BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.

In the Matter of the Application of

Meyers Associates, L.P.
(n/k/a Windsor Street Capital, L.P.)

For Review of Disciplinary Action Taken by

FINRA

File No. 3-18350

BRIEF OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY IN OPPOSITION TO APPLICATION FOR REVIEW

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I. INTRODUCTION

Meyers Associates, L.P. ("Meyers" or the "Firm") has been plagued with systemic supervisory problems for years. Meyers has been the subject of more than a dozen final disciplinary actions since 2000, nine of which involved supervisory failures. The latest, at issue in this appeal, involves the Firm's near total dereliction of its supervisory responsibilities over one of the registered representatives in its Chicago office, George Johnson.

In May of 2012, while employed at the Firm, Johnson engaged in a scheme to manipulate the stock of a financially distressed investment banking client, IceWEB, Inc. ("IWEB"). His scheme was intended to artificially raise the market price of IWEB's stock to induce investors to convert outstanding IWEB warrants and to increase demand of IWEB's upcoming PIPE (Private Investment in Public Equity Offering), which would provide the distressed IWEB with much needed cash, and result in financial gain for Johnson.

In a separate fraudulent transaction, Johnson solicited customers to purchase shares of another very thinly traded stock, Snap Interactive, Inc. ("STVI"), on 11 different occasions without disclosing that he was simultaneously selling that same stock from his and his wife's accounts. Not only were Johnson's sales of his STVI shares from his personal accounts while at the same time recommending that his customers purchase the same stock a clear conflict of interest, Johnson never informed his customers that he was selling his or his wife's STVI shares at the same time he was soliciting those customers to purchase STVI, which was material information.

Meyers failed to adequately supervise Johnson's activities in connection with IWEB because it did not review emails sent to and received by the Chicago office, did not monitor Johnson's trading in IWEB stock, and did not adequately review third-party research reports and other public communications disseminated by Johnson. In addition, Meyers failed to adequately supervise Johnson's trading in STVI with a view to preventing him from recommending that a customer buy a stock that he was selling without disclosing his adverse interest.

Both Johnson's market manipulation and material omissions constitute fraud under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"). Furthermore, pursuant to Article III, Section 4 of FINRA's By-Laws, and Exchange Act Sections 3(a)(39)(F), and 15(b)(4)(E), Meyers' failure to supervise Johnson, a registered representative engaged in securities fraud, subjects the Firm to statutory disqualification.

On appeal, Meyers does not challenge the findings that it failed to supervise Johnson. Rather, the Firm maintains that it cannot be subject to statutory disqualification because FINRA failed to prove that Johnson engaged in securities fraud – specifically that FINRA did not prove that Johnson acted with scienter. As explained more fully below, the record is replete with

evidence of Johnson's scienter, including emails in which Johnson documents his attempts to manipulate the share price of IWEB, trade reports memorializing the manipulative trading, as well as Johnson's and his customer's testimony that Johnson never disclosed his conflicts of interest in the STVI transactions.

The Firm also challenges the denial of Meyers' requests to postpone the hearing below, and FINRA's Department of Enforcement's ("Enforcement") use of Johnson's on-the-record testimony ("OTR"). However, the Firm has consistently failed through the pendency of these proceedings before FINRA and now the Commission to provide even the most rudimentary explanation of how it was prejudiced by either ruling or how the FINRA Hearing Officer abused his discretion.

Finally, the Firm argues, without any support whatsoever, that because FINRA has decided to batch or aggregate the fines imposed, that they should be lower than the fines sought by Enforcement for each cause of action. This contention finds no support in FINRA or Commission case law and is completely unfounded.

Meyers has rehashed the same failing arguments that it made below, and has not provided any evidentiary or legal support for those arguments. On the contrary, the evidence and case law soundly support FINRA's findings that the Firm is subject to statutory disqualification and the appropriateness of the sanctions imposed. Meyers' startling supervisory deficiencies allowed Johnson to engage in a blatantly fraudulent scheme that enriched Johnson, harmed customers, and compromised market integrity. The Firm's serious violations require appropriately consequential sanctions. Accordingly, and for the reasons more fully explained herein, the Commission should affirm the NAC's decision in all respects.

II. FACTUAL BACKGROUND

A. The Firm

Meyers[1] engages in a general securities business headquartered in New York City. RP 11.[2] From approximately December 2011 through June 2012, Donald Wojnowski was the Firm's president, and Wayne Ellison served as the Firm's chief compliance officer ("CCO") and AML compliance officer. RP 2333-34, 2477-81.

In December 2011, Meyers opened an office of supervisory jurisdiction in Chicago. RP 927. Wojnowski recruited several registered representatives with whom he had previously worked to join the Chicago office. These employees included George Johnson, Christopher Wynne, and Joseph Mahalick. RP 4330, 4365, 4389. Wojnowski hired Wynne as the Chicago branch manager and supervisor. RP 2488-90.

Johnson was the highest producing broker at the Firm's Chicago office. RP 5282. The bulk of his business consisted of sales of microcap securities through private offerings and over-the-counter transactions. RP 2505-06, 2827, 5281-82. Wynne began his career in the securities industry as Johnson's sales assistant, and the two of them worked together for more than a decade before joining Meyers. RP 2817. Johnson and Wynne operated as "partners," with Johnson responsible for generating business and servicing clients' accounts, and Wynne supporting Johnson's practice by performing operations and administrative work for Johnson. RP 2491, 5283. This relationship continued at Meyers, where many of Wynne's daily activities

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1 On November 30, 2016, Meyers changed its name to Windsor Street Capital, L.P.

2 "RP" refers to the page number in the certified record.

involved serving as Johnson's sales assistant and entering trades for Johnson's customers on Meyers' order entry system. RP 1288-89.

Wynne had a distinct beneficial financial relationship with Johnson. Wynne and Johnson had a commission-sharing agreement where Johnson gave Wynne 15% of all commissions Johnson earned. RP 2829-2830. The Firm was aware of this de facto partnership as the payments ran through the Firm. Wojnowski viewed the transactions that generated the 15% commissions transferred to Wynne as part of Wynne's own production, and expected Wynne's supervisor to supervise those transactions. RP 2369, 2603-04. However, no one other than Wynne reviewed Johnson's transactions, and no one was supervising Wynne. RP 2510-13.

B. Johnson's Initial Attempts to Manipulate IWEB's Share Price

One of the microcap companies Johnson recommended to his customers was IWEB, a financially distressed company. RP 3485-86. IWEB manufactured and marketed network and cloud-attached storage solutions and delivered online cloud computing application services. RP 4039. Because IWEB consistently sustained sizeable operating losses, it relied upon outside financing to fund its operations. RP 4045-4048, 4058-4062, 4071, 4080-4081.

When Johnson first began soliciting purchases of IWEB stock in 2011, as well as purchasing the stock for himself and his wife, the share price was between 25 and 30 cents. RP 5287. In early 2012, the share price of IWEB stock had fallen to about 12 cents. RP 3485-86. Johnson began taking steps to increase its share price. Shortly after joining Meyers, in December 2011, Johnson and IWEB's president, JS, discussed conducting a PIPE offering with Meyers serving as the placement agent. RP 3971.

In January 2012, at Johnson's request, Wynne introduced JS to JF, a stock promoter. RP 3519. Early in February 2012, IWEB forwarded to Johnson a proposal from JF, in which JF

proposed that IWEB pay him stock and $6,000 per month for six months to "[w]ork to gain favorable analy[sis] and media support" for IWEB and "assist in gaining financial backing in the form of equity or debt if needed." RP 3611-15. During the next six months, JF published five reports regarding IWEB stock (the "JF Reports"). On or about February 29, 2012, JF published the first of these reports, "IWEB -- Turnaround Stock of the Year – On Balance Volume* is saying, 'Buy me!' Part A." RP 3631-51. JF wrote several other reports regarding IWEB, all similarly touting IWEB's promise.

The parties stipulated that the JF Reports did not comport with NASD Rule 2210(d)(1), which governed the content standards that apply to communications with the public prior to February 2013.[3] RP 2675. The JF reports did not disclose that IWEB was paying JF in cash and stock to write the reports. RP 29. The parties also stipulated that the primary goal of the JF Reports was to create a rosy picture of IWEB as a company experiencing an extraordinary turnaround with new orders "pouring in." RP 31. To buttress these claims, the JF Reports made various exaggerated and unbalanced statements concerning IWEB's quarterly growth. *Id.* In addition, two of the JF Reports falsely touted that IWEB won a software industry award in February 2012, when in fact, no such award was ever given, let alone received by IWEB. RP 34.

C. Johnson's Escalated Efforts to Increase IWEB's Share Price in May 2012

Although IWEB received over $3.4 million in outside financing between September 2011 and March 2012, IWEB's cash position was only $112,359. RP 4197. Beginning in late April or early May of 2012, JS, Johnson, and DC, a consultant, discussed obtaining another cash infusion

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[3] The parties also stipulated that Johnson and Wynne, by distributing the JF Reports, to Meyers customers, violated NASD Rules 2210(d)(1), 2711(b)(1)(C) and (h)(2)(A)(ii) and FINRA Rule 2010. These violations are not at issue on appeal. However, the intentionally misleading nature of these reports is an important aspect of Johnson's market manipulation at the center of appeal.

for IWEB through a proposed PIPE offering and the conversion of warrants (the "Warrants") held by certain hedge funds that were convertible at $.17 a share. RP 3691-95, 3705-06, 3983. At the time, IWEB's shares were trading at or below $.12– below the conversion price of the Warrants. RP 3495. In an effort to raise IWEB's stock price, Johnson encouraged JS to hire TS, another stock promoter, to engage in a vigorous stock promotion campaign. RP 3707-08, 3715-25.

In mid-May 2012, IWEB, through DC's consulting firm, retained TS's company, NBT Communications, to conduct a web-based and email "advertorial campaign" from May 22 through May 25, 2012. RP 3729-3730, 3768. The campaign was intended to generate increased trading volume for IWEB's stock and raise the price to at least $.17-$.18, which JS and Johnson believed would increase demand for IWEB's planned PIPE offering and induce holders of IWEB's Warrants to exercise them.[4] RP 3739-40, 3767-68, 3791-97, 3949-51.

1. Email Exchanges and Additional Stock Promoter Reports

During this time period, Johnson exchanged multiple emails with TS and JS discussing their manipulation of IWEB's shares.

On May 16, 2012, Johnson had an email exchange with TS confirming that May 24, 2012, was the day on which IWEB's stock price needed to peak:

Johnson:	How confident are you on the webber?
TS:	Confident on the web campaign? It will be VERY intense 2 million high quality opted in subscribers and compounded with blog support[.] What is the day you need it to peak to convert the warrants at .17? I also have some other support coming in ... Thursday is best for you to convert warrants...$2 million right?

[4] Pursuant to SEC Rule of Practice 323, 17 C.F.R. § 201.323, we ask that the Commission take official notice of the settlement of charges brought against TS and NBT Communications for their fraudulent promotion of IWEB to investors. *See* https://www.sec.gov/litigation/litreleases/2016/lr23504.htm.

Johnson: Yep....let's go my friend. RP 3739-40.

Later that day, Johnson (and Wynne, at Johnson's request) circulated a new JF Report, "Turnaround Stock of the Year Reports 49% Revenue Increase-Inflection point is now defined," to more than 35 Firm customers. RP 3741-49. Johnson knew by then that IWEB planned to retain the Firm as the placement agent for a private offering, but Johnson and Wynne did not disclose that Johnson expected the Firm to receive compensation from IWEB in the next three months. RP 27, 30, 3741-49.

At 3:00 p.m. on May 18, 2012, Johnson emailed TS, again asking how confident TS was about successfully increasing the price of the IWEB stock. TS responded that he was "110% confident . . . we added a $100 million trading group to the mix . . . you WILL be where u want to be[.]" RP 3767-68.

Another email exchange between Johnson and TS on Monday, May 21, 2012, further reflects their goal of significantly increasing the reported price of IWEB stock by Thursday, May 24, 2012. TS noted to Johnson that, "We have not begun [as] yet. . . we only put out simple message to our subs and social media guys as a warm up. . . the fireworks start tomorrow and climax on Thursday." RP 3792. TS then indicated that he shared with Johnson the goal of pushing IWEB's share price up to about 20 cents:

> We are getting the biggest bang for our buck with dedicated emails that crescendo with 1.5 million emails on Thursday morning. . . WITH some of the PIPE money you raise. . . we can expand our program. . . this campaign is short lived and its goal is to get stock in the 20 cent range so [JS] can convert enough warrants to fill his war chest. RP 3791-93.

Later on May 21, 2012, TS again sent Johnson an email reflecting the goal of increasing the price at which IWEB stock would trade on Thursday: "We got 3.5 million shares today with a water pistol. . . The bazookas come out starting tomorrow. . .You close your PIPE deal for

them at .17 on Thursday? Stock will be at .20 or more on Thursday. . . Bet you steak at Gibson's." Johnson responded that if IWEB's stock "closes in the 20s, I will buy you two steaks at Gibson's!!" RP 3794-96.

On May 22, 2012, TS also issued a report entitled, "By Dumb LUCK I Just Discovered the PERFECT Tech Stock. . . In My Backyard!" (the "TS Report"). RP 3803-3824. TS sent an email to Johnson with a link to the TS Report, suggesting that Johnson widely circulate it. RP 3801. The TS Report described IWEB as "perfectly positioned with a low cost/high efficiency unified data storage solution in the commoditized unstructured data storage market" and set forth an initial target of $2.25 for the stock, which was about 15 times the current price. RP 3803. In the early afternoon, Johnson circulated a link to the TS Report to more than 35 customers. RP 3825-61. As with the JF Reports, the parties stipulated that the TS Reports made highly exaggerated statements and predictions about the future success of IWEB with no financial basis or analysis whatsoever. RP 36-37.[5]

On May 24, 2012, Johnson and TS discussed the target price for IWEB shares:

TS:	my orders were to get huge volume and .17-.18 cents. . . .
Johnson:	.165 now. . . I need it at .17 to .18 for a couple days at least. RP 3949.

As hoped, by May 24, 2012, IWEB's trading volume had substantially increased and the stock was trading at $.17. On that day after the market closed, Meyers placed IWEB on its restricted list and Johnson stopped trading in the stock in anticipation of the upcoming PIPE. RP 3953. The PIPE concluded in July 2012 and raised $1,614,715.00, with Johnson and Wynne

[5] The Parties stipulated that the number of customers to whom Wynn and Johnson sent the JF and TS Reports varied, ranging from 35 to over 120. RP 27.

earning a commission of $104,965.15. RP 3977, 5735. Today, IWEB's stock is worthless, with at least one customer losing approximately $200,000. RP 5114.

2. Johnson Aggressively Trades IWEB Shares to Artificially Inflate the Stock Price

Johnson furthered his scheme to increase IWEB's share price by aggressively trading IWEB in his customers' accounts through cross-trades, matched trades, and wash sales to create the appearance of volume in IWEB stock. Prior to May 15, 2012, there were very few purchases of IWEB stock by Johnson for nearly two-and-one-half months. RP 3483. Beginning on May 15, 2012, Johnson intensified his own efforts to push up the price of IWEB. Between May 15 and May 24, 2012, Johnson's customers effected over 90 transactions in IWEB stock at prices that increased from $.12 to $.17 per share. RP 3495-96. Approximately one-third of the trades were matched orders or cross-trades between his customers (a limit order to purchase and a limit order to sell the same or similar number of shares, placed at the same time, for the same price resulting in the shares of one customer being purchased by another customer on the open market). RP 3495-96. Johnson also solicited several customers to sell their IWEB shares at the same time he was soliciting other customers to purchase IWEB. RP 1964-65, 2200-01, 3487-89.

For example, on May 21, 2012, Johnson solicited one customer, HB, to purchase IWEB shares. Beginning at 9:49 a.m., Johnson purchased 170,000 shares in HB's Meyers accounts. RP 3495. Ten minutes later, HB began buying large blocks of IWEB shares through his E*TRADE account. RP 5145. Johnson had a Level II screen, which gave Johnson real-time access to the quotations of individual market makers registered in every Nasdaq-listed security as well as the offering or bidding lots for which they are looking for. RP 1952.

Johnson's manipulations also involved his wife's accounts. Johnson's wife owned IWEB stock in her personal account at Meyers. At 9:31 a.m. on May 23, 2012, Johnson placed a sell

order for 100,000 of his wife's IWEB shares at $.17, which he crossed with a 160,000 buy share order from another customer, who happened to be director of IWEB. RP 3496. At 9:38 a.m., Johnson sent a message to HB asking him to "CALL ME ASAP!!!!!!!!!!!!" RP 3890. Beginning at 9:48 a.m., Johnson placed several large sell orders in HB's Meyers account, while HB placed buy orders in his E*TRADE account, resulting in wash trades. RP 1992-95, 3496.

Between May 15 and May 24, 2012, Johnson's trading in IWEB generated between 30-70% of the daily market volume for IWEB. During this period, Johnson's trading volume in IWEB stock totaled around 7,328,089 shares – an average daily volume of over 916,000 shares. This far exceeded the average daily market volume of 272,862 shares prior to this period. This activity was so anomalous, it prompted an IWEB shareholder to speculate that someone was orchestrating a "pump and dump" of IWEB's stock. RP 3871-73.

D. Meyers Fails to Adequately Supervise Johnson's Activities in Connection with IWEB[6]

Meyers failed to adequately supervise Johnson's activities in connection with IWEB because the Firm did not have appropriate policies and procedures in place, it did not properly train or provide necessary supervisory tools to Wynne, and it the Firm did not supervise Wynne's or Johnson's activities. Specifically, the Firm not review emails sent to and received by the Chicago office, did not review Johnson's trading in IWEB stock, and did not adequately review third-party research reports and other public communications disseminated by Johnson. Meyers' written supervisory procedures ("WSPs") dictated that as the supervisor of the Chicago office, Wynne was responsible for, among other things, reviewing email correspondence, reviewing

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[6] While the findings of fact and conclusions of law regarding Meyers' supervisory failures are not at issue in this appeal (as Meyers has not appealed on those grounds), we discuss these violations above as they serve as support for the sanctions imposed.

trades for potential manipulative activity, reviewing communications with the public to ensure compliance with FINRA rules, and supervising brokers' personal accounts at Meyers. RP 4552, 4583, 4589, 4593, 4708-10. Wynne did not receive any training related to his responsibilities as supervisor, nor was he familiar with the fundamental aspects of compliance, including disclosure obligations concerning conflicts of interests or FINRA's rules concerning communications with the public.

First, Meyers did not adequately review the Chicago office's email. As the designated individual responsible for reviewing email correspondence for all the registered representatives in the Chicago office, Wynne was required under the WSPs to review emails within 30 days of transmission. RP 4589. The Firm used its email archival system, Global Relay, to retain and review emails. RP 2225-26. Global Relay generated a random sample of emails for review, and it also flagged emails containing certain keywords specified by the Firm. RP 2225, 2231, 2239-41. On several occasions between December 2011 and March 2012, Wynne emailed Wojnowski and another Firm employee requesting access, through Global Relay, to the Chicago emails. RP 2869-71, 4779 -83. The Firm, however, never submitted a request to Global Relay to provide Wynne with access to emails and Wynne never gained access to the Chicago emails. RP 3040-41. Had Wynne or his supervisors at the Firm reviewed Johnson's email, they would have been aware of Johnson's numerous emails concerning his manipulation of IWEB stock prices.

Second, Meyers did not adequately review Johnson's communications with the public or the research reports that Johnson sent to customers. Wynne was also responsible for reviewing the public communications of the representatives in the Chicago office. RP 4587. However, Wynne admitted that he never reviewed the TS or JF reports to ensure that the reports complied with FINRA's rules concerning communications with the public. RP 2912-2917. In fact,

Wynne acknowledged that he understood that the reports were not intended to be independent since they were created by stock promoters to drum up in interest in IWEB and that Johnson was distributing to customers reports that omitted material facts concerning IWEB's financial condition and the risks impacting the company, and that contained numerous unwarranted and exaggerated statements. RP 2910-15. Thus, the Firm's supervision of Johnson's public communications and the third-party research reports was inadequate.

Finally, Meyers did not adequately supervise Johnson's trading in IWEB. The section of the Firm's WSPs entitled "Market Manipulation" provided that "[n]o purchase or sale order may be entered or executed that is designed to rise [sic] or lower the price of a security or give the appearance of trading for purposes of inducing others to buy or sell." RP 4552. Nonetheless, the WSPs were not reasonably designed to detect or prevent the entry of orders that violated this prohibition because they did not set forth any specific procedures for a supervisor to follow to detect such orders or prevent them from being entered or executed. The Firm provided Wynne with limited tools to detect, and Wynne took minimal steps to detect, whether registered representatives in the Chicago office were manipulating any stocks. Meyers did not provide Wynne with any exception reports for trading, and Wynne reviewed the daily blotter each day but did not specifically review trading for wash or matched trades. RP 2873-74. As Johnson's trading assistant, Wynne entered all of the trades for Johnson on Meyers' order entry system. RP 2850-51, 2928-65. Although Wynne reviewed Johnson's trades manually, Wynne testified that he did not necessarily review Johnson's trading to ensure that Johnson was not engaging in any sort of manipulative trading. RP 2872-80. Finally, the Firm ignored numerous red flags that would have alerted it to Johnson's illicit trading activities. For example, Wynne was aware that Johnson was placing simultaneous, identical limit orders to buy and sell large blocks of IWEB

shares in the open market. RP 2976-79. Despite this clearly suspicious trading activity, Wynne never questioned any of the trades. Wynne knew that Johnson was selling IWEB from his wife's account while simultaneously soliciting a director of IWEB to purchase her shares. RP 2991.

Wojnowski and Ellison also disregarded red flags concerning Johnson's manipulation. They received daily commission reports showing all trades placed by each broker at the Firm. RP 2526-2531. On more than one occasion, Wojnowski reached out to Wynne because he saw that Johnson was actively trading low-priced securities in his wife's account while he was also recommending those securities to customers. RP 2532-33. Wojnowski told Wynne that Johnson should stop engaging in that activity. RP 2533-34. Wojnowski also discussed the issue with Ellison, but the line of inquiry died there – there was no additional follow-up, no additional supervision of Johnson's activity, and no attempts to discern whether or not the activity was suspicious or illegal. RP 2534-35. Thus, the Firm's supervision of Johnson's trading in IWEB stock in his and his customers' accounts was woefully inadequate.

E. Johnson's Sale of STVI Shares

IWEB was not the only thinly-traded stock that Johnson deceptively traded. In May and June 2012, Johnson purchased 250,000 shares of STVI through his and his wife's Meyers accounts. RP 2045-47, 5000-01, 5008-09, 5030-31, 5038-39. Between July 12 and August 31, 2012, Johnson sold approximately fifty percent of their STVI holdings to his own customers in 11 different transactions. RP 2048-68, 4261-66, 4267-4300, 4993-94, 5018, 5025. On each occasion, Johnson first placed a limit order to sell his or his wife's shares, followed by a market order to purchase a somewhat larger amount of the STVI shares for a customer. RP 2048-60, 4261, 4267-4300. Johnson was aware that STVI was very thinly traded, and that by placing a limit order to sell from his or his wife's account, immediately followed by a market order to buy

for his customer, Johnson was almost assured that his sell order would be filled at the price he wanted. Johnson's scheme was successful – the shares that Johnson sold from his or his wife's accounts were the actual shares that his customers purchased in the market, at the prices in Johnson's limit orders. RP 2048-67, 4261-4300. This scheme netted Johnson and his wife profits of approximately $18,000 in just a few months. RP 2101-03, 4261. Johnson also charged his customers commissions on these transactions of close to $4,400. RP 4261.

Johnson's sales of his STVI shares from his personal accounts while at the same time recommending that his customers purchase the same stock was a clear conflict of interest. Moreover, Johnson never informed his customers that he was selling his or his wife's STVI shares at the same time he was soliciting those customers to purchase STVI, which was material information. RP 2069-2076, 5309-12.

F. Meyers Fails to Adequately Supervise Johnson's Trading of STVI

Meyers failed to adequately supervise Johnson's trading in STVI with a view to preventing Johnson from recommending that a customer buy a stock that Johnson was selling without disclosing his adverse interest. Wynne was aware that Johnson was selling his and his wife's STVI shares at the same time he was soliciting his customers to purchase the stock, since Wynne was the individual entering the trades. RP 2996-97. Even though Meyers' WSPs discussed "adverse interest" conflicts, such as the one perfectly illustrated by Johnson's STVI trades, Wynne never inquired whether Johnson had informed his customers at the time he solicited the sales that he was also selling his own personal shares of STVI. RP 3000-05, 4708. Furthermore, the daily commission reports that were reviewed by Wynne's purported supervisors contained numerous red flags showing instances of Johnson trading for his own accounts contrary to his recommendations to his customers.

III. PROCEDURAL BACKGROUND

Enforcement filed the complaint on April 8, 2015. RP 8-60. In addition to Meyers, the complaint initially named Johnson, Wynne, and Mahalick as respondents. *Id.* The Complaint contained seven causes of action: (1) market manipulation in willful violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010 against Johnson; (2) misleading or false communications with the public in third-party research reports in violation of NASD Rules 2210(d) and 2711(h), and FINRA Rule 2010 against Johnson and Wynne; (3) omissions of material facts in willful violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010 against Johnson; (4) disclosures of non-public information in violation of FINRA Rule 2010 against Johnson; (5) falsification of firm books and records in violation of FINRA Rules 4511 and 2010 against Johnson, Wynne, and Mahalick; (6) failure to supervise Johnson in violation of NASD Rule 3010 and FINRA Rule 2010 against Meyers and Wynne; and (7) failure to adopt and implement an adequate AML program in violation of FINRA Rules 3310(a) and 2010 against Meyers. Among other relief requested, the complaint requested that the Hearing Panel make the specific finding that Meyers is statutorily disqualified. *Id.*

In February 2016, prior to the start of the hearing, Johnson, Wynne, and Mahalick settled with Enforcement, each entering into a Letter of Acceptance, Waiver, and Consent ("AWC"). RP 1303-18, 1459-46, 1547-1618. Each AWC explicitly notes that the respondents consent, "without admitting or denying the allegations in the Complaint . . . to the entry of findings and violations consistent with the allegations of the Complaint[]." The AWCs go on to state that the findings "are not binding on any other person or entity named as a respondent in this or any other proceeding."

During a pre-hearing conference on February 17, 2016, Meyers orally moved for an adjournment of the hearing, seeking a postponement of three weeks. RP 1406-52. Meyers argued that since it had expected the individual respondents to take the lead in defending against the allegations in the first five causes of action, Meyers had not prepared to contest those allegations.[7] *Id.* Enforcement represented that it planned to try to prove the allegations contained in causes one, two, three, and five of the Complaint, in an effort to support its request that the Firm be statutorily disqualified, as well as to support its request for substantial monetary sanctions. *Id.* The Hearing Officer denied Meyers' motion, stating that it was foreseeable that the other respondents would settle, and that Meyers did not show good cause. RP 1453-54.

A five-day hearing was held beginning on February 24, 2016. Johnson, after entering into his AWC in which he accepted a bar, refused to testify. In lieu of his live testimony, and over Meyers' objections, Enforcement offered into evidence excerpts from Johnson's May 5-6, 2014 OTR, which were read into the record during Enforcement's case in chief. RP 5277-5313.

The Extended Hearing Panel issued its decision on November 11, 2016, finding that Meyers engaged in the alleged misconduct. RP 6495-6542. In addition, the Extended Hearing Panel determined that Meyers is subject to statutory qualification because it failed to supervise Johnson with a view to preventing violations of the Exchange Act. The Extended Hearing Panel fined Meyers $350,000; ordered it to retain an independent consultant to conduct a comprehensive review of the Firm's policies, systems, and training related to the review of emails, communications with the public, low-priced securities, monitoring customer accounts for

[7] Meyers acknowledged there was no joint defense agreement in place with the other respondents. RP 1416.

suspicious activities, reviewing transactions in the accounts of its registered representatives and their family members, and the Firm's AML policies and procedures; and ordered it to pay costs.

Meyers appealed to FINRA's National Adjudicatory Council ("NAC") on December 6, 2016. RP 6543-54. The grounds on which Meyers appealed were limited to the following: the Extended Hearing Panel erred in relying on the Johnson AWC to make its statutory disqualification determination; the Firm was prejudiced by its inability to confront and cross-examine Johnson; there was insufficient evidence of Johnson's scienter; the Extended Hearing Panel erred in denying the Firm's motion for a continuance; and the Extended Hearing Panel erred in its application of FINRA Sanction Guideline General Principal No. 4 (batching or aggregation of sanctions). RP 6656-70. Notably, Meyers did not appeal the Extended Hearing Panel's findings that the Firm failed to supervise Johnson in violation of NASD Rule 3010 and FINRA Rule 2010 or that it failed to adopt and implement an adequate AML program in violation of FINRA Rules 3310(a) and 2010.

The NAC affirmed the Extended Hearing Panel's findings. RP 6799-6817. The NAC affirmed and adopted the Extended Hearing Panel's findings that Meyers violated NASD Rule 3010(a)[8] and FINRA Rule 2010 by failing to adequately supervise its Chicago office and FINRA

[8] NASD Rule 3010(a) requires member firms to establish and maintain a supervisory system, to supervise the activities of its registered representatives, principals, and associated persons, "that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD [and FINRA] rules." "It is well established that the presence of procedures alone is not enough. Without sufficient implementation, guidelines and strictures do not ensure compliance." *KCD Fin. Inc.*, Exchange Act Release No. 80340, 2017 SEC LEXIS 986, at *34 (Mar. 29, 2017). Furthermore, "[t]he duty of supervision includes the responsibility to investigate 'red flags' that suggest that misconduct may be occurring and to act upon the results of such investigation." *Michael T. Studer*, 57 S.E.C. 1011, 1023 (2004).

Rules 3310(a) and 2010 by failing to establish and implement adequate anti-money laundering ("AML") policies and procedures. *See* Section IV.D.3. for AML discussion.

The NAC also affirmed the Extended Hearing Panel's determination that Meyers is subject to statutory disqualification because the Firm failed to supervise an employee who engaged in securities fraud in violation of the Exchange Act while employed at the Firm. However, the NAC explicitly found that the Extended Hearing Panel erred in considering Johnson's AWC as a basis for proving scienter, but noted that there was sufficient evidence in the record, exclusive of the AWC, to find scienter.

Finally, while the NAC affirmed the Extended Hearing Panel's requirement that the Firm retain an independent consultant, the NAC increased the monetary sanction imposed from $350,000 to $500,000. The NAC concluded that Meyers' egregious failures to supervise allowed Johnson to engage in securities fraud that enriched Johnson, harmed customers, and compromised market integrity and warranted a more stringent sanction. This appeal followed.

IV. ARGUMENT

The Commission must dismiss this application for review if it finds that Meyers engaged in conduct that violated FINRA rules, FINRA applied its rules in a manner consistent with the purposes of the Exchange Act, and FINRA imposed sanctions that are neither excessive nor oppressive and that do not impose an unnecessary or inappropriate burden on competition.[9] 15 U.S.C. § 78s(e).

The record, which contains a wealth of documentary evidence, conclusively supports that Meyers failed to supervise Johnson while he engaged in securities fraud. The NAC's findings of

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[9] The Firm does not contend that it did not violate FINRA rules, that FINRA applied its rules in a manner inconsistent with the Exchange Act, or that FINRA's sanctions impose an undue burden on competition.

liability are sound, and the $500,000 fine and requirement for an independent consultant are appropriately remedial. The Commission should dismiss Meyers' application for review.

A. The Finding that Meyers Is Subject to Statutory Disqualification Is Amply Supported by the Record

The Firm did not appeal the NAC's findings that it failed to supervise Johnson. Rather, it only takes issue with the underlying findings that Johnson committed fraud, which subjects the Firm to statutory disqualification. Meyers contends that there is insufficient evidence in the record to support a finding that Johnson acted with scienter—a necessary element of fraud. Meyers is incorrect. The record is filled with evidence of Johnson's scienter, thereby supporting the NAC's conclusion that the Firm is statutorily disqualified.

1. Statutory Disqualification

Article III, Section 4 of FINRA's By-Laws, and Exchange Act Sections 3(a)(39)(F), and 15(b)(4)(E), provide that a member firm is subject to statutory disqualification by operation of law if it fails to reasonably supervise an individual subject to its supervision with a view to preventing violations of the Exchange Act, and that individual violates the Exchange Act.

The NAC found that Meyers is subject to statutory disqualification because of its failures to supervise Johnson with a view to preventing Johnson's violations of the Exchange Act. The Firm failed to supervise Johnson, who violated the Exchange Act through his market manipulation of IWEB and his material omissions concerning the STVI transactions.

2. Johnson Engaged in Securities Fraud in Violation of the Exchange Act

Johnson committed fraud by manipulating the share price of IWEB and by omitting material facts when selling STVI. Specifically, Johnson violated Section 10(b) of the Exchange Act, which makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in

contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). Exchange Act Rule 10b-5 makes it unlawful "[t]o employ any device, scheme, or artifice to defraud [Exchange Act Rule 10b-5(a)]; or [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security [Exchange Act Rule 10b-5(c)]." 17 C.F.R. § 240.10b-5.

For the Commission to sustain the NAC's findings of fraud against Johnson, the evidence must demonstrate that Johnson (1) misrepresented or omitted, (2) material facts, (3) with scienter, (4) in connection with the purchase or sale of securities, (5) by means of interstate commerce. *See SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1466-1467 (2d Cir. 1996). A preponderance of the evidence establishes each of these elements — particularly scienter — which is the only element at issue in this appeal.

a. The Record Shows that Johnson Acted with Scienter in His Manipulation of IWEB Securities

The evidence contained in the record before the Commission demonstrates that Johnson manipulated the market for IWEB shares to artificially inflate the stock price. Market manipulation is a well-established violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5. The Commission has characterized market manipulation as "the creation of deceptive value or market activity for a security, accomplished by an intentional interference with the free forces of supply and demand." *Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *42 (Dec. 10, 2009) (citing *Swartwood, Hesse, Inc.*, 50 S.E.C. 1301, 1307 (1992)). Manipulation refers generally to practices, such as wash sales, cross-trades, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity. *Santa Fe Indus. v. Green*, 430 U.S. 462, 476 (1977).

To establish that Johnson engaged in market manipulation in violation of Exchange Act Rule 10(b) and Exchange Act Rule 10b-5, a preponderance of the evidence must demonstrate that he acted with scienter, which has been defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Proof of scienter in manipulation cases may be inferred from circumstantial evidence, "including evidence of price movement, trading activity, and other factors." *See Carole L. Haynes*, Initial Decision Release No. 78, 1995 SEC LEXIS 3134, at *35 (Nov. 24, 1995) (*citing Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91 n.30 (1983)). Proof of a manipulation almost always depends on inferences drawn from a mass of factual detail. *Pagel, Inc.*, 48 S.E.C. 223, 228 (1985), *aff'd*, 803 F.2d 942 (8th Cir. 1986).

The record evidence before the Commission supports the NAC's finding that from May 15 through May 24, 2012, Johnson engaged in a blatant scheme to manipulate the volume and price of IWEB's stock. Specifically, the NAC found that Johnson actively and deliberatively solicited his customers to buy and sell millions of nearly worthless shares of IWEB at steadily increasing prices in order to make the stock look attractive to the warrant holders and to induce prospective purchasers of IWEB's future PIPE offering. Johnson repeatedly managed matching trading of IWEB in his customers' accounts to create the appearance of genuine market activity. During this period, IWEB stock climbed from a closing price of $.12 a share on May 15, 2012 to a closing price of $.1749 cents on May 23, 2012. In addition, the NAC concluded that the emails between Johnson, TS, and JS, in which they brazenly discuss the desire to drastically increase volume and to raise the share price, provide clear evidence of scienter. Furthermore, Johnson knowingly circulated misleading, exaggerated, and inaccurate reports from two stock promoters to dozens of customers in an effort to further bolster the profile of IWEB.

As they did below, the Firm argues that there is insufficient evidence in the record to find that Johnson acted with scienter. Meyers contends that FINRA relied *only* on inferences based on statements made by Enforcement, which are not evidence, to establish scienter, or manipulative intent. Opening Br. at 7-8. Meyers also maintains that without Johnson's live testimony at the hearing, it is "virtually impossible to know what his intent was regarding his transactions in IWEB." *Id.* at 8. Such reasoning would render Rule 10b-5 meaningless. As a reasonable person could conclude, individuals charged with violating Rule 10b-5 do not typically admit that they acted with fraudulent intent. And, as already noted, scienter may be — and, as a practical matter, often is — proven by circumstantial evidence. Manipulative intent establishes scienter for purposes of proving a violation of Rule 10b-5. *Swartwood, Hesse, Inc.*, 50 S.E.C. at 1307 n.16. Meyers' arguments ignore the voluminous record that amply supports a finding that Johnson acted with scienter. Johnson's words and actions speak for themselves. Thus, the Commission should affirm the NAC's conclusion that Johnson acted with scienter.

b. The Record Supports the Finding that Johnson Acted with Scienter in the STVI Transactions

In addition, the record fully supports the NAC's finding that Johnson made material omissions with respect to Johnson's STVI transactions. Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 make it unlawful for any person acting with scienter in connection with the purchase or sale of a security, directly or indirectly to make an untrue statement of material fact or omit a material fact necessary to make a statement not misleading. *See* 17 C.F.R. § 240.10b-5(b); *First Jersey Sec., Inc.*, 101 F.3d at 1467. An omitted fact is material if "there is a substantial likelihood that a reasonable investor would have considered the fact important in making an investment decision." *William Scholander*, Exchange Act Release No. 77492, 2016

SEC LEXIS 1209, at *20 (Mar. 31, 2016), *aff'd sub nom. Harris v. SEC*, 712 F. App'x 46 (2d Cir. 2017).

It is well settled that a broker violates Rule 10b-5 by recommending the purchase of a security without disclosing his own concurrent sale of the same security. *RichMark Capital Corp.*, 57 S.E.C. 1, 8 (2003), *aff'd*, 86 F. App'x 744 (5th Cir. 2004). "When a broker-dealer has a self-interest (other than the regular expectation of a commission) in serving the issuer that could influence its recommendation, it is material and should be disclosed." *Scholander*, 2016 SEC LEXIS 1209, at *17.

In the case of a material omission, "scienter is satisfied where, [as here], the [respondent] had actual knowledge of the material information." *GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 239 (3d Cir. 2004); *Fenstermacher v. Philadelphia Nat'l Bank*, 493 F.2d 333, 340 (3d Cir. 1974); *see also Kenneth R. Ward*, 56 S.E.C. 236, 259-60 (2003) (finding scienter established when representative was aware of material information and failed to make appropriate disclosures to customers), *aff'd*, 75 F. App'x 320 (5th Cir. 2003). Scienter is established if a respondent "acted intentionally or recklessly." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007). "Reckless conduct includes a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'" *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977).

Johnson solicited customers to purchase STVI on 11 different occasions without disclosing that he was simultaneously selling that same stock from his and his wife's accounts. Johnson's customers surely would have considered his self-dealing material. Johnson clearly

knew that he was selling from his and his wife's accounts at the same time he was soliciting his customers to purchase STVI, as he was the one who orchestrated the trades, and therefore acted with scienter. RP 2045-47, 5000-01, 5008-09, 5030-31, 5038-39. Moreover, Johnson admitted at his OTR that he did not disclose his trading activity to his customers. RP 2069-76, 5309-12. Johnson's testimony that he did not disclose his personal sales of STVI was corroborated by several of his customers, who were interviewed by FINRA during its investigation. RP 2069-76, 5309-12.

Therefore, the Commission should affirm the NAC's finding that Johnson possessed the requisite scienter and willfully violated Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 by recommending that his customers purchase STVI without disclosing his and his wife's concurrent sales.

B. Meyers was Not Prejudiced by Its Inability to Confront and Cross-Examine Johnson

The Firm contends that the Extended Hearing Panel erred in permitting Enforcement to rely on excerpts of Johnson's OTR. The Firm maintains that, particularly since it was facing such a serious consequence as statutory disqualification, it should have been provided the "opportunity to confront Johnson as to any of the documents or factual findings which comprise the record upon which the NAC bases its statutory disqualification finding." Opening Br. at 4.

As an initial matter, this argument ignores the fact that neither the Hearing Panel nor the NAC relied on Johnson's OTR testimony to conclude that he acted with scienter in manipulating the market for IWEB. There is sufficient evidence in the record exclusive of the OTR, including Johnson's trading activity and emails, to conclude that he acted with scienter. RP 6813.

Meyers also contends that "FINRA's own procedures permit respondents to...ask questions of claimant witnesses, too, during what is known as cross-examination . . . The

respondents may use rebuttal evidence to contradict the claimant's arguments or evidence." Opening Br. at 8-9 (internal quotations omitted). However, the procedures that Meyers cites to apply to FINRA arbitrations and mediations, not disciplinary proceedings. *See Id.* at 9, n.27.

Meyers received a fair hearing under FINRA rules.[10] Section 15A(b)(8) of the Exchange Act provides that FINRA disciplinary proceedings must be conducted in accordance with fair procedures. *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *51 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2016) (holding that FINRA must provide fair procedures for its disciplinary actions). Section 15A(h)(1) of the Exchange Act requires that FINRA, in a disciplinary proceeding, "bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record." Here, the proceedings before the Hearing Panel were fair and conducted in accordance with FINRA rules. Meyers had ample opportunity to present its case and to rebut all the evidence presented by Enforcement, including Johnson's OTR. Meyers could have counter-designated portions of Johnson's OTR, relied on emails or other documentary evidence to provide possible innocent explanations for the allegations that Johnson was manipulating the price of IWEB, or chosen to cross-examine FINRA's investigator differently regarding Johnson's OTR.[11] It did not. Any perceived prejudice stems from Meyers' defense strategy, or the fact that evidence overwhelmingly supports the finding that Johnson engaged in securities fraud.

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[10] Meyers refers to FINRA as a "quasi-governmental agency." Opening Br. at 5. This is incorrect. "FINRA is not a state actor and thus, traditional Constitutional due process requirements do not apply to its disciplinary proceedings." *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *34 (Oct. 20, 2011).

[11] As discussed later in this brief, Maureen Brogan, FINRA's lead investigator, testified that she believed that Johnson's testimony concerning the IWEB trading was not truthful and that he lied to conceal his manipulation of IWEB. Meyers did not question Brogan regarding the basis for her conclusion that Johnson's testimony was false or attempt to rebut it.

Regardless, as even Meyers has conceded, hearsay evidence, such as testimony at an OTR, is generally admissible in FINRA adjudications. "[I]t is well-established that hearsay evidence is admissible in administrative proceedings and can provide the basis for findings of violation, regardless of whether the declarants testify." *See Scott Epstein*, 2009 SEC LEXIS 217, at *46. "[H]earsay statements may be admitted in evidence and, in an appropriate case, may form the basis for findings of fact." *Charles D. Tom*, 50 S.E.C. 1142, 1145 (1992). "[H]earsay evidence is admissible in administrative proceedings, if it is deemed relevant and material." *SEC v. Otto*, 253 F.3d 960, 966 (7th Cir. 2001); *Dillon Sec., Inc.*, 51 S.E.C. 142, 150 (1992). Hearsay should be evaluated for its probative value, reliability, and the fairness of its use. *See Tom*, 50 S.E.C. at 1145 n.5. The Extended Hearing Panel thoughtfully weighed these factors along with Meyers' objections and determined that Johnson's OTR was admissible, because, particularly as it relates to Johnson's STVI transactions, the testimony was probative, reliable, and fair.[12]

Johnson's OTR statements concerning his failure to disclose his personal sales of STVI are probative of an essential element of the case: whether Johnson omitted a material fact from

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[12] The cases Meyers cites to support its argument (Opening Br. at 5) are misplaced. In *Dep't of Enforcement v. Varone*, Complaint No. 2006007101701, 2008 FINRA Discip. LEXIS 55, at *8 n.4 (FINRA Hearing Panel Aug. 20, 2008), a FINRA hearing panel allowed a witness to testify regarding hearsay statements made by his brother-in-law, before the he died. The panel held that the witness' testimony was reliable and probative in part because it was given under oath and because the respondent had an opportunity to cross-examine the witness. While the respondent was unable to cross-examine the declarant because, like Johnson, he was unavailable, the respondent was able to cross-examine the witness presenting the hearsay evidence, just as Meyers was able to cross-examine Brogan, who presented Johnson's OTR. In *A.G. Baker, Inc.*, Administrative Proceedings Rulings Release No. 256, 1984 SEC LEXIS 2573 (Aug. 1, 1984), an order issued by the ALJ presiding in an SEC administrative proceeding granted the Division of Enforcement's motion to take the deposition of a foreign national in Canada. In *E. Magnus Oppenheim & Co.*, 58 S.E.C. 231 (2005), the SEC held that the applicant had a fair hearing, observing that the NASD had afforded procedural safeguards including allowing the respondent to cross-examine adverse witnesses who testified at the hearing. Neither of the latter cases even addresses hearsay evidence, let alone when it is admissible.

his customers. Those statements also are reliable, because his admissions concerning his failure to disclose were against his own interest and corroborated by Johnson's customers. *See, e.g., Dep't of Enforcement v. Lee*, Complaint No. C06040027, 2007 NASD Discip. LEXIS 7, at *44 (NASD NAC Feb. 12, 2007), *aff'd*, Exchange Act Release No. 57655, 2008 SEC LEXIS 819 (Apr. 11, 2008) (admitting OTR testimony and consistent emails); *John Montelbano*, Exchange Act Release No. 47227, 2003 SEC LEXIS 153, at *22 (Jan. 22, 2003) (crediting OTR testimony admitted during NASD proceeding).

Although not relied on by the Extended Hearing Panel or the NAC, Johnson's OTR testimony regarding the IWEB transactions is probative of his scienter and was properly admitted. Johnson testified that he did not remember why he recommended purchases of IWEB to his customers in May 2012. RP 5289, 5292-94, 5927-5301. At the hearing below, Maureen Brogan, testified that she believed that Johnson's testimony on this point was not truthful and that he lied to conceal his manipulation of IWEB. RP 1935-36, 1959.

The decision regarding the admission or exclusion of evidence is reviewed only for an abuse of discretion. *See Dep't of Enforcement v. North*, Complaint No. 2012030527503, 2017 FINRA Discip. LEXIS 28, at *26 (FINRA NAC Aug. 3, 2017) (*citing Robert J. Prager*, 58 S.E.C. 634, 664 (2005)), *appeal docketed*, SEC Admin. Proceeding No. 3-18150 (Sept. 7, 2017). "Because this discretion is broad, the party arguing abuse of discretion assumes a heavy burden that can be overcome only upon showing that the Hearing Officer's reasons to admit or exclude the evidence were so insubstantial as to render . . . [the admission or exclusion] an abuse of discretion." *Dep't of Enforcement v. North*, Complaint No. 2010025087302, 2017 FINRA Discip. LEXIS 7, at *34 (FINRA NAC Mar. 15, 2017) (internal quotation marks omitted), *appeal docketed*, SEC Admin. Proceeding No. 3-17909 (Apr. 6, 2017). Meyers does not

articulate any specific basis for why the inclusion of excerpts from Johnson's OTR testimony was an abuse of discretion.

The use Johnson's OTR testimony was reliable, probative, and fair. In addition, Meyers made no apparent attempts to marshal any evidence to counter Johnson's OTR testimony. Therefore, the Commission should affirm the NAC's finding that that the Extended Hearing Panel did not abuse its discretion in its admission.

C. Meyers Has Failed to Demonstrate that It Was Prejudiced by the Hearing Officer's Decision to Deny Its Request for a Continuance

Meyers was well-aware of the hearing dates in this matter for months, as well the specific allegations against the Firm and other respondents that would be at issue at the hearing. Meyers nevertheless maintains that the Hearing Officer's denial of its three week continuance request was improper and fundamentally unfair. However, Meyers has provided no evidence or argument to warranting reversing the Hearing Officer's decision.

The Hearing Officer has broad discretion in determining whether a request for a continuance should be granted, based upon the particular facts and circumstances presented. *Falcon Trading Group, Ltd.*, 52 S.E.C. 554, 560 (1995), *aff'd*, 102 F.3d 579 (D.C. Cir. 1996). The denial of a request for a continuance is reviewed for abuse of discretion —whether the denial was the sort of "unreasoning and arbitrary insistence upon expeditiousness that invalidates a refusal to postpone a hearing." *Dep't of Enforcement v. Ricupero*, Complaint No. 2006004995301, 2009 FINRA Discip. LEXIS 36, at *23 (FINRA NAC Oct. 1, 2009) (internal citations omitted), *aff'd*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988 (Sept. 10, 2010), *aff'd*, 436 F. App'x 31 (2d Cir. 2011). We find no such arbitrary insistence here.

In his denial of Meyers' motion, the Hearing Officer stated that it was foreseeable that the other respondents would settle, and that Meyers did not show good cause for delaying the start of

the proceedings. Indeed, it is proper to deny a continuance where the respondent either has not shown how it will be prejudiced or what additional defenses it would assert. *See Dep't of Enforcement v. Busacca*, Complaint No. E072005017201, 2009 FINRA Discip. LEXIS 38, at *35-36 (FINRA NAC Dec. 16, 2009), *aff'd*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787 (Nov. 12, 2010).

The Firm argues, for the first time on appeal to the Commission, that it was somehow prejudiced because it "could have approached Johnson" and "request that he take a deposition or sworn statement," had its request for a continuance been granted. Opening Br. at 11. This highly speculative argument was not made to the Hearing Officer below as a basis for its motion for a continuance, or on appeal to the NAC. Moreover, the Firm never explains why it could not approach Johnson prior to the hearing, whether it attempted to approach Johnson prior to the hearing, or, if it did approach Johnson, whether Johnson would have been willing to provide deposition testimony or a sworn statement.

Meyer's prejudice argument is further belied by its attempts early on in the disciplinary proceedings below to sever its case from the other respondents. On May 14, 2015, Meyers filed a Motion to Sever Claims. RP 281-83. The Firm argued that the evidence Enforcement would need to present a case against the individual respondents involved different facts and circumstances than the allegations against the Firm, that severance of the claims would conserve time and resources, and that Meyers would be unfairly prejudiced if severance is not granted (arguing that the severity of the allegations against the individual respondents would unfairly taint the Hearing Panel's perception of Meyers). Enforcement opposed Meyers' motion, and on June 4, 2015, the Chief Hearing Officer denied the Motion to Sever Claims. RP 463-4. The Chief Hearing Officer noted that:

> Even if the charges against Meyers were severed from the case, much of the evidence relating to the underlying misconduct in the first five causes of action would need to be presented in the case against Meyers. . .. Accordingly because the same or similar evidence would reasonably be expected to be offered at each of the possible hearings, severance would not conserve time or resources of the Parties. RP 464.

Thus, Meyers had long been on notice that the facts underlying the causes of actions involving the settling respondents would be in play in Enforcement's case against it, yet it chose to do nothing to respond to those facts. Any prejudice experienced by Meyers arose from its own lack of preparedness and foresight and not from a denial of its request to continue the hearing.

Meyers did not show how it was prejudiced when it already had ten months to prepare for the hearing, or what additional defenses it would have asserted if the hearing had been continued. The Commission should therefore affirm the finding that the Hearing Officer did not abuse his discretion in denying the Firm's request.

D. The Sanctions Are Appropriate to Protect Investors and the Public Interest and to Promote Market Integrity

The Commission should affirm that NAC's sanctions, which are well-supported and are neither excessive not oppressive. Section 19(e)(2) of the Exchange Act guides the Commission's review of FINRA's sanctions, and provides that the Commission may eliminate, reduce, or alter a sanction if it finds that the sanction is excessive, oppressive, or imposes a burden on competition not necessary or appropriate to further the purposes of the Exchange Act. *See Jack H. Stein*, 56 S.E.C. 108, 120-21 (2003). In considering whether sanctions are excessive or oppressive, the Commission gives significant weight to whether the sanctions are within the allowable range of sanctions under FINRA's Sanction Guidelines ("Guidelines"). *See Vincent M. Uberti*, Exchange Act Release No. 58917, 2008 SEC LEXIS 3140, at *22 (Nov. 7, 2008) (noting that Guidelines serve as "benchmark" in Commission's review of sanctions).

The resulting sanctions are neither excessive nor oppressive and in fact serve to protect investors, market integrity, and the public interest. The $500,000 fine and requirement to retain and independent consultant for Meyers' egregious supervisory and AML violations are meaningful sanctions that are consistent with FINRA's Sanction Guidelines and will deter future misconduct by the Firm. The Commission should therefore affirm the sanctions that the NAC imposed.

1. The Sanctions Imposed are Consistent with FINRA's Sanction Guidelines

To assess the appropriate sanctions, the NAC consulted the Guidelines for each violation at issue, applied the principal and specific considerations outlined in the Guidelines, and considered all relevant evidence of aggravating and mitigating circumstances.[13] RP 6814-16.

The NAC properly applied the Guideline for Systemic Supervisory Failures, as it aptly captures Meyers' myriad supervisory failures.[14] The Guideline directs that:

> Adjudicators should use this Guideline when a supervisory failure is significant and is widespread or occurs over an extended period of time. While systemic supervisory failures typically involve failures to implement or use supervisory procedures that exist, systemic supervisory failures also may involve supervisory systems that have both ineffectively designed procedures and procedures that are not implemented.[15]

Meyers' egregious failures to supervise allowed Johnson to engage in securities fraud that enriched Johnson, harmed customers, and compromised market integrity. The NAC's decision

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[13] The NAC did not consider as a basis for the sanctions imposed the fact that the Firm is subject to statutory disqualification.

[14] *See FINRA Sanction Guidelines*, 105 (2017) http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter *Guidelines*].

[15] *Id.* at 105.

to rely on this Guideline reflects the severity of Meyers' supervisory shortcomings, as well as its inadequate and flawed AML policies and procedures.

The Guideline for systemic supervisory failures recommends fining a firm $10,000 to $292,000. Where aggravating factors predominate, as they do here, the adjudicator is directed to consider a higher fine.[16] The adjudicator is also directed to consider ordering the firm to revise its supervisory systems and procedures, or ordering the firm to engage an independent consultant to recommend changes to the firm's supervisory systems and procedures.[17] The Principal Considerations specific to the systemic supervisory failure Guideline aggravate Meyers' misconduct. Meyers' supervisory deficiencies allowed Johnson's violative conduct to occur or to escape detection.[18] The Firm also failed reasonably to respond to numerous "red flag" warnings.[19] Wynne sent emails to Wojnowski regarding his lack of access to the Chicago emails, but the Firm did not provide Global Relay access to Wynne. Wynne was aware of Johnson's trading activity which strongly indicated that Johnson was manipulating IWEB stock, but took no steps to investigate. RP 6815. Wynne also read the JF Reports and the TS Report but did not consider whether the reports complied with applicable regulatory requirements. In

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16 *Id.*

17 The Firm does not appeal the requirement that it retain an independent consultant to conduct a comprehensive review of the Firm's policies, systems, and training to matters related to review of emails, communications with the public, low-priced securities, monitoring customer accounts for suspicious activities, reviewing transactions in the accounts of its registered representatives and their family members, and the Firm's AML policies and procedures. In any event, this requirement comports with Guidelines and is warranted given the Firm's chronically dysfunctional supervisory system.

18 *Id.* at 105 (Principal Considerations in Determining Sanctions, No. 1).

19 *Id.* (Principal Considerations in Determining Sanctions, No. 2).

addition, Wynne knew that Johnson was soliciting purchases of STVI at the same time that he was selling it (both in his account and his wife's account) but took no steps to investigate whether Johnson was disclosing his conflict of interest. At each and every turn, Meyers' supervisory system ignored these red flags.

Several other aspects of Meyers' conduct are aggravating. Meyers did not allocate its resources to prevent or detect Johnson's violations, which resulted in harm to customers and markets.[20] The Firm provided Wynne with no AML support or training and did not provide Wynne with the supervisory tools to review the Chicago emails, which would have revealed Johnson's manipulative scheme. In fact, no one at Meyers was even supervising Wynne. Furthermore, the number and type of customers, investors or market participants affected by the deficiencies, the number and dollar value of the transactions not adequately supervised as a result of the deficiencies, and the nature, extent, size, character, and complexity of the activities or functions not adequately supervised is aggravating.[21] At least one of Johnson's customers lost $200,000, and others were induced to exercise the Warrants or participate in the PIPE offering based on inflated share prices and misleading stock reports. Customers also paid commissions on Johnson's self-serving trading of both IWEB and STVI.

Meyers' supervisory and AML deficiencies affected market integrity and market transparency.[22] The alarming lack of quality controls and procedures available to Wynne,

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20 *Id.* (Principal Considerations in Determining Sanctions, No. 3).

21 *Id.* at 105-06 (Principal Considerations in Determining Sanctions, Nos. 4, 5, 6).

22 *Id.* at 106 (Principal Considerations in Determining Sanctions, No. 7).

coupled with the fact that Wynne's self-interest and lack of training prevented him from even implementing the sub-par supervisory tools available to him, are additionally aggravating.[23]

Finally, in addition to these aggravating factors, the General Principles Applicable to All Sanction Determinations further support the imposition of a significant sanction. As noted earlier in this brief, Meyers has a lengthy and troubling disciplinary history. The Guidelines direct adjudicators to consider the Firm's relevant disciplinary history and impose progressively escalating sanctions on recidivists.[24] Meyers has been the subject of 17 final disciplinary actions since 2000, nine of which involved supervisory failures.[25] This relevant disciplinary history is alarming, and together with the other considerations warrants the $500,000 fine. Such a fine, as well as the hiring of an independent consultant, will serve the remedial purpose of compelling Meyers to take its supervisory and compliance responsibilities seriously and protect investors, the public interest, and the markets.

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23 *Id.* (Principal Considerations in Determining Sanctions, No. 8).

24 *Id.* at 2 (General Principles Applicable to All Sanction Determinations, No. 2).

25 As examples of Meyers' host of disciplinary issues, in June 2016, FINRA accepted an AWC from the Firm for violations of FINRA Rules 2010 and 7450 and NASD Rule 3010. The Firm consented to findings that it failed to submit reportable order events to the Order Audit Trail System ("OATS") and failed to have in place a supervisory system reasonably designed to achieve compliance with rules regarding OATS reporting. In October 2011, the Firm entered into an Offer of Settlement with FINRA to resolve an appeal of a Hearing Panel decision rendered against the Firm and Bruce Meyers, then the Firm's owner, president, and CEO. The Hearing Panel found that the Firm failed to respond and did not respond timely to requests for information, in violation of FINRA Rules 8210 and 2010, and Bruce Meyers failed to supervise Firm personnel to ensure that they completely and timely responded to requests for information, in violation of NASD Rule 3010 and FINRA Rule 2010. In November 2008, FINRA accepted an AWC from the Firm for violations of Exchange Act Section 17, Exchange Act Rule 17a-4, and NASD Rules 3110, 3010, and 2110. The Firm consented to findings that it failed to establish and maintain a system to retain emails for more than 30 days and a record of the supervisory review of Firm emails.

2. The NAC Is Not Obligated to Impose a Lower Sanction Because the Sanctions Are Aggregated

Arguing that the fine should be lower than $350,000, Meyers implies that because the Extended Hearing Panel batched or aggregated the sanctions, and because Enforcement requested a total of $350,000 in fines divided across two causes of action, the overall monetary sanction should be below the total fine recommended by Enforcement.[26] This argument is without merit. Nothing in the Guidelines, FINRA rules, or case law supports the Firm's argument that a sanction must limited by Enforcement's recommendations, or that a unitary sanction must be lower than the combined total of fines recommended by Enforcement for different causes of action. *See William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *118 (July 2, 2013), *aff'd sub nom.*, *Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014). Rather, the NAC's broad sanctions powers are set forth in FINRA Rule 9348, which provides that the NAC "may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction." The NAC acted consistent with those powers when it engaged in its own independent sanctions evaluation and determined that a fine of $500,000 was warranted.

[26] The Firm once again cites to a FINRA hearing panel decision in *Dep't of Enforcement v. Ranni*, Complaint No. 200080117243, 2012 FINRA Discip. LEXIS 6 (FINRA OHO Mar. 9, 2012) to support its argument that there should be a reduction in sanctions by virtue of the imposition of a unitary sanction. While the hearing panel in *Ranni* imposed unitary sanctions that were lower than those requested by Enforcement, the decision does not hold that unitary or batched sanctions must be lower than fines recommended by a prosecuting department.

3. The Record Supports the NAC's Findings of Meyers' AML Violations

Meyers also argues in its brief that NAC erred in increasing the monetary fine because the record is devoid of any indication that any AML violations actually occurred.[27] Opening Br. at 13.

As an initial matter, the determination that a respondent has violated FINRA's AML rules is not dependent on a finding of an underlying AML violation. *See Lek Securities Corp.*, Exchange Act Release No. 82981, 2018 SEC LEXIS 830, at * 29 (April 2, 2018) ("[Lek] was not charged with failing to file a SAR[], and a failure to do so is not an element of a violation of . . . FINRA Rule 3310(a). FINRA must show instead that the firm failed to establish and implement an AML program reasonably designed to detect and cause the reporting of suspicious transactions. FINRA made that showing here."). *Cf. Prager*, 58 S.E.C. at 662 (stating that a violation of NASD Rule 3010 can occur in the absence of an underlying rule violation); NASD Notice to Members 98-96, 1998 NASD LEXIS 121, at *5 (Dec. 1998) (same).

FINRA Rule 3310 requires each member to develop and implement a written AML program reasonably designed to achieve and monitor compliance with the requirements of the Bank Secrecy Act and its implementing regulations. FINRA Rule 3310 requires that AML programs, at a minimum, "establish and implement policies and procedures that can be reasonably expected to detect and cause the reporting of" suspicious transactions; "[e]stablish and implement policies, procedures, and internal controls reasonably designed to achieve compliance with the Bank Secrecy Act" and its implementing regulations; provide independent testing by qualified persons of the AML program; designate and identify to FINRA an individual

[27] Meyers did not appeal the findings of fact and conclusions of law regarding the Firm's AML violations to the NAC. On the contrary, Meyers conceded in its brief that the Firm's "AML violations are part and parcel of the supervisory violations. . .." RP 6669.

responsible for implementing and monitoring the AML program; and "[p]rovide ongoing training for appropriate personnel." FINRA Rule 3310(a)–(e).

The NAC concluded that the Firm violated FINRA rules because its AML manual did not describe in sufficient detail the policies and procedures that Meyers should follow to monitor accounts for suspicious activity. RP 6811-12. These deficiencies were compounded by the fact that the Firm did not provide any AML exception reports to Wynne, and no one at the Firm used AML exception reports for at least the first eight months of 2012. In addition, the Firm did not adequately prepare Wynne for his AML responsibilities. These findings related to the numerous deficiencies in Meyers' AML policies informed the NAC's analysis and support the sanctions imposed.

4. Meyers' Mitigation Argument Fail

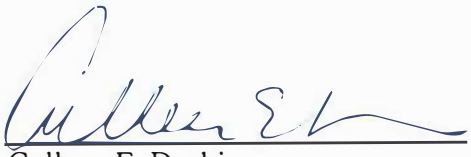
Finally, Meyers contends that there are mitigating factors present that were not addressed, yet the Firm fails to list or discuss any factor that it considers mitigating. However, as articulated above, aggravating factors clearly predominate, with no mitigating factors present.

Meyers also claims that the NAC erred in increasing the monetary fine imposed on the Firm, asserting that the NAC failed to consider that Johnson concealed his misconduct from Meyers, hindering the Firm's supervision of him. On the contrary, the evidence shows that had the Firm properly discharged its supervisory responsibilities, it would have noted the numerous red flags in Johnson's transactions – the emails and the trade reports discussed above make it clear that Johnson was engaged in market manipulation and selling his personal stock to customers in plain sight. The Firm's massive supervisory shortcomings that failed to detect securities fraud provide no mitigation.

V. CONCLUSION

The record supports the NAC's findings that Meyers' grossly inadequate supervision of the registered representatives in its Chicago office allowed Johnson to engage in a scheme to manipulate the volume and price of IWEB's stock and make material omissions with respect to his self-dealing STVI transactions, in violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5. The record also supports the NAC's finding that Meyers is subject to statutory disqualification because the Firm failed reasonably to supervise its employee who engaged in securities fraud in violation of the Exchange Act while employed at the Firm. Moreover, the fine imposed by the NAC is neither excessive nor oppressive, is supported by the record and comports with the Guidelines. The Commission should affirm the NAC's decision in all respects.

Respectfully submitted,



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