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BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

The Association of Robert J. Escobio
With Southern Trust Securities, Inc.

For Review of Denial of Registration by

FINRA

File No. 3-18143

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

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I. INTRODUCTION

Robert J. Escobio engaged in a large-scale, fraudulent commodities scheme that injured at least 100 customers. In connection with this fraudulent scheme, in August 2016 a federal district court permanently enjoined Escobio from directly or indirectly engaging in activities governed by the Commodity Exchange Act and from applying for registration or engaging in any activity requiring registration under that statute. The court also ordered that Escobio and several entities he controlled pay fines and restitution to customers totaling approximately $2.5 million for their "egregious, systematic, and calculated" fraudulent misconduct. As a result of his misconduct, Escobio became statutorily disqualified by operation of the Securities Exchange Act of 1934 ("Exchange Act") and FINRA's By-Laws.

Southern Trust Securities, Inc. (the "Firm"), the broker-dealer that Escobio founded, subsequently filed with FINRA a Membership Continuance Application (the "Application")

seeking permission for Escobio to continue to associate with the Firm notwithstanding his statutory disqualification. The Firm proposed that Escobio's spouse of 28 years, Susan Escobio, would supervise Escobio. The Firm did so despite her candid admission that she did not supervise Escobio at the Firm previously "to avoid a conflict of interest," and neither Susan Escobio nor the Firm could show that the Firm had addressed this conflict. Equally troubling, the Firm proposed Susan Escobio as Escobio's primary supervisor despite her general lack of direct supervisory experience. Likewise, Escobio's proposed alternate supervisor, Frank Trombatore, testified that he had almost no direct supervisory experience. To make matters worse, the Firm proposed that he would supervise Escobio from a remote location.

After an evidentiary hearing, FINRA's National Adjudicatory Council ("NAC") denied the Application. The NAC found that the Firm had failed in myriad ways to demonstrate that it could stringently supervise Escobio as a statutorily disqualified individual. Specifically, the NAC found—based upon Susan Escobio's testimony and the Firm's own statements—that Susan Escobio did not possess the direct supervisory experience necessary to supervise a statutorily disqualified individual such as Escobio, and lacked the necessary independence to supervise Escobio free from conflicts. It also found that Escobio's proposed backup supervisor lacked the necessary supervisory experience, and found troubling that he would supervise Escobio from a remote location. Further, the NAC concluded that the Firm's proposed heightened supervisory plan was inadequate in at least four different respects and found that, among other things, "the provisions designed to prevent future fraudulent activities by Escobio are lacking."

Moreover, the NAC held that the recency and seriousness of Escobio's disqualifying event supported denying the Application. The NAC found that Escobio's misconduct was "extremely serious" and involved an "egregious, systematic, and calculated" multi-year

fraudulent commodities scheme that substantially injured numerous customers. Underscoring the seriousness of Escobio's misconduct, the court imposed a permanent injunction against him to protect the public from the continuing threat that he posed. The NAC found that "far too little time has passed since entry of the [j]udgment for Escobio and the Firm to demonstrate that he is currently able to comply with securities laws and regulations and to refrain from engaging in fraudulent practices." Based upon all of the foregoing factors, the NAC found that Escobio's continued association with the Firm would present an unreasonable risk of harm to the market or investors. Consequently, the NAC denied the Application.

The NAC based its denial on abundant evidence and followed well-established Commission precedent in doing so. The Commission should reject Escobio's attempts to convince it otherwise. For example, Escobio spends a significant portion of his opening brief re-litigating his federal fraud case and arguing that the court erred in finding that he engaged in highly serious misconduct (which he also did before FINRA). Neither FINRA nor the Commission, however, is the proper forum for these arguments, and the Commission should disregard Escobio's improper attempts to challenge his fraudulent misconduct here.

Similarly, the Commission should reject Escobio's argument that FINRA acted prematurely in denying the Application because Escobio has appealed the disqualifying judgment to a court of appeals. The express language of the Exchange Act governing Escobio's disqualification directly undercuts this argument, as does the Commission's own case law rejecting identical arguments under similar circumstances. These authorities make abundantly clear that FINRA appropriately denied the Application notwithstanding Escobio's appeal of the underlying disqualification, and Escobio has presented no legitimate reason to make an exception here.

Escobio also erroneously and repeatedly argues that FINRA's decision to deny the Application is a "sanction," is "punitive," and should be reversed based upon case law addressing Commission or FINRA imposed sanctions. The Commission, however, has repeatedly held that FINRA's denial of a statutory disqualification application is not akin to a sanction and is not reviewable as such. The Commission should reject Escobio's misguided attempts to deviate from this well-settled precedent.

Finally, Escobio disputes the NAC's findings that Susan Escobio lacks the direct supervisory experience and objectivity necessary to stringently supervise a statutorily disqualified individual such as Escobio. The record, however, amply supports these findings. Escobio's recitation of Susan Escobio's *compliance* experience in the industry does not alter the NAC's conclusion that she simply does not have sufficient direct supervisory experience to stringently supervise an industry veteran—and large producer at the Firm—such as Escobio. Likewise, and notwithstanding Escobio's attempt to portray as improperly motivated the NAC's findings that Susan Escobio lacked the independence and objectivity to supervise her spouse, Susan Escobio testified that conflicts posed by their spousal relationship prevented her from previously supervising Escobio. Neither Susan Escobio nor the Firm could demonstrate that the Firm had addressed this admitted potential conflict. The NAC correctly held that this was especially problematic in the context of supervising a statutorily disqualified individual.

For all of these reasons, FINRA urges the Commission to dismiss Escobio's appeal.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Escobio's and the Firm's History

Escobio joined the securities industry in 1980, and he first registered with the Firm's predecessor in 1996. *See* RP 0006, 0009, 1671. Although Escobio claims he has had a "life-

long record of compliance" and an "excellent record in the industry," throughout his career he has been the subject of several disciplinary and regulatory matters and a large number of customer complaints.[1] *See* Escobio's Initial Brief in Support of his Application for Review ("Escobio's Brief"), at 5, 6, 29; RP 2317-18.

Escobio founded the Firm. *See* RP 2141. Although Escobio once held a large ownership interest in, and several executive positions at, the Firm, he claims to currently own less than 1% of the Firm and that he transferred his ownership interests to Susan Escobio, who now owns approximately 31-32% of the Firm.[2] *See* RP 2119, 2141-43.

Susan Escobio—Escobio's spouse since 1989—currently serves as the Firm's president and chief compliance officer (a position she has held since 2003 or 2004). *See* RP 2078, 2174, 2197. As set forth below, the Firm also proposed that she serve as Escobio's primary supervisor under its proposed heightened supervisory plan.

B. The Extremely Serious and Recent Disqualifying Judgment

On August 29, 2016, the United States District Court for the Southern District of Florida entered a Final Judgment (the "Judgment") against Escobio and two entities he controlled, Southern Trust Metals, Inc. ("Southern Metals") and Loreley Overseas Corporation ("Loreley"). *See* RP 0147. The Judgment was based upon a complaint filed by the Commodity Futures Trading Commission ("CFTC") for violations of the antifraud provisions of the Commodity

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[1] Escobio further states that the "only blemish on" his record is the disqualifying judgment. *See* Escobio's Brief, at 29. Setting aside that this statement is inaccurate, the judgment, which involved a large-scale fraudulent commodities scheme perpetrated by Escobio against more than 100 customers, can hardly be characterized as a "blemish."

[2] The NAC observed that "certain aspects of Escobio's and Susan Escobio's testimony regarding the Firm's ownership" and the Firm's relationship with another entity in the years prior to the hearing "was confusing, and, at times, contradicted by documents in the record." RP 2319.

Exchange Act and for Southern Metals's failure to register as a futures commission merchant. *See* RP 1595-1617.

The court entered the Judgment after a three-day bench trial during which numerous witnesses testified. *See* RP 1335. It found that Southern Metals misrepresented to customers that they were purchasing (and owned) physical metals that were held in depositories and that the customers were receiving loans to purchase those metals for which the customers were charged interest.[3] *See* RP 1335-59. In reality, there were no physical metals and no customer loans. Instead, and unbeknownst to customers, Southern Metals transferred customer funds through Loreley to margin trading firms based in London. At those firms, the customer funds were used to purchase derivative contracts designed to hedge Southern Metals's exposure to its customer positions. Southern Metals retained interest paid by the customers for the fictitious loans (as well as other fees and charges paid by customers). The court found that customers lost more than $2.1 million because of the defendants' misconduct. *See* RP 1343-44.

Moreover, the court found that the defendants' violations of the Commodity Exchange Act were knowing, "egregious, systematic, and calculated." RP 1354, 1358. It found that they defrauded at least 100 customers during a several-year span. *See* RP 1354. The court permanently enjoined Escobio from directly or indirectly engaging in a number of activities governed by the Commodity Exchange Act and from applying for registration, and engaging in any activity requiring registration, under the Commodity Exchange Act. *See* RP 0147-48. In

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[3] Prior to issuing the Judgment, the court granted a motion for summary judgment filed by the CFTC on certain counts of its complaint and on the issue of control person liability against Escobio. *See* RP 1581. The court found that Escobio had general control over Southern Metals and Loreley, that he acted in bad faith by deliberately failing to act with reasonable diligence or to institute adequate internal controls, and that he knowingly induced Southern Metals's and Loreley's violations of the Commodity Exchange Act. *See* RP 1590-93.

enjoining Escobio, the court pointed to his extensive experience with the Firm ("a registered broker-dealer with the SEC and a member of FINRA [and] the National Futures Association") and found that:

> There is a strong likelihood that unless enjoined, Mr. Escobio's occupation will present opportunities for future violations. Mr. Escobio remains an SEC and CFTC registrant. He remains involved in the operations of [the Firm] and in that capacity has clear opportunities to engage in the same type of conduct at issue in this case. Unless enjoined, he is in a position to continue to work as he has in the past in the futures and securities markets, and to handle customer funds.

RP 1355. The Judgment further ordered that, among other things, Escobio and his co-defendants pay restitution and penalties totaling approximately $2.5 million (plus post-judgment interest). *See* RP 0148-52.

C. The Defendants Appeal the Judgment

Escobio, Southern Metals, and Loreley appealed the Judgment to the United States Court of Appeals for the Eleventh Circuit, and sought to stay the injunction pending appeal. *See* RP 0811-22, 0826. The district court denied defendants' motion to stay. *See* RP 0345, 2177-78. Similarly, in February 2017, the Eleventh Circuit denied defendants' motion to stay the Judgment. *See* RP 0825. The parties have filed briefs with the appellate court and the appeal remains pending.[4] *See generally* RP 0959.

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[4] Escobio's claim that "there is a very strong likelihood of reversal of the judgment by the Eleventh Circuit" (Escobio's Brief, at 35) is belied by the fact that his stay request was denied both by the district court and the Eleventh Circuit. *See Antonio v. Bellow*, No. 04-12794-GG, 2004 U.S. App. LEXIS 18334, at *3 (11th Cir. June 10, 2004) (stating that in determining whether to grant a stay pending appeal, courts consider, among other things, whether the movant has shown that he is likely to succeed on appeal).

D. Procedural History

The Firm filed the Application on September 23, 2016, seeking to continue to employ Escobio as a general securities representative, general securities principal, and options principal notwithstanding his statutory disqualification. *See* RP 0157. The Firm asserted in the Application that Escobio was not statutorily disqualified because the federal district court erred in entering the Judgment and that the Judgment was likely to be reversed on appeal. *See* RP 0158, 0173.

FINRA's Department of Member Regulation ("Member Regulation") recommended that the NAC deny the Application. *See* FINRA Rule 9524(a)(3)(A); RP 1297. Member Regulation based its denial recommendation on, among other things, Susan Escobio's lack of relevant supervisory experience; her lack of the independence and objectivity necessary to supervise a disqualified individual who is also her spouse; the inadequacy of Escobio's proposed heightened supervisory plan; and the seriousness and recency of the Judgment. *See* RP 1314-22.

A subcommittee of FINRA's Statutory Disqualification Committee (the "Hearing Panel") conducted a hearing on April 25, 2017. *See* RP 2075-2308. Escobio, Susan Escobio, and Escobio's proposed alternate supervisor, Trombatore, testified at the hearing.

E. The NAC Denies the Application

In a decision dated July 27, 2017, the NAC denied the Application and found that Escobio's continued association with the Firm was not in the public interest and presented an unreasonable risk of harm to the market or investors. *See* RP 2313-29. As set forth below, the NAC reached this conclusion based upon the Firm's failure to establish that it could stringently supervise Escobio and the recency and highly serious nature of the Judgment.

1. The NAC Finds that Escobio Is Disqualified and the Eligibility Proceeding Is Not Premature

As an initial matter, the NAC addressed, and thoroughly rejected, the Firm's arguments that because Escobio appealed the Judgment and his appeal is pending, the Judgment is not "final," he is not statutorily disqualified, and the eligibility proceeding underlying this matter is premature. *See* RP 2315-16. The NAC held that the Judgment constitutes a disqualifying event under the plain language of the Exchange Act, regardless of whether Escobio has appealed it. *See* RP 2315. Further, the NAC—relying on Commission precedent involving nearly identical facts—held that Escobio's pending appeal of the Judgment did not render the eligibility proceeding premature and did not alter his status as a disqualified individual. *See* RP 2315-16. The NAC also rejected Escobio's collateral attacks on the Judgment, and properly held that the forum for such arguments is the Eleventh Circuit, not a FINRA eligibility proceeding. *See* RP 2316.

2. The NAC Denies the Application on Its Merits

Having dispensed with the Firm's preliminary arguments, the NAC then denied the Application on its merits. It did so on two general grounds: the Firm's wholly inadequate supervision and supervisory plan for Escobio and the recency and seriousness of the Judgment.

a. The Firm Failed to Show that It Could Stringently Supervise Escobio

First, the NAC found that the Firm failed to demonstrate that it was able to stringently supervise a statutorily disqualified individual such as Escobio—a fatal deficiency for an application to employ a statutorily disqualified individual. *See* RP 2325-28. Specifically, the NAC found that Susan Escobio lacked the direct supervisory experience necessary to supervise a statutorily disqualified individual such as Escobio who has more than 35 years of industry experience. *See* RP 2325. It found that Susan Escobio's prior supervisory experience mostly

consisted of "supervising" as a compliance officer and not as the direct supervisor of registered representatives' sales activities. *See* RP 2325; *see also* RP 2187-90. The NAC concluded that this experience, along with her minimal experience directly supervising brokers' sales activities at the Firm, was insufficient to enable her to stringently supervise Escobio's activities at the Firm and his interactions with customers. *See* RP 2325-26; *see also* RP 0859-60.

The NAC also found that the Firm had not demonstrated that Susan Escobio possessed the necessary independence to supervise Escobio. *See* RP 2326. Indeed, at the hearing, Susan Escobio candidly admitted that she had not previously supervised Escobio at the Firm because this would create a conflict of interest. *See* RP 2218, 2326. Neither Susan Escobio nor the Firm, however, showed how or why this potential conflict had been mitigated upon Escobio's statutory disqualification. *See* RP 2326. The NAC held that Escobio's and Susan Escobio's relationship "presents, at a minimum, the potential for the importance of the spousal relationship overriding the duty to apply stringent heightened supervision." RP 2326. The NAC found the Firm's dependence upon Escobio as the source for a large number of its customers exacerbates this potential conflict. *See* RP 2326.

Moreover, the NAC found that several additional supervisory issues plagued the Application. It held that similar to Susan Escobio, Trombatore (Escobio's proposed backup supervisor) lacked the necessary supervisory experience. *See* RP 2327. Trombatore testified that other than serving as a compliance officer for approximately 2.5 years early in his career, he has never had any supervisory responsibilities. *See* RP 2246-48, RP 2327. The NAC also found problematic that Trombatore would supervise Escobio remotely when Susan Escobio was out of the office. *See* RP 2327. Finally, the NAC found that the Firm's proposed heightened supervisory plan was inadequate. *See* RP 2327-28. Among other deficiencies, the NAC found

that "the provisions in the proposed heightened supervisory plan designed to prevent future fraudulent activities by Escobio are lacking." RP 2327.

b. The Recent and Extremely Serious Judgment Warranted Denial

Second, the NAC found that the recency and seriousness of the Judgment also supported denying the Application. *See* RP 2328-29. The NAC found that the Judgment, entered just 11 months' prior, involved "extremely serious" misconduct and was based upon findings that Escobio engaged in a multi-year fraudulent commodities scheme involving at least 100 customers. *See* RP 2328-29. The NAC observed that the court issuing the Judgment characterized Escobio's misconduct as "egregious, systematic, and calculated" and "that Escobio's position with the Firm presented him with opportunities for future violations." RP 2328. The NAC correctly found that "too little time has passed since entry of the Judgment for Escobio and the Firm to show that he is currently able to comply with securities laws and regulations and to refrain from engaging in fraudulent practices," and rejected arguments that the pending appeal of the Judgment somehow lessens the seriousness of Escobio's misconduct. *See* RP 2329.

Based upon all of the foregoing, the NAC concluded that Escobio's continued association with the Firm presented an unreasonable risk of harm to the market and investors. It therefore denied the Application.

On August 25, 2017, Escobio appealed the NAC's decision.

III. ARGUMENT

Exchange Act Section 19(f) sets forth the applicable standard of review in an appeal from a FINRA decision denying a firm's 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 "imposes 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) (table).[5]

FINRA complies with the Exchange Act in denying an application such as the Firm's when that application is inconsistent with the public interest and the protection of investors. *See Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 SEC LEXIS 2977, at *47 (Sept. 13, 2010); *see also Citadel Sec. Corp.*, 57 S.E.C. 502, 509 (2004) (affirming FINRA's denial of an application based upon inadequate supervision and individual's prior misconduct); *Frank Kufrovich*, 55 S.E.C. 616, 624-26 (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).

As explained below, the NAC's decision fully comports with the standards of Exchange Act Section 19(f). The NAC properly found that Escobio is statutorily disqualified and that the Application was ripe for consideration, notwithstanding Escobio's pending appeal of the Judgment. Moreover, the record conclusively shows that the NAC's denial of the Application was appropriate based on the specific grounds it articulated. Consequently, the Commission should dismiss Escobio's appeal.

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[5] Escobio does 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 of 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. The NAC Properly Found that the Judgment Rendered Escobio Disqualified

The NAC properly found that the Judgment rendered Escobio statutorily disqualified and that the eligibility proceeding to determine the merits of the Application was not premature, despite Escobio's pending appeal of the Judgment. The Commission should reject Escobio's arguments to the contrary and his improper attempt to relitigate the Judgment in this forum.

Exchange Act Section 15(b)(4)(C) provides that a person is subject to statutory disqualification if he is temporarily or permanently enjoined by order or judgment of any court of competent jurisdiction from, among other things, acting as a person or entity required to be registered under the Commodity Exchange Act or from engaging in or continuing any conduct or practice in connection with such activity.[6] *See* 15 U.S.C. § 78o. Escobio does not dispute that a court of competent jurisdiction entered the Judgment, which permanently enjoined Escobio from acting as a person required to be registered under the Commodity Exchange Act and from engaging in activities under that statute. Thus, the Judgment satisfies each element of Exchange Act Section 15(b)(4)(C) and renders Escobio statutorily disqualified. *See* RP 2315-16.

Moreover, the Commission has previously held that a pending appeal of a statutorily disqualifying event—including a disqualifying injunction—has no bearing on an individual's

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[6] FINRA's By-Laws provide that a person is subject to "disqualification," and thus must seek and obtain FINRA's approval prior to associating with a member firm, if he is disqualified under Exchange Act Section 3(a)(39). *See* FINRA By-Laws, Art. III, Sec. 4. Exchange Act Section 3(a)(39) incorporates by reference, among other provisions, Exchange Act Section 15(b)(4)(C). *See* 15 U.S.C. § 78c.

status as statutorily disqualified and does not preclude FINRA from conducting an eligibility proceeding. *See, e.g.*, *Citadel Sec.*, 57 S.E.C. at 506 (rejecting applicant's argument that FINRA's denial of a Membership Continuance Application and its finding that individual was statutorily disqualified were premature when individual was the subject of a federal district court injunction that had been appealed; "an injunction is the action of a court of competent jurisdiction, and the fact that an appeal is taken does not affect the injunction's status as a statutory disqualification"); *Robert J. Sayegh*, 52 S.E.C. 1110, 1112 (1996) (holding that the pendency of an appeal of a permanent injunction "would not alter the factual existence of the injunction and its public interest implications"); *Gershon Tannenbaum*, 50 S.E.C. 1138, 1140 (1992) (rejecting argument that excluding individual from the securities business where he was disqualified as a result of a preliminary injunction that was still awaiting final determination is unfair and stating that, "[j]ust as the court was empowered to act quickly in this case, this Commission and the NASD are also authorized to take prompt action for the protection of public investors prior to a final adjudication on the merits").

The NAC also properly rejected Escobio's repeated efforts to collaterally attack the Judgment and the factual and legal findings underpinning the Judgment (which Escobio again attempts to do before the Commission).[7] The NAC properly held that the Eleventh Circuit is the

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[7] Indeed, Escobio spends a substantial part of his opening brief arguing that the Judgment should be reversed on appeal and providing purported facts and legal rationales in support of this argument. *See, e.g.*, Escobio's Brief, at 4 (arguing that the Judgment "is suspect since it was done in collusion with NFA"); 5-7, 10-11 (arguing that the court retroactively applied a statute in rendering the Judgment in violation of Escobio's rights to due process); 11-19 (rearguing and disputing numerous findings of fact and conclusions of law underpinning the Judgment); 31-32 (rearguing certain counts of the complaint and the total restitution awarded to customers). The Commission should reject these arguments in their entirety (many of which were addressed and rejected by the federal district court rendering the Judgment). Escobio's appeal to the Eleventh Circuit is the only appropriate mechanism to resolve these matters.

proper forum for Escobio to make such arguments (which he has done), and the Commission should affirm the NAC's holding here. *See Citadel Sec.*, 57 S.E.C. at 506 n.11 (holding that challenges to the district court's findings rendering a person statutorily disqualified should be made to the court of appeals); *Jan Biesiadecki*, 53 S.E.C. 182, 185 (1997) (holding that FINRA properly limited attempts to attack disqualified individual's convictions and stating that he "had the opportunity, which he exercised, to defend in court the merits of the original criminal actions"); *Tannenbaum*, 50 S.E.C. at 1140 (stating that "[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 Factors Underlying NAC's Denial of the Application Exist in Fact

Turning to the merits of the Application, the NAC's denial of the Application relied upon factors (serious and myriad concerns with Escobio's proposed supervision and the recency and highly serious nature of the Judgment) that "exist in fact," are amply supported by the record, and were properly considered by the NAC in finding that Escobio's continued association with the Firm was not consistent with the public interest and the protection of investors.

a. The Problems with Escobio's Proposed Supervision Are Well Supported

The NAC conducted its requisite evaluation of the quality of Escobio's proposed supervision, including the qualifications and experience of Escobio's proposed supervisors, Susan Escobio's independence and objectivity (or lack thereof), and the adequacy of the proposed heightened supervisory plan. *See Morton Kantrowitz*, 55 S.E.C. 98, 102 (2001) ("In determining whether to permit the employment of a statutorily disqualified person, the quality of the supervision to be accorded that person is of the 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."); *see also Mitchell T. Toland*, Exchange Act Release No. 73664, 2014 SEC LEXIS 4724, at *25 (Nov. 21, 2014) (finding proposed supervisors were "highly problematic" based upon, among other things, proposed alternate supervisor's inexperience); *Timothy P. Pedregon, Jr.*, Exchange Act Release No. 61791, 2010 SEC LEXIS 1164, at *27-29 (Mar. 26, 2010) (finding troubling the assignment of an unqualified individual to serve as a supervisor for a statutorily disqualified individual).

The NAC appropriately concluded that the Firm failed to demonstrate that Susan Escobio and Trombatore had the direct supervisory experience necessary to supervise Escobio, who is an industry veteran, former owner of the Firm, and large producer at the Firm. *See id.* at *27 (holding that an applicant must establish that it will be able to stringently supervise a statutorily disqualified individual). The NAC based its conclusion upon, among other things, the testimony of Susan Escobio, Trombatore, and the Firm's statement that Susan Escobio only began to directly supervise registered personnel at the Firm beginning in 2014.

Nonetheless, Escobio argues that the NAC erred in concluding that Susan Escobio lacked the necessary experience to supervise Escobio. Curiously, at no point does Escobio dispute the NAC's conclusion that Susan Escobio's employment history is devoid of substantial experience directly supervising the sales activities of registered personnel (which is crucial to ensuring that a statutorily disqualified individual—especially one found to have perpetrated an egregious, widespread fraud on numerous customers—is complying with securities rules and regulations in his dealings with customers). Instead, Escobio spends several pages of his opening brief describing all the other things that Susan Escobio has done in her career. *See* Escobio's Brief, at 20-23.

Indeed, Susan Escobio's testimony demonstrated that she has *compliance* experience, not direct supervisory experience of registered representatives' sales activities.[8] Specifically, Susan Escobio testified that at the first firm where she worked (Dean Witter Reynolds, Inc.), she started as an administrative assistant before she registered as a general securities principal. She testified that at Dean Witter she "was in charge of hiring and firing and assisting the manager in the office, in the sales area, operations area." *See* RP 2186-87. Objective evidence, however, undercuts her testimony. FINRA's Central Registration Depository ("CRD"®) shows that she did not qualify as a general securities principal until September 2000 (10 years *after* she left this firm) and that she was never registered as a principal at this firm. *See* RP 95, 99. Similarly, Susan Escobio's testimony that she did "a little supervision" at another firm where she was employed for approximately seven years (Credit Lyonnais Securities (USA), Inc.) should be given little weight; CRD again shows that she was not registered as a general securities principal during her employment at this firm. *See* RP 95, 99, 2187.

The evidence in the record shows that at best, Susan Escobio has approximately three years' of direct, supervisory experience over registered representatives' sales activities. Specifically, the Firm stated that Susan Escobio began supervising the sales activities of one of the Firm's registered representatives in February 2014, Escobio in June 2016, and Trombatore in October 2016. *See* RP 1621-22. Consistent with the Firm's statement, Susan Escobio testified

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[8] In other contexts, the Commission has recognized that an individual's compliance responsibilities at a firm do not necessarily mean that they are supervisors. *See, e.g.*, *John Gutfreund*, 51 S.E.C. 93, 113 (1992) (settled case) (stating that "[e]mployees of brokerage firms who have legal or compliance responsibilities do not become 'supervisors' . . . solely because they occupy those positions"); *Prime Capital Servs., Inc.*, Initial Decisions Release No. 398, 2010 SEC LEXIS 2086, at *143 (June 25, 2010) ("The Commission distinguishes between persons who are clearly direct, line supervisors . . . and employees of brokerage firms, who . . . have legal or compliance responsibilities."); *Richard Hoffman*, Initial Decisions Release No. 158, 2000 SEC LEXIS 105, at *81 (Jan. 27, 2000) (same).

that for certain activities at the Firm for which she claimed to be acting in a supervisory capacity, she was actually acting in her capacity as the Firm's chief compliance officer. *See* RP 2189-90, 2193; *see also* RP 1633 (Firm organizational chart showing Susan Escobio as the Firm's chief compliance officer and Escobio as the "Retail Sales Supervisor" prior to April 2014); RP 2098 (statement by counsel that Susan Escobio has been supervising at the Firm as its chief compliance officer since 2004).

It was the Firm's burden to show that Susan Escobio had the requisite experience necessary to supervise Escobio. Moreover, the Firm was on notice that Member Regulation had serious concerns that Susan Escobio lacked direct supervisory experience of registered representatives' activities, which is required to stringently supervise Escobio's sales and other activities at the Firm. *See Pedregon*, 2010 SEC LEXIS 1164, at *27; RP 1314-22. The Firm failed to satisfy its burden, and the NAC correctly weighed Susan Escobio's lack of supervisory experience in denying the Application.[9]

Similarly, the NAC correctly determined that Trombatore, an individual whose "supervisory experience" consisted of serving as a compliance officer for less than three years more than two decades ago, lacked the direct supervisory experience necessary to serve as Escobio's alternate supervisor and supported denying the Application. Although Escobio disputes this conclusion (*see* Escobio's Brief, at 26-27), he does not—and cannot—point to anything specific in Trombatore's testimony or the record that undermines the fact that Trombatore's supervisory experience is woefully deficient. Further, while Escobio argues that

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[9] Escobio states, without providing any support or record citation, that Susan Escobio has previously supervised a statutorily disqualified individual (Sandro Flores). *See* Escobio's Brief, at 21, 23. Susan Escobio did not testify before the Hearing Panel that she had ever supervised a statutorily disqualified individual or that she had previously supervised Sandro Flores. *See generally* RP 2185-2237.

Trombatore would travel to Miami to supervise Escobio in person when Susan Escobio is absent from the office, the proposed supervisory plan lacks any provision requiring Trombatore's on-site supervision of Escobio. *See Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 SEC LEXIS 2417, at *19 (July 17, 2009) ("As we have previously concluded, a supervisory plan lacks the necessary intensive scrutiny when the supervisor will not be in close, physical proximity to the statutorily disqualified person.").

Moreover, in assessing the quality of Escobio's proposed supervision, the NAC also properly considered Susan Escobio's ability to objectively supervise her long-time spouse, former owner of the Firm, and the source of a large portion of the Firm's customers. *See Luther E. Oliver*, 51 S.E.C. 914, 916 (1993) (finding that the firm had failed to demonstrate that its supervisory procedures were adequate where the only principal at the firm other than the disqualified FINOP was the disqualified individual's spouse, who had no financial training). It concluded that the Firm had not demonstrated that the potential conflict of interest of having Susan Escobio supervise Escobio—a potential conflict that Susan Escobio admitted required other individuals to supervise Escobio prior to her assuming the role—had been mitigated. At the hearing, Susan Escobio testified that the Firm had implemented procedures to address this issue, but she could not recall what the specific procedures were. *See* RP 2233-35. Further, the NAC found that the Firm's written supervisory procedures ("WSPs") did not appear to contain any provisions specifically addressing the potential conflict of having Susan Escobio supervise her spouse.[10] *See* RP 2327; *see generally* RP 0509-0726 (the Firm's WSPs).

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[10] Just as concerning, the Firm did not amend its proposed heightened supervisory plan to include any provisions addressing Susan Escobio's potential conflict even after Member Regulation raised the issue in its recommendation letter.

Rather than address this issue, Escobio summarily asserts that the NAC's conclusion shows "an implicit bias against women, especially married women," is based solely upon the fact that Susan Escobio and Escobio are married, and necessarily demonstrates a discriminatory motive. *See* Escobio's Brief, at 19, 20, 23. Escobio's incendiary rhetoric does not change the fact that Susan Escobio *admitted* that a conflict prevented her from supervising Escobio before he became statutorily disqualified.[11] Nothing in the record demonstrates that the Firm adequately addressed this conflict or that circumstances changed that otherwise mitigated this conflict. If anything, Escobio's statutory disqualification exacerbates these potential conflicts. Escobio's characterization of the NAC's conclusions as lacking factual support ignores these important and uncontested facts.

Finally, the NAC also properly considered the Firm's inadequate proposed plan of supervision. *See Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 SEC LEXIS 2270, at *63 (June 26, 2014) (affirming FINRA's denial of an application to employ statutorily disqualified individual where "the proposed plan did not contain provisions sufficient to ensure that Hunter Scott properly supervised Savva"); *Arouh*, 2010 SEC LEXIS 2977, at *38 (affirming denial of Membership Continuance Application where proposed supervisory plan lacked detail and lacked other provisions to ensure stringent supervision). Contrary to Escobio's claim that the NAC found that the Firm's supervisory plan was inadequate "without identifying any guideline or standard it fails to meet" (Escobio's Brief, at 26), the NAC made four specific findings in support of its conclusion.

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[11] *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *62 (Jan. 30, 2009) (holding that adverse rulings on their own do not evidence bias; "bias by a hearing officer is disqualifying only when it stems from an extrajudicial source and results in a decision on the merits based on matters other than those gleaned from participation in a case"), *aff'd*, 416 F.eApp'x 142 (3d Cir. 2010).e

First, the NAC concluded, "the provisions in the proposed heightened supervisory plan designed to prevent future fraudulent activities by Escobio" were "lacking," and gave an example as to why. *See* RP 2327. Second, the NAC found that many of the proposed plan's provisions appeared to be applicable to all of the Firm's registered representatives and were not tailored to Escobio. *See* RP 2327; *Arouh*, 2010 SEC LEXIS 2977, at *38 (finding proposed supervisory plan deficient where "[m]uch of what the plan required is no different from the supervision the Firm afforded to all employees"). Third, the NAC specifically found that the plan failed to provide for documentation with the Firm's compliance with the plan. This documentation is essential to allow FINRA to determine whether a firm and statutorily disqualified individual are complying with a heightened supervisory plan. *See* RP 2327. Fourth, the plan failed to designate Trombatore as Escobio's alternate supervisor. *See* RP 2327. Each one of these deficiencies is a fact beyond dispute and is a legitimate basis for the NAC's findings.

Nonetheless, Escobio argues that the Firm's heightened supervisory plan, which he claims has been in effect for more than three years, is effective as demonstrated by the fact that "no violations or wrong-doing have ever been identified or found and no complaints have been made regarding" Escobio or the Firm during this time.[12] *See* Escobio's Brief, at 25. Even assuming the veracity of this statement, far too little time has passed since the Firm implemented this plan to demonstrate that it effectively provides for stringent supervision of Escobio. Moreover, the fact that Escobio may not have engaged in misconduct for approximately one year while purportedly supervised under this plan offers no comfort that the plan will provide a

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[12] At the hearing, Susan Escobio testified that the heightened supervisory plan at issue (dated October 1, 2016), has been in effect since that date—not for three years as Escobio claims. *See* RP 2209-10, 2235.

framework for stringent supervision going forward; this is especially true given the plan's numerous deficiencies and the highly serious and fraudulent misconduct in which Escobio has previously engaged. *See Toland*, 2014 SEC LEXIS 4724, at *35 (holding that "[p]urported evidence of [the firm's] current compliance with its obligations does not negate . . . the serious issues regarding the firm's proposed supervision of Toland").

Further, the Commission should reject Escobio's argument that FINRA should have provided the Firm with "any viable additional procedures that would satisfy its concerns." Escobio's Brief, at 25-26. Drafting a stringent heightened supervisory plan for a disqualified individual is not FINRA's obligation, but the Firm's. *See Emerson*, 2009 SEC LEXIS 2417, at *20 (rejecting argument that the applicants were willing to accept a supervisory agreement thate would satisfy FINRA; "[d]rafting a supervisory plan . . . is neither the Commission's nor FINRA's role"). And Escobio's comparison of the Firm's proposed heightened supervisory plan to another plan that was approved in connection with a different statutorily disqualified individual highlights that he does not understand or appreciate that a stringent heightened supervisory plan for a disqualified individual must be specifically tailored to the facts and circumstances of each case. *See* Escobio's Brief, at 26. The deficiencies of the Firm's plan exist in fact, and the NAC properly weighed them in denying the Application.

b. The Recent Judgment Involved Extremely Serious Misconduct

In denying the Application, the NAC also carefully considered the nature and seriousness of the recent Judgment, and the Commission has repeatedly affirmed this approach.[13] *See Savva*,

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[13] Escobio falsely states, "FINRA primarily, if not exclusively, relies on the CFTC's 'recent judgment' as its cornerstone and sole basis for barring Mr. Escobio from the securities industry." Escobio's Brief, at 30. In fact, the NAC primarily based its denial of the Application on myriad issues with Escobio's proposed supervisors and the Firm's heightened supervisory plan. *See* RP

2014 SEC LEXIS 2270, at *57 (holding that FINRA properly considered that the consent order forming the basis of individual's statutory disqualification stemmed from allegations of serious, securities-related misconduct); *Kufrovich*, 55 S.E.C. at 625-26 (finding that FINRA "properly discharged its Exchange Act obligation" when it weighed all facts developed, including the nature of the underlying disqualifying event, the adequacy of the proposed supervisory plan, and the statutorily disqualified individual's prior disciplinary history); *Michael Albert Weisser*, Exchange Act Release No. 36216, 1995 SEC LEXIS 2410, at *4 n.7 (Sept. 11, 1995) (affirming denial of statutory disqualification application when FINRA considered the recency and seriousness of the underlying disqualifying event). The NAC concluded that the Judgment—entered just 11 months prior to its decision—involved "extremely serious" and "egregious, systematic, and calculated" misconduct. Indeed, the Judgment found that Escobio and the entities that he controlled engaged in a multi-year fraudulent scheme that injured more than 100 customers. The NAC appropriately considered these factors in denying the Application.[14]

Escobio argues that, although the federal district court recently entered the Judgment, it "arose out of events more than four (4) years old which arose from non-securities transactions

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2313 (the NAC stating that it denied the Application because the Firm is incapable of supervising Escobio as a statutorily disqualified individual and that "[t]he seriousness and recency of Escobio's disqualifying event also support our denial").

[14] The Commission should reject Escobio's argument that the NAC improperly considered the seriousness of the Judgment in denying the Application because Escobio has appealed it and the Eleventh Circuit has not issued its opinion. *See Sayegh*, 52 S.E.C. at 1113 (finding that FINRA properly determined that the seriousness of a permanent injunction supported denial of a continuing membership application despite the disqualified individual's pending appeal of the injunction). The Commission should also reject Escobio's recycled argument that because the Judgment involved commodities fraud and "involved no securities," his misconduct is not serious. *See* RP 2329 (NAC's rejection of the same argument). Escobio's wide-ranging fraud was egregious and threatened millions in customer funds. This misconduct resulting in Escobio's injunction properly serves as another basis for denying the Application.

almost a decade ago." He thus argues that the alleged violations on which the Judgment is based are not recent and the NAC erred in finding otherwise. *See* Escobio's Brief, at 30-31. The pertinent date to determine the recency of Escobio's disqualifying event, however, is the date the court entered the Judgment (i.e., August 29, 2016). *See Haberman*, 53 S.E.C. at 1030 (stating that disqualified individual's six-year old felony conviction, based upon underlying misconduct seven to eight years old, was recent); *Sayegh*, 52 S.E.C. at 1113 (finding one-year old injunction, based upon misconduct seven to eight years old, was recent). In any event, Escobio's misconduct underlying the Judgment occurred from July 2011 through the end of April 2013, which is similar to the timeframes previously considered by the Commission and found to be recent in time. *See* RP 1344, 1584; *Haberman*, 53 S.E.C. at 1030; *Sayegh*, 52 S.E.C. at 1113.

The bases for the NAC's denial "exist in fact" and are strongly supported by the record. Further, there is no real dispute that the Judgment rendered Escobio statutorily disqualified and that FINRA properly evaluated the Application.

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 conducted its review and denial of the Application 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 the Firm filed the Application to initiate the eligibility proceeding, FINRA convened the Hearing Panel in

accordance with FINRA Rule 9524(a)(1). The Hearing Panel granted the Firm's request to continue and relocate the hearing in this matter, and FINRA's Office of General Counsel gave Escobio and the Firm proper advance notice of the continued hearing, as required by FINRA Rule 9524(a)(2). *See* RP 0337-39. The Hearing Panel conducted a hearing on April 25, 2017. Escobio appeared at that hearing accompanied by counsel, his proposed supervisor Susan Escobio, and his proposed backup supervisor (who the Hearing Panel permitted to appear by telephone at the Firm's request). All three individuals testified, and Escobio and the Firm were given ample opportunity to demonstrate why it would be in the public interest to allow Escobio to continue to associate with the Firm and rebut Member Regulation's contentions that the Application should be denied.

Escobio does not dispute any of this. Instead, he repeatedly makes cursory assertions—without any elaboration or support—that FINRA exhibited a bias against women and Hispanic and minority-based firms in denying the Application in an arbitrary and discriminatory manner. *See* Escobio's Brief, at 5, 20, 22, 23. The NAC based its denial, however, upon numerous sound and legitimate bases, and nothing in the record supports Escobio's outlandish claims to the contrary. The Commission should reject therefore reject them.[15] *See Epstein*, 2009 SEC LEXIS 217, at *62 (holding that adverse rulings on their own do not evidence bias; "bias by a hearing

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[15] Further, the Commission's precedent discussed herein belies Escobio's argument that adjudicating the Application while his appeal of the Judgment was pending denies him of due process or is otherwise unfair. *See infra* Part III.A.1. In any event, FINRA is not a state actor such that constitutional due process rights apply in FINRA proceedings. *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 Release No. 56770, 2007 SEC LEXIS 2598, at *13-14 (Nov. 8, 2007) (same); *see also Robert J. Prager*, 58 S.E.C. 634, 662-63 (2005) (holding that 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).

officer is disqualifying only when it stems from an extrajudicial source and results in a decision on the merits based on matters other than those gleaned from participation in a case"); *cf. also Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *67 (Sept. 28, 2017) ("To establish a claim of selective prosecution, Respondents must demonstrate that FINRA unfairly singled them out for enforcement action when others similarly situated were not, and that the prosecution was motivated by improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right.").

C. The NAC Applied FINRA 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 discharged its obligations on behalf of FINRA under federal securities laws by adjudicating the Application to determine whether Escobio's continued association with the Firm was in the public interest. Following Commission precedent, the NAC properly concluded that Escobio is statutorily disqualified because of the Judgment and that adjudication of the Application need not be delayed while Escobio appeals the Judgment. The NAC then based its denial of the Application on a totality of the circumstances and thoroughly 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.*, *U.S. v. O'Hagan*, 521 U.S. 642, 658 (1997) (stating that in passing the Exchange Act, one of Congress's animating objectives was "to insure honest securities markets and thereby promote 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).

FINRA must determine whether individuals are ineligible as a result of a statutory disqualification to associate or continue to associate with a member firm, and if so, whether they may associate or continue to associate with their firms notwithstanding their ineligibility. *See* FINRA's By-Laws, Art. III, Section 3; *see also* 15 U.S.C. § 78o-3(g)(2) (providing that a registered securities association such as FINRA may prohibit a statutorily disqualified individual from associating with a firm); *Savva*, 2014 SEC LEXIS 2270, at *25-34 (affirming NAC's findings that individual was statutorily disqualified and denying application).

The Commission has found, "[p]articularly in matters involving a firm's employment of persons subject to a statutory disqualification . . . [that it is] appropriate to recognize the NASD's evaluation of appropriate business standards for its members." *See Halpert & Co., Inc.*, 50 SEC 420, 422 (1990); *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 the Firm'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. The NAC thoroughly explained its holding that Escobio is statutorily disqualified notwithstanding his appeal of the Judgment and that denying the Application was not premature. It also properly found that the Firm failed to demonstrate that Escobio's continued association with the Firm would be in the public interest, and provided a convincing and detailed rationale as to why Escobio's continued association with the Firm represented an unreasonable risk of harm to the market or investors (i.e., the Firm's inability to stringently supervise Escobio based upon the lack of experience of his proposed supervisors, Susan Escobio's lack of independence, and the deficient heightened supervisory plan, as well as the highly egregious and recent Judgment).

Despite the NAC's well-supported decision that thoroughly explains the basis for its denial of the Application, Escobio suggests that the NAC failed to consider the totality of the circumstances when it denied the Application because the Firm has not previously engaged in supervisory violations and Susan Escobio has an "unblemished" record.[16] *See* Escobio's Brief, at 19-20, 22. The NAC, however, did consider these factors and determined that significant deficiencies with Escobio's proposed supervisors, the Firm's inadequate supervisory plan, and

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[16] Moreover, Escobio's argument that the Firm's lack of any regulatory or disciplinary history while Susan Escobio has served as its chief compliance officer purportedly "confirms Susan abilities and effectiveness" as Escobio's proposed supervisor is a non sequitur. *See* Escobio's Brief, at 22. As stated above, Susan Escobio lacks the necessary supervisory experience and independence to stringently supervise Escobio as a statutorily disqualified individual.

the seriousness and recency of the Judgment outweighed these other considerations.[17] *See* RP 2328.

Escobio repeatedly argues that FINRA barred him and imposed "the most severe sanction" in denying the Application and that the Commission should review the NAC's "punitive" denial of the Application as it would any sanction imposed by FINRA. *See, e.g.*, Escobio's Brief, at 5-6, 9-10, 30, 34-35. He also asserts that the NAC's denial of the Application is "the equivalent of capital punishment for someone in the industry." Escobio's Brief, at 6. These arguments miss the mark and completely misconstrue the nature of statutory disqualification proceedings.

Indeed, the effect of a statutory disqualification proceeding cannot be equated with a disciplinary action. In a statutory disqualification proceeding, FINRA makes no determination that a statutorily disqualified individual violated any rule. There is no adjudication of liability. FINRA neither seeks nor intends punishment by denying an individual's ability to remain in the securities industry. And significantly, the Commission has consistently recognized that a "statutory disqualification is not a FINRA-imposed penalty or remedial sanction." *See Anthony*

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[17] Escobio further cites to *Pedregon* to argue that because the NAC failed to explain how the Judgment, "in light of the circumstances relating to it, creates an unreasonable risk of harm to the securities markets or investors," the Commission should permit Escobio to associate with the Firm. *See* Escobio's Brief, at 8. Escobio's argument is baseless. The underlying disqualifying event in *Pedregon* was a non-securities or finance related felony, where the connection between an individual's risk of harm to investors may be attenuated or not entirely clear. *See Pedregon*, 2010 SEC LEXIS 1164. That is not the case here. The NAC explained, in detail, why Escobio's continued association with the Firm presented an unreasonable risk of harm to the market or investors. Included in this discussion was the NAC's finding that the recent Judgment was extremely serious, involved a widespread fraudulent commodities scheme, and harmed customers. In fact, the NAC explained that the court issuing the Judgment expressly found that Escobio needed to be enjoined from further misconduct because of his role at a broker-dealer. The threat to investors and the market posed by Escobio's fraudulent and widespread misconduct underlying the Judgment is evident and was adequately explained.

A. Grey, Exchange Release No. 75839, 2015 SEC LEXIS 3630, at *47 n.60 (Sept. 3, 2015); *see also Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *37 (Mar. 15, 2016) (holding that "FINRA does not subject a person to statutory disqualification as a penalty or remedial sanction. Instead, a person is subject to statutory disqualification by operation of Exchange Act Section 3(a)(39)(F) . . . Considerations of 'fairness' or policy arguments do not bear upon the automatic statutory disqualification imposed upon McCune."); *Emerson*, 2009 SEC LEXIS 2417, at *26-27 (holding that FINRA's denial of an application for a statutorily disqualified individual to associate with a firm did not impose a penalty or remedial sanction); *Kufrovich*, 55 S.E.C. at 629-30 (finding that FINRA had not imposed a penalty in a statutory disqualification matter, but had "simply determined that it would not grant relief from a disqualification previously incurred"). Escobio's arguments conveniently ignore this guiding precedent.[18]

In sum, the NAC's determination that Escobio is statutorily disqualified and its denial of the Application were entirely consistent with the purposes of the Exchange Act.

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[18] For all these reasons, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (involving an SEC sanction in the form of a disgorgement order), *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017) (involving a FINRA imposed sanction of a bar), and *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979) (involving an SEC sanction in the form of a permanent bar and one-year suspension) are inapplicable to the NAC's denial of the Application. The Commission should reject Escobio's reliance upon these authorities and his related arguments as irrelevant. *See, e.g.*, Escobio's Brief, at 5-6, 34-35.

IV. CONCLUSION

A federal district court recently found that Escobio engaged in a widespread, fraudulent commodities scheme that harmed more than 100 customers over the course of several years. The court addressed Escobio's "egregious, systematic, and calculated" misconduct by entering the Judgment, which permanently enjoined him from engaging in certain activities and imposed severe monetary sanctions against him totaling approximately $2.5 million. The Judgment rendered Escobio statutorily disqualified and required that FINRA consider whether Escobio's continued association with his Firm was in the public interest, irrespective of whether Escobio had appealed the Judgment.

FINRA fulfilled its obligations under the Exchange Act and denied the Application because Escobio's continued association with the Firm presented an unreasonable risk of harm to the market or investors. The NAC based its conclusion upon numerous deficiencies related to Escobio's proposed supervision—a critical component of all proposed associations of statutorily disqualified individuals with member firms. It also denied the Application based upon the recent and highly serious Judgment, which undeniably demonstrates that Escobio's continued employment in the securities industry presents an unreasonable risk of harm to the market or investors and that too little time has passed since the Judgment for Escobio to demonstrate otherwise.

On appeal, Escobio has provided no cogent argument to the contrary. Instead, he ignores that the record amply supports the NAC's denial while espousing numerous arguments that the Commission repeatedly has rejected or are inapplicable to this matter. These arguments do not—and under the circumstances cannot—support reversing the NAC's decision. The Commission therefore should dismiss Escobio's appeal.e[19]

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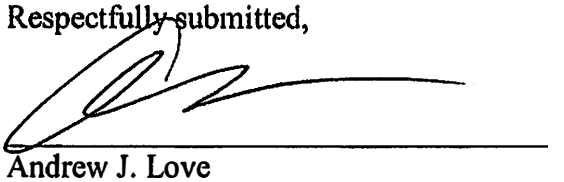
[19] The Commission should not grant Escobio's procedurally improper request, articulated in the final few sentences of his 36-page opening brief, that "at a minimum" the Commission should permit him to associate with the Firm pending a final determination of the Judgment by the Eleventh Circuit. *See* Escobio's Brief, at 36; SEC Rule of Practice 401. This request does not qualify as a motion and the Commission should not entertain it. Regardless, Escobio has simply not demonstrated that the extraordinary relief he seeks should be granted. *See William Timpinaro*, Exchange Act Release No. 29927, 1991 SEC LEXIS 2544, at *6 & n.12, 13, & 14 (Nov. 12, 1991) (stating that "the imposition of a stay is an extraordinary and drastic remedy" and the moving party has the burden of establishing that a stay is appropriate).

As described herein, Escobio has no likelihood of success on the merits of this appeal before the Commission (let alone a "strong" likelihood), and the public interest strongly favors precluding Escobio—the perpetrator of an egregious and widespread fraudulent commodities scheme—from working at the Firm pending resolution of the Judgment on appeal so that he does not further harm investors. *See Meyers Associates, L.P.*, Exchange Act Release No. 77994, 2016 SEC LEXIS 1999, at *7-9 (June 3, 2016) (Order Denying Stay) (in determining whether to issue a stay, the Commission considers whether: (1) there is a strong likelihood that the moving party will prevail on the merits; (2) without a stay, the moving party will suffer irreparable harm; (3) there would be substantial harm to other parties if a stay were granted; and (4) the issuance of a stay would serve the public interest). Moreover, Escobio's cursory argument that he will be irreparably harmed "because he will have been put out of business and prevented from working in a field to which he has devoted most of his life," even if true, has been repeatedly rejected by the Commission as constituting irreparable harm sufficient to warrant granting a stay. Escobio's Brief, at 36; *Meyers*, 2016 SEC LEXIS 1999, at *15. Similarly, Escobio's statement that his customers will suffer if a stay is not granted because they rely upon his expertise is contradicted by Escobio's own testimony, and has been rejected by the Commission in other cases as a sufficient reason to grant a stay request. *See* Escobio's Brief, at 30-31; RP 2129, 2162 (Escobio testifying that the Firm's customers are serviced by teams of registered representatives at the Firm); *N. Woodward Fin. Corp.*, Exchange Act Release No. 72828, 2014 SEC LEXIS 4584, at *15 (Aug. 12, 2014) (Order Denying Stay) ("depriving their customers of applicants' brokerage-related services during the appeal does not support the issuance of a stay"). FINRA urges thee Commission to reject Escobio's request for a stay.e

Respectfully submitted,



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