UNITED STATES OF AMERICA
before the
SECURITIES and EXCHANGE COMMISSION

September 29, 2020

SECURITIES EXCHANGE ACT OF 1934

ADMINISTRATIVE PROCEEDING
File No. 3-19896

In the Matter of the Application of

SILVER LEAF PARTNERS, LLC

For the Review of Disciplinary Action Taken by the

Financial Industry Regulatory Authority, Inc.

Opening Brief

Pursuant to Securities and Exchange Commission ("SEC" or the "Commission") Rule 450, Silver Leaf Partners, LLC, submits this brief for the review ("Review" or "Appeal") of the Financial Industry Regulatory Authority, Inc. ("FINRA") National Adjudicatory Council ("NAC") June 29, 2020 decision ("Decision") in the matter of FINRA Department of Enforcement ("Enforcement") versus Silver Leaf Partners, LLC ("Silver Leaf") in proceeding number 2014042606902 heard on appeal by the NAC (the "Hearing") after an extended proceeding (the "Proceedings") before FINRA's Office of Hearing Officers (the "OHO" or the "Panel") issuing a lower decision on January 29, 2019.

SUMMARY

Enforcement's investigation underlying the Decision was deficient in fundamental regards: Enforcement failed to (i) appoint a qualified investigator, (ii) conduct an adequate investigation and (iii) inform Silver Leaf about the nature and scope of their investigation in order to address important matters that would have materially impacted and informed the Proceedings, the Hearing, and the Decision[1].

[1] *See* August 3, 2018 Hearing Transcript (Bates # 003357) page FINRA 003710 line 23 through FINRA 003714 line 17.

Compounding Enforcement's insufficient investigation, FINRA empaneled a hearing panel unqualified to address the matters put to it for consideration resulting in significant prejudice to Silver Leaf culminating in a fatally flawed process, *in toto*.

Flowing from these inadequacies was a grasping attempt by the OHO and the NAC to assign meaning and motive to conduct and events that were insufficiently understood and investigated by Enforcement.

Indeed, the NAC's Decision, like the OHO decision before it, failed to address important matters of fact, law, regulation, rule, and procedure relating to the investigation, complaint, and the Proceedings.

Like the OHO decision before it, the NAC's Decision failed to address important matters relating to the burden of proof inherent in a structurally sound and equitable adjudicatory process.

In sum and substance, the NAC's Decision gets wrong basic aspects of Silver Leaf's business, its relation to various transactions & persons, and stitches together disparate events over unrelated time frames in order to render a Decision that attempts to validate and reconcile Enforcement's procedural failings.

DECISION DEFICIENCIES

The Decision finds that Silver Leaf failed to establish and maintain a supervisory system *reasonably*[2] designed to supervise its business and that Silver Leaf paid transaction-based compensation to nonmember brokers. Actual understanding of Silver Leaf's business model is requisite to any determination and Decision, and that understanding is fully lacking here from start to finish.

BHP Transactions

First, the instance of Silver Leaf having introduced a client, BHP, to various other institutional parties to engage in block trades or stock loans with such other parties. In one of these instances, the record shows that BHP and Floyd Associates sought to do a block trade transaction with *each other* (the "GAMA Block Trade") and considered doing that trade through Silver Leaf and it's clearing firm, Pershing, LLC, along with other broker dealers and, ultimately, chose BTIG, LLC ("BTIG").

The record shows no instance of Silver Leaf being aware of which other brokers were being considered by BHP and Floyd.

[2] The Decision uses this term from time to time but does not apply it to the facts and circumstances of this case.

The record shows that BHP and Floyd wanted to do the block trade where a portion of the trade was done publicly, and a portion of the trade was done privately. For this transaction construct, Silver Leaf and Pershing, in consultation with one another, *rejected* doing the transaction this way. *Nowhere* in the Proceedings or the Decision was this overarching fact ever referenced, understood, or applied.

The record shows that every FINRA reviewer, from its investigator, Patrick Barritt (the "Investigator") to Enforcement to the OHO to the NAC, latched on to the statement of Khan that he did not have experience with conducting this type of transaction[3] and extended that statement to create a false narrative about the firm's capabilities.

Stretching this testimony past reasonable interpretation, the Decision finds that the firm did not have the capability and supervisory systems to supervise stock loan and block trade transactions, in general. Yet, the evidence of rejecting the trade as contemplated by the parties was, itself, evidence of knowledge of how to handle the contemplated block trade.

Chapler Payments to Halim

Second, the Decision incorrectly declares that Silver Leaf paid a nonregistered person, Sam Halim[4], commissions. In fact, Enforcement's own evidence proved Halim was paid by Jay Chapler and not by Silver Leaf.

Further, it is not even possible to conclude from the record of the proceedings that Silver Leaf did *not* reasonably supervise Chapler. His payments to Halim were *never* authorized by his supervisor, Khan[5].

More importantly, the requirements imposed on broker dealers for reasonable procedures is *not* for reasonable supervision in each and every instance *nor* for each and every broker but for *reasonable* supervision of the broker dealer's business in its totality.

Here, the evidence at the Proceedings showed no other instance—ever—of a Silver Leaf broker making payments to a nonregistered person or Silver Leaf—ever—having such an instance in its business history—ever. Chapler paid Halim. The record also shows that the particular relationship between Chapler and Halim—then concealed from everyone else at Silver Leaf by

[3] By executing part of the GAMA trade "on market" and part of the trade "off market".
[4] Sam Halim is referred to in the Decisions as "SH".
[5] *See* JX-19, Appendix A, page 89, for Silver Leaf's "Supervisory Schedule for Assignment of Registered Representatives" wherein Chapler was informed, and as he well knew, that Khan, and not Meehan, was his designated supervisor.

Chapler—created an instance of highly intelligent persons, with intent and planning, exploiting a firm for their own benefit *in spite of then-existing reasonable supervision and procedures*. "Reasonableness" must and can only be fairly construed when considering the facts known to the firm *at the time*—not after the fact.

Payroll Process

Third, the Decision finds that the payroll practice of Silver Leaf resulted in commission payments to brokers being deposited by Silver Leaf's payroll company to the bank accounts of their wholly-owned limited liability companies which was a standard *and fully disclosed* practice of Silver Leaf for years.

Receiving almost no acknowledgement or consideration by the NAC in its decision was the fact that not one single dollar was *actually* received by anyone other than the intended broker. Not one single dollar!

At most, Silver Leaf's payroll practice was a technical violation of Rule 2040 and not the type of conduct contemplated by the rule itself or FINRA's own guidance for disciplinary proceedings. Further, the record shows no evidence of an intent to violate NASD Rule 2040 or to act contrary to Silver Leaf's discussions with the SEC in this regard.

The record shows instead an unreasonable inflation by FINRA of an instance of *reasonable* conduct that was designed to satisfy Rule 2040 and Silver Leaf's discussion with the SEC. Dispositively, the Investigator testified that FINRA had ***no*** evidence to support its jurisdiction thereof. From the August 15, 2018 Investigator testimony, see page FINRA 003435:

> 18-20 Silver Leaf: "You have no proof that those payments to those LLCs did not originate from foreign transactions; do you?"
>
> 21-22 Investigator: "**I can't show you any documentation related to those fees.**"
>
> [Emphasis added]

PROCESS DEFICIENCIES

In footnote 56 of the Decision, the NAC states that it has "considered and rejected without discussion all other arguments advanced by the parties". This is euphemistic language for trivially acknowledging what the Decision does to the great prejudice of Silver Leaf: The Decision ignores arguments and facts advanced by Silver Leaf that are not to the liking or benefit of the organizational preferencing that FINRA accords itself.

The process deficiencies in the underlying proceedings are myriad:

1. The Investigator held no supervisory licenses, supervisory experience, or investigatory experience[6] when investigating matters relating to the FINRA arbitration action (the "BTIG Arbitration") as referenced in the Decision.

2. The Investigator did not inform Silver Leaf that his investigation of the firm had expanded beyond the BTIG Arbitration and this failure resulted in the ultimate prejudice to Silver Leaf as a result of having no notice of what matters were under consideration and investigation thereby according the firm no opportunity to review and respond to important matters related thereto.

3. The industry members of the OHO panel, Gregg Kidd[7] and William Behrens[8] (together, the "Industry Panelists"), were engaged in none of the same business activities as Silver Leaf, and were therefore unable and incapable of understanding Silver Leaf's business model and accordingly incapable of discharging their duties as properly appointed OHO panelists.

4. Enforcement was the beneficiary of excessive indulgences by the chair of the Panel who permitted Enforcement:

(a) excessive time to prosecute its case,

(b) to introduce additional information in the Proceedings detrimental to Silver Leaf,

(c) to introduce prejudicial matters[9] into the record of the Proceedings,

(d) to allow Enforcement's attorneys, Danielle Schanz and Jason Gaarder, to testify from the table in support of the Investigator's poor grasp of the facts and allegations lodged by Enforcement,

(e) in direct contradiction of the Panel's own rules of procedure, allowed Enforcement's attorneys to repeatedly and prejudicially ask Investigator leading questions, and

(f) even assisting Enforcement at the Proceedings, when Enforcement was completely unprepared for challenges to its investigatory conduct and case

[6] *See* Exhibit CX-15.

[7] Kidd's (CRD# 1353130) firm at the time, Pinnacle Investments, LLC (CRD# 142910) was a financial planning firm engaged in none of the institutional business activities of Silver Leaf.

[8] Behrens' (CRD# 16999) firm at the time, R.F. Lafferty & Co., Inc. (CRD# 2498) was a wealth management, retirement services and retail trading firm engaged in none of the institutional business activities of Silver Leaf.

[9] See Exhibits CX-17, CX-18, CX-19, CX-20, CX-21, CX-22, CX-23, CX-24, and CX-25.

prosecution, by adjourning the Proceedings at a critical stage to "discuss an issue" with the other Panelists[10]. Please review critical cross-examination testimony of the Investigator on August, 3, 2018 found on pages FINRA 003361 line 25 through 003436 line 25).

5. Exclusion from the record of the Proceedings of certain germane exhibits[11] proffered by Silver Leaf.

6. Enforcement did not establish jurisdiction over any of the payments complained of.

7. We continue to take exception with the reassignment of the Proceedings from Hearing Officer David Williams to Hearing Officer David Sonnenberg.

DECISION DISCUSSION: DISTORT AND SUPPORT

The Decision distorts the facts and reads more like a supporting brief for Enforcement than an independent analysis and consideration by the NAC of *all* of the facts and information germane to the Proceedings.

The Decision is revealing by what it does not say as opposed to what it does say, and it is most revealing by what it does not consider than by what it does consider.

I. Background

A. Origin of the Investigation

The Decision accurately summarized that the BTIG Arbitration was the genesis event originating the investigation and the Proceedings, but gives no weight to the following:

1. Enforcement brought no specific charges against Silver Leaf relating to the events involved in the BTIG Arbitration itself.

2. There was no evidence offered *whatsoever*, that Silver Leaf (a) ever spoke to BTIG before BTIG effected the GAMA Trade, (b) was ever aware that BTIG was one of the brokers being considered to handle the GAMA Trade.

3. That, therefore Silver Leaf could not, as erroneously found by the arbitration panel, be "negligent in [its] failure to disclose material facts and in making other misrepresentations and omissions which led to BTIG's damages."

4. Enforcement provided no evidence, and the OHO the NAC sought no evidence, to support the BTIG Arbitration panel findings despite an extensive record developed therein. Enforcement merely declared, in effect, "look, Silver Leaf lost an arbitration." And…?

[10] *See* August 3, 2018 Hearing Transcript (Bates # 003357) page FINRA 003394 lines 19 through line 25.
[11] See Silver Leaf Proposed Exhibits RX-29, RX-39, RX-40, RX-41, RX-45, RX-46, RX-47, RX-48, and RX-62.

5. There is no evidence in the record of the Proceedings that Enforcement even reviewed the record of the BTIG Arbitration.

6. The plaintiff in the BTIG Arbitration, BTIG, is a FINRA-member firm yet there is no evidence in the record of the Proceedings that Enforcement ever spoke to and/or substantiated with them (or the record itself) the findings of the BTIG Arbitration panel's decision.

7. There is no evidence in the record of the Proceedings of any indications of failures to supervise or rule violations by Silver Leaf associated with the BTIG Arbitration.

8. Silver Leaf demonstrated to Enforcement, OHO and the NAC that it had good cause to appeal the BTIG Arbitration and, with the full support of its law firm, did appeal the BTIG Arbitration[12], but was forced to abandon that appeal due to FINRA net capital rules requirements.

9. As a result of Enforcement having failed to produce any evidence of misconduct on the part of Silver Leaf in the BTIG Arbitration (but prejudicially referring to it in *general terms* only), the OHO and the NAC, themselves, failed to consider this glaring deficiency on the part of Enforcement.

10. In light of entering no evidence against Silver Leaf from the BTIG Arbitration, it was reasonable and necessary for the OHO and the NAC to review any and all information[13] that spoke to the potential process deficiencies in the BTIG Arbitration.

11. In light of each of the foregoing, the OHO and the NAC were duty bound to consider—which neither of them did—the sufficiency of the investigation conducted by Enforcement.

12. In light of each of the foregoing, the OHO and the NAC were duty bound to consider—which neither of them did—the competence and capability of the Investigator undertaking the investigation.

13. In light of each of the foregoing, the OHO and the NAC were duty bound to consider and review—which neither of them did—the record of the FINRA Arbitration to determine if Silver Leaf's protestations have merit or not.

Put simply, naked references to the BTIG Arbitration and its outcome *is not evidence of anything at all* and reveals a broken process and a flawed Decision.

[12] *See* JX-26.
[13] *See* Exhibit RX-29.

Finally, the Commission would do well to consider how FINRA's net capital rules effectively denied this small member firm its Constitutional due process and equal protection rights. To wit, FINRA's rules that treat a FINRA arbitration decision as a current liability forced this member, who does not have access to unlimited capital,[14] to abandon meritorious rights of appeal[15] otherwise available to every other citizen of the United States—except FINRA small member firms.

B. Disciplinary Proceedings

1. Complaint

The NAC accurately summarizes Enforcement's complaint.

2. Hearing

The NAC inaccurately summarizes Silver Leaf's arguments at the Hearing as they were, in the record, self-evidently more expansive than indicated in the Decision. Again, the Decision is revealing by what it does not say as opposed to what it does say, and it is most revealing by what it does not consider than by what it does consider.

3. Decision

The NAC accurately summarizes the OHO's decision.

4. Silver Leaf's Appeal

The NAC only partially describes the bases for Silver Leaf's appeal as they were, in the record, self-evidently more expansive than indicated in the Decision. Again, the Decision is revealing by what it does not say as opposed to what it does say, and it is most revealing by what it does not consider than by what it does consider.

II. Facts

A. Silver Leaf

The Decision, generally speaking, accurately summarizes Silver Leaf's business.

B. Silver Leaf's Corporate Advisory Business and Alleged Payment of Transaction-Based Compensation to the Unregistered Finder

1. Background

[14] In contradistinction, publicly-traded "bulge bracket" firms have access to nearly unlimited capital whereas privately-owned small member firms often only have access to the personal savings of their owner's and principal's so, as a result, small member firms do not play as fast and loose with the rules because firm capital is often, as in here, their personal capital.

[15] *See* JX-26.

a. Jay Chapler Registers with Silver Leaf; Silver Leaf Formalizes Its Corporate Advisory Business

As the Decision develops, it builds a narrative inconsistent with the facts. Every single broker that was part of the firm's Corporate Advisory business held the same title of "Managing Director" that was also held by Chapler, and not a single one of them was (i) an employee or officer of the firm or (ii) a supervisor of each other.

At *all times*, Chapler was an independent contractor and his limited elevation was for the sole purpose of team building and leveraging his business acumen.

Further, Khan's testimony about Chapler having "business know-how" was in reference to stock loans only, and not to corporate advisory services generally or even to block trading.

Further, Silver Leaf's Corporate Advisory business did not formalize as a result of Chapler. Khan's testimony was solely related to the fact that each of its Corporate Advisory Managing Directors worked independently and Chapler's experience, physical presence in the office,[16] and desire to work collaboratively helped to spur a team effort.

Entirely ignoring testimony relating to Khan's extensive history with corporate advisory, trading and other business activities, as a businessman and as an attorney, the Decision intentionally diminishes Khan's experience to elevate Chapler to a status and a position that he did not have at the firm.

The fog of a 6-day hearing kicks in quickly, and that fog is prejudicial to the victim of its confusion as intended by Enforcement's prosecuting attorneys and as permitted by the OHO chair.

b. Chapler Introduces Khan to BHP

In a subtly worded narrative, the Decision suggests that Silver Leaf's due diligence on BHP was deficient and stages the thought for the reader that much more was needed to be done.

In fact, Scott Dorey's status as a former senior executive of Lehman Brothers was established in the due diligence conducted by Khan.

Further, and in reality, due diligence is tuned to the service that a broker, Silver Leaf, will provide to its client. Here, Silver Leaf was going to introduce BHP to other *institutional persons*

[16] As is commonplace, many of the firm's brokers did not work from Silver Leaf's NYC offices.

and entities to (i) lend money to them against stock that they owned or (ii) to purchase from or sell a position to another *professional trading firm*. Nothing more was contemplated to be done[17].

The Decision would have you believe that Silver Leaf and BHP met in a boiler room to concoct schemes to sell worthless penny stocks to the world's grandmothers.

c. Chapler Introduces Khan to BHP

The Decision paints a far too limited picture of Chapler's introduction of Halim to Khan.

As the record elaborates, Chapler introduced Halim to Silver Leaf and Khan for two reasons: (i) Halim had a business relationship with BHP and other parties that predated Silver Leaf's relationship with BHP for *non-U.S. transactions* and (ii) Halim was considering, or so he claimed, to be interested in registering as a US. broker.

There is nuance here: Silver Leaf's business is nuanced and bespoke. The Industry Panelists businesses and experiences, in contradistinction, are retail and standard.

d. Chapler Agrees to Split His Silver Leaf Commission with Halim

The Decision correctly indicates that Silver Leaf did not know of this agreement between Chapler and Halim.

However, for point of note, because the Decision withholds this fact until it has already impugned Silver Leaf, we here remind the Commission that Silver Leaf did not have a duty to read each and every email of each and every broker. In fact, no broker dealer is so burdened. Silver Leaf was entitled to rely on the totality of its compliance and supervisory regime.

As the record of the Proceedings reveals but the Decision dismisses, Chapler had a positive *and* continuing obligation, per the requirements of Silver Leaf's supervisory procedures[18] to get specific approval *in advance* from Khan[19] before paying anyone who was not currently a registered representative of Silver Leaf.

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[17] *See* Exhibit JX-40. Pursuant to the terms the agreement, Silver Leaf agreed to do nothing more than ("[introduce] to BHP prospective borrowers suitable for BHP's collateralized stock loan and block purchase business as an independent agent of [BHP]". This agreement did not create any obligations in favor of any parties introduced to BHP by Silver Leaf.

[18] *See* JX-19, page 19, Section 4.2 (16), where Silver Leaf's WSPs clearly informed every broker that they were prohibited from "[c]ompensating any person, firm, or entity other than a registered representative of [Silver Leaf] … without express written advance approval of an authorized Principal", and the only person designated as Chapler's authorized Principal was Khan.

[19] Khan, and not Meehan or anyone else, was Chapler's authorized Principal.

Further, per the requirements of Silver Leaf's supervisory procedures, Chapler annually attested to his compliance with the firm's requirements in this regard and other regards[20], and these annual processes[21] reminded him of his *continuing obligation* to abide by the firm's supervisory requirements, including its strict and specific prohibition from making payments to third parties, like Halim, in relation to firm business[22].

In addition, and dispositively, Silver Leaf's supervisory procedures *specifically* contemplated situations and relationships like the one that existed between Chapler and Halim and it gave Chapler *specific* instruction as to his requirements before paying anyone, including Halim, and those requirements *specifically* required the permission of his supervisor, Khan[23]. No communication by and between Chapler and Meehan could cure, circumvent, or separately authorize what *Chapler*—and not Silver Leaf—did.

Furthermore, Chapler was not on heightened supervision and had never—or since or after—engaged in the misconduct that he engaged in with Halim who, as the Commission reads this brief are still business partners[24] engaged in current deceptions affecting other unwitting parties[25]. They are, as it were, two "peas in a pod" or, more properly and poetically, "partners in crime".

It is also important to indicate and stress that, Enforcement came to know of the existence of the payment agreement between Chapler and Halim as a result of a separate enforcement action (the "Chapler AWC Action") brought against Chapler[26], individually. In further fact, much of what Enforcement latched on to in order to get regulatory mileage against Silver Leaf when the

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[20] *See* RX-19 page 3, question #15 where Chapler annually attested to the fact that he did not engage in "Prohibited Practices as described in Section 4.2 of the firm's compliance manual.

[21] *See* RX-18.

[22] *See* JX-19, page 19, Section 4.2 (18), where Silver Leaf's WSPs clearly informed every broker that they shall not "[give] anything of value … where such payment … is in relation to the business of the firm."

[23] *See* JX-19, page 20, Section 4.2 (18), where Silver Leaf's WSPs clearly informed every broker that payments "to person may only be made if they are made "to persons … before the services are rendered … specifying … the amount of the proposed compensation, and the written consent of such person's employer or principal". Here Chapler was not employed by Silver Leaf and he needed the *written consent* of his principal, Khan.

[24] *See* RX-41 and RX-43.

[25] *See* In re: Pinnacle Global Partners Fund I Ltd. (in Official Liquidation) before the U.S. Bankruptcy Court for the Southern District of New York pursuant to Chapter 15, Case No. 19-11573 (MVK) wherein, even after suffering from a FINRA AWC action, Chapler and Halim have created elaborate swindles duping dozens of parties out of multi-millions of dollars. They have even managed, at least so far, to disappear from the internet and evade the Bankruptcy Court and the appointed liquidators.

[26] *See* JX-32. The FINRA Letter of Acceptance, Waiver and Consent No. 2014042606901 between FINRA Enforcement and Chapler (CRD No. 2575511).

BTIG Arbitration proved unfruitful, was gleaned from the Chapler AWC Action. So, as the Commission can see, it really wasn't as easy to discover this information as the Decision seeks to imply.

It is seductive to hold Silver Leaf accountable for information gleaned collaterally, after the fact, and outside of events *then existing at the time*. But it is also wrong to do so.

e. Silver Leaf Increases Its Override on Stock Loan and Block Trades Due to Increased Risk

Summaries without context are, as hereunder, often of little probative value. The Decision espouses a tidy narrative that is inconsistent with the facts.

As noted in the Decision and discussed in the Proceedings, Silver Leaf has a Fund Marketing business and the firm applies a much lower commission override to this business because these engagements are with professional money managers who have offering documents and are additionally supported by various service providers. Chapler was receiving the benefit of a fee structure that did not apply to his actual business activity and it needed to be changed to reflect this actual business activity. As with most things coming out of the investigation and Proceedings, Silver Leaf was never asked about this or, if asked, given an opportunity to review and recollect events and then discuss and explain.

To be sure, as we will further demonstrate, the Investigator, Enforcement, the OHO and the NAC, even at the late date of the Decision, had only a surface level understanding of Silver Leaf's business and its business activities. This fact can be seen by reference to Meehan's email to Chapler[27] which the NAC misinterprets entirely out of context. In actual context, as we have indicated here and in the Proceedings, Halim had an existing relationship with BHP and was already being paid by them for non-U.S. transactions. A fact known to Meehan. Meehan's email was therefore in regard to what he believed *and what he was led to believe by Chapler* was a non-U.S. transaction with a confusing mix of non-U.S. persons[28] working with non-U.S. clients as well as his additional confusion about Halim's registration status with the firm.

We can understand how an inexperienced Investigator who *did not inform Silver Leaf about his investigation into these payments and provided no context to Meehan or Khan about them*

[27] Meehan writes Chapler "We will split on a net basis so if you have third parties that need to get paid then their payment will come of the top before our splits."

[28] At the time, Meehan thought and believed that Halim was not a U.S. citizen.

could, and did, take this email out of context. But that speaks to an insufficient investigation and not to any misconduct at Silver Leaf in coordination between Chapler and Meehan.

Indeed, much of Enforcement's communications with Silver Leaf during its investigation were eerily similar to the way Chapler communicated with Meehan when he used Meehan to set the firm up for the fall. Silver Leaf thought, and was told by Enforcement, that the BTIG Arbitration was the subject of their investigation but most of the questioning by Enforcement were on subject matters that could barely be recalled by Khan and Meehan.

Quick question Gentle Reader: what did you pay for that item that you bought on Amazon in June of 2017? Try answering that coherently when asked out of the blue and with no context.

Outside of *Chapler paying Halim and Silver Leaf not making impermissible payments to Halim*, Enforcement found no other instance of the firm *ever* paying an unregistered broker. Further, Enforcement did not offer anything noteworthy to the OHO or the NAC about why Silver Leaf would allow Chapler to do so in the case of Halim.

2. The Domestic Co. Block Trade

We do not take exception with the Decision's summary hereunder, but we do take exception, again, with what is left out in this summary and what it seeks to imply.

In fact, the Decision continues to mirror the very same tactics of Chapler himself: Hiding facts in plain sight.

Meehan has professed his utter confusion with the status of Halim and the transactions involving Halim. We do not deny this. It was not Meehan's job or role to understand or to supervise these transactions. We fully acknowledge that Chapler knew that he could confuse Meehan where he could not confuse Khan.

As Meehan testified, he gave Chapler the benefit of the doubt thinking these payments were rule compliant.

As you will see from the record of the Proceedings, these discussions with Meehan were happening while Halim was himself pretending to join Silver Leaf. Yes, Meehan was confused but that confusion does not make Silver Leaf's procedures deficient.

If we may be indulged a simile: every town has rules for which side of the road to drive on. If someone drives on the wrong side of the road, does the rule not exist? Is the town in violation of the rule if the driver does so? Is the town in violation if a town official—who is not charged with enforcing the driving code—sees the violator so driving? Or is the *driver* in violation

of the rule? Here is Silver Leaf's rule: Chapler is prohibited from "[c]ompensating any person … other than a registered representative of [Silver Leaf] for any services rendered … without express written advance approval of [Khan]."

The Decision would have you believe that Silver Leaf was an active participant in Chapler's scheme helping to hide payments to Halim *yet not actually hiding the payments* and leaving all of the incriminating evidence in the firm's email system knowing that it is retained and discoverable! Really? Is that really the most likely conclusion? Such a conclusion is utterly implausible.

3. The Three BHP Transactions

The Decision accurately lists the three transactions under consideration.

At this point, it is critical to define what an institutional stock loan transaction is in the context of these transactions: A stock loan, in the case of BHP, involves a cash loan to a wealthy business owner who is "stock rich" but relatively "cash poor." In other words, most of his wealth is tied up into the value of his company and he wants to receive cash (*i.e.*, a loan) against that stock position.

Before making a loan, firms like BHP undertake extensive analysis to (i) determine the value of the company and (ii) the price movements of the public shares of the company. BHP will then apply a discount rate to the shares, offer a loan and take the shares as collateral for the loan. Any (i) downward price movement of the shares or (ii) shares trading outside of normal trading patterns would increase loan risk to BHP. The risk inherent in stock loans are significant *to the lender*, BHP. For the borrower, the primary issue is how much of a loan they can expect to receive based on the discount applied to the shares owned by them. Both parties *want* to see a higher loan made on a stable equity position.

Further, a stock loan is a bilateral agreement (and relationship) between a borrower and a lender. Silver Leaf has no role in this agreement and relationship. We do not participate as principal or as an agent as is commonly understood in the industry[29]. Silver Leaf owed no duty to the borrower. Silver Leaf's only duty was to the lender (*i.e.*, BHP) and that duty was limited to making an introduction only[30].

[29] Roles and activities well understood by the Industry Panelists. Here, however, these transactions were literally and figuratively "foreign transactions" to the Industry Panelists.

[30] *See* Exhibit JX-40. Pursuant to the terms the agreement, Silver Leaf agreed to do nothing more than ("[introduce] to BHP prospective borrowers suitable for BHP's collateralized stock loan and block purchase business as an

a. The L-Co. Stock Loan

As regularly required, we now discuss what the Decision does not say as opposed to what it does say, and what it does not consider as opposed to what it does consider with regard to the L-Co. Stock Loan ("Transaction #1").

The Decision takes much time to discuss *fully unsubstantiated* claims against BHP associated with Transaction #1 for shares owned by LE in L-Co[31]. As detailed in the Decision, Halim received *allegations* from a "contact" (the "Transaction #1 Contact") claiming nefarious conduct by BHP. These allegations were made from June 28, 2019 through July 2, 2019.

Yet, on July 5, 2019, as indicated in the Decision, LE and L-Co. proceeded with the transaction with BHP. Let that sink in for a minute: After concerns about misconduct by BHP floating about in the ether, LE and L-Co. were comfortable with proceeding with the loan transaction[32].

As you let that sink in, recall what a stock loan is: A stock loan is made by BHP where they take the risk of borrower default and the only asset available to them to stop-gap their losses would be the value of the stock that they received as collateral. A price drop of L-Co.'s shares made the loan to LE more risky *to BHP*!

We now ask: Is our point about the insufficiency of the investigation, the Proceedings and the Decision now coming into full view? We offer the answer: Most certainly.

Also note that, after Halim informed Chapler of this scuttlebutt, Chapler, with Silver Leaf having no duty to assist the parties, informed BHP about the concerns of L-Co. and LE[33].

Enforcement and the Decision creates an obligation for supervision over a transaction that *was entirely outside of the services of Silver Leaf and the limited introductory role that we had in this transaction and to whom we owed a duty (i.e., BHP only).* In FINRA's worldview, at least in this case, a FINRA member is deputizable as a global policeman especially when so designating its member allows FINRA to squeeze fines out of that member.

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independent agent of [BHP]". This agreement did not create any obligations in favor of any parties introduced to BHP by Silver Leaf.

[31] In fact, it was *never* substantiated that BHP had anything to do with share price movement.

[32] It is often the case that, in a privately arranged stock loans, word may get out about the loan and other traders will/can trade against the position. LE and L-Co. thought BHP might have traded down the shares but there was never any evidence that BHP did so, and, in any case, they *ratified* their relationship with BHP by proceeding to do the transaction.

[33] We note for the Commission, and as detailed in the Proceedings, Chapler's undercover partnership and future plans with Halim caused him to share his fees with Halim. Otherwise, Chapler was quite competent and capable.

Note further that the payment by Chapler to Halim was an event that was entirely separate and apart from the L-Co. stock loan transaction itself and, as we have elsewhere indicated, Chapler duped Meehan and he received no authorization for these payments from Khan. Further, Enforcement never established that any payment discussed hereunder—whether approved by Silver Leaf or not—was within the jurisdiction of FINRA's rules.

The Decision hereunder concludes by absorbing as material, and without any analysis, negative information about a BHP employee, Mark Valentine, as a means to incriminate Silver Leaf. First, Silver Leaf does not make hiring decisions for BHP. Second, BHP had a specific and perfectly plausible reason to hire Valentine: To wit, the BHP principals were taking significant capital market risk when making loans and they needed an expert trader—regardless of what we may think about that trader's background—to determine price stability. As is their right, the BHP principals prioritized skill over other factors. What does this have to do with Silver Leaf?

Conclusion on Transaction #1: The transaction proceeded to the satisfaction of the borrower. Further, it was not established that Silver Leaf did anything wrong.

More fundamentally: How can Silver Leaf fail to supervise a transaction that it had no role in and that was outside of the firm?

b. <u>The Subsidiary Co. Stock Loan</u>

Preliminarily, the Decision accurately describes the reason for Silver Leaf's agreement to facilitate an escrow process for the transaction before it ultimately veers off-course so, as further required, we now discuss what the Decision does not say as opposed to what it does say, and what it does not consider as opposed to what it does consider with regard to the Subsidiary Stock Loan ("Transaction #2").

Having run a trading firm for 15-years and being involved in the industry for decades more, the principals of Silver Leaf were comfortable with handling a transaction, via an escrow account, where the firm could see cash and shares coming into the account against each other.

Here, it would also do the reader well to maintain a clear-eyed distinction about matters which related to the loan transaction and matters which related to payments made to Halim, whether by Chapler or Silver Leaf.

Here, unlike the transactions where Chapler paid Halim, without the knowledge and approval of his supervisor (*i.e.*, Khan), this escrow-services transaction was fully disclosed to and approved by the firm.

As always, each of these transactions stood and were considered distinctly by Silver Leaf. Yet, the Decision mashes them up to the point of unrecognizability.

With regard to *these fees*, Silver Leaf earned an escrow fee, and could pay and did pay Halim. Enforcement does not dispute this.

Further, there is light-in-the-truth buried here: Notice that, in this transaction involving *direct payment from Silver Leaf* to Halim, Chapler includes and communicates with Khan. The obvious conclusion to a fair-minded analyst is that Chapler followed the firm's supervisory procedures when he didn't have to hide a payment and that he breached the firm's supervisory procedures when he needed to hide a payment; and that he knew that Meehan would be confused in this regard where he could not confuse Khan.

Note also, that fees paid to Silver Leaf, per its contract with BHP, is really none of anyone's business. Yet, the Decision suggests fees were being hidden from Parent Co.[34]; this is a "tell", if you will, of the Decision seeking to reconcile itself with Enforcement's desired outcome.

If that isn't bad enough, the Decision now brings into full light the utter failure of the Investigator, Enforcement, the OHO and the NAC to understand what happened—and who was at fault—in Transaction #2.

Parent Co., and not BHP was at fault: Parent Co. had failed to inform Turkey's Capital Markets Board (the "TCMB") about this transaction and the TCMB, like securities regulators are charged to do, inquired about the transaction and wanted to know if it was a stock sale or a loan. In fact, they never took a position one way or the other. They were simply asking.

As you will recall, stock loans are subject to price sensitivity of the collateral (*i.e.*, the stock) supporting the loan and BHP was furious—and rightly so—that Parent Co. did not get guidance on this transaction to determine how it would be treated by the TCMB before entering into it with BHP. This was an obligation of Parent Co. and *not* BHP and *certainly not* Silver Leaf.

Parent Co. and its principal, used to getting their way given their status in Turkey, demanded that BHP proceed with the transaction in spite of this uncertainty and further demanded that Silver Leaf, under threat of legal action, tell the TCMB that the loan was not a sale transaction pursuant to Turkish regulations.

Let that sink in: Parent Co. wanted a U.S. broker dealer to inform a Turkish regulator about Turkish law so they could force BHP to complete a loan where *they* failed to qualify the transaction

[34] *See* the Decision, page 14, third paragraph, last sentence.

with *their* regulator[35]. Let it sink deeper that FINRA's various apparatchiks believe that Silver Leaf should opine on foreign law and for a transaction that it was not involved in.

[On a personal note, as counsel for Silver Leaf and were I present at the time, I would have advised my client to get an indemnification agreement from its client, BHP, to protect the firm from being dragged into these types of situations]

Fundamentally, again: How can Silver Leaf fail to supervise a transaction that is outside of the firm?

Likely making an appearance for the first time in recorded history, prudence now becomes evidence of impropriety: As it turned out, Silver Leaf did not need the counsel of an outside lawyer at the time and had the good sense to seek an indemnification from BHP. What would you do if you sat in New York and anyone could walk into your office at any time dumping their issues on you even when those issues have nothing to do with you or, as in the case here, were created by the complainant themselves?

Is the pursuit of liability protection an indication of mismanagement or of competent management? Certainly FINRA—when it is not seeking to fine its members—seems to think that liability protection is a good idea[36].

Also, what misconduct by BHP is the Decision referencing? The Decision recounts statements—hearsay in the real world—but none of those statements are proof of misconduct.

In fact, Silver Leaf never received an inquiry—let alone an *actual* complaint—from anyone, including the TCMB relating to Transaction #2.

Note here that the Decision indicates that "Chapler instructed Carlton to wire [Halim's] share of Silver Leaf's fee directly to [Halim]. Carlton complied with Chapler's request". What a curious phrasing chosen by the NAC to describe the fee this way. Chapler never called the payment to Halim a "share of Silver Leaf's fees", the Decision invents that phraseology to support, well, its support of Enforcement.

Note also that there is no consideration given by the NAC to the facts that Chapler (i) never got approval from Khan to pay, or to instruct anyone to pay, Halim, (ii) kept the actual payment

[35] *See* August 3, 2018 Hearing Transcript (Bates # 003357) page FINRA 003739 line 20 through FINRA 003754 line 2. FINRA's investigation of Silver Leaf began on April 8, 2105 with Barritt's 8210 request and it wasn't until the second to last day of the Hearing, August 3, 2018, that *anyone* at FINRA had any real information about this transaction. Khan's testimony has not been refuted in anyway *whatsoever.*

[36] We remind the Commission that FINRA has secured for itself extensive liability protections against its own conduct.

part hidden from Khan and (iii) *in any case*, Enforcement never established that any payment discussed hereunder—whether approved by Silver Leaf or not—was within the jurisdiction of FINRA's rules.

Note further that, with regard to its escrow services, there were no issues *whatsoever*.

Conclusion on Transaction #2: Silver Leaf did nothing wrong. Further, it was not established that Silver Leaf did anything wrong.

Fundamentally, again: How can Silver Leaf fail to supervise a transaction that it had no role in and that was outside of the firm?

c. <u>The GAMA Block Trade</u>

Preliminarily, the Decision accurately describes the genesis events of the GAMA Block Trade before it ultimately veers off-course so, as continually required, we now discuss what the Decision does not say as opposed to what it does say, and what it does not consider as opposed to what it does consider with regard to the GAMA Block Trade ("Transaction #3").

Let's start first with defining what a block trade is: A block trade is simply a trade that is of size where the terms for purchase and sale are pre-negotiated between the parties so as not to cause negative market impact. Trades like this can be done (i) between two non-broker parties where a broker dealer acts as an agent or (ii) where a broker dealer takes one side of the trade and is acting as principal.

Let this next bit of information not slip your attention: There were two discrete instances of service that Silver Leaf could provide with regard to the GAMA Block Trade: an actual service and a possible service.

Actual service: When Silver Leaf introduced BHP to Floyd it did so as part of its Corporate Advisory business and pursuant to its agreement with BHP to "[introduce] to BHP prospective borrowers suitable for BHP's collateralized stock loan and block purchase business as an independent agent of [BHP]" and ***nothing more***.

Possible service: When Silver Leaf was *considering* acting as agent for the transaction between BHP and Floyd, it was doing so as part of its Institutional Brokerage business and <u>*not*</u> as part of its Corporate Advisory business[37].

<u>*There was and is no such thing as a stock loan and block trading business at Silver Leaf*</u>. Enforcement, OHO and NAC utterly and persistently refuse to acknowledge this fact.

[37] *See* Decision on page 5 at Section II, A, second paragraph.

To do the trade, like every other introducing broker of a correspondent clearing firm, Silver Leaf discussed the trade with its clearing firm, Pershing, and Silver Leaf and Pershing both decided *not to do the trade* consistent with the supervisory and trading procedures of both Silver Leaf and Pershing.

Further, Silver Leaf was not "working to facilitate the transfer of the 107 million GAMA shares", we were merely *considering* whether it could be done that way and we ***and*** Pershing rejected doing the trade as contemplated by the parties.

The record of the BTIG Arbitration shows that BHP and Floyd were talking to multiple broker dealers with whom they were clients to see which of them would handle the trade and how they would handle the trade. How, and why BTIG, handled and did the trade we do not know.

The Decision also makes it appear that these discussions were exclusive to Silver Leaf. As indicated in the BTIG Arbitration, BHP and Floyd were having the *exact same conversation* with multiple broker dealers, including BTIG[38].

Now, here is where the Decision's recitation of the facts is entirely—and we must wonder if it is also intentionally—misleading: When BTIG contacted Silver Leaf on November 4, 2013, BTIG had *already done the trade*. BTIG and Silver Leaf never spoke to one another ***before*** BTIG executed the trade[39].

Conclusion on Transaction #3: Silver Leaf did nothing wrong. Further, it was not established that Silver Leaf did anything wrong. Silver Leaf rejected doing the trade; and we rejected it for not meeting the requirements of Pershing and Silver Leaf's Institutional Brokerage business as opposed to the made-up business line repeatedly being referred throughout the halls of FINRA as Silver Leaf's "stock loan and block trading business". Unbelievable!

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[38] Note that there is no evidence in the Proceedings that the Investigator, Enforcement, the OHO or the NAC even reviewed the facts of the BTIG Arbitration proceeding and/or determined if the panel's decision was supportable by the evidence in those proceedings.

[39] Note Khan's professionalism in advising "BTIG to proceed with caution." Note also that BTIG never told Silver Leaf that it had ***already done the trade*** and only called Silver Leaf *after the fact*. This ***fact*** is the basis of Silver Leaf's petition to vacate the FINRA Arbitration panel's outrageous decision (*see* JX-26) because—like the Investigator, Enforcement, the OHO and the NAC in these Proceedings—the FINRA Arbitration panel ***also did not understand the timeline*** and this failure to understand the facts has resulted in one successive nightmare after another being thrown at Silver Leaf with the firm receiving no support from its membership organization who, after this baseless Arbitration panel decision, chooses instead to back up the truck and run Silver Leaf over again in spite of clear evidence of its Investigator's lack of experience and no evidence from the BTIG Arbitration being presented against Silver Leaf.

Fundamentally, again: How can Silver Leaf fail to supervise a transaction that it had no role in and that was outside of the firm?

C. Silver Leaf's Alleged Payment of Transaction-Based Compensation to the Nonmember Entities

Preliminarily, the Decision accurately describes the firm's payroll process before it winds its way back to reconciling itself with the unsubstantiated claims of Enforcement so, as regularly required, we now discuss what the Decision does not say as opposed to what it does say, and what it does not consider as opposed to what it does consider with regard to Silver Leaf's payroll practice.

FINRA's membership is comprised of a subset of specialty brokers who are associated with FINRA member firms and provide capital raising marketing services to institutional clients. The Industry Panelists have no experience with this type of broker dealer business activity.

These brokers are usually highly experienced and maintain an independent contractor status, as recognized by FINRA, with member firms like Silver Leaf.

Often, they also have an LLC business brand[40] that they maintain in the marketplace which is known to their broker dealer (*i.e.*, Silver Leaf), to clients and to regulators alike.

For more than a decade, Silver Leaf has paid these broker's LLCs in full disclosure to various regulatory bodies (e.g., the SEC, FINRA and NFA) and its auditor with never an issue raised about this payment practice.

Over time, Silver Leaf's business grew, and it had more and more brokers who operated with LLC business brands, and were being paid their commissions to these brand entities.

The Decision states that "[t]he SEC staff did not share Silver Leaf's enthusiasm for the practice." Really? Where is the evidence for this? What enthusiasm is the NAC referring to? How do they know what the issue was that was discussed with the SEC? No one at FINRA, during the investigation or after, *ever* spoke to the SEC.

We testified, and our testimony has not been impeached with any *evidence*, that the issue about payments arose as a result of the SEC examiner not being able to easily identify the broker payee when reviewing the firm's payroll records because certain of these brokers completed IRS tax forms which designated their brand entities as the payees and these entities were therefore

[40] These brand entities are referred to in the Decision as Nonmember Entities.

reflected in the payroll records causing confusion to examiners when they were issuing information production requests.

Anyone with experience in dealing with cycle examinations knows that there is back and forth that occurs between the examiner and the examined that is complex and nuanced. Here, luckily, the Decision accurately indicates the arguments advanced by Khan in furtherance of its *then existing* practice but then the Decision takes a manufactured leap in logic when it references a communication between the SEC and the firm[41].

At the time, the discussions between the SEC and the firm were quite cordial and the firm was well pleased with the informative back and forth that it had with the SEC. Khan, as the Decision mostly describes accurately, relented and then *required* that all brokers resubmit tax forms in their individual capacities so that the firm's payroll records, and therefore it's compliance records, reflected each of them individually as the payment recipients. At the time, the matter was treated as closed and not given another thought.

As the Decision overstates—so that it can wind its way back to Enforcement's desire to paint a false picture of the firm and ultimately collect a cash prize from the firm—the firm did *slightly* change its practice believing that this change was consistent with where the firm last left things with the SEC.

Here is what the record shows happened: Meehan was asked from time to time by its brokers if there was a way to pay their brand entities and, in discussions with the firm's payroll company, Paychex, he learned that if the brokers entities were wholly-owned then the firm could process their payroll with tax forms *still* completed in their individual names thereby *continuing* to have them be the payee of record—as required by the SEC—and then, as a separate matter entirely, Paychex could then deposit their payments into their individual bank account *or* the bank account of their brand entity *if* they wholly-owned that entity.

Khan and Meehan considered and viewed this process to be consistent with the firm's discussions with the SEC. The record then shows that Khan also followed up with an instruction to Meehan to make sure that he secured from the brokers certain "bank letters" confirming their 100% ownership of the brand entity for the firm's records.

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[41] *See* Decision, page 18, third full paragraph where the Decision references a hanging sentence in a letter from the SEC stating that "it"—we do not know what it is—"does not include the steps that you have taken or intend to take with respect" to …. To what? The rest of this sentence reflects manufactured assumptions made by the NAC that was layered on top of assumptions made by Enforcement.

Now, let's think on this further: The firm has already detailed in excruciating detail why it believed that this *slightly modified practice* was consistent with its discussions with the SEC. Yet how can any reasonable reviewer believe that Silver Leaf did not know that this would come up in future examinations? The firm was not trying to hide anything. It thought that it had a compliant solution.

The firm certainly did know, because it took steps to make sure, that its payroll records reflected the brokers correctly as the payees of record with what seemed to it to be an entirely rational and compliant *secondary process* of depositing funds.

At the time of this issue being first discussed with the SEC during the examination, the brand entities were the official payees of record. In response to the examination, the individual brokers became the payees of record. Five months later, the individual brokers were *still* the payees of record[42] exactly as they were when the firm made the change that it told the SEC that it would make.

Further, and more importantly, you will find in the rest of the Decision's analysis that it gives no real consideration to the most important fact: the fact that not one single dollar that was deposited into these brand entities accounts made their way into the hands of anyone other than the intended broker. $0.00!

If this is not the very definition of making a mountain out of a molehill then we don't know what is. We lament—quite incredulously—as we hope the Commission also recognizes, the utter absurdity of the various gatekeepers of FINRA dedicating this level of time and energy over something that could and would have been addressed—simply and without fanfare—in the next cycle examination of the firm.

As we enter the "Discussion" section of the NAC's Decision, we ask that the Commission stop to contemplate the false linkage that the Decision has tried to make between the very disparate events of Chapler's payments to Halim, on the one hand, and the payroll practices of the firm, on the other hand.

We also ask the Commission to take stock of the Decision's analysis and discussion of the three BHP transactions that were confused and confusing in too many ways to count.

The fog of regulatory indulgence here is thick indeed.

[42] *See* RX-30, RX-31, RX-32, RX-33, RX-34, RX-35, and RX-36.

III. Discussion

A. Silver Leaf Paid Transaction-Based Compensation to Nonmembers, in Violation of NASD Rule 2420 and FINRA Rule 2010

As discussed, there was no attempt by Silver Leaf to evade Rule 2420 and there was never any other indications of failures at the firm for the NAC to elevate these events to the level of a violation of Rule 2010 which requires that member firms "observe high standards of commercial honor and just and equitable principles of trade.[43]"

The Decision's reliance on a "catch all" rule like Rule 2010, in the case of the instances before it, is an indulgent stretch and fundamentally unfair to Silver Leaf.

Further, Rule 2420 concerned itself with actual and intended attempts to pay non-brokers which does not exist in the instances considered in the Decision.

Silver Leaf's conduct was transparent, reasonably considered and seeking to adhere to high standards of commercial honor[44] and undertaken with good reason as discussed in the foregoing. The Decision's reliance here on a "catch all" rule is fundamentally inapplicable and unwarranted.

1. Silver Leaf Violated Rule 2420 by Paying Transaction-Based Compensation to SH

As discussed, Silver Leaf did ***not*** pay Halim, ***Chapler paid Halim***.

Further, if there is any basis for Silver Leaf to be held responsible for Chapler's payments to Halim, then a fine should be tied to the *amount impermissibly paid*. Therefore, if impermissible payments amounted to "more than $50,000" to Halim and Silver Leaf received 25% of this amount then a fine should be in the range of $12,500 *at most*.

More fundamentally, Enforcement never established that these fees fell within FINRA's rules and the Decision could not therefore simply make that assumption.

In the light of the *very specific* supervisory procedures detailed above regarding necessary approvals imposed on Chapler and the requirement for pre-clearance by Khan of any payments made to third parties, the Decision lacks any basis for attributing Meehan's "conduct" to the firm. Meehan's *other titles and status* did not and could not modify the firm's procedures such that the Decision could simply pretend that they did not exist; nor could the Decision release Chapler from

[43] *See* https://www.sonnlaw.com/faq/finra/finra-rule-2010/#:~:text=FINRA%20Rule%202010%20is%20perhaps%20the%20single%20most,used%20in%20this%20provision%20is%20intentionally%20broad.%20Essentially%2C for a discussion on the history and applicability of Rule 2010.

[44] Again, nothing was hidden. It was in the books and records of the firm. Silver Leaf expected to discuss its payroll practices with each and every regulator since one of the items of examination is always payroll records.

the conditions imposed on him by the firm which were reasonable and appropriate, and violated by Chapler when he communicated with Meehan *knowing* that he should have been communicating with Khan about his payments to Halim.

FINRA can't have it both ways: It can't complain that Silver Leaf should have specific procedures in some instances (*e.g.*, the three-referenced BHP transactions) and then ignore Silver Leaf's specific procedures in other instances (*e.g.*, Chapler's payments to Halim).

2. Silver Leaf Paid $2.6 Million in Transaction-Based Compensation to the Nonmember Entities

Curiously—and we argue intentionally—absent from the Decision's consideration and analysis is that Enforcement found not one single dollar paid to the brand entities as being received by anyone but the intended broker payees. $0.00! This omission speaks volumes.

More fundamentally, Enforcement never established that these fee payments fell within FINRA's rules, and the Decision could not therefore simply make that assumption.

As patently obvious, when establishing a process, the amount paid can be variable, it could be $2.6MM or $26 dollars; it is the process that matters; and Silver Leaf had a reasonable basis for its payroll *process*. However, if the numbers matter, then Silver Leaf should be fined based on commission payments that were received by someone other than its brokers and that number is $0.00.

Further, the reference to SEC Staff guidance in the Decision is not applicable to the novel process put in place by Silver Leaf. To wit, the firm's payroll records do show *payments* to its individual brokers[45]. The firm believed, and with the reasonable bases therefor, that the depository function could be treated separately. This is not a "federal case" or true instance of misconduct ; it is, at most, a reasonable mistake[46].

3. Silver Leaf's *Morrison*-Based Arguments Fail

Enforcement bears the burden of proof in any enforcement action. Here, it could not even preliminarily meet that burden, but it soldiered on understanding that the scales were tilted in its

[45] *See* RX-30, RX-31, RX-32, RX-33, RX-34, RX-35, and RX-36.

[46] In the firm's thought processes *at the time* was the reality that if it paid commissions to a broker's individual account that there was nothing that would prevent the broker from, after the fact, transferring to the brand entity account and, with this logic, determined that, if the issue was the firm's records about who the payee was, then it didn't matter if Paychex deposited to the brand entity account *if* the brand entity was wholly-owned by the broker and therefore disregarded for most federal and tax purposes anyway. And this is the very definition of intelligent, compliance-focused thinking that FINRA should applaud, instead of seeking to punish on, at best, a technicality.

favor. In so doing, it acted recklessly, negligently, indulgently, and contrary to applicable law; including *Morrison v. National Australia Bank Ltd.,* 561 U.S. 247 (2010).

Notably, FINRA withdrew allegations associated with three of the five referenced payments to Halim due to *Morrison*[47]. It is a tautology to say there can also be no "failure to supervise" allegations made against Silver Leaf with respect to *any payments* if the activity was *not* required to be supervised in the first instance. To argue otherwise is an illogical absurdity—and an impermissible standard under the law.

Morrison—cited over 900 times by federal courts across the nation—was the law of the land in 2012 when applied to the payments under consideration, and that case is still good law today.

> Important, as well, these payments are also governed by *United States SEC v. Benger*, 934 F. Supp. 2d 1008 (N.D. Ill. 2013). Consider the following excerpt from this case:
>
> Section 15(a) is entitled, "**Registration of all persons utilizing exchange facilities to effect transactions; exemptions.**" According to that title the significance to which it is entitled under the SEC's own arguments (*SEC Brief* at 13), leads to the conclusion that the "primary purpose"—to use the SEC's phrase—of Section 15(a)'s registration requirement was to regulate those brokers and dealers utilizing American exchange facilities.
>
> This reading of Section 15(a) is consistent with *Morrison's* holding that the Exchange Act concerns itself not with foreign transactions but with the purchase or sale of any security registered on a national securities exchange. As the Court lambently put it: "[t]hose purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to 'regulate'; it is parties or prospective parties to those transactions that the statute seeks to 'protec[t],' [a]nd it is ... only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies." *Morrison,* 130 S.Ct. at 2884 (citations omitted).

U.S. Sec. & Exch. Comm'n v. Benger, 934 F. Supp. 2d 1008, 1014-15 (N.D. Ill. 2013)

[47] *See* Enforcement's NAC Post-Hearing Brief, top of page three: "…[E]nforcement no longer seeks a finding of liability for these three payments."

Let us step back for a moment and review the logic template put forth by Enforcement in this action. Enforcement claimed that Silver Leaf made impermissible payments, *yet* its Investigator admitted, under oath, that he did ***not*** investigate the underlying facts of the transactions generating *any* of the payments considered in the Decision. Why is this lack of investigation so important? Because *Morrison* and *Benger* make clear that the Securities Exchange Act of 1934 sections 10(b) (anti-fraud provisions) and 15(a) (registration provisions) *only* apply to transactions in securities listed on domestic exchanges and domestic transactions in other securities.

Transactions on foreign exchanges of securities listed on foreign exchanges are beyond the purview of the securities laws of the United States. No person is required to register under section 15(a) to receive any payment, or commission, or bag of corn, or forty acres and a mule, for facilitation or brokering of a foreign transaction. If such persons are not required to register, then they do not have to be supervised.

Enforcement bears the burden of proof. It must prove that the transactions generating the payments to so-called "unregistered" entities involved transactions in securities listed on domestic exchanges or domestic transactions in other securities. Enforcement has *not* met this burden. With the Investigator admitting that there was no investigation associated therewith, how can *anyone* thereafter come to any of the conclusions made in the Decision?

Even more absurdly, Enforcement's NAC Post-Hearing Brief in the middle of page 25 complains about Khan thusly: "At no point did he claim, nor can he credibly, that the representatives in question sold only offshore hedge funds to foreign investors." That. Is. Not. Khan's. Burden!

It is *Enforcment's burden* to prove that *all* payments hereunder considered did not arise from foreign transactions; especially when the *only positive evidence admitted into the record at the hearing* is that the transactions in question *were* foreign in nature and involved foreign stocks listed on foreign exchanges.

In an attempt at a far too belated recovery, Enforcement trots out *Choi v. Tower Research Capital LLC*, 890 F.3d 60 (2d Cir. 2018). Therein, the plaintiffs alleged that defendants Tower Research Capital LLC ("Tower"), a New York based high-frequency trading firm, and its founder, Mark Gorton, injured them and others by engaging in manipulative "spoofing" transactions on the KRX night market in violation of the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 1 et seq.,

and New York law. The district court dismissed the action principally on the ground that the CEA does not apply extraterritorially as would be required for it to reach Defendants' alleged conduct. The 2nd Circuit Court of Appeals, however, concluded that the plaintiffs' allegations made it plausible that the trades at issue were "domestic transactions" and remanded for further proceedings.

A KRX night market trade begins with the placement of a "limit order" on the KRX system in Korea. Within seconds, the trader's order is matched with an anonymous counterparty on CME Globex "using the multiple price a[u]ction method through which successful bidders are required to pay for the allotted quantity of securities at the respect price/yield at which they have bid." Following matching, "settlement of all trades occurs the day after on the KRX." *Choi v. Tower Research Capital LLC*, 890 F.3d 60, 63-64 (2d Cir. 2018).

"Relying on *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010), the district court concluded that application of the CEA to defendants' conduct would be an impermissible extraterritorial application of the act." *Choi v. Tower Research Capital LLC*, 890 F.3d 60, 65 (2d Cir. 2018). The district court reasoned that, under *Morrison*, defendants' alleged conduct was within the territorial reach of the CEA only if the contracts at issue were (i) purchased or sold in the United States or (ii) listed on a domestic exchange. *Id.* at 48. The district court determined that the contracts were not purchased or sold in the United States because the orders needed to "first be placed through the KRX trading system [in Korea]," and because any trades matched on CME Globex in Illinois were final only when settled the following morning in Busan. *Id.* at 49. *Choi v. Tower Research Capital LLC*, 890 F.3d 60, 65 (2d Cir. 2018).

In concluding that *Morrison's* "domestic transactions" test applies to the CEA, the 2nd Circuit adopted a rule established in the §10(b) case of *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012). In *Absolute Activist*, 2nd Circuit concluded that a transaction involving securities is a "domestic transaction" under *Morrison* if "irrevocable liability is incurred or title passes within the United States." 677 F.3d at 67. "[I]rrevocable liability" attaches "when the parties to the transaction are committed to one another," or "in the classic contractual sense, there was a meeting of the minds of the parties." *Id.* at 68 (internal quotation marks omitted); *see also Vacold LLC v. Cerami*, 545 F.3d 114, 121–22 (2d Cir. 2008) (citing *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 890–91 (2d Cir. 1972)). Consequently, plausible allegations that parties to a transaction subject to the CEA incurred irrevocable liability in the United States was

sufficient to overcome a motion to dismiss CEA claims on territoriality grounds. *Choi v. Tower Research Capital LLC*, 890 F.3d 60, 66 (2d Cir. 2018).

The factual situation of *Choi* is vastly different from the business model of Silver Leaf and the transactions underlying the payments here at issue. *Choi* may or may not be the precedent of the land with respect to *Morrison*'s applicability to the CEA and commodity transactions. And *Choi* may or may not be the last word on irrevocable liability being the touchstone of a "domestic transaction" under *Morrison*. Considering the supremacy of the United States Supreme Court to the 2nd Circuit and considering the fact that the former has not ruled on the definition of a "domestic transaction" under *Morrison*, this Commission knows it is highly likely that *Choi* is simply informative at best.

However, let us assume, *arguendo*, that *Choi's* test of irrevocable liability is the standard by which to judge the transactions at issue herein. The case says irrevocable liability attaches "when the parties to the transaction are committed to one another," or, "in the classic contractual sense, there was a meeting of the minds of the parties." *Choi* at 68. If Enforcement had been prepared to address this argument at the hearing then Enforcement would have had to produce a witness from EFH to testify as to the specifics of the Stock Purchase Agreement *and* every other counterparty agreement relating to broker payments it seeks to challenge as impermissible, and establish that a meeting of the minds occurred. Enforcement produced no such evidence despite bearing the burden to do so.

Further, after rummaging through the attic of inapplicable legal arguments, at the bottom of page 23 and the top of page 24 of its NAC Post-Hearing Brief, Enforcement asserts that said Stock Purchase Agreement—and it does not even discuss any other agreements—is not binding upon the parties until the date it is actually signed by the buyer and because the buyer—an assumption only since there is no testimony laying an evidentiary foundation for the authenticity of the Stock Purchase Agreement referenced and it is, as such, nothing but inadmissible hearsay evidence—was located in Indiana—again, an assumption, a conjecture, mere speculation only since there is no evidence or testimony to that effect in the Proceedings.

However, let us assume, *arguendo*, that EFH *is* located in Indiana and the Stock Purchase Agreement was *not* binding upon the parties for purposes of *Choi's* irrevocable liability until it was actually signed by the Buyer. So what? What is Enforcement's point? That the Stock Purchase Agreement was signed in Indiana thereby magically transforming the "foreign

transaction" into a domestic one actionable by Enforcement under *Morrison* (which it didn't even know existed)? Even under *Choi* the burden is Enforcement's to prove that the Stock Purchase Agreement was *actually signed* in Indiana. Enforcement offered ***no evidence or witness(es)*** at the hearing to establish this simple fact. Desperate conjecture and wild speculation have no place in a legitimate enforcement action of FINRA—or a review by the OHO and then the NAC—or a review by this Commission—or a possible review in an actual court of law.

Lastly, the use of *Choi* to support its attempted punishment of Silver Leaf for *any payments* is unconstitutional under Article I, Section 10, Clause 1 of the U.S. Constitution prohibiting *ex post facto* laws. The Constitution prohibits the passage of a law which retroactively punishes citizens for actions which were legal at the time committed. All laws, rules, regulations and even case law has been held to be effective only going forward with incredibly few exceptions. *Morrison* and *Benger* were—and still are today—the law in 2012 when the transactions and payments in question occurred. *Choi* was decided in 2018—many years after the events in question. Enforcement's attempt to use a 2018 legal opinion to justify an enforcement action around conduct occurring well before 2018 is an out of bounds tactic unbecoming of Enforcement the OHO and now, unbelievably, the NAC.

Quite frankly, this tactic shows the taint in the entirety of the proceedings held before FINRA and reveals the organization for what it is: a private corporation circling its wagons at the expense of the membership and—even—the rule of law. Enforcement's attempted use of the 2018 *Choi* case should have been rebuked by the OHO and when not, by the NAC.

For this alone, the Commission should rebuke FINRA and take the same action that a court would take when a complainant so blatantly exploits is prosecutorial *privileges* and wastes the time and resources of parties (*i.e.*, Silver Leaf) and reviewers (*i.e.*, the Commission) alike: Declare an outright dismissal.

B. Silver Leaf Failed to Reasonably Supervise Its Business In Violation of NASD Rule 3010 and FINRA Rules 3110 and 2010

The Decision is absolutely correct: A firm should supervise the business activities in which it engages. The corollary of this is that a firm does not need to supervise business that it does not engage in nor does it have to have procedures for business that it does not engage in.

The firm had an introductory business that intentionally avoided transaction participation *unless is separately and subsequently agreed to provide additional services*[48]. With regard to BHP, Silver Leaf contracted to do no more than "[introduce] to BHP prospective borrowers suitable for BHP's collateralized stock loan and block purchase business as an independent agent of [BHP]". With regard to anyone else, Silver Leaf did not offer to them any services whatsoever; except in the case of the escrow services which had no issues whatsoever.

With regard to the Decision's referenced "L-Co. Stock Loan," no complaint was filed against Silver Leaf (or BHP) and the purportedly aggrieved party proceeded to do business with BHP.

With regard to the Decision's referenced "Subsidiary Co. Stock Loan," no complaint was filed against Silver Leaf (or BHP) and the issues related thereto were caused by L-Co. and not BHP.

With regard to the Decision's referenced "GAMA Block Trade," Silver Leaf *and* Pershing *rejected* getting involved in the trade. Therefore, its supervisory systems which, in any case, related to its Institutional Brokerage business and not FINRA's invented "stock loan and block trade business" was therefore never tested or implicated *at all*.

More fundamentally, the *only party* that Silver Leaf had a duty to was BHP who lodged no complaints against Silver Leaf.

The Decision claims that there were "red flags *suggesting* that misconduct *may be* occurring." Your eyes and your mind do not deceive you. You read that correctly. That was in a Decision issued by the National Adjudicatory Council of the Financial Industry Regulatory Authority.

Hidden behind these "*may be" red flags* are these facts: No one filed a complaint against Silver Leaf outside of the BTIG Arbitration whose events were never tested in order to establish that Silver Leaf did anything wrong.

The liberties taken by FINRA in this case are disappointing and astounding!

1. Silver Leaf Failed to Supervise Its Corporate Advisory Business

As discussed earlier, the only participants in a block loan are the borrower and lender, and Silver Leaf had no obligations to either side of such a bilateral transaction.

[48] For example, the escrow services discussed by the Decision and provided by the firm was pursuant to a separate and additional agreement for services.

As discussed earlier, Silver Leaf *considered* doing the GAMA Bock Trade transaction but did not do it and therefore, having done nothing, could not be deficient in supervising nothing.

We will not go over again how the Decision wildly takes testimony out of context and applies generalities in lieu of specifics other than to state that it latches on to generalities because it has no specifics to point to about Silver Leaf's role in stock loans and block trades.

2. Silver Leaf Failed to Supervise Its Payment of Transaction-Based Compensation to Nonmember Brokers

For the first time, the Decision declares—entirely out of the blue and with no evidence—that "Khan knew the firm was paying transaction-based compensation to SH and took no action to stop it." There exists no evidence for this unsubstantiated declaration. After itself discussing in detail that only Meehan knew about the payments made by Chapler to Halim[49], now the Decision states an unsubstantiated falsity.

C. Silver Leaf's Other Arguments Fail

1. Adequacy of Enforcement's Investigation

FINRA's Investigator was "on the job" for less than 30 days, never ran an investigation before, did not have supervisory licenses, and did not notify Silver Leaf about the expanded scope of his investigation. These are facts that have not been impeached.

2. Hearing Panelists' Qualifications

FINRA's Industry Panelists supervised retail wealth management, financial planning and retirement services business focused on opening client accounts and managing investments therefor. Enough said.

3. Hearing Officer Bias

We shall let the record of the Proceedings speak for itself and leave it to the Commission to wonder how, with such a broken factual record and procedural deficiencies[50], the NAC can deign to pretend that their review could qualify in anyway as *de novo*.

IV. Sanctions

In light of the foregoing the sanctions are excessive, burdensome, and inappropriate in all regards.

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[49] Distinguish this from Khan knowing about the escrow payment as it was permissible; *see* pages 16 & 17 of this brief for a discussion on this point. We think that, like it's FINRA colleagues, the NAC is confused or, at least, we hope that is the case.

[50] *See* page 2, paragraph (f), of this Brief.

A. Principal Considerations in Determining Sanctions for Violations

Enforcement did not demonstrate any "patent" misconduct.

Silver Leaf has processed thousands of payments and only had issues with payments made by one broker to his then future, and now current, business partner.

Silver Leaf established a *new payroll* process that it deemed compliant and reasonable after due care and consideration. Even if technically not compliant, $0.00 were impermissibly paid.

Enforcement demonstrated no failures by Silver Leaf with regard to the three considered BHP Transactions and we note, because it gets no attention in the Proceedings or the Decision, that the firm was engaged in many more business activities that Enforcement did not and could not complain of. The totality of Silver Leaf's business was never *reasonably* considered.

Here are the meager instances on which FINRA declares "patent misconduct": Business related to *one* broker and *one* client, and a reasonable change to the firm's payroll practice. The Decision, therefore, is properly describable as patently absurd.

B. Payment of Transaction-Based Compensation to Nonmembers

The Guidelines applied by the Decision, for the reasons discussed in the foregoing, do not apply to the novel and peculiar instance of Silver Leaf's payroll process that reflected each broker as the individual payee especially in light of the fact that only the individual brokers ultimately received the money.

C. Silver Leaf's Supervisory Violations

Business related to *one* broker and *one* client and a reasonable change to the firm's payroll practice are, on their face, not evidence of "systematic supervisory failures." As a result, the Guidelines utilized in the Decision are wrong and excessive, and should be disregarded.

V. Silver Leaf's Financial Inability to Pay

The Decision here adopts curious logic. Referencing the Guidelines *requirements* which state that the "[a]djudicators are ***required*** to consider a respondent's bona fide ability to pay when imposing a fine or ordering restitution,", it then immediately shifts the burden to Silver Leaf and even increases the bar by stating that "[t]he respondent bears a high burden of demonstrating an inability to pay". [Emphasis added] The Guidelines clearly state that the burden to consider is on the NAC but the Decision "flips the script" and shifts the burden to Silver Leaf. This one-sided pattern review is glaring throughout the Decision.

VI. Conclusion

Enforcement, the OHO and the NAC claim supervisory failures by Silver Leaf but their own failures in the investigation, the Proceedings and the Decision are simply astounding.

To summarize:

1. Enforcement's Investigator had no supervisory level experience;

2. Enforcement's Investigator had no investigatory experience;

3. Enforcement and its Investigator did not notify Silver Leaf of the nature and the scope of the examination having expanded beyond the BTIG Arbitration;

4. Enforcement and its Investigator did not establish FINRA jurisdiction over any of the payments involved in the Proceedings;

5. Enforcement and its Investigator never spoke to, or sought to speak to, BTIG about Silver Leaf's role in the GAMA trade;

6. Enforcement and its Investigator never spoke to, or sought to speak to, BHP about Silver Leaf's role in any of the transactions referenced in the Decision;

7. Enforcement and its Investigator never spoke to, or sought to speak to, Floyd Associates about Silver Leaf's role in the GAMA trade;

8. Enforcement and its Investigator never spoke to, or sought to speak to Halim about his relationship with Silver Leaf or about any of the transactions referenced in the Decision;

9. Enforcement and its Investigator never spoke to, or sought to speak to, the SEC about its regulatory examination of Silver Leaf and discussions relating to its broker payment practices;

10. Enforcement and its Investigator never spoke to, or sought to speak to, any of Silver Leaf's brokers about events associated with payments to them;

11. Enforcement and its Investigator never spoke to, or sought to speak to, NFA examiners who were contemporaneously examining the firm during the time period of the investigation;

12. Enforcement and its Investigator never spoke to, or sought to speak to, other FINRA examiners who were contemporaneously examining the firm during the time period of the investigation;

13. Enforcement and its Investigator never spoke to, or sought to speak to, Transaction #1 Contact;

14. Enforcement and its Investigator never spoke to, or sought to speak to, BHP's counterparties in any of the aforementioned transactions with BHP;

15. Enforcement and its Investigator never spoke to, or sought to speak to, the Turkish Capital Markets Board about events associated with Transaction #2;

16. Enforcement[51] chose to accept its Investigator's *unqualified* narrative about the perceived meaning of proffered facts, motives, and intent of various parties without seeking *readily available* independent verification or corroboration of Enforcement's *assumptions* with any of the parties indicated above.

17. The NAC and the OHO chose to accept Enforcement's *uncorroborated* narrative about the proffered facts, motives, and intent of various parties without any independent verification or corroboration of much of Enforcement's *assumptions*.

18. Fundamentally, FINRA, *in toto*, created and nurtured an unfair and unbalanced adjudicatory process.

In summary and in truth, these Proceedings were not really about Silver Leaf. They were about (i) a newly-minted Investigator seeking to impress his new bosses, (ii) an Enforcement department needing "wins", (iii) an OHO panel going along to get along, and (iv) an overseer (*i.e.*, the NAC) left with the tough choice of supporting fairness or supporting the home team; the NAC chose the latter and its Decision is clear evidence of this fact.

We submit to the Commission that these Proceedings were really about FINRA, and FINRA should therefore bear the costs hereof and thereof.

We submit to the Commission that FINRA did not *evidence* any actual misconduct or rules violations of any material effect, note, or import by Silver Leaf, and the Decision should therefore be set aside in its entirety.

We conclude with our prayer that the Commission will not feel trapped into choosing sides and see these Proceedings for what they are: Trumped-up.

[51] And, ultimately, the OHO and the NAC did as well.

Dated: September 29, 2020

Respectfully submitted,

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UNITED STATES OF AMERICA
before the
SECURITIES and EXCHANGE COMMISSION

September 29, 2020

SECURITIES EXCHANGE ACT OF 1934

ADMINISTRATIVE PROCEEDING
File No. 3-19896

In the Matter of the Application of SILVER LEAF PARTNERS, LLC For the Review of Disciplinary Action Taken by the Financial Industry Regulatory Authority, Inc.	Rule 452 Certificate of Compliance

Pursuant to Rule 450(d) of the Rules of Practice and Rules on Fair Fund and Disgorgements Plans of the Securities and Exchange Commission, Silver Leaf Partners, LLC hereby issues this certificate of compliance, and states that the word count of its opening brief is 14,000 words.

Dated: September 29, 2020

Respectfully submitted,

_____

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Certificate of Service

I am at least 18 years of age and, pursuant to SEC rules, I have served a copy of the "Opening Brief" by electronic mail delivery to the SEC's Office of the Secretary and FINRA's Office of General Counsel on September 29, 2020 at the electronic mail addresses indicated below:

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