BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Thomas Lee Johnson

For Review of Disciplinary Action Taken by

FINRA

File No. 3-20646

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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OS Received 02/28/2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL DECISIONS

COMMISSION DECISIONS AND RELEASES

OS Received 02/28/2022

FEDERAL STATUTES

FINRA DECISIONS

FINRA GUIDELINES

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I. INTRODUCTION

In November 2016, Thomas Johnson, a registered representative of RBC Capital Markets ("RBC"), inherited 60 shares of stock in a Korean company named Doosan Heavy Industries and Construction ("Doosan"). At $22.67 per share, the shares were worth less than $1,400. Johnson saw the share value in his RBC brokerage account every day when he logged onto his computer at work and knew what the Doosan securities were worth. By the end of October 2017, their combined value was less than $1,000.

On November 14, 2017, RBC liquidated Johnson's Doosan stock and warrants. As the result of a pricing error, RBC valued the stock at more than $17,000 per share and the warrants at more than $2,800 per warrant. Rather than credit Johnson's account for the actual value of the liquidated securities, which was less than $1,000, RBC credited it for more than $1 million. When Johnson discovered that he inexplicably had more than $1 million in cash in his brokerage account as a result of that liquidation, he knew he had received the money in error but kept quiet about it, hoping the error would escape RBC's notice. After the error went undetected for eight

OS Received 02/28/2022

days, Johnson withdrew the money from his RBC brokerage account and deposited it to his checking account at an outside bank. About a week later, RBC discovered the error and cancelled and rebilled the liquidations at the correct prices, leaving Johnson with a million-dollar debit balance in his RBC account. Left with no alternative, Johnson returned the money to RBC.

The NAC correctly held, Johnson's withdrawing the money from his RBC account, knowing that he had no right to it, constituted conversion and violated FINRA Rule 2010. Considering the aggravating factors and the dishonest nature of the misconduct, the NAC concluded that barring Johnson was the appropriate sanction.

The core facts establishing Johnson's violation are undisputed and Johnson does not try to challenge FINRA's credibility findings. His legal arguments on appeal are flawed and should be rejected. Contrary to Johnson's arguments, it is clear the funds he converted belonged to RBC, and at no point was he legitimately entitled to possess the funds that were erroneously deposited into his RBC brokerage account. Johnson's conversion of $1 million was realized when he withdrew the money from RBC and put it beyond RBC's reach in an outside checking account. Johnson admitted that he would have kept the money if RBC had not detected the error. FINRA's Sanction Guidelines reflect FINRA's position that someone who engages in conversion is presumptively unfit to participate in the securities industry and, considering Johnson's dishonesty and the aggravating factors, the sanction of a bar is appropriate here to protect investors. The Commission should affirm the NAC's finding that Johnson committed conversion and affirm the bar.

OS Received 02/28/2022

II. FACTUAL BACKGROUND

A. Johnson and His Brokerage Account

Johnson entered the securities industry in 1983. RP 139; 807-15.[1] In 2009, Johnson and his brother registered with FINRA member firm RBC. Johnson registered with RBC as a general securities representative and investment advisor. Johnson worked from RBC's Indianapolis, Indiana branch office, where he held the title of Senior Financial Associate.

When 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 ("RBC account"). On the account application, Johnson listed his income as between $50,000 and $99,999; his family's net worth as between $500,000 and $999,999; and his family's liquid assets as between $100,000 and $249,999. RP 765.

On several RBC account forms, Johnson stated he had considerable investment experience. On an account transfer form, he described his 30 years of investment experience as "extensive." RP 1067. Similarly, on an options agreement form, Johnson described himself as having 25 years of experience trading stocks, bonds, options, and commodities. RP 765.

Johnson characterized the RBC account as his family's primary checking account which they used for "everyday expenses," such as utilities, credit card bills, property taxes, and check deposits. RP 391-92. Johnson's family wrote checks from the account and had debit cards associated with it. *Id.* Johnson also received his salary payments from RBC directly into the account. *Id.* Besides receiving monthly account statements for his RBC account, Johnson saw the account every day when he logged onto his computer at work and when he woke the computer from sleep mode after a period of inactivity. RP 392-94.

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[1] "RP" refers to the page numbers in the certified record of this case filed with the Commission on November 16, 2021.

OS Received 02/28/2022

B. Johnson Inherits Doosan Securities

In November 2016, after his father passed away, Johnson inherited from his father's estate 60 shares of a South Korean company, Doosan. RP 397-98. As of December 14, 2016, when the Doosan shares were transferred to Johnson's account, the stock was priced at $22.67 per share; the total value of the sixty shares was $1,360.36. RP 140. Johnson tried to sell the stock in February 2017 and again in March, but RBC was unable to execute the orders and cancelled them. RP 410-14, 769-70, 771-72. In September 2017, the value of the position $896.32. The next month, it increased slightly to $939.30. RP 131, 980. Also in September 2017, ten Doosan warrants, valued at $2.72 per warrant, were deposited to Johnson's account as a "spinoff" from his 60 shares of stock. RP 140. The next month, the price of the warrants rose to $2.80. As reflected in Johnson's October 2017 account statement, as of October 31, 2017, Johnson's Doosan stock and warrants were together worth $967.34. RP 990-91. Johnson acknowledged that he was aware of both the price of Doosan stock and the total value of his Doosan holdings every month through October 2017. RP 409.

On August 30, 2017, Johnson received notice that, as a result of RBC's changing its international custodian, it would no longer custody assets issued in "certain geographies." RP 1071. The notice identified Johnson's Doosan securities as being affected by the change and noted the current value of the shares. The notice stated that a customer who owned affected securities could either liquidate them, transfer them to another custodian, or complete a "dollar write-off transaction." RP 1072. The notice also stated that, if a customer left affected securities in his account, RBC would liquidate them. RP 415-16, 1071-72. On September 21, 2017, Johnson received another notice from RBC that his Doosan stock and warrants would be liquidated if they remained in his account on October 25, 2017. RP 140, 1073.

OS Received 02/28/2022

C. Johnson Receives a Windfall as the Result of a Pricing Error and Withdraws the Proceeds of the Liquidation of his Doosan Securities

RBC liquidated Johnson's Doosan stock and warrants on November 14, 2017. That day, the stock was worth $15.81 per share and the warrants were worth $2.80 each. Because of a system pricing error, however, RBC treated the prices in Korean won as U.S. dollar prices. The price of the stock was 17,184 Korean won per share but the system recorded the liquidation at $17,184 (U.S. dollars) per share. The price of the warrants was 2,849.40 won but the system recorded the liquidation at $2,849.40 per warrant. Thus, although the actual value of Johnson's 60 shares of Doosan stock was $939.30 and that of the warrants $28, the error caused RBC to confirm the transactions as yielding $1,031,074.80 for the stock and $28,494 for the warrants. RP 141, 990, 991, 1075-76.

When he logged onto his computer on November 14, Johnson was shocked to discover that he had in excess of $1 million in cash in his brokerage account. RP 420–21, 449. Johnson testified that he immediately asked his assistant to find out where the money came from, and she told him that it had come from the liquidation of the Doosan securities. Johnson testified that he checked the price of the stock on a Bloomberg machine and Doosan's website and "confirmed" that the price was $17,000 per share. RP 421-23. Johnson claimed he did not consider the fact that the prices shown on the Doosan website were stated in "₩," the symbol for the Korean won, or that the prices shown on the Bloomberg machine were stated in "KRW," the abbreviation for the won. RP 439-47, 792-94, 799. Johnson acknowledged that he knew the approximate value of the Doosan shares before the liquidation. RP 409. He testified that he first thought the apparent windfall was likely the result of a "mistake" that would be corrected the next day. RP 450. As the days passed without a correction, Johnson testified he became more confident that there had been no mistake and that his father had picked a winner when he bought the stock. RP

OS Received 02/28/2022

450-51. Despite this implausible increase in the share price, Johnson never sought to contact anyone at RBC to determine whether there had been an error. RP 451-53, 456.

Johnson testified that he consulted with his accountant, who was a friend of more than 30 years and a former customer, about what to do with the funds. RP 463-67. Johnson said he informed his accountant of the possibility the account credit could be a "mistake," and the accountant told Johnson that it would be best to transfer the funds away from RBC but not spend any of the money. He also recommended that Johnson speak with an attorney. RP 469.

On November 22, 2017, eight days after RBC erroneously credited more than a million dollars to Johnson's brokerage account, Johnson wrote a check on the account payable to himself in the amount of $1,059,544.98 and deposited it to his personal checking account at Chase Bank. RP 141. He did not need the approval of anyone at RBC to move the money in that manner. In contrast, he would have faced two levels of management approval if he had moved the money either by wire transfer or by requesting a check from RBC. RP 569-72. Johnson testified that he had no reason to use either of those alternative means and noted that he would have had to pay a fee for a wire transfer. RP 458-59. Johnson's check avoided initial scrutiny by RBC but would have been reported in a monthly report of cash-flows above a certain dollar-amount in employee accounts. RP 572-73

On November 28, 2017, after discovering the pricing error, RBC cancelled the liquidation of Johnson's Doosan securities and rebilled the transaction, pricing the stock at $15.8102 per share and the warrants at $2.6215 per warrant. After fees were deducted, Johnson received $924.79 from the sale of the stock and $26.22 from the sale of the warrants. RP 141. The cancellation and rebilling caused a debit balance in Johnson's RBC account of more than $1 million. RP 1085. Johnson learned of the cancellation and rebilling the day it occurred. To

OS Received 02/28/2022

address the debit balance in his brokerage account, Johnson obtained a cashier's check from Chase in the amount of $1,060,000 and deposited it to his RBC brokerage account the next day. RP 14, 474, 715-16. This large deposit prompted RBC to question Johnson about the source of the money and the purpose of the deposit. RP 560–61. Johnson was terminated by RBC for this misconduct. RP 827. At hearing, Johnson acknowledged that, if RBC had not caught the pricing error, he would not have returned the money. RP 718.

III. PROCEDURAL HISTORY

A. Enforcement's Complaint

On January 22, 2019, FINRA's Department of Enforcement ("Enforcement") filed a two-cause complaint against Johnson. RP 4-11. Cause one alleged that Johnson violated FINRA Rule 2010 by converting $1,059,544.98 from RBC when he transferred the funds from his RBC account to his outside bank account. Cause two alleged that Johnson violated FINRA Rules 8210 and 2010 by providing false and misleading statements to FINRA staff during FINRA's investigation.[2] Johnson filed an answer denying the allegations and requesting a hearing. RP 29-39.

B. Hearing Panel Decision and its Credibility Findings

The Hearing Panel issued its decision on August 23, 2019, in which it found that Johnson violated FINRA Rule 2010 by converting funds from RBC. RP 1387-1412. The Hearing Panel concluded that Johnson lacked a credible basis to believe that he had a right to take possession of the proceeds from the liquidation of the Doosan securities. RP 1403-04. For Johnson's

[2] The Hearing Panel found that Enforcement failed to provide sufficient evidence to conclude that Johnson provided false information during FINRA's investigation and dismissed cause two. RP 1407-08. Enforcement did not appeal this finding.

conversion, the Hearing Panel barred him from associating with any member firm in any capacity. RP 1409-11.

Notably, the Hearing Panel made explicit and extensive credibility findings about Johnson's testimony. Specifically, the Hearing Panel found that:

> at no time did Johnson have a credible basis to believe that he was entitled to take possession of the proceeds of the transactions. It was too good to be true.… [U]nder all the circumstances RBC's pricing error would have been obvious to an experienced broker like Johnson. RP 1404.

Thus, the Hearing Panel found that "Johnson never believed he was lawfully entitled to the funds." *Id.*

The Hearing Panel also rejected as incredible Johnson's testimony that he became convinced after looking at the Bloomberg machine and Doosan's website that the price of the stock was $17,000. In this respect, the Hearing Panel observed, "[a]s a seasoned broker, [Johnson] would have known that a foreign issuer's securities would be quoted in local currency on Bloomberg." RP 1405. The Hearing Panel also rejected as implausible "Johnson's assertion that his purported belief that the money was his was strengthened when the Firm did not correct the error within a few days." *Id.* Instead, the Hearing Panel found that:

> Johnson never held a good faith belief that the money was his. He did not bring the obvious error to the attention of anyone at the Firm, which would have been the logical and prudent thing to do. Contrary to Johnson's contorted logic, it was imperative that he disclose the error to RBC before taking the money. Johnson did not contact anyone… because he hoped that RBC would never catch its error and he would reap an extraordinary 1,000-fold windfall at his employer's expense. It would require the suspension of disbelief and an utter display of naiveté for the Panel to find otherwise. It would defy common sense to arrive at a different conclusion. RP 1405.

C. The NAC's Decision

Johnson appealed the Hearing Panel's decision to the NAC. RP 1413. Johnson argued that he did not convert RBC's funds and that, in the alternative, the sanctions the Hearing Panel

OS Received 02/28/2022

imposed were too severe, punitive, and should be reduced. After an independent review of the record, the NAC affirmed the Hearing Panel's findings of liability and the sanction imposed. RP 1689-1700. In affirming the Hearing Panel's decision, the NAC accepted and relied on the Hearing Panel's credibility findings.

Johnson timely appealed the NAC's decision to the Commission.[3] RP 1701-2.

IV. DISCUSSION

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

The NAC's findings of liability are sound, and the sanction the NAC imposed is appropriately remedial. The egregious nature of Johnson's misconduct is apparent. Johnson deceitfully moved over $1 million in funds to which he knew he was not entitled away from his brokerage account to a checking account outside the reach of his firm. Through his malfeasance, Johnson exhibited dishonesty and displayed an unwillingness and inability to comply with basic regulatory requirements. His serious misconduct and grave violations of the ethical standards central to the self-regulation of the securities markets render him unsuited for continued employment in the industry. A bar, which is consistent with the relevant Sanction Guidelines and established Commission precedent, is an appropriately remedial sanction that protects the

[3] Johnson has requested oral argument. Because the issues have been thoroughly briefed and can be adequately determined on the basis of the record, Johnson's request for oral argument should be denied. *See* Commission Rule of Practice 451, 17 C.F.R. § 201.451 (2022) (providing for Commission consideration of appeals based on the "papers filed by the parties" unless the "decisional process would be significantly aided by oral argument").

OS Received 02/28/2022

public interest. Johnson provides no basis on which the Commission should modify the sanctions, which are abundantly supported by record evidence. The Commission should uphold the NAC's findings that Johnson converted RBC's funds and affirm the sanction of a bar.

A. The NAC Correctly Found that Johnson Violated FINRA Rule 2010 by Converting RBC's Funds

The record supports the NAC's conclusion that Johnson converted RBC's funds and that his conversion violated the high standards of conduct required under FINRA Rule 2010. FINRA Rule 2010 sets forth broad ethical principles that "center[ ] on the 'ethical implications' of . . . conduct." *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908, at *17 (Dec. 11, 2014), *aff'd*, 637 F. App'x. 49 (2d Cir. 2016). 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). The Commission has consistently found that conversion is unethical and violates FINRA Rule 2010. *See Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *23 (Sept. 30, 2016); *Steven Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *11 & n.11 (Mar. 29, 2016).

Conversion is defined under FINRA's Sanction Guidelines 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." FINRA Sanction Guidelines at 36 & n.2 (2020) ("Guidelines").[4] 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."

[4] *FINRA Sanction Guidelines* (2020), https://www.finra.org/sites/default/files/2021-10/Sanctions_Guidelines_2020.pdf

OS Received 02/28/2022

John Edward Mullins, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *33 (Feb. 10, 2012).

The record establishes that Johnson converted $1,059,544.98 in funds from RBC. Johnson exercised control over more than a million dollars that did not belong to him and to which he had no entitlement. He took possession of the money, moving it to his checking account and away from RBC's ability to reclaim the funds. The money had been credited to his RBC account in error; he did not own it and had no right to possess it. Indeed, Johnson knew he had no right to the money. Yet he treated the money as if he did and admitted that he would have kept it had RBC not caught the error. RP 718.

Johnson continues to argue on appeal that he did not convert RBC's funds because there is no evidence in the record that the funds belonged to RBC. He also maintains that he could not have committed conversion because he was in "rightful possession and ownership of the funds in his brokerage and checking accounts," and that it was impossible for him to have converted those funds before the Doosan liquidation was rebilled. Applicant's Brief in Support of the Application for Review ("Br.") at 6. These arguments lack merit and any legal support. The only conclusion that can be drawn is that Johnson converted his former employer's funds.

First, Johnson maintains that Enforcement failed to present evidence the money he converted belonged to RBC. He argues that the record evidence confirms that RBC did not own

the funds—without any citation to the record.[5] Br. at 7. On the contrary, the NAC properly concluded the funds converted belonged to RBC.

Johnson similarly argues that a finding that he converted funds that have not been established as belonging to RBC improperly deviates from the theory of liability in the complaint. Br. at 7. Again, this argument lacks merit. First, as discussed above, Enforcement established that the funds belonged to RBC. However, even if Enforcement had not proven that RBC owned the funds (which it did), Johnson was not misled about the issues in controversy—namely, that he improperly took possession of funds erroneously deposited into his account. *See Grivas*, 2016 SEC LEXIS 1173, at *23. In addition, even assuming the funds did not belong to RBC, that fact is not germane to the finding that Johnson improperly exercised ownership over the funds.[6] Based on the definition of conversion in the Guidelines, whether or not RBC owned the funds is not essential to establishing Johnson's liability—only that he took money to which he was not entitled.

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[5] As he did before the NAC, Johnson tries to support this argument by misconstruing the testimony of an RBC employee. Ms. Buswell testified that RBC did not own the securities or funds in Johnson's account. This fact was never in dispute. Of course, Johnson owned the securities and other property that he had deposited into his RBC account and was entitled to the legitimate proceeds after the redemption of the Doosan shares. That is not at issue here. What is at issue is that Johnson improperly exercised ownership over funds that were erroneously deposited by RBC into his RBC account and to which he was not entitled.

[6] Johnson misapprehends the NAC's findings regarding RBC's ownership of the funds. The NAC concluded that RBC was in fact the owner of the converted funds. It maintained, in the alternative, that even if "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." RP 1697.

OS Received 02/28/2022

RBC deposited the funds into Johnson's brokerage account.[7] When RBC rebilled the transactions, it created a negative balance in Johnson's brokerage account. Had Johnson not returned the funds, RBC would have suffered a million-dollar loss. RBC also believed the funds belonged to it. RP 779. Although there is no "paper trail" documenting where the funds were positioned before they arrived in Johnson's brokerage account and where they went after, the only logical conclusion is that the money belonged to RBC.[8] This conclusion is not speculation or conjecture, as characterized by Johnson. Rather, it is the application of common sense to the facts of this case. "While common sense is no substitute for evidence, common sense should be used to evaluate what reasonably may be inferred from circumstantial evidence." *Jackson v. Stovall*, No. 2:08-CV-10094, 2010 U.S. Dist. LEXIS 41906, at *55 (E.D. Mich. Apr. 12, 2010) (*quoting United States v. Durham*, 211 F.3d 437, 441 (7th Cir. 2000)). In fact, the Commission has noted, "It is well established that 'circumstantial evidence can be more than sufficient to prove a violation of the securities laws.'" *Butler*, 2016 SEC LEXIS 1989, at *19 n.18. The only reasonable inference is that the funds belonged to RBC, and the Commission should affirm.

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[7] Rather than bolster his argument, Johnson's citation to Ms. Buswell's testimony undermines it. In fact, Johnson acknowledges that RBC deposited the proceeds into his account: "Would you agree with me then that RBC deposited the funds from the proceeds . . . from the Doosan transaction into Mr. Johnson's RBC brokerage account?" Br. at 6

[8] The burden of proof is met in a FINRA disciplinary proceeding if FINRA's Department of Enforcement establishes its claim by a preponderance of the evidence. The preponderance standard requires only that the complainant "prove it is more likely than not" that the allegations are true. *See Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *16 (June 2, 2016) (applying a preponderance of the evidence standard in FINRA disciplinary proceedings); *Luis Miguel Cespedes*, Exchange Act Release No. 59404, 2009 SEC LEXIS 368, at *18 & n.11 (Feb. 13, 2009) (*citing David M. Levine*, 57 S.E.C. 50, 73 n.42 (2003) ("holding that preponderance of the evidence is the standard of proof in self-regulatory organization ["SRO"] disciplinary proceedings").

Johnson also argues that because he had legitimate ownership of his RBC and checking accounts, he was the owner of all the funds in those accounts—including the $1million—until RBC rebilled the transaction. This argument is baseless. Johnson provides no case law to support the unreasonable proposition that an account holder owns funds that arrived in their account erroneously or unlawfully. Johnson may have been the owner of both his brokerage and checking account, but he did not own the excess funds that were deposited into either account—and he knew it. The Commission should disregard this argument.

B. FINRA's Sanction for Johnson's Conversion Is Consistent with FINRA's Guidelines, and the Public Interest, and Is Neither Excessive Nor Oppressive

The Commission should affirm the NAC's sanction, which is well supported and neither excessive not oppressive. Section 19(e)(2) of the Exchange Act provides that the Commission may eliminate, reduce, or alter a sanction if it finds that the sanction is excessive, oppressive, or imposes a burden on competition not necessary or appropriate to further the purposes of the Exchange Act. *See Jack H. Stein*, 56 S.E.C. 108, 120-21 (2003). In considering whether sanctions are excessive or oppressive, the Commission gives significant weight to whether the sanctions reflect the framework provided in FINRA's Sanction Guidelines. *See Grivas*, 2016 SEC LEXIS 1173, at *25 n.37. *See Vincent M. Uberti*, Exchange Act Release No. 58917, 2008 SEC LEXIS 3140, at *22 (Nov. 7, 2008) (noting that the Guidelines serve as a "benchmark" in Commission's review of sanctions).

The bar the NAC imposed on Jones is neither excessive nor oppressive and serves to protect investors and the public interest. To assess the appropriate sanction, the NAC consulted the Guidelines, applied the principal and specific considerations outlined in the Guidelines, and considered all relevant evidence of aggravating and mitigating circumstances. The Commission should therefore affirm the bar.

OS Received 02/28/2022

1. The Sanction Imposed for Conversion is Appropriately Remedial

FINRA barred Johnson from associating with any member in any capacity for his conversion of RBC's funds. Johnson maintains that the imposition of the bar is punitive and should, at a minimum, be reduced. The Commission should affirm this sanction as it is appropriately remedial. Imposing a bar for Johnson's egregious misconduct furthers the well-reasoned tenet, reflected in the Guideline for conversion and recognized in Commission precedent, that stealing is so profoundly incompatible with one's regulatory duties that it will not be tolerated, absent extraordinary circumstances.

Conversion is extremely serious misconduct and is one of the gravest violations that a securities industry professional can commit. *Mullins*, 2012 SEC LEXIS 464, at *73. At its core, the theft of funds or assets is "patently antithetical to the 'high standards of commercial honor and just and equitable principles of trade' that [FINRA] seeks to promote." *Wheaton D. Blanchard*, 46 S.E.C. 365, 366 (1976). The Guideline for conversion reflects FINRA's position on the gravity of such a violation—a bar is the standard sanction. As the Commission has noted, this "reflects the reasonable judgment that, in the absence of mitigating factors warranting a different conclusion, the risk to investors and the markets posed by those who commit such violations justifies barring them from the securities industry." *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *31-32 (Aug. 22, 2008) (quoting *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *22 n.27 (Nov. 8, 2007)). The Commission often has affirmed the remedial necessity of barring individuals who, like Johnson, have engaged in conversion. *See Denise M. Olson*, Exchange Act Release No. 75837, 2015 SEC LEXIS 3629, at *9 (Sept. 3, 2015) (affirming a bar for Olson's conversion from her employer); s*ee, e.g.*, *Mullins*, 2012 SEC LEXIS 464, at *80 (affirming a bar and

OS Received 02/28/2022

holding that "[w]e support the NAC's conclusion that J. Mullins's misconduct 'reveals a troubling disregard for fundamental principles of the securities industry'"); *Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *53-54 (Dec. 7, 2010) ("A bar and expulsion are severe sanctions. Applicants' demonstrated lack of fitness to be in the securities industry, however, supports the remedial purpose to be served by such sanctions."); *Manoff*, 55 S.E.C. at 1166 ("We conclude that a bar is within the allowable sanction range under the NASD's Guidelines, and is not excessive, oppressive, or unduly burdensome on competition.").

Along with the specific Guideline for conversion, the NAC examined the Principal Considerations in Determining Sanctions and concluded there were several aggravating factors that further support a bar. The amount of money converted was substantial and Johnson's misconduct was intentional. *Guidelines*, at 8 (Principal Guidelines in Determining Sanctions, Nos. 13, 17). Johnson had a well-established, daily routine of checking his trading positions and knew the approximate value of the shares around the time of the liquidation. Furthermore, despite knowing that there was something amiss about the transaction, Johnson deliberately failed to confirm the accuracy of the amount deposited in his account with RBC, which led to Johnson's temporary monetary gain. *Guidelines*, at 8 (Principal Considerations in Determining Sanctions, No. 16). Johnson also chose to withdraw the funds via check, in an effort to avoid RBC's review of the transaction.

"The public interest demands honesty from associated persons of [FINRA] members; anything less is unacceptable." *Ortiz*, 2008 SEC LEXIS 2401, at *29; *accord Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *23 (Feb. 13, 2009) ("[T]he importance of honesty for a securities professional is so paramount . . . ."), *aff'd*, 592 F.3d 173 (D.C. Cir. 2010). Johnson's intentional decision to take over $1 million from his firm—funds he

OS Received 02/28/2022

knew were not his— reflects a cavalier dishonesty that renders him unsuited for continued association with a FINRA member. *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005) ("[T]he purpose of expulsion or suspension from trading is to protect investors, not to penalize brokers."). Johnson's exclusion from the securities industry is an appropriately remedial sanction that serves the public interest. *See Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *54 ("Applicants represent a clear danger to the investing public if they remain in the securities industry, and, as FINRA accurately observed in its decision, 'expelling Mission and barring Biddick in all capacities are the only effective remedial sanctions.'"); *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."). Accordingly, the Commission should affirm the bar.

2. The NAC Properly Considered Johnson's Arguments for Mitigation

Johnson attempts to minimize his misconduct and maintains that if a sanction is to be imposed, it should be less than a bar. Johnson argues that "the NAC failed to give adequate weight to the mitigating factors." Br. at 9. On the contrary, the NAC properly considered all potential mitigating factors and found them inapplicable or insufficient to warrant a sanction other than a bar.

First, Johnson asserts that his acknowledgment that he should have handled the Doosan proceeds differently and the fact that he was truthful with RBC and FINRA about the proceeds are mitigating factors. Br. at 9. The NAC appropriately concluded that these facts are not mitigating. Acceptance of responsibility is mitigating "only when it occurs 'prior to detection and intervention by the firm . . . or a regulator.'" *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *28 (Feb. 20, 2014) (*quoting Guidelines*, at 6 (2007)). Here, Johnson was forced to return the money and respond to his firm and FINRA's inquiries because

OS Received 02/28/2022

he faced a $1 million deficit in his brokerage account, and it was abundantly obvious from the transactions alone what he had done.

Next, Johnson contends it is mitigating that once the liquidation was correctly rebilled, he immediately transferred funds to cover the debit. Br. at 10. The NAC properly concluded that this is not mitigating. Under the Guidelines, an effort to remedy misconduct is mitigating only when a respondent acts prior to detection. *Guidelines,* at 7 (Principal Considerations in Determining Sanctions, No. 4). Johnson repaid the money only after RBC caught the pricing error, and Johnson essentially had no choice but to deposit the money back into his RBC account because there was over a million-dollar deficit. Moreover, Johnson apparently would have remained silent, and his repayment of the converted funds to his firm likely would not have occurred, absent RBC's discovery of the error and subsequent rebilling of the Doosan liquidation. RP 718. *See Joel Eugene Shaw*, 51 S.E.C. 1224, 1227 (1994) ("It appears that Shaw would have retained Luthi's money if she had not discovered his conversion."); *Dist. Bus. Conduct Comm. v. Gurfel,* Complaint No. C9B950010, 1998 NASD Discip. LEXIS 52, at *21 (NASD NAC June 12, 1998) ("[H]is repayment of the funds is not a mitigating factor, as the offer of repayment occurred only after he was confronted about his wrongdoing . . . ."), *aff'd*, 54 S.E.C. 56 (1999).

Johnson also asserts that it is mitigating that he consulted with his accountant before moving the funds to his checking account. Br. at 10. Again, the NAC properly concluded that, while reliance on the professional advice of a lawyer or accountant *can* be mitigating, it was not so here. Johnson did not establish that he relied on professional advice, which would have required him to prove that he "made a complete disclosure to the accountant, sought advice as to the conduct in question, received advice, and relied on that advice in good faith." *Dep't of Enf't*

OS Received 02/28/2022

v. Wood (Arthur W.) Co., No. 2011025444501, 2017 FINRA Discip. LEXIS 30, at *29-31 (NAC Mar. 15, 2017). In fact, as noted in the NAC decision, Johnson did not even follow all of the advice given to him by his accountant.

Finally, Johnson maintains because his act of conversion occurred only once, was not a pattern of misconduct, and that RBC did not lose any money, these facts militate against a bar. The NAC properly concluded they do not. Lack of harm is not mitigating. *See Olson*, 2015 SEC LEXIS 3629, at *31 (sustaining bar for conversion even though respondent reimbursed her firm for false expenses); *Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *21-22 & nn.11-12. Furthermore, the fact that Johnson only once stole money from his firm is not mitigating. Conversion is a dishonest act that reflects negatively on a person's ability to comply with regulatory requirements and raises concerns that the person is a risk to investors, firms, and the integrity of the securities markets—even if it happens only once. *See Mark F. Mizenko*, 58 S.E.C. 846, 856 (2005) (declining to find mitigation where the respondent, who forged a signature on a corporate resolution to guarantee loans and leases for potential customers, asserted that his misconduct was "aberrant and not part of a pattern of conduct intended to deceive his employer"). Thus, because the bar is neither excessive nor oppressive and is appropriately remedial, the Commission should affirm the sanction imposed.

V. CONCLUSION

Johnson converted over $1 million erroneously deposited by his firm into his firm brokerage account when he transferred the funds, that he knew were not his, into an outside checking account. The bar that FINRA imposed for Johnson's egregious misconduct is fully

OS Received 02/28/2022

supported by the record and FINRA's Guidelines, and it is appropriate to protect investors and the public interest. The Commission should affirm the NAC's decision in its entirety and dismiss Johnson's application for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Colleen Durbin, certify that:

(1) FINRA's Brief in Opposition to the Application for Review complies with SEC Rule of Practice 151(e) because it omits or redacts any sensitive personal information; and

(2) FINRA's Brief in Opposition to Application for Review complies with the limitation set forth in SEC Rule of Practice 154(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 5,950 words.

Respectfully submitted,

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Dated: February 28, 2022

CERTIFICATE OF SERVICE

On February 28, 2022, I, Colleen Durbin, certify that I caused a copy of FINRA's Brief in Opposition to the Application for Review, 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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