BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

TMR Bayhead Securities, LLC

For Review of Action Taken by

FINRA

File No. 3-18869

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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January 16, 2019

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I. INTRODUCTION

TMR Bayhead Securities, LLC ("Bayhead") appeals a September 10, 2018 FINRA Expedited Hearing Panel Decision that suspended the firm from FINRA membership until it files audited annual reports for fiscal years ending March 31, 2015, March 31, 2016, and March 31, 2017. The issue on appeal is whether Bayhead has met its burden to establish that it qualified for a claimed exemption from filing audited annual reports for each of these fiscal years. The Expedited Hearing Panel (the "Panel") found that Bayhead did not meet its burden, and the Commission should affirm this finding, which is fully supported by the record.

Section 17(e) of the Securities Exchange Act of 1934 (the "Exchange Act") and Exchange Act Rule 17a-5(d) require every registered broker-dealer, like Bayhead, to file an annual financial report audited by an independent public accountant. Exchange Act Rule 17a-5(e)(1)(i)(A) provides a very narrow "single issuer exemption" that allows broker-dealers to file unaudited financial statements if the broker-dealer limits its activities to acting as a broker

(agent) soliciting subscriptions for securities for a single issuer, and meets certain other requirements. The single issuer exemption generally applies in the case of self-underwritings, where the broker-dealer is solely engaged in soliciting subscriptions of securities for its parent. In such cases, the issuer's unique access to information about the financial health of the broker-dealer justifies the exemption from an independent audit.

Bayhead argues that it qualified for the single issuer exemption for each of its fiscal years ending March 31, 2015, March 31, 2016, and March 31, 2017, and it filed unaudited annual reports for each of these years. Bayhead, however, failed to demonstrate that it conducted any business during the relevant time period. Other than the self-serving claims by Bayhead's owner and sole associated person, which the Panel found not credible, that Bayhead was providing "merger advisory services" to a company owned by the owner's brother, Bayhead provided virtually no evidence to support its claims. To the contrary, the record establishes that Bayhead engaged in virtually no business activities during the relevant period. Under these circumstances, the single issuer exemption does not apply, and Bayhead was required to file audited annual reports.

FINRA's suspension of Bayhead for failure to file audited annual reports is supported by the record, and is consistent with the applicable law. The Commission, accordingly, should sustain FINRA's action and dismiss the application for review.

II. FACTUAL BACKGROUND

A. Bayhead

Bayhead has been a FINRA member since January 2006. R. at 1710.[1] Its main office is located in Poughkeepsie, New York. R. at 1710. Bayhead was founded by Todd M. Roberts. R. at 1225. Roberts is the sole owner of the firm, its sole associated person, and serves as the firm's president, chief compliance officer, financial operations principal, and anti-money laundering supervisor. R. at 1283, 1711.

Bayhead's 2010 FINRA membership agreement authorizes the firm to engage in the business of private placements of securities and selling tax shelters or limited partnerships in primary distributions. R. at 743-46, 1505-07. The membership agreement also authorizes Bayhead to maintain one office and employ five associated persons, and requires the firm to maintain minimum net capital of $5,000. R. at 744. In December 2012, Bayhead requested, and FINRA granted, a change in its fiscal year end date from September 30 to March 31. R. at 748-50, 755, 1677-79.

Bayhead's financial filings with FINRA reflect that the last time it reported any revenue was in 2009. R. at 768, 775-76, 1529-36. In each quarterly report filed from January 1, 2015, through March 31, 2018, Bayhead reported zero revenue and no expenses other than regulatory fees paid to FINRA. R. at 768-776, 1537-1641.

B. FINRA Conducts a 2014 Review of Bayhead's Business Activities

On May 13, 2014, FINRA sent Bayhead a letter asking about the firm's business

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[1] "R. at __" refers to the page number in the certified record. For ease of reference, we have omitted the prefix "FINRA" from references to the page number. "Bayhead Br. __" refers to Bayhead's December 14, 2018 brief in support of its application for review.

activities. R. at 1441. The letter was prompted by Bayhead's FINRA filings, which reflected no revenue since 2009. R. at 1128-29. The letter explained the firm must be engaged in an active securities business in order to be eligible for FINRA membership. R. at 1441. The letter further explained that it appeared that Bayhead was no longer active, and FINRA asked Bayhead to "demonstrate" that the firm was actively conducting a securities business by providing "an explanation of the securities business in which you are engaged, together with appropriate documentation supporting any assertion that your firm is actively conducting a securities business." R. at 1441.

Roberts responded by letter dated May 19, 2014 letter, and he claimed that Bayhead was actively engaged in a securities business. R. at 1442-43. Roberts explained that Bayhead's business was focused on "providing M&A advisory services, business consulting and valuation services, and private placement services for private company fundraisings." R. at 1442. Roberts also explained that Bayhead was developing business opportunities with: (1) Fountainhead Mobile Solutions, LLC ("Fountainhead")[2]; (2) a "mobile medical computing company" seeking a buyer; and (3) private placement services for a renewable energy and eco-construction business. R. at 1443. Roberts provided no documentation supporting these claimed business activities. R. at 1130. Glenn Albaum, the surveillance director for FINRA's New Jersey district, testified that because Bayhead had a regular exam scheduled for 2014, he referred the issue of verifying Bayhead's business activities to the examination team. R. at 1130-31.

During the 2014 examination, Roberts provided some documentation purportedly supporting Bayhead's business activities. R. at 1431-39, 1445-60. The documentation included:

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[2] Fountainhead was owned and operation by Roberts' brother. R. at 1284.

- An unsigned letter dated March 10, 2013, from Bayhead to Fountainhead, and an undated and unsigned agreement between Fountainhead and Bayhead, providing for Bayhead to act as Fountainhead's "exclusive financial advisor in connection with the possible direct or indirect sale" of the company. R. at 1431-39. The letter referenced to the attached unsigned agreement as a "form of engagement letter [the parties] would use for an exclusive engagement." R. at 1431.

- An unsigned letter dated April 28, 2013, from Bayhead to Roberts' brother referencing the unsigned engagement agreement previously sent for Fountainhead, and recommending the same arrangement for seeking a buyer for another entity, Medical Wizards, Inc. R. at 1438-39.

- Emails exchanged by Roberts and his brother dated October 1, 2014, December 8, 2014, and December 9, 2014, with the subject "tax documents." R. at 1448.

- Emails dated December 8 and 9, 2014, attaching documents concerning a solar business. R. at 1449-56.

On October 24, 2014, FINRA requested that Bayhead provide "a list of all deals that are currently active or being planned, including potential deals," along with a brief explanation of each deal. R. at 1459. On October 30, 2014, Roberts submitted a responsive narrative. R. at 1145-46, 1460. For current deals, Roberts listed Fountainhead and Medicals Wizards, the companies owned by his brother. R. at 1460. Roberts also represented that he was in discussions with an orthopedics company for "future medical and technology sell side assignments." R. at 1460. Finally, Roberts represented that Bayhead was "developing prospects in the solar and wind business." R. at 1460.

C. Bayhead Files Unaudited Annual Reports

In December 2014, Elena Domasica, the FINRA regulatory coordinator assigned to Bayhead, sent an email to all of the FNRA members assigned to her, including Bayhead, that reminded them of the upcoming requirement to file audited annual financial statements and

provided information about new Commission requirements when filing annual reports. R. at 731, 742, 1463-64. On April 22, 2015, Roberts replied to Domasica's email. Roberts stated that he believed Bayhead was exempt from filing audited financial statements under the single issuer exemption, asked Domasica to "confirm this is the case," and asked Domasica to let him know if he needed to provide FINRA with anything in order to rely on the exemption. R. at 1462. Roberts explained that Bayhead's business "is limited to M&A advisory services for companies seeking buyers for 100% of their businesses." R. at 1463. This was the first time Bayhead claimed an exemption from the requirement that it file audited annual financial statements. R. at 756-57.

On May 1, 2015, Domasica sent Roberts an email quoting the language of the exemption and advising Roberts that, since the rule was "self-operative," the firm did not need to obtain prior approval from the Commission to claim the exemption. R. at 761-63, 1461. Domasica explained that "if [Bayhead's] activities fall within the purview of the [single issuer exemption], the [Commission] will not recommend any action if [Bayhead] files unaudited annual reports of financial statements." R. at 1461.

Bayhead filed an unaudited annual report for its fiscal year ending March 31, 2015. R. at 1385-98. In the report, Roberts signed an oath stating that "[s]ince the date of its previous report, [Bayhead] has limited its securities business to acting as a broker or dealer for a single issuer." R. at 1386. Bayhead also filed unaudited annual reports for its fiscal years ending March 31, 2016 and March 31, 2017, relying on the same exemption and making the same attestation. R. at 1399-1429.

D. FINRA Requests Documentation Supporting Bayhead's Reliance on the Single Issuer Exemption

After reviewing Bayhead's December 31, 2015 quarterly Focus report, and noting that Bayhead had again reported zero revenue and no expenses for the quarter ending December 31, 2015, FINRA sent Roberts a March 14, 2016 email, asking for additional information about whether Bayhead was still conducting a securities business. R. at 1465-66. Roberts replied by email on March 17, 2016. Roberts stated that the firm was still conducting business and referenced FINRA's 2014 examination concerning the firm's activities. R. at 1465.

After reviewing Bayhead's March 31, 2016 unaudited annual report, for which Bayhead again claimed the single issuer exemption, FINRA sent Roberts a May 13, 2016 email that requested, in part, "[s]upporting documents to show the [f]irm met the requirements for exemption from the requirement to file an audited financial pursuant to [Exchange Act] Rule 17a-5(e)(1)(i)." R. at 1467. On June 1, 2016, Roberts responded with a statement that Bayhead qualified for the exemption, but he did not provide any supporting documentation or details concerning Bayhead's business activities. R. at 1467.

Bayhead filed a third unaudited annual report for its fiscal year ending March 31, 2017. R. at 1415-29. On May 1, 2017, Domasica sent Roberts an email asking him to contact her or Albaum to discuss Bayhead's audit requirement. R. at 1471. Roberts subsequently provided FINRA with two documents that he attached to a May 10, 2017 email. R. at 1470-77. Roberts provided a May 8, 2017 letter from Roberts' brother as the president of a company called PDA Verticals Corporation ("PDA Verticals"). R. at 1472. Roberts's brother stated that, "[b]y this letter, we confirm our intention and agreement to continue our relationship under which your company [Bayhead] promotes our company as a non-exclusive broker and agent acting on our behalf to solicit suitable investors who might be interested in a substantial subscription of our

equity securities." R. at 1472. Roberts also provided FINRA with an undated and unsigned form engagement agreement between Bayhead and PDA Verticals. R. at 1473-75.

On May 11, 2017, FINRA informed Roberts that, consistent with Roberts' previous conversations with FINRA staff, a review of the firm's financial statements and the documentation Bayhead had provided to FINRA confirmed that Bayhead did not qualify for the single issuer exemption and that, accordingly, it needed to file audited financial statements. R. at 1469-70. FINRA further stated that if Bayhead nonetheless believed it did qualify for the exemption, it should contact the Commission to discuss the matter further. R. at 1469-70. In response to a request from Roberts for the staff's reasons for determining that the exemption did not apply, FINRA explained, in a May 17, 2017 email, that the firm appeared to be inactive, and that the single issuer exemption did not apply to an inactive firm. R. at 1469.

In late June 2017, FINRA staff sent Roberts copies of Commission No-Action letters to other firms seeking to rely on the single issuer exemption. R. at 1480-88. In the June 23, 2017 email to Roberts forwarding the letters, FINRA staff asked Roberts to inform FINRA, by June 30, 2017, what steps he intended to take to comply with the audit requirement. R. at 1480.

On August 1, 2017, FINRA sent Roberts another email requesting documentation supporting Bayhead's reliance on the single issuer exemption. R. at 1489-90. Specifically, FINRA requested: (1) a list of potential investors Bayhead had contacted to solicit interest in PDA Verticals; (2) copies of communications, including emails, sent to potential investors; (3) emails between Bayhead and PDA Verticals; and (4) a telephone log of calls to potential investors to obtain indications of interest. R. at 1489-90. FINRA sent a follow-up email to Roberts on August 15, 2017, because he had not responded. R. at 1489. Roberts never provided the requested documents.

III. PROCEDURAL HISTORY

On March 23, 2018, FINRA sent Bayhead a notice of suspension pursuant to FINRA Rule 9552 (the "Suspension Notice").[3] R. at 1643-46. The Suspension Notice explained that Bayhead had failed to demonstrate that it qualified for the single issuer exemption and, accordingly, the firm was required to file audited financial statements for its fiscal years ending March 31, 2015, March 31, 2016, and March 31, 2017. R. at 1643-46. The Suspension Notice advised Bayhead that it would be suspended from FINRA membership effective April 16, 2018, unless the firm either submitted audited annual reports or requested a hearing before that date.[4] R. at 1643-46. On April 12, 2018, Bayhead filed a response to the Notice of Suspension and requested a hearing. R. at 1-3.

A telephone hearing was held over the course of two days in June 2018, before a Hearing Panel that included a Hearing Officer and two industry hearing panelists, at which Roberts, Domasica, Albaum, and a senior director in FINRA's Financial Operations Policy Group testified. R. at 683-1050; 1055-1114. On September 10, 2018, the Panel issued a decision

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[3] FINRA Rule 9552(a) states:

> [i]f a member . . . fails to provide any information, report, material, data, or testimony requested or required to be filed pursuant to the FINRA By-Laws or FINRA rules, or fails to keep its membership application or supporting documents current, FINRA staff may provide written notice to such member or person specifying the nature of the failure and stating that the failure to take corrective action within 21 days after service of the notice will result in suspension of membership or of association of the person with any member.

[4] Under FINRA Rules 9552 and 9559, a suspension imposed under Rule 9552 becomes effective unless the firm either complies with the notice or files a request for a hearing. A request for a hearing stays the effectiveness of the suspension.

finding that Bayhead had not met its burden to demonstrate that it was entitled to rely on the single issuer exemption. R. at 1849-57. Specifically, the Extended Hearing Panel found that Bayhead "has not provided any documentation to establish that its business was limited to a single issuer or that it solicited or effected any transactions for any issuers." R. at 1856. The Panel found that, to the contrary, "the weight of the evidence reveals that [Bayhead] had little to no business activities during the relevant fiscal years." R. at 1856. The Panel ordered that Bayhead would be suspended from FINRA membership until it files "acceptable audited annual reports for the relevant fiscal years," after which Bayhead may apply for termination of the suspension. R. at 1856. The Panel also ordered Bayhead to pay $5,169.50 in hearing costs. R. at 1857.

This appeal followed.

IV. ARGUMENT

Exchange Act Section 19(e) sets the standards applied by the Commission in reviewing FINRA's decision in this case. 15 U.S.C. § 78s(e). The Commission is required to sustain FINRA's suspension of Bayhead "if the record shows by a preponderance of the evidence that [Bayhead] engaged in the conduct FINRA found, that the conduct violated FINRA's rules, and that FINRA's rules are, and were, applied in a manner consistent with the purposes of the Exchange Act." *Sharemaster*, Exchange Act Release No. 83138, 2018 SEC LEXIS 1036, at *19 (Apr. 30, 2018).

The Commission requires every registered broker-dealer to file annual reports audited by an independent public accountant. Bayhead has failed to establish that it qualifies for the very limited exemption from this requirement that applies to broker-dealers soliciting subscriptions of

securities on behalf of a single issuer, usually the broker-dealer's parent. The record contradicts Bayhead's unsupported claim that it worked on behalf of a single issuer owned and operated by his brother. Indeed, the record demonstrates that Bayhead did not conduct any securities business at all. Because it conducted no business, Bayhead was ineligible for the exemption. The Panel's decision is fully supported by the record, and no grounds exist to overturn it. Accordingly, the Commission should dismiss the application for review.

A. The Single Issuer Exemption Is Extremely Limited

Exchange Act Section 17(e) and Exchange Act Rule 17a-5(d) require every registered broker-dealer to file annually financial statements audited by an independent public accountant. Failure to comply with this requirement violates FINRA Rule 2010.[5] *See E. Magnus Oppenheim & Co.*, 58 S.E.C. 231, 235 (2005) (explaining "it is well settled that a violation of any rule promulgated by [the] Commission" violates the predecessor to Rule 2010 and finding such a violation where the applicant violated Exchange Act Rule 17a-5(a)).

Exchange Act Rule 17a-5(e)(1)(i)(A), known as the single issuer exemption, provides a narrow exemption which allows a broker-dealer to file an unaudited report under extremely limited circumstances. The single issuer exemption allows a broker-dealer to file an unaudited report if, since the date of the previous annual report filed: (1) the broker-dealer's securities business has been limited to acting as a broker (agent) for a single issuer in soliciting subscriptions for securities of the issuer; (2) the broker-dealer has promptly transmitted to the issuer all funds and delivered all securities to the subscriber; and (3) the broker-dealer has not otherwise held any funds or securities, or owed money or securities to a customer. 17 C.F.R.

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[5] FINRA Rule 2010 requires FINRA members to conduct their business in accordance with "high standards of commercial honor and just and equitable principles of trade."

240.17a-5(e)(1)(i)(A).

The Commission has held that the single issuer exemption generally applies to brokers and dealers engaged exclusively in self-underwriting. *See Sharemaster*, 2018 SEC LEXIS 1036, at *22. The single issuer exemption is "designed to relieve a broker-dealer that engages exclusively in underwriting the issues of its parent from the requirement that its annual report of financial statements be audited." *Id.* As the Commission explained, it is the "limited nature of the business of a broker that solicits subscriptions for a single issuer and the relationship between the broker and the issuer, such as when the broker is engaged only in underwriting the issues of its parent, that renders the audit requirement unnecessary." *Id.* at 23.

The Commission most recently addressed the single issuer exemption in a September 2018 proposed rule amendment. *Amendment to Single Issuer Exemption for Broker-Dealers*, Exchange Act Release No. 34-84225, 2018 SEC LEXIS 2478 (Sept. 20, 2018). In the proposed rule amendment, the Commission reiterated that the exemption from the audit requirement is a "very limited exemption"[6] that generally applies in self-underwriting situations. *Id.* at *12. In these situations, the issuers' access to information mitigates the "risk of harm from not requiring that an independent public accountant audit the information." *Id.* at 13. In effect, the broker-dealer's single customer—the only customer potentially at risk—is in a position to perform for itself the verification function normally fulfilled by an independent accountant.

Consistent with the language of Exchange Act Rule 17a-5(e)(1)(i)(A), and the rationale for the exemption, the Commission has held repeatedly that the exemption does not apply where

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[6] The Commission noted that, in the past year, only three of the approximately 4,000 broker-dealers registered with the Commission relied on the single issuer exemption. *Id.* at *13, 16.

the issuer has conducted no business. *See, e.g.*, *First Nev. Sec., Inc.*, 50 S.E.C. 1015, 1017 (1992) (finding that the single issuer exemption did not apply where the firm relying on the exemption had done no business during the fiscal year); *Emerald Capital Corp.*, SEC No-Action Letter, 1987 SEC No-Act LEXIS 2192, at *2 (Apr. 26, 1987) (explaining that "[h]aving conducted no business is insufficient justification for an exemption from the audit requirement"); *Wilshire Sec., Inc.*, SEC No-Action Letter, 1987 SEC No-Act. LEXIS 1976 (Apr. 15, 1987) (same); *Talon Sec., Inc.*, SEC No-Action Letter, 1987 SEC No-Act. LEXIS 1896 (Mar. 15, 1987) (same).

B. Bayhead Has Not Established That It Qualifies for the Single Issuer Exemption

Bayhead bears the burden of establishing that it was entitled to rely on the single issuer exemption in this case. *See Sharemaster*, 2018 SEC LEXIS 1036, at *19-20; *FCS Sec.*, Exchange Act Release No. 64852, 2011 SEC LEXIS 2366, at *18 (July 11, 2011), *aff'd*, 539 F. App'x 7 (2d Cir. 2013). Bayhead has failed to establish both that (1) it acted as a broker (agent) soliciting subscriptions for the securities of a single issuer, and (2) that it engaged in any business activities on behalf of any issuer.

In its brief, Bayhead argues that the firm qualifies for the single issuer exemption because it engaged in "mergers advisory transactions" on behalf of a company majority owned and operated by his brother. Bayhead Br., p. 2. The record does not support this claim, but even assuming this this true, however, Bayhead's claimed activities do not qualify for the single issuer exemption.

First, Bayhead's claim that it provided advisory services to a single issuer—a company majority owned and operated by his brother—is unsupported by the record. In October 2014—approximately six months before claiming the single issuer exemption—Roberts represented to

FINRA that he was working on business with multiple companies, including Medical Wizards, Fountainhead, a medical device company, and a solar company. R. at 1459-60. In his email claiming the single issuer exemption for the first time, Roberts described his business activities as advisory services for "companies." R. at 1463. In 2016, when FINRA requested documentation supporting his reliance on the exemption, Roberts referred to his responses to FINRA in 2014, when he claimed to be working with multiple issuers, not a single issuer. R. at 1465.

The Panel found Roberts' testimony concerning his business activities for a single issuer—PDA Verticals—not credible.[7] It is well settled that the "credibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference, and can be overcome only where the record contains substantial evidence for doing so." *John Montelbano*, 56 S.E.C. 76, 89 (2003). Here, the record abundantly supports the Panel's credibility finding, and Roberts has provided no evidence, let alone substantial evidence, to overturn it. Roberts provided no documentary evidence to corroborate his claims other than a vague letter from his brother which seemed to contemplate some future transaction. R. at 1472. Significantly, Roberts did not call his brother or any other witness to corroborate his claims.

Second, and more importantly, even if Bayhead was performing the merger advisory services on behalf Roberts' brothers' company, Bayhead does not qualify for the exemption. The exemption applies to a broker-dealer conducting a self-underwriting on behalf of a parent

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[7] The Panel also found not credible Roberts' assertion, made for the first time at the hearing and without any documentary support, that PDA Verticals, Medical Wizards, and Fountainhead were the same issuer. R. at 1854, FN 38.

because the parent issuer has a unique relationship with the broker-dealer that gives it access to information about the financial health of the broker dealer. *See Sharemaster*, 2018 SEC LEXIS 1036, at *22-23. Bayhead has not established that it had such a relationship with Roberts' brother's company, PDA Verticals. PDA Verticals was not Bayhead's parent and Bayhead does not even claim that it solicited subscriptions of securities for PDA Verticals. Indeed, in his affirmation on Bayhead's unaudited annual reports, Roberts omits the language about soliciting subscription of securities and simply states that it acted as a "broker or dealer" for a single issuer. R. at 1399-1429.

In addition to failing to establish that Bayhead solicited subscriptions of securities for a single issuer, Bayhead also failed to establish that the firm conducted any securities business for any issuer. At the hearing, Roberts relied on undated and unexecuted form agreements and a single letter from his brother, all of which appeared to contemplate possible future engagements. R. at 1472-75. But, none of these documents establish that Bayhead was conducting any business, let alone soliciting possible investors of PDA Verticals. Additionally, Bayhead's annual reports for the relevant period show no revenue and no expenses, indicating that the firm was not conducting any business.[8] R. at 1537-1641.

Despite years of opportunities, Roberts failed to produce a single piece of documentary evidence—not a single email—demonstrating that he had contacted even a single investor on behalf of PDA Verticals or any other issuer. Nor did Roberts produce a single piece of evidence to support his claim that he assisted with PDA Vertical's awards of stock to employees—a claim

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[8] The Panel found not credible Roberts' assertions that while he was incurring expenses in connection with his securities business, he chose not to report the expenses on Bayhead's records. R. at 1855.

the Panel also found not credible. R. at 1856. Finally, Roberts did not call his brother or any other witness at the hearing to corroborate his claim that Bayhead was engaged in a securities business.

The record is completely devoid of evidence that Bayhead conducted any business, let alone that it acted as a broker (agent) soliciting subscriptions of securities on behalf of a single issuer, as required to claim the single issuer exemption. Accordingly, Bayhead has failed to satisfy its burden of establishing that it is eligible to rely on the single issuer exemption.

C. FINRA's Suspension of Bayhead Is an Appropriate Sanction for Bayhead's Failure to File Audited Annual Reports

Bayhead argues that the suspension imposed by FINRA for its failure to file audited annual reports was an inappropriate sanction, and it cites the reversal of a fine in the *Sharemaster* case as support for this position. Bayhead Br., p. 14-15. The record supports that the suspension imposed by FINRA is appropriate, and Bayhead misunderstands *Sharemaster*.

Exchange Act Section 19(e)(2) provides that the Commission may reverse a sanction imposed by FINRA if, "having due regard for the public interest and the protection of investors," the Commission finds that the sanction is excessive or oppressive, or that it imposes an unnecessary burden on competition. 15 U.S.C. § 78s(e)(2). The suspension of Bayhead until it files audited annual reports for the relevant period is neither excessive nor oppressive. To the contrary, the suspension is necessary to prompt Bayhead to comply with this important reporting requirement. *See, e.g.*, Gremo Inv., Inc., Exchange Act Release No, 64481, 2011 SEC LEXIS 1695, at *15 (May 12, 2011) (finding that a suspension imposed in a FINRA Rule 9552 proceeding for failure to file an audited annual statement was remedial because the suspension "will impress upon the Firm and others the importance of filing annual reports that are audited . . . in compliance with the federal securities laws and protect the investing public by reducing the

likelihood of any recurrence of a violation"); *FCS Sec.*, 2011 SEC LEXIS 2366, at *36 (finding a fine and suspension appropriate to prompt the applicant to file appropriate audited annual reports).

Nor does *Sharemaster* change this analysis. In *Sharemaster*, the Commission reversed a $1,000 fine imposed on the firm where the firm filed an audited annual report and its suspension was lifted, and where FINRA's decision did not explain why the fine was nonetheless justified. *Sharemaster*, 2018 SEC LEXIS 1036, at *30. Here, Bayhead has not to this day filed audited annual reports, and if the Commission finds that Bayhead did not meet is burden to establish that it may rely on the exemption, a suspension until audited annual reports are filed is appropriate.

D. Bayhead's Procedural and Fairness Arguments Are Baseless

On appeal, Bayhead makes unsupported procedural and fairness arguments. First, Bayhead claims that the Panel improperly excluded from evidence certain documents introduced by Bayhead and that FINRA did not produce discoverable materials to which Bayhead was entitled. Bayhead Br., p. 8-9. The excluded documents concerned entities that Bayhead claims were prospective purchasers of PDA Verticals. *Id.* While the documents were excluded from the record, the record contains a transcript of the parties' arguments and the Hearing Officer's rulings concerning these documents. R. at 1055-1114. The record demonstrates that the documents Bayhead sought to introduce were public documents concerning these companies that did not mention Bayhead or provide any support whatsoever for Bayhead's claim that Bayhead solicited them as possible purchasers of PDA Verticals. The documents at issue are irrelevant and Bayhead does not—and cannot—make any argument that they have any relevance to the central in this case, i.e., whether Bayhead was entitled to claim the single issuer exemption.

Second, Bayhead takes issue with FINRA's investigation. Bayhead Br., p. 9. Bayhead

argues that FINRA failed to interview appropriate parties, made no attempt to contact Bayhead's customers, and did not understand the single issuer exemption. Bayhead Br., p. 9-10. Bayhead's argument ignores the fact that it was Bayhead's burden and obligation to establish that it was entitled to claim the single issuer exemption—not FINRA's. Bayhead should have introduced appropriate documentary and testimonial evidence supporting its reliance on the exemption, and its attempt to blame FINRA is unavailing.

Bayhead also claims, without explanation or evidence, that FINRA was biased against it because Bayhead is a small broker-dealer. Bayhead Br., p. 15. Bayhead offers no explanation of this bias or how it supposedly affected the outcome in this case. The Commission has rejected such unsubstantiated claims of bias. *See, e.g.*, *Dist. Bus. Conduct Comm. v. Guevara*, Complaint No. C9A970018, 1999 NASD Discip. LEXIS 1, at *39 n.16 (NASD NAC Jan. 28, 1999) (holding that "unsubstantiated assertions of bias are an insufficient basis to invalidate NASD proceedings"), *aff'd*, 54 S.E.C. 655 (2000), *aff'd*, 47 F. App'x 198 (3rd Cir. 2002). Bayhead appears to conflate FINRA's disagreement about Bayhead's ability to rely on the exemption with bias against the firm. Bayhead's claim of bias is an attempt to deflect attention from the fact that Bayhead has provided no support for its reliance on the exemption.

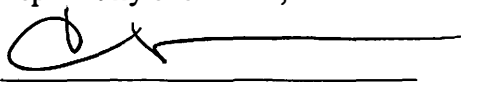
Finally, Bayhead argues that it should be allowed to rely on the single issuer exemption because FINRA somehow approved of the firm's reliance on the exemption. This claim is also not supported by the record. In fact, when Bayhead first claimed the single issuer exemption, FINRA explained that the rule was "self-operative" and that the firm could claim the exemption "if" it believed that its activities "fall[ed] within the purview" of the exemption. R. at 761-63, 1461. Moreover, FINRA consistently questioned Bayhead's reliance on the single issuer exemption, and repeatedly requested that the firm provide documents showing it was conducting

business and supporting its reliance on the single issuer exemption—something Bayhead repeatedly failed to do. R. at 1465-67, 1469-71, 1480, 1489-90. The burden of determining and establishing its eligibility to rely on the single issuer exemption falls on Bayhead, and the Commission should reject its attempt to shift Bayhead's responsibility for complying with Commission rules to FINRA.

V. CONCLUSION

The Commission should sustain FINRA's suspension of Bayhead and dismiss the application for review. Bayhead has presented no credible evidence to support its bald assertion that it is eligible to rely on the single issuer exemption. Bayhead has neither claimed nor demonstrated that it acted as a broker (agent) for a single issuer in soliciting subscriptions of the issuer's securities, as required to claim the exemption. To the contrary, the record supports that Bayhead conducted no business during the relevant time period, which alone disqualifies it from claiming the single issuer exemption. Bayhead is required, like every other broker-dealer, to file audited annual reports, and should be suspended until it complies with this important requirement. The Commission should reject this attempt by an inactive firm to rely on the single issuer exemption to avoid the requirement to submit important audited annual reports and dismiss the application for review.

Respectfully submitted,



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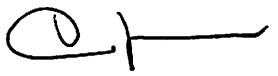
January 16, 2019

CERTIFICATE OF COMPLIANCE

I, Celia L. Passaro, certify that this brief complies with the length limitation set forth in Commission Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 5,824 words, exclusive of the pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

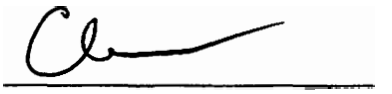
I, Celia L. Passaro, certify that on this 16th day of January 2019, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review, In the Matter of TMR Bayhead Securities, LLC, Administrative Proceeding File No. 3-18869 to be served by messenger and facsimile on:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Fax: (202) 772-9324

and via FedEx and email on:

Todd M. Roberts
TMR Bayhead Securities, LLC
39 Hornbeck Ridge
Poughkeepsie, NY 12603
tmr@nscsolar.com

Service was made on the Commission by messenger and on the Applicant by overnight delivery service and email due to the distance between FINRA's offices and the Applicant.



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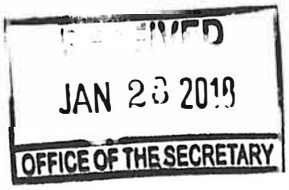
Financial Industry Regulatory Authority



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January 16, 2019

VIA MESSENGER AND FACSIMILE

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RE: In the Matter of the Application for Review of TMR Bayhead Securities, LLC
Administrative Proceeding No. 3-18869

Dear Mr. Fields:

Enclosed please find the original and three (3) copies of FINRA's Brief in Opposition to the Application for Review in the above-captioned matter.

Please contact me at (202) 728-8985 if you have any questions.

Very truly yours,

Celia L. Passaro

Enclosures

cc: Todd M. Roberts (via FedEx and Email)