**Before the**
**U.S. SECURITIES & EXCHANGE COMMISSION**

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| ---------- x | | **APPEAL** |
| | : | **OF N.A.C. Decision in** |
| **In the matter of the Appeal of** | | **Complaint No. 2011025675501** |
| | : | **Kimberly Springsteen-Abbott** |
| **KIMBERLY SPRINGSTEEN-ABBOTT,** | : | **ADMIN PRO.3-17560** |
| | : | **ORAL ARGUMENT REQUESTED** |
| **Appellant.** | | |
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# APPELLANT'S REPLY MEMORANDUM OF LAW

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Appellant Kimberly Springsteen-Abbott ("Appellant") respectfully submits this memorandum of law in reply to FINRA's Brief In Opposition To Application For Review and in further support of her appeal from the July 20, 2017 NAC Remand Decision[1] of the National Adjudicatory Council ("NAC") that permanently barred her from the securities industry, ordered her to disgorge $36,225.85 (reduced from $208,953.75 in the Original NAC Decision), fined her $50,000 (reduced from $100,000 in the Original NAC Decision), and ordered her to pay costs.

**PRELIMINARY STATEMENT**

In its opposition brief, FINRA continues to insist that this is a case about "Springsteen-Abbott's decision to use investor's [*sic*] funds to pay for *personal* expenses." FINRA Brief at 2 (emphasis added). Thus, FINRA begins by describing one of the 84 expense items at issue in the NAC Remand Decision, involving a dinner, and then implies that all of the other 83 items are similar, thereby somehow proving a "pattern and practice" of misusing Fund assets. *Id.* FINRA ignores the unrefuted showing in Appellant's moving brief that $30,102.99 of the $36,225.85 in expenses at issue did *not* involve personal expenses but, instead, involved training and continuing education expenses. Even the NAC in the NAC Remand Decision recognized that these $30,102.99 of expense items did not involve personal expenses. However, the NAC then incorrectly characterized them as "Broker-Dealer Expenses," choosing to once again treat as conclusive evidence a flawed summary exhibit prepared by a FINRA Examiner – the same mistake cited by the SEC in the SEC Opinion and Order vacating the Original NAC Decision.

FINRA continues to assert that the NAC acted properly in upholding a permanent bar of Appellant from the securities industry because Fund investors were harmed by approximately $6,122 of alleged personal expense item reimbursements that were inadvertently allocated to the Funds when they should not have been (and all of which allocations have been reversed). As

[1] Defined terms used herein and not defined herein shall have the same meaning as in Appellant's October 10, 2017 moving brief.

shown in Appellant's opening brief and as further discussed below, the NAC and FINRA have treated Appellant in a fundamentally unfair manner and their conclusions are wrong for numerous reasons, including that:

i. the NAC's finding that Appellant acted in bad faith and unethically is not supported by the evidence, is clearly erroneous, and is fundamentally unfair;

ii. the NAC's finding that 58 of the 84 expense items at issue, totaling $30,102.99 of the $36,225.85 at issue – the so-called (and misnamed) broker-dealer continuing education expenses – is based on a chart created by a FINRA Examiner and the Examiner's recklessly untrue testimony that Appellant represented to FINRA that these were broker-dealer expenses when, in fact, Appellant actually represented that these 58 items related to continuing education for employees of the Funds' sponsor, which is a non-broker-dealer entity that serviced the Funds;

iii. the NAC's finding with respect to the so-called broker-dealer expense items also ignores, without any citation or reasoning as to why it does not apply, the business judgment rule, which requires acceptance by the NAC of Appellant's business judgment that training for employees who serviced the Funds was appropriate;

iv. the NAC's finding that Appellant acted unethically and in bad faith with respect to 26 items involving $6,122.86 in alleged misallocated personal expenses (as well as with respect to the $30,102.99 in so-called (and misnamed) broker-dealer expenses) is clearly erroneous in light of Appellant's voluntary contribution of over $2.4 million to the Funds during this same time period, which fact is not contested by FINRA or the NAC; and

v. the sanctions being imposed by the NAC are insupportable in light of recent court rulings and sanctions imposed by FINRA in other, similar or worse matters.

As discussed below, not only is a permanent bar an overly severe remedy here but, based on the evidence presented – or rather the lack of evidence presented – the entire finding against Appellant in the NAC Remand Decision is clearly erroneous and fundamentally unfair and thus should be reversed. Simply put, the NAC Remand Decision is contrary to the letter and spirit of Section 15A(b)(8) of the Securities Exchange Act of 1934, which requires that FINRA provide a fair procedure for the disciplining of members and persons associated with members.

## POINT I

## THE NAC ERRONEOUSLY (1) RELIED ON UNTRUE TESTIMONY AND A SUMMARY CHART PRESENTED BY A FINRA EXAMINER, AND (2) IMPROPERLY IMPOSED ITS OWN BUSINESS JUDGMENT, RATHER THAN DEFERRING TO APPELLANT'S BUSINESS JUDGMENT

The NAC Remand Decision and FINRA's opposition brief make it clear that, from "Day One," this has been a case where a FINRA Examiner (or someone else at FINRA) essentially says, "I've looked at everything and here's a list of improper expense items, so now you, Kimberly Springsteen-Abbott, prove that everything is legitimate." Thus, FINRA filed an original complaint listing 2,282 charges involving $340,000 that it contended were improperly allocated to the Funds and named as an additional respondent CCSC, the FINRA-member broker-dealer that played no role in the matter. After Appellant disproved some of these items and proved CCSC's lack of involvement, FINRA conceded that CCSC should not have been a respondent and also reduced its charge to 1,840 expense items involving $208,000. It then presented a list of these 1,840 items to the Extended Hearing Panel and again, in essence, said, "Take our word for it – these are improper expenses," and demanded that Appellant prove at the hearing that the expenses were legitimate. The FINRA Extended Hearing Panel accepted that argument in the Panel Decision and so did the NAC in the Original NAC Decision. However, in the SEC Opinion and Order, the SEC correctly pointed out that the securities regulatory

disciplinary system does not work that way, vacated the Original NAC Decision, and remanded the matter for further consideration.

### A. FINRA Examiner Edwards's Testimony That Appellant Admitted That 58 Items Involved Broker-Dealer Expenses Was Untrue, And Her Chart Based On That Testimony Was Erroneous

In the NAC Remand Decision, the NAC's effort to comply with the SEC's directive was to throw out 1,756 of the items on FINRA's prior list, leaving only 84 items that the NAC now believed were improper. However, with respect to the overwhelming bulk of these items – the 58 so-called and misnamed "Broker-Dealer Expenses" items involving $30,102.99 of the $36,225.85 at issue – the NAC repeated the very error that the SEC already said was unacceptable: it improperly relied on a chart prepared by FINRA Examiner Kelly Edwards, taking her word for it that these were improper broker-dealer expenses charged to the Funds, and then penalized Appellant for failing to disprove Ms. Edwards's assertion to the NAC's satisfaction.[2] Ms. Edwards testified, with at minimum a reckless disregard for the truth of her testimony, that she concluded that these were improper broker-dealer expenses because Appellant had supposedly identified the expense items as related to *broker-dealer* continuing education, ignoring the facts that (i) Appellant had identified the items as *Sponsor* continuing education, not broker-dealer continuing education, and (ii) FINRA had been told that Appellant exercised her business judgment to decide that materials used to conduct continuing education for registered broker-dealer personnel were also beneficial in the training of Sponsor (non-broker-dealer) personnel who serviced the Funds.[3]

In its opposition brief, FINRA does not dispute that its case was based on FINRA Examiner Edwards's chart and testimony, but once again asks the SEC to uphold a NAC

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[2] *See* CX-95 (R.002629) and Ms. Edwards's testimony concerning how she (mis)used CX-6 and CX-7 to create CX-95 (May 6, 2014 Tr. (R.001107) at 307).

[3] Ms. Edwards's testimony refers to CX-6, a spreadsheet prepared by Appellant, which was coded with letters identified in CX-7, which was also prepared by Appellant.

decision that is clearly erroneous. Thus, at page 8 of its brief, FINRA concedes that at the hearing it relied on Ms. Edwards's summary chart based on Ms. Edwards's interpretation of CX-7, a document submitted by Appellant ("Edwards testified that she noticed a pattern of charges"). The FINRA opposition brief then wrongly describes CX-7 (R.002295), the code to CX-6, as a document where "Springsteen-Abbott indicated whether a particular expense was FINRA or broker-dealer related. She broadly categorized the broker-dealer expenses via codes that referenced ... FINRA online training and education..." (FINRA Brief at 9.)

However, even a cursory review of CX-7 demonstrates that Ms. Edwards misled the Extended Hearing Panel and then FINRA misled the NAC – CX-7 contains ***no*** such characterization of continuing education as being a "broker-dealer" expense. Rather, CX-7 has a line item that reads: "**Sponsor** CE/Training" (emphasis added). In fact, the "Sponsor" was Commonwealth Capital Corp. ("CCC"), *not* the broker-dealer CCSC. *See, e.g.,* RX-9 (R.00005801) at page 9, which defines the term "Sponsor" and specifically excludes the underwriters (such as the broker-dealer).[4]

Thus, when the NAC Remand Decision first states that "[b]ased on Springsteen-Abbott's own identification of expenses that she attributed as continuing education *to maintain securities registrations at the Firm [the broker-dealer]*, the Hearing Panel found that certain charges it characterized as 'broker-dealer expenses' were improperly allocated to the Funds" and then affirms this finding, it is based on FINRA Examiner Edwards's recklessly untrue testimony that Appellant admitted that the continuing education expenses were for the broker-dealer when in fact the continuing education expenses were for the Funds (*i.e.*, the Sponsor). Once again, the NAC has – contrary to the SEC's guidance – simply premised its decision on a list FINRA wrongly compiled of purported improper expenses (CX-95) and a FINRA Examiner's summary

[4] *See also* the excerpt from CIGF-V Prospectus at page 16, annexed hereto, which specifically identifies CCC, not the broker-dealer CCSC, as the Sponsor.

of how she (wrongly) compiled the list, and then penalized Appellant for failing to disprove every item on the list, after refusing to consider additional information from Appellant disproving FINRA's remaining allegations.

**B. The NAC Improperly Imposed Its Own Business Judgment Instead Of Relying, As Required By Law, On Appellant's Business Judgment**

As pointed out in Appellant's opening brief, Appellant exercised her business judgment to determine that it was beneficial and proper to train personnel servicing the Funds with continuing education materials often used to train registered representatives at FINRA broker-dealers. Notably, nowhere in its opposition brief does FINRA challenge the well-established legal principle of the business judgment rule that a decision by an officer or director of a corporation must be respected if he or she reasonably believes the decision to be appropriate under the circumstances and rationally believes the business judgment is in the best interests of the corporation. Rather, FINRA just declares without legal citation that the business judgment rule does not apply.

As already shown above, FINRA and the NAC incorrectly relied on FINRA Examiner Kelly Edwards's untrue assertion that Appellant admitted the expenses were for the benefit of the broker-dealer rather than for the benefit of the Funds. In fact, FINRA Examiner Edwards's testimony and related exhibit make it clear that the expenses related to continuing education for the Sponsor (whose personnel serviced the Funds) and *not* the broker-dealer. Thus, under the business judgment rule the NAC Remand Decision must be reversed with respect to the $30,102.99 in so-called (and misnamed) broker-dealer expenses.[5]

[5] FINRA's citation in its brief to the fact that one or two registered representatives were also present for a training does not change this conclusion.

## POINT II

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

As discussed in Appellant's opening brief (at pages 9-11 and 22-24), the NAC found that Appellant acted in bad faith and unethically even though uncontroverted evidence was presented establishing that Appellant contributed over $2.4 million to the Funds during the time that she was found to have misallocated the $6,122.86 in so-called personal expense items (as well as the $30,102.99 in so-called broker-dealer expenses). Indeed, in its opposition brief FINRA concedes that Appellant made "the $2.4 million contribution." (FINRA Brief at 34.)

After conceding in its brief that Appellant made the $2.4 million in contributions to the Funds, FINRA argues that the contributions are somehow irrelevant because (1) some of this amount represented "liabilities owed [by the Funds] 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"; and (2) her $2.4 million contribution to the Funds "is uninstructive and immaterial to the conduct at issue." (FINRA Brief at 34-36.) Once again FINRA, as did the NAC, ignores the facts and misses the point.

With respect to the first point, FINRA is simply wrong in stating that the $2.4 million "did not represent an altruistic cash donation from Springsteen-Abbott's pocket." (FINRA Brief at 34.) The money *did* come from Appellant, who was under no legal obligation to make the contributions or waive or forgive fees. Whether the money came *directly* from her pocket or *indirectly* from companies that she wholly owns (Commonwealth Capital Corp. and its subsidiary, the General Partner of the Funds) is wholly irrelevant – either way, the $2.4 million in contributions to the Funds meant that Appellant had $2.4 million less and the Funds had $2.4 million more. Further, Appellant's contributions fit the dictionary definition of altruistic –

"unselfishly concerned for or devoted to the welfare of others."[6] Here, Appellant's actions were for the benefit and welfare of the Funds' investors rather than herself. Appellant's contributions to the Funds also make it clear that Appellant did not receive and retain any personal profit at the expense of the Funds and that, therefore, disgorgement, which is intended to recapture an unlawful retention of a benefit, is unwarranted and erroneous.

With respect to the second point, FINRA argues that "securities professionals are not entitled to self-help" and that Appellant's contributions cannot serve as an offset. Again, FINRA and the NAC miss the point. Appellant was *not* submitting improper expenses in order to engage in "self-help" to recover monies owed to her; indeed, there is no evidence in the record that she even knew of any improper allocations at the time the contributions were made.[7] Nor was Appellant asking the NAC to offset the expenses at issue with the $2.4 million that she contributed. *Rather, Appellant argued that the fact that she voluntarily contributed $2.4 million to the Funds conclusively demonstrates that she did not act unethically or in bad faith.* In other words, the inference underlying the NAC Remand Decision that Appellant unethically wanted to unjustly enrich herself by improperly misallocating expenses to the Funds is illogical. If Appellant had wanted to avail herself of the additional $6,122.86 in personal expenses at issue here (or the $30,102.99 in so-called broker-dealer expenses at issue), she simply would have reduced her voluntary contributions to the Funds by that amount. Appellant submits that her $2.4 million voluntary contributions to the Funds demonstrate that she always tried to place the

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[6] www.dictionary.com

[7] Thus, FINRA's citation to *Dep't of Enforcement v. Doan*, Complaint No. 2009019637001, 2011 FINRA Discip. LEXIS 56 (FINRA Hearing Panel Sept. 19, 2011), is irrelevant. In *Doan*, there was no issue that Doan acted unethically – he stipulated that he submitted falsified invoices in order to obtain money from his employer for expenses that he never incurred. The FINRA panel rejected Doan's self-help contention that he received the money because he was entitled to reimbursement, stating that the contention "provides no defense."

interests of the Funds first but, unfortunately, a flawed method for handling the reimbursement process led to occasional unintentional errors, errors that have been corrected.

FINRA argues that "[t]he fallacy in [Appellant's] argument is that it is too absolute. People can comply with rules for years, but violate them egregiously in a new year." FINRA Brief at 35. Again, FINRA and the NAC both miss the point. Appellant is not making an "absolute" argument that no one can ever be held liable for improper expense reimbursements if they previously contributed money in excess of the amount at issue. Rather, Appellant is arguing that *under the actual facts as presented here – where $6,122.86 in alleged personal expense items were misallocated during the same time period that Appellant voluntarily contributed over $2.4 million – over 390 times the amount of personal expenses at issue – (and $30,102.99 in continuing education expenses were properly charged to the Funds), it was illogical and clearly erroneous for the NAC to have found that Appellant acted unethically and in bad faith.*

Simply put, this is a case where FINRA has poisoned the well against Appellant and then has refused to backtrack, even when it was made clear that the original panel decision and the Original NAC Decision were outrageous. FINRA and the NAC have simply continued to say, in essence, "We presented a list of 1,840 items at the original hearing and at that hearing Appellant failed to refute the only 84 items that we think can survive the SEC's Opinion and Order." That type of hearing is fundamentally unfair.[8]

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[8] In its brief, FINRA argues that the NAC Remand Decision was based, in part, on the fact that Appellant gave seemingly incorrect testimony during the underlying hearing, which FINRA argues supports a finding that Appellant acted unethically and in bad faith. *What FINRA ignores is the context – FINRA provided a list of 1,820 items and told Appellant to prove her innocence. FINRA compounded this problem by providing revised spreadsheets of these 1,840 items during the hearing that contained incorrect dates and locations for many of the 1,840 items.* Because Appellant relied on the incorrect information set forth in FINRA's revised spreadsheets when testifying and when submitting evidence to refute FINRA's spreadsheets, it was inevitable that she then had to amend or backtrack as FINRA confronted her with specific evidence with respect to items that FINRA itself had misled her about.

Rather than simply issuing a new decision that it tried to shoehorn into the SEC's directives, the NAC should have dismissed the claims against Appellant or, at a minimum, ordered a new hearing before a new panel. Having failed to do so, the NAC Remand Decision cannot be allowed to stand.

## POINT III

## THE SANCTIONS IMPOSED BY THE NAC, ESPECIALLY A PERMANENT BAR, ARE PUNITIVE RATHER THAN REMEDIAL, AND ARE UNFAIR, INAPPROPRIATE, NOT SUPPORTED BY THE EVIDENCE, AND CLEARLY ERRONEOUS

In its brief, FINRA states that "barring [Springsteen-Abbott] serves an appropriately remedial objective." (FINRA Brief at 40.) However, in the time between Appellant's first brief on this appeal (filed in early October, 2017) and now, the courts have called into question the use of bars – the securities industry equivalent of capital punishment – as an appropriate remedial remedy. In addition, the sanctions imposed on Appellant are no longer in line with FINRA sanctions (whether punitive or remedial) for similar conduct. These two points are addressed in turn below.

### A. The Sanctions Imposed On Appellant Are No Longer Founded Upon Valid Law

The recent saga of John M.E. Saad demonstrates that the sanctions imposed on Appellant are no longer founded upon valid law. Mr. Saad was a registered representative at a FINRA-member firm. Mr. Saad was barred by FINRA for misappropriating his employer's funds on two occasions, which he accomplished by creating bogus hotel and airline invoices and submitting false expense reports to his firm. Mr. Saad appealed to the SEC, which affirmed FINRA's decision. From there, Mr. Saad appealed to the U.S. Circuit Court of Appeals for the D.C. Circuit. The Circuit Court remanded the case back to the SEC because the Commission's analysis of the FINRA decision "failed to address potentially mitigating factors." *Saad v. SEC*, 718 F.3d 906, 913 (D.C. Cir. 2013) ("*Saad I*"). The Circuit Court "left open the question

whether the lifetime bar was an 'excessive or oppressive' sanction, noting that the Commission had an obligation on remand to ensure that its sanction was remedial rather than punitive." *Id.*

The SEC, in turn, remanded the case back to FINRA, specifically to the NAC, to reconsider the imposition of a bar on Mr. Saad. The NAC concluded, again, that Mr. Saad deserved to be barred, and the SEC agreed on appeal, concluding that the bar was "remedial, not punitive," and "necessary to protect FINRA members, their customers, and other securities industry participant[s]." *In the matter of the Application of John M.E. Saad*, SEC Release No. 76118 at 10 (Oct. 8, 2015).

Once again, Mr. Saad appealed to the D.C. Circuit Court. On October 13, 2017 (after Appellant filed her opening brief in this appeal), the Circuit Court remanded the case back to the SEC – again – to answer the question whether the permanent bar imposed on Mr. Saad was "impermissibly punitive" in light of the Supreme Court's recent decision in *Kokesh v. SEC*.[9] *Saad v. SEC*, 97 F.3d 297, 304 (DC Cir. 2017) ("*Saad II*").

Applying the Supreme Court's *Kokesh* analysis, expulsion or suspension of a securities broker is a penalty, not a remedy. *Saad II* at 304. As the concurring opinion in *Saad II* points out, the "use of the term 'remedial' to describe expulsions or suspensions finds its roots in a single, unexplained sentence in a 77-year old Second Circuit case. *Id.* However, "[u]nder any common understanding of the term "remedial," expulsion and suspension of a securities broker are not remedial. Rather, expulsion and suspension are punitive." *Id.* (emphasis added). Like other punitive sanctions, expulsion and suspension may deter others and prevent the wrongdoer

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[9] In *Kokesh v. SEC*, 137 S.Ct. 1635 (2017), the Supreme Court ruled that disgorgement paid by a respondent to the Government as a sanction imposed by the SEC was a "penalty," and therefore subject to a five-year statute of limitations, overturning a line of cases that had concluded that disgorgement was remedial and not punitive. The Supreme Court's reasoning was that disgorged money paid to the Government does not go to victims; disgorged money also is not limited to the amount of harm to victims; and both of these would need to be true for the sanction to be remedial rather than punitive. *Id.* at 1645.

from further wrongdoing and may thereby protect the investing public. But expulsion and suspension do not provide a remedy to the victim. Similar to disgorgement paid to the Government, expulsion or suspension of a securities broker does not provide anything to the victims to make them whole or to remedy their losses.

In light of *Kokesh* and *Saad II*, FINRA and the SEC can no longer characterize an expulsion or suspension as remedial, as FINRA does here. "After the Supreme Court's decision in *Kokesh* . . . precedents characterizing expulsions or suspensions as remedial are no longer good law." *Saad II* at 304. In *Saad II,* Judge Kavanaugh suggests a way forward:

> If FINRA and the SEC must justify expulsions or suspensions as punitive (as I believe they must after *Kokesh*), they will have to explain why such penalties are appropriate under the facts of each case. FINRA and the SEC will no longer be able to simply wave the 'remedial card' and thereby evade meaningful judicial review of harsh sanctions they impose on specific defendants. Rather, FINRA and the SEC will have to reasonably explain in each individual case why an expulsion or a suspension serves the purposes of punishment and is not excessive or oppressive.

*Saad II* at 306.

The NAC Remand Order clearly fails to meet this standard. There is no analysis of why the sanctions imposed on Appellant, particularly the permanent bar, are appropriate rather than being oppressive or excessive as punishments. The NAC Remand Order never alludes to the concept of punitive sanctions.[10] Even had the NAC attempted to analyze this matter in such a way, we believe that no such analysis could be sustained. For the reasons stated in Points I and II above, the facts simply do not support it. At the very least, it would require an evidentiary hearing to determine. Further, as a matter of punishment, the sanctions, particularly the bar, are clearly an

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[10] The NAC Remand Order is silent on whether Appellant's bar is intended to be remedial, punitive, or serve another purpose. The NAC Remand Order (at 30) does specifically state that Appellant's fine "serves the remedial effect of deterring any future mishandling of investor money."

oppressive and excessive punishment for the conduct alleged. As such the NAC Remand Order cannot stand. The SEC should therefore vacate the NAC Remand Order.

**B. The Sanctions Are Not Consistent With Current FINRA Practices**

In light of the standards discussed above in Point III.A, the sanctions imposed against Appellant are clearly incongruous with FINRA's practice with respect to Rule 2010 violations related to expense reports. One very recent matter provides an example of a similar fact pattern with a strikingly different outcome.

On November 8, 2017, FINRA entered into an Acknowledgement Waiver and Consent ("AWC") with Sandy Galuppo. FINRA AWC # 2015048118501. Mr. Galuppo was a registered representative at Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") and a managing director in Merrill Lynch's Private Executive Services team. As part of his job, Mr. Galuppo traveled extensively, often meeting and dining with clients, prospective clients, business colleagues, and team members with whom he worked. Each year, Mr. Galuppo incurred substantial business expenses, some of which were reimbursable under Merrill Lynch policy. When seeking reimbursement of those expenses from Merrill Lynch, Mr. Galuppo was required to submit his receipts along with an expense report to document, among other things, the business purpose of the expenses and, where relevant, other persons involved or present.

Similar to the case at issue, Mr. Galuppo's practice was to provide his receipts to subordinate employees so that they could prepare and submit the associated expense report on his behalf. Mr. Galuppo's expense reimbursement requests sometimes described meals with his team members as meals with clients, or personal meals as business meals. In other instances Mr. Galuppo also provided inaccurate information about the reported attendees at meals. For example, Mr. Galuppo submitted an April 18, 2015 expense for $430 that was identified as a client meal with a client representative in attendance, when in fact only Mr. Galuppo and another Merrill Lynch employee were present. In total, FINRA found Mr. Galuppo knowingly or

recklessly submitted approximately 82 improper expense reimbursement requests (primarily business-related meals) in violation of firm policies – a number three times as large as the 26 personal expense items at issue here (and, if the 58 misnamed broker-dealer expense items are included, which they should not be, a number virtually identical to the number at issue here).

FINRA found that by knowingly or recklessly submitting false expense reimbursement requests, Mr. Galuppo caused non-reimbursable expenses to be charged against his expense accounts thereby unjustly enriching Mr. Galuppo and that, as a result, Mr. Galuppo violated Rule 2010. For his knowing or reckless misconduct involving 82 personal expense items, Mr. Galuppo received a ***one-year suspension*** and a $10,000 fine (with no order of disgorgement). In contrast, Appellant's conduct only involved 26 alleged personal expense items (one-third the amount that Mr. Galuppo submitted) and Appellant did not knowingly submit false expense reimbursement requests, yet she received a permanent bar, a $50,000 fine and an order of disgorgement. The penalties imposed upon Mr. Galuppo are inexplicably far less punitive than the penalties imposed on Appellant.[11]

Due to the disparity between the sanctions imposed against Appellant and the current FINRA practice with respect to similar or worse matters, the sanctions imposed on Appellant are clearly unjust, excessive and oppressive punishments. At the end of the concurrence in *Saad II*, Judge Kavanaugh waxed poetic: "*[o]ver time, a fairer, more equitable, and less arbitrary system of FINRA and SEC sanctions should ensue.*" *Saad II* at 306. The NAC Remand Decision falls woefully short of this goal but, today, on this appeal, that can be remedied. The SEC has the opportunity to make it clear that outcomes of FINRA disciplinary proceedings should not be determined by the luck of the draw and that FINRA must be held to its own precedents.

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[11] *See also* FINRA AWC # 2016050632401 (accepted by FINRA on July 10, 2017) (registered representative who submitted numerous false expense reports related to meals over a three year period given a six-month suspension and ordered to pay a $5,000 fine).

## CONCLUSION

Accordingly, for the reasons set forth above and in Appellant's moving brief, Appellant respectfully submits that the NAC Remand Decision should be reversed.

December 1, 2017

Respectfully submitted,

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Annex to Section I - A

Prospectus Dated February 7, 2005

# COMMONWEALTH INCOME & GROWTH FUND V

1,250,000 Units of Limited Partnership Interests
(57,500 Units - Minimum Requirement)

We, together with selected securities brokers, will sell the units on a best efforts basis, and will close the offering no later than February 2007.

| | | | |
|---|---|---|---|
| Minimum Number of Units: | 57,500 | Offering Size (Minimum): | $ 1,150,000 |
| Maximum Number of Units: | 1,250,000 | (Maximum): | $25,000,000 |
| Price Per Unit: | $ 20.00 | Net Proceeds (per unit): | $ 18.40 |

THIS OFFERING INVOLVES SIGNIFICANT RISKS; INCLUDING:

- There will be no public market for the units and you may be unable to sell or transfer your units at a time and price of your choosing.
- All or a portion of cash distributions will be a return of capital, so you will not receive a lump sum of returned capital at liquidation in the same amount of your initial investment.
- Our assets may depreciate in value and have limited residual value.
- You will have limited voting rights and participation in management.
- We pay significant fees to our general partner.
- Our general partner will have conflicts of interest.
- We will use leverage to acquire equipment.
- None of our general partner's four prior public funds has gone full cycle to liquidity, so our general partner has no track record of providing income or liquidity to public fund investors.
- There are material tax risks associated with this offering.

*This investment involves a high degree of risk. You should purchase these securities only if you can afford a complete loss of your investment. See "RISK FACTORS", BEGINNING ON PAGE 11.*

| | Price to Public | Selling Commissions[1] | Proceeds to the Partnership[2] |
|---|---|---|---|
| Per Share | $ 20 | $ 1.60 | $ 18.40 |
| Total Minimum | $ 1,150,000 | $ 92,000 | $ 1,058,000 |
| Total Maximum | $25,000,000 | $ 2,000,000 | $ 23,000,000 |

[1] The price to the public and the selling commissions will be reduced by volume discounts in the case of a purchase in excess of $250,000 by a single investor. However, the proceeds to the partnership will not be reduced by such discounts. See "Plan of Distribution" for a complete description of the amount and terms of such commissions.

[2] Before deducting an organization fee equal to three percent of the limited partners' capital contributions up to $10,000,000 and two percent of the limited partners' capital contributions thereafter to be paid by the partnership to the general partner ($34,500 if 57,500 units are sold and $600,000 if 1,250,000 units are sold), and a dealer manager fee of two percent of capital contributions, ($23,000 if 57,500 units are sold and $500,000 if 1,250,000 units are sold), out of which the dealer manager will pay offering and marketing expenses and due diligence reimbursements. The general partner will pay all organizational and offering expenses other than underwriting commission. Commissions will be paid to the dealer manager only after minimum escrow amount has been reached. The escrow agent will retain proceeds until the minimum escrow requirement has been met. If the minimum amount has not been reached during offering period, the proceeds will be promptly returned to investors with interest and without deduction. Approximately 87.5% of the offering proceeds will be invested in computer peripheral equipment.

Neither the SEC nor any state securities commission has approved or disapproved of these securities or determined whether this prospectus is truthful or complete. They have not made, nor will they make, any determination as to whether anyone should buy these securities. Any representation to the contrary is a criminal offense. The use of forecasts in this offering is prohibited. Any representations to the contrary and any predictions, written or oral, as to the amount or certainty of any present or future cash benefit or tax consequence which may flow from an investment in this program is not permitted.

COMMONWEALTH CAPITAL SECURITIES CORP.
400 Cleveland Street, Seventh Floor
Clearwater, Florida 33755
1-877-654-1500

Delays in acquiring equipment will delay or reduce the anticipated benefits to you from the acquisition of units.

**Our inability to repay non-recourse debt could cause a loss of our investment in financed equipment.**

Borrowing increases the risks of investment in CIGF5 because, in the case of non-recourse debt, if debt service payments are not made when due, we may sustain a loss of our investment in the equipment which secures that debt and the limited partners may experience adverse tax consequences. Borrowing can also lead to increased losses or the imposition of restrictions on our ability to borrow further amounts. See "United States Federal Income Tax Considerations — Allocation of Partnership Income, Gains, Losses, Deductions and Credits."

Money market fluctuations have affected the availability and cost of loans that may finance the purchase of equipment. The general partner will be unable to predict the nature of the money market at times when we may seek financing and any future tightening of credit controls will make obtaining financing more difficult and more costly. In such event, we may be forced to purchase equipment using only or mostly the cash proceeds from this offering, with little or no borrowings. This would make it more difficult for us to achieve the desired diversification of equipment and would prevent us from spreading the risk of unproductive investments over a greater number of items of equipment. In addition, future credit restrictions may adversely affect the ability for us to sell or refinance equipment and may affect the terms of equipment sales.

**In leasing the equipment to lessees, we may be exposed to liability for damages resulting from their actions or inaction, independent of contract terms, which can reduce cash available for distributions.**

Lessees' use of the equipment may cause damages to third parties or their property for which CIGF5, as owner of the equipment, may be held liable, whether or not CIGF5 caused the damage. Although we will use our best efforts to minimize the possibility and exposure of such tort liability, CIGF5's assets may not always be protected against such claims.

**The equipment leasing industry is highly competitive, and our inability to compete effectively in this market will reduce your returns and the value of your units.**

CIGF5's competitors include independent leasing companies, affiliates of banks and insurance companies and other partnerships. Many of these entities may have larger equipment inventories, greater financial resources and more experience in the industry than CIGF5 or the general partner. See "Investment Objectives and Policies — Competition."

**CIGF5's ability to lease, release or sell its equipment, and therefore returns to investors, may be affected by actions taken or not taken by, or the business prospects of, IBM, over which we will have no control.**

The general partner currently expects that a substantial portion of CIGF5's equipment will be manufactured by IBM or will be compatible with equipment manufactured by IBM, making the success of CIGF5 dependent in part on the success of IBM.

**Our ability to release or sell the equipment at the end of the lease term, and therefore returns to investors, could be adversely affected by the actions of the equipment manufacturer or others hired to perform services on the equipment.**

The failure of an equipment manufacturer to honor its product warranties or to provide necessary parts and servicing, the decline of the manufacturer's reputation in the industry, the discontinuance of the manufacture of such equipment or the termination of the manufacturer's business may also hinder our ability to release or sell the equipment.

We may enter into contracts with manufacturers or others in which such parties may perform certain services related to equipment, including refurbishing and storing equipment and performing related services. Our ability to meet our investment objectives would be partially dependent on the satisfactory performance of these functions by such parties. See "Investment Objectives and Policies — Computer Peripheral Equipment."

**Our Sponsor, Commonwealth Capital Corp., depends upon the profitability of affiliated prior programs in order to be in a position to repay a $1,000,000 promissory note to our general partner, thereby putting our general partner's capitalization at risk if the prior programs become unprofitable.**

## CERTIFICATE OF SERVICE

I, Steven M. Felsenstein, certify that on this 30th day of November, 2017, I caused a copy of the foregoing Appellant's Reply Brief (File No. 3-17560) to be sent via Registered Email and overnight express delivery to:

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

And via overnight delivery and electronic mail to:
Lisa Jones Toms
Assistant General Counsel
FINRA
Office of the General Counsel
1735 K Street, NW
Washington, DC 20006
Lisa.Toms@finra.org

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

Steven M. Felsenstein
Greenberg Traurig, LLP
2700 Two Commerce Square
Philadelphia, PA 19103
(215) 988-7837

November 30, 2017

## CERTIFICATE OF COMPLIANCE

I, Steven M. Felsenstein, certify that the foregoing Plaintiff's Reply Memorandum filed in ADMINISTRATIVE PROCEEDING 3-17560r complies with the limitation on length set forth in Rule 451(c) of the Commission's Rules of Practice. I have utilized the word count feature of Microsoft Word to verify that the Memorandum (including the facing page, the body, and all certificates) contains 4,838 words.

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November 30, 2017

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November 30, 2017

**VIA EXPRESS DELIVERY**

Office of the Secretary
U.S. Securities and Exchange Commission
Room 10915
100 F Street NW
Washington, D.C. 20549

Re: Ms. Kimberly Springsteen-Abbott
Administrative Proceeding 3-17560r
Appellant's Reply Memorandum – Appeal of N.A.C. Decision

Dear Sir or Madam:

Pursuant to the Order of the Commission dated September 8, 2017, as amended on November 6, 2017, enclosed are three copies of Appellant's Reply Memorandum.

As set forth in the Certificate of Service attached to the submission, copies have been served by express delivery on counsel to FINRA.

Thank you for your assistance.

Sincerely,

Steven M. Felsenstein

cc: Ms. Kimberly Springsteen-Abbott (via email)
Elaine C. Greenberg, Esq. (via email)
Donald Cohen, Esq. (via email)
Leo F. Orenstein, Esq. (via express delivery)
Lisa Jones Toms, Esq. (via express delivery)
Sean F. Firley, Esq. (via express delivery)