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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

Thaddeus J. North

For Review of

FINRA Disciplinary Action

File No. 3-18150

BRIEF OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY IN OPPOSITION TO MOTION TO ADDUCE ADDITIONAL EVIDENCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Statutes and Codes

FINRA Rules, Notices and Guidelines

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I. INTRODUCTION

FINRA opposes Thaddeus J. North's September 29, 2017 motion to adduce additional evidence.[1] North requests that the Commission accept ten exhibits in support of his appeal of a final FINRA action that fined him $5,000 for failing to enforce his member firm's written supervisory procedures ("WSPs") regarding the oversight of the firm's electronic communications. (Motion at 1-2.)[2] Because North does not show that the evidence is material to this proceeding and that he had reasonable grounds for his failure to adduce the evidence previously, the Commission should deny North's motion.

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1 FINRA did not receive North's motion until October 3, 2017.

2 References to "Motion at __" are to North's September 29, 2017 Motion and Brief in Support of Admission of Additional Evidence to Supplement the Record in Disciplinary Proceeding No. 2012030527503. "RP" refers to the record page numbers in the certified record of this case.

II. BACKGROUND

A. North's Admitted Responsibility for Enforcing the Firm's WSPs and Role in Reviewing the Firm's Electronic Communications

North was the chief compliance officer for Ocean Cross Capital Markets, LLC ("Ocean Cross") during his entire tenure with the firm, from August 2011 until January 2013. (RP 1146, 1769.) FINRA's Department of Enforcement filed a complaint against North, which alleged that during the seven-month period from September 8, 2011, through April 30, 2012 (the "Review Period"), North failed to enforce Ocean Cross's WSPs regarding the oversight of the firm's electronic correspondence and the recording of that review, in violation of NASD Rule 3010 and FINRA Rule 2010. (RP 7-11.) North *admitted* in his hearing testimony that he was responsible for enforcing the firm's WSPs and that he reviewed the firm's electronic communications when he knew that no one else at the firm was doing it. (RP 1191, 1198.) After crediting North's testimony, both the Hearing Panel and the NAC determined that North was responsible for enforcing the firm's WSPs relating to the review of electronic communications and that he violated NASD and FINRA rules when he failed to discharge his responsibilities adequately. (RP 1349, 1352, 1773, 1784.)

Ocean Cross's WSPs designated the review of email and instant messaging to the firm's "President or designated principal." (RP 1340.) In relevant part, the WSPs required that the president or designated principal perform a "daily" "[r]eview [of] an appropriately sized sample of incoming and outgoing e-mail / IM [instant message] correspondence; OR review any e-mails / IMs flagged by filtering software (if utilized)." (RP 1340, *see also* RP 1221, 1280 (daily review of email).) The WSPs also required the president or designated principal, in conducting the review of the firm's electronic correspondence, to "[m]aintain all reviewed e-mails / IM in a separate folder (electronic or hardcopy); initial and date electronic correspondence review log;

[and] initial and maintain record of any findings and actions taken." (RP 1340.)

North admitted repeatedly throughout these proceedings that he was responsible for enforcing the WSPs, and he knew that the firm's president, William E. Schloth, was routinely not reviewing the firm's emails prior to April 30, 2012. Instead, North himself "would step in and do it." (RP 1152, 1182, 1191-93, 1198-99.) North stated that "[i]t was Bill [Schloth] and I running the entire place, and if he was not reviewing emails, then I would do it to be a good person and get in there and make sure that it's done." (RP 1192.) North was keenly familiar with the Smarsh, Inc. ("Smarsh") system that the firm used to review email and Bloomberg messages. North had used Smarsh at another firm, and admitted that it "made sense" that he "help out" with the electronic communication review for Ocean Cross.[3] (RP 1187.)

North further admitted that he aware that the hectic state of Ocean Cross led to Schloth's lax review of electronic communications. North stated that he "knew that [Schloth] wasn't doing it in the beginning because we were so busy doing all sorts of other stuff, and he was trying to get business in the door, that . . . if [Schloth] wasn't doing it, then I would step in and do it." (RP 1193.) But North did not conduct the required daily review of emails and IMs. North stated

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[3] During the Review Period, Ocean Cross used Smarsh to retain its electronic communications, including email and Bloomberg instant messages. (RP 839-40, 850, 1165-66, 1176-77.) Smarsh is an archiving company that specifically caters to the financial services industry and archives electronic correspondence to comply with SEC and FINRA rules. (RP 832). Smarsh provides software and systems that may be used by compliance or supervisory personnel at broker-dealers to produce reports that evidence the extent of supervision activity, including the review of electronic correspondence such as emails and instant messages. (RP 838, 840.) The Smarsh platform permitted designated staff at Ocean Cross to log onto the system, run searches, view the search results, and open the messages for review. (RP 845-46.) Smarsh's system recorded, among other things, the identity of the user who logged onto the system, the searches run by the user, the search history, the message review history, and the number of messages located through the search. (RP 837-38, 847-48, 853, 855-59, 862-65, CX 9, CX 10, CX 11, CX 12.) Smarsh recorded all of this information, including a user's search activity, in Smarsh's computer database automatically. (RP 841-42, 847.) North was provided log-in credentials to use the Smarsh system to review the firm's archived emails and Bloomberg instant messages. (RP 862, 872, 1125-26, 1166.)

that, prior to April 2012, he reviewed a random sample of email "at least once a week." (RP 1150, 1172-73, 1193.) By North's own admission, he was not reviewing email and Bloomberg messages daily.

To review Bloomberg instant messages, North was required to conduct a separate search of the Smarsh archive because Bloomberg messages are a different file type than emails and stored in a separate database. (RP 839-42, 846, 1166.) North reviewed no Bloomberg messages until FINRA conducted its first on-site examination of Ocean Cross beginning on January 30, 2012, and lasting for one week.[4] (RP 1113.)

Ocean Cross's WSPs required the person reviewing electronic correspondence to store all reviewed email and Bloomberg messages in a separate folder and initial and date an electronic correspondence review log. (RP 1340.) Yet North's testimony shows that he admittedly did not do this. North relied upon the Smarsh system to record his review of electronic communications and did not create a separate record of his reviews as directed by the firm's WSPs. (RP 1214-15, 1340.) North stated that he knew from prior experience using Smarsh that "somewhere in the system, it's recorded . . . [as] an electronic initial." (RP 1214-15.)

B. The Smarsh Reports

As part of its investigation, Enforcement requested that Smarsh submit reports ("Smarsh Reports") that reflected North's review of the firm's electronic communications during the Review Period. The Hearing Officer in this matter conducted a two-day evidentiary hearing in advance of the disciplinary hearing to determine the admissibility and reliability of the Smarsh Reports. Enforcement offered the telephonic testimony of Smarsh's Director of Web Services, Jimmy Douglas ("Douglas"), to explain and authenticate the Smarsh Reports. North's counsel

[4] During the Review Period, North logged onto the Smarsh system that archived the firm's Bloomberg messages on five days in February, seven days in March, and one day in April. (RP 1329-33.)

extensively cross-examined Douglas during the evidentiary hearing.

The Hearing Panel determined that Douglas's testimony was credible and that the Smarsh Reports were reliable and admissible evidence. (RP 1355.) The NAC upheld these findings. (RP 1771-72 n.5.) The Hearing Panel expressly found that Douglas credibly testified that "every action that is taken inside Smarsh's archiving system is attributed to the specific user who logged onto the system, and Smarsh's system can generate a report to demonstrate supervisory search and review activity." (RP 847, 1355.) With respect to the Smarsh Reports, the Hearing Panel also found that Douglas credibly testified that Ocean Cross's review of its electronic communications was stored in a Smarsh database, which recorded the actions taken within the Smarsh web-based application. (RP 882, 1355.) Thus, the Smarsh Reports were generated from North's electronic communications review activity recorded by Smarsh's database. (RP 882-83, 1355.)

North's primary argument throughout FINRA's proceedings was that the electronic communications provided to him by Enforcement were compromised by alleged spoliation. North has contended that this purported spoliation of the firm's electronic records and the Smarsh Reports, which reflected North's search and review of the electronic communications archives, makes the reports inherently unreliable. To be clear, however, whether Smarsh's archive saved each Ocean Cross email or Bloomberg message in precisely the same format as these records appeared in Ocean Cross's systems (and whether Smarsh spoliated these records) has no bearing whatsoever on the findings against North that he failed to review electronic communications. Indeed, the NAC considered these same arguments and rejected them. The NAC's findings of liability against North were centrally based on North's own testimony.

C. FINRA's Separate Disciplinary Action Against North and North's Lawsuit Against Smarsh and FINRA

FINRA filed a separate disciplinary action against North in July 2013, which was related to his misconduct while he was employed at Southridge Investment Group LLC. *See Dep't of Enforcement v. North*, Complaint No. 2010025087302, 2017 FINRA Discip. LEXIS 7, at *7-9 (FINRA NAC Mar. 15, 2017), *appeal docketed*, Administrative Proceeding No. 3-17909 (SEC Apr. 6, 2017). The NAC determined in that case that North failed to report a relationship with a statutorily disqualified person, in violation of NASD Rule 3070(a)(9) and FINRA Rules 4530(A)(1)(H) and 2010. *Id.* at *10-16. North also failed to establish and maintain a reasonable supervisory system related to the review of electronic correspondence and failed to adequately review email correspondence, in willful violation of MSRB Rules G-27 and G-17 and violation of NASD Rule 3010 and FINRA Rule 2010. *Id.* at *16-29. For his misconduct, the NAC imposed a $40,000 fine and a 30-business-day suspension in all principal and supervisory capacities followed by a two-month suspension in all principal and supervisory capacities. *Id.* at *46-56.

After FINRA filed its two actions against North, North filed an action in the United States District Court for the District of Columbia against FINRA and Smarsh alleging that the data produced by Smarsh and relied upon by FINRA in this proceeding and the other against North, *North*, 2017 FINRA Discip. LEXIS 7, was spoliated and tampered. North sought monetary damages for the intentional or negligent spoliation of data and to enjoin FINRA's disciplinary actions against him as well as to prevent the dissemination and use of such data in any future proceeding. The district court dismissed the action on December 4, 2015. *North v. Smarsh, Inc.*, 160 F. Supp. 3d 63 (D.D.C. 2015). In dismissing the action, the court identified that FINRA's allegations against North in this proceeding—"whether Mr. North reviewed

sufficient electronic correspondence as required by securities laws and regulations—have nothing to do with the content of the spoliated ESI [electronically stored information]." *Id.* at 86. The district court subsequently denied North's motion to amend his complaint against Smarsh and FINRA alleging other federal mail and wire fraud violations as well as conspiracy to convert and tortious conversion of electronic data and conspiracy to spoliate and tortious spoliation of electronic data. *North v. Smarsh, Inc.*, Civil Action No. 15-494 (D.D.C. Jan. 21, 2016) (attached as Exhibit 1).

III. ARGUMENT

The Commission should reject North's efforts to dramatically expand the record on appeal, manufacture a new defense to a failure-to-enforce WSPs violation, and then attempt to attack FINRA as part of that supposed defense. None of North's proffered evidence is material to North's liability, which the NAC determined based largely on his own testimony and admissions.

The common theme among North's proposed exhibits is an attempt to conjure support for his spurious claims that FINRA and Smarsh conspired together to intentionally corrupt the evidence to be used against him. North's arguments are without merit and have been rejected in a variety of forums. North made these arguments in numerous prehearing motions before the FINRA Hearing Officer in an effort to offer expert witness testimony and attendant evidence on the purported spoliation, and he made these arguments again before the NAC. In rejecting North's arguments, the NAC determined that North's testimony provided ample evidence to find that he failed to enforce the firm's WSPs related to review of electronic communications, in violation of NASD Rule 3010 and FINRA Rule 2010. The NAC gave the Smarsh Reports

minimal weight as they merely confirmed the finding that North failed to undertake the required review as directed by the WSPs. Contrary to North's fanciful arguments, there is no conspiracy.

The Commission should reject North's efforts to obfuscate the simplicity of this case and deny his motion to adduce in its entirety.

A. Legal Standard for Admission of Additional Evidence

Rule 452 of the Commission's Rules of Practice states that the "Commission may accept or hear additional evidence . . . as appropriate." 17 C.F.R. § 201.452. Under Rule 452, a party must establish "that there were reasonable grounds for failure to adduce such evidence previously" and "show with particularity that such additional evidence is material." *Id.* North fails to carry his significant burden under the rule. He does not establish that his evidence is material to the issues raised in his appeal of FINRA's action, provides "no valid reason for his failure to adduce" this evidence previously, "or both." *See Michael David Schwartz*, Exchange Act Release No. 81784, 2017 SEC LEXIS 3111, at *7 n.9 (Sept. 29, 2017). The Commission should therefore decline to admit his additional evidence. *See id.*; *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *58 (Nov. 9, 2012) ("Tucker failed to satisfy either of these requirements and we therefore decline to admit them."); *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *56 n.60 (Feb. 10, 2012) ("We . . . decline to admit this new evidence.").

B. North's Evidence Is Immaterial and He Does Not Have Reasonable Grounds for His Failure to Adduce this Evidence Previously

North does not establish that the evidence he seeks to adduce is material to the issues relevant in this appeal—whether North failed to enforce Ocean Cross's WSPs related to the firm's oversight of electronic communications. Moreover, he cannot show reasonable grounds for his failure to adduce this evidence before now.

Rule 452 of the Commission's Rules of Practice requires a distinctive demonstration that the additional evidence North seeks to admit will "materially affect the outcome of the proceedings." *Richard A. Holman*, 40 S.E.C. 870, 874 (1961); *see also Thomas S. Foti*, 51 S.E.C. 217, 221 n.9 (1992) (rejecting additional evidence because it raised "collateral issues and matters of questionable relevance to the violations alleged"). North does not establish that his evidence is material to FINRA's findings that he failed to enforce Ocean Cross's WSPs related to daily review of electronic communications and the documentation of that review in accordance with the methodology as specified in the firm's WSPs. North's allegations of spoliation of electronic records are irrelevant. His evidence must therefore be excluded on this ground.

1. Proposed Exhibits 1 Through 5

Before the NAC, North sought to introduce two declarations of Frank Huber, a purported expert in computer programming, and numerous attachments in support of Huber's opinion that the electronic data at issue in this case was spoliated. The NAC correctly determined that the Huber declarations were immaterial to these proceedings. (RP 1375-1410, 1411-1466, 1781.) North now seeks to adduce those Huber materials as well as additional Huber declarations listed as Proposed Exhibits 1 through 5 in his motion. Proposed Exhibits 1 through 5 reflect that Huber reviewed data that FINRA provided to North in November 2013, January 2014, and October 2014, and provided to FINRA by North in August 2014. (*See* Proposed Exhibit 2 at ¶¶ 5b, 5c.) North argues that he has good cause to adduce these exhibits because he did not retain Huber until after the hearing below and he did not retain Huber earlier because he "presumed" that Smarsh properly archived Ocean Cross's electronic communications and provided them to FINRA. (Motion at 6-7.) North's claim of good cause fails. North had an obligation to marshal

his evidence and present it at the hearing. Waiting until after the hearing does not establish good cause to add more evidence later. "[T]he failure of a respondent to . . . adduce available evidence to meet the charges against him and show mitigating factors does not entitle him to have the proceedings reopened after the issuance of an adverse decision." *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *60 (Jan. 30, 2009) (internal quotation marks omitted), *aff'd*, 416 F. App'x 142 (3d Cir. 2010); *cf. Richard Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *27-28 (Oct. 20, 2011) (rejecting proposed additional evidence after applicant did not show a reasonable basis for failing to adduce this evidence sooner).

Further, Proposed Exhibits 1 through 5 are immaterial. The Huber materials describe purported corruptions, falsifications, and alterations of Ocean Cross's archived electronic data. These proposed exhibits are irrelevant to the issue of whether North reasonably enforced Ocean Cross's WSPs related to the review of the firm's electronic communications and should be rejected.

The Commission should also reject Proposed Exhibits 1 through 5 based on North's attempt to circumvent the Hearing Officer's prior rulings related to expert testimony. *See Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *79 (Sept. 28, 2017) (upholding Hearing Officer's exclusion of expert testimony when the proposed testimony did not concern the central issue in the case). The Hearing Officer denied North's August 29, 2014 motion to offer the testimony and declaration of Andy Thomas, a different proposed expert, on the issue of alleged spoliation of electronic evidence. (RP 307-11, 413-14.) North argued that Thomas examined all of the electronically-stored evidence that Enforcement provided to North during discovery and that Thomas would testify to the spoliation of that evidence. The Hearing

Officer determined that North had failed to comply with FINRA Rule 9242(a)(5) by timely providing a statement of Thomas's qualifications and failing to provide a list of Thomas's publications and other proceedings in which Thomas had given expert testimony. (RP 413.) The Hearing Officer further determined that North had failed to meet his burden of showing that Thomas's testimony would be relevant and that it would assist the Hearing Panel in adjudicating this matter. (RP 414.) The Hearing Officer determined that the issues raised by North were not relevant to whether the electronic communications culled from Ocean Cross's system and archived by Smarsh were reviewed by North and documented according to the firm's WSPs. (RP 415-16.) And accordingly, the Hearing Officer denied North's motion to offer Thomas's testimony and declaration. (RP 415-17.)

On October 7, 2014, North filed a "Brief Respecting Evidentiary Issues Related to Alleged Spoliation, Admissibly of Evidence and Testimony, and Motion to Compel Production of CDJob Requests and Smarsh Event Logs." (RP 537-700.) North again offered Thomas's testimony on alleged spoliation of electronic records. The Hearing Officer granted in part North's motion to present Thomas's testimony. (RP 780.) While Thomas was precluded from testifying about alleged spoliation and other matters previously deemed not relevant, the Hearing Officer permitted Thomas to testify at the evidentiary hearing regarding: "North's logging into the Smarsh system during the review period to review Ocean Cross and Bloomberg emails that Smarsh archived for Ocean Cross; the number of any such Smarsh-archived emails available for North's review during the review period; the number of Smarsh-archived emails that North reviewed during the review period; the number and content of North's word searches of Smarsh-archived emails during the review period; and the dates of North's email reviews during the review period." (RP 780-81.) Despite being allowed to present Thomas's testimony at the

evidentiary hearing, however, North withdrew his request on October 31, 2014, and chose not to call Thomas to testify. (RP 821-910, 987-1035.) North's decision not to present testimony from one expert is no reason to add evidence on appeal from another expert. *See Epstein*, 2009 SEC LEXIS 217, at *60.

The Commission should reject Proposed Exhibits 1 through 5.

2. Proposed Exhibits 6 and 7

North also seeks to adduce an excerpt from the testimony of Richard Sherman ("Sherman"), a witness from Smarsh[5] who testified on April 13, 2015, in the separate FINRA proceeding against North and involving North's misconduct while he was associated with a different member firm, Southridge Investment Group.[6] (RP 1468-1472; Proposed Exhibit 6); *see generally North*, 2017 FINRA Discip. LEXIS 7, at *17-29 (finding North failed to establish and maintain a reasonable supervisory system for the review of electronic correspondence and failed to adequately review electronic correspondence at Southridge Investment Group). Sherman's testimony offered in a different disciplinary matter involving North's misconduct occurring at a different firm has no bearing on the issue before the Commission now of whether North properly enforced Ocean Cross's WSPs related to review of electronic communications at Ocean Cross. The Commission should reject Proposed Exhibit 6.

In addition, North seeks to adduce the "Declaration of Bonnie Page," which he unsuccessfully sought to introduce before the NAC, among other documents that he filed in his

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[5] North in his motion misidentifies Sherman as an "Enforcement Investigator." (Motion at 2.)

[6] North also sought to adduce Sherman's testimony below, which the NAC rejected as immaterial. (RP 1781.) Before the NAC, North submitted transcript pages 112-116 of Sherman's testimony. (RP 1468-72.) Before the Commission, North submits transcript pages 111-115, 119-121. The page discrepancy does not alter the fact that this information is not material to North's misconduct while at Ocean Cross.

unsuccessful lawsuit against Smarsh and FINRA in federal district court. (RP 1518 (item 4 seeking to adduce complaint and exhibits filed in federal action), 1527-31, 1542-46; Proposed Exhibit 7.) Page is Smarsh's General Counsel. The Page declaration is immaterial to this appeal.[7] Page did not testify in this proceeding and her credibility is not at issue. Nor does her declaration in North's federal action have any bearing on the credible testimony of Douglas, Smarsh's Director of Web Services, authenticating exhibits offered by Enforcement and who North's counsel cross examined extensively. The central issue in this case is North's enforcement of Ocean Cross's WSPs and not the methods by which Smarsh stored emails.

The Commission should decline to admit Proposed Exhibits 6 and 7 into evidence.

3. Proposed Exhibits 8 and 9

Proposed Exhibit 8 is an October 25, 2011 email from Smarsh Support to unknown recipients labeled, "Valued Client." The email describes a network upgrade scheduled to take place on October 27, 2011. The hearing in this case took place in April 2015. (RP 1346.) Although this email was sent nearly four and a half years before the hearing, North has not provided a reasonable excuse for failing to introduce it previously. *See Neaton*, 2011 SEC LEXIS 3719, at *27 (declining to accept additional evidence that was dated "well over a year before the Panel Hearing date"). Moreover, North represents that this email was obtained for the other disciplinary case against him, the Southridge proceedings, from a server used by Southridge employees. (Motion at 10.) This email is not material to North's misconduct at Ocean Cross because it is "not offered in support of claims that would excuse or mitigate [his] violations or address the relevant issues *in this case*." *See Tucker*, 2012 SEC LEXIS 3496, at *58 (emphasis added).

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[7] North also filed in his federal action Proposed Exhibits 4 and 5 (Huber materials) and Proposed Exhibit 9 (Tom McCay declaration).

Proposed Exhibit 9 is the declaration of Tom McCay, a Senior Services Technician at Southridge Technology, LLC. North represents that this declaration was not available before August 21, 2014, and therefore asserts that there is good cause for failing to offer it below. (Motion at 11-12.) North twists reality. His reason for failing to adduce this evidence is not valid nor is McCay's declaration material to the reasonableness of North's enforcement of Ocean Cross's WSPs. *See Schwartz*, 2017 SEC LEXIS 3111, at *7 n.9.

Nearly three years ago, North attempted to introduce McCay's testimony before the Hearing Officer and was denied. (RP 917-19, 1037-41.) On November 24, 2014, North filed a motion to supplement his proposed hearing exhibits and submitted a declaration seeking to offer the expert testimony of either Jonathan Gibney, the Chief Executive Officer of Southridge Technology, or McCay. (RP 917-19.) The Hearing Officer denied the motion. (RP 1037-41.) North's motion to supplement the record was untimely pursuant to the case's Scheduling Order and North's proposed exhibits and witnesses could have been included by the filing deadline. As the Hearing Officer noted, "North first raised the issue of the reliability of Smarsh's preservation of email records in an August 21, 2014 pleading, yet he waited until November 24, 2014, the day before the conclusion of the pre-hearing evidentiary proceeding, to move to submit . . . the testimony of Southridge [Technology] employees." (RP 1041.) While North is free to argue in his brief in support of his application for review that the Hearing Officer's ruling was in error, he fails to establish good cause for adding McCay's declaration when he missed the deadline to declare witnesses and submit proposed exhibits below.

Nor is the proposed declaration of McCay—a Southridge Technology employee—relevant to the issues in this matter. As the Hearing Officer aptly explained in refusing McCay's testimony below, that "[t]estimony or evidence suggesting that Southridge [Technology]

maintained back up files that included more or different emails and messages from those archived by Smarsh for Ocean Cross is not relevant to this proceeding." (RP 1041); *see Asensio & Co.*, Exchange Act Release No. 68505, 2012 SEC LEXIS 3954, at *63-64 (Dec. 20, 2012) (refusing to admit immaterial evidence concerning a proceeding that was not at issue in the current appeal).

The Commission should not receive North's Proposed Exhibits 8 and 9 into evidence.

4. Proposed Exhibit 10

Proposed Exhibit 10 is a one-page excerpt from Schloth's investigative on-the-record ("OTR") testimony and receipts from Web.com. North contends that this evidence is material to show that Web.com provided email services for Ocean Cross and "suggests that Enforcement suborned perjury from Smarsh witness Douglas." (Motion at 12-13.) Abundant evidence in the record, including North's own testimony, however, reflects that Smarsh archived electronic communications for Ocean Cross. (RP 839-40, 850, 1165-66, 1176-77.) Whether Web.com provided email services for Schloth is a non sequitur to whether North reviewed Ocean Cross's electronic communications in accordance with the frequency and methods outlined by the firm's WSPs—which he admittedly did not. Proposed Exhibit 10 is immaterial.

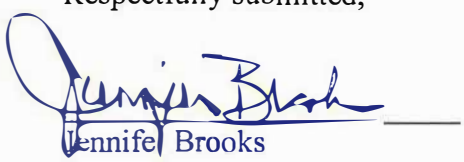
Moreover, North's reason for his failure to offer this information sooner is not reasonable. North attempted to offer excerpts from Schloth's OTR on November 24, 2014, when he filed a motion before the Hearing Officer to supplement the hearing exhibits. (RP 1038.) The Hearing Officer excluded this evidence, finding it not relevant. The Hearing Officer's order stated that Schloth was expected to testify at the hearing in this matter and that North would be allowed to use Schloth's OTR testimony to refresh Schloth's recollection or impeach his testimony, if relevant and appropriate. (RP 1040.) In the end, neither Enforcement nor North

called Schloth to testify at the hearing and therefore North did not ask Schloth about what services Web.com provided. (RP 1353.) North's failure to call an available witness does not provide valid grounds for him to adduce this evidence now. *See* FINRA Rule 9252; *Epstein*, 2009 SEC LEXIS 217, at *60. The Commission should decline to admit Proposed Exhibit 10.

IV. CONCLUSION

North has failed to sustain his heavy burden to show that his proffered evidence is material and that he had a reasonable basis for failing to introduce it below. FINRA requests that the Commission deny North's motion to adduce and exclude all of his proposed exhibits.

Respectfully submitted,



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Dated: October 11, 2017

CERTIFICATE OF SERVICE

I, Jennifer Brooks, certify that on this 11th day of October 2017, I caused a copy of the foregoing FINRA Opposition to Motion to Adduce Additional Evidence to be served by messenger on:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F St., NE
Washington, DC 20549-1090

and via certified and electronic mail on:

Constance J. Miller
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Service was made on the Commission by messenger and Applicant by certified and electronic mail due to the distance between the offices of FINRA and Applicant.

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CERTIFICATE OF COMPLIANCE

I, Jennifer Brooks, certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition to North's motion not to exceed 7,000 words. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 4,712 words.

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EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THADDEUS J. NORTH, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 15-494 (RMC)**
SMARSH, INC., *et al.*,	)	
Defendants.	)	

ORDER

On December 4, 2015, the Court dismissed this case in its entirety. Order [Dkt. 30]. Plaintiffs Thaddeus J. North and Mark P. Pompeo did not move to set aside or alter the Court's final judgment. Instead, on December 28, 2015, Plaintiffs filed a Motion for Leave to File an Amended Complaint. Mot. [Dkt. 31]. The proposed amended complaint asserts five claims: (1) mail fraud, in violation of the Racketeer Influenced Corrupt Organizations Act ("RICO"); (2) wire and wireless fraud in violation of RICO; (3) conspiracy to convert and tortious conversion of electronic data; (4) conspiracy to spoliate and tortious spoliation of electronic data; and (5) a request for injunctive relief. Defendants Financial Industry Regulatory Authority (FINRA) and Smarsh, Inc. oppose the Plaintiffs' motion. Plaintiffs' motion to amend the Complaint will be denied.

It is well established that "once a final judgment has been entered, a court cannot permit an amendment unless the plaintiff first satisfies Rule 59(e)'s more stringent standard for setting aside that judgment." *Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C. Cir. 2004) (citation omitted). Rule 59(e) of the Federal Rules of Civil Procedure provides that a "motion to alter or

amend a judgment must be filed no later than 28 days after the entry of judgment." Fed. R. Civ. P. 59(e). This rule applies even when a claim has been dismissed without prejudice and the Court enters a final appealable order that closes the case. *See Mouzon v. Radiancy, Inc.*, 309 F.R.D. 60, 63 (D.D.C. 2015) (citations omitted); *DeGeorge v. United States*, 521 F. Supp. 2d 35, 40-41 (D.D.C. 2007).

Such was the case here. The Court dismissed the claims against Smarsh without prejudice for lack of personal jurisdiction. *See* Order. The Court dismissed the claims for damages against FINRA with prejudice and the claims for injunctive relief against FINRA without prejudice. *Id.* The fact that some of the claims were dismissed "without prejudice to filing another suit does not make the case unappealable, for denial of relief and dismissal of the case ended this suit as far as the District Court was concerned." *Ciralsky*, 355 F.3d at 666 (quoting *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949)). There is no question that the Court's dismissal of this case constituted a final judgment, rendering Rule 59(e) applicable.

The 28-day limit passed and no Rule 59(e) motion was filed.[1] "[B]ecause the Court previously dismissed this action and entered judgment, Plaintiffs were required to file a Rule 59(e) motion to alter or amend the judgment, *together* with a Rule 15(a) motion requesting leave to amend the complaint, in order to amend the complaint." *Mouzon*, 309 F.R.D. at 63 (citing *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)) (emphasis in original). Since Plaintiffs did not file the motion within the time prescribed by the federal rules, it cannot

[1] The Court also notes that that the proposed amended complaint does not cure many of the original complaint's deficiencies identified in the Court's December 4, 2015 Memorandum Opinion — such as FINRA's absolute immunity from suit and the Court's lack of personal jurisdiction over Smarsh. The proposed amendments may be futile. *See Richardson v. United States*, 193 F.3d 545, 548-49 (D.C. Cir. 1999).

be said that they met "Rule 59(e)'s more stringent standard" necessary to reopen this case. *Ciralsky*, 355 F.3d at 673. Accordingly, it is hereby

ORDERED that Plaintiffs' Motion for Leave to File an Amended Complaint, Dkt. 31, is **DENIED.**

Date: January 21, 2016

/s/
ROSEMARY M. COLLYER
United States District Judge

Financial Industry Regulatory Authority

Jennifer Brooks
Associate General Counsel

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October 11, 2017

BY MESSENGER

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549-1090

RE: In the Matter of the Application for Review of Thaddeus J. North
Administrative Proceeding No. 3-18150

Dear Mr. Fields:

Enclosed please find the original and three (3) copies of FINRA's Brief in Opposition to Motion to Adduce Additional Evidence in the above-captioned matter.

Please contact me at (202) 728-8083 if you have any questions.

Very truly yours,

Jennifer Brooks

Enclosures

cc: Constance J. Miller (via certified and electronic mail)
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