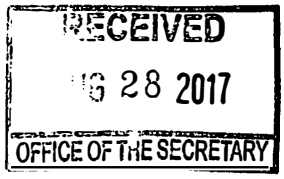
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.



In the Matter of the Application of

LOUIS OTTIMO

For Review of Disciplinary Action Taken By

Financial Industry Regulatory Authority

Administrative Proceeding File No. 3-17930

APPLICANT'S REPLY TO FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

Sylvia Scott, Partner
Holmes, Taylor, Scott & Jones, LLP
Attorneys for Applicant Louis Ottimo
617 South Olive Street, Suite 1200
Los Angeles, CA. 90014
Direct: (213) 212-4300
Fax: (213) 973-6282
Email: Sylvia.scott@htsjlaw.com

August 25, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

SEC Releases and Decisions

FINRA Rules

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.

In the Matter of the Application of

LOUIS OTTIMO

For Review of Disciplinary Action of

Financial Industry Regulatory Authority

Administrative Proceeding File No. 3-17930

APPLICANT'S REPLY TO FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

I. INTRODUCTION

FINRA's Brief in Opposition to Application for Review ("Opposition") is based on arguments that are not supported by the evidence and/or the law. In fact, as detailed herein and in the opening brief of Applicant Louis Ottimo ("Ottimo"), the evidence in the record directly rebuts the arguments in the Opposition.

Thus, all of the fraud findings against Ottimo should be dismissed and the bar imposed against him should be eliminated as it is based solely on the fraud charges. Alternatively, if the Commission finds that there were fraud violations, the sanctions should be substantially reduced

in view of the mitigating circumstances and FINRA's lack of jurisdiction over the investment advisory activities.[1]

II. THE "OMISSIONS" AT ISSUE WERE NOT MATERIAL

All of the "materiality" arguments in the Opposition are fatally flawed because they are based on the false premise that Ottimo played a much larger and more substantive role in *co-managing* the fund than was in fact the case. The Opposition completely ignores the fact that the fund was a special purpose vehicle that was formed for the sole purpose of buying pre-IPO Facebook, Inc. ("Facebook") stock. After the offering, the fund purchased the Facebook, as promised, and shortly thereafter the fund investors received their Facebook stock. No investors lost money. No one was harmed. The fund kept its promise. It is undisputed that Ottimo performed his limited role as co-manager perfectly.

Ignoring all of this, the Opposition (page 7) erroneously contends that investors were investing in Ottimo's business expertise in an attempt to inflate the importance of Ottimo's affiliations with Jet One Jets and Wheatley. The Opposition (page 23) goes on to erroneously state that the record does not support the contention that investors were only interested in the manager's ability to purchase Facebook. At the outset, it should be clarified that Ottimo was *co-manager* with Nancy Lotvin, whose biography is similarly brief in its description of her corporate affiliations, though no regulatory action was ever brought against her. Second, the

---

[1] FINRA's Opposition devotes nearly seven (7) pages discussing the NAC's findings with regard to the Form U-4 reporting allegations, which are *not* on appeal before the Commission and were *not* addressed in Applicant's opening brief. This is an obvious attempt to prejudice Ottimo in the hopes that these other, irrelevant findings will sway the Commission in FINRA's favor. As a consequence, these sections of the Opposition (i.e., Section I. (the portion that relates to the Form U4 findings, Section II.F., Section IV.D. and Section IV.E.2) should be stricken.

record is replete with evidence that investors were only interested in the managers' ability to buy Facebook stock, beginning with FINRA's own witness, WS. WS explicitly testified:

> "I thought I was going to be buying shares of Facebook."

RP 1952.

Additionally, Nancy Lotvin, Ottimo, Carter, Ledyard & Milburn, LLP ("Carter Ledyard"), the law firm who drafted the PPM, and nearly all of the investors stated that the purpose of the offering was to raise funds to buy pre-IPO Facebook stock. RP 5605 – 5612; RP 2343 – 2712, 2349 – 2351, 2391 (Tr. pgs. 632 – 634, 674); RP 2713 – 3065, 2740 (Tr. pg. 1023); RP 4851 – 4928 (Investor Letters). Nearly all of the investors submitted letters, *the very first sentence* of which states:

> "[T]he Fund "was established as a result of the interest communicated to EKN Financial Services, Inc. ("EKN") by many of its investors like you who wanted to purchase the stock of Facebook, Inc. ("Facebook") in the private market before its IPO."

The evidence could not be clearer that investors were investing in Facebook, not the business or investing acumen of the fund managers, Ottimo and Nancy Lotvin. In fact, the only "expertise" that the managers needed was the ability to purchase Facebook on the market, which they both had by virtue of their prior employment in the securities industry. FINRA appears to be confusing the fund in question with a hedge fund where portfolio management skills are important. Thus, Ottimo's successes or failures in running a pass-through corporation (Wheatley) or a jet brokerage company (Jet One Jets) was not relevant to the duties he had to perform as co-manager. In fact, even if the fund was a hedge fund, it is doubtful that the Wheatley and Jet One Jets information would be material.

Despite evidence to the contrary, the Opposition (page 23) argues that Ottimo was tasked with more than buying Facebook but then cites to facts which do not amount to much more than

that. Specifically, the Opposition states that the managers were tasked with deciding when and how to buy Facebook, which Dutch auction to register with, the amount and pricing of any of any auction bid, whether and when any distributions of the Fund would be made. However, none of these tasks are relevant to Ottimo's experiences (good or bad) with Wheatley or Jet One Jets. With regard to the purchase and distribution of Facebook stock, the only relevant experience is the securities industry experience of Ottimo and Nancy Lotvin. It should be noted that Nancy Lotvin's extensive compliance and administrative experience made her ideally suited for performing all of these tasks and Ottimo's brokerage industry experience made him ideally suited for buying the Facebook shares on the auction market, which he did.

Curiously, the Opposition (pages 23 – 25) makes much of the testimony of WS, which *supports* Ottimo's position that the fund was formed to purchase Facebook. Beyond that, it is largely unintelligible and/or irrelevant. With that in mind, the Opposition cites to testimony by WS wherein he states that he initially thought he was buying Facebook directly per representations made by an EKN registered representative by the name of Eugene Dworkis. Then WS somehow later learned that he was investing in a fund that was buying Facebook. The Opposition then contends that WS testified that had he (WS) fully understood his investment was purchasing shares in a fund, he likely would not have invested and that Ottimo's background as the fund's manager given this type of investment was material to him. This testimony is speculative, irrelevant and bizarre. The Opposition (page 25) then claims that WS' testimony somehow underscored the importance of Ottimo's omissions about the negative events of Jet One Jets and Wheatley. Ironically, in another part of the Opposition (page 20), FINRA asserts that the materiality standard is an *objective* standard and yet here the Opposition cites to convoluted testimony of a single investor (WS), which doesn't actually say that the Jet One Jets and Wheatley information was

material to him. Moreover, as to the DOT action against Jet One Jets, when WS is told on cross-examination that the fine was actually only $1500 - $2500, he referred to it as a "slap on the wrist."[2] RP 1999 – 2000. WS also testified that he understood that businesses can be profitable or unprofitable, referring to Wheatley and Jet One Jets. RP 1966 – 1967.

In fact, none of the investors believed that they had been misled with regard to Ottimo's background, which is why 17 out of 21 investors submitted letters stating that they did not believe that information about Jet One Jets and Wheatley was material (hereinafter, "Investor Letters"). RP 4851 – 4928. In fact, even WS did not feel misled about Ottimo's background. WS was upset with the way his financial advisor, Eugene Dworkis ("Dworkis"), presented the investment to him and unreasonably believed that he should not have been charged the commission that was so explicitly disclosed in the PPM. RP 1951 – 1952, 1955 – 1957. However, these grievances are unrelated to any alleged wrongdoing by Ottimo. They relate to how Dworkis allegedly presented the investment.

Knowing how powerful the Investor Letters are in rebutting the fraud allegations, the Opposition attempts to discredit them by offering a number of meritless arguments. First, the Opposition (page 25) tries to make a point out of the fact that the letters were sent after the

---

[2] With regard to the DOT action, the Opposition (page 25) cites *SEC v. Kirkland*, 521 F. Supp. 2d. 1281, 1303 (M.D. Fla. 2007) for the proposition that the DOT action should have been disclosed in the PPM. However, in Kirkland, the actions involved two California Desist and Refrain Orders wherein the respondent was charged with selling unregistered securities and making material misrepresentations and omissions relating to their offers and sales in violation of various securities regulations. Naturally, the court found that these securities regulatory actions were relevant as investors would want to know whether management was following the law in marketing securities. In contrast, the DOT action involved a slap on the wrist of a company whose website, according to DOT, was not clear enough in disclosing that the company (Jet One Jets) was an airline broker versus an airline carrier. This allegation was dubious, which is why the fine was so drastically reduced. In any event, the DOT action has nothing to do with marketing securities, nor does it reflect in any way on Ottimo's ability perform his duties as co-manager.

offering had closed. This argument, however, misses the point of the letters. The Investor Letters were sent on the advice of Carter Ledyard because Carter Ledyard (who drafted the PPM) strongly believed that the disclosures in the PPM were sufficient, as evidenced by the Wells Submission, which they also drafted. RP 2421 – 2424; RP 5605 – 5611. In fact, the very same Carter Ledyard lawyer who drafted the Investor Letters (Ethan Silver) also participated in the drafting of the PPM and the Wells Submission. RP 2424; see also, reliance on counsel/scienter discussion below. Carter Ledyard obviously believed (correctly) that the Investor Letters rebutted the potential charges under investigation by FINRA.

In fact, the Investor Letters include, among other things, acknowledgements just above the signature line, stating that "additional information provided by Mr. Ottimo relating to his personal financial issues would have had no impact on my decision to invest in [the fund] had they been disclosed as part of his biography in the PPM." As FINRA attempted unsuccessfully to do with the testimony of a *single* fund investor (WS), Carter Ledyard did successfully with *17* Investor Letters.

Despite the foregoing, the Opposition (page 25 – 26) criticizes the Investor Letters for reading "like an argument to defend his case" and for not including all of the alleged material information referenced in the Complaint in this matter. When Carter Ledyard drafted the Investor Letters, it could not divine all of the items that FINRA would arbitrarily designate as material. Indeed, Carter Ledyard speculated that FINRA would take the position that Ottimo's liens and personal judgments might be considered material by the FINRA investigators and so included them in the Investor Letters. However, as it turned out, FINRA decided not to include these items in the Complaint. This point further underscores the outrageous and arbitrary standard that Ottimo is being held to when it comes to figuring out what FINRA will decide is

material with regard to a PPM biography. Carter Ledyard had two shots at trying to second-guess what FINRA would deem material (the PPM and the Investor Letters), and this premier securities law firm still did not get it right in the eyes of FINRA! Where does that leave Ottimo, who has never drafted a PPM! What this also shows is Carter Ledyard's state of mind when it drafted the PPM, i.e., this law firm had a different view of the materiality standard that applied to Ottimo's PPM biography. *See also*, scienter discussion, below.

Indeed, it is disingenuous for the Opposition to argue that the Investor Letters should have disclosed more than they did given how comprehensive the letters are. For instance, the argument that Carter Ledyard should have included in the Investor Letters the amount of Wheatley's liabilities at the time of the bankruptcy is absurd. If the investors cared about the fact of the bankruptcy they could easily obtain a copy of the petition, but the Investor Letters make clear that they are not concerned with these types of matters. It should also be noted that the $1.4 million alleged liability figure does not represent the actual liabilities but potential liabilities. In fact, the Wheatley was dismissed because there were no creditors and the bankruptcy ran its course until the judge dismissed the entire filing, as Ottimo testified. With regard to the Jet One Jets bankruptcy, Ottimo was not affiliated with the company at the time. RP 2890. Moreover, Jet One Jets was dormant at the time, but again this was after Ottimo was no longer associated with the company. Id. In any event, this fact is not material, which is why Carter Ledyard did not include it in the letter.

It should also be noted that sending out the Investor Letters created a risk for Ottimo as investors could have asked for the return of their investment once they had heard about this so-called relevant information concerning his background. However, investors did not do because this information was not material. Additionally, as to FINRA's contention that Ottimo made

money, this is inaccurate as the legal fees of approximately $150,000 eliminated any potential profit.

As regards the DOT action not being included in the Investor Letters, FINRA's own witness (WS) referred to it as a "slap on the wrist," as noted above.

The Opposition then tries to discredit the Investor Letters by asserting that WS testified that he was offered a quid pro quo deal whereby he would get his Facebook stock if he signed the letter. While WS's testimony was at times confused and contradictory, he ultimately testified that he was not offered a quid pro quo deal. RP 1983.[3] In fact, it was WS who was trying to negotiate a quid pro quo deal with Ottimo whereby he (WS) would receive the return of the commissions he paid if he signed the letter, but Ottimo categorically refused to do this. RP 1982 – 1983.

The Opposition (page 22) cites to an inapposite case for the proposition that, based on Ottimo's position with the fund, his prior business experience in running companies (positive or negative) was material. See, *Reliance Financial Advisors, LLC* ("*Reliance*"), Initial Decisions Release No. 941, 2016 SEC LEXIS 87, at *46 (Jan. 11, 2016). In *Reliance*, the Respondent Dembski ("Dembski") and his partner, Settling Respondent Scott M. Stephan ("Stephan") co-founded a *hedge fund* to employ a trading idea of Stephan, i.e., a computer algorithm trading strategy that took long and short positions throughout the day based on the share price of certain stocks at designated time. Dembski and Stephan hired the law firm of Holland & Knight to form the hedge fund and prepare the PPM. Holland & Knight sent them a background *questionnaire* to complete. Stephan falsely represented to Holland & Knight that he had a 14-year career managing securities portfolios and that during the first half of his career he co-

[3] Additionally, the Carter Ledyard invoices refer to legal work performed to ensure the Facebook shares are distributed "equitably" further rebutting the notion of any quid pro quo exchange. RP 5831.

managed a portfolio of over $500 million. In fact, Stephan never managed any securities portfolios at all. Dembski was aware of this gross falsehood. Dembski, who sold interest in the hedge fund, was found liable for using a PPM which, among other things, falsely represented that Stephan had "substantial relevant experience" to run the Fund, when in reality he had none. Notably, the *Reliance* decision used the phrase "relevant experience." Clearly, Stephan's lie about managing multi-million dollar investment portfolios was relevant experience and, therefore, material. In sharp contrast to *Reliance*, all of the background information Ottimo provided to his law firm was *true* and the fund was a special purpose vehicle formed for the sole purpose of buy Facebook shares (it was not a hedge fund). Another interesting distinguishing factor in *Reliance*, is that the law firm provided Stephan with a background questionnaire, whereas, Carter Ledyard did not provide Ottimo with a background questionnaire.[4]

III. OTTIMO DID NOT ACT WITH SCIENTER

The Opposition (page 29) argues that Ottimo acted with scienter because he was aware of the negative information that was omitted from the PPM biography. This argument ignores the fact that Ottimo was not aware of the legal significance of the omitted information (assuming for the sake of argument it was significant or "material"), and the fact that Carter Ledyard was supposed to have advised him on this issue. It is undisputed that Carter Ledyard did not specify what biographical information they needed from Ottimo and Ottimo had no way of knowing how

[4] The Opposition also attempts to prop up the alleged importance of Ottimo's corporate affiliations by pointing to boilerplate PPM language drafted by the Law Firm to the effect that the managers had unfettered control over use of investor funds and when any distribution would be made, and that one of the risk factors was that investors had no right to take part in the management of the fund. Opposition, pp. 7, 21. This and other boilerplate language in the PPM, which Carter Ledyard decided to include in the PPM, does not take away from the undisputed fact that the sole purpose of the fund was to buy Facebook and had the managers done otherwise, they would have committed fraud and would have been sued not only by the regulators, but by the investors, as well.

much detail to provide as he had never drafted a PPM. There was no intent on the part of Ottimo to conceal any negative information and Ottimo would have gladly provided whatever Carter Ledyard had requested in order to draft a compliant biographical section for the PPM.

Despite the foregoing, the Opposition disingenuously asserts that Ottimo supposedly admitted that he knew that he was drafting his biography for the purpose of providing potential fund investors with a description of his previous business experience. Opposition, p. 29 (RP 2383). First, Ottimo testimony does *not* state this. The cited testimony is vague and is not probative of anything. Second, Ottimo simply provided Carter Ledyard with a biographical summary because they had requested it without providing any guidance as to what it ought to include. Third, as far as Ottimo knew, investors were not concerned about the details of his business experience because the fund's only purpose was to buy Facebook.

Next, the Opposition argues that Ottimo conceded that all material disclosures in the PPM should have been "fair and balanced" and that despite this so-called "inherent knowledge," Ottimo nonetheless decided to selectively disclose only positive information to make it deceptively appear that these companies were successful businesses when they were not. Opposition, pp. 29 – 30. None of these claims are supported by the record. First, the argument about Ottimo conceding that all material disclosures in the PPM should be fair and balanced inaccurately presupposes that the information at issue was material and that if it was material, that Ottimo knew this to be the case. Second, the Opposition (pages 29 – 30) is misleading in its characterization of Ottimo's testimony, which states in pertinent part:

> Q. Do you admit that a private placement memorandum should be fair and balanced?
>
> A. According to Carter, Ledyard, these were not material misrepresentations or omissions.

> Q. But as a registered representative, in an individual with FINRA, would you agree with me that a private placement memorandum should be fair and balanced?
>
> A. I do agree, everything should be fair and balanced if it is, if it's material to the fact.

RP 2379.

The Opposition (page 30) also cites several cases that are not applicable to the facts of this case. With regard to *LeadDog Capital Markets, LLC*, 2012 SEC LEXIS 2918 ("*LeadDog*") and *SEC v. Carriba Air*, 681 F.2d 1318 (11th Cir. 1982) ("Carriba Air"), Ottimo's brief has already explained their irrelevancy.[5] The Opposition also cites to *GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 239 (3d Cir. 2004) which is also inapplicable. *GSC Partners CDO* involved a corporate merger where Company A and Company B merged into Company C and the plaintiffs claimed that certain officers of Company A knew there were problems Company B but failed to disclose this to investors in an offering circular. Interestingly, the court found that the defendants did *not* act with scienter. Additionally, materiality was *not* an issue in *GSC Partners CDO* as it is in this case. Consequently, none of the cases cited in the Opposition regarding scienter are instructive.

With regard to Ottimo's reliance on counsel defense, the Opposition (page 31) argues that it should be rejected because "there is no evidence that Ottimo completely disclosed to his

---

[5] *LeadDog* involved a traditional hedge fund (not a special purpose vehicle) where the defendant disclosed some of his broker-dealer employers but excluded the "disgraced firms" that had been expelled by FINRA. Moreover, the defendant had not relied upon independent counsel, as is the case herein. In *Carriba Air*, the issuer was an airline carrier and the prospectus failed to disclose the close connection of its principals with another bankrupt airline carrier and other failed business ventures. Obviously, an officer's prior failure in running an airline business (or other business) is relevant if the business of the issuer is running an airline. But that is not the case here.

counsel all relevant facts regarding the negative information that he intended to omit."[6] First, Ottimo did not *intend* to omit anything. Ottimo did not know what ought to be included in a PPM or a PPM biography, which is why he hired experienced securities counsel. If Ottimo had known, he could have drafted the PPM himself and saved $150,000. Moreover, all of the information Ottimo provided to Carter Ledyard was true. The real issue here is whether the Carter Ledyard failed to gather sufficient information, conduct a sufficiently detailed interview of Ottimo and his co-manager, and compile the requisite information necessary to draft a compliant PPM biography. If Carter Ledyard was negligent in failing to request all of the requisite background information (via a questionnaire, for example), Ottimo cannot be held liable for Carter Ledyard's failings. This is what Carter Ledyard was paid a lot of money to do.

Further, there is no evidence in the record that Ottimo misled Carter Ledyard during its information gathering process. To the contrary, the record reflects that Ottimo fully cooperated with Carter Ledyard. In fact, that is why Carter Ledyard continued to represent Ottimo during the FINRA investigation and even prepared a Wells Submission on Ottimo's behalf. RP 5605 (Wells Submission); RP 5711 – 5852 (Legal Invoices).[7] Had Ottimo misled Carter Ledyard, they would not have continued to represent him in the FINRA investigation.

---

[6] Curiously, the Opposition argues (page 30, note 31) that the Commission should ignore Ottimo's contention that the NAC failed to address the reliance on counsel defense in the liability section of its decision because Ottimo allegedly never raised the reliance on counsel as an affirmative defense. To the contrary, the NAC decision (page 8) itself states, "Ottimo argues that his omissions did not give rise to the level of intentional or reckless fraud." In fact, the NAC decision is replete with other references to Ottimo arguing for the absence of scienter. Moreover, FINRA's Opposition cites no legal authority to support this request.

[7] Incredibly, the Opposition states that the Wells Submission is "notably silent" on whether Carter Ledyard advised Ottimo to make any omissions to his biography and does not include a reliance on counsel defense. Opposition, p. 33. That is because Carter Ledyard had a clear conflict of interest. Had Carter Ledyard asserted a reliance on counsel defense on Ottimo's behalf and it was ultimately determined that the advice was incorrect, then Carter Ledyard would

[Footnote continued on next page]

In the wake of this compelling evidence, the Opposition (page 33) nonetheless asserts that Ottimo has not offered any evidence to show that Carter Ledyard made the choice of what to omit in the PPM biography and further argues that the firm did not know anything about the negative information at the time the biography was drafted. With regard to the biographical summary that Ottimo provided to Carter Ledyard, the Opposition (page 9) also claims that "[t]he law firm neither knew nor had any reason to believe that Ottimo withheld negative information about the financial performance and bankruptcies of Jet One Jets and Wheatley, or the DOT's regulatory action against Jet One Jets." To the contrary, Carter Ledyard had every reason to know that negative information regarding Wheatley and Jet One Jets had been omitted given, among other things, the bare bones biographical descriptions that Ottimo provided as to these start-up companies.

With regard to Wheatley, the biographical summary states, "Louis [Ottimo] founded Wheatley in 2001, which maintained an operating agreement with EKN Financial Services through 2008." This scant summary included no financial information on Wheatley (positive or negative). It is inconceivable that Carter Ledyard believed that there was no negative financial information to be had on this unknown, start-up company. Yet Carter Ledyard did not ask any follow-up questions about Wheatley's financial performance or legal actions. That is because Carter Ledyard did not believe it was material given that the fund was a special purpose vehicle formed for the sole purpose of purchasing Facebook. RP 5605 – 5611.

The biographical summary that Ottimo provided to Carter Ledyard regarding Jet One Jets is similarly brief and only refers to a reseller agreement with American Express and revenues

---

[cont'd]

likely be liable for malpractice. In fact, this is precisely why Ottimo has not been given a fair opportunity to defend himself in these proceedings, as previously argued in Ottimo's brief.

that the company had generated, all of which is indisputably *true*. Again, it is inconceivable that Carter Ledyard was unaware that revenues do not equate to profits or losses and that there might be some negative financial information about this unknown, start-up company. Indeed, *all* start-up companies have at least some negative financial information. Clearly, Carter Ledyard knew that there must have been some negative financial information about Jet One Jet and Wheatley that was not addressed in the terse biographical sketch that Ottimo provided the firm. During its preparation of the background section of the PPM, Carter Ledyard even referred to Ottimo as having a "colorful past" based on his BrokerCheck Report, which reported *negative* financial information.

Notably, the Opposition (page 9) concedes that Carter Ledyard did not provide any guidance concerning what Ottimo ought to include in the biographical summary, which is indisputable given the testimony of Ottimo and Nancy Lotvin. Moreover, Ottimo cannot be expected to divine how much information Carter Ledyard needed to prepare the PPM biography. However, the Opposition (page 33, note 35) contends that Carter Ledyard merely made technical edits to the biography they received from Ottimo and, based on this contention, FINRA concludes that Ottimo drafted the PPM biography. Leaving aside the fact that Carter Ledyard made more than technical edits to the biographical sketch they received from Ottimo (as already addressed in Ottimo's opening brief), this bootstrapping argument unfairly and erroneously glosses over the fact that Carter Ledyard was hired to draft the PPM biography. If Carter Ledyard failed to gather sufficient information to supplement what they received from Ottimo (or failed to give Ottimo proper instructions in the first place with regard to the type of biographical information they needed), this failing cannot be ascribed to Ottimo nor can it form the basis for holding Ottimo liable for a defective PPM biography (assuming for the sake of

argument that it is defective). Further, it is undisputed that Ottimo was truthful and cooperative with Carter Ledyard, as detailed in the opening brief and above.

The Opposition (page 33, note 34) also claims that Carter Ledyard's billing statements provide no references to research or advice about the materiality of omitted negative information concerning Jet One Jets and Wheatley. This "hair splitting" distinction dances around the fact that the billing statements and emails are replete with references to discussions by the lawyers about Ottimo's "background," "disciplinary history," and "colorful past," as detailed in Ottimo's opening brief. Significantly, Ottimo could not subpoena Carter Ledyard to testify at the hearing and the lawyers would not testify voluntarily. Therefore, it is disingenuous and unfair to wordsmith clear admissions by Carter Ledyard when Ottimo had no ability to compel them to testify. Indeed, Ottimo's inability to do so deprived him of a fair opportunity to fully present his reliance on counsel defense.

The Opposition (page 33, note 34) also attempts to downplay the significance of the fact that Carter Ledyard drafted both the PPM and Wells Submission, which vociferously argues that the Wheatley and Jet One Jets information was *not* material. The Opposition argues that the record does not support the contention that Carter Ledyard made decisions about materiality of the omissions *before* it drafted the PPM biography. Given that Carter Ledyard was paid over $100,000 to make these kinds of materiality decisions, they were contractually bound to do so. Moreover, Carter Ledyard was a premier Wall Street law firm and it is more likely than not that they did make materiality decisions about the level of detail that was required to be included in Ottimo and Nancy Lotvin biographies (the *co-managers* of the fund) with regard to their corporate affiliations. As already noted, the billing statements and emails show that Carter Ledyard was looking into the background of Ottimo as they drafted his biography. Moreover,

the Wells Submission, PPM and Investor Letters were all drafted by the very same lawyer (Ethan Silver). Further, after reading the Wells Submission and Investor Letters, coupled with the other evidence, one can see that Ethan Silver's and his colleague's approach to drafting Ottimo's PPM biography was to attach minimal significance to Ottimo's business experience and personal financial matters.

Significantly, prior to commencing the first draft of the PPM and before obtaining a biography from Ottimo, Carter Ledyard had already pulled Ottimo's FINRA BrokerCheck Report and were scrutinizing it. RP 5714 – 5715; RP 5893 – 5895. The BrokerCheck Report included, among other things, Ottimo's disciplinary history and his affiliations with Wheatley, JOJ and two other companies. RP 5882 – 5891. The BrokerCheck Report also included eight liens, including one involving *Wheatley*. Yet, Ethan Silver and his colleagues made the "materiality" decision not to include the liens or the disciplinary history, which is understandable when you read the explanation he prepared in the Wells Submission. However, *if* Carter Ledyard made the wrong decision about materiality, Ottimo should not be held accountable for this error. To the contrary, reliance on counsel negates scienter, as discussed in Ottimo's opening brief.

The Opposition (page 34) also makes a curious argument in its attempt to downplay the significance of EKN's chief compliance officer, Richard Borgner, finding no problem with the PPM. Specifically, the Opposition contends that there is no evidence that the chief compliance officer was aware of Ottimo's background but then concedes that he did notarize *Wheatley's bankruptcy petition*. Indeed, evidence does not get any more powerful than this! Moreover, as chief compliance officer of the placement agent (EKN), Richard Borgner was required by law to respond to any red flags that the PPM was misleading, to conduct due diligence of the fund and

to be familiar with the backgrounds of EKN's registered representatives which included Ottimo.[8] However, the compliance officer, like Carter Ledyard, did not think Ottimo's business experience and personal financial information were relevant because the purpose of the fund was solely to buy Facebook stock. Given that Carter Ledyard, EKN's compliance officer and Nancy Lotvin (who had a strong compliance background) didn't know that this information was material (assuming for the sake of argument it was material), then how can Ottimo be expected to know?

By reason of the foregoing, Ottimo did not act with scienter and the information at issue was not material. Consequently, all of the fraud charges should be dismissed.

IV. FINRA LACKS JURISDICTION OVER THE INVESTMENT ADVISORY ACTIVITIES

FINRA argues that Ottimo waived his jurisdiction arguments because they were not raised previously. However, the case that FINRA cites does not support its argument. *Harry Gliksman*, 54 S.E.C. 471, 481 (1999). In *Gliksman*, the waiver involved the respondent's failure to object to the introduction of evidence which was admitted into the record. Here, the issue involves whether FINRA has the jurisdiction over the conduct that is the subject of its Complaint. It is well established that subject matter jurisdiction cannot be waived. See e.g., *Alliance of Am. Insurers v. Cuomo,* 854 F.2d 591, 605 (2d Cir. 1988); *Manway Construction Co. v. Housing Authority of Hartford,* 711 F.2d 501, 503 (2d Cir.1983); *Bender v. Williamsport Area School District*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908).

---

[8] FINRA members who act as placement agents are required to conduct due diligence of the issuer. *See e.g.*, FINRA Regulatory Notice 10-22. FINRA members are also required to conduct financial adviser due diligence in order to determine whether they need to be placed on heightened supervision (a compliance function). *See e.g.*, NASD Notice to Members 97-19.

The Opposition cites to a series of Rule 2010 (f.k.a. Rule 2110) cases, none of which involved investment advisory activities and are wholly irrelevant to the issue at hand. Specifically, FINRA's Complaint focuses on Ottimo's role as principal of an SEC private fund adviser. It is well settled that FINRA does not (at least not yet) have jurisdiction over investment advisory activities. The Opposition does not and cannot advance any arguments that overcome this lack of subject matter jurisdiction. As a consequence, all of the charges relating to Ottimo's role as principal of the private fund adviser, i.e., as co-manager of the fund, must be dismissed.

V. THE SANCTIONS SHOULD BE ELIMINATED OR SIGNIFICANTLY REDUCED

The Opposition argues that the sanctions imposed on Ottimo are not excessive based on the erroneous assumption that he committed a fraud and acted with scienter. As Ottimo did not commit these violations, no sanction should be imposed against him. That said, the Opposition essentially takes the meritless arguments used to support the scienter argument and applies them to the sanctions analysis. However, as detailed above and in Ottimo's opening brief, Ottimo did not act with scienter and did not commit a fraud.

To his credit, Ottimo and his co-manager hired the best law firm they could find to guide them through the PPM process and to form an SEC exempt private fund adviser. As the billing statements show, Ottimo and his co-manager spared no expense in obtaining expert legal advice on the PPM and cooperated fully with the law firm. All of these factors *mitigate* any sanctions that might be imposed.

Moreover, it should be recognized and acknowledged that the so-called material information was not recognized as such by Carter Ledyard, EKN's compliance officer, co-manager Nancy Lotvin (who had a strong compliance background). This should be recognized as additional mitigation should the Commission find that the information was material.

Finally, even if Ottimo is found to have acted fraudulently (though clearly he did not), the sanctions are excessive as they encompass activities over which FINRA has no jurisdiction.

VI. THE OPPOSITION GOES BEYOND THE SCOPE OF APPLICANT'S OPENING BRIEF AND THE OFFENDING SECTIONS SHOULD BE STRICKEN

FINRA's Opposition devotes nearly seven (7) pages discussing the NAC's findings with regard to the Form U-4 reporting allegations, which are *not* on appeal before the Commission and were *not* addressed in Applicant's opening brief. This is an obvious attempt to prejudice Ottimo in the hopes that these other, irrelevant findings will sway the Commission in FINRA's favor. As a consequence, these sections of the Opposition (i.e., Section I. (the portion that relates to the Form U4 findings, Section II.F., Section IV.D. and Section IV.E.2) should be stricken.

VII. CONCLUSION

By reason of the foregoing, the Commission should reject all of the arguments in the Opposition, grant Ottimo's application and strike the sections of the Opposition which are outside the scope of this appeal.

Respectfully submitted,

Sylvia Scott, Partner
Holmes, Taylor, Scott & Jones, LLP
Attorneys for Applicant
617 South Olive Street, Suite 1200
Los Angeles, CA. 90014
Direct: (213) 212-4300
Fax: (213) 973-6282
Email: sylvia.scott@htsjlaw.com

August 25, 2017

CERTIFICATE OF SERVICE

I, Sylvia Scott, certify that on this 25th day of August 2017, I caused a copy of the foregoing APPLICANT'S REPLY TO FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW to be served via overnight mail (Federal Express) to:

Mr. Brent J. Fields, Secretary **(Original + 3 Copies)**
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549-1090; and

Lisa Jones Toms, Esq.
Assistant General Counsel
FINRA - Office of General Counsel
1735 K Street, NW
Washington, DC 20006
Telephone: (202) 728-8044

Sylvia Scott
Holmes, Taylor, Scott & Jones, LLP
617 S. Olive Street, Suite 1200
Los Angeles, CA 90014