UNITED STATES OF AMERICA

Before the
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of the Application of

MEYERS ASSOCIATES, L.P.

(n/k/a WINDSOR STREET CAPITAL L.P.)

and BRUCE MEYERS

For Review of Disciplinary Action Taken by

FINRA

Admin. Proc. File No. 3-18359

OPENING BRIEF IN SUPPORT OF APPLICATION FOR REVIEW ON BEHALF OF MEYERS ASSOCIATES, L.P., (n/k/a WINDSOR STREET CAPITAL L.P.) and BRUCE MEYERS

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PRELIMINARY STATEMENT

Applicants MEYERS ASSOCIATES, L.P., (n/k/a WINDSOR STREET CAPITAL L.P.) (the "Firm") and BRUCE MEYERS ("BMeyers") (collectively "Applicants"), pursuant to Rule 450 of the Commission's Rules of Practice, respectfully submit this Opening Brief In Support of Application For Review of a disciplinary action taken against them by the Financial Industry Regulatory Authority's ("FINRA") National Adjudicatory Council ("NAC") on January 4, 2018 (the "NAC Decision") for consideration by the Commission.

Familiarity with the record[1] is assumed. All prior submissions are incorporated by reference into this Application.

PROCEDURAL BACKGROUND

Applicants previously summarized the relevant procedural history in their "Notice of Appeal / Application for Review" dated January 26, 2018, but recapitulate here for convenience.

FINRA's Department of Enforcement ("DOE") alleged nine causes of action in a disciplinary proceeding commenced October 6, 2014, pursuant to various FINRA rules and SEC provisions, for allegedly marketing unregistered securities in violation of Section 5 of the Securities Act of 1933 (The "1933 Act"). The DOE also alleged, largely as fruit of the supposed Section 5 violation tree, ancillary claims for record keeping rule violations, falsified tax returns, inadequate supervisory controls and complaint-reporting rule violations.

A six day hearing ended October 27, 2016. The Extended Hearing Panel (the "EH Panel") correctly dismissed (i) the Section 5 and (ii) the falsified tax returns allegations, as unproven, but incorrectly found liability on six lesser "ancillary" causes of action, and assessed $700,000.00 (seven hundred thousand dollars) against the Firm and $75,000.00 (seventy-five

[1] The Record for the underlying FINRA Complaint No. 2010020954501 was certified to the Commission by FINRA under cover of a transmittal letter dated February 20, 2018.

thousand dollars) against BMeyers. This assessment made no sense inasmuch (i) as the DOE had requested a total of $750,000.00 on *nine* causes of action (ii) it had withdrawn one of those prior to hearing (iii) the two primary causes of action were dismissed and (iv) all the causes of action were dismissed against another principal of the Firm, who accordingly, is not part of this appeal.

The Firm timely appealed the EH Panel's decision, on May 23, 2016, to the NAC.

In the NAC's January 4, 2018 Decision, it improperly or incorrectly (a) discounted or ignored exculpatory evidence, (b) discounted or ignored explanatory testimony which plausibly demonstrated no violations of any kind, and (c) decided that the Firm:

(i) emailed "unbalanced" and misleading communications to "the public", violating NASD Rule 2210 and FINRA Rule 2010;

(ii) kept "inaccurate" books and records, violating the 1934 Exchange Act Section 17 and its Rules 17a-3, 17a-4 and 17a-5, NASD Rule 3110 and FINRA Rules 4511 and 2010; ,

(iii) failed to "reasonably" supervise preparation of its books and records, violating NASD Rule 3010 and FINRA Rule 2010;

(iv) failed to "reasonably" supervise its electronic correspondence, violating NASD Rules 3010 and 2110 and FINRA Rule 2010; and

(v) failed to timely report customer complaints, violating NASD Rules 3070 and 2110, and FINRA Rule 2010; failed to "maintain" an "adequate" system of supervisory controls, violating NASD Rule 3012 and FINRA Rule 2010;

The foregoing decisions were made despite the fact that (i) communications were simply not misleading, (ii) the evidence contradicting the decision was clear (iii) properly prepared books were demonstrated (iv) no violative emails were sent, and (v) the odd delay was immaterial and no customer was harmed by virtue of any delay, and even though a hierarchical supervisory structure was in place.

LEGAL DISCUSSION

I. DOE FAILED TO PROVE A VIOLATION OF SECTION 5 OF THE SECURITIES ACT AND ACCORDINGLY THE ANCILLARY CLAIMS ALSO SHOULD HAVE BEEN REJECTED

DOE failed to meet its requisite burden to prove a *prima facie* case for a violation of Section 5(c) of the Securities Act of 1933,[2] (the "Act") in connection with an offering of Series A Preferred Shares of SignPath Pharma, Inc. (SignPath). It needed to show "(1) lack of a registration statement as to the subject securities; (2) the offer or sale of the securities; and (3) the ***use of interstate transportation or communication and the mails*** in connection with the offer or sale"[3] [emphasis provided] of a security. DOE similarly failed to meet its falsified tax returns allegations.

In other words, DOE failed to prove its two primary claims, which in turn were logically predicated on proving the ancillary claims. But it pressed its specious ancillary claims, by looking not to their *bona fides* (there were none) but rather to the claimed *mala fides* of the Applicants (i.e., prior unrelated disciplinary history). In fact, DOE, without shame, stated in its post-hearing brief that it had proven its case based on "the considerable disciplinary histories of Myers and his firm".[4] For this alone the Decision should be overturned as improperly influenced by *ad hominem* and other assertions disconnected to evidence of the alleged failings.

It is inescapable that had DOE been able to *properly* prove its ancillary claims, the Section 5 claim would have been sustained, because, in large part, the ancillary claims were functionally the elements necessary to prove the Section 5 claims. Nevertheless, the NAC "bought" the *ad hominem* attacks and abandoned the veneer of pretense of being a fair finder of

[2] 15 U.S.C. § 77e(c).
[3] *SEC v. Cavanagh*, 445 F.3d 105, 111 n.13 (2d Cir. N.Y. 2006) (quoting *Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 124 n.4 (2d Cir. 1998) (internal quotation marks omitted)).
[4] DOE post-hearing brief at 1.

fact, and thus gratuitously gifted not only a confirmation to DOE, but ratchetted up the monetary sanction previously assessed by the EH Panel as an apparent penalty, not for any wrongdoing, but for having the temerity to appeal an erroneous decision.

II. APPLICANTS DID NOT VIOLATE FORMER NASD RULE 2210 AS TO THE CONTENT STANDARDS THAT APPLY TO THE PUBLIC COMMUNICATIONS OF FINRA MEMBERS

The finding of the email violation pursuant to Former NASD Rule 2210(d)(1)(A)[5] is a perfect example of an unwarranted ruling. First, as detailed *infra*, not one person / entity who received an actual prospectus for the SignPath offering ever received an email. No evidence to the contrary exists. And, expressed as a corollary, but expressed anyway for the elimination of doubt, no person /entity that received an email ever received a prospectus. Thus the spurious finding that the emails were "selling" the investment or "misleading" is devoid not only of evidentiary support but of any connection to reality.

The DOE failed to present evidence that tied the Firm's 1,037 emails to SignPath's offering[6]. And so the DOE did what parties lacking evidence have done since time immemorial – it simply baldly asserted those emails were inextricably tied to the Section 5 allegations.[7] Treating an assertion as evidence of the thing asserted is classic reversible error.

Moreover, considering the sophistication of the persons / entities who did receive emails, not one was misled or suffered any economic harm or even could be deemed to have been "defrauded".

DOE complained about what it considered "exaggerated" claims, but the supposed hyperbole alluded to by the DOE, even if it had been sales hyperbole, has routinely been held to

[5] NASD Rule 2210(d)(1) (Feb 5, 2009 – Feb 3, 2013).
[6] Transcript of Record at 726, Dep't of Enforcement v. Meyers, FINRA Disciplinary Proceeding No. 2010020954501 (Oct. 6, 2014) [hereinafter Tr.].
[7] Complaint at ¶ 23-31; Department of Enforcement's Prehearing Brief at 11-15.

be not actionable under the anti-fraud provisions of the federal securities laws. Importantly, the emails were not sales pitches. But, even if Applicants had been attempting to sell the offering via email (and they were not), mere sales hyperbole (or, in this case, notification hyperbole) is simply not actionable under the federal securities laws. The applicable jurisprudence runs wide and deep, universally concluding that (i) the law does not reward naiveté (not relevant here) and (ii) comments boasting of profits or even simple guarantees of success do not violate the federal securities laws[8] (directly relevant here). And while Applicants understand that this is not a "customer complaint" situation, the same principles apply, particularly since not one email recipient requested a prospectus. Not one.

In other words even though no one outside the DOE mistook the emails for anything other than the notification hyperbole that they were, the NAC went out its way to give its imprimatur to the DOE's mischaracterizations. This despite the DOE's failure to demonstrate that even one person / entity who received an email was somehow unable to distinguish a notification "feeler" from an unequivocal representation on which they could legally rely.

In *Bateman Eichler*[9], the SEC established a two-prong test that would render "solicitations" non-violative. First, the solicitation must be generic in nature and not reference any specific investment currently offered or contemplated for offering. Second, the sender must implement procedures designed to insure that persons solicited were not offered any securities

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[8] *See, e.g., DeBlasio v. Merrill Lynch & Co., Inc.*, 07 Civ. 318 (RJS)(S.D.N.Y. 2009); *Zack v. Allied Waste Indus., Inc.*, No. CIV 04-1640 PHXMHM, 2005 WL 3501414, at *9 (D. Ariz. Dec. 15, 2005) *aff'd*, 275 F. App'x 722 (9th Cir. 2008); *Bischoff v. G.K. Scott & Co.*, 687 F. Supp. 746 (E.D.N.Y. 1988); *Newman v. L.F. Rothschild*, 651 F.Supp. 160, 163 (S.D.N.Y.1986); *Metzner v. DH Blair & Co.*, 689 F. Supp. 262 (S.D.N.Y. 1988) *; McCoy v. Goldberg*, 748 F. Supp. 148 (S.D.N.Y. 1990) *Frota v. Prudential-Bache Securities, Inc.*, 639 F. Supp. 1186, 1190 (S.D.N.Y 1986); *Rotstein v. Reynolds & Co., Inc.*, 359 F. Supp. 109, 113 (N.D. Ill. 1973); *Bowman v. Hartig*, 334 F. Supp. 1323, 1328 (S.D.N.Y. 1971).

[9] Bateman Eichler, Hill Richards, Inc., SEC No Action Letter, 1985 WL 55679 (Dec. 3, 1985).

that were offered or contemplated for offering at the time of the solicitation.[10]

Here, the emails at issue, including those stating that SignPath was "seeking investors" or "seeking capital," were generic. Not one referenced the private offering of SignPath's Preferred Shares.[11] Not one referenced any other security or class of security.[12] Not one suggested any particular type or category of investment that might interest the recipient.[13] As such, all of the emails satisfied the first prong of the SEC's *Bateman Eichler* test.

As to the second prong, the Firm implemented "Chinese Wall" procedures to insure separation of the emails and the private placement.[14] The Firm kept a log of the persons who received offers of the Preferred Shares; offering documents were numbered; and the log shows the recipient, date sent, state of residence of the recipient, and delivery method for each.[15] The Firm also kept a list of the people to whom BMeyers sent the emails.[16] The only way a potential investor could obtain offering documents for the Preferred Shares was through the Firm. The Firm did not permit any recipient of the emails to receive the offering documents. The Firm did not send emails to those who had received offering documents.[17] The Firm's "Chinese Wall" worked. So not only did the Applicants implement procedures, they implemented *successful* procedures. No one who received offer information on the Preferred Shares was sent an email[18] and none of the email recipients were offered or sold SignPath Preferred Shares.[19] In that way, the Applicants not only satisfied the first prong of the SEC's *Bateman Eichler* test, they satisfied

[10] *Bateman Eichler, supra* n. 15, at 1.
[11] CX-42.
[12] *Id.*
[13] *Id.*
[14] Tr. 510:16-24; 511:3-21; 1697:13-18.
[15] CX-40 (SignPath PPM Log for Private Offering of Series A Convertible Preferred Stock).
[16] Tr. 511:5-21.
[17] Tr. 511:5-21; 586-587.
[18] Tr. 510:22-24
[19] Tr. 510:16-21; 1633:17-1634:3. CX-40; CX-42. Over three years later, two email recipients with preexisting brokerage accounts at the Firm received private placement documents *for a new offering* of SignPath Preferred Shares not contemplated in 2011. (Tr. 1626:6 – 1635:3; RX 5 at 6. *Cf.* CX-42 at 51, 161.)

the second prong as well.

Having satisfied both prongs of the SEC's *Bateman Eichler* test, there was no rational basis for the NAC to uphold the email violation findings.

The NAC Decision expressly acknowledges that the emails "referred to SignPath as a 'development phase' company" and "discussed its various formulations of curcumin".[20] The NAC Decision ignores that SignPath maintains a web site -http://signpathpharma.com, where it describes itself as a "clinical stage company" with detailed information about its curcumin formulations - http://signpathpharma.com/portfolio/liposomal-curcumin-for-treatment-of-cancer. In other words, the emails echoed the public statements made by SignPath. The NAC Decision entirely ignores current reality – people "google" information.

In addition, DOE failed to show that the statements in the notification emails were false, exaggerated, misleading, or omitted necessary information under Rule 2210(d)(1). A DOE witness agreed, after examining an example, that no sentence of the email was problematic on its own.[21] He nevertheless opined that the email as a whole was problematic, because of its "overall positive tone" and inclusion of a "lot of forward looking future events."[22] This amounted to testimony that every statement was true, but by adding true statements together, the communication was magically converted into a lie. Applicants understand that the law is not always logical, but testimony must be logically construed, and it was not here. The NAC sustaining a claim that Applicants made "false, exaggerated, unwarranted or misleading" statements under Rule 2210(d)(1)(B) is unsupported by reality or the evidence placed before it.

Finally, the DOE failed to present any evidence that anyone was misled. The phrase "development stage pharmaceutical company" – fully consistent with SignPath's own

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[20] NAC Decision at 5.
[21] Tr. 878-889.
[22] Tr. 852.

description as a "clinical stage company" is a straightforward representation that the company has no current revenue stream and requires funds for future progress. Grandma does not invest in development stage companies – only sophisticated investors do. And so if any email triggered interest, a potential investor, would likely start at the company's web site, and if seriously interested, would engage in more meaningful due diligence.

III. APPLICANTS' FINANCIAL RECORDKEEPING PRACTICES DID NOT VIOLATE SEC, NASD, OR FINRA RULES

The DOE failed to prove its "fifth cause of action" - that Applicants falsified or caused to be falsified, federal income tax returns. Despite the correct dismissal of that claim, the NAC nevertheless upheld the "fourth cause of action", that Applicants failed to maintain accurate books and records. But there was no inaccuracy at all, and indeed the accounting dispute had absolutely no effect on the Firm's tax reporting, FOCUS report or interaction with the public in any way.

Nevertheless, The NAC ruled that the Firm "inaccurately" recorded expenses as "business expenses", which expenses it was contractually bound to reimburse to two individuals, because the included some "personal" expenses. In other words, the NAC ruled that what was at most an inconsequential accounting mistake was somehow an intentional violation of FINRA Rule 2010 and the related SEC rules as they pertain to recordkeeping.

BMeyers and another were each entitled, pursuant to lawful contract, to have certain items expensed by the Firm. Whether thought of as a contractual obligation or a fringe benefit, pursuant to GAAP and corresponding IRS rules, businesses' contractual financial obligations are business expenses[23]. What was at most, a line item misclassification of an immaterial sum simply did not render the Firm's financial statements or its books and records inaccurate.

[23] See, e.g. 26 U.S.C. §162(a).

Section 17(a)(1) of the Exchange Act[24] makes clear that record are to be maintained "as necessary or appropriate in the public interest, for the protection of investors..."

In fact, SEC Rule 17a-4(b)(3)[25] expressly requires, as a records to be preserved: "All bills receivable or payable (or copies thereof), paid or unpaid, relating to the business of such member, broker or dealer, as such." The Firm's contractual obligations to BMeyers and another definitionally relate to its business. Thus, even if the entry were made in the wrong place, the accuracy of its information was not affected and it was in fact required. In other words, had the Firm NOT made the entry, it would have been in violation. Providing the required information was compliance. NAC is punishing Applicants for negligently putting a penny in the wrong jar.

BMeyers and another had lawful employment contracts with the Firm. The contracts provided for non-accountable expense allowances.[26] So for example, they were contractually entitled to charge both personal and business expenses to a corporate American Express credit card (the "AmEx"), for which the Firm would make payments on each of their behalves, up to a specified monthly limit.[27] Non-accountable plans are legal and proper. It did not violate any SEC or FINRA rule.[28] Nothing was concealed. The wrong jar into which the penny was placed was transparent.

The Firm's CFO entered those expenses on the general ledger.[29] BMeyers made no entries on the general ledger, nor caused any entries to be made.[30] No contrary evidence was adduced. If there was error on the part of the CFO in classifying the expenses, the error was on

[24] 15 U.S.C. §78q(a)(1).
[25] 17 CFR 240.17a-4(b)(3).
[26] JX-4; JX-9.
[27] JX-4; JX-9.
[28] Tr. 163:2-15.
[29] Tr. 645:18-21; 1372:13 – 1373:4; 1425:3-7; 533:4-9.
[30] Tr. 645:22 – 646:6; 1372:13 – 1373:4; 1579:2 – 1580:4; 533:10-14.

the side of inclusion – full disclosure – not exclusion or concealment. It was thus not a material error and there exists no metric in the record by which this rises to the level of a material inaccuracy (or even any kind of inaccuracy). There is no indication anywhere about how it created a threat to the "protection of investors" or otherwise violated Section 17(a) of the Exchange Act or the rules promulgated under it.

Moreover, the data entry by the Firm's CFO was subject to review by the Firm's outside auditors, a PCAOB-accredited accounting firm, WeiserMazars LLP ("WeiserMazars").[31] WeiserMazars issued two clean opinion letters for fiscal years 2011[32] and 2012[33]—which, according to the testimony of Lorenzo Prestigiacomo still stand[34]—in addition to a letter to the Firm in 2014 specifically confirming that WeiserMazars:

> "had reviewed the Firm's general ledger and particularly the Firm's accounting for the payment of expenses on behalf of its executive officers, Bruce Meyers and Imtiaz Khan. Additionally, the auditing staff had been provided with copies of the employment agreements for both Bruce Meyers and Imtiaz Khan, and was familiar with the provision in each agreement regarding the payment of employee-related business and personal expense allowance."[35]

The amounts paid for personal expenses in 2011 and 2012 were *de minimis*. In 2011, the Firm paid $37,635.00 or 0.56% of the Firm's gross revenue for the year.[36] In 2012, the Firm paid $25,107.00 or 0.21% of the Firm's gross revenue for the year.[37] DOE's own witness admitted that these percentages did not appear to be material.[38] The so-called "inaccuracy" was not an inaccuracy at all – it was a misclassification of an expense category - the total expense and

[31] Tr. 1389:9-19.
[32] JX-19.
[33] JX-20.
[34] Tr. 1129:15-20.
[35] RX-19.
[36] RX-21.
[37] RX-22.
[38] Tr. 208:10-18.

income amounts were unaffected; they remained accurately calculated. The "bottom line" amounts were unaffected.[39] There was no effect on the Firm's net capital computation.[40]

The two employees in question, including BMeyers, upon learning of the tax issues related to the way the CFO had recorded the expenses, took corrective action with the IRS to include the contractual benefit in their taxable income. After taking corrective action, BMeyers had zero change to his tax liability[41] and the other individual was shy $700 (seven hundred dollars) for 2011 and $1,100.00 for 2012.[42]

The NAC, in its studious disregard of reality, relied on a case where a member firm failed to accrue a liability – *DOE v. Wood Co.* – asserted that even though the payments were fully recorded, they somehow were not.[43] The NAC Decision is so divorced from reality and evidence, that it is difficult to fathom. In fact the NAC Decision says only the expenses were "incorrectly reported", not that they were inaccurately reported. It misses the standard entirely, and therefore must be reversed.

IV. PRINCIPLES OF FUNDAMENTAL FAIRNESS REQUIRE REVERSAL OF THE REMAINING BOOTSTRAPPED FINDINGS ON THE ANCILLARY CLAIMS

Neither The Firm nor BMeyers failed to supervise the Firm's business. The NAC Decision's conclusion to the contrary is based largely on its illogical decision on the financial reporting issue. In other words, it's a sham, bootstrapped conclusion, reached to justify the unjustifiable penalties assessed, as discussed below.

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[39] Tr. 181:23 – 182:2; 1136:6-25; 1138:2 – 1139:6.
[40] Tr. 183:3-12.
[41] Tr. 557:22 – 558:2; 558:17-21.
[42] Tr. 1578:16-21.
[43] NAC Decision at 8.

The conclusion that the Applicants failed to supervise the Firm's books and records[44] discounts the material facts that (i) the books and records were maintained by a CFO and (ii) the CFO's entries were reviewed regularly by a firm of certified public accountants. The conclusion is not only a transparent bootstrap but is dead wrong because it ignores salient facts. At bottom, it relies on circular reasoning to reach a pre-ordained conclusion unsupported by any evidence.

The NAC Decision specifically cites to *Wedbush Sec.*[45], in which that firm *knowingly* made inaccurate regulatory filings. But here there was not only no intentional act, but there was no inaccuracy at all. Accurate numbers were placed in arguably erroneous places by a CFO and approved by an outside accounting firm. Holding Applicants liable in the peculiar circumstances here is tantamount to imposing a requirement that brokerage firm principals have accounting degrees and double check the work of their outside accountants. The NAC Decision fails to discuss how Applicants were not justified in relying on personnel hired to assure correct accounting practices were followed.

With regard to the review of electronic correspondence, the alleged unreported complaints were not due to the absence of a supervisory system. In fact, Applicants, in the consistent effort to upgrade and tighten an already existing, proper supervisory systems, were able to successfully uncover the 49 alleged unreported customer complaints as listed in CX-139, and report each one on the 4530 system as of December 24, 2015, some two years before the NAC Decision.

It was thus obvious to the NAC that the Applicants had been engaged for years in effort to upgrade and improve the Firm's supervisory system. This conduct is the converse of failing to

[44] NAC Decision at 9.
[45] NAC Decision at 9.

supervise; it reflects diligent supervision. But the NAC's obsession with "prior disciplinary" history led it to render the NAC Decision being appealed from.

Notwithstanding the foregoing, the Applicants are aware that there were gaps in timing, largely due to certain unfortunate circumstances affecting the Firm in 2009 and 2010. These included the death of the Firm's compliance consultant; two eye surgeries for the CFO (who also took on the compliance consultant's duties), a fire at the Firm's office, which had snowballing effects such as a physical office move, destruction of necessary equipment (not to mention papers, including exculpatory evidence), and employee illnesses from smoke inhalation and so on. FINRA began its 2010 cycle exam a few days after the fire; it was chaos.[46] Applicants offer this context not as an excuse, but rather as an explanation.

In all events, the NAC Decision failed to consider that the Firm had previously entered into an AWC with FINRA to address certain of the underlying issues here (i.e., customer complaint filing and electronic correspondence review) thus settling them. By ignoring this material reality, the NAC Decision operated as a "pile on" (because it was expressly premised in part on Applicants' prior disciplinary history, which includes the settled claims that were reasserted here). And it is respectfully submitted that charging Applicants again for *settled* conduct is quintessentially unfair.

And that is not the only unfair component. FINRA waited over four years to bring formal charges on the issues at bar, when the SEC Rule requiring the retention of customer complaints, 17a-3(a)(18), only requires that the Firm maintain such records for a period of three years, with the first two years in an easily accessible place.[47] Apparently FINRA's case was so weak that it needed to play games designed to hobble Applicants' ability to fully paper their

[46] Tr. 1660:9-20.
[47] *See* SEC Rule 17a-4(b)(1).

defenses. And for current perspective, the subject emails span March 6, 2007 (more than eleven years ago) through July 13, 2010 (almost eight years ago). FINRA's lengthy delay eliminated two key witnesses, one of whom has died and another retired, of advanced age, with progressive medical conditions that prevented him from testifying.

V. APPLICANTS' DISCIPLINARY HISTORIES WERE NOT FACTUALLY RELEVANT

Applicants understand that their prior disciplinary histories may be taken into account when considering an appropriate sanction for actual subsequent violative conduct. But it may not be taken into account as evidence to assess whether separately charged violative conduct ever occurred, as the NAC Decision did here. The problem is multiplied by the bootstrapping effect – NAC considered previously settled violative conduct as newly charged and not only imposed an exaggerated unwarranted sanction, but increased the sanctions imposed by the EH Panel in the NAC Decision appealed from.

VI. SANCTIONS

There is no underlying logic to the manner in which NAC redistributed the fines, (a) *quadrupling* the fine against the Firm for advertising violations (which were not in fact violations as detailed above) and (b) *doubling* the fine for the advertising "issue" against BMeyers to $50,000.00. Essentially, NAC "rejiggered" the fines against the Firm, maintaining a $700,000.00 aggregate fine, going so far as to lump $500,000.00 together as a "unitary sanction" in order to mask an egregious upward departure from the guidelines. NAC Decision at 17.

The NAC failed to provide any logical explanation beyond what amounted to "we feel like it" for aggregating the remaining (and duplicative) fines as a "unitary sanction" against the Firm, resulting in a fine that exceeded the guidelines. This "Torquemada-esque" ruling cannot stand. We use that invented phrase pointedly, because the intent appears to be to torture the

Applicants. And we say that in light of the fact that the DOE itself, in assessing the appropriate sanction for *nine causes of action* concluded in *its* inflated calculus that $750,000.00 – already a significant upward departure from the guidelines – was appropriate. That would place a value of only $50,000.00 on the aggregate of three causes of action:

- Offering to sell securities in violation of Section 5 of the Act;
- Failure to timely file a private placement memorandum, in violation of FINRA Rules 5122 and 2010; and
- Falsifying federal income tax returns in violation of FINRA Rule 2010.

It defies logic and any sense of equity or fundamental fairness to conclude that serious violations of law (falsifying tax returns is a felony) and industry regulation expressed in one-third of the claims asserted only merits one-fifteenth of the aggregate sanction sought, and that the lesser remnant claims, constituting two-third of the number of claims asserted, is worth 14/15ths (93%) of the total sanctions sought.

And it bears repeating that the two most serious allegations – sale of unregistered securities and falsified tax returns – failed. The aggregate of the ancillary claims, particularly the email claim and the books and records expensing claim, were largely make weight assertions to taint Applicants in the hope it would help sell the failed claims. In this light, the NAC upward departure is easily seen as retaliatory.

Should the Commission determine that any sanctions are appropriate, it ought to abide by FINRA's General Principles Applicable to All Sanction Determinations.[48] General Principle No. 1 provides that: "Disciplinary sanctions should be designed to protect the investing public by deterring misconduct and upholding high standards of business conduct."[49] In this proceeding,

[48] SANCTION GUIDELINES, 2 (2015), *available at* https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf.
[49] *Id.*

with the possible exception of the SignPath emails, none of the charges involved or affected the investing public, but rather related to the internal operations of the Firm's business and record keeping. There were no "ill-gotten gains" by the Applicants in connection with any of these allegations, and none of the alleged violations had "widespread impact" on the investing public, on the markets, or on the Firm's ability to comply with its obligations under the federal securities laws or FINRA Rules.[50]

Additionally and most importantly, "Adjudicators should consider a firm's size with a view toward ensuring that ***the sanctions imposed are remedial*** and designed to deter future misconduct, but ***are not punitive***."[51] The staggering amount of money that NAC has imposed against the Firm– in the aggregate $700,000.00 (seven hundred thousand dollars) is transparently designed to close the Firm; it is wildly excessive and *prima facie* punitive.

Not one customer lost a dime.

Despite this, NAC has elevated the ancillary claims into a metaphoric capital offense and summarily imposed the death penalty – barring BMeyers after a thirty year career and fining the Firm out of existence.

FINRA Sanction Guidelines instruct adjudicators to impose sanctions tailored to address the misconduct in each individual case.[52]

With regard to the alleged recordkeeping violations, as stated in the Sanction Guidelines, the NAC should have considered the actual nature and materiality of inaccurate information.[53] As detailed above, there were no intentional violations, and if there were any violations at all, they were immaterial and *de minimis* and resulted from Applicants' reasonable reliance on the

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[50] *Id.*
[51] *Id.* (emphasis added).
[52] *Id.* at 3.
[53] *Id.* at 29.

Firm's internal CFO and its outside acountants, WeiserMazars. According to the Sanction Guidelines, the penalties imposed by the EH Panel should have been reduced, not increased by NAC.

In every instance of cited wrongdoing, there were documented mitigating factors, resolutely ignored by NAC. There was not even a pretense of impartiality. The evidence adduced throughout this long journey has clearly shown that Applicants were struggling to right a ship badly damaged by the perfect storm of events in 2010, detailed above. A fair application of the governing standards would have led any impartial Panel to reduce the fines not raise them.

CONCLUSION

In light of the foregoing, and in consideration of the documentary evidence and witness testimony that was presented on behalf of the Applicants, the Applicants request that the Commission reverse the NAC, restore BMeyers to registration, and evaluate an appropriate, not a wildly punitive, set of monetary sanctions reflecting the foregoing.

Dated: Brooklyn, New York
April 11, 2018

Respectfully submitted,

BY: ______________________

Lawrence R. Gelber
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AFFIRMATION AND CERTIFICATE OF SERVICE

STATE OF NEW YORK)
)ss.:
COUNTY OF KINGS)

I, Lawrence R. Gelber, an attorney duly admitted to practice in the courts of the State of New York, do hereby certify and affirm, pursuant to 28 U.S.C. §1748, that I served a copy of the foregoing OPENING BRIEF IN SUPPORT OF APPLICATION FOR REVIEW ON BEHALF OF MEYERS ASSOCIATES, L.P., (n/k/a WINDSOR STREET CAPITAL L.P.) and BRUCE MEYERS via facsimile and overnight courier to:

Facsimile: (202) 772-9324
The Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549-1090

Facsimile: (202) 728-8264
Gary Darnelle, Esq.
Office of General Counsel
Financial Industry Regulatory Authority
1735 K Street, N.W.
Washington, D.C. 20006

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Brooklyn, New York
April 11, 2018

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