FINANCIAL INDUSTRY REGULATORY AUTHORITY
U.S. SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of **William H. Murphy & Co., Inc.** **Houston, TX 77056** **And** **William H. Murphy** **Houston, TX 77056** **For Review of Disciplinary Action Taken by FINRA**

3-18895

APPLICATION FOR REVIEW OF FINRA DISCIPLINARY DECISION

COMES NOW Respondents, William H. Murphy & Co., Inc. and William H. Murphy, and hereby submits this Application for Review by United States Securities and Exchange Commission ("SEC"). William H. Murphy & Co., Inc. ("WHM") and Mr. William H. Murphy ("Murphy") appeal the October 11, 2018 National Adjudicatory Council's Decision ("NAC Decision") which upheld the Hearing Panel majority's decision in a FINRA Disciplinary Action ("FINRA Decision"). This case is styled *In the Matter of Department of Enforcement vs. William H. Murphy & Co., Inc. and William H. Murphy*, **FINRA Complaint No. 2012030731802**. Pursuant to Section 19(d)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(d)(1), WHM and Murphy timely file this Application for Review. WHM and Murphy respectfully request that the SEC reverse and dismiss with prejudice the NAC Decision and the Hearing Panel Decision entirely. WHM and Murphy reserve any and all rights, remedies and relief not expressly mentioned herein.

1. PROCEDURAL HISTORY

FINRA filed a two-cause complaint on November 7, 2014. An eight day hearing was held on December 7, 2015 thru December 17, 2015 in Houston, Texas. The Hearing Panel ruled against WHM for violating FINRA Rule 2010 and also finding that WHM and Murphy violated NASD Rule 3010 and FINRA Rule 2010 and suspended them from associating with any FINRA member for 6 months, fined them and required requalification by examination before reentering the securities industry in any capacity. WHM and Murphy appealed the FINRA Decision to the National Adjudicatory Council ("NAC"). On October 11, 2018, the NAC affirmed the Hearing Panel's Decision and modified the sanctions. WHM and Murphy timely submit this Application for Review to the SEC.

2. PARTIES

WHM and Murphy may be served with process by and through its attorney of record, Dawn Meade at 4635 Southwest Freeway, Suite 900, Houston, TX 77027.

3. SUMMARY OF APPEAL

This is a case of first impression. WHM implemented many protective measures for new investors that the SEC has articulated in no-action letters and in the Compliance and Disclosure Interpretations ("C&DIs"). WHM and Murphy structured a referral agreement in accordance with SEC rules and regulations and federal laws to protect investors and investor interests. WHM implemented many supervisory procedures that protected investors and investor interests. The main protective measures were that (1) there be a pre-existing substantive relationship between WHM and a client before a client was introduced to private placement materials and information or an issuer; (2) a cooling off period; (3) generic public advertising and communications; (4) limitations on access to private offering materials to only those qualified, sophisticated and suitable; and (5) all investors were well informed, qualified, sophisticated and suitable.[1] WHM went above and beyond what was permitted in previous no-action letters to protect investors, and it worked! All investors are satisfied with their investment, had full disclosure of information to

[1] Murphy and WHM implemented extensive procedures to ensure compliance with federal laws and regulations. To name a few procedures, WHM hired a FINRA legal specialist, Dan LeGaye, to advise him on the referral arrangement. WHM had supervisory procedures reasonably designed to achieve compliance with the applicable laws and regulations and with applicable FINRA rules and to ensure that the solicitations did not violate Section 502(c) (RX 55, p. 2). There was an on sight compliance officer and registered representatives (RR 1150:1-6), provided hands on training (RR 183:12-16) and training sessions to make sure WHM registered representatives knew their roles and responsibilities (RX- 62; RR 621:3-12, 624:18-25, 625:1-25, 626:1-3). Murphy himself provided hands on training sessions. There were monthly or weekly meetings (RR 624:18-25, 625:1-25, 626:1-3; 183:12-16). All WHM personnel were required to know WHM's Supervisory Procedures Memorandum (RR 621:3-25; 622:1), and be fingerprinted associated persons (RR 622:8-14). WHM implemented SMARSH to review and monitor the registered representatives' email accounts (RR 930:18-23). Everything that was communicated to the public had to be pre-approved by WHM (RR 624:13; CX-95a, Page 37, Line 1-10; CX-97a, Page 34-35, Line 17-7; CX-101a, Page 47, Line 2-13). There were procedures relating to the dual employees (RR 622:15-17). Dual employees had to have separate phone lines, (RR 623:19-25, RR 624:1-2), separate email accounts, (RR 624:3-9), and a CRM to monitor the client relationship (RR 623:1-13). There is no evidence that Murphy's supervision was substandard. Even more, the DOE's own investigator determined there was nothing wrong with Respondents' supervisory procedures (RR 1532:12-1533:01; 1539:12-1539:19). Murphy had random on the ground inspections. Murphy ultimately reviewed, supervised and monitored all of the registered representatives' and the referral company's employees' work and activities. Murphy monitored all public communications, wrote the referral company's Compliance Manual, reviewed the private placement memoranda to make sure there was proper and sufficient disclosure, implemented a cooling off period, tracked Murphy clients and referral company's students, tracked all Issuer introductions, required all clients to fill out a Murphy New Account Form, required that only qualified clients be introduced to the Issuers and requiring that Murphy approve breaking escrow of each private placement.

make an informed decision when deciding to invest, the investors have profited from their investment and there are no damages or unhappy investors in this case.

The central issues here are whether or not WHM committed a general solicitation violation under Section 5 of the Securities Act of 1933 and whether there is substantial evidence to support finding a general solicitation violation. The FINRA and NAC Decisions ("Decisions") arbitrarily apply SEC rules, regulations and federal securities laws to establish a general solicitation violation and a violation of FINRA Rules 2010 and 3010. Also, the Decisions are unsupported by substantial evidence.

In this case, it is undisputed that all the investors had a pre-existing substantive relationship with WHM before they invested in any private offering and before they were introduced to any private offering materials and information. The Hearing Panel found that all investors waited an appropriate cooling off period before investing. It is uncontested that all the investors were well informed, qualified, sophisticated and suitable for the investment. The majority of these investors were also accredited. It is also undisputed that all private placement materials and information were only disclosed to prospective investors who were qualified, sophisticated and suitable after a sufficient cooling off period. The Hearing Panel found that all public communications were generic in nature and never discussed any ongoing or live private offering. It is also undisputed that the private placement materials and issuers provided the investors with full disclosure of information necessary to make an informed investment decision and that the issuers complied with all federal and state private exemption laws. Also, it is undisputed that there are no damages in this case and all the investors profited from their investment.

Yet, in spite of all of these findings and uncontested facts, the Decisions still found a general solicitation violation. In order to find a general solicitation violation, the Decisions ignore material facts and evidence supporting those facts mentioned above. They also ignore that the company WHM had a referral agreement with was an educational and social networking entity. The Decisions ignore the testimony from seven witnesses. The Hearing Panel found all seven witnesses not credible without providing any explanation for why all seven witnesses' testimony was not credible. The Decisions rely heavily on old unused documents, withdrawn business plans and documents created by Mr. Eric Beck, FINRA's lead investigator on this case, instead of the uncontroverted witness testimony. Worse, the Decisions rely on Mr. Eric Beck's opinion testimony even though he was not qualified to provide expert opinion testimony. WHM and Murphy were not permitted to present expert opinion testimony. Furthermore, there is no evidence that the radio shows awakened an interest in the public. Enforcement presented no tangible or direct evidence to show an "awakening of an interest" or that the public communications conditioned the market. In fact, the questionnaires given by FINRA and the FINRA investigation revealed nothing in this regard. FINRA presented no evidence of any influence on the future investors whatsoever by the radio shows. Last, FINRA presented no evidence that WHM and Murphy had inadequate supervisory procedures. Enforcement wholly failed to present substantial evidence to show a general solicitation violation.

Second, the Decisions misapply federal private securities laws such as Rules 502(c), 506, 508 and 4(a)(2) of the Securities Exchange Act. The Decisions misapply *SEC v. Ralston Purina Co.*, 346 U.S. 119, (1953) and other federal cases to the facts of the case. The Decisions misapply SEC rules and regulations.[2] The Decisions do not recognize and distinguish material circumstances in many SEC no-action letters which permit and provide guidance to broker-dealers on how to publicly advertise for new clients and have a referral arrangement with companies without a general solicitation violation. The Decisions also misapply the C&DIs.[3] Specifically, questions 256.33, 256.23, 256.24, 256.27, 256.28, 256.29, 256.30 and 256.31.

Further, the Decisions determine that WHM and Murphy violated FINRA Rule 3010 merely because of a general solicitation violation. A finding of general solicitation is not ipso facto a Rule 3010 violations absent substantial evidence. The Decisions provide no evidence for the Rule 3010 violation. Even more, the FINRA investigator found nothing wrong with Respondents' supervisory procedures (RR 1532:12-1533:01; 1539:12-1539:19) and found that **"the red flags were false positives"** (RR 1435:15-20). Yet, despite the evidence showing WHM and Murphy relied on FINRA expert counsel, nothing wrong with its supervisory procedures and no red flags, the Decisions held that there are no mitigating factors.

The Hearing Panel was clearly underqualified to evaluate and understand private securities laws and exemptions. None of the panel members had experience in private placement securities and none of them were lawyers who specialized in federal securities laws and private exemptions or Texas securities laws.

There are many other issues subject to appeal. In sum, FINRA's enforcement proceeding violated WHM and Murphy's rights to due process, equal protection rights, the proceeding lacked impartiality and was biased, the Hearing Panel's bias prejudiced WHM and Murphy, there were no procedural safeguards to protect WHM and Murphy interests in the enforcement proceeding, the Decisions were arbitrary and capricious, there was an abuse of discretion, the Hearing Panel's opinions and fact conclusions are speculative, conclusory and unsupported by substantial evidence, FINRA acted outside its scope of regulatory power, there was arbitrary forum selection, the sanctions are excessive and unsupported by substantial evidence and are but penal and there is an appointments clause violation.

This case concerns a plethora of issues wherein, collectively or individually, that warrant reversal and dismissal of the Decisions. Therefore, WHM and Murphy respectfully request that the SEC reverse and dismiss with prejudice both decisions, the FINRA Decision and the NAC Decision.

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[2] See generally, *Bateman Eichler*, 1985 SEC No-Act. LEXIS 2918 (Dec. 3, 1985); *E.F. Hutton*, 1985 SEC No-Act. LEXIS 2917 (Dec. 3, 1985); *H.B. Shaine & Co., Inc.*, 1987 SEC No-Act LEXIS 2004 (May 1, 1987); *IPONET*, 1996 SEC No-Act. LEXIS 642 (July 26, 1996); *Lamp Technologies, Inc.*, 1997 SEC No-Act. LEXIS 638 (May 29, 1997) and *Lamp Technologies, Inc.*, 1998 WL 278984 (May 29, 1998).

[3] See Securities Act Rules, C&DIs, https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

4. REQUEST FOR SUPPLEMENTAL BRIEF AND ORAL HEARING

There are many material issues that require additional explanation. WHM and Murphy strongly believe that supplemental briefing is required in order to assist the Commission with its decisional process and request that the Commission grant WHM and Murphy opportunity to fully brief the material issues of this appeal and oral hearing.

Respectfully Submitted:

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application for Review was served on the following parties via first class certified United States mail on November 9, 2018:

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