UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

SPARTAN CAPITAL SECURITIES, LLC, JOHN D. LOWRY, and KIM M. MONCHIK

For Review of Disciplinary Action Taken by FINRA

Admin. Proc. File No. 3-22285

RESPONDENTS/APPELLANTS SPARTAN CAPITAL SECURITIES, LLC, JOHN D. LOWRY, AND KIM M. MONCHIK'S BRIEF IN SUPPORT OF THEIR APPLICATION FOR REVIEW

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PRELIMINARY STATEMENT

FINRA's Department of Enforcement ("Enforcement") filed the Complaint against Respondents/Appellants Spartan Capital Securities, LLC ("Spartan"), John D. Lowry ("Lowry") and Kim M. Monchik ("Monchik") (collectively, "Respondents"). It asserted three causes of action.

The first cause of action is against Spartan and asserts it failed to make, or made late, U4 and U5 disclosures for its registered representatives and alleged violations of Article V, Sections 2(c) and 3(b) of FINRA's By-Laws and FINRA Rules 1122 and 2010. It is based on allegations relating to disclosure issues by Spartan, as an entity, arising from certain broker arbitrations, financial events, and customer complaints. It is not asserted against Lowry and Monchik.

The second cause of action is against Lowry for alleged U-4 disclosure failures and alleged violations of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010. It is limited to a claim that Lowry failed to report arbitrations and/or customer complaints on his own U4.

The third cause of action is against Monchik for alleged U-4 disclosure failures and alleged violations of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010. It is limited to allegations that Monchik failed to report arbitrations on her own U4.

Each cause of action is legally distinct and involved a separate analysis for each disclosure that formed the basis for each claim.

FINRA appointed a FINRA hearing officer, Michael J. Dixon, to preside over the disciplinary proceeding. H.O. Dixon ruled on motions, presided over nine hearing days, and ruled on the admissibility of testimony from eight witnesses and several hundred exhibits.

On March 28, 2023, H.O. Dixon, on behalf of the Extended Hearing Panel, issued the Extended Hearing Panel Decision dated March 28, 2023 (the "OHO Decision").

In the OHO Decision, H.O. Dixon found that Spartan violated Article V, Sections 2(c) and 3(b) of FINRA's By-Laws and FINRA Rules 1122 and 2010 and found Spartan's failure to report various U4 and U5 amendments was willful. He fined Spartan $600,000 – an amount far exceeding the Sanction Guidelines, ordered Spartan to retain an independent consultant to review its supervisory procedures, and required Spartan to amend the U4s and U5s of its registered persons, including Lowry and Monchik, to reflect the filing and disposition of customer arbitrations and written complaints.

With regard to Lowry and Monchik, H.O. Dixon found they each willfully violated Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010. he fined Lowry $40,000, suspended him for two years from associating with any member firm in any capacity for willfully failing to amend his Form U4, and ordered him to make curative disclosures. With regard to Monchik, he fined her $30,000, suspended her for two years from associating with any member firm in any capacity for willfully failing to amend her Form U4, and ordered her to make curative disclosures.

Respondents appealed the OHO Decision to the National Adjudicatory Counsel ("NAC").

On October 9, 2024, NAC issued its decision affirming the violations and "willful" finding, modifying certain sanctions imposed but affirming the two-year suspension sanctions imposed against Lowry and Monchik and the $600,000 sanction imposed against Spartan (the "Decision"). [Decision, R. 26067].[1]

[1] References to the Record on Appeal are hereinafter referred to by the Bates Number for the

Initially, the underlying FINRA disciplinary hearing conducted by a FINRA appointed Hearing Officer was unconstitutional because: i) FINRA's in-house disciplinary proceeding violated Respondents' Seventh Amendment right to a jury trial; and ii) the Hearing Officer who presided over the disciplinary proceeding and issued the OHO Decision was a non-government appointed hearing officer in violation of the U.S. Constitution's Appointments Clause. Notwithstanding the unconstitutionality of the disciplinary proceeding, H.O. Dixon and NAC committed numerous reversible errors by applying the incorrect legal standard and ignoring the weight of the evidence.

This is an important case of first impression. It turns upon Respondents' decision not to report certain arbitration claims on Lowry, other Spartan Officers, such as its FINOP, and Monchik's U4s where they were named as respondents solely because of their positions as Spartan's Officers or Principals (for ease of reference, "Officer Disclosures"). Unlike a disclosure for a financial event or arbitration where the individual was the broker who engaged in the alleged sales practice – where the mere failure to make a U4 disclosure will be deemed willful conduct, the standard for determining the reportability of an Officer Disclosure is driven by FINRA in its published Form U4 and U5 Interpretive Questions and Answers (the "FINRA Guidance"). The FINRA Guidance for an Officer Disclosure, in sum and substance, provides that the Officer or Principal, if named in a claim based on their position, may make a good faith

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Index on Appeal and will be referred to as [R. _____], citations to the Decision will referred to as "Decision, p. #", and citations to the OHO Decision [R.25319] referred to as "OHO Decision, p. #". Respondents address the Decision's errors in their legal arguments because it is not practical to reiterate the Decision's contents herein given it spans 42 pages, including 49 footnotes, and the OHO Decision spans 84 pages, including 642 footnotes. Respondents cite and reference the OHO Decision because the Decision does not include any citations to the Record or any citations to the OHO Decision.

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determination, on a case-by-case basis, as to whether or not a statement of claim alleges that the Officer or Principal failed to supervise the specific representative alleged to have committed a reportable sales practice violation. As acknowledged by Bernard Howard, the Director of FINRA's Regulatory Review and Disclosure Unit (the "FINRA Disclosure Unit"), if the allegations against an Officer/Principal are general, broad, and non-specific in nature, and discuss general supervisor duties over the entire firm based on his/her Title, and do not directly allege a sales practice violation by the Officer/Principal, the arbitration need not be reported by Officer/Principal on his/her U4.

In reaching the conclusion that Respondents willfully failed to disclose the Officer Disclosures on Lowry, other Spartan Officers, and Monchik's U-4, NAC and H.O. Dixon committed reversible error by applying the incorrect legal standard and failing to apply the good faith determination test for each statement of claim required by the FINRA Guidance. Had they applied the correct standard, NAC would have found that the evidence demonstrated Respondents made a good faith determination for each arbitration's statement of claim, and the Officer Disclosures were not reportable by Lowry, other Spartan Officers, and/or Monchik. The evidence supporting Respondents' good faith determination – ignored or improperly discounted by NAC and H.O. Dixon – is substantial.

First, the evidence proves that, for the non-disclosed arbitrations, the statement of claims alleged that Lowry, other Spartan Officers, and/or Monchik failed to supervise the firm's representatives, as a whole, based on their Titles, and did not allege that either one of these individuals failed to supervise *the broker*, who conducted the alleged sales practice violation.

Second, Respondents made a good faith determination for each arbitration disclosure for Lowry, other Spartan Officers, and/or Monchik when they reviewed each statement of claim's

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allegations within the 30-day reporting period.

Third, the evidence proves that Respondents consulted with multiple, experienced legal counsel and securities compliance consultants. The testimony and evidence proves that Respondents provided each statement of claim to legal counsel; counsel reviewed the claim's allegations, the Form U4 and the FINRA Guidance; and counsel provided legal advice to Respondents that the particular Officer Disclosures were not reportable for Lowry, other Spartan Officers, and/or Monchik.

Finally, the evidence demonstrated that Respondents did not act willfully. They documented their good faith determination, which identified the steps undertaken in reaching their determination.

With respect to the findings against Spartan, they are distinct from those against Lowry and Monchik. Although Spartan, as a firm, admitted that it had some CRD reporting failures caused by a former Compliance Officer, NAC committed reversible error when it held that Spartan had an obligation to submit U4 financial disclosure updates for its registered representatives based on unverified and incomplete third-party summary information, relied on inapposite authority concerning individuals – not a firm, and discounted Spartan's substantial efforts to investigate the information provided to determine the accuracy of the possible disclosure events. FINRA provided the possible disclosure events to Spartan via summary sheet, and FINRA refused, despite request, to provide back-up information to Spartan – such as a copy of the actual lien/judgment; identifying the county/court where the lien/judgment had been filed or even a Case Number for a filing. While Spartan subsequently determined that *51 of 169 financial events identified by FINRA* were accurate and submitted U4 financial disclosure updates, the Decision unduly penalized Spartan for its "late filings" arising from its good faith

efforts to determine the accuracy of the information – information for which Spartan was not a party to the lien/judgment or involved in the underlying events.

Finally, NAC did not properly consider the Sanction Guidelines' Principal Considerations, failed to consider the weight of the evidence demonstrating Lowry and Monchik's good faith disclosure determinations, and erred in finding that Respondents were "willful" in their failure to make U4 Disclosures. NAC also errored in affirming the two-year suspensions against Lowry and Monchik and affirming the monetary sanctions imposed against Spartan – monetary sanctions that were ***779% greater than the high-end*** of the recommended sanction range set forth in the Sanction Guidelines.

LEGAL ARGUMENT

I. Standard of Review

The U.S. Securities and Exchange Commissions (the "SEC") must conduct a *de novo* review of the Decision and the disciplinary sanction imposed. *PAZ Sec. Inc. v. SEC*, 494 F.3d 1059, 1064 (D.C. Cir. 2007). This review includes an "independent review of the record" to determine whether Respondents engaged in the conduct that NAC found them to have engaged, whether that conduct violated the rules specified in the Decision, and "whether those provisions and rules are, and were applied in a manner, consistent with the purpose of [the Securities Exchange Act of 1934 (the "Exchange Act")]." *Eric Smith*, Release No. 34-100762, 2024 WL 3875989, *6 (Aug. 19, 2024). In conducting its review, the SEC applies the preponderance of the evidence standard. *Id*. With respect to sanctions, the SEC will not sustain the sanctions imposed by NAC if it "finds that, given due regard to public interest and protection of

investors, the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition." *Bruce Zipper*, Release No. 34-100777, 2024 WL3876042, *4 (Aug. 20, 2024). The SEC considers any aggravating or mitigating factors, as well as "whether the sanctions serve remedial rather than punitive purposes, and although not binding on the SEC, the SEC uses FINRA's Sanction Guidelines as a benchmark." *Id.*

Based on its review, the SEC can approve, modify, or disapprove FINRA's actions. *Alpine Sec. Corp. v. FINRA*, No. 23-5129, __ F.4th __, 2024 WL 4863140, *7 (D.C. Cir. Nov. 22, 2024). For the reasons stated herein, the SEC should disapprove FINRA's actions and set aside the Decision.

II. The SEC Must Set Aside the Decision Because the Disciplinary Proceeding was Unconstitutional

The SEC must set aside the Decision because FINRA's in-house disciplinary proceeding is unconstitutional.[2]

A. FINRA's In-House Disciplinary Proceeding Violated the Seventh Amendment

In *Jarkesy v. SEC*, the U.S. Court of Appeals for the Fifth Circuit ruled the use of in-house disciplinary proceeding conducted by the SEC was unconstitutional and violated the Seventh Amendment's right to a jury trial. 34 F.4th 446 (5th Cir. 2022), *rehearing denied in banc*, 51 F.4th 644 (5th Cir. 2022). The Fifth Circuit held that a jury trial attaches to SEC enforcement actions, and Congress, or any agency acting pursuant to congressional authorization, cannot assign the adjudication of such claims to an agency because such action

[2] Respondents did not waive their constitutional arguments. Despite NAC deeming them waived [*see* Decision, n. 29], Respondents briefed the issues before NAC [R. 25769-25773], FINRA briefed its opposition to the issues [R. 25915-25917], and NAC decided the issue on the merits. [Decision, pp. 26-29].

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would violate the Seventh Amendment right to a jury trial. *Id.* at 451. In reaching its decision, the Fifth Circuit held that the right to a jury trial attaches to actions seeking civil penalties, including actions seeking penalties brought by the SEC. *Id.* at 454. The Court found that the SEC often acts as both prosecutor and judge in in-house proceedings. *Id.* at 449. In this capacity, the Court found the SEC's Administrative Law Judges ("ALJs") exercise considerable power over the administrative case's record by controlling the presentation and admission of evidence, they could punish contemptuous conduct, and often their decisions are final and binding. *Id.* at 464. Finally, the Fifth Circuit found that a jury trial in this context does not "dismantle" any statutory or rule scheme or impede swift resolution. *Jarkesy,* 34 F.4th at 455-56. Indeed, under the Exchange Act, the federal courts have jurisdiction to hear actions brought by the SEC. *Id.* On June 27, 2024, the U.S. Supreme Court affirmed the Fifth Circuit's decision and held that the Seventh Amendment entitles a respondent in an administrative enforcement proceeding to a jury trial in a federal court organized under Article III of the U.S. Constitution when the SEC seeks civil penalties for securities fraud. *SEC v. Jarkesy*, 144 S.Ct. 2117, 2139 (2024). Because the SEC's civil penalties for securities fraud are "designed to punish and deter, not to compensate", they are the "type of remedy at common law that could only be enforced in courts of law" with Seventh Amendment protections. *Id.* at 2128-29. In short, the Court found that SEC civil penalty actions regarding fraud are "a common law suit in all but name" and therefore the *Jarkesy* respondents were "entitled to a jury trial in an Article III court." *Id.* at 2136, 2139. *Jarkesy* makes clear that this proceeding tramples Respondents entitlement to have their private rights resolved in an Article III Court and impairs the enforcement responsibility of those courts to adjudicate them. This is so because, just as the SEC's use of in-house courts violated the Seventh Amendment right to a jury trial, by extension, FINRA's use of its in-house

courts, which are derived from the ***same*** authority delegated by Congress to the SEC, are also unconstitutional.

FINRA is a self-regulatory organization ("SRO") registered with the SEC as a national securities association pursuant to the Maloney Act of 1938. 15 U.S.C. §§78o-3, *et seq.*, amending the Exchange Act, 15 U.S.C. §§73a, *et seq*. As an SRO, FINRA is part of the Exchange Act's comprehensive plan for regulating the securities markets. *See id.* at §§78q, 78s; *Desiderio v. NASD*, 191 F.3d 198, 201 (2d Cir. 1999), *cert. denied*, 531 U.S. 1069 (2001); *see also PennMont Sec. v. Frucher*, 586 F.3d 242, 245 (3d Cir. 2009), *cert. denied*, 559 U.S. 972 (2010). FINRA's regulatory duties are imposed by Congress and require FINRA to conduct the daily regulation and administration of the securities markets. Among its regulatory obligations, the Exchange Act requires FINRA to establish rules "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade . . . and, in general, to protect investors and the public interest. . . ." 15 U.S.C. §78o-3(b)(6). The Exchange Act also mandates that FINRA discipline member firms and their associated persons for violating FINRA rules or the federal securities laws. *Loftus v. FINRA*, No. 20-CV-7290, 2021 WL 325773, *1 (S.D.N.Y. Feb. 1, 2021); *Karsner v. Lothian*, 532 F.3d 876, 880 (D.C. Cir. 2008) (FINRA "serves as a quasi-governmental agency, with express statutory authority to adjudicate actions against members who are accused of illegal securities practices . . . ."); *see also* 15 U.S.C. §78o-3(b). The Exchange Act provides for extensive SEC oversight of SROs such as FINRA. *Id.* at §78s; *Desiderio*, 191 F.3d at 201. The SEC must approve all FINRA rules, including the ones at issue in this case. 15 U.S.C. at §78s(b) and (c). The Exchange Act establishes the process by which FINRA may initiate disciplinary proceedings against its members and associated persons. *Id.* at §78o-3(h). That process has been codified in FINRA's

Code of Procedure. FINRA Rule 9000, *et seq*. FINRA filed the Complaint pursuant to its Code of Procedure, and by extension, the Exchange Act. The Complaint sought to impose a monetary penalty against Respondents.[3] [R. 1, Compl., p. 22].

As stated by the Federal Courts, FINRA "stands in the shoes of the SEC" in monitoring its members' compliance with the securities laws and rules. *Cashmore v. FINRA*, No. 18-CV-1198S, 2020 WL 6566302, *5 (W.D.N.Y. Nov. 9, 2020); *Scher v. NASD*, 218 Fed. Appx. 46, 47 (2d Cir. 2007). And one Judge of the U.S. Court of Appeals for the District of Columbia has found that "FINRA hearing officers are near carbon copies of those [SEC's] ALJs." *Alpine Securities Corp. v. FINRA*, No. 23-5129, 2023 WL 4703307, at *2 (D.C. Cir., July 5, 2023) (Walker, J., concurring). Here, in FINRA's in-house disciplinary proceeding, FINRA acted as ***both*** prosecutor and judge [R. 1; R. 25319].[4]

Accordingly, the SEC must set aside the Decision because it is the product of an unconstitutional proceeding that violated Respondents' Seventh Amendment right to a jury trial.

B. FINRA's Use of Non-Government Appointed Hearing Officers Violated the Appointments Clause

> *FINRA relies on a Goldilocks defense. It is too much like a private entity for Article II's strictures, yet too much like the government for the private nondelegation doctrine to apply. But FINRA "cannot have its cake and eat it too." Its split identity fails to provide the accountability required by our Constitution. When federal law empowers officials to decide a company's fate, they must be Officers of the United States, selected through the Constitution's Appointments Clause and properly removable by the President.*

[3] The Decision's "willful" finding also implicates a statutory disqualification under the Exchange Act.

[4] In its appellate review process, FINRA acts at the Appeals Judge. While the in-house appeal before NAC was heard by a two member Subcommittee, Patricia Louie and Karen Woody [R. 25919], the Decision was not issued by – nor referenced – Mses. Louie or Woody. [*See* Decision]. Rather, Jennifer Piorko Mitchell, FINRA's Vice President and Deputy Corporate Secretary, issued the Decision on behalf of NAC. [*Id.* at p. 42].

– Circuit Judge Walker, *Alpine*, 2024 WL 4863140, *16 (concurring in part and dissenting in part).

While FINRA professes to being a private corporation, FINRA is a government actor that cloaks itself in governmental immunity for its actions,[5] and its use of non-government appointed Hearing Officers, including H.O. Dixon, is unconstitutional because they are subject to the Appointment Clause of the U.S. Constitution.

The Constitution's Appointments Clause requires the President to appoint principal officers of the United States with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. Congress may vest the appointment of "inferior" officers in the President alone, the courts of law, or in the heads of departments. *Lucia v. SEC*, 585 U.S. 237, 253 (2018). Anyone who wields "significant" executive power is an Officer of the United States and must "be appointed in the manner prescribed by [the Appointments Clause]." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). At the time of the framing, federal officers encompassed all officials "with responsibility for an ongoing statutory duty." *Lucia*, 585 U.S. at 253 (Thomas, J., concurring). "The principle of separation of powers is embedded in the Appointments Clause." *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991). "[T]he Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997). The Appointment Clause creates a chain of command in the Executive Branch ensuring legitimacy and accountability in tying all power back to the People through their elected representatives in the President and Congress. *United*

[5] *See e.g., SCAP 9 LLC v. FINRA*, No. 23-15627, 2024 WL 1574348, * 1 (9th Cir. Apr. 11, 2024); *Standard Inv. Chartered, Inc. v. NASD*, 637 F.3d 112, 115 (2d Cir. 2011); *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114 (D.C. Cir. 2008); *Weissman v. NASD*, 500 F.3d 1293, 1296 (11th Cir. 2007).

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States v. Arthrex, Inc., 594 U.S. 1, 13 (2021). It also improves the quality of appointments by guaranteeing "public accountability for both the making of a bad appointment and the rejection of a good one." *Edmond*, 520 U.S. at 660.

The Appointments Clause is one of "the significant structural safeguards of the constitutional scheme." *Edmond v. U.S.*, 520 U.S. 651, 659 (1997). The Appointments Clause applies to "Officers of the United States," U.S. CONST. art. II, §2, cl. 2, or those who exercise "significant authority pursuant to the laws of the United States." *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 486 (2010). The Appointments Clause requires that "inferior Officers" be appointed by the President, the federal courts, or the "Heads of Departments." *Id*. at 487. In *Lucia*, the Supreme Court held that the SEC's ALJs – its Hearing Officers – were "Officers of the United States" subject to the Appointments Clause. 585 U.S. at 251. The Court then held that the ALJ's adjudications and decisions were void because the ALJs had not been appointed consistent with the Appointments Clause. *Id*. at 251-52.

The *Lucia* Court's built its holding on prior Supreme Court precedent. *Id.* at 241 (citing, *Freytag*, 501 U.S. 868). In *Freytag*, the Supreme Court held the U.S. Tax Court's special trial judges ("STJs") exercised significant executive power and their appointment violated the Appointments Clause. The *Lucia* Court noted SEC's ALJs were "near-carbon copies" of *Freytag* STJs. 585 U.S. at 246. The Fourth Circuit construed *Lucia's* holding about SEC ALJs "to apply broadly" and declined to confine it to SEC ALJs. *See Brooks v. Kijakazi*, 60 F.4th 735, 740 (4th Cir. 2023) (applying *Lucia* to Social Security Administration's ALJs). Adjudicatory officers such as *Lucia's* ALJs and *Freytag's* STJs are officers in the executive branch. The *Arthrex* Court explained that, even if the "duties" of hearing officers "partake of a Judiciary quality," these officers "exercis[e] executive power and must remain dependent upon the President." 594 U.S. at

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17. "[I]ndeed, under our constitutional structure, they must be exercises of … the 'executive Power,' for which the President is ultimately responsible." *Id.* Make no mistake, despite FINRA's use of the "private" actor label, FINRA and its Hearing Officers – akin to the *Lucia's* ALJs and *Freytag's* STJs are "Officers of the United States," exercise identical powers, and they are government actors who engage in government action. FINRA's Rules, once adopted by the SEC, have the force of federal law. *See Birkelbach v. SEC*, 751 F.3d 472, 475, n.2. (7th Cir. 2014). When a FINRA Member violates a FINRA Rule, FINRA's Hearing Officers levy sanctions, such as in this case, "that carry the force of federal law." *Turbeville v. FINRA*, 874 F.3d 1268, 1270 (11th Cir. 2017). And as previously noted, Judge Walker of the U.S. Court of Appeals for the District of Columbia has already opined that "FINRA hearing officers are near carbon copies of those [SEC's] ALJs." *Alpine*, 2023 WL 4703307, at *2.[6] In fact, when the roles of FINRA's Hearing Officers is considered "point for point" – straight from *Freytag's* and *Lucia's* list— FINRA Hearing Officers have equivalent duties and powers as STJs and ALJs in conducting adversarial inquiries." *See Lucia*, 585 U.S. at 248 (comparing STJs with SEC's ALJs). This point for point comparison is illustrated in the below chart:

[6] On November 22, 2024, the Court of Appeals for the District of Columbia Circuit held FINRA's expedited proceedings violate the nondelegation doctrine, but remanded, without deciding, the issue of whether FINRA's use of in-house ALJ's violated the Appointments Clause to the District Court. *Alpine*, 2024 WL 4863140, at *16. The Court of Appeals remanded the undecided issue to the District Court to determine on remand because, procedurally, the case was before the Court of Appeals on a narrow preliminary injunction issue without a fully developed factual record. *Id.* This issue is also winding through two other U.S. Courts of Appeals. The Court of Appeals for the Fourth Circuit recently dismissed a petition for review of a similar challenge to the constitutional structure of FINRA because the appealed SEC Order was not a final order; consequently, the Court lacked jurisdiction to reach the issue – a "question [] for another day." *Black v. SEC*, No. 23-2297, 2025 WL 84919 (4th Cir. Jan. 14, 2025). And the Court of Appeals for the Third Circuit has also been requested to weigh in on the same issue. *Blankenship v. FINRA*, No. 24-2860 (3d Cir.) [Appeal filed Oct. 10, 2024].

***Freytag* STJ**	***Lucia* ALJ**	**FINRA Hearing Officer**
"take testimony" *Freytag*, 5-1 U.S. at 881-82.	"take testimony" *Lucia*, 585 U.S. at 248.	"require a member . . . to testify" and "order that witnesses . . testify" FINRA Rules 8210 and 9252(c).
"conduct trials" *Id.*	"conduct trials" *Id.*	"regulat[e] the course of the hearing" and "order[] the Parties to present oral arguments" FINRA Rule 9235(a)(2), (a)(3).
"rule of the admissibility of evidence" *Id.*	"rule of the admissibility of evidence" to "shape the administrative record" *Id.*	and "resovl[e] any and all . . . evidentiary matters" and "may exclude all evidence . . ." FINRA Rules 9235(a)(4) and 9263(a).
"have the power to enforce compliance with discovery orders" *Id.*	"enforce compliance with discovery orders" *Id.*	enforce compliance with discovery orders by issuing a sanction orders FINRA Rule 9280(a)-(b).
"prepare proposed findings and an opinion" *Id.* at 880-81.	issue decisions "containing factual findings, legal conclusions, and appropriate remedies" *Id.* at 249.	"prepare written decisions" including "findings of fact" legal "conclusions . . . as to whether the Respondent violated any provision alleged in the Complaint", and a "statement describing the sanction imposed" FINRA Rule 9268(a)-(b).

Therefore, FINRA's Hearing Officers are "Officers of the United States" under Supreme Court precedent. H.O. Dixon, however, was not appointed in conformity with the Appointments Clause. As a result, the SEC must set aside the Decision because the FINRA Disciplinary

Proceeding helmed by H.O. Dixon was unconstitutional under the Appointments Clause.

III. The SEC Must Set Aside the Decision or Remand to NAC Because NAC and H.O. Dixon Applied the Incorrect Legal Standard and the Decision's Finding are Not Supported by the Evidence

This is an important case of first impression. The issue pertains to Officer Disclosures – *i.e.,* the U-4 disclosure requirement by a Firm's Officer/Principal when an arbitration claim names him/her as a respondent based on their Title, but does not allege the Officer/Principal was the broker who engaged in the sales practice or the supervisor who supervised the broker who engaged in the sales practice. Notwithstanding this key distinction, NAC and H.O. Dixon committed reversible error when they applied an incorrect legal standard to find Respondents willfully failed to disclose arbitration claims for Lowry, other Spartan Officers, and/or Monchik when the claims did not provide specific allegations that either of them committed a sales practice violation or were the direct supervisor of the relevant broker who engaged in the alleged sales practice violation. Rather, the statements of claim's allegations merely named Lowry, other Spartan Officers, and/or Monchik as respondents because of their position as an Officer/Principal. Unlike the authorities cited by H.O. Dixon (the NAC cited no legal authority for its interpretation), the U-4 disclosure determination, in this case, turns on additional legal elements injected by the FINRA Guidance to determine whether or not Respondents acted in good faith – not willfully – when they made the informed decision, after a reasonable investigation and consultation with counsel and industry professionals, that certain arbitration claims – Officer Disclosures – were not reportable.[7]

[7] NAC erroneously held Respondents' conduct was "willful." In reaching this conclusion, it relied upon inapposite case law holding willfulness to "simply mean[] that the person charged with the duty knowns what he is doing. A failure to disclose is willful if the registered person subjectively intended to omit material information from required disclosures" – *i.e.*, by not filing a U-4 disclosure. [*See* Decision, p. 33 (citing *Michael Earl McCune*, Release No. 34-77375,

A. Officers Disclosures are Evaluated Under the FINRA Guidance to Determine if the Claim is Reportable

The starting point for Lowry, other Spartan Officers, and/or Monchik's disclosures is U-4 Question 4I, which requires an individual to disclose "investment-related, consumer-initiated arbitrations alleging his or her involvement in a sales practice violation." [*See* R. 3953]. In nearly every instance, this question is the start and end of the discussion. For Officer Disclosures, however, it is just the beginning because the FINRA Guidance ***adds*** additional legal elements for determining whether or not the arbitration is disclosable for the individual. Specifically, the FINRA Guidance provides:

> **Q4**: If an arbitration claim names several registered persons as respondents, and the statement of claim contains allegations of sales practice violations, but does not ***specifically*** allege that each respondent was involved in a violation, which respondents should answer "Yes" to Question 14I(1)(a)? For example, ***if the statement of claim alleges that a broker engaged in churning and that his office manager should have been overseeing the broker's activities***, and the persons named as respondents are the broker and his branch manager, as well as the compliance director and the president of the broker/dealer, who should report?
>
> **A:** The broker and his branch manager should answer "Yes" to Question 14I(1)(a), ***but the compliance director and the president may answer "No."*** A registered person must report an arbitration under Question 14I(1)(a) if he is named as a respondent and the statement of claim alleges that he was involved in one or more sales practice violations. Because the statement of claim alleges no sales practice violation by the compliance director or the president, they are not required to report the arbitration, even though they are named as respondents.
>
> The terms "involved" and "sales practice violations" are defined to clarify reporting obligations. The term "involved" includes both doing an act and failing reasonably to supervise ***another in doing an act***. The term "sales practice violations" includes any conduct directed at or involving a customer that would constitute a violation of

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2016 SEC LEXIS 1026, at *13-23 (Mar. 15, 2016) (finding addressed bankruptcies and a tax liens – not Officer Disclosure under the FINRA Guidance); *Robert D. Tucker*, Release No. 34-68210, 2012 SEC LEXIS 3496, at *24 (Nov. 9, 2012) (judgments, bankruptcies, and a tax lien – not Officer Disclosure under the FINRA Guidance); *Allen Holeman*, Release No. 34-86523, 2019 SEC LEXIS 1903, at *38 (July 31, 2019) (tax liens – not Officer Disclosure under the FINRA Guidance)]. None of these authorities addressed Officer Disclosures and the FINRA Guidance.

> an SRO rule for which a person could be disciplined; any provision of the Securities and Exchange Act of 1934; or any state statute prohibiting fraudulent conduct in connection with the offer, sale or purchase of a security or in connection with the rendering of investment advice, and thus includes churning. Thus, the broker and the branch manager must report the arbitration.
>
> It is not necessary that a statement of claim use precise legal terminology. The fact that the claim does not use the legal term "failing reasonably to supervise" does not alleviate the branch manager's obligation to report. The allegation that the manager should have been overseeing a ***broker's activities*** is sufficient to trigger reporting. Firms and registered persons should review each claim on a ***case-by-case basis*** and ***make a good faith determination*** as to whether reporting is required.

[R. 4027 (emphasis added)].

NAC erroneously concluded that "as this FAQ makes clear, an officer who is alleged in a statement of claim to have failed to supervise is required to report the arbitration." [Decision, p.7]. This is not, however, what the FAQ provides.

At the hearing, the Director of FINRA's Disclosure Unit, Bernard Howard, in interpreting the FINRA Guidance, expressly acknowledged that "General" or "Broad" allegations against an officer need ***not*** be reported – and only "specific" allegations need to be reported. [R. 1731, Tr. 581:22–582:14]. Director Howard clarified that if a failure to supervise claim is made against an officer ***merely because of his/her position as an officer,*** the officer should use his/her good faith judgment to determine if it is reportable – and such broad allegations would not be reportable. [*Id.*, Tr. 604]. This testimony is evidence by the below exchange between Director Howard and Panelist Feignblatt and sums-up Director Howard and, by extension, the FINRA Disclosure Unit's position on the FINRA Guidance:

> THE WITNESS: ***If there was an overarching statement like the -- this individual has broad responsibility for setting policy for ensuring the safety of accounts, that would <u>not</u> be a specific allegation that would be clearly report***able, but then they would have to do the -- make the next step of –
>
> ARBITRATOR FEIGENBLATT: Good faith?

THE WITNESS: Good faith, correct. ***And if that person did actually manage the person***, then I would expect disclosure under that circumstance as well.

ARBITRATOR FEIGENBLATT: And so if you're seeing -- just so I'm clear, if you're seeing a statement of claim that -- that names other people and goes on to say that the CCO has -- by nature of their title has broad supervisory responsible and, therefore, failed to supervise here, is that statement as I just said it -- is that considered broad or specific, because they're saying the words, you know, "failed to supervise"?

THE WITNESS: Can you repeat it again so I can make sure I'm –

ARBITRATOR SANTUCCI: If a statement –

THE WITNESS: -- following?

ARBITRATOR FEIGENBLATT: -- of claim amongst -- you know, amongst naming specific respondents, also goes on to state that a CCO, chief compliance officer, as inherent by their title, has broad supervisory responsibility and, therefore, failed to supervise in this case, is that considered a specific allegation, or is that considered a broad allegation?

THE WITNESS: I would -- there is some -- I think there is some gray area in that particular allegation.

[R. 1731, Tr. 600:19–602:7 (emphasis added)] . Director Howard further explained:

ARBITRATOR FEIGENBLATT: Regarding a CEO, if a statement of claim states specifically that a CEO has -- you know, they're at the top of the pyramid, and, therefore, they have broad supervisory responsibilities and, therefore, failed to supervise in this case or -- you know, is that broad or is that specific, if in the claim, it -- it says, you know, you're the CCO, so you've got broad supervisory responsibility over the whole firm; therefore, you failed to supervise in this specific case?

THE WITNESS: ***I would say that's somewhat broad, and then they would take the next step of doing -- making a good faith determination***.

[*Id.*, Tr. 604:3-604:17 (emphasis added)].[8]

[8] Indeed, earlier in its Decision, NAC acknowledged a similar position such that "an officer who is named as a respondent, but not otherwise alleged to have supervised or failed to supervise ***a broker who engaged in a sales practice violations***, is not required to report the arbitration."

Thus, as required by the FINRA Guidance, when an Officer is named in a Statement of Claim because of his/her position that he/she has broad supervisory responsibilities over an entire firm, then for each such claim, on a case-by-case basis – the Officer reviews the statement of claim and makes a good faith determination – based on the claim's allegations – as to whether or not reporting is required. [*See* R. 1731, Tr. 604:3-604:17].

While NAC held that the disclosure requirement is "*allegation driven*" [Decision, p. 22], it fails to account for instances, as here, where the claim's general allegation that a group of officers "failed to supervise" over the firm versus the actual broker involved, and it's holding is against the grain of the FINRA Guidance and the testimony of Director Howard. Director Howard testified that such claims are a "gray area", and when the Officer is at the top of the Officer pyramid and the allegations concern the broad supervision over all of the firm's representatives, Director Howard specially testified "***I would say that's somewhat broad, and then they would take the next step of doing -- making a good faith determination***." [R. 1731, Tr. 604:3-604:17 (emphasis added); *see also id.*, Tr. 583:8-12 ("if they alleged to have broad supervisory responsibilities, they don't necessarily have a reporting obligation…."). Thus, contrary to the NAC's erroneous conclusion, the Director of FINRA's Disclosure Unit specially testified that when, as here, a claim is made against a group of Officers, a good faith determination needs to be made to determine if the specific Officer was the manager who was overseeing – *i.e.*, supervising – the broker who engaged in the sales practice violation. [R. 1731, Tr. 600:19–602:7].[9]

[Decision, p. 7 (emphasis added)].

[9] While NAC asserts that an individual can make a motion to an arbitration panel to expunge a disclosure from the CRD System if the allegations are factually impossible or clearly erroneous, [*see* Decision, n. 27], NAC overlooks the fact that the stain of such erroneous and non-reportable

B. The Credible Evidence Demonstrates Respondents Made Good Faith Determinations When Determining Whether an Officer Disclosure was Reportable

Notwithstanding its erroneous interpretation of the FINRA Guidance, NAC committed further error when it found that Lowry, Monchik, and Spartan failed to report Officer Disclosures and had not acted in good faith when making their reporting determination because they "were unable to produce credible in evidence that they acted in such manner." [Decision, n. 28].

Although the FINRA Guidance does not define "good faith", it has a legal definition, namely: "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." *Good Faith*, BLACK'S LAW DICTIONARY (11th ed. 2019). And while there is scant discussion of what constitutes good faith in FINRA Disciplinary Decisions, one Panel had determined, in the Rule 8210 context, that an individual ***demonstrated*** good faith when there were: no instances of the individual avoiding a request; no evidence of seeking to hide the facts or trying to mislead his organization. *DOE v. Day,* No. C8A010094, 2003 WL 1908382, *4 (OHO Feb. 10, 2023). Against this standard, the credible evidence demonstrates that Respondents acted in good faith when making their U4 reporting decisions.

The credible evidence establishes that Respondents acted in good faith when making the reporting determination for Officer Disclosures. For example, had NAC reviewed the Statement of Claim filed on behalf of Greg Wampler, [R.20763, CX-124], it would have found that that the

event on an individual's license is part of the public record for months or over year while the expungement process proceeds, it remains a permanent fixture on internet archives and in some state's records, and it can cost an individual several thousand dollars in filing, hearing, and attorneys' fees to obtain expungement for each factually impossible or clearly erroneous disclosure.

arbitration was not reportable, and Respondents had made a good faith determination of same. On June 16, 2015, Claimant Wampler filed his Statement of Claim naming several respondents, including Lowry. [*Id.*]. The Wampler Statement of Claim:

- Named, among others, Lowry in the caption and listed him as an individual that Claimant is initiating a claim against. [R. 20763, CX-124, p. 1].

- Under the Summary of the Claim, it alleged "[t]he supervisors at Spartan Capital condoned the conduct of the broker handling the subject account and/or otherwise failed to supervise the brokers' actions and conduct." [*Id.*, p. 2].

- Under Jurisdiction, Venue, and the Parties, it alleged: Respondent John D. Lowry ("Lowry") (CRD# 4336146) is the Chief Executive Officer and a managing member of Spartan Capital, a FINRA member firm. ***As CEO, Lowry is responsible for, among other things***, the supervision of brokers registered at Spartan Capital as well as for ensuring that the firm's clients are treated fairly and according to industry rules and laws. [*Id.*, p. 3 (emphasis added)].

- And under Claims at Subpart C, it alleged: [i]n the instant matter, Respondent Spartan Capital permitted the Subject Account to be traded in the manner described herein, and ***its principals failed to adequately supervise the firm's registered representatives*** and protect its clients from mismanagement and abusive activity. [*Id.*, p. 4 (emphasis added)].

There were no other allegations concerning Lowry and no specific allegation that he failed to supervise ***the*** broker who engaged in the alleged sales practice violation – rather, it merely alleged that Lowry had broad supervisory responsibility over the whole firm. [*Id.*]. Given these general and broad allegations, the evidence proves that Monchik, on behalf of Respondents, reviewed the claim and engaged in a good faith determination that this arbitration was an Officer Disclosure and not reportable on Lowry's U-4.

Specifically, the evidence reflects that by July 13, 2015, within the 30 day U-4 reporting period, Monchik reviewed the Wampler Statement of Claim, reviewed the FINRA Guidance, consulted with a professional compliance consultants, and provided the Wampler Statement of Claim to, and consulted with, David Saulsbury of the FINRA Disclosure Unit. [R. 23295, RX-

31]. After her conversation with Mr. Saulsbury, Monchik memorialized their telephone conversation and set forth the basis for Respondents' good faith determination that the Wampler arbitration was not disclosable on Lowry's U-4s, which she emailed to Mr. Saulsbury.[10] [*Id.*]. Finally, for Spartan's files, Monchik prepared a detailed Memorandum detailing Respondents' efforts in reaching their good faith determination that the arbitration was not reportable. [*Id.*]. Thus, Respondents' good faith determination to not report the Wampler arbitration on Lowry's U-4 and providing their determination to the FINRA Disclosure Unit is consistent with the FINRA Guidance, the legal definition of good faith, and comparable to conduct that another

[10] Monchik emailed her determination to the FINRA Disclosure Unit because its responsibilities included determining whether U4 disclosures are required to be made. [*See* R. 1451, Tr. 377:18-21]. In another instance of misstating the evidence, H.O Dixon claimed that this email chain "showed [the FINRA Disclosure Unit] did not agree with [Monchik's] conclusion to not disclose the two arbitrations." [Decision, p. 14 (citing Tr. 1069). Director Howard, however, definitively testified that the FINRA Disclosure Unit made no such determination: "we don't' say not reportable or reportable" [R. 1731, Tr. 557:7-12]. Rather, the email chain and Monchik's testimony plainly state that the FINRA Guidance provided by the FINRA Disclosure Unit "was the basis to my determination that it was not reportable." (R. 21671, CX-213; R. 2385, Tr. 1069). Respondents provided similar notices to the FINRA Disclosure Unit. [*See* CX 212 (R. 21653) through CX-232 (R. 21743)]. In this regard, Respondents' conduct is similar to *Day* in that the evidence shows that they did not hide any facts from, or try to mislead, FINRA. *See e.g.*, *Day,* 2003 WL 1908382, at *4. Further, for submissions emailed to the FINRA Disclosure Unit, it sent an email confirmation that informed Respondents that general reviews are completed in three to five business days and, importantly, "***[a]s we conduct our review of your submission, we will notify you through a new CRD disclosure letter should we require any additional information or action from you. Unless we contact you, no current additional action is required on your behalf.***" [*See* R. 21731, CX 229, p.4 (emphasis added)]. There is no evidence that the FINRA Disclosure Unit informed Respondents to provide additional information or take any further action on the Wampler claim. To the contrary, the FINRA Disclosure Unit had provided Spartan with disclosure letters stating that the matter was "Fully Resolved." [*See* R. 23407, RX-35]. Director Howard testified that, where the response to a disclosure letter to a firm says the disclosure is "Fully Resolved" it means the FINRA Disclosure Unit had closed-out its inquiry and "there will be no additional follow-up from the Disclosure Unit on that particular issue." [R. 1731, Tr. 587:3-13]. When Respondents received a disclosure letter stating that the matter was "Resolved," they understood that there was no further action to be taken and that they had resolved the inquiry with FINRA. [R. 2641, Tr. 1263:16-1264:9].

Hearing Panel deemed had demonstrated good faith. *See Good Faith*, BLACK'S LAW DICTIONARY; *Day,* 2003 WL 1908382, at *4.

As a further example, in May 2018, Philip Hoff filed a Statement of Claim naming several respondents, including Monchik. [R. 20977, CX-141]. The Hoff Statement of Claim:

- Named, among others, Monchik as a respondent in the caption. [*Id.*, p. 1].
- Under the title Failure to Supervise, it alleged "[r]espondent Spartan Capital Securities, LLC and the above identified Respondents***, in their capacities as control and supervisory personnel***, failed to supervise ***the firm's*** registered representatives and, therefore, permitted the Claimant's account to be abused in the manner described herein [*Id.*, p. 8 (emphasis added)].

There were no other allegations against Monchik. [*See id.*]. The allegation concerning a group of respondents, is precisely the type of allegation that Director Howard testified is "definitively" a circumstances where "a good faith determination [is] to be made [as to] who is actually responsible, if they leave it broad, respondents." [R. 1731, Tr. 603:14-19]. Therefore, per the FINRA Guidance and Director Howard, the Hoff Statement of Claim does not allege that Monchik supervised "***the broker***" who engaged in the sales practice violation, but rather, merely named Monchik, as a group of one of the above identified respondents, "***in [her] capacity as control and supervisory personnel"*** concerning the entire "firm's registered representatives." As a result, a good faith determination of the allegations against Monchik, as conducted by Respondents, would lead to a determination that this claim was not reportable by Monchik under the FINRA Guidance. [*See* R. 4027].

NAC also erroneously held that a list of Officers, including Spartan's Financial and Operations Principal ("FINOP"), should have disclosed an arbitration involving customer LC because the claim asserted that they had failed to supervise the two brokers who engaged in churning. [Decision, p. 10]. The LC Statement of Claim made no such allegation. Rather, in the

Statement of Claim, the FINOP had been named as one of nine respondents because Spartan's BrokerCheck reflected that "he is an owner who directs the management and policies of Spartan Capital. As such he is liable for failure to supervise and as a control person as defined in State and Federal securities laws." [R. 20923, CX-138, ¶6]. The FINOP is a Series 27 Financial and Operations Principal – a license that does not provide for the supervision of retail sales practices. *See* https://www.finra.org/registration-exams-ce/qualification-exams/permitted-activities. Given such limited capacity, it is no surprise that the claim contained no other allegations concerning the FINOP or that he failed to supervise the broker who engaged in the alleged sales violation. [*See* R. 20923, CX-138]. Similarly, NAC held that Monchik, as well as Spartan's FINOP, failed to disclose MF's Statement of Claim that asserted these "officers failed to supervise two brokers who engaged in churning . . . " [Decision, p. 12]. Yet MF's Statement of Claim made no such allegations against Monick or the FINOP. Rather, it merely alleged "the above identified Respondents, in their capacities as control and supervisory personnel, failed to supervise the firm's (as a whole) registered representatives." (R. 20967, CX-140, p. 8). Because the claim grouped "Respondents" and did not allege that Monchik or the FINOP failed to supervise *the broker who the claim alleged conducted the sales practice violation*, under the FINRA Guidance, Spartan and Monchik correctly concluded that it was not reportable for Monchik and Spartan's Officers. [*See* R. 4027; R. 1731, Tr. 603:14-19, 604:3-604:17].

As a last example, NAC erroneously held that the "TW and KW arbitrations . . . alleged 'Spartan and Lowry were ***under a duty to supervise the activities of its associated persons*** in a manner that is reasonably designed to achieve compliance with applicable securities laws and regulations and with FINRA Rules. Had Respondent[s] Spartan and Lowry been supervising and

training properly, Claimants' accounts would not have been mismanaged …" [Decision, p. 12 (emphasis added)]. There is no allegation that Lowry failed to supervise the conduct of the broker – only the allegations that he and Spartan were under the general duty to supervise all of Spartan's brokers in a manner reasonably designed to achieve compliance with the securities laws. Rather, the claim alleged that "***Spartan was not adequately and properly supervising Respondents Gainer and Murray*** [the brokers who were alleged to engage in the sale practice violation]" and asserted a control person claim against Lowry. [R. 20897, CX-134 (emphasis added)]. Consistent with the FINRA Guidance and Director Howard's interpretation, Spartan and Lowry were not required to disclose this arbitration claim because Lowry was not alleged to be the manager who supervised the specific broker who engaged in the sales practice violation.[11] [R. 4027; R. 1731, Tr. 604:3-604:17].[12]

The credible evidence demonstrated that Spartan's former Chief Compliance Officers and/or Monchik, in connection with an experienced securities counsel or consultants (as discussed *infra*), reviewed each statement of claim and made a good faith determination as to whether or not the claim was reportable by Lowry, other Spartan Officers, and/or Monchik. [R.

[11] NAC noted that Lowry reported the TW and LK arbitration after an award had been issued; however, a subsequent award does not nullify Respondents' years-earlier good faith Officer Disclosure determination under the FINRA Guidance concerning the statement of claim's *allegations*. [*See* Decision, p. 12].

[12] NAC similarly applied its erroneous interpretation to multiple statements of claim that made similar group respondent allegations – *i.e.*, the group respondents, including Lowry, generally failed to supervise all the Firm's representatives – but made no allegation that Lowry supervised the broker who engaged in the sales practice violation. [Decision, p. 11 ("LK filed a statement of claim alleging, among other things, that '[Spartan's] principals, including Lowry and Monchik failed to adequately supervise ***the firm's registered representatives*** and protect its clients from mismanagement and abusive activity." (emphasis added); *id*. at n.10 (stating there were five other statement of claim that contained "identical language regarding Lowry" as those in the LK statement of claim)].

1731, Tr. 662:5-16; 656:7-16; 658:22-662:16; 797:5-798:2; 668:3-23]. Spartan's Compliance Department operated free of any influence by Monchik or Lowry. [R. 3681, R. 4537, Hechler OTR (May 21, 2020) at 30:22-31:24; 43:4-47:21; 51:9-53: 22; 100:15-101:11; R. 3679, R. 4501, Monaco OTR (May 19, 2020) at 31:7-11; 53:22-54:4; 99:21-100:8; 144:23- 147:10]; *see also supra*, note 10]. Further, throughout the years, Respondents engaged experienced securities legal counsel and consultants to assist them in making a good faith determination on the reporting of an arbitration claim given that there was some gray area in a claim's allegations. [R. 2053, Tr. 1019:25–1020:18]. Even Director Howard acknowledge that reliance on counsel's determination whether not a claim is reportable could satisfy the good faith obligation under the FINRA Guidelines. [R. 1731, Tr. 574:5-11].

To establish a good faith reliance on counsel's advice, the evidence must demonstrate: a request for advice on the legality of the proposed action; full disclosure of the relevant facts to counsel; receipt of advice from counsel that the action to be taken will be legal; and reliance in good faith on counsel's advice.[13] *DOE v. Turner,* No. C8A010063, 2002 WL 31231000 (OHO Mar. 26, 2002). The proof of such advice given may be submitted through testimony of the lawyer who gave the advice or written documentation of the actual advice. *DOE v. Cantone,* No. 2013035130101, 2017 WL 2644537 (OHO May 12, 2017); *Mathis v. SEC*, 671 F3d. 210, 219 (2d Cir. 2012) (stating it may be true that broker who justifiably relies on advice from a person of suitable experience, position and knowledge has not engaged in willful conduct).

[13] The Decision sets forth conflicting holdings. In one breath, NAC held "reliance on counsel is not available as a defense where, as here, intent is not an element of the violation," (Decision, p. 30), and later held that a failure to disclose "is willful if the registered representative, 'subjectively intended to omit material information from his required disclosure." (*Id.* p. 33 (cleaned up).

Here, Liam O'Brien, Esq., Matthew Fiorovanti, Esq., and Robert Rabinowitz, Esq. testified on Respondents' behalf – experienced lawyers with a specialty representing participants in the financial industry. [R. 2961, Tr. 1531:6-1532:12; R. 3311, Tr. 2018:18; R. 2961, Tr. 1532:2-12; 1533:2-14, 1738:7 (O'Brien over 25 years experience)]. For example, O'Brien had reviewed similar disclosure issues for multiple firms, including Merrill Lynch – dozens and dozens of times. [*Id.*, Tr. 1539:6-23].

Moreover, the credible, contemporaneous evidence reflects that O'Brien and his firm had been reviewing claims and providing legal advice to Respondents on the disclosure issue. For example, the invoice from McCormick & O'Brien, evidences that, by at least, June 8, 2015, Respondents were proactively seeking legal advice concerning whether or not a particular Officer Disclosure was reportable. Specifically,

06/08/2015	analysis of form u4/u5 disclosure language: complete review of three customer complaints and prepare memorandum re whether three matters were required to be reported under question 7 of form u5 and nature of disclosure language used - Fran Curran	3:00

[R. 22815, RX-4, 9; *see also id.*, 5 (01/27/14 entry for similar disclosure advice)]. As evidenced by this time entry, Respondents' legal counsel conducted an in-depth (3 hour) analysis of the particular issue – evidence that NAC improperly ignored. The record is fulsome with similar credible evidence that Respondents provided their lawyers with the pertinent statement of claim for which Respondents sought legal advice concerning Lowry, other Spartan Officers and/or Monchik's reporting requirement. [R. 2961, Tr. 1538:4-1539:5 (O'Brien); R. 3311, Tr. 2023:3-23; 2032:5-20 (Fiorovanti); R. 2961, Tr. 1744:2-8 (Rabinowitz)].

In an effort to discount such robust evidence, NAC committed error when it found that Respondents, their lawyers and consultants often "looked outside the four corners of the

statements of claim." [Decision, p. 23].[14] The record, however, evidence that ***each lawyer reviewed the claim, the relevant reporting rules and FINRA Guidance***. [R. 2961, Tr. 1538:4-1539:5, and RX-31 (O'Brien); R. 3311, Tr. 2024:4-2025:24 (Fiorovanti); R. 2961, Tr. 1743:4-13, 1753:3-25 (Rabinowitz)]. And each lawyer provided Respondents with legal advice on the disclosure requirements for Spartan's Officers, including Lowry and Monchik, who were named in arbitrations. [R. 2961, Tr. 1533:22–1535:2; 1535:19; 1536:3 (O'Brien); R. 3311, Tr. 2018:18-19, 2021:4-15, 2031:19-25 (Fiorovanti); R. 2961, Tr. 1745:2-1747:7 (Rabinowitz)].

Finally, for the Officer Disclosure claims, these learned counsel opined – and informed Respondents – that under the FINRA Guidance, these claims were ***not*** reportable by Lowry, other Spartan Officers and/or Monchik on their U-4s. [R. 2961, Tr. 1540:6–1541:19 (O'Brien); R. 23289, RX-26, R. 23295, RX-31; R. 3311, Tr. 2023:3-23; 2032:5-20 (Fiorovanti advice concerning the Sells, Sportsfield, Chlebowski/Algers, Gary Douglas, Flick, Hoff and Maycock claims); R. 2961, Tr. 1746:2-1747:7; 1753:20-1754:8 (Rabinowitz)]. In addition to these lawyers' testimony, Respondents submitted proof of the legal advice that they had received by these and other legal counsel that reached the same conclusion. [R. 22815, RX-4; R. 23287, RX-24; R. 23289, RX-26; R. 23295, RX-31].[15]

Therefore, the credible evidence demonstrates that Respondents acted in good faith when they made the determination – as required by the FINRA Guidance – that the Officer Disclosures

[14] Ironically, NAC asserts that legal counsel *should have looked outside the four corners of the statement of claim* when it later opined that legal counsel should have been informed of prior Cautionary Action Letters concerning *other* statements of claim. [Decision, p. 31].

[15] Monchik testified that Respondents also relied on the advice provided by seasoned securities lawyer, RuthAnn Niosi, Esq., and two securities compliance consultants: Bao Nguyen and Lisa Roth. [R. 2385, Tr. 1076:19-1078:10; R. 2961, Tr. 1558:2-11; R. 2053, Tr. 1002:20-1003:7; R. 2053, Tr. 1021:5-22].

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for Lowry, other Spartan Officers, and Monchik were not reportable on their U-4s.[16] Respondents did not willfully fail to inform others of these arbitration claims and then take no action. Respondents also did not seek random, general advice from inexperienced legal counsel to "rubber stamp" the non-reporting of an event. To the contrary, the evidence proves that Respondents reviewed the claims and gave thoughtful consideration to the allegations and their reporting obligations. To assist them, Respondents sought, and received, legal advice from counsel experienced in disclosure issues –counsel, with decades of relevant experience, who reviewed the statements of claim, consulted the FINRA Guidance, and provided learned opinions that the claims were not disclosable by Lowry and/or Monchik. They informed the FINRA Disclosure Unit in writing that they were not reporting the specific arbitration claims based on the FINRA Guidance. Respondents engaged in this process, for each claim because they sought to, and did, make a good faith determination concerning their reporting obligations.[17]

Accordingly, the SEC must set aside the Decision or remand this matter to the NAC because NAC and H.O. Dixon applied the incorrect legal standard and the Decision's findings

[16] The Cautionary Action Letters ("CAL") subsequently issued to Spartan – not Lowry or Monchik – do not nullify Respondents' prior good faith determinations, which were made on a case-by-case basis, concerning the reportability of the Officer Disclosures for Lowry or Monchik. [*See* R. 20667, CX-113; R. 20729, RX-121]. FINRA issues a CAL for a "violation of minor nature and there is an absence of customer harm or determinantal market impact…." *See* http://www.finra.org/rules-guidance/enforcement (accessed Oct. 13, 2023). Moreover, the CALs were issued by an Examination Team, which did not include a FINRA Disclosure Unit member with expertise to make assessments concerning Officer Disclosures. [*See* R. 20667,CX-113 at p. 9; R. 20729, RX-121 at p. 10]. The need for such expertise is great because, as Director Howard testified, the classification of some arbitrations is not always clear and there can be "gray area" in some allegations. [*See* R. 1731, Tr. 600:19–602:7]. Indeed, three arbitrations identified by the inexperienced Examination Team had been previously marked as "Resolved" by the FINRA Disclosure Unit. [*See* R. 3939, CX-3; R. 3941, RX-3a (Charts)].

[17] Respondents' process also comported with Spartan's WSPs. [*See* R. 4041, CX-14, §8.2.7].

are not supported by the evidence.

IV. The SEC Must Set Aside the Decision or Remand to the NAC Because NAC and H.O. Dixon Applied the Incorrect Legal Standard For a Firm's Financial Reporting Obligation and the Decision's Finding are Not Supported by the Evidence

NAC erroneously held that Spartan presented no evidence to rebut its financial disclosure failures and asserted that Spartan should have filed ***inaccurate*** U-4 financial disclosure updates for its registered representatives based on unverified and incomplete third-party information concerning potential financial events. [Decision, p. 24].

NAC's cursory finding that Spartan failed to timely disclose 51 financial events is largely based on a notification from FINRA to Spartan dated July 22, 2019, which included a spreadsheet of information that FINRA had taken from a Lexis-Nexis report. [Decision, pp. 23-24; OHO Decision, p. 63 citing R. 22561, CX-339]. H.O. Dixon erroneously opined that FINRA provided complete information to Spartan because FINRA "provided Spartan with the exact judgment or lien amount, the creditor, and the date it was recorded." [OHO Decision., p. 26]. FINRA, however, refused to provided a copy of the lien or judgment, identify the County or Court where the filing had purportedly been made, or identify the Case Number for the filing. [*See* R. 22561, CX-339; R. 2961, Tr. 1599:2-9]. NAC erroneously approved H.O. Dixon determination to impose the direct obligation on the firm – Spartan – in the first instance to report this information on a registered representative's U-4 without confirming the accuracy of the second-hand information. In this regard, H.O. Dixon and NAC erroneously held that Question 14M of the Form U4 "requires firms and registered representatives" to report an unsatisfied judgment and lien despite its plain statement: "Do ***you*** have any unsatisfied judgments or liens against you?" [OHO Decision, p. 63, citing CX-9]. Question 14M imposes no such obligation against the firm – the question is directed at the registered representative – the

"you", who is signing the U-4.

The evidence, however, details that once Spartan received the summary, unverified, third-party information from FINRA, it began taking reasonable steps to obtain copies of the liens/judgments and to verify that the information was accurate and up-to-date. [R. 2961, Tr. 1597:10-1599:7, 1601:22-1602:25]. Spartan engaged in these diligent efforts because, as Monchik testified, Spartan wanted to confirm the accuracy of the information before it reported it.[18] [R. 3311, Tr. 1850]. When Spartan requested information to verify the possible liens/judgments contained in the third-party report from FINRA to expedite its verification process, FINRA refused to provide that information to Spartan. [R. 2961, Tr. 1599:2-9]. Had FINRA provided that information, it would have expedited Spartan's investigation and disclosure of these events.

Without any additional information from FINRA, Spartan embarked on a reasonable and diligent effort to confirm the accuracy of the possible liens/judgments reported by FINRA's third-party vendor. [*Id.*, Tr. 1601:22-1602:18]. When Spartan received the FINRA letter, it immediately tasked Registration Specialist Maureen Toale, who it hired in February 2019 as part of its corrective actions to address disclosure issues, to assist in researching the items identified by FINRA. [*Id.*; R. 1731, Tr. 713:19]. While the Decision does not reference the Record, the OHO Decision cites to several of Spartan's efforts to verify that the information was accurate – such as: instructing the registered representative go to the courthouse to obtain the judgment or the firm contacting the IRS or state tax authority concerning a tax lien.[19] [OHO Decision, p. 26].

[18] Spartan did so because it did not want to make an inaccurate or misleading U-4 filing.

[19] The Record demonstrates that FINRA's list of possible disclosures sourced from Lexis-Nexis ***contained inaccurate information for events that were not reportable.*** for which it sought Spartan to disclose contained inaccurate or outdated information that was ***not reportable***. [*See*

Despite the clear need and appropriateness for a firm to determine the accuracy of incomplete, third-party information before making a regulatory filing, NAC erred when relied on legal authority that does not discuss a firm's obligations. [Decision, p. 24]. The cited authority, *DOE v. Holeman* and *DOE v. Elgart,* are inapposite because they pertain to the ***individual broker***, who has the personal knowledge concerning his/her unpaid taxes/debts and resulting tax liens/judgments for which he/she would have been served/provided copies. – not the broker's member firm. In *DOE v. Holeman*, the Panel rejected ***the individual broker's*** defense that he was not aware of his ***own*** tax liens and had to confirm their existence because such statement was "contradicted by the evidence and common sense". No. 2014043001601, 2018 WL 2387846, at *6 (NAC May 21, 2018). Similarly, in *DOE v. Elgart*, the ***individual broker*** "concede[d] that he was aware of the numerous tax liens around the time that the liens were issued." No. 2013035211801, 2017 WL 1076330, at *7 (NAC Mar. 16, 2017). This authority does not apply to a firm – an entity that is ***not*** a party to the lien/judgment, is ***not*** served the lien/judgment by the creditor, and otherwise has ***no knowledge*** of the underlying events leading to the lien/judgment. It is for this reason that Spartan reasonably requested information to determine the accuracy of the possible financial disclosures from FINRA – a reasonable request that FINRA ***refused***. [*See* R. 2961, Tr. 1599:2-9].[20]

R. 22561, CX-339, Exh. C, p. 4 (David Nobel 2002 bankruptcy filing; Daby Carreras civil judgement filed on June 5, 1990). It is for this reason that NAC and H.O. Dixon only found that Spartan had made late filings for 51 of the 169 financial events identified on the LexisNexis Report. [*Id.*, compare, Decision, p. 23 and OHO Decision, p. 25 (citing CX4, CX-399)].

[20] Under the NAC ruling, Spartan would have had to accept FINRA's notice of these possible financial events as true without conducting any due diligence or reasonable investigation. Given the gravity of a U4 disclosure on a registered representative's license, Spartan acted responsibly and reasonably when it elected to investigate the items identified by FINRA before updating a registered representative's U4. Indeed, in its CRD Public Records Validation Initiative, FINRA informed firms that they "should take steps to independently verify" information received for

Finally, the evidence demonstrates that Spartan promptly began researching the accuracy of the third-party information provided by FINRA and it provided continuous updates to FINRA, as well as making any necessary and accurate disclosures. Within weeks of FINRA's letter, on August 26, 2019, Spartan provided an update to FINRA on its efforts, [*see* R. 22608, CX-341], and it continued to update FINRA over the months that followed. [*See* R. 22619, CX-346; R. 22631, CX-346a; R. 22643, CX-348; R. 22649, CX-348a]. Ultimately, as reflected in CX-346a, Spartan had either reported or determined that items were not reportable for approximately 95% of all the financial disclosure items identified in FINRA's third-party report. [*See* R. 22631, CX-346a].[21]

Accordingly, the SEC must set aside the Decision or remand this matter to the NAC because NAC applied the incorrect legal standard concerning a firm's reporting obligation and the Decision's findings are not supported by the evidence.

V. The SEC Must Revise the Sanctions Substantially Downwards Because the Sanctions are Punitive and Grossly Excessive under the Sanction Guidelines

At the outset, the SEC should set aside the Decision's finding that Respondents acted willfully and are statutorily disqualified because NAC reversibly erred in applying the incorrect

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their registered representatives about such possible financial events and were "encouraged to retain any documentation that they obtained [from their investigation of the possible unreported disclosures] in their files as a record of the research performed." *See* CRD Public Records Validation Initiative, FINRA, https://www.finra.org/sites/default/files/CRD-PublicRecordsValidationInitiative_June.16.pdf. (accessed October 23, 2023). Thus, FINRA expected firms, such as Spartan, to investigate and research possible undisclosed financial events and retain documentation of their results.

[21] The Decision acknowledges that Spartan made filings for 51 financial events on the Form U4s of its registered representatives; however, it takes issue with the amount of time that Spartan took to determine the accuracy of the information provided on the third-party report, [*see* Decision, pp. 18-19] – late filings that would not have occurred had FINRA provided the information requested by Spartan.

legal standard to reach its willful determination. *See supra*, Point III. As previously discussed, the credible evidence demonstrates that Respondents acted in good faith when they timely made a determination that the Officer Disclosures were not reportable under the FINRA Guidance. *Id.*

A. The Suspension Sanctions Against Lowry and Monchik are Punitive, Excessive Under the Sanction Guidelines, and Ignore the Weight of the Evidence

The NAC affirmed the two-year suspension for Lowry and Monchik in all capacities but reduced the fines imposed to $20,000 and $10,000, respectively. [Decision, p. 41].

As NAC acknowledged, under FINRA's Sanction Guidelines (ed. 2022) (the "Sanction Guidelines"), the recommended sanction may include a suspension of ten business days to six months, or where aggravating factor predominate, a suspension of up to two years. [Decision, p. 35]. Here, the top-end, two-year suspension penalty is ***unprecedented*** and ***excessive*** in this case of first impression – particularly in view of the testimony of Director Howard concerning the flexible good faith reporting standard, the avalanche of evidence reflecting the multiplicity of efforts made by Lowry and Monchik to comply with such standard, the shotgun pleadings that grouped Spartan's Officers/Principals, including its FINOP, as respondents, and the absence of any concealment or gain. Respondents relied upon ***five*** experienced legal counsel, ***two*** securities compliance consultants; and ***five*** compliance officers – who each reviewed the statements of claim and FINRA Guidance – to reach their good faith determination that the Officer Disclosure arbitration claims were not reportable by Lowry or Monchik. *See supra*, Point III.

The sanction penalty imposed, which included a statutory disqualification, is tantamount to an industry death sentence. Such sanctions are punitive in nature – not remedial – and cannot stand. As stated by the U.S. Court of Appeals of the Second Circuit in *McCarthy v. SEC*, "a compelling argument can be made that suspending McCarthy now will not serve remedial interests and will work an excessive and punitive result-namely, the destruction of the brokerage

practice McCarthy has built during several years of rule-abiding trading." 406 F.3d 179, 190 (2d Cir. 2005) (remanding the imposition of a 2 year suspension for further proceedings). Fundamental fairness is a bedrock principle of FINRA disciplinary proceedings. *See Jeffrey Ainley Hayden*, No. 3-9649, 2000 WL 649146, *2 (SEC May 11, 2000) (the Exchange has a statutory obligation to ensure the fairness and integrity of its disciplinary proceedings, and the SEC has "indicated that a fundamental purpose governing all SRO disciplinary proceedings is fairness."). Here, the punitive penalties imposed are fundamentally unfair and reflective of a NAC that simply ignored the evidence and applicable standards.

In this regard, NAC did not properly consider or apply the Sanction Guidelines, which plainly state that it "provide[s] direction for Adjudicators in imposing sanctions consistently and fairly." Sanction Guidelines, p. 1. Further, the General Principles Applicable to All Sanction Determinations make clear that disciplinary history is relevant, sanctions must be tailored to the misconduct, and, critically, "[s]anctions in disciplinary proceedings are intended to be remedial and to prevent the recurrence of misconduct." *Id.*, pp. 2-6. NAC errored by not properly considering the various Principal Considerations in Determining Sanctions against the evidence. *Id.*, pp. 7-8. These Principal Considerations included, *inter alia*,: whether the individual demonstrated reasonable reliance on competent legal . . . advice; whether the individual attempted to conceal the conduct; whether the individual's misconduct resulted directly or indirectly in injury to such other parties; and whether the individual or firm's misconduct resulted in the potential for the respondent's monetary or other gain. *Id.* Other Principal Considerations considered in imposing sanctions for Form U4/U5 Disclosures, include, *inter alia*, whether the failure to disclose delayed a regulatory investigation or caused a statutory disqualified individual to remain associated with a firm. *Id.*, p 108.

NAC did not properly consider the above Principal Considerations or those specifically relating to the claims when it affirmed the two year suspension sanction imposed against Lowry and Monchik – a suspension term that is not consistent with precedent nor fair, punitive and not remedial, not tailored to the misconduct alleged, and the fact that neither Lowry nor Monchik have any prior disciplinary history.

First, in this case of first impression, Lowry and Monchik did not act recklessly or in bad faith when they did not report the Officer Disclosures on their U4s. As detailed *supra* at Point III, the credible evidence demonstrates that, in each instance, they acted in good faith when they made the decision not to disclose the Officer Disclosures on their U4s. They reviewed each statement of claim's allegations; reviewed the FINRA Guidance; consulted with experienced legal counsel; documented their decision making process, and notified FINRA's Disclosure Unit of their good faith determination. [*See e.g.*, R. 23295, RX-31; R. 1731, Tr. 662:5-16; 656:7-16; 658:22-659:5; 659:24-660:6; 660:22-662:16; 797:5-798:2; 668:3-23] And as opposed to an Officer Disclosure allegation, for any customer complaint/arbitration in which Lowry was named as the broker, Respondents disclosed such arbitration proceeding on his U4. Thus, Lowry and Monchik did not act recklessly or in bad faith when they did not disclose the Officer Disclosures on their U4s.[22]

[22] Over half of the arbitrations filed against Lowry and Monchik, in their capacity as Spartan Officers, were filed by a compensated non-attorney representative firm: Cold Spring Advisors Group ("CSAG"). [R. 20755 to 21110, CX-123, CX-124, CX-130, CX-135, CX-136, CX-140-143, CX-145-147]. Louis Ottimo owns and runs CSAG. [R. 1731, 664:2-24]. FINRA barred Ottimo from the securities industry. *Louis Ottimo*, Release No. 34-95141, 2022 WL 2239146 (June 22, 2022) (Initial Extended Hearing Panel Decision barring Ottimo dated July 15, 2015). Years ago, FINRA recognized that compensated non-attorney representatives harm customers and others and sought to bar them from filing arbitration claims – such as the statement of claims at issue. *See* FINRA Regulatory Notice 17-34 (Oct. 17, 2017). Nearly six years later, on October 5, 2023, FINRA filed a Proposed Rule Change with the SEC to bar compensated non-

Second, Lowry and Monchik demonstrated reasonable reliance on competent legal advice. For example, they sought legal advice from Liam O'Brien, Esq., who had over 25 years of experience representing financial firms with similar disclosure issues. [R. 2961, Tr. 1539:6-23]. Respondents provided O'Brien with the particular statement of claim for which they sought legal advice. [*Id.*, Tr. 1538:4-1539:5]. He reviewed the relevant reporting rules and the FINRA Guidance. [*Id.*]. And O'Brien opined – and provided legal advice– that the claim was not reportable by Lowry or Monchik on their U-4s. [*Id.*, Tr. 1540:6–1541:19]. Thus, Lowry and Monchik reasonably relied on experienced legal counsel when they did not disclose the Officer Disclosures on their U4s – a similar process followed for each claim with an Officer Disclosure issue.

Third, Lowry and Monchik did not attempt to conceal their conduct. The evidence demonstrates that, in each instance, they informed the FINRA Disclosure Unit, in writing, that Lowry and/or Monchik were not reporting the Officer Disclosures on their U4s under the FINRA Guidance and detailed how they had arrived at that conclusion. [*See e.g.,* R. 23295, RX-31]. Thus, Lowry and Monchik did not attempt to conceal their conduct from FINRA.

Fourth, Lowry and Monchik's conduct did not result, directly or indirectly, in injury to other parties. Indeed, the OHO Decision acknowledged Monchik was purely a Spartan Officer – she was never a broker who serviced any member of the investing public. [OHO Decision, p. 4]. And there is no evidence in the Record that the failure to file U4s for the Officer Disclosures resulted in any harm to the investing public. [*Id*., p. 78].

Fifth, Lowry and Monchik's conduct did not result in the potential for monetary or other

attorney representative firms, such as CSAG, from representing parties in FINRA Arbitrations. *See* File No. SR-FINRA-2023-013 (Oct. 5, 2023).

gain. There is no evidence that Lowry or Monchik received, or had the potential to receive, any monetary or other gain as a result of Respondents' good faith determination that the Officer Disclosures were not reportable on their U4s.[23]

Sixth, there is no evidence in the Record that Monchik or Lowry's conduct delayed a regulatory investigation or resulted in a statutory disqualified person becoming or remaining associated with Spartan.

Finally, a review of an additional factor particular to this case support a lower suspension sanction. For Officer Disclosures, the decision to disclose is not black and white. Director Howard recognized that the determination as to whether a claim's allegations compel disclosure or allow for non-disclosure under the FINRA Guidance, can be a "gray area" depending on the non-specific allegations.[24] [*See* R. 1731, Tr. 600:19-602:7]. Prior to this action, there had been no discussion or analysis of the FINRA Guidance to FINRA Members. Lowry and Monchik reasonably followed the FINRA Guidance when they – and their legal counsel – made the good faith determination that the Officer Disclosures were not reportable. The Sanctions Guidelines does not have, but should have, a factor that the SEC considers in weighting the proper suspension sanction because unlike a black-and-white, disclose or not disclose a claim, the disclosures here were "grey" claims that required additional consideration under the FINRA Guidelines. As detailed herein, Monchik and Lowry and/or their legal counsel reviewed the

[23] There was not a single witness presented by Enforcement that accused Lowry or Monchik of acting in bad faith or from a customer that relied upon their BrokerChecks – none – while there were multiple witnesses and documents evidencing that they acted in good faith. [*See generally,* R. 1095-3683].

[24] It is for this reason Respondents engaged experience legal counsel to opine, and advise them, on their reporting obligation for specific claims. *See supra*, Point III.

claims and reached a good faith determination that the Officer Disclosures were not disclosable – they should not be harshly punished for following the published FINRA Guidance.

Accordingly, the SEC should set aside the Decision or modify the punitive suspension sanctions imposed against Monchik and Lowry from the maximum two years suspension to a 20 business day suspension[25] in light of the credible evidence demonstrating their good faith determination in concluding that the Officer Disclosures were not reportable. *See supra*, Point III. The SEC should also set aside any willful finding against Lowry and Monchik.[26]

B. The Monetary Fine Imposed Against Spartan is Excessive Under the Sanction Guidelines and Ignores the Weight of the Evidence

NAC affirmed the sanctions imposed against Spartan including, the $600,000 monetary fine.

The Sanction Guidelines recommend a monetary penalty for late file filing or failing to report U4s/U-5s in a range between $5,000 to $77,000 for a Small Firm.[27] Sanction Guidelines, p. 55. It further provides that where aggravating factors predominate to *consider* a higher fine. The NAC erroneously concluded that aggravating factors were predominant when it imposed a

[25] FINRA imposed similar suspension sanctions against individuals based on similar conduct. *See Jamie J. Worden*, No. 2017056432601 (AWC Dec. 31, 2020) (no willful finding; 15 business day suspension for multiple regulatory violations, including similar U-4 reporting issues); *Robert J. Eide*, No. 201102638602 (Order Accepting Offer of Settlement in OHO Proc. Aug 3, 2015) (no willful finding; 15 business day suspension); *Gregory P. Pellizon*, No. 2014041107201 (AWC Nov. 18, 2019) (no willful finding; 20 business day suspension).

[26] In a further demonstration of their good faith, Lowry and Monchik voluntarily began their efforts to amend their Form U-4s to disclose the arbitrations identified on the Exhibits C and D to the OHO Decision, and Spartan retained an independent compliance consultant to monitor CRD reporting and implement new procedures, before Enforcement filed a Motion to For an Order Placing Interim Conditions and Restrictions on Respondents. [*See* R. 25603].

[27] Spartan is a Small Firm. [Decision, n. 35].

$600,000 monetary fine against Spartan – a fine that is ***300% greater than the high-range*** for a Midsize to Large Firm and ***779% greater than high-range*** of the Small Firm's Monetary Sanction. *Id.*

The SEC should set aside or modify the monetary penalty[28] imposed against Spartan because it is far excessive, punitive, and NAC ignored the weight of the evidence in support of a lesser monetary sanction, *i.e.* – a sanction between the range recommended for a Small Firm.

While NAC relied heavily on the number of disclosure events, the metrics include previously discussed Officer Disclosures and financial events that resulted in late filings after Spartan determined the accuracy of a financial event filing – similar violations that the Guidelines make clear are to be batched. *See id*., p. 4. In addition to the factors and evidence previously discussed, the other factors that support a substantially reduced penalty include, *inter alia*, measures that NAC erroneously determined to be too little, too late. [*See* Decision, p. 40].

NAC failed to properly evaluate the Principal Considerations in Determining Sanctions against the evidence. *See* Sanction Guidelines, pp. 7-8.

First, as previously detailed, Spartan acted in good faith when its Officers reached the conclusion that the Officer Disclosures for Lowry, other Spartan Officers, and/or Monchik were not reportable under the FINRA Guidance. *See supra*, Point III. These arbitration disclosures constituted the vast majority of the arbitration disclosures for which NAC and H.O. Dixon found that Spartan had failed to disclose. [*See* Decision, p. 21]. Thus, the SEC should not penalize Spartan for its good faith efforts in complying with the FINRA Guidance.

Second, the evidence demonstrated that Spartan acted responsibly and in good faith with

[28] At the beginning of the appeal process, Spartan retained an independent consultant and made the required U4 filings. [*See* R. 25603].

respect to the financial disclosures that NAC found it had reported on an untimely basis. At the outset, the evidence demonstrated that Spartan performed background checks on its brokers, including google searches, court searches, county searches and issued requests directly to the brokers for their information. [R. 2385, Tr. 1181:23-1183:18; R. 23561, RX-36]. There is also extensive testimony about several iterations of the methodology used by Spartan, at different time periods,[29] to try to obtain information on judgments and liens of its registered representatives. [*Id.*, Tr. 1183:19-1186:11]. Spartan utilized annual attestations for each broker in which the broker certified that he/she had reported any reportable disclosures to Spartan, and it issued annual compliance alerts to its brokers that specifically address disclosure obligations. [R. 2385, Tr. 1188:23-1189:5; 1189:17-1200; R. 22907, RX-8]. As previously detailed, Spartan took reasonable steps to determine the accuracy of 169 financial events identified in the LexisNexis Report provided by FINRA, and it filed 51 accurate reports – reports that NAC held to be late filings. *See supra* Point IV. The SEC should not penalize Spartan for its efforts to ensure accurate filings, and its efforts to do so do not give rise to aggravating sanction factors as asserted by NAC.

Finally , the credible evidence demonstrates that Spartan took corrective action by, *inter alia*, making full disclosure of the disclosable events and hiring additional (and different) compliance staff, a new Chief Compliance Officer, and a Registration Specialist, Maureen Toale, to resolve open disclosure items, including late filings – two-and-a-half years prior to Enforcement filing the Complaint. [*See* R. 22905, RX-7; R. 22571, CX-340; R. 2053, Tr.

[29] In 2014, as part of a routine audit, the SEC informed Spartan that it should be more robust in its efforts to try to obtain possible disclosure information on behalf of its brokers. [R. 3947, CX-107]. As a result, Spartan improved its processes to obtain such information – a process that evolved over time. [R. 2385, Tr. 1125:8-1130:2; 1133:3-25].

831:21-832:19; R. 23281, RX-23; R. 22667, CX-353; R. 1731. Tr. 845:14-846:7]. Further, there is no evidence in the Record that Spartan's conduct harmed the investing public.[30]

The enforcement proceeding is against the Spartan of old; it is not based upon Spartan's current compliance activity, which had been corrected effective February 2019. As such, while some penalty may be appropriate, there is no need for the SEC to uphold and impose a monetary sanction ***that exceeded the high range of the Sanction Guidelines by 779%*** to coerce compliance or corrective action by Spartan, which it had already corrected. Rather, as set forth in the Sanctions Guidelines, a monetary sanction in the range between $5,000 to $77,000 is an appropriate sanction for Spartan's dated failures.[31] *See* Sanction Guidelines, p. 55.

Based upon the above, Spartan submits that the SEC should set aside or modify the monetary sanction imposed against it to range between $5,000 to $77,000, which would be more appropriate in light of the evidence, its corrective action to remediate its reporting problem, and the recommended range of sanctions set forth in the Sanction Guidelines. The SEC should also reverse the willful finding against Spartan because Spartan took clear efforts to correct any failure by its compliance officers.

CONCLUSION

Based on the foregoing, Respondents/Appellants Spartan Capital Securities, LLC, John D. Lowry, and Kim M. Monchik respectfully submit that the SEC should set aside the Decision as unconstitutional, or in the alternative, set aside the Decision, modify the sanctions downwards,

[30] "Enforcement did not present direct evidence of harm to investors or others." [OHO Decision, p. 78].

[31] While FINRA has taken issue with Spartan's former Chief Compliance Officers' good faith determinations and their reporting of disclosures, it did not file disciplinary actions against them.

or remand the matter back to the NAC with a directive to apply the applicable law and give due weight to the evidence discussed.

Respectfully submitted,

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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

SPARTAN CAPITAL SECURITIES, LLC, JOHN D. LOWRY, and KIM M. MONCHIK

For Review of Disciplinary Action Taken by FINRA

Admin. Proc. File No. 3-22285

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Respondents/Appellants Spartan Capital Securities, LLC, John D. Monchik, and Kim M. Monchik's Brief in Support of Their Application for Review contains 13,846 words, as counted by Microsoft Word and by hand counting the number of words in the embedded picture not counted by Microsoft Word, and is in compliance with 17 C.F.R. § 201.450(c).

Dated: January 23, 2025

Respectfully submitted,

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OS Received 01/23/2025

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SPARTAN CAPITAL SECURITIES, LLC, JOHN D. LOWRY, and KIM M. MONCHIK

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CERTIFICATE OF SERVICE

I, Richard J. Babnick Jr., certify that on this January 23, 2025, I caused a copy of Respondents/Appellants Spartan Capital Securities, LLC, John D. Monchik, and Kim M. Monchik's Brief in Support of Their Application for Review to be filed through the SEC's eFAP system on:

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