UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of Meyers Associates, L.P. (n/k/a Windsor Street Capital, L.P.) For Review of Disciplinary Action Taken by FINRA	Admin. Proc. File No. 3-18350

REPLY BRIEF IN FURTHER SUPPORT OF APPLICATION OF MEYERS ASSOCIATES, L.P. (N/K/A WINDSOR STREET CAPITAL, L.P.) FOR A REVIEW OF DECISION OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY'S NATIONAL ADJUDICATORY COUNCIL

BECKER & POLIAKOFF, LLP
Robert I. Rabinowitz, Esq.
Sarah Klein, Esq.
331 Newman Springs Road, #225
Red Bank, New Jersey 07701
Tel. (732) 842-1662
rrabinowitz@beckerlawyers.com
sklein@beckerlawyers.com
Attorneys for Respondent/Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Pursuant to Rule 450 of the Commission's Rules of Practice, Meyers Associates, L.P. (n/k/a Windsor Street Capital, L.P.) (the "Firm") hereby submits this reply brief in further support of its application for a review by the Securities and Exchange Commission (the "Commission") of the decision of the Financial Industry Regulatory Authority's ("FINRA") National Adjudicatory Council ("NAC") dated December 22, 2017 (the "NAC Decision").

LEGAL ARGUMENTS

I. The OHO Panel's Finding That the Firm is Subject to Statutory Disqualification by Operation of Law Was Improper and Not Supported by the Facts in the Record Before it and Should Not Have Been Affirmed by the NAC.

The Department of Enforcement ("Enforcement") asked the OHO Panel to make a specific finding that the Firm "is subject to statutory disqualification by operation of law, in accordance with FINRA's By-Law Article III, §4 and Section 3(a)(39) of the Exchange Act."[1] The OHO Panel made this important determination and relegated it to a footnote in the OHO Decision, based in part on an Order Accepting Offer of Settlement, *Dep't of Enforcement v. Johnson*, No. 2013035533701 (Feb. 18, 2016) (the "Johnson Settlement").

The OHO Panel erred in utilizing the findings set forth in the Johnson Settlement as a basis for finding the Firm subject to statutory disqualification because the Johnson Settlement specifically provides that, "The findings herein are pursuant to Respondent George Johnson's Offer of Settlement **and are not binding on any other person or entity named as a respondent in this or any other proceeding.**"[2] In addition, there are multiple cases which state that the findings in one respondent's offer of settlement are not binding upon another respondent in a multi-

[1] *See* Extended Hearing Panel Decision (Nov. 11, 2016), Bates No. 006495 at 41, n. 245 [hereinafter, "Decision, Bates No. 006495"].
[2] Order Accepting Offer of Settlement, *Dep't of Enforcement v. Johnson*, No. 2013035533701 (Feb. 18, 2016), Bates No. 001459 at 2, n. 1 (emphasis added) [hereinafter, "Johnson Settlement, Bates No. 001459"].

respondent case.[3] It is important to note that the Johnson Settlement also contains language that precludes its use for any purpose other than the final settlement of charges by Enforcement against Johnson, specifically providing that "...Respondent has consented, without admitting or denying the allegations of the Complaint..."[4]

On appeal, **the NAC "...agree[d] with Mevers that the Extended Hearing Panel erred in relving on the (Johnson) settlement agreement,** but nevertheless find that the record, excluding any reliance on the settlement agreement, supports a finding that the Firm is statutorily disqualified."[5] The NAC erred in finding that the record was sufficient to support a finding that the Firm is statutorily disqualified absent the reliance on the Johnson Settlement since the OHO Panel specifically and deliberately relied on the Johnson Settlement in order to reach its determination of statutory disqualification. Furthermore, for the reasons explained below, the record alone does not provide sufficient evidence to support a finding that the Firm is statutorily disqualified.

First, the Firm was precluded from confronting and cross-examining the key witness, Johnson. The OHO Panel erred by permitting Enforcement to introduce and rely upon excerpts of transcripts from On-The-Record ("OTR") interviews of Johnson conducted by Enforcement in which the Firm did not participate and was not represented.[6] Johnson did not appear or testify at the hearing, despite being named on the Firm's witness list, and therefore the Firm had no opportunity to confront Johnson as to any documents or factual findings which comprise the record upon which the NAC bases its statutory disqualification finding.

---

[3] *See, e.g., In re ACAP Financial and Gary Hume*, Release No. 70046 (July 26, 2013) at 8.
[4] Johnson Settlement, Bates No. 001459 at 1 (emphasis added).
[5] *See* Final NAC Decision, dated December 22, 2017, Bates No. 006795 at 11.
[6] *See* Hearing Transcript (Feb. 24, 2016), Bates No. 001709 at 102–109.

Although the Firm recognizes that hearsay is admissible in administrative proceedings, such admissibility is premised on the reliability and probative value of that testimony, and the fairness of its use, such as where the testimony was under oath and the respondent had an opportunity to cross-examine the witness.[7] Here, the Firm had no such opportunity, and repeatedly objected to the use of Johnson's OTR testimony.

In order to make the finding requested by Enforcement—that the Firm is subject to statutory disqualification—the OHO Panel and the NAC would have had to find (1) that Johnson violated Section 10(b) and Rule 10b-5, and (2) that the Firm failed reasonably to supervise Johnson.[8] Regarding Johnson's alleged violation of Section 10(b) and Rule 10b-5, the requested finding relates to two of the five underlying Causes of Action against Johnson in which the Firm was not named: The First and Third Causes of Action. Enforcement failed to prove its allegations in both of these Causes of Action largely due to the fact that Johnson settled his portion of the case before and did not testify at the hearing, and because the Firm was unfairly precluded from cross-examining him.

As to the First Cause of Action, Enforcement failed to present evidence of scienter. The crux of Enforcement's argument in relation to IWEB was that Johnson manipulated the market by engaging in "cross" or "matched" transactions. As a matter of law, "'agency cross' or 'matched' transactions are not manipulative per se."[9] Absent proof of manipulative intent, mere wash trades or matched orders that were sent out to a market maker or exchange for execution do not establish a violation of Section 10(b) and Rule 10b-5.[10] Further, "The securities laws do not proscribe all

---

[7] *See, e.g., Dep't of Enforcement v. Varone*, No. 2006007101701 (Aug. 20, 2008) at n.4; *see also In re A.G. Baker, Inc.*, 1984 SEC LEXIS 2573 (Aug. 1, 1984) at *2-3.
[8] Post-Hearing Brief of Respondent Meyers Associates, L.P. (Apr. 15, 2016), Bates No. 006139 at 25–35.
[9] *Dep't of Market Regulation v. Ara Proudian*, Disciplinary Proceeding No. CMS040165, at 14 (NASD Office of Hearing Officers, Sept. 7, 2006).
[10] *Rockies Fund, Inc. v. S.E.C.*, 428 F.3d 1088, 1093 (D.C. Cir. 2005).

buying or selling which tends to raise or lower the price of a security...So long as the investor's motive in buying or selling a security is not to create an artificial demand for, or supply of, the security, illegal market manipulation is not established."[11]

In order for Enforcement to have met its burden of proof for the allegations in the First Cause of Action (which was necessary in order for the OHO Panel and the NAC to make a finding that the Firm was subject to statutory disqualification), it would have needed to provide evidence that Johnson's alleged conduct was done with the specific intent of manipulating IWEB's common stock. Of particular importance to this case is that **"omissions and ambiguities count against inferring scienter."**[12] In this case, there was a huge, glaring omission: Johnson did not testify at the hearing and neither the OHO Panel nor the NAC (nor the Firm) were able to evaluate his testimony to determine his state of mind and the reasons behind his pattern of trading IWEB stock.

Given that Johnson did not testify at the hearing, it was virtually impossible to know what his intent was regarding his transactions in IWEB. While Enforcement might argue that the OHO Panel and the NAC could have inferred Johnson's intent from his OTR testimony, such an argument is imprudent because (1) Enforcement's own chief witness and lead investigator in this case, Maureen Brogan, testified at least twice that she felt that Johnson's testimony at his OTR was false[13] and (2) the Firm never had an opportunity to cross-examine Johnson about his intent regarding the IWEB transactions. It was both imprudent and fundamentally unfair to subject the Firm to a finding which could lead to its statutory disqualification when it did not have a chance to properly defend itself on the merits of this important issue.

---

[11] *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 383 (2d Cir. 1973).
[12] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 326 (2007) (emphasis added).
[13] *See* Hearing Transcript (Feb. 24, 2016), Bates No. 001709 at 227:18 – 228:11; 251:17-22.

The Third Cause of Action—which was also not charged against the Firm—should have easily been disposed of because there was simply no evidence introduced at the hearing to prove these allegations. As explained above, Johnson did not testify at the hearing, and the only one of Johnson's customers who testified at the hearing, Doug Twiddy, did not testify regarding STVI. Without such testimony, it is impossible to know whether Johnson disclosed any potential conflict of interest to his customers or not. Here, again, Enforcement failed to prove its allegations, and the OHO Panel and the NAC erred by utilizing these findings to find that the Firm was subject to statutory disqualification.

Additionally, the OHO Panel's denial of the Firm's request for a brief adjournment was improper and fundamentally unfair given that it was not seeking an unreasonable delay of the hearing, and no parties would have been prejudiced by such a brief delay. The OHO Panel's contention that the Firm had "assumed the risk" of having to defend against Causes of Action with which it was not charged, was in error and fundamentally unfair. The Firm renewed its objections at the hearing after the conclusion of opening statements, specifically moving to exclude evidence related to the first five Causes of Action because it was not charged with those Causes of Actions and they had been removed from the OHO Panel's jurisdiction based upon the settlements with the other respondents who were charged in those Causes of Action.[14] As part of that oral motion, the Firm argued that it was Enforcement's decision to settle with Johnson and the other individual respondents prior to the hearing.[15] This decision resulted in Johnson's failure to appear at the hearing, and as an obvious consequence of that, the Firm was unable to cross-examine him.[16]

[14] *See* Hearing Transcript (Feb. 24, 2016), Bates No. 001709 at 61–86.
[15] *Id.*
[16] *Id.*

Had the Firm been granted the requested brief adjournment, it could have approached Johnson, with whom it had been in communications, to request that he take a deposition or take a sworn statement clarifying his underlying actions in this case and putting in perspective certain statements he made in his OTR.

II. Neither the OHO Panel Nor the NAC Adhered to General Principle No. 4 of FINRA's Sanction Guidelines.

FINRA's Sanction Guidelines provide for the aggregation or "batching" of similar types of violations rather than imposing sanctions per individual violation.[17] Here, the OHO Panel conceded that that Guidelines for AML and supervisory violations are analogous,[18] and agreed with the Firm's position that the AML violations are part and parcel of the supervisory violations and "impose[d] a unitary sanction for these violations"[19] of $350,000. However, the amount of this "unitary" fine was the exact amount requested by Enforcement in its Pre-Hearing Brief, in which it sought two separate and distinct fines against the Firm in the amount of $250,000 for its supervisory violations, and a $100,000 fine for its AML violations.[20] The concept of "batching" or "aggregating" fines does not mean to add the two fines together and term it a "unitary sanction," but rather to fold the lesser offense into the greater offense which is subsumed thereby.[21] Based on the OHO Panel's stated acceptance of Enforcement's recommended fine structure, the appropriate amount of the monetary fine imposed against the Firm should have been no greater than $250,000 for the combined supervisory and AML violations, as they both arose from the exact same course of conduct.

---

[17] SANCTION GUIDELINES, General Principle No. 4, *available at* http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf.
[18] Decision, Bates No. 006495 at 35.
[19] *Id.* at 36.
[20] Department of Enforcement's Pre-Hearing Brief (Jan. 19, 2016), Bates No. 001043 at 60–62.
[21] *See, e.g., Dep't. of Enforcement v. Ranni*, Disciplinary Proceeding No. 20080117243 (Mar. 9, 2012), at 25–26.

Furthermore, the NAC erred in increasing the monetary fine imposed on the Firm without sufficient basis to do so. The NAC failed to take into account – or even address the fact – that since Johnson's "scheme," as described by the NAC itself, involved Johnson's efforts to conceal his conduct from the Firm and hinder its supervision of him ("circulating and disseminating inaccurate reports," "soliciting customers to purchase STVI without disclosing that he was simultaneously selling that same stock," and that he "acted with scienter"), the Firm was hindered in its supervision efforts by Johnson. Moreover, the record is devoid of any indication that any AML violations actually occurred. Thus, contrary to the NAC's finding that "aggravating factors predominate," in fact, *mitigating* factors were present but were not addressed. The NAC Decision was made in error, and the Firm's fine should have thus been reduced, not increased.

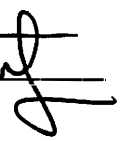
III. Conclusion

In view of the foregoing, the Firm respectfully requests that the Commission reverse the NAC's finding that the Firm is subject to statutory disqualification by operation of law, in accordance with FINRA By-Laws Article III, §4 and Section 3(a)(39) of the Exchange Act, and further modify the NAC Decision to reduce the amount of monetary fine imposed to no more than $250,000.

Dated: May 8, 2018

Respectfully Submitted,

Meyers Associates, L.P. (n/k/a Windsor Street Capital, L.P.)

By: 

Robert I. Rabinowitz, Esq.
Sarah Klein, Esq.
331 Newman Springs Road, #225
Red Bank, New Jersey 07701
Tel. (732) 842-1662
rrabinowitz@beckerlawyers.com
sklein@beckerlawyers.com
Attorneys for Respondent/Appellant

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of	:	
	:	
Meyers Associates, L.P. (n/k/a Windsor Street Capital, L.P.)	:	Admin. Proc. File No. 3-18350
	:	
For Review of Disciplinary Action Taken by FINRA	:	
	:	

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2018 I caused a true and correct copy of the foregoing Applicant's reply brief in further support of its application for a review by the Securities and Exchange Commission of the decision of the Financial Industry Regulatory Authority's National Adjudicatory Council dated December 22, 2017 to be served upon the following by overnight delivery service addressed to:

Eduardo A. Aleman
Assistant Secretary
Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
Facsimile: (202) 772-9324

Colleen Durbin, Esq.
Office of General Counsel
Financial Industry Regulatory Authority
1735 K Street, N.W.
Washington, D.C. 20006
Facsimile: (202) 728-8264

Dated: May 8, 2018

Robert I. Rabinowitz, Esq.
Sarah Klein, Esq.
Attorney for Applicant
Becker & Poliakoff, LLP
331 Newman Springs Road, Suite 225
Red Bank, NJ 07701
(732) 842-1662–Telephone
(732) 842-9047-Facsimile
rrabinowitz@beckerlawyers.com

Robert I. Rabinowitz
rrabinowitz@beckerlawyers.com
Phone: (732) 842-1662 Fax: (732) 842-9047

Becker & Poliakoff, LLP
331 Newman Springs Road, Ste. 225
Red Bank, NJ 07701

Becker

May 8, 2018

Via FedEx Delivery

Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: In the Matter of the Application of Meyers Associates, L.P. (n/k/a Windsor Street Capital, L.P.) For Review of Action Taken By FINRA
Admin. Proc. File No. 3-18350

Dear Sir/Madam:

We represent Meyers Associates, L.P. (n/k/a Windsor Street Capital, L.P.) ("Applicant"). Attached for filing please find an original and three (3) copies of Applicant's reply brief in further support of its application for a review by the Securities and Exchange Commission of the decision of the Financial Industry Regulatory Authority's National Adjudicatory Council dated December 22, 2017 along with a signed Certificate of Service.

Very truly yours,

Robert I. Rabinowitz

RIR:cmk
Enclosures

cc: Colleen Durbin, Esq. FINRA Office of General Counsel (by Electronic Mail and FedEx)
Windsor Street Capital, L.P. (by e-mail only)

Robert I. Rabinowitz
rrabinowitz@beckerlawyers.com
Phone: (732) 842-1662 Fax: (732) 842-9047

Becker & Poliakoff, LLP
331 Newman Springs Road, Ste. 225
Red Bank, NJ 07701

Becker

May 8, 2018

Via FedEx Delivery

Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: In the Matter of the Application of Meyers Associates, L.P. (n/k/a Windsor Street Capital, L.P.) For Review of Action Taken By FINRA
Admin. Proc. File No. 3-18350

Dear Sir/Madam:

We represent Meyers Associates, L.P. (n/k/a Windsor Street Capital, L.P.) ("Applicant"). Attached for filing please find an original and three (3) copies of Applicant's reply brief in further support of its application for a review by the Securities and Exchange Commission of the decision of the Financial Industry Regulatory Authority's National Adjudicatory Council dated December 22, 2017 along with a signed Certificate of Service.

Very truly yours,

Robert I. Rabinowitz

RIR:cmk
Enclosures

cc: Colleen Durbin, Esq. FINRA Office of General Counsel (by Electronic Mail and FedEx)
Windsor Street Capital, L.P. (by e-mail only)