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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Kimberly Springsteen-Abbott

For Review of Disciplinary Action Taken by

FINRA

File No. 3-17560

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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December 28, 2016

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I. INTRODUCTION

The violation in this case stems from Kimberly Springsteen-Abbott's categorization of personal expenses—as well as non-allowable business expenses—as business expenses. These improper expenses were paid by investment funds, to the detriment of the investors in the funds. The expenses, such as an anniversary dinner and expenses at Disney World, were not paid by Springsteen-Abbott personally but with fund monies. This misconduct spanned the course of three years and involved not just a few instances, but more than 1,800 improperly paid expenses.

Springsteen-Abbott was registered with FINRA member firm, Commonwealth Capital Securities Corp., as a registered representative and direct participation programs principal. Springsteen-Abbott was also the head official of the Commonwealth enterprise, a family owned-business that operated 13 publicly and privately offered investment fund programs ("Commonwealth Funds"). She managed the Commonwealth Funds and thus possessed a

fiduciary duty to safeguard the Commonwealth Funds' assets in accordance with the terms of the operations agreement. She failed in this duty.

As a registered person of a FINRA member firm, Springsteen-Abbott agreed to comply with FINRA's just and equitable principles of trade rule, which required that she uphold high standards of commercial honor and follow ethical business practices. FINRA's ethical tenets apply to all registered persons when their misconduct involves the securities business, and also when it involves other business-related activities. Because Springsteen-Abbott misused investors' monies to pay personal and non-allowable expenses, she acted unethically, in violation of FINRA's just and equitable principles of trade rule.

From 2009 through 2011, Springsteen-Abbott took advantage of an informal business process and improperly expensed thousands of personal charges on a corporate credit card for reimbursement by the Commonwealth Funds. In turn, she reaped hundreds of thousands of dollars of Commonwealth Fund monies, in breach of the Commonwealth Funds' operations agreement. The Commonwealth Funds improperly paid for a total of 1,840 items Springsteen-Abbott expensed including, but not limited to: airline and hotel accommodations, car rentals for personal vacations and family events, groceries and sundries, toys for her grandchildren, and home décor. Her misconduct persisted for three years until two anonymous whistleblowers—former Commonwealth employees—alerted FINRA.

In a decision rendered on August 23, 2016, the National Adjudicatory Council ("NAC") found that Springsteen-Abbott improperly allocated 1,840 personal and non-related business expenses to be paid by the Commonwealth Funds. The NAC found that her improper use of Commonwealth Fund monies was unethical and violated the high standards of commercial honor and just and equitable principles of trade rule. The NAC also found that Springsteen-Abbott's

pattern of dishonesty exhibited bad faith. Finding her misconduct to be a serious violation of FINRA rules, the NAC barred Springsteen-Abbott from association with a FINRA member in all capacities, fined her $100,000, and ordered that she disgorge $208,953.75 to FINRA. The evidence in the record overwhelmingly supports the NAC's findings and the sanctions imposed are neither excessive nor oppressive. The Commission should sustain the NAC's decision in all respects.

II. STATEMENT OF FACTS

A. Springsteen-Abbott's Background

During the relevant period, Springsteen-Abbott was associated with Commonwealth Capital Securities Corp. ("Firm") as a registered representative and direct participation programs principal. RP 237, 585, 2207, 7885.[1] She was Chairman, Chief Executive Officer, and Chief Compliance Officer of the Firm. RP 52, 585, 2230, 5803, 7256, 7262, 7886. The Firm is located in Clearwater, Florida and was the managing broker-dealer of the Commonwealth Funds, which were sponsored by the Firm's parent company, Commonwealth Capital Corp. RP 52, 238, 7885.

B. The Commonwealth Funds

From December 1993 to October 2013, the Commonwealth Funds raised more than $240 million in sales to investors. RP 7886. Commonwealth Capital Corp. is a family-owned business that leases medical, telecommunications, and information technology equipment on a short-term basis (between 12 to 36 months). RP 238, 5810, 7886. Springsteen-Abbott took over

[1] "RP" refers to the record page number.

the business around 2005 from her late-husband and became the owner and top executive of all of the Commonwealth entities. RP 536, 7262, 7886.

Springsteen-Abbott oversaw all Commonwealth operations. RP 7886. She was the sole shareholder, Chairman, and Chief Executive Officer of Commonwealth Capital Corp.; and Chairman and Chief Executive Officer of the Commonwealth Funds' manager, Commonwealth Income and Growth Funds, Inc. ("General Partner"). RP 52, 585, 2230, 5803, 7256, 7262, 7886. Many of Springsteen-Abbott's relatives were also Commonwealth Capital Corp. employees holding various positions, including her current husband, son, daughter, son-in-law, brother, sister, brother-in-law, sister-in-law, and cousin. RP 907-09.

C. The Commonwealth Funds Expense Allocation Process

Each Commonwealth Fund was a separate legal entity with governing documents that set forth the terms of the funds' operations (hereinafter "Operations Agreement"). RP 5801-68. The General Partner managed all Commonwealth Fund operations, including purchasing the leasing equipment and negotiating, executing, and administering the equipment leases.[2] The General Partner also handled each fund's accounting, administrative and operating expenses. The Operations Agreement included a section called "Company Expenses" that explicitly detailed which expenses could be billed to, and paid for, by the Commonwealth Funds. RP 5812. A Commonwealth Fund expense included administrative or any related expenses that were "necessary to the prudent operation of the [Commonwealth Funds]." RP 5813. Commonwealth Fund expenses were paid through an expense allocation process by which an expense was

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[2] The Commonwealth Funds had no employees. Business operations of the Commonwealth Funds were conducted by employees of Commonwealth Capital Corp. or the General Partner whose proportionate share of salaries and administrative costs was then attributed to the applicable Commonwealth Fund(s) for reimbursement. RP 537.

allocated to a respective Commonwealth Fund or multiple funds on a pro rata basis, and the General Partner or Commonwealth Capital Corp. received a reimbursement.[3]

Notwithstanding the "Company Expenses" provision, the Operations Agreement provided that any expense of a "Controlling Person" could not be allocated to the fund.[4] RP 5813-14. Examples of these expenses included "salaries, fringe benefits, travel expenses and other administrative items incurred or allocated to any Controlling Person of the Manager." RP 5813-14.

Springsteen-Abbott was a Controlling Person as defined by the Operations Agreement. RP 536, 1619, 7256, 7262, 7887. Therefore, none of her expenses could be allocated to or paid for by any Commonwealth Fund assets—even if the expense she incurred related to the Commonwealth Funds' businesses or operations. RP 536, 1619, 7256, 7262, 7887.

Springsteen-Abbott was not the only Controlling Person by definition. Her current husband, Hank Abbott, was a Controlling Person when he became the president and board member of Commonwealth Capital Corp. and General Partner in 2010. RP 7263. Lynn Franceschina ("Franceschina"), Commonwealth's Chief Operations Officer, principal financial officer for all of the Commonwealth entities, and board member of Commonwealth Capital

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[3] The amount of reimbursable expenses allocated to a particular Commonwealth Fund increased or decreased depending on a number of factors including the number of investors, legal and compliance issues, and the number of existing leases. RP 5812-13.

[4] "Controlling Person" was defined in the Operations Agreement as any "person, whatever his or her title, performing functions for the Manager or its Affiliate similar to that of chairman or member of the Board of Directors or executive management (such as president, vice president or senior vice president, corporate secretary or treasurer) . . . or any person holding a five percent or more equity interest in the Manager or its Affiliates or having the power to direct or cause the direction of the Manager or its Affiliates, whether through the ownership of voting securities, by contract, or otherwise." RP 5805.

Corp. also met the definition of a Controlling Person. RP 1342. None of Springsteen-Abbott's, Hank Abbott's or Franceschina's expenses—whether business expenses or not—could be allocated to and paid for by Commonwealth Fund monies. *See* RP 5813-14, 7265 (stating under Article 5, Section 5.3 of the Operations Agreement that the salaries, fringe benefits, travel expenses and other administrative items incurred by Controlling Persons of the General Partner are excluded from the allowable reimbursements).

D. Springsteen-Abbott's Allocation of American Express Charges to the Commonwealth Funds

Springsteen-Abbott used an American Express corporate credit card for the business expenses of Commonwealth Capital Corp. and the Commonwealth Funds. RP 239, 587, 7887. The account was in Springsteen-Abbott's name and linked to other cardholders, including Hank Abbott and Franceschina. RP 239, 587, 7887.

Springsteen-Abbott was responsible for the review of the American Express account statements. RP 7888. She testified that she performed her review on a monthly basis and determined which charges to allocate to the Commonwealth Funds. RP 1459. Her review and allocation of American Express charges to the funds was informal—Commonwealth had no written policies or procedures on the allocation process. RP 1349, 1685, 7888.

Springsteen-Abbott testified at the hearing to her deep involvement in the allocation process, including how rigorously she reviewed the American Express bills to determine which charges would be allocated as a Commonwealth Fund expense. Springsteen-Abbott testified that she reviewed the account statements "fiercely" and looked at the statements "line by line" to determine how expenses on the account should be allocated. RP 1459. The account statements confirmed her detailed review. The account statements had Springsteen-Abbott's check marks next to each charged item and some items had her handwritten notes next to them concerning the

allocation.[5] RP 1348-49, 1431-32. Springsteen-Abbott further testified that she reviewed and approved the American Express bill before it was paid; and she approved all final expense allocations to the Commonwealth Funds before they were made. RP 1459.

From December 2008 to February 2012, Springsteen-Abbott charged—and permitted others to charge—1,840 personal items and other non-allowable expenses totaling $208,953.75 to the American Express corporate account. RP 7888. The American Express charges that were personal in nature ranged from groceries, fast food, pharmacy, clothing merchandise, toys, kids' meals, extended car rentals, and home décor and improvement items. RP 7323-58. In some instances, thousands of dollars charged on the American Express corporate card went towards Springsteen-Abbott's personal vacations, birthday celebrations, and other family events. RP 7889.

The Extended Hearing Panel decision provided many details of the 1,840 American Express charges at issue. RP 7268-97, 7889. The Department of Enforcement ("Enforcement") categorized the misallocated charges by expense type or particular event.[6] Attached to the NAC's decision is an expense schedule, which itemized all of the 1,840 American Express charges by date order. RP 7323-58 (hereinafter, "*Expense Schedule*").

Springsteen-Abbott claimed throughout the proceeding that after she received a Wells notice from Enforcement in August 2012, she reversed some of the misallocations but she

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[5] Franceschina reviewed the American Express account statements and made journal entries. RP 1346-47. Once she received Springsteen-Abbott's direction on how to allocate the charges, Franceschina instructed Commonwealth's accounts payable group and processed the allocation. RP 1346, 1348-49, 1359, 1433.

[6] For example, FINRA staff provided a chart summarizing all charges expensed on the corporate credit card for Hank Abbott's 60th birthday celebration, which totaled $5,457.75. RP 2339.

refused to specifically identify which of the charges were reallocated. RP 319-20, 539, 7261, n. 22 (Extended Hearing Panel requesting Springsteen-Abbott to indicate exactly which of the 1,840 charges were covered by her admission of misallocations, which she never did). To this day, Springsteen-Abbott has produced no reliable calculation of the reallocated expenses and has submitted no supporting documentation, such as a bank record, verifying that a repayment was made to the Commonwealth Funds.

Springsteen-Abbott also claimed that after receiving the Wells notice she revised the allocation process and implemented a new procedure to monitor and document the allocation of expenses to the Commonwealth Funds. RP 542, 880. Referring to it as a "tick sheet" or allocable expense ticket, Springsteen-Abbott supplied additional document productions in January and February 2014 that included these cover sheets or tick sheets describing some of the charges at issue and its purported business purpose. RP 542, 1465, 7260. The January and February 2014 productions were Springsteen-Abbott's attempts at justifying some of the 1,840 charges as legitimate business expenses. RP 1460-61. The tick sheets were handwritten and backdated, in some cases several years, and included business justifications that many of which were demonstrably false. Thus, the NAC in its decision found the tick sheets that Springsteen-Abbott produced to be unreliable evidence. RP 7897.

E. Springsteen-Abbott Admits to Her Improper Allocations

Notwithstanding her rigorous review of the 1,840 charges at issue, Springsteen-Abbott admitted that some of the charges were improperly allocated to the Commonwealth Funds as a fund expense and paid for with Commonwealth Fund monies. Springsteen-Abbott categorized a broad range of personal expenditures improperly, including the following:

Walt Disney World—Animal Kingdom Lodge Vacation. In June 2010, Springsteen-Abbott went to Disney World and stayed at the Animal Kingdom Lodge with her family. RP 587, 7289-90. Attendees were Springsteen-Abbott, her husband, her daughter and son-in-law, and their two children. RP 927, 2729-34. She spent $2,679.10 on fast food, hotel accommodations, car rentals, gas, and other merchandise such as kid strollers, "mickey mitts," and other toys purchased at the Disney store—all of which was paid for by the Commonwealth Funds. RP 936, 939-41, 2736-37, 2741, 6902. Springsteen-Abbott admitted at the hearing that her trip to Disney World was a family vacation and the associated charges that were allocated to, and paid for, by the Commonwealth Funds were mistakes. RP 869-70, 1565-67.

Thanksgiving Dinner: November 2009. Springsteen-Abbott spent Thanksgiving Day 2009 with her family at the Dilworthtown Inn in West Chester, Pennsylvania. RP 1487. She expensed two meal charges for Thanksgiving dinner totaling $459.61 that were allocated to and paid for by the Commonwealth Funds. RP 1487, 1490-91, 5097-5104. In her January and February 2014 document productions to Enforcement, Springsteen-Abbott submitted the meal receipts along with a tick sheet stating that the business justification for the meal expense—on Thanksgiving Day—was in connection with a "CE Firm Element." RP 1489, 5098-5102. She conceded at the hearing that it was a family dinner that "should have never been allocated to the funds" and that it was "an error." RP 1488. She also admitted that the tick sheet she produced to Enforcement in attempts to categorize the charges as a business expense was also false. RP 1489 ("A. It is not correct.").

Supplier Diversity Conference. Springsteen-Abbott allocated a meal expense at Quiznos to the Commonwealth Funds in connection with Hank Abbott's attendance, from May 26-29, 2009, at a supplier diversity conference in Phoenix, Arizona. RP 1475, 5085-90. Yet, Hank

Abbott did not attend the supplier diversity conference. On the date of the meal, he was actually in route with Springsteen-Abbott to Vancouver for a personal vacation. RP 1476. The expense was improperly allocated to and paid for by the Commonwealth Funds. To defend the charge as a business expense, Springsteen-Abbott produced copies of another employee's calendar as part of her January and February 2014 production to Enforcement that was unrelated to Hank Abbott's attendance or the expense. RP 1477, 5085-90. At the hearing when questioned about the employee's calendar, she finally admitted: "This was an error," agreeing that the backup documentation had nothing to do with the allocated expense. RP 1476-77.

Kids Meals at Cody's Roadhouse: August 2010. In August 2010, Springsteen-Abbott had dinner with her daughter and grandchildren at Cody's Roadhouse in Tarpon Springs, Florida. The dinner receipt, totaling $104.23, included charges for kids' menu items. RP 5181-88. The entire meal was allocated to the Commonwealth Funds. Springsteen-Abbott insisted that the dinner was a business expense, testifying at the hearing that it was not a family dinner and that she ordered the kids meals because she was on a Jenny Craig diet. RP 1513 ("Q. You didn't order a kids mac and cheese, did you? A. Yes. At the time I was on Jenny Craig."). When Enforcement confronted her with an email that contradicted her testimony, however, Springsteen-Abbott recanted her earlier testimony and admitted that the meal at Cody's restaurant was a personal family dinner. *See* RP 1515 (Springsteen-Abbott stating by email: "We had dinner with her and the kids last night."); RP 1517 (Springsteen-Abbott admitting: "Yes. This is definitely an error.").

When Enforcement presented item after item before the Extended Hearing Panel, Springsteen-Abbott repeatedly asserted that the charges were business expenses, despite evidence to the contrary:

April 24, 2010: Dinner at Cody's Roadhouse. Springsteen-Abbott allocated a meal expense at Cody's Roadhouse in the amount of $174.97. RP 5195. She attempted to defend the expense by submitting a tick sheet as part of her January and February 2014 production indicating that the business justification for the expense was a "travel meal" for four adults, when the only person who had traveled from out of town was her brother. RP 5194, 7272. The dinner receipt revealed that instead of four persons, the bill covered a party of six persons in attendance. RP 5195. It further showed that kids' meals were ordered, along with adult food, beer and wine. RP 1526-27, 7272. At the hearing, Springsteen-Abbott denied that she was having a family dinner with children present. RP 1527. Yet, Enforcement presented an email that Springsteen-Abbott sent to her daughter just hours earlier making arrangements for the family dinner. RP 1528-29. The Extended Hearing Panel found her testimony denying that the dinner was a family dinner not credible, and concluded that the tick sheet she provided to justify the charge as a legitimate business expense was false. RP 7272.

October 10, 2010: Dinner at Cody's Roadhouse. Springsteen-Abbott allocated a meal expense at Cody's Roadhouse in the amount of $89.67. On the tick sheet, she tried to categorize the expense as a business meal with five adults in attendance to discuss Commonwealth becoming a transfer agent and to evaluate a former interview candidate. RP 1520-21, 7274. She included as supporting documentation to the tick sheet an email regarding the candidate, but the email indicated that the interview took place a month prior to the dinner. RP 1522, 7274. Further, the dinner receipt she provided indicated that instead of five adults, there were kids who ate at the dinner. Springsteen-Abbott admitted at the hearing that her daughter's birthday was a day before, RP 1520, and a complimentary birthday dessert was ordered at the dinner. RP 1524. When Enforcement asked about the kids' meals on the receipt, however, her only response was

"I don't know." RP 1524. The Extended Hearing Panel found the tick sheet she provided justifying the meal as a legitimate business expense was false. RP 7274. Based on emails discussing a birthday party, the Extended Hearing Panel concluded that, rather than being a business expense, the dinner was to celebrate Springsteen-Abbott's daughter's birthday. RP 7274.

Best Buy Purchases. Springsteen-Abbott allocated a Best Buy expense in the amount of $213.98 on February 22, 2010. RP 2599, 2603, 7282. She purchased a Motorola Bluetooth speaker and an XM SkyDock, an in-vehicle satellite radio. RP 2599, 7282. FINRA principal examiner, Kelly Edwards ("Edwards"), testified at the hearing that when she questioned Springsteen-Abbott during the investigation about the business purpose of the purchases, Springsteen-Abbott told her that it was an "incentive gift" for a potential wholesaler candidate to lure him from a competitor. RP 1089-90, 7282. The statement was false. Upon further research, Edwards discovered that the candidate had been unemployed for several years prior to the purchase date and up until April 2010. RP 1091. The Extended Hearing Panel rejected Springsteen-Abbott's claim that the charge was for a legitimate business purpose and further found that she intentionally provided a false business justification for the Best Buy charge. RP 7282-83.

III. PROCEDURAL BACKGROUND

Enforcement filed an amended complaint on October 22, 2013 alleging that Springsteen-Abbott misused investor funds by allocating personal and other expenses not legitimately related to the Commonwealth Funds' businesses, in violation of FINRA Rule 2010. RP 235-74.

The Extended Hearing Panel heard seven days of witness testimony, including Springsteen-Abbott's testimony, and issued a decision on March 30, 2015, which found that

Springsteen-Abbott engaged in the misconduct, as alleged. RP 7255-7358. Specifically, the Extended Hearing Panel found that Springsteen-Abbott's improper use of Commonwealth Fund monies for three years to pay for personal and other nonrelated business expenses violated FINRA's just and equitable principles of trade rule. RP 7304-11. For sanctions, the Extended Hearing Panel barred Springsteen-Abbott from associating with a FINRA member in all capacities, fined her $100,000, and ordered her to disgorge $208,953.75—representing the entire sum of the misused funds—plus pre-judgment interest. RP 7311-21. Springsteen-Abbott appealed the Extended Hearing Panel's decision to the NAC. RP 7359-66.

After its *de novo* review of the record, the NAC affirmed the Extended Hearing Panel's findings in a decision in all respects. RP 7885-7902. In sustaining the Panel's findings, the NAC rejected Springsteen-Abbott's defenses raised on appeal. RP 7892-98. The NAC found that her misconduct fell squarely within FINRA's jurisdictional reach as unethical business-related conduct that was inconsistent with just and equitable principles of trade. RP 7892-94. The NAC found that her misuse of investment funds constituted unethical behavior and that her misconduct was committed in bad faith. RP 7894-96. The NAC also carefully reviewed the evidentiary record, including Springsteen-Abbott's testimony regarding some of the 1,840 charges, and found that Enforcement proved by a preponderance of the evidence that Springsteen-Abbott committed the alleged violation. RP 7894.

The NAC barred Springsteen-Abbott from the industry for her misconduct. RP 7899. It also fined her $100,000 and ordered disgorgement of $208,953.75, plus prejudgment interest. RP 7899. In assessing sanctions, the NAC found that Springsteen-Abbott's widespread misuse

of investment funds constituted one of the most serious violations of the securities laws, and thus warranted the severest sanctions. RP 7898. This appeal to the Commission followed.[7]

IV. ARGUMENT

The NAC correctly found that Springsteen-Abbott violated FINRA's rule that requires associated persons to follow high standards of commercial honor and just and equitable principles of trade. Springsteen-Abbott's long record of charging personal expenses to the Commonwealth Funds was a misuse of the Commonwealth Fund's monies. The NAC also correctly found that the personal nature of many of the charges—broadly ranging from family vacations, birthdays celebrations, and other family events, to toys, clothing merchandise, kids' meals and home décor—demonstrated that Springsteen-Abbott acted both unethically and in bad faith.

The NAC considered the arguments raised by Springsteen-Abbott on appeal and found that her misappropriation of fund assets was not accidental or inadvertent but that she deliberately categorized personal charges and other improper expenses as business expenses and had done so for many years. RP 7895. Her misuse was deliberate and would have continued if not for former Commonwealth employees who alerted FINRA to her misconduct. Instead of returning her ill-gotten advances when Springsteen-Abbott was under investigation, she attempted to conceal the gravity of her misconduct by supplying FINRA staff with bogus tick sheets and other documentation that were either inconsistent with the applicable expense or

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[7] Springsteen-Abbott separately has filed a motion requesting oral argument in connection with her application for review. FINRA believes that the issues raised in this application can be determined sufficiently on the basis of the record and the briefs filed by the parties, and therefore opposes Springsteen-Abbott's motion pursuant to Rule 451(a) of the Commission's Rules of Practice. 17 C.F.R. § 201.451(a).

blatantly false. Equally aggravating to the NAC was Springsteen-Abbott's attempt to blame others for her regulatory obligations rather than accepting full responsibility for her misconduct. Based on this, the NAC rightfully affirmed the Extended Hearing Panel's findings that she violated FINRA Rule 2010. The Commission should sustain the NAC's findings.

A. The Record Overwhelmingly Supports the NAC's Findings That Springsteen-Abbott Violated the Just and Equitable Principles of Trade Rule

An associated person's business-related conduct not only includes his business relationship with employer, but also his commercial relationships with investors. *See Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4982, at *19 (Dec. 11, 2014) (defining business-related conduct for purposes of a FINRA Rule 2010 violation). The "special focus of [FINRA]'s Rules is the professionalization of the securities industry," *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (NASD NAC June 2, 2000), and not whether the misconduct occurred at the broker-dealer or involved solely a brokerage transaction. *Id.* at *16 ("[FINRA] Rule [2010] is not limited to securities-related conduct; instead, it covers all unethical business-related conduct.").

FINRA Rule 2010 requires members, in the conduct of their business, to observe high standards of commercial honor and just and equitable principles of trade. The rule applies an ethical standard to all associated persons. Rather than define each offensive business practice that is inconsistent with the public interest, *Thomas W. Heath, III*, 586 F.3d 122, 132 (2d Cir. 2009), the rule broadly prescribes ethical principles on associated persons to "protect investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market." *Tomlinson*, 2014 SEC LEXIS 4982, at *16, n. 15. In furtherance of these ethical principles, FINRA's just and equitable principles of trade rule governs "a wide variety of conduct that may operate as an injustice to investors or other

participants in the marketplace." *Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *15 (Jan. 9, 2009), *aff'd*, 586 F.3d 122 (2d Cir. 2009). The evidence overwhelmingly supports the NAC's findings that Springsteen-Abbott improperly allocated 1,840 American Express charges that were paid by the Commonwealth Funds. Springsteen-Abbott's misuse of Commonwealth Fund monies violated FINRA Rule 2010.

1. The Preponderance of Evidence Demonstrates That Springsteen-Abbott Improperly Used Commonwealth Fund Monies to Pay Personal and Non-Related Business Expenses.

Procedurally, Springsteen-Abbott has the misimpression that the NAC's findings were based on something less than a preponderance of the evidence in the record and argues that, at the hearing, Enforcement presented only a limited portion of the alleged improper charges. Applicant Brief, at 18. The NAC independently reviewed the evidence presented by the parties (including over 7,500 record pages, 1,300 hearing transcript pages, and 300 exhibits).[8] The NAC's findings of violation are fully supported by the record and should be affirmed. Moreover, the NAC correctly used a preponderance of the evidence standard. *See Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *16-17 (June 2, 2016) (applying a preponderance of evidence standard to self-regulatory organization disciplinary actions).

Springsteen-Abbott re-argues before the Commission that Enforcement failed to meet its burden of proof, and did not establish a prima facie case. Applicant Brief, at 19-20. This argument has no substance. The NAC addressed Enforcement's burden of proof directly in its

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[8] RP 7892. To be sure, the application before the Commission is to review the NAC's findings of violation and order of sanctions against Springsteen-Abbott. 15 U.S.C. § 78s(d); *see Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *25 (May 13, 2011) (holding that, in disciplinary cases, NAC decisions, not Hearing Panel decisions, are subject to Commission review).

decision. RP 7894. As the NAC stated, the entire itemized list of the 1,840 American Express charges was admitted into evidence. RP 7894. It was Enforcement's burden to establish a prima facie case that Springsteen-Abbott committed the alleged violation by a preponderance of the evidence. The NAC reviewed the itemized list, Springsteen-Abbott's testimony, Enforcement's cross-examination and impeachment of Springsteen-Abbott and affirmed the Extended Hearing Panel's findings of violation. RP 7894.

Although Springsteen-Abbott erroneously views the NAC's affirmance no different than a trial court upholding a prosecutor's conviction based only an indictment, Applicant Brief, at 20, once Enforcement specified the improper expenses and explained that they were personal or nonrelated expenses, there was ample evidence to show that Springsteen-Abbott misused the Commonwealth Fund monies. Although Springsteen-Abbott testified in defense of the allocations, she failed to marshal credible evidence to refute the claims alleged against her. *Cf. Dep't of Enforcement v. Mullins*, Complaint Nos. 20070094345 and 20070111775, 2011 FINRA Discip. LEXIS 61, at *25 (FINRA NAC Feb. 24, 2011) (finding that respondent failed in overcoming his burden in producing evidence to support his claimed defenses to the charges in the amended complaint), *aff'd*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012). Far from resting on mere allegations, Enforcement's evidence that each of the 1,840 charges was paid for by the Commonwealth Funds was undisputed. The fact that Springsteen-Abbott failed to prove that the expenses were business expenses does not demonstrate that the NAC used the wrong burden of proof.

It is important to note that the NAC's basis for its findings was not limited to the expenses Enforcement addressed before the Extended Hearing Panel at the hearing as Springsteen-Abbott suggests. All relative documentation that was accepted into evidence from

both of the parties informed the NAC's conclusions. *See Butler*, 2016 SEC LEXIS 1989, at *19, n.18 ("It is well established that 'circumstantial evidence' can be more than sufficient to prove a violation of the securities laws."). In accordance with the terms of the Commonwealth Funds' Operations Agreement, for example, the NAC gleaned that none of the 1,840 charges at issue incurred by Springsteen-Abbott, Franceschina or Hank Abbott (after 2010) could legitimately be expensed to the funds for reimbursement because they were Controlling Persons. RP 1661, 1700, 2015, 7300. These prohibited expenses alone, when viewed independently, constituted the bulk of the 1,840 misallocated charges. *See Expense Schedule*, RP 7323-57 (providing only the initials of Springsteen-Abbott, Hank Abbott, Franceschina for each charge at issue). Indeed, Springsteen-Abbott conceded that Controlling Person expenses could not be charged to the Commonwealth Funds. RP 1619-20. Once Springsteen-Abbott made this key concession, the case was about how deliberate the violation was, not whether Springsteen-Abbott committed the violation. The record abundantly supports the NAC's findings that Springsteen-Abbott engaged in unethical business practices in violation of FINRA rules.

2. Springsteen-Abbott Was Personally Involved in Categorizing the Expenses.

Throughout this proceeding, Springsteen-Abbott has repeatedly admitted that she improperly allocated some of the American Express charges. *See* RP 7578 ("[Springsteen-Abbott] 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."). She also stipulated that she had the *sole* responsibility in determining whether the Commonwealth Funds would pay for expenses charged on the American Express credit card. RP 586 ("Springsteen-Abbott had the *sole* responsibility to determine whether the [Commonwealth Funds]. . . would pay for expenses charged on the American Express cards in accordance with the Operating Agreement")

(Emphasis added); RP 7578 ("There is no contention on this appeal that Appellant, as the CEO of CCC, had no responsibility for the errors that were made. *The buck does stop at the office of the CEO.*") (Emphasis added).

Astonishingly, on appeal to the Commission, Springsteen-Abbott argues that she was unaware of the 1,840 misallocations to the Funds, contending that the NAC had no evidence otherwise. Applicant Brief, at 25-26, 32-34. She then blames her principal financial officer, Franceschina, for forgetting to "back out Appellant's meals from the Fund allocations," Applicant Brief, at 25, and implies that she relied on her internal accounting staff and auditors to catch her misuse of fund monies. Applicant Brief, at 26. The record shows that Springsteen-Abbott was completely aware that the charges were unrelated to the Commonwealth Funds' businesses, was directly involved in the allocation process, and thus caused the misuse of the Commonwealth Fund's assets. The Commission should reject Springsteen-Abbott's attempts to deflect liability.

While Springsteen-Abbott's state of mind is not required to establish a FINRA Rule 2010 violation, Springsteen-Abbott's own testimony contradicts her argument that she lacked awareness. *See Butler*, 2016 SEC LEXIS 1989, at *18 ("[W]e need not find scienter to establish a Rule 2010 violation"). At the hearing, she testified to attending several personal vacations and family events that were included in the 1,840 misallocations. Thus, she was aware of them. For example, Springsteen-Abbott acknowledged that she took an Alaskan cruise for her 50th birthday in June 2009. RP 1466. She admitted that the cruise was a personal vacation and that she incurred personal expenses. RP 1473. She attended the dinner at Fiori D'Italia with her friends where they spent $251.60 for food and thereafter she improperly allocated this expense to

the Commonwealth Funds. RP 1472-73. Springsteen-Abbott admitted that she approved this misallocation:

> Q. So the context of this meal is you're on a cruise for your 50th birthday and your best friend's 50th birthday in Alaska, right?
>
> A. Yes.
>
> Q. And this meal is allocated to the funds, right?
>
> A. Yes.
>
> Q. And you approved that allocation, right?
>
> A. I did.
>
> . . .
>
> Q. The cruise was a personal vacation, right?
>
> A. Yes.
>
> RP1466-68, 1472.

Indeed, Springsteen-Abbott knew about hundreds of similar personal expenses at issue. She knew about Disney World, Thanksgiving dinner, Hank Abbott's supplier conference, family meals at Cody's Roadhouse, and the stereo speakers she bought at Best Buy. The American Express corporate account was in her name and thus her credit was at stake. RP 239. She had the sole responsibility to determine which charges the Commonwealth Funds would pay for. RP 587.

Springsteen-Abbott was also directly involved in the allocation of the charges to the Commonwealth Funds. Springsteen-Abbott miraculously claims in her brief that "she never said she personally reviewed and approved each allocation individually," which is not a "reasonable expectation for a CEO." Applicant Brief, at 33. Yet, she testified at the hearing that reviewed the American Express account statements "line by line" to determine which charges would be allocated to the Commonwealth Funds and stated that allocating expenses to the funds was a

"careful process." RP 1459. Moreover, she reviewed any allocations to the Commonwealth Funds before they were processed through accounts payable and before the American Express bill was paid. RP 1348.

Springsteen-Abbott claims in her brief that her purpose in reviewing the statements was to make sure the charges were proper and to look for instances of misuse of the cards by other employees. Applicant Brief, at 26. Her assertion misses the point. Springsteen-Abbott was categorizing her own expenses, and those of her husband's, as business expenses. Her claims of performing a different review were not credible. *See* RP 7267, n. 59 (rejecting Springsteen-Abbott's attempt to avoid responsibility for the improperly allocated expenses and finding her responsible for the allocation system and allocations themselves).

The evidence also unequivocally demonstrates that it was Springsteen-Abbott's—not her principal financial officer's or anyone else's—responsibility to determine which of the charges would be allocated to the Commonwealth Funds and to approve the allocations in accordance with the Commonwealth Funds Operations Agreement.

Attempting to pass off her liability, Springsteen-Abbott suggests that the misallocations resulted from accounting and human errors made by Franceschina. Applicant Brief, at 25. Her argument lacks factual support. First, the misallocations could not have been the result of an accounting or "procedural" error, as Springsteen-Abbott claims, because there was no formal allocation process that existed. *See e.g.*, RP 1349, 1685 (confirming that there were no written policies or procedures in determining how an expense should be allocated); RP 1436 (Franceschina testifying about written policies on allocations, and stating: "I don't believe there was ever anything in writing that said if it's this, allocate it this way. If it's this, allocate it that way.").

Second, the record depicts a vastly different level of Springsteen-Abbott's involvement in the allocation process. Franceschina's role, along with other staff in the accounting group, was clerical. She processed the allocation of expenses to the Commonwealth Funds and paid the American Express bill. Franceschina testified that she prepared the allocation spreadsheet after Springsteen-Abbott's review of the American Express statements. RP 1346-48. Springsteen-Abbott would notate either on the statement itself or verbally which charges were allocated to the Commonwealth Funds. RP 1402, 7266 (describing Springsteen-Abbott's involvement in the allocation process). While Franceschina testified that there were some routine business expenses that she typically knew to allocate, Springsteen-Abbott—and not her—reviewed and approved any expense allocation to the Commonwealth Funds before it was made. RP 1381, 1402-1403.[9] Springsteen-Abbott's improper business practices "cannot be excused by pointing the finger of blame at employees who do not have the authority to prevent the alleged violations." *Kirk A. Knapp*, 51 S.E.C. 115, 134 (1992). The only "human" error that Springsteen-Abbott can blame for improperly expensing 1,840 personal charges is her own.

For the same reasons, the Commission should reject Springsteen-Abbott's implication that third party auditors should have caught her improper allocations. Whether or not auditors should have questioned Springsteen-Abbott's allocations, the responsibility to use Commonwealth Fund monies correctly is Springsteen-Abbott's. *See E. Magnus Oppenheim & Co., Inc.*, 58 S.E.C. 231, 239 (2005) (finding respondent cannot shift its responsibilities and blame third party accountants for its compliance obligations); *Dep't of Enforcement v.*

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[9] Springsteen-Abbott's own testimony also undercuts her weak attempt at blaming others. She explained in her pre-hearing brief that "[a]ll allocations are subject to [Springsteen-Abbott]'s final approval." RP 538. She stated that the allocations were made on a monthly basis while the details of the charge were "fresh in [her] mind" and thus "relatively simple." RP 538.

Audifferen, Complaint No. C10030095, 2007 FINRA Discip. LEXIS 5, at *32 (FINRA NAC Oct. 18, 2007) (rejecting respondent's attempt to assign responsibility for his own shortcomings to his firm's operations department, which illustrated his refusal to accept responsibility for his own misdeeds), *aff'd*, Exchange Act Release No. 58230, 2008 SEC LEXIS 1740 (July 25, 2008).

As the Chief Executive Officer and top executive for all of the Commonwealth entities, Springsteen-Abbott had an ethical obligation under FINRA rules and a fiduciary duty as the Commonwealth Funds' manager to ensure that fund monies were not used to pay for her personal vacations and family events. *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002) ("[FINRA Rule 2010] applies when the misconduct reflects on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money."). Springsteen-Abbott's personal involvement in allocating improper expenses to the Commonwealth Funds is fully supported by the record.

3. Springsteen-Abbott's Testimony was Repeatedly Untrue and Documents She Created Were Backdated.

The Extended Hearing Panel found that Springsteen-Abbott lacked credibility, stating that her testimony was "rife with inconsistencies" and "often defied commonsense." RP 7301. The Panel also found that she provided false and misleading business justifications for the expenses. RP 7301. Springsteen-Abbott argues that the NAC had no basis for upholding these findings that Springsteen-Abbott's testimony was not credible. Applicant Brief, at 23. In doing so, she references FINRA's decision in *Trevisan*, in which the NAC found inadequate support in the record for the Hearing Panel's credibility determination. Applicant Brief, at 25; *Dep't of Enforcement v. Trevisan*, Complaint No. E9B2003026301, 2008 FINRA Discip. LEXIS 12, at *16 (FINRA NAC Apr. 30, 2008). But credibility determinations differ from case to case. Nonetheless, *Trevisan* is easily distinguishable from the present case.

In *Trevisan*, the NAC found that the Hearing Panel made "only general credibility findings" while failing to address the substantial record evidence that contradicted their credibility determination. *Id.* Conversely, the Extended Hearing Panel in this case made at least seven discrete credibility findings regarding Springsteen-Abbott's testimony on specific improper charges the Commonwealth Funds paid for. *See* RP 7267, 7271-74, 7279, 7282. It then dedicated an entire section of the Hearing Panel decision to addressing her damaged credibility based on her inconsistent testimony and false and misleading business justifications that she produced. *See* RP 7301-7302. Moreover, unlike *Trevisan*, the Extended Hearing Panel's findings that Springsteen-Abbott's testimony was inconsistent and misleading were fully supported by the record. With no substantial evidence to the contrary, the NAC correctly affirmed the Panel's credibility determination. "[T]he credibility determination of an initial fact finder is entitled to considerable weight and deference because it is based on hearing the witnesses' testimony and observing their demeanor." *Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *53, n. 71 (Dec. 10, 2009).[10]

Springsteen-Abbott repeatedly testified inconsistently before the Extended Hearing Panel about the nature of the charges allocated to the Commonwealth Funds. For example, Springsteen-Abbott and Hank Abbott celebrated their third wedding anniversary in April 2011. RP 7284. On the day of her anniversary, she ate at the Villa Gallace in Indiana Rocks, Florida,

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[10] Springsteen-Abbott suggests that there is evidence contradicting the allegation that she intended to harm the Commonwealth Funds, Applicant Brief, at 25, but never states what that contradictory evidence is. In any event, she misinterprets the NAC's finding that she misused Commonwealth Fund monies to the detriment to the fund investors, which is stated on RP 7892. The NAC's finding does not state that Springsteen-Abbott intended to destroy or harm the Commonwealth Funds—nor was that ever alleged. Rather, Springsteen-Abbott caused investor harm by exhausting fund assets on the improper payments of expenses unrelated to the business operation of the Commonwealth Funds.

and improperly allocated her meal cost in the amount of $220.83 to the Commonwealth Funds. RP 1554. In attempting to justify the meal as a business expense, she denied that the dinner was a celebration of her wedding anniversary. RP 1556. Just hours prior to the dinner, however, Springsteen-Abbott sent her brother-in-law an email in which she stated that she was going out for her anniversary, "but will be back by 9:00 p.m." RP 1557. In other emails that Springsteen-Abbott authored, she also stated that she celebrated her wedding anniversary. RP 1559. Not only did the Extended Hearing Panel find that Springsteen-Abbott improperly allocated the dinner expense to the Commonwealth Funds, it also found that her testimony was not credible. RP 7285.

There were many other instances where Springsteen-Abbott's testimony was repeatedly untrue. *See* RP 7267, 7271-74, 7279, 7282. Supplying no evidence or reasonable explanation for her inconsistent testimony, the Extended Hearing Panel appropriately called Springsteen-Abbott's truthfulness into question and NAC correctly found no reason to overturn the Panel's credibility findings. *Dep't of Enforcement v. Kendzierski*, Complaint No. C9A980021, 1999 NASD Discip. LEXIS 40, at *8 (NASD NAC Nov. 12, 1999) (stating the NAC will "only reject credibility determinations by the initial fact finder when the record contains 'substantial evidence' for doing so").

In addition, Springsteen-Abbott produced false documents to FINRA during the investigation. By way of background, Springsteen-Abbott claimed that she did two things to correct some of the misallocations to the Commonwealth Funds. First, she revised the allocation process and implemented a new procedure by using allocable expense tickets or "tick sheets" to better account for expenses. RP 7890. Second, she also claimed that she reversed some allocations and credited the funds. RP 7590.

Regarding the tick sheets, Springsteen-Abbott's January and February 2014 document productions to Enforcement included tick sheets to justify the 1,840 charges at issue as legitimate business expenses. It was these productions that the NAC found to be demonstrably false and thus unreliable evidence for a number of reasons. RP 7890, 7897. First, Springsteen-Abbott backdated the tick sheets using the date that the charge was incurred, which in some cases happened several years prior. RP 7897. Backdating business records and providing misleading information is a form of deception. *Cf. Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *50 (May 27, 2015) (finding a just and equitable principles of trade violation when respondent backdated account records in his attempt to deceive regulatory authorities). Second, the tick sheets were handwritten and failed to provide basic details regarding the business purpose of the charge and how or when a reallocation occurred. RP 7897. Most notably, many of the tick sheets had supporting documentation attached that had nothing to do with the charge at issue, or the business purpose stated on the tick sheet was wrong. RP 7897.

For example, in December 2009, Springsteen-Abbott traveled to New York with her family members, including Hank Abbott, her son, her daughter, two other adults, and three children. RP 7292-93. Springsteen-Abbott testified at the hearing that she had a "family" dinner while in New York. RP 1494, 1496. Yet, she drafted the tick sheet, to which the family dinner receipt was attached, stating that the "business purpose" of the meal was to meet with "leasing vendors" for year-end, which she then admitted in testimony was false. RP 1497 ("Q. And it's completely inaccurate, right? A. It is inaccurate . . ."). The meal totaling $826.08 was a personal expense that was improperly paid for with Fund monies. Rather than offering the truth, Springsteen-Abbott wrote up a false business justification on the tick sheet, submitted it to FINRA, and attempted to represent the meal as a legitimate business expense when it was not.

Dep't of Enforcement v. Pierce, Complaint No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at *95 (FINRA NAC Oct. 1, 2013) ("Falsifying documents is dishonest and suggests that [respondents] are willing to bend the rules where regulation is concerned to suit their own needs.") (citation omitted).

Springsteen-Abbott also claims that she reversed certain charges allocated to the Commonwealth Funds in error. *See* Applicant Brief, at 21, n. 5. But there was no substantiation in the record of her returning $208,953.75 in misappropriated funds, or any portion thereof.[11] Instead, the record undoubtedly demonstrates that Springsteen-Abbott routinely charged her corporate credit card and used fund monies to pay for personal expenses. In addition to meal expenses, there were a host of other charges unrelated to the business operation of the Commonwealth Funds that represented Springsteen-Abbott's *personal* spending, including purchases of kids' toys, holiday decorations, home improvement expenses, clothes and wine.[12]

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[11] Springsteen-Abbott claims that the NAC punished her because it believed that she was unremorseful. Applicant Brief, at 24. She notes that she was cooperative during the Commission's investigation, where she reached a settlement without admitting or denying the findings that she made misleading disclosures in the Commonwealth offering documents concerning salary expenses of Controlling Persons, but was frustrated that she had to "undergo a second regulatory investigation and subsequent proceeding." Applicant Brief, at 24. Her claim that the NAC punished her has no merit. First, not once in its decision did the NAC reference Springsteen-Abbott's lack of remorse. Second, the only reference the NAC made to the Commission settlement was to affirm the Extended Hearing Panel's decision *not* to treat her as a recidivist for purposes of sanctions. *See* RP 7899. Third, Springsteen-Abbott has the misimpression that the issues pertaining to her Commission settlement were the same as in this case. While it is true that Springsteen-Abbott's deviant business practices also ran afoul of the disclosure provisions under the federal securities laws, the issues presented in this case solely pertain to her unethical business conduct in violation of FINRA rules. Accordingly, the Commission settlement did not impact the NAC's findings of liability against Springsteen-Abbott or the sanctions it imposed.

[12] Springsteen-Abbott claims that Enforcement misrepresented a "Safeguard" charge as an improper allocation. Applicant Brief, at 11. FINRA acknowledges that one charge in the amount of $761.84 was for "Safeguard Self-Storage" instead of a "Safeway" grocery store. The

(Footnote continued on next page)

Springsteen-Abbott argues that there were no American Express charges for her "personal clothing, jewelry or any other personal item" and therefore the NAC was wrong to say that Springsteen-Abbott was living off the Commonwealth Fund's monies. *See* Applicant Brief, at 23. The NAC, however, stated that Springsteen-Abbott had a practice of "living off of the Funds' monies instead of her own. . . ". The NAC's accurate statement highlights that many of the improper charges were Springsteen-Abbott's personal living expenses. The Commission should uphold the NAC's findings of violation against Springsteen-Abbott for her unethical behavior.

B. Springsteen-Abbott's Actions Were Business-Related and Violated Just and Equitable Principles of Trade

1. Commission Precedent Confirms That Springsteen-Abbott's Misconduct was Business-Related.

FINRA Rule 2010 is a broad rule that authorizes FINRA to regulate the ethical standards of securities firms and professionals. *Alfred P. Reeves*, Exchange Act Release No. 76376, 2015 SEC LEXIS 4568, at *12 (Nov. 5, 2015). To this end, FINRA Rule 2010 sets forth a standard intended to encompass "a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace." *Id.* (internal quotation omitted). FINRA's power to

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(cont'd)

misallocated expense remained on the list because Springsteen-Abbott never produced documentation showing that the storage charge was a business-related expense of the Commonwealth Funds. *See generally* Exhibit CX-131, which contains no tick sheet or supporting documentation for the Safeguard charge. Furthermore, the *Expense Schedule* attached to the NAC's decision only pertains to charges that were allocated to the Commonwealth Funds; therefore, any expenses in connection with Hank Abbott's birthday party that were not allocated to the Commonwealth Funds were either not on the *Expense Schedule*, and thus irrelevant to this case, or was on the schedule and Springsteen-Abbott failed to demonstrate with sufficient evidence that the charge was a legitimate business expense.

discipline its members and their associated persons under FINRA Rule 2010 is accordingly far-reaching and covers *any* unethical, business-related conduct. *See Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996); *see also Keilen Dimone Wiley*, Exchange Act Release No. 76558, 2015 SEC LEXIS 4952, at *11 (Dec. 4, 2015) ("As a registered person and a person associated with a member firm, Wiley's business-related conduct is subject to discipline in accordance with FINRA's rules."), *aff'd*, 2016 U.S. App. LEXIS 19051 (5th Cir. Oct. 19, 2016).

Springsteen-Abbott asserts in her brief that "[t]he only purpose of Rule 2010 is to regulate broker-dealer conduct and to provide for the discipline for broker-dealer misconduct." Applicant Brief, at 28. This is incorrect. It is well established that FINRA Rule 2010 governs any *business-related* conduct that is inconsistent with just and equitable principles of trade and Springsteen-Abbott's attempt to restrict the broad scope of FINRA's just and equitable principles of trade rule has been consistently rejected in a long line of cases.[13]

Springsteen-Abbott's misconduct was undoubtedly business-related. Springsteen-Abbott was the head of all the Commonwealth entities. She was the *de facto* manager of the Commonwealth Funds, which were privately or publicly offered investment programs that were sold through her managing brokerage firm. As the chairman and Chief Executive Officer of the

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[13] *See Vail*, 101 F.3d at 39 ("[FINRA]'s disciplinary authority is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security."); *Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *16-17 (Mar. 29, 2016) (finding respondent's conversion of investment fund monies in violation of FINRA Rule 2010 need not bear a close relationship to the associated person's firm or firm customers); *Wiley*, 2015 SEC LEXIS 4952, at *11 (finding conversion in violation of FINRA Rule 2010 that did not involve the broker-dealer firm or firm customers); *Daniel D. Manoff*, 55 S.E.C. at 1162 (finding conduct inconsistent with just and equitable principles of trade and high standards of commercial honor when respondent charged expenses to a co-worker's credit card without authorization); *Leonard John Ialeggio*, 52 S.E.C. 1085, 1089 (1996) ("We consistently have held that misconduct not related directly to the securities industry nonetheless may violate [just and equitable principles of trade].").

General Partner, she had a fiduciary duty to handle Fund assets and safeguard investor funds in accordance with the Commonwealth Funds' terms of operation.[14] As an associated person of a FINRA member, she also possessed the duty to conduct her business in observance of high standards of commercial practice and just and equitable principles of trade. *See Mullins,* 2011 FINRA Discip. LEXIS 61, at *23 ("A registered representative serving as an officer of his corporate customer violates [FINRA] Rule [2010] when he diverts corporate assets for his own interests and contrary to the interests of the corporation."). She failed in her duty to act ethically, in violation of FINRA Rule 2010, when she improperly allocated 1,840 personal and other non-business related expenses to be paid by the Commonwealth Funds.

2. FINRA's Authority to Evaluate Statutory Disqualification Events is in Addition to its Authority to Bring Disciplinary Cases.

In her attempts to further limit FINRA's authority, Springsteen-Abbott argues that the NAC's decision violated FINRA's authority to evaluate statutory disqualification applications. Applicant Brief, at 29-30. Springsteen-Abbott's argument has no merit. The Exchange Act authorizes FINRA to bring *both* disciplinary cases—such as this case—and to rule on statutory disqualification applications. Exchange Act Section 19(d) authorizes Commission review of an action of a self-regulatory organization that: (i) imposes any final disciplinary sanction on any member or person associated with a member; (ii) denies membership to any applicant; (iii) prohibits or limits any person in respect to access to services offered by such organization or

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[14] Section 9.4.1 of the Commonwealth Funds' limited partnership agreement provides: "The General Partner shall manage and control the Partnership, its business and affairs." RP 5854. Section 9.4.3 also provides: "The General Partner shall have the fiduciary responsibility for the safekeeping and use of all funds and assets of the Partnership, whether or not in the General Partner's immediate possession or control." RP 5854.

member thereof; or (iv) bars any person from becoming associated with a member. *See* 15 U.S.C. § 78s(d); *Morgan Stanley & Co.*, 53 S.E.C. 379, 382 (1997).

The existence of FINRA's authority to deny a statutory disqualification application does not limit, in any way, FINRA's authority to file a disciplinary case. Statutory disqualification is not a FINRA-imposed penalty or remedial sanction, and thus cannot be compared to actions FINRA takes to discipline its members and associated persons for violating its conduct rules. *See Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *37 (Mar. 15, 2016), *aff'd*, 2016 U.S. App. LEXIS 21690 (10th Cir. Dec. 6, 2016). Tellingly, Springsteen-Abbott has no specific legal authority for her argument that FINRA's statutory disqualification authority limits the reach of FINRA Rule 2010. In any event, FINRA's disciplinary proceeding here was authorized under FINRA's Code of Procedure; it was not a criminal prosecution.

C. Springsteen-Abbott's Voluntary Contribution Do Not Disprove Her Violation

Springsteen-Abbott's brief argues repeatedly that she voluntarily contributed $2.4 million to the Commonwealth Funds, which "conclusively demonstrates that she did not act unethically or in bad faith." Applicant Brief, at 2, 4, 10-11, 21-22, 24. The NAC rejected this argument in its decision for sound reasons.

As a preliminary matter, the $2.4 million contribution was not an altruistic cash donation from Springsteen-Abbott's pocket. It represented an approximate sum of liabilities owed to either Commonwealth Capital Corp. or the General Partner that Springsteen-Abbott, acting as CEO of Commonwealth Capital Corp., elected not to charge against the Commonwealth Funds

for business reasons.[15] Even if the contributions to the Commonwealth Funds were made by Springsteen-Abbott based solely on generosity, which they were not, that is immaterial to the NAC's findings that Springsteen-Abbott engaged in unethical misconduct and acted in bad faith with respect to the improper allocation of the 1,840 charges at issue. *See Heath*, 2009 SEC LEXIS 14, at *25 (finding that good faith is not a *per se* defense to a violation of the just and equitable principles of trade rule). The actions are separate.

Springsteen-Abbott cannot undo unethical behavior by arguing that she had moved $2.4 million in Commonwealth capital around over the years to keep certain funds solvent. The SEC and FINRA have consistently rejected such a "self-help" defense in the past. For example, in *Olsen*, the Commission rejected the respondent's attempt to downplay her improper receipt of a firm reimbursement by arguing that the firm had owed her money for two office refrigerators and other items that she previously purchased—the cost of which well exceeded the converted amount. *See Denise M. Olsen*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at *14-16 (Sept. 3, 2015). The Commission declined to excuse her liability or offset any monies the firm might have owed her, and re-affirmed its holding that "securities professionals are not entitled to self-help in this manner." *Id.* at *16. Likewise, Springsteen-Abbott cannot use her

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[15] *See* RP 1681, in which Springsteen-Abbott testified that voluntary contributions assisted with purchasing acquisitions for the funds from quality clients, stating "we were trying to keep the investment grade credit in the [Fund] portfolios high. So if it is not quite there, Commonwealth can waive its fee, its acquisition fee, in order for that to be more. . . . Q. So if you didn't do that, you wouldn't have a deal? A. Right. The [F]und wouldn't have a deal." *See also* RP 2135, in which Springsteen-Abbott discusses providing voluntary "support" to certain Commonwealth Funds that underwent litigation for the purpose of keeping the legal costs from stinting its ability to reinvest.

voluntary contribution to the Commonwealth Funds to demonstrate good will or escape the unethical acts she has taken.

The SEC and FINRA have repeatedly rejected claims that a rule violation can be excused because of other disputes. *See id.* at *16 (rejecting respondent's attempt to offset converted funds and holding that "securities professionals are not entitled to self-help in this manner"); *Dep't of Enforcement v. Doan*, Complaint No. 2009019637001, 2011 FINRA Discip. LEXIS 56, at *10 (FINRA Hearing Panel Sept. 19, 2011) (finding conversion and rejecting respondent's self-help defense that he was entitled to reimbursement for office furniture); *Dep't of Enforcement v. Saad*, Complaint No. 2006006705601, 2009 FINRA Discip. LEXIS 29, at *22 (FINRA NAC Oct. 6, 2009) ("The suggestion that he may have been able to obtain reimbursement for other legitimate expenses if submitted properly does not exonerate or lessen the significance of his unethical conduct."), *aff'd*, Exchange Act Release No. 62178, 2010 SEC LEXIS 1761 (May 26, 2010), *remanded on other grounds*, 718 F.3d 904 (D.C. Cir. 2013).

In sum, Springsteen-Abbott's voluntary contributions are merely a distraction. This case is about Springsteen-Abbott's unethical business conduct regarding the misallocation of 1,840 personal and non-related business expenses to the Commonwealth Funds. The evidence in the record overwhelmingly demonstrates that Springsteen-Abbott acted unethically *and* in bad faith when she caused the Commonwealth Funds to pay for 1,840 misallocated charges that were not business, but personal and unrelated expenses. Accordingly, the Commission should uphold the NAC's findings of violation.

D. The NAC's Sanctions are Consistent With the Sanction Guidelines and Appropriate for Springsteen-Abbott's Misconduct

The NAC barred Springsteen-Abbott from the industry for her misconduct, fined her $100,000, and ordered her to pay $208,953.75 in disgorgement, plus prejudgment interest. The Commission should sustain the NAC's sanctions in all respects.

In determining sanctions, the NAC carefully considered FINRA's Sanction Guidelines ("Guidelines"), including the Principal Considerations in Determining Sanctions set forth therein, and any other case-specific factors. A bar is the standard sanction in improper use of funds cases, unless the improper use resulted from the respondent's misunderstanding of the customer's intended use of the funds or other mitigation exists.[16] "Misappropriation or misuse of customer funds constitutes a serious violation of the securities laws, involving a betrayal of the most basic and fundamental trust owed to a customer." *Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *33-34 (Jan. 9, 2015).

In view of the seriousness of Springsteen-Abbott's actions, the NAC considered both aggravating and mitigating factors and found a number of aggravating ones. RP 7898. For three years, Springsteen-Abbott regularly used fund monies to pay for her personal expenditures. Rather than making a couple of inadvertent mistakes, the evidence showed a cyclical pattern of deviant behavior. RP 7898. Her improper allocation of personal and other unrelated expenses was pervasive, impacting the assets of multiple funds at an unidentifiable dollar amount and size. RP 7898. Each of these factors is aggravating. And while it was apparent that the misallocations were a result of her deliberate and intentional decision-making, Springsteen-Abbott tried to

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[16] *See FINRA Sanction Guidelines* (2015), at 36 [hereinafter "Guidelines"]. A copy of the relevant Guidelines are provided herein as Attachment A. The Guidelines were updated in October 2016, but the changes are not relevant to this proceeding. For violations involving the improper use of funds, the Guidelines also recommend a fine between $2,500 and $73,000, but allow adjudicators to impose a fine outside of the recommended range when tailoring appropriate remedial sanctions. *See id.* at 1, 36.

escape liability by producing bogus tick sheets and blaming everyone but herself for her misdeeds. RP 7899. At the hearing Springsteen-Abbott's testimony was not credible. Her inability to tell the truth also "demonstrated [her] inability to abide by [her] ethical obligations." *Dep't of Enforcement v. Saad*, Complaint No. 2006006705601r, 2015 FINRA Discip. LEXIS 49, at *46 (FINRA NAC Mar. 16, 2015), *aff'd*, Exchange Act Release No. 76118, 2015 SEC LEXIS 4176 (Oct. 8, 2015), *appeal docketed*, No. 15-1430 (D.C. Cir. Nov. 20, 2015). The sanctions the NAC imposed on Springsteen-Abbott are neither excessive nor oppressive, but instead served to remedially address the egregiousness of her actions. "Sanctions should be a meaningful deterrent and reflect the seriousness of the misconduct at issue." *Guidelines*, at 2.

Springsteen-Abbott argues that in order for her to be barred under FINRA Rule 2010, her misconduct must have involved broker-dealer activity, a brokerage customer, or funds of the broker-dealer. Applicant Brief, at 30. The Commission has rejected her argument in similar cases for many years. Since 1975, the SEC has affirmed FINRA's sanction of a bar for violations of FINRA's just and equitable principles of trade rule for misconduct that did not involve the broker-dealer. *See Thomas E. Jackson*, 45 S.E.C. 771, 772 (1975). Although Springsteen-Abbott contends that even in the insurance cases where a broker-dealer or securities transaction was not involved, the investor was a broker-dealer customer, she is mistaken. Applicant Brief, at 30. In 2015, the Commission barred an associated person for violating FINRA Rule 2010 and the investors were insurance policyholders—not broker-dealer customers. *See Wiley*, 2015 SEC LEXIS 4952, at *11 (holding respondent's unethical business-related conduct, even while performing insurance-related activities, falls under FINRA's jurisdiction). As the NAC did, the Commission should further the protection of Commonwealth Fund

investors by affirming the NAC's sanctions. The Commission should not treat Springsteen-Abbott with leniency because she misused funds that were not funds of broker-dealer customers.

Even more recently, the Commission sustained an action taken by FINRA in which the respondent, like Springsteen-Abbott, was barred solely for violating FINRA Rule 2010. *See Grivas*, 2016 SEC LEXIS 1173, at *16-17. In *Grivas*, the respondent misused monies of an investment fund, but none of the fund investors were customers of the broker-dealer. The Commission has rejected the argument that the misconduct must bear a close relationship to the associated person's firm or firm customers, and stated:

> Grivas is also incorrect that the misconduct must bear a "close relationship" to the associated person's "investment banking or securities business." This language is not in Rule 2010 and is contrary to the precedent interpreting that rule. Nor must the conduct relate to the associated person's customers or to a securities transaction in order to be covered by Rule 2010. *Id.*

FINRA has the authority to discipline Springsteen-Abbott for her business-related misconduct under FINRA Rule 2010 and the Commission should uphold the NAC's sanction determination.

1. The NAC Correctly Used the Preponderance of the Evidence Standard When it Assessed Sanctions.

Springsteen-Abbott's argues that the preponderance of evidence standard in permanent bar cases gives a broader scope to FINRA Rule 2010 than what Congress intended and that a clear and convincing standard is more appropriate. She, however, provides no precedential support for her contention. If fact, the case Springsteen-Abbott cites to support her contention, *SEC v. Moran*, is inapposite. 922 F. Supp. 867, 890 (S.D.N.Y. Apr. 2, 1996). The court held that it would *not* apply a clear and convincing standard to even circumstantial evidence, and

stated that "this case shall be governed by the preponderance of the evidence standard." *Id.* (rejecting respondent's argument that a higher standard of proof should apply).

FINRA disciplinary proceedings—even those that bar violators for their misconduct—have been "repeatedly upheld based on the preponderance standard." *Dist. Bus. Conduct Comm. v. Bruno*, Complaint No. C10970007, 1998 NASD Discip. LEXIS 51, at *10 (NASD NBCC July 8, 1998). This case should be no different. The NAC correctly barred Springsteen-Abbott for violating FINRA Rule 2010 based on the appropriate evidentiary standard, which does not change based on the type of sanction imposed. *See Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *19 (Dec. 7, 2010) (sustaining FINRA's disciplinary action when the record showed by a preponderance of the evidence that respondents committed the alleged violation and FINRA applied its rules consistently with the Exchange Act). The Commission should not overrule years of its own precedent.

Springsteen-Abbott separately argues that FINRA lacks the jurisdiction to *bar* members for violating only FINRA Rule 2010 and that doing so somehow violates the Securities Exchange Act of 1934 ("Exchange Act"). Applicant Brief, at 27. On the contrary, Section 15A of the Exchange Act requires FINRA to design its rules to "promote just and equitable principles of trade." 15 U.S.C. § 78o-3(b)(6). It also empowers FINRA as a self-regulatory organization to sanction its members and associated persons, who, like Springsteen-Abbott, violate FINRA rules or the federal securities laws. *See* 15 U.S.C. § 78o-3(b)(7) (providing a variety of sanctions available in FINRA disciplinary actions, including barring individuals from association with a FINRA member); *Guidelines*, at 1 ("As part of FINRA's regulatory mission, it must stand ready

to discipline member firms and their associated persons by imposing sanctions when necessary and appropriate to protect investors.").[17]

2. The NAC's Order of Disgorgement is Fully Supported by the Record.

The NAC imposed disgorgement in the amount $208,953.95, which represented the full amount of misallocated charges alleged in Enforcement's amended complaint. Enforcement's recommended sanction of restitution in the amount of $174,321.73 was based on the difference between the 1,840 misallocated charges and certain expenses that Springsteen-Abbott claimed she reversed and reallocated back to Commonwealth Capital Corp., as notated in Exhibit CX-6. RP 2249-95, 6917. Her repayment to the Commonwealth Funds, however, was not proven.

Springsteen-Abbott challenges the NAC's disgorgement order, claiming that the NAC "cannot award greater disgorgement relief than was sought." Applicant Brief, at 31. Her argument stems from Enforcement's recommendation in its post-hearing brief that Springsteen-Abbott pay restitution in the amount of $174,321.73 to the Commonwealth Funds. *See* RP 6917. As a preliminary matter, Enforcement's recommendation is not binding on the NAC. As the Commission has held, the NAC has the discretion to "affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction." *Tomlinson*, 2014 SEC LEXIS 4908, at *15. The NAC's disgorgement was a fitting sanction.

The evidence compellingly shows that Springsteen-Abbott provided no supporting documentation to substantiate her reallocation claims or the return of any misappropriated

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[17] Springsteen-Abbott provides no legal basis for her contention that that FINRA may only bar her for non-securities related conduct when the misconduct results in a conviction. Applicant Brief, at 27. A conviction is a term typically used in criminal law when a court of law finds the defendant guilty of a crime. But, "FINRA proceedings are not criminal matters," and thus such a term has no bearing on FINRA's discretion to impose sanctions, including a bar, on its members for rule violations. *Mullins*, 2011 FINRA Discip. LEXIS 61, at *28.

monies back to the Commonwealth Funds. As noted in the NAC decision, it was Springsteen-Abbott's burden to accurately identify with supporting documentation the improper charges that she purportedly reversed and fully reimbursed to the Commonwealth Funds, but she failed to do so. *See* RP 7261, n.22, 7901. The Extended Hearing Panel declined to accept Enforcement's lower restitution amount, and the NAC correctly did not use the lower amount in ordering disgorgement. RP 7901.

With respect to ordering restitution as opposed to disgorgement as a sanction, the NAC rightfully affirmed the Panel's decision not to order that she pay restitution. Restitution is based on the *actual* amount of the loss sustained by the harmed victim and is typically used in cases where the victim otherwise would unjustly suffer a quantifiable loss proximately caused the respondent's misconduct. *See Guidelines*, at 4. As noted in the NAC's decision, it was impossible from the record "to determine which Fund should receive how much of any restitution that could be ordered." RP 7901.

Disgorgement on the other hand is more appropriate where "the record demonstrates that the respondent obtained a financial benefit from his or her misconduct," as was the case here. *Dep't of Enforcement v. Weinstock*, Complaint No. 2010022601501, 2016 FINRA Discip. LEXIS 34, at *52 (FINRA NAC July 21, 2016); *Guidelines*, at 4-5. Finding that Springsteen-Abbott unduly benefitted financially from her misconduct, the NAC ordered her to disgorge $208,953.75, plus prejudgment interest, which was a reasonable approximation of unlawful gains that she received from her repeated misallocations. The Commission should affirm the NAC's ordered sanctions in its entirety.

V. CONCLUSION

The NAC's findings of violation are well supported by the record and Springsteen-Abbott's sanctions are appropriate. FINRA urges the Commission to sustain the NAC's decision in all respects.

Respectfully submitted,

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December 28, 2016

APPENDIX OF APPLICABLE FINRA SANCTION GUIDELINES

This appendix sets forth the relevant text of FINRA's Sanction Guidelines on the Improper Use of Funds.

(Source: *See FINRA Sanction Guidelines* (2015 ed.))

FINRA

Financial Industry Regulatory Authority

Sanction Guidelines

Table of Contents

Overview

The regulatory mission of FINRA is to protect investors and strengthen market integrity through vigorous, even-handed and cost-effective self-regulation. FINRA embraces self-regulation as the most effective means of infusing a balance of industry and non-industry expertise into the regulatory process. FINRA believes that an important facet of its regulatory function is the building of public confidence in the financial markets. As part of FINRA's regulatory mission, it must stand ready to discipline member firms and their associated persons by imposing sanctions when necessary and appropriate to protect investors, other member firms and associated persons, and to promote the public interest.

The National Adjudicatory Council (NAC), formerly the National Business Conduct Committee, has developed the *FINRA Sanction Guidelines* for use by the various bodies adjudicating disciplinary decisions, including Hearing Panels and the NAC itself (collectively, the Adjudicators), in determining appropriate remedial sanctions. FINRA has published the *FINRA Sanction Guidelines* so that members, associated persons and their counsel may become more familiar with the types of disciplinary sanctions that may be applicable to various violations. FINRA staff and respondents also may use these guidelines in crafting settlements, acknowledging the broadly recognized principle that settled cases generally result in lower sanctions than fully litigated cases to provide incentives to settle.

These guidelines do not prescribe fixed sanctions for particular violations. Rather, they provide direction for Adjudicators in imposing sanctions consistently and fairly. The guidelines recommend ranges for sanctions and suggest factors that Adjudicators may consider in determining, for each case, where within the range the sanctions should fall or whether sanctions should be above or below the recommended range. These guidelines are not intended to be absolute. Based on the facts and circumstances presented in each case, Adjudicators may impose sanctions that fall outside the ranges recommended and may consider aggravating and mitigating factors in addition to those listed in these guidelines.

These guidelines address some typical securities-industry violations. For violations that are not addressed specifically, Adjudicators are encouraged to look to the guidelines for analogous violations.

In order to promote consistency and uniformity in the application of these guidelines, the NAC has outlined certain **General Principles Applicable to All Sanction Determinations** that should be considered in connection with the imposition of sanctions in all cases. Also included is a list of **Principal Considerations in Determining Sanctions**, which enumerates generic factors for consideration in all cases. Also, a number of guidelines identify potential principal considerations that are specific to the described violation.

General Principles Applicable to All Sanction Determinations

1. **Disciplinary sanctions should be designed to protect the investing public by deterring misconduct and upholding high standards of business conduct.**

   The purpose of FINRA's disciplinary process is to protect the investing public, support and improve the overall business standards in the securities industry, and decrease the likelihood of recurrence of misconduct by the disciplined respondent. Toward this end, Adjudicators should design sanctions that are meaningful and significant enough to prevent and discourage future misconduct by a respondent and deter others from engaging in similar misconduct.

   Sanctions should be more than a cost of doing business. Sanctions should be a meaningful deterrent and reflect the seriousness of the misconduct at issue. To meet this standard, certain cases may necessitate the imposition of sanctions in excess of the upper sanction guideline. For example, when the violations at issue in a particular case have widespread impact, result in significant ill-gotten gains, or result from reckless or intentional actions, Adjudicators should assess sanctions that exceed the recommended range of the guidelines.[1]

   Finally, as Adjudicators apply these principles and tailor sanctions, Adjudicators should consider a firm's size with a view toward ensuring that the sanctions imposed are remedial and designed to deter future misconduct, but are not punitive. Factors to consider in connection with assessing a firm's size are: the financial resources of the firm; the nature of the firm's business; the number of individuals associated with the firm; and the level of trading activity at the firm. This list is included for illustrative purposes and is not exhaustive. Other factors also may be considered in connection with assessing firm size.[2]

2. **Disciplinary sanctions should be more severe for recidivists.** An important objective of the disciplinary process is to deter and prevent future misconduct by imposing progressively escalating sanctions on recidivists beyond those outlined in these guidelines, up to and including barring associated persons and expelling firms. Sanctions imposed on recidivists should be more severe because a recidivist, by definition, already has demonstrated a failure to comply with FINRA's rules or the securities laws. The imposition of more severe sanctions emphasizes the need for corrective action after a violation has occurred, discourages future misconduct by the same respondent, and deters others from engaging in similar misconduct.

   Adjudicators should always consider a respondent's relevant disciplinary history in determining sanctions and should ordinarily impose progressively escalating sanctions on recidivists. In certain cases, the guidelines recommend responding to second and subsequent disciplinary actions with increasingly severe suspensions, monetary sanctions, and in certain cases, prohibitions or limitations on a respondent's lines of business. This escalation is consistent with the concept that repeated misconduct calls for increasingly severe sanctions.

   Adjudicators also should consider imposing more severe sanctions when a respondent's disciplinary history includes significant past misconduct that: (a) is similar to that at issue; or (b) evidences a reckless disregard for regulatory requirements, investor protection,

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1. See, e.g., Dep't of Enforcement v. Murray, Complaint No. 2008016437801, 2012 FINRA Discip. LEXIS 64, at *31 (FINRA OHO Oct. 25, 2012) (finding that respondent's disregard of his supervisory duties supported sanctions above the range recommended by the Sanction Guidelines), aff'd, 2013 FINRA Discip. LEXIS 33, at *5 (FINRA NAC Dec. 17, 2013).

2. Adjudicators may consider a firm's small size in connection with the imposition of sanctions with respect to rule violations involving negligence. With respect to violations involving fraudulent, willful or reckless misconduct, Adjudicators should consider whether, given the totality of the circumstances involved, it is appropriate to consider a firm's small size and may determine that, given the egregious nature of the fraudulent activity, firm size will not be considered in connection with sanctions.

or market integrity. Certain regulatory incidents are not relevant to the determination of sanctions because they do not qualify as disciplinary history. Arbitration proceedings, whether pending, settled, or litigated to conclusion, are not "disciplinary" actions. Similarly, pending investigations or the existence of ongoing regulatory proceedings prior to a final decision are not disciplinary history.

3. **Adjudicators should tailor sanctions to respond to the misconduct at issue.** Sanctions in disciplinary proceedings are intended to be remedial and to prevent the recurrence of misconduct. Adjudicators therefore should impose sanctions tailored to address the misconduct involved in each particular case. Section 15A of the Securities Exchange Act of 1934 and FINRA Rule 8310 provide that FINRA may enforce compliance with its rules by: limitation or modification of a respondent's business activities, functions and operations; fine; censure; suspension (of an individual from functioning in any or all capacities, or of a firm from engaging in any or all activities or functions, for a defined period or contingent on the performance of a particular act); bar (permanent expulsion of an individual from associating with a firm in any or all capacities); expulsion (of a firm from FINRA membership and, consequently, from the securities industry); or any other fitting sanction.

   To address the misconduct effectively in any given case, Adjudicators may design sanctions other than those specified in these guidelines. For example, to achieve deterrence and remediate misconduct, Adjudicators may impose sanctions that: (a) require a respondent firm to retain a qualified independent consultant to design and/or implement procedures for improved future compliance with regulatory requirements; (b) suspend or bar a respondent firm from engaging in a particular line of business; (c) require an individual or member firm respondent, prior to conducting future business, to disclose certain information to new and/or existing clients, including disclosure of disciplinary history; (d) require a respondent firm to implement heightened supervision of certain individuals or departments in the firm; (e) require an individual or member firm respondent to obtain a FINRA staff letter stating that a proposed communication with the public is consistent with FINRA standards prior to disseminating that communication to the public; (f) limit the number of securities in which a respondent firm may make a market; (g) limit the activities of a respondent firm; or (h) require a respondent firm to institute tape recording procedures. **This list is illustrative, not exhaustive, and is included to provide examples of the types of sanctions that Adjudicators may design to address specific misconduct and to achieve deterrence. Adjudicators may craft other sanctions specifically designed to prevent the recurrence of misconduct.**

   The recommended ranges in these guidelines are not absolute. The guidelines suggest, but do not mandate, the range and types of sanctions to be applied. Depending on the facts and circumstances of a case, Adjudicators may determine that no remedial purpose is served by imposing a sanction within the range recommended in the applicable guideline; *i.e.*, that a sanction below the recommended range, or no sanction at all, is appropriate. Conversely, Adjudicators may determine that egregious misconduct requires the imposition of sanctions above or otherwise outside

of a recommended range. For instance, in an egregious case, Adjudicators may consider barring an individual respondent and/or expelling a respondent member firm, regardless of whether the individual guidelines applicable to the case recommend a bar and/or expulsion or other less severe sanctions. Adjudicators must always exercise judgment and discretion and consider appropriate aggravating and mitigating factors in determining remedial sanctions in each case. In addition, whether the sanctions are within or outside of the recommended range, Adjudicators must identify the basis for the sanctions imposed.

4. **Aggregation or "batching" of violations may be appropriate for purposes of determining sanctions in disciplinary proceedings.** The range of monetary sanctions in each case may be applied in the aggregate for similar types of violations rather than per individual violation. For example, it may be appropriate to aggregate similar violations if: (a) the violative conduct was unintentional or negligent (*i.e.*, did not involve manipulative, fraudulent or deceptive intent); (b) the conduct did not result in injury to public investors or, in cases involving injury to the public, if restitution was made; or (c) the violations resulted from a single systemic problem or cause that has been corrected.

   Depending on the facts and circumstances of a case, however, multiple violations may be treated individually such that a sanction is imposed for each violation. In addition, numerous, similar violations may warrant higher sanctions, since the existence of multiple violations may be treated as an aggravating factor.

5. **Where appropriate to remediate misconduct, Adjudicators should order restitution and/or rescission.** Restitution is a traditional remedy used to restore the status quo ante where a victim otherwise would unjustly suffer loss. Adjudicators may determine that restitution is an appropriate sanction where necessary to remediate misconduct. Adjudicators may order restitution when an identifiable person, member firm or other party has suffered a quantifiable loss proximately caused by a respondent's misconduct.[3]

   Adjudicators should calculate orders of restitution based on the actual amount of the loss sustained by a person, member firm or other party, as demonstrated by the evidence. Orders of restitution may exceed the amount of the respondent's ill-gotten gain. Restitution orders must include a description of the Adjudicator's method of calculation.

   When a member firm has compensated a customer or other party for losses caused by an individual respondent's misconduct, Adjudicators may order that the individual respondent pay restitution to the firm.

   Where appropriate, Adjudicators may order that a respondent offer rescission to an injured party.

6. **To remediate misconduct, Adjudicators should consider a respondent's ill-gotten gain when determining an appropriate remedy.** In cases in which the record demonstrates that the respondent obtained a financial benefit[4] from his or her misconduct, where appropriate to remediate misconduct, Adjudicators may

3. Other avenues, such as arbitration, are available to injured customers as a means to redress grievances.

require the disgorgement of such ill-gotten gain by ordering disgorgement of some or all of the financial benefit derived, directly or indirectly.[5] In appropriate cases, Adjudicators may order that the respondent's ill-gotten gain be disgorged and that the financial benefit, directly and indirectly, derived by the respondent be used to redress harms suffered by customers. In cases in which the respondent's ill-gotten gain is ordered to be disgorged to FINRA, and FINRA collects the full amount of the disgorgement order, FINRA's routine practice is to contribute the amount collected to the FINRA Investor Education Foundation.

7. **Where appropriate, Adjudicators should require a respondent to requalify in any or all capacities.** The remedial purpose of disciplinary sanctions may be served by requiring an individual respondent to requalify by examination as a condition of continued employment in the securities industry. Such a sanction may be imposed when Adjudicators find that a respondent's actions have demonstrated a lack of knowledge or familiarity with the rules and laws governing the securities industry.

8. **When raised by a respondent, Adjudicators are required to consider ability to pay in connection with the imposition, reduction or waiver of a fine or restitution.** Adjudicators are required to consider a respondent's *bona fide* inability to pay when imposing a fine or ordering restitution. The burden is on the respondent to raise the issue of inability to pay and to provide evidence thereof.[6] If a respondent does not raise the issue of inability to pay during the initial consideration of a matter before "trial-level" Adjudicators, Adjudicators considering the matter on appeal generally will presume the issue of inability to pay to have been waived (unless the inability to pay is alleged to have resulted from a subsequent change in circumstances). Adjudicators should require respondents who raise the issue of inability to pay to document their financial status through the use of standard documents that FINRA staff can provided. Proof of inability to pay need not result in a reduction or waiver of a fine, restitution or disgorgement order, but could instead result in the imposition of an installment payment plan or another alternate payment option. In cases in which Adjudicators modify a monetary sanction based on a *bona fide* inability to pay, the written decision should so indicate. Although Adjudicators must consider a respondent's *bona fide* inability to pay when the issue is raised by a respondent, monetary sanctions imposed on member firms need not be related to or limited by the firm's required minimum net capital.

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4. "Financial benefit" includes any commissions, concessions, revenues, profits, gains, compensation, income, fees, other remuneration, or other benefits the respondent received, directly or indirectly, as a result of the misconduct.

5. Certain guidelines specifically recommend that Adjudicators consider ordering disgorgement in addition to a fine. These guidelines are singled out because they involve violations in which financial benefit occurs most frequently. These specific references should not be read to imply that it is less important or desirable to order disgorgement of ill-gotten gain in other instances. The concept of ordering disgorgement of ill-gotten gain is important and, if appropriate to remediate misconduct, may be considered in all cases whether or not the concept is specifically referenced in the applicable guideline.

6. See In re Toney L. Reed, Exchange Act Rel. No. 37572 (August 14, 1996), wherein the Securities and Exchange Commission directed FINRA to consider financial ability to pay when ordering restitution. In these guidelines, the NAC has explained its understanding of the Commission's directives to FINRA based on the Reed decision and other Commission decisions.

Principal Considerations in Determining Sanctions

The following list of factors should be considered in conjunction with the imposition of sanctions with respect to all violations. Individual guidelines may list additional violation-specific factors.

Although many of the general and violation-specific considerations, when they apply in the case at hand, have the potential to be either aggravating or mitigating, some considerations have the potential to be only aggravating or only mitigating. For instance, the presence of certain factors may be aggravating, but their absence does not draw an inference of mitigation.[1] The relevancy and characterization of a factor depends on the facts and circumstances of a case and the type of violation. This list is illustrative, not exhaustive; as appropriate, Adjudicators should consider case-specific factors in addition to those listed here and in the individual guidelines.

1. The respondent's relevant disciplinary history (see General Principle No. 2).
2. Whether an individual or member firm respondent accepted responsibility for and acknowledged the misconduct to his or her employer (in the case of an individual) or a regulator prior to detection and intervention by the firm (in the case of an individual) or a regulator.
3. Whether an individual or member firm respondent voluntarily employed subsequent corrective measures, prior to detection or intervention by the firm (in the case of an individual) or by a regulator, to revise general and/or specific procedures to avoid recurrence of misconduct.
4. Whether the respondent voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct.
5. Whether, at the time of the violation, the respondent member firm had developed reasonable supervisory, operational and/or technical procedures or controls that were properly implemented.
6. Whether, at the time of the violation, the respondent member firm had developed adequate training and educational initiatives.
7. Whether the respondent demonstrated reasonable reliance on competent legal or accounting advice.
8. Whether the respondent engaged in numerous acts and/or a pattern of misconduct.
9. Whether the respondent engaged in the misconduct over an extended period of time.
10. Whether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive or intimidate a customer, regulatory authorities or, in the case of an individual respondent, the member firm with which he or she is/was associated.
11. With respect to other parties, including the investing public, the member firm with which an individual respondent is associated, and/or other market participants, (a) whether the respondent's misconduct resulted directly or indirectly in injury to such other parties, and (b) the nature and extent of the injury.

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1. *See, e.g., Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (explaining that while the existence of a disciplinary history is an aggravating factor when determining the appropriate sanction, its absence is not mitigating).

12. Whether the respondent provided substantial assistance to FINRA in its examination and/or investigation of the underlying misconduct, or whether the respondent attempted to delay FINRA's investigation, to conceal information from FINRA, or to provide inaccurate or misleading testimony or documentary information to FINRA.

13. Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence.

14. Whether the member firm with which an individual respondent is/was associated disciplined the respondent for the same misconduct at issue prior to regulatory detection. Adjudicators may also consider whether another regulator sanctioned a respondent for the same misconduct at issue and whether that sanction provided substantial remediation.

15. Whether the respondent engaged in the misconduct at issue notwithstanding prior warnings from FINRA, another regulator or a supervisor (in the case of an individual respondent) that the conduct violated FINRA rules or applicable securities laws or regulations.

16. Whether the respondent member firm can demonstrate that the misconduct at issue was aberrant or not otherwise reflective of the firm's historical compliance record.

17. Whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain.

18. The number, size and character of the transactions at issue.

19. The level of sophistication of the injured or affected customer.

VI. Improper Use of Funds/Forgery

Conversion or Improper Use of Funds or Securities

Forgery and/or Falsification of Records

Conversion or Improper Use of Funds or Securities

FINRA Rules 2010 and 2150[1], and NASD Rule 2330 and IM-2330

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	***Conversion***[2] (No fine recommended, since a bar is standard.) ***Improper Use*** Fine of $2,500 to $73,000.	***Conversion*** Bar the respondent regardless of amount converted. ***Improper Use*** Consider a bar. Where the improper use resulted from the respondent's misunderstanding of his or her customer's intended use of the funds or securities, or other mitigation exists, consider suspending the respondent in any or all capacities for a period of six months to two years and thereafter until the respondent pays restitution.

1. This guideline also is appropriate for violations of MSRB Rule G-25.
2. Conversion generally is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it.

CERTIFICATE OF COMPLIANCE

I, Lisa Jones Toms, certify that the foregoing FINRA's Brief in Opposition to the Application for Review (File No. 3-17560) complies with the length limitation set forth in SEC Rule of Practice 154(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 10,142 words.

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December 28, 2016

CERTIFICATE OF SERVICE

I, Lisa Jones Toms, certify that on this 28th day of December 2016, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review (File No. 3-17560) to be sent via messenger and fax to:

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Service was made on the Securities and Exchange Commission by messenger and on the Applicant's counsel by overnight delivery service and electronic mail between the offices of FINRA and the counsel for the Applicant.

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