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 DEFENDANT SECURITIES AND EXCHANGE COMMMISSION'S CROSS-MOTION FOR SUMMARY JUDGMENT, D.E.51**

Introduction

The Court should deny the Securities and Exchange Commission's (SEC's) Cross-Motion for Summary Judgment. D.E.51. There are no material disputes concerning the facts. Indeed, SEC does not dispute Plaintiffs' Statement of Undisputed Material Facts, D.E.45-2, and it does not offer any additional undisputed material facts in support of its cross-motion for summary judgment. But SEC'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) Financial Industry Regulatory Authority, Inc.'s (FINRA) 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.[1]

The reasons for denying SEC's motion are as follows: This Court has jurisdiction over the jury-trial claim (Count 3), and SEC's argument that the jury-trial claim is unripe is wholly without merit. *See* D.E.51-1:6–16. SEC's argument for grant of summary judgment to SEC on Count 3 fails for reasons stated herein. *See* D.E.51-1:16–17. As do SEC's arguments for grant of summary judgment to SEC on Counts 1 (Appointments Clause) (D.E.51-1:20–23) and 2 (private nondelegation doctrine) (D.E.51-1:17–20).

Argument

I. SEC 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

SEC 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.51-1:6. SEC 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 post-

[1] SEC combined its memorandum supporting its cross-motion for summary judgment and opposing Black/Southeast's motion for summary judgment. That 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 SEC's brief. If SEC construes any portion of this brief to be a reply in support of Plaintiffs' motion for summary judgment (D.E.45), SEC 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 FINRA, pursuant to LCvR 7.1(c)(2) and (d).

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

SEC's entire argument on the jury-trial claim is based on its unsupported assumption that the claim is not structural. D.E.51-1:6–17. 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).

SEC'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[.]" *Axon*, 598 U.S. at 195. SEC resists this key holding of *Axon*. Instead, SEC argues here what it argued in *Axon*, that Black/Southeast "must raise [the jury-trial claim] in administrative proceedings" and then petition the appropriate circuit court for review. D.E.51-1:7; 598 U.S. at 184. *Axon* rejected SEC's 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 an Article III court, where trial will be by jury where appropriate. *Jarkesy*, 603 U.S. at 122, 128; *Stern*, 564 U.S. at 484.

SEC next says that circuit courts have "exclusive" jurisdiction over the jury-trial claim under 15 U.S.C. § 78y(a) and the "detailed structure" of the Exchange Act. D.E.51-1:1, D.E.51-1:6. But neither § 78y(a) nor the Exchange Act's detailed structure supports SEC's exclusivity argument because the Supreme Court has already rejected that argument in *Shalala* and *Axon*, as discussed below.

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, SEC's argument fails even if based on an "implici[t]" grant of jurisdiction to circuit courts in § 78y or the Exchange Act. As the Supreme Court explained in *Axon*, an "exclusive" statutory review scheme "does not necessarily extend to every claim concerning agency action." 598 U.S. 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). SEC's jurisdiction-stripping argument is, thus, meritless.

Under *Shalala* and *Axon*, therefore, this Court has jurisdiction to render judgment on the jury-trial claim because it is a structural constitutional claim. That should be the end of the analysis. But SEC insists on discussing the three-factor test for implicit jurisdiction stripping. Because SEC wastes much ink on this irrelevant test, D.E.51-1:8–14, so must we.

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.

SEC's principal argument on the three factors is to misdirect this Court. SEC characterizes Black/Southeast's jury-trial claim as a "procedural-due-process claim." D.E.51-1:8. But labels do not convert a *structural* claim into a procedural one. Black/Southeast's jury-trial claim is not about the procedures used in FINRA/SEC

adjudication but rather "subjection to [that] illegitimate proceeding." *Axon*, 598 U.S. at 191. The jury-trial claim cannot receive "meaningful judicial review" on appeal from SEC's order 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. SEC 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.

SEC 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 SEC suggests. D.E.51-1:9–10. 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.51-1:12–13. 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 commenced 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 at 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).

SEC'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 ¶ 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 SEC admits, FINRA/SEC would be "wielding authority unconstitutionally." D.E.51-1:12 (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 Jury-Trial Claim Is Ripe

To skirt *Axon*'s clear holding on jurisdiction, SEC repackages its argument as one about ripeness, D.E.51-1:14–15, but the ripeness doctrine is inapposite here. The

holding of *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 579–82 (1985), is fatal to SEC's argument. *Union Carbide* concluded that structural challenges to non-Article III adjudication are ripe because such claims do not depend on the outcome of that non-Article III adjudication.

Axon itself provides grounds to reject SEC's ripeness argument. SEC asserts that Black/Southeast have "not yet suffered injury and any future impact remains wholly speculative." D.E.51-1:14. The premise of that argument is SEC's assumption that the jury-trial claim is not structural. As discussed above, that is not so.

Further, as *Axon* confirmed, while run-of-the-mill cases may be heard directly on appeal, cases like this—involving structural constitutional claims—must be heard in district court; there is a major "difference" between the two. 598 U.S. at 192. The difference is this: Black/Southeast's injury is the "here-and-now … subjection to an unconstitutionally structured decisionmaking process"—that is, "subjection to" FINRA/SEC's juryless non-Article III adjudication "irrespective of its outcome, or of other decisions made within it." *Id.* Black/Southeast "will lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over." *Id.* The structural nature of Black/Southeast's jury-trial claim makes the ripeness doctrine inapposite.

If the ripeness doctrine applies, Black/Southeast's jury-trial claim plainly meets the test for ripeness, which turns on "fitness" and "hardship." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014). As discussed above, *Axon* and *Union Carbide* show that Black/Southeast's structural jury-trial claim is "fi[t]" for resolution in Article III courts under 28 U.S.C. § 1331. Further, because "the court of appeals [could] do nothing" about a "proceeding that has already happened," *Axon*, 598 U.S. at 191, by going through the administrative process here, Black/Southeast would be subjected to the very "hardship" they complain of—subjection to juryless non-Article III adjudication.

SEC's ripeness argument is wholly without merit. There is no mechanism by which this Court can "avoid," D.E.51-1:16, deciding Black/Southeast's jury-trial claim. This Court should so hold.

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

SEC makes a single-paragraph pro forma argument wrongly suggesting that Black/Southeast need to satisfy the *Salerno* test for "facial challenges." D.E.51-1:16 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). That argument fails for two reasons.

First, the *Salerno* test does not apply because Black/Southeast ask primarily for declaratory judgment as to themselves—that FINRA cannot proceed administratively against them on common-law claims. There is nothing "facial," D.E.51-1:16, about such a declaratory judgment. *Jarkesy* held, citing *Stern*, 564 U.S. at 484, that Article III adjudication is "mandatory" if, as here, FINRA's claim against Black/Southeast "is in the nature of an action at common law." 603 U.S. at 128. SEC admits, as it must, that FINRA's beef against Black/Southeast is about negligent preservation of records, fraud, and perjury, D.E.51-1:4–5—all of which are "in the nature of an action at common law." *Jarkesy*, 603 U.S. at 128. For those allegations, SEC admits, as it must, that FINRA seeks "a range of disciplinary sanctions including censure, fines, suspension or expulsion from membership, or cease-and-desist orders." D.E.51-1:4–5.

Second, even assuming the *Salerno* facial-challenge test applies, there are no set of circumstances under which "an action at common law," *Jarkesy*, 603 U.S. at 128, can be maintained outside Article III courts. The Supreme Court expressed its frustration in having "repeatedly explained that matters concerning private rights may not be removed from Article III courts." *Id.* at 127. "[A]djudication by an Article III court is mandatory," *id.* at 128; there are no set of circumstances where private-

rights cases can be litigated outside of Article III courts. And SEC does not dispute that the underlying claims here involve private rights. D.E.51-1:8.

The Court should reject SEC's argument and grant summary judgment to Black/Southeast on the jury-trial claim (Count 3).

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

SEC principally argues that SEC's "ultimate control" over FINRA, which "functions subordinately to the SEC," is sufficient to satisfy the private nondelegation doctrine. D.E.51-1:1; D.E.51-1:17 (simplified). SEC's argument fails for two reasons.

First, SEC misdirects the Court by saying that SEC supervised FINRA's rulemaking process and has approved every single rule FINRA has promulgated, D.E.51-1:3–4, D.E.51-1:18–19, so there cannot be a private non-delegation problem. But SEC's supervision of FINRA's *rulemaking* process is not at issue here. Sure, FINRA rules do not go into effect until after SEC has reviewed and approved them. That is beside the point.

Second, SEC 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 does not need, nor ask for, SEC's sign-off to issue a notice of charges which commences the in-house prosecution of FINRA's complaint against regulated parties like Black/Southeast. There is no mechanism to get prosecutorial preclearance from SEC. That amounts to FINRA's 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 SEC admits as it must that an order of disbarment or expulsion by FINRA is not automatically stayed pending SEC review. D.E.51-1:13. Here, Black

remained disbarred for over four-and-a-half years that SEC took to "review" FINRA's decision—a fact that SEC 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 "wiel[d] authority and surveillance," D.E.51-1:18 (simplified), 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. If SEC wanted to adequately supervise FINRA, (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. SEC has not exercised any of these options, nor has it indicated that it would. Instead, SEC 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.51-1:19 n.4. SEC's brief, thus, confirms 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 SEC'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

SEC's main argument with respect to Black/Southeast's Count 1 is that the Appointments Clause "does not govern the selection of private executives or board members of a private corporation outside the government." D.E.51-1:20. 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) SEC 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. SEC 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 SEC 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 Enter. Fund v. PCAOB*, 561 U.S. 477, 514 (2010). That is what compliance with the Appointments Clause looks like.

Fourth, SEC'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, SEC has shown it is not entitled to judgment as a matter of law on Black/Southeast's Appointments Clause claim. The Court should deny SEC's motion for summary judgment on Count 1 and grant summary judgment to Black/Southeast.

Conclusion

The Court should deny Defendant SEC's cross-motion for summary judgment (D.E.51) and grant Plaintiffs Black/Southeast's motion for summary judgment (D.E.45).

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Respectfully submitted,

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