UNITED STATES OF AMERICA

BEFORE THE UNITED STATES SECURITIES & EXCHANGE COMMISSION

In the Matter of the Application of Wilson-Davis & Co., Inc. (CRD No. 3777) and Byron B. Barkley's (CRD No. 12469) For Review of Disciplinary Action Taken by FINRA	NAC DECISION ON REMAND: JULY 10, 2025 SEC ORDER: DEC. 28, 2023 (ADMIN. PROC. FILE NO. 3-19666) NAC DECISION: DEC. 19, 2019 FINRA HEARING PANEL DECISION: FEB. 27, 2018 FINRA COMPLAINT NO. 2012032731802

OPENING BRIEF FOR APPEAL OF WILSON-DAVIS & CO., INC. AND BYRON B. BARKLEY

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Pursuant to Section 19(d)(2) of the Exchange Act and Rule 420 of the Securities & Exchange Commission's (the "Commission") Rules of Practice, Wilson-Davis & Co., Inc. ("Wilson-Davis" or the "Firm") and Byron B. Barkley ("Barkley") (collectively, "Petitioners")[1] appeal the decision of FINRA's National Adjudicatory Council ("NAC" or "FINRA") dated July 10, 2025 (the "NAC Decision"). At issue are three sanctions the NAC imposed, namely (1) a $180,000 fine for Wilson-Davis's short-selling violations of Regulation SHO; (2) a $310,000 fine for the Firm's failure to supervise and implement adequate anti-money laundering ("AML") procedures, and (3) a $25,000 fine, six-month principal capacity suspension, and requalification requirements for Barkley's failure to supervise the Firm's short sales. Because these sanctions are punitive, the Commission should either reverse the NAC Decision or, at a minimum, vacate or substantially reduce the sanctions the NAC imposed.

INTRODUCTION

Less than two years ago, the Commission set aside nearly all of the sanctions the NAC imposed and remanded this matter with explicit explanations of what the NAC had done wrong and instructions to correct those mistakes. More specifically, in an opinion issued on December 28, 2023 (the "Remand Order"), the Commission set aside fines imposed on the Firm and Barkley because the NAC "provided no explanation or analysis" to support its actions, and the Commission remanded this proceeding to the NAC to articulate and perform the required explanation and analysis. This case returns to the Commission because the NAC disregarded the Commission's mandate and repeated the same fundamental errors that plagued its first bite at the sanctions apple, where it imposed punitive sanctions without any analysis grounded in reason or fact.

[1] James Snow, a petitioner in the first Application for Review, is now retired and does not join Petitioners in this Application for Review.

In its instructions remanding this matter, the Commission directed FINRA to justify any renewed penalties with a transparent methodology, based in its own Sanctions Guidelines, and demonstrate that any penalty it imposes is remedial in nature, and not punitive or retaliatory. Instead, and for the second time, FINRA assessed punitive penalties against Petitioners, ignored mitigating facts, and offered only conclusory analysis for its sanctions, leaving Petitioners (and the Commission) unable to discern linkages between the sanctions and investor protection.

This failure does more than violate the Commission's Remand Order. It undermines the core charge that an adjudicatory body act neutrally and impartially in applying its own rules. In doing so, FINRA engages in regulation by enforcement rather than neutral adjudication, and by imposing a $180,000 Reg SHO fine, a $310,000 AML/supervisory fine, and sweeping sanctions on Barkley without any showing of present risk or considering proportionality, the NAC Decision eschews principled discipline for punishment. The Commission should vacate or substantially reduce these sanctions to restore the principle that enforcement must first protect investors, not punish firms or their principals for past conduct.

BACKGROUND & PROCEDURAL HISTORY

Wilson-Davis is a small broker-dealer founded in 1968 with its principal office in Salt Lake City.[2] Twelve years ago, Anthony Kerrigone ("Kerrigone"), an equity trader at Wilson-Davis, executed 122 short sales in four low-priced, OTC securities without first locating shares to cover his short sales. The Firm timely covered Kerrigone's short positions but an unexpected increase in the price of one stock – LOTE – resulted in a net loss of more than $4.2 million and a request that Kerrigone disassociate from the Firm. Kerrigone reimbursed the Firm for only some of the trading loss, leaving the firm with a net loss of $2.3 million. No evidence has been presented, or

[2] Barkley joined Wilson-Davis in 1969 and, for a time, was the Firm's head trader.

even an allegation raised, that anyone other than Kerrigone engaged in short-selling practices or that any similar trading has occurred since April 2013. Nor is there any evidence that the market or any customers were harmed by Kerrigone's trading.

In February 2018, a FINRA Hearing Panel found Wilson-Davis liable for Regulation SHO, supervisory, and AML violations, ordering $51,642 in disgorgement and imposed significant Firm and individual sanctions, including a $1,170,000 Reg SHO fine and a $300,000 supervisory/AML fine. *See* R. 8805.[3] In December 2019, the NAC affirmed the liability findings but significantly modified the Hearing Panel's sanctions, reducing the Reg SHO fine to $350,000, increasing the supervisory/AML fine to $750,000, and imposing suspensions and requalification requirements for Barkley. *See* R. 8738. On appeal, the Commission sustained the violations, disgorgement, and the Firm's independent consultant undertaking. However, it set aside the fines and Barkley's sanctions, remanding for FINRA to explain and/or analyze Wilson-Davis's purportedly reckless conduct and "how that conclusion factors into" any Reg SHO fine. R. 8759. Because FINRA impermissibly relied on the same underlying facts that it considered in imposing the Reg SHO-related fine that FINRA set aside, the Commission also vacated the fine imposed for supervisory and AML violations. R. 8760. Finally, the Commission ordered FINRA to explain why any sanctions are necessary to protect the public and demonstrate that the sanctions are "appropriately remedial and not punitive or otherwise excessive or oppressive." *See* R. 8757-58, 8761.

On remand, the NAC Decision imposed a $180,000 Reg SHO fine and a $310,000 supervisory/AML fine. R. 8898. It also set Barkley's sanctions at a $25,000 fine, a six-month principal capacity suspension, and requalification requirements as a general securities principal,

[3] All citations to the underlying record are prefixed with "R." and omit any zeros before the relevant Bates number or range.

investment-banking principal, and compliance officer. *Id.* In August, Wilson-Davis and Barkley filed an Application for Review to the Commission, arguing that the revised sanctions remain punitive rather than remedial and fail to comply with the Commission's remand instructions. R. 8905.

THE COMMISSION'S MANDATE ON REMAND

When the Commission set aside FINRA's sanctions in the Remand Order, it made clear that any renewed sanctions must be supported with a reasonable explanation and tailored to remedial purposes. The Commission directed FINRA to reconsider the appropriate sanctions in "light of our opinion" and specifically instructed that FINRA provide an *explanation **and** analysis* of aggravating and mitigating factors that FINRA believes would merit such extreme deviations from its own Sanctions Guidelines. R. 8761, 8764, 8806.[4] The Commission further emphasized that FINRA must explain, and that the Commission considers, how any sanctions are necessary to protect the public and are appropriately remedial, not punitive, or otherwise excessive or oppressive. R. 8757-58, 8761. These instructions echo the Exchange Act's standard that sanctions must serve investor protection, not punishment. *See Scottsdale Capital Advisors Corp. v. FINRA*, 390 F. Supp. 3d 72, 81 (D.D.C. 2019) (noting that it is the Commission's role to review a final disciplinary sanction imposed by FINRA and determine whether its rules were applied in a manner consistent with the purposes of the Exchange Act).

FINRA, the Commission, and courts have all held that sanctions must be remedial and not

[4] Although the Sanctions Guidelines have been revised several times since 2019, the NAC previously explained that, when its decisions are appealed to the Commission and remanded, the version of the guidelines in effect at the time of the initial NAC decision still applies. *See In re Houston*, 2013 FINRA Discip. LEXIS 3, at *19. Here, both the NAC and the Commission applied the 2019 version of the guidelines. R. 8758, n.81. Accordingly, the 2019 version continues to apply here, and is referred to as the "Sanctions Guidelines" throughout this Opening Brief. *See* https://www.finra.org/sites/default/files/2020-10/2019_Sanctions_Guidelines.pdf (last accessed Oct. 10, 2025).

punitive.[5] A sanction is remedial when it reduces the risk that a particular offender will repeat unlawful acts; *however*, when the purpose strays to discouraging others from doing the same, the sanction becomes punitive. *Kokesh v. SEC*, 137 S. Ct. 1635, 1638 (2017) ("a pecuniary sanction operates as a penalty only if it is sought for the purpose of punishment, and to deter others from offending in a like manner—as opposed to compensating a victim for his loss."). Likewise, General Principle No. 1 of the Sanctions Guidelines states that the purpose of FINRA's disciplinary process is to "protect the investing public, support and improve the overall business standards in the securities industry, and decrease the likelihood of recurrence of misconduct by the disciplined respondent." Sanctions Guidelines at 2.

Courts are clear that regulatory disciplinary decisions must provide a clear explanation for the sanctions those bodies impose on its regulated members or persons. For example, in *PAZ Securities, Inc. v. SEC* ("*PAZ I*"), the D.C. Circuit vacated a bar where "nothing in the record" supported the sanction and the agency merely stated that "in effect, petitioners are bad and must be punished." 494 F.3d at 1064–65. Two years later, the same court affirmed a bar where the Commission articulated why the sanction was "*necessary* to protect investors" and lesser measures were insufficient. *PAZ Secs., Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009) ("*PAZ II*").[6] Similarly, in *Saad v. SEC*, the D.C. Circuit stressed that sanctions must be "remedial, not punitive" and tied to specific risk reduction. 718 F.3d 904, 906–07 (D.C. Cir. 2013).

The Remand Order adopts this framework, requiring FINRA to move beyond conclusory

[5] *See, e.g.*, Sanctions Guidelines at 1 (noting that the Sanctions Guidelines were developed for the purpose of "determining appropriate remedial sanctions"); *In re Elgart*, 2017 SEC LEXIS 3097, at *27-28 ("In making this assessment, we must consider any aggravating or mitigating factors, and whether the sanctions are remedial and not punitive."); *PAZ Secs., Inc. v. SEC*, 494 F.3d 1059, 1061 (D.C. Cir. 2007) (reversing SEC order where "it did not identify any remedial – as opposed to punitive – purpose for the sanctions it approved.").

[6] Unless otherwise stated, emphasis is added, and internal citations and brackets are omitted throughout.

assertions and demonstrate, with record-based reasoning, why each sanction is calibrated to protect the public rather than merely punish past conduct. The NAC Decision's failure to meet this standard here render the sanctions arbitrary, punitive, and unlawful under Section 19 of the Exchange Act.

This brief proceeds in three steps. Section I addresses the Reg SHO fine and shows why, under the Sanctions Guidelines and the Commission's remand, an above-range sanction is not remedial. Section II explains why the AML/supervisory fine duplicates FINRA's Reg SHO analysis, ignores firm size and existing undertakings, and remains punitive. Section III shows that Barkley's individual sanctions are not tailored to present risk and recommends narrower, remedial alternatives.

ARGUMENT

I. The NAC Ignored the Commission's Instructions and Imposed an Arbitrary and Punitive Reg SHO Penalty.

With the remedial standard for sanctions and the Commission's specific remand instructions in focus, the Commission should first consider whether the NAC Decision's imposition of a $180,000 Reg SHO fine was derived from a transparent methodology grounded in the Sanctions Guidelines and tailored to a present risk. The Remand Order set aside the first Reg SHO fine because FINRA failed to explain and/or analyze how the Firm acted recklessly and how that conclusion translated into an appropriate fine. R. 8759. It further emphasized that any renewed sanction must be supported by a reasoned explanation "in light of" the opinion and that any selected sanctions are appropriately remedial. R. 8738, 8757, 8764.

This required the NAC to, at a minimum: (i) identify the relevant Sanctions Guidelines tier applicable to this case (i.e., first, second, or subsequent action); (ii) state a baseline within the specified sanctions range; (iii) analyze aggravating and mitigating factors to quantify or otherwise

explain the impact of recklessness (if any) on the sanction; and (iv) show why the specific number selected is remedial and tailored to reduce the risk of future violations, as opposed to punishing misconduct or deterring others in the abstract. *See* R. 8757-61 (setting aside fine and instructing FINRA to conduct such an analysis).

a. The NAC Decision Fails to Ground the $180,000 Fine in the Sanctions Guidelines.

The NAC Decision—repeating the same fundamental error cited in the Remand Order—offers only a conclusory statement that Wilson-Davis acted "recklessly" and then sets a $180,000 fine without explaining how that figure aligns with the Sanctions Guidelines or mitigates future risk. R. 8888. The NAC declares that a $180,000 fine is appropriate only after dropping in a footnote that it "would have imposed a fine of $230,000 but have reduced the fine by $50,000" to take partial account of the Commission's prior action against Wilson-Davis. R. 8889, n.16.

This "analysis" is precisely what the Commission told FINRA not to do again. The NAC never states whether this proceeding represents FINRA's first action against the Firm for a violation of Reg SHO, as opposed to a second/subsequent action; it never identifies the baseline sanctions range (e.g., $5,000 to $16,000 for a first action offense) it applied; and it never ties the underlying record into a principled position warranting a sanction *beyond* the Sanctions Guidelines' imposed range for a *repeat* offender.

Instead, the NAC Decision offers vague and conclusory descriptions in support of a Reg SHO sanction. *See, e.g.*, R. 8889 ("[t]here was a clear pattern of misconduct," without stating what such pattern was; "Wilson-Davis acted in reckless disregard for its obligations associated with legitimate market-making activity as it enriched itself through its misconduct," omitting for narrative's sake that the Firm lost over $4 million through Kerrigone's short selling). The NAC Decision then declares that $180,000 is the appropriate fine, anchored only by a statement that the

fine "would have been $230,000," but with no explanation of the basis for that "would have" been number. R. 8889, n.16. This is not a methodology; it is ipse dixit in the very spot the Commission demanded analysis. *See* R. 8759 (requiring FINRA to explain in determining that if the "amount of the fine should exceed the [Sanctions] Guidelines range" that it "provide [an] analysis" in how it "reached this conclusion.").

The NAC purports to reduce the fine by $50,000 in light of the prior Commission action, but it also never explains *how or why* $50,000 is the appropriate amount. The Sanctions Guidelines, meanwhile, direct FINRA to consider sanctions already imposed for the same or similar conduct. *See* NAC, 13; *cf.* Sanctions Guidelines at (wherein General Principle No. 6 notes that "adjudicators should consider sanctions previously imposed by other regulators … based on the same conduct"). Here, however, the NAC Decision does not explain whether the prior Commission action causes FINRA to treat this matter as a first, second, or subsequent action; it does not explain what overlapping conduct exists between the two proceedings; and, it wholly fails to identify the conduct that the Commission's case did not address, which FINRA apparently sees as uniquely relevant and aggravating here.

This omission is not trivial. FINRA's own Sanctions Guidelines cap sanctions at $16,000 for a "First Action" against a member firm for a Reg SHO violation. The Sanctions Guidelines make clear that "an 'action' means a Letter of Acceptance, Waiver and Consent (AWC), *a settled case* or *a fully litigated case*." Sanctions Guidelines at 9. And here, it is indisputable that this proceeding constitutes FINRA's first disciplinary action against Wilson-Davis for a violation of Reg SHO. FINRA's Sanctions Guidelines, accordingly, provide a straightforward framework: $5,000 to $16,000 for a "First **Action**," $10,000 to $77,000 for a "Second **Action**," and $10,000 to $155,000 for "Subsequent **Actions**," with upward revisions permitted only when aggravating

factors predominate. *Id.* at 65.

If FINRA considered this a second or subsequent action and used that as the basis for the penalty it is imposing, it must say that, justify it, and then qualify the incremental increase beyond any range the Sanctions Guidelines provide, not simply invoke a large number divorced from the Guidelines' framework. Yet here, FINRA imposed a fine more than *eleven times* the maximum sanction of the First Action range without explanation. *But see Enforcement v. Legacy Trading, Co.*, No. 2005000879302, 2010 FINRA Discip. LEXIS 20, at *48-49 (respondent fined a total of $10,000 despite committing 2,192 short sales in violation of Reg SHO); *In re Simplex Trading, LLC*, SEC Release No. 98346 (Sept. 11, 2023) (respondent fined $200,000 for executing "short sales *of millions of shares*" without locating shares and improperly relying on the bona-fide market making exception).

Additionally, the NAC Decision's only numerically explicit step (a $50,000 reduction from an unexplained $230,000) does not substitute for the structured analysis the Commission required upon remand. This defect matters because the Commission needs to "discern" that a sanction is tailored and remedial, not punitive, and the absence of any visible methodology calculating this amount makes that impossible. The Commission cannot affirm a sanction where FINRA does nothing more than effectively say that "petitioners are bad and must be punished." *See* R. 8761 (citing *Bruce Zipper*, 2020 WL 7496222, at *19-20 (Dec. 21, 2020)).[7] Accordingly, the absence of *any* explanation and/or analysis tying the Reg SHO sanction to FINRA's Sanctions Guidelines

[7] Wilson-Davis also urged the NAC to consider a "batching" or aggregated approach in crafting the appropriate sanction. *See* R. 8816. General Principle No. 4 of the Sanctions Guidelines states that "batching" is appropriate if the violative conduct was unintentional, did not result in injury to the public or investors or if restitution was made, or if the violations result from a single systemic problem or cause that has since been corrected. *See* Sanctions Guidelines at 4. All of these factors are satisfied here, but the NAC Decision does not engage with this argument, even though it would directly address the Commission's concern that FINRA explain sanctions in a manner tailored to remedial purposes rather than an undisclosed methodology. *Cf.* R. 8757-58.

warrants vacatur.

b. The NAC Decision's "Recklessness" Finding is Asserted, Not Analyzed.

The Remand Order also admonished FINRA for offering only conclusory statements regarding the Firm's alleged reckless behavior. *See* R. 8759 ("[W]ithout more than a conclusory statement, we cannot evaluate FINRA's basis for concluding how Wilson-Davis acted recklessly or how that conclusion factors into FINRA's imposition of a fine for Wilson-Davis's violating Reg SHO."). The NAC Decision repeats that error, reciting a handful of facts (i.e., non-competitive quotes, failure to locate, speculative trading strategy) and pronounces those actions reckless. R. 8888. What it does *not* do, however, is apply those findings to scienter (because it cannot). *Contra* R. 8759 (noting that scienter is an important factor in evaluating whether sanctions are appropriate). The NAC Decision further fails to address how such alleged reckless conduct justifies imposing a sanction *eleven times higher* than the high-end the Sanctions Guidelines specifies for a firm's first Reg SHO action.

c. The NAC Failed to Follow the Commission's Mandate by Not Grappling with Relevant, Mitigating Facts and Cases.

In contrast to the NAC Decision, Wilson-Davis squarely addressed the Commission's concerns regarding recklessness and scienter, showing that the firm's Reg SHO understanding was based on a good-faith belief that the trading fit within the bona fide market making exemption, the period was short, the Firm absorbed a massive loss from the trading, and that there has been no recurrence for over twelve years since the Firm voluntarily suspended its short selling practice. *See* R. 8808-8817; 8865-68 (rebutting the Department of Enforcement's belated recklessness theory and highlighting non-recurrence); *Monetta Fin. Servs. v. SEC*, 390 F.3d 952, 958 (7th Cir. 2004) (finding that where misconduct took place "a decade ago, for an eight-month period, making it a fairly isolated occurrence" that the likelihood of a future violation was slight). All of these

factors are inconsistent with the need for an outsized penalty, yet the NAC refused to grapple with these facts or engage in this analysis, and instead, transformed vague and conclusory "reckless conduct" allegations into a punitive $180,000 penalty.

Even assuming that FINRA established recklessness, it still had to explain and/or analyze how that finding quantitatively impacts the penalty it levies. It did not. But precedent cautions that a remedial sanction is one that focuses on the present risk of a future violation by the Firm itself. *See PAZ I*, 494 F.3d at 1064-65 (holding that a sanction is remedial if it addresses the risk of future misconduct rather than punishing past acts); *West v. SEC*, 641 F. App'x 27, 31 (2d Cir. 2016) (noting that the "risk of future violations" is relevant in considering whether a sanction is remedial or punitive). As discussed, Wilson-Davis established that: (i) the short selling episodes were short-lived, taking place in only 13 trading days across four securities, *see* R. 8813; (ii) totaled 122 trades, R. 8812 (iii) the only trader who used the strategy left in 2013, R. 8811-12; (iv) the firm has not engaged in short selling in over a decade, R. 8811; and (v) the Firm's over $4.2 million loss in LOTE, one of the stocks the trader sold short, created a powerful deterrent against repetition. R. 8813.

Rather than contend with these facts and explain why they still warrant a fine outside of the Sanctions Guidelines ranges, the NAC labels the Firm's post-misconduct improvements as "irrelevant" and proceeds as if the only question is the gravity of past acts. R. 8890. And without citing any authority, the NAC Decision cursorily concludes that "any deterrence created by the firm's financial losses stemming from its misconduct is separate from the deterrence component of a FINRA sanction." *Id.* But General Principle No. 1 makes clear that the disciplinary process "aims to protect the investing public … and decrease the likelihood of recurrence of misconduct." R. 8808 (quoting Sanctions Guidelines). In addition, the Sanctions Guidelines emphasizes that

adjudicators must weigh aggravating *and* mitigating circumstances. Sanctions Guidelines at 4 ("Adjudicators must always exercise judgment and discretion *and consider appropriate aggravating and mitigating factors* in determining remedial sanctions in each case); *see Monetta*, 390 F.3d at 958 (7th Cir. 2004) (vacating order imposing sanctions where order failed to meaningfully consider mitigating conduct); R. 8757 (noting that the Commission considers the same, citing *Saad*). The question of whether there is a risk that the Firm's conduct will recur sits at the heart of the remedial versus punitive analysis; ignoring it is not an analytically sound or fair-minded option but is precisely what the NAC Decision does.

In a brief attempt to cloak its conclusion with legal gravitas, the NAC Decision cites two cases, first looking to *Wedbush Securities* for the proposition that "corrective actions are not mitigating when taken after the identification of misconduct" because some corrective actions were taken "only after regulators notified them of the reporting failures." R. 8890. But that proposition is inapplicable here: even *before* FINRA's Department of Enforcement began looking into the short selling at issue, Wilson-Davis stopped the short-selling activity and never resumed it. R. 8811 ("Here, even before Enforcement started looking into the trades at issue, Wilson-Davis stopped the short-selling activity and never resumed it."). The second case, *Denise M. Olson*, concerned whether the respondent's clean record could offset the seriousness of the misconduct at the time of the violation, but does not consider whether a decade of non-recurrence coupled with a multi-million-dollar loss and structural changes eliminates, or substantially reduces, the need for an above-range fine. R. 8890. At bottom, FINRA was required to explain *why* $180,000, rather than a sanction within the $5,000 to $16,000 range, was necessary in light of all of these circumstances. It failed to satisfy this mandate.

In addition and when identifying comparative cases, while the Firm did not attempt to bind

the NAC to prior adjudications, it did present a gross disparity in sanctions requiring explanation that the NAC Decision similarly ignored. R. 8814-15. In *Legacy Trading*, the NAC found 2,192 short selling trades violated Reg SHO (coupled with aggravators such as willfulness and false statements) yet imposed a much lower fine of $10,000 plus disgorgement equating to approximately $4.56 per trade. *Id.* By contrast, the NAC's fine here (initially $350,000, now $180,000) equates to $1,475 per trade, or *three hundred times higher* than *Legacy Trading's* per-fine violation, despite Wilson-Davis's far fewer trades and multi-million dollar hit to its finances. *See* R. 8814-16 (discussing *Legacy Trading*); R. 8865-68 (discussing the same per-violation comparison and disparity under the original $350,000 fine); *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005) (noting that an indicator of an abuse of regulatory discretion involves "a sanction palpably disproportionate to the violation or a failure to support the sanction chosen").

But again, the NAC Decision does not engage with this disparity or tries to address it in any meaningful way. It asserts that comparisons can be inapt, but *Bruce Zipper* and similar Commission decisions instruct that where an outcome appears excessive relative to the Sanctions Guidelines and to broadly comparable matters, an adjudicator must explain why the sanction is remedial and necessary. *See* R. 8761 (citing *Bruce Zipper*, noting that remedial sanctions require an explanation for why the sanctions are necessary to protect the public and that a sanction must do more than represent punishment for punishment's sake); *cf. D'Alessio v. SEC*, 380 F.3d 112, 125 (2d Cir. 2004) (recognizing that gross disparities in sanctions for similar behavior suggests an underlying bias and gives a reviewing court pause). The NAC's silence reinforces the conclusion that $180,000 is not the product of a thoughtful remedial calculation, but instead, simply represents a knee-jerk calculation of punitive instinct.

d. The Record Demonstrates Minimal Present Risk; A Large, Above-Range Fine is Not Necessary to "Protect the Public."

The NAC Decision does nothing in the way of explaining why Wilson-Davis's conduct presents a future risk to investors. As case law makes clear, decisions imposing disciplinary sanctions must explain why the punishment is necessary to protect investors and that regulators must "sufficiently articulate the grounds for their decisions" in justifying sanctions. *PAZ II*, 566 F.3d at 1176. Here, however, the NAC Decision does not explain why the record merits a fine that dramatically exceeds the maximum range of the Sanctions Guidelines to protect investors. At best, it leans on language stressing the importance of general deterrence. *See* R. 8890 ("A fine of $180,000 incentivizes the firm to comply with Reg SHO in the future *and additionally will deter others from engaging in such misconduct*."). But because the NAC Decision cannot point to any evidence that the Firm poses a clear risk of future misconduct or to investors, and because the sanction is not imposed based on a well-explained amount to deter Wilson-Davis from reoffending, it is punitive.

On this record, a remedial outcome consistent with the Sanctions Guidelines is a sanction within the First Action range. The conduct at issue was short-lived, has not recurred in more than a decade, generated massive firm losses, and is already subject to structural remediation.[8] An unexplained $180,000 penalty, *eleven times higher* than the maximum $16,000 that the Sanctions Guidelines permits, cannot be affirmed as remedial.

II. The NAC Failed to Provide the Reasoned Analysis the Commission Required for Supervisory/AML Violations.

FINRA's AML/supervisory analysis fares no better because it relies on the same narrative without the fact-specific reasoning the Commission expressly required on remand. The Remand

[8] The Firm retained two independent consultants who successfully performed AML and supervision undertakings because of other regulatory settlements from the general time period. *See* R. 8806, n.3.

Order explicitly set aside the supervisory/AML fine FINRA initially imposed because the NAC anchored its decision on aggravators that formed the imprecise Reg SHO conduct the Commission also vacated. *See* R. 8760 ("Because these aggravating factors are related to those that FINRA considered in imposing the Reg SHO-related fine that we set aside and remanded above, we also set aside and remand the fine imposed for Wilson-Davis's supervisory and AML failures").

On remand, the NAC imposed a penalty of $310,000, the maximum supervisory/AML fine that the Sanctions Guideline permitted. In manufacturing this penalty, the NAC: (i) brushed aside the Commission's requirement that FINRA consider the Firm's size and aggregate burden in crafting an appropriate fine, calling such considerations "largely moot," *see* R. 8895; (ii) reused, for the second time, the same factual predicate underscoring the Firm's Reg SHO sanction to justify a maximum supervisory/AML sanction, *see* R. 8891-95 (iii) failed to acknowledge the presence of an independent consultant as an already-imposed remedial mechanism, *see id.*; and (iv) relied on generalized aggravators untethered to the record or misaligned with the Principal Considerations the Sanctions Guidelines identifies. *Id.* In short, the NAC's Decision again substitutes assertion for analysis, leaving the Commission unable to discharge its review function or affirm the revised fine as remedial.

a. The NAC Never Performed a Size and Burden Analysis.

In the Remand Order, the Commission expressly authorized Wilson-Davis to raise, and required FINRA to consider, arguments "such as the appropriate fine given the firm's size and the aggregate fines imposed, for FINRA to consider in the first instance." R. 8760. That directive reflected the Commission's concern that FINRA failed to justify its sanctions in a manner proportionate to the Firm's size and overall sanctions.

Wilson-Davis did exactly what the Commission invited: it presented a concrete, data-

driven demonstration that the NAC's initial supervisory/AML fine equated to approximately 21% of the Firm's 2018 net capital and that the total fines (including Reg SHO) assessed amounted to approximately 31% of Firm's net capital. R. 8820-22. The Firm also showed that FINRA's AML fines against much larger institutions (for more extensive and prolonged AML lapses) represented fractions of one percent to at most a few percentage points of net capital. *Id.* For example, Morgan Stanley was fined $10 million for multiple alleged AML violations, representing 0.3% of that company's net capital; the Industrial and Commercial Bank of China was fined $5.3 million for wide-sweeping AML violations, representing 1.2% of the bank's net capital; and BNP Paribas was fined only .07% of that company's net capital for AML violations that included processing over 70,000 wires worth $233 billion and at least 834 customer accounts associated with high-risk jurisdictions. *Id.* These examples illustrate how size and aggregate burden matter to the inquiry of whether a sanction is appropriately remedial and not punitive.

The NAC's response was to ignore those size/aggregate arguments because "pragmatic considerations" such as "the avoidance of time-and-manpower-consuming adversary proceedings" may affect sanctions, and then declared Wilson-Davis's arguments as "largely moot" because it reduced the relevant sanction on remand anyway. R. 8894-95. The former position, however, infers that FINRA might let larger firms off the hook in exchange for cost savings to avoid litigating rule violations, but that is not an appropriate or unbiased method of adjudicating or enforcing regulatory rules. And a conclusion that the firm-size and aggregate impact is "moot" is no substitute for and absconds from the reasoned consideration the Commission required the NAC to engage in. The NAC Decision therefore failed to address a central factor bearing on whether the sanction is remedial rather than punitive, and such omission is dispositive. The NAC Decision is divorced from what the Exchange Act contemplates when sanctions are supposed to be imposed

for protecting investors and "promoting just and equitable principles of trade." *Cf.* FINRA Rule 2010.

While Wilson-Davis acknowledges that the Sanctions Guidelines do not pin FINRA to amounts tied to a member's net capital, those same guidelines acknowledge proportionality and fairness by directing adjudicators to weigh aggravating and mitigating factors and recognize that sanctions should be applied in an even-handed manner and for the sake of investor protection. *E.g.* Sanctions Guidelines at 1, 3, 4-5. Ignoring the only record evidence on size and burden, after the Commission invited precisely that analysis, cannot satisfy the requirement that a fine is remedial as opposed to punitive. *See* R. 8760 (stating that the Firm should raise, and FINRA must consider, "arguments, such as the appropriate fine given the firm's size and the aggregate fines imposed, for FINRA to consider in the first instance.").

b. In Crafting an AML/Supervisory Sanction, the NAC Relied on the Same Factual Predicate as the Firm's Reg SHO Violations.

The Commission initially vacated FINRA's supervisory/AML fine because the NAC's analysis recited the same aggravating factors that FINRA considered "in imposing the Reg SHO-related fine that we set aside and remanded." R. 8760. Implicit in this directive is that FINRA was required to distinguish the uniquely aggravating factors it relied on in support of its supervisory/AML penalty.

Yet here, the NAC Decision candidly states that it "necessarily" relies on "many of the same facts we considered for the Reg SHO violation," R. 8891, n.15, in imposing the maximum possible penalty permitted. *See* R. 8891-95. For example, the NAC Decision focuses on the downstream consequences of the Firm's Reg SHO violations, like the short sales in question "created risk for Kerrigone's counterparties that the transactions would not settle … created risk for other market participants that the stock's price was being manipulated … without finding

locates, Kerrigone accumulated a short position of 34,900 shares of PVTA." R. 8892. Because the $310,000 penalty again incorporates the same conduct as the Reg SHO penalty, and because FINRA failed to distinguish and identify the uniquely aggravating conduct attributable directly to supervisory/AML violations, the NAC failed to follow the Commission's mandate. The Commission warned against this kind of unreasoned aggregation, or where a fine becomes excessive or oppressive, and multiple sanctions cover the same ground. *See* R. 8761 (citing *Kimberly Springsteen-Abbott*, Exchange Act Release No. 88156, 2020 WL 605918, at *17-18 (Feb. 7, 2020) (setting aside fine based on the absence of explanation for why a fine was necessary in light of sanctions covering the same conduct)).

The concern here is not that some facts overlap between conduct and supervision, but that the NAC never precisely identified which facts, if any, uniquely aggravate supervisory and/or AML failures, which the Remand Order demanded. Instead, the NAC layered the same Reg SHO narrative into another maximum fine, without the rule-specific and fact-distinguishing reasoning the Commission required.

c. The NAC Ignored the Firm's Undertakings.

The Commission sustained, and Wilson-Davis does not challenge, the requirement that the Firm retain an independent consultant to review and remediate the Firm's supervisory and AML systems. R. 8758. That undertaking is a quintessential remedial measure aimed at deterrence by improving controls and oversight. On remand, the NAC was obligated to explain why, given the structural remedy that the Commission imposed, a maximum supervisory/AML fine remained necessary to protect investors. It did not.

In *In re C.L. King & Assocs.*, a FINRA Hearing Panel fined the firm $450,000 for AML-related violations. 2019 FINRA Discip. LEXIS 43 (Oct. 2, 2019). The NAC specifically

acknowledged that a reduced fine for supervisory failures was "appropriate given that we direct the firm to retain an independent consultant. Good compliance is critical to the business of the firm … [a]n independent consultant should assist the firm in establishing a successful supervisory program going forward." *Id.* at *140. In *C.L. King*, the total AML fine was $292,000, yet the facts were substantially more egregious than those present here. In that case, the NAC concluded that respondents had "systemic supervisory failures" that "were significant and persisted for more than four years." *Id.* at *126. The respondents started liquidating penny stock but "failed to tailor the firm's AML program to address" that new line of business and "egregiously failed to respond reasonably to many conspicuous red flag warnings." *Id.* at *80-81, 127. Due to these failures, two customers sold over *11 billion shares* in securities of companies with little or no history of operations or revenue, generating sales proceeds of $19 million and commissions of over $574,000. As in *C.L. King*, where the NAC recognized a *reduced* supervisory fine was appropriate "given that we direct the firm to retain an independent consultant," FINRA was required to—but did not—explain why imposing the *maximum* AML/supervisory fine remains necessary here despite this undertaking already in place.

Here, contrastingly, Wilson-Davis retained two independent consultants who successfully performed AML and supervision undertakings. R. 8806, n.3. Yet the NAC did not explain why the Firm's retention of these consultants did not yield anything below the maximum penalty amount and simply re-concluded that aggravating factors predominate.

d. The NAC's Aggravators Are Unsupported or Overstated and Culminate in a Punitive, Maximum Sanction.

To the extent that the NAC relies on "aggravating" factors that do not overlap with the factual bases for its finding of a Reg SHO violation, those recitation of facts continue to evince a sanction crafted in a punitive manner.

First, the NAC contends that Wilson-Davis's supervisory failures "affected other persons" because the Firm's failure to supervise short sales created "risk for [the trader's] counterparties that the transactions would not settle" and for other market participants because it created risk that "the stock's price was being manipulated." R. 8890. The NAC points to no evidence, however, of any failed settlements or investor losses arising from the supervisory/AML conduct at issue, instead summarily concluding that "[c]learly, Wilson-Davis's supervisory and AML deficiencies affected market integrity" and transparency. *Id.*;[9] *but see* R. 8889 (admitting that the trading "had the *potential* to create unfair" market conditions). Abstract and theoretical risks, untethered to record evidence, cannot bear the weight of a maximum sanction, especially where the Commission required FINRA to demonstrate why such severity was necessary now to protect investors. *See David Tysk*, 2021 WL 842612, at *8 (Mar. 5, 2021) (noting that FINRA cannot base liability on speculative assertions with no basis in the record) (quoting *Boss v. Castro*, 816 F.3d 910, 919 (7th Cir. 2016) ("speculation is not evidence.")).

Second, the NAC emphasizes that the Firm's supervisory failures "impacted a considerable number and dollar value of transactions." *Id.* However, the NAC never explains how those transactions or the dollar value translates into a present risk or justifies a maximum fine. The record, and the Commission's own opinion, show that deficiencies were short-lived: the challenged short sales occurred on only 13 total trading days spread across four securities, not over a period of "more than a year." R. 8813; *cf.* R. 8889, n.14. Wilson-Davis also demonstrated that

[9] The NAC Decision does not cite to any record evidence to support these points, because none exists. Any hypothetical risks were never realized as every transaction settled, and therefore, there was no actual impact on any other person. *See* R. 8741-42 ("Kerrigone covered his entire short position and ended flat."); Sanctions Guidelines at 7 (identifying Principal Considerations, where No. 11 states that "[w]ith respect to other parties, including the investing public" sanctions should consider "(a) whether the respondent's misconduct resulted directly or indirectly in injury to such other parties, and (b) the nature and extent of the injury.").

its supervisory and AML policies were overhauled years ago, that the firm implemented heightened supervision protocols, retained independent consultants in 2019 and 2021, was acquired by another Nasdaq firm in 2023, and that more than a decade has passed without any subsequent violation. R. 8806-07, 8811, 8818. None of these facts are subject to bona fide dispute, but the NAC doesn't confront them. Instead, it advances no reasoned explanation for why the maximum penalty is justified here.

Third, the NAC cites the Firm's disciplinary history in broad strokes to purportedly support maximum sanctions. R. 8893-94. But as the Firm explained, the historical settlements the NAC invokes are not like the supervisory and AML concerns at issue here, which is necessary for imposing a sanction based on recidivism under the Sanctions Guidelines' general principles. R. 8822-23 (citing Sanctions Guidelines at 3). Instead, the NAC offers no citation-specific analysis or facts showing similarity; it merely gestures toward other enforcement proceedings. That does not meet the Commission's requirement for a reasoned aggravation analysis.

Taken together, the NAC's recitation of aggravating factors represents boilerplate reliance on purported facts as opposed to the "explanation and analysis" that the Commission required. *See McCarthy v. SEC*, 406 F.3d at 189 (suggesting that justifications couched in general terms indicates that the decisionmaker "did not devote individual attention to the unique facts and circumstances of the case"). Without a fair and full treatment of mitigating factors, none of which are given a hard or serious look in the NAC Decision, the resulting maximum sanction imposed of $310,000 is excessive and punitive.

III. The NAC Failed to Articulate a Tailored Justification for Barkley's Sanctions.

The same remedial logic applies to Barkley's sanctions. Absent a record-based explanation of why a $25,000 fine, six-month suspension and an order to requalify are all necessary today to

reduce the risk of recidivism, the sanctions remain punitive.

The Commission's remand directive was unambiguous regarding FINRA's imposition of sanctions on the individuals in question: explain "why the chosen sanctions, considered together, are necessary to protect the public, and are remedial and not punitive or otherwise excessive or oppressive," rather than offering conclusions divorced from the underlying record. R. 8761. The Commission cautioned that it "must be able to discern from the record and the NAC's discussion that the sanction does more 'than say, in effect, petitioners are and must be punished," citing *Bruce Zipper* for the proposition that generic rationales are insufficient. *Id.* at n.100. Accordingly, the Commission set aside the prior sanctions and remanded to FINRA for a clear analysis of the appropriate mix of sanctions.

On remand, the NAC modified Barkley's sanctions downward, imposing a $25,000 fine, a six-month principal capacity suspension, and a requirement to requalify by examination as a general securities principal, investment banking principal, and compliance officer before acting in those capacities again. R. 8898. But the explanation the NAC provided in support of these sanctions is generic and non-tailored, repeating broad statements without grounding the length of the suspension, the scope of requalification, or the particular capacities chosen in record-specific risks associated with Barkley today.

a. The Remand Required a Tailored, Remedial Justification; the NAC Provided Conclusions Instead.

The Commission did two critical things in remanding Barkley's sanctions. First, the Commission reaffirmed that suspension and requalification can be complementary *when* FINRA explains why that mix is necessary for investor protection. R. 8761. Second, it required the NAC to connect the dots and explain why this duration (e.g., six-month principal capacity suspension) and why these requalification categories were necessary in order to make a record-based case that

the resulting sanctions are remedial, not punitive. *Id.*

The NAC's decision does not meet this standard. While the decision supposes that Barkley's lapses were "egregious," it simultaneously recognizes that he "did not act intentionally" and characterizes his conduct as "grossly negligent" at worst. R. 8897. Yet the decision still imposes a six-month principal capacity suspension and requires requalification in three distinct principal categories without explaining how that level and scope correspond to the current risk posed by Barkley. Taking the suspension first, the NAC states that a meaningful suspension will allow "reflection" and reduce risk, but it does not identify facts that make six months, as opposed to a shorter time, necessary to protect investors. R. 8898. The NAC's findings and the broader record display mitigating factors that the Commission signaled are relevant to the remedial inquiry, including: (i) Barkley has no disciplinary history, *see* R. 8872;[10] (ii) he is winding down his career and serving a small number of clients as a registered representative rather than supervising market making or AML related-activities, *see* R. 8807; (iii) the trading strategy ended and has not recurred in more than a decade, *see* R. 8805; and (iv) at the firm level, independent compliance consultants were engaged and the Firm's leadership changed, all reducing the probability of recurrence under any principal's tenure. *See* R. 8806, 8810.

The NAC Decision, however, did not weigh these factors or explain why a six-month principal capacity suspension is required to address present risk of recurrence that a shorter, tailored restriction plus requalification does not equally address. The NAC Decision expressly notes that Barkley did not engage in reckless conduct. R. 8896. But under the Sanctions Guidelines, the length of an individual suspension is supposed to be tailored to the nature and persistence of the deficiency and whether the problem persists. R. 8891. Yet the NAC does not

[10] *See also* R. 8872, n.11 (requesting that the NAC take notice of Barkley's CRD record).

make a finding that any supervisory deficiency persists today, nor does it explain how six months tracks the present risk profile.

Instead, the NAC Decision speculates that Barkley might return to such a role. R. 8897; *but see Tysk*, *Boss*, *supra* p. 20. But several mitigating factors identified by the Commission and by Wilson-Davis are wholly omitted from and undermines this prophecy. The NAC does not acknowledge that Barkley is winding down his career, serves a small set of clients as a registered representative, and is not acting in a supervisory capacity over market making or AML-implicated activities. R. 8806-07. The NAC similarly failed to analyze how his present role creates a risk requiring a principal-capacity suspension, especially when requalification in unrelated roles would still be required and that the Firm stopped the allegedly violative conduct twelve years ago.

b. Barkley's Appropriate Remedy.

Because the NAC again failed to provide a tailored remedial explanation for Barkley's sanctions, the Commission should vacate the six-month principal capacity suspension and the requalification requirements. Barkley's fine should be reduced to $10,000, which is on the lower end of the Sanctions Guidelines, and a principal capacity suspension should only remain in place until Barkley requalifies as a general securities principal. This sanction would comport with the Commission's remand directives and aligns with the Sanctions Guidelines' focus on decreasing the likelihood of recurrence, while also respecting that sanctions must be appropriately remedial and not punitive. Because the NAC found no intentional conduct and described Barkley's omissions as grossly negligent at worst, any supervision should be narrowly tailored to his principal capacity and terminate upon his requalification as a general securities principal. There is no record basis for requalification in investment-banking or compliance officer roles, which were not implicated by his conduct.

RESERVATION OF RIGHTS

In 2024, the Supreme Court issued its decision in *SEC v. Jarkesy*. *See* 219 L. 3d. 2d 650 (2024). In that decision, the Supreme Court found that, at a minimum, Commission enforcement proceedings similar to those here violated the Seventh Amendment to the U.S. Constitution (and possibly Article Three of the Fifth Amendment). Wilson-Davis reserves the right to argue all issues raised in *Jarkesy* and does not waive any of its constitutional rights or the constitutional issues associated with these proceedings.

CONCLUSION

For the foregoing reasons, the fines and sanctions imposed in the NAC Decision should be significantly modified as detailed throughout this Opening Brief.

Respectfully submitted this 10th day of October 2025.

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CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that on this 10th day of October 2025, a true and correct copy of the foregoing **OPENING BRIEF** was filed via the Commission's Electronic Filings in Administrative Proceedings (eFAP) system and sent via email to:

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CERTIFICATION

Pursuant to Rule 450(c) of the Commission's Rules of Practice, I hereby certify that the foregoing Opening Brief contains 7,720 words, exclusive of the tables of contents and authorities. This word count was generated using the "word count" function in Microsoft Word.

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