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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

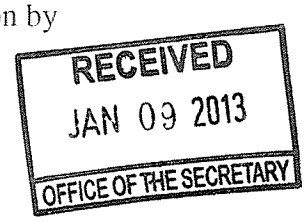
In the Matter of the Application of

The Association of Nicholas S. Savva
With Hunter Scott Financial, LLC

For Review of Denial of Registration by

FINRA

File No. 3-15017



BRIEF OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY IN OPPOSITION TO APPLICATION FOR REVIEW

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FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

I. INTRODUCTION

Nicholas S. Savva is statutorily disqualified as the result of an August 2004 final order entered by the State of Vermont, which found that he engaged in unauthorized transactions, made unsuitable recommendations, and engaged in high pressure, "boiler room" sales tactics. In the decision on review, FINRA's National Adjudicatory Council ("NAC") denied the application of Savva's firm, Hunter Scott Financial, LLC ("Hunter Scott" or the "Firm"), for Savva to continue to associate with Hunter Scott notwithstanding his statutory disqualification. The record convincingly supports the NAC's findings that Savva's continued association with the Firm would present an unreasonable risk of harm to the market or investors.

The NAC correctly based its denial on numerous factors in the record. First, the nature and seriousness of the disqualifying Vermont order is highly troubling. Savva engaged in the

misconduct underlying Vermont's order by making repeated and rehearsed telephone calls to unsuspecting customers during which he peddled small cap, aggressive growth stocks—regardless of each customer's financial objectives or resources—and coerced customers into purchasing these securities. Vermont, among other things, prohibited Savva from seeking registration as a broker-dealer sales representative or an investment adviser representative without its prior written consent and fined him $25,000.

Savva's checkered history is additional cause for concern. At least 10 customers filed complaints against Savva that alleged serious misconduct, including sales practice violations. Nine of those complaints resulted in Savva or his firms making payments to customers, which totaled more than $240,000. In addition, in November 2005, the State of Illinois required Savva to withdraw his registration, and prohibited him from reapplying for several years, for failing to timely report a customer complaint. And in April 2009, FINRA issued Savva a Cautionary Action for unsuitable recommendations and excessive trading. As the NAC correctly found, these matters "raise serious concerns" regarding Savva's dealings with customers and his ability to comply with securities laws and regulations.

Moreover, Hunter Scott's proposed heightened supervisory plan was woefully inadequate. As the NAC found, the proposed plan was "skeletal, lack[ed] specificity, and [was] not specifically tailored to Savva and preventing misconduct similar" to the disqualifying order, among other deficiencies. The Firm's implementation of that plan also weighed against the application. Specifically, a recent FINRA Cautionary Action found that the Firm had failed to comply with the plan's terms. Moreover, Savva continued to be the subject of customer complaints and regulatory matters, notwithstanding that he had operated under the alleged "heightened" supervisory plan for years.

In the face of a record replete with evidence supporting the NAC's denial of Hunter Scott's application to continue to employ Savva, Savva and Hunter Scott seek to deflect attention from the unreasonable risk of harm to investors and the market posed by their application. They do so with numerous, scattershot arguments that FINRA somehow treated them unfairly. Applicants' arguments should be denied. FINRA did not, as applicants have erroneously asserted, unfairly and retroactively apply to Savva the definition of "statutory disqualification." Congress amended that definition to include state orders like the Vermont order more than two years *prior* to Vermont's entry of the disqualifying order. Likewise, Savva's general complaint about the "delay" in these proceedings is without merit. FINRA immediately processed Savva's existing disqualification when it had revised procedural rules in place to do so, and applicants do not, and cannot, explain how this prejudiced their ability to advocate their position.

The record also flatly contradicts applicants' argument that they did not have adequate notice of the precise statutory grounds for Savva's disqualification. At the start of these proceedings, FINRA provided notice that Vermont's order caused Savva to be statutorily disqualified. And more than four months prior to the hearing, the parties were directed to brief the legal issue of the precise statutory grounds for Savva's disqualification. Applicants do not, and cannot, describe with particularity any prejudice they suffered as a result of this directive.

Equally without merit is applicants' assertion—raised here for the first time—that because Savva consented to the disqualifying order, it somehow does not constitute a "final order" under the Exchange Act and thus cannot render Savva statutorily disqualified. Applicants have waived that argument, and their narrow interpretation of what constitutes a "final order" is legally unsupported, has no practical support, and would lead to absurd results.

The Commission also should reject applicants' arguments that the NAC somehow got it wrong on the application's merits. Contrary to applicants' arguments, the record convincingly shows that Hunter Scott's heightened supervisory plan is inadequate. In fact, while under this plan, Savva continued to be the subject of customer complaints and regulatory matters (as recently as April 2009). The NAC also appropriately considered that Savva had been the subject of at least 10 customer complaints and other regulatory issues throughout his career, and applicants' argument that Savva's allegedly "clean" record during the past several years somehow negates years of customer complaints involving serious allegations of wrongdoing runs contrary to Commission precedent. Similarly, applicants' reliance upon 11, newly proffered affidavits from a select sampling of Savva's customers is procedurally improper and immaterial. In short, the totality of the circumstances fully supports the NAC's findings that Savva's continued association with the Firm is incompatible with the public interest. The Commission should dismiss this appeal.

II. FACTUAL BACKGROUND

A. Savva's Statutorily Disqualifying Event

Savva is statutorily disqualified because Vermont's Department of Banking, Insurance, Securities, and Health Care Administration entered against him an Order Imposing Administrative Sanctions and Consent to Same on August 3, 2004 (the "Vermont Order"). *See* RP 251-60. The bases for the Vermont Order were findings that, from August 2002 until November 2003, Savva engaged in unauthorized transactions in customer accounts, made unsuitable recommendations to customers, and regularly utilized high pressure or "boiler room" sales tactics, and thus violated numerous Vermont laws and regulations that prohibit fraudulent, manipulative, or deceptive conduct.

Specifically, the Vermont Order found that Savva: (1) purchased and sold securities in a customer's account without consulting and obtaining his approval for each transaction while the customer was on a hunting trip and unreachable; (2) recommended securities to customers without reasonable grounds to believe that they were suitable by purchasing lead cards containing the names, addresses, and telephone numbers of business owners, and then "cold calling" these leads; (3) almost always recommended to the customers small cap, aggressive growth stocks without considering the customers' investment experience, investment objectives, or financial resources; (4) "regularly exerted high pressure on his customers and [l]eads to make hasty decisions to purchase the securities that he was recommending;" and (5) coerced customers through repeated, rehearsed telephone calls to purchase securities "and, on many occasions, gathered enough information from [l]eads to enable him to open accounts in their names and then [to] execute[] unauthorized transactions in those accounts." (RP 252-53)

For Savva's serious misconduct, Vermont censured him, ordered that he permanently cease and desist from violating Vermont law, and fined him $25,000. (RP 255-56) Moreover, Vermont prohibited Savva from seeking registration in Vermont as a broker-dealer or investment adviser representative, and from supervising any Vermont-registered representative, without prior written consent from Vermont (which it may withhold in its sole discretion). Savva expressly waived compliance with the provisions of Vermont's Administrative Procedures Act regarding contested cases, and the Vermont Order stated that it resolved all violations against Savva referenced therein. (RP 251, 256) In the accompanying written consent executed by Savva, he acknowledged that the Vermont Order constituted a valid order and agreed that he would not challenge the validity of the findings of fact and conclusions of law contained in the order in any proceedings before Vermont or other state securities regulators. (RP 259-60)

In October 2004, Vermont filed with FINRA's Central Registration Depository ("CRD"®) a Uniform Disciplinary Action Reporting Form ("Form U6") in connection with the Vermont Order. (RP 828-30) On the Form U6, Vermont classified its order as a final order based on violations of laws or regulations prohibiting fraudulent, manipulative, or deceptive misconduct (hereinafter, "an FMD order"). (RP 829)

B. Savva's Background

Savva qualified as a general securities representative in August 1996, and passed the uniform securities agent state law exam in September 1996. (RP 014) Savva has been associated with Hunter Scott since January 2004. (RP 002) In March 2004, Hunter Scott placed Savva under heightened supervision, utilizing the same plan that it proposed in the application to the NAC. *See* RP 611, 1127-28, 1788-89. Savva was previously associated with eight firms between May 1992 and January 2004. *See* RP 001-008. Savva testified that his employing firm prior to Hunter Scott also had placed him on heightened supervision because of several customer complaints. *See* RP 1004-06.

C. Savva's Numerous Customer Complaints

In addition to the complaints underlying the Vermont Order, at least 10 customers have filed complaints against Savva.

In August 1999, a customer alleged that Savva engaged in unauthorized trading and failed to execute trades in his account. (RP 033) The customer sought damages of $5,400. Savva personally settled the claim for $5,585. Savva claimed that this complaint was filed several months after he left his firm and that another broker was handling this account. (RP 988)

In November 1999, a customer alleged that Savva engaged in unauthorized trading. (RP 019-20) The customer sought damages of $166,000. Savva's former firm settled the claim for

$100,000, and Savva contributed $8,333 to that settlement. Savva testified that he did not handle this account. (RP 988)

In April 2000, a customer alleged that Savva charged excessive commissions and sought damages of $5,057. (RP 035-36) Savva testified that he believes that he personally paid between $1,500 and $4,000 to settle this matter. (RP 991)

In March 2003, a customer alleged that Savva improperly handled his account and sought damages of $31,000. (RP 022) CRD indicates that Savva's former firm settled the matter for $19,980, without him personally contributing to the settlement. Savva stated that the customer's mother, also Savva's customer, had a dispute with Savva that "created a negative sentiment" in the customer's relationship with Savva and that the customer complained about the amount of commissions earned by Savva and the firm. (RP 1215)

In April 2003, a customer alleged that Savva engaged in unauthorized trading and sought $86,000 in damages. (RP 038) The matter was dismissed.

In September 2003, a customer alleged that Savva engaged in excessive trading and sought damages of $60,000. (RP 023) The matter was settled for $24,000, without Savva personally contributing to the settlement. Savva testified generally that he disputed the allegations. (RP 982-83)

In August 2005, a customer alleged that Savva charged excessive commissions and sought damages of $47,000. (RP 028) Hunter Scott settled the matter for $40,000, without Savva personally contributing to the settlement. Savva testified that this customer "knew the game" and blamed the complaint on the customer wanting to recoup from Savva some of the losses in his account due to market fluctuations. (RP 964)

In June 2007, a customer alleged that Savva charged excessive commissions and sought $56,000 in damages. (RP 029) Hunter Scott settled the complaint for $37,000, without Savva personally contributing to the settlement. Savva testified that this customer was being "coached" by his local broker who wanted more of the customer's business. Savva also explained that the customer informed Savva's supervisor that he had pulled Savva's CRD and asked that the Firm "just give him some money back and he'll go away." (RP 966)

In July 2007, a customer alleged that Savva engaged in improper and unsuitable trading. (RP 040-41) The customer sought $45,057 in damages. The matter was settled for $9,995 by Savva's former firm, without Savva personally contributing to the settlement. Savva stated that he handled this account with two other brokers at his former firm, the customer closed the account without ever complaining about Savva, and several years later the customer filed a claim in arbitration against Savva, his former firm, and the other two registered representatives. (RP 1215-16)

Finally, in January 2008, a customer alleged that Savva engaged in an unauthorized transaction. (RP 539) Hunter Scott settled the matter for $2,284. Savva's then supervisor, Michael Hechme ("Hechme"), testified that he was familiar with this matter, disputed the customer's allegations, and reversed the commissions earned on the transaction as a courtesy. (RP 969-72)

In total, Savva has personally paid at least $15,418 to settle certain of these matters. Savva's firms have paid approximately $225,000 to settle certain of the customer complaints filed against Savva (with Hunter Scott paying $79,284 of that total). At least three of the 10 customer complaints (not including the complaints underlying the Vermont Order) involved

allegations of unauthorized transactions, and Savva personally contributed funds to settle two of these three complaints.

D. Savva's Other Regulatory Issues

In addition to the numerous customer complaints filed against Savva, he has had several other regulatory issues. In November 2005, the State of Illinois ordered Savva to withdraw his registration in the state (the "Illinois Order"). (RP 542-45) The Illinois Order also prohibited Savva from reapplying for registration in Illinois for several years and required Savva to pay $750. The Illinois Order was based upon Savva's failure to timely update his Uniform Application for Securities Industry Registration or Transfer ("Form U4") to reflect the November 1999 customer complaint described above. Savva asserted that he disclosed the matter to his supervisor, although he admittedly did not follow up to ensure that the complaint was reported on his Form U4.

FINRA also named Savva in an informal action. Specifically, in April 2009, FINRA issued Savva a Cautionary Action in connection with unsuitable recommendations in a customer's account, excessive trading in customer accounts, and using personal email accounts for business purposes. (RP 547-48)

III. PROCEDURAL BACKGROUND

A. Proceedings Before the Hearing Panel

On June 15, 2009, FINRA's Department of Member Regulation ("Member Regulation") notified Hunter Scott that Savva was statutorily disqualified under Exchange Act Section 3(a)(39). (RP 796) That notice expressly stated that Savva's disqualification arose as a result of the Vermont Order. (*Id.*) The Firm subsequently filed a Membership Continuance Application (the "Application") seeking approval for Savva to continue to associate with the Firm

notwithstanding his disqualification, but disputing that the Vermont Order constituted a disqualifying event because it did not bar Savva.[1] *See* RP 265.

Member Regulation subsequently recommended to the NAC that it deny the Application. (RP 519-20) In July 2011, more than four months prior to the hearing on this matter, a Hearing Panel of FINRA's Statutory Disqualification Committee (the "Hearing Panel") requested that the parties brief the legal issue of whether the Vermont Order rendered Savva statutorily disqualified and if it did, on what specific grounds under the Exchange Act. (RP 785) The parties each filed briefs on these matters. *See* RP 789-895. In its brief filed on July 29, 2011, Member Regulation explicitly asserted that, pursuant to Exchange Act Sections 3(a)(39) and 15(b)(4)(H), the Vermont Order was disqualifying as both an order barring Savva and an FMD order. (RP 808)

Several months later, on November 17, 2011, the Hearing Panel held an evidentiary hearing. *See* RP 911-1196. Savva, his then-proposed supervisor Hechme, and the Firm's chief compliance officer, Charles Hughes ("Hughes"), all testified at the hearing. During and after the hearing, the Hearing Panel requested, and the parties provided, information and additional briefs on various issues. *See, e.g.*, RP 1203-1739.

B. The NAC Denies the Application

In a decision dated August 10, 2012, the NAC denied the Application and found that permitting Savva to continue to associate with the Firm would present an unreasonable risk of harm to the market or investors. *See* RP 1770-90.

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[1] After issuance of the notice, Member Regulation appeared to have asserted that the Vermont Order constituted a disqualifying event because it barred Savva. The October 2004 Form U6 filed by Vermont, however, indicated that the Vermont Order was an FMD Order.

1. The NAC Rejects Applicants' Procedural Arguments

As an initial matter, the NAC thoroughly addressed—and rejected—applicants' various procedural arguments. (RP 1771-80) First, the NAC held that the Vermont Order, as an FMD order, is disqualifying under Exchange Act Section 3(a)(39). (RP 1774-77) The NAC found that Vermont, on its Form U6, classified the Vermont Order as an FMD order. (RP 1774) Moreover, the NAC examined the Vermont statutes and regulations violated by Savva and independently determined that the Vermont Order is an FMD order. (RP 1774-76)

Second, the NAC soundly rejected applicants' argument that they were somehow unfairly prejudiced because Member Regulation failed to specify initially that the Vermont Order was an FMD order. (RP 1776-77) The NAC determined that applicants suffered no unfair prejudice and were afforded ample opportunity to brief and argue the legal issue concerning the precise statutory basis for Savva's disqualification several months prior to the hearing.

Third, the NAC rejected applicants' argument that FINRA retroactively and unfairly imposed upon Savva the definition of statutory disqualification. (RP 1778-80) The NAC found that Vermont entered the Vermont Order two years *after* Congress amended the definition of statutory disqualification. (RP 1778) Similarly, the NAC found that the misconduct underlying the Vermont Order also occurred *after* Congress amended the Exchange Act. (*Id.*) The NAC then rejected applicants' argument that FINRA improperly applied its eligibility procedures retroactively, finding, among other things, that FINRA's changes to its by-laws and procedural rules had no effect on the fact that Savva was statutorily disqualified under the Exchange Act upon entry of the Vermont Order in August 2004, did not impair any rights that Savva possessed or increase liability for his misconduct, and did not impose any new substantive duties upon Savva. (RP 1778-80) "Instead, FINRA's amendments clarified the procedures and mechanism

pursuant to which Savva's existing statutorily disqualifying event and his continued association with a broker-dealer notwithstanding his disqualification would be resolved and that it would be resolved by FINRA adjudicators." (RP 1779)

2. The NAC Denies the Application on the Merits

Having resolved the procedural issues raised by applicants, the NAC next turned to the merits of the Application. The NAC determined that Savva's continued association with Hunter Scott presented an unreasonable risk of harm to the markets or investors. The NAC based its determination on several factors. *See* RP 1787-90.

First, the NAC considered that the Vermont Order and Savva's misconduct underlying that order was "highly troubling," serious, and securities-related. (RP 1787)

Second, the NAC considered that at least 10 customers have filed complaints against Savva since 1999. The NAC further considered that Savva personally paid $15,400 to settle certain complaints, that his firms paid approximately $225,000 to settle complaints, and that at least three of the customer complaints involved allegations of unauthorized transactions (i.e., misconduct similar to the misconduct underlying the Vermont Order). The NAC also considered that in 2005, Illinois required Savva to withdraw his registration for failing to timely update his Form U4 and in 2009, FINRA issued Savva a Cautionary Action in connection with unsuitable recommendations and excessive trading in a customer's account. (RP 1788)

Third, the NAC found that Hunter Scott failed to demonstrate that it could adequately supervise Savva, "*regardless* of who serves as Savva's primary supervisor."[2] (RP 1788-89)

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[2] Applicants state incorrectly that the NAC did not appropriately consider the Firm's "amended and strengthened supervision plan." (Applicants' Brief, at 12) The only difference between the Firm's original heightened supervisory plan and its so-called amended plan is that Hughes would serve as Savva's primary supervisor (instead of Hechme) and Savva would work

[Footnote continued on the next page]

(emphasis supplied) The NAC found that the Firm's proposed plan of heightened supervision "[was] skeletal, lack[ed] specificity, and [was] not specifically tailored to Savva and preventing misconduct similar to the Vermont Order." (RP 1788) The NAC also found numerous specific deficiencies with the proposed plan. *See* RP 1788-89. For example, the NAC found that the plan contained no provisions regarding the monitoring or review of Savva's communications with customers, did not specify how or whether certain monitoring would be documented, did not contain any procedures concerning how to handle customer complaints filed against Savva, and failed to designate any backup supervisor. (*Id.*)

Moreover, the NAC found that even though Savva has been on heightened supervision for almost his entire career, most of his customer complaints have occurred while he was on heightened supervision—including four customer complaints, the Illinois Order, and the FINRA Cautionary Action while under the Firm's heightened plan. (RP 1789) In addition, the NAC considered that in April 2009, FINRA cited the Firm for failing to follow its heightened procedures with respect to Savva. (RP 1789) Consequently, and based upon all of these factors, the NAC denied the Application.

On September 7, 2012, applicants appealed the NAC's denial. (RP 1794-95) Applicants subsequently sought from the Commission a stay of the NAC's decision. The Commission denied such request pursuant to an order dated October 31, 2012.

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in the Firm's Delray Beach office (instead of in Brooklyn). *See* RP 1762-63. The NAC considered these facts, and determined that it did not matter who supervised Savva under the proposed plan because the plan was inherently flawed. *See* RP 1770, 1788-89.

IV. ARGUMENT

Section 19(f) of the Exchange Act sets forth the applicable standard of review in an appeal from a FINRA decision denying an application to associate with a statutorily disqualified person. That section provides that if the Commission finds that: (1) the "specific grounds" upon which FINRA based its denial "exist in fact;" (2) such denial is in accordance with FINRA's rules; and (3) such rules are, and were applied in a manner consistent with the purposes of the Exchange Act, it "shall dismiss the proceeding," unless it finds that such denial "imposed any burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act. *See* 15 U.S.C. § 78s(f); *William J. Haberman*, 53 S.E.C. 1024, 1027 (1998), *aff'd*, 205 F.3d 1345 (8th Cir. 2000).[3]

FINRA complies with the Exchange Act in denying an application such as Hunter Scott's when that application is inconsistent with the public interest and the protection of investors. *See Leslie A. Arouh*, Exchange Act Rel. No. 62898, 2010 SEC LEXIS 2977, at *46 (Sept. 13, 2010); *Frank Kufrovich*, 55 S.E.C. 616, 625-26 (2002) (affirming FINRA's conclusions based on its stated analysis, which included an evaluation of the individual's prior misconduct and the sponsoring firm's inadequate plan of supervision); *Citadel Sec. Corp.*, 57 S.E.C. 502, 509 (2004) (affirming FINRA's denial of an application based upon an inadequate heightened supervisory plan and individual's prior misconduct).

As explained below, the NAC's decision fully comports with the standards of Exchange Act Section 19(f).

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[3] Applicants do not assert, and the record does not demonstrate, that FINRA's denial of the Application imposes an unnecessary or inappropriate burden on competition.

A. The Specific Grounds for the NAC's Denial Exist in Fact

The record demonstrates that the grounds for the NAC's denial of the Application exist in fact.

1. Savva Is Statutorily Disqualified

As an initial matter, Savva is statutorily disqualified. Pursuant to amendments made by the Sarbanes-Oxley Act in July 2002, Exchange Act Section 3(a)(39) provides, in pertinent part, that:

> A person is subject to a "statutory disqualification" with respect to . . . association with a member of, a self-regulatory organization, if such person—
>
> * * *
>
> (F) . . . is subject to an order or finding enumerated in paragraph . . . (H) . . . of paragraph (4) of section 15(b) of this title[.]

15 U.S.C. § 78c(a)(39).

In turn, Exchange Act Section 15(b)(4)(H) includes any individual that is subject to any "final order" of a state securities commission or state authority that supervises or examines banks that:

> (i) "Bars such person from association with an entity regulated by such commission[;]" or
>
> (ii) "Constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative or deceptive conduct."

15 U.S.C. § 78o(b)(4)(H).

The NAC found that the Vermont Order, entered in August 2004 and based upon misconduct from August 2002 through November 2003, is an FMD order under Exchange Act Sections 3(a)(39) and 15(b)(4)(H)(ii) and, therefore, statutorily disqualifying. The NAC made

this determination—as it has consistently done in other eligibility proceedings—based upon Vermont's classification of the Vermont Order as such. *See* RP 829 (Uniform Disciplinary Action Reporting Form filed by Vermont); RP 1774. The NAC also independently analyzed the Vermont statutes and regulations at issue and reached the same conclusion. *See* RP 1774-77.

On appeal, applicants focus solely on whether the Vermont Order is a "final order" under the Exchange Act, and argue (for the first time) that it is not a final order under Exchange Act Sections 3(a)(39) and 15(b)(4)(H)(ii) because "[t]he Sarbanes-Oxley Act does not expressly state that consent orders can be defined as 'final orders,'" because the Vermont Order did not result from an administrative disciplinary complaint,[4] and because Savva neither admitted nor denied the findings. (Applicants' Brief, at 6-7) These arguments should be rejected for myriad reasons.

This argument is completely new on appeal, and applicants should not be permitted to raise it now. *See Mayer A. Amsel*, 52 S.E.C. 761, 767 (1996) (holding that arguments are waived where raised for the first time on appeal); *see also In re Nortel Networks Corp. Secs. Lit.*, 539 F.3d 129, 132 (2d Cir. 2008) ("It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.") (citations and internal quotations omitted). At no time did Savva or Hunter Scott argue that the Vermont Order was not a final order under the Exchange Act. Yet applicants had ample opportunity to raise this issue below. They did not, and their numerous other arguments below concerning why the Vermont Order was not disqualifying did not preserve their ability to raise this new argument for the first time on appeal. *See Libertyville Datsun Sales v. Nissan Motor Corp.*, 776 F.2d 735, 737 (7th Cir. 1985) (holding

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[4] Although applicants state cursorily that the Vermont Order is not final "because the Vermont Securities Division did not file an administrative disciplinary complaint against Savva," (Applicants' Brief, at 6), they ignore that Savva waived any requirements that Vermont comply with its administrative procedures regarding contested cases. *See* RP 251, 259.

that where party raises specific argument for first time on appeal, it is waived even though "general issue" addressed by the argument was before the district court); *Nortel Networks*, 539 F.3d at 133 (finding argument raised below insufficient to preserve new argument on appeal).

In any event, this new argument is without support. FINRA has defined "final order" to mean "a written directive or declaratory statement issued by an appropriate federal or state agency . . . that constitutes a final disposition or action by that federal or state agency." *See* http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p116979.pdf (Form U4 instructions defining, among other things, "final order"). The Commission approved this definition when FINRA amended the Form U4 to reflect the additional categories of statutorily disqualifying events created by the Sarbanes-Oxley Act. *See Order Granting Approval to Proposed Rule Change Relating to Revisions to the Uniform Application for Securities Industry Registration or Transfer*, Exchange Act Rel. No. 34-48161, 2003 SEC LEXIS 1634 (July 10, 2003). Consequently, this definition of the term final order should be given deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984) (holding that considerable weight should be given to an agency's reasonable interpretation of a statute).[5]

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[5] Moreover, the Commission has defined "final order" similarly in other contexts. *See Amalgamated Clothing and Textile Workers Union v. SEC*, 15 F.3d 254, 257 (2d Cir. 1994) (holding that orders are final for purposes of Exchange Act Section 25(a) when they "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process") (internal quotations omitted); *see also Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings*, Securities Act Rel. No. 33-9211, 2011 SEC LEXIS 1820, at *42-47 (May 25, 2011) (proposing amendments, in the context of analogous language set forth in the Dodd-Frank Act, to define the term "final order" to mean an order that constitutes a final disposition by a state agency as described in the Form U4). Vermont holds a similar view as to what constitutes a final order. *See Jordan v. State of Vermont Agency of Transportation*, 702 A.2d 58, 61 (Vt. 1997) (stating that, "[f]or an order to be final, it must have disposed of all

[Footnote continued on the next page]

Under the definition set forth in the Form U4, the Vermont Order is a final order. It expressly states that it fully resolved all violations against Savva referenced therein, and that Savva waived his right to appeal those matters. *See* RP 251, 256. It also is undisputed that, in consenting to the Vermont Order, Savva and Vermont achieved finality with respect to the allegations set forth therein and Vermont imposed obligations and restrictions upon Savva. *See id.* Vermont also expressly classified its own order as a final order. Indeed, on the Form U6 concerning the Vermont Order filed by Vermont in October 2004, Vermont responded affirmatively to the question, "Does the order constitute a *final order* based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct?" (emphasis added) and indicated in another response that the status of the Vermont Order was "final." (RP 828-30)

Rather than apply the reasonable and well-supported definition of a final order, applicants' propose a narrow interpretation of the term (for which they offer no support) to include only orders resulting from a fully-litigated case. Applicants' narrow interpretation of a final order runs contrary to the Commission-approved definition set forth in the Form U4 and would require regulators to litigate every case (and individuals such as Savva to defend, through a contested hearing, every case) to ensure that individuals would not later assert that such orders lacked "finality" and could not have collateral consequences (such as rendering an individual statutorily disqualified). Such an impractical and unreasonable reading would have far-reaching implications for regulators and registered representatives seeking to obtain resolution and finality

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[cont'd]
matters that should or could properly be settled at the time and in the proceeding then before the [decision-making body]") (internal quotations omitted).

of a matter without the need for a full-blown adjudication on the merits.[6] *See Board of Trade v. SEC*, 883 F.2d 525, 529-30 (7th Cir. 1989) (stating that "finality" is a practical concept). The Commission should reject applicants' arguments.

Similarly, the cases cited by applicants to support their narrow reading that the Vermont Order does not constitute a final order are inapposite, and the language quoted by applicants is taken out of context. *See* Applicants' Brief, at 6. For instance, in *SEC v. Pace*, the court found that the Commission was not precluded from asserting a claim against the defendant based upon a settlement in a tax court proceeding. 173 F. Supp. 2d 30, 33-34 (D.D.C. 2001). *Pace* did not address finality; instead, it concerned whether an issue had been adjudicated for purposes of evaluating whether claim preclusion applied. Similarly, in *Beatrice Foods Co. v. FTC*, the plaintiff argued that the resolution by consent decree of another unrelated matter involving unrelated parties before the Federal Trade Commission led to the "inescapable" conclusion that its acquisition and the resulting effect on concentration for antitrust purposes was lawful. *See* 540 F.2d 303, 312-13 (7th Cir. 1976). Not surprisingly, the court held that a consent decree resolving another administrative action was not binding upon the FTC in determining whether Beatrice's acquisitions violated antitrust laws. *Id.* at 312. Neither of these cases supports applicants' position that the Vermont Order is not a final order under the Exchange Act and thus not statutorily disqualifying.

Likewise, in *SEC v. Levine*, the defendant agreed to a consent order whereby he agreed to, among other things, disgorge assets to a receiver to satisfy claims against him pursuant to a court-approved plan to be proposed by the Commission. 881 F.2d 1165, 1169 (2d Cir. 1989).

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[6] In other contexts, matters entered into consensually have routinely served as statutorily disqualifying events. *See, e.g., Scott E. Wiard*, 57 S.E.C. 879 (2004) (no contest plea to a felony charge); *Morton Kantrowitz*, 55 S.E.C. 98, 99-100 (2001) (injunction consented to by applicant).

The defendant later argued that the consent order required that certain tax claims be given priority. The court held that nothing in the consent order granted priority for the tax claims. *Id.* at 1179-80. The court stated that "consent judgments should be interpreted in a way that gives effect to what the parties have agreed to, as reflected in the judgment itself or the documents incorporated in it by reference." *Id.* at 1179. Thus, *Levine* concerned interpretation of the terms of a consent order, not its finality. Nothing in *Levine* suggests that the Vermont Order is not a final order and was not intended to finally resolve all matters against Savva related to the misconduct underlying the order. For all of these reasons, the Commission should reject applicants' argument that the Vermont Order is not statutorily disqualifying.

2. The Factors Underlying the NAC's Denial of the Application Exist in Fact

Further, the factors relied upon by the NAC to deny the Application—the seriousness of the securities-related Vermont Order, Savva's customer complaints, the Illinois Order and FINRA's 2009 Cautionary Action against Savva, and Hunter Scott's woefully inadequate proposed plan of heightened supervision—all "exist in fact" and are amply supported by the record. Applicants do not contest the existence of such factors, but rather the importance and interpretation of each of these factors. *See* Part IV.C *infra.*

In sum, Savva's disqualification and the factors utilized by the NAC to find that he presents an unreasonable risk to the market and investing public exist in fact. In denying the Application, the NAC fully considered the totality of the circumstances and clearly explained the bases of its decision. Savva and Hunter Scott failed to overcome their burden of proof and also failed to demonstrate grounds for Savva's continued association in the securities industry. *See Gershon Tannenbaum*, 50 S.E.C. 1138, 1139-40 (1992); *M.J. Coen*, 47 S.E.C. 558, 561 (1981) ("[A]ny member wishing to employ such a [statutorily disqualified] person . . . must

'demonstrate why the application should be granted.'"); *Halpert & Co.*, 50 S.E.C. 420, 422 (1990) (same).

B. The NAC's Review and Denial of the Application Were Fair and in Accordance with FINRA Rules

The record also shows that the NAC's review and denial of the Application were conducted fairly and in accordance with FINRA rules. Article III, Section 3(b) of FINRA's By-Laws prohibits a member firm from remaining in membership if it employs a statutorily disqualified individual. Article III, Section 3(d) of FINRA's By-Laws provides that any member ineligible for continuance in membership may file an application requesting relief from the ineligibility pursuant to FINRA rules. FINRA Rules 9520 through 9525 set forth FINRA's procedures for eligibility proceedings.

FINRA followed its by-laws and rules in processing this matter. After Hunter Scott filed the Application to initiate the eligibility proceeding, the Hearing Panel was convened in accordance with FINRA Rule 9524(a)(1). FINRA's Office of General Counsel gave applicants proper advance notice of the hearing, as required by FINRA Rule 9524(a)(2). (RP 905) The Hearing Panel conducted a hearing on November 17, 2011. Savva appeared at that hearing accompanied by counsel, Hunter Scott's chief compliance officer (Hughes), and Hechme. All three individuals testified, and Hunter Scott and Savva were given ample opportunity to demonstrate why it would be in the public interest to allow Savva to continue to associate with the Firm. *See generally* RP 911-1151.

Further, both during and after the hearing, the Hearing Panel ordered the parties to provide additional information. *See* FINRA Rule 9524(a)(3)(C) (granting the Hearing Panel authority to order the parties to provide additional information at any time prior to the issuance of its recommendation). The Hearing Panel also afforded Hunter Scott and Savva an opportunity

to contest Member Regulation's proposed submission of additional post-hearing evidence, which they did. *See* RP 1703, 1711, 1724-26, 1732, 1741-49. Following the NAC's consideration of this matter, on August 10, 2012, FINRA filed with the Commission (with a copy to the parties) the required notice pursuant to Exchange Act Section 19(d)(1) and the rules adopted thereunder. (RP 1767)

Nonetheless, applicants argue that FINRA's proceedings were somehow unfair. As explained below, none of those arguments has merit.[7]

1. FINRA Did Not Retroactively Apply to Savva the Definition of Statutory Disqualification

Savva and Hunter Scott, as they did before the NAC and in their unsuccessful motion to stay filed with the Commission, continue to assert that FINRA unfairly and retroactively applied its rules and provisions of the Exchange Act in connection with this matter. A brief description of the relevant Exchange Act and FINRA rule provisions illustrates that applicants' arguments are without merit.

a. Amendments to the Definition of Statutory Disqualification and FINRA's By-Laws and Procedural Rules

In July 2002, Congress enacted the Sarbanes-Oxley Act. *See* Pub. L. No. 107-204, 116 Stat. 745 (2002). Section 604 of the act expanded the definition of "statutory disqualification"

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[7] As a general matter, and notwithstanding applicants' suggestions to the contrary, the fairness requirements of constitutional due process do not apply to FINRA procedures because FINRA is not a state actor. *See D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) (stating that it is a well-settled principle that FINRA is not a governmental actor); *Charles C. Fawcett*, Exchange Act Rel. No. 56770, 2007 SEC LEXIS 2598, at *13-14 (Nov. 8, 2007) (same). In determining the fairness of FINRA's proceedings, the Commission looks to whether the proceedings were conducted in accordance with FINRA's rules and whether FINRA implemented its procedures fairly. *See Robert J. Prager*, 58 S.E.C. 634, 662-63 (2005). The record establishes that the proceeding before FINRA met these standards.

contained in Exchange Act Section 3(a)(39) to include several additional statutorily disqualifying events. Among other things, the Sarbanes-Oxley Act amended the Exchange Act's then-existing definition of statutory disqualification to include an individual who is subject to a final order of a state securities commission that either bars such person or constitutes an FMD order. 15 U.S.C. § 78o(b)(4)(H).

In July 2003, as a result of the Sarbanes-Oxley Act's creation of additional categories of statutorily disqualified individuals, FINRA amended the Form U4. The amended Form U4 required registered personnel to report the additional statutorily disqualifying events created by the Sarbanes-Oxley Act. FINRA stated that the amendments would, among other things, "elicit reporting of regulatory actions that may cause an individual to be subject to a statutory disqualification under the expanded definition of disqualification in Section 15(b)(4)(H) of the Exchange Act, created by the passage of the Sarbanes-Oxley Act." *See NASD Notice to Members 03-42*, 2003 NASD LEXIS 50, at *3 (July 2003); *see also* Part IV.A.1 *supra*.

Until July 2007, NASD's By-Laws tracked most of the language in Exchange Act Section 3(a)(39), but they did not include the additional categories of disqualification added by the Sarbanes-Oxley Act. Under Exchange Act Section 15A(g)(2), however, FINRA could have sought, at all times relevant, to bar from associating with a broker-dealer an individual such as Savva who was disqualified under Exchange Act Section 3(a)(39).[8] Thus, the only practical implication of the discrepancy between NASD's By-Laws' definition of statutory disqualification and the Exchange Act's definition was that individuals who were statutorily

[8] Exchange Act Section 15A(g)(2) provides, in pertinent part, that "a registered securities association may . . . bar from becoming associated with a member any person, who is subject to a statutory disqualification." 15 U.S.C. § 78o-3(g)(2).

disqualified under the Exchange Act from July 2002 until 2007 as a result of the Sarbanes-Oxley Act were not immediately subject to FINRA's formal eligibility procedures governing statutorily disqualified individuals.[9]

In connection with the formation of FINRA, the Commission approved amendments to NASD's By-Laws that harmonized its definition of statutory disqualification with the Exchange Act's more expansive definition. *See Order Approving Proposed Rule Change to Amend the By-Laws of NASD to Implement Governance and Related Changes*, Exchange Act Rel. No. 56145, 2007 SEC LEXIS 1640 (July 26, 2007), *as amended by* Exchange Act Rel. No. 56145A, 2008 SEC LEXIS 1270 (May 30, 2008). The harmonization of FINRA's and the Exchange Act's definition of statutory disqualification caused all individuals subject to statutory disqualification under the Exchange Act to be subject to FINRA's then-existing procedures governing eligibility proceedings.

FINRA, with the Commission's approval, subsequently amended its procedures to effectively address the additional individuals who became statutorily disqualified as a result of the Sarbanes-Oxley Act. *See Order Approving Proposed Rule Change to Amend the FINRA Rule 9520 Series Regarding Eligibility Procedures for Persons Subject to Certain Disqualifications*, Exchange Act Rel. No. 59586, 2009 SEC LEXIS 744 (Mar. 17, 2009). FINRA's revised procedural rules, which became effective in June 2009, required that only certain individuals statutorily disqualified as a result of the Sarbanes-Oxley Act—including

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[9] At all times, NASD's and FINRA's eligibility procedures referenced the definition of statutory disqualification in their respective by-laws. *Compare* NASD Rule 9521(a) (referencing disqualification as defined in NASD's By-Laws), *available at* http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=10888+element_id=7826+highlight=9521#r10888, *with* FINRA Rule 9521(a) (referencing the definition of disqualification contained in FINRA's By-Laws).

persons like Savva—file with FINRA applications seeking relief from their ineligibility.[10] *See FINRA Regulatory Notice 09-19*, 2009 FINRA LEXIS 52 (Apr. 2009). The Commission stated that the changes to FINRA's rules governing eligibility proceedings should allow FINRA "to integrate filings mandated by the revised definition of disqualification into established programs that monitor subject persons." 2009 SEC LEXIS 744, at *9. In June 2009, as soon as FINRA's revised procedural rules governing eligibility proceedings became effective, FINRA notified Hunter Scott that Savva was disqualified under Exchange Act Section 3(a)(39) as a result of the Vermont Order, and the Firm had to file an MC-400 application with FINRA if it sought to continue to employ Savva. *See* RP 796.

b. Applicants' Retroactivity Arguments Lack Merit

Against the forgoing backdrop, applicants' arguments that FINRA retroactively and unfairly applied to Savva the definition of statutory disqualification must fail. When Vermont entered the Vermont Order in 2004, the Exchange Act provided that an order such as the Vermont Order was statutorily disqualifying. Indeed, Congress amended the Exchange Act two years before Vermont entered the disqualifying Vermont Order and prior to Savva's misconduct underlying the Vermont Order. Pursuant to Exchange Act Section 15A(g)(2), FINRA, at all times relevant and regardless of the specific procedural rules in place, has had discretionary

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[10] Applicants argue that, "[i]f FINRA believed Mr. Savva was disqualified by virtue of the Sarbanes-Oxley Act alone, it surely would not have delayed notification for five years." (Applicants' Brief, at 11) This argument misses the point. The fact that the Vermont Order rendered Savva statutorily disqualified upon its entry in August 2004 is separate and distinct from the timing of FINRA's notice to Savva under FINRA's revised procedural rules governing eligibility proceedings. Indeed, FINRA's amendments to its by-laws and procedural rules governing eligibility proceedings had no impact whatsoever on Savva's status as a statutorily disqualified individual.

authority to prevent individuals such as Savva subject to an FMD order from associating with a member firm.[11] Thus, there was nothing "retroactive" about Savva's statutory disqualification.

Moreover, while Savva and Hunter Scott cite to the Supreme Court's decision in *Landgraf v. USI Film Products* to support its position that FINRA acted unfairly by subjecting Savva to an eligibility proceeding, they provide no analysis or discussion concerning exactly how FINRA acted retroactively or improperly in light of that decision. A review of *Landgraf* validates that FINRA acted properly. In *Landgraf*, the Court stated generally that, without clear evidence of a statute's intent, a presumption exists against statutory retroactivity. 511 U.S. 244, 264 (1994). The Court further elaborated that with respect to federal statutes, courts should first ask whether Congress has expressed its intent to apply the statute retroactively. *Id.* at 280. Absent such intent, courts must determine whether the statute would have a retroactive effect. Factors to consider in making this determination include whether the statute would impair rights a party possessed at the time he acted, increase liability for past conduct, or impose new duties concerning transactions already completed. *Id.*

Under this framework, the NAC properly concluded that FINRA did not retroactively and unfairly apply the definition of statutory disqualification to Savva. As stated above, there was nothing retroactive concerning Savva's disqualification, as he was disqualified under the Exchange Act upon entry of the Vermont Order in August 2004. Further, FINRA intended that its changes to the definition of statutory disqualification contained in its by-laws and procedures

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[11] Despite applicants' suggestions to the contrary, the fact that FINRA did not exercise this discretion with respect to Savva while its by-laws and procedural rules were being amended does not support applicants' argument that Savva's continued association with the Firm is—notwithstanding the seriousness of the Vermont Order, Savva's lengthy history of customer complaints and regulatory issues, and the Firm's defective heightened supervisory plan—in the public interest. *See* Part IV.C.2 *infra.*

governing eligibility proceedings apply to all individuals statutorily disqualified as a result of the Sarbanes-Oxley Act, including those already disqualified. In fact, the primary reason FINRA amended its by-laws was to make its definition of statutory disqualification mirror the Exchange Act's definition and include those individuals disqualified since 2002 under the Sarbanes-Oxley Act.[12] *See* 2007 SEC LEXIS 1640, at *33-34. Similarly, FINRA amended its procedural rules governing eligibility proceedings in 2009 to address those individuals disqualified as a result of Sarbanes-Oxley and to permit certain categories of such individuals to avoid an eligibility proceeding. *See* 2009 SEC LEXIS 744, at *4.

Moreover, the changes to FINRA's by-laws and procedural rules did not impair any rights a party such as Savva possessed at the time he acted, increase liability for past conduct, or impose new duties concerning transactions already completed. In fact, *Landgraf* expressly addressed changes to procedures such as those effectuated by FINRA in 2007 and 2009, stating that, "[c]hanges in procedural rules may often be applied . . . without raising concerns about retroactivity." 511 U.S. at 275. The Court observed that rules of procedure regulate secondary conduct, and parties hold "diminished reliance interests in matters of procedure." *Id.* The FINRA by-laws and rules amended and approved by the Commission in 2007 and 2009 concerned only procedural matters, not any substantive rights possessed by Savva and others who had been previously rendered disqualified after Sarbanes-Oxley became law. For all of these reasons, applicants' retroactivity arguments should be rejected.

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12 When FINRA amended the definition of statutory disqualification to conform to the Exchange Act definition, it stated that "[t]he revised definition of 'disqualification' will cause a limited number of individuals to be subject to NASD eligibility proceedings for persons subject to disqualification (i.e., NASD Rule 9520) who were not subject to those proceedings before the definitional change." *See* Shaswat Das, Esq., NASD, SEC No-Action Letter, 2007 SEC No-Act. LEXIS 540, at *2 (July 27, 2007).

2. Applicants Had Fair and Ample Notice of the Basis for Disqualification

Applicants' argument that they did not have proper notice of the basis for Savva's disqualification is equally flawed. FINRA Rule 9522(a) requires that if FINRA has reason to believe that an associated person is statutorily disqualified, it issue a written notice that "shall specify the grounds for such disqualification or ineligibility." FINRA staff issued such notice on June 15, 2009. (RP 796) In that notice, FINRA staff indicated that the Vermont Order rendered Savva statutorily disqualified under Exchange Act Section 3(a)(39). FINRA satisfied the notice requirements of Rule 9522(a), and applicants have known since at least June 2009 that the Vermont Order is the basis for FINRA's determination that Savva is statutorily disqualified.[13]

Applicants nonetheless argue that subsequent to the June 15, 2009 notice, Member Regulation staff asserted, as the sole statutory basis for Savva's disqualification, that the Vermont Order was an order barring Savva. Applicants argue that until the Hearing Panel ordered the parties to brief the matter of the precise statutory grounds for the disqualification four months prior to the hearing, Member Regulation did not assert that the Vermont Order was an FMD order. Under these circumstances, applicants contend that the Hearing Panel acted unfairly by ultimately concluding that the Vermont Order was an FMD order. Applicants' arguments should be rejected.

As an initial matter, the NAC was not bound by Member Regulation's characterization of the specific statutory basis why the Vermont Order was statutorily disqualifying. *See JJFN Servs., Inc.*, 53 S.E.C. 335, 342 (1997) (holding that statements made by Nasdaq staff with respect to an application for listing on the automatic quotation system did not bind NASD). The

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[13] Vermont placed applicants on notice that the Vermont Order was an FMD order in October 2004 when it filed its Form U6.

NAC, as an adjudicator, was empowered to raise and address this legal issue sua sponte. *See, e.g., Perez v. United States*, 830 F.2d 54, 58 (5th Cir. 1987) ("A trial court can sua sponte address a legal issue raised by neither party."); *Brown v. Termplan, Inc.*, 693 F.2d 1047, 1048-49 (11th Cir. 1982) (same).

Moreover, and regardless of the specific statutory basis previously articulated by FINRA staff to applicants or their counsel, there is no dispute that in July 2011, the Hearing Panel requested that the parties brief whether Savva is disqualified because the Vermont Order is a final order barring Savva or an FMD order. The Hearing Panel made this request because after its preliminary review of the record, the exact statutory basis for Savva's disqualification was unclear. (RP 785) Applicants, who were at all times represented by counsel, had ample opportunity to address and argue this legal issue, and in fact filed several briefs on the matter months before the November 2011 hearing. *See* RP 791, 875, 897. Applicants do not assert any specific prejudice resulting from the Hearing Panel's directive. Further, applicants had ample time to prepare for the hearing with the knowledge that the Vermont Order might be considered an FMD order. In sum, applicants had notice and argued the issue. The Commission should therefore reject this baseless argument.

3. The NAC Properly Admitted a Post-Hearing Exhibit

Applicants also argue that the NAC unfairly based its denial on a transcript admitted after the evidentiary hearing, which they allege prejudiced them because they had no opportunity to explain the testimony in the transcript. Applicants' argument rings hollow and is undermined by the record.

Approximately one month after the November 2011 hearing, Member Regulation filed a motion to introduce the transcript of a 2003 investigative interview conducted by Vermont

examiners, in which Savva testified that he spoke to the customer and recommended the securities at issue in the Vermont Order. (RP 1221) Member Regulation sought to introduce this transcript to rebut Savva's testimony at the hearing that he merely filled out the customer's order ticket and had no additional involvement with the customer. After affording applicants the opportunity to respond to the motion (and receiving numerous pleadings from applicants on the matter), the NAC admitted the transcript into evidence "solely for the purpose of considering Savva's differing explanations of the events surrounding the Vermont Order." *See* RP 1773 (NAC decision), RP 1698, 1705, 1724, 1741 (applicants' pleadings addressing whether the transcript should be admitted). Accordingly, applicants' assertions that they were deprived of an opportunity to address the transcript and were prejudiced by its admission, for the limited purpose described by the NAC, are both factually incorrect.

Regardless, the NAC's use of the transcript for the limited purpose specified in its decision had no impact on the fact that the Vermont Order was a disqualifying event, that it involved serious and securities-related misconduct, that at least 10 customers have filed complaints against Savva, that Savva has been the subject of two regulatory actions, and that Hunter Scott's heightened supervisory plan was inadequate. Moreover, applicants' argument that the hearing had been "closed" and, consequently, the Hearing Panel could not admit any additional evidence runs contrary to FINRA's rules and common sense. *See, e.g.*, FINRA Rule 9524(a)(3)(C) (providing that the Hearing Panel may order the parties to supplement the record "at any time prior to the issuance of its recommendation"). Indeed, the Hearing Panel would

have been derelict in its duties had it knowingly ignored material evidence that each party had an opportunity to address.[14]

4. Applicants Were Not Unfairly Prejudiced by Purported Delays

Applicants also argue generally that they were unfairly prejudiced by the amount of time between the Vermont Order and FINRA's issuance of the notice that Savva was statutorily disqualified, and were further prejudiced by the additional three years until the NAC issued its decision. *See* Applicants' Brief, at 7-8. In support of their assertion that these delays "expose[] the inherent unfairness of these proceedings," applicants cite *Jeffrey Ainley Hayden*, 54 S.E.C. 651 (2000). Savva and Hunter Scott again miss the mark, as their arguments are inapposite and without merit.

In *Hayden*, the Commission set aside a disciplinary proceeding by the New York Stock Exchange that resulted in findings that Hayden engaged in certain misconduct. The Commission found that the delay in bringing the underlying disciplinary proceeding against Hayden—approximately 14 years from the time of the first act of misconduct to the filing of charges against Hayden and more than six years from the last act—violated the Exchange Act's fairness requirements.

A statutory disqualification proceeding, however, is not akin to a disciplinary proceeding. In Savva's statutory disqualification proceeding, FINRA never charged him with any violation of

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[14] In prior pleadings, applicants have pointed to the statement at the end of the hearing by the chairperson of the Hearing Panel that, "[h]earing nothing else, we'll close the hearing," for the proposition that the Hearing Panel could not consider any additional evidence brought to its attention. *See* RP 1151 (hearing transcript); RP 1743 (Applicants' Opposition to Member Regulation's Motion to Reopen the Hearing to Introduce New Evidence). This argument is without merit. Moreover, pursuant to applicants' tortured logic, Hunter Scott's so-called amended supervisory plan, submitted more than seven months after conclusion of the hearing in this matter, could not be considered by the NAC.

rules or regulations. Nor did the NAC impose any penalty or sanction upon Savva in connection with its denial of the Application. *See Timothy H. Emerson Jr.*, Exchange Act Rel. No. 60328, 2009 SEC LEXIS 2417, at *26 (July 17, 2009) (explaining that when FINRA denies a request to continue to associate with a firm notwithstanding a statutory disqualification, it is not imposing a penalty or sanction). Thus, the reasoning of *Hayden* and its progeny are not applicable to statutory disqualification proceedings and to Savva generally.

Moreover, since *Hayden*, the Commission has made it clear that in determining whether delay in bringing a disciplinary proceeding is unfair, there is no bright-line test; rather, fairness is determined by examining the entirety of the record. *See Mark H. Love*, 57 S.E.C. 315, 323-25 (2004). In determining fairness, the Commission in *Love* focused on whether applicant's ability to mount an adequate defense was harmed by the delay. *Id.* at *325. In this matter, applicants have not asserted that the delays rendered them unable to advocate in favor of their Application, and the record would undercut any such argument. Thus, even assuming that *Hayden* and *Love* apply to Savva's eligibility proceeding (they do not), applicants have not demonstrated that any delay rendered these entire proceedings unfair.[15]

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The NAC considered all the evidence presented in this matter and denied the Application because Hunter Scott and Savva failed to meet their burden to demonstrate that Savva's continued association with Hunter Scott was in the public interest, not because FINRA somehow applied its rules and procedures unfairly. FINRA gave applicants proper notice of all issues, and Savva received the benefit of a fair statutory disqualification hearing that FINRA conducted in

[15] Applicants also contributed to the delay, in part, by requesting that the hearing in this matter be postponed while Savva continued to work at the Firm. *See* RP 779.

accordance with applicable FINRA by-laws and rules. The fact that the NAC denied the Application after considering the facts and circumstances of this particular case "does not mean that [applicants] were not given a fair hearing." *See Jan Biesiadecki*, 53 S.E.C. 182, 186 (1997). The Commission should reject applicants' arguments to the contrary.

C. The NAC Applied FINRA's Rules in a Manner Consistent with the Purposes of the Exchange Act

The NAC's denial of the Application was entirely consistent with the purposes of the Exchange Act. The NAC based its denial on a totality of the circumstances and clearly explained and articulated the bases for its denial.

A central purpose of the Exchange Act is to promote market integrity and enhance investor protection. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 658 (1997) (stating that in passing the Exchange Act, one of Congress's animating objectives was "to ensure honest markets, thereby promoting investor confidence"). In this vein, FINRA was formed to "adopt, administer, and enforce rules of fair practice," "[t]o promote . . . high standards of commercial honor," and "to promote just and equitable principles of trade for the protection of investors." FINRA Manual, Restated Certificate of Incorporation of Financial Industry Regulatory Authority, Inc., Objects or Purposes (Third) (1) and (3) (July 2, 2010). Within the structure created by the Exchange Act, FINRA promulgates and enforces rules to "protect investors and the public interest." *See* 15 U.S.C. § 78o-3(b)(6).

The Commission has found it "appropriate to recognize the NASD's evaluation of appropriate business standards for its members . . . [p]articularly in matters involving a firm's employment of persons subject to a statutory disqualification." *See Halpert*, 50 S.E.C. at 422; *Am. Inv. Serv., Inc.*, 54 S.E.C. 1265, 1271 n.16 (2001). As the Commission stated in *Haberman*, "NASD may, in its discretion, approve association with a statutorily disqualified person only if

the NASD determines that such approval is consistent with the public interest and the protection of investors." 53 S.E.C. at 1027 n.7. In reviewing an application to permit a statutorily disqualified person to remain associated with a member firm, the NAC follows the factors enumerated in Article III, Section 3(d) of FINRA's By-Laws by reviewing:

> the relevant facts and circumstances as it, in its discretion, considers necessary to its determination, which, in addition to the background and circumstances giving rise to the failure to qualify or disqualification, may include the proposed or present business of a member and the conditions of association of any current or prospective associated person.

The Commission has stated that FINRA complies with the Exchange Act in denying an application such as Savva's when it bases its determination on a "totality of the circumstances" and explains "the bases for its conclusion." *See Arouh*, 2010 SEC LEXIS 2977, at *46; *Emerson*, 2009 SEC LEXIS 2417, at *14. As discussed below, the NAC properly found that Savva and Hunter Scott failed to demonstrate that Savva's continued association with the Firm would be in the public interest, and the NAC provided a convincing rationale as to why Savva represented an unreasonable risk of harm to the market or investors.

1. The NAC Properly Considered the Seriousness of the Securities-Related Vermont Order

In denying the Application, the NAC appropriately considered that the Vermont Order involved serious, securities-related misconduct. *See Citadel Sec. Corp.*, 2004 SEC LEXIS 949, at *12 (finding that in denying firm's application, FINRA properly considered the seriousness and nature of the disqualifying permanent injunction involving an individual's failure to supervise employees in connection with market manipulation, which is "relevant to his fitness to associate with a member firm"). The Vermont Order was based upon serious findings that Savva, among other things, engaged in unauthorized transactions. *See Howard Alweil*, 51 S.E.C.

14, 18 (1992) ("[u]nauthorized trading is very serious misconduct"). Indeed, the Vermont Order describes with specificity one such transaction that occurred in November 2002. *See* RP 252.

The Vermont Order further found that Savva recommended securities to his customers without reasonable grounds to believe that his recommendations were suitable for them, and that Savva almost always recommended to his customers small cap, aggressive growth stocks regardless of their experience, financial resources, or investment objectives. *See* RP 253. FINRA has emphasized the importance of ensuring that recommended securities are suitable for customers. *See Dep't of Mkt. Regulation v. Kresge*, Complaint No. CMS030182, 2008 FINRA Discip. LEXIS 46, at *15 n.12 (FINRA NAC Oct. 9, 2008) (holding that "it is axiomatic that fraud and unsuitable recommendations rank among the most serious kinds of securities law violations"), *aff'd*, Exchange Act Rel. No. 55988, 2007 SEC LEXIS 1407 (June 29, 2007).

Moreover, the Vermont Order found that Savva engaged in high pressure or "boiler room" sales tactics when dealing with his customers. (RP 254) The order found that Savva "regularly exerted high pressure on his customers and [l]eads to make hasty decisions to purchase the securities that he was recommending to them." (RP 253) The Vermont Order further found that Savva coerced customers and leads to make securities purchases. (*Id.*) Such fraudulent and misleading conduct is extremely serious, and as the NAC found, "highly troubling." *See* RP 1787; *see also SEC v. Wolfson*, 539 F.3d 1249, 1253 n.6 (10th Cir. 2008) (stating that boiler rooms typically involve salespeople making calls to lists of potential investors in order to peddle speculative or fraudulent securities and using high pressure sales pitches containing misleading information about the nature of the investment).

Savva and Hunter Scott attempt to downplay the findings contained in the Vermont Order by arguing that Savva merely consented to its entry, and assert that it is a "settlement contract

negotiated between Vermont and Mr. Savva." (Applicants' Brief, at 5, 8) Settlements, however, may be considered in evaluating the matter before the Commission. *Cf. Gregory O. Trautman*, Exchange Act Rel. No. 61167A, 2009 SEC LEXIS 4173, at *79 n.85 (Dec. 15, 2009) (citations omitted) (considering settled matters as part of respondent's disciplinary history). Applicants also ignore that this settlement between Savva and one of his regulators contained no restrictions on its future use and was intended to resolve serious allegations of misconduct against Savva and to avoid the need for Vermont to institute disciplinary proceedings against Savva. *Cf. Am. Inv. Serv.*, 54 S.E.C. at 1273 (denying a firm's application to associate with statutorily disqualified persons who "demonstrate[d] a troubling lack of understanding . . . of their own role in the events that were at issue in the [statutorily disqualifying event]"). Applicants' efforts to undermine the validity of the Vermont Order are nothing more than collateral attacks on Savva's disqualifying event and should be rejected. *See Tannenbaum*, 50 S.E.C. at 1140 ("[i]t is always true in a case of this sort that a respondent cannot mount a collateral attack on findings that have previously been made against him.").

2. The Numerous Customer Complaints and Regulatory Matters Against Savva Support Denial of the Application

The NAC also properly found that Savva's lengthy regulatory history, which included at least 10 customer complaints and several other regulatory matters, weighed against approving the Application. *See Emerson*, 2009 SEC LEXIS 2417, at *17-18 (holding that FINRA reasonably concluded that two customer complaints filed against disqualified individual and settled by his firm, as well as discharges from prior firms, reflected poorly on his judgment and trustworthiness); *Kufrovich*, 55 S.E.C. at 626 (holding it is appropriate to consider individual's prior disciplinary history); *cf. Michael D. Smith*, CFTC Docket No. 93-9, 1997 CFTC LEXIS 48, at *22 (Mar. 11, 1997) (stating that evidence of prior wrongdoing is "relevant in assessing the

threat a respondent will pose to market integrity in that it further indicates a pattern of respondent's failure to comply with significant regulatory requirements").

The record shows that at least 10 customer complaints were filed against Savva between 1999 and 2008. *See* RP 019-042. Savva has personally paid at least $15,418 to settle certain of these matters, and Savva's firms have paid approximately $225,000 to settle certain of the customer complaints filed against Savva. Hunter Scott alone has paid $79,284 of that total. Of the 10 customer complaints filed against Savva, at least three (not including the complaint underlying the Vermont Order) involved allegations of unauthorized transactions, and Savva personally contributed funds to settle two of these three complaints. In addition, Savva was the subject of the Illinois Order and a FINRA Cautionary Action. Both regulatory events involved serious matters.

Savva and Hunter Scott argue that these complaints are "stale" and that FINRA based its denial "on events that happened nearly a decade ago." *See* Applicants' Brief, at 13. Applicants ignore that at least three customer complaints have been filed against Savva in the past five years, and that Savva recently received a Cautionary Action from FINRA for, among other things, unsuitable recommendations and excessive trading. Regardless, FINRA appropriately reviewed and considered Savva's entire regulatory history in determining that Savva's continued association with the Firm would present an unreasonable risk of harm to the market or investors. *See Emerson*, 2009 SEC LEXIS 2417, at *17-18 (holding that "[e]ven where prior misconduct is not recent, it still reflects poorly on [an applicant's] judgment and trustworthiness") (internal quotations omitted).

Applicants further argue that the NAC ignored Savva's alleged "clean" recent history and interactions with customers. *See* Applicants' Brief, at 13. In support, applicants attach 11

affidavits from customers that purportedly demonstrate their satisfaction with Savva and his "current business practices."[16] (Applicants' Brief, at 15)

These affidavits were not introduced during the proceedings before FINRA. Pursuant to Commission Rule of Practice 452, applicants must demonstrate with particularity that these items are material and that there were reasonable grounds for failing to introduce them previously. *See* 17 C.F.R. 201.452. Applicants have flagrantly disregarded this rule, and have made no attempt to demonstrate that they have satisfied the Commission's standard. Nor could they.

The customer affidavits are immaterial. They have no bearing on the fact that at least 10 customer complaints (significantly more than applicants' characterization of a "handful" of complaining customers) have been filed against Savva. *See Jeffrey L. Gibson*, Exchange Act Rel. No. 57266, 2008 SEC LEXIS 236, at *14-15 (Feb. 4, 2008) (finding views of individual investors who had executed declarations in support of registered representative should not be determinative in assessing investor protection), *aff'd*, 561 F.3d 548 (6th Cir. 2009); *cf. Andrew P. Gonchar*, Exchange Act Rel. No. 60506, 2009 SEC LEXIS 2797, at *54 (Aug. 14, 2009) (rejecting as mitigating applicants' argument that notwithstanding violations of FINRA's rules they generally complied with the rules in other instances), *aff'd*, 409 Fed. App'x 396 (2d Cir. 2010). These affidavits also do not alter the undisputed fact that Savva's disqualifying event was serious and securities-related and that Hunter Scott proposed an inadequate supervisory plan. The fact that certain of Savva's customers may not have complained about his conduct is

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[16] All 11 affidavits, which were submitted for the first time on appeal as an attachment to applicants' unsuccessful motion to stay, generally contain similar language regarding the customers' interactions with Savva, his purported expertise, and each customer's belief that Savva would not cause any harm if permitted to continue to associate with Hunter Scott.

irrelevant, and the opinions of a small, self-selected sample of Savva's customers cannot substitute for the NAC's judgment that Savva should not be permitted to remain in the securities industry.

In addition, applicants have not demonstrated that there are reasonable grounds for failing to introduce these affidavits during the proceedings below. Applicants, who have been represented by counsel at all stages of these proceedings, knew that Member Regulation cited to numerous customer complaints against Savva as a reason to deny the Application. *See* RP 531-32. The customer affidavits could have been submitted prior to or during the hearing. They were not.[17]

Similarly, the Commission should reject applicants' argument that the fact that FINRA did not exercise its discretion prior to June 2009 to prohibit Savva from associating with Hunter Scott in light of his disqualification shows that he is not a danger to the investing public. It shows no such thing. FINRA's decision to wait until it had revised, Commission-approved procedural rules in place before requiring Savva to come through an eligibility proceeding was

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[17] Applicants state that permitting Savva to continue to associate with Hunter Scott will serve the public interest because his customers have relied upon Savva's expertise in connection with their investment decisions and are currently being denied their "right" to choose their own broker. *See* Applicants' Brief, at 15. The Commission has rejected similar arguments, and should do so here. *See Gibson*, 2008 SEC LEXIS 236, at *15 ("we look beyond the interests of particular investors . . . to the protection of investors generally"); *see also Christopher A. Lowry*, 55 S.E.C. 1133, 1144-45 (2002) (rejecting argument that adviser's customers would suffer if he was barred and stating that "Lowry's clients remain free to find another investment adviser. The Commission has an obligation to protect the investing public."), *aff'd*, 340 F.3d 501 (8th Cir. 2003). In addition, the Commission should reject applicants' assertion that the NAC's denial "effectively prevents Mr. Savva from exercising his fundamental right to earn a livelihood, and thus merits exceptionally close scrutiny by the Commission." (Applicants' Brief, at 1) As set forth above, it is well-established that FINRA is not a state actor to which constitutional proscriptions attach. Moreover, the Commission has previously rejected arguments by statutorily disqualified individuals that FINRA has deprived them of a right to work in the industry. *See Emerson*, 2009 SEC LEXIS 2471, at *23-27.

entirely appropriate. That FINRA exercised its discretion cannot serve as a basis for applicants' assertion that the public interest would be served by permitting Savva to continue to associate with Hunter Scott, especially considering the reasons articulated by the NAC for denying the Application. *Cf. W. N. Whelen & Co.*, 50 S.E.C. 282, 284 (1990) ("A regulatory authority's failure to take early action neither operates as an estoppel against later action nor cures a violation.").

3. Hunter Scott's Inadequate Supervisory Plan Further Supports Denial of the Application

Finally, the NAC properly found that Hunter Scott failed to demonstrate that it had constructed, and would be capable of implementing, an adequate plan of heightened supervisory procedures for Savva. The Commission has consistently emphasized the need for "stringent supervision" of statutorily disqualified persons. "[I]n determining whether to permit the employment of a statutorily disqualified person, the quality of the supervision to be accorded that person is of utmost importance. We have made it clear that such persons must be subject to stringent oversight by supervisors who are fully qualified to implement the necessary controls." *Citadel Sec. Corp.*, 57 S.E.C. at 509-10 (internal quotations omitted); *see also Kufrovich*, 55 S.E.C. at 628-29 (finding that the firm's proposed plan lacked "a key component—stringent supervision").

The NAC found that the Firm fell far short of this stringent standard. It stated that the Firm's proposed heightened supervisory plan was "skeletal, lack[ed] specificity, and [was] not specifically tailored to Savva and preventing misconduct similar to the Vermont Order." (RP 1788) The NAC properly considered that the proposed plan lacked a number of provisions important to ensure that the Firm properly supervised Savva. *See* RP 1788-89. For example, the plan contained no provisions regarding the monitoring or review of Savva's communications

with customers, did not specify how or whether certain monitoring would be documented, did not contain any procedures concerning how to handle customer complaints filed against Savva, and failed to designate any backup supervisor. *See Kantrowitz*, 55 S.E.C. at 102 (stating that disqualified individuals must be supervised by supervisors who are fully qualified to implement the necessary controls). These are all undisputed facts.[18]

Moreover, the record demonstrates that several customer complaints, the Illinois Order, and the FINRA Cautionary Action all occurred while Savva was subject to the very plan of "heightened supervision" that the NAC considered. (RP 1789) That Savva may not have received a customer complaint during the past few years does not somehow eliminate Savva's dreadful track record under the proposed plan from 2004 until 2009.[19] In addition, the NAC appropriately considered that in April 2009, FINRA cited Hunter Scott for failing to follow its heightened procedures with respect to Savva. *See* RP 1789; *Emerson*, 2009 SEC LEXIS 2417, at *20-21 (considering a firm's prior violation of its own rules regarding heightened supervision in

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[18] Applicants argue that the plan contains a number of provisions not discussed by the NAC, and that the NAC stated in a "conclusory fashion" that the proposed plan contained no special provisions concerning future customer complaints against Savva. *See* Applicants' Brief, at 12. The inadequacy of Hunter Scott's plan speaks for itself, and nowhere in the plan does the Firm describe how it will handle future customer complaints filed against Savva. *See* RP 611 (Firm's proposed plan); *cf. NASD Winter 1999 Regulatory and Compliance Alert* at 17-18, *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/rca/p002379.pdf (stating that although there is no one plan appropriate for each disqualified individual, most plans should contain certain provisions described therein, including provisions concerning reporting and handling customer complaints); *NASD Notice to Members 97-19*, 1997 NASD LEXIS 23 (Apr. 1997) (setting forth provisions firms should consider in designing heightened supervisory plans).

[19] Applicants state that the NAC failed to provide any rationale as to why Hughes could not properly supervise Savva. The NAC found that under the proposed plan of supervision—a plan deficient in numerous respects and proven to be unable to prevent regulatory problems—no one could ensure the stringent supervision of a statutorily disqualified individual such as Savva. Thus, that Hughes is the supervisor under an inherently flawed supervisory plan is of no moment.

denying application). The NAC properly considered, and concluded based upon abundant facts in the record, that Hunter Scott did not propose an adequate plan to supervise Savva.

V. CONCLUSION

The NAC properly concluded, based upon ample evidence set forth in a fully-developed record, that permitting Savva to continue to associate with Hunter Scott would present an unreasonable risk of harm to the market and investors. The statutorily disqualifying Vermont Order found that Savva engaged in serious, highly troubling, and securities-related misconduct. The NAC considered this fact, along with Savva's inability to deal fairly and properly with customers (as evidenced by the numerous customer complaints filed against him), the Illinois Order, and the 2009 FINRA Cautionary Action. Hunter Scott's skeletal and inadequate supervisory plan, and applicants' dreadful record while operating under that plan, further support the NAC's decision to deny the Application. The numerous procedural arguments raised by Savva and Hunter Scott have no legal or factual basis, and applicants had every opportunity to demonstrate that the public interest would be served by permitting Savva to continue in the securities industry. They failed to do so. Accordingly, the Commission should dismiss this appeal.

Respectfully submitted,

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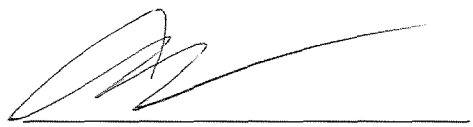
January 9, 2013

CERTIFICATE OF COMPLIANCE

I, Andrew J. Love, certify that this Brief in Opposition to Application for Review (File No. 3-15017) complies with the length limitation set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 13,085 words.



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