Before the Securities and Exchange Commission
Washington, DC

In the Matter of the Application of	X	
Edward S. Brokaw	X	Administrative Proceedings
	X	File No. 3-15059
For Review of Disciplinary Action Taken by FINRA	X	

REPLY BRIEF OF EDWARD S. BROKAW
IN SUPPORT OF MR. BROKAW'S APPLICATION FOR REVIEW

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Respectfully submitted,

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I. INTRODUCTION

FINRA's overzealous and baseless prosecution of Edward S. Brokaw ("Brokaw") continues in its most recent brief filed in opposition to Mr. Brokaw's Application of Review. Rather than concede that the case against Mr. Brokaw was based on faulty premises and conjecture, FINRA is still trying to argue that Mr. Brokaw should have taken additional steps (indeed, unspecified steps) to stop the non-existent manipulation of Monogram Biosciences Inc. ("MGRM") by one of Deutsche Bank Securities Inc.'s ("DBSI") and Mr. Brokaw's clients, Mr. Kevin Tang and his fund, Tang Capital Partners. The entire premise of FINRA's case of alleged unethical conduct is based on FINRA's assertion that Mr. Tang's instructions were, in fact, "suspicious customer trading instructions". **(See FINRA Brief, p. 1)**. This premise is faulty as the NAC properly concluded that Mr. Tang's trading was for legitimate economic reasons. Furthermore, FINRA is unable to assert that any false information was injected by Mr. Brokaw into the public marketplace and there is no evidence of any injury caused to the investing public as a result of DBSI's execution of the six unsolicited sell market orders from Mr. Tang.

As the NAC Decision set forth below, the strategy employed by Mr. Tang was both rationale and legal:

> "KT [Kevin Tang] testified that he learned from his prior trading, and through other brokers, that MGRM had the most liquidity in the beginning and end of each trading day... Thus it was KT's view based on his historical knowledge that it was advantageous to split orders at the open and close to be assured that the order was filled. He also understood that by selling into higher volume, he would not affect the price as dramatically...
>
> "We determine that the evidence shows that KT had a rational strategy, and the Hearing Panel's erroneous determination to ignore KT's testimony tips the balance of proof against Enforcement."

See R 12485-R 12486 (R is referenced to the certified record). Given that the trades were all market orders and part of Mr. Tang's overall strategy to exit his MGRM position in a legal, orderly and logical fashion, Mr. Brokaw was not confronted with the numerous purported "red flags" set forth in FINRA's Opposition Brief.

As described in Mr. Brokaw's main brief and herein, FINRA has been engaged in the overzealous prosecution of Mr. Brokaw since 2007. Contrary to FINRA's attempts to wave away as irrelevant the prosecutorial misconduct of Lane Thurgood who falsely charged in the December 2007 Wells letter that Mr. Brokaw had given specific and false instructions to his sales assistant concerning the creation of certain booking tickets ***(when at the time Mr. Thurgood already knew the sales assistant's sworn testimony contradicted such a charge)*** FINRA's overreaching is far from irrelevant. The travesty here is that FINRA has gone far afield from its mission of protecting investors and protecting the integrity of the markets. Rather, FINRA's actions have forced an honest broker out of business after twenty-seven years with an unblemished record in the industry, causing him to lose millions of dollars of potential

earnings while serving the investing public and to make matters even worse, FINRA has impugned Mr. Brokaw's integrity without a basis.

As set forth in Mr. Brokaw's Opening Brief, and this Reply, the Commission should overturn all sanctions against Mr. Brokaw since the evidence fails to establish any misconduct by Mr. Brokaw.

II. MR. BROKAW DID NOT VIOLATE RULE 2110 NOR DID HE ENGAGE IN ANY UNETHICAL CONDUCT

A. FINRA OVERSATES THE EXISTENCE OF BOTH SUSPICIOUS ACTIVITY AND ITS SO-CALLED RED FLAGS

In an effort to bolster its weak case against Mr. Brokaw, FINRA uses a host of adjectives and engages in hyperbole on several levels.

FINRA asserts in several places in its Opposition Brief that Mr. Brokaw ignored a myriad of "red flags" concerning Mr. Tang's orders to sell MGRM **[See FINRA Brief p.1, pps.13-14]**. FINRA further asserts that the "red flags" were comprised of the following facts:

> (1) "On three successive trading days, Brokaw placed 50,000 share sell orders of a biotech stock [MGRM] at the open and close of the market for a hedge fund manager named Kevin Tang ("Tang"), one of Brokaw's biggest and most important customers." **[FINRA Brief at p. 1]**
>
> (2) "Brokaw's trading for Tang occurred during the pricing period for a derivative security that both Tang and Brokaw owned." **[FINRA Brief at p. 1]**
>
> (3) "Brokaw also knew that Tang held a sizeable position that he was liquidating rapidly during the period to maximize profits and that Tang's trading during this period deviated from his past practices on several fronts." **[FINRA Brief at p.1]**

Based on these purported "red flags", FINRA surmises that Mr. Brokaw failed in his responsibility as a "gatekeeper" to confirm that Mr. Tang's trades were for a legitimate purpose. Mr. Brokaw asserts that the activity was neither suspicious nor accurately described by FINRA. As the law established by the NAC Decision for this case, the only finding that is relevant is that

NAC concluded after a review of all of the evidence that Mr. Tang had a rational strategy in his orderly liquidation of a hedged position consisting of a long position of MGRM common stock and a long position of MGRM CVR's held by Tang Capital Partners. **[R 12485-12486]**.

Based on all of the known facts at that time, Mr. Brokaw had no reason to believe that anything other than an orderly liquidation was taking place. Moreover, even with the benefit of hindsight, FINRA fails to say what steps Mr. Brokaw should have undertaken other than the following statement:

> "Brokaw possessed the discretion to refuse to execute the trades that were suspicious or, at a minimum to highlight the orders and what he knew about them for others in a supervisory or compliance capacity before placing the trades."

[FINRA Brief, p. 13] For the reasons outlined herein, none of the trades were suspicious nor out of the ordinary as alleged. But more importantly, Mr. Brokaw did, in fact, highlight the situation and educate the sales-trader, Jenner Watson, who was responsible for getting Mr. Tang's orders executed, about the pricing period involving MGRM and the CVR's as well as the likely selling pressure. **[R 10672-10676].** Thus, FINRA's arguments are flawed given the facts of this case.

1. The Receipt of Market Orders to Sell Near the Open and Near the Close from Tang Capital Partners is Not a Red Flag

The timing of the orders placed by Tang Capital Partners with DBSI is not suspicious. The determination of the value of the CVR's was not based on a closing price but rather was calculated based on the Volume Weighted Average Price over a fifteen-day pricing period. **[R 12486].** The NAC Decision specifically stated as follows:

> "The VWAP for each day of the pricing period constituted 1/15 of the final VWAP for determining CVR's value, regardless of the volume on a particular day or **time** of day." (Emphasis Added)

[R 12486]. One of DBSI's sales-traders, David Zitman, testified that the 50,000 share orders had no material effect on the VWAP since the stock traded over 2 million shares a day on average during the period May 19, 22 and 23, 2006. **[R 10764; R 10719]**. Mr. Zitman's exact quote was as follows:

> "Listen to me, listen to me. The 50,000 shares have no fucking effect on the VWAP. It's trading two million shares."

[R 5293; R 10719]. Thus the size of the orders given to DBSI and the timing of the orders were not suspicious. The VWAP for any given day would include all orders executed regardless of the time of the day of the trade. The CVR's were being priced on the average VWAP over 15 days – not based on a closing price. **[R 8703-8754]**.

The fact that Mr. Tang previewed his afternoon order to Brokaw on May 19, 2006 is of no consequence either. Mr. Tang was traveling from the West Coast to New York City that day, and he merely wanted Mr. Brokaw to know in advance about both Friday orders since he would be in flight. **[R 6862-6863]**. NAC determined that Mr. Tang had no prearrangement with Mr. Brokaw or DBSI about the May 22 or May 23 orders. **[R 12487]**. Mr. Brokaw did not know if he was getting additional orders unless Mr. Tang called. **[R 12487]**. Furthermore, the allegation that Mr. Brokaw communicated all six sell orders on May 19, May 22 and May 23, 2006 to DBSI's sales-traders is simply not true. Will Ewing, one of Mr. Brokaw's registered sales assistants placed the second order on May 19, 2006 **[R 5242]**. Mr. Ewing also placed the morning order on May 22, 2006 **[R 5259]**, and the afternoon order on May 22, 2006 **[R 5270]**. Mary Meyer, another DBSI registered representative placed the morning order on May 23, 2006 **[R 5288]**. None of these registered representatives nor the DBSI sales-traders ever questioned the market orders being placed by Mr. Tang as suspicious.

And as the NAC decision clearly set forth, Mr. Tang's historical trading in MGRM formed a credible basis for his belief that there was more liquidity at or near the open and at or near the close in MGRM. **[R 12485-12486** – "We determine that the evidence shows that KT [Kevin Tang] had a rational strategy..."]. The NAC also acknowledged that there was another broker at another firm, Thomas Lombardi, who was handling similar orders for Mr. Tang and who agreed with Mr. Tang's viewpoint about selling MGRM near the open and near the close due to increased liquidity at that time. **[R 12486]**.

Thus, under any objective view, the trading by Mr. Tang (solely initiated by him on an unsolicited basis) was not suspicious and therefore not a red flag.

2. The Assertion that Mr. Brokaw's Trading for Mr. Tang Occurred During the Pricing Period for a Derivative Security that Both Mr. Tang and Mr. Brokaw Owned is Not a Red Flag

Obviously, FINRA is using the word "derivative security" as if a derivative type security automatically requires extra scrutiny. This is not supported by any case citations for the proposition that derivative securities warrant enhanced diligence. In fact, there was no trading in the MGRM CVR's by either Mr. Tang or Mr. Brokaw at DBSI during the MGRM pricing period. **[R 7857-8353; R 8759-8934]**. MGRM had announced the existence of the pricing period eighteen months earlier at the time of the merger. **[R 8708]**. Mr. Tang was not the only fund manager who had set up a hedged position involving the MGRM common stock and the MGRM CVR's **[See Black Horse Capital Quarterly Report R 10757-10758]**. When Mr. Brokaw discussed what was happening with MGRM during his conversation with Ms. Watson, he had general knowledge that there was likely to be selling as other holders unwound their positions. **[R 10672-10676]**.

FINRA's allegation that it was Mr. Brokaw's trading for Mr. Tang at issue in the pricing period places the cart before the horse and misstates the evidentiary record. Mr. Brokaw did no trading on behalf of Mr. Tang. He, and his associates, received six market orders to sell on an unsolicited basis **[R 11026-11054]**. The client's orders were part of an overall strategy to liquidate an existing long position in MGRM by the end of the pricing period for the MGRM CVR's. **[R 10785-10796]**. Mr. Tang had sold 4,864,400 shares of MGRM prior to the pricing period. **[R 801]**. Mr. Tang sold a total of 262,600 shares of MGRM at DBSI on May 19, 22 and 23, 2006 at an average price of $1.93. **[R 8935-8976]**. Mr. Tang's MGRM trades through Mr. Brokaw and DBSI during the pricing period were sold at higher prices than the overall VWAP for MGRM of $1.85 for the pricing period. **[R 11559]**. The NAC concluded that Mr. Tang had a "rational strategy" in picking the specific times of the day to sell **[R 12486]** and in fact, his sales through DBSI and Mr. Brokaw were at a higher price ($1.93) than the VWAP for the pricing period ($1.85). **[R 8935-8976; R 11558]**.

FINRA also asserts that somehow Mr. Brokaw's ownership of MGRM CVR's in his account and related family accounts had a bearing on his actions. As reflected in the evidentiary record, Mr. Brokaw owned CVR's in MGRM dating back to December 2004 when they were created. He owned a total of 178,970 CVR's that were valued at $109,171.70 on May 19, 2006, the first day of the pricing period. **[R11061]**. The total incremental appreciation had the CVR's been fully valued was $48,321.90. **[R 11061]**. More importantly, Mr. Brokaw sold 50,000 CVR's personally on April 18 and 20, 2006. **[R 11061]**. Had there been some plan as alleged by FINRA to maximize profit, FINRA offers no explanation concerning the pre-pricing period sales. Similarly, the commissions earned by Mr. Brokaw on Mr. Tang's sales were minimal when compared to Mr. Brokaw's overall production. Mr. Brokaw's gross commissions in 2003

were $1,773,487, in 2004 were $1,855,448, in 2005 were $1,675,836 and through June 2006, Mr. Brokaw's year-to-date commissions were $931,446. **[R 11057-R 11060]**. The total commissions earned by DBSI on Mr. Tang's six unsolicited trades were $3,626. **[R 11056]**. Mr. Brokaw's payout of the total gross was 20%. **[R 7216]**. Out of that amount, Ms. Meyer received 25%. **[R 7217]**. And Mr. Brokaw's two registered sales assistants – Mr. Ewing and Mr. Aliperti – received a small portion. **[R 7217]**. Mr. Brokaw gave very credible evidence that neither his ownership of CVR's back to 2004 nor the approximate $500 in commissions he received influenced him in any way. **[R 7218]**.

In reality, both Mr. Brokaw and Mr. Tang shared a view that MGRM's stock price would likely decline due to the selling pressure during the pricing period and MGRM's financial picture. **[R 10781]**. Ultimately, MGRM's stock price declined to 45 cents per share in November 2008. **[R 10781]**. And more importantly, the VWAP for MGRM was never above the $2.02 strike price set forth in the publicly available CVR Agreement for any 30-day period after the pricing period. **[R 10769-10784]**.

Based on these facts, it is baseless to assert that Mr. Tang's goal to sell his MGRM common stock holdings by the end of the pricing period when the CVR's would be priced and paid out thus eliminating the hedged position was a red flag. In reality, it was both a prudent and valid strategy utilized by others as well as Mr. Tang. **[R 10757-10762]**.

3. Mr. Brokaw's Knowledge of the Valuation Process for the MGRM CVR's is Not a Red Flag

As set forth herein, MGRM had publicly announced how the CVR's would be priced at the time of the merger between Aclara and Virologic **[R 8703-8754]**. The valuation process was a matter of public record. Whether MGRM would satisfy its CVR obligation through cash or issuance of more shares was not known until May 26, 2006 when MGRM issued a press release.

[R 10753-10754]. Thus, for all of the Tang Capital Partner's MGRM trades done through DBSI during the pricing period, it was entirely possible that MGRM could have issued more stock to satisfy its CVR obligations rather than just cash. **[R 8703-8754]**. Accordingly, the argument that either Mr. Tang or Mr. Brokaw and his family accounts were trying to maximize the cash payouts on May 19, 22 and 23, 2006 is baseless since MGRM still could have issued stock to satisfy CVR holders during that time. Given the shared view that MGRM common stock could come under selling pressure, the issuance of more stock would act as a deterrence and diffuse the argument that there was an attempt to drive the price of MGRM below the strike price of $2.02 as set forth in the publicly available CVR agreement.

4. The Fact that Mr. Brokaw Knew that Tang Capital Partners Had a Sizeable Position That It was Liquidating Was Not a Red Flag Nor Did Mr. Tang's Trading During the Pricing Period Deviate From Mr. Tang's Past Practices as Falsely Asserted by FINRA

FINRA further asserts that two additional red flags ignored by Brokaw allegedly were (1) The fact that Mr. Tang was selling off a sizeable position in MGRM "rapidly" during the pricing period to maximize profits **[FINRA Brief at p.1]**, and (2) Tang's trading during the pricing period deviated from his past practices on several fronts. **[FINRA Brief at p.1]**. In fact, the NAC decision specifically held that Mr. Tang "never informed Brokaw of the total of MGRM shares that he had to sell during the pricing period, the **pace** at which he planned to sell these shares or other broker-dealers that he was using also to sell MGRM shares. **[FINRA 12487]**. This finding directly contradicts FINRA's position as set forth on page 1 of its Opposition Brief. Mr. Brokaw did not even know what Mr. Tang was doing elsewhere. The 50,000 share sell orders at DBSI were actually small compared to a daily trading volume of close to 2 million shares traded in MGRM during May 19, 22 and 23, 2006. **[R 10763-10768]**.

Furthermore, FINRA's position that Mr. Tang had deviated from past trading is factually wrong. Mr. Tang testified that he had problems with DBSI's executions in the past that had caused a drop in the business he was giving DBSI and Mr. Brokaw. **[R 6832 – "Business with DBSI had steadily declined"; "...I was increasingly unhappy with the trade execution at Deutsche Bank..." (both statements made by Mr. Tang)]**. Given that Mr. Tang's trades in MGRM at issue here were for dollar values of approximately $90-$100,000 each, these trades were not unusual given his trading history at DBSI. For illustration, Mr. Brokaw cited to Mr. Tang's trades in Cell Therapeutics earlier in 2006, wherein Mr. Tang purchased 750,000 shares of that stock for a cost of $1.7 million. **[R 08811-8840]**. The Tang Capital Partners account had a valuation of $75,395,536 at month-end May 2006 **[R 8935]**. Mr. Tang was selling through DBSI on May 16, 2006 a total of 543,562 shares of Cell Therapeutics for proceeds in excess of $920,000. **[R 8960]**. How can FINRA credibly argue that the size of the sales in MGRM were "unusual" given the size of Mr. Tang's accounts and his trading history in healthcare stocks? **[R 8759-8935]**. Based on the evidence, such an argument is nonsense. The trades in MGRM paled in comparison in size. As has been held by the NAC, Mr. Tang had a rationale purpose for trading near the open or near the close due to MGRM's abundant liquidity at those times. **[R 12484-12485]**. There is no evidence that anyone told Mr. Brokaw that Mr. Tang's orders were disrupting the market in MGRM and in fact, Mr. Tang's sales at DBSI during the pricing period were at higher average prices than the average VWAP for MGRM for the pricing period.

Under these circumstances, there were no "red flags" ignored by Mr. Brokaw in relation to those legitimate and orderly sales by Tang Capital Partners.

B. MR. BROKAW COMPLIED WITH THE DUTIES HE OWED TO DBSI AND HIS CLIENT, AND THE OVERALL MARKETPLACE

Under prior SEC case law, whether a registered representative has violated Rule 2110 depends on whether he has engaged in conduct that violates a duty owed to either his employer or his clients. DiFrancesco 2012 SEC LEXIS 54 (2012). FINRA's premise is that Mr. Brokaw ignored purported "red flags" and should not have communicated Mr. Tang's legitimate trade orders is not supported by the facts nor the law as set forth in Mr. Brokaw's Opening Brief **[See Legal Argument, Mr. Brokaw's Opening Brief, pp. 13-21]**.

FINRA flatly states that Mr. Brokaw knew about the MGRM pricing period and the MGRM CVR's because "he personally owned" CVR's. Both the pricing period and the CVR's valuation process were a matter of public record and had been publicly known for 18 months since the merger. **[R 8703-8754]**. FINRA asserts that the timing of the Tang orders were suspicious but the CVR's were valued based on an average of the VWAP over 15 days – not a closing price – therefore the timing was irrelevant as the daily VWAP is simply based on shares traded – not the time when the shares were traded. **[R 8703-8754]**. As set forth above, Mr. Tang's orders were not of any size consequence in light of the similar trading in healthcare stocks by Mr. Tang in much larger quantities! **[R 8759-8935]** and not material given the abundant liquidity in MGRM.

Mr. Brokaw's explanation to the sales-trader Ms. Watson on May 19 also showed that Mr. Brokaw was being fully transparent about the MGRM CVR pricing period and educating the firm's traders of possible market events concerning MGRM. **[R 10672-10676]**. Nowhere in either the NAC Decision or in FINRA's Opposition Brief does FINRA explain what Mr. Brokaw should have done other than not accept Mr. Tang's business. Given that Mr. Tang employed similar selling strategies in MGRM at two other firms (Knight Capital and Summer Street

Research) as reflected in the record that have not been challenged, Mr. Brokaw's refusal of the orders would have simply made no sense. **[R 10881-10922; R 11091-11098; R 11399-11558]**. His employer expected him to produce business, and Mr. Tang's trades were business legitimately done with a rational economic basis.

Furthermore, Mr. Brokaw had no discretion over the timing of the trades. Mr. Tang, as a sophisticated money manager was very knowledgeable that MGRM's liquidity was greatest during the open and the close of the trading day. The NAC Decision confirmed this fact. **[R 12485-R 12486]**. The DBSI sales-traders who actually communicated the market orders to the traders testified that (1) the traders knew that all trades were market orders, (2) the trades were done without injecting any false or misleading information into the marketplace, and (3) the trades were executed at commercially reasonable levels in an orderly fashion. **[R 5675-5676; R 6253]**. Thus, Mr. Brokaw breached no duty to the investing public.

C. MR. TANG WAS WELL KNOWN TO BOTH MR. BROKAW AND DBSI AND HAD BEEN A LEGITIMATE CUSTOMER OF DBSI FOR A LONG TIME

FINRA's attempts to paint Mr. Tang as a rogue or suspicious trader are baseless. Mr. Tang had worked at DBSI for several years **[R 6828-R 6829]** as a research analyst in the healthcare field. At the time Mr. Tang did the MGRM trades, he was managing Tang Capital Partners. **[R 6830]**. Mr. Tang had done business for several years with Mr. Brokaw at DBSI. **[R 6831]**. He often times took large positions. **[R 10797-R 10923]**. Mr. Tang's business with DBSI had fallen over the years due to execution problems that had arisen. **[R 6832-R 6833]**. As the NAC Decision confirmed, Mr. Tang shared his bearish opinion on MGRM with Mr. Brokaw, how the mechanics of the CVR's worked, the concept of the hedged position he created **[R 12487; R 10785-R 10796]** and his objective that Mr. Tang wanted to be completely liquidated in

his long position in MGRM by the end of the pricing period. **[R 12487]**. Thus, Mr. Brokaw had been diligent in (a) knowing his client, (b) understanding the particularities of the MGRM CVR pricing period, and (c) gaining knowledge about the client's particular objective with the unraveling of the hedged position. As reflected in his conversation with the DBSI sales-trader Watson on the first day of the pricing period on May 19, 2006, Mr. Brokaw shared this information with this sales-trader to have complete transparency. **[R 10672-R 10676].** There have been no charges brought against Mr. Tang and even the NAC Decision states that Mr. Tang was motivated by a valid economic rationale. **[R 012486]**.

Under these facts, Mr. Brokaw did not act unethically nor did he breach any duty to exercise due diligence to prevent fraud since **no fraud existed**!

D. FINRA'S RELIANCE ON TESTIMONY OF DAVID ZITMAN, A DBSI SALES-TRADER IS MISPLACED

FINRA is attempting to give great significance to a footnote in the NAC Decision that stated that Mr. Brokaw failed to understand the significance of the trepidation of DBSI sales-trader, Zitman. **[R 12489, FINRA Brief pp.22-23]** on the morning of May 22, 2006 after Mr. Zitman took an order from Mr. Ewing for Mr. Tang. Neither the NAC Decision nor FINRA can explain why Mr. Zitman entered the order for execution **before** talking to Mr. Brokaw if such trepidation was credible. **[R 6169]**. Moreover, Mr. Zitman's deposition testimony conflicted with his testimony on the witness stand at Mr. Brokaw's hearing wherein he stated that he only became concerned about Mr. Tang's trading in MGRM on May 23, 2006 in connection with the afternoon order of May 23 placed by Mr. Tang. **[R 10438-R 10439]**. In connection with that order, Mr. Zitman had failed to execute the Tang Capital sell order before the market closed on May 23 in contravention of the client's instructions **[R 10995- R 11054]**. As a result, the DBSI position traders took the position into inventory and gave Mr. Tang the last market price.

Mr. Zitman directly lied to Ms. Meyer, another registered representative about this order. Specifically, the conversation went as follows:

(at 4:25:32 on May 23, 2006 – **See JX-1, R 10716)**

Dave Zitman:	Yo.
Mary Meyer:	That trade wasn't printed after the close was it?
Dave Zitman:	It was what, about who, about what?
Mary Meyer:	It wasn't done after the close, was it?
Dave Zitman:	No, it was reported to you after the close.
Mary Meyer:	Right?
Dave Zitman:	It was the last print.

In fact, as both the NASDAQ Order Audit Trail and DBSI's own trade run show, the order was filled at 4:11:32, after the close on May 23. **[R 11677; R 11047]**.

Mr. Zitman also lied to Mr. Brokaw as set forth below in a conversation about the same afternoon trade of May 23, 2006:

Dave Zitman:	You pissing and moaning?
Ned Brokaw:	Yeah, because here's what he's saying, he's saying ---
Dave Zitman:	I'm selling them at 15:59. This is what I think, this is what I think is happening. He's selling them at 15:59. You see all those prints, 3,700, 1300...
Ned Brokaw:	Yeah, yeah, yeah, yeah.
Dave Zitman:	Those are all, I believe, I'm going to double check it, those are all him.

[R10718]. As reflected by the NASDAQ Order Trail and DBSI's own trade run, the order was not filled until 4:11:32 and Mr. Zitman engaged in unethical conduct by lying to Mr. Brokaw.

Since Mr. Tang's order had not been properly executed, he rejected the trade. **[R 6876-R 6877]**. Mr. Zitman thought that was suspicious even though he failed to get the order done as instructed by the client **[R 6876; R 10711-R 10712]**, he lied to other DBSI personnel (Mary Meyer) that the stock was sold before the close **[R 10716-R 10717]** and he lied to Mr. Brokaw about selling the stock before the close. **[R 10718-R 10719]**. Moreover, DBSI falsely reported 12,600 shares were sold before the close when the NASDAQ order trail record shows that to be false. **[R 11587-R 11680]**. Thus Mr. Zitman and DBSI created false records and breached their ethical duty to the client and their duty of candor to Mr. Brokaw.

Mr. Zitman's dislike of Mr. Tang was well known to DBSI, FINRA and the NAC Panel who heard the appeal, but Mr. Zitman's disdain for Mr. Tang has never properly been taken into consideration. At one point, Mr. Zitman stated as follows to Mary Meyer on May 22, 2006:

> "This fuckin' Tang shit, not supposed to be coming through my desk. I am fuckin's livid here." **[R 10691]**

When asked why he was livid, Mr. Zitman stated as follows:

> "Because I'm fuckin' – because I spoke to the guy the other day, and he fuckin' started with me. And if he fuckin' starts with me one more time, I'm going to fly out to San Diego and kill him." **[R 10691]**

When asked at the hearing what triggered such a negative reaction to a former Deutsche Bank research analyst, and now a prominent customer of the firm, Mr. Zitman was unable to give an explanation. **[R 6146]**.

It is simply incredulous to argue that Mr. Zitman ever gave any kind of credible warning to Mr. Brokaw or express true trepidation about Mr. Tang's legitimate trading. In fact, Mr.

Zitman specifically looked to see if Mr. Tang was going to trade more MGRM on the morning of May 23. **[R 10706]**. The evening before on May 22, Mr. Zitman had the following conversation with Mr. Brokaw:

Dave Zitman:	If I could talk to you guys and not talk to Tang, this would work out for you.
Ned Brokaw:	Exactly, I'll deal with the asshole, don't worry.
Dave Zitman:	Yeah, you deal with him and I'll –
Ned Brokaw:	The only thing is I can get a lot more business out of him, but I'm not here all of the time.
Dave Zitman:	Whatever.

[R 10702]. For FINRA to argue that Mr. Zitman was seeking to "warn Mr. Brokaw" is not credible in light of the fact that Mr. Zitman was searching for orders and trying to devise a plan whereby he would execute Tang orders as long as he did not have to speak with him directly.

In reality, Mr. Zitman resented Mr. Tang and that clouded his judgment. Mr. Zitman's lies to other DBSI personnel, his failure to get the trades executed properly and his anger towards Mr. Tang discredit his testimony.

III. PURSUANT TO EXISTING LEGAL STANDARDS, MR. BROKAW DID NOT VIOLATE RULE 2110

Perhaps the penultimate statement in FINRA's Opposition Brief is as follows:

> "The NAC did not declare Tang's trades to be legitimate. As the language on the tapes suggest, a manipulative scheme may very well have been in motion, but Enforcement did not prove a necessary element."

FINRA Brief at p. 25. Clearly FINRA is still trying to argue that Mr. Tang had no rational economic basis for the trades at issue and Mr. Brokaw should have known that. This is directly contradicted by the NAC's holding as follows:

> "We determine that the evidence shows that KT (Kevin Tang) had a rational strategy, and the Hearing Panel's erroneous determination to ignore KT's testimony tips the balance of proof against Enforcement."

[R 12486]. Similarly, the NAC Decision held as follows:

> "When we consider all of the other facts before us, however, we conclude that Enforcement has not proven that Brokaw knew or was reckless in not knowing the following KT's (Kevin Tang, the seller of the securities through his hedge fund) directions was manipulative. Brokaw had no discretion over KT's orders – all of which were unsolicited orders. Rather, Brokaw worked these orders through the firm's trading desk, which executed them at prevailing market prices. These facts mitigate against a finding that he was involved in any manipulative scheme."

[R 012487].

Unlike the cases cited by FINRA, in Mr. Brokaw's situation, there is inadequate evidence to suggest that Mr. Brokaw's actions were unethical or that he ignored blatantly suspicious activity that required some other action on his part. FINRA completely ignores the fact that the Securities and Exchange Commission reviewed Mr. Tang's trading in MGRM and no action was taken. **[R06881]**. Mr. Tang was not engaged in a fraud and Mr. Brokaw acted appropriately under all of the circumstances.

In his Opening Brief, Mr. Brokaw took great pains to distinguish his case from the cases cited in the NAC Decision because the existence of red flags, suspicious activity, manipulation, wash sales and direct involvement by the Respondents in those cases is so starkly different than the facts in this case.

FINRA has cited to new cases to try and bolster its position, but again the facts are wholly distinguishable. Here are just a few examples:

(1) Matter of Sharon Graham and Stephen Voss, 1988 SEC LEXIS 2598 (November 30, 1998) -- There was a finding that the broker Graham aided and abetted a scheme by a customer by John Broumas, who engaged in hundreds of wash trades in a stock in which he was a Director at contrived prices. The broker took orders from the client directing where trades could be effected – a red flag for manipulation. By contrast, all of Mr. Tang's sales at DBSI were done at prevailing market prices with minimal impact on the stock's price.

(2) Matter of James Goetz, 1998 SEC LEXIS 499, (March 25, 1998) – Broker made a material misrepresentation to obtain a matching gift donation from his employer when, in fact, he was not eligible for a matching gift. Clearly this conduct breached an ethical obligation by the broker to his member-firm. Mr. Brokaw made no misrepresentation to his employer in contrast.

(3) Matter of Calvin Fox, 2003 SEC LEXIS 2603 (October 26, 2003) The registered representative submitted an altered copy of his license to practice law in the state of Florida. Case remanded to determine whether there was bad faith or unethical conduct when the broker made his statements to his supervisors about his law license. Clearly, Mr. Brokaw did not alter documents nor is there even a hint that he misrepresented anything to his supervisors.

(4) Matter of the Application of Justine Fisher, 1998 SEC LEXIS 1763 (August 19, 1998) – There were findings that the registered representative engaged in conduct inconsistent with just and equitable principles of trade by (1) making misstatements and

intentional omissions to one or more customers concerning an investment strategy, (2) effecting transactions without authority and (3) engaging in excessive activity. The broker admitted that her strategy was unsuitable for the customers at issue. In contrast, Mr. Brokaw had no strategy, did no unauthorized or excessive trading and misled no customers. This case is clearly distinguishable from Mr. Brokaw's case.

(5) Matter of Application of Scott Epstein, 2009 SEC LEXIS 217 (January 30, 2009) – The registered representative engaged in unsuitable mutual fund switches in twelve client accounts. The broker did not challenge the findings of the inappropriate switches but challenged the evidentiary record and how the evidence was introduced. By contrast, throughout Mr. Brokaw's case, he has challenged all of the specious charges against him. There is no evidence that he engaged in bad faith or unethical conduct by violating any duty to his firm or his clients.

(6) Matter of Application of Jason A. Craig, 2008 SEC LEXIS 2844 (December 22, 2008) – Broker filed a false Form U-4 by failing to disclose four false felony charges and one misdemeanor conviction. Clearly such conduct is in bad faith. This case is distinguishable from Mr. Brokaw's and irrelevant to his proceeding.

(7) Matter of the Application of James B. Chase, 2003 SEC LEXIS 566 (March 10, 2003) – In this case, the broker violated suitability rules by engaging in recommendations without a reasonable basis to believe that such recommendations were suitable. This case is irrelevant to Mr. Brokaw's case because Mr. Brokaw made no recommendations. Rather, his client gave DBSI six unsolicited orders to sell MGRM at the market.

(8) Michael Rooms v. Securities and Exchange Commission, 444 F.3d 1208 (March 14, 2006) – A broker was found to have violated penny stock rules that required certain

disclosures and then he attempted to obstruct the NASD investigation. The Court held the registered representative offered bribes to his clients to get them to sign backdated forms that were fake. There is no such egregious conduct in the present dispute. Mr. Brokaw's conduct does not rise to the level of bad faith or unethical conduct as set forth in this case.

(9) Heath v. Securities and Exchange Commission, 586 F.3d 1122 (November 4, 2009) – In this case, an investment banker improperly disclosed details of a pending acquisition to a competitor at another financial institution. The Hearing Officer found that the broker's conduct violated the just and equitable principles of trade because it improperly disclosed material, confidential client information potentially jeopardizing the merger. The conduct was found to be unethical because it violated the broker's duty to both his client and his firm.

The SEC in Heath stated as following concerning the just and equitable rule:

> "This rule incorporates 'broad ethical principles,' and focuses on the 'ethical implications of the [a]pplicant's conduct.' The rule serves as an industry backstop for the representation 'inherent in the relationship,' between a securities professional and a customer, 'that the customer will be dealt with fairly, and in accordance with the standards of the profession.'
>
> Promulgated to discipline 'a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace,' the J&E Rule focuses on the securities professional's conduct rather than on a subjective inquiry into the professional's intent or state of mind. Accordingly, a violation of the rule need not be premised on a motive or scienter finding....
>
> [Petitioner]'s breach of confidentiality violated one of the most basic duties of a securities professional, [**25] a duty that is grounded in fiduciary principles and reflected in the [J.P. Morgan] Code of Conduct."

Applying the Heath holdings to the Brokaw case is appropriate. There is no evidence to support a finding of bad faith against Mr. Brokaw. At best, FINRA argues that by accepting Mr. Tang's orders, he engaged in unethical conduct by not asking more questions. In reality, under Heath, Mr. Brokaw fulfilled his duty to his customer by communicating the orders to the sales-traders at DBSI and assisting the client in the orderly liquidation of a hedged position. Mr. Brokaw also fulfilled his duties to DBSI by alerting the sales-traders of the specifics of the MGRM pricing period for the CVR's and by alerting the DBSI traders to possible selling pressure. And finally, Mr. Brokaw fulfilled his duty to the marketplace since there was no evidence that he ever caused any false information to be injected into the marketplace regarding MGRM. Mr. Tang's trades were all done in an orderly fashion at prevailing market prices.[1]

IV. THE NAC DECISION FAILED TO PROPERLY CONSIDER THE PREVAILING PRACTICE AT DBSI CONCERNING THE PREPARATION OF ORDER TICKETS

A. FINRA'S CHARGE AGAINST MR. BROKAW WAS CHANGED FROM AN INTENTIONAL ACT OF PURPORTED WRONGDOING TO A CHARGE OF NEGLIGENCE

In the Wells Process, FINRA's lead attorney, Mr. Thurgood, falsely asserted that Mr. Brokaw "caused the books and records of the firm to be inaccurate by instructing one of his sales assistants to incorrectly fill out trade tickets for trades in Monogram Biosciences on May 19, 22, and 23, 2006. **[R 47]**. This charge was made on December 12, 2007. **[R 47]**. Mr. Thurgood had taken Mr. Aliperti's deposition on September 6, 2007 and Mr. Aliperti, the sales assistant who completed the tickets, had testified that he had gotten the instructions from Mr. Ewing and Mr. Brokaw had not ever seen the tickets. **[R 9362-9363; R 9387; R 9390]**.

[1] Except that DBSI did not properly execute the afternoon trade on May 23 and did not report it accurately. **[See discussion, supra and R 11677; R 10716 and R 11047]**

FINRA now asserts that what Enforcement alleged in the Wells Process is irrelevant. **[See FINRA Brief, Footnote 4, p. 11]**. FINRA further states that Enforcement obtained new evidence and thus modified its charge. **[See FINRA Brief, Footnote 4, p.11]**. Nowhere does FINRA say what that additional evidence was. In reality, the charge went from a very clear allegation of intentional wrongdoing to a charge that Mr. Brokaw "failed to ensure the accuracy of the order tickets". The change in theories was made because FINRA Enforcement knew it could not prove the charge of intentional misconduct by Mr. Brokaw.

B. THE NAC OVERLOOKED THE EXISTING PRACTICE AT DBSI

Mr. Brokaw challenges the severity of the sanction relating to the alleged books and records violation due to the established practices at DBSI. Mr. Brokaw also asserts that the sales-traders who communicated the Tang orders to the position traders maintained accurate memoranda in DBSI's computer showing the placement of each of the six unsolicited orders. **[R 10995-11054].** The "booking tickets" prepared by Mr. Aliperti were inaccurate but he testified he got his instruction from Mr. Ewing. **[R 9362-9363; R 9387; R 9390]**.

Mr. Brokaw relied upon the established practice in the branch that gave the duty to complete order tickets to the sales assistants **[R 7191]**, and allowed either the sales assistants or the sales-traders to complete the order tickets. **[R 6613]**. In fact, Mr. Brokaw introduced ample evidence that this was the established practice and NAC simply ignored such evidence. **[R 6595; R 6675; R 1187-1404; R 6674]**.

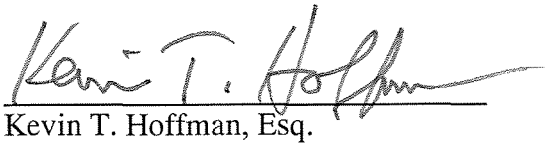
Under these circumstances, Mr. Brokaw believes the sanction for the alleged books and records violation is too severe.

CONCLUSION

Mr. Brokaw submits that he did not act in bad faith or unethically in connection with six unsolicited orders received on May 19, 22 and 23, 2006 from Tang Capital Partners. Mr. Brokaw further submits that these trades were not suspicious and the purported "red flags" referenced by FINRA simply are an exaggeration of normal activity. At some point, FINRA needs to concede that Mr. Tang's trading was legitimate and for sound economic and logical reasons and not suspicious. Accordingly, Mr. Brokaw needs to be exonerated for simply fulfilling his duties to his client, to his employer DBSI and to the investing public.

Dated: January 16, 2013

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I, Kevin T. Hoffman, certify that this Reply Brief complies with the Commission's Rules of Practice by filing a Reply Brief not to exceed 7,000 words. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 6,966 words.

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