BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Titan Securities and Brad C. Brooks

For Review of Disciplinary Action Taken by

FINRA

File No. 3-20387

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

Alan Lawhead
Vice President and
Director – Appellate Group

Jennifer Brooks
Associate General Counsel

Celia L. Passaro
Associate General Counsel

FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8985
ersilia.passaro@finra.org
nac.casefilings@finra.org

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I. INTRODUCTION

Applicants Titan Securities ("Titan" or the "firm") and Brad C. Brooks appeal FINRA's findings that they engaged in three types of misconduct that violated the securities laws and FINRA rules. The record abundantly supports FINRA's findings of violations and the sanctions it imposed, and the Commission should affirm both.

The first two violations resulted from Brooks's lax supervision during a three-and-a-half-year period at a time when the firm could not afford a dedicated compliance staff, and Brooks himself supervised virtually every aspect of the firm *and* served as its chief compliance officer. First, Titan and Brooks failed to supervise an outside business activity by one of its registered representatives, Richard Demetriou. When Brooks discovered an email that indicated Demetriou might be engaged in an outside business activity with respect to an offering, RBCP Preferred, LLC ("RBCP"), he asked Demetriou for an explanation of his involvement with RBCP.

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Demetriou submitted a written explanation claiming that while he was communicating with customers about RBCP, he was not "offering" it as an investment. Based on Demetriou's explanations alone, Brooks decided that Demetriou was not engaged in an outside business activity. Brooks allowed Demetriou to continue communicating with these customers about RCBP, an offering Brooks knew virtually nothing about, with the sole condition that Demetriou tell the customers that Titan "was not involved" with it.

Despite numerous red flags, Brooks accepted at face value Demetriou's explanation and did not conduct any investigation to verify Demetriou's claims or independently learn about RBCP. As a result, Demetriou participated in an outside business activity that Titan failed to supervise, and Demetriou was able to engage in misconduct related to RBCP that resulted in customer losses of $337,700.

Second, for a two-year period Demetriou and five other Titan registered representatives used personal email accounts to conduct securities business without firm oversight. Brooks received more than 120 emails from these personal accounts. Brooks was keenly aware that the use of personal email accounts was a problem at the firm, and that communications to and from these accounts were not captured, monitored, or maintained by Titan. Nonetheless, the use of personal emails continued unabated for months, and Titan failed to preserve these securities-related emails.

Separately, Titan and Brooks engaged in misconduct in connection with a contingency offering for which Titan was the managing broker-dealer and exclusive seller. Brooks and Titan caused an affiliate of the issuer to borrow funds to purchase units in the offering. The affiliate's purchases were counted towards the offering's minimum amount, in violation of the terms of the

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offering[1] and the federal securities laws. Titan and Brooks intentionally broke escrow to purchase a property that would have been lost if they had waited for bona fide investments to meet the contingency minimum.

For Titan's and Brooks's failure to supervise Demetriou's outside business activity, the NAC fined them $50,000, jointly and severally, and suspended Brooks for one year in all principal and supervisory capacities. For their misconduct related to the contingent offering, the NAC fined Titan and Brooks $50,000, jointly and severally, imposed a second consecutive one-year principal and supervisory suspension on Brooks, and ordered Brooks to requalify by examination as a principal. The NAC's sanctions are consistent with FINRA's Sanctions Guidelines and supported by the record, including applicable aggravating factors. None of the arguments advanced by Applicants undercut these sanctions, and the Commission should sustain them.

Titan's and Brooks's misconduct resulted from both a lack of adequate supervision and a willingness to violate the rules to capture a business opportunity. The Commission should affirm FINRA's findings of violation and sustain the sanctions imposed.

II. FACTUAL BACKGROUND

A. Brooks and Titan

Brooks entered the securities industry in 1986. (RP 2769.) During his career, Brooks associated with several firms and obtained the general securities representative, general securities

[1] *See* page 55 of the private placement memorandum for the offering at RP 4421. "RP __" refers to the page number in the certified record filed by FINRA on July 13, 2021. "Stip. No. __" refers to the parties' Joint Stipulations found at RP 1779-86. "Appellants' Br. at __" refers to Titan's and Brooks's December 1, 2021 brief in support of their application for review.

principal, municipal securities principal, national commodities futures, options principal, and uniform investment advisor registrations. (RP 2769-70, 3729-42.)

Brooks formed Titan in 2004; the firm registered with FINRA in August 2004. (RP 2772; Stip. No 1.) Brooks registered with Titan in October 2005. (RP 2772-73, 3732.) Brooks is Titan's sole owner, chief executive officer ("CEO"), president, and for an approximately three-and-a-half-year period ending in December 2012, served as the firm's chief compliance officer ("CCO").[2] (Stip. No. 4; RP 2773-75; 2812- 14, 3193, 3201-02, 5216-17.) Among other things, Brooks was responsible for supervising associated persons, private placement activities, advertising activities, and correspondence, including email. (RP 2812-13, 5216-17.) Brooks was also responsible for supervising all firm offices. (RP 2813-14.)

Titan is headquartered in Addison, Texas. (RP 3713.) The firm's primary business line is offerings of private placement securities, from which Titan generates approximately 80 percent of its gross revenue. (Stip. No. 2; RP 2776.) During the period from 2009 through 2012, Titan experienced a period of growth, growing from approximately 8 to 25 registered representatives. (RP 2775-2776.) In the spring of 2009, Brooks learned that another firm, Private Consulting Group, Inc. ("PCG"), was going out of business because some of PCG's proprietary private placements had failed. (RP 2779-81.) Brooks recruited PCG registered representatives, ultimately hiring five former PCG brokers, including Demetriou. (RP 2779, 2790.) Demetriou registered with Titan in April 2009. (RP 1977, 3769.)

[2] Brooks testified that he took over as CCO because after the 2008 financial crisis, Titan could not afford its previous CCO. (RP 3193-94.) Brooks also testified that in 2012, he "saw that [Titan] needed more expert help, and we got compliance personnel in there to handle everything," and since then, Brooks has been mostly "in charge of sales." (Id.)

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During the relevant period, Brooks was Demetriou's direct supervisor (RP 2814; Stip. No. 5.) Demetriou worked from his home in North Carolina and, for a period, from an office in Georgia. (RP 2021-11, 2866-68, 2814-16.) Brooks supervised Demetriou from the Titan offices in Texas, and Brooks testified that, during the relevant period, he did not conduct any inspections of Demetriou's offices or of a storage unit in which Demetriou stored documents related to his securities business. (RP 2814, 3007-09, 3011-12, 3032, 3040-41.) Brooks testified that Demetriou was one of the top 10 producing brokers at Titan every year. (RP 3192.)

B. Demetriou Becomes Involved with RBCP

Prior to joining Titan, PCG employed Demetriou from 2001 until March of 2009, when the firm went out of business. (RP 1971, 1974; Stip. No. 6.) PCG was owned by Robert Keys, who was also PCG's CEO and Demetriou's direct supervisor.[3] (RP 1971.) While at PCG, Demetriou sold real estate limited partnerships to his customers, including several limited partnerships sponsored by PCG. (RP 1972-73.) These illiquid real-estate limited partnerships largely failed, the customers lost the entirety of their investments, and PCG went out of business. (RP 1973-76, 2569-70, 3393, 3437-38, 3473.) After he joined Titan, Demetriou continued serving his PCG customers as a financial advisor and updated them on the status of their PCG investments. (RP 1976.) Four of these PCG customers became Titan customers. (RP 3012-13, 4137.)

Demetriou testified that he learned about RBCP in June or July of 2010 when Keys asked him for contact information for Demetriou's former PCG customers. (RP 2167, 2191.) Keys and his business partner Bill Phillips organized RBCP to raise and pay the start-up costs for an

[3] Brooks testified that he knew Keys owned PCG. (RP 2780.)

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affiliated entity, RBC Acquisitions, LLC ("RBC Acquisitions"). (RP 2074, 2217, 5663-71.) Keys and Phillips were the principals of RBC Acquisitions, which was formed with the plan to obtain a multi-million-dollar bank loan to construct a real estate development in Mississippi.[4] (RP 2167-68, 2217, 3805.) RBCP planned to raise capital through a private placement and use the funds raised to pay attorneys' fees, property taxes, and other fees for RBC Acquisitions until it could secure a loan. (RP 2167-68.)

Keys and Phillips asked Demetriou for help selling preferred units in RBC's private placement to Demetriou's customers, even though the customers had lost money in prior PCG-sponsored real estate limited partnerships. In addition to facilitating contact between Keys, Phillips, and these customers, and communicating directly with the customers about RBCP, Demetriou also agreed to serve as the managing member for the offering. (RP 2189-90.) Demetriou testified that, after "checking around," he concluded that RBCP had a chance of making money and decided to tell his current and former customers about it. (RP 2195-97.) Demetriou did not inform Titan prior to agreeing to serve as RBCP's managing member (RP 2944.)

1. Demetriou Sends an Email About RBCP to 36 Former and Current Customers

On July 6, 2010, Demetriou sent an email to 36 former and current customers who had invested previously in PCG-sponsored limited partnerships (the "July 6 Email"). (RP 3845-47, 4137.) Four of the customers who received the July 6 Email were Titan customers. (RP 4137.) Demetriou sent the email from a Titan-approved email account, which Titan's third-party email

[4] The property to be developed had previously been the principal asset of one of the prior PCG-sponsored limited partnerships that had failed when the partnership could not obtain financing for the development. (RP 3845.)

service provider captured. (RP 2958-59, 4129.) Demetriou sent the email two days prior to a conference call for the investors about RBCP. (RP 3845.)

In the July 6 Email, Demetriou explained the terms of the RBCP offering, told investors it offered a "great return," suggested the offering was in high demand, and explained that RBCP was the only way investors could recoup their prior PCG losses. Demetriou explained that Keys had filed for bankruptcy and, accordingly, would not be liable to the customers for their losses in the PCG-sponsored investments in a lawsuit. (Id.) Demetriou continued that, notwithstanding his bankruptcy filing, Keys felt, "from an ethical standpoint," that he had an obligation not to "abandon" the investors. (Id.) Accordingly, Demetriou explained, Keys had "set aside" a $25,000,0000 investment in RBC Acquisitions for these customers. (Id.) Regarding Keys's motives for offering RBCP to these customers, Demetriou wrote in the email that, "[t]he only thing I can determine is that he feels a personal obligation to the investor and to me." (Id.)

Demetriou also described the terms of the offering. Demetriou explained that customers would have to invest an amount equal to 1.5 to 4.5 percent of the loss each investor had suffered in their prior PCG-sponsored investments for an equivalent investment in RBC Acquisitions. (Id.) Demetriou summarized, "in other words, $1500 buys $100,000 in the RBC Acquisitions." (Id.) Demetriou also explained that the preferred RBCP shares would pay a four percent annual cumulative preferred dividend, and that the principal would be repaid at 20 percent per year over five years. (Id.) As an example of the "[p]rofit [p]otential," Demetriou wrote, "a $4500 investment will return $300,000 principal" and "a first-year principal return of $60,000 that is built into the numbers." (Id.)

In a section of the email titled "Good money after bad?," Demetriou wrote he was "somewhat taken back [sic] by the request for my clients to put 1.5% cash into something that

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has failed to meet its promises," but he noted that (1) the first construction draw would be used to repay the cash investment, which would "occur within 90 days," and (2) he was "told that there are $2 [million] in numismatic coins set aside as collateral for the 1.5% investments," for which the potential investors "of course, need convincing confirmation." (Id.) Demetriou mentioned that the customers did not have to participate in the investment, and if they chose not to, "the preferred shares that my [Demetriou's] investors do not want are already spoken for," suggesting that the RBCP offering was in high demand. (Id.)

Demetriou closed his email by emphasizing that the investment offered "a great return, especially if the $1500 will be returned in 90 days." (Id.) Demetriou further wrote that he "desperately" wanted his customers to recoup the amounts they had lost in the PCG-sponsored investments, and that while several items in the proposal needed to be confirmed, "RBC Acquisitions seems to be the best route to return your investments." (RP 3846.) Demetriou noted he would be on the upcoming conference call and would be available to talk to customers before or after the call. (Id.)

On July 8, 2010, Demetriou was on the conference call during which Keys and Phillips solicited customers to invest in RBCP. (Stip. No. 7.) Demetriou had organized the conference call. (RP 2164-65.) After the call, Demetriou sent emails to certain customers summarizing the presentation. (RP 2244, 2246-47, 5515.) Demetriou also sent certain customers individualized illustrations of how the proposed RBCP investment would work for them. (RP 5517.) Demetriou testified that, in preparing these individual illustrations, he discovered a mathematical error in the proposal that resulted in an increase in the minimum amount customers needed to invest to participate. (RP 2234-35.)

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2. Demetriou Sends a Second Email to the Customers

On July 21, 2010, Demetriou sent a second email (the "July 21 Email") to the same 36 former and current customers to whom he had sent the July 6 Email.[5] (RP 3849-50, 4137.) Demetriou explained that because of the mathematical error he had discovered, the "offer had to be restructured" and the minimum percentage of the original investment that a customer had to invest had increased from 1.5 percent to 5 percent of the loss each investor had suffered in their prior PCG-sponsored investment.[6] (RP 3849.) Demetriou told customers that the five percent investment was "still secured by rare coins on deposit at San Diego Artworks." (Id.) Demetriou also claimed that: (1) the developer would repay the five percent "deposit" from the first construction draw in approximately 120 days (not the 90 days initially promised); (2) the investment was "still guaranteed by a $3,000,000 Safe Keeping Receipt," i.e., the rare coins, which purportedly had been appraised for $3,000,000; (3) investors' returns would be 20 times their 5 percent "deposit"; (4) outside investors (investors other than Demetriou's customers) could purchase shares of RBCP for a higher "10% cash deposit"; (5) shares would be redeemed at 20 percent per year over five years, plus a four percent preferred cumulative dividend on the unpaid balance; and (6) no distributions would be made to the owners of RBC Acquisitions (Keys and Phillips) until all of Demetriou's customers' shares were redeemed, up to a maximum of $25,000,000. (Id.)

[5] Like the July 6 Email, Demetriou sent the July 21 Email from an email account that was captured and monitored by Titan. (RP 2958-59, 4129.)

[6] The amount each customer had to invest subsequently was raised a second time to 10 percent of the customer's loss in the prior PCG investment, but the customers had the option to invest half of this amount in the form of a promissory note in favor of RBCP. (RP 3851.)

Demetriou attached to this email a copy of the "safekeeping receipt," which purported to show that there were coins appraised at more than $3,000,000 on deposit at San Diego Artworks. (RP 3850.) The safekeeping receipt identified the depositor as RBCP and noted that "[the coins] are subject to various restrictions of transfer pursuant to [an] agreement" between RBCP and RBC Acquisitions. (Id.) The restrictions were not described in the safekeeping receipt. (Id.) Demetriou testified that he did not review the referenced agreement between RBCP and RBC Acquisitions, and he did not recall ever seeing the agreement. (RP 2279-80, 2762.)

In his July 21 Email, Demetriou reassured customers that "[a]s managing member of the LLC [RBCP], I will be able to call the collateral on your part if it appears that Riverbend construction will not go forward." (RP 3849.) He concluded "I am trying very hard to assure that all investor money is returned." (Id.)

3. Demetriou Resigns as RBCP's Managing Member After Reviewing the Draft Private Placement Memorandum

In August 2010, Demetriou received a copy of the draft private placement memorandum ("PPM") for the RBCP offering. (RP 2178-79, 5658.) The draft raised concerns for Demetriou, which he memorialized in a note dated August 16, 2010, and captioned "Demetriou PPM Questions." (RP 5658.) In his notes, Demetriou wrote "when would [EL, the person who posted the coins as collateral] ever give me permission to remove the coins?," "[t]his does not seem like collateral of any kind," and "no direct line to the coins?"[7] (Id.) Demetriou testified that based on his concerns after reviewing the draft PPM, he resigned as the managing member and sought to "distance" himself from RBCP. (RP 2178-79, 2191, 2254, 2289-90.) At the time he resigned,

[7] EL's full name may be found in the record at RP 2298. EL was the principal of an entity, ICF, that was to receive $500,000 from the proceeds of the RBCP offering. (RP 3046-47, 5749.)

Demetriou had been the managing member of RBCP for approximately four weeks. Shortly after Demetriou resigned as the managing member, RBCP issued the final offering PPM on August 24, 2010. (RP 5737.)

4. Demetriou Sends a Third Email to Customers About RBCP

Notwithstanding his concerns about the collateral for the RBCP investments and his decision to resign as the managing member for the offering and "distance" himself from the offering, Demetriou continued to communicate with customers about RBCP. On September 9, 2010, Demetriou sent a third email to his 36 current and former customers (the "September 9 Email"), which included access information for a conference call scheduled for the next day with Keys and Phillips.[8] (RP 3851-52.) Demetriou began his email by noting that most of the customers had received the PPM for the RBCP offering, and that they would receive copies of the "Subscription Document" by mail. (RP 3851.)

Demetriou noted that he was "not offering this as a securities representative," and that the offering paid "no commissions." (Id.) Demetriou explained that his "efforts over the last two months have been to understand the collateral offered for this relative [sic] small upfront cost and the probability of getting the upfront cost returned by February 1, 2011 as described by the documents." (Id.) He wrote that he had "asked" Keys and Phillips to explain during the upcoming conference call "the offering and the progress that has been made so far in securing the underlying financing" for Riverbend, the property which was to be developed. (Id.) Demetriou then previewed "the bullet points that will be discussed." (Id.)

[8] Like the July 6 Email and July 21 Email, Demetriou sent the September 9 Email from an email account that was captured and monitored by Titan. (RP 2958-59, 4129.) The July 6 Email, July 21 Email, and September 9 Email are referred to collectively as the "Three Emails."

Under a section titled "Priority Return," Demetriou wrote that the "first $25,000,000 of profit in RBC Acquisitions plus a 4% per year preferred and cumulative dividend will be paid to you, the RBC Preferred Investors before any owner of RBC Acquisitions receives any proceeds." (Id.) Demetriou explained, "[f]rom what I have seen in the securities business, this is unprecedented in a good way." (Id.) Under the heading "Priority Return Amount," Demetriou wrote that, "[f]or each $5,000 initial deposit (deposit returned to you before 2-1-11), you will receive $50,000 of the $25,000,000 . . . plus the 4%/yr dividend." (Id.)

In a section titled "Return of your cash deposit," Demetriou wrote that the RBCP "documents" defined "February 1, 2011 as the latest date that your cash deposit can be returned to you." (Id.) Demetriou continued, "[i]f it is not returned, there are over $5,000,000 in rare coins that have been deposited as collateral to back up the February 1, 2011 promise." (Id.) Demetriou also told customers, "I have personally talked to the appraiser of these coins, and the valuations seem to be solid. In practice, the coins would have to be sold slowly to achieve the full value of their appraisal." (Id.)

Demetriou explained that half of a customer's ten percent investment could be "in the form of a promissory note to be repaid 2-1-11 when the repayment of your initial deposit is due," and that "[t]his investor land" would be purchased at the time "the major funding is in place," which was expected to be "sometime this fall," at which time the investors would be paid "approximately 15% of the original investment." (Id.) Demetriou also included a link to the "[f]ull [d]ocuments online," including the username and password to access them. (Id.)

Demetriou closed his email to the customers by writing, "[w]hile I cannot present this [RBCP] as an investment, I can search, dig, and scratch to find out if it may be a good offer to you." (Id.) Demetriou concluded, "[i]t honestly seems like the best chance of returning your

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money plus a profit." (Id.) Demetriou noted that he would be on the conference call the next day and would attempt to record it for customers who could not attend. (Id.) Nowhere in the September 9 Email did Demetriou tell customers he had resigned as the managing member for RBCP nor disclose his concerns about the accessibility of the collateral coins should the offering fail.

5. RBCP Fails, the Collateral Is Not Foreclosed, and Demetriou's Customers Lose Their Entire Investments

The RBCP offering closed on October 28, 2010. (RP 2404, 2685-86, 5793-94.) The offering sold 500 preferred partnership units for $5,000 per unit, raising a total of $2,500,000. (RP 5715-55.) Demetriou's current and former customers invested a total of $337,700 in RBCP. (RP 6065.) Keys emailed Demetriou confirmations when Demetriou's customers completed an investment in RBCP. Demetriou thereafter included values for RBCP on investment statements he sent to his customers who had invested. (RP 2357-58, 3825-28, 4205, 4233, 4263, 4269, 4271, 4275.)

RBC Acquisitions failed to secure a multi-million-dollar loan to develop Riverbend, and then failed to repay the RBCP investors on February 1, 2011, as promised. (RP 2258, 2296-97, 2374, 2456.) Over the course of the next approximately two years, Demetriou continued to facilitate contact between the customers and Phillips and Keys, and continued sending emails to customers with updates. (RP 3857-3910.) Demetriou's emails regularly included statements about the efforts to secure a loan for the Riverbend development and assurances that the coins would be sold to repay the RBCP investors. (Id.) Ultimately, the coins were never foreclosed and sold, and Demetriou's customers lost the entirety of their cash investments in the RBCP offering, a total of $337,700. (RP 2232, 2403, 2461, 3283, 5593-94.)

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C. Brooks Discovers RBCP and Accepts Without Verification Demetriou's Explanation of His Involvement

In October 2010, during a routine supervisory review of Demetriou's emails, Brooks noticed several emails that mentioned RBCP and raised red flags that Demetriou might be involved in an undisclosed outside business activity ("OBA"). (RP 2900-01; Stip. No. 9.) While Brooks could not recall the specific emails he discovered or what those emails contained, he testified that he did not understand them and that he asked Demetriou to "put in writing" an explanation of his involvement with RBCP. (RP 2901-02.)

On October 13, 2010, Demetriou sent Brooks an email purportedly explaining his involvement with RBCP. (RP 2341-43, 3803, 3805-07.) Demetriou wrote that Phillips was offering RBCP and that the purpose of the offering was to "[r]aise a relatively small amount of cash to pay attorney fees and land option fees" on the land to complete the Riverbend project, and provide a "very high return to PCG investors who have lost money in troubled investments sponsored by PCG." (RP 3803.) Demetriou wrote that, because of Phillip's relationship with Keys, Phillips had agreed that the first $25,000,000 of profits in Riverbend would go to PCG investors with a rate of return of $50,000 for every $5,000 invested, plus the four percent cumulative dividend. (Id.) Demetriou also wrote that the cash investment would be repaid by February 1, 2011, and that $5,000,000 in rare coins had been pledged as collateral, which could be foreclosed and sold if the investments were not repaid by that date. (Id.) Finally, 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 [Phillips] is the individual who is making the offer" (Id.)

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Demetriou testified that he spoke to Brooks about RBCP and told him that Demetriou did not have enough information to determine whether RBCP would be a good or bad investment. (RP 2197.) Brooks testified that he asked Demetriou for a copy of the RBCP PPM, but Demetriou said he did not have a copy. (RP 2917, 3047.) On the same day that Demetriou sent Brooks his written explanation, Brooks replied by email instructing Demetriou to, "just be sure to let them [the customers with whom Demetriou was communicating about RBCP] know that Titan is not involved[.]" (RP 2904, 3805.)

Brooks testified that based on Demetriou's explanation, he determined that RBCP was not an OBA and he did not supervise Demetriou's RBCP activities. (RP 2840-41, 2904, 2955; Stip. No. 12.) Brooks allowed Demetriou to continue communicating with customers about RBCP based on Demetriou's representations that he was not recommending RBCP and not receiving compensation from his RBCP activities. (RP 2905-06.)

D. Demetriou and Other Titan Registered Representatives Use Unapproved Email Accounts for Securities Business

The facts underlying the use of unapproved email accounts for securities business by Titan registered representatives are largely undisputed and the subject of the parties' joint stipulations. (Stip. Nos. 15-17.) Titan's written supervisory procedures ("WSPs") effective during the relevant period, "strictly prohibited" the use of personal email accounts for securities-related business unless a registered principal had granted permission. (Stip. No. 15; RP 4857.) The WSPs also stated that "[t]o the extent a personal e-mail account is permitted, all e-mails must be copied to the associated person's [Titan] e-mail address and will be subject to the review standards of all other electronic communications." (Stip. No. 15; R. 4857) For most of the relevant period—from at least July 2010 through December 2012—Brooks was responsible for reviewing Titan registered representatives' email. (RP 3069-71).

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The parties stipulated that between July 2010 and July 2013, Demetriou used two different unapproved personal email accounts, a "gmail" account and a "frontier" account "to conduct securities-related business with Titan customers." (Stip. No. 16; RP 3067.) Demetriou used these accounts without obtaining written approval from a Titan principal and "email communications from these email addresses were not captured, reviewed, or maintained by Titan." (Stip. No. 16; RP 3867-71.) Additionally, between April 2011 and April 2013, five other Titan registered representatives used outside email accounts for securities-related business without obtaining written approval from a Titan principal, and communications to and from these email accounts were not captured, reviewed, or maintained by Titan. (Stip. No. 17; RP 3067-69.)

From April 2011 through April 2013, Brooks received more than 120 emails from Demetriou's and the other registered representatives' unapproved personal email accounts. (RP 3345-47, 5465-5500.) Brooks testified that he knew Titan had a problem with the use of unapproved email accounts for securities business and when he hired a new full-time CCO at the end of 2012, he directed her to "clean this up." (RP 3071, 3194.) Nonetheless, the use of unapproved personal email accounts by the five registered representatives continued until April 2013 and Demetriou's use continued until July 2013. (Stip. Nos. 16-17.)

E. Titan Acts as the Managing Member for the Evolution Contingency Offering

In October 2012, Titan and Brooks participated in a contingency offering conducted by a limited partnership, Evolution Partners II, LTD ("Evolution"). (RP 3111-12, 4367-4422; Stip. No. 18.) Evolution had been formed to acquire interests in another limited partnership, MR Parker Center, LP, which, in turn, had been formed to purchase a business center property. (Id.) Evolution's general partner, Evolution GP II, LLC ("Evolution GP"), would then manage the

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property. (RP 3122, 4377.) Brooks owned 56 percent of Evolution GP and was its managing member (RP 3118, 3121, 4593.) Titan acted as the managing broker-dealer for Evolution's contingency offering, and the offering was sold exclusively though Titan. (RP 3111-12; Stip. No. 18.)

The Evolution offering was on a contingency basis and the PPM stated that the offering sought to raise a minimum of $1,000,000 and a maximum of $3,000,000. (RP 3112-13, 3126, 4368.) The PPM stated that investor funds raised during the offering would be placed in an escrow account until the offering had raised the $1,000,000 minimum, and that investor funds would be refunded if the minimum offering amount was not met by December 31, 2012. (RP 3113-14, 3127-29, 3130-31, 4368, 4421.) Although the offering was to close by December 31, 2012, the PPM allowed the offering to be extended to March 31, 2012, with notice to the investors. (RP 3113, 3127, 3129, 4421.) The PPM further stated that "[a]ny Units purchased by [Evolution GP] or its affiliates will not be counted in calculating the minimum offering." (RP 4421.)

Evolution opened an escrow account at NexBank to hold investor funds until the minimum offering amount had been raised. (RP 3128, 4423-36.) Under the terms of the escrow agreement with NexBank, the funds in the escrow account could be distributed once the balance reached $1,000,000. (RP 3138-39, 4423-24.) If funds totaling $1,000,000 were not received in the escrow account by December 31, 2012, the agreement provided that the escrow agent would remit the funds to the investors, in accordance with Evolution's instructions. (RP 4424.)

Evolution raised $300,000 from five bona fide retail investors. (RP 3139-40, 4437; Stip. Nos. 19-20.) These finds were deposited into Evolution's escrow account. (RP 3139-40.) On October 25, 2012, Evolution GP secured two loans totaling $1.6 million. (RP 4578, 4652; Stip.

Nos. 19-20.) The next day, the loan proceeds were deposited into Evolution's escrow account as investor funds under the name "JP Realty Services," and Brooks allowed escrow to be broken and all the funds in escrow—both the funds from retail investors and the loan proceeds—were withdrawn to purchase the business property. (RP 3133, 3141-42, 3144, 4437; Stip. No. 20.) In breaking escrow, Titan and Brooks relied on the purchases by Evolution GP (made with the loaned funds) to satisfy the minimum offering amount. (RP 3135-36; Stip. No. 21.)

Evolution continued to sell partnership units to investors after the property was purchased. (RP 3145-46; Stip. No. 20.) As these units were sold, the units purchased by Evolution GP with the loan proceeds were canceled and the units assigned to new investors. (RP 3145-46.) All the units purchased with loan proceeds were cancelled by February 13, 2013, after they were re-sold to investors. (RP 3145-46; Stip. No. 20.) The loans were then repaid. (Id.)

III. PROCEDURAL HISTORY

Although Demetriou was a respondent before the Hearing Panel and the NAC, he did not appeal the NAC's decision to the Commission and the findings against him are discussed in the footnotes to this section.

A. The Complaint

On October 17, 2016, FINRA's Department of Enforcement ("Enforcement") filed a seven-cause complaint against Titan, Brooks, and Demetriou. (RP 1-64.) Three causes alleged violations by Titan and Brooks. Under cause three, Enforcement alleged that, from October 2010 through April 2013, Titan and Brooks violated NASD Rule 3010 and FINRA Rules 3270 and 2010 by failing to adequately supervise Demetriou's RBCP OBA. (RP 22-23.) Under cause five, Enforcement alleged that, from April 2011 through April 2013, Titan failed to establish and

maintain a reasonable supervisory system to detect and prevent the use of personal email accounts for securities business, in willful violation of Exchange Act Section 17(a) and Rule 17a-4 thereunder (RP 24-26.) Cause five also alleged that, based on the same misconduct, Titan and Brooks violated NASD Rules 3110 and 3010 and FINRA Rules 4511 and 2010. (Id.) Finally, under cause seven, Enforcement alleged that Titan willfully violated Exchange Act Section 15(c) and Exchange Act Rule 15c2-4 by releasing investor funds from the Evolution offering's escrow account before the minimum amount had been raised from bona fide investors. (RP 27-29.) Cause seven also alleged that Titan and Brooks willfully violated Exchange Act Section 10(b), Exchange Act Rule 10b-9, and FINRA Rule 2010 by making material misrepresentations related to Evolution.[9] (Id.)

B. The Hearing Panel Decision

After a seven-day hearing, the Hearing Panel found that Demetriou, Titan, and Brooks engaged in several violations warranting sanctions. (RP 5995-6065.) 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 procedures for the capture, review, and retention of Titan's securities-related emails. (RP 6036-39.) The Hearing Panel also found that Titan failed to preserve emails in violation of Exchange Act Section 17(a) and

[9] Causes one, two, four, and six alleged violations by Demetriou. (RP 10-22, 23-24, 26.) Enforcement alleged that Demetriou: (1) violated FINRA Rule 2010 by making misrepresentations to prospective investors in connection with his promotion of RBCP, including in the three emails and in individual investment illustrations he sent to certain investors; (2) violated NASD Rule 3030 and FINRA Rule 2010 by engaging in an undisclosed, unapproved OBA with respect to RBCP; (3) violated FINRA advertising and communications with the public rules by drafting and disseminating consolidated financial statements and sales literature that violated the standards of those rules; and (4) violated FINRA Rule 2010 by using unapproved, personal email accounts to conduct securities business. (Id.)

Exchange Act Rule 17a-4. (Id.) A majority of the Hearing Panel found that Titan's violation of the Exchange Act was not willful, and the Hearing Officer dissented from this finding concerning willfulness. (RP 6036-38, 6060-61.) For these violations, the Hearing Panel fined Brooks and Titan $50,000, jointly and severally, and suspended Brooks for two months in any principal or supervisory capacity. (RP 6050.)

A majority of the Hearing Panel found that Titan violated Exchange Act Section 15(c), Exchange Act Rule 15c2-4, and FINRA Rule 2010 by releasing investor funds from escrow before the Evolution offering's minimum offering amount was met. (RP 6039-48.) A majority of the Hearing Panel found that Enforcement failed to prove that this violation was willful. (Id.) The Hearing Officer dissented, finding that the willfulness standard was met. (RP 6061-64.) A majority of the Hearing Panel also found that Enforcement failed to prove that Brooks and Titan violated Exchange Act Section 10(b), Exchange Act Rule 10b-9, and FINRA Rule 2010 because, the majority found, there was insufficient evidence that Brooks and Titan made material misrepresentations about the Evolution offering with the requisite scienter (RP 6039-43.) The Hearing Officer dissented, finding that Enforcement had proven scienter. (RP 6061-64.) For these violations, the Hearing Panel fined Titan $15,000. (RP 6051.)

Finally, a majority of the Hearing Panel dismissed the cause alleging that Demetriou engaged in an undisclosed, unapproved OBA with respect to RBCP. (RP 6025-26.) The Hearing Panel majority found that Enforcement failed to meet its burden of proof because Demetriou was not employed or compensated by RBCP, and also dismissed the corresponding cause against Titan and Brooks for their failure to supervise Demetriou's OBA.[10] (RP 6025-28.)

[10] The Hearing Panel also found that Demetriou violated FINRA Rule 2010 by making material, false and misleading misrepresentations about RBCP in the Three Emails. (RP 6019-

[Footnote continued on next page]

C. The NAC Decision

The NAC affirmed the Hearing Panel's findings that Demetriou violated FINRA Rule 2010 by making false and misleading misrepresentations to prospective investors in the Three Emails. (RP 6440-45.) The NAC also affirmed the Hearing Panel's findings that Demetriou violated FINRA's advertising and communications with the public rules and that Demetriou violated FINRA Rule 2010 by using unapproved personal email accounts to conduct securities business. (RP 6449-54.) The NAC, reversing the Hearing Panel, found that Demetriou engaged in an undisclosed, unapproved OBA with respect to RCBP, in violation of NASD Rule 3030 and FINRA Rule 2010. (RP 6445-47.) The NAC barred Demetriou for his misconduct. (RP 6458-61.)

The NAC, reversing the Hearing Panel, found that Titan and Brooks violated NASD Rule 3010 and FINRA Rules 3270 and 2010 by failing to supervise Demetriou's OBA. (RP 6447-49.) Specifically, the NAC found that Brooks failed to adequately investigate red flags that Demetriou was engaged in an OBA, but rather, decided based on Demetriou's unverified representations alone that RCBP was not an OBA. (Id.) For this violation, the NAC fined Brooks and Titan $50,000, jointly and severally, and suspended Brooks in all principal and supervisory capacities for one year. (RP 6462.)

24.) The Hearing Panel also found that Demetriou violated NASD Rule 2210 and FINRA Rules 2210 and 2010 by sending the Three Emails and the investment summaries that contained inaccurate information and failed to provide a sound basis for evaluating the facts therein, and by sending the Three Emails without obtaining approval from an appropriately qualified Titan registered principal. (RP 6028-35.) Finally, the Hearing Panel further found that Demetriou violated FINRA Rule 2010 by using unapproved email accounts to conduct securities business. (RP 6038.)

With respect to Titan's failure to preserve emails in violation of Exchange Act Section 17(a) and Exchange Act Rule 17a-4, Enforcement appealed only the Hearing Panel's finding that these violations were not willful. (RP 6067-69.) The NAC reversed the Hearing Panel, finding that Titan's violations were willful. (RP 6453.) The NAC found that Brooks knew Titan registered representatives were using unapproved personal email for securities business, but intentionally allowed this use to continue unabated for months. (Id.)

Finally, the NAC found that Brooks and Titan willfully violated Exchange Act Section 10(b) and Exchange Act Rule 10b-9 by making misrepresentations with respect to the Evolution offering. (RP 6455-57.) The NAC also found that Titan willfully violated Exchange Act Section 15(c) and Exchange Act Rule 15c2-4 by releasing Evolution investor funds from escrow before the minimum was met. (RP 6457-58.) For these violations, the NAC fined Titan and Brooks $50,000, jointly and severally, suspended Brooks for one year in all principal and supervisory capacities—to run consecutively with his other principal suspension—and ordered that Brooks requalify as a principal by examination. (RP 6465-66.)

IV. ARGUMENT

The Commission reviews FINRA disciplinary decision to determine (1) whether the applicants engaged in the conduct FINRA found; (2) whether the conduct violated the rules specified in FINRA's determination; and (3) whether the rules were applied in a manner consistent with the Exchange Act. *See* 15 U.S.C. § 78s(e)(1); *see also Richard Riemer*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022, at *8 (Oct. 31, 2018). FINRA's findings of violation here meet this standard and, accordingly, the Commission should affirm them in all respects.

A. Titan and Brooks Failed to Supervise Demetriou's OBA

The NAC correctly found that Titan and Brooks failed to supervise Demetriou's activities that he engaged in for RBCP. The NAC found that from July through October 2010, Demetriou engaged in an undisclosed OBA in RCBP, and that Titan and Brooks failed to supervise that OBA, in violation of NASD Rule 3030 and FINRA Rules 3270 and 2010.

Applicants argue that RBCP was not an OBA because Demetriou was not "working in the service of" RBCP and thus was not employed by RBCP and, accordingly, Titan and Brooks did not fail to supervise those activities. (Applicants' Br. at 21.) Applicants' argument fails because the evidence demonstrates that Demetriou's conduct as a managing member of RBCP was plainly outside the scope of his relationship with Titan, he was engaged in an OBA, and Brooks did not conduct a sufficient investigation when he became aware of red flags indicating an OBA.

1. Demetriou's Activities Related to RBCP Were an OBA

NASD Rule 3030 provided that a registered person may not "be employed by, or accept compensation from, any other person as a result of any business activity . . . outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member." An associated person is required to disclose any outside business activity "at the time when steps are taken to commence a business activity unrelated to his relationship with his firm" and OBAs must be disclosed regardless of whether an associated person receives compensation for it. *See Dep't of Enf't v. Schneider*, Complaint No. C10030088, 2005 NASD Discip. LEXIS 6, at *13-15 (NASD NAC Dec. 7, 2005).[11]

[11] Effective December 2010, FINRA Rule 3270 replaced NASD Rule 3030. FINRA Rule 3270 provides that "no registered person may be an employee, independent contractor, sole

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The NAC correctly found that from July through October 2010, Demetriou activities were sufficient to conclude that he was employed by RBCP and, accordingly, he was engaged in an OBA. (RP 645-47.) Demetriou served in a formal position as RBCP's *managing member* for approximately four weeks, and held himself out as such to customers. (RP 3851.) *See Kent M. Houston*, Exchange Act Release No. 66014, 2011 SEC LEXIS 4491, at *5-6 (Dec. 20, 2011) (finding that a representative's appointment as a trustee for a trust was an outside business activity). Demetriou decided how the safekeeping receipt for the RBCP collateral should be issued and personally spoke to the appraiser of the coins that were to serve as collateral for RBCP. (RP 3851, 3849, 3851.) There activities were business activities on behalf of RBCP.

Demetriou facilitated solicitation of his customers, discussed RBCP with them, and urged them to invest. He organized conference calls with his customers during which the issuer solicited their investment. (RP 3845-47, 3849-52.) Demetriou sent the July 7 Email, July 21 Email, and September 9 Email to customers explaining the terms of the RBCP offering and soliciting their investments by telling them their investments were "secured" and "guaranteed" by the coins, that RBCP offered a "great return," was "unprecedented in a good way" and offered

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proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member.

Supplementary material instructs members that when it receives notice of an OBA, it must consider whether the activity will interfere or compromise the registered person's responsibilities to the member or its customers, or be viewed by customers or the public as part of a member's business based on the nature of the activity and the manner in which it will be offered. In connection with the implementation of FINRA Rule 3270, FINRA instructed members to apply the standards of FINRA Rule 3270 to pre-existing OBA activities. *See FINRA Regulatory Notice 10-49*, 2010 FINRA LEXIS 96, at *2 (Oct. 2010). Brooks did not conduct this lookback for Demetriou's RBCP activities even though he knew that Demetriou was discussing RBCP with customers and facilitating communications between the customers and the issuer. (RP 2919-20, 2949.)

the "best chance" of recouping the customers' losses in the PCG-sponsored partnerships. (Id.) He told them that he was "trying very hard to assure that all investor money is returned." (RP 3849.) Demetriou prepared individualized illustrations of the RBCP investment for his customers and received confirmations when they made an investment.

Applicants attempt to minimize Demetriou's work for RBCP, including the fact that he served as RBCP's managing member for four weeks, by citing Demetriou's testimony that he was "tricked" by Keys into becoming involved. (Applicants' Br. at 22.) Demetriou offered no explanation of how he was "tricked" other than to say his name was in the RBCP PPM. But it was no mistake that Demetriou accepted the position of managing member. Moreover, whether or not Demetriou fully understood that his name would be listed in the RBCP PPM does not undercut that he engaged in an OBA.

Demetriou's RBCP activities are precisely those which the outside business activities rule is meant to prevent. NASD Rule 3030 was designed in part to protect investors and the public interest. *See Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *31 (Sept. 30, 2016). Demetriou encouraged and enabled his customers' investments in an offering outside Titan. Demetriou's activities on behalf of RBCP were unsupervised and resulted in customer losses.

2. Brooks and Titan Failed to Supervise Demetriou's RBCP OBA

Brooks failed to conduct a reasonable investigation considering the red flags in Demetriou's explanation of his involvement with RBCP. As a result, Brooks wrongly decided that Demetriou was not engaged in an OBA and Titan and Brooks failed to supervise it in violation of FINRA rules.

NASD Rule 3010 requires FINRA member firms to establish and maintain a supervisory

system, including written supervisory procedures, to supervise the activities of associated persons that is "reasonably designed to achieve compliance" with the federal securities laws and FINRA rules. *See* NASD Rule 3010(a)(1), (b)(1). A member must implement and enforce its supervisory system and written procedures reasonably considering the circumstances presented. *See Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843, at *33 (Dec. 19, 2008). A FINRA member's "duty of supervision includes the responsibility to investigate 'red flags' that suggest that misconduct may be occurring and to act upon the results of such investigation." *Michael T. Studer*, 57 S.E.C. 1011, 1023-24 (2004), *aff'd*, 260 F. App'x 342 (2d Cir. 2008). "[R]ed flags and suggestions of irregularities demand inquiry as well as adequate follow-up and review, [and] [w]hen indications of irregularity reach the attention of those in authority, they must act vigorously, decisively, and with the utmost vigilance to detect and prevent improper activity." *Merrimac Corp. Secs.*, Exchange Act Release No. 86404, 2019 SEC LEXIS 1771, at *75 (July 17, 2019) (internal quotations omitted).

Demetriou admitted to Brooks that he was discussing an outside investment offering with customers and facilitating contact between customers and the issuer (RP 3803.) Brooks knew that Keys was involved in RBCP and that Keys had been involved in prior offerings that had failed and, as a result, Brooks wanted nothing to do with Keys. (RP 2781, 2936, 2940-41.) Demetriou told Brooks that $25,000,000 of RBCP would go to his customers and that the investment offered extraordinary returns of 1,000 percent. (RP 3803.) Demetriou also told Brooks that the investment was guaranteed by rare coins. (Id.) This implausible rate of return and promise of a guaranteed investment were significant red flags.

Despite these red flags, Brooks failed to investigate further. Indeed, Brooks acknowledges that he decided RBCP was not an OBA solely based on information that came

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from Demetriou, without taking steps to investigate or verify Demetriou's claims. (RP 2904.) While Brooks asked for a copy of the PPM, he did not insist that Demetriou obtain a copy when Demetriou claimed he did not have one. (RP 2918, 3047.) Brooks did not ask Demetriou how many customers were involved in his communications about RBCP or whether any were Titan customers. (RP 2928, 2930-31, 2935-36, 2954, 3011-13.) Brooks never conducted historical email searches to look for additional information about RBCP. (RP 2956, 2991-92.) For example, the July 7 Email, July 21 Email, and September 9 Email were sent by Demetriou from an email account that was captured and monitored by Titan. (RP 2958-59, 4129.) If Brooks had done a historical search of "RBCP," "Keys," or "Phillips" in October 2010, he would have discovered these emails and known that Demetriou was acting outside the scope of his association with Titan. (RP 2955, 2994-96.) These emails also would have revealed to Brooks that Demetriou had served as RBCP's managing member, that he was recommending RBCP to his customers, touting the benefits of the investment, and preparing individualized illustrations and having conversations about RBCP with customers. (RP 3845, 3849, 3851.)

Brooks's failure to reasonably investigate the reg flags that indicated that Demetriou was engaged in an OBA allowed that OBA to continue undetected and unsupervised by Titan, and caused $337,700 in customer losses. The evidence fully supports the NAC's findings that Brooks and Titan failed to supervise Demetriou's RBCP OBA, in violation of NASD 3010 and FINRA Rules 3270 and 2010.

B. Titan's Failure to Preserve Emails Was Willful

It is uncontested that from April 2011 through April 2013, Titan and Brooks failed to maintain and enforce adequate written supervisory procedures for the capture, review, and retention of Titan's securities-related emails, in violation of NASD Rules 3010 and 3110 and

FINRA Rules 4511 and 2010, and that Titan failed to preserve emails in violation of Exchange Act Section 17(a) and Exchange Act Rule 17a-4. (RP 6036-39.) The NAC found that Titan's email preservation failures under the Exchange Act were willful. The Applicants' assertions do not undercut this finding and the Commission should affirm it.

The Commission has explained that willfulness means that the respondent subjectively intended to commit the act which constitutes the violation. *See Allen Holeman*, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at *37-39 (July 31, 2019), *aff'd,* 833 F. App'x 485 (D.C. Cir. 2021). Willfulness does not require an awareness that one is violating a section of the Exchange Act. *Id.* at *37. Rather, "liability may be imposed only where it is shown that the petitioner . . . intended" to commit the violative act—here, failing to preserve emails for a two-year period. *Id.* at *38 (internal quotations omitted). Intent may be established by showing that Titan acted with extreme recklessness with respect to its failure to preserve email. *Id.* at *38-39. The record establishes that Titan, through Brooks, acted at least with extreme recklessness in its failure to preserve emails.

It is undisputed that for a two-year period, Titan failed to capture and maintain emails concerning its securities business that were sent to and from the unapproved email accounts of Demetriou and five other Titan registered representatives.[12] (RP 3067-69; Stip. Nos. 16-17.)

[12] Titan and Brooks argue that there is "no clear evidence" of any uncaptured and unpreserved emails, pointing out that the emails listed in CX-119 were either sent to or copied to a Titan securities address. (Applicants' Br. at 26.) It is true that the emails in CX-119, which was introduced as evidence to show that Brooks and other Titan staff were aware of the use of personal email accounts by Titan registered representatives, were sent or copied to Titan email addresses. However, the parties *stipulated* that there were securities-related communications sent to and from the unapproved personal email accounts that were not maintained by Titan. (Stip. Nos. 16-17.) In the absence of compelling circumstances, Titan and Brooks cannot now deny the truth of those stipulations. *See Joseph Abbondante*, 58 S.E.C. 1082, 1088 n.12 (Jan. 6, 2006) (stating that stipulated facts "serve important policy interests in the adjudicatory process"

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Brooks knew Demetriou and other Titan representatives were using unapproved personal email addresses. Brooks testified that he "knew we had a problem with some . . . emails being used out there among the [Titan sales] force" that the firm needed to "clean[] up" and that Demetriou was "sloppy" with his use of email addresses. (RP 3070, 3194.) Indeed, the record includes evidence that over the two-year period in question, Titan staff received approximately 580 emails from these unapproved email accounts, and Brooks himself received more than 120 emails from Demetriou's and the other registered representatives' unapproved personal email accounts. (RP 3345-47, 5465-5500.)

Brooks conceded that it was his responsibility to look for the use of unapproved email addresses and to act when such use was discovered. (RP 3037-39, 3070-71.) While Brooks testified that he did his "best" to stop the use of unapproved email accounts, Titan's violation continued unabated for two years. Even after Brooks purportedly directed the firm's new CCO to stem the tide of unapproved email usage, it continued for months and Brooks and Titan knew it. (RP 3071, 3075.) For example, on January 15, 2013, Demetriou was still sending email from his unapproved Gmail account to Brooks and Titan's new CCO, requesting approval of a letter to be sent to Titan customers who invested in RBCP. (R 4735-36.) Titan and Brooks stipulated that the use of unapproved accounts continued well into 2013, until July 2013 by Demetriou and April 2013 for the other five registered representatives. (Stip. Nos. 16-17.)

In support of its argument that its failure to preserve email was not willful, Titan cites a FINRA Office of Hearing Officers decision that was never appealed to the NAC, *Department of*

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and the Commission "will honor stipulations in the absence of compelling circumstances"), *aff'd*, 209 F. App'x 6 (2d Cir. 2006). The existence of uncaptured emails is also confirmed in Brooks's testimony about his efforts to obtain copies of such emails from one of his registered representatives after FINRA had requested them. (RP 3087-94.)

Enforcement v. The Dratel Group, Inc. Complaint No. 2009016317701, 2013 FINRA Discip. LEXIS 31 (FINRA OHO Sept. 19, 2013).[13] In *Dratel*, the firm was contacted by its third-party email custodian and notified that, due to a computer malfunction, the firm's emails had not been archived. *Id.* at *30-33. The Hearing Panel found that Dratel's violation was not willful because the firm's principal assigned an employee to work with the vendor to solve the problem, and he had no reason to believe the problem had not been solved until he requested emails and noticed from the small number that there was a continuing malfunction. *Id.* The Hearing Panel found that under these circumstances, Dratel's principal had acted negligently, not intentionally, and that the violations were "inadvertent" and "minor" *Id.*

Dratel is readily distinguishable from the facts here. Brooks and Titan were on notice for two years that six registered representatives were using unapproved personal email accounts for securities business and, accordingly, the firm was not capturing, reviewing, or maintaining these emails. Brooks testified that he was aware of the problem and he was copied on more than 120 email from these accounts. Nonetheless, it took two full years for Titan to address its failure to preserve business records. Under these circumstances, Brooks and Titan were extremely

[13] Applicants' arguments focus on the Hearing Panel decision in this case. It is the NAC's de novo decision, however, that is under review. *See Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *21 n17. (Nov. 8, 2006) (explaining that it is the decision of the NAC, not the hearing panel, which is FINRA's final action subject to Commission review.) The NAC correctly found that Titan's and Brooks's failures to preserve emails were willful. Applicants also argue that Brooks's intent was the subject of a credibility finding because a majority of the Hearing Panel accepted his testimony that he did his "best" to prevent the use of unapproved personal email accounts. (Applicants' Br. at 25.) First, the Hearing Panel decision does not make an explicit finding about Brooks's credibility in this regard. Moreover, the record is clear that Brooks was aware for years that registered representatives were using unapproved personal email accounts for securities business, but he failed to take steps adequate to stop this use and capture and preserve these emails. Under these circumstances, Brooks's claims that he did his "best" do not undercut the fact that his failures were extremely reckless, and thus willful.

reckless in their failure to maintain emails and, accordingly, the NAC properly found Titan's violations of Exchange Act Section 17(a) and Exchange Act Rule 17a-4 to be willful.

C. Titan and Brooks Made Misrepresentations About the Evolution Offering and Caused Investor Funds to be Withdraw from Escrow Before the Minimum Offering Was Met by Bona Fide Sales

1. Titan and Brooks Willfully Violated Exchange Act Section 10(b) and Exchange Act Rule 10b-9

The NAC found that Titan and Brooks willfully violated Exchange Act Section 10(b) and Rule 10b-9 thereunder by making false and misleading statements in the Evolution PPM. Specifically, the NAC found that notwithstanding the representation in the PPM that purchases in the offering by the issuer and its affiliates would not count towards the minimum, Titan and Brooks did just this in order to capture a business opportunity. These findings are supported by the record and the Commission should affirm them.

Exchange Act Rule 10b-9 "prohibits representations that a security is being offered on a 'part-or-none' basis unless the offering is contingent on the prompt return of subscribers' funds if the specified amount of securities is not sold and the specified price received within the specified time." *J.V. Ace & Co., Inc.*, 50 S.E.C. 461, 464 (Dec. 21, 1990). Moreover, the minimum number of shares must be sold to "the public" before a contingency offering can be closed. *See Svalberg v. SEC*, 876 F.2d 181, 183 (D.C. Cir. 1989). "A minimum contingency offering may not be considered sold for purposes of the representation unless the securities are sold in bona fide transactions and the purchase prices are fully paid." *Dep't of Enf't v. Joseph Gaetano Gerace*, Complaint No. C02990022, 2001 NASD Discip. LEXIS 5, at *13 (NASD NAC May 16, 2001) (citing *Requirements of Rules 10b-9 and 15c2-4 Under the Securities Exchange Act of 1934 Relating to Issuers, Underwriters and Broker-Dealers Engaged in an "All or None" Offering*, Exchange Act Release No. 11532, 1975 SEC LEXIS 1229 (July 11, 1975)). Sales to

the issuer or its affiliates are not bona fide sales for purposes of Exchange Act Rule 10b-9. *See Gerace*, 2001 NASD Discip. LEXIS 5, at *14 (finding that sales to an affiliate of the issuer were not bona fide sales for purposes of meeting the minimum offering amount).

It is undisputed that Evolution was being offered on a contingency—i.e., all-or-nothing—basis. (Stip. No. 18.) The Evolution PPM stated if a minimum of $1,000,000 was not sold by December 31, 2012, the offering would be terminated and the investors' funds, which would be held in an escrow account, would be returned. (RP 3113-14, 3127-29, 3130-31, 4368, 4421.) Consistent with the requirement of Exchange Act Rule 10b-9 that the contingency must be met by sales to bona fide investors, the Evolution PPM also stated that any units in the offering purchased by Evolution GP would not count towards the minimum contingency. (RP 4421.)

It is also undisputed that Brooks caused Evolution GP to borrow $1.6 million, deposited the loan proceeds into the Evolution escrow account, and relied on the loan proceeds in meeting the minimum contingency and breaking escrow, thereby disregarding the requirements of the securities laws and statements in the PPM. (RP 3133-36, 3141-42, 3144, 4437, 4578, 4652; Stip. Nos. 20, 21.) Brooks testified that the loan was taken, and the proceeds were deposited in escrow with the intention of canceling Evolution GP's shares and repaying the loan as new investors purchased Evolution—which ultimately happened. (RP 3145.) Brooks's conduct caused the statements in the PPM to be false and misleading.

Applicants argue that they lacked the requisite scienter to violate Exchange Act Rule 10b-9. *See Robert Tretiak*, 56 S.E.C. 209, 226 (Mar. 19, 2003) (requiring scienter to prove a violation of Exchange Act Rule 10b-9). The record, however, contains ample evidence of scienter. In the context of Exchange Act Rule 10b-9, scienter is established by showing that the respondent knew the minimum investment amount and that the funds were retained even though

the minimum was not raised. *See SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998). Here, Brooks claims that he relied on advice from counsel and did not have the requisite scienter because—based on that advice—he believed Evolution GP's purchases were bona fide sales that counted towards the minimum contingency. The NAC rightly rejected both these arguments.

First, Brooks testified that he consulted counsel because there was a discrepancy between the PPM and Evolution GP's partnership agreement that made it unclear whether purchases by Evolution GP could be considered bona fide. According to Evolution's counsel, a section of Evolution GP's partnership agreement allowed it to borrow funds and engage in transactions with Evolution. (RP 4447.) The claimed discrepancy, however, does not exist. The Evolution PPM stated that "[a]ny Units purchased by [Evolution GP] or its affiliates will not be counted in calculating the minimum offering." (RP 4421.) Other sections of the PPM stated that "[t]he General Partner reserves the right to acquire unsold Units and offer them to investors at a later date." (RP 4383, 4500.)

The PPM is clear that units purchased by Evolution would not be counted towards the minimum investment amount.[14] That the PPM also allowed Evolution GP to purchase Evolution units and later sell them to investors has no bearing on whether those units could also be counted towards to the minimum offering amount. The same is true of the provision in Evolution GP's

[14] In arguing that there was a discrepancy in the offering documents, Applicants' point to the "Question and Answers" section of the PPM which states that Evolution GP reserves the right to acquire unsold units and offer them to investors at a later date. (RP 4383.) First, Applicants ignore other parts of the "Questions and Answers" which state that investment funds will be held in escrow until the $1 million minimum is met. (Id.) Moreover, the section Applicants rely on does not say purchases by Evolution GP will count towards the minimum, and it is entirely consistent with the representation that purchases by it would *not* count towards the minimum.

partnership agreement allowing the GP to borrow funds and enter into transactions with Evolution. It is not inconsistent to say that the minimum offering amount will be met by bona fide purchases and that Evolution GP can also acquire units and resell them at a later date.

Applicants also have not met their burden of establishing a defense of reliance on advice of counsel. To do so, Applicants must establish that (1) they made complete disclosure to counsel; (2) sought advice on the legality of the intended conduct; (3) received advice that the intended conduct was legal; and (4) relied in good faith on counsel's advice. *See Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at * 38 (Nov. 14, 2008), *aff'd*, 347 F. App'x 692 (2d Cir. 2009).

Applicants offered as evidence of counsel's advice a memorandum written by the attorney who drafted the PPM and Evolution GP partnership agreement. (RP 4447-48.) This memorandum was prepared a year after Evolution broke escrow, after FINRA began its investigation. (Id.) The memorandum states:

> Section 3.1 of the Agreement of Limited Partnership grants [Evolution GP] the power to borrow money and to engage in transactions with the Partnership . . . . [Evolution GP] arranged for funds to be advanced . . . to facilitate the closing. The authority for [Evolution GP] to acquire and dispose of Units in the Partnership is found in Section 4.1 of the Partnership Agreement.
>
> The steps were taken because it allowed the Partnership's investors to participate in the transaction. The timetable for the closing of the purchase of the real property could not be extended. The escrow disbursements were necessary to allow the Partnership to capture the opportunity.
>
> [Evolution GP] had strong reason to believe that additional subscriptions were forthcoming.

(Id.)

This memorandum fails to prove reliance on advice of counsel for two reasons. First, the

memorandum says nothing about a claimed discrepancy in the documents and does not address the legal question at issue—whether the units purchased by Evolution GP could be counted towards the minimum offering amount. To the contrary, the memorandum undercuts Applicants' claims, and confirms that the reason Brooks caused Evolution to borrow funds and purchase Evolution units was because "[t]he timetable for the closing of the purchase of the real property could not be extended. The escrow disbursements were necessary to allow the Partnership to capture the opportunity."[15] (RP 4447.)

Second, the memorandum was created after the real estate purchase and therefore could not have been relied on as legal advice that the intended conduct was legal. A desire to purchase real estate, not any misunderstanding, was the reason why Evolution purchased units.

The evidence establishes that Brooks acted with scienter when he broke escrow in the Evolution offering before the minimum amount was raised in bona fide transactions. Because Brooks acted with scienter, Titan's and Brooks's violations of Exchange Act Section 10(b) and Exchange Act Rule 10(b)-9 were also willful. *See Gopi Krishna Vungarala*, Exchange Act Release No. 90476, 2020 SEC LEXIS 4938, at *28 n.36 (Nov. 20, 2020) (explaining that a finding of scienter demonstrates that a violation is willful).

[15] Applicants argue that because the Hearing Panel "accepted [Brooks's] testimony" about his belief in a discrepancy in the offering documents, the Hearing Panel made a credibility finding that he lacked scienter. (Applicants Br. at 29.) The Hearing Panel decision does not make an explicit finding about Brooks's credibility. In any event, for all the reasons discussed in this section, the NAC found that "substantial evidence in the record demonstrates that Brooks's claims about supposed confusion in the Evolution offering documents are not credible." (RP 6512, 6520.)

2. Titan and Brooks Willfully Violated Exchange Act Section 15(c) and Exchange Act Rule 15c2-4

The NAC correctly found that Titan and Brooks willfully violated Exchange Act Section 15(c), Exchange Act Rule 15c2-4, and FINRA Rule 2010 by releasing investor funds from escrow in the Evolution offering before the minimum offering amount was raised from bona fide investors. Exchange Act Rule 15c2-4 states that, in a contingency or "all-or-none" offering, it shall constitute a "fraudulent, deceptive, or manipulative act or practice" under Exchange Act Section 15(c)(2) if the investor funds are not deposited into an escrow account and held there "until the appropriate event or contingency has occurred" and then are either "promptly transmitted or returned to the persons entitled thereto." 17 C.F.R. § 240.15c2-4. The evidence unequivocally shows that Titan and Brooks intentionally released the funds from escrow before the offering minimum was met by purchases from bona fide investors and thereby acted willfully. *See Holeman*, 2019 SEC LEXIS 1903, at *37-39 (defining willfulness as intentionally committing the act that constitutes the violation). The Applicants contest on appeal only that their violations were willful.

Brooks intentionally released the funds from Evolution's escrow account before the $1,000,000 minimum amount was raised from bona fide investments. As discussed above, Brooks's claim that he believed, based on advice from counsel, that Evolution GP's purchases were bona fide is contradicted by the record. Accordingly, Titan's and Brooks's violations of Exchange Act Section 15(c), Exchange Act Rule 15c2-4 were willful.

D. The Sanctions Imposed By the NAC Are Supported by the Record, Consistent with the Sanction Guidelines, and Neither Excessive Nor Oppressive

Under Exchange Act Section 19(e)(2), the Commission will sustain the sanctions FINRA imposes unless they are "excessive or oppressive" or impose an unnecessary or inappropriate

burden on competition. 15 U.S.C. § 78s(e)(2). In evaluating the sanctions imposed, the Commission must consider any aggravating or mitigating factors, and whether the sanctions are remedial and not punitive. *See Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Secs., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007). The Commission considers FINRA's Sanction Guidelines ("Guidelines") as a benchmark in conducting its review.[16] *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *61 n.85 (Nov. 9, 2012). The sanctions FINRA imposed on Titan and Brooks for their violations are consistent with the Guidelines and meet the standards of Exchange Act Section 19(e)(2).

1. The Sanctions FINRA Imposed on Titan and Brooks for Failure to Supervise Demetriou's RBCP OBA Are Appropriately Remedial

For the failure to supervise Demetriou's RBCP OBA, the NAC fined Titan and Brooks $50,000, jointly and severally, and suspended Brooks in all principal and supervisory capacities for one year (RP 6462.) These sanctions are consistent with the Guidelines and appropriately remedial.

The Guidelines for failure to supervise recommend a fine of $5,000 to $73,000, and recommend considering a separate fine for the firm and the responsible individual. *Guidelines* at 104. The Guidelines also recommend suspending the responsible individual in all supervisory capacities for up to 30 business days and, in egregious cases, up to two years or a bar *Id.* The specific considerations for assessing sanctions for failure to supervise include: (1) whether the respondent ignored "red flag" warnings that should have resulted in additional supervisory scrutiny and whether the individual responsible for underlying misconduct attempted to conceal misconduct from respondent; (2) the nature, extent, size and character of the underlying

[16] FINRA Sanction Guidelines (2018), https://www.finra.org/sites/default/files/2018_Sanctions_Guidelines.pdf .

misconduct; and (3) the quality and degree of supervisor's implementation of the firm's supervisory procedures and controls. *Id.*

The NAC found that Brooks's failure to supervise was egregious and that several aggravating factors applied to his misconduct. (RP a 6462.) First, while Demetriou's written explanation omitted important information about his involvement with RCBP, it also raised numerous red flags that should have prompted further investigation by Brooks. (*See supra* Part IV.B.2.) Brooks knew about and allowed Demetriou to discuss with customers an offering outside Titan, that was promising customers extraordinary returns of 1,000 percent, and allowed Demetriou to facilitate communication between these customers and the issuer. Demetriou told Brooks that RBCP had set aside $25,000,000 for these customers and that the investment was supposedly secured by rare coins, claims that should have prompted further inquiry. (RP 3803.) Brooks knew that Keys sponsored RBCP, a person he knew had been involved in prior bad deals and who Brooks said he wanted nothing to do with. Notwithstanding his knowledge, Brooks accepted at face value Demetriou's explanations, Brooks did not conduct an adequate investigation, and Demetriou's unsupervised OBA resulted in significant customer losses.

Applicants argue that the sanctions imposed by FINRA should be eliminated or reduced because Titan is a "well-respected smaller firm." (Applicants' Br. at 2.) It is well-settled, however, that a lack of disciplinary history if not mitigating for purposes of accessing sanctions in FINRA disciplinary proceedings. *See, e.g., Philippe N. Keyes*, 2006 SEC LEXIS 2631, at *23 (explaining that the lack of disciplinary history is not mitigating for purposes of sanctions because an associated person "should not be rewarded for acting in accordance with his duties as a securities professional").

Applicants also argue that is it mitigating that no customers complained about the activity at issue and no customer harm resulted from Titan's or Brooks's misconduct. (Applicants' Br. at 2.) First, it is not true that there was no customer harm in this case. Demetriou's unsupervised RBCP activities resulted in customer losses of $337,700. But even if Applicants' claims were true, it is well-settled that a lack of customer harm it not mitigating. *See, e.g., Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at *68 (Nov. 15, 2013).

Brooks's and Titan's misconduct warranted the significant sanctions that the NAC imposed. A $50,000 fine is within the range recommended by the Guidelines, and Brooks's one year supervisory and principal suspension is justified by his egregious supervisory failures. Accordingly, the sanctions imposed by FINRA are neither excessive nor oppressive and the Commission should affirm them.

2. The Sanction FINRA Imposed for Titan's and Brooks's Violations Related to Evolution Are Appropriately Remedial

The NAC imposed a unitary sanction for Titan's and Brooks's violations of Exchange Act Rules 10b-9 and 15c2-4. (RP 6465-66.) For these violations, the NAC fined Titan and Brooks $50,000, jointly and severally, and suspended Brooks for one year in all principal and supervisory capacities. (Id.) The NAC ordered that this suspension run consecutively to his principal suspension for failure to supervise an OBA and also ordered Brooks to requalify as a principal by examination. (Id.) FINRA's sanctions are supported by the record and consistent with the Guidelines and the Commission should sustain them.

The Guidelines recommend a fine of $5,000 to $73,000 for violations of Exchange Act Rule 10b-9. *Guidelines*, at 22. In egregious cases, the Guidelines also recommend considering a suspension of the firm or the responsible individual in any or all capacities for up to two years. *Id.* For violations of Exchange Act Rule 15c2-4, the Guidelines recommend a fine of $1,000 to

$15,000 and, in egregious cases, suspension of the firm or responsible individuals in any or all capacities for up to 30 business days. *Id.*

The NAC found that Titan's and Brooks's violations Exchange Act Rule 10b-9 were egregious and that several aggravating factors under the Guidelines apply to their misconduct. (RP 6465-66.) Brooks's misconduct was intentional. *Guidelines*, at 8 (Principal Consideration No. 13). The NAC rejected Brooks's claim of reliance on counsel and found not credible his claim that he believed Evolution's GP investment could be counted towards the offering minimum.

In addition, three years before the misconduct at issue Titan and Brooks were censured and fined for comparable violations of Exchange Act Rules 10b-9 and 15c2-4, including releasing funds to an issuer before the minimum contingency had been met. (RP 3110-12.) Titan's and Brooks's recidivism is an aggravating factor and, because they were on notice of the requirements of these rules, supports the finding that their violation here was intentional. *Guidelines*, at 2, 8 (General Principal No. 2; Principal Consideration No. 14).

Titan and Brooks frustrated the important purpose under the rule that requires the minimum in a contingency offering be met through bona fide sales. Brooks used Evolution GP's non-bona fide sales to give the impression that the contingency was met, thereby thwarting the investor protection purpose of a contingency offering. Contingency offerings "were developed in order to provide buyers with somewhat greater security in the purchase of risky offerings." *Svalberg*, 876 F.2d at 183. The fact that the offering minimum was not met through sales to bona fide investors is important to investors because "the inability of the underwriter to sell the specified minimum to bona fide investors may well indicate that the market judges the offering price too be too high." *A. J. White & Co. v. SEC*, 556 F.2d 619, 623 (1st Cir. 1977). Moreover,

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Brooks's and Titan's misconduct resulted in their financial gain in the form of the commissions paid to them from the offering. *Guidelines*, at 8 (Principal Consideration No. 16).

Under these circumstances, the sanctions imposed by FINRA are appropriately remedial and neither excessive nor oppressive. The Commission should affirm them.

V. CONCLUSION

Brooks's lax supervision allowed Demetriou's involvement in an OBA to continue unsupervised, resulting in losses to customers. In addition, Titan's registered representatives used unmonitored, personal email accounts for securities business for two years despite Brooks knowing that this was a problem. Titan and Brooks violated the securities laws in connection with the Evolution contingency offering, breaking escrow before the minimum amount had been raised from bona fide investors to capture a business opportunity. The sanctions the NAC imposed will promote better supervision and discourage breaking escrow improperly in

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contingency offerings in the future. The Commission should sustain FINRA's action in all respects and dismiss Brooks's and Titan's application for review.

Respectfully submitted,

/s/ *Celia Passaro*
Celia L. Passaro
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8985
ersilia.passaro@finra.org
nac.casefilings@finra.org

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CERTIFICATE OF COMPLIANCE

I, Celia L. Passaro, certify that this brief complies with the length limitation set forth in Commission Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 12,582 words, exclusive of the pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits.

Respectfully submitted,

/s/*Celia Passaro*

Celia Passaro
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8985
ersilia.passaro@finra.org
nac.casefilings@finra.org

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CERTIFICATE OF COMPLIANCE

I, Celia Passaro, certify that this motion complies with the Commission's Rules of Practice by filing a motion that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

/s/*Celia Passaro*

Celia Passaro
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8985
ersilia.passaro@finra.org
nac.casefilings@finra.org

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CERTIFICATE OF SERVICE

I, Celia L. Passaro, certify that on this 28th day of January 2022, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review, In the Matter of Titan Securities and Brad C. Brooks, Administrative Proceeding File No. 3-20387, to be filed through the SEC's eFAP system.

And served by electronic mail on:

Bruce B. Kelson, Esq.
Schnader Harrison Segal & Lewis, LLP
650 California Street, 19th Floor
San Francisco, CA 94108
BKelson@SchnadeRPcom

/s/ *Celia Passaro*
Celia L. Passaro
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8985
ersilia.passaro@finra.org
nac.casefilings@finra.org