UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of SUZANNE MARIE CAPELLINI For Review of Disciplinary Action Taken by FINRA	Admin. Proc. File No. 3-22284

OPENING BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

Ian J. McLoughlin
SHAPIRO HABER & URMY LLP
One Boston Place
26th Floor
Boston, MA 02108
Telephone: (617) 439-3939
imcloughlin@shulaw.com

Counsel for Suzanne Capellini

OS Received 01/31/2025

Table of Contents

OS Received 01/31/2025

Table of Authorities

Cases

OS Received 01/31/2025

Statutes

Other Authorities

Rules

Constitutional Provisions

I. INTRODUCTION

The writing is on the wall for FINRA. Applying recent Supreme Court and Circuit Court precedent, FINRA's exercise of Enforcement authority over Ms. Capellini violated: (1) her Seventh Amendment right to a jury trial; (2) the private nondelegation doctrine; and/or (3) Article II of the United States Constitution's requirement that executive officers be appointed and removable by the President. The October 3, 2024 decision (the "Decision") of FINRA's National Adjudicatory Council ("NAC") should be vacated and set aside for these reasons alone.

At a minimum, given these serious Constitutional questions, it was critical that FINRA exercise its jurisdiction consistently with its own By-Laws, rules and precedent, which it did not do. First, the NAC erred in finding FINRA had jurisdiction because FINRA failed to file this action within two years of the termination of Ms. Capellini's FINRA registration. Second, the NAC applied an incorrect legal standard when it found Ms. Capellini violated FINRA Rule 8210 by producing documents in response to ambiguous requests and imposed an excessive sanction. Finally, the NAC erred in finding Ms. Capellini violated FINRA Rule 3310(a) and imposed an oppressive sanction. The Decision should therefore be vacated and set aside.

II. STATEMENT OF THE CASE

A. Factual Background

1. Ms. Capellini Responded Truthfully to Rule 8210 Requests

Enforcement charged Ms. Capellini with violating FINRA Rule 8210 in responding to three related requests. The FINRA Office of Hearing Officers ("OHO") Panel majority found all three responses violated Rule 8210; the OHO dissent disagreed, finding none of the three responses violated Rule 8210. The NAC found two of the three responses violated Rule 8210. The evidence established that the OHO dissent was correct, and the OHO majority and NAC were wrong.

OS Received 01/31/2025

Ms. Capellini had an exemplary career in the securities industry for approximately 40 years, serving as compliance director of First Manhattan Corp. ("FMC") from 1985 to May 2020.[1] She reported to Neal Stearns, General Counsel and Chief Compliance Officer, who had broad supervisory responsibilities.[2] Prior to these events, Ms. Capellini had no disciplinary history.[3]

In late 2019 and early 2020, FINRA's Office of Fraud Detection and Market Integrity ("OFDMI") sent FMC (addressed to Ms. Capellini) Rule 8210 requests regarding trading activity in the shares of Rivex Technology Corp. ("RIVX"), Lazex, Inc. ("LAZX") and Remaro Group Corp. ("REMO"), traded in her husband's FMC accounts.[4] OFDMI investigated securities fraud.[5]

Ms. Capellini typically prepared FMC's responses to Rule 8210 requests, which were approved by Stearns.[6] She understood that she and FMC were required to respond "fully, promptly and without qualification."[7] She asked Stearns whether it was appropriate for her to handle the RIVX, LAZX and REMO requests because they involved shares traded in her husband's accounts; Stearns said it was and directed her to prepare the responses.[8]

On November 19, 2019, OFDMI sent FMC a request, addressed to Ms. Capellini, seeking:

> "[A]ll documentation related to all receipt, delivery, and/or transfer of RIVX stock as well as all due diligence inquiries made to determine the free trading basis of any RIVX shares sold by the account between August 2018 and November 7, 2019."[9]

FINRA witness John Sazegar, who worked in OFDMI and testified for Enforcement, admitted this request stated "[w]e are conducting a review of trading activity in the common shares

---

[1] 1103; 2345; 2943-44; 6614; 6996. References to numbered documents are to the record.
[2] 1103; 2348-49; 2943-44; 6614-15; 6996; 7003.
[3] 2770-71; 6475 *et seq.*; 6661-62.
[4] 1104-05; 1454-55; 6627-39.
[5] 1459; 6627-28.
[6] 2797.
[7] 2797-99; 5303-04.
[8] 2800-01.
[9] 5311; 6630; 7003.

of RIVX," and not that "we are conducting a review or investigation into FMC's due diligence procedures."[10] Critically, Sazegar further admitted:

> "The target of this investigation was RIVX Technology. We were investigating a potential securities fraud scheme involving RIVX Technology. ***The target of this investigation-what this investigation does not amount to an investigation specifically targeting First Manhattan***."[11]

Sazegar also admitted "[t]here is no sentence… that explicitly states that" FMC should only send documents it had before November 19, 2019, or when the shares were deposited, in response.[12]

Ms. Capellini understood the request's subject to be trading in RIVX, not FMC or its due diligence. She believed the request sought all documentation relating to RIVX trading activity.[13]

On November 26, 2019, Ms. Capellini sent OFDMI a response including some documents she got from her husband after receiving the request, a legal opinion regarding the registration of the shares and a shareholder list.[14] The response did not state that those documents were in FMC's files when the shares were deposited, nor did Ms. Capellini intend to make OFDMI believe that.[15]

When asked about the response, Sazegar admitted: "there is nothing directly stated that appears to me to be false."[16] He also admitted the focus of the inquiry was whether the shares could be sold under the federal securities laws, and the information FMC provided was "not unhelpful."[17]

On December 4, 2019, OFDMI sent a request to FMC, addressed to Ms. Capellini, seeking:

> "[A]ll due diligence inquiries that the firm made to determine the free trading basis of the LAZX shares deposited by, or transferred into, the account listed in Item #1.

[10] 1475-76.
[11] 1477 (emphasis added).
[12] 1464-65, 69.
[13] 2688-89; 2799-2802.
[14] 2698-99; 5579; 6631-32; 7004.
[15] 2807; 5579.
[16] 1462-64.
[17] 1470-71.

> This should include, if applicable, copies of stock certificates, attorney opinion letters, and any other documents detailing the origin of the shares."[18]

Although the wording was slightly different, the LAZX request in substance sought the same type of information as the RIVX request and was sent, in Sazegar's words, for the "same purpose."[19] Like RIVX, the LAZX request focused on trading in the stock.[20] Sazegar also admitted "[t]here is no sentence that explicitly states that" FMC should only send documents it already had in its possession prior to the receipt of the Rule 8210 request.[21]

Ms. Capellini did not understand the LAZX request to seek anything different from the RIVX request. She believed the subject of the request was trading in LAZX, not FMC or the adequacy of its due diligence. She did not understand the LAZX request to ask for what due diligence the firm had conducted at the time the shares were deposited; she understood it, like the RIVX request, to ask for all documentation to support the free trading basis of the shares.[22]

On December 9, 2019, Ms. Capellini sent OFDMI a response with documents she got from her husband after receiving the request, a subscription agreement, legal opinion letter and shareholder list.[23] The response did not state that the documents were in the firm's files when the shares were deposited, nor did Ms. Capellini intend OFDMI believe that.[24] Sazegar admitted the response did not state the documents were in FMC's possession when the shares were deposited.[25]

On January 24, 2020, OFDMI sent a request to FMC, addressed to Ms. Capellini, seeking:

> "[A]ll due diligence inquiries that the firm made to determine the free trading basis of the REMO shares deposited by, or transferred into, the account listed in Item #1.

---

[18] 5599; 6633; 7004
[19] 1410-11; 1479-80; 1516-17; 6661.
[20] 1480-81; 5599.
[21] 1481-82.
[22] 2717-19; 2808.
[23] 2715-17; 5779-80; 6634; 7004-05.
[24] 2809-10; 5779-80.
[25] 1484-85.

> This should include, if applicable, copies of stock certificates, attorney opinion letters, and any other documents detailing the origin of the shares."[26]

Ms. Capellini did not understand the REMO request to seek anything different from the prior requests. She understood the subject of the request to be trading in REMO, not FMC or the adequacy of its due diligence. She understood the request to include all documentation supporting the free trading of the shares without regard to when she or FMC first obtained such documents.[27]

On January 27, 2020, Ms. Capellini sent OFDMI a response with documents she got from an attorney who worked with her husband after receiving the request – an opinion letter regarding the registration of the shares and attachments.[28] The response did not say those documents were in FMC's files when the shares were deposited, nor did Capellini intend that OFDMI believe that.[29]

The Decision relies on the fact that one of the attachments, a publicly available amended S-1 registration statement (the "S-1"), "did not contain the footer indicating that it had been downloaded from Edgar that day" to conclude Ms. Capellini acted "to conceal the fact that the documents had been downloaded after Capellini received the Remaro Request and thus could not have been part of First Manhattan's due diligence file."[30] Yet Enforcement's witness Andrew Aspen, FMC's in-house counsel, who first discovered the printed S-1 with the missing footer, agreed the S-1 that FMC sent to OFDMI in January 2020 was identical to the one filed with the SEC, which is all Ms. Capellini was purporting to produce. Aspen was also unable to surmise any motive from the removal of the footer from the printed S-1, such as a motive that FINRA not have a printed S-1 when the REMO shares were deposited.[31]

---

[26] 5793; 6636.
[27] 2732-35; 2757-59; 2764; 2801-02; 2811-12.
[28] 2738-39; 6051-52; 6638.
[29] 2812-13, 2817-20; 6051-52.
[30] 7006; 7019-20.
[31] 1613-15; 6662.

Like Mr. Aspen, the dissenting OHO Panelist recognized it would be entirely speculative to infer any intent to conceal from the mere fact of the removal of the footer from the printed S-1:

> "[T]he issue is the trimming of the footer at the bottom of the document during its initial printing. For guidance on whether this was a malicious attempt to deceive FINRA or was essentially inconsequential to the 8210 request cannot be resolved based on what was presented at the hearing. There were no witnesses that testified to malicious behavior. The testimony by Ms. Capellini was that she doesn't even remember how this came to pass. So the question becomes is this a single innocuous incident or part of a pattern of deceptive behavior? Based on information and belief, there is nothing apart from the alleged impropriety of removing the footer on a Form S-1/A document that suggests an attempt to deceive Enforcement. There were no other documents in Ms. Capellini's possession that were alleged to have been tampered with or altered including, most importantly, First Manhattan documents. Ms. Capellini's conjecture that the original documents didn't contain a footer and therefore that they may have been returned to their original condition for submission is not unreasonable.
>
> So with no pattern of obstruction or obfuscation, and a respected industry veteran who for 35 years didn't have a blemish on her record, the evidence suggests that this does not rise to the level of an 8210 violation…."[32]

The dissent's findings conform to the evidence.[33] When FINRA asked Ms. Capellini for the first time (during her on-the-record testimony) which documents produced were in FMC's files prior to receipt of the requests, and which she obtained after receiving the requests, she responded truthfully.[34] No policy or rule required FMC to have printed S-1's in its paper files, and the S-1 was always available electronically on Edgar, so she had no reason to pretend the firm already had a printed S-1.[35] Ms. Capellini's 28-year supervisor Stearns testified she had a high level of integrity, was respected, trusted and held in high regard at FMC. He testified she was an excellent employee and person, and it would have been totally out of character for her to deceive FINRA.[36]

---

[32] 6659; 6662.
[33] 2757-60; 6662. The NAC in its Decision mentions the dissent in passing in a footnote, but fails to grapple with its analysis. 7008 n. 17.
[34] 2819; 6661.
[35] 2818.
[36] 2887-88; 2956-59; 6661.

2. Ms. Capellini Fulfilled her Duties as AMLCO in a Reasonable Manner

The NAC found Ms. Capellini failed to establish and enforce a reasonable AML program for low-priced securities ("LPS") and failed to detect and reasonably investigate red flags of potentially suspicious LPS activity in her husband's accounts.[37] Any such violations, however, existed long before Ms. Capellini became AMLCO; she reasonably continued to carry out the same policies and practices that had already been established, implemented and vetted.

From 2004 to January 2018, Cheryl Kallem was FMC's primary AMLCO; Ms. Capellini served as "backup."[38] The firm's AML policies, including with respect to LPS, were adopted and revised years prior to 2018.[39] Although Ms. Capellini assisted FMC's Compliance team in the development of policies, she did not have the authority to independently adopt any new compliance or AML policies, either before or after 2018; Stearns did.[40]

FMC, in consultation with and at the suggestion of Pershing, had established a process for submitting a preclearance form for LPS in 2013, when Kallem was AMLCO, based on trading activity in Ms. Capellini's husband's account, which process was approved by Kallem and Stearns.[41] FMC relied on Pershing to monitor for suspicious activity because its exposure as the clearing firm for millions of accounts was far broader than FMC's.[42]

Enforcement's AML expert, Arthur Middlemiss, testified that the core deficiency in FMC's AML program, the failure to identify and address the firm's LPS' risk, existed before 2018, and that the "line had been crossed long ago."[43] Yet Middlemiss also admitted the firm never provided

---

[37] 7010.
[38] 1103, ¶ 4; 2352-53; 2771-72; 6618; 6996.
[39] 2778-79; 3183; 3188; 6618; 6997.
[40] 2233-34; 2777; 2975-77; 3185-86; 6144; 6618; 6644; 7014.
[41] 2400-01; 2784-85; 3183-84; 6619; 6997.
[42] 2773; 2777; 2962-63; 2979-80.
[43] 3183-88.

Ms. Capellini with "any AML training that would have enabled her to detect and address the AML deficiencies regarding low-priced securities."[44] The firm's practices for LPS, including preclearance forms and exception reports, were the same before and after 2018.[45]

On December 29, 2017, outside auditors provided an annual report regarding FMC's AML procedures, which identified no deficiencies regarding LPS and stated:

> "FMC has a robust surveillance program in place for monitoring unusual and suspicious money movements… and… the corresponding processes and procedures meet current regulatory requirements."[46]

Immediately after that, from January 2018 to May 2020, Ms. Capellini served as AMLCO, with Joseph Sammarco. She did not ask for more AML duties and received no extra compensation.[47]

FMC received audit reports for 2018 and 2019, but they did not recommend significant changes with respect to FMC's AML program for LPS, such as by incorporating the guidance in FINRA Regulatory Notice 19-18.[48] The 2018 report identified a few "clerical or minimal oversight deficiencies."[49] The 2019 report indicated some previously identified issues had not yet been addressed, but characterized them as "LOW RISK," with no mention of LPS.[50] Ms. Capellini believed the firm's AML procedures were compliant because of the audits and because FINRA and SEC exams had never identified any issues.[51] There were no instances of money laundering at FMC.[52] Stearns agreed FMC undertook reasonable AML compliance efforts.[53]

---

[44] 3188; 2772; 2776.
[45] 2280-82; 2285-92; 2363-65; 2786-88; 2794-95; 3183-88; 5094.
[46] 6519; 2269-78; 2375; 2788-91.
[47] 1603-04; 2238-43; 2250-51; 2773-77; 2972-79; 4041; 6153, 68, 77; 6422; 6618-19, 61.
[48] 2247-48; 2251-52; 2792-93; 6419; 6443; 3198-99; 6624-25.
[49] 2243-45; 6442; 6624; 6998.
[50] 2248-50; 6446; 6624-25; 6998.
[51] 2252-53; 2790-94; 2983-84; 3201.
[52] 2793; 2980-81.
[53] 2981-83.

Although the NAC found Ms. Capellini failed to detect or investigate red flags of suspicious activity in her husband's accounts (the firm customer who traded most frequently in LPS),[54] LPS were an insignificant, atypical part of FMC's business, such that it was reasonable for the firm and Ms. Capellini to devote less time and resources to it from a compliance perspective.[55]

Ms. Capellini had known her husband Roger Bendelac for 40 years and reasonably trusted his assurances that there was nothing untoward with the shares deposited in his accounts.[56] Stearns was principal for the opening of Mr. Bendelac's account, had supervisory responsibility for LPS at FMC and approved the preclearance forms.[57] And when Capellini asked Stearns for permission to have her husband's accounts maintained outside of FMC, he declined,[58] even though it was an "obvious" conflict of interest to assign her the responsibility to monitor family accounts.[59]

B. Procedural History

FMC terminated Ms. Capellini's employment May 8, 2020.[60] FMC emailed FINRA on May 8, 2020 and gave it notice of the termination and circumstances via a WebEx presentation on May 11, 2020.[61] Her FINRA registration terminated on May 8, 2020.[62]

Enforcement filed its Complaint more than two years later, on June 1, 2022.[63] On June 28, 2022, Capellini moved to dismiss, arguing FINRA lacked jurisdiction because the Complaint was

[54] 6643; 6646-48.
[55] 1612; 2395; 2783-84; 2796; 2950-52; 6615; 6996.
[56] 2690-91. Although the NAC found Capellini's husband's LPS "activity increased dramatically" after she became AMLCO, 6999, the evidence at the hearing proved the opposite. The number of LPS deposited, and the proceeds from sales of such securities, were substantially higher in his accounts from 2012–2017 than from 2018–2020. 2302-2321; 4311 *et seq*.
[57] 2783; 2786; 2947; 2962; 6614-15.
[58] 2782-83; 2953; 6647.
[59] 2298-99; 3188-93; 6625; 6661.
[60] 6477.
[61] 507; 1432-36; 1519-20; 5309; 6641.
[62] 6477; 6899, n. 19.
[63] 22-25. Enforcement amended its Complaint on November 2, 2022. 235; 251-54.

filed more than two years after termination of her registration. On July 22, 2022, the Hearing Officer denied that motion with leave to refile a motion for summary disposition.[64] On November 21, 2022, Capellini filed a Motion for Summary Disposition, arguing, among other things, that FINRA lacked jurisdiction.[65] On January 13, 2023, the Hearing Officer denied that motion.[66]

After a hearing in February 2023, the Panel issued a decision on July 14, 2023, in which: (1) two out of three Panelists barred Ms. Capellini for violating Rule 8210 with respect to the RIVX, LAZX and REMO responses and (2) the Panel found Ms. Capellini violated Rule 3310(a).[67] One Panelist dissented from the Rule 8210 findings. Ms. Capellini timely appealed to the NAC on August 4, 2023.[68] On October 3, 2024, the NAC issued its Decision, dismissing the portion of the Panel majority's finding that Ms. Capellini violated Rule 8210 with respect to the RIVX Request, but otherwise barring her for violating Rule 8210.[69] The NAC also barred her for violating FINRA Rules 3310(a) and 2010.[70] Ms. Capellini timely applied for SEC review on October 30, 2024.[71]

C. Burden of Proof and Standard of Review

FINRA bears the burden of proving each element of its charges against Ms. Capellini by a preponderance of the evidence.[72] To determine whether FINRA met that burden, the SEC reviews FINRA's findings and disciplinary sanctions, as represented by the NAC Decision, *de novo*.[73]

---

[64] 33 *et seq.*; 137-38.
[65] 367 *et seq.*
[66] 367 *et seq.*; 987-994; 6653 n. 438.
[67] The Panel did not sanction Ms. Capellini for this because of the Rule 8210 bar, but suggested an appropriate sanction would be a $25,000 fine and two-year suspension. 7008.
[68] 1297 *et seq.*; 6613-4; 6660-62; 6665-67.
[69] 7020; 7026.
[70] *Id.*
[71] 7067.
[72] *See Dratel Grp., Inc.*, Exch. Act Rel. No. 77396, 2016 SEC LEXIS 1035, at *15 (Mar. 17, 2016).
[73] *See Black v. SEC*, No. 23-2297, at 5 (4th Cir. Jan. 14, 2025) (citing 15 U.S.C. § 78s(d)(2), (e)(2)).

III. EXCEPTIONS AND SUPPORTING ARGUMENT

A. FINRA Violated Ms. Capellini's Seventh Amendment Right to a Jury Trial

FINRA's disciplinary action against Ms. Capellini violated her Seventh Amendment right to a jury trial. The Supreme Court's recent decision in *SEC v. Jarkesy*, 144 S.Ct. 2117, 2124-25, 2127 (June 27, 2024) holds the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud and prohibits the SEC from adjudicating such matters in-house before one of its administrative law judges ("ALJ's"), rather than in federal court. The same analysis applies to in-house proceedings brought by FINRA, given that federal law requires firms and individuals to join FINRA to engage in securities business, and that FINRA is subject to SEC oversight.[74] FINRA's proceedings against Ms. Capellini, seeking civil penalties for claims of misrepresentation and concealment, violated her Seventh Amendment right to a jury trial. Pursuant to *Jarkesy* and other recent Supreme Court precedent reigning in the powers of administrative agencies,[75] the SEC cannot use FINRA to do indirectly what it cannot do directly, adjudicate such claims administratively, rather than in federal court where a respondent has a right to a jury trial.

The Seventh Amendment applies to claims that are "legal in nature," as opposed to claims in equity. 144 S.Ct. at 2128 (citing *Granfinanciera v. Nordberg*, 492 U.S. 33, 53 (1989) and *Tull v. United States*, 481 U.S. 412 (1987)). *Jarkesy* held an SEC securities fraud action is "legal in nature" because: (1) it is closely aligned with common law fraud; and (2) the SEC seeks civil penalties that are "designed to punish and deter, not compensate." *Id.* at 2128-30. And because the SEC's action targeted the same basic conduct as common law fraud, employed the same terms of art, relied on similar legal principles and sought civil penalties, a punitive remedy, the SEC's

[74] *Alpine Sec. Corp. v. FINRA.*, 2024 U.S. App. LEXIS 29728, *3, 10-12 (D.C. Cir. Nov. 22, 2024).
[75] *See, e.g.*, *Loper Bright Enterp. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron*; courts may not defer to an agency's interpretation of a statute simply because it is ambiguous).

claims implicated private rights rather than public rights, and the "public rights" exception to the Seventh Amendment right to a jury trial did not apply. *Id.* at 2131-34.

Following *Jarkesy*, FINRA's in-house prosecution of Ms. Capellini violated her Seventh Amendment right to a jury trial in an Article III federal court. First, a comparison of FINRA's action against Ms. Capellini to "to 18th-century actions brought in the courts of England, prior to the merger of the courts of law and equity," *Granfinanciera*, 492 U.S., at 42, reveals FINRA's case against Ms. Capellini is akin to common law fraud. FINRA claims that Ms. Capellini provided misleading Rule 8210 responses as some kind of cover-up for purported AML-related violations.[76] These claims are closely analogous to a common law claim for fraud for the same reasons that the securities fraud claims in *Jarkesy* were – all such claims "target the same basic conduct: misrepresenting or concealing material facts." *Jarkesy*, 144 S. Ct. 2130.

Second, an examination of "the remedy sought" to "determine whether it is legal or equitable in nature," reveals that FINRA's action against Ms. Capellini is legal in nature. *Granfinanciera*, 492 U.S., at 42. Under *Jarkesy*, what determines whether a civil sanction "is legal is if it is designed to punish or deter the wrongdoer…." *Jarkesy*, 144 S. Ct. 2129. A "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." *Id.* (citing *Austin v. United States,* 509 U. S. 602, 610 (1993). Here, FINRA sought monetary sanctions from Ms. Capellini[77] and obtained orders barring her from working in the securities industry, all of which was designed to punish and deter.[78] Such sanctions are "legal" in nature for the same reasons as in *Jarkesy*. Like

[76] 24-25; 254-55; 7024.
[77] 25, 255; 6658.
[78] 7021 ("[T]he NAC 'should design sanctions… to prevent and discourage future misconduct by a respondent and deter others from engaging in similar misconduct.'").

the SEC's penalties in *Jarkesy*, FINRA's penalties are available "even when no investor has actually suffered financial loss." *Id.* at 2126, 2130; 7022-23. And as in *Jarkesy*, the criteria for the severity of the sanctions turns on "culpability of the defendant." 144 S. Ct. at 2130; 7025.

To the extent FINRA argues the "public rights" exception applies, such argument fails for the same reasons as in *Jarkesy*. To the extent FINRA argues it is not a governmental actor subject to the Seventh Amendment, it is wrong. It would be extraordinary if FINRA's in-house proceedings were constitutional when the SEC's in-house proceedings are not, because then the SEC could use FINRA to do what it cannot do itself – adjudicate fraud claims seeking civil penalties administratively instead of in federal court before a jury. This would create a glaring *Jarkesy* loophole. As the Supreme Court has made clear, "what matters is the substance of the suit, not where it is brought, who brings it or how it is labeled." *Id.* at 2136. FINRA violated Ms. Capellini's Seventh Amendment right to a jury trial, and the Decision should be vacated and set aside.

B. FINRA Violated the Private Nondelegation Doctrine

These proceedings arose from FINRA's investigation of possible violations of the federal securities laws, contravening the private nondelegation doctrine. The Circuit Court of Appeals for the District of Columbia recently enjoined FINRA from expelling the broker-dealer Alpine Securities following an expedited proceeding that did not afford an opportunity for SEC review in violation of the private nondelegation doctrine. *Alpine*, 2024 U.S. App. LEXIS 29728, *4, *17-*18. FINRA's proceedings against Ms. Capellini also violated the private nondelegation doctrine.

The private nondelegation doctrine "requires that a private entity statutorily delegated a regulatory role be supervised by a government actor." *Id.* at *18; *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (delegation of government power to a private party is "delegation in its most obnoxious form"). "For a delegation of governmental authority to a private entity to be constitutional, the private entity must act only 'as an aid' to an accountable government agency

that retains the ultimate authority to 'approve[], disapprove[], or modif[y]' the private entity's actions and decisions on delegated matters." *Alpine*, 2024 U.S. App. LEXIS 29728, at *20. Because the SEC could not statutorily review an expulsion order before it went into effect, FINRA's expedited hearing process ran afoul of the private nondelegation doctrine. *Id.* at *26.

In dissent, Judge Walker urged the Court to issue "a broader injunction that would prevent FINRA from policing its member's misconduct at all." *Id.* at *26. In rejecting the dissent's call for a more sweeping application of the private nondelegation doctrine, the majority emphasized repeatedly that in *Alpine*, FINRA sought only to enforce its own rules, not federal securities laws. *Id.* at *14, 16, 26-27. This is significant because it indicates that to the extent FINRA seeks to enforce federal securities laws, it violates the private nondelegation doctrine.

FINRA's proceedings against Ms. Capellini violated the private nondelegation doctrine for the reasons in Judge Walker's dissent. *Id.* at *56-61. At a minimum, under the majority's approach, these proceedings resulted from FINRA's investigation of possible violations of the federal securities laws, without SEC oversight, which violated the private nondelegation doctrine. FINRA witness Sazegar admitted the focus of the Rule 8210 requests was whether the "shares in question could be sold under the federal securities laws" and that OFDMI was investigating "a potential securities fraud scheme."[79] The entire purpose of OFDMI was to investigate "a wide variety of securities fraud schemes."[80] This proceeding arose from a FINRA investigation of possible violation of the federal securities law, without SEC supervision, contravening the private nondelegation doctrine. The NAC Decision should be vacated and set aside for this reason alone.

[79] 1470, 1477.
[80] 1379, 1459.

C. FINRA's Exercise of Federal Enforcement Authority over Ms. Capellini Violated Article II of the United States Constitution

Even if FINRA could overcome the Seventh Amendment and private nondelegation challenges above (it cannot), FINRA's structure, procedures and exercise of enforcement authority over Ms. Capellini would nonetheless violate Article II of the Constitution. Article II provides: "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1; *Seila Law, LLC v. Consumer Fin. Prot. Bur.*, 140 S. Ct. 2183, 2197 (2020) (recognizing that the executive power "belongs to the President alone"). No one in the government can wield such power, except for the President and executive officers appointed and removable consistent with Article II. *See* U.S. Const. art. II, § 2, cl. 2 (Appointments Clause); *id.* art. II, § 1, cl. 1 (Vesting Clause); *see also Seila*, 140 S. Ct. at 2197; *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018).

FINRA's hearing officers, who wield significant executive enforcement authority, must be: (1) properly appointed; and (2) removable by the President. *Id.* at 2053-55 (holding SEC ALJ's are "Officers of the United States" who must be appointed per Article II because they exercise "significant discretion," have "the authority needed to ensure fair and orderly adversarial hearings," and may serve as the "last-word" in an enforcement action) (following *Freytag v. Commissioner*, 501 U.S. 868, 880-82 (1991), holding the same for "special trial judges" of the Tax Court); *Free Ent. Fund v. PCAOB*, 561 U.S. 477, 483-84, 498-502, 505-06, 514 (2010) (holding structure of a private, quasi-governmental board violated separation of powers because its officers enjoyed two levels of protection from presidential removal). As in *Lucia* and *Freytag*, FINRA's

hearing officers are not appointed consistent with the appointments clause;[81] and as in *Free Enterprise Fund*, its hearing officers are unconstitutionally insulated from presidential removal.[82]

FINRA's hearing officers are "near carbon copies" of the SEC ALJ's in *Lucia*. *Alpine Sec. Corp. v. FINRA*, 2023 U.S. App. LEXIS 16987, *6 (D.C. Cir. July 5, 2023) (Walker, J., concurring). They are permanent employees in continuing offices exercising "important functions" identified by the Supreme Court as markers of "significant authority." *Freytag*, 501 U.S. at 881-82. They "have authority to do all things necessary and appropriate to discharge [their] duties," which (as in *Lucia* and *Freytag*) includes taking testimony, conducting trials, ruling on the admissibility of evidence, and enforcing compliance with discovery orders. FINRA Rule 9235(a); *see also* FINRA Rule 9280; FINRA Rule 9260 *et seq.* And in performing these tasks, they exercise a wide degree of discretion — a hallmark of "significant authority." *Freytag*, 501 U.S. at 882. FINRA's hearing officers are tasked by statute with enforcing the nation's securities laws. 15 U.S.C. § 78s(g)(1). And FINRA can "levy sanctions that carry the force of federal law." *Turbeville v. FINRA*, 874 F.3d 1268, 1270 (11th Cir. 2017) (citing 15 U.S.C. § 78o-3(b)(7)). The role of FINRA's hearing officers is exactly like *Lucia*, where the SEC was granted "statutory authority to enforce the nation's securities laws" and "delegate[d] that task to an ALJ." 585 U.S. at 241.

As in *Lucia* and *Freytag*, FINRA's hearing officers possess "nearly all the tools of federal trial judges." *Lucia*, 138 S. Ct. at 2053. They are thus "Officers of the United States," who must

[81] *See* By-Laws of FINRA Regulation, Inc., FINRA, art. 7, § 7.3.

[82] FINRA's hearing officers have multiple layers of tenure protection. They can be removed only by the FINRA CEO, *Office of Hearing Officers*, FINRA, https://www.finra.org/rules-guidance/adjudication-decisions/office-hearing-officersoho#:~:text=Employment%20protections%20exist%20for%20hearing,of%20FINRA's%20Board%20of%20, who can be removed only for good cause by the SEC Commissioners, 15 U.S.C. § 78s(h)(4)(B), who are removable by the President only for good cause. *See Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022).

be appointed directly by the President, courts of law, or heads of departments — just like the officials in *Lucia* and *Freytag*. *Id.* at 2049, 2052. And the Constitution does not permit them to be insulated from presidential removal by more than one level of for-cause removal restrictions. *See Free Ent.*, 561 U.S. at 514. Yet FINRA's hearing officers violate both these principles.

FINRA may argue the Constitution does not apply because it is a private entity. But it would make no sense for the Constitution to prohibit the SEC from using ALJ's, but permit the SEC to have FINRA use hearing officers who are "near carbon copies" of those ALJ's, to enforce federal law. To the extent any additional state action is required, it is present here, "when a private party acts as an agent of the government in relevant respects," *NB ex rel. Peacock v. D.C.*, 794 F.3d 31, 43 (D.C. Cir. 2015), when "a nominally private entity . . . is entwined with governmental policies," *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 288-89 (2001), when the government has "so far insinuated itself into a position of interdependence with" a "private" entity "that it [is] a joint participant in the enterprise," *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357–58 (1974), or "when the government compels the private entity to take a particular action." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

Here, FINRA was acting as an agent at the behest of the SEC and was entwined with the SEC, when it proceeded against Ms. Capellini. This case arose first from a FINRA investigation into possible federal securities violations in the trading of certain securities, including in the accounts of Ms. Capellini's husband, and second from an SEC investigation of the information Ms. Capellini provided in that FINRA investigation. Sazegar testified FINRA coordinated with the SEC in investigating the Rule 8210 responses,[83] as corroborated by contemporaneous emails.[84]

[83] 1433; 1519-20; 7006.
[84] 5309; 7006.

The discussions between FINRA and the SEC concerned both the Rule 8210 responses and an SEC request "related to the account of Aleutian Equity Holdings LLC," one of the accounts of Ms. Capellini's husband.[85] These discussions included personnel from FINRA's Boston office, who had no connection with OFDMI's prior investigation but were apparently coordinating with SEC personnel in Boston investigating Mr. Bendelac. The SEC ultimately sued Mr. Bendelac (unsuccessfully, losing on all its claims after a bench trial) in connection with his trading,[86] apparently seeking to use FINRA and its proceedings against Ms. Capellini as leverage over her husband in violation of her civil rights. In sum, FINRA's proceedings against Ms. Capellini violated Article II,[87] and the NAC Decision must be set aside.

D. FINRA Lacked Jurisdiction over Ms. Capellini

The Decision erroneously held FINRA has jurisdiction.[88] FINRA lacked jurisdiction; the Complaint was filed more than two years after termination of Ms. Capellini's FINRA registration.

Article V, Section 4(a)(i) of FINRA's By-Laws requires FINRA to file a complaint within "two years after the effective date of termination of registration pursuant to Section 3…." Section 3(a) in turn states: "Following the termination of the association with a member of a person who is registered with it, such member shall, not later than 30 days after such termination, give notice of the termination of such association to [FINRA] via electronic process or such other process as [FINRA] may prescribe on a form designated by [FINRA]." The plain language the By-Laws thus contemplates ***two*** ways a FINRA registration can be terminated: (1) "via electronic process"; or (2) "such other process as [FINRA] may prescribe on a form designated by [FINRA]."

---

[85] 1531; 5309.
[86] 1982; *SEC v. Trends Investments et al.*, No. 22-10889-RGS (D. Mass.).
[87] Ms. Capellini also contends FINRA's conduct violated Article III of the Constitution and the Fifth Amendment's Due Process Clause, as argued by the petitioners in *Black v. SEC*, No. 23-2297 (4th Cir.). Ms. Capellini reserves all rights to assert and develop those arguments on further appeal.
[88] 7009-10.

OS Received 01/31/2025

The effective date of Ms. Capellini's termination of registration was May 8, 2020, as reflected in her CRD Report, which states:

> "Registrations with Previous Employer(s)
>
> From 04/01/2009 to ***05/08/2020*** FIRST MANHATTAN CO (1845)"[89]

This is supported by the undisputed facts establishing FMC provided FINRA notice of Ms. Capellini's termination "via electronic process" (email and a WebEx presentation) in May 2020:

> "It is also undisputed that First Manhattan's law firm, WilmerHale, told FINRA about Capellini's termination within a few days of her termination. In fact, on May 11, 2020, WilmerHale made a presentation to FINRA, among others, in which it displayed 280 pages of materials, including the Rule 8210 responses prepared by Capellini that are the subject of this case."[90]

The Complaint was filed more than two years later, on June 1, 2022, and is therefore time-barred.

The NAC, following the Hearing Officer, concluded Ms. Capellini's FINRA registration terminated on June 5, 2020, when FMC filed her Form U5.[91] The NAC's reading is that Article V, Section 3(a) of the By-Laws "provides that notice of termination shall be provided by the electronic process *prescribed by* FINRA or other process prescribed by FINRA," and that the only form FINRA has prescribed is the U5, such that *only* the filing of a Form U5 can trigger termination.[92]

There are at least four problems with the NAC's interpretation. First, that is not what Article V, Section 3(a) says. It says a member can give notice of termination either:

> via electronic process or such other process as [FINRA] may prescribe on a form designated by [FINRA].

If FINRA intended what the NAC suggests, the By-Laws would say:

---

[89] 6477 (emphasis added). *See also* 6899 n. 19, Order Governing FINRA Rule 9285 Motion ("According to the Central Registration Depository, Capellini… was last registered with FINRA through her association with First Manhattan, which terminated on May 8, 2020.").
[90] 989; *see also* 507; 1387; 1432-36; 1518-20; 5309.
[91] 7009.
[92] 7009-10.

> via electronic process as [FINRA] may proscribe on a form it designates or such other process as [FINRA] may prescribe on a form designated by [FINRA]; or
>
> via electronic process, or such other process, as [FINRA] may prescribe on a form designated by [FINRA].

Second, the NAC's reading renders the foregoing language of the By-Laws meaningless because there would be only *one* way a member can notify FINRA of termination, the Form U5, whereas the By-Laws plainly contemplate *two* ways, (1) "electronic process" or (2) "such other process as [FINRA] may prescribe on a form designated by [FINRA]."[93] Third, at a minimum the By-Laws are ambiguous and should thus be construed against FINRA, the drafters, particularly here given the Constitutional questions surrounding the exercise of FINRA enforcement authority.[94]

Fourth, Ms. Capellini's interpretation comports with the purpose of the jurisdictional provision, which "is to ensure that [FINRA] retains jurisdiction over persons for two years after they leave the securities industry."[95] Because Capellini's association with FMC was terminated in all capacities on May 8, 2020, she ceased conducting a securities business from that moment on.[96] Ms. Capellini's interpretation also ensures FINRA has adequate time to investigate and bring a disciplinary action, which it could have done at any time between May 2020 and May 2022.

The NAC also avers that the May 8, 2020 termination date listed in Ms. Capellini's CRD report "refers to the date her *employment* was terminated, and she ignores the material just below

---

[93] *See, e.g.*, *NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. Ct. 2007) ("Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court."). Because FINRA is a Delaware corporation, and its By-Laws are a contract, Delaware rules of contract interpretation apply. *See, e.g.*, *In re Cerence S'holder Derivative Action*, 2024 U.S. Dist. LEXIS 230625, *8-9 (1st Cir. Dec. 20, 2024).

[94] *See, e.g.*, *Cerence*, 2024 U.S. Dist. LEXIS 230625, at *8-9 (applying Delaware case law holding that any ambiguity must be construed against the drafter).

[95] *D.B.C. Comm. v. Gurfel*, 1998 NASD Discip. LEXIS, 52 at *8 (NAC June 12, 1998).

[96] https://www.sec.gov/reportspubs/investor-publications/divisionsmarketregbdguidehtm.html at section II D and D1.

this in her CRD record that states her *registrations* were terminated June 5, 2020."[97] That is not what the CRD Report says. What it says is: ""Registrations with Previous Employer(s) From 04/01/2009 to 05/08/2020 FIRST MANHATTAN CO (1845),"[98] i.e. her FINRA registration was terminated as of May 8, 2020. And the material "just below" that in her CRD record is not to the contrary. That language says only that her "Registration Status" was "TERMED" as of the "Status Date" June 5, 2020, meaning that by June 5, 2020, her registrations were terminated; that language does not say anything about the status of her FINRA registrations in May 2020, whereas the language quoted above specifically says her registration was terminated as of May 8, 2020. The CRD Report is FINRA's own official registration record; FINRA is bound by it.

Without citing any support in the record, the NAC also claims "the parties stipulated that First Manhattan filed a Form U5 terminating Capellini's registration on June 5, 2020."[99] Ms. Capellini never stipulated that; as the NAC acknowledges elsewhere in the Decision, she has asserted repeatedly in these proceedings that FINRA lacks jurisdiction because her registration terminated in May 2020.[100] If the NAC is referencing paragraph 10 of the parties' Joint Stipulations, all that says is: "On June 5, 2020, First Manhattan filed a Uniform Termination Notice for Securities Industry Registration ("Form U5"), disclosing that it had terminated Capellini's employment on May 8, 2020." The suggestion that the foregoing language somehow constitutes an admission by Ms. Capellini that her registration was terminated on June 5, 2020, in the face of her repeated contentions otherwise, is clearly erroneous.[101]

---

[97] 7010 n. 18.
[98] 6477 (emphasis added). *See also* 6899 n. 19.
[99] 7010 n. 18.
[100] 7008.
[101] 1104.

The NAC cites precedent that a registered person cannot "unilaterally terminate" his or her registration, but that misses the point. Ms. Capellini is not arguing *she* unilaterally terminated her registration.[102] Instead, *FMC's* notice of her termination "via electronic process" triggered termination. FMC fully informed FINRA of the circumstances surrounding Ms. Capellini's termination via electronic process in May 2020; FINRA did not learn anything from the U5 in June 2020 that it did not already know.[103] Moreover, as the Hearing Officer acknowledged, "none of the SEC or NAC decisions confront precisely the circumstances that exist here."[104] And none of those decisions hold a U5 is the *only* form of notice to FINRA that can *ever* "open the two-year window."

The NAC finally reasons that Ms. Capellini's "illogical reading" would "undermine… certainty" about the period that FINRA retains jurisdiction. There is nothing illogical about Ms. Capellini's reading; it tracks the plain language of the By-Laws, which contemplate *two* methods by which a member can notify FINRA and trigger termination of registration. Nor would Ms. Capellini's interpretation create "uncertainty." A notice of termination via electronic process by means other than a Form U5, as occurred here, triggers effective termination of registration in the exact same way as the filing of a Form U5. The NAC's conclusion FINRA has jurisdiction is thus legally incorrect, and the Decision should be vacated and set aside.

E. Ms. Capellini did not Violate Rule 8210, and FINRA's Sanctions for that Charge are Excessive and Oppressive

The NAC incorrectly applied legal standards when it found Ms. Capellini violated Rule 8210.[105] First, the onus is on *FINRA* to propound clear and unambiguous Rule 8210 requests:

> "When FINRA makes requests for documents and information, those requests must be clear and unambiguous… A recipient of a Rule 8210 request should not have to guess what documents or information is being requested or have to connect the dots

[102] 7009-10.
[103] 7 and 41, ¶ 6.
[104] 989-91.
[105] *See, e.g.*, *In re Scottsdale Cap. Adv. Corp.*, 2021 SEC LEXIS 2789, at *28-31 (Sept. 17, 2021).

> with language contained somewhere else in the Rule 8210 request to understand what information FINRA is seeking under a particular request."[106]

The ambiguity of the requests here is clear because three sets of decision-makers at FINRA have interpreted the requests in three different ways. The OHO majority found that all three requests "sought… information… that the firm had in its files at the time of the request,"[107] even though none of the requests said that. The OHO dissent completely disagreed:

> "The first letter requesting information on RIVX sent to Ms. Capellini by Enforcement is ambiguous as to whether or not the information was to be drawn exclusively from the firm's files or could include information from other sources. Ms. Capellini testified that she thought it the latter, that by gathering as much information as possible including from outside sources, she was being cooperative. At the time, she was unaware that First Manhattan was the subject of the investigation. She believed that RIVX was. She then received two nearly identical requests for information regarding LAZX and REMO. The wording on these two requests was slightly different than the first but, essentially, they mirrored the earlier request. Ms. Capellini subsequently provided FINRA with a similarly broad swath of material for LAZX and REMO. During testimony, Ms. Capellini never denied that some of the documents sent to FINRA were not originally in her possession nor did Enforcement ever suggest that she did deny it. Instead, Enforcement theorizes that by her silence she was obfuscating or obstructing the investigation. This presumption is not supported by a preponderance of the evidence. As noted in the Panel decision "(a) recipient of a Rule 8210 request should not have to guess what documents or information is being requested…" The wording in Enforcement's letters was inconsistent. Combining that with Ms. Capellini's sworn testimony that she believed that she was fully cooperating, the blame for this confusion has to be at a minimum shared with FINRA."[108]

The NAC declined to impose liability for the RIVX response, because the "wording" of that request sought "documentation related to the receipt, delivery and/or transfer of… stock" and "the customer… was Capellini's spouse," but imposed liability for the LAZX and REMO responses, because they supposedly sought only "First Manhattan's contemporaneous due diligence."[109] That these three decision-makers construed the requests differently by itself establishes their ambiguity.

---

[106] *Dep't of Enforcement v. Blake*, 2018 FINRA Discip. LEXIS 30, *13-14 (OHO Oct. 29, 2018).
[107] 6649.
[108] 6661.
[109] 7018-20.

The NAC's ruling that Ms. Capellini should have interpreted the second and third requests for LAZX and REMO differently from the first request for RIVX makes no sense. Enforcement has always argued the three requests should be interpreted the same way.[110] And as Sazegar testified and the dissent found, the language of the three requests is similar, and they all served the same purpose.[111] Because the RIVX requests came first, they set the stage for the later LAZX and REMO requests. Once Ms. Capellini understood the first request to seek "all documentation related to the receipt, delivery, and/or transfer of" the stock, she reasonably understood the later requests to seek the same. This was supported by Sazegar's admissions that none of the requests said the firm should produce only documents already in its files before receiving the requests or at the time the shares were deposited, and that nothing stated in the responses was false.[112] Sazegar's testimony was extremely damaging to Enforcement's Rule 8210 case in several ways, yet the NAC simply ignored it entirely. And the LAZX and REMO requests, like the RIVX request, involved trading in the accounts of Ms. Capellini's husband, which the NAC relied on when refusing to impose liability for the RIVX response. The NAC's refusal to impose liability based on the RIVX response was correct, but it should have extended to the LAZX and REMO responses as well.

The NAC, like the OHO majority, improperly faulted Ms. Capellini for failing to guess as to the meaning of, or read words into, the LAZX and REMO requests. The NAC interpreted the LAZX and REMO requests as calling for "production of First Manhattan's *contemporaneous* due diligence,"[113] but the word "contemporaneous" appears nowhere in the requests. The NAC assumes that "due diligence" means "contemporaneous due diligence," but "due diligence" can be

[110] 18-21.
[111] 1410-11; 1479-81; 1516-17; 5559; 6661.
[112] 1462-65, 69; 1481-82; 1484-85.
[113] 7018 (emphasis added).

conducted at different times, and the requests did not specify a time frame. The NAC faulted Ms. Capellini for obtaining documents from her husband after receiving the requests,[114] but nothing in the requests instructed her not to do that, so the only way Ms. Capellini could know that would be to guess. The NAC, like the Panel majority, criticized Ms. Capellini for her "silence when she produced these documents" because she did not explain that she obtained some of them after receiving the requests,[115] but nothing in the requests asked her to explain when she obtained the documents, and the NAC identifies no other legal basis for imposing a duty on her to disclose when she obtained the documents. The NAC incorrectly applied applicable legal standards.

As the NAC points out, "associated persons have an unequivocal and unqualified duty to comply with FINRA Rule 8210 requests, and to do so completely and accurately."[116] A corollary to this is that recipients of a Rule 8210 request must produce all responsive documents within their control under the language of the Rule. A "member firm or associated person must make books, records, or accounts available when they are in the possession of a third party, but the firm or individual 'controls or has a right to demand them.'"[117] Failing to produce responsive documents within a recipient's ability to demand from a third party violates Rule 8210.[118]

Mr. Bendelac was the husband of Ms. Capellini, to whom the requests were addressed, and a customer of FMC. Broker-dealers have a right to, and indeed are required to, obtain information from customers, including as to a customer's occupation, net worth, income and investment

[114] 7018.
[115] 7018-19.
[116] 7018.
[117] *Dep't of Enforcement v. Wilfredo Felix*, 2021 FINRA Discip. LEXIS 7, *16-17 (NAC May 26, 2021) (citing Rule 8210, Supplementary Material .01); *Dep't of Enforcement v. Wilfredo Felix*, 2020 FINRA Discip. LEXIS 32, *76 (OHO July 1, 2020).
[118] *DOE v. Dreamfunded Marketplace*, 2019 FINRA Discip. LEXIS, *243-47 (OHO June 5, 2019).

objectives.[119] It is also appropriate for a firm to demand information about a customer's trading. In fact, at the request of Pershing, FMC had done exactly that in 2013, demanding information, through Ms. Capellini, about her husband's trading.[120]

Ms. Capellini thus would have violated Rule 8210 by failing to produce the attorney opinion letters and other documents she and FMC had the right to demand from her husband relating to the shares. It would have been incredibly risky for Ms. Capellini to produce such documents for RIVX but not for LAZX and REMO. If FINRA did not want Capellini's husband involved, why didn't it say so, and why did it address the requests to Ms. Capellini in the first place? Given that the requirement to respond fully to a Rule 8210 request is "unequivocal," "unqualified," and "mandatory,"[121] Ms. Capellini and FMC had to produce the documents.

The NAC also found Ms. Capellini produced an altered document in response to the REMO request, faulting her for offering "no explanation" for the altered S-1. In doing so, the NAC applied an incorrect legal standard by improperly shifting the burden of proof to Ms. Capellini to "explain" the altered S-1. Enforcement had the burden of proof by a preponderance of the evidence, and as the OHO dissent explained, failed to meet that burden.[122] Ms. Capellini never, either by labeling the REMO pdf file she produced "Due Diligence" to correspond with the applicable request,[123] or anything else, represented to FINRA that FMC had the printed S-1 at the time the shares were deposited.

---

[119] https://www.sec.gov/rules/2001/10/books-and-records-requirements-brokers-and-dealers-under-securities-exchange-act-1934; 5286-87.
[120] 2400-06.
[121] *Dreamfunded Marketplace*, 2019 FINRA Discip. LEXIS 27, at *235-36.
[122] 6659; 6662, quoted on p. 6, n. 32 above.
[123] 6651.

The theory that Ms. Capellini acted to mislead FINRA by producing the S-1 without the date printed presupposes she understood the requests to seek only information the firm had before receiving the requests. Given the ambiguity of the requests, however, she reasonably believed the requests were broader, covering "all documentation" regarding the trading of the shares. The NAC's finding Ms, Capellini violated Rule 8210 should be vacated and set aside.

In any event, the sanction imposed, a bar, is excessive and oppressive. As the NAC acknowledges, FINRA's Sanction Guidelines "direct us to consider the importance of the information requested as viewed from FINRA's perspective."[124] Sazegar admitted the focus of the requests was to investigate potential securities fraud schemes involving these stocks, *not* FMC or the adequacy of its due diligence, and that the documents Ms. Capellini provided were "not unhelpful."[125] That the requests came from OFDMI, which investigates securities fraud, and said "[w]e are conducting a review of trading activity in the common shares of" the stocks, further demonstrates the information Ms. Capellini provided was helpful to FINRA's investigation.

What appears to have driven the NAC's sanction is "the potential for monetary gain furthered by Capellini's misleading responses," but as set forth below this is pure speculation. There was no evidence at the hearing that Ms. Capellini tried to conceal the scope of FMC's due diligence to mask the purported inadequacy of her AML review of her husband's trading to allow him to make illegal trades of LPS so that she could profit as a result. As the OHO dissent recognized, that is an unsupported inference drawn from a single fact – the existence of an altered S-1— which was not proven by a preponderance of the evidence (and would never hold up in a federal court). FINRA's sanctions under Rule 8210 should therefore be canceled.

[124] 7024.
[125] 1470-71.

F. Ms. Capellini did not Violate Rule 3310(a), and FINRA's Sanctions for that Charge are Excessive and Oppressive

The record does not support the finding that Ms. Capellini violated Rule 3310(a). The standard under Rule 3310(a) is one of reasonableness, *Scottsdale*, 2021 SEC LEXIS 2789, at **37-41, and as set forth above, Ms. Capellini acted reasonably, including because:

- The systems, policies and procedures at issue were all established by her predecessor Kallem and supervisor Stearns, well before she became primary AMLCO.
- The trading in her husband's account had presented "red flags" since at least 2012, and FMC had already put its systems in place to address that then.
- Neither FMC's outside auditors, nor Pershing, nor FINRA nor SEC examinations ever identified the purported deficiencies here.
- Trading in LPS constituted a *de minimis* portion of FMC's business, and there were no instances of money laundering at FMC.
- FMC forced Ms. Capellini into a conflict by expecting her to monitor her husband's trading and refusing to allow his accounts to be held outside FMC.

Enforcement failed to prove she violated Rule 3310(a); the NAC's findings should be set aside.

At a minimum, the NAC's sanction for the Rule 3310(a) claim (a bar) is excessive and oppressive. The standard sanction is a fine and suspension of 10 business days to two months.[126] And the NAC did not cite any precedent imposing anywhere near as severe a sanction as a bar for a Rule 3310(a) violation. On the contrary, the primary case cited by the NAC to support its finding of a Rule 3310(a) violation (7012-14), *Dep't of Enf. v. C.L. King et al.*, 2019 FINRA Discip. LEXIS 43, **2, 140-141 (NAC Oct. 2, 2019), imposed only a three-month suspension and $20,000 fine.[127]

A proper application of the Sanction Guidelines demonstrates the NAC's imposition of a bar was outlandish. The NAC avers that Ms. Capellini "failed to detect and investigate a plethora

[126] 6655; 2024 Sanction Guidelines at 83-84.
[127] Other precedent is in accord. *See, e.g.*, *Dep't of Enf. v. John Carris Inv., LLC et al*, 2015 FINRA Discip. LEXIS 32, *162-63 (OHO Jan. 20, 2015) (three-month suspension and $25,000 fine).

of red flags of suspicious activity… over two and a half years," but acknowledges that "low-priced securities constituted a small part of First Manhattan's overall business," does not dispute that the only purported "red flags" were in her husband's accounts, who she reasonably trusted after decades of marriage, and does *not* find "that any particular transaction was reportable."[128]

The NAC found Ms. Capellini's "failures… were reckless" but the evidence did not support that.[129] The NAC indicated she ignored recommendations from the auditors, but they never identified the issues here, and the few issues they did identify were characterized as "LOW RISK." The NAC faulted Capellini for failing to "incorporate applicable red flags set forth in FINRA guidance,"[130] but neither Stearns, nor anyone else at FMC, nor the auditors, nor FINRA, nor the SEC, nor Pershing told or trained her to do that. The NAC faulted Ms. Capellini's "due diligence" of LPS deposits, but she was doing what FMC had always done. The NAC criticized her for not taking "responsibility," but she was "entitled to present a vigorous defense."[131] The reality is, whatever AML-violations existed at FMC began long before she became primary AMLCO, and even if she violated Rule 3310(a) by continuing to do what had always been done, rather than educating herself as to what needed to change and changing it, such conduct is no different from any run-of-the-mill AML-related or other supervisory violation and is a far cry from "reckless."

The NAC refused to mitigate Ms. Capellini's sanction due to FMC's termination, asserting she did not prove it "materially reduced the likelihood of misconduct," but she did. Ms. Capellini's termination from FMC ended her career in the securities industry. She is in her late sixties and has been out of the industry for close to five years. She is not coming back and has suffered enough.

---

[128] 7022.
[129] *Id.*
[130] *Id.*
[131] 6657.

The NAC indicated the "most troubling aggravating factor" was the supposed "substantial financial gain to Capellini resulting from her husband's trading in accounts for which she conducted deficient AML review," but there was no evidence that any "financial gain" resulted from her "deficient AML review" as opposed to her husband's trading. The NAC presupposes his trading was illegal and that FMC would have shut it down if she had identified the "red flags,"[132] but Enforcement never proved that. FMC did not stop his trading when Pershing had raised an issue years earlier. And even if it had, he could have traded LPS in outside accounts.[133] There is nothing unlawful about trading in LPS, so the mere fact that Ms. Capellini may have profited from her husband's trading (which was also unproven)[134] does not justify an increased sanction.

Two other Principal Considerations[135] indicate, at most, a minimal sanction is warranted:

- Ms. Capellini did not conceal her conduct; she was candid when asked;[136] and
- No one was injured by her conduct, neither firm customers nor anyone else.[137]

The suggested sanction for Capellini's claimed 3310(a) violation is thus excessive and oppressive.

IV. CONCLUSION

Ms. Capellini therefore requests that the NAC's Decision and sanctions be vacated and set aside, FINRA's findings of liability be rejected and its sanctions be canceled.

---

[132] 7023.
[133] 675-77.
[134] Enforcement did not prove that Mr. Bendelac's trading resulted in any profit at all, rather than a return of principal on the cost basis paid.
[135] 2024 Sanction Guidelines at 7.
[136] It appears that what may have driven the sanction for the Rule 3310(a) to be so much higher than usual is the erroneous belief that Ms. Capellini violated Rule 8210 to "cover up" purported AML violations. 7024. Thus, once the portion of the Decision regarding Rule 8210 is set aside, any sanction for a Rule 3310(a) violation should also be set aside.
[137] As former head of Enforcement Susan Schroeder made clear, the question whether an Enforcement action is appropriate at all turns on whether there was demonstrated financial harm or a significant risk of harm. https://clsbluesky.law.columbia.edu/2018/09/27/latham-watkins-discusses-principles-guiding-finra-enforcement-action/. Here, there was ***no evidence*** of either.

Dated: January 31, 2025

Respectfully submitted,

/s/ Ian J. McLoughlin

Ian J. McLoughlin
SHAPIRO HABER & URMY LLP
One Boston Place
Boston, MA 02108
Telephone: (617) 439-3939
Facsimile: (617) 439-0134
imcloughlin@shulaw.com

Counsel for Suzanne Capellini

CERTIFICATE OF SERVICE

I certify that on January 31, 2025, I served a copy of the foregoing by email on:

Attn: Celia Passaro
Office of General Counsel
FINRA
1700 K Street, N.W.
Washington, D.C. 20006
ersilia.passaro@finra.org
nac.casefilings@finra.org

/s/ Ian J. McLoughlin
Ian J. McLoughlin

CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with the length limitation set forth in SEC Rule of Practice 450(c) in that the brief is 30 pages long and contains 9,705 words, exclusive of the tables and cover and signature.

/s/ Ian J. McLoughlin
Ian J. McLoughlin