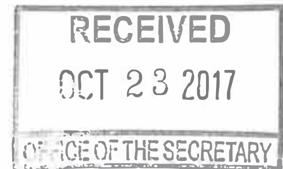
**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION.**




**Admin. Proc. File 3-18150**

| **In the matter of the Application of THADDEUS J. NORTH For Review of Disciplinary Action Taken by FINRA** | **Reply in Support of Admission of Additional Evidence to Supplement the Record in Disciplinary Proceeding No. 2012030527503** |
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Pursuant to the Securities and Exchange Commission (the "Commission") Rules of Practice 154 and 452, applicant Thaddeus J. North ("Mr. North") replies to Opposition to his Motion for the Admission of Additional Evidence ("Mot. to Admit") filed by the Financial Industry Regulatory Authority ("FINRA").

Respectfully submitted this 19th day of October 2017.

**THADDEUS J. NORTH, BY COUNSEL**

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## INTRODUCTION

This case confronts a question of significant public importance for the SEC because its resolution affects the regulation of brokers and dealers by its SRO throughout the country and around the world, many of which do business with Smarsh. FINRA and Smarsh jointly represented to the NASD and FINRA, the FINRA hearing officer(s) hearing panel(s) in this and the related case that Smarsh delivered archiving and compliance services according 17 C.F.R. § 240.17a-4(f)(ii). The additional evidence demonstrates that Smarsh, had neither the capacity nor intent to perform the services it held itself out to perform. Mot. to Admit at 6-8, 10-12.

This Reply, therefore, appeals to the sound reasoning and logic of Securities and Exchange Commission ("SEC") respecting the inadmissibility of evidence in the underlying proceeding due to condition of the digital data allegedly archived by Smarsh Inc. ("Smarsh") and the source of the compliance reports FINRA attributed as having been prepared by Smarsh ("Smarsh Reports") from the Smarsh Management Console ("SMC"). Inferred by the arguments and conclusory statements made in FINRA's Response to Mr. North's North Motion for the Admission of Additional Evidence is the objective of convincing the SEC to ignore FINRA's unlawful conduct and tacitly approve the continuing perversion of the administrative process as was done in this case.

Had FINRA not collaborated with Smarsh to steal the Email of brokers registered at Ocean Cross Capital Markets, LLC ("Ocean Cross") and to make up evidence in these proceedings, FINRA would not have a complaint against Mr. North. The fact that FINRA solicited Smarsh to lie about its relationship with and the services Smarsh contracted to provide to Ocean Cross brokers makes the additional evidence both relevant and material as Mr. North contends. *See id.* at 8-10, 12-13. Mr. North urges that FINRA's dogged resistance to the concerns

raised by Mr. North throughout the FINRA proceedings about the digital data's condition and sources, establishes the relevance and materiality of the additional evidence offered: it shows collaboration between FINRA and Smarsh, identifies the misrepresentations they jointly fostered, and details how with Smarsh's help, FINRA unlawfully procured Ocean Cross brokers' Email in violation of the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2522 (2015) ("ECPA"), Mr. North's constitutional right to privacy in his personal Email, and other laws, made up exhibits from reconstructed Email, and made up the Smarsh Reports on non-Y2K resources and servers Smarsh does not own, control, or operate. *See* Mot. to Admit at 6-8.

It is clear from the sources and dates on which the proposed evidence was obtained it was not available, not known to exist, or in fact, did not exist, or was not discovered as a part of this proceeding before the August 21, 2014 deadline for identifying evidence in the underlying FINRA proceeding. *See id.* at 5. Mr. North's persistence that the evidence FINRA produced and offered was corrupted or false, resulted in FINRA and Smarsh collaborating to offer perjured testimony and excuses for their inabilities to produce the Email and server records that would certify the archive and the accuracy of the Smarsh Reports being used against Mr. North. *See id.* at 8-10. Innocent persons do not offer excuses or cover up honest acts.

## I. The Nature of the Additional Evidence Offered.

The additional evidence tendered, e.g. Frank Huber's Declarations/Reports, shows how FINRA illegally obtained and changed Email to suggest securities laws violations and also used non-Y2K resources make up the Smarsh Reports to discredit Mr. North. *See id.* at __. Evidence that such malfeasance occurred in the administrative proceedings of a self-regulatory organization ("SRO") under SEC supervision, should always be material and relevant, because it has to do with the integrity, reliability, and credibility of any FINRA proceeding in which

Smarsh Email archiving and compliance support are involved. The concerns Mr. North raise regarding integrity and admissibility of digital data are issues of relevance and materiality to all federal appellate courts and all brokers and dealers who must comply with SEC rule 17 C.F.R. § 240.17a-4(f)(ii).

## II. Argument.

### A. The additional evidence is material and relevant to show when and how Smarsh and FINRA unlawfully obtained and altered the evidence used in the FINRA proceedings.

Mr. Huber's Declarations/Reports and the Declaration of Bonnie Page demonstrate that the Email interception was accomplished by Smarsh instructing its broker customers to change settings on their equipment to redirect the broker Email to a private network in which non-Y2K resources are used and that is supported by FINRA's Internet Service Provider ("ISP"), Internap Corp.[1] *See id.* at 6-10. As discussed by Mr. Huber, the private network and Internap's New York location are identified in the Email metadata; servers processing Email identify themselves in the metadata. Mr. Huber observed by comparing the content of altered Emails to the same Emails in native format, that the altered Emails were designed to suggest securities law violations. The private network is also where reports of compliance actions attributed to Smarsh were made up and available in a form that FINRA examiners could change or "fix" because they overlooked the leap year in 2012 affecting dates reflected in reports FINRA attributed to Smarsh. *See id.* at 6-8, 10-11.

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[1] Mr. Huber observed that data was directed to a private network including servers located at 75 Broad Street, New York City, which is an Internap Corp. datacenter. *North 2* Compl. ¶ 64, Exhibit 5 at 9. *See also* http://www.datacentermap.com/ USA/new-york/internap-75-broad.html. Internap is FINRA's Internet Service Provider ("ISP"). *See* https://db-ip.com/75.98.61.67.

### B. FINRA hearing officers and the National Adjudicatory Council ("NAC") chose to ignore evidence of FINRA's misconduct and unlawful actions.

Mr. North is not a technology expert. When he confronted FINRA about concerns that the production files were incomplete, not in native format, and appeared to demonstrate spoliation, FINRA and Smarsh collaborated to present deceptive testimony and evidence, which the additional evidence refutes. *See id.* at 2-5. It is now evident that because Smarsh does not own, operate, or control any of the necessary servers to perform the archiving and compliance services they claim to provide, none of the evidence FINRA attributed to Smarsh came from Smarsh. Mr. North contends those facts are relevant and material to the inadmissibility of the evidence to which Mr. North objected throughout the FINRA proceedings.

Because Smarsh does not have the equipment for archiving and compliance, non-Y2K government resources were used to store Email and prepare the Smarsh Reports, and the files were delivered to Mr. North by FINRA already altered, the only logical conclusion is that FINRA obtained the Email unlawfully and made up the evidence from the digital files Smarsh help FINRA illegally procure in violation of the ECPA. The record shows that when Mr. North tendered evidence of the failures relating to Smarsh's archiving and compliance support, which should have rendered any evidence offered by FINRA inadmissible, the hearing officer(s) considered it immaterial and irrelevant. *See id.* at 4. Mr. North reasons that FINRA continues to argue that the evidence of Smarsh's and FINRA's misconduct is irrelevant and immaterial, because FINRA has been caught breaking the law.

Smarsh, not a trusted partner of other third party vendor, contracted to archive Ocean Cross brokers' Email and provide compliance support; it was the only entity that should have handled the data after Ocean Cross executed the services contract with Smarsh. However, as Mr.

Huber pointed out, the records of the American Registry of Internet Numbers ("ARIN") and the Internet Assigned Numbers Authority ("IANA")[2], prove that Smarsh did not have the ability to archive data and provide compliance services, because there are no servers registered to the company and none of the Internet Protocol addresses in Smarsh's instructions or in any of the Email metadata resolve to Smarsh, but instead to FINRA's ISP, Internap. *See id.* at 6-8, 10-11.

**C. FINRA hearing officers and the NAC ignored logic and the reasonable and intended application of FINRA Rules.**

FINRA would have the SEC ignore that (i) when Mr. North persisted in questioning the source and integrity of the digital data FINRA produced to them, it became irrelevant; (ii) at FINRA's request Smarsh witnesses offered deceptive and contradictory statements and testimony changing their stories about Smarsh's archiving and compliance services continuing to maintain the façade of archiving services that Smarsh had neither the intent nor ability to provide; (iii) the Email had been surreptitiously intercepted and redirected into a network supported by FINRA's ISP for access by FINRA; (iv) the Email delivered to Mr. North had been altered to suggest securities law violations; (v) compliance reports were "fixed" because non-Y2K compliant resources were used to prepare them; (vi) only FINRA would have access to government reclaimed non-Y2K compliant resources; and (vii) neither Smarsh nor FINRA have denied the condition of the data or obtained any expert witness who contradicts the conclusions reached by the professionals Mr. North consulted. *See generally* Mot to Admit.

The additional evidence is relevant and material to the credibility of evidence FINRA introduced into the record before the hearing panels and also considered by the NAC because it reveals a fraud upon the administrative process—FINRA prosecutors suborned perjury and created and attributed to Smarsh compliance reports prepared on non-Y2K compliant resources

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[2] *See* https://www.arin.net; https://www.iana.org.

that FINRA staff could change. The additional evidence explains why neither FINRA nor Smarsh could produce thousands of Email files not lost or otherwise destroyed by the alleged unsuccessful migrations, server decommissioning or maintenance described by various Smarsh witnesses, and how Email was altered in ways to suggest securities law violations—improper third party handling and reconstruction—when all should have been archived unchanged, and produced in native format. *See id.* at 6-8. Had the FINRA hearing officer, panel, or NAC been attentive to the technology issues and not part of the problem, concerns respecting altered Email and the failure of the archive and compliance platform would have been addressed, instead of relegated to irrelevance or immateriality.

It is disturbing that FINRA staff attributed to Smarsh archiving and compliance support it could not deliver because it does not own, operate or control any of the equipment necessary to support those services. It is mendacious that "journaling" instructions Smarsh gave users and the Email metadata demonstrate a prism structure modeled after surveillance programs Edward Snowden exposed in 2013, in which the major phone carriers unlawfully sent copies of digital phone records to an NSA government network after 9/11 so the records could be searched for key words relevant to terrorism, because parameters of the U.S. Patriot Act Pub. L. No. 107-56 (October 26, 2001) were erroneously interpreted to allow it.

As if intercepting and stealing the broker's Email was not enough, instead of searching for words of terrorism as the NSA purported to do, FINRA changed the Email and used the changes to prosecute Mr. North and other brokers. Not only were FINRA's allegations against Mr. North dependent on the contents and attachments to Email allegedly archived by Smarsh and allegedly available to Mr. North for compliance review on the SMC, but Mr. North had a non-delegable duty to preserve all business Email and other electronically stored information ("ESI"),

according SEC rule 17 C.F.R. § 240.17a-4(f)(ii), making the quality and integrity of the technology services for preserving Email of particular, critical importance. The failure of evidence to comply with SEC rules should be of concern to FINRA; instead, FINRA's dismissiveness and obvious collaboration with Smarsh to avoid addressing SEC rule failure are further confirmation of FINRA's complicity with Smarsh.

**D. Mr. North candidly described his duties and actions.**

Ignoring the fact that Smarsh does not have the equipment to archive or support the alleged SMC, the record admits the loss, destruction, and inaccessibility of what should have been the most reliable evidence of the firm's Email compliance, and individually, of Mr. North actions. *See id.* at 8-10, In this matter, FINRA continues to minimize the fact the Mr. North was not a supervisor over any employee, or a principal designated in the WSPs or by management to review Email; Mr. North candidly admitted to reviewing Email to ensure reasonable compliance when he observed that the direct supervisors and designated principals—who were and are not under the bondage of slavery—had not reviewed the Email as the WSPs outlined. Although it was not his designated duty, he recognized the importance of performing Email review and he stepped in to ensure that the firm was in reasonable compliance. His actions were proper and reasonable; they are not evidence of dereliction of a duty not Mr. North's to perform.

Another flaw in FINRA's reasoning is that WSPs are not FINRA rules to enforce. WSPs are a firm's internal operating guidelines and no SEC and FINRA rule requires daily Email review. In addition, Mr. North had substantial other responsibilities during the start up of and transitioning accounts and registered brokers to the Ocean Cross firm; he had continuing responsibilities to respond to FINRA's investigation of Southridge also.

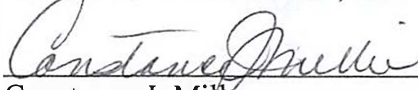
FINRA accuses Mr. North of delay and acting in bad faith because he was able, at great effort and cost, to obtain alarming evidence of FINRA having unlawful procured Smarsh to assist in intercepting brokers' Email, their joint efforts in creating and maintaining the façade of archiving and compliance services Smarsh promised to provide, and the resulting continual interference with the firm's and Mr. North's ability to ensure and later prove their compliance. Mr. North contends that it is not bad faith to obtain evidence showing that Smarsh lied for FINRA in hearings in this matter to hide their respective roles in intercepting the Email so that FINRA could generate evidence it designed to discredit Mr. North and others like him.

## III. Conclusion.

Had the hearing officer considered, without bias, the implications raised about the source of the Email and the Smarsh Reports, the outcome of the FINRA proceedings would have been different and this matter would not be on appeal. However, FINRA's deliberate efforts to hide its conspiratorial actions with Smarsh have brought these issues to the SEC. The additional evidence, concealed by FINRA with Smarsh's complicity, supports the only logical conclusion: FINRA procured Smarsh to assist FINRA in stealing broker Email, so FINRA could change it to suggest securities law violations and make up other evidence, like compliance reports to facilitate spurious prosecutions. The evidence tendered by Mr. North means that Smarsh's operations are a sham and FINRA promotes it. The evidence tendered also means that FINRA and Smarsh jointly engaged in this deceit and that none of the evidence produced and used in prosecuting Mr. North was admissible. Mr. North contends that this matter should be reversed and vacated, Mr. North's record expunged, and the participants in the FINRA proceedings investigated for their roles in violating the ECPA, Mr. North's constitutional right to privacy in his personal Email, and other federal and state laws.

Respectfully submitted this 19th day of October 2017.

**THADDEUS J. NORTH, BY COUNSEL**



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## CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October 2017, a copy of Respondent Thaddeus J. North's foregoing Reply in Support of the Admission of Additional Evidence was sent by USPS mail to the SEC and by mail and Email to FINRA at:

The Office of the Secretary
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Attention: Jennifer Brooks
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