IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, ***Plaintiff,*** ***v.*** **McGINN, SMITH & CO., INC., McGINN, SMITH ADVISORS, LLC, McGINN, SMITH CAPITAL HOLDINGS CORP., FIRST ADVISORY INCOME NOTES, LLC, FIRST EXCELSIOR INCOME NOTES, LLC FIRST INDEPENDENT INCOME NOTES, LLC THIRD ALBANY INCOME NOTES, LLC, TIMOTHY M. MCGINN, DAVID L. SMITH, LYNN A. SMITH, DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, GEOFFREY R. SMITH, LAUREN T. SMITH, and NANCY McGINN,** ***Defendants,*** **LYNN A. SMITH, and NANCY McGINN,** ***Relief Defendants, and*** **DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04** ***Intervenor.***	§	**10 Civ. 457 (GLS/DRH)**

NON-PARTIES FINRA AND FINRA EMPLOYEES' REPLY MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENAS

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Financial Industry Regulatory Authority ("FINRA") and Gary Jaggs, Robert J. McCarthy, Michael Newman, and Randy Pearlman (the "FINRA Employees") submit this Reply Memorandum in Support of their motion to quash subpoenas issued on them by Defendants David L. Smith and Timothy L. McGinn (the "Motion to Quash") and supporting memorandum of law ("FINRA's Opening Brief").

PRELIMINARY STATEMENT

Defendants' five subpoenas to FINRA and the FINRA Employees (together, the "Subpoenas") remain audacious in how they seek confidential information at the heart of any FINRA investigation. Defendants' justification for seeking documents from and depositions of FINRA's lead attorney in an ongoing FINRA administrative proceeding, the FINRA examiners who have worked with him, and FINRA's custodian of records is that they can establish an alleged "prima facie" case that FINRA has been a state actor working at the behest of the SEC. Such argument falls far short of providing a sufficient basis for obtaining such discovery, and accordingly, the Court should grant FINRA and the FINRA Employees' Motion to Quash.

Notwithstanding that Defendants failed to exhaust their administrative remedies (contrary to applicable caselaw and the applicable FINRA Rules of Procedure) prior to issuing the Subpoenas, through briefs in the Southern District of New York, and now the Northern District of New York, Defendants have demonstrated a unique ability to not actually confront, much less disagree with, FINRA and the FINRA's Employees' central argument: the investigatory privilege applies to protect the documents and depositions sought in this case.

In their response brief, Defendants attempt to divert this Court's attention from the central argument in two principle ways. First, Defendants fail to address head-on the application of the investigatory privilege by instead arguing that the affidavits of James S. Shorris, Executive Vice President and Acting Director of Enforcement of FINRA, do not meet the prerequisites

required to assert the investigatory privilege—which they absolutely do—and that FINRA was required to produce a privilege log summarizing the withheld documents—which it was not under the circumstances. Memorandum of Law in Support of Defendants' Opposition to FINRA's Motion to Quash Subpoenas ("Def. Br.") at 15-18, 9-12.

Second, Defendants argue they are entitled to the requested information because it is relevant to show that FINRA conducted its investigation as a state actor in violation of Defendants' Fifth Amendment privileges against self-incrimination. Def. Br. at 3. To make this argument, Defendants ignore the specific information contained in the Shorris affidavits that establishes how the FINRA investigation was conducted separately from the Securities and Exchange Commission ("SEC") investigation. Indeed, under recent caselaw, the Shorris affidavits provide the groundwork necessary for this Court to determine that Defendants are not entitled to additional discovery on the Fifth Amendment issue. *In re Application of Michael Sassano*, SEC Admin. Proc. File No. 3-12903, Release No. 58632.[1] This result is also consistent with caselaw that warns that defendants cannot "use the discovery process to go on a fishing expedition in the hopes that some evidence will turn up to support an otherwise unsubstantiated [state action] theory." *Id*. at 17.

FINRA has already produced over 31,250 pages worth of materials and many thousand more pages of electronic documents to Defendants that are responsive to the Subpoenas. Non-Parties FINRA and FINRA Employees' Memorandum of Law in Support of Motion to Quash Subpoenas ("FINRA Br.") at 6. The documents that FINRA did not produce—investor interview notes, internal FINRA communications and analyses, and FINRA's communications

[1] A true and correct copy of *In re Application of Michael Sassano*, SEC Admin. Proc. File No. 3-12903, Release No. 58632 (Sept. 24, 2008) is attached to FINRA's Opening Brief as **Exhibit 7**.

with the SEC—remain protected from production by the investigatory privilege. *Id*.; Affidavit of James S. Shorris ("Shorris Aff.") at ¶ 16.

REPLY MEMORANDUM OF POINTS AND AUTHORITIES

I. Defendants Have Failed to Exhaust Their Administrative Remedies

Caselaw has established that the administrative remedies doctrine applies to the National Association of Securities Dealers ("NASD"), FINRA's predecessor, because "NASD's status as a registered national securities association pursuant to specific statutory authorization requires NASD to perform many of the same functions as a public administrative agency." FINRA Br. at 11; *McLaughlin, Piven, Vogel, Inc. v. Nat'l Ass'n of Secs. Dealers, Inc.*, 733 F. Supp. 694, 697 (S.D.N.Y. 1990). Defendants respond that *McLaughlin* is inapplicable because, unlike the plaintiffs in that case, Defendants are parties to a separate federal litigation. Def. Br. at 24. This is a distinction without a difference. Nothing in *McLaughlin* says application of the administrative remedies doctrine to NASD turns on whether there is a separate pending federal litigation.

Moreover, FINRA has established a clear procedure for obtaining materials such as those requested here. FINRA Br. at 10-11. The FINRA Code of Procedure requires defendants in a FINRA enforcement action, to file a discovery motion pursuing the withheld documents under section 9251; in order to succeed, defendants must make a showing as to why they are entitled to production of documents and testimony. *Id*.; Shorris Aff. at Exhibit 1. Here, the FINRA Hearing Officer in the FINRA Action entered a scheduling order specifically requiring Defendants to comply with section 9251. *Id*. at 11. Defendants seek to obtain the documents in this proceeding by arguing that "[t]hey had no other recourse to get discovery from FINRA for use in the instant case." Def. Br. at 24. Such argument is not only conclusory and unsupported by any caselaw, but it completely avoids the reality that there is an ongoing FINRA

administrative action in which Defendants could have requested the documents they ask for here. FINRA Br. at 11. Defendants' attempt to obtain the documents in this proceeding without first exhausting their remedies in the FINRA Action should be rejected.

II. Applicable Legal Standards for the Investigatory Privilege

The parties appear to agree as to the basic legal principle applicable to the Motion to Quash: the investigatory privilege is a qualified privilege with a shifting burden. FINRA, as the party invoking the privilege, bears the initial burden of establishing its applicability. *See* FINRA Br. at 14; *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003); *see also* Def. Br. at 16 ("The party asserting the privilege has the burden of establishing the existence of the investigative privilege . . ."). The burden then shifts to Defendants, as the party opposing application of the privilege, to demonstrate a compelling reason why the investigatory privilege should not apply. *Id*.; *DGM Invs., Inc. v. N.Y. Futures Exch.*, 224 F.R.D. 133, 140 (S.D.N.Y. 2004) (showing of application of investigatory privilege may only be overcome by an adequate showing of a litigant's need for such information) (citing *Apex Oil Co. v. DiMauro*, 110 F.R.D. 490, 497-98 (S.D.N.Y. 1985) (same)).

The parties do, however, disagree over what a self-regulatory organization ("SRO") must demonstrate in order to support application of the investigatory privilege. FINRA's Opening Brief cites a body of caselaw holding that the initial burden for FINRA is not substantial. FINRA Br. at 14; *DGM Invs., Inc.*, 224 F.R.D. at 140 (where an SRO asserts the investigatory privilege, the standards applicable to governmental entities "appear to have been applied less rigorously, if at all"). In response, Defendants argue that FINRA and the FINRA Employee's reliance on *DGM Investments* is "meritless" because that court "did not decide the issue of whether the investigative privilege had been asserted." Def. Br. at 18. However, even a cursory review of *DGM Investments* makes clear that the burden is not strongly applied because there is a

public interest in preserving the ability of SROs to function effectively. *DGM Invs., Inc.*, 224 F.R.D. at 140. Other cases agree. *See, e.g., Ross v. Bolton*, 106 F.R.D. 22, 23 (S.D.N.Y. 1985) (noting "strong public interest" in finding that investigatory privilege precluded discovery of NASD file materials); *In re Adler, Coleman, Clearing Corp.*, 1999 WL 1747410, at *3 (S.D.N.Y. Dec. 8, 1999) (same).[2]

III. The Investigatory Privilege Applies to Protect Production of the Documents Defendants Seek Here

As established in FINRA's Opening Brief, the Subpoenas must be quashed because Defendants request documents and seek testimony protected by the common law investigatory privilege doctrine. FINRA Br. at 14 *et seq.*; Fed. R. Civ. P. 45(c)(3)(A)(iii).

A. FINRA Has Met Its Initial Burden of Showing that the Investigatory Privilege Applies to the Requested Documents

FINRA has met its initial burden of showing that the investigatory privilege applies to the requested documents. FINRA Br. at 14-20. In opposition, Defendants advance two arguments as to why FINRA has not met its initial burden for applying the investigatory privilege under the present circumstances: (1) FINRA did not properly assert the investigatory privilege through the Shorris affidavits; and (2) FINRA did not produce a privilege log. *See* Def. Br. at 15-18, 9-12. Both arguments are without merit.

1. FINRA Properly Asserted the Investigatory Privilege in the Shorris Affidavits

As FINRA and Defendants both note in their opening briefs, the *Adler* court outlined three prerequisites to the assertion of the investigatory privilege: (1) the head of the department having control over the information requested must assert the privilege; (2) the official in question must do so based on actual personal consideration; and (3) he or she must specify the

[2] A true and complete copy of *In re Adler, Coleman, Clearing Corp.*, No. 95-08203, 1999 WL 1747410 (S.D.N.Y. Dec. 8, 1999) is attached to FINRA's Opening Brief as **Exhibit 4**.

information purportedly covered by the privilege, and accompany the request with an explanation as to why such information falls within the scope of the privilege. FINRA Br. at 14-15; Def. Br. at 16 n. 5 (both citing *Adler*, 1999 WL 1747410, *3 (S.D.N.Y. Dec. 8, 1999)).

In support of their Motion to Quash, FINRA and the FINRA Employees submit two affidavits by Mr. Shorris, which, contrary to Defendants' assertion that "FINRA has failed to properly assert the investigatory privilege," Def. Br. at 15, meet each of the three requirements set forth above. First, Mr. Shorris, as Executive Vice President and Acting Director of Enforcement of FINRA, is head of the department having control over the requested documents. Shorris Aff. at ¶ 1.

Second, Mr. Shorris asserts the investigatory privilege based on his actual personal consideration of, and familiarity with, the FINRA Action. Shorris Aff. at ¶¶ 9, 11, 15 (discussing FINRA's investigation of, and procedural developments in, FINRA's case against Defendants and their Firm), 14 ("I have reviewed and considered the Subpoenas . . ."); Supplemental Affidavit of James S. Shorris ("Shorris Supp. Aff.") at ¶ 2 ("[] I have supervised [FINRA's] examination and inquiry . . . and also the enforcement action . . ."; "I am personally familiar with the FINRA Action, which is separate and apart from the SEC Proceeding.").

Third, Mr. Shorris specifies in great detail both the documents covered by the privilege and why such documents should be protected. Shorris Aff. at ¶¶ 16 ("FINRA withheld from production notes from interviews of investors taken in connection with the FINRA Action, internal memoranda regarding the FINRA Action, internal communications with and among FINRA's Enforcement attorneys and investigative staff in connection with the FINRA Action, internal examiner-prepared schedules in connection with the FINRA Action, certain communications between FINRA staff and the SEC, including communications containing

privileged attachments, and a memorandum to the SEC regarding the FINRA Action."), 17 ("Disclosure of the privileged withheld information, which is essential to FINRA's case against Defendants, would reveal the nature and direction of FINRA's case to Defendants. It would also inevitably impair FINRA's ability to present the strongest possible case at the merits hearing next May."); Shorris Supp. Aff. ¶ 7 ("The witness interviews and communications with customers and investors should be protected to allow such persons to talk frankly and openly with investigators. The internal communications, analyses, memoranda, spreadsheets, and documents should be protected because they are replete with FINRA's internal opinions and analyses and would reveal how FINRA conducts its investigations and forms its litigation strategy. The relatively minimal communications between FINRA and the SEC should be protected to allow FINRA to communicate and transfer information to the SEC in furtherance of and to facilitate FINRA's referral."); Shorris Aff. ¶¶ 18-21 (describing negative precedential effects of disclosure). Mr. Shorris' explanation as to why the requested documents are covered by the investigatory privilege is the very "deliberate and precise invocation of the claim of qualified privilege" required under applicable caselaw. *See id*. ¶¶ 17-21; *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336 (D.C. Cir. 1984). Accordingly, FINRA has properly invoked the investigatory privilege.

2. FINRA Should Not Be Required to Produce a Privilege Log Under the Circumstances

Through FINRA's Opening Brief, FINRA and the FINRA Employees also establish that they are not required to produce a privilege log under the circumstances. FINRA Br. at 17. First, the administrative remedies doctrine (discussed above) required Defendants to first pursue the withheld documents in the FINRA Action. *Id*. Second, Defendants' generalized assertions would not meet the requirements for obtaining a privilege log under the applicable FINRA rules.

Id. Third, as a matter of policy, FINRA's production of a log without a sufficient showing under the applicable FINRA rules could reveal the inner workings of a FINRA investigation. *Id*.; Shorris Supp. Aff. at ¶ 7.

Defendants' argument that the absence of a privilege log deprives the Defendants and the Court of "the necessary tools to consider whether privilege attaches to the documents in dispute," Def. Br. at 11-12, is not supported by the facts of this case. Both FINRA's Opening Brief and the Shorris affidavits describe in detail, category by category, the three general categories of documents withheld from production—investor interview notes, internal FINRA communications and analyses, and FINRA's communications with the SEC—and also specifically describe why the investigatory privilege attaches to each of those categories. FINRA Br. at 17-21. In addition, FINRA provides specific references to cases in which those very types of documents were protected from production. *Id*. at 18-21. With such information, Defendants have not and cannot maintain in good faith that it is impossible to determine whether the documents are properly within the scope of the claimed privileges.[3]

Nonetheless, as previously set forth in FINRA's Opening Brief, and out of an abundance of caution, Defendants are prepared to present to the Court for in camera review (and will bring to the hearing on the motion) a privilege log and the underlying communications with the SEC and investors that FINRA withheld pursuant to the investigatory privilege. FINRA Br. at 17.

B. Defendants Have Not Met Their Burden of Demonstrating a Compelling Need For the Requested Documents

Defendants have not met their burden of showing a compelling need for each of the categories of documents that FINRA withheld pursuant to the investigatory privilege. As set

[3] This Court should give no weight to Defendants' argument that the SEC has agreed to provide a privilege log to Defendants relating to the SEC's communications with FINRA. Def. Br. at 12. As explained in FINRA's Opening Brief and this Reply Brief, FINRA has particular institutional concerns that do not require FINRA to provide a privilege log under the circumstances.

forth above, the nearly two dozen categories of documents that Defendants seek essentially boil down to three: (1) FINRA's witness interviews and communications with customers and investors; (2) FINRA's internal communications, analyses, memoranda, spreadsheets, and documents; and (3) FINRA's communications with the SEC. FINRA Br. at 17-18.

Witness interviews and communications with customers and investors. With respect to witness interviews and communications with customers and investors, Defendants offer no effective explanation as to why they should be entitled to such documents. Def. Br. at 8 (generally claiming Defendants want investor-related information). As previously set forth, it is essential that such information be protected because witnesses privy to information in connection with alleged securities violations should be encouraged to talk frankly and openly to examiners. *Id*. at 18; Shorris Supp. Aff. at ¶ 7. Unsurprisingly, courts have protected such documents under the investigatory privilege. *Id*.; *Ross v. Bolton*, 106 F.R.D. 22 (protecting unsworn deposition transcripts and analyses and opinions drawn from such material).

FINRA's internal communications, analyses, memoranda, spreadsheets, and documents. Defendants likewise offer no explanation as to why they are entitled to FINRA's internal communications, analyses, memoranda, spreadsheets, and documents referring to Defendants, as these documents reveal how FINRA conducts its investigations and forms its litigation strategy. Shorris Supp. Aff. at ¶ 7. Not only do such documents constitute work product, but they are the core "opinion and analysis work" contemplated by *Ross* and its progeny. FINRA Br. at 19; *see Ross*, 106 F.R.D. at 23 (noting "strong public interest" in finding that investigatory privilege precluded discovery of NASD file materials constituting opinion and analysis); *DGM Invs., Inc.*, 224 F.R.D. at 143 (protecting NYBOT's internal compliance manuals from production under the investigatory privilege).

Communications with the SEC. Defendants attempt to avoid application of the investigatory privilege to communications between FINRA and the SEC by suggesting the information sought is relevant and reasonably calculated to lead to admissible evidence that FINRA is a state actor that violated Defendants' Fifth Amendment rights against self-incrimination. Def. Br. at 3. As an initial matter, FINRA has never taken a position that the information Defendants seek is not relevant. Indeed, FINRA already produced over 31,250 pages worth of materials and many thousand more pages of electronic documents to Defendants that are responsive to the Subpoenas. FINRA Br. at 6. FINRA's communications with the SEC were withheld because they are protected by the investigatory privilege.

Additionally, FINRA's Opening Brief establishes that because FINRA is a private not-for-profit Delaware corporation and a self-regulatory organization registered with the SEC, it is not a state actor. FINRA Br. at 19; *Desiderio v. Nat'l Ass'n of Secs. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999). In order to transform FINRA into a state actor, Defendants must establish that FINRA has a "close nexus" with the SEC so that the "seemingly private behavior may be fairly treated as that of the State itself." *Id.*; *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 121 S.Ct. 924 (2001). Defendants, in their opposition, suggest that state action exists here because (1) FINRA's discovery sought after FINRA's referral was for use by the SEC and there is no explanation for the continued FINRA investigation after December 2009, when FINRA referred the matter to the SEC and (2) FINRA forwarded transcripts of testimony to the SEC on a rolling basis. Def. Br. at 5.

FINRA's Opening Brief, together with the Shorris affidavits, establish how FINRA was acting as an independent SRO in investigating Defendants. FINRA Br. at 20-21; Shorris Aff. at ¶¶ 11-13; Shorris Supp. Aff at ¶¶ 3-4. First, Defendants conveniently focus on FINRA's routine

examination but not FINRA's continuing Enforcement investigation and how it directly resulted in the administrative complaint FINRA filed. *Id*. at 20. Even a cursory review of the FINRA complaint in its administrative proceeding, filed before the SEC complaint, shows that FINRA's on-the-record testimony was focused on the very issues it had been investigating—such as the structure of the note offerings and Defendants' use of the proceeds for improper purposes. *See, e.g.*, Shorris Aff. Exhibit 2. at ¶¶ 15-23, 31-32. Indeed, it is increasingly typical in FINRA investigations into fraud and mismanagement by a member firm for FINRA to turn its focus to associated persons and registered individuals, especially where those individuals themselves are suspected of shielding assets or personally profiting from alleged securities laws violations. Shorris Supp. Aff. at ¶ 5. As such, there is no inference to be drawn from the timing and substance of the FINRA investigation. Second, FINRA's forwarding of transcripts to the SEC and continuance of its investigation after referral to the SEC do not alter this fundamental point. It is not surprising that FINRA forwarded transcripts to the SEC because often times, the SEC requests access to FINRA's investigative files where a member firm is under investigation by both FINRA and the SEC. *See* Shorris Supp. Aff. at ¶ 3; *In re Application of Michael Sassano*, SEC Admin. Proc. File No. 3-12903, Release No. 58632, at 15.

Recent caselaw establishes that Defendants are not entitled to additional discovery under the circumstances here. As explained in FINRA's Opening Brief, there is a body of SEC cases (in which the SEC is acting in its appellate capacity relating to administrative proceedings) that discuss the circumstances in which defendants are entitled to additional discovery based on a Fifth Amendment state actor claim. FINRA Br. at 20. Those cases culminate in *In re Application of Michael Sassano*, which makes clear that defendants cannot "use the discovery process to go on a fishing expedition in the hopes that some evidence will turn up to support an

otherwise unsubstantiated [state action] theory" and concludes that any production standard can be satisfied through allowing depositions or by FINRA providing an affidavit, as FINRA and the FINRA Employees did here. *Id.*; *In re Sassano*, SEC Admin. Proc. File No. 3-12903, Release No. 58632 at 17. Defendants fail to cite, let alone address, *Sassano*'s logic and how it explains the older cases upon which Defendants rely. *See In re Sassano*, SEC Admin. Proc. File No. 3-12903, Release No. 58632 at 19 n. 54; Def. Br. at 4-5. Under this standard, Defendants have failed to establish that they are entitled to the requested discovery.

IV. The Investigatory Privilege Applies to Protect the Depositions Sought Here

Finally, Defendants fail to justify how they are entitled to depose FINRA's lead prosecuting attorney, the supervising examiner, two examiners, and the custodian of records in the FINRA Action under the circumstances. *See* FINRA Br. at 22-23. With respect to all of the subpoenaed FINRA employees, the investigatory privilege "applies to both investigatory files and testimony concerning their contents." *Id.* at 22; *In re Adler,* 1999 WL 1747410, at *5 (declining to compel testimony of NASD employee, even where his testimony was sought only as to factual matters and not as to either his opinion or analysis) (citing *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988) ("It would make little sense to protect the actual files from disclosure while forcing the government to testify about their contents.")).

With respect to the lead prosecuting attorney, in particular, a defendant who wishes to call a prosecutor as a witness must demonstrate a compelling and legitimate reason to do so. FINRA Br. at 22; *U.S. v. Regan*, 103 F.3d 1072, 1083 (2d Cir. 1997) (citing *U.S. v. Schwartzbaum*, 527 F.2d 249, 253 (2d Cir. 1975)). As set forth in FINRA's Opening Brief, in May 2010, this Court recognized the investigatory privilege and allowed a deposition of an SEC attorney to go forward in the SEC Proceeding on only very narrow grounds that are not present,

and are easily distinguished, here.[4] The relief defendant (Smith's wife) had noticed for deposition an SEC attorney involved in the SEC's investigation of McGinn Smith, and the SEC attorney had previously submitted a declaration reporting her results of interviews with unnamed investors. *Id*. At a status conference, the SEC objected to the deposition on various grounds, including that her testimony was protected by the investigatory, attorney-client, and work product privileges. *Id*. This Court found that the claimed privileges had been waived to the extent reported in the attorney's declaration and that the deposition could go forward only with respect to the results of the investor interviews reported in the declaration. *Id*. at 2.

The case for quashing the subpoena of FINRA's lead prosecutor is even stronger here. No privilege has been waived by the FINRA Employees, and Defendants have not demonstrated any reason, much less a compelling and legitimate reason, why they should be permitted to depose Mr. Newman, especially when he and his team are preparing their case for hearing. Defendants have likewise not demonstrated any relevant reason why the other FINRA Employees and the FINRA custodian of records should have their depositions taken in the SEC Proceeding. Those employees have no relevant, discoverable, information that has not already been provided to Defendants, and no declarations of fact have been filed by any of the proposed deponents here.

CONCLUSION

For the foregoing reasons, FINRA respectfully requests that the Court grant its motion and quash the Subpoenas.

[4] *See* Docket No. 10.

Dated: December 6, 2010

Respectfully submitted,

By: */s/ Richard B. Harper*

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury pursuant to 28 U.S.C. Section 1746 that on the 6th day of December 2010, I served the foregoing FINRA and the FINRA Employees' Reply Memorandum in Support of Motion to Quash Subpoenas by email upon the following counsel:

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