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UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of Bruce Meyers and Meyers Associates, L.P. For Review of Action Taken by FINRA	:	**File No. 3-17254**

OPENING BRIEF IN SUPPORT OF APPLICATION OF BRUCE MEYERS AND MEYERS ASSOCIATES, L.P. FOR A REVIEW OF DECISION OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY'S NATIONAL ADJUDICATORY COUNCIL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

PRELIMINARY STATEMENT

Pursuant to Rule 450(a) of the Commission's Rules of Practice, Meyers Associates, L.P. (the "Firm") and Bruce Meyers ("Meyers") (sometimes referred to herein collectively as "Applicants") hereby submit this opening brief in support of the application of Meyers and the Firm for a review by the Securities and Exchange Commission (the "Commission") of the decision of the Financial Industry Regulatory Authority's ("FINRA") National Adjudicatory Council ("NAC") dated May 9, 2016 (the "NAC Decision") which determined that: 1) Bruce Meyers, an associated person of a FINRA-member firm is statutorily disqualified pursuant to Sections 3(a)(39) and 15(b)(4)(H)(i) of the Securities Exchange Act of 1934 (the "Exchange Act"), and 2) denying the Firm's MC-400 Membership Application (the "MC-400 Application") to permit Meyers to continue to associate with the Firm in any capacity.[1] Applicants base their appeal on the following procedural and public policy grounds: (A) FINRA erred by excluding relevant evidence in violation of FINRA Rule 9524(a)(4); (B) FINRA misinterpreted and improperly expanded Section 3(a)(39) and Section 15(b)(4)(H)(i) of the Exchange Act; and (C) as a matter of public policy, the SEC should, in this interpretation of the federal securities laws and its own rules, provide clarity to industry members and state regulators.

JURISDICTIONAL AUTHORITY

The NAC Decision is a final disciplinary sanction by a self-regulatory organization ("SRO") as to which a notice is required to be filed with the Commission pursuant to Section 19(d)(1) of the Exchange Act. Such notice was filed with the Commission on May 9, 2016.[2] Applicants properly filed an application, pursuant to Section 19(d)(2) of the Exchange Act, for review of action taken against them by FINRA, on June 8, 2016 which was within thirty (30) days

[1] NAC Decision, dated May 9, 2016 (Bates No. 002221) [hereinafter, "NAC Decision (Bates No. 002221)"].
[2] *See generally*, NAC Decision (Bates No. 002221).

after the notice of the determination was filed with the Commission and received by the Applicants, pursuant to Rule 420 of the Commission's Rules of Practice.

BACKGROUND

Meyers has been a registered person at a FINRA member firm continuously since May 1982 when he qualified as a general securities representative.[3] In March 1987 and again in July 1993 he became qualified as a general securities principal.[4] Meyers passed the Uniform Securities Agent State Law Exam in December 1982.[5] He also became registered through waiver as an investment banking representative and operations professional.[6]

Meyers has been associated with the Firm from April 1993 to the present and has been its chairman and chief executive officer for most of that time.[7] Meyers founded the Firm and indirectly owns 90% of the Firm through his 90% ownership interest in Meyers Securities Corp.[8]

On March 24, 2015, Applicants entered into a Consent Order with the Connecticut Department of Banking (the "Order") which, among other things, required Meyers to withdraw his registration as a broker-dealer agent in Connecticut and not to reapply for registration as an agent of a broker-dealer in Connecticut for three years from the date of the Order.[9] Importantly, the Order further provided that the Firm must ensure that, for so long as Meyers remained affiliated with the Firm in an unregistered capacity in Connecticut, Meyers refrain from directly supervising or training any broker-dealer agents with respect to securities business transacted in or from Connecticut and receiving any compensation in connection with the offer, sale, or purchase of

[3] NAC Decision (Bates No. 002221) at 2.
[4] NAC Decision (Bates No. 002221) at 2.
[5] NAC Decision (Bates No. 002221) at 2.
[6] NAC Decision (Bates No. 002221) at 2.
[7] NAC Decision (Bates No. 002221) at 2.
[8] NAC Decision (Bates No. 002221) at 2.
[9] *See Meyers Associates, L.P. and Bruce Meyers*, Docket No. CFNR-14-8132-S, State of Connecticut Department of Banking, Consent Order, dated March 24, 2015 (Bates No. 000545) at p. 5, ¶ 6 [hereinafter, "Order (Bates No. 000545)"].

securities effected in or from Connecticut.[10] The Order provided for other sanctions, terms and conditions against the Firm which are not relevant here.[11]

On April 23, 2015, FINRA's Department of Member Regulation ("Member Regulation") notified the Firm that it had determined that based on the Order, Meyers was subject to statutory disqualification as defined in Section 3(a)(39) of the Exchange Act.[12] After receiving said notification, Meyers contacted the Connecticut Department of Banking (the "Department") and informally sought confirmation that the Department did not intend the Order to constitute a statutory disqualification under Exchange Act Section 15(b)(4)(H)(i) as it did not constitute a "bar" against Meyers.[13] Without explanation, the Department declined the request and Meyers subsequently filed with the Department a formal Petition for Reconsideration and Modification of the Order.[14] In June 2015 the Banking Commissioner denied Meyers' Petition for Reconsideration without setting forth the rationale or basis for its decision.[15]

After the Department's denial of the Petition for Reconsideration, Meyers filed a Complaint in Connecticut state court requesting that the Court require the Department to amend the Order to state that it should not be construed as a "statutory bar," arguing that the Department and Meyers did not intend that the Order serve as a disqualifying order under the Exchange Act.[16] This was evidenced by, *inter alia*, the fact that Meyers was permitted to remain registered with the Firm notwithstanding the entry of the Order and was not required to divest himself of ownership

[10] Order (Bates No. 000545) at p. 5, ¶ 7.
[11] *See generally*, Order (Bates No. 000545).
[12] Notice of Statutory Disqualification, dated April 23, 2015 (Bates No. 000555).
[13] NAC Decision (Bates No. 002221) at 5.
[14] NAC Decision (Bates No. 002221) at 5.
[15] NAC Decision (Bates No. 002221) at 5.
[16] NAC Decision (Bates No. 002221) at 5.

of the Firm.[17] In October 2015 the Court dismissed the Complaint on procedural grounds having never addressed Meyers' substantive arguments.[18]

STANDARD FOR APPELLATE REVIEW

The Commission's review of the NAC Decision is governed by the standards set forth in Section 19(f) of the Exchange Act of 1934, 15 U.S.C. § 78s(f). The Commission must dismiss Applicants' appeal if it finds (i) that the specific grounds on which FINRA based its action exist in fact, (ii) that the denial of the MC-400 Application is in accordance with FINRA rules, and (iii) that those rules were applied in a manner consistent with the purposes of the Exchange Act, and unless it determines that FINRA's action imposes an unnecessary burden on competition.[19] Applicant's appeal should not be dismissed because (i) the specific grounds for the statutory disqualification do not exist in fact because the Order was simply not a bar pursuant to the statute, (ii) the denial of the MC-400 Application was not in accordance with FINRA rules because FINRA erroneously excluded relevant testimony, and (iii) by misinterpreting and improperly expanding Section 3(a)(39) of the Exchange Act, FINRA did not fairly apply its rules in a manner consistent with the purposes of the Exchange Act.

LEGAL ARGUMENTS

Applicants appeal the NAC Decision based on the following procedural and public policy grounds: (A) FINRA erred by excluding relevant evidence in violation of FINRA Rule 9524(a)(4); (B) FINRA misinterpreted and improperly expanding Section 3(a)(39) and Section 15(b)(4)(H)(i) of the Exchange Act; and (C) as a matter of public policy, the SEC should, in its interpretation and

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[17] Order (Bates No. 000545) at p. 5, ¶ 7.
[18] NAC Decision (Bates No. 002221) at 5–6.
[19] *In The Matter Of Timothy H. Emerson, Jr. For Review Of Action Taken By FINRA,* Release No. 60328, Release No. 34-60328, 4 (July 17, 2009); *In The Matter Of The Application Of May Capital Grp., LLC & Melvin Rokeach For Review Of Action Taken By NASD,* Release No. 53796, Administrative Proceeding File No. 3-12094 (May 12, 2006).

enforcement of federal securities laws and of its own rules, provide clarity with respect to the "functional equivalency" standard of the definition of a "bar" to industry members and state regulators.

(A) FINRA Erred by Excluding Relevant Evidence in Violation of FINRA Rule 9524(a)(4)

FINRA Rule 9524(a)(4) provides, "The disqualified member, sponsoring member, and/or disqualified person...shall be entitled to be heard in person, to be represented by an attorney, and to **submit any relevant evidence.**"[20] Acting in direct contravention of this rule, FINRA prohibited Applicants from introducing the testimony of Nathan Pereira, Esq. ("Pereira") regarding the negotiations and intent of Applicants and the Department in entering into the Order after it had determined that it would permit Mr. Pereira to testify.[21] Pereira's testimony was directly relevant to the third question in Section One of the MC-400 Application, which asks, "Does the firm or prospective employee have any reason to believe that the event does not constitute a statutory disqualification under Article III, Section 4 of NASD's By-Laws?"[22] By prohibiting Applicants from presenting material evidence relevant to the eligibility proceeding, FINRA violated its own procedural rules as well as basic principles of due process.

In both a January 6, 2016 Pre-Hearing Brief[23] and a February 1, 2016 Reply Brief,[24] the Applicants briefed specific NAC precedent regarding the relevance of intent in *In the Matter of the Continued Association of X as a General Securities Representative, et al.,* 2004 WL 5319879, NAC Decision No. SD04014 (N.A.S.D.R. 2004) ("*SD04014*"), *citing Leslie T. Peterson v. Nat'l*

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[20] Emphasis added.
[21] *See* Letter to parties regarding testimony at hearing, dated March 4, 2016 (Bates No. 001865) [hereinafter, "March 4 Letter (Bates No. 001865)"]; Hearing Transcript, dated March 22, 2016 (Bates No. 001945) at 101:25 – 102:8 [hereinafter "Hearing Tr. (Bates No. 001945)"].
[22] Hearing Tr. (Bates No. 001945) at 97:9 – 98:12; Completed Form MC-400 (with attachments), dated June 3, 2015 (Bates No. 000559).
[23] Pre-Hearing Brief of Meyers Associates, dated January 6, 2016 (Bates No. 000729).
[24] Applicant's Reply Brief, dated February 1, 2016 (Bates No. 001845).

Futures Ass'n, 1992 CFTC LEXIS 416 (Oct. 7, 1992).[25] In SD 04014, the NAC made it abundantly clear that the intent of the parties in entering into a settlement is relevant to the determination of statutory disqualification.[26]

While the briefs outlined the legal arguments related to intent and statutory disqualification, the existing record was not sufficient to completely inform the Hearing Panel about the facts relevant to this issue. Applicants offered in their pre-hearing discussions with Membership Regulation and in their proposed witness list to submit testimonial evidence on this issue and made it clear well in advance of the hearing that they would call Pereira as a witness to fully develop the factual record regarding the discussions that led to the entry of the Order and the intent of the Applicants and the Department in agreeing to its terms.[27]

FINRA did not, however, clearly indicate that the statutory disqualification issue had been conclusively decided prior to the MC-400 hearing. In a letter dated February 10, 2016, Associate General Counsel Andrew Love, Esq. on behalf of the Hearing Panel, advised that "the Hearing Panel has concluded that the order ***appears to be*** disqualifying under Paragraph (H)(i)."[28] The qualifying language "appears to be" indicated that, based on the submissions the Hearing Panel had received to that point, they were inclined to conclude Meyers was statutorily disqualified, but had not come to a final decision and would only do so after the Applicants had the opportunity to present their evidence and witness testimony at the eligibility hearing.[29]

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[25] *See* Pre-Hearing Brief of Meyers Associates, dated January 6, 2016 (Bates No. 000729) at pp. 7, 8, 9; *see also* Applicant's Reply Brief, dated February 1, 2016 (Bates No. 001845) at pp. 2, 3, 4.

[26] *Id.* The importance of considering the intent of the parties to the Order is discussed in more detail in section (A)(i) of this Opening Brief, below.

[27] *See* March 4 Letter (Bates No. 001865).

[28] Letter regarding disqualification determination and rescheduling the hearing, dated February 10, 2016 (Bates No. 001857) at 1 (emphasis added).

[29] Letter regarding disqualification termination and rescheduling the hearing, dated February 10, 2016 (Bates No. 001857).

Further, in a March 4, 2016 letter, Mr. Love further advised that the Hearing Panel would "not consider legal arguments already raised by the applicant in its briefs" but would permit Pereira to testify at the hearing "reserv[ing] its right to exclude any testimony (including testimony that is deemed immaterial, irrelevant or cumulative of other testimony presented at the hearing)."[30]

Applicants had indicated that Pereira's testimony would focus on conversations between representatives of the Applicants and employees of the Connecticut Banking Department that led to the execution of the Consent Order. The letter's reference to excluding "legal arguments" was entirely consistent with Applicants' understanding that Pereira would be permitted to testify to the *facts* surrounding and circumstances under which the Order was negotiated.[31] FINRA communicated that, while it did not need to hear argument on legal issues related to statutory disqualification, the purpose of the hearing was, *inter alia*, to hear factual testimony that would illuminate and inform their decision on the legal issues addressed in the briefs.[32] FINRA did not indicate that its decision on the issue of statutory disqualification had been conclusively made.[33]

The proposed testimony Pereira was to offer was consistent with what had been indicated in pre-hearing communications. At the hearing, the Hearing Panel initially indicated that, consistent with prior communications, it would allow limited testimony from Pereira concerning the facts underlying negotiation of the Order.[34] However, after Member Regulation repeated its objections to the testimony,[35] the Hearing Panel reversed its decision and ruled that it would not

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[30] March 4 Letter (Bates No. 001865) at 1.
[31] March 4 Letter (Bates No. 001865) at 1.
[32] *See generally,* March 4 Letter (Bates No. 001865).
[33] Hearing Tr. (Bates No. 001945) at 9:4-10; 11:16 – 12:17; *see also* March 4 Letter (Bates No. 001865).
[34] Hearing Tr. (Bates No. 001945) at 97:9-15 (Chairman Denton: "Okay. The panel has heard -- has read the record and is willing in a very limited basis to let Mr. Pereira testify, but we will cut it off very quickly if it seems like it is going on . . ."); *see also* Hearing Tr. (Bates No. 001945) at 19:3-8 (Ms. Rohrer: "...We are laying the groundwork for appeal. If you have already determined that issue, we ask for leeway to get that evidence in as to intent." Chairman Denton: "Okay.").
[35] Hearing Tr. (Bates No. 001945) at 99:5 – 101:16.

allow him to testify at all.[36] The Hearing Panel did not offer any reasoned basis for precluding the Applicants from introducing testimony that has been deemed relevant in prior proceedings. Rather, when counsel for Applicants stated, "Before we go forward, I just want to clarify, initially, Mr. Denton, you had indicated you were willing to take some limited testimony from Mr. Pereira, but I understand that's no longer the case, that we are not going to be permitted to offer Mr. Pereira's testimony. I just want to clarify." the Chairman simply responded, "Correct." without offering any reasoned basis for its reversal of its decision.[37]

In addition to the aforementioned preservation of Applicants' objection at the hearing itself, Applicants further preserved their objection in subsequent correspondence to FINRA on April 6, 2016, well before the NAC issued its Decision.[38]

In the NAC Decision, the NAC for the first time determined that the pre-hearing submission of legal briefs was analogous to a motion for summary disposition pursuant to FINRA Rule 9264(d) (which governs enforcement proceedings) and therefore Applicants should have submitted all evidence related to the issue at that time.[39] However, the NAC erred in applying Rule 9264(d) in this context. Prior to the hearing Applicants were instructed that legal briefs would be permitted but there was no discussion of motions for summary disposition for which there is no provision under the FINRA rules related to eligibility proceedings.[40] The correspondence from the Hearing Officer and statements made by the Hearing Panel directly contradict the conclusion that the briefs were the equivalent of a summary judgment motion requiring the submission of affidavits.

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[36] Hearing Tr. (Bates No. 001945) at 101:13-16; 101:25 – 102:8.
[37] Hearing Tr. (Bates No. 001945) at 101:25 – 102:8.
[38] *See* Applicant's letter regarding the testimony of Nathan Pereira, dated April 6, 2016 (Bates No. 002187).
[39] NAC Decision (Bates No. 002221) at 10, n.11.
[40] *See, e.g.*, FINRA Rule 9520, *et seq.*

Had Pereira been allowed to testify, he would have discussed the negotiations with the Department that led to the Order.[41] As one of the individuals directly involved in the negotiations with the Department, Pereira formed an opinion based on his numerous discussions with representatives from the Department that they did not intend for the sanction imposed on Meyers to be a bar, or the functional equivalent of a bar, which would have subjected him to becoming statutorily disqualified to continue as an associated person of a FINRA member firm.[42] Pereira would also have testified that the Department had offered a sanction of voluntary withdrawal against the entire Firm as early as April 2014,[43] well before the issuance of *In the Matter of the Continued Assoc. of Ronald M. Berman as a Gen. Sec. Representative with Axiom Capital Mgmt., Inc.*, NAC Decision No. SD-1997 (December 11, 2014). Accordingly, neither the Applicants nor the Department were on notice that the voluntary withdrawal they were negotiating would be considered the functional equivalent of a bar by FINRA.[44]

In the NAC Decision, FINRA also incorrectly noted that because Meyers was directly involved in the negotiations, Pereira's testimony was properly excluded as "irrelevant, immaterial, unduly repetitious or unduly prejudicial."[45] FINRA erroneously cites the evidentiary standard in Rule 9263(a) for disciplinary hearings, which is not relevant to eligibility proceedings.

However, Meyers' participation in the negotiations was mostly through his attorneys and thus any testimony he could have offered (other than his own intent) would have been inadmissible hearsay. Only Pereira and other counsel who participated directly in relevant conversations with the Department could testify as to those conversations. In addition, Meyers' testimony on this issue

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[41] *See* Affidavit of Nathan Pereira in Support of Motion for Stay (May 19, 2016) at ¶ 5, attached to Applicant's Motion to Stay the NAC Decision, dated May 19, 2016 (Bates No. 002259) [hereinafter, "Pereira Affidavit (Bates No. 002259)"]. Mr. Pereira's Affidavit is incorporated herein by reference.
[42] Pereira Affidavit (Bates No. 002259) at ¶ 12.
[43] Pereira Affidavit (Bates No. 002259) at ¶ 6.
[44] Pereira Affidavit (Bates No. 002259) at ¶ 10.
[45] *See* NAC Decision (Bates No. 002221) at 10, n.11.

would have been a far broader waiver of the attorney-client privilege than the partial waiver offered in connection with Pereira's testimony.[46]

By depriving the Applicants of the opportunity to present the proffered testimony in support of their Application, FINRA did not follow its own procedural rules and mis-applied the rules related to enforcement proceedings which are inapplicable to eligibility proceedings, thus depriving the Applicants of a full and fair hearing.

(i) The importance of intent in determining whether the Order constituted a bar that formed the basis for statutory disqualification cannot be understated.

The intent of Meyers and the Department is relevant in determining the effect of the Order entered into between Meyers and the Department. Consent orders should be construed as contracts because they "have many . . . attributes of . . . contracts."[47]

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; *rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.* For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.[48]

The interpretation of a consent order is governed by traditional contract principles, and although the scope of a consent order must be discerned within its four corners, extrinsic evidence may be

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[46] Pereira Affidavit (Bates No. 002259) at ¶ 13.
[47] *U.S. v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236-37 (1975).
[48] *U.S. v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) (emphasis added).

considered if the terms of the judgment or order are ambiguous.[49] Additionally, "reliance upon certain aids to construction is proper, as with any other contract," and such reliance does not violate the "four corners" rule of *Armour*.[50]

In interpreting the effect of a consent order entered into between the Federal Trade Commission ("FTC") and the Continental Baking Co., the Supreme Court stated that aids of construction included "the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree."[51] To interpret the consent order, the Court used documents incorporated by reference, including the complaint and an appendix that set forth the background leading to the complaint and proposed order.[52]

In interpreting the effect of a consent judgment entered into between the SEC and an individual alleged to have engaged in insider trading, the Second Circuit stated that "consent judgments should be interpreted in a way that gives effect to what the parties have agreed to, as reflected in the judgment itself or in documents incorporated in it by reference."[53]

The principles set forth by the Supreme Court regarding the interpretation of consent orders compels the conclusion that the intent of Meyers and the Department is relevant in determining whether the Order constituted a bar that formed the basis for statutory disqualification. Like the orders and decrees in *ITT Cont'l Baking Co.*, *Levine*, and *Peterson*, the Order must be interpreted

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[49] *SEC v. Levine*, 881 F.2d 1165, 1179 (2d Cir. 1989).
[50] *U.S. v. ITT Cont'l Baking Co.*, 420 U.S. 223, 238 (1975).
[51] *Id.*
[52] *Id.*
[53] *SEC v. Levine*, 881 F.2d 1165, 1179 (2d Cir. 1989); *see also SEC v. Gellas*, 1 F. Supp. 2d 333, 336-37 (S.D.N.Y. 1998) (giving effect to what parties intended by looking to the plain language of, and extrinsic evidence surrounding, a consent agreement between the SEC and an individual alleged to have violated certain federal securities laws); *Leslie T. Peterson v. Nat'l Futures Ass'n*, 1992 CFTC LEXIS 416 (Oct. 7, 1992) (noting that appropriate weight must be given to the bargain struck by the parties when interpreting the effect of an agreement to settle NYMEX disciplinary charges).

as a contract in a manner that gives effect to what the parties intended and ultimately agreed. The plain language of the Order demonstrated that Meyers and the Department did not agree to a bar. The Order clearly and unambiguously provided that Meyers would remain associated with the Firm while the Order was in effect.[54] Therefore, the Order could not form the basis for statutory disqualification based on an interpretation that it is a bar, or its functional equivalent. However, if the language in the Order was ambiguous as to whether it constituted a bar, extrinsic evidence regarding the parties' intent must be considered. Consistent with the principles of *Armour* and *ITT Cont'l Baking Co.*, the Order, as a contract, embodies the purposes of Meyers and the Department. Thus, intent is relevant in any attempt to give effect to what the parties agreed and must be recognized in determining the effect of the Order. FINRA's failure to recognize this, and its failure to provide Pereira with the opportunity to testify regarding the parties' intent, constitutes reversible error.

(B) FINRA has Improperly Expanded the Definition of Statutory Disqualification

Article III, Section 4 of the NASD By-Laws incorporates by reference the definition of "statutory disqualification" set forth in Section 3(a)(39) of the Exchange Act. Section 604 of the Sarbanes-Oxley Act expanded the definition of statutory disqualification in Section 3(a)(39) by creating and incorporating Exchange Act Section, 15(b)(4)(H) (the "Act") so as to include persons that are subject to any final order of a state securities commission or state authority that supervises or examines banks that:

> (i) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

[54] Order (Bates No. 000545) at p.5, ¶ 7.

(ii) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.[55]

There is no provision under the Exchange Act for statutory disqualification of an individual who voluntarily withdraws from registration and agrees not to reapply for a certain period of time. The plain language of the statute requires a "bar" by a state securities commissioner or a final order based on violations prohibiting fraudulent, manipulative, or deceptive conduct.

By any reasonable definition, a "bar" is a sanction involuntarily imposed upon one who either actively disputes the charges against them or agrees in conjunction with a settlement to being "barred." Indeed, in *Disqualification of Felons & Other Bad Actors from Rule 506 Offerings*, SEC Release No. 33-9414, 2013 SEC LEXIS 2000 (July 10, 2013), 78 F.R. 44730, 44741 (July 24, 2013) (the "SEC Release") the SEC defines the practical effect of a bar as "prohibiting a person from engaging in a particular activity." Meyers' license was not suspended, his license was not revoked, and he was not barred from acting as a broker-dealer agent in Connecticut.[56] The Order represented the understanding that as the owner of the Firm, Meyers would withdraw his registration from Connecticut and therefore forgo the economic benefits that flow from his ability to personally generate revenue from that state for a period of three years.

Had the parties to the Order intended for there to be a bar to Meyers acting as an agent of a broker-dealer in Connecticut, the Order would have clearly stated as much.[57] In the *Young* matter, the consent order clearly states the agreement among the parties that the sanction was that "Respondent shall be **BARRED**."[58] The actions alleged in the underlying action were that Young

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[55] There is no basis to interpret the Order as meeting the second criteria in §15(b)(4)(H)(ii) of the Exchange Act, as the sanctions against Meyers were not based on violations of laws prohibiting fraudulent, manipulative, or deceptive conduct.

[56] Order (Bates No. 000545) at p.5, ¶¶ 6,7.

[57] *See In The Matter of Andre Paul Young*, 2015 WL 336266, Consent Order Docket No. CO-14-8081-S (Conn. Dept. Banking, Jan. 16, 2015).

[58] *Id.* at *3 (emphasis in original).

had improperly solicited loans from clients; his personal actions resulted in his consenting to being barred from acting as an agent in Connecticut.[59] Similarly, in *In the Matter of Orion Capital LLC & Herman Wayne Gibson,* 2014 WL 6480348, Consent Order Docket No. CF-14-8080-S, (Conn. Dept. Banking, Nov. 7, 2014), the individual that was barred was the individual who allegedly committed the bad acts in selling promissory notes in Connecticut without being registered. There, the individual specifically consented that he be **BARRED** from transacting business in the state.[60] Here, the agreement among the parties was that Meyers was to not accept compensation from Connecticut business nor supervise agents of the Firm in connection with business derived in or from Connecticut, not to be barred all capacities.[61] Furthermore, the allegations underlying the Order were not based on the personal actions of Meyers.

There are numerous consent orders entered into by the Department which specifically refer to a bar (often in capitalized and bolded print).[62] Furthermore, the Department also employs a sanction of a bar or revocation with a right to reapply.[63] The Department uses variations on the language of these settlements, all of which must be read within the plain meaning of those terms which evidence the clear intent of the parties agreeing to those sanctions. When the Department

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[59] *Id.* at *2.

[60] *In the Matter of Orion Capital LLC & Herman Wayne Gibson,* 2014 WL 6480348, Consent Order Docket No. CF-14-8080-S, *3 (Conn. Dept. Banking, Nov. 7, 2014) (emphasis in original).

[61] Order (Bates No. 000545) at p.5, ¶ 7.

[62] *See, e.g., In the Matter of Michael James Byl,* 2014 WL 690466, Consent Order Docket No. CR-14-8150-S (Conn. Dept. Banking, Dec. 3, 2014); *In the Matter of Vasilios Koutsobinas,* 2014 WL 587973, Consent Order Docket No. CO-13-8022-S (Conn. Dept. Banking, Feb. 10, 2014); *In the Matter of Edmund J. Ramos & The Right Mortgage Co.*, 2014 WL 4996690, Consent Order No. CO-14-8041-S (Conn. Dept. Banking, Sept. 30, 2014); *In the Matter of Drew R. Fraser & Salt Wall Trading, Inc.*, 2014 WL 898657, Consent Order No. CO-14-8077-S (Conn. Dept. Banking, Feb. 28, 2014).

[63] *See, e.g., In the Matter of Edmund J. Ramos & The Right Mortgage Co.*, 2014 WL 4996690, Consent Order No. CO-14-8041-S (Conn. Dept. Banking, Sept. 30, 2014); *In the Matter of Michael H. Clinton,* 2012 WL 1011709, Consent Order No. CO-12-7990-S (Conn. Dept. Banking, Mar. 21, 2012); *In the Matter of William Alexis Cronin, Jr.*, 2012 WL 6589031, Consent Order Docket No. CRF-12-7930-S (Conn. Dept. Banking, Dec. 11, 2012); *In the Matter of Wadsworth Investment Co. & William F. Wadsworth, Sr.*, 2012 WL 1294214, Order Modifying Remedial Restrictions and Conditions, Docket No. CFNR-10-7779-S (Conn. Dept. Banking, Apr. 10, 2012).

intends to bar an individual, the consent orders contain very specific language to accomplish such a result.

"In interpreting a statute, the SEC and NASD must presume that the 'legislature says in a statute what it means and means in a statute what it says.'"[64] Furthermore, the NAC in that case noted, "a basic principle of statutory construction provides that words in a statute that are not defined must be given their ordinary meaning."[65] On its face, and giving effect to the plain meaning of its terms, the Order is not a "bar."

A bar is a very serious sanction and in the absence of specific language referring to a bar, Meyers' sanction should not be read more broadly than to what he agreed. "Settlement terms should be administered in accordance with the fair expectations of the settling parties."[66] Meyers should be given the benefit of the settlement which he entered into and not have it operate as a "gotcha" by an overzealous regulator. If persons contemplating settlements with state or other regulators know that FINRA, through denial of reentry applications, would routinely apply those sanctions more broadly than intended, the incentive to settle would diminish markedly.

Furthermore, FINRA failed to recognize the importance of the fact that the Order is limited to one capacity in one jurisdiction. Meyers' voluntary withdrawal as an agent is limited to the sole capacity as a registered agent, and only in one state of the United States, and as such is not a "bar" from association with a broker or dealer. This situation is more closely aligned with that of NAC Decision No. SD04014 in which the individual (redacted as "X") was required to withdraw as an associated person with the Commodity Futures Trading Commission ("CFTC"), and not to act in

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[64] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).
[65] *U.S. v. Granderson*, 511 U.S. 39, 70 (1994).
[66] *In The Matter Of The Application Of May Capital Grp., LLC & Melvin Rokeach For Review Of Action Taken By NASD*, Release No. 53796, Administrative Proceeding File No. 3-12094 (May 12, 2006); citing *In the Matter of the Application of Harry M. Richardson*, SEC Release No. 51236, 2005 SEC LEXIS 414, at *18, n.32 (Feb. 22, 2005).

any capacity as a principal, associated person or an agent or officer of any person and/or entity registered or required to be registered as a futures commission merchant.[67]

In *SD04014*, the NAC ruled, "Our conclusion that X is not statutorily disqualified is consistent with our previous decisions. NASD has not required a person who is barred in a single registered capacity (such as a general security principal), but registered in other capacities (such as a general security representative), to undergo NASD's eligibility proceedings in order to remain associated with a member firm in the allowed category."[68]

Furthermore, the NAC in *SD04014* held that Section 3(a)(39) specifically states that a person is statutorily disqualified if he or she is subject to an "order denying, suspending, or expelling such person from membership."[69] The NAC determined that the settlement order to withdraw in certain capacities and never reapply was not the equivalent of the statutory requirement of "denying, suspending and expelling" under Section 3(a)(39).[70]

In *SD04014*, the NAC also took notice of and cited liberally from a CFTC eligibility case which is directly on point. Because the language in *SD04014* is so persuasive, the full passage is quoted below:

> In a fully litigated proceeding in 1992, the CFTC addressed the issue of whether a person is disqualified if he or she has agreed to a settlement in which he or she is ordered to comply with an undertaking to withdraw a registration and not reapply. See Leslie T. Peterson v. Nat'l Futures Ass'n, 1992 CFTC LEXIS 416 (Oct. 7, 1992). In this case, the applicant, Leslie T. Peterson ("Peterson") settled a disciplinary action with the New York Mercantile Exchange ("NYMEX") in 1984 and agreed to undertake to withdraw his membership from NYMEX and never reapply. Five years later, in 1989, Peterson applied for registration as an AP with the NFA. Based on the 1984 ordered undertaking, the NFA commenced a

[67] *See In the Matter of the Continued Association of X as a General Securities Representative, et al.*, 2004 WL 5319879, NAC Decision No. SD04014 (N.A.S.D.R. 2004).
[68] *Id.* at *4.
[69] *Id.*
[70] *Id.*

> statutory disqualification proceeding against Peterson and denied his application. Peterson appealed to the CFTC.
>
> The CFTC found that Peterson Employee 1 was not statutorily disqualified under the CEA because the language of his settlement did not fit within the language of Section 8a(3)(J), which provides that a person is statutorily disqualified if he or she is subject to an "order denying, suspending, or expelling such person from membership." The CFTC reasoned that the CEA's statutory language served notice to individuals of the specific grounds for disqualifications. Therefore, the CFTC stated that the NFA could not interpret the statute in such a way as to eliminate the distinctions reflected in the language that Congress adopted. ***The CFTC concluded that because the disqualifying statute did not include appropriate language to encompass an undertaking to withdraw from membership, Peterson could not have been on notice that the language of Section 8a(3)(J), which included the words "deny, suspend and expel," would also include the wording of his order to comply with an "undertaking to withdraw and never reapply."***
>
> The CFTC also stated that in order to give effect to the terms to which the parties had agreed, Peterson's settlement had to be construed as written and "not as it might have been written had the allegations of the complaint been established through adjudication." Peterson, 1992 CFTC LEXIS 416 at *9-10, citing U.S. v. ITT Continental Baking Co., 420 U.S. 223, 236-37 (1975). Accordingly, the CFTC found that the NFA could not unilaterally rewrite the parties' agreement to create an order that met the "denying, suspending and expelling" requirements of Section 8a(3)(J).[71]

In *SD04014* and *Peterson*, the NAC ruled that voluntary withdrawal was not the same as the statutory disqualification criteria to "deny, suspend, or expel" in Section 8a(3)(j) and thus not the equivalent of a "bar." Similarly, Meyers' agreement to voluntarily withdraw cannot be interpreted as a "bar" from association with a regulated entity or from engaging in the business of securities as is required under the relevant statue in this case, Section 15(b)(4)(H)(i) of the Exchange Act.

[71] *Id.* at *3–4 (emphasis added).

In addition, FINRA erroneously relied on precedent in *Berman*, cited above. In *Berman*, the NAC found that a consent order from the state of Vermont in which Berman agreed to withdraw his registration and not to reapply for reinstatement for five years was statutorily disqualifying under both Section 15(b)(4)(H)(i) *and,* because it was based on his fraudulent, manipulative, and deceptive conduct, Section 15(b)(4)(H)(ii) of the Exchange Act.[72] Thus while the NAC correctly found that Berman was subject to a final order under the second criteria 15(b)(4)(H)(ii) of the Exchange Act, it erroneously found that the Vermont Consent Order constituted a bar under the first criteria in 15(b)(4)(H)(i).[73]

Further, the above-cited SEC Release focuses on the underlying conduct of "felons and other bad actors" in connection with their disqualification for relying on the Rule 506 exemption from registration. By definition, Berman and the individuals covered under the SEC Release are felons and/or other bad actors, whose personal conduct directly led to the violations underlying the statutory disqualification. Here, Meyers was not found to be (and in fact is not) a felon or "bad actor" whose personal conduct formed the basis for the underlying allegations by the Department. His personal conduct as a registered representative was not at issue in the state's charging documents, nor was he the direct supervisor of any of the individuals whose conduct was at issue in any of the allegations. However, as the chairman and CEO of the Firm, Meyers has ultimate responsibility for all of the Firm's employees, registered representatives and supervisory structure, and voluntarily took responsibility through the undertakings in the Order.

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[72] *See In the Matter of the Continued Assoc. of Ronald M. Berman as a Gen. Sec. Representative with Axiom Capital Mgmt., Inc.*, NAC Decision No. SD-1997 (December 11, 2014).

[73] *Cf. In The Matter Of The Application Of Nicholas S. Savva And Hunter Scott Financial, LLC*, Release No. 72485, Release No. 34-72485, 2014 WL 2887272 (June 26, 2014) (Vermont consent order in which individual agreed to a censure, cease and desist, fine, and not to seek registration in Vermont or supervise any sales person in Vermont determined to form the basis for statutory disqualification under Section 15(b)(4)(H)(ii) of the Exchange Act, but not under 15(b)(4)(H)(i)).

Clearly a distinction must be drawn between those individuals who, as a result of their own personal conduct, should be precluded from becoming or remaining registered in the securities industry, and those like Meyers who agreed to a certain sanction as the CEO of a broker-dealer in order to amicably resolve a regulatory proceeding by taking responsibility for activities that may have occurred within the Firm that bears his name.

The NAC in *Berman* also erroneously cited the SEC Release as standing for the proposition that "if a final order has the effect of barring an individual such sanction is a bar, regardless of the language contained in the order."[74] However, the SEC Release is subtly different, stating that:

> We believe the statutory language is clear: bars are orders issued by one of the specified regulators that have the effect of barring a person from association with certain regulated entities; from engaging in the business of securities, insurance or banking; or from engaging in savings association or credit union activities. Any such order that has one of those effects is a bar, regardless of whether it uses the term "bar." Orders that do not have any of those effects are not bars, although they may be disqualifying "final orders," as discussed below.[75]

The SEC Release cannot be interpreted as justification to disregard the plain language of a voluntary settlement agreement. Instead, a sanction can be construed as a bar only if one of the enumerated effects is present. The enumerated effects however, are simply not present in the Order. Meyers was not prohibited from associating with the Firm, as the Order specifically contemplated his continued unregistered affiliation with the Firm.[76] He was not prohibited from engaging in the business of securities, and instead agreed to a circumscribed role within the Firm by withdrawing his registration as a broker-dealer agent only in Connecticut.[77] Accordingly, the

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[74] *In the Matter of the Continued Assoc. of Ronald M. Berman as a Gen. Sec. Representative with Axiom Capital Mgmt., Inc.*, NAC Decision No. SD-1997 (December 11, 2014) at 3.
[75] *Disqualification of Felons & Other Bad Actors from Rule 506 Offerings*, SEC Release No. 33-9414, 2013 SEC LEXIS 2000 (July 10, 2013), 78 F.R. 44730, 44741 (July 24, 2013) at **75-76.
[76] Order (Bates No. 000545) at p. 5, ¶ 7.
[77] Order (Bates No. 000545) at p. 5, ¶¶ 6, 7.

SEC Release does not support the conclusion that Meyers should be statutorily disqualified as a result of the Order.

(C) The SEC Should Provide Clarity as a Matter of Public Policy

In this case and the *Berman* matter cited above, FINRA relies primarily on the SEC Release in interpreting the withdrawal language as the "functional equivalent of a bar."[78] There is a severe lack of guidance from FINRA or the SEC when it comes to this concept of a "functional equivalent of a bar." In the SEC Release, the SEC defined the practical effect of a bar as "prohibiting a person from engaging in a particular activity."[79] However, FINRA has interpreted the SEC Release language far too broadly in adopting its newfound "functional equivalent of a bar" standard. Under the same reasoning, many state sanctions would be unintentionally construed as a bar and form the basis for statutory disqualification.

Significantly, the SEC Release focuses on the underlying conduct of "felons and other bad actors" in connection with their disqualification in relying on the Rule 506 exemption from registration in connection with private securities offerings.[80] Thus an issuer or person involved in a distribution of securities could not rely on the exemption from registration and would have to consider other alternatives. Not being able to utilize the exemption from registration in a private securities offering provided by Regulation D is a minor inconvenience; not being able to maintain your securities registration and with it, your livelihood, is much more than that. For FINRA to make such a massive interpretive leap based on the language of the SEC Release is unwarranted, given that the SEC Release did not address whether a state sanction could form the basis for

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[78] *See In the Matter of the Continued Assoc. of Ronald M. Berman as a Gen. Sec. Representative with Axiom Capital Mgmt., Inc.*, NAC Decision No. SD-1997 (December 11, 2014).
[79] *See Disqualification of Felons & Other Bad Actors from Rule 506 Offerings*, SEC Release No. 33-9414, 2013 SEC LEXIS 2000 (July 10, 2013), 78 F.R. 44730, 44741 (July 24, 2013).
[80] *Id.*

statutory disqualification in a FINRA eligibility proceeding. The repercussions for FINRA's broad interpretation and expansion of the SEC Release to determine that an individual would be permanently barred from the securities industry (rather than simply ineligible to take advantage of an exemption from registration in a private securities offering) are so severe that it is imperative that the SEC directly address this issue.[81]

FINRA's By-Laws and Membership rules are in place to protect the investing public and the integrity of the marketplace. However, they do not give Membership Regulation or the NAC the unfettered discretion to rewrite a negotiated agreement with a state regulator or unilaterally expand the definition of statutory disqualification. Here, any reasonable reading of the plain language of the Order, and any fair and equitable interpretation of its intended purpose, should lead to the conclusion that Meyers is not and should not be statutorily disqualified.

Like the individuals in *SD04014* and *Peterson*, Meyers could not have been on notice that the language of the Exchange Act, which refers to the word "bar," would include the words "voluntarily withdraw his agent registration in Connecticut and not reapply for registration as an agent of a broker-dealer for three years." To do so would be to allow FINRA to unilaterally rewrite the parties' agreement and expand the definition of Statutory Disqualification under the Exchange Act.

Finally, FINRA acted outside of its authority by adding elements to the definition of statutory disqualification that are not included in nor intended by the statute. This dangerous precedent will send a chilling effect to any member firm or registered individual seeking to resolve

[81] FINRA has also indicated that the period of statutory disqualification extends through the time that the Department approves Meyers' registration in the State and not merely after the three-year term has expired, citing the SEC Release. It is also imperative that the Commission interpret this language in the context of Section 3(a)(39) and provide clear guidance to FINRA and the industry to ensure that a statutory disqualification does not remain in place for longer than the sanction that created it.

charges with a regulatory authority if they are in danger of receiving the regulatory equivalent of the death penalty without sufficient notice of this significant collateral effect. Clearly that was not the intention of the statute and FINRA should not be permitted to unilaterally redefine the statute without further authority from the SEC and Congress.

CONCLUSION

For the foregoing reasons, Meyers Associates, L.P. and Bruce Meyers respectfully request that the Commission overturn the NAC Decision because (A) FINRA erred by excluding relevant evidence in violation of FINRA Rule 9524(a)(4); (B) FINRA misinterpreted Section 3(a)(39) and Section 15(b)(4)(H)(i) of the Exchange Act; and (C) as a matter of public policy, the SEC should, in this interpretation of its own rules, provide clarity to industry members and state regulators.

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Respectfully Submitted,

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