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February 17, 2016

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VIA MESSENGER

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: SUCCESS TRADE SECURITIES, INC. AND FUAD AHMED
ADMINISTRATIVE PROCEEDING FILE NO. 3-16900

Mr. Fields:

Enclosed are the original and three copies of FINRA's Brief in Support of the Order of Restitution for the above-referenced matter. Please contact me at 202-728-8317 if you have any questions.

Very truly yours,



Jante C. Turner

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Enclosures

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FEB 18 2016

OFFICE OF THE SECRETARY

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**

In the Matter of the Application of
Success Trade Securities, Inc. and Fuad Ahmed
For Review of Disciplinary Action Taken by
FINRA
Administrative Proceeding File No. 3-16900

FINRA'S BRIEF IN SUPPORT OF THE ORDER OF RESTITUTION

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February 17, 2016

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In January 2016, the Commission took official notice that Fuad Ahmed and Success Trade Securities, Inc. (“STS”) settled regulatory actions with the Commission and District of Columbia. The Commission has requested that the parties submit briefs to “address whether and to what extent these orders [of disgorgement and restitution] have an effect on whether FINRA’s restitution order is ‘excessive or oppressive’ as defined by [Securities] Exchange Act [of 1934] Section 19(e)(2).”

FINRA’s order of restitution is neither excessive nor oppressive. A FINRA Hearing Panel determined that Ahmed and STS engaged in fraud and sold non-exempt unregistered securities. The FINRA Hearing Panel assessed sanctions on Ahmed and STS, including properly imposing an order of restitution to restore the investors who were victims of Ahmed’s and STS’s fraud to the status quo ante.

FINRA’s order of restitution is the correct measure of the investors’ losses, and, because it has not been enforced, it is not duplicative, excessive, or oppressive. FINRA’s order of restitution also is subject to offset, and neither Ahmed nor STS will be required to submit

duplicative disgorgement or restitution amounts to multiple regulators or defrauded victims. The Commission should affirm FINRA's order of restitution against Ahmed and STS.

I. FACTUAL BACKGROUND

A. The FINRA Hearing Panel's Decision and Order of Restitution Against Ahmed and STS

In April 2013, FINRA's Department of Enforcement filed the complaint against Ahmed and STS. RP 11-43. The Hearing Panel issued its decision in June 2014. RP 11899-11980. The Hearing Panel found that Ahmed and STS willfully misrepresented and omitted material facts when they sold Success Trade Inc.'s (the "Parent Company") promissory notes to investors. RP 11962-11973. The Hearing Panel also found that Ahmed and STS sold the Parent Company's unregistered notes without the benefit of a registration exemption. RP 11962-11973.

The Hearing Panel barred Ahmed and expelled STS for the misconduct. RP 11977-11980. The Hearing Panel also ordered Ahmed and STS to pay, jointly and severally, \$12.42 million in restitution and \$1.26 million in prejudgment interest to 59 identified investors ("FINRA's Restitution Order"). RP 2643-2644, 11978-11982. The NAC affirmed the Hearing Panel's decision in September 2015. RP 12613-12674.

B. The District of Columbia's Settlement and Order of Restitution Against Ahmed and STS

In February 2015, Ahmed and STS settled a regulatory action with the District of Columbia. *See Success Trade Secs., Inc.*, DC Department of Insurance, Securities and Banking, Administrative Consent Order SB-CO-03-15 (Feb. 19, 2015), attached as Appendix A. Ahmed, STS, and the Parent Company consented to findings that their sales of the Parent Company's promissory notes to investors violated the federal securities laws, the District of Columbia's rules

and regulations, and FINRA's rules governing the purchase and sales of securities. Appendix A at 29-30.

As part of the settlement, the District of Columbia ordered Ahmed, STS, and the Parent Company to cease and desist from selling unregistered and non-exempt securities in the District of Columbia, barred them from engaging in any securities business in the District of Columbia, and ordered them to pay, jointly and severally, a civil penalty of \$650,000. Appendix A at 32. Ahmed, STS, and the Parent Company also agreed to pay, jointly and severally, \$12.53 million in restitution to 58 identified investors ("DC's Restitution Order"). Appendix A at 32.

C. The Commission's Partial Settlement and Order of Disgorgement Against Ahmed and STS

In August 2015, the Commission initiated an administrative proceeding against Ahmed, STS, and the Parent Company for the same conduct at issue in these proceedings. *See Success Trade, Inc.*, Exchange Act Release No. 75707, 2015 SEC LEXIS 3390, at *1 (Aug. 14, 2015). Ahmed, STS, and the Parent Company partially settled the Commission's administrative proceeding. *See id.* at *1-2. In so doing, Ahmed, STS, and the Parent Company consented to findings that they willfully engaged in securities fraud, in violation of the Securities Act of 1933 ("Securities Act") and Securities Exchange Act of 1934 ("Exchange Act"), and that they willfully sold unregistered securities without the benefit of an exemption, in contravention of the Securities Act. *See id.* at *20-21.

As part of the settlement, Ahmed, STS, and the Parent Company agreed to cease and desist from committing future violations of the fraud provisions of the Securities Act and Exchange Act and the registration requirements of the Securities Act, and they consented to the revocation of STS's broker-dealer registration. *See id.* at *23-24. The Commission ordered Ahmed, STS, and the Parent Company to pay, jointly and severally, \$12.78 million as a civil

penalty, in addition to \$12.78 million in disgorgement and \$1.5 million in prejudgment interest to 57 identified investors (“Commission’s Disgorgement Order”). *See id.* The Commission, however, agreed to “credit \$900,000, the proceeds from [the] sale of STS’s assets, towards the disgorgement amount owed upon receipt of those funds from the escrow account where such funds are currently being held.” *Id.* at *23. The Commission’s action is pending to determine whether additional sanctions should be imposed against Ahmed. *See id.* at *21-22.

II. ARGUMENT

FINRA’s Restitution Order was a necessary sanction to seek when FINRA’s Department of Enforcement filed its complaint against Ahmed and STS in 2013. It was properly ordered by the Hearing Panel in 2014 as a sanction based on the well-supported findings that Ahmed and STS committed fraud and sold unregistered securities. And it should be upheld by the Commission in this case because the victims have not yet recovered their losses through either restitution payments or the distribution of disgorgement. Although the Commission’s affirmance of FINRA’s Restitution Order might create the surface appearance of orders addressing the same harm, the Commission can avoid any possibility of duplicative payments to the investors by affirming FINRA’s Restitution Order while directing FINRA to offset any payments actually made by Ahmed or STS to the investors. FINRA’s Restitution Order against Ahmed and STS is neither excessive nor oppressive, and the Commission should affirm it.

A. FINRA’s Restitution Order Is Not Excessive or Oppressive

FINRA’s authority to order restitution arises from its power to impose “any other fitting sanction.” *Michael Frederick Siegel*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459, at *48 (Oct. 6, 2008), *aff’d*, 592 F.3d 147 (DC Cir. 2010); *see* FINRA Rule 8310(a)(7). Pursuant to Section 19(e)(2) of the Exchange Act, the Commission may eliminate, reduce, or alter a

sanction if it finds that the sanction is excessive, oppressive, or imposes a burden on competition not necessary or appropriate to further the purposes of the Exchange Act. *See Jack H. Stein*, 56 S.E.C. 108, 120-21 (2003). Specifically, the Commission will examine FINRA's Restitution Order to determine whether the order is "palpably disproportionate to the violation," does not "serve [its] intended purpose," or lacks "support . . . with a meaningful statement of findings and conclusions, and the reasons or basis therefor." *Glodek v. SEC*, 416 F. App'x 95 (2d Cir. Mar. 25, 2011) (quoting *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005)). FINRA's Restitution Order easily meets this standard.

FINRA's Restitution Order is proportional to Ahmed's and STS's misconduct because it is the correct measure of the investors' losses. *Cf. U.S. v. Newell*, 658 F.3d 1, 35 (1st Cir. 2011) ("[R]estitution is inherently proportional, insofar as the point of restitution is to restore the victim to the status quo ante."). FINRA ordered that Ahmed and STS pay, jointly and severally, \$12.42 million in restitution and \$1.26 million in prejudgment interest to the 59 identified investors. FINRA determined the amount of FINRA's Restitution Order by calculating each investor's principal investment, then subtracting from that amount any returned principal and interest paid to that investor. RP 2643-2644. The resulting order of restitution is the proportional measure of Ahmed's and STS's wrongdoing, and is neither excessive nor oppressive. *Cf. U.S. v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998) ("[B]ecause the full amount of restitution is inherently linked to the culpability of the offender, restitution orders that require full compensation in the amount of the loss are not excessive.").

FINRA's Restitution Order also serves its intended purpose. Restitution is a fitting sanction "when an identifiable person, member firm or other party has suffered a quantifiable loss proximately caused by respondent's misconduct." *FINRA Sanction Guidelines* at 4 (General

Principles Applicable to All Sanction Determinations, No. 5) (2013 ed.). Specifically, restitution restores the status quo ante where a victim otherwise would unjustly suffer loss “by returning to the victim the amount by which the victim was deprived.” *Dep’t of Enforcement v. Kapara*, Complaint No. C10030110, 2005 NASD Discip. LEXIS 41, at *34 (NASD NAC May 25, 2005); *see also Dep’t of Enforcement v. Belden*, Complaint No. C05010012, 2002 NASD Discip. LEXIS 12, at *25 (NASD NAC Aug. 13, 2002), *aff’d*, 56 S.E.C. 496 (2003). FINRA’s Restitution Order identified the 59 individuals who were the victims of Ahmed’s and STS’s misconduct, and ordered Ahmed and STS to pay the investors the amount of restitution necessary to restore them to the status quo ante.

Finally, FINRA provided a meaningful explanation for its decision to impose the restitution order. The 59 investors, to whom FINRA ordered the payment of restitution, incurred \$12.42 million in losses as a direct result of Ahmed’s and STS’s fraudulent misrepresentations and omissions and unregistered securities sales. Ahmed reviewed, authorized, and approved the contents of the offering documents, approved all sales of the notes to the investors, including the terms of the sales, and directly communicated with investors to convince them to renew, extend, or convert the notes into shares of the Parent Company’s stock as the notes matured. RP 1619-1621, 1669-1673. And STS is jointly and severally liable in FINRA’s order of restitution because of Ahmed’s intentional acts. *See Kirk A. Knapp*, 50 S.E.C. 858, 860 n.7 (1992) (explaining that FINRA properly attributed scienter of firm’s owner to firm and thereby found primary antifraud violation by firm based on owner’s conduct). FINRA’s Restitution Order is precise, reflecting the exact amounts necessary to restore the investors to the status quo ante, and is neither excessive nor oppressive.

B. The Commission's Disgorgement Order and DC's Restitution Order Do Not Render FINRA's Order of Restitution Excessive or Oppressive

The purpose of FINRA's Restitution Order is to compensate Ahmed's and STS's victims, a purpose that has not yet (and may never be) realized by the Commission's Disgorgement Order or DC's Restitution Order.¹ If the Commission affirms FINRA's findings of fraud and sales of unregistered securities, it should uphold FINRA's Restitution Order because any question regarding Ahmed's and STS's making actual duplicative payments should be addressed when Commission staff or FINRA are enforcing the disgorgement or restitution orders. *See U.S. v. Perry*, 714 F.3d 570, 578-79 (8th Cir. 2013).

Courts consider whether a wrongdoer will pay duplicative restitution amounts when *enforcing* restitution orders, not when *entering* them. *See id.* In *Perry*, the United States Court of Appeals for the Eighth Circuit considered whether funds forfeited to the government should offset a criminal restitution order. *Id.* The Eighth Circuit declined to reach the issue, stating that "[a]ll such questions must await final resolution of the forfeiture action or enforcement of the restitution order, at which time the district court will retain authority to modify the amount of restitution as may be appropriate." *Id.* Here, FINRA's Restitution Order has not reached a final resolution. FINRA's Restitution Order has been stayed while Ahmed and STS are pursuing this appeal. *See* FINRA Rule 9370. The Commission therefore should affirm FINRA's Restitution Order.

¹ As reflected in the Commission's partial settlement, when \$900,000 of proceeds from the sale of STS's assets is received by the Commission, it will credit that amount towards the \$12.78 million of disgorgement owed.

In any event, once FINRA's Restitution Order has become final – assuming for the sake of argument that Ahmed or STS actually made restitution or disgorgement payments – those payments would be offset against FINRA's Restitution Order. In an analogous circumstance, the United States Court of Appeals for the Second Circuit upheld the Commission's disgorgement order as not providing a double recovery when another court had ordered restitution to investors based on similar misconduct by the same defendant. *See SEC v. Risman*, 7 F. App'x 30, 31 (2d Cir. 2001). The Second Circuit found that the Commission was obligated to administer the disgorgement fund so as to avoid the payment of duplicate compensation to investors. *Id.* at 31.

Although FINRA will not be administering a disgorgement fund, FINRA acknowledges that Ahmed's and STS's victims should not be paid duplicate compensation. FINRA represents that it will honor valid proof from Ahmed and STS that they have paid disgorgement under the Commission's Disgorgement Order or restitution under DC's Restitution Order. *Cf. U.S. v. Elson*, 577 F.3d 713, 733-34 (2009) (“[T]he burden of proving an offset should lie with the defendant.”).

In affirming FINRA's order of restitution, the Commission also can ensure that FINRA does not require Ahmed or STS to make duplicative payments by ordering FINRA to credit Ahmed and STS with any payments made pursuant to the Commission's Disgorgement Order or DC's Restitution Order. *See SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996) (affirming trial court's disgorgement order that included a \$5 million offset for a prior payment made in a class-action settlement when the disgorgement amount – including the offset – was “a reasonable approximation of [the wrongdoer's] unlawful profits from its fraudulent transactions.”). Whether stated explicitly by the Commission, or followed by FINRA as the

applicable law, offset will guard against FINRA's sanctions imposed on Ahmed and STS from becoming excessive or oppressive.

III. CONCLUSION

FINRA's Restitution Order is the correct measure of the investors' losses, and, because it has not been enforced and is subject to offset, it is neither excessive, nor oppressive. The Commission should affirm FINRA's Restitution Order.

Respectfully Submitted,



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