by the investors: "Each Limited Partner acknowledges and agrees that the purchase or sale of property … may give rise to conflicts of interest between the Partnership and the Limited Partners, on the one hand, and the General Partner or such Affiliate, on the other hand."[12]

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[9] R-901, ¶ 64.
[10] R-899, p. 13 (section heading).
[11] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=OBsH3wl/D7YE/zDa17jvgg== , p. 16. https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=79bV2JPgr8LSmlrZkjdq2w== , § 2.09.
[12] *Id.*

Lastly, NYAG's allegation regarding Mr. Allen's purported salary was also false. Mr. Allen was not paid $5.7 million in "salary," as alleged in the complaint. Rather, that was the approximate (but still overstated) amount of his *total compensation* over a ten-year period, the majority of which consisted of commissions which Mr. Allen earned on his own placement business – money which has nothing whatsoever to with any funds invested by the Fund into NYPPEX Holdings.[13] In reality, Mr. Allen received less than half of the "salary" that NYAG alleged in the complaint, and the purported self-dealing, dollar-for-dollar connection between Fund assets invested in NYPPEX Holdings and salary paid to Mr. Allen by NYPPEX Holdings simply did not exist.

**C. *The Preliminary Injunction Hearing*.**

At the same time that NYAG filed its complaint, it also sought a preliminary injunction to extend the injunctive relief imposed by the Ex Parte Order a year earlier. The court scheduled a preliminary injunction hearing for January 2020, only six weeks after the filing of the complaint (and before Mr. Allen or the other defendants filed answers or affirmative defenses). After initially scheduling one day for the hearing, the court ended up hearing testimony – almost exclusively from NYAG – over the course of five days.[14]

The preliminary injunction hearing revealed a clear case of the tail wagging the dog. Rather than building a case based on legitimate complaints of wrongdoing by investors (since no Limited Partner had ever sued Mr. Allen for alleged wrongdoing), NYAG created its fraud narrative and

[13] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=tI0Jut2JLjoNQ_PLUS_U2nfdHGA== , p. 4 (expert report detailing that Mr. Allen's total compensation of approximately $5.55 million over a 10-year period "includes not just salary, but also commissions, health reimbursement, miscellaneous pay, and a draw" and that "[e]xcluding commissions, Allen's salary, misc. pay, health reimbursement, and draw average approximately $266,000 annually" or approximately $2.6 million over a 10-year period).

[14] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=44wRjI2TE2YJ9fVJ6oSB5A== , p. 761 (closing argument of NYAG, acknowledging "I understand initially [this] was to take one day and perhaps you have been deceived into giving us five").

then went out and solicited Limited Partners who would agree to support that narrative. This was best evidenced by Limited Partner Elizabeth MacGillivray, who testified that an Assistant Attorney General "sent me the complaint to look at because I was going to be a witness in this trial, so therefore I should probably have an idea what the trial is about."[15] Ms. McGillivray confirmed that her knowledge of the matter came from the allegations in the complaint, which, in circular fashion, she presumed to be true because they were in the complaint.[16]

As plaintiff, NYAG had the burden at the preliminary injunction hearing to demonstrate a likelihood of success on the merits of its allegations. But as to the primary allegation of fraud, NYAG never even attempted to establish the contractual violation that it alleged. NYAG called five Limited Partners as witnesses at the hearing (with a sixth by affidavit)[17], and it did not attempt to establish a violation of the LPA through any of them (nor through any other witness). In fact, NYAG used the LPA as an exhibit with only one witness (Limited Partner David Minceberg), and even with that witness it made no attempt to establish what the contract said or how Mr. Allen purportedly violated it.[18] Mr. Minceberg was critical of the NYPPEX Holdings investments (calling them "inappropriate"), but he conceded on cross-examination that (i) the LPA says that the General Partner may "purchase property" in an affiliate, and (ii) he was not aware of any contractual provision which prohibited affiliate investments.[19] And one Limited Partner witness

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[15] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=qdJAvp/HwJ82i3yP7ReIug== , p. 307-308 ("Q: How did you know the information was true though? A: I read the complaint").

[16] *Id.*

[17] David Minceberg, Jeffrey Crouth, Scott Pinkus, Elizabeth MacGillivray, Thomas Judge.

[18] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=0l4NSkXTVm_PLUS_3CC9bHmckrw== , p. 3-93.

[19] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=0l4NSkXTVm_PLUS_3CC9bHmckrw== , p. 115; 136-137. Mr. Minceberg testified that his "interpretation" of the LPA was that it merely allowed the Fund to contract for "services" from an affiliate, which ignores the plain language in the same paragraph of the contract stating that the Fund could also "purchase property" in an affiliate. This was the fundamental problem with the NYAG action: it relied on an interpretation of the LPA which ignored what that document actually said. *See* R-899, ¶ 56 (complaint citing "Transactions With Affiliates" section of LPA but omitting reference to operative language regarding purchasing property in or from an affiliate).

called by NYAG (Scott Pinkus) actually *contradicted* NYAG's allegation that investments in affiliates were prohibited, testifying on direct examination that NYPPEX Holdings "was an affiliate, and yes, ***somewhere buried in the language he's allowed to invest in affiliates***" (emphasis added).[20]

At most, NYAG presented testimony from a handful of Limited Partners who had assorted grievances and complaints about the Fund, including the slow pace of distributions, investments and strategies with which the investors disagreed (such as the NYPPEX Holdings investments), proposed amendments to the LPA which these witnesses voted against, lack of communication from management, recordkeeping, etc.[21] But that misses the point. Investors are entitled to have complaints, but the complaints articulated by the Limited Partners who testified for NYAG did not amount to "fraud" or "breach of fiduciary duty" or anything close to it.[22] In fact, no witness testified that that Mr. Allen committed fraud, breached his fiduciary duties or violated the LPA in any manner. NYAG failed to establish – much less even attempt to establish – *the central allegation in the complaint*, which was that Mr. Allen's investment of Fund assets in an affiliate entity, NYPPEX Holdings, was in violation of the LPA and therefore fraudulent.[23]

NYAG also failed to demonstrate that Mr. Allen received $5.7 million in "salary" from NYPPEX Holdings, as it had alleged in the complaint. NYAG introduced a summary exhibit of Mr. Allen's W-2 statements "showing his annual compensation from NYPPEX Holdings for 2008 through 2018," but it made no effort to prove that any or all of that amount was *salary*, as opposed

[20] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=qdJAvp/HwJ82i3yP7ReIug== , p. 259.
[21] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=qdJAvp/HwJ82i3yP7ReIug== , p. 299-300.
[22] Ms. MacGillivray even acknowledged that she had already received a 90% return on her $100,000 investment, even before final liquidation of the Fund (which was scheduled for January 2019 but halted by the Ex Parte Order).
[23] The defense presented evidence that in September 2008, prior to the first investment in NYPPEX Holdings, Mr. Allen sought and received a five-page legal opinion from counsel stating that the LPA and PPM "contain sufficient authorization to allow ACP X to invest in the equity securities of NYPPEX."
https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=MNK0Tgh_PLUS_KAiyAw99kvTOLA==

to other compensation, such as commissions.[24] In acquiescing to the admission of that exhibit in evidence, Mr. Allen's counsel noted specifically that "[t]his represents total compensation, which you will hear later is not all salary."[25] And, consistent with that representation, Mr. Allen testified later that approximately half of his compensation (and sometimes up to 73% in a given year) was in the form of commissions on "deals that I originate that I manage, that I've placed" that "have zero to do with any ACP investment in NYPPEX Holdings."[26]

**D. *The Preliminary Injunction Order*.**

Following five days of hearings which ended on February 3, 2020, the court entered an order granting preliminary injunctive relief the very next day, on February 4, 2020. In a brief order focused almost entirely on legal issues (statute of limitations, applicability of New York's Martin Act, etc.), the court held that "[f]or all the reasons which follow, the Court finds that the Office of the Attorney General has shown a likelihood of success on the claims asserted in the Complaint."[27]

But the court then failed to address the primary "claim asserted in the complaint," that Mr. Allen *violated the Fund's operating documents* by investing Fund assets in an affiliate entity. There is literally no discussion of this claim whatsoever, much less any citation to the LPA or the PPM or any of the testimony at the hearing (such as that of Mr. Pinkus, who conceded that pursuant to the LPA the General Partner was "allowed to invest in affiliates," or of Mr. Allen, who testified that he had received a legal opinion before investing in NYPPEX Holdings). The court issued an order finding "outright fraud" but without any reference to or analysis of the contracts which governed the actions that were alleged to have constituted fraud, or any testimony in mitigation of that finding. The court also failed to distinguish Mr. Allen's salary from total compensation,

[24] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=qdJAvp/HwJ82i3yP7ReIug== , p. 316.
[25] Id., p. 317.
[26] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=YHUBeL8u8M7daXxNiF7y9g== , p. 515-516.
[27] R-880.

holding that "during the period 2008 to 2018 Mr. Allen's total compensation from NYPPEX Holdings exceeded $6 million"[28] without acknowledging that the majority of compensation was in the form of commissions, a fact which further mitigated NYAG's self-dealing narrative.

***E. Trial on the Merits.***

A trial on the merits was conducted over the course of four days in January 2021, one year after the preliminary injunction hearing. The court denied Mr. Allen's jury trial demand as untimely, and the case was tried as a bench trial. Due to the ongoing Covid-19 pandemic, the trial was conducted remotely via Microsoft Teams. Direct testimony was submitted by affidavit, with affiants subject to cross-examination. The entire record of the preliminary injunction hearing was admitted as part of the trial record.

NYAG again did nothing to establish that Mr. Allen had violated the LPA. In fact, NYAG began the hearing by reading into the record portions of Mr. Minceberg's testimony from the preliminary injunction hearing.[29] After Mr. Minceberg's testimony, NYAG called a valuation expert on an entirely different topic, and then rested its case (relying in large measure on the record from the preliminary hearing).[30] At no point did NYAG demonstrate that the LPA prohibited investments in affiliates, or that Mr. Allen violated the LPA by causing the Fund to invest in NYPPEX Holdings.

In his defense, Mr. Allen provided testimony from six Limited Partners[31], each of whom testified that the General Partner was authorized to invest Fund assets in affiliate entities and that Mr. Allen did not engage in wrongdoing. Perhaps the most astute testimony came from Limited Partner Christian Erdman, who testified that that while he did not particularly agree with Mr.

[28] R-882.
[29] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=UR7hxTtU0OPk082nL5QPOg== , p. 39.
[30] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=1wtNznpgrWzSYq1Ev2bVWw== , p. 244.
[31] Christian Erdman, James Johnson, Vernon Sumnicht, Robert Schubert, Bassim Shihadeh, David Rubis.

Allen's decision to make follow-on investments in NYPPEX Holdings, Mr. Allen "was perfectly within his right in making these investments."[32] On cross-examination, Mr. Erdman testified that although the "optics" of making an investment in an affiliate "somewhat closely related to Larry" "were not good," Mr. Allen was "certainly within his rights to do it."[33] And that hits at the heart of the matter: all of the complaints regarding the investments in NYPPEX Holdings concerned the "optics" of the related-party transactions – *i.e.*, the conflicts of interest inherent in investing money in an affiliated entity in which the General Partner also has a significant interest – rather than the General Partner's contractual authority to make those investments. As Mr. Erdman noted correctly, the Limited Partners gave the General Partner the power to make investment decisions, including investments in affiliates, notwithstanding the "optics" of such investments.[34]

NYAG conducted a summation of the case that included no reference to the LPA or to any provision therein addressed to investments in affiliates.[35] In his own summation, Mr. Allen's counsel practically begged the court look at the operative contracts:

> [A]ll of the alleged wrongdoing was not only disclosed, but it was approved by contractual agreements. We note that the Court has not yet performed the full contractual analysis that accounts for the effect between the LPA, affiliate services agreement, PPM, the expense sharing agreement and the other agreements setting up this fund, through very competent counsel. …
>
> The LPA, as amended includes … explicit reference to [and] discloses and expressly allows the conduct at issue in this case. We endeavor to ask the Court to undergo this analysis. It is the only way to properly determine whether Mr. Allen did something he was or was not allowed to do; much less if he did anything that amounts to fraud or breach of any fiduciary duty as the Attorney General alleges. So, as I said before, if you go to the tape,

[32] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=Jzdo7tv6IRarRiWw1aF1Ew== , ¶ 9.
[33] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=1wtNznpgrWzSYq1Ev2bVWw== , p. 253.
[34] Mr. Allen also presented the expert report of Yale Law School contracts law professor Alan Schwartz, who summarized and analyzed the relevant provisions of the PPM and LPA concerning transactions with affiliates and concluded that "[i]n my opinion … a Delaware court would find that ACP was permitted to invest in its affiliates." https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=SXiMr/JOpsGKTBrtFtsgOA==
[35] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=bMNb/wCZhuC5DVe8_PLUS_K_PLUS_vgQ== , p. 697-704.

> and I think that you have to do that here. You have to look at what is actually alleged in this complaint. …
>
> Where does the complaint cite to fraudulent acts? If you look at statement number one in the complaint … it says that Allen invested ACP's assets in NYPPEX and perpetrated a fraud on investors. … [W]e ask you to study the contractual agreements introduced, and you will find everything was disclosed and agreed to by the LPs.[36]

**F. *Post-Trial Submissions.***

Towards the close of trial, the court instructed the parties as to post-trial briefing, including a comment to NYAG that "[i]n your post-trial brief you will explain why transfers to affiliated entities was not permitted under the Partnership Agreement and in the private placement memorandum."[37] But NYAG failed to do this; in fact, it did not file a post-trial memorandum at all. Rather, it submitted proposed findings of fact and conclusions of law which ignored entirely any argument or discussion addressing how or why affiliate investments were prohibited.[38] As to affiliate investments, NYAG merely regurgitated its allegation from the complaint that "Allen fraudulently caused ACP to invest $6 million in NYPPEX, a failing broker dealer he owned and operated as its CEO" and that "ACP's investment in NYPPEX was merely a thinly disguised scheme for Allen to line his own pockets in violation of New York law and his fiduciary duties."[39] But merely saying that Mr. Allen acted fraudulently does not make it so. Through the preliminary injunction hearing, trial on the merits and afterwards, NYAG failed to establish (or even attempt to establish) that the Fund's investment in NYPPEX Holdings was in violation of the LPA or PPM, such that those investments constituted "fraud" on the investors.

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[36] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=bMNb/wCZhuC5DVe8_PLUS_K_PLUS_vgQ== , p. 711:

[37] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=bMNb/wCZhuC5DVe8_PLUS_K_PLUS_vgQ== , p. 590.

[38] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=b2OKu2iYPmgfLHeyNvl4EQ==

[39] *Id.*, ¶ 7.

On the other hand, Mr. Allen addressed this issue squarely in his post-trial memorandum, with numerous citations to the evidentiary record:

> Investments in NYPPEX and the other conduct at issue here are expressly allowed by and disclosed in the fund's contractual documents. … Section 2.09 of the LPA clearly provides that the general partner of ACP X may invest in affiliates, and so does Article III of the PPM. (Doc. No. 103, LPA § 2.09; Doc. No. 102, PPM at 19-20). ... Simply put, Section 2.09 authorizes "transactions" with affiliates, and an "investment" is a transaction. Section 2.09 broadly permits affiliate transactions "in addition to transactions specifically contemplated by this Agreement," and it also has a provision that the general partner is authorized to purchase property in any affiliate. The PPM in Article III contains similar language, and under Delaware law it is clear that the LPA allows investments in affiliates. Indeed, before Defendants invested in affiliates, they received a legal opinion, which also stated that the LPA and Delaware law permitted such investments. (Doc. No. 108, Legal Op.)
>
> Section 2.09 of the LPA makes clear that each LP "acknowledges and agrees that" ACP has the authority to invest in an affiliate, though such an investment may create "conflicts of interest" between ACP and the affiliate. (Doc. No. 103, LPA § 2.09.) And LPA Article 2.10 provides: "(a) Each Limited Partner represents and warrants that such Limited Partner has carefully reviewed and understood the information contained in the PPM and (b) acknowledges and agrees that ACP…may engage…in any and all of the activities of the type or character described or contemplated in Section 2.09." (Id. § 2.10). This lawsuit seeks to eviscerate the clear, express language disclosed to and agreed to by sophisticated investors.[40]

**G. *The Decision After Trial.***

Little more than two weeks after the close of trial, and just six days after the parties' post-hearing submissions, the court entered its Decision After Trial, finding, incredibly, that "the four days of trial testimony confirmed all of the facts established at the preliminary injunction hearing."[41] Even after the court stated during trial that "[t]he documents say what the documents say," and after Mr. Allen's counsel repeatedly asked the court to conduct a "full contractual

[40] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=mwwe3QZK7SDwD7aVj_PLUS_ufMg== , p. 20.
[41] R-943.

analysis" and "study the contractual agreements introduced," and after the court specifically instructed NYAG to brief the contractual issue but NYAG failed to do so, and after Mr. Allen's counsel directed the court in the post-trial memo to the specific provisions in the PPM and LPA regarding affiliate investments, the court wrote an order that did not even cite the PPM or LPA, much less discuss or analyze any provision of those contracts with regard to affiliate investments.

Rather, the court held that "the testimonial and documentary evidence adduced during nine days of testimony in this case established that, through a maze of entities owned and /or controlled by defendant Allen, a significant portion of the capital contributed to the ACPX limited partnership was substantially diverted by a hopelessly conflicted Allen toward funding NYPPEX."[42] But that is a non-sequitur; the court did not cite to any such "testimonial or documentary evidence," nor did it make any effort to explain how Mr. Allen's purported "diversion" of Fund assets – which were equity investments in NYPPEX Holdings and disclosed to the Limited Partners in quarterly reports – was improper when the LPA and PPM specifically authorized him to make such investments.

The court held in conclusory fashion that NYAG "established its right to relief" and that it had proved by a preponderance of the evidence that, among other things, Mr. Allen "fraudulently caused ACP X to make oversized investments in NYPPEX" and "provided fraudulent investment advice to ACPX by advising ACPX to invest in NYPPEX."[43] The court even noted Mr. Allen's argument that this was a contract matter: "[D]efendants argue that their alleged conduct at most constitutes a breach of contract but not Martin Act and Executive Law violations. However, nothing precludes defendants from being liable for *both* breach of contract and other violations,

[42] R-944.
[43] R-949, 946.

including Martin Act fraud and breaches of fiduciary duty" (emphasis added).[44] Yet the court did not find a "breach of contract," which was the purported predicate – in both the NYAG complaint and in the court's ruling – for the imposition of liability under the Martin Act, Executive Laws and for breach of fiduciary duty. Bizarrely, the court found Mr. Allen liable under each of those theories without making any effort whatsoever to demonstrate that he engaged in the predicate act of violating his contractual authority. In an action concerning a private partnership governed by contract, the court simply ignored the contract and imposed its own subjective judgment.

The Decision After Trial omits any reference to the PPM and LPA, and specifically to the provisions which state that the General Partner was authorized "to purchase property" in an affiliate such as NYPPEX Holdings. It omits reference to the testimony of the numerous witnesses (including multiple Limited Partners and an expert witness) who testified that those contracts permitted investments in affiliates such as NYPPEX Holdings. It omits reference to the testimony and evidence that Mr. Allen sought and received a legal opinion that investments in affiliates were permitted. In short, the court made a factual finding – that Mr. Allen "fraudulently" caused the Fund to invest in NYPPEX Holdings – that was completely contrary to the evidence and testimony. And the court was able to do so only by omitting any reference to that evidence and testimony, as acknowledgement of that evidence and testimony would have contradicted the court's findings.

Mr. Allen has no explanation for why NYAG filed a complaint which included allegations that were easily disproved by reference to the PPM and LPA, or why the court adopted those allegations without any scrutiny or legal analysis whatsoever. But as the foregoing recitation demonstrates, the court's orders reflect a one-sided narrative which conveniently omits any of the substantial mitigating evidence and testimony that contradicted that narrative.

[44] R-947.

***H. Appeal.***

Mr. Allen appealed the Decision After Trial to the Appellate Division. The appeals court denied Mr. Allen's appeal, holding in cursory fashion that the trial court's "finding of fraud was not against the weight of the evidence."[45] But that was not at all surprising, as the appellate standard in New York favors sustaining judgments and holds generally that "the decision of the fact-finding court should not be disturbed on appeal." *See e.g.*, *Security Pac. Natl. Bank v. Evans*, 175 AD3d 410, 411 (1st Dept 2019) ("the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses"); *Richstone v Q-Med, Inc.*, 186 AD2d 354 (1st Dept 1992) ("[u]pon review of a bench trial, the findings of fact should be viewed *in a light most favorable to sustain the judgment*") (emphasis added).

Notably, although the appellate court held that the trial court's "finding of fraud was not against the weight of the evidence," it did not discuss the evidence, acknowledge any mitigating evidence or engage in any critical analysis. Its discussion regarding the weight of the evidence consisted of one brief paragraph, and the decision was otherwise addressed to legal arguments.

Mr. Allen then sought a discretionary appeal to the New York Court of Appeals, that state's highest court. The Court of Appeals dismissed Mr. Allen's appeal, not on the merits, but on jurisdictional grounds, holding that "no substantial constitutional question is directly involved."[46]

[45] *People v. Allen*, 198 AD3d 531, 533 (1st Dept 2021).
[46] *People v. Allen*, 39 N.Y.3d 928 (Oct. 20, 2022).

Notwithstanding that the New York Action was premised on Mr. Allen's purported violations of the LPA, not a single New York court ever acknowledged, addressed or discussed any provision of that contract.[47]

**4. <u>The Trial Court's Additional Findings.</u>**

Before moving on, we must make brief mention of the trial court's separate finding that Mr. Allen "fraudulently took carried interest to which [he was] not entitled, pursuant to amendments to the limited partnership agreement that were procured by means of material misrepresentations."[48] While a full explanation is not possible in this brief due to the word count limitation, the "carried interest" allegation was, like the "affiliate investment" allegation, a narrative concocted by NYAG which had no basis in fact, which the court accepted without meaningful scrutiny, and about which the court omitted material evidence from its orders. If the Commission reverses FINRA's decision, Mr. Allen stands ready to present additional information to FINRA regarding the court's omissions regarding the carried interest allegation.

Briefly, the theory behind this allegation was that Mr. Allen himself "misappropriated" $3.4 million in carried interest distributions from the Limited Partners by misrepresenting the terms of the LPA to the Limited Partners in proposed amendments to that contract. But although the court made a finding that Mr. Allen received $3.4 million in carried interest distributions, that was in fact the total amount of carried interest paid to the General Partner team (of which Mr. Allen was but one member) and the court omitted evidence and testimony that Mr. Allen himself

[47] Mr. Allen is in the process of petitioning the U.S. Supreme Court for certiorari on the grounds that federal law preempts New York's Martin Act with regard to private investments: "The underlying action construes and applies the Martin Act in a way that usurps and displaces federal securities laws and regulations" and "[t]he application of the Martin Act in this case imposes requirements regarding disclosures of securities offerings that conflict with federal law, in violation of the Supremacy Clause of the United States Constitution." Mr. Allen filed an Application for Extension of Time to File a Petition for Writ of Certiorari with the Supreme Court on January 17, 2023.
[48] R-950.



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received less than $1 million in carried interest distributions.[49] Further, the court omitted reference to evidence and testimony that the amendments to the LPA were reviewed and approved by legal counsel and by the LPAC before being submitted to the Limited Partners for a vote. The court also omitted that the purported "misrepresentation" was contained not within the substantive language of the proposed amendments but rather in a hypothetical illustration demonstrating how a partial distribution of carried interest would work. The court also omitted that carried interest is always accrued for the benefit of the General Partner and is not otherwise payable to the Limited Partners. And the court omitted the fact that although the amendments were passed in 2013, 2015 and 2017, no Limited Partner ever alleged that he or she was misled until NYAG created its fraud narrative in 2019. In short, as with the "affiliate investment" finding, the court omitted from its orders substantial mitigating evidence which would have otherwise contradicted its findings.

**5. <u>The Membership Application Proceeding.</u>**

In February 2020, NYPPEX filed a membership continuance application with FINRA via Form MC-400.[50] NYPPEX's application requested permission for Allen to continue to associate with the Firm despite a statutory disqualification stemming from the preliminary injunction in New York. For more than two years, FINRA's membership supervision department expressly permitted Mr. Allen to remain associated with NYPPEX pending review of the MC-400 application, notwithstanding the court's holdings in the New York Action (of which FINRA was aware).

In his application, Mr. Allen informed FINRA of his disagreements with the New York Action:

> We believe the NYAG as well as this state court lacked an understanding of the contractual terms of ACP X, LP, and in general, how a private equity

[49] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=44wRjI2TE2YJ9fVJ6oSB5A== , p. 629; https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=pU5evr9Jtn/egiuit4c2FQ== ($994,527.51 distributed to Mr. Allen, through LGA Consultants, between 2013 and 2017).
[50] R-956, et seq.; as amended at R-2186, et seq.

> partnership operates. ***The general partner's actions were expressly authorized by (a) the limited partnership agreement of ACP X, LP as between the limited partners and the general partner as well (b) advice and legal opinions from various outside legal counsel over the years.*** Further, Defendant's expert witnesses testified at trial that such actions were authorized. (Emphasis added.)[51]

In April 2022, FINRA's National Adjudicatory Council conducted a hearing on the membership continuance application. Mr. Allen appeared through counsel and provided testimony and argument. Mr. Allen presented as evidence, among other things, an amicus brief filed by the LPAC in a related proceeding before the Commission, as well as sworn affidavits submitted in the New York Action by numerous Limited Partners.[52] FINRA developed a record consisting of more than 2,200 pages in connection with Mr. Allen's application.

On September 23, 2022, FINRA issued a decision in which it denied the membership continuance application.[53] The decision relied heavily on the Decision After Trial in the New York Action. FINRA "conclude[d] that Allen's recent and securities-related disqualifying event involved serious and extensive misconduct, including misappropriation of investor funds and fraud, and weighs heavily against" NYPPEX's application, noting that "the New York court had found that Allen engaged in an extensive scheme involving fraud, misappropriation [and] self-dealing[.]"[54] As a second basis for its denial, the NAC found that NYPPEX had "not demonstrated that it can stringently supervise Allen."[55]

FINRA briefly acknowledged Mr. Allen's arguments concerning the New York Action but rejected them out of hand: "Allen testified that the NYAG and the New York courts did not understand the facts and contractual obligations surrounding the Limited Partnership … Allen and

[51] R-2195.
[52] R-1870; R-1842-1869.
[53] R-2162.
[54] R-2163; 2177.
[55] R-2176.



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the Firm's arguments are without merit [because] [i]t is well established that a disqualified individual may not collaterally attack the event giving rise to the statutory disqualification."[56] However, FINRA mischaracterized Mr. Allen's arguments, stating that he claimed "that the events underlying the disqualifying injunctions were merely a contractual dispute with a disgruntled limited partner."[57] That, of course, is not correct. Although Mr. Allen made brief reference to a dispute with a disgruntled Limited Partner as the possible *genesis* of the NYAG action, his contract argument concerns not a dispute with a Limited Partner but rather the court's failure to address the Fund's operative contracts in any of its orders.

Mr. Allen appeals from the denial of his membership continuation application.

## ARGUMENT

### 1. Standard of Review.

Section 19(f) of the Exchange Act governs the Commission's review of FINRA's denial of a membership continuance application. 15 U.S.C. § 78s(f); *Commonwealth Cap. Sec. Corp.*, Exchange Act Release No. 89260, at *12 (July 8, 2020). The Commission will dismiss an appeal if (1) the specific grounds on which FINRA based its denial exist in fact; (2) the denial was in accordance with FINRA's rules; and (3) FINRA's rules "are, and were applied in a manner, consistent with" the Exchange Act's purposes. *Commonwealth Cap. Sec. Corp.*, *supra* at *5.

For the denial of a membership continuance application to be consistent with the Exchange Act, FINRA must "independently evaluate the application based upon the totality of the circumstances and explain the bases for its conclusion." *Id.* at *8, *citing Leslie A. Arouh*, Exchange Act Release No. 62898, at *20 (Sept. 13, 2010). FINRA may grant a firm's membership continuance application if it determines that the continued association of the disqualified person

[56] R-2166.
[57] R-2177.

would be "consistent with the public interest and the protection of investors." *Commonwealth Cap. Sec. Corp.*, supra at *12. "[T]he burden rests on the applicant to show that, despite the disqualification, it is in the public interest to permit the requested employment." *Id.* The Commissions "affords FINRA discretion in determining whether persons subject to statutory disqualification should be permitted to associate with a member firm." *Id.*

Mr. Allen submits that FINRA's denial of his application was not consistent with the Exchange Act because FINRA did not "independently evaluate" his application "based on the totality of the circumstances." Further, Mr. Allen adequately demonstrated that his continued association is consistent with the public interest and the protection of investors.

**2. FINRA Did Not "Independently Evaluate" The Application Based on the "Totality of the Circumstances."**

We begin by noting that there does not appear to be any clearly articulated guidance on what constitutes an "independent evaluation" of the "totality of the circumstances." The denial of a continuing membership application is exceedingly rare – Mr. Allen's was the first such instance in more than three years, and his was the first *appeal* of a denial in more than four years.[58] In the ten years preceding the denial of Mr. Allen's application, FINRA had issued only fourteen (14) denials; only six of those were appealed, and only three resulted in opinions of the Commission.[59] And, in none of those few instances did the Commission elaborate on what it means to "independently evaluate" the application based on the "totality of the circumstances."

What seems to happen in each case is that FINRA "weigh[s] the facts and circumstances developed at the hearing" and "cogently explain[s] the basis for its decision that [an individual's] continued association … is not in the public interest and would present an unreasonable risk of

[58] https://www.finra.org/rules-guidance/adjudication-decisions/national-adjudicatory-council-nac. One denial of a membership continuance application subsequent to Mr. Allen's has also been appealed and remains pending.
[59] *Id.* During the same ten-year period, FINRA approved forty-three (43) membership continuation applications.

harm to the market or investors." *Meyers Associates, L.P.*, Exchange Act Rel. No. 81778, at *12 (Sept. 29, 2017). In reality, FINRA (through the NAC) merely adopts the findings in an underlying court order (as presented by a FINRA attorney) and bases its denial on those findings, without question. Respectfully, that is not an "independent" evaluation, nor an evaluation that considers the "totality of the circumstances."

In this case, FINRA did not independently evaluate Mr. Allen's application based on the totality of the circumstances, as it is required to do in order to be consistent with the Exchange Act's purposes, nor would it entertain such a discussion. Rather, FINRA dismissed Mr. Allen's arguments out of hand, holding that his "arguments are without merit" because he may not "collaterally attack the event giving rise to a statutory disqualification" and thereby refusing to consider any argument (including, as FINRA noted, his assertion that "the NYAG and the New York courts did not understand the facts and contractual obligations surrounding the Limited Partnership and misapplied the law to find that Allen … engaged in misconduct").[60]

The authority which holds that an individual may not "collaterally attack" the event giving rise to a disqualification is in direct conflict with the legal standard for review of a membership continuance application, as FINRA cannot "independently evaluate" the "totality of the circumstances" if every underlying court order is considered unassailable. If FINRA accepts every court order at face value, without question, then by definition it is not "independently" evaluating the circumstances giving rise to those orders, nor is it considering the "totality of the circumstances." Rather, it is serving merely as a rubber stamp for the underlying court.

Mr. Allen recognizes than in 99% of cases there is likely no question or concern regarding the event which gives rise to disqualification (which is typically a court order finding a violation

[60] R-2166.

of the federal securities laws, imposing an injunction, or both). But 99% is not 100%, and there certainly may be instances (as here) in which a true "independent" evaluation is not only advisable but necessary. As Mr. Allen has argued previously, prosecutors and judges and juries are not infallible; they make mistakes from time to time.[61] Likewise, the process is not always fair or equitable, such as when the event giving rise to a disqualification occurs in secret, without any opportunity for the adversely affected party to object or defend. FINRA does a disservice to its members and associated persons if it refuses to acknowledge that, at least occasionally, the events giving rise to a disqualification may not be unimpeachable, or at least subject to meaningful and "independent" review. Mr. Allen is not suggesting that FINRA can overturn or "undo" a court order, or that it should conduct a *de novo* review and ignore what happened below altogether. Rather, all that he asks is that FINRA, as a self-regulatory organization, exercise true independence and not blindly accept the findings and conclusions in a court order as the unassailable truth when presented with compelling evidence to the contrary, or when the basis for a disqualifying event raises basic questions about fundamental fairness and due process. Both concerns persist here.

Taking the latter first, FINRA determined that Mr. Allen was disqualified in December 2018 as a result of the Ex Parte Order.[62] And since a disqualification is a disqualification (*i.e.*, an individual cannot be "re-disqualified" or disqualified successively if he is *already* disqualified), that order forms the jurisdictional basis for Mr. Allen's disqualification, notwithstanding that other,

[61] By way of example, there is ample evidence and analysis of wrongful convictions in criminal cases. *See e.g.* https://www.washingtonpost.com/crime-law/2020/09/16/more-than-half-all-wrongful-criminal-convictions-caused-by-government-misconduct-study-finds/ (study finding 2,400 exonerations between 1989 and 2019, with more than half the result of government misconduct); https://www.georgiainnocenceproject.org/2022/02/01/beneath-the-statistics-the-structural-and-systemic-causes-of-our-wrongful-conviction-problem/ (studies estimate that between 4-6% of people incarcerated in U.S. prisons are actually innocent). While Mr. Allen's case was civil and not criminal, the same principal applies: a judgment at trial is not always correct and does not always reflect the truth.

[62] R-2163 ("Mr. Allen first became statutorily disqualified pursuant to a December 28, 2018 Ex Parte Order issued by a New York state court… at the request of the Office of the New York Attorney General").

similar orders, later followed.[63] But the problem is that the Ex Parte Order resulted from an *ex parte* (*i.e.*, secret) proceeding in which Mr. Allen had no rights: he was excluded from the hearing and thus unable to object or defend himself. This puts him in a no-win situation: subject to disqualification (per FINRA), but unable (also per FINRA) to question or "collaterally attack" a proceeding in which he was *intentionally excluded* from presenting evidence in his defense. It is unjust and fundamentally unfair for FINRA to deny Mr. Allen's continued membership based on a finding of fraud (or at least the likelihood of fraud) in a secret proceeding, then claim that Mr. Allen cannot question or "collaterally attack" that proceeding and all that came after it.[64] But that is just what FINRA has done.[65]

As to the former concern, Mr. Allen was accused of violating the LPA to such an extent that his actions constituted a "shocking level of self-dealing" and "outright fraud," yet the court omitted reference to the LPA in its orders finding "fraud," even though Mr. Allen and his counsel repeatedly asked the court to "study the contracts" and conduct a "full contractual analysis." The LPA was introduced at trial and constitutes mitigating evidence, yet the court refused to acknowledge that mitigating evidence in its orders. As a result, Mr. Allen has been found liable for fraud – in orders upon which FINRA relied in denying his continued membership –

[63] Mr. Allen has always taken the position that the Ex Parte Order was not a disqualifying event (as it was rendered in secret and had the effect of a temporary restraining order). But FINRA has taken a contrary position and argued that Mr. Allen was disqualified as a result of the Ex Parte Order. If that is true (and that determination remains subject to an ongoing appeal), then that order takes on greater significance as the threshold disqualifying event.

[64] Mr. Allen has asserted that the Ex Parte Order tainted everything that came after it, and thus led to additional injunctions which he also cannot question or attack. Put simply, everything that followed might have turned out differently had Mr. Allen had the opportunity in December 2018 to demonstrate to the initial judge (a different judge than the one who was assigned following NYAG's complaint) that the LPA expressly authorized the actions which NYAG alleged were fraudulent. But he never had that opportunity.

[65] The basis for statutory disqualification is set forth in Section 15A(g)(2) of the Securities Exchange Act of 1934. Mr. Allen is not aware of a single instance in the nearly 100-year history of that statute in which FINRA has based statutory disqualification on an *ex parte* proceeding, until now.

notwithstanding that there are written contracts which expressly authorize the actions that the court found "fraudulent."

Indeed, it is impossible to reconcile the following two sentences – the first from Section 2.09 of the LPA, the second from the trial court's order:

- "[T]he General Partner … is hereby authorized … ***to purchase property in*** … any Affiliate of the General Partner" (emphasis added.)[66]

- "Allen [the General Partner] fraudulently caused ACPX ***to purchase equity in*** NYPPEX [an Affiliate of the General Partner] in each of 2014, 2015, 2016, and 2017-18" (emphasis added.)[67]

One cannot "fraudulently" purchase equity in an affiliate when a written contract states that he is authorized to do just that. Thus, the only manner in which the court could reach this conclusion was to omit reference to the LPA in its orders, as citation to the language in the LPA would render the court's finding indefensible, since the finding is directly contradicted by the contract language. Any "independent" evaluation of the "totality of the circumstances" giving rise to Mr. Allen's disqualification must acknowledge that, as a material omission is certainly part of the "totality of the circumstances" giving rise to the disqualifying event, and the omitted evidence exists separate and apart from the court proceeding. FINRA failed to consider the trial court's omissions, and its failure was inconsistent with the Exchange Act's purposes.

Likewise, Mr. Allen presented to FINRA an amicus brief from the LPAC, in which the LPAC – which represents the interests of the Limited Partners and averred its belief that it represents the view of a majority of investors – stated in no uncertain terms that it disagreed with the court's orders for a number of reasons, including that Mr. Allen did not exceed his contractual

[66] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=79bV2JPgr8LSmlrZkjdq2w== , § 2.09
[67] R-950.

authority.[68] Mr. Allen also presented to FINRA the sworn affidavits in the New York Action submitted by other Limited Partners, which said basically the same thing.[69] But FINRA failed to even acknowledge the views of the investors whom it is purportedly attempting to protect, and it failed to consider the omission of the Limited Partner perspective by the trial court. Again, this constitutes part of the "totality of the circumstances" giving rise to the disqualifying event, and an "independent" evaluation of those circumstances must necessarily consider this evidence (particularly since it comes from the investors purportedly affected by Mr. Allen's actions).

In practice, it would not be difficult for FINRA to evaluate the court's orders *and* Mr. Allen's arguments (and any mitigating evidence) and determine, based upon an independent review of the totality of the circumstances, that sufficient questions exist which preclude denial of the membership continuance application. But FINRA did not do that. It looked only to the court's orders and disregarded any argument by Mr. Allen about those orders as a "collateral attack."

This is not a collateral attack. If the court had considered all of the evidence and subjected it to analysis and scrutiny, Mr. Allen's complaints might rightly be regarded as an attack. But that is not what happened. The fundamental problem here is not what the court did do; it is what the court failed to do. The court omitted significant mitigating evidence – evidence which might have altered the outcome had the court acknowledged it.[70] Pointing that out is an assertion of fact, based on evidence in the trial record which appears nowhere in any of the court's orders. And, even if this does constitute an "attack," it should not matter. The omitted evidence exists, and it harms no one for Mr. Allen to point that out and to ask FINRA to consider it. To the extent that precedent holds that an individual may not attack the event giving rise to disqualification, Mr. Allen asks the

[68] R-1870.
[69] R-1842-1869.
[70] It stands to reason that the court omitted reference to the LPA because citation to the relevant provisions of the LPA would be fundamentally incompatible with the finding of fraud that the court clearly wanted to make.

Commission to reconsider such precedent in the limited circumstances presented here, where an individual can demonstrate that the event giving rise to disqualification omits mitigating evidence that (i) might have altered the outcome had it not been omitted, and (ii) exists as a matter of fact and remains material to FINRA's review of a membership continuance application. Put simply, FINRA does not have to rely solely on a court order in making a determination on a membership application; it can and should consider additional evidence if the evidence is material. But it did not do so in this case.

In summary, Mr. Allen has always maintained that the trial court's orders do not reflect the truth or the full story regarding his actions because those orders omit any reference to the LPA or to the testimony of the Limited Partners regarding the propriety of his actions (as well as other mitigating evidence, such as the correct amount of his salary and carried interest distributions, etc.). Mr. Allen's story is much more plausible in context than the court's orders, given (i) Mr. Allen's lack of disciplinary history over the course of more than three decades, (ii) the absence of public complaint or litigation by any Limited Partners concerning a fund that has been in existence since 2004, (iii) the lack of any action by the SEC or FINRA, notwithstanding that a purported whistleblower brought to them the same complaints that he later shopped to NYAG, (iv) the clear language of the PPM and LPA, which directly contradicts NYAG's allegations and the court's findings, and (v) the significant testimony from numerous Limited Partners that Mr. Allen acted in accordance with his contractual authority and did not engage in any wrongdoing. If it had conducted an independent evaluation of the totality of the circumstances regarding the events giving rise to Mr. Allen's statutory disqualification, FINRA could have considered all of this and allowed his membership continuance application. But it did not, and in so doing it failed to apply its rules in a manner consistent with the Exchange Act's purposes.



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Mr. Allen is not asking the Commission to do anything extraordinary. All he asks is that the Commission require FINRA to consider all of the facts and circumstances giving rise to a disqualifying event, including evidence of a material omission (or omissions) in connection with the disqualifying event. This is not outcome-determinative: Mr. Allen is not suggesting that FINRA must necessarily approve his application. Rather, he is merely requesting that he receive a fair shot; that FINRA be required to listen to him and consider his arguments and evidence rather than dismissing him out of hand merely because he is subject to a court order. FINRA did not do so in this case, and its decision should be reversed.

### 3. Mr. Allen Demonstrated That His Continued Association is Consistent With the Public Interest and the Protection of Investors.

For largely the same reasons as discussed above, Mr. Allen adequately demonstrated that his continued association is consistent with the public interest and the protection of investors. Although the New York court orders exist as a matter of fact, the Commission should consider the alternative scenario – that the New York Action was an anomaly, an unnecessary governmental intrusion into the private contractual affairs of a limited partnership in which NYAG and the court chose to impose their own subjective judgments (based on hindsight, and with no personal knowledge whatsoever) and effectively rewrite the contractual agreement between the partners in ACP X based on a fundamental misunderstanding of how some private equity firms operate. Since at least 2003, numerous sponsors of private equity funds have followed SEC federal regulations which authorize investments in affiliates, including Goldman Sachs, Credit Suisse and Fortress Group – funds on which ACP X was modeled. The absurdity of NYAG's allegation that Mr. Allen committed "securities fraud" and "self-dealing" by causing the Fund to make investments in an affiliate would be analogous to accusing Warren Buffett of "self-dealing" if Berkshire Hathaway made follow-on investments in any of its numerous affiliates. Put simply, the orders which form



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the basis for Mr. Allen's statutory disqualification do not reflect the truth, or the reality of private equity fund operations and practices under existing law.[71] And, to make matters worse, the court omitted significant mitigating evidence which might have compelled a different outcome had it been acknowledged.

Mr. Allen poses no threat to the public or investors, and his continued membership is consistent with the public interest. He has no customer complaints. He has never been sued by a customer or investor. Numerous Limited Partners submitted sworn statements and/or filed briefs stating that Mr. Allen did nothing wrong, and that the true harm to their Fund has been caused by NYAG and the court.[72] And, notwithstanding the court's findings, the unrebutted evidenced adduced at trial showed that all of the Limited Partners stood to be redeemed in full, with gains, upon liquidation of the Fund.[73] There is simply no evidence that Mr. Allen has ever caused harm to any investor.

Likewise, NYPPEX does not conduct any retail securities business or interact with public customers. In fact, it does not conduct any business at all at present due to FINRA's decision and the Commission's denial of Mr. Allen's request for a stay pending review.[74] Even when it did conduct business, however, NYPPEX did not operate as a traditional broker dealer. It does not recommend or execute the purchase or sale or stocks, bonds, mutual funds, ETFs, etc., and it does

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[71] As noted, Mr. Allen seeks review by the U.S. Supreme Court on the grounds that federal law preempts the Martin Act. Unless the Supreme Court and/or the Commission take steps to clarify this area, decisions such as the ones issued by the New York trial court will continue to create a confused regulatory and operating environment for investment advisors and law firms, particularly in New York. The SEC must send a public message by confirming that federal securities regulations on private exempt securities ***preempt*** state securities regulations.

[72] R-1886, et seq. ("The outside interference by the NYAG, the Court and now the Commission is negatively impacting the value of our investment in the Fund and is damaging us as investors").

[73] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=bMNb/wCZhuC5DVe8_PLUS_K_PLUS_vgQ== , p. 650.

[74] FINRA's denial of Mr. Allen's membership continuance application became effective when the Commission denied his request for a stay in September 2022. NYPPEX immediately terminated Mr. Allen's association.

not maintain customer accounts or provide investment advice to retail investors. Rather, NYPPEX's sole function is to assist private parties in finding secondary market liquidity. NYPPEX has long provided outsourced services for large financial institutions such as Merrill Lynch, UBS, etc., and those firms rely on NYPPEX to assist clients seeking liquidity.[75] In a burgeoning $13 trillion market, it is in the public interest to have more entities providing secondary liquidity services, particularly with Mr. Allen's experience and expertise.

In summary, Mr. Allen adequately demonstrated that it is in the public interest to permit his continued membership.

**4. <u>The Heightened Supervision Plan Was Not Inadequate.</u>**

As a separate and independent basis for denying Mr. Allen's membership continuance application, FINRA held that NYPPEX failed to demonstrate that it could stringently supervise Mr. Allen, for several reasons, including (i) that Mr. Allen was the owner of the firm and its largest producer and "would continue to play a large managerial role at the firm;" (ii) that the firm had not demonstrated that Michael Schunk, its chief compliance officer, could adequately supervise Mr. Allen; and (iii) that the firm had proposed an inadequate heightened supervision plan for Mr. Allen.

As an initial matter, FINRA's holding presents a Catch-22: at the time of the FINRA hearing in April 2022, NYPPEX had only two registered persons – Mr. Allen and his proposed supervisor, Mr. Schunk. (As noted above, NYPPEX is not currently conducting broker dealer business and Mr. Allen is no longer registered with the firm.) Thus, if Mr. Allen was incapable of

[75] In fact, Mr. Allen recently received a request from a Senior Private Wealth Relationship Manager in the Merrill Lynch Private Banking and Investment Group, seeking assistance with finding a secondary market purchaser for two private investment holdings owned by a Merrill Lynch client, valued at approximately $1 million. Due to the uncertainty regarding his registration status, Mr. Allen and NYPPEX have been unable to assist, which is detrimental to both the Merrill Lynch client and NYPPEX's relationship with Merrill Lynch.



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being supervised, and Mr. Schunk was incapable of supervising him, then no supervisory plan would be sufficient, and "supervision" – and the firm's business, more generally – would be impossible. Put another way, FINRA effectively precluded NYPPEX from operating by denying its only two registered persons the ability to operate it. To the extent that FINRA's denial of the membership continuance application is based on a finding that NYPPEX "has not demonstrated that it can stringently supervise Mr. Allen," the effect of such denial "imposes [a] burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act, and is "excessive or oppressive," both in contravention of the Exchange Act. 15 U.S. Code § 78s(e)(2). Mr. Allen relies on this argument as an alternative basis for reversal of FINRA's decision.

Moreover, FINRA ignored the circumstances and treated the proposed supervision plan as typical or run-of-the-mill. But NYPPEX is not Merrill Lynch, or UBS, or Morgan Stanley, or Wells Fargo, or any other retail broker dealer. It does not (or at least did not) purchase or sell securities for customers; it does not have the type of trade blotters or commission runs or daily activity reports which form the basis for much of the supervision in the securities industry. It does not make investment recommendations or provide investment advice. It does not interact with the investing public. NYPPEX's only business is to provide secondary market liquidity services to private clients, often at the behest of other financial institutions, such as Merrill Lynch, which have outsourced their business to NYPPEX.

FINRA made no effort to understand what NYPPEX actually does (or what Mr. Allen does) so that it could determine what appropriate supervision would look like. Nowhere in its decision denying the membership continuation application did FINRA ever discuss the unique nature of NYPPEX's business, or Mr. Allen's role and responsibilities at NYPPEX, such that its discussion of supervision reflected the proper context. Mr. Allen's job is to find secondary market



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purchasers for otherwise illiquid private investments. He was a pioneer in creating this market and is one of the few individuals who understand it and have the ability to find secondary market liquidity for private clients. Yet in denying his application, FINRA held that "the inconvenience to Allen's existing customers … of finding another broker to assist them … simply do not outweigh the unreasonable risk of harm to the markets presented by Allen's continue association with the Firm."[76] This indicates that FINRA does not understand – or did not care to understand – what Mr. Allen does and how few options there are for private investors seeking secondary market liquidity. This is not as simple as a Merrill Lynch client simply turning instead to a Morgan Stanley broker for similar services; NYPPEX provides a unique and highly specialized service and those it assists cannot easily "find[] another broker to assist them," as FINRA suggests.

Further, FINRA noted that "a heightened supervision plan for a disqualified individual should, at a minimum, contain provisions tailored to prevent the misconduct underlying the disqualification from happening again."[77] But this ignores that the purported misconduct did not occur at NYPPEX (or any broker dealer) and existed in an entirely different context – that of a general partner in a private equity limited partnership, making investment and other decisions based on authority conferred by extensive contracts prepared by legal counsel. Indeed, there is no "supervision" even possible in the context of the Fund, since operation of the Fund has been enjoined since December 2018 as a result of the court's orders. How would FINRA expect Mr. Allen to be supervised with respect to the Fund when he is under court order to refrain from doing anything in connection with the Fund (which, at this point, is subject to a receivership in any

[76] R-2178.
[77] R-2182, fn. 23.

event)? FINRA appears to be imposing conditions that are not realistic and do not take into account the actual facts and circumstances as they exist today.[78]

Further, FINRA contends that Mr. Schunk cannot adequately supervise Mr. Allen because he was also Mr. Allen's supervisor at the time the alleged wrongdoing occurred. But, as noted throughout this brief, Mr. Allen acted in a manner consistent with the Fund's governing contracts (the LPA and PPM), and his actions were non-controversial at the time (*i.e.*, no Limited Partner ever complained about investments in affiliate entities, amendments to the LPA, etc.). It was only years later, when NYAG intervened with a narrative of "fraud" and "self-dealing," that Mr. Allen's past actions came under scrutiny. How could Mr. Schunk have supervised Mr. Allen differently between 2008 and 2018 if there was no indication during that time that he had done anything out of the ordinary? In reality, Mr. Allen did nothing that he was not authorized to do by the PPM, LPA and majority votes of the Limited Partners, and most everything he did was with the advice of counsel and the knowledge of the LPAC. Mr. Schunk's supervision of him during that time was entirely adequate and proper, as there was never any suggestion – until NYAG intervened – that Mr. Allen had ever engaged in any wrongdoing.[79]

FINRA's decision does not reflect the practical reality that in 2022 NYPPEX consisted of two registered persons (Mr. Allen and his proposed supervisor, Mr. Schunk), that it conducted no retail securities business and that its business was limited to providing secondary market liquidity

[78] Moreover, FINRA's suggestion that Mr. Allen's supervision plan should be "tailored to present the misconduct underlying the disqualification from happening again" ignores the multiple layers of compliance and supervision that attended the purported "misconduct." As noted throughout this brief, Mr. Allen took certain actions on behalf of the General Partner that were authorized by the LPA, reviewed and approved by legal counsel and by the LPAC, and/or were approved by majority votes of the Limited Partners. That a trial court somehow found those actions to be "fraud" does not change the fact that there were multiple levels of notice, sign-off, approval and/or supervision for each of those actions.

[79] FINRA also contends that Mr. Schunk cannot supervise Mr. Allen because he "has a regulatory and disciplinary history that casts doubt on his ability to stringently supervise Allen." R-2180. This is highly misleading. Outside of one recent matter which remains on appeal (and which relates to the New York Action), Mr. Schunk has only one formal disciplinary action on his record – an AWC that was entered in February 2012, more than ten years ago.

services exclusively to private clients.[80] Moreover, although FINRA acknowledged that Mr. Schunk and Mr. Allen meet "daily" for compliance and other meetings (and often multiple times per day), it somehow found the proposed plan inadequate because it "does not contain any specific provisions for meetings between Allen and his supervisors to discuss compliance with the plan" – even though the fact that those meetings occur is undisputed.[81] Respectfully, that is a particularly poor reason for finding a supervision plan inadequate, and if FINRA wanted NYPPEX to include such "specific provisions" proving for something which already occurs, NYPPEX would be happy to do so.

Relatedly, merely because FINRA deemed the supervision plan "inadequate" is not a reason to deny Mr. Allen's membership continuance application. The proposed supervision plan was submitted to FINRA in February 2020 and was revised in March 2021.[82] FINRA provided no comment about the plan until it deemed the plan "inadequate" in September 2022, more than two and a half years after the plan was proposed. Regulation is a two-way street, and if FINRA believed the plan was inadequate, it could have worked with NYPPEX to improve it.[83] NYPPEX has never refused to work with FINRA or to listen to substantive concerns, and it is always open to a constructive dialogue. In fact, one of NYPPEX's regulatory advisors is a former member of FINRA's Board of Governors, and the goal of the firm at all times is to ensure regulatory compliance (which is reflected in the fact that, prior to the New York Action, the firm had only one disciplinary action on its record, a 2013 AWC which resulted in a censure and small fine). For FINRA to ignore the supervision plan for more than two and a half years and then deem it

[80] R-1452 (describing Mr. Allen's daily activities).
[81] R-2187, fn. 22; *see also* R-1990, 2041 and 2180 re: daily meetings.
[82] R-2174.
[83] By way of example, FINRA also complains at Footnote 22 that, among other things, the plan does not "provide for documentation of the Firm's compliance with the plan." R-2182, fn. 22. That concern – and the others expressed in the same footnote – could have been resolved quite easily with a simple phone call between FINRA and NYPPEX. But FINRA never expressed those concerns until they were articulated in an order denying Mr. Allen's application.

"inadequate" without any communication or dialogue, and to use that purported inadequacy as a basis for denying Mr. Allen's application, is punitive and unjustified.

## CONCLUSION

FINRA has every right to determine whether it is in the public interest to permit the continued membership of an associated person. But it is required to make such determinations independently and based on the "totality of the circumstances" presented to it. In dismissing Mr. Allen's arguments merely as collateral attacks, rather than as a good faith effort to demonstrate a material omission, FINRA failed to adhere to this standard. The Commission should reverse FINRA's decision and order it to conduct an independent review which considers Mr. Allen's arguments on the merits.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Commission Rule of Practice 450(d) (17 C.F.R. §201.450(d)), I hereby certify that the foregoing brief does not exceed the word count limit set forth in Rule 450(c). The foregoing brief contains 13,932 words, exclusive of the case caption and table of contents.

/s/*John K. Wells*
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## CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2023, I caused a copy of the foregoing document to be served on counsel of record by electronic mail to Andrew J. Love andrew.love@finra.org and nac.casefilings@finra.org.

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