BEFORE THE U.S. SECURITIES & EXCHANGE COMMISSION

In the Matter of the Appeal of

DEPARTMENT OF ENFORCEMENT

Complainant,

vs.

THOMAS LEE JOHNSON

Respondent.

Brief in Support of the Application for Review of Thomas Lee Johnson
AP File No. 3-20646

DATE OF SERVICE
January 28, 20222

ORAL ARGUMENT REQUESTED

Thomas L. Johnson ("Mr. Johnson" or "Applicant"), by and through his undersigned counsel, hereby submits this brief in support of the application for review of the National Adjudicatory Council's ("NAC") decision (the "Decision") regarding FINRA Complaint No. 201805684810.

I. Exceptions

The following are the exceptions to the findings and conclusion made by the NAC, which Mr. Johnson has raised in this appeal and will address throughout this brief:

- The NAC's finding that Mr. Johnson violated FINRA Rule 2010 for converting funds from his former employer firm, which is erroneous as a matter of law and unsupported by the record;
- The NAC's imposition against Mr. Johnson of a bar from associating with any FINRA member firm in any capacity, which is in error and unsupported by the record;
- The NAC's ratification of the hearing panel's findings that Mr. Johnson's mitigating evidence was insufficient; and
- The NAC's affirmation of the hearing panel's lifetime bar of Mr. Johnson, which was arbitrary and erroneous, grossly excessive, inherently punitive, and was premised upon a misreading of the law and factual determinations not supported by the record.

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II. Factual Background

Mr. Johnson entered the securities industry in 1983.[1] In 2009, Mr. Johnson became registered with RBC Capital Markets ("RBC" or "Firm") as a securities representative and investment advisor.[2]

When Mr. Johnson registered with RBC in 2009, he transferred securities from a joint brokerage account he and his wife held at his prior firm to a new joint brokerage account with RBC.[3] In November 2016, Mr. Johnson inherited from his father's estate 60 shares of a South Korean company, Doosan Heavy Industries and Construction ("Doosan").[4] The Doosan shares were held in his RBC account.[5] On September 18, 2017, Mr. Johnson's account received ten Doosan warrants from a spinoff of the Doosan shares.[6]

On August 30, 2017, RBC informed Mr. Johnson that the Firm would "no longer custody" Mr. Johnson's Doosan securities.[7] RBC gave Mr. Johnson three options: 1) liquidate the position; 2) transfer his holdings to another custodian; or 3) complete a "dollar write-off" transaction.[8] The notice further stated that RBC would liquidate the shares and warrants if no action was taken by October 2017.[9] As of October 31, 2017, the total value of Doosan shares was $939.30 and the total value of Johnson's Doosan warrants was $28.04.[10]

[1] Amended NAC Decision (Bates Number 001685) (the "Decision") at 1.
[2] *Id*.
[3] *Id*. at 2.
[4] *Id*.
[5] *Id*. at 2-3.
[6] *Id*. at 3.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*. at 3.

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On November 14, 2017, RBC liquidated the 60 Doosan shares and ten warrants.[11] As a result of the liquidation, Mr. Johnson's account received $1,059,544.98 USD.[12] The confirmation notices provided by RBC to Mr. Johnson reflected that the Doosan stock and warrants were priced at $17,184.58 per share and $2,849.40 per warrant.[13]

On November 22, 2017, eight days after RBC's liquidation of the shares and warrants, Mr. Johnson wrote himself a check for $1,059,544.98 and deposited the check in a personal account he jointly owned with his wife.[14]

On November 28, 2017, 14 calendar days after the Doosan liquidations, RBC canceled the liquidation, rebilled it, and debited Mr. Johnson's account approximately $1 million.[15] RBC repriced the Doosan stock at $15.8102 USD per share and each warrant at $2.6215 USD. Because of a system error, RBC had erroneously priced the securities in U.S. dollars rather than South Korean won ("KRW").[16] Therefore, RBC had previously valued Mr. Johnson's Doosan stock liquidation at $17,184.58 USD per share, rather than 17,184.58 KRW per share.[17] As a result, Mr. Johnson received a total of $1,031,074.80 USD instead of the actual value of the 1,031,074.80 KRW securities.[18]

On November 29, 2017, the day after Mr. Johnson saw the rebilled transaction, he obtained a check in the amount of $1,060,000 from his checking account and deposited the check into his RBC account.[19]

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[11] *Id*.
[12] *Id*.
[13] Parties Stipulations Regarding Certain Facts and Exhibits, Dated May 3, 2019 (Bates Number 000135) ("Stip") at 14.
[14] *Id*. at 6.
[15] *Id*.
[16] *Id*. at 3.
[17] *Id*.
[18] *Id*.
[19] *Id*. at 6.

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III. Procedural History

On January 22, 2019, FINRA's Department of Enforcement ("Enforcement") filed a two-cause complaint against Mr. Johnson.[20] Cause one alleged that Mr. Johnson violated FINRA Rule 2010 by converting $1,059,544.98 from RBC when he transferred the funds from his brokerage account to his checking account.[21] Cause two alleged that Mr. Johnson violated FINRA Rules 8210 and 2010 by providing false and misleading statements to FINRA staff on two occasions during FINRA's investigation.[22]

The Hearing Panel found that Mr. Johnson violated FINRA Rule 2010 by converting funds from RBC as alleged in the complaint's first cause of action, and as a sanction for this misconduct, barred him from associating with any FINRA member in any capacity.[23] The Hearing Panel dismissed the second cause of action on the basis that Enforcement failed to prove that Mr. Johnson provided false information during FINRA's investigation.[24]

Mr. Johnson appealed the Hearing Panel's decision as to the first cause of action. Enforcement did not appeal the Hearing Panel's dismissal of the second cause of action. The NAC affirmed the Hearing Panel's findings of liability and also affirmed the bar against Mr. Johnson.[25]

IV. Argument

Mr. Johnson's conduct as alleged did not amount to conversion of funds from RBC. There was no unlawful taking of another's property. Mr. Johnson received property, by mistake, which he promptly returned. While Mr. Johnson acknowledges he should have handled the

[20] *See* Complaint (Bates Number 00001).
[21] *Id.*
[22] *Id.*
[23] *See* Hearing Panel Decision (Bates Number 01387).
[24] *Id.*
[25] *See* Decision *passim*.

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liquidation of his Doosan securities differently, he did not convert property from RBC by moving funds between two accounts which he owned and controlled. The NAC misapprehended the facts and the law in affirming the Hearing Panel's decision. Moreover, the imposition of a lifetime bar against Mr. Johnson is punitive, excessive, and serves no remedial purpose. The NAC's decision should be overturned, and the bar should be vacated.

A. Legal Standard

For the purposes of a FINRA disciplinary proceeding, conversion is defined as an 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 and can be divided into five elements: (i) intentional (ii) unauthorized (iii) taking or exercise of ownership over (iv) property (v) by one with no right of ownership or possession.[26] For the reasons set forth below, the NAC's findings fail to meet the elements required for conversion.

B. Mr. Johnson Did Not Commit Conversion

In affirming the Hearing Panel's decision, the NAC concluded that, "Johnson's withdrawing the money from his RBC account and depositing it in his personal checking account at a different bank is the act of conversion—what Johnson did with the money after taking it, or whether RBC knew at the time that the money was missing, is immaterial to liability."[27] Further, the NAC concluded that:

> Logic dictates that the excess funds that RBC (or its outside vendor) deposited into Johnson's account belonged to RBC. Even assuming the provenance of the funds was unknown, it is immaterial for the finding that Johnson improperly exercised ownership over funds to which he was not entitled.[28]

[26] FINRA Sanction Guidelines ("Guidelines") at 36 n.2 (2020), http://www.finra.org/sanctionguidelines; *see also Dep't of Enforcement v. Doni*, No. 2011027007901, 2017 FINRA Discip. LEXIS 46, at *21 (NAC Dec. 21, 2017). ; *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *33 (Feb. 10, 2012).
[27] Decision at 10.
[28] *Id*. at 9, fn, 9.

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The NAC's conclusions on both points are insufficient to support a conversion charge.

First, Mr. Johnson's act of moving funds already in his possession from the liquidation of his Doosan securities, from his brokerage account to his checking account, was not a taking or exercising of ownership over property with no right of ownership or possession. Mr. Johnson owned and controlled his brokerage account and his checking account.[29] Logic dictates that the nature of his possession of the Doosan proceeds in his brokerage account was the same as his possession of the funds in his checking account. The movement of the Doosan proceeds between his accounts is immaterial. Similarly, the fact that a portion of the Doosan proceeds was erroneously deposited into Mr. Johnson's RBC account is irrelevant. At the time he moved the Doosan proceeds, the transaction had not been rebilled. Mr. Johnson was in rightful possession and ownership of the funds in his brokerage and checking accounts. Had Mr. Johnson kept the funds *after* the Doosan liquation was rebilled, that conduct would have likely amounted to conversion. However, in reality, Mr. Johnson promptly addressed the debit in his brokerage account, and no conversion occurred.

Second, the ownership of the funds in question is critical to, and determinative of, the analysis of whether Mr. Johnson converted RBC's funds. At the hearing, Enforcement produced one witness from RBC to discuss the Doosan securities transactions, Ms. Janet Buswell. Under cross-examination, she testified as follows:

(Aras) Q. Okay.

Would you agree with me then that RBC deposited the funds from the proceeds in Mr. -- from the Doosan transaction into Mr. Johnson's RBC brokerage account?

(Buswell) A. The proceeds from the sale of the securities were deposited into his account, yes.

[29] *Id*. at 2, 5.

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(Aras) Q. Okay.

And you would agree that RBC doesn't own the securities in Mr. Johnson's brokerage account; correct?

(Buswell) A. No, they do not.

(Aras) Q. Okay.

And you would agree that RBC doesn't own the funds in Mr. Johnson's brokerage account; correct?

(Buswell) A. No, they do not.[30]

Based on RBC's testimony, the funds in Mr. Johnson's brokerage account were not owned by RBC. Instead of considering this record evidence, the NAC found that ownership of the funds is "immaterial" to a finding of conversion.[31] However, the complaint charged Mr. Johnson specifically with converting $1,059,544.98 from RBC. The complaint did not charge Mr. Johnson with generally exercising ownership over funds he did not own nor was entitled to possess. Enforcement was required to prove that Mr. Johnson ***converted*** RBC's funds. The record evidence confirmed the opposite, that RBC *did not* own the funds from the Doosan stock liquidation. Accordingly, NAC's conclusion that Mr. Johnson converted RBC's funds is based on speculation and assumption, not evidence.

With regard to legal precedent, the cases cited in support of the NAC's decision are unavailing. In *Department of Enforcement v. Reeves*, the NAC found that a registered representative committed conversion when he directed a payment to himself from his former firm, without his member firm's knowledge or authorization, and spent those funds even after acknowledging the funds were not his to spend.[32] Here, Mr. Johnson did not direct a payment to

[30] Hearing Transcript (Bates Number 00349) ("Tr.") at 266-267.
[31] Decision at 9, fn 9.
[32] *See Dep't of Enforcement v. Reeves*, No. 2011030192201, 2014 FINRA Discip. LEXIS 41, at *5 (NAC Oct. 8, 2014).

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himself, the funds in question were already in his possession, and when his brokerage account was debited, Mr. Johnson funded the account immediately. In *Department of Enforcement v. Olson*, the SEC found that the respondent engaged in conversion when she falsified expense records to her member firm for personal items she purchased.[33] The respondent misled her firm and spent firm funds without authorization.[34] Again, Mr. Johnson was the recipient of funds from the liquidation of stocks he owned in his personal brokerage account. Mr. Johnson did not mislead his firm and he did not spend any funds from the Doosan stock liquidation. Lastly, the NAC cites *Department of Enforcement v. Kendzierski*, wherein the respondent converted funds from his client by forging documents to direct payments to himself on two occasions.[35] The *Kendzierski* matter has no bearing on or relevance to Mr. Johnson's conduct. Mr. Johnson did not engage in an act of deception to obtain the Doosan stock proceeds. He received the funds in an amount that was later determined to be an error. The cases relied on by NAC are inapposite and completely inapplicable to Mr. Johnson's circumstance.

The NAC failed to apprehend the material facts and apply them to the requirements for an act of conversion. The NAC's affirmation of the Hearing Panel's decision was misguided and made in error. Because Mr. Johnson's movement of funds between two accounts he owned and controlled did not constitute conversion, the NAC's decision should be overturned and the bar should be vacated.

[33] *Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEX LEXIS 3629 (Sept. 3, 2015).
[34] *Id*.
[35] *Dep't of Enf't v. Kendzierski*, No. C9A980021, 1999 NASD Discip. LEXIS 40, at *7 (NASD NAC Nov. 12, 1999).

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C. Mr. Johnson Should Not be Barred

Mr. Johnson did not commit an act of conversion, and therefore, no sanction should be imposed. If Mr. Johnson is sanctioned, the imposition of a bar is unwarranted, punitive, and excessive. At the very least, the Commission should vacate the bar and mete out a sanction that is remedial and appropriate.

According to the FINRA sanction guidelines, "Sanctions in disciplinary proceedings are intended to be remedial and to prevent the recurrence of misconduct. Adjudicators therefore should impose sanctions tailored to address the misconduct involved in each particular case."[36] If the Commission finds a sanction to be "excessive or oppressive" or to impose an unnecessary or undue burden on competition, the sanction may be modified or cancelled.[37] When a sanction is imposed for punitive purposes as opposed to remedial purposes, the sanction is excessive or oppressive and therefore impermissible.[38]

The NAC's affirmation of the bar against Mr. Johnson is improper and unsupportable. While the NAC characterized the bar as an appropriate remedial sanction, it cited no remedial purpose in support.[39] Rather, the NAC made clear that it was punishing Mr. Johnson for his past conduct.[40] In doing so, the NAC failed to give adequate weight to the mitigating factors raised by Mr. Johnson, which are:

- Mr. Johnson acknowledged that he would have handled the Doosan proceeds differently.[41] He was truthful with RBC and FINRA regarding the Doosan proceeds.[42]

[36] Guidelines at 3.
[37] Exchange Act Section 19(e)(2), 15 U.S.C. § 78s(e)(2).
[38] *See Paz Secs., Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009).
[39] Decision at 11-12.
[40] *Id*.
[41] Guidelines at 7 (Principal Considerations No. 2); JX-21 (Bates Number 001131) at 100-101.
[42] Decision at 6.

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- When the Doosan stock liquidation was rebilled, Mr. Johnson immediately transferred funds to cover the debit.[43]

- Mr. Johnson consulted with his accountant, a long-time trusted advisor, prior to moving the Doosan Proceeds.[44]

- Mr. Johnson's conduct occurred once, under unique circumstances, and was not a pattern of misconduct.[45]

- RBC was not injured or affected. The firm is highly sophisticated, handled the Doosan stock liquidations itself, and never lost any money from the transaction.[46]

A bar in this case can only be characterized as punitive. Mr. Johnson has learned a painful lesson throughout this process. While Mr. Johnson's handling of the Doosan proceeds may be viewed as a lapse in judgement, he did not commit conversion. Moreover, the imposition of a bar serves no remedial purpose. Mr. Johnson is not a threat to the public interest or investors. He poses no risk of future misconduct.

Mr. Johnson respectfully requests that the Commission overturn the NAC's decision, vacate the bar, and allow him to continue his career in the securities industry.

V. Conclusion

For the reasons stated herein, Mr. Johnson respectfully requests that conversion charge be dismissed.

Respectfully submitted,

/s/Jon-Jorge Aras
Jon-Jorge Aras, Esq.

Attorney for Thomas L. Johnson

Dated: January 28, 2022

[43] Guidelines at 7 (Principal Considerations No. 3); Decision at 6.
[44] Guidelines at 7 (Principal Considerations No. 7); Decision at 5.
[45] Guidelines at 7 (Principal Considerations No. 8 and 9).
[46] Guidelines at 7 (Principal Considerations No. 17 and 18).

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CERTIFICATE OF SERVICE

On January 28, 2022, I, Jon-Jorge Aras, certify that I caused a copy of Applicant's brief in support of the application in the matter of Thomas Lee Johnson, Administrative Proceeding File No. 3-20646, to be filed through the SEC's eFAP system on:

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