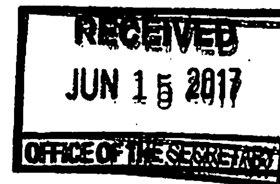
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of the Application of DAVID ADAM ELGART For Review Of Disciplinary Action Taken By FINRA	ADMINISTRATIVE PROCEEDING File No. 3-17925

APPLICANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

Alan M. Wolper
Heidi E. VonderHeide
500 W. Madison Street
Suite 3600
Chicago, IL 60610
(312) 658-6500
Fax: (312) 658-6501
awolper@ulmer.com
hvonderheide@ulmer.com

Dated: June 14, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

I. PRELIMINARY STATEMENT 1

II. STANDARD OF REVIEW 1

III. FACTS 2

A. David Elgart and Sequoia Investments 2

B. The Tax Liens 3

C. Form U-4's Requirements 3

D. Mr. Elgart's Understanding of Form U-4 4

E. The FINRA Questionnaire 4

IV. ARGUMENT 5

A. Mr. Elgart's Omission Was The Result Of Mistake, Specifically, A Mistake In His Understanding Of U-4. 6

B. FINRA Has Failed To Act Consistently In Its Prosecution Of U-4 Disclosure Cases. 10

C. Mr. Elgart's Response To The FINRA Questionnaire Was Not In Bad Faith. 13

V. CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Daniel D. Manoff, 55 S.E.C. 1155, 1162 and n. 6 (2002) 7

Department of Enforcement v. Jeffrey S. Cederberg, Disciplinary Proceeding No. 2014040815101 (March 21, 2017) 11

Department of Enforcement v. Kevin Graetz, Disciplinary Proceeding No. 20140388447602 (May 15, 2017) 11

DOE v. Forrest G. Harris, Disciplinary Proceeding No. C07010084 (May 31, 2002) 7, 8, 10, 13

In the Matter of Glenn Scott Searles, (AWC 2014040546101, May 15, 2017) 11

In the Matter of the Application of Michael Earl McCune (Exch. Act Rel. No. 77375; Admin. Proc. File No. 3-16768 / March 15, 2016) 12

Joseph S. Amundsen, Exch. Act Rel. No. 69406, 2013 SEC LEXIS 1148 (Apr. 18, 2013) 8

Rani T. Jarkas, Exch. Act Rel. No. 77503, 2016 WL 1272876, at *4 (Apr. 1, 2016) 2

Richard G. Cody, Exch. Act Rel. No. 64565, 2011 WL 2098202, at *1, 9 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012) 2

Statutes

15 U.S.C. § 78(e)(1) 2

15 U.S.C. 78o3(b)(8) 13

SRO Rules

Article V, Section 2(c) of FINRA's By-Laws 3

I. PRELIMINARY STATEMENT

David Adam Elgart seeks the Commission's review of a Decision by FINRA that he (1) willfully failed to update his Form U-4 in a timely manner to reflect five unpaid tax liens, and (2) incorrectly, and in bad faith, responded to a questionnaire that FINRA provided to him in the context of an examination that asked him about pending tax liens.

It is undisputed that Mr. Elgart did not amend his Form U-4 in a timely manner to reflect the unpaid tax liens filed against him, so this Petition does not seek review of that particular factual finding by FINRA. More specifically, therefore, this Petition challenges FINRA's findings that (1) Mr. Elgart's failure to amend his Form U-4 in a timely manner to disclose those tax liens was "willful," and (2) his response to the questionnaire was made in bad faith. In fact, while a review of case precedent reveals that FINRA is anything but consistent in its historic analyses of what constitutes "willful" in the context of prior Form U-4 cases, it is evident that here, at least, FINRA erred in concluding that Mr. Elgart acted willfully.

Moreover, FINRA also erred in concluding that Mr. Elgart's answers to the FINRA personal questionnaire were provided in bad faith, albeit inaccurate.

Finally, the fairness of FINRA's entire approach to charging and prosecuting U-4 disclosure cases should be questioned due to the patent inconsistencies in outcomes displayed in various disciplinary proceedings involving seemingly the same set of pertinent facts.

II. STANDARD OF REVIEW

Rule 420(a) of the Commission's Rules of Practice authorizes the Commission to review any "final disciplinary sanction" by FINRA. In reviewing disciplinary action taken by a self-regulatory organization ("SRO") like FINRA, the Commission must determine whether the applicant engaged in the conduct found by the SRO, whether such conduct violates the SRO's

rules as specified in the SRO's determination, and whether those rules are, and were applied in a manner consistent with the purposes of the Securities Exchange Act of 1934.[1] The Commission is to base its findings on an independent review of the record and apply a preponderance of the evidence standard to determine whether the evidence supports the SRO's findings.[2]

III. FACTS

A. David Elgart and Sequoia Investments

Applicant is David Adam Elgart. Mr. Elgart has been in the securities industry for 45 years, that is, since 1971.[3] Since 1998, Mr. Elgart has been president and chief compliance officer of Sequoia Investments, Inc. ("Sequoia"), a very small firm – it had only four employees at the time of the FINRA hearing[4] – in Atlanta, Georgia, in which he purchased a majority ownership interest in 2001. Sequoia's business is, with limited exception, restricted to municipal trading and municipal tax exempt and taxable underwritings.[5]

Mr. Elgart has no disciplinary history.[6] Prior to the instant FINRA disciplinary action, he had never been named as a respondent in any matter by FINRA (or its predecessor, NASD), the SEC or any of the various states with which he is (or has been) registered. He does have a single customer matter disclosed on his CRD record, an arbitration that was filed and settled back in 1992.[7] But, there were no findings of any sort made against Mr. Elgart in that arbitration and he

---

[1] 15 U.S.C. § 78(e)(1).

[2] *See Rani T. Jarkas*, Exch. Act Rel. No. 77503, 2016 WL 1272876, at *4 (Apr. 1, 2016); *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *1, 9 (May 27, 2011) (citing *Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982) (upholding preponderance of evidence standard in FINRA disciplinary proceeding)), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

[3] Record at Bates No. 486 (Elgart testimony).

[4] *Id.* at 489.

[5] *Id.*

[6] Record at Bates No. 919 (JX-1, Elgart CRD).

[7] *Id.*

did not contribute to the settlement in any way (as it was paid by the member firms named as co-respondents).

While it was not named as a respondent in the FINRA Complaint, it is also noteworthy that Sequoia has no disciplinary history.[8]

B. The Tax Liens

At issue in this case are the following five pending tax liens against Mr. Elgart:

1. June 10, 2003: federal tax lien for $150,843.50;
2. December 12, 2005: State of Georgia tax lien for $6,962.92;
3. November 3, 2008: federal tax lien for $130,137.74;
4. April 6, 2009: State of Georgia tax lien for $27,236.57; and
5. June 2, 2010: federal tax lien for $73,575.25.

As of the date of the hearing, all were unpaid.[9]

C. Form U-4's Requirements

Question 14M on Form U-4 requires that unpaid tax liens be disclosed. Mr. Elgart did not dispute FINRA's assertion that he had failed to update his Form U-4 in a timely manner[10] to reflect that these five liens had been filed against him and that they remained outstanding (despite the fact that he admitted that he was only aware of some, but not all, of the tax liens when they were filed against him).[11] Accordingly, unlike some U-4 disclosure cases, the

---

[8] Record at Bates No. 559 (CX-1, Sequoia CRD)

[9] While the reason for the tax liens is not specifically pertinent to the issues on review, Mr. Elgart testified that they related to his purchase of Sequoia, and involved a "question of return of capital as opposed to taxing it as ordinary income." Record at Bates Nos. 483-484 (Elgart testimony)

[10] By rule, Form U-4 should be amended within 30 days of a disclosable event, including the receipt of a tax lien. *See* Article V, Section 2(c) of FINRA's By-Laws.

[11] Record at Bates No. 521 (Elgart testimony)

principal issue here is not whether Mr. Elgart's failure to have disclosed his tax liens in a timely manner on his Form U-4 stemmed from some ignorance of the fact the liens were filed.

D. Mr. Elgart's Understanding of Form U-4

The dispositive issue here does, however, revolve around ignorance, just ignorance of a different fact. Here, the record reflects that, rightly or wrongly, Mr. Elgart was ignorant of what sort of tax liens had to be disclosed on his Form U-4. It is undisputed in the record that Mr. Elgart harbored the understanding (which he now acknowledges to be a misunderstanding) that these five tax liens – which were all filed against him personally and not against Sequoia – did not have to be disclosed on his U-4 because they did not put Sequoia into financial jeopardy.[12] Mr. Elgart testified that he understood – incorrectly, as it turns out – that Question 14M on Form U-4 required him to disclose only those liens or judgments that could endanger or impact Sequoia and its clients.[13] Because the five liens in question did not actually impact (or even potentially) Sequoia or its customers, Mr. Elgart concluded that the liens fell outside of that definition and were therefore not disclosure items. To put it as simply as possible, Mr. Elgart misunderstood what Question 14M on Form U-4 required to be disclosed when it came to unpaid tax liens. And, unfortunately, he repeated this same error for each of the five liens that FINRA identified.

E. The FINRA Questionnaire

The second charge FINRA lodged against Mr. Elgart pertains to a questionnaire – a "Personal Activity Questionnaire" or "PAQ" – that FINRA supplied him in connection with its examination of Sequoia.[14] In response to a question posed to him on that FINRA questionnaire,

[12] Record at Bates Nos. 524, 528 (Elgart testimony).

[13] Mr. Elgart's misunderstanding of the scope of Question 14M may have been a direct consequence of the fact that he did not really look at that question on Form U-4. Record at Bates No. 500 (Elgart testimony)

[14] Record at Bates No. 997 (JX-2).

Mr. Elgart indicated that he had no unsatisfied liens or judgments against him. Mr. Elgart acknowledged at the hearing that at the time he provided that answer, he was already on notice of the five tax liens at issue. But, he testified that he answered "no" notwithstanding that awareness for the same reason that he had not disclosed the liens on his Form U-4: not because he was trying to hide anything, but because he understood that he only needed to disclose liens if they impacted Sequoia.

FINRA utterly disregarded that explanation, however, and concluded that Mr. Elgart "intentionally" "chose to answer dishonestly to mislead FINRA."[15]

IV. ARGUMENT

As noted above in the short recitation of the few facts pertinent to this Petition, Mr. Elgart did not contend below, nor does he here, that he timely amended his Form U-4 to reflect that the five tax liens had been filed against him. To the contrary, he admitted that his U-4 amendment (which he ultimately, but willingly, made at FINRA's direction, once Form U-4 was explained to him) was not timely. Thus, the hearing in this case, an appropriately abbreviated hearing, given the narrow issues to be decided, focused instead on two other things: (1) why Mr. Elgart did not file timely amendments to his U-4 to disclose the tax liens, and, more importantly, (2) whether his failure to have filed timely amendments was "willful."

Why is the second question more important? Because a willful failure to update a Form U-4 in a timely manner constitutes a statutorily disqualifying – and, thus, career-ending, or at least career-threatening – event; a non-willful failure, by comparison, is, in both a relative and absolute sense, a modest rule violation with a modest sanction. Indeed, according to FINRA Rule 9217, a failure to update Form U-4 in a timely manner is deemed to be a "minor rule

[15] NAC Decision at 14.

violation," subjecting the offender to a monetary fine "not to exceed $2,500," and not even requiring an evidentiary hearing.

Rather remarkably, FINRA suggests that this difference, i.e., the difference between, on the one hand, a statutorily disqualified respondent being permanently prevented from associating with any FINRA member firm in any capacity, and, on the other hand, a respondent having to pay a fine of less than $2,500, is not pertinent to the discussion here. Not only is it pertinent, it is the heart of the discussion.

A. Mr. Elgart's Omission Was The Result Of Mistake, Specifically, A Mistake In His Understanding Of U-4.

Mr. Elgart testified – and FINRA presented no witness to contradict his testimony – that he understood Question 14M on Form U-4 required that he only disclose tax liens that could have a financial impact on Sequoia, or its customers. Because the five tax liens against him, personally, had no such impact, he determined that no U-4 disclosure was required.[16]

FINRA mocks Mr. Elgart's reasoning. FINRA concludes that the U-4 question at issue – Question 14M – is "unambiguous," and "contains no limitations on the kinds of liens required to be disclosed."[17] It observes that "the plain language of the Form U4" is, essentially, incapable of being misinterpreted because "there is nothing ambiguous about" it.[18] Given that view, FINRA determined that it is impossible for someone like Mr. Elgart, with his "decades of industry

[16] It is important to note, too, Mr. Elgart's unrebutted testimony that while he was Sequoia's Chief Compliance Officer, he delegated the responsibility for the occasional U-4 amendment – for address or registration changes – to the firm's FINOP. Record at Bates Nos. 491-492 (Elgart testimony). Given that, it was not at all unreasonable that Mr. Elgart was not particularly familiar with the questions posed on Form U-4, including Question 14M. But FINRA simply dismisses that fact, insisting that "Elgart had an independent responsibility to understand his disclosure requirements." NAC Decision at 11. Here is yet one more statement that reveals FINRA's efforts to remove "mistake" as a defense to willfulness (as discussed in detail below). If all registered persons have the duty to understand their U-4 disclosure requirements, but fail, for whatever reason, to meet those requirements, then the reason for their failure is, in FINRA's eyes, immaterial. As demonstrated below, however, that is not true, and FINRA's insistence to the contrary in the NAC Decision mandates reversal.

[17] NAC Decision at 10.

[18] *Id.*

experience," "a general securities principal, president, and chief compliance officer of his firm," to misread the U-4 as badly as Mr. Elgart testified that he did.[19]

In an effort, perhaps, to protect this reasoning from reversal on appellate review,[20] FINRA characterizes its conclusion that Mr. Elgart's failure to amend his U-4 to disclose the tax liens was willful as being based on his credibility, stating that Mr. Elgart's claimed misunderstanding of Question 14M somehow "strains credulity."[21] In fact, however, this has nothing to do with credibility. To the contrary, it comes down simply to FINRA's wildly inconsistent determinations of what constitutes a mere "mistake" – an excuse for a U-4 disclosure omission which does not trigger statutory disqualification.

This is amply demonstrated by a review of FINRA's decision in *DOE v. Forrest G. Harris,* Disciplinary Proceeding No. C07010084 (May 31, 2002). That litigated case also involved a respondent's failure to amend his Form U-4 in a timely manner to reflect an event that should have been disclosed. Unlike the instant case, the *Harris* case centered on Questions 23A and 23B (now Questions 14A and 14B) on Form U-4, which ask about criminal disclosures, including all felony charges and convictions, and certain misdemeanor charges and convictions. Mr. Harris, the respondent, answered "no" to Questions 23A and 23B even though he had been charged with a misdemeanor of the variety that required disclosure – "wrongful taking of property" – as well as three felony charges. While all charges against him were eventually dropped, it was not disputed that they still required disclosure.

At his hearing, when asked to explain the reason for his disclosure failures, Mr. Harris offered several. First, regarding the felony charges, he said he somehow did not understand that

---

[19] *Id.*

[20] This is a result of the principle that credibility determinations made by factfinders are entitled to deference on review. *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 and n. 6 (2002).

[21] NAC Decision at 10.

he had been charged with any felonies, and so did not disclose them. As to the misdemeanor charge, and more to the point for Mr. Elgart, Mr. Harris explained that when he reviewed Question 23B(1)(b) relating to misdemeanor charges, he simply " stopped reading after its italicized reference to 'investment-related,'" and so did not see that, in addition to "investment-related" misdemeanors, the question also called for disclosure of misdemeanor charges of wrongful taking of property. Because he misread Question 23B(1)(b), he failed to disclose his misdemeanor charge.

The Hearing Panel, considering Mr. Harris' testimony and interpretation of Form U-4, found him to be "careless" and "inattentive." In light of that finding, when it came to willfulness, the Panel said it was "not persuaded by a preponderance of the evidence that Respondent's omissions were willful, rather than careless. . . . He misread the . . . question . . . ."

Mr. Elgart submits that Question 23B – the one that Mr. Harris managed to "misread" – is no more or less ambiguous in its wording than Question 14M; yet, based on the results of Mr. Elgart's case, FINRA has apparently determined that only the latter is somehow incapable of being misread, that one who reads Question 14M (at least a reader like Mr. Elgart, an "industry veteran") is legally precluded from making a mistake in interpretation akin to that committed by Mr. Harris.

That standard is simply unworkable in its vagueness and its inconsistency.[22] A mistake, a misreading of the English language, even if arguably unreasonable, remains a mistake, and that is enough to constitute a defense to willfulness.

[22] FINRA cites to another case, *Joseph S. Amundsen*, Exch. Act Rel. No. 69406, 2013 SEC LEXIS 1148 (Apr. 18, 2013), for the proposition that a question on U-4 can be so "explicit and unambiguous," so "written in plain language," that to claim to have misunderstood it defies credibility. But, as noted above in connection with the *Harris* case, Question 23B is as equally plain and explicit as Question 14B, yet Mr. Harris' testimony that he misread the former was readily accepted.

FINRA has put no qualifiers on what it deems to constitute a mistake in the context of a U-4 case that can serve to vitiate a claim of willfulness. Notice to Members 04-19, issued in March 2004, contains a matrix that lists guidelines for each rule violation that is subject to being treated as an MRV. Notably, the failure to amend a Form U-4 in a timely manner is just such a rule violation. According to the guideline for that particular violation, "[a]n MRV or Letter of Caution should be limited to failure to file Form U4 amendments in a timely way or non-negligent errors on Form U-4 due to inadvertence, ***mistake*** or incorrect advice from an attorney or member firm after full disclosure by the individual." (Emphasis supplied). Thus, a mistake is enough, according to FINRA, both in its guidance (NTM 04-19) and its case precedent (*Harris*), to render a late U-4 amendment not willful. There is nothing that states, or even suggests, that the mistake must be reasonable to be effective.

Admittedly, the matrix in NTM 04-19 also states that "[a] willful misstatement or omission on Form U4 even if it is not material generally requires full disciplinary proceedings." But, this language is hardly helpful, as it is not entirely clear what it even means. As written, it appears to suggest that if the Department of Enforcement concludes a U-4 omission was willful, then it cannot use the MRV process to deal with the disposition of the exam, and must, instead, utilize a "full disciplinary proceeding." But, that just dictates the procedural route Enforcement should take to enforce the perceived rule violation, not the outcome of the case.

More importantly, it does not state that *if* Enforcement feels compelled to bring a "full disciplinary proceeding" that mistake is therefore unavailable as a defense to a claim of willfulness. Indeed, this guidance regarding how FINRA proceeds when Enforcement feels the U-4 omission was willful must be reconciled with the comment quoted in the paragraph above, i.e., that a respondent's ***mistake*** is an appropriate reason to treat a U-4 omission with as an MRV.

Just because a FINRA Enforcement lawyer utilizes his or her vast degree of prosecutorial discretion to charge willfulness, thereby eliminating the chance to treat the case as an MRV, cannot and does not mean that mistake is unavailable as a defense in the ensuing disciplinary action.[23]

A footnote from the *Harris* case bolsters this conclusion. There, the Hearing Panel wrote that "[l]iability for what a Respondent 'should have known' must rest on more than a general duty to answer the U-4's questions carefully and accurately. Statutory disqualification would otherwise flow automatically from any material error. Such a result would penalize every applicant who made a mistake and would render the 'willfulness' requirement meaningless." Thus, demonstration by a respondent that a U-4 omission was the result of a mistake, such as Mr. Harris' "misreading" of an apparently unambiguous question, rebuts willfulness. And because Mr. Elgart's U-4 omission stemmed from the very same thing, i.e., his misreading of a different U-4 question, the result here should be the same as in the *Harris* case.[24]

B. FINRA Has Failed To Act Consistently In Its Prosecution Of U-4 Disclosure Cases.

As noted above, in conducting its review of FINRA's Decision against Mr. Elgart, the Commission must determine whether FINRA's rules at issue "were applied in a manner consistent with the purposes of the Securities Exchange Act of 1934." Here, the Commission should conclude that FINRA has failed to operate in accordance with its statutory mandate, at least when it comes to U-4 omission cases. This is a direct result of its grossly inconsistent

[23] It is also worth noting that through the use of the word "generally," FINRA expressly acknowledges that there is no hard-and-fast rule here, that even a willful case of a U-4 failure can enjoy a disposition that does not include a "full disciplinary proceeding."

[24] FINRA makes a weak attempt to distinguish *Harris* by asserting that unlike Mr. Harris, Mr. Elgart "did not misread the relevant disclosure language on Form U4." NAC Decision at 12 n.11. Unfortunately, that simply disregards Mr. Elgart's unrebutted testimony to the contrary.

interpretation of "willfulness" in such cases over the years, and continuing through the present. Consider the following.

Three months ago, FINRA accepted an Offer of Settlement in *Department of Enforcement v. Jeffrey S. Cederberg*, Disciplinary Proceeding No. 2014040815101 (March 21, 2017). Like Mr. Elgart, Mr. Cederberg failed to disclose tax liens, in this case, three of them, on his Form U-4. Like Mr. Elgart, he failed to do so for a number of years – six years, for one of Mr. Cederberg's liens. Yet, Mr. Cederberg's U-4 omissions were not deemed to be willful.

Only one month ago, FINRA accepted an AWC in *In the Matter of Glenn Scott Searles,* (AWC 2014040546101, May 15, 2017). Mr. Searles failed to timely report on his U-4 one unsatisfied judgment and one unpaid tax lien. In addition, Mr. Searles inaccurately answered "no" on a questionnaire provided to him by his broker-dealer asking about unsatisfied judgments and liens. Like Mr. Elgart, Mr. Searles has been in the securities industry for decades. Like Mr. Elgart, Mr. Searles was apparently aware of the liens that he did not disclose. Mr. Searles' AWC, however, does not include a finding of willfulness.

Remarkably, on the same day as the *Searles* AWC, FINRA accepted an Offer of Settlement in *Department of Enforcement v. Kevin Graetz*, Disciplinary Proceeding No. 20140388447602 (May 15, 2017), another U-4 disclosure case involving tax liens. Unlike Mr. Searles and Mr. Cederberg, Mr. Graetz's omissions were deemed to be willful, and, as a result, he was statutorily disqualified.

The list goes on and on. As do the inconsistent results. And, it is not restricted to FINRA. Even this Commission has given blurred signals regarding what constitutes willfulness in the context of U-4 disclosure cases.

Last year, the SEC released its decision in *In the Matter of the Application of Michael Earl McCune* (Exch. Act Rel. No. 77375; Admin. Proc. File No. 3-16768 / March 15, 2016), which included a lengthy discussion of willfulness. The respondent, Mr. McCune, was guilty of the same misdeed as Mr. Elgart and all the other respondents noted above, that is, failing to amend his Form U-4 in a timely manner to reflect unpaid tax liens that had been filed against him.[25] In addressing the question whether McCune acted willfully, the SEC concluded that "McCune therefore acted willfully because he intended to commit the acts that constituted the violation – failing to amend his Form U4 for a period ranging from more than a month to six years to disclose his bankruptcy and liens."

The problem is, that precise statement could have been made about *any* of the respondents in *any* of the cases cited above: Every one of them failed to amend his U-4 to disclose an event that should have been disclosed. If that single fact is determinative of the issue of willfulness, then every respondent acts willfully. But, clearly, based on the wide variety of outcomes in cases that seemingly involve the same fact patterns, that is not how either FINRA or the SEC see things. Sometimes it's willful; sometimes, it's not. And it is simply impossible to predict with any sort of accuracy how the regulators will deign to characterize the failure to disclose in any given case.

In August 1996, in the 21(a) Report that the SEC issued regarding its examination of NASD – FINRA's predecessor – the Commission noted that

> [t]he NASD's rules must be designed to prevent fraud and manipulation, to promote just and equitable principles of trade, and to protect investors and the public interest. Its rules may not unfairly discriminate among customers, brokers, dealers, or issuers, fix minimum profits, or regulate matters not related to the purposes of the Exchange Act. The rules are required to provide fair procedures both for disciplining members and for denying access to services.

[25] In fairness, Mr. McCune also failed to disclose a bankruptcy filing.

This language, of course, stems from the Securities Exchange Act of 1934, which provides that FINRA's rules must "provide a fair procedure for the disciplining of members and persons associated with members . . . and the prohibition or limitation by the association of any person with respect to access to services offered by the association or a member thereof."[26] FINRA's standard for "willfulness," at least in U-4 disclosure cases like Mr. Elgart's, is now so vague, so fuzzy, so incapable of being articulated well enough to provide any actual guidance, that there is no "fair procedure" for disciplining members, or individuals like Mr. Elgart. And, because a finding of willfulness leads inexorably to statutory disqualification – the ultimate denial of access to services – there is no fairness there, either.

C. Mr. Elgart's Response To The FINRA Questionnaire Was Not In Bad Faith.

FINRA concluded that Mr. Elgart "was unethical, [acted] in bad faith" in not reporting the liens on the FINRA questionnaire. In so doing, FINRA based its finding on the same notion that underlies its finding on Mr. Elgart's response to Question 14M, namely, that "[t]his question was not subject to misinterpretation."[27] The problem with this logic is the same as that with FINRA's similar determination regarding Question 14M: it effectively eliminates from the discussion any possibility of a respondent utilizing the defense of mistake. Remember the footnote from the *Harris* case quoted above, and its admonition that to disregard mistake would effectively render every U-4 disclosure case willful.

But we know, based on a review of prior cases, that FINRA is willing, for whatever reason, to agree that some U-4 omissions are not willful, and therefore not charge them as such, or settle them as such. Thus, FINRA's finding here that the questions on its questionnaire were

---

[26] 15 U.S.C. 78o3(b)(8).

[27] NAC Decision at 14.

crafted in such a manner that they could not possibly lead a reader – any reader, apparently – to mistake their import is, simply, untenable. For that reason alone, this finding needs to be reversed.

FINRA also disregarded the fact that Mr. Elgart's answer on the questionnaire had zero impact on the examination of Sequoia. The record clearly reflects that FINRA sent that questionnaire to Mr. Elgart already armed with knowledge of the pending tax liens, knowledge gleaned from a Lexis/Nexis report that FINRA ran on Mr. Elgart prior to the exam.[28] FINRA's witness at the hearing, Mr. Cormier, confirmed that FINRA already knew about the tax liens before it commenced the exam.[29] Thus, FINRA's claimed concern that Mr. Elgart's questionnaire answers somehow "misled" the examiners is patently false.[30] The conclusion that "truthful information about the liens [on the questionnaire] would have informed FINRA staff that Elgart had withheld material information from customers, member firms, and regulators for years"[31] is also completely wrong. FINRA was aware of the liens, and of Mr. Elgart's CRD record. It could plainly see for itself Mr. Elgart's omissions. The only question for FINRA to pursue was why he had not disclosed them, and the answers on the questionnaire had zero impact on that inquiry.

Finally, FINRA erroneously refers to a "pattern of misconduct," due to the fact that Mr. Elgart failed to disclose his liens on both his Form U-4 and the questionnaire. Yes, it is a pattern of behavior, but, no, it is not a pattern of misconduct. Mr. Elgart's reason for not disclosing the liens in either place was exactly the same: he did not understand that he needed to do so. It was

[28] Record at Bates No. 793 (CX-3).

[29] Record at Bates Nos. 442-443; 465-466 (Cormier testimony)

[30] NAC Decision at 17.

[31] *Id.* at 18

an error on his part, a misunderstanding of what he was required to do, but there is no evidence that his error was intentional, malicious, or, as FINRA put it, "in bad faith." It is an unreasonable leap of logic to conclude that because a respondent makes the same innocent error twice he has evidenced a "pattern of misconduct."

V. CONCLUSION

For the reasons stated herein, the Commission should: (1) vacate the finding that Mr. Elgart acted willfully; (2) reduce the fine for his U-4 violation to something not to exceed $2,500; (3) eliminate the suspension for his U-4 violation; (4) vacate the finding that Mr. Elgart acted in bad faith by responding to the FINRA questionnaire; and (5) reduce the sanction for the FINRA questionnaire error to a Cautionary Action Letter.

Dated: June 14, 2017

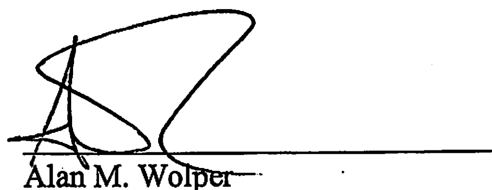
ULMER & BERNE LLP

Alan M. Wolper
Heidi E. VonderHeide
500 W. Madison Street
Suite 3600
Chicago, IL 60661
(312) 658-6500
Fax: (312) 658-6501
awolper@ulmer.com
hvonderheide@ulmer.com

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2017, I served a copy of the foregoing **APPLICANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW**, as follows:

Original and three copies to: Via facsimile transmission and overnight mail delivery	Brent J. Fields, Secretary Office of the Secretary Securities and Exchange Commission 100 F. Street, N.E. Room 10915 Washington, D.C. 20549-1090 Fax: (202) 772-9324
One copy to: Via facsimile transmission, e-mail and overnight mail delivery	Michael Garawaski FINRA Office of the General Counsel 1735 K Street, NW Washington, DC 20006-1506 Fax: (202) 728-8264 OGC-RPO@finra.org Michael.Garawaski@finra.org



Alan M. Wolper