UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Admin. Proc. File No. 3-21933

In the Matter of the Application of NYPPEX, LLC and LAURENCE G. ALLEN For Review of Disciplinary Action Taken by FINRA	:

OPENING BRIEF OF NYPPEX, LLC AND LAURENCE G. ALLEN

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I. INTRODUCTION

Section 19(e)(1)(A) of the Securities and Exchange Act of 1934 ("Exchange Act") provides that if the Commission, "having due regard for the public interest and the protection of investors" finds that the Financial Industry Regulatory Authority ("FINRA") imposes a sanction that causes "*any* burden on competition *not necessary or appropriate* in furtherance of the purposes of this chapter" or that "is excessive or oppressive," it may cancel, reduce, or require the remission of such sanction." (Emphasis added). Applicants NYPPEX, LLC ("Broker Dealer" or "BD") and Laurence G. Allen ("Allen," collectively, "Applicants") request that the Commission cancel or require remission of the sanctions that FINRA has imposed on them, which include a bar on Allen and one-year suspension of the BD and monetary fines totaling $50,000 (on the BD). (FINRA 009080). The non-monetary penalties resulted from a purportedly "incomplete production" to two of dozens of items that FINRA demanded under Rule 8210, just as the Covid pandemic had begun. The monetary fines are for alleged violations of the statutory disqualification provisions and a FINRA advertising restriction.

The Commission should grant this relief to Applicants because these sanctions: (1) impose a "burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act; (2) do not derive from "fraud" findings made under the Martin Act in the State of New York: (3) are neither needed to protect investors nor related to the public interest; (4) are *penalties* and, as such, are "excessive and oppressive"; (5) are *penalties* that the Commission cannot affirm under the right-to-trial provision of the Seventh Amendment; and (6) are, as FINRA Rule 8310 links to Rule 8210, powers that the Commission lacks, could not delegate, and cannot affirm under the Due Process provision of the Fifth Amendment.

II. THE PENALTIES BURDEN COMPETITION

FINRA's penalties constitute a "burden on competition" that is neither "necessary [n]or appropriate in furtherance of the purposes of [the Exchange Act]." The purposes of the Exchange Act are: (1) to enable investors to make informed decisions about investments; (2) to prohibit fraud; (3) to have companies keep accurate books and records; and (4) to provide for the regulation of the secondary financial markets to ensure that brokers, dealers, and exchanges treat investors fairly and honestly.

Allen co-founded the BD, which began in 1999, and was the first person to develop and implement a business model for qualified investors of restricted interests in private capital funds (limited partnership interests) and private companies (unregistered stock) to liquidate their ownership interests through a broker-dealer in a new, private market. (Declaration of Laurence G. Allen ("Declaration") ¶ 3).[1] This model affords an investment exit that does not require the liquidation and dissolution of the private capital fund, the private sale of a company, or an initial public offering. This service is particularly needed today because exit distributions from private capital funds are at an 11-year low, and qualified investors, including retirees' pension funds, need liquidity.

[1] The Declaration is attached to Respondents' Motion to Supplement Record, filed contemporaneously herewith.

Allen's earlier experience at major investment banks developing secondary private markets for new asset classes at that time, which included mortgage loans and private debt placements, and his entrepreneurial spirit were responsible for this innovation. Under his management for almost 25 years, and depended on by numerous financial institutions, including Bank of America and UBS, Allen enabled qualified investors worldwide to exit their holdings in private capital funds and private companies and access liquidity for these alternative investments.

FINRA did not find that Allen or the BD violated antifraud provisions of the Exchange Act, but belatedly identified "noncompliance" with the prophylactic statutory disqualification provisions of Exchange Act § 3(a)(39) and FINRA's related provisions, for which it imposed monetary fines and a one-year suspension on the BD and a bar on Allen. FINRA also did not find that Applicants failed to keep accurate books and records or treated investors, on the secondary or primary markets, other than fairly and honestly.

FINRA's bar of Allen and suspension of the BD place in serious jeopardy the important and unique service that they provide to holders of illiquid alternative investments, which include state pension funds and financial institutions, and they do not, in any way, further objectives of the Exchange Act. Instead, these penalties suppress an important private secondary market, thereby harming customers of that market without promoting any objective of the Exchange Act.

III. THE SEVERE PENALTIES DO NOT ARISE FROM THE NEW YORK MATTER

A matter in New York triggered the FINRA inquiry and the decision from which Applicants seek review. It began just after Letitia James was sworn in as New York's Attorney General on December 12, 2018. Within two weeks, she had her staff convert a two-year-old investigation into an "urgent" motion for an *ex parte* order. The "urgency" was prompted by the request of Allen's counsel to reschedule Allen's third investigative testimony session based on the attorney's conflict with a scheduled court hearing. A new New York Assistant Attorney General stated that she would show "who's boss" and moved, without notice, on December 28, 2018, for an order under New York's General Business Law § 354. (Declaration ¶¶ 63-64). The motion was duly granted on January 2, 2019 ("354 Order"), after which the NYAG filed its complaint, almost one year later, on December 4, 2019. It thereafter moved for and obtained a preliminary injunction on February 4, 2020. (Declaration ¶¶ 68-71, 73-74).

A. The Preliminary Injunction Prompted FINRA's Inquiry

The preliminary injunction of February 4, 2020, prompted FINRA: (1) to commence an inquiry by issuing the first of five time-overlapping Rule 8210 document demands and four testimony demands over the next 9 weeks; and (2) to issue, on February 13, 2020, a notice of statutory disqualification based on the preliminary injunction. (Declaration ¶¶ 66-67, 91; FINRA 006177). Ultimately, FINRA would impose two types of sanctions on Applicants: the first would be the severe, non-monetary penalties — a bar on Allen and a one-year suspension of the BD; and the second would be monetary fines for alleged violations of the statutory disqualification ("SD") provisions of the Exchange Act and related FINRA provisions and the advertising restrictions of FINRA's Rule 2010.

B. FINRA Imposed Two Types of Penalties

FINRA's non-monetary penalties have nothing to do with the New York matter. They are based solely FINRA's claim that Applicants — during the inception of Covid and in complete disregard of Applicants' offers to provide the requested information subject to privacy protections — did not fully provide two subsets of documents (Allen family trust bank statements of which Allen had no control or signing authority) among dozens of demanded "items." (Declaration ¶¶ 93-94). The sole penalty that relates to the New York matter is Applicants' alleged SD violation. The SD notice of February 13, 2020, stated that an SD may have occurred on February 4, 2020, and the BD should conduct an internal review and reach a conclusion. (FINRA 006177). After notice, Applicants immediately and properly submitted a membership continuance application (MC-400) on February 14, 2020. (Declaration ¶ 91(1), FINRA 006181). On March 31, 2021, two senior attorneys, including the director of FINRA SD, confirmed on a conference call with counsel for the BD and Allen that the BD and Allen were not statutorily disqualified and could continue to do business as normal until otherwise informed. Later, FINRA determined that the SD had actually commenced when the NYAG filed its motion seeking the 354 Order.

C. The NYAG Relied on the Martin Act's Definition of "Fraud"

The NYAG, proclaiming to protect the limited partners ("LP"s) of the private equity fund, ACP X, LP ("Fund"), claimed that: (1) the Fund's general partner, ACP Partners X, LLC ("GP"), of which Allen was one of 11 members and a 40% minority owner, was Allen's alter ego; and (2) the holding company of the BD, NYPPEX Holdings, LLC ("HC"), had improperly sold securities to the Fund. (Declaration ¶¶ 68-70). The terms of the Fund Contract (the private placement memorandum ("PPM"), the subscription agreements, and the limited partnership agreement ("LPA" or "Contract")) were critical to the matter. (Declaration ¶¶ 19, 23, 25, 33, 45, 75-77). The NYAG claimed that the Fund Contract prevented the Fund from amending the LPA, that amendments were duplicitous, and, consequently, the Fund's purchase of the affiliate's securities was "fraudulent." In its final order of February 4, 2021, the trial court, acting as factfinder, accepted the NYAG's theory, without reference to any provisions of the Fund's Contract, that the Fund's private purchase of the HC's securities violated the Fund's Contract; in effect, the judge found that the GP had committed a promissory "fraud" on the LP investors, *nunc pro tunc*. (Declaration ¶ 78 & Ex. 7). This was confirmed in its statement that "future conduct that renders prior representations *false* can serve as the basis for a Martin Act claim." (Declaration, Ex. 7, at 7) (emphasis added). The trial court's conclusion ignored letters from numerous investors in the Fund, and expert witnesses who testified that the Fund's Contract, in fact, had authorized the GP to make the investments, advice from outside legal counsel and its opinion letter, and SEC regulations permitting investments in affiliates, and the full disclosures, beginning in 2008 and continuing for 10 years, to the Fund's investors of the investments in affiliates, without objection.

D. The New York Courts Ignored the Federal Preemption Provision

The appellate court (First Department) affirmed the factual findings and the State's disregard of Section 18r(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S. Code § 77r(a). This provision preempts application of state law to "covered" securities, which are

securities offered to and bought by "qualified purchasers." 15 U.S.C. § 77r(b)(3). This statute is intended to prevent a state, with respect to covered securities, from prohibiting, limiting or imposing conditions on: (1) the issuer's offering documents, 15 U.S.C. § 77r(a)(2)(A); (2) the issuer's proxy statements, reports to shareholders, or other disclosure documents, 15 U.S.C. § 77r(a)(2)(B); or (3) the merits of the issuer or the offering, 15 U.S.C. § 77r(a)(2)(C).

The HC's securities were "covered" securities under Section 18r(a) because they had been privately offered and sold exclusively to the Fund, the owners being the GP and LPs, all qualified purchasers. By interpreting the Fund's Contract, imposing *post facto* conditions on the HC's primary-market offers and sales of its securities to the Fund, and ruling on the "merits" of the HC's securities, New York violated 15 U.S.C. § 77r.

E. New York Harmed the Fund's Investors

In the end, the NYAG's actions seriously harmed the Fund's limited partners ("LPs") and its GP, the largest Fund investor. One LP, for inappropriate reasons, had requested to be bought out (at a premium) and threatened to complain to the NYAG's office if his buyout demand (which was contrary to the operative agreements) was not met—no other LP ever brought a legal action or complained about the Fund's management or operation. (Declaration ¶¶ 54-58). When the New York court issued the 354 Order on January 2, 2019, the Fund's total value was approximately $37 million, an amount that had almost doubled the contributed capital of about $17.6 million. The Fund held much of this value in cash and marketable securities, as the GP and LPs anticipated a distribution on January 15, 2019. (Declaration ¶¶ 52,79).

On June 2, 2022, the trial court appointed a receiver for the Fund, and on December 20, 2023, five years after the 354 Order, it observed that the Fund's "marketable securities and cash position ... appear[] to have already decreased at more than 50 percent, and perhaps as much as 70 percent, for which there is no explanation whatsoever." (Declaration ¶ 80). It also noted that "the fees to which [two law firms] are seeking to be reimbursed represent a extremely significant percentage of the total [remaining] assets of the estate." (*Id.*). To date, New York has continued to restrict the capital accounts of the Fund's LPs for no good reason and has not made a meaningful distribution to the Fund's investors of their initial capital contributions. (*Id*. ¶ 81).

IV. THE PENALTIES DO NOT PROTECT INVESTORS

FINRA's penalties are punitive only: they are not needed to protect investors or promote investor protection for at least two reasons. First, Applicants do not interact with the "investing public." They do not participate in any public markets, primary or secondary. Second, neither FINRA nor the Commission found that investors, public or private, need to be protected from Applicants. Neither FINRA nor the Commission has determined that Applicants violated anti-fraud provisions of the Exchange Act or the Securities Act.

As noted above, the BD operated, before the suspension, as a private secondary market. This market enabled qualified investors holding illiquid restricted securities in private capital funds and private companies to exit their investments without relying on an issuer's sale, merger, dissolution, or initial public offering. Allen, as a member of the GP, served as the managing principal of the Fund; the Investment Committee managed the investments. The Fund was appropriately exempt from the Investment Company Act of 1940 and only participated in the

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private primary and secondary markets: the Fund's sales were to sophisticated and qualified investors, many being managers of funds with billions of dollars in assets under management; and the Fund's investments were in other private capital funds and private companies, including the BD's holding company. (Declaration ¶¶ 10-12, 32-35, 46-52). With respect to these private markets, FINRA made no finding that Applicants defrauded or harmed private, secondary-market BD customers or private, primary-market qualified investors in the Fund.

V. THE PENALTIES ARE CALLED SANCTIONS

FINRA punished Applicants for the alleged "violation" of Rule 8210, as it confirmed in the following statement: "For individuals who provide a partial but incomplete response to a request made pursuant to Rule 8210, the Guidelines instruct us that a bar is standard." (FINRA 9074). The bar may be reduced to the minimum 2-year suspension if "the respondent can demonstrate that the information provided substantially complied with all aspects of the request." *Id*. Applicants' "violations" were regulatory victimless crimes for which Applicants were "charged" and, upon a finding of guilty, were subject to sanction guidelines that "instruct" on the standard punishment, akin to the federal sentencing guidelines for criminal matters. Here, instead of being locked *in* prison, they were *locked out* of the industry and earning a living from the private market that they pioneered in the prime of their careers.

A. FINRA Disregarded the Factual Context

FINRA ignored the factual context of Applicants' alleged Rule 8210 violation in early 2020: the inception of Covid; the overlapping 8210 demands; the health problems then affecting Allen and the BD's chief compliance officer, Michael Schunk; and the production made before and after the specific demands on which FINRA focuses. This context had to be omitted to warrant the conclusion that "Allen did not substantially comply with all aspects of FINRA's Rule 8210 requests directed to him." (FINRA 009075). Of the dozens of items solicited, FINRA focused on the two incomplete items: the Allen family's trust bank checking statements and loa documents, for which Allen had no control or signing authority.

B. FINRA Disregarded Allen's Offers to Produce

FINRA claimed that "Allen has not provided a *valid reason* for not providing a complete response" to the requested bank and loan documents. (FINRA 009076) (emphasis added). It did not disclose the "reason" or state why it was "valid." In fact, Allen had informed FINRA staff that certain bank accounts and loan documents that were related to a family trust, he did not have signatory authority or control and was not the sole beneficiary. Allen's counsel offered to provide the bank and loan documents to FINRA through Web *access* or by hard copy subject to confidentiality. FINRA rejected these offers, although they were arguably consistent with Rule 8210(a)(2). (Declaration ¶¶ 93-102). In the end, Applicants did not fail, under Rule 8210(c), "to permit inspection and copying of books, records, or accounts." FINRA omitted this part of the narrative because it shows that FINRA's staff was less interested in reviewing the information than in punishing Allen for his purported failure to produce it and confirms that the sanctions are indeed penalties.

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C. FINRA Ignored Applicants' Cumulative Compliance in Defining "Substantial"

Rule 8210 substantial compliance should at least consider the proportion of *documents produced* to the *documents requested*. FINRA limited the universe of *documents requested* (the denominator) to the two items regarding which it claimed that Applicants had not completed production. FINRA did not acknowledge that Allen participated, directly and indirectly, in producing considerable numbers of documents in response to considerable number of document demands over a very short period and while he was suffering from an accident-caused condition of impaired cognitive and memory, as documented. (Declaration ¶¶ 60, 90-91). Only by ignoring this compliance (and not considering fact that Allen and Schunk had medical issues while addressing the emerging Covid pandemic) could FINRA claim to be "deeply disturbed by Allen's disregard for his obligations under FINRA Rule 8210." (FINRA 009077).

D. FINRA Ignored Applicants' Cumulative Compliance in Finding "Disregard"

To justify the strict liability imposition of its penalties on Applicants, FINRA highlights Allen's answer to the standard question whether he understands his Rule 8210 obligations. Allen answered, with justification, that he had a "'new' understanding:" "FINRA uses [Rule 8210] to provide a record that's inaccurate so that, when you get to a hearing, they can accuse you of not providing documents." FINRA used this answer to state: "in light of Allen's *disregard* for his obligation to comply with FINRA Rule 8210, we find that a bar is necessary for the protection of investors." (FINRA 009077) (emphasis added). This finding was not only superfluous (given the Guidelines) but misleading: the best evidence of Allen's regard for 8210 was his *very substantial compliance* with the FINRA's unceasing flow of 8210 demands in 2020 and over thirty-six years of SEC, FINRA, and state oversight. His actual responses in real time to the 8210 demands, not his after-the-fact oral responses during an adversarial proceeding, are the best evidence to determine "disregard." FINRA's claim that Allen had a "cavalier attitude" further conceals the significant time, effort, and money that Allen, his employees, and his counsel expended to comply with the many document demand items and sub-items and testimony that he, Schunk, and the employees of the BD provided. (Declaration ¶ 90-103). Allen did not "disregard" his Rule 8210 obligations: he was overwhelmed by them.

E. FINRA Ignored Applicants' Cumulative Compliance in its Prediction

FINRA concludes that "Allen's *conduct* raises substantial doubt about *whether he would respond completely* to any future Rule 8210 requests issued to him." (FINRA00 9078) (emphasis added). Only by restricting Allen's "conduct" to his responses to two small items among dozens and ignoring the other responses to those numerous Rule 8210 demands, can FINRA make a baseless inference about Allen's future responses to Rule 8210. FINRA's claim that "Allen poses a *continuing danger to the investing public*, and that a *bar is necessary to protect investors*," (FINRA 9078) (emphasis added), is rhetorical justification for retributive or (perhaps) deterrence-based punishment. For over thirty-six years, Allen had never posed any "danger" to the "investing public"—with which he did not interact and, if he did, FINRA has not identified it in the past and certainly did not identify it in this matter.

VI. THE PENALTIES CANNOT BE AFFIRMED UNDER *JARKESY*

The Seventh Amendment states that "[i]n suits at common law, … the right of trial by jury shall be preserved," and that right is before an Article III court. The Amendment applies to any action that is "legal in nature." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989). Whether an action is legal in nature depends "on the cause of action and the remedy it provides." *SEC v. Jarkesy*, – U.S. –, 144 S. Ct. 2117, 2129 (2024). If the cause of action "sound[s] in both law and equity," the remedy becomes the "more important consideration" in determining whether the action is legal or equitable in nature. *Id*. (citing *Tull v. United States*, 481 U.S. 412, 418-21 (1987)). Any "civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment." *Jarkesy*, at 2129 (emphasis added) (citing *Austin v. United States*, 509 U.S. 602, 610 (1993)). Civil penalties are punitive and "a type of remedy at common law that could only be enforced in courts of law." *Id*. If tied "to the perceived need to punish the defendant rather than to restore the victim, such considerations are legal rather than equitable." *Id.*

Under *Jarkesy*, FINRA's non-monetary and monetary penalties both are punitive, and as such, are "all but dispositive" that the present matter is legal in nature. *Id.* If a sanction is not solely intended to "restore the victim" or "cannot fairly be said *solely* to serve a remedial purpose" but "*also* serv[es] either retributive or deterrent purposes," it is punishment for purposes of the Seventh Amendment. *Id*. (emphasis added); *see also, Saad v. SEC*, 873 F.3d 297, 304 (D.C. 2017) (Kavanaugh, J., concurring) ("'remedial' makes little sense when describing the expulsion or suspension of a securities broker" because they "do not provide a remedy to the victim.") Expulsion and suspension under Exchange Act § 19(e)(2) are, as noted in the *Saad* concurrence, punitive and therefore "oppressive and excessive" under that provision. *Id.*

In *Saad*, the Commission characterized the self-regulatory system as a "victim" of Rule 8210 noncompliance because such noncompliance tends to undermine FINRA's ability to detect misconduct. This does not, of course, alter the outcome under *Jarkesy* because the sanction is not remedial— the bar and suspension (and fines for other violations) do not remedy the abstract victim or organizational harm. They are not remedies and certainly not solely remedies. The SEC's Division of Enforcement, which itself has no power to impose severe penalties on a non-compliant subpoenaed party, is no less "harmed" nor is its ability "to detect misconduct" any less undermined because it does not have the ability to enforce its subpoenas without recourse to the federal courts. The reality is that "a violation of Procedural Rule 8210 would rarely, in itself, result in direct injury to a customer or [a] direct monetary gain for a violator," *PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1175 (D.C. Cir. 2009), which is certainly true in this matter.

FINRA imposed monetary fines for the purported SD and advertising regulation "violations." As for the SD, Exchange Act § 3(a)(39)(F) states that "[a] person is subject to a 'statutory disqualification'" if "enjoined from any action, conduct, or practice specified in" Exchange Act Section 15(b)(4)(C). Section 15(b)(4) states that after a due process hearing, the Commission must censure, restrict or revoke, a broker dealer: (1) if it is "in the public interest" and (2) if any person associated with the broker dealer ... (C) "is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from ... engaging in or continuing any conduct or practice in connection with ... with the purchase or sale of any security." This and FINRA's derivative provisions impose strict liability.

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The absence of remedial relief is evidenced by FINRA's actions and inactions. The 354 Order was sought by the NYAG on December 28, 2018, and entered on January 2, 2019. Applicants learned of it later in January 2019, after which they disclosed the order to FINRA in an amended Form U4 dated January 24, 2019. (Declaration ¶¶ 65-67). After the NYAG procured a preliminary injunction against Allen on February 4, 2020, FINRA sent Applicants an SD Notice dated February 13, 2020, identifying February 4, 2020 — not January 2, 2019 — as the SD-commencement date. (FINRA 006177). Applicants immediately filed a membership continuance application (MC-400) on February 14, 2020. On March 31, 2020, FINRA's SD Department met with Applicants, did not discuss the January 2, 2019, SD date, and did not allow Applicants to retroactively file a membership continuance form for such date. Not until FINRA was compiling its "charges" against Applicants did the date of the *motion* under GBL § 354 (not the order) arise as the SD commencement date. Not only did FINRA commence the SD period before any order was entered, it found that Applicants had "waived" their due process by not moving *post facto* to challenge the 354 Order, and, disregarding Applicant's contemporaneous unawareness of the motion or order, chose not to commence the SD date as of the last date on which a *post facto* motion could have been made.

FINRA also fined the BD for a statement posted on its website following the close of a 2018 examination. FINRA's claims focused upon two sentences. The first sentence was that "FINRA *did not find* any violation of applicable securities regulations to warrant a fine, censure or disciplinary action of the Company." (FINRA 009025) (emphasis added). This *negative* statement was true: it did not say that FINRA found no "exceptions" and was not an affirmative narrative of regulatory compliance. The second sentence contrasted FINRA's non-findings with the NYAG allegations: "The [NYAG's] allegations are in conflict with the facts concluded by FINRA." *Id*. These two sentences state that FINRA and the NYAG see different realities, and they suggest that FINRA's view is based on greater expertise. Combining the true statement that FINRA found no violation and suggesting that FINRA is more expert than the NYAG is *not* an affirmative suggestion that FINRA "endorses" the BD's "business practices." In fact, it is not information about FINRA, but about the NYAG's expertise in the securities industry.

VII. THE PENALTIES FOR RULE 8210 DEMANDS CANNOT BE AFFIRMED AS A MATTER OF ADMINISTRATIVE LAW

The Commission's powers to demand information depend on whether it is mandatory information or non-mandatory information. The latter, which is a much broader category of information, requires the issuance of an administrative subpoena. *See, e.g.*, SEC Form 1661. Mandatory information is that which regulated entities and associated persons *must collect and maintain. Id*. ¶ B.1.a. (emphasis added). Failure to allow inspection access to *mandatory information* empowers the Commission to censure, suspend, bar, or expel the noncompliant person. *Id.* ¶ C.1 (a).

For all non-mandatory information, "production ... is voluntary," (*id*. at ¶ B.2.) or is produced in response to an administrative subpoena. Courts have held that the Due Process clause prevents federal agencies from enforcing their own administrative subpoenas. *See, e.g.*, *Shasta Minerals & Chem. Co. v. SEC*, 328 F.2d 285, 286 (10th Cir. 1964). Judicial, not agency, enforcement protects against an agency's *abuse of* its subpoena power. *See*, *Penfield Co. of Cal. v. SEC*, 330 U.S. 585, 590 (1947) (judicial compulsion of production is "fine or imprisonment

imposed on the contemnor); *ICC v. Brimson*, 154 U.S. 447, 484 (1894) (the "power to [fine or imprison] ... to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises"); *United States v. Sec. State Bank & Trust*, 473 F.2d 638, 641 (5th Cir. 1973).

Congress delegated to the Commission power to adjudicate, in administrative proceedings, violations of the federal securities laws, 5 U.S.C. §§ 553 and 554, and the power to impose sanctions within the Agency's jurisdiction and as authorized by law. 5 U.S.C. § 558(b). The Commission has delegated to FINRA the power "to discipline for any provision of this chapter, the rules or regulations thereunder ... or the rules of the association" by imposing "expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction." 15 U.S.C. 78o(b)(7). The Commission's delegation authority is not, however, without limit. *Kisor v. Wilkie*, 588 U.S. 558, 589 (2019) ("administrative law doctrines must take account of the far-reaching influence of agencies and the opportunities such power carries for abuse.").

FINRA is a non-profit, Delaware corporation that has regulatory authority only by delegation. *Fiero v. FINRA*, 660 F.3d 569, 574 (2d Cir. 2011) (FINRA does not have independent authority under the Exchange Act.). The Commission oversees FINRA by reviewing and approving (or not) proposed FINRA rules and final decisions. 15 U.S.C. § 78s. Among the Commission-approved rules are FINRA's Series 8000, which include Rules 8210 and 8310. *Principal Sec., Inc. v. Agarwal*, 23 F.4th 1080 (8th Cir. 2022); *Luis v. RBC Cap. Mkts., LLC*, 984 F.3d 575, 577 (8th Cir. 2020) (The Exchange Act enables FINRA, as an SRO, "to regulate the financial industry with [Commission] approval."); *PAZ Sec., Inc.*, Exch. Act Release No.57656, 93 S.E.C. Docket 47, 2008 WL 1697153, at *4 (Apr. 11, 2008). Rule 8210 empowers FINRA to make information demands for documents and testimony analogous to the Commission's Enforcement-issued administrative subpoenas.

FINRA, however, has powers the Commission lacks with these demands, namely, the power to adjudicate noncompliance, in-house, and, under Rule 8310, the power to impose non-monetary and monetary penalties that are *far harsher* than any *penalty* ("poena") *under which* ("sub") a recipient of an Enforcement administrative subpoena is subject. Because the Commission lacks these punishment powers for administrative subpoenas, *e.g.*, *SEC v. Carebourn Capital, LP*, 339 F.R.D. 510 (N.D. Ill. 2021) (subpoena enforcement action under 15 U.S.C. § 78u(c)), it cannot delegate them to FINRA. Affirmance of FINRA's use — and, in this matter, *abuse* — of such powers would violate the doctrine of delegation and the Due Process clause of the Fifth Amendment, notwithstanding prior precedent, *N. Woodward Fin. Corp.*, SEC Release No. 34-74913 (May 8, 2015) (bar based on failure to respond fully to FINRA's Rule 8210 demand affirmed), that is no longer subject to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (precedent that "relied on *Chevron* is, at best, 'just an argument that the precedent was wrongly decided.'") (citations omitted).

VIII. CONCLUSION

For the foregoing reasons, Applicants request that the Commission cancel or require the remission of all FINRA-imposed sanctions against Applicants.

Dated: August 2, 2024

Respectfully submitted,

/s/ *Cory C. Kirchert*

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Attorneys for Respondents

CERTIFICATE OF SERVICE

In accordance with Rule 151 of the SEC Rules of Practice [17 CFR § 201.151], I hereby certify that a true copy of the foregoing Motion for Extension of Briefing Schedule was served on the following on this 2nd day of August, 2024, in the manner indicated below:

Via the Commission's Electronic Filings in Administrative Proceedings:
The Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Room 10915
Washington, D.C. 20549-1090

Via U.S. Mail and email to:
FINRA
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Attn: Michael M. Smith
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Washington, D.C. 20006
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/s/ *Adriaen M. Morse Jr.*
Adriaen M. Morse Jr.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of the Application of NYPPEX, LLC and LAURENCE G. ALLEN For Review of Disciplinary Action Taken by FINRA	:

DECLARATION OF LAURENCE G. ALLEN

I, Laurence G. Allen, being over the age of 18, hereby declare and state as follows:

1. I am one of the two Applicants in this Review. I submit this Declaration with the attached exhibits to highlight certain aspects of the FINRA record.

BACKGROUND OF LAURENCE ALLEN

2. I have been in the securities industry for over 36 years after graduation from the Wharton School at the University of Pennsylvania with a B.S. in Economics with honors in 1979, and an M.B.A. in Finance in 1982. In my senior year, I served as President of the Wharton Student Government.

3. During my career, I have managed private placement teams of investment bankers, traders, and portfolio managers. My career background is:

(1) Merrill Lynch from 1982 to 1993 as Vice President and Head of the Commercial Mortgage Trading Desk, where I participated in the origination, private placement, and development of secondary private market liquidity for commercial mortgage loans with institutional investors; and

(2) Bear Stearns from 1993 to 1998 as Managing Director and Head of the Private

Placement Group, where I participated in the origination, private placement, and development of secondary private market liquidity for convertible and high yield corporate bonds with institutional investors.

(3) NYPPEX Holdings, LLC from 1998 to present as a co-founder and Managing Member, where I participated in the origination, private placement, and development of secondary private market liquidity for restricted securities in private companies and private capital funds (i.e. buyout, private equity, venture, real estate, distressed debt, infrastructure etc.) with institutional investors.

(4) In 2004, the U.S. Internal Revenue Service issued a private letter ruling that formally recognized NYPPEX as a Qualified Matching Service ("QMS") under IRS §1.7704-1 known as the "publicly traded partnership" rule. This enabled NYPPEX to provide a QMS Safe Harbor Exemption to qualify private capital funds to permit higher annual volumes of secondary interest transfers without an adverse tax consequence.

(5) I have been a guest speaker at private capital fund conferences and quoted in publications worldwide. Over the years, typically in 1-hour "state of the market" presentations, I advised members of the House Financial Services Committee and senior regulators regarding "emerging regulatory issues in alternative assets" along with one of our senior securities attorneys typically from Gibson Dunn or Sullivan Cromwell. Regulators included the Chairperson of the SEC, CEO of FINRA, and General Counsel of the FDIC.

(6) During a pilot program with the SEC and FDIC, NYPPEX provided access to its secondary private market price data on over 9,400 private capital funds in 110 countries. I understand that the (a) SEC considered using this data to evaluate price executions of

secondary interest transfers in the secondary private market and (b) FDIC considered using this data to evaluate risk-adjusted capital ratios of banks that held interests in private capital funds as assets.

(7) For over 36 years, I had an exemplary regulatory background as I had never been fined, disciplined, or censured in the United States or the 26 foreign jurisdictions in which NYPPEX operated. NYPPEX team members and I proactively visited our state and federal regulators and provided updates on our unique secondary private transfer business and the alternative asset industry. Often, we were told that NYPPEX was among the few organizations that proactively made annual visits to securities regulators.

(8) During my career, I have served on a variety of advisory boards including the Wharton School, Bowery Mission in New York City, and the Second Congregational Church in Greenwich, CT. I received a Lifetime Achievement Award from Ducks Unlimited, a leader in wetlands conservation. My wife, Michelle and I have raised our three children in the same home for 26 years in Greenwich, CT.

BACKGROUND OF ENTITIES

ORGANIZATIONAL STRUCTURE OF NYPPEX ("NYPPEX ENTITIES")

4. Our organizational structure consists of a parent company, NYPPEX Holdings, LLC ("HC"), NYPPEX, LLC, a subsidiary and former broker-dealer for institutional investors ("BD" or "NYPPEX"), and ACP Investment Group, LLC, ("ACP" or "Advisor") a subsidiary and former SEC-registered advisor that sponsored private equity funds for institutional investors (collectively, the "Entities").

5. Our organizations have never provided financial services to the public. Eligible customers had to be sophisticated and both an accredited investor as well as a qualified client as

per SEC Rule 205-3. All our organizations are Delaware limited liability companies. Our organizations were supervised by internal Oversight Committees including an Executive Committee, Finance and Audit Committee, and Legal and Compliance Committee.

6. For over 18 years, an independent auditor reviewed our organization's financial statements and issued unqualified opinion letters. Our broker-dealer and private fund's outside legal advisors included Latham & Watkins and Gibson Dunn. Our former General Counsel was previously an attorney with the SEC and the New Jersey Securities Bureau. Many of our employees had 10 years or more experience with major financial services firms including Morgan Stanley, JP Morgan, and Goldman Sachs.

7. NYPPEX and ACP pioneered the development of secondary private market liquidity for private capital funds and institutional investors worldwide. Our institutional clients included financial institutions such as Bank of America and UBS, foundations such as Wellcome Trust, the largest charitable foundation in the U.K., and university endowments such as University of California Regents.

8. NYPPEX was located in the former headquarters of General Foods in Rye Brook, NY. Its computer servers were secure, password protected, and maintained in various co-locations across the U.S. which provided a high level of comfort to institutional clients that valued server redundancy and protection of confidential documents. NYPPEX systems were never hacked.

9. In 2019, NYPPEX employed approximately 12 professionals in its transfer administration, data, and private funds management businesses located in Rye Brook, NY and teams of tech developers located in Texas, Massachusetts, and India. NYPPEX employed both W-2 employees and 1099 contractors.

ORGANIZATIONAL STRUCTURE OF ACP X, LP ("FUND")

10. In 2004, ACP Investment Group, LLC ("ACP" or "Advisor") sponsored and served as advisor to ACP X, LP (formerly Allen Capital Partners X, LP), a Delaware limited partnership ("Fund"). ACP Partners X, LLC (formerly Allen Partners X, LLC) served as General Partner to the Fund (the "GP").

11. Based on legal documents I have reviewed, it is my understanding that the Fund privately offered and sold limited partnership interests only to persons that were qualified investors in reliance on exemptions provided under: (1) Section 4(a)(2) of the Securities Act of 1933 ("Securities Act"), (2) Regulation D, Section 506(b), under the Securities Act [17 C.F.R. 230.506(b)]; and (3) Regulation S under the Securities Act for interests privately offered and sold outside the United States. Experienced outside counsel, Perkins Coie, prepared the Fund's documents to comply fully with all federal and state laws.

12. The Fund raised approximately $17.6 million in a private placement with approximately 76 limited partners that were sophisticated qualified clients as defined in SEC Rule 205-3. The Fund was not an investment company as defined under the U.S. Investment Company Act of 1940.

13. The Fund's primary objective was to seek an attractive risk-adjusted total return over the long term. The Fund's investment strategy was to make secondary and primary private investments in private capital funds and private companies.

14. The General Partner team invested in the Fund alongside limited partners and became one of the largest investors in ACP X, LP. The GP's investment in the Fund served to align the best interests of its limited partners with the GP team.

15. Typical of standard compensation structures for sponsors of multiple private capital funds and affiliated businesses, our employees and contractors were legally eligible to

receive compensation from our various private funds and businesses.

16. Expenses were allocated among Entities, including the Fund, based on both (i) written guidelines stated in the NYPPEX Affiliate Service Agreement - which FINRA typically reviewed during examinations, as well as (ii) the operating agreements of our sponsored funds. Annually, expense allocations among affiliates were reviewed by our Finance and Audit Committee, and thereafter, by an independent auditing firm. The NYAG misunderstood how expenses are allocated among affiliates in the private capital fund industry and erroneously alleged that our Fund was charged certain expenses.

17. Neither I nor any individuals or entities with whom I was or am associated or affiliated ever solicited, offered, or sold to the Fund's limited partnership interests to the general public.

18. Neither I nor any individuals or entities with whom I was or am associated or affiliated ever solicited, offered, or sold any securities to the general public. Again, NYPPEX and ACP did not provide their services to the public, nor were involved with publicly traded securities.

THE FUND'S CONTRACT

19. As a standard operating procedure in the private capital funds industry, the General Partner of ACP X, LP and its limited partners agreed on a contract, the Amended and Restated Agreement of Limited Partnership (the "LPA"). The LPA described the terms under which the Fund would be managed by the General Partner and was signed by each limited partner. The Fund's 2005 LPA (with its 1st amendment) is attached as Exhibit 1.

20. The Fund also provided prospective limited partners with a Private Placement Memorandum ("PPM") and a Subscription Agreement. The PPM is a confidential private

offering document that discusses important information about the Fund such as its strategy, legal structure, and makes numerous risk disclosures - which in this case included that the Fund's strategy included making investments in affiliates, and therefore, numerous potential conflicts of interest would exist. The limited partners accepted this risk as it also provided the Fund with various competitive advantages.

21. Because a private capital fund typically takes 2 years or more to raise its target capital commitments, an industry standard is for the PPM and LPA to be periodically revised and restated to reflect new information such as recent investments made by a fund.

22. The Fund called capital from its limited partners from 2004 to 2007, during which time the Fund invested the called capital in private capital funds and private companies as authorized by its LPA.

23. In 2005, the Fund revised its 2004 PPM to reflect its new investments and clarified certain information. The revised 2005 PPM was provided to prior limited partners (without any objections) as well as to new limited partners. A true and complete copy of the Fund's 2005 PPM is attached as Exhibit 2.

24. The PPM stated the Fund's investment objective (Ex. 2 at 15), which included making allocations to private equity firms and private companies (*Id.* at 17); the GP's broad investment ability; the GP's ability to transact with affiliates (*Id.* at 19); and the Fund's investments (*Id.* at 9).

25. The Fund's LPA (before amendment and restatement) in Section 2.09, captioned "Transactions with Affiliates," the LPA described the GP's authority to make investments in affiliates as detailed below:

(1) *... the General Partner, when acting in its capacity as general partner of the*

Partnership, is hereby authorized, on behalf of the Partnership, to purchase property or obtain services from, to sell property or provide services to, or otherwise to deal with the General Partner, any Affiliate of the General Partner, any Limited Partner, any Private Fund, any Portfolio Company or any Related Person (whether before or after or in connection with the making of the applicable Investment), or any Affiliate of any of the foregoing Persons.

(2) *In connection with any services performed by any Affiliate of the General Partner for the Partnership, such Affiliate shall be entitled to be compensated by the Partnership for such services, and the amount of such compensation shall be determined by the General Partner in its discretion. Each Limited Partner acknowledges and agrees that the purchase or sale of property, the performance of such services, other dealings or the receipt of such compensation may give rise to conflicts of interest between the Partnership and the Limited Partners, on the one hand, and the General Partner or such Affiliate, on the other hand. ACP and its Affiliates may act as a lender, principal or investor in the Portfolio Investments and may acquire, hold, sell, issue or dispose of securities issued by or to the Portfolio Investments or the Partnership, including securitizations, in principal or agency transactions. Such loans or securities may be pari passu, senior or junior in ranking to the Partnership's investment.*

Exhibit 1 § 2.09

26. The LPA had a specific procedure for proposing amendments to the Fund's limited partners ("LPs"), which the GP Team properly followed. In my opinion, a private capital fund will typically have 10 or more amendments over its 10–15-year term for reasons that include revising strategy and adjusting to changing market conditions.

27. The Fund's Limited Partners Advisory Committee ("LPAC"), comprised of particularly sophisticated limited partners, provided advice to the GP team and typically reviewed and edited draft amendment proposals from the GP team.

28. The 3rd, 4th and 5th proposed amendments were approved by a majority of the Fund's LPs, and among other issues, reiterated that the GP was authorized to make follow-on investments in its portfolio of private companies and private funds, including affiliates. The GP believed that reinvesting the Fund's cash would help the Fund achieve its primary objective - to generate an attractive risk-adjusted total return over the long term.

29. The Fund's LPA noted that in the event the terms of LPA conflicted with the PPM or the amended LPA, the amended LPA controlled.

30. Over the years, the Fund invested in over 210 private equity funds and private companies.

THE FUND'S SOPHISTICATED AND QUALIFIED INVESTORS

31. To be eligible to make a capital commitment to the Fund, prospective subscribers were required to represent in the Fund's Subscription Agreement (§ 2.4) they were sophisticated with respect to illiquid investments in private capital funds and private companies, accredited investors, and qualified clients as per SEC Rule 205-3.

32. Specifically, Section 2.4.1 of the Subscription Agreement asked the subscriber to confirm that they possessed: *(a) the financial ability to bear the economic risk of this investment, [having] adequate means to provide for the subscriber's current needs and contingencies, and [having] no need for liquidity with respect to the subscribed Interest; (b) the financial sophistication and experience with private equity to make an intelligent, independent evaluation of the risks of the Interests offered in the Partnership (Fund); and (c) concluded that an Interest*

in the Partnership meets the investment objectives of and is a suitable investment for the subscriber. A true and complete copy of the Subscription Agreement is attached as Exhibit 3.

33. The Subscription Agreement required confirmation that the subscriber had the personal net worth and liquidity to withstand the risks inherent in a private equity partnership investment, which entailed an uncertain holding period and frequency of distributions, which could result in a complete loss of capital. (*Id.* §§ 2.4, 2.6, 2.7, 2.8.; *see also*, FINRA 005304).

34. The Fund's investors included the GP and the limited partners ("LPs"), the latter consisting of asset managers typically with billions in assets under management and wealthy private clients.

35. There was no public market for interests in the Fund ("Interests") and no public market was expected to occur.

THE FUND'S INVESTMENT STRATEGY & OBJECTIVE

36. The Fund's investment strategy was to make investments in private capital funds and private companies.

37. The Fund's primary investment objective was to seek an attractive total return on its capital over the long term, similar to many other private capital funds.

38. The Fund's term was expected to be 10 years with 2 one-year term extensions not requiring approval from limited partners, as is standard for U.S. private capital funds.

39. Eligible investment types in private companies included preferred stock, common stock, warrants, and convertible notes (loans).

THE 2008 GREAT RECESSION

40. The 2008 great recession caused substantial reductions in valuations of private capital funds and private companies. In addition, profitable exit events would take years longer.

41. To illustrate, it is estimated that in in 2008, the S&P 500 Index ("Index") declined approximately 38% year over year. On August 28, 2008, the Index peaked at 1,300.68, but on March 9, 2009, declined approximately 48% to 948.05.

42. The GP team noticed that valuations had declined by more than 70% in certain private company sectors, including fintech and biotech.

43. The GP team decided that it would be in the best interests of the Fund, and enhance its ability to achieve its investment objective, to rebalance its portfolio by (i) reducing its allocation to private capital funds and (ii) increasing its allocation to fintech and biotech private companies.

44. It is an industry standard practice and a natural risk management tool for private capital funds to periodically rebalance their portfolios as market conditions change.

45. On September 22, 2008, the GP team received a legal opinion letter from outside general counsel that reiterated the Fund was authorized to make investments in affiliates, including its own fintech company, NYPPEX Holdings, LLC. On May 11, 2009, the GP Team, relying on the legal opinion and the terms of the LPA and PPM, approved the Fund to make its first investment in an affiliate, specifically authorizing an investment in NYPPEX Holdings, LLC. A true and complete copy of these documents are attached as Exhibit 4.

46. With approvals from the ACP Legal and Compliance Committee, outside general counsel, and the Fund's Limited Partners Advisory Committee, the GP team implemented its rebalancing strategy by (i) selling some investments typically at moderate discounts to their cost and (ii) reinvesting sales proceeds into biotech and fintech private companies typically at substantial discounts to their prior valuations.

47. The Fund's portfolio rebalancing strategy worked very well as compared to results if the Fund had held its prior investments. Although numerous private capital funds ceased doing business

during this period, the Fund's total return increased substantially as measured by Investment Multiple (i.e. Cumulate Distributions + Net Asset Value / Capital Contributions).

48. Soon, the Fund ranked in the top 10% of all 2004 vintage private capital funds worldwide according to Preqin, ahead of well-known private fund sponsors such as Goldman Sachs and AXA.

49. The Fund's re-investments included convertible notes in NYPPEX Holdings, LLC at conversion prices that represented substantial 75% discounts such as $0.50 per share as compared to the most recent price paid of $2.00 per share by outside accredited investors.

50. The Fund adhered to a 15% maximum allocation guideline for investments in affiliates based on the current market value of the Fund at the time of an investment.

51. Prior to the Fund considering an investment in an affiliate, an ACP investment committee would review and decide if the proposed investment would help the Fund achieve its objective and in the best interests of its limited partners. The committee would memorialize their analysis and decision by signing a certification document.

52. In December 2018, a majority of the Fund's limited partners approved a proposed 7th Amendment to terminate the Fund and distribute its cash and investments. At this time, NYPPEX Holdings, LLC was preparing to list on a stock exchange, which was expected to generate an attractive return to the Fund. The approved 7th Amendment scheduled the Fund to make a final distribution of cash and in-kind securities to limited partners on or about January 15, 2019.

FEDERAL AND STATE SECURITIES REGULATORS

53. Over the course of my career, I have personally responded to various regulatory requests for information, both in terms of documents and testimony, concerning one of our

Entities. In each case, federal and state securities regulators were pleased with my response.

NEW YORK ATTORNEY GENERAL INVESTIGATION

LP WITH A LIQUIDITY PROBLEM CONTACTS THE NYAG

54. In 2016, I was contacted by an LP in the Fund, who explained he had a liquidity problem because of the 2008 recession's impact on his commercial real estate investments. He demanded that the Fund buyback his commitment ($100,000) and insisted on a price of 100% of its current value ($195,000).

55. The GP team approved this LP to transfer his interest, but explained that as a fiduciary, a buyback of his commitment would not be in the best interests of the Fund or its other 75 limited partners.

56. Thereafter , the LP telephoned our employees and threatened, on multiple occasions over years, that if his demand was not met, he would complain to the Office of the New York Attorney General ("NYAG"), presumably, I believe, to motivate the GP team to change its decision.

57. The NYAG apparently references this individual in ¶ 90 of its verified complaint of December 4, 2020.

58. To the best of my knowledge, this LP never filed a formal complaint, nor was he asked by the NYAG to submit an affidavit or testify at subsequent hearings, which I believe shows his lack of credibility

59. In August 2016, the NYAG subpoenaed the GP team for information about the Fund, which apparently marked the beginning of an investigation instituted under the New York Martin Act of 1921, which is codified in its General Business Law ("GBL") at N.Y. GEN. BUS. § 352 ("Martin Act").

60. Over the next twenty-eight months, our Entities and I complied fully with all the NYAG's demands for documents and testimony. During that period, the NYAG took my testimony twice, in spite of my disclosed impaired cognitive and memory condition caused by a terrible car accident earlier in 2018.

61. Despite the Fund's success for its limited partners, in 2020, the NYAG alleged that the Fund's investments in affiliates constituted "self-dealing" under the New York Martin Act and ignored the facts and the law in pursuing a case against our business. The NYAG and the New York court ignored federal preemption and the GP team's and its legal advisors' reliance for over 14 years on SEC regulations, including Rule 17a, that permit investment advisors to make investments in affiliates. They also circumvented the relevant PPMs, subscription agreements, and LPAs which governed our entities and affiliates. Given that numerous private capital funds and companies make investments in affiliates, including Warren Buffet when he buys stock back in Berkshire Hathaway, I believe this NYAG allegation and the court decision will create a chill among private capital funds and their legal advisors regarding investments in affiliates, unless the SEC clarifies its position on these issues.

THE EX PARTE ORDER (GBL 354) ORDER (DECEMBER 28, 2018)

62. On December 12, 2018, Letitia James became the NYAG. A true and complete copy of a press article announcing Letitia James as the NYAG is attached as Exhibit 5.

63. Approximately two weeks later, on or before December 28, 2018, during a teleconference call and upon my counsel's request that my intended third testimony be postponed because of my counsel's scheduling conflict due to a court hearing, a new assistant attorney general for the NYAG, Jaclyn Grodin, stated, "You'll see who's boss here." (I understand from her LinkedIn posting that Ms. Grodin joined the NYAG Investor Protection

Bureau in April 2018. During her 14-year career, she had worked for several different law firms. Her most senior role was that of a Senior Associate. She had no documented experience with private capital funds.) Ms. Grodin did not elaborate as to what her ominous comment meant.

64. On the same day, December 28, 2018, as I later learned, Grodin filed under GBL Section 354 to secure from the New York State Supreme Court ("NYSSCT") for New York County an *ex parte* order ("354 Order") that compelled testimony, froze the Fund's assets, and granted a preliminary injunction "as may appear to be proper and expedient." The 354 Order was signed by a judge on January 2, 2019. (FINRA 006041).

FILING OF FINRA FORM U4 (JANUARY 24, 2019)

65. In January 2019, I first learned of the 354 Order naming me and certain Entities as defendants.

66. Upon learning about the 354 Order, the BD and I filed, on January 24, 2019, an Amended Form U4 with FINRA ("U4"). (FINRA 005969). Under the U4's disclosure question 14G, I answered "yes" to the following question: "Have you been notified, in writing, that you are now the subject of any: (1) regulatory complaint or *proceeding* that could result in a 'yes' answer to any part of 14C, D or E? (If 'yes', complete the *Regulatory Action* Disclosure Reporting Page.)" Parts 14C, D, and E relate to findings of various kinds of violations by the SEC, CFTC, other federal or state regulatory agencies, or self-regulatory organizations. I also answered "yes" to U4 question 14H(1): "Has any domestic or foreign court ever: (a) enjoined you in connection with *an investment-related* activity?" (FINRA 005979). The U4 identified and described the 354 Order on the appropriate reporting pages and provided detailed information concerning the NYAG legal action, including the date the 354 Order had been entered—December 20, 2018. (FINRA 005982-85 (related to 14H(1)(a)) and FINRA 005985-88 (related

to 14G(1))).

67. I solicited the advice of several attorneys as to whether the 354 Order had rendered me "statutorily disqualified." Their response was universally consistent in concluding that the 354 Order, about which I had no knowledge contemporaneous with its issuance and which provided no due process, had not rendered me statutorily disqualified nor was the BD disqualified for being associated with a person statutorily disqualified.

THE NYAG'S VERIFIED COMPLAINT (DECEMBER 4, 2019)

68. On December 4, 2019, almost one year after 354 Order, the NYAG filed a verified complaint ("Complaint") for Case No. 452378/2019. (FINRA 006047; *see also* FINRA 009022).

69. The Complaint identified: (1) as primary defendants, the GP, Allen, the HC, the Adviser, and the Fund; and (2) as relief defendants, various entities, including the BD, against which the NYAG made no claims.

70. The Complaint asserted five claims against the Defendants, which were based on alleged violations of: (1) the Executive Law 63(12) (claims II and V); (2) the General Business Law (Martin Act provisions) (claim I); (3) the law concerning fiduciary duties (claim III); and (4) the common law of equitable fraud. The Complaint sought disgorgement, damages, and other relief.

71. The New York Martin Act, as I understand, under GBL § 352 authorizes the NYAG to investigate, among other things, any alleged "deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise" in the offering or sale of any security in violation of the provisions of said section [or Section 359]. I understand further that the Martin Act is considered by many to be the most severe state securities or "blue sky" law in the United States in terms of scope and ease of favorable results for the NYAG.

THE NYAG'S PRESS RELEASE (DECEMBER 5, 2019)

72. On December 5, 2019, the NYAG issued a press release which was sub-captioned, and stated as fact, that "AG James Files Lawsuit Against Private Equity Fund Manager Who Used Investor Funds as Private Piggy Bank: Fund Manager Illegally Converted More than $13 Million in Investor Funds to Prop Up Failing Broker-Dealer," and confirmed that "[i]n December 2018 ... the [NYAG] obtained an order pursuant to Section 354 of the Martin Act" — which remains in effect today — "[that] restrained Allen from further misappropriation of [Fund] assets or otherwise enriching himself at the expense of investors." A true and complete copy of the NYAG Press Release of December 5, 2019, is attached as Exhibit 6.

THE NYAG'S PRELIMINARY INJUNCTION (FEBRUARY 4, 2020)

73. On or about December 9, 2019, the NYAG sought a preliminary injunction (1) to enjoin me and the Entity defendants from accessing the assets of the Fund and (2) to seek appointment of a receiver to distribute the remaining assets of the Fund.

74. On February 4, 2020, the NYSSCT: (1) issued a decision and order that granted the NYAG's motion, which (2) prohibited any transactions by defendants with the Fund and Advisor, other than Court-approved distributions from the Fund, and (3) denied the NYAG's request for a receiver ("PI Order"). The PI Order stated that the NYSSCT would "provide a copy of [its] opinion to the appropriate enforcement agencies." (FINRA 006129).

THE NYAG AND THE NYSSCT IGNORES SEC AND FEDERAL PREEMPTION

75. The NYAG's core allegation was that the GP engaged in "self-dealing" as defined in the Martin Act. On numerous occasions, GP's counsel explained and I testified to the NYAG and in court that the Fund was authorized in its LPA to make investments in affiliates, that the GP received advice and a legal opinion from outside legal counsel, that the Fund was authorized

to make investments in affiliates, that all investments in affiliates were fully disclosed to LPs without objection, and that SEC federal regulations, including SEC Rule 17a, permitted investment advisors to make investments in affiliates, and that our attorneys had assisted us to adhere with all contractual and regulatory requirements over the years.

76. The GP's attorneys understood that federal securities regulations preempt state securities regulations on specific issues. However, a NY state court disagreed and issued an adverse decision against defendants, effectively unwinding the Fund's investments in affiliates and reversing the LP-approved amendments that authorized distributions to the GP team.

77. I was personally offended and shocked by the NYSSCT's refusal to honor the terms of private contracts that governed the conduct and business of the Entities and investors, all in compliance with the federal securities laws and SEC rules and regulations, and the interest of the NYAG in issuing press releases instead of protecting investors. There was not a single penny that was missing from the Fund.

THE NYAG'S TRIAL, DECISION, AND ORDER (FEBRUARY 4, 2021)

78. From January 11, 2021, to January 14, 2021, the NYAG tried its action in a court-ordered bench trial. On February 4, 2021, the NYSSCT issued a decision and order that, among other things: (1) granted the NYAG's motion, and (2) prohibited any transactions by defendants with the co-defendant Fund. A true and complete copy of the NYSSCT Decision After Trial is attached as Exhibit 7.

THE PRESENT STATE OF THE FUND

79. On December 28, 2018, when the NYSSCT issued the 354 Order: (1) the net asset value of the Fund was approximatley $37 million, an amount confirming significant return on the total contributed capital of approximately $17.6 million; and (2) the Fund's assets were in cash,

marketable securities and remaining private investments. Again, the GP had scheduled a full and final cash and in-kind distribution for January 15, 2019 as per the approved 7th Amendment.

80. On June 2, 2022, the NYSSCT ordered that a receiver seize the Fund and its assets. The receiver, as I understand, subsequently took exclusive control of the Fund and its assets. A true and complete copy of the NYSSCT Order of June 2, 2022, is attached as Exhibit 8.

81. On October 28, 2022, the NYSSCT directed the receiver to marshal the Fund's assets, monetize them, and distribute them to the LPs in accordance with the schedule to which the receiver and NYAG had agreed.

82. On December 20, 2023, almost five years after the 354 Order, the NYSSCT held a (virtual) hearing on the status of the Fund, which I attended. During the hearing, the NYSSCT stated, among other things, that:

(1) "the marketable securities and cash position of limited partnership appears [sic] to have decreased at more than 50 percent, and perhaps as much as 70 percent, for which there is no explanation whatsoever [from the receiver]" (Tr. at 4);

(2) "there has basically been radio silence from the receiver with respect to the conduct of the marshalization and monitorization [sic] of the estate" (*Id.*);

(3) "it's quite apparent that [two law firms] have added absolutely no value to the administration of this estate" (*Id.* at 5); and

(4) "[i]n fact, they've presided over radical diminution of the value of the estate. And the fees to which these parties are seeking to be reimbursed represent a [sic.] extremely significant percentage of the total assets of the estate." (*Id.*).

A true and complete copy of the NYSSCT hearing transcript of December 20, 2023 (emphasis (highlighting) added), is attached as Exhibit 9.

83. I understand, that as of August 2024, the LPs have still not received a meaningful distribution from the Fund to return their contributed capital. It is also my opinion that the receiver does not understand how to manage the Fund or sell private equity assets, consisting of private partnerships or private companies.

84. In the end, the NYAG's actions — ostensibly intended to protect sophisticated investors familiar with partnership and contract law and none of whom complained about the Fund's operations or results — severely reduced the value of the Fund and have, to this day, prevented any of the partners, the LPs and the GP alike, from receiving their contributed capital and what, if anything, remains of the returns the GP generated on that contributed capital.

THE FINRA MATTER

The FINRA Examination (2018-2019)

85. In 2018, FINRA conducted an examination of the BD, in the matter numbered 2018-0562809.

86. On February 28, 2019, FINRA informed the BD that the examination was completed, and on April 30, 2019, FINRA sent an examination disposition letter noting exceptions. (FINRA 006165).

87. FINRA reviewed many of the same issues alleged by the NYAG about the Fund, our BD, and me. FINRA did not issue a fine, discipline, or censure of the BD, the Fund, or me.

88. In 2021, the SEC's Boston Office also conducted an extensive investigation of our GP, Fund, and me regarding the same issues alleged by the NYAG. Subsequently, the SEC Assistant Regional Director issued a close-out letter dated May 18, 2021, which stated, "We have concluded the investigation as to ACP Investment Group, LLC. Based on the information we have as of this date, we do not intend to recommend an enforcement action by the Commission against ACP

Investment." A true and complete copy of the SEC's letter is attached as Exhibit 10.

THE FINRA RULE 8210 DOCUMENT AND TESTIMONY DEMANDS (EARLY 2020)

89. As noted above, the PI Order of February 4, 2020, stated that the NYSSCT would "provide a copy of [its] opinion to the appropriate enforcement agencies," Based on this statement, it is my understanding that the NYSSCT, the NYAG, or both provided FINRA with information and documentation concerning the PI Order.

90. As of February 4, 2020:

(1) The PI Order prevented the Fund's GP, the HC and its BD from engaging in transactions with the Fund;

(2) The BD had 12 employees, which included the Chief Compliance Officer, Michael Schunk, and me, and was operating on a full-time basis;

(3) Mr. Schunk had stomach cancer for which he was receiving chemotherapy—Mr. Schunk has since passed away; and

(4) I was on medication for a brain trauma suffered in an automobile accident in May 2018. Specifically, neurologists at Yale Medical concluded that as the result of my car accident, I had an impaired cognitive processing and memory condition during the NYAG depositions, NYSSCT hearings, and FINRA investigation.

91. Beginning on February 10, 2020, FINRA's departments began sending Rule 8210 document demands to the BD, me, and the BD's chief compliance officer, Michael Schunk, and Rule 8210 demands for testimony from several of our employees, including us. These overwhelming and overlapping demands over a tight time period and related documents and events are listed below (much of this information appears at FINRA 009027-009034):

(1) Document Demand 1 ("DD1")

Date: February 10, 2020 (FINRA 007707)
From: Department of Member Supervision (Steinberg)
Items: 8
Due: February 24, 2020 – 14 days (3 of 8 Items)

February 13, 2020	Notice of Statutory Disqualification (FINRA 006177)
February 14, 2020	BD submitted MC-400 (continuance of membership) (FINRA 006181)
February 24, 2020	Extension granted to March 2 (FINRA 007715)
March 2, 2020	BD has difficulty uploading documents, requests assistance (FINRA 007723)
March 13, 2020	FINRA complains of no response to Items 2 and 8, combines Feb 10 and Feb 20 deadlines with new response deadline of March 20 (FINRA 007729)
March 20, 2020	FINRA extends deadline to March 24, asks for documents on rolling basis (FINRA 007757)
March 21, 2020	BD Production re Item 8, continuing to produce documents (FINRA 007779)
March 30, 2020	BD documents uploaded (FINRA 00787)
March 30, 2020	FINRA Email (Steinberg) re Items 2, 6 and 7, threats of summary FINRA proceeding (FINRA 007789)
March 31, 2020	Schunk emailed "complete production" (FINRA 00791)
April 1, 2020	Schunk had surgery
April 15, 2020	FINRA Letter (Steinberg) claiming incomplete production constitutes violation of FINRA 8210 and threatening sanctions (FINRA 007793)
April 24, 2020	BD wrote to Steinberg disputing incompleteness (FINRA 007825)
May 11, 2020	Record of document submissions from Mar 2-May 11, 2020 responsive to February 10 document demand (FINRA 007721)

(2) Document Demand 2 ("DD2")

Date: February 20, 2020 (FINRA 007711)
From Department of Member Supervision (Steinberg)
Items: 2
Due: February 27, 2020 — 7 days

March 2, 2020	BD uploads some documents, notes difficulty uploading documents, requests assistance (FINRA 007723)
March 5, 2020	BD uploaded 8 documents (FINRA 007783)

March 13, 2020	FINRA complains of no response to Item 1, combines Feb 10 and Feb 20 deadlines with new response deadline of March 20 (FINRA 007729)
March 20, 2020	FINRA extends deadline to March 24, asks for documents on rolling basis (FINRA 007757)
March 21, 2020	BD Production re Items 1 and 2 (including 3 loan agreements for Item 1), continuing to produce (FINRA 007759)
March 30, 2020	BD documents uploaded in response to Items 1 and 2 (FINRA 007783)
March 30, 2020	FINRA Email (Steinberg), Item 2 no response, threats of summary FINRA proceeding (FINRA 007789)
March 31, 2020	Schunk emailed "complete production" (FINRA 00791)
April 1, 2020	Schunk had surgery
April 15, 2020	FINRA Letter (Steinberg) claiming incomplete production constitutes violation of FINRA 8210 and threatening sanctions (FINRA 007793)
April 24, 2020	BD wrote to Steinberg disputing incompleteness (FINRA 007825)

(3) Document Demand 3 ("DD3") — DD3 is discussed at length in the NAC Decision

Date: March 5, 2020 (FINRA 007667)
From: Department of Advertising Regulation (Gregory)
Items: 5
Due: March 19, 2020 – 14 days

March 30, 2020	Second request, answers due April 6 (FINRA 007681)
April 8, 2020	Third request, answers due April 15 (FINRA 007683)
April 20, 2020	Allen emailed Gregory to explain that BD has just seen first request and was "overwhelmed" by all the requests and suggested ways to address (FINRA 007685)
April 20, 2020	FINRA (Gregory) approves extension to April 24 (FINRA 007685)
April 23, 2020	Letter to Gregory providing documents, responses to questions, and explaining (among other things) that the firm's press release had been reviewed and approved by external counsel, the information contained in it was factually accurate, and nowhere did it state or imply that FINRA endorsed, indemnified, or agreed with the firm's business practices (FINRA 007691)

(4) Testimony 1 – Allen

Date: March 10, 2020

(5) Document Demand 4 ("DD4")

Date: March 10, 2020 (FINRA 007814)
From: Department of Enforcement (Koszulinski)
Items: 29
Due: March 20, 2020 — 10 days

March 31, 2020	BD email to FINRA (Koszulinski) noting that responses to Feb 10 and Feb 20 requests submitted and Schunk to enter hospital for surgery on April 1 (the next day) (FINRA 00791)
March 31, 2020	Extension granted to April 13 (FINRA 00791)
April 1, 2020	Schunk had surgery
April 15, 2020	FINRA Letter (Steinberg) claiming incomplete production constitutes violation of FINRA 8210 and threatening sanctions (FINRA 007793)
April 24, 2020	BD wrote to Steinberg disputing incompleteness (FINRA 007825)

(6) Testimony 2 – Schunk

Date: March 18, 2020

(7) Document Demand 5 ("DD5")

Date: April 10, 2020 (FINRA 007833)
From: Department of Member Supervision (Steinberg)
Items: 14
Due: April 24, 2020 – 14 days

April 15, 2020	FINRA Letter (Steinberg) claiming incomplete production constitutes violation of FINRA 8210 and threatening sanctions (FINRA 007793)
April 24, 2020	BD wrote to Steinberg disputing incompleteness (FINRA 007825)

(8) Testimony 3 – Schunck

Date: April 28, 2020

(9) Testimony 3 – Schunck

Date: April 29, 2020

92. In various emails dated April 27, 2020, and May 1, 2020, FINRA investigator David Steinberg noted our continued production on outstanding items and the need for passwords to certain documents uploaded into FINRA's Request Manager. (FINRA 007847-00748).

FINRA'S REJECTION OF ACCESS TO PROTECTED BANK DOCUMENTS.

93. DD1, Item 2, requested production of documentation from bank accounts over which I had signatory authority. I had signatory authority over one set of bank accounts, namely my personal accounts, for which I could and did produce the FINRA-requested documentation ("Regular Accounts").

94. However, I did not have signing authority for Allen family trust accounts for which I am not the sole beneficiary and for which I did not have legal authority to produce documentation without an assurance of confidentiality ("Trust Accounts").

95. After receiving DD1 and prior to May 7, 2020, my counsel John Hewitt and I ("we") informed FINRA's investigator, David Steinberg, that I was legally constrained from producing documents for the Trust Accounts.

96. We offered to have FINRA view information for the Trust Accounts online for purposes of the investigation. FINRA informed us that this offer was unacceptable.

97. We offered, on May 5, 2020, to produce to FINRA the information for the Trust Accounts in hard copy, subject to agreed-upon confidentiality. FINRA informed us that this offer was unacceptable, too.

98. By letter dated May 7, 2020, FINRA's investigator David Steinberg informed my counsel, John Hewitt, that "FINRA Rule 8210 requires that FINRA members produce all documents or information requested by FINRA, but does not authorize or permit firms or

individuals to place conditions on the production of those materials." A true and complete copy of this letter is attached as Exhibit 11.

99. We offered to provide FINRA a discrete review of information in person from the Trust Accounts. FINRA informed us that this offer was also unacceptable.

100. By letter dated May 12, 2020, BD's counsel, John Hewitt, wrote FINRA investigator Steinberg, noting that, as for certain bank accounts within the scope of DD1, Item 2, Hewitt stated that FINRA's "Staff has agreed to make a discrete review of these accounts to determine their relevance in this matter" and "[w]e are currently discussing with the Staff arrangements for this review." (FINRA 007859).

101. Mr. Steinberg testified that he was unaware of any such discussions about any of Allen's bank statements. (FINRA 009032).

102. Hewitt and I did not understand why FINRA would not agree to review the materials online given that FINRA Rule 8210(a)(2) authorizes FINRA to "inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding that is in such member's or person's possession, custody or control." The access to the requested information we had offered literally allowed FINRA staff to "inspect and copy" all of the information they were requesting—either by copying the information by hand or by taking screenshots of the information made available online; given the constraints on my ability to turn over the information, which was not in my possession, custody, or control, this was full compliance with the 8210 demand.

103. Further, FINRA Enforcement claimed to have misplaced passwords or have never received passwords on numerous occasions, which prevented its staff from access documents we produced on the FINRA system. This required that we email or send by expedited delivery these

documents to FINRA. In an April 24, 2020, letter that addressed the various delays and extensions of time worked out between FINRA staff and our external counsel, the BD noted that FINRA staff had also neglected to access password-protected documents in a timely fashion (14 days), allowing the passwords to expire. (FINRA 007825, 007828).

104. The NAC's decision of April 8, 2024, states that my answers to obviously rhetorical questions about the function and importance of FINRA Rule 8210 evidenced a "cavalier attitude about [my] failure to comply with Rule 8210." (FINRA 009077).

105. The NAC drew the wrong inference from my answers. They reflected not a "cavalier attitude" but genuine frustration with having done my best to respond timely and completely to FINRA's multitudinous and overlapping information demands imposed on our business. The seriousness with which I took the Rule 8210 information demands is best evidenced not by answers to several questions but the multitude of documents that our staff, our counsel, and I produced in response to five overlapping document demands and four testimonial demands all within a two-month period, all undertaken while continuing to operate a business, to prepare for a trial with the NYAG, and to address the physical infirmities that Mr. Schunk and I were under, not to mention the fact that the COVID-19 pandemic was then rampant throughout the United States and the entire economy, including our business, was attempting to operate (and survive) under pandemic lock-down conditions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 2nd day of August 2024.

Laurence G. Allen