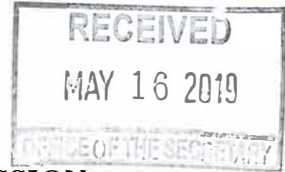


UNITED STATES OF AMERICA
BEFORE THE
UNITED STATES SECURITIES AND EXCHANGE COMMISSION



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In the Matter of the Application of :
Trevor Michael Saliba : Administrative Proceeding
For Modification of Action Taken by FINRA : File No. 3-18989
-----X

**OPENING BRIEF IN SUPPORT OF APPLICATION OF TREVOR
MICHAEL SALIBA FOR MODIFICATION OR REVERSAL OF
DECISION OF THE FINANCIAL INDUSTRY REGULATORY
AUTHORITY'S NATIONAL ADJUDICATORY COUNCIL**

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I. PRELIMINARY STATEMENT

Pursuant to Rule 450 of the Securities and Exchange Commission's (the "**Commission**") Rules of Practice, Trevor Michael Saliba ("**Mr. Saliba**") hereby submits this opening brief in support of his application for modification or reversal of the decision by the Financial Industry Regulatory Authority's ("**FINRA**") National Adjudicatory Council ("**NAC**"), dated January 8, 2019 (the "**NAC Decision**"). Familiarity with the record¹ is assumed.

II. FACTUAL BACKGROUND

A. The Firm

NMS Capital Securities, LLC ("**NMS Securities**" or the "**Firm**") was a FINRA regulated broker-dealer with its home office in Beverly Hills, California. RBN 000853 at 1.² The Firm became regulated by FINRA in June 2001 and ultimately filed a Form Broker-Dealer Withdrawal in October 2015. RBN 000853 – RBN 000854 at 1, 3. During the Firm's operation, it was approved to conduct only one line of business – the private placement of securities. RBN 000853 at 2. The Commission and FINRA terminated its registration in December 2015. RBN 000854 at 3. Prior to changing its name to NMS Securities, the Firm was known as MCA Securities, LLC ("**MCA**"). RBN 000853 at 1. Effective November 2011, the two owners of MCA sold all of their interest in MCA to NMS Capital Group, LLC ("**NMS Capital Group**"). RBN 000853 at 2. NMS Capital Group is wholly-owned by Mr. Saliba. RBN 000853 at 2.

B. Mr. Saliba

Mr. Saliba entered the securities industry in 1995 when he became associated with a FINRA regulated broker-dealer. RBN 000854 at 4. Mr. Saliba has been associated with eight

¹ The record for the underlying FINRA Complaint No. 2013037522501 was certified to the Commission by FINRA under cover of a transmittal letter dated February 19, 2019.

² References to "RBN ____" refer to the record bates numbers in the certified record filed by FINRA.

FINRA regulated broker-dealers at various times since 1995 and has been licensed as a Series 7 General Securities Representative, a Series 79 Limited Representative – Investment Banking and a Series 24 General Securities Principal. *Id.* Throughout the relevant time period, Mr. Saliba was Chairman of NMS Securities. *Id.* at 5. Mr. Saliba was previously registered with NMS Capital Advisors, LLC (“**NMS Advisors**”), a FINRA regulated broker-dealer which was active throughout the relevant time period. RBN 000854 at 6. During the relevant period, Mr. Saliba owned approximately twenty-four point nine percent (24.9%) of NMS Advisors through NMS Capital Group. *Id.* Mr. Saliba also owns an interest in NMS Capital Asset Management, Inc. (“**NMS Capital Asset Management**”), which was previously licensed with the Commission as a Registered Investment Advisor. *Id.* at 7. Prior to this matter, Mr. Saliba has had no other disclosures on his record.

C. The CMA Process and Related Interim Restrictions

In October 2011, NMS Securities filed a Continuing Membership Application (“**CMA**”) with FINRA seeking approval of a change in ownership from MCA to NMS Capital Group (the “**October 2011 CMA**”), and refiled the CMA in July 2012 (the “**July 2012 CMA**”) after the October 2011 CMA lapsed. RBN 000856 – RBN 000857 at 19-20. On August 15, 2012, FINRA’s Membership Application Program Group (“**MAP**”) imposed certain interim restrictions on NMS Securities (the “**Interim Restrictions**”). RBN 000857 at 21-22. The Interim Restrictions imposed by MAP prohibited NMS Securities from: (1) permitting Mr. Saliba to act in a principal or supervisory capacity; (2) adding any new lines of business, offices, or personnel; and (3) conducting any securities business on behalf of any affiliated entity owned or controlled by Mr. Saliba. RBN 006417 – RBN 006456 (NAC Decision at 5).

On August 20, 2012, Mr. Saliba sent a letter to MAP seeking clarification on the parameters of the Interim Restrictions and requesting a meeting to discuss. RBN 003619 – RBN 003621. On September 25, 2012, Mr. Saliba and Jervis Hough (“**Hough**”) – a compliance consultant and former FINRA examiner who Mr. Saliba hired to assist in the July 2012 CMA process – met with MAP staff in New York (the “**September 25 MAP Meeting**”) to seek clarification regarding, and request modification of, the Interim Restrictions. RBN 006417 – RBN 006456 (NAC Decision at 5). On October 17, 2012, MAP amended the Interim Restrictions to permit certain limited activities. RBN 003623 – RBN 003624. The amendments to the Interim Restrictions: (1) permitted Mr. Saliba to act in a limited capacity with respect to supporting certain enumerated financial functions of the Firm under the supervision of the Firm’s designated Financial and Operations Principal; and (2) permitted the Firm to hire two additional operational support personnel provided that such personnel would only be permitted to support Firm operations, compliance and supervision functions. *Id.*

At all times throughout the July 2012 CMA process, including after MAP implemented the Interim Restrictions, Mr. Saliba made every effort to clarify any doubts and/or concerns he had with MAP. RBN 001958; RBN 001989 – RBN 001991. Any areas that Mr. Saliba did not bring to the attention of, or clarify with, MAP throughout the process were areas that Mr. Saliba believed he understood well enough to require no further clarification. However, as the July 2012 CMA process continued, it became apparent to Mr. Saliba that the Interim Restrictions were extremely confusing and unreasonably commercially oppressive given the totality of the circumstances.

(i) **Mr. Saliba's Hiring Involvement/Participation**

After the September 25 MAP Meeting, Mr. Saliba met with Sperry Younger ("**Younger**") at the request and suggestion of Hough, who suggested that Younger might be a good contact for Mr. Saliba to have when Mr. Saliba tried to establish a New York presence for NMS Securities at a later time. Mr. Saliba was not contemplating hiring Younger at that time, but got along with Younger extremely well and began to contemplate Younger as the replacement for the Firm's Chief Executive Officer ("**CEO**"), James Miller ("**Miller**"), who had recently expressed his desire to retire to Mr. Saliba. RBN 006109 – RBN 006138 (Respondent Saliba and Mansourian's Opening Brief at 7). Mr. Saliba and Younger got along well. Noting that Younger could establish the New York presence that Mr. Saliba desired, as well as Younger's availability to start immediately, Mr. Saliba offered Younger the position as CEO of NMS Securities during their second meeting. *Id.*

After Mr. Saliba confirmed Miller's intention to resign as CEO, Mr. Saliba contacted Stephanie Volkell ("**Volkell**") at MAP on October 5, 2012, prior to Younger assuming the CEO position, to inform her and confirm that the change would not impact the July 2012 CMA process. RBN 001989 – RBN 001991. Mr. Saliba continued to move forward upon Volkell's confirmation that the CEO change would not impact the July 2012 CMA process. *Id.* At no time did Mr. Saliba understand that the CEO change violated the Interim Restrictions, or that he was required to obtain MAP's approval to replace the CEO. RBN 001995. Accordingly, Mr. Saliba proceeded with signing Younger's Independent Representative Agreement on behalf of the Firm. In addition to hiring Younger as CEO, Mr. Saliba also participated in the hiring process of other employees of the Firm. RBN 001977 – RBN 001978; RBN 001981. Mr. Saliba discussed hiring decisions with the Firm's management in order to approve the financial aspect, specifically related to any base

salary compensation and back-office resources that the prospective employee requested, but Firm management had final approval on hiring decisions. RBN 001292; RBN 001977 – RBN 001978; RBN 001981. Mr. Saliba was not aware that being involved with the Firm’s hiring decisions, particularly the financial aspects of those decisions, was principal activity – especially in light of MAP’s amendment to the Interim Restrictions to accommodate such activity. RBN 001945 – RBN 001947; RBN 001978.

(ii) Mr. Saliba Executed Investment Banking Agreements in Accordance With Supervisory Approval

Mr. Saliba signed investment banking agreements on the Firm’s behalf while the Interim Restrictions were in effect. RBN 006417 – RBN 006456 (NAC Decision at 15). However, Mr. Saliba signed the investment banking agreements at all times with the approval of his designated supervisor(s) and erroneously believed that supervisory approval would ensure that he did not violate the Interim Restrictions. RBN 001957 – RBN 001959; RBN 001964.

D. The JM and Younger New Business Approval Memos

After FINRA’s MAP denied NMS Securities’ July 2012 CMA on or about June 21, 2003, in part because MAP indicated its belief that Mr. Saliba had acted as a principal in violation of the Interim Restrictions (and referred to eight agreements that Mr. Saliba had signed on behalf of NMS Securities), Mr. Saliba appealed MAP’s denial of the July 2012 CMA to the NAC. RBN 006417 – RBN 006456 (NAC Decision at 9). Mr. Saliba and his counsel met with MAP on or about August 22, 2013, in an attempt to convince MAP to reconsider the denial of the July 2012 CMA. *Id.* After Mr. Saliba indicated that he signed each of the eight referenced agreements with verbal approval of the Firm’s CEOs (Miller and later Younger), MAP requested written evidence that Mr. Saliba had obtained CEO approval before signing such agreements. RBN 006417 – RBN 006456 (NAC Decision at 9-10). Among the documents Mr. Saliba provided to FINRA were the three

memos signed by Miller (the “**JM Memo(s)**”), as well as eight documents entitled “New Business Memo” signed by Younger (the “**Younger Memo(s)**”). RBN 006417 – RBN 006456 (NAC Decision at 10). Mr. Saliba later provided the JM Memos and Younger Memos to Enforcement. RBN 006417 – RBN 006456 (NAC Decision at 11). Since Miller was no longer registered with the Firm, Mr. Saliba located the JM Memos amongst the Firm’s books and records, and provided them to MAP and Enforcement afterwards. RBN 006417 – RBN 006456 (NAC Decision at 10-11). Mr. Saliba recalled that he located the JM Memos in a box of files. RBN 002107. No record existed of Miller providing the JM Memos to Mr. Saliba via email, which was typical as Miller often avoided email communications due to his problems using scanners. RBN 002107 – RBN 002109. Nevertheless, Mr. Saliba was unequivocal in the notion that the JM Memos came from the Firm’s books and records. RBN 002648. Younger provided seven of the eight Younger Memos to Mr. Saliba via email, who later provided them to MAP and Enforcement. RBN 004077; RBN 006417 – RBN 006456 (NAC Decision at 10-11). Although Younger confirmed that he signed the eighth Younger Memo, he did not provide that memo to Mr. Saliba via email. RBN 001749 – RBN 001751. At no time was Mr. Saliba responsible for maintaining any of the Firm’s books and records, including any of the JM Memos or Younger Memos.

E. Mr. Saliba’s Production of His Work Computer .

In response to a Rule 8210 request, Mr. Saliba appeared before FINRA on or about June 19, 2014, for an on the record testimony (“**OTR**”). RBN 005943. While still conducting the OTR, Enforcement hand-served a Rule 8210 request to Mr. Saliba and the Firm requiring them to produce any and all computers and/or electronic storage devices used by Mr. Saliba for NMS Securities’ business. RBN 005943. Mr. Saliba and the Firm were required to make the production “immediately upon receipt of [the] letter,” and Enforcement advised Mr. Saliba that

Enforcement staff would be at his office that day to copy the hard drive of any computers produced in response. Mr. Saliba produced the computer that was responsive to the Rule 8210 request. RBN 001579; RBN 002613.

F. Mr. Saliba's Purported Second Computer and Related Testimony

Notwithstanding Mr. Saliba's production of the only computer in his possession that he used to conduct Firm business, FINRA alleged that Mr. Saliba failed to turn over a second computer allegedly used for Firm business. NMS Capital Group was actually the purchaser of the second computer, not NMS Securities as FINRA alleged, and Mr. Saliba never utilized the second computer for NMS Securities business. RBN 002613. Shortly after NMS Capital Group purchased the computer, Mr. Saliba gave the computer to his wife for her use, and his wife in turn recycled the machine. RBN 000906; RBN 001573; RBN 001575; RBN 001580. In an attempt to establish that Mr. Saliba utilized a second computer, FINRA introduced evidence at the disciplinary proceeding showing that: (1) Mr. Saliba's use of the produced computer dropped dramatically after the purchase of the second computer, (2) Mr. Saliba's computer was completely turned off for a period of approximately seven weeks during the summer period, and (3) Mr. Saliba was working on documents and sending emails while his computer was turned off. RBN 006417 – RBN 006456 (NAC Decision at 20-21). Mr. Saliba testified at numerous times throughout this matter that he provided FINRA with the only computer that he used for Firm business that was in his possession at the time he was served with the Rule 8210 request. RBN 001579; RBN 002613. Mr. Saliba also testified that it was possible, on rare occasions, that he may have used his personal home computer to access Firm emails but that he did not recall. RBN 006109 – RBN 006138 (Respondent Saliba and Mansourian's Opening Brief at 19). Mr. Saliba also testified that he did not travel with his work computer, and may have at times used a hotel business center or his wife's

computer to check his email. RBN 0021638. Traveling without his computer was never an issue for Mr. Saliba, who largely conducted his business for the Firm through his phone and email. RBN 001312. Finally, Mr. Saliba has consistently maintained that, at the time he received the Rule 8210 request, he was no longer in possession of the second computer, but rather had given it to his wife who had recycled it. RBN 000906; RBN 001573; RBN 001575; RBN 001580.

G. Backdated Compliance Documents

In April 2013, as part of an unannounced FINRA examination of the Firm, FINRA submitted a number of document requests. Such requests included requests for the most recent Outside Business Activity (“**OBA**”) and Private Securities Transaction (“**PST**”) forms completed by the Firm’s registered representatives. RBN 006417 – RBN 006456 (NAC Decision at 12). Richard Tabizon (“**Tabizon**”), the Firm’s Chief Compliance Officer (“**CCO**”), was unable to locate some of the OBA and PST forms. *Id.* Tabizon sent an email from his personal email to junior registered representative Arthur Mansourian’s (“**Mr. Mansourian**”) personal email, attaching OBA and PST forms and requesting that Mr. Mansourian send the forms to the personal email accounts of several of the Firm’s registered representatives and ask those registered representatives to send the forms back to Mr. Mansourian signed and backdated. *Id.* The registered representatives who received the OBA and PST forms included three experienced registered securities principals, yet all recipients of the forms returned the signed and backdated OBA and PST forms to Mr. Mansourian. Mr. Mansourian provided them to Tabizon, who subsequently provided the completed forms to FINRA. *Id.* At the time Tabizon and Mr. Mansourian sent the forms from their personal email accounts, the Firm’s Written Supervisory Procedures prohibited business-related communication being sent over non-firm email accounts. *Id.*

Tabizon advised Mr. Saliba that Tabizon would be replacing the missing compliance documents, and Mr. Saliba signed the backdated OBA and PST forms at CCO Tabizon's request. According to Tabizon, Tabizon had spoken with a FINRA representative ("Examiner Leong") about the missing OBA and PST forms, and Examiner Leong had advised Tabizon that it was acceptable for him to recreate the forms. RBN 006417 – 006456 (NAC Decision at 23).

III. PROCEDURAL HISTORY

A. The FINRA Disciplinary Proceeding and Decision

On or about March 24, 2016, FINRA's Department of Enforcement instituted a disciplinary proceeding against Mr. Saliba and several other individuals. RBN 006417 – RBN 006456 (NAC Decision at 6). On or about December 15, 2017, a FINRA Office of Hearing Officers' Extended Hearing Panel ("**OHO Panel**") issued its Extended Hearing Panel Decision ("**OHO Decision**"), finding that Mr. Saliba: (1) violated FINRA Rule 2010 by acting as a principal in violation of Interim Restrictions imposed by MAP; (2) violated FINRA Rules 8210 and 2010 by failing to cooperate with FINRA and providing false and misleading documents and information to FINRA by (a) providing certain purportedly false and misleading memoranda (the JM Memos and Younger Memos) to FINRA, (b) making misrepresentations to FINRA regarding his use of computers for work with his member firm, and (c) failing to produce all computers he used for his firm business in response to FINRA's request; and (3) violated Rule 2010 by participating in the backdating of compliance forms while knowing such forms would be submitted to FINRA. RBN 005952 – RBN 005959; RBN 005963. For these purported violations, the OHO Panel imposed the unitary sanction of barring Mr. Saliba from association with any FINRA member firm in any capacity. RBN 005965 – RBN 005966. Mr. Saliba timely appealed the OHO Decision to the NAC (the "**NAC Appeal**"). RBN 006417 – RBN 006456 (NAC Decision at 7).

B. The NAC Appeal and Decision

After the NAC conducted what it characterized as an independent review of the record in connection with the NAC Appeal, the NAC Decision affirmed the improper and unsupported findings of the OHO Decision. RBN 006417 – RBN 006456 (NAC Decision at 14-21; 22-24). The NAC concluded its review of the matter by disagreeing that the unitary sanction of a bar was appropriate, and finding that three separate bars in all capacities was appropriate. RBN 006417 – RBN 006456 (NAC Decision at 27-28).

(i) The NAC Erroneously Held that Mr. Saliba Violated Rules 8210 and 2010

The NAC found that Mr. Saliba violated FINRA Rules 8210 and 2010 by providing the JM Memos and eighth Younger Memo to FINRA in response to Rule 8210 requests. RBN 006417 – RBN 006456 (NAC Decision at 18-20). In support of such finding, the NAC concluded that the JM Memos and the eighth Younger Memo were false, and that Mr. Saliba “knew or should have known” of their falsity. *Id.* at 20.

The NAC further concluded that Mr. Saliba falsely testified about his use of a single computer for Firm business. RBN 006417 – RBN 006456 (NAC Decision at 20). In support of its conclusion, the NAC noted that Enforcement’s expert testified that Mr. Saliba’s use of his work computer dramatically dropped after the purchase of the second computer, and his work computer was completely turned off for a period of seven (7) weeks in 2013. RBN 006417 – RBN 006456 (NAC Decision at 20-21). In addition, the NAC noted that during the time that Mr. Saliba’s computer was turned off, the record contains evidence that Mr. Saliba was working on documents and sending emails. RBN 006417 – RBN 006456 (NAC Decision at 21).

(ii) The NAC Ignored Multiple Mitigating Factors Regarding Mr. Saliba

In his moving papers filed in support of his NAC Appeal, Mr. Saliba offered several mitigating factors, noting the OHO Panel's failure to consider them. For example, in *Respondent Saliba and Mansourian's Opening Brief*, Mr. Saliba raised the mitigating factor that his testimony about his computer usage was not false or deceptive if fairly considered. RBN 006109 – RBN 006138 (*Respondent Saliba and Mansourian's Opening Brief* at 24). Mr. Saliba also raised the following mitigating factors from FINRA's Sanction Guidelines: General Principle 1, General Principle 2, General Principle 3, Principal Consideration 5, Principal Consideration 11, Principal Consideration 12, Principal Consideration 13, Principal Consideration 15, Principal Consideration 17, Specific Sanction Guidelines Applicable to "Falsification" of Records, and Specific Sanction Guidelines Applicable to the Rule 8210 Allegations. RBN 006109 – RBN 006138 (*Respondent Saliba and Mansourian's Opening Brief* at 24-25 (citing Sanction Guidelines (2015 ed.)). Notwithstanding Mr. Saliba providing such mitigating factors to the NAC, the NAC largely ignored the mitigating factors as described more fully below.

IV. ARGUMENT

A. Legal Standard

Pursuant to Section 19(e)(1) of the Securities Exchange Act of 1934 (the "**Exchange Act**"), in reviewing the decision of a self-regulatory organization ("**SRO**") in a disciplinary action, the Commission must conduct an independent, de novo review of the record to determine (1) whether the aggrieved person engaged in the conduct found by the SRO, (2) whether such conduct violated the securities laws or SRO rules, and (3) whether those rules are – and were – applied in a manner consistent with the purposes of the Exchange Act. *See* 15 U.S.C. § 78s(e)(1). Pursuant to Section 19(e)(2) of the Exchange Act, the Commission, with due regard for the public interest and

protection of investors, will not sustain a sanction imposed by FINRA if the sanction is excessive or oppressive, or imposes an unnecessary or inappropriate burden on competition. *See* 15 U.S.C. § 78s(e)(2). Congress clearly intended that the substantive fairness of FINRA deliberations be subject to the Commission's review. *See, e.g.,* Harry Richardson, Exchange Act Release No. 34-51236, 2005 WL 424920, at *5 (Feb. 22, 2005).

As part of its review to determine whether a FINRA sanction is excessive or oppressive, the Commission must carefully consider whether there are any aggravating or mitigating factors that are relevant to its determination of an appropriate sanction and whether the sanctions imposed by FINRA are remedial and not punitive. *See John M.E. Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013). In *Saad*, the District of Columbia Circuit further noted that “this review is particularly important when the respondent faces a lifetime bar, which is ‘the securities industry equivalent of capital punishment.’” *Id.* (citing *PAZ Securities, Inc. v. SEC*, 494 F.3d 1059, 1065-1066 (D.C. Cir. 2007)). When reviewing a NAC decision on an appeal from an OHO Panel determination, the Commission's decision is ripe for remand if it ignores potentially mitigating factors asserted by the petitioner and supported by the record. *Saad*, 718 F.3d at 913.

In connection with a Commission review of an SRO's disciplinary action, credibility determinations by a fact-finder deserve “special weight.” *Alderman v. SEC*, 104 F.3d 285, 288 n.4 (9th Cir. 1997), *aff'g*, *Daniel Joseph Alderman*, 52 S.E.C. 366 (1995). These determinations can be overcome only when there is “substantial evidence” for doing so. *Anthony Tricarico*, 51 S.E.C. 457, 460 (1993); *see also Eliezer Gurfel*, 54 S.E.C. 56, 62 n.11 (1999) (explaining that “[c]redibility determinations by the fact finder are entitled to substantial deference and can be overcome only where the record contains substantial evidence for doing so.”)

B. Mr. Saliba Did Not Violate FINRA Rule 8210 or 2010

FINRA Rule 8210 provides that FINRA staff may (1) require one subject to FINRA's jurisdiction to provide information with respect to any matter involved in an investigation, complaint, examination, or proceeding, and (2) inspect and copy the books, records, and accounts of one subject to FINRA's jurisdiction with respect to any matter involved in an investigation, complaint, examination, or proceeding. FINRA Rule 2010 provides that a "member, in the conduct of [its] business, shall observe high standards of commercial honor and just and equitable principles of trade." A violation of any FINRA rule, including Rule 8210, is also a violation of Rule 2010. *See* William J. Murphy, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *26 n.29 (July 2, 2013), *aff'd sub nom., Birkelback v. SEC*, 751 F.3d 472 (7th Cir. 2014). The NAC found that Mr. Saliba violated FINRA Rules 8210 and 2010 by providing the JM Memos and eighth Younger Memo to FINRA in response to Rule 8210 requests. The NAC further found that Mr. Saliba provided false and misleading information to FINRA regarding his work computer and failed to fully cooperate with FINRA's request to produce any work computer used for NMS Securities business. As provided herein, such determinations were erroneous because the record does not establish (1) Mr. Saliba's involvement in the preparation of the JM Memos or the eighth Younger Memo, (2) Mr. Saliba's knowledge that the JM Memos and eighth Younger Memo were false, (3) any knowingly false testimony from Mr. Saliba about his computer usage, or (4) that Mr. Saliba was in possession of a computer that was responsive to the subject Rule 8210 request but failed to produce such computer.

First, although Mr. Saliba provided the JM Memos and eighth Younger Memo to FINRA, he did not know that any of those memos were falsified in any manner. As noted herein, Mr. Saliba testified as to where he located the JM Memos in the Firm's books and records. No record

existed of Miller providing the JM Memos to Mr. Saliba via email, which was typical as Miller often avoided email communications due to his difficulty using scanners. Nevertheless, Mr. Saliba was unequivocal in the notion that the JM Memos came from the Firm's books and records. Younger provided seven of the eight Younger Memos to Mr. Saliba via email, and testified that he signed the eighth Younger Memo (the only memo of the eight that Younger did not email to Mr. Saliba). No reasonable de novo review of the record herein supports the conclusion that Mr. Saliba "knew or should have known" that the JM Memos or the eighth Younger Memo were falsified when Mr. Saliba produced them to MAP or Enforcement.

With regard to his work computer, Mr. Saliba produced the only responsive computer in his possession. He also never provided knowingly false testimony regarding his usage. As noted herein, Mr. Saliba testified that it was possible, on rare occasions, that he may have used his personal home computer to access Firm emails, but that he did not recall. Mr. Saliba also testified that he did not travel with his work computer, and may have at times used a hotel business center or his wife's computer to check his email. Both the OHO Panel and the NAC apparently completely disregarded that Mr. Saliba did not need a computer to conduct his Firm business, which he largely conducts through his phone and email. RBN 001312 Finally, Mr. Saliba has consistently maintained that, at the time he received the Rule 8210 request, he was no longer in possession of the second computer, but rather had given it to his wife who had recycled it. Even Enforcement's witness, Schad Brannon ("Brannon") – who was notably hostile towards Mr. Saliba due to being terminated for cause from NMS Capital Asset Management and another affiliated company of the Firm for engaging in a non-approved outside business activity, misappropriation of insurance commission funds, and other misconduct – provided false testimony as to Mr. Saliba's purported use of the second computer, as Brannon was not at the Firm's offices during the time

period in question. RBN 002516. Finally, the evidence Enforcement introduced regarding Mr. Saliba's use of his work computer did nothing to establish that Mr. Saliba utilized the second computer for NMS Securities business.

Based upon a fair review of the record herein, Enforcement failed to establish that Mr. Saliba violated Rules 8210 and 2010 through his submission of the JM Memos and eighth Younger Memo to FINRA, through his production of his work computer to FINRA, or through his testimony regarding his computer usage. The NAC's review of the record should have mandated its reversal of the OHO Panel's findings, but the NAC failed to do so. In connection with this application, the Commission should reverse the finding that Mr. Saliba violated FINRA Rules 8210 and 2010.

C. Mitigating Factors Warrant a Reduced Sanction for Mr. Saliba

(i) The Interim Restrictions Were Ambiguous and Confusing

As noted herein, Mr. Saliba acknowledges MAP's authorization to impose interim restrictions on both him and the Firm pursuant to NASD Rule 1017. However, Mr. Saliba asserts that the Interim Restrictions were confusing and unreasonably oppressive given the totality of the circumstances. Mr. Saliba acknowledges that he often times had difficulty ascertaining which activities were authorized and which activities were not. Mr. Saliba's supervisors, Miller, Younger, and Tabizon, were equally confused by the Interim Restrictions on numerous occasions. In an attempt to remain proactive in the face of uncertainty, Mr. Saliba contacted MAP on multiple occasions to seek guidance and to avoid running afoul of the Interim Restrictions. The areas in which Mr. Saliba mis-stepped were the areas where he felt as though he had a good working understanding of permitted activities versus unpermitted activities.

In its review, the NAC failed to consider the confusing and unreasonably oppressive nature of the Interim Restrictions as a mitigating factor in its determination. There are multiple

instances throughout the record in this matter where Mr. Saliba asserted that the Interim Restrictions were confusing in light of the circumstances. RBN 001937 – RBN 001940; RBN 001942. In fact, as explained herein, the OHO Panel’s Hearing Officer in the disciplinary proceeding noted during the testimony of Joseph Sheirer’s (“**Sheirer**”), the MAP’s former Director and Counsel, that MAP did not apply the Interim Restrictions “very stringently or at least not literally.” RBN 001532 – RBN 001533. Furthermore, the Hearing Officer noted that the Interim Restrictions did not appear to specifically limit Mr. Saliba’s ability to participate in the hiring process, but rather only his ability to act in a principal capacity. RBN 001529 – RBN 001530. This is quite noteworthy because, notwithstanding the OHO Panel’s observation, the NAC still found that Mr. Saliba’s involvement in the hiring process to be principal activity. RBN 006417 – RBN 006456 (NAC Decision at 15). In addition, one of the other panel members noted the unrealistic nature of the Interim Restrictions in light of the fact that Mr. Saliba is the sole owner of NMS Securities, and questioned FINRA’s realistic expectation that Mr. Saliba would be able to adhere completely to such restrictions. RBN 001534.

Mr. Saliba contacted MAP whenever he was uncertain about how a particular activity could be achieved given the Interim Restrictions. One example is when Mr. Saliba learned that Miller was considering resigning from his position as CEO. Although Miller voiced his desire to resign as CEO prior to the September 25 MAP Meeting, Miller had not yet confirmed his departure. To the contrary, Miller mentioned his willingness to remain in his position for the duration of the July 2012 CMA process if his resignation would adversely affect the process. Accordingly, Mr. Saliba believed that a discussion about Miller’s potential departure during the September 25 MAP Meeting would have been premature since Miller had not finalized his decision to resign. RBN 001998.

At no time was it more apparent that the Interim Restrictions were confusing than during the FINRA Disciplinary Proceeding, when the OHO Panel’s Hearing Officer examined Sheirer concerning whether replacing a CEO or outgoing employee (as opposed to adding an employee to the Firm) was a violation of the Interim Restrictions. RBN 001530 – RBN 001531. Sheirer was obviously unclear as to the answer but noted that such a change might **possibly** fall within the Interim Restrictions’ scope. *Id.* The Hearing Officer pressed further by asking Sheirer if, in his opinion, replacing a CEO was a direct violation of the Interim Restrictions, to which Sheirer noted that in his opinion such activity would be a violation. RBN 001532. Despite Sheirer’s assessment of such activity, the Hearing Officer confirmed that MAP never informed NMS Securities or Mr. Saliba that the aforementioned activities were violations of the Interim Restrictions. *Id.* In response to Sheirer’s assertions, the Hearing Officer noted that MAP did not apply the Interim Restrictions “very stringently or at least not literally.” RBN 001532 – RBN 001533. In addition, Sheirer’s testimony established that MAP was aware of the Firm’s New York Office of Supervisory Jurisdiction (“OSJ”), acknowledged that the opening of that OSJ was apparently also a violation of the Interim Restrictions, and confirmed that MAP never informed the Firm or Mr. Saliba of such violation. RBN 001533. Finally, members of the OHO Panel pressed Sheirer regarding whether anyone from MAP inquired into how the Firm operates to determine whether anyone other than Mr. Saliba had decision making authority within the Firm before implementing the “strict” Interim Restrictions, and further noted the contradictory nature of MAP communicating directly with Mr. Saliba as the Firm’s contact person while being forbidden from functioning as a principal. RBN 001535 – RBN 001536.

The imposition of the Interim Restrictions placed Mr. Saliba in a very challenging position as the owner of a small firm that he alone funded. It was Mr. Saliba’s capital that made it possible

for the Firm to operate and to hire staff. To the extent Mr. Saliba violated the Interim Restrictions he did not do so in bad faith. Rather, Mr. Saliba tried his best to operate within the confines of the Interim Restrictions as he understood them. Mr. Saliba was involved in the Firm's hiring decisions to the extent necessary in his capacity as the Firm's owner and financier. In fact, control of the financial aspects of the Firm was the primary motivator for Mr. Saliba's desire to have the Interim Restrictions amended. Notwithstanding the unrealistic nature of the Interim Restrictions, Mr. Saliba consistently sought MAP's guidance concerning how best to comply with the Interim Restrictions.

The NAC also found that Mr. Saliba acted as a principal and violated the Interim Restrictions by entering into investment banking agreements on behalf of the Firm. RBN 006417 – RBN 006456 (NAC Decision at 16-17). The NAC found that Mr. Saliba's involvement in entering into certain investment banking agreements was evidence of Mr. Saliba's substantial involvement in managing the Firm and acting as a principal. *Id.* at 16. Mr. Saliba did not understand that signing investment banking agreements would cause him to run afoul of the Interim Restrictions.

Simply put, Mr. Saliba's understanding regarding the parameters of the Interim Restrictions was incorrect and caused him to engage in activities that violated the Interim Restrictions. His errors, however, were not done in bad faith and a fair, de novo review of this matter will reveal such. Mr. Saliba's repeated interactions with MAP regarding the Interim Restrictions simply do not reflect the actions of an individual who was acting in bad faith. His good faith should be treated as a mitigating factor.

(ii) Tabizon's Instructions to Mr. Saliba Were Blessed by a FINRA Examiner

As noted herein, Tabizon cleared the idea of recreating the OBA and PST forms to replace the missing forms with Examiner Leong, and Tabizon advised Mr. Saliba of such before Mr. Saliba signed his forms. FINRA did not produce Examiner Leong to rebut Tabizon's contention, and instead only introduced testimony from Examiner Leong's prior supervisor regarding typical standards for FINRA staff. Certainly that testimony does not contradict the notion that Examiner Leong engaged in the atypical act of allowing Tabizon to remedy missing forms by simply replacing the forms. Although the NAC did not credit Tabizon's claim that Examiner Leong allowed the recreation of the OBA and PST forms, nothing in the record contradicts the notion that Mr. Saliba believed Tabizon's claim. Mr. Saliba's understanding that Examiner Leong had authorized the activity, as well as FINRA's inability to directly rebut the notion, are significant mitigating factors that any de novo review should consider when determining the appropriate sanction for Mr. Saliba signing the replacement forms.

(iii) The Mitigating Factors Warrant the Reversal of OHO Panel's Credibility Determination and the NAC's Acceptance Thereof

A fair assessment of the mitigating factors also warrants reversing the OHO Panel's credibility determination regarding Mr. Saliba, as well as the NAC's refusal to disturb that credibility determination. The Commission's application of the mitigating factors discussed herein warrant the Commission reversing such determination. Reversal of the OHO Panel's credibility determination – and the NAC's acceptance thereof – will allow the Commission to view Mr. Saliba in a fair manner, as an individual who mis-stepped, but whose conduct does not warrant the NAC affirming the OHO Decision and Mr. Saliba's permanent bar.

V. CONCLUSION

With regard to the JM Memos and Younger Memos, as well as Mr. Saliba's computer usage and testimony regarding that usage, the OHO Panel's determination that Mr. Saliba violated FINRA Rules 8210 and 2010 was in error. The NAC's affirmation of the same was erroneous, and the Commission should reverse such findings. With regard to the (1) Interim Restrictions and (2) recreated OBA and PST forms, Mr. Saliba engaged in conduct that violated FINRA Rules and should be fairly sanctioned in connection with such violations. However, any reasonable, de novo review of such conduct – in the absence of a mean-spirited desire to punish Mr. Saliba and coupled with the mitigating factors that are relevant for consideration – demonstrate that Mr. Saliba's conduct does not warrant a permanent bar from the securities industry. For the reasons set forth herein, Mr. Saliba respectfully requests that the Commission modify or reverse the NAC Decision by ordering a reasonable lesser sanction against Mr. Saliba.

Dated: May 15, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on May 15, 2019, I caused a true and correct copy of the foregoing document to be served upon the following by overnight mail, facsimile, and email transmission, addressed to:

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