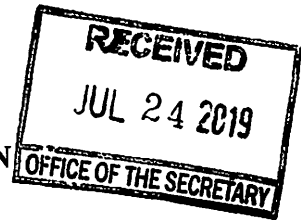


**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.**



In the Matter of the Application of
Bruce M. Zipper and Dakota Securities Int'l, Inc.
For Review of Disciplinary Action Taken by
FINRA
Administrative Proceeding File No. 3-19138

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

Bruce Zipper admits that he associated with Dakota Securities International, Inc. ("Dakota"), and engaged in activities requiring registration—including recommending specific securities transactions to his customers—while he was suspended in all capacities and statutorily disqualified. Zipper further admits that, while serving as Dakota's president, chief executive officer, and chief compliance officer, he purposely misidentified the representative of record on trades entered in Dakota's trading system, and directed others to do the same, causing the firm's books and records to be inaccurate with respect to hundreds of trades.

FINRA's National Adjudicatory Council ("NAC") correctly concluded that Zipper violated FINRA's By-Laws, NASD Rule 1031, and FINRA Rule 2010 by associating with Dakota and engaging in activities requiring registration while suspended and statutorily disqualified, and that Dakota violated FINRA's By-Laws, NASD Rule 1031, and FINRA Rule 8311 by allowing Zipper to do so. The NAC further found that, by intentionally misidentifying the representative of record on trades entered in Dakota's trading system, Zipper and Dakota violated FINRA Rules 4511 and 2010, and Dakota willfully violated Section 17(a) of the

Securities Exchange Act of 1934 (the “Exchange Act”) and Rule 17a-3 thereunder. Finally, the NAC found that Dakota also violated FINRA Rules 3110 and 2010 as a result of its supervisory failures relating to Zipper’s flagrant violation of his suspension and the firm’s maintenance of inaccurate books and records. The NAC concluded that these violations were egregious, and reflected Zipper’s and Dakota’s intentional flouting and disregard of their obligations under FINRA Rules. The NAC therefore barred Zipper and expelled Dakota from FINRA membership.

The NAC’s findings of violations are fully supported by the record and the sanctions it imposed are neither excessive nor oppressive. The Commission should affirm the NAC’s findings of violations and the sanctions it imposed on Zipper and Dakota.

I. Factual Background

A. Zipper and Dakota

Zipper entered the securities industry in 1981. RP 757. In 2004, he founded Dakota, a broker-dealer focused on selling equities, options, and corporate debt to retail customers. RP 613. Zipper was registered with Dakota from 2005 to 2017 as a general securities principal (Series 24), general securities representative (Series 7), and registered options principal (Series 4). RP 767. Zipper describes Dakota as a “one-man business,” where he wore “all of the hats,” including serving as Dakota’s president, chief executive officer (“CEO”), chief compliance officer (“CCO”), and financial operations principal (“FINOP”). RP 614, 767, 1119. Zipper owned a majority stake in the firm until 2018, when he sold his interest to his wife. RP 308, 767, 964-65.

B. Zipper Agrees to a Three-Month Suspension in All Capacities and Becomes Subject to Statutory Disqualification

In April 2016, Zipper executed a Letter of Acceptance, Waiver and Consent (the “AWC”) to resolve charges arising from his failure to disclose three unsatisfied judgments on his Uniform Application for Securities Industry Registration or Transfer (“Form U4”). *See* RP 2435-42. Zipper agreed to pay a \$5,000 fine and serve a three-month, all-capacities suspension. RP 2436-42. In executing the AWC, Zipper acknowledged that, while suspended, he also was statutorily disqualified, and therefore could “not be associated with any FINRA member in any capacity, including clerical or ministerial functions[.]” RP 2438-39. FINRA notified Zipper in writing that his suspension would begin on May 31, 2016, and continue through August 30, 2016 (the “Suspension Period”). RP 2355.¹

Zipper informed FINRA that he had selected his longtime friend and Dakota employee, Robert Lefkowitz, to take over for him at the firm during his suspension. RP 995-96, 2421. Lefkowitz would hold the titles of president, CEO, and CCO, and would be responsible for the firm’s operations on a day-to-day basis. RP 1000-02, 1629, 2421.² Along with running Dakota, Lefkowitz also was supposed to handle all of Zipper’s customers’ accounts. RP 1002. Zipper updated Dakota’s written supervisory procedures (“WSPs”) to reflect these changes to the firm’s management structure. RP 1629.

Lefkowitz had never been a supervisor at Dakota or any other firm. RP 1000. Other than taking the general securities principal exam, which he did shortly before the Suspension Period began, Lefkowitz had no training at all to prepare him for his new role at Dakota. RP 607, 1000-

¹ FINRA initially scheduled Zipper’s suspension to begin on May 16, 2016. RP 2353. After Zipper requested more time to prepare for his absence from the firm, FINRA delayed the start of the suspension by two weeks. RP 828-29, 2359-60.

² Zipper also brought in a new FINOP and a new options principal. RP 2421.

01. As Lefkowitz explained at the hearing, he “took the Series 24 very rapidly,” and “within two weeks of [his] license, [he] was handed over the keys to the car.” RP 1032.

C. Zipper Conducts Dakota’s Securities Business While Suspended and Statutorily Disqualified

Aside from its new management structure, little changed at Dakota after Zipper’s suspension began. The firm continued operating from its principal place of business inside Zipper’s south Florida home. RP 1008. All of the firm’s paper files, including its customer records, remained in a cabinet in Zipper’s living room. RP 1010. Lefkowitz worked from his own home, but visited Zipper’s home periodically to perform his “administrative duties,” including getting the firm’s mail, paying bills, and filing new account paperwork. RP 1010-11.

Despite Zipper’s suspension, Dakota did not restrict his access to the firm’s trading system. RP 607, 845. Zipper could log in to the system simply by clicking an icon on his Dakota computer, which remained in his home office. RP 1009-10, 1015. Zipper testified that, while suspended, he regularly accessed the firm’s trading system to view reports on Dakota’s trading activity. RP 845-46. He also admitted that he used the trading system to review his customers’ account holdings and statements. RP 2257, 2262.

Similarly, during Zipper’s suspension, Dakota did not restrict his access to the firm’s email system. RP 607, 1028. Zipper could send and receive messages via his Dakota email account. RP 845. Lefkowitz was responsible for reviewing all of Dakota’s electronic communications, and was copied automatically on all of Zipper’s incoming emails, but he conducted no reviews to see if Zipper was using his Dakota email account while suspended. RP 1002-04, 1006.

1. Zipper Reviews Customer Accounts and Recommends Specific Securities Transactions

With unfettered access to Dakota's files and its trading and email systems, Zipper was able to communicate with his customers to discuss their account holdings, and even recommend specific securities transactions, while serving his all-capacities suspension.

For example, in June 2016, Zipper sent a message from his Dakota email account to a customer recommending that the customer sell shares of two particular stocks in his Dakota account. RP 2141. Like most messages Zipper sent from his Dakota email, this one identified him as the "President of Dakota Securities," even though he was suspended at the time. RP 2141. In his message to the customer, Zipper advised:

[Y]our account valuation is doing well at 115K. In reviewing your portfolio, I would like to offer you a suggestion to consider. . . . You have two companies both losing money . . . My suggestion is to sell them both, raise about 34K in cash and sit back and wait for opportunity or add to other stocks in the portfolio making money or paying dividends. [Issuer] which you own about 700 shares now . . . is one to consider. But sitting in cash with the market in a tough spot isn't bad either. . . . Just my thoughts to upgrade portfolio and raise cash. Let me know if interested, hope all is well, Bruce.

RP 2141; *see also* RP 881-87.³

Also in June 2016, Zipper emailed two other Dakota customers recommending they both purchase a particular stock. RP 2146. Zipper wrote:

A stock I like a lot and has been getting high analyst praise is [issuer]. . . . Here is why I like this stock a lot Great company, great dividend and will have three stocks instead of one in October all making money. I strongly recommend this stock [] to both of you. You both have large cash balances and this old time blue chip would look good in each of your portfolios. Let me know if interested, Bruce.

RP 2146; *see also* RP 889-92.

³ The next day, Zipper sent the same customer another email in which he wrote: "I did forget another good company you own which is [issuer] 800 shares at 17.50 per share." RP 2143; *see also* RP 887-88.

In July 2016, Zipper emailed a different customer recommending that he buy additional shares of a stock he already held in his Dakota account. RP 2183. Zipper wrote:

[Issuer] is a stock you own 700 shares at about 17 dollars per share. . . . Stock is selling at 10 x this year[']s earnings which is dirt cheap for technology stocks. . . . One of the bargains on [W]all [S]treet I believe. Your account is at its high mark of 294K of which 47K is in cash. [M]y suggestion is to buy another 700 share[s] (10K) and take your position to 1400 shares. [L]et me know if interested, Bruce.

RP 2183; *see also* RP 928-29.

During the Suspension Period, Zipper also sent several emails to another Dakota customer telling her how to access her account online and attaching copies of her account statements. In the first such email, Zipper instructed:

[A]re you still not able to get into your account? If you are go to google and put in [clearing firm] login. You then see a user: and password. Your username is your acct# which is [REDACTED] and the password is now [REDACTED]. I have tried this and it works. . . . Please let me know if this works for you. If not I will try to get your tax forms and e-mail them to you. Please advise, Bruce.

RP 2077; *see also* RP 863-865.⁴

Zipper sent similar emails to other customers while suspended. *See* RP 2079, 2081.

2. Zipper Resolves Dakota's Net Capital Deficiency and Settles Customer's Arbitration Claim

In addition to servicing his customers' accounts, including recommending specific securities, Zipper also actively managed Dakota's affairs during the Suspension Period.

For example, Zipper worked with Dakota's clearing firm to resolve a net capital deficiency so Dakota could continue operating its securities business. On the first day of Zipper's suspension, Dakota's clearing firm called and left a voicemail for Zipper about the net

⁴ While suspended, Zipper sent four additional emails to this customer attaching account statements. *See* RP 2083-2139; RP 2157-76; RP 2193-98; RP 2199-2204.

capital deficiency. RP 852. Zipper responded by emailing the clearing firm from his personal email account. Zipper wrote:

[G]ot your voicemail and will get back to you tomorrow. . . . I know you are asking about the net cap excess to 25K for Dakota. The number for April rose to 18K and by May will show 25K or more. . . . [W]e are slowly coming out of a bad tailspin and I appreciate all that you and [clearing firm] have done for me. I give you my word that the May numbers will be there. Thanks again, speak tomorrow, Bruce.⁵

RP 2071; *see also* RP 851-53.

Zipper then sent a message to Dakota's minority owner, who also owned a company to which Dakota owed money. RP 854-55. Zipper wanted the minority owner's company to write off Dakota's debt to help alleviate Dakota's net capital deficiency. According to Zipper, he "needed to get the Dakota financing position in a better spot or Dakota could lose its clearing firm[.]" RP 857. Zipper wrote:

I am using my personal e-mail for privacy reasons. I got a call from [clearing firm] today on my voicemail. He said [clearing firm] saw we are under the 25K minimum net cap excess and wants to talk to me. . . . I didn't want to speak to him and give him any assurances about this until I spoke to you. . . . I just need the assurance as does [Dakota's FINOP] that this is what is happening before I call [clearing firm]. Please get back to me soon, and help me with this[.]

RP 2073.⁶

A little over a week later, Zipper forwarded to the clearing firm an email he received from Dakota's FINOP containing an estimated net capital computation for Dakota as of June 9, 2016. RP 2155. Zipper admitted that he spoke to the FINOP and asked him to provide the computation. RP 921-23.

⁵ At the hearing, Zipper testified that he could not recall whether he spoke with anyone at the clearing firm the next day. RP 853.

⁶ Later that day, Zipper sent Dakota's clearing firm another email regarding a penalty imposed on Dakota that Zipper wanted the clearing firm to waive. RP 2075; *see also* RP 858-59. A few days after that, Zipper and the clearing firm had another email exchange regarding the penalty. RP 2179-80; *see also* RP 925-27.

Later in the Suspension Period, in August 2016, Zipper facilitated the resolution of another serious problem at the firm by personally negotiating a settlement to an arbitration claim filed by a customer against Dakota. Zipper testified that he and the customer's attorney worked together "for weeks to try to resolve this matter[.]" RP 937. After agreeing to terms, Zipper emailed Dakota's minority owner to notify him of the settlement and update him on Dakota's net capital deficiency. Zipper wrote:

I spoke with the attorney for the claimants on the arb case today. He is drawing up a settlement where Dakota will pay 5K to settle the case. Should have the agreement by end of week. I spoke with [Dakota's FINOP] today and he needs an e-mail from you to give forgiveness of the mon[ey] owed [by Dakota] to [the minority owner] to complete the focus in good standing for Dakota. . . . Let's meet later this week and come up with a strategy going forward for Dakota. I told you I would resolve all our issues and I did. Get back to me when you can[.]

RP 2205; *see also* RP 935-37.

Zipper also communicated with Dakota's email provider several times while he was suspended, and helped set up an email account for a new registered representative at the firm.

RP 2069-70, 2185, 2189-91.

D. Zipper and Dakota Intentionally Misidentify the Representative of Record on Hundreds of Transactions

While Zipper was suspended, numerous trades were entered in Dakota's trading system under Zipper's representative code, and many of those trades were entered from Zipper's computer. RP 1044-45, 1617-20. Lefkowitz testified that he, not Zipper, entered the trades using Zipper's representative code and, in many instances, Zipper's computer. RP 1012, 1044-46.⁷ Indeed, Zipper and Lefkowitz both testified that before, during, and after Zipper's

⁷ When asked why he entered trades from Zipper's computer, Lefkowitz responded, "[s]ometimes I would have my laptop and his computer open because some of his clients would call me at the same time or I have to place trades with different clients at the same time." RP 1046.

suspension, they often intentionally misidentified the representative of record when entering trades in Dakota's trading system. RP 898-901, 1044-47.

Each registered person at Dakota had a representative code that was included on the order memorandum and trade confirmation for each transaction entered in Dakota's trading system. Zipper's individual representative code was DS02. RP 747. DS01 was the representative code for CM, a former Dakota registered person who was discharged from the firm on February 19, 2016. RP 902, 1048. DS03 was a joint representative code Zipper shared with CM. RP 747.

Zipper admits that, after CM left the firm in early 2016, he kept using CM's representative code (DS01) and the joint representative code he shared with CM (DS03) when entering transactions for customers who lived in New Jersey. Zipper testified that he was not registered in New Jersey, but he thought that CM was. RP 901.⁸ Zipper explained that he did not want to pay the fee to register himself in New Jersey. Therefore, when Zipper entered a trade for a customer who lived in that state, he used either CM's representative code (DS01) or the joint representative code he shared with CM (DS03). RP 898-901, 906-913, 917.

While Zipper was suspended, Lefkowitz continued the practice of misidentifying the representative of record when entering transactions into Dakota's trading system. Lefkowitz purportedly was responsible for servicing Zipper's customers' accounts while Zipper was suspended, including entering their orders. Rather than using his own representative code for these transactions, Lefkowitz entered these transactions under either Zipper's representative code

⁸ CM's registration in New Jersey terminated in December 2015, and therefore CM was not registered in New Jersey in 2016 when Zipper and Lefkowitz were entering trades for customers in that state under CM's representative codes. RP 902-903, 1554. Dakota was not registered in New Jersey in 2016. RP 903-912, 1500.

(DS02), CM's representative code (DS01), or the joint representative code Zipper shared with CM (DS03). RP 1044-46, 1048-51, 1611-16, 1617-1620.

From February 22, 2016, through November 16, 2016, excluding the Suspension Period, Zipper entered 451 trades under either CM's representative code or the joint-representative code he shared with CM. RP 1160-63, 1599-1610. During the Suspension Period, Lefkowitz entered 29 trades using Zipper's representative code, 93 trades using CM's representative code, and 109 trades using Zipper's and CM's joint-representative code. RP 1611-20, 1163-70.⁹

E. After FINRA Denies His Membership Continuance Application, Zipper Continues Associating With Dakota While Statutorily Disqualified

Zipper's suspension ended August 31, 2016, but he remained statutorily disqualified because of his failure to disclose material information on his Form U4. In July 2016, Dakota submitted a Membership Continuance application (the "MC-400") on Zipper's behalf seeking FINRA's approval for Zipper to associate with the firm after his suspension ended. RP 2265-2272.¹⁰ Under FINRA's rules and policies, once Zipper's suspension ended on August 31, 2016, he was allowed to associate with Dakota until FINRA acted on Dakota's MC-400.

FINRA denied Dakota's MC-400 on October 2, 2017, and Zipper was prohibited from associating with Dakota after that date. In its decision denying Dakota's application, FINRA wrote, in part, that it denied the application because it found that "Zipper engaged in serious misconduct . . . by associating with [Dakota] while suspended[.]" RP 2207-2231.

⁹ These trades were marked "solicited," but Lefkowitz said he did not solicit any of them. Lefkowitz testified that "solicited" was the trading system's default, and he did not bother changing it when entering the orders. Lefkowitz explained, "[i]t's set to default and when you enter into a trade, you're clicking most of the same. You're not really looking at that part of the trade blotter." RP 1012.

¹⁰ Lefkowitz testified that Zipper completed Dakota's MC-400 application, even though he was suspended at the time. RP 997-1000.

FINRA emailed a copy of the decision and a cover letter to Zipper and Dakota and also sent copies to each of them via certified mail. RP 2207-2231. FINRA's cover letter stated that, "unless the [Securities and Exchange] Commission stays the effect of the enclosed notice . . . the enclosed notice is effective immediately, and Bruce Zipper shall terminate his association with Dakota Securities International, Inc." RP 2228.¹¹

Zipper appealed FINRA's denial of Dakota's MC-400, but otherwise ignored it. Zipper continued to associate with Dakota for at least another month, and Dakota allowed him to do so. RP 2289-95, 2297-98.

II. Procedural History

In November 2017, FINRA's Department of Enforcement ("Enforcement") filed a five-cause complaint against Zipper and Dakota. RP 1-66.¹² Enforcement alleged that Zipper violated the terms of the AWC by associating with Dakota while suspended (first cause), engaged in activities requiring registration while suspended and statutorily disqualified (second cause), and willfully misidentified the representative of record for trades on Dakota's books and records (fifth cause). Enforcement alleged that Dakota allowed Zipper to associate with the firm while suspended (third cause), willfully misidentified the representative of record for trades on its books and records (fifth cause), and failed to establish and maintain a supervisory system

¹¹ The SEC affirmed FINRA's denial of Dakota's MC-400 application. *Bruce Zipper*, Exchange Act Release No. 84334, 2018 SEC LEXIS 2709, at *13 (Oct. 1, 2018) ("Despite his suspension from association with any FINRA member firm, Zipper acted as an associated person by communicating with customers and other third parties about firm business, and by making securities recommendations to firm customers.").

¹² Lefkowitz submitted a Letter of Acceptance, Waiver and Consent to resolve the charges against him arising from his and Dakota's misconduct in this matter. *See Robert Brian Lefkowitz*, AWC No. 2016047565701 (June 29, 2017).

reasonably designed to achieve compliance with applicable securities laws and regulations and FINRA rules (fourth cause).

A two-day hearing was held in March 2018. In June 2018, the Hearing Panel issued its decision finding Zipper and Dakota liable on all causes of action alleged against each of them. RP 2449-2468. The Hearing Panel barred Zipper and expelled Dakota from FINRA membership as a sanction under each applicable cause of action. Zipper and Dakota appealed to the NAC.

After conducting a de novo review, the NAC affirmed the Hearing Panel's findings of violation and the sanctions it imposed. RP 2614-2641. The NAC found that Zipper "associated with Dakota during the Suspension Period by facilitating and conducting Dakota's securities business," and that he "engaged in activities requiring registration during the Suspension Period by discussing specific securities with customers and recommending particular securities transactions[.]" The NAC found that Dakota allowed Zipper to do so. The NAC further found that Zipper and Lefkowitz "intentionally misidentified the representative of record on hundreds of trades entered between February 22, 2016, and November 16, 2016, thereby causing Dakota to maintain inaccurate books and records." And last, the NAC found that Dakota "failed to maintain a supervisory system adequate to ensure that Zipper did not associate with the firm during the Suspension Period and failed to adequately supervise the creation of the firm's books and records[.]"

III. Argument

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

The record amply supports the NAC's findings on each violation alleged in the complaint. Barring Zipper and expelling Dakota are appropriately remedial sanctions and are neither excessive nor oppressive given their egregious misconduct. Zipper's arguments on appeal do not serve as a basis for disturbing the NAC's findings or the sanctions it imposed. The Commission should therefore dismiss the applicants' application for review.

A. Zipper Associated With Dakota and Engaged in Activities Requiring Registration While Suspended and Statutorily Disqualified

The NAC found that Zipper associated with Dakota and engaged in activities requiring registration while suspended and statutorily disqualified, in violation of NASD Rule 1031, FINRA's By-Laws, and FINRA Rule 2010 (first and second causes). The NAC's findings are supported by the undisputed evidence, and the Commission should sustain them.

1. Zipper Associated With Dakota

The AWC imposed a three-month suspension prohibiting Zipper from associating in any capacity with any FINRA member. Failure to comply with a FINRA suspension order violates FINRA Rule 2010, which requires member firms and their associated persons to observe high standards of commercial honor and just and equitable principles of trade. *David C. Ho*, Exchange Act Release No. 54481, 2006 SEC LEXIS 2100, at *8 (Sept. 22, 2006), *aff'd*, 2007 U.S. App. LEXIS 9882 (7th Cir. 2007), *aff'd*, 2007 U.S. App. LEXIS 9882 (7th Cir. 2007). Additionally, Zipper was statutorily disqualified for the duration of the Suspension Period. 15 U.S.C. § 78c(a)(39). FINRA's By-Laws prohibit a statutorily disqualified person from associating with any FINRA member. FINRA By-Laws, Art. III, § 3(b)

A person "associates" with a FINRA member when his functions "are part of the conduct" of the member's "securities business." *Bruce Zipper*, Exchange Act Release No. 84334, 2018 SEC LEXIS 2709, at *14 (Oct. 1, 2018). A member's "securities business"

includes underwriting or distributing securities, purchasing securities and offering them for sale as a dealer, and purchasing and selling securities upon the order and for the account of others. FINRA By-Laws, Art. I(u). The definition of associated person is interpreted broadly, and includes even clerical staff if their duties are part of the conduct of a firm's securities business. *See, e.g., Stephen M. Carter*, 49 S.E.C. 988, 989 (1988) (employee who worked as a cashier was an associated person because he received checks and securities and entered them in the firm's computer system, prepared firm checks for signature in payment of customer balances, prepared deposit slips, and furnished account balances and other information to customers).

Zipper was heavily involved in the conduct of Dakota's securities business throughout the Suspension Period. Zipper admits that he regularly accessed Dakota's trading system to review the firm's trading activity and customer accounts. He admits, and the record shows that, on numerous occasions, Zipper discussed his customers' Dakota accounts with them and recommended specific securities transactions. He also admits, and the record shows that, he facilitated Dakota's securities business by, among other things, working with its clearing firm to resolve a net capital deficiency and negotiating a settlement to an arbitration claim filed by a customer against the firm. By engaging in this conduct while suspended and statutorily disqualified, Zipper violated FINRA Rule 2010 and Article III, Section 3(b) of FINRA's By-Laws.

2. Zipper Engaged in Activities Requiring Registration

NASD Rule 1031 provides that any person engaged in the securities business of a FINRA member firm and functioning as a "representative" must be registered with FINRA.¹³ A

¹³ NASD Rule 1031 was replaced by the FINRA Rule 1200 series in 2018. The NAC applied the rules in effect at the time of the misconduct.

“representative” is any person associated with a FINRA member firm who is “engaged in the member’s investment banking or securities business, such as supervision, solicitation, [or] conduct of business in securities[.]” FINRA Rule 1220(b)(1). Activities requiring registration include communicating with members of the public to determine their interest in making investments, discussing the nature or details of particular securities or investment vehicles, recommending the purchase or sale of securities, and accepting orders for the purchase or sale of securities. *See Michael F. Flannigan*, 56 S.E.C. 8, 19-20 (Jan. 8, 2003); *Dist. Bus. Conduct Comm. v. Gallison*, Complaint No. C02960001, 1999 NASD Discip. LEXIS 8, at *51 (NASD NAC Feb. 5, 1999).

While suspended and statutorily disqualified, Zipper repeatedly engaged in conduct requiring registration. As described above, Zipper frequently communicated with customers about their Dakota accounts, and even recommended specific securities transactions on several occasions. As a result of this conduct, Zipper violated NASD Rule 1031, Article III, Section 3(b) of FINRA’s By-Laws, and FINRA Rule 2010. *See Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *2 (Aug. 22, 2008) (“An associated person violates Rule [2010] when he or she violates any other [FINRA] rule.”).

3. Zipper’s Defenses Have No Merit

Although Zipper admits all of the misconduct underlying these violations, he makes two arguments in his defense. First, he argues that he did not violate the AWC by communicating with his customers about their accounts because the AWC only prohibited him from associating with any FINRA member, and his customers are not FINRA members, so he could freely communicate with them as he did. Second, he argues that a FINRA staff member, Dawn Colange, gave him permission to associate with Dakota while he was suspended. Neither argument has merit.

a. Zipper Knew He Could Not Communicate with Customers While Suspended

Zipper concedes that he “did contact a few clients who sent questions to [his] email for [his] help in resolving their account” while he was suspended, but argues that he “reviewed [his] AWC agreement which clearly states that Zipper cannot have any contact with a FINRA member for 90 days,” and he “felt then and still do[es] that if [he] had contact with a NON FINRA Member [he] would not be violating the rules of the AWC.” Applicants’ Brief at 5.¹⁴

Zipper’s argument is frivolous. The AWC and Dakota’s WSPs plainly controvert it. The AWC prohibited Zipper from “associat[ing] with any FINRA member in any capacity, including clerical or ministerial functions, during the . . . suspension.” This prevented him from engaging in *any* aspect of the securities business—including contacting customers about their securities holdings and transactions, and contacting third parties about their business with Dakota. Dakota’s WSPs provide that, during a suspension, employees may not “have direct or indirect contact with customers” or “give investment advice or counsel.” RP 1671. Indeed, shortly before Zipper’s suspension began, he personally updated the AWCs to read: “Starting on June 1, 2016 [*sic*] and ending on August 31, 2016 Bruce Zipper . . . will be on a 90 day suspension and will not be involved in the company’s business for that time period.” RP 836-38, 1629.

Moreover, Zipper’s claim that he interpreted the AWC to allow him to communicate with his customers about their accounts is belied by an email he sent to Enforcement attorney Kevin Rosen just two days before executing the AWC. In the email, Zipper asked Enforcement to

¹⁴ The Commission considered and rejected this exact argument from Zipper when he appealed FINRA’s denial of his MC-400 application. *See Bruce Zipper*, 2018 SEC LEXIS 2709, at *16.

consider a suspension in a principal capacity only, rather than in all capacities, precisely so he would be able to continued discussing investments with his customers. Zipper wrote, in part:

Needless to say being barred [*sic*] to act as a principal is less severe than in all capacities. Is there any chance for you to reconsider this as a possibility so that I cannot act as a principal *but still be allowed to have conversations with lifetime clients*[?] [emphasis added] I ask for this reconsideration to have the ability to pay my fines in a faster way and more importantly *not to hurt my lifetime clients who had no part in this issue and would be harmed in a possible financial way by not having the ability to discuss their investments which they have entrusted to me and have relied on for 30 years.* [emphasis added] Can we possibly open this up for discussion or have some possible alternatives to still have a time suspension with limited abilities?

RP 2059-60.¹⁵

Zipper's email to Rosen is conclusive evidence that Zipper knew he could not communicate with customers about their Dakota accounts (much less recommend securities transactions to them) while serving his all-capacities suspension.¹⁶

b. FINRA Did Not Grant Permission for Zipper to Associate with Dakota While Suspended

Zipper asserts that a FINRA staff member, Dawn Colange, gave permission for him to associate with Dakota while he was suspended. According to Zipper, Colange said that Zipper could intercede in Dakota's business if a problem arose that only Zipper could handle. But there is no credible evidence supporting Zipper's claim.

¹⁵ Rosen responded to Zipper's email that day and informed Zipper that Enforcement would not accept anything less than an all-capacities suspension. RP 2059.

¹⁶ Whether Zipper knew he was prohibited from communicating with his customers and other non-FINRA member is not relevant to Zipper's liability because this is not a scienter-based violation. In any event, the record shows that Zipper understood the implications of his all-capacities suspension.

Indeed, Zipper’s argument on appeal does not align with his own testimony at the hearing. At the hearing, Zipper insisted that Enforcement attorney Kevin Rosen—not Dawn Colange—granted permission for him to associate with Dakota while suspended. Zipper testified in detail about his purported conversation with Rosen. According to Zipper, during an in-person meeting at FINRA’s office before he signed the AWC, he asked Rosen “if this should happen . . . Bruce Zipper is the only one in that 90 days [suspension period] when I’m out of the company [who] can answer it, so that the firm and/or client would not be hurt, could I do that. His [Rosen’s] answer was yes. Period.” RP 796. When pressed further on this point, Zipper responded: “That’s my response and I’m under oath and I can’t wait for Mr. Rosen tomorrow.” RP 806.

When Rosen testified the next day, however, he flatly denied granting permission for Zipper to associate with Dakota while suspended. RP 1118-23. Rosen acknowledged that, on several occasions, Zipper had asked about interceding in Dakota’s affairs if an issue arose that only Zipper could handle. RP 1118-19. But Rosen testified that each time Zipper raised the issue, Rosen told Zipper that he could *not* involve himself in Dakota’s business while he was suspended, and that if any issue arose that Dakota’s principal could not handle, the principal should contact FINRA staff, not Zipper. RP 1120-23.

Rosen’s testimony on this issue is consistent with an email he sent to his FINRA colleagues on April 1, 2016, the same day Zipper executed the AWC. In his email, Rosen wrote that Zipper had “raised a concern that the principal who will cover for him during the suspension may need to call [Zipper] to ask a question.” RP 2063; *see also* RP 1079-1082. He further wrote, “Rather than Zipper possibly crossing the suspension line, I told Zipper to tell his principal, now, to instead contact our office during his suspension.” RP 2063.

The Hearing Panel found Rosen's testimony on this issue was credible and Zipper's was not. RP 2459. The applicants have not presented any reason to disturb these credibility findings. *See John Montelbano*, 56 S.E.C. 76, 89 (2003) (“[C]redibility determinations of an initial fact-finder, which are based on hearing the witnesses’ testimony and observing their demeanor, are entitled to considerable weight and deference, and can be overcome only where the record contains substantial evidence for doing so.”). In fact, on appeal to the NAC, Zipper buttressed the Hearing Panel’s credibility determination. In his opening brief, Zipper stated that he asked Rosen “about a situation that could come up whereby I would be the only person who could handle a problem since I was a one man business[.]” RP 2501. According to Zipper, rather than granting permission to intervene, as Zipper had testified at the hearing, Rosen told him that “he [Rosen] didn’t have the authority to make that decision if [Zipper] could intercede. He said that would be the [FINRA] supervisor for [Dakota] in Boca Raton by the name of Dawn Colange.” RP 2502.

Contrary to Zipper’s current version of events, there is no credible evidence that anyone at Dakota even sought permission from Colange for Zipper to intercede in Dakota’s business while suspended, much less that Colange actually granted it. The only evidence this happened is Lefkowitz’s testimony, which the Hearing Panel found not credible. Lefkowitz began his testimony by claiming that Zipper had told him about his conversation with Rosen, in which Rosen purportedly told Zipper that he could involve himself in Dakota’s business (the same conversation that Zipper now admits never actually happened). RP 1052. Lefkowitz went on to testify that he had his own telephone conversation with Colange and another FINRA staff member, AB, about the same issue. According to Lefkowitz, he asked Colange and AB “if any situation comes up that I am not able to handle because I don’t have the knowledge or experience

or whatever, and only Bruce Zipper has that knowledge or information, would he [Zipper] be allowed to take care of that. And they [Colange and AB] said yeah, don't worry about it." RP 1052-53; *see also* RP 1054-55.

Colange denied ever having such a conversation with Lefkowitz. When Colange was asked if Lefkowitz had asked "whether during the suspension if something came up that he didn't know how to handle whether he could talk to Mr. Zipper about it," she answered, "He never asked us that." RP 1245; *see also* RP 1246-47. And when Colange was asked if she had told Lefkowitz that "if something comes up during the suspension that you don't know what to do just go ask Mr. Zipper," she answered, "No, absolutely not. The message to him [Lefkowitz] was clear. Again, Mr. Zipper could not associate with the firm in any capacity." RP 1245-46.

The Hearing Panel found Colange's testimony on this issue was credible and Lefkowitz's was not. RP 2459. The Hearing Panel noted that Lefkowitz was Zipper's longtime friend, and that his favorable testimony was elicited in response to Zipper's leading questions. The Hearing Panel concluded that Lefkowitz was trying "to help his friend and to justify his own misconduct as a supervisor." RP 2459. The NAC properly deferred to the Hearing Panel's credibility determination. On appeal, the applicants have not provided a single legitimate reason to disturb these credibility findings. *Montelbano*, 2003 SEC LEXIS 153, at *21.

Zipper erroneously argues that, during his cross-examination of Colange, she admitted she told Zipper he could associate with Dakota if a problem arose that only he could resolve. According to Zipper, Colange's testimony shows that Zipper spoke with "FINRA supervisors," who told him "if a problem comes up and [Zipper is] the only one who could resolve it," then Zipper could "act to get involved to fix the problem and go back to [his] suspension." Applicants' Brief at 5.

Zipper mischaracterizes Colange's testimony. Colange acknowledged that, in some circumstances, in response to a specific request, FINRA staff might not object to a suspended person intervening in a member firm's business for a limited purpose. *See* RP 1269-73. Colange further acknowledged that, in 2017, while Lefkowitz was suspended (and well after Zipper's suspension had ended), FINRA staff granted permission for Lefkowitz (not Zipper) to assist Dakota's principal, Gary Cuccia, with a "technical issue" relating to the firm's email provider. RP 1269-70.¹⁷ But Colange specifically and repeatedly denied ever granting permission for Zipper to involve himself in Dakota's affairs while he was suspended. RP 1244-47, 1252. Indeed, Colange testified that neither Zipper nor Lefkowitz ever sought her permission for that. RP 1244-47, 1252, 1273. As for Zipper's assertion that Colange permitted him to recommend securities transactions to customers while suspended, Colange testified that she was not aware of any FINRA member ever asking permission for a suspended representative to recommend a securities transaction, and that she "cannot even imagine a scenario where we [FINRA] would ever say that was okay." RP 1274. Applicants' purported excuses for Zipper's improper association with Dakota while suspended do not pass muster, and the Commission should reject them.

¹⁷ Colange explained that she received an email from Cuccia stating that he needed Lefkowitz's permission to be added as an administrator to the firm's email system so that Cuccia could "get [his] email and [have the] ability to review [email] with Dakota's provider [.]" RP 1250-51. Colange stated that when she received Cuccia's email, she discussed it with her director and they determined that "because the firm is a small firm, they were trying . . . to do the right thing here and get the structure. We wouldn't object to this happening in order for [Cuccia] to be able to set up the firm in the appropriate way." RP 1250-52. Colange testified that she did not receive a similar request from Lefkowitz while Zipper was suspended. RP 1252.

B. Dakota Allowed Zipper to Associate with it and Engage in Activities Requiring Registration While Suspended and Statutorily Disqualified

The NAC found that Dakota permitted Zipper to associated with the firm while Zipper was suspended and statutorily disqualified, in violation of Article III, Section 3(b) of FINRA's By-Laws, NASD Rule 1031, FINRA Rule 8311, and FINRA Rule 2010 (third cause). These findings are well supported by the evidence, and the Commission should sustain them.

Article III, Section 3(b) of FINRA's By-Laws provides that "[n]o person shall become associated with a member, [or] continue to be associated with a member . . . if such person is or becomes subject to a disqualification . . . and no member shall be continued in membership, if any person associated with it is ineligible . . . under this subsection." Similarly, FINRA Rule 8311 provides that "[if] a person is subject to a suspension . . . or other disqualification, a member shall not allow such person to be associated with it in any capacity that it is inconsistent with the sanction imposed or disqualified status, including a clerical or ministerial capacity." A violation of FINRA Rule 8311 also is a violation of FINRA Rule 2010. *Ortiz*, 2008 SEC LEXIS 2401, at *23.

Dakota, through Lefkowitz, enabled Zipper to associate with the firm and engage in conduct requiring registration while he was suspended and statutorily disqualified. Throughout Zipper's suspension, Dakota continued operating out of Zipper's home, its principal place of business. All of Dakota's paper files, including its customer records, were in Zipper's living room. Dakota did not restrict Zipper's access to its trading system, and Dakota knew that Zipper could log in to the system from his Dakota computer, which the firm allowed him to keep in his home. Dakota did not restrict Zipper's access to its email system, either, and it knew that Zipper could use the system to communicate with customers regarding their accounts at the firm. Nevertheless, the firm never reviewed Zipper's emails to ensure that was not happening. As a

result of this conduct, Dakota violated Article III, Section 3(b) of FINRA's By-Laws, NASD Rule 1031, and FINRA Rules 8311 and 2010.¹⁸

C. Zipper and Dakota Falsified Dakota's Books and Records by Intentionally Misidentifying the Representative of Record on Trades

The NAC found that Zipper and Dakota violated FINRA Rules 4511 and 2010, and that Dakota also willfully violated Exchange Act Section 17(a) and Rule 17a-3 thereunder, by falsifying Dakota's books and records by intentionally misidentifying the representative of record for certain trades entered before, during, and after the Suspension Period (fifth cause). These findings are supported by the evidence, and the Commission should affirm them.

FINRA Rule 4511 requires every FINRA member firm to "make and preserve books and records as required under the FINRA rules, the Exchange Act and the applicable Exchange Act rules."¹⁹ Exchange Act Rule 17a-3 requires every FINRA member firm to make and keep current a memorandum of each brokerage order that includes, among other information, the identity of the person who entered or accepted the order on behalf of the customer. 17 C.F.R. § 240.17a-3(a)(6)(i). Implicit in the Commission's recordkeeping rules is a requirement that the information contained in a required book or record be accurate. *John M. Repine*, Exchange Act Release No. 54937, 2006 SEC LEXIS 2916, at *26 (Dec. 14, 2006). Causing a firm to enter false information in its books and records violates FINRA Rules 4511 and 2010. *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *48-49 (Sept. 24, 2015).

¹⁸ Dakota is responsible for Lefkowitz's misconduct in allowing Zipper to associate with the firm and engage in activities requiring registration while suspended and statutorily disqualified. See *Merrimac Corp. Sec., Inc.*, Exchange Act Release No. 86404, 2019 SEC LEXIS 1771, at *78 (July 17, 2019) ("[I]t is well-established that a firm may be held accountable for the misconduct of its associated persons because it is through such persons that a firm acts.").

¹⁹ FINRA Rule 4511 also applies to associated persons such as Zipper. See FINRA Rule 0140.

Zipper and Lefkowitz admit that they intentionally misidentified the representative of record on hundreds of trades entered in Dakota's system between February 22, 2016, and November 16, 2016, thereby causing Dakota to maintain inaccurate books and records. As a result of this conduct, Zipper and Dakota violated FINRA Rule 4511.

By maintaining inaccurate books and records, Dakota also violated Exchange Act Section 17(a) and Rule 17a-3 thereunder. Dakota's violation of Rule 17a-3 was willful. In this context, "willful" does not mean that Dakota intended to violate the Exchange Act or any Exchange Act rule. *See Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 180 (2d Cir. 1976) (holding that the term "willfully" does not require proof of evil intent). Rather, "[a] willful violation under the federal securities laws simply means that the person charged with the duty knows what he is doing." *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *41 (Nov. 9, 2012) (citing *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000)). At the time of Dakota's misconduct, either Zipper or Lefkowitz was serving as Dakota's president and CEO and had control over the firm. Zipper and Lefkowitz each admit that, while running the firm, they acted intentionally, and therefore willfully, in misidentifying the representative of record on Dakota's books and records. The NAC properly attributed Zipper's and Lefkowitz's willfulness to Dakota, and found that Dakota acted willfully. *See, e.g., Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *49 (Sept. 28, 2017) ("And since [applicant] is the only officer of [the firm] and controlled the company, his scienter can be imputed to [the firm] as well.").

In his defense, Zipper argues that Dakota's customers knew about the firm's practice of misidentifying the representative of record and approved it, and that no customer was harmed. This is no defense. The Commission has emphasized that the recordkeeping provisions of the

securities laws are “important both to monitor the financial status of broker-dealers and to protect public investors.” *First Colo. Fin. Servs. Co., Inc.*, 53 S.E.C. 843, 847 (Sept. 1998). Violations of these provisions “are serious, and adversely impact the monitoring function exercised by regulatory authorities.” *Id.* Dakota’s customers’ purported approval of the firm’s inaccurate books and records, even if true, has no bearing on Zipper’s and Dakota’s liability, nor does the alleged absence of customer harm. *See Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *68 n. 93 (Dec. 10, 2009) (“[W]e have held that FINRA’s authority to enforce its rules is independent of a customer’s decision not to complain.”).²⁰

D. Dakota Failed to Supervise Its Business and Associated Persons

The NAC found that Dakota failed to establish, maintain, and enforce a system of written supervisory procedures to supervise its business and associated persons, in violation of FINRA Rules 3110 and 2010. Dakota does not dispute that it engaged in this misconduct. Regardless, the evidence abundantly supports this finding.

FINRA Rule 3110(a) requires that each FINRA member establish and maintain a supervisory system to supervise the activities of each associated person that is reasonably designed to achieve compliance with the federal securities laws and FINRA rules. “The 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.

²⁰ Zipper objects to the use of the word “falsify” to describe his and Dakota’s misconduct because, he contends, “falsify” means “to alter so as to mislead,” and his customers were not misled. The record shows, however, that Zipper and Dakota intended to mislead regulators in order to avoid New Jersey’s registration requirements. Zipper and Dakota therefore falsified Dakota’s books and records by intentionally misidentifying the representative of record on certain transactions. *See, e.g., United States v. Rowland*, 826 F.3d 100, 108 (2d Cir. 2016) (“Dictionary definitions thus confirm that, in common usage, it is acceptable to say that someone ‘falsifies’ a document when he creates a document that misrepresents the truth.”).

1011, 1023-24 (2004), *aff'd*, 260 F. App'x 342 (2d Cir. 2008*). Final responsibility for proper supervision rests with the firm, and a supervisor's violation of a duty to supervise may be imputed to the firm. *Meyers Associates, L.P.*, Exchange Act Release No. 86193, 2019 SEC LEXIS 1626, at *30 (June 24, 2019). A violation of FINRA Rule 3110 is a violation of FINRA Rule 2010. *Ortiz*, 2008 SEC LEXIS 2401, at *23.

Dakota had WSPs relating to suspended and disqualified persons, but the firm failed to enforce them during the Suspension Period. Dakota's WSPs provided that Zipper, as a suspended and statutorily disqualified person, was not to "[h]ave direct or indirect contact with customers" or "give investment advice or counsel." RP 1671. The WSPs further provided that, during the Suspension Period, Zipper "will not be involved in the company's business." RP 1629. Yet Dakota did virtually nothing to keep Zipper from interceding in its business while he was suspended and statutorily disqualified. The firm continued to operate from its principal place of business in Zipper's home and left Zipper's Dakota computer, which could access the firm's trading system, in Zipper's home office. The firm made no effort whatsoever to restrict Zipper's access to its trading or email systems. Lefkowitz was responsible for reviewing the firm's emails during the Suspension Period, but he did not review Zipper's emails to ensure that Zipper was not using the firm's email system. Lefkowitz received copies of emails showing that Zipper was conducting Dakota's securities business, but failed to investigate or follow-up on these red flags.²¹

Dakota also failed to supervise the creation of its books and records between February 22, and November 16, 2016. Zipper and Lefkowitz each admit that, during that period, they intentionally misidentified the representative of record when entering hundreds of transactions in

²¹ See, e.g., RP 2081, 2145, 2177, 2187.

Dakota's trading system, which caused Dakota's books and records to be inaccurate with respect to those transactions. Zipper and Lefkowitz each was serving as Dakota's president, CEO, and CCO at the time he falsified the firm's books and records. As a result of this conduct, Dakota violated FINRA Rules 3110 and 2010.

E. The Sanctions Are Warranted and Are Neither Excessive Nor Oppressive

The Commission may eliminate, reduce, or alter a FINRA sanction only 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).²² 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 (the "Guidelines"). *See Steven Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *25 n.37 (Mar. 29, 2016).

The Commission should sustain the NAC's bar of Zipper and its expulsion of Dakota. The NAC considered the Guidelines, including the General Principles Applicable to All Sanction Determinations and the Principal Considerations in Determining Sanctions, and properly determined that these sanctions were appropriate.

In imposing sanctions in this case, the NAC properly considered Zipper's and Dakota's disciplinary histories an aggravating factor for all violations. *See Castle Sec. Corp.*, 58 S.E.C. 826, 836-37 (2005) (explaining that disciplinary history is a significant aggravating factor and an

²² Applicants do not argue, and the evidence does not show, that the sanctions impose an unnecessary burden on competition.

important consideration in weighing sanctions).²³ Most recently, and separate from the AWC at issue in this proceeding, in April 2016, FINRA sanctioned Zipper and Dakota for failing to supervise the firm's email communications and ensure those communications were preserved. RP 2337-2343. FINRA suspended Zipper in a principal capacity for one month and fined him \$10,000, and censured Dakota and fined it \$10,000 for this misconduct. In March 2010, FINRA censured Dakota and fined it \$5,000 for failing to retain and review email communications. RP 2329-2335. In November 2009, the Florida Office of Financial Regulation sanctioned Zipper and Dakota for failing to conduct independent testing of Dakota's anti-money laundering compliance program. RP 2319-2327. Zipper and Dakota were fined \$5,000, jointly and severally. In 1995, the Florida Department of Banking and Finance fined Zipper \$1,000 for failing to timely notify the department about an NASD action. RP 2309-2317. The year before, NASD censured Zipper, fined him \$5,000, and suspended him for five days for failing to comply with an arbitration award. RP 2305-08. And in 1989, NASD censured Zipper and fined him \$1,000 for effecting transactions in non-exempt securities while failing to maintain sufficient net capital. RP 1404-1407, 2299-2304.

The NAC also considered that Zipper and Dakota continued to be intertwined, and Zipper continues to be involved in Dakota's business. Although Zipper sold his interest in Dakota, control of the firm remains in the hands of his immediate family, as Zipper's wife now owns 90% of Dakota's stock. RP 964-65, 1295. Additionally, Gary Cuccia, Dakota's CFO and CCO at the time of the hearing, testified that, shortly before the hearing, he shared Dakota's financial results with Zipper, even though Zipper no longer owned an interest in the firm. RP 596-597.

²³ See also *Meyers Associates*, 2019 SEC LEXIS 1626, at *69 ("This history evidences a reckless disregard for regulatory and supervisory requirements that justifies heightened sanctions to attempt to prevent future misconduct.").

Cuccia further admitted he did not share those results with Zipper's wife. RP 596-597. Cuccia also testified that Zipper had visited Dakota's office just a few weeks before the hearing to discuss the firm's audit. RP 1313.

The NAC determined that Zipper's continued involvement with Dakota presents a substantial risk that, regardless of whether Zipper is prohibited from associating with Dakota in the future, he will cause Dakota to violate FINRA rules. Indeed, the applicants admit that, in the past, Zipper has used his influence over Dakota to that end:

Bruce Zipper was Dakota Securities and Dakota Securities was Bruce Zipper. It seems so totally unfair that Dakota Securities had to lose their ability to stay in business because Dakota Securities allowed Bruce Zipper to do what FINRA says he allegedly did. This is so blatantly unfair it defies logic to even explain. *What did FINRA expect Dakota Securities to do? Say no to the one person who ran the company[?]*

Applicants' Brief at 8 (emphasis added). The NAC properly considered the possibility that, if Dakota is allowed to continue operating as a FINRA member in the future, no one at the firm will be able to "[s]ay no to the one person who [runs] the company."

1. Associating With Dakota and Engaging In Activities Requiring Registration While Suspended and Statutorily Disqualified

The NAC barred Zipper for associating with Dakota and engaging in activities requiring registration while suspended and statutorily disqualified (first and second causes).²⁴ The NAC expelled Dakota for allowing Zipper to engage in this misconduct (third cause). The

²⁴ The NAC appropriately imposed a unitary sanction on Zipper for causes one and two because the violations under both are attributable to Zipper's violation of the AWC. *See Dep't of Enforcement v. Riemer*, Complaint No. 2013038986001, 2017 FINRA Discip. LEXIS 38, at *21 n.6 (FINRA NAC Oct. 5, 2017), *aff'd*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022 (Oct. 31, 2018) ("We agree with the [h]earing [p]anel's imposition of a unitary sanction for [respondent's] violations given that they are based on related misconduct.").

Commission should affirm these sanctions, as they are amply warranted given Zipper's blatant disregard of the terms of his suspension.

For associating with a FINRA member firm while statutorily disqualified, or allowing a statutorily disqualified person to do so, the Guidelines recommend a fine of \$5,000 to \$73,000 each for the individual and the firm and, in egregious cases, a bar for the individual and a suspension of up to two years for the firm.²⁵ The principal considerations are the nature and extent of the disqualified person's activities and responsibilities, whether a Form MC-400 application was pending, and whether disqualification resulted from financial and/or securities misconduct.²⁶ There are no specific guidelines for associating with a FINRA member firm while suspended, or allowing a suspended person to do so.

The NAC determined that Zipper's and Dakota's violations of FINRA's membership and registration rules were egregious. Zipper's association with Dakota during the Suspension Period was not an isolated incident—it was persistent and continuous. Moreover, Zipper's activities during the Suspension Period were not limited to technical or administrative matters; he repeatedly discussed particular securities with his customers, and even recommended particular securities transactions to them, while also addressing and resolving key issues concerning the firm's securities business. The NAC found that Zipper's and Dakota's conduct reflect an intentional flouting and disregard of their obligations under FINRA's rules.

The NAC also found aggravating Zipper's refusal to acknowledge his wrongdoing or accept responsibility for it. *See Castle Sec. Corp.*, 58 S.E.C. at 835 (finding that it was proper for FINRA to consider as an aggravating factor that “instead of accepting responsibility for its

²⁵ *FINRA Sanction Guidelines* 43 (2017 ed.), https://www.finra.org/sites/default/files/2017_Sanction_Guidelines.pdf [hereinafter, “Guidelines”].

²⁶ *Id.* at 43.

violations, [applicant] sought to shift the blame elsewhere”). Zipper argued (and continues to argue) that he believed he could communicate with customers while he was suspended because he was prohibited from associating with any FINRA member, and customers are not FINRA members. But the evidence shows that Zipper fully understood the terms of his suspension, and specifically understood that he could not communicate with customers during the Suspension Period (as set forth in Dakota’s own WSPs). The NAC also rejected Zipper’s effort to shift blame for his misconduct to FINRA staff by insisting that the staff granted permission for Zipper to associate with Dakota while suspended in all capacities and statutorily disqualified. The NAC found no credible evidence in the record to support that claim.

The NAC found that Zipper’s and Dakota’s conduct after Zipper’s suspension ended also was aggravating. As explained above, because FINRA denied Dakota’s MC-400 application, Zipper could not associate with Dakota, even after his suspension ended, due to his ongoing statutory disqualification. FINRA denied Dakota’s MC-400 because it found that Zipper had associated with the firm while he was suspended. Nevertheless, Zipper continued associating with Dakota for at least one month after receiving notice of FINRA’s decision, and Dakota allowed him to do so. In other words, *after* Zipper and Dakota learned that FINRA had denied the MC-400 precisely *because* Zipper had violated the terms of his suspension by associating with Dakota while suspended and statutorily disqualified, Zipper *continued* to associate with Dakota while he was statutorily disqualified.

Zipper argues that the sanctions the NAC imposed are too severe because “there was not a penny lost by any client. There was not a single complaint filed against Zipper or Dakota Securities.” Applicants’ Brief at 7. But the absence of customer complaints or losses is not mitigating. *Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *27

(Nov. 9, 2009), *aff'd*, 416 F. App'x 95 (2d Cir. 2011) (“The fact that many of the customers did not lose money and did not complain about the violations does not further mitigate [respondent’s] misconduct.”).

The NAC determined that, given Zipper’s and Dakota’s conduct during Zipper’s prior suspension and statutory disqualification, there is no reason to believe that Zipper or Dakota would comply with the terms of another suspension, and imposing another suspension on Zipper or Dakota would be futile. Therefore, the only remedial sanctions were to bar Zipper and expel Dakota from FINRA membership.

2. Intentionally Misidentifying Representative of Record on Trades Entered in Dakota’s Trading System

The NAC separately barred Zipper and expelled Dakota for intentionally falsifying Dakota’s books and records (fifth cause). The Commission should affirm this sanction.

For violations of FINRA Rule 4511 and Exchange Act Rule 17a-3, the Guidelines recommend a fine of \$1,000 to \$15,000, and where aggravating factors predominate, a fine of \$10,000 to \$146,000 or higher if significant aggravating factors predominate.²⁷ For individuals, the Guidelines recommend a suspension in any or all capacities of 10 business days to three months, and where aggravating factors predominate, a suspension of up to two years or a bar.²⁸ For firms, where aggravating factors predominate, the Guidelines recommend a suspension of ten business days up to two years or expulsion.²⁹ The principal considerations include (1) the nature and materiality of the inaccurate or missing information; (2) the nature, proportion, and

²⁷ *Id.* at 29.

²⁸ *Id.*

²⁹ *Id.*

size of the firm records at issue; (3) whether inaccurate or missing information was omitted intentionally, recklessly, or as the result of negligence; (4) whether the violations occurred over an extended period of time or involved a pattern of misconduct; and (5) whether the violations allowed other misconduct to occur or escape detection.³⁰

The NAC found that Zipper's and Dakota's violations were egregious. Zipper was serving as Dakota's president, CEO, and CCO at the time he intentionally misidentified the representative of record on trades he entered for customers. Lefkowitz continued this practice when he took over as president, CEO, and CCO of the firm during the Suspension Period. Both Zipper and Lefkowitz admit they falsified Dakota's books and records to avoid the state of New Jersey's registration requirements. As a result of Zipper's and Lefkowitz's misconduct, Dakota's books and records were inaccurate with respect to hundreds of trades entered between February and November 2016.

The NAC determined that Zipper's and Dakota's misconduct in falsifying the firm's books and records was intentional, pervasive, and carried out with the specific intent to mislead regulators. Therefore, the NAC barred Zipper and expelled Dakota. The Commission should sustain these sanctions, as they are neither excessive nor oppressive and fully warranted under the circumstances.

3. Failing to Supervise

The NAC separately expelled Dakota for failing to establish, maintain, and enforce a system of written supervisory procedures to supervise its business and associated persons. The Commission should affirm this sanction.

³⁰

Id.

Because Dakota's supervisory failures were significant, occurred over an extended period of time, and involved the firm's failure to implement or use supervisory procedures that existed, the NAC applied the Guidelines for systemic supervisory failures.³¹ The Guidelines recommend a fine of \$10,000 to \$292,000 and, where aggravating factors predominate, a suspension of up to two years or expulsion.³² The principal considerations are (1) whether the deficiencies allowed violative conduct to occur or escape detection; (2) whether the firm failed to timely correct or address deficiencies once identified, failed to respond to prior warnings from FINRA or another regulator, or failed to respond reasonably to other "red flag" warnings; (3) whether the firm appropriately allocated its resources to prevent and detect the supervisory failure; (4) the number and type of customers, investors, or market participants affected by the deficiencies; (5) the number and dollar value of the transactions not adequately supervised; (6) the nature, extent, size, character, and complexity of the activities or functions not adequately supervised; (7) the extent to which the deficiencies affected market integrity, market transparency, the accuracy of regulatory reports, or the dissemination of trade or other regulatory information; and (8) the quality of controls or procedures available to the supervisors and the degree to which the supervisors implemented them.³³

The NAC found, and the evidence strongly shows, that Dakota's violations were egregious. The firm's supervisory violations enabled Zipper to continue associating with it, and engage in activities requiring registration, throughout his three-month suspension. Dakota missed numerous red flags that should have alerted the firm to Zipper's misconduct. For

³¹ *Id.* at 106-07.

³² *Id.*

³³ *Id.*

example, Dakota failed to supervise and adequately review email communications during the Suspension Period, even though FINRA previously had sanctioned the firm for failing to do just that. And after Dakota received FINRA's denial of its MC-400, which expressly stated that Zipper could no longer associate with the firm, Dakota continued to allow Zipper to do so. Dakota's extensive supervisory failures permitted violative conduct to occur or escape detection.

The NAC also found that Dakota's supervisory violations enabled Zipper and Lefkowitz to falsify the firm's books and records for almost an entire year. Zipper and Lefkowitz purposely misidentified the representative of record on hundreds of transactions entered between February and November 2016. Dakota's failure to adapt and implement procedures to ensure the accuracy of its books and records reflect a failure to allocate resources to prevent or detect supervisory failures.

Considering Dakota's disciplinary history of supervisory violations, its egregious misconduct here, and the absence of any mitigating factors, the NAC properly concluded that expulsion is the only appropriate sanction for this violation.

F. There Is No Evidence of Bias and FINRA's Proceedings Were Fair

Zipper argues that the sanctions imposed on him and Dakota are "unfair, unwarranted and filled with bias from FINRA[.]" Applicants' Brief at 1. As explained above, the sanctions imposed for each violation are appropriately remedial and neither excessive nor oppressive. Moreover, Zipper does not identify any evidence of actual bias. Instead, Zipper contends that the sanction imposed under the AWC "was the first indication that there was bias being shown by FINRA[.]" Applicants' Brief at 1. But Zipper voluntarily executed the AWC, and in doing so, specifically waived the right to claim bias or prejudice by FINRA. RP 2439. Zipper also claims that FINRA's initial denial of his request to hold the hearing on his MC-400 application in Florida rather than Washington, D.C., is evidence of FINRA's bias. But Zipper concedes that

FINRA quickly reversed that decision and agreed to hold that hearing in its Boca Raton, Florida office to accommodate him.³⁴ Zipper further contends that FINRA’s decision to charge him with these violations also is evidence of FINRA’s bias, but as explained above, each of the violations is well supported by evidence.

Finally, Zipper complains that the sanctions imposed here are unfair when compared to misconduct purportedly engaged in by others in the securities industry. Applicants’ Brief at 8. Sanctions, however, are imposed depending upon the facts and circumstances of each particular case. *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 SEC LEXIS 3225, at *41 (Sept. 16, 2011) (“[W]e consistently have held that the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases.”). The evidence overwhelmingly demonstrates that barring Zipper and expelling Dakota for their egregious and intentional misconduct are appropriate, and in fact, necessary, under the circumstances.

IV. Conclusion

The NAC’s findings of violations and the sanctions it imposed are fully supported by the record and appropriate under the facts and circumstances of this case. The Commission therefore should dismiss applicants’ application for review, sustain FINRA’s disciplinary action, and affirm the sanctions imposed by the NAC.

³⁴ Zipper does not explain how any alleged bias in the FINRA proceeding on Dakota’s MC-400 (which was denied by the NAC and affirmed by the Commission) is connected to the current proceeding. Regardless, the documents relating to Zipper’s request to move the hearing location in that matter are part of the record in Zipper’s appeal to the Commission of FINRA’s denial of his MC-400 application. Contrary to Zipper’s claims, they do not evidence bias. Rather, they show that Zipper initially requested to move the hearing to Florida because of ██████████ ██████████ involved in travelling to Washington, D.C. FINRA denied Zipper’s request “based upon the information currently” available. Once Zipper revealed to FINRA that he was caring for his wife, however, FINRA agreed to reschedule the hearing and hold it in Boca Raton.

Respectfully submitted,

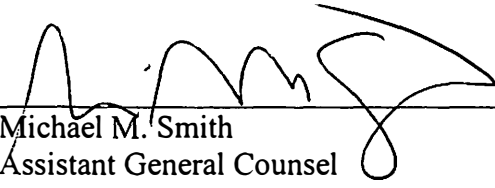
A handwritten signature in black ink, appearing to read "Michael M. Smith", is written over a horizontal line.

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Dated: July 24, 2019

CERTIFICATE OF COMPLIANCE

I, Michael M. Smith, certify that this brief complies with SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 10,902 words.



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CERTIFICATE OF SERVICE

I, Michael M. Smith, certify that on this 24th day of July, 2019, I caused the original and three copies of the Brief of FINRA In Opposition To Application For Review in the matter of the Application for Review of Bruce Zipper and Dakota Securities International, Inc., Administrative Proceeding No. 3-19138, to be served by messenger on:

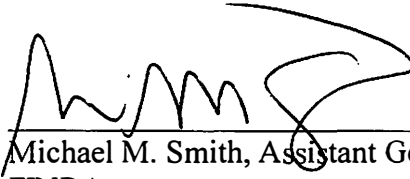
Vanessa A. Countryman
Secretary
Securities and Exchange Commission
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Room 10915
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On this date, I also caused copies of the brief to be served via overnight FedEx and first-class mail on:

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Different methods of service were used because courier service could not be provided to the Applicants.

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