UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

ADMINISTRATIVE PROCEEDING
File No. 3-20387

In the Matter of the Application of

TITAN SECURITIES AND BRAD C. BROOKS

For Review of Disciplinary Action Taken by

FINRA

OPENING BRIEF OF APPLICANTS TITAN SECURITIES AND BRAD C. BROOKS IN SUPPORT OF APPLICATION FOR REVIEW

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Applicants Titan Securities ("Titan") and Brad C. Brooks ("Brooks") respectfully submit this Opening Brief in Support of their Application for Review. Specifically, Applicants seek review of a decision of the National Adjudicatory Council ("NAC") of FINRA dated June 2, 2021.

I. INTRODUCTION

The NAC Decision on review in this proceeding involves three sets of erroneous findings against Titan and Brooks – all of which should now be set aside.

First, the NAC found that Titan and Brooks failed to supervise a registered representative's "outside business activity" ("OBA"), in violation of NASD and FINRA rules. A majority of the FINRA Hearing Panel, however, had earlier correctly found that the representative's actions did not amount to an OBA because the representative was not employed or compensated by the outside entity – and thus Titan and Brooks had no duty to supervise the representative's actions. Accordingly, the Hearing Panel majority dismissed the cause of action. The NAC's subsequent reversal on this issue was erroneous – the NAC failed to properly apply applicable law, and the finding is not supported by the record. For these reasons, the NAC finding should be set aside.

Second, the NAC found that Titan failed to preserve certain emails (from personal email accounts) relating to its securities business, in willful violation of Exchange Act Section 17(a) and Rule 17a-4 thereunder. A majority of the Hearing Panel, however, had earlier correctly found that Titan's violation was not willful. The NAC's subsequent reversal on this issue was erroneous – the NAC failed to properly apply applicable law, and the finding is not supported by the record. The NAC finding on this point, too, should be set aside.

Third, the NAC found that Titan and Brooks made prohibited false and misleading statements relating to a minimum contingency offering, in willful violation of Exchange Act Section 10(b), Rule 10b-9 thereunder, and FINRA Rule 2010. A majority of the Hearing Panel, however, had earlier correctly found that Titan and Brooks did not act with requisite scienter, and accordingly dismissed this portion of the cause of action. Separately, the NAC found that Titan released escrow funds before the minimum amount was raised in the minimum contingency offering, in willful violation of Exchange Act Section 15(c), Rule 15c2-4 thereunder, and FINRA Rule 2010. A majority of the

Hearing Panel, however, had earlier correctly found that Titan's violation was not willful. The NAC's subsequent reversals on these two issues were erroneous – the NAC failed to properly apply applicable law, and the findings are not supported by the record. The NAC findings on these two points should be set aside as well.

In addition to these substantial reversals and momentous findings, the NAC also significantly increased the severity of the sanctions imposed.

As to the OBA supervision claim, a majority of the Hearing Panel had dismissed the claim. Following reversal on this claim, the NAC imposed a fine of $50,000 on Titan and Brooks, jointly and severally, and suspended Brooks in all principal and supervisory capacities for one year.

As to the personal email-related claims, the Hearing Panel imposed a fine of $50,000 on Titan and Brooks, jointly and severally, and suspended Brooks in all principal and supervisory capacities for two months (for separate supervisory violations not at issue on this Application). Following the NAC's reversal on the willfulness issue relating to the email preservation claim, Titan is now also subject to statutory disqualification.

As to the minimum contingency offering claims, a majority of the Hearing Panel imposed a fine of $15,000 on Titan for its (non-willful) violation of Section 15(c), Rule 15c2-4 and Rule 2010. Following reversals on the claims, the NAC imposed a fine of $50,000 on Titan and Brooks, jointly and severally, suspended Brooks in all principal and supervisory capacities for one year (to run consecutively with his other principal suspension), and ordered Brooks to requalify as a principal by reexamination. Following the NAC's reversals on the willfulness issue, Titan and Brooks are now also subject to statutory disqualification on these claims.

Aside from the findings, Titan and Brooks also take exception to the sanctions imposed by the NAC. To the extent that any of the challenged findings are affirmed and not set aside, then Titan and Brooks seek reduction or elimination of related sanctions, which are unwarranted and excessive.

Titan and Brooks do not deserve the extremely harsh treatment as meted out by the NAC. Titan is a well-respected smaller firm, serving a base of loyal clients who had no complaints about the activity at issue here and suffered no injury or harm from the conduct of Titan or Brooks. Brooks

is a seasoned veteran securities industry professional who always tried to do the right thing in connection with the matters at issue. On the OBA supervision issue, he discovered the indications that the representative might be engaged in an OBA, demanded a written explanation, and then made an informed and reasoned determination that the actions did not amount to an OBA. On the personal email issue, he consistently directed representatives not to use personal accounts, he directed the outside email manager to capture personal email if necessary, and he hired a full-time CCO and tasked her with the immediate capture or elimination of personal accounts. And on the minimum contingency offering issue, he promptly turned to experienced counsel for advice when he saw there were discrepancies in the offering documents as to whether the General Partner could purchase shares to be counted toward the minimum amount. In every setting, he was doing the right thing.

By overturning the various findings of the Hearing Panel majority, the NAC essentially sabotaged the judgment of the two securities industry professionals who served on the Hearing Panel. Along with the Hearing Officer, these panelists were the only ones "in the room" during the seven-day hearing – and they made several critical credibility assessments, including as to the sincerity of Brooks' efforts to stop the use of personal email accounts, and the sincerity of his belief that a General Partner could purchase units to be counted toward a minimum offering amount. The Hearing Officer was apparently unable to convince the panelists to find certain violations, but through a dissenting opinion, provided a roadmap for the NAC to arrive at that end result. And with that, the presence and perspective of the industry panelists was effectively nullified.

Regardless of the process, the NAC Decision in this case contains numerous substantial errors that now need to corrected, as suggested by the wild swing in terms of liabilities and sanctions from the Hearing Panel Decision to the NAC Decision, and as discussed in more detail below. This is certainly not the only recent case to raise such issues of error.[1] But whether this case is an anomaly or part of a pattern, it case cries out for careful reconsideration by the Commission, in exercise of its proper oversight of the SRO adjudicatory process.

[1] *See, e.g.*, *Scottsdale Capital Advisors Corp.*, Exchange Act Release No. 93052, 2021 WL 4242630 (Sept. 17, 2021) and *David B. Tysk*, Exchange Act Release No. 91268, 2021 WL 842612 (Mar. 5, 2021).

II. BACKGROUND – STATEMENT OF RELEVANT FACTS[2]

A. The Applicants Titan and Brooks

Titan is a registered broker-dealer – a full service brokerage firm – based in Addison, Texas, and has been a member of FINRA since 2004.[3] In the period from 2009 through 2013, roughly overlapping with the relevant period in this case, Titan grew from eight to around twenty-four registered representatives.[4]

Brooks is Titan's owner, Chief Executive Officer, and President, and, until approximately December 2012, also served as Titan's Chief Compliance Officer.[5] Brooks entered the securities industry in November, 1986, when he associated with a member firm and registered with FINRA.[6] Accordingly, at the time of the hearing in this matter in April, 2018, Brooks had over 31 years of experience in the securities industry. During his career in the securities industry, Brooks has obtained the Series 3, 4, 7, 8, 24, 53, and 65 securities licenses, and he was associated with three other larger member firms (Shearson Lehman, Bear Sterns, and Wachovia) before founding Titan.[7]

B. Richard Demetriou's Actions Relating to RBCP[8]

During the relevant period, Richard Wayne Demetriou ("Demetriou") was employed by Titan as a registered representative.[9] Specifically, Demetriou became employed by and associated with

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[2] The FINRA Complaint and the related decisions of the Hearing Panel and the NAC (and thus the overall record on review) involve multiple claims relating to three separate sets of facts, and accordingly the statement of facts set forth here is necessarily presented in abbreviated form and not in full detail, in light of the brief length limitations stated in Rule 450(c).

[3] Record ("R.") 1779 (Stip. ¶ 1).

[4] R. 1779, 2775-76 (Stip. ¶ 1; Tr. 851-52).

[5] R. 1780 (Stip. ¶ 4). In September, 2012, Brooks hired a full time CCO, who formally took over the position in December, 2012, after passing the requisite examinations. R. 2775 (Tr. 851).

[6] R. 1780 (Stip. ¶ 3).

[7] *Id.*

[8] Many of these facts relating to Demetriou are relevant only as to the claims against Demetriou and not as to the claims against Titan and Brooks – except as background to the OBA determination issue. Nonetheless, these facts are presented here in the interests of context and full disclosure.

[9] R. 1780 (Stip. ¶ 6). Demetriou entered the securities industry in 1976, when he obtained a Series 1 securities license and associated with a FINRA member firm. Accordingly, at the time of the hearing in this matter in April, 2018, Demetriou had over 41 years of experience in the securities industry. During his long career in the securities industry, Demetriou obtained the Series 1, 7, 24, 27, 63, and 65 securities licenses, and he was associated with seven other FINRA member firms before

Titan in April, 2009.[10] During his time with Titan, Demetriou worked out of his home in North Carolina.[11] During the relevant period, Brooks served as Demetriou's direct supervisor.[12]

Prior to becoming employed by Titan, Demetriou was associated with Private Consulting Group, Inc. ("PCG") from 2001 to 2009. While at PCG, Demetriou sold to his customers interests in certain real estate limited partnerships sponsored by PCG. Following the 2008 real estate market crash, the partnerships performed poorly or failed, and PCG later went out of business in March 2009. After joining Titan one month later, in April, 2009, Demetriou continued to act as the customers' financial advisor, and four of the customers became Titan customers.[13]

In mid-2010, Robert Keys ("Keys"), the former Chief Executive Officer of PCG, reached out to Demetriou by telephone and asked Demetriou to provide contact information for his former customers from PCG. Keys explained that he and his business partner "BP" had formed a new entity, RBCP Preferred, LLC ("RBCP"), which they created for the purpose of paying the start-up costs of another entity ("RBC Acquisitions") that was planning to develop the "Riverbend" mixed-use real estate project it owned. Specifically, RBCP would provide short-term capital to pay for fees and taxes until RBC Acquisitions could obtain a larger construction loan. To raise the short-term capital that RBC Acquisitions needed, Keys and BP proposed that RBCP would make a private placement of preferred securities. Keys also induced Demetriou to serve as a managing member of RBCP by saying that, in such a position, and on behalf of any customers who invested, Demetriou could "monitor" Key's activities. Demetriou did as much "checking around" as he could, and ultimately decided to bring RBCP to the attention of his customers.[14] He later sent three emails to his customers, and arranged two conference calls, related to RBCP.

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associating with Titan. R. 1780, 1968-69 (Stip. ¶ 6; Tr. 44-45). Demetriou was a Respondent in the FINRA case, but is not a party to this Application before the Commission.

10 R. 1780, 1977 (Stip. ¶ 6, Tr. 53). Demetriou testified that he joined Titan because he and Brooks "shared common goals, common faith, you know, common commitment to helping our clients as much as we can." R. 1977 (Tr. 53).

11 R. 1780, 2021-23 (Stip. ¶¶ 5-6, Tr. 97-99) Demetriou's home was located in Highlands, North Carolina, not in Georgia as noted in the NAC Decision (R. 6423, NAC Dec. at 4), though Demetriou did have an assistant who worked out of an office in Tucker, Georgia. R. 2021-23 (Tr. 97-99).

12 R. 1780, 2021-23 (Stip. ¶¶ 5-6, Tr. 97-99).

13 *See* R. 6000-01 (Hearing Panel Dec. at 6-7).

14 *See* R. 6001-02 (Hearing Panel Dec. at 7-8).

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On July 6, 2010, Demetriou sent his first email about RBCP to 36 of his current and former customers who had invested in PCG-sponsored real estate partnerships.[15] The email consisted of information that Keys had provided to Demetriou, including an attached letter from Keys – and Demetriou expected that Keys would be presenting the same information directly to the customers in a conference call with Keys and BP to be held two days later.[16]

The July 6 email described the Riverbend project and the structure and terms of the RBCP offering. The email stated that Keys felt a "personal obligation" to the customers in light of the prior losses on PCG-sponsored investments, and that Keys had "set aside" $25 million in the RBC Acquisitions investment to go to the customers. Accordingly, the email stated that the minimum investment in RBCP would be 1.5 to 4.5 percent of the amount the customers had lost on the PCG-sponsored partnerships, in exchange for preferred stock in RBC Acquisitions with a face amount equivalent to the amount of the loss. The email also relayed that RBC Acquisitions had arranged for "numismatic" (rare) coins to be posted as collateral. The email noted that the proposed return would be a "great return" and that RBCP seemed to be the best route to return the investments lost in the PCG partnerships. The email closed by noting that Demetriou would be on the conference call with Keys and BP, and attached a Riverbed investment summary written by BP.[17]

On July 8, 2010, the referenced conference call took place, during which Keys and BP solicited the customers to invest in RBCP. Demetriou had organized the call, and was on the call, but Keys and BP made the presentation.[18]

On July 21, 2010, Demetriou sent a second email about RBCP to the same current and former customers. Among other things, this email noted that the minimum investment amount had increased from 1.5 percent to 5 percent of the customers' loss in the PCG-sponsored partnerships. In addition, Demetriou stated – for the first and only time – that he was serving as a managing member of RBCP, and he further stated that as such he would be able to call for the sale of the rare coins on behalf of

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15 R. 1781, 3845-48 (Stip. ¶ 8; CX-9).
16 R. 2207-13, 2225 (Tr. 283-89, 301).
17 R. 3845-46, 2218-19 (CX-9 at 1-2; Tr. 294-95).
18 R. 1780, 2164-65 (Stip. ¶ 7; Tr. 240-41).

the customers if the Riverbend construction did not go forward. The email also attached a Safekeeping Receipt showing that the coins had been appraised at $3,076,351.[19]

In August, 2010, Demetriou received a draft copy of the RBCP private placement memorandum ("PPM") and was surprised to see his name "all over it" – and concluded that Keys had tricked him into becoming a managing member of RBCP. Demetriou also noted that he was listed as managing member in the state filing to open RBCP, though he had "never signed anything." After reading the draft PPM, Demetriou was concerned that Keys had written the PPM in a way that was not right, and he told Keys to get him out of it, and then immediately resigned as managing member of RBCP. At that time, Demetriou had apparently been managing member for just four weeks. After his resignation, Demetriou sought to distance himself further from RBCP and Keys.[20]

On August 24, 2010, RBCP issued its PPM in final form, with Demetriou removed as managing member. Among other things, the PPM stated that RBC Acquisitions would be prohibited from making distributions to its other members until the preferred interests were redeemed in full.[21]

On September 9, 2010, Demetriou sent a third email about RBCP to the same current and former customers. This email was sent one day before a conference call scheduled so that Keys and BP could discuss RBCP with the customers, and it included the call access information. The email stated at the outset that Demetriou was "not offering this as a securities representative" and that the offering paid "no commissions." Among other things, the email also noted, as stated in the PPM, that the first $25 million in profit in RBC Acquisitions would be paid to the customers (including preferred and cumulative dividends) before the owners of RBC Acquisitions received any proceeds. The email also stated that, from what he had seen in the securities business, this was "unprecedented in a good way." In addition, the email repeated that the customers' recourse would be to the rare coins as collateral – and further stated that Demetriou had spoken with the appraiser of the coins, and that the valuations seemed to be solid. The email further noted that Keys and BP themselves would explain the offering during the upcoming conference call, as well as the progress to date in securing

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19 R. 1781, 3849-50, 5795-96, 2498 (Stip. ¶ 8; CX-10 at 1-2; JX-2; Tr. 574).

20 R. 5658, 2178-79, 2189-91, 2289-90, 2350, 2675-76 (RX-2 at 2; Tr. 254-55, 265-67, 365-66, 426, 751-52).

21 R. 5737-38 (RX-4 at 23-24).

the underlying financing for the Riverbend project. The email closed with Demetriou stating "[w]hile I cannot present [RBCP] as an investment, I can search, dig, and scratch to find out if it may be a good offer to you," and that RBCP seemed like the "best chance" of returning the customers' money plus a profit. The email then noted Demetriou would also be on the conference call the next day.[22]

On September 10, 2010, the second conference call took place, during which Keys and BP again solicited the customers to invest in RBCP. Again, Demetriou organized the call, and was on the call, but Keys and BP made the presentation. At the outset of the call, Demetriou asked Keys and BP to explain the RBCP offering – and Demetriou also noted that he was "not offering [RBCP] as an investment as a securities representative." BP then described the Riverbend mixed-use development project and its progress (including completed zoning approvals, expected letter of intent for licensing for "anchor" entertainment center, etc.). Keys followed by summarizing and discussing the terms of the offering, including that the aggregate face amount of the RBCP preferred stock was $25 million, and that it was being offered first to former PCG customers who had invested in the PCG-sponsored partnerships. Keys also stated that the collection of coins had been put up as collateral. In addition, Keys stated that brokers were working to secure financing for the Riverbend project, and that two lenders had already indicated that they wanted to make $70 million loans to RBC Acquisitions and were conducting due diligence at that time. In response to a customer question regarding the "worst case scenario," Keys stated that if RBC Acquisitions was not able to secure financing for the project, then RBCP would liquidate the coins and return the investment funds to the customers.[23]

C. Brooks Learns of Demetriou's Actions Relating to RBCP and Determines That Demetriou Is Not Engaged in an Outside Business Activity

In October 2010 (after Demetriou had already resigned as a managing member of RBCP and had already sent his third customer email), Brooks conducted a periodic supervisory review of Demetriou's emails and identified indications that Demetriou was possibly engaged in an undisclosed

[22] R. 1781, 3851-52 (Stip. ¶ 8; CX-12).
[23] R. 1780, 5597-5602, 5606 (Stip. ¶ 7; CX-128 at 1-6, 10).

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OBA relating to RBCP. Brooks promptly directed Demetriou to provide a written explanation of his actions relating to RBCP.[24]

On October 13, 2010, Demetriou submitted his written explanation to Brooks. Demetriou first noted that RBCP was being offered by BP, an accomplished developer. Demetriou then stated that the purpose of RBCP seemed to be two-fold: first, to raise a "relatively small amount of cash" to pay fees needed for the Riverbend project; and, second, to provide a "very high return" to PCG customers who had lost money in PCG-sponsored investments. Demetriou further noted that, because of the relationship between BP and Keys, there was an agreement that the first $25 million in profits would go to the former PCG customers. Demetriou also described the return of investment ($50,000 for every $5,000 invested), noted that rare coins had been placed as collateral, and stated that the full return (including cumulative preferred dividend) would have to be paid before the owners would receive any profits on the development.[25] Finally, Demetriou stated that he was not presenting RBCP as an offering and was not getting paid for it, but was trying to understand it to be able to discuss it with his customers. Specifically, Demetriou wrote:

> Rick Demetriou is not presenting this investment as an offering. There are no commissions being paid for the [RBCP] investment. Rick Demetriou is merely trying to understand the investment and be able to discuss it with his clients. In all conversations, it is made clear that [BP] is the individual who is making the offer.[26]

After reading Demetriou's written explanation and speaking with Demetriou, Brooks made a determination that Demetriou's actions relating to RBCP were not an OBA.[27] *Brooks believed that Demetriou was facilitating contact between his customers and Keys in an effort to recover the customers' lost investment funds, but that because Demetriou was not employed by RBCP, and was not receiving compensation from RBCP, Demetriou's actions relating to RBCP did not constitute an OBA.*[28] Accordingly, Brooks responded to Demetriou's written explanation with a reply email later

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[24] R. 1781, 2339, 2900-03 (Stip. ¶ 9; Tr. 415, 975-78).
[25] R. 3803, 2342-4 (CX-6; Tr. 418-20). *See also* R. 2400 (Tr. 476) ("Phillips I knew from a - - a previous time to be an accomplished person.").
[26] R. 3803, 2906, 2919-20, 2924 (CX-6; Tr. 981, 994-95, 999).
[27] R. 2901, 2955, 3104 (Tr. 976, 1030, 1179).
[28] R. 2941 (Tr. 1016).

that same day, stating "Thanks, just be sure to let them know that Titan is not involved."[29] Because he made a determination that RBCP was not an OBA, Brooks did not require Demetriou to submit an OBA disclosure form, and did not engage in supervision of Demetriou's actions relating to RBCP.[30]

D. The RBCP Private Placement Closes and RBCP Subsequently Defaults

In late October, 2010, on or around October 28, 2010, the RBCP offering closed.[31] Apparently, twenty-eight of Demetriou's customers purchased RBCP units for a total cash investment of approximately $338,200.[32]

In December, 2010, BP informed Demetriou that RBC Acquisitions had received a commitment letter for a multi-million dollar construction loan for the Riverbend project.[33] Ultimately, however, the loan was not obtained – and with no loan, RBCP did not return the investment funds by a February 1, 2011 deadline, and thereby defaulted.[34]

On a conference call one week later, Keys and BP stated that they were beginning to foreclose on the rare coins, and that they had started a 90-day cure process to that end.[35] In addition, RBCP's attorney informed Demetriou that RBCP had issued a notice of default and formally demanded to be

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29 R. 3805, 2904 (CX-7 at 1; Tr. 979).

30 R. 1781, 2356-57, 2841, 2955 (Stip. ¶¶ 11-12; Tr. 432-33, 917, 1030).

31 R. 5793-94, 2404-05 (JX-1; Tr. 481-82). Both the Hearing Panel Decision and the NAC Decision state that the RBCP offering sold a total of 500 preferred membership units at a price of $5,000 per unit, raising a total of $2.5 million – *i.e.*, the maximum amount contemplated in the RBCP PPM. R. 6011, 6431 (Hearing Panel Dec. at 17; NAC Dec. at 12). The only record document cited for this proposition is RX-4 (at 1). *See* R. 6011 (Hearing Panel Dec. at 17, n.145). Exhibit RX-4, however, provides no support or authority for such an assertion as to the total RBCP capital raise. In fact, RX-4 is apparently simply a set of the subscription documents of one customer (RW). The assertion as to the total capital raise is also significantly inconsistent with the JX-1 exhibit, which shows a total cash raise of only $378,550. R. 5793-94. *See also* R. 3282 (Tr. 1357) (noting that JX-1 includes four RBCP investors who were not Demetriou's customers).

32 R. 5593-94, 2403, 3281-83 (CX-126A; Tr. 479, 1356-58). Both the Hearing Panel Decision and the NAC Decision state that twenty-eight of Demetriou's customers purchased RBCP units for a total of $337,700. R. 6011-13, 6431-32 (Hearing Panel Dec. at 17-19; NAC Dec. at 12-13).

33 R. 3867, 2367 (CX-20 at 1; Tr. 443).

34 R. 2258, 2296-97, 2374, 2456 (Tr. 334, 372-73, 450, 532).

35 R. 3857 (CX-16).

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put in possession of the coins.[36] Ultimately, however, RBCP was not able to obtain possession and sell the coins – and Demetriou's customers ended up losing their investments in RBCP.[37]

E. Demetriou and Other Titan Registered Representatives Use Unapproved Personal Email Accounts for Business or Firm Communications

Titan's Written Supervisory Procedures ("WSPs") prohibited the use of personal email accounts for securities related business unless the registered representative obtained written supervisory approval – and the supervisor would not give approval unless Titan could capture emails from the personal account.[38] The WSPs further provided that "[t]o the extent a personal email account is permitted, all emails must be copied to the associated person's Company e-mail address and will be subject to the review standards of all other electronic correspondence.[39] For most of the time period of the Complaint (until December 2012), Brooks was responsible for reviewing registered representatives' email correspondence – and he understood that he was required to take action if he saw an unapproved personal account being used.[40]

Between July 2010 and July 2013, Demetriou used two personal email accounts to conduct securities business with Titan customers.[41] Demetriou used these accounts without obtaining approval, and accordingly Titan did not capture, review, or maintain emails from these accounts.[42] Titan was not aware that Demetriou was using the personal email accounts for Titan business.[43]

Between April 2011 and April 2013, five other Titan registered representatives used outside email accounts for securities related business without obtaining firm approval.[44] During this time, Titan's third-party email service provider did not capture all communications to and from these personal email accounts, and thus the firm did not review or maintain all emails to and from these personal email accounts. However, it appears at least that "internal" emails between these accounts

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36 R. 3859 (CX-17).
37 R. 5593-94, 2403, 3282-83 (CX-126A; Tr. 479, 1357-58).
38 R. 1782, 5261, 4840, 2848-49, 2861 (Stip. ¶ 15; CX-111 at 53; CX-113 at 53; Tr. 924-25, 937).
39 R. 1782 (Stip. ¶ 15).
40 R. 3039 (Tr. 1114).
41 R. 1782 (Stip. ¶ 16).
42 R. 1782 (Stip. ¶ 16).
43 R. 3037 (Tr. 1112).
44 R. 1782 (Stip. ¶ 17).

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and the firm (*i.e.*, from, to, or copied to "@titansecurities.com" accounts) *were in fact captured and maintained by the firm – and were later produced to FINRA in response to investigative requests*.[45] During the relevant period, Brooks apparently received approximately 126 of such "internal" emails from those personal email accounts.[46] There is no evidence of the existence of any "business" emails from the personal email accounts other than the "internal" emails captured by the firm.

Brooks did not allow Titan registered representatives to use unapproved email addresses to communicate regarding Titan business – and Titan "never allowed anybody to use anything except captured emails."[47] If Brooks saw an unapproved outside email account being used for Titan business, he would direct the registered representative to stop using that account.[48] And if the representative continued using the personal email account, then Brooks would instruct Titan's outside email manager to capture that account.[49] In late 2012, Brooks became aware that there was some use of personal email accounts, and he took steps to have the accounts immediately captured or eliminated – including by hiring a full-time CCO and making one of her "immediate job tasks" to stop any use of personal email accounts and to make sure that it was "all cleaned up."[50]

F. Titan Participates in the Evolution II "Minimum Offering" Private Placement

In October 2012, Titan participated as a managing broker-dealer in a "minimum-maximum" ("contingency") offering of units by Evolution Partners II, LTD ("Evolution II"), a limited partnership formed to acquire units in another partnership formed to purchase a business center property.[51] The general partner of Evolution II was Evolution II GP, LLC ("General Partner").[52]

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45 *See* R. 5465-5500 (CX-119); *see also* R. 3340-44 (Tr. 1415-19) (noting that CX-119 shows emails "from and to titansecurities.com and truesdell.net and/or insurancemakesmesick.com" as "provided to [FINRA] from Titan Securities.").

46 R. 5465-5500, 3347 (CX-119; Tr. 1422).

47 R. 3073-74 (Tr. 1148-49).

48 R. 3075 (Tr. 1150) ("I do my best.").

49 R. 3082-83 (Tr. 1157-58).

50 R. 3070-71 (Tr. 1145-46) ("I wanted those captured immediately and taken care of . . . or taken away"; "So it was our duty, Jamie's responsibility to clean this up. She did. They're captured now or they're not being used."). One of the five other Titan registered representatives who had used outside email accounts for securities related business without obtaining firm approval, Paul Truesdell, resigned from the firm rather than comply with the strict enforcement of the Titan policy.

51 R. 1782, 4368 (Stip. ¶ 18; CX-88 at 2).

52 R. 4377 (CX-88 at 11).

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The Evolution II PPM stated that the offering sought to raise a minimum of $1 million and a maximum of $3 million.[53] The PPM further stated that investor funds raised in the offering would be placed in an escrow account and would be refunded if the minimum amount of $1 million was not received by December 31, 2012 (unless extended to not later than March 31, 2013).[54]

In addition, the Evolution II PPM stated, on the second to last page of the PPM (page 55 of 56), that "[a]ny Units purchased by the General Partner of its affiliates will not be counted in calculating the minimum offering."[55] However, on page 17 of the PPM – *in a "Questions and Answers" item specifically addressing the minimum amount* – the Evolution II PPM stated that the *general partner reserved the right to acquire unsold Units and offer them to investors at a later date*.[56] Specifically, this "Q&A" item provided as follows:

> **Q: What happens if the Partnership does not sell at least $1,000,000 of Units?**
>
> A: If the minimum of $1,000,000 of Units are not sold before December 31, 2012, the Partnership will terminate the offering and stop selling Units. The Partnership may, however, extend such minimum offering termination date to March 31, 2013, in the sole discretion of the General Partner. In any event, within ten days after termination of the offering, the escrow agent will return funds including any interest, to investors. *The General Partner reserves the right to acquire unsold Units and offer them to investors at a later date*.[57]

The Evolution II PPM also attached three documents as exhibits, including the Evolution II Limited Partnership Agreement and the subscription documents.[58] The Limited Partnership Agreement specifically granted the General Partner the power to borrow money and to engage in transactions with the Evolution II Partnership, as well as the authority to purchase and dispose of

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53 R. 1782, 4368 (Stip. ¶ 18; CX-88 at 2).

54 R. 1782, 4368 (Stip. ¶ 18; CX-88 at 2). Accordingly, the general partner, Evolution II GP, established an escrow account to hold the funds until the $1 million minimum amount was raised; the escrow agreement provided that, on receipt of $1 million or more in the escrow account, the escrow bank would distribute the funds. R. 4423-24 (CX-90 at 1-2).

55 R. 1783, 4421 (Stip. ¶ 18; CX-88 at 55).

56 R. 4383 (CX-88 at 17).

57 *Id.* (emphasis added). Remarkably, this fact – *i.e.*, this PPM Q&A item specifically addressing the minimum offering amount and the General Partner's right to acquire and resell unsold units – though highlighted in the Hearing Panel Decision (R. 6017-18, Hearing Panel Decision at 23-24), is *completely omitted* from the NAC's statement of facts. *See* R. 6434-36 (NAC Dec. at 15-17).

58 *See* R. 4373 (CX-88 at 7); *see also* R. 3114-16 (Tr. 1189-91) (noting that the "packet of information" sent to investors included the limited partnership agreement).

Units in the Evolution II Partnership.[59] In fact, the form of Promissory Note relating to such a loan to the General Partner was prepared and completed by counsel on September 27, 2012, even before the Evolution II PPM was completed.[60]

During the period from October 1, 2012 to October 22, 2012, the Evolution II offering raised $300,000 from five investors.[61]

During this same period, Brooks considered exercising the General Partner's right to acquire unsold Units and offer them to investors at a later date, in order to permit the partnership to release escrowed funds to take advantage of a favorable investment opportunity.[62] Brooks believed that there was a discrepancy within the PPM (as noted above), as well as between the PPM and the Limited Partnership Agreement (as noted above), as to whether the General Partner could take out a loan and purchase partnership units in the circumstances prior to the escrow break, including whether those purchases could be counted toward the minimum amount.[63] But he wanted to be very careful.[64] Accordingly, to that end, Brooks turned to counsel – the same attorney who had drafted the PPM, the Limited Partnership Agreement and the Promissory Note – to determine which document controlled,

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59 *See* R. 4447 (CX-93 at 1) (referring to Sections 3.1 and 4.1 of the Evolution II Limited Partnership Agreement). The limited partnership agreement itself is not included in the record.

60 R. 4571-76 (CX-107 at 1-6). The Evolution II PPM was still being reviewed and revised by counsel on October 3, 2012. R. 4731 (CX-108 at 7).

61 R. 1783 (Stip. ¶ 19).

62 R. 3143 (Tr. 1218) (noting that "GE Capital was getting out of the business" and the partnership would be able to "buy some buildings from them for a very low price").

63 R. 3136 (Tr. 1211) ("But to understand the situation more fully, you have to understand that there was more than one document that the investors received, and that the other document – yes, there was a discrepancy in the documents. It did say exactly what you said right here in this document, and in the other document, it said something different."); R. 3155 (Tr. 1230) ("It's my understanding, from my attorney, that this is all one document, and that there was a difference in what each document said.").

64 *See* R. 3137 (Tr. 1212) ("After having the problem in '09, I wasn't about to have another problem and wanted to be sure, so we sought counsel out."); R. 3200 (Tr. 1275) "I just know this was the second deal we had been involved in, and we had had an issue four or five years earlier because of an attorney that told us it was okay to do something, and I wanted to make sure we didn't have that problem again.").

and whether the General Partner had the authority under the documents to borrow funds to purchase partnership units in the circumstances.[65]

Upon consultation, counsel advised Brooks that the loan and purchase of units could be completed in accordance with the partnership documents. Among other things, counsel advised Brooks that the Limited Partnership Agreement was the controlling document and that Brooks could make the loan to purchase partnership units.[66] Counsel then also drafted the loan agreement (after having previously prepared the Promissory Note), which further confirmed counsel's approval of the loan and the purchase of partnership units in the circumstances – and reinforced Brooks' understanding that counsel saw nothing wrong with the General Partner borrowing money to purchase partnership units in the circumstances.[67]

Thereafter, on October 25, 2012, the proposed loan closed. Specifically, the General Partner secured two loans totaling $1.6 million and then used the loan proceeds to purchase 40 partnership units, at $40,000 per unit, in the offering.[68] The General Partner's purchase brought the amount raised by the offering to $1.9 million.

On October 26, 2012, Titan broke escrow and released all of the funds ($1.9 million) to the issuer.[69] Titan released the funds from the escrow account in reliance on the General Partner's

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[65] R. 3136-37 (Tr. 1211-12) ("So we noticed that discrepancy, and we went to our attorney before taking the loan to find out if – which, in fact, ruled over the two."); R. 3155 (Tr. 1230) ("But all the documents were presented together to the customers, and we went to him beforehand to make sure which language applied."); R. 3200 (Tr. 1275) ("So we met directly with him, asked him if we could do it. He was the one that put the – helped put the PPM together, reviewed it, approved it, knew – knew everything in and out from a legal side, in my viewpoint as a layman.").

[66] R. 3155 (Tr. 1230) ("I'm not an attorney. And so I went to him. He said, that is the overruling document in that packet that the client gets, and *so, yes, you can make the loan*."); R. 3156 (Tr. 1231) ("The presentation to the investors included both documents, sir. And so it was all disclosed all at the same time, together, written by the – the attorney [who] wrote the PPM is the same attorney that we went to for our opinion – the opinion on whether we could do this or not before we did it. I wanted to be sure, and *he said yes*."); R. 3159 (Tr. 1234) ("Again, I asked my attorney to give us parameters on whether the loan could be made or not under this agreement, and *he said yes*.") (emphasis added).

[67] R. 3201 ("We would have never done it without going to him first, and I think that's logically seen in the fact that, you know, he did review the documents and he did even help prepare the loan documents. So why would he prepare the loan documents if he didn't think it was ok to do?").

[68] R. 1783, 4578, 4652 (Stip. ¶ 19; CX-107 at 8, 82).

[69] R. 1783, 4437 (Stip. ¶ 20; CX-91 at 1).

purchases to meet the minimum offering (*i.e.*, by counting the General Partner's purchases towards the minimum amount).[70]

Titan and Brooks counted the General Partner's purchase of units in calculating the minimum offering "[o]nly after consulting counsel and making sure that we had the authority to do it through our documents," as set forth above.[71] In doing so, Brooks specifically believed that counting the General Partner's purchase of units to break escrow was approved by counsel: "Mr. Peisen helped prepare the loan documents. We had discussions with him. And a logical person would deem that he approved – he believed it could be done."[72]

Thereafter, as Evolution II sold additional partnership units to investors, the partnership cancelled the units that the General Partner had previously purchased with the loan proceeds.[73] Evolution II sold enough units to investors to generate total proceeds of $2,973,600 (74.34 units) by February 13, 2013, and the loans were fully repaid by that date – and the offering then formally closed on March 27, 2013.[74]

Later, in response to an inquiry from FINRA, Evolution II's counsel prepared a memorandum noting the relevant sections of the Limited Partnership Agreement regarding the General Partner's authority to borrow funds and to acquire units in the partnership.[75] The memorandum also addressed the ultimate issue of the General Partner's belief as to its authority to borrow funds, purchase units, and disburse funds (break escrow): "*The General Partner believed that it had the authority under the Agreement of Limited Partnership to take the steps to allow the Partnership to disburse the funds.*"[76]

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70 R. 1783 (Stip. ¶ 19).

71 R. 3135-36 (Tr. 1210-11).

72 R. 3208 (Tr. 1283); R. 3200 (Tr. 1275) ("when we met with John Peisen . . . I mean, to me, this was a legal opinion.").

73 R. 1783 (Stip. ¶ 20).

74 *Id.*

75 R. 3159 (Tr. 1234) ("And then when FINRA asked for clarification from our attorney, that's – that's what he gave me."); R. 3200-01 (Tr. 1275-76) ("And so when FINRA asked, where was your authority for this, I went back to Mr. Peisen and said, remember the conversations we had, you know, let's – I need that memorialized, and this is what he gave me."); R. 4447 (CX-93 at 1).

76 *Id.* (emphasis added). Again, remarkably, this statement regarding the General Partner's belief as to its power to break escrow and disburse funds, though included in the Hearing Panel Decision (R. 6019, Hearing Panel Dec. at 25), is *completely omitted* from the statement of facts set forth in the NAC Decision. *See* R. 6435-36 (NAC Dec. at 16-17). Separately, the counsel memorandum stated

G. Procedural History

1. FINRA Examination and Investigation

This matter arose out of an SEC audit of Titan's Tucker, Georgia branch office in late 2011, which was eventually subsumed into a regulatory examination conducted by the FINRA Member Regulation Department starting in 2012, covering the period from July, 2010 to March, 2013.

In late 2013, following a referral from Member Regulation, the FINRA Department of Enforcement commenced its related investigation, which eventually stretched out to three years later.

2. The FINRA Complaint

On October 17, 2016, the FINRA Department of Enforcement filed its Complaint[77] setting forth seven causes of action against Demetriou, the primary Respondent, and also against Titan and Brooks, as follows:

- **First Cause of Action:** alleged that, in the period from July, 2010 to October, 2010, Demetriou made misrepresentations to prospective investors in RBCP (through his emails to his customers regarding RBCP) in violation of FINRA Rule 2010.

- **Second Cause of Action:** alleged that, in the period from July, 2010 to October, 2010, Demetriou participated in an undisclosed OBA through his actions relating to RBCP, in violation of NASD Rule 3030 and FINRA Rule 2010.

- **Third Cause of Action:** alleged that, in the period from October, 2010 to April, 2013, Titan and Brooks failed to adequately supervise Demetriou's OBA relating to RBCP, in violation of NASD Rule 3010 and FINRA Rules 3270 and 2010.

- **Fourth Cause of Action:** alleged that, in the period from July, 2010 to July, 2013, Demetriou disseminated financial statements and sales literature to his customers (including through his emails to customers regarding RBCP) in violation of NASD and FINRA advertising and communications rules.

- **Fifth Cause of Action:** alleged that, in the period from April, 2011 to April, 2013, Titan and Brooks failed to establish and maintain adequate supervisory systems with regard to the capture, review, and retention of securities related emails, and failed to enforce Titan's written supervisory procedures ("WSPs") prohibiting employees from using personal email accounts for securities business, in violation of NASD Rules 3010 and 3110 and FINRA Rules 4511 and 2010. In addition, the Fifth Cause of Action alleged that, in the same period from April,

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that "[t]he General Partner had strong reason to believe that additional subscriptions were forthcoming," and that investor interest "remained strong and all units offered to investors were sold prior to March 31, 2013, the outside date specified" in the PPM. R. 4448 (CX-93 at 2).

[77] R. 1-32 (Compl.).

2011 to April, 2013, Titan failed to preserve emails relating to its securities business, in willful violation of Exchange Act Section 17(a) and Rule 17a-4 thereunder.

- **Sixth Cause of Action:** alleged that, in the period from July, 2010 to July, 2013, Demetriou used two unapproved personal email accounts for securities business, in violation of FINRA Rule 2010.

- **Seventh Cause of Action:** alleged that, in the period from October 26, 2012 to February 13, 2013, Titan and Brooks made false and misleading statements in the Evolution II PPM regarding the counting of General Partner purchases, in willful violation of Exchange Act Section 10(b) and Rule 10b-9 thereunder and FINRA Rule 2010. The Seventh Cause of Action also alleged that, in the same period from October 26, 2012 to February 13, 2013, Titan released investor funds from the Evolution II escrow account before the minimum amount had been raised by bona fide investors, in willful violation of Exchange Act Section 15(c) and Rule 15c2-4 thereunder and FINRA Rule 2010.

3. The Hearing and The Hearing Panel Decision

In April, 2018, an Extended Hearing Panel of the FINRA Office of Hearing Officers held a seven-day hearing, at which nine witnesses testified and more than 130 exhibits were entered into evidence.[78] The Hearing Panel issued its Decision on March 5, 2019,[79] finding as follows:

- **First Cause of Action:** the Hearing Panel found that Demetriou violated Rule 2010 by making false and misleading representations regarding RBCP in his customer emails.

- **Second Cause of Action:** a majority of the Hearing Panel found that Enforcement failed to show that Demetriou violated Rules 3030 and 2010, because he was not employed or compensated by RBCP and thus was not engaged in an OBA relating to RBCP. This cause of action was dismissed. The Hearing Officer dissented from that finding.

- **Third Cause of Action:** a majority of the Hearing Panel found that Enforcement failed to show that Titan and Brooks violated Rules 3010, 3270, and 2010, because Demetriou was not engaged in an OBA relating to RBCP and thus no duty to supervise those actions existed. This cause of action was dismissed. The Hearing Officer dissented from that finding.

- **Fourth Cause of Action:** the Hearing Panel found that Demetriou violated advertising and communications rules by sending his customer emails and investment summaries.

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[78] On the last day of the hearing on April 24, 2018, at the conclusion of the hearing, the FINRA Hearing Officer stated that Post-Hearing Briefs would not be required for various reasons. However, on July 18, 2018, eighty-five days later, the Hearing Officer suddenly issued, without further explanation, an Order Directing the Parties to File Post-Hearing Briefs (R. 5853-56), with specific instructions to address each cause of action and affirmative defense, relevant evidence, credibility issues, and other specific substantive issues, apparently tailored to the discussion presented in the Dissent of the Hearing Officer at R. 6053-64.

[79] R. 5991-6066 (Hearing Panel Dec.).

- **Fifth Cause of Action:** the Hearing Panel found that Titan and Brooks violated NASD Rules 3010 and 3110 and FINRA Rules 4511 and 2010 by failing to establish, maintain, and enforce adequate supervisory systems for the capture, review, and retention of securities related emails. In addition, the Hearing Panel found that Titan violated Section 17(a) and Rule 17a-4 by failing to preserve emails relating to its securities business. A Hearing Panel majority found that Titan did not willfully violate Section 17(a) and Rule 17a-4. The Hearing Officer dissented from that finding.

- **Sixth Cause of Action:** the Hearing Panel found that Demetriou violated Rule 2010 by using two unapproved personal email accounts for securities business.

- **Seventh Cause of Action:** a majority of the Hearing Panel found that Enforcement failed to show that Titan and Brooks violated Section 10(b), Rule 10b-9, and FINRA Rule 2010, because there was insufficient evidence that Titan and Brooks made prohibited representations relating to the Evolution II offering with scienter. That portion of the cause of action was dismissed. The Hearing Officer dissented from that finding. In addition, a majority of the Hearing Panel found that Titan violated Section 15(c), Rule 15c2-4, and FINRA Rule 2010 by releasing escrow funds before the minimum amount was raised in the Evolution II offering. One of the Hearing Panelists dissented from that finding. A majority of the Hearing Panel, however, found that Titan did not willfully violate Section 15(c) and Rule 15c2-4. The Hearing Officer dissented from that finding.[80]

4. The FINRA NAC Appeal

On March 26, 2019, the FINRA Enforcement Department filed its Notice of Appeal to the NAC.[81] In relevant part, Enforcement appealed (1) the dismissal of the Second Cause of Action; (2) the dismissal of the Third Cause of Action; (3) the finding that Titan's violation of Section 17(a) and Rule 17a-4 under the Fifth Cause of Action was not willful; (4) the dismissal of the Section 10(b)/Rule 10b-9 claim in the Seventh Cause of Action; and (5) the finding that Titan's violation of Section 15(a) and Rule 15c2-4 under the Seventh Cause of Action was not willful.[82]

5. The NAC Hearing and NAC Decision

On October 6, 2020, a hearing on the NAC appeal was held by Zoom conference call.[83]

On June 2, 2021, the NAC issued its Decision – the subject of this Application.[84]

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[80] Altogether, the Panel fined Demetriou $40,000, suspended him for one year and nine months, and ordered restitution of $84,425. As noted, on the Fifth Cause of Action, the Hearing Panel fined Titan and Brooks $50,000 jointly and severally, and suspended Brooks in all principal and supervisory capacities for two months; and on the Seventh Cause of Action, a Hearing Panel majority separately fined Titan $15,000.

[81] R. 6067-71 (DOE Notice of NAC Appeal).

[82] On March 31, 2019, Demetriou cross-appealed several of the Panel's findings that are not relevant on this Application. R. 6077-80 (Demetriou Notice of NAC Appeal).

[83] R. 6279-6391 (NAC Appeal Tr.).

In relevant part, the NAC found as follows:

- **Second Cause of Action:** the NAC found that Demetriou violated NASD Rule 3030 and FINRA Rule 2010 by engaging in an undisclosed OBA relating to RBCP.

- **Third Cause of Action:** the NAC found that Titan and Brooks violated NASD Rule 3010 and FINRA Rules 3270 and 2010 by failing to adequately supervise Demetriou's OBA relating to RBCP. For these violations, the NAC fined Titan and Brooks $50,000, jointly and severally, and suspended Brooks in all principal and supervisory capacities for one year.

- **Fifth Cause of Action:** the NAC found that Titan *willfully* violated Section 17(a) and Rule 17a-4 by failing to preserve emails relating to its securities business. As a result, Titan is subject to statutory disqualification.

- **Seventh Cause of Action:** the NAC found that Titan and Brooks *willfully* violated Section 10(b), Rule 10b-9, and FINRA Rule 2010 by making prohibited representations relating to the Evolution II offering. In addition, the NAC found that Titan *willfully* violated Section 15(c), Rule 15c2-4, and FINRA Rule 2010 by releasing escrow funds before the minimum amount was raised in the Evolution II offering. For these violations, the NAC fined Titan and Brooks $50,000, jointly and severally, and suspended Brooks in all principal and supervisory capacities for one year (to run consecutively with his other principal suspension) – and also ordered Brooks to requalify as a principal by examination. In addition, as a result of the findings of willful violations, Titan and Brooks are also subject to statutory disqualification.

All of these NAC findings and sanctions are at issue on this Application.[85]

III. ARGUMENT

In reviewing FINRA's disciplinary action, the Commission must determine whether Applicants engaged in the conduct FINRA found, whether that conduct violated the statutory provisions or rules specified in FINRA's determination, and whether those provisions and rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[86] The Commission bases its findings on an independent review of the record and applies a preponderance of the evidence standard.[87]

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[84] R. 6415-68 (NAC Dec.).

[85] As to Demetriou, the NAC Decision also affirmed the violations under the First, Fourth and Sixth Causes of Action, and modified the applicable sanctions. Other than the underlying ruling regarding the existence of an OBA under the Second Cause of Action, the claims against Demetriou are not relevant to or a part of this Application.

[86] 15 U.S.C. §78s(e)(1). "[I]t is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of [FINRA] which is subject to Commission review." *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 WL 3313843, at *6 n.17 (Nov. 8, 206).

[87] *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *1, *9 (May 27, 2011) *aff'd*, 693 F.3d 251 (1st Cir. 2012).

A. The Record Does Not Support The NAC Finding That Demetriou Engaged in an Undisclosed Outside Business Activity Relating to RBCP, and Thus The Record Does Not Support The NAC Finding That Titan and Brooks Were Obligated to Supervise Demetriou's Actions Relating to RBCP (Third Cause of Action)

As the NAC Decision acknowledges, NASD Rule 3030 provides that the actions of a registered representative only amount to an OBA if the representative is "employed by" or "accepts compensation from" the outside person.[88] On this appeal, there is no dispute that Demetriou did not receive any compensation from RBCP.[89] Accordingly, the only issue here is whether Demetriou was an "employee" of RBCP.

Without any citation to any case law of other authority, the NAC simply asserts that "Demetriou was employed by RBCP."[90] To be clear, he was not. The NAC's assertion on this point is without any basis in fact or law, and strains credulity.

The legal dictionary definition of an "employee" is "[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance."[91] Other definitions of "employee" include "one employed by another usually for wages or salary and in a position below the executive level"[92] and "a person who works for another in return for financial or other compensation."[93]

Under these definitions, Demetriou clearly was not an employee of RBCP (or of Keys or BP). Demetriou was not "working in the service of" RBCP; there was no "express or implied contract of hire"; RBCP (and Keys and BP) had no right to control his actions; and RBCP paid him no wages or

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88 NASD Rule 3030. *See* R. 6445-47 (NAC Dec. at 26-28). The NAC Decision also specifically acknowledges that NASD Rule 3030, which was effective until December 15, 2010, applies to Demetriou's actions in this case. *See* R. 6445 (NAC Dec. at 26 n.34).

89 As the NAC Decision notes, the Hearing Panel majority found that Enforcement failed to prove the Demetriou received any compensation from RBCP. The NAC chose not to address the issue, however, because it believed there was "more than sufficient evidence" that Demetriou was "employed" by RBCP. R. 6446 (NAC Dec. at 27 n.36).

90 R. 6446 (NAC Dec. at 27).

91 *Black's Law Dictionary* (11th Ed. 2019) at 662.

92 *Merriam Webster's Collegiate Dictionary* (10th Ed. 1993) at 379.

93 *American Heritage Dictionary* (5th Ed. 2018) at 585.

salary, or financial or other compensation. At a minimum, there is no evidence in the record on these points. Moreover, the NAC presents no competing standard, test, or definition for an "employee."[94]

Demetriou sent three emails to his customers about RBCP, and he organized two conference calls on which Keys and BP solicited investors for RBCP – but Demetriou was clearly always acting on behalf of and for the benefit of his customers, and not working for or on behalf of RBCP (or Keys or BP). Demetriou may have made false and misleading statements in his emails to his customers – and that may have exposed him to liability under statutory provisions and rules – but that would not automatically convert him into an "employee" of RBCP.

The NAC focused primarily on the fact that Demetriou was apparently designated as a managing member of RBCP for approximately four weeks. And Demetriou did reference this status in one of his emails (on July 21, 2010). But Demetriou also testified that he was effectively induced or tricked by Keys into assuming that status – by Keys' assurances that he could thereby "monitor" Keys' activities *for and on behalf of his customers*. (Notably, Keys did not reference anything that Demetriou would be doing *for or on behalf of RBCP*, much less any employment or management responsibilities.) Moreover, Demetriou pulled out and resigned as managing member as soon as he saw the draft RBCP PPM (with his name "all over it") in early August, 2010 – *well before he discussed the matter with Brooks*. Whatever status he briefly held, he "quit" shortly thereafter. And in any event, a "managing member" position alone would not make him an "employee" of RBCP.[95]

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[94] It is remarkable that an appellate panel of FINRA could decide this issue involving a key term presented in FINRA's own rules without even discussing a basic definition of that term. The NAC does cite to one case – *Dep't of Enf't v. Schneider*, 2005 NASD Discip. LEXIS 6 (NASD NAC Dec. 7, 2005) – but only for the unremarkable propositions that OBAs should be disclosed at the outset of the activity and that an OBA will arise when a representative *either* is employed by, *or* accepts compensation from, the outside person. R. 6445-46 (NAC Dec. at 26-27 and n.35). But the *Schneider* case – in which an undisclosed OBA was found to exist – is actually instructive here on the main OBA issue as well. In *Schneider*, the representative had incorporated the outside entity himself, was the owner/operator, and was actively promoting and conducting business on behalf of the outside entity. He was not only "working in the service of" the outside entity – he effectively *was* the outside entity. Nothing like that exists here. If anything, *Schneider* further confirms that Demetriou's actions were not an OBA.

[95] *See Merriam Webster's Collegiate Dictionary* (10th Ed. 1993) at 379 ("employee" is "one employed by another usually for wages and salary *and in a position below the executive level*") (emphasis added). Also, notably, the successor to NASD Rule 3030 – FINRA Rule 3270 – expressly includes certain additional managerial positions that were *not* a part of NASD Rule 3030. *See*

Beyond that, the NAC merely repeats the various actions that Demetriou took in the relevant period, including sending the emails to his customers and organizing the conference calls. But, again, these were all actions that Demetrious was taking on behalf of his customers, and not on behalf of RBCP. Moreover, while these are all things that an employee can or might do, these are not things that *make* someone an employee. These actions did not convert Demetriou into an RBCP employee.

Through laudable oversight, Brooks discovered indications that Demetriou might be engaged in an OBA. Brooks did the right thing by asking Demetriou for a written explanation. Brooks then received and reviewed the explanation and discussed the matter further with Demetriou. And nothing in that explanation or discussion indicated that Demetriou was employed by or receiving compensation from RBCP. (And none of the allegedly omitted information would have suggested that, either.)[96] Accordingly, Brooks properly made the determination that Demetriou was not engaged in an OBA relating to RBCP.[97]

Because Demetriou was not engaged in an OBA relating to RBCP, Titan and Brooks were not obligated to supervise Demetriou's actions relating to RBCP. Accordingly, the NAC finding that Titan and Brooks failed to supervise Demetriou's OBA should be set aside, and the Third Cause of Action should be dismissed.[98]

FINRA Rule 3270 ("No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person…"). The older rule applies here, however.

[96] The NAC Decision notes that Demetriou omitted certain facts from his written explanation, including that he had briefly been a managing member, had sent related emails to his customers, had organized conference calls, etc. However, again, none of these points bear on the "employee" or "compensation" issues. The NAC Decision claims that these omissions suggest that Demetriou knew he was engaged in an OBA. More likely, he simply thought this additional information was outdated and irrelevant to the OBA determination issue.

[97] At the time of this determination, in mid-October, 2010, Demetriou had 34 years of experience in the securities industry, and Brooks had almost 24 years of experience in the securities industry – and Brooks had previously made dozens, if not hundreds, of OBA determinations.

[98] NASD Rule 3030 is a fairly simple rule – it requires that a representative be employed or compensated by an outside person in order for an OBA to exist. FINRA must follow the rule as it is written, not as FINRA would like it to be written. The related duty to supervise is a substantial duty with serious implications and costs – and obviously this duty to supervise cannot be extended to every possible "extramural" undertaking or avocation. The NASD drew a line with Rule 3030 – and FINRA must abide by that rule where it applies. The alternative would be supervisory obligations without clear limitation, with resulting adverse impact on the securities industry and capital markets.

B. The Record Does Not Support The NAC Finding That Titan Willfully Failed to Preserve Emails (Fifth Cause of Action)

The Hearing Panel found that Titan violated Exchange Act Section 17(a) and Rule 17a-4 thereunder for failure to preserve certain firm emails, but a majority of the Hearing Panel found that the violation was not willful.[99] The NAC, however, found that Titan's violation of Section 17(a) and Rule 17a-4 was willful. The NAC finding is erroneous and unsupported, and should be set aside.

The NAC claimed that the Hearing Panel "misunderstood the standard for deciding willfulness." However, both the Hearing Panel and the NAC in fact framed the relevant issue using the exact same terms: whether Titan "intentionally failed to preserve firm emails."[100] The two bodies answered that question differently, however. Following a seven-day in-person hearing, a majority of the Hearing Panel said no. Based on a cold record three years later, the NAC said yes.

Specifically, the NAC stated that Brooks had received emails from the personal accounts of certain representatives and thus was aware that certain representatives were using personal accounts for firm business by the end of 2012, but that Titan's failure to preserve these emails continued for months, meaning that Titan intentionally failed to preserve the emails to and from those personal accounts.[101] In other words, the NAC asserts that the use of personal emails continued for a few months, despite Titan's knowledge thereof (and best efforts to stop it), so there must have been a willful failure to preserve those emails. But this is not sound or logically necessary. The NAC's position is similar to saying that if a government knows of a pandemic, and take steps to stop it, but it nonetheless persists, then the government must have intentionally failed to stop it. Sometimes things happen despite best efforts to prevent them – and that does not mean their occurrence was intentional.

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[99] The Hearing Panel also found that Titan and Brooks violated certain supervisory procedure and recordkeeping and review rules (NASD Rule 3010 and 3110 and FINRA Rules 4511 and 2010) in connection with the personal email accounts. These findings are not on appeal in this Application. As noted, for these violations, together with the non-willful violations of Section 17(a) and Rule 17a-4, the Hearing Panel fined Titan and Brooks $50,000, jointly and severally, and imposed on Brooks a two-month suspension in any principal or supervisory capacity.

[100] R. 6037, 6453 (Hearing Panel Dec. at 43; NAC Dec. at 34). As the Hearing Panel and the NAC both stated, "willfulness" simply means that the respondent "knows what it is doing" and "intentionally commits the act that constitutes the violation." (citations omitted).

[101] R. 6453 (NAC Dec. at 34).

The Hearing Panel, on the other hand, emphasized that Titan had a strong policy prohibiting the use of personal email accounts for firm business; that whenever Brooks saw a representative using a personal email account, he ordered the representative to stop it; that if the representative continued using the personal email account, then Brooks would instruct Titan's outside email provide to capture that account; and that by late 2012 Brooks hired a full-time CCO and tasked her with immediately capturing or eradicating any personal email accounts used for firm business. A majority of the Hearing Panel further stated that it "accept[ed] Brooks' testimony" on these points.[102] If any personal email accounts were still being used for firm business in the period from December, 2012 to April, 2012, then that happened despite Brooks' best efforts – and that does not mean that there was an intentional or willful failure to stop that practice or preserve those emails.

Moreover, the Hearing Panel position is supported by relevant case law. In *Dep't of Enf't v. The Dratel Group, Inc.*, No. 200901631701, 2013 WL 6835085 (NASDR OHO Sept. 19, 2013), for instance, the Hearing Panel found that "there is no evidence to contradict [respondent's] testimony that he directed an employee to have the problem remedied, and believed, mistakenly, that it had been" (even though subsequent interactions with the outside email manager/archiver indicated a continuing problem). In these circumstances, the Hearing Panel found that the respondents were negligent but did not intentionally fail to preserve emails – and thus the violation of Section 17(a) and Rule 17a-4 was not willful. The same result is appropriate and required here.

In large part, the willfulness issue here essentially involves a credibility determination, as to the sincerity of Brooks' efforts to stop the use of personal emails. A majority of the Hearing Panel clearly believed Brooks and "accepted his testimony" – and this issue is best left to the members of the Hearing Panel themselves, who were "in the room" with Brooks during the seven-day hearing (and were not simply reading a cold record three years later).[103] There was no "misunderstanding" by the Hearing Panel as to "the standard for deciding willfulness" – instead, there was simply a refusal

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[102] R. 6038 (Hearing Panel Dec. at 44).

[103] *See William H. Murphy & Co., Inc.*, Exchange Act Release No. 90759, 2020 WL 7496228, at *12 (Dec. 21, 2020) ("We generally defer to a FINRA Hearing Panel's 'credibility determinations in the absence of substantial evidence to support overturning them.'") (quoting *John Edward Mullin*, Exchange Act Release No. 66373, 2012 WL 423413, at *13 (Feb. 10, 2012)).

by the NAC to credit Brooks' testimony. The Commission should defer to the Hearing Panel majority's findings on this issue, in concluding that any failure preserve emails was not willful.

Moreover, on a more fundamental level, it appears that there was no clear evidence of any "uncaptured" or "unpreserved" business-related emails from the personal accounts anyway. Enforcement's principal evidence on the email issue – CX-119 – is a summary chart showing the "internal" business emails sent "to and from titansecurities.com and [the two personal email accounts] truesdell.net or insurancemakesmesick.com."[104] However, all of these "internal" emails *were captured and maintained by Titan* – and *were "provided to [FINRA] from Titan*."[105] Accordingly, there was apparently no "failure to preserve" as to these "internal" emails.[106] Furthermore, there is apparently no evidence that there were any other ("external") securities-related emails from those personal accounts that were not captured by Titan (*i.e.*, aside from the "internal" emails that were captured by the firm as reflected on CX-119).[107] To be clear, perhaps the individual holders of the personal email accounts never used those accounts for any "securities business" purpose except communicating with the firm (and not for any "external" communications). It is impossible to say for certain, based on the record at hand. In short, it appears that Enforcement was trying to show the existence of "uncaptured" emails solely by referring to emails that were in fact captured, and produced to Enforcement, by Titan.[108]

C. The Record Does Not Support The NAC Finding That Titan and Brooks Willfully Violated Section 10(b) and Rule 10b-9, or That Titan Willfully Violated Section 15(c) and Rule 15c2-4, In Connection with the Evolution II "Minimum Offering" Private Placement (Seventh Cause of Action)

1. The Record Does Not Support The NAC Finding That Titan and Brooks Willfully Violated Section 10(b) and Rule 10b-9 In Connection with the Evolution II "Minimum Offering" Private Placement

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104 R. 5465-5500, 1415 (CX-119; Tr. 1415).

105 R. 3344 (Tr. 1419).

106 *See, e.g.*, *District Business Conduct Committee*, No. SEA-498 (NASDR Bd. of Governors, Jan. 18, 1995), 1995 WL 1093424, at *3 (dismissing Rule 17a-4 charge where records were not properly maintained or preserved in central file, but were nonetheless "readily available").

107 For instance, there is no indication that Enforcement sought to obtain any such "external" business-related emails from the individual holders of those personal email accounts.

108 On this basis, all of the Hearing Panel and NAC findings on the email issue should be set aside, and the Fifth Cause of Action should be dismissed.

The NAC found that Titan and Brooks made false and misleading statements with scienter in the Evolution II PPM to the effect that General Partner purchases would not be counted in calculating the minimum offering amount, in willful violation of Section 10(b) and Rule 10b-9. This finding is erroneous and unsupported, and should be set aside.

The Hearing Panel majority correctly found that Enforcement failed to prove the requisite scienter because it failed to establish that Titan and Brooks knew the minimum amount had not been raised when the investment funds were disbursed from escrow.[109] Specifically, the Hearing Panel majority found that Titan and Brooks did not know the offering had failed to raise the minimum amount – because they believed that the General Partner's purchases counted toward the minimum amount. The Hearing Panel majority correctly dismissed this portion of the Seventh Cause of Action.

As NAC notes, the PPM stated, on its next-to-last page (page 55 of 56), that "[a]ny Units purchased by the General Partner of its affiliates will not be counted in calculating the minimum offering." However, on page 17 – in a "Q&A" item *specifically addressing the minimum amount* – the PPM stated that the General Partner "*reserves the right to acquire unsold Units and offer them to investors at a later date.*"[110] Moreover, the attached Limited Partnership Agreement expressly granted the General Partner the power to borrow money, to engage in transactions with the Partnership, and to purchase and dispose of Units.[111] In fact, counsel prepared the form of Promissory Note for a loan to the General Partner even before completing the PPM.

Brooks believed there was an ambiguity or discrepancy within the PPM and between the PPM and the Limited Partnership Agreement as to whether the General Partner could take out a loan and purchase partnership units in the circumstances, prior to the escrow break, including whether those purchases could be counted toward the minimum amount.[112] Accordingly, Brooks turned to the same attorney who had drafted all of the documents, to determine which document controlled and whether

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109 Citing the standard set forth in *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1988).
110 R. 4383 (CX-88 at 17). After omitting this point from its statement of facts, the NAC Decision fails to note in its Discussion that this statement specifically referenced the minimum offering issue.
111 R. 4447 (CX-93 at 1) (referring to Sections 3.1 and 4.1 of the Limited Partnership Agreement).
112 R. 3136, 3155 (Tr. 1211, 1230).

the General Partner had authority to borrow funds to purchase units in the circumstances.[113] Counsel advised Brooks, among other things, that the Limited Partnership Agreement was the controlling document and that Brooks could make the loan and purchase partnership units.[114] Counsel then also drafted the loan agreement (after having previously prepared the Promissory Note), which further confirmed counsel's approval of the loan and the purchase of partnership units in the circumstances – and reinforced Brooks' understanding that counsel saw nothing wrong with the General Partner borrowing money to purchase partnership units in the circumstances.[115]

Titan then closed the loan, purchased units raising the offering proceeds above the minimum amount, and "broke escrow," releasing the funds. Titan and Brooks counted the General Partner's purchase of units in calculating the minimum offering "[o]nly after consulting counsel and making sure that we had the authority to do it through our documents."[116] And Brooks specifically believed that counting the General Partner's purchase of units to break escrow was approved by counsel.[117] Counsel also later prepared a memorandum stating, among other things, that "*[t]he General Partner believed that it had the authority under the Agreement of Limited Partnership to take the steps to allow the Partnership to disburse the funds.*"[118]

On these facts, it is clear that Brooks did not act with scienter – he believed that the General Partner's purchases could be counted towards the minimum amount, and accordingly he did not think that the offering had not yet reached the minimum amount.

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113 R. 3136-37, 3155, 3200 (Tr. 1211-12, 3155, 1275).

114 R. 3155 (Tr. 1230) ("*so, yes, you can make the loan*"); R. 3156 (Tr. 1231) ("*he said yes*"); R. 3159 (Tr. 1234) ("*he said yes*.") (emphasis added). *See, e.g.*, *Howard v. SEC*, 376 F.3d 1136, 1147-49 (D.C. Cir. 2004) (good faith reliance on advice of counsel may counter evidence of a respondent's scienter, negligence, or both; reliance on advice of counsel "need not be a formal defense" but "is simply evidence of good faith, a relevant consideration in evaluating" a respondent's state of mind.).

115 R. 3201 ("So why would he prepare the loan documents if he didn't think it was ok to do?").

116 R. 3135-36 (Tr. 1210-11).

117 R. 3208 (Tr. 1283) ("Mr. Peisen helped prepare the loan documents. We had discussions with him. And a logical person would deem that he approved – he believed it could be done."); R. 3200 (Tr. 1275) ("when we met with John Peisen . . . I mean, to me, this was a legal opinion.").

118 R. 4448 (CX-93 at 2). Although the NAC referenced this memorandum and certain statements therein, it completely ignored and omitted the statement regarding the General Partner's ultimate belief as to its authority to borrow funds, purchase units, break escrow, and disburse funds.

The NAC asserts that the "plain language" of the PPM contradicts any claim that the PPM contained an "internal discrepancy." *However, the "plain language" of the PPM also includes the clear statement regarding the General Partner's reservation of rights to acquire and later resell unsold units, which appears in a prominent "Q&A" item specifically addressing the minimum offering amount.* This Q&A item flatly inconsistent with the prohibition against counting General Partner purchases, which appears much later in the PPM. The NAC ignores this fact. Moreover, the express authorizations to borrow money and to purchase units were certainly inconsistent with any limitation against counting General Partner purchases *at that time* and *in those circumstances*. At the very least, these are ambiguities and "mixed messages" giving rise to reasonable doubt.

The NAC also attempts to suggest that Brooks' consultations with counsel were limited to the authority to borrow money and purchase shares, and did not address counting purchases toward the minimum. However, all of those issues were clearly part of the discussions with counsel *at that time* and *in those circumstances*. Moreover, as set forth above, Brooks and counsel did specifically address all of those issues – borrowing money, purchasing units, counting purchases, breaking escrow and disbursing funds. Among other things, this is clear from Brooks' testimony, counsel's preparation of loan documents shortly after the offering opened, and counsel's later memorandum.

The scienter issue here also largely involves credibility determinations, including as to Brooks' belief as to "discrepancies" in the documents, his reliance on advice of counsel, and his understanding of his authority to take a loan, purchase units, break escrow and disburse funds. A majority of the Hearing Panel clearly believed Brooks – and specifically "accepted his testimony." Again, these are issues best reserved to the members of the Hearing Panel themselves, who were "in the room" with Brooks during the seven-day hearing (and were not simply reading a cold record three years later).[119] Again, the Commission should defer to the Hearing Panel majority's findings on these issues in concluding that Brooks did not act with scienter in taking steps to disburse the escrow funds.

2. The Record Does Not Support The NAC Finding That Titan Willfully Violated Section 15(c) and Rule 15c2-4 In Connection with the Evolution II "Minimum Offering" Private Placement

[119] *See William H. Murphy & Co., Inc., supra*.

The NAC found that Titan released funds from the escrow account before the minimum amount had been raised, in willful violation of Section 15(c) and Rule 15c2-4. The NAC finding as to willfulness is erroneous and unsupported, and should be set aside.

A majority of the Hearing Panel found that Titan violated Section 15(c) and Rule 15c2-4 by releasing escrow funds before the minimum amount had been raised.[120] A different Hearing Panel majority, however, correctly found the violation was not willful because Enforcement failed to prove Titan knew the offering had not raised the minimum amount when it released the escrow funds.[121]

For the same reasons set forth in Section III.C.1 above, Enforcement did not prove that Titan intentionally released the escrow funds before the minimum offering amount was met, because Titan believed the minimum amount had been met with the General Partner's purchases.[122] Accordingly, Enforcement failed to establish that Titan's violation of Section 15(c) and Rule 15c2-4 was willful.

IV. CONCLUSION

For the foregoing reasons, Applicants Titan and Brooks respectfully request that the challenged findings and sanctions on the Third, Fifth and Seventh Causes of Action be set aside.[123]

Dated: December 1, 2021

Respectfully Submitted,

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[120] For these violations, the Hearing Panel majority imposed a $15,000 fine on Titan.

[121] As to the finding that Titan violated Section 15(c) and Rule 15c2-4, one of the Hearing Panelists dissented; as to finding that the violation was not willful, the Hearing Officer dissented.

[122] *See* R. 3133 (Tr. 1208) ("I believe myself to be a bona fide investor."); R. 3158 (Tr. 1233) ("I don't believe escrow was broken early.").

[123] In view of all of the facts and argument set forth in this Application, the sanctions imposed by the NAC are unwarranted and excessive. To the extent that any of the challenged findings in the NAC Decision are not set aside for any reason – though, to be clear, Titan and Brooks believe that all such challenged findings should clearly be set aside – then Titan and Brooks also respectfully request that the Commission reduce or strike the sanctions imposed, as appropriate. *See, e.g., Murphy*, 2020 WL 7496228, at *18-19 (sustaining findings of violations, modifying sanctions, and remanding).

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

ADMINISTRATIVE PROCEEDIING
File No. 3-20387

In the Matter of the Application of TITAN SECURITIES AND BRAD C. BROOKS For Review of Disciplinary Action Taken by FINRA	CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of December, 2021, I caused a copy of the foregoing Opening Brief of Applicants Titan Securities and Brad C. Brooks In Support Of Application for Review to be sent via Electronic Mail to the following address:

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Executed on December 1, 2021, at Concord, California.

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OS Received 12/01/2021