SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of WILLIAM JOSEPH KIELCZEWSKI For Review of Disciplinary Action Taken by FINRA	Admin Proc. File No. 3-20636

APPEAL BRIEF SUBMITTED ON BEHALF OF WILLIAM JOSEPH KIELCZEWSKI

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Introduction

William Joseph Kielczewski ("Kielczewski") worked as a registered representative for Huntington Investment Corporation ("Huntington") from 2014 to 2017. He was fired based on allegations that he had engaged in private securities transactions for a hedge fund. Over the next two years, FINRA obtained documents and information from Kielczewksi and Huntington before it filed a complaint in March 2019 and held a hearing in December 2019. Despite an unblemished 18-year career in the securities industry and full and fair disclosure of the transactions at issue to his employer, FINRA imposed, among other sanctions, an 18-month suspension on Kielczewski.

Unbeknownst to either Kielczewski or FINRA until days before the hearing, Huntington had withheld documents and information from its FINRA Rule 8210 responses, a fact that came to light nine days before the first scheduled hearing date. Notwithstanding the incompleteness of the record, FINRA declined Kielczewski's request to have Huntington produce the withheld documents or even to require Huntington to identify the reasons for withholding them, and FINRA proceeded with the scheduled hearing on the obviously incomplete record.

By proceeding in this fashion, FINRA violated its own rules and further deprived Kielczewski of the fair procedure he is entitled to under the Exchange Act of 1934. In addition, the record shows that Kielczewski fully and fairly informed Huntington of his relationship with Mariemont before and during his employment at Huntington, negativing the mens rea found by FINRA and warranting a lesser sanction. Finally, under any view of the evidence, the sanctions imposed were excessive.

For these reasons, the decision of FINRA below should be vacated and the case remanded for new proceedings.

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I. Factual Background

The facts set forth in Kielczewski's post-hearing brief are incorporated herein by reference. (FINRA 005244-5265). A summary of the facts relevant to this appeal is set forth below.

a. FINRA Issues FINRA 8210 Requests to Huntington and Kielczewski Following Kielczewski's Termination and Unfavorable Disclosures on His U-5

On April 26, 2017, Kielczewski was terminated by Huntington. (FINRA 002254-2255). Kielczewski's Form U-5 stated that Kielczewski was fired for violating "investment-related statutes, regulations, or industry standards of conduct," (JX-30 at 10, FINRA 004682), [1] rendering him effectively unemployable by FINRA members. (*Id.* at 8; FINRA 004680; FINRA 002261).

As a result of the U-5 filing, FINRA initiated an investigation and issued requests for documents and information under FINRA Rule 8210 ("Rule 8210") to Kielczewski, to which he responded. Kielczewski also sat for two investigative depositions by FINRA.

At the same time, FINRA issued Rule 8210 requests to Huntington. Most of the Rule 8210 requests to Huntington, both pre- and post-complaint, (specifically those dated Aug. 15, 2017; June 27, 2018; July 30, 2018; Jan. 23, 2019; Sept. 10, 2019, and Sept. 19, 2019) included the following language:

> Under FINRA Rule 8210, your client [referring to Huntington] is obligated to respond to this request fully, promptly, and without qualification. Your client [is] also obligated to supplement or correct any response that is later learned to have been incomplete or inaccurate. If any responsive document or information is withheld, specifically identify what is being withheld and state the basis for doing so. (Motion to Compel Decision at 3-4, FINRA 005291-5292).

Notwithstanding this unequivocal language, Huntington withheld documents and information from these Rule 8210 requests (*id.* at 5-6, FINRA 005293-5294), but never

[1] References to JX-__, RX-__, and CX-__, are to the Joint Exhibits, Respondent's Exhibits, and Complainant's Exhibits offered into evidence at the four-day hearing held in this matter on Dec. 11, 12, 13, and 16 of 2019. References to FINRA ___ are to the official record of this proceeding as certified by FINRA.

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"specifically identif[ied] documents or information" that it had withheld or "stat[ed] the basis for doing so." (*id*. at 3, FINRA 0052911). In fact, never in the course of these proceedings has Huntington identified the documents and information that it withheld from the hearing.

After the complaint was filed against Kielczewski (FINRA 000001-26), a hearing officer was assigned and a prehearing schedule set, including a date for Kielczewski to make a motion under FINRA Rule 9252 for FINRA to issue additional Rule 8210 requests. (FINRA 000087-121). Kielczewski made a timely Rule 9252 motion on September 10, 2019 (FINRA 000141-154). FINRA then issued the Rule 8210 request to Huntington, including the same language above requiring Huntington to produce documents or to identify those withheld and the reasons for doing so. (FINRA 000157). On October 7, 2019, Huntington produced some of the requested documents but, as it had regularly done over the previous two years, withheld documents without indicating any were withheld or providing a privilege log for those withheld.

b. Days Before the Hearing, Huntington Reveals that It Has Intentionally Withheld Documents and Information from Its Rule 8210 Responses Without Giving Notice to FINRA or Kielczewski

On December 2, 2019, one day before the pre-hearing conference, and just nine days before the first day of hearing, Huntington moved to intervene in order to invoke the attorney-client privilege for documents and information relating to its assertedly privileged internal investigation into Kielczewski. In its motion, for the first time, Huntington indicated that it had withheld documents and information from its previous productions. (FINRA 000437-441).

Kielczewski filed his opposition to the motion the same day, noting that Huntington had failed to provide notice to FINRA (and, accordingly, under the FINRA rule, to Kielczewski) by identifying the documents and information that were withheld and, in doing so, had waived any

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applicable privileges. Kielczewski sought production of the withheld documents or information, a privilege log, continuance, and other relief. (FINRA 000443-451).

The hearing officer granted Huntington's motion to intervene (FINRA 000673-674) but denied Kielczewski any relief. Instead, the hearing officer reserved the question of whether Kielczewski would be entitled to relief concerning the documents and information that Huntington had withheld from its responses until *after* the conclusion of the evidentiary hearing. (FINRA 001360-1369). The hearing officer held that under no circumstances would the evidentiary hearing be delayed. (FINRA 001362).

c. The Evidence At Hearing Showed That Kielczewski Disclosed His Relationship with Mariemont Before and During His Employment at Huntington

FINRA conducted a four-day, in-person hearing in connection with the charges against Kielczewski in New York in December 2019 before a hearing panel consisting of a Hearing Officer and two Panelists.

The complaint alleged that Kielczewski had willfully and intentionally deceived Huntington about his relationship with Mariemont, and, to the same end, had caused Huntington to file false statements on the Forms U4 Huntington had filed on his behalf. The evidence at the hearing, however, showed that Kielczewski informed Huntington about his relationship with Mariemont before and during his employment at Huntington, including during a "second look" by Huntington in 2016, and that he never deceived Huntington about his relationship with Mariemont.

i. Before Joining Huntingon, Kielczewksi Told His Future Boss He Would Be Talking to His Huntington Clients About Investing in Mariemont

Prior to his employment with Huntington, Kielczewski disclosed the material facts about his relationship with Mariemont to Huntington, including that he would be talking to his Huntington clients about investing in Mariemont.

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At the time, Kielczewski worked at Fifth Third Securities ("Fifth Third"), another mid-western regional bank, covering fixed income investments for his clients, including mortgage-backed securities. (*See generally* JX-1, FINRA 002829-2836; FINRA 002166-2171). There he met Jeffrey Chapman, (FINRA 002171), who was head of Capital Markets, and Kevin Taylor, a mortgage-backed securities trader. (FINRA 002172; FINRA 002175). Chapman left Fifth Third and became head of Capital Markets at Huntington and in 2013 he recruited Kielczewski to join him at Huntington. (FINRA 002188).

Prior to joining Huntington, Kielczewski told Chapman that he would be involved as a founder of Mariemont and that he would be talking to his Huntington clients about investing in Mariemont. Chapman knew, moreover, that Kielczewski was talking to Kielczewski's biggest client at Huntington, Spartan Chemical, about investing in Mariemont in January 2014 and, further, understood that Kielczewksi was having similar conversations with his other potential Huntington clients about Mariemont. (FINRA 002105-2106).

Chapman also obtained and transmitted documents and information about Mariemont to Huntington's parent bank, which ultimately advanced Mariemont a $40 million loan. The Underwriting Analysis made clear, in writing, that Kielczewski expected his transitioning Huntington clients to also be investors in Mariemont:

> "Bill Kielczewski was a former Fifth Third fixed income trader and associate of Kevin Taylor who joined Huntington Investment Company (HIC) in December 2013. Bill and another Fifth Third trader (Ted Sumnar) will be leading HNB's efforts to build an institutional client base. <u>Kevin, Bill, and Ted have former Fifth Third clients that will be investors in Mariemont; those clients are also prospective HIC clients</u>." JX-45b at 12 (FINRA 004790) (emphasis added).

The Underwriting Analysis also noted that Kielczewski had a significant ownership stake in the general partner and the financial advisor for Mariemont and that he was not merely an investor. (JX-45b at 14, FINRA 004792).

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Finally, given the potential conflicts between Kielczewski's interest in Mariemont and his duty of loyalty to Huntington, Huntington instituted several measures to address the potential conflicts. For example, Mariemont was required to house its investments with Huntington; Kielczewski was to have no access or visibility to the Mariemont account at Huntington; and the Mariemont account was to be serviced by a Huntington salesperson other than Kielczewski. (FINRA 002234).

ii. Kielczewski Discloses His Relationship with Mariemont to Huntington in His Written Disclosures

On December 23, 2013, in responding to a Huntington on-boarding questionnaire, Kielczewski disclosed that: "he was engaged in an outside business activity with an entity named 'Mariemont Capital'"; "his relationship with Mariemont Capital began on November 30, 2013"; "he was a passive owner/investor in a general/limited partnership that invests in non-conforming MBS [mortgage-backed securities]"; "he had no business duties at Mariemont Capital"; "he intended to devote approximately one hour per month to this other business"; "he received $50,000 annually in compensation from this outside business activity"; he was a "general partner in an investment-related limited partnership or manager of an investment-related limited liability company"; and that he anticipated "participat[ing] in private securities transactions". (JX-3, FINRA 002845-2858).[2]

Between January 2014 and December 2016, Kielczewski also provided information for his U4 filings. Specifically, in response to the question: "Are you currently engaged in any other

[2] In response to an email follow-up from Gregory, Kielczewski later stated, erroneously, that he did not anticipate participating in private securities transactions. (JX-4 at 1, FINRA 002859). This "clarification" was based on Kielczewski's reasonable belief that Gregory understood the relationship between Kielczewski and Mariemont and that he, Gregory, did not consider Kielczewski's disclosed relationship with Mariemont to amount to "participation" in private securities transactions. (FINRA 002222-2224). It was for this reason that in 2015, when Kielczewski filled out a registered representative questionnaire, he answered the question, "Have you engaged in any Private Securities Transactions while employed through [Huntington]?" with the answer "No." (JX-13, FINRA 003171-3173).

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business either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise?" Kielczewski stated, in relevant part, that he was a "passive silent minority partner in Mariemont Capital LLC, an investment related company since 12/1/2013. 0 hours per month devoted to this business." (JX-12, FINRA 003165-3169).

iii. Following Kielczewski's Disclosures to a FINRA Branch Examiner in 2016, Huntington Takes a "Second Look" at Kielczewski's Relationship with Mariemont but Does Not Request Kielczewski Divest Himself of His Interest in Mariemont

In April 2016, FINRA began a branch examination of the Huntington branch in Toledo, where Kielczewski worked. (FINRA 001139). In connection with the exam, Kielczewski filled out a questionnaire that asked if Kielczewski was involved in any "outside employment/activities or private securities transactions." (JX-14b at 3, FINRA 003185). As he had done with his answers on the pre-registration request form and the Form U4s, Kielczewski answered "yes" to this question. During the course of the interview, Kielczewski stated he was both an owner and general partner of Mariemont and that, while he did not earn a salary, he did earn general partnership fees if a hurdle was satisfied. (FINRA 002233). In response to a further question, Kielczewski stated that he was aware of the conflicts that this arrangement presented and that they were addressed by procedures Huntington had put in place; specifically, that all trades made by Mariemont were run through a Huntington account overseen by a registered representative other than Kielczewski and supervised by Huntington's head trader. (FINRA 002234).

Following Kielczewski's meeting with the FINRA branch examiner in May 2016, Huntington conducted a careful review of Kielczewski and Mariemont. On June 28, 2016, a meeting was held between Stephen Dahlke, then Huntington's Chief Compliance Officer (and who had replaced Gregory), Serina Shores, the Huntington compliance officer who attended the meeting between the FINRA examiner and Kielczewski, and Matthew Dougherty, a senior

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Huntington compliance officer. Kielczewski did not attend the meeting. Following the meeting, which included a close review of Mariemont organizational documents, Huntington concluded that Kielczewski ought to divest his ownership interest in Mariemont:

> Hi Steve,
> During today's meeting, we agreed that Compliance should recommend that Bill K. divest himself of his ownership interest in Mariemont Capital due to, amongst other things, a potential conflict of interest.

(JX-46a at 65, FINRA 004909).

Following the June 28, 2016 meeting, on July 1, 2016, Stephen Dahlke organized a call with Scott Kleinman, then Huntington's Head of Capital Markets (and who had replaced Jeffrey Chapman), Matthew Milcetich, Huntington's Chief Operating Officer for Capital Markets, (FINRA 001544), and David Fitzsimmons, a Huntington supervisory principal in Capital Markets and Kielczewski's immediate supervisor. Kielczewski did not attend the meeting. This was followed by a call on July 5, 2016 with the same participants (JX-46a at 70, FINRA 004914).

In connection with these discussions, Fitzsimmons sought to obtain more information from Kielczewski about his relationship with Mariemont. On July 1, 2016, Kielczewski sent an email to Fitzsimmons, and on July 14, 2016, Kielczewski completed an outside business activity form. (JX-15b, FINRA 003193-3194; JX-15d at 4-7, FINRA 003198-3201). In these communications, Kielczewski identified his role at Mariemont, his ownership percentage, his voting rights, and the names of his Huntington clients who had also invested in Mariemont. (*Id.*). In connection with this "second look" in 2016, Kielczewski answered every question put to him and provided every document requested of him regarding his relationship with Mariemont. (FINRA 001662-1663).

Notwithstanding Huntington's conclusion that Kielczewski should divest himself of his interest in Mariemont and the subsequent discussion of these issues by the senior officers at Huntington, no one, apparently, ever asked Kielczewski to do so: Dahlke testified that this would

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have been Fitzsimmons' responsibility. (FINRA 001552). Fitzsimmons said he had never spoken to Kielczewski about divesting his interests in Mariemont. (FINRA 001657).

Instead, on September 20, 2016, Kielczewski was asked to execute a new Outside Business Activity Monitoring form in connection with his relationship with Mariemont. (JX-17c at 2-3, FINRA 003258-3259). The executed form stated, in relevant part: "Bill has a fully disclosed minority ownership interest in Mariemont Capital." (JX-17c at 2, FINRA 003258). Furthermore, and apparently based on a review by Huntington that revealed Kielczewski had discussed Mariemont with his Huntington clients using his Huntington email account,[3] the agreement required that Fitzsimmons, as Kielczewski's supervisory principal, conduct quarterly reviews of Kielczewski's emails for the word "Mariemont"; would cross-reference Mariemont trades with client activities in Kielczewski's accounts, also on a quarterly basis; and that Kielczewski would confirm the correctness of the disclosures in the form on an annual basis. (*Id.* at 3, FINRA 003258).

On December 6, 2016, Fitzsimmons asked Kielczewski to confirm the accuracy of the statements in the September 20, 2016 form (JX-17c, FINRA 003257), which Kielczewski did the same day. (JX-18, FINRA 003263). It is undisputed that Kielczewski complied with the September 2016 Outside Business Activity Monitoring agreement during his time at Huntington. (FINRA 001662-1663).

iv. Huntington Fires Kielczewski Despite His Compliance With the Change in Procedures

Notwithstanding Kielczewski's compliance with the increased supervision that Huntington required after the "second look", Huntington terminated Kielczewski on April 26, 2017. (FINRA 001633). In the Form U5 that Huntington filed in connection with the termination, Huntington

[3]Documents demonstrating this fact may have been held back by Huntington from its responses to the FINRA Rule 8210 requests. Even in the absence of such documents, however, this is a fair inference from the evidence that FINRA was able to procure.

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stated that: "Representative misrepresented activity relating to an OBA, and engaged in private securities transactions without firm approval for which there are no known customer complaints." (JX-30 at 8, FINRA 004680).

v. Huntington Moves to Intervene, Revealing for the First Time That it Withheld Documents and Information from its Responses to FINRA's Requests

Huntington alleged in its motion to intervene that, prior to deciding to terminate Kielczewski in April 2017, Huntington had conducted an:

> internal review of Respondent's undisclosed and unapproved outside business activities, and his participation in undisclosed and unapproved private securities transactions (i.e., the activity that forms the bases of this action). At the conclusion of the internal review, [Huntington] terminated Respondent's association with it. (FINRA 000438).

Because of the assertedly privileged nature of this review, Huntington alleged that it withheld documents based on assertions of attorney-client privilege and work-product protection. FINRA never asked Huntington to justify this assertion of the attorney-client privilege or work-product protection. Although the hearing officer had told Kielczewski he would be able to explore the foundations for these assertions of privilege, at hearing he allowed Huntington to invoke privilege as to each and every foundational question put to Huntington's witnesses. (*See* FINRA 001560-1596). Further, FINRA permitted Huntington to invoke privilege on topics unrelated to the alleged internal review throughout the hearing to cut off lines of questioning by Kielczewski. (*See, e.g.*, FINRA 001665-1682).

Accordingly, it is undisputed that Huntington asserted attorney-client and work-product privilege over the critical communications between the parties regarding the outside business activity and private securities transactions from which the charges arise, communications that are core to the case. The withheld documents may also include notes and details of conversations with

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Huntington employees who testified against Kielczewski, documents reflecting the detailed disclosures Kielczewski had made over the years concerning Mariemont, the discussions and considerations behind the decision to retain Kielczewski in 2016 after the "second look" and Huntington's detailed knowledge of his relationship with Mariemont,[4] and the discussions and considerations concerning Kielczewski's termination. Attorney-client privilege may not apply to any such documents unless legal advice is both sought and rendered. *See* SEC Enforcement Manual, § 4.1.1 ("Attorney-Client Privilege"). All of these, obviously, would have been invaluable to Kielczewski's counsel at the hearing. Accordingly, even if Huntington withheld these documents based on a good-faith belief that they were protected, Kielczewski was severely prejudiced by his inability to challenge that belief.

However, it is difficult to say Huntington was acting in good faith when it repeatedly withheld documents without informing FINRA according to the requirements of Rule 8210 and then asserted privilege over such documents at the 11th hour. It is even more difficult to say so considering Huntington's subsequent actions when Kielczewski, as a former Huntington employee, had to bring three separate actions; *i.e.*, a Rule 9252 request to FINRA, which was denied, followed by two state court lawsuits against Huntington to obtain - not advancement or indemnification - but just *copies of the relevant insurance policies* from Huntington to facilitate Kielczewski's defense against the FINRA claims.[5] This unjustifiable refusal to cooperate demonstrates a knowing

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[4] For example, FINRA Enforcement made much out of the emails Kielczewski sent to Huntington customers about investments in Mariemont. (FINRA 002616 -2618). Such emails, obviously, would have been received much differently had it been disclosed that the Chief Compliance Officer for Huntington and Kielczewski's immediate supervisor had reviewed those emails in 2016 and still kept Kielczewski at Huntington.

[5] More specifically, on June 21, 2019, Kielczewski moved under FINRA Rule 9252 for an order compelling FINRA Enforcement to issue a Rule 8210 request to Huntington for, among other things, the insurance policies that Huntington held for Kielczewski's benefit in the event of a regulatory action being taken against him. (FINRA 000053-66). FINRA Enforcement opposed issuing such a Rule 8210 request (FINRA 000067-72), and a FINRA hearing officer ultimately denied the motion, (FINRA 000079-82). This caused Kielczewski to seek relief in the state courts. On October 24, 2019, an action was filed in New York State Supreme Court, New York County under Index No. 0656236/2019 for an order compelling the production of Huntington's insurance policies. After the presiding judge concluded that the

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disregard by Huntington of its obligations to its employees that shows, coupled with its knowing disregard in its handling of documents that may have been critical to Kielczewski's defense, shows that it is Huntington that lacks clean hands here, not Kielczewski.

Further, given the importance of "written notice" to the FINRA Rule 3280 charges, the improper withholding by Huntington of even one document may have changed the outcome of the proceedings. But because Huntington's invocations of privilege went unchallenged by FINRA and because the hearing officer cut off all efforts by Kielczewski to inquire regarding the documents and information that were withheld by Huntington and the reasons (if any) why, those questions cannot be addressed on this record. Remand is essential.

vi. Following the Hearing, FINRA Denies Kielczewski's Motion to Obtain the Documents and Information That Huntington Withheld and Sanctions Kielczewski

After the conclusion of the evidentiary hearing, the Hearing Officer took briefs from the parties and Huntington on the question of whether Huntington should be compelled to produce the documents and information it had withheld in violation of Rule 8210, and the Hearing Panel took briefs from the parties on the proposed findings of fact and conclusions of law.

On March 3, 2020, the Hearing Officer denied Kielczewski's motion to compel. (FINRA 005289 -5297). On May 15, 2020, the Hearing Panel issued its decision, finding that Kielczewski had violated the FINRA rules as charged in the Complaint willfully or recklessly and imposed as sanctions an 18-month suspension, statutory disqualification, a $50,000 fine, and special conditions that he requalify by examination before acting as a registered representative and that he

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appropriate venue for the lawsuit was Ohio, a stipulation of dismissal without prejudice was executed by the parties on November 20, 2019. On or around November 13, 2019, a second action seeking the same relief was filed by local counsel in Ohio Court of Common Plea, Franklin County under Case No. 19-CV-008962, which resulted in Huntington finally producing the sought after insurance policies.

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only be employed by a firm willing to place him on heightened supervision for at least one year. (FINRA 005307- 5354).

Kielczewski timely appealed the decision to FINRA's National Adjudicatory Council. After argument, the NAC affirmed the decision of the Hearing Officer and of the Hearing Panel in all respects, except that it removed the heightened supervision requirement. (FINRA 005607-5643). Kielczewski timely petitioned for review to the Commission. (FINRA 005645-5680).

II. Argument

a. The FINRA Findings Receive No Deference Under *De Novo* Review

The Commission will conduct "an independent review of the record and apply the preponderance of the evidence standard. Pursuant to Exchange Act Section 19(e)(1), in reviewing an SRO disciplinary action, [the SEC] determine[s] whether the respondent engaged in the conduct found by the SRO, whether such conduct violates the SRO's rules, and whether such SRO rules are, and were applied in a manner, consistent with the purposes of the Exchange Act." *In the Matter of Lane*, SEC Rel. No. 74269, Admin. Proc. No. 3-15701 (Feb. 13, 2015).

b. SEC Review of SRO Sanctions Is Founded on Fairness to Respondents

Disciplinary proceedings against members of an exchange and their associated persons are governed by Section 6(b)(7) of the Exchange Act, which provides that an exchange may not be registered with the Commission unless its rules "provide a fair procedure for the disciplining of members and persons associated with members[.]" Section 19(e)(1)(A) of the Exchange Act governs the Commission's review of disciplinary actions taken by self-regulatory organizations ("SROs"), including FINRA. "In applying this section, [the Commission has] indicated that a fundamental principle governing all SRO disciplinary proceedings is fairness." *In the Matter of Hayden*, Admin. Proc. File No. 3-9649 (SEC May 11, 2000). The Commission has explained that

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the fairness of the proceeding is determined based on "the entirety of the record" and looks to whether the respondent has shown that his "ability to mount a defense was harmed[.]" *Mark H. Love*, 57 S.E.C. 315, 324-25 (2004) (addressing effect of prejudicial delay in an enforcement action).

c. <u>FINRA Sanctioned Kielczewski Based on a Fundamentally Flawed Record</u>

Huntington never fully or fairly responded to most of the Rule 8210 requests, including the Rule 8210 request FINRA made in September 2019 in response to Kielczewski's Rule 9252 motion. Applying a *de novo* standard of review with a focus on the fundamental fairness of the proceedings, the Commission should find that FINRA did not provide Kielczewski with a fair proceeding due to rulings regarding withheld documents critical to Kielczewski's defense.

i. Huntington Waived Any Applicable Privileges or Protections Over the Withheld Documents

By failing to invoke the privilege in its responses to the nine relevant Rule 8210 requests, Huntington waived any applicable privileges or protections. "The failure of a party to list a document withheld during the course of discovery on a privileged log . . . ordinarily results in a finding that the privilege otherwise asserted has been waived." *Cice (Beijing) Science & Technology Co., Ltd. v. Misonix, Inc.*, 331 F.R.D. 218, 228 (E.D.N.Y. Apr. 11, 2019) (citing *Feacher v. Intercontinental Hotels Grp.*, No. 3:06-cv-0877, 2007 WL 3104329, at *5 (N.D.N.Y. Oct. 22, 2007)); *FG Hemisphere Associates, L.L.C. v. Republique Du Congo*, No. 01-cv-8700, 2005 WL 545218, at *6 (S.D.N.Y. Mar. 8, 2005) ("As other judges in this District and I have repeatedly held, the unjustified failure to list privileged documents on the required log of withheld documents in a timely and proper manner operates as a waiver of any applicable privilege" (citations omitted)); accord *Kogut v. Cty. of Nassau*, No. 06-cv-6695, 2011 WL 13284714, at *4 (E.D.N.Y. Nov. 14, 2011) ("The failure of defendants to list the ... documents [in question] on a

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privilege log constitutes a waiver of any applicable privilege"). In addition, "the privilege may be implicitly waived when the [party] asserts a claim that in fairness requires examination of protected communications." *Reitz v. City of Mt. Juliet*, 680 F. Supp. 2d 888, 894 (M.D. Tenn. 2010) (internal quotation marks and citation omitted).

Moreover, "the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity." *Parneros v. Barnes & Noble, Inc.*, 332 F.R.D. 482, 491 (S.D.N.Y. 2019) (internal citation omitted). "The proponent . . . has the burden of establishing that the information was a communication between client and counsel, that it was intended to be and was kept confidential, and [that] it was made in order to assist in obtaining or providing legal advice or services to the client." *Id.* (internal citation omitted). "Such showings must be based on competent evidence, usually through affidavits, deposition testimony or otherwise admissible evidence." *Id.* at 491-492 (internal citation omitted); *Bowne of N.Y City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 472 (S.D.N.Y. 1993). Here, Huntington repeatedly failed to meet its burden and thereby waived any privilege or protection over the withheld documents. As such, the documents should be produced.

In the alternative, Huntington should produce a privilege log of documents withheld. The importance of a privilege log in such cases is axiomatic: "[C]ourts consistently have held that the rule requires a party resisting disclosure to produce a document index or privilege log," *In re Grand Jury Proceedings,* 802 F.3d 57, 67 (1st Cir. 2015). Indeed, a privilege log is essential to fairness: "The requirement of a privilege log is intended to underscore the gravity, if not the solemnity, of an assertion that otherwise presumptively discoverable documents are exempt from discovery." *Main Street Am. Assurance Co. v. Savalle*, No. 3:18CV02073(JCH), 2019 WL

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4437923, at *3 (D. Conn. Sept. 16, 2019); *see also Simpson v. City of Indianapolis*, No. 1:13-cv-00791-RLY-TAB, 2015 WL 332750, at *2 (S.D. Ind. Jan. 23, 2015) ("privilege log serves an important purpose"); *Alleyne v. N.Y. State Educ. Dep't*, 248 F.R.D. 383, 386 (N.D.N.Y. 2008) (recognizing importance of privilege log by stating "court's task" of conducting in-camera privilege review "is nearly impossible absent a detailed privilege log"). Moreover, "[a]n invocation of a claim of privilege without producing an accompanying privilege log can be an unfair discovery tactic . . ." *Savalle*, 2019 WL 4437923, at *3 (citation omitted). Indeed, the SEC's Enforcement Manual instructs that SEC staff should request a detailed privilege log for any document withheld on the basis of a privilege or protection and that it be produced at the same time the responsive documents are produced. SEC Enforcement Manual § 3.2.7.4 ("Privilege Logs").

The precise nature of the withheld documents here cannot be known without production and review, but they may include statements by Huntington employees and management about Kielczewski's onboarding at Huntington and their understanding of the scope of his work with Mariemont upon onboarding, whether the scope of such work evolved over time, what he communicated about such work throughout his tenure at Huntington, what management communicated about his work in general and in particular about Mariemont, the process by which he was ultimately terminated, the facts and factors considered in that determination, and the communications regarding the termination.[6] In a case that is focused on the nuances of communications between Kielczewski and Huntington, it is critical that all such communications be produced. Valid claims of attorney-client privilege may be few, and further, subject to challenge

[6] It is worth noting that had an individual like Kielczewski engaged in conduct similar to Huntington, FINRA would have barred that individual from the industry for life. *See, e.g.*, *In the Matter of Felix*, Compl. No. 2018058286901 at 6 (NAC May 26, 2021) (imposing bar for failure by respondent to obtain, at FINRA's request, a tax transcript); *In the Matter of Goldstein*, Release No. 71970 (Apr. 17, 2014) (bar warranted for conduct obstructing FINRA investigation).

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if the privileged communications were relied upon to make the assertions in the U5 that led to Kielczewski's termination.

ii. Kielczewski Did Not Have Notice That Huntington Had Withheld Documents

In none of the responses to any Rule 8210 request did Huntington state that it was withholding documents. As noted above, most of FINRA's Rule 8210 requests specifically stated that, "[Huntington] is obligated to respond to this request fully, promptly, and without qualification . . . If any responsive document or information is withheld, specifically identify what is being withheld and state the basis for doing so." (FINRA 005291-5292). In its responses, Huntington stated that it produced copies of "all non-privileged" communications without identifying any documents that were withheld or used similarly non-specific language. (*Id.*). None of Huntington's responses were sufficiently specific to state a claim of privilege as to any withheld documents, and thus, did not provide notice that Huntington was withholding privileged or other documents.

Courts have uniformly so held. In *Brown v. Tellermate Holdings Ltd.,* the court concluded that a company's general assertion that it was producing "all non-privileged documents" was not sufficiently specific to constitute a claim of privilege as to *any* documents. No. 2:11-CV-1122, 2013 WL 1363738, at *4 (S.D. Ohio Apr. 3, 2013). The court noted that the company's failure to list the withheld documents on a privilege log further compounded the problem: "[i]t would be manifestly unfair … to permit a party, after failing to make a timely disclosure that it had withheld documents and the reason why it did so, to succeed on a claim of privilege by first asserting the privilege in response to a motion to compel (or under the threat of an impending motion)." *Id.* The *Brown* court found the privilege was waived and ordered the company to produce the withheld documents. *Id*.

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Other courts have similarly found waiver when reviewing similarly vague attempts to assert privilege. *See, e.g.*, *OneBeacon Ins. Co. v. Forman Int'l, Ltd.*, No. 04 Civ. 2271, 2006 WL 3371010, at *8 (S.D.N.Y. Dec. 15, 2006) (nonparty waived any applicable privilege by asserting "that it 'had no obligation to provide [the requesting party] with a privilege log'"); *Carfagno v. Jackson Nat'l Life Ins. Co.*, No. 5:99CV118, 2001 WL 34059032, at *2 (W.D. Mich. Feb. 13, 2001) (defendant waived privilege where its brief made "vague statements concerning the possibl[y] privileged nature of [various] documents..." but defendant had not submitted "a privilege log in support of its objections"); *West v. Lake State Ry. Co*., 321 F.R.D. 566, 570 (E.D. Mich. 2017) (failure to timely identify evidence on privilege log results in waiver); *Peterson v. Ne. Loc. Sch. Dist.*, No. 3:13CV00187, 2015 WL 5013360, at *3 (S.D. Ohio Aug. 25, 2015), report and recommendation adopted, No. 3:13-CV-L 87, 2015 WL 5793944 (S.D. Ohio Sept. 30, 2015) (general assertion of privilege insufficient)*; Etheredge v. Etheredge,* No. 1:12-0165, 2013 WL 4084642, at *4 (M.D. Tenn. Aug. 12, 2013) ("to assert any privilege, the Defendants had to prepare and serve a privilege log, and their failures to do so constitute waivers of these privileges."). Even clear refusals to produce privileged documents will result in a waiver if they are made in "boilerplate." *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005). Thus, Huntington did not provide notice to FINRA or Kielczewski that it was withholding privileged documents sufficient to preserve the privilege.

Kielczewski was not "on notice" until he received Huntington's motion to intervene on December 2, 2019, where Huntington asserted, for the first time, that it possessed documents and communications that should be protected by the privilege. (FINRA 000437-441). By that point, more than two years after Huntington's first response to a Rule 8210 request, Huntington's delay *by itself* resulted in the waiver of any privilege. *See Burlington* at 1149. Kielczewski acted

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immediately, filing his motion the same day he received notice of the withheld documents. (FINRA 000443-451). Kielczewski waived no rights to the documents and information he and FINRA Enforcement had requested.

iii. FINRA Did Nothing to Address Huntington's Failure to Comply With Its Own Rule 8210 Requests

Kielczewski reasonably relied upon FINRA to enforce compliance with its own Rule 8210 requests.[7] Yet FINRA took no action against Huntington despite its failures to comply with them, presumably because it was not clear to FINRA that Huntington was withholding privileged documents from production. Had FINRA been aware of such failures, it is difficult to conceive that it would not have acted to ensure compliance by Huntington. Further, because FINRA had exercised its authority to request the documents from Huntington, and FINRA alone had the authority to enforce its requests, the burden fell on FINRA to do so. As a purely practical matter, FINRA had the non-compliant responses from Huntington more than two years longer than Kielczewski did. Even more damning, FINRA opposed Kielczewski's efforts to obtain relief before the hearing after becoming aware of its own failures. Under these circumstances, it is hardly fair for FINRA now to argue that Kielczewski should have been aware of Huntington's violations of its obligations under Rule 8210 when FINRA, as the author of such requests, was not.

iv. Kielczewski's Motion to Compel Should Have Been Granted

In ruling against Kielczewski at every stage on this issue, the hearing officer, as noted above, stated his primary concern was to proceed with the evidentiary hearing on the scheduled

[7] Tellingly, FINRA Enforcement argued that Kielczewski lacked standing to challenge Huntington's disregard of its Rule 8210 obligations. (FINRA 000487). It is unlikely that such an argument would be consistent with the fundamental fairness required in an SRO disciplinary proceeding. Should FINRA raise that argument before the Commission, Kielczewski reserves the right to address such arguments in reply.

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dates. However, FINRA's own rules vest hearing officers with considerable discretion to adjourn or adjust hearing dates or change other deadlines for "good cause."

FINRA hearing officers have discretion to "extend or shorten any time limits prescribed by the Code for the filing of any papers and may, consistent with [FINRA Rule 9222](b), postpone or adjourn any hearing." FINRA Rule 9222(a) (emphasis added). The standard for extending a time limit is good cause. *Id.* For example, a party can seek to submit additional evidence, notwithstanding the ten-day requirement of FINRA Rule 9261(a), if the party shows good cause and the hearing officer, in his discretion, determines the evidence sought to be admitted is relevant and necessary for a complete record. FINRA Rule 9261(c). Similarly, a hearing officer may "extend or shorten any time limits prescribed by the Code for the filing of any papers and may, consistent with [FINRA Rule 9222](b), postpone or adjourn any hearing." FINRA Rule 9222(a) (emphasis added). The standard for extending a time limit is also good cause. *Id.*

Here, there were nine days before commencement of the hearing in which Huntington could have produced the documents that it already must have identified and set aside from its productions to FINRA, or a log of them. If this were insufficient time, the following "good cause" factors are considered by hearing officers in postponing a hearing: "(A) the length of the proceeding to date; (B) the number of postponements, adjournments, or extensions already granted; (C) the stage of the proceedings at the time of the request; (D) potential harm to the investing public if an extension of time, adjournment, or postponement is granted; and (E) such other matters as justice may require." FINRA Rule 9222(b)(1). *See, e.g.*, OHO Order 16-25 (2013038986001), entered in *Enf't v. Richard Reimer*, Discip. Proc. No. 2013038986001 (OHO Order Sept. 7, 2016).

Good cause existed for a postponement of the hearing if, for example, Huntington had been unable to produce the privilege log in nine days. Specifically, the hearing had not commenced;

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there had been no prior postponements of the hearing; discovery had otherwise concluded; a postponement would not pose any potential harm to the investing public; and the other matters discussed below that support the importance of the information sought for the elemental fairness of the proceeding. And, importantly, Kielczewski was blameless in the cause requiring the delay. In sum, to the extent necessary to effect the relief Kielczewski was entitled to, FINRA was bound by its own rules, as well as the fundamental fairness required in all SRO disciplinary proceedings, to postpone the evidentiary hearing.

v. The "General Purpose" Doctrine and the Fundamental Fairness the Commission Requires of SRO Proceedings Militates in Favor of Kielczewski

FINRA hearing officers are to "construe" FINRA Rules under a "dominating general purpose" lens. OHO Order 19-26 (2015045312501) at 4, entered in *Enf't v. Lek Securities Corp. and Samuel Lek*, Discip. Proc. No. 2015045312501 (OHO Order July 10, 2019). By looking at the "dominating general purpose" of the Rules rather than the plain text of the Rules, hearing officers are able to reach results not otherwise evident in the plain text of the Rules. *Id.* Given that the general purpose of FINRA Rule 9251(a)(1) is for FINRA Enforcement to make available for inspection and copying to a respondent the documents that were "prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings[,]" there is an expectation that FINRA will exercise due diligence in so doing and, when it becomes evident it did not, to take prompt action to remediate its failure and to accomplish its general purpose under the rule. To the same end, the Commission tests the disciplinary proceedings of SROs for "fundamental fairness".

Here, elemental fairness required ensuring that Kielczewski had access to all documents to which he was entitled and appropriate information regarding those to which he was not. He was

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entitled to the documents or to a privilege log and he did not get either one. Further, there was good cause shown on his part to obtain the documents or a privilege log, while Huntington and FINRA both failed in their obligations regarding such a log.

Under these circumstances, the Commission's purpose in ensuring fairness at this stage in SRO disciplinary proceedings requires remand for FINRA to provide relief to Kielczewski, whether by finding waiver and directing production of the withheld documents forthwith or by directing Huntington to produce a privilege log forthwith and defend its claim on a document by document basis.

d. Kielczewski Did Not Act Willfully

The basis for imposition of statutory disqualification was FINRA's conclusion that Kielczewski actively, knowingly, and intentionally deceived Huntington about his relationship with Mariemont. (FINRA 005585). This conclusion is not supported by the record.

A *de novo* review of the record makes clear that Kielczewski had nothing to hide and hid nothing from Huntington. Although Kielczewski conceded that he violated FINRA Rule 3280, in that he did not inform Huntington in writing of each private securities transaction in which he participated and that the working agreement concerning his relationships with Mariemont and Huntington had not been properly documented. (FINRA 002268-69), the record shows he also fully and fairly informed Huntington of his involvement with Mariemont at every stage.

For example, it is undisputed that Kielczewski told Chapman before he began working at Huntington that he would be the general partner and an owner of the Mariemont hedge fund, and that Mariemont's prospective institutional clients would be the same ones he had serviced at Fifth Third (FINRA 002048). The Underwriting Analysis prepared by others at Huntington and based—as Chapman acknowledged—on documents and information Chapman provided (FINRA 002059;

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JX45-b at 7, FINRA 004785), states that "Bill [Kielczewski] and another former Fifth Third trader, Ted Sumner, will be leading Huntington's efforts to build an institutional client base [and] have former Fifth Third clients that will be investors in Mariemont[.]" Thus, Kielczewski put Huntington on notice that his transitioning Fifth Third clients would also be investors in Mariemont. (FINRA 002057). The Underwriting Analysis also showed Huntington's analysis of the Mariemont organizational documents, reflecting that Kielczewski was a member of the Mariemont general partner as well as an owner of Mariemont. (JX-45b at 14; FINRA 004792).

Chapman further testified that he knew the Fifth Third clients that would be investing in Mariemont, was aware that they trusted Kielczewski, and that Kielczewski's transitioning clients—who were also investing in Mariemont—represented a $400 million book of business for Huntington (FINRA 002075-2081). Chapman testified that he knew not only that Kielczewski intended to talk to his potential Huntington clients about Mariemont (FINRA 002084), but also that Kielczewski was in fact having such discussions with these customers in 2014, including with Spartan Chemical (FINRA 002076), one of Kielczewski's largest clients.

Finally, and most importantly, Chapman testified that he "was comfortable and the compliance department was comfortable with this arrangement, so we brought [Kielczewski] on. Again I laid that at their [Compliance's] feet and said here is where we are and Ted [Sumnar] was also an investor in the fund." (FINRA 002120).

This evidence, by itself, negatives any finding of a willful intent to deceive or a reckless disregard of the truth by Kielczewski. It defies belief that someone in Kielczewski's position would completely disclose his involvement in and future intentions towards a hedge fund like Mariemont and then lie about how passive his role was or the few hours per week he intended to spend on Mariemont activity. So too does a contemporaneous email from Mark Gregory, Huntington's then-

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Head of Compliance, which suggests that he and Chapman had serious discussions about at least one incoming former Fifth Third employee who had "involvement (and equity)" in Mariemont (JX-11a at 3, FINRA 003159). So too does Kielczewski's answering "Yes" to the question of whether he would engage in "Private Securities Transactions" during his employment at Huntington. (JX-3 at 3, FINRA 002847).[8] At a bare minimum, and crediting Chapman's testimony that he never gave Kielczewski permission to sell away, as well as Enforcement's argument that only compliance could approve such activities, there is still no basis to conclude that Kielczewski *intentionally misled* Huntington, because *he believed* Huntington knew and approved what he was doing.

And while it cannot be disputed that Kielczewski should have disclosed in writing each of the securities transactions in which he participated, the fact that he did not do so does not mean he acted willfully or recklessly. As he testified, he did not know that he was required to make such disclosures in writing, and apparently neither did Chapman or Gregory.

Kielczewski's disclosures during the course of his employment were along the same lines. Kielczewski openly discussed his relationship with Mariemont with the FINRA cycle examiner, identified all the overlapping Mariemont and Huntington clients for Huntington (JX-15b, FINRA 003193-3194), and complied with the amended outside business activities monitoring program that Huntington instituted after its second look. (FINRA 001662-1663).

[8] Kielczewski answered yes based on the questionnaire's definition of private securities transactions as "outside the scope of [his] association with [Huntington] and in which [he] participate[s] for another party's benefit" (JX-03 at 4, FINRA 002847). He did not change his position when asked to clarify his role at Mariemont by Jillian Bowman (Huntington's head of registration), and instead explained that he was a "passive *general* partner" (JX-04 at 1, FINRA 002860) (emphasis added). Only after Gregory asked again, in a leading manner, whether Kielczewski was a "passive investor/owner" who did not engage in private securities transactions did Kielczewski amend his response to say he did not. It should be noted that Huntington's pre-registration questionnaire and its WSPs provide definitions of private securities transactions that are different from each other and different from the definition in FINRA Rule 3280. (*See* JX-3 at 3 (prehearing questionnaire), FINRA 002847; JX-5 at 1 (WSPs), FINRA 002861).

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e. In the Alternative, the Disclosures Made by Kielczewski Are Mitigating

Even if the Commission finds some degree of culpability on the part of Kielczewski, the Panel's sanction of an 18-month suspension, statutory disqualification, and a $50,000 fine is excessive. There was enough disclosure by Kielczewski to put Chapman, and in turn, Gregory, on notice that Kielczewski's relationship with Mariemont could raise issues with Rule 3280. For example, the FINRA Hearing Panel found credible Chapman's testimony that "he expected the transitioning clients to ask Kielczewski questions about the Mariemont Fund and that Kielczewski would answer them, [even if] he neither expected that Kielczewski would solicit them to invest in the Fund nor did he know that they had, in fact, made investments in it." (Decision 28 at n.223, FINRA 005334).[9] For similar reasons, Kielczewski's answer of "yes" to the question of "Do you participate in any private securities transactions?" (JX-3 at 3, FINRA 002847) discussed in detail above, gave meaningful notice that his relationship with Mariemont might warrant further exploration, exploration that Gregory dispensed with by asking a single leading question. Also, Kielczewski's disclosure of the large number of overlapping Huntington-Mariemont clients in his outside business agreement in July 2016 (JX-15d at 7, FINRA 003201) should have raised the possibility, at the very least, that Kielczewski had discussed with those clients their investments at Mariemont.

Further weighing in favor of mitigation is that Kielczewski told Chapman, and reasonably believed, that Mariemont, and the possibility of investing in it, held the possibility of significant benefits for Huntington. As Kielczewski testified without contradiction, the ability to make an investment in Mariemont simultaneously with the transition of the majority of these clients' fixed-

[9] Chapman testified that while he knew Kielczewski would be "talking to" his transitioning Fifth Third customers, in his capacity as their "investment advisor" about Mariemont (FINRA 002105-2106), he did not expect Kielczewski to "solicit" these customers to invest in Mariemont. (FINRA 002107). Chapman never explained his basis for distinguishing between these "talking" and "soliciting" and certainly never shared that distinction with Kielczewski.

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income investments to Huntington's platform was a powerful inducement to these customers to make this transition as Mariemont would allow them to continue to invest in private label mortgage-backed securities. (FINRA 002200 - 002201).

Such disclosures and encouragement by senior management can be mitigating. For example, in *In re DOE v. Patov Ghosh*, Complaint No. 2016051615301 (NAC Dec. 16, 2021), the NAC found mitigation when "management at times blurred the lines" defining outside business activities and senior principals were "not diligent" in ensuring compliance with FINRA rules, despite being on notice of conduct that could be found to violate them. (*Id.* at 23-24). In *In the Matter of Mathieson*, Compl. No. 2015040876001 (NAC Mar. 19, 2018), the NAC found "partial disclosures" like these regarding participation in private securities transactions warranted a reduction in sanction from one year to six months.

f. Remand is Required for FINRA to Consider the Factors in the Sanction Guidelines

On remand, FINRA must consider the factors set forth in its Sanction Guidelines. Relevant here is General Principle No. 2, which states that sanctions should be more severe for recidivists (FINRA Sanction Guidelines ("Guidelines") at 2); General Principle No. 3, which states that adjudicators should tailor sanctions so that they are both remedial and prevent the recurrence of misconduct (Guidelines at 3); and General Principle No. 6 (Guidelines at 5), which requires that adjudicators should consider a respondent's ill-gotten gain when determining an appropriate remedy. With respect to "Selling Away (Private Securities Transactions)," the Guidelines set forth more than a dozen specific factors to consider in determining appropriate sanctions.[10]

[10] Guidelines at 14-15 ("Selling Away (Private Securities Transactions)") list these among 13 factors relevant to sanctions.

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Applying the above considerations to the facts, it is clear that aggravating factors do not predominate. To start, under General Principle No. 2, Kielczewski is not a recidivist and has no prior disciplinary history. Further, under General Principle No. 6, Kielczewski earned no commissions or profits from the sales. Although he did have a financial interest in increasing the total funds invested in Mariemont, he would have earned more money, according to Chapman, if he had placed the investments with Huntington. (FINRA 002121-2122).

With respect to the dollar volume of sales, number of customers, and length of time over which the selling away activity occurred, the facts are not, collectively, aggravating. While the total volume of sales was more than $10 million, Kielczewski earned no commissions, and there were only five customers involved. And with respect to the length of time involved, the transactions were spread over close to three years but again, there were only five transactions during that period.

Similarly, with respect to the products sold (residential mortgage-backed securities), there is no evidence of any violations of laws or SRO rules in selling these products. Further, as previously set forth, Kielczewski disclosed his interest in Mariemont to his customers in the materials he provided to them (*see* JX-9, FINRA 003017-3050) and did not attempt to create the impression that Huntington sanctioned the activity. Also, it is undisputed that the sales activity caused no injury to the investing public.

The subject transactions involved firm customers and Kielczewski did not provide prior notice to the firm, but he also did not involve other registered representatives in so doing. Nor did any of the transactions take place after Huntington ultimately advised him that there was an issue regarding the transactions. Finally, he did not intend to mislead, as evidenced by the facts set forth herein.

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In assessing all the specific factors above in light of the range of suspensions set forth in the Guidelines for private securities transactions involving sales of more than $1 million (*i.e.,* 12 months to a bar), a suspension at or below the Guideline minimum, at least with respect to the suspension, is appropriate.

There are additional reasons to deviate below the Guidelines. First, Kielczewski previously had a spotless record and thus is not a recidivist (*see* General Principle No. 2). Second, Kielczewski received no commissions or profits from the five transactions (*see* General Principle No. 6). Third, there were mitigating factors (as found by the Hearing Panel); namely, that the firm terminated his employment based on the same conduct at issue, that he was "chastened and contrite" at the hearing, and that the Hearing Panel found sincere his assurance that he is "sure going to do better in the future." These reasons suggest a suspension of six months would be appropriate. For recent cases involving private securities transactions and related misstatements where suspensions were less than 18 months, *see, e.g.*, *Enf't v. Miller,* Compl. No. 2012034393801 (NAC May 23, 2018) (NAC reduced sanctions to fine of $25,000 and 12-month suspension where respondent participated in five private securities transactions over period of months with sales above $1 million); *Enf't v. Mathieson,* Compl. No. 2014040876001 (NAC Mar. 19, 2018) (NAC reduced sanctions to fine of $50,000 and six-month suspension where respondent participated in several private securities transactions and outside business activities without notice or approval of firm); and *Enf't v. Brown,* Discip. Proc. No. 2014042690502 (OHO Aug. 2, 2017) (OHO imposed fine of $25,000 and one-month suspension where respondent Goetz participated in five private securities transactions).

There is also a reason to altogether eliminate the suspension in all capacities, or at least reduce it. Under General Principle No. 3, sanctions should be tailored to respond to the misconduct at issue; *i.e.,* "[a]djudicators may design sanctions other than those specified in these guidelines."

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A relatively recent development is the use of business line restrictions specifically tailored to respond to the misconduct at issue. *See, e.g., Enf't v. Lek Securities Corp*., Discip. Proc. No. 20110297130-04 (OHO Dec. 17, 2019) (order accepting offer of settlement); *Enf't v. Wilson-Davis & Co., Inc.,* Disc. Proc. No. 2016048837401 (OHO July 16, 2021) (order accepting offer of settlement). For example, as an alternative to a suspension in all capacities for six months, adjudicators could impose, in addition to the fine, a business line restriction for a longer period that prohibits *any outside business activities or private securities transactions of any kind*, regardless of notice, with an undertaking by the member firm to confirm compliance with the restriction. This would meet the requirements of General Principle No. 3, to tailor sanctions so that they are both remedial and prevent the recurrence of misconduct. Here, Kielczewski's misconduct is limited to private securities transactions and statements regarding such; thus, a business-line restriction tailored to prevent a recurrence of the misconduct, coupled with a fine, would meet both requirements.

Ultimately, this is a case in which there are mitigating and other factors to consider, including that it is a first offense for Kielczewski, he is "chastened and contrite," he made substantial disclosures regarding his relationship with Mariemont, no customer harm occurred, his customers were each sophisticated investors, he received no selling compensation, and his firm terminated him for the same conduct. An 18-month suspension, $50,000 fine, statutory disqualification, and requalification ordered by FINRA are excessive in light of these facts and in comparison with the sanctions imposed in other cases. In particular, a business line restriction, in lieu of a suspension in all capacities, that nevertheless prohibited any outside business activities or private securities transactions, would accomplish the same goals of remediation and prevention of any recurrence of the misconduct.

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III. Conclusion

Given all of the reasons addressed herein, the decision of the Panel that Kielczewski engaged in willful, intentional or reckless conduct should be vacated, as should the findings that he violated FINRA Rule 2010; Article V, Section 2(c) of FINRA's By-Laws and FINRA Rule 1122; and the matter should be remanded for a new fact hearing. In the alternative, even if the Panel's findings are upheld, the sanctions imposed are meaningfully excessive and oppressive concerning the misconduct at issue and should be substantially reduced.

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Respectfully submitted,

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