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UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

Admin. Proc. File No. 3-18142 - (FINRA SD-2130)

IN THE MATTER OF THE APPLICATION
OF ROBERT J. ESCOBIO FOR REVIEW
OF ACTION TAKEN BY FINRA.
_____/

APPLICANT, ROBERT J. ESCOBIO'S INITIAL BRIEF IN SUPPORT OF HIS APPLICATION FOR REVIEW OF FINRA'S DECISION BARRING HIS CONTINUING ASSOCIATION WITH SOUTHERN TRUST SECURITIES, INC. BASED ON STATUTORY DISQUALIFICATION

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PROCEDURAL BACKGROUND OF APPLICATION FOR REVIEW

By letter dated September 7, 2016, FINRA notified Southern Trust Securities, Inc., ("STS"), that Robert J. Escobio, ("Mr. Escobio"), who was registered with STS, was subject to statutory disqualification under Section 3(a)(39) of the Securities Exchange Act of 1934 ("Exchange"). R. 155-156. FINRA stated the statutory disqualification arose from an August 29, 2016 Final Judgment by the United States Futures Trading Commission, ("CFTC"), filed in the U.S. District Court for the Southern District of Florida, in which Mr. Escobio was permanently enjoined and prohibited from certain activities involving commodities trading and registration with the CFTC. Id. FINRA further stated that Mr. Escobio could not continue his association with FINRA member, STS, unless STS requests and receives written approval from FINRA by following FINRA's "Membership Continuation" process. Id.

On September 23, 2016, STS filed an MC-400 Membership Continuation Application, ("Application"), with FINRA's Department of Registration and Disclosure to start that process. STS's Application requested that FINRA permit Mr. Escobio, a person subject to a statutory disqualification, to continue to associate with STS as a general securities representative, general securities principal, and options principal.

FINRA's approach in evaluating "Membership Continuation" applications based on statutory disqualifications uses the following analysis:

- the nature and gravity of the disqualifying event;
- the length of time that has elapsed since the disqualifying event;
- whether any intervening misconduct has occurred;
- any other mitigating or aggravating circumstances that may exist;

- the precise nature of the securities-related activities proposed in the application;
- the disciplinary history and industry experience of both the member firm and the person proposed by the firm to serve as the responsible supervisor of the disqualified person.

By letter dated April 11, 2017, FINRA's Department of Membership Regulations, ("Member Reg"), recommended to FINRA's Statutory Disqualification Committee and FINRA's National Adjudicatory Committee, ("NAC"), that Mr. Escobio's continued membership association with STS be denied. R. 1297-1326.

Ignoring the actual circumstances and the record, which negates the disqualification based on an analysis of the above factors, FINRA's Member Reg stated its recommendation of denial was based on the following factors: "(1) the egregious nature and recency of the disqualifying event, wherein the federal court, based on finding of fraud, permanently enjoined Escobio from effecting commodities-related transactions; (2) federal court found unless enjoined, Escobio was likely to commit future violations; (3) Escobio engaged in a pattern of fraudulent practices; (4) the firm proposed an inadequate plan of supervision which includes proposing Escobio's wife, Susan, as his sole supervisor, although she lacks the requisite experience and objectivity to provide the required level of supervision to oversee a statutorily disqualified individual." R. 1297-1298.

On April 25, 2017, a hearing panel of FINRA's Statutory Disqualification Committee held a hearing in the matter. R. 2075-2308. Mr. Escobio, his proposed primary supervisor, Susan Escobio, and alternate supervisor, Frank Trambatore, testified. Id.

FINRA's hearing panel submitted its written recommendation to the FINRA Statutory Disqualification Committee which in turn considered the recommendation and

presented it to FINRA's National Adjudicatory Council, ("NAC"). On July 27, 2017, FINRA's NAC issued its written "Notice Pursuant to Section 19(d), Securities Exchange Act of 1934, denying STS's Application for Mr. Escobio's Continued Association with STS." R. 2309-2330. FINRA's NAC stated the following as its reason for the denial:

> We find that the Firm is not capable of supervising a statutorily disqualified individual such as Escobio. The Firm has not demonstrated that Susan Escobio has either the supervisory experience or independence necessary to supervise Escobio. Similarly, Trombatore lacks the supervisory experience to serve as Escobio's backup supervisor from an offsite location, and the Firm's proposed heightened supervisory plan is inadequate. We therefore deny the application. The seriousness and recency of Escobio's disqualifying event also support our denial. R. 2313.

On August 23, 2017, Mr. Escobio filed his application for review, ("Notice of Appeal"), with the pursuant to S.E.C. Rule 420 (a)(iv) and (c) seeking review of NAC's July 27, 2017 decision barring him from continuing his association with STS because he was "statutorily disqualified." Mr. Escobio's statutory disqualification is solely based on a CFTC judgment. See Section 3(a)(30) of the Exchange Act; FINRA Rule 9521(b). R. 147-154. The CFTC judgment is presently on appeal to the United States Eleventh Circuit Court of Appeal in *U.S. Commodities Futures Trading Commission, Plaintiff/Appellee v. Robert Escobio, Southern Trust Metals, Inc. and Loreley Overseas Corp., Defendants/Appellants*, Case No. 16-16544. Oral argument was heard on September 28, 2017.[1] R. 371-374.

In addition, the CFTC judgment is suspect since it was done in collusion with NFA, which had settled the case, as the Magistrate Judge found. R. 375-388. Although the District Court Judge reversed the Magistrate Judge, it remains a mitigating factor that a federal magistrate judge reviewed the record and found the case has been settled by both

[1] Oral Argument had initially been set for June 19, 2017 by the Appellate Court and was only continued due to the request by the Commodities Futures Trading Commission, ("CFTC"). But for the delay caused by CFTC, a decision would already have been made in the appeal.

the NFA and the CTFC and that the CFTC's claim was barred by estoppel. R. 1581-1593, R. 1327-1334. In addition, Mr. Escobio has a life-long record of compliance prior to the complaint of one client, (a client with less than a stellar record). The conclusion that Mr. Escobio would continue to commit violations, if indeed there were any, is pure conjecture and contrary to the record. The conclusion that the firm cannot supervise itself if Mrs. Escobio runs it has no factual or legal basis, and is a sexist, biased conclusion not supported in fact or law.

STANDARDS OF REVIEW

1. FINRA abused its discretion when it failed to properly address Petitioner's arguments. *Securities, Inc. V. S.E.C.*, 566 F.3d 1172 (D.C. Cir. 2009). The S.E.C. reviews FINRA's decisions on sanctions for abuse of discretion. Id.

2. FINRA's remedy is unwarranted, gave insufficient weight to factors raised in mitigation and failed to explain and weigh all the facts and circumstances surrounding the statutorily disqualifying event and proposed supervisory plan. *Eric J. Weiss*, Exchange release No. 69177 (March 19, 2013); Paz, *supra*.

3. FINRA imposed the most severe sanction and failed to consider factors outlined in *Steadman v. SEC, 603 F.2d 1126, 1140* (5th Cir. 1979). Id. Sanctions should be used to protect investors, but not to punish a regulated person or firm. *Paz*, *supra* at 1175.

4. The Agency failed to adequately explain its decision or make the necessary findings, did so prematurely, and improperly retroactively applied a statute. *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979).

5. The S.E.C. must determine whether FINRA imposed sanctions are excessive or oppressive. *Saad v. S.E.C.*, __ F.3d __, 2017 WL 4557511 at *6 (D.C. Cir. Oct. 23, 2017) J. Kavanaugh, concurring.

6. An agency must adequately explain its decision and the agency did not do so here. The "Steadman Factors" include "the egregiousness of the defendant's action", the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful act, and the likelihood that the defendant's occupation will present opportunities for future violations". *Bartko v. S.E.C.*, 845 F.3d 1217, n.8 (D.C. Cir. 2017) citing *Steadman*, supra at 1140.

7. In reviewing the disciplinary sanction imposed by FINRA, the S.E.C. must carefully consider whether any aggravating or mitigating factors exist, particularly as is the case here, where the sanction is a lifetime ban, the equivalent of capital punishment for someone in the securities industry, and involves someone with decades of an excellent record in the industry. *Saad v. SEC*, 718 F.3d 904 (D.C. Cir. 2013).

8. In reviewing the conclusions by FINRA, the S.E.C. must carefully consider the specific history and experience of the proposed supervisor and the proposed supervisory plan. *Daniel Covello*, Exchange Release No. 71533 (Feb. 12, 2014).

9. Where new laws attach a new legal consequence to events completed before the law's enactment or increase a person's liability for past conduct, the sanctions and penalty cannot be applied retroactively. *Bartko v. S.E.C.*, 845 F.3d 1217 (D.C. Cir. 2017).

10. To the extent Dodd-Frank contained provisions that only became effective after the events here had occurred, the sanctions and restitution damages the court awarded in regard to that time frame are impermissible and a violation of the due process clause of the United States Constitution. See *Landgraff v.USI Film Products*, 511 U.S. 244 (1994).

11. In regard to disciplinary action taken by FINRA, the S.E.C. conducts a *de novo* review of the record and makes its own findings as to whether the alleged conduct violated FINRA rules. Exchange Act 19(d)(2),19(e)(1), 15 U.S.C.§ 78s(d)(2),(e)(1). *Mathis v. SEC*, 671 F.3d 210 (2nd Cir. 2012).

THE APPLICABLE LEGAL STANDARDS

Under the Exchange Act "any person aggrieved" by FINRA's denial of a membership application for continued association may file an application for review by the S.E.C. See, 15 U.S.C. § 78s(d); 17 C.F.R. § 201.420. Section 19(f) of the Exchange Act sets forth the criteria that govern the S.E.C.'s review of FINRA's statutory disqualification decision denying an applicant's association with a FINRA member. See, 15 U.S.C. § 78s(f). The criteria are: the specific grounds on which FINRA based its action exist in fact; the denial was in accordance with FINRA's rules; and, those rules were applied in a manner consistent with the purposes of the Exchange Act. Even if these criteria are satisfied, Section 19(f) would require the S.E.C. to grant the application to continue membership if it found that FINRA's action imposed an undue burden on competition. Id. In regard to disciplinary action taken by FINRA, the S.E.C. conducts a *de novo* review of the record and makes its own findings as to whether the alleged conduct violated FINRA

rules. Exchange Act 19(d)(2),19(e)(1), 15 U.S.C. § 78s(d)(2),(e)(1). *Mathis v. SEC*, 671 F.3d 210 (2nd Cir. 2012).

The S.E.C. and federal appellate courts, in evaluating whether FINRA has applied its rules in a manner consistent with the Exchange Act have required FINRA's evaluation of the application for continuation of membership be based on more than conclusory assertions. FINRA, in evaluating an application for association of a statutorily disqualified person with a member, must determine if continued association is in the public interest and does not create an unreasonable risk of harm to the securities markets or investors. FINRA By-Laws, Art. III, Sec. 3(d). FINRA's assessment, under its rules, includes considering the nature and gravity of the statutorily disqualifying misconduct, the time elapsed since its occurrence, the restrictions imposed, the totality of the regulatory history, the potential for future regulatory problems, and whether the sponsoring firm understands the need for, and has the capability to provide adequate supervision of the statutorily disqualified person. *Gershon Tannenbaum*, 50 S.E.C. 1138(1992); *Timothy P. Pedregon, Jr.*, Exchange Act Release No. 61791 (March 26, 2010). FINRA's determination, in order to satisfy these criteria must explain how a particular disqualifying event, in light of the circumstances relating to it ,creates an unreasonable risk of harm to the securities markets or investors. See, e.g. *Pedregon, supra*. In this case, FINRA's assessment failed in every respect.

The Exchange Act allows FINRA to deny association of a statutorily disqualified person when it would be inconsistent with the public interest and protection of investors. However, for FINRA's denial of an application to be consistent with the Exchange Act, FINRA must "independently evaluate the application, based on the totality of the

circumstances, and ...explain the basis for its conclusions." Id. See e.g. *Frank Kufrovich*, 55 S.E.C. 616, 623 and 625 (2002); *Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328 (July 17, 2009). The S.E.C. has stated the relevant inquiry is, "whether under the totality of the circumstances," a person's continued association with a member is "inconsistent with the public interest and the protection of investors." *Eric J. Weiss*, Exchange Act, Release No. 69177, (March 19, 2013), citing *Pedregon*. In order for denial of the application to be consistent with the Exchange Act, FINRA must have appropriately weighed all the facts and circumstances surrounding the statutorily disqualifying event **and the proposed supervisory plan**. *Weiss*, supra at n. 59; *Emerson*, 2009 S.E.C. LEXIS 2417 at*14. A conclusory assertion that the proposed supervisory plan is inadequate does not satisfy this requirement. *Daniel Covello*, Exchange Act Release No. 71533 (February 12, 2014), (analyzing the details of supervisory plan).

The S.E.C. and courts review FINRA's decisions on sanctions, such as barring a person from the securities industry, for abuse of discretion. *Saad v. S.E.C.*, 718 F.3d 904 (D.C. Cir. 2013); *Paz Securities, Inc. v. S.E.C.*, 566 F.3d 1172 (D.C. Cir. 2009) ("PAZ II"); *Steadman v. S.E.C.*, 603 F.2d. 1126 (5th Cir. 1979), aff'd other grounds, 450 U.S. 91 (1981). These decisions have repeatedly stated the sanctions should be used to protect investors, **but not to punish** a regulated person or firm. *PAZ II*, *supra* at 1175. "In reviewing a disciplinary sanction imposed by FINRA, the S.E.C. must determine whether, with due regard for the public interest and protection of investors that sanction is excessive or oppressive". *Saad*, supra at 906; 15 U.S.C. § 78s(e)(2). The S.E.C. must carefully consider whether there are any aggravating or mitigating factors that are relevant to the FINRA determination. Id. This is particularly important where the person faces a lifetime

bar, which is the industry equivalent of a capital punishment. Id. (Citing *PAZ Securities, Inc. v. S.E.C.*, 494 F.3d 1059, 1065 (D.C. Cir. 2007) ("PAZ I")). The appellate courts have required the S.E.C. and FINRA to "explain why imposing the most severe, and therefore punitive sanction is in fact, remedial". Id. at 1175.

The courts review the S.E.C. and FINRA's conclusion on sanctions to determine whether they are arbitrary, capricious or an abuse of discretion. The courts in their analysis of whether the sanctions imposed were an abuse of discretion use factors developed in *Steadman v. S.E.C.*, *supra*. The "Steadman Factors" include "the egregiousness of the defendant's action, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful act, and the likelihood that the defendant's occupation will present opportunities for future violations." *Bartko v. S.E.C.*, 845 F.3d 1217, n.8 (D. C. Cir. 2017), (citing *Steadman*, *supra* at 1140).

The same analysis should be applied whether the industry ban is a result of disciplinary action by FINRA or a statutory disqualification because the result is that the person banned from the securities industry, in effect, has been given the death penalty. See, *Saad*, *supra* at 912-913, (FINRA and the SEC's burden is to provide a convincing rationale in light of governing law); *PAZ II*, supra at 1176.

Additionally, where new laws attach a new legal consequence to events completed before the law's enactment or increase a person's liability for past conduct, the sanctions and penalty cannot be applied retroactively. *Bartko v. S.E.C.*, 845 F.3d 1217 (D.C. Cir. 2017). Thus, to the extent Dodd-Frank contained provisions that only became effective after the events here had occurred, the sanctions and restitution damages awarded by the

District Court in the CFTC claim, regarding that time frame are impermissible and a violation of the due process clause of the United States Constitution. See *Landgraff v.USI Film Products*, 511 U.S. 244 (1994). With respect to determining the retroactivity of legislation, elementary considerations of fairness dictate that an individual should have the opportunity to know what the law is in order to conform conduct accordingly. Id. The anti-retroactivity principle "finds expression in several provisions of our Constitution" including the Ex Post Facto clause, the Fifth Amendment takings clause, the prohibition against Bills of Attainder and the Due Process Clause. Id. At 265. These provisions demonstrate that retroactive application raises serious concerns. Id. For this reason, retroactive application here was improper and is barred.

History of the Statutorily Disqualifying Event[2]

Robert Escobio, a founder and shareholder of Southern Trust Securities Holding Company, ("STSHC"), had been registered in the futures and options industry for thirty-five years **without a complaint against him**. In 2009, an outside group pitched him an idea for trading metals. He referred them to the Holding Company's president, who approved. The Holding Company owned Southern Trust Securities, a registered NFA member. The new metals business, ST Metals, would not trade regulated products, so it was established as a subsidiary of the British Virgin Islands Company, Loreley Overseas, which the Holding Company owned.

ST Metals began selling physical precious metals, both on a fully paid and leveraged basis, in 2009. ST Metals offered only one product – precious metals. Dodd-

[2] This history is from the trial record evidence in the CFTC case found in Appellants' Brief, which is of record here. R. 984-993.

Frank became law in July 2010, though its major changes to CFTC jurisdiction did not go into effect for another year, on July 16, 2011. Dodd-Frank gave the CFTC new jurisdiction over certain leveraged "retail commodity transactions," with an exception for transactions resulting in "actual delivery within 28 days." 7 U.S.C. §2(c)(2)(D)(ii). Dodd-Frank did not define "actual delivery."

ST Metals asked Mr. Escobio to meet the regulated UK financial firms who traded bullion. Mr. Escobio met with Berkeley Futures Limited ("Berkeley") in London on August 3 and 6, 2010, soon after Dodd-Frank passed. Berkeley is an established London financial firm regulated by UK authorities with numerous registrations on exchanges around the world. In the U.S., Berkeley has a foreign firm exemption from registration with the NFA, allowing it to trade futures. The Berkeley account for Loreley, which would be holding the subaccounts for ST Metals' customers, was opened during Mr. Escobio's August 2010 visit. Mr. Escobio took additional trips to London and the Bahamas in 2010, 2011 and 2012 to meet with Berkeley representatives.

Berkeley offered a virtually unlimited array of products that would include off-exchange physical bullion. In April, 2013, Berkeley's head trader wrote ST Metals, "**I can confirm that all Loreley accounts titled with the prefix X1LOR were silver bullion accounts. These accounts only traded in OTC silver bullion and never traded any futures contracts.**" R. 986.

Soon after ST Metals and Loreley established subaccounts for customers at Berkeley, Mr. Escobio began having discussions and meetings with Hantec, another London firm. An October 12, 2010, e-mail from Hantec to Mr. Escobio recounted their conversation where they discussed "the recent changes in U.S. Regulatory requirements

for retail forex transactions." ST Metals wrote back, explaining that Loreley **"is the entity you would be dealing with to transact the purchase and sale of precious metals only."** R. 986. Hantec opened the subaccounts for Loreley, and the majority of ST Metal's customer trading occurred there.

Hantec, like Berkeley, was willing to supply the physical metals. Hantec described "Bullion trading" as operating "in the same manner as foreign exchange trading, except the underlying asset is either Loco London Gold (LLG) or Loco London Silver (LLS). Hantec's product guide defines "Loco London Gold and Silver" as "Refer[ring] to the place at which gold is physically held and to which a particular price applies. The prime example is Loco London Gold which means not only that the gold is held in London but also that the price quoted is for delivery there." R. 987.

At Hantec's offices, Mr. Escobio was shown "holding statements" from banks confirming physical metal on deposit. Id. Hantec confirmed that it was willing to make delivery directly to customers in a November 18, 2011 letter: **"We confirm that any Gold or Silver you purchase from us is held for your account and upon full payment we are able to arrange delivery for you when requested."** R 987. Hantec wrote again on April 15, 2013, "**I can confirm that you hold accounts with us that only trade Silver Bullion.**" R. 987. ST Metals' customers were told about risks, purchases in London and the offer of leverage. Hantec and Berkeley offered this through their leveraged bullion trading. **Customers understood they were receiving a "third-party loan," the metals were purchased in London, and they could take physical possession of their metals in New York or London.**" R. 988-989.

Loreley maintained a master account at Hantec and Berkeley, and each ST Metals customer had a corresponding subaccount. ST Metals contemporaneously sent trade confirmations to customers reflecting every transaction in the subaccounts. Hantec and Berkeley charged Loreley fees on whatever leverage was outstanding in a subaccount. ST Metals charged its own commissions, fees and interest; its earnings were the difference between fees and interest charged to ST Metals' customers less the fees and interest charged by Hantec or Berkeley. ST Metals withheld a portion of customer funds for commission charges or interest. R. 988-989.

Eight ST Metals' customers used funds at Berkeley to trade futures and options. Eight ST Metals' customers with accounts at Berkeley decided to use funds already on deposit at Berkeley to trade futures. R. 989. Seven of the eight customers were foreign nationals and all of them wanted to maintain offshore investment accounts. R. 989. Berkeley itself was authorized to trade futures in the U.S. through an NFA foreign firm exemption. All futures trades ST Metals' customers made through Berkeley were placed by Series 3 licensed brokers and executed on a regulated exchange by a registered FCM. R. 989; R. 2122-2124 (**Mr. Escobio did not broker or earn any money from those transactions.)** R. 2123.

The CFTC Interprets the Dodd-Frank "Actual Delivery" Requirement

In December 2011, the CFTC offered guidance on Dodd-Frank's "actual delivery" exception. *See*, Retail Commodity Transactions Under Commodity Exchange Act, 76 Fed. Reg. 77670 (Dec. 14, 2011). The proposed interpretation advocated a flexible, fact-based approach to "actual delivery," not limited to literal delivery of a leveraged, (i.e., unpaid for), commodity to the customer, but allowing for delivery "into the possession of a depository

other than the seller." Id. Following comments, the CFTC issued it formal interpretation on August 23, 2013, preserving the example of "actual delivery" through a depository. Retail Commodity Transactions Under Commodity Exchange Act, 78 FR 52426-01 (Aug. 23, 2013).

The NFA Investigation and ARA

In March 2013, a multi-millionaire ST Metals' customer from California who traded futures at Berkeley complained to the NFA. R. 990. The next month, the NFA arrived at the Southern Trust's offices to investigate the matter. Because certain customers were trading futures at Berkeley, the NFA asserted ST Metals had acted as an unregistered Futures Commission Merchant, ("FCM").

On the NFA's orders, Robert Escobio notified ST Metals that it had to liquidate all ST Metals' customer positions, including all metals positions at Hantec, and transfer the funds to another NFA Member. R. 990. As a direct result of the NFA's orders, there were losses in customer accounts as silver prices were low. Id. After causing the losses, the NFA brought an Associate Responsibility Action, ("ARA"), against Mr. Escobio and Southern Trust Securities contending ST Metals supposedly acted as an unregistered FCM for eight customers trading futures at Berkeley. Id. The ARA barred Mr. Escobio and affiliated businesses from trading or transferring customer funds; this forced ST Metals out of business. R. 991. Mr. Escobio satisfied all conditions of the ARA. Citing Mr. Escobio's cooperation, the NFA terminated the ARA. R. 991.

The Agencies Conspire to Unfairly Target Mr. Escobio and STS

Inexplicably, almost immediately after citing Mr. Escobio's cooperation and terminating the ARA, the NFA brought a second disciplinary proceeding, a Business

Conduct Committee action, ("BCC"), against Mr. Escobio and Southern Trust Securities. The BCC repeated the same allegations from the ARA, R. 991. Mr. Escobio and STS denied all wrongdoing and maintained the NFA was acting outside its jurisdiction. Mr. Escobio and ST Metals reached a settlement with NFA on April 1, 2014, denying any guilt. Pursuant to the settlement, Mr. Escobio and the firm agreed to pay a $50,000 fee and to a three-year ban for Mr. Escobio registering as a Principal. R. 1765-1767. At the same time, the parties agreed the settlement **"shall resolve and terminate all complaint, investigations and audits relating to them, which are pending as of the date of this Offer of Settlement."** R. 992-993. As part of the settlement, required by the NFA (in collusion with the CFTC), Mr. Escobio transferred his majority shares interest in STS and resigned as its CEO and principal in April 2014. R. 2117. Two days later, the CFTC began drafting its Complaint to bring a duplicative enforcement action. R. 993. FINRA has since taken the position that the transfer was improper because it did not obtain FINRA's approval despite NFA and CFTC **requiring** the transfer. R. 1275-1278.

The CFTC was involved in virtually every stage of the NFA investigation, and was intimately involved with NFA in the settlement. R. 991. CFTC fully knew that the intent and understanding was that the settlement would resolve and conclude everything relating to ST Metals; Mr. Escobio was purposely led to believe the settlement resolved all issues, otherwise he would not have entered into it. The CFTC filed the case leading to the subject statutory disqualifying judgment within three months of the April 2014 NFA settlement, based on essentially the same conduct and compelling evidence that the agencies had colluded and were just waiting to continue the targeting of Mr. Escobio and his minority-owned business. R. 1595-1618. The CFTC Complaint alleged that ST Metals

had been operating a leveraged, over-the-counter derivative trading platform in London, violated Dodd-Frank's provisions dealing with off-exchange financing of retail commodity transactions, could not meet the "actual delivery" exceptions under the Dodd-Frank amendment, acted as an unregistered FCM and made false statements as to ST Metals precious metals business. CFTC alleged Mr. Escobio was individually liable as a control person. Federal Judge James Lawrence King, of the Southern District of South Florida referred to Magistrate Judge Edwin Torres, the issue of whether the CFTC was estopped from bringing the case due to the NFA settlement. **Magistrate Judge Torres ruled that the NFA settlement "settled all claims against him [Escobio] by all related enforcement agencies" and that the language was so clear the CFTC "knew or should have known . . . that further prosecution was prohibited."** R. 375-385. Despite the Magistrate Judge's ruling, Judge King entered a partial summary judgment in favor of CFTC deciding a portion of the case including the "actual delivery" and estoppel defense. R. 1581-1593. Thereafter, the Judge scheduled a bench trial to rule on the fraud violations and the equitable relief. The CFTC never responded to discovery as to its alleged losses. As a sanction for this discovery violation, Judge King barred CFTC's witness regarding damages from testifying. **The customers who testified at the bench trial all acknowledged their losses were the result of the metals market declines and forced liquidation of metals by NFA at an inopportune time, knew the risks involved, never wanted or asked for physical delivery of the metals to them, knew they were borrowing money and paying interest using their metals as collateral. They all admitted that they never met or dealt with Mr. Escobio and did not know who he was. As a result, CFTC, had no damages testimony, and instead claimed categorical**

totals from the account statements and exhibits with no explanation regarding how the numbers were determined. R.1000-1004.

Judge King had the parties submit proposed findings of fact and conclusions of law. The CFTC's proposed findings asserted it did not have to show loss causation, simply transaction causation for restitution damages. R. 389-414. CFTC argued because the business was illegal from the outset, the losses were all a foreseeable result of the violations, therefore more than $2.1 million was owed. This is directly contrary to the Dodd-Frank amendment to the CEA authorizing customer loss restitution, but requiring that the losses must have been "proximately caused by [the alleged] violation." 7 U.S.C. § 13a-1(d)(1). This is the exact same language referring to established court definitions of "loss causation." See, e.g., *v. Koger Properties, Inc.*, 116 F. 3d 1441, 1448 (11th Cir. 1997) (defining loss causation as "a causal connection between misrepresentation and the investment's subsequent decline in value.") The customer losses in the case were not "proximately caused" by an alleged CEA or CFTC regulation violation. The CFTC never disputed this. Instead the CFTC misled Judge King into using a foreseeability standard for restitution damages to recover everything the customers lost from the date of their initial purchases. In effect, the award provided the customers with a guarantee against any loss. This is contrary to well-established and long-standing law in the securities world. See, e.g., *Holmes v. Securities Investors Protection Corp.*, 503 U.S. 258, 268 (1992); *Dura Pharm. Inc. v. Broudo*, 544 U.S. 336, 346 (2005). While this case involved physical metals trading, not securities, the Dodd-Frank language adding the remedy of restitution in the CFTC law is the same proximate cause language that requires proof of loss causation, not foreseeability or transaction causation. The recent U.S. Supreme Court in *Bank of*

America Corp v. City of Miami, FL, 137 S. Ct. 1296 (May 1, 2017), has confirmed in a case interpreting the Fair Housing Act's that "foreseeability" is insufficient to "establish proximate cause for restitution." This Supreme Court case and above cited securities cases leave no doubt that Judge King's conclusion awarding restitution of damages based on "foreseeability" is reversible error, and at the very least, mitigates against the Agency's draconian penalty even if no reversal is obtained.

Despite the law, the Judge adopted nearly verbatim the CFTC's proposed findings and conclusion and awarded over $2 million in restitution. Compare R. 389-414, R. 471-496. A clear legal error which led to the court's decision that the violations were "egregious" and banned Mr. Escobio from the futures industry for life. This resulted in Mr. Escobio being statutorily disqualified. See, Exchange Act Section 3(a)(39) and 15(b)(4)(c).

Summary of Basis for Mr. Escobio's Application for Reversal of FINRA NAC's Decision

Argument

I. FINRA NAC's Decision Is Arbitrary and Contrary to Required Standards Because the Facts Fail to Establish that Mr. Escobio's Continued Association Poses a Threat to Securities Markets or Investors or Poses Opportunities for Future Violations

FINRA refused to accept the supervisory plan or the proposed supervisor, without any basis in fact or law and contrary to the standards required by the cases discussed above. FINRA's conclusion that Susan Escobio, the designated supervisor is incapable of supervising Robert Escobio is based on the fact that she is married to him and therefore FINRA concludes, she cannot be objective, and totally ignores Mrs. Escobio's own qualifications in the industry. Susan Escobio has an unblemished record and her experience in the securities industry spans thirty-eight (38) years. R. 91-106, 499-500,

1237-1250. FINRA, in effect, admits this in its Decision. R. 2321. Yet, without any non-discriminatory basis, FINRA states she is incapable of supervising a statutorily disqualified person to whom she is married. Susan Escobio's lengthy history and spotless background in the industry clearly refutes FINRA's speculative conjecture and reveals it is based on purely arbitrary, discriminatory and unsupported conclusions for denial of this plan.

A. Susan Escobio's 38-year Background in Supervising and Enforcing[3] Compliance in the Securities Industry Establish She Not Only Is, But Has and Continues to be Capable of Supervising Mr. Escobio

Susan Escobio graduated from Florida International University with a Bachelor of Arts degree concentrated in business. R. 2186. She is bilingual. She has worked in the securities industry from 1978 to date. R. 112; 91-106, 499-500, 1237-1250. She holds Series 4, 7, 24, 28, 65, 79 and 99 securities licenses. She has worked in the securities business in both New York and Miami. She worked at Dean Witter Reynolds, Inc. from September 1978 to March 1986; Credit Lyonnais Securities, Inc. from March 1986 until November 1993; Smith Barney from November 1993 to September 1996; Community Investment Services Inc. and Cardinal Capital Management, Inc. from September 1996 to May 2000; Brill Securities, Inc. from February 2000 through October, 2000; Southern Trust Securities Asset Management, Inc. from November 2005 to May 2015; Southern Trust Securities Holding Corporation from May 2000 to June 2014; and Southern Trust Securities from May 2000 to the present time. Id.

During this period of over thirty-eight (38) years, she has worked and has been involved in and responsible for virtually every facet of the securities industry. R. 2186-2189. She has been in charge of hiring and terminating personnel; monitoring and

[3] Susan Escobio's testimony at the hearing is in R. 2186-2237.

managing clients' portfolios, trading and investments in securities; monitoring day to day operational responsibilities, executing trades in securities; overseeing and addressing all regulatory exams and preparing responses to regulatory inquiries; implementing and enforcing compliance procedures; ensuring the accuracy of operational functions of the firms; surveilling all sales and trading activity; implementing and enforcing anti-money laundering procedures and background checks for new domestic and foreign securities accounts; ensuring timely regulatory financial filings; and overseeing annual and quarterly accounting audits as well as routine and special regulatory exams. R. 2188-2196.

Further, she has been a director and officer in several of these securities businesses including maintaining books and records as Chief Financial Officer. She has been the Chief Compliance Officer for over eighteen (18) years at Southern Trust Securities and as a result STS has never been found in violation of applicable securities laws and regulations. R. 2194-2199. While at STS, she has found violations of securities laws by employees, reported such violations to regulators as well as fired registered persons for various violations in her career. R. 2188. Her experience has included supervising a statutorily disqualified person who was allowed to continue employment in the securities business. During her thirty-eight (38) year plus career in the industry, only one customer complaint has ever been filed naming her. It was filed in March 2004 and settled without any personal contribution by Susan Escobio. Another broker had caused the complaint and Susan had merely inherited the account when the broker left the firm and the account was transferred into her name. R. 2197-2198.

Susan Escobio has developed, implemented and enforced the various written supervisory procedures required under FINRA's series of rules regarding supervisory

responsibilities, FINRA Rules 3100-3170. R. 509-726; R. 1175-1184, R. 2208-2212. The rules clearly establish that the Chief Compliance Officer is required to be and is engaged in the supervision of the firm's personnel. Susan testified as to the existence and detailed actions she takes to detect and achieve compliance with applicable securities laws and regulations. Susan's experience in implementing and enforcing the supervisory and compliance rules is confirmed by the several examples about which she testified. R. 2187-2192, 2196-2197. Susan was responsible for detecting, preventing and eliminating from the securities industry several persons who violated applicable procedures, rules and laws. Id. She caught a registered representative trying to use a false letter of authorization to direct funds from a customer's account. Id. In another situation, she caught a broker using a customer's credit card to pay for the broker's own personal expenses. Id. In a third instance, a registered representative failed to follow the applicable rules in an investment banking transaction. R. 2190. In each instance, she was responsible for detecting the violations, reporting them to FINRA, firing the persons and preventing any loss to the customer. Id. Further evidence of her ability to supervise and enforce compliance with applicable securities laws and rules is the fact that, despite a myriad of inspections and examinations by FINRA, most recently eight (8) in the last two years, and another scheduled before even the last one is complete, (which is more evidence of targeting), STS has not been subject to any disciplinary action. R. 2199. Obviously, the fact that STS, despite numerous examinations by FINRA, has not been found to have committed violations and FINRA has taken no disciplinary action since its inception in 2000, confirms Susan's abilities and effectiveness. R. 2199. Additionally, both Mr. Escobio and Frank Trombatore testified that Susan requires compliance with the applicable supervisory and

compliance rules and regulations. R. 2241. **There are no facts to the contrary.** Susan testified as to the details of how she goes through individual sales tickets daily, balances accounts, performs due diligence on accounts and potential new accounts. R. 2192-2194. Significantly, Susan has been responsible for supervision of Robert Escobio during the entire 3+ years' time after the NFA proceeding started and NFA settlement with Robert in 2013. There has been no violation by Mr. Escobio of any securities industry laws or rules during the period. R. 2210-2212. This is further evidence that she is capable of supervising Mr. Escobio and has in fact done so effectively.

The assertion that Susan Escobio is not qualified is undermined by the fact that Susan Escobio has supervised a statutorily disqualified person in the past, Sandro Flores.

Indeed, if prior supervision of a statutorily disqualified individual were a requirement for establishing adequacy of supervision no one would ever have met it, since until the first person was statutorily disqualified by FINRA no one could have previously supervised such non-existent person.

The conclusions of FINRA are unsupported by the record and show an implicit bias against women, especially married women, and Hispanic and minority-owned businesses, since STS is one of only a few such broker dealer firms in existence and the evidence of the relentless targeting points to such bias.

B. STS's Heightened Supervision Plan for Robert Escobio Is Implemented and Effective

STS presented at the hearing in this matter a "Heightened Supervision Plan Regarding Robert Escobio," dated October 1, 2016, which had been implemented in addition to the prior proposed plan submitted with its initial MC-400 application. R. 1177-

1184, 2208-2212. The heightened supervision plan was implemented regarding Robert Escobio, in addition to the firm's existing "Written Supervisory Procedures." Id. The additional supervisory restrictions and control over Mr. Escobio and procedures put into effect included the following:

1. Regarding Mr. Escobio's duties and responsibilities at STS, he:
   a. Is prohibited from acting in any supervisory role.
   b. Is prohibited from hiring or firing any employees of STS.
   c. Is prohibited from executing any contract or engagement that will bind the Firm in any way.
   d. Is prohibited from authorizing the withdrawal of any funds on behalf of the Firm.

2. Regarding Mr. Escobio's limitations as a registered representative of the Firm, he:
   a. Is prohibited from having, maintaining, or managing any discretionary accounts of any kind.
   b. Will have all order tickets approved.
   c. Will have correspondence on the firm's letterhead reviewed prior to sending, including incoming and outgoing e-mails which are maintained on the firm's server.
   d. Cannot execute customer instructions to order a payment by check or wire from a customer account or to order the registration and shipment of any securities. This must be completed by the operations staff of the firm and approved and confirmed by the Principal of the firm.
   e. Reports all customer complaints immediately to the Principal of the firm when received. A complaint can either be in written form or verbal.
   f. Completes the monthly attestation as required by the firm at the end of each month.

3. Regarding the review of registrations, operations, and Outside Business Activities:
   a. Each month the Principal of the firm will review CRD to assure that Mr. Escobio is only registered with the firm. If a registration with any other firm is discovered then Mr. Escobio will immediately be terminated.
   b. Each month the Principal of the firm will review the records posted by the Florida Corporate Secretary of Florida to see if any new corporations have been established with Robert Escobio acting in the role of owner, director, officer or agent. If any such activity has occurred without the expressed prior knowledge and approval of the firm then Mr. Escobio will be immediately terminated.

c. Each month the firm will have Mr. Escobio execute a monthly attestation (attached) whereby Mr. Escobio will affirm that he has not violated any portion of this Heightened Supervisory Procedure. If Mr. Escobio fails to submit the attestation or if any violation comes to light on the attestation then Mr. Escobio will immediately be terminated.

d. Each month the Principal of the firm will solicit comments from all staff at the firm to see if Mr. Escobio had acted in any way that may have violated any portion of this Heightened Supervisory Procedure.

e. The Principal of the firm will immediately investigate any customer complaint that is brought to the attention of the firm. Once initially investigated, the Principal will notify FINRA of the complaint, the initial findings, and the anticipated resolution.

f. The Principal, or appointed registered staff, will process and confirm all withdrawals of funds or securities with any customers where Mr. Escobio is the registered representative of record. The Principal and operations staff will not allow Mr. Escobio to authorize any withdrawal of any kind from any customer account.

g. Operations staff of the Firm will review all trade activity and cash movements of Mr. Escobio's customer accounts and confirm to the Principal that all activity was executed correctly and with proper authorization.

R. 177-1184.

Indeed, these proposed restrictions, controls and procedures were implemented regarding Robert for 3+ years from the date of the NFA settlement until FINRA barred his continued employment.

The effectiveness of these procedures, controls and restrictions is proven by the fact that despite repeated and continued regulatory agency exams, inspections and records examination for the past 3+ years, no violations or wrong-doing have ever been identified or found and no complaints have been made regarding Robert or STS. R. 2194; 1863-1878.

While FINRA complains the supervisory procedures and heightened supervision of Mr. Escobio are inadequate, the above facts contradict and refute that assertion. **It is significant that while FINRA quibbles over the procedures and asserts they are not**

adequate, it does not provide any viable additional procedures that would satisfy its concerns. Instead, FINRA makes its unsubstantiated claims that the staff member to assist in supervision is "unnamed" and it speculates that "it is extremely unlikely that staff members would adequately or accurately report any bad acts Escobio might engage in." However, in her testimony, Susan Escobio identified the staff member assisting her in supervision, Isabel Campos, who is a licensed securities woman with over 30 years of experience working in the securities industry. R. 2193. **The plan in fact is more stringent than the plan approved by the S.E.C. when it approved the application in *Daniel Covello, supra*.**

The supervisory plans STS implemented regarding Mr. Escobio have been shown to be effective. FINRA's conclusory denial that the supervisory plan is inadequate without identifying any guideline or standard it fails to meet confirms the denial is arbitrary and capricious, and an abuse of discretion, especially when the facts show it has worked.

C. Frank Trombatore's Experience in the Securities Industry Qualifies Him to Act as Back-Up Supervisor[4]

As a back-up to supervision by Mrs. Escobio, Frank Trombatore is also qualified to supervise Mr. Escobio and ensure there is no risk to the public from the proposed continued association. Frank Trombatore has been in the securities industry since 1987, when he started with insurance and variable life products. R 2238. He was a branch compliance officer for several years in the 1990's. Id. In 2008, he was licensed with STS and is fully familiar with its strict compliance and supervision requirements, having been subject to them for years. R.2245. He holds a Series 24 general principal license, as well

[4] Frank Trombatore's testimony at the hearing is in R. 2238-2252.

as Series 3, 6, 7, 63, 65 and 66 licenses. R 2242-2245. Other than a minor NFA problem in 2003, he has not had any regulatory issues. R. 2242-2245.168-171. He has not been disciplined by FINRA for any violations. Id. He has stated he will come to STS's offices to supervise Mr. Escobio when Mrs. Escobio is away. R. 2241-42. FINRA's conclusory assertion that he lacks the necessary supervisory experience is contradicted by his thirty plus years in the securities industry. R107-130, 2019-2074.

D. Mr. Escobio's History and Background in the Securities Industry Refutes the Assertion that He is a Threat to the Securities Markets or Investors[5]

Mr. Escobio graduated from the University of Florida in 1977 with a major in finance and minor in economics and was on the Dean's List. R. 1-90, R. 497-498. Thereafter he attended graduate school at the University of Miami and graduated with a Master's degree in Business Administration in 1978, concentrating in finance. Id. R. 2108. Mr. Escobio began working in the securities industry in October, 1979. R. 497-498, 2108. Mr. Escobio holds the following licenses in the securities industry: Principal's licenses Series 4, 9, 10, 24 and 53; other financial licenses Series 3, 5, 7, 53, 63, 65, 79 and 99 and licenses for variable and life insurances. Id., R. 1759-1764. Mr. Escobio's experience in the securities business since October, 1979 is as follows:

- Bache & Co., (Oct. 1979-Sept. 1981), where he began his career and obtained his Series 7 license; Paine Webber, (Sept. 1981-Sept. 1984); Dean Witter, (Sept. 1984-Sept. 1985), Prudential Securities (Sept. 1985-Sept. 1991), Smith Barney, Inc., (April 1991-Sept. 1996); Cardinal Capital Management, Inc., (Sept. 1996-May 2000); Southern Trust Securities, Inc., (May 2000-July 27, 2017), and Southern

[5] Robert Escobio's testimony at hearing is in R. 2108-2185.

Trust Securities Asset Management, Inc., (November 2005-September, 2015). R 1-90, 497-498, 1759-1764.

During this time, Mr. Escobio developed many long-term clients, including an international client base and focused on financial institutions working with foreign banks, providing consulting services for government central banks and quasi-governmental corporations and has been involved in a myriad of investment banking transaction. R. 2108-2113. He has provided portfolio management and investment banking for high net worth individuals and institutions, both foreign and domestic; provided consulting services for private and public companies, corporate restructuring, secondary offerings, general corporate financing, including raising capital for public and privately held companies. Id. Mr. Escobio in his almost 40 years in the securities business has held numerous officer and director positions within the securities industry entities dealers and worked in virtually every aspect of the securities industry. R. 2108-2115. Around the time of September, 1996, he was part of the founders of the securities firm that was the predecessor of STS and that became STS in 2000.

During this period of over 38 years in the securities industry, Mr. Escobio has had no securities related complaints against him, except for a group of complaints instigated by Dean Witter almost 30 years ago in the 1980's when he announced he was leaving to go to Prudential Securities, Inc. with his clients. R. 2109-2116; 2128. These complaints turned out to be nothing more than an attempt by Dean Witter to blame its operational errors on Mr. Escobio and hold up his leaving Dean Witter to give it time to attempt to keep Mr. Escobio's clients from leaving with him. Id. His total contribution regarding the complaints was $7,300 which was paid just to enable him to transfer his license to

Prudential Securities, Inc. and later reimbursed by Prudential to Mr. Escobio. R. 2115-2116. The fact that FINRA's Member Reg even raised these stale 30-year old complaints in its analysis and recommendation of denial, establishes the lack of any real securities-related violations by Mr. Escobio and its lack of evidentiary value for imposition of the equivalent of a death penalty in the securities industry. Indeed, NAC may have realized the extremes to which FINRA went to target Mr. Escobio and STS and attempted to cover it up by stating in footnote 6 of its denial that it "need not decide whether Escobio's older customer complaints are relevant because we (NAC) do not base our denial on these or any other customer complaints filed against Escobio." R. 2318.

The only other blemish in Mr. Escobio's background and 38-year history of working in the securities industry, aside from the CFTC Judgment that is on appeal, is the state Court Frieri judgment based on a breach of contract arising from whether Mr. Frieri was making a loan or an investment. The appellate decision on that matter established there was no fraud or any violation of law other than a common law breach of contract. R. 795-796.

Thus, the totality of circumstances of Mr. Escobio's 38-year history establish there is no history of any violation of the securities laws or rules which indicate that he poses an unreasonable risk of harm to the market or investors. The only blemish on Mr. Escobio's record is the CFTC judgment that is on appeal. R. 959-1030. In fact, Mr. Escobio has testified that despite the CFTC Judgment and NFA, STS's clients have remained with STS and Susan Escobio with full knowledge of the matters, satisfied with Susan Escobio and her independent record of accomplishments. R. 2133.

E. Mr. Escobio's History and Recent Facts Establish FINRA Has No Basis for Asserting Mr. Escobio Creates a Threat or Unreasonable Risk of Harm to the Securities Market, Investors or the Public

FINRA primarily, if not exclusively, relies on the CFTC's "recent judgment" as its cornerstone and sole basis for barring Mr. Escobio from the securities industry. The non-final judgment, did not involve securities or securities related transactions. FINRA ignores the lack of any securities related complaints and lack of disciplinary action related to securities for over 30 years. R. 2115. The CFTC judgment, highlighted by FINRA, arose out of events more than four (4) years old which arose from non-securities transactions almost over a decade ago. R. 1863-1878, 2210-2211, 2194, 2199. Mr. Escobio has been engaged in securities transactions for over three years after his settlement with NFA. R. 2115. He has fully complied with the settlement, which expired in April, 2017. During these past 3+ years, FINRA has found no violation of any securities laws or rules by either Mr. Escobio or STS, despite its targeting of Mr. Escobio and the STS firm, subjecting them to unrelenting multiple random investigations, inspections and exams. R. 2128, 2210-2211. The time elapsed since the events on which CFTC judgment is based and lack of any regulatory problems over those years, as well as the 30+ years before, which include a lifetime of compliance, clearly negate any basis for fear of potential future regulatory problems, inability to comply with securities laws and regulations or any unreasonable risk of harm to the securities market, investors in it and the harm to the investing public.

In fact, eliminating Mr. Escobio from the securities industry harms the public interest because it prevents long-time clients of STS and Mr. Escobio's group, many of whom are Spanish-speaking foreign nationals, from being able to have Mr. Escobio's expertise, with which they have relied on for years, without any problem, involved in their securities

related transactions. Furthermore, the denial will greatly harm one of the few minority-owned competitors in the securities markets[6].

II. FINRA's Denial Based on the Recentness and Seriousness of the CFTC Judgment Looks Beyond the Judgment Yet Ignores the Facts

FINRA further bases its denial on the "seriousness and recency of Escobio's disqualifying event," which it defines by looking to the facts that purport to give rise to the judgment. While the judgment is recent, the alleged violations on which the judgment is purportedly based are not recent. The transactions and events forming the alleged basis of the purported commodities-related violations occurred in transactions that took place four (4) or more years ago and in a span of time going back as far as 2009. There is no evidence or assertion that Mr. Escobio engaged in any commodities-related violation within at least the past four (4) years. Mr. Escobio has been registered in the futures and options industry for 35 years without a complaint against him until this matter. Additionally, the evidence established Mr. Escobio fully cooperated with the NFA including liquidation of all the customer's metals holdings and three audits of the customers' accounts, which established there were no missing funds. Indeed, all the customers who testified agreed the losses were due to declines in the metals markets. **The market losses, for the most part were a result of the NFA forcing liquidation while the metals markets were down, without regard to the customers' desires to keep their metals and positions.** After complete liquidation and the accounting, the NFA was satisfied there was nothing missing and lifted the Associate Responsibility Action, ("ARA") it had filed earlier against Mr. Escobio, (something which is virtually never done by NFA).

[6] Susan Escobio is a woman and is Hispanic. FINRA's treatment of Mrs. Escobio is reprehensible and should be independently investigated.

After Mr. Escobio satisfied all the conditions and the ARA was terminated, NFA again targeted Mr. Escobio with a second disciplinary proceeding, a Business Conduct Committee action based on the same allegations from the ARA. Mr. Escobio and the firm denied wrongdoing and maintained NFA was acting outside its jurisdiction. Settlement discussions took place with the NFA. These discussions resulted in a settlement in April, 2014 whereby Mr. Escobio and the firm agreed to a $50,000 fine and a three-year ban for Mr. Escobio registering as a principal, and it was agreed the settlement, "shall resolve and terminate all complaints, investigations and audits relating to them, which are pending as of the date of this Offer of Settlement." R. 992-993, 1765-1767. The settlement was without admission of guilt, and only made because it was far less costly than litigating over the issue. Mr. Escobio fully performed the terms of the settlement including transferring his majority share interest in STS and resigning as CEO and principal in April, 2014. R. 2116-2117, 12-75-1278.

Unbeknownst to Mr. Escobio, and in spite of the NFA settlement, with involvement by the CFTC, (as the Magistrate Judge found), the CFTC was lurking in the background all the while planning to bring a duplicative enforcement action, for which the CFTC began drafting the Complaint two days after the NFA settlement was confirmed. R. 993, 1595-1618.

Mr. Escobio was duped into believing that the matter would be closed with the NFA settlement. Magistrate Torres in the CFTC case found that CFTC's collusion in the settlement estopped it from bringing the duplicative action, which is another key point argued for reversal of the judgment in the pending appeal, and which in any event is a mitigating factor. R. 375-385.

FINRA also points to the "seriousness of the Judgment" as a basis for denial. It focuses on the $2.5 million in restitution awarded in the appealed CFTC judgment that made the misconduct "egregious, systematic and calculated." This conclusion is contrary to the results of the audits and the determination by the NFA that every penny of the customers' funds was properly accounted for. The reason for such a disparity is fully described in the appellate briefs. The CFTC's damage witness was barred from testifying because it failed to provide responses reflecting the basis for its damages. As pointed out in the appeal, CFTC put forth a restitution figure in its proposed findings of fact and law based on transaction causation, not losses proximately caused by the alleged violation. This is completely contrary to the plain terms of 7 U.S.C. § 13a-1(d)(3)(A) in the Dodd-Frank amendments, which requires loss causation. Loss causation required proof of a causal connection between the misrepresentation and the investments' decline in value. No such proof exists in the CFTC case, as is clear from the NFA settlement and audits and lack of witness testimony on this issue.

Moreover, the recent Supreme Court decision in *Bank of America Corp. v. City of Miami, FL, supra,* establishes that the "proximate cause" language requirement in Dodd-Frank leaves no question, but that loss causation is required for determination of restitution of damages in the CFTC case. The *Bank of America Corp*. decision is consistent with long-standing Supreme Court law regarding damages in securities cases. See, e.g., *Dura Pharm. Inc. v. Broudo*, *supra*; *v. Securities Investor Protection Corp*., *supra*. Application of the correct legal standard for damages in the CFTC case eliminates FINRA's basis for asserting the Two Million plus figure to support its conclusions as to "seriousness" and "egregiousness" of the alleged disqualifying event. Additionally, the analysis is further

flawed in that those improper damages attempt to apply Dodd-Frank retroactively in violation of constitutional legal principles, including due process. Finally, the serious question about the loss calculation mitigates against using it as a basis for support of the "seriousness evaluation."

Judge King, adopted almost verbatim CFTC's findings of fact creating a clear error of law. See, *In re Colony Square Co.,* 819 F.2d 272, 274-5 (11th Cir. 1987) (finding courts have "repeatedly condemned the ghost writing of judicial orders by litigants," and warning of the dangers of "the verbatim adoption of proposed orders drafted by litigants.") R. 389-414, 471-496. Correction of this clear legal error eliminates the losses claimed and eliminates the basis for asserting Escobio's misconduct was "egregious, systematic and calculated."

III. Denial of Mr. Escobio's Continued Association with a FINRA Member, Based on Statutory Disqualification, is Punitive

Circuit Judge Kavanaugh in his concurring opinion in *Saad v. S.E.C.*, __F.3d __, 2017 WL 4557511 (D.C. Cir. Oct. 23, 2017), relying on the recent Supreme Court case of *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (June 5, 2017), concluded that: "We can no longer characterize an expulsion or suspension as remedial," after *Kokesh*. See, *Saad*, 2017 WL 4557511*6. The S.E.C must determine based on this recent precedent whether the sanction imposed on Mr. Escobio was appropriate or permissible under the totality of the circumstances here. The statutory disqualification is the equivalent of expulsion or suspension, and not remedial.

The Supreme Court's decision in *Kokesh also* makes it clear that monetary awards in cases brought by federal agencies, no matter how characterized which operate as a

penalty, or the functional equivalent of a penalty are subject to applicable statutes of limitations. Based on *Kokesh,* the monetary award for "restitution damages" in the CFTC case cannot be used by FINRA to impose the sanctions since all or part may be barred by statute of limitations.

IV. FINRA NAC's Decision is Premature at Best Because the Judgment On Which it is Based is Not Final

While the CFTC judgment may be final for purposes of taking an appeal, it is not final for purposes of res judicata or collateral estoppel until all appellate rights are exhausted. As discussed infra there is a very strong likelihood of reversal of the judgment by the Eleventh Circuit Court of Appeals because of clear errors of law.

FINRA was required to look at the totality of the circumstances in making its determination as to whether there is a threat to the securities materials, investors or likely harm to the public in allowing Mr. Escobio to continue in the securities industry. To properly do this, FINRA should have looked at the facts and events underlying the judgment. This is especially true whereas here it did not involve securities, and even the erroneous judgment and injunction based on it only barred Mr. Escobio from registering with the CFTC. Instead of delving into the circumstances leading to the judgment, FINRA simply relies upon it and nothing else, contrary to its rules and ignores the fact it does not have res judicata or collateral estoppel effect due to the pendency of the appeal.

Allowing this type of premature application of the judgment to eliminate Mr. Escobio from his life long career in the securities industry, deprives him of the benefit of his legal rights, is unjust, and unfairly targets him in violation of his constitutional rights to procedural and substantive due process. Such decision should at a minimum, await the

outcome of the appeal, especially here where FINRA has put forth not a shred of evidence to support its assertion that he is somehow a danger to the securities markets, investors and threat of unreasonable harm to the public.

Moreover, it is fundamentally unfair and a denial of due process to take action on Mr. Escobio's application before an appeal is concluded in this circumstance. When the CFTC judgment is reversed, Mr. Escobio will have already suffered irreparable harm because he will have been put out of business and prevented from working in a field to which he has devoted most of his life. His appeal is meaningless if he is put out of business before the Court has ruled.

CONCLUSION

For all of the above reasons, the S.E.C. should reverse FINRA's Denial, and order that Mr. Escobio be allowed to continue to associate with STS, or at a minimum, order that such association be allowed pending the final determination of his appeal of the CFTC judgment.

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CERTIFICATE OF COMPLIANCE WITH RULE 450 (d)

Counsel for Applicant hereby submits its Certificate of Compliance stating that the Applicant's Brief complies with the 14,000 word and page limit of Rule 450 (c) in that the word processing system used to prepare the brief determined it was 10,417 words, exclusive of pages containing the table of contents, table of authorities and any addendums.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following parties this 24th day of October, 2017 as follows:

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United States Securities & Exchange Commission
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October 24, 2017

VIA FAX (202)772-9324 & FEDERAL EXPRESS

Office of the Secretary
United States Securities and Exchange Commission
100 F. Street, N.E.,
Mail Stop 1090-Room 10915
Washington, D.C. 20549
Attention: Brent J. Fields

3-18143

Re: Notice of Appeal of FINRA NAC's SD-2130 Decision
In the Matter of the Continued Association of
Robert J. Escobio (CRD #703813) with
Southern Trust Securities, Inc., (BD#103781)

Dear Secretary:

Pursuant to S.E.C. Rule 150, we today herewith file via fax, "Applicant, Robert J. Escobio's Initial Brief in Support of His Application For Review of FINRA's Decision Barring His Continuing Association With Southern Trust Securities, Inc. Based on Statutory Disqualification". We are herewith, by FEDEX overnight delivering to you for filing the manually signed original with three copies, per S.E.C. Rule 152 (d).

By copy of this letter, we have served the same on Andrew J. Love, Esq., Counsel for FINRA.

Very truly yours,

Joseph W. Beasley

JWB/jm
Enclosures
cc: Andrew J. Love, Esq. (via e-mail, fax & Federal Express)
Office of General Counsel
FINRA
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Send Result Report

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Job No.: 134914 Total Time: 0°10'31" Page: 043

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JOSEPH W. BEASLEY

October 24, 2017

VIA FAX (202)772-9324 & FEDERAL EXPRESS

Office of the Secretary
United States Securities and Exchange Commission
100 F. Street, N.E.,
Mail Stop 1090-Room 10915
Washington, D.C. 20549
Attention: Brent J. Fields

Re: Notice of Appeal of FINRA NAC's SD-2130 Decision

No.	Date and Time	Destination	Times	Type	Result	Resolution/ECM
001	10/24/17 15:56	**12027729324**	0°10'31"	FAX	OK	200x100 Normal/On

[LA94401125]