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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

Administrative Proceeding File No. 3-17560r

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

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I. INTRODUCTION

In December 2009, Kimberly Springsteen-Abbott traveled to New York City and had dinner with her husband, son, daughter, two other adults, and three children. The Springsteen-Abbott party of nine dined at Broadway Joe's and the payment to the restaurant was $826.08. Springsteen-Abbott was registered in a principal capacity with a FINRA broker-dealer, and was the *de facto* manager of the companies that operated thirteen publicly and privately offered investment fund programs ("Commonwealth Funds"). She approved the $826 payment from the Commonwealth Funds for this meal.

After FINRA's Department of Enforcement ("Enforcement") filed a complaint, and an amended complaint in October 2013, which both identified hundreds of improper expenses, including the Broadway Joe's dinner, Springsteen-Abbott submitted to Enforcement itemized explanations, called tick sheets, that provided a description of most of the expenses in question and attached receipts. On the tick sheet for Broadway Joe's, Springsteen-Abbott claimed that the

expense was a business meeting with leasing vendors, who were essential to the equipment-leasing business model of the Commonwealth Funds.

Springsteen-Abbott denied the allegations in Enforcement's amended complaint, was represented by counsel, and a Hearing Panel conducted an evidentiary hearing in 2014. At the live hearing, Enforcement cross-examined Springsteen-Abbott about the Broadway Joe's dinner, and she admitted that the dinner was a personal expense. She conceded that the tick sheet that described the dinner as a business-related expense was incorrect. Springsteen-Abbott's testimony about this dinner, and her tick sheet explanation, made a strong negative impression on the Hearing Panel. It found that the Commonwealth Funds' payment for the dinner was improper. It further stated: "[t]he circumstances of this expense and the false business justification both added to the Hearing Panel's distrust of Springsteen-Abbott." After seven days of hearing testimony, the Hearing Panel concluded that Springsteen-Abbott engaged in a pattern and practice of allocating as business expenses paid by the Commonwealth Funds, personal and other nonbusiness expenses.

The critical question raised in this appeal is whether the dinner at Broadway Joe's in addition to 83 other examples of expenses that Commonwealth Funds should not have paid, show a pattern and practice of Springsteen-Abbott misusing the assets of the Commonwealth Funds. FINRA urges the Commission to answer this question in the affirmative and uphold the National Adjudicatory Council's ("NAC's") decision in all respects. Springsteen-Abbott's decision to use investor's funds to pay for personal expenses is a fundamental breach of FINRA's rules that requires FINRA-registered individuals to uphold high standards of commercial conduct. FINRA barred Springsteen-Abbott for her pattern and practice of paying

for expenses that were not business expenses with the Commonwealth Funds' monies and the Commission should affirm this sanction to protect the investing public.

II. PROCEDURAL HISTORY

In prior proceedings, the NAC issued a decision on August 23, 2016 that affirmed the Hearing Panel's findings of violation and sanctions it imposed against Springsteen-Abbott ("Original NAC Decision"). RP 7881-7902. Springsteen-Abbott appealed the Original NAC Decision to the Commission and, on March 31, 2017, the Commission remanded the case to FINRA for further proceedings ("Remand Order"). RP 8095-8104. The NAC considered the record anew, including the parties' briefs, and issued a new decision on July 20, 2017 ("2017 NAC Decision"). RP 8213-8252.

III. FACTUAL BACKGROUND

A. Springsteen-Abbott Owns and Controls All of the Commonwealth Entities

Commonwealth Capital Corp. ("Parent") is a family-owned business that leases medical, telecommunications, and information technology equipment on a short-term basis. RP 238, 586, 5810.[1] Springsteen-Abbott took over the business around 2006 and became the owner and top executive of all of the Commonwealth entities. RP 536, 2069-70, 7262, 7577.

During the relevant period, Springsteen-Abbott was associated with Commonwealth Capital Securities Corp. ("Firm"), a FINRA firm, as a general securities representative and direct participation programs principal. RP 585, 7262. She was the Firm's Chairman, Chief Executive

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

Officer ("CEO"), and Chief Compliance Officer, and indirectly owned the Firm through the Parent.[2] RP 7, 52, 237, 585, 2207, 2230, 5803.

The Firm was the managing broker-dealer of the Commonwealth Funds—thirteen publicly and privately offered investments funds sponsored by the Parent and managed by Commonwealth Income and Growth Funds, Inc. ("General Partner"). RP 7, 52, 238, 536, 586, 7262, 8217. Springsteen-Abbott oversaw all of the Commonwealth Funds' operations as the Parent's Chairperson, and CEO, and as the General Partner's Chairperson and CEO. RP 7262.

B. Springsteen-Abbott Authorized the Allocation of Expenses for the Commonwealth Funds

Each Commonwealth Fund was a separate legal entity with governing documents issued at Springsteen-Abbott's direction that set forth the terms of its operations (collectively "Operations Agreement"). RP 587, 5801-68. As head of the General Partner, Springsteen-Abbott was ultimately responsible for the Commonwealth Funds' administration and accounting, including ensuring that she paid the Funds' expenses in accordance with the Operations Agreement.[3] Springsteen-Abbott used an expense allocation process in which she allocated expenses to a respective Commonwealth Fund or multiple Funds on a pro rata basis and the General Partner or Parent received a reimbursement from the Commonwealth Funds.[4] RP 5812-13.

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[2] Springsteen-Abbott was the sole shareholder of the Parent. RP 7577. The Parent owned a wholly owned subsidiary—Commonwealth of Delaware, Inc.—that, in turn, owned the Firm. RP 7-8; Applicant Br. at 14.

[3] *See e.g.*, RP 5864 (stating, in relevant part: "The General Partner shall manage and control the [Funds], its business and affairs;" and "The General Partner shall have the fiduciary responsibility for the safekeeping and use of all funds and assets of the [Funds]").

[4] The Commonwealth Funds had no employees. Employees of the Parent or General Partner conducted the Funds' business operations and their proportionate share of salaries and administrative costs was then allocated to the applicable Fund(s) for reimbursement. RP 537.

The Operations Agreement precisely defined which expenses could be allocated to, and paid for, by the Commonwealth Funds. RP 5812. An expense of the Commonwealth Funds included any administrative or related expense that was "necessary to the prudent operation of the [Commonwealth Funds]." RP 5813.

Certain expenses, however, were not allocable to the Commonwealth Funds even if they were legitimate business expenses. These included any expense of a "Controlling Person," which 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. . . . or any person holding a five percent or more equity interest in the Manager or its Affiliates.

RP 5805, 5813-14.

By definition, Springsteen-Abbott was a Controlling Person, which meant that no Commonwealth Fund could pay for her expenses. RP 536, 1619, 7256, 7262.

However, Springsteen-Abbott's expenses were not the only impermissible ones. Her husband, Hank Abbott, became a Controlling Person sometime in 2010. RP 1699-70, 2015, 7263. In addition, Lynn Franceschina, the Parent's Chief Operations Officer and board member, and principal financial officer for all of the Commonwealth entities, met the definition of a Controlling Person. RP 1342, 1965. Therefore, neither Hank Abbott's nor Franceschina's expenses could be paid for by the Commonwealth Funds.

Springsteen-Abbott as manager of the Commonwealth Funds discharged her expense allocation duties quite informally. With no written policies or procedures at hand, Springsteen-Abbott readily charged—and allowed other Commonwealth employees to charge—personal and

other non-Commonwealth Fund related items on the Parent's corporate American Express credit card.[5] RP 239, 587.

The decision to allocate a charged item either to the Commonwealth Funds, the Parent, or as a personal expense rested solely with Springsteen-Abbott. RP 587. Springsteen-Abbott confirmed at the hearing that she reviewed the American Express bill on a monthly basis. RP 1459. Springsteen-Abbott testified that she reviewed the account statements "fiercely" and looked at the statements "line by line" to determine how she allocated expenses on the account. RP 1459. The account statements confirmed her detailed review. They had Springsteen-Abbott's check marks next to each charged item and some items had her handwritten notes next to them concerning the allocation. RP 1348-49, 1431-32, 3037-3856. Springsteen-Abbott testified that she approved all final expense allocations to the Commonwealth Funds, along with the payment of the American Express bill. RP 1459.

Franceschina confirmed Springsteen-Abbott's hands-on involvement and ultimate authority over the expense allocation process in her testimony. RP 1348. Franceschina testified that there were no written policies on determining an expense allocation. RP 1349. Franceschina, who reported to Springsteen-Abbott (and later Hank Abbott), also received copies of the American Express account statements. RP 1401. She processed the allocations, but not before receiving Springsteen-Abbott's *direction* on whether and how to allocate a particular charge (unless the charge concerned a routine operational Commonwealth Fund expense).[6] *See*

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[5] Springsteen-Abbott was the lead holder of the American Express corporate credit card; she linked other cardholders, including Hank Abbott and Franceschina, to the account. RP 239, 587, 7266.

[6] In particular, Franceschina explained that when the American Express bill arrived, both she and Springsteen-Abbott would review the charges "simultaneously." RP 1401. Springsteen-Abbott then gave Franceschina either verbal or written instruction on the allocation of certain charged items as part of Springsteen-Abbott's detailed review or "overall just the approval of the

RP 1401-02. Franceschina then worked with the accounts payable group to journal the allocations and pay the bill. RP 1346, 1348-49, 1359, 1433.

In describing the process, Franceschina affirmed at the hearing that the decision to allocate an expense rested *solely* with Springsteen-Abbott. RP 1349. She explained that, for the charges at issue, Springsteen-Abbott had to "approve" the charged item in order "for it to be allocated to the funds." RP 1357. It was *always* Springsteen-Abbott—and not Franceschina—who ultimately authorized the allocation of an expense before it was made to the Commonwealth Funds:

> Q. And this Bijioux Terner charge was allocated to the funds?
> Franceschina: I don't have reason to believe it wasn't.
>
> Q. Okay. And Kim Springsteen-Abbott would have approved that allocation, right?
> Franceschina: In general, she would approve all allocations, yes.

RP 1365; *see also* RP 1357.

C. Springsteen-Abbott Improperly Allocates Personal and Other Non-Business Expenses to the Commonwealth Funds

From January 2009 to April 2011, Springsteen-Abbott routinely directed the Commonwealth Funds to pay for several improper expenses. These improper expenses fell within three categories: (1) personal, (2) Controlling Person, and (3) broker-dealer expenses. RP 8219.[7]

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invoice itself." RP 1402. Franceschina would prepare the allocation via a worksheet for accounts payable. If necessary, Franceschina would then ask Springsteen-Abbott additional questions about the allocation. RP 1402. Springsteen-Abbott also reviewed the "overall allocation," which included "the front sheet that shows how, overall, the bill was allocated, and . . . the backup in it." RP 1403.

[7] None of the improper expenses found in the 2017 NAC Decision were administrative expenses of the Funds per the Operations Agreement. RP 5813.

Regarding personal expenses, Springsteen-Abbott spent the Commonwealth Funds' monies on numerous personal expenditures ranging from ranging from personal vacations, birthday celebrations, car rentals, gasoline, and family dining that represented thousands of Fund dollars. RP 8221-32. Springsteen-Abbott admitted at the hearing that she allocated some personal charges in error. *See e.g.*, RP 1488-89 (conceding that her Thanksgiving dinner "should have never been allocated to the funds"). With the exception of these few mistaken charges, Springsteen-Abbott contested most of the allocated personal expenses by falsely depicting them as business-related and properly paid for by the Commonwealth Funds. *See e.g.*, RP 1513-17, 1526-27, 1554-57.

Regarding Controlling Person expenses, Springsteen-Abbott admitted at the hearing that she was a Controlling Person. RP 1619-20. In a section titled "Excluded Expenses," the Operations Agreement explicitly prohibited Springsteen-Abbott from expensing to the Commonwealth Funds any of her or any other Controlling Person's expenses—even if they were legitimate business expenses that related to servicing the Funds' operations. RP 5813, 8233.

Springsteen-Abbott also allocated charges categorized as broker-dealer expenses. These charges included meals, fuel, and other incidentals associated with FINRA training and continuing education, broker-dealer conferences, and study materials for FINRA registered representatives. RP 1145.

Regarding the broker-dealer expenses, the Hearing Panel heard testimony by FINRA examiner Kelly Edwards, who reviewed Springsteen-Abbott's document production, which included the American Express bills, allocation spreadsheet, business explanations for each expense, and any supporting documentation. RP 893. Edwards testified that she noticed a pattern of charges allocated to the Commonwealth Funds, such as Series 7 (general securities

representative) and Series 22 (direct participation programs representative) examination study materials, FINRA training and continuing education, and "firm element" events, "that pertain[ed] to broker/dealer functions" and not the Commonwealth Funds' administration or operation.[8] RP 1144-46.

After Enforcement filed its original complaint in May 2013, Springsteen-Abbott prepared and submitted a spreadsheet to Enforcement to substantiate many of the expenses as legitimate business expenses ("August 2013 Spreadsheet"). RP 2249-95. On the August 2013 Spreadsheet, Springsteen-Abbott indicated whether a particular expense was FINRA or broker-dealer related. She broadly categorized the broker-dealer expenses via codes that referenced securities industry conferences, FINRA online training and education, and Commonwealth-sponsored continuing education. *See* RP 2295.

Springsteen-Abbott then identified each expense on the August 2013 Spreadsheet by its respective code and provided a business explanation. The explanations referenced (1) FINRA education and training;[9] (2) FINRA continuing education;[10] or (3) an associated broker-dealer

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[8] FINRA requires that securities professionals take qualification examinations such as the Series 7 and 22 when they engage in certain securities activities and sell certain products in the broker-dealer industry. *See Series 7 Exam—General Securities Representative Exam (GS)*, http://www.finra.org/industry/series7; *Series 22 Exam—Direct Participation Programs Representative Exam (DR)*, http://www.finra.org/industry/series22. FINRA requires associated persons to take continuing education training within 120 days after the second anniversary of their initial securities registration. *See FINRA Registration and Qualification*, http://www.finra.org/industry/registration-qualification.

[9] *See e.g.*, RP 2257 (stating "FINRA educ[ation]"), 2261 (stating "FINRA E-learning library subscription"), 2274 (stating "FINRA conference").

[10] *See e.g.*, RP 2260 (stating "FINRA Webinar" and "FINRA Online CE—Mark Hershenson").

registration expense.[11] Springsteen-Abbott also labeled some charges as "Firm Element" or "continuing education," which are FINRA compliance requirements applicable to maintaining a broker-dealer. *See e.g.*, RP 1641, 2612, 2614-20 (testifying that the December 2009 Firm Element at Alfano's restaurant that incurred a bill of $5,624.02 was for the broker-dealer and including the Firm's meeting agenda and sign-in sheets as supporting documentation); 1640, 5568 (testifying that the August 2010 continuing education annual compliance meeting was for the broker-dealer and including the Firm's meeting agenda as supporting documentation); 1641-42, 2293, 2295, 5108-09 (testifying that the Annual CE Firm Element held in December 2011 was for the broker-dealer and including the Firm's sign-in sheets for the meeting as supporting documentation). The record demonstrates that Springsteen-Abbott allocated multiple broker-dealer expenses to the Commonwealth Funds, like these, that concerned FINRA continuing education and training or broker-registration. RP 2253, 2259, 2264-65, 2274, 2276, 2278, 2280, 2282-83, 2284, 2292-93.

Springsteen-Abbott claimed that after Enforcement filed its original complaint, she recognized that she allocated to the Funds some of the alleged charges in error and reversed or "reallocated" those charges. Included in Springsteen-Abbott's August 2013 Spreadsheet was a category labeled "previously adjusted (8/2012)" that showed Springsteen-Abbott had reversed a total of $35,810.59 in allocated charges due to her error. RP 2295. She then identified the expense by a respective code on the spreadsheet. RP 2249-95. None of the improper expenses subject to the 2017 NAC Decision included Springsteen-Abbott's reallocations.

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[11] *See e.g.*, RP 2280 (stating "Series 22 review class"), 2285 (stating "Series 7 study materials").

D. Springsteen-Abbott's Testimony Regarding Misallocated Expenses Paid for by the Commonwealth Funds

Springsteen-Abbott testified that some of the allegedly improper expenses were mistakes, some were business expenses, and that she reversed some expenses.

- 2009 Birthday Cruise to Alaska

At the end of May 2009, Springsteen-Abbott celebrated her fiftieth birthday on a cruise from Vancouver to Alaska with her husband, her best friend, DA, and DA's husband. RP 1466. Springsteen-Abbott admitted in testimony that the cruise was a "personal vacation." RP 1470. Springsteen-Abbott also admitted that she allocated two of the birthday cruise expenses to the Commonwealth Funds in error: a meal charge for $251.60 at Fiori D'Italia and the Quiznos charge for $16.61 incurred at the airport in Phoenix where she and her husband had a layover on the way to Vancouver. RP 1475-76.

- August 11, 2010: Dinner at Cody's Roadhouse

In August 2010, Springsteen-Abbott dined with her daughter and grandchildren at Cody's Roadhouse in Tarpon Springs, Florida. The meal receipt, totaling $104.23, included charges for kids' menu items, RP 5181-88, yet Springsteen-Abbott insisted at the hearing that the dinner was a business expense:

> Q. Cody's Roadhouse. This meal was actually a meal with your family, wasn't it.
> Springsteen-Abbott: No.
>
> Q. You didn't order a kids mac and cheese, did you?
> Springsteen-Abbott: Yes. At the time I was on Jenny Craig. I know it doesn't show now, but at the time I was, and I was drinking two percent milk, and I was drinking and eating appetizers.
>
> Q. Okay. And your testimony is this is not a dinner with your family?
> Springsteen-Abbott: Yes.

RP 1513.

It was not until Enforcement confronted Springsteen-Abbott with an email that contradicted her testimony that she recanted. Springsteen-Abbott reversed her sworn testimony and admitted that the meal at Cody's restaurant was a personal family dinner. RP 1515, 1517 ("Q. You would agree with me, after reviewing the email, that Cody's meal on August 11th was dinner with your daughter and her kids, correct? Springsteen-Abbott: Yes. This is definitely an error.").

- Walt Disney World—Animal Kingdom Lodge Vacation

In June 2010, Springsteen-Abbott vacationed at Disney World—Animal Kingdom Lodge with her family. RP 587, 1565. Springsteen-Abbott admitted throughout the proceeding that her trip to Disney World was a "family vacation" and the associated charges of $2,679.10 spent on fast food, hotel accommodations, rental cars, gas, and other merchandise such as kid strollers, "Mickey mitts," and other toys purchased at the Disney store that the Commonwealth Funds paid for, were "mistake[s]" that she did not catch. RP 677, 870, 923-942, 1565-66, 7179. Springsteen-Abbott claimed that she reversed the Disney charges that she improperly allocated as Commonwealth Fund expenses.[12] RP 123, 547, 677. The evidence showed that she did not. RP 2249-93.

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[12] Springsteen-Abbott claimed as an affirmative defense to the amended complaint that she revised the allocation process and implemented a new procedure by using allocable expense tickets or "tick sheets" to better account for expenses. RP 325-26, 542, 880, 1444. Springsteen-Abbott's January and February 2014 document productions to Enforcement included the tick sheets to justify the 1,840 charges alleged in the amended complaint as legitimate business expenses. RP 1460-61, 7260. The tick sheets were handwritten and backdated using the incurred charge date, which in some cases happened several years prior. *See e.g.*, RP 3971-5080. Many tick sheets failed to provide basic details about the charge's business purpose, and how or when a reallocation occurred. Most notably, many of the tick sheets had supporting

- December 30, 2009: Year-End Holiday Meal

Springsteen-Abbott had dinner at Blue Pear Bistro with her husband. The Commonwealth Funds paid the restaurant bill totaling $116.41. RP 5151. The tick sheet that Springsteen-Abbott submitted to FINRA claimed that the expense had a legitimate Commonwealth Funds business purpose (i.e., a "wholesaler performance review meeting"). RP 1501, 5150. Springsteen-Abbott admitted at the hearing, however, that she misallocated at least her portion of the dinner to the Commonwealth Funds because she was a Controlling Person. RP 1504. She then claimed before the Hearing Panel that she corrected the mistake by "back[ing] out" the expense. RP 1504. The record, however, refutes this claim. Based on Springsteen-Abbott's August 2013 Spreadsheet, the entire meal expense remained improperly allocated to the Commonwealth Funds.

IV. THE HEARING PANEL DECISION AND THE NAC'S 2017 DECISION

On March 30, 2015, the Hearing Panel issued a decision finding that Springsteen-Abbott improperly used the Commonwealth Funds' monies for three years to pay for personal and other nonbusiness expenses, in violation of FINRA Rule 2010. RP 7255-7358. The Hearing Panel decision details and makes findings on the nature and circumstances of several personal, Controlling Person, and broker-dealer expenses that demonstrated Springsteen-Abbott's "purposeful pattern and practice of improperly allocating expenses to the Commonwealth Funds." RP 7303.

The Hearing Panel decision also makes several credibility findings. Specifically, it found that Springsteen-Abbott's and Hank Abbott's testimony on the purported business purposes for

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documentation attached that had nothing to do with the charge at issue, or the business purpose stated on the tick sheet was wrong. RP 8240.

various expenses were "rife with inconsistencies" and "often defied commonsense" and thus were proven untrustworthy. RP 7301, 7303. The Hearing Panel also found that Springsteen-Abbott repeatedly provided FINRA with business justifications for the allocated expenses that were contradicted by other evidence. RP 7302. The evidence led the Hearing Panel to conclude that Springsteen-Abbott acted unethically and in bad faith. RP 7309-11. For her misconduct, the Hearing Panel barred Springsteen-Abbott from associating with a FINRA member in all capacities, fined her $100,000, and ordered that she disgorge $208,953.75—representing the entire sum of the misused funds alleged—plus pre-judgment interest. RP 7311-21. Following Springsteen-Abbott's timely appeal, the Original NAC Decision affirmed the Hearing Panel's findings of violation and sanctions it imposed.

In its Remand Order, the Commission directed FINRA to address two main areas of concern. First, the Commission asked FINRA to explain whether or not, in affirming the Hearing Panel's findings in the Original NAC Decision, the NAC intended to include *all* 1,840 charges identified in the expense schedule attached to its decision, or a "specific subset of expenses" that established a "pattern and practice of misconduct in violation of FINRA Rule 2010." RP 8101. Second, the Commission requested FINRA's clarification on how the NAC's findings of violation on remand would affect Springsteen-Abbott's disgorgement sanction, if any, given that any disgorgement amount should be a "reasonable approximation of unjust enrichment" that is causally connected to the violation. RP 8102.

The NAC considered the full record anew and issued the 2017 NAC Decision. RP 8213-52. The NAC reaffirmed the Hearing Panel's findings that Springsteen-Abbott violated FINRA Rule 2010. RP 8233. It recognized, however, that it misstated the Hearing Panel's findings

regarding the number of individual charges proven at the hearing as improperly allocated. RP 8233.

The NAC's findings of violation on remand specified that 84 charges were improper and it found that those charges, in addition to the Controlling Person expenses that Springsteen-Abbott initially allocated, established a pattern and practice of Springsteen-Abbott's misuse of investment funds. RP 8233-34. The 2017 NAC Decision found that Springsteen-Abbott's pattern of misuse of investment funds violated just and equitable principles of trade. *See* RP 8221-35. The NAC credited Springsteen-Abbott's claim that she reallocated approximately $35,000 in charges from the Commonwealth Funds, thereby further limiting its liability findings to only those improperly allocated expenses that Springsteen-Abbott did not subsequently reverse in August 2012. RP 2249-93, 8233, 8238.

The NAC also reconsidered and adjusted Springsteen-Abbott's sanctions. RP 8241-46. The NAC found that Springsteen-Abbott committed a severe violation, and—based on the numerous aggravating factors that remained present in the case—it imposed a bar on her. The NAC, however, modified the disgorgement amount. Based on the NAC's findings of violation, the NAC correspondingly reduced its disgorgement order to $36,225.85 and the fine to $50,000. RP 8244-46. Springsteen-Abbott's appeal to the Commission followed.

V. ARGUMENT

A. Springsteen-Abbott Engaged in a Pattern of Misconduct That Violated FINRA Rule 2010

As a FINRA registered principal, Springsteen-Abbott committed to act ethically with regard to her business conduct and to observe high standards of commercial honor and just and equitable principles of trade. The NAC correctly found by a preponderance of the evidence that, over a three-year period, Springsteen-Abbott engaged in a pattern of misusing investment funds

by causing the Commonwealth Funds to pay for numerous impermissible expenses, in violation of her ethical duty under FINRA Rule 2010. The Commission should affirm the NAC's findings.

FINRA Rule 2010 sets forth an ethical standard that focuses on the professionalization of the securities industry and requires associated persons of a member to act ethically in all their business dealings. Specifically, it states that members, in the conduct of their business, must observe high standards of commercial honor and just and equitable principles of trade. The Rule "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." *Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *19-20 (Jan. 9, 2015), *aff'd*, 641 F. App'x 27 (2d Cir. 2016).

The Commission has firmly established that the misuse of investor funds is misconduct that violates FINRA Rule 2010. "[M]isuse of customer funds is 'patently antithetical to the high standards of commercial honor and just and equitable principles of trade that [FINRA] seeks to promote." *Id.* at *21; *see also Bernard D. Gorniak*, 52 S.E.C. 371, 373 (1995) (finding respondent violated just and equitable principles of trade by misusing customer funds entrusted to him for investment purposes); *Henry E. Vail*, 52 S.E.C. 339, 342 n.12 (1995) (finding misappropriation patently inconsistent with the just and equitable principles of trade rule), *aff'd*, 101 F.3d 37 (5th Cir. 1995).

Springsteen-Abbott failed in her duty to use investment funds only for the operation of the Commonwealth Funds. She directed that the Commonwealth Funds' monies pay for an array of personal expenses involving her personal vacations, family dinners and holiday meals, anniversary celebrations, and other personal events. Springsteen-Abbott intermixed personal and

business expenses on a single credit card, which placed in her hands the ability to spend thousands of dollars of the Commonwealth Funds' monies on these improper expenses. Her unethical misuse of investment funds in this manner violated FINRA Rule 2010. *See Timothy L. Burkes*, 51 S.E.C. 356, 360 (1993) (finding respondent's improper use of funds constituted unethical conduct in violation of just and equitable principles of trade), *aff'd*, 29 F.3d 630 (9th Cir. 1994) (table).

Springsteen-Abbott also misused Fund monies to pay for Controlling Person expenses. While this case was pending before the Hearing Panel, Springsteen-Abbott agreed that the Commonwealth Funds should not have paid any Controlling Person expenses; and at the hearing, she readily admitted that the allocation of these expenses were improper. *See* RP 1619-20. Although the NAC could not tally an independent amount of Controlling Person expenses that were misallocated for purposes of its disgorgement order, it correctly found that "for three years, Springsteen-Abbott admitted that she neglected to exclude any portion of her, Franceschina's or Hank Abbott's expenses" before she allocated the expense to the Commonwealth Funds, which further evidenced her pattern of misconduct.[13] RP 8235.

In addition to personal and Controlling Person expenses, the NAC found that Springsteen-Abbott routinely improperly allocated broker-dealer expenses. RP 8235. The evidence demonstrates that Springsteen-Abbott routinely caused the Commonwealth Funds to pay for costs related to FINRA examination study materials, online continuing education courses taken by Firm registered representatives, broker-dealer conferences, "Firm Element" and other Firm continuing education programs—that are operational costs of running a broker-dealer. RP

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[13] Hank Abbott became a Controlling Person at some point in 2010. RP 2015. Thus, Springsteen-Abbott could not allocate a portion of his expenses in 2010 and all of his incurred expenses in 2011. RP 8218.

1144-46, 2249-95, 7298-99, 7303. These were expenses that Springsteen-Abbott herself identified on the spreadsheet that she produced as FINRA or broker-dealer related. RP 2249-95.

As an example, the *Firm*, and not the Commonwealth Funds, hosted the annual continuing education meeting held at Alfano's Restaurant and moderated by Firm registered representatives. RP 2612-15. Springsteen-Abbott testified that the event was a Firm Element for the broker-dealer. RP 1641; *see also FINRA Firm Element*, http://www.finra.org/industry/firm-element (requiring broker-dealers to establish a formal training program to keep covered registered persons up to date on job- and product-related subjects). The incurred cost of $5,624.02 that she allocated to the Commonwealth Funds had nothing to do with the Commonwealth Funds' business of leasing short-term equipment. Nor was it part of the administrative expenses of maintaining the Commonwealth Funds.

The NAC correctly found that the 84 specified misallocated personal and nonbusiness expenses, in addition to the Controlling Person expenses that Springsteen-Abbott initially allocated, established a pattern and practice of Springsteen-Abbott's misuse of investment funds. RP 8234. Springsteen-Abbott had an ethical obligation as an associated person and fiduciary of the Funds to spend the Funds' assets for the operation of the Commonwealth Funds. RP 5821. She failed to uphold these obligations.

Springsteen-Abbott argues that the NAC imposed its own, rather than deferring to her, business judgment that she properly charged the broker-dealer expenses to the Commonwealth Funds. Applicant Br. at 14. She claims that she required employees who did not require FINRA registration to attend continuing education because, in her *business* judgment, the education would benefit the Commonwealth Funds. Applicant Br. at 14. She argues that she reasonably believed that attributing broker-dealer costs to the Commonwealth Funds' as Fund expenses was

"in the best interest of the Funds." Applicant Br. at 20. Her arguments are without merit for several reasons.

State law does not govern whether these expenses were properly paid for by the Commonwealth Funds. The Commonwealth Funds had to spend money on its operation. As Springsteen-Abbott acknowledged at the hearing, "we do act within the operating agreement and the limited partnership agreement, and that governs how we allocate our expenses." RP 1685. Just as the Operations Agreement made clear that the Commonwealth Funds could not pay expenses of Controlling Persons, it is also apparent that the Commonwealth Funds could not pay the expenses of the broker-dealer.

The NAC correctly classified the expenses as broker-dealer expenses for several reasons. First, Springsteen-Abbott broadly identified several of the expenses as FINRA or broker-dealer related. RP 2295. She then identified certain expenses on the August 2013 Spreadsheet when explaining their business purpose as: (1) FINRA education and training; (2) FINRA continuing education; and (3) an associated broker-dealer registration expense. *See e.g.*, RP 2257, 2260, 2280.

Springsteen-Abbott further testified at the hearing that certain "Firm Element" or "continuing education"[14] events were expenses that related to the broker-dealer. *See e.g.*, RP 1641, 2612, 2614-20 (testifying that the December 2009 Firm Element at Alfano's restaurant incurring $5,624.02 in costs was for the broker-dealer and providing the Firm's meeting agenda and sign-in sheets as supporting documentation); 1640, 5568 (testifying that the August 2010 continuing education annual compliance meeting was for the broker-dealer and including the

[14] FINRA requires associated persons of broker-dealer members to take continuing education courses as part of their qualification to engage in securities transactions and business activities with the investing public. *See FINRA Registration and Qualification*, *supra* note 8.

Firm's meeting agenda as supporting documentation); 1641-42, 2293, 2295, 5108-09 (testifying that the Annual CE Firm Element held in December 2011 was for the broker-dealer and including the Firm's sign-in sheets for the meeting as supporting documentation).

Second, Springsteen-Abbott's claim has no support. She suggests that nonregistered personnel incurred the expenses, Applicant Br. at 21, but the evidence demonstrates otherwise. For example, Springsteen-Abbott indicated on her spreadsheet that Mark Hershenson attended a FINRA continuing education seminar online. RP 2260. But Hershenson is *registered with FINRA*. FINRA has continuing education requirements for a registered person—the Commonwealth Funds do not. A FINRA online continuing education course taken by an associated person of the Firm is an expense associated with Springsteen-Abbott's broker-dealer—it is not an expense of the Commonwealth Funds.

In another example, Springsteen-Abbott provided FINRA with a tick sheet indicating that she had dinner with two Firm registered representatives during the FINRA conference in Baltimore, MD. RP 4622-23. She then indicated that she went out to dinner with these Firm representatives again the next day. RP 4632-33. In these examples, there was no mention of nonregistered personnel in attendance. In any event, the Firm should have paid for meal expenses when broker-dealer representatives are attending a FINRA conference. Thus, any allocation of these types of charges as a Commonwealth Funds' operation or administrative expense was improper. The Commission should therefore reject Springsteen-Abbott's assertion that these expenses related to nonregistered employees.

Third, the Commonwealth Funds authorized Springsteen-Abbott to use the Commonwealth Funds' assets only in accordance with the terms of the Operations Agreement. RP 5822 ("The Manager shall not have the authority to do any act in contravention of this

Agreement"). The Operations Agreement provided that the Commonwealth Funds would reimburse the General Partner only for expenses that were necessary for and related to its business operation (i.e., operating expenses in connection with the purchase, lease, and sale of medical, telecommunications and information technology equipment). RP 587, 5810, 5812-13. Other than arguing that nonregistered employees purportedly attended an event, Springsteen-Abbott provided no testimony as to why the expenses were not broker-dealer expenses.[15] Indeed, FINRA registration, training and continuing education expenses are not included as a Commonwealth Funds stated business purpose or Commonwealth Funds operation. Her allocation of these broker-dealer expenses to the Commonwealth Funds was improper.

In sum, the NAC correctly found that Springsteen-Abbott misused investment funds in violation of FINRA Rule 2010. RP 8237. Her misconduct established a pattern of misuse that reflected on her inability "to fulfill [her] fiduciary duties in handling other people's money." *Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *10 (Mar. 29, 2016) (internal quotation marks omitted); *Keilen Dimone Wiley*, Exchange Act Release No. 76558, 2015 SEC LEXIS 4952, at *15 (Dec. 4, 2015), *aff'd*, 663 F. App'x 353 (5th Cir. 2016). The Commission should sustain the NAC's findings.

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[15] Springsteen-Abbott's brief states that it "was made clear at the hearing that Appellant required her employees to attend continuing education, even those who serviced the Funds." Applicant Br. at 4. This argument, however, is not supported by any citation to Springsteen-Abbott's testimony. Her brief merely quoted her counsel's closing statement, which states that "Kim [Appellant] testified she requires all her employees to attend CE [Continuing Education]," but again there is no citation to that testimony. Applicant Br. at 20. Indeed, counsel's closing statement is not testimony.

B. FINRA's Jurisdiction Over Springsteen-Abbott's Misconduct Is Well Established

FINRA's personal jurisdiction over Springsteen-Abbott is unchallenged. She had two categories of registration with a FINRA member during this disciplinary proceeding.[16] RP 2207; *see also Wiley*, 2015 SEC LEXIS 4952, at *11 ("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 rules."). Springsteen-Abbott continues to raise her previous argument that FINRA had no authority to discipline her misconduct under FINRA Rule 2010 because it did not involve a broker-dealer transaction or a broker-dealer customer. Applicant Br. at 26. The NAC rejected—as the Commission should—Springsteen-Abbott's attempt to artificially restrict FINRA's jurisdictional reach under Rule 2010. RP 8240-41.

It is well established that FINRA's jurisdiction under FINRA Rule 2010 is far-reaching and covers *any* unethical, business-related conduct. *See Vail*, 101 F.3d at 39. The NAC correctly found that Springsteen-Abbott's pattern of misuse of the Commonwealth Funds' monies was unethical in violation of Rule 2010 because it "reflected on her inability to comply with the regulatory requirements of the securities business and to fulfill [her] fiduciary duties in handling other people's money." RP 8235; *see also Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *23-24 (Sept. 30, 2016) (finding that Rule 2010 applies to business-related conduct that is inconsistent with just and equitable principles of trade and is not limited only to unethical conduct involving firm customers or securities).

Springsteen-Abbott's misconduct was undoubtedly business-related. *See Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4982, at *19 (Dec. 11, 2014)

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[16] Rule 2010 applies to Springsteen-Abbott via FINRA Rule 0140(a), which provides that a person associated with a member shall have the same duties and obligations as a member.

(finding that an associated person's "business" includes the business relationship with his employers and the commercial relationship he has with his customers), *aff'd*, 637 F. App'x 49 (2d Cir. 2016). Springsteen-Abbott was the head of all the Commonwealth entities and the *de facto* manager of the Commonwealth Funds. RP 8241. She was also the head of the Firm that sold the Fund securities to the public and thus her roles were "inextricably intertwined." *Accord DWS Sec. Corp.*, 51 S.E.C. 814, 822 (1993) (finding that FINRA's disciplinary authority is broad enough to cover misconduct away from the broker-dealer, particularly when the firm sold the securities of the issuer where the misconduct occurred and the respondent controls the issuer). Springsteen-Abbott's violation was business-related because she committed her misconduct while carrying out her business responsibilities, which included acting as *de facto* manager of the Commonwealth Funds and CEO of the Parent. Even though Springsteen-Abbott's misuse did not directly involve the Firm, her improper use of investment funds appropriately satisfied "Rule 2010's requirement that the misconduct be in the conduct of [her] business." *Grivas*, 2016 SEC LEXIS 1173, at *16 (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).

Springsteen-Abbott's brief attempts to distinguish her fact pattern from the *Vail* and *Grivas* cases—all to no avail. These cases stand for the proposition that FINRA Rule 2010 governs any business-related conduct that is inconsistent with just and equitable principles of trade, *irrespective of whether it involves a security*. Springsteen-Abbott claims that the *Grivas* case is dissimilar to hers because the respondent used client funds held at a broker-dealer to save a struggling broker-dealer. Applicant Br. at 26. However, like Springsteen-Abbott, Grivas breached his duty as the fund's manager and improperly used investment fund monies for

unauthorized means. *Grivas*, 2016 SEC LEXIS 4952, at *16. Moreover, like Springsteen-Abbott, the Commission held that "[h]is management of the Fund and conversion of fund assets in breach of his fiduciary duty to the Fund is business-related conduct" that violated FINRA Rule 2010. *Id.*

Springsteen-Abbott also strains to distinguish her actions from the facts in *Vail*. In *Vail*, the respondent—like Springsteen-Abbott—misappropriated funds held outside of his associated brokerage firm. *Vail*, 101 F.3d at 39. The court held that "Vail's position as a fiduciary of the club managing the club's funds constituted business-related conduct." *Id.* The ruling from *Vail* applies to Springsteen-Abbott, whose misuse was business-related in that her business roles included being the CEO of a broker-dealer and the *de facto* manager of the Commonwealth Funds.

Springsteen-Abbott's brief next asserts that, "[w]hile there are Rule 2010 decisions in the insurance business area, the victims are broker-dealer clients." Applicant Br. at 26. This is simply not true. In *Wiley*, for example, the Commission held that Wiley, a dually registered associated person and insurance agent, violated FINRA Rule 2010 when he misused the insurance premium payments by customers of an insurance agency to pay for his personal and business expenses. *Wiley*, 2015 SEC LEXIS 4952, at *15-22. Wiley's conversion occurred away from the broker-dealer, and the "victims" were insurance policyholders, not broker-dealer customers. *Id.* at *3, *16 (stating that Wiley sold insurance products and converted the insurance premium payments from customers of an insurance agency). The Commission correctly found that his business-related misconduct violated FINRA Rule 2010. *Id.* at *15-16.

As a registered person, Springsteen-Abbott was required to observe just and equitable principles of trade in all of her business dealings. Her misuse of investment funds, despite

occurring away from the Firm, constituted business-related conduct that is wholly actionable under FINRA Rule 2010. The Commission should sustain the NAC's findings.

C. Springsteen-Abbott's Defenses to Liability Are Unavailing

1. Springsteen-Abbott Is Solely Responsible for Her Misconduct

Springsteen-Abbott has stipulated, and her briefs filed during FINRA's proceedings conceded, that she had the *sole* responsibility to decide whether the Commonwealth Funds would pay for a particular expense.[17] But in this application for review, Springsteen-Abbott's brief argues that she was unaware that the misallocations occurred until the SEC and FINRA investigations and there is no evidence that she knowingly approved the misallocations. Applicant Br. at 2, 15. Springsteen-Abbott also blames Franceschina for forgetting to "back out" her meals from the Commonwealth Fund allocations, and asserts that she relied on her staff and outside auditors to catch her improper allocations. Applicant Br. at 6-7. The Commission should reject these baseless attempts to deflect liability.

The record demonstrates that Springsteen-Abbott knew well the nature of the expenses. She testified to her own attendance at the personal vacations, anniversary celebrations, family meals, and other family events, that the Commonwealth Funds improperly paid for. *See e.g.*, RP 1466, 1473, 1487-88, 1494-97, 1513-17, 1550-53, 1560-62, 1565. In these cases, she had firsthand knowledge of the misallocated expenses at issue. For example, Springsteen-Abbott testified that she took an Alaskan cruise for her 50th birthday in June 2009. RP 1466. She

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[17] *See e.g.*, 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); Applicant Br. at 3 ("Appellant also recognizes that, as the CEO, she bore ultimate responsibility for what occurred.").

admitted that the cruise was a "personal vacation" and that she incurred personal expenses. RP 1470-73. She attended the dinner at Fiori D'Italia with her friends where they spent $251.60 for food and thereafter she directed the allocation of this expense to the Commonwealth Funds. RP 1472-73.

> 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?
> Springsteen-Abbott: Yes.
>
> Q. And this meal is allocated to the funds, right?
> Springsteen-Abbott: Yes.
>
> Q. And you approved that allocation, right?
> Springsteen-Abbott: I did.

RP 1466-68, 1472.

The record also shows that Springsteen-Abbott made the decisions to allocate expenses to the Commonwealth Funds. Attempting to pass off her liability, Springsteen-Abbott suggests that the misallocations resulted from accounting and human errors made by Franceschina. Applicant Br. at 3, 25. These arguments lack factual support. First, the misallocations were not the result of an accounting or "procedural" error, as Springsteen-Abbott claims, because there was no formal or systematic allocation process that existed. Regarding written policies on allocations, Franceschina testified: "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." RP 1436; *see also* RP 1349, 1685 (confirming that there were no written policies or procedures in determining how an expense should be allocated).

Second, it was Springsteen-Abbott's—and not Franceschina's—responsibility to decide which of the charges at issue to allocate to the Commonwealth Funds and to approve the allocations in accordance with the Operations Agreement. Her testimony confirmed her role.

RP 1459. Springsteen-Abbott testified that, each month, she reviewed the American Express bill "fiercely" and looked at the statement "line by line" to determine whether the expense was a Commonwealth Fund expense. RP 1459.

In contrast, Franceschina's role, along with other staff in the accounting group, was not to make decisions. Franceschina processed the allocation of expenses to the Commonwealth Funds and paid the American Express bill, but not without Springsteen-Abbott's direction and ultimate approval. RP 1402-03. While Franceschina testified that she knew to allocate some routine business expenses, Springsteen-Abbott—and not her—reviewed and approved any expense allocation to the Commonwealth Funds before it was made. RP 1381, 1402-03.[18] To be sure, Springsteen-Abbott's misconduct "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). Indeed, the only "human" error that Springsteen-Abbott can blame for using the Commonwealth Fund's monies to pay for improper expenses is her own.[19]

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[18] Springsteen-Abbott's own testimony also undercuts her attempt now to blame 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 she made the Fund allocations on a monthly basis while the details of the charge were "fresh in [her] mind" and thus "relatively simple." RP 538.

[19] Springsteen-Abbott claims again in her brief that she inherited the antiquated expense allocation system from her late husband who originated the practice of commingling personal and Commonwealth Fund expenses. Applicant Br. at 5, 17. But, as noted in the 2017 NAC Decision, adopting risky practices and continuing to their use does not alleviate Springsteen-Abbott of her liability. RP 8243. Springsteen-Abbott also argues that, despite her supervision over the document productions to FINRA, there were errors for some business justifications because she was dealing with issues, illness, and death of family members. Applicant Br. at 17. Springsteen-Abbott submitted the tick sheets, however, as a newly implemented monitoring system to catch and correct errors in the expense allocation process and to substantiate actual expenses of the Commonwealth Funds. RP 337, 542, 880, 1444.

Springsteen-Abbott further claims that once she learned of the misallocations, she "corrected all discovered misallocations of her meals" before FINRA filed charges. Applicant Br. at 15. This contention, however, is disproven by the evidence in the record.

The evidence demonstrates that Springsteen-Abbott's reallocations occurred in August 2012—which was *after* Enforcement filed its original complaint. RP 2295. Indeed, Springsteen-Abbott should receive no credit for correcting her misconduct in response to FINRA's investigation and filing of a complaint. *See Dep't of Enforcement v. Mullins*, Complaint Nos. 20070094345, 20070111775, 2011 FINRA Discip. LEXIS 61, at *27 (FINRA NAC Feb. 24, 2011) (repaying funds after discovery does not alter FINRA's findings of conversion and misuse), *aff'd*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012). Furthermore, the NAC's findings extended only to "those improperly allocated charges that Springsteen-Abbott did not subsequently reverse in August 2012," RP 8233-35, which makes Springsteen-Abbott's reallocation claim irrelevant for the NAC's finding of misuse.

The Commission should also reject Springsteen-Abbott's implication that the Commonwealth Funds' outside auditors should have caught her misconduct. Applicant Br. at 3, 6-7. It was Springsteen-Abbott—and not the auditors—who had the responsibility to spend the Commonwealth Funds' assets in accordance with the Operations Agreement. *See E. Magnus Oppenheim & Co.*, 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. 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 top executive for all of the Commonwealth entities and Commonwealth Funds' *de facto* manager, Springsteen-Abbott had the duty to ensure that she did not wrongfully use the Commonwealth Funds' monies to pay for her personal vacations, family events and other unrelated costs. Springsteen-Abbott breached her duty by directing the Commonwealth Funds to pay for 84 impermissible expenses, as well as initially paying Controlling Person expenses, over a three-year period.

2. Springsteen-Abbott Acted Unethically *and* in Bad Faith

In her brief, Springsteen-Abbott argues that FINRA was required to prove that she acted unethically and in bad faith and that, contrary to the NAC's findings, she acted ethically and in good faith. Applicant Br. at 18, 22-24. Springsteen-Abbott's arguments about the legal requirements for a Rule 2010 violation is simply incorrect. And her claims about her actions being inadvertent and therefore not in bad faith have no merit. Applicant Br. at 2-3, 27-28.

First, she claims that this is a contract case and because her violation occurred outside of the Firm, FINRA could not find she violated Rule 2010 without finding that she acted in bad faith. Applicant Br. at 18. But a FINRA Rule 2010 violation does not require a showing of both unethical behavior and bad faith. The Commission has long applied a disjunctive bad faith or unethical conduct standard to a disciplinary action under FINRA Rule 2010. *See Heath v. SEC*, 586 F.3d 122, 133 (2d Cir. 2009) ("The most that is required is a finding of bad faith *or unethical conduct.*"). Accordingly, FINRA is not required to find that Springsteen-Abbott acted in bad faith to find she violated FINRA Rule 2010.

Springsteen-Abbott's reliance on *Buchman v. SEC*, 553 F.2d 816, 821 (2d Cir. 1977), is also misplaced. There, the court held that a breach of contract involving a broker-dealer's refusal to accept delivery of a stock—when the Commission had warned all broker-dealers to

assure themselves that they were not furthering a manipulative scheme—can be a violation of just and equitable principles of trade only when the broker-dealer did not have an honest and reasonable belief that the transaction was part of a manipulative scheme to evade federal securities laws. *Buchman*, 553 F.2d at 820. In *Heath*, the same court found *Buchman* "entirely distinguishable" because the respondent had no competing obligation to act in the way the broker-dealer in *Buchman* did. *See Heath*, 586 F.3d at 136. Springsteen-Abbott's case is likewise entirely distinguishable from *Buchman*. Springsteen-Abbott's violation is the improper use of funds; she identifies no competing obligation that, based on a Commission announcement or any other authoritative source, required her to use the Commonwealth Funds' monies to pay for personal and nonbusiness expenses. Moreover, the complaint did not allege that Springsteen-Abbott breached a contract and thereby violated Rule 2010.

Nevertheless, the NAC properly concluded that Springsteen-Abbott acted unethically *and in bad faith*, finding that "Springsteen-Abbott's routine practice of misusing the Funds' monies in this manner was unethical conduct and illustrated bad faith." RP 8237. The NAC based this conclusion on the fact that Springsteen-Abbott improperly used Commonwealth Fund monies by allowing the Funds to pay for personal and nonrelated business expenses for several years. *See West*, 2015 SEC LEXIS 102, at *23 (finding respondent acted unethically *and* in bad faith when notwithstanding the clear limitations on the use of funds, he misused them to pay for personal debts and nonrelated operating expenses).

The NAC found two main aspects of Springsteen-Abbott's bad faith, each of which reinforces the other: her pattern and practice of misusing the Commonwealth Funds' monies and her providing false business justifications regarding the expenses both during FINRA's investigation and in testimony before the Hearing Panel. Springsteen-Abbott's pattern and

practice of misuse we previously discussed. *See supra* Part V.A. The NAC found that Springsteen-Abbott's provision of false information on tick sheets in her attempts to justify the improper allocations as legitimate business expenses also demonstrated her bad faith. RP 8238. In many cases, Springsteen-Abbott supplied a business justification on the tick sheet and attached supporting documentation that had nothing to do with the expense at issue or the business purpose for the expense stated on the tick sheet was wrong.

For example, Springsteen-Abbott defended her dinner for nine at Broadway Joe's during FINRA's investigation as a legitimate business dinner. RP 1494-97. She drafted the tick sheet, attached the family dinner receipt, and submitted these documents to Enforcement. RP 5141-44. Only during cross-examination at the hearing did Springsteen-Abbott admit that the $826 dinner was not a business dinner. RP 1497. On this point, the Hearing Panel found that "Springsteen-Abbott provided a false business justification to FINRA staff . . . The circumstances of this expense and the false business justification both added to the Extended Hearing Panel's distrust of Springsteen-Abbott." RP 7293. This and other false statements to FINRA staff demonstrate that Springsteen-Abbott acted in bad faith. *See also* RP 7271-73, 7275, 7282, 7285, 7292, 7294, 7297 (finding the business justifications provided to FINRA false or misleading).

An additional aspect of Springsteen-Abbott's bad faith was her false and misleading testimony at the hearing. The NAC affirmed multiple, adverse credibility findings that the Hearing Panel made regarding Springsteen-Abbott's testimony on her allocation of improper expenses to the Commonwealth Funds. *See* RP 7301-03, 8240. Springsteen-Abbott repeatedly testified inconsistently before the 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, and improperly allocated her meal cost 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. Yet even after being shown the email, Springsteen-Abbott denied that the dinner was an anniversary dinner. Not only did the Hearing Panel find that Springsteen-Abbott allocated the dinner expense to the Commonwealth Funds improperly, it also found that her testimony was inconsistent with her email and therefore was not credible. RP 7285.

As another example, Springsteen-Abbott testified that she was at dinner with her daughter at Cody's Roadhouse in August 2010. RP 1513-14. The meal, which totaled $104.23, was a charged on Springsteen-Abbott's corporate credit card. RP 1470-73. She insisted at the hearing that the dinner was a business expense—and even claimed that the kid's meal ordered was her, and not her grandchildren's meal. RP 1513. It was not until Enforcement confronted her with an email that contradicted her testimony that Springsteen-Abbott recanted her testimony and admitted that the meal was a family dinner. RP 1515, 1517.

The Hearing Panel found Springsteen-Abbott's testimony regarding the Cody's Roadhouse meal was not credible on multiple points. It found that Springsteen-Abbott's insistence that the dinner was a business meal until she was shown proof that it was not "damaged her credibility." RP 7273. The Hearing Panel further found Springsteen-Abbott's testimony that she ate the "kid's mac & cheese" rather than admitting that her grandchildren were present at the dinner was also not credible. RP 7273. Lastly, the Hearing Panel found that

"Springsteen-Abbott's testimony with regard to the business nature of the dinner was not credible." RP 7273.

Supplying no evidence or reasonable explanation for her inconsistent testimony, the Hearing Panel summarized that it "does not find either Springsteen-Abbott or her husband, Hank Abbott, credible. Their testimony was rife with inconsistencies and often defied commonsense." RP 7301. The NAC rightly concluded that Springsteen-Abbott's pattern and practice of misusing Fund monies over a three-year period and her false statements that the expenses were Commonwealth Fund expenses showed bad faith. RP 8237.

Although the NAC amply supported these findings, Springsteen-Abbott sets forth a number of reasons why she could not have acted in bad faith. All of her arguments fail.

First, she argues that she reasonably believed that the broker-dealer expenses were for the benefit of the Commonwealth Funds and not the Firm. Applicant Br. at 22. But Springsteen-Abbott was not allowed to spend the Commonwealth Funds monies in any manner that she saw fit. The guidepost that Springsteen-Abbott had to follow for the Commonwealth Funds' expenses was the Operations Agreement, and not her own preferences. Per the terms of the Operations Agreement, costs associated with broker-dealer registration and continuing education were not included as operation expenses of the Commonwealth Funds. *See* RP 5812-14 (describing various types of expenses that related to the administration and operation of the Commonwealth Funds). Springsteen-Abbott failed to demonstrate that they were the Commonwealth Funds' expenses.

Second, Springsteen-Abbott argues that the *remaining* personal expenses do not support the NAC's finding of a purposeful pattern of misuse given that she voluntarily contributed $2.4

million to the Commonwealth Funds. Applicant Br. at 22-23. This argument ignores the NAC's findings.

Contrary to Springsteen-Abbott's argument, the NAC considered the $2.4 million contribution, but found it uninstructive and immaterial to the conduct at issue. RP 8238. The contribution was not a convincing showing of good faith, nor was it logically a reason to negate Springsteen-Abbot's actions taken in bad faith. The evidence well supports these findings. The $2.4 million contribution did not represent an altruistic cash donation from Springsteen-Abbott's pocket. Rather, $2.4 million was an approximate sum of liabilities owed to either the Parent or General Partner over the years that Springsteen-Abbott in her controlling position elected not to charge the Commonwealth Funds for business reasons. For example, Springsteen-Abbott testified that the $2.4 million contribution assisted with lease acquisitions from quality clients.[20] A significant amount of the contribution went towards massive legal expenses that could have adversely affected the cash flows of certain Commonwealth Funds.[21] Further, the two Commonwealth Funds that largely received the contribution were not even the Commonwealth Funds that are the subject of this disciplinary action. RP 2022, 8238 n.26.

Even if Springsteen-Abbott donated money to the Commonwealth Funds as a showing of good will toward the investors, this was a separate transaction and unrelated to her misuse of the Commonwealth Funds monies. *See Thomas W. Heath, III*, Exchange Act Release No. 59223,

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[20] *See* RP 1681 (Springsteen-Abbott testifying: "[W]e 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.").

[21] *See* RP 2135 (Springsteen-Abbott discussing the voluntary "support" she provided to certain Funds for keeping the legal costs from hindering the Funds' ability to reinvest).

2009 SEC LEXIS 14, at *25 (Jan. 9, 2009) (explaining that good faith is not a per se defense to a violation under Rule 2010), *aff'd*, 586 F.3d 122 (2d Cir. 2009). The actions are separate.

Indeed, Springsteen-Abbott's contribution to the Commonwealth Funds, no matter how extensive, did not excuse her from improperly using Commonwealth Fund monies for personal and nonbusiness purposes. "[S]ecurities professionals are not entitled to self-help in this manner." *Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at *16 (Sept. 3, 2015) (citing *Joseph H. O'Brien II*, 51 S.E.C. 1112, 1115 (1994), which held that respondent did not have the authority to remove funds from a customer's account simply because the customer owed him money).

Springsteen-Abbott further argues that the NAC did not properly consider her contribution to the Commonwealth Funds. This is not accurate. The 2017 NAC Decision states: "We disagree that Springsteen-Abbott's 2.4 million contribution meant that she could not have acted in bad faith or unethically." RP 8238. Springsteen-Abbott's apparent unstated reasoning is that because she contributed to the Commonwealth Funds (albeit on a different occasions), any conclusion that she acted in bad faith in handling the Commonwealth Funds' monies is always wrong. The fallacy in this argument is that it is too absolute. People can comply with rules for years, but violate them egregiously in a new year.[22] The NAC's finding of bad faith was specific to Springsteen-Abbott's pattern of misuse of Commonwealth Funds' monies and her false justifications and testimony to deny the misuse. Springsteen-Abbott's unrelated conduct should not displace the NAC's finding that she acted in bad faith.

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[22] For the same reason, the Commission should reject Springsteen-Abbott's claim that, prior to the SEC's and FINRA's investigations, Springsteen-Abbott had an "unblemished" 26-year career in the securities industry, Applicant Br. at 1, 14, because the absence of past violations is no defense to her routine improper use of the Funds' monies for three years—a severe violation of FINRA Rule 2010.

Similarly, Springsteen-Abbott cannot use her voluntary contribution to the Commonwealth Funds to reverse the unethical acts she has employed. *See also 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). Based on 84 improper expenses that the NAC found, in addition to the Controlling Person expenses that the Commonwealth Funds improperly paid, the record amply supports Springsteen-Abbott's Rule 2010 violation.

D. The NAC's Sanctions Are Consistent with the Sanction Guidelines and Are Neither Excessive or Oppressive

For her improper use of Commonwealth Funds' monies to pay for personal and other nonbusiness expenses, the NAC barred Springsteen-Abbott from associating with any FINRA member in any capacity, fined her $50,000, and ordered her to disgorge $36,225.85 to FINRA. These collective sanctions are appropriate given the gravity of Springsteen-Abbott's misconduct and are neither excessive nor oppressive.[23] *See* 15 U.S.C. § 78s(e)(2).

The NAC, after reviewing the record anew, carefully considered the FINRA Sanction Guidelines (the "Guidelines") and analyzed Springsteen-Abbott's liability based on evidence of her purposeful pattern and practice of improperly allocating expenses. After reviewing the Principal Considerations relevant to all sanction determinations and the relevant aggravating and mitigating factors, the NAC correctly determined that a bar was warranted for Springsteen-

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[23] The standards articulated in Section 19(e) of the Exchange Act provide that the Commission must dismiss Springsteen-Abbott's application for review if it finds that FINRA imposed sanctions that are neither excessive nor oppressive and that do not impose an unnecessary or inappropriate burden on competition. 15 U.S.C. § 78s(e). Springsteen-Abbott does not contend that FINRA's sanctions impose an undue burden on competition.

Abbott's unethical misconduct involving the misuse of the Commonwealth Funds. The Commission should affirm these sanctions.

In sanctioning Springsteen-Abbott, the NAC considered the Guidelines for conversion and improper use of funds. In its review of sanctions, the Commission considers the principles articulated in the Guidelines and gives weight to whether the sanctions are within the allowable sanction range under the Guidelines. *See Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *18-19 (Feb. 24, 2012); *see also Grivas*, 2016 SEC LEXIS 1173, at *25 n.37 (using the Guidelines "as a benchmark" when reviewing FINRA's sanctions on appeal).

The Guidelines recommend that a bar is the standard sanction for an improper use of funds violation unless the misuse resulted from the applicant's misunderstanding of her customer's intended use of funds or other mitigation exists.[24] The Guidelines also recommend a fine ranging from $2,500 to $73,000.[25] The Guidelines further provide that an order of disgorgement is proper where the respondent obtained a financial benefit from the misconduct, and that a fine should be imposed with disgorgement even if a respondent is barred where there is widespread, significant, and identifiable customer harm, or where the respondent retained substantial ill-gotten gains.[26] The NAC's sanctions are consistent with these recommendations and guidance.

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[24] *See FINRA Sanction Guidelines* (2015), at 36 (hereinafter "*Guidelines*"). The NAC applied the 2015 version of the Guidelines on remand in modifying its sanctions for Springsteen-Abbott's misconduct. A copy of the relevant Guidelines is provided herein as Attachment A.

[25] *Id.*

[26] *Id.* at 4-5, 10.

1. Springsteen-Abbott's Improper Use of Funds Warrants a Bar

Springsteen-Abbott's misuse of funds demonstrates her disregard for fundamental ethical principles and unfitness to practice in the security industry. "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." *See West*, 2015 SEC LEXIS 102, at *33-34. The Guidelines' recommended bar, absent mitigating circumstances, reflects the long-established principle that a securities professional who engages in the improper use of funds "poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry." *Charles C. Fawcett*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *22 n.27 (Nov. 8, 2007). Here, not only is there a lack of mitigating factors to justify a sanction less than a bar, but aggravating factors predominate.[27]

FINRA's decision to bar Springsteen-Abbott is strongly supported by several troubling, aggravating factors that demonstrate the unethical nature of her misconduct. RP 8242-43. First, Springsteen-Abbott's improper use of Fund monies was deliberate and intentional. *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13). Second, the volume of the improper allocations—exhibiting a deliberate pattern and practice—over the course of three years further aggravates her misconduct and contradicts Springsteen-Abbott's claims that her actions were anything other than deliberate. *See id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 8, 9, and 18). Third, by attributing personal and other nonbusiness expenses to the Funds that she or her Firm were otherwise obligated to pay, Springsteen-Abbott derived a monetary benefit to which she was not entitled. *See id.* at 7

[27] The Guidelines for improper use of customer funds do not specify any additional factors but direct adjudicators to the Guidelines' Principal Considerations for a non-exhaustive list of aggravating and mitigating factors. *Guidelines*, at 36. The relevance of these factors depends on the facts and circumstances of each case. *Id.* at 6-7.

(Principal Considerations in Determining Sanctions, No. 17). Fourth, Springsteen-Abbott accompanied her misconduct with unmistakable efforts to conceal her actions from FINRA, including providing inconsistent and false testimony. *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 10). Finally, Springsteen-Abbott has yet to acknowledge her misconduct and continues to blame others for her purposeful misdeeds. *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 2). Indeed, the testimony she gave to FINRA does little to assuage the concern that, if given the opportunity to continue in the securities industry, she would engage in similar misconduct in the future.

The NAC properly considered and rejected Springsteen-Abbott's mitigation arguments. The record belies Springsteen-Abbott's claims on appeal that her misallocations were inadvertent, mere error, or *de minimis*. Springsteen-Abbott's improper use of Commonwealth Funds' monies did not involve a few instances that she could pass off as "inadvertent" accounting errors, but $36,225 worth of personal and other nonbusiness expenses that the Funds improperly paid over the course of three years. Springsteen-Abbott made the decision to approve expenses and directed the Commonwealth Funds to pay for personal meals for friends and family, extended cars rentals, expenses occurred during hair restoration trips, family vacations and events, and broker-dealer expenses. The sheer volume of misallocations flies in the face of any argument of inadvertence.[28]

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[28] Contrary to her arguments, FINRA acted appropriately when it sanctioned Springsteen-Abbott for misuse of customer funds outside her broker-dealer business. *See Wiley*, 2015 SEC LEXIS 4952, at *29 ("[W]e reject Wiley's claim that FINRA lacks jurisdiction to sanction him for non-securities related conduct that is inconsistent with just and equitable principles of trade."); *see also, e.g., Grivas*, 2016 SEC LEXIS 1173, at *16-17, *21 (affirming applicant's bar for converting the funds of an investment fund in violation of just and equitable principles of trade); *Vail*, 52 S.E.C. at 339 (affirming applicant's bar for misappropriating funds of an organization for which he served as treasurer in violation of just and equitable principles of trade).

The NAC considered Springsteen-Abbott's $2.4 million voluntary contribution to the Commonwealth Funds and properly concluded it was not mitigating. First, as a factual matter, the record provides that the contribution largely related to two Commonwealth Funds that were not the subject of her improper use violation. Moreover, the underlying, yet unproven, assumption that Springsteen-Abbott did not profit from her misconduct because of the contribution does not alter the assessment that barring her serves an appropriately remedial objective. *See Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 SEC LEXIS 994, at *91-92 n.66 (Feb. 1, 2010) (sustaining a bar although the applicant "may not have profited directly from misappropriating some of her clients' funds").

Likewise, the NAC's reduction of the disgorgement order and amount of fine amount does not change the fact that Springsteen-Abbott committed a severe rule violation, for which a bar is the appropriate recourse.[29] *See O'Brien*, 51 S.E.C. at 1116-17 (finding that barring respondent for his improper use of funds, along with imposing a substantial fine and restitution, were warranted due to the serious nature of his misconduct). The bar reflects that Springsteen-Abbott's disregard for fundamental ethical principles and unfitness to practice in the security industry, which is unchanged by the reduced disgorgement order and fine.[30]

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[29] Springsteen-Abbott argues that by imposing a bar against her, "the NAC has continued to adopt the Hearing Panel's bias" against her. Applicant Br. at 25. The NAC found no evidence of bias or prejudice in the Hearing Panel's decision. *See* RP 8240. Likewise, Springsteen-Abbott provides no evidence in support of her argument that the NAC has adopted the Panel's bias. The Commission should reject Springsteen-Abbott's bias claim as meritless.

[30] To wit, the Commission has affirmed a bar in other conversion and misuse of fund cases involving fewer transactions and a lower dollar amount. *See, e.g., Olson*, 2015 SEC LEXIS 3629, at *20 (affirming FINRA Rule 2010 violation for applicant's improper, one-time reimbursement of $740.10); *Daniel D. Manoff*, 55 S.E.C. at 1155, 1164 (2002) (affirming NASD Rule 2110 violation for four unauthorized credit card transactions totaling $3,745).

Finally, Springsteen-Abbott argues that the NAC applied the Guidelines "in an unfair matter" in comparison to other decisions cited in the NAC's decision, which "are easily distinguishable from the facts present here." But the Commission has long ruled that the determination of whether a particular sanction imposed by a self-regulatory association is excessive or oppressive "is made with regard to 'the facts and circumstances of each particular case, and cannot be precisely determined by comparison with the actions taken in other proceedings.'" *Hal S. Herman*, 55 S.E.C. 395, 404 (2001) (quoting *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973)). The NAC did not bar Springsteen-Abbott based on precedent. Rather, it imposed a bar based on the facts and circumstances, including the numerous aggravating factors, related to Springsteen-Abbott's pattern of misuse of the Commonwealth Funds' monies.[31]

Cognizant of its statutory duty to protect the investing public, the NAC believed that it would be remiss not to act decisively in a case such as this, where the evidence calls into question the honesty and trustworthiness of a person associated with a FINRA member. As the Commission has noted, the securities industry "presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants." *Bernard D. Gorniak*, 52 S.E.C. 371, 373 (1995) (citations omitted). Springsteen-Abbott's deliberate use of the Commonwealth Funds' monies to pay for personal and other nonbusiness expenses raises

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[31] Of note, Springsteen-Abbott's reliance on FINRA's decisions in *McCartney* and *Leopold* to support a claim of mitigation is particularly problematic. Applicant's Br. at 27-28. FINRA's decisions in *McCartney* and *Leopold* were highly fact specific and did not rest on the presence or absence of any one aggravating or mitigating factor. *See Dep't of Enforcement v. Olson*, Complaint No. 2010023349601, 2014 FINRA Discip. LEXIS 7, at *15 n.14 (Bd. of Governors May 9, 2014), *aff'd*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629 (Sept. 3, 2015). Thus, Springsteen-Abbott's position violates the FINRA Board of Governors' instruction that "relying on discrete statements from [*McCartney* and *Leopold*] to support a claim of mitigation in another case is unsound." *Id.*

grave concern about her ability to fulfill her obligation to act honestly and ethically in the securities industry. *See Manoff*, 55 S.E.C. at 1166 ("We agree with [FINRA] that Manoff's continued presence in the securities industry threatens the public interest."); *Vail*, 52 S.E.C. at 342 ("[Vail's] actions make us doubt his commitment to the high fiduciary standards demanded by the securities industry"). Under the circumstances, the NAC concluded that Springsteen-Abbott's continued participation in the securities industry threatens the investing public. The record amply supports the NAC's finding.

Accordingly, the Commission should affirm as appropriately remedial the bar FINRA imposed in this case.

2. The NAC's Disgorgement Order and Fine Imposed Are Proper

In addition to the bar, the NAC appropriately ordered that Springsteen-Abbott disgorge $36,225. 85in ill-gotten gains and fined her $50,000. RP 8244. Other than conclusory statements (without citation) that the NAC's order of disgorgement and fine are unsupported by the evidence, Springsteen-Abbott makes no argument to undermine the propriety of these sanctions. The Commission should reject this feeble attempt and affirm the sanctions, which are well supported by the Guidelines and the findings in the 2017 NAC Decision.

The Guidelines provide that, where a respondent has obtained a financial benefit from her misconduct, an adjudicator may order that the respondent disgorge her ill-gotten gains. *Guidelines*, at 4-5 (General Principles Applicable to All Sanction Determinations, No. 6); *see also id.* at 10 (providing that adjudicators should order disgorgement in sales practice abuse cases, even where an individual is barred, if she has retained substantial ill-gotten gains). Springsteen-Abbott obtained $36,225. 85by misallocating personal and broker-dealer expenses to the Commonwealth Funds. This amount, which the NAC reduced on remand from the

Commission, reflects "a reasonable approximation of profits causally connected to [her] violation."[32] *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989). The NAC's order is appropriate and serves to remedy Springsteen-Abbott's misconduct. *See The Dratel Group*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035, at *73 (Mar. 17, 2016) ("We have held that FINRA, in cases involving misconduct, may require respondents to disgorge their entire financial benefit."); *Michael David Sweeney*, 50 S.E.C. 761, 768 (1991) ("[D]isgorgement is intended to force wrongdoers to give up the amount by which they were unjustly enriched.").

The NAC's fine of $50,000 is likewise appropriate. The NAC correctly found that Springsteen-Abbott's misconduct was significant and widespread and caused financial harm to the Commonwealth Funds, justifying the imposition of a fine. *See Guidelines*, at 10. Springsteen-Abbott's fine falls squarely within the recommended sanction range in the Guidelines for the improper use of funds. *Id.* at 36.

In sum, the bar, $36,225.85 disgorgement order, and $50,000 fine imposed upon Springsteen-Abbott serve a remedial purpose and are needed to protect the investing public. The Commission should affirm the NAC's sanctions.

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[32] As noted in its decision, the NAC's disgorgement order excludes Controlling Person expenses that Springsteen-Abbott admitted to improperly allocating to the Commonwealth Funds because the applicable charged items were not clearly identified in the amended complaint. It also excludes any alleged charges that Springsteen-Abbott reversed in August 2012. Contrary to Springsteen-Abbott's argument that she did not personally benefit from the broker-dealer expenses, Applicant Br. at 28-29 n.10, the evidence demonstrates that Springsteen-Abbott unduly benefitted from her improper use of the Commonwealth Funds' monies as the head and indirect owner of both the Commonwealth Funds and the Firm. *See Guidelines*, at 4-5 (recommending disgorgement of some or all of the financial benefit derived, directly or indirectly, from the misconduct).

VI. CONCLUSION

The evidence of Springsteen-Abbott's improper use of funds abundantly supports the NAC's finding of violation. The sanctions imposed by the NAC for her misconduct are fully supported by the record and are remedially appropriate under the facts and circumstances of this case. The Commission therefore should dismiss the application for review, sustain FINRA's disciplinary action, and affirm the sanctions it imposed.

Respectfully submitted,

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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

2015

Sanction Guidelines

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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

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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.

Applicability

These guidelines supersede prior editions of the *FINRA Sanction Guidelines*, whether published in a booklet or discussed in *FINRA Regulatory Notices* (formerly *NASD Notices to Members*). These guidelines are effective as of the date of publication, and apply to all disciplinary matters, including pending matters. FINRA may, from time to time, amend these guidelines and announce the amendments in a *Regulatory Notice* or post the changes on FINRA's website *(www.finra.org)*. Additionally, the NAC may, on occasion, specifically amend a particular guideline through issuance of a disciplinary decision. Amendments accomplished through the NAC decision-making process or announced via *Regulatory Notices* or on the FINRA website should be treated like other amendments to these guidelines, even before publication of a revised edition of the *FINRA Sanction Guidelines*. Interested parties are advised to check FINRA's website carefully to ensure that they are employing the most current version of these guidelines.

Technical Matters

Calculation of days of suspension. As was the case in prior versions of the *FINRA Sanction Guidelines*, recommendations for the imposition of suspensions contained herein distinguish between suspensions for 30 or fewer days and 31 or more days. In these guidelines, the NAC recommends that a suspension of 30 or fewer days be measured in *business days*, while a suspension of 31 or more days be measured in *calendar days*.

Censures. These guidelines do not specifically recommend whether or not Adjudicators should impose censures under any of the individual sanction guidelines for particular violations. In the following two instances, however, Adjudicators generally should not impose censures: 1) in cases in which the total monetary sanction (fines, disgorgement, and restitution) is $7,000 or less and the disciplinary action (regardless of the number of violations alleged) involves the violations indicated in Schedule A to these guidelines; and 2) in cases in which an Adjudicator imposes a bar, expulsion or suspension. Adjudicators should impose censures in cases in which fines above $7,000 are reduced or eliminated due to a respondent's inability to pay or bankruptcy. Adjudicators also may impose censures in cases in which this policy would suggest no censure if the Adjudicator determines that extraordinary circumstances exist.[2]

Change in terminology; "actions" replaces "violations." Many of the guidelines recommend progressively escalating monetary sanctions for second and subsequent disciplinary "actions." The term "actions" is used to acknowledge that every violation of a rule will not necessarily rise to the level of a formal disciplinary action by FINRA, and also to reflect that, as discussed herein, multiple violations may be aggregated or "batched" into one "action" (see General Principle no. 4).

> An "action" means a Letter of Acceptance, Waiver and Consent (AWC), a settled case or a fully litigated case. FINRA Regulation staff-issued Cautionary Action Letters and staff interviews are informal actions that are not included for purposes of the *FINRA Sanction Guidelines* in the term "action."

Fines. Fines may be imposed individually as to each respondent in a case, or jointly and severally as to two or more respondents.

2. Interested parties are directed to *NASD Notice to Members 99-91* (November 1999) for additional information on FINRA's Censure Policy

Monetary sanctions–Imposition and collection of monetary sanctions. FINRA has identified the circumstances under which Adjudicators generally will impose and FINRA generally will collect monetary sanctions. In that the overriding purpose of all disciplinary sanctions is to remedy misconduct, deter future misconduct and protect the investing public, Adjudicators may exercise their discretion in applying FINRA's policy on the imposition and collection of monetary sanctions as necessary to achieve FINRA's regulatory purposes. The following lists of violations may not be exhaustive and these recommendations also may be appropriate for other types of cases.[3]

- Adjudicators generally should not impose a fine if an individual is barred and there is no customer loss in cases involving the following types of misconduct:
  - failure to respond under FINRA Rule 8210;
  - exam cheating; and
  - private securities transactions (if the Adjudicator does not order disgorgement or restitution).
- Adjudicators generally should not impose a fine if an individual is barred and the Adjudicator has ordered restitution or disgorgement of ill-gotten gains as appropriate to remediate the misconduct in cases involving the following types of misconduct:
  - conversion or improper use of funds or securities;
  - forgery; and
  - sales practice and private securities transaction cases (if only one or a small number of customers are harmed).
- Adjudicators generally should impose a fine and require payment of restitution and disgorgement even if an individual is barred in all sales practice cases if:
  - the case involves widespread, significant and identifiable customer harm; or
  - the respondent has retained substantial ill-gotten gains.
- In all cases, Adjudicators may exercise their discretion and, if a bar is imposed, refrain from imposing a fine, but require proof of payment of an order of restitution when a respondent files an application for re-entry into the securities industry.[4] Adjudicators also may, in their discretion, impose a suspension and a fine, but require proof of payment of the fine when the respondent re-enters the securities industry. In this regard, Adjudicators should consider the following factors:
  - whether the respondent is suspended or otherwise not in the securities industry when the sanction is imposed; and
  - the number of customers harmed.

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3. Interested parties are directed to NASD *Notice to Members 99-86* (October 1999) for additional information on FINRA's Monetary Sanctions Policy.

4. Adjudicators have the discretion to impose post-judgment interest on restitution orders.

Monetary sanctions—payment of monetary sanctions. Respondents may be permitted to pay fines and costs through an installment payment plan. Installment payment plans generally will be limited to two years (although in extraordinary cases, installment payment plans may be extended to not more than five years). Respondents who are allowed
to utilize an installment payment plan will be required to execute promissory notes that track the installment payment plan.

Organization. These guidelines are organized into 11 subject-matter categories and arranged alphabetically by name in each category. In addition, the index lists all the guidelines alphabetically by name.

Restitution—Payment of interest. When ordering restitution, Adjudicators may consider requiring the payment of interest on the base amount. Generally, interest runs from the date(s) of the violative conduct and should be calculated at the rate established for the underpayment of federal income tax in Section 6621 of the Internal Revenue Code, 26 U.S.C. Section 6621(a)(2). If appropriate, Adjudicators may order payment to a state escheat fund of any amount that a respondent is not able to pay in restitution because he or she is unable, after reasonable and documented efforts, to locate a customer or other party to whom payment is owed.

Suspensions, bars and expulsions. These guidelines recommend suspensions that do not exceed two years. This upper limit is recommended because of the NAC's sense that, absent extraordinary circumstances, any misconduct so serious as to merit a suspension of more than two years probably should warrant a bar (of an individual) or expulsion (of a member firm) from the securities industry. Notwithstanding the NAC's recommendation in these guidelines to impose suspensions that do not exceed two years, under FINRA's rules, an Adjudicator may suspend the membership of a member or the registration of a person associated with a member for a definite period that may exceed two years or for an indefinite period with a termination contingent on the performance of a particular act.

It should be noted that an individual who is barred from associating with a member firm in any capacity generally may not re-enter the industry. Although a barred individual may seek special permission to re-enter the industry via FINRA's eligibility process, to date, the NAC has disfavored applications for re-entry.[5]

5 In Securities Exchange Act Release No. 34720 (September 26, 1994), Securities and Exchange Commission staff indicated in a letter to various self-regulatory organizations, including FINRA, that "[h]enceforth, imposition of an unqualified bar evidences the Commission's conclusion that the public interest is served by permanently excluding the barred person from the securities industry. Accordingly, absent extraordinary circumstances, a person subject to an unqualified bar will be unable to establish that it is in the public interest to permit reentry to the securities industry."

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. 3-17560r) 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 11,938 words.

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November 16, 2017

CERTIFICATE OF SERVICE

I, Lisa Jones Toms, certify that on this 16th day of November 2017, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review (File No. 3-17560r) to be sent via messenger and fax to:

Brent J. Fields, Secretary
Securities and Exchange Commission
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Room 10915 – Mailstop 1090
Washington, DC 20549-1090

and via overnight delivery and electronic mail to:

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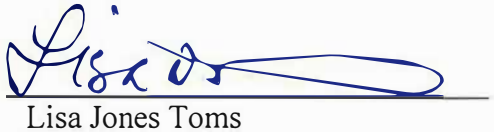
Service was made on the Securities and Exchange Commission by messenger and on the Applicant's counsel by overnight delivery service and electronic mail between the offices of FINRA and the counsel for the Applicant.



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