IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

FRANK HARMON BLACK; and SOUTHEAST INVESTMENTS, N.C., INC., Plaintiffs, v. FINANCIAL INDUSTRY REGULATORY AUTHORITY; and SECURITIES AND EXCHANGE COMMISSION, Defendants.	No. 3:23-CV-709-RJC-DCK **PLAINTIFFS' OPPOSITION TO FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.'S CROSS-MOTION FOR SUMMARY JUDGMENT, D.E.49**

Introduction

The Court should deny the Financial Industry Regulatory Authority, Inc.'s (FINRA) Cross-Motion for Summary Judgment. D.E.49. There are no disputed facts that are material here. D.E.49-2. FINRA offers additional facts, D.E.49-2, that Plaintiffs do not dispute.[1] But FINRA's arguments fail as a matter of law because (1) Article III and the Fifth and Seventh Amendments to the Constitution guarantee Plaintiffs Frank Harmon Black and Southeast Investments, N.C., Inc. (Black/Southeast) Article III courts and juries, (2) FINRA's suit against Black/Southeast cannot be assigned for adjudication to FINRA under the private nondelegation doctrine, and (3) FINRA cannot exercise delegated governmental power without proper appointment under the Appointments Clause. *See* Fed. R. Civ. P. 56.[2]

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[1] Plaintiffs have submitted their counterstatement to FINRA's additional facts contemporaneously with this brief.

[2] FINRA combined its memorandum supporting its cross-motion for summary judgment and opposing Black/Southeast's motion for summary judgment. That

The reasons for denying FINRA's motion are as follows: This Court has jurisdiction over the jury-trial claim (Count 3), and the state action doctrine is inapposite. *See* D.E.49-1:16–20. FINRA's argument for grant of summary judgment to FINRA on Count 3 fails on the merits for reasons stated herein. *See* D.E.49-1:20–23. FINRA's arguments on Counts 1 (Appointments Clause) (D.E.49-1:7–13) and 2 (private nondelegation doctrine) (D.E.49-1:13–16) fare no better. FINRA's alternative argument on the permanent injunction factors is beside the point because Plaintiffs primarily seek declaratory relief under 28 U.S.C. §§ 2201–2202 which would mature into a follow-on contempt proceeding for an injunction only if FINRA/SEC defy the Court's declaratory judgment.

Argument

I. FINRA Is Not Entitled to Judgment as a Matter of Law on the Jury-Trial Claim

A. This Court Has Jurisdiction Over the Jury-Trial Claim

FINRA attacks this Court's jurisdiction only as to Count 3 (jury trial), not as to Counts 1 (Appointments Clause) and 2 (private nondelegation doctrine). D.E.49-1:16. FINRA is not entitled to judgment as a matter of law on Plaintiffs' Count 3 because Article III and the Fifth and Seventh Amendments to the Constitution guarantee Black/Southeast Article III courts and juries. This jury-trial claim is about "the structure or very existence of" FINRA/SEC in-house adjudication. As the Supreme Court held, these structural constitutional claims must be heard in federal district courts in the first instance under 28 U.S.C. § 1331 because deciding them

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violates LCvR 7.1(c)(2) and (d), as the Court noted in D.E.54:2. It is difficult to separate out the respective portions of FINRA's brief. If FINRA construes any portion of this brief to be a reply in support of Plaintiffs' motion for summary judgment (D.E.45), FINRA may not file a sur-reply without leave of the Court. Plaintiffs will file a separate reply in support of their motion for summary judgment as directed by the Court (D.E.54:2). And Plaintiffs file a separate brief opposing the cross-motion for summary judgment filed by Defendant Securities and Exchange Commission (SEC), pursuant to LCvR 7.1(c)(2) and (d).

post-deprivation on appeal is "too late to be meaningful." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 189, 191 (2023).

FINRA's entire argument on the jury-trial claim is based on its unsupported assumption that the claim is not structural. D.E.49-1:16–23. The jury-trial claim is structural. First, under the Seventh Amendment and *SEC v. Jarkesy*, 603 U.S. 109, 128, 132 (2024), suing administrative enforcement targets like Black/Southeast in Article III court is "mandatory" when the suit "concerns private rights," and "presump[tive]" in all other cases. Second, under Article III and *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (simplified), "Congress" cannot "'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty'" because the "responsibility for deciding" such suits "rests with Article III judges in Article III courts." Third, the Fifth Amendment's Due Process Clause structurally guarantees "*judicial* process … before" a person can be deprived of life, liberty, or property. *Jarkesy*, 603 U.S. at 150 (Gorsuch, J., concurring); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1721, 1741–42 (2012) (The Due Process Clause structurally guarantees that only Article III courts can deprive persons of liberty or property.).

The right of jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional *structure*." *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (emphasis added); *see also Jones v. United States*, 526 U.S. 227, 244–48 (1999) (discussing the historical pedigree of the structural checks and balances provided by juries); Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of our Government*, 55 Wm. & Mary L. Rev. 1241, 1243 (2014) ("The Seventh Amendment likewise serves a *structural* purpose and protects individual rights.") (emphasis added).

FINRA's argument against Count 3 fails because that claim is a structural constitutional challenge, which the Supreme Court confirmed, "agency adjudications are generally ill suited to address[.]" 598 U.S. at 195. FINRA resists this key holding of *Axon*. Instead, FINRA argues what SEC argued in *Axon*, that the Exchange Act's judicial-review provisions are "exclusive" and "presumptively ba[r] district court jurisdiction." D.E.49-1:16. *Axon* rejected that argument, stating that Black/Southeast's "injury"—being subjected to a non-jury non-Article III proceeding—"is impossible to remedy once the [administrative] proceeding is over, which is when appellate review kicks in." 598 U.S. at 191. The "injury" of being deprived of trial by jury is not about "this or that ruling." *Id.* at 195. Rather, the injury is "subjection to all agency authority." *Id.* Because FINRA/SEC has targeted Black/Southeast with a suit that is "legal in nature," FINRA/SEC's suit *must be*—"mandatory"—brought in Article III court, where trial will be by jury where appropriate. *Jarkesy*, 603 U.S. at 122, 128; *Stern*, 564 U.S. at 484.

FINRA's exclusivity argument also lacks merit based on *Shalala* and *Axon* because the Supreme Court has already rejected that argument in those cases.[3]

First, 15 U.S.C. § 78y does not vest the circuit courts with exclusive jurisdiction because it lacks a clear statement to that effect. In *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 10 (2000), the Supreme Court considered 42 U.S.C. § 405(h), which provided "no action … shall be brought under section 1331 or 1346 of title 28." The Court held that such an express and clear statement divested district courts of subject-matter jurisdiction. Neither § 78y nor the entirety of the Exchange Act contains such express divesting language.

Second, FINRA's argument fails even if based on an "implici[t]" grant of jurisdiction to circuit courts in § 78y of the Exchange Act. *Axon*, 598 U.S. at 185. As

[3] FINRA only argues that the Act "presumptively bars district court jurisdiction." D.E.49-1:16.

the Supreme Court explained in *Axon*, an "exclusive" statutory review scheme "does not necessarily extend to every claim concerning agency action." *Id.* at 185–86. "[C]laims that the structure … of an agency violates the Constitution … are not 'of the type' the [FTC/SEC] statutory review schemes reach." *Id.* at 196 (simplified). FINRA's jurisdiction-stripping argument is, thus, meritless.

Under *Axon*'s straightforward holding, therefore, this Court has jurisdiction to render judgment on the jury-trial claim because it is a structural constitutional claim; walking anew through the three factors is unnecessary. But because FINRA does that, D.E.49-1:16–19, Black/Southeast do, too.

The three-factor implicit jurisdiction stripping test most recently applied in *Axon* looks at (a) whether the statute's review scheme forecloses "meaningful" judicial review, (b) whether the claims for which review is sought are "wholly collateral" to the statute's review provisions, and (c) whether the claim is "outside the agency's expertise." 598 U.S. at 186.

The three factors all cut in Black/Southeast's favor. *Axon* confirms that (a) judicially reviewing a violation of a structural constitutional claim after the fact is not "meaningful," (b) structural constitutional claims are "wholly collateral" to the statute's review-channeling provisions, so district courts must decide those claims in the first instance, and (c) structural constitutional claims are not within an agency's expertise; only courts have the requisite expertise.

On the three factors, FINRA's main argument is that challenges to FINRA's statutory authority must be channeled through SEC. D.E.49-1:17. But that rests on FINRA's false premise that Black/Southeast are "challenging FINRA's 'procedure.'" D.E.49-1:18. As discussed, Black/Southeast's jury-trial claim is structural. It is structurally impossible to conduct jury trials inside FINRA or SEC because the federal jury (which has the power to render verdict) is an arm of Article III courts where the jury aids the independent judiciary to keep prosecutors in check as well as

neutralize FINRA-style "corporate attacks on the civil jury." Whitehouse, 55 Wm. & Mary L. Rev. at 1244. The "interlocking checks and balances" of suing in Article III court with juries rendering verdicts and judges rendering judgment (including the power to issue judgment notwithstanding the verdict where appropriate) is a "vital" recipe for we the people to participate in our government. *Id.* at 1270–71. Such participatory government is baked into our Constitution's structure, which requires (a) Congress and the President to be elected by "We, the People," (b) grand juries, which have the power to present or indict, to exercise a check on the Executive Branch's prosecutorial decisions, and (c) criminal and civil juries to render verdict as arms of the judicial branch. 2 Debates on the Constitution 177 (J. Elliot ed. 1836).

In short, analyzing the meaningfulness factor, *Axon* rejected the channeling argument that FINRA posits here because the jury-trial claim cannot receive "meaningful judicial review" on appeal from SEC's order. That is so because Black/Southeast would have been "subject[ed] to" juryless non-Article III adjudication before any Article III court could meaningfully address a "fundamental" violation of "our constitutional structure." *Blakely*, 542 U.S. at 305–06. Perhaps FINRA expects all parties to waste private and government resources to litigate inside FINRA/SEC, only to have a circuit court vacate the SEC order. *AT&T, Inc. v. FCC*, No. 24-60223, __ F.4th __, 2025 WL 1135280, at *10 (5th Cir. Apr. 17, 2025) (holding that a post-deprivation claim about denying an administrative enforcement target "an Article III decisionmaker and a jury trial" leads to "vacat[ur]" of the agency order). Such vacatur may be meaningful in one sense, but ultimately beside the point. Sure, an enforcement target may elect to use the post-deprivation 15 U.S.C. § 78y route to circuit courts. That doesn't change the *Axon* analysis in situations where the enforcement target elects to go to district court *before* the agency can violate the Constitution's structure. That's the whole point of *Axon*. Structural constitutional claims are "wholly collateral," "outside the agency's expertise," and must be decided

by federal district courts under 28 U.S.C. § 1331 because that is what "meaningful judicial review" requires. *Axon*, 598 U.S. at 186.

On to the collaterality and expertise factors: Black/Southeast's jury-trial claim is "wholly collateral" to the ongoing FINRA proceeding, and neither FINRA nor SEC have any "expertise" on the question. *Axon*, 598 U.S. at 186. It is the "province and duty" of Article III judges in Article III courts to be "experts" in matters of "legal interpretation." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). That is especially true on a structural constitutional matter about the scope of the Constitution's Article III and Fifth and Seventh Amendments. SEC has no power to declare the FINRA/SEC in-house adjudication structure unconstitutional. "It makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested." *Shalala*, 529 U.S. at 13 (simplified); *Carr v. Saul*, 593 U.S. 83, 93 (2021) (same).

FINRA next presents another inapposite argument that *Axon* rejected: Black/Southeast could win in the FINRA/SEC adjudication. But the *Axon* rule does not turn on what *could* happen in the FINRA/SEC adjudication, as FINRA suggests. D.E.49-1:18. Black/Southeast's claim is not about "this or that" fact the non-jury administrative factfinder may find or about the makeshift procedures or legal theories that the FINRA/SEC administrative decisionmaker might use; it is about "subjection" to such non-jury, non-Article III adjudication. *Axon*, 598 U.S. at 195. Nor does the rule depend on what remedies are ultimately awarded in that FINRA/SEC adjudication. D.E.49-1:18. Focusing on the remedy gets FINRA/SEC nothing because *Stern* requires all suits, regardless of whether the remedy asked therein sounds in "common law, or in equity, or admiralty," to be commended and decided by "Article III judges in Article III courts." 564 U.S. at 484 (simplified). The only difference is that for suits where the remedy truly is one of equity or admiralty, there is no right

to a jury trial under *Jarkesy*; rather, the Article III court has discretion to impanel an advisory jury under Fed. R. Civ. P. 39(c).

FINRA's speculation about the outcome of the FINRA/SEC adjudication is misplaced for another reason. The remedy FINRA seeks here is plainly "legal in nature." *Jarkesy*, 603 U.S. at 123. It is undisputed that SEC has already awarded $73,500 to FINRA on the affirmed claim, D.E.45-2:3 ¶ 23, and FINRA currently seeks all sanctions, "including monetary sanctions" and lifetime bar, "under FINRA Rule 8310(a)" on the remanded claim against Black/Southeast from itself and co-defendant SEC. JA0150. FINRA/SEC, therefore, have two options based on *Stern* and *Jarkesy*: (1) FINRA/SEC must litigate their claims against Black/Southeast in an Article III court (with a jury where appropriate) as *Stern*, 564 U.S. at 484 (based on Article III), and *Jarkesy*, 603 U.S. at 128, 132 (based on Article III and Seventh Amendment), 150 (Gorsuch, J., concurring) (based on the structural component of the Fifth Amendment's Due Process Clause), dictate, or (2) FINRA/SEC must unconditionally dismiss the entire administrative matter. FINRA/SEC cannot proceed administratively against Black/Southeast because in so proceeding, as FINRA admits, FINRA/SEC would be "wielding authority unconstitutionally." D.E.49-1:17 (quoting *Axon*, 598 U.S. at 189).

This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 to render judgment on Black/Southeast's jury-trial claim (Count 3).

B. The State Action Doctrine Is Inapposite

FINRA makes a perfunctory argument based on the state action doctrine. D.E.49-1:19–20. FINRA says its disciplinary action does not "constitute state action," so "Article III and the Fifth and Seventh Amendments" do not apply. D.E.49-1:19. FINRA's premise for that argument is that it is "engaged in … self-regulation" of FINRA members. D.E.49-1:20. FINRA's argument fails for two reasons.

First, assuming the state action doctrine is somehow applicable here, FINRA exercises significant governmental power. Indeed, FINRA has no answer to the sheer amount of delegated governmental authority it exercises. FINRA's exercise of significant governmental power dooms its claim of no state action.

Second, and alternatively, the state action doctrine is irrelevant here because the doctrine is inapplicable to structural violations. *See CFTC v. Schor*, 478 U.S. 833, 850–51 (1986) (holding that "parties cannot by consent cure" an Article III structural separation of powers violation). FINRA does not dispute that private-versus-private suits, as here, for ouster and money damages based on some negligence or fraudulent misrepresentation theory are classic common-law suits that state and federal judges and juries routinely decide. Here, therefore, Black/Southeast do not argue that FINRA's internal black-box procedures are subject to constitutional constraints, D.E.49-1:20; they contend that if FINRA wishes to proceed against them at all, FINRA must sue them in federal court in its capacity as a "Delaware corporation," D.E.49-2:7 ¶ 1, or ask SEC to bring such suit under 15 U.S.C. §§ 77t, 78u, 80b-9. That is what *Stern* and *Jarkesy* require. Nothing in the state action doctrine, SEC's statutory scheme, or FINRA's internal procedures prohibit Black/Southeast from suing FINRA in federal court to insist on their right to a judicial forum and jury trial. The state action doctrine is simply inapposite.

FINRA's no-state-action argument against Black/Southeast's jury-trial claim (Count 3) is entirely without merit. The Court should so hold.

C. FINRA's Argument on the Jury-Trial Claim Fails on the Merits

On the merits, FINRA makes three main arguments: consent, D.E.49-1:20–21, fair in-house procedures, D.E.49-1:22–23, and public rights, D.E.49-1:21–23. Each of those arguments is meritless.

First, FINRA's argument, that Black/Southeast consented to non-Article III juryless adjudication by becoming members of FINRA, D.E.49-1:20–21, fails because

structural violations are not consentable. *Schor*, 473 U.S. at 850–51 (holding that "parties cannot by consent cure" an Article III structural separation of powers violation). Assuming they are consentable, consent must be voluntary, knowing, informed, written, and uncoerced. *CFTC v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985). FINRA does not claim, much less produce, any piece of paper where Black/Southeast agreed to non-Article III non-jury adjudication.[4] A generic assertion that Black/Southeast "affirmatively joined and registered with FINRA," so they consented to be "regulated by [FINRA's] rules," D.E.49-1:20, does not suffice under *Schor* and *Union Carbide*. Registration with FINRA, the only national securities association, is compulsory under federal law, not voluntary. Lacking proof (because there is none), and lacking compliance with *Schor* and *Union Carbide*, FINRA's consent-based argument falls flat.

Next, FINRA erroneously argues that Black/Southeast's Fifth Amendment structural due process claim is a procedural claim and then asserts that FINRA satisfies due process by "providing a fair procedure" in its in-house adjudication. D.E.49-1:22–23. That is inapposite. The Fifth Amendment guarantees *judicial* process before anyone can be deprived of liberty or property. Here, FINRA seeks to deprive Black/Southeast of liberty (bar or expulsion) or property (monetary fines) without proving its case to an Article III judge and jury. That non-jury non-Article III adjudication violates the Fifth Amendment's Due Process of Law Clause. *Jarkesy*, 603 U.S. at 150 (Gorsuch, J., concurring).

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[4] FINRA implies without proof that Black/Southeast signed some contract under which they gave up their right to be sued in state or federal court. D.E.49-1:20–21. There is no such contract to begin with. But even if one assumes there's an executed contract somewhere out there, FINRA has not produced it here in support of its motion for summary judgment; and even if they could produce some such piece of paper, that would be a material, disputed fact that would defeat FINRA's motion for summary judgment on the jury-trial claim. *See* Fed. R. Civ. P. 56(a).

Finally, FINRA argues that its suit against Black/Southeast concerns public rights and therefore can be adjudicated in a non-Article III forum. D.E.49-1:21–23. That argument fails for four reasons.

First, *Jarkesy* cabined the public-rights exception to Article III adjudication to *six* categories of cases and FINRA's case against Black/Southeast is not one of them: "revenue collection by a sovereign," immigration, tariffs on imports, "relations with Indian tribes," "administration of public lands," and "granting of public benefits such as payments to veterans, pensions, and patent rights." 603 U.S. at 127, 129–131 (simplified). Even where "matters … fall within the scope of the 'public rights' doctrine, the *presumption* is in favor of Article III courts." *Id.* at 132 (emphasis added). "The public rights exception is, after all, an *exception* [that] has no textual basis in the Constitution." *Id.* at 131. That is why the Supreme Court "has typically evaluated the legal basis for the assertion of the [public-rights] doctrine with care," and has "t[aken] pains to justify the application of the exception." *Id.* FINRA's suit against Black/Southeast is based on negligence, fraud, perjury, and forgery—none of which can be categorized under any of the six *Jarkesy* public-rights categories. JA0777 n.208 (negligence), JA0852 (fraud), JA1071 (fraud), JA0741 (false testimony), JA0755 (false testimony), JA0768 (false documents). And FINRA does not even attempt any such categorization.

Second, *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977), which held that non-Article III adjudication of public rights cases is permissible in some situations, does not control here. *See Jarkesy*, 603 U.S. at 132 (confirming that adjudication of public-rights cases is *presumptively* in Article III courts). FINRA's calling its claims breach of ethical standards, D.E.49-1:22, does not shoehorn FINRA's claims into *Atlas Roofing*. What matters for there to be a Seventh Amendment right to trial by jury is that the action is "legal in nature," that is, one involving monetary penalties and legal claims. 603 U.S. at 123. FINRA does not dispute that its suit against Black/Southeast

is precisely such a private-rights suit that requires it to proceed in federal court with a jury. Therefore, FINRA's discussion concerning whether the ethical standards FINRA invokes, D.E.49-1:22, proscribe conduct that is "narrower" or "broader" than the common law, or whether it "only targets certain subject matter and certain disclosures," is irrelevant. *Jarkesy*, 603 U.S. at 125. This case does not involve "public rights," a phrase FINRA studiously avoids.

Third, this case involves a liability dispute among private actors and, as such, belongs in an Article III court. *See Crowell v. Benson*, 285 U.S. 22, 51 (1932). Here, FINRA is a private Delaware corporation, as it admits, D.E.49-2:7 ¶ 1, going after a private person (Black) and a private company (Southeast). *Atlas Roofing* cannot apply in such situations because it applies, if at all, only in "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes." 430 U.S. at 450.

Fourth, FINRA does not counter (and has therefore waived) any argument against Black/Southeast's argument based on *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (simplified), that Congress cannot "'withdraw from judicial cognizance any matter, which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty'" because the "responsibility for deciding" such suits "rests with Article III judges in Article III courts." That is, even if a suit involved equitable remedies (such as, say, a prospective injunction or a cease-and-desist order), such claims belong in Article III court; only, a jury trial may not be available in such suits. *See* Fed. R. Civ. P. 38–39 (allowing advisory juries in actions not triable of right by a jury). In other words, the six narrow public-rights categories in *Jarkesy* are exceptions to Article III; they have nothing to do with the Seventh Amendment. FINRA does not argue otherwise. And FINRA fails to show how its claims against Black/Southeast fall under one of these tailored categories of the public-rights exception to Article III.

FINRA, thus, fails to make any plausible argument based on the public-rights exception to Article III.

In sum, FINRA has not shown why it is entitled to judgment as a matter of law on the jury-trial claim. The Court should deny FINRA's motion for summary judgment on Count 3 and grant summary judgment to Black/Southeast.

II. FINRA/SEC's Adjudication Structure Violates the Private Nondelegation Doctrine

FINRA principally argues that because it "functions subordinately to" SEC, there is no private nondelegation doctrine violation here. D.E.49-1:13. That argument fails for three reasons.

First, FINRA says that SEC supervised FINRA's rulemaking process, so there cannot be a private nondelegation problem. D.E.49-1:13–14. But SEC's supervision of FINRA's *rulemaking* process is not at issue here. Sure, FINRA's rules do not go into effect until after SEC has reviewed and approved them. That is beside the point.

Second, FINRA's claim that SEC could hypothetically "suspend or revoke" FINRA under 15 U.S.C. § 78s(h) fails because it is illusory control at best. D.E.49-1:13–14. SEC should definitely revoke FINRA, short of Congress fixing the constitutional problems with the Exchange Act. But SEC has *not* done so and is exceedingly unlikely to anytime in the foreseeable future. Such theoretical control by SEC is speculative and hopelessly unrealistic. It is also ultimately irrelevant because, as discussed below, on occasions where it matters most, there is no mechanism for SEC to effectively control FINRA.

Third, FINRA does not address the two improper delegations that are actually at issue here: (a) the improper delegation of unreviewable prosecutorial discretion to FINRA to commence in-house adjudication, and (b) the improper delegation of a combination of governmental powers that FINRA exercises *before* SEC has the opportunity to adequately supervise FINRA.

Indeed, FINRA has significant independent authority, as demonstrated by the fact that it does not need, nor ask for, SEC's sign-off to issue a notice of charges and commence in-house prosecutions. There is no mechanism to get prosecutorial preclearance from SEC. That amounts to FINRA exercising unreviewable prosecutorial discretion, which is a "quintessentially executive power." *Seila Law LLC v. CFPB*, 591 U.S. 197, 219 (2020); FINRA Rule 8210, 8310, 8313, 9120, 9211, 9235(a), 9268(f). And FINRA admits as it must that an order of disbarment or expulsion by FINRA is not automatically stayed pending SEC review. D.E.49-1:16. Here, Black remained disbarred for over four-and-a-half years that SEC took to "review" FINRA's decision—a fact that FINRA does not dispute. D.E.45-2 ¶¶ 12–16. FINRA plainly exercises significant governmental power—subjecting parties to punishment while the parties wait for SEC review.

Further solidifying the nondelegation-doctrine violations, there is also no *pre-deprivation* mechanism for SEC to wield "authority and surveillance," D.E.49-1:13, over FINRA's imposition of industry bars or expulsions. FINRA/SEC continue to seek a bar and expulsion on the portion of the case that's currently pending at FINRA. JA0150. The following is what adequate and effective supervision looks like: (a) SEC could have directed FINRA to dismiss its case against Black/Southeast in its entirety and pay attorney fees to Black/Southeast, (b) SEC could have insisted that FINRA dismiss its in-house suit and instead file suit in federal court against Black/Southeast, or (c) SEC could have insisted on an automatic stay of all FINRA sanctions until an Article III court gets the opportunity to issue judgment. FINRA has not asked SEC to exercise any supervisory control. SEC has not exercised any of these options, nor has it indicated that it would. Instead, FINRA makes the tone-deaf—and inapposite—suggestion that "a person barred from trading securities can pursue other work" outside the area of expertise that he spent his lifetime learning "while appealing to the SEC." D.E.49-1:16 n.3. FINRA's brief, thus, manages to

confirm the serious constitutional deficit in the vast delegation and concentration of constitutionally separated governmental power in a private entity (FINRA). Such delegation is "delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004) (holding that the nondelegation doctrine "serves both to separate powers as specified in the Constitution, and to retain power in the governmental Departments") (simplified).

Because FINRA/SEC's adjudication structure violates the private nondelegation doctrine, the Court should deny FINRA's motion for summary judgment and grant summary judgment to Black/Southeast on Count 2.

III. FINRA/SEC's Adjudication Structure Violates the Appointments Clause

FINRA argues in the main that Black/Southeast's claim under the Appointments Clause (Count 1) fails because the Appointments Clause "applies only to instrumentalities of the U.S. government, not private parties." D.E.49-1:7. That argument lacks merit for four reasons: (a) both public and private officials wielding government power must be properly appointed, (b) eventual SEC review of the private entity's decision does not cure the Appointments Clause defect as *Lucia* held, (c) FINRA does not dispute that FINRA's board and hearing officers are in continuing positions wielding significant government power, and (d) FINRA is not a voluntary association because membership in FINRA is mandated by law.

First, no court has ever held that the Appointments Clause applies only to public employees. Rather, according to the private nondelegation doctrine, people who wield significant government power must be appointed in compliance with the Appointments Clause. *Pittston* held that "core governmental power must be exercised by the Department on which it is conferred and must not be delegated to others in a manner that frustrates the constitutional design." 368 F.3d at 394. That is, the President's executive power cannot be delegated away from the executive branch, nor

can an Article III court's judicial power be delegated away from the judicial branch. *Id.*; *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 535–39 (1935). As noted, worse than interbranch delegation is extrabranch delegation—that's delegation in its "most obnoxious form." *Carter*, 298 U.S. at 311. If governmental powers can be exercised outside the constitutional system, the government would be "able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). Private actors may perform "*ministerial* or *advisory*" functions, but government cannot give private entities "governmental power over others," *Pittston*, 368 F.3d at 395, at least not when the private office is "continuing and permanent." *Lucia v. SEC*, 585 U.S. 237, 245 (2018).

FINRA is a private entity that exercises significant executive authority, which subverts the constitutional design absent proper appointment. FINRA enforces both its own rules and federal securities law, without adequate control by the President. 15 U.S.C. § 78o-3(b)(2). FINRA investigates, inspects, requires testimony under oath, and exercises prosecutorial discretion to institute in-house action or choose no action, all without the need to inform SEC, obtain SEC's preclearance, or with any SEC supervision or oversight. FINRA Rules 8210(a)(1)–(2), 8211, 8213, 9211(a)–(b), 9270; *Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) ("[FINRA] disciplinary proceedings are treated as an exercise of prosecutorial discretion."); *Wedbush Securities, Inc.*, No. 78568, 2016 WL 4258143, at *16 (SEC Aug. 12, 2016) ("FINRA has broad prosecutorial discretion[.]"). FINRA also requires members to participate in in-house adjudicatory proceedings, impose a spectrum of sanctions as FINRA unilaterally "deems fair and appropriate," and issue large fines, as well as disbar members or firms, all while the disbarment of persons or firms has the force of federal law *before* SEC decides to review FINRA's orders. FINRA Rules 8310(a), 8313, 8320(c), 8330, 9221(b), 9231, 9235.

In short, FINRA operates as the "principal decisionmaker in the use of federal power" without any initial approval from its supposed supervisor—SEC. *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023). This "especially provocative exercise of governmental power by a private organization" is a transgression of the private nondelegation doctrine. 1 Kenneth Culp Davis, *Administrative Law Treatise* 141 (1st ed. 1958); *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013) ("Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority.").

Second, eventual SEC review does not cure the Appointments Clause defect. *Lucia* held that SEC ALJs must be properly appointed and removable, regardless of SEC's ability to review their decisions. 585 U.S. at 241–52. FINRA does not dispute that hearing officers wielding substantially the same power as SEC ALJs can do so without the same Appointments Clause restrictions. The opposite rule that FINRA proposes—that the Constitution requires *less* accountability to the President when significant executive authority is delegated outside the executive branch than when such authority is delegated within it—makes no sense.

Third, simply put, FINRA's board members and hearing officers are in "continuing and permanent" offices, *Lucia*, 585 U.S. at 245. They perform "important functions" with a wide degree of discretion that the Supreme Court categorizes as "significant authority." *Freytag v. CIR*, 501 U.S. 868, 881–82 (1991). FINRA officers have "nearly all the tools of federal trial judges." *Lucia*, 585 U.S. at 248. So, they must be appointed in compliance with the Appointments Clause—directly by the President, courts of law, or heads of departments, and they cannot be insulated from presidential removal by more than one level of for-cause removal restrictions. *Id.* at 241, 247; *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 514 (2010). That is what compliance with the Appointments Clause looks like.

Fourth, FINRA's attempt to re-cast FINRA as some voluntary association lacks merit. Congress in 1983 made membership in securities associations mandatory for nearly all brokers and dealers. 97 Stat. 205, 206–07 (1983), *codified, as amended, in* 15 U.S.C. § 78o(a)(1), (b)(1). Today, the only securities association recognized by SEC is FINRA. 88 Fed. Reg. 61,850, 61,851 (Sept. 7, 2023) (noting FINRA as "the only" registered national securities association). Were FINRA a public entity or agency of the United States—which it is not—that might solve the private nondelegation problem; it would make the Appointments Clause problem more acute. But, as all parties agree, FINRA is a private entity. And that makes both the private nondelegation and the Appointments Clause violations that much more egregious. In other words, because too much governmental power is delegated to FINRA, FINRA's board and hearing officers must be appointed in compliance with the Appointments Clause and subject to the President's ultimate control in compliance therewith.

Because FINRA board members and hearing officers are not appointed in compliance with the Appointments Clause, FINRA has shown, D.E.49-1:7–13, it is not entitled to judgment as a matter of law on Black/Southeast's Appointments Clause claim. The Court should deny FINRA's motion for summary judgment on Count 1 and grant summary judgment to Black/Southeast.

IV. FINRA Has Not Shown It Is Entitled to Judgment as a Matter of Law

FINRA has not made any showing to defeat Black/Southeast's motion for summary judgment. Nor has FINRA shown how the law supports it to obtain summary judgment. "When faced with cross-motions for summary judgment, the court must review each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (simplified). Where, as here, there are no material facts in dispute, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (quoting Fed. R. Civ. P. 56). To defeat summary

judgment, the opponent must show either that "the facts are genuinely in dispute" or "the law does not support the movant's position." *Dupree v. Younger*, 598 U.S. 729, 737 (2023).

The permanent-injunction factors that FINRA brings up are simply inapplicable when a court declares that a party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. Black/Southeast primarily ask for *declaratory* relief under 28 U.S.C. §§ 2201–2202, D.E.1:2 ¶ 11—that FINRA/SEC in-house adjudication that FINRA instituted against Black/Southeast is unconstitutional. D.E.1:10–11 ¶¶ 79 ("declaration"), 80 ("declaration"), 81 ("declaration").

FINRA's briefing of the permanent-injunction factors is, therefore, entirely premature. D.E.49-1:23–25. Perhaps FINRA wishes to hint that it will defy this Court's declaratory judgment if the Court rules in Black/Southeast's favor. Briefing on the permanent-injunction factors might be relevant in such scenario. For now, Black/Southeast hope FINRA knows better than to invite follow-on contempt proceedings for failure to comply with an Article III court's orders.

Even if the permanent-injunctions factors are somehow relevant, Black/Southeast easily satisfy them all. Black/Southeast have shown why they succeed on the merits and FINRA/SEC do not. As *Axon* explained, the here-and-now injury of being subjected to an illegitimate proceeding, led by an illegitimate decisionmaker is impossible to remedy once the proceeding is over. 598 U.S. at 191. FINRA/SEC adjudication's violation of the Constitution's structure unquestionably constitutes irreparable harm under *Axon*. Likewise, the balance of equities and the public interest both favor Black/Southeast because FINRA/SEC wish to extrajudicially deprive them of liberty or property in open noncompliance with the Constitution's guarantee of structural and individual rights. *Nken v. Holder*, 556 U.S. 418, 426 (2009).

Conclusion

The Court should deny Defendant FINRA's cross-motion for summary judgment (D.E.49) and grant Plaintiffs Black/Southeast's motion for summary judgment (D.E.45).

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Respectfully submitted,

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