BEFORE THE SECURITIES AND EXCHANGE COMMISSION

In the Matter of:	Adm. Proc. No. No. 3-15017
The Association of Nicholas S. Savva With Hunter Scott Financial, LLC	FINRA No. SD-1800

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APPLICANTS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR APPLICATION FOR REVIEW

WINGET, SPADAFORA &
SCHWARTZBERG, LLP
45 Broadway, 19th Floor
New York, NY 10006
(212) 221-6900
Attorneys for Hunter Scott Financial, LLC and Nicholas Savva

Of Counsel:
Michael Schwartzberg, Esq.
Steven E. Mellen, Esq.

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Hunter Scott Financial, LLC ("Hunter Scott") and Nicholas S. Savva (collectively, the "applicants"), through their undersigned counsel, hereby submit the instant Reply Brief, pursuant to 17 C.F.R. § 201.450, in further support of their application for review of the August 10, 2012 National Adjudicatory Council decision (the "NAC Decision") which denied Hunter Scott's application for Mr. Savva to continue to associate with the firm as a general securities representative.

INTRODUCTION

Nearly a decade ago, Mr. Savva agreed to entry of a Consent Order by the securities regulators of the State of Vermont in order to avoid the expense and uncertainty of a protracted regulatory proceeding. Today, Mr. Savva finds himself completely disqualified from the securities industry, based solely upon that selfsame consent order and a disqualification process initiated by FINRA five years after the fact.

This Application for Review raises serious issues not only with respect to Mr. Savva's lost career, but also with respect to the Commission's oversight of FINRA and the national regulatory process. The process implemented by FINRA in this case, where a routine consent order with a single State has been transformed into a complete and total bar from the securities industry altogether, inevitably must result in a world where voluntary settlements and consent orders no longer exist – because no regulated individual could ever agree to one in good conscience. State regulators will no longer be able to operate within the constraints of their limited budgets, because every potential regulatory violation will have to be fully litigated to conclusion – lest the target sign his own order of banishment from the industry. It is imperative for the Commission to reject FINRA's incorrect and draconian interpretation of the disqualification rules. Only a determination on the merits, and not a settlement by consent, should have the preclusive effect required to support a statutory disqualification from the securities industry.

FINRA's opposition brief fails to grapple with this serious issue at all, and indeed, goes so far as to absurdly claim that it is Applicants who are suggesting that every regulatory proceeding ought to be tried to conclusion. Nothing could be further from the truth. The regulatory process simply must allow for the continuing existence of settlements and negotiated resolutions, lest the process and the securities industry itself become bogged down in a boundless mire of litigation over every single alleged violation.

While this is perhaps the most important reason why the decision below should be overturned, it is far from the only one. FINRA's opposition brief does little to persuasively

address the numerous additional items of error discussed in Applicants' opening submission, including FINRA's blatant violation of its own rules by changing its entire theory of disqualification only just before the final hearing. For the reasons set forth in Applicants' opening brief and discussed in further detail below, the Application for Review should be granted and the decision of the National Adjudicatory Council reversed.

ARGUMENT

I. The NAC Decision Misapplied FINRA Rules and Securities Laws

a. FINRA Fails to Find a Proper Basis for Classifying the Vermont Consent Order as a Statutory Disqualification

The Vermont Securities Division's Consent Order is not a statutory disqualification under the Exchange Act Section 15(b)(4)(H), 15 U.S.C. § 78o(b)(4)(H), because it legally constitutes nothing but a settlement agreement between Mr. Savva and the Vermont Securities Division. In that agreement, Mr. Savva did not admit to (nor deny) any violations of any Vermont laws or regulations which prohibit fraudulent conduct. He simply agreed to certain conditions in order to resolve a dispute and avoid the risks and expense of a protracted regulatory proceeding.

In its Brief in Opposition to the Application for Review (hereafter "Opposition Brief" or "Opp."), FINRA fails to provide any cases or statutes which expressly provide that a negotiated Consent Order constitutes a statutory disqualifying event. Instead, FINRA argues that the Vermont Consent Order constitutes a statutory disqualification because FINRA defined "final

order" in its Form U4 instructions.[1] Opp. at p. 17. Specifically, the Form U4 Explanation of Terms states:

> For purposes of Question 14D(2), [a final order] means a written directive or declaratory statement issued by an appropriate federal or state agency (as identified in Question 14D(2)) pursuant to applicable statutory authority and procedures, that constitutes a final disposition or action by that federal or state agency.

As a preliminary matter, the Form U4 definition is limited to only "the purposes of Question 14(D)(2)" and therefore, is not applicable to this matter. Moreover, the Form U4 definition of final order does not reference settlement agreements or consent orders such as the Vermont Consent Order. It fails to define a final order to include orders where the registered representative settled a regulatory matter and did not admit to violations of any laws or regulations.

FINRA also argues that the state of Vermont classified the Vermont Consent Order as final on the Form U6.[2] Opp. at p. 18. The Form U6 questioned whether the order "constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct." However, like the Form U4 definition referenced above, the Form U6 inquiry does not expressly provide for situations, like the instant matter, where the parties settled and agreed to language contained in a consent order. The Form U6 simply did not ask that question.

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[1] FINRA includes a hyperlink to its own website that appears to contain the "May – Version 2009.2" "Form U4 Explanation of Terms" which was apparently approved in the 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.) However, the SEC Order does not address consent agreements.

[2] Although the Form U6 was filed in October 2004, FINRA waited five years to bring its action.

Additionally, FINRA argues that classifying settlement agreements as non-statutory disqualifying events "[w]ould 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." Opp. at 18. In actuality, this classification does not even mildly impair the rights of regulators, such as Vermont, to seek actions against registered representatives. Regulators commence actions to enforce the laws of their own jurisdiction – not to secure collateral consequences. Indeed, FINRA's interpretation of consent agreements will make it virtually impossible for a registered representative to settle with a regulator because a settlement agreement, with even a single regulator, may ultimately lead to the devastating outcome of statutory disqualification in every jurisdiction. Thus, classifying settlement agreements as statutory disqualifying events will inevitably increase litigation, as registered representatives will be fearful of negotiating settlement agreements with regulators. In a great many cases, registered representatives will choose to litigate their defenses through a contested hearing than face statutory disqualification for settling with a single regulator.

Seemingly arguing in the alternative, FINRA suggests that the Vermont Consent Order can support Mr. Savva's statutory disqualification *even if* it is classified as a settlement agreement. Opp. at 36. FINRA also attempts to amplify the importance of the settlement agreement by claiming that the Vermont Order contained "no restrictions on future use." Opp. at 36. The absence of such language does not have any significance nor does it indicate that the issuance of the Vermont Consent Order constituted a disqualifying event; nothing in the

Vermont Consent Order suggests that Vermont was attempting to make any pronouncement whatsoever about the collateral effect of the settlement. FINRA's argument that it is entitled to "consider" settlements has no relevance here, where the Vermont Consent Order is the sole basis for the purported statutory disqualification of Mr. Savva.

Finally, FINRA asserts that the applicants should not be able raise this argument because it is supposedly "new on appeal." Opp. at p. 16. In fact, the applicants consistently argued during the proceedings below that the Vermont Consent Order was not a disqualifying order under Exchange Act Section 3(a)(39). See NAC Decision at p. 7. Moreover, it is ironic that FINRA would question the applicants' ability to raise this argument as FINRA itself: (a) waited five years to notice Mr. Savva of his purported disqualification, (b) waited an additional three years to complete the NAC review process, and (c) belatedly changed the grounds for disqualifying Mr. Savva shortly before the hearing.

The Vermont Consent Order was not a statutory disqualification. In terms of its preclusive effect, it was nothing but a settlement negotiated between Vermont and Mr. Savva. The NAC Decision erroneously classified the Vermont Consent Order as a "final order" and should be reversed.

b. FINRA Did Not Properly Notice the Applicants As Required by FINRA Rule 9522(a)

The NAC Decision erred in concluding that FINRA's Department of Member Regulation ("Member Regulation") properly provided notice to the applicants that the Vermont Consent

Order was considered a final order based upon laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct under the Exchange Act's Section 15(b)(4)(H)(ii). (See NAC Decision at p. 7) Instead, FINRA Member Regulation had initially informed the Applicants that Mr. Savva's ineligibility was based upon the Vermont Consent Order constituting a "final order barring Mr. Savva" under Exchange Act Section 15(b)(4)(H)(i).

In its Opposition Brief, FINRA argues that the "NAC was not bound by Member Regulation's characterization of the specific statutory basis why the Vermont Order was statutorily disqualifying." Opp. at p. 28.[3] However, Member Regulation and the NAC are bound by FINRA Rules. Specifically, FINRA Rule 9522(a) provides that if:

> FINRA staff has reason to believe that a disqualification exists or that a member or person associated with a member otherwise fails to meet the eligibility requirements of FINRA, FINRA staff shall issue a written notice to the member or applicant for membership under NASD Rule 1013. **The notice shall specify the grounds for such disqualification or ineligibility**. (Emphasis added)

In a review of an appeal, the SEC must consider whether FINRA's action was in accordance with its own rules. See In the Matter of the Application of Manuel P. Asenio, 2010 SEC LEXIS 2014, *29-30 (2010); Robert J. Prager, 58 S.E.C. 634, 662-63 (2005). In violation of its own rules, FINRA staff failed to specify the grounds for Mr. Savva's disqualification in the notice it provided him.

[3] FINRA cites to JJFN Servs.Inc., 53 S.E.C. 335, 342 (1997) to supports its assertion that Member Regulation's characterization of the statutory basis for disqualification is irrelevant. The facts of that case are distinguishable from this matter because the supposed statements made by NASD staff in JJFN did not contradict a rule requiring specific notice. Id. Rather, the statements involved a promise to approve an application. Id.

FINRA disingenuously argues that the applicants "had ample time to address and argue this legal issue" because the parties submitted briefs before the NAC. Opp. at 29. Nevertheless, the belated opportunity for the Applicants' to submit legal briefs – *two years* after the June 2009 notice of disqualification - does not vitiate FINRA's responsibility to adhere to its own Rule 9522(a) requiring that the formal notice of disqualification set forth the specific grounds for Mr. Savva's disqualification. Moreover, although the Hearing Panel in July 2011 requested that the parties brief the basis for Mr. Savva's disqualification, it never provided the parties with a ruling on this issue or even proffered any guidance as to whether it would consider FINRA's new basis for Mr. Savva's ineligibility. As a result, the applicants were prejudiced during the hearing as the Hearing Board failed to inform them of the actual basis for disqualification under consideration.

Accordingly, the applicants did not receive proper notice and FINRA's actions were not in accordance with its own rules.

c. FINRA Retroactively Imposed Upon Savva A New Definition of Statutory Disqualification

The NAC Decision erred in concluding that FINRA did not retroactively apply the definition of statutory disqualification. (See NAC Decision at pp. 9-11) FINRA argues that Mr. Savva was "disqualified under the Exchange Act upon entry of the Vermont Order in August 2004" because the Sarbanes-Oxley Act's more expansive definition of "statutory disqualification" was enacted earlier. Opp. at 25-26. However, FINRA fails to provide a rational explanation as to why it waited until June 2009 - an additional five years - to notify the Applicants that Mr. Savva was purportedly disqualified, if Sarbanes-Oxley were the only

relevant precondition. If FINRA believed Mr. Savva was disqualified in August 2004 when the Vermont Order was executed, it surely would not have delayed notification for five years. FINRA concedes that the entirely of a record determines whether a delay in bringing a proceeding is fair. Opp. at 32, citing Mark H. Love, 57 S.E.C. 315, 323-25 (2004).[4] A review of the record clearly indicates that FINRA retroactively imposed the new definition of statutory disqualification and unfairly delayed the proceeding.

FINRA also argues that the amendments to its by-laws and rules in 2007 and 2009 "concerned only procedural matters" and not any "substantive rights possessed by Mr. Savva" to justify retroactive application of Mr. Savva's statutory disqualification.[5] Opp. at 27. To the contrary, those amendments are not merely "procedural" as they required certain individuals to be subject to eligibility proceedings who were not subject to those proceedings before the amendments. The amendments to the by-laws and rules affected Mr. Savva's substantive rights to remain eligible in the securities industry and remain employed in his chosen profession.

II. The NAC Decision Omits Relevant Facts

a. FINRA Fails to Acknowledge NAC's Deficient Analysis Of Hunter Scott's Amended Supervisory Plan

The applicants amended supervisory plan provided that Charles Hughes, Hunter Scott's Chief Compliance Officer, would supervise Mr. Savva in the firm's Delray Beach office. Rather than addressing the merits of Mr. Hughes' supervisory ability, FINRA and the NAC rely entirely

[4] FINRA provides no rationale for its delay in prosecution of this matter. Instead, FINRA's simply defends its delay in the matter by distinguishing a disciplinary proceeding from this eligibility proceeding. Opp. at 31.

[5] FINRA cites to Landgraf v. US Films Products, 511 U.S. 244, 275 FINRA asserts that "[c]hanges in procedural rules may often be applied....without raising concerns about retroactivity." However, Landsgraf also states that "the mere fact that a new rule is procedural does not mean that it applies to every pending case." Id.

upon conclusory, dismissive statements. For example, FINRA argues that the designation of Hughes as supervisor "under an inherently flawed supervisory plan is of no moment." Opp. 41, fn 19.

In reviewing an appeal, the SEC must evaluate whether the specific grounds on which FINRA based its denial exist in fact. See In the Matter of the Application of Manuel P. Asenio, 2010 SEC LEXIS 2014, *29-30 (SEC 2010). In this case, the NAC Decision omitted relevant facts concerning Mr. Hughes' ability to supervise Mr. Savva.

Moreover, the NAC Decision and FINRA rely upon stale customer complaints in addressing the adequacy of the Hunter Scott supervisory plan. The NAC Decision omitted relevant facts related to the success of Hunter Scott's heightened supervision plans during the tumultuous market of the last four years. Since Mr. Savva did not have a single customer complaint during that tumultuous period, the success of Hunter Scott's recent heightened supervision efforts speaks for itself.

b. FINRA Does Not Provide Any Legitimate Basis for the Admission of a Transcript Into Evidence After the Close of the Evidentiary Hearing

FINRA incorrectly argues that the NAC properly admitted a post hearing exhibit. Opp. at 29-30. FINRA asserts that the NAC properly admitted the transcript of a 2003 interview conducted by Vermont because the evidence was "solely" admitted "for the purpose of considering Savva's differing explanations of the events surrounding the Vermont Order." Opp. at p. 30. Although the NAC claims that the transcript was only admitted for a limited purpose, the proverbial "cat was out of the bag" and Mr. Savva did not have an opportunity to

appropriately address the testimony contained within the transcript. FINRA asserts that the NAC provided the applicants with opportunities to respond to the motion to introduce the transcript. However, the applicants' motion papers do not replace Mr. Savva's right to address any issues pertaining to the transcript in the form of testimony.

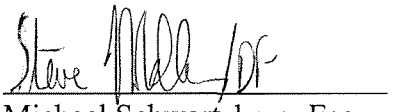
FINRA fails to justify the improper and unfair acceptance of a transcript of prior testimony that was introduced and accepted for the first time after the close of the evidentiary hearing.

CONCLUSION

For the foregoing reasons, the applicants respectfully request that the SEC grant their Application for Review.

Dated: New York, New York
January 23, 2013

WINGET, SPADAFORA &
SCHWARTZBERG, LLP

By: 

Michael Schwartzberg, Esq.
Steven E. Mellen, Esq.
45 Broadway, 19th Floor
New York, New York 10006
(212) 221-6900

Attorneys for Hunter Scott Financial, LLC and Nicholas Savva