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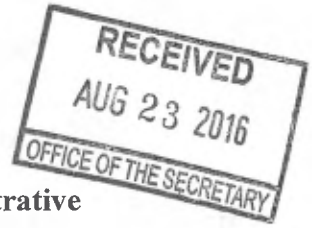

SECURITIES AND EXCHANGE COMMISSION (S.E.C.)

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	)	

KEITH GEARY'S MOTION TO STAY & BRIEF IN SUPPORT

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Pursuant to 17 C.F.R. § 201.420(d), Keith Geary ("Geary") files this motion to stay sanctions contemporaneously with his application for review of final disciplinary action by FINRA in FINRA Complaint No. 2009020465801 . 17 C.F.R. § 201.420(d); *see also* 15 U.S.C. § 78s(d)(2); 17 C.F.R. § 201.420(a)(1); FINRA Rule 9370(a). Geary requests the Commission stay the sanctions imposed by FINRA, including a 30 business day suspension in all capacities from September 19, 2016 to October 28, 2016, and payment of a $20,000 fine and hearing costs of $5,056.70, pending his appeal before the Commission.

Brief in Support

I. PRELIMINARY STATEMENT

FINRA's final disciplinary action sanctioned Geary with a 30 business day suspension in all capacities, a bar from serving in a principal or supervisory capacity with any FINRA member firm, $20,000 fine, and hearing costs. FINRA notified Geary that these sanctions, except for the principal/supervisory bar, would be stayed pending appeal to the Commission. As a precaution based on uncertainty under the Commission regulations and FINRA Rules, Geary is submitting this Motion.

The Commission should confirm FINRA's stay of sanctions on three independent grounds:

- The Commission grants stays where the sanctioned party will lose the benefit of appeal if he complies with the suspension that is shorter than the appeal process;
- The Commission does not credit compliance with a suspension during an appeal once FINRA notifies the party that the suspension is stayed; and
- FINRA's letter stating the sanctions are stayed is an express waiver and estops FINRA from objecting to a stay.

II. FACTUAL BACKGROUND

1. On July 20, 2016, FINRA served the National Adjudicatory Counsel (NAC) decision on Geary. (Marcia E. Asquith, FINRA, Letter to Joe M. Hampton (July 20, 2016)

(hereafter "Notice") Ex. 1; July 20, 2016 NAC Decision Complaint #2009020465801 (hereafter "Decision") Ex. 2.)

2. The notice states "The Board of Governors of [FINRA] did not call this matter for review, and the attached NAC decision *is the final decision of FINRA*. (Ex. 1 Notice at 1 (emphasis added).)

3. The NAC decision suspends Keith Geary for 30 business days in all capacities (from September 19, 2016 to October 28, 2016), barred Geary from serving in a principal or supervisory capacity with any FINRA member firm, fined him $20,000, and ordered him to pay hearing costs of $5,056.70. (Ex. 1 Notice at 1; Ex. 2 Decision at 1-2.)

4. The notice provides "The filing with the SEC of an application for review shall stay the effectiveness of any sanction except a bar or expulsion. Thus, the 30 day suspension imposed by the NAC in the enclosed decision will be stayed pending appeal to the SEC," and "orders in the enclosed NAC decision to pay fines and costs will be stayed pending appeal." (Ex. 1 Notice at 3.)

III. ARGUMENT & AUTHORITIES

A. The Commission Should Confirm FINRA's Stay of Sanctions, Because Geary Will Lose the Benefit of Appeal if Geary Complies with the 30-day Suspension.

The Commission should confirm FINRA's grant of a stay of sanctions, because Geary will lose the benefit of his appeal if he must comply with a 30 day suspension while awaiting the appeal process. "[T]he Commission has granted stays where the sanction imposed is of a short-term nature and requiring applicants to comply with the sanctions during the pendency of the appeal would put them in jeopardy of losing the benefit of a successful appeal." *Michael E. McCune*, Release No. 34-77921, 2016 WL 2997935, at *1 (May 25, 2016). In *Michael E. McCune*, the Commission granted a stay of a *six* month suspension and $5,000 fine. *Michael E.*

McCune, 2016 WL 2997935, at *1. Here, FINRA suspended Geary for an even shorter amount of time, *30 business days*, September 19, 2016 to October 28, 2016, fined him $20,000, and ordered him to pay hearing costs of $5,056.70. (Ex. 1 Notice at 1; Ex. 2 Decision at 1-2.) Thus, the Commission should stay the sanctions imposed on Geary during the pendency of this appeal.

B. The Commission Should Confirm FINRA's Stay of Sanctions, Because FINRA's Notice Letter Could Preclude Credit for Geary's Compliance with Suspension.

As independent and alternative grounds, the Commission should confirm FINRA's stay of sanctions, because FINRA's notice letter may preclude Geary's compliance with the suspension during his appeal. The Commission previously recognized that a notice letter and FINRA Rule 2370's automatic stay precluded an appealing party from asserting her suspension was served during her appeal. *John Edward Mullins*, Release No. 34-66373, 103 S.E.C. Docket 23, 103 S.E.C. Docket 40, 2012 WL 423413, at *21 n.98 (February 10, 2012).

In *John Edward Mullins*, FINRA initially suspended K. Mullins for nine months. *John Edward Mullins*, 2012 WL 423413, at *1. The Commission reduced her suspension by two months. *John Edward Mullins*, 2012 WL 423413, at *21. K. Mullins argued that "that her 'time sanction has been satisfied' because she had already served it by the time of her appeal to the NAC." *John Edward Mullins*, 2012 WL 423413, at *21 n.98. However, the Commission took the position that "FINRA Rule 2370 automatically stays all sanctions (except for bars or expulsions) pending appeal," and concluded that K. Mullins "has not yet begun to satisfy any suspension imposed." *John Edward Mullins*, 2012 WL 423413, at *21 n.98. Further, the Commission relied on FINRA's "February 24, 2011 transmittal letter accompanying the NAC's decision" to K. Mullins as notice to her of the stay. *John Edward Mullins*, 2012 WL 423413, at *21 n.98.

Similarly, FINRA's transmittal letter enclosing the NAC's decision to Geary provides this same notice, stating "The filing with the SEC of an application for review shall stay the effectiveness of any sanction except a bar or expulsion. Thus, the 30 day suspension imposed by the NAC in the enclosed decision will be stayed pending appeal to the SEC," and "orders in the enclosed NAC decision to pay fines and costs will be stayed pending appeal.." (Ex. 1 Notice at 3.) FINRA Rule 9370(a) grants an automatic stay stating "The filing with the SEC of an application for review by the SEC *shall stay* the effectiveness of *any sanction, other than a bar or an expulsion*, imposed in a decision constituting final disciplinary action of FINRA for purposes of SEA Rule 19d-1(c)(1)." FINRA Rule 9370(a) (emphasis added). Thus, if Geary complies with the 30 day suspension starting September 19, 2016 during his appeal to the Commission, there is precedent that the Commission may not credit his time served.

C. FINRA has Waived or Is Estopped from Objecting to a Stay of Sanctions.

In the alternative and as independent grounds, the Commission should grant a stay, because FINRA has waived or is estopped from objecting to a stay of sanctions. First, "waiver is the voluntary and intentional relinquishment of a known right." *Murphy Oil USA, Inc. v. Wood*, 438 F.3d 1008, 1013 (10th Cir. 2006). "[T]he doctrine of waiver focuses on the intention of the party against whom the waiver is asserted; that is, the party must have the intent to waive its right." *Wood*, 438 F.3d at 1013. "Waiver can occur both expressly and implicitly." *Id.* Express waiver requires actual evidence the party waived its right. *See id.*at 1014. "Implied waiver can be shown by conduct which warrants an inference of an intent to relinquish." *Id.*

FINRA's written statements that "the 30 day suspension imposed by the NAC in the enclosed decision will be stayed pending appeal to the SEC," and "orders in the enclosed NAC decision to pay fines and costs will be stayed pending appeal." are a "clear, unequivocal and

decisive manifestation of the party's relinquishment of the right." *See Wood*, 438 F.3d at 1014; (Ex. 1 Notice at 3.)

Second, "a person may waive a right by conduct or acts which indicate an intention to relinquish it, or by such failure to insist upon it that the party is estopped to afterwards set it up against his adversary." *Hidalgo Props., Inc. v. Wachovia Mortg. Co.*, 617 F.2d 196, 199 (10th Cir. 1980). "Historically, equitable estoppel has been used to prevent a party from taking a legal position inconsistent with an earlier statement or action that places his adversary at a disadvantage." *Penny v. Giuffrida*, 897 F.2d 1543, 1545 (10th Cir. 1990). Equitable estoppel "ensure[s] that no one will be permitted to 'take advantage of his own wrong.'" *Penny*, 897 F.2d at 1545. The elements of equitable estoppel are

> (1) the party to be estopped must know the facts;
>
> (2) the party to be estopped must intend that his conduct will be acted upon or must so act that the party asserting the estoppel has the right to believe that it was so intended;
>
> (3) the party asserting the estoppel must be ignorant of the true facts; and
>
> (4) the party asserting the estoppel must rely on the other party's conduct to his injury.

Id. at 1545-46. For judicial estoppel,[1] when "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Kaiser v. Bowlen*, 455 F.3d 1197, 1204 (10th Cir. 2006).

---

[1] Although some courts apply judicial estoppel only if the inconsistent statement was made in a separate proceeding, it is an "equitable doctrine invoked by a court at its discretion," and "additional considerations may inform the doctrine's application in specific factual contexts." *Queen v. TA Operating, LLC*, 734 F.3d 1081 (10th Cir. 2013) (internal quotation marks and brackets omitted).

Estoppel is appropriate in this matter, to prevent FINRA from taking an inconsistent position on the stay of sanctions it has already permitted. Geary is relying on the stay stated in the notice letter to proceed with his appeal. FINRA should not be permitted to reverse its position.

IV. CONCLUSION

The Commission should grant a stay of sanctions against Geary, because the 30 day suspension would last less than the appeal process robbing Geary of the benefit of his appeal, the Commission does not give credit for suspensions served during the appeal process resulting in a duplicate sentence if Geary complies, and FINRA has waived and is estopped from objecting to a stay.

Respectfully submitted,

JOE M. HAMPTON, OBA No. 11851
AMY J. PIERCE, OBA No. 17980
Corbyn Hampton, PLLC
One Leadership Square, Suite 1910
211 North Robinson
Oklahoma City, Oklahoma 73102
Telephone: (405) 239-7055
Facsimile: (405) 702-4348

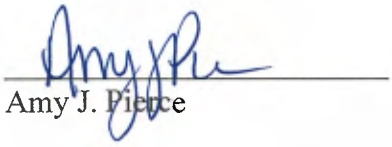
ATTORNEYS FOR KEITH GEARY

CERTIFICATE OF SERVICE

The foregoing document was served on and received by the 18th day of August 2016, by facsimile and U.S. Mail on the following:

Office of the Secretary
Securities and Exchange Commission
100 F Street, NE.
Room 10915
Washington, DC 20549
Mailstop 1090
Attn: Secretary of the Commission Brent J. Fields
Facsimile #: (202) 772-9324

Megan Rauch
Marcia E. Asquith
Senior Vice President and Corporate Secretary
Office of General Counsel
Financial Industry Regulatory Authority
1735 K Street, NW
Washington, DC 20006-1506
Fax #: (202) 728-8300



Amy J. Pierce

CERTIFICATE OF WORD COUNT

The undersigned certifies that the foregoing document complies with the length limitation set forth in 17 C.F.R. § 201.154(c), and contains 1706 words.

Amy J. Pierce

FINRA

Financial Industry Regulatory Authority

Marcia E. Asquith
Senior Vice President and
Corporate Secretary

Direct: (202) 728-8831
Fax: (202) 728-8300

July 20, 2016

VIA CERTIFIED MAIL:
RETURN RECEIPT REQUESTED/FIRST-CLASS MAIL

Joe M. Hampton Esq.
Corbyn Hampton PLLC
One Leadership Square
211 North Robinson, Suite 1910
Oklahoma City, OK 73102

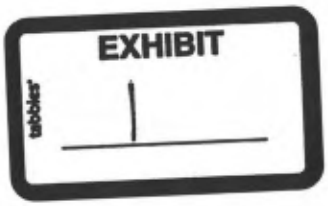
Re: Complaint No. 2009020465801: Keith D. Geary

Dear Mr. Hampton:

Enclosed is the decision of the National Adjudicatory Council ("NAC") in the above-referenced matter. The Board of Governors of the Financial Industry Regulatory Authority ("FINRA") did not call this matter for review, and the attached NAC decision is the final decision of FINRA.

In the enclosed decision, the NAC found that Keith D. Geary ("Geary") twice permitted his firm to operate a securities business while it lacked the required net capital, in violation of FINRA Rule 2010. For his misconduct, Geary was fined $20,000, imposed a 30-business-day suspension in all capacities, and barred from acting in any principal or supervisory capacity with any FINRA member firm. The NAC also affirmed the order to pay hearing costs of $5,056.70. Please note that under Rule 8311 ("Effect of a Suspension, Revocation, Cancellation, or Bar"), because the NAC has imposed a bar effective immediately, Geary is not permitted to associate further with any FINRA member firm in any principal or supervisory capacity.

The 30-business-day suspension imposed by the NAC shall begin with the opening of business on **Monday, September 19, 2016** and end at the close of business on **Friday, October 28, 2016**. Please note that under Rule 8311 ("Effect of a Suspension, Revocation, Cancellation, or Bar"), Geary is not permitted to associate with any FINRA member firm in any capacity, including a clerical or ministerial capacity, during the period of his suspension. Further, member firms are not permitted to pay or credit any salary, commission, profit or other remuneration that results directly or indirectly from any securities transaction that Geary may have earned during the period of his suspension.



1735 K Street, NW
Washington, DC
20006-1506

t 202 728 8000
www.finra.org

Pursuant to Article V, Section 2 of the FINRA By-Laws, if Geary is currently employed with a member of FINRA, he is required immediately to update his Form U4 to reflect this action. Geary is also reminded that the failure to keep FINRA apprised of his most recent address may result in the entry of a default decision against him. Article V, Section 2 of the FINRA By-Laws requires all persons who apply for registration with FINRA to submit a Form U4 and to keep all information on the Form U4 current and accurate. Accordingly, Geary must keep his member firm informed of his current address.

In addition, FINRA may request information from, or file a formal disciplinary action against, persons who are no longer registered with a FINRA member for at least two years after their termination from association with a member. See Article V, Sections 3 and 4 of FINRA's By-Laws. Requests for information and disciplinary complaints issued by FINRA during this two-year period will be mailed to such persons at their last known address as reflected in FINRA's records. Such individuals are deemed to have received correspondence sent to the last known address, whether or not the individuals have actually received them. Thus, individuals who are no longer associated with a FINRA member firm and who have failed to update their addresses during the two years after they end their association are subject to the entry of default decisions against them. See Notice to Members 97-31. Letters notifying FINRA of such address changes should be sent to:

CRD
P.O. Box 9495
Gaithersburg, MD 20898-9401

Geary may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, he must file an application with the SEC within 30 days of your receipt of this decision. A copy of this application must be sent to the FINRA Office of General Counsel, as must copies of all documents filed with the SEC. Any documents provided to the SEC via facsimile or overnight mail should also be provided to FINRA by similar means.

The address of the SEC is:

The Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549

The address of FINRA is:

Attn: Megan Rauch
Office of General Counsel
FINRA
1735 K Street, NW
Washington, D.C. 20006

If Geary files an application for review with the SEC, the application must identify the FINRA case number and state the basis for his appeal. He must include an address where you may be served and a phone number where he may be reached during business hours. If his address or phone number changes, he must advise the SEC and FINRA. Attorneys must file a notice of appearance. The filing with the SEC of an application for review shall stay the effectiveness of any sanction except a bar or expulsion. Thus, the 30 day suspension imposed by the NAC in the enclosed decision will be stayed pending appeal to the SEC. The bar in any principal or supervisory capacity imposed by the NAC in the enclosed decision will not be stayed pending appeal to the SEC, unless the SEC orders a stay. Additionally, orders in the enclosed NAC decision to pay fines and costs will be stayed pending appeal.

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is (202) 551-5400.

If Geary does not appeal this NAC decision to the SEC and the decision orders him to pay fines or costs, he may pay these amounts after the 30-day period for appeal to the SEC has passed. Any fines and costs assessed should be paid (via regular mail) to FINRA, P.O. Box 418911, Boston, MA 02241-8911 or (via overnight delivery) to Bank of America Lockbox Services, FINRA 418911 MA5-527-02-07, 2 Morrissey Blvd., Dorchester, MA 02125.

Very truly yours,

Marcia E. Asquith
Senior Vice President and Corporate Secretary

cc: Keith D. Geary, 8101 NE 140th, Edmond, OK, 83013
Leo F. Orenstein
Jeffrey Pariser

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Keith D. Geary Edmond, OK, Respondent.	DECISION Complaint No. 2009020465801 Dated: July 20, 2016

Respondent twice permitted his firm to operate a securities business while it lacked the required net capital. Held, findings affirmed and sanctions modified.

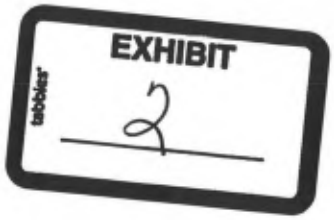
Appearances

For the Complainant: Leo F. Orenstein, Esq., Sarah B. Belter, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Joe M. Hampton, Esq., Amy J. Pierce, Esq.

Decision

Keith D. Geary appeals a July 8, 2014 Hearing Panel decision pursuant to FINRA Rule 9311. The Hearing Panel found that Geary twice permitted his firm to operate a securities business while it lacked the required net capital, in violation of FINRA Rule 2010. The Hearing Panel separately sanctioned Geary for each violation. For the first violation, the Hearing Panel fined Geary $10,000, suspended him from association with any FINRA member firm in any capacity for 30 business days, and barred him from acting in a principal or supervisory capacity with any FINRA member firm. For the second violation, the Hearing Panel fined Geary $20,000, suspended him from association with any FINRA member firm in any capacity for 60 calendar days, and barred him from acting in a principal or supervisory capacity with any FINRA member firm. The Hearing Panel imposed the suspensions consecutively. It also ordered Geary to pay costs. After an independent review of the record, we affirm the Hearing Panel's findings of liability and modify the sanctions it imposed. For his misconduct, we impose a unitary sanction: we fine Geary $20,000, impose a 30-business-day suspension in all capacities, and bar



him from acting in any principal or supervisory capacity with any FINRA member firm. We also affirm the Hearing Panel's order to pay costs.

I. Background

Geary has worked in the financial services industry since 1979. Among other things, he worked as a consultant for financial institutions dealing with interest rate risk management. In 1997, Geary first associated with a FINRA member firm and registered as a general securities representative. He generated revenues of two to three million dollars a year and was paid thirty percent of what he produced.

In August 2007, Geary purchased Capital West Securities, which later became Geary Securities, Inc. ("GSI" or the "Firm"). At GSI, Geary intended to continue serving the banks that had been his long-standing clients, while earning additional revenue from the Firm's securities business. When Geary acquired the Firm, he became its chairman, chief executive officer ("CEO"), and president. He was registered as a general securities representative, general securities principal, municipal securities principal, operations professional, and investment banking limited representative.

When Geary acquired GSI, the Firm had approximately 50 employees. Geary kept the existing staff, including Norman Frager, the Firm's primary financial and operations principal ("FINOP"), DH, the Firm's on-site accountant and bookkeeper, and AR, the Firm's chief compliance officer ("CCO") and on-site FINOP. Frager was on-site at the Firm at least two days per month to finalize and submit the Firm's FOCUS reports. DH acted as the Firm's bookkeeper and prepared a rough draft of the FOCUS reports for Frager. AR was responsible for the operations part of the FINOP duties at the Firm. At the time Geary acquired the Firm, and throughout the relevant period, the Firm's regulatory filings indicated it was subject to a $250,000 minimum net capital requirement.

GSI terminated its FINRA membership on April 2012. Geary has been registered with another FINRA member firm since February 2012.

II. Procedural History

On September 17, 2012, the Department of Enforcement ("Enforcement") filed a five-cause complaint against Geary and Frager. Only two causes of action were alleged against Geary. Prior to the hearing, Frager settled the charges against him; the hearing proceeded solely on the charges against Geary. In cause one, Enforcement alleged that Geary knew, should have known, or was reckless in not knowing that GSI conducted a securities business while failing to maintain its minimum net capital requirement on May 28-29, 2009, in violation of FINRA Rule 2010. In cause four, Enforcement alleged that Geary knew, should have known, or was reckless in not knowing that GSI conducted a securities business while failing to maintain its minimum net capital requirement for 15 days between February 2, 2010, and February 25, 2010, in violation of FINRA Rule 2010.

After a three-day hearing, the Hearing Panel issued its decision on July 8, 2014. The

Hearing Panel found that Geary engaged in the misconduct as alleged in the complaint. For the two violations, the Hearing Panel fined Geary a total of $30,000, imposed a 30-business-day suspension followed by an additional 60-calendar-day suspension, and barred him from acting in a principal or supervisory capacity with any member firm. This appeal followed.

III. Discussion

The Hearing Panel found that Geary twice permitted GSI to operate a securities business while it lacked the required net capital. We affirm these findings.

Securities Exchange Act of 1934 ("Exchange Act") Rule 15c3-1, known as the net capital rule, prohibits broker-dealers from engaging in a securities business if their net capital falls below certain amounts. The purpose of the rule is to ensure that broker-dealers have sufficient liquid assets on hand at all times to cover their indebtedness. *See Inv. Mgmt. Corp.*, Complaint No. C3A010045, 2003 NASD Discip. LEXIS 47, at *17 (NASD NAC Dec. 15, 2003). Broker-dealers calculate their required net capital based on their ratio requirement and the activities performed at the firm and then calculate their net capital position by making adjustments to net worth to account for illiquidity. *See* 17 C.F.R. § 240.15c3-1(a), (c)(2). The rule requires broker-dealers to maintain their required net capital continuously, demonstrating "moment-to-moment" compliance. *See NASD Notice to Members 07-16*, 2007 NASD LEXIS 36, at *1 (Apr. 2007). Broker-dealers are prohibited from continuing to engage in a securities business if their net capital falls below the requirement. *See id.* A violation of the net capital rule also is a violation of FINRA Rule 2010. *See Dep't of Enforcement v. Fox & Co. Invs., Inc.*, Complaint No. C3A033017, 2005 NASD Discip. LEXIS 5, at *19 (NASD NAC Feb. 24, 2005), *aff'd*, 58 S.E.C. 873, 883 (2005).

On appeal, Geary does not dispute that GSI was a broker-dealer that received customer checks made payable to itself and operated a securities business throughout the relevant period in May 2009 and February 2010. Thus, pursuant to the minimum requirements set forth in Exchange Act Rule 15c3-1(a)(2)(i), GSI was required to maintain minimum net capital of $250,000 throughout the relevant period.[1]

Based on our de novo review, we find that GSI lacked the required net capital on certain days in May 2009 and February 2010. We also find Geary is liable under FINRA Rule 2010 for these violations because he permitted GSI to operate a securities business while it lacked the required net capital.

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[1] The Firm also made regulatory filings throughout the relevant period indicating that it was subject to a $250,000 minimum net capital requirement.

A. May 2009 Net Capital Violation

The Hearing Panel found that GSI operated a securities business while it lacked the required net capital on May 28 and 29, 2009. We agree.

1. The CEMP Program

During the financial downturn, securities rating organizations were downgrading Collateralized Mortgage Obligations ("CMOs"). As a result, the price of CMOs was dropping precipitously, and the market was flooded with sellers. In or about 2009, Geary came up with the idea to buy reduced-price CMOs and improve their credit rating by combining them with treasury bonds. He called the plan "Credit Enhanced Mortgage Pool" or "CEMP."

In early May 2009, Geary discussed the CEMP plan with Frager, who had prior experience relating to the resecuritization of fixed income instruments. Frager prepared a bullet point presentation for Geary explaining what he should do to implement the CEMP plan. Among other things, Frager explained to Geary that Geary would need to create a special purpose entity because GSI lacked the capital to repackage the CMOs. Frager also told Geary that GSI should only serve as a placement agent and should not acquire the CMOs.[2]

Geary acknowledges that Frager told him that he needed to create a separate entity to do the CEMP transactions. Geary does not concede, however, that he understood that GSI would have a net capital problem if the Firm were to acquire the CMOs while implementing the CEMP program.

2. May 2009 Events

Geary had a long-standing and wealthy customer named JM, who owned Frontier State Bank ("Frontier") in Oklahoma City. Geary previously had sold private label CMOs to Frontier and other banks. According to Geary, on May 1, 2009, Frontier received a letter from the FDIC advising the bank of an upcoming examination and informing it that it would have to adjust its positions in private label securities and inject more capital into the bank. In May 2009, JM made numerous transfers from his personal accounts at the bank to his accounts at GSI.[3] In late May 2009, Frontier solicited bids for its private label CMOs.

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[2] Based on Frager's advice, Geary approached an Oklahoma law firm to establish a special purpose entity to create and issue the products. Frager told Geary that he did not believe that the Oklahoma law firm had sufficient experience, so Geary retained a more experienced law firm in New York. The New York law firm created a special purpose entity, and the entity closed its first CEMP transaction in September 2009.

[3] Geary testified JM did so to strengthen Frontier's equity-to-asset ratio.

On Thursday, May 28, 2009, Geary submitted the high bid for 13 private label CMOs from Frontier and caused GSI to buy them for $76.7 million. Geary did not talk to anyone at the Firm prior to the transaction. Geary testified that he intended to use the CMOs for the CEMP plan, and he expected to close the first transaction in two to three weeks. The CMOs were taken into a Firm proprietary account at GSI's clearing firm, Pershing LLC ("Pershing"), and Pershing transferred funds to Frontier to pay for the purchase. Geary testified that he expected Pershing to hold the CMOs for GSI's account and charge GSI interest.

The next day, Pershing discovered it had paid Frontier, but it had not received any payment from GSI for the transaction. Therefore, Pershing issued a margin call and sought payment from GSI.[4] Geary asked Pershing to extend credit to GSI for the securities. Pershing personnel declined because Pershing had a policy against extending credit for CMO purchases.

On Saturday, May 30, 2009, Geary emailed Frager, "I may need to visit with you on Monday morning as to how [GSI], with Pershing's help, can carry a group of [private label CMOs] for the ten, fifteen days it would take" to repackage the CMOs and sell them. Frager telephoned Geary on June 1, 2009, and Geary told him that he purchased the CMOs with the intention of holding them for weeks for the CEMP project. Frager told Geary the securities could not be in the Firm's account, and Geary said he would move them.

Geary thereafter contacted JM, who agreed to buy the CMOs and instructed Geary to divide them between the GSI account of JM's foundation and JM's personal account at GSI. JM did not have sufficient funds to cover the entire purchase. He purchased some of the CMOs on June 1, 2009, and he asked Geary to find out whether Pershing would let him buy the remaining CMOs on margin. Pershing personnel declined. On June 3, 2009, JM deposited funds sufficient to purchase the remainder of the CMOs.[5]

The Firm did not report the CMOs as an inventory position on its May 2009 FOCUS report. The May 2009 FOCUS report reflected that GSI had net capital of $1,026,261 at the end of May 2009. Frager prepared GSI's May 2009 FOCUS report, and Geary was not consulted or involved in any respect.

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[4] At the hearing, Pershing personnel testified that the transactions were large and resulted in a "fairly large" margin call of approximately $32 million. Pershing's Director of Operations in Los Angeles also noted that the price that GSI paid for the CMOs was higher than the price at which Pershing carried the CMOs on its books, resulting in "deficit equity in the account."

[5] At the time of transaction, Frontier had a high troubled asset ratio. Pershing personnel testified that they were concerned at the time that the bank might be selling distressed assets. They later became even more concerned when they discovered that the purchaser of the CMOs from GSI was one of the controlling members of Frontier. Pershing personnel speculated that the bank may have been engaging in some "financial accounting" and therefore filed an internal incident report.

3. FINRA's November 2009 On-Site Examination

In November 2009, the Oklahoma Department of Securities advised FINRA of GSI's CMO purchase and a potential net capital violation. FINRA staff thereafter conducted an on-site examination to review GSI's net capital position at the end of May 2009. FINRA staff determined that GSI had a deficit net capital position of roughly $11.5 million on May 28 and 29, 2009, as a result of holding the CMOs in the Firm's proprietary account, which was not reflected in its May 2009 FOCUS report.

During the on-site visit, FINRA staff spoke to Frager by telephone. FINRA staff explained that the Firm had been in violation of its net capital requirement on May 28 and 29, 2009, as a result of the CMO purchase and requested that GSI file a net capital deficiency notice. Frager asserted that GSI did not have a net capital deficiency because the CMOs had been purchased for a customer (i.e., JM) and not for the Firm. Frager declined to file the net capital deficiency notice. According to the FINRA examiner, Frager told him that he was going to contact Pershing to have the CMO trades "corrected." The evidence reflects that, in November 2009, Frager requested that Pershing change both the trade dates and the settlement dates for the CMO sales to JM and JM's foundation from June 1 and 3, 2009, to May 28, 2009 (which was also the trade date and settlement date of GSI's purchase of the CMOs from Frontier). Pershing changed the trade date to May 28, 2009, but it did not change the settlement date, which remained June 1 and 3, 2009.

Frager did not consult with Geary prior to declining FINRA's request to file the net capital deficiency notice. FINRA staff requested and received from GSI corrected trade confirmations and thereafter had a follow up conversation with Frager. Frager continued to assert that GSI did not have a net capital deficiency. The last time FINRA discussed the matter with Frager prior to this litigation was November 2009. FINRA staff never discussed or followed up with Geary about the issue. According to Frager, Geary was not involved because "it was an accounting issue. It was not . . . a net capital issue. It really was an accounting issue."

4. GSI Operated While It Lacked the Required Net Capital in May 2009

It is undisputed that GSI continued to operate throughout the relevant period. On appeal, Geary argues that GSI never had a net capital deficiency in May 2009. We disagree. When GSI purchased the CMOs on May 28, 2009, for $76.7 million, its account at Pershing reflected a long securities position until June 3, 2009, when all of the securities had been sold to JM and JM's foundation. Because GSI had not paid for the CMOs, it should have recorded a corresponding liability to Pershing in the interim; moreover, GSI was required to deduct a 15 percent haircut on the CMOs for its net capital computation, equating to approximately $11.5 million.[6]

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[6] A broker-dealer's net capital is determined by deducting the total haircut, along with other adjustments, from the broker's net worth. *See* 17 C.F.R. § 240.15c3-1(c)(2). Pursuant to Exchange Act Rule 15c3-1, the CMOs were subject to a 15 percent haircut on the market value of the CMOs. *See* 17 C.F.R. § 240.15c3-1(c)(2)(vi)(J).

On appeal, Geary argues that GSI had no position in the CMOs on May 28 and May 29, 2009, because the trade dates of the CMO sales to JM and JM's foundation had been changed, with Pershing's acquiescence, to May 28, 2009. As a result, GSI incurred no liability to Pershing and was not required to deduct a haircut. We are not persuaded. "[I]t is essential that a firm monitor its net capital compliance on an ongoing basis on the basis of records that are reliable and up-to-date." *Hutchinson Fin. Corp.*, 51 S.E.C. 398, 403 (1993). The overwhelming evidence reflects that the CMOs were in GSI's inventory on May 28 and 29, 2009, and that they remained there until GSI sold them to JM and JM's foundation on June 1 and 3, 2009. Geary's own testimony supports this finding. Among other things, Geary testified at the hearing that he purchased the CMOs on behalf of GSI for the CEMP program and that, at the time of the purchase, he did not have a customer in mind to receive the CMOs from GSI, he had no commitment from JM or JM's foundation to buy the CMOs from GSI, and he expected Pershing to hold the securities for GSI's account and to charge GSI interest for doing so.[7] Testimony by other GSI employees and Pershing representatives also support the finding that the CMO trades were not a riskless principal transaction and that the transaction resulted in a net capital deficiency at GSI. Frager's repapering of the transactions, and Pershing's acquiescence, does not change the substance or timing of the transactions. *See id.* ("[W]e generally have been unreceptive to attempts to adjust net capital computations with documentation obtained after the date as of which the computations were made.").[8]

In summary, Geary's defenses lack evidentiary support and do not obviate the fact that GSI violated the net capital rule by conducting a securities business with less than the $250,000 required net capital on May 28 and 29, 2009. We therefore affirm the Hearing Panel's findings that GSI violated the net capital rule in May 2009.

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[7] At an on-the-record interview before FINRA, Geary testified, "[Frager] says okay, [the CMOs] were never meant for the firm. They were just meant for [JM's foundation] and [JM] and I will backdate the tickets. So I guess he backdated them to the 28th day . . . . And then [Frager] ultimately backdated the tickets to make the [net] capital violation go away." Frager's rationale for repapering the transactions in November does not alter the fact that Geary did not have a customer commitment at the time GSI purchased the CMOs.

[8] At the hearing, a FINRA examiner incorrectly testified that Pershing had rejected GSI's efforts to change the trade dates for the sale of the CMOs from GSI to JM and JM's foundation to May 28, 2009. As discussed above, while Pershing had rejected GSI's efforts to change the *settlement* dates for those transactions to May 28, Frager was able to change the *trade* dates to May 28. On appeal, Geary argues that the FINRA examiner's mistake is significant because Enforcement's net capital expert testified that a firm's liability arises on the trade date when the firm buys, and the liability disappears on the trade date when the firm sells. Geary's argument ignores that the expert later testified that GSI's repapering of the trade date did not reflect the reality of the transaction. We agree and note the record is replete with evidence that GSI did not contract to sell the CMOs until June 1 and 3, 2009.

B. February 2010 Net Capital Violation

The Hearing Panel found that GSI operated a securities business while it lacked the required net capital in February 2010. We agree.

According to Frager, he was on-site at GSI in January 2010 to complete the Firm's December 2009 FOCUS report and other year-end reports. Frager had warned Geary in the months prior that GSI's net capital was in continuous decline. Frager told Geary that the Firm needed at least $500,000 in additional capital and that Geary needed to infuse the Firm with capital, either with the profits GSI anticipated from an ongoing CEMP transaction or from another source. Frager also told Geary that the Firm should consider amending its membership agreement with FINRA to drop its net capital requirement to $100,000, but that was not done.

According to Frager, he previously told Geary and AR (the Firm's CCO and on-site FINOP) the implications of the Firm violating the net capital rule.[9] At the hearing, Frager emphasized that Geary recently had passed the general securities principal test, "so he knew what had to happen." According to Geary, Frager "generally spoke about . . . a net capital violation" and told him that GSI must stop writing tickets if the Firm went below its net capital requirement.

In January 2010, Geary continued to work on a CEMP transaction that had failed to close in December 2009. On January 20, 2010, Frager sent an email to the FINRA regulatory coordinator for GSI, which read:

> On Friday the 22nd, [GSI] currently plans on the closing of CEMP 2010-1 resecuritization trust, which in and of itself will restore significant capital to the broker-dealer entity. If for some reason the closing is delayed, I have received assurances that the parent company [owned by Geary and his wife] will arrange to infuse additional capital into the [Firm] next week.

The CEMP transaction did not close at the end of January.

On or about February 4, 2010, DH (the Firm's on-site accountant and bookkeeper) told Geary that, based on her calculations, she believed the Firm had gone approximately $20,000 below its net capital requirement. Geary testified that he told DH to contact Frager. Geary also called his bank that same day and inquired whether GSI's parent company could borrow $750,000 that would be repaid mid-April after the CEMP transaction and other transactions closed.[10] While waiting for the loan, on February 5, 2010, Geary transferred $75,000 from his

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[9] Frager testified that he also told Geary the implications of the Firm violating the net capital rule during his January 2010 visit.

[10] Geary, on behalf of the parent company, had already paid down $2.5 million of his original $5 million loan ahead of schedule, so he expected the bank would loan him the money.

personal account to the Firm. Despite the bank's assurances to Geary, the $750,000 loan from the bank was not immediately forthcoming. Geary continued to follow up with the bank's CEO and ultimately went to a bank directors' meeting on February 16, 2010, to plead his case. On February 26, 2010, the bank disbursed the funds to Geary.[11]

On or about February 10, 2010, Frager testified he learned from DH that the Firm had fallen below its required minimum net capital of $250,000. Frager testified he was surprised because he knew DH was having daily conversations with Geary. Frager also thought DH would have told him that the Firm was approaching the net capital threshold because DH also spoke to Frager almost every day. On February 10, 2010, AR emailed Frager and informed him that she had left a message for FINRA staff and suggested that GSI did not need to send an email to GSI's brokers to stop writing tickets "until we have had discussions with FINRA." Frager responded that same day, writing, "I left you a voice mail instructing you **not** to send out any notice to our brokers. I spoke to [DH], Keith [Geary], ... I will file the notice today . . . . [The bank] has a Board of Directors meeting on Tuesday to provide the Geary Cos. with additional funds."

Frager filed the Firm's first net capital deficiency notice on February 10, 2010. In the notice, Frager noted that GSI expected to receive $500,000 from its parent company on February 16, 2010. From February 10, 2010, onward, DH prepared daily net capital computations for Frager. DH also communicated daily with Geary and together they reviewed the numbers from the GSI's clearing firm and the Firm's net capital calculation.

Frager spoke with Geary on multiple occasions during February 2010. According to Geary, Frager called him sometime between February 10 and 12, 2010, and told him that the Firm had fallen below its net capital requirement. Frager told Geary that Geary needed to infuse capital into GSI and that having "net capital violations means you don't write tickets, you just quit doing business in the [Firm]." According to Frager, Geary made "repeated assurances" during February 2010 that he was going to obtain additional funding for the Firm. Geary told Frager that he was obtaining a bank loan, and he gave Frager the bank's contact information, so Frager could contact the bank himself to confirm that it was going to lend Geary money.

On February 12, 2010, Frager filed a second notice of net capital deficiency on behalf of GSI. Frager again noted that GSI expected to receive $500,000 from its parent company on February 16, 2010. Notwithstanding Frager's notation, GSI continued to be net capital deficient until February 26, 2010, when Geary infused the Firm with an additional $500,000. On February 26, 2010, the Firm filed a third notice of net capital deficiency. In the notice, Frager noted, "[p]arent company reduced a non-allowable receivable on Feb. 26, 2010 by a cash payment and capital compliance regained."

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[11] According to Geary, had he known that it would have taken until February 26, 2010, to receive the funds, he would have pursued another source of funding.

On appeal, Geary does not dispute that GSI violated the net capital rule by conducting a securities business with less than $250,000 in net capital in February 2010.[12] The evidence supports that GSI effected securities transactions and had a net capital deficiency ranging from $3,903 to $131,273.74 for 15 days during the period beginning February 2, 2010, through February 25, 2010.[13] We therefore affirm the Hearing Panel's findings that GSI violated the net capital rule in February 2010.

C. Geary Permitted GSI to Operate While the Firm Lacked the Required Net Capital

The Hearing Panel found that Geary violated FINRA Rule 2010 by permitting GSI to conduct a securities business in May 2009 and February 2010 while it lacked the required minimum net capital. We agree.

FINRA Rule 2010 requires members and associated persons in the conduct of their business to observe high standards of commercial honor and just and equitable principles of trade. The Commission has found that an officer or executive at a firm may be liable under FINRA Rule 2010 for a firm's net capital violations. *See Rani T. Jarkas*, Exchange Act Release No. 77503, 2016 SEC LEXIS 1285, at *24 (Apr. 1, 2016) (finding firm's CEO violated NASD 2110 and FINRA Rule 2010 because he permitted his firm to conduct a securities business without sufficient net capital); *Fox & Co. Invs., Inc.*, 58 S.E.C. 873, 883 (2005) (finding the firm's president violated NASD Rule 2110 because he permitted his firm to conduct a securities business without sufficient net capital); *Paul Joseph Benz*, 58 S.E.C. 34, at 40-41 (2005) (finding the firm's president violated NASD Rule 2110 because he was responsible for his firm's violation of the net capital rule); *Kirk A. Knapp*, 51 S.E.C. 115, 126 (1992) (finding the chief shareholder and executive liable for the firm's net capital and recordkeeping violations because he had proposed many of the violative transactions, controlled the FINOP, and dictated the operations of the firm); *see also Dep't of Enforcement v. Block*, Complaint No. C05990026, 2001 NASD Discip. LEXIS 35, at *16 (NASD NAC Aug. 16, 2001) (finding chief executive officer responsible for the firm's net capital violation because he co-supervised the FINOP).

Geary was responsible for GSI's net capital violations in May 2009 and February 2010. Geary's own missteps caused the net capital violation in May 2009 because the CMO trades were placed at his request on behalf of the Firm. He knew or should have known that his trading would cause a net capital violation. Moreover, Frager specifically advised Geary that GSI could

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12 Instead, Geary argues that the Hearing Panel's characterization of his conduct is not adequately supported by the facts. We address these arguments in Part IV (Sanctions) of this decision.

13 At the hearing, Enforcement presented evidence that the Firm was below its minimum net capital requirement for 16 days between January 31, 2010, and February 25, 2010. Because the complaint alleged that Firm was below its minimum net capital requirement between February 2, 2010, and February 25, 2010, we limit our findings to those allegations.

not purchase the CMOs, but Geary did so anyway. Then, in February 2010, Geary knowingly permitted GSI to continue to operate a securities business while the Firm lacked the required net capital.

We need not find that Geary acted with scienter to find him liable. *See, e.g.*, *Jarkas*, 2016 SEC LEXIS 1285, at*18 (finding the firm's president's intent to violate net capital rule was irrelevant to finding that he violated NASD Rule 2110 and FINRA Rule 2010); *First Heritage Inv. Co.*, 51 S.E.C. 953, 957 n.15 (1994) (rejecting claim that Exchange Act Rule 15c3-1 has an implicit scienter requirement); *Hutchinson Fin. Corp.*, 51 S.E.C. at 403 (finding firm's president violated predecessor to NASD Rule 2110 and FINRA Rule 2010 by allowing his firm's inadvertent net capital violation even though there was no showing that he intended a net capital deficiency). Thus, it is irrelevant whether Geary intended to trigger a net capital deficiency when he caused GSI to purchase the CMOs in May 2009. Geary's mental state likewise is irrelevant with respect to the February 2010 net capital violation for liability purposes.

Geary's reliance on and deference toward Frager and AR likewise does not preclude a finding of liability in this instance. "[T]he FINOP's role is to ensure that the firm complies with applicable net capital, recordkeeping and other financial and operational rules. The FINOP, however, does not act independently of those who control the operations of the firm." *Jarkas*, 2016 SEC LEXIS 1285, at *22. Indeed, "[o]fficers of securities firms bear a heavy responsibility in ensuring that the firm compl[ies] with all applicable rules and regulations[,] including the duty of ensuring that the firm comply with the net capital requirement." *Fox & Co. Invs., Inc.*, 58 S.E.C. at 889 (internal quotations and citations omitted).

As president and CEO of GSI, Geary ultimately was responsible for ensuring that the Firm complied with all regulatory requirements. He also controlled those responsible for the Firm's financial recordkeeping and net capital reporting. Geary not only caused the May 2009 net capital violation through his proprietary trading, but he had actual knowledge of the Firm's net capital insufficiency as of February 4, 2010, but nonetheless permitted the Firm to effect securities transactions.[14] Thus, any claimed lack of awareness or involvement with respect to requirements surrounding GSI's financial reporting does not negate Geary's responsibilities as president of the Firm. *Cf. Block*, 2001 NASD Discip. LEXIS 35, at *16 ("[E]ven if there has been an effective delegation of financial compliance responsibilities, a controlling executive who is directly involved in accounting and net capital violations incurs responsibility for those violations.").

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[14] Geary should have been monitoring the Firm's net capital compliance even prior to February 4, 2010, because, among other things, Frager had warned Geary in the months prior that GSI's net capital was in continuous decline and that the Firm would need additional capital. *Cf. Hutchinson Fin. Corp.*, 51 S.E.C. at 404 (affirming the finding that firm's president was responsible for net capital violation where he ignored "warning signs" and "took no steps to assure the firm's ongoing net capital compliance").

Based on the foregoing, we conclude that Geary permitted GSI to conduct a securities business while it lacked the required net capital in violation of FINRA Rule 2010.

IV. Sanctions

The Hearing Panel separately sanctioned Geary for each violation. After an independent review of the record, we modify these sanctions. Because we find that Geary twice permitted GSI to operate while it lacked the required net capital, any sanction that we impose should be designed and tailored to deter the same underlying misconduct. We therefore impose a unitary sanction for these two violations comprised of a $20,000 fine, 30-business-day suspension in all capacities, and a bar in all principal and supervisory capacities.

A. Unitary Sanction

For net capital violations, the FINRA Sanction Guidelines ("Guidelines") recommend a fine of between $1,000 and $73,000 and a suspension of the "responsible party" in any or all capacities for up to 30 business days.[15] In egregious cases, the Guidelines advise adjudicators to consider a lengthier suspension of up to two years or a bar.[16] The Guidelines instruct adjudicators to consider whether the firm continued to operate while knowing of deficiencies and whether the respondent attempted to conceal deficiencies.[17]

As president and CEO of GSI, Geary was directly responsible for the events that triggered both of the Firm's net capital deficiencies. With respect to the May 2009 net capital violation, we find that Geary knew or should have known that GSI did not have sufficient capital to hold the CMOs in the Firm's account. Although Geary acknowledged that Frager told him that he needed to create a separate entity to do the CEMP transactions, Geary argues that he did not understand that GSI would have a net capital problem if the Firm acquired the CMOs in implementing the CEMP program. At the hearing, when asked whether he specifically warned Geary of "a potential net capital violation" during their May 2009 discussion regarding the CEMP program, Frager testified, "[w]ell, there really was no net capital implications, you know, because I knew he knew and we knew that we weren't buying this for our own, for own inventory. We were . . . creating a product as a placement agent only."[18] We find that Frager told Geary and Geary knew that GSI could not purchase the CMOs for the Firm's inventory, and

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15 *FINRA Sanction Guidelines*, 33 (2015), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

16 *Id.*

17 *Id.*

18 Frager also testified that he never got the impression that Geary was "consciously disregarding the net capital requirements for the firm."

Geary should have known that GSI's acquisition of the CMOs would cause GSI to have a net capital deficiency. We find that Geary's conduct was at a minimum reckless in light of the magnitude of the trade and the explicit advice he previously received from Frager and because he did not consult Frager prior to the purchase.[19] *Cf. Jarkas*, 2016 SEC LEXIS 1285, at *22 (finding that firm's president should have recognized the regulatory implications of his proprietary trading and, at the very least, alerted the FINOP).

With respect to the February 2010 net capital violation, it is undisputed that Geary knew that GSI was net capital deficient for at least 13 days, as a result of Geary's failure to infuse GSI with more capital, yet Geary permitted the Firm to continue to operate. When Geary learned about the deficiency from DH on or about February 4, 2010, Geary took numerous steps to attempt to infuse GSI with capital to correct the net capital deficiency, including immediately transferring $75,000 of personal funds and taking steps to obtain a $750,000 loan. These actions, however, do not obviate the fact that Geary knowingly permitted the Firm to operate below its required net capital minimum, which we find aggravating.

Geary testified he left net capital issues to the FINOP, but, with the benefit of hindsight, he wished he would have stepped in. Indeed, as president of GSI, Geary was ultimately responsible for GSI's net capital compliance. On appeal, Geary asserts that Frager did not direct him to have the Firm cease doing business, and Frager told GSI's on-site FINOP, AR, not to tell brokers to stop placing orders. The fact that Frager told AR to continue to have brokers take orders does not absolve Geary of responsibility for his own inaction.[20] Moreover, according to Geary, Frager had previously told him that GSI must stop writing tickets if the Firm went below its net capital requirement.[21] Even GSI's written supervisory procedures explicitly provided that

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[19] The Hearing Panel found that Geary knew he was acting improperly when he acquired the CMOs on behalf of GSI and therefore did not consult Frager prior to doing so.

[20] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 7).

[21] The Hearing Panel found that Geary's suggestions that he did not have the "knowledge base" to realize that the Firm should have ceased doing business was not credible in light of Geary's involvement in discussions with Frager and AR about whether to stop doing business. The NAC gives great weight and deference to credibility determinations by a Hearing Panel, which can only be overcome by substantial record evidence. *See Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *18 (Aug. 22, 2008). At the hearing, when asked whether he spoke to Geary in February 2010 about whether the Firm needed to stop doing business, Frager testified he spoke to AR about what GSI needed to do. Frager further testified that he did not know about AR's conversations about the matter with Geary. AR did not testify at the hearing but provided a statement. She said that her recollection relating to GSI ceasing business was limited to the email she received from Frager instructing her not to notify brokers. We do not need to resolve the factual discrepancy regarding whether Geary was involved in discussions with Frager and AR because, as Geary acknowledges, Frager had previously told Geary that GSI must stop writing tickets if the Firm went below its net capital requirement.

the Firm must stop doing business if it fell below the minimum net capital threshold. We find Geary's contention that Frager needed to direct him to have the Firm stop doing business is unreasonable because it ignores Geary's responsibility as president of GSI and Geary's ultimate control over the Firm and its financial affairs. Accordingly, we also find it aggravating that Geary permitted the Firm to continue to operate while knowing of deficiencies.

In regard to the second principal consideration for determining sanctions for net capital violations, we find there is no evidence in the record that Geary tried to conceal GSI's net capital deficiencies. When FINRA inquired at an on-the-record interview about the violation in May 2009, Geary was forthcoming and testified that Frager backdated the trade date "to make the capital violation go away." With respect to the February 2010 net capital violation, Geary argues that he "acknowledged the alleged misconduct to FINRA." Whereas GSI was obligated under Exchange Act Rule 17a-11(b) to file the deficiency notices, we note other instances in which GSI alerted FINRA to the net capital issues at the Firm.[22] For instance, prior to the February 2010 net capital violation, Frager emailed GSI's FINRA regulatory coordinator for GSI on January 22, 2010, informing FINRA that GSI planned to close a CEMP transaction "which in and of itself will restore significant capital to the broker-dealer entity," and, if for some reason the closing is delayed, that GSI's parent company "will arrange to infuse additional capital into the [Firm] next week." And on February 10, 2010, in addition to Frager filing the first net capital deficiency notice on behalf of the Firm, AR left a message for FINRA staff regarding net capital issues at the Firm. Although the Firm did not file its first net capital deficiency notice until February 10—six days after Geary learned about the net capital deficiency—we attribute this delay to sloppiness as opposed to an effort to conceal.

Having examined the principal considerations for determining sanctions for net capital violations, we next turn to the remaining relevant principal considerations and general principles applicable to all violations. First, we note that "[n]ot every consideration listed in the guidelines has the potential to be mitigating." *Siegel v. SEC*, 592 F.3d 147, 157 (D.C. Cir. 2010). For instance, Geary argues that the Hearing Panel ignored his lack of disciplinary history over his 16-year career in the securities industry. But as the Commission has repeatedly held, the lack of a disciplinary history is a not mitigating factor.[23] *See John B. Busacca, III,* Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *64 n.77 (Nov. 12, 2010), *aff'd*, 449 F. App'x. 886 (11th Cir. 2011); *see also Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *23 (Nov. 8, 2006) (stating that the absence of disciplinary history is not mitigating because "an associated person should not be rewarded for acting in accordance with his duties as a securities professional"). Similarly, the lack of customer complaints also is not mitigating. *See Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *27 (Nov. 9, 2009) ("The fact that many of the customers did not lose money and did not complain about the violations does not further mitigate [respondent's] misconduct").

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22 *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2).

23 *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 1).

It likewise is not mitigating that Geary's misconduct did not result in customer harm or that the conduct did not result in the potential for personal gain.[24] *See, e.g., Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *26 & n.25 (Feb. 24, 2012) (internal quotations omitted) ("The absence of monetary gain or customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally."). Of course, by permitting GSI to effect securities transactions while below its minimum net capital requirement, Geary exposed the Firm's customers to potential harm and undue risks. *See Fox & Co. Invs., Inc.*, 58 S.E.C. at 897 ("By conducting business when the Firm was not in compliance with net capital requirements, [respondents] subjected the Firm's customers to undue risks."). In addition, Geary's actions enabled him and the Firm to continue to generate income, resulting in monetary gain. *See id.* at 896.

We agree with Geary that he did not attempt to delay FINRA's investigation, conceal information, or engage in misleading testimony or documentary evidence.[25] Nonetheless, "[w]hen [Geary] registered with [FINRA], he agreed to abide by its rules, and compliance with his obligation to cooperate with an investigation is not a mitigating factor." *Glodek*, 2009 SEC LEXIS 3936, at *28. We note, however, that FINRA staff testified that they found that Geary was cooperative and responsive and provided "substantial assistance" during the course of its investigation, including at the November 2009 exam and at his on-the-record interview in November 2010.[26] We therefore award some mitigation considering Geary's substantial assistance.

Geary argues that the Hearing Panel ignored his subsequent corrective measures with respect to the February 2010 net capital violation.[27] After the intended CEMP transaction did not close in January 2010, DH informed Geary on February 4, 2010, that she believed the Firm had gone approximately $20,000 below its net capital requirement. The uncontroverted record provides that Geary told DH to contact Frager, Geary called his banker that same day and inquired about a loan, and Geary transferred $75,000 from his personal account to the Firm the next day. The $75,000 loan is significant because it should have covered the $20,000 deficiency, as calculated by DH, which we find mitigating. We know, of course, the loan amount was insufficient, and Geary at that point was on direct notice of the Firm's net capital issues. Notwithstanding this knowledge, Geary did not investigate the amount of the net capital deficiency at the time and permitted the Firm to continue to effect securities transactions, which we find aggravating. We also find it aggravating that Frager did not file the first net capital

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24 *See Guidelines*, at 6-7 (Principal Considerations in Determining Sanctions, Nos. 11, 17).

25 *See Guidelines*, at 6-7 (Principal Considerations in Determining Sanctions, Nos. 10, 12).

26 Similarly, Frager and other GSI employees testified at the hearing that they never got the impression that Geary was purposefully disregarding FINRA rules.

27 *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 3).

deficiency notice until February 10, 2010. The record supports, however, that Geary tried throughout February to secure a loan for GSI's parent company to infuse capital into GSI. According to Geary, it "was all he worked on." While none of these actions excuses the fact that he knowingly permitted the Firm to continue to operate while it was below its required minimum net capital, it is readily apparent that Geary was trying in earnest in February 2010 to bring the Firm into net capital compliance.[28]

Geary also argues he did not engage in a pattern of misconduct over an extended period of time, and a net capital deficiency at the Firm was aberrant and not otherwise reflective of the Firm's historical compliance record.[29] Although the May 2009 net capital violation lasted only two days, the CMO transaction created an extremely large deficiency, which we find aggravating. *See Dep't of Enforcement vs. CMG Institutional Trading, LLC*, Complaint No. 2006006890801, 2010 FINRA Discip. LEXIS 7, at *43-44 (FINRA NAC May 3, 2010) (finding respondents' misconduct egregious where it subjected the Firm to a net capital deficiency of roughly $2.2 million). Frager also had warned Geary previously that GSI could not itself engage in the CEMP transactions due to, among other things, a lack of net capital, and Geary proceeded with the CMO transaction without consulting Frager. Less than eight months later, GSI again was net capital deficient for 15 days, 13 days of which Geary knowingly permitted the Firm to operate. Although the collective time period during which GSI continued to operate while net capital deficient was less than three weeks, Geary's attitude about his role and responsibility as president of the Firm with respect to net capital requirements and financial reporting is apparent from the repeated violations. Thus, we find it further aggravating that Geary's firm violated the net capital rule two separate times less than eight months apart, exposing GSI's customers to undue risk. *See Fox & Co. Inv., Inc.*, 58 S.E.C. at 897.

Geary argues that his sanctions should be reduced because he was already sufficiently sanctioned by the Oklahoma Department of Securities. Oklahoma's action involved the same May 2009 and February 2010 net capital violations and additional allegations. Without admitting or denying a violation, Geary agreed to not act as a principal, officer, or director of any broker-dealer in the state of Oklahoma for 25 months. We agree with the Hearing Panel that Geary's settlement with the State of Oklahoma is not sufficient to remedy Geary's violation of FINRA's rules.[30] The Exchange Act "provides several parallel and compatible procedures for

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28 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 4). From February 4, 2010, onward, DH also performed daily net capital calculations. We award no mitigation for this action because Geary still permitted GSI to continue to operate despite DH's calculations showing that GSI was below its required minimum net capital. *See id.* at 3 (Principal Considerations in Determining Sanctions, No. 3).

29 *See id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 8, 9, 16).

30 *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 14) (directing adjudicators to consider "whether another regulator sanctioned the respondent for the same misconduct at issue and whether that sanction provided substantial remediation").

the achievement of its objectives," and FINRA "has an independent statutory mandate to enforce the provisions of the Exchange Act, as well as its own rules." *Kirk A. Knapp*, 51 S.E.C. 115, 130-31 (1992) (rejecting argument that NASD was precluded from pursuing action against respondent that arose from the same misconduct that was already the subject of a Commission administrative action). We note that the Oklahoma consent order is the result of a settlement. Contrary to Geary's argument on appeal, the fact that the sanction imposed by the State of Oklahoma was the result of a settlement is relevant because "pragmatic considerations justify the acceptance of lesser sanctions in negotiating a settlement such as the avoidance of time-and-manpower-consuming adversary proceedings." *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *33 (Feb. 20, 2014) (internal quotations omitted). In addition, the consent order only affected Geary in a principal capacity, under which Geary agreed to not to act as a principal, officer, or director of any Oklahoma broker-dealer for 25 months. We, however, find it necessary to impose sanctions against Geary in his capacity as a general securities representative as well because of the serious consequences of his trading activity. Therefore, whereas we have considered the import of the consent order with the State of Oklahoma, we find that a limited statewide ban does not sufficiently remediate the misconduct at issue.

On appeal, Geary argues that the sanctions imposed by the Hearing Panel constitute an "abuse of discretion." The fact that the Hearing Panel imposed a more stringent sanction than recommended by Enforcement is not problematic. *See Dep't of Enforcement v. Wedbush Secs., Inc.*, Complaint No. 20070094044, 2014 FINRA Discip. LEXIS 40, at *82-83 (FINRA NAC Dec. 11, 2014), *appeal pending*, Admin. Proceeding No. 3-16329 (SEC Jan. 9, 2015). As the Guidelines make clear, adjudicators have broad discretion when assessing sanctions, and the Hearing Panel is free to impose any sanction it sees fit.[31] The NAC also has broad discretion, and "may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction" in its de novo review. FINRA Rule 9348.

Having considered the record in its entirety and the arguments made on appeal, we agree with the Hearing Panel that Geary's misconduct was egregious.[32] A net capital violation may be considered egregious in the absence of fraud or scienter. *See, e.g.*, *Jarkas*, 2016 SEC LEXIS 1285, at *47-48. Indeed, the Guidelines have many provisions recommending sanctions for egregious misconduct for non-fraud, non-scienter based violations, including the Guidelines applicable to net capital violations.

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31 *See Guidelines*, at 2.

32 The fact that the Hearing Panel imposed sanctions without an explicit finding that Geary's conduct was "egregious" is not problematic. The Hearing Panel is not required to make an express finding that a respondent's conduct is egregious in order to impose sanctions for egregious misconduct. The Hearing Panel's finding was implicit its decision, as evidenced by the sanctions the Hearing Panel imposed. In any event, our de novo review of sanctions alleviates any perceived deficiency in the Hearing Panel's decision.

We agree with Geary that his acts were not motivated by fraud. We find, however, that Geary's reckless disregard of the consequences of his proprietary trading in May 2009 and his intentional disregard in February 2010 of the net capital rules and his own Firm's written supervisory procedures, obligating the Firm to cease operations while net capital deficient, warrant significant sanctions.[33] *See William K. Cantrell*, 52 S.E.C. 1322, 1327 (1997) (finding sanctions neither excessive nor oppressive when respondent permitted the firm to operate with substantial net capital deficiencies thereby depriving its customers protections afforded to them by the net capital requirements and exposing them to undue risk).

As the Commission has stated, "[n]et capital violations are serious. The uniform net capital rule is designed to ensure that a broker-dealer will have sufficient liquid assets to satisfy its indebtedness, particularly the claims of its customers." *Edward B. Daroza, Jr.*, 50 S.E.C. 1086 (1992). Moreover, "officers of securities firms bear a heavy responsibility in ensuring that the firm complies with all applicable rules and regulations. This includes the duty of ensuring that the firm comply with the net capital requirements." *Hutchinson Fin. Corp.*, 51 S.E.C. at 404. Geary did not fulfill this duty. Instead, his proprietary trading in May 2009 exposed GSI and its customers to market and net capital risk, and he engaged in this trading despite Frager's insistence that the Firm could not purchase the CMOs. Geary later put GSI and its customers at further risk when he knowingly permitted the Firm to operate while it was below its minimum net capital requirement. His actions showed an abdication of his responsibilities as a principal and a lack of appreciation for the industry's regulatory requirements with respect to financial reporting.

Based on his failure to discharge the significant responsibilities that fall on a firm principal to ensure the firm's compliance with applicable laws, rules, and regulations, we conclude that Geary has demonstrated that he is incapable of acting as a principal. We therefore bar him from acting in any principal or supervisory capacity with any FINRA member firm. We also fine him $20,000 and impose a 30-business-day suspension in all capacities to remediate the misconduct.

B. Inability to Pay

On appeal, Geary argues that the Hearing Panel "failed to adequately assess" his inability to pay and "consider these mitigation factors." We have carefully considered Geary's assertion concerning his financial difficulties and determine that he has failed to demonstrate an inability to pay.

Geary has the burden of demonstrating a bona fide inability to pay. *See Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 8); *Dep't of Enforcement v. Cipriano*, Complaint No. C07050029, 2007 NASD Discip. LEXIS 23, at *43-44 (NASD NAC July 26, 2007) (citing *Toney L. Reed*, 52 S.E.C. 944, 947 n.12 (1996)). A respondent must prove

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33 *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

bona fide insolvency. *See DBCC v. Schiff*, Complaint No. C10970156, 1999 NASD Discip. LEXIS 15, at * 22 (NASD NAC Apr. 9, 1999) (finding that evidence of respondent's negligible net worth and income is not sufficient to prove bona fide insolvency); *Toney L. Reed*, 52 S.E.C. at 947 (holding that respondent has the burden of introducing evidence sufficient to prove bona fide insolvency).

Geary has not met his burden. Geary testified that he currently does not have financial resources to satisfy his unpaid financial obligations or meet all his obligations if he is suspended, but he submitted no additional evidence or any documentation showing financial hardship. This evidence is insufficient under our jurisprudence. *See Dep't of Enforcement v. Levitov*, Complaint No. CAF970011, 2000 NASD Discip. LEXIS 12, at *33-34 (NASD NAC June 28, 2000) ("We require all respondents who wish to make a claim of inability to pay to verify the accuracy of their financial condition through the submission of signed and notarized documents evidencing financial hardship."). Geary also did not demonstrate that he was unable to borrow or otherwise raise additional funds. *Cf. Dep't of Enforcement v. Tomlinson*, Complaint No. 2009017527501, 2014 FINRA Discip. LEXIS 4, at *30-31 (FINRA NAC March 5, 2014) (declining to impose a fine and costs where respondent demonstrated insolvency). Based on the record, we conclude that Geary has not demonstrated an inability to pay.[34]

V. Conclusion

Geary twice permitted his firm to operate a securities business while it lacked the required net capital, in violation of FINRA Rule 2010. For his misconduct, we fine Geary $20,000, impose a 30-business-day suspension in all capacities, and bar him from acting in any principal or supervisory capacity with any FINRA member firm.[35] We also affirm the order to pay hearing costs of $5,056.70.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith
Senior Vice President and Corporate Secretary

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[34] Although we modified the fine in this matter, we did not do so because of an inability to pay, but because we believe that the bar in any principal or supervisory capacity, the suspension, and the $20,000 fine will remediate Geary's misconduct and effectively serve the public interest.

[35] Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be revoked for non-payment.