RECEIVED
DEC 12 2016
OFFICE OF THE SECRETARY

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION (S.E.C.)

WASHINGTON, D.C.

In the Matter of Application of	)	
	)	
Keith D. Geary	)	**S.E.C.Administrative**
	)	**Proceeding**
For Review of Disciplinary Action Taken by FINRA	)	**File No. 3-17406**
In Case No. 2009020465801	)	

REPLY BRIEF OF KEITH D. GEARY TO BRIEF OF FINANCIAL INDUSTRY REGULATORY AUTHORITY IN OPPOSITION TO <u>GEARY'S BRIEF IN SUPPORT OF APPLICATION FOR REVIEW</u>

Pursuant to 15 U.S.C. §78s(d)(2), 17 C.F.R. § 201.450 and Secretary Brent J. Field's Order dated September 21, 2016, Applicant Keith D. Geary ("Geary") respectfully submits this Reply to the Response Brief of the Financial Industry Regulatory Authority ("FINRA") in Opposition to Geary's Application for Review. In support of this Reply, Geary respectfully shows the Commission as follows:

I. <u>REPLY TO INTRODUCTION AND FACTUAL BACKGROUND SECTIONS</u>

FINRA's introductory and background statements often lack context; rather, FINRA opts to readily attach descriptions of purportedly "egregious" conduct to events that, in many instances, did not involve direct action and participation by Geary. Geary recognizes that inaction does not automatically shield him from regulatory responsibility liability. However, the fact that Geary retained and relied on qualified, experienced industry professionals (Frager and Roberts, for example) provides context for the underlying events. Geary respectfully submits that context must necessarily be considered by the Commission in its review of the NAC

Decision, particularly as it relates to the appropriateness and severity of the sanctions imposed on Geary.

II. REPLY TO ARGUMENT AND AUTHORITIES

A. Liability for Violation of the Net Capital Rule.

At pp. 14-20 of FINRA's Response, FINRA cites to and relies upon many of the same cases as those found in the NAC Decision. However, the cases cited by FINRA were based on remarkably different facts than the facts at issue in the instant matter, and therefore should have no application to the instant matter.

For example, in *Fox & Co. Invs., Inc.*, 58 S.E.C 873 (2005), Moldermaker was the principal owner, president, general securities principal and the FINOP who was directly responsible for computing the firm's net capital. *Id.* at p. 2. Five former customers of the firm filed an arbitration claim against Moldermaker, the firm, the firm's clearing broker and a registered representative. On December 27, 2001, the arbitration panel issued an award against Moldermaker and firm for $983,992 and Moldermaker received a copy of the award on January 2, 2002. Despite receipt of the award, Moldermaker filed a FOCUS report on January 25, 2002 that did not book the award as a liability or include it in the firm's net capital. Instead, he reported a positive net capital $200,000 in excess of the requirement. Moldermaker subsequently had phone conversations with NASD employees wherein they advised him to book the arbitration award as a liability, but Moldermaker disagreed and refused to book the award as a liability, based on his belief insurance would pay the award. The NASD even faxed a letter confirming Moldermaker's obligation to book the award. Several weeks later, Moldermaker filed a FOCUS report in which he again did not report the arbitration award as a liability, but instead reported a positive net capital of $643,110. Had he booked the award as directed, a negative net capital deficiency would have been shown. The *Fox & Co.* affirmed a finding that "applicant's conduct was intentional because they failed repeatedly to book the arbitration award as a liability and insisted on recognizing the insurance claim as an allowable asset, despite the contrary advice of the NASD staff."

The facts present in *Fox & Co.* are drastically different and distinguishable from the instant matter FINRA cannot identify any prior warnings or advice that was provided by FINRA and ignored by Geary. In fact, in connection with the May 2009 alleged violation, FINRA first raised an issue concerning the accuracy of the firm's FOCUS report in November 2009 – six months later. At that time, FINRA representatives dealt with the firm's FinOp (Norman Frager), who made the decision to decline FINRA's request for corrective action, on his own and without notifying or consulting Geary.

Likewise in *Mark James Hankoff*, 48 S.E.C. 705 (1987), the facts were that the head of the broker-dealer was clearly aware of the firm's deficient net capital position. Moreover, the Commission actually modified and reduced the sanctions imposed by the NASD on Hankoff to a $5,000 fine, censure and four month suspension from association with any member firm in his principal capacity. *Hankoff* noted that "[a] firm's official is relieved of responsibility for compliance with the federal securities laws only when he or she reasonably "delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his or her duties."" *See Mark James Hankoff*, 48 S.E.C. at 707. The facts in this action are that Geary, in many material respects, delegated and relied on qualified industry professionals (Frager and Roberts) who had performed the same functions for the firm for many years. Geary should not be criticized and severely sanctioned – including an all capacities suspension – for decisions made by others without Geary's knowledge or involvement.

FINRA argues that the "overwhelming evidence [supports] that the CMOs were in GSI's inventory on May 29 and 29, 2009" and remained so until they were sold to McKean and his foundation on June 1 and 3, 2009. FINRA then cites to *Rani T. Jarkas,* Exchange Act Release No. 77503 (April 1, 2016) to support its assertion that a violation occurred because the CMOs allegedly were in inventory. In that case, Jarkas was the CEO of Global Crown. Global Crown was not approved at any time to conduct proprietary trading, which requires a minimum net capital of $100,000 under the Exchange Act of 1934. *See* pg. 3. Jarkas did not deny he was responsible for filing an application for approval for Global Crown to engage in certain trading activities, which would have increased the firm's net capital requirements. Without filing the appropriate application, Jarkas engaged in proprietary trading from August through September 2008, by actually placing trades himself, opening and holding 30 securities positions in the firm's average price account for multiple days, without allocating them to customer accounts. While conducting its routine audit of the Firm, FINRA received a Notice of Levy from the IRS, stating the firm owed nearly $250,000 in back payroll taxes, and that the firm had not recorded the payroll taxes as a liability for purposes of net capital computations. Once FINRA began to investigate the net capital violation, Global Crown provided some but not all documents requested, going so far as to refuse to produce certain requested documents, and blocking FINRA staff from continuing their onsite examinations. *Id.* at pp 4-5. Again, factually *Jarkas* is nothing like the instant case.

FINRA also relies on the case of *Kirk A. Knapp,* 51 S.E.C. 115, 126 (1992), to support its assertion that Geary cannot rely upon or defer to the actions for Frager or Roberts. Once again, *Knapp* is based on distinguishable facts. Knapp directed and was the motivating force behind the firm's numerous violations of the customer protection and net capital recordkeeping rules. The opinion noted that Knapp "engaged in extremely serious misconduct", had an "extensive disciplinary history" and also found Knapp deliberately and repeatedly orchestrated transactions in an attempt to disguise violations, ignored NASD's bar by exercising a managerial role in the Firm and solicited a kickback in connection with a public offering. FINRA's attempted reliance on *Knapp* is misplaced. Geary does not have any prior disciplinary history, much less "extensive." Geary did not, in any manner, attempt to conceal the transactions at issue, nor did he do anything to interfere with or obstruct FINRA's investigation (in fact, all FINRA witnesses testified Geary was fully cooperative).

FINRA's Response also cites *In Matter of Hutchison Financial Corp.,* 51 S.E.C. 398 (1993), but again this opinion is inapposite. In *Hutchison,* the firm and its former president (Mace) did not dispute that at various times in 1990, the firm had conducted its securities business with inadequate net capital and that it had inaccurately reported to the NASD it had sufficient net capital. The firm had also frequently fallen below minimum net capital and had even closed on several occasions due to these issues. Mace knew the firm had a history of net capital violations and that the firm had closed and he was aware that in previous months he had a very small cushion above net requirement amounts. Despite these warnings, Mace took no steps to secure compliance and displayed a level of intention to the problem that was clearly inappropriate. The sanctions issued against Mace included only a $1,000 fine and requalification. Geary's situation is vastly different. Prior to May 2009, Geary Securities had never experienced a net capital deficiency. Likewise, Geary Securities never knowingly submitted an inaccurate FOCUS report to FINRA. When Geary was told in 2010 that the firm was approaching its net capital threshold, Geary immediately devoted his full time and attention to taking action to maintain compliance (including immediately contributing personal funds in an amount he was informed would be adequate, as well as immediately seeking additional funding from his lender).

B. <u>Sanctions for Violation of the Net Capital Rule</u>.

Geary recognizes that the Guidelines state that they do not prescribe fixed sanctions for particular violations," but the purpose of the Guidelines is to provide guidance for adjudicators to sanctions fairly and consistently, and here the NAC Decision inexplicably chose to ignore or place less weight on certain factors, which has caused the sanctions against Geary to be neither consistent nor fair. *See* Guidelines, Overview, p. 1.

The cases cited by FINRA relating to Guidelines do not support the NAC's Decision, as these case are irrelevant since they do not relate to net capital violations. *See e.g., Daniel D. Manoff,* 55 S.E.C. 1155 (2002)(registered representative was alleged to have made unauthorized use of his co-worker's credit cards. SEC noted that there we no specific guidelines that applied to unauthorized use of credit cards, so NASD applied Guidelines for "Conversion or Improper Use of Funds or Securities", which required a bar unless there were mitigating circumstances); *Robert Tretiak,* 56 S.E.C. 209 (2003)(representative, principal and president of broker dealer failed to honor arbitration award entered against him, sold securities in parent company's IPO pursuant to a materially misleading prospectus and failed to establish escrow account for IPO, thereby causing violation of Exchange Act Rule.)

Additionally, in the cases cited by FINRA, the respondents' complained of actions were much more egregious than those alleged here. *See e.g. Hutchison,* 51 S.E.C. 398 (firm president was fully aware of numerous net capital issues and problems, and was even aware firm had to close due to net capital issues; despite this knowledge and the fact that prior month only had a small cushion, president allowed net capital violations and displayed a level of intention to the problem that was "clearly inappropriate.") *Jarkas,* Exchange Act Release No. 77503 (CEO did not deny that he was responsible for filing application for firm to engage in trading activities that would have increased net capital requirements, did not do so, and then engaged in this trading for several months, holding up to 30 securities for multiple days, then proceeded to provide FINRA with only some requested documents, and even went so far as to block FINRA staff from continuing onsite examinations); *Benz,* 58 S.E.C. 34 (Benz was president and FINOP, who established a margin account on behalf of customer with clearing broker. Benz was aware that client made a purchase of 999,000 shares at the end of trading day on October 32, but which was not booked by clearing broker until November 1. When clearing broker contacted Benz, Benz personally vouched for customer, and based upon these statements, clearing broker did not cancel trade. When client failed to pay entire purchase, leaving a [redacted], NASD contacted Benz and Benz did not dispute he did not include the deficit in calculated the requisite net capital.)

FINRA also argues that *Kirk A. Knapp,* 51 S.E.C. 115, 126 (1992) supports the fact that NAC did not consider the other disciplinary measures imposed by the Oklahoma Department of Securities ("ODS"). However, *Knapp* does not support this assertion as *Knapp* does not involve the application of Guidelines, Factor No. 14, p.7, regarding consideration of other disciplinary measures for the same conduct at issue. Instead, in *Knapp,* the broker argued that he was subject to "double jeopardy" because he had agreed to a consent entry for a permanent injunction in Commission proceedings if the Commission would not proceeded administratively against him on the basis of the injunction. Knapp argued that the NASD action was a violation of this stipulation, and the NASD was foreclosed from pursuing any action against him from the same misconduct. *Id.* at *12. The Commission disagreed, but made its determination that the NASD had its own independent statutory mandate to enforce the provisions of the Exchange Act.

However, the Guidelines specifically provided that for FINRA HP was required to consider whether the respondent was disciplined for the same misconduct at issue, and the NAC likewise ignored the same. *See* Guidelines, Factor No. 14, p. 7.

FINRA attempts to refute the application of the Guidelines by arguing that the ODS disciplinary measures were the result of a settlement and could be disregarded. In order to attempt to support this assertion (which appears nowhere in the Guidelines) FINRA cites to *Kent M. Houston,* Exchange Act Release No. 71589. However, *Houston* did not involve Guideline Factor No. 14, but instead the discussion of settlement in that matter was based upon Houston's argument that the NAC should have imposed disciplinary sanctions on him that were less severe because he had attempted to settle the matter with the NASD, which was rebuffed, and thus the sanctions imposed against him should have been in-line with sanctions that had been imposed in similar proceedings settled by the NASD. *Id.* Thus, *Houston* does not stand for the proposition that the fact that another regulatory agency "settles" a disciplinary matter, that same discipline may not be considered under Factor No. 14.

FINRA also cites to *William K. Cantrell,* 52 S.E.C. 1322 for its assertion that the sanctions were not punitive. However, in that matter Cantrell was a firm FINOP. At issue were approximately 42 transactions in a firms "error account" involving Metrowireless Interactive Corp. stocks ("MWIC"). Customer transactions were cancelled for non-payment and placed in the error account, held for a period of time, and then resold. As noted in the opinion, the level of activity in the "error account' was "significant" and approximately several thousand shares of MWIC were held in the account at various points in time. The NASD found that the error account was used to establish "substantial positions" in MWIC stock and essentially the error account functioned as the firm's investment account. Thus, the firm was required to maintain at least $100,000 in net capital. NASD found that Cantrell, as the FINOP, prepared the Firm's net capital computations without considering whether or not the Net Capital requirement was met. The facts established that Cantrell knew the "error account" was not functioning like a typical error account, but instead was holding positions. He was aware the level and volume of transactions was high, and that customers were rejected trades as unauthorized. He also was aware that the firm would be a risk for these transactions until the error account liquidated the trades. Documents showed a pattern of customer buy trades being canceled for non-payment and then re-billed to other customers. Again, the facts here are nothing like those in *Cantrell.* Again, FINRA has not cited to any opinion which would support the sanctions here.

V. CONCLUSION

WHEREFORE Geary respectfully requests the Commission reverse this matter and find that the NAC erred in: (a) affirming the FINRA Hearing Panel's decision that Geary violated FINRA Rule 2010 (net capital); (b) stating it agreed with the FINRA Hearing Panel's "implicit finding" that Geary's alleged misconduct was "egregious," despite its admission the FINRA Hearing Panel did not make an explicit finding of "egregious" misconduct; (c) issuing sanctions against Geary that, while modified, remain excessive and oppressive, because Geary's suspension in all capacities is punitive, rather than deterrent; (d) issuing sanctions against Geary that, while modified, remain excessive and oppressive, because they ignore the financial hardship that accompanies the all capacities suspension and fine imposed; (e) imposing sanctions that were not supported by the evidence, inconsistent with the FINRA Sanctions Guidelines, and significantly in excess of the sanctions suggested by FINRA Enforcement.

Respectfully submitted,

Joe M. Hampton, OBA No. 11851
Amy J. Pierce, OBA No. 17980
CORBYN HAMPTON BARGHOLS PIERCE, PLLC
One Leadership Square
211 North Robinson, Suite 1910
Oklahoma City, Oklahoma 73102
Telephone: (405) 239-7055
Facsimile: (405) 702-4348
Email: jhampton@corbynhampton.com
apierce@corbynhampton.com

ATTORNEYS FOR RESPONDENT KEITH D. GEARY

CERTIFICATE OF SERVICE

I, Joe M. Hampton, hereby certify that on 5th day of December, 2016 the foregoing Reply Brief in Support of Review were served on the following persons, via certified U.S. Mail, first class, postage prepaid and also via facsimile:

Brent J. Fields, Secretary
Lynn M. Powalski, Deputy Secretary
Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549-1090
FACSIMILE: 703-813-9793
(original plus 3 copies served via mail)

Alan Lawhead,
Vice President and Director – Appellate Group
Megan Rauch,
Assistant General Counsel
Andrew Love,
Associate General Counsel
FINRA
Office of General Counsel
1735 K Street, N.W.
Washington, DC 20006
FACSIMILE: 202-728-8264

Joe M. Hampton