

HARD COPY

**UNITED STATES OF AMERICA
BEFORE THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION**

In the Matter of the Application of

SCOTTSDALE CAPITAL ADVISORS
CORPORATION, JOHN J. HURRY, TIMOTHY B.
DIBLASI, AND D. MICHAEL CRUZ

For Review of Disciplinary Action Taken by FINRA

**PETITIONERS' MOTION FOR LEAVE TO INTRODUCE ADDITIONAL EVIDENCE
AND INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT**

I. INTRODUCTION

Petitioners Scottsdale Capital Advisors Corporation, John J. Hurry, Timothy B. DiBlasi, and D. Michael Cruz respectfully submit this motion for leave to introduce additional evidence pursuant to SEC Rule of Practice 452. Petitioners request that the Commission admit an expert report that analyzes the reliability and [REDACTED] of Gregory Ruzicka at that time that he provided his on-the-record testimony (“OTR”) to FINRA’s Department of Enforcement (“Enforcement”).

Rule 452 permits a party to move to introduce additional evidence in proceedings before the SEC “at any time prior to issuance of a decision by the Commission.” 17 CRF §201.452. Such a motion (1) “shall show with particularity that such additional evidence is material” and (2) shall show “that there were reasonable grounds for failure to adduce such evidence previously.” *Id.*

Although Mr. Ruzicka did not testify at the hearing, the Hearing Officer admitted the transcript of his OTR into evidence over Petitioners’ objections.¹ Although Petitioners have never had the opportunity to cross-examine him, the Hearing Panel and the National Adjudicatory Council (“NAC”) nevertheless placed great weight on selected portions of his OTR.

Since the conclusion of the NAC’s proceedings, Mr. Ruzicka has been found [REDACTED] [REDACTED] in California on a litany of criminal charges ranging from trespass and vagrancy to second-degree robbery.

As explained below, the proposed expert report explains how Mr. Ruzicka was exhibiting signs of [REDACTED] at the time of OTR. That is important for the Commission to consider because that would render Mr. Ruzicka’s OTR unreliable and provide yet another reason why his OTR should have been excluded from evidence.

¹ Mr. Ruzicka was not subject to FINRA Rule 9252 and so could not be compelled to attend the hearing.

II. EVIDENCE OF MR. RUZICKA'S [REDACTED] THE TIME OF HIS OTR IS [REDACTED] TO HIS CREDIBILITY

Petitioners' proposed new evidence consists of an expert report prepared by Dr. Dennis L. Johnson, Ph.D. A copy of that report is attached as Exhibit 1. This report examines Mr. Ruzicka's [REDACTED] [REDACTED] at the time of his OTR, and is based on Dr. Johnson's review of (1) Mr. Ruzicka's OTR testimony, (2) 61 pages of emails to and from Mr. Ruzicka from March 31, 2015 to May 26, 2015, discussing his OTR testimony, and (3) Mr. Ruzicka's California criminal record, which was the catalyst for this new evidence.

The status of Mr. Ruzicka's [REDACTED] at the time of his OTR is material to this proceeding. While the Commission's Rules do not define [REDACTED] for purposes of Rule 452, the Commission has treated relevance as the touchstone of materiality. *See, e.g., Eric J. Weiss*, SEC Release No. 69177, 2013 WL 1122496, at *9 (Mar. 19, 2013) (declining to admit additional evidence in part because it did not deal with the "relevant" issues on which FINRA based its conclusions); *KCD Financial Inc.*, SEC Release No. 80340, 2017 WL 1163328, at *8, n.39 (June 15, 2017) (declining to admit additional evidence in under SEC Rule 452 in part because it was not relevant, and therefore not material); *Meyers Associates, L.P., and Bruce Meyers*, SEC Release No. 81778, 2017 WL 4335044, at *8, n.45 (Sept. 29, 2017) (finding that the proposed additional evidence was not relevant because it "has nothing to do with" FINRA's decision); *see, also, Dep't of Enforcement v. Pellegrino*, 2008 WL 115195, at *13 n.28 (NAC Jan. 4, 2008) (admitting new evidence that "ha[d] some relevance" to a charge).

The Commission has made clear that new evidence is material if it bears on the credibility of a witness or on the assessment of sanctions, or if it contradicts evidence on which the Hearing Panel relied in support of its findings. *See James A. Winkelmann, Sr., and Blue Ocean Portfolios, LLC*, SEC Release No. 4715, 2017 WL 2591799, at *1 (June 15, 2017) (finding the proposed

additional evidence “material” because it provided a “definitive defense” and contradicted findings in the previous decision); *Absolute Potential, Inc.*, SEC Release No. 71866, 2014 WL 1338256, at *3 (Apr. 4, 2014) (admitting evidence regarding alleged inaccuracies in post-decision SEC filings as relevant to sanctions); *OptionsXpress, Inc.*, SEC Release No. 30743, 2013 WL 5635987, at *3 (Oct. 16, 2013) (admitting an options exchange settlement order containing findings that contradicted the ALJ’s findings of fact and conclusions of law); *Russo Sec., Inc.*, SEC Release No. 44186, 2001 WL 379064, at *2 n.10 (Apr. 17, 2001) (recognizing that new evidence casting doubt on the factfinder’s credibility determinations may be admitted under SEC Rule of Procedure 452); *see also Pellegrino*, 2008 WL 115195, at *13 & n.28 (admitting evidence of a videotaped presentation delivered by the firm’s compliance officer, which respondent offered to demonstrate the reasonableness of his decision to appoint that individual as compliance officer); *Sears*, 2007 WL 2806293, at *3 (admitting customer affidavits that contradicted Enforcement witness’s allegations of unauthorized trading).

There can be no genuine dispute that the proposed new evidence is material. An OTR is hearsay. Such hearsay may only be admitted if it is determined to be reliable. *Richard G. Strauss*, SEC Release No. 31222, 1992 WL 252168, at *3 (Sept. 22, 1992) (hearsay evidence must be found reliable before it can be introduced) As explained in other briefing recently submitted to the Commission in this matter, there are a multitude of reasons that demonstrate the inherent unreliability of Mr. Ruzicka’s OTR testimony.² Evidence that Mr. Ruzicka’s adjudicated [REDACTED] [REDACTED] OTR would conclusively demonstrate the unreliability of that testimony.

² Opening Br. for Appeal of John Hurry at Section V.

As the careers of the individual Petitioners hang in the balance, the Commission should consider this information that goes to the heart of the reliability of the primary witness upon whom the Hearing Panel and the NAC relied in issuing their decisions.

III. PETITIONERS HAVE CONSISTENTLY MOVED PROMPTLY TO INTRODUCE EVIDENCE OF MR. RUZICKA'S [REDACTED] ISSUES

As Petitioners learned of Mr. Ruzicka's post-proceeding criminal and [REDACTED] promptly moved to inform the NAC. For example, after Mr. Ruzicka's arrest for felony burglary, Petitioners submitted their first Motion for Leave to Introduce Additional Evidence on March 9, 2018.³ After Mr. Ruzicka was declared [REDACTED], Petitioners submitted a Supplemental Motion for Leave to Introduce Additional Evidence on June 27, 2018.⁴

Included in its decision upholding the Hearing Panel's sanctions against Petitioners, the NAC also denied the aforementioned motions regarding Mr. Ruzicka.⁵ The NAC explained that although those motions had been timely filed, evidence relating to Mr. Ruzicka's [REDACTED] June of 2018 was not material to determining his [REDACTED] in May of 2015, when he provided his OTR.⁶

In direct response to that recent ruling, Petitioners retained Dr. Johnson. His expert opinion squarely addresses the reason the NAC provided for denying the prior motions. Thus, Petitioners timely sought this expert analysis and are timely moving for its consideration by the Commission. *See, e.g., James A. Winkelmann, Sr., and Blue Ocean Portfolios, LLC*, SEC Release No. 4715, 2017 WL 2591799, at *1 (June 15, 2017) (finding that reasonable grounds for not adducing the

³ Respondents' Motions for Leave to Introduce Additional Evidence (FINRA 010761).

⁴ Respondents' Supplemental Motions for Leave to Introduce Additional Evidence (FINRA 010805).

⁵ NAC Decision at 93 (FINRA 010923).

⁶ *Id.*

proposed additional evidence exist when the evidence is [REDACTED] only in light of an erroneous initial finding).

The proposed new evidence regarding Mr. Ruzicka's [REDACTED] at the time of his OTR refutes the factual basis for the NAC's findings and helps to correct Petitioners' loss of the right of cross-examination. *See Sears*, 2007 WL 2806293, at *3–4; *see also Dep't of Enforcement v. Ortiz*, 2007 WL 2984846, at *10 (NAC Oct. 10, 2007) (prior opportunity for cross-examination bears on good cause for admitting new evidence).

IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission grant this motion and accept the expert report of Dr. Dennis Johnson.

Dated: October 5, 2018

Respectfully Submitted,

A handwritten signature in black ink, appearing to be a stylized name, possibly "Kevin J. Harnisch".

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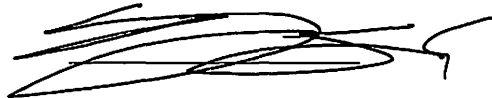
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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2018, I caused the foregoing to be served by facsimile on the following:

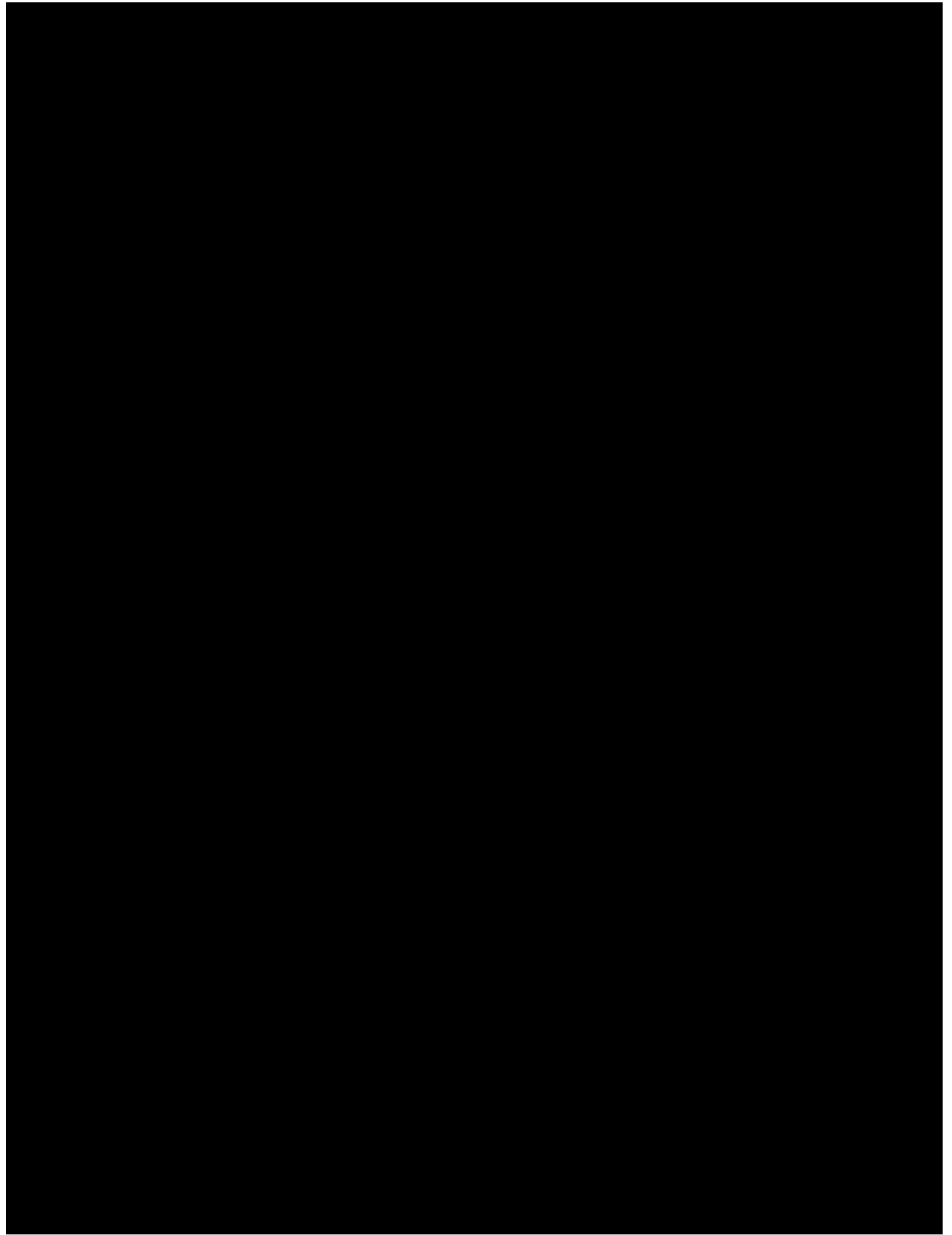
The Office of the Secretary
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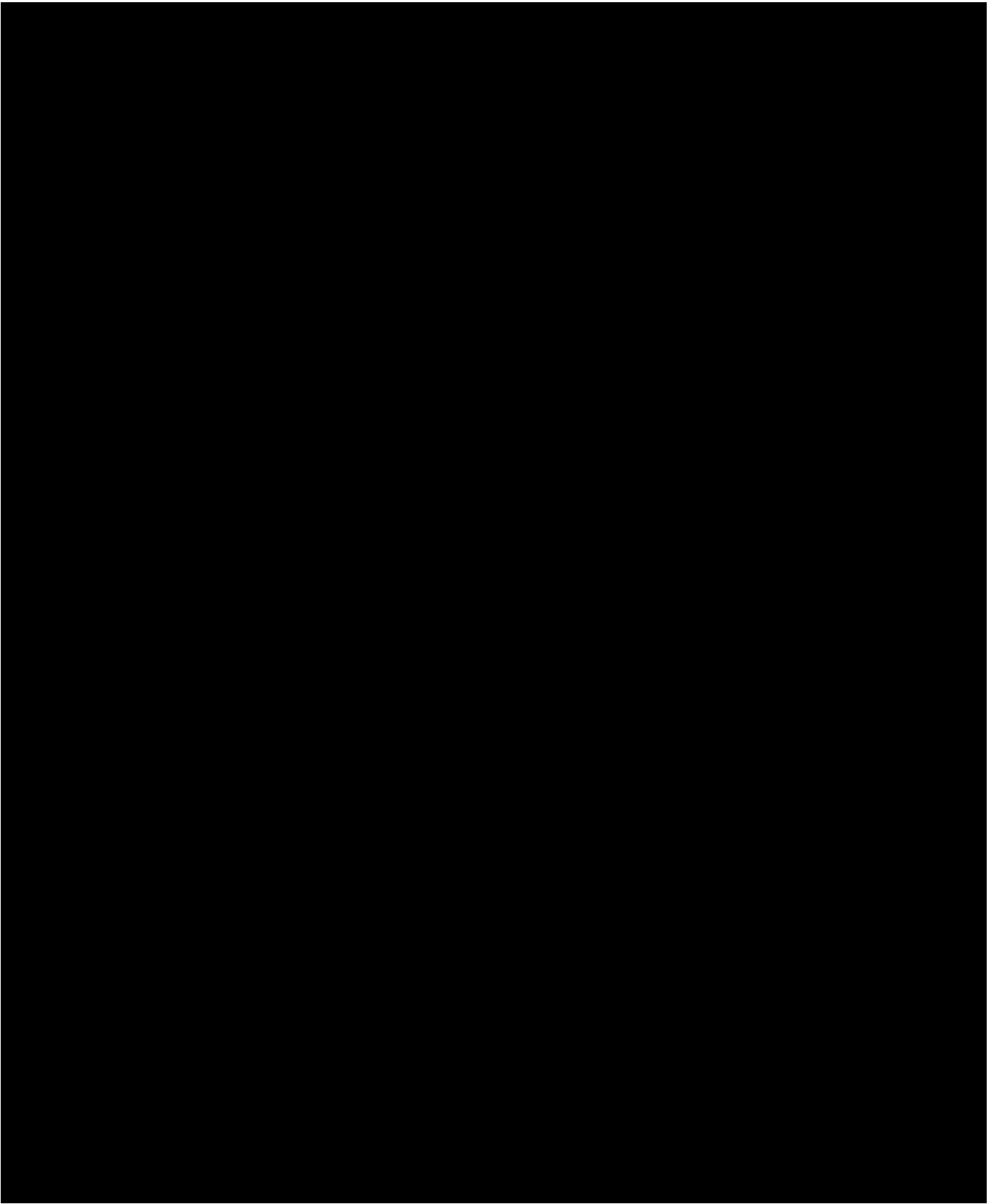
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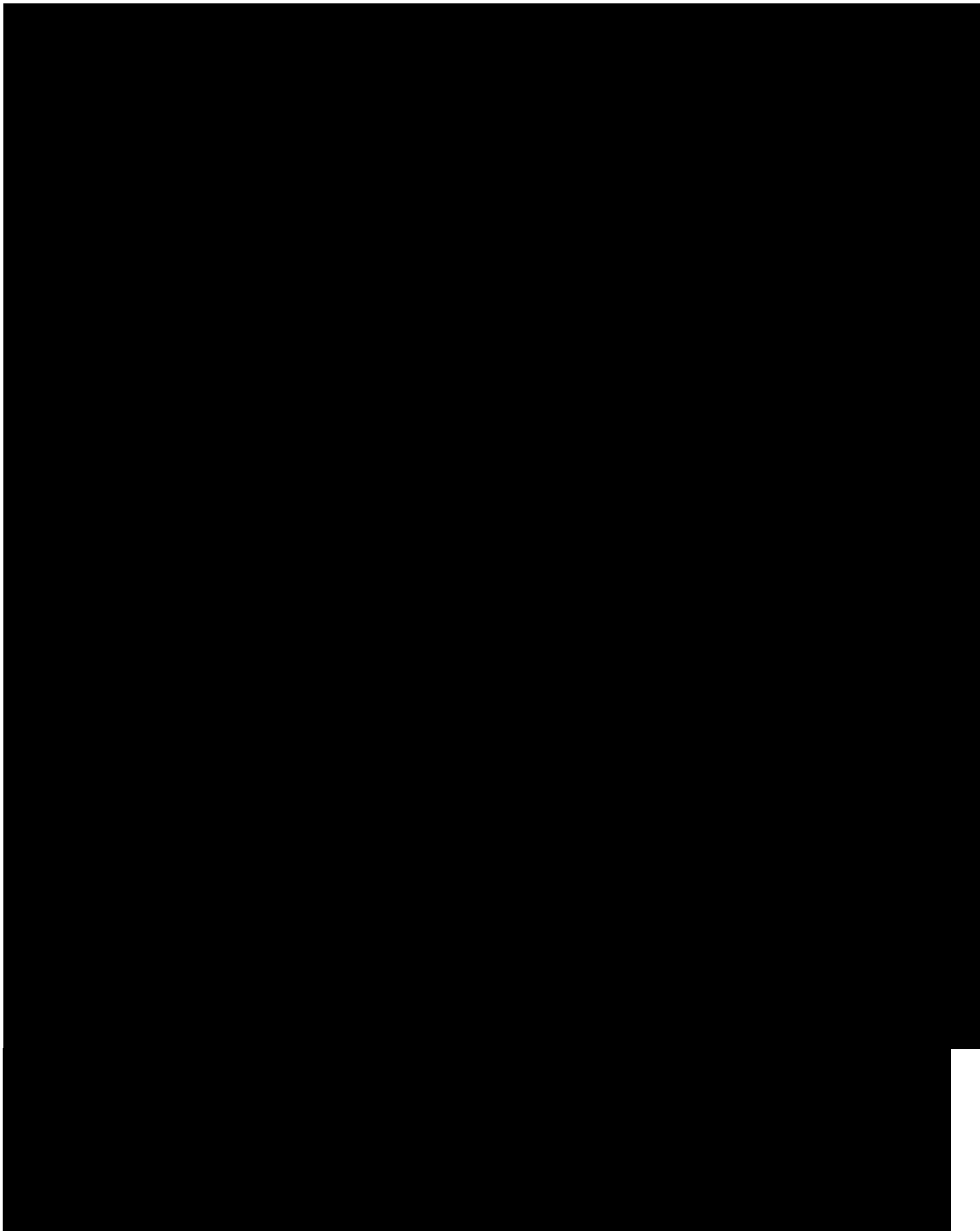
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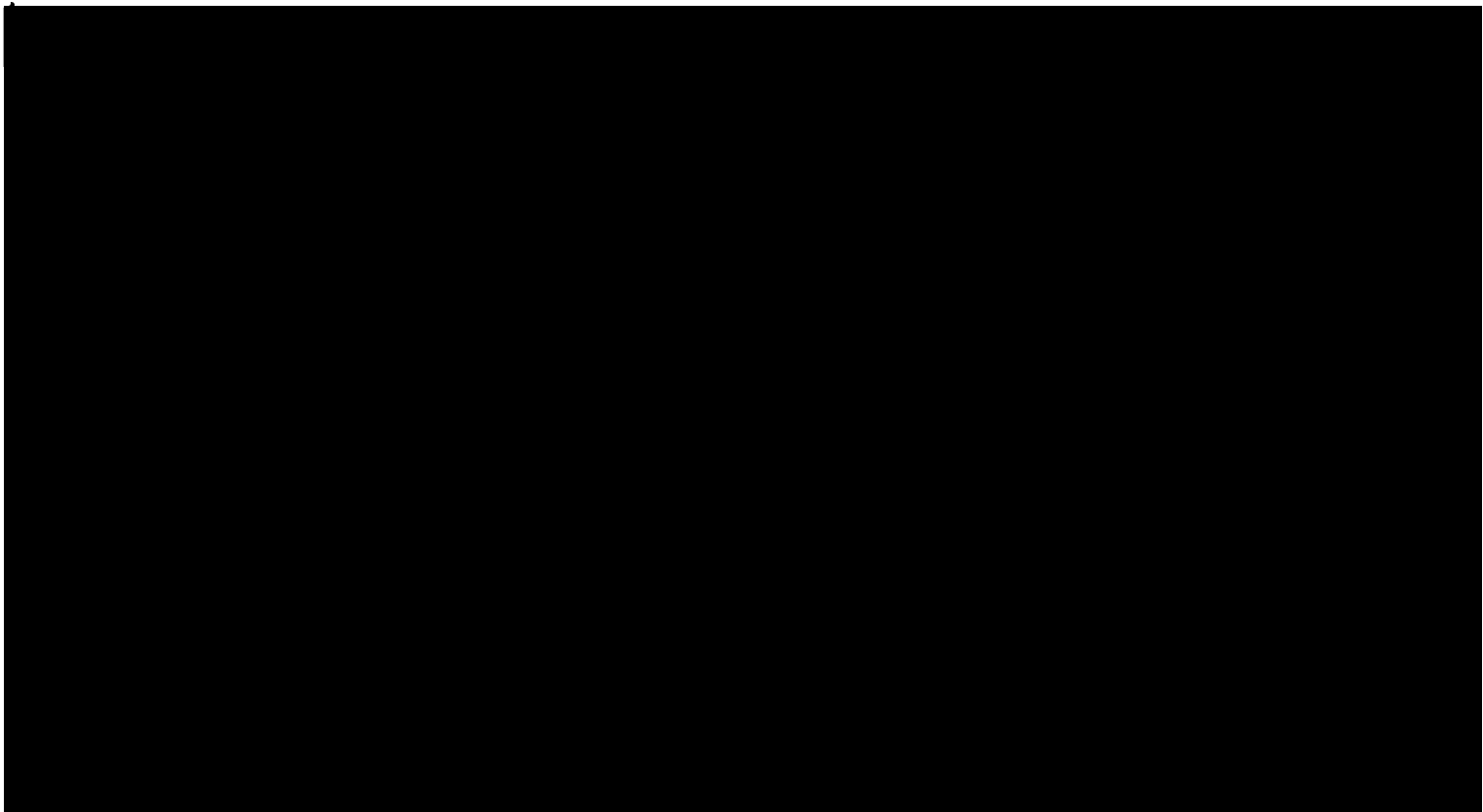
Kevin J. Harnisch

EXHIBIT 1



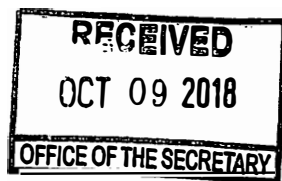






October 5, 2018

Via Courier



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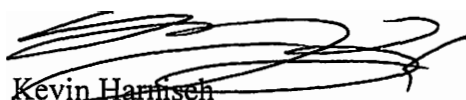
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Re: Scottsdale Capital Advisors Corporation, John J. Hurry, Timothy B. DiBlasi, and D. Michael Cruz: Administrative Proceeding File No. 3-18612

To Whom it May Concern:

On behalf of our clients, Scottsdale Capital Advisors Corp., John J. Hurry, Timothy B. DiBlasi, and D. Michael Cruz (collectively "Petitioners"), enclosed please find Petitioners' Opening Briefs in the above-captioned matter. Additionally, please find Petitioners' Motions for Leave to Introduce New Evidence, and for Oral Argument. A copy of these documents was also faxed to the SEC on October 5, 2018 at fax numbers (703) 813-9793 and (202) 772-9324.

Very truly yours,



Kevin Harnisch

KJH
Enclosures