BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Edward Beyn

For Review of Disciplinary Action Taken by

FINRA

File No. 3-19007

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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I. INTRODUCTION

This appeal involves egregious excessive trading and churning of customer accounts and unsuitable recommendations. The record demonstrates that over the course of approximately two years, Edward Beyn controlled and excessively traded nine accounts belonging to six of his customers—all older individuals nearing or at retirement age. The trading resulted in turnover rates ranging from eight to 188, and cost-to-equity ratios ranging from 18% to 573%. The frequency and costs of trading made it virtually impossible for Beyn's customers to break even, much less realize any net gains from their accounts. And while his customers suffered devastating losses totaling almost $3 million, Beyn earned commissions and fees for himself and his firm of almost $1.8 million.

Four of Beyn's customers credibly testified at the hearing and told very similar stories about their interactions with Beyn. All testified that they relied on Beyn for the trading in their accounts, that he selected the stocks to trade, and he determined the amounts and timing of the

trades (which included several purchases of highly speculative and complex exchange traded notes). All also testified that they believed that were paying a flat commission of $99 per trade and that Beyn never explained that, in addition to this $99 fee, he was executing their trades on a riskless principal basis and also charging them substantial mark-ups or mark-downs on their trades. While all the customers acknowledged receiving statements and confirmations for their accounts, none understood the confirmations, which set out the $99 fee clearly but required customers to understand how to calculate the mark-up or mark-down that had been charged.

On appeal, Beyn ignores the evidence concerning the frequency and costs of trading in his customers' accounts and, not unsurprisingly, argues that this case is not about the credibility of his customers' testimony. Instead, Beyn asks the Commission to overturn FINRA's findings of liability and the bar it imposed on him because: (1) he purportedly was denied due process because he did not have an opportunity to review all the documents produced to him by the Department of Enforcement ("Enforcement") in connection with its discovery production; and (2) the affidavits signed by three of the six customers at issue are purportedly dispositive and exonerate him, notwithstanding the contrary credible testimony of these customers. Beyn's arguments are unavailing and a distraction from the real issues in this case.

The evidence, including the credible testimony of his customers and the incontrovertible analyses of the trading in their accounts, is overwhelming. Moreover, the record demonstrates that Beyn was provided with a fair hearing and had an opportunity to cross-examine all the witnesses with the documents relevant to the allegations of excessive trading, churning, and making unsuitable recommendations. The Commission, accordingly, should dismiss the application for review and sustain FINRA's decision.

II. FACTUAL BACKGROUND

A. Beyn

Beyn joined the securities industry while still in high school, when he began working as a cold-caller for Pointe Capital, Inc. in 2007. (R. at 3839-41, 6004.)[1] In 2008, he registered as a general securities representative with Pointe Capital. (R. at 3839-40, 6001.) Craig Taddonio, whom Beyn knew through mutual friends, also worked at Pointe Capital and was one of the people who trained Beyn. (R. at 3846-49.) In February 2012, Beyn joined the new firm Taddonio had opened, Craig Scott Capital, LLC ("CSC"), where he remained until September 2015.[2] (R. at 3850, 5998.) After leaving CSC, Beyn opened his own Office of Supervisory Jurisdiction ("OSJ") at Rothschild Lieberman, LLC. (R. at 3851, 5997.) Beyn has not been associated with any FINRA member since March 2016. (R. at 3851-53, 5997.)

B. CSC's Practices

CSC operated with a model of senior and junior brokers, although many of the so-called "senior" brokers had little experience. (R. at 1987, 2505-06, 3594, 4508.) Junior brokers worked with a senior broker and engaged primarily in prospecting by cold calling leads. (R. at 1974-75, 1987.) Junior brokers attempted to open accounts with an opening trade in a mainstream stock and charging a $99 commission for the trade. (R. at 3484, 3488-89, 3557, 3586.) The account was then handed over to a senior broker, who contacted the new customer

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[1] "R. at __" refers to the page number in the certified record. "Beyn Br. __" refers to Beyn's June 3, 2019 brief in support of his application for review.

[2] As described below, FINRA barred Taddonio for failing to adequately supervise Beyn and other CSC brokers, and for lying to FINRA during on-the-record interviews ("OTRs").

and handled the account going forward. Beyn, who had been registered for just four years when he joined CSC, was considered a senior broker at the firm. (R. at 3725-26, 3976-77.)

Many CSC brokers, including Beyn, employed, and touted to their customers, what Taddonio referred to as the "earnings play" strategy. (R. at 2580-81, 3631, 3981.) This strategy involved purchasing a stock shortly before it was expected to release an earnings announcement in the hope that the announcement would cause an increase in the stock price and the stock could be sold at a gain. (R. at 4229.) Taddonio provided lists to the registered representatives of companies expected to make earnings announcements in the near future. (R. at 3493.) Beyn used the strategy to make numerous, frequent, short-term trades in the customer accounts at issue in this case.

Most of CSC's revenue was generated by commissions (including mark-ups and mark-downs) paid by customers. (R. at 2468.) CSC charged a flat $99 fee for every trade, all of which was retained by the firm (the "Firm Commission"). (R. at 2027, 2752, 3480, 4570-72.) Additionally, CSC charged a commission on each trade, a portion of which was paid to the firm and a portion to the broker. (R. at 2016-19.) The individual broker was given discretion to decide the amount of this commission as long as it did not exceed the firm's general limits or an individual limit that may have been placed on a particular account. (R. at 3649-50, 4898.) Beyn's payout on commissions for his accounts was 70%. (R. at 4859.)

CSC's brokers, including Beyn, also had the authority to decide whether a trade would be executed on a riskless principal basis, in which case the customer would be charged a mark-up or mark-down instead of a commission.[3] (R. at 3709.) Again, as long as the mark-up or mark-

[3] A "riskless principal" transaction is one in which, after receiving an order to buy or sell from a customer, the broker-dealer buys or sells the security to another person in its principal

[Footnote continued on next page]

down did not exceed the general firm limits, or an individual limit placed on an account, the individual broker was authorized to set the amount of the mark-up or mark-down. (R. at 2016-19.) For the trading at issue in this case, Beyn executed the trades on a riskless principal basis and, accordingly, his customers were charged mark-ups and mark-downs in addition to the $99 Firm Commission on each trade.

CSC's clearing firm sent trade confirmations to customers. (R. at 10613-18.) Every confirmation included basic information about the trade, including the name of the stock, the trade date, the number of shares purchased or sold, and the price per share. (*Id.*) The confirmation also set out the "Principal" amount of the trade (the price per share multiplied by the number of shares purchased or sold), the $99 "Firm Commission," and the "Net Amount" (calculated by adding the $99 Firm Commission to the Principal amount). (*Id.*)

The trade confirmations also included a section entitled "[s]pecial remarks for this transaction." (*Id.*) This section was located on the bottom left of the trade confirmation and was in smaller type than the rest of the information. (*Id.*) When a trade was executed on a riskless principal basis, this section contained several pieces of information. First, this section would note that the trade was executed on a "Riskless Principal" basis. (*Id.*) Second, this section noted the "Reported Price"—i.e., the price per share *including* the mark-up or mark-down for the transaction. (*Id.*) Finally, this section would set out the "Commission Equivalent . . . per share"—i.e., the amount per share charged as a mark-up or mark-down. (*Id.*)

[cont'd]

capacity for or from its proprietary account to cover the customer's order. *See Dennis Todd Lloyd Gordon*, Exchange Act Release No. 57655, 2008 SEC LEXIS 819, at *39 n.47 (Apr. 11, 2008). For a buy transaction, the firm will charge the customer more than it paid to buy the stock for its proprietary account—a mark-up. For a sale, the firm pays the customer a lower price for the stock that it received from the sale from its proprietary account—a mark-down.

The total amount of commissions the customer paid, however, was not evident from the face of the confirmations. In order to calculate the total cost of a riskless principal trade, a customer would have to multiply the number of shares traded by the "Commission Equivalent" and then add the $99 Firm Commission. CSC did not provide customers with a written explanation of mark-ups and mark-downs or how to calculate the costs of a trade from the confirmation, and the individual broker would have been the only source of this information. (R. at 3803, 3805.) Beyn never provided this information to his customers.

C. Beyn Excessively Trades Nine Accounts Belonging to Six Customers

Beyn's violations involve his trading in nine accounts belonging to six customers—Bradley McKibbin, Timothy Pixley, Edward Heikkila, Edward Kennedy, Jim Bolton, and Wayne Rea. All but Bolton and Rea testified at the hearing. As set forth below, the evidence—including credible customer testimony and uncontested calculations of turnover rates and cost-to-equity ratios—convincingly shows that Beyn excessively traded and churned the accounts of these customers.[4] The Firm earned a total of almost $1.8 million from Beyn's misconduct, Beyn personally earned almost $650,000, and his customers suffered almost $3 million in losses. (R. at 6245, 6247.)

1. Bradley McKibbin

McKibbin testified that he was college-educated and self-employed as a sales representative for aviation companies, earning approximately $200,000 per year. (R. at 2169-

[4] An account's cost-to-equity ratio is the percentage the account would have to appreciate just to break even given the costs of trading and is calculated by dividing the total expenses by the average monthly equity in an account. *Ralph Calabro*, Exchange Act Release No. 75076, 2015 SEC LEXIS 2175, at * 31 (May 29, 2015). Turnover rate refers to the number of times the securities in the account were exchanged for a different portfolio of securities and is calculated by dividing the total purchases in the account by the average account equity and annualizing the number. *Id.*

72.) At the time he opened his account with CSC, McKibbin was 60 years old, married, and had a disabled adult daughter whom he supported. (R. at 2169, 2172-73.) McKibbin described his previous investment experience as consisting of: (1) an annuity; (2) a managed account that he liquidated and closed prior to opening his CSC account; (3) the purchase of a few aviation stocks in a self-directed account for which he was familiar with the companies through his business; (4) an investment in Garmin stock because he knew one of the company's founders; and (5) an investment in a company that made body cameras for police because he thought that would be a growing business. (R. at 2174-77.) At the time McKibbin opened his CSC account, he had $700,000 in his annuity and $400,000 from the proceeds of his liquidated managed account. (R. at 2177, 2181-82.)

McKibbin testified that, after receiving approximately three to five cold calls from a CSC broker over several months, he agreed to open an account and make a small investment. (R. at 2173-74.) McKibbin initially agreed to invest $10,000 with CSC in an IRA account to "test it out." (R. at 2178.) The account was opened in January 2015. (R. at 10725-26.) McKibbin testified that shortly after completing his new account paperwork and making his initial investment, he was contacted by Beyn, who told him that his account had been transferred to him because he had more experience as a broker. (R. at 2178, 2180, 2247, 5348-49.) McKibbin testified that Beyn told him that he could not be effective with an investment of only $10,000, and urged him to invest additional funds. (R. at 2180.) Beyn claimed that with a larger amount of money he could make McKibbin $40,000 in gains in only three to four months. (R. at 2178, 2180, 2206-07, 2248.) Beyn testified that he employed the earnings play strategy in McKibbin's account. (R. at 5350.)

After speaking with Beyn, McKibbin agreed to invest an additional $240,000. (R. at 2179.) When he received the transfer paperwork from CSC, however, McKibbin saw that the amount of the transfer was listed at $400,000—the entire amount in the brokerage account from which he was making the transfer. (*Id.*) McKibbin said he changed the amount to $240,000, returned the paperwork, and only $240,000 was transferred. (*Id.*)

McKibbin testified he told Beyn that, although he wanted his money to grow, he also did not want to lose it because he needed it for retirement. (R. at 2181-82.) McKibbin also testified that he told Beyn he was supporting an adult, disabled child. (*Id.*)

The account opening documents for McKibbin's IRA account listed his investment objective as "maximum growth," which was defined as "[m]aximum capital appreciation with higher risk and little to no income." (R. at 10726.) McKibbin testified that the new account document was largely prefilled with information when he received it from CSC to sign. (R. at 2185.)

McKibbin testified that he spoke frequently to Beyn and relied on Beyn's recommendations. (R. at 2191-92.) In making recommendations, Beyn would refer to earnings reports and estimate the gains they would "stand to book" from a trade. (R. at 2193.) McKibbin often responded to Beyn's recommendations by saying "you're the expert" and "I have to rely on you." (R. at 2195.) McKibbin testified that, when his account started to experience losses, Beyn would always have an excuse and would reassure him that they "would make it up on the next one." (R. at 2193.) McKibbin also testified that Beyn chose all the stocks purchased in his account, and decided the number of shares to trade and when to buy and sell. (R. at 2194.) McKibbin testified that he did not suggest any stocks and that, with the exception of a single

airline stock, followed all Beyn's recommendations. (R. at 2195-96, 2250.) McKibbin said that he trusted and put his faith in Beyn. (R. at 2293.)

McKibbin acknowledged that he received trade confirmations and account statements. (R. at 2202-03.) He also testified, however, that he was not fully aware of the level of trading in his account. (R. at 2196.) McKibbin testified that he was not aware that he had signed a margin agreement and did not understand what margin means. (R. at 2200.)

McKibbin testified that he and Beyn never discussed mark-ups and mark-downs, and it was McKibbin's understanding that he was paying only $99 per trade—an amount McKibbin thought was high in comparison to the $18 he had previously paid for self-directed trades. (R. at 2183-84, 2221-22, 2225, 2287.) Beyn never reviewed with McKibbin the costs and fees associated with his trading. (R. at 2196, 2297.)

When the account started experiencing losses, McKibbin tried to use the trade confirmations to calculate the total amount of his losses. (R. at 2208, 2283-85.) Based on his calculations, McKibbin thought his account had lost approximately $25,000. (R. at 2208.) When he closed his account and transferred the balance to another broker-dealer, however, he realized his losses were almost three times as much. (R. at 2209.) McKibbin could not understand the discrepancy until an attorney he consulted explained that he had been paying mark-ups and mark-downs in addition to the $99 Firm Commission. (R. at 2210, 2222-23.)

On February 9, 2015, barely one month after he opened his account, CSC sent McKibbin a letter noting that his account was "very active" and asking McKibbin to sign and return the letter "confirm[ing]" that his account was being handled in accordance with his investment

objectives.[5] (R. at 10727.) McKibbin signed the letter on February 12, 2015, and returned it to CSC. (*Id.*) McKibbin testified that he signed this letter because it was sent early in the trading of his account and he did not know at this point what was going on in his account. (R. at 2211.)

McKibbin's account was actively traded from January 2015, through May 2015. (R. at 6245.) During that period, there were 80 trades in McKibbin's account, and the account realized net losses of more than $65,000. (*Id.*) The total costs of the trading in the account were more than $52,000, including mark-ups and mark-downs of more than $44,000 and almost $8,000 in Firm Commissions. (*Id.*) Beyn's share of the mark-ups and mark-downs paid by McKibbin was more than $15,000. (R. at 6247.)

The annualized cost-to-equity ratio in McKibbin's account was more than 70%, and the account had an annualized turnover rate of more than 23. (R. at 6245.) Over the course of just five months, the portfolio of securities in McKibbin's account was completely exchanged almost 10 times, an average of almost twice per month.

2. Edward Kennedy

Kennedy opened an account with Beyn in March 2012, when he was almost 70 years old and semi-retired. (R. at 3978, 4292.) In addition to social security, he earned approximately $26,000 from a construction business. (R. at 4297.) Kennedy testified that, after high school, he had attended less than a year of college and two years at a trade school. (R. at 4293, 4295.) Prior to trading with Beyn, Kennedy's investment experience was limited to a single trade he had made decades earlier, and on which he lost money. (R. at 4299, 4301.) After that loss, Kennedy never traded again until opening his account with Beyn. (*Id.*)

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[5] Starting in February 2013, CSC received monthly active account reports from its clearing firm. (R. at 4511-12, 4519.) CSC subsequently sent out these so-called "active account letters" to certain customers. (R. at 4552.)

Kennedy testified that he was contacted by CSC through a cold call. (R. at 4297-98, 4380-81.) He agreed to open an account and invest $5,000 with CSC. (R. at 4298-4304.) After opening the account, it was transferred to Beyn, who told him he was "very lucky" to have him as a broker because he was a seasoned senior broker, who would make him a lot of money. (R. at 4305-06.) Kennedy testified that he and Beyn spoke frequently, often had long talks, and Kennedy came to trust Beyn and consider him a friend. (R. at 4308.) Beyn admitted that he used the earnings play strategy in Kennedy's account throughout the life of the account. (R. at 3981.)

Based on his conversations with Beyn, Kennedy agreed to invest an additional $350,000 in his CSC account. (R. at 4313, 4326.) Kennedy testified that this $350,000 was his "life savings." (R. at 4330.) Kennedy testified that he told Beyn he had no investment experience and would have to "totally rely on [Beyn]." (R. at 4309.) Kennedy testified, "I told [Beyn] I had none, no investment experience at all. And if I was going to do this, that I would have to rely on him and Mr. Beyn assured me not to worry he would make us lots of money." (*Id.*) Kennedy testified that Beyn recommended all the trades in his account, and that he simply agreed to all Beyn's recommendations. (R. at 4337, 4412-13.)

Kennedy testified that he signed his account opening documentation even though it contained certain errors, including with respect to his income and net worth, because Beyn told him it was just a formality and not important. (R. at 4314-20.) The new account document Kennedy signed was prepopulated with "speculation" as the stated investment objective. (R. at 10741-42.) Kennedy also signed a margin agreement because Beyn claimed margin would make his account "more flexible." (R. at 4311, 4402, 4408.)

Kennedy testified that Beyn never explained the meaning of riskless principal trades to him and that they never discussed the mark-ups and mark-downs he would be charged for these trades. (R. at 4311.) Kennedy also testified that Beyn told him that he would pay only $99 for each trade. (R. at 4310, 4343-44, 4350-51.) Kennedy acknowledged that he received trade confirmations for his account, but he testified that he did not understand that he was being charged more than the $99 commission, which he understood was the sole cost for each trade. (R. at 4288.)

Beyn recommended three exchange traded notes ("ETNs") to Kennedy. In June 2012, Kennedy invested $63,000 in the iPath S&P 500 VIX Short Term Futures ETN ("VXX"), which he held until June 2013, and sold for a loss of $42,500. (R. at 12716-19, 12671-74.) In August 2013, Kennedy invested $120,000 in Velocity Shares 3X Long Gold ETN ("UGLD") and Velocity Shares 3X Long Silver ETN ("USLV"), which Kennedy transferred to another firm after he closed his CSC accounts in October 2013. (R. at 12663-66, 12657-59.)

Kennedy credibly testified that he did not know what ETNs are and had never traded them before CSC. (R. at 4346.) Kennedy testified that Beyn recommended the ETNs to him and that there was no discussion with Beyn about the ETNs other than that it was a recommendation Beyn was making. (R. at 4346-47.) Kennedy also testified that Beyn never recommended that he sell the ETNs that were in his account when it closed and that he never told Beyn he wanted to hold them. (R. at 4349.)

Kennedy's account appeared on CSC's monthly active account report in February, March, April, and June of 2013. (R. 7035, 7057-58, 7078-79, 7116.) On May 21, 2013, CSC lowered the maximum commission Beyn could charge for trades in Kennedy's account to 1%. (R. at 7387.) In July 2013, Kennedy signed an affidavit of support provided by Beyn which

stated that he did not feel the trading in his account was excessive and that he understood the costs of the trading. (R. at 10757.) Kennedy testified that he signed the affidavit even though it was "totally bogus," because he considered Beyn his friend and Beyn told him he was in "serious trouble" and would lose his job if he did not sign it. (R. at 4364-67.) Kennedy repeatedly testified that he considered Beyn a friend who he trusted to safeguard his investments. (R. at 4309, 4328, 4331, 4425.)

Beyn actively traded Kennedy's account from March 1, 2012, through August 31, 2013, during which there were 115 trades in the account. (R. at 6245.) During this period, the account had realized net losses of more than $230,000 and incurred costs of more than $188,000, including more than $166,000 in mark-ups and mark-downs, $11,000 in Firm Commissions, and $10,000 in margin interest. (*Id.*) Beyn received more than $116,000 from the mark-ups and mark-downs charged to Kennedy's account. (R. at 6247.)

The annualized cost-to-equity ratio for Kennedy's account during the period it was actively traded was more than 70%, and the account had an annualized turnover rate of more than 18. (R. at 6245.) The non-annualized cost-to-equity ratio for Kennedy's account for the active period was more than 106% and the turnover rate for this period was almost 28. (*Id.*)

3. Timothy Pixley

At the time he opened his accounts, Pixley was over 70 years old. (R. at 3200.) Pixley was an engineer who co-owned a construction company with Edward Heikkila, another Beyn customer. (R. at 3203-07.) Pixley initially opened his accounts with Beyn at a prior firm after responding to a solicitation to buy Facebook IPO stock. (R. at 3208-10.) Pixley's accounts were transferred to CSC when Beyn joined the firm. (R. at 5331-32.) Pixley had two accounts at

CSC—an IRA account and an individual account. Pixley testified that Beyn told him they would "win" on 12 out of 15 trades and improve the value of his accounts. (R. at 3211, 3213.)

Pixley testified that for both accounts Beyn told him he was using the earnings play strategy and that he accepted all of Beyn's trade recommendations. (R. at 3214, 3253.) Pixley also testified that Beyn selected which stock to trade, when to buy and sell it, and determined how many shares to trade. (R. at 3252-53.) Pixley explained that he was busy running his business and that he put the management of his account in Beyn's hands. (R. at 3215, 3338.)

Pixley testified that he understood that he was paying $99 for each trade and that it was not until he was contacted by FINRA that he learned that he was also paying mark-ups and mark-downs on his trades, and that a large part of what he thought were trading losses were actually commissions paid to CSC. (R. at 3213, 3230, 3240, 3259-63, 3331-32, 3347, 3397-98.) Beyn never mentioned to him the terms "riskless principal transactions," "mark-up," or "mark-down," and Pixley did not know what these terms meant. (R. at 3230-31, 3345.) Pixley testified that while he received confirmations, he did not understand the comments in the "special remarks" section, from which mark-ups and mark-downs could be calculated. (R. at 3257, 3250-51, 3308-10.)

a. Pixley's IRA

Pixley's IRA was initially worth $1.4 million. (R. at 3231-36.) Pixley testified that while he hoped to grow his IRA to $5 million, he told Beyn that he did not want to speculate in the IRA, but was willing to speculate in his individual account initially worth $100,000. (R. at 3225-27.) Pixley's IRA had a listed investment objective of "growth," defined as "capital appreciation through quality equity investments and little or no income." (R. at 10609-10.) Pixley testified that he expected the individual account and IRA to be invested differently given

the different investment objectives. (R. at 3225-26.) Beyn, however, testified that he used the earnings play strategy in Pixley's IRA and traded it as if the objective was "speculation." (R. at 5333-34.)

Pixley's IRA appeared on CSC's active account report for the months of February through May, 2013, and in July 2013. (R. at 7032-33, 7054, 7076, 7099-7100, 7126-27.) Pixley signed and returned a May 28, 2013 active account letter for the IRA. (R. at 10635.) Pixley testified that he signed the letter because Beyn asked him to do so. (R. at 3273, 3426, 3428.)

Pixley's IRA was actively traded from April 2012, through December 2013, during which there were 662 trades in the account (an average of more than 31 trades per month). (R. at 6245.) During that period the account suffered realized net losses of almost $787,000 and incurred costs of almost $600,000. (*Id.*) The costs included more than $533,000 in mark-ups and mark-downs, and more than $65,000 in Firm Commissions. (*Id.*) Beyn's payout from the mark-ups and mark-downs charged to Pixley's IRA was $186,000. (R. at 6247.) Pixley's IRA had an annualized cost-to-equity ratio of almost 34% and an annualized turnover rate of almost 11. (R. at 6245.)

b. Pixley's Individual Account

The investment objective for Pixley's individual account was listed as "speculation." (R. at 10601-02.) Pixley's individual account appeared on the active account report every month from February through November, 2013. (R. at 7033, 7055, 7076, 7100, 7114-15, 7135.) On May 21, 2013, CSC lowered the maximum commission that could be charged for trades in both Pixley's accounts to 1%. (R. at 7383.)

Pixley did not sign an active account letter sent by CSC for the individual account in November 2013. (R. at 10645.) In June 2013, Pixley signed a CSC document entitled an

"affidavit of support" sent to him by Beyn for his individual account. (R. at 10637-39.) Pixley represented in the affidavit of support that he did not feel his account had been traded excessively. Pixley testified that he signed the affidavit because Beyn asked him to do so because CSC was "on his case," and he signed it as a favor to Beyn. (R. at 3276, 3426, 3428.)

Pixley's individual account was actively traded at CSC from May 2012, through December 2013, during which there were 154 trades in the account. (R. at 6245.) During that period, the account had a net realized loss of more than $66,000 and incurred costs of almost $81,000, including mark-ups and mark-downs of more than $65,000 and Firm Commissions of more than $15,000. (*Id.*) Beyn received almost $23,000 of the mark-ups and mark-downs charged to Pixley's individual account. (R. at 6247.) Pixley's individual account had an annualized cost-to-equity ratio of more than 70% and an annualized turnover rate of more than 22. (R. at 6245.)

4. Edward Heikkila

Heikkila was Pixley's long-time business partner in a construction company, and was referred by Pixley to Beyn while Beyn was at another firm. (R. at 3000-10.) Heikkila transferred his account to CSC when Beyn joined CSC, and Heikkila was almost 70 years old. (R. at 2999, 3005, 4039.) Prior to investing at CSC, Heikkila had several individual and IRA investment accounts and had invested in silver and gold. (R. at 3011-12, 3016, 3032-33.) Heikkila opened two accounts at CSC—an IRA account and an account held in the name of a limited partnership. Heikkila testified that Beyn promised to make him money, claiming that they would make money on "eight out of 10 or eight out of 12" trades. (R. at 3107.)

Heikkila testified that he and Beyn spoke often and that he followed Beyn's recommendations. (R. at 3030, 3032.) Heikkila testified that he relied on Beyn because he was

busy running his construction business and that Beyn chose the stocks for Heikkila's account and decided how much to trade and when to buy and sell. (R. at 3032, 3050.)

Heikkila testified that it was his understanding that he would be paying $99 per trade, and that there was no discussion of any additional commission. (R. at 3026-27, 3095.) Heikkila said Beyn never used the terms "mark-up" or "mark-down" and that he had never heard of those terms before. (R. at 3026-27, 3041-42, 3098.) Heikkila also testified that he relied on and followed most of Beyn's recommendations. (R. at 3040.) Heikkila explained that Beyn "talked a good game" and paying $99 per trade was attractive. (R. at 3125.)

a. Heikkila's IRA

"Growth" was listed as the investment objective for Heikkila's IRA. (R. 11169-70.) Beyn, however, admitted that he traded the account as if the objective was "speculation." (R. at 4043-44, 4055.)

Heikkila's IRA appeared on CSC's monthly active account report for every month from February 2013 through April 2014. (R. at 7032, 7053-54, 7075, 7099, 7114, 7134-35, 7155-56, 7178, 7205-06, 7229-30, 7255-56, 7281-82, 7309, 7339-40, 7369-70.) On May 21, 2013, CSC lowered the maximum Beyn could charge for trades in the account to 1%. (R. at 7383.) Heikkila did not sign November 2013 and March 2014 active account letters CSC sent for the IRA. (R. at 11201-02.)

Heikkila's IRA was actively traded from April 2012, through July 2014, during which there were 398 trades in the account. (R. at 6245.) During that period, the IRA sustained net realized losses of $985,000 and incurred costs of more than $426,000, including $387,000 in mark-ups and mark-downs and almost $39,000 in Firm Commissions. (*Id.*) Beyn's share of the mark-ups and mark-downs charged to Heikkila's IRA was more than $135,000. (R. at 6247.)

The IRA had an annualized cost-to-equity ratio of more than 18% and an annualized turnover rate of more than eight. (R. at 6245.)

b. The 5143 Interest Account

Heikkila also opened an account with Beyn in the name of a limited partnership through which he invested, the 5143 Interest, LP (the "5143 Interest Account"). (R. at 3008.) The initial account opening form for the 5143 Interest Account included a preprinted account objective of "speculation," and a handwritten note changing the objective to "maximum growth." (R. at 11159-60.) In an updated account form completed a year later, the objective was listed as "maximum growth." (R. at 11153.)

The 5143 Interest Account appeared on CSC's monthly active account report in March May, June, August, September, October and November of 2013, and in March and April of 2014. (R. at 7100, 7114, 7156, 7178, 7206, 7230, 7340, 7370.) Heikkila did not sign or return active account letters that were sent by CSC in December 2013 and April 2014 for the 5143 Interest Account. (R. at 11203-04.) In January 2013, Heikkila signed an affidavit of support for the 5143 Interest Account stating that he did not feel the trading in the account was excessive and that he understood the costs of trading in the account. (R. at 11175.) Beyn contacted Heikkila about the affidavit of support and urged him to sign it, telling him they would not be able to continue trading until he did so. (R. at 3055.) Heikkila testified that Beyn did not explain the contents of the affidavit and that he did not review it before he signed and retuned it. (R. at 3056-57.)

The 5143 Interest Account was actively traded from March 2012, through July 2014, during which there were 323 trades in the account. (R. at 6245.) During that period, the account had more than $571,000 in net realized losses and incurred more than $261,000 in costs,

including almost $224,000 in mark-ups and mark-downs and almost $32,000 in Firm Commissions. (*Id.*) Beyn's share of the mark-ups and mark-downs charged for this account was more than $78,000. (R. at 6247.) The account had an annualized cost-to-equity ratio of more than 21% and an annualized turnover rate of more than 8. (R. at 6245.) The non-annualized cost-to-equity ratio for the period the IRA was actively traded was more than 42%, and the non-annualized turnover rate was more than 19. (*Id.*)

5. Wayne Rea

Rea did not testify at the hearing, but the record contains documentary evidence of the trading in his accounts. Rea opened two accounts with Beyn at CSC. Beyn testified that he employed the earnings play strategy in both Rea's accounts. (R. at 5343, 5345-46.)

a. Rea's First Account

Rea's first account was opened in June 2013. (R. at 10499-1500.) Beyn actively traded the first account from June 2013, through September 2013, during which there were 94 trades (an average of more than 23 trades per month). (R. at 6245.) Beyn marked 77 of these 94 trades as "solicited." (R. at 14187-14302.) During this period of active trading, the account had a net realized loss of more than $86,000 and incurred costs of more than $46,000, including more than $36,000 in mark-ups and mark-downs and more than $9,000 in Firm Commissions. (R. at 6245.) Beyn's portion of the mark-ups and mark-downs was more than $25,000. (R. at 6247.)

Rea's first account appeared on CSC's monthly active account reports for the months of June, July, and August 2013. (R. at 7109, 7126-27, 7148.) Rea did not sign a September 2013 active account letter sent to him by CSC for this account. (R. at 7446.) The annualized cost-to-equity ratio for this account was more than 182% and it had an annualized turnover of more than 52. (R. at 6245.) Rea closed the first account in September 2013. (R. at 13507-28.)

b. Rea's Second Account

Rea's second CSC account with Beyn was opened in April 2014. (R. at 10511.) The second account was actively traded from April 2014, through July 2014, during which there were 88 trades in the account (an average of 22 trades per month). (R. at 6245.) Beyn marked all of the trades "solicited." (R. at 14187-14302.) The second account suffered a realized net loss of more than $52,000 and incurred costs of almost $49,000, including almost $40,000 in mark-ups and mark-downs and almost $9,000 in Firm Commissions. (R. at 6245.) Beyn received almost $28,000 of the mark-ups and mark-downs charged to this account. (R. at 6245.)

Rea's second account appeared on CSC's active account report for the month of April 2014, the first month is was open. (R. at 7363-64.) The account had an annualized cost-to-equity ratio of more than 546% and an annualized turnover rate of more than 177. (R. at 6245.) Rea filed a statement of claim with FINRA's Department of Dispute Resolution in August 2014, seeking damages for the trading in his accounts. (R. at 10523-98.)

6. Jim Bolton

Bolton also did not testify at the hearing. Bolton opened his account with Beyn in November 2012. (R. at 4016, 11467-68.) However, Bolton did no trading in the account after the initial trade, and in February 2014 an updated new account form was completed. (R. at 11473-74.) Bolton's account was actively traded from April 2014, through July 2014, during which there were 106 trades in the account (an average of approximately 26 trades per month). (R. at 6245.) The account had net realized losses of almost $66,000, and incurred costs of almost $66,000, including almost $55,000 in mark-ups and mark-downs and more than $10,000 in Firm Commissions. (*Id.*) Beyn received more than $38,000 of the mark-ups and mark-downs charged to the account. (R. at 6247.) Beyn marked 105 of the 106 trades in Bolton's account "solicited."

(R. at 14187-14302.) The account had an annualized cost-to-equity ratio of more than 573% and an annualized turnover rate of more than 188. (R. at 6245.)

Bolton's account appeared on CSC's monthly active account report in April 2014, the first month it was traded. (R. at 7363.) In June 2014, CSC sent Bolton an active account letter. (R. at 11483.) In response, Bolton sent CSC two letters in July 2014, stating that he was not aware the account was on margin, that the account appeared to have excessive trading and commissions, and asking CSC to close his account "immediately." (R. at 11484-85.)

III. PROCEDURAL HISTORY

A. The Complaint

The investigation which resulted in this case arose out of a May 2014 FINRA examination of CSC. (R. at 4213-14, 4222, 4865-66.) On March 16, 2016, Enforcement filed a three-cause complaint against Beyn. (R. at 431-50.) Enforcement alleged that, during the period from March 2012 through May 2015, Beyn exercised control over the accounts of six customers and excessively traded and churned those accounts. (R. at 431.) Enforcement alleged that, based on the frequency of trading and the commissions charged, "there was little to no possibility that the customers would profit from [the] trading" and Beyn "abused [his customers'] trust by excessively and fraudulently trading the accounts." (R. at 433.)

Cause one alleged that Beyn churned the accounts of the six customers, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. (R. at 445-46.) Cause two alleged that Beyn excessively traded the accounts, in violation of NASD Rule 2310 and FINRA Rules 2111 and 2010. (R. at 446-47.) Finally, cause three alleged that Beyn recommended investments in ETNs

to Kennedy without reasonable grounds for believing that the investments were suitable for him, in violation of NASD Rule 2310 and FINRA Rules 2111 and 2010. (R. at 448.)

On June 1, 2016, the Hearing Officer granted Enforcement's motion to consolidate Beyn's case with another case against CSC, Taddonio, and CSC's co-owner (Brent Porges). (R. at 1145-48.) On June 6, 2016, the Hearing Officer issued a scheduling order, scheduling hearing dates for January 24, 2017, through February 10, 2017, and setting various other prehearing deadlines, including deadlines for motions related to Enforcement's production of documents. (R. at 1149-1154.) Enforcement completed its required production to Beyn's counsel on June 1, 2016, pursuant to FINRA Rule 9251, which requires Enforcement to produce all documents obtained in the course of its investigation, including in response to all FINRA Rule 8210 requests issued in connection with the investigation. (R. at 1382.) On October 31, 2016, the Hearing officer granted Beyn's counsel's motion to withdraw and Beyn proceeded pro se. (R. at 1201-03.)

B. Beyn Untimely Requests Additional Discovery and Adjournment of the Hearing

On December 5, 2016, Beyn filed a motion for additional discovery, requesting "the complete production from Enforcement of all relevant documents," and propounding more than 100 requests for documents and information. (R. at 1305-06.) On December 14, 2016, the Hearing Officer denied Beyn's motion. (R. at 1381-83.) The Hearing Officer found that: (1) Beyn's objections to discovery were untimely; (2) the additional discovery Beyn sought was irrelevant and immaterial; and (3) Enforcement had complied with its discovery obligations months before, on June 1, 2016, and had provided Beyn with a second electronic copy of discovery on December 9, 2016 after Beyn requested a copy of the discovery which had been provided to his counsel on June 1, 2016. (*Id.*)

In January 2017, shortly before the hearing was scheduled to begin, Beyn again moved for discovery and to postpone the hearing, citing his decision to proceed pro se and his need to review Enforcement's Rule 9251 production (which had been produced to his counsel more than six months earlier). (R. at 1499-1502.) The Hearing Officer denied the motion, again citing the untimeliness of Beyn's objections, the lack of a basis for Beyn's requests, and the limited nature of the documentation relevant to the claims against Beyn. (R. at 1625-28.) Specifically, the Hearing officer explained that the documents relevant to claims of excessive trading and churning—new account forms, trade confirmations, summaries of trading, and communications with customers—were already included in Enforcement's proposed exhibits and readily available to Beyn without having to search through all the June 2016 discovery. (*Id.*) The Hearing Officer further explained that Beyn had not "identif[ied] any documents or classes of documents not included in Enforcement's proposed exhibits that he believes he needs to locate in Enforcement's production in order to defend himself in this proceeding." (R. at 1628.)

Once the hearing commenced, Beyn renewed his objection to proceeding on the grounds that he had not had sufficient time to review all of Enforcement's June 2016 discovery production and because he purportedly could not access certain of the documents produced in connection therewith. (R. at 1802-17, 1843.) The Hearing Officer proceeded with the hearing, but accommodated Beyn by ordering that Enforcement set aside a week after the hearing to be available in person to assist Beyn in accessing the discovery documents that Enforcement originally produced in June 2016. The Hearing Officer further ordered that the record remain open so that Beyn would have an opportunity to introduce any additional relevant documents from the June 2016 discovery production, and permitted Beyn to request that the hearing be reconvened to recall witnesses if necessary. (R. at 4775-85, 5467.) Beyn, however, did not seek

Enforcement's help in accessing documents until Thursday of the week set aside by the Hearing Officer. (Beyn Br. at 5.) Further, Beyn did not offer any additional documents to the Hearing Panel. (R. at 15294.) Nor did he request that the hearing be reconvened to permit him to recall witnesses or ask for additional time to review the documents contained in the June 2016 production.[6]

A twelve-day hearing was held during January and February 2017, at which Beyn, Taddonio, Porges, and 13 other witnesses testified. (R. at 1797-5900.) The Extended Hearing Panel issued a decision on July 31, 2017. (R. at 15291-15345.) The Hearing Panel found, based upon the credible testimony of McKibbin, Kennedy, Pixley, and Heikkila, as well as the documentary evidence and numerical calculations, that Beyn excessively traded customer accounts, churned customer accounts, and made qualitatively unsuitable recommendations to a customer. (R. at 15291.) For his violations, the Hearing Panel barred Beyn from associating with any FINRA member in any capacity.[7] (*Id.*)

C. The NAC Appeal

Beyn filed an application for review by FINRA's National Adjudicatory Council ("NAC"). (R. at 15347-48.) On January 29, 2019, the NAC issued a decision affirming the

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[6] In contrast, Taddonio reviewed the June 2016 discovery documents and sought to admit certain documents from the discovery production, which the Hearing Panel granted. Taddonio also sought, and was granted by the Hearing Officer, and extension of his time to submit these additional exhibits. (R. at 15015-38.)

[7] The Extended Hearing Panel also found that Taddonio and Porges failed to exercise reasonable supervision in light of numerous red flags confronting them that Beyn and other CSC registered representatives were excessively trading customer accounts and gave false testimony to FINRA in sworn OTRs. (R. at 15291-92.) CSC did not file an answer and was held in default for the claims asserted against it. (R. at 15292.)

findings of violation by Beyn and the bar imposed on him.[8] (R. at 16027-64.) Specifically, the NAC found that Beyn excessively traded and churned nine account belonging to 6 customers, and that he recommended unsuitable ETNs to one customer. (*Id.*) The NAC found "no substantial evidence in the record to warrant overturning the Hearing Panel's credibility determinations" with respect to Beyn and his customers. (R. at 16045.) The NAC also agreed that numerous aggravating factors applied to Beyn's egregious misconduct and that a bar was an appropriately remedial sanction. (R. at 16027-64.) The NAC explained that Beyn's trading of the accounts demonstrated that "Beyn traded the accounts to generate revenue for himself and CSC," and that Beyn "has shown that he is a danger to investors, cannot comply with rules and regulations intended to protect investors, and has no place in the securities industry." (R. at 16049, 16061.) This appeal to the Commission followed.[9]

IV. ARGUMENT

On appeal, Beyn does not seriously challenge that he excessively traded and churned the customers' accounts and recommended unsuitable ETNs to Kennedy. Instead, he argues that he was denied due process because he was not given sufficient time or access to review the documents in Enforcement's June 2016 discovery production and that the affidavits signed by three of his customers are dispositive and establish that he did not excessively trade accounts. Beyn's arguments have no merit.

A. There is No Substantial Evidence in the Record to Overturn the Hearing Panel's Credibility Findings

In its decision, the Hearing Panel made detailed findings about the relative credibility of

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[8] The NAC also affirmed the findings of violation by Taddonio. (R. at 16027-64.)

[9] Taddonio also appealed the NAC's decision to the Commission. Taddonio's appeal is pending as Administrative Proceeding No. 3-19012.

Beyn and the four customers who testified. With respect to Beyn's credibility, the Hearing Panel made the following findings:

- "Beyn was evasive, avoiding direct responses to clear questions; his testimony was inconsistent; and his demeanor suggested that he was formulating answers that he thought might be helpful to his case rather than providing candid responses to the questions." (R. at 15310.)

- "The Panel considered Beyn's testimony describing the customers as highly sophisticated investors and claiming that he discussed the risks and costs of each trade, including markups and markdowns, with the customers. The Panel, however, rejects all of Beyn's testimony in that regard, as well as Beyn's other self-serving statements, as not credible." (R. at 15309.)

In contrast, the Hearing Panel found that Beyn's customers testified credibly. The Hearing Panel found that:

- The four testifying customers who testified "all stated, credibly, that they relied on Beyn to determine trading strategy for their accounts; to identify the companies in which to invest; and to determine when and how much to invest and when to sell." (R. at 15308.)

- McKibbin "testified, credibly, that Beyn never discussed with him what the charges would be for investing through CSC" and that Beyn did not disclose what he was actually being charged. (R. at 15303.)

- Kennedy "reasonably believed that he was being charged only $99 per trade." (R. at 15310.)

- The Panel credited Pixley's testimony that he expected his IRA and individual account to be traded differently in accordance with their investment objectives and that Pixley understood he was paying $99 per trade. (R. at 15311-12.)

Beyn points to nothing in the record to disturb these credibility findings. *See John Montelbano*, 56 S.E.C. 76, 89 (2003); *see also Eliezer Gurfel*, 54 S.E.C. 56, 62 n.11 (1999) (explaining that "[c]redibility determinations by the fact finder are entitled to substantial deference and can be overcome only where the record contains substantial evidence for doing

so"), *aff'd*, 205 F.3d 400 (D.C. Cir. 2000). Indeed, the record, including Beyn's own admitted lies under oath, abundantly supports the Hearing Panel's credibility findings.[10]

B. Beyn Excessively Traded Customer Accounts

NASD Rule 2310 and FINRA Rule 211 require when a broker makes a recommendation to a customer, he must have reasonable to believe the recommendation is suitable. Recommendations violate the suitability rule if "(i) the representative's understanding of the investment is insufficient to establish a reasonable basis for making a recommendation; (ii) the representative inadequately assesses whether the recommendation is suitable for the specific investor to whom the recommendation is directed; or (iii) the level of trading recommended by the representative is excessive in light of the customer's investment needs and objectives." *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *26 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012); *see also John M. Reynolds*, 50 S.E.C. 805, 806 (1991) (explaining that the suitability rule includes the requirement that the trading in an account be quantitatively suitable).

"Excessive trading occurs when a registered representative has control over the trading in an account and the level of trading in that account is inconsistent with the customer's objectives and financial situation." *Cody*, 2011 SEC LEXIS 1862, at *40-41. A broker can be found to control an account if he has de facto control of the account, which may be established when the customer relies on the representative such that the representative controls the volume and

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[10] The Hearing Panel's credibility findings are bolstered by its finding that Beyn lied under oath at an OTR. Beyn blamed these false statements on his lawyer and also claimed that he made the statements at his OTR because he was angry with Taddonio and thought it would help his new OSJ if he hurt a competitor. (R. at 5656.) Based on Beyn's admissions, the Hearing Panel found that Beyn lied under oath at his June 2016 OTR. (R. at 1509.) Beyn's admittedly false testimony supports the Hearing Panel's credibility findings.

frequency of the trading in the account. *Clyde J. Bruff*, 53 S.E.C. 880, 883 (1998), *aff'd*, 1999 U.S. App. LEXIS 27405 (9th Cir. Oct. 25, 1999); *see also Calabro*, 2015 SEC LEXIS 2175, at *18 (explaining that de facto control may be established (1) "when the customer relies on the representative such that the representative controls the volume and frequency of transactions" or (2) "where a customer routinely follows a registered representative's recommendations" and the customer does not have "sufficient understanding to make an independent evaluation of the broker's recommendations").

1. Beyn Controlled the Customers' Accounts

The record demonstrates that Beyn controlled the accounts at issue. The four testifying customers credibly testified that they relied on Beyn to recommend the trading in their accounts and that they routinely followed his recommendations. (R. at 2191-92, 2195, 3030, 3032, 3214, 3252-53, 4337, 4412-13.) These four customers also testified that they neither fully understood the level of trading in the account, nor the costs of that trading. (R. at 2183-84, 2221-22, 2225, 2287, 3026-27, 3095, 3213, 3230, 3240, 3259-63, 3331-32, 3347, 3397-98, 4310, 4343-44, 4350-51.) Beyn's claims that his customers controlled their accounts and approved of Beyn's trading are completely without support and run contrary to the credible testimony of these four customers.

Specifically, Kennedy credibly testified that he had virtually no investment experience, that he trusted and relied on Beyn, and that Beyn did not disclose the mark-ups and mark-downs he was paying. (R. at 4299, 4301, 4310-11, 4309, 4337, 4343-44, 4350-51, 4412-13.) McKibbin credibly testified that his investment experience was limited to a handful of stocks, mostly related to the industry in which he worked, that he relied on Beyn, that he did not understand mark-ups and mark-downs or how to calculate them, and that he thought he was paying $99 per

trade. (R. at 2174-77, 2183-84, 2196, 2221-22, 2225, 2287, 2297.) Pixley likewise credibly testified that he was focused on running his business and relied on Beyn to manage his accounts and that he accepted all Beyn's recommendations. (R. at 3215.) Under these circumstances, Beyn controlled these accounts. *See, e.g.*, *Cody*, 2011 SEC LEXIS 1862, at *43 (finding that registered representative had de facto control because the customers "did not independently evaluate his recommendations but rather acquiesced in his trades"); *Gerald E. Donnelly*, 52 S.E.C. 600, 604 (1996) (finding control where customers "approved individual transactions simply on the basis of [the registered representative's] recommendations"); *Joseph J. Barbato*, 53 S.E.C. 1259, 1272-77 (1999) (finding control where the registered representative chose the investments in the customer's account and the customer "habitually followed [his] recommendations").

While Rea and Bolton did not testify, the documentary evidence supports that Beyn controlled those accounts as well. Beyn marked the vast majority of the trades in both customers' accounts "solicited." (R. at 14187-14302.) Additionally, the turnover and cost-to-equity ratios for both accounts are so high that it is inconceivable that a customer who understood the trading and was in control of his account would have engaged in the trading. Rea's accounts had annualized cost-to-equity ratios of more than 546% and 182% and annualized turnover rates of almost 178 and 53. (R. at 6245.) Bolton's account had an annualized cost-to-equity of more than 573% and annualized turnover rate of more than 188. (*Id.*) These cost-to-equity ratios made it impossible for the accounts to break even, and guaranteed that Beyn's trading in the accounts could only benefit Beyn and CSC.

2. Beyn Excessively Traded the Customers' Accounts

The Commission has held that in determining whether trading is quantitatively unsuitable, it considers the turnover rate, cost-to-equity ratio, and the number and frequency of trading, including the use of in-and-out trading. *See Calabro*, 2015 SEC LEXIS 2175, at *32. "While there is no definitive turnover rate or cost-to-equity ratio that establishes excessive trading, [the Commission has] held that a turnover rate of 6 or a cost-to-equity ratio in excess [] of 20% generally indicates that excessive trading has occurred." *Id.*

All nine accounts here exceed the benchmarks set by the Commission and the majority exceeded those benchmarks by large amounts. Rea's accounts had annualized turnover rates of 52 and 177 and annualized cost-to-equity ratios of 182% and 546%, respectively. (R. at 6245.) Bolton's account had an annualized turnover rate of 188, and an annualized cost-to-equity ratio of 573%. (*Id.*) Kennedy's account had an annualized turnover rate of 18 and an annualized cost-to-equity of 70%. (*Id.*) Eighty trades were executed in McKibbin's account in the five months it was actively traded, resulting in an annualized turnover rate of 23, and an annualized cost-to-equity ratio of 70%. (*Id.*) Pixley's individual account had an annualized turnover rate of 22 and an annualized cost-to-equity ratio of 70%, and his IRA, which averaged 31 trades per month, had an annualized turnover of 11 and an annualized cost-to-equity ratio of 34%. (*Id.*) Both of Heikkila's accounts both had annualized turnover rates of eight and annualized cost-to-equity ratios of 18% and 21%, respectively. (*Id.*) The trading volume and costs were so high for the accounts that the trading was excessive even for the accounts with an investment objective of speculation. On appeal, Beyn does not, and cannot, challenge these numbers. The NAC's findings that Beyn excessively traded the customers' accounts should be affirmed.

C. Beyn Churned Customer Accounts

The Commission has held that "[c]hurning occurs when a securities broker enters into transactions and manages a client's account for the purpose of generating commissions and in disregard of his client's interests." *Donald A. Roche*, 53 S.E.C. 16, 22 (1997). Excessive trading constitutes churning when it is done with scienter, and churning violates Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010.[11] *Calabro*, 2015 SEC LEXIS 2175, at *122. Scienter is "a mental state embracing an intent to deceive, manipulate, or defraud" and can be established by showing the broker's trading was intentionally for the purpose of generating commissions in disregard of the customer's interest or in reckless disregard of the customer's interests. *Id.* at *55. Churning "does not require proof of a specific or invidious intent to defraud." *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171 n.2 (10th Cir. 1974). Rather, "scienter may be inferred from the amount of commissions charged by the registered representative." *Calabro*, 2015 SEC LEXIS 2175, at *55-56. It is sufficient that a broker acts with reckless disregard for the customer's interests. *See Studer*, 57 S.E.C. at 1020.

The turnover rates and cost-to-equity ratios demonstrate that Beyn acted with at least reckless disregard for his customers' interests. Most of the customers' accounts would have to appreciate from 34% to 573% just to break even given the costs Beyn was charging and volume of trading. (R. at 6245.) *See William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *64-65 (July 2, 2013) (finding that the high commissions and resulting high cost-to-equity ratio supported a finding of scienter). Moreover, while his customers suffered

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[11] Churning is a manipulative and deceptive device within the meaning of Exchange Act Section 10(b) and Exchange Act Rule 10b-5. *See Michael T. Studer*, 57 S.E.C. 1011, 1020-23 (2004), *aff'd*, 260 F. App'x 342 (2d Cir. 2008).

losses of almost $3 million, Beyn earned almost $650,000 from the trading in the accounts—all in the form of mark-ups and mark-downs that all the customers testified they did not understand—further demonstrating that Beyn acted with scienter. (R. at 6245, 6247.) *See Calabro*, 2015 SEC LEXIS 2175, at *55-56 (explaining that scienter may be inferred from the amount of commissions charged by the registered representative). *Studer*, 57 S.E.C. at 1020) (explaining that churning occurs when a broker "manages a client's account for the purpose of generating commissions" and that "generation of commissions as a goal overriding the client's interests evidences scienter in churning"). The Commission should sustain the NAC's findings that Beyn churned the customers' accounts.

D. Beyn Recommended Qualitatively Unsuitable ETNs to Customer Kennedy

NASD Rule 2310, and its successor, FINRA Rule 2111, require that, "[i]n recommending the purchase, sale, or exchange of any security," a broker "must have reasonable grounds for believing that the recommendation is suitable for that customer based on the facts . . . disclosed by the customer as to his other securities holdings and the customer's financial situation and needs"—i.e., that the recommendation is *qualitatively* suitable. *See Murphy*, 2013 SEC LEXIS 1933, at *38. There are two types of analysis under NASD Rule 2310 and FINRA Rule 2111, known as "reasonable basis" suitability and "customer-specific" suitability. *Id.; see also Cody*, 2011 SEC LEXIS 1862, at *30-31. To satisfy reasonable-basis suitability a broker must conduct a reasonable investigation and conclude that a recommendation could be suitable for at least some investors. *See Cody*, 2011 SEC LEXIS 1862, at *26-32. Customer-specific suitability requires that a broker must assess whether an investment recommendation is suitable for the specific customer to whom it is made, and to tailor recommendations to a customer's financial profile.

Beyn recommended unsuitable ETNs—VXX, UGLD, and UGLV—to Kennedy. VXX, UGLD, and UDLV were all highly complex and speculative investments intended for highly sophisticated investors and were meant to be held for less than a day.[12] The issuer warned that ETNs like VXX "are riskier than ordinary unsecured debt securities" and could result in the loss of some or all of an investor's principal. (R. at 10942.) Similarly, the issuer of UGLD and USLV cautioned that "ETNs are intended to be daily trading tools for sophisticated investors to manage daily trading risks" and are designed to "achieve their stated investment objectives on a daily basis." (R. at 10957.) The issuer further cautioned that ETNs "should be purchased only by knowledgeable investors," and investors "should actively and frequently monitor their investments in ETNs, even intra-day." (*Id.*) Finally, the issuer cautioned that "it is possible [investors] will suffer significant losses in the ETNs" even if the long-term performance of the underlying index is favorable. (*Id.*) In his hearing testimony, Beyn conceded that ETNs were investments intended as very short-term investments. (R. at 3995-96, 3998.) The ETNs were unquestionably unsuitable for Kennedy, and Beyn makes no convincing argument to the contrary on appeal.

The record supports Kennedy's credible testimony that Beyn recommended the ETNs to him, and refutes Beyn's self-serving claim that VXX was Kennedy's idea. (R. at 4346-49.) The record shows that Beyn also sold VXX to Heikkila and marked the trade solicited. (R. at 4026.) Beyn claimed that while Heikkila and Kennedy did not know each other, they both separately called him and asked him to buy VXX. (R. at 4047-49.) Moreover, other CSC brokers also sold VXX to customers on a solicited basis during the same time period. (R. at 14187-302.)

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[12] The record shows that Kennedy's accounts held these securities for more than one day.

For all of these reasons, the Commission should affirm the NAC's findings that Beyn made unsuitable recommendations to Kennedy.

E. Beyn's Arguments on Appeal Are Unavailing

Beyn's main arguments on appeal are that he was denied due process and a fair hearing because he did not have an opportunity to review all the discovery produced by Enforcement and that the NAC did not give appropriate dispositive weight to the affidavits signed by Kennedy, Pixley, and Heikkila. These arguments have no merit.

1. FINRA's Disciplinary Proceedings Were Conducted Fairly

Beyn claims that FINRA's proceeding denied him due process. It is well established, however, that self-regulatory organizations such as FINRA are not state actors and, accordingly, not subject to the Constitution's due process requirements. *See, e.g.*, *Timothy P. Pedregon, Jr.*, Exchange Act Release No, 61791, 2010 SEC LEXIS 1164, at *19 n.19 (Mar. 26, 2010); *Mark H. Love*, 57 S.E.C. 315, 323 n.13 (2004) ("We have held that NASD proceedings are not state actions and thus not subject to constitutional requirements."); *William J. Gallagher*, 56 S.E.C. 163, 168 n.10 (2003) (noting that "many courts and [the] Commission have determined that self-regulatory organizations . . . are not subject to . . . constitutional limitations applicable to government agencies"). Instead, the Exchange Act requires that proceedings for disciplining members and persons associated with members be fair. *See* 15 U.S.C. § 78o-3(b)(8). As discussed below, the record demonstrates that Beyn was provided with a fair proceeding here.[13]

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[13] Beyn also argues that Enforcement failed to do a proper investigation because it did not obtain all of the customer confirmations. The Commission should reject this argument, as the customers testified that they received the confirmations but did not understand from them what they were being charged per trade. It is also undisputed that the sample confirmations that were introduced into evidence were representative of the confirmations received by CSC customers. Regardless, the Commission has held that the Exchange Act's requirement of a "fair procedure"

[Footnote continued on next page]

Beyn's reliance on *Brady v. Maryland*, 373 U.S. 82 (1963), is similarly misplaced. There is no evidence that Enforcement failed to turn over exculpatory evidence pursuant to FINRA's rules, and Beyn does not point to the existence of any such evidence. *See Dep't of Enforcement v. Scholander*, Complaint No. 2009019108901, 2014 FINRA Discip. LEXIS 33, at *44 (FINRA NAC Dec. 29, 2014), *aff'd*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209 (Mar. 31, 2016 (explaining that Brady does not apply to FINRA disciplinary proceedings, which are instead governed by FINRA Rule 9251).

2. The Hearing Officer Did Not Abuse His Discretion in Denying Beyn's Request to Stay the Hearing

Beyn argues that FINRA's proceedings was unfair because the Hearing Officer did not stay the hearing in order to give him time to review Enforcement's June 2016 production of documents. The denial of a request for a stay is reviewed under an abuse of discretion standard. *See Michael Nicholas Romano*, Exchange Act Release No. 76011, 2015 SEC LEXIS 3980, at *16 (Sept. 29, 2015). Under this standard, "the moving party must carry a heavy burden to succeed" and the Commission will affirm the denial of the stay unless the hearing officer applied the wrong legal standard or made a clear error of judgment. *Id.* Beyn has not met this burden here.

Beyn's challenges to discovery and requests for a stay were untimely. Enforcement produced its discovery to Beyn's counsel on June 1, 2016. (R. at 1382.) Beyn, however, did not make his motions until December 2016, almost six months later, approximately a month before

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in an adjudicatory proceeding "does not extend to investigations." *Cody*, 2011 SEC LEXIS 1862, at *61.

the hearing was scheduled to begin, and after the deadlines for objections and motions set out in the scheduling order.

Notwithstanding Beyn's untimeliness, the Hearing Officer accommodated Beyn and directed Enforcement to make itself available for an entire week to assist Beyn, in person, to access the June 2016 discovery. (R. at. 15294.) The Hearing Officer also kept the record open for 30 days after the hearing was completed to give Beyn an opportunity to introduce additional proposed exhibits from the June 2016 discovery production and to recall witnesses if necessary. (*Id.*) Beyn, however, waited until Thursday of the designated week to meet with Enforcement and never offered any additional proposed exhibits. Beyn's failure to take advantage of this time to access documents he supposedly required for his defense demonstrates that his discovery complaints were simply a pretense aimed at delaying the resolution of the claims against him. Beyn's failures to seek to recall additional witnesses, or even ask for more time to keep the record open to review the June 2016 discovery production further underscore this point.

Most importantly, the documents relevant to the excessive trading and churning claims against Beyn were designated as proposed exhibits by Enforcement and were available to Beyn during the hearing. These included for each account at issue: new account documents; the trading blotter from which the clearing firm generated confirmations; sample confirmations sent to the customers; account statements; active account letters; affidavits of support; and other communications with the customers.[14] Beyn has not identified a single pertinent document or

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[14] Beyn complains that he was not able to adequately cross-examine the customer witnesses because the record did not include a trade confirmation for every trade. (Beyn Br. at 8-9.) Beyn, however, has failed to articulate how a trade confirmation for every trade would have exonerated him. First, the record contains sample trade confirmation and the trade blotter from which all the confirmation were generated (which includes all the same information as the trade confirmations). In any event, all of the customers who testified acknowledged that they received

[Footnote continued on next page]

category of document which he required for his defense and which he did not have at the hearing.

In short, the record demonstrates that Beyn was provided a fair hearing. Beyn's claims to the contrary have no merit.

3. The Affidavits Signed by Kennedy, Pixley, and Heikkila Are Not Dispositive

Finally, Beyn argues that the affidavits signed by Kennedy, Pixley, and Heikkila were sworn statements and prove Beyn did not commit the violations. He posits that these affidavits were not given appropriate weight by the NAC. (Beyn Br. at 2, 11.)

The NAC, however, expressly gave little weight to the affidavits because four customers—including the three who executed the affidavits—credibly testified that they trusted and relied on Beyn and that they did not understand the costs of the trading in their accounts when they signed the affidavits. (R. at 2183-84, 2221-22, 2225, 2287, 3026-27, 3095, 3213, 3230, 3240, 3259-63, 3331-32, 3347, 3397-98, 4310, 4343-44, 4350-51.) Moreover, all three customers testified that Beyn urged them to sign the affidavits. (R. at 3055-57, 3276, 3426,

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trade confirmations. The issue is not the receipt of confirmations, but whether the trade confirmations clearly set forth the costs of each trade. The customers credibly testified that they did not, and that Beyn never explained how to calculate the mark-ups and mark-downs he was charging. Moreover, the Commission has held that customer's receipt of trade confirmations does not demonstrate that the customer controls his or her account. *See, e.g.*, *Michael David Sweeney*, 50 S.E.C. 761, 765-66 (1991) (stating that the fact customers received confirmations and monthly statements did not change the Commission's view that the broker controlled the accounts where the broker initiated nearly all the transactions in the accounts and the customers did not fully understand the trading or the costs of the trading); *Jack H. Stein*, 56 S.E.C. 108, 119 n.31 (2003) (rejecting the argument that a customer was estopped from objecting to excessive trading because she had received confirmations and statements and was thus aware of the trading activity). In short, having access to every trade confirmation would not have changed the outcome here.

3428, 4309, 4328, 4331, 4364-67, 4425.) Kennedy testified that he signed the affidavit after Beyn told him he was in trouble with his firm and would get fired. (R. at 4364-67.) Pixley testified that he signed the affidavit as a favor to Beyn after Beyn told him CSC was "on his case" about it. (R. at 3276, 3426, 3428). Heikkila testified the he signed the affidavit after Beyn told him they would be unable to trade until he did so and that he did not review it before signing it. (R. at 3055-57.) When viewed in the context of Beyn's misconduct with respect to all nine accounts and the customers' testimony, the fact that three of the customers signed an affidavit at Beyn's request for three of the nine accounts at issue is not persuasive, and the Commission should reject Beyn's arguments to the contrary.

F. A Bar Is the Appropriate Sanction for Beyn's Egregious Misconduct

On appeal, Beyn does not explain how the bar imposed for his egregious misconduct is excessive or oppressive.[15] Nor can he. The record amply demonstrates that a bar is the only appropriately remedial sanction given Beyn's misconduct and the facts and circumstances of this case. Accordingly, the Commission should sustain it.

In reviewing a disciplinary sanction imposed by FINRA, the Commission considers persuasive the principles articulated in FINRA's Sanction Guidelines (the "Guidelines") and uses them as a benchmark in conducting its review. *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *61 (Nov. 9, 2012) (explaining that the Guidelines serve as a benchmark); *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *39 (Oct. 20, 2011) (same).

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[15] Exchange Act Rule 19(e) provides that the Commission must affirm the sanctions imposed by FINRA unless the sanctions are excessive or oppressive or imposes any unnecessary burden on competition. *See CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *30 (Jan. 30, 2009). Beyn does not claim, and the record does not show, that the bar imposes an undue burden on competition.

The Guidelines for excessive trading and churning recommend monetary sanctions of $5,000 to $110,000, a suspension in any or all capacities for one month to two years or, where aggravating factors predominate, a longer suspension of up to two years or a bar. (Guidelines at 79.) The Guidelines further direct "[s]trongly consider[ing] barring an individual for reckless or intentional misconduct (*e.g.*, churning)." (*Id.*)

For making unsuitable recommendations, the Guidelines recommend a fine of $2,500 to $110,000, and a suspension in any or all capacities for a period of 10 business days to two years. (Guidelines at 96.) Where aggravating factors predominate, the Guidelines direct "strongly consider[ing] a bar for an individual respondent." (*Id.*)

There are numerous aggravating factors that support the bar that was imposed on Beyn. Beyn's excessive trading and churning of nine customer accounts involved a pattern of numerous, intentional acts of misconduct over an extended period of time. (Guidelines at 7-8.) He also intentionally recommended highly speculative, complex ETNs to one customer. While Beyn induced his customers to trust him, his misconduct caused them substantial losses and resulted in substantial financial gains to Beyn. (Guidelines at 7-8.) Indeed, Beyn personally earned almost $650,000 (and CSC almost $1.8 million) as a result of his excessive and unsuitable trades. Beyn has taken no responsibility for his misconduct, has shown no remorse for the losses sustained by his customers (almost $3 million), and has taken no steps to provide any restitution to customers. (Guidelines at 7.) Instead, he continues to falsely claim that his customers controlled their accounts and approved Beyn excessively trading and churning their accounts.

The outrageously high volume of trading, along with the mark-ups and mark-downs Beyn charged, assured that his customers would never benefit from the trading and demonstrates that

the sole purpose of Beyn's trading was to benefit his firm and himself. Beyn has shown himself to be a danger to the investing public who should not be permitted to work in the securities industry. Accordingly, the Commission should sustain the bar in all capacities for Beyn's misconduct.

V. CONCLUSION

The evidence of Beyn's misconduct is overwhelming, includes the credible testimony of his customers and uncontroverted analyses of the trading in the accounts, and reflects the outrageously high volumes and costs of Beyn's trading. The record demonstrates that Beyn's trading served no purpose but to generate commissions for himself and his firm at the expense of his customers. The record also shows that Beyn recommended completely unsuitable ETNs to a customer while in the throes of his churning the customer's accounts.

Beyn ignores this evidence. Instead, he attempts to distract the Commission with hyperbolic claims of procedural unfairness that have no merit. He also points to three pieces of paper—the affidavits of support—and argues that because they were sworn statements, they must prevail even if the face of substantial contrary evidence. Tellingly, Beyn does not hold himself to this same standard as he repeatedly tried to disclaim his own sworn, verified answer.

Beyn's abuse of his customers' trust and their accounts demonstrates that he has no place in the securities industry. Beyn's trading of their accounts was effectively a transfer of their funds into his pocket and that of his firm, enriching himself while his customers sustained

millions in losses. The Commission should sustain the finding of violations and the bar in all capacities imposed on Beyn, and dismiss the application for review.

Respectfully submitted,

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July 3, 2019

CERTIFICATE OF COMPLIANCE

I, Celia L. Passaro, certify that this brief complies with the length limitation set forth in Commission Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 13,452 words, exclusive of the pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

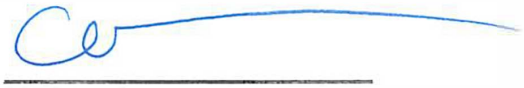
I, Celia L. Passaro, certify that on this 3rd day of July 2019, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review, In the Matter of Edward Beyn, Administrative Proceeding File No. 3-19007, to be served by messenger and facsimile on:

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Fax: (202) 772-9324

and via FedEx and electronic mail on:

Edward Beyn
[redacted]
Dix Hills, NY [redacted]
[redacted]@gmail.com

Service was made on the Commission by messenger and on the Applicants by overnight delivery service due to the distance between FINRA's offices and the Applicants.



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VIA MESSENGER AND FACSIMILE

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RE: In the Matter of the Application for Review of Edward Beyn
Administrative Proceeding No. 3-19007

Dear Ms. Countryman:

Enclosed please find the original and three (3) copies of FINRA's Brief in Opposition to the Application for Review in the above-captioned matter.

Please contact me at (202) 728-8985 if you have any questions.

Sincerely,

Celia L. Passaro

Enclosures

cc: Edward Beyn (via FedEx and Email)