SECURITIES & EXCHANGE COMMISSION

_____x

In the matter of the Appeal of

KIMBERLY SPRINGSTEEN-ABBOTT,

_____x

APPEAL
OF N.A.C. Decision in
Complaint No. 2011025675501
Kimberly Springsteen-Abbott

ADMIN PRO.3-17560

ORAL ARGUMENT REQUESTED

APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF HER APPEAL

Joel E. Davidson, Esq.
2077 Center Ave, Suite 19J
Ft. Lee, New Jersey 07025
(917) 886-6130
jedlaw47@gmail.com

Attorney for Appellant

Table of Contents

Table of Authorities

Cases **Page**

Statutes

Other Authorities

PRELIMINARY STATEMENT

Appellant Kimberly Springsteen-Abbott ("Appellant"), who had an unblemished 26 plus year career as a registered representative in the securities industry before the matters underlying this proceeding and a related settlement with the U.S. Securities and Exchange Commission[1] ("SEC"), respectfully submits this Memorandum of Law in support of her appeal from an August 23, 2016, decision (the "NAC Decision") of the National Adjudicatory Council ("NAC"), which permanently barred her from the securities industry; ordered her to disgorge $208,953.75 to FINRA, due to misallocations made to certain Funds of which she is a control person ($34,000 more than FINRA's Department of Enforcement (the "DOE") requested); fined her $100,000; and ordered her to pay costs of $11,037.14. Both decisions below should be reversed because they misapply the applicable law, make numerous factual findings which have no support in the record, are arbitrary and capricious, and apply the wrong evidentiary standard.

The NAC and the Hearing Panel made very negative findings with respect to Appellant's credibility and honesty. In fact, both decisions reflect rather extraordinary hostility. As set forth below, in fact these findings were unfounded and erroneous. The decisions accepted the DOE's aggressive argument that Appellant was a liar without giving any consideration to all of the compelling evidence that controverted that evidence. In doing so, the DOE and both decisions below violated the norms for evaluating credibility that governed the proceeding. Having concluded that Appellant was a liar, the Hearing Panel and then the NAC, not all that surprisingly, resolved every issue of fact and law against her.

Once the error in the credibility findings is exposed, the other findings miss the point. There was not one document introduced or one witness presented that showed that Appellant ever knowingly or intentionally misallocated any expense to the Funds or acted in bad faith or

[1] *Commonwealth Income & Growth Fund Inc.*, SEC Release No. 9459, 2013 WL 5405360 (Sept. 27, 2013).

unethically. Nor was there any evidence that she ever knowingly directed anyone to make such misallocations, or that she every knowingly approved such misallocations. Appellant never argued that her voluntary contributions of over $2.4 million to the Funds made any improper allocations proper – she readily acknowledged that when an improper allocation occurred, the Funds were entitled to a refund. Similarly, Appellant did not argue that any particular misallocated expense was exactly offset by a voluntary contribution to the same Fund in the same amount. Further, Appellant argued that the fact that she voluntarily contributed over $2.4 million to the Funds conclusively demonstrates that she did not act unethically or in bad faith.

Underlying the two decisions below is the inference that Appellant wanted to unjustly enrich herself by improperly misallocating expenses to the Funds. This is illogical – if Appellant had desired to avail herself of the additional $208,000 at issue here, she simply would have reduced her voluntary contributions to the Funds by that amount. The bottom line is that the Appellant always tried to place the interests of the Funds first. Unfortunately, due to human error and a flawed and antiquated method for handling the expense reimbursement process, as well as the lack of detection of mistakes by the auditors and other professionals representing the Funds, mistakes that she was not aware of did occur. Once these issues came to Appellant's attention, she voluntarily put in place new procedures that corrected the problem; these new procedures have been reviewed by FINRA in subsequent examinations without any issue. Appellant also recognizes that, as the CEO, she bore ultimate responsibility for what occurred. Her 2013 voluntary SEC settlement, which has been timely satisfied, reflects her cooperation with regulators and does not support FINRA's "lack of remorse" argument. Under these circumstances, for the Extended Hearing Panel and the NAC to have found that errors in allocations made by the staff of CCC were done or directed by Appellant in bad faith or

unethically is clearly erroneous. In light of the above, the finding of unethical or bad faith or dishonest conduct, or conduct inconsistent with just and equitable principles of trade, is wholly illogical and irrational.

As discussed below in Point I, the findings against Appellant and the order to disgorge over $208,953.75 relate to approximately 1,840 items on an American Express charge account that the DOE alleged, but did not prove, were improperly allocated to the Funds. At the hearing, the DOE presented many receipts and documents identifying the existence of non-control person charges, but it is important to note that the DOE failed to provide any support for its business objection to approximately 98% of such charges. The limited evidence presented often involved nothing more than DOE's disagreement with Appellant's business judgment and not any violation of the Funds' offering documents. Further, the DOE then argued that its "proof" regarding one item established the impropriety of every item on each list. Based on this failure of evidence, the Extended Hearing Panel found that Appellant had acted wrongly with respect to over 1,800 expense items. Incredibly, the NAC affirmed, stating:

> Enforcement has the burden of proving a prima facie case based on a preponderance of the evidence that Springsteen-Abbott committed the alleged violation.... *The entire itemized list of the 1,840 charges at issue was presented and accepted into evidence....* We find that, based on the evidence presented, *Enforcement established its prima facie case of her alleged violation. An explanation detailing each of the 1,840 itemized charges was not required. Upon establishing a prima facie case, the burden shifted to Springsteen-Abbott to either discredit or rebut the evidence presented*, which she failed to successfully do.

NAC Decision at 10 (emphasis added; citations omitted).

Simply stated, the DOE presenting an "itemized list" of expense charges does not establish a *prima facie* case against Appellant with respect to every item on the list, does not satisfy the DOE's burden of proof, and does not comport with the fundamental fairness to which

Appellant is entitled. The NAC's act of affirming the findings against Appellant without evidence in the record is no different from an appellate court upholding a prosecutor's conviction against a criminal defendant based only on the prosecutor's putting into evidence a copy of an indictment and the defendant failing to rebut the unproven accusation in the indictment. An indictment does not serve to reverse the prosecutor's burden of proof nor do the spreadsheets introduced by the DOE reverse its burden in this matter. Appellant objected to this failure of proof, but a motion to strike all line items as to which proof of error was not presented by the DOE was rejected by the hearing officer. Accordingly, the decisions below must be reversed.

As discussed below in Point II, equally troubling is the fact that both the Extended Hearing Panel and the NAC found that Appellant acted in bad faith and unethically, even though uncontroverted evidence was presented to the Panel establishing that Appellant voluntarily contributed over $2.4 million to the Funds during the same time period that she was found to have misallocated the $208,000 in expenses. The Extended Hearing Panel found that "such voluntary contributions to the Funds ... would not make her improper allocations of personal expenses to the Funds proper." (Panel Decision at 57.) Agreeing with the Panel and missing the point of this uncontroverted evidence, the NAC simply engaged in an accounting analysis as to whether the $2.4 million lined up with the alleged improper expense charges. (NAC Decision at 11-12 and n.13.) Both the panel and the NAC missed the point that Appellant's voluntary contribution negated any inference of bad faith or unethical conduct.

Finally, as discussed below in Points III though VII, the Panel Decision and the NAC Decision are fatally flawed for additional reasons, including their reliance on findings unsupported by the record and their over-extension of Rule 2010. In addition, as discussed below, the NAC erred in affirming a claim that was neither pleaded nor mentioned in the pre-

hearing brief in applying an erroneous standard of proof and in misapplying the applicable law regarding credibility determinations. Accordingly, for all of the reasons set forth herein, the decisions below should be reversed.

STATEMENT OF FACTS

A. Appellant Took Over Her Deceased Husband's Business, Including Its Flawed Accounting Systems

Mr. George Springsteen founded Commonwealth Capital Corp. ("CCC") and its affiliates, including Commonwealth Capital Securities Corp. ("CCSC") and Commonwealth Income & Growth Fund, Inc. ("CIGF"), and created the funds they sponsored (the "Funds"). Appellant joined CCC in 1997 and later married Mr. Springsteen in 2000. (R. 02060, 5/12/14.) Mr. Springsteen had built a successful business involving the marketing and sale of various funds investing in equipment leases and then leased the equipment, often computer related equipment, to many creditworthy companies.

When Mr. Springsteen passed away in 2006, Appellant took over this family business and met with the national selling group of firms to assure business continuity. CCC, an equipment leasing company and fund sponsor, offered investment programs for accredited and non-accredited investors, through a selling group of FINRA member broker-dealers nationally, and has acquired more than $650 million in operating leases in 49 states and US territories. During its 38 year history, it has sold over $300 million in limited partnership interests in the equipment leases and has grown into one of the leading woman-owned, equipment leasing companies in the United States.

When he started the companies, Mr. Springsteen used a business American Express Card ("the Amex Card") to pay for some of the administrative expenses of the Funds, and allocated those charges on the Amex Card to the Funds, to himself for personal expenses, and to CCC and

CCSC where applicable. After Mr. Springsteen passed away, Appellant continued this practice, including the accounting systems that her late-husband had put into place.

The evidence established that, after 2006, when the monthly American Express bills arrived, the Principal Financial Officer ("PFO"), Lynn Franceschina, allocated expenses, based on her knowledge of regulatory guidelines, guidance from the firm's then general counsel and periodic input from Appellant and Hank Abbott, who later became the President of CCC, and who Appellant subsequently married. The PFO was also one of the American Express cardholders on the same account with Appellant and her new husband, as she handled and coordinated the general purchasing of supplies for the firm. In addition, the Amex card was used to charge travel and related expenses for other CCC employees.

Under the documents governing the relevant companies, as the controlling person, none of Appellant's expenses were supposed to be allocated to the Funds. However, the PFO failed to back out many of Appellant's expenses, such as Appellant's portion of meal expenses from group meals, and some other charges. The PFO would review all the information she gathered and make allocations to the Funds, CCC or CCSC.[2] The PFO then gave the accounting department the marked up Amex bill with her additional allocations. The accounting department provided Appellant with an allocation totals sheet for the purpose of obtaining authority for payment of the bill. (R. 01401-04; R. 01430-34; R. 01621; D. 12.)

B. Appellant Reasonably Relied on Her PFO and Accounting Staff

During that period, Appellant relied upon the general allocations made by the PFO, through her accounting staff, and typically just initialed the summary sheet to approve payments. Because there were controls in place to prevent employees from approving high dollar purchases

[2] A "large portion" of the allegedly improper expenses were actually charged on Hank Abbott's AMEX business credit card. (D. 9.)

and invoices, Appellant did not study and analyze how each one of the hundreds of items was being allocated. She relied upon the mistaken belief that what she was given to review was in accordance with the appropriate rules and procedures. Thus, she was unaware before the DOE complaint that the PFO forgot that all meals or expenses for Appellant, as a "Control Person," including her portion of working business meals she had with her husband, had to be backed out from the allocation of expenses from the Funds. (R. 01661.) As Appellant testified at the disciplinary hearing "Lynn [the PFO] realized that she had not backed out my portion of the meals ... and that's why she made those adjustments". (R. 00921.)

Yet, without any factual basis, the DOE argued that the mistaken expense submissions were due to Appellant's intentional wrongdoing and deliberate misallocation even though Appellant testified that she had understood that "none of my charges as a control person would be allocated to the funds" (R. 01662, 512811 4) and that "[t]he American Express voucher allocation sheet I approved and signed. That's what I approved." (R. 1648.) Appellant did not knowingly or recklessly engage in "allocating personal expenses" to the Funds. (D. 56). Indeed, the evidence established that Appellant used her personal bank and credit cards for personal expenses of $220,000 (RX-13 and RX-14) during this time period.

C. Appellant Reasonably Relied on Outside Professionals

In addition to relying on the PFO and other internal accounting personnel, Appellant engaged premiere legal and accounting advisors, even though the expense of this effort was more than most small family businesses would wish to incur. Appellant employed law firms such as Blank Rome, Reed Smith and Greenberg Traurig as counsel to the Funds, CCC, CIGF, and CCSC. The accountants retained were Ernst & Young and later Asher & Co., a major Philadelphia auditing firm that was acquired by BDO in 2012. Notably, no audit management

letter ever cited any misallocation or any internal control issues relating to the allocation of expenses. Additionally, neither her accountants nor her lawyers addressed any issues relating to allocable expenses until 2011, when the SEC looked at the control person issue. (R. 01498-99, 5/7/2014.) (See Audit management letters, Additional Evidence Items 2 and 4.)

D. FINRA Conceded To Multiple Errors In Its Original Claims (Withdraws One Respondent, Two Claims and Hundreds of Expenses In Its Amended Claim)

After conducting an investigation, the DOE filed an original complaint that included some 2,282 Amex charges that FINRA contended were improperly allocated from the Amex card to the Funds. (R. 00001-90.) The original complaint also named CCSC, the FINRA-member broker-dealer that had no role in the handling of these expenses, as a respondent, and included charges other than the Rule 2010 claim now at issue. Despite a formal request from Appellant's counsel prior to the complaint being filed seeking the items list, the DOE had refused to provide any information to Appellant or counsel regarding the basis upon which charges were selected or why they were being challenged by FINRA. (CR. 011996.) The allocations in the DOE charge primarily involved expenses charged on the Amex card by Mr. Abbott and the PFO. The 2,200 charges aggregated $340,000.

The DOE admitted its first error when it later amended its complaint in 2013 to remove CCSC, the broker-dealer, from the case – the withdrawal of claims against CCSC was a clear concession that no broker-dealer activity is involved in this case. The DOE admitted its second and third errors when it dropped two counts against the Appellant for misrepresentation and falsification of a document, based on proof provided to them, recognizing that the allegations were false. The DOE admitted its fourth error when the amended charge filed also reduced the complaint item list of disputed charges with the total allocated expenses complained of from

$340,000 to $208,000 (R. 00235). The DOE apparently recognized that the original complaint contained approximately 400 errors and inflated the challenged charges by over 70%.

E. During the Hearing, the DOE Recognized That Another $40,000 in Expenses Were Not Improper

The DOE admitted its fifth error during the hearing, when it the further reduced its claims by another $40,000, eventually seeking restitution of $174,320 (CX-61), further reducing the previous adjustments made by FINRA. (See Cl. Br. R. 06914). The DOE admitted that 33 of the charges it twice had claimed to be misallocated were, in fact, never allocated to the Funds. (R.01205.) In its closing argument, the DOE, while seeking disgorgement of $174,320 admitted to the panel that there was a possible set-off to the $208,953 of $63,622, which would leave $144,378 as alleged misallocations. FINRA also conceded that it could not explain why $63,622 be subtracted from the $208,953. (CR. 02178-79.) All of the above errors by the DOE apparently led the Extended Hearing Panel to commit yet another error – despite the DOE asking for $174,340, and conceding a lower figure might apply, the Extended Hearing Panel imposed restitution totaling $208,953, an amount not supported by the evidence in the record.

F. The DOE Only Presented Evidence that 2% of the 1,840 Expense Items At Issue Were Improperly Allocated

At the hearing, the DOE presented many receipts and documents identifying the existence of charges. However, *the DOE only presented evidence supporting its objections to the allocation of approximately 2% of these nom-control person alleged improper charges.* For the remaining 98% the DOE simply presented a series of spreadsheets setting forth all expenses of the same category. DOE then argued that its "proof" regarding one item established the impropriety of every item on each list. Based on this failure of evidence, the Extended Hearing Panel found that Appellant had acted wrongly with respect to over 1,800 expense items and the

NAC affirmed this finding. This method reflected DOE's disagreement with Appellant's business judgment, which was beyond the purview of its authority.

G. Appellant Contributed $2.4 Million to the Funds, Which Was Ignored by the Panel and the NAC

Uncontroverted evidence was presented at the hearing that Appellant voluntarily contributed $2.4 million to the Funds. Thus, Appellant continued the prior practice of often waiving fees owed to CCC by the Funds that would have been properly allocable to the Funds. In addition, up to 10% of all charges that were properly allocable to the Funds were never allocated to the Funds but were, instead, absorbed by CCC, the parent company, in order to benefit Fund investors.

This contribution of $2.4 million included the absorption of Fund expenses by CCC of a percentage of all allocable Amex charges and a portion of the salaries of employees performing Funds business, both of which could have been properly allocated to the Funds. (RX-55.) Appellant did this, as a general business practice, to provide a "cushion" for the Funds (R. 00864-65, 5/13/14, R. 01983; R. 01986-88; R. 02018, 5/12/14) to contribute in yet another way to their success. Appellant also made some capital contributions to certain Funds to assist them in dealing with lease and lessee-related legal problems or with purchasing new leases to enhance the economics of that lease transaction. In short, she conducted herself in an exemplary fashion, voluntarily "contributing" some $2.4 million to the Funds in the same time period. (See RX-55.)

At the hearing, even the DOE admitted that Appellant waived or absorbed $2,046,000 in costs and fees that were fully allocable to the Funds. (CR. 01099, 5/5/14.) However, the DOE incorrectly contended that Appellant's voluntary support of the Funds and financial contributions to the Funds were not relevant to her intent or motivation and were not a mitigating factor at all.

That Appellant would donate or waive collectible payments, or allocate a total of $2.4 million to the Funds – by voluntarily reducing fees, allocating expenses to CCC, making capital grants to the Funds, and paying $344,000 of the Funds' dedicated employees' salaries which were fully allocable to the Funds (R. 01975-76; *5112114;* RX-55; Additional Evidence Item 6) – and then intentionally misallocate $208,000 or less in order to "enrich" herself is completely inconsistent with the record. We strongly doubt any other industry funds expressed the same level of interest in benefitting investors to this extent. Yet the Extended Hearing Panel and the NAC ignored this and found that Appellant acted in bad faith and unethically.

H. A Review of the Few Expense Items Actually Presented By the DOE at the Hearing Demonstrates that Appellant Did Not Act in Bad Faith or Unethically

A review of the few expense items actually presented by the DOE at the hearing demonstrates that Appellant did not act in bad faith or unethically. Many of the misallocations discussed at the hearing were misrepresented by the DOE or their significance exaggerated. A few examples follow:

- Safeway – the DOE confused, admits its mistake, but leaves item on the list as improper

The DOE counted $794 in "Safeway" charges as improper "grocery" charges. (App. C, CX128, #19.) The DOE had to admit at the hearing *Safeguard* was a storage facility, not a supermarket (CR. 488 –Edwards 5/6/14), (App. E, CX129, Amex bill "Safeguard storage facility"), yet the DOE kept the charge in its disgorgement exhibit. (App. B, item 9.)

- Hank Abbott's Birthday Party never allocated to the Funds

Similarly, the NAC affirmed findings that certain expenses were allocated to the Funds for Appellant's husband's birthday party in New York in 2010. That was not so. The party was not allocated to the Funds. A manager's meeting and dinner were scheduled in New York for the day before the party and those expenses were (properly) allocated to the Funds. There was no

evidence introduced indicating that the expenses on CX-22, involving an earlier trip to New York when Appellant did look for places for the party, did not involve other allocable business expenses.

- Rental Car Expenses – not improper

Mr. Abbott did not lease or buy a car in Florida for his business travel, and there was no evidence that his rentals, aggregating $24,000 over three years (CX65) exceeded what purchasing or leasing would have cost, inclusive of gas and maintenance. Many of the rental charges involved providing transportation to employees and attendees of due diligence meetings.

- Baby Shower – the DOE again admits error and confusion

The DOE admitted that no hotels or transportation were allocated to the Funds and that only two meals were allocated to the Funds, and it did not know if the meal allocation was improper. (R.01432-33.)

- Captiva – DOE's own unaffiliated witness undercuts the DOE's charge

Appellant, and her PFO, in trying to reconstruct 2,400 charges, did inadvertently make a number errors. As a small firm, this process was very cumbersome. Thus, a meal CCC listed as in Captiva with Mr. Aulbach turned out to be in Orlando. The DOE's claim that the person involved had never even met Appellant was wrong, as became apparent when Mr. Aulbach immediately recognized Appellant at the hearing. Further, the evidence showed that CCC had received an email thank you for the dinner event, but the DOE did not acknowledge that. (R. 330-346 Aulbach 5/6/2014.)

- Weekend Meals – the DOE takes unreasonable positions

The DOE created charts of meals charged to the Amex card and billed to the Funds for weekend meals (CX-96) arguing to the Panel that there is no such thing as a legitimate weekend business meal. This argument was patently unreasonable.

- Flower Charges – the DOE has no explanation as to why charge is improper

The DOE could not explain why these were improper. (R.01292.) Appellant correctly asserts that it is a reasonable business expense to send flowers to a Fund employees and business colleagues who suffered a serious family illness or death.

- Three Day Family Disney Vacation Hotel Incidentals – admitted mistaken allocation

Appellant paid for the Disney hotel with points, and did not spend any Fund monies on the hotel or hotel taxes or Disney passes. Someone did give the hotel her AMEX card number for expenses billed to the rooms and incidental items, $1,972 of which were charged to the AMEX and erroneously allocated to the Funds. Appellant testified that this was an error. PFO Franceschina explained why an error was made (R. 489). No evidence suggests Appellant sought this allocation or knew of it or approved it. No weight was given to the fact that it was an admitted mistake or that the PFO, knowing the rooms were not paid for on the AMEX, confused the incidental Disney charges with a different Disney business event attended by CCC (RCX 130 at 55).

- Thanksgiving – admitted mistaken allocation

Appellant testified: "This was an error." (R.01487-88.)

- Meal with Grandchild – Appellant was accommodating at the hearing

Appellant sometimes disagreed with the DOE's contention that business could never have been discussed among adult family members who were employed in this small family

business while the grandchildren were present at a meal. Rather than fighting every matter, Appellant was accommodating and testified to an "error." (R.01517.) The DOE argued to the Panel that Appellant's disagreements or lack of recollection were "lies."

- Board Meeting Trip to Hawaii (after Founder passed)

The DOE took issue with a board of directors meeting held in Hawaii despite the fact that Appellant billed only 25% of the cost to the Funds (roughly the normal cost of an off-site board meeting), although she could have billed all of it, and despite the fact that, after the DOE frowned upon the Hawaii location of the meeting, she voluntarily cut the Fund allocation again, absorbing 87.5% of the cost of the trip to CCC and not to the Funds. This was an extraordinary and one-time event to thank the members of the Board for sticking with her during her the period following her husband's passing and the portion of the expense charged to the Funds was in line with other prior board meetings.

- The DOE Overstated Meal Misallocations

The DOE erroneously claimed all of the costs of certain meals to be improper. If six people had a $120 meal and one of them was Appellant, $100 of the $120 were properly allocated to the Funds but the DOE calculated that the entire meal of $120 was a misallocation and the entire amount contributed to the total dollars was alleged to be misallocated.

- The DOE Includes Items Outside of the Charge

The DOE's Post-Hearing Panel brief (at page 5) alleged that some $30,000 in continuing education (CE) expenses for CCSC, the broker-dealer, were improperly passed on to the Funds and that an expense sharing agreement was needed and did not exist. (R-309-Edwards, 5/6/14). This charge is not in the pleadings or its pre-hearing brief. It is well-established that "FINRA may not impose a bar on a basis not supported by the record." *Christopher A. Parris*, SEC

Release No. 78669, 2016 WL 4446331 (Aug. 24, 2016); 15 USC § 78o-3(h)(1) (FINRA must "bring specific charges").

I. Appellant's Strong Credibility and Unblemished Career Prior to 2011

Prior to 2011, Appellant had an unblemished 26 year career in the securities industry, as a registered associate, and 19+ of those years as a Chief Compliance Officer at Commonwealth. Appellant became the sole owner and Chief Executive Officer of CCC, a holding company, after her husband passed away in 2006 (D. 8 fn. 25). CCC in turn owned Commonwealth of Delaware, Inc. ("CDI") which in turn owned CIGF, the general partner in several public and private equipment leasing funds and the broker-dealer, CCSC. The Funds were subject to SEC jurisdiction and filed quarterly and annual reports with the SEC for the public Funds and Form D for the private Funds.

In 2011, the SEC began investigating the Funds in response to a complaint about Appellant brought by a disgruntled former employee who was laid off from the firm as part of a reduction of a larger number of support staff. (D. at 5; R. 51-52,990-912, Day 1). This led the SEC to question whether certain individuals employed by CCC, in addition to Appellant, also were "control persons" of the Funds, based on the specific, but atypical definition of "control person" in the offering documents. Based upon a contract between CCC and the Funds, expenses and salaries of "control persons" were not to be passed onto the Funds. The SEC accepted the process, but felt disclosure would have been unclear. The SEC inquiry led to a September 2013 settlement pursuant to which some expenses allocated to the Funds were reallocated to CCC. (Panel Decision dated March 15, 2015, Bates 007255; CR, Bates 000001·00736.)

Appellant did not admit to any violations in the settlement agreement. *Commonwealth Income & Growth Fund, Inc.*, SEC Release No. 9459, 2013 WL 5405360 (Sept. 27, 2013). The

SEC inquiry included a review of certain American Express expenses that had been allocated to the Funds. In 2013, the issues presented here were reviewed by the SEC. Appellant cooperated with the SEC's investigation as she cooperated with FINRA. She and the SEC reached a settlement in 2013 which reflects her cooperation with regulators and does not support the DOE's lack of remorse arguments. The SEC was careful not to refer to her registered status or to any broker-dealer. She satisfied the terms of the settlement within the time specified in the Agreement.

As discussed above, Appellant was not aware of the disclosure and expense issues until the SEC investigation and the FINRA investigation which followed shortly thereafter. Upon learning of the errors, she corrected all discovered misallocations of her meals. In fact, many of these corrections occurred prior to FINRA filing charges. (CX 222; RX 1 at 4 bottom, RX 50, App.-B.) Moreover, Appellant admitted that her meal allocations had been improper in light of the Fund prohibitions on allocating control person expenses to the Funds. (CR.0921; CR-1661-62.) The DOE attempted to introduce Appellant's SEC settlement as proof that she was a recidivist, even though DOE had to know it was acting improperly. Appellant's settlement with the SEC in September, 2013 was used to tarnish her credibility even though she neither admitted nor denied the SEC conclusions and therefore the SEC settlement could not properly be used against her. See SEC Release.

Additionally, Appellant reallocated away from the Funds certain lost luggage related expenses of her PFO. (CR-514-533 Franceschina, 5/7/14,Panel Decision at 42 fn.226).) These corrections also occurred before the DOE filed charges. (CX 222; RX 1 at 4 bottom, RX 50, App.-B.) In fact, she even reallocated a number of properly allocated items that "FINRA did not

like" (Tr. 820), due to lack of proper expense documentation, because she believed this additional effort would demonstrate her good faith.

At the hearing, Appellant conceded the errors in the accounting that resulted in the misallocation to the Funds. However, there was no evidence that she was aware of the accounting errors earlier. In fact, there is evidence contradicting the allegation that Appellant intend the Funds any harm.

Just as Appellant conceded that there were allocations to the Funds which should have been reversed, there were other expenses cited by the DOE that Appellant believed were properly allocated to the Funds. For instance, Appellant believed that some of the meals allocated to the Funds were correctly allocated. These were working meals at simple restaurants. Yet the simple act of not rolling over and admitting that the DOE was correct in every respect – especially when the DOE itself conceded numerous errors – was taken by the Panel and the NAC to be evidence that Appellant was not credible.

Moreover, the DOE sought to punish Appellant not only for accounting errors but for business decisions she made with which the DOE did not agree. For instance, the DOE criticized as improper a total of $1,800 in payments made for flowers (over a three-year period) involving Firm Award Recognition events, Fund Service employees, Fund 3rd Party Servicers and Selling Representatives that were either involved in a death, related funeral or hospitalization that were allocated to the Funds.[3] (CX 23.) The DOE was unable to explain why these charges were improper. (CR 1237.) They are normal and customary business expenses.

[3] $80 of flowers were sent to Appellant's father and misallocated to the Fund. However, this order was not placed by Appellant nor was she aware of the order. Rather, the order was placed by a staff member who used the PFO's AMEX card. App. C.

J. Appellant acknowledges on this appeal, as she did below, that some of the allocations made to the Funds were made due to errors or oversights and were thus improper.

There is no contention on this appeal that Appellant, as the CEO of CCC, had no responsibility for the errors that were made. Rather, it is her contention that the errors that were made do not remotely rise to the level of unethical or bad faith behavior required to satisfy the charges brought against her and the draconian sanctions imposed.

The system employed to allocate the Amex charges pre-dated Appellant and was outdated and inefficient. Although the Panel repeatedly states that Appellant "misallocated," in fact, most of the errors and oversights were made by PFO Lynn Franceschina and included charges made by Appellant, Appellant's new husband, Hank Abbott, the PFO and other employees.[4]

LEGAL ARGUMENT

Point I

THE FINDINGS BY THE EXTENDED HEARING PANEL AND THE NAC THAT APPELLANT UNETHICALLY SUBMITTED 1,840 EXPENSES FOR REIMBURSEMENT IN BAD FAITH ARE UNSUPPORTED BY THE EVIDENCE AND CLEARLY VIOLATE ELEMENTAL STANDARDS OF FAIRNESS

The findings against Appellant and the order to disgorge over $208,000 relate to approximately 1,840 expense items that the DOE alleged were unethically and improperly charged to the Funds in bad faith. At the hearing, the DOE presented some receipts and documents identifying the existence of charges. However, at the hearing the DOE only presented evidence supporting its objections to the allocation of approximately 2% of these alleged improper charges. For the remaining 98%, the DOE simply presented a series of spreadsheets setting forth all expenses of the same category. The DOE then argued, despite the

[4] Appellant admitted that she failed to detect some errors from her oversight of the PFO, but her possible failure to supervise a CCC function was not charged by FINRA and is beyond the scope of FINRAs authority in light of the fact that CCC is not a FINRA member..

objection of Appellant, that its "proof" regarding one item on a list established Appellant's unethical and bad faith conduct with respect to every other item on the list.

Based on this failure of evidence, the Extended Hearing Panel found that Appellant had acted wrongly with respect to over 1,800 expense items. Incredibly, the NAC affirmed, stating:

> Enforcement has the burden of proving a prima facie case based on a preponderance of the evidence that Springsteen-Abbott committed the alleged violation.... *The entire itemized list of the 1,840 charges at issue was presented and accepted into evidence....* We find that, based on the evidence presented, *Enforcement established its prima facie case of her alleged violation. An explanation detailing each of the 1,840 itemized charges was not required. Upon establishing a prima facie case, the burden shifted to Springsteen-Abbott to either discredit or rebut the evidence presented*, which she failed to successfully do.

NAC Decision at 10 (emphasis added; citations omitted).

The decisions by the Extended Hearing Panel and the NAC are contrary to well-established law regarding the burden of proof that the DOE was required to meet in the presentation of its case. As the NAC explained in *Market Regulation v. John Patrick Leighton*, "[t]he burden of proof ... rested with [Complainant], which was required to show that the respondents' ... conduct was not reasonable." 2010 WL 781457, *43 (NAC Mar. 3, 2010). *See also SEC v. Seghers*, 404 Fed. Appx. 863, 864 (5th Cir. 2010) (affirming the district court's conclusion that the SEC, in presenting merely conclusory evidence of purportedly illegally obtained gains, failed to meet its burden of proof); *DOE v. CMG Institutional Trading, LLC*, Complaint No. E8A20050252, 2008 WL 538887, *7 (NAC Feb., 20, 2008) (finding that the DOE did not meet its burden of proof where there were "considerable questions concerning the accuracy of Enforcement's ... assessment").

Simply stated, the DOE presenting an "itemized list" of expense charges does not meet the burden of proof required and does not comport with the fundamental fairness to which

Appellant is entitled. The NAC's view that the DOE submitting an "*itemized list of the 1,840 charges at issue ... into evidence ... established its prima facie case of her alleged violation*" is clearly erroneous. The NAC's affirmance of the findings against Appellant without evidence in the record is no different from an appellate court upholding a prosecutor's conviction against a criminal defendant based only on the prosecutor's putting into evidence a copy of an indictment and the defendant failing to rebut the presumption of the indictment. An indictment does not serve to reverse the prosecutor's burden of proof nor does the spreadsheet introduced by the DOE reverse its burden in this matter.

Therefore, the findings by the Extended Hearing Panel and the NAC that Appellant unethically and improperly submitted 1,840 expenses for reimbursement in bad faith are unsupported by the evidence and clearly erroneous. There can be no doubt that these findings violate elemental standards of fairness. Accordingly, the decisions below must be reversed.

Point II

THE FINDINGS BY THE EXTENDED HEARING PANEL AND THE NAC THAT APPELLANT ACTED IN BAD FAITH AND UNETHICALLY ARE UNSUPPORTED BY THE EVIDENCE AND CLEARLY ERRONEOUS

In the proceeding against Appellant, the DOE charged her with violating Rule 2010, which provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." Appellant was not charged with violating any other FINRA rule. It is well established that "[i]f no other rule has been violated, a violation of Rule 2110 [the precursor rule] requires evidence that the respondent *acted in bad faith or unethically*." *Market Regulation at* *42 (emphasis added; citing *Chris Dinh Hartley*, SEC Release No. 50031, 2004 WL 1593848, *5, n.13 (July 16, 2004)); *see also Kirlin Securities, Inc.*, SEC Release No. 61135, 2009 WL 4731652 (Dec. 10, 2009) ("in the absence of a violation

of another securities rule or law, conduct may violate Rule 2010 if it is 'unethical' or committed in 'bad faith.'").

As already demonstrated above in Point I, both the Extended Hearing Panel and the NAC erroneously found that Appellant unethically submitted 1,840 improper expense requests in bad faith when the evidence submitted by the DOE represented only 39 expense requests.[5] Appellant submits that (at most) 39 non-control person improper expense requests, made over a number of years without any wrongful intent, are insufficient to support a finding of bad faith or unethical behavior.

More importantly, both the Extended Hearing Panel and the NAC found that Appellant acted in bad faith or unethically, even though uncontroverted evidence was presented to the Panel establishing that Appellant voluntarily contributed over $2.4 million to the Funds during the time that she was found to have misallocated the $208,000 in expenses. As set forth above, Appellant caused CCC, which she owns, to absorb a percentage of all Amex charges allocable to the Funds and a portion of the salaries of employees performing Fund business, both of which could have been properly allocated to the Funds (RX-55) as a general business practice, to provide a cushion for the Funds (R. 00864-65, 5/13/14, R. 01983; R. 01986-88; R. 02018, 5/12/14) so as to contribute to their success. Appellant also made some capital contributions to certain Funds to assist them in dealing with lease and lessee-related legal problems or with purchasing new leases to enhance the economics of that lease transaction. *Even the DOE admitted that Appellant waived or absorbed $2,046,000 in costs and fees that were fully allocable to the Funds.* (CR. 01099, 5/5/14.)

[5] As shown above, at the hearing Appellant readily admitted and corrected erroneous expense request submissions relating to her own meals and her other control person expenses, while demonstrating that others submissions were, in fact, proper.

Ignoring these facts, the Extended Hearing Panel found that "such voluntary contributions to the Funds ... would not make her improper allocations of personal expenses to the Funds proper." (Panel Decision at 57.) Agreeing with the Panel and missing the point of this uncontroverted evidence, the NAC simply engaged in an accounting analysis as to whether the $2.4 million lined up with the alleged improper expense charges. (NAC Decision at 11-12 and n.13.)

The Panel and NAC decisions below entirely miss the point. Appellant never argued that her voluntary contributions made any improper allocations proper – she readily acknowledged that when an improper allocation occurred, the Funds were entitled to a refund. Similarly, Appellant did not argue that any particular misallocated expense was exactly offset by a voluntary contribution to the same Fund in the same amount. Rather, Appellant argued that the fact that she voluntarily contributed over $2.4 million to the Funds conclusively demonstrates that *she did not act unethically or in bad faith.* Underlying the two decisions below is the inference that Appellant wanted to unjustly enrich herself by improperly misallocating expenses to the Funds. This is illogical – if Appellant had desired to avail herself of the additional $208,000 at issue here, she simply would have reduced her voluntary contributions to the Funds by that amount. The bottom line is that the Appellant always tried to place the interests of the Funds first but, unfortunately, utilized a flawed method for handling the expense reimbursement process and occasionally made errors. Once these issues came to Appellant's attention, she voluntarily put in place new procedures that corrected the problem and which have been reviewed by FINRA in subsequent examinations without any issue. Appellant also recognizes that, as the CEO, she bore ultimate responsibility for what occurred.

Under these circumstances, for the Extended Haring Panel and the NAC to have found that Appellant acted in bad faith and unethically is clearly erroneous and not supported by the evidence. Accordingly, the Panel and NAC decisions should be reversed.

Point III

THE FINDING THAT APPELLANT WAS NOT TRUTHFUL IS CLEARLY IN ERROR AND NOT SUPPORTED BY THE RECORD

There is no basis for the NAC findings that Appellant provided "blatantly false" information, (NAC Decision at 15) or that she was "not credible" (NAC Decision at 13) or that she lacked any remorse or "adopted a way of life" of deliberately misallocating her own personal expenses to the Funds (NAC Decision at 14) or that Principal Consideration No. 10 supported the sanction of a permanent bar (NAC Decision at 14, 15 n22).

There was not one witness or one document that showed that Appellant ever knowingly or intentionally allocated a personal expense to the Fund. Nor was there any evidence that she ever knowingly directed anyone to make such misallocations, or that she every knowingly approved such misallocation. In fact, Appellant corrected the procedural errors that led to misallocations when she became aware of them and prior to the DOE filing any charges against her. (CR-845-846, Springsteen-Abbott, 5/8/14 -Bates 585, Stipulation para 23.)[6]

Contrary to the NAC's finding that Appellant was "living off the funds monies" (NAC Decision at 11), there was no evidence of any such thing. In fact, there were *no* AMEX charges for Appellant's personal clothing, jewelry or any other personal item allocated to the Funds.

[6] In fact, despite a formal request from Appellant's counsel, prior to the complaint being filed seeking the items list, the DOE refused to provide any information to Appellant or counsel regarding the basis upon which charges were selected or why they were being challenged by FINRA. (CR. 011996.)

This complete lack of evidence contradicts NAC's findings as presumably such personal items would be routinely allocated to the Funds had Appellant been "living off the funds".

Not only was there no evidence of Appellant "living off the Funds", there was evidence of Appellants conscientious attempt to foster and support the funds. As previously set forth, Appellant voluntarily contributed $2.4 million of her own money to the Funds (RX-55). This clearly rebuts the Hearing Panel's and the NAC's conclusion that she intentionally tried to "live off the Funds" and that this was her "way of life." If she wanted to pocket money, she could have just reduced her Fund contributions or eliminated them completely.

The NAC punished Appellant because they believed the Hearing Panel's unsupported conclusion that she was unremorseful. That was not the case, nor is there any evidence to support such a conclusion. Appellant did not attempt to justify the bookkeeping errors, as others did in cases like *DOE v. Saad*, and *DOE v. Olson*. The NAC Decision's reliance on these "justification" cases is an error.

In 2013, the issues presented here were reviewed by the SEC. Appellant cooperated with the SEC's investigation as she cooperated with FINRA. She and the SEC reached a settlement in 2013 which reflects her cooperation with regulators and does not support the DOE's lack of remorse arguments.

What the DOE – and the Hearing Panel and the NAC – perceived was not a lack of remorse but rather frustration on Appellant's part for having to undergo a second regulatory investigation and subsequent proceeding even though she contributed $2.4 million to the Funds, voluntarily corrected many mistakes upon being apprised of them and absorbed up to ten percent of the AMEX charges which could have been rightly charged to the Funds. (RX 55, p. 2.) While this frustration was justified, the Hearing Panel and the NAC may not have appreciated

the source of the frustration as they were not involved in the SEC investigation. Nonetheless, this did not vitiate the Panel's absolute obligation to be fair to Appellant and consider the appropriate evidence.

The NAC's decision in *DOE v. Trevisan*, (NAC 2008), 2008 WL 1946802, (N.A.S.D.R. Apr. 30 2008), is illuminating. There, the hearing panel found that an appellant's admitted negligence did not amount to intentional misconduct warranting a permanent bar. Specifically they noted:

> In particular, if we find that the Hearing Panel's discussion 'includes only general credibility findings and does not discuss the substantial amount of record evidence that appears to contradict those findings,' then we have the power to set aside the Hearing Panel's credibility determination." (quoting *Warren G. Schreiber*, 53 S.E.C. 912, 916 (1988)).

Id. at *5.

That is the case here. Appellant conceded the errors in the accounting resulting in the misallocation to the Funds. There was no evidence that she was aware of the accounting errors. In fact, there is evidence contradicting the allegation that Appellant intended the Funds any harm.

Moreover, the finding that it was "inconceivable" that Appellant was unaware of the misallocations is unsupported. It was the PFO who forgot to back out Appellant's meals from the Fund allocations. Perhaps Appellant should have reviewed her work more carefully, but that is far different from concluding that Appellant "knew." *Id.*, at *6 ("Although we do not condone *Trevisan's* failure to review the verification screen . . ., we find that . . . error rate . . . is not so high as to preclude a finding of inadvertent mistake.").

Appellant *did not* testify that she reviewed each of the *allocations* of the approximately 7,500 items on the AMEX statements that involved up to 75,000 allocations among the many

funds and corporate entities. The Hearing Panel and the NAC could not point to any such evidence in the record. Rather, they just assumed that because they believed she was a liar, it had to be true. She did testify that she carefully and "fiercely" reviewed the charges on the AMEX statement each month to make sure the charges appeared to be proper charges to her account, and to look for possible instances of misuse of the cards by the other employees who had a card on the same account or the ability to charge items on the account. (CR-620, 782-784-Springsteen-Abbott, 5/7/14.) The AMEX statements reflect that cards were issued on her AMEX account to her husband and her PFO. Office assistants including her executive assistant also used the PFO's card. App. C. If Appellant saw something questionable, as with the PFO's lost luggage situation, she reallocated it. (CR-845-846, Franceschina, 5/7/14.) That was ignored by the Hearing Panel and the NAC because it contradicted their view that Appellant was dishonest. They simply assumed that Appellant's "fierce" review must have disclosed the misallocations, even though all the testimony was clear that this was not the purpose or focus of her review.

The Hearing Panel and the NAC overlooked that the PFO allocated the AMEX charges using spreadsheets, sent them to the accounting department, which generated a one page list of the gross amount from the AMEX bill allocated to each Fund or other entity. Appellant received and initialed the summary, but she did not determine or review the allocations of 7,500 AMEX charges which entailed up to 75,000 allocations via journal entries (Tr. 563-565; 809), nor would any CEO. Moreover, thousands of AMEX charges were never allocated to the Funds.

Further, the conclusion that Appellant had no right to rely on her PFO or fifteen accounting staff members or auditors is an inaccurate, absurd and wrong as a matter of law. *See, e.g.*, Safe Harbor Provisions. This is not a case where an auditor found a deficiency and the CEO

ignored it, or where an auditor resigned because the CEO insisted on a wrongful course of conduct. Highly experienced and recognized accounting firms audited CCC and its related companies and the 10-Ks filed with the SEC by each of the Funds. The auditors had access to all the financial information of all the parties, and also had a direct responsibility to its client, the Funds, to ascertain that they were not being allocated expenses that were improper or prohibited by the offering documents.

Accordingly, the finding that Appellant was not truthful is clearly in error and not supported by the record.

Point IV

THE APPLICATION OF RULE 2010 TO THE NON-BROKER-DEALER CONDUCT AT ISSUE HERE IS REVERSIBLE ERROR

Although FINRA claims the right, pursuant to FINRA Rule 2010, to bar members for any conduct it deems to be unethical or dishonest; such an unbound application of FINRA's power to bar violates the Securities Exchange Act of 1934 (the "34 Act") and Congressional intent. The 34 Act specifically prohibited self-regulatory organizations such as FINRA from adopting rules that "regulate by virtue of any authority conferred by this Title, matters not related to the purposes of this Title." 15 U.S.C. § 78o-3(b)(6). Congress developed a balanced approach to the powers afforded the SEC and FINRA. *An associated person may be barred from the securities industry for non-securities related misconduct only when that conduct has resulted in a conviction.* Id.

Initially, statutory disqualification only existed for securities related offenses. It was not until 1990 that the definition of statutory disqualification was amended to include non-securities related felonies. As a result, many persons are now subject to statutory disqualification for committing offenses unrelated to the securities industry (*e.g.*, driving under the influence,

possession or sale of a controlled substance, assault, manslaughter). "The majority of [Market Regulation's] reviews now deal with such cases, referred to as 'other felonies.'"[7]

In fact, even a statutorily disqualified individual may be permitted to remain in the industry under certain circumstance. The SEC has said that:

> Under Rule 19h-1, a member firm willing to sponsor (*i.e.*, employ) a person subject to a statutory disqualification makes an application to its member SRO (usually the NYSE or NASD) for approval. If the SRO approves the employing firm's application, the SRO submits it to the Commission.
>
> MR staff review the materials submitted by the SROs and make a determination to approve or recommend against a proposed association. The determination is based on whether the approval is in the public interest and consistent with the protection of investors. [Footnotes omitted].[8]

Consequently, under the right circumstances, an individual who, after receiving an appropriate due process hearing, has been convicted of a crime "*e.g.*, driving under the influence, possession or sale of a controlled substance, assault, manslaughter," may nonetheless be permitted to continue working in the industry. However, here Appellant, an individual who has never been convicted of, or even charged with, a crime much less a felony, who conceded accounting errors in the allocation of expenses to the Funds, who corrected those errors, who paid a settlement to the SEC for allocation errors in the time specified, and who voluntarily contributed $2.4 million dollars to the Funds, is barred from the securities industry because in essence the DOE believed, and the Hearing Panel and the NAC accepted, the DOE's proposition that Appellant showed no remorse for the misallocation of expenses to the Funds.

The only purpose of Rule 2010 is to regulate broker-dealer conduct and to provide for the discipline for broker-dealer misconduct. While there is a body of decisions that appear to place

---

[7] U.S. Securities and Exchange Commission, "Reports and Publication" found at https://www.sec.gov/about/oig/audit/363fin.htm.

[8] Id.

no parameters upon FINRA, "[t]he ultimate question is one of congressional intent" and these cases are inconsistent with congressional intent, which nowhere suggests that FINRA or the SEC can unilaterally be arbiters of morality and honesty. *Touche Ross & Co. v. Redington*, 442 US 560, 568 (1979).

The NAC considers the nature of the violation and principal considerations governing all sanction determinations. *DOE v. Iida*, Complaint No. 2012033351801 (FINRA NAC May 18, 2016). Pursuant to Exchange Act Section 19(e)(1) (15 U.S.C. § 78s(e)(1)), in reviewing an SRO disciplinary action, it determines whether the aggrieved person engaged in the conduct found by the SRO, whether such conduct violates the SRO's rules, and whether those SRO rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. 15 U.S.C. § 78s(e)(1); Stephen Grivas, Exchange Act Release No. 77470, 2016 WL 1238263, at *4 (Mar. 29, 2016) (citing Exchange Act Section 19(e)(1)).

The SEC should find that it is unreasonable to conclude that business activity of virtually any sort, even if done away from the broker-dealer firm and not securities-related, or even outside the ambit of any SRO or federal regulatory body, may provide a basis for FINRA sanction if the activity is deemed unethical or inequitable. This is certainly true if the third party is unaffiliated with the brokerage business of the broker. The only affiliation between CIGF and the broker-dealer that both are held by the same holding company and owned by the parent CCC.

Rule 2010, which provides that a member and an associated person abide by Standards of Commercial Honor and Principles of Trade specifically states that it is "in the conduct of its business" that the member is required to "observe high standards of commercial honor and just and equitable principles of trade." Rule 2010 was *not* intended to be a catchall autocratic rule granting powers to FINRA exceeding those granted by the 34 Act. If FINRA had the power to

exclude from the industry any person it deems dishonest, then the Statutory Disqualification statute, 15 USC § 78(c)(a)(39), is meaningless, and of no import. *See Transamerica Mortg. v. Lewis*, 444 U.S. 11 (1979)) ("highly improbably that Congress absentmindedly forgot" to mention regulation of conduct not involved the business of a member).

The Hearing Panel and the NAC, in accepting the DOE's extraordinarily expansive view of FINRA's power, violated the Statutory Disqualification statute. Typically, Rule 2010 violation cases involve customer or firm funds or transactions and specific rule violations. In *DOE v. Grivas*, 2015 WL 4386172 (NAC July 16 2015), relied on below, the respondent used client funds held at the broker dealer to "save a struggling broker dealer" and concealed his movement of funds. The case has *no* similarities to this one. In *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996), the court found that the appellant's misappropriation of funds was securities related because he represented that the funds were in an account at Cigna, where the appellant was a securities salesman. Again, this is unlike the instant case.

Here, there was a lack of evidence of knowing or deliberate misallocations involving the broker-dealer. Therefore, Rule 2010 sanctions were improper here. While there are Rule 2010 decisions involving associated persons' misconduct in the insurance business area, the victims are broker-dealer clients and the intertwined nature of the violation makes those cases, if they are not wrong, statutorily reconcilable. (It should be noted that the Statutory Disqualification rules provide for FINRA suspension if a state insurance regulator suspends an insurance license). *None of Appellant's conduct as CEO of CIGF required any registration, involved any client of the broker-dealer (CCSC), any funds ever deposited with CCSC, or any investment sold by CCSC to clients . This was not broker-dealer business.*

Accordingly, because the Hearing Panel and the NAC misinterpreted the scope of Rule 2010, their decisions should be reversed.

Point V

THE AFFIRMANCE OF $208,000 IN DISGOREGMENT WAS ARBITRARY, CAPRICIOUS AND WITHOUT EVIDENTIARY SUPPORT

The NAC'S affirmance of the $208,000 disgorgement order by the Hearing Panel was unconscionable because even the DOE admitted it only proved and sought at most $174,000 in disgorgement. The DOE's evidence (CX-128;App. B) and post-hearing brief (R-06914) calculated and sought no more than $174,000 in disgorgement, not the $208,000 figure which earlier appeared in the Amended Complaint. Therefore, the NAC improperly affirmed disgorgement of $208,000.

The NAC cannot award greater disgorgement relief than was sought. A Panel can impose higher sanctions that are sought, but it cannot fabricate a disgorgement number. The SEC should not let this go unanswered.

Point VI

THE NAC APPLIED THE WRONG BURDEN OF PROOF STANDARD

Courts have recognized that in cases involving severe civil penalties such as a permanent bar, the appropriate standard of proof is clear and convincing evidence, rather than the preponderance of the evidence standard applied below. *See SEC v. Moran*, 922 F. Supp. 867, 890 (S.D.N.Y. 1996). The Supreme Court has also required a higher standard where significant rights are impacted. *See, generally, Addington v. Texas*, 441 U.S. 418, 424 (1979) (heightened standard is "typically" used in "civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant."). Most state courts, including Florida, the home of

Appellant, apply the more stringent standard in cases involving the taking of attorney or physician licenses. *See,, e.g., Florida Bar v. Rayan*, 238 So.2d 594, 597 (Fla. 1970), and in some cases even driver's licenses.

While the Supreme Court in *Steadman v. SEC*, 450 U.S. 91 (1981), held that the standard of proof in SEC permanent bar cases is the preponderance of evidence set forth in the Administrative Procedure Act ("APA"), FINRA is *not* a federal administrative agency and, therefore, unlike the SEC, is not subject to the APA. *Matter of Palumbo*, 60 S.E.C. 1473, Release No. 35427, 1995 WL 630926, at *6 (Oct. 26, 2995) (1995). To Appellant's knowledge, the Supreme Court has never ruled that this APA standard applies to FINRA permanent bar proceedings.

Although the SEC and some courts have applied the preponderance standard in permanent bar cases, we respectfully request the Commission to reconsider this issue carefully. The SD rules insist upon the protection of due process rights and do not provide for SD of someone who has not had their day in court governed by the "beyond a reasonable doubt" standard. A permanent bar is a "draconian sanction." *Fiero v. FINRA*, 660 F.3d 569 (2d Cir. 2011).

Here, the NAC gave a scope to Rule 2010 beyond congressional intent and yet applied the least demanding standard of proof. That is just unfair.

Point VII

THE FINDING THAT APPELLANT KNEW OF THE MISALLOCATIONS IS UNSUPPORTED

It was the PFO who forgot to back out Appellant's meals and other control person expenses from the Fund allocations. Perhaps Appellant should have reviewed her work more carefully, but that is far different from concluding that Appellant "knew." *See Trevisan*, 2008

WL 1946802, at *6 ("Although we do not condone *Trevisan's* failure to review the verification screen . . ., we find that . . . error rate . . . is not so high as to preclude a finding of inadvertent mistake.").

She did not testify that she reviewed each of the allocations of the approximately 7,500 items on the AMEX statements that involved up to 75,000 allocations among the many funds and corporate entities. The NAC could not point to any such evidence in the record. Rather, it just assumed that because she was a liar, it had to be true. She did testify that she carefully and "fiercely" reviewed the charges on the AMEX statement each month to make sure the charges appeared to be proper charges to her account, and to eyeball charges by the other employees who had a card on the same account or the ability to charge items on the account. The AMEX statements reflect that cards were issued on her AMEX account to Appellant, her husband, Hank and her PFO, Lynn Franceschina ("PFO") (App. F). Office assistants including Heidi Schwartz also used the PFO's card. See App. C.

NAC overlooked that the PFO allocated the AMEX charges using spreadsheets, sent them to the accounting department which generated a one page list of the gross amount from the AMEX bill allocated to each Fund or other entity. Appellant received and initialed the summary, but she did not determine or review the allocations of 7500 AMEX charges which entailed up to 75,000 allocations via journal entries. TR. 563- 565; 809, nor would any CEO. Moreover, thousands of AMEX charges were never allocated to the Funds. Appellant never said she personally reviewed and approved each allocation individually, nor would that be a reasonable expectation for a CEO.

The NAC's conclusion that Appellant had absolutely no right to rely on her PFO or accountants or auditors is an inaccurate, absurd and wrong as a matter of law. See, e.g. Safe

Harbor Provisions. This is not a case where an auditor found a deficiency and the CEO ignored it, or where an auditor resigned because the CEO insisted on a wrongful course of conduct. BDO audited CCC and its related companies and the 10-Ks filed with the SEC by each of the Funds.[9]

CONCLUSION

The DOE did not charge Appellant with a violation of Rule 2050 and represented that it was not claiming misuse of customer funds (Tr. 1094) but remarkably, in its Post-Hearing Brief, sought the bar here because "an associated person makes improper use of customer funds where he or she fails to apply the funds...as directed by the customer" (Post Hearing Br. p. 22). This contradicts the basic claims in the record. CCSC "does not have any retail clients" and Appellant's affiliation with CCC/CIGF are "outside business activities." (See Department of Enforcement Op. Brief at 2, App. X.)

Consequently, under the right circumstances, an individual who, after receiving an appropriate due process hearing, has been convicted of a crime "*e.g.*, driving under the influence, possession or sale of a controlled substance, assault, manslaughter" may nonetheless be permitted to continue working in the industry, while here Appellant, an individual who has never been convicted of, or even charged with a crime, who conceded accounting errors in the allocation of expenses to the Funds, who corrected those errors, who paid a settlement to the SEC for disclosure and related expense errors, and who voluntarily contributed $2.4 million dollars to the Funds, is barred from the securities industry.

[9] Appellant reserves all of the grounds set forth in the Notice of Appeal and reserves her arguments before the Commission in the briefs set forth below.

SECURITIES & EXCHANGE COMMISSION

_____x

In the matter of the Appeal of

KIMBERLY SPRINGSTEEN-ABBOTT,

APPEAL
OF N.A.C. Decision in
Complaint No. 2011025675501
Kimberly Springsteen-Abbott

ADMIN PRO.3-17560

ORAL ARGUMENT REQUESTED

_____x

APPELLANT'S CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 450(d)

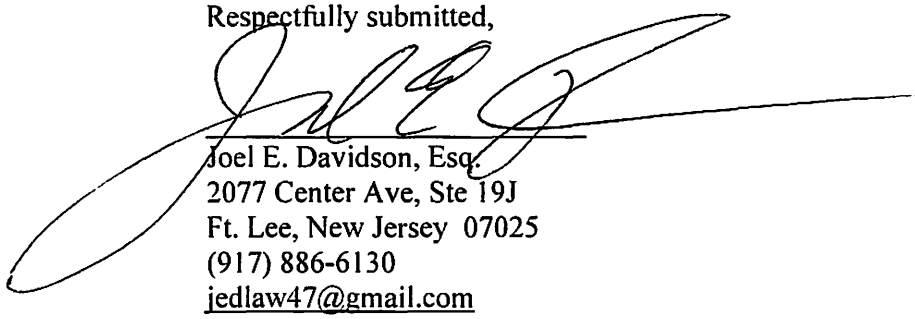
Joel E. Davidson, Esq.
2077 Center Ave, Ste 19J
Ft. Lee, New Jersey 07025
(917) 886-6130
jedlaw47@gmail.com

Attorney for Appellant

Pursuant to Rule 450 of the Commission's Rules of Practice, the Appellant respectfully certifies that Appellant's brief complies with the requirements set forth in paragraph (c) of this section. The Appellant's brief contains 10,541 words.

November 23, 2016

Respectfully submitted,



Joel E. Davidson, Esq.
2077 Center Ave, Ste 19J
Ft. Lee, New Jersey 07025
(917) 886-6130
jedlaw47@gmail.com