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May 28, 2020

VIA ELECTRONIC MAIL

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
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RE: In the Matter of the Application of Robert R. Tweed
Administrative Proceeding No. 3-19652

Dear Ms. Countryman:

Enclosed for filing in the above-referenced matter, please find FINRA's Brief in Opposition to the Application for Review. Please contact me at (202)728-8177 if you have any questions. Thank you.

Sincerely,

Michael M. Smith

Enclosures

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

In the Matter of the Application of

Robert R. Tweed

For Review of Disciplinary Action Taken by

FINRA

Administrative Proceeding File No. 3-19652

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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May 28, 2020

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BEFORE THE
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In the Matter of the Application of

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For Review of Disciplinary Action Taken by

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Administrative Proceeding File No. 3-19652

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

I. Introduction

Robert R. Tweed appeals a decision by FINRA's National Adjudicatory Council (the "NAC") finding that he violated Sections 17(a)(2) and (3) of the Securities Act of 1933 (the "Securities Act") and FINRA Rule 2010, and barring him for that misconduct. Tweed does not substantively challenge the NAC's findings of violation. Instead, he contends FINRA's disciplinary proceeding was untimely and the bar the NAC imposed is excessive. The NAC's decision is supported by the record and the Commission should sustain it.

Tweed misrepresented or failed to disclose material information while soliciting investments in Athenian Fund, L.P. ("Athenian"), a private investment fund he managed and controlled. Specifically, Tweed failed to disclose or misrepresented all of the fees and expenses associated with an investment in Athenian, his right to receive a portion of those fees and expenses, and how Athenian would use investors' money, including the identity of the person who would have control of it.

Tweed does not substantively dispute the NAC's findings of violation, but instead argues the Commission should dismiss the charges against him because, he claims, they are barred by the five-year statute of limitations under 28 U.S.C. § 2462, and he was unfairly prejudiced by the purported delay in the filing of the complaint. Neither argument has merit. The federal statute of limitations applies generally to federal government actions—not FINRA disciplinary actions. The Commission repeatedly has held that FINRA is not subject to any statute of limitations because it is not a governmental entity. There is no reason why the Commission should diverge from this established precedent here.

There is no evidence that FINRA unduly delayed this proceeding, or that Tweed was unfairly prejudiced in any way. To the contrary, any delay lays at Tweed's feet. Tweed's violations occurred in 2010, but he concealed his misconduct until 2014, when an SEC examination of his office uncovered it. As soon as FINRA's Department of Enforcement ("Enforcement") learned about Tweed's misconduct, it promptly began investigating. Enforcement filed its complaint about three years later, in April 2017. There was no undue delay by FINRA. While Tweed makes sweeping claims of unfair prejudice, he does not identify a single document or witness that was unavailable to him due to the passage of time, nor does he identify any material issue decided against him as a result of the unavailability of any evidence. Tweed's claims of unfair prejudice are groundless, and the Commission should reject them.

The bar the NAC imposed on Tweed is appropriately remedial because Tweed poses a danger to the investing public. Tweed sold Athenian to investors as a liquid investment in equities that would be managed using a sophisticated quantitative trading system. That was not true. In early 2010, Tweed entrusted Athenian's money to a person named Eric Richardson, who Tweed suspected of having questionable business dealings. Tweed did not disclose Richardson's

involvement to Athenian's existing investors, nor did he disclose it in the offering documents he was using to solicit new investors. A few months later, Richardson secretly invested almost half of Athenian's capital, $650,000, in a gold-dust mining operation in Uganda. When Tweed tried to get Athenian's money back from Richardson in the fall of 2010, Richardson told him that $650,000 of Athenian's money was "locked up" in a "credit facility" and could not be returned for several months. Tweed did nothing to verify what Richardson had told him, nor did he tell investors their supposedly liquid investment was now "locked up." Instead, having already quietly withdrawn all of his own money from Athenian, Tweed began making redemptions for certain investors without telling the others. In early 2011, without telling investors, Tweed invested $200,000 of Athenian's money in a six-month promissory note issued by one of his clients, a software startup in which Tweed previously had invested his own money. The company never made a payment on the note and eventually filed for bankruptcy. Tweed concealed these facts for four years.

By the time Tweed's malfeasance was uncovered in 2014, Athenian had lost more than $1 million, but the loss was not shared by all of its investors. Tweed made sure that he, his stepson, and certain other investors received all of their money back. In fact, Tweed's stepson got more money back from Athenian than he invested, even though the fund never turned a profit. A few other investors received some of their money back. The remaining investors lost their entire investments. Tweed's conduct in managing Athenian demonstrated total disregard for the interests of Athenian's investors, and the NAC determined that a bar is necessary to protect the investing public.

The NAC's findings of violation are supported by the record and the bar it imposed is appropriately remedial. The Commission should sustain the NAC's decision.

II. Factual Background

A. Robert R. Tweed

Tweed was registered with CapWest Securities, Inc., as a general securities principal and a general securities representative between November 2009 and March 2010, when he engaged in the misconduct at issue. RP 249.[1] During that time, Tweed also owned and controlled an investment advisor, Tweed Financial, Inc. RP 346.

B. Tweed Forms Athenian and Agrees to Invest Its Assets in Quant Pool

1. Tweed Forms Athenian

Tweed formed Athenian in 2008. RP 249. Up until then, Tweed's business had focused mainly on real estate-based investments. RP 718-19. Tweed had no experience forming or managing private investment funds. RP 423, 588. Nevertheless, he made Tweed Financial Athenian's general partner. Through Tweed's control of Tweed Financial, he controlled Athenian. RP 346.

2. Tweed Agrees to Invest All of Athenian's Assets in Quant Pool

When Tweed formed Athenian, he had been following the progress of a company called Portfolio Management International, Inc. ("PMI"), for several years. RP 828. PMI and its manager, Barry Hunter (the "PMI Manager"), had developed a proprietary, algorithmic trading system (the "PMI System") that Tweed described as the "holy grail." RP 720. PMI claimed its system could trade equities and produce "superior returns" with "substantially reduced risk." RP

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[1] "RP" refers to the page number in the certified record FINRA filed with the Commission.

892. Tweed wanted to raise money from investors through Athenian and have PMI manage it using the PMI System. RP 723.

Rather than managing Athenian's money directly, PMI wanted Tweed to invest it in PMI's own private investment fund, PMI Quant Pool I, LLC ("Quant Pool"). Athenian's money would be combined with money from other private investment funds, and PMI would manage all of the money using the PMI System. RP 727-28. In this arrangement, the smaller funds, like Athenian, would be the "feeder" funds, and Quant Pool would be the "master" fund. *Id.*

Quant Pool's offering documents stated that investors would pay PMI a monthly management fee at an annualized rate of five percent of the value of their investments in the fund. RP 995.

In or around November 2009, Tweed agreed to invest all of the money raised by Athenian in Quant Pool.[2] *See* RP 1257-1320.

3. Tweed Hires an Attorney to Draft Athenian's Offering Documents

Tweed hired an attorney (the "Athenian Attorney") to serve as Athenian's legal counsel. RP 372. The Athenian Attorney completed the offering documents for Athenian, including a private placement memorandum ("PPM") and a partnership agreement, in November 2009. RP 1093-1210.

The Athenian PPM described how Athenian's assets would be invested in Quant Pool and managed by PMI using the PMI System. The PPM stated that Athenian "was formed to pool investment funds of its investors . . . for the purpose of allocating one hundred percent (100%) of [its] assets to PMI Quant Pool 1, LLC . . . promoted and operated by Portfolio Manager

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[2] Athenian had not yet raised any money from investors.

International, LLC[.]" RP 1097. It further stated that Quant Pool's "competitive advantage" was "based on [its] use of a quantitative trading platform that acts to actively manage the long and short side price cycles in each of the approximately 150 highly liquid securities which collectively make up [Quant Pool's] investment portfolio." RP 1098. The PPM identified the PMI Manager as "the managing member and controlling principal" of PMI. RP 1131. It touted the PMI Manager's experience as an "entrepreneur . . . at the forefront of technology for the past 25 years," and described him as "uniquely qualified to operate a quantitative trading system." RP 1131.

As for fees, the Athenian PPM stated that investors would pay a management fee and a "performance allocation." Investors would pay the management fee monthly at an annualized rate of three-and-a-half percent of the value of their investments in Athenian, and would pay the performance allocation quarterly based on the profitability of their investments compared with a common stock market index. RP 1116-17. The PPM stated that Tweed Financial and PMI would share the management fee and performance allocation, with PMI receiving "[t]wo-thirds (2.5%)" of the management fee and half of the performance allocation, and Tweed Financial receiving the rest. RP 1116-17. The Athenian PPM did not disclose Quant Pool's five percent management fee.

4. Tweed Solicits Investors Using the Athenian Offering Documents

Tweed began using the Athenian PPM to solicit investors in late 2009. Tweed explicitly represented to investors that an investment in Athenian would be liquid. RP 380-81. Indeed, one Athenian investor testified that Tweed told him that an investment in Athenian "counted as cash . . . because the money could be withdrawn whenever we needed it." RP 632.

The first two investors were Tweed and his stepson, Chris Masterson, who invested $65,000 and $50,000, respectively. RP 2461. By January 28, 2010, Tweed had raised almost $1 million from 14 investors (including Tweed and his stepson). RP 2461.

C. Tweed Agrees to Invest Athenian's Assets in QAMF without Revising the Athenian PPM

1. PMI Tells Tweed Quant Pool Is Dissolving

On January 29, 2010, the PMI Manager informed Tweed that PMI was dissolving Quant Pool. RP 1321. PMI returned all of Athenian's capital a few days later.

Tweed did not revise the Athenian PPM to reflect Quant Pool's dissolution. Instead, he continued using the original Athenian PPM to solicit investors. RP 252. Between January 30, 2010, and March 7, 2010, Tweed raised almost $220,000 from four investors who received the inaccurate PPM. RP 2461.

2. Tweed Invests Athenian's Assets in QAMF

When the PMI Manager told Tweed Quant Pool was dissolving, he also told him that a new master fund to replace it was in the works. RP 1322. In an email to Tweed, the PMI Manager wrote that the new master fund would not be managed by PMI, but by Eric Richardson. RP 1322. The PMI Manager wrote that PMI "would be given third party trading authorization to trade the fund" using the PMI System. RP 1322.

Tweed was concerned when he learned Richardson was involved in the new master fund. Tweed testified he had met Richardson several times. RP 388. Although Richardson was registered with FINRA and had no disciplinary history, Tweed knew Richardson had business dealings with a person named Chris Hales. RP 390-91, 764. Tweed explained that he had "heard a few rumors" about Hales, that he had "r[u]n into" him "socially," and that he "didn't really like him." RP 764. When asked during the hearing whether Hales "was a person that you

would not want connected to the manager of a fund that you were going to invest in," Tweed responded, "There was definitely a question there." RP 391.[3]

The PMI Manager was aware of Tweed's concerns about Richardson and tried to assuage them. In his email to Tweed, the PMI Manager wrote that he knew Tweed "had some questions about Eric [Richardson], but . . . I have been working closely with Eric over the past several weeks and have great confidence in his abilities. He has disconnected from Chris Hales and expressed his desire to be part of the PMI team." RP 1322.

Tweed considered hiring PMI to trade Athenian's assets directly rather than investing in Richardson's new master fund. To do so, however, Tweed needed to open a brokerage account for Athenian at TradeStation Securities, Inc. According to Tweed, PMI told him that the PMI System would not function properly on any other firm's platform. RP 354. In early February 2010, Tweed's assistant applied for an account for Athenian at TradeStation, but TradeStation rejected the application due to pending customer complaints about Tweed. RP 364.

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[3] Tweed's concerns about Hales and Richardson were well founded. In March 2010, Hales was indicted on federal charges of mail fraud, wire fraud, bank fraud, and money laundering in connection with fraudulent purchases of real estate. He eventually pleaded guilty to bank fraud and was sentenced to seven years in prison and ordered to pay $12.7 million in restitution. In May 2012, the U.S. Commodity Futures Trading Commission sued Richardson, Hales, and their company, Bentley Equities, LLC, in federal court alleging fraud and misappropriation in connection with commodity futures trading. The CFTC alleged that, from April 2009 through August 2010, the defendants fraudulently solicited and accepted more than $1 million from investors to trade commodity futures in a commodity pool account and in individual managed accounts. The court entered an order for more than $2.7 million in disgorgement and civil and monetary penalties against Bentley Equities, Hales, and Richardson. In July 2012, Richardson pleaded guilty to one count of bank fraud in connection with his and Hales's involvement in a scheme in February 2010 to obtain fraudulent automobile loans. *See* RP 1643-1707. There is no evidence that Tweed was aware of this misconduct before 2012, or that any of this misconduct was related to Athenian or either of its master funds.

In late February, Tweed decided to move forward with an investment in Richardson's master fund, Quantitative Analytics Master Fund, LLC ("QAMF"). When asked at the hearing whether, by that time, he had done anything to verify that Richardson had "disconnected" from Hales, Tweed replied, "I mean, I talked to—you know what? I don't remember exactly." RP 390. When asked whether he had talked to Hales, Tweed replied, "No." RP 391. When asked whether he had talked to Richardson about Hales, Tweed replied, "I don't remember." *Id.*

In late February 2010, Richardson sent an email to Tweed, Tweed's assistant, and the PMI Manager attaching QAMF's offering documents. RP 1509. QAMF's offering documents stated that the fund would be managed by the investment advisor Richardson controlled, Richardson Performance Management and Investments Company LLC ("RPM"), and that it was "highly likely and anticipated that most of [QAMF's] capital will be dedicated to the [PMI System] operated by [PMI]." RP 1350-51. As for fees, QAMF's offering documents stated that investors would pay RPM a monthly management fee at an annualized rate of three-and-a-half percent of the value of their investments in QAMF and a quarterly performance allocation based on the profitability of their investments. RP 1350.

The next business day, Tweed's assistant sent an email to the Athenian Attorney attaching QAMF's offering documents and asking her to revise Athenian's offering documents. RP 1513. In her email, Tweed's assistant wrote, "Rusty [Tweed] is requesting more revisions. We were not able to open our own account at Trade Station [sic], so we[']re now part of the enclosed feeder [sic] fund that already has an account established with TradeStation." RP 1513. Athenian's offering documents, however, were never revised. RP 252.

Sometime between March 4 and March 8, 2010, Tweed executed QAMF's subscription agreement on Athenian's behalf. RP 395; 1495-96. Around that time, Tweed also executed a

"Consulting, Side and Advisory Agreement" with RPM (the "Consulting Agreement"). RP 1515-18. Under the Consulting Agreement, in exchange for investing Athenian's assets in QAMF, Tweed Financial would receive "Success Fee Compensation equal to forty-five percent (45%) of net proceeds received by" RPM as a result of Athenian's investment. RP 1515-16.

Tweed continued using the Athenian PPM to solicit investors without making any changes to disclose that Athenian's assets would now be invested in QAMF and controlled by Richardson rather than being invested in Quant Pool and controlled by the PMI Manager. RP 252. Between March 8, 2010, and March 24, 2010, Tweed raised more than $500,000 from six investors. RP 2461. By the end of March 2010, Tweed had raised a total of $1,700,500 from 24 investors (including Tweed and his stepson). RP 2461. Tweed invested all of that money in QAMF. Athenian was QAMF's largest investor and its only outside investor.[4]

D. $1 Million of Athenian's Assets Are Lost

1. QAMF's Manager Invests Athenian's Capital in the "Credit Facility"

In early May 2010, Tweed learned that PMI had stopped trading QAMF's capital because of a problem with the PMI System. RP 1561-62. All of the securities in QAMF's account were liquidated. RP 1726.

In May or June 2010, Richardson told Tweed that he had placed some of QAMF's cash in a "credit facility" so it could earn interest while PMI was fixing the PMI System. RP 1726. Tweed testified he assumed the credit facility was a short-term, liquid investment through a bank, but admitted he did nothing to verify his assumption; he did not review the credit facility contract or any other documents relating to the transaction. RP 465-66.

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[4] According to QAMF's financial statements, RPM invested $100,000 in QAMF. QAMF had no investors other than Athenian and RPM. RP 1585-1604.

Around this time, Tweed withdrew all of his own money from Athenian. In late June 2010, Tweed asked Richardson to return $165,000 of Athenian's capital. RP 2339-40; 2342-43; 2465. When Richardson returned the money, Tweed used it to fully redeem his investment ($65,000) and those of two other investors ($50,000 each). RP 2463, 2465.

2. QAMF's Manager Tells Tweed Athenian's Capital Is "Locked Up" and Cannot Be Returned for Six Months

By September 2010, PMI still had not resumed trading QAMF's capital, and Tweed decided it was time to wind down Athenian and distribute its assets to its investors. RP 1726.

Tweed was unable to wind down Athenian, however, because QAMF was unable to return all of Athenian's money. According to Tweed, when he asked Richardson to return Athenian's investment in QAMF, Richardson told him he had placed $650,000 of Athenian's cash in the purported credit facility, and this money would be "locked up" until June 2011. RP 1726. Tweed testified he was surprised and angry when Richardson told him this because he believed it violated the terms of QAMF's offering documents. RP 466, 473.

Tweed and Richardson agreed that QAMF would immediately return Athenian's "current liquid assets," and return the balance of Athenian's money when the credit facility expired in June 2011. RP 1631. In September and October 2010, QAMF returned about $760,000 to Athenian. RP 2465.[5]

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[5] Richardson's math did not add up. Athenian invested $1,700,500 in QAMF. RP 2465. Richardson invested $650,000 in the purported credit facility and returned almost $925,000 to Athenian, leaving about $125,000 unaccounted for. When Tweed was asked at the hearing whether he did anything to verify that Richardson "had returned all of the Athenian Fund money except for $650,000," Tweed responded "I don't know." RP 477. When Tweed was asked what happened to the missing money, he responded, "this was the first time I was made aware that there was any discrepancy," and "nothing has ever come up that we're missing this 100-and-whatever-it-was-thousand dollars. . . . [T]his is the first time I heard about it." RP 786-87.

Over the next several months, Tweed used some of that cash to make redemptions for certain investors who requested them, including his stepson, who received a partial redemption of $25,000, half of his initial investment, in November 2010. RP 2463.

3. Tweed Uses $200,000 of Athenian's Capital to Buy a Promissory Note Issued by Teamwork Retail

In March 2011, Tweed used $200,000 of Athenian's money to buy a six-month promissory note issued by Teamwork Retail, LLC, an early-stage software company that was his client. RP 505-06; 1726-27. Tweed claimed he was simply trying to generate income to cover Athenian's expenses until QAMF returned the rest of Athenian's money, but he admitted he already had invested his own money in Teamwork Retail and that he had "assisted Teamwork Retail with certain capital-raising activities." *Id.*

4. QAMF's Manager Tells Tweed Athenian's Capital Is "Locked Up" for Another Year

When June 2011 arrived, QAMF still could not return Athenian's $650,000. Richardson told Tweed the borrower had exercised its option to extend the purported credit facility for another year. RP 752.

Over the next several months, Tweed continued making redemptions for certain investors who requested them. Between June 2011 and September 2011, Tweed returned approximately $80,000 to investors, including his stepson, who received another partial redemption of $12,000 in June 2011. RP 2463.

5. Teamwork Retail Defaults; Tweed Learns QAMF's Manager Actually Invested Athenian's Capital in a Gold-Dust Mining Operation

By September 2011, Teamwork Retail had defaulted on its promissory note to Athenian without making any payments. RP 506.

By November 2011, Tweed knew that Richardson had lied about the credit facility, and that he had actually used Athenian's $650,000 to finance a gold-dust mining operation in Ghana. Tweed also knew Richardson was having trouble getting Athenian's money back. In an email to one of Richardson's business associates involved in the transaction, Tweed wrote, "I just need to know that the money will actually be released Dec. 4th. Every conversation we've had [with the borrower], the date keeps moving back 30 days, we started @ Sept. [W]e need to either get some returns or get the money back!!!" RP 1636.

Despite the uncertainty over the whereabouts of half of Athenian's money, Tweed continued making redemptions for certain investors who requested them. In December 2011, Tweed returned approximately $105,000 to investors. RP 2463.

6. Athenian Runs Out of Cash

By January 2012, Athenian's cash had dwindled to the point that Tweed could no longer make a redemption for every investor who asked. In late January 2012, one investor sent a letter asking Tweed to redeem her entire $100,000 investment in Athenian. RP 2352. A few days later, she followed up with an email to Tweed asking him to confirm receipt of her letter. RP 2353-54. Tweed responded by email the next day, writing, "Yes, I got the letter and no problem, we'll make sure your funds are redeemed." RP 2353. Tweed never returned any money to her. RP 543.[6]

Tweed did manage, however, to return money to several other investors after January 2012, including his stepson, who received the remainder of his Athenian investment, $13,000,

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[6] This investor continued seeking information from Tweed about her investment in Athenian for the next two years. RP 2355-58.

plus an additional $103.25, in February 2012.[7] RP 2463. Another investor received a redemption of almost $100,000 (99% of his initial investment) in February 2012. RP 2463. In total, between February and June 2012, Tweed returned approximately $123,000 to certain investors. RP 2463. There were no further redemptions.

7. QAMF's Manager Pleads Guilty to Bank Fraud

In July 2012, Richardson told Tweed he would be pleading guilty to felony bank fraud in a criminal matter unrelated to QAMF. RP 489-92. In a statement filed in federal court, Richardson admitted that, in February 2010, he fraudulently obtained an automobile loan from a bank and used the proceeds to pay personal expenses. RP 1646.

With Richardson incapacitated, Tweed took over efforts to collect the $650,000 of Athenian's money invested in the gold-dust mining operation. At the hearing, Tweed conceded the money was lost. RP 753-55.

In August 2013, Teamwork Retail filed for bankruptcy without making any payments to Athenian on the promissory note. RP 1727. Athenian filed a claim with the bankruptcy court for $200,000 plus interest. RP 512. The trustee awarded Athenian $43,000. *Id.* Tweed testified that, as of the hearing, Athenian had received only about $2,000 of that money. RP 513.

E. Athenian's Problems Are Revealed

1. Tweed's Firm Learns the Truth about Athenian's Losses and Forces Him to Tell Investors

From 2010 through 2013, Tweed made no written disclosures to investors about what was happening with their investments. RP 426-28. For some time, Tweed provided investors

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[7] Despite Athenian's losses, Tweed's stepson and another investor received more money back from Athenian than they invested. *See* RP 2463.

with unaudited financial statements that purported to show the value of their investments.[8] *Id.* These statements, however, continually showed the value of each investor's capital account as one hundred percent of the money he or she had invested. RP 642; 676-77. None of these statements disclosed that Richardson had used $650,000 of Athenian's money to finance a gold-dust mining operation, or that Tweed had invested $200,000 of Athenian's money in Teamwork Retail, or that both investments had failed. RP 642-48.

Tweed also intentionally obfuscated Athenian's status when he met with investors to review their accounts. Tweed never told Athenian's remaining investors that he and his stepson, among others, had withdrawn their money from Athenian. RP 647-48. One investor testified that she met with Tweed twice a year to discuss her account, and Tweed did not mention any problems with her investment in Athenian. RP 677. Tweed admitted at the hearing he did not want to tell investors what had happened because most of them had other money invested with him, and he feared losing their business if they knew the truth. RP 806-07.

In April 2014, Tweed finally was forced to tell investors what had happened. Earlier that year, the SEC had opened an examination of Tweed Financial's office. As a result of the examination, Tweed's firm at the time, Concorde Investment Services, LLC, learned about some of Athenian's problems. RP 422-23; 1719-24. The firm ordered Tweed to hire an attorney and make any required disclosures to investors. *Id.* In April 2014, Tweed sent a letter to the remaining investors summarizing the events since Quant Pool dissolved in January 2010. RP 1725-27.

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[8] Under Athenian's partnership agreement, Tweed was required to provide to investors "an annual financial statement prepared in accordance with U.S. generally accepted accounting principles and audited by an independent certified public accounting firm." RP 1185.

2. Athenian's Losses Are Born by 18 of 24 Investors; Six Investors, Including Tweed and His Stepson, Lose Nothing

As of the hearing, Athenian had sustained losses totaling more than $1 million. These losses, however, were not shared by all investors. Six investors, including Tweed and his stepson, received full redemptions from Athenian totaling about $330,000. RP 2463. Six investors received partial redemptions totaling about $350,000; these investors lost a total of about $135,000. RP 2463. The remaining twelve investors received nothing back from Athenian; these investors lost a total of about $890,000. RP 2463.

III. Procedural History

A. Origin of FINRA's Investigation and Complaint

In or around March 2014, Concorde notified FINRA of its concerns about Athenian. Enforcement opened its investigation around that time. RP 619-21; 1719-24; 1729-38.

On April 27, 2017, Enforcement filed a single-cause complaint alleging that Tweed, through his use of the Athenian PPM, negligently misrepresented or failed to disclose material facts while soliciting investors for Athenian, and engaged in a course of conduct that operated as a fraud or deceit on Athenian's investors, in violation of Securities Act Sections 17(a)(2) and (3) and FINRA Rule 2010. RP 1-45.

Enforcement alleged four misrepresentations and omissions. First, Enforcement alleged that Tweed failed to disclose that he initially intended to operate Athenian as a stand-alone fund, not a feeder fund, and that he decided to operate it as a feeder fund only after TradeStation refused to open a brokerage account for Athenian due to customer complaints against him. Second, Enforcement alleged that Tweed failed to disclose all of the fees and expenses associated with an investment in Athenian, including Quant Pool's management fee, QAMF's

management fee, and QAMF's performance allocation. Third, Enforcement alleged that Tweed failed to disclose the Consulting Agreement between Tweed Financial and RPM, under which Tweed was entitled to a portion of Athenian's fees and expenses payable to RPM. And fourth, Enforcement alleged that Tweed failed to disclose anything about the change in master funds from Quant Pool to QAMF, including Richardson's involvement in QAMF.

Tweed filed an answer in which he admitted many of Enforcement's factual allegations but denied violating the Securities Act or any FINRA Rule. RP 49-54. Tweed also asserted that Enforcement's claims were time barred by the statute of limitations under 28 U.S.C. § 2462.

B. The Hearing Panel's Decision

The Hearing Panel found Tweed liable for all of the misconduct alleged in the complaint, except it found that Enforcement failed to prove that Tweed initially intended to operate Athenian as a stand-alone fund, and that he decided to operate it as a feeder fund only after TradeStation refused to open a brokerage account for Athenian. RP 2636.

The Hearing Panel rejected Tweed's argument that Enforcement's charges were time barred under the statute of limitations and further found that Enforcement did not bring the disciplinary action unfairly late. For Tweed's misconduct, the Hearing Panel barred him from associating with any FINRA member in any capacity and fined him $50,000.

C. The NAC's Affirmance of the Hearing Panel's Decision

Tweed's appeal to the NAC was limited to the Hearing Panel's findings on the timeliness of the proceeding and the bar it imposed. RP 2645-47.

In December 2019, the NAC affirmed the Hearing Panel's findings of violations and the bar it imposed. RP 2871. The NAC found the federal statute of limitations did not apply and that the proceeding against Tweed was fair. The NAC determined a bar was necessary to protect

the investing public. In light of the bar, the NAC vacated the $50,000 fine the Hearing Panel had imposed.

On January 10, 2020, Tweed filed an application for review of the NAC's decision. RP 2895.

IV. Argument

The Commission should affirm the NAC's findings of violation because they are well supported by the record.

A. The Commission Should Affirm the NAC's Findings of Violation

1. Tweed Violated Securities Act Section 17(a)(2) and FINRA Rule 2010 by Misrepresenting or Failing to Disclose Material Facts to Investors

Securities Act Section 17(a)(2) applies in the offer or sale of any securities in interstate commerce, and prohibits obtaining money or property by means of any material misstatement of fact or statement that omits a material fact. 15 U.S.C. § 77q(a)(2).[9] Section 17(a)(2) does not require a showing of scienter; negligence is sufficient. *Aaron v. SEC*, 446 U.S. 680, 686-87, n.6 (1980). Negligence is a failure "to use the degree of care and skill that a reasonable person of ordinary prudence and intelligence would be expected to exercise in the situation." *SEC v. True N. Fin. Corp.*, 909 F. Supp. 2d 1073, 1122 (D. Minn. 2012). The Commission has held that the "knew or should have known" standard is appropriate to establish negligence under Securities Act Section 17(a)(2). *The Port Authority of New York and New Jersey*, Securities Act Release No. 10278, 2017 SEC LEXIS 67, at *24-25 (Jan. 10, 2017). It is not necessary to prove investor

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[9] Tweed stipulated that interests in Athenian were securities, the alleged misconduct involved the offer or sale of securities, and he received money from investors through the mail and by wire transfers. RP 252.

reliance, loss causation, or damages to establish a violation. *SEC v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 490-91 (S.D.N.Y. 2002).

A misrepresentation or omission is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). Materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information. *SEC v. Meltzer*, 440 F. Supp. 2d 179, 190 (E.D.N.Y. 2006). "Nevertheless, to be material, a fact need not be outcome-determinative—that is, it need not be important enough that it would necessarily cause a reasonable investor to change his investment decision." *Id.*

A violation of Securities Act Section 17(a)(2) also violates FINRA Rule 2010. *See Kirlin Secs., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *65 (Dec. 10, 2009) (stating "[i]t is well established that a violation of . . . securities laws or regulations" also violates FINRA Rule 2010).

In this case, Tweed violated Section 17(a)(2) and FINRA Rule 2010 when he obtained approximately $1.7 million from investors by means of material misstatements or omissions contained in the Athenian PPM. *See* RP 252. Tweed used the Athenian PPM to solicit each investment in Athenian. RP 252. The Athenian PPM misrepresented or failed to disclose all of the fees and expenses associated with an investment in Athenian; the switch in master funds from Quant Pool to QAMF, including Richardson's involvement in QAMF; and the Consulting Agreement under which Tweed was entitled to a portion of QAMF's fees and expenses.

a. Tweed Misrepresented or Failed to Disclose All Fees and Expenses Associated with an Investment in Athenian

Through the Athenian PPM, Tweed disclosed Athenian's three-and-a-half percent management fee and its performance allocation, but he did not disclose the fees and expenses associated with Athenian's master funds. Specifically, while Athenian was invested in Quant Pool, in addition to Athenian's fees and expenses, Athenian's investors were subject to Quant Pool's management fee. RP 984. While Athenian was invested in QAMF, Athenian's investors were subject to QAMF's management fee and performance allocation. RP 1350. Tweed did not disclose these fees and expenses to Athenian's investors.

The undisclosed fees and expenses associated with an investment in Athenian were material because they effectively doubled the cost of investing in Athenian. *See Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 94 (2d Cir. 2010) (noting the SEC's "strongly held belief in the importance of fees and expenses in a typical investor's decision to invest in a fund"). A reasonable investor would consider additional fees and expenses important in deciding whether to invest in Athenian.

While Tweed concedes his failure to disclose these fees and expenses was a "technical" violation of Section 17(a)(2), in challenging the bar the NAC imposed, Tweed argues the undisclosed fees and expenses were not actually material because he never intended to charge them and he claims investors never paid them. Tweed Brief at 7-8. Tweed's intent to charge the undisclosed fees and expenses is not relevant. Quant Pool and QAMF were entitled to charge the undisclosed fees and expenses, and therefore Tweed should have disclosed them to investors. Moreover, Tweed's assertion that the undisclosed fees and expenses were not charged is not supported by the evidence. While Quant Pool refunded Athenian's investment in early 2010

without deducting its management fee, there is no evidence that QAMF did not charge the undisclosed fees and expenses on Athenian's investment. QAMF failed to return approximately $775,000 of Athenian's money. Whether QAMF deducted fees and expenses from money it never returned is not known.

Tweed acted at least negligently in not disclosing these fees and expenses, because he should have known that he needed to disclose all applicable fees and expenses to Athenian's investors.

b. Tweed Misrepresented or Failed to Disclose the Change in Master Funds from Quant Pool to QAMF

Tweed also negligently misrepresented or failed to disclose to investors anything about the change in Athenian's master fund from Quant Pool to QAMF, including Richardson's involvement in QAMF. Through the Athenian PPM, Tweed represented to investors that any money they invested in Athenian would be invested in Quant Pool, that Quant Pool would be managed by PMI, and that PMI would be controlled by the PMI Manager. After January 29, 2010, when Tweed learned that Quant Pool was dissolving, these representations about Athenian's master fund were no longer true. Between January 30 and March 6, 2010, Athenian had no master fund. As of March 8, 2010, Athenian's master fund was QAMF, not Quant Pool, and QAMF was controlled by Richardson, not the PMI Manager. As a result, from January 29, 2010, through March 24, 2010, when Athenian received its final investment, Tweed misrepresented the identity of Athenian's master fund, its manager, and the person who controlled its manager. RP 1097. Ten investors contributed capital to Athenian during that period. RP 2461.

Tweed's misrepresentations about Athenian's master fund were material. The Athenian PPM made clear that Athenian would be a "feeder" fund for a "master" fund. The success of an investment in Athenian, therefore, depended on the success of its master fund. A reasonable investor would consider the identity of Athenian's master fund, and the person who controlled it, important in deciding whether to invest in Athenian. *See, e.g.*, *Schwarm & Co.*, 47 S.E.C. 785, 788 (1982) ("In connection with an investment in a limited partnership, information relating to those who are responsible for the success or failure of the enterprise is clearly material.").

While Tweed does not dispute his liability, in arguing against the bar the NAC imposed, Tweed contends his failure to disclose the change in master funds was "not material . . . in light of the information Tweed had at the time the change occurred[.]" Tweed Brief at 8-9. According to Tweed, because Quant Pool and QAMF both were supposed to be managed using the PMI System, the "only possibly meaningful disclosure to investors would have been the different control persons of" of Quant Pool (the PMI Manager) and QAMF (Richardson). Tweed Brief at 9. Tweed contends even this was not actually material at the time because Richardson "had a years-long, unblemished record in the securities industry," and "from a due diligence perspective, Richardson appeared to Tweed at the time to be a better choice than [the PMI Manager]." Tweed Brief at 9. Tweed's own testimony belies his argument. At the hearing, Tweed admitted he was concerned about Richardson's involvement in QAMF due to his ties to Hales. In fact, Tweed was so concerned about Richardson's involvement that he tried to hire PMI to manage Athenian's assets directly rather than investing in QAMF. Tweed decided to invest in QAMF only after he was unable to open a brokerage account for Athenian at TradeStation. A reasonable investor would want to know this information before investing in Athenian.

Tweed acted at least negligently by not disclosing the changes in Athenian's master fund. Tweed concedes that, in hindsight, he should have revised the Athenian PPM to reflect the changes in Athenian's master fund from Quant Pool to QAMF, including Richardson's involvement in QAMF. Tweed Brief at 8-10.

c. Tweed Misrepresented or Failed to Disclose His Right to Receive a Portion of QAMF's Fees and Expenses

Tweed failed to disclose the Consulting Agreement between Tweed Financial and RPM, under which Tweed Financial was entitled to 45 percent of the compensation RPM received as a result of Athenian's investment in QAMF. Tweed's failure to disclose the Consulting Agreement was material because it likely would have been viewed, if disclosed, as something that could influence Tweed's decision to invest Athenian's money in QAMF. *See Kevin D. Kunz*, 55 S.E.C. 551, 565 (2002) (finding that when a broker-dealer "has a self-interest (other than the regular expectation of a commission) in serving the issuer that could influence its recommendation, it is material and should be disclosed"), *aff'd*, 64 F. App'x 659 (10th Cir. 2003). Tweed's failure to disclose the Consulting Agreement was at least negligent because he was aware of the agreement and should have known he was required to disclose it. The Commission therefore should affirm the NAC's finding that Tweed violated Securities Act Section 17(a)(2) and FINRA Rule 2010 by negligently failing to disclose the Consulting Agreement.

2. Tweed Violated Securities Act Section 17(a)(3) and FINRA Rule 2010 by Engaging in a Course of Conduct That Operated as a Fraud or Deceit on Investors

Securities Act Section 17(a)(3) applies in the offer or sale of any securities in interstate commerce, and prohibits engaging "in any transaction, practice, or course of business which

operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(3). Section 17(a)(3) applies "where, as a result of a [respondent's] negligent conduct, investors receive misleading information about the nature of an investment or an issuer's financial condition. It also might apply where, as a result of a [respondent's] negligence, prospective investors are prevented from learning material information about a securities offering." *John P. Flannery*, Exchange Act Release No. 73840, 2014 SEC LEXIS 4981, at *64 (Dec. 15, 2014) Tweed is liable under both Section 17(a)(2) and Section 17(a)(3) based on allegations stemming from the same set of facts because he "undertook a deceptive scheme or course of conduct that went beyond the misrepresentations." *See SEC v. Stoker*, 865 F. Supp. 2d 457, 467 (S.D.N.Y. 2012).

After learning that Quant Pool was dissolving, Tweed negotiated an agreement to invest in Richardson's master fund, QAMF. Tweed also negotiated a Consulting Agreement under which he would receive additional compensation based on the amount of money Athenian invested in QAMF. At the time Tweed was negotiating these agreements, he had well-founded concerns about Richardson. Tweed nonetheless disregarded those concerns and agreed to invest all of Athenian's capital in QAMF without disclosing the change in master funds from Quant Pool to QAMF, Richardson's involvement in QAMF, the additional fees and expenses associated with Athenian's investment in QAMF, or Tweed's right to receive a portion of those fees and expenses. Tweed then concealed his actions for four years while Athenian's losses mounted.

Tweed's conduct after Quant Pool's dissolution constituted a course of business that operated as a fraud or deceit on Athenian's investors, and the Commission should affirm the NAC's finding that Tweed violated Securities Act Section 17(a)(3) and FINRA Rule 2010.

B. The Disciplinary Proceeding against Tweed Was Timely and Fair

1. No Statute of Limitations Applies in FINRA Disciplinary Proceedings

Tweed contends that FINRA's charges against him are time barred by the federal statute of limitations under 28 U.S.C. § 2462 because they accrued more than five years before the complaint was filed. Section 2462 provides that, "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." Tweed argues that Enforcement's charges are time barred because they accrued on March 24, 2010, when he made the last sale of an interest in Athenian, and FINRA did not bring charges against him until April 2017. Tweed's argument has no merit.

The Commission consistently has held that FINRA is not constrained by any statute of limitations. *See, e.g.*, *William D. Hirsh*, 54 S.E.C. 1068, 1077 (2000) ("We have consistently held that no statute of limitations applies to the disciplinary actions of . . . self-regulatory organizations."); *Shamrock Partners, Ltd.*, 53 S.E.C. 1008, 1015 n.15 (1998) ("The five year statute of limitations . . . does not apply to NASD proceedings."); *mPhase Technologies, Inc.*, Exchange Act Release No. 74187, 2015 SEC LEXIS 398, at *51 (Feb. 2, 2015) ("[W]e have long held that FINRA, a private organization, is not subject to the requirements of 28 U.S.C. § 2462, applicable to government agencies."). Indeed, the Commission has stated that applying a limitations period to FINRA disciplinary actions would "impair [FINRA's] statutory obligation and duty to protect the public and discipline its members." *Frederick C. Heller*, 51 S.E.C. 275, 280 (1993).

In the face of this well-settled precedent, Tweed argues the statute of limitations should apply to FINRA disciplinary proceedings because it applies in certain SEC enforcement actions, and the SEC regulates FINRA.[10] The Commission has considered and rejected this precise argument several times. For example, the applicants in *William J. Murphy* argued that FINRA's disciplinary action was time barred under 28 U.S.C. § 2462. *See* Exchange Act Release No. 69923, 2013 SEC LEXIS 1933 (July 2, 2013), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014). Like Tweed, the applicants relied on *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), in which the court held that the limitations period applied to an administrative proceeding initiated by the Commission. The applicants argued that SROs like FINRA "act as the Commission's 'surrogates' and therefore *Johnson*'s reasoning should apply to disciplinary proceedings brought by an SRO." *Murphy*, 2013 SEC LEXIS 1933 at *92-94. The Commission disagreed. It held that, although the limitations period applied to SEC enforcement actions seeking civil penalties, it did not apply to FINRA's enforcement actions because SROs "are

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[10] Tweed misstates the applicability of the limitations period to SEC enforcement actions. Without citation, Tweed contends the U.S. Supreme Court "unanimously ruled that [SEC] enforcement actions are bound by the five-year limitations period set forth" in 28 U.S.C. § 2462. Tweed Brief at 1. Tweed is incorrect. The limitations period is applicable only to the extent the SEC seeks a penalty within the meaning of 28 U.S.C. § 2462, rather than a remedial sanction. *See, e.g.*, *Herbert Moskowitz*, 55 S.E.C. 658, 683 (2002) ("Cease-and-desist proceedings are remedial in nature and not subject to Section 2462."). The distinction between a penalty and a remedial sanction for purposes of the statute of limitations in an SEC enforcement action is not relevant in a FINRA disciplinary proceeding because FINRA's proceedings are governed by a different statutory scheme. *See John M.E. Saad*, Exchange Act Release No. 86751, 2019 SEC LEXIS 2216, at *24-25 (Aug. 23, 2019) ("[I]mporting *Kokesh*'s analysis of whether disgorgement is a penalty under Section 2462 into the analytically distinct determination of whether a FINRA bar is a penalty would be inconsistent with Supreme Court precedent recognizing that a 'penalty is a term of varying and uncertain meaning,' and that a remedy may be punitive for one purpose but not for others.").

generally not subject to the requirements and duties applicable to government agencies." *Id.* at *94. The Commission should follow its reasoned precedent on this issue here.[11]

Contrary to Tweed's assertion, the absence of a statute of limitations does not mean that FINRA has "an untempered ability to discipline its members for actions that occur beyond a reasonable time frame, beyond which the SEC itself cannot seek penalties." Tweed Brief at 3. The fairness of FINRA's disciplinary proceedings is governed by the Securities Exchange Act of 1934 (the "Exchange Act"), which requires FINRA to "provide a fair procedure for the disciplining of members and persons associated with members[.]" 15 U.S.C. § 78o-3(b)(8). When determining whether a FINRA disciplinary proceeding was fair, the Commission specifically considers, among other things, the effect of any delay by FINRA in the filing of a complaint on the overall fairness of the disciplinary proceeding. *See Mark H. Love*, 57 S.E.C. 315, 323 (2004) (explaining that the Commission's decisions "have addressed the effect that a delay by [an SRO] in the filing of a complaint against a representative may have on the overall fairness of proceedings against the representative"). In this case, FINRA timely brought its disciplinary case against Tweed, and there is no evidence that the proceeding was inherently unfair to Tweed, or that Tweed's ability to mount his defense was harmed.

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[11] *See also Larry Ira Klein*, 52 S.E.C. 1030, 1039 n.36 (1996) (holding that, while SRO's like FINRA "operate subject to a scheme of government regulation," they are not government agencies, and therefore the limitations period under Title 28, Section 2462 does not apply to their disciplinary proceedings); *Stephen J. Gluckman*, 54 S.E.C. 175, 187 n.43 (1999) ("[I]t is not necessary for enabling legislation [for SROs] expressly to exempt SROs from constitutional and statutory provisions that on their face are applicable only to government agencies.").

2. The Disciplinary Proceeding Was Fair

a. Tweed Delayed Initiation of this Proceeding by Concealing His Misconduct for Years

Tweed's assertion that FINRA delayed initiation of this proceeding for seven-and-a-half years has no basis in fact. *See* Tweed Brief at 4. Instead, Tweed himself is to blame. Tweed delayed the proceeding by concealing his misconduct for almost four years. By the time FINRA learned about Tweed's misconduct in 2014, Tweed had known for four years that he had failed to disclose the change in master funds from Quant Pool to QAMF, and that he had failed to disclose Richardson's involvement in QAMF. Tweed also had known for about three years that at least $650,000 of Athenian's money had been lost due to Richardson's investment in the gold-dust mining operation, and that another $200,000 had been lost due to Tweed's purchase of the promissory note from Teamwork Retail. Tweed did not timely disclose this information to anyone. Instead, Tweed gave the illusion that Athenian was sound by continuing to make full redemptions for certain investors who asked for them. During this time, Tweed also failed to honor his obligation under Athenian's partnership agreement to provide annual audited financial statements, which would have revealed the truth about Athenian's finances.

Because of Tweed's actions, his misconduct went undetected until 2014, when the SEC's examination finally uncovered the truth. FINRA learned about Athenian's problems in March 2014 and promptly opened its investigation. FINRA diligently investigated Athenian and filed its complaint in April 2017. Having caused the delay in the initiation of this proceeding, Tweed cannot now claim he was unfairly prejudiced by it. *Cf. Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, at *77 (Feb. 13, 2015) ("[A]lthough there was an extended period between when FINRA's investigation began and when the final FINRA decision

was issued . . . at least some of the fault for that delay rests with Applicants, who failed to cooperate with FINRA staff.").

b. Tweed Was Not Unfairly Prejudiced by Any Delay in this Proceeding

The Exchange Act requires SROs like FINRA "to provide a fair procedure for the disciplining of associated persons of member firms." *Love*, 57 S.E.C. at 323; *see also* 15 U.S.C. § 78o-3(b)(8). In assessing the overall fairness of a disciplinary proceeding, the Commission considers "the effect that a delay by [the SRO] in the filing of a complaint against a representative may have on the overall fairness of proceedings against the representative." *Love*, 57 S.E.C. at 323. While there is no bright line rule about the impact of the length of a delay in filing a complaint on the fairness of the disciplinary proceedings, the Commission considers four different time periods in reviewing whether the SRO proceedings were fair: the time between the filing of the complaint and the initial misconduct, the last misconduct, the SRO's notice of the misconduct, and the initiation of the SRO's investigation. *Id.* at 323-24; *Jeffrey Ainley Hayden*, 54 S.E.C. 651, 653-54 (2000). The Commission also considers whether the respondent's ability to mount an adequate defense was harmed by any delay in the filing of the complaint. *Love*, 57 S.E.C. at 325.

The time periods in this case do not support Tweed's assertion that this proceeding was unfair. In *Hayden*, the Commission found that a disciplinary proceeding was inherently unfair when the charges were not brought until 14 years after the first act of misconduct, six years after the last act of misconduct, five years after the SRO was informed about the misconduct, and three years and six months after the SRO opened is investigation. *Hayden*, 54 S.E.C. at 653-54. Here, the time between the complaint and the initial misconduct was seven years and five months

(versus 14 years in *Hayden*); the time between the complaint and Tweed's last misconduct was seven years and one month (versus six years in *Hayden*); the time between the complaint and when FINRA first learned of Tweed's misconduct was three years and one month (versus five years in *he*); and the time between the complaint and when FINRA initiated its investigation also was three years and one month (versus three years and six months in *Hayden*). Notably, in *Hayden*, the Commission found it significant that the SRO waited two years to open an investigation after being "informed about significant misconduct . . . through a referral . . . to its Division of Enforcement of a 'voluminous' sales practice examination report." *Id*. There was no similar delay by FINRA in this case. Enforcement promptly opened its investigation after learning about Athenian's problems, diligently worked to complete it, and filed the complaint within about three years. There is no evidence that FINRA delayed this proceeding, or that this proceeding was inherently unfair to Tweed.[12]

Nor has Tweed shown that his ability to mount an adequate defense was harmed by the purported delay in the filing of the complaint. While Tweed laments "documents disappear[ing] and memories fad[ing] with the passage of time," Tweed Brief at 4, the NAC decided this case largely on undisputed facts. Tweed admitted most of the factual allegations in the complaint and stipulated to others before the hearing. *See* RP 49-54; 249-56. In his reply brief on appeal to the

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[12] *See Dep't of Enforcement v. The Dratel Grp., Inc.*, Complaint No. 2008012925001, 2014 FINRA Discip. LEXIS 6, at *102-03 (FINRA NAC May 2, 2014) (no evidence of unfair delay when complaint was filed five years after first misconduct, three years after last misconduct, four years after discovery of misconduct, and four years after initiation of investigation), *aff'd*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035 (Mar. 17, 2016)); *Love*, 57 S.E.C. at 323-25 (no evidence of unfair delay when complaint was filed seven years after first misconduct, six years after last misconduct, four years after discovery of misconduct, and three years and six months after investigation initiated).

NAC, Tweed conceded that "the facts themselves are largely not at issue in this appeal[.]"[13] RP 2734. Indeed, the only significant material factual dispute at the hearing (the timing of Tweed's decision to operate Athenian as a feeder fund) was resolved in Tweed's favor and not appealed to the NAC. RP 2635-36. Given the dearth of material factual disputes in this case, it is inconceivable how Tweed could have been unfairly prejudiced by purportedly missing documents and faded memories. *See Love*, 57 S.E.C. at 325 ("In fact, NASD based its decision on facts that Love did not dispute. Therefore, the testimony of these individuals ultimately was not material.").

Rather than identifying specific evidence that was not available to him as a result of FINRA's purported delay, Tweed makes three broad arguments based on conclusory assertions. None of the arguments has merit.

First, Tweed contends that "FINRA enjoyed the distinct 'head start' benefit of being able to marshal documents and testimony for years before the allegations were made known to Tweed, and thus years before he could begin to marshal the evidence critical to his defense." Tweed Brief at 5. As Tweed notes, however, FINRA's procedures require Enforcement to collect and analyze evidence before filing a complaint. Tweed Brief at 5. This process is not unfair; rather, it protects FINRA members and their associated persons by requiring evidence of a violation before a disciplinary proceeding is publicly initiated.

Tweed's suggestion that he was unfairly surprised by FINRA's filing of its complaint is not credible. Tweed was the first to know about his misconduct and Athenian's problems. He

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[13] Similarly, at the oral argument before the NAC, Tweed's attorney stated "[t]he facts are pretty clear, and there's not a lot of dispute of what happened here and what Mr. Tweed did and what Mr. Tweed didn't do that he should have done[.]" RP 2770.

had every motive to preserve any exculpatory evidence that may have existed, even before FINRA opened its investigation. He also had ample opportunity. As Athenian's manager, Tweed controlled all of Athenian's documents and information. There is no evidence that Tweed or anyone else lost or destroyed evidence before Tweed became aware of FINRA's investigation in 2014. To the contrary, the record contains numerous documents dating back to the very beginning of the fund.[14]

Next, Tweed contends he was harmed by FINRA's "unusually long delay in bringing this proceeding" because, "[a]s he testified multiple times at the hearing, he simply could not remember events that occurred so many years ago, which unavoidably cast doubt on his truthfulness and caused him actual prejudice in defending himself[.]" Tweed Brief at 5. Although Tweed identifies several instances during the hearing when he claimed he was unable to remember things, he does not identify any material issue decided against him because he was unable to remember a relevant fact.[15] As discussed above, the only significant factual dispute at the hearing was resolved in Tweed's favor and resulted in dismissal of one of the alleged violations. *See* RP 2635-36.

Last, Tweed contends he was "unable to refresh his recollection with documents that likely would have been available if FINRA had filed its . . . complaint within five years." Tweed Brief at 5-6. Tweed states the "longest record retention requirement applicable to a brokerage firm is six years," and that broker-dealers are required to retain customer complaints for three

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[14] *See, e.g.*, RP 1257-58; 1321-24; 1509-11; 1513; 1518; 1519-20; 1561.

[15] In his brief, Tweed cites nine instance during his testimony when he claimed he was unable to remember something, but he does not explain how they are evidence of unfair prejudice. Tweed Br. at 5, n.13.

years. Tweed Brief at 5-6. Tweed argues it is "inherently unfair" to require him to defend himself "with respect to matters that occurred beyond the time period that even FINRA and the SEC feel records should reasonably be retained." Tweed Brief at 6. Essentially, Tweed is asking the Commission to impose a de facto statute of limitations on SRO disciplinary proceedings, which the Commission already has stated it has no interest in doing. *See Love*, 57 S.E.C. at 324 ("[W]e have never employed a mechanical test and decline the invitation to endorse a de facto statute of limitations using the time frames presented by the facts in *Hayden* as limits defining the border of fairness in SRO proceedings.").

Once again, Tweed does not identify any particular evidence that was unavailable to him due to the passing of document retention periods. *See Edward John McCarthy*, 56 S.E.C. 1138, 1159 (2003) ("McCarthy makes no claim that any witnesses or documents were unavailable as a result of the alleged delay on the part of the Exchange and, therefore, has failed to establish that he was prejudiced as a result."). Oddly, Tweed points to customer complaints as a category of documents that may have been unavailable to him. He does not, however, identify any particular customer complaint, nor does he explain how a complaint filed with his broker-dealer could have materially aided his defense in this case. *See Shamrock Partners,* 53 S.E.C. at 1015-16 (rejecting applicants' argument that a delay in the initiation of a proceeding beyond the retention period for blue sheet data hindered their ability to obtain the data for their defense when there was no evidence they asked for it).

C. The Commission Should Affirm the Bar FINRA Imposed on Tweed

A bar is necessary to protect the investing public because Tweed's conduct demonstrated his complete disregard for the interests of Athenian's investors. In reviewing the bar the NAC imposed, the Commission must consider any aggravating or mitigating factors and whether the

bar is remedial in nature and not punitive. *PAZ Sec., v. SEC*, 494 F.3d 1059, 1064-64 (D.C. Cir. 2007). Barring Tweed is consistent with the statutory requirements and the Commission should affirm it.

1. A Bar Is Necessary to Protect the Investing Public

Tweed's actions demonstrate that he is a threat to the investing public and should not be permitted to remain in the securities industry. Tweed repeatedly misled Athenian's investors for years, causing some of them to lose more than $1 million, while ensuring that he and his stepson suffered no losses. Barring Tweed is consistent with FINRA's Sanction Guidelines ("Guidelines") and appropriately remedial in light of the egregiousness of Tweed's misconduct.

In barring Tweed, the NAC considered the Guidelines for negligent misrepresentations and omissions, which recommend a suspension of up to two years and a fine of $2,500 to $77,000.[16] The NAC, however, is not bound by the Guidelines, and may impose a more severe sanction when necessary to reflect the seriousness of the misconduct at issue. *See Peter W. Schellenbach*, 50 S.E.C. 798, 803 (1991) (explaining that there are "instances where the particular case facts and circumstances justify sanctions other than those suggested" in the Guidelines), *aff'd*, 989 F.2d 907 (7th Cir. 1993); *Steven P. Sanders*, 53 S.E.C. 889, 909 n.43 (1998) (explaining that the Guidelines "are not meant to prescribe fixed penalties but merely to provide a 'starting point' in the determination of remedial sanctions").[17] After considering all of

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[16] *FINRA Sanction Guidelines* 89 (Mar. 2019) (Fraud, Misrepresentations or Material Omissions of Fact), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter, "*Guidelines*"].

[17] *See also Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 1) ("Sanctions should be a meaningful deterrent and reflect the seriousness of the misconduct at issue. To meet this standard, certain cases may necessitate the imposition of sanctions in excess of the upper sanction guideline.").

the evidence, including several aggravating factors, the NAC concluded that a stronger sanction was warranted, and that a bar was necessary to protect the investing public.

The NAC's imposition of a bar in this case is supported by the record. The undisputed evidence shows that Tweed poses a clear risk of future misconduct and that he is a threat to investors. For four years, Tweed consistently placed his own personal and financial interests ahead of those of Athenian's investors. Tweed misrepresented or failed to disclose material facts and concealed the true state of Athenian's affairs. In addition to Tweed's general mismanagement of Athenian, the NAC identified several specific factors it found particularly aggravating: Tweed's inequitable distribution of Athenian's assets to investors, his purchase of the Teamwork Retail promissory note, his failure to provide audited financial statements to investors, and the duration and scope of his misconduct.

a. Tweed's Inequitable Distribution of Athenian's Assets Is Highly Aggravating

The NAC found highly aggravating Tweed's inequitable distribution of Athenian's "remaining liquid assets" after he learned that $650,000 of Athenian's money was "locked up" in the purported credit facility and after he made the ill-fated investment in the Teamwork Retail promissory note. Tweed's actions enabled him to conceal Athenian's problems for years, and caused certain investors to bear all of Athenian's losses while others, including Tweed and his stepson, bore none.[18]

In September 2010, Tweed had an opportunity to ensure that all of Athenian's investors received at least some of their money back, but doing so would have required him to reveal the

[18] *See Guidelines*, at 7-8 (Principal Considerations in Determining Sanctions, Nos. 10, 11, 16).

truth about what he had done. PMI had not resumed trading in QAMF's account, and Tweed decided to shut down Athenian and return its capital to investors. When Tweed asked Richardson to return all of the money Athenian had invested in QAMF, Richardson told Tweed he could not return $650,000 of Athenian's money because it was "locked up" in the purported credit facility until June 2011. Richardson did return Athenian's "current liquid assets," which amounted to about $760,000. At this juncture, Tweed could have returned that money pro rata to Athenian's remaining investors. Had Tweed done that, however, he would have had to explain that he could not make full redemptions because almost half of Athenian's capital was "locked up" until June 2011. This would contradict Tweed's prior representations about Athenian's liquidity. Tweed therefore would have had to explain that Richardson made the decision to place Athenian's money in the credit facility without his knowledge. Athenian's investors, of course, had no idea who Richardson was, much less that he was managing the money they had entrusted to Tweed.

Rather than returning some money to all of Athenian's investors and telling them the truth, Tweed selectively returned money to certain investors without accounting for Athenian's losses, which enabled him to continue concealing Athenian's problems. Tweed began making full redemptions in 2010 and continued doing so over the next few years, even as it became more and more obvious that Athenian had incurred significant, unrecoverable losses. Tweed kept making full redemptions after QAMF was unable to return Athenian's $650,000 in June 2011, after Teamwork Retail defaulted on its $200,000 promissory note in September 2011, and even after Tweed learned that the purported credit facility did not exist, and that Richardson actually had used Athenian's $650,000 to finance a troubled gold-dust mining operation. Indeed, as late as February 2012, Tweed made a redemption of nearly $100,000 for one investor, while twelve

other investors, who had contributed almost $900,000 to Athenian, had yet to receive any of their money back (and never would). Through these selective redemptions, Tweed effectively overpaid some investors at the expense of others.[19] As a result of Tweed's inequitable distribution of Athenian's assets, a few unlucky investors sustained all of Athenian's losses.

Tweed argues the NAC erred in considering his inequitable distribution of Athenian's assets an aggravating factor because, he contends, he was not required to treat Athenian's investors equitably until the fund dissolved. According to Tweed, there was "no legal or evidentiary basis as to why Tweed was required to make pro rata distributions," because the "partnership was never dissolved or liquidated pursuant to Article XIII of the Operating [sic] Agreement[.]" Tweed Brief at 16. Essentially, Tweed suggests he was free to distribute Athenian's assets in any way he chose, including fully repaying himself and his stepson, as long as he did not dissolve the fund. Tweed is incorrect.

Athenian's Partnership Agreement and PPM required Tweed to allocate Athenian's losses and expenses pro rata among all investors on an ongoing basis, not just upon dissolution. Under Athenian's partnership agreement, Tweed was required to determine, on the last day of each month (or on some other regular interval), Athenian's net asset value "on the accrual basis of accounting in accordance with U.S. generally accepted accounting principles[.]" RP 1196 (CX-10 at 20). As part of that process, Tweed was required to make a good-faith determination of the current value of the securities Athenian owned (e.g., the investment in QAMF and the

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[19] In addition to the losses from QAMF and Teamwork Retail, Athenian's records indicate that Athenian paid more than $50,000 in various accounting, compliance, and regulatory fees between 2010 and 2014. RP 1712-17; 1859-2116. Investors who left some or all of their capital invested in Athenian paid all of these fees.

Teamwork Retail promissory note). Tweed also was required to deduct from the net asset value the "the Management Fee payable to [Tweed], estimated expenses for accounting, legal, custodial and other administrative services . . . and such reserves for contingent liabilities of [Athenian], including estimated expenses . . . as [Tweed] shall determine." RP 1197. Tweed then was required to allocate the periodic net increase or decrease in net asset value to the capital accounts of Athenian's investors pro rata. *Id.*

Similarly, Athenian's PPM represented that Athenian's losses and expenses would be shared by all investors pro rata. The Athenian PPM provided that, "The interest of the [investors] in profits, losses, and increases in Net Asset Value shall be allocated to each [investor] in proportion to all [investors'] capital accounts for the relevant period." RP 1121. It further provided that,

> [t]o determine how the economic gains and losses of the Partnership will be shared, the Partnership Agreement allocates net income or loss to each [investor's] capital account. . . . Generally, net income and net loss for each month . . . will be allocated to the [investors] in proportion to their capital account balances as of the start of the month[.]

RP 1121.

Contrary to Tweed's assertions, under Athenian's partnership agreement and the Athenian PPM, Tweed was, in fact, required to treat investors equitably by allocating Athenian's losses pro rata on an ongoing basis, not just upon dissolution of the fund. Therefore, the NAC properly considered Tweed's inequitable distribution of Athenian's assets an aggravating factor.

b. Tweed's Purchase of the Teamwork Retail Promissory Note Is Highly Aggravating

The NAC also found highly aggravating Tweed's use of $200,000 of Athenian's money to purchase the six-month promissory note issued by Teamwork Retail. This investment

presented a conflict of interest for Tweed because he already had invested his own money in Teamwork Retail and he also had a business relationship with the company. Moreover, Tweed's purchase of the note was inconsistent with Athenian's investment program, as described in the Athenian PPM. The PPM represented to investors that their money would be invested in highly liquid securities selected by PMI using the PMI System. RP 1098, 1113-14. Indeed, Tweed assured his customers that an investment in Athenian would be as liquid as cash. Tweed's purchase of a six-month promissory note issued by an early-stage software company did not comport with Tweed's assurances of liquidity.

c. Tweed's Failure to Provide Audited Financial Statements Is Aggravating

Tweed's failure to provide investors with any audited financial statements between 2010 and 2014 is aggravating because it violated his obligations under Athenian's partnership agreement and enabled him to conceal his misconduct for years.[20] Section 3.07 of Athenian's partnership agreement provided that Tweed "shall cause to be prepared and distributed" to each investor "as soon as practicable following each Fiscal Year an audited financial statement prepared in accordance with U.S. generally accepted accounting principles and audited by an independent certified public accounting firm." RP 1185. Tweed did not provide an audited financial statement to investors until 2014 (and did so then only because his firm ordered him to). As a result, Tweed was able to conceal from investors the change in master funds from Quant Pool to QAMF, Richardson's investment of Athenian's capital in the gold-dust mining

[20] *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 10).

operation, Tweed's investment of Athenian's capital in Teamwork Retail, and the many withdrawals of capital from Athenian, including Tweed's own.

d. The Duration and Scope of Tweed's Misconduct Is Aggravating

Last, the NAC found it aggravating that Tweed's misconduct continued over an extended time period and involved a significant amount of money.[21] Tweed's misconduct began in 2009 and he concealed it from investors until 2014. Several of Athenian's investors lost more than almost $1 million as a result of Tweed's misconduct and his efforts to conceal it.

2. A Lesser Sanction Is Not Warranted

Tweed argues that the Commission should vacate the bar, but no lesser sanction serves adequately to guard against Tweed's malfeasance. While the NAC credited Tweed with some mitigation based on his reliance on the Athenian Attorney in drafting the Athenian PPM, the NAC concluded that any mitigation is outweighed by the many aggravating factors supporting the bar. The NAC's conclusion is fully supported by the record.

a. Tweed Is Entitled to Some Mitigation for His Reliance on the Athenian Attorney

The Guidelines provide that a respondent's "reasonable reliance on competent legal or accounting advice" may be mitigating.[22] To establish reliance on counsel for mitigation purposes, Tweed "must provide sufficient evidence . . . that [he] made full disclosure to counsel, appropriately sought to obtain relevant legal advice, obtained it, and then reasonably relied on the advice." *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at

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[21] *Id.,* at 7-8 (Principal Considerations in Determining Sanctions, Nos. 8, 9, 17).

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

*40 (Nov. 14, 2008). Tweed is not entitled to mitigation "without producing the actual advice from an actual lawyer." *Id.*

The NAC found partially mitigating that the Athenian Attorney, who held herself out as an expert in private investment funds, drafted the PPM that failed to disclose Quant Pool's management fee. Tweed is not entitled to any additional mitigation for his purported reliance on the Athenian Attorney because there is no evidence he relied on her advice in making the other misrepresentations and omissions for which the NAC found him liable.

Tweed's other misrepresentations and omissions resulted from his failure to revise the Athenian PPM after the switch in master funds from Quant Pool to QAMF, which was well after the Athenian Attorney finished drafting the Athenian PPM. Tweed contends that, "when changes were made pertaining to the Athenian Fund's investments," i.e., the change in master funds from Quant Pool to QAMF, the Athenian Attorney "did not advise [Tweed] to revise and recirculate an amendment to the PPM." Tweed Br. at 12. There is no evidence, however, that the Athenian Attorney advised Tweed to continue using the Athenian PPM after the change in master funds. Indeed, Tweed testified at the hearing that he and the Athenian Attorney never discussed that issue:

Question:	And I think you testified that no one told you that you couldn't use [the Athenian PPM] once it became incorrect, but no one told you that you could use it either, right?
Tweed:	That didn't really come up as an issue.
Question:	Yeah. You didn't consult [the Athenian Attorney] about whether or not you could continue to use the PPM after it becomes incorrect, correct?
Tweed:	I didn't ask that direct question. She was fully aware of what we were doing. . . . So I know that she had looked at [Richardson's]

	documents [for QAMF], and she was definitely consulted on this issue.
Question:	Well, you didn't ask her to give you an opinion, a legal opinion about whether or not you could continue to use the PPM after it had become inaccurate, did you?
Tweed:	Not specifically, no.
Question:	And she never provided you with any legal opinion about whether you could continue to use the PPM after it had become incorrect, right?
Tweed:	I had no such discussion.

RP 758-59.

Given the absence of any evidence that Tweed relied on the Athenian Attorney's advice when making the misrepresentations and omissions relating to the change in master funds from Quant Pool to QAMF, Tweed was not entitled to any further mitigation. *See Berger*, 2008 SEC LEXIS 3141, at *40.

b. Tweed Is Not Entitled to Mitigation Based on the Materiality of His Misrepresentations and Omissions

Although Tweed does not challenge the NAC's liability findings, he nonetheless argues the NAC should have found mitigating that his misrepresentations and omissions were not actually material. Tweed argues his failure to disclose all fees and expenses was not material because, he contends, "it was never Tweed's intention to charge any fees other than those disclosed in the PPM," and "in fact he never did." Tweed Brief at 7. Tweed is not entitled to mitigation for his claimed lack of intent to conceal Athenian's fees and expenses because the NAC applied the Guidelines for negligent misrepresentations, which encompass violations without scienter. Moreover, as the NAC found, the undisclosed fees and expenses were, in fact, material. *See* Section IV.A.1(a), above. It also is not mitigating that Athenian's investors

purportedly did not pay the undisclosed fees and expenses, because the absence of investor harm is not mitigating. *See, e.g.*, *PAZ Secs., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *17 (Apr. 11, 2008) (holding that applicants' failure to comply with NASD rule "are not mitigated because those failures did not, in themselves, produce a monetary benefit to Applicants or result in injury to the investing public"), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009). Moreover, contrary to Tweed's assertion, there is no evidence to support Tweed's claim that Athenian's investors did not pay any fees other than those disclosed in the Athenian PPM. *See* Section IV.A.1(a), above. Tweed also argues the change in master funds from Quant Pool to QAMF also was not material, but this argument is belied by his own testimony. Tweed admitted at the hearing that he had concerns about investing QAMF due to Richardson's involvement in it. *See* Section IV.A.1(b), above.

c. Tweed Is Not Entitled to Mitigation Based on His Purported Reliance on His "Compliance Person," His Broker-Dealer, or Athenian's Accountant

Tweed also is not entitled to mitigation for his claimed reliance on his "compliance person," broker-dealer, or accountant. Tweed Brief at 12. It was Tweed's responsibility as Athenian's manager to ensure the accuracy of Athenian's offering documents, and as a registered person, he cannot shift to others his responsibility to refrain from committing a securities violation. *See Thomas E. Warren*, III, 51 S.E.C. 1015, 1019 (1994) (rejecting applicant's attempts to shift blame to others for misconduct). Regardless, there is no evidence that either Tweed's "compliance person" or his broker-dealer advised Tweed that his misrepresentations or omissions were permissible. Tweed's purported reliance on his accountant is similarly baseless. Tweed argues the NAC should have awarded him mitigation because he relied on an accountant in preparing Athenian's unaudited financial statements. Tweed Brief at 12. But Tweed did not

prove what he disclosed to the accountant. There is no evidence that any accountant told Tweed that the unaudited financial statements were sufficient to satisfy his obligation under Athenian's partnership agreement to provide audited financial statements. Indeed, the unaudited statements Tweed provided to investors were a work of fiction showing the value of each investor's account was equal to the amount he or she had invested in the fund.

d. Tweed Is Not Entitled to Mitigation Based on the Purported Absence of Customer Complaints

Tweed argues the NAC should have given him mitigation credit because, he claims, the investors who testified at the hearing remained his customers and did not file complaints. Tweed Brief at 11. Even if true, this is not mitigating. *Kevin M. Glodek*, Exchange Act Rel. No. 60937, 2009 SEC LEXIS 3936, at *27 (Nov. 4, 2009) ("The fact that many of the customers did not lose money and did not complain about the violations does not further mitigate Glodek's misconduct.").

e. Tweed Is Not Entitled to any Mitigation Based on His Purported Acceptance of Responsibility

Tweed argues additional mitigation is warranted because he "demonstrated he was an honest and credible witness," and he "accepted responsibility for his actions and made it abundantly clear that he will certainly not be engaging in this kind of behavior in the future." Tweed Brief at 13. Neither of these factors is mitigating. Tweed is required to testify honestly; he is not entitled to a reduction in sanctions because of it. *See Allen M. Perres*, Exchange Act Release No. 79858, 2017 SEC LEXIS 212, at *18 (Jan. 23, 2017) ("Perres's misconduct is not mitigated or any less egregious because he did not compound his violations by lying to the Commission or destroying documents."). And, contrary to Tweed's assertions, he has not fully accepted responsibility for his actions. While Tweed concedes liability, he nonetheless

downplays his misconduct as "technical" violations because he views his misrepresentations and omissions as immaterial, despite the NAC's findings to the contrary.[23] Astoundingly, Tweed continues to argue that his preferential distribution of Athenian's assets to certain investors was proper, even though it directly contravened Athenian's governing documents requiring pro rata sharing of losses and expenses among all investors. Tweed's selective distribution resulted in some investors suffering all of Athenian's losses, while others, including Tweed and his stepson, received all of their money back. Tweed's inability to appreciate the magnitude of his misconduct highlights the need for a bar.

The bar the NAC imposed on Tweed is appropriately remedial and necessary for the protection of the investing public, and the Commission should affirm it.

V. Conclusion

By misrepresenting and omitting to disclose material facts to Athenian's investors and engaging in a course of business that operated as a fraud or deceit on those investors, Tweed has demonstrated that he is not fit to continue in the securities industry. Barring Tweed is entirely appropriate for his dereliction of the most basic obligations as a securities professional, which cost unsuspecting investors over $1 million. The Commission should sustain the NAC's decision in all respects.

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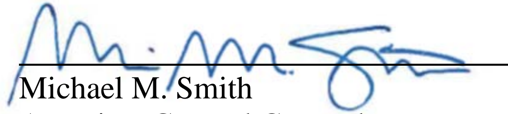
[23] *See* Tweed Brief at 7 ("any such violation was immaterial because it was never Tweed's intention to charge any fees other than those disclosed in the PPM"); 8 ("the change in master funds . . . was not material"); 13 ("the imposition of a permanent bar for technical disclosure violations is disproportionate and not tailored to the misconduct it is intended to remediate").

Respectfully submitted,



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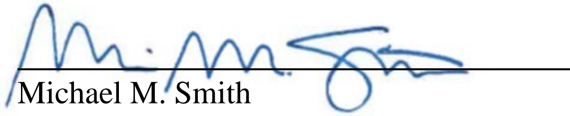
Certificate of Compliance

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 13,355 words.



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CERTIFICATE OF SERVICE

I, Michael M. Smith, certify that on this 28th day of May 2020, I caused a copy of FINRA's Brief in Opposition to the Application for Review, in the matter of *Application for Review of Robert R. Tweed*, Administrative Proceeding No. 3-19652, to be served by electronic mail on:

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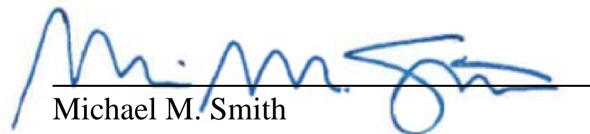

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