UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NYPPEX, LLC, LAURENCE ALLEN, and MICHAEL SCHUNK,

Plaintiffs,

-against-

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC. (FINRA),

Defendant.

----------X

Civil Action No. 7:22-cv-01528

ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

UPON the annexed Affidavit of the Plaintiffs, by LAURENCE ALLEN, sworn to the 23rd day of February, 2022, upon the Declaration of JONATHAN E. NEUMAN, ESQ., attorney for Plaintiffs, dated February 24, 2022, and the exhibits annexed thereto, and upon all the prior papers and proceedings heretofore had herein, it is

ORDERED, that the above-named defendant show cause before a motion term of this Court, at Room ____, United States Courthouse, 300 Quarropas Street, in the City of White Plains, County of Westchester and State of New York, on _____, 2022, at ____ o'clock in the _____noon thereof, or as soon thereafter as counsel may be heard, why an order should not be issued pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the defendant during the pendency of this action from proceeding with the currently scheduled OHO hearing or NAC hearing against Plaintiffs; and it is further

ORDERED that, sufficient reason having been shown therefor, pending the hearing of plaintiffs' application for a preliminary injunction, pursuant to Rule 65, Fed. R. Civ. P., the defendant is temporarily restrained and enjoined from proceeding with the currently scheduled OHO hearing or NAC hearing against Plaintiffs; and it is further

ORDERED that security in the amount of $_____ be posted by the plaintiffs prior to _____, 2022, at _____ o'clock in the _____noon of that day; and it is further

ORDERED that personal service of a copy of this order and annexed affidavit upon the defendant or his counsel via ECF filing on or before _____ o'clock in the _____noon, _____, 2022, shall be deemed good and sufficient service thereof.

Dated: White Plains, New York

Issued: _____

_____
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
NYPPEX, LLC, LAURENCE ALLEN,
and MICHAEL SCHUNK,

Civil Action No. 7:22-cv-01528

Plaintiffs,

-against-

FINANCIAL INDUSTRY REGULATORY
AUTHORITY, INC. (FINRA),

Defendant.
----------X

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

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February 24, 2022

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Plaintiffs respectfully submit this Memorandum of Law in support of their motion for a preliminary injunction and temporary restraining order:

PRELIMINARY STATEMENT

Defendant has removed this case from state court notwithstanding the fact that the complaint deals only with a matter of state law. That notwithstanding (and which will be dealt with in a separate motion for remand), Plaintiffs are in need of a preliminary injunction and immediate temporary retraining order, as Defendant's bad faith actions have caused Plaintiffs to face immediate, irreparable harm. As Plaintiffs can demonstrate an irreparable harm in the absence of the injunction and either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor, it is respectfully submitted that the Court should grant a preliminary injunction and temporary restraining order enjoining the defendant during the pendency of this action from proceeding with the currently scheduled OHO hearing or NAC hearing against Plaintiffs.

STATEMENT OF FACTS

On or about February 23, 2022, Plaintiffs filed this action in the Supreme Court of the State of New York, Westchester County, under Index Number 56797/2022. *See* Summons and Complaint annexed hereto as **EXHIBIT 1**. Plaintiffs also filed a motion for a preliminary injunction and temporary restraining order, and placed Defendant on notice. *See* **EXHIBIT 2**. In response, Defendant removed this action, which asserts nothing other than a state law claim for breach of contract. Plaintiffs will be separately moving for remand back to state court, but due to the exigencies of the motion, are filing this motion as well.

The Complaint asserts one cause of action: breach of contract.

As described therein, Plaintiff NYPPEX is a broker-dealer with a business focused on the secondary market for private equity funds. NYPPEX has been a FINRA member since 1999 and is wholly owned by NYPPEX Holdings, of which ALLEN is a majority owner. ALLEN has worked in the securities industry for more than three decades and has no FINRA disciplinary history and no record of customer complaints. Nor does he interact at all with retail investors; rather, through NYPPEX, he is a provider of valuable liquidity in alternative funds to qualified investors on the secondary market.

As a broker-dealer, NYPPEX is required to be registered as a member with Defendant FINRA, as are ALLEN and SCHUNK as associated persons with a broker-dealer. As such, NYPPEX, ALLEN, and SCHUNK are subject to FINRA's by-laws. Similarly, FINRA is subject to its own by-laws. Corporate by-laws are the set of rules that govern a corporation's operations, and therefore are legally enforceable as a contract among the members of the corporation.

FINRA's Statutory Disqualification Process

In 2018 ALLEN became a defendant in a New York state court action initiated by the Office of the Attorney General of the State of New York. The action largely concerned ACP X, LP, a private equity fund of which ALLEN is the managing member of the general partner of that fund, and NYPPEX is an affiliate of the fund. That action resulted in three orders from the Supreme Court, New York County. The first was an *ex parte* order, dated December 28, 2018, which ordered the production of documents, directed witnesses to appear for testimony and entered a temporary restraining order to preserve the status quo ("Ex Parte Order"). The second was a preliminary injunction order dated February 4, 2020 ("Preliminary Injunction Order"), and the third was a Decision and Order After Trial, dated February 4, 2021 and amended as of February 26, 2021, which converted the preliminary injunction to permanent injunctive relief

("Trial Decision"). The Trial Decision is currently on appeal, as the defendants are seeking leave to appeal to the Court of Appeals.

Neither NYPPEX nor ALLEN received any communication from FINRA in connection with the December 2018 Ex Parte Order. FINRA rules provide that "[i]f FINRA staff has reason to believe that a disqualification exists or that a member or person associated with a member otherwise fails to meet the eligibility requirements of FINRA, FINRA staff *shall* issue a written notice to the member or applicant for membership" and "[t]he notice *shall* specify the grounds for such disqualification or ineligibility." (Emphasis added.) Despite this mandatory language, no department of FINRA communicated to NYPPEX or ALLEN that FINRA believed that the December 2018 Ex Parte Order was a disqualifying event. Relying on the advice of counsel, ALLEN continued to conduct business.

More than a year later, the Preliminary Injunction Order was entered. At that time, FINRA's Department of Registration and Disclosure ("RAD") sent a letter to NYPPEX, dated February 13, 2020, stating that it had determined that ALLEN was subject to statutory disqualification as a result of that order. Notably, the RAD letter refers to the Preliminary Injunction Order but makes no mention whatsoever of the earlier Ex Parte Order or any disqualification based on the Ex Parte Order. NYPPEX promptly submitted an MC-400 application the very next day, on February 14, 2020 ("MC-400 Application"), invoking the membership continuation process under FINRA's by-laws. ALLEN continued to conduct business.

The Trial Decision was entered a year later, in February 2021. Subsequent to that order, ALLEN requested a meeting with Membership Supervision to discuss his registration status. A Zoom meeting was held on March 31, 2021 and was attended by Patricia Delk-Mercer and Deon

McNeil-Lambkin of FINRA's Statutory Disqualification and Membership Supervision departments, as well as ALLEN and several of his legal and regulatory advisors. During that call, one of ALLEN'S attorneys asked if he could continue to engage in his business, notwithstanding the permanent injunction imposed by the Trial Decision. Ms. McNeil-Lambkin responded in the affirmative, stating that he could continue to conduct business pending the membership continuation process. In accordance with this express representation by Membership Supervision, ALLEN continued to conduct business.

NYPPEX's MC-400 Application on behalf of ALLEN was scheduled for a hearing before the National Adjudicatory Council ("NAC") on April 25, 2022. The purpose of the NAC hearing is to approve or disapprove the application, which will determine whether ALLEN may continue to engage in his business notwithstanding a disqualifying event. Membership Supervision typically makes a recommendation to the NAC to approve or disapprove an MC-400 application, and over the past ten years in approximately 225 cases it has recommended approval at a ratio of approximately 8-to-1.

FINRA Enforcement Complaint

In May 2021, FINRA's Department of Enforcement filed a complaint against Plaintiffs. The complaint stemmed from the orders entered in the New York state court action, and charged Plaintiffs with nine causes of action based on a series of purported FINRA rule violations, although it was not based on the allegations or findings of the state court action. Rather it alleged violations of FINRA rules based on actions that the Plaintiffs allegedly took in relation to that state court action.

The principal allegation in Enforcement's complaint (Count I) is that ALLEN was statutorily disqualified on December 28, 2018, as a result of the Ex Parte Order, and that ALLEN

continued to associate with NYPPEX, and NYPPEX permitted him to do so, without filing an MC-400 application, in violation of FINRA By-Laws and rules. As noted above, however, neither NYPPEX nor ALLEN received any communication from FINRA in connection with the Ex Parte Order. Nor did FINRA's first communication regarding disqualification – the February 13, 2020 letter from RAD – refer to the Ex Parte Order. Nor did Membership Supervision mention the Ex Parte Order during the March 31, 2021 Zoom meeting to discuss ALLEN'S status. Rather, the allegation that ALLEN was disqualified in December 2018 was first raised by Enforcement in 2021, not RAD or Statutory Disqualification or Membership Supervision or any other department of FINRA at any time prior to that.

A hearing in the Enforcement action before FINRA's Office of Hearing Officers ("OHO") is scheduled to begin on February 28, 2022. One of the lead Enforcement attorneys in the case is a FINRA employee named Karen Daly. Ms. Daly signed the Enforcement complaint against Plaintiffs.

In 2020, subsequent to the preliminary injunction order in the New York state court action, the FINRA Department of Enforcement sent Rule 8210 requests to NYPPEX, seeking documents, information and testimony, all in connection with matters relating to the New York action and NYPPEX's reaction to it. ALLEN reached out to an attorney, Stephanie Nicolas of WilmerHale, in April 2020, and they had privileged communications relating to a number of topics. On April 29, 2020, Enforcement took ALLEN'S on-the-record ("OTR") testimony (similar to a deposition in a civil action). ALLEN was represented by Jack Hewitt of Pastore & Dailey. Karen Daly, David Steinberg and David Newman were the Enforcement attorneys present at the OTR.

Ms. Nicolas's name arose during the OTR, as ALLEN identified her as an attorney at

WilmerHale who had provided legal advice and had assisted in drafting an April 23, 2020 letter that was introduced as an exhibit during the OTR. Specifically, Ms. Daly asked ALLEN if he had drafted the letter; he responded no, and when Ms. Daly asked who drafted it, he testified "a few attorneys but primarily WilmerHale," and then identified Ms. Nicolas as the WilmerHale attorney. During the OTRs, Mr. Hewitt reminded the FINRA attorneys on several occasions to stop asking for attorney-client privileged information.

On or about May 5, 2020, Ms. Daly contacted Stephanie Nicolas at WilmerHale and asked about advice she had provided to ALLEN and NYPPEX. Ms. Daly is a former WilmerHale lawyer.

This has direct relevance to the upcoming FINRA Enforcement hearing. ALLEN was asked during his OTR about a letter dated April 23, 2020. That letter is referenced throughout Enforcement's complaint and is the subject of at least one cause of action in the upcoming hearing. ALLEN testified at his OTR that Ms. Nicolas drafted that letter and provided legal advice to him in connection with it. Notwithstanding that testimony (or perhaps because of it), Ms. Daly reached out to Ms. Nicolas to ask questions about legal advice Ms. Nicolas had provided to ALLEN, a clear violation of attorney-client privilege, specifically after FINRA was warned about encroaching upon the privilege.

Ms. Nicolas has since declined to testify for Plaintiffs in the hearing, and Plaintiffs have no means of compelling her testimony. Accordingly, one of FINRA Enforcement's lead attorneys sought improperly to obtain privileged information about an allegation in an action that she will be prosecuting against him in the next few weeks.

It is possible that Ms. Daly, or other Enforcement attorneys, reached out to others of Plaintiffs' former attorneys, all of whom with the exception of one have declined to offer

testimony in the hearing. Plaintiffs do not have subpoena power or any other method of compelling their testimony. Nor do Plaintiffs have the ability to obtain discovery on these matters through the FINRA Enforcement hearing process.

There is grave concern that FINRA Enforcement's attorneys have either improperly obtained privileged attorney-client communications, or that by their actions in reaching out to Plaintiffs' former attorneys, have scared them from participating in the OHO hearing. As one of Plaintiffs' main defenses in the FINRA Enforcement case is their reliance on counsel, this has substantially prejudiced Plaintiffs' ability to put on their defense.

FINRA's Recent Actions Demonstrate That Something is Afoul

On January 10, 2022, NYPPEX received a letter from Ms. Delk-Mercer, stating that "FINRA has determined that Mr. Allen can no longer continue his association with NYPPEX until final decision from FINRA's National Adjudicatory Council approves such association." Ms. Delk-Mercer notified NYPPEX that it had to terminate Mr. Allen's registration by January 21, 2022. This was highly unusual, as the decision as to whether a registered person can continue to associate with a member ultimately rests with the NAC, not Membership Supervision. Moreover, there was a hearing coming up at which the NAC would make that very decision.

While Membership Supervision has the ability to recommend approval or disapproval of an application, it is unheard of for it to unilaterally mandate the termination of registration before a NAC hearing has occurred, as it is the NAC, and not Membership Supervision, that ultimately decides whether a registered person may continue in membership notwithstanding a disqualifying event. By requiring NYPPEX to terminate ALLEN before the hearing, Membership Supervision was effectively usurping the role of the NAC in the membership

continuation process, ensuring that ALLEN would effectively be permanently barred from the industry notwithstanding any finding the NAC might make.

Plaintiffs have been unable to find any precedent for Membership Supervision's actions, and in fact the precedent shows just the opposite, that FINRA's interpretation of Article III, Section 3(c) of FINRA's By-Laws permits individuals who become statutorily disqualified while they are employed to continue working pending the outcome of the statutory disqualification process. Further, the timing of Ms. Delk-Mercer's letter came as a complete surprise, as Membership Supervision had permitted ALLEN to engage in his business for nearly two years without issue. Moreover, no material facts had changed around this time that would justify such an about-face – the NAC had not conducted a hearing on the MC-400 Application, the Decision remained subject to ongoing appeals, and ALLEN (who has no prior disciplinary history) remains on heightened supervision, with no adverse or reportable events.

The most disturbing aspect of Ms. Delk-Mercer's letter was footnote 1, at which she wrote that "Mr. Allen initially became statutorily disqualified upon the entry of an ex parte temporary injunctive order issued by the New York Court on December 28, 2018 ('December 2018 Order')" and "Mr. Allen continued to be statutorily disqualified upon the entry of a subsequent preliminary injunction issued by the New York Court on February 4, 2020 after an evidentiary hearing." As noted previously, no FINRA department advised NYPPEX or ALLEN that ALLEN was disqualified as a result of the Ex Parte Order (a requirement under FINRA's rules), nor did any department ever express that position until Enforcement filed its complaint in May 2021.

Plaintiffs, through counsel, requested a meeting to discuss the January 10, 2022 letter, and on January 20, 2022, Plaintiffs' representatives participated in a telephone conference with

Ms. Delk-Mercer, Ms. McNeil-Lambkin and others, including two members of the Department of Enforcement. On that call, Ms. Delk-Mercer stated that it was Membership Supervision that made the decision to withdraw the exercise of discretion and require the termination of ALLEN'S registration, but in response to questioning, she did not provide any good reason for doing so. Moreover, she indicated that Membership Supervision had also determined that it would recommend to the NAC that the MC-400 Application be denied – which is entirely inconsistent with its forbearance over the past two years and no adverse incidents involving ALLEN. Clearly, Membership Supervision had changed its position and altered the status quo that has been in effect for nearly two years, but without any explanation of why or why now when the NAC hearing was just a few months away.

Plaintiffs (through counsel) attempted to address that question during the conference on January 20, but did not receive a good answer. Several of Plaintiffs' advisors asked iterations of the question *why now?* and *what prompted this?*, to which Ms. Delk-Mercer did not provide any real answer other than that Membership Supervision decided to do so. As noted, however, there was no basis for doing so, as decisions as to membership continuance are reserved to the NAC, and a hearing before the NAC on ALLEN'S application had been scheduled.

Membership Supervision's actions in January 2022 served no real purpose for that department, but were quite beneficial to the Department of Enforcement, which had the OHO hearing fast approaching. For example, footnote 1 in Ms. Delk-Mercer's January 10, 2022 letter articulates a position that mirrors Enforcement's complaint, but which had never been expressed previously by Statutory Disqualification, Membership Supervision, RAD, or any other FINRA department. Although that footnote was not necessary as a basis for the termination of Mr. Allen's registration (which, per the letter, was based on the February 2021 Decision), it did

create a record for Enforcement to use at the upcoming hearing.

Likewise, the timing of the January 10, 2022 letter raised obvious concerns. For nearly two years, Membership Supervision did nothing, and, in fact, members of that department specifically told Mr. Allen in March 2021 that he could continue to conduct business pending resolution of the membership continuation process. That process had not yet been resolved. Nevertheless, some ten months later but just six weeks before the start of the Enforcement hearing, Membership Supervision suddenly changed course and reversed its position on Mr. Allen's registration status, for no apparent reason and based on no objective factors or events.

This does not reflect a fair process, or the fair administration of FINRA processes. This is particularly so given that the subject is Plaintiffs' registration, which affects their ability to conduct business and to earn a living. Likewise, NYPPEX's and ALLEN's registration status affects employees and shareholders as well.

FINRA's recent actions are clearly arbitrary, capricious and unfair, but even worse appear to be initiated, influenced by and/or coordinated with Enforcement. Any such influence would be improper, unfair and highly prejudicial to Mr. Allen, both with regard to his registration status and in the upcoming enforcement hearing.

In fact, upon threat of litigation regarding the January 10, 2022 letter, FINRA once again changed its position, and decided to allow ALLEN to continue to associate with NYPPEX until the NAC hearing. However, it is clear that there are one or more individuals at FINRA who do not want to give Plaintiffs a fair process, and so the outcome at this point of the OHO and NAC hearings is inevitable, and the "process" a means for FINRA to dot its I's and cross its T's before permanently barring Plaintiffs, as it is clear FINRA is utilizing every means available to it to accomplish.

In fact, FINRA's Department of Enforcement has taken the position that it will not even begin to discuss any potential negotiation with NYPPEX or SCHUNK unless ALLEN agrees to a permanent bar, despite the fact that the vast majority of Enforcement actions are resolved through mediation or direct settlement, further demonstrating that FINRA has no interest in treating Plaintiffs fairly or in accordance with Plaintiffs' reasonable expectations under the parties' contract.

Accordingly, there are serious questions that must be addressed, including but not limited to:

- When did Membership Supervision make the decision to withdraw the discretion previously afforded Mr. Allen, and to require the immediate termination of his registration?
- Why did Membership Supervision make that decision now, after two years of inactivity?
- Why make that decision at all, given that a NAC hearing is upcoming?
- Who were the participants in that decision?
- Are there notes reflecting any meetings to discuss that decision?
- Was Enforcement a party to those discussions?
- Were there any communications between Enforcement and Membership Supervision on the subject (which should be preserved if they do exist)?
- Who decided to add footnote 1 to Ms. Delk-Mercer's January 10, 2022 letter and why?
- Where did the information in the footnote come from?

- Did Enforcement play any role in including the footnote, or reference to the Ex Parte Order?
- Why, after two years of permitting ALLEN to conduct business, did Membership Supervision suddenly decide to recommend that his membership continuation application be denied?
- Who participated in that decision?
- When was it made?
- On what basis was it made?
- Have the various departments at FINRA been colluding with each other to ensure that Plaintiffs are permanently barred no matter the outcome of the state court action, the OHO hearing, or the NAC hearing?

In each of these instances, there is no rational explanation for FINRA's actions – they are out of the ordinary, inconsistent with its past handling of ALLEN's registration status, and inconsistent with department precedent. On the other hand, the one common theme is that these actions are all beneficial to the Department of Enforcement in connection with its upcoming action against Plaintiffs.

Plaintiffs Reach out to FINRA's Office of the Ombudsman To No Avail

Having nowhere else to turn, and receiving no real answers, earlier this month Plaintiffs reached out to FINRA's Office of the Ombudsman. FINRA's Office of the Ombudsman is an impartial, confidential and independent resource that works informally to assist in finding solutions to issues, or concerns that members may have with FINRA. Members are encouraged to contact the Ombudsman's Office if they believe that they cannot resolve the concern through normal channels, cannot determine the proper avenue for handling the concern, or if they require

anonymity. As a neutral party, the Ombudsman considers the interests and concerns of all parties in the situation, with the objective of achieving a fair outcome. The FINRA Ombudsman reports directly to the Audit Committee of the Board of Governors and functions independently from other departments and FINRA management. As a designated neutral, the Office of the Ombudsman does not represent or act as an advocate for any person or entity in a dispute with FINRA; instead, it is designed to promote fair processes and the fair administration of those processes. The Ombudsman's Office, however, does not actually have any authority.

Although Plaintiffs have raised their concerns with potential prosecutorial misconduct in connection with the upcoming Enforcement hearing to the Ombudsman's Office, those concerns have not resulted in any change of circumstance, and the hearing is still scheduled to begin on February 28, 2022. Further, the Ombudsman's Office has stated that it is not able to confirm or deny any aspects of its review to the Plaintiffs, meaning that although Plaintiffs have raised legitimate concerns, they have no way of knowing whether, when or how those concerns are addressed. As the Ombudsman's Office does not actually have any authority to mandate any action, it suggested to Plaintiffs that they make a request to OHO that the hearing set to begin February 28, 2022, be postponed while the investigation and any resolution thereof continues.

However, Enforcement has denied Plaintiffs' request to agree to a postponement, and OHO has denied an official request from counsel to postpone the hearing. Plaintiffs have exhausted all available remedies internally within FINRA.

It is patently unfair and a deprovision of Plaintiffs' reasonable expectations under the parties' contract for Plaintiffs to have to go through a hearing that will undoubtedly result in severely negative consequences for them because of the "game is fixed" against them. Plaintiffs are entitled to a fair process and a fair administration of the process free from undue influence

and collusion, and one that is not arbitrary and capricious. While there are avenues of appeal and further processes, the reality of the situation is that any such avenue of appeal is going to be limited by the record below and a reversal of any determination is statistically likely to fail. Further, Plaintiffs have no avenue for discovery regarding allegations of collusion and prosecutorial misconduct in the Enforcement process itself, and thus they cannot create an evidence-based record for appeal on those issues. What will happen is that Plaintiffs will raise their concerns for the record, they will be dismissed out of hand, and the dismissal of those concerns will be affirmed on appeal because Plaintiffs have no evidence to support their allegations, since discovery is not available to them in the FINRA hearing process.

Moreover, in the interim, Plaintiffs would potentially (and based on the recent actions of FINRA described above, likely) be barred from the industry, and it could take years to reverse that status, even assuming Plaintiffs could ultimately receive a fair shot. It would be impossible to reverse that damage.

In summary, Plaintiffs face an upcoming hearing in which they have expressed multiple concerns about potential prosecutorial misconduct but have no avenue to address those concerns other than through the court system, as they have exhausted all possible options internally at FINRA. Simply put, no one at FINRA seems to care that a lead attorney in the upcoming hearing attempted to obtain attorney/client privileged information from one of Plaintiffs' attorneys or may have attempted to influence another FINRA department to take action against ALLEN in advance of the hearing. Plaintiffs' concerns have fallen on deaf ears, and they have no other recourse but to seek injunctive relief.

As stated, Plaintiffs worked diligently attempting to address these serious concerns through every available avenue at FINRA in the few weeks following the January 10, 2022

letter. On February 23, 2022, Robert Colby, FINRA Chief Legal Officer, informed Plaintiffs that FINRA would not postpone the OHO hearing. Having exhausted all internal options, Plaintiffs had no choice but to immediately file the instant action and seek a preliminary injunction and temporary restraining order.

Last night, at 11:39 pm, Defendant filed a Notice of Removal, thereby ensuring that the Westchester Supreme Court would not hear Plaintiffs' motion for a temporary restraining order. Accordingly, Plaintiffs are filing the instant motion.

STANDARDS APPLICABLE

Rule 65(b) of the Federal Rules of Civil Procedure authorizes a court to issue a TRO. The standards for granting a TRO are the same as those governing preliminary injunctions. AFA Dispensing Grp. B.V. v. Anheuser-Busch, Inc., 740 F. Supp. 2d 465, 471 (S.D.N.Y. 2010). To be entitled to a Temporary Restraining Order in this Circuit, a party must demonstrate: "(1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor." Cnty. of Nassau, N.Y. v. Leavitt, 524 F.3d 408, 414 (2d Cir. 2008). Of these factors, "[a] showing of irreparable harm is 'the single most important prerequisite for the issuance of a preliminary injunction." Faiveley Transp. Malmo AB v. Wabtec Corp., 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks omitted). "To satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction they will suffer 'an injury that is neither remote nor speculative, but actual and imminent,' and one that cannot be remedied 'if a court waits until the end of trial to resolve the harm.'" Grand River Enter. Six Nations, Ltd v. Pryor, 481 F.3d

60,66 (2d Cir. 2007).

ARGUMENT

I. PLAINTIFFS SATISFY THE GROUNDS FOR A PRELIMINARY INJUNCTION AND A TEMPORARY RESTRAINING ORDER

As shown in Plaintiffs' Complaint (annexed hereto as **EXHIBIT 1**), Defendant's bad faith actions threaten Plaintiffs' entire business and ALLEN's ability to forever practice in the securities industry, notwithstanding his more than thirty-five (35) year record in that industry with not a single disciplinary action by the Defendant Financial Industry Regulatory Authority ("FINRA"). There is currently a hearing (effectively, a full trial on the merits) set to begin on Monday, February 28, against Plaintiffs, which FINRA has refused to postpone so that the serious issues of misconduct identified by Plaintiffs through various avenues at FINRA can be fully investigated and addressed. As discussed in the Complaint, Plaintiffs have already been substantially prejudiced with regard to their ability to put on a defense at the hearing, and should the hearing take place and its inevitable conclusion reached, Plaintiffs will have little to no realistic recourse, as they will have been unable to establish any sort of record for review regarding to the bad faith misconduct that appears to have transpired.

Plaintiffs have taken every possible avenue available to them within FINRA, including reaching out to the FINRA departments themselves, reaching out to the FINRA's Chief Legal Officer, and reaching out to the FINRA Ombudsman's Office, all to no avail. Accordingly, Plaintiffs have no other option but to come before this Court.

Although there are provisions for agency review, as explained in Plaintiffs' complaint, should the hearing move forward without Plaintiffs being able to establish a record for the misconduct they have identified, such agency review will be meaningless.

The Supreme Court has ruled in an analogous situation that provisions for agency review do not restrict judicial review "if a finding of preclusion could foreclose all meaningful judicial review; if the suit is wholly collateral to a statute's review provisions; and if the claims are outside the agency's expertise." Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 489-90, 130 S. Ct. 3138, 3150 (2010).

The Court, rejecting the Government's argument that petitioners would have to raise their claims by appealing a Board sanction, held that "[i]f the [Securities and Exchange] Commission then affirms, the firm will win access to a court of appeals--and severe punishment should its challenge fail. We normally do not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law,', and we do not consider this a 'meaningful' avenue of relief." Id. at 490-91 (internal citations omitted).

Additionally, because the issues brought up in Free Enterprise were "standard questions of administrative law, which the courts are at no disadvantage in answering," the matter was collateral to the statute and outside the agency's expertise, and therefore properly subject to the court's jurisdiction. Id. at 491.

As discussed in Plaintiffs' Complaint, Plaintiffs do not have any meaningful avenue of relief. Plaintiffs cannot be required to "bet the farm," take their inevitable permanent bar, and then keep their fingers crossed and hope – after multiple levels of appeals, significant expenditures of resources and years in which Plaintiffs must sit out of the securities industry – that the SEC might reverse when Plaintiffs will have been unable to establish a record below. As discussed in the Complaint, there has clearly been severe prosecutorial misconduct and collusion at FINRA, and FINRA's actions have already substantially prejudiced the process by interfering with Plaintiffs' attorney-client relationships and substantially harming Plaintiffs' ability to put on

their full defense. As Plaintiffs have no subpoena power within the OHO proceeding, they have no ability to compel witnesses, at least one of whom was improperly contacted by FINRA, so as to meaningfully put on their defense. Nor do Plaintiffs have any ability to conduct discovery within the FINRA hearing process with regard to their allegations. Put simply, Plaintiffs have raised serious allegations of prosecutorial misconduct in connection with an upcoming trial, but they have no ability to do anything about it absent Court intervention. FINRA is a private self-regulatory organization which has apparently decided to turn a blind eye and move forward with an enforcement action as if Plaintiffs' allegations of misconduct *in connection with that action* did not exist.

Accordingly, Plaintiffs are in need of a preliminary injunction, and a temporary restraining order pending the determination of the motion, to prevent Defendant's bad faith actions from making Plaintiffs forever lose their ability to practice in the securities industry and destroying Plaintiffs' business. It is respectfully submitted that FINRA must be restrained from proceeding with the OHO hearing or the NAC hearing until Plaintiffs' have had the full and fair opportunity to uncover any malfeasance at FINRA. One would hope that FINRA, as an alleged fair and impartial self-regulatory organization, would accede to, if not join in, the request, to root out any corruption entangling itself within the organization.[1] Instead, FINRA has just further demonstrated its bad faith by refusing to postpone the OHO hearing so that this motion could be resolved.

[1] It would appear that there is substantial corruption taking place at FINRA, as a recent Georgia court found that Wells Fargo and FINRA had a secret deal that allowed Wells Fargo to fraudulently manipulate the arbitration selection system, thereby undermining the entire integrity of FINRA's supposedly neutral system. *See* https://www.wsj.com/articles/wells-fargo-gamed-system-in-investor-arbitration-judge-says-11643903122 (last visited February 24, 2022). A number of United States Senators are now seeking more information from FINRA related thereto. *See* https://www.warren.senate.gov/imo/media/doc/2022.02.09%20Letter%20to%20FINRA%20on%20Wells%20Fargo%20Scandal%20(1).pdf (last visited February 24, 2022)

Here a preliminary injunction and temporary restraining order should be granted.

First, Plaintiffs can demonstrate a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation. It is incontrovertible that the actions of FINRA in suddenly, and out of the blue, informing ALLEN that he could no longer associate with NYPPEX, in contravention to how FINRA has always treated its by-laws, only to reverse itself after threat of litigation. *See, e.g.*, In re Robert J. Escobio, SD-2130, at n.3 (July 27, 2017), *available at* https://www.finra.org/sites/default/files/NAC_SD-2130_Escobio_072717_0_0_0.pdf (last visited February 23, 2022) ("Escobio has been permitted to work at the Firm pending resolution of the Application, which is consistent with FINRA's interpretation of Article III, Section 3(c) of FINRA's By-Laws permitting individuals who become statutorily disqualified while they are employed to continue working pending the outcome of the statutory disqualification process.")

Moreover, as described in the Complaint, it is clear from footnote 1 of the January 2022 letter that Statutory Disqualification, Membership Supervision, and the Department of Enforcement have all been colluding with each other to prejudice Plaintiffs' rights, especially right before the OHO and NAC hearings.

It is also incontrovertible that FINRA will be acting contrary to its usual practice in recommending to the NAC to deny ALLEN's continued association, even though FINRA has for years recommended approval of MC-400 applications in situations far more grievous than those present here.

By way of example, Membership Supervision's most recent recommendation of approval was on December 1, 2021 (*Peter R. Cerra*, SD-2277), in which the registered person was convicted of felony aggravated vehicular assault after injuring two individuals while driving

under the influence of alcohol. For further recent examples of approval recommendations, *see Alex J. Drost*, SD-2078 (Sept. 13, 2017) (felony conviction for Accosting, Enticing of Soliciting Child for Immoral Purposes related to sexual conduct with a 14-year old); *Joseph Campo*, SD-2186 (Dec. 11, 2019) (felony conviction for conspiracy to distribute marijuana); *James H. Dean*, SD-2154 (Jan. 16, 2017) (misappropriating funds from customers, including proceeds of a check issued on a customer's life insurance policy); *Richard Reis*, SD-2291 (Apr. 26, 2021) (failure to supervise registered representative who committed fraud in violation of federal securities laws); *David L. Ciano*, SD-2262 (Feb. 2, 2021) (engaging in conduct that resulted in the unauthorized purchase of $1.8 million dollars of securities in a customer's brokerage account, including by multiple transfers of the customer's funds on behalf and using a photocopy of the customer's signature); *Barry T. Eisenberg*, SD-2210 (Nov. 24, 2020) (failure to supervise registered representative who made unsuitable investment recommendations, churned customer accounts and engaged in excessive trading); *Zachary S. Brodt*, SD-2226 (Oct. 28, 2020) (willful failure to disclose guilty plea for shoplifting on Form U-4); *Kevin McKenna*, SD-2202 (Feb. 28, 2020) (willfully aiding and abetting firm in failing to file Suspicious Activity Reports on hundreds of transactions that it knew or had reason to know involved use of the firm to facilitate fraudulent activity); *Sandra M. Logay*, SD-2138 (Mar. 23, 2017) (failure to supervise registered representative who willfully violated the federal securities laws by engaging in a scheme to defraud investors via churning, unauthorized trading, recommending unsuitable investments and making misrepresentations and omissions of material fact); *Arthur W. Lewis*, SD-2230 (Oct. 21, 2019) (failure to supervise and direct involvement and approval of registered representative who illegally sold more than 2.5 billion shares of unregistered penny stocks, often with Lewis' direct involvement and approval, despite numerous red flags indicative of illegal unregistered

distributions); *Craig Burdulis*, SD-2273 (Feb. 11, 2021) (willful violation of federal securities laws).

These are just a small sample of recommended *approvals* in situations far worse than that in this case (which in any event is based on a state court order that remains subject to an ongoing appeal and an injunction which is currently stayed pending the outcome of the appeals process). As is clear from these cases, Membership Supervision recommended approval of MC-400 applications on behalf of individuals who have been convicted of felonies, willfully violated federal securities laws and engaged in federal securities law fraud in connection with retail investors. In contrast, ALLEN's purported disqualifying event is based solely on a state court injunction which contains no finding of willfulness or intent to deceive, no violation of federal securities laws or FINRA rules, nor any allegation (much less finding) of fraud under federal law. Moreover, the injunction does not concern the investing public, but rather a limited number of sophisticated investors in a private partnership. The injunction remains subject to ongoing appeals and enforcement of the injunction has been stayed in part pending resolution of the appeals process. Lastly, ALLEN has no prior disciplinary history or customer complaints, remains on heightened supervision and poses absolutely no risk to the public.

Likewise, FINRA's prosecutorial misconduct in reaching out to Plaintiffs' former attorneys and seeking disclosure of attorney-client privileged communications undoubtedly is a breach of good faith and fair dealing, and has substantially harmed Plaintiffs in the very action that this FINRA employee is prosecuting. FINRA will be unable to deny that it reached out to one or more of Plaintiffs' former attorneys and attempted to obtain information on privileged communications.

Thus it is clear that FINRA has breached the covenant of good faith and fair dealing by acting blatantly contrary to the reasonable expectations of Plaintiffs according to FINRA's by-laws. FINRA is a Delaware corporation. https://www.finra.org/rules-guidance/rulebooks/corporate-organization/restated-certificate-incorporation-financial (last visited February 23, 2022). As [the Delaware] Supreme Court has made clear, the bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the DGCL." Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 939 (Del. Ch. 2013).

FINRA's by-laws provide for specific sections related to membership, disqualification, and disciplinary proceedings. https://www.finra.org/rules-guidance/rulebooks/corporate-organization/laws-corporation (last visited February 23, 2022).

Article XI of the by-laws specifically provides that "To promote and enforce just and equitable principles of trade and business, to maintain high standards of commercial honor and integrity among members of the Corporation, to prevent fraudulent and manipulative acts and practices, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, to protect investors and the public interest, to collaborate with governmental and other agencies in the promotion of fair practices and the elimination of fraud, and in general to carry out the purposes of the Corporation and of the Act, the Board is hereby authorized to adopt such rules for the members and persons associated with members, and such amendments thereto as it may, from time to time, deem necessary or appropriate. If any such rules or amendments thereto are approved by the Commission as provided in the Act, they shall become effective Rules of the Corporation as of such date as the Board may prescribe. The

Board is hereby authorized, subject to the provisions of the By-Laws and the Act, to administer, enforce, suspend, or cancel any Rules of the Corporation adopted hereunder."

This provision clearly applies not just to Plaintiffs, but to FINRA as well. When FINRA itself acts in an unethical manner inconsistent with just and equitable principles of trade and business and high standards of commercial honor and integrity, then FINRA is clearly violating the covenant of good faith and fair dealing and the reasonable expectations that members have with how they will be treated.

Accordingly, it is fairly apparent that Plaintiffs can demonstrate a likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation.

With regard to the prospect of irreparable injury, this too can be demonstrated. As shown above, as stated by the Supreme Court, a party does not have to "bet the farm" and then keep their fingers crossed that somehow, someday the SEC will reverse. Should Plaintiffs be permanently barred from the securities industry by OHO, and then that determination upheld under agency review, there will be little to no realistic recourse for Plaintiffs, especially since they will have been unable to establish the necessary record that they will be unable to establish outside of this action.

Finally, with respect to the balance of the equities, this too tips in favor of Plaintiffs. As stated, if the Court does not grant the preliminary injunction, Plaintiffs will be forced to engage in a process where the outcome is already a foregone conclusion that they will be permanently barred out of the industry in which they have spent decades of their lives without having the opportunity to establish a record for the very serious matters that have been raised. However, if the Court does grant a preliminary injunction, this matter can proceed on an expedited basis, and

the OHO and NAC hearings can simply be rescheduled. The OHO matter only began less than 9 months ago, and the hearing is on for the first time. We just experienced a nationwide pandemic that delayed cases for years. Accordingly, a postponement of a matter that is on for the first time so as to ensure that a full and fair record can be established for purposes of agency review is clearly tipped in favor of Plaintiffs. Moreover, due to the pandemic, the hearing is not even set to take place in person, but rather via Zoom, and so nobody has made any travel plans that would need to be altered. And as stated, one would hope that FINRA too would join in the effort to root out any unethical or untoward conduct within its midst. An injunction would simply maintain the status quo, with no side any worse off. The New York state injunctions, which have been in place for over two years now, will still be in place. Plaintiffs, who have been working without issue for the last 2+ years, will continue to do so. And once a full and fair opportunity to uncover malfeasance at FINRA has taken place, the hearings can resume. There is no prejudice to FINRA in delaying the hearings, but there will be devastating consequences to Plaintiffs in moving forward before having the opportunity to establish their record.

Accordingly, it is respectfully submitted that a preliminary injunction is patently warranted and should be granted. Plaintiffs are not asking the Court to determine the ultimate rights of the parties, but rather to simply maintain the status quo until such rights can be determined or the parties can resolve the matter on their own.

Additionally, because moving forward threatens to force Plaintiffs to "bet the farm" and keep their fingers crossed that the SEC will reverse any adverse determination without any underlying record of the malfeasance complained of, Plaintiffs have no "meaningful avenue of relief," and instead will be forced to roll the dice. As the Supreme Court has said, this is inappropriate. Plaintiffs do not have to first be barred for years while attempting to exhaust

agency review. Instead, it is respectfully submitted that this Court should temporarily stay all proceedings at FINRA including the OHO proceeding and the NAC proceeding, and set this matter down for an expedited discovery schedule. As the hearing is set to begin on February 28, and will necessarily occur before this motion can be heard and decided, it is clear that immediate and irreparable injury, loss or damage will result to Plaintiffs unless Defendant is restrained before the hearing can be had. Accordingly, it is similarly respectfully submitted that a temporary restraining order should be granted pending the hearing and determination of this motion, so as not to render this application and this action moot before Plaintiffs even have a chance to demonstrate its merits.

CONCLUSION

For the reasons demonstrated above, it is respectfully submitted that the Court should grant a preliminary injunction and temporary restraining order enjoining the defendant during the pendency of this action from proceeding with the currently scheduled OHO hearing or NAC hearing against Plaintiffs, together with such other, further, and different relief as to this Court may be just and proper.

Dated: Fresh Meadows, New York
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/Jonathan E. Neuman/

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