Disciplinary Proceeding No. 2018059545201

United States Securities and Exchange Commission

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ROBERT ESCOBIO,
(CRD No. 703813)

Applicant/Respondent.

APPENDIX TO APPLICATION FOR REVIEW OF RESPONDENT – ROBERT ESCOBIO

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2021 I filed the foregoing brief with The Office of the Secretary, Securities and Exchange Commission, 100 F Street, NE, Room 10915, Washington, D.C. 20549-1090 via electronic mail to apfilings@sec.gov, with copy to the Office of General Counsel, FINRA, 1735 K Street, N.W. Washington, D.C. 20006 Attn: Ashley Martin via electronic mail to Ashley.martin@finra.org.

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United States CFTC v. Escobio

United States Court of Appeals for the Eleventh Circuit

January 6, 2020, Decided

No. 19-11027

Reporter
946 F.3d 1242 *; 2020 U.S. App. LEXIS 185 **; 105 Fed. R. Serv. 3d (Callaghan) 1294; 28 Fla. L. Weekly Fed. C 697; 2020 WL 57331

U.S. COMMODITY FUTURES TRADING COMMISSION, Plaintiff - Appellee, versus ROBERT ESCOBIO, Defendant - Appellant, SUSAN ESCOBIO, Intervenor.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:14-cv-22739-JLK.

U.S. CFTC v. Southern Trust Metals, Inc., 2019 U.S. Dist. LEXIS 86685 (S.D. Fla., Mar. 29, 2019)
U.S. CFTC v. S. Trust Metals, Inc., 2019 U.S. Dist. LEXIS 43187 (S.D. Fla., Mar. 18, 2019)

Case Summary

Overview
HOLDINGS: [1]-Where the Commodity Futures Trading Commission (CFTC) obtained a judgment ordering a defendant to pay restitution to victims of his commodity fraud scheme, and where rather than enforcing the restitution order under the Federal Debt Collection Procedures Act (FDCPA), the CFTC sought enforcement pursuant to its civil contempt power, the district court erred in issuing a contempt order because the CFTC was limited to the enforcement remedies provided by the FDCPA to collect on defendant's restitution obligation; [2]-The restitution award was properly characterized as a money judgment, which was not enforceable by contempt, because the judgment required defendant to pay a sum certain of money, it imposed interest, which only applied to a money judgment, and by its terms, restitution under the CEA had to consider customer losses, and thus, could not be equitable restitution.

Outcome
Decision vacated; case remanded.

LexisNexis® Headnotes

Civil Procedure > Sanctions > Contempt

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN1[] **Sanctions, Contempt**

Appellate courts have jurisdiction to review a contempt order under *28 U.S.C.S. § 1291*. *Section 1291* imposes a finality test for appellate review. Contempt citations issued post judgment are subject

to the test of finality and are not immediately appealable unless there is both a finding of contempt and a noncontingent order of sanction.

Civil Procedure > Sanctions > Contempt

HN2[] **Sanctions, Contempt**

Courts distinguish contempt orders that are conditional or subject to modification from those that impose a fine or penalty within a time certain that may not be avoided by some other form of compliance. Conditional orders reflect an ongoing effort by the district court to prod the contemnor into compliance. The bar against appellate review of conditional contempt orders exists to avoid disrupting this continuing, orderly course of proceedings. A district court has essentially placed the keys of the prison cell in the contemnor's pocket by encouraging the contemnor to comply with the order prior to the imposition of any sanctions. But once sanctions are imposed, review of the order no longer ties the hands of the district court because the district court has gone beyond just prodding compliance.

Civil Procedure > Sanctions > Contempt

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN3[] **Sanctions, Contempt**

When a sanction is entered as a result of the contempt finding, it renders the contempt judgment final and makes both the finding of contempt and the later sanction order appealable under *28 U.S.C.S. § 1291*. In such circumstances, the judgment and the order containing the finding of contempt merge and become subject to review on appeal.

Civil Procedure > Sanctions > Contempt

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN4[] **Sanctions, Contempt**

Actual imposition of a penalty is not necessary for appellate review as being placed under the threat of future sanction is an unconditional present sanction. The necessity of notifying the district court of the contemnor's noncompliance does not deprive appellate courts of jurisdiction to review the contempt order.

Civil Procedure > Sanctions > Contempt > Civil Contempt

Civil Procedure > ... > Justiciability > Mootness > Real Controversy Requirement

HN5[] **Contempt, Civil Contempt**

It is well established that once a civil contempt order is purged, no live case or controversy remains for adjudication.

Civil Procedure > Remedies > Injunctions

Civil Procedure > ... > Justiciability > Mootness > Real Controversy Requirement

HN6[] **Remedies, Injunctions**

Injunctive relief is considered moot only if (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

Civil Procedure > Appeals > Appellate Jurisdiction > Lower Court Jurisdiction

HN7[] Appellate Jurisdiction, Lower Court Jurisdiction

The filing of a notice of appeal generally divests a district court of jurisdiction as to those issues involved in the appeal. The appeal lasts until the appellate court issues the mandate. The stay of the mandate delays the return of jurisdiction to the district court to carry out the court's judgment in that case.

Civil Procedure > Appeals > Appellate Jurisdiction > Lower Court Jurisdiction

HN8[] Appellate Jurisdiction, Lower Court Jurisdiction

An appeal does not automatically stay the enforcement of a judgment. A party can move to have the judgment stayed upon appeal. *Fed. R. Civ. P. 62*; *Fed. R. App. P. 8*. Absent entry of a stay, a district court retains jurisdiction to enforce its judgment-via contempt or other means-during the pendency of an appeal.

Civil Procedure > Sanctions > Contempt > Civil Contempt

Civil Procedure > Judgments > Enforcement & Execution > Writs of Execution

HN9[] Contempt, Civil Contempt

Whether a district court can invoke its civil contempt power to enforce a judgment depends on the nature of that judgment. Injunctions, and other coercive equitable remedies, have historically been enforceable via the court's civil contempt powers. Money judgments, on the other hand, are enforceable by a writ of execution, unless the court directs otherwise. *Fed. R. Civ. P. 69*. The procedure of that execution is governed by state law, or, when applicable, federal law.

Securities Law > Commodities Futures Trading > Civil Penalties

HN10[] Commodities Futures Trading, Civil Penalties

The Commodities Exchange Act (CEA) empowers the Commodity Futures Trading Commission (CFTC) to bring an action against any registered entity or person for violations of the CEA. *7 U.S.C.S. § 13a-1*. (3). Among the compliance remedies, the CFTC can seek a permanent or temporary injunction or restraining order, *§ 13a-1(b)*, writs of mandamus, or orders affording like relief, *§ 13a-1(c)*, and civil penalties, *§ 13a-1(d)*. Civil penalties include both general penalties and equitable remedies. *§ 13a-1(d)(1)*. The statute authorizes the CFTC to seek and the court to impose equitable remedies including restitution to persons who have sustained losses proximately caused by such violation, in the amount of such losses, and disgorgement of gains. *§ 13a-1(d)(3)*.

Securities Law > Commodities Futures Trading

HN11[] Securities Law, Commodities Futures Trading

Collection of restitution awards under the Commodities Exchange Act is governed by the Federal Debt Collection Procedures Act (FDCPA), which provides the exclusive civil procedures for the United States to recover on judgments for debt owed to the United States, including judgments for restitution. *28 U.S.C.S. §§ 3001* and *3002(3)(B)*. &(8). The FDCPA provides several remedies to collect on judgments, including execution, installment payment orders, and garnishment. *28 U.S.C.S. §§ 3202-3205*. It does not include the power of civil contempt. The FDCPA's 's Rule of Construction provision, however, provides that the outlined procedures shall not be construed to supersede or modify the authority of a court to exercise the power of contempt under any Federal law. *28 U.S.C.S. § 3003*.

Civil Procedure > Sanctions > Contempt > Civil Contempt

HN12[] **Contempt, Civil Contempt**

A money judgment, it is not enforceable by contempt.

Civil Procedure > Sanctions > Contempt > Civil Contempt

Civil Procedure > Preliminary Considerations > Equity > Relief

HN13[] **Contempt, Civil Contempt**

Equitable remedies can take a variety of forms. Some equitable remedies are restitutionary, in money or otherwise. Others are coercive, commanding the defendant to do or refrain from a specified act via an in personam order. Coercive remedies are distinctive in that they are enforceable by the power of contempt. Money restitution, however, can be enforced without resort to any special equity powers.

Civil Procedure > Preliminary Considerations > Equity > Relief

HN14[] **Equity, Relief**

Not all relief falling under the rubric of restitution is available in equity.

Civil Procedure > Remedies > Damages > Monetary Damages

HN15[] **Damages, Monetary Damages**

A money judgment need consist of only two elements: (1) an identification of the parties for and against whom judgment is being entered, and (2) a definite and certain designation of the amount which plaintiff is owed by defendant.

Civil Procedure > Remedies > Judgment Interest

HN16[] **Remedies, Judgment Interest**

28 U.S.C.S. § 1961(a) allows interest on any money judgment, but does not affect the interest imposed on other judgments. *28 U.S.C.S. § 1961(c)(4)*.

Civil Procedure > Preliminary Considerations > Equity > Relief

Securities Law > Commodities Futures Trading > Civil Penalties

HN17[] **Equity, Relief**

By its terms, restitution under the Commodities Exchange Act must consider customer losses and therefore cannot be equitable restitution.

Securities Law > Commodities Futures Trading > Civil Penalties

HN18[] **Commodities Futures Trading, Civil Penalties**

The Federal Debt Collection Procedures Act limits the enforcement remedies available to the Commodity Futures Trading Commission (CFTC) when it seeks to collect restitution. It provides the CFTC with multiple tools, including execution, installment payment orders, and garnishment. To the extent that the CFTC has identified specific assets, it can seize that property using writs of attachment or writs of garnishment. If the CFTC is unaware or uncertain of other property that a defendant owns, it can depose persons having knowledge of his assets or obtain other discovery. *28 U.S.C.S. § 3015*. To the extent that the CFTC

suspects that a defendant has engaged in fraudulent transfers to avoid paying a restitution obligation, subsection D of the FDCPA provides mechanisms for the CFTC to obtain relief. *28 U.S.C.S. §§ 3301-3308*.

Securities Law > Commodities Futures Trading > Civil Penalties

HN19[] **Commodities Futures Trading, Civil Penalties**

The Federal Debt Collection Procedures Act provides numerous means of satisfying a restitution obligation and equity intervenes only when there is no adequate remedy at law.

Civil Procedure > Sanctions > Contempt > Civil Contempt

HN20[] **Contempt, Civil Contempt**

Courts have the inherent power to enforce compliance with their orders through civil contempt. A court can use its power of contempt in ancillary proceedings in aid of enforcement.

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Judges: Before ED CARNES, Chief Judge, BRANCH, and TJOFLAT, Circuit Judges.

Opinion

[*1244] PER CURIAM:

This case involves the enforcement of a judgment the Commodity Futures Trading Commission ("CFTC") obtained against Robert Escobio. Among other things, the judgment ordered Escobio **[**2]** to pay $1,543,892 within 10 days in restitution to the investors who fell victim to his commodity-fraud scheme. Instead of enforcing the restitution order pursuant to legal remedies provided by the *Federal Debt Collection Procedures Act ("FDCPA")*, **[*1245]** the CFTC asked the District Court to enforce Escobio's payment of restitution pursuant to its civil contempt power.

Following a show-cause hearing, the Court held Escobio in contempt for failing to pay the restitution as ordered. Rather than sanctioning Escobio's contempt, however, the District Court *sua sponte* modified its restitution order and required Escobio to pay $350,000 within 10 days of its revised order, and $10,000 per month thereafter. If Escobio failed to make any of the payments, on receipt of "written notice from the CFTC," the Court would order the U.S. Marshals Service to take him into custody and jailed.

Escobio appeals the District Court's contempt adjudication and its *sua sponte* modification of the restitution provisions of its judgment. Concluding that those provisions constitute a money judgment enforceable under the FDCPA, but not by the District Court's civil contempt power, we vacate the Court's contempt adjudication **[**3]** and its modification of the restitution provisions of its judgment.

I.

A.

This is not the first time this case has been before us. The current appeal arises from the CFTC seeking to enforce a judgment that we partially upheld. *See* *Commodity Futures Trading Comm'n v. Southern Trust Metals, Inc., 894 F.3d 1313 (11th Cir. 2018)*. As we explained there, Escobio was the Chief Executive Officer and Director of Southern Trust. *Id. at 1319*. The CFTC, acting on a customer complaint, investigated Southern Trust and Escobio (collectively, the "Defendants") for commodities fraud. *Id. at 1320*. The CFTC filed suit against the Defendants alleging that they had engaged in two illegal schemes in violation of the *Commodities Exchange Act ("CEA")*. *Id. at 1321*.

In the first, which we deemed the "unregistered-futures scheme," the CFTC alleged that the Defendants were not registered as futures commission merchants. *Id.* In the second, the "metals-derivative scheme," the CFTC alleged that the Defendants accepted money from investors for metals, but instead invested the money in metal derivatives. *Id.* In addition, the complaint alleged, the Defendants charged these investors interest for nonexistent loans. *Id. at 1322*.

Following a bench trial, the District Court entered a judgment awarding restitution for losses the investors incurred from both schemes. **[**4]** *Id. at 1328*. For the metals-derivative scheme, it ordered the Defendants to pay $1,543,892. *Id.* For the unregistered-futures scheme, it ordered the Defendants to pay $559,725. *Id.* The Court held the Defendants jointly and severally liable and ordered payment of the "Restitution Obligation" within ten days. The Court appointed the National Futures Association[1] as Monitor to collect and distribute the restitution payments to those who lost money in connection with the two schemes.[2] The Court ordered Defendants to cooperate with the Monitor, including **[*1246]** executing any documents necessary to release funds for payment toward the Restitution Obligation. The Court further made each investor who suffered a loss an intended third-party beneficiary under *Rule 71 of the Federal Rules of Civil Procedure*. The Court also permanently enjoined the Defendants from participation in commodities trading and ordered other civil penalties, payable to the CFTC.

Escobio appealed. On January 22, 2018, we determined that the "CFTC did not prove that the Defendants' violations in the unregistered-futures scheme caused any loss" and vacated that portion of the restitution award. *Commodity Futures Trading Comm'n v. S. Tr. Metals, Inc., 880 F.3d 1252, 1268 (11th Cir. 2018)*.

On rehearing on July 12, 2018, we arrived at the same outcome, but by different reasoning. **[**5]** *S. Tr. Metals, Inc., 894 F.3d at 1313*. We vacated the restitution award for the unregistered-futures scheme after determining that the registration violation did not proximately cause the loss as required by the CEA. *Id. at 1335*. We affirmed the

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[1] "The National Futures Association ('NFA') is a congressionally authorized futures industry self[-]regulatory organization. The purpose of the NFA is to assure high standards of business conduct by its Members and to protect the public interest." *Commodity Futures Trading Comm'n v. R.J. Fitzgerald & Co., 310 F.3d 1321, 1326 n.3 (11th Cir. 2002)*.

[2] The Court's order enables the Monitor to treat restitution payments as civil monetary penalty payments "[i]n the event that the amount of Restitution Obligation payments to the Monitor are of a *de minimis* nature such that the Monitor determines that the administrative cost of making a distribution to eligible customers is impractical." The District Court did not explain why the Monitor had the power to convert restitution into a civil monetary penalty.

restitution award for the metals-derivative scheme. *Id.* Our mandate issued on October 26, 2018.

B.

In March 2018, while Escobio's appeal was pending, the CFTC moved the District Court to issue an order requiring Escobio to show cause for his failure to pay the Restitution Obligation and the civil penalties. Escobio challenged the motion, arguing that the Restitution Obligation and the civil penalties are money judgments that cannot be enforced pursuant to the civil contempt power. The District Court decided that it could invoke the contempt power to coerce payment of the Restitution Obligation, but that it lacked any authority to coerce payment of the civil penalties. The Court reasoned that because restitution was an equitable remedy—not a money judgment—it could be enforced by the civil contempt power rather than by the remedies provided by the Federal Debt Collection Procedures Act ("FDCPA").

The District Court then granted the CFTC's motion and ordered Escobio to show cause for his failure **[**6]** to pay the Restitution Obligation. The District Court held evidentiary hearings on October 24 and 25, 2018—a few months after we granted rehearing in *Southern Trust Metals*, but one day before we issued our mandate. During the hearing, Escobio testified that he had paid approximately $3,525 to the restitution fund. He claimed that he could not afford to pay more than $100 per month toward the Restitution Obligation.

On March 18, 2019, the District Court held Escobio in contempt for failing to pay the Restitution Obligation. The Court found that Escobio did not lack the ability to pay the ordered restitution in full given the significant value of his assets, discretionary spending, the benefits of his and his wife's incomes, and money received from other sources.

1.

Based on evidence Escobio presented, the District Court concluded that he had at **[*1247]** least $941,447 in assets. The Court identified the following assets:

- An individual retirement account ("IRA") worth $300,000;
- A joint securities-investment account worth $35,000;
- $3,000 in a joint checking account;
- $554,000 of equity in a co-owned Florida house;
- $21,000 of personal property.[3]

Escobio and his wife, Susan Escobio, jointly own the securities-investment account, the checking account, and the Florida house. Escobio argued that these joint assets are exempt under state law. He also argued that his IRA is exempt from consideration under state law.

The District Court rejected Escobio's arguments. It reasoned that "courts have broad equitable powers to reach assets otherwise protected by state law to satisfy an order for restitution." The Court found that because Escobio withdrew approximately $250,000 from his IRA following the entry of the final judgment, he made a "deliberate, conscious choice to pay his own expenses instead of paying the judgment." The Court ruled that "Escobio

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[3] The sum of the identified assets is $913,000. The Exhibit that Escobio submitted to the District Court identified $941,447 in assets as follows:

- Individual Assets
  - IRA: $309,921
  - Salary (gross): **[**7]** $14,102 (to date)
  - Wells Fargo Bank Account: $944
  - Personal Property: $21,000 est.
  - Total: $345,967
- "Assets owned with wife as joint tenants by the entirety"
  - Homestead property equity: $554,369 est.
  - TD America Bank: $3,120
  - Securities acct.: $38,021
  - Total: $595,510

Although Escobio identified his salary as an asset, the Court considered it in its analysis of Escobio's income.

cannot insulate himself from the restitution order by keeping his assets in an IRA to spend as he chooses." The Court also found that Escobio had the "unfettered ability to withdraw money" from the joint investment and checking **[**8]** account. Citing to *SEC v. Bilzerian, 112 F. Supp. 2d 12, 27 n.29 (D.D.C. 2000)*, but without further analysis, the District Court determined that despite Florida's "homestead exemption," it could consider the value of Escobio's house in determining his ability to pay. The District Court also noted that Escobio provided no reason that his personal property could not be sold to satisfy the Restitution Obligation.

2.

The Court also considered Escobio's expenses and both of the Escobios' incomes. The Court acknowledged that Escobio makes approximately $30,000 to $40,000 per year as a pilot. However, the Court found that Escobio's prioritization of discretionary payments[4] as well as multiple international travel trips evidenced "willful evasion of the Court's judgment." The Court found that under "principles of equity," it could consider the income that Mrs. Escobio makes as the president of Southern Trust. The Court determined that Mrs. Escobio's income was directly attributable **[*1248]** to "Escobio's transfer of shares (and title) to her" and that, because Southern Trust continues to operate and benefit Escobio in the same way as it did before he was barred from participating in the company, the Court could consider the benefits he derives from it.

3.

The District **[**9]** Court also considered the $200,000 to $300,000 in "loans" that Escobio had received from family, friends, and other unidentified sources in its determination of his ability to pay. The Court did not credit Escobio's testimony that these were repayments. Moreover, the Court reasoned, Escobio used this money for personal expenses but could have used it to pay the Restitution Obligation.

4.

After finding that it could consider Escobio's jointly-held assets, both Escobios' incomes, the extensive discretionary spending, and the unidentified "loans," the Court concluded that Escobio had not demonstrated his inability to comply with the final judgment. On March 18, 2019, the District Court held Escobio in civil contempt for failing to pay the Restitution Obligation (hereinafter the "Contempt Order"). But it did not immediately sanction him for the failure. Instead, the Court ordered Escobio to pay $350,000 to the CFTC within ten days "or be subject to coercive sanctions." The Court further ordered Escobio to pay off the balance of the outstanding restitution award at the rate of $10,000 per month "or face coercive sanctions, which shall issue on motion by the CFTC." In a separate paragraph, **[**10]** the Court stated "should Robert Escobio not pay the sums identified above within ten (10) days of the issuance of this Order, upon written notice from the CFTC of the infringing Defendant's noncompliance, a warrant for his arrest shall issue and the United States Marshal Service is authorized to take Escobio into custody and incarcerated until such time as he fully complies with this Court's Order." Escobio appeals the Contempt Order.

C.

Escobio requested a stay of the Contempt Order pending his appeal from both the District Court and this Court. It was denied. Meanwhile, after receiving notice from the CFTC that Escobio had failed to make the required upfront payment, the District Court ordered Escobio to voluntarily surrender to the U.S. Marshals Service on April 1, 2019 (hereinafter the "First Incarceration Order"). Two days later, Escobio filed an amended notice of

[4] The Court identified these payments as $118,700 to attorneys, $113,624 to credit cards, $40,076 in student loan payments for the benefit of Escobio's adult daughters, $36,548 in car lease payments, and $31,600 in checks written to cash. The Court also found it noteworthy that Escobio pays twice as much for his cable as he claims he can pay to the restitution fund each month.

appeal from the First Incarceration Order. Escobio paid $350,000 and thereby purged the contempt. The Court ordered his release from custody on April 26, 2019.

On August 13, the CFTC moved the District Court to issue coercive sanctions based on Escobio's failure to pay the $10,000 monthly installments. On August 19—the **[**11]** day before oral argument in the current appeal, the District Court, without first issuing an order for Escobio to show cause, held Escobio in contempt and ordered him to surrender to the U.S. Marshals Service on August 20, 2019 (hereinafter the "Second Incarceration Order"). The CFTC thereafter filed a certificate that Escobio had paid the amount in arrears and the District Court ordered his release from custody on August 22, 2019.

II.

A.

HN1[⬆] We have jurisdiction to review the Contempt Order under *28 U.S.C. § 1291*. **[*1249]** *Section 1291* imposes a finality test for appellate review. Contempt citations issued post judgment are subject to the test of finality and are not immediately appealable unless there is "*both* a finding of contempt and a *noncontingent* order of sanction." *Combs v. Ryan's Coal Co., 785 F.2d 970, 977 (11th Cir. 1986)*; *see also Mamma Mia's Trattoria, Inc. v. Original Brooklyn Water Bagel Co., 768 F.3d 1320, 1325 (11th Cir. 2014)*.

HN2[⬆] In *Combs*, we distinguished orders that are "conditional or subject to modification" from those that impose a fine or penalty within a time certain that may not be avoided by some other form of compliance. *785 F.2d at 977*. Conditional orders reflect an ongoing effort by the district court to prod the contemnor into compliance. *Id.* The bar against appellate review of conditional contempt orders exists to avoid "disrupting" this "continuing, orderly course of proceedings." **[**12]** *Id. at 976* (quoting *Drummond Co. v. Dist. 20, United Mine Workers of Am., 598 F.2d 381, 384 (5th Cir. 1979)*). A district court has essentially "place[d] the keys of the prison cell in the contemnor's pocket" by encouraging the contemnor to comply with the order prior to the imposition of any sanctions. *Id. at 977*. But once sanctions are imposed, review of the order no longer "tie[s] the hands of the district court" because the district court has gone beyond just prodding compliance. *Id.*[5]

HN3[⬆] Therefore, and as we recently explained, "[w]hen a sanction is entered as a result of the contempt finding," it "render[s] the contempt judgment final and ma[kes] both the finding of contempt and the later sanction order appealable under *28 U.S.C. § 1291*." *PlayNation Play Sys., Inc. v. Velex Corp., 939 F.3d 1205, 1212 (11th Cir. Sept. 24, 2019)* (second and third alteration in original) (quoting *Sizzler Family Steak Houses v. W. Sizzlin Steak House, Inc., 793 F.2d 1529, 1533 n.1 (11th Cir. 1986)*). In such circumstances, the judgment and the order containing the finding of contempt merge and become subject to review on appeal. *Id.* (citing *Akin v. PAFEC Ltd., 991 F.2d 1550, 1563 (11th Cir. 1993)*). We have jurisdiction to review the First Incarceration Order and the underlying Contempt Order based on Escobio's amended notice of appeal.[6]

The CFTC argues that—despite the imposition of sanctions for the upfront $350,000 payment—we lack jurisdiction to review the portion of the

[5] *Combs* involved the District Court's issuance of two contempt orders. One order—which imposed sanctions—was immediately appealable, the other was not. We determined that we lacked jurisdiction to review the District Court's first order as it was part of a continuing effort to compel compliance. *785 F.2d at 978*. That order held appellants in contempt and directed them to pay the amounts due under the parties' consent decree. *Id. at 974*. The second order rejected the contemnor's inability to pay claim and ordered the contemnor to be incarcerated for 21 days unless he demonstrated a good faith effort at compliance with the earlier order. *Id. at 975*. We had jurisdiction to consider the trial court's subsequent order, which incorporated by reference the earlier ruling. *Id. at 978 n.2*.

[6] Because sanctions were imposed, we need not decide whether the Contempt Order would independently qualify for review under *28 U.S.C. § 1291* for modifying the terms of a final judgment.

Contempt Order that relates to future monthly payments because those sanctions are conditional. **[**13]** But because the imposition of sanctions rendered the Contempt Order final, we can review the entire order, including the previously conditional sanctions. The Contempt **[*1250]** Order also provides that the warrant for Escobio's arrest "shall issue" as soon as the CFTC notifies the Court of Escobio's noncompliance. ***HN4***[⬆] There is nothing for the District Court to modify once it is notified of Escobio's noncompliance. And in *Sizzler*, we concluded that a contempt order that imposed a "prospective fine scale" was immediately appealable. *793 F.2d at 1534 n.2*. Actual imposition of a penalty is not necessary for appellate review as "[b]eing placed under the threat of future sanction" is "an unconditional present sanction." *Id.*; *see also Chairs v. Burgess, 143 F.3d 1432, 1435 (11th Cir. 1998)* ("[W]e can review the district court's order to the extent that contempt was found and a prospective fine—the $23.00 per day—was then imposed on the State."). The necessity of notifying the Court of the contemnor's noncompliance does not deprive us of jurisdiction to review the Contempt Order.

B.

The CFTC next argues that the issue is moot because Escobio has purged the contempt. ***HN5***[⬆] It is well established that "once a civil contempt order is purged, no live case or controversy remains for adjudication." **[**14]** *In re Grand Jury Subpoena Duces Tecum, 955 F.2d 670, 672 (11th Cir. 1992)* (collecting cases) (holding that the appeal was moot because the contemnor had "completely purged his contempt"). To decide whether Escobio can justifiably challenge an order adjudicating him in contempt when the amount has already been paid would violate the constitutional prohibition against this Court "decid[ing] abstract, hypothetical or contingent questions." *Id. at 671-72*; *see also RES-GA Cobblestone, LLC v. Blake Constr. & Dev., LLC, 718 F.3d 1308, 1314 (11th Cir. 2013)* (holding that the contemnor's challenge to the $250 per day contempt fine was moot because he had agreed to pay the accrued fine).

The District Court held Escobio in contempt for his failure to pay the Restitution Obligation in full and Escobio faces jail time each month that he fails to make a $10,000 payment. Because Escobio has not "completely purged his contempt," we can review the Contempt Order on the merits as it relates to future monthly payments.[7]

Moreover, the Contempt Order morphed the Restitution Obligation into a different kind of scheme. The District Court attempted to use a coercive *in personam* order to enforce an installment **[*1251]** payment plan with incarcerative sanctions if Escobio did not comply. ***HN6***[⬆] Injunctive relief is considered moot only if "(1) it can be said with assurance that there **[**15]** is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Reich v. Occupational Safety & Health Review Comm'n, 102 F.3d 1200, 1201 (11th Cir. 1997)*. Escobio's adherence to the new payment structure does not negate the possibility that he will fail to pay in the

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[7] The CFTC brings to our attention a similar case from the Ninth Circuit. Our sister Circuit's opinion in *S.E.C. v. Hickey, 322 F.3d 1123, 1127 (9th Cir. 2003)*, does not compel a different conclusion. The District Court found Hickey in contempt for his failure to pay his disgorgement obligation. *Id.* It ordered him to pay $20,000 per month over the next three months or report for custody. *Id.* It also ordered Hickey to adhere to the disgorgement payment schedule by paying $40,000 per month thereafter. *Id.* The Ninth Circuit determined that it lacked jurisdiction to hear the appeal because "the district court never imposed sanctions pursuant to its contempt order." *Id.* It continued that even if it had jurisdiction, the appeal would be moot because Hickey had made the three required payments. *Id.*

This case is not on point, however, because the Ninth Circuit did not consider whether it had jurisdiction to review the $40,000 future monthly payments. And unlike Escobio, there is no indication that Hickey would face incarceration if he failed to make those payments, because the order did not threaten sanctions for failure to make those payments. Here, the District Court has ordered Escobio to report for custody twice and imposed a noncontingent threat of future incarceration.

future nor has it "completely and irrevocably" paid off the restitution award. His challenge to the payment scheme is not moot.

C.

HN7[] Next, we must determine whether the District Court had jurisdiction to issue the Contempt Order. The filing of a notice of appeal generally divests a district court of jurisdiction as to those issues involved in the appeal. *RES-GA Cobblestone, 718 F.3d at 1314*; *see also Weaver v. Fla. Power & Light Co., 172 F.3d 771, 773 (11th Cir. 1999)*. The appeal lasts until we issue the mandate. *Zaklama v. Mount Sinai Med. Ctr., 906 F.2d 645, 649 (11th Cir. 1990)*; *see also Martin v. Singletary, 965 F.2d 944, 945 (11th Cir. 1992)* ("The stay of the mandate . . . delays the return of jurisdiction to the district court to carry out our judgment in that case."). Here, Escobio argues that the District Court lacked jurisdiction to hold the evidentiary hearings on its order to show cause because our mandate had not yet been issued.[8]

HN8[] However, an appeal does not automatically stay the enforcement of a judgment. Wright & Miller, 16A Fed. Prac. & Proc. Juris. § 3954 (5th ed. 2019). A party can move **[**16]** to have the judgment stayed upon appeal. *Fed. R. Civ. Pro. 62*; *Fed. R. App. P. 8*. Escobio did so—and his motion was denied. Absent entry of a stay, a district court retains jurisdiction to enforce its judgment—via contempt or other means—during the pendency of an appeal. *Sergeeva v. Tripleton Int'l Ltd., 834 F.3d 1194, 1202 (11th Cir. 2016)*; *see also Resolution Tr. Corp. v. Smith, 53 F.3d 72, 76-77 (5th Cir. 1995)*.

III.

Because we have jurisdiction to consider this live controversy, we turn now to the merits. Escobio first argues that the District Court had no authority to adjudge him in contempt and that the CFTC was limited to the enforcement remedies provided by the FDCPA to collect on the Restitution Obligation. Escobio also claims that the District Court erred by considering exempt assets and Mrs. Escobio's income in its consideration of his ability to pay the Restitution Obligation. We agree on the first point and need not reach the second.

A.

HN9[] Whether a district court can invoke its civil contempt power to enforce a judgment depends on the nature of that judgment. Injunctions, and other coercive equitable remedies, have historically been enforceable via the court's civil contempt powers. Money judgments, on the other hand, are enforceable "by a writ of execution, **[*1252]** unless the court directs otherwise." *Fed. R. Civ. P. 69*. The procedure of that execution is governed by **[**17]** state law, or, when applicable, federal law. *Id.*

This case hinges on a federal statute that enables the CFTC to seek "equitable remedies," including "restitution" for customer losses, against any person found to have violated the CEA. The CFTC argues that the District Court has the inherent power of civil contempt to enforce this "equitable" restitution. Escobio argues that the Restitution Obligation is a money judgment and there is no federal law that authorizes the use of civil contempt to enforce this money judgment. We agree with Escobio.

First, we describe the statutory scheme at issue and how the District Court concluded that the restitution constitutes an equitable remedy. Second, we explain why the restitution at issue here is, in fact, a money judgment—a remedy at law, rather than a remedy at equity.

1.

HN10[] The CEA empowers the CFTC to bring an action against any registered entity or person for violations of the CEA. *7 U.S.C. § 13a-1*. Among

[8] The District Court found Escobio in contempt on March 18, 2018—nearly five months after we issued the mandate in *Southern Trust Metals*. However, the District Court based its determination on evidence obtained in the hearing held before we issued the mandate in October.

the compliance remedies, the CFTC can seek a "permanent or temporary injunction or restraining order," § 13a-1(b), "writs of mandamus, or orders affording like relief," § 13a-1(c), and "civil penalties," § 13a-1(d). Civil penalties include both general penalties and equitable remedies. § 13a-1(d)(1) & **[**18]** (3). The statute authorizes the CFTC to seek and the court to impose "equitable remedies including" "restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses)" and "disgorgement of gains." § 13a-1(d)(3).

HN11[] Collection of restitution awards under the CEA is governed by the FDCPA,[9] which provides the "exclusive civil procedures for the United States" to recover on judgments for debt owed to the United States, including judgments for restitution.[10] 28 U.S.C. §§ 3001 and 3002(3)(B) & (8). The FDCPA provides several remedies to collect on judgments, including execution, installment payment orders, and garnishment. *Id.* §§ 3202-3205. It does not include the power of civil contempt. The FDCPA's Rule of Construction provision, however, provides that the outlined procedures "shall not be construed to supersede or modify" the authority of a court "to exercise the power of contempt under any Federal law." *Id.* § 3003.

According to the District Court, because the restitution awarded here was equitable in nature, the FDCPA does not preclude the use of the civil contempt power to enforce it. By this logic, because the CEA authorizes equitable restitution, and because equitable restitution (not in the form of a **[**19]** money judgment) was historically enforced via the power of contempt, the CEA's authorization of equitable remedies **[*1253]** carries with it the power to enforce by civil contempt. Thus, the CEA enabled the Court to invoke its civil contempt power.

2.

Contrary to the District Court's conclusion and the statute's label, the restitution at issue here is properly characterized as a money judgment. HN12[] And as a money judgment, it is not enforceable by contempt.[11] Combs, 785 F.2d at 980.

HN13[] The District Court erred by assuming that the "equitable remedies" language in the statute automatically conferred the power to enforce the award by contempt. Equitable remedies can take a variety of forms. "Some equitable remedies are restitutionary, in money or otherwise." 1 DAN B. DOBBS, LAW ON REMEDIES, § 2.1(1), at 56 (2d ed. 1993). Others are coercive; commanding the defendant to do or refrain from a specified act via an *in personam* order. *Id.* Coercive remedies are distinctive in that they are enforceable by the power of contempt. *Id.* "Money restitution," however, can be enforced "without resort to any special equity powers." DOBBS, § 2.1(2), at 59.

HN14[] As the Supreme Court made clear in Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 212, 122 S. Ct. 708, 714,

[9] The FDCPA provides that "[t]o the extent that another Federal law specifies procedures for recovering on a claim or a judgment for a debt arising under such law, those procedures shall apply to such claim or judgment to the extent those procedures are inconsistent with this chapter." 28 U.S.C. § 3001. The CFTC has not pointed us to, nor have we found, where the CEA specifies procedures for collection of restitution, so the CFTC is subject to the limitations in the FDCPA.

[10] Restitution under the CEA is reduceable to a debt owed to the United States for the use and benefit of the persons who have sustained losses proximately caused by Escobio's violation of the CEA.

[11] We need not decide whether a court can invoke its civil contempt power to enforce other equitable remedies under the CEA. For example, the CFTC directs our attention to cases which uphold an order of civil contempt for failure to pay disgorgement under the CEA. *E.g.*, Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc., 950 F.2d 1525, 1531 (11th Cir. 1992). But disgorgement is not a money judgment reduced to a debt owed to the United States under the terms of the FDCPA. *See, e.g.*, 28 U.S.C. § 3002(3)(B) (definition of debt does not include disgorgement); S.E.C. v. Huffman, 996 F.2d 800, 803 (5th Cir. 1993). Here, the Restitution Obligation is reduceable to a debt. 28 U.S.C. § 3002(3)(B).

151 L. Ed. 2d 635 (2002), "not all relief falling under the rubric of restitution **[**20]** is available in equity." The Court distinguished equitable restitution from legal restitution. *Id.* Historically, a plaintiff could seek equitable restitution when "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to *particular* funds or property in the defendant's possession." Id. at 213, 122 S. Ct. at 714 (emphasis added) (citing DOBBS, § 4.3(1), at 587-88); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 4 (Am. Law Inst. 2011) ("[T]he hallmark of equitable remedies in restitution cases is that they give relief to the claimant via rights in identifiable assets."). A court could impose a constructive trust or an equitable lien and order the defendant to transfer title or give a security interest to the plaintiff. *Id.* In contrast, when the money or property could not be identified, a plaintiff could seek legal restitution by obtaining a judgment for the defendant to "pay a sum of money." *Id.*

Here, the final judgment constitutes a money judgment for several reasons. Most plainly, the final judgment required Escobio to pay approximately $1.5 million within ten days, subject to accruing interest. That is a classic money judgment. HN15[↑] It provides for a sum certain, non-contingent "payment of money . . . that the court found **[**21]** to be due and owing." Combs, 785 F.2d at 980; *see also* Penn Terra Ltd. v. Dep't of Envtl. Res., Com. of Pa., 733 F.2d 267, 275 (3d Cir. 1984) ("[A money judgment] need consist of only two elements: (1) an identification of the parties for and against whom judgment is being entered, **[*1254]** and (2) a *definite* and *certain* designation of the amount which plaintiff is owed by defendant."). It does not provide the victims of Escobio's schemes with relief via the right to claim particular assets.

HN16[↑] Additionally, the District Court prescribed § 1961 post-judgment interest on the award, which it could do only on a money judgment. Section 1961(a) allows interest on "any money judgment," but does not affect the interest imposed on other judgments. 28 U.S.C. § 1961(c)(4).

Finally, the history of the CEA buttresses our conclusion here. Congress added the "equitable remedies" subsection to the CEA in 2010. *Pub.L. 111-203, Title VII, §§ 741(b)(5)*, 744, July 21, 2010, 124 Stat. 1731, 1735. Prior to the amendment, we had held that a court's authority to issue injunctions under § 13a-1(a) carried with it the "full range" of equitable powers, including the power to grant restitutionary remedies. Commodity Futures Trading Comm'n v. Wilshire Inv. Mgmt. Corp., 531 F.3d 1339, 1344 (11th Cir. 2008). Equitable restitution, however, was limited to the amount that the defendant wrongfully gained, rather than the amount that the customers lost. Id. at 1345. As we explained, the equitable power of restitution was "designed to cure unjust enrichment **[**22]** of the defendant *absent consideration of the plaintiff's losses*." *Id.* (quoting Waldrop v. S. Co. Servs., Inc., 24 F.3d 152, 158 (11th Cir. 1994)). Because awarding damages in the amount of customer losses could exceed the remedial basis, we reasoned that it was beyond the scope of the court's equity powers to base restitution on customer losses. *Id.*

After the 2010 amendments, however, restitution under the CEA is awarded "to persons who have sustained losses proximately caused by such violation" and "in the amount of such losses." § 13a-1(d)(3). As we held in *Southern Trust Metals*, the "statutory language, by its terms, permits restitution *only* for losses proximately caused by a violation." 894 F.3d at 1329 (emphasis added). We upheld the restitution award for the metals-derivative scheme as the customers sustained losses when their accounts were liquidated at a down time in the market. Id. at 1334.

HN17[↑] By its terms then, restitution under the CEA must consider customer losses and therefore cannot be equitable restitution. *See* Wilshire, 531 F.3d at 1345. Furthermore, because the court ordered Escobio to "pay a sum of money" for the

customers' losses instead of returning specific property, it is legal restitution rather than equitable restitution. *See* *Knudson, 534 U.S. at 213, 122 S. Ct. at 714*. As the final judgment awarded legal restitution, it is a money judgment. **[**23]** As a money judgment, the restitution award is subject to the limitations in the FDCPA.

HN18[↑] The FDCPA limits the enforcement remedies available to the CFTC when it seeks to collect restitution. It provides the CFTC with multiple tools, including execution, installment payment orders, and garnishment. As we explained in *Bradley v. United States*, to the extent that the CFTC has identified specific assets, it can seize that property using writs of attachment or writs of garnishment. *644 F.3d 1213, 1310 (11th Cir. 2011)*. If the CFTC is unaware or uncertain of other property that Escobio owns, it can depose persons having knowledge of his assets or obtain other discovery. *Id.*; *28 U.S.C. § 3015*. To the extent that the CFTC suspects that Escobio has engaged in fraudulent transfers to avoid paying the Restitution Obligation, subsection D of the FDCPA provides mechanisms for the CFTC to obtain **[*1255]** relief. *28 U.S.C. §§ 3301-3308*. It was reversible error for the District Court to hold Escobio in contempt for failure to pay the money judgment.

It appears that the District Court attempted to morph the lump-sum restitution award into an injunctive installment plan backed up by the threat of incarceration. That is error for the reasons explained above. ***HN19***[↑] The FDCPA provides numerous **[**24]** means of satisfying the Restitution Obligation and equity intervenes only when there is no adequate remedy at law. *Bradley, 644 F.3d at 1311*. In addition, the installments are still money judgments that cannot be enforced by contempt. *See* *Combs, 785 F.2d at 980* (concluding that regardless of whether the consent decree was payable "immediately or in installments," it is a money judgment).

HN20[↑] Our conclusion does not deprive a district court from ever using its civil contempt power. Courts have the inherent power to enforce compliance with their orders through civil contempt. *Shillitani v. United States, 384 U.S. 364, 370, 86 S. Ct. 1531, 1535, 16 L. Ed. 2d 622 (1966)*. A court can use its power of contempt in ancillary proceedings in aid of enforcement. For example, in *Combs*, we refrained from passing on the propriety of the District Court's contempt order as it was not immediately clear why the Court had issued the order. *785 F.2d at 981*. As we clearly laid out, if the Court used its contempt power to coerce the appellants into paying the money judgment, it was improperly entered. *Id.* If, however, the Court used its contempt power to coerce the appellant into providing financial records, then it was a proper use of the contempt power. *Id.* We remanded so the Court could clarify the purpose of the order. *Id.* Unlike the questionable order in **[**25]** *Combs*, there is no doubt that, here, the District Court attempted to use its contempt power to force Escobio to pay the Restitution Obligation.[12] That is reversible error.

B.

Because the District Court lacked the authority to enforce the Restitution Obligation pursuant to its civil contempt power, we need not consider Escobio's arguments that the Court erred in considering exempt assets or Mrs. Escobio's income in its determination of Escobio's ability to pay. The District Court's Contempt Order, issued on March 18, 2019, and its First Incarceration Order, issued on April 1, 2019, are VACATED.

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[12] We also pause to caution that when a district court invokes its civil contempt power, it must do so in accordance with due process. Per the terms of the Contempt Order, an arrest warrant "shall" issue upon notification by the CFTC of Escobio's noncompliance. Any hearing to consider why Escobio failed to comply is triggered only after "notification from the U.S. Marshal's Office that Escobio is in custody." But that, in essence, holds Escobio in contempt for future conduct. As we have previously held, a court cannot hold that certain future conduct is contumacious. *Mercer v. Mitchell, 908 F.2d 763, 767 (11th Cir. 1990)*. Such a finding deprives the alleged contemnor of his due process rights of notice and hearing. *Id. at 767*. A "defendant should always be given an opportunity to show that changed circumstances would make holding him in contempt unjust." *Id. at 769*.

SO ORDERED.

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Finra: Who's watching the watchdog?

By **Mark Schoeff Jr. and Bruce Kelly** — September 2, 2017

IF you're a broker, there are three things in life that are certain: death, taxes — and answering to Finra.

Finra is the self-regulatory organization that makes sure the nation's 3,700 broker-dealers and 631,000 brokers comply with securities laws and regulations to ensure that investors are protected and treated fairly. It has the power to levy fines and, in serious cases, bar brokers and individuals from the industry. If you want to be a broker or operate a brokerage firm, you must join Finra.

No one argues against the need for regulation, but over the years the **Financial Industry Regulatory Authority Inc.** has grown into a huge institution, one that generates hundreds of millions of dollars a year in revenue through membership fees and fines. It also maintains a reserve of about $1.6 billion and employs upward of 3,000 people, some of whom receive exorbitant salaries by industry standards.

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Finra wields enormous power over the lives of brokers and broker-dealers. Last year alone, it issued more than 1,400

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took our online survey had to say about Finra

500 brokers from the industry.

And yet people in the industry know little about how Finra operates, how it spends the millions it collects in membership fees and fines, and how it sets its regulatory agenda. Finra writes its own rules, meets behind closed doors and releases information if and when it deems necessary. Finra is the watchdog that no one is watching.

"It is largely unaccountable to the industry or to the public," David Burton, a senior fellow in economic policy at the Heritage Foundation, **wrote in a February report**. "Due process, transparency and regulatory-review protections normally associated with regulators are not present, and its arbitration process is flawed. Reforms are necessary."

In an *InvestmentNews* survey of 363 readers who are regulated by Finra, nearly half — 48% — said the organization is not doing a good job of regulating brokers, compared with 29% who said it was. Meanwhile, 61% said Finra is not transparent about its finances, and the same percentage said the SEC's oversight of Finra is inadequate.

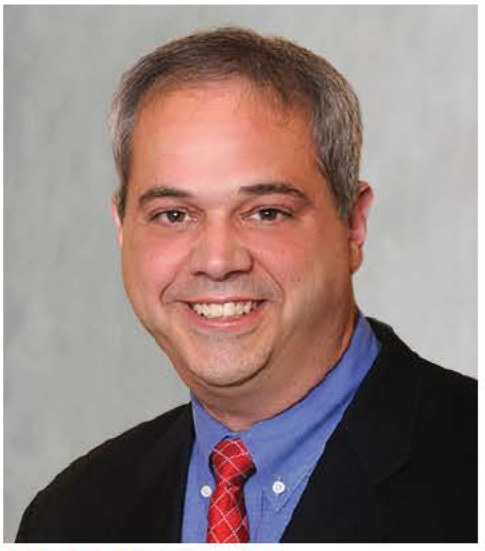
Jim R. Webb, CEO of broker-dealer Cape Securities Inc., is frustrated that Finra acts like a government agency but does not have to follow the laws that govern public agencies. For example, it is not subject to laws that would allow the public to attend its meetings, nor is it subject to the Freedom of Information Act, which allows anyone to request information about any matter from a federal agency.

Finra protects itself from lawsuits from members by claiming that as an SRO it has absolute immunity from private lawsuits challenging the conduct of its regulatory mission.

"There needs to be definition," Mr. Webb said. "Is it a government agency or not a government agency? As long as there's not a choice for brokers, it's a monopoly — and monopolies need to be regulated."

Mr. Webb ran unsuccessfully last month for a seat on Finra's board representing small brokers, calling for more disclosure. "I want to make the funding of Finra more transparent," he said. "Other than the annual report, what do you know?"

Kenneth E. Bentsen Jr., CEO of the Securities



"IS IT [FINRA] A GOVERNMENT OR NOT A GOVERNMENT AGENCY? AS LONG AS THERE'S NOT A CHOICE FOR BROKERS, IT'S A MONOPOLY – AND MONOPOLIES NEED TO BE REGULATED."

JIM R. WEBB, CEO, CAPE SECURITIES INC.

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representing the securities industry, also decried a lack of information coming out of Finra.

"There is virtually no public information currently available about how Finra specifically uses the revenues it receives from its fees and other income," he **wrote in a comment letter about Finra 360**, a comprehensive review of the SRO's **operations being conducted by CEO Robert Cook**.

Finra declined to respond to specific criticisms from members and experts contacted for this story, nor did it make Mr. Cook available for an interview. It did, however, emphasize that **Finra 360** has already produced reforms.

For example, the SRO said it has streamlined its enforcement operation, enhanced examiner onboarding and training, and reformed registration rules to make it easier for people with no securities industry experience to take a general knowledge exam. Finra also recently announced it will begin publishing summary reports on common exam findings by the end of the year.

"The ongoing, multi-year project has already resulted in a number of changes and improvements ... and reflects our commitment to be the best-informed, and most effective and efficient self-regulatory organization we can be," Finra spokeswoman Michelle Ong said in a statement.

FINRA'S FINANCES

Make no mistake, executives at Finra are running a business — and a very big business at that. Depending on its size, a broker-dealer can expect to pay anywhere from a few thousand dollars to tens of millions of dollars a year in membership fees.

The SRO maintains a strong balance sheet and **had $1.6 billion in net assets** held in a reserve fund on Dec. 31, 2016. To some Finra members, that is a point of contention.

"If you're a not-for-profit, why isn't that money being rebated to members?" said Carrie Wisniewski, president of B/D Compliance Associates Inc. and a Finra member.

Finra returned money to members from 2007 through 2014, with totals ranging from $5.4 million to $20 million. But it hasn't done so in the last two years.

Thanks to a dramatic 85% **increase in fines**, Finra's net revenues totaled $1.02 billion in 2016, a 2.6% increase from $992.5 million the year before. The increase in net revenue was fueled by a big jump in fine revenue to $173.8 million, from $93.8 million in 2015.

Finra fine amounts growing

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Source: Finra

The aggressiveness with which Finra issues fines, and its use of what many describe as strong-arm tactics to collect them, has not gone unnoticed.

In 2008, Finra issued 577 fines that averaged $48,500. In 2016, the SRO issued 624 fines — an increase of 8%. But the average amount of those fines has skyrocketed to $278,500, an increase of 474% over that period.

"Finra is fining the big firms a little bigger; instead of $1.5 million, it's now $2.5 million," said David Sobel, a former chairman of Finra's small firm advisory board and Finra specialist with the law firm Jacko Law Group. "But they are nickel-and-diming the small broker-dealers. Some of it is the enforcement division getting overaggressive in fines and penalties."

Then there's the matter of how Finra spends the fine money it collects. It does not report in detail where that money goes, except to say it is used for capital projects.

Finra declined a request by *InvestmentNews* to shed more light on how it spends its fine revenue. "We do not view fines as part of our operating revenues," **Finra wrote in this year's annual report**. "The use of fine monies is limited to capital expenditures and regulatory projects, such as our efforts to leverage

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I've asked specifically: Where do the funds go? I don't really get a straight answer," Mr. Kohn said at the time.

Although Finra says it doesn't use fine revenue to offset expenses, if it does use it for capital projects, then it is freeing up other revenue that would otherwise be used to pay for those projects.

"Money is fungible," said Alan Wolper, a partner at Ulmer & Berne. "It all goes to the bottom line. The more money on the bottom line, the more money that is available."

The Financial Services Institute, a trade group that represents independent broker-dealers, told Finra in a recent comment letter related to Finra 360 that fines are being used as an intimidation tool.

"It has been a concern in the past that large fines are proposed to firms, and that they need to sign [a settlement] or face a larger fine if the discussions with Finra continue," Robin Traxler, FSI vice president of regulatory affairs and associate general counsel, said in an interview.

Another FSI worry is that Finra is using enforcement as a way to effectively establish new rules.

"There is a perception, if not the reality, that enforcement has morphed into a regulatory mechanism rather than making investors whole," Ms. Traxler said.

REGULATORY APPROACH

Finra's approach to regulation is a sore spot, particularly among small broker-dealers. In the last 10 years, the number of firms Finra regulates has declined 24%. Some of those firms have gone out of business because of Finra, according to Ira Lee Sorkin, an attorney and former head of the New York office of the Securities and Exchange Commission.

"Many small firms have not been able to survive Finra sanctions," Mr.

small firms out of business.

Critics complain that Finra is too quick to bring punitive action instead of working with firms to bring them into compliance.

"Finra has to decide if it's a compliance or an enforcement organization," said Mr. Sobel. "Finra should go in and help the broker-dealers first. And after you help and there's a problem, then do enforcement."

Last year, **Finra logged 1,434 disciplinary actions**, barred 517 brokers and returned $27.9 million to harmed investors.

"Their prosecutorial role clashes with their regultory role of trying to help firms," said Daniel Nathan, a partner at the law firm Morvillo and a former Finra vice president and director of regional enforcement. "For the last five to 10 years, they have increasingly been trying to play in the same arena as the SEC and the criminal agencies."

LACK OF ACCOUNTABILITY

By law, the SEC is in charge of Finra and has the power to approve or reject any rules Finra wants to adopt. But it applies little more than a rubber stamp to Finra's rules, critics say.

"In practice, Finra operates with substantial independence from the SEC," Hester Peirce, a senior research fellow at the Mercatus Center at George Mason University, **noted in a 2015 paper**. "Finra rules do not typically attract close attention from the SEC commissioners."

"FINRA OPERATES WITH SUBSTANTIAL INDEPENDENCE FROM THE SEC."

HESTER PEIRCE, SEC NOMINEE

Ms. Peirce may be in a position to change that soon. She has been nominated by President Donald J. Trump to serve on the five-member commission that governs the SEC. "Finra is an issue that they need to be paying attention to," she said in an interview prior to her nomination.

The Government Accountability Office likewise found that the SEC could be doing a better job of overseeing Finra in a 2012 report and **a follow-up report in 2015**. In the follow-up report, the GAO said the SEC had improved its monitoring of Finra but that it still needed to develop specific performance goals and measures for Finra oversight, formalize documentation of oversight determinations and perform an assessment of Finra's internal risks related to staffing and priorities.

comment. Last year, the SEC established a special unit to consolidate monitoring of Finra's examination efforts after the SEC transferred more authority for broker exams to Finra so that the SEC could increase its examinations of registered investment advisers.

Although Finra is not directly accountable to Congress, it does invest a lot of money in lobbying. In 2012, it spent $960,000 as it pushed for legislation that would allow it to expand its regulatory reach to include RIAs, who are now primarily regulated by the SEC. In 2016, **Finra's spending on lobbying dropped to $670,000**.

But even here, Finra is not transparent. In its disclosure form, it stated that it talked to lawmakers about "regulation of broker-dealers, securities industry and markets" as well as "investor protection and education." That's the same description it has used to describe its lobbying efforts every year since 2013.

FINRA'S BOARD

Finra's governance is also lacking. The organization is governed by a 24-member board, which consists of 10 industry governors, 13 public governors and Finra's CEO. Some governors are elected by Finra members while others are appointed by Finra.

By order of its own charter, a Finra public governor must not have any material relationship with a broker or another SRO. In assembling its group of public governors, however, Finra seems more intent on following the letter of the law rather than its spirit.

"Many of Finra's public governors have had long industry careers and serve on the boards of other financial services firms," Ben Edwards, an associate professor of law at the University of Nevada, Las Vegas, wrote in a September 2016 draft paper about Finra's board.

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As an example, Mr. Edwards cited Randal Quarles, managing partner of the Cynosure Group, a Salt Lake City private equity firm. A former managing director at the private equity firm the Carlyle Group, he's also a member of the board of the U.S. Chamber of Commerce.

Other examples included Joshua S. Levine, managing director and founder of Kita Capital Management, an investment and consulting firm; William Heyman, the current board chair, who is also vice chairman and chief investment officer at the Travelers Companies Inc.; and Eileen

Bridgewater Associates.

"Is this the best way to represent the public on this board? Why not an investor advocate?" Mr. Edwards said. "The industry perspective is always present, it's always voiced, it's always there."

Mr. Quarles has been nominated by the Trump administration for a position at the Federal Reserve. In a July 27 Senate hearing, he defended his independence.

"In representing the public on the Finra board, I have done that without any influence from or even discussion with the Chamber of Commerce," Mr. Quarles said.

Todd Henderson, a law professor at the University of Chicago, is a former public member of Finra's National Adjudicatory Council, which reviews the regulator's initial disciplinary proceedings. He said that non-industry members of Finra bodies "are deferential to industry members in a good way," meaning they count on them for expertise about the securities business.

He points to Finra public governor Hillary Sale, a professor of law and management at Washington University in St. Louis and currently a visiting professor at the Georgetown University Law Center.

"She's as independent as you can get," Mr. Henderson said.

InvestmentNews attempted to reach Mr. Levine, Mr. Heyman and Ms. Murray. None of them responded to interview requests.

Ms. Sale agreed to talk to *InvestmentNews* accompanied by a Finra spokeswoman.

"Without getting into the inner workings of the board, which are confidential, I would say that most of the time, you can't tell who is industry and who is public because everyone on the board is committed to protecting investors and providing effective regulation," Ms. Sale said.

This is what readers in our online survey said about Finra

"Finra's mission is market integrity and investor protection but there is no protection for brokers who are always presumed guilty and must prove innocence. Finra needs an overhaul to be more fair to firms and brokers."

Source: *InvestmentNews* Research online survey

The pay for Finra board members varies widely, ranging in 2015 from $112,500 for former chairman John J. "Jack" Brennan, a longtime Vanguard executive, to two board members who took no salary. Most made between $40,000 and $90,000, according to Finra's Form 990 tax filing.

Unlike the SEC, which must conduct meetings that are open to the public under the Sunshine Act, Finra holds its board meetings behind closed doors. Following the sessions, **Finra posts on its website a letter from Finra's CEO, Mr. Cook**, and a video featuring him and the board chairman describing the board's actions.

"Board meetings are like a secret society," Mr. Kohn said before winning a seat on the board. "We should know where board members stand on some of the issues."

PUSHING BACK

Finra members can grouse that the regulator is too tough on them, but its membership also can turn Finra back from aggressive regulation.

One of the biggest investor-protection efforts Finra undertook, the massive data-collection and investor-harm monitoring program known as CARDS, was abandoned in 2015 after strong protests from SIFMA, FSI, individual firms and even Capitol Hill Republicans.

Finra can't get too far ahead of the industry on investor protection, said Barbara Roper, director of investor protection at the Consumer Federation of America.

"They operate in a difficult environment," she said. "Their incentives for doing anything ground-breaking to advance a pro-investor agenda are non-existent."

COMPENSATION

FROM EXECS TO RANK AND FILE, FINRA PAYS WELL

Working for the Financial Industry Regulatory Authority Inc. can be lucrative. Seven of the nonprofit's executives make more than $1 million a year, while three others earn more than $900,000.

Thomas Gira, Finra's executive vice president for market regulation and transparency services, earned close to $2.7 million, including deferred compensation and other benefits.

Senior staff at other regulatory groups do not come close to earning

Company Accounting Oversight Board, which is also overseen by the Securities and Exchange Commission, earned $673,000 last year. Pay for senior management at the PCAOB has not changed since 2009.

Compensation is one area where the SEC provides little oversight of Finra, according to the Government Accountability Office. Finra's board determines the pay of its executives. It hires a consultant and compares Finra to Wall Street firms.

Finra salaries have been a flash point over the years. A former Finra chairwoman, Mary Schapiro, took in nearly $9 million in 2009 before leaving to become SEC chairwoman, enraging financial advisers and stoking the perception that Finra is out of step with the securities industry.

Finra's payroll grows over time

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Are Finra executives overpaid?

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Source: Finra (above), *InvestmentNews* Research online survey (right)

The rank and file at Finra are also well compensated. Although salaries are not made public, dividing total compensation by the number of employees indicates that the average comp package is close to $200,000. Finra has been slow to adjust its payroll to a declining membership. Although the number of brokerage firms that Finra regulates has fallen by 24% since 2007, the number of Finra employees has increased 16.7%.

INVESTMENTNEWS SURVEY

BROKERS BRISTLE AT FINRA'S 'GOTCHA' MINDSET

Brokers aren't feeling a lot of love for the Financial Industry Regulatory Authority Inc.

An *InvestmentNews* survey of 363 brokers who consider Finra their primary regulator revealed a significant amount of dissatisfaction with the performance and transparency of the self-regulatory

That brokers are unhappy with the organization that imposes rules and regulations is not particularly surprising. What is noteworthy, however, is the extent to which they question their regulator's judgment and authority.

For example, nearly 90% of those who responded to the survey, which went out into the field last month, feel that Finra has too many rules. Sixty percent believe the organization treats brokers unfairly and 56% said it lacks transparency around its finances.

"Finra is no longer a membership organization," wrote one respondent. "It should be abolished and started anew. I've seen this organization go from one that was helpful to one issuing fines ad nauseam."

Finra declined to respond to the survey results.

One of the biggest majorities in the survey, 78%, believe that Finra should be made subject to the Freedom of Information Act, which applies to the Securities and Exchange Commission, because it is a government agency. As a self-regulatory organization, Finra currently is not subject to FOIA and does not have to honor public requests for information about its operations.

The securities industry is changing: Commissions are down drastically and the Department of Labor's fiduciary rule is expensive to put in place. Readers want to know how Finra is going to react to those changes.

Finra does a good job regulating brokers **Finra is fair to brokers**

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Does Finra have too many rules? **Does Finra issue too many fines?**

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Source: *InvestmentNews* Research online survey

"Finra should continue to regulate, but needs to go back to being a self-regulatory organization," another respondent wrote. "Outside directors have pushed Finra into becoming a 'gotcha' regulator for consumer financial services, similar to the Consumer Financial Protection Bureau."

Frank Akridge Jr., a former broker and chief compliance officer who is now president of a registered investment adviser, said Finra tends to be too adversarial in its approach to examinations.

he said. "That atmosphere puts brokers and advisers on the defensive. It's rare that I've heard any [of them] say, 'I felt Finra was here to help me.'"

THE FUTURE

WHAT'S NEXT FOR FINRA?

The number of broker-dealers is shrinking and the securities industry is rapidly consolidating, leading many to wonder what's next for the Financial Industry Regulatory Authority Inc. if the industry it oversees continues to diminish at this speed.

The number of Finra-registered firms has dropped a stunning 24% since 2007, when there were 5,000 registered firms. Now there are less than 3,800 firms, and that number could slide to 3,000 in three to five years. Many firms closed shop amid the fallout from the market crash and the Great Recession. Others have left the business due to increased compliance costs and regulatory risk, particularly the Department of Labor's new fiduciary standard. Finra-registered brokers continue to leave the business to become registered investment advisers, a much less compliance-intensive regulatory regime overseen by the Securities and Exchange Commission.

"Clearly the issue we're facing is a shrinking broker-dealer and financial adviser industry," said Terry Lister, senior consultant at Freeman Mathis & Gary and a former NASD attorney. "How important is it for Finra to try to develop to ensure that it is relevant going into the future?

"If I were Finra, I would be trying to determine what impact that would have on my business, if the industry continues to shrink at its present pace," said Mr. Lister. "Maybe it's time to rethink the business model."

A key concern is Finra's shrinking revenue, said brokerage executives. Finra's operating revenues declined 6% in 2016. How will it plug that hole?

"For 2017, we are continuing to take steps to manage expenses closely," **Finra CEO Robert Cook wrote in the regulator's annual report**. "Already this year, among other actions, we have reduced year-over-year compensation increases by freezing officer salaries, freezing promotions of existing officers (other than where necessary to backfill positions), and reducing annual merit increases for non-officers."

Finra could morph into one of three types of organizations, industry executives and

How do you believe regulation of the

As the number of broker-dealers continues to decline, Finra could become a smaller, leaner operation, overseeing a smaller brokerage industry.

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Source: *InvestmentNews* Research online survey

Or Finra could become part of the federal government and formally join the SEC, a move that would decimate lucrative salaries as staff would move to a government pay scale. Republicans in Congress are not likely to support such a move as they already criticize Finra for being too much like the SEC and not enough like a self-regulator guided by its membership.

Finally, if Finra is politically savvy, it could expand its reach as a regulator, gain more power and oversee RIAs as well as broker-dealers. In the process, it could ensure its role as the primary enforcer of the DOL's fiduciary rule.

But the 12,172 SEC-licensed registered investment advisers, most of whom started as Finra-registered reps, certainly don't want Finra as their primary regulator and would balk if Finra entered their side of the financial advice industry.

"Finra wanted to regulate the RIA industry and get larger and grow bigger back in 2012, and how did the investment adviser industry respond to that? No damn way," said Larry Doyle, a former Wall Street executive and outspoken critic of Finra.

"Regulating the RIA industry would be a source of revenues for Finra and it could grow, but there are the inherent conflicts of interest in the model," Mr. Doyle said.

At Finra's annual conference in May, Mr. Cook said that increasing Finra's reach is not something he's pursuing. But could it find a new source of revenue by using its expertise and technological resources to sell consulting services to its members?

Regardless of what Finra may develop into over the next decade, the hurdles it faces right now are steep.

"We're in a time of tremendous change with the new DOL standard and new leadership at the SEC," said Mark Casady, the former CEO of LPL Financial and a former Finra board member.

"It's a crazy quilt of regulators covering retail investors; and, with the switch to advisory relationships and the fiduciary standard, Finra, the SEC and the DOL should work together to remake that quilt or sort that out."

What sparked your interest in financial literacy and what's stopping you from doing even more to educate your community?

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Broker- Dealer LAW CORNER

FINRA Claims To Be Reasonable When It Comes To Sanctions, But It Is Clear That Permanent Bars Are What It's All About

By Alan Wolper on April 29, 2020

If you are a regular reader of this blog, you know that one of my pet peeves with FINRA is its unrelenting zeal to bar people, permanently, from the securities industry. Seemingly without much regard for the actual conduct at issue, or for the existence of mitigating circumstances. It is literally a running joke in my office: after every call with the Department of Enforcement about settlement, the lawyer who handles the calls has others guess what FINRA insists it needs from the respondent to settle. The reason this is a joke – or at least what passes for humor in our world – is that nearly 100% of the time, what FINRA wants is…wait for it…a bar. It doesn't matter who our client is, or what they supposedly did wrong, or whether a customer was harmed, or whether they are still in the industry, or whether they have been working for two or 20 years in the industry with a clean record: if you guess "permanent bar," you win!

Now, FINRA bridles at such accusations. FINRA management often touts just how fair and reasonable they are. Robert Cook, the head of FINRA, Jessica Hopper, the head of Enforcement (and before her Susan Schroeder): they all talk

Section 3, p. 1

(or talked) about their even-handed approach to disciplinary actions, and how the sanctions meted out are tailored carefully to the offense at issue. That sounds good, but just doesn't comport with reality. What FINRA likes to do, and wants to do, is bar people.

You don't have to take my word for it. At the end of March, FINRA **published a blog post** entitled "Working on the Front Lines of Investor Protection – Barring Bad Actors from the Industry." Read it. It is a one-page self-congratulatory puff piece in which FINRA openly brags about how many people it has barred: "In the last two years alone, FINRA barred more than 730 brokers from the brokerage industry – an average of one per day – for a vast range of misconduct." Wow! One per day! Imagine how happy FINRA must be that 2020 is a leap year!

And make no mistake, FINRA is downright excited about its statistics. The post ends with this statement: "Thus, we are particularly proud that, in numerous instances, FINRA staff were able to bar a bad actor from the industry within just a few weeks of the discovery of the underlying misconduct, saving investors and the markets from further harm." FINRA is "proud" not just of the fact that it bars one person per day, but that it goes after those bars so quickly.

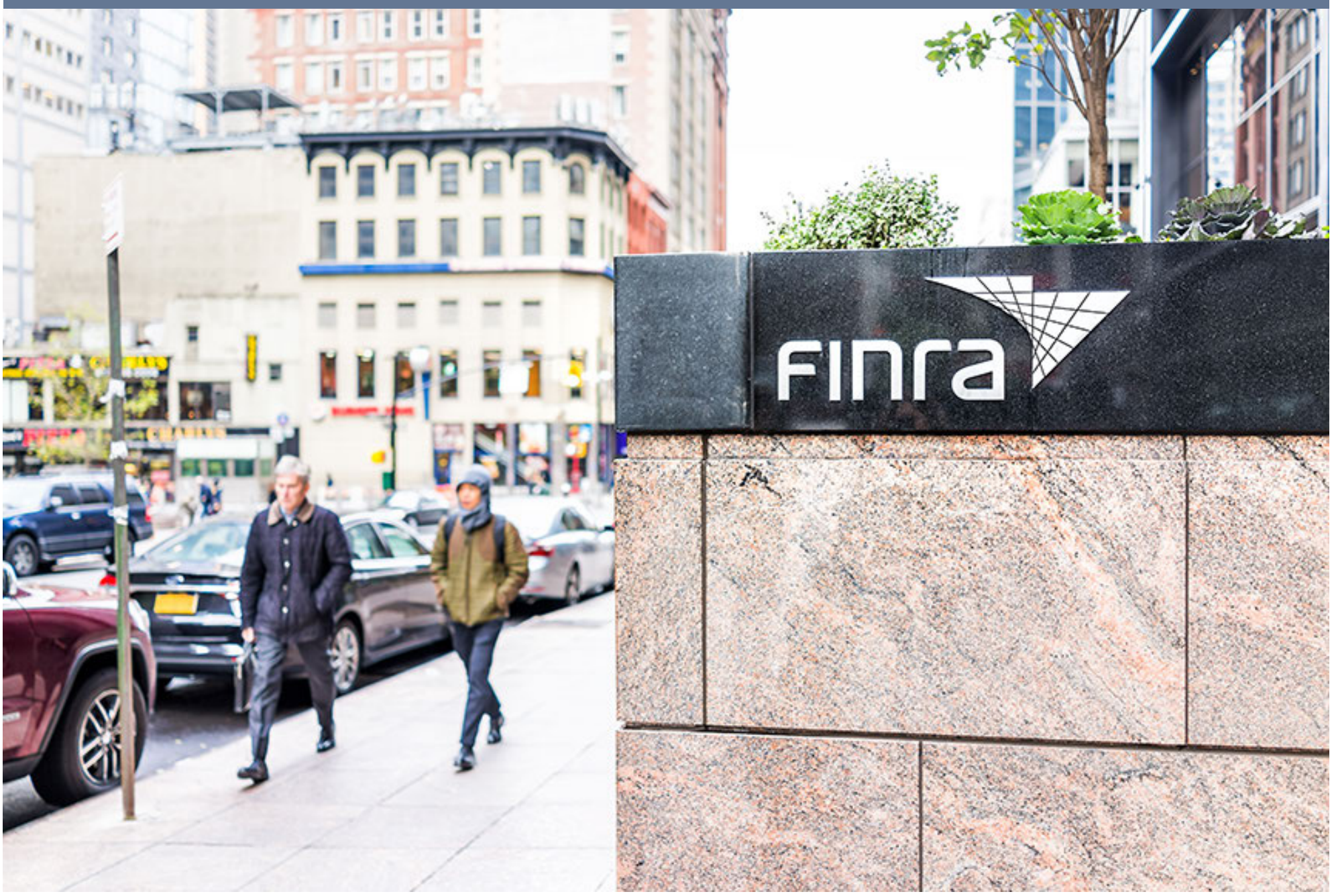
I just don't get this as a source of "pride." When I worked for the NASD 20 years ago as a regional attorney prosecuting enforcement actions, what made me proud is not the particular sanctions I was able to get, but, rather, the fact that I never once lost a case that I brought. That meant that I had properly evaluated the facts uncovered during the exam, correctly concluded that a rule had been violated, and accurately assessed my ability to prove the allegations to the satisfaction of the hearing panel. Indeed, my bonus at the time wasn't impacted in the slightest by the magnitude of the sanctions awarded in my cases; more importantly, my receipt of a bonus hinged on me not losing a case as a result of my failure to meet my burden of proof.

Today, it seems that FINRA operates quite differently. Given the frequency with which FINRA seeks permanent bars, and its public, prideful trumpeting of its

numerical success in obtaining bars, it is hard to argue that it really doesn't matter to FINRA whether it gets a bar or not. To FINRA, getting a bar provides bragging rights, I suppose. I am not sure who FINRA is trying to impress. The investing public? The SEC? The media? I will tell you one group that is not impressed, and that is the group that consists of FINRA member firms and their associated persons. To them, this is not a game, not a joke, and not a matter of flaunting the statistical equivalent of sticking an enemy's head on a pike. All they want is to be treated fairly and reasonably, and I don't think that's too much to ask. Sadly, that doesn't make good headlines, so don't waste your time looking for another blog post from FINRA touting the number of, say, Cautionary Action Letters it issues.

Working on the Front Lines of Investor Protection – Barring Bad Actors from the Industry

MARCH 30, 2020



Within FINRA, we view ourselves as working on the “front lines” of investor protection.

What does that mean?

It means that we act quickly to identify misconduct, stop fraud and prevent losses, obtain restitution for harmed investors, and remove bad actors from the brokerage industry. Here, we are focusing on that last piece—barring bad actors from the industry.

Let us start with the obvious—there are over 600,000 registered brokers, and the overwhelming majority conduct themselves with the highest ethical standards and are a trusted source of valuable investment advice for their clients. Unfortunately, however, a small minority of brokers engage in purposeful misconduct. And because of their positions within the brokerage industry, these few “bad apples” are capable of causing outsized harm to investors—and the markets—and casting a shadow over the rest of the industry.

Our job, therefore, is to remain vigilant. To be alert to “red flags” of broker misconduct, and, where we identify such misconduct, to move as fast as possible to stop ongoing harm and remove the bad actors from the industry.

In the last two years alone, FINRA barred more than 730 brokers from the brokerage industry—an average of one per day—for a vast range of misconduct, including:

- a broker who withdrew over $130,000 from his mother's account, without his mother's knowledge or consent, and used those funds to pay his personal expenses;
- a broker who accepted blank checks from his 87-year-old customer purportedly so that he could pay the customer's caregivers if the customer became unable to do so, but instead used the checks to fund personal expenditures, including the purchase of a 1976 Corvette; and
- a broker who churned the account of his customer, a 93-year-old retired clothing salesman who was experiencing a decline in mental health, by effecting more than 3,500 transactions in the customer's accounts, generating approximately $735,000 in commissions.

One more thing about working on the front lines of investor protection: **it is critical that FINRA staff be nimble,** *i.e.*, ready to respond quickly and aggressively to stop ongoing misconduct. Thus, we are particularly proud that, in numerous instances, FINRA staff were able to bar a bad actor from the industry within just a few weeks of the discovery of the underlying misconduct, saving investors and the markets from further harm.

Disciplinary Proceeding No. 2018059545201

United States Securities and Exchange Commission

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ROBERT ESCOBIO,
(CRD No. 703813)

Applicant/Respondent.

OPENING BRIEF OF RESPONDENT – ROBERT ESCOBIO

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INTRODUCTION

Despite the absence of a single customer complaint, witness testimony or other reliable or admissible evidence showing that Robert Escobio ("Robert") used his old Southern Trust Securities (STS) email account after he resigned and retired as a registered broker to contact STS customers, Financial Industry Regulatory Authority (FINRA) launched and aggressively pursued a pointless enforcement action against Robert, seeking to impose a permanent bar upon a statutorily disqualified, retired member on the eve of his two year retirement anniversary.

The National Adjudicatory Council (NAC)'s ruling below ignored the rules of evidence when reviewing the sufficiency or admissibility of evidence FINRA submitted yet imposed evidentiary burdens upon the Respondent that far exceeded the proof required to show coercion and duress.

This case, and others like it, exhibit NAC's double standards and FINRA's enormous waste of resources that would be better utilized to ensure that material violations historically overlooked for active members defrauding the public do not go undetected. It is because of enforcement actions like the one at the case at bar, and coercive immaterial enforcement actions against other small firm members for merely questioning FINRA's reasoning or authority for Rule 8210 requests, that it has become clear that FINRA's disproportionate and expansive application of Rule

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8210 against small firms must be limited, closely examined and requests for draconian sanctions for Rule 8210 "violations" denied. See, *Finra: Who's watching the watchdog? https://www.investmentnews.com/finra-whose-watching-the-watchdog-72102,* (Mark Schoeff, Jr. and Bruce Kelly, Sept. 2, 2017) at Appendix A, § 1.

STATEMENT OF THE CASE AND FACTS

The genesis of this case reportedly began in August 2018. FINRA alleged it opened an investigation in August 2018 to obtain additional information regarding Robert Escobio's ("Robert") "possible continuing association"[1] with Southern Trust Securities, Inc. ("STS") after he retired, was terminated, and statutorily disqualified. *See* Arno Declaration, dated December 18, 2019. ("Arno Decl.") at ¶¶ 10, 12.

FINRA sat on the case for eight (8) months. Eight months later, on March 26, 2019 – after a District Court entered an illegal coercive Order[2] finding Robert in contempt -- FINRA mailed its first Rule 8210 request to Robert's residence. *Id.* at ¶ 11.

[1] Based upon *unanswered* emails sent to an STS email address that Robert Escobio no longer had access to.

[2] See March 18, 2019 Order Finding Robert Escobio in Contempt at Doc. 281 ("Contempt Order") at p. 19, U.S. Commodity Futures Trading Commission v. Southern Trust Metals, Inc., Loreley Overseas Corporation and Robert Escobio, Southern District of Florida Case No. 1:14-cv-22739-JLK. ("CFTC Matter").

Two (2) days after FINRA mailed the first 8210 request, the illegal coercive Order required Robert Escobio to tender $350,000 followed by successive $10,000 monthly installments. The penalty for failing to make any of the payments was indefinite, repetitive incarceration.

Because Robert was unable to meet the March 28, 2019 deadline to pay $350,000 and subsequent $10,000 monthly installments, on April 1, 2019 Robert was indefinitely incarcerated until sufficient funds were deposited on April 26th,[3] and subsequently reincarcerated when monthly payments were not timely paid. Docs. 299 and 347, U.S. District Court, Southern District of Florida, Case No. 1:15:22739-JLK.

This egregious coercion and duress of facing repetitive, indefinite reincarceration did not cease until January 6, 2020 -- the day the Eleventh Circuit issued its opinion reversing the Contempt order – six (6) full months after FINRA mailed the last 8210 request. This is clear coercion and duress that FINRA and NAC patently disregarded in their rulings.

In March, April, May and June 2019, while Robert was illegally incarcerated and striving to maintain his employment as a flight instructor to support himself and attempt to pay the monthly $10,000 installments the Contempt Order required

[3] Except for a weekend furlough to attend a family member's funeral, Robert remained incarcerated until April 26, 2019. Id. at Doc. 314, 317, 322, 325-329, 334, 335.

to avoid re-incarceration, FINRA sent repetitive Rule 8210 requests for information and on the record ("OTR") testimony. FINRA was fully aware of the Contempt Order and the impact that Robert's incarceration and the order's onerous payment obligations had upon his ability to comply. Arno Decl. at ¶ 10 and 15.

Although Robert requested timely postponements for compliance with the 8210s he learned of while he was illegally incarcerated and striving to maintain his employment as a flight instructor when he was not incarcerated, FINRA Enforcement made it clear that if Robert did not appear for an OTR examination or produce records demanded, that FINRA Enforcement would file a Complaint seeking sanctions, including debarment, for each and every time he had failed to comply. *See* Arno Decl. at Ex. 25, p. 1 (email dated April 10, 2019, 3:43 pm threatening to fine, suspend or bar Robert if he did not appear for an OTR on April 18, 2019), *Id.* at Exhibits 30 and 40. Although Robert, who was statutorily barred from seeking reregistration, agreed not to seek reinstatement and to be voluntarily barred to resolve the investigation, *Id.* at 40, Enforcement refused to accept those terms, and demanded that Robert execute a Letter of Acceptance, Waiver and Consent containing false allegations of fact. FINRA, in a further waste of Enforcement's resources, filed a Complaint seeking sanctions after Robert refused to execute a document with false allegations of fact.

During the Enforcement proceeding, FINRA's Department of Enforcement

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("DOE") filed a motion for summary disposition. On February 5, 2020, the Hearing Officer granted DOE's motion even though the undisputed facts showed that DOE's investigation was solely based upon Ms. Arno's suspicions and speculations, and was unsupported by any customer complaint, eye-witness testimony or copy of an email initiated by Robert to any STS client. The Hearing Panel ignored the fact that it was not improper for the Registered Entity, STS, to leave the Applicant's email account open to enable the Registered Entity to identify clients who were not aware that Robert no longer worked with STS. The Hearing Panel disregarded the following issues raised in this appeal:

STATEMENT OF ISSUES

1. Whether NAC erred in ruling that no mitigating evidence existed and in failing to remand this matter for an evidentiary hearing to address the continual coercion and duress Robert Escobio experienced as the result of indefinite, repetitive incarceration imposed by a subsequently reversed federal court Order?

2. Whether NAC's decision must be reversed because it improperly relied uponuncorroborated, inadmissible, speculative hearsay in an affidavit from an individual without personal knowledge to justify the Department of Enforcement's (DOE) investigation and continued investigation into a

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statutorily disqualified resigned member?

3. Whether a Permanent bar in this case IS UNWARRANTED?

STANDARD OF REVIEW

Section 19(e)(2) of the Securities Exchange Act of 1934 does not require sanctions to be sustained where, after giving due regard to the public interest and the protection of investors, the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. 15 U.S.C. § 78s(e)(2). As part of the review, the Securities and Exchange Commission (SEC) must consider aggravating or mitigating factors, and whether the sanctions are remedial or punitive. *Saad v. SEC,* 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Sec., Inc. v. SEC,* 494 F.3d 1059, 1064-65 (D.C. Cir. 2007). In making this determination, the SEC is not bound by FINRA's Sanction Guidelines. *See, e.g., John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033 at *11, 2013 SEC Lexis 1699 at *42 (June 14, 2013).

SUMMARY OF THE ARGUMENT

NAC improperly relied upon DOE's speculative theories that Robert Escobio ("Robert") "associated" with STS based upon emails sent to Robert's old email account where no evidence, witness statement or customer complaint showed that Robert ever had access to that old email account or responded to any emails

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sent to that account. Summary disposition cannot be granted on pretext suspicions, based upon "evidence" that is not admissible at a hearing or trial. Hearsay statements, unsupported inferences, speculation or conjecture are improper in summary disposition affidavits and declarations and cannot be considered on a motion for summary disposition.

The Hearing Panel improperly relied upon and condoned DOE's frivolous enforcement action orchestrated to subject Robert to 8210 requests at a time when he would be least able to accurately and completely respond, for the purpose of obtaining a permanent bar of a retired, statutorily disqualified individual shortly before FINRA lost jurisdiction to do so. Such fabricated investigations do not serve the public interest, waste valuable resources, and should not be condoned or upheld.

In contrast, NAC ignored the Hearing Panel's wholesale failure to consider the mitigating factors and disputed facts regarding the coercion and duress Robert was subjected to while being illegally incarcerated pursuant to an illegal, now reversed Order of Contempt that required monthly monetary payments well beyond Robert's income and assets, which if not paid, would result, and did result, in his immediate and indefinite incarceration. The NAC's failure to reverse and remand this matter for a hearing is clear error.

Furthermore, NAC applied an improper standard for proving coercion and duress that is not supported by any reported citation of authority or rule of law.

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No reported case or evidentiary rule requires a psychological report to prove coercion or duress. Accordingly, NAC's factual findings and rulings on this issue are reversible error.

Moreover, NAC improperly disregarded DOE's orchestration of its 8210 requests at the same time the CFTC enforced the Order of Contempt requiring the illegal incarceration of Robert each and every month he was unable to pay monetary installments in excess of his income and assets. By the time DOE's first two Rule 8210 requests would have been received, Robert was incarcerated, unable to access records and as a result, unable to respond. DOE's subsequent communications made it clear that earlier failures to respond already subjected Robert an enforcement action, and therefore, were futile.

DOE's use of 8210 requests against individuals unable to respond for the sole purpose of seeking a permanent bar where no complaints have been filed and no evidence shows that the retired/statutorily disqualified member ever responded to a single email that gave rise to the misplaced suspicions, should not be condoned. While DOE may assert that they are "authorized" to go on fishing expeditions in empty ponds to seek evidence that does not exist, the SEC should not condone the waste of DOE's resources for the sole purpose of increasing FINRA's statistical disciplinary achievements, or to share records with other agencies that cannot otherwise share them legally.

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These Rule 8210 requests were not for the laudatory purpose of protecting investors, but rather for the purpose of extracting and sharing more records with the CFTC and/or to increase the statistical disciplinary achievements that could report to the public. Such pyrrhic victories against resigned, statutorily disqualified members should not be encouraged or condoned.

NAC further failed to remand this matter to the Hearing Panel for consideration of the mitigating evidence, and improperly ruled that no mitigating evidence existed. Moreover, imposition of sanctions against a retired, statutorily disqualified member for failing to respond to 8210 requests while incarcerated or facing indefinite, repetitive incarceration should he miss work to attend an 8210 OTR, should not be condoned, and no sanctions should be issued in order to discourage FINRA's waste of enforcement resources in the future.

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ARGUMENT

I.

NAC erred in ruling that no mitigating evidence existed andin failing to remand this matter for an evidentiary hearing to address the continual coercion and duress Robert Escobio experienced as the result of indefinite, repetitive incarceration imposed by a subsequently reversed federal court Order.

The Hearing Panel erroneously ruled that no mitigating factors existed and failed to discuss any mitigating factors in the Record. See Hearing Panel Decision at p. 11. The Record showed that at the time FINRA commenced its investigation, an illegal coercive District Court Order required the incarceration of Robert if he failed to make payments in excess of his earnings and ability to pay.[4] Two (2) days after FINRA mailed the first 8210 request, the illegal coercive Order required Robert Escobio to tender $350,000 followed by $10,000 monthly installments. The penalty for failing to make *any* of the required payments was indefinite,

[4] NAC failed to consider facts cited in the Eleventh Circuit's decision that document the illegality of the Contempt Order and the facts Robert relied upon to demonstrate his unavailability and mitigation. The rules of procedure and evidence do not require citations of reported opinions to be added to the record. Further, Rule 201 of the Federal Rules of Evidence requires courts to take judicial notice of facts that are not subject to reasonable dispute that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. See Fed. R. Evid. 201(b)-(d). A citation to a reported decision of an appellate court is not capable of reasonable dispute and is undeniably accurate. Moreover, "[j]udicial notice may be taken at any stage of the proceeding." Id. at ¶ (f). Therefore, this tribunal may take judicial notice of Court records and reported opinions cited in the Applicant's submissions below.

repetitive incarceration.

Because Robert was unable to meet the March 28, 2019 deadline to pay $350,000 and subsequent $10,000 monthly installments, on April 1, 2019 Robert was indefinitely incarcerated until sufficient funds were deposited on April 26th.[5] In addition, Robert was threatened with and reincarcerated when he was unable to timely remit the $10,000 monthly payments. Docs. 299 and 347, U.S. District Court, Southern District of Florida, Case No. 1:15:22739-JLK.

NAC ignored the fact that the Hearing Panel did not mention or discuss this evidence and erred in ruling that in order to prove coercion that a member must present "evidence addressing his mental state." NAC Decision at p. 15. NAC never discussed or addressed the patent financial stress and physical and mental stress a continual threat of reincarceration for failure to make $10,000 monthly payments would place upon an individual who does not have the ability to pay the monthly installments. Nor did NAC provide a citation of authority to support is assertion that "evidence addressing mental state" must be provided to prove coercion. Moreover, NAC never addressed or discussed the duress that the illegal Order imposed upon Robert. *Id.,* at 15.

No reported case or authority requires the submission of medical evidence to

[5] Except for a weekend furlough to attend a family member's funeral, Robert remained incarcerated until April 26, 2019. Id. at Doc. 314, 317, 322, 325-329, 334, 335.

prove coercion or duress. The Record below showed that Robert's unavailability was due to either an illegal incarceration or threat of reincarceration each and every month if he failed to earn sufficient funds to pay $10,000 per month installments. These facts demonstrate that Robert was subjected to both coercion and duress stemming from an illegal Court Order, the violation of which would result in additional indefinite incarceration. Lack of free choice is "[a] crucial element of coercion or duress." *See Korn v. Franchard Corp.,* 388 F. Supp. 1326, 1333 (S.D.N.Y. 1975). The word "duress" implies feebleness on one side, overpowering strength on the other. *United States v. Bethlehem Steel Corp.,* 315 U.S. 289, 300, 62 S. Ct. 581, 587 (1942).

NAC citation to *John M.E. Saad,* Exchange Act Release No. 76118, 2015 SEC LEXIS 4176 (Oct. 8, 2015) and *Ahmed Gadalkareem*, Exchange Act Release No. 82879, 2018 SEC LEXIS 719 at *29-*30 (Mar. 14, 2018) are misplaced. Both cases involve facts and circumstances inapposite to the case at bar.

In *John M.E. Saad,* Exchange Act Release No. 76118, 2015 SEC LEXIS 4176 (Oct. 8, 2015), the member falsified expense receipts in order to hide the fact that he did not attend a business meeting in Memphis. Generic stress resulting in deceitful conduct is not remotely similar to the certainty of indefinite, illegal incarceration Robert – then 63 years old -- faced if he failed to timely pay the $10,000 monthly payments which were in far in excess of his income and ability to

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pay. Thus, it was abundantly clear that every hour that Robert could possibly work he had to do so and that he could not risk losing his job as a flight instructor - the only job he had - by failing to report to work when required. Without that job, Robert did not have any hope to earn the funds necessary to pay the $10,000 payments to avoid indefinite re-incarceration.

Likewise, NAC's citation to *Ahmed Gadalkareem*, Exchange Act Release No. 82879, 2018 SEC LEXIS 719 at *29-*30 (Mar. 14, 2018) does not excuse the Hearing Officer's failure to hold a hearing and NAC's failure to remand this matter for such a hearing. In *Gadalkareem*, the medical evidence presented addressing Gadalkareem's aggressive and harassing conduct was for a period of time well after the threatening and harassing conduct that Gadalkareem engaged in that gave rise to his disciplinary proceeding. The facts and rulings in *Gadalkareem* are wholly irrelevant to the case at bar. The conduct here -- failure to comply with moot[6] 8210 requests -- occurred at exactly the same time Robert was incarcerated and faced further indefinite periods of incarceration if he failed to pay the onerous $10,000.00 per month installments. As a result, NAC's citation to and reliance on *Gadalkareem* is misplaced.

Accordingly, NAC's findings that Robert failed to present mitigating

[6] The 8210 requests were moot for two reasons: (1) Robert was and is ineligible for reinstatement, and (2) the testimony of all witnesses confirmed that Robert never engaged in any inappropriate conduct or had access to a regulated firm's email account.

evidence must be rejected and remanded with directions to conduct an evidentiary hearing, and, alternatively, to rescind the bar imposed in this matter based upon the extreme conditions Robert was faced with at the time of DOE's 8210 requests.

II.

NAC's decision must be reversed because it improperly relied upon uncorroborated, inadmissible, speculative hearsay in an affidavit from an individual without personal knowledge to justify the Department of Enforcement's (DOE) investigation and continued investigation into a statutorily disqualified resigned member.

Hearsay evidence, unsupported inferences, speculation or conjecture are improper in summary judgment affidavits and declarations, cannot support ordefeat a motion for summary judgment. See, Rule 56(c), Federal Rules of Civil Procedure. See also, *SEC v. Jacoby,* 2021 U.S.Dist. LEXIS 20262 (DC Md 2021); *Dorral v. Dep't of the Army*, 301 F.3d 1375, 1380 (Fed. Cir. 2002), overruled on other grounds by *Garcia v. Dep't. of Homeland Sec.,* 437 F.3d 1322 (Fed. Cir. 2006). The movant must show that it is entitled to summary disposition beyond all reasonable doubt. *SEC v. International Mining Exchange, Inc.,* 515 F.Supp. 1062, Fed Sec. L Rep. (CCH) ¶ 98013, Fed. Sec. L. Rep., (CCH) ¶98013, 1981 U.S. Dist. LEXIS 12268 (D. Colo 1981) *reh'g denied*, Fed. Sec. L. Rep. (CCH) ¶98278, 1981 U.S.

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Dist. LEXIS 14556 (D. Colo. 1981).

FINRA's Department of Enforcement ("DOE") motion for summary disposition showed that DOE's investigation was solely based upon Ms. Arno's suspicions and speculations. Not a single customer complaint, eye-witness testimony or copy of an email initiated by Robert to any STS client supported Ms. Arno's allegations.

A registered entity's business decision to leave an email account open after a member leaves is a prudent measure that businesses engage in to be able to identify clients that may not be aware that a member is no longer associated with the firm. None of the emails identified in Ms. Arno's affidavit were directed to clients. Rather, all of the client emails were all *received from*, *not sent to* clients.

Moreover, FINRA suspicions were incorrect. No customer statements or complaint showed that Robert contacted customers for any prohibited purpose or acted in the capacity of a broker-dealer following his retirement from STS in July 2017. In this regard, Janine Arno, following an exhaustive investigation of STS and OTRs of four associated persons who worked closely with Robert prior to his retirement, Janine Arno issued a Wells Notice to Susan Escobio on April 29, 2020. See Rule 201, Fed. R. Evid. While there are numerous petty and unsubstantiated charge allegations contained in the Notice to Susan and STS, there is one glaring charge omission. There is no charge against either Susan or STS for allegedly

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aiding and abetting Robert's acting in the capacity of a broker-dealer after his retirement from STS. This is because Janine Arno and FINRA found no evidence whatsoever that Robert acted in such capacity. Accordingly, the whole premise for seeking Robert's OTR and document production requests pursuant to Rule 8210 was baseless.

Lacking the ability to bring a serious charge, Janine Arno and FINRApressed forward with a much weaker charge of the Firm not terminating Robert's email connection, which does not implicate wrongdoing on the part of Robert. In this regard, the Hearing Panel should not have considered emails sent to the STS email account "robert.escobio@stshc.com" by former clients requesting information or actions to be taken regarding their accounts. None of those client emails were in response to an email that Robert sent, and no evidence showed that Robert ever read or responded to those emails. No eyewitness testimony, customer complaints or forensic evidence showed that Robert had any access the "robert.escobio@stshc.com"n email account, even though DOE had the ability to, and obtained records from STS and testimony from individuals with personal knowledge of whether Robert had access to STS emails. Once again, this weak email allegation really has no bearing on Robert and should not merit a sanction against him for lack of responding to a Rule 8210 request involving what demonstrably turned out to be a meritless fishing expedition.

Nonetheless, Janine Arno baldly uttered in her Declaration that the mere fact that the former clients sent emails to "robert.escobio@stshc.com" provided "evidence that [Robert] Escobio continued to use his Southern Trust e-mail address." *See* Escobio Disputed Facts regarding DOE's UF Nos. 7, 8 and 9. An affidavit in support of summary judgment must set out facts that would be admissible in evidence. Hearsay evidence, unsupported inferences, speculation or conjecture cannot be used to support summary judgment. *Id.* See, Federal Rule of Civil Procedure 56(c)(4); *Dorral v. Dep't of the Army*, 301 F.3d 1375, 1380 (Fed. Cir. 2002), *overruled on other grounds by Garcia v. Dep't of Homeland Sec.,* 437 F.3d 1322 (Fed. Cir. 2006).

Nonetheless, NAC condoned the frivolous enforcement action orchestrated to subject Robert to 8210 requests and questioning at a time when he would be least able to accurately and completely respond, for the purpose of obtaining a permanent bar of a retired individual who agreed to take a voluntarily bar, but refused to sign FINRA's unilaterally drafted Letter of Acceptance, Waiver and Consent containing false allegations of fact. The utter waste of FINRA's resources to prosecute this matter is shameful in light of the history of this case, and the need to investigate the never-ending investment scams that proliferate and prey upon sophisticated and unsophisticated investors.

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III.

A Permanent bar in this case is unwarranted.

Although the genesis of this case reportedly began in August 2018, FINRA sat idly by awaiting the District Court's entry of an Order of Contempt in the *CFTC Matter* imposing onerous payment obligations in excess of Robert's ability to pay, coupled with repetitive, indefinite, incarcerative sanctions immediately imposed upon the CFTC's filing of a notice in the *CFTC Matter* that Robert failed to make payment in full. Protection of investors was obviously not the concern of FINRA in the eight-month period.

By the time Robert could have received the first two Rule 8210 "requests," this statutorily barred terminated former member was at the Federal Detention Center unable to email or contact individuals who were not on his approved call or email list, and all such communications are recorded and monitored. *See bop.gov/inmates/communications.jsp.* Clearly, these Rule 8210 requests were not for the laudatory purpose of protecting investors, but rather to harass a former member, achieve a pyrrhic victory, and increase the statistical disciplinary achievements that FINRA could report to the public.

That is especially clear where, as here, the former member was approaching the sunset of FINRA's two year enforcement limit, and issuing a bar serves no purpose -- other than to create another reportable statistic of a permanent bar for

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FINRA's website and social media publications. See *FINRA Claims To Be Reasonable When it Comes to Sanctions, But it is Clear that Permanent Bars are What it's All About*, (Wolper, April 29, 2020) and FINRA's March 30, 2020 blog post bragging that it has barred "an average of one [broker] per day." Attached at *Appendix A, § 2-3*, respectively.

NAC ignored the Hearing Panel's failure to consider or discuss any of the foregoing facts when ascertaining the "sanction" that should be imposed on this former member who, through counsel, noted he agreed to a voluntary bar, albeit, without being compelled to execute a document replete with false allegations of fact.[7] In cases such as this, FINRA's waste of resources in filing a Complaint should warrant the issuance of no sanctions in order to discourage FINRA's waste of enforcement resources in the future.

Rule 8210 has become a symbol of abuse for FINRA. Many industry commentators have been screaming for abrogation of the Rule because of the years of abuse. Susan and Robert Escobio both have horror stories to tell. In the Wells Notice served upon Susan on April 29, 2020, FINRA alleges a Rule 8210 violation because Susan did not turn over personal family cell phone records fast enough

[7] Notably, Section 19(e)(2) of the Securities Exchange Act does not require sanctions to be sustained where they are excessive, oppressive or impose do not protect investors. Before imposing sanctions, the aggravating or mitigating factors must be considered as well as whether the sanctions are remedial or punitive. *See Saad v. SEC,* 718 F.3d 904, 906 (D.C. Cir. 2013); PAZ Sec., Inc. v. SEC, 494 F.3d 1059, 1064-65 (D.C. Cir. 2007).

regarding Robert's phone. She is being charged with an 8210 violation because upon advice of counsel she asserted spousal privilege in initially not turning over the records. FINRA said it did not respect such privilege, and she was coerced to turn over the records. Her 8210 violation is simply she did not turn them over fast enough.

The SEC must take action to reign in the overzealous abuses by FINRA Enforcement and Hearing Panels in invoking serious sanctions for alleged 8210 violations in circumstances such as occurred in this case. In this regard, we urge that a bar is an inappropriate sanction for an alleged 8210 violation when there is no separate violation that relates to a customer complaint, material losses or a violation of a rule requiring a showing of malfeasance and/or scienter. In short, a bar is an unwarranted sanction, particularly in Robert's case where he is retired from the securities industry and already subject to an inability to re-enter the industry due to a statutory disqualification.

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CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the SEC set aside NAC's Decision and the sanctions imposed below.

Dated: July 1, 2021.

By: */s/ Rhonda A. Anderson*

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2021 I filed the foregoing brief with The Office of the Secretary, Securities and Exchange Commission, 100 F Street, NE, Room 10915, Washington, D.C. 20549-1090 via overnight mail and electronic mail to apfilings@sec.gov, with copy to the Office of General Counsel, FINRA, 1735 K Street, N.W. Washington, D.C. 20006 Attn: Ashley Martin via electronic mail to Ashley.martin@finra.org. I further certify that an electronic copy of the foregoing brief has been served via email on all counsel of record listed on the Service List below.

By: */s/ Rhonda A. Anderson*

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