UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

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

APPLICATION FOR REVIEW
OF FINRA NAC DECISION IN
SD-2265

FILE No. 03-21222

LAURENCE G. ALLEN'S REPLY TO FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

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ARGUMENT

1. FINRA Failed to Address, Counter or Oppose Mr. Allen's Argument that the New York Trial Court Omitted Material Mitigating Evidence.

Applicant Laurence G. Allen ("Mr. Allen") demonstrated in his Opening Brief that this case is distinguishable from Commission precedent because it concerns the *omission* of material mitigating evidence by the trial court whose orders gave rise Mr. Allen's statutory disqualification. Mr. Allen argued that FINRA's National Adjudicatory Council ("NAC") was required to consider and "independently evaluate" these omissions as part of the "totality of the circumstances" regarding his membership continuance application but failed to do so here. An omission raises entirely different issues than the typical case because it involves material evidence that exists in the trial record but was not included in a court order – and therefore the NAC cannot properly consider the totality of the circumstances giving rise to statutory disqualification unless it also evaluates the evidence that was omitted.

In its Brief in Opposition ("Opposition"), FINRA ignored Mr. Allen's arguments regarding the court's omissions. FINRA acknowledged the *evidence* which Mr. Allen contends was omitted but failed to address the actual omission of that evidence by the trial court. And for good reason: substantial mitigating evidence exists as a matter of fact, was presented to the court and clearly contradicts the court's findings and conclusions, but it is impossible to justify or defend the court's failure to acknowledge that evidence or to address it on the merits.

Throughout the Opposition, though, FINRA drops subtle hints that Mr. Allen's argument is compelling. For example, at footnote 9, FINRA writes that:

> Assuming, arguendo, that the relevant documents permitted [Mr. Allen] to use investor funds to invest in Parent (which appears to be inconsistent with the express findings of the New York court) …[1]

[1] Opposition, p. 11, fn. 9.

This is the point that Mr. Allen has been making repeatedly: the court's findings are fundamentally inconsistent with (and are in fact contradicted by) the plain language of the Fund's operative contracts – the Limited Partnership Agreement ("LPA") and Private Placement Memorandum ("PPM") – regarding investments in affiliates, and the only way the court could reach those findings was to omit reference to the contracts, as reference to the relevant provisions would contradict the fraud finding that the court was making. By acknowledging that the "express findings" of the court "appear to be inconsistent with" the relevant contracts (or vice versa), FINRA confirms Mr. Allen's argument.

In addition, at footnote 21, FINRA writes:

> 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) …

Again, by acknowledging (even if solely for the sake of argument) that "the findings of wrongdoing by the New York court could be called into question" and that Mr. Allen may be "correct," FINRA is confirming the very points that Mr. Allen has been making.

At other points in the Opposition, FINRA acknowledges (correctly) that Mr. Allen presented the contracts to the court and argued that his actions were allowed under the contracts – thus demonstrating that that the omitted evidence was properly before the court. *See* Opposition, p. 3 ("Allen and the Firm actively litigated these issues before the New York trial court"); p. 34 ("Applicants admittedly presented these arguments and evidence to the New York trial court"). And at page 10 of the Opposition, FINRA notes specifically that:

> 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. 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.[2]

All true. But what FINRA neglects to mention at any point in the Opposition, however, is that despite the substantial evidence presented by Mr. Allen on this point, the court *omitted any reference to that evidence* in its orders. FINRA makes one oblique reference to Mr. Allen's argument (Applicants "now claim the courts ignored these matters and that the NAC should have considered them in assessing the Application")[3] but quickly dismisses it as an improper collateral attack and an attempt "to relitigate the merits of the underlying disqualification injunction."[4] FINRA did not substantively address, counter or oppose Mr. Allen's argument regarding the court's material omissions, nor his argument that this case is unique because of those omissions. In failing to address these arguments, FINRA effectively concedes the point.[5]

The omissions were material not only because they allowed the court to reach erroneous conclusions, but also – and just as importantly – because they created a false public narrative regarding Mr. Allen that continues to prejudice him to this day, including in this proceeding and in the court of public opinion. Although Mr. Allen presented a substantial defense that included documentary evidence (including the LPA and PPM, which should have been dispositive), numerous lay witnesses (including investors who confirmed Mr. Allen's contractual authority) and multiple expert witnesses (including a prominent Yale Law School professor who opined that the Fund's operative contracts permitted investments in affiliate entities), the court failed to

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[2] Opposition, p. 10 (internal citations omitted).
[3] Opposition, p. 34.
[4] *Id.*
[5] Relatedly, FINRA's attempt to minimize or belittle the mitigating nature of the omitted evidence is unavailing given its acknowledgement that the language of the operative contracts and the express findings of the court are "inconsistent" with one another. *See* Opposition, p. 2 ("alleged" mitigating evidence), p. 34 ("so-called" mitigating evidence), p. 36 (evidence "mischaracterized as 'mitigating'" by Mr. Allen). The contracts say what they say (General Property "may purchase property in" an affiliate); if the court said otherwise (General Partner "fraudulently purchased equity in" an affiliate), the contracts are evidence in mitigation of the court's findings.

acknowledge *any* of that significant mitigating evidence in its orders. As a result, the court's orders present a one-sided and highly misleading narrative and do not accurately reflect the evidence and testimony introduced by both sides in the court record. This was grossly unfair and prejudicial to Mr. Allen, as no observer reading the court's orders would ever have any indication that there was a substantial narrative presented at trial contrary to the one expressed in the orders.

Further to that point, Mr. Allen's arguments are not mere "collateral attacks" on the court's orders, as FINRA suggests. If a court omits material evidence from its orders, and those orders form the basis for statutory disqualification and later become relevant to a FINRA membership continuance application, how else is an applicant supposed to raise and address those omissions with the NAC or the Commission? An omission by definition is something that is *excluded from* and thus does not appear on the face of a court order. The evidence excluded would not be known to anyone not familiar with the underlying court record. The only manner in which one might bring attention to the omission is to do just that – bring attention to it by raising it as a matter of concern. Regardless of whether it is termed a "collateral attack" or a consideration of the "totality of the circumstances," the terminology matters less than the point. As Mr. Allen argued in his Opening Brief, the evidence exists and is real – a point which FINRA seems to concede in the Opposition – notwithstanding whether the court omitted it from its orders. If that evidence mitigates the court's findings (or exonerates a litigant entirely), then it is certainly relevant and germane to any subsequent proceeding arising from the court's orders (such as the membership continuance application proceeding before the NAC and now the Commission), and it constitutes part of the "circumstances" which the NAC must consider in "independently" evaluating the application.

FINRA has no rejoinder to this point other than to defend reflexively the NAC's refusal to look outside the four corners of the court's orders. But in so doing FINRA effectively ignores every argument that Mr. Allen made in his Opening Brief. FINRA is content to treat this matter as entirely ordinary when Mr. Allen has demonstrated that it is anything but. FINRA's position is wrong and should be rejected.

2. FINRA Appears to Concede that Mr. Allen's Investment of Fund Assets in an Affiliate Was in Fact Authorized by Contract.

FINRA appears to concede tacitly that the LPA and PPM permitted the affiliate investments which the court found to be fraudulent. At no point in the Opposition does FINRA deny that the pertinent language in the contracts exists (*i.e.*, that the General Partner was permitted to "purchase property in" an affiliate entity), nor does it ever assert that Mr. Allen is wrong in arguing that the contracts permitted the General Partner to invest in NYPPEX Holdings, the affiliate entity. Nor does FINRA ever attempt to square the plain language of the LPA and PPM with findings by the court that FINRA readily acknowledges were "inconsistent" with the contract language. FINRA also confirms that Mr. Allen "obtained a legal opinion in support of his claim that the operating and offering documents permitted him to invest" in an affiliate.[6] FINRA acknowledges that the Fund's investors "opined that… Allen was permitted to use the investor's funds to invest in Parent pursuant to the Limited Partnership's operating agreement and offering documents."[7] And, at footnote 21, FINRA asserts, even if arguendo, that Mr. Allen may be "correct" and that a portion of the court's findings "could be called into question." In effect, the Opposition concedes, in roundabout fashion, the very point that Mr. Allen has stressed, which is

[6] Opposition, p. 10.
[7] Opposition, p. 15.

that the LPA and PPM permitted the investments which the court found to be "fraudulent" – which, in turn would make the court's findings erroneous and fundamentally wrong.

Recognizing this, FINRA attempts to change the subject, arguing that "the court's findings of misconduct" were "significantly broader than simply using investor funds to invest in the Fund's parent without the authority to do so." Opposition, p. 3, 11. Mr. Allen will address this point in more detail below, but it bears note here that the purported affiliate investment fraud was not an insignificant matter of "simply using investor funds" to invest in an affiliate: it was the *central allegation* in NYAG's complaint and by far the largest purported fraud. FINRA is attempting to minimize the court's findings on this point because it appears to recognize that the court was wrong. But if FINRA is going to "assume, arguendo, that the relevant documents permitted [Mr. Allen] to use investor funds to invest in Parent"[8] (which is true), and if it is going to "assume, arguendo" that "a portion of the findings of wrongdoing made by the New York court could be called into question" (which is also true), then it must also concede – arguendo or not – that the court was wrong in accusing Mr. Allen of "widespread, highly serious, securities-related misconduct" and a "decade-long fraudulent scheme" to enrich himself "at the expense of investors," as those findings were based *primarily and in substantial part* on Mr. Allen's investment of nearly $6 million in Fund assets in an affiliate entity, NYPPEX Holdings. And if the court's findings on that point were wrong (which the Opposition seems on the verge of acknowledging, as discussed above), then the entire case – *i.e.*, the event leading to Mr. Allen's statutory disqualification – is subject to question.

[8] Opposition, p. 11, fn. 9.

3. FINRA Overstates the Nature of "Other Fraudulent Conduct."

Seemingly in recognition of that point, FINRA repeatedly stresses in the Opposition that Mr. Allen was found liable not just for making affiliate investments but for "other fraudulent conduct," and that the court's findings were "significantly broader" than the affiliate investments.[9] This overstates the case for several reasons.

First, as noted above, the allegation that Mr. Allen's investment of millions of dollars in an affiliate entity was *the central aspect* of NYAG's fraud case against Mr. Allen; it was highlighted in the opening paragraphs of the complaint and was the main headline for the action ("Allen Invested ACP's Assets in NYPPEX and Perpetrated a Fraud on Investors").[10] There was nothing in the action "significantly broader" than this finding.

Second, the purported affiliate investment fraud was not only central but also the threshold allegation from which all other allegations flowed. If one was inclined to believe that Mr. Allen "perpetrated a fraud on investors" by "diverting" Fund assets to an affiliate entity, one might also be inclined to believe that he engaged in other misconduct, as the affiliate investment allegation was a significant (purported) fraud which suggested a likelihood of other frauds. Once the court determined that Mr. Allen engaged in fraud by investing in NYPPEX Holdings in violation of the Fund's operative contracts, the floodgates were open: everything that Mr. Allen was alleged to have done over the past decade was suspect. But if the main finding by the court was wrong, and Mr. Allen did not "fraudulently" cause the Fund to invest in NYPPEX Holdings (and in fact was permitted to do so by contract), then the remaining allegations lose all context.

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[9] Opposition, p. 11, fn. 9. *See also* p. 3 (court found "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"); p. 35, fn. 22 (the "court found that Allen engaged in extensive misconduct beyond simply investing the Limited Partnership's funds in Parent").

[10] R-900.

Third, much of the "other fraudulent conduct" referred to by FINRA was specifically related to the purported affiliate investment fraud. For example, the court found that Mr. Allen provided "fraudulent investment advice" – but that allegation concerns advising the Fund (in Mr. Allen's capacity as investment adviser) to invest in NYPPEX Holdings. If the investments themselves were not "fraudulent," then advising the Fund to make those investments was not "fraudulent" either. Likewise, the court found that Mr. Allen made misrepresentations and omissions to investors, but those purported misrepresentations and investments concerned the investments in affiliates. The court also found that Mr. Allen fraudulently caused the Fund to make "oversized" investments in an affiliate; that finding, again, relates to the central fraud allegation that Mr. Allen was prohibited from investing in affiliates.

Ultimately, NYAG alleged and the court found three "frauds" that were purportedly part of a "decade long scheme" designed to enrich Mr. Allen at the expense of investors: (1) investing in an affiliate, NYPPEX Holdings, (2) taking carried interest distributions, and (3) paying NYPPEX Holdings operating expenses. Any other findings were tangential to those matters. Mr. Allen will address briefly the second and third purported frauds below, as well as a separate finding concerning the valuation of NYPPEX Holdings. In so doing, Mr. Allen stresses again that this is not a "collateral attack" on the court's orders. FINRA raised these issues in the Opposition by pointing to the court's findings of "other fraudulent conduct," and Mr. Allen has a right to reply to FINRA's argument. And, as with the purported affiliate investment fraud, the key is not what the court wrote in its orders but what it left out. As discussed below, with each finding the court omitted significant mitigating evidence presented at trial. The Commission will never know what the court omitted unless Mr. Allen addresses it.

A. Carried Interest Distributions.

The second allegation of purported fraud concerned the distribution of carried interest to Mr. Allen (and others) in 2013, 2015 and 2017 pursuant to amendments to the LPA that were approved by majority votes of the Fund's investors (the "Limited Partners"). In order to get around the inconvenient fact that the Limited Partners themselves *approved* the distribution of carried interest on three separate occasions, NYAG alleged and the court found that Mr. Allen "procured" those amendments by purportedly misrepresenting his "entitlement" to carried interest (a word which never appeared in any proposed amendment and was the court's own creation). But (i) the proposed amendments were prepared and reviewed by legal counsel, (ii) the proposed amendments were also reviewed and approved by the Limited Partners' advisory committee ("LPAC"), which represented the interests of the Limited Partners (iii) the primary purpose of the proposed amendments was to provide early liquidity opportunities to the Limited Partners, not to distribute carried interest, (iv) the proposed amendments were voted on and approved by large majorities of the Limited Partners on three separate occasions over the course of more than four years, (v) no Limited Partner ever complained about the proposed amendments or suggested that there was a misrepresentation contained within in them, (vi) carried interest was distributed not only to Mr. Allen but also to numerous other members of the General Partner team, (vii) the court altered one sentence in the proposed amendments by replacing part of the sentence with a set of dots indicating an ellipsis, which changes the meaning of the passage, and (viii) the amount which Mr. Allen actually received in carried interest distributions (less than $1 million) was far less than was misrepresented by both NYAG and the court ($3.4 million), as the latter figure represented the total amount paid to all members of the GP team, not solely to Mr. Allen. As Mr. Allen noted in his Opening Brief, the court omitted all of this mitigating evidence from its orders.

B. Purported Payment of NYPPEX Operating Expenses.

The court found that "[a]dditionally, Allen caused ACPX to pay approximately $750,000 in NYPPEX's operating expenses in August-October 2018, even though such expenses were the General Partner's responsibility."[11] The court's "finding" on this allegation consisted of that one sentence. At no point did the court cite any evidence or testimony to support its statement that the sum at issue did in fact represent "NYPPEX operating expenses" or that it was the "General Partner's responsibility." And again, the court omitted mitigating evidence which would have contradicted its finding.

For example, the court omitted reference to testimony that the $750,000 was not for "NYPPEX operating expenses" but instead represented quarterly expense allocations made pursuant to an expense sharing agreement between related entities.[12] In general, NYPPEX Holdings, LLC (which FINRA has defined as "Parent") pays expenses on behalf of its affiliates (which include the Fund, NYPPEX, Inc., and others under the ACP Investment Group umbrella). Thereafter, expenses are allocated among the affiliates according to each affiliate's operating agreement and an Affiliate Services Agreement ("ASA") between them.[13] The court omitted any reference to the ASA or this arrangement. It also omitted reference to testimony that "ACP X does not pay expenses of NYPPEX."[14] It also omitted reference to Sections 4.02, 4.03, 4.04 and 2.02 of the LPA which address "Partnership Expenses" and provide that the Fund (and not the General Partner) is responsible for payment of those expenses.[15] It also omitted reference to testimony that expense allocations are a FINRA requirement and that FINRA regularly examined the ASA and

[11] R-953.
[12] https://iapps.courts.state ny.us/nyscef/ViewDocument?docIndex=YHUBeL8u8M7daXxNiF7y9g== , p. 512-514.
[13] *Id.*, p. 513.
[14] Id., p. 514.
[15] https://iapps.courts.state ny.us/nyscef/ViewDocument?docIndex=79bV2JPgr8LSmlrZkjdq2w==

expense allocations over the course of nearly eighteen years.[16] The court also omitted reference to testimony from the FinOp for NYPPEX Holdings that "[t]he books and records of those three companies [NYPPEX Holdings, LLC, NYPPEX, LLC and ACP Investment Group, LLC] appeared to be reasonably complete and accurate and … consistent with the affiliate service agreements among the three companies."[17] In summary, the court made a one-sentence finding with no factual support and which omitted all mitigating evidence that contradicted that court's finding.

C. Valuation of NYPPEX Holdings.

Lastly, and in connection with the purported affiliate investment fraud, the court found that Mr. Allen misrepresented to investors the value of NYPPEX Holdings, LLC, and that the valuation of NYPPEX Holdings was "wildly inflated." Again, however, the court omitted mitigating evidence – namely, Section 6.06(k) of the LPA regarding the valuation of investments, which states specifically that the value of private company investments is to be determined by the General Partner in its discretion.[18] Here, the General Partner went well beyond what was required and solicited two separate independent valuations of NYPPEX Holdings, which were consistent with one another and both significantly lower (approximately $0.87 per share) than the per-share price at which NYPPEX Holdings had last raised capital ($2.00 per share) with outside accredited investors. For its part, NYAG did not obtain a valuation of NYPPEX Holdings at all and did not

[16] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=YHUBeL8u8M7daXxNiF7y9g== , p. 513. Every two years or so over the course of approximately eighteen years, FINRA examiners would examine the books and records of NYPPEX, including the ASA and expenses allocated to affiliate entities, including the Fund.

[17] https://iapps.courts.state ny.us/nyscef/ViewDocument?docIndex=_PLUS_4c_PLUS_DqMW6iKiFWGaX3_PLUS_IDQ==

[18] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=79bV2JPgr8LSmlrZkjdq2w== , § 6.06(k): "All other non-freely tradable securities will be valued initially at cost, with subsequent adjustments to values that reflect selected comparable investments, third party transactions in the private market, or third party appraisals. All securities will be valued by the General Partner in its discretion, on dates that are as near as reasonably practical to the portfolio valuation date."

purport to offer expert evidence or testimony regarding the valuation of NYPPEX Holdings at trial; rather, it offered the testimony of a purported expert who conceded that he had never valued a financial technology company or provided expert testimony on business valuation, that he only had a "general understanding" of NYPPEX's business and that he was unsure what the valuation should be for NYPPEX Holdings:

> Q. Mr. Dolgoff, what is the value of NYPPEX?
> A. I have not offered any opinion on what its value is.[19]

Nevertheless, the court concluded the independent valuations were too high, without any contrary evidence before it. Put simply, the court in its own subjective opinion did not believe the valuations so it discounted them entirely and concluded that Mr. Allen had committed fraud in representing the results of the independent valuations to investors.[20]

In summary, if one concedes (and FINRA does not argue otherwise) that Mr. Allen was authorized by contract to make investments in affiliates – by far the largest purported fraud – then the remaining allegations are either moot (fraudulent investment advice and misrepresentations and omissions regarding those investments) or inconsequential (taking carried interest distributions specifically voted on and approved by the Limited Partners, allocating expenses pursuant to an affiliate services agreement and relying on business valuations performed by multiple independent valuation experts). The problem with the fraud narrative was that it was a

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[19] https://iapps.courts.state ny.us/nyscef/ViewDocument?docIndex=c5eS8GmQ5gLnFIM3K636Yw== , p. 552-556.

[20] As an anecdotal counterpoint to the court's unsupported opinion that the NYPPEX Holdings valuations were based on "fanciful projections" and could not possibly be valued at approximately $0.87 per share, a competitor in the marketplace has since emerged, initiated a public offering in 2022 and is currently trading (as of the date of this brief) at $1.77 per share, with a market capitalization of more than $300 million. *See* https://finance.yahoo.com/quote/FRGE/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAFRc1BOOscJntLx6yqgrzwJGNf2wzpjDuXD1-VEkVFVjZqqsVd3uyGCRdtzgCvcRakrmQlyugaD0XGQhGZJgZxzhCRnSMJ4pSNZFYQkCnlCM8kYZMLV6a2JDGd_uA6n_SCJBeeDrlKsn2Q1aruE4lmeFjQKSISsUZJ-1-p5UMAgu
The market for secondary market liquidity exists, but the court – in its zeal to find that Mr. Allen (a pioneer in this space) had engaged in "fraud" – simply ignored the evidence and refused to accept it.

Frankenstein monster consisting of completely unrelated and noncontroversial actions over the course of more than a decade which NYAG cobbled together to make it appear as if Mr. Allen was engaged in a longstanding and massive scheme of wrongdoing. Stripped of its core, however, the disparate pieces of the monster simply fall part.

4. <u>The Court Omitted Mitigating Evidence Regarding Robert Zimmel</u>.

In the Opposition, FINRA notes that significant evidence against Mr. Allen came from "a former employee of the Firm and Parent who testified that 'every certification that he and Mr. Allen signed from 2013 to 2017… was a lie."[21] The court found "the testimony of the former employee … to be credible" (while finding Mr. Allen's testimony "unworthy of belief").[22] Because FINRA has raised the issue – and because, once again, the court omitted significant mitigating evidence – Mr. Allen will address the former employee, Robert Zimmel.

Mr. Zimmel was the treasurer of NYPPEX Holdings, LLC from 2012 to 2017.[23] He was effectively the NYAG's "star witness." The substance of Mr. Zimmel's testimony was that literally "every" certification and accounting report he had signed off on over a period of more than four years had been false, due to alleged pressure from Mr. Allen and the threat of termination. Mr. Zimmel testified at the preliminary injunction hearing and at trial, and the court wrote in its final order after trial that "Zimmel's testimony about defendants' various defalcations is entirely credible."[24] But the court also acknowledged that Mr. Zimmel "apparently made 'whistleblower' complaints" about Mr. Allen to the SEC and to FINRA "but no action was taken with respect to these complaints."[25] The fact that neither the SEC nor FINRA saw fit to take action based on Mr.

[21] Opposition, p. 9.
[22] Opposition, p. 12.
[23] R-881.
[24] R-953.
[25] R-942.

Zimmel's allegations should have been a red flag for the court but apparently was not.[26] And as was its pattern, the court omitted mitigating evidence regarding Mr. Zimmel's testimony.

Sonya Still was former legal counsel for NYPPEX and ACP (and a former SEC attorney for nine years). She provided testimony at trial that "[b]ased on my dealings with Mr. Zimmel, it was simply not in his nature or character to sign off on accounting reports or certifications he believed to be inaccurate."[27] Ms. Still also testified that "Mr. Zimmel and Mr. Allen often conflicted with each other on issues, and at times, had an acrimonious relationship. This acrimonious relationship seemed to be a contributing factor as to how Mr. Zimmel conducted himself in dealings with Mr. Allen during and after Mr. Zimmel's resignation from the Firm."[28] The court omitted Ms. Still's testimony in its orders.

Amra Pasic was the accounting manager for NYPPEX Holdings, LLC and worked directly under Mr. Zimmel. She testified that she had a "very good working relationship" with Mr. Zimmel but stated that "I believe Bob Zimmel was not being truthful when he testified, he felt he was forced to sign off on things that he did not review because he always reviewed things and all of his books and records were always in order."[29] She testified further that:

> I do not believe that he would ever have signed anything without reviewing them first. I do not believe he would have signed an audit review without reviewing it. It is not the standard that he held himself too. I say this because I never witnessed Larry Allen force someone, pressure someone or threaten someone to sign a document. In fact, Bob Zimmel never mentioned to me that Larry Allen had forced him to sign something. Bob Zimmel never told me that documents he signed he was forced to do so. He never said this.[30]

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[26] https://iapps.courts.state ny.us/nyscef/ViewDocument?docIndex=YHUBeL8u8M7daXxNiF7y9g==, p. 449-450.
[27] https://iapps.courts.state ny.us/nyscef/ViewDocument?docIndex=IHwMy/x0oSn64HSTVPK9xA==
[28] *Id.*
[29] https://iapps.courts.state ny.us/nyscef/ViewDocument?docIndex=J8aWKEShPRlQ/8h9XsVXXw==
[30] *Id.*

Consistent with Ms. Still's description of an "acrimonious" relationship between Mr. Zimmel and Mr. Allen, Ms. Pasic testified:

> When Bob [Zimmel] and Larry [Allen] were in the same room, they would act friendly or cordial, but Bob would disparage Larry outside of Larry's presence. I recall on numerous occasions when Bob told me that if Larry were to fire him, ***"he would take Larry down with him."*** I do not recall specific dates, but I recall him saying this many times. Bob constantly professed his unhappiness about Larry being an "Asshole." Bob would often tell me about his disappointments with Larry. Bob would complain to me about his compensation, about how he deserved more. Bob told me he was upset about not getting additional compensation from Larry and this left a very bad taste in his mouth. Bob would always act cordial in front of Larry. However, I could see there was friction between Bob and Larry as Bob showed me his email exchanges with Larry.
>
> Bob told me he was approached by the New York Attorney General and that they were looking to the company's dealings. ***I think that Bob may have a vendetta against Larry***, but taking Larry down is going to cost several people their jobs and hurt several families as a result. I am disappointed in how Bob acted after he left NYPPEX and in his dealings with Larry. I had always held him in high regard. However, my opinion of him has been ruined. ***I think Bob is acting out of a vendetta against Larry.*** (Emphasis added.)[31]

The court omitted Ms. Pasic's testimony in its orders.[32]

Michael Schunk was the chief compliance officer for NYPPEX Holdings and ACP Investment Group and was responsible for human resources. Mr. Schunk testified:

> Mr. Zimmel never told me he was lying or made any false certifications on accounting records or any other certifications provided to any government regulators. I have no reason to believe that Mr. Zimmel made any false certification or statement, or that any accounting reports were falsified or not in order.[33]

The court omitted Mr. Schunk's testimony regarding Mr. Zimmel in its orders.

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[31] *Id.*

[32] Mr. Zimmel confirmed the testimony of Ms. Still and Ms. Pasic, acknowledging that he used invective to describe Mr. Allen and that he had "heated exchanges," "altercations" and at least one "yelling or screaming match" with Mr. Allen. https://iapps.courts.state ny.us/nyscef/ViewDocument?docIndex=1wtNznpgrWzSYq1Ev2bVWw== , p. 288.

[33] https://iapps.courts.state ny.us/nyscef/ViewDocument?docIndex=D1z31I3Jb_PLUS_2uLoiQ4mfRIA==

In summary, the court found Zimmel's testimony "entirely credible," yet it omitted reference to at least three witnesses who knew him professionally (not even including Mr. Allen) and who testified that his testimony was *not* credible. And, worse, the court found Mr. Zimmel credible without acknowledging evidence regarding possible bias and a motive in testifying against Mr. Allen. The court omitted any reference to Ms. Pasic's testimony that Mr. Zimmel "may have a vendetta" against Mr. Allen and that Mr. Zimmel had bragged "many times" that "he would take [Mr. Allen] down with him."

5. <u>FINRA Continues to Ignore or Minimize the Investors' Perspective</u>.

In his Opening Brief, Mr. Allen asserted that the voice of the Limited Partners – the investors whom securities regulators would purportedly seek to protect – was ignored by the trial court and subsequently by the NAC. In the Opposition, FINRA largely ignored this issue as well. FINRA acknowledged in its factual recitation that Mr. Allen presented Limited Partner affidavits and an amicus brief to the NAC, and that the NAC "gave limited weight" to the affidavits and failed to address the amicus brief at all, but it made no mention of the Limited Partners whatsoever in the Argument portion of the Opposition. Nor did it attempt to address the substantive points raised by the Limited Partners in their affidavits and amicus brief.

The Commission should read the investor affidavits and LPAC amicus brief carefully. Mr. Allen adopts them and incorporates them herein.[34] The New York court did not listen to these investors. Nor did the NAC. Perhaps the Commission now will. These are sophisticated investors who entered into an arms-length contractual relationship with Mr. Allen and they understand that relationship better than anyone, including the NYAG, the New York trial court and the NAC. These are investors who had a direct economic stake in the Fund and a vested interest in knowing

[34] R-1870-1892; R-1842-1869.

whether Mr. Allen engaged in fraud or misappropriated their money. And yet they have stated repeatedly that Mr. Allen did not engage in wrongdoing and that the real harm to their interests has come from NYAG and the court in imposing their own subjective judgment over matters governed by contract.

It remains incredibly bizarre to Mr. Allen that, through multiple court and regulatory actions, not a single adjudicator has ever acknowledged these Limited Partners, much less addressed the substance of what they have to say. If FINRA's goal is "Investor Protection," why then did the NAC ignore an amicus brief submitted by the very investors who have an economic interest at stake, and who represent the interests all of the Fund's Limited Partners? The NAC was required to "independently evaluate" the "totality of the circumstances" giving rise to Mr. Allen's statutory disqualification, yet it gave "limited weight" to the *sworn testimony* of the investors whom Mr. Allen purportedly defrauded and ignored entirely the amicus brief submitted by others of them (an amicus brief which averred its belief that the "views expressed herein represent the views of the majority of Limited Partners in the Fund").

No proceeding against Mr. Allen is fair or impartial if every adjudicator continues to turn a blind eye to investors who provide testimony on his behalf. In what judicial system can only the investors who testify for the government matter? The LPAC represents the interests of *all* of the Limited Partners, and it believes that its views are shared by the *majority* of the investors. Yet no one will listen to what they have to say. That cannot be right. Mr. Allen respectfully requests that the Commission read what the Limited Partners have said and take it into consideration.

6. FINRA Ignored Mr. Allen's Argument that the NAC Failed to Independently Evaluate the Application Based on the Totality of the Circumstances.

The sum of FINRA's Opposition is that the "record supports fully the NAC's conclusion that the seriousness of the misconduct underlying Allen's statutory disqualification" and that the

NAC "carefully considered the nature and seriousness of Allen's disqualifying injunctions and Allen's securities-related misconduct underlying the injunctions[.]"[35] In short, FINRA contends that the NAC did its job by adopting the court's findings. But the NAC did not consider any argument raised by Mr. Allen concerning the trial court's numerous material omissions as discussed herein. The NAC did not "independently evaluate" the "totality of the circumstances" giving rise to statutory disqualification, and FINRA made no effort in the Opposition to argue otherwise, except to suggest that adopting the court's findings was sufficient. But as Mr. Allen has argued, the "totality of the circumstances" includes much more than just the court's orders – particularly if evidence exists as a matter of fact – and merely adopting the findings of a court when presented with evidence that *the court omitted material evidence* does not constitute an "independent evaluation" of those circumstances.

At page 37 of the Opposition, FINRA contends that Mr. Allen is requesting that "FINRA [the NAC] be required consider arguments that were repeatedly made and evidence that was repeatedly presented to these courts in connection with the numerous adverse rulings against Mr. Allen" and suggests that the Commission "should reject applicants' thinly disguised attempt to circumvent the New York court's adverse findings."[36] What FINRA fails to acknowledge in that passage is Mr. Allen's argument that although he repeatedly made arguments and presented evidence to the court, and although the court made "numerous adverse findings," those adverse findings exist solely because the court *omitted* the arguments and evidence that Mr. Allen presented, because those arguments and evidence contradicted the adverse rulings. The New York court wanted to believe that Mr. Allen engaged in fraud because the NYAG said that he engaged in fraud, so it refused to acknowledge all evidence and testimony which indicated that Mr. Allen

[35] Opposition, p. 22.
[36] Opposition, p. 37.

did not engage in fraud, including contracts which specifically allowed the actions which the court held were fraudulent. And now FINRA refuses to acknowledge that the court refused to acknowledge material evidence, which creates a self-perpetuating cycle of denialism.

In summary, FINRA effectively ignored every argument that Mr. Allen raised in the Opening Brief and is essentially arguing a different case. FINRA repeats the common refrain that Mr. Allen is "simply trying to relitigate the merits of a disqualifying injunction" and cites precedent that is inapposite.[37] To the best of Mr. Allen's knowledge, the Commission has never considered a case concerning the omission of material evidence by a trial court. As Mr. Allen noted in his Opening Brief, this is a rare case with unique facts and is different from 99% of the cases which come before the Commission. The Opposition's refusal to acknowledge that point, or to address Mr. Allen's arguments on the merits, presents no opposition at all.

7. <u>FINRA Did Not Directly Address Mr. Allen's Arguments Regarding Supervision</u>.

Possibly in recognition that the trial court action raises numerous concerns, FINRA spent much of the Opposition addressing the NAC's alternate basis for denial of Mr. Allen's application – the purported inadequacy of NYPPEX's heightened supervision plan and the challenges of supervising Mr. Allen because he is the owner of the firm. As an initial matter, though, supervision is inexorably linked with the underlying New York court action: if the court was wrong with regard to its fraud narrative and Mr. Allen was in fact permitted to make the investments in an affiliate which the court held were "fraudulent," then no one would be talking about supervision of Mr. Allen at all. It is likely a rare circumstance in which FINRA would be concerned with the supervision of an individual who acted in accordance with the authority granted to him by contract. And, if the court was wrong, Mr. Allen should never have been statutorily disqualified in the first

[37] Opposition, p. 34.

place. (The trial court's orders still remain subject to appeal, as Mr. Allen is seeking certiorari to the United States Supreme Court.) So any discussion regarding the Firm's supervision plan for Mr. Allen must necessarily acknowledge that supervision is only relevant insofar as the court held (erroneously) that Mr. Allen engaged in wrongdoing.

Apart from that, the Opposition merely makes generic arguments regarding supervision that have little to do with NYPPEX and Mr. Allen. Again, this case is unique, and here for entirely different reasons that have been discussed previously. At no point in the Opposition does FINRA address Mr. Allen's argument that NYPPEX is unlike any other broker dealer and that supervision therefore looks different in context. Instead, FINRA cites *Commonwealth Cap. Sec. Corp.*, 2020 SEC LEXIS 2612, Exchange Act. Rel. No. 89260 (July 8, 2020), for the precedent that the Commission will reject an argument that a firm is "unique" with a "limited business" in finding that a proposed supervisory plan was inadequate. But the Commission found in that case that "CCS is an introducing broker-dealer and is engaged in the business of offering securities of the Funds for sale to the public." *Id. Commonwealth Cap. Sec. Corp.* is inapposite. NYPPEX does not offer securities for sale to the public, and it has no public or retail business. When registered, it connected qualified purchaser accredited private individuals and institutions to arrange secondary private market liquidity. Neither the NAC nor FINRA commented on supervision is the context of this business specifically, notwithstanding that NYPPEX is not a normal broker dealer.

Nor did FINRA adequately address Mr. Allen's argument that denial of his membership continuance application imposes an undue burden on competition because it "effectively preclude[s] NYPPEX from operating." FINRA suggests that the "Commission should reject this argument" but it fails to provide any reason why the Commission should do so except to cite

another inapposite case, *Michael B. Scheft*, 48 S.E.C. 710 (1987). The firm in *Scheft* was a traditional broker dealer and the disqualified individual was a salesperson providing similar services to thousands of registered persons. Here, NYPPEX is one of a very few (and in fact was one of the first) providers of secondary market liquidity for private investors, Mr. Allen was a pioneer in developing this new market and numerous brokerage firms have relied on NYPPEX and Mr. Allen to find secondary liquidity opportunities for their clients. NYPPEX is unique in this regard, but FINRA fails to address this at all.

Lastly, the Opposition contains a significant logical inconsistency. On page 28, FINRA argues that the Commission should reject Mr. Allen's arguments regarding supervision because "the NAC denied the Application for two independent reasons, one of which had nothing to do with Allen's supervision."[38] But on page 34 FINRA argues just the opposite: that if "applicants are correct" regarding the allegations of misconduct, "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."[39] FINRA goes on to say that "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."[40] In other words, if the first reason to uphold the NAC decision is insufficient, then the second will suffice, and if the second is insufficient, then the first will suffice. But these are contradictory assertions. FINRA is effectively conceding that both bases for upholding the NAC decision might be insufficient.

[38] Opposition, p. 28.
[39] Opposition, p. 34, fn. 21.
[40] *Id.*

CONCLUSION

The NAC failed to independently evaluate the totality of the circumstances regarding the events giving rise to Mr. Allen's statutory disqualification, both with respect to the substantive findings of alleged misconduct and with respect to supervision. The Opposition fails to counter or refute that argument. The Commission should reverse and remand this matter to the NAC with instructions to consider and evaluate (rather than dismiss out of hand) all of the circumstances raised by Mr. Allen in connection with his application for membership continuance.

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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 6,883 words, exclusive of the case caption and table of contents.

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 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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