

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 70833 / November 7, 2013

Admin. Proc. File No. 3-14146

In the Matter of the Application of

ROBERT CONWAY
20 Blackmore Lane
East Islip, NY 11730

and

KAKIT NG
2260 Powell Ave.
Bronx, NY 10462

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY
PROCEEDING

Conduct Inconsistent with Just and Equitable Principles of Trade

Registered securities association found that registered representatives, while associated with member firms, engaged in conduct inconsistent with just and equitable principles of trade by using deceptive market timing practices and executing late trades in mutual fund shares. *Held*, association's findings of violations and sanctions imposed are *sustained*.

APPEARANCES:

Robert Conway, pro se.

Kakit Ng, pro se.

Marc Menchel, Alan Lawhead, and Gary Dernelle, for Financial Industry Regulatory Authority, Inc.

Appeal filed: November 29, 2010
Last brief received: March 4, 2011

I.

Robert Conway and Kakit Ng appeal from FINRA disciplinary action.¹ FINRA found that Conway and Ng, while registered with FINRA through FINRA members A.B. Watley, Inc. ("Watley Inc.") and A.B. Watley Direct, Inc. ("Watley Direct"; together with "Watley Inc.," the "Watley firms"), engaged in unethical conduct, in violation of NASD Conduct Rule 2110,² by using deceptive market timing practices and executing late trades in mutual fund shares. FINRA fined Conway and Ng, suspended them from association with a FINRA member in any capacity for eighteen months and nine months, respectively, and ordered the payment of hearing costs.

Based on our independent review of the record, we agree with FINRA that Conway and Ng acted unethically. We find that their conduct reflects negatively on their ability to comply with regulatory and business standards necessary for the proper functioning of the securities industry and protection of public investors, and therefore is inconsistent with high standards of commercial honor and just and equitable principles of trade.³ Accordingly, for the reasons set forth below, FINRA's disciplinary action against Conway and Ng is sustained.

II.

In January 2007, FINRA's Department of Enforcement ("Enforcement") filed an amended five-cause complaint against Conway, Ng, and three others.⁴ As relevant here, Cause

¹ In July 2007, the National Association of Securities Dealers, Inc. ("NASD") was consolidated with the regulatory arm of the New York Stock Exchange ("NYSE"), resulting in the formation of the Financial Industry Regulatory Authority, Inc. ("FINRA"). *See* Securities Exchange Act Rel. No. 56146, 2007 WL 5185331 (July 26, 2007) (approving proposed rule change to reflect NASD's name change to FINRA). Because FINRA's review of this matter occurred after the consolidation, all references to FINRA will include references to NASD.

² NASD Conduct Rule 2110 (now FINRA Rule 2010) requires members to "observe high standards of commercial honor and just and equitable principles of trade." This Rule applies to Conway and Ng through NASD General Rule 115 (now FINRA Rule 140), which extends the applicability of NASD rules governing members to their associated persons.

³ *See Daniel D. Manoff*, Exchange Act Rel. No. 46708, 55 SEC 1155, 2002 WL 31769236, at *4 (Oct. 23, 2002) (holding that conduct that reflects negatively on an associated person's ability to comply with fundamental regulatory requirements is inconsistent with "high standards of commercial honor and just and equitable principles of trade").

⁴ The other respondents were Watley Direct; Watley firms' president, Robert Malin; and Watley firms' chief compliance officer, Linus Nwaigwe. Prior to the hearing, each of these

One alleged that in at least 145 instances from approximately October 2002 to September 2003, Conway and Ng engaged in unlawful late trading in mutual fund shares by processing orders that they received from their clients after 4:00 p.m. Eastern Standard Time ("EST"),⁵ and executing those orders at the same trading day's price or net asset value ("NAV"),⁶ instead of the next trading day's NAV. Cause Three alleged that in at least 210 instances from approximately August 2002 to September 2003, Conway and Ng deceptively used multiple client accounts and different branch office and registered representative codes to circumvent mutual fund companies' efforts to restrict Conway's and Ng's market timing trading. Both causes charged violations of NASD Conduct Rule 2110.

In April 2008, a FINRA Hearing Panel ("Panel") determined that Conway and Ng violated NASD Conduct Rule 2110.⁷ The Panel fined Conway \$50,000 per cause, for a total of \$100,000; ordered him to disgorge \$78,720; and imposed consecutive suspensions (six months for unlawful late trading and twelve months for deceptive market timing practices) totaling eighteen months. The Panel fined Ng \$10,000 per cause, for a total of \$20,000, and imposed

(...continued)

respondents entered into settlements with FINRA to resolve any claims relating to their alleged misconduct.

⁵ All times noted in the opinion are EST.

⁶ A mutual fund's NAV "reflects the current market value of the fund's total assets minus its total liabilities." *VanCook v. SEC*, 653 F.3d 130, 133 n.1 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1582 (2012).

⁷ With respect to Cause One, the Panel also found that Conway and Ng's late trading "violated both a legal rule [Rule 22c-1(a) of the Investment Company Act of 1940] and an ethical standard applicable to registered representatives." Investment Company Act Rule 22c-1(a) generally requires that mutual fund shares be priced at the NAV "next computed" by the mutual fund after the receipt of an order for the mutual fund's shares. Decisions interpreting Rule 22c-1(a) have read it to prohibit mutual fund investors from trading a mutual fund's shares after 4:00 p.m. while still receiving that day's NAV. *See Gregory O. Trautman*, Exchange Act Rel. No. 61167A, 2009 WL 6761741, at *2 n.10 (Dec. 15, 2009) (collecting cases); *see also VanCook*, 653 F.3d at 133 (stating that "late trading violates the forward pricing rule of SEC Rule 22c-1").

FINRA's National Adjudicatory Council ("NAC"), however, disagreed with the Panel's finding that Conway and Ng violated Rule 22c-1. As the NAC properly found, Conway and Ng could not directly violate Rule 22c-1 because they were not within the class of persons subject to its provisions. *Trautman*, 2009 WL 6761741, at *1 n.5; *see* 17 C.F.R. § 270.22c-1 (limiting Rule 22c-1's application to registered investment companies, persons designated in investment companies' prospectuses to consummate transactions in their securities, principal underwriters, and dealers of mutual fund shares).

consecutive suspensions (three months for unlawful late trading and six months for deceptive market timing practices) totaling nine months. The Panel further ordered Conway and Ng, jointly and severally, to pay hearing costs of \$11,519.81.

Conway and Ng timely appealed the Panel's decision to FINRA's National Adjudicatory Council ("NAC"). In an amended decision issued in October 2010, the NAC agreed with the Panel that Conway and Ng acted unethically. It fined Conway \$100,000 and suspended him for eighteen months, and fined Ng \$20,000 and suspended him for nine months. While recognizing that its sanctions were "ostensibly on par" with those imposed by the Panel, the NAC stated that it had determined to impose "unitary" sanctions, rather than sanctions per cause, because it found that Conway's and Ng's conduct stemmed from a single systemic problem.⁸ The NAC affirmed the Panel's order that Conway and Ng pay hearing costs, but vacated its disgorgement order because the \$78,720 figure was unreliable and not causally connected to Conway's conduct.

III.

Conway and Ng entered the securities industry in 1993 and 1996, respectively.⁹ Conway and Ng met at Prudential Securities, Inc. ("Prudential") in 1999 and started working together in 2000. While at Prudential, Conway and Ng executed mutual fund transactions for hedge funds that employed market timing trading strategies. "Market timing" refers to the practice of frequent buying and selling of mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Market timing, while not itself illegal, can harm long-term mutual fund shareholders by, among other things, diluting the value of their shares, increasing a mutual fund's transaction costs, and disrupting the management of a fund's investment portfolio.¹⁰ When Conway left Prudential, Ng followed him to other broker-dealers.

In July 2002, the Watley firms hired Conway to establish a mutual fund market timing business. Conway became registered with Watley Inc. on July 3, 2002, and with Watley Direct

⁸ FINRA Sanction Guidelines authorize the aggregation or "batching" of violations for purposes of determining sanctions if, among other things, the violations result from a single systemic problem or cause. FINRA Sanctions Guidelines, General Principles Applicable to All Sanction Determinations, No. 4.

⁹ Neither Conway nor Ng is currently registered with FINRA.

¹⁰ See Trautman, 2009 WL 6761741, at *2. & nn.13-14 (collecting cases).

on July 23, 2002.¹¹ Shortly thereafter, Conway hired Ng as his assistant. Ng became registered with Watley Inc. on October 28, 2002, and with Watley Direct on January 16, 2003.¹²

At the Watley firms, Conway and Ng serviced the accounts of four hedge funds that traded in mutual fund shares: Chronos Asset Management, Inc. ("Chronos"); Nettcorp Group ("Nettcorp"); Parametric Capital Management ("Parametric"); and Simpson Capital Management, Inc. ("Simpson"). All four hedge funds engaged in market timing of mutual funds and were known as market timers. Conway and Ng knew that their clients were market timers.¹³

Conway's responsibilities included communicating with clients, developing new business, and making sure "things were running smoothly." Conway earned compensation equal to 82% of the net revenues generated by his mutual fund business.¹⁴ Between July 2002 and December 2003, Conway's gross earnings at the Watley firms exceeded \$850,000. While Conway was the registered representative responsible for customer accounts, it was Ng, the self-described "worker bee," who was the primary point of contact for the four hedge fund clients

¹¹ Watley Inc. and Watley Direct were subsidiaries of A.B. Watley Group, Inc., a publicly traded company, and shared common supervisory, compliance, and operations staff, as well as the same office space. In July 2004, Watley Inc. was expelled from FINRA membership for failure to pay fines in connection with two unrelated settlements.

¹² Although Ng did not first register with a Watley firm until October 2002, he began working there in July 2002. Between July and October 2002, Ng opened new customer accounts for Conway's clients, executed mutual fund trades through those accounts, and reviewed correspondence from mutual fund companies. Ng's conduct during this period was not charged in FINRA's amended complaint, and we do not consider it in determining liability or the appropriate sanctions. Nevertheless, we note that NASD Membership and Registration Rules 1021(a) and 1031(a) require that all persons who act as a principal or representative of an NASD member firm be properly registered as a principal or representative, respectively, with FINRA. NASD Membership and Registration Rule IM-1000-3 provides that the failure of any member to register an employee who should be so registered may be conduct inconsistent with just and equitable principles of trade, and therefore a violation of NASD Conduct Rule 2110.

¹³ For example, in a March 19, 2003 email to a friend, Ng wrote, "[H]ere is an idea of what I do for clients," and attached a Forbes.com story titled "Looting Mutual Funds." The story discussed the problem of arbitrageurs trading mutual fund shares at outdated NAVs at the expense of long-term mutual fund shareholders. Ng's friend responded, "[Y]our [sic] going to SEC hell with your client clowns." Ng replied, "[I]ts [sic] not illegal, its [sic] frowned upon."

¹⁴ These revenues consisted of "wrap" fees. "Wrap" fees are based on the value of assets under management in clients' accounts, transaction charges, and "12b-1" fees, *i.e.*, fees paid out of mutual fund assets in accordance with a distribution plan adopted pursuant to Rule 12b-1 of the Investment Company Act of 1940.

and performed most of the day-to-day work, including answering the telephones, processing and executing clients' mutual fund orders, and interacting with the Watley firms' clearing firm, Penson Financial Services, Inc. ("Penson"). The Watley firms paid Ng a monthly salary of \$4,000 to \$5,000.

A. Deceptive Market Timing Practices

1. Facts

While market timing itself is not unlawful, mutual fund companies generally discuss in their funds' prospectuses the harmful effects of market timing on the funds and long-term shareholders, discourage the frequent buying and selling of fund shares, and reserve the right to restrict or prohibit trading in circumstances where an investor exhibits a pattern of abusive trades made for short-term considerations.¹⁵ When a mutual fund company detects market timing activities, it often sends brokers "stop" notices, or restriction letters, stating its objections to market timing and placing restrictions on future trading, including prohibiting purchases or exchanges of shares by certain customer accounts or particular brokers or branch offices.

Between August 2002 and September 2003, Conway and Ng received through Penson copies of approximately 150 "stop" notices from mutual fund companies that detected market timing trades by their clients.¹⁶ Conway or Ng then contacted the appropriate client to inform it of the restrictions imposed by the particular mutual fund. Ng compiled a spreadsheet of the "stop" notices and kept copies of the notices in a file. Conway and Ng also received from Penson lists summarizing the customer account numbers and registered representative and branch office codes "stopped" by the various mutual fund companies. Ng testified that he alerted Conway whenever he received "stop" notices and that Conway read them. Conway confirmed that he was aware of and read the "stop" notices.¹⁷ Nevertheless, Conway and Ng disregarded the "stop" notices and used various means to evade the trading restrictions imposed by mutual funds.¹⁸

Conway and Ng opened multiple accounts for Chronos, Nettcorp, and Parametric and shifted the execution of trades from one account to another when a mutual fund company

¹⁵ Conway testified that he was "somewhat aware" that mutual fund prospectuses addressed mutual fund companies' market timing policies.

¹⁶ Penson also notified Conway and Ng by telephone when it received mutual fund "stop" notices.

¹⁷ Both Conway and Ng admitted to having received "stop" notices while working at other firms.

¹⁸ Conway's counsel stated at the hearing that Conway was "not denying trades were done in funds after restriction letters [were] sent."

imposed restrictions on a particular client's account.¹⁹ Although each client had multiple accounts with different names or account numbers, the accounts often shared mailing addresses, authorized agents, traders, and officers and directors, and were under common control and ownership.²⁰ A former Chronos trader, Zachary Apoian, testified that Chronos maintained multiple "cloned" accounts with the Watley firms for the specific purpose of evading the efforts of mutual funds to restrict its market timing trading.²¹

For example, on March 3, 2002, the Alger Fund sent a "stop" notice through Penson to Conway and Ng prohibiting a number of their clients from executing further exchanges in any equity fund operated by the Alger Fund. One account the Alger Fund identified was Chronos's Standard Atlantic account. Notwithstanding this prohibition, within days, Conway and Ng executed several short-term exchanges of shares in Alger Fund equity funds through Chronos's other accounts at the Watley firms.

Likewise, in January 2003, Conway and Ng executed several short-term trades in three ARK Funds portfolios through Nettcorp's Boston Pipes account. On January 29, 2003, Penson forwarded to Conway and Ng a "stop" notice from ARK Funds, which stated that ARK Funds did not permit market timing trading and that a registered representative was market timing at least three ARK Funds portfolios. The notice further stated that ARK Funds was prohibiting the Boston Pipes account from making future purchases of shares in its funds. Notwithstanding this prohibition, Conway and Ng began executing Nettcorp's trades in mutual funds operated by ARK Funds through Nettcorp's NettFund Inc. (Portfolio 7) account. The trading continued until ARK Funds discovered what Conway and Ng were doing and sent Penson a second "stop" notice. In the second "stop" notice, which Penson forwarded to Conway and Ng, ARK Funds stated that the registered representative whose trading precipitated the first "stop" notice

¹⁹ Chronos opened a total of six accounts, four accounts through Watley Inc. and two accounts through Watley Direct. Four of the six Chronos accounts were opened in the name of Standard Atlantic Ltd. ("Standard Atlantic"), and two were opened in the name of Hutchkins, LLC ("Hutchkins"). Standard Atlantic and Hutchkins were both owned by Chronos Offshore, Inc. Nettcorp opened two accounts through Watley Direct, one in the name of Boston Pipes, LLC, and the other in the name of Nettfund, Inc. (Portfolio 7). Parametric opened six accounts through Watley Inc., one each in the names of Troybilt, LLC; Doublecut Capital, LLC; Pine Brook Investors, LLC; Allencord Investments, LLC; Green Brook Investors, LLC; and Bluecrab, LLC. Each of these entities was owned by Vinship, LLC. Parametric also opened two accounts through Watley Direct, but the accounts were never funded.

²⁰ Mutual fund prospectuses often cautioned that trading conducted in multiple accounts under common ownership or control would be considered when imposing limitations on excessive, short-term mutual fund trading. Mutual fund "stop" notices often highlighted this policy.

²¹ Conway affirmed that he "cloned" accounts but denied that he did so to evade mutual fund market timing restrictions.

continued to market time by opening new accounts under new account numbers. ARK Funds therefore stated that "[d]ue to this ongoing market timing activity" it was "going to shut down all trading" for the branch code from which the trades originated.

Conway and Ng also used multiple branch office and registered representative codes to help their clients evade market timing restrictions. Each customer account that cleared through Penson had a two-letter branch code and two-digit registered representative code identifying the branch and registered representative associated with the account. During the relevant period, Conway and Ng used six different code combinations for their clients' accounts.²²

Penson sent numerous emails to Conway and Ng complaining that their and their clients' continued market timing activities after "stop" notices were sent were causing "severe relationship problems" between Penson and mutual fund companies. On May 6, 2003, Penson's Stephaney Robinson wrote:

We received a stop letter today from Credit Suisse. Your Rep code was shut down a while back, but you're still trading these funds. . . . kindly quit it. Once a fund is added to your *Market Timing Fund Company List*, please liquidate all shares asap and get out of it. Holding them, then continuing to trade some 2 weeks later or so, just angers the Fund Cos. and makes it look like Penson never passed the stop info on to you.

On June 19, 2003, Robinson's superior, James McGrath, wrote:

[E]ffective immediately when any of your accounts is stopped due to market timing in a fund family all of your accounts will be frozen. In the past you were notified on an account basis. As you know once the fund flags you they will stop all subsequent accounts. To allow subsequent exchanges only increases our rejects, alienates the fund and puts Penson at risk of having our dealer agreements revoked by the fund. We cannot and will not allow activity that jeopardizes our ability to transact business with fund companies.

²² Parametric's Allencord, Green Brook, and Pine Brook accounts were alternately coded WD50, WB50, and WB99, while its Doublecut and Troybilt accounts were first coded WD50 and then WB50. Chronos's Watley Inc. accounts used two codes, WZ50 and WB50, and its Watley Direct accounts used yet a third code, IQ00. The code on Simpson's account at Watley Direct was changed from IQ00 to IQ01. After receiving several "stop" notices concerning trading through Parametric's accounts coded WD50 and WB50, Ng asked Watley personnel about the procedure for changing codes. Ng then requested that he and Conway be granted use of code WZ50 for a new Parametric account. When this account was funded and started trading, it used code WZ50.

On July 23, 2003, yet a third Penson employee wrote, "I need you to stop all trading in the Blackrock Funds due to market timing. It is very important this happens today – our dealer agreement is in jeopardy. The exchanges that you put through yesterday are in question." Ng affirmed that he and Conway knew that the continued market timing was causing problems for Penson, but that they did not stop the trading.

In September 2003, news reports surfaced about an investigation by the New York Attorney General's Office into the market timing of mutual funds. Conway testified that after September 2003 his mutual fund business "substantially" declined. Conway and Ng left the Watley firms in 2004.

2. NASD Conduct Rule 2110 Violations

NASD Conduct Rule 2110 states broad ethical principles and encompasses a "wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace."²³ The Rule focuses on a securities professional's conduct, rather than a subjective inquiry into the professional's intent or state of mind.²⁴ Thus, proof of scienter is not required to establish a violation,²⁵ but we may consider it when imposing sanctions.²⁶

Between August 2002 and September 2003, numerous mutual funds determined that Conway's and Ng's clients were market timing and stopped trading under certain account numbers and branch office and registered representative codes associated with their trades. Conway and Ng received dozens of mutual fund "stop" notices stating that their clients were engaged in market timing of mutual funds, that market timing was contrary to fund policies and detrimental to long-term shareholders, and that the relevant funds were restricting Conway's and Ng's activities. Conway and Ng admitted that they read the "stop" notices, informed their clients of the trading restrictions, and kept track of those restrictions through lists from Penson and Ng's spreadsheet. Conway and Ng thus were made aware that mutual funds both deemed market timing to be improper and sought to prevent it.

²³ *Thomas W. Heath, III*, Exchange Act Rel. No. 59223, 2009 WL 56755, at *5 (Jan. 9, 2009) (quoting *Daniel Joseph Alderman*, Exchange Act Rel. No. 35997, 52 SEC 366, 1995 WL 442069, at *2 (July 20, 1995), *petition denied*, 104 F.3d 285 (9th Cir. 1997)), *petition denied*, 586 F.3d 122 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2351 (2010).

²⁴ *Id.*

²⁵ *Id.*; *but see* NASD Notice to Members 03-50 (stating that members and associated persons who "knowingly or recklessly" engage in late trading or certain market timing activities violate NASD Rule 2110), 2003 WL 22095887, at *1 & 2 (Sept. 5, 2003).

²⁶ *See infra* Section IV.

Although not required for a violation of NASD Conduct Rule 2110, we believe Conway's and Ng's conduct was at least reckless, if not intentional.²⁷ Despite knowing of the "stop" notices, Conway and Ng recklessly or intentionally perpetuated their clients' market timing by creating multiple accounts under different names for the same clients and by using different branch office and registered representative codes to conceal the trading and avoid detection by the mutual funds. Courts, as well as the Commission, have found such practices to be deceptive under antifraud provisions of the federal securities laws.²⁸ The record shows that in 210 instances during the relevant period, Conway and Ng executed trades in restricted mutual funds using deceptive market timing practices. These deceptive practices enabled them and their clients to circumvent market timing restrictions and caused mutual funds to process transactions they otherwise would have rejected. There can be no doubt that Conway's and Ng's use of deceptive market timing practices constituted conduct inconsistent with just and equitable principles of trade, in violation of NASD Conduct Rule 2110.

3. Applicants' Arguments

Conway and Ng argue that they had no notice that their trading activities violated NASD Conduct Rule 2110. But "[p]articipants in the securities industry must take responsibility for compliance with regulatory requirements and cannot be excused for lack of knowledge, understanding, or appreciation of these requirements."²⁹ As experienced securities professionals, Conway and Ng fairly can be charged with notice that their trading practices, which amounted to

²⁷ "Recklessness" means "an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it." *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 704 (7th Cir. 2008) (quoting *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 76 (2d Cir. 2001)).

²⁸ See, e.g., *SEC v. Ficken*, 546 F.3d 45, 52-53 (1st Cir. 2008) (finding defendant's use of duplicative financial advisor and customer account numbers in order to deceive mutual funds met the scienter requirement of the securities laws' antifraud provisions); *SEC v. Gann*, No. Civ. A. 305CV0063L, 2006 WL 616005, at *5-6 (N.D. Tex. Mar. 13, 2006) (denying motion to dismiss complaint for securities fraud where defendants engaged in mutual fund market timing scheme using deceptive practices to avoid detection by mutual funds; deceptive practices included using multiple accounts, multiple registered representative numbers, and multiple branch office codes, and dividing trades into smaller dollar amounts); *Trautman*, 2009 WL 6761741, at *6 n.28 (finding the use of multiple accounts and representative and branch office codes to be deceptive market timing practices) (collecting cases).

²⁹ *Thomas C. Kocherhans*, Exchange Act Rel. No. 36556, 52 SEC 528, 1995 WL 723989, at *3 (Dec. 6, 1995).

deceptions that helped circumvent industry norms meant to protect mutual funds and their long-term shareholders, were unethical.³⁰

Additionally, Conway and Ng had actual notice that their activities were improper. The dozens of "stop" notices that they received alerted them to the relevant mutual funds' anti-market timing policies and the harmful effects of market timing on the funds and their long-term shareholders. Emails from Penson further informed them of the harmful effects of their activities, not only on mutual funds, but on Penson as well.

Conway and Ng argue that their conduct was consistent with industry norms, and that this disciplinary proceeding makes them "scapegoats" for abuses for which other individuals have not been prosecuted. But "[FINRA] disciplinary proceedings are treated as an exercise of prosecutorial discretion."³¹ We have stated that "it is no defense that others in the industry may have been operating in a similarly illegal or improper manner."³²

Conway attempts to justify the multiple accounts by claiming that they were opened because of accounting problems that were preventing the Watley firms from paying him. He said that when he first opened accounts at Watley Inc., he was not paid on a timely basis because senior management told him that they could not separate the fees generated by his mutual fund business from the fees generated by the firms' other businesses. According to Conway, Watley's president Robert Malin and others came up with the idea of using Watley Direct, whose FINRA membership they had originally determined to cancel, to house Conway's mutual fund business. FINRA generally did not credit Conway's testimony,³³ which was undercut by Malin's testimony

³⁰ See *Thomas W. Heath, III*, 586 F.3d 122, 140-41 (2d Cir. 2009) (stating that "the J & E [just and equitable principles of trade] Rule's standard of unethical conduct does not fail to provide Petitioner with adequate notice that the conduct in question was sanctionable"), *cert. denied*, 130 S. Ct. 2351 (2010); cf. *Trautman*, 2009 WL 6761741, at *18 n.69 (rejecting respondent's argument that he lacked fair notice that late trading and market timing violated antifraud provisions).

³¹ *Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993). Insofar as Conway and Ng argue they were selectively prosecuted, they failed to show that they were singled out for discipline while others similarly situated were not, and that this selection was motivated by unjustifiable considerations such as race, religion, national origin, or the exercise of constitutionally protected rights. See *Scott Mathis*, Exchange Act Rel. No. 61120, 2009 WL 4611423, at *12 (Dec. 7, 2009).

³² *Patricia H. Smith*, Exchange Act Rel. No. 35898, 52 SEC 346, 1995 WL 394145, at *2 n.8 (June 27, 1995).

³³ We typically defer to a fact-finder's credibility determinations absent substantial evidence to the contrary. See *Manoff*, 2002 WL 31769236, at *4 & n.6. Conway and Ng do not point to, nor do we find, substantial evidence contradicting FINRA's credibility determinations.

that he intended to use Watley Inc., not Watley Direct, to house Conway's mutual fund business. Malin, moreover, did not recall any problems paying Conway that resulted in shifting client accounts from Watley Inc. to Watley Direct.

To the extent that Ng argues he is less at fault than Conway because he was Conway's assistant and acted at Conway's direction, the facts of his active and substantial involvement in Conway's market timing business undercut his argument. Ng, the "worker bee" of the operation, was the primary point of contact for Conway's hedge fund clients, answering clients' telephone calls, processing and executing clients' orders, and interacting with the clearing firm. Ng's central role in the misconduct is reflected by the email he sent a friend in which he described his work on clients' behalf by attaching an online article, "Looting Mutual Funds."³⁴

B. Late Trading

1. Facts

"Late trading" refers to the unlawful practice of placing orders to buy, sell, or exchange U.S. mutual fund shares after 4:00 p.m., the time when mutual funds calculate their NAV, but receiving the price based on the NAV already determined as of 4:00 p.m. that day. Late trading enables the trader to profit from market events that occur after 4:00 p.m. but are not reflected in the current day's NAV.³⁵

The prospectuses of mutual funds traded by Conway's and Ng's clients typically disclosed that the funds calculated NAV "at" or "as of" the NYSE's 4:00 p.m. close of trading. The prospectuses made clear that customers had to submit their orders no later than 4:00 p.m. to receive that day's NAV. A number of prospectuses stated that the time at which an order was received by the broker, rather than the mutual fund itself, was the time for determining the NAV to be assigned for the order's execution. Although Conway and Ng testified that they did not read the prospectuses of the mutual funds traded by their clients, both were aware of the 4:00 p.m. cut-off time for accepting client orders.

Penson's procedures for processing mutual fund orders also required that correspondent broker-dealers receive a client's mutual fund order by 4:00 p.m. for pricing at the current day's NAV. Penson's mutual fund operations department manager, Stephaney Robinson, provided on-the-record testimony that she informed Conway and Ng of this requirement.³⁶ Penson permitted correspondents to enter and process a mutual fund order through its online order entry

³⁴ See *supra* note 13.

³⁵ See *VanCook*, 653 F.3d at 133; *Trautman*, 2009 WL 6761741, at *2 & n.9 (collecting cases).

³⁶ Robinson did not testify at the hearing.

system until at least 5:00 p.m., but only if the order was received by the correspondent from the customer no later than 4:00 p.m. Penson's online order entry system had no mechanism for correspondents to indicate the time at which they received a client's mutual fund order. As a result, Penson did not know whether a client's order actually had been received by 4:00 p.m., as required. Conway admitted that he knew of this weakness in Penson's system.

Conway and Ng stipulated that their usual process for executing trades in mutual fund shares began with a client sending an email containing an "indication of interest" to engage in certain trades. Conway and Ng typically received from a client a single "indication of interest" listing all of the proposed trades for the client's accounts.³⁷ An "indication of interest," however, was a proposed order only. Conway and Ng generally required clients later to verbally confirm by telephone the trades that were the subject of their "indication of interest." The verbal confirmation typically indicated that a client wanted Conway and Ng either to execute or to cancel all of the trades proposed in the "indication of interest" and constituted the client's actual order.³⁸ Conway and Ng initially processed orders by faxing a client's "indication of interest" to Penson. Then, in or about October 2002, Conway and Ng started using Penson's online order entry system.

However, between October 2002 and September 2003, Chronos, Simpson, and Nettcorp transmitted fifteen "indication of interest" emails to Conway and Ng after 4:00 p.m. Despite the fact that the trades proposed in the fifteen "indications of interest" originated after the equity markets had closed, Conway and Ng processed them through Penson's online order entry system as if they had received the orders before 4:00 p.m. They executed at least 145 late trades based on these fifteen "indications of interest."³⁹ Each trade received the NAV determined as of 4:00 p.m. that trading day, rather than the next trading day.

2. NASD Conduct Rule 2110 Violations

Conway's and Ng's mutual fund order submissions were contrary to provisions in the relevant mutual fund prospectuses and Penson's procedures requiring that registered representatives receive clients' orders by 4:00 p.m. for pricing at that day's NAV. While Penson provided an administrative grace period that permitted orders to be processed until at least 5:00 p.m., neither Penson nor the relevant fund prospectuses gave brokers additional time after the equity markets had closed to accept new orders or to confirm, modify, or cancel orders received

³⁷ Conway and Ng dealt with the same one or two traders acting on behalf of each client.

³⁸ Conway testified that it was understood that clients' orders were to be entered on the same trading day that they were received. Conway further testified that he did not believe he ever waited until the following trading day to execute a client's order.

³⁹ Of the 145 trades, 132 trades were executed for Chronos, seven trades were executed for Simpson, and six trades were executed for Nettcorp.

before 4:00 p.m. By knowingly processing and executing trades received after 4:00 p.m. as if they actually were received before 4:00 p.m., Conway and Ng recklessly or intentionally deceived mutual fund companies into providing improper prices for the trades.⁴⁰ Their clients thus obtained an advantage, at the expense of long-term mutual fund shareholders, when they were given the opportunity to trade mutual fund shares at NAVs set before the release of market-moving information.⁴¹ Conway's and Ng's execution of late mutual fund trades violated NASD Conduct Rule 2110.

At the hearing, Conway and Ng generally denied that they accepted mutual fund orders after 4:00 p.m. Rather, they testified that, due to "technology issues," *i.e.*, issues with the Watley firms' computers, they sometimes received clients' telephone orders before 4:00 p.m., followed by "indication of interest" emails after 4:00 p.m. FINRA generally found that Conway and Ng were not credible witnesses,⁴² and that their testimony regarding "technology issues" was "speculative." Neither Conway nor Ng could recall a specific instance in which he accepted a client's mutual fund order by telephone before 4:00 p.m., only to receive the "indication of interest" email later that day. Similarly, Apoian, the former Chronos trader, could not recall a single instance in which he telephoned Conway or Ng with a mutual fund order before 4:00 p.m., but sent the "indication of interest" email after 4:00 p.m. FINRA found Apoian to be a credible witness.

In addition, FINRA investigative technical examiner Patrick Hendry testified that he reviewed the metadata (data about data), known as internet headers, embedded in the fifteen "indication of interest" emails. The internet headers identified the times automatically recorded for each step in the transmission of an email from the sender's to the recipient's computer. Based on his analysis of the internet headers, Hendry testified that the times on each "indication of interest" email were recorded by the particular client's computer and not by the Watley firms' computers. Hendry's un rebutted testimony established that all fifteen "indication of interest" emails were sent after 4:00 p.m., and that any "technology issues" with the Watley firms' computers had no effect on the times recorded on those emails.⁴³

⁴⁰ See *Trautman*, 2009 WL 6761741, at *14.

⁴¹ *Id.* at *16.

⁴² See *supra* note 33.

⁴³ FINRA staff also searched for possible "back-up" or duplicate emails and found only one instance in which an "indication of interest" sent before 4:00 p.m. contained substantially similar information to an "indication of interest" sent after 4:00 p.m. The record thus fails to support Conway's claim that, in five instances, identical "indication of interest" emails preceded the fifteen "indication of interest" emails at issue.

Furthermore, Conway's and Ng's testimony that they received telephone confirmations first, followed by "indication of interest" emails, was contrary to their usual practice, which required clients to submit "indication of interest" emails first, followed by confirming telephone calls, before mutual fund orders would be processed. Both Conway and Ng stipulated that they typically followed this practice.⁴⁴

3. Applicants' Arguments

Conway and Ng argue that Apoian's testimony refuted the finding that they engaged in late trading. They point to Apoian's statement that up until February 2003, Chronos's mutual fund trading did not depend on the ability to execute trades after 4:00 p.m. While it is true that the ability to execute post-4:00 p.m. trades was not a component of Chronos's trading strategy before February 2003, Apoian testified that from the outset Conway and Ng gave Chronos the "luxury" of being able to confirm or cancel proposed trades after the equity markets had closed. Apoian stated that knowing Conway and Ng accepted trades after 4:00 p.m. helped Chronos manage its order flow on busy days when it was having difficulty transmitting orders to other brokers that required mutual fund orders to be received by 4:00 p.m. Apoian also testified that both Conway and Ng told him it was acceptable to call and place actual orders confirming or cancelling proposed trades between 4:00 and 4:15 or 4:30 p.m. Indeed, Conway's and Ng's willingness to process and execute orders received after 4:00 p.m. distinguished them from other brokers and led Apoian, in February 2003, to develop a trading strategy based on their ability to execute post-4:00 p.m. trades. Apoian stated that several months later Chronos added millions of dollars to its accounts at the Watley firms to implement this strategy.

Conway and Ng argue that the number of late trades at issue represents a small amount of trades in light of the overall number of trades executed for the hedge fund clients and proves that their actions were unintentional. As discussed, proof of scienter is not required to establish a Rule 2110 violation. Conway and Ng further argue that their clients did not always profit, and Ng argues that he did not benefit, from the late trading. Even if true, Conway and Ng's conduct still flouted ethical principles to which they were required to adhere.⁴⁵

IV.

Based on the above violations, FINRA found that it would be in the public interest to fine Conway \$100,000 and suspend him for eighteen months, and fine Ng \$20,000 and suspend him for nine months. Section 19(e)(2) of the Securities Exchange Act of 1934 directs us to sustain

⁴⁴ Apoian's testimony that he understood a proposed mutual fund order would not become a "live" trade until it was confirmed in a follow-up telephone call provided further corroboration.

⁴⁵ See *Perpetual Sec., Inc.*, Exchange Act Rel. No. 56613, 2007 WL 2892696, at *7 & n.27 (Oct. 4, 2007), *reconsideration denied*, Exchange Act Rel. No. 56962, 2007 WL 4372765 (Dec. 13, 2007).

FINRA's sanctions unless we find, having due regard for the public interest and protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.⁴⁶ Applying that standard, we conclude that FINRA's sanctions are not excessive or oppressive and do not impose an unnecessary or inappropriate burden on competition.

In assessing the appropriate sanctions to impose on Conway and Ng, FINRA looked to its Sanction Guidelines ("Guidelines"). We are not bound by the Guidelines, but we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2).⁴⁷ Although the Guidelines contain no specific guideline for late trading and market timing, FINRA concluded that the most closely analogous guideline was for misrepresentations and material omissions of fact.⁴⁸ The Guidelines recommend, for intentional or reckless misconduct, a fine of \$10,000 to \$100,000, a suspension of ten business days to two years, and, in egregious cases, a bar. The Guidelines also recommend considering such factors as whether the applicants engaged in numerous acts or a pattern of misconduct; whether they engaged in the misconduct over an extended period of time; whether the misconduct was the result of an intentional act, recklessness, or negligence; whether the misconduct resulted in the potential for their monetary or other gain; and whether they accepted responsibility for the misconduct.⁴⁹ We find that the sanctions imposed by FINRA were consistent with the Guidelines.

Based on the record, we agree with FINRA's findings that Conway and Ng engaged in egregious misconduct. Conway and Ng engaged in numerous deceptive acts that continued over an extended period of time. Their misconduct was at least reckless, if not intentional. Conway and Ng knew that their clients were market timers. Between August 2002 and September 2003, they received and kept track of dozens of mutual fund "stop" notices stating that their clients were engaged in market timing and placing restrictions on the trading. Conway and Ng systematically disregarded the "stop" notices and circumvented trading restrictions by opening multiple client accounts and using different registered representative and branch office codes.

⁴⁶ 15 U.S.C. § 78s(e)(2). Neither Conway nor Ng argues that the sanctions impose an undue burden on competition, and our de novo review of the record does not indicate there is any such burden.

⁴⁷ *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656, 2008 WL 1697153, at *3 (April 11, 2008), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

⁴⁸ The Guidelines make clear that they "are not intended to be absolute," and "[f]or violations that are not addressed specifically, [a]djudicators are encouraged to look to the guidelines for analogous violations." FINRA Sanction Guidelines, Overview.

⁴⁹ See FINRA Sanction Guidelines, Principle Considerations in Determining Sanctions, Nos. 2, 8, 9, 13, 17, 18.

Penson's warnings that Conway and Ng "quit" market timing in restricted mutual funds were ignored.

Apoian's credible testimony also established that Conway and Ng accommodated Chronos's late trading and routinely accepted Apoian's verbal confirmation of orders after 4:00 p.m. Although Conway and Ng were aware of the 4:00 p.m. cut-off for accepting mutual fund orders, they nevertheless exploited weaknesses in Penson's order entry system to their and their clients' advantage and executed trades received after 4:00 p.m. at the current trading day's NAV. Conway's and Ng's deceptive conduct belies any suggestion that their actions were either negligent or inadvertent.⁵⁰

We also agree with FINRA's finding that Conway stood to gain financially from his misconduct. His compensation was tied to the amount of assets hedge funds placed with him for trading. Conway's willingness to execute trades that benefitted his clients had the potential to lead to their placing more money in their Watley firms' accounts.⁵¹ In fact, Chronos added millions of dollars to pursue its late trading strategy.

Further, Conway and Ng have not accepted responsibility for their conduct. They continue to blame others, including the mutual funds they deceived, for their misconduct. The securities industry "presents a great many opportunities for abuse and overreaching and depends very heavily upon the integrity of its participants."⁵² Conway's and Ng's continued refusal to acknowledge any wrongdoing is a troubling indication that they either misunderstand their regulatory obligations or hold those obligations in contempt.⁵³ Although Ng contends that he poses no threat of recidivism, Conway's and Ng's actions reveal a fundamental misunderstanding

⁵⁰ That Conway and Ng may have acted lawfully in executing other trades for their clients is not a mitigating factor. *See Andrew P. Gonchar*, Exchange Act Rel. No. 60506, 2009 WL 2488067, at *13 & n.69 (Aug. 14, 2009), *petition denied*, 409 F. App'x 396 (2d Cir. 2010).

⁵¹ *See Janet Gurley Katz*, Exchange Act Rel. No. 61449, 2010 WL 358737, at *26 (Feb. 1, 2010) (stating that "Katz may not have profited directly from misappropriating some of her clients' funds, but she did benefit from keeping her clients happy and retaining their business") & n.66 (collecting cases), *petition denied*, 647 F.3d 1156 (D.C. Cir. 2011).

⁵² *Bernard D. Gorniak*, Exchange Act Rel. No. 35996, 52 SEC 371, 1995 WL 442063, at *2 & n.10 (July 20, 1995) (quoting *Richard D. Earl*, Exchange Act Rel. No. 22535, 48 SEC 334, 1985 WL 548312, at *2 (Oct. 16, 1985), *aff'd*, 798 F.2d 472 (9th Cir. 1986)).

⁵³ *See The Barr Fin. Group, Inc.*, Investment Advisers Act Rel. No. 2179, 56 SEC 1243, 2003 WL 22258489, at *7 (Oct. 2, 2003). Because our review of sanctions imposed by FINRA is limited to a determination of whether they are excessive or oppressive, we do not examine whether a longer suspension or bar might provide even greater protection against further wrongdoing.

of their duties as security industry professionals and present a significant likelihood that they will commit similar violations in the future.⁵⁴ We find that Conway's and Ng's widespread deceptive conduct, coupled with their insistence that their conduct was not wrong, indicates that they pose a continuing threat to the public.

Conway and Ng argue that FINRA singled them out for discipline. However, "the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken [or not] in other cases."⁵⁵ Conway and Ng highlight hardships they have suffered as a result of this proceeding, but those hardships do not render the sanctions either excessive or oppressive.⁵⁶ Ng cites his "junior" position to Conway and argues that it is unfair to sanction him for his wrongdoing. FINRA accounted for this when it determined to impose lesser sanctions against Ng. We find nothing in the record that supports further mitigation of sanctions.

Because we agree with FINRA that Conway's and Ng's conduct was egregious and that the relevant factors weighed in favor of the sanctions, we find that the fines and suspensions that FINRA imposed on Conway and Ng are neither excessive nor oppressive. FINRA's sanctions are justified under the Guidelines, result from a thoughtful weighing of the relevant facts, and are

⁵⁴ See *Scott B. Gann*, Exchange Act Rel. No. 59729, 2009 WL 938033, at *6 (Apr. 8, 2009), *aff'd*, 361 F. App'x 556 (5th Cir. 2010). Conway's and Ng's lack of disciplinary history is not a mitigating factor. *Id.*

⁵⁵ *Scott Epstein*, Exchange Act Rel. No. 59328, 2009 WL 223611, at *21 n.75 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

⁵⁶ See *Ashton Noshir Gowadia*, Exchange Act Rel. No. 40410, 53 SEC 786, 1998 WL 564575, at *4 (Sept. 8, 1998) (holding that economic harm, standing alone, does not make NASD's sanction excessive or oppressive).

appropriately remedial because they will serve as a reminder that Conway and Ng must comply with fundamental regulatory requirements and deter others from engaging in similar misconduct.⁵⁷

An appropriate order will issue.⁵⁸

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN and PIWOWAR).

Elizabeth M. Murphy
Secretary

⁵⁷ See *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005) (stating that, "[a]lthough general deterrence is not, by itself, sufficient justification for expulsion or suspension, we recognize that it may be considered as part of the overall remedial inquiry").

⁵⁸ We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70833 / November 7, 2013

Admin. Proc. File No. 3-14146

In the Matter of the Application of

ROBERT CONWAY
20 Blackmore Lane
East Islip, NY 11730

and

KAKIT NG
2260 Powell Ave.
Bronx, NY 10462

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by the Financial Industry Regulation Authority against Robert Conway and Kakit Ng be, and it hereby is, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary