UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

SPARTAN CAPITAL SECURITIES, LLC, JOHN D. LOWRY, and KIM M. MONCHIK

For Review of Disciplinary Action Taken by FINRA

Admin. Proc. File No. 3-22285

RESPONDENTS/APPELLANTS SPARTAN CAPITAL SECURITIES, LLC, JOHN D. LOWRY, AND KIM M. MONCHIK'S REPLY BRIEF IN SUPPORT OF THEIR APPLICATION FOR REVIEW

Sichenzia Ross Ference Carmel LLP
Richard J. Babnick Jr., Esq.
Michael H. Ference, Esq.
1185 Avenue of the Americas, 31st Floor
New York, New York 10036
(212) 930-9700
rbabnick@srfc.law
mference@srfc.law

Attorneys for Respondents/Appellants
Spartan Capital Securities,
LLC, John D. Lowry and Kim M. Monchik

OS Received 03/10/2025

TABLE OF CONTENTS

OS Received 03/10/2025

TABLE OF AUTHORIES

Cases:

I. Enforcement Ignores the FINRA Guidance, Director Howard's Testimony, And the Record Evidence Demonstrating that Respondents Followed the FINRA Guidance and Made a Good Faith Determination that the Officer Disclosures Were Not Reportable[1]

Throughout its Opposition ("Opp."), Enforcement argues that the Forms U4 and U5 mandated the disclosure of each Statement of Claim regardless of its actual allegations. Enforcement claims that precedent and the explicit language of the U4 and U5s require disclosure with no room for interpretation. [Opp. at 2]. It is plain, however, that U4 and U5s are subject to interpretation because FINRA published – and its Disclosure Unit circulated – FINRA Guidance, which is a 13-page document that sets forth 50 Questions/Answers to provide interpretive guidance for U4/U5 disclosure items. [R. 4027, CX-12]. The FINRA Guidance for Officer Disclosures is just one item that FINRA provides guidance. [*Id.* at 7]. Contrary to Enforcement's assertion, there is no precedent applying the Officer Disclosure provision of the FINRA Guidance – this is a case of first impression. Because the application of the FINRA Guidance is detrimental to its arguments, Enforcement does not quote or apply the FINRA Guidance; rather, it relies on summary statements that are against the weight of the Record evidence. [*See e.g.*, Opp. at 6-7, 24].

Both the FINRA Guidance and Director Howard's testimony provided that when, as repeatedly the case here, a claim names several officers as respondents and alleges an overarching statement that an officer, because of his/her position, has broad responsibility over the supervision or safety of a ***firm's*** representatives or accounts, the claim is not reportable for that specific officer. [*See* Brief at 16-19]. Rather, the claim is reportable for the officer who

[1] Respondents adopt and incorporate all terms defined in their Opening Brief (the "Brief") herein.

OS Received 03/10/2025

actually managed or supervised ***the broker***, who engaged in the alleged sales practice violation. [*Id*]. In such instances, the actual supervisor, such as a Branch Manager, and the named Chief Executive Officer, Chief Compliance Officer, and/or Chief Administrative Officer, each review the claim's allegations, and under the FINRA Guidance, they each make a good faith determination if the claim is reportable or not on his/her U4. [*Id*]. For the Branch Manager, who actually supervised ***the broker***, the claim is reportable, and for the named CEO, CCO, or CAO, the claim is not reportable.[2] [*See* R. 4027, CX-12 at 7]. For example, the NAC failed to apply the FINRA Guidance and erroneously found that Spartan's Officers, including its FINOP, should have reported the LC Statement of Claim. [*See* Brief at 23-24]. Rather than address the LC claim's allegations, Enforcement focused on the statement that a FINOP, by its license, cannot and does not supervise a broker. [*See* Opp. at n. 14]. Enforcement chose to ignore the LC's claim's allegations because, under the FINRA Guidance, the claim was not reportable because the claim's allegations did not allege that the FINOP supervised ***the broker***, who engaged in the alleged sales practice violation. The FINOP had been named as one of nine respondents because Spartan's BrokerCheck reflected that "***he is an owner who directs the management and policies of Spartan Capital. As such he is liable*** for failure to supervise and as a control person as defined in State and Federal securities laws." [R. 20923, CX-138, ¶6]. The claim does not allege that the FINOP supervised ***the broker,*** but alleged that, solely because of his position, he

[2] Further, contrary to Enforcement's assertions, the U4 ***does require*** an individual to look beyond a claim's allegations to make a disclosure determination. Unlike Question 14I(1), which asks if you were ***named*** as a respondent in an arbitration, Questions 14I(4) and (5) asks if an un-named individual has been ***the subject*** of an investment-related arbitration claim which alleged that the unnamed individual was involved in a sales practice violation – Questions that requires a Firm or individual to review the claim beyond its allegations to determine the individual who is the subject of the claim and report the claim even though the individual is not named nor identified by name in the claim. [*See* R. 3953, CX-9; R. 4027, CX-12 at Question 14I Generally, Q5].

OS Received 03/10/2025

is liable for such claim. [*Id.*]. Similarly, Enforcement misconstrues the allegations in the Wampler Statement of Claim to opine that it was reportable for Lowry. The Wampler claim, however, does not allege that Lowry – Spartan's CEO, supervised ***the broker*** who engaged in the activity. [Opp. at 24]. Rather, Wampler alleged, "***supervisors*** at Spartan Capital condoned the conduct of the broker" and/or "failed to supervise the broker's actions…" [R. 20763, CX-124 at 1-2 (emphasis added)].[3] "Supervisors" was not a defined term. [*Id.*; *see also* Opp. at 9 (citing RP 20756) (discussing identical language in the Englin claim)]. Later, when the Wampler claim discussed Lowry, it alleged that, ***'[a]s CEO***, Lowry is responsible for, among other things, ***the supervision of brokers registered at Spartan Capital***" – *i.e.*, the ***firm's brokers – not the broker***. [*Id.* at 3 (emphasis added)].

While Enforcement makes much ado that the language in the Wampler claim contained "language identical to that of another arbitration that Applicants – ultimately but reluctantly disclosed," [Opp. at 25], Enforcement omits to inform the SEC that those disclosures occurred years later after an Award had been issued.[4] A later issued Award, however, does not undermine

[3] Enforcement argues that the FINRA Guidance is only utilized when "allegations use imprecise legal terminology about a named respondent's involvement in a sales practice violation," [Opp. at 23], yet declines to recognize that the overwhelming majority of the Statement of Claim's allegations used "imprecise legal terminology" because the claims were filed by *non-attorney representatives*, including the Wampler claim. [*See* R. 20755 to 21110, CX-123, CX-124 (Wampler), CX-130, CX-135, CX-136, CX-140-143, CX-145-147].

[4] Enforcement filed Form U6s for each Award issued that set forth all material details concerning the disclosable event. There is no merit to Enforcement's argument that Respondents were subsequently late in filing a U4 ***for the same Award disclosed via a U6.*** A subsequently filed U4 for the ***same*** item disclosed in a U6 does not provide any details that are not contained in a U6. To find otherwise would to find that FINRA, when it filed a U6, did not disclose all material information concerning the disclosed item. As a result, there is no conceivable harm or failure to provide material information arising from the late filing of a U4 pertaining to an item disclosed on a U6.

OS Received 03/10/2025

or nullify Respondents' year(s)-earlier good faith determination under the FINRA Guidance to determine if the claim's allegations were reportable.[5] [*See e.g.*, Brief at Point II].

The Record contains ample evidence that Respondents acted in good faith when they made the determination, in each instance, that a particular Officer Disclosure was not reportable under the FINRA Guidance. [*See* Brief at Point III.B]. Incredulously, Enforcement argues that Respondents failed to show that they had obtained legal advice, for each arbitration at issue, from learned, experienced counsel, [*see* Opp. at 27], when it waited *years* to bring the action – after memories had dulled and records had been lost to time.[6] Despite the passing of years, three unrelated legal counsel testified concerning the legal advice that they recalled providing to Respondents, and Respondents submitted ***uncontroverted*** evidence, included notes, memorandums, and legal invoices, of advice sought and received on the U4 disclosure issues – advice received for numerous claims over the span of years.[7] [*See* Brief at 27; *see also*, R.

---

[5] Importantly, while Enforcement opined the Wampler claim was reportable – despite its broad allegations concerning Lowry or Monchik's supervision over ***the firm's*** representatives, the Wampler Arbitrator made the affirmative finding that Lowry was Spartan's CEO with "no direct supervisory responsibility over front line registered representatives" and Monchik had "no supervisory responsibility over Spartan's Registered Representatives." [R. 22083, CX-252].

[6] For example, Enforcement argues that Respondents could not identify all the arbitrations in response to an 8210 Request that it issued "four months before the end of the Relevant Period", [Opp. at 27], but it fails to inform the SEC that the 8210 Response was created years after the facts at issue, and, in the Response, Milbank LLP stated, "[t]he Firm has sought to identify specific requests for or provisions of legal advice on the topic based upon available contemporaneous notes and law firm invoices, but it is difficult to catalog every communication seeking or providing advice." [R. 22629, CX-351, 3]. Moreover, six of the ten arbitrations identified in the Response were for Officer Disclosures at issue in this case: Sells, Felder, Fayard, Wampler, Englin, and Russo. [*Id.*, *compare*, OHO Decision, Sched. C].

[7] For each claim, Monchik consulted with counsel concerning the disclosure of the claim "at or around the claim was received". [R. 2385, Tr. 1088:6 –1092:5 (discussing claims, including those listed on CX-1C [R. 3919])].

22815, RX-4; R. 23287, RX-24; R. 23289, RX-26]. The Record also evidences that each lawyer reviewed the claim, the relevant reporting rules and FINRA Guidance.[8] [R. 2961, Tr. 1538:4-1539:5, and RX-31 (O'Brien); R. 3311, Tr. 2024:4-2025:24 (Fiorovanti); R. 2961, Tr. 1743:4-13, 1753:3-25 (Rabinowitz)]. And each lawyer provided Respondents with legal advice on the disclosure requirements for Spartan's Officers, including Lowry and Monchik, who were named in arbitrations. [R. 2961, Tr. 1533:22–1535:2; 1535:19; 1536:3 (O'Brien); R. 3311, Tr. 2018:18-19, 2021:4-15, 2031:19-25 (Fiorovanti); R. 2961, Tr. 1745:2-1747:7 (Rabinowitz)]. This substantial evidence reflects a pattern and practice by Respondents of serious, contemplative, and good faith decision making in reaching a determination, for each Officer Disclosure, as to whether or not a claim required disclosure by Lowry, Monchik, or another Spartan Officer.[9]

---

[8] It is disingenuous that Enforcement argues that legal counsel should not have looked outside the four corners of the statements of claim and consider who filed the claim, [Opp. at 28], when: i) it asserts that legal counsel should have been informed, and considered, prior Cautionary Action Letters concerning *other* statement of claims, [*id.* at 27]; and ii) it asserts that the FINRA Guidance is only utilized when "allegations use imprecise legal terminology about a named respondent's involvement in a sales practice violation," [*id.* at 23], yet fails to inform the SEC that the overwhelming majority of the Statement of Claim's allegations used "imprecise legal terminology" because the claims were filed by *non-attorney representatives*, including the Wagner claim. [*See supra*, n. 3].

[9] Enforcement also erroneously asserts that a "good faith claim" does not explain Respondents' failure to disclose arbitration awards and settlements. [Opp. at 26]. A subsequent award or settlement, under Question 14I(1), however, ***does not*** change, or require an amendment, to the initial disclosure determination for an Officer Disclosure that the named Officer, whether Lowry, Monchik, or a FINOP, was not alleged to have been involved in the in the sales practice violation. [*See* R. 3953, CX-9 at Question 14I(1)(a) (initial determination for claim that is "still pending"), *compare* Question 14I(1)(b)(c) (same claim that later resulted in award or settlement). Indeed, in one claim that NAC erroneously found required disclosure – the Wampler claim, in the Award, the Arbitrator found that Lowry and Monchik had no direct supervisory responsibility over the broker. [*See supra*, note 5].

II. The NAC Erroneously Held that FINRA Staff Had Repeatedly Warned Respondents that Officer Disclosures Must be Disclosed

Enforcement embraces the NAC's erroneous finding that FINRA's Disclosure Unit, Member Supervision, and Enforcement each repeatedly warned Respondents that the Officer Disclosure must be reported on U4/U5s. [Decision at 13; Opp. at 10-13]. This finding is not supported by, and is in fact contrary to, the Record evidence.

A. FINRA's Disclosure Unit

The NAC found, and Enforcement argued, that FINRA's Disclosure Unit repeatedly informed Respondents that Arbitrations against Officers must be disclosed. [Opp. at 10]. This finding is contrary to the explicit and direct testimony of the Director of FINRA's Disclosure Unit. At the hearing, on cross-examination discussing Officer Disclosures, Director Howard testified:

> Q -- you if you directed them that they were obligated to report these arbitrations or whether you didn't, because you testified yesterday that FINRA doesn't give legal advice.
>
> A: Yeah. So we point them -- so ***we don't say not reportable or reportable***.

[R. 1731, Tr. 557:7-12 (emphasis added)]. Director Howard's testimony is consistent with the email interaction between Monchik and David Saulsbury of FINRA's Disclosure Unit concerning the Wampler claim. [R. 23295, RX-31 at 5].

Thus, the FINRA Disclosure Unit never told Respondents that they must disclose the Officer Disclosures, and notwithstanding that the Disclosure Unit was aware of every Officer Disclosure claim, it did not file a U-6 for any Officer Disclosure that Enforcement and the NAC argue Respondents should have disclosed.

B. Member Supervision

NAC and Enforcement argue that Member Supervision thought that the Firm should have disclosed selected Officer Disclosures, and issued two Cautionary Action Letters ("CALs") concerning a few disclosure items. [Decision at 15; Opp. at 11]. The SEC should give no weight to these CALs. First, the CALs were issued to Spartan – ***not*** Lowry and Monchik. [See R. 20667, CX-113; R. 20729, RX-121]. Second, only the 2017 CAL pertained to Officer Disclosures. [R. 20667, CX-113].[10] In the 2017 CAL, FINRA's Examination Team identified one arbitration claim that Lowry had timely reported. [*Id.*, 12 (No. 15-02871; date issued: 12/4/2015; date reported to Lowry's U-4: 12/17/2015)]. They also identified a claim that is not a subject of the Decision. [*Id.* (No. 15-01911), *compare*, Decision, at Sched. C and D]. The CALs did not raise an issue with Respondents' good faith determination that the Officer Disclosures were not reportable for four of the arbitrations that H.O. Dixon identified in the Decision. [R. 20667, CX-113, Tables 3 and 4, *compare*, Decision, at Sched. C and D (Nos. 15-01888, 15-01416, 15-01160, and 15-00497)]. The Examination Team also did not have the experience of the FINRA Disclosure Unit, and they identified a claim in which there were no allegations concerning Lowry: No. 16-00839. [R. 20667, CX-113, Tables 3]. Indeed, in reading the Statement of Claim for No. 16-00839, the SEC will find that Lowry's name appears *only in the caption* and there are no allegations concerning him. [R. 20867, CX-132]. Rather, the claim alleged, under the claim for Negligent Failure to Supervise, that "Respondents Spartan and Kelly have an affirmative duty to supervise the activities of their registered representatives…" – there

[10] The 2018 CAL addressed one disclosure item for Lowry and Yvonne Owens, and the claim did not involve Officer Disclosure concerning a failure to supervise claim. [*See* R.2072, CX-120].

OS Received 03/10/2025

is no supervisory allegation made against Lowry. [*Id.* at 8]. Notably, Member Supervision did not file a U-6 for any disclosures that it opinioned was disclosable.

In any event, the CALs do not nullify Respondents' good faith determination when they reviewed each Statement of Claim and determined that an Officer Disclosure was not reportable under the FINRA Guidance. [*See* Brief at Point III.B].

C. <u>Enforcement</u>

Finally, NAC and Enforcement argue that Enforcement cautioned Respondents that they must disclose the Officer Disclosures because Enforcement had issued 8210 Requests to them in February 2019, and later, Wells Notices in August 2020. [Decision at 16; Opp. at 13]. These findings and arguments distort the evidence and do not support what Enforcement argues or the NAC's erroneous finding.

The 8210 Request did ***not*** instruct Respondents that they must disclose the Officer Disclosures. [*See e.g.* R. 22541, CX-335].[11] Indeed, as the SEC is aware, 8210 Requests do ***not*** state such a finding because, the plain language in an 8210 Request provides, "Department of Enforcement is investigating this matter ***to determine whether*** violations of the federal securities laws or FINRA, NASO, NYSE, or MSRB rules have occurred." [*See e.g.*, CX-334 (emphasis added)].

With respect to the Wells Notices, as the SEC is also aware, a Wells Notices is ***not*** instructions to take action, but states that it is a preliminary determination by Enforcement to recommend disciplinary action against Respondents. It sets forth Enforcement's contested

---

[11] Neither Enforcement nor the Decision cite to the actual 8210 Requests issued to Respondents in February 2019 because they were either not offered or admitted into evidence at the hearing; consequently, they are not part of the Record. *See* Certification of the Record to the Securities and Exchange Commission, No. 3-22285, filed by Enforcement.

position. [*See* R. 22687, CX-356]. A party may then submit a Wells Response and FINRA's Office of Disciplinary Affairs then decides whether or not to file a complaint. Importantly, Respondents did not ignore the Wells Notices. After receiving their Wells Notices, Lowry consulted his counsel and he reported one of the claims, [OHO Decision at 34], Monchik consulted with a securities compliance consultant who advised her that Spartan's position that the claims were not reportable for her was correct, [R. 2385, Tr. 1087:19], and Respondents' then-counsel, Milbank LLP, submitted a Well Submission addressing the issues raised. [*See* R. 23301, RX-34].

Therefore, the SEC should give no weight to the NAC's erroneous finding, which relied on materials outside the Record, and Enforcement's arguments. Indeed, while Enforcement argues it instructed Respondents to disclose the Officer Disclosures, which it asserts contain material information, Enforcement did ***not*** file a U6 for any of the Officer Disclosures.

III. The NAC Erroneously Held that Lowry and Monchik Acted "Willfully" When They Applied the FINRA Guidance and Made Good Faith Determinations that the Officer Disclosures Were Not Reportable

The NAC erroneously held that Respondents' failure to disclose the Officer Disclosures on U4/U5s was "willful." [*See* Decision at 33]. In reaching this conclusion, it relied upon inapposite case law holding willfulness to "simply mean[] that the person charged with the duty knows what he is doing. A failure to disclose is willful if the registered person subjectively intended to omit material information from required disclosures" – *i.e.*, by not filing a U-4 disclosure, [*id.*], yet none of the NAC's cited authorities addressed Officer Disclosures and the FINRA Guidance. [*See* Brief at n. 7]. In its Opposition, Enforcement argues to preserve the NAC's erroneous finding, and while it acknowledges that a "willfulness" finding requires, at a minimum, proof of extreme recklessness and cites cases that quote from the seminal case, *Robare Group Ltd. v. SEC*, [*see* Opp. at 21], Enforcement fails to fully discuss the *Robare* holding and its application – to this first of its kind case – to the FINRA Guidance.[12]

In the seminal case, *Robare Grp., Ltd. v. SEC*, the United States Court of Appeals for the D.C. Circuit evaluated what established "willful" with respect to information omitted on an application for registration with the SEC under Section 207 of the Investment Advisors Act. 922 F.3d 468 (D.C. Cir. 2019). In *Robare*, plaintiff had omitted information in its Form ADV – its application for registration akin to a U4 for FINRA Members. *Id.* at 479. The Court rejected the SEC's view that "neither the principals' alleged good faith mindset nor their subjective belief that their disclosures were proper is relevant to willfulness." *Id*. (cleaned-up). The Court held that to find that the principals acted willfully in omitting the material information in the Form ADV, there had to be a finding that they act with specific intent or extreme recklessness – negligence would not suffice. *Id.* at 479-480 (holding "[w]e are aware of no appellate case holding that negligence can be willful within the meaning of Section 207 and we conclude that it cannot."). Thus, under *Robare*, a respondent cannot be found to have acted "willfully" for failing to disclose information required to be included in a Form ADV – or for our purposes a U4/U5 – unless he/she subjectively believed that such information was required to be disclosed but nevertheless deliberately failed to disclose the information. *Id.* at 480. In an SEC decision that followed *Robare*, the SEC reviewed FINRA's disciplinary action against a CCO for not reporting liens on his Form U4 and determined that Section 3(a)(39)(F), like the similar statute at issue in

---

[12] While Enforcement argues that a "willful" finding is a not a penalty, but a collateral consequence of the Decision, [*see* Opp. at 9-10], the NAC's utilized the "willful" finding as a sanction when it specifically held, based on its erroneous willful finding, that Respondents are statutorily disqualified. [Decision at 32-33]. It was not for the NAC, but FINRA's Statutory Disqualification Unit, to determine if the Decision resulted in a statutory disqualification.

OS Received 03/10/2025

Robare, "incorporates the requirement that one have acted 'willfully' in the violation itself.*"* *Allen Holeman*, Release No. 34-86523, 2019 WL 3530381, at *11 (July 31, 2019). As the SEC held, "liability may be imposed only where it is shown that the petitioner 'subjectively intended to omit material information from' his required disclosures." *Id*. (citing *Robare*, 922 F. 3d at 479).

Here, the Record evidences that Lowry and Monchik neither subjectively intend nor acted with extreme recklessness to omit the Officer Disclosures from their U4s. They did not receive a claim and then ignore their reporting obligations. To the contrary, the ample evidence demonstrates that the Officer Disclosure claims were not based on their individual conduct. Faced with claims in which they were named as respondents because of their capacity as one of Spartan's C-Level Officers, the evidence demonstrates, *inter alia*, that: i) they reviewed their U4 disclosure obligations; ii) contacted the FINRA Disclosure Unit for initial guidance; iii) reviewed the applicable FINRA Guidance; and iv) importantly, they consulted with multiple, experienced securities legal counsel, as well as securities compliance consultants, in making a good faith determination that the particular Officer Disclosure was not reportable. [*See* Brief at Point III.B]. The evidence also includes instances where Monchik documented the process in reaching her good faith determination that an Officer Disclosure was not reportable. [R. 23295, RX-31]. Respondents' deliberative process in evaluating their disclosure obligation for an Officer Disclosure is a far cry from reckless – let alone extremely reckless – conduct. At best, Respondents and/or their multiple, learned securities counsel were negligent in reaching their determination after reading the claims and applying the FINRA Guidance – particular FINRA Guidance that has not been previously analyzed by a court or administrative tribunal. Negligence, however, is insufficient for, and cannot support, a "willfulness" finding. For the

OS Received 03/10/2025

reason set forth by the D.C. Circuit in *Robare*, the NAC cannot rely on conduct that is "no more than negligent . . . as evidence of 'willful[]' conduct for purposes of" a statute prohibiting willful omissions. *Robare*, 922 F.3d at 480.

Accordingly, the SEC should set aside the NAC's "willful" finding because the evidence demonstrates that Respondents were not extremely reckless – or reckless at all – in using the FINRA Guidance and consulted with several unrelated and learned securities counsel to reach a good faith determination as to whether or not a particular Officer Disclosure was reportable on a U4/U5.

IV. The NAC's Findings on Spartan's Financial Event Reporting Are Not Supported by the Evidence

Enforcement implicitly concedes, as it must, that a Member Firm, such as Spartan, must take measures to confirm the accuracy of the financial event information received before making a U4/U5 financial disclosure. [*See* Opp. at n. 16]. Enforcement argues, however, that Spartan took too long to determine the accuracy of a financial event before making a disclosure. Specifically, Enforcement asserts that "Spartan's excessive delay in disclosure was not reasonable" because, using its data, Spartan made a U4/U5 disclosure "more than 200 days on average from the notice of the event." [*Id.* at 29].

Initially, while Enforcement takes issue with the length of time it took Spartan to confirm the largely inaccurate dump of information that FINRA provided to Spartan concerning its representative's financial events,[13] Enforcement and NAC failed to recognize that 23% of the disclosures filed by Spartan – after it confirmed the disclosures were accurate – were less than 30

[13] A majority of the information provided by FINRA contained inaccurate or outdated information that was not reportable. [*See* Brief at n. 19.]

OS Received 03/10/2025

days after the reporting deadline. [R. 3943, CX-4 (Lines 40-51)]. Moreover, the data that Enforcement and the NAC relied upon for their determination of delay – an average of 200 days – is greatly skewed by the inclusion of a ***false*** outlier data point: a claimed 1,009 day delay in reporting a $6,433 tax lien that was allegedly learned by Spartan, in 2016, from a pre-hire Background Check for a registered representative. [Opp. at 29 (referencing tax lien at R. 3943, CX-4 (line 1); OHO Decision at n. 291 (citing CX-323, at 26, 29). The Background Check replied upon by H.O. Dixon, NAC, and Enforcement, however, ***does not provide that there was a reportable $6,433 tax lien***. Drawing the SEC's attention to the Business Information Group's Due Diligence Investigation Services Criminal & Credit Report for Kyle Manning cited in the OHO Decision, [R. 22477, CX-323 at 26], under the Tax/Attachment Liens Section, [*id*. at 29], TransUnion's Database reported a "***paid tax lien***" in the amount of $6,433 with a filing date of "10/9/2008", with the Status: "***Satisfied***" on a status date of "5/6/2009". [*Id*. (emphasis added). As a satisfied lien, the financial event ***was not*** reportable by Spartan, in 2016, on representative Manning's U4. [*See* R. 3953, CX-9 at Question 14M].

As a result, the Record does not support H.O. Dixon or the NAC's findings and the complained of average filing delay – caused by FINRA providing inaccurate and incomplete information – is less than the time relied upon by NAC and asserted by Enforcement.

V. The SEC Must Revise the Sanctions Substantially Downwards Because the Record Does Not Support the NAC or Enforcement's Purported Aggravating Factors

Initially, the SEC must revise the sanctions imposed substantially downward because they are not supported by the Record and the Sanctions Guidelines. [*See* Brief at Point V]. In response to Respondents' detailed analysis, Enforcement argues several aggravating factors to

OS Received 03/10/2025

save the NAC's erroneous holding. As detailed below, the Record does not support the aggravating factors that NAC and Enforcement seek to invoke.

A. There Was No Concealment from Regulators

Enforcement argues that Respondents' failure to disclosed "resulted in concealing information and misleading regulators." [Opp. at 31-32]. This point is not supported by the Record. Indeed, it is ironic that Enforcement asserts this factor when, over the years, FINRA argues that it ***was aware of the Officer Disclosures*** and claimed to have repeatedly warned Respondents to make disclosure filings.[14] [*See id.* at 10-14]. Indeed, the Record demonstrates that the regulators knew of each Officer Disclosure because Respondents and FINRA had communications concerning each claim. For example, Monchik emailed FINRA's Disclosure Unit about the Officer Disclosure claim for the Wampler claim wherein she informed the Disclosure Unit the reason why Spartan had made a good faith determination not to report the claim. [*See* R. 23295, RX-31]. So too, the Record demonstrates that the regulators knew of the purported reportable financial events because ***FINRA provided the (largely inaccurate) list to Spartan***. [*See* Opp. at 9; R. 22561, CX-339, Exh. C at 4 *compare*, Decision at 23 and OHO Decision at 25 (citing CX4, CX-399)]. As a result, there is no merit to the NAC and Enforcement's position that Respondents concealed the disclosures from regulators because the regulators were fully aware of each claim and event.

[14] Notwithstanding that FINRA was aware of every Officer Disclosure, FINRA ***did not*** file a U-6 for any of the disclosures – until an Award had been issued – that it now argues should have been reported. [*See* Opp. at n. 8].

OS Received 03/10/2025

B. <u>There Was Harm to the Investing Public</u>

In support of the NAC's erroneous finding, Enforcement argues that Respondents' failure to make disclosures for the Officer Disclosures harmed the investing public despite no such evidence in the Record. [*See* Opp. at 34]. As acknowledged by H.O. Dixon, "Enforcement did not present direct evidence of harm to investors or others," [OHO Decision at 78]; consequently, there is ***no*** evidence of any customer harm in the Record. Indeed, there can be no evidence of any customer harm arising from the Officer Disclosures because, for example, Monchik, the FINOP, or any other Spartan Compliance Officer did not have any customer accounts; consequently, they did not engage in the sales practice violations – a point acknowledged by H.O. Dixon. [OHO Decision at n. 19 ("Monchik did not manage customer accounts at Spartan.")]. The Record further evidences that for non-Officer Disclosures, Spartan filed U4/U5s disclosing the claim for the broker who engaged in the sales practice violation. [*See* R. 3897, CX-1]. Therefore, the SEC should give no weight to NAC and Enforcement's position that Respondents' application of the FINRA Guidance for Officer Disclosures caused harm to the investing public.

C. Respondents Did Not Act Extremely Reckless But Engaged in a Good Faith <u>Determination as to Whether or Not an Officer Disclosure Was Reportable</u>

Enforcement and NAC's summary conclusion that Respondents acted extremely reckless in making a reporting determination for Officer Disclosures is not supported by the evidence and Director Howard's testimony. The NAC did not give any weight (or reference to) Director Howard' testimony, and Enforcement baldly argues that Respondents rely on a "misreading of Mr. Howard's testimony" without quotation, citation or discussion of his testimony. [*See e.g.*, Decision; Opp. at 23, 35]. The Record evidence demonstrates that FINRA's Disclosure Unit provided the FINRA Guidance to Respondents to apply to Officer Disclosures, [*see* R. 23295,

OS Received 03/10/2025

RX-31 at 5], and Respondents acted in good faith – not extremely reckless – in applying the FINRA Guidance. They reviewed the claim's allegations, consulted the FINRA Guidance, and obtained legal advice from experienced securities attorneys in reaching a good faith determination that the Officer Disclosures were not reportable. [*See* Brief at Point III]. Moreover, Respondents' application of the FINRA Guidance was consistent with Director Howard's testimony concerning the application of the FINRA Guidance to a claim's allegations where, as here, a claim lumps higher level officers among a group and alleges that they are responsible for the supervision of a ***firm's representatives – and not the broker who engaged in the sales practice violation***. [*See id*. at 17-19]. Consequently, there is no basis for NAC's application of an aggravated factor because the evidence shows that Respondents did not act with extreme recklessness, but rather, they acted in good faith in applying the FINRA Guidance to the Officer Disclosures.

VI. The SEC Must Set Aside the Decision Because It is the Result of an Unconstitutional Proceeding

FINRA raises several arguments to evade the question of the constitutionality of its Hearing Officers in its Disciplinary Proceedings – Disciplinary Proceedings that are presently being challenged before the SEC and in numerous Courts throughout the country.[15] As demonstrated below, Enforcement's arguments are without merit.

[15] FINRA has been fighting the constitutionality of its in-house courts for years in numerous court proceedings throughout the country – just as the SEC had fought the constitutionality of its in-house courts for years before the U.S. Supreme Court, in *Jarkesy v. SEC*, finally reached the decision that the SEC's in-house disciplinary proceedings were ***unconstitutional***. [*See* Brief at Point II].

OS Received 03/10/2025

A. Respondents Did Not Waive Their Constitutional Arguments

In a footnote, Enforcement argues that Respondents waived the right to raise their constitutional arguments and relies on *Newport Coast Securities, Inc.* in support of its argument. [Opp. at n. 30]. As detailed before NAC, Respondents did not waive their constitutional arguments because, at the early stage of the proceeding, Respondents did not have a good faith basis to raise their constitutionality arguments until later, while the appeal was pending, a U.S. Court of Appeals issued its ruling in *Alpine* and the U.S. Supreme Court granted *certiorari* in *Jarkesy* – decisions that provided Respondents with a good faith basis to raise their constitutionality challenges. [*See* R. 25925, Reply at Point I]. Moreover, Enforcement's citation to *Newport Coast Securities, Inc.* is inapposite because, in Newport, the SEC concluded that the constitutional argument has been waived ***because Newport failed to raise it at any stage before FINRA***, including in its briefing to the NAC or at oral argument before the NAC. Release No. 34-88548, 2020 WL 1659292, *16 (Apr. 3, 2020). Here, unlike *Newport,* Respondents and DOE briefed substantive arguments on the constitutionality issue and Respondent argued the issue at oral argument before the NAC. [R. 25759; R. 25877; R. 25925; R. 25943]. Accordingly, Respondents did not waive their constitutional arguments.

B. Respondents Did Not Waive Their Constitutional Rights

Enforcement argues that Respondents waived or relinquished their constitutional rights when they joined or became associated with FINRA. [Opp. at 45]. There is no merit to this argument because there is no constitutional waiver provision in the Form U-4 that relinquished Monchik or Lowry's constitutional rights. [*See* R. 3953, CX-9 at 15-17]. Moreover, no Court in which a FINRA Member or Associated Person has raised a constitutionality challenge has found that the FINRA Member or Associated Person waived their constitutional rights when it/he/she

OS Received 03/10/2025

joined FINRA – none. *See e.g.*, *Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314 (D.C. Cir. 2024); *Black v. SEC*, 125 F.4th 541 (4th Cir. 2025); *Blankenship v. FINRA*, No. 24-3003, 2024 WL 4043442 (E.D. Pa Sept. 4, 2024). Therefore, Respondents did not waive their constitutional rights when they joined FINRA.

C. FINRA is a Governmental Actor

In the face of numerous challenges to its unconstitutional in-house court system, FINRA argues that it is not part of the government itself and relies heavily upon *Lebron v. Nat'l R.R. Passenger Corp*. in support of its arguments. [Opp. at 39-40]. FINRA's reliance upon *Lebron* is misplaced and the SEC should give it no weight.

In *Lebron*, Amtrak – like FINRA – had previously been found by lower courts to not be a governmental actor, and the U.S. Government had expressly disclaimed it as an agency of the U.S. Government – a status that deprived Amtrack of immunity from suit. *Lebron*, 513 U.S. 374, 392 (1995).[16] The U.S. Supreme Court, facing the question of Amtrak's status for the first time, concluded that it was an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution. *Id.* at 394. As of yet, FINRA has not had the question of its governmental status determined by the U.S. Supreme Court. In one of the potential feeder cases to the U.S. Supreme Court, however, one of the Justice of the U.S. Court of Appeals for the D.C. Circuit opined, "FINRA is likely a private entity

[16] Curiously, while lower courts held that Amtrak was not a governmental actor and it could not cloak itself in immunity from suit, FINRA, which claims a similar non-governmental actor status, uniformly and frequently cloaks itself in quasi-governmental immunity from suit. *See e.g., SCAP 9 LLC v. FINRA*, No. 23-15627, 2024 WL 1574348, * 1 (9th Cir. Apr. 11, 2024); *Standard Inv. Chartered, Inc. v. NASD*, 637 F.3d 112, 115 (2d Cir. 2011); *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114 (D.C. Cir. 2008); *Weissman v. NASD*, 500 F.3d 1293, 1296 (11th Cir. 2007).

OS Received 03/10/2025

exercising significant executive authority. If so, FINRA subverts the constitutional design." *Alpine*, 121 F.4th at 1343 (J. Walker, concurring in part and dissenting in part).[17]

Accordingly, for the reasons set forth in Respondents' Opening Brief, the SEC must set aside the Decision because it is the product of an unconstitutional proceeding. [*See* Brief at Point II].

VII. Conclusion

This is an important case of ***first*** impression because it is the first to apply the FINRA Guidance. The evidence demonstrates that Respondents applied the FINRA Guidance to Officer Disclosures and consulted experienced securities counsel to advise them in applying the FINRA Guidance. There is no legal precedent interpreting the FINRA Guidance that legal counsel or Respondents could draw upon to apply it to the Officer Disclosures. Its application is also not as clear cut as Enforcement argues because, its chosen witness, the Director of its Disclosure Unit, Director Howard testified that the FINRA Guidance has "some grey area." The SEC should set aside the willful finding and sanctions against Lowry and Monchik for the reasons detailed, and use this case as an opportunity to clarify the FINRA Guidance to provide Member Firms and Associated Person's greater clarity on when Officer Disclosures are reportable.

Based on the foregoing, Respondents/Appellants Spartan Capital Securities, LLC, John D. Lowry, and Kim M. Monchik respectfully submit that the SEC should set aside the Decision as unconstitutional, or in the alternative, set aside the Decision, modify the sanctions downwards,

[17] On February 18, 2025, Alpine filed a Petition with the U.S. Supreme Court for a stay of its pending FINRA Expedited Proceeding based on its constitutional challenges to FINRA's in-house disciplinary proceedings. *Alpine Securities Corp. v. FINRA*, No. 24A808. On March 7, 2025, FINRA filed its Response to the Petition.

OS Received 03/10/2025

or remand the matter back to the NAC with a directive to apply the applicable law, any clarification provided by the SEC, and to give due weight to the evidence discussed.

Respectfully submitted,

/s *Richard J. Babnick Jr.*

Sichenzia Ross Ference Carmel LLP
Michael H.. Ference, Esq.
Richard Johnnie Babnick Jr., Esq.
1185 Avenue of the Americas, 31st Floor
New York, New York 10036

OS Received 03/10/2025

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

SPARTAN CAPITAL SECURITIES, LLC, JOHN D. LOWRY, and KIM M. MONCHIK

For Review of Disciplinary Action Taken by FINRA

Admin. Proc. File No. 3-22285

CERTIFICATE OF SERVICE

I, Richard J. Babnick Jr., certify that on this March 10, 2025, I caused a copy of Respondents/Appellants Spartan Capital Securities, LLC, John D. Lowry, and Kim M. Monchik's Reply Brief in Support of Their Application for Review to be filed through the SEC's eFAP system on:

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

and served by electronic mail on:

Colleen Durbin, Esq.
Office of General Counsel
FINRA
1700 K Street, NW
Washington, D.C. 20006
colleen.durbin@finra.org
nac.casefilings@finra.org

Respectfully submitted,

<u>*/s Richard J. Babnick Jr.*</u>
Richard J. Babnick Jr.
Sichenzia Ross Ference Carmel LLP
1185 Avenue of the Americas, 31st Floor
New York, New York 10036
(212) 930-9700
rbabnick@srfc.law

OS Received 03/10/2025

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

SPARTAN CAPITAL SECURITIES, LLC, JOHN D. LOWRY, and KIM M. MONCHIK

For Review of Disciplinary Action Taken by FINRA

Admin. Proc. File No. 3-22285

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Respondents/Appellants Spartan Capital Securities, LLC, John D. Lowry, and Kim M. Monchik's Reply Brief in Support of Their Application for Review contains 6,128 words, as counted by Microsoft Word, and is in compliance with 17 C.F.R. § 201.450(c).

Dated: March 10, 2025

Respectfully submitted,

/s Richard J. Babnick Jr.
Richard J. Babnick Jr.
Sichenzia Ross Ference Carmel LLP
1185 Avenue of the Americas, 31st Floor
New York, New York 10036
(212) 930-9700
rbabnick@srfc.law

OS Received 03/10/2025