UNTIED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D. ALLEN BLANKENSHIP, *Plaintiff,* v. FINANCIAL INDUSTRY REGULATORY AUTHORITY, *Defendant.*	Civil Action No. 2:24-cv-3003 Assigned to the Honorable Judge

VERIFIED COMPLAINT FOR A TEMPORARY RESTRAINING ORDER, AS WELL AS A PRELIMINARY AND PERMANENT INJUNCTION TO ENJOIN THE PROSECUTION OF PLAINTIFF IN AN UNLAWFUL FORUM, AND A REQUEST FOR DECLARATORY RELIEF

D. Allen Blankenship ("Mr. Blankenship"), by and through undersigned counsel hereby files the following Verified Complaint against Defendant, the Financial Industry Regulatory Authority ("FINRA"), requesting that the Court enter a temporary restraining order ("TRO"), and after appropriate proceedings, a preliminary and permanent injunction to enjoin the disciplinary proceedings instituted by FINRA's Department of Enforcement ("FINRA Enforcement") which is to take place in an improper forum, before an arbitrator whose selection was made in blatant violation and disregard of Mr. Blankenship's Seventh Amendment right to a trial before a jury in an Article III court. Further, the imminent disciplinary proceedings are overseen by an agency recently deemed to lack the authority to adjudicate claims consistent with those lodged against Mr. Blankenship, in its administrative courts.

Mr. Blankenship requests also that the Court enter an Order declaring that the herein-referenced disciplinary proceedings violate Mr. Blankenship's Seventh Amendment right to a trial by an impartial judge, and before a jury of his peers in an Article III court, and therefore the proceedings before FINRA's Office of Hearing Officers are void and have no legal affect.

FACTUAL BACKGROUND

On November 19, 2019, after Mr. Blankenship spent over two decades cultivating relationships with his clients, Defendant notified Mr. Blankenship that it had initiated an inquiry into him, based upon a Form U5 filing by Independent Financial Group, LLC ("IFG"), Mr. Blankenship's former employer. Therein, IFG characterized the reason for his termination as, *in haec verba*, "[ ] for violation of firm's policy with regard to submission of required documents for certain mutual fund transactions, failure to ensure clients were receiving [ ] benefit of mutual fund breakpoints[,] and exercising discretion without proper authorization."

For the 37 months following receipt of the above-referenced notification from Defendant, Mr. Blankenship expended hundreds of hours complying with Defendant's formal and informal requests for information and documentation. In addition, Mr. Blankenship incurred hundreds of thousands of dollars in costs for representation—during and after the 37-month period—exhausting his retirement and savings, entirely. As a result of Defendant's incessant attempts to obtain evidence from Mr. Blankenship's customers in support of Defendant's tenuous allegations, Mr. Blankenship suffered substantial harm to his professional reputation that resulted in a 65% decline in his earnings.

Between October 22, 2019 and November 19, 2019, Defendants initiated an inquiry into Mr. Blankenship's termination from IFG. See, *supra*, (Introduction referencing the notification

received by Mr. Blankenship). The relevant period associated with the inquiry, as declared by Defendants, consists of the 40 months between August 2016 and September 2019.

Nearly three years later, on November 2, 2022, Defendant issued a Wells Notice, asserting that FINRA had "made a preliminary determination" to recommend disciplinary action against Plaintiff for violations of FINRA Rules: 2010, 2111, 3260(b), and 4511, as well as NASD Rule 2510(b).

Over one year later, on December 7, 2023, Defendant filed a formal disciplinary complaint (see *supra*, FINRA Disc. Proceeding No. 2019064333401, Complaint, hereafter "Complaint") against Mr. Blankenship. In a departure from the Wells Notice, Defendant alleged violations of FINRA Rules 2010, 2111, and 4511 in its Complaint. Defendant's filing of the Complaint initiated its *in-house* proceedings against Mr. Blankenship.

In support of Plaintiff's requests, it states the following:

PARTIES

1. Plaintiff, Mr. Blankenship, is a natural person residing at 562 General Learned Rd., King of Prussia, Pennsylvania 19406, for no less than 25 years.
2. FINRA is a Self-Regulatory Organization headquartered in 1735 K St NW, Washington, D.C. 20006.

JURISDICTION AND VENUE

3. Personal jurisdiction is proper in this court because Mr. Blankenship resides within Pennsylvania and the wrongs alleged herein were committed in Pennsylvania by FINRA, an SRO which operates within Pennsylvania.

4. Subject matter jurisdiction is proper pursuant to 28 USC § 1331 because this case is being brought in a federal district court regarding a federal question.
5. Venue is proper pursuant to 28 USC § 1391 as the events at issued giving rise to the present claim occurred herein.

INTRODUCTION

6. FINRA is a self-regulatory agency (SRO) which derives its authority from the Securities and Exchange Commission (SEC).
7. The SEC is a statutorily appointed government agency empowered by the Securities Exchange Act of 1934.
8. SEC commissioners are appointed by the President of the United States pursuant to the Constitution's Appointments Clause, and the SEC and its commissioners are empowered with executive authority pursuant to Article II.
9. Since the passage of the Dodd-Frank Act, the SEC has been allowed to bring enforcement actions either in-house or in Article III courts, where the right to a jury trial would apply.
10. FINRA, a non-governmental agency, exclusively brings enforcement actions in its in-house arbitration forum known as the Office of Hearing Officers ("OHO").
11. OHO arbitrates cases brought by FINRA, including cases which would traditionally be actions brought at common law.
12. FINRA does not analyze whether a case has a right to a jury trial, nor whether Congress has established or defined a public right which can be brought before an Article II administrative court.

13. Rather, FINRA requires members to submit to its authority and jurisdiction, including the use of OHO, to arbitrate any allegations by FINRA against a broker.

14. The case at issue focuses on the disciplinary action brought by FINRA against Mr. Blankenship for claims of violation of FINRA rules 2110, 2111, and 4511. These claims arise from Mr. Blankenship's termination from IFG for failure to file certain required documents, failure to ensure that clients were receiving benefits of mutual fund breakpoints, and exercising discretion without proper authorization.

15. On June 27, 2024, the United States Supreme Court issued a decision in *SEC v. Jarkesy*, No. 22-859, 2024 U.S. LEXIS 2847 (June 27,2024), which held that suits at common law are subject to the seventh amendment, and Congress, in the Exchange Act, did not establish or define a "public right" for which Article II administrative courts could adjudicate (i.e., the SEC may no longer pursue claims that are legal in nature against individuals through in-house enforcement proceedings).

16. *Jarksey* states that "If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." *Jarkesy*, at *6.

17. To determine whether a claim receives Seventh Amendment protection pursuant to *Jarksey*, a two-part test is applied. The test, first set forth in G*ranfinanciera v. Nordberg*, 492 U.S. 33 (1989), first asks the court to compare the statutory action to 18th-century actions brought forth in the courts of England prior to the merger of the courts of law and equity.

18. This case is ultimately a case for common law fraud disguised under regulatory language as the core allegations are that Mr. Blankenship did not properly file

documents, did not make suitable recommendations to his clients, and acted without proper authorization from his principal client.

19. Without admitting to any of the allegations brought by FINRA, Mr. Blankenship asserts that all of these allegations are assertions of common law fraud, and as such the claims are legal in nature and should properly be brought before an Article III court.

20. The allegations brought by FINRA assert that, solely to earn commissions, Mr. Blankenship misrepresented or omitted material facts to his customers, and his customers relied upon the alleged misrepresentations to their detriment.

21. The common law elements of fraud include a false representation of a material fact, knowledge of that fact's falsity, intent that the false fact should be relied upon, actual reliance upon that fact, and resulting injury caused by such reliance.

22. Pursuant to *United States SEC v. Appelbaum*, No. 22-81115-CIV-CAN, 2023 U.S. Dist. LEXIS 39201 at *10 (S.D. Fla. Jan. 24, 2023), the SEC clearly views FINRA Rule 2111 as a securities-fraud claim under Rule 10b-5 of the Securities and Exchange Act.

23. As the claims at issue appear to be fraud claims, the first part of the *Granfinanciera* test is met.

24. The second part of the test in *Granfinanciera* used in *Jarkesy* requires that the factfinder examine the remedy sought and determine whether it is legal or equitable in nature.

25. The relief sought in the present case is that the court order one or more of the sanctions provided under FINRA Rule 8310(a), including full disgorgement of any ill-gotten gains and/or complete restitution, together with interest.

26. Disgorgements are only effective against individuals who continue to operate under FINRA's jurisdiction, as FINRA has no judicial power to enforce the collection of disciplinary fines.
27. Additionally, fines and disgorgements are placed into accounts owned and administered solely by FINRA – such funds are not paid to individuals who suffer injury.
28. Furthermore, FINRA Rule 8310(a) allows a hearing officer to impose censure, fines, suspension of current membership or bar to future membership with any member, expulsion, issuance of a cease and desist, or imposition of any other fitting sanction.
29. Clearly, the listed remedies go beyond restoring the status quo and are all on the table according to the language of the OHO case against Mr. Blankenship.
30. According to *Jarkesy*, what determines whether a remedy is legal is if it is designed to punish or deter the wrongdoer, or on the other hand, solely to restore the status quo.
31. As possible remedies include those beyond merely restoring the status quo, the remedy is legal in nature.
32. As the remedy is legal in nature, the second prong of the test from *Granfinanciera* is satisfied and the case at hand should receive the Seventh Amendment right to a jury trial.
33. A decision rendered in an OHO proceeding may be appealed to FINRA's National Adjudicatory Counsel ("NAC"), within 25 day following service of the OHO decision.
34. Upon completion of its *de novo* review, the NAC issues a written appellate decision that may affirm, modify, or reverse the OHO decision being reviewed.

35. Upon receipt of an NAC appellate decision containing an imposition of a disciplinary sanction, the individual subject to the sanction has a statutory right to motion for review by the SEC.
36. The SEC performs its review of NAC appellate decisions absent an Article III court and jury.
37. According to *Jarkesy*, the SEC's review is unconstitutional.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Declaratory Relief Regarding Plaintiff's Right to Jury Trial Pursuant to the Seventh Amendment)

38. Plaintiff incorporates and reasserts all prior factual allegations as though fully set forth herein.
39. The Seventh Amendment Staes, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved."
40. According to the two-pronged test as laid out in *Jarkesy* and *Granfinancieria*, this case is a suit at common law to which the public rights exception does not apply.
41. As this is a case at common law, adjudication by an Article III court is mandatory.
42. The case at issue should be removed from FINRA's jurisdiction as mandatory arbitration outside of an Article III court is a violation of Plaintiff's Seventh Amendment rights.

SECOND CAUSE OF ACTION

(Permanent Injunction)

43. Plaintiff incorporates and reasserts all prior factual allegations as though fully set forth herein.
44. Plaintiff is scheduled to begin an eight-day in-house prosecution presided over by defendant, currently scheduled to begin on July 15, 2024.
45. If Plaintiff's request for injunction is not granted by the court, he will be subject to resolution of claims by an unconstitutionally structured adjudicator, which is a here-and-now injury that cannot later be remedied.
46. Furthermore, plaintiff will suffer irreparable harm without an injunction because the ongoing FINRA enforcement proceedings will put him out of business.
47. Plaintiff is likely to prevail on claims that FINRA's hearing offices impermissibly wield power that may only be exercised by the President and those under his direct supervision.
48. Plaintiff is likely to prevail on his claim under the Seventh Amendment right to a jury trial before an Article III court because—whether in the OHO enforcement proceeding, or on appeal to the SEC—Defendant's claims are those sounding in common law and thus, belong in an Article III court before a jury.
49. The equities and public interest favor an injunction, as it is in the public interest to ensure the legitimacy of the decisionmaker in the present case in light of recent rulings from the United States Supreme Court.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court:

1. Issue declaratory relief removing the present case from FINRA jurisdiction in accordance with Plaintiff's Seventh Amendment right to trial in an Article III court;

2. Issue a permanent injunction preventing FINRA from hearing this claim as it is a claim at common law, not subject to the public rights exception, for which Plaintiff has a Seventh Amendment right to trial in an Article III court.

Respectfully submitted this 10th day of July, 2024.

By: */s/ John P. Quinn*

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(Motion for Pro Hac Vice to be filed)

JS 44 (Rev. 04/21)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

D. Allen Blankenship

(b) County of Residence of First Listed Plaintiff Montgomery Co., PA
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
John P. Quinn, Quinn Law Partners
Radnor Financial Center, 150 N Radnor Chester Road,
Ste. F200, Radnor, PA 19087; (484) 354-8080

DEFENDANTS

Financial Industry Regulatory Authority

County of Residence of First Listed Defendant Washington, D.C.
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☒ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

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- ☐ 423 Withdrawal 28 USC 157

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- ☐ 880 Defend Trade Secrets Act of 2016

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- ☐ 862 Black Lung (923)
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- ☐ 865 RSI (405(g))

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- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
28 U.S.C. §1983

Brief description of cause:
Violation of Seventh Amendment rights and civil rights

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 7/10/2024

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

05/2023

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DESIGNATION FORM

(to be used by counsel to indicate the category of the case for the purpose of assignment to the appropriate calendar)

Address of Plaintiff: 562 General Learned Rd., King of Prussia, Pennsylvania 19406

Address of Defendant: 1090 Vermont Avenue NE Ste 430, Washington, D.C. 20005

Place of Accident, Incident or Transaction: 1601 Market Street, Suite 2700, Philadelphia, PA, 19103

RELATED CASE IF ANY:

Case Number: _____ Judge: _____ Date Terminated _____

Civil cases are deemed related when ***Yes*** is answered to any of the following questions:

1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? Yes ☐ No ☐
2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit Pending or within one year previously terminated action in this court? Yes ☐ No ☐
3. Does this case involve the validity or infringement of a patent already in suit or any earlier Numbered case pending or within one year previously terminated action of this court? Yes ☐ No ☐
4. Is this case a second or successive habeas corpus, social security appeal, or pro se case filed by the same individual? Yes ☐ No ☐

I certify that, to my knowledge, the within case ☐ **is** / ☑ **is not** related to any now pending or within one year previously terminated action in this court except as note above.

DATE: 7/10/2024 _____ 85239

Attorney-at-Law (Must sign above) *Attorney I.D. # (if applicable)*

Civil (Place a √ in one category only)

A. Federal Question Cases:

- ☐ 1. Indemnity Contract, Marine Contract, and All Other Contracts)
- ☐ 2. FELA
- ☐ 3. Jones Act-Personal Injury
- ☐ 4. Antitrust
- ☐ 5. Wage and Hour Class Action/Collective Action
- ☐ 6. Patent
- ☐ 7. Copyright/Trademark
- ☐ 8. Employment
- ☐ 9. Labor-Management Relations
- ☐ 10. Civil Rights
- ☐ 11. Habeas Corpus
- ☐ 12. Securities Cases
- ☐ 13. Social Security Review Cases
- ☐ 14. Qui Tam Cases
- ☑ 15. All Other Federal Question Cases. *(Please specify)*: Review of Federal Agency

B. Diversity Jurisdiction Cases:

- ☐ 1. Insurance Contract and Other Contracts
- ☐ 2. Airplane Personal Injury
- ☐ 3. Assault, Defamation
- ☐ 4. Marine Personal Injury
- ☐ 5. Motor Vehicle Personal Injury
- ☐ 6. Other Personal Injury (*Please specify*): _____
- ☐ 7. Products Liability
- ☐ 8. All Other Diversity Cases: *(Please specify)* _____

ARBITRATION CERTIFICATION

(The effect of this certification is to remove the case from eligibility for arbitration)

I, John Quinn, counsel of record *or* pro se plaintiff, do hereby certify:

☐ Pursuant to Local Civil Rule 53.2 § 3(c)(2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of $150,000.00 exclusive of interest and costs:

☒ Relief other than monetary damages is sought.

DATE: 7/10/2024 _____ 85239

Attorney-at-Law (Sign here if applicable) *Attorney ID # (if applicable)*

NOTE: A trial de novo will be a jury only if there has been compliance with F.R.C.P. 38.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D. ALLEN BLANKENSHIP, *Plaintiff,* v. FINANCIAL INDUSTRY REGULATORY AUTHORITY, *Defendant.*	Civil Action No. 2:24-cv-3003 **Jury Trial Demanded**

PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

1. Plaintiff D. Allen Blankenship ("Mr. Blankenship" or "Plaintiff"), by and through his undersigned counsel, hereby moves this Court, pursuant to Federal Rule of Civil Procedure 65, for entry of a Temporary Restraining Order to initially enjoin Defendant Financial Industry Regulatory Authority, Inc. ("FINRA" or "Defendant") from proceeding with the disciplinary hearing against Plaintiff in the FINRA OHO forum currently scheduled to take place from July 15, 2024, through July 25, 2024, and from taking any adverse action against Plaintiff—either directly or indirectly—including, but not limited to speaking with Plaintiff's clients, employers, or others; and thereafter to enjoin, preliminarily and permanently thereafter, Defendant from the same until this matter may be heard by this Court to resolve the underlying legal dispute.

2. Plaintiff incorporates by reference the facts alleged in his Verified Complaint as if fully restated herein.

3. Plaintiff also incorporates by reference the legal arguments contained in the Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction as if fully restated herein.

4. Plaintiff has satisfied the four-part test for granting a temporary restraining order and preliminary injunction. As set forth in the accompanying legal memorandum,

a. Plaintiff is likely to succeed on the merits of his claim under either or both distinct legal grounds briefed extensively in the accompanying Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction;

b. Plaintiff will suffer irreparable harm unless the requested injunctive relief is granted;

c. No harm to Defendant would result from granting Plaintiff the requested injunctive relief; and

d. Public interest favors granting the requested relief to Plaintiff.

5. Defendant is scheduled to hold a disciplinary hearing against Plaintiff from July 15, 2024, through July 25, 2024. Absent a temporary restraining order to enjoin that action, Plaintiff's claims will be moot and he will suffer irreparable harm because the ongoing FINRA disiciplinary proceedings will put him out of business. In addition, as noted by Judge Walker in *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, "the resolution of claims by an unconstitutionally structured adjudicator is a 'here-and-now-injury' that cannot be later remedied." *Id.*, No. 23-5129, 2023 U.S. App. LEXIS 16987, at *3-5 (D.C. Cir. July 5, 2023); 15 U.S.C § 78s(g)(1). The postponement is necessary only for so long as it takes this Court to resolve the underlying legal dispute, which Plaintiff press on a preliminary injunction basis.

6. Plaintiff, through his undersigned counsel, gave notice of this action and Motion for Temporary Restraining Order and Preliminary Injunction to Counsel for Defendant, Justin W. Arnold, FINRA Dept. of Enforcement, Sr. Litigation Counsel, on July 10, 2024. All documents filed with this Court have been emailed to Counsel for Defendant separately.

7. Plaintiff respectfully requests that this Court immediately schedule a hearing and issue a temporary restraining order enjoining Defendant from holding the disciplinary hearing against Plaintiff from July 15, 2024, through July 25, 2024, until further order of this Court.

8. Because this is a non-commercial case involving relief pursuant to principles of equity, and because the balance of hardships favors the Plaintiff, the security bond requirement in Federal Rule of Civil Procedure 65(c) should be waived. *B.H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 409 (E.D. Pa. 2011) (citing *Elliott v. Kiesewetter*, 98 F.3d 47, 59–60 (3d Cir. 1996)).

WHEREFORE, Plaintiff respectfully requests that this Court enter a Temporary Restraining Order to, initially enjoin Defendant from proceeding with the disciplinary hearing against Plaintiff in the FINRA OHO forum currently scheduled to take place from July 15, 2024, through July 25, 2024, and from taking any adverse action against Plaintiff—either directly or indirectly—including, but not limited to speaking with Plaintiff's clients, employers, or others; and thereafter to enjoin, preliminarily and permanently thereafter, enjoin Defendant from the same until this matter may be heard by this Court to resolve the underlying legal dispute.

Respectfully submitted,

Dated: July 10, 2024

By: */s/ John P. Quinn*

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(Motion for Pro Hac Vice to be filed)

UNTIED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D. ALLEN BLANKENSHIP,

Plaintiff,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY,

Defendant.

Civil Action No. 2:24-cv-3003

Assigned to the Honorable Judge

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Cases

Statutes and Rules

INTRODUCTION

Pursuant to the recent United States Supreme Court ruling in *United States Securities and Exchange Commission v. Jarkesy*, No. 22-859, 2024 U.S. LEXIS 2847 (June 27, 2024), Plaintiff D. Allen Blankenship ("Mr. Blankenship") respectfully requests this Honorable Court enjoin the Financial Industry Regulatory Authority ("FINRA") from proceeding with an administrative hearing scheduled for Monday, July 15, 2024, which hearing will violate Plaintiff's rights under the Seventh Amendment to the United States Constitution under the interpretation set forth in *Jarkesy*.

On Monday, July 15, FINRA, a self-regulatory organization ("SRO") empowered and supervised by the United States Securities and Exchange Commission ("SEC"), intends to adjudicate claims against Plaintiff through an in-house administrative arbitration panel, rather than before a federal court as required by the *Jarkesy* opinion. Only an immediate injunctive order from this Court will prevent this imminent violation of Plaintiff's constitutional rights. See *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 178, 143 S. Ct. 890, 897 (2023) ("the resolution of claims by an unconstitutionally structured adjudicator is a 'here-and-now injury' that cannot later be remedied.")

STATEMENT OF FACTS

Pursuant to the federal Securities Exchange Act of 1934, as amended (15 U.S.C. § 78a, et seq.) ("Exchange Act"), brokers and dealers of securities must be registered with the SEC. See 15 U.S.C. §78o(a). To purchase and sell securities, brokers and dealers must also become members of certain self-regulatory organizations ("SROs") established by the SEC, which SROs are primarily "responsible for 'enforc[ing] compliance' with the 'provisions' of the [Exchange Act],

and the 'rules and regulations thereunder.' *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, No. 23-5129, 2023 U.S. App. LEXIS 16987, at *2 (D.C. Cir., July 5, 2023) (*citing* 15 U.S.C. §78s(g)(1) and 15 U.S.C. §78o-3(b)(7)). Natural persons who represent brokers and dealers in the purchase and sales of securities must also be registered with all states in which such natural person conducts securities business, and such persons must be subject to the jurisdiction of the SRO to which their employing broker or dealer is a member.

I. DEFENDANT FINRA IS A SELF-REGULATORY ORGANIZATION EMPOWERED BY THE SEC

Defendant FINRA was created by the SEC on July 26, 2007,[1] through consolidation of its predecessor SRO, the National Association of Securities Dealers ("NASD"), and the regulatory arm of the New York Stock Exchange. As the District of Columbia Circuit Court of Appeals very recently noted in *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth., supra*, although FINRA is not technically a government agency, it is private corporation empowered by the SEC with the "responsib[ility] for regulating securities brokers."[2] Specifically, FINRA maintains an investigative division, an enforcement division, and an adjudicative body that issues determinations on enforcement actions filed against member registrants. FINRA's adjudicative body is known as the Office of Hearing Officer ("OHO"). In short, FINRA investigates, prosecutes and adjudicates claims against member brokers, dealers and their associated employees.

FINRA gives the individual presiding over claims adjudicated in OHO proceedings the title, "Hearing Officer."[3] Every hearing officer is appointed by a "Chief Hearing Officer."[4]

[1] 15 U.S.C. § 78o-3 "Registered securities associations"
[2] *Alpine*, U.S. App. LEXIS 16987, at *2-5; 15 U.S.C § 78s(g)(1)
[3] FINRA Rule 9120(r).
[4] *Id.*

Unsurprisingly, the "Chief Hearing Officer" is *designated* by FINRA's Chief Executive Officer ("CEO").[5] The CEO of FINRA is *not* appointed by the President under the Article II Appointments Clause, rather, he is *chosen* by the FINRA Board of Directors. When it comes to the individuals who comprise the FINRA Board of Directors, FINRA's Nominating Committee (also chosen *inter se* by FINRA) nominates 15 of the board members, and the remaining 7 members are voted on by FINRA member firms. In short, there are no FINRA officers who were properly appointed, pursuant to the Article II Appointments Clause.

A decision rendered in an OHO disciplinary proceeding may be appealed to FINRA's National Adjudicatory Counsel ("NAC"), within 25 days following service of the decision.[6] The NAC performs a *de novo* review of each appealed decision and issues a written appellate decision that "may affirm, modify, or reverse" the OHO decision being reviewed.[7] Upon receipt of an NAC appellate decision containing an imposition of a disciplinary sanction, the individual subject to the sanction has a statutory right to motion for review by "by [the] appropriate regulatory agency."[8] The appropriate regulatory agency that is statutorily obligated to review a "final disciplinary sanction" imposed by FINRA is the SEC.[9] That creates a distinct problem, with respect to the Supreme Court's holding in Jarkesy, because the Supreme Court established that common law fraud claims cannot be adjudicated by the SEC administrative courts. Accordingly, it is established that Defendant's claims against Mr. Blankenship, sounding in common law claims of fraud and

[5] *Id.* (b).
[6] FINRA Rule 1015(a)
[7] *Id.* (j)(1).
[8] 15 U.S.C. § 78s(d)
[9] The obligation requires that the aggrieved must file his motion seeking review under 15 U.S.C. § 78(s)(d) within thirty days after the date notice of the final regulatory action was issued. Id., at (2).

misrepresentation, belong in an Article III court before a jury—whether in the OHO proceeding, or on appeal to the SEC.

In recently imposing an injunction against FINRA's OHO adjudicative process, the United States Court of Appeals for the DC Circuit noted:

> *FINRA's hearing officers are near carbon copies of [SEC Administrative Law Judges "ALJs"]. They are tasked by statute with enforcing the nation's securities laws. 15 U.S.C § 78s(g)(1). They can "levy sanctions that carry the force of federal law."* Turbeville v. FINRA, *874 F.3d 1268, 1270 (11th Cir. 2017) (citing 15 U.S.C. § 78o-3(b)(7)). And like* [the SEC's] *ALJs, hearing officers demand testimony, rule on motions, regulate the course of a hearing, decide the admissibility of evidence, and enforce compliance with discovery orders by punishing contempt.* See *FINRA Rules 8210 (Provision of Information and Testimony), 9252 (Requests for Information), 9235 (Hearing Officer Authority), 9263 (Evidence Admissibility), 9280 (Contemptuous Conduct).*
>
> *True, the SEC can review FINRA's decisions "on its own motion, or upon application by any person aggrieved . . . filed within thirty days." 15 U.S.C. § 78s(d)(2). But that doesn't differentiate the hearing officers from* [SEC] *ALJs. The SEC could review the ALJs' decisions too. Yet that "ma[d]e no difference" to whether they exercised significant executive power.* Lucia, *138 S. Ct. at 2054. The Court emphasized that the SEC "adopts [ALJs'] credibility findings absent overwhelming evidence to the contrary."* Id. *(cleaned up). The standard of review is similar here.* See Daniel D. Manoff, *55 S.E.C. 1155, n.6 (2002) (credibility determinations made by NASD—FINRA's predecessor—"can be overcome only when there is 'substantial evidence' for doing so") (cleaned up).*

Alpine, U.S. App., at *6-7. Accordingly, the DC Circuit enjoined FINRA's OHO proceeding pending determination on the merits as to whether FINRA's claims were merited. It is important to note that the Alpine court enjoined FINRA's OHO one year prior to the Supreme Court's *Jarkesy* opinion.

It is this same OHO administrative procedure that FINRA seeks to invoke against Plaintiff on Monday, July 15, in clear violation of the principle established in *Alpine* and the Supreme Court's recent opinion in *Jarkesy*.

II. DEFENDANT FINRA SEEKS TO SUBJECT PLAINTIFF TO ITS UNCONSTITUTIONAL TRIBUNAL

Since February 1997, Plaintiff D. Allen Blankenship has been licensed as an associated person or registered representative of various broker-dealers registered with the SEC and a member of FINRA, as required by the Exchange Act.[10] On November 19, 2019, following more than two decades of successfully cultivating relationships with securities customers, Plaintiff was notified by Defendant that an inquiry had been initiated against Plaintiff based upon information filed publicly by Independent Financial Group, LLC ("IFG"), Mr. Blankenship's former broker-dealer employer.[11] Therein, IFG characterized the reason for his termination as, *in haec verba*, "[ ] for violation of firm's policy with regard to submission of required documents for certain mutual fund transactions, failure to ensure clients were receiving [ ] benefit of mutual fund breakpoints[,] and exercising discretion without proper authorization." In subsequent litigation between IFG and Blankenship, it was determined that these public statements were false and defamatory, and Blankenship was awarded damages as a result.[12]

Nonetheless, for 37 months following receipt of the above-referenced notification from Defendant, Mr. Blankenship expended hundreds of hours complying with Defendant's formal and informal requests for information and documentation.[13] In addition, Mr. Blankenship incurred

[10] As used herein, "FINRA" also pertains to FINRA's predecessor, the National Association of Securities Dealers ("NASD").
[11] IFG filed a termination notice, known as a Form U5, which publicly discloses that a registered representative has been terminated by a registered broker-dealer.
[12] On December 6, 2021, a FINRA arbitration panel held that IFG's allegation that Mr. Blankenship exercised unauthorized use of discretion *was defamatory in nature*, and the Panel recommended expungement of the allegation.
[13] Defendant issued over 12 formal written requests for information and documentation during its egregiously long investigation. Through counsel, Mr. Blankenship provided, *inter alia*, more than 12,000 pages of handwritten and notes and documents annotated with handwritten notes requested by Defendant.

hundreds of thousands of dollars in costs for representation—during and after the 37-month period—exhausting his retirement and savings, entirely. As a result of Defendant's incessant attempts to obtain evidence from Mr. Blankenship's customers in support of Defendant's tenuous—and entirely defunct allegations—Mr. Blankenship suffered substantial harm to his professional reputation which resulted in a 65% decline in his earnings.

PROCEDURAL HISTORY

Nearly three years after opening an entirely-unwarranted and groundless investigation into Plaintiff, on November 2, 2022, Defendant issued a Wells Notice to Plaintiff,[14] asserting that FINRA had "made a preliminary determination" to recommend disciplinary action against Plaintiff for violations of FINRA Rules: 2010, 2111, 3260(b), and 4511, as well as NASD Rule 2510(b).

Over one year later, on December 7, 2023, Defendant filed a formal disciplinary complaint (see *supra*, FINRA Disc. Proceeding No. 2019064333401, Dept. of Enforcement's Complaint, hereafter "Complaint") against Mr. Blankenship. In a departure from the Wells Notice, Defendant alleged violations of FINRA Rules 2010,[15] 2111,[16] and 4511[17] in its Complaint. Defendant's filing of the Complaint initiated its *in-house* OHO proceedings against Mr. Blankenship.

The FINRA Rules with which Defendant charges Mr. Blankenship, and all other FINRA Rules, are created by FINRA through the authority granted to it—not by Congress, but rather, as a

[14] *Wells Notice* is a term borrowed from the SEC that refers to letter sent by a regulator to a prospective respondent, notifying him of the substance of the charges that the regulator intends to bring against the prospective respondent.
[15] FINRA Rule 2010 is an add-on rule, whereby a violation of another rule constitutes a violation of Rule 2010.
[16] Rule 2111 is the sole substantive charge against Mr. Blankenship. It comports with the anti-fraud provisions of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 (17 C.F.R. § 240.10b-5). Discussed *infra*.
[17] Rule 4511 is (also) an add-on rule, whereby Defendant seeks to hold the accused liable for inaccuracies in his firm's books and records, if the alleged misconduct caused such inaccuracies.

byproduct of Congress's 45-day ultimatum to the SEC. See 15 U.S.C. § 78s(b)(2)(A)(i) (mandating that the SEC either approve or disapprove of FINRA's proposed rule changes within 45 days). All such proposed rule changes are submitted to the SEC, pursuant to 15 U.S.C. §78s(b)(1). Upon receipt by the SEC and "as soon as practicable after the date of filing of any proposed rule change, [the SEC] publish[es] notice [to] give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change." *Id.* The period immediately following the SEC's publication of proposed rule change is commonly known as the "comment period." Absent the implication of an extension of time, to which the SEC must obtain FINRA's consent, under *id.*, (b)(2)(A)(ii), the SEC is compelled to either grant approval or deny the proposed rule contrived by FINRA.

Should the SEC wish to approve of a proposed rule change, the SEC is statutorily required to *interpret* the proposed rule change insofar as ensuring that it is "consistent with the requirements of [U.S. Code, Title 15, C]hapter [2B (i.e., the Exchange Act)] and the rules and regulations issued under [it] that are applicable to [FINRA]." *Id.*, (b)(2)(C)(i) (*emphasis added*). To put another way, Congress mandates that the SEC, *interpret* the Exchange Act in every instance that FINRA submits a proposed rule change . . . and, "the rules and regulations [(i.e., provisions)] issued under [the Exchange Act, and determine which are] applicable to [FINRA—who, consequently, drafted the very same proposed rule being reviewed by the SEC to determine if said proposed rule comports with the SEC's interpretation of the Exchange Act]." *Id.*, See *Loper Right Enters. V. Raimondo*, Nos. 22-451, 22-1219, 2024 U.S. LEXIS 2882, at *9-10 (June 28, 2024) (wherein, the Supreme Court is outwardly critical of agencies such as the SEC *interpreting* statutory ambiguities).

To reiterate, prior to approval, the SEC's *interpretation* of a proposed rule change requires the SEC to unilaterally determine whether the proposed rule change is "consistent with the

requirements of the [Exchange Act].” 15 U.S.C. § (b)(2)(C)(i) (*emphasis added*). Further, the SEC must determine whether the proposed rule change “is consistent with the *rules and regulations* under [the Exchange Act].” *Id.* (*emphasis added*). But in doing so, the SEC must also unilaterally determine *which* “rules and regulations under [the Exchange Act] *apply to* [FINRA].” *Id.* (*emphasis added*). Upon the SEC completing the above-enumerated *interpretations* of the proposed rule change, its provisions, and which apply to FINRA, the SEC formally approves the proposed rule, which will take effect and be enforceable upon publication with the federal register. 15 U.S.C. §§ 78s(b)(2)(A-F), et seq.

It follows in logic that all FINRA Rules, including those with which Defendant charges Mr. Blankenship, are not only vetted and approved by the SEC—they are also deemed by the SEC to be “consistent with the requirements of [the Exchange Act and] the [provisions] under it that apply to [FINRA].” 78s(b)(2)(C)(i). Lastly, the SEC’s involvement is a statutory requirement of implementing all FINRA Rules.

On January 4, 2024, through counsel, Mr. Blankenship timely filed his Statement of Answer to the Complaint. The OHO has appointed a Hearing Officer, and FINRA and the Hearing Officer have scheduled the hearing to begin before the FINRA Hearing Officer on Monday, July 15, 2024.

ARGUMENT

III. PLAINTIFF HAS A REASONABLE PROBABILITY OF PREVAILING ON THE MERITS.

Plaintiff comes before the Court on the heels of the United States Supreme Court’s (6-3) decision in *SEC v. Jarkesy*, No. 22-859, 2024 U.S. LEXIS 2847 (June 27, 2024). *Jarkesy* held: (1) “[s]uits at common law” (e.g., fraud and misrepresentation) are subject to the Seventh

Amendment;[18] and (2) Congress, in the Exchange Act, did not establish or define a "public right" for which Article II administrative courts could adjudicate (i.e., the SEC, may no longer pursue claims against individuals that are legal in nature through *in-house* enforcement proceedings). The Supreme Court reasoned that the Seventh Amendment is implicated in such instances, because such claims involve private rights,[19] by which the accused has a constitutional right to a jury trial.

Two weeks prior, the D.C. Circuit Court of Appeals ruled in favor of the Appellant, Alpine Securities Corp., by granting an emergency motion against FINRA to enjoin it from continuing its "enforcement action seeking to stop Alpine from selling securities." *Alpine*, U.S. App., at *2 (ordering that FINRA, the SRO, "be enjoined from continuing [its] enforcement proceedings against Alpine Securities Corporation." *Id.*). Judge Walker reasoned that "[t]here is a serious argument that FINRA hearing officers exercise significant executive power. And it is undisputed that they do not act under the President[— which] may be a constitutional problem." *Alpine*, U.S. App., at *10 (Citing U.S. const. art. II, § 1, cl. 1; *id.* art. II., § 2, cl. 2).

Less than one year prior, the Supreme Court's disdain for usurpers of executive power was clearly conveyed in the *Polansky* (8-1) decision, which stated that "the entire executive Power belongs to the President alone[, and] it can only be exercised by the President and those acting under him." *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 449, 143 S. Ct. 1720, 1741 (2023) (Thomas J., concurring) (cleaned up); see U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President of the United States.").

Plaintiff seeks emergency injunctive relief from this Court on two distinct legal grounds. Either of which, by itself, is sufficient grounds upon which to award Plaintiff the relief sought.

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[18] "If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." *Jarkesy*, at *6.
[19] See FN19, *supra*.

A. Plaintiff is likely to prevail on his claim under the Seventh Amendment right to a jury trial before an Article III court.

First, Defendant's in-house prosecution of Mr. Blankenship is a violation of his Seventh Amendment right to a jury trial before an Article III court. On July 15, 2024, Defendant aims to begin an eight-day, *in-house prosecution*, presided over and prosecuted by Defendant. See *Jarkesy*, *2-3, 11, 13; *Granfinanciera v. Nordberg*, 492 U.S. 33, 36, 109 S. Ct. 2782, 2787 (1989). If Mr. Blankenship's request for an injunction is *not* granted by the Court, he will be subject to "the resolution of claims by an unconstitutionally structured adjudicator[—which, *ipso facto*,] is a 'here-and-now injury' that cannot be later remedied." *Alpine*, U.S. App. *3-4 (cleaned up) (citing *Axon*, 598 U.S., at 210).

Applying the analysis used by the Supreme Court in *Jarkesy*, as set forth in *Granfinanciera* and *Tull*,[20] it is clear that Defendant's in-house prosecution of Mr. Blankenship "may not be resolved outside of an Article III court, without a jury." *Jarkesy*, at *3.

First, we apply part one of the two-part test set forth in *Granfinanciera* to "compare the statutory action to 18th-century actions brought in the courts of England, prior to the merger of the courts of law and equity." *Granfinanciera*, 492 U.S., at 42. The allegations brought by Defendant against Mr. Blankenship are that, "solely to earn commissions," Complaint, ¶ 1. Mr. Blankenship misrepresented or omitted material facts to his customers, and his customers relied upon the alleged misrepresentations and omissions to their detriment. *Id.*

Although the charges levied against Mr. Blankenship by Defendant are artfully worded in an attempt to appear as though they are based upon a "novel statutory scheme[,]" in actuality, the allegations amount to nothing more than charges of common law fraud—and why wouldn't they?

[20] *Tull v. United States*, 481 U.S. 412, 417-418 (1987);

Just like the SEC was in *Jarkesy*, "[s]elf-regulatory organizations are responsible for 'enforc[ing] compliance' with the 'provisions' of the Securities and Exchange Act, and the 'rules and regulations thereunder.'" *Alpine*, App. Ct., at *2 (citing 15 U.S.C. §§ 78o(a)(1), (b)(1)(B), 78s(g)(1); see also *id.* § 78o-3(b)(7)).

A recent case brought by the SEC against an individual, Appelbaum, in the U.S. Dist. Court for the Southern Dist. of Florida, for violations of FINRA Rule 2111,[21] clearly shows that the SEC views a violation of FINRA Rule 2111 as a "securities-fraud claim brought under Rule 10b-5[.]" *United States SEC v. Appelbaum*, No. 22-81115-CIV-CAN, 2023 U.S. Dist. LEXIS 39201, at *10 (S.D. Fla. Jan. 24, 2023) (Appelbaum's statements and omissions to customers, him being "well aware of his long-time customers' investment profiles[,]" and his "fail[ure] to follow [his employer's] policy[22]" was "sufficient . . . to create a strong inference that Appelbaum was aware that the [investments] were *unsuitable* for [his c]ustomers." *Appelbaum*, at *13-14 (*emphasis added*). Lastly, it is relevant to note that the *Appelbaum* matter, like many prosecutions by the SEC, was disposed of through a consent judgment that, in relevant part, mirrors current consent judgments for SEC allegations against violations of anti-fraud provisions.

The second part of the two-part *Granfinanciera* test relied upon in *Jarkesy* requires that the factfinder "examine the remedy sought and determine whether it is legal or equitable in nature." *Granfinanciera*, 492 U.S., 2790 (citing *Tull*, 481 U.S., at 417-418). In considering this part of the analysis, *Tull* provides applicable insight by noting that the statute authorizing the action in *Tull*

[21] A violation of FINRA Rule 2111 is the same substantive violation with which FINRA charged Mr. Blankenship. See FN18, *supra*.

[22] The employer's policy that Appelbaum failed to follow involved "Appelbaum['s] further fail[ure] to obtain customer signatures." *Appelbaum*, at *16. *Compare*, Defendant's allegation against Mr. Blankenship that he "fail[ed] to obtain customers' signatures on the [employer-required] forms." Complaint, p. 2, at 2.

"does not direct that the [monetary] penalty imposed be calculated solely on the basis of equitable determinations, such as the profits gained from violations of the statute, [among other things, and that] history of [the authorizing statute] reveals that Congress wanted the district court to consider the need for *retribution* and *deterrence,* in addition to restitution, when it imposed [monetary] penalties." *Tull*, 481 U.S. at 422 (*Emphasis added*).

The relief sought in Defendant's claims against Mr. Blankenship is, *inter alia*, that "the Panel order that *one or more of the sanctions* provided under FINRA Rule 8310(a) be imposed, including that [Blankenship] be required to *disgorge fully* any ill-gotten gains and/or make [full] and complete restitution, together with interest[.]" Complaint, p. 11, at B. (*Emphasis added*).

First and foremost, fines, disgorgements, and restitution ordered by FINRA (about which Defendant boasts on its website and in its annual report) are meaningless, unless ordered against a member who continues operating under Defendant's jurisdiction after the order is issued. See *Fiero v. Fin. Indus. Regulatory Auth., Inc.*, 660 F.3d 569, 579 (2d Cir. 2011) (holding that "there was no existing SEC rule or statute that authorized the NASD [or FINRA] to initiate judicial proceedings to enforce the collection of its disciplinary fines.") In addition, fines and disgorgements are placed into accounts owned and administered solely by FINRA—such funds are not paid to the individuals who suffered injury. Annual Report, FINRA (2023), pp. 2, 31, 36.

Secondly, relief awarded pursuant to FINRA Rule 8310(a) allows a hearing officer to "impose one or more of the following sanctions [ ] for any neglect to comply with [ ] the FINRA Rules . . . (1) censure [ ] (2) impose a fine" as well as suspension of current membership, suspension of or bar to future membership with any member, expulsion, issuance of a cease and desist, or the imposition of "any other fitting sanction." *Id.* The preceding reveals that relief requested under Rule 8310(a) does not limit the hearing officer to exclusively award sanctions "to restore the status

quo." *Tull*, 481 U.S., at 424. Put another way, "[Rule 8310(a)]'s concerns are by no means limited to restoration of the status quo." *Id.* See 15 U.S.C.S. §§ 78u-2(c), 80b-3(i)(3) (The Exchange Act and Investment Advisers Act conditioning monetary penalties upon six factors, "[o]f [which], several concern culpability, *deterrence*, and recidivism. Because they tie the availability of civil penalties to the perceived need to punish the defendant rather than to restore the victim, such considerations are *legal rather than equitable*." *Jarkesy*, at *1. (*Emphasis added*).); compare FINRA Sanction Guidelines, March 2024, "General Principle Applicable to All Sanction Considerations" p. 2, at 1 (emphasizing the importance of "*deterrence*" by "*design*[*ing*] sanctions that are meaningful and significant[.]") (*Emphasis added*); accord, *Jarkesy* aptly holds that "[w]hat determines whether a monetary remedy is legal is if it is *designed* to punish or *deter* the wrongdoer, or, on the other hand, solely to restore the status quo." *Jarkesy*, at *21. (*Emphasis added*) (internal quotations omitted). See also, FINRA Sanction Guidelines, March 2024, "Suitability—Unsuitable Recommendations" p. 121 (referring to FINRA Rules 2111 and 2010, and recommending a "[m]onetary [s]anction" for a violation of these Rules should be a "[f]ine of $2,500 to $40,0000[.]" Unequivocally showing that Defendant recommends that hearing officers assess a punitive monetary fine and order it be paid to Defendant, for violations consistent with those that Defendant charged against Mr. Blankenship.)

B. Plaintiff is likely to prevail on his claim that FINRA's hearing officers impermissibly wield executive power that only the President and officers under his direct supervision may exercise.

Jarkesy concerns the SEC, rather than FINRA. Despite *Jarkesy* finding that the SEC's administrative legal justices ("ALJs") may not conduct in-house prosecutions in which the SEC seeks to impose monetary penalties upon the accused, the SEC is better positioned than FINRA to

(at least attempt to) defend against an Article II attack of the SEC's exercise of executive power. Because unlike any single individual within FINRA, the Director of the SEC qualifies as an officer under the Article II Appointments Clause[23].

It is settled that the SEC's hearing officers, ALJs, wield significant executive power. *Alpine*, App. Ct., at *5. Similarly, it is also no secret that FINRA's hearing officers are "carbon-copies" of the SEC's ALJs. *Id.* Although Judge Walker points out two insignificant differences between the SEC's ALJs and FINRA's hearing officers,[24] the difference that is most relevant in the immediate matter is that, unlike the SEC's ALJs, Defendant's hearing officers can show no linage to anyone appropriately appointed by the Article II Appointments Clause.

FINRA's hearing officers undeniably wield substantial executive power through fulfilling their statutory task of "enforcing the nation's securities laws." *Id.* In addition, "[t]hey can levy sanctions that carry the force of federal law[,] demand testimony, rule on motions, regulate the course of a hearing, decide the admissibility of evidence, and enforce compliance with discovery orders by punishing contempt." *Id.* See *Tuberville v. FINRA*, 874 F.3d 1268, 1270 (11th Cir. 2017); See also FINRA Rules 8210 (Provision of Information and Testimony), 9120 (Definitions), 9252 (Requests for Information), 9235 (Hearing Officer Authority), 9263 (Evidence Admissibility), 9280 (Contemptuous Conduct).

The courts' growing disdain for usurpers of executive power makes the proceedings initiated by Defendant against Mr. Blankenship uniquely problematic, because as noted in *Alpine*,

[23] President Joe R. Biden nominated the current Chair of the SEC on February 3, 2021. The appointment was confirmed by the U.S. Senate on April 14, 2021, and SEC Chairperson, Gary Gensler, was sworn into office on April 17, 2021.

[24] *Alpine*, FN1 "To be sure, there are some minor differences between the FINRA hearing officers and [the SEC]'s ALJs. For example, the ALJs administer Oaths. In FINRA hearings, that job is left to a court reporter or notary public." (internal quotations and citations omitted).

"[a]nyone who wields significant executive power must be an Officer of the United States." *Id.*, at *5. As discussed *supra*, none at FINRA constitute an officer under Article II. Further, notwithstanding the Supreme Court holding that "[a] private entity may qualify as a state actor when . . . the entity exercises powers traditionally exclusively reserved to the State" (*Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 802, 139 S. Ct. 1921, 1924 (2019)), Defendant has historically prevailed in its argument that it is not a state actor. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, F. Supp. 3d, 2023 U.S. Dist. LEXIS 77822, at *14 (N.D. Tex. May 4, 2023); *Mohlman v. Fin. Indus. Regulatory Auth.*, No. 3:19-cv-154, 2020 U.S. Dist. LEXIS 31781, at *14 (S.D. Ohio Feb. 24, 2020); *McGinn, Smith & Co., Inc. v. FINRA*, 786 F. Supp. 2d 139, 147 (D.D.C. 2011).

All the same, the tide is clearly changing for Defendant in a post-Jarkesy world. This is undoubtedly the cause of great angst for Defendant—because if, or when, FINRA is deemed a state actor, it will not only eviscerate Defendant's preferred excuse for trampling on the constitutional rights of its members (i.e., as a private company, we are not required to adhere to the Seventh Amendment), it will likely also be subject to Freedom of Information Act ("FOIA") requests and a level of transparency that many believe will prove fatal to Defendant.

IV. PLAINTIFF WILL BE IRREPARABLY HARMED ABSENT AN INJUNCTION.

Mr. Blankenship will "suffer irreparable harm without an injunction[,] because the ongoing FINRA enforcement proceedings will put [him] out of business. Plus, the resolution of claims by an unconstitutionally structured adjudicator is a 'here-and-now-injury' that cannot be later remedied." *Alpine*, U.S. App., at *3-4 (citing *Axon Enterprises*, *supra*).

V. THE EQUITIES AND PUBLIC INTEREST FAVOR AN INJUNCTION.

Undoubtedly, the public has a longstanding interest in expedient and efficient enforcement against those who break the law. Oftentimes at the expense of efficiency and expediency, the Constitution prevents Congress from "withdraw[ing] from judicial cognizance any matter which, from its very nature, is the subject of a suit at the common law." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 18 How. 272, 284, 15 L. Ed. 372. A jury trial by an Article III court is required for "all suits which are not of equity or admiralty jurisdiction, whatever may be the particular form which they may assume." *Parsons v. Bedford*, 28 U.S. (3 Peters) 433, 441 (1830). Further, precedent forecloses the argument that statues aimed at increasing governmental efficiency trigger the public-rights exception to the Seventh Amendment. See *Stern v. Marshall*, 564 U. S. 462, 501, 131 S. Ct. 2594 (2011); *INS* v. *Chadha*, 462 U. S. 919, 944, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) (quoting Justice White's dissent). If the public rights exception were allowed to be applied to Defendant, "evading the Seventh Amendment would become nothing more than a game, where the Government need only identify some slight advantage to the public from agency adjudication to strip its target of the protections of the Seventh Amendment." *Jarkesy*, at *43.

Of substantial relevance in the immediate matter is the fact that "the only evidence that [Mr. Blankenship] *has* violated the law is [Defendant]'s say-so. And if [Mr. Blankenship] is correct on the merits, then FINRA is an illegitimate decisionmaker." *Alpine*, U.S. App., at *4 (*emphasis original*). Borrowing from Judge Walker, Plaintiff asserts that "an injunction would also be equitable and in the public interest[, because] the public interest favors preventing the deprivation of individual rights and abuses of government power. If [Mr. Blankenship]'s constitutional

challenge has merit, that is the case here: [he] will be 'subject[] to an illegitimate proceeding, led by an illegitimate decisionmaker.'" (Internal citations omitted). *Id.*

CONCLUSION

For all the reasons set forth herein, Plaintiff's motion for a temporary restraining order and preliminary injunction should be GRANTED.

Respectfully submitted this 10th day of July, 2024.

By: */s/ John P. Quinn*

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(Motion for Pro Hac Vice to be filed)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D. ALLEN BLANKENSHIP, *Plaintiff,* v. FINANCIAL INDUSTRY REGULATORY AUTHORITY, *Defendant.*	Civil Action No. 2:24-cv-3003 **Jury Trial Demanded**

[PROPOSED] TEMPORARY RESTRAINING ORDER

AND NOW, on this ____ day of _____, 2024, upon the Motion for Temporary Restraining Order and Preliminary Injunction (the "Motion") filed by Plaintiff D. Allen Blankenship ("Mr. Blankenship" or "Plaintiff") against Defendant Financial Industry Regulatory Authority, Inc. ("FINRA" or "Defendant"), Plaintiff's supporting Memorandum of Law, verified Complaint, and supporting materials, and Defendant's opposition, if any, and having held a hearing on _____, 2024, this Court finds that Plaintiff has established that:

1. There is a substantial likelihood that the Plaintiff will succeed on the merits of his claim against Defendant;

2. Plaintiff will suffer immediate and irreparable harm if Defendant's unlawful conduct remains unabated;

3. The irreparable injury Plaintiff faces outweighs the injury that Defendant will sustain as a result of the immediate injunctive relief; and

4. The public interest will be served by the granting of the immediate injunctive relief.

WHEREFORE, IT IS HEREBY ORDERED THAT the Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction is **GRANTED**, and the Defendant is hereby bound by the following terms:

1. For the duration of this Temporary Restraining Order, Defendant is enjoined from taking any action to proceed with the disciplinary hearing against Plaintiff in the FINRA OHO forum currently scheduled to take place from July 15, 2024, through July 25, 2024, and from taking any adverse action against Plaintiff—either directly or indirectly—including, but not limited to speaking with Plaintiff's clients, employers, or others.

2. Defendant shall maintain and hold all records, documents, or other forms of information, including that which is stored in electronic form in any place which Defendant may store such information, which relate to the allegations in Plaintiff's verified Complaint, to ensure the fair conduct of this litigation.

3. Any person, including any corporation, partnership, franchise, or other business entity, having received notice of this Order pursuant, shall afford it full faith and credit and undertake all reasonable efforts to safeguard any information relating to Plaintiff's claims and take no action to assist Defendant from taking any adverse action against Plaintiff—either directly or indirectly.

IT IS HEREBY FURTHER ORDERED THAT:

1. A hearing is set on Plaintiff's Motion for Preliminary Injunction to be held on _____ ____ , 2024, at ____ o'clock a.m./p.m. in Courtroom ____ of the United States District Court for the Eastern District of Pennsylvania.

2. Plaintiff shall immediately provide notice of this Order and, to the extent he has not already, make service of all papers upon Defendant.

3. This Temporary Restraining Order is entered at ____ o'clock a.m./p.m. and shall remain in effect unless otherwise modified further order of this Court.

SO ORDERED.

ENTERED this ____ day of _____, 2024.

_____

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

Department of Enforcement Complainant, v. D. Allen Blankenship CRD No. 2842335, Respondent.	Disciplinary Proceeding No. 2019064333401 **Emergency Motion to Stay Proceeding**

Respondent, D. Allen Blankenship ("Mr. Blankenship"), through undersigned counsel, files this motion to stay the herein-referenced proceeding under FINRA Rule 9146, and in light of uncertainties stemming from the United States Supreme Court's decision in *SEC v. Jarkesy*, No. 22-859 (June 27, 2024).

EMERGENCY STAY OF PROCEEDING NO. 2019064333401 REQUESTED

The *Jarkesy* decision established that claims sounding in common law fraud cannot be adjudicated by the SEC administrative courts. Accordingly, it is established that FINRA Enforcement's ("Enforcement's") claims against D. Allen Blankenship belong in an Article III court before a jury—whether in the imminent OHO proceeding, or on appeal to the SEC.

Mr. Blankenship has a statutory right to appeal the imposition of a disciplinary sanction resulting from the disciplinary proceeding scheduled to begin on Monday, July 15, 2024. 15 U.S.C. § 78s(d) (stating in relevant part that, "[i]f any self-regulatory organization imposes any final disciplinary sanction on any [ ] person associated with a member[, such] action [ ] shall be subject to review by the appropriate regulatory agency[.]"). Wherein, "the appropriate regulatory agency" refers to the SEC. *Id.*

The immediate charges levied against Mr. Blankenship by Enforcement, although artfully worded to appear as though they are based upon a "novel statutory scheme[,]" in actuality, amount to nothing more than charges of common law fraud—and why wouldn't they? Just like the SEC was in *Jarkesy*, "[s]elf-regulatory organizations[, such as FINRA,] are responsible for 'enforc[ing] compliance' with the 'provisions' of the Securities and Exchange Act, and the 'rules and regulations thereunder.'" *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.,* 2023 U.S. App. LEXIS 16987, *2 (D.C. Cir., July 5, 2023) (citing 15 U.S.C. §§ 78o(a)(1), (b)(1)(B), 78s(g)(1); see also *id.* § 78o-3(b)(7)).

Further support that neither charges implicating anti-fraud provisions of the Securities Exchange Act (1934), nor FINRA Rule 2111 violations are distinguishable from one another is abundant among scores of recent consent judgements for SEC allegations of violations of anti-fraud provisions. One such case is *Appelbaum*. Therein, the SEC filed a claim in the U.S. Dist. Court for the Southern Dist. Of Florida, for violations of FINRA Rule 2111.[1] *Appelbaum* unequivocally shows that the SEC views a violation of FINRA Rule 2111 as a "securities-fraud claim brought under Rule 10b-5[.]" *United States SEC v. Appelbaum*, No. 22-81115-CIV-CAN, 2023 U.S. Dist. LEXIS 39201, at *10 (S.D. Fla. Jan. 24, 2023) (Appelbaum's statements and omissions to customers, him being "well aware of his long-time customers' investment profiles[,]" and his "fail[ure] to follow [his employer's] policy"[2] was "sufficient . . . to create a strong inference that Appelbaum was aware that the [investments] were *unsuitable* for [his c]ustomers." *Appelbaum*, at *13-14 (*emphasis added*).

[1] The sole substantive violation with which Enforcement charged Mr. Blankenship in the above-referend disciplinary proceeding is a violation of FINRA Rule 2111.
[2] The employer's policy that Appelbaum failed to follow involved "Appelbaum['s] further fail[ure] to obtain customer signatures." *Appelbaum*, at *16. *Compare*, Enforcement's allegation against Mr. Blankenship that he "fail[ed] to obtain customers' signatures on the [employer-required] forms." Complaint, p. 2, at 2.

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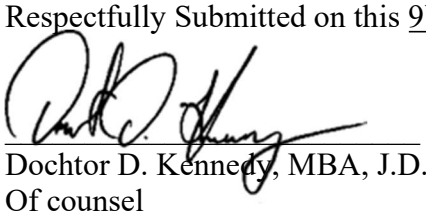
CONCLUSION

According to the implications triggered by the Supreme Court's (6-3) decision in *Jarkesy* (absent a guarantee that neither you, Mr. Simpson (OHO), nor the NAC, will impose a disciplinary sanction upon Mr. Blankenship as a result of the immediate proceedings), a failure to grant this motion to stay will subject Mr. Blankenship to adjudication involving private rights,[3] outside of an Article III court—in direct conflict with the holding of *Jarkesy*, at *6.

Please note that no part of this correspondence shall be construed as an admission. Likewise, Mr. Blankenship does not waive any rights, defenses, claims, nor counterclaims related hereto, or otherwise .

I appreciate your time and attention to this matter. Should you have any questions or concerns, please feel free to contact me directly.

Respectfully Submitted on this 9th day of July, 2024, by:



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[3] "If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." *Jarkesy*, U.S., at *6.

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