UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of Falcon Technologies, Inc. For Review of Action taken by FINRA	ADMINISTRATIVE PROCEEDING File No.: 3-19575

BRIEF IN SUPPORT OF APPLICATION OF FALCON TECHNOLOGIES, INC. FOR REVIEW OF ACTION TAKEN BY FINRA

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INTRODUCTION

This matter involves an appeal from a final determination by the Financial Industry Regulatory Authority ("FINRA"). On January 22, 2019, Petitioner, Falcon Technologies, Inc. ("FLCN"), submitted an application to FINRA to conduct a change of stock symbol and change of corporate name (the "Corporate Actions"), pursuant to FINRA Rule 6490. The Department reviewed FLCN's submission, but it determined that FLCN's request was deficient and did not process the documentation. The Department cited FINRA Rule 6490(d)(3)(2), and it stated that FLCN's request for corporate actions was deficient because the issuer was not current in its reporting requirements to the Commission. The Department gave a determination on July 11, 2019.

The Company appealed the Notice of Deficiency to a subcommittee of FINRA's Uniform Practices Code Committee on July 17, 2019. The subcommittee affirmed FINRA's denial on September 4, 2019, Case No. CAS-65999-D4D0V6.

FINRA Rule 6490 establishes procedures for the submission, review, and approval of requests, by issuers to FINRA, to process certain corporate actions, including name changes, symbol changes, distributions, and stock splits. Rule 6490 is an extension of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and SEC Click or tap here to enter text.Rule 10(b)-17, promulgated thereunder, and it grants FINRA the authority to deny an issuer's request if the request is incomplete. FINRA may also deny an issuer's request the Department may determine that it is necessary "for the protection of investors, the public interest and to maintain fair and orderly markets." Here, Falcon disclosed all material information requested by the application. The name change had been processed by the relevant state agency and the Petitioner included documentation to that effect. FINRA's denial was based on a failure to file past reports prior to a filing of a Form 15 Notice Of Termination Of Registration Under Section 12(g) of the Securities Exchange Act Of 1934 Or Suspension Of Duty To File Reports Under Sections 13 And 15(d) of the Securities Exchange Act Of 1934 ("Form 15"). The Form 15 was filed in 2009 after which the Issuer was granted a name and symbol change. FINRA Rule 6490 was enacted in September 2010. FINRA's denial is therefore punishment for past conduct, improper, and should be reversed.

STATEMENT OF FACTS

I. Procedural Posture

A. Petitioner's Application and FINRA's Initial Denial

On January 22, 2019, Falcon submitted a notice to FINRA's Department of Operations ("DOP") requesting that the DOP process documentation which would allow Petitioner to conduct the Corporate Actions. (CASE NO. CAS-65999-D4D0V6), The Subcommittee's Findings and Conclusions, pp. 2-5). Petitioner's notice was made pursuant to FINRA Rule 6490. In filing its notice and in subsequent correspondence with FINRA, Falcon complied with all of Rule 6490's requirements and submitted all required documentation. *(See* FINRA 000050-54, Issuer Company-Related Action Notification Form *& see* Record *generally.)*

The DOP made no finding that the documentation Falcon submitted was in any way deficient. (FINRA 000463, Deficiency Notice). On July 11, 2019, the DOP refused Falcon's application by providing Falcon with a deficiency notice. *(Id.)* In refusing to grant Falcon's application, the DOP stated its denial was based on the DOP's citing to the delinquent '34 Act reports made prior to the filing of the Form 15.

B. Petitioner's Appeal and FINRA's Final Decision

Falcon appealed the Notice of Deficiency to a subcommittee of FINRA's Uniform Practices Code Committee on July 17, 2019. The subcommittee affirmed FINRA's denial on September 4, 2019, Case No. CAS-65999-D4D0V6. In affirming the DOP's refusal, the UPCC Subcommittee listed three factors. (UPCC Subcommittee's Findings and Conclusions, pp. 2-5) First, the UPCC Subcommittee upheld the Department's determination pursuant to FINRA Rule 6490(d)(3)(2), that FLCN's request for corporate actions was deficient because it was not current in its reporting requirements to the Commission. *(Id.)* The UPCC Subcommittee acknowledged that FLCN filed a Form 15 on May 11, 2007 but, notwithstanding this fact, determined that the public interest favors issuers becoming current in their Exchange Act Reporting obligations that provide public disclosure of financial information about an issuer so investors may make informed decisions. *(Id.)* The UPCC Subcommittee made a finding that FLCN's history of ignoring its reporting obligations evidences a high degree of disregard for the importance of public disclosure. The UPCC Subcommittee provides no additional

facts supporting this finding. *(Id.)* The UPCC Subcommittee in its decision submitted no material facts that FLCN was the subject of any civil action related to fraud or securities law violations. The UPCC Subcommittee made findings of law in this regard. (FINRA 000401, UPCC Subcommittee's Findings and Conclusions, pp.2-4)

SUMMARY OF ARGUMENT

FINRA's denial of Petitioner's application should be reversed. FINRA's denial of Petitioner's application creates rather than prevents market confusion. FINRA's denial of Falcon's application exceeded the authority granted to FINRA under Rule 6490 and should be reversed. FINRA's deficiency determination and the Commission's affirmation of FINRA's deficiency determination should be time-barred based on FINRA's reasoning in their denial by the general statute of limitations contained in 28 U.S.C. § 2462. Accordingly, FINRA's denial of Petitioner's application should be reversed and the Petitioner's corporate actions should be processed.

FINRA's denial of Petitioner's application should be reversed because FINRA's denial of Petitioner's Corporate Action creates rather than prevents such confusion. FINRA's application of an SEC-approved FINRA regulation has resulted in a conflict between state corporate law and FINRA regulation as delegated by the Securities and Exchange Commission (the "SEC") for the Petitioner. The Petitioner's Corporate Actions are legally effective in accordance with state law. FINRA's refusal to reflect such change in Petitioner's name results in public misinformation. Accordingly, FINRA's denial of Petitioner's application should be reversed because FINRA's denial of Petitioner's Corporate Action creates confusion in the markets rather than prevents such confusion.

FINRA Rule 6490 is a ministerial rule. Enacted in September 2010, Rule 6490 sets forth procedures for the submission, review, and determination of the sufficiency of requests made to FINRA by issuers to process certain corporate actions, including dividends, distributions, and stock splits. Rule 6490 is an extension of Section 10(b) of the Exchange Act and Click or tap here to enter text.Rule 10(b)-17, promulgated thereunder. As noted in the proposal to adopt Rule 6490, FINRA has no jurisdiction over issuers and does not impose listing standards. Proposal Release, at 39604. FINRA may not make substantive judgments for a corporation about matters of corporate governance. The only power granted to FINRA

under Rule 6490 by Section 10(b) of the Exchange Act and SEC Click or tap here to enter text.Rule 10(b)-17, the enabling statute and SEC Rule, is to require the filing of an appropriate notice, which it may refuse to file if the notice is deficient in some way. UPCC Subcommittee's Findings and Conclusions make no attempt whatsoever to base its decision on the actual language of the rule, in context, or this important history. Thus, any argument by FINRA *now* that its decision is supported by Rule 6490 is a semantic argument that relies on certain broad language from subsection (d)(3), taken out of context. In sum, FINRA's denial exceeded the scope of its authority under Rule 6490 and was improper. FINRA Rule 6490 states that its guiding principles are to prevent fraudulent activities in connection with the securities markets and to protect investors and the public interest. The UPCC Subcommittee's Findings and Conclusions do not state or explain how the aforementioned factors implicate Falcon in any fraudulent activities in connection with the securities markets. *(See id.)* Nor does the UPCC Subcommittee set forth an explanation as to how its decision protects investors and the public interest. UPCC Subcommittee supports its decision by citing to inapplicable caselaw. The caselaw is wholly distinguishable from the facts in the within case. *(See id.)*

In *AutoChina Int. Ltd,* Exchange Act Release No. 79010, 2016 SEC LEXIS 3771, at *1-2, (Sept. 30, 2016) FINRA found that AutoChina's request was deficient under FINRA Rule 6490(d)(3)(3) because FINRA had actual knowledge that AutoChina was the subject of a civil action related to fraud or securities law violations. The Commission did not uphold FINRA's finding and remanded the matter back to FINRA.

In *mPhase Techs., Inc.*, Exchange Act Release No. 74187, 2015 SEC LEXIS 398, at *2, 6 (Feb. 2, 2015), FINRA found that mPhase's request was deficient and that mPhase's chief executive and chief operating officers were the subject of a "settled regulatory action related to . . . securities laws violations. FINRA determined that such misconduct "raised concerns for FINRA regarding the protection of investors." (*See id).*

In, *In re Positron Corp,* Securities Exchange Act Release No. 74216 *2 (Feb. 5, 2015) FINRA found that Positron's request was deficient and that processing the announcement was not in the public interest because Positron's then chief executive officer ("CEO") had consented in federal district court to an injunction against future violations of the antifraud and disclosure provisions of the federal securities laws. He was also the subject of a pending Commission administrative proceeding to determine whether a securities industry suspension or bar against him was warranted.

No such findings were made against FLCN by FINRA. (*See* UPCC Subcommittee's Findings and Conclusions, pp. 2-5). Petitioner noted in its appeal to the UPCC that Falcon has never violated the federal securities laws, including Section 5 of the Securities Act. *(Id.)* In addition, no such allegations of fraud of securities violations were made against FLCN by the DOP. (*See* the DOP's determination July 11, 2019.) The UPCC Subcommittee made no mention of these facts in their Findings and Conclusions. *(See* UPCC Subcommittee's Findings and Conclusions, pp.2-4).

The UPCC Subcommittee cites authority that does not support its finding against FLCN. In affirming the DOP's refusal, the UPCC Subcommittee has slavishly followed the DOP's determination of July 11, 2019 without any consideration or analysis of facts and law applicable to FLCN. The UPCC Subcommittee's decision to exercise its discretion pursuant to FINRA Rule 6490 was made in the absence of fair procedures in circumstances where it failed to properly consider all the material facts pertinent to FLCN before rendering its decision. The UPCC Subcommittee arrived at a decision containing errors of law on the face of the record. The UPCC Subcommittee's determination was thereby judicially unsound and should be reversed by the Commission.

Accordingly, FINRA's denial of Petitioner's application to conduct Corporate Actions split should be reversed. Accordingly, FINRA's denial of Falcon's application exceeded the authority granted to FINRA under Rule 6490 and should be reversed.

FINRA's deficiency determination and the Commission's affirmation of FINRA's deficiency determination would amount to punishing Falcon for past conduct. Accordingly, the FINRA proceedings below as well as this appeal constitute "an action, suit or proceeding" for the enforcement of a "penalty" and the Commission should be time-barred from affirming FINRA's denial by the general statute of limitations contained in 28 U.S.C. § 2462.

ARGUMENT

I. FINRA's Denial of Petitioner's Application Should Be Reversed Because Denial Creates Confusion in the Markets Rather than Prevents Said Confusion as FINRA's Denial Abrogates State Corporate Law

FINRA's denial of Petitioner's application should be reversed because FINRA's denial of Petitioner's Corporate Action creates confusion in the markets rather than prevents such confusion. FINRA's application of an SEC-approved FINRA regulation has resulted in a conflict between

state corporate law and FINRA regulation as delegated by the Securities and Exchange Commission (the "SEC") for the Petitioner. On January 22, 2019, Petitioner submitted an application to FINRA to conduct the "Corporate Actions, pursuant to FINRA Rule 6490." As a necessary part of that application, Petitioner submitted a Certificate of Amendment filed and approved by the State of Oregon in which the name of the Petitioner was changed from Falcon Technologies, Inc. to Eco-Growth Strategies, Inc. At the time of the FINRA refusal, Petitioner had already received board and shareholder approval and had filed the necessary amended articles with the State of Oregon, legally effectuating the name change.

In support of its denial of the Corporate Action, FINRA relied upon its discretion under FINRA Rule 6490 and the failure of the Petitioner to file the necessary financial reports prior to the filing of its '34 reports from September 2002 through May 15, 2007. FINRA cited that "Under FINRA Rule 6490, the Department is permitted to exercise discretion and to decline to process documentation related to corporate actions if an issuer's request is "deficient," based on one or more of the five-factors listed in FINRA Rule 6490(d)(3), and if denial of the issuer's request is "necessary for the protection of investors, the public interest and to maintain fair and orderly markets."" citing mPhase Techs., Inc., Exchange Act Release No. 74187, 2015 SEC LEXIS 398, at *6 (Feb. 2, 2015). First, the Commission should note that the authority is conjunctive, and that FINRA is obligated to prove that requested corporate action is not only deficient but that denial of the corporate action is "necessary for the protection of investors, the public interest and to maintain fair and orderly markets." *See AutoChina Int. Ltd*; *mPhase Techs., Inc.*, and; *In re Positron Corp.*

The Petitioner's Corporate Actions are legally effective in accordance with state law. FINRA's refusal to reflect such change in Petitioner's name results in public misinformation. FINRA's mandates is to protect investors and maintain fair and orderly markets. See, FINRA 6490(d)(3) and mPhase Techs., Inc., Exchange Act Release No. 74187, 2015 SEC LEXIS 398, at *6 (Feb. 2, 2015). Confusing the legal name of the Petitioner with the "as-traded" name of the Petitioner is not an effective method to protect investors or maintain fair and orderly markets. FINRA's actions create confusion. FINRA's actions create a fundamental conflict between federal and state law and the ability to regulate corporate actions.

Effective September 27, 2010, the SEC approved FINRA Rule 6490 (Processing of Company Related Actions). Rule 6490 requires that corporations whose securities are trading on the over-the-counter market (OTCQX, OTCQB, OTCBB or pinksheets) timely notify FINRA of

certain corporate actions, such as dividends, forward or reverse splits, rights or subscription offerings, symbol changes, and name changes. The Rule grants FINRA discretionary power when processing documents related to the announcements.

Rule 6490 works in conjunction with Exchange Act Click or tap here to enter text.Rule 10(b)-17. Click or tap here to enter text.Rule 10(b)-17 provides that "it shall constitute a manipulative or deceptive device or contrivance as used in Section 10(b) of the Act for any issuer of a class of securities publicly traded...to fail to give notice in accordance with paragraph (b) of this section of the following actions relating to such class of securities: (1) a dividend or other distribution in cash or in kind...(2) a stock split or reverse split; or (3) a rights or other subscription offering." Section (b) requires that notice be given to FINRA "no later than 10 days prior to the record date involved."

Prior to 2010, FINRA's role has been predominantly ministerial due to its limited jurisdictional ability to impose informational or other regulatory requirements, and fundamental lack of power to reject requested changes. However, since the SEC began expressing concern that entities were using FINRA to assist in fraudulent activities, Rule 6490 was created. The Rule codifies FINRA's authority to conduct in-depth reviews of company-related actions and equips the staff with discretion to refuse the processing of such actions in situations when the information or requisite forms are incomplete or when certain indicators of potential fraud exist.

Exchange Act Click or tap here to enter text.Rule 10(b)-17 is limited to notice and allows the SEC to pursue an enforcement action for the failure to give such notice in a timely manner. Rule 6490 goes far beyond, stating a corporation action "will not be processed" if FINRA makes a "deficiency determination." Clearly subsections (3) and (4) give broad discretionary authority to FINRA to render such a deficiency determination and refuse to process an action.

Exacerbating the existing conflict between the application of state and federal law, FINRA requires that an issuer submit the file-stamped amendments to its corporate charter as part of its review process. The FINRA corporate action process requires that an issuer legally completes the corporate action on the state level prior to issuing a determination as to whether it will process the already-completed change with the marketplace.

FINRA should be required to respect state law, and should be required to process the Corporate Action unless FINRA is obligated to prove that requested corporate action is not only deficient but that denial of the corporate action is "necessary for the protection of investors, the

public interest and to maintain fair and orderly markets" and not the perpetrator of confusion in the markets. mPhase Techs., Inc., Exchange Act Release No. 74187, 2015 SEC LEXIS 398, at *6 (Feb. 2, 2015).

Accordingly, FINRA's denial of Petitioner's application should be reversed because FINRA's denial of Petitioner's Corporate Action creates confusion in the markets rather than prevents such confusion.

II. FINRA's Denial of Petitioner's Application Should Be Reversed Because the Denial Exceeded the Authority Granted to FINRA Under Exchange Act Section 10(b), SEC Rule 10(b)-17, and FINRA Rule 6490.

FINRA has no jurisdiction over issuers and does not impose listing standards. FINRA may not make substantive judgments about matters of corporate governance for a corporation. The only power granted to FINRA under Rule 6490 by Section 10(b) of the Exchange Act and SEC Click or tap here to enter text.Rule 10(b)-17, the enabling statute and SEC Rule, is to require the filing of an appropriate notice, which it may refuse to file if the notice is deficient in some way. Accordingly, FINRA's denial of Falcon's application exceeded the authority granted to FINRA under Rule 6490 and should be reversed.

Two provisions of the Exchange Act define FINRA's quasi-governmental authority to adjudicate actions against members who are accused of unethical or illegal securities practices and the Commission's oversight of that authority: Sections 15(a) and 19 of the Exchange Act. *National Ass 'n of Secs. Dealers. Inc. v. SEC,* 431 F.3d 803, 804 (D.C. Cir. 2005), *rehearing en bane denied* (2006) *("NASD v. SEC').* Section 15 of the Exchange Act, 15 U.S.C. § 78o-3, lays out FINRA's specific duties, including disciplinary functions. Section 19, 15 U.S.C. § 78s, sets out the SEC's supervisory duties over FINRA. A close look at Section 19 shows that FINRA's rule-making authority should be strictly limited by parameters set forth by the Commission and, by extension, Congress. *See* 15 U.S.C. § 78s (b)(l) ("Each self-regulatory organization shall file with the Commission, *in accordance with such rules as the Commission may prescribe,* copies of any proposed rule or any proposed change.... No proposed rule change shall take effect *unless approved by the Commission)* (emphasis added); *see also Fiero v. FINRA,* 600 F.3d 569, 574-79 (2d Cir. 2011) (analyzing whether FINRA's actions in that case conformed to the authority granted under the Exchange Act and any corresponding SEC and/or SRO rule).

Thus, the overarching purpose of the Rule 6490 is to ensure that the investing public is not misled by the failure of issuers to disclose information that would be considered material under the federal securities laws. Rule 6490(d)(3) itself recognizes in that subsection's title, "Deficiency Determination," that FINRA's sole function in the application process is ministerial. That subsection states that:

> [W]here an SEA Rule l0b-17 Action or Other Company-Related Action is deemed deficient, the Department may determine ... that documentation ... will not be processed ... [W]here the Department makes such a deficiency determination, the request to process documentation ... will be closed ... The Department shall make such deficiency determinations solely on the basis of one or more of the following factors: (1) FINRA staff reasonably believes the forms and all supporting documentation, in whole or in part, may not be complete, accurate or with proper authority; (2) the issuer is not current in its reporting requirements, if applicable, to the SEC or other regulatory authority; (3) FINRA has actual knowledge that the issuer ... officers, [or] directors ... are the subject of a pending, adjudicated or settled regulatory action or investigation by a federal, state or foreign regulatory agency, or a self-regulatory organization; or a civil or criminal action related to fraud or securities laws violations; [and] (4) a state, federal or foreign authority or self-regulatory organization has provided information to FINRA, or FINRA *otherwise has actual knowledge* indicating that the issuer ... officers, [or] directors ... may be potentially involved in fraudulent activities related to the securities markets and/or pose a threat to public investors...

FINRA Rule 6490(d)(3) (emphasis added); *see also* Proposal Release, at 39606 ("Accordingly, the Commission believes that the proposal is designed to encourage issuers and their agents to provide complete, accurate and timely information to FINRA concerning Company-Related Actions involving OTC Securities, *and thereby* to prevent fraudulent and manipulative acts and practices with respect to these securities") (emphasis added).

Thus, under the plain text of subsections (d)(l) and (d)(2) of Rule 6490, FINRA can deny a request if the issuer fails to include information that is material under the federal securities laws. Subsection (d)(3) further states that the Department may determine that it is necessary for the protection of investors, the public interest and to maintain fair and orderly markets, that documentation related to such SEA Click or tap here to enter text.Rule 10(b)-17 Action or Other Company-Related Action will not be processed. While Subsection (d)(3) does

make a stated reason that "the issuer is not current in its reporting requirements," Subsection (d)(3) does make "not current in its reporting requirements" "if applicable." The Petitioner filed a Form 15 on May 15, 2007. Thereafter, the Petitioner had no obligation to report to the SEC.

In *In re Metatron, Inc.* Securities Exchange Act Release No. 86069, *2, (June 7, 2019), FINRA found that Metatron's request that FINRA process and announce Metatron's stock split was "deficient" under FINRA Rule 6490(d)(3)(2). FINRA made this finding because Metatron was "not current in its reporting requirements to the Commission." The Commission ordered both Metatron and FINRA to provide additional briefing to address the issue of the extent of Metatron's reporting requirements at the time of FINRA's action, as a result of filing a Form 10-SB to register a class of its common stock following its filing of a Form 15 to terminate that registration. Metatron filed a Form 15 and certified that it had 202 shareholders as of the date of filing.

UPCC Subcommittee's Findings and Conclusions made no adverse findings that FLCN filed a Form 15. The Findings and Conclusions made no adverse findings and by extension accepted that FLCN was eligible to file a Form 15 where it had fifty three (53) shareholders as of the date of filing (UPCC Subcommittee decision, September 4, 2019, pp. 2, 4)

FINRA Rule 6490 states that its guiding principles are to prevent fraudulent activities in connection with the securities markets and to protect investors and the public interest. The UPCC Subcommittee's Findings and Conclusions do not state or explain how the aforementioned factors implicate Falcon in any fraudulent activities in connection with the securities markets. *(See id.)* Nor does the UPCC Subcommittee set forth an explanation as to how its decision protects investors and the public interest. The UPCC Subcommittee supports its decision by citing to inapplicable caselaw. The caselaw is wholly distinguishable from the facts in the within case. *(See id.)*

In *AutoChina Int. Ltd,* Exchange Act Release No. 79010, 2016 SEC LEXIS 3771, at *1-2, (Sept. 30, 2016) FINRA found that AutoChina's request was deficient under FINRA Rule 6490(d)(3)(3) because FINRA had actual knowledge that AutoChina was the subject of a civil action related to fraud or securities law violations. The Commission did not uphold FINRA's finding and remanded the matter back to FINRA.

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the protection of investors." (*See id).*

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No such findings were made against FLCN by FINRA. (*See* the UPCC Subcommittee's Findings and Conclusions, pp. 2-5). Petitioner noted in its appeal to the UPCC that Falcon has never violated the federal securities laws, including Section 5 of the Securities Act. *(Id.)* In addition, no such allegations of fraud of securities violations were made against FLCN by DOP. (*See* DOP's determination, July 11, 2019.) The UPCC Subcommittee made no mention of these facts in its Findings and Conclusions. *(See* UPCC Subcommittee's Findings and Conclusions, pp. 2-4).

The UPCC Subcommittee's Findings and Conclusions make no attempt whatsoever to base its decision on the actual language of the 6490 rule, in context, or this important history. Thus, any argument by FINRA *now* that its decision is supported by Rule 6490 is a semantic argument that relies on certain broad language from subsection (d)(3), taken out of context. In sum, FINRA's denial exceeded the scope of its authority under Rule 6490 and was improper. Accordingly, FINRA's denial of Petitioner's application to conduct Corporate Actions split should be reversed.

III. The SEC's Enforcement of FINRA's Denial Would Be Improper Because It Violates the Five Year Statute of Limitations.

FINRA's deficiency determination and the Commission's affirmation of FINRA's deficiency determination would amount to punishing Falcon for past conduct. Accordingly, the FINRA proceedings below as well as this appeal constitute "an action, suit or proceeding" for the enforcement of a "penalty" and the Commission should be time-barred from affirming FINRA's denial by the general statute of limitations contained in 28 U.S.C. § 2462.

The five year limitations period has clearly passed. In the Supreme Court's recent decision in *Gabelli v. SEC,* 568 U.S. 442 (2013), the Supreme Court held that the five-year

statute of limitations period in Section 2462 begins to run at the time the actions at issue are "complete" rather than when they are discovered. The Court rejected the SEC's arguments that the discovery rule should apply to Section 2462. The conduct at issue occurred from September 2002 through May 15, 2007. Under the rule in *Gabelli,* the statute began to run as late as May 15, 2007. Even under the discovery rule, however, the clock began to tick when the Petitioner filed its Form 15 - that is, once it first became possible to comment and compel the Petitioner to file the delinquent reports.

Preventing Falcon from conducting corporate actions for the past conduct of its officers and directors, and for failure to file reports that are over a decade old, is a "penalty" within the meaning of Section 2462. In *Johnson v. SEC,* the D.C. Circuit Court of Appeals ruled that a sanction rendered by the Commission is a "penalty" within the meaning of section 2462 if it (1) has "collateral consequences" beyond merely remedying the instant misconduct, and (2) is based mostly on a person's past misconduct. 87 F.3d 484, 488 (D.C. Cir. 1996). Here, the misconduct at issue took place from September 2002 through May 15, 2007, and was terminated by the filing of the Form 15 on May 15, 2007. FINRA's deficiency determination based on the failure to file delinquent reports would have the collateral consequence of creating an impermissible conflict between the Petitioner's legal name under Oregon corporate law and the name and symbol under which the Petitioner trades thereby promoting, not eliminating, confusion in the markets.

Although there is case law from other Circuits that is contrary to Petitioner's position, Petitioner urges the Commission to look at a recent decision coming out of the Fifth Circuit in *SEC v. Bartek,* as persuasive. 484 Fed. Appx. 949, 2012 LEXIS 16399 (5th Cir. 2012). In that case, collateral consequences were sufficiently "penal" to make the Division's enforcement action subject to Section 2462's five year statute of limitations. *Id.* at *22-23.

Lastly, the Commission should recognize that FINRA's deficiency determination and the Commission's affirmation of FINRA's deficiency determination constitute an "action, suit or proceeding." Section 2462's five year limitation applies to the entire federal government in all civil penalty cases, unless Congress specifically provides otherwise. *3M Co. v. Browner,* 17 F.3d 1453, 1461 (D.C. Cir. 1994). This statute applies to the SEC. *See Johnson,* 87 F.3d at 488; *SEC v. Jones,* 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007). Here, Rule 6490 is an extension of Section 10(b) of the Exchange Act and Rule 10(b)-17, promulgated thereunder. Under the statute and rules, FINRA denied Petitioner's application based on past conduct, and

did so in a way that constitutes a present and future punishment. Thus, any argument that FINRA can punish misconduct that took place more than five years ago because it is not a government agency would be improperly and unfairly placing form over substance. In any event, because FINRA derives its disciplinary powers from the SEC, as set forth above, in Argument Section II.A., this five year limitation should also apply to FINRA.

CONCLUSION

For all of the foregoing reasons, we respectfully request that the Commission reverse the decision of the DOP, UPCC Subcommittee, and FINRA in favor of Petitioner.

Dated: New York, New York
December 3, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused one facsimile original and one non-facsimile original and three copies of the foregoing Brief in Support of Application of Falcon Technologies, Inc, for Review of Action Taken by FINRA, Case No. CAS-65999-D4D0V6, to be served on:

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I further certify that on this day, I caused one facsimile original, one electronic mail original, and one non-facsimile original of the foregoing Brief in Support of Application of Falcon Technologies, Inc, for Review of Action Taken by FINRA, Case No. CAS-65999-D4D0V6, to be served on:

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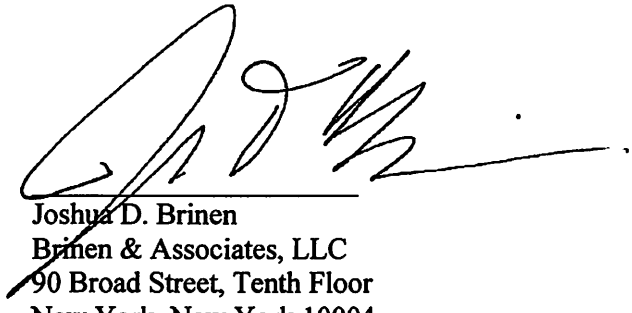
Dated: New York, New York
December 3, 2019



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December 3, 2019

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Re: Petitioner Falcon Technologies, Inc's Brief in Support of Application of Falcon Technologies, Inc for Review of Action taken by FINRA
In the Matter of Falcon Technologies, Inc., et al.
Securities and Exchange Commission,
SECURITIES EXCHANGE ACT OF 1934
Release No. 87472 / November 5. 2019
Admin. Proc. File No. 3-19575
FINRA, Case No. CAS-65999-D4D0V6
Our File No.: Falcon 11.FINRA

To the Members of the Commission:

My firm represents the Petitioner, Falcon Technologies, Inc. ("Falcon") in the above-referenced matter before the Commission.

The Petitioner, Falcon filed an appeal for review of action of action taken by FINRA following its determination of September 4, 2019. FINRA, Case No. CAS-65999-D4D0V6.

In further support of the Petitioner, enclosed find Petitioner Falcon's Brief in support of their appeal for review of action of action taken by FINRA.

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Should you have any questions, please do not hesitate to contact me at the New York office or via electronic mail at jbrinen@brinenlaw.com.

Yours truly,

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Joshua D. Brinen

Enclosure

cc: Client

JDB:jdb