UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of WILLIAM SCHOLANDER and TALMAN HARRIS For Review of Decision by the National Adjudicatory Council	:	Administrative Proceeding File No.: 16360

REPLY BRIEF IN SUPPORT OF APPLICATION FOR REVIEW
BY WILLIAM SCHOLANDER AND TALMAN HARRIS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER DECISIONS

Other Authorities

I. INTRODUCTION

William Scholander ("Scholander") and Talman Harris ("Harris") (collectively, "Appellants"), by and through their undersigned counsel, submit their reply brief in support of their application for review of the order by the National Adjudicatory Council ("NAC"), which permanently barred Appellants from associating with any Financial Industry Regulatory Authority ("FINRA") member firm in any capacity.

This case involves a significant but fairly discrete point of law: whether Appellants had a duty to disclose the payment from Deer Consumer Products, Inc. (the "Deer Payment") and their prior dealings with Deer, in their sales of Deer securities months or years later. The answer is that Appellants had no duty to disclose those facts because there is no nexus between the Deer Payment or their prior dealings with Deer and the months- or years-later transactions with their customers. Nothing FINRA has argued alters this analysis.

Rather than engage in a complete analysis of the legal principles at issue here, FINRA has merely sought to malign the character of Appellants. This tactic is particularly egregious here because there is no support for many of the aspersions cast by FINRA. Although Appellants assumed, for the sole and limited purpose of this appeal, and without admitting any of the NAC's factual findings, that the NAC's factual findings were true, FINRA apparently feels that it can grossly misconstrue the record. Even assuming FINRA's carefully structured fiction to be entirely true – which it is not – FINRA's version of events does not alter the applicable legal conclusions. Nevertheless, in order to set the record straight on some of FINRA's most significant omissions or half-truths, Appellants note that:

- FINRA failed to mention that, although the trades of Deer securities from February to November 2010 accounted for 11% of First Merger's commission dollars, the vast majority of these dollars – 78% – were from the *liquidation* of Deer securities. Only 22% of the commissions were the results of *purchases* of Deer securities. (Hearing Tr. of Testimony of Robert Morris, at 390-91, pp. 000854-55).

- FINRA states as fact that "Scholander and Harris had attempted a few months before the sales at issue to secure a contract with Deer to provide advisory services with a follow-on offering." (FINRA's Br. in Opp'n, at 17). Yet, there is nothing at all in the record to support such an assertion. The contract on which FINRA is relying (1) was never executed; and (2) does not identify Appellants or any entity owned by them at the time. Furthermore, there was no testimony at all regarding the origins of this contract other than from Gearty who stated "I don't know where it was or how . . . . it was drawn up or anything," but speculated that *she* had asked an attorney to draft it in conjunction with "how [she] was going to get this fee sent to First Merger." (Hearing Tr. of Testimony of Maureen Gearty, at 500-01, pp. 000964-65).

- To the extent FINRA implied that Harris was a principal for First Merger at any time, that is untrue. Although Talman Harris was registered as a general securities principal in February 2011, coinciding with his final month with First Merger as identified by FINRA, (FINRA Dep't of Enforcement v. Scholander et al., at 1 (FINRA NAC Dec. 29, 2014) (the "NAC Decision"), he never acted as a principal on behalf of First Merger. Furthermore, the allegations at issue encompass sales of securities that occurred between February and November 2010, (Id. at 1), and thus, do not overlap with the period in which Harris was registered as a principal.

- FINRA never acknowledged that, on March 31, 2011, Appellants were terminated from First Merger by Maureen Gearty, the branch operations manager of First Capital, and Ronen Zakai, demonstrating that they had far less control over First Merger than FINRA alleges.

- FINRA also failed to mention that Gearty, whom the NAC found uniquely credible and relied upon so heavily for testimony, admitted that she lied under oath to FINRA. (See NAC Decision, at 17).[1]

Thus, while FINRA purports to tell "the relevant facts," it is clear that FINRA is only interested in a narrative intended to impugn Appellants' characters rather than focusing on the actual factual background or the law that applies to it.

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[1] The NAC, in its own campaign to smear Scholander to the furthest extent possible, inexplicably brought up a charge to which Scholander pled guilty more than 25 years ago when he was still a minor, and even more, only thirteen years old. Given that this conviction occurred so long ago and when Scholander was barely a teenager, it is absurd that the Hearing Panel and the NAC used this fact as a basis to defend Gearty's lies by claiming that her alleged fear of Scholander had some foundation.

Another notable omission is the lack of evidence regarding the impact of these alleged fraudulent omissions on any customer. FINRA spent a significant portion of its briefing arguing that a reasonable investor would want to know about the Deer Payment and Appellants' prior dealings with Deer. Tellingly, however, FINRA could not be bothered to call even a single witness to testify that this was important information or would have changed their view. Even more, there has never been a single customer complaint against Appellants for their sales of Deer securities.

Finally, and most tellingly, FINRA barely even notes the fact that the NAC found that the Deer Payment was not related to the transactions at issue (and did not link any of Appellants' prior dealings with Deer to the transactions). Indeed, the NAC stated: "[T]he $350,000 payment from DEER reflected a single, substantial, non-transaction-based payment from an issuer in exchange for consulting services, which Scholander and Harris used to try to acquire a broker-dealer and to establish a branch office from which they sold the issuer's securities." (Id. at 23). FINRA instead latches onto the NAC's presumption that "the limited advisory services that Scholander and Harris provided were not the only services that Deer expected for its money," and is now attempting to argue that Appellants provided "ongoing services" to Deer. (FINRA's Br. in Opp'n, at 16). There is nothing to support this in the record, and even Gearty admitted that she had no knowledge at all of any further services provided to Deer by Appellants. (Hearing Tr. of Testimony of Maureen Gearty, at 502-03, pp. 000966-67). Rather, the Deer Payment was a "non-transaction based payment." (See NAC Decision, at 23).

As demonstrated above, FINRA's summary of the factual record goes beyond mere advocacy – it is filled with purposeful omissions and half-truths designed to mislead readers. Furthermore, for the reasons described below, FINRA's legal analysis is incorrect. The legal analysis set forth in Appellants' initial briefing (and further described below) is the proper standard, demonstrating that Appellants did not violate the anti-fraud provisions at issue.

II. LEGAL DISCUSSION

In addition to correcting FINRA's most significant omissions or half-truths, Appellants submit this reply brief in order to address two critical legal issues. First, FINRA did not properly analyze whether a fraudulent omission occurred here, ignoring the required analysis as to a duty to disclose and the transactional nexus requirement under the applicable law. Second, FINRA misapplied several of the applicable factors under the FINRA Sanction Guidelines in arguing that a bar is warranted here.

A. FINRA's Analysis Is Incorrect: Appellants Had No Duty to Disclose Under the Requirements of Press

1. FINRA Sidestepped the Key Analysis Here: Appellants Had No Duty to Disclose Because a Duty Cannot Be Assumed

FINRA's lengthy argument analyzes materiality, but FINRA fails to recognize or analyze the additional requirement overlaid on all alleged fraudulent *omissions* (as opposed to misrepresentations): there must first be a duty to speak. The Supreme Court of the United States, its underlying circuit and district courts, and the SEC have all recognized this requirement. See, e.g., Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988) (stating that, in addition to being material, "[t]o be actionable, of course, a statement must be misleading," and "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5"); Overton v. Todman & Co., CPAs, P.C., 478 F.3d 479, 483 (2d Cir. 2007) ("A fundamental principle of securities law is that before an individual becomes liable for his silence, he must have an underlying duty to speak."); SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1467 (2d Cir. 1996) (stating that, to establish liability under the anti-fraud provisions, there must be "*a duty to speak*" (emphasis added)); Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 200 n.19 (3d Cir. 1990) ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5."); Hoffman v. UBS-AG, 591 F. Supp. 2d 522 (S.D.N.Y. 2008) (noting that, because "the basic requirement of Rule 10b-5 . . . holds parties liable for misleading statements, not merely incomplete statements," the respondents could not be liable for omissions when their statements were not otherwise misleading); In re David J. Montanino, Release No. 773, 2015 WL 1732106, *29 (SEC Apr. 16, 2015) (stating that "[w]ithout a duty to speak, [respondent's] silence is not actionable" and holding that the respondent had no duty to speak because the Division of Enforcement had not shown that the respondent was either a fiduciary or had a similar relationship of trust and confidence with the investor); In re Monetta Financial Services, Inc., Release No. 162, 2000 WL 320457, at *20 (SEC Mar. 27, 2000) (noting that "a duty to speak arises, and material omissions become fraudulent" only when there is a "fiduciary or similar relationship of trust and confidence").

Here, FINRA, just as the NAC did in its decision below, made a fatal error by neglecting to analyze the critical issue of whether a duty exists at all. Instead, FINRA incorrectly assumed that a duty existed, relying on the premise that a duty to speak somehow arises *per se* when there is a material omission, which is patently incorrect and would improperly supersede the requirement that there must first be a duty to speak. (See FINRA's Br. in Opp'n, at 14-15). Materiality, on which FINRA focuses its argument, is a separate and distinct requirement. See, e.g., Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988) (stating that, in addition to being material, "[t]o be actionable, of course, a statement must be misleading," and "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5"); In re Lazard Freres & Co. LLC, Release No. 7671, 1999 WL 232594, at *3 (SEC Apr. 21, 1999) ("A duty to speak arises, and *material omissions become fraudulent*, when a person or entity has information that another is entitled to know because of a fiduciary or similar relationship of trust and confidence." (emphasis added)).

Thus, unlike FINRA's assertion to the contrary, omissions (regardless of materiality) do not become fraudulent until there is a finding of a fiduciary or similar relationship of trust and confidence requiring disclosure. More to the point, FINRA has made no showing, and the NAC made no finding, that Appellants were in a fiduciary or similar relationship of trust and confidence such that they could be held liable under the anti-fraud provisions.

2. Press is the Controlling Law

As described more fully in Appellants' initial brief, the correct analysis begins with whether Appellants had a duty to disclose the Deer Payment, and under Press v. Chemical Investment Services Corp., 166 F.3d 529 (2d Cir. 1999), the answer is, "No." FINRA incorrectly suggests that the Press holding, its predecessors, and its progeny hold no weight here. Rather, there are four primary reasons the Press decision applies here.

First, in order to determine whether there is a fiduciary duty or similar relationship of trust and confidence – and, therefore, a duty to speak – the SEC must look to state law. See, e.g., In re Lazard Freres & Co. LLC, Release No. 7671, 1999 WL 232594 (SEC Apr. 21, 1999) (applying New Jersey law to determine whether a fiduciary duty existed where the respondent resided in New Jersey); In re O'Brien Partners, Inc., Release No. 7594, 1998 WL 744085 (SEC Oct. 27, 1998) (stating that Washington and California state law imposed a fiduciary duty where plaintiff and respondent resided in those respective states). As Appellants are New York residents and operated out of New York, New York law applies here. Press, its predecessors, and its progeny all evaluate New York state law as to whether a fiduciary duty exists. Thus, Press is the applicable law here in evaluating whether Appellants had a duty to disclose.

Second, the "transactional nexus" requirement, while a term of art adopted by Appellants for ease of reference to Press and its requirement, is not some new test Appellants invented as FINRA implied. Rather, Press is the standard followed by the Second Circuit when applying New York law. In fact, far from being on an island as FINRA suggested, the Press decision has been widely followed. Indeed, "it is well-established Second Circuit law that the fiduciary duty in the broker/customer relationship is only to 'the narrow task of consummating the transaction requested.'" Hoffman v. UBS-AG, 591 F. Supp. 2d 522, 535 (S.D.N.Y. 2008) (quoting Press, 166 F.3d at 536); see, e.g., In re Refco Securities Litigation, 759 F. Supp. 2d 301, 323 (S.D.N.Y. 2010) ("[W]here a broker does not have discretionary trading authority over an account, the broker's only duty is the proper execution of transactions upon explicit customer instructions."); Thermal Imaging, Inc. v. Sandgrain Securities, Inc., 158 F. Supp. 2d 335, 344 (S.D.N.Y. 2001) ("As the Second Circuit has recognized, a broker/customer relationship ordinarily does not give rise to a fiduciary duty under New York law. Accordingly, a fiduciary obligation will only arise where the customer has delegated discretionary trading authority to the broker. Absent such discretion, a broker's fiduciary duty extends only to those matters with which it is entrusted—namely, the completion of transactions." (internal citations and quotations omitted)); Bissell v. Merrill Lynch & Co., Inc., 937 F. Supp. 237, 246 (S.D.N.Y. 1996) ("The fiduciary obligation between a broker and customer under New York law is limited to affairs entrusted to the broker, and the scope of affairs entrusted to a broker is generally limited to the completion of a transaction."), aff'd, 157 F.3d 138 (2d Cir. 1998); Schenck v. Bear, Stearns & Co., Inc., 484 F. Supp. 937, 947 (S.D.N.Y. 1979) (noting that the "scope of affairs entrusted to a broker is generally limited to the completion of a transaction"); Jordan v. UBS AG, 11 A.D.3d 283 (N.Y. App. Div. 2004) ("Absent agreement to the contrary, . . . a broker does not owe fiduciary duties to a purchaser of securities . . . excepting executing trades in accordance with the customer's instructions.").[2]

FINRA nevertheless suggests that the Press test does not limit the broker's duty to the transactional nexus requirement, but is broader, encompassing "the affairs entrusted to the broker." (See FINRA's Br. in Opp'n, at 22 n.12). That is blatantly false. In Press, the Second Circuit reviewed two lines of cases analyzing whether a broker has a fiduciary duty to his customer, concluding:

> The two lines of case law can, of course, be reconciled. The cases that have recognized the fiduciary relationship as evolving simply from the broker-client relationship have limited the scope of the fiduciary duty to the narrow task of consummating the transaction requested. . . . Simply put, the fiduciary obligation that arises between a broker and a customer as a matter of New York common law is limited to matters relevant to affairs entrusted to the broker.

Press, 166 F.3d at 536 (internal citations omitted). Thus, the Press court has clearly stated that "matters relevant to affairs entrusted to the broker" is another way of saying "the narrow task of consummating the transaction requested"; the "matters relevant to affairs entrusted to the broker" standard is not a broader test that allows for a finding that a duty exists where there is no transactional nexus. Id. As demonstrated above, this is consistent with other decisions within the Second Circuit. See, e.g., Thermal Imaging, 158 F. Supp. 2d at 344 ("Absent such discretion, a broker's fiduciary duty extends only to those matters with which it is entrusted—namely, the completion of transactions.").

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[2] Notably, other Circuit Courts agree with this analysis. See, e.g., Martinez Tapia v. Chase Manhattan Bank, N.A., 149 F.3d 404, 412 (5th Cir. 1998) ("While the nature of the duty owed by a broker will vary depending on the relationship between the broker and the investor, where the investor controls a nondiscretionary account and retains the ability to make investment decisions, the scope of any duties owed by the broker will generally be confined to executing the investor's order.").

FINRA also attempts to broaden the Press decision by citing to another Second Circuit case, de Kwiatkowski v. Bear, Stearns & Co., Inc., 306 F.3d 1293 (2d Cir. 2002), for the proposition that "the broker owes duties of diligence and competence in executing the client's trade orders, and is obliged to give honest and complete information when recommending a purchase or sale." (FINRA's Br. in Opp'n, at 14-15). Appellants do not disagree with this dicta in de Kwiatkowski[3]; the holdings of the two other cases of the Second Circuit analyzing the scope of the fiduciary duty brokers owe customers, however, make clear just how limited that scope actually is. See Press, 166 F.3d at 536; Independent Order of Foresters v. Donald, Lufkin & Jenrette, Inc., 157 F.3d 933, 940 (2d Cir. 1998).

In fact, Independent Order of Foresters impliedly utilized the transactional nexus analysis to conclude that there was no obligation to disclose purported "kickbacks" paid to a corporation's investment officer because those payments were not made with respect to the actual transactions at issue. See Independent Order of Foresters, 157 F.3d at 940-41. In Independent Order of Foresters, the plaintiff alleged that the defendant, a broker-dealer that also acted as an issuer, underwriter, and marketer of collateralized mortgage obligation derivative securities ("CMOs"), bought CMOs on behalf of the plaintiff. 1997 WL 563348, at *1-2 (S.D.N.Y. Sept. 9, 1997), aff'd in relevant part, 157 F.3d 933 (2d Cir. 1998). The plaintiff further alleged that the broker "commercially bribed" the plaintiff's investment officer by creating an account, which identified the investment officer as the agent and the plaintiff as the client, selling bonds in the account, and then later the same day, buying back the bonds at a

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[3] The de Kwiatkowski decision, while summarizing the law of the Second Circuit as to where a broker has a fiduciary duty, did not analyze whether there was a transactional nexus (because there was), but instead considered whether a fiduciary duty is owed due to "special circumstances" for a non-discretionary account where the client is dependent on the broker. See de Kwiatkowski, 306 F.3d at 1308.

higher price, leaving the remainder in the account for the investment officer, unbeknownst to the plaintiff, thereby "pa[ying] a kickback to [the investment officer] to suborn his loyalty." 1997 WL 563348, at *2. The plaintiff filed claims due to its losses of over $14 million on the CMOs purchased and further pursued claims on the basis of the concealed payments made to its investment officer. 157 F.3d at 937. The Second Circuit examined whether the broker-dealer owed any fiduciary duty to the plaintiff due to these concealed payments, noting that "the broker's duties are quite limited," and it held that the broker-dealer had no duty to disclose the payments. Id. at 940. Although not expressly analyzed under the transactional nexus rubric, it impliedly followed it: the Court held that there was no fiduciary duty with respect to the concealed payments because there was no link between those payments, i.e., the alleged conflict of interest, and the transaction at issue, i.e., the purchase of the CMOs.

Third, all of the cases – those cited by the NAC and by FINRA in its opposition brief – implicitly follow this standard, even if not expressly stated. As demonstrated in Appellants' initial briefing, for every case holding that a conflict of interest must be disclosed, the conflict of interest was linked to the transaction in some way. FINRA has yet to point to a single case showing otherwise.[4] As a result, FINRA now attempts to link the Deer Payment and prior dealings with Deer to the customer's transactions, never acknowledging that the NAC made

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[4] Buried in footnote 12 of its brief, FINRA points to only one case that it claims is "in conflict with" the transactional nexus requirement, Dep't of Enforcement v. Jordan, Complaint No. 2005001919501, at 15-23 (FINRA NAC Aug. 21, 2009), but FINRA's analysis of that case is incorrect. FINRA is correct that "the NAC held that an analyst's pursuit of employment with the company that was [the] subject of research reports she drafted was material information that should have been disclosed in the research reports." (See FINRA's Br. in Opp'n, at 23 n.12). However, following suit with FINRA's many other half-truths, FINRA neglects to mention that the holding in Jordan is predicated upon the fact that the analyst-respondent's new employment contract "provided that a material portion of her total compensation would be in the form of stock and options," and thus, she had a financial interest in the position, which violated FINRA Rules requiring analysts to disclose a "conflict of interest." Jordan, Complaint No. 2005001919501, at 15-22. Her financial interest, in the form of securities of the corporation, is tied to the potential transactions at issue of actual customers because sales of the securities of the corporation will, in turn, affect the value of her shares. Thus, Jordan would also meet the transactional nexus requirement under Press.

no such findings – nor could they. The Deer Payment, as found by the NAC, was a "non-transaction-based payment." (NAC Decision, at 23).

Finally, and perhaps most importantly, Press is controlling precedent insofar as this matter is appealable to the U.S. Court of Appeals for the Second Circuit, where Press is governing law. See 15 U.S.C. § 78y(a)(1) (stating that "[a] person aggrieved by a final order of the Commission . . . may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business.").

Based on the foregoing, FINRA's (and the NAC's) analysis is incorrect because it fails to analyze whether there is a duty to disclose. Instead, FINRA just assumes that there is a duty to disclose. In order to analyze whether there is a duty to disclose here, Press is the controlling law because: (1) whether a duty exists is a question of state law, and Press analyzes New York law, which is the applicable law as to Appellants; (2) "the narrow task of consummating the transaction" standard, i.e., the "transactional nexus" requirement, is the law in the Second Circuit and has been described and followed in multiple decisions; (3) every case analyzed by the NAC and FINRA has – at least implicitly – followed the Press analysis as to alleged fraudulent omissions of conflicts of interest, i.e., the alleged conflict of interest in each case had some tie to the transaction at issue, thus requiring its disclosure; and (4) Press is the controlling precedent in the Second Circuit, the jurisdiction in which this matter is appealable.

In sum, the NAC incorrectly concluded that there was a fraudulent omission here; Appellants had no duty to disclose the Deer Payment or its prior dealings with Deer because neither were in any way tied to the "narrow task of consummating the transaction" for their customers. Therefore, Appellants had no duty to speak.

B. FINRA (and the NAC) Misapplied Several of the Factors Under the FINRA Sanction Guidelines in Arguing that a Bar is Warranted Here

Due to FINRA's – and the NAC's – misapplication of the factors and considerations identified in the FINRA Sanction Guidelines, Appellants also need to provide clarity regarding the accurate application of these factors beyond that which Appellants already provided in their initial briefing.

First, FINRA takes great liberty in suggesting that Appellants' initial briefing somehow "blame[d] others." (See FINRA's Br. in Opp'n, at 33). A reading of the arguments throughout Appellants' initial briefing demonstrates that this is yet another gross mischaracterization by FINRA. The initial briefing merely argued that, under the objective component required for scienter, others' (and particularly those licensed as securities principals') consideration of whether a disclosure must be made in this instance demonstrates "what a reasonably prudent securities professional under the circumstances would have done." Gebhart v. SEC, 255 Fed. App'x 254, 255-56 (9th Cir. 2007). It is not "blaming" to argue that others' determinations demonstrate the objective reasonableness of the omission – others' determinations are, in fact, the baseline for the "reasonableness" of the decision. Thus, FINRA's suggestion that Appellants blamed others here is absurd, farcical, and a further demonstration of its dealings in omissions and half-truths in its briefing.[5]

FINRA also appears to argue that the NAC's finding that Appellants provided

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[5] It was already unfair and harsh for the NAC to hold that Appellants "blamed" others simply by making the legal argument before the Hearing Panel and the NAC that they "reasonably relied on the advice" of these same individuals. FINRA's (and the NAC's) reliance on In re Castle Securities Corp., Release No. 52580, 2005 WL 2508169 (SEC Oct. 11, 2005), is misplaced. Castle Securities involved violations for failing to transmit order reports, inadequate supervisory procedures, and failure to accept or decline trades, none of which require a finding of scienter. 2005 WL 2508169, *1. Unlike in Castle Securities, Appellants' state of mind is a necessary element of the violations alleged here, and Appellants are entitled to argue how others' actions affected their state of mind without having such a showing be mischaracterized as an attempt to "blame" others.

false or misleading testimony warrants a bar. Although Appellants have assumed the findings of fact as true for purposes of this appeal, they deny that they provided false and misleading testimony. Nevertheless, even assuming that finding was accurate, a bar is not required where there is a finding that a respondent has provided false or misleading testimony. See, e.g., In re Robert B. Tucker, Release No. 68210, 2012 WL 5462896 (SEC Nov. 9, 2012) (sustaining the NAC's modification of the sanction against the respondent from a bar to a two-year suspension despite finding that his testimony was "evasive and contradictory" and that he attempted to conceal evidence from FINRA, implicitly affirming the NAC's underlying decision that the suspension struck "the appropriate balance between addressing the egregiousness of the violation without being unreasonably harsh"), sustaining Complaint No. 2007009981201 (FINRA NAC Oct. 4, 2011); In re Dennis S. Kaminski, Release No. 65347, 2011 WL 4336702 (SEC Sept. 16, 2011) (affirming the NASD's 18-month suspension of the respondent for supervisory violations, which considered the respondent's attempts to mislead the NASD in its sanction determination); In re Andrew P. Schneider, Complaint No. C10030088 (FINRA NAC Dec. 7, 2005) (only fining the representative $5,000 and suspending him for 2 months for an outside business activity that involved diverting business from his current broker-dealer to his own corporation despite several aggravating factors, including the respondent's misleading and inaccurate testimony regarding his activities at the hearing).

Finally, it is unclear why FINRA found Appellants' batching argument so "confusing," particularly when FINRA seems to highlight why batching would be appropriate here should the SEC determine that a disclosure was required: as FINRA points out, the "complaint charged fraud in a single cause of action," yet FINRA is asserting (and the NAC found) that, for sanctions purposes, Appellants committed 35 acts of fraud over a period of nine months, thus counting each and every alleged omission. (See FINRA's Br. in Opp'n, at 32, 37-38). As described more fully below, even if a disclosure was required here – which it was not – it would be most appropriate to "batch" or "aggregate" the alleged omissions here (much like the complaint did in charging Appellants) given that this case stemmed from a single systemic problem, i.e., the reasonable belief that the Deer Payment and prior dealings with Deer did not need to be disclosed, not some grand, fraudulent scheme to defraud customers. See FINRA Sanction Guidelines, General Principles No. 4 ("Aggregation or 'batching' of violations may be appropriate for purposes of determining sanctions in disciplinary proceedings," including where the "conduct did not result in injury to public investors" or "the violations resulted from a single systemic problem or cause that has been corrected."). Thus, the NAC improperly concluded that Appellants "engaged in numerous acts of fraud over an extended period of time," and thus improperly found it to be an aggravating factor, (see NAC Decision, at 31), when, in actuality, it should be a mitigating factor, or at a minimum, a neutralizing factor.

Based on the foregoing, and for all of the reasons previously identified in Appellants' initial brief in support of their application, the bar imposed on Appellants and the sanctions deemed appropriate (but not imposed) as to Appellants are unwarranted, excessive, oppressive, and punitive.

III. CONCLUSION

As described more fully in Appellants' initial briefing, as well as above, Appellants had no duty to disclose the Deer Payment or prior dealings with Deer under the controlling law and lacked the requisite scienter. Furthermore, even if Appellants had committed violations by failing to disclose the Deer Payment, the sanctions imposed upon or deemed appropriate as to Appellants are excessive, oppressive, and unwarranted. Nothing FINRA has argued changes the analysis, and thus, the NAC's decision should be reversed as to the anti-fraud violations, and even if it is not, Appellants should not be permanently barred from the industry. Furthermore, the sanctions deemed appropriate as to Appellants for the OBA violations is unwarranted, excessive, oppressive, and punitive, given the above considerations, and thus, it should be reduced.

Dated: May 26, 2015

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WORD COUNT CERTIFICATION

I, Adriel Garcia, Esquire, hereby certify that the foregoing document contains 5,031 words and, therefore, complies with the length limitation set forth in SEC Rule of Practice 450(c).

Adriel Garcia

CERTIFICATE OF SERVICE

I, Adriel Garcia, Esquire, hereby certify that on May 26, 2015, I filed a true and correct copy of the foregoing as follows:

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I further certify that, on May 26, 2015, I also served a true and correct copy of the foregoing as follows:

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