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

Opening Brief in the Appeal of Disciplinary Proceeding No. 2012030527503

Pursuant to the Securities and Exchange Commission (the "Commission") Rules of Practice 152 and 450, applicant Thaddeus J. North ("Mr. North") submits his Opening Brief in support of his Application for Review by the Commission.

Respectfully submitted this 10th day of November 2017.

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THE DECISIONS BELOW

On August 3, 2017, the National Adjudicatory Council ("NAC") Panel affirmed[1] the July 23, 2015[2] FINRA Hearing Panel decision in Disciplinary Action 2012030527503 respecting Applicant Thaddeus J. North's conduct as a chief compliance officer ("CCO") at Ocean Cross Capital Markets, LLC ("Ocean Cross" or "OC"). Mr. North applied for review of the FINRA Hearing and NAC Panels' orders because the errors made by the FINRA Hearing Officer respecting the admissibility of evidence and the rejection of additional and new evidence by the National Adjudicatory Council ("NAC") Subcommittee were not harmless. Mr. North contends that but for the errors the outcomes of the proceedings below would have been different.

The NAC Subcommittee denied Applicant Thaddeus J. North's ("Mr. North") Motion and Brief in Support of Admission of Additional Evidence to Supplement the Record,[3] submitted September 30, 2015, which included evidence not available at the time FINRA Hearing Panel convened in April 27, 2015. The new evidence demonstrates that FINRA Enforcement and Smarsh Inc. ("Smarsh"), unlawful colluded in an arrangement that intercepted broker email and electronic communications (collectively, "Email") in violation of the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2522 (2015) ("ECPA"), that allowed Enforcement to create evidence from the illegally obtained Email, which Enforcement used in administrative proceedings. The new evidence includes:[4] (i) findings and conclusions of expert, Frank Huber, whom Mr. North consulted between May 2015 and December 2015 to analyze the Email, its metadata, and XML messaging that FINRA Enforcement produced to Mr. North (Exhibits 1-5);

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[1] Record ("R.") 001763.

[2] R. 001341.

[3] R. 001567.

[4] *See* Mr. North's Motion ... for Admission of Additional Evidence filed September 29, 2017 ("Mot. for Add. Evid.") Exhibits 1-10.

(ii) excerpts from the testimony of Smarsh witness Robert Sherman on April 13, 2015 (Exhibit 6); (iii) a declaration from Smarsh General Counsel dated September 3, 2015 (Exhibit 7); (iv) Email instructions from Smarsh dated October 25, 2011 obtained from Southridge Technologies Grp LLC ("Southridge Tech"), the email service provider for the Southridge Investment Group LLC ("Southridge") (CRD 45531) (Exhibit 8); (v) a declaration dated September 4, 2015 from technician Tom McCay, employed by Southridge Tech (Exhibit 9); and (vi) excerpts from the April 2012 testimony of William E. Schloth, CEO of Ocean Cross (Exhibit 10).

QUESTIONS PRESENTED

I. Whether, according to FINRA Rule 9251(g), the outcomes before the Hearing Panel and subsequently the NAC Panel would have been different but for the cumulative evidentiary errors made by the Hearing Officer in the FINRA proceedings,[5] e.g., finding Email allegedly archived by Smarsh, expert testimony about the Email's source and condition when delivered to Mr. North, and the causes of the condition(s) observed in the Email and its metadata to be irrelevant and admitting the Smarsh Reports allegedly prepared by Smarsh as evidence, over Mr. North's objections.

II. Whether the outcomes before the NAC Panel would have been different but for the errors in rejecting the admission of additional evidence, including proof that Smarsh does not own, control, or operate any server equipment necessary to archive Email and support the SMC platform from which the Smarsh Reports were allegedly created, and that instructions Smarsh gave users[6] to add Internet Protocol ("IP") addressed to settings in their communication devices

[5] R. 000771, 00791, 00987 (Nov. 25 Hr'g Tr. at 9), 001307.

[6] *See* Mot. for Add. Evid. Exhibit 7 (Declaration of Bonnie Page, Smarsh General Counsel dated September 3, 2015 ("Page Dec.")); Mot. for Add. Evid. Exhibit 9 (Declaration Tom McCay dated September 4, 2015 ("McCay Dec.")); Mot. for Add. Evid. Exhibit 8 (Smarsh Email dated October 25, 2011 ("Smarsh Email")).

was the device that triggered the interception and delivery of Email to a network controlled and accessed by FINRA employees who "made up" exhibits, including the Smarsh Reports that allegedly reflect records of Email supervision.

III. Whether the FINRA Hearing Officer's and NAC Subcommittee's decisions respecting admissibility of evidence and additional evidence were motivated by bias.

INTRODUCTION

Mr. North asserts that the Hearing Officer and the NAC Subcommittee in the proceedings committed reversible, prejudicial errors respecting the relevance and admissibility of evidence, but for which errors, the outcomes of the FINRA proceedings and therefore the NAC Panel hearings would have been different. If not calculated to hide known facts regarding FINRA's relationship with Smarsh, the errors, in fact, prevented the introduction of evidence of Mr. North's innocence and his proper actions as a chief compliance officer, and precluded the introduction of evidence of Enforcement's and Smarsh's arrangement for the unconstitutional and conversion by interception of Ocean Cross broker Email for purposes of creating prosecution evidence and sabotaging the firm's good faith and reasonable efforts of compliance with securities laws.

Neither FINRA nor Smarsh have produced evidence that they did not collaborate to violate the ECPA and other criminal statutes; all arguments offered by Enforcement and actions taken by the Hearing Officer and NAC Subcommittee avoided addressing the issues raised by Mr. North about how the condition, content, and sources of the Email are relevant to reports allegedly created by Smarsh ("Smarsh Reports") that allegedly reflect compliance actions towards Email allegedly archived and that are allegedly produced from the Smarsh Management

Console ("SMC") for compliance and supervisory actions.[7] The Smarsh Reports were allegedly delivered to FINRA's Department of Enforcement ("Enforcement") by Smarsh after FINRA issued Rule 8210 requests in 2012.[8] Mr. North asserts that the condition of the Email and other electronically stored information ("ESI") in FINRA's production files belies the existence of the alleged archive and SMC.

Mr. North reasons that before the Commission can determine whether the Hearing and NAC Panels erred, the Commission must address the conclusions collectively reached by the professionals[9] Mr. North consulted: that according to the American Registry of Internet Numbers ("ARIN") and the Internet Assigned Numbers Authority ("IANA")[10] Smarsh does not own, operate, or control any registered servers necessary to provide the archiving services and compliance support by way of the alleged SMC, therefore, consistent with the condition of the Email, the content of the Email[11] and its metadata, and witness testimony and statements[12]

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[7] R. 001099 (OC Hr'g Tr. 87:8 – 91:21)

[8] R. 001099 (OC Hr'g Tr. 33:22 – 34:24).

[9] Frank Huber concluded that Smarsh did not archive the Ocean Cross Email and that actions of both Smarsh and FINRA *in real time* intentionally altered critical compliance information in the Email. *See also* Mr. North's Motion ... for Admission of Additional Evidence ("Mot. for Add. Evid.") submitted September 29, 2017 Exhibit 1 (Declaration of Frank Huber dated February 23, 2016 ("Huber Dec. 5")); Exhibit 2 (Declaration of Frank Huber dated June 9, 2015 ("Huber Dec. 1")); Exhibit 3 (Supplement Declaration of Frank Huber dated August 12, 2015 ("Huber Dec. 2")); Exhibit 4 (Declaration of Frank Huber dated November 28, 2015 ("Huber Dec. 3")); Declaration of Frank Huber dated December 22, 2015 ("Huber Dec. 4")). Mr. Huber was consulted for his expertise in XML, the program language for Bloomberg messaging, which comprises over eighty-five percent of the production Email. Mr. Huber's Declarations considered also the findings of Andy Thomas of To The Rescue Texas, *see* R. 000537 (attachment: Consolidated Declaration of Andy Thomas dated October 4, 2014), Navigant professional Dustin Sachs, and Jon Berryhill of Berryhill Computer Forensics Inc. *See, e.g.*, Exhibit 1 Huber Dec. 5 at 14.

[10] *See* https://www.arin.net; https://www.iana.org. *See also* Mot. for Add. Evid. Exhibit 4 (Huber Dec 3 ¶¶ 5-9).

[11] *See* as an example R. 001271 (Enforcement Exhibit CX-2).

[12] *See generally* Mot. for Add. Evid. Exhibits 6-10.

Smarsh had neither the ability or intent to provide archiving and compliance support. Because Enforcement delivered the production files in an already altered condition suggesting securities law violations, the only logical conclusion is that Enforcement procured Smarsh to assist in intercepting and delivering the Email to Enforcement without the knowledge or permission of the brokers sending and receiving those communications.

The record also shows that the Smarsh Reports were produced on non-Y2K compliant equipment. FINRA Enforcement is the only known entity that possessed and handled the data and its Examiner admittedly changed the Smarsh Reports,[13] as further confirmation that Enforcement procured Ocean Cross brokers' Email unlawfully so it would have the sole record for tailoring exhibits and compliance action reports to suggest specific securities law violations.

The record shows that when Mr. North challenged the Email content and Smarsh Reports as inadmissible,[14] according to the Federal Rules of Evidence, Enforcement offered misleading statements and testimony from Smarsh witnesses about archiving and compliance services[15] Smarsh allegedly delivered, but had neither the ability nor intent to perform. To avoid producing the source material for the Smarsh Reports, e.g., server event logs, Smarsh witnesses offered

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[13] Enforcement Examiner James McKennedy stated that he "fixed" the Smarsh Reports due to a leap year issue that affects resources that are non-Y2K compliant. R. 001099 (April 27, 2015 Ocean Cross Hearing Transcript ("OC Hr'g Tr.") 35:9 – 37:6; 106:8 – 107:4). Y2K compliance across all industries was addressed in 1998 and 1999; all computer systems purchased before 1997, *particularly for financial industries*, were required to become compliant before the year 2000. *See* The Y2K Act, 15 U.S.C. §§ 6601-6617 (1999). Smarsh was incorporated in New York in 2002 and it is unlikely that it would have invested in non-compliant systems for compliance archiving in violation of the law. There was no evidence that Ocean Cross used Y2K non-compliant equipment or software. *See also* NASD Notice to Members ("NTM") 97-16 (March 1997).

[14] R. 000315. *See also* R. 001293, 001297, 001325, and 001329 (Enforcement Exhibits CX-9 through CX-12).

[15] R. 000821 (Nov. 5 Hr'g); R. 000987 (Nov. 25 Hr'g). Mot. for Add. Evid. Exhibit 6 (Southridge H'rg Tr.); Mot. for Add. Evid. Exhibit 7 (Page Dec.).

excuses for the unavailability of the source material.[16] Enforcement also argued and the Hearing Officer determined that the Email, Email content, and the sources of Email and the Smarsh Reports, were irrelevant to the content of the Smarsh Reports.[17]

Instead of being irrelevant, the additional evidence submitted shows that the *Email* contains instructions[18] Smarsh delivered to Email users at the Ocean Cross firm coincidental to setting up the brokers' Email that resulted in users changing settings on their individual communication devices, allegedly for archiving purposes according to the "communication type".[19] The *Email metadata*[20] demonstrates that the instructions given by Smarsh to brokers were the device, according to the ECPA, that caused the Ocean Cross brokers' business *and personal Email* to be intercepted from the users' individual and various devices, and redirected in real time to a private network supported by FINRA's Internet service provider ("ISP"), Internap Corp.[21]

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[16] One Smarsh employee testified that Smarsh lost Bloomberg files during a data migration in 2014 to explain why no source material was available for Smarsh Reports offered as evidence in the Southridge proceeding on April 13, 2015. Later, Smarsh General Counsel Bonnie Page attributed server decommissioning as the reason. *Compare* Mot. for Add. Evid. Exhibit 6 (Robert Sherman Testimony in Disciplinary Proceeding No. 2010025087302 ("Southridge H'rg Tr.")) *with id.* Exhibit 7 (Page Dec.). *See also* Mot. for Add. Evid. Exhibit 2 (Huber Dec. 1 ¶ 28).

[17] R. 000407. *See* Enforcements' Response to Mr. North's Motion ... for Admission of Additional Evidence, etc. at 4. *See also* R. 001099 (OC Hr'g Tr. 87:8 – 89:10)

[18] *See* Mot. for Add. Evid. Exhibit 8 (Smarsh Email); *id.* Exhibit 7 (Smarsh Page Dec.); *id.* Exhibit 4 (Huber Dec. 3 ¶ 11).

[19] R. 000821 (Nov. 5 Hr'g Tr. 20:23 – 22:13).

[20] For a list of what can be found in metadata *see* https://www.privacyinternational.org/node/53. "Metadata describes how and when and by whom a particular set of data was collected, and how the data is formatted. Metadata is essential for understanding information stored in data warehouses and has become increasingly important in XML-based Web applications." *See* http://www.webopedia.com/TERM/M/metadata.html.

[21] Mot. for Add. Evid. Exhibit 3 (Huber Dec. 2 at 12 and attachments 3 and 4) *See also* http://www.datacentermap.com/USA/new-york/internap-75-broad.html; https://db-ip.com/75.98.61.67. This interception and redirection mimics the prism set up exposed by Edward Snowden in 2013 that was used by the NSA in the first few years after Congress passed

Mr. North urges that the outcome of the FINRA and the NAC Panel Hearings in Disciplinary Proceeding No. 2012030527503, would have been different if the additional evidence now before the Commission had been available for consideration by those bodies, instead of hidden by Enforcement and Smarsh actions as a fraud upon the proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background.

FINRA approved Ocean Cross to commence business in mid September 2011.[22] The Ocean Cross firm contracted with third party archival firm and retention vendor, Smarsh,[23] to perform compliance archiving for Email and provide the SMC for periodic query and supervisory examination of Email, according to Commission rules and regulations.

Mr. North prepared the written supervisory procedures ("WSP") for Ocean Cross using a template produced by a professional service.[24] The firm's WSP identified the Ocean Cross President, William Schloth, or "other designated principal" for Email review.[25] Harry Bloch was the Municipal Securities Principal at Ocean Cross.[26] In particular, Mr. Schloth was directly responsible for supervising and reviewing Email of one broker, LK, who had transferred to

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the U.S. Patriot Act, Pub. L. No. 107-56 (October 26, 2001) (and) to capture telephone communications to be searched for words related to terrorism.

[22] R. 001099 (OC Hr'g Tr. 76:3-25).

[23] Smarsh originally contracted with Greenfield Capital Partners, LLC in 2005, which firm became Southridge Investment Group, LLC ("Southridge"). *See* BrokerCheck listing for Greenfield, CRD# 45531 / SEC# 8-51079. When Southridge closed in September 2011, Smarsh provided Email archiving services to Ocean Cross. According to his CRD, Mr. North was registered with Southridge in 2008 and Ocean Cross in 2011. *See* https://brokercheck.finra.org/individual/summary/2100909.

[24] R. 001099 (OC Hr'g Tr. 74:6-12; 115:3-14; 118:21 – 119:11). The WSP would have been included in the firm's application to FINRA for approval to engage in business.

[25] R. 001339 (Respondent's Exhibit RX-12).

[26] R. 001099 (OC Hr'g Tr. 15:11 – 16:25; 83:2-17); R. 001337 (CX-14, Ocean Cross Organizational Chart).

Ocean Cross and traded almost exclusively in municipal securities.[27] Bloomberg messaging involving municipal securities trading comprised the vast majority of Ocean Cross Email.[28]

For rational reasons, Mr. North was intentionally not designated in the WSP as a principal for Email review nor did he supervise any Ocean Cross employee or broker.[29] Mr. North is not a Municipal Securities Principal and did not have the requisite background to supervise Municipal Securities trading and Email related to Municipal Securities trading.[30] During the first months of Ocean Cross's operations he had substantial compliance and operational responsibilities in setting up compliance systems for Ocean Cross, registering brokers, obtaining state approvals, and transferring client accounts.[31] At Enforcement's request, Mr. North was responsible for winding down the Southridge firm; he also spent twenty-five to fifty percent of his time answering regulatory inquiries relating to the Southridge firm.[32]

At intervals during the first six months of Ocean Cross's business, Mr. North observed that Mr. Schloth was not reviewing Emails as the WSP outlined due to his commitments and efforts to build the firm's business. Mr. North had no legal, supervisory, or constitutional power or authority to compel or force Mr. Schloth or the Municipal Securities principal to sit at a desk and review Email. His observations compelled him, however, to step in to review Email to ensure the firm performed compliance in that respect.[33]

The Commission and FINRA allow third party vendors to provide archiving and compliance services to firms and for firms to keep those records electronically as long as vendors

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[27] R. 001099 (OC Hr'g Tr. 17:20-25; 59:1-6; 83:1-17).
[28] Mot. for Add. Evid. Exhibit 2 (Huber Dec. 1 ¶¶ 5a-c, 7).
[29] R. 001337 (Enforcement Exhibit CX-14)
[30] *See supra* note 24.
[31] R. 001099 (OC Hr'g Tr. 65:22 – 66:25; 78:1 – 81:10).
[32] *Id.* (OC Hr'g Tr. 78:1-15).
[33] *Id.* (OC Hr'g Tr. 15:25 – 16:5; 81:20 – 82:16; 89:12-25; 92:10-15; 95:3-24).

comply with 17 C.F.R. §240.17a-4(f)(ii). Mr. North believed that Smarsh delivered its services as promised in its contracts and marketing and sales materials and so he reasonably relied on Smarsh's equipment and expertise to record compliance actions he and Messrs. Schloth and Bloch performed. Ocean Cross closed in 2013 less than two years after it opened.

II. Procedural Background.

Email and related ESI allegedly archived by Smarsh were intrinsic to two regulatory investigations.[34] Enforcement in the New Orleans FINRA office focused on a business relationship between a broker, LK, and a statutorily disqualified person between July 1, 2009 and September 2011.[35] When Southridge closed in late 2011, Enforcement turned its attention to Ocean Cross, because LK registered with Ocean Cross.[36] Enforcement in New Orleans filed a disciplinary action involving Southridge in July 2013; Enforcement in Boston filed a second complaint in August 2013 alleging compliance failures[37] and before mid-February 2014 Enforcement delivered ten production disks in support of its complaint against Mr. North.

During its dual investigations of Ocean Cross and Southridge, Enforcement used Emails in on-the-record interviews ("OTR" or "OTRs") that contained language and content suggesting events and actions that did not occur.[38] In particular, Enforcement Exhibit CX-2 and thousands like it suggested that LK used a non-business Email account for Municipal Securities trading.[39] Experts Mr. North retained identified other "false positive" indicators of archiving failures like

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[34] *See also* FINRA Disciplinary Proceeding No. 2010025087302, also on appeal and SEC Administration Proceeding No. 3-17909.

[35] R. 001099 (OC Hr'g Tr. 9:6-10; 11:1-25; 17:20-25; 18:9 – 19:23).

[36] *Id.* (OC Hr'g Tr. 62:17 – 65:14; 115:10 – 116:15).

[37] R. 000001.

[38] *Compare* R. 001271 (Enforcement Exhibit CX-2) *with* R. 000987 (Nov. 25 Hr'g Tr. 32:14 – 40:17). Smarsh witness Douglas could not explain how a Google *gmail* address could be displayed in an Email in a field where a Bloomberg address should be in Exhibit CX-2.

[39] *See* Opening Statement of Paul Taberner for Enforcement R. 001099 (OC Hr'g Tr. 8:5-13).

those found in Enforcement Exhibit CX-2[40] and other exhibits and Emails.

Concerns about the completeness of the ESI, error messages received when opening the files, and other discrepancies, led to the purchase of the relevant Bloomberg archives in April 2014 to compare to the Email allegedly archived by Smarsh between September 2011 and April 2012.[41] Mr. North believed that all Email and ESI had been archived by Smarsh and remained in Smarsh's control and exclusive possession until he requested that Smarsh deliver a copy of the Email and ESI directly to FINRA in response to Rule 8210 demands for records. Contrary to his presumption about Smarsh's services, however, the professionals Mr. North consulted in 2014 concluded that as much as seventy-five percent of the Email was missing and the remaining Email and ESI was pervasively spoliated and corrupted by improper third party handling and or reconstruction.[42] Undersigned counsel informed Enforcement in a telephone conference on or about July 28, 2014 regarding concerns about the integrity of *all* ESI produced by Enforcement.

On or about August 21, 2014, Mr. North filed his pre-hearing brief, pre-hearing witness list, and exhibit list;[43] he reasserted concerns about spoliation and the inadmissibility of evidence derived from the altered data.[44] Also on August 21, 2014, likely due to concerns Mr. North expressed on July 28, 2014 about spoliation to the Email and ESI, Enforcement delivered with its

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[40] R. 00001271. Enforcement Exhibit CX-2 is a Bloomberg Email message made to appear as if sent and received from a Google *gmail* account; time is also displayed in GMT format, not standard in the United States.

[41] Mot. for Add. Evid. Exhibit 2 (Huber Dec. 1 ¶ 5a).

[42] *Id.* (Huber Dec. 1 ¶¶ 8-10, 22, 29, and Conclusion); R. 000209 (Respondent North's Pre-hearing Brief); R. 000307 (Respondent's Motion in Limine, etc.); R. 000537 (Thaddeus J. North's Brief, etc.). *See also* R. 00537 (attachment: Consolidated Declaration of Andy Thomas ¶ 79c). Mr. Thomas also noted failures of the ESI due to large discrepancies in the numbers of Emails, the appearance of errors in the critical compliance information in the Email on the disks delivered by Enforcement, and multiple versions of same Emails.

[43] R. 000209.

[44] *Id.* (Pre-Hearing Brief).

opening brief, and witness and exhibit lists, an August 19, 2014 letter authored by Smarsh employee Jimmy Douglas,[45] in which Mr. Douglas claims:

> Smarsh provided Ocean Cross with *email hosting, which integrated with our email archiving platform*. Email was captured *using the journaling function*. Journaling ensures that all emails and attachments sent to, from or within a clients' domain are instantly placed in the archive. There is no window of opportunity for messages to be tampered with before they are sent to the archive.
>
> For Bloomberg archiving, *our solution interfaces with Bloomberg servers directly throughout each day*, capturing any new messages, blogs, or chats that have been sent or received by the users at a firm. Messages are fully indexed and are stored in their respective XML formats with all attachments and metadata completely preserved.
> ...
> All searches performed, including criteria used, are recorded. Reports can be generated to show those searches performed. (Emphasis added.)

On or about August 29, 2014 Mr. North objected to Enforcement's evidence due to spoliation and inadmissibility of the Smarsh Reports on Federal Rules of Evidence grounds,[46] and also filed motions in limine respecting expert testimony and the spoliated evidence.[47] Instead of addressing Mr. North's challenges to Enforcement's proposed evidence and witnesses, because of discrepancies in the Email and the absence of the supporting electronic records for the Smarsh Reports, the Hearing Officer concluded that all things relating to the equipment used and the processes of collecting, handling, and archiving the Email were irrelevant to whether Mr. North reviewed Email for compliance purposes as allegedly recorded in the Smarsh Reports.[48] The Hearing Officer scheduled evidentiary hearings for November 2014 to allow Enforcement to offer Mr. Douglas' testimony about Smarsh's archiving and the information contained in his

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[45] R. 000167 (Enforcement's pre-hearing brief and pre-hearing witness and exhibit lists); R. 001335 (Enforcement Exhibit CX-13: August 19, 2014 Letter).

[46] R. 000315.

[47] R. 000307. *See also* R. 000419.

[48] R. 000407.

August 19, 2014 letter and the Smarsh Reports.[49] On or about October 31, 2014 and November 24, 2014 Mr. North filed motions to allow additional evidence for purposes of impeachment when Enforcement offered the testimony of Smarsh witness Douglas.[50] Even though Enforcement had known for three years[51] that Ocean Cross brokers' Email was hosted by web.com, it offered Mr. Douglas to testify that Smarsh hosted the Email services, seamless archiving, and compliance support for the Ocean Cross brokers and the Hearing Officer interrupted impeachment on the subject.[52]

Mr. Douglas could not explain how a Google *gmail* address would be a sending or receiving address in Bloomberg Email messages as shown in Enforcement Exhibit CX-2 nor did he understand that the Smarsh Reports would have been prepared from the administrative or server event logs for the SMC that should have recorded exact details respecting Email compliance actions[53] taken by Messrs. North, Schloth, and Bloch.

Before the April 27, 2015 FINRA panel hearing in this matter, another Smarsh employee testified on April 13, 2015 in the Southridge proceeding that Bloomberg records relating to the Smarsh Reports were lost to failures in migrating and reingesting data in early 2014.[54] During the April 27, 2015 hearing in this matter, FINRA Examiner James McKennedy testified to "fixing"

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[49] R. 000821, 000987.

[50] R. 000807 and 000917. *See also* R. 000987 (Nov. 25 Hr'g Tr. 41:24 – 44:7).

[51] *See, e.g.*, R. 000917 (Exhibit RX-19); R. 000987 (Nov. 25 Hr'g Tr. 9:4-16; 10:15 – 11:5; 40:4 – 43:19). *See also* R. 001099 (OC Hr'g Tr. 42:20 – 45:25).

[52] *See* Mot. for Add. Evid. Exhibit 10 (Schloth Testimony Excerpts Apr. 2012 Tr. 19:20-23).

[53] Mr. Douglas described how the SMC used search terms, yet when Mr. North used the words ultimate, tier, and advisors as search words, no email containing any one of those words was produced in response to the alleged search. *See, e.g.*, R. 1293, 1297, 1325, 1329 (Enforcement Exhibits CX 9-12). *See also* R. 000821 (Nov. 5 Hr'g Tr. 45:3 – 46:16, 62:8 – 63:20); R. 000987 (Nov. 25 Hr'g Tr. 36:7-22; 38:2 – 39:20).

[54] *See id.* Exhibit 6 (Southridge Hr'g Tr. 114:13 – 115:7).

the Smarsh Reports because the reports did not reflect the leap year date of February 29, 2012.[55] During the April 27, 2015 hearing in this matter Mr. North also reasserted all prior objections respecting the Hearing Officer's evidentiary rulings.[56]

On September 3, 2015 Smarsh General Counsel Bonnie Page, who had participated in the November 2014 and the April 13, 2015 evidentiary hearings, stated that Smarsh's records are not available because of server decommissioning in July 2014, coincidental to Mr. North informing Enforcement that its production files appeared to be completely spoliated.[57]

The FINRA Hearing Panel concluded that Mr. North was liable for the compliance failures relating to Email review.[58] The NAC Panel confirmed the FINRA Hearing Panel.[59] Each referred to the Smarsh Reports as showing compliance failures and disparaged Mr. North's credibility.[60]

III. Expert Witnesses and the Additional Evidence Tendered to Commission.

Mr. North is not a technology expert and when he confronted FINRA about concerns that the production files delivered as evidence of his compliance failures were incomplete, not in native format, and appeared to demonstrate spoliation, FINRA used Smarsh to present misleading testimony and evidence. The additional evidence tendered to the NAC and Commission refutes the misleading testimony and evidence FINRA and Smarsh presented; it also explains

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[55] R. 001099 (OC Hr'g Tr. 35:1 – 36:25, 106:15 – 107:16, 143:8-14). *See also* R. 001063.
[56] R. 001099 (OC Hr'g Tr. 129:22 – 131:3).
[57] *See* Mot. for. Add. Evid. Exhibit 7 (Page Dec. ¶ 4).
[58] R. 001341.
[59] R. 001763.
[60] *See generally* R. 001341 (Hearing Panel Decision); R 001763 (NAC Panel Decision).

how Smarsh, by instructing users to change settings on their communications devices,[61] assisted FINRA in intercepting Ocean Cross Email before altering it.

The Hearing Officer ignored Mr. North's logic that the Smarsh Reports were inadmissible without the supporting source material (as opposed to excuses for its unavailability) because the condition of the Email and ESI demonstrated a failure within the archive that must have affected content and reliability of the Smarsh Reports.[62]

After learning about the data migration failure and the use of non-Y2K compliant resources Mr. North retained Frank Huber in May 2015, due to his experience with Y2K conversion, XML or "extensible markup language" computing (the native language of Bloomberg messaging), and Email transportation.[63] Mr. Huber exhaustively examined the Email and ESI used in this and the Southridge proceedings, along with testimony, exhibits, and the reports of professionals Mr. North consulted before April 2015.[64] Mr. Huber concluded that FINRA procured Smarsh to deliver instructions as the device that caused the interception of Ocean Cross brokers' Email in real time, redirecting it to a private network supported by FINRA's ISP, Internap Corp., and making it immediately accessible to Enforcement employees for purposes of preparing the types of exhibits and reports used in this and the Southridge proceedings.[65]

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[61] Although Enforcement accuses Mr. North of not marshaling his evidence, as the record and foregoing discussion show, when Mr. North challenged Enforcement's evidence, FINRA and Smarsh collaborated to offer misleading evidence and testimony.

[62] *See* R. 001099 (OC Hr'g Tr. 128-140).

[63] Mot. for Add. Evid. Exhibit 1 (Huber Dec. 5 at 10-12).

[64] *Id.* Exhibit 2 (Huber Dec. 1 ¶¶ 4-7); *id.* Exhibit 4 (Huber Dec. 3 ¶¶ 2c, 5a). Mr. North tendered Mr. Huber's first reports as additional evidence for the NAC Subcommittee to consider, however, the evidence was rejected. R. 001567.

[65] Mot. for Add. Evid. Exhibit 1 (Huber Dec. 5 ¶¶ 11, 14, 15, and Conclusion); *id.* Exhibit 3 (Huber Dec. 2 ¶¶ 5a-6, 10, and Conclusion); *id.* Exhibit 4 (Huber Dec. 3 ¶¶ 11-12).

Mr. Huber observed other relevant facts to support his conclusions: there are no servers registered to Smarsh for archiving and compliance, the Smarsh Reports were prepared on non-Y2K compliant resources and could be corrected by Enforcement Examiner(s) because of the leap year issue known to exist in non-Y2K compliant resources, Smarsh did not exist pre-2000, and the files were delivered to Mr. North by FINRA already altered.[66] Mr. Huber also concluded that Smarsh did not provide archiving compliant with Commission rules, because Smarsh did not connect to the Email server hosting the Ocean Cross Email.[67]

Mr. North objected to evidence FINRA produced and introduced, e.g., the Smarsh Reports, because it appeared from the content and condition of the Email produced that the archive had failed. The record shows that in response to Mr. North's objections and offers of evidence about failures in Smarsh's archiving and compliance support, FINRA and Smarsh offered misleading statements and testimony and the Hearing Officer(s) relegated Mr. North's evidence and concerns to being immaterial and irrelevant.[68]

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[66] Mot. for Add. Evid. Exhibit 4 (Huber Dec. 3 ¶ 11).

[67] *Id.* Exhibit 4 (Huber Dec. 3 ¶ 13).

[68] *See* FINRA's Response to Mr. North's Motion ... for the Admission of Additional Evidence etc. at 4.

ARGUMENT

I. The Hearing Officer's rulings.

Although FINRA Hearing Officers and panels may not regularly apply the formal rules of evidence, because final review of those proceedings is by petition to the Circuit Courts, Hearing Officers are not privileged to abandon principles of evidence to achieve unjust or prejudicial results. FINRA rules provide that Hearing Officers "shall receive *relevant* evidence, and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial."[69] Mr. North contends that given the condition of Enforcement's production files, of which Enforcement Exhibit CX-2 is an example, facts that prove whether the Email was properly archived *and available in the SMC* for compliance actions are relevant to the admissibility of the Smarsh Reports. He asserts that Enforcement's introduction of Smarsh's misleading statements about Email services and the contents of the Smarsh Reports were insufficient to overcome the implications of the failure of the Email archive as reflected in Enforcement's Exhibit CX-2. Because it is now known that Smarsh does not own, operate or control any registered servers to provide its alleged services, Smarsh had no intent or ability to support the SMC and produce the Smarsh Reports.[70] The Hearing Officer's decision that Emails and expert testimony about the condition of the Email were irrelevant to the admissibility of the Smarsh Reports ignores common sense and logic, because the Smarsh Reports were prepared from the same non-Y2K compliant system allegedly archiving the Email and recording compliance actions.[71]

Mr. North asserts that the Hearing Officer intentionally avoided the relevance of the Email and its metadata because she recognized that Enforcement had the means (the expertise

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[69] FINRA Rule 9263(a).

[70] Mot. for Add. Evid. Exhibit 3 (Huber Dec. 2 ¶ 6).

[71] *Id.* Exhibit 4 (Huber Dec. 3 ¶ 12).

and equipment), the opportunity (its control over the record and its relationship with Smarsh), and the motive (to facilitate prosecution of targeted firms and brokers) to carry out the actions that affected the content and appearance of the Email and the Smarsh Reports in this case.

A. The Hearing Officer's and NAC Subcommittee's evidentiary rulings are not harmless error.

Mr. North contends that FINRA's and Smarsh's actions of intercepting the Ocean Cross brokers' Email interfered with his and the Ocean Cross firm's compliance. He asserts further that the Hearing Officer's evidentiary rulings and the NAC Subcommittee's refusal of additional evidence were not harmless errors and affected his substantive right to present evidence in his defense,[72] "contributed to the findings of liability", and changed the outcome of the proceedings. The rulings by the Hearing Officer and the NAC Subcommittee were prejudicial because they attempted to and nearly eliminated all evidence of Enforcement's and Smarsh's unconstitutional and unlawful and conduct.[73]

A proper archive preserves all communication "records *exclusively in a non-rewriteable, non-erasable format*".[74] Other rules require FINRA members to review firm correspondence that is preserved.[75] The rules recognize that "correspondence" includes written letters and electronic mail messages distributed by FINRA members.[76] The Commission and FINRA permit members

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[72] His substantive rights include the right to present evidence and receive prosecutory and exculpatory evidence, which in this case was either lost or destroyed and spoliated by the combined efforts of Enforcement and Smarsh.

[73] Mot. for Add. Evid. Exhibits 1-10.

[74] *See* 17 CFR 240.17a-4(f)(2)(ii)(A) (emphasis added). *See also* Mot. for Add. Evid. Exhibit 5 (Huber Dec. 4 ¶¶ 6-7).

[75] "In 1998, recognizing that the growing use of electronic communications such as email made adherence to this requirement difficult, FINRA amended its rules to allow members the flexibility to design supervisory review procedures for correspondence with the public that are appropriate to the individual member's business model." FINRA Regulatory Notice ("RN") 07-59 at 5 (December 2007).

[76] FINRA Rule 2210.

to outsource functions related to IT and technology, such as Email archiving and electronic review platforms (e.g., the development and/or implementation of a lexicon system).[77]

Harmless error is an "...error, defect, irregularity or variance which does not affect substantial rights ...."[78] The essence of the harmless error rule is that a judgment may stand only when there is no reasonable possibility that an error respecting the admission or refusal to admit evidence *might have contributed to findings of liability.*[79] An appellate body has the duty to view evidence in an underlying proceeding as a whole and not reverse decisions about the admissibility of evidence on the basis of errors, which are, in fact, harmless.[80]

It is also important that

> [a]ll 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects *which do not affect the substantial rights of the parties.*'[81] None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions *for small errors or defects that have little, if any, likelihood of having changed the result of the trial.*[82]

FINRA rules address the issue of harmless error in the context of Enforcement failing to make documents and statements available to respondents.[83] For example, and relevant here is Rule 9251 (g), which provides:

> In the event that a Document required to be made available to a Respondent pursuant to this Rule is not made available by the Department of Enforcement or the Department of Market Regulation, no rehearing or amended decision of a proceeding already heard or decided shall be required unless the Respondent establishes that the failure to make the

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[77] *See* FINRA RN 07-59 n. 24. *See also* NASD NTM 05-48 (July 2005).

[78] *See* 28 U.S.C. § 2111. *See also* Fed. R. Crim. P. 52(a).

[79] *United States v. Hasting*, 461 U.S. 499, 506 (1983).

[80] *United Statesl. v. Montgomery*, 998 F.2d 1011 (4th Circ. 1993).

[81] *Id.*

[82] *Chapman v. State of California*, 386 U.S. 18, 22-23 (1967) (citations omitted; emphasis added.)

[83] *See* FINRA Rules 9251 (g) and 9253 (b).

> Document available was not ***harmless error***. The Hearing Officer, or, upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the National Adjudicatory Council, shall determine whether the failure to make the document available was not ***harmless error***, applying applicable Association, Commission, and *federal judicial precedent*. (Emphasis added.)

In this case, all records relevant to the Email and Smarsh Reports were not made available. Professionals who compared the numbers of unduplicated electronic files contained in the ten disks Enforcement delivered to Mr. North in early 2014 with the numbers of Emails Mr. North obtained from other sources confirmed that large quantities of Emails were lost, destroyed or withheld by Smarsh or FINRA or both of them,[84] the Email and ESI delivered to Mr. North were spoliated and altered,[85] and the underlying source materials used to create the Smarsh Reports, e.g., administrative or server event logs, were not produced or required.[86] The NAC Panel refused to consider the additional evidence regarding these failures and deferred to the Hearing Officer's rulings and Hearing Panel's decision.

Mr. North contends that had the Hearing Officer and NAC Subcommittee been attentive to the implication of a failed or non-existent archive and SMC, each would have demanded an investigation instead of ignoring relevant facts before them. Had the Hearing and NAC Panel heard evidence of how Enforcement and Smarsh actions created the façade of archiving and compliance report production, the outcome of the proceedings would have been different. No person should be found liable on false evidence created in violation of federal laws. Using false

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[84] *See generally* R. 000537 (Consolidated Declaration of Andy Thomas), rejected by the Hearing Officer, R. 000771. Like Mr. Huber had, Mr. Thomas examined and compared the production files from Enforcement to LK's Bloomberg messages and other Emails obtained from LK's and Mr. North's computers and found that as much as seventy-five percent of the Email was unaccounted for. *See* Mot. for Add. Evid. Exhibit 4 (Huber Dec. 3 ¶ 7).

[85] *See* Mot. for Add. Evid. Exhibit 1 (Huber Dec. 5 ¶ 6); Exhibit 2 (Huber Dec. 1 ¶¶ 5a, 5b, 8-11).

[86] *See* R. 000537 (Respondent's Motion to Compel, etc.); R. 000771 (Order); R. 000987 (Nov. 5 Hr'g Tr. 62:8 – 63:3.

evidence to prosecute is not harmless error.

B. The Email and how and why it appeared spoliated are relevant.

Given that FINRA members have duties to archive Email and review it[87] and Enforcement has *Jencks* and *Brady*[88] duties to make exculpatory documents and materials available to Mr. North, neither the quantity nor the condition of the Email is irrelevant. Mr. North contends that properly archived Email in a searchable platform is a necessary prerequisite to performing compliance Email review. In this case, before FINRA delivered its production disks in early 2014, Mr. North reasonably presumed that Smarsh archived the Ocean Cross Emails as required by law and held that archive in a searchable SMC recording his and others' compliance actions. To the contrary, however, the condition and content of the Email deemed irrelevant reveals that Smarsh did not archive it.

Evidence is relevant when it tends to prove facts of consequence to the outcome of a matter.[89] Mr. North urges that predicate issues in this case were the authenticity of the Smarsh Reports and whether the reports accurately reflected Mr. North's or other's compliance actions, which neither could be because Smarsh does not own, operate, or control any registered servers.

> The general rule is that relevant evidence is admissible.[90] Relevant evidence ... is "evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[91] Under this test, there is no such thing as "highly relevant" evidence or, as

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[87] *See, e.g.*, 17 C.F.R. § 240.17a-4(f)(2)(ii)(A)-(D).

[88] *Jencks v. United States*, 353 U.S. 657 (1957) ("We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial.") *Brady v. Maryland*, 373 U.S. 83 (1963) ("Suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process.)

[89] *United States v. Foster*, 986 F.2d 541, 545 (D.C. Cir. 1993).

[90] Fed. R. Evid. 402.

[91] Fed. R. Evid. 401.

the government puts it in its brief, "marginally relevant" evidence. Evidence is either relevant or it is not.

"Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case."[92] The initial step in determining relevancy is therefore to identify the "matter properly provable." As Professor James[93] explained in a highly-regarded article, "[t]o discover the relevancy of an offered item of evidence one must first discover to what proposition it is supposed to be relevant."[94]

To prove the authenticity of the Smarsh Reports, the existence of the archive and the SMC must be proven. If the archive and SMC do not exist, because Smarsh does not own operate or control any registered services to provide those services, then the nonexistence of the archive and SMC are relevant. The condition and content of Email and metadata are relevant, because, according to authorities, the metadata[95] reveals the handling of the Email, and whether or not Emails were preserved in compliance with Commission rules.[96] Whether the Ocean Cross Email was or was not archived as Commission rules require is a relevant and material fact of consequence that the appearance of the Emails in Enforcement's Exhibit CX-2 tends to prove. The fact that the thousands of Email files were delivered to Mr. North in an already altered condition suggesting securities law violations demonstrates the failure of the alleged archive and Enforcement's hand in it.

C. The Smarsh Reports were inadmissible.

When Enforcement counsel Taberner delivered reports similar to CX-9 through CX-12 to

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[92] Advisory Committee's Note to Fed. R. Evid. 401.

[93] James, Relevancy, Probability and the Law, 29 CAL. L. REV. 689, 696 n. 15 (1941).

[94] *Foster*, 986 F.2d at 545.

[95] *See supra* note 14.

[96] The duty to preserve data files is imposed on FINRA members, who may satisfy that duty by using third party retention vendors like Smarsh. NASD NTM 05-48 (July 2008).

Mr. North in 2013, Mr. North complained that the reports were wrong.[97] Mr. North challenged the Smarsh Reports as inadmissible.[98] At the hearing, Mr. North emphasized again: "I know I reviewed emails for Ocean Cross quite often, and to show me a report that just says, 0, 0, 0, 0, 0, there is obviously something wrong with that report or the person that put it together."[99]

The admissibility of the Smarsh Reports is not dependent upon the number of times Enforcement relies on records produced by Smarsh nor on Smarsh's self-proclamation about being a leading archivist with over 20,000 customers.[100] The Federal Rules of Evidence and judicial precedent provide guidance.[101] To pass the test of credibility and reliability requires that evidence not be hearsay, that it can be authenticated, and that a proper foundation can be laid for its admissibility.[102] The Hearing Officer's treatment of the Smarsh Reports was a deliberate and misguided departure from tested rules of evidence and judicial precedent.

Even if Mr. Huber had not determined why and how the Email was intercepted, redirected, and altered, because the production Email and ESI demonstrated alteration and evidence of improper third party reconstruction, it is irrational to believe that Smarsh could have produced reliable or credible compliance reports from an archive in which Email content was altered. Because the Hearing Officer admitted the Smarsh Reports,[103] the Hearing and NAC Panels discredited Mr. North because the content of the reports made it appear that Mr. North did not review Email as he testified to doing.

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[97] R. 001099 (OC Hr'g Tr. 83:18 – 84:15; 109:8 – 110:21).

[98] *See* R. 000315. As a result of his challenge, Enforcement offered the testimony of Smarsh witness Douglas. *See* R. 000791, 000801, 000821, 000913, and 000987.

[99] *Id.* (OC Hr'g Tr. 84:16-20).

[100] *See* https://www.smarsh.com.

[101] FINRA Rule 9251 (g).

[102] Fed. R. Evid. 401, 402, 803(6), 901, 902, 1006.

[103] *See* R. 000821 (Nov. 5 Hr'g Tr. 5:8-14); R. 001099 (OC Hr'g Tr. 4:2-3).

1. Smarsh's witness was misleading and unqualified.

The Smarsh Reports are not self-authenticating documents.[104] If considered records of a regularly conducted business activity, the reports may fit one of the hearsay rule exceptions for admissibility as long as certain conditions are met. Fed. R. Evid. 901 provides that when authenticating a document, evidence "sufficient to support a finding that the item is what the proponent claims it is" is necessary, which evidence is often in the form of testimony of a witness with knowledge.[105] Mr. North urges that FINRA did not meet the exceptions, particularly respecting testimony of a qualified witness to authenticate the reports.[106]

Enforcement solicited Smarsh witness Douglas[107] to prove that Smarsh archived the Ocean Cross Email, even though the condition of the Email and its metadata demonstrates otherwise. Mr. Douglas was neither a qualified witness according the Rule 803(6) nor a "witness with knowledge" according to Rule 901.[108] His august 19, 2014 letter was rife with inaccuracy.[109] Mr. Douglas had no first hand knowledge of the Ocean Cross Email account set-up and maintenance,[110] his background with Smarsh is in sales and social media, and he did not know where the Ocean Cross Email was physically archived. Mr. Douglas did not prepare or participate in the preparation of the Smarsh Reports, and he did not supervise the persons who

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[104] Fed. R. Evid. 902.

[105] Fed. R. Evid. 901 (b) (1).

[106] Fed. R. Evid. 803 (6) (D).

[107] *See* R. 001335 (Enforcement Exhibit CX-13); R. 000821 and 000987 (November Hr'g Trs.)

[108] *See supra* notes 38, 50, 51, 53 and accompanying text.

[109] *See* R. 001335 (Enforcement Exhibit CX-13). Because Douglas misrepresented that Smarsh hosted the Email servers and services to Ocean Cross, Mr. North tendered Exhibit RX-19 for impeachment as evidence that the actual host of Ocean Cross's Email services was Web.com. The Hearing Officer rejected the evidence. R. 000987 (Nov. 25 Hr'g Tr. 9:4-16) *See supra* notes 49-52 and accompanying text.

[110] Mr. Douglas is involved in "sales" and social media at Smarsh. *See* R. 000821 (Nov. 5 Hr'g Tr. 71:10-19); R. 000987 Nov (Nov. 25 Hr'g Tr. 39:21 – 40:3; 44:11-20).

prepared the alleged Smarsh Reports.[111] Mr. Douglas misrepresented the services allegedly provided by Smarsh to Ocean Cross, insisting that Smarsh hosted the Email server(s) and services to Ocean Cross, when, in fact, Web.com hosted the Email services.[112] When Mr. North challenged Mr. Douglas' technical knowledge regarding archiving, and asked questions about the Emails, the Hearing Officer interrupted and suggested answers or disallowed the questioning.[113] Mr. Douglas also did not understand how administrative or server event logs must be used to create spreadsheets in the form of the Smarsh Reports.[114] It was evident from his testimony that while Mr. Douglas could generally explain the information shown in the Smarsh Reports,[115] he *could not explain how an Email from a Bloomberg account would show as being sent and received from a non-Bloomberg Email service provider*, e.g. Google *gmail*.[116] Mr. North suggests that Mr. Douglas would also be unable to explain how non-Bloomberg Email addresses, like those shown in Enforcement's Exhibit CX-2, or the other anomalies in the production Email, would be interpreted within the alleged SMC in response to compliance user queries or shown within the Smarsh Reports.

2. The Smarsh Reports were created on non-Y2K compliant resources.

Problematic is the fact that person(s) prepared the Smarsh Reports on a computer system that is non-Y2K compliant and in violation of federal law.[117] FINRA Examiner McKennedy

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[111] R. 000821 (Nov. 5 Hr'g Tr. 58:19 – 61:2).

[112] R. 000987 (Nov. 25 Hr'g Tr. 39:21 – 40:3; 44:11-20).

[113] *Id.* (Nov. 25 Hr'g Tr. 33:9 – 40:17).

[114] R. 000821 (nov 5 Hr'g Tr. 62:8 – 63:3).

[115] *Id.* (Nov. 5 Hr'g Tr. 16:1 – 29:20); R. 000987 (Nov. 25 Hr'g Tr. 29:20 – 32:13).

[116] R. 000987 (Nov. 25 Hr'g Tr. 36:7 – 39:20).

[117] NASD NTM 97-16 (March 1997) sets forth requirements for FINRA (formerly NASD) members to become Y2K compliant, and further that "*[c]omputer failures related to Y2K problems generally will be considered neither a defense to violations of firm's regulatory or compliance responsibilities nor a mitigation of sanctions for such violations.*" In this case the

"fixed" the reports to correct a leap year issue, known to exist in non-Y2K compliant systems and software.[118] The fact that the reports were created with noncompliant computers and software is not only illegal, it is inconsistent with Smarsh being a post-2000 global archiving company. The use of non-Y2K compliant resources is consistent, however, with the conclusion that Enforcement made up *and* fixed the Smarsh Reports.

3. The Smarsh Reports lack supporting source material and foundation.

No supporting data in the form of administrative, server, event, or activity logs were made available to validate the Smarsh Reports. Mr. North objected to the reports and moved to compel Smarsh or Enforcement to provide the underlying source material to the Smarsh Reports according to the Federal Rules of Evidence,[119] due to the hearsay and foundation limitations inherent to summaries.[120]

The Hearing Officer did not require FINRA to produce the source data for the Smarsh Reports;[121] the pre-hearing evidentiary hearings in November 2014 allowed Enforcement and Smarsh to perpetuate the illusion of seamless archiving and compliance support for the Smarsh Reports,[122] confounding the principles articulated in Fed. R. Evid. 1006, which provides:

> The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent *must make the originals or duplicates available* for examination or copying, or both, by other parties at a reasonable time and place. (Emphasis added.)

Without the underlying SMC server event logs, no one can vouch for the Smarsh Reports,

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failure was not due to Mr. North or the Ocean Cross firm, but a failure by Smarsh or Enforcement – whomever prepared the Smarsh Reports. *See also* Mot. for Add. Evid. Exhibit 4 (Huber Dec. 3 ¶ 12).

[118] R. 001099 (OC Hr'g Tr. 35:9 – 37:6).

[119] R. 000537 (Motion to Compel, etc.).

[120] *See* R. 000315. *See also* Fed. R. Evid. 803 (6); 901, 902, and 1006.

[121] R. 000407.

[122] R. 000821, 000987.

because, depending on the witness, the supporting data is gone either due to server decommissioning or unsuccessful migration and reingestion of Bloomberg Email files.[123] This coincidental unavailability of files occurred only after Mr. North brought his concerns about spoliation to the attention of Enforcement on or about July 28, 2014.

D. Expert testimony was necessary and relevant to inform the Hearing and NAC Panels; the additional evidence tendered is relevant and material to the Commission's review of the Hearing and NAC Panel decisions.

Interpreting Email metadata is outside of the competence and understanding of most laypersons and adjudicators, and therefore, expert testimony[124] was necessary in this case and relevant to interpret or explain the anomalies in the Email, the Email metadata, and likely source material for the Smarsh Reports. Expert testimony was also necessary to inform the Hearing and NAC Panels about the causes and extent of, and the parties responsible for the content and condition of the Email produced by Enforcement and how the alterations to the Email affected firm and individual compliance and the content of the Smarsh Reports.

When Mr. North raised concerns respecting spoliation, instead of encouraging expert testimony or appointing a disinterested expert for the benefit of the Hearing Panel, the Hearing Officer excised the issue from the process as *irrelevant*.[125] Mr. North contends that the NAC Panel decision would have been different had the NAC Subcommittee admitted the additional evidence tendered in September 2015,[126] because the panel would have learned the Email and its metadata show that the Email was intercepted and intentionally altered in real time, interfering with compliance so that Enforcement could change Email content and create the Smarsh Reports.

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[123] *See* Mot. for Add. Evid. Exhibits 6 and 7. *See also* R. 001099 (OC Hr'g Tr. 97:15 – 98:17).

[124] Expert testimony may be offered by a witness who is "qualified as an expert by knowledge, skill, experience, training, or education...." Fed. R. Evid. 702.

[125] R. 000407, 001037.

[126] R. 001517; R. 001361.

II. Supervision and Email Review.

A. Mr. North was not a supervisor.

Mr. North was *purposefully not designated* as supervisor of any employee or designated in the WSP to review Email[127] because of the wide range of competing operational duties he had at Ocean Cross during the examination period.[128] In addition to the orderly closure of Southridge and the transition of brokers and accounts,[129] up to fifty percent of Mr. North's time was occupied with responding to regulator inquiries.[130]

FINRA Rule 3110 (a) (2) (former NASD Rule 3010) and MSRB Rule G-27 (a) and (c) contemplate supervision of securities activities by appropriate supervisory principals. Mr. North emphasizes that current rules reflect long held policies respecting supervision. FINRA RN 14-10 provides that new rule 3110(a)(2) requires firms to "designate an appropriately registered principal(s) with authority to carry out the supervisory responsibility for each type of business" engaged in by the firm.[131] FINRA Rule 3110(a)(5) and (6) require that each registered person be assigned to an *appropriate* representative or supervisor *with the necessary experience or training to perform supervision*.[132] Mr. North was not a Municipal Securities Principal.[133] The vast majority of Email at issue involved municipal securities trades and Bloomberg communications by one registered representative, LK; therefore, it was not appropriate for Mr. North to supervise Email dealing with municipal securities transactions.

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[127] R. 001337 (Enforcement's Exhibit CX-14); R. 001339 (Respondent's Exhibit RX-12).

[128] R. 001099 (OC Hr'g Tr. 48:17 – 49:25; 20; 65:22 – 66:25; 74:6-23; 78:1-23.

[129] *Id.* (OC Hr'g Tr.65:19 – 66:25; 79: 15 – 81:4).

[130] *Id.* 68:10 – 69:5; 77:10 – 78:23; 71:1-16.

[131] FINRA RN 14-10 at 2 (March 2014).

[132] *Id.* at 3. In this case, both Messrs. Scholth and Bloch had supervisory responsibility over to LK's Email; Mr. Schloth was her direct supervisor and Mr. Bloch was the Municipal Securities principal.

[133] R. 001099 (OC Hr'g Tr. 15:25 – 16:5).

Mr. North surmises that Enforcement focused on Mr. North because he had been primarily responsible for Email review at Southridge and because Mr. North candidly admitted that during the first six months of Ocean Cross' business, he often stepped in to review Email because he observed that President Schloth "wasn't doing it" as the WSP designated; he and Mr. Schloth were responsible for organizing all aspects of starting up the firm's business.[134] Enforcement was determined, however, to impose on Mr. North all supervisory responsibility for all Email notwithstanding that such an imposition is contrary to the FINRA and MSRB supervision principles and Ocean Cross WSP identifying the President or other "designated principal" as responsible for review Email.[135]

In addition there are no facts, writings, or other directives to show that Mr. North was designated as a supervisor at Ocean Cross for purposes of Email review. Instead, he did what any CCO would do to fill the gap, knowing that Email review needed to occur, even though he did not have the supervisory authority or requisite experience.[136]

Enforcement targeted only Mr. North for Email review and failed to inquire at any time about, or request any evidence of Email review by the supervisory principals, Messrs. Schloth or Bloch.[137] Therefore, the Hearing Panel's conclusion that Mr. North was the sole person responsible for Email review or that others did not have administrative access or duties to review Email, contradicts the facts in evidence, e.g., the WSP and testimony,[138] and assumes facts not in

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[134] R. 001099 (OC Hr'g Tr. 52:6-10; 54:12-19; 81:20 – 82:16; 95:3-24).

[135] *Id.* (OC Hr'g Tr. 26:17-23; 89:12-25).

[136] *Id.* (OC Hr'g Tr. 49:20 – 50:23; 54:12-19; 94:1 – 95:24).

[137] *Id.* (OC Hr'g Tr. 15:25 – 16:5; 23:4 -24:19; 26:17-23; 89:12-25; 92:10-15). Mr. Douglas also did not know whether Smarsh set up others at the firm for administrative access to review email R. 00987 (Nov. 25 Hr'g Tr. 19:13-22).

[138] *See* R. 001339 (Respondent's Exhibit RX-12). Enforcement investigator McKennedy's testimony about being told Mr. North was responsible for Email review is classic hearsay and was objected to. R. 001099 (OC Hr'g Tr. 24:13-19).

evidence, i.e., that others performed no Email review at all and that Mr. North had the power and authority to control or force Messrs. Schloth or Bloch to review Email. Even though others had supervisory duties[139] neither the firm nor Smarsh were ever asked to produce records that would reflect Email review performed by Messrs. Schloth or Bloch.[140]

The Hearing Panel relied on cases regarding the role of a supervisor that are inapplicable and distinguishable. *Gutfreund* involved an in-house legal counsel's willful failure to report that three members of senior management within the firm's government trading desk who had submitted a false bid in an auction of U.S. Treasury securities.[141] Here, Mr. North stepped in to review Email when he observed the designated supervisors had not reviewed Emails as often as they should.[142] In the case of *George J. Kolar,* Kolar was made aware of possible violations of securities laws, investigated them and concluded that misconduct had not occurred. Nonetheless, the Commission focused on "whether, after being alerted to *possible* misconduct by Turner, Kolar took reasonable measures to prevent the violations that followed."[143] *Kolar* continues, "[D]etermining if a particular person is a 'supervisor' depends on *whether, under the facts and circumstances of a particular case, that person has a requisite degree of responsibility, ability or authority to affect the conduct of the employee whose behavior is at issue.*"[144] (Emphasis added.) Unlike *Kolar*, Messrs. Scholth's and Bloch's overlapping duties were meant to ensure that LK's municipal securities trades and Email were regularly examined, due to FINRA's scrutiny.[145]

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[139] *Id.* (OC Hr'g Tr. 15:25 – 16:5; 83:14-17; 92:10 -15). *See also* FINRA Rule 3110 (a)(2).
[140] *Id.* (OC Hr'g Tr. 89:22-25).
[141] *See John H. Gutfreund,* 51 S.E.C. 93, 108 (1992).
[142] R. 001099 (OC Hr'g Tr. 52:6-10; 54:17-19; 74:24 – 75:14; 85:17 – 86:21; 104:20 – 105:7).
[143] *George J. Kolar,* 55 S.E.C. 1009, 1016 (1992) (Emphasis added.)
[144] *Id.*
[145] R. 001099 (OC Hr'g Tr. 83:2-17).

B. No rule requires daily email review.

The WSP were not criticized as deficient. The Hearing and NAC Panels' decisions, however, wrongly elevated the terms of the WSP, e.g., daily Email review, as having equal or greater authority than the rules with which the WSP were intended to comply.[146] No rule or law requires daily or any particular time intervals to be designated in WSP for Email review notwithstanding terms in the firm's WSP;[147] no rule provides that a CCO is solely responsible for Email review or vicariously liable for the compliance failures of principals over whom the CCO has no supervisory, legal, or constitutional authority. Mr. North's responsibility was to ensure a reasonably designed supervisory system existed to achieve compliance with applicable federal securities laws as "a product of sound thinking ... common sense, [considering] factors that are unique to a member's business."[148] The WSP could have been amended to reflect different intervals for Email review in line with the firm's business and still be compliant with appropriate supervision. FINRA recognizes that no matter how comprehensive or vigilant, a "supervisory system cannot guarantee firm-wide compliance with all applicable laws and regulation and FINRA rules."[149]

II. The Hearing Officer showed bias.

The Hearing Officer demonstrated bias in favor of Enforcement in evidentiary rulings by blocking all of Mr. North's efforts to present evidence of what he perceived to be massive failures in the services Smarsh was to have provided and to defend himself against what he contends are spurious charges made from altered evidence, illegally obtained by Enforcement

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[146] R. 001341 (Hearing Panel Decision at 10-12).

[147] FINRA RN 07-59 at 10-14; 17 C.F.R. § 240.17a-4(f)(2)(ii)(A)-(D). *See generally* SEC Interpretation Release No. 34-47806 (May 12, 2003); NASD NTM 07-30 at 8-11 (June 2007).

[148] FINRA RN 14-10 at 17 n. 4 (citations omitted).

[149] *Id.*

with assistance from Smarsh. Mr. North urges again that because Smarsh does not own, operate, or control any registered servers, only Enforcement could have handled the Email and created the Smarsh Reports at issue with its resources and its access to government resources. The cumulative effect of the Hearing Officer's evidentiary rulings covered up Enforcement's misconduct and prejudiced Mr. North.[150] Even though the conduct under scrutiny involved Email supervision, the Hearing Officer was not neutrally disposed and irrationally determined there the Email itself had no relevance, even though critical compliance content like that observed in Enforcement Exhibit 2, such as the sender, receiver, date, and time in the Email headers, demonstrates it was not archived in a manner compliant with Commission rules or that it had not been archived at all. Her predisposition respecting the relevance of the Email, which could not in the world of computing display the content shown in Enforcement Exhibit CX-2, is shown in one particular discussion before the Hearing Panel:[151]

> BY MS. MILLER:
>
> Q: Do you remember seeing this particular Exhibit?
>
> [MR. NORTH]
>
> A: I believe it was given to me from FINRA as an Exhibit.
>
> Q: And looking at the top line, Aubrey Hurse is the gentleman you just referred to?
>
> A: Correct.
>
> Q: And he is not an Ocean Cross employee.
>
> A: No.
>
> Q: Okay. And below it says LeslieKing@gmail. Smarsh doesn't collect from the Gmail?
>
> A: Correct.
>
> Q: Did anyone ever contact Bloomberg or did you ever contact Bloomberg to find out how this would have been coming from a Bloomberg system?
>
> MR. TABERNER: Objection. Relevance.
>
> HEARING OFFICER CARLONI: What is the relevance to that?

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[150] *See, e.g.*, R. 001099 (OC Hr'g Tr. 87:22 – 89:3).

[151] R. 001099 (OC Hr'g Tr. 87:13 –89:25).

MS. MILLER: Well, you know these whole proceedings are about email and email review.

HEARING OFFICER CARLONI: Okay, but this – these email have nothing to do with his review. What has to do with his review are the Exhibits 9-13. So this email, CX-2 has nothing to do with his review. Nothing to do with his review.

MS. MILLER: If he had never seen it before maybe it didn't exist, and maybe this is a false document.

HEARING OFFICER CARLONI: But you've entered this document into evidence. Enforcement is not using this document to try to prove that he did or did not review email. What I want to stay on is the proof that Mr. North is responsible for reviewing emails – not that he just did it, but his responsibility that he was specified as the responsible party, and how often he did it. That's what I want to stick with.

This email doesn't really tell me anything. This email is -- it doesn't really tell me whether -- if Mr. North reviewed email, he can tell us that, but --

BY MS. MILLER:

Q: Did any of these email s in RX-2 (sic) ever come up as one of your exceptions?

HEARING OFFICER CARLONI: CX-2 actually.

MS. MILLER: I'm sorry, CX-2.

A: I don't remember if one of these was the one that I came up with.

I don't remember. It was a long time ago.

Q: So during the time you were at Ocean Cross, and during the approximately six to eight months that it was in business, who was the designated person responsible for reviewing email?

A: Bill Schloth, like it says in the WSP.

Q: And you assisted by providing email review yourself – correct?

A: Correct. I was familiar with the system because I had done it at Southridge, so when -- it was just Bill and I, it made sense that I help out.

Q: And do you recall FINRA ever asking for production of the email review that was performed by Mr. Schloth?

A: I don't believe so.

Otherwise, the Hearing Officer consistently denied the relief sought by Mr. North, except on one occasion when she continued the December 16, 2014 hearing date to April 27, 2015 because Mr. North's mother committed suicide on December 15, 2014.[152]

A. The Maloney Act.

1. The Maloney Act did not contemplate FINRA's abuse of process and power.

The Maloney Act provided a path for the Commission to delegate securities law enforcement to SROs, like FINRA.[153] However, the Maloney Act contemplated that approved SROs would *enforce* securities laws,[154] *not violate federal laws* to achieve prosecutions by whatever means an SRO might have at its disposal. Mr. North asserts that FINRA's misconduct in procuring Smarsh to intercept his business *and personal* Email and that of other Southridge brokers violated the mandates of the Maloney Act,[155] the ECPA, and the Fourth Amendment's prohibition against unlawful searches and seizures.

Mr. North urges that the evidence in this case illustrates how FINRA interfered with the operations and compliance of the Ocean Cross firm by intercepting brokers' Email without lawful authority. Mr. North did not know until he consulted Mr. Huber that Smarsh does not have the intent or ability to archive Email and that Smarsh facilitated the interception of business *and personal*[156] Email of the registered Ocean Cross brokers the time each received instructions from Smarsh allegedly for their Email "archiving" set-up.

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[152] R. 001065, 001069.

[153] *See* The Maloney Act of 1938, 15 U.S.C. § 78o-3 (2012).

[154] *Id.*

[155] *Id.* 15 U.S.C. § 78o-3 (b)(8).

[156] In other words, because personal Email was also intercepted and delivered to FINRA, FINRA employees knew about personal, social and family relationships, events, and plans. The presence of "emailarchive@greenfieldcapitalarchive.com" in the metadata demonstrates that the arrangement to intercept and redirect Email began when Smarsh contracted to archive Email for

Whether FINRA is either an out-of-control SRO or there is rogue group of actors who have disregarded all propriety, it required extraordinary effort by FINRA to carry out and conceal its misconduct. There was and is no "better good" served by FINRA's conduct with Smarsh. FINRA does not have the discretion to violate the law and then use its control of the record to hide its misconduct.

B. FINRA has no authority or immunity for its unlawful actions.

FINRA, as an SRO, is traditionally protected by immunity for prosecutorial and administrative actions. In this case, however, FINRA's actions towards the Email and alleged Smarsh Reports are not entitled to immunity because FINRA's conduct was illegal and unconstitutional.[157] Prosecutorial or absolute immunity extends to SROs like FINRA; "... when they perform their statutorily delegated adjudicatory, regulatory, and prosecutorial functions."[158] Importantly and consistent with the caution to narrowly construe immunity "[w]hen an SRO is not performing a purely regulatory, adjudicatory, or prosecutorial function, but rather acting in its own interest as a private entity, absolute immunity from suit ceases to obtain."[159]

The *Weissman* case highlights two critical points respecting immunity: an SRO like FINRA enjoys immunity when "engaged in conduct consistent with the quasi-governmental

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Greenfield Capital in 2005, long before probable cause existed to initiate an investigation, examination, or judicial proceeding against Mr. North or any registered brokers of Ocean Cross. *See* Mot. for Add. Evid. Exhibit 3 (Huber Dec. 2 ¶ 3 and attachment 3)

[157] *North, et al v. Smarsh Inc., et al*, 160 F. Supp. 3d. 63, 88 (2015).

[158] *Weissman v. National Ass'n of Securities Dealers*, 500 F.3d 1293, 1297 (11th Cir. 2007) (NASDAQ's advertising activity was not an adjudicatory, regulatory, or prosecutorial function.) (citations omitted). *See also Barbara v. New York Stock Exch.*, 99 F.3d 49, 59 (2d Cir.1996); *Austin Mun. Sec., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 692 (5th Cir.1985); *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1215 (9th Cir. 1998); *Zandford v. Nat'l Ass'n of Sec. Dealers, Inc.*, 80 F.3d 559, 559 (D.C. Cir. 1996).

[159] *Weissman*, 500 F.3d at 1297.

powers delegated to it ...." and "only when an SRO is "*acting in its capacity as a[n] SRO.*"[160] *Weissman* emphasized that immunity does not apply "*whenever*" an SRO engages in conduct that is simply "*consistent with*" its powers.[161] Mr. North urges that it is not consistent with an SRO's authority to violate the law and initiate regulatory action in which the SRO's absolute control over the record is used it to cover up its unlawful and unconstitutional conduct.

1. Immunity does not apply because FINRA's actions occurred outside of the boundaries of absolute or qualified immunity.

Considering the origins of the prosecutorial immunity,[162] "immunity must be narrowly construed;"[163] it only protects those acting *within the scope of the official duties of prosecutors* to ensure "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."[164] Mr. North emphasizes that absolute immunity[165] is limited to conduct within the professional function that the immunity was designed to protect.[166] Immunity does not allow violating federal law or the U.S. Constitution.

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[160] *Id.*

[161] *Id.* (emphasis added).

[162] After the enactment of 42 U.S.C. § 1983 (2012), the Supreme Court developed the common law of absolute and qualified immunity as a matter of public policy to protect certain classes of persons from the potential of frivolous litigation based on § 1983. The statute created a cause of action for damages against "[e]very person who, under the color of "state or local law, subjects "any citizen ... to the deprivation of any rights privileges, or immunities secured by the Constitution and laws" of the United States.

[163] *Weissman*, 500 F.3d at 1297.

[164] *See Imbler v. Pachtman*, 424 U.S. 409, 427-31 (1976).

[165] *Imbler* described the doctrine of qualified immunity is associated with investigative conduct and protects the actor—whether an investigator, examiner, law enforcement officer, or prosecutor—from liability for all other conduct not "intimately associated with the judicial phase" and when the person acted in good faith and without malice. *Id.*, 424 U.S. at 430.

[166] *Pierson v. Ray*, 386 U.S. 547, 553-553 (1967. *See also Imbler*, 424 U.S. at 430 (Immunity applies to the judicial phase of a criminal process.); *In re Series 7 Broker Qualification Exam Scoring Litigation*, 548 F.3d 110, 114 (D.C. Cir. 2008) (It applies to regulatory action). See also *Weissman*, 500 F.3d at 1296; *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993) (Immunity attaches when there is probable cause to arrest an identified defendant); *Newcomb v. Ingle*, 944

The Supreme Court has maintained the *Imbler* and *Buckley* distinctions for prosecutors acting within the scope of official prosecutorial duties after probable cause is established.[167] However, the cases also reason that immunity may give way when there are clear violations of statutory and constitutional law. In *al-Kidd v. Ashcoft*[168] the Supreme Court extended immunity because it was not shown that Attorney General Ashcroft violated a clearly established law. Likewise, *Thompson v. Connick*, the Court reversed the Fifth Circuit's conclusion that the district attorney's office was liable for failing to train staff respecting *Brady*[169] responsibilities, in part, because the prosecutor's office committed only one *Brady* violation. Mr. North urges that decisions in *Ashcroft* and *Thompson* suggest that the Supreme Court may have decided differently had al-Kidd demonstrated that the attorney general violated a clearly established law, like the ECPA, and had the district attorney's office and staff in *Thompson* committed multiple, substantial, due process *Brady* violations.

Consistent with *Buckley's* recognition that immunity attaches at the judicial phase of prosecution, *McGhee v. Pottawattamie Cnty., Iowa*,[170] held that a prosecutor is not immune for fabricating evidence *prior to filing formal charges*. *McGhee* is instructional because the facts demonstrate that FINRA's and Smarsh's unlawful arrangement was already in place when Ocean Cross was approved to commence business and resulted in the interception of Mr. North's and

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F.2d 1534, 1536 (10th Cir. 1991) (Immunity includes decisions whether to prosecute.); *Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir. 1986) (Immunity applies to suppression of exculpatory evidence); *Betts v. Richard*, 726 F.2d 79, 81 (2d Cir. 1984) (Immunity applies to subpoenaing witnesses); *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1243-45 (7th Cir. 1990) (Immunity covers witness testimony preparation.)

[167] *Imbler*, 424 U.S. at 430; *Buckley*, 509 U.S. at 274.

[168] *al-Kidd v. Ashcoft*, 580 F.3d 949, 952 (9th Cir. 2009), *rev'd*, 563 U.S. 731, 740-743 (2011).

[169] *Thompson v. Connick*, 578 F.3d 293, 311 (5th Cir. 2009), *rev'd*, 131 S. Ct. 1350, 1366 (2011). *See also Brady v. Maryland*, 373 U.S. 83 (1963).

[170] *McGhee v. Pottawattamie Cnty., Iowa*, 547 F.3d 922, 933 (8th Cir. 2008).

other Ocean Cross employees' Email contemporaneous to their registration with Ocean Cross, prior to probable cause existing for any regulatory actions against them. Like *McGhee*, which involved the fabrication of evidence for later use in prosecutorial proceedings, Email and ESI in this case was being intercepted before FINRA commenced disciplinary proceedings, and the Email and ESI was processed and reconstructed into exhibits that resembled real Email and reports that falsely suggested compliance failures. Ironically, the greater compliance failure, *e.g.*, the failure to archive the Email was ignored, because the failure was motivated by FINRA's and Smarsh's scheme to circumvent regulatory compliance archiving, intercept the Email, and fabricate prosecution evidence.

2. The actions of FINRA and Smarsh violated the ECPA and U.S. Constitution.

The plan to intercept the Email and make up compliance reports was not done in good faith or without malice; therefore, there is no immunity for FINRA [or indirectly for Smarsh].[171] The interception and destruction of Email, its security, and encryption, interfered with and sabotaged Mr. North's and the firm's efforts in compliance. None of the conduct Mr. North attributes to FINRA and Smarsh involves conduct entitled to immunity. Neither FINRA nor Smarsh have the privilege or right to intercept any person's Email absent a court order, subpoena, warrant, or other lawful authority. Neither FINRA nor Smarsh is above the law.

Smarsh General Counsel Page's declaration[172] submitted as additional evidence, confirms

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[171] Mr. North believes that Mr. Douglas' statements that Smarsh hosted the Email services and archiving for Ocean Cross were intended to make it appear that it was an electronic communications service provider or ECS. The Stored Communications Act, 18 U.S.C. §§ 2701-2712 (2012) immunizes any ECS for accessing Email on its own servers. *In re Yahoo Email Litigation*, 7 F. Supp. 3d 1016, 1026-27 (N.D. Cal. 2014). In this case, neither Smarsh nor FINRA is an ECS, and immunity as an ECS does not apply.

[172] See Mot. for Add. Evid. Exhibit 7 (Page Dec.) Ms. Page's Declaration strongly suggests that statements made by Mr. Douglas *in Ms. Page's presence* during the evidentiary hearing in this

Mr. Huber's conclusions that the settings users were instructed by Smarsh to make triggered the unlawful interception of the Email and that the interception occurred from individual devices—computers, iPhones, Smart Phones, Blackberries and the like.[173] Therefore, FINRA not only procured the interception of the business Email of the Ocean Cross brokers when they became registered at Ocean Cross but it was intercepting all forms of *personal and private communications* sent and received over the individuals' devices and delivering them to the private network in violation of the ECPA and Fourth Amendment.[174] These actions disrupted the lawful chain of custody for the Email, which should have started at the contracted Email server e.g., Web.com for Ocean Cross.

CONCLUSION

The Hearing Officer's evidentiary rulings were not harmless error. Nor was it harmless error for the NAC Subcommittee to refuse the tender of additional evidence that documents actions taken by Enforcement and Smarsh agents, which violate federal criminal laws and the Fourth Amendment. Had the Hearing Officer and NAC Subcommittee and their respective hearing panels considered the evidence Mr. North tendered and implications raised about the sources of the Email and the Smarsh Reports, the outcome of the underlying Enforcement proceedings would have been different and this matter would not be before the Commission. Because Smarsh does not own, control or operate any registered servers necessary to perform the archiving and compliance services Smarsh contracted to support, and Enforcement possessed and delivered the Email and ESI to Mr. North in the altered condition described by the professionals

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case, R. 000821, 000987, and by Mr. Sherman, were deceptive and intended to promote the false presumption that Smarsh delivered the promised compliance services for admitting the Smarsh Reports. *See* Mot. for Add. Evid. Exhibit 6 (Southridge Hr'g Tr.).

[173] *See* Mot. for Add. Evid. Exhibit 1 (Huber Dec. 5 ¶¶ 15, 16).

[174] *See generally* Mot. for Add. Evid. Exhibits 1-5 (Huber Declarations).

Mr. North consulted, the only logical conclusion is that Enforcement procured Smarsh to assist in intercepting and redirecting the Ocean Cross brokers' Email to Enforcement in real time so Enforcement could create damning exhibits to facilitate prosecutions. The guilty actions after Mr. North questioned the source and integrity of the Email and ESI FINRA produced to him are self-condemning: the Hearing Officer deemed it irrelevant and at FINRA's request Smarsh witnesses offered deceptive statements and testimony about Smarsh's archiving and compliance services to maintain the façade of archiving and compliance support services that Smarsh had neither the intent nor ability to provide. The combined actions of Enforcement and Smarsh agents were intentional, deliberate, and too complicated and resource intensive for execution by one person or for prosecuting just one or two FINRA members. Therefore, Mr. North urges the Commission to vacate the Hearing and NAC Panel decision, expunge his record, investigate the participants in the FINRA proceedings for their roles in violating the ECPA, Mr. North's constitutional right to privacy in his personal Email, and other federal and state laws, and grant other appropriate relief including costs and attorneys fees.

Respectfully submitted this 10th day of November 2017.

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CERTIFICATE OF WORD COUNT

1. This document complies with the word limit of Commission Rule of Practice 450 (d), this document contains 12,658 words.
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Respectfully submitted this 10th day of November 2017,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November 2017, a copy of Respondent Thaddeus J. North's Opening Brief in this matter was sent by USPS / FedEx mail to the Commission and by mail to FINRA at:

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