UNITED STATES OF AMERICA

Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of	:	
	:	**Administrative Proceeding**
Robert R. Tweed,	:	**File No. 3-19652**
	:	
For Review of Disciplinary Action Taken by FINRA	:	
	:	
	:	

ROBERT R. TWEED'S BRIEF IN SUPPORT OF APPLICATION FOR MODIFICATION OR REVERSAL OF THE DECISION BY THE NATIONAL ADJUDICATORY COUNCIL

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Robert R. Tweed ("Tweed") hereby submits this brief in support of his application for modification or reversal of the decision by the National Adjudicatory Council ("NAC") of the Financial Industry Regulatory Authority ("FINRA") dated December 11, 2019 (the "NAC Decision") on the following grounds: (1) the NAC erred in upholding the FINRA Office of Hearing Officer's ("OHO") Panel's finding that the statute of limitations in 28 U.S.C. § 2462 does not apply, and further, that Tweed was not unfairly prejudiced by FINRA's seven-and-a-half year delay in bringing the proceeding against him; (2) the sanction against Tweed of a permanent bar is unwarranted, excessive in light of the OHO Panel's findings, not supported by the evidence provided at the Hearing, and punitive in violation of General Principle No. 1 of the FINRA Sanction Guidelines; and (3) the NAC erred in upholding the OHO Panel's finding that Tweed was obligated to reimburse Athenian investors *pro rata*.

I. THE PANEL ERRED IN NOT APPLYING THE FIVE-YEAR STATUTE OF LIMITATIONS APPLICABLE TO SEC ENFORCEMENT ACTIONS TO THIS FINRA ENFORCEMENT ACTION WHERE TWEED WAS UNFAIRLY PREJUDICED BY FINRA'S FILING DELAY.

The United States Supreme Court unanimously ruled that the Securities and Exchange Commission ("SEC") enforcement actions are bound by the five-year statute of limitations set forth in 28 U.S.C. § 2462. It is irrefutable that FINRA directly derives its powers from the SEC, and that it is subject to its oversight. So, it logically follows that the five-year statute of limitations should be equally applicable to enforcement actions asserted by FINRA, as it is to those asserted by the SEC. Thus, the NAC erred in upholding the OHO Panel's finding that the five-year statute of limitations in 28 U.S.C. § 2462 does not apply to the instant enforcement action against Tweed. This is further detailed below, as well as the unfair prejudice Tweed has suffered as a direct result of FINRA's unreasonable seven-and-a-half-year delay in asserting its enforcement action.

A. The Five-Year Statute of Limitations is Applicable Here

It is well-established that the five-year statute of limitations contained in 28 U.S.C. § 2462 applies to SEC enforcement actions. That statute states:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained within five years from the date the claim first accrued, if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.[1]

The Supreme Court unanimously held in Kokesh that this five-year statute of limitation applies when the SEC seeks monetary civil penalties."[2] Other federal courts have held that the statute applies when the SEC commences civil enforcement actions seeking other forms of relief, including disgorgement, censures, and suspensions.[3] It is important to note that this statute does not mention the SEC, nor any other regulatory entity.

Similar to the SEC, FINRA is a regulatory entity which seeks to maintain the integrity of the securities markets and protect the investing public. "FINRA also has enforcement powers. It operates as a "'quasi-governmental agency' authorized 'to adjudicate actions against members who are accused of illegal securities practices and to sanction members found to have violated the Exchange Act or ... [SEC] regulations issued pursuant thereto.'" "[4] "As a self-regulatory organization registered under the Securities Exchange Act of 193[4], FINRA 'supervises the conduct of its members under the general aegis of the SEC.' ...Thus, while FINRA is a private

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[1] 28 U.S.C. § 2462.

[2] Kokesh v. S.E.C., 137 S. Ct. 1635, 1638, 198 L. Ed. 2d 86 (2017) (internal citations omitted).

[3] See, e.g., Id.; Johnson v. S.E.C., 87 F.3d 484 (D.C. Cir. 1996) (SEC proceeding resulting in a censure and a six-month disciplinary suspension of a securities industry supervisor was subject to the five-year statute of limitations period of Section 2462)

[4] Scottsdale Capital Advisors Corp. v. Fin. Indus. Regulatory Auth., 390 F. Supp. 3d 72, 75–76 (D.D.C. 2019) (internal citations omitted) (appeal pending).

party, Congress granted FINRA 'quasi-governmental power[ ]' to act in a regulatory capacity."[5] FINRA's authority to bring actions against its broker-dealer members, and their associated persons such as Tweed, is directly derived from the SEC. "The Securities Exchange Act of 1934 ('Exchange Act') authorizes the Securities and Exchange Commission ('SEC') to register self-regulatory organizations ('SROs'). Pursuant to that authority, the SEC registered FINRA, a non-profit membership corporation comprised of financial brokers and dealers."[6] "All rules promulgated by FINRA must be approved by the SEC and must be consistent with the Exchange Act. The SEC also has power to amend any existing FINRA rule to ensure that it comports with the purposes and requirements of the Exchange Act."[7] A further example of the SEC's oversight of FINRA is that FINRA disciplinary decisions are appealable to the SEC first, and then to the United States Courts of Appeal.

Logic and fairness dictate that the same five-year statute of limitations should apply to FINRA enforcement actions as apply to those of the SEC. Under this same principle, FINRA should not have an untempered ability to discipline its members for actions that occurred beyond a reasonable time frame, beyond which the SEC itself cannot seek penalties. This is especially so where the sanction imposed is the most punitive of all, such as Tweed's permanent bar at issue

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[5] Hurry v. Fin. Indus. Regulatory Auth. Inc., No. CV-14-02490-PHX-ROS, 2015 WL 11118114, at *4–5 (D. Ariz. Aug. 5, 2015), aff'd, 782 F. App'x 600 (9th Cir. 2019) (internal citations omitted); see also National Ass'n of Securities Dealers v. Securities and Exch. Comm'n, 431 F.3d 803, 804 (D.C.Cir.2005) (internal citations omitted) ("By virtue of its statutory authority, NASD wears two institutional hats: it serves as a professional association, promoting the interests of its members and it serves as a quasi-governmental agency, with express statutory authority to adjudicate actions against members who are accused of illegal securities practices and to sanction members found to have violated the Exchange Act or Securities and Exchange Commission regulations issued pursuant thereto."); Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc., 637 F.3d 112, 116–17 (2d Cir. 2011) (holding that FINRA had absolute immunity because, "The statutory and regulatory framework highlights to us the extent to which an SRO's bylaws are intimately intertwined with the regulatory powers delegated to SROs by the SEC and underscore our conviction that immunity attaches to the proxy solicitation here.").

[6] Scottsdale Capital Advisors Corp. v. Fin. Indus. Regulatory Auth., 390 F. Supp. 3d 72, 75–76 (D.D.C. 2019) (internal citations omitted) (appeal pending).

[7] Id. (internal citations omitted).

here.[8] The constraints placed on the SEC by the law, should be similarly applicable to a self-regulatory agency that derives its regulatory authority from the very agency whose actions are constrained by the statute of limitations. To hold otherwise would result in inconsistent results and gross unfairness.

B. Tweed Has Suffered Unfair Prejudice as a Direct Result of FINRA's Seven-and-a-Half-Year Delay in Bringing the Instant Enforcement Action

FINRA did not assert its enforcement action against Tweed until seven and a half years after the alleged violative conduct – which is well after the longest record retention period applicable to brokerage firms. Tweed's last alleged wrongful sale of the Athenian Fund occurred on March 24, 2010.[9] FINRA first learned of the potential misconduct in March 2014. Despite this knowledge, FINRA did not file the Complaint until late April 2017[10] – more than two years after the arguably applicable statute of limitations articulated in 28 U.S.C. § 2462. The fact that the vast majority of statutes of limitation are five years or less is, in part, an acknowledgement that documents disappear and memories fade with the passage of time. That is what precisely what has happened here, and why Tweed has been unfairly prejudiced in his defense.

"[T]he SEC relie[s] on the Exchange Act's "fairness" language in resolving whether an SRO's undue delay in bringing a case requires dismissal. Fairness is an equitable principle requiring consideration of the facts and circumstances of each particular case. The SEC indicated that four periods should be reviewed as part of a fairness analysis dealing with timing issues: the elapsed time between (1) the first alleged occurrence of misconduct and the date that the SRO filed the complaint; (2) the last alleged occurrence of misconduct and the date that the SRO filed the

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[8] Kokesh v. S.E.C., 137 S. Ct. 1635, 198 L. Ed. 2d 86 (2017); In the Matter of the Application of John M.E. Saad for Review of Disciplinary Action Taken by Finra, Release No. 86751 (Aug. 23, 2019).
[9] Transcript Day 1, Bates No. 000303 at 102:9-11.
[10] Extended Hearing Panel Decision, Bates No. 002607 at 22.

complaint; (3) the date that the SRO received notice of the alleged misconduct and the date that it filed the complaint; and (4) the date that the SRO commenced its investigation and the date that it filed the complaint."[11] This factor is important because SROs, including FINRA, are liberally able investigate, i.e., to engage in discovery, before they file an enforcement complaint against the alleged wrongdoer.[12] In the instant matter, FINRA enjoyed the distinct "head start" benefit of being able to marshal documents and testimony for years before the allegations were made known to Tweed, and thus years before he could begin to marshal the evidence critical to his defense.

The foregoing four-pronged test is not a mechanical one; adjudicators must also look to traditional equitable concepts for guidance. The notion of fundamental fairness requires that a respondent be able to mount an adequate defense; here, Tweed was undoubtedly harmed by FINRA's unusually long delay in bringing this proceeding. As he testified multiple times at the hearing, he simply could not remember events that occurred so many years ago, which unavoidably cast doubt on his truthfulness and caused him actual prejudice in defending himself against this charge.[13]

In addition, Tweed was unable to refresh his recollection with documents that likely would

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[11] IN THE MATTER OF DEPARTMENT OF ENFORCEMENT, COMPLAINANT MORGAN STANLEY DW INC. ET AL., RESPONDENTS, 2002 WL 1840813, at *11.

[12] FINRA Rule 8210 states: (a) Authority of Adjudicator and FINRA Staff. For the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to:

(1) require a member, person associated with a member, or any other person subject to FINRA's jurisdiction to provide information orally, in writing, or electronically (if the requested information is, or is required to be, maintained in electronic form) and to testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation, complaint, examination, or proceeding; and

(2) inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding that is in such member's or person's possession, custody or control.

[13] See, e.g., Transcript Day 1, Bates No. 000303 at 37:21-23; 57:6-25; 76:16-19; 88:21-25; 89:3-5; 115:9-13; 118:15-23; 188:25 – 189:13; 217:11-19; Transcript Day 3, Bates No. 000715 at 447:22-24. These are only a few of the many instances.

have been available if FINRA had filed its enforcement complaint within five years. It is important to note that the longest record retention requirement applicable to a brokerage firm is six years.[14] In addition, SEC Rule17a-3(a)(18) requiring broker/dealers to retain customer complaints, only requires that a firm maintain such records for a period of three years, with the first two years in an easily accessible place.[15] It is inherently unfair for Tweed to have to defend formal charges with respect to matters that occurred far beyond the time period that even FINRA and the SEC feel records should reasonably be retained. FINRA should not be permitted to make such inconsistent and arbitrary determinations, especially when the consequences are as severe as a permanent bar.

It cannot credibly be denied that Tweed was severely prejudiced by FINRA's seven-and-a-half-year delay in filing its enforcement action. For these and other reasons of basic fairness, formal charges should not have stood after the passage of more than five years after the alleged wrongful conduct, as is consistent with 28 U.S.C. § 2462.

II. THE SANCTIONS FAIL TO COMPORT WITH THE SANCTION GUIDELINES AND IN FACT FAR EXCEED THEM.

FINRA's Sanction Guidelines (the "Guidelines") list nine General Principles upon which adjudicators are to determine sanctions. The fundamental core of these principles is defined in General Principle No. 1, which states that the purpose of disciplinary sanctions is to "protect the investing public, support and improve the overall business standards in the securities industry, and decrease the likelihood of recurrence of misconduct by the disciplined respondent."[16] Consequently, adjudicators are instructed to design sanctions that "are meaningful and significant enough to prevent and discourage future misconduct" and that are "***remedial…but are not***

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[14] See SEC Rule 17a-3; see also FINRA Rule 4511(b).
[15] See SEC Rule 17a-4(b)(1).
[16] SANCTION GUIDELINES, 2 (2018), available at http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf (hereinafter "GUIDELINES").

punitive."[17] [emphasis added]

That sanctions are to be remedial but not punitive is not merely lip service to an ideal; it is a balancing of considerations that is the backbone of all the General Principles and is repeated throughout.

In General Principle No. 3, which instructs adjudicators to tailor sanctions to respond to the specific misconduct, the Guidelines identify that it is the remedial nature of sanctions that requires sanctions to be tailored to the particular misconduct:

> Sanctions in disciplinary proceedings are intended to be remedial and to prevent the recurrence of misconduct. Adjudicators therefore should impose sanctions tailored to address the misconduct involved in each particular case…Adjudicators must always exercise judgment and discretion and consider appropriate aggravating and mitigating factors in determining remedial sanctions in each case.[18]

Here, the NAC erred in its affirmation of the OHO Panel's failure to consider a multitude of mitigating factors in determining the kind of remedial sanctions it would assess against Tweed. Those mitigating factors are as follows.

First, even though the OHO Panel determined that there was a violation in terms of management fee disclosure, any such violation was immaterial because it was never Tweed's intention to charge any fees other than those disclosed in the PPM,[19] which was distributed to all investors in the Athenian Fund, and in fact he never did. The veracity of Tweed's testimony that he never intended to charge duplicate fees is borne out by the fact that Tweed did not, in fact, charge any fees other than those permitted by and disclosed in the original PPM.[20] The only fee

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[17] Id.
[18] Id. at 3-4.
[19] Hearing Transcript dated December 6, 2017 – Day 3, Bates No. 000715 (hereinafter "Transcript Day 3, Bates No. 000715") at 438:2 – 441:19.
[20] Hearing Transcript dated December 4, 2017 – Day 1, Bates No. 000303 (hereinafter "Transcript Day 1, Bates No. 000303") at 148:21-24; Hearing Transcript dated December 5, 2017 – Day 2, Bates No. 000549 (hereinafter "Transcript Day 2, Bates No. 000549") at 300:15-20.

charged was the 3.5%.[21] Despite FINRA Enforcement's creation of three hypothetical charts which one of the panelists angrily called "completely misleading", Enforcement itself acknowledged that there was no issue with Tweed charging a fee, and his fee structure was not inherently inappropriate.[22] Initially, Tweed only charged a 3.5% fee during the first few months of the Fund's operation in early 2010 then suspended taking any fees and recredited those fees once the Fund went to an all cash position.[23] He also put his own money into the Fund to pay for expenses.[24] There was certainly no customer harm incurred by this immaterial disclosure error.[25] Tweed's technical failure to disclose the side agreement for the split in management fees with Quantitative Analytics Management Fund ("QAMF") was also immaterial because it did not affect what fees investors would be, or actually were, charged. It was not an additional fee; rather, it was a split of the existing and previously disclosed 3.5% management fee, which ended up not being charged to investors anyway.[26] The technical nature of these disclosure violations should have been more closely considered by the OHO Panel, and by the NAC, as mitigating factors in determining appropriate remedial sanctions. This is especially so because the OHO Panel itself raised these concerns during Enforcement's closing argument; namely the fact that no fees were paid, Tweed had no intention to duplicate fees, and there was no customer loss.[27]

Second, although Tweed concedes that it should have been disclosed, the change in master fund from PMI Quant Pool I, LLC ("PMI") to QAMF was not material, especially when viewed in light of the information Tweed had at the time the change occurred, and not viewed in hindsight

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[21] See supra n. 2; see also CX-42, Athenian Fund "Audited Financials", Bates No. 001709.
[22] Transcript Day 2, Bates No. 000549 at 400:12 – 402:10; Transcript Day 3, Bates No. 000715 at 557:25 – 558:5.
[23] See supra n. 2; see also Transcript Day 2, Bates No. 000549 at 315:24 – 316:9; Transcript Day 3, Bates No. 000715 at 467:15 – 468:23; CX-32, Accountant Letter regarding 2010 Athenian Fund Management Fees, Bates No. 001633.
[24] Transcript Day 3, Bates No. 000715 at 467:15 – 468:23.
[25] Extended Hearing Panel Decision, Bates No. 002607 at 26.
[26] See CX-22, Consulting Side, and Advisory Agreement, Bates No. 001515 at § III(a); CX-30, QAMF Fee Addendum, Bates No. 001629.
[27] Transcript Day 3, Bates No. 000715 at 546:9 – 547:23.

as the Hearing Panel had the benefit of doing. As Tweed testified, the two master funds did the exact same thing, and there was no difference in the actual trading or risk that Athenian Fund investors were exposed to as a result of the change.[28] The only physical difference was that the money would be in a different TradeStation account number.[29] The only possibly meaningful disclosure to investors would have been the different control persons of PMI and QAMF. In essence, they replaced Barry Hunter with Eric Richardson. While Tweed concedes that this change should have been disclosed, the OHO Panel, and then the NAC, erred in determining the severity of this disclosure error because it has the benefit of hindsight. At the time of the change in master fund, Eric Richardson had a years-long, unblemished record in the securities industry, whereas Barry Hunter had just started working in the industry.[30] From a due diligence perspective, Richardson appeared to Tweed at the time to be a better choice than Hunter. There was no way Tweed could have known that Richardson would later be convicted of bank fraud, and it was improper for the OHO Panel, and the NAC, to consider Tweed's failure to disclose in 2010 with the benefit of their knowledge of later events.[31] Indeed, viewed in real time, the change in master fund was not material to investors. As customer Stephen Kutcher testified at the hearing, "That was my understanding, that the PMI model had just simply transferred over to QAMF, and that QAMF was using the same modeling that PMI had been doing which, okay, <u>**that's acceptable**</u>. That's what was taking place. I didn't know any more information about QAMF, other than what I had been told by Mr. Tweed, which <u>**it didn't sound like a significant change had taken place**</u>, other than a change of managers, but the same model was being used, according to my

[28] Transcript Day 3, Bates No. 000715 at 436:23 – 438:1.
[29] <u>Id</u>.
[30] Transcript Day 3, Bates No. 000715 at 462:25 – 464:1.
[31] Transcript Day 3, Bates No. 000715 at 518:12 – 520:8.

understanding.[32] Furthermore, it was disclosed to investors in the PPM and the Fund's Limited Partnership Agreement that Tweed had the authority and discretion to invest in funds such as QAMF. For example, the PPM explained to investors, "The Partnership implements its investment program by causing substantially all of its assets to be invested in a centralized investment company, commonly known as a 'master' fund (the Partnership being a 'feeder' fund). However, **the Partnership also has the ability to make certain investments directly**."[33] The PPM also informed investors that, "[t]he General Partner has **complete discretion** to select investments for the Partnership as investment opportunities arise. A Limited Partner must rely upon the ability of the General Partner to identify and implement investments consistent with the Partnership's investment objective."[34] Sections 3.01 and 3.02 of the Limited Partnership Agreement, which was included as an exhibit to the PPM distributed to investors, further provided the General Partner with broad discretion that permitted the investment of Fund assets in QAMF.[35] Finally, it is worth noting again that the actions underlying Richardson's conviction were completely separate and apart from his involvement in the Athenian Fund.[36] These were undoubtedly mitigating factors which the OHO Panel, and the NAC, should have considered.

Third, Enforcement alleged in its Complaint that Tweed made negligent material misrepresentations or omissions regarding four areas. In its decision, the OHO Panel found that one of Enforcement's allegations was inaccurate; namely, that Tweed did **not** have an obligation to disclose that TradeStation rejected an account application for Athenian.[37] Despite dismissing

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[32] Transcript Day 2, Bates No. 000549 at 340:1-11 (emphasis added).
[33] CX-9, Athenian Fund PPM, Bates No. 001093 at 21 (emphasis added); CX-45, Tweed Statement to SEC and FINRA (w/o exhibits), Bates No. 001729 at 5-6.
[34] CX-9, Athenian Fund PPM, Bates No. 001093 at 48 (emphasis added); CX-45, Tweed Statement to SEC and FINRA (w/o exhibits), Bates No. 001729 at 5-6.
[35] CX-10, Athenian Fund Limited Partnership Agreement, Bates No. 001177 at 4-7; CX-45, Tweed Statement to SEC and FINRA (w/o exhibits), Bates No. 001729 at 5-6.
[36] Transcript Day 1, Bates No. 000303 at 185:24 – 186:14.
[37] Extended Hearing Panel Decision, Bates No. 002607 at 25, 29-30.

25% of the allegations against Tweed, the OHO Panel imposed a sanction far more severe than what Enforcement requested, and it did this in spite of one of the OHO Panelist's dissent from that sanction, as will be discussed in more detail below.

Fourth, this matter came to Enforcement's attention in a roundabout way that the Panel itself had trouble deciphering.[38] In fact, both customers who Enforcement called to testify at the hearing remained Tweed's customers at the time of the hearing. The first customer to testify, Stephen Kutcher, explained that he "did not file a complaint because it was quite clear that this money that we invest has the possibility of loss. I knew that going in."[39] At the time he testified, Kutcher still had $400,000 invested with Tweed in various other investments, and described what happened with the Athenian Fund investment as "water under the bridge."[40] The second customer, Barbara McCutchan, testified that she had started working with Tweed in 1999 and he was still her financial advisor to that day.[41] At the time of the hearing, McCutchan had approximately $800,000 invested with Tweed.[42] It is quite telling that Tweed's customers did not feel that his conduct with respect to the Athenian Fund was worthy of bringing to FINRA's attention, and indeed, continued to invest with him years after the conduct at issue. The OHO Panel completely failed to address this significant mitigating factor, and the NAC did not give it appropriate weight.

Fifth, Tweed relied on the expertise of others in drafting the PPM. He hired an attorney, Hannah Terhune, who was touted as an expert in drafting PPMs.[43] Tweed reviewed the documents Terhune drafted but, having never drafted a PPM before, he believed that much of it was boilerplate

[38] Transcript Day 2, Bates No. 000549 at 305:24 – 308:14; 312:20 -314:11; see also Extended Hearing Panel Decision, Bates No. 002607 at 3, n. 3.
[39] Transcript Day 2, Bates No. 000549 at 365:9-14.
[40] Transcript Day 2, Bates No. 000549 at 362:5 – 364:9.
[41] Transcript Day 2, Bates No. 000549 at 370:11-18.
[42] Transcript Day 2, Bates No. 000549 at 377:14-17.
[43] See CX-12, Email re Athenian Fund PPM + Attached Draft Athenian Fund PPM, Bates No. 001257.

language and did not realize its shortcomings.[44] Furthermore, when changes were made pertaining to the Athenian Fund's investments, Tweed advised Terhune of these changes and provided her with documentation regarding items such as the fee structure and the change from PMI to QAMF as master fund, but she did not advise him to revise and recirculate an amendment to the PPM.[45] Had she advised him of that requirement, Tweed would have updated the PPM as required.[46] Tweed further relied on his compliance person, Camille Checketts, and his broker-dealer at the time, CapWest, which knew and approved the product and reviewed all documentation before Tweed sold it.[47] Lastly, Tweed relied on his accountants in preparing the financial statements for the Athenian Fund.[48] Despite this, the Panel failed to consider this mitigating factor. It further failed to address Principal Consideration No. 7, which states, "Whether the respondent demonstrated reasonable reliance on competent legal or accounting advice."[49] This argument was raised at the hearing yet was not adequately considered by the OHO Panel or included in the decision in the discussion of sanctions, and the NAC failed to give it appropriate weight.

Sixth, although Tweed admittedly fell short in the adequacy of certain disclosures, the OHO Panel, and the NAC, should have considered that he did make disclosures to investors that were recommended by his experienced counsel, however imperfect they may have been. Those disclosures include financial statements which were sent to investors, oral communications with investors, and meetings with investors.[50]

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[44] Transcript Day 3, Bates No. 000715 at 425:25 – 426:2; 429:8-13.
[45] Transcript Day 3, Bates No. 000715 at 532:10 – 533:4; see also CX-24, Email re Consulting Agreement (RE: draft engagement) & Draft Consulting Agreement Attachment), Bates No. 001519.
[46] Transcript Day 3, Bates No. 000715 at 436:7-22.
[47] Transcript Day 3, Bates No. 000715 at 430:21 – 431:8; Transcript Day 3, Bates No. 000715 at 506:25 – 507:18.
[48] Transcript Day 3, Bates No. 000715 at 486:8 – 487:1.
[49] GUIDELINES at 7.
[50] Transcript Day 1, Bates No. 000303 at 124:11 – 125:2; Transcript Day 2, Bates No. 000549 at 335:20 – 336:3; 358:5-22; 374:8-12.

Lastly, in conceding many of the allegations at issue in the Complaint, and testifying frankly about his mistakes, Tweed demonstrated that he was an honest and credible witness. He accepted responsibility for his actions and made it abundantly clear that he will certainly not be engaging in this kind of behavior in the future.[51] In furtherance of this end, Tweed is no longer engaged in the RIA business (or securities business in view of the FINRA decision to bar him) and therefore, there is no future risk to investors that Tweed will engage in the kinds of violations at issue in this case. Indeed, Tweed relinquished his "Tweed Financial Services" IA registration as of 2014 and, other than his involvement in the Athenian Fund, he has never produced another PPM and has no plans to do so. He has also never been the general partner or manager of a fund other than the Athenian Fund, and has no plans to do so. The OHO Panel should have considered this mitigating factor in determining appropriate remedial sanctions, and the NAC should have given it significant weight.

The SEC need look no further than Enforcement's own initial evaluation of the case to see that the imposition of a permanent bar for technical disclosure violations is disproportionate and not tailored to the misconduct it is intended to remediate. Taking what was admittedly a hardline position, Enforcement requested sanctions of no less than a two-year suspension and a $73,000 fine against Tweed.[52] Enforcement clearly recognized the severity of the sanctions it requested when it stated in its closing argument, "We're not asking for those sanctions lightly. It took a -- we put a great deal of thought into that, and we realize the impact that that has."[53] Despite this, the OHO Panel imposed a permanent bar against Tweed, even though it found (1) that Tweed did not commit one of the four negligent misrepresentations or omissions Enforcement alleged, in essence

[51] See, e.g., Transcript Day 3, Bates No. 000715 at 499:16 – 502:16.
[52] Transcript Day 3, Bates No. 000715 at 554:19-22.
[53] Transcript Day 3, Bates No. 000715 at 569:1-3.

dismissing 25% of the allegations; (2) the fact that one of the OHO Panelists took the extremely unusual and extraordinary step of dissenting as to the sanction, stating that "the appropriate sanction is a two-year suspension in all capacities" rather than a bar; and (3) all of the mitigating factors discussed above. These facts alone warrant a modification of the permanent bar sanction.

Furthermore, the OHO Panel, and again the NAC, misapplied the Sanction Guidelines applicable to the type of misconduct at issue. Per the decision, the OHO Panel and the NAC acknowledged that the charges here were for non-scienter based, negligent misconduct, **not** intentional or reckless misconduct. The Sanction Guidelines for "Fraud, Misrepresentations or Material Omissions of Fact," which the OHO Panel cited in its decision, clearly state that the appropriate sanction for "Negligent Misconduct" is "Suspend individual in any or all capacities for 31 calendar days to two years."[54] As to "Intentional or Reckless Misconduct," the Guidelines state, "Strongly consider barring an individual. Where mitigating factors predominate, however, consider suspending an individual in any or all capacities for a period of six months to two years. Consider applicable Principal Considerations in determining the duration of a suspension or whether to impose a bar."[55] Here, the OHO Panel, and again the NAC, acknowledged in the Decision that the misconduct was negligent, yet went above and beyond even the recommended range of sanctions for intentional or reckless misconduct, despite all of the mitigating factors discussed above. The SEC should ask if the OHO Panel (or more accurately, two-thirds of the Panel) and the NAC believe it is appropriate to impose the most severe possible sanction of a permanent bar on an individual who is charged with negligent misconduct, it begs the question of what level of sanction would be appropriate to impose on an individual who was charged with

[54] GUIDELINES at 89.
[55] Id.

intentional or reckless misconduct. Simply put, the sanctions imposed against Tweed were wildly disproportionate to the charges.

The sanction of a permanent bar in all capacities is the regulatory equivalent of the death penalty as it means that Tweed will no longer be able to pursue his lifelong career in the securities industry, serve his hundreds of longstanding customers, and provide a livelihood to his five employees. Even assuming he chooses not to return to the securities business (which is now not an option in light of the bar), having been subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act as a result of the FINRA bar, Tweed's ability to earn a living outside of the securities and investment advisory businesses has also been adversely effected as the stain of a statutory disqualification follows one through the rest of one's life. Both the OHO Panel and the NAC failed to acknowledge the extreme disparity between the imposed sanctions and the Guidelines or Enforcement's recommendations, especially given the one Panelist's dissent as to the imposition of a permanent bar.

III. ENFORCEMENT PROVIDED INSUFFICIENT EVIDENTIARY SUPPORT FOR THE PANEL'S FINDING THAT TWEED WAS OBLIGATED TO REIMBURSE ATHENIAN INVESTORS *PRO RATA*.

Footnote 86 of the OHO decision states: "Despite distributing $600,000 to investors, Tweed contested Enforcement's argument that he was bound by the terms of Athenian's Operating Agreement to make *pro rata* distributions to investors because he had not technically dissolved or liquidated Athenian, and that it was still in existence. Tr. 470-71. The Panel disagrees and finds that once Tweed decided to wind down Athenian and start reimbursing investors he was obligated to do so equitably and not favor some investors over others."[56]

[56] Extended Hearing Panel Decision, Bates No. 002607 at 13, n. 86.

The NAC erred in upholding this finding by the Panel, which provided no legal or evidentiary basis as to why Tweed was obligated to make *pro rata* distributions other than stating that it "disagreed" with his actions. The partnership was never dissolved or liquidated pursuant to Article XIII of the Operating Agreement,[57] and Enforcement did not and could not prove otherwise. Therefore, Tweed simply was not obligated to make distributions of the partnership's assets *pro rata*.[58] This is significant because the Panel erroneously identified Tweed's manner of making distributions as an aggravating factor in determining sanctions[59] which, as discussed above, were far more severe than what Enforcement had requested.

IV. CONCLUSION

In view of the foregoing, Tweed respectfully requests that the SEC reverse in part the NAC's decision to uphold the OHO Panel's imposition of the severe and excessive sanction of a permanent bar against Tweed.

Dated: April 24, 2020

Respectfully Submitted,

ROBERT R. TWEED

By: Robert I. Rabinowitz

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[57] CX-10, Athenian Fund Limited Partnership Agreement, Bates No. 001177.
[58] Transcript Day 3, Bates No. 000715 at 469:20 – 471:9.
[59] Extended Hearing Panel Decision, Bates No. 002607 at 32-33.

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April 24, 2020

Via Electronic Mail Only
apfilings@SEC.gov

Ms. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, D.C. 20549-1090

Re: In the Matter of the Application of Robert R. Tweed
Administrative Proceeding No. 3-19652

Dear Ms. Countryman:

As you know, we represent Robert R. Tweed, the Respondent/Applicant in the above-referenced matter. Attached for filing please find Applicant's Opening Brief in Support of Application for Modification or Reversal of the Decision by the National Adjudicatory Council in FINRA Disciplinary Proceeding No. 2015046631101. The Opening Brief is being filed electronically only pursuant to Exchange Act Release No. 88415 issued March 18, 2020.

Please contact me at 732-915-0692 or at rrabinowitz@beckerlawyers.com if you have any questions. Thank you for your attention to this matter.

Very truly yours,

Robert I. Rabinowitz

Robert I. Rabinowitz

Attachments

cc: Michael M. Smith, Esq. and Alan Lawhead, Esq.
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Mr. Robert R. Tweed

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of	:	
	:	
Robert R. Tweed,	:	File No. 3-19652
	:	
For Review of Disciplinary Action Taken by FINRA	:	

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2020 I caused a true and correct copy of the foregoing Applicant's Opening Brief in Support of Application for Modification or Reversal of FINRA's National Adjudicatory Council Decision dated December 11, 2019 in connection with FINRA Disciplinary Proceeding No. 2015046631101, and this Certificate of Service, is being served upon the following by electronic mail service only pursuant to Exchange Act Release No. 88415 issued March 18, 2020 permitting all filings with the Commission to be made electronically, at apfilings@sec.gov to:

Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E., Room 10915
Washington, D.C. 20549
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with a copy by electronic mail only to:

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Dated: April 24, 2020

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