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

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| FRANK HARMON BLACK; and SOUTHEAST INVESTMENTS, N.C., INC.,<br><br>Plaintiffs,<br><br>v.<br><br>FINANCIAL INDUSTRY REGULATORY AUTHORITY; and SECURITIES AND EXCHANGE COMMISSION,<br><br>Defendants. | No. 3:23-CV-709-RJC-DCK<br><br>**PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, D.E.45** |

## Introduction

The Court should grant Plaintiffs' motion for summary judgment, D.E.45. The parties have "no genuine dispute as to any material fact," and Plaintiffs are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This reply is submitted as ordered by the Court, D.E.54:2.

Plaintiffs Frank Harmon Black and Southeast Investments, N.C., Inc. (Black/Southeast) present structural constitutional claims: (1) FINRA/SEC adjudication is unconstitutionally structured because it violates Article III and the Fifth and Seventh Amendments to the Constitution, which guarantee Black/Southeast Article III courts and juries (Count 3), (2) FINRA/SEC adjudication is unconstitutionally structured because the delegation of governmental power to Defendant Financial Industry Regulatory Authority, Inc. (FINRA) violates the private nondelegation doctrine (Count 2), (3) FINRA/SEC adjudication is unconstitutionally structured because FINRA's board and hearing officers exercise significant governmental power but are neither properly appointed nor subject to the

President's removal power in violation of the Appointments Clause (Count 1).

Defendant Securities and Exchange Commission (SEC) does not dispute most points of law that entitle Plaintiffs to judgment as a matter of law. D.E.52.[1] Nor does FINRA. D.E.50.[2] Moreover, as will be discussed below, FINRA/SEC concede and admit key points that doom their arguments for denying summary judgment to Plaintiffs.

## Argument

### I. FINRA/SEC Adjudication Is Unconstitutionally Structured Because It Violates Article III, and the Fifth and Seventh Amendments to the Constitution (Count 3)

SEC does not dispute the merits of Plaintiffs' submission (D.E.45-1:5–13) on Count 3. D.E.52:16–17.

FINRA, on the other hand, attempts to attack the merits of Count 3. D.E.50:20–23. FINRA's arguments lack merit for five reasons.

First, as expected, D.E.45-1:9–10, FINRA argues that Black/Southeast agreed to FINRA/SEC's administrative adjudication through voluntary, knowing, informed, written, and uncoerced consent. D.E.50:20–21 (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985)). But FINRA presents no evidence—because there is none—to support its assumption that Black/Southeast consented to the FINRA/SEC

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[1] SEC and FINRA combined their respective memoranda supporting their cross-motions 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 FINRA/SEC's briefs. This brief is Plaintiffs' reply in support of Plaintiffs' motion for summary judgment (D.E.45). Defendants cannot file a sur-reply to Plaintiffs' reply without leave of Court, and Defendants cannot combine their reply in support of their summary judgment motions with their sur-reply to this brief. Plaintiffs construe LCvR 7.2(c)(2) as requiring one reply brief in support of Plaintiffs' summary judgment motion where two defendants each file separate oppositions to that motion.

[2] SEC's combined briefs—D.E.51-1 and D.E.52—are identical documents. As are FINRA's combined briefs—D.E.49-1 and D.E.50. For convenience, Plaintiffs' reply brief refers to D.E.52 and D.E.50 because those filings are docketed as Defendants' memoranda in opposition to Plaintiffs' motion for summary judgment.

non-Article III, non-jury adjudication. The absence of evidence is fatal to FINRA's argument, and without evidence, FINRA's bare assertion is insufficient to create a fact dispute to defeat Black/Southeast's motion for summary judgment.

Second, and more importantly, FINRA does not address the lead point (and has therefore forfeited any counterargument it could have made) about Count 3—that the right to adjudication in actual courts, with juries where appropriate, is a structural right,[3] and structural rights cannot be waived by party consent; courts indulge every reasonable presumption against the waiver of such structural rights.[4] When "Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Schor*, 478 U.S. at 851; *see also* D.E.45-1:5 ("FINRA/SEC adjudication is unconstitutionally *structured*.") (emphasis altered); D.E.45-1:10 (same, based on Article III and the Fifth Amendment); D.E.45-1:12 (FINRA/SEC adjudication "*structure* violates the Fifth Amendment"). The structural guarantee of adjudication in an Article III court (with juries where appropriate) is simply not waivable by Black/Southeast.

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[3] *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.'"); *SEC v. Jarkesy*, 603 U.S. 109, 128, 132 (2024) (Suing enforcement targets like Black/Southeast in Article III court is "mandatory" when the suit "concerns private rights," and "presump[tive]" in all other cases.); *id.* at 150 (Gorsuch, J., concurring) (The Fifth Amendment's Due Process Clause structurally guarantees "*judicial* process … before" a person can be deprived of life, liberty, or property.); *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (The "right of jury trial" is "structur[al]."); *Jones v. United States*, 526 U.S. 227, 224–48 (1999) (Juries provide structural checks and balances.).

[4] *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). An Article III defendant can waive its Seventh Amendment right to a jury trial. *See Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393–94 (1937) (holding that because the "Seventh Amendment" "right of jury trial is fundamental, courts indulge every reasonable presumption against waiver").

Third, as expected, D.E.45-1:7–10, FINRA latches on to the public-rights exception to Article III. D.E.50:21–22. FINRA says that the administrative matter that is pending now relates to "ethical standards that are different … from common-law fraud." D.E.50:22. FINRA/SEC's own documents rebut that recharacterization. JA0777 n.208 (negligence), JA0852 (fraud), JA1071 (fraud), JA0741 (false testimony), JA0755 (false testimony), JA0768 (false documents).[5] And, as expected, D.E.45-1:6–7, FINRA has no answer to *Jarkesy*'s holding that common-law analogs are just that—analogs (dictionary definition: comparable, similar). It does not matter whether the ethical standards requiring truthful statements are "narrower" or "broader" than common-law negligence, misrepresentation, or fraud. 603 U.S. at 126; D.E.50:22 (arguing FINRA's ethical standards are broader—"beyond those any law can establish"). They plainly have a common-law ancestor. And, as expected, D.E.45-1:6, FINRA has no answer to the "more important" "remedy" factor, *Jarkesy*, 603 U.S. at 111; FINRA does not dispute that it continues to seek money damages and lifetime bar for these alleged "ethical violations," D.E.50:22; JA0150 (citing FINRA Rule 8310), and FINRA does not dispute that it pockets the fines it awards itself, D.E.50:23. That makes FINRA's suit against Black/Southeast a classic "action in debt requiring trial by jury." *Jarkesy*, 603 U.S. at 122 (simplified).

Fourth, FINRA mischaracterizes Black/Southeast's structural Fifth Amendment argument, D.E.45-1:11–13, by labeling it as procedural due process. D.E.50:22–23. FINRA fails to counter Black/Southeast's argument that the Fifth Amendment structurally guarantees "*judicial* process … before" Black/Southeast can

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[5] FINRA attempts to draw an invalid inference in one of its proposed facts. D.E.49-2:7 ¶ 4. The invalid inference is that only the remanded claims are at issue, and the affirmed claims are not. That is not so. Each of FINRA's five claims, JA0142–JA0149, and all relief FINRA has requested, including lifetime bar, expulsion, and/or monetary fines, JA0150, remain at issue and unappealable to federal court until SEC issues a fully final and appealable order adverse to Black/Southeast. *See Black v. SEC*, 125 F.4th 541, 547 (4th Cir. 2025).

be deprived of liberty or property, *Jarkesy*, 603 U.S. at 150 (Gorsuch, J., concurring), and that this guarantee does not change "no matter how court-like [FINRA's] decisionmaking process might appear." *Ortiz v. United States*, 585 U.S. 427, 465 (2018) (Alito, J., dissenting). Even where the "duties" of FINRA hearing officers "partake of a Judiciary quality," and even where their "activities" "take … 'judicial' forms," *United States v. Arthrex*, 594 U.S. 1, 17 (2021) (simplified), no one pretends that FINRA's in-house adjudication provides *judicial* process that only Article III courts can. *Jarkesy*, 603 U.S. at 150 (Gorsuch, J., concurring) (It is "the peculiar province of the judiciary to safeguard life, liberty, and property"; "Congress [cannot] mak[e] any process 'due process of law,' by its mere will.") (simplified). Because FINRA/SEC would deprive Black/Southeast of "property, … due process demands nothing less than the process and proceedings of" Article III courts. *Id.* at 151 (Gorsuch, J., concurring) (simplified).

Fifth, FINRA also fails to explain how any "extensive process" FINRA might provide could ever cure the structural Fifth Amendment violation, given its open profit motive (D.E.45-1:12–13)[6] in awarding itself money damages payable by Black/Southeast for their alleged "ethical violations." D.E.50:22.

Having failed to counter Black/Southeast's principal points of law, FINRA/SEC have not shown why Black/Southeast are not entitled to judgment as a matter of law. The Court should so hold and issue judgment to Black/Southeast on Count 3.

## II. FINRA/SEC Adjudication Is Unconstitutionally Structured Because It Violates the Private Nondelegation Doctrine (Count 2)

FINRA/SEC do not address what's at issue here: whether *adjudication* by FINRA/SEC violates the private nondelegation doctrine. D.E.45-1:13–15. It does. The doctrine requires each department—the legislative, executive, and judicial—to retain

[6] FINRA acknowledges the fact that the "government does not … provide [FINRA] any funding," D.E.49-2:7 ¶ 3—a fact that Plaintiffs do not dispute.

its power. Also, it prohibits Congress from delegating judicial power outside Article III and executive power outside Article II.

*Jarkesy*, quoting *Stern*, holds that "adjudication by an Article III court is "mandatory" if a suit "concerns private rights." 603 U.S. at 128. Accordingly, delegation of the power to adjudicate private-rights cases outside of Article III (as here, to FINRA or SEC) is *per se* unconstitutional because that's "delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). FINRA/SEC do not respond to this crucial point.

In addition to "separat[ing] powers as specified in the Constitution," the nondelegation doctrine also serves the important purpose of "retain[ing] power in the governmental Departments." *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004) (simplified). By assigning the prosecutorial and adjudicatory power to FINRA, D.E.45-1:14–15, Congress/SEC has done precisely what the nondelegation doctrine forbids—the Constitution requires that governmental power be *retained* in one of the three separate "Departments" established by the Constitution. *Pittston*, 368 F.3d at 394. Again, FINRA/SEC have no answer.

Instead, they focus on the strawman of FINRA *rulemaking*. D.E.52:17–20; D.E.50:13–16. That is a major concession that goes in Black/Southeast's favor. Rulemaking (or, delegation of legislative power) is not at issue here.

The Court should issue judgment to Black/Southeast on Count 2.

## III. FINRA/SEC Adjudication Is Unconstitutionally Structured Because FINRA's Board and Hearing Officers Are Not Properly Appointed (Count 1)

FINRA/SEC attempt to read a private-entity exception into the Appointments Clause such that vast governmental power can be delegated to a private entity without the corresponding accountability strictures of the Appointments Clause. D.E.52:20–23; D.E.50:7–13. That argument fails for one simple reason.

The reason is this: FINRA/SEC do not address the Appointments Clause test

as articulated by the Supreme Court. Persons in "continuing and permanent" positions who wield "significant" governmental "authority" must be appointed by "the President, a court of law, or a head of department." *Lucia v. SEC*, 585 U.S. 237, 244–45 (2018). FINRA/SEC do not dispute that FINRA's board and hearing officers are in "continuing and permanent" positions, or that they wield "significant" governmental "authority." *Id.* And FINRA/SEC point to no authority suggesting that the Appointments Clause test does not apply in situations where the elements of the test are necessarily satisfied. So, because FINRA's board and hearing officers were not properly appointed in compliance with the Appointments Clause, they wielded power unlawfully.

The Court should issue judgment to Black/Southeast on Count 1.

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Private associations like local pickleball clubs can write their own by-laws, perform all manner of executive-like actions such as collecting annual dues, and can even undertake judicial-like drumhead trials to oust or fine its members, with little if any government oversight. But that is not what's happening here. Starting in 1983, when Congress fundamentally changed the relationship between SEC and national securities associations, *Congress* delegated to FINRA, the only national securities association, vast *governmental* power—legislative, executive, and judicial—and ordered private persons and firms like Black/Southeast to comply with FINRA's diktat. But the federal government's executive and judicial powers weren't Congress's to give away to a private entity such as FINRA. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). Even if somehow Congress could delegate away executive and judicial power that "it does not possess," *id.*, Congress could not have insulated persons exercising that executive/judicial power from the accountability to the "President" or "Courts of Law" that the Constitution's Appointments Clause requires. U.S. Const. art. II, § 2, cl. 2. There remains much daylight between this private-adjudication structure and

the Constitution's requirement that (a) only Article III courts with juries where appropriate can deprive persons of life, liberty, or property, and (b) only if the constitutionally authorized accuser proves that the accused violated (c) law written by the constitutionally authorized lawmakers before the alleged violation occurred. Combining governmental powers in FINRA and permitting it to profit from the unilateral use of those governmental powers is plainly unconstitutional.

**Conclusion**

The Court should grant Plaintiffs' motion for summary judgment, D.E.45.

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Respectfully submitted,

/s/ Ruth C. Smith
RUTH C. SMITH
N.C. Bar No. 26754
Elmore and Smith Law Firm
P.O. Box 1823
Weaverville, NC 28787
Tel.: (828) 367-7998
Fax: (828) 367-7991
Ruth@mywncattorney.com

/s/ Aditya Dynar
ADITYA DYNAR*
D.C. Bar No. 1686163
Pacific Legal Foundation
3100 Clarendon Blvd.
Suite 1000
Arlington, VA 22201
Tel.: (202) 888-6881
Fax: (916) 419-7747
ADynar@pacificlegal.org

CAMERON HALLING*
Cal. Bar No. 306778
Pacific Legal Foundation
555 Capitol Mall, Ste. 1290
Sacramento, CA 95814
Tel.: (916) 419-7111
Fax: (916) 419-7444
CHalling@pacificlegal.org

**admitted Pro Hac Vice*

*Counsel for Plaintiffs*