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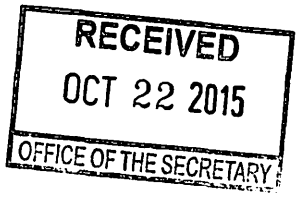

UNITED STATES OF AMERICA

Before The

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

MICHAEL EARL MCCUNE

For Review of Disciplinary Action

Taken By FINRA and the National

Adjudicatory Council of FINRA

(FINRA Complaint No. 2011027993301

FINRA NAC Decision Dated

July 21, 2015)

Opening Brief of Applicant,

Michael Earl McCune

Admin. Proc. File No. 3-16768

Pursuant to the September 22, 2015 Order Scheduling Briefs in this matter, Applicant Michael Earl McCune submits the following Opening Brief in support of his application for review and appeal by the Commission of a final disciplinary action by FINRA and the National Adjudicatory Council (the "NAC") of FINRA.

This appeal involves a determination of the NAC in a decision dated July 27, 2015 which upheld the sanctions imposed on the Applicant in a decision of the FINRA Office of Hearing Officers ("OHO"). The NAC decision represents the final disciplinary decision of FINRA.

The decision of the NAC reaches the illogical conclusion that a registered representative who has virtually no compliance issues prior to the current issue and who has provided very good care for his customers is subjected to essentially the same sanctions as a registered representative who commits outlandish fraud and steals clients' money – a lifetime ban from the industry. During the year in which FINRA initiated its action against the Applicant, 95% of those accused of U-4 violations and who received a suspension as a sanction, regardless of the duration of the suspension, were no longer in the securities industry after the suspension. Given the current environment in the industry of absolute fear of any regulatory issue, even large producers with any U-4 issues have difficulty finding a FINRA member who will accept them upon receiving a suspension; a smaller producer such as the Applicant is, for all practical purposes, banned as though he

had stolen every penny of his clients' money. In GAO-12-625, the Government Accountability Office recommended retrospective reviews of FINRA's rules to "systematically assess whether its rules are achieving their intended purpose and take appropriate action, such as maintaining rules that are effective and modifying or repealing rules that are ineffective or burdensome". The draconian result of the NAC's decision essentially barring a conscientious registered representative is surely an "ineffective" result. The NAC's argument that "...the six month suspension and $5,000 fine imposed by the Hearing Panel will deter McCune from engaging in similar misconduct and appropriately remedial sanctions for this violation" (p. 8 of the NAC decision) is nonsense when the actual result will be that McCune will no longer be around to be deterred from any conduct whatsoever.

The NAC argues that it will be in the investing public's interest that McCune be subject to suspension and statutory disqualification. Aside from the fact that it is difficult for such sanctions to serve any remedial purpose when the representative being sanctioned will no longer be in the securities industry, it is difficult to understand how McCune poses such an onerous threat to the investing public that he should be (in essence) banned from the industry when he has taken good care of his clients. Much of the NAC's argument concerning the investing public revolves around the very recent development of the internet as a substantial communication source and around FINRA's Broker Check system

as the vehicle to convey information to the public about registered representatives. In fact, these developments are so recent that the Applicant (McCune) was totally unaware that Broker Check even existed until weeks before his termination by Royal Alliance (his broker-dealer in 2011). In any malfeasance, intent is an important element that justifies the sanctions handed down by the body charged with making such decisions. When the Applicant was not even aware of the existence of Broker Check, it is hard to find that he had the intent to defraud the system. The Applicant was negligent in his actions, but did not act willfully. It is also totally implausible to hold that the Exchange Act could have even remotely anticipated the internet and the Broker Check system.

Perhaps that biggest problem with the NAC's decision is that the sanctions are in conflict with the Eighth and Fourteenth Amendments to the Constitution of the United States of America. In the case of *United States v Bajakajian,* 524 U.S. 321 (1998), the Supreme Court ruled that it was unconstitutional to confiscate $357,144 from Hosep Bajakajian who failed to report the possession of $10,000 while leaving the United States. The Supreme Court found that a fine would offend the Eighth Amendment of the United States of America if it were "grossly disproportional to the gravity of a defendant's offense". Applying this standard to the Applicant's actions leads to the following reasoning and conclusion: Applicant did not report certain events on required forms ((Bajakajian failed to report the possession of $10,000); Applicant will be essentially banned from the securities

industry if the NAC decision stands; Applicant will lose his existing business of securities clients – applying a modest valuation of $80,000/year for a ten-year time period and discounting at the current ten-year Treasury rate of 2.073% (the rate quoted in the WSJ Online for October 20, 2015) results in an overall valuation of Applicant's business of approximately $730,802.00; that amount will be lost to the Applicant if the NAC decision stands. The amount confiscated from Bajakajain was $357,144 and the Supreme Court found this to be "grossly disproportional"; the amount that will be confiscated from the Applicant if the NAC decision stands will be $373,658.00 more.

Finally, the NAC argues that "comparisons to sanctions in settled cases are inappropriate because pragmatic considerations justify the acceptance of lesser sanctions in negotiating a settlement such as the avoidance of time-and-manpower-consuming adversary proceedings." While this is certainly logical in determining the amount of fines due to the increased expense if a case is not settled, the Applicant is at a loss as to how a difference in suspension time would in any way offset the increased expense if a case is not settled.

For all the foregoing reasons, the Applicant respectfully submits that the NAC decision be modified and the suspension and statutory disqualification sanctions imposed by this decision be vacated.

Dated: October 20, 2015

Respectfully Submitted By:

MICHAEL EARL MCCUNE, APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that I have caused an original and three copies of the foregoing "Opening Brief of Applicant, Michael Earl McCune – Admin. Proc. File No. 3-16768, FINRA Complaint No. 2011027993301, FINRA NAC Decision Dated July 21, 2015" to be sent via facsimile to the United States Securities and Exchange Commission at 202-772-9324 on this 21st day of October, 2015 and by UPS Next Day Air on this same 21st day of October, 2015 to:

The Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Mail Stop 1090 – Room 10915
Washington, DC 20549.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing "Opening Brief of Applicant, Michael Earl McCune – Admin. Proc. File No. 3-16768, FINRA Complaint No. 2011027993301, FINRA NAC Decision Dated July 21, 2015" to be sent via facsimile to FINRA at 202-728-8264 on this 21st day of October, 2015 and by UPS Next Day Air on this same 21st day of October, 2015 to:

Colleen Durbin
FINRA – Office of General Counsel
1735 K Street, NW
Washington, DC 20006.

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