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

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

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I. INTRODUCTION

As previously set forth, there are three causes of action at issue on this appeal.

First, as to the OBA issue, FINRA provides no definition or standard (or related analysis) as to what it means to be an "employee" of an outside entity for purposes of an OBA determination – and FINRA ignores that neither they nor the NAC have ever referenced any such definition or standard. And without any such definition or standard (or related analysis), FINRA essentially simply asserts (incorrectly) that Demetriou was an "employee" of RBCP – as though the term means whatever they say it is in any particular case. This is lawless and abusive. FINRA also attempts to argue that Brooks should have performed a more thorough investigation into Demetriou's RBCP activities – though a related "duty to supervise" would only arise *after* a determination that an OBA exists. In this way, FINRA seeks to shift the focus away from Demetriou's status and over to Brooks' conduct – though Brooks had already made a proper, informed determination that an OBA did not exist. Again, this is lawless and abusive. Rule 3030 is a fairly basic rule – it simply states that a representative must be employed or compensated by an outside entity in order for an OBA to exist. Under this rule, Demetriou was not engaged in an OBA. FINRA must follow the rule as it is written, not as they would like to read it. There was no OBA, and therefore no duty to supervise.

Second, as to the personal email accounts issue, FINRA asserts that Titan "intentionally failed to preserve" securities-related emails from those accounts simply because, despite Brooks' best efforts to stop it, it continued for several months. But this is not logical or sound reasoning. And, as relevant case law indicates, these facts do not amount to intentional misconduct or recklessness in any event. Moreover, despite FINRA's efforts to deny or discount it, the Hearing Panel majority essentially made a credibility determination as to the sincerity of Brooks' efforts to stop the use of personal email accounts – they clearly believed him and "accepted his testimony." This is an issue best left to the panelists themselves, who were "in the room" with Brooks during the seven-day hearing. To do otherwise would be to reject the input and opinions of the industry panelists, who found that Brooks did nothing reckless or intentionally wrong. If FINRA chooses to set up its adjudicatory process with "mixed" panels, then it should defer to the fact-finding (and especially the

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credibility determinations) of such panels, and not simply nullify the input and opinions of the industry members at the internal appeal stage. Furthermore, in any event, FINRA has a significant evidentiary issue or "proof problem" because, at the end of the day, there is in fact *no evidence* of any uncaptured securities-related emails from the personal accounts. At a minimum, the alleged failure to preserve such emails should not be deemed intentional or willful.

Third, as to the Evolution contingency offering, there is substantial evidence to support and justify Brooks' belief that the General Partner's unit purchases properly counted towards the minimum amount. This evidence includes the prominent "reservation of rights" in the PPM Q&A section; the limited partnership agreement authorizations; Brooks' pre-transaction consultations with counsel; counsel's preparation of the loan documents in the circumstances; Brook's final consultations with counsel before counting the purchase of units towards the minimum amount (and breaking escrow and disbursing funds); and, finally, counsel's post-transaction memorandum. And here, too, despite FINRA's efforts to deny or discount it, the Hearing Panel majority essentially made a credibility determination as to the sincerity of Brooks' belief in his authority in the circumstances to purchase units and count them towards the minimum amount – again, they clearly believed him and "accepted his testimony." This, again, is an issue best left to the panelists, who were "in the room" with Brooks during the seven-day hearing. To do otherwise would be to reject the input and opinions of the industry panelists, who found that Brooks did nothing reckless or intentionally wrong. FINRA should defer to, and not nullify, the fact-finding – and especially the credibility determinations – of its three-member hearing panels. Here, Brooks had neither the scienter for a violation of Section 10(b)/Rule 10b-9, nor the intentionality for a willful violation of Section 15(c)/Rule 15c2-4.

As noted in Applicant's Opening Brief, this is certainly not the only recent case to raise substantial issues of error.[1] And there are broader calls as well for increased oversight of FINRA. In any event, this is a case that calls out for careful reconsideration and correction by the Commission, in exercise of its proper oversight of the SRO adjudicatory process.

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

II. ARGUMENT

A. Demetriou Did Not Engage in an OBA Related to RBCP, and Thus Titan and Brooks Were Not Obligated to Supervise Demetriou's Actions Related to RBCP

As Applicants' Opening Brief makes clear, and as the NAC Decision and the FINRA Opposition Brief both acknowledge, NASD Rule 3030 applies in this case and provides that the actions of a registered representative amount to an OBA only if the representative is "employed by" or "accepts compensation from" the outside entity – and, specifically, the only issue on this appeal is whether Demetriou was an "employee" of RBCP.[2]

In their Opening Brief, Applicants set forth several legal definitions of the term "employee." Applying these definitions, Demetriou clearly was *not* an "employee" of RBCP because he was not "working for" or "in the service of" RBCP; there was no "express or implied contract of hire"; RBCP had no "right to control" his actions or "the details of [his] work performance"; and RBCP paid him no wages or salary, or financial or other compensation.[3] And there is no evidence in the record to contradict these specific points regarding Demetriou's "non-employee" status.

Among other things, Demetriou sent three emails to his customers about RBCP, and he organized two conference calls for his customers on which Keys and BP solicited investors for RBCP. But as the facts make clear, Demetriou was always acting *on behalf of and for the benefit of his customers*, and *not* working for or in the service of or on behalf of RBCP, or under any contract of hire with RBCP, under which RBCP controlled his actions or paid him any compensation.[4] There is no evidence to the contrary.[5]

Astonishingly, an appellate panel of FINRA – the NAC – decided this issue involving a key term (*i.e.*, "employee") as contained in FINRA's own rule without even discussing *any* definition of that term. The NAC presented no competing (or *any*) standard, test, or definition of "employee" status. Even more astonishingly, after being specifically apprised of this issue in Applicants'

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[2] App. Brief at 21; R. 6445-47 (NAC Dec. at 26-28 and n.34); Oppo. Brief at 23-24.
[3] *See* App. Brief at 21-22.
[4] *See* App. Brief at 5-8, 21-23.
[5] Demetriou may have made false and misleading statements in his emails to his customers – and that may have separately exposed him to liability under certain statutory provisions and rules – but that did not convert him into an "employee" of RBCP as defined.

Opening Brief (*see* App. Brief at 22, n.94), the FINRA Appellate Group ignores this issue as well, and likewise provides no definition for the key term "employee" as used in FINRA's own rule.

In short, this is FINRA behaving as though the term "employee" means whatever they say it is in any particular case. This is lawless and abusive. FINRA must be tethered to some rational definition of a key term it uses in its own rule. In the absence of any input on the issue from FINRA, and applying the most appropriate definitions, Demetriou clearly was *not* an "employee" of RBCP.

Instead, FINRA again simply points to the fact that Demetriou was apparently designated as a "managing member" of RBCP for approximately four weeks. However, a "managing member" position alone would not make Demetriou an "employee" of RBCP in any event.[6] Also, notably, the successor to NASD Rule 3030 (*i.e.*, FINRA Rule 3270) expressly includes certain additional positions that were *not* a part of Rule 3030 – strongly indicating that Rule 3030 is strictly limited to simple "employees."[7] And even FINRA Rule 3270 (inapplicable here) does not include a "managing member" reference, either. In short, there is nothing to indicate that a "managing member" position would make a person an "employee" of an outside entity.

In addition, as noted in Applicant's Opening Brief, Demetriou testified that he was effectively induced or tricked by Keys into assuming that status by Keys' assurances that Demetriou 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 refer to any employment or management responsibilities, or any contract for hire, or any compensation from RBCP. Instead, Keys only referenced how Demetriou might *serve his own customers*. Moreover, Demetriou pulled out and resigned as managing member as soon as he saw the draft PPM with his name "all over it" – *well before he discussed the matter with Brooks*. For these reasons as well, Demetriou's very brief stint as a nominal "managing member" did not convert him into an "employee" of RBCP.

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[6] *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).

[7] *See* FINRA Rule 3270 ("No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person…").

On this point, FINRA cites to *Kent M. Houston*, Exchange Act Release No. 66014, 2011 SEC LEXIS 4491, at *5-6 (Dec. 20, 2011). However, *Houston* is completely distinguishable, and is of no value for FINRA here. In *Houston*, the Commission upheld a finding that a representative's service as a trustee constituted an outside business activity – but in that case the trust document explicitly provided that the trustee was entitled to *compensation* for services, and in fact the representative received more than *$400,000* for his services over a four-year period. *Id.* Moreover, the representative's "Independent Contractor Agreement" with his firm "expressly mentioned acting as a trustee as an example of an outside business activity," and two internal firm memoranda separately required disclosure of all trustee appointments. *Id.* Under these standards, Demetriou's actions relating to RBCP clearly were *not* an outside business activity.[8]

Beyond the reference to Demetriou's fleeting status as "managing member," FINRA merely repeats certain actions that Demetriou took in the relevant period, including sending emails *for his customers*, organizing conference calls *for his customers*, and providing information and illustrations *for his customers*.[9] Again, however, these were all actions that Demetriou was taking on behalf of his own 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 of the offeror. These actions did not convert Demetriou into an "employee" of RBCP.

Through a review of Demetriou's emails, with laudable oversight, Brooks discovered indications that Demetriou might be engaged in an OBA. Brooks did the right thing by having numerous discussions with Demetriou about the matter and then asking Demetriou for a written explanation – and then Brooks then received and reviewed the explanation and had even more

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[8] The only other case cited by FINRA on the OBA issue – *Dep't of Enf't v. Schneider*, 2005 NASD Discip. LEXIS 6 (NASD NAC Dec. 7, 2005) – further confirms that Demetriou's actions were not an OBA. In *Schneider*, in which an undisclosed OBA was found to exist, the representative had incorporated the outside entity himself, was the owner/operator of the outside entity, was actively promoting and conducting business on behalf of the outside entity, and would obtain compensation indirectly as a result of the entity's activities. In essence, the representative was not only "working in the service of" the outside entity – he effectively *was* the outside entity. *Schneider*, too, reflects a very high bar for finding an OBA, and nothing even close to that exists here.

[9] *See* Oppo. Brief at 24-25.

discussions with Demetriou about it.[10] And nothing in that explanation or those discussions indicated that Demetriou was employed by or receiving compensation from RBCP.[11] (And none of the allegedly omitted information would have suggested that, either.[12]) Accordingly, Brooks properly made the determination that Demetriou was not engaged in an OBA relating to RBCP.[13]

As the Hearing Panel majority properly noted, because Demetriou was not engaged in an OBA, Titan and Brooks were not obligated to supervise Demetriou's actions relating to RBCP.[14]

FINRA attempts to muddle this issue by suggesting that Brooks should have engaged in a more thorough "investigation" in the first place into whether Demetriou was engaged in an OBA. Oppo. Brief at 25-27. But this suggestion would flip the regulatory supervisory process on its head – and would require the result of an OBA determination (*i.e.*, a duty of supervision and investigation) to be applied even before a determination as to whether an OBA exists or not, or even (as here) *in spite of a determination that an OBA does not exist*. FINRA's attempt to conflate the OBA determination issue with the "duty to supervise" is unfounded and improper. (In other words, FINRA gets it wrong because the relevant inquiry here should be Demetriou's employment status, not

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[10] R. 2901 (Tr. 415) ("I know we discussed the situation and we came to an agreement about it."); R. 2904 (Tr. at 976) ("We had a lot of discussions about it. And then I asked him to put in writing exactly what his function was and provide details in writing and send it to me; he did. We then had more discussions about it."); R. 2904 (Tr. at 979) ("We had numerous conversations in between [Demetriou's explanation and Brooks' response].").

[11] R. 2941 (Tr. 1016) ("As I said, all I knew was that he was putting the clients together with the group that had lost them money with a deal that might help them make it back. That sounded like an altruistic thing to do, *not a job, not compensation, not a position, nothing*.") (emphasis added).

[12] The NAC Decision argues 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, or had organized conference calls. However, none of these points bear on "employee" status. The NAC Decision claims that these omissions somehow suggest that Demetriou knew he was engaged in an OBA – but more likely, Demetriou simply thought that this additional information was outdated and irrelevant to a proper OBA determination.

[13] R. 2901 (Tr. 976) ("And after listening to the explanation, I then determined what his role was going to be. I then determined that it was not an outside business activity."). As noted, 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.

[14] R. 6027 ("In Section II.B. of this Decision, the Hearing Panel majority concludes that Demetriou's involvement in RBCP was not an outside business activity because he was not employed by any person in the offering and did not receive compensation. Accordingly, the Hearing Panel majority finds that Brooks and Titan did not commit the supervisory violation alleged.").

Brooks' investigative conduct.) In short, this is FINRA behaving as though the term "OBA determination" means whatever they say it is in any particular case. This, again, is lawless and abusive. As the Hearing Panel majority properly noted, the duty to supervise does not arise when an OBA does not exist – and in this case an OBA did not exist.[15]

Because Demetriou was not engaged in an OBA, Titan and Brooks were not obligated to supervise Demetriou's actions relating to RBCP. Thus, the finding that Titan and Brooks failed to supervise Demetriou's OBA should be set aside, and the Third Cause of Action dismissed.[16]

B. Titan Did Not Willfully Fail to Preserve Any Securities-Related Emails

Following a seven-day hearing in April 2018, a majority of the Hearing Panel concluded that Titan did not intentionally fail to preserve certain securities-related emails from personal accounts, and thus that the failure to preserve those emails was not willful. Based on a cold record three years later, the NAC reversed that judgment, substituting in its own conclusion.

The NAC focused on the fact that Brooks had received business-related emails from the personal accounts of certain representatives (other than Demetriou) and was aware that representatives were using personal accounts for firm business by the end of 2012, but that Titan's failure to preserve these emails continued for several months thereafter (to April or July 2013), concluding that Titan therefore "intentionally" failed to preserve the emails to and from those personal accounts.[17] In other words, the NAC asserted that the use of personal emails continued for four to seven months, despite Titan's efforts to stop it, so there must have been a willful failure to

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[15] R. 6027 (Hearing Panel Dec. at 33) ("The supervisory obligations of NASD Rule 3010, FINRA Rule 3270, and the Supplementary Material to FINRA Rule 3270 do not come into play in this proceeding because there was no outside business activity for Brooks and Titan to supervise.").

[16] As noted, NASD Rule 3030 simply states that a representative must be employed or compensated by an outside person in order for an OBA to exist. FINRA must follow this 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 any clear limitations, with resulting adverse impacts on the securities industry and capital markets.

[17] R. 6453 (NAC Dec. at 34); R. 3070 (Tr. 1145). Exhibit CX-119 only shows the emails to and from the personal email accounts of five representatives other than Demetriou. R. 5465-5500. The Joint Stipulations, at ¶¶ 16-17, say nothing about Brooks' awareness of any use of personal email accounts by any of the Titan representatives. R. 1782.

preserve those emails during that period. As noted in Appellant's Opening Brief, this is not sound or logical. Sometimes undesired things happen despite best efforts to prevent them (pandemic infections, for instance) – but that does not make their occurrence intentional or willful.

As the Hearing Panel correctly emphasized, Titan had a strong policy prohibiting the use of personal email accounts for firm business; Brooks ordered representatives to stop it when he saw the use of personal email accounts; Brooks instructed Titan's outside email provider to capture personal email accounts if the representative continued using it; and in 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.[18] If any personal email accounts were still being used for firm business thereafter, then that happened despite Brooks' best efforts – meaning that there was not an intentional or willful failure to stop that practice or preserve those emails.

As set forth in Applicants' Opening Brief, the willfulness issue here essentially involves a credibility determination as to the sincerity of Brooks' efforts to stop the use of personal emails. And on that point, a Hearing Panel majority clearly believed Brooks and "accepted his testimony." Accordingly, 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).[19] The Commission should defer to the Hearing Panel majority's findings on this issue, in concluding that any failure preserve emails was not willful.[20]

In addition, as discussed in Applicants' Opening Brief, the Hearing Panel majority conclusion is strongly supported by *Dep't of Enf't v. The Dratel Group, Inc.*, No. 200901631701, 2013 WL

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

[19] *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)).

[20] FINRA's only response on this specific point is to argue that the Hearing Panel decision does not make an "explicit finding about Brooks's credibility in this regard." (Oppo. Brief at 30, n.13.) However, FINRA offers nothing to suggest that an "explicit finding" on credibility is necessary, or that "special words" must be used. Clearly, the Hearing Panel majority went out of their way to stress that they "accept[ed] Brooks' testimony" and accordingly concluded that any failure to preserve emails was not willful.

6835085 (NASDR OHO Sept. 19, 2013), in which the firm's principal directed an employee to have an email archiving problem remedied, and mistakenly believed that it had been remedied, even though subsequent interactions with the outside email archiver over a period of several months thereafter indicated there was a continuing problem. In these strikingly similar factual circumstances, the *Dratel* Hearing Panel found that the respondents were negligent but did not intentionally fail to preserve emails – and thus that the violation of Section 17(a) and Rule 17a-4 was not willful.

FINRA responds to the *Dratel* case by suggesting incorrectly that the principal "had no reason to believe the problem had not been solved" until he later discovered that there was a continuing malfunction.[21] As the case notes, the principal was notified of the archiving issue in December 2008 and instructed an employee to correct the problem at that time. 2013 WL 6835085 at *10. However, *each month thereafter*, the vendor sent him disks of archived emails that contained suspiciously few emails, but he "thought nothing of it" and disregarded the issue. *Id.* It was not until *several months later, in late July, 2009* – after another message from the vendor about the problem, and after a FINRA request for emails – that the principal checked the disks more carefully and realized there was a continuing malfunction. *Id.* In the *Dratel* case, the principal should have known better, and earlier. As in this matter, however, the factual circumstances amounted to negligence at worst.

Finally, in any event, as set forth in Applicant's Opening Brief, there is no actual evidence of any "uncaptured" or "unpreserved" business-related emails to and from the personal email accounts. As FINRA explicitly acknowledges, Enforcement's principal evidence on the email issue – Exhibit CX-119 – shows "internal" business emails sent "to and from titansecurities.com" and the personal email accounts, meaning that all of these "internal" emails were actually captured and maintained by Titan (and in fact were later "provided to [FINRA] from Titan").[22] Accordingly, there was no "failure to preserve" as to these "internal" emails.[23]

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[21] Oppo. Brief at 30.

[22] R. 5465-5500, 3340, 3344 (CX-119; Tr. 1415, 1419). Oppo. Brief at 28, n.12 ("*It is true that the emails in CX-119…were sent to or copied to Titan email addresses.*") (emphasis added).

[23] *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").

Importantly, there is no evidence that there were any *other* (*i.e.*, "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).[24] As a fall-back argument, FINRA asserts that "the parties *stipulated* that there were securities-related communications sent to and from the unapproved personal email accounts that were not maintained by Titan."[25] However, that is *not* what the Stipulation says. Instead, the Stipulation simply states that "communications" to and from these email accounts were not captured, reviewed or maintained by Titan.[26] In the relevant sentences, the Stipulation does *not* refer to "securities-related" emails. There is no evidence of any "unpreserved" securities-related emails from the personal accounts, period.

The most plausible (probable) interpretation of all this is that the representatives copied the firm on all "securities-related" emails from those accounts (which were thus captured by the firm), while otherwise using those accounts only for "personal" (or at least "non-securities-related") communications (that were not captured by the firm). There is no evidence to the contrary. It is impossible to say for certain, based on the record at hand – but, again, it was FINRA's burden to prove its case. At this point, *at the very least*, these evidentiary shortcomings should result in a conclusion that the alleged failure to preserve emails was not intentional or willful.[27]

C. Titan and Brooks Did Not Violate Section 10(b) and Rule 10b-9 or Willfully Violate Section 15(c) and Rule 15c2-4 In Connection with the Evolution II "Minimum Offering" Private Placement

1. Titan and Brooks Did Not Violate Section 10(b) and Rule 10b-9

The Hearing Panel majority correctly found that Enforcement failed to prove the requisite scienter on these claims 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. Specifically, the Hearing Panel majority found that Titan and Brooks did not know that the offering had failed to raise

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[24] There is no indication that Enforcement ever sought to obtain any such "external" business-related emails from the individual holders of those accounts, or from the email service providers.

[25] Oppo. Brief at 30 (emphasis original), citing R. 1782 (Stip. ¶¶ 16-17).

[26] R. 1782 (Stip. ¶¶ 16-17).

[27] Logically, 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 outright.

the minimum amount at the time because they believed that the General Partner's purchases properly counted toward the minimum amount.

Applicant's Opening Brief sets forth at length the numerous reasons why Titan and Brooks believed that the General Partner's purchases could be counted towards the minimum amount – and thus why they believed that the minimum amount had been raised at the time of the escrow break.[28]

The PPM does state, 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 states that the General Partner "*reserves the right to acquire unsold Units and offer them to investors at a later date*."[29] Moreover, the Limited Partnership Agreement expressly granted the General Partner the power to borrow money and to purchase and dispose of Units – without any limitation or restriction as to timing or other conditions.[30] In fact, counsel prepared the form of Promissory Note for a loan to the General Partner even before completing the PPM.

Accordingly, Brooks believed there was an ambiguity or discrepancy within the PPM, and also 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.[31] For this reason, Brooks turned to the same attorney who had drafted all of the documents, to determine which document controlled and whether the General Partner had authority to borrow funds, purchase units, and break escrow in the circumstances.[32] 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 in the circumstances.[33] Counsel then also drafted the loan agreement documents, which further confirmed counsel's approval of the loan and the purchase of partnership

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28 App. Brief at 12-16, 26-29.
29 R. 4383 (CX-88 at 17).
30 R. 4447 (CX-93 at 1).
31 R. 3136, 3155 (Tr. 1211, 1230).
32 R. 3136-37, 3155, 3200 (Tr. 1211-12, 1230, 1275).
33 R. 3155 (Tr. 1230) ("*He said…so, yes, you can make the loan*"); R. 3156 (Tr. 1231) ("*he said yes*"); R. 3159 (Tr. 1234) ("*he said yes*.") (emphasis added).

units *in the circumstances at the time* – and reinforced Brooks' understanding that counsel saw nothing wrong with the General Partner borrowing money to purchase partnership units in the circumstances and to break escrow.[34] In fact, the loan agreements openly and specifically outlined the entire series of proposed transactions leading to the disbursement of escrowed funds.[35] In short, everybody (including the lawyers drafting the documents) knew that the loan proceeds would be used to break escrow, and apparently nobody raised an issue or thought anything was wrong with that.

The General Partner then closed the loan, purchased units raising the offering proceeds above the minimum amount, and broke escrow, disbursing 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."[36] And Brooks specifically believed that counting the General Partner's purchase of units to break escrow was approved by counsel.[37] Counsel also later prepared a memorandum in connection with the FINRA investigation 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.*"[38]

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 thus that the offering had reached the minimum amount at the time of the escrow break.

As with the "willfulness" issue relating to the personal email accounts, 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, again, specifically "accepted his testimony."[39] Here, too, these are issues best

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34 R. 3201 ("So why would he prepare the loan documents if he didn't think it was ok to do?").
35 R. 4577, 4578, 4652 (CX-107 at 7, 8, 82).
36 R. 3135-36 (Tr. 1210-11).
37 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.").
38 R. 4447 (CX-93 at 1); R. 3159, 3200-01 (Tr. 1234, 1275-76).
39 R. 6041 (Hearing Panel Dec. at 47).

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).[40] Here, too, 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.[41]

In their Opposition Brief, FINRA argues that "the claimed discrepancy" (within the PPM, and between the PPM and the Limited Partnership Agreement) "does not exist."[42] However, FINRA completely ignores that the General Partner's clear reservation of rights to acquire and re-sell units appears in a prominent place in the PPM, in a "Q&A" section on page 17, with a bold-type heading that *specifically references the minimum offering amount*.[43] In this context, the statement looks exactly like (or in fact was) a disclosure that the General Partner reserved the right to acquire Units *in order to meet the minimum amount, i.e.*, that the purchased Units *could be counted* toward the minimum amount. This Q&A item is thus flatly inconsistent with the prohibition against counting General Partner purchases (which appears much later in the PPM anyway). FINRA also ignores the fact that the Limited Partnership Agreement expressly granted the General Partner the power to borrow money and to purchase and dispose of Units, without referencing any limitation or restriction as to timing or other conditions.[44] FINRA also ignores Brooks' substantial testimony as to the discrepancy or ambiguity that he in fact perceived.[45] In these circumstances, Brooks properly saw a discrepancy in the documents that led him to then seek advice from counsel (and obtain approval).

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40 *See William H. Murphy & Co., Inc., supra.*

41 Again, FINRA argues that the Hearing Panel decision does not make an "explicit finding about Brooks's credibility." (Oppo. Brief at 35, n.15.) However, FINRA again offers nothing to suggest that such an "explicit finding" on credibility is necessary, or that "special words" must be used. Clearly, the Hearing Panel majority went out of their way to stress that they "accept[ed] Brooks' testimony" and accordingly concluded that Brooks did not act with scienter in breaking escrow.

42 Oppo. Brief at 33-34. FINRA references the PPM provision stating that Units purchased by affiliates will not be counted towards the minimum amount, but then acknowledges that "other sections of the PPM" provide that the General Partner reserved the right to acquire unsold units and re-sell them at a later date. FINRA then claims that the General Partner's reservation of rights (and the authority to take loans and acquire units as set forth in the limited partnership agreement) have "no bearing" on whether the units could be counted towards the minimum amount. *Id.*

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

44 R. 4447 (CX-93 at 1).

45 R. 3136-37, 3155 (Tr. 1211-12, 1230).

FINRA next argues that Applicants "have not met their burden of establishing a defense of reliance of advice of counsel."[46] However, as noted in *Howard v. SEC*, 376 F.3d 1136, 1147-49 (D.C. Cir. 2004), 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. In this regard, good faith reliance on advice of counsel may be used simply to counter evidence of scienter, negligence, or both. *Id.* That is exactly how the relevant evidence is being used here.

FINRA also argues that counsel's memorandum, prepared in connection with the FINRA investigation, "fails to prove reliance on advice of counsel" because it "does not address the legal question at issue" – whether the units purchased by the General Partner could be counted towards the minimum amount.[47] However, FINRA completely omits and ignores the single most important sentence in this memorandum, which addresses the ultimate issue of the General Partner's belief as to its authority to borrow funds, purchase units, count them towards the minimum, and then break escrow and disburse funds: *"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.*"[48] This memorandum – prepared by counsel at the request of FINRA Enforcement Staff during the post-transaction investigation[49] (after Titan and Brooks suggested that the Staff meet with counsel and voluntarily waived the attorney-client privilege) – covers the entire sequence of events from loan closing to escrow break and disbursement of funds, and specifically rebuts FINRA's scienter claims.[50] In any event, FINRA ignores all of the other evidence as to Brooks' belief that his conduct was authorized, including (aside from the PPM Q&A reservation of rights and the limited partnership agreement authorizations), Brooks' pre-transaction consultations with counsel; counsel's preparation

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46 Oppo. Brief at 34.
47 Oppo. Brief at 34-35.
48 R. 4447 (CX-93 at 1).
49 R. 3159, 3200-01 (Tr. 1234, 1275-76).
50 FINRA also argues that the memorandum fails to prove reliance on advice of counsel because it was "created after the real estate purchase and therefore could not have been relied on as legal advice that the intended conduct was legal." Oppo. Brief at 35. This argument is frivolous. As noted, the memorandum was created after the fact because it was requested by FINRA during their investigation. Obviously, the memorandum itself could not have been relied on as legal advice at the time of the relevant transactions, but it was never intended to serve that purpose – it merely memorialized the facts that existed and the advice that was provided at that time.

of the loan documents in the circumstances; and Brook's final consultations with counsel before counting the purchase of units towards the minimum amount, breaking escrow, and disbursing funds.

Accordingly, the NAC finding that Titan and Brooks violated Section 10(b) and Rule 10b-9 should be set aside, and this portion of the Seventh Cause of Action should be dismissed.

2. Titan Did Not Willfully Violate Section 15(c) and Rule 15c2-4

For the same reasons set forth in Section II.C.1 above, Enforcement failed to 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. Accordingly, FINRA has failed to establish that Titan's violation of Section 15(c) and Rule 15c2-4 was willful.

III. 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.[51]

Dated: February 18, 2022

Respectfully Submitted,

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[51] 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 Titan and Brooks believe that all such challenged findings clearly should be set aside – then Titan and Brooks respectfully repeat their 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).

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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 18th day of February, 2022, I caused a copy of the foregoing Reply 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 February 18, 2022, at Concord, California.

By: Tiana Reyes
Tiana Reyes, Legal Secretary

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