BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

The Continued Association of Laurence Allen
With NYPPEX, LLC

For Review of Denial of Registration by

FINRA

File No. 3-21222

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

Alan Lawhead
Vice President and
Director – Appellate Group

Andrew J. Love
Associate General Counsel

FINRA
Office of General Counsel
1735 K Street, NW
Washington, DC 20006
202-728-8281 – Telephone
202-728-8264 – Facsimile
andrew.love@finra.org
nac.casefilings@finra.org

February 23, 2023

OS Received 02/23/2023

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATE DECISIONS

SEC DECISIONS AND RELEASES

OS Received 02/23/2023

FEDERAL STATUTES AND CODES

FINRA RULES

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

The Continued Association of Laurence Allen
With NYPPEX, LLC

For Review of Denial of Registration by

FINRA

File No. 3-21222

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

I. INTRODUCTION

This matter involves FINRA's denial of a statutory disqualification application filed by NYPPEX, LLC (the "Firm") to continue to employ its majority owner, Laurence Allen. Allen is statutorily disqualified under the Securities Exchange Act of 1934 ("Exchange Act") and FINRA's By-Laws because a New York State court recently entered a series of injunctions against him. The court enjoined Allen from violating state securities laws and selling certain securities and found that he engaged in widespread, highly serious, securities-related misconduct (which included misappropriating millions of dollars of investors' funds through investments in the Firm's parent at "wildly inflated" prices).

FINRA's National Adjudicatory Council ("NAC") denied the Firm's application for two reasons. First, the NAC found that Allen's disqualifying injunctions, entered by the court as a necessary measure to stop Allen's lengthy and extensive scheme involving "a shocking level of

OS Received 02/23/2023

self-dealing, breaches of fiduciary duty, misappropriation of enormous sums of [investors'] capital, and outright fraud," weighed heavily against the Firm's application. The NAC further held that insufficient time had passed since the New York court entered the injunctions against Allen for him to demonstrate that he is currently able to comply with securities rules and regulations and refrain from engaging in misconduct.

Second, as an independent basis to deny the Firm's application, the NAC found that the Firm failed to show that it could stringently supervise Allen. The NAC concluded that Allen's role as the Firm's majority owner, largest producer, and lender of large sums to the Firm's parent undermined the Firm's ability to stringently supervise him. The NAC also concluded that Allen's proposed supervisor, Michael Schunk ("Schunk"), was simply not up to the task. The NAC pointed to Schunk's disciplinary history, which includes supervisory failures that occurred at the Firm under Schunk's watch as its Chief Compliance Officer and Allen's supervisor (including the extensive misconduct underlying Allen's disqualifying injunctions). Finally, the NAC determined that the proposed heightened supervisory plan for Allen was deficient in myriad ways, including that it completely failed to address the inherent tensions involved with supervising Allen as the owner of the Firm and Schunk's boss.

The NAC followed Commission precedent for each factor it used to deny the Firm's application, and the record abundantly supports each basis that the NAC relied upon in determining that Allen's continued association with the Firm presented an unreasonable risk of harm to the markets and investors. On appeal, Allen and the Firm primarily argue that the New York court ignored certain evidence that purportedly showed Allen was permitted to use investor funds to purchase shares in the Firm's parent. They assert that the NAC should have considered this alleged "mitigating" evidence—evidence that applicants admit was fully before the New

OS Received 02/23/2023

York court—when considering the Firm's application to somehow discount the New York court's extensive findings that Allen engaged in serious securities-related misconduct.

The Commission should reject Allen and the Firm's meritless arguments. Notwithstanding applicants' substantial efforts to couch their claim that the New York court erred as somehow unique or not an attempt to relitigate these issues (and setting aside that the New York court found, after nine days of evidentiary hearings, that Allen engaged in misconduct significantly broader than simply using investor funds to invest in the Firm's parent without the authority to do so), substantively applicants are collaterally attacking the court's rulings. The NAC correctly determined that Allen and the Firm could not relitigate the disqualifying injunctions in a FINRA forum. It is well-established that such collateral attacks, whether before FINRA or the Commission, are impermissible. Indeed, Allen and the Firm actively litigated these issues before the New York trial court and unsuccessfully appealed the lower court's rulings to an intermediate appellate court and then to the highest state appellate court. At each turn, they lost, despite making the specific arguments and presenting the evidence they allege the NAC should have considered and credited when it evaluated the Firm's application to continue to employ Allen. FINRA was not required to reconsider these arguments and the evidence in support thereof when it denied the Firm's application.

For all of these reasons, FINRA urges the Commission to dismiss this appeal.

OS Received 02/23/2023

II. FACTUAL BACKGROUND

A. Allen

Allen was registered and associated with the Firm, which he founded, from May 1999 until December 2022.[1] RP 667, 1941. Allen was the Firm's Chief Executive Officer ("CEO") until 2020, and at the time of the hearing on the Firm's application, he served as the managing member of the Firm's Office of the CEO (which consisted of Allen, Schunk, and the Firm's general counsel, Jeremy Kim ("Kim")) and as the Chairperson of the Firm's Executive Committee. RP 673, 1449, 2003, 2006. Allen also served as Schunk's supervisor, approved Schunk's hiring, testified that he would "probably" be involved in any decision to terminate Schunk, and would be involved with setting Schunk's compensation. RP 2025, 2065-66. As of the hearing, Allen worked remotely from his home in Greenwich, Connecticut. RP 2015-16.

B. The Firm

The Firm focuses on providing "secondary private market liquidity to sophisticated investors that seek to buy and sell interests in private equity partnerships." *See* Applicants' Brief in Support of Application for Review ("App. Br."), at 9; RP 1990. The Firm is wholly owned by NYPPEX Holdings, LLC ("Parent"). RP 2004. Allen and his family affiliates own 54% of Parent, and Allen serves as Parent's managing member.[2] RP 2004-05. When he was registered with the Firm, Allen was the Firm's largest producer and as recently as 2020 he generated nearly half of the Firm's revenues. RP 2004-05. Allen has also, through entities that he and his family

---

[1] Allen entered the securities industry in 1982. RP 673. FINRA's Central Registration Depository ("CRD®") shows that the Firm terminated Allen's registrations in December 2022.

[2] Allen also held an ownership interest in and controlled ACP Investment Group, LLC, an investment adviser affiliated with the Firm (the "Investment Adviser"). Allen eventually merged the Investment Adviser into Parent. RP 941.

OS Received 02/23/2023

control, loaned Parent approximately $1.164 million. RP 1570-79, 2004. These loans remain outstanding. RP 2005.

Pertinent to the current appeal, and in addition to several Cautionary Actions issued to the Firm by FINRA in the past few years that included findings of supervisory failures, in March 2013 the Firm consented to findings by FINRA that it failed to establish and maintain a supervisory system and written supervisory procedures ("WSPs") reasonably designed to ensure that it conducted adequate due diligence for private placements and the secondary sale of partnership interests, which is the primary focus of its business. *See* RP 1588-92 (2013 Letter of Acceptance, Waiver and Consent ("AWC")); *see also* 1594-1678 (Cautionary Actions). FINRA censured the Firm, fined it $10,000, and ordered it to review and revise its WSPs.[3] RP 1589-90.

C. Schunk

The Firm proposed that Allen would be supervised by Schunk, who had supervised Allen for years. RP 959, 2036. Schunk joined the Firm in 2004, has served as the Firm's Chief Compliance Officer ("CCO") since 2012, and as its CEO since 2020. RP 710, 2003, 2023-24. He also currently serves in various other roles at Parent and the Investment Adviser. RP 2026, 2062. Schunk works remotely and supervised Allen remotely. RP 2015-16.

[3] As noted in the NAC's decision, the Firm, Allen, and Schunk are the subject of an August 26, 2022 FINRA Hearing Panel decision finding that they engaged in highly serious and varied misconduct mostly unrelated to the misconduct underlying the disqualifying injunction. *See* RP 2168-69; *see also* www.finra.org/sites/default/files/2022-10/OHO_NYPPEX_Appealed_2019064813801.pdf. Based upon these findings, a FINRA Hearing Panel expelled the Firm and barred Allen. The Hearing Panel also barred Schunk in all supervisory and principal capacities, suspended him in all capacities for two years, and fined him $120,000. The Firm, Allen, and Schunk have appealed the Hearing Panel's decision. Because respondents appealed that decision to the NAC and the appeal is pending, the sanctions imposed by the Hearing Panel are not yet in effect. Further, the NAC did not consider this matter when it denied the Firm's application to continue to employ Allen notwithstanding his disqualification. *See* RP 2169 (finding that "ample bases" existed to deny the Firm's application without having to consider the August 2022 decision).

OS Received 02/23/2023

Schunk has relevant disciplinary history unrelated to the August 2022 FINRA Hearing Panel decision that barred him in all supervisory capacities that is currently on appeal to the NAC. In January 2019, Schunk received a Cautionary Action from FINRA for failing to timely update his Uniform Application for Securities Industry Registration and Transfer ("Form U4").[4] RP 1732. Moreover, in 2012 Schunk consented to findings by FINRA that, among other things, he: failed to ensure that his prior employing firm established and maintained a supervisory system and WSPs reasonably designed to comply with securities rules and regulations; failed to draft WSPs that were reasonably designed to achieve compliance with rules relating to the supervision of representatives subject to regulatory orders; and failed to supervise reasonably the activities of two individuals with disciplinary histories. RP 1724-30. FINRA suspended Schunk in all principal capacities for 30 days, fined him $20,000, and ordered that he complete training in connection with this misconduct. RP 1727.

Further, Schunk served as the Firm's CCO, and was responsible for establishing and maintaining the Firm's supervisory systems and procedures, during the Firm's supervisory failures underlying the 2013 AWC, recent Cautionary Actions received by the Firm (which included supervisory deficiencies), and the entire period that Allen engaged in the extensive misconduct underlying his disqualifying injunctions (when he also bore supervisory responsibility for Allen's activities).[5] RP 1449, 2036, 2038-39, 2045-46, 2057.

---

[4] Schunk could not recall what this recent Cautionary Action concerned. RP 2049-51.

[5] Making matters worse, during the time Allen engaged in the misconduct underlying his disqualification, he was allegedly under heightened supervision because of his role as a large producer at the Firm. RP 2027, 2030-31.

OS Received 02/23/2023

D. Allen Is Enjoined by a New York Court and Rendered Disqualified

1. The Court Enters a Temporary Injunction Against Allen

In December 2018, a New York State court entered an *Ex Parte* Order against Allen and affiliated entities (the "December 2018 Order") at the request of the Office of the New York Attorney General (the "NYAG"). RP 873-77. The NYAG had argued that a temporary injunction against Allen and his affiliated entities was necessary "because alleged fraudulent practices of Respondents threaten continued and immediate injury to the public." RP 874. The December 2018 Order preliminarily enjoined and restrained Allen and his affiliated entities from, among other things: (1) engaging in securities fraud; (2) violating New York's securities laws (specifically, New York General Business Law Article 23-A (the "Martin Act"), which among other things prohibits fraudulent practices relating to investment advice or the purchase, exchange, or sale of securities); (3) facilitating, allowing, or participating in the purchase, sale, or transfer of limited partnership interests in a private equity fund created by Allen, ACP X, LP (the "Limited Partnership");[6] and (4) converting or otherwise disposing of or transferring funds from the Limited Partnership. RP 876-77.

2. The NYAG Files a Complaint Against Allen Alleging Extensive and Serious Misconduct and Seeks a Preliminary Injunction

In December 2019, while the temporary injunction against Allen and the other defendants remained in place, the NYAG filed a 50-page, five-count complaint against Allen and his affiliated entities (including the Firm as a relief defendant) alleging that Allen and the other

[6] Allen formed the Limited Partnership in 2004 to allow investors to invest in other private equity funds on the secondary market. RP 897. The Investment Adviser served as the investment adviser to the Limited Partnership and owned 100% of the Limited Partnership's general partner. RP 941.

defendants engaged in a decade-long fraudulent scheme centered around the Limited Partnership to enrich themselves at the expense of investors. RP 885-937.

The complaint alleged that Allen and the other defendants engaged in fraud, breaches of fiduciary duty, and violations of the Martin Act and other New York laws. It alleged, among other things, that Allen represented to investors that the Limited Partnership would invest in discounted private equity interests on the secondary market, but instead he diverted investors' funds to Parent.[7] The complaint alleged that Allen and the other defendants made misrepresentations and material omissions to investors in the Limited Partnership about the nature of the Limited Partnership's securities, investment advice relating to the Limited Partnership's operations, management, and investment objectives, and the distribution of the Limited Partnership's assets and securities. The complaint further alleged that Allen concealed his fraud by providing investors with inflated valuations of their investments and deprived investors of their rightful profits by distributing millions of dollars of investor funds to himself and his entities. The NYAG sought an order requiring that the defendants disgorge profits from their fraudulent practices, and sought a preliminary injunction to enjoin Allen and the defendants from, among other things, accessing the remaining assets of the Limited Partnership.

3. The Court Issues a Preliminary Injunction Against Allen After an Extensive Multi-Day Hearing

The New York court held a five-day evidentiary hearing on the NYAG's request for a preliminary injunction in early 2020. At the hearing, Allen was extensively examined and cross-examined, and 10 additional witnesses testified. These witnesses included six investors in the

[7] The complaint contained numerous citations to provisions in the Limited Partnership's operating agreement and offering documents to support the NYAG's claims that Allen engaged in misconduct, including but not limited to the assertion that these documents did not authorize Allen to invest Limited Partnership funds in Parent. *See, e.g.*, RP 897-900, 925.

Limited Partnership, who all testified that Allen had deceived or defrauded them, and a former employee of the Firm and Parent who testified that "every certification that he and Mr. Allen signed from 2013 to 2017, including certifications related to the value of NYPPEX, was a 'lie.'" RP 880-81.

In February 2020, the court issued a preliminary injunction against, among others, Allen, Parent, and the Firm as a relief defendant, in substantially the same form as the temporary injunction set forth in the December 2018 Order. RP 879-84.

In entering the preliminary injunction, the court found that "[t]he evidence adduced at the preliminary injunction hearing revealed a shocking level of self-dealing, breaches of fiduciary duty, misappropriation of enormous sums of [the Limited Partnership's] capital, and outright fraud." RP 880. The court found Allen's explanations for the "suspicious circumstances" surrounding this matter to be "fanciful," and held that the Limited Partnership was "essentially utilized as a piggy bank to fund a failing broker-dealer, its failing parent, and Mr. Allen." RP 882. In granting the NYAG's request for a preliminary injunction, the court found that it "cannot allow Mr. Allen or any of the companies he controls to make any decisions with respect to the remaining and very modest assets of [the Limited Partnership.]" RP 883.

4. The Court Issues a Permanent Injunction Against Allen After a Second Multi-Day Evidentiary Hearing

In January 2021, after delays caused by withdrawals by several of defendants' attorneys, the court conducted another evidentiary hearing on the NYAG's request for a permanent injunction and its related complaint. RP 943. The defendants stipulated that the entire record from the preliminary injunction hearing would be deemed part of the record of the plenary trial,

and this second hearing lasted four days. RP 943. Fourteen witnesses testified at this hearing.[8] RP 943. At the hearing and in post-hearing briefs, Allen argued as a defense to the NYAG's charges that the Limited Partnership's operating agreement and offering documents expressly permitted Allen to use investor funds to invest in Parent and he presented evidence in support of these arguments. *See, e.g.*, RP 2199, 2255; *see also* App. Br., at 19-21. Allen also presented evidence that he obtained a legal opinion in support of his claim that the operating and offering documents permitted him to invest Limited Partnership funds in Parent. *See* App. Br., at 15 n.23.

In February 2021, the court issued a permanent injunction, in the same form as the preliminary injunction, against Allen, Parent, and other affiliated entities (including the Firm as a relief defendant). RP 940-55. The court also ordered that Allen and the other defendants disgorge approximately $7.872 million. RP 955. Further, the court appointed a provisional receiver to liquidate the remaining assets of the Limited Partnership. RP 955.

The court found that the January 2021 evidentiary hearing confirmed all facts established at the 2020 preliminary injunction hearing. The court held that:

> [T]he 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 [Limited Partnership] was substantially diverted by a hopelessly conflicted Allen toward funding NYPPEX — the broker-dealer entity controlled by Allen. NYPPEX, in turn, utilized these funds to pay Allen exorbitant NYPPEX annual salaries totaling approximately $6 million, as well as to pay the salaries of his staff. [The Limited Partnership's] capital was also used to pay NYPPEX operating expenses. . . . [The Limited Partnership's] investment in NYPPEX is in no way

[8] Some of the 14 witnesses, which included witnesses called by Allen, had testified at the first hearing (including the former employee of the Firm and Parent who testified that Allen fabricated certifications concerning the value of Parent). The parties submitted direct testimony by affidavit, "and each affiant whose testimony was considered by the Court was subjected to cross-examination." RP 943.

> consistent with the investment thesis contained in the [Limited Partnership] Private Placement Memorandum and in the [ ] Limited Partnership Agreement.

RP 944.

Although Allen and the Firm currently focus on whether the Limited Partnership's operating agreement and offering documents authorized him to invest partnership funds in Parent (and, to a lesser extent, whether Allen improperly took carried interest), the court's findings of misconduct were significantly broader than that.[9] Indeed, the court expressly found that Allen and the other defendants:

> (1) made frequent, material misrepresentations and misleading omissions to investors in the Limited Partnership;
>
> (2) fraudulently caused the Limited Partnership to make "oversized" investments in Parent;
>
> (3) gave false and misleading investment advice to purchase Parent's stock to investors in the Limited Partnership;
>
> (4) made false and misleading reports on the value of the Limited Partnership's interest in Parent to investors and caused the Limited Partnership to purchase Parent's stock at "wildly inflated" prices;

[9] For instance, Allen and the Firm state in their brief that the Limited Partnership's operating agreement and offering documents provide "compelling evidence that would exonerate [Allen] from fraud allegations," as well as allegations that he breached his fiduciary duties, and state that the "fundamental issue" underlying the injunction is whether "Allen's actions were permitted or not." App. Br., at 5, 7. They point to language in the Limited Partnership's operating agreement that permitted the general partner, which Allen controlled, "to purchase property in . . . any Affiliate of the General Partner" as proof that he was permitted to use investor funds to purchase shares in Parent and that the New York court erroneously concluded that he engaged in widespread fraud and acted inconsistently with the "investment thesis" set forth in the operative documents. *See* App. Br., at 12, 32. Assuming, arguendo, that the relevant documents permitted him to use investor funds to invest in Parent (which appears to be inconsistent with the express findings of the New York court), the New York court made additional findings that Allen made fraudulent misrepresentations and omissions to investors in connection with those investments (such as engaging in fraud to deceive the investors about the value of their investments in Parent) and other actions taken by Allen. In fact, the New York court stated that "the present action is based on conduct that violated the representations made in the offering documents (and subsequent amendments) **as well as other fraudulent conduct**"). RP 945 (emphasis supplied).

OS Received 02/23/2023

(5) made false and misleading statements concerning the wind-down of the Limited Partnership;

(6) concealed the merger of Parent and the Investment Adviser (which served as the investment adviser to investors in the Limited Partnership);

(7) fraudulently took carried interest to which Allen and the other defendants were not entitled, pursuant to amendments to the limited partnership agreement that Allen procured by means of material misrepresentations; and

(8) fraudulently caused the Limited Partnership to cover significant operating expenses of Parent, without fairly disclosing any of these wrongdoings to the Limited Partnership's investors.

RP 950. In making these extensive and varied conclusions concerning Allen's misconduct, the court found that Allen's testimony was "unworthy of belief," the testimony of his valuation experts was not credible, and the testimony of the former employee of the Firm and Parent to be credible. RP 953.

5. Allen Unsuccessfully Appeals

Allen and the other defendants appealed the decision of the New York court to two appellate courts. In the briefs filed by Allen with the intermediate appellate court, he repeatedly argued that the lower court had ignored contractual language that authorized Allen to make investments in Parent. *See*, *e.g.*, RP 2225, 2235, 2239-40. Notwithstanding these arguments, the intermediate appellate court affirmed the lower court's decision finding that Allen engaged in widespread, serious, securities-related misconduct. *See* RP 1397-1405. The intermediate appellate court held that the trial court's "finding of fraud was not against the weight of the evidence." *See* RP 1400. The intermediate appellate court also found that Allen and the other defendants "cannot seriously dispute the trial court's finding that "Allen's appropriation of $3.4 million of carried interest was procured by the fraudulent representation to [Partnership]

investors that [he] was always entitled to carried interest," and noted that Allen's counsel advised him that he could not take carried interest when he did, but he did so anyway. *See* RP 1400.

Allen sought leave to further appeal to New York's highest appellate court. In the briefs filed in support of his request, Allen again argued that the lower court had ignored contractual language that authorized Allen to make investments in Parent. *See, e.g.*, RP 1750, 1769-70, 1790. New York's highest court denied Allen's request, and Allen has exhausted his appeals. *See People v. Allen*, 188 N.E.3d 129, 38 N.Y.3d 996 (N.Y. Apr. 26, 2022) (motion for leave to appeal dismissed on jurisdictional grounds); *People v. Allen*, 198 N.E.3d 477, 39 N.Y.3d 928 (N.Y. Oct. 20, 2022) (same).

III. PROCEDURAL HISTORY

A. The Firm Files the Application

The Firm filed its application to continue to employ Allen notwithstanding his statutory disqualification in February 2020, and amended it in March 2021 (the "Application").[10] RP 956, 2186. The Application sought approval to continue to employ Allen as a general securities representative and general securities principal.

The Firm proposed that Schunk would continue to serve as Allen's primary supervisor. RP 958-59. Initially, the Firm did not specify who would supervise Allen when Schunk was out

[10] The Firm filed the Application in February 2020 after the New York court entered the preliminary injunction against Allen. The August 2022 FINRA Hearing Panel decision found that Allen improperly associated with the Firm while statutorily disqualified from entry of the December 2018 Order until the Firm filed the Application in February 2020. Despite applicants' suggestions to the contrary, the December 2018 Order and the precise date of Allen's disqualification are not at issue in this appeal, and Allen fully participated in proceedings before the New York court prior to its entry of the preliminary injunction in February 2020 and the permanent injunction in February 2021. *See also* infra Parts IV.A.1, IV.B.

of the office, although it later proposed that if Schunk were out "an assignee from the NYPPEX Legal and Compliance Committee or an advisor from outside legal counsel or regulatory consultants shall" supervise Allen. RP 2223. At the hearing, the Firm proposed that its part-time financial and operations principal, Robert Calamunci ("Calamunci"), would serve as Allen's alternate supervisor if Schunk was unavailable. *See* RP 1926.

B. Proceedings Before the NAC

In December 2021, FINRA's Office of General Counsel notified the parties that a hearing would occur on April 25, 2022. RP 1004. FINRA's Department of Member Supervision ("Member Supervision") subsequently recommended that the NAC deny the Application in a filing dated April 11, 2022. *See* RP 1017-1738; *see also* FINRA Rule 9524(a)(3) (providing that Member Supervision shall file and serve its recommendation within 10 business days of the hearing). Member Supervision based its denial recommendation on the seriousness and recency of Allen's disqualifying injunction, the inadequacy of the Firm's proposed heightened supervisory plan, and the Firm's failure to propose suitable supervisors for Allen.

Prior to the hearing, Member Supervision and the Firm filed numerous exhibits in connection with the Application. *See* RP 1044-1892. Included among the documents submitted by the Firm were affidavits from some investors in the Limited Partnership and an amicus brief filed by certain limited partners in an administrative proceeding involving Allen that is currently before the Commission.[11] These documents generally opined that Allen did not engage in any

[11] In March 2022 the Commission instituted administrative proceedings against Allen pursuant to Exchange Act Section 15(b) and the Investment Advisers Act of 1940. In those proceedings, the Commission's Division of Enforcement seeks industry and penny-stock bars against Allen based upon his misconduct in connection with the New York injunctions. *See* SEC Administrative Proceeding File No. 3-20795, https://www.sec.gov/litigation/apdocuments/ap-3-20795.xml. This matter is pending.

OS Received 02/23/2023

misconduct, that Allen was permitted to use the investors' funds to invest in Parent pursuant to the Limited Partnership's operating agreement and offering documents, and that the court erred in finding that he engaged in any misconduct. *See* RP 1842-69 (affidavits), 1870 (amicus brief).

A subcommittee of FINRA's Statutory Disqualification Committee (the "Hearing Panel") conducted a hearing on April 25, 2022. *See* RP 1895-2159. Allen appeared and testified at the hearing, accompanied by counsel. Schunk and Kim also appeared and testified.

C. The NAC Finds that Allen's Continued Association with the Firm Was Not in the Public Interest

In a decision dated September 23, 2022, the NAC denied the Application, determined that the Firm had failed to show that Allen's continued association with the Firm was in the public interest, and determined that Allen's continued association with the Firm presented an unreasonable risk of harm to the markets and investors.[12] *See* RP 2162-84. The NAC based its denial on two independent factors.

1. Allen's Highly Serious and Recent Misconduct Weighed Heavily Against the Application

First, the NAC found that Allen's highly serious and securities-related misconduct underlying his disqualification weighed heavily against approving the Application. RP 2176-79. The NAC observed that the New York court found that Allen engaged in a lengthy and extensive scheme where it found that, among other things, Allen:

- Engaged in a "shocking level of self-dealing;"

[12] At the hearing, the Firm argued that Allen was not statutorily disqualified by virtue of the New York court's injunctions because, among other things, they did not enjoin Allen from acting as an investment adviser or broker-dealer or engaging in any activities with such entities in connection with the purchase or sale of securities. The NAC properly rejected this argument, and applicants do not currently contest Allen's disqualification. *See* RP 2166-67.

OS Received 02/23/2023

- Misappropriated "enormous sums" of investors' funds;
- Engaged in "outright fraud;"
- Was "hopelessly conflicted" and diverted investor funds to the Parent and Firm while paying himself and others "exorbitant" annual salaries approximating $6 million; and
- Made "frequent, material misrepresentations and misleading omissions" to investors.

RP 2177.

The NAC also cited to the New York court's findings that the Limited Partnership's "investment in NYPPEX is in no way consistent with the investment thesis contained in the [Limited Partnership] Private Placement Memorandum and in the [ ] Limited Partnership Agreement." RP 2165. The NAC found that the court's order that Allen disgorge $7.827 million "is a powerful measure of the risk of harm to investors that would exist if we were to approve" the Application. RP 2179. The NAC also found that Allen's disqualifying injunctions were recent and that insufficient time had passed for Allen and the Firm to demonstrate that he is currently able to comply with securities rules and regulations. RP 2177-78.

The NAC rejected several arguments and assertions made by Allen and the Firm to downplay the seriousness of Allen's disqualifying injunctions. The NAC dismissed applicants' arguments that the events underlying the disqualifying injunctions were merely a contractual dispute with a disgruntled investor. It rejected applicants' contention that the New York court's findings and legal conclusions (which were affirmed twice on appeal) were erroneous as impermissible collateral attacks on the injunctions.[13] RP 2166, 2177. The NAC also found

[13] For similar reasons, the NAC considered but gave "limited weight" to the affidavits of certain limited partners in the Limited Partnership submitted by the Firm. RP 2177. Applicants argue that the NAC "ignored" these affidavits and the amicus brief filed by certain limited

[Footnote continued on the next page]

"problematic" Allen's attempts to minimize his misconduct and his claims that it was "shocking" and "outrageous" that he and the Firm had to spend time pursuing approval of the Application, RP 2177.

Further, the NAC rejected applicants' claim that Allen's regulatory history and his ability to work at the Firm while the Application remained pending supported approving the Application. RP 2178-79. Finally, the NAC rejected applicants' argument that approving the Application posed no risk to the Firm's customers because they are sophisticated. The NAC aptly observed that Commission precedent and the fact that Allen's misconduct underlying the disqualifying injunctions severely harmed sophisticated investors belied this assertion. RP 2179.

2. The Firm Failed to Show that it Can Stringently Supervise Allen

Second, as "a separate and independent reason to deny the Application," the NAC concluded that the Firm failed to show that it could stringently supervise Allen as a disqualified individual—which by itself is a fatal flaw for a statutory disqualification application. *See* RP 2179-82. Several well-established factors formed the basis for the NAC's conclusion.

For example, the NAC expressed "serious doubts" that the Firm could stringently supervise Allen given his ownership of the Firm, role as the Firm's largest producer, and lender of large sums to Parent. RP 2180. The NAC found that its concerns were "particularly applicable here" because the Firm had proposed that Allen would continue to manage the Firm, would be involved with any decision to terminate Schunk, and would determine Schunk's

---

partners in the pending Commission administrative action against Allen. *See* App. Br., at 6-7, 32-33. However, as set forth above, the NAC addressed the affidavits and gave them limited weight because they simply attempted to attack the New York court's findings that Allen engaged in extensive wrongdoing. Although the NAC did not reference the amicus brief submitted by the Firm, which contained the same information as the affidavits that the NAC gave limited weight, this lack of a specific mention had no material impact on the NAC's denial of the Application, which rejected the applicants' collateral attacks.

OS Received 02/23/2023

compensation. RP 2180. The NAC stated that "[a]ll these facts underscore the difficulty of supervising Allen given his position of authority at, and control over, the Firm and the Firm's dependence on him for business and funds." RP 2180.

The NAC also expressed doubt that Schunk was up to the task of stringently supervising Allen. RP 2180. The NAC cited to Schunk's regulatory history, which included the 2012 AWC for supervisory violations for which FINRA suspended him in any principal capacity for 30 days and fined him $20,000. In connection with that AWC, Schunk agreed to findings that he failed to ensure that a firm where he served as CCO established and maintained a supervisory system and WSPs designed to comply with rules regarding branch office supervision and email retention. RP 2181. The NAC also considered that Schunk received from FINRA a Cautionary Action in 2019 and served as the Firm's CCO during the misconduct cited in the 2013 AWC and supervised Allen's activities when he engaged in the extensive misconduct underlying the disqualifying injunctions. RP 2181. Adding to Schunk's list of issues, the NAC correctly observed that under his watch as the Firm's CCO the Firm had recently received from FINRA three Cautionary Actions that cited the Firm for numerous deficiencies, including supervisory violations and failing to properly supervise Allen's activities at the Firm.[14] RP 2181.

Finally, the NAC determined that the Firm's proposed heightened supervisory plan was inadequate. RP 2181-82. Specifically, the NAC held that the plan lacked detail and consisted of boilerplate applicable to other registered personnel at the Firm, omitted provisions designed to ensure stringent supervision, contained no provisions to ensure that Allen's supervisors

[14] The NAC also reasonably questioned whether Schunk had sufficient time, given his multiple roles at the Firm, Parent, and affiliated entities, to stringently supervise Allen. It reached a similar conclusion regarding Allen's belatedly named alternate supervisor, Calamunci. RP 2181.

OS Received 02/23/2023

possessed the necessary independence to supervise Allen, and lacked provisions sufficient to help ensure that misconduct similar to the misconduct underlying Allen's disqualifying injunctions did not reoccur. RP 2181-82. The NAC provided specific examples of how the proposed plan failed to provide for stringent supervision. RP 2182.

The NAC rejected applicants' arguments that provisions designed to prevent reoccurrence of the extensive and serious securities-related misconduct underlying the disqualifying injunctions were unnecessary. RP 2182. It correctly stated that "a heightened supervisory plan for a disqualified individual should, at a minimum, contain provisions tailored to prevent the misconduct underlying the disqualification from happening again." RP 2182. The NAC also rejected applicants' complaint that Member Supervision only raised concerns about the Firm's proposed plan shortly before the hearing (as is provided under FINRA's rules) and that they had hired a consultant to draft a revised supervisory plan to address Member Supervision's concerns.[15]

D. Applicants Appeal the Denial

On or about October 24, 2022, Allen and the Firm appealed the NAC's denial. They subsequently sought to stay the NAC's denial, which FINRA opposed. The Commission denied applicants' stay request pursuant to an order entered on November, 28, 2022. *See* www.sec.gov/litigation/opinions/2022/34-96391.pdf.

[15] Despite Allen's testimony that the Firm had hired a consultant to draft a revised heightened supervisory plan to address Member Supervision's concerns, and applicants' complaints in their brief that some of the deficiencies identified by Member Supervision and subsequently by the NAC could have been easily remedied, the Firm never submitted an amended heightened supervisory plan for the NAC's consideration. *See* RP 1999.

IV. ARGUMENT

Section 19(f) of the Exchange Act establishes the standard for the Commission's review of FINRA's denial of the Firm's membership continuance application. *See Robert J. Escobio*, Exchange Act Release No. 83501, 2018 SEC LEXIS 1512, at *13 (June 22, 2018). Section 19(f) directs the Commission to dismiss an applicant's appeal if the Commission finds: (1) the specific grounds on which FINRA based its denial exist in fact; (2) FINRA acted in accordance with its rules; and (3) FINRA applied its rules in a manner that is consistent with the purposes of the Exchange Act. *See id; see also William J. Haberman*, 53 S.E.C. 1024, 1027 (1998), *aff'd*, 205 F.3d 1345 (8th Cir. 2000) (table). Section 19(f) also requires the Commission to set aside FINRA's action if it finds that the action imposes an unnecessary burden on competition. *See* 15 U.S.C. 78s(f).

FINRA complies with the Exchange Act in denying an application such as the Firm's when it independently evaluates the application, bases its determination on a "totality of the circumstances," and explains "the bases for its conclusion." *See Escobio*, 2018 SEC LEXIS 1512, at *28; *Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 SEC LEXIS 2977, at *46 (Sept. 13, 2010); *see also Citadel Sec. Corp.*, 57 S.E.C. 502, 509 (2004) (affirming FINRA's denial of an application based upon inadequate supervision and individual's prior misconduct); *Frank Kufrovich*, 55 S.E.C. 616, 624-26 (2002) (affirming FINRA's conclusions based on its stated analysis, which included an evaluation of the individual's prior misconduct and the sponsoring firm's inadequate plan of supervision).

The NAC's decision to deny the Firm's application to continue to employ Allen comports fully with the standards of Exchange Act Section 19(f). The Commission should therefore dismiss applicants' appeal.

A. The Specific Grounds for the NAC's Denial Exist in Fact

1. Allen Is Statutorily Disqualified

The NAC correctly found that Allen is subject to a statutory disqualification because of the New York court's injunctions against him.[16] The court's February 2020 and February 2021 injunctions prohibit him from, among other things, violating state securities laws and facilitating, allowing, or participating in the purchase, sale, or transfer of the Limited Partnership's securities. *See* 15 U.S.C. § 78c(a)(39)(F); 15 U.S.C. § 78o(b)(4)(C) (providing that an individual is statutorily disqualified if they are "permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer . . . or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security"); *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *35 (Apr. 18, 2013) (holding that applicant was statutorily disqualified because the judgment at issue enjoined him from engaging in fraudulent activity in connection with the purchase or sale of securities), *aff'd*, 575 F. App'x 1 (D.C. Cir. 2014).

2. The Factors that Support the NAC's Denial Exist in Fact

The NAC considered several independent factors when it concluded that granting the Application was not in the public interest. Each of these considerations, which the Commission

[16] Although applicants argue that the temporary injunction set forth in the December 2018 Order should not have rendered Allen disqualified because it was entered on an *ex parte* basis, and repeatedly assert that the December 2018 Order was unfairly entered against Allen, it is undisputed that the New York court subsequently entered preliminary and permanent injunctions after extensive evidentiary hearings in February 2020 and February 2021, respectively, at which Allen was able to, and did in fact, present his defense. The precise date of Allen's disqualification is not at issue in this appeal.

has commonly recognized as grounds to support the denial of a membership continuance application, exist in fact.

a. Allen's Disqualifying Injunctions Are Recent and Involved Highly Serious Securities-Related Misconduct

The record supports fully the NAC's conclusion that the seriousness of the misconduct underlying Allen's statutory disqualification, and the recency of the court's disqualifying injunctions, warrants denying the Application. Applicants present no meaningful facts or arguments that undermine this conclusion.

The NAC carefully considered the nature and seriousness of Allen's disqualifying injunctions and Allen's securities-related misconduct underlying the injunctions, and the Commission has repeatedly affirmed this approach. *See Commonwealth Cap. Sec. Corp.*, Exchange Act Release No. 89260, 2020 SEC LEXIS 2612, at *8 (July 8, 2020) (affirming denial of statutory disqualification application and agreeing with the NAC that individual's recent disqualifying misconduct—misappropriation of investor funds—was serious and warranted denial); *Escobio*, 2018 SEC LEXIS 1512, at *16 (agreeing with the NAC that the seriousness of the misconduct underlying the disqualifying injunction—a large-scale fraudulent commodities scheme—supported denying the statutory disqualification application); *Meyers Assocs., L.P.*, Exchange Act Release No. 81778, 2017 SEC LEXIS 3096, at *29 (Sept. 29, 2017) (affirming FINRA's denial of statutory disqualification application based in part upon the seriousness and recency of the underlying disqualifying event); *Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 SEC LEXIS 2270, at *34 (June 26, 2014) (holding that FINRA properly considered that the consent order forming the basis of an individual's statutory disqualification stemmed from allegations of serious misconduct); *Kufrovich*, 55 S.E.C. at 625-26 (finding that FINRA "properly discharged its Exchange Act obligation" where it weighed all facts developed,

including the nature of the underlying disqualifying event, the adequacy of the proposed supervisory plan, and the statutorily disqualified individual's prior disciplinary history).

The New York court made a litany of findings against Allen and described his myriad misconduct in detail. *See* RP 879-84, 940-55. The court found that Allen engaged in a lengthy and extensive scheme that involved a "shocking level of self-dealing" whereby he misappropriated "enormous sums" of investors' funds, engaged in "outright fraud," and paid himself and others at the Firm compensation of approximately $6 million with those funds. RP 880, 942. The New York court also held that Allen made numerous misrepresentations and omissions of material facts to investors and that Allen caused the Limited Partnership to purchase Parent's stock at "wildly inflated" prices. It also found that Allen's use of investor funds to purchase shares in Parent was not consistent with the "investment thesis" set forth in the Limited Partnership's operating agreement and offering documents. RP 944.

The NAC considered these findings in assessing the nature and seriousness of Allen's misconduct, and appropriately concluded that "[t]he New York court's order that Allen and the other defendants disgorge $7.872 million is a powerful measure of the risk of harm to investors that would exist if we were to approve of this Application." *See* RP 2179; *cf. Haberman*, 53 S.E.C. at 1028 (holding that the sentence imposed on an individual disqualified as a result of a felony conviction may indicate the seriousness of the disqualifying misconduct).

The NAC also properly considered the recency of Allen's disqualifying injunctions and that insufficient time has passed for Allen and the Firm to demonstrate that Allen is currently able to comply with securities rules and regulations. *See Escobio*, 2018 SEC LEXIS 1512, at *17 (holding that FINRA properly determined that the date a court entered a disqualifying injunction finding that an individual engaged in a fraudulent scheme was recent when it was

OS Received 02/23/2023

entered less than two years ago); *Eric J. Weiss*, Exchange Act Release No. 69177, 2013 SEC LEXIS 837, at *29 (Mar. 19, 2013) (finding that FINRA properly concluded that a disqualifying order was recent because it was entered 3.5 years prior to the filing of the MC-400 application and that insufficient time had passed for the disqualified individual "to have demonstrated a sufficiently long-term change in behavior to show he would comply with the securities regulations going forward"); *see also Haberman*, 53 S.E.C. at 1030 (affirming denial of statutory disqualification application where felony conviction occurred "only six years ago"). To the contrary, the recency and scope of Allen's serious, securities-related misconduct demonstrates that he is currently a danger to investors—particularly in light of Allen's insistence throughout the proceeding that he acted in the "best interests" of his investors. RP 2177. The NAC appropriately based its denial of the Application on Allen's recent and highly serious misconduct, and the Commission should affirm the NAC's decision.

b. The Firm Failed to Show That it Can Stringently Supervise Allen

Stringent supervision of disqualified individuals is a crucial and required element to approve an application such as the Firm's. *See Escobio*, 2018 SEC LEXIS 1512, at *18 (stating that "we require stringent supervision for a person subject to a statutory disqualification"); *Weiss*, 2013 SEC LEXIS 837, at *42 (same); *Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 SEC LEXIS 2417, at *18-19 (July 17, 2009) (holding that an applicant must establish that it will be able to stringently supervise a statutorily disqualified individual). Here, the NAC appropriately concluded that the Firm failed in several respects to demonstrate that it could stringently supervise Allen. The NAC's conclusion is fully supported by the record.

First, the NAC—following Commission precedent—found that supervising Allen as the Firm's majority owner, large producer, and lender of large sums to Parent was a difficult task.

See, e.g., *Bruce Zipper*, Exchange Act Release No. 84334, 2018 SEC LEXIS 2709, at *21 (Oct. 1, 2018) (holding that it is "difficult for employees to supervise effectively the activities of the owner of a firm because owners will almost certainly continue to exercise control over the firm's operations, including the ability to fire an employee charged with the responsibility to supervise the firm's owner"); *Escobio*, 2018 SEC LEXIS 1512, at *22 (stating that a firm's dependence on a disqualified individual as the source of a large portion of the firm's customers "undermine[s] the independence of a supervisor"); *Asensio & Co.*, Exchange Act Release No. 68505, 2012 SEC LEXIS 3954, at *17 (Dec. 20, 2012) (noting the difficulties in supervising a disqualified owner); *Citadel Sec. Corp.*, 57 S.E.C. at 509-10 (same).

The NAC further found that these facts and circumstances, as well as the fact that Allen would continue to play a large managerial role at the Firm and would make decisions concerning Schunk's continued employment and compensation, underscored these difficulties. Despite having the burden to show that it could stringently supervise Allen, the Firm made no attempt to minimize or even address these issues. The NAC appropriately concluded that these facts undercut the Firm's claim that it was capable of stringently supervising Allen.

Second, the NAC's conclusion that Schunk was not a suitable supervisor for Allen is well supported by the record. *See Citadel Sec. Corp.*, 57 S.E.C. at 510 (stating that disqualified individuals "must be subject to stringent oversight by supervisors who are fully qualified to implement the necessary controls"). Schunk has a history of failing to carry out his supervisory obligations. FINRA sanctioned him in 2012 for supervisory lapses, and Schunk was the Firm's CCO when it was sanctioned by FINRA in 2013 for supervisory failures.[17] Further, Schunk was

[17] Applicants suggest that the 2012 AWC against Schunk is dated and should not have been considered. *See* App. Br., at 40 n.79. Applicants are mistaken. *See Savva*, 2014 SEC LEXIS

[Footnote continued on the next page]

Allen's supervisor and the Firm's CCO when Allen engaged in the widespread misconduct underlying his disqualification, as well as during the recent period where FINRA issued the Firm multiple Cautionary Actions (which again included supervisory lapses). Moreover, Schunk personally received a recent Cautionary Action for failing to keep his Form U4 current. The record fully supports the NAC's conclusion that Schunk is not a suitable supervisor for Allen.

Third, the NAC appropriately concluded that the Firm's proposed supervisory plan was deficient in numerous ways. *See, e.g.*, *Escobio*, 2018 SEC LEXIS 1512, at *24 ("We have previously found that supervisory plans that . . . lack[] detail are insufficient."); *Savva*, 2014 SEC LEXIS 5100, at *38 (affirming denial of statutory disqualification application based, in part, upon FINRA's findings that the proposed supervisory plan was "skeletal, lack[ed] specificity, and [was] not specifically tailored to Savva and preventing misconduct similar to" the underlying disqualifying order); *Asensio & Co.*, 2012 SEC LEXIS 3954, at *17 (finding that proposed plan failed to contain provisions that provided for stringent supervision of disqualified owner); *Arouh*, 2010 SEC LEXIS 2977, at *38 (finding proposed supervisory plan deficient where "[m]uch of what the plan required is no different from the supervision the Firm afforded to all employees"). Here, the NAC correctly found that the proposed plan lacked detail and omitted provisions designed to ensure that the Firm would stringently supervise Allen, did not contain a single provision to ensure that Allen's supervisors possessed the necessary independence to stringently

5100, at *35 (rejecting argument that FINRA improperly relied on customer complaints against a disqualified individual that were a decade old and stating that FINRA "appropriately reviewed and considered Savva's entire regulatory history" in denying a membership continuance application). Moreover, for the same reasons that Allen and the Firm cannot now challenge that Allen engaged in the extensive fraudulent conduct underlying his disqualification, they cannot credibly claim that Schunk's supervision of Allen while he for years engaged in this widespread misconduct "was entirely adequate and proper." *See* App. Br., at 40; *see also infra* Part IV.C.

supervise Allen, and lacked provisions sufficient to help ensure that misconduct similar to the misconduct underlying Allen's disqualification did not reoccur.

On appeal, applicants argue that the Firm's proposed supervisory plan was adequate and criticized the NAC for failing to understand the Firm's "unique" business and treated the Firm like any retail broker. *See* App. Br., at 38. Allen and the Firm are mistaken. *See Commonwealth Cap. Sec. Corp.*, 2020 SEC LEXIS 2612, at *15, *17 (rejecting argument that firm was "unique" with a "limited business" in finding that proposed plan was inadequate and reiterating that "[a] proposed supervisory plan must reflect the careful consideration required to effectively supervise a [statutorily] disqualified individual and [include] specifically tailored provisions designed to prevent and deter future misconduct"). Indeed, the Firm's proposed plan failed to provide for stringent supervision for Allen's activities at the Firm in several ways, including that it did not address the challenges Allen's supervisors would face in supervising a disqualified owner and other details surrounding Allen's proposed supervision. *See id.* at *14-15 (finding that a proposed plan did not contain provisions to address supervision of the firm's owner and omitted other details "such as how much time [supervisor] would spend supervising Springsteen-Abbott, how he would review her emails, and how, and how often, he would review her compliance with the plan").

And, contrary to applicants' argument, the proposed plan should have—but did not—contain provisions designed to prevent Allen from engaging in the widespread misconduct underlying the disqualifying injunctions. *See, e.g.*, *Savva*, 2014 SEC LEXIS 5100, at *37-38 (affirming denial of statutory disqualification application based, in part, upon FINRA's findings that the proposed supervisory plan was not specifically tailored to preventing misconduct similar to that underlying the disqualifying order). Applicants' assertions that the terms of the

OS Received 02/23/2023

injunctions already serve to prevent similar misconduct and that the underlying misconduct did not occur at the Firm ring hollow and ignore that the disqualifying injunctions do not contain provisions related to Allen's actions generally and preventing the large-scale fraud that gave rise to the injunction (and that the Firm benefited from Allen's securities-related misconduct while he was associated with and controlled the Firm). The plan contains no provisions to help prevent Allen from making fraudulent misrepresentations and omissions, misappropriating investor funds, or engaging in other fraudulent activity.[18]

Allen and the Firm also argue that the NAC's denial imposes an unnecessary burden on competition based on its finding that the Firm failed to show that Schunk could stringently supervise Allen. They assert that the Firm only had two registered principals (Allen and Schunk) and that by finding Schunk was unsuitable to supervise Allen, "it effectively precluded NYPPEX from operating." *See* App. Br., at 38. The Commission should reject this argument. As set forth herein, the NAC denied the Application for two independent reasons, one of which had nothing to do with Allen's supervision. And, although the NAC found that Schunk was unsuitable to stringently supervise Allen, it also found that the Firm's proposed supervisory plan contained numerous deficiencies (i.e., even if Schunk was a suitable supervisor, which he is not, the deficient supervisory plan warranted denial of the Application). Regardless, the NAC's denial of

[18] Allen and the Firm argue, as they did before the NAC, that FINRA did not provide any input on the Firm's proposed supervisory plan until the NAC deemed the plan inadequate in its decision, and that FINRA could have helped the Firm improve the plan. *See* App. Br., at 41. As set forth herein, however, Member Supervision provided a detailed description of the plan's inadequacies in its recommendation letter sent to the Firm in April 2022, and the Firm claimed that it was working on a revised plan with a consultant (that was never submitted to the NAC in the intervening five months before the NAC issued its decision). Regardless, FINRA is not required to work with a firm to create a stringent supervisory plan. *See Emerson*, 2009 SEC LEXIS 2417, at *20 (holding that drafting a supervisory plan is the firm's responsibility, not FINRA's). This is especially true here where Allen's serious and recent underlying misconduct by itself warranted denial of the Application.

the Application had nothing to do with the Firm's size and does not impose an unnecessary burden on competition under the Exchange Act. *See Michael B. Scheft*, 48 S.E.C. 710, 712 (1987) (rejecting argument that denial of statutory disqualification application was an undue burden on competition where firm was a new FINRA member with only one registered principal to supervise disqualified individual and stating that disqualified individual "has not explained, and it is not apparent to us, why excluding him from the securities business would discriminate against new and small firms").[19]

Allen and the Firm also argue that Allen does not present a risk to the markets and investors because he has no customer complaints and has the support of some of the limited partners in the Limited Partnership (excluding the limited partners who testified before the New York court that he deceived and defrauded them). *See* App. Br., at 36. They also claim that the public interest favors approving the Application to allow Allen and the Firm to continue to provide purportedly "unique" services to investors. *See* App. Br., at 37, 39. Applicants' arguments should be rejected. *See Zipper*, 2018 SEC LEXIS 2709, at *40-41 (rejecting argument that disqualified individual's lack of customer complaints supported approval of application); *see also Bradley T. Smith*, Advisers Act Release No. 2604, 2007 SEC LEXIS 1030, at *25-26 (May 16, 2007) (rejecting argument that a bar was unnecessary after a court injunction

[19] Allen and the Firm also argue that the NAC's denial is "excessive or oppressive . . . in contravention of the Exchange Act." *See* App. Br., at 38. Applicants' argument is without merit. An eligibility proceeding to determine whether to permit an individual such as Allen to continue to associate with a firm notwithstanding his disqualification is not a disciplinary proceeding to determine wrongdoing and impose sanctions. *See Richard Allen Riemer, Jr.*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022, at *28 (Oct. 31, 2018) (stating that "we have held that FINRA does not subject a person to a statutory disqualification as a penalty or remedial sanction. Instead, a person is subject to statutory disqualification by operation of" the Exchange Act); *but see* 15 U.S.C. § 78s(e) (providing that in any proceeding to review a final disciplinary sanction imposed by FINRA, the Commission may cancel, modify, or reduce a sanction if it finds that the sanction is "excessive or oppressive").

because respondent's customers supported him and would allegedly suffer if he was barred and stating that "we have long held that the public interest determination extends beyond the consideration of particular investors to the public-at-large").

Similarly, the Commission should reject applicants' argument that Allen does not pose a threat to the investing public because the Firm does not conduct a retail business and deals only with sophisticated customers. As the NAC found, Allen's extensive misconduct involving the Limited Partnership caused severe harm to investors, all of whom Allen and the Firm allege are sophisticated.[20] *See* RP 2179; *see also Lester Kuznetz*, 48 S.E.C. 551, 554 (1986) (rejecting argument that customers' experience negated registered representative's liability for fraud and holding that customers' investment experience did not give him "license to make fraudulent representations"), *petition for review denied*, 828 F.2d 844 (D.C. Cir. 1987); *Gopi Krishna Vungarala*, Exchange Act Release No. 90476, 2020 SEC LEXIS 4938, at *29-30 (Nov. 20, 2020) (stating that "the Commission has 'repeatedly rejected arguments that the antifraud provisions do not apply to customers who were experienced or sophisticated'").

Allen and the Firm were required to propose a plan of stringent supervision overseen by qualified supervisors. The NAC's conclusion that applicants failed to do so is fully supported and the Commission should affirm the NAC decision on this basis.

[20] As he did before the NAC, Allen continues to shirk responsibility for the misconduct underlying his disqualification. *See, e.g.*, App. Br. at 35 (suggesting that the injunction "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"). This demonstrates that, contrary to applicants' assertions, Allen remains a threat to the investing public.

OS Received 02/23/2023

B. The NAC Fairly Adjudicated This Matter in Accordance with FINRA Rules

Article III, Section 3(d) of FINRA's By-Laws provides that any member ineligible for continued membership may file an application requesting relief from the ineligibility pursuant to FINRA rules. FINRA Rules 9520 through 9525 set forth the rules for FINRA eligibility proceedings. The NAC adjudicated and issued its decision to deny the Application in full accordance with these rules.

As required under FINRA Rule 9522, FINRA notified the Firm of Allen's statutory disqualification and the Firm's ineligibility for continued membership. RP 938. Thereafter, the Firm filed the Application initiating the membership continuance process, and FINRA considered the Application consistent with the process afforded under FINRA Rule 9524.

The NAC appointed a Hearing Panel, which issued notice that it would conduct a hearing. *See* FINRA Rule 9524(a)(1)-(2). Prior to conducting the hearing, the Firm and Member Supervision transmitted to the Hearing Panel all required documents, including Member Supervision's recommendation and the parties' proposed exhibit and witness lists. *See* FINRA Rule 9524(a)(3).

The Hearing Panel conducted a hearing, and in doing so, afforded Allen and the Firm the opportunity to be heard and represented by an attorney, and to submit any relevant evidence. *See* FINRA Rule 9524(a)(4). The hearing was recorded, and a transcript was prepared by a court reporter. *See* FINRA Rule 9524(a)(6).

Finally, the Hearing Panel made a written recommendation to the NAC's Statutory Disqualification Committee, which in turn presented its written recommendation to the NAC. *See* FINRA Rule 9524(b). On September 23, 2022, the NAC issued a written decision denying the Application, the contents of which conformed entirely to FINRA rules. *See id.*

Allen and the Firm argue that using the December 2018 Order as the basis for Allen's disqualification raises "basic questions of fundamental fairness and due process." *See* App. Br., at 30. They state that "[t]he New York Action might have proceeded in an entirely different manner, and might have had an altogether entirely different outcome, had Mr. Allen had the opportunity to defend himself and provide critical context from the outset, or had the Limited Partners . . . been heard." *See* App. Br., at 11 n.6, 31 n.64. Applicants' assertion is entirely speculative and ignores that Allen had two opportunities (of which he fully availed himself) to defend against the NYAG's allegations, provide context for his actions, and present the opinions of limited partners.

Moreover, Allen and the Firm's argument ignores that even if there was any doubt that Allen was disqualified by the December 2018 Order (which as set forth above, is not at issue in this appeal but rather concerns the August 2022 FINRA Hearing Panel decision that is currently on appeal to the NAC), there is no question that the February 2020 preliminary injunction and the February 2021 permanent injunction rendered Allen statutorily disqualified. *See infra* Part IV.A. FINRA provided Allen and the Firm a fair process in connection with the Application as required under FINRA's rules and the Exchange Act. *See William H. Murphy & Co.*, Exchange Act Release No. 90759, 2020 SEC LEXIS 5218, at *41 (Dec. 21, 2020) (stating that the requirements of constitutional due process do not apply to FINRA and that it is required to provide fair procedures under the Exchange Act). Allen's suggestions to the contrary are without merit.

C. The NAC Applied FINRA's Rules Consistently with the Purposes of the Exchange Act

Under the express terms of the Exchange Act, FINRA may deny a FINRA member's application to associate with a statutorily disqualified person if FINRA determines that the

person's employment under the member's proposed heightened supervisory plan is not consistent with the public interest and the protection of investors. *See* 15 U.S.C. § 78o-3(g)(2). As the Commission has held, the NAC's denial of a membership continuance application is consistent with the Exchange Act where the denial explains how the particular disqualifying event, examined in light of the circumstances relating to that disqualification, creates an unreasonable risk of harm to the market or investors. *See Emerson*, 2009 SEC LEXIS 2417, at *14.

"A propensity for dishonest behavior is of particular concern in the securities industry, an industry that presents numerous opportunities for abuses of trust." *See Kufrovich*, 55 S.E.C. at 627. The Commission has thus recognized that, in order to protect investors, FINRA may demand a high level of integrity from its members and their associated persons. *Id.* Congress, through the Exchange Act, grants FINRA discretion in matters involving a member's association with a person who is statutorily disqualified. *See Arouh*, 2010 SEC LEXIS 2977, at *48-49. Particularly in such matters, "it is appropriate to recognize [FINRA's] evaluation of appropriate business standards for its members." *Halpert and Co.*, 50 S.E.C. 420, 422 (1980).

The NAC's decision denying the Application, in full accordance with FINRA rules, provided such an explanation by appropriately weighing all facts and circumstances surrounding Allen's disqualification and the Firm's proposed supervision of Allen. As the NAC's decision makes clear, it considered that the misconduct underlying Allen's statutory disqualification, which occurred recently, is especially serious and securities-related. The NAC further explained, in detail, that the Firm failed to show in various ways that it could stringently supervise Allen.

Nonetheless, Allen and the Firm argue that FINRA failed to independently consider the totality of the circumstances related to the Application because the NAC failed to consider Allen

OS Received 02/23/2023

and the Firm's various arguments that sought to undermine the findings and legal conclusions of the New York court and the disqualifying injunctions. Applicants point to so-called "mitigating evidence," which consists of language from the Limited Partnership's organizational and offering documents and testimony of some of the investors in the Limited Partnership supportive of Allen that they claim shows that Allen was permitted to invest Limited Partnership funds in Parent and allegedly exonerates him from any findings of wrongdoing.[21] Applicants admittedly presented these arguments and evidence to the New York trial court and appellate courts, but they now claim the courts ignored these matters and that the NAC should have considered them in assessing the Application.

Applicants, however, are simply trying to relitigate the merits of the underlying disqualifying injunction. It is well-established that they are estopped from re-litigating here the factual findings or legal conclusions underlying the New York court's injunctions against Allen that support FINRA's decision to deny the Application. *See Escobio*, 2018 SEC LEXIS 1512, at *30 (holding that "[t]he NAC 'correctly adhered to [FINRA's] long-standing policy of prohibiting collateral attacks on underlying disqualifying events.'"). Contrary to applicants' assertions, the NAC was not obligated to reconsider arguments and evidence aimed at undermining the New York court's findings—arguments and evidence that they had

[21] Even assuming, arguendo, that applicants are correct that the NAC should have considered that the relevant operational and offering documents permitted Allen to use investor funds to purchase Parent's securities (such that a portion of the findings of wrongdoing made by the New York court could be called into question), the NAC found—as "a separate and independent basis" to deny the Application—that the Firm failed to show that it could stringently supervise Allen. *See* RP 2179-82. Applicants' argument that the NAC could have approved the Application if it had considered the operational and offering documents at issue is flawed because it ignores this separate and independent basis for denial. *See* App. Br., at 34.

unsuccessfully presented to that court and the New York appellate courts—regardless of the label applicants attach to their arguments and evidence.[22]

Indeed, under similar circumstances, the Commission affirmed FINRA's denial of a statutory disqualification application and rejected applicants' efforts to undermine the event underlying the disqualification. *See Escobio*, 2018 SEC LEXIS 1512. Escobio was disqualified because of a federal court injunction entered in connection with an extensive commodities scheme. Escobio and his firm argued that the NAC's denial of the firm's application to continue to employ Escobio was inconsistent with the Exchange Act because the NAC failed to reexamine the facts underlying the permanent injunction. "According to Escobio, without such review FINRA could not appropriately weigh all the facts and circumstances surrounding his statutory disqualification and the proposed supervisory plan." *Id.* at *30. The Commission rejected this argument and held that "collateral estoppel prevented Escobio from re-litigating both the factual findings and legal conclusions of the injunctive action." *Id.*

Here, the NAC considered the totality of the circumstances surrounding the Application, including the disqualifying event, how much time had elapsed since its occurrence, Allen and the

[22] Allen made the arguments and presented the evidence in support thereof to the New York trial court, and it still found that Allen engaged in extensive misconduct. In fact, and contrary to applicants' assertion that these arguments and evidence were ignored, the trial court held that Allen's investment of the Limited Partnership's funds in Parent was inconsistent with the investment thesis contained in the very documents that applicants argue that the trial court ignored. Furthermore, Allen made the same arguments, based upon the same evidence that he presented to trial court, to two appellate courts and those courts affirmed the lower court's findings and conclusions. Applicants do not explain how or why the New York appellate courts affirmed the lower court's decision if the arguments and exculpatory evidence purportedly ignored by the lower court conclusively showed that Allen did not engage in any misconduct. And as set forth above, the New York trial court found that Allen engaged in extensive misconduct beyond simply investing the Limited Partnership's funds in Parent when he was prohibited from doing so. *See infra* Part II.D.3-4.

Firm's history, Schunk's history, Allen's proposed role and duties at the Firm, and Allen's proposed supervision. It independently considered, based upon the fully litigated disqualifying injunctions, that the court's findings contained therein were serious and reflected poorly on Allen's ability to comply with securities rules and regulations going forward. The NAC was not required to reconsider arguments and evidence—even if they are mischaracterized as "mitigating"—presented to the state court that entered the disqualifying injunctions and subsequent appellate courts in an effort to undermine or somehow discount those findings. *See id.*; *Weiss*, 2013 SEC LEXIS 837, at *17 (holding that "we have long held that principles of collateral estoppel dictate that a respondent must not be permitted to retry the merits of a proceeding that results in conviction or an injunction"); *Robert J. Sayegh*, 52 S.E.C. 1110, 1112 (1996) (rejecting applicant's arguments against numerous findings of the court entering the disqualifying injunction and stating that "[t]he merits of that proceeding, however, are not before us. Sayegh has had the opportunity to litigate these issues before the courts. Collateral estoppel prevents retrial of the facts underlying the permanent injunction.").[23]

Allen and the Firm state that they are not asking the Commission "to do anything extraordinary." *See* App. Br., at 35. But in fact, they are. Applicants wanted FINRA to deeply undermine a New York trial court that entered two orders, after nine days of evidentiary hearings where extensive findings and credibility determinations were made, that conclusively found

[23] *Cf. Talman Harris & Victor Alfaya*, Admin Pro. File Nos. 3-17874 and 317875, SEC Release No. ID-1402, 2020 SEC LEXIS 4065, at *3 (Initial Decision Sept. 2, 2020) ("It is well established that the Commission does not permit criminal convictions or civil injunctions to be collaterally attacked in its administrative proceedings."); *Charles Phillip Elliott*, 50 S.E.C. 1273, 1276-77 n.16 (1992) (stating that "this proceeding is concerned with the factual existence of Elliot's conviction and its public interest implications. Elliott's conviction has been established, and Elliott may not challenge its validity.").

Allen had engaged in widespread and serious securities-related misconduct. They wanted FINRA to engage in this relitigation even after two appellate courts subsequently affirmed the trial court's findings and dismissed Allen's appeals. Applicants' request goes even further, as they ask that FINRA be required to consider arguments that were repeatedly made and evidence that was repeatedly presented to these courts in connection with the numerous adverse rulings against Allen. The Commission should reject applicants' thinly disguised attempt to circumvent the New York court's adverse findings.

Applicants also argue that accepting FINRA's arguments that they cannot collaterally attack the underlying disqualifying injunction is tantamount to permitting FINRA to "blindly accept every court order as inviolate" even when a court is wrong (as it allegedly was here) and that this would somehow be unjust, unfair, and contrary to FINRA's requirement to independently consider a membership application based upon the totality of the evidence. *See* App. Br., at 1. Applicants' arguments miss the mark. The New York courts were the proper forums to litigate these matters, and Allen extensively litigated before those courts. He presented the arguments and evidence to the New York courts that he claims that the New York courts ignored and the NAC should have considered, and he lost before the trial court and two appellate courts. If Allen's appeal had any merit and he had been successful in obtaining reversal of the trial court's decision, he would have had a remedy before FINRA—the basis for the statutory disqualification proceeding would no longer exist and he could move to have the proceeding dismissed. *Cf. Gershon Tannenbaum*, 50 S.E.C. 1138, 1140 (1992) (rejecting argument that excluding individual from the securities business where he was disqualified as a result of a preliminary injunction that was still awaiting final determination is unfair and stating that

"[s]hould a respondent ultimately prevail, the justification for any regulatory action based on a preliminary order would disappear and such action would be vacated").

In sum, applicants want the Commission to require FINRA to permit unsuccessful litigants to relitigate an underlying disqualifying order if they disagree with it and it adversely impacts a membership continuance application. This is untenable and contrary to years of precedent precluding collateral attacks in a FINRA proceeding. Consequently, the Commission should reject applicants' arguments and dismiss this appeal.

V. CONCLUSION

The NAC properly concluded that Allen's continued association with the Firm presented an unreasonable risk of harm to the markets and investors. It based its conclusion on two independent bases, each of which is fully supported by the record and is a well-established factor for the NAC to consider in analyzing an application such as the Firm's. The Commission should follow its precedent and reject Allen and the Firm's attempt to relitigate and call into question the findings and legal conclusions underlying the court orders that form the basis for Allen's disqualification. Allen lost repeatedly in the New York state courts, and his collateral attacks should likewise fail in this forum. For all of these reasons, the Commission should dismiss applicants' appeal.

Respectfully submitted,

/s/ Andrew Love
Andrew Love
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8281
andrew.love@finra.org
nac.casefilings@finra.org

February 23, 2023

CERTIFICATE OF COMPLIANCE

I, Andrew Love, certify that this Brief in Opposition to Application for Review (File No. 3-21222) complies with the length limitation set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 11,811 words.

I further certify that I have complied with the Commission's Rules of Practice by filing a brief that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

/s/ Andrew Love

Andrew Love
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8281
andrew.love@finra.org
nac.casefilings@finra.org

Dated: February 23, 2023

CERTIFICATE OF SERVICE

I, Andrew J. Love, certify that on this 23rd day of February 2023, I caused a copy of the foregoing FINRA's Brief in Opposition to Application for Review, Administrative Proceeding No. 3-21222, to be filed through the SEC's eFAP system on:

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

and served by electronic mail on:

John K. Wells
Greenberg Traurig, LLP
One International Place, Suite 2000
Boston, MA 02110
wellsj@gtlaw.com

/s/ Andrew Love

Andrew Love
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8281
andrew.love@finra.org
nac.casefilings@finra.org