UNITED STATES OF AMERICA
BEFORE THE
UNITED STATES SECURITIES & EXCHANGE COMMISSION

IN THE MATTER OF THE APPLICATION OF

Paul Eric Flesche's (CRD No. 3277904)

Respondent/Appellant

SEC Case No.: 3-20647

NAC Decision: October 6, 2021

FINRA Decision: April 5, 2019

FINRA Complaint No.: 201604956590

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I. INTRODUCTION

This brief is in further support of an appeal by applicant Paul Eric Flesche ("Eric Flesche") of the NAC's Decision to affirm sanctions against him for an alleged failure to adequately supervise Huanwei Huang ("Andy Huang"), a registered representative at Glendale Securities, Inc., and in reply to FINRA's Brief in Opposition to Application for Review ("Opposition Brief"). Among other arguments, Eric Flesche asserts that the record does not support the NAC's findings of violation or the sanctions imposed, and the SEC should overturn the NAC's Decision and reverse the findings and sanctions against Eric Flesche, and even assuming the NAC (and OHO) decision supported a finding of liability for a failure to supervise, Eric Flesche argues the decision is erroneous, because he reasonably executed on the firm's WSPs, and his conduct was reasonable in light of the circumstances.

In response to the Opposition Brief, Eric Flesche contends that FINRA does not address the substance of the critical argument presented in his Opening Brief ("Opening Brief") that FINRA's finding that Eric Flesche's failure to supervise Andy Huang is erroneous in light of the circumstances, conclusory and not supported by the facts in evidence or the record.

II. ARGUMENT

Eric Flesche reiterates his arguments that the SEC must overturn the NAC decision because Eric Flesche adequately supervised Andy Huang, and FINRA did not prove or properly conclude otherwise. In addition, FINRA failed to oppose several key arguments from the Opening Brief and instead argued points Eric Flesche did not raise, confusing and distracting from the ultimate issues, which are the inadequacies in the NAC (and OHO) decision and the overall procedure of this enforcement action.

Furthermore, the Opposition Brief makes references to the evidence in a format unavailable to Eric Flesche and, therefore, he cannot verify FINRA's citations to the record. This lack of transparency and access to information further supports Eric Flesche's argument in his Opening Brief that FINRA, throughout this enforcement process, has behaved in ways that raise questions about fairness and misconduct. Specifically, FINRA doctored evidence during trial; identified a possible bias during the initial hearing, but hired its own outside counsel to conduct a secret investigation into the bias, refused to involve any of the respondents in the "investigation" process, and then refused to provide any information to the Respondents regarding the results of the secret investigation or the findings of bias; and now, makes citations to a record in a format

not provided to Eric Flesche. Eric Flesche did not receive the record in the format cited, which is why he specifically cited to hearing testimony (citing Hearing Transcripts "TT") and exhibits, as opposed to the general record. For example, the Opposition Brief references "RP at 4981" on page 8. However, Eric Flesche does not have access to a document labeled "RP 4981" and, therefore, does not have the ability to verify FINRA's citation. As to the few cites Eric Flesche was able to decipher and verify, none supported FINRA's claim.

A. Eric Flesche Adequately Supervised Huang's Communications with Foreign Customers, and FINRA's Findings to the Contrary are Conclusory and Not Supported by Facts in the Record

1. The Failure to Supervise Claim Is Conclusory

In his Opening Brief, Eric Flesche establishes the NAC (and OHO) decision included no findings of fact to support its conclusion that Eric Flesche is liable for a failure to supervise claim. A reversal is thus warranted, because the NAC (and OHO) failed to support its conclusory findings, without any findings of fact as to what Eric Flesche's duties were, how Eric Flesche breached said duties, or what he could (or should) have done differently. Thus, the conclusion that Eric Flesche failed to supervise Andy Huang must be reversed.

In addition, the NAC (and OHO) decision is especially troubling because it premised the sanctions, at least in part, on a violation of Eric Flesche's nonexistent duty to ensure customers understood the forms they submitted.

In his Opening Brief, Eric Flesche argued: "The [OHO] decision must be overturned for the simple reason that it is a conclusory finding, and does not make a finding on any of the required elements of a failure to supervise claim, but merely concludes the underlying violation of the rules [by Andy Huang] equates to a failure to supervise sanction as well, irrespective of the actual facts of the matter." (Opening Brief at 14). In his opening brief Eric Flesche argues:

> [T]he OHO decision did *not* make any findings of fact regarding Eric Flesche's culpability; the OHO decision did *not* make any findings of fact regarding any alleged damages to the VXEL clients; the OHO decision did *not* make any findings of facts that the Firms' WSPs were inadequate; and the OHO decision did *not* make any findings of fact that Eric Flesche failed to execute upon the firm's WSPs. In short, the OHO decision ignored the elements of the charge.
> ....
> Even the NAC decision leaves one wondering what exactly Eric Flesche did wrong (culpability), what he could have done differently, what "damage" did his alleged failure to supervise cause (underlying violation), whether Eric Flesche

> executed on the firm's WSPs, and does the punishment fit the crime (sanctions)? This is especially true in light of the fact the failure to supervise claim charged that Eric Flesche failed to supervise Andy Huang's communications with KTO and KSC, and the OHO opinion only provided a summary conclusion that Eric Flesche failed to supervise Andy Huang's communications with KTO and KSC without any factual support or analysis, which the NAC simply adopted.

(*Id*. at 15-16, italics in original).

By failing to oppose the lack of factual findings argument, FINRA has conceded that the NAC (and OHO) decision does not contain sufficient findings of fact to support the charges or the sanctions[1] and, thus, warrants a reversal. The failure of the NAC (and OHO) to make sufficient findings of fact to support its conclusory statements is sufficient grounds for the SEC to reverse the decision holding Eric Flesche liable for a failure to supervise claim. In fact, the SEC is required to review the underlying decision to determine if it is reasonable and reasonably explained, and must overturn it if it is "arbitrary, capricious, or an abuse of discretion." *Siegle v. SEC*, 592 F.3d 147, 155 (DC Cir. 2010).

Here, a sanction for failure to supervise without the appropriate supportive findings of fact can only be characterized as "arbitrary" and "capricious."

2. The Record Shows that Eric Flesche Adequately Supervised Andy Huang and Did Not Miss Red Flags

FINRA argues Eric Flesche missed red flags, "because he knew Huang had not communicated directly with customers and had translated some but not all, of the provisions contained in documents that Ong sent to the customers." (Opposition Brief. at 11-12). This argument is misleading and misses the mark. First, the NAC decision does not state Andy Huang's direct communications and translations "presented [Flesche] with red flags that required further supervisory scrutiny." (Opposition Brief. at 11). Conspicuously absent is FINRA's citation to the record to support this argument.[2]

[1] Instead FINRA argues its complaint made sufficient allegations, but does *not* oppose that there were insufficient findings of fact to support the sanctions.

[2] In fact, FINRA's entire "analysis" provides two cites to the record. One reference is found on page 12: "Flesche knew that the Vitaxel customers were based in Asia" and the other on page 13: "Ong testified that he did not know if the Vitaxel customers could speak or read English." Those are FINRA's only two references to the record in this section, and neither supports its conclusion that Eric Flesche "knew Huang had not communicated directly with customers." The reason FINRA did not cite to any authority to support its claims is because that "evidence" does not exist in the record.

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However, simply "kn[owing] [Andy] Huang had not communicated directly with customers and had translated some but not all, of the provisions contained in the documents that Ong sent customers" is not a red flag, and only becomes a "red flag" if Eric Flesche had any indication the VXEL shareholders did not understand the documents they completed, signed, and returned. FINRA advocates for a procedure that simply does not make sense and is seeking to establish a new precedent.

The record simply does not support this position. Specifically, Andy Huang stated that he did have direct communications with all 30 VXEL customers, and even testified he spoke to some of them directly. "[Andy Huang]: Yeah. I speak to a few of the customers, and I do e-mail all 30 of the customers once I have their account number and I left their wire instructions." (TT 1576:3-6). Next, Andy Huang also testified he emailed all of the VXEL clients directly regarding funding their accounts. As an initial matter, the firm does *not* accept 3rd party wires to fund customer accounts (CX-009 at 113). Furthermore, each of the VXEL shareholders specifically followed instructions to fund their Glendale accounts with wire transfers from their own accounts. In fact, Andy Huang testified as such: "But every wire had to come from the customers. They come under their own names because our clearing firm ETC have the wire transfer policy. We do not allow third-party transfers. And their address on their customer spend account has to match on the address on the brokerage account." (TT 1580:15-21)

Here, the VXEL customers were provided specific instructions, and executed those specific instructions, further evidencing they understood the documents they completed, signed, and returned. By funding their accounts, from their own personal accounts, the VXEL customers are evidencing they understood the documents they completed, signed, and returned, by acting in a manner consistent with understanding the documents they completed, signed, and returned.

FINRA *admits* there is no rule requiring Eric Flesche to ensure firm customers understand the forms they are submitting. In FN10 of its Opposition Brief, FINRA asserts:

> Flesche argues that there is no requirement that he ensure customers understood the Glendale documents they were signing and that doing so would be impossible (internal cite omitted). The NAC decision, however, did not hold that he was required to ensure customers understood the documents. Rather, the NAC found that under these circumstances ... he was required to take additional steps to determine whether those customers could understand the documents.

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FINRA argues the NAC did not find Eric Flesche was required to ensure firm customers understood the forms they completed, signed, and submitted, but under "these circumstances" Eric Flesche was required to take additional steps to ensure the customers understood the forms they had completed, signed, and submitted is doublespeak. FINRA's assertion also highlights the confusion based on the NAC's failure to identify the "additional steps" that should have been taken by Eric Flesche, or what exactly "these circumstances" entails. [3]

Then FINRA concludes in the footnote "Flesche, however, did nothing." FINRA's conclusion is inconsistent with the record. Contrary to failing to supervise, upon discovering Andy Huang was communicating with the VXEL customers through a 3rd party, Eric Flesche took action to ensure that the customer's provided limited powers-of-attorney acknowledging that Mr. KT Ong could communicate on their behalf. Mr. Ong is bilingual and testified at the hearing that he communicated with, and was able to explain documents and procedures to, the customers, who fully understood his communications. (HT 2150:18-2153:8).

Here, the VXEL customers were from an English-speaking country[4] (a former British colony), who completed, signed, and submitted forms in English, acted as if they understood the forms, they completed by submitting supporting documentation, funding their accounts, and ultimately transacting in securities; and no customers complained they did not understand the forms they had completed. By claiming VXEL customers *may not have* understood the English forms they completed, signed, and submitted, FINRA is arguing that irrespective of the evidence before a broker-dealer, a supervisor should assume the customers do not understand the forms they completed, signed, and submitted; and has a duty to follow up on that assumption by separately confirming that the customers understand what they are signing. That is simply not the standard and, if that concept is followed to its logical conclusion, it supports the assertion that anyone, anywhere, could escape the consequences of their actions by claiming they did not understand the documents they signed and provided in support of the actions.

[3] Are "these circumstances" simply because the VXEL customers were from Malaysia?

[4] Malaysia was a British colony, until **1965**, and by law, enacted in 1963/67, the Malaysian National Language Act allowed the "continued use of English"; "Use of English language may be permitted in Parliament and Legislative Assembly"; in fact article 6 of the Malaysian statute required "the texts – (a) of all Bills to be introduced or amendments thereto … (b) of all Acts of Parliament … (c) of all Enactments … (d) of all Ordinances … *shall be* in the national language *and in the English language* …."; article 8 of the Malaysian statute allows Court proceedings to be in English.

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Beyond the steps taken by Eric Flesche in the normal course of his duties, he was not required to supplementally question the VXEL customers to ensure they understood the documents they completed, signed, and submitted, and there was no indication or finding in the record that any of the customers could not understand the documents.

3. Eric Flesche's Assumption that the Customers Understood their Documents Was Reasonable and FINRA Did Not Dispute It

FINRA did not oppose, and therefore conceded, that it was reasonable for Glendale (and by extension Eric Flesche) to assume a customer that has completed the account applications, signed the same, submitted the documents, and acted in a manner consistent with someone who understood the forms they submitted, did in fact understand the documents:

> Furthermore, both OHO and NAC ignored that the VXEL customers filled out and signed the account applications; never complained that they did not understand the forms; and, then ultimately acted in accordance with understanding the account documents, by selling the stock they deposited. This coupled with the fact there are no issues of customer losses, results in the logical and reasonable conclusion that VXEL shareholders fully understood the documents they were signing.

(Opening Brief at 27).

Eric Flesche explained this position: "[T]he reasonable assumption is that if someone does not understand a document, they will either identify their inability to understand the document, or they will obtain a way to understand the documents (i.e. have someone read it, translate it, *etc*.) and that is the reasonable assumption Glendale and Eric Flesche made in this instance." (*Id*.)

Eric Flesche then identified why he believed his supervision was appropriate in this instance: "Here, if someone fills out a form, answers the questions asked, provides the required information, signs the underlying document, funds the account, and never identifies their inability to understand the same, then it is reasonably assumed the person understands the document." (*Id*.)

Eric Flesche testified to the above as well:

> A: Well, I think that's – that's an interesting question. If – if you look at the places that they're signing, I think my general understanding of this is that if someone signs a document or a contract, I think it's generally understood that they either had it explained to them or they understood English. [¶] I think if as a society we were to go with this idea that everyone can just get out of a document

> by claiming they didn't speak English, the whole legal system would come to a halt.

(HT 966:1-10).

Albert Laubenstein, the firm's former ALMCO, indicated the same.

> Q: Okay. Why not translate the entire document, especially the disclosure section?
>
> A: …. I'm going to think that we've always kind of believed that, you know, if people are signing documents, we believe that they had been translated to them and that they understood those documents that they were signing.

(HT 2610:21-2611:3).

These are reasonable conclusions under the circumstances.

Based on his experience and knowledge, Eric Flesche reasonably believed the VXEL shareholders understood the English forms they completed and because the VXEL customers completed, signed, and submitted the account applications, provided the required documentation in support, and acted as if they understood the documents by funding their accounts, executing on transactions, and never complaining they did not understand the forms they were completing. In fact, Eric Flesche had no reason to believe otherwise. Furthermore, there is no FINRA rule (or any other rule, statute, case law, or otherwise), that requires Eric Flesche to question and determine whether customers understand the forms they completed, signed, and submitted and accordingly, Eric Flesche's conduct was reasonable in light of the facts and the circumstances.

In further support of this argument, Eric Flesche presented an in-depth analysis of contract law, which is analogous in this instance: "In considering this issue, Counsel directs the Commission to consider contract law, because the account applications are tantamount to a contract between the client and Glendale." (Opening Brief at 25).

FINRA has not opposed these points, and has thus conceded these points, which warrants a reversal of the NAC decision on the failure to supervise claim.

4. NAC's Finding that Eric Flesche's Failure to Ask How Andy Huang Communicated with his Customers is Vague and Ambiguous and Is Not Supported by the Record

FINRA dismisses the facts associated with Eric Flesche's supervisory role involving the WeChat messages (Opening Brief 19-25), by asserting that NAC (and OHO) did *not* sanction Eric Flesche for failing to supervise Andy Huang's WeChat messages. (Opposition Brief FN 4).

However, both OHO and NAC make reference to "how" Andy Huang communicated with clients as the basis for their failure to supervise findings: "Enforcement alleges, he [Eric Flesche] failed to inquire *how* Huang communicated with his customers generally …. The Panel finds that Flesche's and Laubenstein's supervision of Huang's communications was unreasonable given the number of Huang's customers, the customers' relationship with KTO and KSC, and the fact that the customers lived overseas." (OHO Decision at 88). "We find that Flesche, Laubenstein, and Glendale failed to reasonably supervise Huang's dealings with these customers. Neither Flesche nor Laubenstein asked Huang about *how* he communicated with these customers…." (NAC Decision at 41).

The NAC (and OHO) failed to make sufficient and specific findings of fact of the violative conduct to support their conclusion that Eric Flesche failed to supervise Andy Huang by failing to ask "how he communicated with these customers." As discussed above, it is difficult to determine whether "how he communicated with these customers" means the mode of communications used (*i.e.,* the WeChat platform) or the language (English or other) used to communicate. The fact that Eric Flesche and FINRA can draw two *different* conclusions about what conduct each decision found violative further demonstrates that NAC (and OHO) failed to make sufficient findings of fact or provide adequate analysis regarding this issue.

FINRA attempts to pivot from addressing this ambiguity by simply stating that the NAC decision did not find the WeChat messages violative, which is an inaccurate statement. This ignores the fact that OHO found Andy Huang's use of the WeChat messages was a violation of the rules and specifically did *not* find the issue involving language as violative of any rules (see generally OHO decision).[5]

Furthermore, in their brief before the NAC, FINRA (through the DOE) did not argue that Eric Flesche's failure to supervise claim stemmed from ensuring the VXEL customers understood the forms they completed, signed, and returned. Instead, in their brief before the NAC, FINRA (through DOE) instead argued "Glendale, [George] Castillo, and [Eric] Flesche failed to establish and maintain a reasonable supervisory system to ensure compliance with Securities Act Section 5." (DOE NAC opening brief at 36). In fact, the FINRA NAC Brief, only

[5] Andy Huang was sanctioned for his use of unapproved WeChat messages, but was not sanctioned for any issues raised concerning the language used in the communication or English translation of forms. Andy Huang did not appeal the OHO decision to the NAC.

refers to VXEL in the context of AML, and not supervisory violations. As such, the NAC simply adopted the OHO conclusions on appeal, without FINRA arguing a position.

With regard to the WeChat messages: Eric Flesche executed on the firm WSPs by training Andy Huang on the firm WSPs, auditing Andy Huang's work on a biannual basis, and certifying Andy Huang, on an annual basis, that he understood only authorized communication methods were acceptable at the firm. Also Andy Huang admitted that he intentionally concealed his use of the WeChat app, which was not approved for firm use, and was sanctioned for this violation.

Based on the foregoing, it is Eric Flesche's position that regardless of the meaning given to the finding, he did not fail to supervise Andy Huang.

5. The Firm's WSPs Were Adequate, and Eric Flesche Properly Executed His Duties as Described in the WSPs

Based on FINRA's rule guidance, Rule 3110 puts the onus on the firm to have sufficient WSPs in place. "FINRA Rule 3110 requires *a firm* to establish and maintain a system to supervise the activities of its associated persons that is reasonably designated to achieve compliance with the applicable securities laws and regulations and FINRA Rules." *See* https://www.finra.org/rules-guidance/key-topics/supervision.

Eric Flesche's position is that Rule 3110 requires the firm to have sufficient WSPs in place and the supervisor's duties are to execute on the firm's WSPs. Rule 3110 specifically states as such: "Each member shall establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules." The rule lists several requirements for the firm, including the establishment of WSPs, designation of an appropriate registered principal *with authority to carry out the supervisory responsibilities*; etc. Thus, making clear that a supervisor's role under Rule 3110 is to execute on the WSPs. In fact, one of the criteria for finding a failure to supervise is: "Quality and degree of *supervisor's implementation of the firm's* supervisory procedures and controls." (FINRA Sanctions Guidelines October 2021) (emphasis added).

Eric Flesche specifically acknowledged a supervisor can be liable under Rule 3110 if he was derelict in his duties and failed to dutifully execute on the firm WSPs, a point FINRA does not oppose. The NAC (and OHO) decision did *not* find the firm's WSPs were inadequate nor

that Eric Flesche was derelict in his duties executing on the firm's WSPs. An argument, FINRA conceded: "Accordingly, there need not be a finding of inadequate WSPs to find that Flesche failed to supervise." (Opposition Brief at 14). However, FINRA's logic that Eric Flesche can be liable under this charge, without a finding that the WSPs were inadequate or that he was derelict in his duties in executing on the firm's WSPs, creates a logical paradox.

(1) Under the rules, the firm has a duty to establish WSPs, and Eric Flesche's supervisory duties are to execute on the WPSs.

(2) The NAC (and OHO) did *not* find the firm's WSPs were inadequate (thus finding the WSPs were adequate). Logically, Eric Flesche could only be liable if he was derelict in his duties, executing on the firm's WSPs.

(3) The NAC (and OHO) did *not* find Eric Flesche failed to execute on the firm's WSPs either (thus finding he was not derelict in his duties).

(4) If the firm's WSPs were adequate (the NAC (and OHO) did not find the firm's WSPs were inadequate) and Eric Flesche was not derelict in his duties (the NAC (and OHO) did not find Eric Flesche was derelict in his duties to execute on the firm's WSPs), then logically the NAC (and OHO) could <u>not</u> have found Eric Flesche failed to supervise Andy Huang. In other words, what did Eric Flesche do wrong here?

B. Eric Flesche's Procedural Arguments Are Unopposed by FINRA and the Proceeding Has Been Unfair, Lacking Transparency, and Biased Against Eric Flesche

The lack of a fair, transparent, and unbiased proceeding also requires the SEC to reverse the NAC (and OHO) decisions. Moreover, FINRA did not address or oppose the merits of Eric Flesche's procedure-based arguments on appeal. *See Momox-Caselis v. Donahue*, 987 F.3d 835 (2021), which holds that a failure to oppose an argument is a concession that the argument is valid and meritorious. While each argument raised above is a sufficient, independent ground for the SEC to reverse the NAC (and OHO) decision on the failure to supervise claim, the procedure-based arguments are equally as persuasive and similarly require the SEC to overturn the NAC (and OHO) decisions.

1. The Proceedings Against Eric Flesche Have Been Unfair, Lack Transparency, and Raise Questions About Whether FINRA Has Deliberately Engaged in Misconduct in Order to Prevail Against Him

FINRA devotes much of its Opposition Brief to addressing the issue of bias in its proceedings and summarily concludes that there was no bias, but evidence of unfairness and bias against Eric Flesche and the other respondents has appeared throughout the proceedings. The first incident of bias occurred during the initial hearing when FINRA intentionally doctored two exhibits by removing exculpatory portions from each and presented them as authentic and complete documents during the hearing in order to obtain a finding against the respondents. FINRA claims there was no evidence doctoring, but the evidence of doctoring is evident from the exhibits themselves.

The first doctored exhibit was the Result Corp. deposit packet (CX-16 – doctored version by FINRA; RX-94 unaltered by respondents), FINRA removed NUGN stock certificates from the Result Corp. deposit packet, which were not subject to a lockup/leak-out, and thus, did not have a lockup/leak-out agreement stamped on them (a pertinent issue in the 10b-5 claim), and questioned George Castillo about the missing certificates and whether Glendale Securities knew the Result Corp. stock certificates had the lockup/leak-out agreement stamped on them. (HT 319:15-25). In fact, Mr. Watling, specifically questioned Mr. Castillo about the "missing" stock certificates from CX-16, despite knowing that: (i) Mr. Castillo had not reviewed the documents because they were not documents he would review in the regular course of business (this task was delegated to others); and (ii) FINRA had removed the stock certificates. "Q: If we go to CX-16, there's a cover sheet that references a certificate number, but there is not a copy of that certificate within the deposit package. Isn't that correct?" (TT 358 22:25). However, the full package provided to FINRA by Glendale Securities included the stock certificates (as evidenced by RX-94), wherein the stock certificates were not stamped with a lockup/leak-out agreement. It should be noted the removed stock certificates were in the middle of the document, and portions of the document before and after the stock certificates remained intact as part of the document, thus FINRA could not claim it "accidentally" left the stock certificates out of the exhibit. And respondents knew the content of the Result Corp. file because it was their due diligence file.

In the Opposition Brief, FINRA states that "both were identified on the parties' pre-hearing exhibit list." (Opposition Brief at FN 14). Surprisingly, FINRA argues that simply

because it listed a document it doctored on its exhibit list, that it should get a pass for tampering with the document. Furthermore, respondents did not receive FINRA's trial binders, with the complete exhibits, until a few days prior to the commencement of the hearing. Respondents did not review and compare each document to its original to determine its authenticity and mistakenly relied on FINRA's integrity. To date, FINRA has offered no explanation as to why it doctored two exhibits in this case. Additionally, despite evidence that Exhibit CX-16 was doctored, Mr. Dixon, the hearing officer, allowed the exhibit into evidence.

The second doctored exhibit was the BLMK Form 211 packet; CX 109, which was not part of the firm's books and records, but rather was a document that FINRA produced in discovery. The respondents did not have access to or knowledge of this exhibit prior to this matter. In fact, the first-time respondents saw BLMK's Form 211-packet was when FINRA produced it in discovery (along with approximately 20,000 pages of other documents). In this case, FINRA doctored the exhibit by removing the shareholder relationship statements, a key issue in the section 5 claims, from the *middle* of the BLMK Form 211 packet (CX-109 (doctored) and RX-108 (un-doctored). The issue there was whether two people were married. The relationship chart in the BLMK Form 211 packet (which FINRA removed from its version of the exhibit) explicitly indicated no relationship between the two parties. During trial, FINRA's exhibit doctoring was uncovered when presented with RX-108, the complete BLMK Form 211 packet that was entered into evidence by respondents:

Q: I'd like to you to turn to RX-108, please ….
Q. Okay. And this actually indicates – it's a "relationship list" across the top; correct?
[Snyder]: Yes.
Q: And there's a little key across the top: W, wife; H, husband; B, brother; S, sister; and N for none. Do you see that?
A: I do. ….
Q: And if you look at the line from Dena Kurland, the relationship is listed as "None"; correct?
A: Correct.
Q: So there's an attestation that Dena Kurland does not have a husband, wife, brother, sister, relationship with any of the other shareholders; correct?
A: I don't know if you – I don't know if this is an attestation, but there is a document that says you just represented, yes.
Q: And it's included in the Form 211; correct?
A: *That's what it appears to be.*
Q: *And Glendale would not have an independent way of receiving the Form 211, other than through FINRA; correct?*

A: *Yes*.
(Emphasis added, HT 1320:18-1324:1).

FINRA has attempted to downplay the fact it doctored a second exhibit by claiming the parties provided different "versions" of the same exhibit (Opposition Brief at FN14). FINRA's proclamations that these are merely two different versions of the same documents is disingenuous because FINRA produced one version of the document in discovery (the complete version with the relationship chart), followed by an incomplete, doctored version at trial which had exculpatory material removed; in fact, the doctored version was "missing" key information that solely benefited respondents and damaged FINRA's case, the relationship chart.

Notably FINRA's assertion that neither of the documents are related to the failure to supervise claim (Opposition Brief at 25-26) is true, but Eric Flesche's point in raising the issue is not an attempt to argue against the failure to supervise finding, but rather is evidence that the entire proceeding was unfair, biased, and lacking in transparency, and to evidence that FINRA engaged in misconduct. The FINRA enforcement process is supposed to be "untainted" and "neutral," and these examples of the FINRA's behavior with respect to doctoring documents presented as exhibits at the hearing are grounds for the SEC to dismiss this case entirely.

2. Eric Flesche Did Not Argue Abuse of Discretion by the Chief Hearing Officer by Staying the Decision

In its Opposition Brief, FINRA appears to respond to arguments Eric Flesche never made. For example, from pages 15-17 of its brief, FINRA argues the Chief Hearing Officer (CHO) did not abuse her discretion when she stayed the proceedings for the "bias investigation." However, Eric Flesche did not argue the CHO abused her discretion in instituting a stay. Instead, Eric Flesche argued he and the other respondents were not involved and were left uninformed throughout this "bias" investigation and specifically stated: "The CHO refused to respond to any questions involving the alleged bias, where the alleged report of bias originated, or who was allegedly biased, and against whom." (Opening Brief at 9). Eric Flesche next stated that neither he nor the other respondents were made aware of the allegations that led to the "investigation" and were not contacted regarding the allegations of bias. "Despite repeated demands for information regarding the bias allegations, Respondents were never made aware of what the allegations were, who the law firm was that was 'investigating' the allegations of bias, or what the 'results' of the 'investigation' were." (*Ibid.*)

As of this day, FINRA has not disclosed the allegations of bias it claimed existed in this case and instead argues lifting the stay equates to a finding of no bias. "Implicit in the lifting of the stay is that the investigation discovered no conflict or bias. Under these circumstances, there is no requirement to disclose any details of a confidential investigation to the parties." (Opposition Brief at FN 11). This statement is flawed for several reasons. First, lifting the stay does not necessarily mean no bias was discovered, nor should it. If no bias was discovered, why are the results unavailable? Second, how can the results be objective when the respondents were not included in the bias investigation that involved them? Third, relying on this statement from FINRA requires blind faith that the results of a "confidential" investigation that resulted in the exculpation of FINRA and its processes, conducted by FINRA's outside counsel and paid for by FINRA, was fair and unbiased, yet not worth of disclosure.

Eric Flesche rejects FINRA's position and asserts that he and the rest of the respondents should be apprised of the facts and findings of the bias investigation. Additionally, FINRA and NAC should be required to ensure their procedures are transparent and free from bias, and when allegations of bias are uncovered, they should immediately disclose the allegations to the parties and work with the parties to resolve the same, rather than holding a secret "investigation," refusing to include the affected parties, and reaching subjective conclusions, and the SEC should dismiss the ruling against Eric Flesche because he was not afforded the opportunity of a fair and transparent proceeding in which he could defend himself.

3. Eric Flesche Argued That NAC (and the OHO) Had Insufficient Evidence for its Findings, not that There Was Inadequate Notice of the Allegations Against Him

FINRA spends several pages of its Opposition Brief arguing the complaint sufficiently pled the claims against Eric Flesche, despite the fact that he does not argue the complaint was defective. Instead, Eric Flesche argues the NAC (and OHO) decision failed to provide sufficient legal or factual analysis to conclude he breached his duties to supervise Andy Huang and that FINRA is limited to the allegations in its complaint. Neither argument has been opposed and, thus, is conceded by FINRA.

C. The Sanctions Imposed by the NAC Are Not Supported by the Record, Inconsistent with the Sanction Guidelines, and Excessive and Oppressive

In appeals from FINRA sanctions, the SEC must determine whether the FINRA-imposed sanctions are "excessive or oppressive." 15 U.S.C. §78s(e)(2). Cases have held that the SEC may

uphold FINRA sanctions as not being excessive or oppressive if the sanctions are remedial, not punitive. *See, Siegel v. SEC*, 592 F3d 147 (DC Cir. 2010); *Paz Securities Inc. v. Securities and Exchange Commission*, 566 F3d 1172, 1175-76 (D.C. Cir. 2009). The sanctions issued against Eric Flesche are punitive and not based on the facts, the law, or FINRA's own Sanctions Guidelines. As such, the SEC must overturn the decision on these grounds. However, even if the SEC upholds the NAC (and OHO) decision that Eric Flesche failed to supervise Andy Huang, the sanctions should be reduced because: (i) the current sanctions are inconsistent with FINRA's Sanctions Guidelines and FINRA's prior disciplinary actions; (ii) the justification for the current sanctions is not supported by the record; and (iii) the decision incorrectly states that Eric Flesche is a recidivist as an aggravating factor in the case. In light of FINRA's Sanctions Guidelines, the improper reliance on facts not in evidence, and the inaccurate characterization of Eric Flesche as a recidivist, the $30,000 fine and 30-day all-capacities suspension are excessive and punitive rather than remedial.

In failure to supervise cases, the FINRA Sanctions Guidelines recommend fines ranging from $5,000 to $77,000 and potential suspension from supervisory capacities for 30 days or longer. The Sanctions Guidelines state that an "all capacity" suspension is only recommended in "egregious" cases. In this case, OHO found Eric Flesche's conduct was "egregious," but provided no analysis or discussion of the facts to indicate how or why Eric Flesche's conduct was "egregious." The NAC accepted the OHO's conclusions without any additional analysis or explanation of its reasoning, as articulated above. Eric Flesche again asserts that his conduct did not amount to failure to supervise Andy Huang given that no rule required Eric Flesche to ensure his customers, who came from an English-speaking country, understood the firm's forms that they had completed, signed, and submitted (a point FINRA conceded in its brief Opposition Brief at FN 10), and Eric Flesche had no reason to question whether the VXEL customers understood the forms they completed, signed, and submitted, but even if Eric Flesche did fail to supervise Andy Huang, his conduct was not an "egregious violation of the rules."

The sanctions issued by FINRA are intended to be remedial, not punitive. The Supreme Court discussed the issue of remedial versus punitive distinction in *Kokesh v. SEC* (137 S. Ct. 1635) (2017). In "egregious" cases, a suspension might make sense to emphasize the significance of the supervisory obligations but, as FINRA's benchmark sanction guidelines state, "all capacity" suspension is not recommended in run of the mill failure to supervise cases.

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Notably the Sanctions Guidelines do not specifically define egregious conduct, but the Oxford English dictionary defines egregious as "outstandingly bad; shocking," and FINRA disciplinary cases against other firms and individuals shed additional light on "egregious" behavior. Furthermore, the NAC (and OHO) never supported its conclusion that Eric Flesch's conduct was egregious, with any findings of facts. What about Eric Flesche's conduct was egregious? Why was Eric Flesche's conduct egregious? The NAC does not and cannot answer these questions, and leaves Eric Flesche why his conduct was considered egregious.

As Eric Flesche described and cited in his Opening Brief, the sanctions against Eric Flesche, particularly the all-capacities suspension, are significantly greater than sanctions in cases involving worse conduct, including those that involved actual underlying harm to customers. In its Opposition Brief, FINRA claims the cases Eric Flesche cited in his Opening Brief are irrelevant because each is based on its own facts. Of course, each case is based on its own facts; however, sanctions from other cases are a guidepost of acceptable sanctions and provide insight into the spectrum of possible behaviors the Sanctions Guideline are designed to address.

Here, Eric Flesche's behavior is much different from the egregious behavior noted in other failure to supervise cases. His alleged failure to supervise arose from the fact that Andy Huang was communicating with foreign clients, and that the VXEL shareholders may not have understood the forms they were completing, even though no rule requires Eric Flesche to ensure clients understand the forms they complete, sign, and return. Notably, the record contains no evidence that the VXEL shareholders did *not* understand the forms they completed and submitted or that Eric Flesche knew or had reason to believe the VXEL shareholders did not understand the forms they completed. No customer ever complained about the firm's communication with them, nor did any customer make any complaints about the service the firm provided to them. But most importantly, no customer complained they did not understand the forms they completed, signed, and returned. Moreover, each of the VXEL customers acted in a manner consistent with understanding the forms they completed, signed, and returned, by funding their accounts (from their personal account), and transacting in securities transactions.

Moreover, when Eric Flesche discovered Andy Huang was communicating with a representative on behalf of the customers, Eric Flesche required the customers provide executed power of attorneys authorizing the representative to speak with the firm on their behalf, which

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each customer executed and returned, further evidencing they understood firm communications and the forms they completed. Furthermore, there was no underlying damage caused by the alleged failure to supervise, and Eric Flesche did take action to ensure that Andy Huang was permitted to speak to Mr. Ong as representative to the customer.

Additionally, the NAC (and OHO) noted that an aggravating factor in the case was the fact that Eric Flesche was a "recidivist," which is incorrect. Eric Flesche has never been sanctioned by a regulator (FINRA or otherwise). In sanctioning Eric Flesche, OHO claimed: "that the firm has relevant disciplinary history involving similar misconduct, which is an aggravating factor for determining sanctions." (OHO Decision at 91). This is incorrect, first, Eric Flesche, acting in his individual capacity, cannot be in impugned with the firm's past disciplinary history; and second, even if Eric Flesche was impugned with the firm's past conduct, the firm was not previously involved in a disciplinary matter that included failing to supervise. Previously the firm entered into an Acceptance, Waiver, & Consent (an "AWC") with FINRA, but that AWC did not include any supervisory violations. Thus, the NAC (and OHO) decision improperly issued excessive and punitive sanctions against Eric Flesche based on the inaccurate characterization of Eric Flesche as a recidivist, which he is not.

Based on the foregoing, even if the SEC upholds the NAC and OHO decision that Eric Flesche failed to supervise Andy Huang, the sanctions should be reduced because the current sanctions are inconsistent with FINRA's Sanctions Guidelines and the goal of FINRA's disciplinary system; the justification for the current sanctions is not supported by the record, the decision incorrectly states that Eric Flesche is a recidivist as an aggravating factor in the case.

III. CONCLUSION

In conclusion, FINRA failed to oppose key arguments Eric Flesche presented in lieu of arguing positions he did not take. This lack of opposition to key elements of Eric Flesche's defense must result in an SEC reversal of the NAC (and OHO) decisions.

The NAC (and OHO) failed to make sufficient findings of fact to support their conclusions that Eric Flesche failed to supervise Andy Huang, much less that such a failure was "egregious." This itself is grounds to reverse the NAC (and OHO) decision.

Next, Eric Flesche's actions in light of the circumstances were reasonable. Eric Flesche reasonably believed the clients that completed, executed, and submitted account application understood the documents they completed. Furthermore, these customers also acted in a manner

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consistent with understanding the documents: they funded their Glendale Account from their own personal accounts, then submitted and executed securities transactions thereupon. Next, Eric Flesche had no reason to believe the VXEL customers did not understand the forms they had completed, because no customer ever articulated they did not understand the documents they completed, signed, and returned. However, most importantly, there is no rule, statute, case law, or otherwise, that requires Eric Flesche to verify whether the clients that completed, executed, and returned documents, then act in accordance with understanding said documents, understood the same. This is an independent ground for the SEC to reverse the NAC (and OHO) decision.

Additionally, the proceedings against Eric Flesche and the other respondents were unfair, lacked transparency, and evidenced that FINRA engaged in misconduct. The proceedings were not neutral and as such the SEC should reverse the decision the decision and dismiss the case.

Furthermore, even if the SEC is not persuaded to reverse the unsupported sanctions against Eric Flesche outright, it must reduce the penalties because they simply do not fit the alleged wrongdoing, are not remedial, and are clearly punitive. Here, the alleged wrongdoing is at best a minimal violation (if any) resulting in no harm to the customers and FINRA has not presented any arguments to the contrary.

Respectfully submitted,

Dated: April 19, 2022

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CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that on this 19th day of April 2022, a true and correct copy of the foregoing Reply Brief was filed electronically using the Commission's Electronic Filings in Administrative Proceedings (eFAP) system accessed through the Commission's website, upon the following:

Through eFAP

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