BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Michael Joseph Clarke

For Review of

FINRA Disciplinary Action

File No. 3-20126

BRIEF OF FINRA IN OPPOSITION TO APPLICATION FOR REVIEW

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I. INTRODUCTION

Michael Joseph Clarke obtained hundreds of thousands of dollars in loans from his securities industry colleagues and an associate by making false promises that he would invest their money in his business of brokering events tickets. Clarke instead converted the monies he borrowed, using the victims' funds intended to purchase tickets to pay personal expenses. Clarke's misconduct was not aberrant; in fact, Clarke subjected other colleagues to the same sham, leaving a trail of debts in his wake as he moved from firm to firm. Clarke also had a longstanding habit of knowingly writing checks without sufficient funds. At least one check was made out to a victim of the ticket-brokering scheme at issue to temporarily convince him that repayment was imminent and to further conceal his misconduct.

Clarke filed an application seeking the Commission's review of FINRA's action in this matter. Specifically, Clarke appeals a September 17, 2020 decision of FINRA's National

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Adjudicatory Council ("NAC") that found the foregoing conduct violated FINRA Rule 2010. The decision barred Clarke from the securities industry for his patently unethical behavior. The NAC's decision is without any genuine controversy. The facts on which the NAC's decision is premised are not in dispute, and they provide a firm foundation for FINRA's action in this matter. Indeed, Clarke stipulated to most of the key facts and conceded even more during the hearing. Clarke made misrepresentations of material fact to his victims to induce them to lend him money. After telling his victims that he would use their funds to purchase event tickets and seat licenses, that he would pay them back by a specific date, and that he would pay them significant interest, Clarke's converted the victims' funds and used their funds to pay personal expenses, including creditors who previously loaned him money under the same false pretenses. In fact, there is no evidence in the record that Clarke ever purchased any tickets or seat licenses, as he represented he would. Clarke also wrote bad checks in the conduct of his business when he knew his accounts lacked sufficient funds.

Consistent with the FINRA Sanction Guidelines ("Guidelines") and the seriousness of Clarke's misconduct, the NAC barred Clarke from association with any member firm in any capacity and ordered that he pay restitution to his victims for his acts of conversion and misrepresentations of material fact. The NAC also assessed, but did not impose in light of the bar, a $10,000 fine and six-month suspension for Clarke's bad checks. FINRA's sanctions are fully warranted and necessary to protect the investing public from Clarke's deceptive and repeated behavior.

On appeal, Clarke has not presented any legitimate reason to disturb the NAC's findings of liability or the sanctions that the NAC imposed. Clarke does not contest the fact that his victims gave him money for the purpose of purchasing tickets, and that he instead used their

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funds to pay personal expenses. In an effort to avoid responsibility, Clarke offers a variety of excuses, none of which negate his liability. Regardless of whether Clarke intended to eventually pay back his victims does not alter the fact that Clarke used his victims' funds for unauthorized purposes. Clarke also attempts to discredit the victims at issue, all of whom testified against him, asserting that they made money on separate transactions with him. Clarke also attempts to discredit other victims of the same scheme by impugning their character. The Commission should disregard Clarke's self-serving, unsupportable statements that do not affect the findings of liability. Moreover, the Hearing Panel found that Clarke was not a credible witness, and the NAC deferred to those findings, which are fully supported by the record.

Clarke's misconduct squarely reflects on his ability to comply with regulatory requirements that are necessary to the proper functioning of the securities industry and vital for the protection of the investing public. The NAC's findings of liability are based in fact, and the NAC's sanctions—a bar in all capacities and order to pay restitution—are not excessive or oppressive. The Commission should dismiss Clarke's application for review.

II. FACTS

A. Clarke's Background

Clarke entered the securities industry in 1982 and had been registered as a municipal securities representative for nearly 40 years. RP 185 (Stip ¶1), 2504-07.[1] For at least 10 years prior to the alleged events at issue, Clarke routinely informed his securities colleagues and others that he brokered and resold tickets for sporting events, concerts, and other events by acquiring

[1] "RP" refers to the page numbers in the certified record of this case filed with the Commission.

tickets at a discount and reselling them for a profit. Clarke told his colleagues that he had contacts with various individuals and venues in the New York area who supplied him with tickets. RP 866-67 (Tr. 457-58). Clarke also touted to colleagues his contacts within the securities industry who Clarke claimed would purchase those tickets for entertaining clients, personal use, or resale. RP 867-68 (Tr. 458-59). Clarke often did not have the money to purchase the tickets, so he borrowed money from others, including from his colleagues at various FINRA member broker-dealers. RP 582-83 (Tr. 174-75), 869-75 (Tr. 460-66).

B. Clarke Borrowed Money from MARV Capital Partners and Their Business Associate For the Purpose of Acquiring Tickets and Seat Licenses

Clarke associated with MARV Capital in October 2015.[2] RP 949 (Tr. 540), 2505. MARV Capital is a small broker-dealer operated by two partners, Maneesh Awasthi and Virupaksha Raparthi. RP 567-68 (Tr. 159-60). Almost immediately upon association, Clarke began soliciting his new MARV colleagues to invest in his ticket brokering business, including Awasthi, Raparthi, and AG, a MARV advisory client and business associate of Awasthi and Raparthi. RP 468, (Tr. 60), 578-80 (Tr. 170-72). Awasthi, Raparthi, and AG collectively invested $637,400 with Clarke for the explicit purpose of purchasing tickets and seat licenses, as described below. RP 186-88 (Stip. ¶¶ 8, 15, 36)

1. Awasthi's, Raparthi's, and AG's Loans For the Purpose of Buying Tickets

In October 2015, Clarke solicited Raparthi for a loan for Clarke's ticket brokering business. Clarke told Raparthi that he had contacts that would sell him tickets at low prices and

[2] At the time of his association, Clarke was deeply indebted to at least two colleagues at his prior firm, including PO, who Clarke owed more than $300,000 plus interest. RP 935-36 (Tr. 526-27), 942-43 (Tr. 533-34), 947 (Tr. 538), 2373, 2474-85, 2487-90, 2491-94. Prior to Clarke's association with MARV Capital, PO had threatened Clarke that, if Clarke failed to repay him, he would "alert FINRA as well as [Clarke's firm] of [Clarke's] ticket brokering," file a civil action against Clarke, and report Clarke to the Internal Revenue Service. RP 2373.

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that he already had buyers lined up to purchase those tickets. RP 580-81 (Tr. 172-73). Clarke told Raparthi that he would purchase tickets with Raparthi's funds. Clarke also told Raparthi that he would return Raparthi's original investment and pay Raparthi $33,590 in interest from a portion of the profits Clarke generated by reselling the tickets. RP 582 (Tr. 174). Based on Clarke's representations, Raparthi loaned Clarke $218,600 between October and November 2015, so that Clarke could purchase tickets for resale.[3] RP 187 (Stip. ¶ 20).

Raparthi also told AG, a MARV advisory client and business associate of Awasthi and Raparthi, about Clarke's ticket brokering business. RP 187 (Stip. ¶ 18), 589-90 (Tr. 181-82), 793-94 (Tr. 384-85). AG then spoke directly with Clarke. Clarke told AG that Clarke already had buyers lined up to purchase the tickets, that the investment was low risk, and that Clarke would return AG's original investment plus $5,700 in interest from a portion of the profits Clarke generated by reselling the tickets. RP 794-97 (Tr. 385-88). Based on Clarke's representations, AG loaned Clarke $45,300, so that Clarke could purchase tickets for resale.[4] RP 187 (Stip. ¶¶ 18, 20), 797-98 (Tr. 388-89).

In October 2015, Clarke also solicited Awasthi for a loan for Clarke's ticket brokering business. Clarke told Awasthi that he had contacts that would sell him tickets at low prices and that he already had buyers lined up to purchase those tickets. RP 186 (Stip. ¶ 9). Clarke told Awasthi that he would buy tickets with Awasthi's funds. Clarke also told Awasthi he would

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[3] Raparthi loaned the money together with his wife and two entities he controlled. RP 1964, 1969.

[4] Raparthi advanced AG's investment to Clarke, and AG paid back Raparthi. RP 595-96 (Tr. 187-88), 802-03 (Tr. 393-94), 1967. Raparthi transferred his and AG's money to Clarke in seven separate payments, totaling $263,9000, which included the $45,300 that AG agreed to lend Clarke. RP 186 (Stip. ¶¶ 18, 20), 1617. Initially, Raparthi's and AG's loan to Clarke was an oral agreement, but all three later memorialized the terms of the loan in writing. RP 665 (Tr. 257), 1018-19 (Tr. 609-10), 1947. *See* part II.D. *infra.*

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return Awasthi's funds and pay Awasthi $10,000 in interest from a portion of the profits that Clarke generated by reselling the tickets. RP 186 (Stip. ¶10). Based on Clarke's representations, Awasthi loaned Clarke $61,500, so that Clarke could purchase tickets for resale.[5] RP 186 (Stip. ¶ 8), 1617, 1619. Awasthi believed his loan to Clarke to be virtually riskless.[6] RP 480 (Tr. 72).

2. Raparthi's Loan For the Purpose of Acquiring Seat Licenses

Shortly after Raparthi loaned Clarke the majority of his funds, but before the loan and interest came due, Clarke proposed another ticket venture to Raparthi. RP 188 (Stip. ¶ 35), 601-02 (Tr. 193-94). Clarke told Raparthi that he had an opportunity to acquire lifetime rights to multiple permanent seat licenses for the US Open Tennis Championship ("USTA licenses"). RP 521 (Tr. 113), 602 (Tr. 194). Clarke told Raparthi that the holder of the USTA licenses could acquire the entire season's tickets at face value and resell them for substantial profit because of "massive demand." RP 602-03 (Tr. 194-95). Clarke told Raparthi he knew a family interested in selling the seat licenses because of financial hardship, and that family offered Raparthi the "rarely" available opportunity to purchase rights to six USTA licenses. RP 603-04 (Tr. 195-96).

Clarke told Raparthi that he would invest his own money to buy three of the licenses and proposed that Raparthi buy the other three. RP 604 (Tr. 196). Clarke then told Raparthi he was short of funds and asked Raparthi to advance Clarke's share. RP 605 (Tr. 197). Clarke told Raparthi that the transfer of the licenses would take four to six weeks, but Clarke assured Raparthi that his funds would be placed in an escrow account with Clarke's attorney until the

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[5] Awasthi transferred his money to Clarke in two payments, on October 23 and 26, 2015, respectively. RP 186 (Stip. ¶¶ 11, 12), 1619.

[6] Initially, Awasthi's loan to Clarke was an oral agreement, but they later memorialized the terms of the loan in writing at Awasthi's request after Clarke missed their agreed upon repayment deadline. RP 495 (Tr. 87), 1943-44. *See* part II.D. *infra.*

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transaction closed. RP 188 (Stip. ¶ 38), 605-07 (Tr. 197-99). Based on Clarke's representations that Raparthi's funds would be used to acquire the USTA licenses and the funds would be kept in escrow until the transaction closed, Raparthi wired $312,000 to Clarke. RP 188 (Stip. ¶ 36), 610-12 (Tr. 202-04).[7]

C. Clarke's Unauthorized Use of Awasthi's, Raparthi's, and AG's Funds

Despite Clarke's representations to Awasthi, Raparthi, and AG that he would use their money to purchase tickets and USTA licenses, there is no evidence that Clarke ever purchased tickets or USTA licenses with any of their funds. In fact, Clarke stipulated and admitted at the hearing that he used the funds that he received from Awasthi, Raparthi, and AG to pay personal expenses and creditors. RP 975-78 (Tr. 566-69).

The evidentiary record further establishes Clarke's unauthorized use of Awasthi's, Raparthi's, and AG's funds. Prior to receiving the funds from Awasthi, Raparthi, and AG, Clarke's checking account was overdrawn. RP 972-73 (Tr. 563-64). The funds Clarke received from Awasthi and Raparthi were the only deposits in Clarke's account. RP 973 (Tr. 564). After receiving $61,500 from Awasthi and $158,500 from Raparthi for the purpose of buying tickets—and only 19 days after associating with MARV Capital—Clarke wired $130,000 from his account to his former colleague, PO, to whom he owed more than $300,000 plus interest. RP 186 (Stip. ¶ 13), 974-75 (Tr. 565-566), 980 (Tr. 571), 1617, 2199. Two days later, Raparthi loaned Clarke an additional $59,200, and Clarke immediately transferred $43,000 to a different colleague to whom he was also indebted. RP 1617, 2206. Clarke also paid another creditor

[7] The parties stipulated that Clarke told Raparthi that Clarke would purchase "lifetime premium tickets to the US Open tennis tournament" with Raparthi's funds RP 188 (Stip. ¶¶ 35, 37). In actuality, and as is well documented by the record, Clarke told Raparthi that Clarke would purchase USTA licenses, not lifetime premium tickets to the US Open, with Raparthi's funds. RP 601-07 (Tr. 193-99), 2905.

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$13,000, withdrew more than $20,000 in cash, and transferred $6,700 to his daughter. RP 973-75 (Tr. 564-66), 981-82 (Tr. 571-72), 2199. He also used the money for other personal expenditures, including restaurants, liquor stores, groceries, and personal items. RP 978 (Tr. 569), 996 (Tr. 587), 2197-99.

Clarke also stipulated that he never put Raparthi's funds intended for the purchase of USTA licenses into escrow and that he did not use Raparthi's funds to purchase USTA licenses or tickets. RP 188 (Stip. ¶¶ 39, 40). The evidentiary record further establishes Clarke's unauthorized use of Raparthi's funds. The same day that Raparthi transferred Clarke the money, Clarke wired an additional $255,000 to PO. RP 1005-06 (Tr. 596-97), 1617, 2207. And Clarke's attorney confirmed in writing to Raparthi that he never held any money from Clarke in escrow or otherwise. RP 2429.

D. Clarke's Failure to Perform Under the Loan Agreements

Clarke did not fully repay the funds he borrowed from Awasthi, Raparthi, and AG. RP 188 (Stip. ¶¶ 33, 34). 1619, 1621. Instead, Clarke offered them a litany of excuses for his nonpayment[8] and made numerous false promises that he would repay them in the future.

By January 2016, Awasthi had become increasingly concerned about Clarke's failure to perform on their oral agreement and wanted to have Clarke's promise to repay the loan in

[8] Clarke blamed his failure to pay the loans on a buyer's check not arriving as expected, his business partner depositing funds in the wrong account, and a problem with the mail. RP 489 (Tr. 81), 644-45 (Tr. 236-37), 2394. At one point, Clarke claimed he was expecting a large payment from someone in Florida that would enable him to repay Awasthi, Raparthi, and AG. Clarke claimed in a text message that he was in Florida getting the money, when, in fact, he was still at home in New York. RP 680-81 (Tr. 272-73), 814-15 (Tr. 405-06), 2376, 2413. Clarke also became difficult to contact. For example, he claimed in text messages he was unavailable because he was traveling to California, when in reality he was still in New York. RP 1032-35 (Tr. 623-26). He also claimed various family emergencies prevented him from communicating. RP 2381, 2395-2400, 2416, 2418, 2421.

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writing. RP 491 (Tr. 83). Clarke signed documents acknowledging the loan amounts and dates by which Clarke had promised to repay. RP 495 (Tr. 87), 1943. Clarke promised a first payment by December 4, 2015, and a second payment by January 30, 2016.[9] RP 495 (Tr. 87), 1943-44. After failing to meet these repayment deadlines, Clarke promised Awasthi that repayment would happen by February 16, 2016. RP 499-500 (Tr. 91-92). Awasthi gave Clarke an extra month, and they agreed to repayment by March 16, 2016, as evidence by their second written agreement. RP 500 (Tr. 92), 1945.

Clarke also executed a written letter agreement memorializing the loans from Raparthi and AG in February 2016. The agreement provided that Clarke would repay Raparthi and AG all of their principal and interest by February 12, 2016.[10] RP 1947. The agreement also documented that Raparthi had advanced $312,000 to Clarke—$210,00 for three USTA licenses and $102,000 as a personal loan to Clarke—to be repaid by February 12, 2016. RP 1947. Clarke also in writing "affirm[ed] that the $312,000 has been deposited in a mutual escrow [attorney trust] account with [an] attorney." RP 1947.

Despite the written agreements with Awasthi, Raparthi, and AG, Clarke never fully repaid the loans. RP 187 (Stip. ¶ 28), 518, 724 (Tr. 110, 315), 1617, 1619, 1621. Clarke did make a $5,000 interest payment to AG in late January 2016, a $10,000 interest payment to

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[9] Despite signing the document in January 2016, Clarke acknowledged that he had promised a first payment by December 4, 2015, a month prior. RP 489 (Tr. 81), 1943-44.

[10] Raparthi drafted the agreement, and he, his wife, AG, and Clarke signed it. RP 666-69 (Tr. 258-61), 1947. Raparthi testified that, in his rush to complete the document, he inadvertently omitted AG's investment with Clarke and the principal and interest owed to AG. RP 668 (Tr. 260). AG nonetheless executed the agreement. RP 1947.

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Awasthi in February 2016, and a $34,290 interest payment to Raparthi in February 2016.[11] RP 187 (Stip. ¶¶ 26, 27), 505 (Tr. 97), 672-73 (Tr. 264-65), 809 (Tr. 400), 1972. But the deadlines for Clarke's promised performance under the written agreements came and went without further payment. Clarke never paid any of the remaining funds owed to Awasthi ($61,500), Raparthi ($218,600), or AG ($45,300). RP 1617-1621.

In April 2016, Clarke wrote checks to Raparthi and AG for their outstanding principal balances of $218,600 and $45,300, respectively. RP 187-88 (Stip. ¶¶ 29, 30)., 495-96 (Tr. 87-88). Clarke's bank account, however, did not have sufficient funds to cover either check. Raparthi attempted to cash the $218,600 check, and it was returned. RP 188 (Stip. ¶¶ 31-32), 822-25 (Tr. 413-416), 2369, 2371. Later that month, Clarke authorized MARV Capital to withhold $25,000 of his commissions to reduce the amounts he owed to Raparthi, Awasthi, and AG. RP 188 (Stip. ¶ 34), 510-15 (Tr. 102-07). Awasthi, Raparthi, and AG decided to split the money evenly, with each person receiving $8,333. RP 514-15 (Tr. 106-07).

By July 2016, Raparthi and Awasthi contemplated terminating Clarke from MARV Capital. RP 525-28 (Tr. 117-120). Before he was fired, Clarke resigned effective immediately and associated with another member firm. RP 527-28 (Tr. 119-20), 2504-05. Clarke never paid Awasthi's $53,167 loan principal (i.e., $61,500-$8,333); AG's $36,967 loan principal (i.e., $45,300-$8,333); or Raparthi's $210,266 loan principal (i.e., $218,600-$8,334), or the $312,000

[11] The $34,290 interest payment to Raparthi was comprised of the interest owed to Raparthi ($33,590) and the remaining balance of $700 owed to AG as interest. After Raparthi received the interest payment from Clarke, Raparthi gave $700 to AG. RP 671, 675 (Tr. 263, 267).

that Raparthi advanced to Clarke for the USTA licenses. In total, Clarke still owes Awasthi, Raparthi, and AG $612,400.[12] RP 1617, 1619.

E. Clarke Wrote Bad Checks and Initiated Electronic Transfers Without Sufficient Funds

The record establishes that Clarke, since at least 2008, wrote his colleagues checks in purported satisfaction of his debts, but without sufficient funds in his account. RP 482-84 (Tr. 473-75), 1140-43 (Tr. 731-34), 1754, 1765. This was part of a larger pattern for Clarke of bad checks and failed electronic transfers. The parties stipulated that, between February 2013 and September 2016, Clarke wrote at least 46 checks and authorized 14 electronic transfers that failed to clear because of insufficient funds. RP 1623-24, 189 (Stip. ¶ 43). Clarke's bad checks and failed electronic transfers were drawn on four different accounts at different banks. RP 189 (Stip. ¶ 42). Of the 60 bad checks and failed payments that Clarke caused, 51 posted when his account had a negative balance, frequently by thousands of dollars. RP 1623-24.

III. PROCEDURAL BACKGROUND

On June 15, 2018, FINRA's Department of Enforcement ("Enforcement") filed a three-cause complaint against Clarke. RP 1-44. Enforcement alleged that Clarke converted funds intended for the purchase of tickets and seat licenses from Awasthi, Raparthi, and AG, in violation of FINRA Rule 2010. RP 12-13. Enforcement further alleged that Clarke misrepresented material facts to Awasthi, Raparthi, and AG to induce them to loan Clarke

[12] Besides the $25,000 in commissions that Clarke authorized Raparthi and Awasthi to use in satisfaction of his debts, MARV Capital withheld from Clarke approximately three additional months of commission totaling approximately $57,000. The firm did not disburse the funds to Awasthi, Raparthi, or AG but continues to hold the funds in the firm's capital account. RP 717-18 (Tr. 308-09).

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money, in violation of FINRA Rule 2010. RP 13-14. Specifically, Enforcement alleged that Clarke falsely told them that their funds would be used to purchase event tickets, that he would repay them by a specific date, and that he would pay them significant interest. Enforcement further alleged that Clarke falsely told Raparthi that he would acquire USTA licenses and that his funds would be put into an escrow account. RP 13-14. Finally, Enforcement alleged that, from February 2013 through August 2016, Clarke wrote and tendered 46 checks and authorized 14 electronic payment that failed to clear due to insufficient funds, in violation of FINRA Rule 2010. RP 11-12, 15. Enforcement further alleged that at the time Clarke wrote, tendered, or authorized the 60 failed payments, Clarke knew or should have known that he had insufficient funds in his accounts to cover the transactions. RP 15.

After a four-day hearing, the Hearing Panel found Clarke liable for the violations as alleged in the complaint. RP 2677-96. The Hearing Panel found that Clarke was not a credible witness. RP 2682-84, 2686-87, 2691-92. Specifically, the Hearing Panel found Clarke's claimed intention of using his colleagues' money for ticket resales was "false" and that Clarke intended to use the borrowed funds in large part to pay creditors and fund his personal expenditures. RP 2687. The Hearing Panel rejected Clarke's excuses for his failure to pay Awasthi, Raparthi, and AG, dismissing them as "excuses lacking credibility" and "false promises about repayment in the future." RP 26863, 2686. The Hearing Panel also rejected Clarke's claim that he sent the money he borrowed from Raparthi for USTA licenses to PO because PO was helping with the transaction. Rather, the Hearing Panel concluded that PO "knew nothing about any US Open seat licenses" and that "[i]n fact, Clarke was repaying previous loans from [PO]." RP 2683. Finally, the Hearing Panel did not credit Clarke's testimony that he did not pay attention to how much money he had in his bank accounts and thus did not realize he was

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bouncing checks and authorizing payments that failed to clear due to insufficient funds. RP 2688. The Hearing Panel concluded that "the frequency, volume, and duration of the failed payments over the relevant period establish that Clarke deliberately passed bad checks and caused the failed electronic transfers." RP 2692. The Hearing Panel barred Clarke for the conversion and material misrepresentations and ordered Clarke to make restitution in the amount of $612,400, plus interest, to Awasthi, Raparthi, and AG. 2693-94. The Hearing Panel also barred Clarke for the 60 failed payments. RP 2694-95. Clarke's appeal to the NAC followed. RP 2699-2702.

The NAC deferred to the Hearing Panel's credibility findings that Clarke was not a credible witness, which findings are thoroughly supported by the record. RP 2904. The NAC affirmed the Hearing Panel's findings that Clarke converted funds, in violation of FINRA Rule 2010. RP 2904-08. The NAC noted that Clarke stipulated to most of the facts necessary to establish his conversion of Awasthi's, Raparthi's, and AG's funds. RP 2904. The NAC found that Awasthi, Raparthi, and AG loaned Clarke money for the purpose of acquiring tickets and USTA seat licenses, and Clarke used their money without authorization to pay personal expenses and creditors. RP 2904-07. The NAC found that the evidence overwhelmingly supported that Clarke's claimed intention of using the victim's money to purchase tickets for resale was false. RP 2906. The NAC also found that, as soon as he received the funds, Clarke used the money to pay personal expenses and repay debts rather than purchasing tickets. RP 2906. The NAC also found that Clarke made the alleged material misrepresentations, rejecting Clarke's claim that the statements were true when he made them and finding that Clarke's statements to induce the loans were false when he made them. RP 2908. Finding a litany of aggravating factors, and a complete lack of mitigating factors, the NAC barred Clarke for his misconduct. RP 2910-12.

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Consistent with the Guidelines, the NAC ordered that Clarke pay restitution in the amount of $612,400, plus interest from the date Clarke received the money, to Awasthi, Raparthi, and AG. RP 2912.

The NAC modified the Hearing Panel's findings regarding Clarke's 60 failed payments. RP 2909-10. While Clarke stipulated he wrote 46 bad checks and authorized 14 electronic transfers that failed to clear because of insufficient funds, the NAC found that the evidence was sufficient to establish that only four of the 46 bad checks were business related and within the broad range of misconduct proscribed by FINRA Rule 2010. RP 2909. The NAC thus set aside the Hearing Panel's findings of Clarke's liability for the remaining bad checks and failed electronic transfers. The NAC considered the Hearing Panel's credibility findings that Clarke deliberately passed 46 bad checks and caused the 14 failed electronic transfers, and accepted the support they provided about Clarke's knowledge of his insufficient funds with respect to the four checks for which the NAC found Clarke liable under FINRA Rule 2010. RP 2910. When assessing sanctions for this misconduct, the NAC found numerous aggravating factors, and concluded that a six-month suspension in all capacities and a $10,000 fine was necessary for investor protection and appropriately remedial. RP 2912-13. In light of the bar imposed upon Clarke for conversion and material misrepresentations, however, the NAC did not impose these additional sanctions. RP 2913.

On October 19, 2020, Clarke filed this appeal with the Commission. RP 2963.

IV. ARGUMENT

The Commission should affirm the NAC's decision in all respects. On appeal, Clarke offers a variety of excuses that have no basis in the record and none of which negate his liability. The evidence and law unequivocally support the NAC's findings and the sanctions the NAC

imposed, and Clarke offers nothing to merit overturning FINRA's action. The Commission should therefore dismiss Clarke's appeal.

A. Clarke Converted Funds from Awasthi, Raparthi, and AG in Violation of FINRA Rule 2010

The NAC's findings that Clarke converted funds he borrowed from Awasthi, Raparthi, and AG and thus violated FINRA Rule 2010 are plainly founded in fact. FINRA Rule 2010 states that a broker-dealer, "in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." [13] FINRA Rule 2010 prohibits misconduct that "reflects on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money." *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002). Conversion is conduct that violates FINRA Rule 2010. *See, e.g.*, *Steven Grivas,* Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *11 & n.11 (Mar. 29, 2016). Conversion is "extremely serious and patently antithetical to the high standards of commercial honor and just and equitable principles of trade that [FINRA] seeks to promote." *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *42 (Feb. 10, 2012).

Conversion is defined as the "intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it." *See, e.g., Grivas*, 2016 SEC LEXIS 1173, at *11 (relying on the Guidelines' definition of conversion). Clarke's conduct met each element of conversion. It is well established that if a person gives a registered representative money for a specific purpose, the representative's use of

[13] FINRA Rule 2010 applies to persons associated with a member under FINRA Rule 0140(a), which provides that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules."

that money for a different, unauthorized purpose constitutes conversion. *See Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *23 (Sept. 30, 2016) (affirming that respondent converted money given to him for investment purposes by willingly using it to pay personal expenses).

That is precisely what occurred here. Awasthi, Raparthi, and AG loaned Clarke a total of $612,400 to purchase tickets and USTA licenses. Rather than purchase tickets and USTA licenses, Clarke intentionally used their funds for the different, unauthorized purpose of paying creditors and personal expenses. RP 186 (Stip. ¶¶ 8, 11-13, 15, 18, 20, 36-40). These facts are undisputed, and Clarke does not contest them on appeal.

Clarke acted intentionally. The Hearing Panel did not find Clarke's claim credible that he intended to use his colleagues' money for ticket resales. RP 2904. These findings are well supported by the record, and there was no substantial evidence to the contrary. RP 2904; *see William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *30 n.45 (Mar. 31, 2016) ("[Credibility] determinations, based on hearing the witness's testimony and observing demeanor, are entitled to considerable deference."), *aff'd sub nom.*, *Harris v. SEC*, 712 F. App'x 46 (2d Cir. 2017); *Manoff*, 55 S.E.C. at 1161-62 & n.6 (explaining that a Hearing Panel's credibility determination is entitled to deference absent substantial evidence to the contrary). Indeed, there is no evidence that Clarke ever bought any tickets for resale or sought to purchase USTA licenses with the funds he received from Awasthi, Raparthi, and AG. As Clarke readily admitted at the hearing, he used their funds for personal expenses. RP 975-78 (Tr. 566-69). And Clarke's multiple acts and years-long unauthorized use of borrowed funds from others further evidences his deliberate intent in this instance. *See Peter W. Schellenbach*, 50 S.E.C. 798, 801 (1991) (finding that respondent's pattern of misconduct evidenced deliberate intent).

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Clarke's use of Awasthi's, Raparthi's, and AG's funds was unauthorized. Awasthi, Raparthi, and AG loaned money to Clarke to purchase tickets and USTA licenses, and Clarke instead used their money to pay creditors and personal expenses. Awasthi, Raparthi, and AG each testified that Clarke never said he would use their money for any purpose other than to buy tickets and seat licenses for resale, and that they would not have loaned him the money if they had known he would use it for his own purposes. RP 480–481 (Tr. 73–74), 587–588 (Tr. 179–180), 800– 01 (Tr. 391–392).

In sum, Clarke intentionally used the $612,400 he received from Awasthi, Raparthi, and AG for the unauthorized purpose of paying creditors and personal expenses. Clarke's acts undoubtedly constitute conversion and are "patently antithetical" to just and equitable principles of trade and violated FINRA Rule 2010. *Akindemowo*, 2016 SEC LEXIS 3769, at *25; *Mullins*, 2012 SEC LEXIS 464, at *42. Accordingly, the Commission should affirm FINRA's findings.

B. Clarke Made Misrepresentations of Material Fact in Violation of FINRA Rule 2010

The record likewise supports the NAC's finding that Clarke made misrepresentations of material facts to Awasthi, Raparthi, and AG and violated the high standards of conduct required by FINRA Rule 2010. An associated person who obtains money or conducts business through the use of misrepresentations acts in a manner inconsistent with just and equitable principles of trade. *See Donner Corp.*, Exchange Act Release No. 55313, 2007 SEC LEXIS 334, at *29 (Feb. 20, 2007). Associated persons may be held liable under FINRA Rule 2010 for any unethical, business-related conduct, regardless of whether it relates to securities or an associated person's customers. *See, e.g.*, *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (affirming findings that a representative violated FINRA Rule 2010's predecessor rule by misappropriating funds from a political club while serving as the club's treasurer and misrepresenting that the club's funds were

held in an account at the representative's member firm); *Leonard John Ialeggio*, 52 S.E.C. 1085, 1089 (1996) ("We consistently have held that misconduct not related directly to the securities industry nonetheless may violate [just and equitable principles of trade]."), *aff'd*, No. 98-70854, 1999 U.S. App. LEXIS 10362, at *4-5 (9th Cir. May 20, 1999).

Clarke made misrepresentations of material fact to Awasthi, Raparthi, and AG when he convinced them to provide him with funds based upon false statements that he would use the money to purchase events tickets in connection with Clarke's ticket brokering business; that he would repay them the money they lent him by a specific date; and that he would pay them interest on their loans from the profits he earned from reselling the tickets he purchased with their funds. The record further establishes that Clarke made additional misrepresentations of material fact to Raparthi when he told Raparthi that he would use his money to acquire USTA licenses and that Raparthi's money would be held in an escrow account with Clarke's attorney.

Clarke makes no argument on appeal disputing FINRA's findings that he made these misrepresentations. Nor can he. The facts are incontrovertible. The parties stipulated that Awasthi, Raparthi, and AG agreed to lend Clarke money so that Clarke could purchase tickets for resale. The parties also stipulated that Clarke informed Awasthi, Raparthi, and AG that he already had buyers lined up to purchase the tickets. Finally, the parties stipulated that Clarke told Raparthi that he would use Raparthi's $312,000 to purchase USTA licenses, and that the funds would be placed into an escrow account until the tickets were purchased.

Clarke's misrepresentations were material. "The test of materiality is whether the omitted information would have significantly altered the total mix of information made available." *Scott Mathis*, Exchange Act Release No. 61120, 2009 SEC LEXIS 4376, at *29 (Dec. 7, 2009). Clarke's statements were "material because a reasonable investor would want to

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know how their funds were actually being used." *Akindemowo,* 2016 SEC LEXIS 3769, at *17 (affirming FINRA's finding that the applicant's material misrepresentations to induce the victims to transfer money for applicant to buy securities violated FINRA Rules 2020 and 2010). Awasthi, Raparthi, and AG loaned Clarke money based on Clarke's misrepresentations of material fact about the use of their funds, repayment schedule, interest owed, and how their funds would be kept. Moreover, they each testified they would not have given Clarke money had they known that Clarke was going to use their funds to pay personal expenses and creditors.

Clarke was not credible when he asserted that the misrepresentations were true when he made them. RP 2904. Rather, the Hearing Panel found that Clarke's statements made to induce Awasthi, Raparthi, and AG were false when Clarke made them. RP 2908. The NAC deferred to these credibility findings, which the evidence overwhelmingly supports. RP 2908. Immediately after receiving the funds—and sometimes that very day—Clarke transferred money to creditors and used the money for personal expenses rather than using the funds for their intended purpose. Clarke's actions of lying to Awasthi, Raparthi, and AG to induce them to give him money for personal expenses were the same deceitful conduct he exhibited for more than a decade, establishing that Clarke knew he was lying to Awasthi, Raparthi, and AG. RP 935-36 (Tr. 526-27), 942-43 (Tr. 533-34), 947 (Tr. 538), 1209-19 (Tr. 800-10), 1624, 1829, 2373, 2474-85, 2487-90, 2491-94; *see also* footnotes 19-21 *infra.*

In sum, Clarke made misrepresentations of material fact to Awasthi, Raparthi, and AG about his intended use of their funds, in violation of FINRA Rule 2010. Accordingly, the Commission should affirm FINRA's findings.

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C. Clarke Executed Bad Checks in Violation of FINRA Rule 2010

The NAC found that Clarke deliberately wrote four business-related checks with ample reason to know the checks would not clear, and that his misconduct with respect to those four checks violated FINRA Rule 2010. The Commission should affirm these findings.

Associated persons may be held liable under FINRA Rule 2010 for any unethical, business-related conduct, regardless of whether it relates to securities or an associated person's customers. *See, e.g.*, *Vail*, 101 F.3d at 39. The four checks for which the NAC ascertained liability were business related and fit within the broad range of misconduct proscribed by FINRA Rule 2010. They include: (1) the previously described $218,600 check to Raparthi for which payment failed on September 9, 2016; (2) a $26,000 check to JM, for which payment failed on July 11, 2016; (3) a $11,000 check to JO for which payment failed on December 29, 2014; and (4) a $19,500 check to JJ, for which payment failed on October 23, 2014. RP 1623-24, 2909.

First, these four bad checks were business related. Both the checks to Raparthi and JJ were part of a larger scheme in which Clarke converted funds and then used the checks to lull his colleagues and others into a false sense of security that they would be fully repaid. As discussed above, Clarke wrote the $218,600 check to Raparthi in connection to his ticket brokering business after Clarke's unauthorized use of Raparthi's funds. RP 188 (Stip. ¶¶ 31-32), 2369, 2371, 822-25 (Tr. 413-16). Clarke's account had a negative balance of -$1,199.23 when his $218,600 check to Raparthi failed to clear. RP 1624. Clarke therefore knew that the check to Raparthi would fail to clear but nonetheless wrote it to deceive Raparthi that payment was imminent.

Similarly, the record shows that Clarke wrote the check to JM, his industry colleague, after Clarke's unauthorized use of the funds JM loaned him. RP 1655, 1899, 932-33 (Tr. 523-

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24), 1214 (Tr. 805), 1829. Clarke borrowed money from JM, a friend and securities broker, on at least two occasions in or around 2016. RP 1211 (Tr. 802). Clarke told JM that he would use the money from one loan to purchase tickets and that he would use the money from the second loan to pay for his son's college tuition and health insurance. RP 1209-11 (Tr. 800-02). With respect to the latter loan, Clarke, in fact, used the money from JM to repay another individual to whom he was indebted. RP 932-33 (Tr. 523-24), 1655, 1899. Clarke did not repay JM on time or in full. RP 1212 (Tr. 803). In June 2016, in partial purported satisfaction of his debt, Clarke deposited a check for $26,000 to JM directly in JM's bank account, which bounced. RP 1214-15 (Tr. 804-05), 1829. Clarke's account had a balance of $6.18 when his $26,000 check to JM failed to clear. RP 1624. Clarke therefore knew that his $26,000 check to JM would be denied for insufficient funds but he nonetheless passed the bad check and offered JM a flimsy excuse that bank's denial was caused because of an accounts receivable issue with a vendor. RP 1215 (Tr. 806). Clarke later gave JM two other checks, but each time JM went to deposit them, the bank teller warned him that the account had insufficient funds. RP 1217-19 (Tr. 808-10), 1829. JM therefore never deposited the checks and never was fully repaid. RP 1218-19 (Tr. 809-10).[14]

The other two checks at issue Clarke wrote to his coworkers and were part of Clarke's larger scheme in which he, moving from firm to firm, sought loans and funds from unsuspecting colleagues and then offered payment via checks knowing he lacked sufficient funds. JO worked with Clarke at Tradition Asiel Securities Inc. ("Tradition Asiel") and Avatar Capital Group

[14] At the hearing, JM said he was "pretty confident" that Clarke's debts to him were settled, and JM wrote off the remaining $1,000 or $2,000 because Clarke was a friend. RP 1216 (Tr. 807).

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("Avatar") on the corporate desk. RP 1419 (Tr. 1010).[15] Clarke's checking account had a negative balance of -$1,776.70 when Clarke's $11,000 check to JO was denied for insufficient funds on December 29, 2014. RP 1623, 1652, 2450. In fact, Clarke's account at that time had been subject to a negative balance for 14 days, and had been precipitously declining after Clarke made two withdrawals totaling $6,650, two ATM withdrawals totaling $1,000, and a funds transfer of $2,000 immediately after depositing $11,000 on December 11, 2014. RP 1651. It defies reason that Clarke could believe that his check to JO was good when he wrote it.

The circumstances surrounding Clarke's $19,500 check to JJ are similar. JJ was Clarke's supervisor at Tradition Asiel. RP 931 (Tr. 522), 1303 (Tr. 894), 1390 (Tr. 981).[16] Despite his checking account having a balance of $156.30, Clarke wrote the $19,500 check to JJ which was denied for insufficient funds. FINRA 1623, 1650, 2448. But two days prior to the check being denied, Clarke had withdrawn $500 from an ATM, leaving a balance after the withdrawal of $523.76. Thus, Clarke knew his account lacked sufficient funds for such a large check but nonetheless intentionally wrote the bad check to JJ.

In sum, Clarke wrote the four checks with reason to know that the checks would not clear. RP 2910, 1623-24. Moreover, the Hearing Panel found that Clarke's alleged belief that the checks were valid at the time he wrote them was not credible, which finding is fully supported by the record. RP 2910. The large differences between the balances in Clarke's

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[15] FINRA's BrokerCheck also establishes that Clarke and JO were coworkers at Traditional Asiel and Avatar. The Commission may take official notice of information on BrokerCheck, available at http://brokercheck.finra.org. *See* Commission Rule of Practice 323, 17 C.F.R. § 201.323; *see also Bruce Zipper*, Exchange Act Release No. 84334, 2018 SEC LEXIS 2709, at *1 n.2 (October 1, 2018).

[16] FINRA's BrokerCheck also establishes that Clarke and JJ were coworkers at Traditional Asiel.

accounts and the amounts of the checks he wrote establish that Clarke deliberately and intentionally wrote the four checks knowing they would be denied for insufficient funds. *See Voss & Co.*, 47 S.E.C. 626, 628 (1981) (finding that record supported the inference that the respondent knew he had insufficient funds when he passed bad checks).

Clarke's conduct reflects a fundamental disregard for the rules and standards governing the financial services industry and bespeaks a willingness to abuse financial systems, upon which the investing public relies. Clarke's misconduct therefore "reflects on the associated person's capacity 'to comply with the regulatory requirements of the securities business and to fulfill [his or her] fiduciary duties in handling other people's money.'" *Grivas*, 2016 SEC LEXIS 1173, at *10 (quoting *Manoff*, 55 S.E.C. at 1163). By deliberately writing the four checks—the $218,600 check to Raparthi, $26,000 check to JM, $11,000 check to JO, and $19,500 check to JJ—with ample reason to know that the checks would not clear, Clarke failed to observe the high standards of commercial honor and just and equitable principles of trade. *See George R. Beall*, 50 S.E.C. 230, 231 (1990) (holding that respondent's passing of bad checks to his firm constituted a violation of the predecessor rule to FINRA Rule 2010); *Lamb Bros., Inc.*, 46 S.E.C. 1053, 1057 (1977) (holding that the practice of writing bad checks knowing that there is not money to cover them is "patently unethical in the securities business").

FINRA Rule 2010 was designed to promote just and equitable principles of trade, and Clarke's bad check writing with respect to the four checks plainly contravened the just and equitable principles of trade. Accordingly, the Commission should affirm FINRA's findings.

D. Clarke's Arguments on Appeal Are Meritless

Faced with incontrovertible facts, and his owns admissions, which establish that Clarke engaged in conversion, made misrepresentations of material fact, and passed bad checks, all in

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violation of FINRA Rule 2010, Clarke makes a variety of meritless arguments on appeal. The Commission should reject each of them.

Clarke argues that FINRA stated he never reimbursed Awasthi, Raparthi, and AG for "ANY of the deals" to which they agreed, and that Awasthi, Raparthi, and AG "made profits on at least seven or eight deals." Opening Br. at 1.[17] FINRA made no such statement. Rather, the NAC found that "Clarke never paid Awasthi's $53,167 loan principal; AG's $36,967 loan principal; or Raparthi's $210,266 loan principal or the $312,000 that Raparthi advanced to Clarke for the US Open seat licenses, totaling $612,400" in the *alleged* transactions. RP 2902. Awasthi, Raparthi, and AG did not make any profit on any of the transactions that the NAC found constituted conversion. Further, there is no evidence in the record that Awasthi, Raparthi, or AG made any profit on any additional transactions with Clarke. Regardless, though, it would not alter the fact that Clarke converted funds from them in the alleged transactions upon which Clarke's liability is based.

Clarke contends that FINRA did not tell "the FULL story" and "brought in people to create something that didn't really happen." Opening Br. at 1. Clarke also attacks various victims of his misconduct, asserting that he paid them back in cash or that they are lying. *Id.* The Commission should reject these arguments, which lack support in the record and for which Clarke offers no factual support. Clarke received the "fair procedure" that the Exchange Act requires here, including notice of the specific charges against him and multiple opportunities to be heard. *See* 15 U.S.C. § 78o-3(b)(8), (h)(1) (requiring that self-regulatory organizations provide fair procedures); *Sundra Escott-Russell*, 54 S.E.C. 867, 873-74 (2000) (finding requirements of the Exchange Act met when FINRA brought specific charges, the respondent

[17] Clarke's opening brief is a one-page email to the Commission dated March 15, 2021.

had notice of such charges, the respondent had an opportunity to defend against such charges, and FINRA kept a record of the proceedings). Clarke had the opportunity to advocate for himself, and he received notice of the allegations of violations, a hearing, and the opportunity to present evidence and make written and oral arguments. That Clarke chose to not call additional witnesses or present additional evidence in his defense does not make FINRA's proceeding unfair. *See John Montelbano*, 56 S.E.C. 76, 103 n.58 (2003) ("[I]t is a respondent's obligation…to marshal all the evidence in his defense.").

Clarke attached to his opening brief a court filing from the civil matter Raparthi and AG filed against him in New York Supreme Court and asserted that the action is still pending and "the court has NOT thrown out my defense that the Raparthi 'loans' were usurious."[18] Opening Br. at 1. Clarke also asserts that he is suing Raparthi for "my commissions." The pendency of New York state court action, however, has no effect on FINRA's action, and the Commission should ignore Clarke's irrelevant distraction. The issue before FINRA was not whether the loans were enforceable but whether Clarke violated FINRA's just-and-equitable principles of trade rules by converting funds, making misrepresentations of material fact, and writing bad checks. And FINRA has a compelling interest in regulating the conduct of its associated persons that threatens the integrity of the industry such as the misconduct that occurred in this case.

Finally, Clarke argues that he would have repaid the funds to Awasthi, Raparthi, and AG if MARV Capital had paid Clarke the six month of commissions it is withholding. Opening Br. at 1. Clarke made a similar argument before the NAC, which the NAC rejected as "neither

[18] Clarke contended before the NAC that New York usury law renders the loans void and unenforceable due to the high rates of return that Clarke agreed to pay. RP 2912. Clarke, of course, was no mere borrower, agreeing to the terms of a powerful lender. Rather, Clarke himself set the allegedly usurious interest rates.

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legally or factually supported." RP 2906. Clarke, of course, agreed in March 2016 that MARV Capital could withhold $25,000 of commissions after he had already missed several repayment deadlines, and Awasthi and Raparthi distributed that money equally among Awasthi, Raparthi, and AG. RP 188 (Stip. ¶ 34), 510-15 (Tr. 102-07). The record also establishes that MARV Capital withheld an additional $57,000 of Clarke's commissions, which remain in the firm's corporate account. RP 717-18 (Tr. 308-09). Even assuming, arguendo, that Clarke's contention is some sort of defense, the withheld commissions are insufficient. In total, the $82,000 of Clarke's commissions (of which only $25,000 has been distributed per Clarke's agreement) falls far short of the $612,400 that Clarke still owes to Awasthi, Raparthi, and AG. Therefore, Clarke's assertions do not negate FINRA's action or findings that Clarke converted Awasthi's, Raparthi's, and AG's funds, made material misrepresentations, and wrote bad checks in violation of FINRA Rule 2010.

To the extent that Clarke contends that any intent on his part to repay the funds somehow shields him from liability, he is mistaken. Even if Clarke intended to repay Awasthi, Raparthi, and AG, he still intentionally used their money for an unauthorized purpose. The record definitively establishes that, as soon he received the funds from Awasthi, Raparthi, and AG, Clarke used the funds for his own purposes, which were contrary to the purposes for which the funds were loaned to him. That intentional, unauthorized use constitutes conversion and violates FINRA Rule 2010. *See Akindemowo*, 2016 SEC LEXIS 3769, at *23.

E. The Sanctions the NAC Imposed on Clarke Are Neither Excessive Nor Oppressive

The NAC barred Clarke in all capacities for his conversion and material misrepresentations. RP 2912. The NAC also ordered Clarke to make restitution in the amount of $612,400 to Awasthi, Raparthi, and AG. RP 2912. Finally, for the four bad checks, the NAC

assessed, but did not impose in light of the bar, a $10,000 fine and six-month suspension in all capacities. RP 2913. On appeal, Clarke does not directly contest these sanctions. Opening Br. at 1. Indeed, the sanctions are supported by the facts in this case, are consistent with the Guidelines, are neither excessive nor oppressive, and serve the public interest. The NAC carefully considered all the factors, including the complete dearth of mitigating factors, and imposed appropriate sanctions that protect the investing public and correctly reflect the gravity of Clarke's misconduct.

1. Barring Clarke Serves the Public Interest and is Not Excessive or Oppressive

The NAC assessed a unitary sanction for Clarke's conversion and material misrepresentations in connection with the loans to Awasthi, Raparthi, and AG because the violations arose out of the of same conduct. RP 2910-11. In determining what sanctions to impose, the NAC considered the Guidelines for conversion and misrepresentations of material fact. RP 2911; *See FINRA Sanction Guidelines* 36, 89 (2019), https://www.finra.org/sites/default/files/2020-10/2019_Sanctions_Guidelines.pdf [hereinafter "*Guidelines*"]. The Guidelines for conversion reflect the serious nature of the misconduct and provide that a bar should be the "standard" sanction regardless of the amount converted. *Guidelines*, at 36. As the Commission has explained, "[t]his approach reflects the judgment that, absent mitigating factors, conversion poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry." *Grivas*, 2016 SEC LEXIS 1173, at *25. The Guidelines for misrepresentations of material fact also recommend that the adjudicators strongly consider a bar when the conduct is intentional. *Guidelines*, at 89.

FINRA's decision to bar Clarke is supported by several aggravating factors. RP 2911. First, Clarke's conduct was intentional, inherently deceitful, and for his monetary gain. RP

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2911; *Guidelines*, at 8 (Principal Considerations in Determining Sanctions, Nos. 13, 16). Clarke exploited his relationships with colleagues and lied to them about his intended use of their funds. Rather than use the money to purchase tickets and USTA licenses, Clarke converted more than $600,000 from Awasthi, Raparthi, and AG and immediately began using their money to pay creditors and personal expenses. Second, Clarke concealed his misconduct from Awasthi, Raparthi, and AG, and he later offered various excuses and false statements about his plans for repayment to conceal his misconduct. RP 2911; *Guidelines*, at 7-8 (Principal Considerations in Determining Sanctions, Nos. 10, 11, 17). Third, Clarke's behavior continued despite being terminated by Whitaker Securities LLC for similar misconduct in February 2010[19] and being

[19] While associated with the Whitaker Securities, Clarke borrowed $64,000 from the firm's CEO. RP 876-80 (Tr. 467-71). Similar to the misconduct at issue here, Clarke told the CEO that Clarke would purchase tickets with the CEO's funds and would resell the tickets at a profit, from which he would pay the CEO interest on the advanced money. RP 1751, 1769. When the payment deadline approached, Clarke gave the CEO a check for $25,000, along with a promise to pay the remainder of the loan in a few days. RP 482-84 (Tr. 473-75), 1754. The check bounced. RP 1194 (Tr. 785), 1197-99 (Tr. 788-90), 1808-09. Clarke eventually made some additional payments, but $18,000 of the original loan balance remained. RP 1145-46 (Tr. 736-37), 1767.

Another colleague at the firm loaned Clarke at least $35,000. Clarke told the colleague that Clarke would purchase and resell tickets and pay the colleague a portion of the profits. RP 1193-94 (Tr. 784-85), 1196-99 (Tr. 787-90), 1807. Clarke gave the colleague numerous checks that bounced. RP 1194 (Tr. 785), 1197-99 (Tr. 788-90), 1808-09. Eventually, Clarke repaid a portion of the $35,000 debt he owed to this colleague, but he never paid the colleague the remainder or any profit. RP 1199 (Tr. 790).

As a result of Clarke's actions, Whitaker Securities conducted an internal investigation and eventually terminated him in February 2010. RP 1157-65 (Tr. 748-56), 1681-1748, 2552. On his Uniform Termination Notice for Securities Industry Registration ("Form U5"), the firm disclosed that it terminated Clarke after "review[ing] allegations that [Clarke] had not repaid all of the monies he borrowed from non-customers to conduct his outside business, may have used such borrowed funds for other non-disclosed purposes, and may have issued checks for repayment . . . on a closed account." RP 2552. The firm concluded there was "reason to believe the allegations to be true." RP 2552.

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prosecuted for similar misconduct by the Kings County District Attorney's Office in Brooklyn, New York, in April 2011.[20] RP 2911; *Guidelines*, at 8 (Principal Considerations in Determining Sanctions, No. 14). Fourth, his misconduct was "part of a years-long pattern of unethical financial dealings with colleagues in the securities industry," exhibiting a pattern of misconduct littered with multiple acts over a period of time.[21] RP 2911; *Guidelines*, at 7-8 (Principal Considerations in Determining Sanctions, Nos. 8, 9, 17). Finally, Clarke never acknowledged his misconduct, and the testimony he gave to FINRA provides no comfort that he will not, if given the opportunity to continue in the securities industry, engage in similar misconduct in the future. RP 2911; *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, Nos. 2, 4); *see also, e.g.*, *Manoff*, 55 S.E.C. at 1165 ("Manoff has not shown any remorse or admitted wrongdoing, and has not provided assurances against a recurrence."); *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *64 (Nov. 9, 2012) (finding that applicant's "persistent attempts to deflect blame onto others . . . suggests that he is likely to

[20] Around the time of his termination from Whitaker Securities, the Kings County District Attorney's Office investigated Clarke for similar conduct. RP 1819-22. The investigation focused on transactions in which three individuals gave Clarke $63,100 after Clarke represented to them that the money would be used for investments arranged by Clarke in his capacity as a ticket broker. RP 1819-22. That investigation led to an April 2011 deferred prosecution agreement, in which the prosecutor agreed not to bring criminal charges against Clarke if he repaid the three individuals the full amount of the funds they advanced him. According to the District Attorney, Clarke's representations about his ticket reselling "may have been false and/or fraudulent when he made them, in that he lacked the capacity to arrange and execute the supposed deals." RP 1820.

[21] The record is replete with evidence of Clarke's years-long pattern of unethical conduct, including conversion and inducing colleagues and others to loan him money based on misrepresentations of material fact about Clarke's intended use of their funds. Among others, Clarke preyed on his security industry colleagues. Not only did Clarke engage in the same misconduct at Whitaker Securities, Clarke's unethical conduct continued at other member firms, including the firms Clarke associated directly before and after MARV Capital, Tradition Asiel and Avatar. RP 932-39 (Tr. 523-30), 1209-11 (Tr. 800-02), 1340-51 (Tr. 931-42), 2561.

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engage in similar misconduct in the future"); *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *75 (Jan. 30, 2009) ("We agree with FINRA that Epstein's demonstrated insouciance and indifference towards his responsibilities under NASD rules poses a serious risk to the investing public."), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

Clarke nevertheless claims that his competence as a municipal securities broker and trustworthiness is "evident in the commissions [he] has earned over the years." Opening Br. at 1. Clarke's alleged trustworthiness is belied by the record before the Commission. Moreover, Clarke's prior ability to earn commissions does not negate the seriousness of his misconduct or provide any assurance that his misconduct will not reoccur. *See Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 SEC LEXIS 994, at *92 (Feb. 1, 2010) ("Katz's assertions that she was [a] nice person who did a good job for her clients similarly do not warrant a lesser sanction, , as her misconduct demonstrated a readiness to put her own interests ahead of her clients'.").

Clarke laments that, as a result of FINRA's action, he has lost commissions and customers and, as of FINRA's final action, his securities license. Opening Br. at 1. "But any negative consequences for [Clarke] resulting from the violation he committed, or from the disciplinary proceeding that followed, are not mitigating." *John Joseph Plunkett,* Exchange Act Release No, 69766, 2013 SEC LEXIS 1699, at *51 (June 14, 2013) (affirming's FINRA bar of applicant). The hardship that Clarke has suffered is outweighed by the necessity of ensuring that the investing public is protected from him. *See id*. at *52. Converting funds through deceptive means like what occurred here is "antithetical to the basic requirement that customers and firms must be able to trust securities professionals with their money." *Keilen Dimone Wiley*, Exchange Act Release No. 76558, 2015 SEC LEXIS 4952, at *26 (Dec. 4, 2015), *aff'd*, 663 F. App'x 353 (5th Cir. 2016); *see also Manoff*, 55 S.E.C. at 1166 ("We agree with the NASD that Manoff's

continued presence in the securities industry threatens the public interest."). Given the gravity of his misconduct, barring Clarke is necessary to protect the investing public and is not excessive or oppressive.

2. The Guidelines Support Ordering Restitution

The NAC also appropriately ordered that Clarke pay $612,400 in restitution to Awasthi, Raparthi, and AG. RP 2912. The Guidelines provide that FINRA may order restitution when an identifiable individual has "suffered a quantifiable loss" that was "proximately caused by [the] respondent's misconduct." *Guidelines*, at 4. "'An order requiring restitution . . . seeks primarily to return customers to their prior positions by restoring the funds of which they were wrongfully deprived.'" *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *86 (Sep. 28, 2017) (quoting *Kenneth C. Krull*, Exchange Act Release No. 40768, 1998 WL 849545, at *6 (Dec. 10, 1998)). Commission policy favors restitution where an individual has suffered identifiable losses proximately caused by a registered person's misconduct. *See, e.g.*, *Toney L. Reed*, 52 S.E.C. 944, 946 (1996). ("[W]e reiterate our preference that the NASD issue orders of restitution, in contrast to fines payable to the NASD, in instances in which losses have been suffered by identifiable customers as a result of a respondent's misconduct."). That is precisely the situation here.

FINRA ordered that Clarke make restitution in the amount of $612,400, plus interest from the date that Clarke received the money. RP 2912. Specifically, FINRA ordered Clarke to pay $53,167 to Awasthi with prejudgment interest as of October 26, 2015; $522,266 to Raparthi with prejudgment interest as of November 12, 2015; and $36,967 to AG with prejudgment interest as of November 5, 2015. RP 2912. The appropriateness of FINRA's restitution order is beyond dispute. The quantifiable losses suffered by Awasthi, Raparthi, and AG were caused by

Clarke's misrepresentations of material fact about Clarke's use of their funds and his conversion: they would not have suffered their losses if Clarke had not made the material misrepresentations and converted their money. The restitution amounts properly account for all of the funds that Awasthi, Raparthi, and AG transferred to Clarke for the purpose of acquiring event tickets and USTA licenses, after deducting any monies that Clarke paid back to them and Clarke's withheld commissions that were distributed. RP 1619, 1621. And FINRA's restitution order explicitly stated any amounts to Awasthi, Raparthi, and AG shall be offset by any documented payments or adjustments to the amounts owed as a result of the civil matter filed by Raparthi and AG against Clarke in New York Supreme Court. RP 2912. Accordingly, the restitution order restores Awasthi, Raparthi, and AG to the position they would have been in had they not been subject to Clarke's misconduct. *See Ahmed*, 2017 SEC LEXIS 3078, at *86 (finding that FINRA's restitution order was proper to restore the losses suffered by victims as a result of the respondents' fraud).

Clarke argues that Awasthi, Raparthi, and AG "made profits on at least seven or eight deals." There is no factual support for these assertions. Even if there were, the fact that Awasthi, Raparthi, and AG may have made a profit on other transactions with Clarke does not negate the fact that Clarke caused their quantifiable loss for the transactions at issue by making the misrepresentations of material fact and converting the money at issue.

Clarke previously argued that Awasthi, Raparthi, and AG were "finance industry veterans" who should have been "wary of high rates of return in a short time frame, such as the rates that Clarke purported to promise to his colleagues." RP 2908. But as FINRA found, Awasthi, Raparthi, and AG each agreed to loan Clarke money based on his misrepresentations about the use of their funds, and none of the victims would have given Clarke money had they

known that he would use it to pay creditors and personal expenses. Accordingly, Clarke did, in fact, cause the losses suffered by Awasthi, Raparthi, and AG. *See Michael Frederick Siegel*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459, at *53 (Oct. 6, 2008) (rejecting applicant's argument that restitution was inappropriate because victims were sophisticated and knew the associated risks).

Finally, despite Clarke's arguments to the contrary, the pendency of the New York state court action has no effect on FINRA's disciplinary action or its sanctions and restitution order. Opening Br. at 1. New York usury law is wholly inapposite in FINRA's disciplinary action, where the issue is not whether the loans are enforceable but whether Clarke violated FINRA ethical rules. And the record definitively established that Clarke took more than $600,000 from Awasthi, Raparthi, and AG, used the money for unauthorized purposes, and failed to return it as promised. Restitution therefore is appropriate as a matter of equity.

3. The Guidelines Support the Sanctions That FINRA Assessed For Clarke's Bad Check Conduct

The Guidelines do not specifically address intentionally writing checks without sufficient funds. The NAC therefore considered the nature of the violation and applied the Principal Considerations and General Principles Governing All Sanction Determinations and assessed an appropriately remedial sanction that serves the public interest. RP 2912-13.

The NAC properly considered that Clarke's behavior was irresponsible, intentional, and unethical. RP 2912; *Guidelines*, at 8 (Principal Considerations in Determining Sanctions, No. 12). The NAC found that Clarke intentionally wrote bad checks without having sufficient funds, lulling payees into inactivity or making them believe that his debts were repaid. RP 2912; *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 10). His behavior "subjected the recipient of his checks to serious risk of loss." RP 2912-13 (quoting *Voss & Co.*,

47 S.E.C. at 633); *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 11). The four checks were also part of a larger scheme in which Clarke engaged, moving from firm to firm, seeking loans and funds from unsuspecting colleagues and offering payment via checks without sufficient funds. RP 2913; *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 8). The NAC also found it aggravating that Clarke displayed a lack of remorse and continued to blame the victims of his bad checks instead of accepting responsibility. RP 2913; *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 2).

After considering all of these factors, the NAC concluded that a $10,000 fine and a six-month suspension in all capacities struck an appropriate balance and served the public interest. RP 2913. In light of the bar for conversion and misrepresentations of material fact, however, the NAC assessed, but did not impose, these sanctions. RP 2913. Even if FINRA had imposed these sanctions, however, they are neither excessive nor oppressive considering the misconduct and complete lack of mitigating factors.

V. CONCLUSION

Clarke does not dispute any of the core facts that form the basis of FINRA's action. The record amply supports that Clarke converted Awasthi's, Raparthi's, and AG's funds. Clarke exploited the relationship with his colleagues and an associate by intentionally inducing them to loan him funds by making misrepresentations of material fact, and then Clarke used those funds for unauthorized purposes to pay creditors and personal expenses. By converting funds and making these misrepresentations of material fact, Clarke displayed an utter disregard for the fundamental ethics by which all FINRA members must abide and has shown no remorse. His deceptive and unscrupulous acts demand the investing public be protected. Barring Clarke and

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ordering him to pay $612,400 in restitution are entirely appropriate for Clarke's grievous misconduct. The Commission should affirm the NAC's decision in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Megan Rauch, certify that on this 28th day of April 2021, caused a copy of the foregoing Brief of FINRA in Opposition to Application for Review, In the Matter of the Application of Michael Joseph Clarke, Administrative Proceeding File No. 3-20126 to be served by electronic mail and eFAP on:

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CERTIFICATE OF COMPLIANCE

I, Megan Rauch, certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

I, Megan Rauch, further certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition not to exceed 14,000 words. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 11,168 words.

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