UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of STEPHEN GRIVAS For Review of Action Taken by FINRA	Admin Proc. File No. 3-16756

BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

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PRELIMINARY

The proceeding at bar seeks review of a FINRA National Adjudicatory Council ("NAC") Decision, dated July 16, 2015 (the "Decision"). It is a case raising issues of first impression, i.e., the extent of FINRA's jurisdiction/authority under the law and FINRA Rule 2010. The Decision does not, because it cannot, deal authoritatively with these issues.

This case is solely about the FINRA Department of Enforcement's charge that "Respondent Stephen Grivas converted approximately $280,000 of investor funds raised through a fund he formed to purchase Facebook, Inc. stock, Obsidian Social Networking Fund I. LLC" (the "Fund") (R- 1-34).[1] Thus, this is a case solely involving, a limited liability company, the Fund, its manager, Obsidian Social Networking Management, LLC ("Management Co."), and

[1] Despite numerous efforts by Grivas in writing (unresponded to) (**Exhibit A** hereto) and orally of both the Commission and FINRA, neither would provide requested specified portions of the Record. Therefore, it is not possible for Grivas to cite to relevant pages of the Record. Rather, references to R in this brief refer only to entire documents as described in the index to the certified record received by Grivas.

the owner of the Manager, Stephen Grivas ("Grivas"), who issued withdrawal instructions on behalf of the Fund and the Manager.[2] This is not a case involving (a) a broker/dealer's customer or (b) conduct closely related to the investment banking or securities business. Accordingly, it is not a case within the jurisdiction or authority of FINRA or its rules.

THE DECISION IS CLEARLY ERRONEOUS

The Decision is erroneous in virtually all respects as set forth in Grivas' Application for Review (R- 2917-2936). Some major errors follow:

(a) The Decision erred because it is overly broad and generic and does not resolve, because it cannot, the specific legal issues raised by Grivas.

(b) The Decision erred in holding that while Grivas took monies from the Fund "for an unauthorized purpose" the fact that the Complaint alleges that Grivas converted monies of "the Fund's investors", not of the Fund (R- 1-34), is a "distinction without a difference" (R- 2897-2916).

(c) FINRA Rule 2010 provides "a member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." (*emphasis supplied*) The first words serve as a limitation on application of the remainder of the rule. Thus, Rule 2010 by its terms applies only to a member's (associated person's) securities and investment banking business, that is, business related conduct. (See pp. 10-17, *infra*). The Decision, on the other hand, pays no attention to the limiting language of FINRA Rule 2010, but only to the latter portion of the Rule. The entire Rule must be considered. It was not.

(d) The Decision erred in finding that "the Fund's Private Placement Memorandum and Operating Agreement stated that the Fund intended to make in-kind distribution of

[2] For purposes of the Application for Review, Grivas does not question the NAC finding that the funds he took from the Fund and deposited in Management Co. was without authority.

purchased Facebook securities to the Fund's Class A members." The Fund's Private Placement Memorandum and Operating Agreement do not so provide. (R- 1837-1916, 2563-2594) (See pp. 5-6, *infra*).

(e) The Decision erred in find that "the Private Placement Memorandum and Operating Agreement provided for the distribution of the Fund's un-invested capital, after payment of the Fund's fees and expenses, to the Fund's investors." (R- 2897-2916). The Fund's Private Placement Memorandum and Operating Agreement do not so provide. (R- 1837-1916, 2563-2594) (See pp. 5-6, *infra*).

(f) The Decision erred in finding that "after the conclusion of a 6-month lockup period that ended in November 2012, all that remained for the Fund to do was to pay any additional, accrued expenses, distribute purchased Facebook shares to the Fund's Class A members, refund any remaining monies to those investors, and dissolve the Fund." Not only is this gratuitous finding contrary to the express terms of the Fund's Operating Agreement, but, further, this finding was not contained in the Hearing Panel Decision (R- 2409-2434), and therefore, not a subject of the appeal to the NAC. Further, the Decision wholly ignores unimpeached evidence that distributions of stock and cash to the Fund's members, even if decided upon by Grivas in his sole discretion pursuant to the terms of the Fund's Operating Agreement, was not possible until mid-2013, when it took place. (R- 1073-1742, Grivas testimony).

(g) The Decision erred as a matter of law in using its own "broad" generalized definition of conversion rather than the specific lawful definition of conversion required under the circumstances of this case. In fact, the NAC itself has recognized and cited to the proper lawful definition of conversion – that is "conversion is the wrongful exercise of dominion over

the personal property of another," Department of Enforcement v. Paratore, 2008 FINRA Discip. Lexis 1 (NAC March 7, 2008) and in Schulman v. Voyou, L.L.C., 251 F. Supp. 2d 166, 170 (D.D.C. 2003) (cited and quoted in Paratore) the federal court defines conversion as "today, courts define conversion as "any unlawful exercise of ownership, dominion, or control, over the personal property of another in denial or repudiation of that person's right thereto."" *See* Department of Enforcement v. Mullins, 2011 FINRA Discip. Lexis 61 (NAC February 24, 2011) (citing Paratore), aff'd, 2012 SEC Lexis 464 (February 10, 2012). The personal property "converted" here is that of the Fund, a disclosed outside business of Grivas (R- 2897-2916), not of its members.

(h) The Decision erred in holding that because "this case arises out of the Regulation D offering of the Fund's securities", Grivas' misconduct is business related. The fact is that the Regulation D offering closed well before the acts charged in the Complaint (R- 2897-2916) and are independent of the offering. In short, the offering is irrelevant and immaterial at bar.

QUESTIONS PRESENTED

The issues presented for the Commission's review and decision are set forth in Grivas' Application for Review filed with the Commission.

FACTS

The salient facts are set forth in the Stipulation between the parties, dated October 24, 2013 (R- 879-890). It is undisputed that on June 14, 2012, Grivas, on behalf of the Fund, instructed that two hundred eighty thousand ($280,000) dollars of the Fund's money be transferred from the Fund's Operating Account to the bank account of the Management Co. and that such transfer took place. This is the basis for the Decision's holding that Grivas is barred for converting $280,000 from the Fund. (R- 2897-2916), a matter not charged in the Complaint. It

is significant that there was no evidence presented that (a) any of the 24 customers of the broker/dealer, Obsidian Financial Group, LLC ("Obsidian Financial Group"), who became members of the Fund, were customers of Grivas, or that Grivas had any connection, direct or indirect, with any of them; (b) Grivas solicited any of the members of the Fund to invest in the Fund; or (c) any of the members of the Fund were customers of Obsidian Financial Group or Grivas at the time of the "conversion" of Fund monies found in the Decision. Moreover, there was no evidence presented that any Fund member sustained any loss as a result of the "conversion" by Grivas.

Other than the Stipulated Facts (R- 879-890), two exhibits in evidence are controlling.

The Fund's Private Placement Memorandum (R- 1837-1916) and the Fund's Operating Agreement (R- 2563-2594), disclose to potential members of the Fund the following, among others:

THE FUND'S PRIVATE PLACEMENT MEMORANDUM

(a) The Fund, in essence, is responsible for its own expenses;

(b) No member of the Fund has a right to withdrawal of all or any amount of his or its capital;

(c) At the time of dissolution of the Fund, which is in the sole discretion of Management Co., the proceeds of liquidation of the Fund's assets are applied, as one would expect, first to payment or debts of liabilities of the Fund, second to creation of reasonable and necessary reserves for payment of contingent or unforeseen liabilities of the Fund, and last, monies, if any is remaining, to members of the Fund.

Thus, from the disclosures in the Private Placement Memorandum, it is clear that Fund members had no right to all or any portion of the Two Hundred and Eight Thousand ($280,000.00) Dollars involved at bar.

THE FUND'S OPERATING AGREEMENT

The Operating Agreement for the Fund (R- 2563-2594), to which each Member is a signatory, similarly provides. Although the Management Co.'s power to make advances/loans is not specified, Management Co. can exercise all powers reasonably connected with the Fund's business and which limited liability companies may legally exercise, obviously including the power to make advances/loans from the Fund. The Management Co. was granted "full and complete authority, power and discretion to make any and all decisions and to do any and all things which the Manager shall deem to be reasonably required in light of the Company's business and objectives". The Management Co. did so at bar. The Management Co. also has the express power to draw checks or other orders for the payment of monies.

The Operating Agreement also provides that "no Member shall have any right to demand or receive (i) any cash, Issuer Securities or Company assets in return of its Capital Contribution or the balance of its Capital Account in respect of its Interest until the dissolution of the Company or (ii) any distribution from the Company in any form other than cash". Further, no Member has a "right to withdraw or receive any return on such Member's Capital Contributions, or any claim to any Company capital, prior to the termination of the Company"; and dissolution of the Fund is at the sole discretion of the Management Co., of which Grivas was the sole member. Moreover, no member, in general, could transfer, pledge or hypothecate the member's interest without prior written approval of the Management Co., which did not have to be granted.

In essence then, under the Operating Agreement, as well as the disclosures in the Private Placement Memorandum, no member had a right to any funds of the Fund, except at the end, and as part, of the Fund's dissolution process. There was no such dissolution at the time of the transfer of the $280,000 at bar.

Thus, if there is wrongdoing by Grivas, it is the withdrawal of monies from the Fund and the deposit of such monies to the Management Co. account set forth above. This neither implicates (a) monies which Fund members/investors had immediate rights to, (b) a broker-dealer or (c) the securities or investment banking business. It implicates solely the Fund's business, and transactions therein, a business over which FINRA had no jurisdiction/authority. More significantly, conversion of the Fund's monies is not charged in the Complaint in this proceeding. Thus, the unauthorized withdrawal of monies of the Fund by Management Co./Grivas found in the Decision may not form the basis for the violation found and sanctions rendered.

ARGUMENT

POINT I

THE DECISION'S FINDINGS OF GRIVAS' LIABILITY ARE OUTSIDE THE SCOPE OF THE ALLEGATIONS IN THE COMPLAINT IN THIS PROCEEDING

The Complaint in this proceeding charges only conversion of $280,000.00 of "investor funds" from the Fund by Grivas. (R- 1-34). The Decision, on the other hand, sanctions Grivas because he "converted funds belonging to an investment fund that he formed and managed." (R- 2897-2916). This finding and the basis of the Decision is not the subject of the FINRA proceeding. It is beyond the scope of the allegations in the Complaint in this proceeding. Thus, the Decision decides a matter not before it – whether withdrawal of monies belonging to the Fund by Grivas constitutes conversion. Therefore, the Decision must be reversed. Department of Enforcement v. Zenke, 2009 FINRA Discip. Lexis 37 (NAC December 14, 2009).[3]

POINT II

BECAUSE THERE NEITHER IS, NOR COULD BE, A CONVERSION OF INVESTOR FUNDS AS CHARGED, THE NAC DECISION MUST BE REVERSED

Because there is no conversion of investor funds under the law, the NAC simply found, without detailed analysis of FINRA Rule 2010, that so long as Grivas took funds he was not entitled to, Grivas is guilty of conversion and violated FINRA Rule 2010 (R- 2897-2916). Shockingly, NAC cases do not support this bald statement. Rather, Department of Enforcement v. Paratore, 2008 FINRA Discip. Lexis 1 (2008); and Department of Enforcement v. Mullins, 2011 FINRA Discip. Lexis 61 (2011), aff'd., 2012 SEC Lexis 464 (February 10, 2012) (relying upon Paratore), specifically rely upon, and cite to cases, setting forth, the common law of

[3] The NAC's unsupported statement that it, in effect, can ignore the charges in the Complaint because Grivas received the "notice required" is contrary to law and plain wrong (R- 2897-2916).

conversion (see pp. 3-4, *supra*); *see also*, Department of Enforcement v. Olson, 2014 FINRA Discip. Lexis 7 (Bd. Of Govs. May 9, 2014) ("Olson knowingly falsified an expense request, deceitfully obtained Wells Fargo's payment of personal expenses, and converted her firm's funds", that is, Olson exercised control over funds belonging to Wells Fargo, "in denial or repudiation of" Wells Fargo's "right thereto"); Zendler Construction Co., Inc. v. First Adjustment Group, Inc., 59 A.D.3d 439, 873 N.Y.S. 2d 134 (2d Dept. 2009) (conversion requires legal ownership to specifically identifiable funds and that the converting party exercised unauthorized dominion over such funds to the exclusion of the other party's rights); Global View, Ltd. Venture Capital v. Great Central Basin Exploration, LLC, 288 F. Supp. 2d 473 (S.D.N.Y. 2003) ("the plaintiff must demonstrate that he has 'legal title or an immediate superior right of possession to the identifiable funds'"). This common law is the "conversion standard under FINRA Rule 2010" and as "defined" by the NAC. Thus, the Decision's holding is erroneous. For this reason alone, the Decision must be reversed.

As the facts show, and as the Decision concluded, the monies withdrawn were those of the Fund, not those of its members. In fact, according to the Fund's Operating Agreement, the Fund's members had no right to immediate possession or return of those monies (see R- 2563-2594). Rather, those monies were the Fund's, maintained in the Fund's Operating Account, and to be used for expenses, to pay the second year management fee to the Management Co., to cover expenses involved in the termination/dissolution of the Fund, and for any other purpose deemed appropriate by the Manager. (See p. 6, *supra*). Any funds thereafter remaining in the Fund's Operating Account are to be, and have been, distributed to the Fund's members (R- 2897-2916).

According to the Fund's Operating Agreement, and ignored in the Decision, the Fund's members neither had legal title to the monies found converted, nor any superior right of

possession thereto over the rights of the Fund. (See pp. 5-6, *supra*). Thus, the Decision's holding sustaining the Hearing Panel Decision (R- 2409-2434) that conversion alone, no matter whose funds were converted, is sufficient for violation of FINRA Rule 2010 (R- 2897-2916) is without basis in law and undisputed fact. Accordingly, the Decision must be reversed.

It should also be beyond dispute, as a matter of the documented record, that the monies found "converted" were not investor funds, but rather monies belonging to the Fund itself and in the Fund's Operating Account. The Complaint charges conversion of investor funds. The Decision clearly refers to the monies taken by Grivas as monies of the Fund not of the Fund members. Unable to support the finding that the monies "converted" were investor funds, which, as set forth above, they neither are nor could be, but in order to find Grivas guilty of something, the Decision, ignoring "the law of conversion", merely states that "the distinction drawn by Grivas is one without a difference." (R- 2897-2916). The Decision in this connection also argues that the gavamen of Enforcement's Complaint is that Grivas took monies "invested in the Fund." This argument begs the question at bar. The simple irrefutable fact is those monies, whether converted or not, were Fund monies. There is a distinction! There is a difference! The Fund's Operating Agreement is unambiguous as to whose monies they are (see R- 2563-2594). The NAC not only takes the position it can ignore the law, but the contract also. The NAC's magic wand cannot transform monies in the Fund's Operating Account into member/investor funds.

For the foregoing reasons, the Decision is without basis in law or fact. It must be reversed.

POINT III

FINRA LACKS DISCIPLINARY JURISDICTION/AUTHORITY OVER THE SUBJECT MATTER OF THIS PROCEEDING

A. FINRA'S JURISDICTION IS LIMITED TO THAT AUTHORIZED BY THE SECURITIES EXCHANGE ACT OF 1934 AND FINRA'S RESTATED CERTIFICATE OF INCORPORATION

(1) Securities Exchange Act of 1934

The Securities Exchange Act of 1934 (the "1934 Act") was created to "provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mail, to prevent inequitable and unfair practices on such exchanges and markets..." 15 U.S.C. § 78. The 1934 Act created the Securities and Exchange Commission "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." Securities and Exchange Commission, The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, http://www.sec.gov/about/whatwedo.shtml (Modified June 10, 2013).

Section 15A of the 1934 Act, enacted in 1938, and generally known as the Maloney Act, is an amendment to the 1934 Act intended to provide for the regulation of trade practices in over-the-counter transactions. The Maloney Act provides for the establishment and registration with the Securities and Exchange Commission of national securities associations whose purpose is to supervise the conduct and ethical standards of their members and to exercise power over them. 15 U.S.C. § 78o-3. As the Securities and Exchange Commission has stated:

> "In its essentials, the new section sets up a system of regulation in the over-the-counter markets through the formation of voluntary associations of investment bankers, dealers and brokers doing business in these markets under appropriate Governmental supervision. This system is designed to provide investors in the over-the-counter markets with protection comparable to that provided by the Securities Exchange Act of 1934 with respect to national securities exchanges and is patterned upon the control of exchanges provided in that Act." Fourth Annual

Report of the Securities and Exchange Commission, fiscal year ending June 30, 1938, page 33; *See* Austin Mun. Sec., Inc. v. NASD, 757 F.2d 676 (5th Cir. 1985).

Thus, FINRA's regulation of the business activities of its members[4] is restricted to the "investment banking or securities business." UBS Fin. Serv., Inc. v. Carilion Clinic, 706 F.3d 319 (4th Cir. 2013); Raymond James Fin. Serv., Inc. v. Cary, 709 F.3d 382 (4th Cir. 2013); Fiero v. FINRA, Inc., 660 F.3d 569 (2d Cir. 2011). The facts show that Grivas' conduct charged is wholly unrelated to investment banking or the securities business.

(2) Restated Certificate of Incorporation of Financial Industry Regulatory Authority, Inc.

FINRA is a national securities association incorporated in Delaware and created pursuant to § 15A of the 1934 Act. Its Restated Certificate of Incorporation provides, among others that its mission is:

> "to promote through cooperative effort, the investment banking and securities business, to standardize its principles and practices, to promote therein high standards of commercial honor, and to encourage and promote among members observance of federal and state securities laws." Restated Certificate of Incorporation, Article 3, paragraph (1).[5] (*Emphasis supplied*)

As the 4th Circuit Court of Appeals has recently recognized, "the FINRA Rules give further context by suggesting that the business activities of a FINRA member involve "investment banking or securities business."" Carilion Clinic, 706 F.3d at 325, *supra*; Cary, 709 F.3d at 386 *supra* ("Member's business activities, namely the activities of investment banking and the securities business."); Morgan Keegan & Co., Inc. v. Silverman, 706 F.3d 562 (4th Cir. 2013) ("business activities involve the investment banking or securities business"). It is thus beyond

[4] FINRA Rule 0140(a) provides, among others, that "Persons associated with a member shall have the same duties and obligations as a member under the Rules."

[5] Article I(u) of the FINRA By-Laws defines "investment banking or securities business" as "the business carried on by a broker, dealer or municipal securities dealer... or government securities broker or dealer, of underwriting or distributing issuer securities, or of purchasing securities and offering the same for sale as a dealer, or of purchasing and selling securities upon the order and for the account of others."

dispute "that the NASD [now FINRA] Rules were [not] meant to apply to every sort of financial service an NASD member might provide, regardless of how remote that service might be from the investing or brokerage activities which the NASD oversees." Fleet Boston Robertson Stephens, Inc. v. Innovex, Inc., 264 F.3d 770, 772 (8th Cir. 2001); UBS Financial Services, Inc. v. City of Pasadena, 2012 W.L. 3132949 (C.D. Ca. 2012). The facts show that Grivas' conduct at bar is wholly unrelated to the investment banking and securities activities which FINRA oversees.

B. FINRA Rule 2010 IS INAPPLICABLE TO THE MATTERS CHARGED

The reach of FINRA Rules is limited by the 1934 Act and FINRA's Revised Certificate of Incorporation to investment banking and the securities business. FINRA Rule 2010, by its specific terms, recognizes these limitations. It provides:

> "A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."

This mirrors the 1934 Act purpose of "promoting just and equitable principles of trade." 15 U.S.C. § 78f (b) (5). "Member" is defined in the 1934 Act and in the FINRA By-Laws as a broker-dealer, that is, a person or entity "engaged in the business of effecting transactions in the securities for the account of others or in the business of buying and selling securities for such individuals or entities own account, through a broker or otherwise." FINRA By-Laws Article 1(e) (k); 1934 Act §§ 3(a) (4) and (5). FINRA Rule 2010 is equally applicable to Grivas in his capacity as an associated person of Obsidian Financial Group. FINRA Rule 0140(a).

Thus, the language "a member, in the conduct of its business" can only refer to the members [associated person's] securities or investment banking business. Accordingly, FINRA Rule 2010 must be limited to that business and cannot be extended to a remote outside business of a person who happens also to be an associated person. The Decision wholly avoids this

limiting language and, instead, focuses solely on the remainder of the rule.[6] That is wrong. Even the NAC must follow FINRA rules as they are written. It may not rewrite them as the NAC has done in the Decision.

C. FINRA, SEC AND COURT DECISIONS LIMIT CONDUCT VIOLATIVE OF RULE 2010 TO THE INVESTMENT BANKING OR SECURITIES BUSINESS

Aside from the explicit language of FINRA Rule 2010, the cases are legion that conduct violative of FINRA Rule 2010, a general ethical rule, must bear a close relationship to the broker-dealer's [or associated person's] investment banking or securities business, regardless of whether it involves a security. *See e.g.*, Dep't of Enforcement v. Saad, 2009 FINRA Discip. Lexis 29 (2009). ("FINRA's authority to pursue disciplinary actions for violations of Rule 2110 is sufficiently broad to encompass any unethical business-related misconduct, regardless of whether it involves a security"), sustained, Matter of the Application of Saad, 2010 W.L. 2111287 (2010), *affirmed*, Saad v. S.E.C., 718 F. 3d 904 (D.C. Cir. 2013) (Saad falsified receipts, submitted a fraudulent expense report and accepted reimbursement to which he was not entitled from his broker-dealer employer) remanded, 2013 W.L. 5533145 (SEC 2013), FINRA v. Saad, Decision No. 2006006705601 (NAC 2015), aff'd., 205 W.L. 5904181 (SEC 2015); Egan v. TradingScreen, Inc., 2011 W.L. 1672066 (S.D.N.Y. 2011) (misappropriation of confidential client information); Matter of the Application of Ortiz, 2008 W.L. 3891311 (2008), (broker forged or caused to be forged customer initials on account applications); Matter of the Application of Manoff, 2002 SEC Lexis 2684 (2002) (unauthorized use of co-worker, also a client, credit cards); Matter of the Application of Goetz, 53 S.E.C. 472 (1998) (associated person

[6] "Grivas' conduct defied the high standards of commercial honor and just and equitable principals of trade by which all professional, securities industry participants must abide and constituted a conversion of funds that violated FINRA Rule 2010" and "we disagree with Grivas' circumscribed view of FINRA's ability to discipline its members and their associated persons for violating the high standards of conduct and just and equitable principles of trade imposed under FINRA Rule 2010." (R- 2897-2916).

misused members matching gift program to obtain private school tuition); Matter of the Application of Ialeggio, 1996 SEC Lexis 3057 (1996) (inducement by broker of member's parent company to pay fees and reimburse expenses broker not entitled to); Vail v. Securities and Exchange Commission, 101 F.3d 37 (5th Cir. 1996) (per curiam) ("Because Vail made misrepresentations regarding the existence of an account at Cigna [broker/dealer], we find that Vail's misconduct was securities related and thus, clearly within the scope of Article III § 1.");[7] Voss & Co., Inc., 1934 Act Release No. 18028 (1981) (lead trader of member firm purchased securities with checks drawn on insufficient funds); Matter of the Application of Thomas E. Jackson, 45 S.E.C. 771 (1975) (forgery of signatures on applications for insurance submitted through broker's broker-dealer); John C. Gebura, 46 S.E.C. 1121 (November 23, 1977) (the registered representative sold interests in a private venture to his brokerage customers and then improperly withheld customer funds); Heath v. S.E.C., 586 F.3d 122 (2d Cir. 2009), cert. denied, 130 S.Ct., 2351 (2010) (this case involves disclosure of brokerage client confidential information); Matter of the Application of Calvin David Fox, 2003 WL 22467374 (October 31, 2003) (petitioner violated the "ethical rule" by making a misstatement to his member firm employer about the status of his license to practice law in Florida); Matter of the Application of Robert E. Kaufman, 1993 WL 483323 (November 18, 1993), *affirmed*, Kaufman v. S.E.C., 40 F.3d 1240 (3rd Cir. 1994), (petitioner violated the ethical rule by misrepresenting to NASD and to the Pennsylvania Securities Commission that he had received a bachelor's degree); Timothy L. Burkes, 51 S.E.C., 356 (1993), *affirmed*, 29 F.3d 630 (9th Cir. 1994) (broker caused funds to be improperly credited to his commission account); Joseph Alderman, 52 S.E.C. 366 (1995), *affirmed*, 104 F.3d 285 (Cir. 1997) (Alderman mishandled funds of customers of a member firm

[7] Rather than cite to the specific basis for the finding in this per curiam decision, the NAC, instead, resorts to a generic and mischaracterized statement of the Court's holding. See fn 9, *infra* at 17.

for which he served as director and control person, as well as withheld funds from customers); Matter of the Application of DWS Securities Corp., 51 S.E.C. 814 (November 12, 1993) (DWS, a broker-dealer, and certain registered individuals, sold private preferred stock of an affiliated entity to investors); Matter of the Application of George R. Beall, Jr., 50 S.E.C., 230 (May 25, 1990) (Beall passed bad checks to the brokerage firm in connection with options trading in his personal account); Department of Enforcement v. Tomlinson, 2013 FINRA Discip. LEXIS 11 (OHO March 21, 2013) (disclosure of a broker-dealer's confidential information); Department of Enforcement v. Jennings, 2013 FINRA Discip. LEXIS 18 (OHO March 4, 2013) (misuse of proprietary confidential trading strategies); Ernest A. Cipriani, Jr., 51 S.EC. 1004 (Feb. 24, 1994) (Cipriani collected customers cash payments for life insurance premiums and failed to remit the funds to his broker-dealer employer); Department of Enforcement v. Conway, 2010 FINRA Discip. LEXIS 27 (NAC Oct. 26, 2010) (execution of late trades and deceptive practices to evade market timing restrictions imposed by mutual funds); Department of Enforcement v. Shvarts, 2000 NASD Discip. LEXIS 6 (NAC June 2, 2000) (failure to comply with a court judgment awarding former customers attorneys fees and costs incurred in a proceeding challenging an arbitration award the customers had won); Matter of the Application of John Edward Mullins, 2012 S.EC. LEXIS 464 (February 10, 2012) ("J. Mullins converted customer property and breached his fiduciary duty to a customer in violation of Rule 2110"); Thomas R. Alton, 59 S.E.C. Docket 2978 (1995), *aff'd.*, 105 F.3d 664 (9th Cir. 1996) (misrepresentations in broker's registration form).

The Decision's attempts to deal with this issue are feeble. Thus, it notes that "FINRA's authority to pursue discipline for violations of FINRA Rule 2010 is sufficiently wide to encompass any unethical business-related conduct regardless of whether it involves a security'."

What the Decision cites to, in support of that position, are cases in which the facts bear a close relationship to the investment banking or securities business, whether the wrongdoing involved a security or not.[8] Indeed, the facts in Vail v. SEC, *supra*, are closely related to the broker/dealer business. There, the Fifth Circuit, in a per curiam opinion, ruled: "Because Vail made misrepresentations regarding the existence of an account at Cigna [broker/dealer], we find that Vail's misconduct was securities related and thus, clearly within the scope of Article III, Section 1." The critical fact establishing securities business related conduct is the representation of the existence of a "firm account" in which the monies taken were supposedly placed.[9]

Simply put, no FINRA, SEC or court case goes beyond the plethora of cases above cited. Nonetheless, the facts at bar are far outside any of those cases. The Decision stands alone and is plain wrong. It extends FINRA's jurisdiction/authority beyond that authorized by the 1934 Act, FINRA Certificate of Incorporation and by-laws, FINRA Rule 2010 and all existing case law. The Decision must be reversed.

D. THE ACTS COMPLAINED OF ARE OUTSIDE THE SCOPE OF EXISTING CASE LAW CONCERNING FINRA JURISDICTION/AUTHORITY UNDER RULE 2010

FINRA has acknowledged that FINRA Rule 2010 will be applied to non-securities activities of associated persons "consistent with existing case law." Proposed Rule Change to Adopt Consolidated FINRA Supervision Rules, SEC File No. SR-2013-025, page 38 (June 2013). The existing case law is set forth in C above.

In June 2011, FINRA proposed supplementary material to Rule 3110 that included "supervision for all of the member's business lines irrespective of whether they require broker-

[8] See Matter of Ialeggio, *supra*; Matter of Manoff, *supra*.

[9] In Matter of the Application of Goetz, *supra*, at 478 fn. 10, the Commission specifically pointed to the fact that Vail "represented they [the funds] were in a firm account" as the basis for the finding of securities business related misconduct. In mischaracterizing Vail, the Decision pretends that the Commission's view is non-existent.

dealer registration" so as to "achieve compliance with FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade)". Proposed Rule Change to Adopt Rules Regarding Supervision, SEC Release No. 34-64736, pages 5, 31-33. (June 2011).

In June 2013, FINRA filed another Proposed Rule Change to Adopt the Consolidated FINRA Supervision Rules with the Securities and Exchange Commission (File No. SR-2013-025) in which it eliminated "the proposed supplementary material from the proposed rule" and, instead, "will continue to apply FINRA Rule 2010's standard to non-securities activities of members and their associated persons consistent with existing case law." *Id.* at 38.[10]

The existing case law cited is Ialeggio v. S.E.C, *supra*, Vail v. SEC, *supra*, and Saad v. S.E.C., *supra*, all of which involved the broker's relationship with and acts concerning, or closely related to, the member firm's investment banking or securities business (extensive case law is cited at pages 14-16, *supra*).

The acts charged at bar relate solely to the alleged "conversion of funds" from the Fund's Operating Account by the Management Co., of which Grivas was the sole member. (R- 1-34). There is absolutely no relation to any business, securities or non-securities, of the member with whom Grivas is registered, or to Grivas' activities as an associated person, nor even to members of the Fund.

Thus, by FINRA's own admission, in the circumstances at bar, there can be no violation by Grivas of FINRA Rule 2010 and FINRA does not have jurisdiction/authority over the withdrawal of monies (whether authorized or not) at bar.

[10] Curiously, the Decision pretends these proposed FINRA rule changes, published by the S.E.C., are non-existent and thus avoids any discussion of them at all.

E. THE ACTS COMPLAINED OF ARE REMOTE FROM GRIVAS' REGISTRATION OR ACTIVITY AS AN ASSOCIATED PERSON OF OBSIDIAN FINANCIAL GROUP

The parties and matters alleged do not relate to or implicate the investment banking or securities business of Grivas as an associated person of Obsidian Financial Group. Accordingly, FINRA Rule 2010 is inapplicable as aforesaid, and, in all events, FINRA is without jurisdiction/authority over the acts alleged.

To put this in perspective, the alleged conversion of Fund monies is unrelated to the Fund's private offering or to the purchase of member interests in the Fund by persons or entities who were at the time of purchase customers of Obsidian Financial Group. Indeed, the events that form the basis for FINRA Enforcement's charges occurred after the private offering closed and were in connection with the general business operations of the Fund.

The Fund's offering concluded by March 30, 2012. (R- 2897-2916). By that time all funds raised were "pooled" and were thereafter monies of the Fund and in the Fund's Operating Account. Moreover, there was no evidence presented that any of the 24 Obsidian Financial Group customers who purchased member interests in the Fund were customers of Obsidian Financial Group at the time of the "conversion" found.

Thus, under "existing case law" and the facts at bar, the "conversion of funds" found in the Decision is remote from the investment banking or securities business of Grivas. Accordingly, FINRA Rule 2010 is inapplicable and the conduct found is without FINRA's disciplinary jurisdiction/authority.

CONCLUSION

The Decision finds that Grivas is liable for a matter not charged – conversion of monies of the Fund. Moreover, in order to find Grivas liable for any conduct, whether charged or not,

the Hearing Panel had to (a) avoid the well – established law of conversion followed in NAC decisions, (b) refer only to a portion of Rule 2010 without reference to its limiting language - "in the conduct of its business" - (c) interpret business related conduct to include conduct far beyond any securities or investment banking business related conduct in the plethora of decided cases, (d) avoid the fact that the monies found converted were monies of the Fund and not those of the members by wrongly characterizing it as a "distinction without a difference", (e) mischaracterize or ignore entirely the Fund's Operating Agreement and (f) make findings of facts that are clearly erroneous, not in the Record at all or unsupported by the Record. In short, the Decision is so blatantly wrong in all respects it must be reversed and this proceeding dismissed.[11]

Dated: November 20, 2015
Garden City, New York

WEXLER BURKHART HIRSCHBERG & UNGER, LLP

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[11] Grivas does not argue at bar that he may not be punished if he in fact converted Fund monies. Grivas could be subject to an S.E.C. proceeding, a state administrative proceeding, a criminal proceeding or a proceeding by a member of the Fund. It is FINRA that does not have jurisdiction/authority over the acts complained of.

EXHIBIT A

Stephen Grivas
38 Birchwood Park Crescent
Jericho, NY 11753

October 9, 2015

Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Attn: Lynn M. Powalski
Deputy Secretary

RE: **Matter of the Application for Review of Stephen Grivas**
Admin. Proc. File No. 3-16756

Dear Ms. Powalski:

I write because I am in need of copies of certain documents from the Record in the above proceeding. The documents are bate stamped as follows: 1-34 (Complaint), 879-890 (Stipulations), 1837-19716 (Obsidian Social Networking PPM), 2409-2434 (Hearing Panel Decision), 2563-2594 (Obsidian Social Networking Fund Operating Agreement), and 2897-2916 (NAC Decision). Please have these documents forwarded to me or advise me as to further steps I need to take to obtain them.

Very truly yours,

Stephen Grivas

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of STEPHEN GRIVAS For Review of Action Taken by FINRA	Admin Proc. File No. 3-16756 **CERTIFICATE OF SERVICE**

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

I, FRANCINE R. RAMSAY-BROWN, being duly sworn, state:

I am not a party to the action, am over 18 years of age and reside in Suffolk, New York 11729.

On November 20, 2015, I served an original and three copies of the annexed **BRIEF IN SUPPORT OF APPLICATION FOR REVIEW** by mailing same via Federal Express delivery in a sealed envelope, in a designated Federal Express depository within the State of New York, addressed to the last known address of the addressee as indicated below:

(Original and 3 copies)
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Mail Stop 1090 – Room #10915

(1 copy)
Gary Dernelle, Esq.
FINRA, Office of General Counsel
1735 K Street, N.W.
Washington, D.C. 20006

Francine R. Ramsay-Brown

Sworn to before me this
20th day of November 2015

Notary Public

MARTIN PAUL UNGER
Notary Public, State of New York
No. 02UN1055240
Qualified in Nassau County
Commission Expires March 30, ~~192~~ 2019